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## CHAPTER I - Introduction

### I. MODERN LAW OF EVIDENCE

#### A. The Need for Reform.

*1 Witkin Cal. Evid. Intro § 1*

[§ 1] The Need for Reform.

"The rules of evidence have been developed in myriads of cases, wherein the later judges have felt themselves bound by the doctrine of stare decisis to adhere to the pronouncements of their predecessors but bound also to avoid the absurdities which the simple application of these pronouncements would produce. In attempting to escape this dilemma they have engrafted qualifications, refinements and exceptions upon the earlier rules, so that the law of evidence has grown irregularly and in haphazard fashion, one rule seeming to have no relation in reason to another. ... To put it in another way, the law of evidence is now where the law of forms of action and common law pleading was in the early part of the nineteenth century." (Foreword to Model Code of Evidence, p. 5.) Similar criticisms have been expressed by many writers. (See 1 Wigmore (Tillers Rev.) p. xv and §8c; 59 *Cal. L. Rev.* 1356; 59 *Harv. L. Rev.* 481; 25 *Loyola L.A. L. Rev.* 629 [comprehensive symposium on many aspects of law of evidence, both California and federal]; 40 *So. Cal. L. Rev.* 1; 2 *U.C.L.A. L. Rev.* 1; 1960 A.S. 554; on reform of federal law, see 76 *Harv. L. Rev.* 275; *infra*, §5; for defects in former California law, see *infra*, §11.)

Prior to the adoption of the Evidence Code (*infra*, §13), California opinions showed an awareness of the need for modernization of evidentiary rules. As the court observed in *People v. Collup* (1946) 27 *C.2d* 829, 167 *P.2d* 714: "The modern tendency is to relax the rigid rules of evidence--to escape from a slavish adherence to them with the accompanying hardship, injustice and prevention of a full disclosure of all pertinent circumstances to the trier of fact." (27 *C.2d* 838.) (See *California Bank v. Diamond* (1956) 144 *C.A.2d* 387, 391, 301 *P.2d* 60 ["Practicability and common sense should govern in applying the rules of evidence"]; *Los Angeles v. Faus* (1957) 48 *C.2d* 672, 679, 312 *P.2d* 680 ["The former rule was contrary to logic, unrealistic, and followed in only a few other states. ... [I]t becomes our duty not to follow decisions that we are convinced are erroneous and obsolete"]; *People v. Spriggs* (1964) 60 *C.2d* 868, 871, 874, 36 *C.R.* 841, 389 *P.2d* 377, *infra*, §14.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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B. Uniform Acts.

*1 Witkin Cal. Evid. Intro § 2*

[§ 2] Uniform Acts.

Distinct from the Model Code of Evidence and the Uniform Rules of Evidence (*infra*, §§3, 4) are a number of specific Uniform Acts adopted in many jurisdictions. These are contained in volumes 8A, 11, 11A, 12, and 14 of Uniform Laws Annotated (Master Ed.), and are listed here with an identifying note as to those adopted in California:

- (1) Absence as Evidence of Death and Absentees' Property Act (8A U.L.A. (Master Ed.), p. 1).
- (2) Act To Secure the Attendance of Witnesses From Without a State in Criminal Proceedings (11 U.L.A. (Master Ed.), p. 1; adopted in California as P.C. 1334 et seq., 2 *Cal. Evidence* (4th), *Witnesses*, §9).
- (3) Audio-Visual Deposition Act (12 U.L.A. (Master Ed.), p. 51).
- (4) Photographic Copies of Business and Public Records as Evidence Act (14 U.L.A. (Master Ed.), p. 189; adopted in California as *Ev.C. 1550*, 2 *Cal. Evidence* (4th), *Documentary Evidence*, §§45, 46).
- (5) Rendition of Prisoners as Witnesses Act (11A U.L.A. (Master Ed.), p. 457).

**SUPPLEMENT:** [This section is current through the latest supplement]

(4) *Photographic Copies of Business and Public Records as Evidence Act*: See 14 U.L.A. (Master Ed.), p. 269.

(5) *Rendition of Prisoners as Witnesses Act*: See 11 U.L.A. (Master Ed.), p. 233.



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### I. MODERN LAW OF EVIDENCE

#### C. Model Code of Evidence.

*1 Witkin Cal. Evid. Intro § 3*

[§ 3] Model Code of Evidence.

The American Law Institute, believing that a restatement of the existing law of evidence would perpetuate much bad law and retard reform, proposed a drastic revision in its Model Code of Evidence, promulgated in 1942. The method of Wigmore's Code (a comprehensive and concise summary of the rules) was not followed; the drafters felt that this would give the Model Code too much rigidity. Instead, general rules were drawn to cover the major topics of the subject, leaving a large measure of discretion to the trial judge in admission and exclusion of evidence. (See Foreword to Model Code, p. 12; for other discussions of its objects, method, and provisions, see 1942 A.S. 880; 1949 A.S. 975.)

The Code received much scholarly praise, and was at first cited as persuasive authority on new points and in the reexamination of outmoded rules. But the reaction in many professional areas was unsympathetic. (See Wigmore, 28 *A.B.A. Journal* 23 [changes too radical, coverage not adequate, impractical, etc.]; 2 *U.C.L.A. L. Rev.* 3 [discussing strong opposition of California State Bar Committee to extraordinary powers given trial judge and loose rules of admissibility]; 1949 A.S. 975.)

As a result of these criticisms and the failure of any state to adopt the Code, the American Law Institute abandoned efforts to promote it, and the reform movement was concentrated on the Code's successor--the Uniform Rules (infra, §4).

**SUPPLEMENT:** [This section is current through the latest supplement]



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### I. MODERN LAW OF EVIDENCE

#### D. Uniform Rules of Evidence.

*1 Witkin Cal. Evid. Intro § 4*

[§ 4] Uniform Rules of Evidence.

In 1949, the American Law Institute referred the Model Code of Evidence (supra, §3) to the National Conference of Commissioners on Uniform State Laws for study and redrafting. The new Uniform Rules of Evidence were approved by the Conference in 1953, and revised in 1974 to conform as far as practicable to the Federal Rules of Evidence. (See Prefatory Note to Original 1974 Rules of Evidence, 13A (Part 1A) U.L.A. (Master Ed.), p. 5.)

Although the Model Code of Evidence was used as the basis of the 1953 Rules, and the broad aims of both were the same, the Conference sought to eliminate some of the more radical provisions, and to give the revision a more practical slant. Speaking of the Model Code, the Commissioners said: "[I]f its departures from traditional and generally prevailing common law and statutory rules of evidence are too far-reaching and drastic for present day acceptance, they should be modified in such respects as will express a common ground of acceptability in the jurisdictions and by the tribunals which the rules are expected to serve. So with the objects of acceptability and uniformity in mind, this effort is devoted to the policy of retaining such parts of the Model Code as appear to meet the requirements of such objectives, and to reject, revise or modify the rest." (Prefatory Note to Uniform Rules of Evidence (1953), National Conference of Commissioners on Uniform State Laws, p. 161.)

The 1953 Rules generally followed the Model Code outline, and both it and the 1974 version continued the policy of stating broad rather than detailed rules. But the controversial Model Code provisions on the trial judge's powers were omitted, and in several other instances the Model Code view was modified or rejected. (For further discussion and comparisons of the Model Code and the first version of the Uniform Rules, see 1953 A.S. 787; and see 1955 A.S. 615 [noting New Jersey committee's recommendation of adoption of main body of rules]; 1960 A.S. 554 ["For the better part of a decade hope for evidence reform has been focused on the Uniform Rules of Evidence"]; 1964 A.S. 355; for comparison of the 1953 Rules and California law, see 2 *U.C.L.A. L. Rev.* 1.)

The following excerpt from the Commissioners' preface to the 1974 Rules explains the new approach of conformity with the Federal Rules of Evidence:

"We believe uniformity in the Law of Evidence is desirable. To conform state and federal practice is to require a lawyer to learn one set of rules instead of two. The lawyer will better serve the public in whichever of these forums he may be litigating. Uniformity also discourages forum shopping. It is difficult for a litigant to understand that his cause may be won or lost depending on the court or the state in which the action may be tried. Finally, it seems, that to get genuine reform in the Law of Evidence it is necessary that attention be focused on special areas and special problems. We have seen that the case by case approach produces confusion."



"The Uniform Rules of Evidence (1974) reflect as closely as possible P.L. 93-595. The section numbers conform to their federal counterparts, and the division of subjects into 11 articles is likewise the same. These mechanical aids are most important as they make readily accessible the thorough and careful notes of the Federal Rules Committee as well as the congressional reports. Future annotations will also be easily located. The rules are thus arranged to facilitate use by courts and litigating lawyers." (Prefatory Note to Original 1974 Rules of Evidence, 13A (Part 1A) U.L.A. (Master Ed.), p. 5.)

**SUPPLEMENT:** [This section is current through the latest supplement]

A revised version of the Uniform Rules of Evidence was adopted in 1999. (See Prefatory Note, 13A U.L.A. (Master Ed.), p. 2.) Citations to the Uniform Rules in this Supplement are to the revised version.

The Prefatory Note to Original 1974 Rules of Evidence is now found at 13A U.L.A. (Master Ed.), p. 213.



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### I. MODERN LAW OF EVIDENCE

#### E. Federal Rules of Evidence.

#### *1 Witkin Cal. Evid. Intro § 5*

[§ 5] Federal Rules of Evidence.

The first statutory rules of evidence for federal courts were enacted on January 2, 1975, and are entitled "Rules of Evidence for United States Courts and Magistrates." There are 63 Rules in 11 Articles, commencing with Rule 101 and ending with Rule 1103, which states: "These rules may be known and cited as the 'Federal Rules of Evidence.'" They are mainly a codification of established evidence law in American jurisdictions, with relatively few innovations. (See 1 Wigmore (Tillers Rev.) §6.3 et seq.; 1 Mueller & Kirkpatrick, Federal Evidence 2d (Preface); 29 and 29A Am.Jur.2d (1994 ed.), Evidence; Olson & Graham, Handbook of Federal Evidence 4th; Wright & Graham, Federal Practice and Procedure: Federal Rules of Evidence (Vols. 21-23); 9 U.C. Davis L. Rev. [symposium on California Evidence Code, with contrasts to federal rules where they differ from California statutes]; 25 Loyola L.A. L. Rev. 909 [Do the Federal Rules of Evidence Matter?]; 28 Loyola L.A. L. Rev. 1251 [criticism of federal rules].)

The scope and applicability of the rules to courts and proceedings are covered by Rules 101 and 1101. Rule 102 (Purpose and Construction) states: "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." (See 1 Mueller & Kirkpatrick, Federal Evidence 2d, §3.)

In this work, the Rules are fully covered at all appropriate places, with references to Mueller & Kirkpatrick, Federal Evidence 2d, for explanation and critical comment on each rule, and to the applicable sections in volumes 29 and 29A of Am.Jur.2d (1994 ed.), Evidence.

**SUPPLEMENT:** [This section is current through the latest supplement]

See 88 Cal. L. Rev. 2437 [describing adoption of Federal Rules as triumph of Thayer approach of increasing discretion of trial judge].



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I. MODERN LAW OF EVIDENCE

F. Revision of Wigmore on Evidence.

*1 Witkin Cal. Evid. Intro § 6*

[§ 6] Revision of Wigmore on Evidence.

From 1961 through 1988, the Third Edition of Wigmore on Evidence was revised and replaced by a Fourth Edition. The revision was carried out by three authors: James Chadbourn (volumes 2 through 7, and 9; see 87 *Harv. L. Rev* 1590 [review of revision of volume 3 on testimonial evidence]); John McNaughton (volume 8); and Peter Tillers (volume 1). Volume 10 contains the tables of statutes and cases, and volume 11 contains an index and table of authors cited.

Although some sections were transferred and new ones added, the basic outline of the Third Edition was unchanged, and the numbering is still from §1 to §2597. Each revisor preserved most of Wigmore's language and citations of authority, either in the text or footnotes. (See, e.g., 3 Wigmore (Chadbourn Rev.), p. v.) However, in addition to covering new developments in the law of evidence, the revisors indicated the points on which Wigmore's views have been challenged or rejected. (See, e.g., 1 Wigmore (Tillers Rev.), p. xi.)

The first volume of The New Wigmore: A Treatise on Evidence, which will eventually replace Wigmore 4th, was issued in 1995.

**SUPPLEMENT:** [This section is current through the latest supplement]

The following volumes of The New Wigmore: A Treatise on Evidence are now available: Selected Rules of Limited Admissibility (one volume, issued in 1995 and revised in 2002); Evidentiary Privileges (two volumes, issued in 2002).



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### I. MODERN LAW OF EVIDENCE

#### G. Proposition 8.

#### 1. Constitutional Provisions and New Statutes.

*1 Witkin Cal. Evid. Intro § 7*

[§ 7] Constitutional Provisions and New Statutes.

(1) *Adoption of Proposition 8.* At the June 1982 primary election, an initiative measure amending the California Constitution and several statutes was adopted, effective June 9, 1982 (the day after the election). Section 1 of the proposition states: "This amendment shall be known as 'The Victims' Bill of Rights.' "

Proposition 8 added Cal. Const., Art. I, §28, containing the major constitutional changes in subdivisions (a) to (g). It also added a number of statutes mainly dealing with criminal law. (For the coverage of constitutional and statutory changes in criminal law and procedure, see *1 Cal. Crim. Law (3d), Introduction to Crimes*, §102 et seq.) The changes in the law of evidence are outlined in the next two sections (infra, §§8, 9).

(2) *Constitutional Challenges.* The validity of the new measure was attacked in *Brosnahan v. Brown (1982) 32 C.3d 236, 186 C.R. 30, 651 P.2d 274*, and all constitutional challenges directed at the manner of its adoption were rejected. And *In re Lance W. (1985) 37 C.3d 873, 210 C.R. 631, 694 P.2d 744*, held that the Right to Truth-in-Evidence provision (Cal. Const., Art. I, §28(d)) abrogated the California vicarious exclusionary rule (the right of a defendant to assert the right of another person to be free from unreasonable search and seizure), in the light of the contrary view of the *United States Supreme Court*. (37 C.3d 885.) (For an analysis of the Supreme Court's interpretation of Proposition 8, see *60 So. Cal. L. Rev. 540*.)

(3) *Not Retroactive.* In *People v. Smith (1983) 34 C.3d 251, 258, 193 C.R. 692, 667 P.2d 149*, the court, noting the importance and urgency of the question of retroactivity, held Proposition 8 applicable "only to prosecutions for crimes committed on or after its effective date" of June 9, 1982. Subsequently, the court held in *People v. Weaver (1985) 39 C.3d 654, 217 C.R. 245, 703 P.2d 1139*, that the applicability of the proposition in a probation revocation hearing must be determined by *the date of the crime that led to the revocation of probation*, not by the date of the crime that led to the original grant of probation. (39 C.3d 659, disapproving *People v. Huff (1983) 148 C.A.3d 801, 196 C.R. 290*.)

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### I. MODERN LAW OF EVIDENCE

#### G. Proposition 8.

#### 2. Truth in Evidence.

##### a. In General.

*1 Witkin Cal. Evid. Intro § 8*

[§ 8] In General.

(1) *Constitutional Provision.* Cal. Const., Art. I, §28(d) reads as follows:

"*Right to Truth-in-Evidence.* Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or *Evidence Code, sections 352, 782, or 1103.* Nothing in this section shall affect any existing statutory or constitutional right of the press." (On requirement of two-thirds vote of Legislature to change rule, see *People v. Scott (1987) 194 C.A.3d 550, 554, 239 C.R. 588.*)

(2) *Purpose and Effect of Provision.* The chief purpose of the new provision was to eliminate independent state grounds for exclusion of illegally obtained evidence, leaving the federal Constitution as interpreted by controlling federal decisions as the sole basis for exclusion. (See *In re Lance W. (1985) 37 C.3d 873, 888, 210 C.R. 631, 694 P.2d 744.*) However, the constitutional directive had the effect of nullifying other statutory and decisional rules restricting the admission of relevant evidence as well. (See *infra, §9; People v. Harris (1989) 47 C.3d 1047, 1082, 255 C.R. 352, 767 P.2d 619* [rejecting argument that sole purpose of Proposition 8 was to conform California search and seizure law to federal exclusionary rule]; for a discussion suggesting changes in the process by which voters enact measures limiting the California judiciary's ability to examine the state Constitution independently, see *21 Hastings Const. L. Q. 95.*)

(3) *Statutes and Rules Retained.* The qualifying language of the last two sentences of Cal. Const., Art. I, §28(d) retains a number of important rules of evidence and constitutional rights, which are fully considered in subsequent chapters of this work:

(a) *Privilege.* (On statutory rules, see *2 Cal. Evidence (4th), Witnesses, §59 et seq.*; on constitutional privilege against self-incrimination, see *2 Cal. Evidence (4th), Witnesses, §355 et seq.*; *People v. Weaver (1985) 39 C.3d 654, 217 C.R. 245, 703 P.2d 1139, §381.*)

(b) *Hearsay.* (See *1 Cal. Evidence (4th), Hearsay, §1.*)

(c) *Procedure for attacking credibility of sex victim's conduct to prove consent (Ev.C. 782).* (See *1 Cal. Evidence (4th), Circumstantial Evidence, §62.*)

(d) *Restrictions on admissibility of sex victim's conduct to prove consent (Ev.C. 1103).* (See 1 Cal. Evidence (4th), Circumstantial Evidence, §63.)

(e) *Discretionary exclusion of relevant evidence for policy reasons (Ev.C. 352).* (See 1 Cal. Evidence (4th), Circumstantial Evidence, §17 et seq.)

(f) *Constitutional and statutory rights of the press.* (See 2 Cal. Evidence (4th), Witnesses, §333 et seq.; 7 Summary (9th), Constitutional Law, §231.)

There are certain other obvious limitations on the scope of the rule. Evidence may still be excluded as irrelevant, because the rule applies only to *relevant* evidence. And due process may require the exclusion of some highly objectionable matter, e.g., evidence obtained by brutality (see 2 Cal. Evidence (4th), Witnesses, §413 et seq.), coerced confessions (see 1 Cal. Evidence (4th), Hearsay, §64 et seq.), and impeachment by proof of prior felonies not involving moral turpitude (see 3 Cal. Evidence (4th), Presentation at Trial, §307).

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Purpose and Effect of Provision.* See *People v. Barrett* (2003) 109 C.A.4th 437, 450, 135 C.R.2d 103 [in vehicular manslaughter prosecution, records of defendant's prior participation in county drunk driving program were properly admitted, even assuming prosecutor was required to, and did not, comply with federal regulations in obtaining records, as exclusion under these circumstances was not required by federal Constitution].(3) *Statutes and Rules Retained.*

(f) *Constitutional and statutory rights of the press.*

*Cross-Reference:* 7 Summary (10th), Constitutional Law, §§311, 313.



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### I. MODERN LAW OF EVIDENCE

#### G. Proposition 8.

#### 2. Truth in Evidence.

#### b. Particular Evidentiary Rules Affected.

#### *1 Witkin Cal. Evid. Intro § 9*

#### [§ 9] Particular Evidentiary Rules Affected.

In the years since Cal. Const., Art. I, §28(d) was enacted, the courts have considered its effect on evidentiary rules in a number of areas:

(1) *Character Evidence Generally.* (See *People v. Perkins* (1984) 159 C.A.3d 646, 650, 205 C.R. 625 [general exclusion of character evidence (*Ev.C. 1101*) remains valid]; *People v. Scott* (1987) 194 C.A.3d 550, 551, 239 C.R. 588 [same]; *People v. Taylor* (1986) 180 C.A.3d 622, 631, 225 C.R. 733 [evidence of defendant's good character for truth was admissible even though prosecution offered no evidence of his bad character to attack his credibility; Proposition 8 had effect of repealing *Ev.C. 790* (3 *Cal. Evidence* (4th), *Presentation at Trial*, §362) in criminal cases]; *People v. Harris* (1989) 47 C.3d 1047, 1081, 255 C.R. 352, 767 P.2d 619 [agreeing with conclusion of *Taylor* court that *Ev.C. 790* was repealed in criminal cases; trial judge properly admitted evidence of prosecution witness' past reliability as police informant]; *People v. Adams* (1988) 198 C.A.3d 10, 17, 18, 243 C.R. 580 [in rape trial, trial judge erred in excluding, under *Ev.C. 787* (3 *Cal. Evidence* (4th), *Presentation at Trial*, §287), evidence of victim's false accusations of others; *Ev.C. 787* was abrogated by Proposition 8]; *People v. Lankford* (1989) 210 C.A.3d 227, 231, 258 C.R. 322 [agreeing with *Adams* court that *Ev.C. 787* was no longer valid; after defendant introduced evidence of his good character, prosecution could rebut with evidence of specific instances of his misconduct].)

(2) *Prior Offense for Impeachment or as Element of Current Offense.* (See *People v. Castro* (1985) 38 C.3d 301, 306, 211 C.R. 719, 696 P.2d 111, 1 *Cal. Evidence* (4th), *Circumstantial Evidence*, §18 [impeachment of witness by prior felony conviction]; *People v. Valentine* (1986) 42 C.3d 170, 181, 182, 228 C.R. 25, 720 P.2d 913, 1 *Cal. Evidence* (4th), *Circumstantial Evidence*, §16 [in prosecution for possession of concealable weapon by ex-felon, *nature* of prior offense should have been excluded even though *fact* of prior offense was element of current offense, where defendant offered to stipulate to ex-felon status]; *People v. Wheeler* (1992) 4 C.4th 284, 292, 14 C.R.2d 418, 841 P.2d 938, 3 *Cal. Evidence* (4th), *Presentation at Trial*, §286 [impeachment of witness by prior conduct amounting to misdemeanor]; *People v. Lee* (1994) 28 C.A.4th 1724, 1740, 34 C.R.2d 723, 3 *Cal. Evidence* (4th), *Presentation at Trial*, §295 [under *Wheeler*, and subject to some limitations, conduct evincing moral turpitude may be used for impeachment purposes even if it was subject of juvenile adjudication]; *People v. Lepolo* (1997) 55 C.A.4th 85, 89, 63 C.R.2d 735, 3 *Cal. Evidence* (4th), *Presentation at Trial*, §314 [in determining whether misconduct that did not result in conviction evinced moral turpitude so as to qualify for impeachment use, trial judge need not determine what label it would have been given if it had been charged as crime; citing *Wheeler*]; see also 24 *Loyola L.A. L. Rev.* 621 [The Impact of Proposition 8 on Prior Misconduct Impeachment Evidence in California Criminal Cases].)

(3) *Prosecution's Failure To Preserve Evidence.* (See *People v. Tierce* (1985) 165 C.A.3d 256, 265, 211 C.R. 325 [trial judge properly admitted police officer's testimony as to statements made to him by defendant at time of arrest, even though officer failed to preserve his field notes regarding statements]; *People v. Johnson* (1989) 47 C.3d 1194, 1233, 255 C.R. 569, 767 P.2d 1047, 3 Cal. Evidence (4th), Presentation at Trial, §126 [Proposition 8 had effect of replacing California standard as to prosecution's duty with federal standard]; *People v. Valencia* (1990) 218 C.A.3d 808, 819, 267 C.R. 257, 3 Cal. Evidence (4th), Presentation at Trial, §131 [prosecution failed to prevent deportation of witness; Proposition 8 had effect of replacing former California rule, which did not require defendant to show that witness' testimony would have been favorable, with federal rule].)

(4) *Confessions and Admissions by Defendant.* (See *People v. May* (1988) 44 C.3d 309, 315, 243 C.R. 369, 748 P.2d 307, 3 Cal. Evidence (4th), Presentation at Trial, §319 [admissibility, for impeachment, of statements obtained in violation of *Miranda*]; *People v. Markham* (1989) 49 C.3d 63, 71, 260 C.R. 273, 775 P.2d 1042, 1 Cal. Evidence (4th), Hearsay, §86 [standard of proof as to voluntariness of confession]; *People v. Hall* (1988) 199 C.A.3d 914, 920, 245 C.R. 458, 2 Cal. Evidence (4th), Witnesses, §391 [admissibility of neutral information, elicited from arrestee for proper jail administration but without required *Miranda* warnings]; *People v. Warner* (1988) 203 C.A.3d 1122, 1126, 1127, 1129, 250 C.R. 462, 1 Cal. Evidence (4th), Hearsay, §77 [admissibility of confession obtained at renewed interrogation after fresh *Miranda* warnings]; *People v. Gastile* (1988) 205 C.A.3d 1376, 1384, 253 C.R. 283 [presumption that noncoerced, Mirandized confession is tainted by prior non-coerced, non-Mirandized confession]; *People v. Cox* (1990) 221 C.A.3d 980, 987, 270 C.R. 730, 1 Cal. Evidence (4th), Hearsay, §53 [admissibility of confession of mentally deficient defendant].)

(5) *Confessions and Admissions by Codefendant.* (See *People v. Boyd* (1990) 222 C.A.3d 541, 562, 271 C.R. 738, 1 Cal. Evidence (4th), Hearsay, §59 [admissibility of codefendant's statement incriminating accused, where codefendant testifies at trial]; *People v. Walkkein* (1993) 14 C.A.4th 1401, 1407, 18 C.R.2d 383 [admissibility of codefendant's statement incriminating accused in trial to court].)

(6) *Miscellaneous Issues.* Because of the broad scope of the truth in evidence provision ("relevant evidence shall not be excluded"), the courts have been called on to consider its effect on a wide range of other issues. (See *People v. Mickle* (1991) 54 C.3d 140, 168, 284 C.R. 511, 814 P.2d 290, 3 Cal. Evidence (4th), Presentation at Trial, §286 [admissibility of evidence that prosecution witness threatened witnesses in proceedings against him]; *People v. Gibson* (1987) 195 C.A.3d 841, 852, 854, 241 C.R. 126, 2 Cal. Evidence (4th), Witnesses, §461 [admissibility of defendant's bank records]; *People v. Wood* (1989) 207 C.A.3d Supp. 11, 16, 255 C.R. 537, 2 Cal. Crim. Law (3d), Crimes Against Public Peace and Welfare, §231 [decimal point to which blood-alcohol test results must be carried in drunk driving prosecution]; *People v. Trotman* (1989) 214 C.A.3d 430, 438, 262 C.R. 640, 2 Cal. Evidence (4th), Witnesses, §425 [nonconsensual taking of blood sample from driver prior to arrest]; *People v. Sullivan* (1991) 234 C.A.3d 56, 57, 58, 285 C.R. 553, 2 Cal. Evidence (4th), Demonstrative, Experimental, and Scientific Evidence, §86 [speed trap evidence]; *People v. Culton* (1992) 11 C.A.4th 363, 373, 14 C.R.2d 189 [concurring opinion suggests that corpus delicti rule has been abrogated]; *People v. Plyler* (1993) 18 C.A.4th 535, 544, 22 C.R.2d 772, 5 Cal. Crim. Law (3d), Criminal Trial, §336 [recording of phone call obtained in violation of pretrial detainee's privacy rights]; *People v. Ortiz* (1995) 38 C.A.4th 377, 387, 44 C.R.2d 914, 1 Cal. Evidence (4th), Hearsay, §210 [in murder case, victim's statements indicating fear of defendant].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2a) *(New) Prior Offense To Bolster Witness' Credibility.* In *People v. Stern* (2003) 111 C.A.4th 283, 3 C.R.3d 479, defendant was charged with attempted murder, making a criminal threat, and dissuading a witness by threat or violence. During the trial, evidence of a prior stabbing incident involving defendant was admitted in order to corroborate the testimony of one of the victims of the current offenses. That victim had testified that after the attempt on his life, defendant called him, told him not to testify, threatened to slit the victim's mother's throat, and mentioned the earlier stabbing which, he claimed falsely, involved someone else's throat being cut. Another witness was allowed to testify directly concerning the stabbing incident. Defendant was acquitted on the attempted murder counts but was convicted of



the threat and witness dissuasion charges. *Held*, affirmed; admission of evidence concerning the stabbing was proper.

(a) The general prohibition against the use of character evidence to prove the defendant's conduct on a specific occasion (*Ev.C. 1101*) does not apply under these circumstances. The stabbing evidence was admitted to bolster the victim's credibility, and *Ev.C. 1101(c)* expressly states that the admissibility of character evidence relating to credibility is to be determined under *Ev.C. 786 et seq.*, not *Ev.C. 1101*. (*111 C.A.4th 296*.)

(b) *Ev.C. 786, 787* (character traits and specific instances of conduct to attack or support credibility of witness) are likewise inapplicable, as they were abrogated by Cal. Const., Art. I, §28(d), insofar as they would otherwise apply in a criminal case. (*111 C.A.4th 297*, citing *People v. Harris* (1989) 47 C.3d 1047, 255 C.R. 352, 767 P.2d 619, text, p. 15.)

(c) The only real issue therefore is whether the evidence was sufficiently relevant within the meaning of *Ev.C. 352* (*1 Cal. Evidence (4th), Circumstantial Evidence, §17*). Defendant's telephone call to the victim was made in part to prevent the victim from testifying, and that very conduct was the basis for one of the charged offenses. The accuracy of the victim's recitation of defendant's words was an important issue, and the fact that defendant was in fact involved in a stabbing around the time of the telephone call lent credence to the victim's testimony concerning the threats. The trial judge did not abuse his discretion in reaching this conclusion. (*111 C.A.4th 298, 299*.) Further, although evidence of an uncharged incident is usually sought to be admitted for impeachment purposes, there is nothing in Cal. Const., Art. I, §28(d), "to prevent the use of relevant testimony to prove a crime victim, or any other witness for that matter, is telling the truth." (*111 C.A.4th 300*.) (4) *Confessions and Admissions by Defendant*. See *People v. Alvarez* (2002) 27 C.4th 1161, 1180, 119 C.R.2d 903, 46 P.3d 372, 1 Cal. Crim. Law (3d), *Elements*, Supp., §46 [Proposition 8 abrogated corpus delicti rule insofar as it would preclude admission of defendant's out-of-court statement absent independent evidence of crime, but independent-proof portion of rule remains valid, and instruction to that effect is required]; *Rayyis v. Superior Court* (2005) 133 C.A.4th 138, 148, 35 C.R.3d 12 [effect of Proposition 8 on corpus delicti rule in preliminary hearings was same as its effect on trials, as stated in *Alvarez, supra*]; *People v. Herrera* (2006) 136 C.A.4th 1191, 1201, 39 C.R.3d 578 [trial judge did not err in granting defendant's motion under P.C. 995 to dismiss charge of conspiracy to manufacture methamphetamine on ground that corpus delicti rule was not satisfied; rule applies to probable cause determination at preliminary hearing].

(6) *Miscellaneous Issues*. See *People v. Williams* (2002) 28 C.4th 408, 415, 121 C.R.2d 854, 49 P.3d 203 [where preliminary alcohol screening breath test was not administered in compliance with applicable regulations, Proposition 8 precludes court from excluding results for purpose of deterring police misconduct]; *People v. Collins* (2004) 115 C.A.4th 137, 156, 8 C.R.3d 731 [even if prison officials violated Department of Corrections regulations in connection with body cavity search of prison inmate that resulted in recovery of heroin balloons, suppression of balloons was not required; Proposition 8 eliminated judicially created remedies for violations of administrative provisions except where federal Constitution requires exclusion of evidence obtained as result of violations].



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## CHAPTER I - Introduction

### I. MODERN LAW OF EVIDENCE

#### H. Conflict of Laws.

##### *1 Witkin Cal. Evid. Intro § 10*

#### [§ 10] Conflict of Laws.

(1) *General Principle: Law of Forum.* Rules of evidence are generally regarded as procedural and therefore governed by the law of the forum. This principle covers such matters as burden of proof, presumptions and inferences, competency and credibility of witnesses, and admissibility and sufficiency of evidence. (See *Pfingsten v. Westenhaver* (1952) 39 C.2d 12, 19, 244 P.2d 395 [negligence of automobile driver in Iowa accident; sufficiency of evidence to support verdict determined by California law]; *Hamlet v. Hook* (1951) 106 C.A.2d 791, 794, 236 P.2d 196 [presumption of negligence in Kansas accident held a Kansas statutory rule of evidence, not enforced in California]; *Sadberry v. Griffiths* (1961) 191 C.A.2d 610, 613, 12 C.R. 773 [presumption of ownership arising from registration of automobile under Texas law; effect of presumption determined by California law]; *Rest.2d, Conflict of Laws* §§133 et seq., 137, 138; 1 Wigmore (Tillers Rev.) §5; 16 Am.Jur.2d (1998 ed.), *Conflict of Laws* §§168, 169; 58 Harv. L. Rev. 153; 59 Harv. L. Rev. 505.)

As to *privileges*, the theory is more questionable, because they are based on policy rather than the necessity for or probative value of evidence (2 Cal. Evidence (4th), *Witnesses*, §98).

(2) *Distinctions.* Substantive matters sometimes appear in procedural form (see 3 Cal. Proc. (4th), *Actions*, §97 et seq.), and may be governed by foreign law. The parole evidence rule, regarded as substantive in nature (see 2 Cal. Evidence (4th), *Documentary Evidence*, §62), is the most important example. (See *Hutchinson v. Hutchinson* (1941) 48 C.A.2d 12, 19, 119 P.2d 214; *Crumley v. Walter M. Ballard Corp.* (1950) 100 C.A.2d 698, 702, 224 P.2d 455; *Rest.2d, Conflict of Laws* §140; 1 Wigmore (Tillers Rev.) §5, p. 337.) And on the burden of proof and sufficiency of evidence, the Conflict of Laws Restatement states that, if the primary purpose of the law of a nonforum state on these subjects is to affect the decision of the issue, rather than to regulate the trial, the law of that state must be applied. (*Rest.2d, Conflict of Laws* §133 et seq.) (See also 16 Am.Jur.2d (1998 ed.), *Conflict of Laws* §172.)

There are differing views as to whether the statute of frauds, or a particular provision thereof, is substantive or procedural. (See 1 Wigmore (Tillers Rev.) §5, p. 340; 50 Harv. L. Rev. 1162; 67 Harv. L. Rev. 179; 43 Cal. L. Rev. 295.) The modern approach to conflict of law problems is to avoid rigid characterization and to weigh the interests involved. (See 1 Summary (9th), *Contracts*, §55.) This approach was taken in California in a decision upholding an oral contract made in Nevada and enforceable there, although within the California statute of frauds. (*Bernkrant v. Fowler* (1961) 55 C.2d 588, 594, 595, 12 C.R. 266, 360 P.2d 906, 1 Summary (9th), *Contracts*, §55; see 49 Cal. L. Rev. 962; 53 Cal. L. Rev. 64; 16 Hastings L. J. 644.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Distinctions.* *Bernkrant v. Fowler:*

*Cross-Reference:* 1 *Summary* (10th), *Contracts*, §83.



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CHAPTER I - Introduction

II. CALIFORNIA EVIDENCE CODE

A. Background.

1. Defects in California Statutory System.

*1 Witkin Cal. Evid. Intro § 11*

[§ 11] Defects in California Statutory System.

The outmoded analysis, classification, and terminology of former California statutes, and the inadequacy of their case law supplementation, were well described by the Law Revision Commission in its "Recommendation Proposing an Evidence Code" (January 1965):

"Although Part IV of the Code of Civil Procedure purports to be a comprehensive and systematic statement of the law of evidence, in fact it falls far short of that. Its draftsmanship does not meet the standards of the modern California codes. There are duplicating and inconsistent provisions. There are long and complex sections that are difficult to read and more difficult to understand. Important areas of the law of evidence are not mentioned at all in the code, and many that are mentioned are treated in the most cursory fashion. Many sections are based on an erroneous analysis of the common law of evidence upon which the code is based. Others preserve common law rules that experience has shown do more to inhibit than to enhance the search for truth at a trial. Necessarily, therefore, the courts have had to develop many, if not most, of the rules of evidence with but partial guidance from the statutes." (7 Cal. Law Rev. Com. Reports, p. 30.)

Then, after examining the statutory coverage in such important areas as hearsay and privilege, the Commission concluded:

"These and similar deficiencies call for a thorough revision and recodification of the California law of evidence. It is true that the courts have filled in many of the gaps contained in the present code. They have also been able to remedy some of the anomalies and inconsistencies in the code by construction of the language used or by actual disregard of the statutory language. But there is a limit on the extent to which the courts can remedy the deficiencies in a statutory scheme. Reform of the California law of evidence can be achieved only by legislation thoroughly overhauling and recodifying the law." (7 Cal. Law Rev. Com. Reports, p. 31.)

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## CHAPTER I - Introduction

### II. CALIFORNIA EVIDENCE CODE

#### A. Background.

#### 2. The Law Revision Commission's Studies and Conclusions.

##### *1 Witkin Cal. Evid. Intro § 12*

[§ 12] The Law Revision Commission's Studies and Conclusions.

(1) *Study of Uniform Rules.* The project began with a directive by the 1956 Legislature to conduct a study of the Uniform Rules of Evidence to determine whether they might be the basis for a revision of the California law. The Law Revision Commission's consultants, Professors Chadbourn and Degnan, prepared elaborate studies and tentative recommendations, which were published and critically examined by committees of the bar and the judiciary. (7 Cal. Law Rev. Com. Reports, p. 29.)

(2) *Rejection of Uniform Rules.* The Commission found many of the Uniform Rules superior to present California law, and drew liberally upon them for new doctrines and restatement of established principles. But the original thought that the Rules might be adopted as a whole was abandoned for the following reasons set forth in the Commission Recommendation:

"*First*, in certain important respects, the Uniform Rules would change the law of California to an extent that the Commission considers undesirable. For example, the Uniform Rules would admit any hearsay statement of a person who is present at the hearing and subject to cross-examination. In addition, they do not provide a married person with a privilege to refuse to testify against his spouse. In both respects--and in a number of other respects as well--the Commission has disagreed with the conclusions reached by the Commissioners on Uniform State Laws. Sometimes the disagreement has been upon matters of principle; in others, it has been upon matters of detail. In total, the disagreements have been substantial and numerous enough to persuade the Law Revision Commission that the Uniform Rules of Evidence should not be adopted in their present form."

"*Second*, the existing California statutes contain many provisions that have served the State well and that should be continued but are not found in the Uniform Rules of Evidence. If the Uniform Rules of Evidence were approved in their present form, segregated from the remainder of the statutory law of evidence, California's statutory law of evidence would be seriously complicated. Yet, the contrasting formats of the Uniform Rules of Evidence and the California evidence statutes make it impossible to integrate these two bodies of evidence law into a single statute while preserving the Uniform Rules in the form in which they were approved by the Commissioners on Uniform State Laws."

"*Third*, the draftsmanship of the Uniform Rules is in some respects defective by California standards. The Uniform Rules contain several rules of extreme length that are reminiscent of several of the cumbersome sections in the 1872 codification. For example, the hearsay rule and all of its exceptions are stated in one rule that has 31 subdivisions. Moreover, different language is sometimes used in the Uniform Rules to express the same idea. For example, various communication privileges (attorney-client, physician-patient, and husband-wife) are expressed in a variety of ways even

though all are intended to provide protection for confidential communications made in the course of the specified relationships."

"*Fourth*, the need for nationwide uniformity in the law of evidence is not of sufficient importance that it should outweigh these other considerations. The law of evidence--unlike the law relating to commercial transactions, for example--affects only procedures in this State and has no substantive significance insofar as the law of other states is concerned. Thus, although the adoption of the Uniform Rules elsewhere indicates that they are deserving of weighty consideration, such adoption is not in and of itself a reason to adopt the rules in California." (7 Cal. Law Rev. Com. Reports, p. 33.)

(3) *Decision To Draft a New Code*. The Commission concluded that a comprehensive new statute, embodying the best features of the Uniform Rules and existing California law, together with innovations found in neither, would best accomplish its objectives. It was further decided that the changes should not be made by amendment of Part IV of the Code of Civil Procedure, which contains sections on other aspects of civil and criminal procedure. Further, it was highly desirable that the rules of evidence be available in a separate volume--"in effect, an official handbook of the law of evidence--a kind of evidence bible for busy trial judges and lawyers." (7 Cal. Law Rev. Com. Reports, p. 34; see also *Ev.C. 1* [short title: "Evidence Code"].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER I - Introduction

### II. CALIFORNIA EVIDENCE CODE

#### B. Nature, Scope, and Organization.

##### *1 Witkin Cal. Evid. Intro § 13*

[§ 13] Nature, Scope, and Organization.

(1) *Mainly Restatement.* The Evidence Code was adopted by the 1965 Legislature, with an effective date of January 1, 1967. (*Ev.C. 12.*) Although it is far more detailed than either the Uniform Rules of Evidence or the preexisting Part IV of the California Code of Civil Procedure, it is mainly an improved statement of prior statutory and case law. "[I]ts principal effect will be to substitute a clear, authoritative, systematic, and internally consistent statement of the existing law for a mass of conflicting and inaccurate statutes and the myriad decisions attempting to make sense out of and to fill in the gaps in the existing statutory scheme." (7 Cal. Law Rev. Com. Reports, p. 34; see *18 Hastings L. J.* 89.)

(2) *Courts and Proceedings Covered.* "Except as otherwise provided by statute, this code applies in every action before the Supreme Court or a court of appeal, superior court, or municipal court, including proceedings in such actions conducted by a referee, court commissioner, or similar officer, but does not apply in grand jury proceedings." (*Ev.C. 300.*) (See *Jauregi v. Superior Court* (1999) 72 C.A.4th 931, 939, 940, 85 C.R.2d 553 [hearsay is not admissible, over proper objection, to prove standing in forfeiture proceeding under *Health & Saf.C. 11488.4(g)*; *Ev.C. 300* makes Evidence Code applicable in every action before superior court except where otherwise provided by statute, and no statute provides applicable exemption].)

Because "action" is defined to include civil and criminal actions and proceedings (*Ev.C. 105*), the Code covers civil and criminal evidence. (See *People v. Holmes* (1993) 12 C.A.4th 1094, 1097, 16 C.R.2d 52, citing the text [Evidence Code governs criminal proceedings unless overridden by constitutional concerns of specific Penal Code provisions].) But it does not apply to administrative proceedings unless the controlling statutes or agency rules contain an election to be governed by it. (Law Rev. Com. Comment on *Ev.C. 300*; see *infra*, §55.)

The proviso, "Except as otherwise provided by statute," recognizes the effect of special statutes relaxing the strict rules of evidence in certain informal judicial proceedings, e.g., those in the small claims court (*infra*, §49), the family conciliation court (*infra*, §48), the juvenile court (*infra*, §36 et seq.), or a criminal court considering probation (*infra*, §25). (Law Rev. Com. Comment on *Ev.C. 300.*)

(3) *Subjects Not Covered.* The Code restates what are generally called the "common law rules of trial evidence." It does not cover the following:

(a) Exclusionary rules based on constitutional principles and developed and expounded by the courts: e.g., involuntary confessions and admissions (*1 Cal. Evidence (4th)*, *Hearsay*, §§52 et seq., 136); evidence obtained by brutality (*2 Cal. Evidence (4th)*, *Witnesses*, §413 et seq.); evidence obtained by unreasonable search and seizure (see *4 Cal. Crim. Law (3d)*, *Illegally Obtained Evidence*, §1 et seq.); evidence obtained from an accused without an

advisement of the rights of counsel and silence (*1 Cal. Evidence (4th), Hearsay, §76*); evidence obtained in violation of the privilege against self-incrimination (*2 Cal. Evidence (4th), Witnesses, §355*).

(b) The parol evidence rule, a substantive law doctrine (*2 Cal. Evidence (4th), Documentary Evidence, §59*).

(c) Discovery, governed by a separate statute (*2 Cal. Evidence (4th), Discovery, §1 et seq.*).

(4) *Divisions of Code*. The Code contains 11 divisions, some subdivided into chapters and articles. The divisions have the following titles:

1. Preliminary Provisions and Construction. (See *infra*, §16.)

2. Words and Phrases Defined. (See *infra*, §17.)

3. General Provisions. (See *3 Cal. Evidence (4th), Presentation at Trial, §43 et seq.*)

4. Judicial Notice. (See *1 Cal. Evidence (4th), Judicial Notice, §1 et seq.*)

5. Burden of Proof; Burden of Producing Evidence; Presumptions and Inferences. (See *1 Cal. Evidence (4th), Burden of Proof and Presumptions, §1 et seq.*)

6. Witnesses. (See *2 Cal. Evidence (4th), Witnesses, §1 et seq.*)

7. Opinion Testimony and Scientific Evidence. (See *1 Cal. Evidence (4th), Opinion Evidence, §1 et seq.*; *2 Cal. Evidence (4th), Demonstrative, Experimental, and Scientific Evidence, §1 et seq.*)

8. Privileges. (See *2 Cal. Evidence (4th), Witnesses, §59 et seq.*)

9. Evidence Affected or Excluded by Extrinsic Policies. (See *1 Cal. Evidence (4th), Circumstantial Evidence, §§38 et seq., 67 et seq., 132 et seq.*)

10. Hearsay Evidence. (See *1 Cal. Evidence (4th), Hearsay, §1 et seq.*)

11. Writings. (See *2 Cal. Evidence (4th), Documentary Evidence, §1 et seq.*)

(5) *Trial Attorney's Evidence Code Notebook*. This C.E.B. looseleaf work, now in its Third Edition (1982) and regularly supplemented, follows the organization of the Code, contains Law Revision Commission and Legislative Commission Comments, cites illustrative cases, and makes appropriate reference to other C.E.B. practice books.

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Courts and Proceedings Covered*. *Ev.C. 300* was amended in 2002 to delete the reference to municipal courts.





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## CHAPTER I - Introduction

### II. CALIFORNIA EVIDENCE CODE C. Future Developments by Judicial Decisions.

#### *1 Witkin Cal. Evid. Intro § 14*

[§ 14] Future Developments by Judicial Decisions.

In *People v. Spriggs* (1964) 60 C.2d 868, 36 C.R. 841, 389 P.2d 377, the court made it clear that improvement of the law of evidence is not solely a legislative responsibility:

"In 1872 the California Legislature codified many of the common law rules of evidence. ... The Legislature, however, did not freeze the law of evidence to the rules set forth in the Code of Civil Procedure or other statutes. ... Numerous questions arise on which the Legislature has been silent or inexplicit. The courts must answer these questions and develop judicially the law of evidence ... in the light of common law principles and the basic objectives of the statutes. ... Thus, we have continued to supplement the common law of evidence as it was codified in 1872, restricting the admissibility of certain evidence ... , and expanding the scope of admissible evidence." (60 C.2d 871.)

The opinion adds this significant quotation from an earlier decision: "[T]he purpose of all rules of evidence is to aid in arriving at the truth, [and] if it shall appear that any rule tends rather to hinder than to facilitate this result ... it should be abrogated without hesitation." (60 C.2d 874.)

The Law Revision Commission, although attempting to frame a comprehensive set of rules, nevertheless accepted the approach of the *Spriggs* case: "The code will not, however, stifle all court development of the law of evidence. In some instances--the *Privileges* division, for example--the code to a considerable extent precludes further development of the law except by legislation. But, in other instances, the Evidence Code is deliberately framed to permit the courts to work out particular problems or to extend declared principles into new areas of the law. As a general rule, the code permits the courts to work toward greater *admissibility* of evidence but does not permit the courts to develop additional *exclusionary* rules." (7 Cal. Law Rev. Com. Reports, p. 34; see also *People v. Holmes* (1993) 12 C.A.4th 1094, 1097, 16 C.R.2d 52, citing the text [Evidence Code is supplemented by judicial decisions that answer questions on which Legislature has been silent or inexplicit].)

More specifically, as will be seen:

(1) The courts may add to the lists of matters judicially noticed (1 Cal. Evidence (4th), *Judicial Notice*, §6) and may create nonstatutory presumptions (1 Cal. Evidence (4th), *Burden of Proof and Presumptions*, §103).

(2) The courts may create new hearsay exceptions (1 Cal. Evidence (4th), *Hearsay*, §2).

(3) The courts cannot create new rules of privilege (2 Cal. Evidence (4th), *Witnesses*, §§62, 64).

(4) The courts cannot create new exclusionary rules of evidence (1 Cal. Evidence (4th), *Circumstantial Evidence*,

§5). However, determinations that certain types of evidence are irrelevant create rules of exclusion (*1 Cal. Evidence (4th), Circumstantial Evidence*, §6); relevant evidence may be excluded for reasons of extrinsic policy (*1 Cal. Evidence (4th), Circumstantial Evidence*, §8 et seq.); and the application of constitutional principles has resulted in additional judicially created rules of exclusion. (See *4 Cal. Crim. Law (3d), Illegally Obtained Evidence*, §1 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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### II. CALIFORNIA EVIDENCE CODE

#### D. Change by Ordinance Invalid.

##### *1 Witkin Cal. Evid. Intro § 15*

[§ 15] Change by Ordinance Invalid.

In *Fisher v. Berkeley* (1984) 37 C.3d 644, 209 C.R. 682, 693 P.2d 261, the court, upholding the constitutionality of defendant city's rent control ordinance, held invalid a provision establishing a presumption.

Retaliatory eviction for assertion or exercise of tenant rights is an established defense in an action instituted by a landlord, as well as a basis for a damage suit by the tenant (see 4 *Summary* (9th), *Real Property*, §693), and the ordinance at issue in *Fisher* contained this implementing provision: In an action by the landlord to recover possession, or an affirmative action by the tenant for damages, "evidence of the assertion or exercise by the tenant of rights under this Ordinance within six months prior to the alleged act of retaliation shall create a presumption that the landlord's act was retaliatory." (37 C.3d 693.) And "[p]resumption means that the Court must find the existence of the fact presumed unless and until its nonexistence is proven by a preponderance of the evidence." (37 C.3d 694.) *Held*, the presumption was one affecting the burden of proof, and invalid under the governing provisions of the Evidence Code.

(a) The presumption is one affecting the burden of proof under *Ev.C. 605* (1 *Cal. Evidence* (4th), *Burden of Proof and Presumptions*, §56), for defendant claimed that it was intended to further the city's policy against retaliatory evictions and to promote the policy of encouraging tenants to exercise their rights under the ordinance. (37 C.3d 696, 697.)

(b) *Ev.C. 500* states that the burden of proof is on the party asserting a fact essential to the party's claim or defense (see 1 *Cal. Evidence* (4th), *Burden of Proof and Presumptions*, §3); and under the ordinance, proof of retaliation is essential to the tenant's defense or claim for damages. Hence, the presumption, relieving the tenant of that burden, is invalid unless the exception in *Ev.C. 500* ("Except as otherwise provided by law"; 1 *Cal. Evidence* (4th), *Burden of Proof and Presumptions*, §6) applies. (37 C.3d 687.) "Law" includes constitutional provisions, statutes, and case law (*Ev.C. 160*), and, in some cases not relevant to the evidentiary rule here involved, the term "statute" has been held to include local ordinances. However, long before enactment of the Evidence Code, the courts were agreed that *municipal governments have no authority to change the common law of evidence*. (37 C.3d 697, 698.)

"Given this background, we cannot believe that the Legislature, when it enacted *Evidence Code* sections 500 and 160 in 1965, ever intended municipal ordinances to come within the exception clause of *Evidence Code* 500. Whether the Evidence Code directly or by implication preempts a local ordinance that purports to create a presumption shifting the burden of producing evidence is a separate issue, on which we reserve decision. (See *Evid. Code*, §550, subd. (b).) For now, we conclude that the Legislature deliberately excluded ordinances from those sources of law that may change the traditional allocation of the burden of proof, and that the presumption in section 14 shifting the burden of proof, on its face, directly conflicts with the Evidence Code. (§500.) To that extent, the ordinance is invalid." (37 C.3d 698.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*Cross-Reference:* 12 *Summary* (10th), *Real Property*, §712.



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## CHAPTER I - Introduction

## II. CALIFORNIA EVIDENCE CODE

### E. Construction.

#### *1 Witkin Cal. Evid. Intro § 16*

[§ 16] Construction.

(1) *Comments by Law Revision Commission and Legislative Committees.* In its 1965 recommendations (*supra*, §12), the Law Revision Commission included valuable Comments on each section, explaining its purpose, its relation to other sections, and some of the problems of application. The Comments are published at 7 Cal. Law Rev. Com. Reports, p. 38 et seq., as well as in the Evidence Code volumes of West's Annotated California Codes. The importance of the Comments is underscored by the statutory declaration that they reflect the legislative intent in adopting the law. (See 7 Cal. Law Rev. Com. Reports, pp. 1007, 1008; *Kaplan v. Superior Court* (1971) 6 C.3d 150, 158, footnote 4, 98 C.R. 649, 491 P.2d 1 ["These comments are declarative of the intent not only of the draftsmen of the code but also of the legislators who subsequently enacted it"]; *People v. Williams* (1976) 16 C.3d 663, 667, 128 C.R. 888, 547 P.2d 1000 [comments declare legislative intent]; *Arellano v. Moreno* (1973) 33 C.A.3d 877, 884, 109 C.R. 421 ["it can readily be inferred that with respect to unchanged sections of the Evidence Code the commission's comments state the intent of the Legislature regarding those sections"].)

One distinction should be noted, however. In some cases, the Senate and Assembly Judiciary Committees revised the Commission Comments or added new ones of their own. These new or revised comments are included in the West's Annotated California Codes, where they are designated "Comment--Senate Committee on Judiciary" or "Comment--Assembly Committee on Judiciary."

(2) *Rules of Construction.* Division 1 contains a number of familiar rules found in all of California's modern codes: (a) Constitutional severability. (*Ev.C. 3.*) (b) Liberal construction to effectuate objects and promote justice. (*Ev.C. 2.*) (c) Preliminary provisions of Division 1 govern construction. (*Ev.C. 4.*) (d) Division, chapter, article, and section headings do not affect meaning. (*Ev.C. 5.*) (e) Statutory reference includes amendments. (*Ev.C. 6.*) (f) Definitions of "Division," "Chapter," "Article," "Section," "Subdivision," and "Paragraph." (*Ev.C. 7.*) (g) Present tense includes past and future, future tense includes present. (*Ev.C. 8.*) (h) Masculine gender includes feminine and neuter. (*Ev.C. 9.*) (i) Singular number includes plural, plural includes singular. (*Ev.C. 10.*) (j) "Shall" is mandatory and "may" is permissive. (*Ev.C. 11.*)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER I - Introduction

### II. CALIFORNIA EVIDENCE CODE F. General Definitions.

*1 Witkin Cal. Evid. Intro § 17*

[§ 17] General Definitions.

"Unless the provision or context otherwise requires, these definitions govern the construction of this code." (*Ev.C. 100.*)

The Code lists definitions of general application in Division 2, and puts definitions with special significance to a particular division or article in that division or article. (See Law Rev. Com. Comment on Division 2.) However, some of the definitions in Division 2 are more useful in the discussion of the major subjects or topics to which they relate, and are accordingly stated in later sections or chapters of this work. These are *Ev.C. 110*, burden of producing evidence; *Ev.C. 115*, burden of proof; *Ev.C. 125*, conduct; *Ev.C. 135*, declarant; *Ev.C. 140*, evidence; *Ev.C. 190*, proof; *Ev.C. 210*, relevant evidence; *Ev.C. 225*, statement; *Ev.C. 240*, unavailable witness; *Ev.C. 250*, writing.

The remaining general definitions in Division 2 are as follows:

- (1) *Action*. This includes "a civil action and a criminal action." (*Ev.C. 105.*)
- (2) *Civil Action*. This includes "civil proceedings." (*Ev.C. 120.*)
- (3) *Criminal Action*. This includes "criminal proceedings." (*Ev.C. 130.*)
- (4) *The Hearing*. This is a broader term than "trial"; it means "the hearing at which a question under this code arises," and includes preliminary hearings and post-trial proceedings. (*Ev.C. 145* and Law Rev. Com. Comment.)
- (5) *Law*. This includes "constitutional, statutory, and decisional law." (*Ev.C. 160.*)
- (6) *Oath*. This includes affirmation or declaration under penalty of perjury. (*Ev.C. 165.*)
- (7) *Perceive*. This means "to acquire knowledge through one's senses." (*Ev.C. 170.*)
- (8) *Person*. The term is broadly defined to include "a natural person, firm, association, organization, partnership, business trust, corporation, limited liability company, or public entity." (*Ev.C. 175.*)
- (9) *Personal Property*. This includes "money, goods, chattels, things in action, and evidences of debt." (*Ev.C. 180.*)
- (10) *Property*. This includes both real and personal property. (*Ev.C. 185.*)
- (11) *Public Employee*. This means "an officer, agent or employee of a public entity." (*Ev.C. 195.*)

(12) *Public Entity*. This includes every form of public authority: "a nation, state, county, city and county, city, district, public authority, public agency, or any other political subdivision or public corporation, whether foreign or domestic." (*Ev.C. 200.*)

(13) *Real Property*. This includes "lands, tenements, and hereditaments." (*Ev.C. 205.*)

(14) *State*. This has two distinct meanings: (a) Ordinarily, "the State of California." (b) If applied to the different parts of the United States, "it includes any state, district, commonwealth, territory, or insular possession of the United States." (*Ev.C. 220.*)

(15) *Statute*. This includes "a treaty and a constitutional provision." (*Ev.C. 230.*)

(16) *Trier of Fact*. This includes "(a) the jury and (b) the court when the court is trying an issue of fact other than one relating to the admissibility of evidence." (*Ev.C. 235.*) But this definition is not exclusive: A referee, court commissioner, or similar officer may be a trier of fact. (Law Rev. Com. Comment on *Ev.C. 235.*)

**SUPPLEMENT:** [This section is current through the latest supplement]

(8a) (*New*) *Dependent Person*. A dependent person is a person who has a physical or mental impairment that substantially restricts his or her ability to carry out normal activities or to protect his or her rights. It includes, but is not limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have significantly diminished because of age. It also includes persons admitted as inpatients to a 24-hour health facility. (*Ev.C. 177*, added in 2004.)



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## CHAPTER I - Introduction

### III. MEANING OF EVIDENCE AND PROOF

#### A. Evidence.

*1 Witkin Cal. Evid. Intro § 18*

[§ 18] Evidence.

(1) *Former Law.* Former C.C.P. 1823 defined "judicial evidence" as "the means, sanctioned by law, of ascertaining in a judicial proceeding the truth respecting a question of fact." Former C.C.P. 1827 described evidence as of four kinds: matters judicially noticed, testimony, writings, and material objects presented to the senses. And former C.C.P. 1957 added a fifth kind, presumptions. (See *People v. Leonard* (1962) 207 C.A.2d 409, 414, 24 C.R. 597, citing the text ["evidence is that probative material, legally received, by which the tribunal may be lawfully persuaded of the truth or falsity of a fact in issue"]; *In re Eugene M.* (1976) 55 C.A.3d 650, 658, 127 P.2d 851 ["Evidence is matter that makes clear the truth of fact (Blackstone), persuades a court of the existence of fact (Bentham), or produces a just conviction of truth (Livingston)"].)

(2) *Evidence Code. Ev.C. 140* reads as follows: " 'Evidence' means testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact." This section is both broader and more restrictive than the superseded statutes: (a) It abandons the "sanctioned by law" limitation, and covers inadmissible matters offered, for these have full evidentiary effect in the absence of a proper objection. (See Law Rev. Com. Comment on *Ev.C. 140*, citing the text; 1 McCormick 5th, §54.) (b) Judicial notice, which is more accurately a substitute for evidence and conclusive on the issue (see *1 Cal. Evidence (4th), Burden of Proof and Presumptions*, §3), is not included in the listing of matters covered. (c) Presumptions are not within the definition, and are also expressly excluded by *Ev.C. 600* (see *1 Cal. Evidence (4th), Burden of Proof and Presumptions*, §52).

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Evidence Code.* See 1 McCormick 6th, §54.





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III. MEANING OF EVIDENCE AND PROOF  
B. Proof.

*1 Witkin Cal. Evid. Intro § 19*

[§ 19] Proof.

Under former C.C.P. 1824, "proof" was "the effect of evidence, the establishment of a fact by evidence." *Ev.C. 190* states: " 'Proof' is the establishment by evidence of a requisite degree of belief concerning a fact in the mind of the trier of fact or the court." (See Law Rev. Com. Comment on *Ev.C. 190*, pointing out that even when the jury is the trier of fact, the court still has to determine preliminary questions of fact on the basis of proof; 3 *Cal. Evidence (4th)*, *Presentation at Trial*, §48.) (See also 2 McCormick 5th, §336; 29 *Am.Jur.2d (1994 ed.)*, *Evidence* §2; on the various standards of proof, see 1 *Cal. Evidence (4th)*, *Burden of Proof and Presumptions*, §34 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 2 McCormick 6th, §336.



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## CHAPTER I - Introduction

### IV. EVIDENCE IN CRIMINAL PROCEEDINGS

#### A. In General.

*1 Witkin Cal. Evid. Intro § 20*

[§ 20] In General.

"The rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in this code." (P.C. 1102; see *People v. Jackson* (1946) 74 C.A.2d 22, 25, 167 P.2d 776; *People v. Hewlett* (1951) 108 C.A.2d 358, 374, 239 P.2d 150; *Conservatorship of Jones* (1986) 188 C.A.3d 306, 309, 310, 232 C.R. 600, quoting the text.) And the Evidence Code provides that it shall govern proceedings in "actions" (*Ev.C. 12(a)*), which include criminal as well as civil actions (*Ev.C. 105*). Thus, there is no separate law of evidence for criminal trials, and the phrase "criminal evidence," sometimes used by text writers, merely refers to the particular rules of evidence that are designed mainly or exclusively for issues or situations arising in criminal proceedings.

"Criminal evidence," in the above sense, is as fully covered as "civil evidence" in this work, as follows:

(1) Major areas of application of rules to criminal cases are separately treated; e.g., burden of proof, degree of proof, and presumptions in criminal prosecutions (*1 Cal. Evidence (4th), Burden of Proof and Presumptions*, §20 et seq.); admissibility of character evidence (*1 Cal. Evidence (4th), Circumstantial Evidence*, §50 et seq.) and evidence of other offenses (*1 Cal. Evidence (4th), Circumstantial Evidence*, §74 et seq.); involuntary confessions and admissions (*1 Cal. Evidence (4th), Hearsay*, §§64 et seq., 136 et seq.); real or demonstrative evidence (*2 Cal. Evidence (4th), Demonstrative, Experimental, and Scientific Evidence*, §3 et seq.); corroboration requirements (*3 Cal. Evidence (4th), Presentation at Trial*, §96 et seq.) and sufficiency of circumstantial evidence (*3 Cal. Evidence (4th), Presentation at Trial*, §142 et seq.); the self-incrimination privilege (*2 Cal. Evidence (4th), Witnesses*, §355 et seq.); discovery of identity of informer (*2 Cal. Evidence (4th), Witnesses*, §306 et seq.). Criminal discovery is fully explored in another work (see *5 Cal. Crim. Law* (3d), *Criminal Trial*, §27 et seq.), as is illegally obtained evidence (see *4 Cal. Crim. Law* (3d), *Illegally Obtained Evidence*, §1 et seq.).

(2) In treating topics in which the evidentiary rules are the same, illustrative civil and criminal cases are often separately discussed.

Certain criminal proceedings that are not criminal trials are also briefly examined. (See *infra*, §21 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Criminal Law k.304 et seq.



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## CHAPTER I - Introduction

## IV. EVIDENCE IN CRIMINAL PROCEEDINGS

## B. Preliminary Examination.

## 1. In General.

*1 Witkin Cal. Evid. Intro § 21*

[§ 21] In General.

Where a felony prosecution is by information in the superior court, a preliminary examination must be held before a magistrate to determine whether a public offense has been committed and whether there is probable cause to hold the accused. (P.C. 858 et seq.; see 4 *Cal. Crim. Law* (3d), *Pretrial Proceedings*, §117 et seq.) Two general principles apply in such a hearing:

(1) The degree or quantum of proof required is less than that necessary for conviction at the trial; i.e., only a reasonable probability of guilt need be shown, and "slight evidence" is sufficient. (See *People v. McRae* (1947) 31 C.2d 184, 187, 187 P.2d 741; *Kind v. Superior Court* (1956) 143 C.A.2d 100, 102, 299 P.2d 414; *People v. Jablon* (1957) 153 C.A.2d 456, 458, 314 P.2d 824; *People v. Superior Court (Shamis)* (1997) 58 C.A.4th 833, 842, 68 C.R.2d 388; 4 *Cal. Crim. Law* (3d), *Pretrial Proceedings*, §§147, 232.)

(2) The rules of admissibility of evidence are the same as those governing a trial; hence, the showing must consist of "legal" or competent evidence: "The constitutional guarantee of due process of law requires adherence to the adopted and recognized rules of evidence. There cannot be one rule of evidence for the trial of cases and another rule of evidence for preliminary examinations. The rule for the admission or rejection of evidence is the same for both proceedings." (*People v. Schuber* (1945) 71 C.A.2d 773, 775, 163 P.2d 498 [information dismissed]; see also *People v. Davidson* (1964) 227 C.A.2d 331, 335, 38 C.R. 660 [same].) This principle, however, is subject to a major exception: Proposition 115 provides for the admission of certain kinds of hearsay that would not be admissible at trial. (See infra, §24; 4 *Cal. Crim. Law* (3d), *Pretrial Proceedings*, §142.) (See also P.C. 872.5 [notwithstanding *Ev.C. 1520* et seq. (2 *Cal. Evidence* (4th), *Documentary Evidence*, §31), in preliminary examination, contents of writing may be proved by otherwise admissible original, or otherwise admissible secondary evidence].)

*People v. McRae*, supra, makes this distinction: A defendant can be held to answer on evidence consisting solely of the uncorroborated testimony of an accomplice. The testimony of an accomplice must be viewed with distrust (see 3 *Cal. Evidence* (4th), *Presentation at Trial*, §108), and without the corroboration required by P.C. 1111 it is insufficient to establish guilt (see 3 *Cal. Evidence* (4th), *Presentation at Trial*, §96); but a committing magistrate may believe it and conclude that there is probable cause to hold the defendant for trial. "[B]y prohibiting a conviction based solely upon the uncorroborated testimony of an accomplice, section 1111 precludes a result that might otherwise follow from such testimony. It is explicit and complete in defining the result that it precludes. In restricting its prohibition to a conviction, section 1111 is in harmony with the principle that less evidence is required to support a determination of probable cause for a commitment than a determination of guilt for a conviction." (31 C.2d 187.) (See dissent, arguing that policy, if not literal terms, of P.C. 1111 makes such testimony incompetent.)

A dictum in *People v. Davidson*, *supra*, 227 C.A.2d 337, takes the same position as the *McRae* case (without citing it) on the requirement of corroborating witnesses for proof of perjury (former P.C. 1103a, now P.C. 118(b), 3 Cal. Evidence (4th), Presentation at Trial, §107); i.e., the requirement applies to the trial, not to the preliminary examination.

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Criminal Law k.229 et seq.



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## CHAPTER I - Introduction

### IV. EVIDENCE IN CRIMINAL PROCEEDINGS

#### B. Preliminary Examination.

#### 2. Defendant's Right To Cross-Examine.

*1 Witkin Cal. Evid. Intro § 22*

[§ 22] Defendant's Right To Cross-Examine.

The right to cross-examine for the purpose of overcoming the prosecution's case or establishing an affirmative defense is an element of due process of law. "It is as critical as the right to cross-examine witnesses at one's trial." (*Gallaher v. Superior Court* (1980) 103 C.A.3d 666, 671, 162 C.R. 389, 3 Cal. Evidence (4th), Presentation at Trial, §237.) (See also *Foster v. Superior Court* (1980) 107 C.A.3d 218, 224, 225, 165 C.R. 701 [improper refusal to allow cross-examination to probe for possible bias]; P.C. 865 ["The witnesses must be examined in the presence of the defendant, and may be cross-examined in his behalf"]; 4 Cal. Crim. Law (3d), Pretrial Proceedings, §142.) (On defendant's right of confrontation--to see as well as hear witnesses against him--see *Herbert v. Superior Court* (1981) 117 C.A.3d 661, 666, 172 C.R. 850, 3 Cal. Evidence (4th), Presentation at Trial, §16; on defendant's discovery rights, see *Holman v. Superior Court* (1981) 29 C.3d 480, 485, 486, 174 C.R. 506, 629 P.2d 14 ["a reasonable, limited discovery directed to the restricted purpose of the preliminary examination should be available, in the discretion of the magistrate, prior to that examination"; citing 15 Santa Clara Lawyer 665]; *People v. Buckley* (1986) 185 C.A.3d 512, 523, 228 C.R. 329 [at the preliminary examination, "the defendant may not seek cross-examination or presentation of a witness for the sole and primary goal of obtaining discovery"]; on restrictions imposed on examination of witnesses by Proposition 115, see *infra*, §24.)

In *People v. Davis* (1984) 161 C.A.3d 796, 207 C.R. 846, the court upheld the right of a defendant to personally cross-examine the prosecution's witness. The charge was bribery, and defendant's counsel did not cross-examine the sole prosecution witness but reserved the right to recall him. Thereafter, counsel did recall the witness, and informed the magistrate that defendant, an experienced trial lawyer with special expertise that counsel did not have, had prepared for this cross-examination and requested that he be allowed to conduct it. The magistrate denied the request, stating that he found counsel to be competent. The witness was not cross-examined, and defendant was held to answer, but the trial judge granted a P.C. 995 motion to dismiss the information. *Held*, affirmed.

(a) A defendant represented by counsel does not have an absolute right to participate in the presentation of the defense case, but the court or magistrate has discretion to allow the defendant to do so if the orderly and expeditious conduct of business will not be hindered. (161 C.A.3d 801, 802.)

(b) Denial of the request was an abuse of discretion. Defendant was not the usual layperson without knowledge of legal procedure, but an experienced attorney capable of conducting an effective cross-examination and prepared to do so. And counsel had informed the magistrate that he was not prepared to cross-examine, and that unless defendant could do so, the key prosecution witness would not be cross-examined at all. The magistrate's position--that counsel was able to represent defendant and nothing else need be considered--ignored the important special facts of the case. (161 C.A.3d

805.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Criminal Law k.231



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## CHAPTER I - Introduction

### IV. EVIDENCE IN CRIMINAL PROCEEDINGS

#### B. Preliminary Examination.

#### 3. Special Procedures for Child, Developmentally Disabled, and Other Witnesses.

##### *1 Witkin Cal. Evid. Intro § 23*

[§ 23] Special Procedures for Child, Developmentally Disabled, and Other Witnesses.

The Legislature has established special preliminary examination procedures for certain categories of witnesses:

(1) *Witness 10 Years of Age or Younger*. The preliminary examination may be postponed by 1 court day "in order to accommodate the special physical, mental, or emotional needs of a child witness who is 10 years of age or younger." (P.C. 861.5.) The magistrate must *admonish* both the prosecution and defense *against coaching the child witness* prior to the witness' next appearance in the preliminary examination. (P.C. 861.5.) (On use of one-way or two-way closed-circuit television for taking testimony of minor witnesses, see P.C. 1347, 3 *Cal. Evidence (4th)*, *Presentation at Trial*, §217 et seq.)

(2) *Sexual Offense Victim 15 Years of Age or Younger or Mentally Retarded*. Where a defendant has been charged with *specified sex crimes* against a victim who is *15 years of age* or younger or is developmentally disabled due to mental retardation, the prosecution may apply for an order that the victim's testimony at the preliminary hearing be *videotaped* as well as stenographically recorded. (P.C. 1346(a), (b).) On timely receipt of the application, the magistrate must make the order, and the videotape must be *transmitted to the clerk of the court* in which the action is pending. (P.C. 1346(c).) "If at the time of trial the court finds that further testimony would cause the victim emotional trauma so that the victim is medically unavailable or otherwise unavailable within the meaning of *Section 240 of the Evidence Code*, the court may admit the videotape of the victim's testimony at the preliminary hearing as former testimony under *Section 1291 of the Evidence Code*." (P.C. 1346(d).) (See 14 *Pacific L. J.* 591; 13 *Pepperdine L. Rev.* 175.)

(3) *Spousal Rape or Domestic Violence Victim*. In a prosecution for spousal rape or domestic violence, the prosecution may apply for an order that the victim's testimony at the preliminary hearing be videotaped as well as stenographically recorded. (P.C. 1346.1(a), (b).) On timely receipt of the application, the magistrate must make the order and the videotape must be transmitted to the clerk of the court in which the action is pending. (P.C. 1346.1(c).) If the victim's prior testimony at the preliminary hearing is admissible at trial, the videotape recording may be introduced as evidence. (P.C. 1346.1(d).)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Witness 10 Years of Age or Younger*. P.C. 861.5 was amended in 2004 and 2005 to include dependent persons as defined in P.C. 288(f)(3). (See 2 *Cal. Crim. Law (3d)*, *Sex Offenses and Crimes Against Decency*, §41.)



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## CHAPTER I - Introduction

### IV. EVIDENCE IN CRIMINAL PROCEEDINGS

#### B. Preliminary Examination.

#### 4. Effect of Proposition 115.

*1 Witkin Cal. Evid. Intro § 24*

[§ 24] Effect of Proposition 115.

The Crime Victims Justice Reform Act (Proposition 115) was enacted by the voters in 1990. It made numerous changes in criminal procedure, all of which are discussed in detail in another work. (See *1 Cal. Crim. Law (3d), Introduction to Crimes, §106.*) The evidentiary aspects of the preliminary examination were affected as follows:

(1) *Limitation on Scope of Examination.* The scope of the examination is limited to establishing whether probable cause exists to believe that the defendant has committed a felony. "The examination shall not be used for purposes of discovery." (P.C. 866(b).) The prosecuting attorney may request that the magistrate require an offer of proof as to the testimony expected from any witnesses the defendant proposes to produce. The magistrate may not permit the testimony unless the offer of proof indicates that the testimony is "reasonably likely to establish an affirmative defense, negate an element of a crime charged, or impeach the testimony of a prosecution witness or the statement of a declarant testified to by a prosecution witness." (P.C. 866(a).)

(2) *Hearsay.* "In order to protect victims and witnesses in criminal cases, hearsay evidence shall be admissible at preliminary hearings, as prescribed by the Legislature or by the people through the initiative process." (Cal. Const., Art. I, §30(b).) The constitutional provision is implemented by P.C. 872(b), stating that "the finding of probable cause may be based in whole or in part upon the sworn testimony of a law enforcement officer relating the statements of declarants made out of court offered for the truth of the matter asserted." The officer giving hearsay testimony of this type must have specified experience or training. (See *Nienhouse v. Superior Court (1996) 42 C.A.4th 83, 92, 49 C.R.2d 573* [P.C. 872(b) does not benefit only prosecution; it allows defense to introduce hearsay in its favor from law enforcement officer, either on cross-examination of prosecution witness or from its own witness]; *People v. Daily (1996) 49 C.A.4th 543, 551, 56 C.R.2d 787* [statute does not require child hearsay declarant to be competent to testify in order for properly qualified officer to relate child's out-of-court statements at preliminary examination]; *4 Cal. Crim. Law (3d), Pretrial Proceedings, §142*; *30 Loyola L.A. L. Rev. 1053* [criticizing holding in *Nienhouse*].)

In *Whitman v. Superior Court (1991) 54 C.3d 1063, 2 C.R.2d 160, 820 P.2d 262, 4 Cal. Crim. Law (3d), Pretrial Proceedings, §143*, the court held that P.C. 872(b) does not permit an officer with no personal knowledge about the case to simply read from the investigating officer's report. "The testifying officer ... must have sufficient knowledge of the crime or the circumstances under which the out-of-court statement was made so as to meaningfully assist the magistrate in assessing the reliability of the statement." (*54 C.3d 1072, 1073.*)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Hearsay.* P.C. 872(b), as amended in 2005, additionally allows the finding of probable cause to be based on the



sworn testimony of an honorably retired law enforcement officer. However, the honorably retired officer may only relate statements of declarants that were made out of court and offered for the truth of the matter asserted if those statements were made at a time when the officer was active.

In *People v. Miranda* (2000) 23 C.4th 340, 96 C.R.2d 758, 1 P.3d 73, a murder prosecution involving multiple defendants, the magistrate at the preliminary examination denied the prosecutor's motion to admit the confession of a nontestifying codefendant against defendant and an accomplice. After the case was dismissed as to defendant and the accomplice, the prosecution moved to reinstate the complaint against defendant. The trial judge denied the motion, but the Court of Appeal reversed. *Held*, judgment of the Court of Appeal affirmed; the confession should have been admitted. *Whitman v. Superior Court* (1991) 54 C.3d 1063, 2 C.R.2d 160, 820 P.2d 262, text, p. 34, concluded that at a preliminary hearing conducted under Proposition 115, testimony by a qualified law enforcement officer relating single-level hearsay is, as to the defendant, admissible as against hearsay, Confrontation Clause, and due process objections. "We see no good reason for applying a different rule to a qualified officer's testimony relating out-of-court hearsay statements by nontestifying accomplices, despite defendant's claim of the general unreliability of such statements. Judges and magistrates are presumably well equipped to consider and weigh the possible unreliability of an accomplice's statement in determining whether to hold the defendant for trial. ... Care and caution regarding accomplice statements are especially appropriate if the accused lacks opportunity to cross-examine the accomplice regarding his or her incriminatory statements. But we find no reasonable basis for recognizing an exception to *Whitman* in cases involving an accomplice's confession or other incriminating statement." (23 C.4th 350, 351.)

See *Correa v. Superior Court* (2002) 27 C.4th 444, 463, 117 C.R.2d 27, 40 P.3d 739, 1 Cal. Evidence (4th), Hearsay, Supp., §125 [at preliminary hearing in assault case, admission of investigating officers' testimony as to out-of-court statements by victim and witness was not error, even though statements, made in Spanish, were translated to officers by lay interpreters; translation did not add extra layer of hearsay].



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## CHAPTER I - Introduction

### IV. EVIDENCE IN CRIMINAL PROCEEDINGS

#### C. Grand Jury Proceeding.

*1 Witkin Cal. Evid. Intro § 25*

[§ 25] Grand Jury Proceeding.

(1) *Nature of Proceeding.* The grand jury is not a judicial body and it does not concern itself exclusively with crime. (On the nature, formation, powers, and duties of a grand jury, see *4 Cal. Crim. Law (3d), Introduction to Criminal Procedure*, §31 et seq.) Its proceedings are therefore quite different from those in a criminal trial or a preliminary examination. Thus, it normally functions in secret session, with unauthorized persons excluded. (See *4 Cal. Crim. Law (3d), Pretrial Proceedings*, §156 et seq.) The interrogation is conducted by the district attorney and jurors (see P.C. 935; *4 Cal. Crim. Law (3d), Pretrial Proceedings*, §161); the defendant is not entitled to present evidence (P.C. 939.7; see *4 Cal. Crim. Law (3d), Pretrial Proceedings*, §161); and the witnesses may be admonished not to disclose the questions or their answers (*People v. Mersino (1965) 237 C.A.2d 265, 269, 46 C.R. 821*). Although refusal of a witness to testify is a contempt, the process must issue from the court and the court must make the adjudication. (See *4 Cal. Crim. Law (3d), Pretrial Proceedings*, §161.)

(2) *Applicability of Rules Governing Witnesses and Evidence.* Despite the nonjudicial nature of the grand jury proceeding, it is subject to some of the basic rules governing witnesses and evidence:

(a) Witnesses have the usual privileges, including the privilege against self-incrimination. (See *2 Cal. Evidence (4th), Witnesses*, §371; *52 Cal. L. Rev. 125*.)

(b) Only legally competent evidence can be received. (P.C. 939.6; see *Mott v. Superior Court (1964) 226 C.A.2d 617, 618, 38 C.R. 247*; *4 Cal. Crim. Law (3d), Pretrial Proceedings*, §162.) (On applicability of rule excluding illegally obtained evidence, see *4 Cal. Crim. Law (3d), Illegally Obtained Evidence*, §18.) Because the defendant has no opportunity to object, there can be no waiver of the incompetency. (See *Mott v. Superior Court, supra*; *4 Cal. Crim. Law (3d), Pretrial Proceedings*, §163.)

The test of sufficiency of the evidence to support an indictment on a motion to set it aside is the same as that applied to an information based on a commitment after a preliminary examination (*supra*, §21 et seq.): It need not be enough to establish guilt. (See *4 Cal. Crim. Law (3d), Pretrial Proceedings*, §232.)

P.C. 939.6(b) codifies the basic rule of admissibility and an established distinction: "[T]he grand jury shall not receive any evidence except that which would be admissible over objection at the trial of a criminal action, but the fact that evidence that would have been excluded at trial was received by the grand jury does not render the indictment void where sufficient competent evidence to support the indictment was received by the grand jury." (See *4 Cal. Crim. Law (3d), Pretrial Proceedings*, §§162, 163.)

P.C. 939.6(c) states an exception similar to the one provided by P.C. 872(b) for preliminary hearings (*supra*, §24): Notwithstanding the hearsay rule, "as to the evidence relating to the foundation for admissibility into evidence of documents, exhibits, records, and other items of physical evidence, the evidence to support the indictment may be based in whole or in part upon the sworn testimony of a law enforcement officer relating the statement of a declarant made out of court and offered for the truth of the matter asserted."

(3) *Evidence Favorable to Defendant*. Although the defendant has no right to present evidence, when the grand jury has reason to believe that evidence is available to explain away the charge, it must order that evidence to be produced. (P.C. 939.7; see 4 *Cal. Crim. Law* (3d), *Pretrial Proceedings*, §164.) In *Johnson v. Superior Court* (1975) 15 C.3d 248, 255, 124 C.R. 32, 539 P.2d 792, the court held that a district attorney who is aware of such evidence must inform the grand jury of its nature and existence. (See also *People v. Snow* (1977) 72 C.A.3d 950, 958, 140 C.R. 427 [*Johnson* rule is satisfied by bringing evidence to attention of grand jury (here by informing foreman who in turn communicated information to members); prosecutor is not required to produce evidence or seek out witnesses].)

The *Johnson* holding was codified in 1997 with the enactment of P.C. 939.71, requiring the prosecutor, on becoming aware of any exculpatory evidence, to inform the grand jury of it, and to further inform the jurors of their duties under P.C. 939.7, *supra*. A failure to comply with P.C. 939.71 resulting in substantial prejudice constitutes grounds for dismissal of that portion of the indictment relating to the evidence in question.

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Grand Jury k.36 et seq.



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IV. EVIDENCE IN CRIMINAL PROCEEDINGS

D. Degree and Penalty Hearings.

1. Determination of Degree of Crime.

*1 Witkin Cal. Evid. Intro § 26*

[§ 26] Determination of Degree of Crime.

Where a crime is divided into degrees, the judgment must fix the degree in order that a proper sentence may be imposed. Sometimes the defendant enters a guilty plea specifying the degree, or enters a guilty plea leaving determination of the degree to the judge. But where the degree is contested, it must be determined on the basis of competent evidence, whether by the jury in its verdict or, where jury trial is waived, by the judge. A judge determining this issue may not rely on incompetent evidence or information received out of court. (See *People v. Verdier* (1950) 96 C.A.2d 29, 31, 214 P.2d 433; 6 Cal. Crim. Law (3d), Criminal Judgment, §§56, 57, 150.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## IV. EVIDENCE IN CRIMINAL PROCEEDINGS

## D. Degree and Penalty Hearings.

## 2. Murder Penalty Hearing.

*1 Witkin Cal. Evid. Intro § 27*

[§ 27] Murder Penalty Hearing.

(1) *In General.* Under P.C. 190.1 and 190.3, after a conviction for first degree murder with a charged special circumstance found to be true, or a conviction for other specified offenses for which the death penalty may be imposed, a separate proceeding is held to determine whether the penalty should be death or life imprisonment without possibility of parole. (See *3 Cal. Crim. Law (3d), Punishment, §§434, 463.*) P.C. 190.3 allows inquiry into "any matter *relevant* to aggravation, mitigation, and sentence." The statute lists a number of factors that the trier of fact must take into account, without specifying which factors are aggravating and which mitigating, and this list has been held to limit the parties to introducing evidence relevant to the specific factors. (See *People v. Thompson (1988) 45 C.3d 86, 123, 246 C.R. 245, 753 P.2d 37.*) In light of P.C. 190.3(k), allowing the jury to consider "[a]ny other circumstance which extenuates the gravity of the crime," this limitation has little effect on the defendant. (See *People v. Boyd (1985) 38 C.3d 762, 775, 215 C.R. 1, 700 P.2d 782* [prosecution's evidence in aggravation must be relevant to specific factor, but defendant may offer any extenuating evidence, including evidence of character and background].)

Among the listed factors are the circumstances of the present crime, the presence or absence of criminal activity by the defendant involving the use of, or threat to use, force or violence, and the presence or absence of any prior felony conviction. Evidence of nonviolent criminal activity, other than a felony conviction, or of any criminal activity of which the defendant was acquitted, is inadmissible. (P.C. 190.3.)

The prosecution may not introduce evidence of uncharged criminal activity as an aggravating factor, even though that activity involved violence, unless a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*People v. Boyd, supra*, 38 C.3d 778; but see *People v. Hawkins (1995) 10 C.4th 920, 963, 42 C.R.2d 636, 897 P.2d 574* [small errors in reasonable doubt instruction did not mislead jury]; *People v. Avena (1996) 13 C.4th 394, 433, 53 C.R.2d 301, 916 P.2d 1000* [failure to give instruction was harmless].)

(2) *Competent Evidence Requirement.* Cases arising under a similar provision in former P.C. 190.1 held that, although the provision broadened the scope of the relevancy rule by allowing proof of collateral matters that would be inadmissible on the issue of guilt, it did not affect the fundamental requirement that only *legally competent* evidence be received. (See *People v. Purvis (1961) 56 C.2d 93, 97, 13 C.R. 801, 362 P.2d 713*; *People v. Hamilton (1963) 60 C.2d 105, 128, 32 C.R. 4, 383 P.2d 412*; *3 Cal. Crim. Law (3d), Punishment, §467.*) However, the trial judge has no discretion under Ev.C. 352 (*1 Cal. Evidence (4th), Circumstantial Evidence, §17*) to exclude unduly prejudicial evidence where that evidence is specifically made admissible under P.C. 190.3(b) (violent criminal activity). (See *People v. Karis (1988) 46 C.3d 612, 641, 250 C.R. 659, 758 P.2d 1189*; *People v. Davenport (1995) 11 C.4th 1171, 1205, 47 C.R.2d 800, 906 P.2d 1068* [no discretion to exclude crime scene and autopsy photographs as unduly

inflammatory or lacking in probative value[.])

In *People v. Harris* (1984) 36 C.3d 36, 69, 70, 201 C.R. 782, 679 P.2d 433, defendant's proffered hearsay evidence was held admissible under: (1) The holding of *Green v. Georgia* (1979) 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738, that in the punishment phase of a capital case, highly relevant and reliable evidence proffered by the defendant must be admitted even if it is inadmissible hearsay under the state law; and (2) the "mental state" exception to the hearsay rule (Ev.C. 1250, 1 Cal. Evidence (4th), Hearsay, §198). (See also *People v. Smithey* (1999) 20 C.4th 936, 996, 86 C.R.2d 243, 978 P.2d 1171 [hearsay statements of defendant's former parole officer were not "highly probative of the defendant's innocence" within meaning of *Green* but simply corroborative of other evidence, and thus their exclusion did not violate his constitutional rights].)

(3) *Illustrations*. Evidentiary issues concerning the statutory aggravating and mitigating factors arise in every death penalty case, and these are fully discussed in another work. (See 3 Cal. Crim. Law (3d), *Punishment*, §470 et seq.) The following cases are illustrative:

*People v. Stanley* (1995) 10 C.4th 764, 838, 839, 42 C.R.2d 543, 897 P.2d 481 [trial judge properly admitted defendant's statements on videotapes to show information on which psychiatrist based his opinion, but not for truth of facts asserted, because tapes had no indicia of reliability; citing *Green*].

*People v. Avena*, *supra*, 13 C.4th 428, 429 [admission of unadjudicated murder as aggravating evidence did not violate defendant's self-incrimination privilege and right to due process, even though it forced him to choose between testifying and denying the murder (causing him to lose privilege in future trial) and remaining silent (leaving evidence of his guilt un rebutted)].

*People v. Carpenter* (1997) 15 C.4th 312, 417, 63 C.R.2d 1, 935 P.2d 708 [except for other crimes, trial judge should not instruct at all on burden of proving mitigating and aggravating circumstances, because sentencing function is moral and normative, not factual].

*People v. Holt* (1997) 15 C.4th 619, 684, 63 C.R.2d 782, 937 P.2d 213 [judge has no duty to instruct on standard for resolution of factual disputes at penalty phase].

*People v. Ramos* (1997) 15 C.4th 1133, 1172, 1174, 64 C.R.2d 892, 938 P.2d 950 [after defense witness testified as to defendant's renewed involvement with religion while incarcerated, prosecution was properly allowed to impeach her testimony with evidence of defendant's weapons possession in prison; this evidence was also admissible under P.C. 190.3(b) as showing activities involving use of, or threat to use, violence].

*People v. Quartermain* (1997) 16 C.4th 600, 632, 66 C.R.2d 609, 941 P.2d 788 [exclusion of evidence regarding prison conditions defendant would experience if sentenced to life was proper, notwithstanding that jury had received evidence about comfortable conditions in federal prison where defendant had been incarcerated].

*People v. Hart* (1999) 20 C.4th 546, 652, 653, 85 C.R.2d 132, 976 P.2d 683 [after defendant presented evidence in mitigation indicating that he was loving and devoted husband, trial judge did not abuse discretion in allowing prosecution to introduce testimony that defendant had made improper advances to another woman].

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Competent Evidence Requirement*. See *People v. Kraft* (2000) 23 C.4th 978, 1073, 1074, 99 C.R.2d 1, 5 P.3d 68 [letters written by defendant while in jail were properly excluded as self-serving hearsay, where they possessed no probative value apart from truth or sincerity of their contents, and there was evidence that defendant wrote them in order to assemble persuasive case in mitigation; distinguishing *People v. Harris* (1984) 36 C.3d 36, 201 C.R. 782, 679 P.2d 433, text, p. 37]. (3) *Illustrations*. The following cases are illustrative:

*People v. Weaver* (2001) 26 C.4th 876, 980, 981, 111 C.R.2d 2, 29 P.3d 103 [trial judge properly instructed jurors

that they could consider defendant's videotaped responses to Vietnam Era Stress Inventory not for truth, but as demonstrating basis for medical experts' opinions; following *People v. Stanley* (1995) 10 C.4th 764, 42 C.R.2d 543, 897 P.2d 481, text, p. 38].

*People v. Elliot* (2005) 37 C.4th 453, 481, 482, 35 C.R.3d 759, 122 P.3d 968 [trial judge did not err in instructing jurors that defendant's statements to expert defense witness could be considered only to show information on which witness relied and not for truth; statements were made in preparation for trial and were not sort of highly relevant and reliable hearsay that cannot constitutionally be excluded from penalty hearing]. *West's Key Number Digest*, Criminal Law k.986.6(3)



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#### IV. EVIDENCE IN CRIMINAL PROCEEDINGS

##### E. Probation Hearing.

*1 Witkin Cal. Evid. Intro § 28*

[§ 28] Probation Hearing.

The judge determines an application for probation largely on consideration of the probation officer's report. (See P.C. 1203; 3 *Cal. Crim. Law (3d), Punishment*, §§529.) This will usually include hearsay, and properly so: "A probation officer could not make an investigation and report ... if restricted to the rules of evidence. Much of the prior record and history of a defendant, as well as the circumstances surrounding the crime, are hearsay and can be investigated and reported upon only by the use of hearsay information." (*People v. Valdivia (1960) 182 C.A.2d 145, 148, 5 C.R. 832*; see *People v. Barajas (1972) 26 C.A.3d 932, 939, 103 C.R. 405*.) (On use of statements in probation report to determine nature of prior crime, see *1 Cal. Evidence (4th), Hearsay*, §12.)

However, the defendant is entitled to present evidence on his or her own behalf or in rebuttal of the report, and it is improper for the judge to receive new information not incorporated in the report and therefore not available for refutation. (*People v. Valdivia, supra*, 182 C.A.2d 149.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Criminal Law k.982.6(3)





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### IV. EVIDENCE IN CRIMINAL PROCEEDINGS

#### F. Hearings on Revocation of Probation or Parole.

##### 1. In General.

*1 Witkin Cal. Evid. Intro § 29*

[§ 29] In General.

(1) *Criminal Prosecution Distinguished.* The minimum due process requirements for *parole* revocation proceedings established in *Morrissey v. Brewer* (1972) 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484, 3 Cal. Crim. Law (3d), *Punishment*, §646, and held applicable to *probation* revocation proceedings in *People v. Vickers* (1972) 8 C.3d 451, 105 C.R. 305, 503 P.2d 1313, 3 Cal. Crim. Law (3d), *Punishment*, §581, do not change these proceedings into criminal prosecutions. "We emphasize there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense; it is a narrow inquiry; the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial." (*Morrissey v. Brewer*, *supra*, 92 S.Ct. 2604, 33 L.Ed.2d 498.) (See *People v. Maki* (1985) 39 C.3d 707, 715, 217 C.R. 676, 704 P.2d 743, *infra*, §32; 11 A.L.R.4th 999 [admissibility of hearsay evidence in probation revocation hearings].) (On admissibility of illegally obtained evidence, see 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence*, §§20, 21.)

(2) *Relaxed Standards of Proof.* "The correct standard of proof to be used by the trial court in assessing whether there exists 'reason to believe' the probationer has violated his probation or committed a new offense has been variously stated [e.g., "clear and satisfactory"; "clear and convincing"; "preponderance of the evidence"]. Yet the authorities are unanimous in concluding that the standard of proof used in a criminal trial, namely, the 'beyond a reasonable doubt' standard ... is inapplicable to the probation revocation hearing." (*In re Coughlin* (1976) 16 C.3d 52, 56, 127 C.R. 337, 545 P.2d 249; see *People v. Rodriguez* (1990) 51 C.3d 437, 441, 443, 272 C.R. 613, 795 P.2d 783, 3 Cal. Crim. Law (3d), *Punishment*, §586 [correct standard in probation revocation proceeding is preponderance of the evidence].)

(3) *Identity of Informant.* A defendant in a probation revocation proceeding is entitled to disclosure of the identity of an informant who is a material witness. (*Goodlow v. Superior Court* (1980) 101 C.A.3d 969, 972, 975, 162 C.R. 121.)

(4) *Corroboration of Accomplice Testimony.* P.C. 1111, requiring corroboration of accomplice testimony (see 3 Cal. Evidence (4th), *Presentation at Trial*, §96), does not apply in probation revocation proceedings. Corroboration is less essential when, as in probation revocation proceedings, the trier of fact is a judge rather than a jury. Further, the statute is only applicable where the result of the proceeding would be a criminal conviction, and it cannot be said that a probation revocation proceeding results in a conviction, because the probationer has already been convicted and placed on probation. (*People v. McGavock* (1999) 69 C.A.4th 332, 336, 337, 81 C.R.2d 600.)

(5) *Defendant's Testimony Not Admissible in Later Trial.* Under a judicially created "privilege," the defendant's testimony at a probation revocation hearing cannot be used against the defendant in a subsequent trial on the related charge except under limited circumstances for impeachment or rebuttal. (*People v. Weaver* (1985) 39 C.3d 654, 659,

*217 C.R. 245, 703 P.2d 1139, 2 Cal. Evidence (4th), Witnesses, §381.)*

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Criminal Law k.982.9(5); Pardon and Parole k.90



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#### 2. Offenses Committed During Probation or Parole.

*1 Witkin Cal. Evid. Intro § 30*

[§ 30] Offenses Committed During Probation or Parole.

Probation may be revoked on the basis of offenses committed during the period of probation, even though the evidence of guilt is insufficient for conviction. (*In re Coughlin* (1976) 16 C.3d 52, 56, 127 C.R. 337, 545 P.2d 249.) Probation revocation is also proper even though the charge was dismissed due to an illegal search and seizure. (*People v. Nixon* (1982) 131 C.A.3d 687, 691, 183 C.R. 878; see 77 A.L.R.3d 636 [admissibility of illegally seized evidence in probation revocation hearing].)

The court or Board of Prison Terms may consider evidence of subsequent offenses despite the fact that the probationer or parolee was tried and acquitted of the charge. (*In re Coughlin*, *supra*, 16 C.3d 56 [probation revocation hearing]; *In re Dunham* (1976) 16 C.3d 63, 69, 127 C.R. 343, 545 P.2d 255 [parole revocation hearing].) And this evidence may concern a *federal* offense, over which the state has no jurisdiction. (*People v. Beaudrie* (1983) 147 C.A.3d 686, 691, 195 C.R. 289.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### F. Hearings on Revocation of Probation or Parole.

##### 3. Use of Prior Testimony.

##### *1 Witkin Cal. Evid. Intro § 31*

[§ 31] Use of Prior Testimony.

In *People v. Winson* (1981) 29 C.3d 711, 175 C.R. 621, 631 P.2d 55, defendant was identified at his preliminary examination by the victim of an assault as the perpetrator of the crime. Thereafter, the victim left the state, and the charges against defendant were dropped when the trial court ruled that the prosecution could not use the transcript of the victim's prior testimony at the forthcoming criminal trial because it had failed to exercise due diligence in attempting to locate and maintain contact with the victim. However, the transcript was received at the hearing on revocation of defendant's probation without any further showing. *Held*, it was improperly admitted.

(a) In *People v. Cambitsis* (1980) 101 C.A.3d 141, 161 C.R. 441, the Court of Appeal characterized the opportunity to cross-examine an adverse witness as the "main and essential" purpose of the right of confrontation, while describing as "secondary and dispensable" the opportunity for the tribunal to observe the witness' demeanor. But the United States Supreme Court, in *Ohio v. Roberts* (1980) 448 U.S. 56, 100 S.Ct. 2531, 2537, 65 L.Ed.2d 597, 606, 3 Cal. Evidence(4th), *Presentation at Trial*, §21, indicated that *both* interests were not lightly to be disposed of in the criminal fact-finding process and should be accorded "equal value" under minimum due process requirements in such proceedings. (29 C.3d 717.) Hence, "[a] preliminary hearing transcript of a witness' testimony in a defendant's related criminal case is not a proper substitute for the live testimony of the witness at defendant's probation revocation hearing in the absence of the declarant's unavailability or other good cause." (29 C.3d 713.)

(b) The issue of whether former testimony may be utilized in lieu of a witness' personal appearance is best resolved on a case-by-case basis. Here, the following circumstances make admission of the preliminary examination testimony of the victim improper: The victim was the sole percipient witness, a finding of *no* legal unavailability had been made in the underlying proceedings and no additional evidence was introduced on the issue at the probation revocation hearing, and the court made no specific finding of good cause for denying the right to confrontation and cross-examination. (29 C.3d 719.) (See *People v. Arreola* (1994) 7 C.4th 1144, 1160, 1161, 31 C.R.2d 631, 875 P.2d 736 [at probation revocation hearing, admission of testimony of sole prosecution witness at preliminary hearing was error because prosecution failed to offer any justification for not securing witness' presence; however, error was harmless in light of substantial evidence of defendant's probation violation].)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Ohio v. Roberts* (1980) 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597, text, p. 41, was overruled in *Crawford v. Washington* (2004) 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177, 3 Cal. Evidence (4th), *Presentation at Trial*, Supp., §21.

See *People v. O'Connell* (2003) 107 C.A.4th 1062, 1066, 1067, 132 C.R.2d 665 [at probation hearing, trial judge, in terminating defendant's participation in drug counseling program and placing him on probation, did not err in relying on written progress report indicating that defendant had failed to attend any counseling sessions; unlike former testimony in *People v. Winson* (1981) 29 C.3d 711, 175 C.R. 621, 631 P.2d 55, text, p. 41, progress report was prepared contemporaneously to, and specifically for, hearing where defendant's lack of compliance was at issue].



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## 4. Use of Reliable Hearsay.

*1 Witkin Cal. Evid. Intro § 32*

[§ 32] Use of Reliable Hearsay.

In *People v. Maki* (1985) 39 C.3d 707, 217 C.R. 676, 704 P.2d 743, defendant's probation was revoked on a finding that he had traveled to Chicago without permission from his probation officer. The evidence at the hearing consisted of (a) a car rental invoice signed by defendant, which recited the rental of a Hertz car at Chicago's O'Hare Airport, and (b) a hotel receipt in payment for services at Hyatt Regency O'Hare in Chicago. *Held*, the evidence was not admissible under the hearsay exception for adoptive admissions (see 1 Cal. Evidence (4th), Hearsay, §103), or for a nonhearsay purpose (see 1 Cal. Evidence (4th), Hearsay, §31 et seq.), but it was nevertheless sufficient to support the order revoking probation.

The court relied on *People v. Winson* (1981) 29 C.3d 711, 175 C.R. 621, 631 P.2d 55, *supra*, §31, and federal cases, upholding the use of otherwise inadmissible hearsay when accompanied by reasonable indicia of reliability. "The significant factor is the uncontroverted presence of defendant's signature on the invoice." (39 C.3d 716.) If the invoice were simply printed and filled out by an unidentified hand, it would have been insufficient, even when accompanied by the hotel receipt. "However, the identification of defendant's signature on the printed invoice and the fact that it is an invoice of the type relied upon by parties for billing and payment of money, leads us to find it sufficient here." (39 C.3d 717.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Johnson* (2004) 121 C.A.4th 1409, 1413, 18 C.R.3d 230 [in probation revocation hearing, use of laboratory report analyzing rock cocaine that defendant was caught selling was not subject to requirements of *Crawford v. Washington* (2004) 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177, 3 Cal. Evidence (4th), *Presentation at Trial, Supp.*, §21; report was routine documentary evidence, not *testimonial* hearsay to which *Crawford* applies]; *In re Miller* (2006) 145 C.A.4th 1228, 1236, 52 C.R.3d 256 [in revoking defendant's parole based on evidence of forced oral copulation and sexual battery, Board of Parole Hearings erred in relying on unsworn hearsay (statements of victim as related in testimony by two police officers), without determining unavailability of declarant or reliability of evidence, and without weighing factors favoring admission of evidence against defendant's right of confrontation to determine whether good cause existed]; *People v. Shepherd* (2007) 151 C.A.4th 1193, 1198, 60 C.R.3d 616 [in revoking defendant's probation for alcohol consumption, trial judge erred in permitting defendant's probation officer to testify concerning out-of-court statements by administrator of defendant's alcohol treatment program; good cause standard of *People v. Winson* (1981) 29 C.3d 711, 175 C.R. 621, 631 P.2d 55, text, p. 42, was applicable, and in light of lack of evidence of administrator's unavailability, standard was not met].



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### V. EVIDENCE IN NONJURY TRIAL

#### A. In General.

*1 Witkin Cal. Evid. Intro § 33*

[§ 33] In General.

Most of the exclusionary rules of evidence were developed for jury trials, and reversible error in admission of improper evidence is based on its probable prejudicial effect on the jury. (See generally 9 *Cal. Proc.* (4th), *Appeal*, §408 et seq.; 6 *Cal. Crim. Law* (3d), *Reversible Error*, §1 et seq.) Whether the rules, or the effect of their violation, are or should be different in nonjury trials has been the subject of some discussion in legal literature. (See 1 Wigmore (Tillers Rev.) §4d.1; 1 McCormick 5th, §60 [describing the view of the common law that it was "inexpedient" to apply these restrictions to judges]; 79 *Harv. L. Rev.* 407 [analysis of problem and discussion of divergent theories].)

Two contrasting views have found support in state and federal decisions:

(1) That it may be presumed on appeal that the judge disregarded inadmissible evidence in reaching his or her decision; hence, that reversal will not be ordered if there is other competent evidence to support it. (See 1 McCormick 5th, §60; 79 *Harv. L. Rev.* 407, 409.)

(2) That the rules apply to nonjury trials in the same way that they do in jury trials, i.e., that admissibility and reversible error are determined in the same manner. (See 1 McCormick 5th, §60; 79 *Harv. L. Rev.* 414.)

Under one variation of the first position, the judge would be required to indicate that the improper evidence was disregarded. (See 79 *Harv. L. Rev.* 411.) Under another variation, the appellate court would presume that the judge carefully appraised all of the admitted evidence, whether proper or improper, and gave it its appropriate probative value. This approach essentially exempts the judge from the ordinary rules of evidence. (See 79 *Harv. L. Rev.* 412.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 1 McCormick 6th, §60.(1) *Presumption that judge disregarded inadmissible evidence:* See 1 McCormick 6th, §60.

(2) *Rules apply in same way to jury and nonjury trials:* See 1 McCormick 6th, §60.



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#### B. Civil Cases.

*1 Witkin Cal. Evid. Intro § 34*

[§ 34] Civil Cases.

In civil cases, a number of California decisions follow the presumption that the trial judge considered and relied only on competent evidence in making findings and rendering a judgment. The effect is to require a strong showing that the error did influence the result in order to obtain a reversal despite other sufficient evidence. (See *Keating v. Basich Bros. Const. Co.* (1944) 66 C.A.2d 258, 263, 151 P.2d 892; *Nason v. Leth-Nissen* (1947) 82 C.A.2d 70, 74, 185 P.2d 880; *Bixby v. Bixby* (1953) 120 C.A.2d 495, 499, 261 P.2d 286; 9 Cal. Proc. (4th), Appeal, §414; but see *Wilson v. Manduca* (1965) 233 C.A.2d 184, 189, 190, 43 C.R. 435, 9 Cal. Proc. (4th), Appeal, §442, taking the opposite view.)

There is one situation in which reliance on competent evidence is not an issue: In determining whether the adoption of an adult or married minor child is in the public interest or in the best interests of the parties seeking it, the trial judge may consider oral or written evidence regardless of whether it conforms to the Evidence Code. (*Family C. 9328*; see *10 Summary* (9th), *Parent and Child, Supp.*, §400J.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Cross-Reference:* 10 *Summary* (10th), *Parent and Child*, §155. *West's Key Number Digest*, Trial k.376 et seq.





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### V. EVIDENCE IN NONJURY TRIAL

#### C. Criminal Cases.

*1 Witkin Cal. Evid. Intro § 35*

[§ 35] Criminal Cases.

In criminal cases, particularly where constitutional rights are allegedly violated, the United States Supreme Court appears to treat jury and nonjury trials alike in holding the error reversible despite adequate competent evidence of guilt. (See *Fahy v. Connecticut* (1963) 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171, 6 Cal. Crim. Law (3d), *Reversible Error*, §9.) In one important area, however, both the federal and California courts make a distinction in how judges and jurors are likely to react to prejudicial material. *Bruton v. United States* (1968) 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476, requires the exclusion of a defendant's extrajudicial statement incriminating a codefendant where the two defendants are tried jointly before a jury. But federal case law does not apply the same rule where the trial is to the court, and the passage of Proposition 8 (supra, §§7, 8) made the federal approach applicable in California. (*People v. Walkkein* (1993) 14 C.A.4th 1401, 1408, 1409, 18 C.R.2d 383.) "[E]xclusion of a codefendant's incriminating statements should not be required in court trials, for the United States Supreme Court has made clear that the Sixth Amendment right is not violated by the admission of a codefendant's statements where 'there does not exist the *overwhelming probability*' that the fact finder will be unable to disregard the statements in determining the accused's guilt or innocence." (14 C.A.4th 1409, quoting *Richardson v. Marsh* (1987) 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176, 1 Cal. Evidence (4th), *Hearsay*, §60.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
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### VI. EVIDENCE IN JUVENILE COURT

#### A. In General.

#### 1. Nature of Juvenile Court Proceedings.

*1 Witkin Cal. Evid. Intro § 36*

[§ 36] Nature of Juvenile Court Proceedings.

The procedure in the juvenile court, including the applicable rules of evidence, is fully covered in *10 Summary (9th)*, *Parent and Child*, §449 et seq. (See also C.E.B., *Juvenile Court Practice*, Vol. 1 [Delinquent Minors], Vol. 2 [Dependent Minors and Status Offenders]; Seiser & Kumli, *California Juvenile Courts Practice and Procedure* (one-volume softcover publication, replaced annually).) In this and subsequent sections, the major topics will be treated with brief statements of the law as set forth in statutes, cases, and Rules of Court, and cross-references to the more detailed material in the *Summary*.

(1) *Informality and Control by Court*. "The judge of the juvenile court shall control all proceedings during the hearings with a view to the expeditious and effective ascertainment of the jurisdictional facts and the ascertainment of all information relative to the present condition and future welfare of the person upon whose behalf the petition is brought. Except where there is a contested issue of fact or law, the proceedings shall be conducted in an informal nonadversary atmosphere with a view to obtaining the maximum cooperation of the minor upon whose behalf the petition is brought and all persons interested in his welfare with such provisions as the court may make for the disposition and care of such minor." (Welf.C. 680; see also nearly identical Welf.C. 350(a)(1); C.R.C., Rule 1412(a); 2 C.E.B., *Juvenile Court Practice* §7.1 et seq.; Seiser & Kumli, *California Juvenile Courts Practice and Procedure* (1999 ed.), §1.31; *10 Summary (9th)*, *Parent and Child*, §547.) Contested hearings are conducted as *adversary proceedings*. (C.R.C., Rule 1412(b).)

(2) *Recording of Proceedings*. An official court reporter is required in a judge's hearing, and the judge may direct that a reporter be present at a referee's hearing. (Welf.C. 347, 677; C.R.C., Rule 1411(a), (b).) And the reporter must prepare a transcript if directed by the judge or requested by the minor, the minor's parent, guardian, or adult relative, or the attorneys for those persons. (See *10 Summary (9th)*, *Parent and Child*, §550.)

(3) *Separate Private Session*. "All juvenile court proceedings shall be heard at a *special or separate session* of the court, and no other matter shall be heard at that session. No person on trial, awaiting trial, or accused of a crime, other than a parent, de facto parent, guardian, or relative of the child, shall be permitted to be present at the hearing, except while testifying as a witness." (C.R.C., Rule 1410(a); see *10 Summary (9th)*, *Parent and Child*, §544.)

(4) *Testimony in Chambers or by Closed-Circuit Television*. In a dependency proceeding, the testimony of the minor may, under certain circumstances, be taken in chambers and outside the presence of the minor's parents or guardian. (See Welf.C. 350(b); *In re Mary S.* (1986) 186 C.A.3d 414, 422, 230 C.R. 726.) And the judge in a dependency proceeding has the inherent power to order the use of one-way closed-circuit television to take the minor's

testimony outside the parents' presence, in order to ensure truthfulness. (*In re Amber S.* (1993) 15 C.A.4th 1260, 1262, 19 C.R.2d 404.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Cross-Reference:* 10 *Summary* (10th), *Parent and Child*, §440 et seq.(1) *Informality and Control by Court*. C.R.C., Rule 1412(a) was renumbered C.R.C., Rule 5.534(a) in 2006.

C.R.C., Rule 1412(b) was renumbered C.R.C., Rule 5.534(b) in 2006.

*Cross-Reference:* 10 *Summary* (10th), *Parent and Child*, §§589, 813.

(2) *Recording of Proceedings*. C.R.C., Rule 1411(a), (b) were renumbered C.R.C., Rule 5.532(a), (b), respectively, in 2006.

*Cross-Reference:* 10 *Summary* (10th), *Parent and Child*, §§591, 814.

(3) *Separate Private Session*. C.R.C., Rule 1410(a) was amended in 2004 to change the first "shall be heard" to "must be heard," the second "shall be heard" to "may be heard," and "shall be permitted to" to "may."

C.R.C., Rule 1410(a) was renumbered C.R.C., Rule 5.530(a) in 2006.

*Cross-Reference:* 10 *Summary* (10th), *Parent and Child*, §586 et seq. *West's Key Number Digest*, Infants k.171 et seq.



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## CHAPTER I - Introduction

### VI. EVIDENCE IN JUVENILE COURT

#### A. In General.

#### 2. Types of Hearings.

*1 Witkin Cal. Evid. Intro § 37*

[§ 37] Types of Hearings.

(1) *Divided Hearing on Grounds and Disposition*. The Juvenile Court Law establishes a two-stage hearing procedure: (a) the *jurisdiction hearing* on the grounds of the petition, i.e., whether the minor comes within Welf.C. 300, 601 or 602; (b) the *disposition hearing*, on the disposition to be made if the finding on the grounds is against the minor. (Welf.C. 701 et seq.; see *10 Summary (9th), Parent and Child*, §§679 et seq., 775 et seq.; *infra*, §45 et seq.)

(2) *Detention Hearing*. A minor *taken into custody* must be brought before a judge or referee for a "detention hearing." (Welf.C. 632 et seq.; C.R.C., Rule 1471; see *10 Summary (9th), Parent and Child*, §§667 et seq., 736 et seq.; *infra*, §43.)

(3) *Fitness Hearing*. A minor charged under Welf.C. 602 (crime) may, on motion of the petitioner, be given a hearing on the question whether the minor will be "a fit and proper subject to be dealt with under the juvenile court law." (Welf.C. 707; C.R.C., Rule 1480(a); *10 Summary (9th), Parent and Child*, §754 et seq.; *infra*, §44.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Divided Hearing on Grounds and Disposition*.

*Cross-Reference:* *10 Summary (10th), Parent and Child*, §§609 et seq., 855 et seq.

(2) *Detention Hearing*. C.R.C., Rule 1471 was renumbered C.R.C., Rule 5.752 in 2006.

*Cross-Reference:* *10 Summary (10th), Parent and Child*, §§598 et seq., 819 et seq.

(3) *Fitness Hearing*. C.R.C., Rule 1480(a) was renumbered C.R.C., Rule 5.766 in 2006.

*Cross-Reference:* *10 Summary (10th), Parent and Child*, §835 et seq.



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### VI. EVIDENCE IN JUVENILE COURT

#### A. In General.

#### 3. Rules of Evidence.

*1 Witkin Cal. Evid. Intro § 38*

[§ 38] Rules of Evidence.

(1) *Evidence Code Governs*. "The admission and exclusion of evidence shall be pursuant to the rules of evidence established by the Evidence Code and by judicial decision." (Welf.C. 701.) (See *10 Summary (9th)*, *Parent and Child*, §555 et seq.)

(2) *Particular Rules*. A number of decisions have dealt with the applicability in the juvenile court of general rules governing evidence and witnesses. (See *In re Edward D.* (1976) 61 C.A.3d 10, 15, 132 C.R. 100 [Ev.C. 1012, psychotherapist privilege]; *In re Mitchell P.* (1978) 22 C.3d 946, 949, 151 C.R. 330, 587 P.2d 1144 [rule requiring corroboration of testimony of accomplice inapplicable]; *In re Joaquin S.* (1979) 88 C.A.3d 80, 83, 151 C.R. 508 [polygraph test inadmissible]; *In re Tracy J.* (1979) 94 C.A.3d 472, 477, 156 C.R. 512 [right to disclosure of identity of informer]; *In re Juma P.* (1988) 204 C.A.3d 1228, 1236, 251 C.R. 739 [involuntary confession]; *In re Elizabeth T.* (1992) 9 C.A.4th 636, 641, 12 C.R.2d 10, 1 Cal. Evidence (4th), Hearsay, §261 [hearsay exception for child's former testimony at preliminary examination]; *Cynthia D. v. Superior Court* (1993) 5 C.4th 242, 256, 19 C.R.2d 698, 851 P.2d 1307, 10 Summary (9th), *Parent and Child*, Supp., §718A [provisions allowing termination of parental rights on lesser standard of proof than clear and convincing evidence are constitutional]; *In re Jose M.* (1994) 21 C.A.4th 1470, 1479, 27 C.R.2d 55, 10 Summary (9th), *Parent and Child*, Supp., §602 [rule limiting admissibility of codefendant's out-of-court statements is inapplicable where judge is trier of fact and codefendant testifies]; *In re Cindy L.* (1997) 17 C.4th 15, 31, 69 C.R.2d 803, 947 P.2d 1340, 1 Cal. Evidence (4th), Hearsay, §172 [approving court-created "child dependency hearsay exception"]; 21 *Pepperdine L. Rev.* 1493 [*Cynthia D.*]; 10 Summary (9th), *Parent and Child*, §555 et seq.; on exclusion of illegally obtained evidence, see *infra*, §39.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Evidence Code Governs*.

*Cross-Reference:* 10 Summary (10th), *Parent and Child*, §§617 et seq., 872.

(2) *Particular Rules*. See *In re Kentron D.* (2002) 101 C.A.4th 1381, 1392, 1393, 125 C.R.2d 260, 3 Cal. Crim. Law (3d), *Punishment*, Supp., §586 [revocation of minor's probation on sole basis of written report containing probation officers' hearsay allegations was improper, where some officers were not shown to be unavailable, and others were present in court]; *In re Eddie M.* (2003) 31 C.4th 480, 502, 3 C.R.3d 119, 73 P.3d 1115 [where juvenile probation violation "not amounting to a crime" is alleged, preponderance of evidence standard can be constitutionally applied].

*Cynthia D.:*

*Cross-Reference:* 10 *Summary* (10th), *Parent and Child*, §691.

*Jose M.:*

*Cross-Reference:* 10 *Summary* (10th), *Parent and Child*, §786.

*Applicability of rules:*

*Cross-Reference:* 10 *Summary* (10th), *Parent and Child*, §§617 et seq., 872. *West's Key Number Digest*, Infants k.171 et seq., 207



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### VI. EVIDENCE IN JUVENILE COURT

#### A. In General.

#### 4. Minor's Constitutional Rights.

*1 Witkin Cal. Evid. Intro § 39*

[§ 39] Minor's Constitutional Rights.

The constitutional guaranty of due process entitles juveniles in delinquency cases to many of the same fundamental rights as those enjoyed by defendants in criminal cases. (See *In re Gault* (1967) 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527, 10 Summary (9th), *Parent and Child*, §580.) *Gault* and subsequent decisions dealt with a number of the more important of these rights in the area of evidence and witnesses:

(1) *Miranda rule*. (See *In re Albert R.* (1980) 112 C.A.3d 783, 787, 789, 169 C.R. 553; see also *Fare v. Michael C.* (1979) 442 U.S. 707, 99 S.Ct. 2560, 2571, 61 L.Ed.2d 197, 212 [*Miranda* rule is inapplicable to request for probation officer]; 10 Summary (9th), *Parent and Child*, §§594, 606.)

(2) *Involuntary confession or admission*. (See *In re Peter G.* (1980) 110 C.A.3d 576, 582, 168 C.R. 3; *In re Aven S.* (1991) 1 C.A.4th 69, 75, 1 C.R.2d 655 [voluntariness of minor's confession is evaluated in same manner as that of adult criminal; i.e., prosecution need only prove voluntariness by preponderance of the evidence]; *In re Shawn D.* (1993) 20 C.A.4th 200, 212, 24 C.R.2d 395; 10 Summary (9th), *Parent and Child*, §595.)

(3) *Self-incrimination privilege*. (See *In re Gault*, *supra*, 87 S.Ct. 1458, 18 L.Ed.2d 561; *People v. Macias* (1997) 16 C.4th 739, 742, 66 C.R.2d 659, 941 P.2d 838, 2 Cal. Evidence (4th), *Witnesses*, §370 [statements made during fitness evaluation may not be used as substantive evidence of guilt at subsequent criminal trial but may be used for impeachment].)

(4) *Right of confrontation and cross-examination*. (See *In re Gault*, *supra*, 87 S.Ct. 1459, 18 L.Ed.2d 562; on parents' right of confrontation, see *In re Kerry O.* (1989) 210 C.A.3d 326, 333, 334, 258 C.R. 448 [in dependency proceeding, waiver of this right need not be express and personal].)

(5) *Illegally obtained evidence*. The exclusionary rule (see 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence*, §2) applies in juvenile court proceedings involving criminal charges. (See *In re Scott K.* (1979) 24 C.3d 395, 402, 155 C.R. 671, 595 P.2d 105; 10 Summary (9th), *Parent and Child*, §559.)

The *Aranda-Bruton* rule, requiring the editing of a defendant's out-of-court statement implicating a codefendant, was formerly held applicable to juvenile court proceedings. (See *In re D.L.* (1975) 46 C.A.3d 65, 70, 120 C.R. 276.) But *People v. Walkkein* (1993) 14 C.A.4th 1401, 1409, 18 C.R.2d 383, determined that Proposition 8 (*supra*, §§7, 8) abrogated that aspect of the California version of the rule that required such editing in trials to the court. Under *Walkkein*, then, the rule has no application in a juvenile jurisdictional hearing tried to the court. (*In re Jose M.* (1994) 21

*C.A.4th 1470, 1480, 27 C.R.2d 55.)*

**SUPPLEMENT:** [This section is current through the latest supplement]

*In re Gault:*

*Cross-Reference:* 10 *Summary* (10th), *Parent and Child*, §783.

(1) *Miranda rule.*

*Cross-Reference:* 10 *Summary* (10th), *Parent and Child*, §§792, 802.

(2) *Involuntary confession or admission.*

*Cross-Reference:* 10 *Summary* (10th), *Parent and Child*, §793.

(5) *Illegally obtained evidence.*

*Cross-Reference:* 10 *Summary* (10th), *Parent and Child*, §§617, 875.





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#### A. In General.

#### 5. Statutory Listing of Rights.

*1 Witkin Cal. Evid. Intro § 40*

[§ 40] Statutory Listing of Rights.

Constitutional rights of the minor (see *supra*, §39) are in some instances restated and implemented by statutes and rules, and some additional rights are given express recognition. (See *10 Summary (9th), Parent and Child*, §579.) Those dealing with evidence and witnesses include the following:

(1) *Right to subpoena witnesses.* (Welf.C. 341, 664; C.R.C., Rule 1408(d).)

(2) *Right of confrontation and cross-examination.* (Welf.C. 311(b), 630(b); and see, e.g., C.R.C., Rules 1412(j) [required advice as to this right], 1444(c) [detention hearing].)

(3) *Privilege against self-incrimination.* (Welf.C. 630(b), 702.5; and see, e.g., C.R.C., Rules 1412(j) [required advice as to this right], 1444(c) [detention hearing].)

(4) *Adjudication only on competent evidence.* (Welf.C. 355, 701; and see, e.g., C.R.C., Rules 1450 [jurisdiction hearing in dependency case], 1488 [jurisdiction hearing in delinquency case].)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Cross-Reference:* *10 Summary* (10th), *Parent and Child*, §§567, 782.

(1) *Right to subpoena witnesses.* C.R.C., Rule 1408(d) was renumbered C.R.C., Rule 5.526(d) in 2006.

(2) *Right of confrontation and cross-examination.* C.R.C., Rule 1444(c) was relettered C.R.C., Rule 1444(d) in 2002. C.R.C., Rule 1444(d) became C.R.C., Rule 5.674(d) in 2006.

C.R.C., Rule 1412(j) was renumbered C.R.C., Rule 5.534(j) in 2006. C.R.C., Rule 5.534(j) was relettered C.R.C., Rule 5.534(k) in 2007.

(3) *Privilege against self-incrimination.* C.R.C., Rule 1444(c) was relettered C.R.C., Rule 1444(d) in 2002. C.R.C., Rule 1444(d) became C.R.C., Rule 5.674(d) in 2006.

C.R.C., Rule 1412(j) was renumbered C.R.C., Rule 5.534(j) in 2006. C.R.C., Rule 5.534(j) was relettered C.R.C., Rule 5.534(k) in 2007.

(4) *Adjudication only on competent evidence.* C.R.C., Rule 1450 was renumbered C.R.C., Rule 5.684 in 2006.

C.R.C., Rule 1488 was renumbered C.R.C., Rule 5.780 in 2006.



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### VI. EVIDENCE IN JUVENILE COURT

#### A. In General.

#### 6. Discovery.

*1 Witkin Cal. Evid. Intro § 41*

[§ 41] Discovery.

The statutes do not mention discovery, but a limited discovery procedure was approved in *Joe Z. v. Superior Court* (1970) 3 C.3d 797, 801, 91 C.R. 594, 478 P.2d 26, and is now comprehensively covered by C.R.C., Rule 1420.

The Rule declares the general purpose of encouraging disclosure (Rule 1420(a)), and states the affirmative duty of the petitioner to disclose (Rule 1420(c)), and the duty of a parent or guardian to disclose (Rule 1420(e)). Provision is also made for a motion to compel disclosure (Rule 1420(f)), for sanctions on failure to comply (Rule 1420(j)), and for protective orders (Rule 1420(g)). (See *Navajo Express v. Superior Court* (1986) 186 C.A.3d 981, 985, 231 C.R. 165 [discovery in personal injury suit of plaintiff's juvenile records]; *In re Jeanette H.* (1990) 225 C.A.3d 25, 37, 275 C.R. 9, 2 Cal. Evidence (4th), Witnesses, §147 [court's authority to order exchange of witness lists at trial readiness conference in dependency proceeding, under its inherent power to manage its calendar]; *Robert S. v. Superior Court* (1992) 9 C.A.4th 1417, 1422, 12 C.R.2d 489 [court's discretionary authority to order reciprocal discovery, even though Rule 1420 does not provide for it]; *Clinton K. v. Superior Court* (1995) 37 C.A.4th 1244, 1249, 44 C.R.2d 140 [prior to fitness hearing, juvenile court has inherent power to order disclosure of items listed in P.C. 1054.3 (5 Cal. Crim. Law (3d), Criminal Trial, §74) without any additional showing of necessity, but should not exercise this authority unless discovery appears reasonably necessary and will not unduly delay or prolong proceeding]; 10 Summary (9th), Parent and Child, §562 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

C.R.C., Rule 1420 was renumbered C.R.C., Rule 5.546 in 2006. C.R.C., Rule 1420(a), (c), (e), (f), (g), (j) became C.R.C., Rule 5.546(a), (c), (e), (f), (g), (j), respectively.

See *In re Thomas F.* (2003) 113 C.A.4th 1249, 1254, 7 C.R.3d 19 [in jurisdictional hearing of wardship proceeding, minor's due process rights were violated when trial judge refused to allow minor to call four witnesses due to defense counsel's failure to disclose her intent to call them; reciprocal discovery provisions of P.C. 1054 et seq. (5 Cal. Crim. Law (3d), Criminal Trial, §30 et seq.) do not automatically apply to juvenile court proceedings, and judge had not ordered reciprocal discovery consistent with those sections].

*Cross-Reference:* 10 Summary (10th), Parent and Child, §§612, 860 et seq. West's Key Number Digest, Infants k.201



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### VI. EVIDENCE IN JUVENILE COURT

#### A. In General.

#### 7. Immunity of Witnesses.

*1 Witkin Cal. Evid. Intro § 42*

[§ 42] Immunity of Witnesses.

The Juvenile Court Law does not cover the subject of granting immunity to witnesses claiming the privilege against self-incrimination, but C.R.C., Rule 1421 fills the statutory gap. (See *10 Summary (9th)*, *Parent and Child*, §568 et seq.)

(1) If it appears that the testimony may tend to incriminate, the judge must advise the witness of the privilege; and if the witness claims the privilege, the judge may grant the appropriate immunity. (C.R.C., Rule 1421(a), (b).)

(2) In a Welf.C. 602 proceeding (based on a charge of crime), if the prosecuting attorney makes a request for an order that the witness answer a question or produce evidence, the judge must proceed under P.C. 1324. (See *2 Cal. Evidence (4th)*, *Witnesses*, §489.) "The prosecuting attorney may request an order granting the witness use or transactional immunity." (C.R.C., Rule 1421(c).)

(3) In a Welf.C. 300 (dependency) or 601 (delinquency) proceeding, the witness is given only use immunity. (C.R.C., Rule 1421(d).)

**SUPPLEMENT:** [This section is current through the latest supplement]  
C.R.C., Rule 1421 was renumbered C.R.C., Rule 5.548 in 2006.

*Cross-Reference:* *10 Summary (10th)*, *Parent and Child*, §§621, 879 et seq.

(1) *Advice as to privilege:* C.R.C., Rule 1421(a), (b) were renumbered C.R.C., Rule 5.548(a), (b), respectively, in 2006.

(2) *Request for order:* C.R.C., Rule 1421(c) was renumbered C.R.C., Rule 5.548(c) in 2006.

(3) *Use immunity:* C.R.C., Rule 1421(d) was renumbered C.R.C., Rule 5.548(d) in 2006.



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### VI. EVIDENCE IN JUVENILE COURT

#### B. Detention Hearing.

*1 Witkin Cal. Evid. Intro § 43*

[§ 43] Detention Hearing.

(1) *Delinquency or Crime*. Detention hearing procedures for minors believed to be delinquent or guilty of a criminal violation are specified in Welf.C. 635 and 636 and C.R.C., Rule 1471 et seq. (See *10 Summary (9th)*, *Parent and Child*, §740 et seq.; 1 C.E.B., *Juvenile Court Practice*, Chap. 4.) (On the burden and standard of proof, see 1 C.E.B., *Juvenile Court Practice* §4.25 et seq.; on presenting testimony, see 1 C.E.B., *Juvenile Court Practice* §4.33; on prima facie showing as prerequisite for detention, see C.R.C., Rule 1474; 1 C.E.B., *Juvenile Court Practice* §4.37.)

In making the findings for an order of detention, the court may rely solely on written police reports, probation reports, or other documents. (C.R.C., Rule 1473(c).) The minor, the minor's parent or guardian, and their attorneys are entitled to inspect and receive copies of the reports or documents (C.R.C., Rule 1473(a)), and the judge must give the advice of rights required by C.R.C., Rule 1412, which includes the right to confront and cross-examine persons who prepared reports and documents and witnesses called to testify (C.R.C., Rule 1472(a)).

(2) *Dependency*. Detention hearing procedures for dependency cases are specified in Welf.C. 315 et seq. and C.R.C., Rule 1444 et seq. (See *10 Summary (9th)*, *Parent and Child*, §670 et seq.; 2 C.E.B., *Juvenile Court Practice* §17.9 et seq.) (On examination by court and presentation of evidence, see Welf.C. 319; C.R.C., Rule 1444(b); on sufficiency of documentary evidence, see C.R.C., Rule 1445(b); on cross-examination of preparer of document, see C.R.C., Rule 1444(c)(1); on cross-examination of person examined by judge, see C.R.C., Rule 1444(c)(2).)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Delinquency or Crime*. C.R.C., Rule 1412 was renumbered C.R.C., Rule 5.534 in 2006.

C.R.C., Rule 1471 et seq. were renumbered C.R.C., Rule 5.752 et seq. in 2006.

C.R.C., Rule 1472(a) was renumbered C.R.C., Rule 5.754(a) in 2006.

C.R.C., Rule 1473(a) was renumbered C.R.C., Rule 5.756(a) in 2006.

C.R.C., Rule 1473(c) was renumbered C.R.C., Rule 5.756(c) in 2006.

C.R.C., Rule 1474 was renumbered C.R.C., Rule 5.758 in 2006.

*Cross-Reference:* *10 Summary (10th)*, *Parent and Child*, §819 et seq.(2) *Dependency*. C.R.C., Rule 1444(b) and (c) were relettered C.R.C., Rule 1444(c) and (d), respectively, in 2002.

C.R.C., Rule 1444 et seq. were renumbered C.R.C., Rule 5.674 et seq. in 2006. C.R.C., Rule 1444(c), (d) became C.R.C., Rule 5.674(c), (d), respectively.

C.R.C., Rule 1445(b) was renumbered C.R.C., Rule 5.676(b) in 2006.

*Cross-Reference:* 10 *Summary* (10th), *Parent and Child*, §598 et seq.

See C.E.B., 1 *Juvenile Dependency Practice* 2d, §2.31 et seq.



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### VI. EVIDENCE IN JUVENILE COURT

#### C. Fitness Hearing.

*1 Witkin Cal. Evid. Intro § 44*

[§ 44] Fitness Hearing.

Five factors must be evaluated in determining whether a minor who is the subject of a petition under Welf.C. 602 (supra, §37) is a fit and proper subject for treatment under the juvenile law. (See Welf.C. 707; C.R.C., Rule 1480 et seq.; *People v. Superior Court (Steven S.)* (1981) 119 C.A.3d 162, 178, 173 C.R. 788 [sufficiency of evidence relating to the five factors]; 10 *Summary* (9th), *Parent and Child*, §754 et seq.; 2 C.E.B., *Juvenile Court Practice*, Chap. 5; 37 *A.L.R.5th* 703 [applicability of rules of evidence in hearing on transfer of minor to adult criminal court].) (On admissibility of probation officer's report and any other relevant evidence, see C.R.C., Rule 1482(c); on minor's right to testify, see *Sheila O. v. Superior Court* (1981) 125 C.A.3d 812, 816, 817, 178 C.R. 418; on use of minor's statements in fitness evaluation to impeach minor in subsequent criminal trial, see *People v. Macias* (1997) 16 C.4th 739, 756, 66 C.R.2d 659, 941 P.2d 838, 2 *Cal. Evidence* (4th), *Witnesses*, §368; on discovery in fitness proceedings, see supra, §41.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
C.R.C., Rule 1480 et seq. were renumbered C.R.C., Rule 5.766 et seq. in 2006.

C.R.C., Rule 1482(c), on admissibility of the probation officer's report and other relevant evidence, was relettered C.R.C., Rule 1482(b) in 2000. C.R.C., Rule 1482(b) became C.R.C., Rule 5.770(b) in 2006.

*Cross-Reference:* 10 *Summary* (10th), *Parent and Child*, §835 et seq.



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### VI. EVIDENCE IN JUVENILE COURT

#### D. Jurisdiction Hearing.

#### 1. Delinquency or Crime.

*1 Witkin Cal. Evid. Intro § 45*

[§ 45] Delinquency or Crime.

The jurisdiction hearing on the grounds of the petition filed under Welf.C. 601 (delinquency) or 602 (crime) is covered in Welf.C. 700 et seq. and C.R.C., Rule 1485 et seq. (See *10 Summary (9th)*, *Parent and Child*, §§555, 781 et seq.; 1 C.E.B., *Juvenile Court Practice*, Chap. 7.) (On constitutional rights of minor, see *supra*, §39; on statutory rights of minor, see *supra*, §40.) The following important rules govern a contested hearing:

(1) *Burden of Proof in Welf.C. 602 Proceeding*. "Proof beyond a reasonable doubt supported by evidence, legally admissible in the trial of criminal cases, must be adduced to support a finding that the minor is a person described by Section 602." (Welf.C. 701, stating holding of *In re Winship* (1970) 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368, *10 Summary (9th)*, *Parent and Child*, §574; see also C.R.C., Rule 1488(e).)

(2) *Burden of Proof in Welf.C. 601 Proceeding*. "[A] *preponderance of evidence*, legally admissible in the trial of civil cases must be adduced to support a finding that the minor is a person described by Section ... 601." (Welf.C. 701; see also C.R.C., Rule 1488(e).)

(3) *Admissibility of Evidence*. "In a section 601 matter, the admission and exclusion of evidence shall be in accordance with the Evidence Code as it applies in civil cases. In a section 602 matter, the admission and exclusion of evidence shall be in accordance with the Evidence Code as it applies in criminal cases." (C.R.C., Rule 1488(b); see also Welf.C. 701.)

(4) *Implied Objections by Unrepresented Minor*. "If the child is not represented by counsel, objections that could have been made to the evidence shall be deemed made." (C.R.C., Rule 1488(d).)

(5) *Premature Reading of Probation Report*. "Except as otherwise provided by law, the court shall not read or consider any portion of a probation report relating to the contested petition prior to or during a contested jurisdiction hearing." (C.R.C., Rule 1488(c); see *10 Summary (9th)*, *Parent and Child*, §787.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
C.R.C., Rule 1485 et seq. were renumbered C.R.C., Rule 5.774 et seq. in 2006.

*Cross-Reference:* *10 Summary (10th)*, *Parent and Child*, §855 et seq.

(1) *Burden of Proof in Welf.C. 602 Proceeding*. C.R.C., Rule 1488(e) was renumbered C.R.C., Rule 5.780(e) in



2006.

*Cross-Reference:* 10 *Summary* (10th), *Parent and Child*, §878.

(2) *Burden of Proof in Welf.C. 601 Proceeding*. C.R.C., Rule 1488(e) was renumbered C.R.C., Rule 5.780(e) in 2006.

(3) *Admissibility of Evidence*. C.R.C., Rule 1488(b) was renumbered C.R.C., Rule 5.780(b) in 2006.

(4) *Implied Objections by Unrepresented Minor*. C.R.C., Rule 1488(d) was renumbered C.R.C., Rule 5.780(d) in 2006.

(5) *Premature Reading of Probation Report*. C.R.C., Rule 1488(c) was renumbered C.R.C., Rule 5.780(c) in 2006.

*Cross-Reference:* 10 *Summary* (10th), *Parent and Child*, §871. *West's Key Number Digest*, Infants k.196



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### VI. EVIDENCE IN JUVENILE COURT

#### D. Jurisdiction Hearing.

#### 2. Dependency.

#### 1 Witkin Cal. Evid. Intro § 46

[§ 46] Dependency.

The procedure for a jurisdiction hearing in Welf.C. 300 proceedings (dependency) is set forth in Welf.C. 345 et seq. and C.R.C., Rule 1449 et seq. (See *10 Summary (9th)*, *Parent and Child*, §679 et seq.; 2 C.E.B., *Juvenile Court Practice*, Chap. 18.) The following important rules deal with evidence and witnesses:

(1) *Preponderance Standard Applicable*. Proof by a *preponderance of the evidence* is sufficient. (C.R.C., Rule 1450(f); see *In re Cheryl H.* (1984) 153 C.A.3d 1098, 1112, 200 C.R. 789, 1 *Cal. Evidence (4th)*, *Burden of Proof and Presumptions*, §37; *In re Jennifer V.* (1988) 197 C.A.3d 1206, 1210, 243 C.R. 441 [following *Cheryl H.* and observing that it is only in *dispositional phase* that clear and convincing standard *may* come into play].)

(2) *Evidence Code Governs*. Except as provided in Welf.C. 355.1 and C.R.C., Rule 1450(c)-(e), the admission and exclusion of evidence is governed by the Evidence Code as it applies to civil cases. (C.R.C., Rule 1450(b).) Welf.C. 355.1 creates presumptions from circumstantial evidence of the minor's condition, or the parent's or guardian's criminal history, which affect the burden of producing evidence. (See *In re Cindy L.* (1997) 17 C.4th 15, 31, 69 C.R.2d 803, 947 P.2d 1340, 1 *Cal. Evidence (4th)*, *Hearsay*, §172 [approving court-created "child dependency hearsay exception"]; *In re Kathleen W.* (1987) 190 C.A.3d 68, 73, 235 C.R. 205 [denial of minor's request for hearing to establish foundational facts for admission of polygraph examination taken by agreement pursuant to *Ev.C. 351.1* (2 *Cal. Evidence (4th)*, *Demonstrative, Experimental, and Scientific Evidence*, §95) constituted reversible error]; *In re Amber B.* (1987) 191 C.A.3d 682, 687, 236 C.R. 623, 2 *Cal. Evidence (4th)*, *Demonstrative, Experimental, and Scientific Evidence*, §108 [applicability of *Kelly-Frye* test for admissibility of scientific evidence (observation of child's behavior in playing with anatomically correct dolls)]; *In re Mark C.* (1992) 7 C.A.4th 433, 441, 443, 8 C.R.2d 856 [admissibility of character evidence showing father's lack of propensity to molest children]; *10 Summary (9th)*, *Parent and Child*, §661.)

(3) *Social Study Admissible and Sufficient To Support Finding*. A social study, with hearsay evidence contained in it, is admissible and is sufficient to support a finding that the child is described by Welf.C. 300. The social study must be provided to all parties and their counsel within a reasonable time before the hearing, and the report's preparer must be made available for cross-examination at the request of any party. (C.R.C., Rule 1450(c).) If a party objects to particular hearsay in the report and provides the petitioner with reasonable time to meet the objection, the evidence, with certain exceptions, may not be found to support a jurisdictional finding in and of itself. (C.R.C., Rule 1450(d).) (See *In re Malinda S.* (1990) 51 C.3d 368, 381, 272 C.R. 787, 795 P.2d 1244, *10 Summary (9th)*, *Parent and Child*, *Supp.*, §689 [social studies containing hearsay and even multiple hearsay are competent evidence on which to base finding of jurisdiction under Welf.C. 300]; *In re Donald R.* (1987) 195 C.A.3d 703, 710, 240 C.R. 821; *In re Kailee B.* (1993) 18 C.A.4th 719, 726, 22 C.R.2d 485 [minor's hearsay statements contained in social study report were admissible

notwithstanding that minor was incompetent to testify].)

(4) *Objections Deemed Made*. "Objections that could have been made to evidence introduced shall be deemed to have been made by any parent or guardian who is present at the hearing and unrepresented by counsel, unless the court finds that the parent or guardian has made a knowing and intelligent waiver of the right to counsel. Objections that could have been made to evidence introduced shall be deemed to have been made by any unrepresented child." (Welf.C. 355(a).)

(5) *Spousal Privileges Inapplicable*. "The *privilege* not to testify or to be called as a witness against a spouse, and the *confidential marital communication* privilege, shall not apply to dependency proceedings." (C.R.C., Rule 1450(e).)

**SUPPLEMENT:** [This section is current through the latest supplement]  
C.R.C., Rule 1449 et seq. were renumbered C.R.C., Rule 5.682 et seq. in 2006.

See C.E.B., 1 Juvenile Dependency Practice 2d, §4.1 et seq.

*Cross-Reference:* 10 Summary (10th), *Parent and Child*, §608 et seq.(1) *Preponderance Standard Applicable*. C.R.C., Rule 1450(f) was renumbered C.R.C., Rule 5.684(f) in 2006.

(2) *Evidence Code Governs*. C.R.C., Rule 1450(b) and C.R.C., Rule 1450(c)-(e) were renumbered C.R.C., Rule 5.684(b) and C.R.C., Rule 5.684(c)-(e) in 2006.

*Cross-Reference:* 10 Summary (10th), *Parent and Child*, §616.

(3) *Social Study Admissible and Sufficient To Support Finding*. C.R.C., Rule 1450(c) and (d) were renumbered C.R.C., Rule 5.684(c) and (d) in 2006.

Hearsay statements contained in a social study of a minor who is the subject of a Welf.C. 300 hearing and who is deemed to be incompetent as a witness because of an inability at the time of the testimony to understand the obligation to tell the truth or to distinguish between truth and falsehood are admissible under Welf.C. 355(c)(1)(B), even if the statements do not meet the requirements of the judicially created child dependency hearsay exception (see *1 Cal. Evidence (4th)*, *Hearsay*, §172). However, because of due process concerns, statements of this type may not be relied on exclusively, unless the court finds that the time, content, and circumstances of the statements provide sufficient indicia of reliability. (*In re Lucero L. (2000) 22 Cal.4th 1227, 1242, 1247, 96 Cal.2d 56, 998 P.2d 1019.*)

*Cross-Reference:* 10 Summary (10th), *Parent and Child*, §618.(5) *Spousal Privileges Inapplicable*. C.R.C., Rule 1450(e) was renumbered C.R.C., Rule 5.684(e) in 2006.



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### VI. EVIDENCE IN JUVENILE COURT

#### E. Disposition Hearing.

*1 Witkin Cal. Evid. Intro § 47*

[§ 47] Disposition Hearing.

(1) *Delinquency or Crime*. The disposition hearing is governed by Welf.C. 702 or Welf.C. 706, and C.R.C., Rule 1492 et seq. (See *10 Summary (9th)*, *Parent and Child*, §§576 et seq., 790 et seq.; 1 C.E.B., *Juvenile Court Practice*, Chap. 9.)

"The court shall receive in evidence and consider the social study and any relevant evidence offered by the petitioner, the child, or the parent or guardian. The court may require production of other relevant evidence on its own motion. In the order of disposition the court shall state the social study has been read and considered by the court." (C.R.C., Rule 1492(b); see also Welf.C. 706 [additionally specifying that relevant evidence includes any written or oral statement offered by victim or victim's relatives, and that in order of disposition court must state that both social study and "any statement" were considered].)

The requirement that the court receive the social study and other relevant evidence does not mandate that the court grant the minor's request to cross-examine the probation officer who prepared the social study. The provisions of *Ev.C.* 352, allowing the court to limit relevant evidence if it is cumulative, time consuming, or likely to confuse (see *1 Cal. Evidence (4th)*, *Circumstantial Evidence*, §17), are necessarily implied in Welf.C. 706. (*In re Romeo C. (1995) 33 C.A.4th 1838, 1843, 1844, 40 C.R.2d 85*; see 17 J. *Juvenile Law* 202 [*Romeo*].)

(2) *Dependency*. The disposition hearing is governed by Welf.C. 358 and C.R.C., Rule 1455 et seq. (See *10 Summary (9th)*, *Parent and Child*, §692 et seq.; 2 C.E.B., *Juvenile Court Practice*, Chap. 20.) The court must receive the *social study*, any study or evaluation prepared by a child advocate appointed by the court, and any *other relevant and material evidence* that is offered. Any judgment and order of disposition must specifically state that the social study and the child advocate evaluation, if any, were read and considered. (Welf.C. 358(b); see also C.R.C., Rule 1455(b); *In re Basilio T. (1992) 4 C.A.4th 155, 167, 5 C.R.2d 450*; *In re Keyonie R. (1996) 42 C.A.4th 1569, 1571, 1572, 50 C.R.2d 221* [holding of *In re Malinda S. (1990) 51 C.3d 368, 381, 272 C.R. 787, 795 P.2d 1244, 10 Summary (9th)*, *Parent and Child, Supp.*, §689, allowing admission of hearsay contained in social service reports, is not limited to jurisdiction hearings but applies to 12-month and selection and implementation hearings as well].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Delinquency or Crime*. C.R.C., Rule 1492 was amended in 2002 to change "shall receive" to "must receive" and "shall state" to "must state".

C.R.C., Rule 1492 et seq. were renumbered C.R.C., Rule 5.785 et seq. in 2006. C.R.C., Rule 1492(b) became C.R.C., Rule 5.785(b).

*Cross-Reference:* 10 *Summary* (10th), *Parent and Child*, §884 et seq.

(2) *Dependency*. C.R.C., Rule 1455 et seq. were renumbered C.R.C., Rule 5.690 et seq. in 2006. C.R.C., Rule 1455(b) became C.R.C., Rule 5.690(b).

See C.E.B., 1 *Juvenile Dependency Practice* 2d, §5.1 et seq.

*Cross-Reference:* 10 *Summary* (10th), *Parent and Child*, §624 et seq.

*Malinda case:*

*Cross-Reference:* 10 *Summary* (10th), *Parent and Child*, §618. *West's Key Number Digest*, Infants k.222



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### VII. EVIDENCE IN OTHER SPECIAL COURTS

#### A. Family Conciliation Court.

*1 Witkin Cal. Evid. Intro § 48*

[§ 48] Family Conciliation Court.

The Family Conciliation Court Law seeks "to provide means for the reconciliation of spouses and the amicable settlement of domestic and family controversies." (*Family C. 1801.*) In counties in which the superior court elects to utilize this procedure, a superior court judge sits as the "family conciliation court." (*Family C. 1810, 1811.*) The hearing is an informal conference designed to effect a settlement of differences (*Family C. 1838*), not to determine issues triable in the divorce action; hence, the rules of trial procedure and evidence would appear to have little, if any, application. (See generally *Sawdey v. Superior Court (1961) 195 C.A.2d 729, 732, 16 C.R. 156* [court commissioner had power to require wife to meet with him in private, without her counsel present]; 1 Wigmore (Tillers Rev.) §4d.2; *11 Summary (9th), Husband and Wife*, §§116 et seq., 123.)

All communications, verbal or written, from a party to the judge, commissioner, or counselor conducting the hearing are deemed to be official information within the meaning of *Ev.C. 1040 (2 Cal. Evidence (4th), Witnesses, §246)*. (*Family C. 1818.*)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Cross-Reference:* *11 Summary (10th), Husband and Wife*, §90 et seq.



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### VII. EVIDENCE IN OTHER SPECIAL COURTS

#### B. Small Claims Court.

*1 Witkin Cal. Evid. Intro § 49*

[§ 49] Small Claims Court.

The Small Claims Act dispenses with formal pleadings (*C.C.P. 116.310*), prohibits representation by attorneys or agents (*C.C.P. 116.530(a)*), and provides for an "informal" hearing to "dispense justice promptly, fairly, and inexpensively" (*C.C.P. 116.510*). (See 1 Wigmore (Tillers Rev.) §4d.2; 2 *Cal. Proc.* (4th), *Courts*, §273 et seq.)

The rules of evidence are not observed, and ordinary trial procedure is equally inappropriate. "At the hearings the presentation of evidence may be sharply curtailed, and the proceedings often terminated in a short space of time. The awards--although made in accordance with substantive law--are often based on the application of common sense; and the spirit of compromise and conciliation attends the proceedings." (*Sanderson v. Niemann* (1941) 17 *C.2d* 563, 573, 110 *P.2d* 1025; see *Houghtaling v. Superior Court* (1993) 17 *C.A.4th* 1128, 1138, 1139, 21 *C.R.2d* 855, 2 *Cal. Proc.* (4th), *Courts*, §306 [relevant hearsay evidence may be received in small claims action, subject to law of privilege and court's power to weigh prejudice against probative value]; 1 Jefferson, *California Evidence Benchbook* 3d, §1.14.)

Although the plaintiff and defendant may offer evidence by witnesses, the judge may also consult witnesses informally and otherwise investigate the controversy. (*C.C.P. 116.520*.) Certain types of parties need not appear personally and may submit declarations to serve as evidence supporting their claims. (*C.C.P. 116.540*.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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### VIII. EVIDENCE IN ARBITRATION PROCEEDINGS

#### A. Contractual Arbitration.

*1 Witkin Cal. Evid. Intro § 50*

[§ 50] Contractual Arbitration.

At a hearing pursuant to an arbitration agreement, the parties are entitled to be heard, to present evidence, and to cross-examine witnesses, "but rules of evidence and rules of judicial procedure need not be observed." (*C.C.P. 1282.2(d)*.) (See generally 1 Wigmore (Tillers Rev.) §4e; 4 *Am.Jur.2d* (1995 ed.), *Alternative Dispute Resolution* §187 et seq.; 5 *San Diego L. Rev.* 1, 22; 6 *Cal. Proc.* (4th), *Proceedings Without Trial*, §484 et seq.) The parties may obtain *subpenas for witnesses and documents*, and the neutral arbitrator may also issue them on his or her own determination. (*C.C.P. 1282.6(a)*.)

With the exception that depositions for discovery may not be taken unless leave to do so is granted by the arbitrator, parties to an arbitration agreement have the same rights *to take depositions* and *obtain discovery* as parties to a civil action, whenever (1) the arbitration involves *death or injury* from a wrongful act or negligence, or (2) the *arbitration agreement so provides*. (*C.C.P. 1283.05(a)-(e)*, *1283.1*; see 2 *Cal. Evidence* (4th), *Discovery*, §29 et seq.) And, on application by a party, the neutral arbitrator may require a *deposition* to be taken for use as *evidence* but not for discovery, whenever the witness cannot be compelled to attend or the interests of justice so require. (*C.C.P. 1283*.)

With specified exceptions (e.g., matters arising out of collective bargaining agreements or actions involving personal injury or death), where the controversy exceeds \$ 50,000, either party may require the other to provide a *list of the witnesses* it intends to call and a *list of the documents* it intends to introduce, provided the demanding party provides lists of its own at the time of the demand. (*C.C.P. 1282.2(a)(2)(A)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 4 *Am.Jur.2d* (2007 ed.), *Alternative Dispute Resolution* §161 et seq.; 76 *Am.Jur.* Trials 1 [evidentiary practice and procedure in arbitration hearings].

*Discovery:* *C.C.P. 1283.05(b)* gives arbitrators the power "to enforce the rights, remedies, procedures, duties, liabilities, and obligations of discovery by the imposition of the same terms, conditions, consequences, liabilities, sanctions, and penalties as can be or may be imposed in like circumstances in a civil action," but it does not require them to do so. (*Alexander v. Blue Cross of Calif.* (2001) 88 *C.A.4th* 1082, 1088, 106 *C.R.2d* 431 [arbitrator did not exceed powers in refusing to deem admitted requests for admissions to which defendant failed to respond].) *West's Key Number Digest*, Arbitration k.35 et seq.





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### VIII. EVIDENCE IN ARBITRATION PROCEEDINGS

#### B. Judicial Arbitration.

##### *1 Witkin Cal. Evid. Intro § 51*

[§ 51] Judicial Arbitration.

The rules of evidence for civil actions apply in hearings under the mandatory judicial arbitration statute (*C.C.P. 1141.10* et seq.). (C.R.C., Rule 1613(b); see 6 *Cal. Proc.* (4th), *Proceedings Without Trial*, §553.)

There are, however, special provisions requiring admission of the following materials: (1) "written reports of any expert witness, medical records and bills (including physiotherapy, nursing, and prescription bills), documentary evidence of loss of income, property damage repair bills or estimates, police reports concerning an accident which gave rise to the case, other bills and invoices, purchase orders, checks, written contracts, and similar documents prepared and maintained in the ordinary course of business" (see C.E.B., Judicial Arbitration §§2.35, 3.31; 6 *Cal. Proc.* (4th), *Proceedings Without Trial*, §554); (2) written statements of other witnesses in the form of affidavits or declarations under penalty of perjury (see C.E.B., Judicial Arbitration §§2.38, 3.33; 6 *Cal. Proc.* (4th), *Proceedings Without Trial*, §555); (3) depositions not otherwise admissible under *C.C.P. 2025(u)* (see C.E.B., Judicial Arbitration §§2.40, 3.38; 6 *Cal. Proc.* (4th), *Proceedings Without Trial*, §556). (C.R.C., Rule 1613(b).)

*C.C.P. 2002* et seq., governing the parties' discovery rights and obligations in civil actions, apply to judicial arbitration hearings. (C.R.C., Rule 1612; see C.E.B., Judicial Arbitration §§2.46, 3.35; 6 *Cal. Proc.* (4th), *Proceedings Without Trial*, §548.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
C.R.C., Rule 1613(b) was renumbered C.R.C., Rule 3.823(b) in 2006.

*Written reports of expert witness:* See C.E.B., Effective Use of ADR, §11.30.

*Written statements of other witnesses:* See C.E.B., Effective Use of ADR, §11.32.

*Depositions not otherwise admissible:* *C.C.P. 2025(u)*, on the admissibility of depositions, was repealed and replaced by *C.C.P. 2025.620* in 2004 without substantive change. (See C.E.B., Effective Use of ADR, §§11.34, 11.35.)

*Applicability of discovery statutes:* C.R.C., Rule 1612 was renumbered C.R.C., Rule 3.822 in 2006. (See C.E.B., Effective Use of ADR, §11.5.)



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### IX. EVIDENCE IN ADMINISTRATIVE PROCEEDINGS

#### A. Scope of Treatment.

*1 Witkin Cal. Evid. Intro § 52*

[§ 52] Scope of Treatment.

(1) *In General.* The extent to which the common law or "technical" rules of evidence apply in proceedings before administrative bodies or officers is impossible to state definitively. Administrative agencies are numerous and varied in their functions and operations; statutory and case law coverage of the subject is inadequate; and administrative procedure is in a transitional stage of experimentation and development. (See 1 Wigmore (Tillers Rev.) §4a; 4 Jones 6th, Chap. 30; Prefatory Note, Model State Administrative Procedure Act (1981), 15 U.L.A. (Master Ed.), p. 1; 15 *Hastings L. J.* 369; 2 *Am.Jur.2d* (1994 ed.), *Administrative Law* §345 et seq.) However, an attempt will be made in this and succeeding sections to outline the principal evidence problems that arise and to cite authorities that develop the topics in more detail.

(2) *Determinations and Decisions Reached Outside Formal Hearing Process.* In 1995, the Legislature amended the Administrative Procedure Act by adding *Govt.C. 11400* et seq., effective July 1, 1997. The new provisions established procedures for informal hearings, emergency decisions, declaratory decisions, and alternative dispute resolution that may be used in addition to the Act's existing formal hearing procedures. (See 9 *Cal. Proc. (4th)*, *Administrative Proceedings*, §30.) Insofar as the new provisions relate to discovery and the admissibility and introduction of evidence, they are noted in the present work. (See *infra*, §53 et seq.)

(3) *Matters Outside Scope.* The following related matters are not within the scope of a work on California Evidence:

(a) Procedural due process rights under the Constitutions and statutes. (See 7 *Summary (9th)*, *Constitutional Law*, §518 et seq.)

(b) Administrative procedure apart from evidence problems. (See 9 *Cal. Proc. (4th)*, *Administrative Proceedings*, §§1, 28 et seq.)

(c) Judicial review of administrative decisions. (See 8 *Cal. Proc. (4th)*, *Extraordinary Writs*, §§30, 257 et seq.; 9 *Cal. Proc. (4th)*, *Administrative Proceedings*, §103 et seq.; C.E.B., *California Administrative Mandamus* 2d (1988).)

(d) Proceedings of administrative agencies acting in a quasi-legislative capacity. (See *Southern Calif. Jockey Club v. California Horse Racing Bd.* (1950) 36 *C.2d* 167, 170, 223 *P.2d* 1; 55 *Harv. L. Rev.* 402 [distinguishing rules for determining "legislative facts" and "adjudicative facts"]; 7 *Summary (9th)*, *Constitutional Law*, §129 et seq.)

(e) Federal administrative agencies and their evidence problems. (See 1 Wigmore (Tillers Rev.) §4c; 2 *Am.Jur.2d*

(1994 ed.), *Administrative Law* §327 et seq.; 2 *Federal Procedure*, L.Ed., *Administrative Procedure*, §2:161 et seq.; 6 *A.L.R. Fed.* 76 [hearsay].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General.* See 2 *Am.Jur.2d* (2004 ed.), *Administrative Law* §344.(3) *Matters Outside Scope.*

(a) *Procedural due process rights:*

*Cross-Reference:* 7 *Summary* (10th), *Constitutional Law*, §657 et seq.

(d) *Proceedings of administrative agencies:*

*Cross-Reference:* 7 *Summary* (10th), *Constitutional Law*, §166 et seq.

(e) *Federal administrative agencies:* See 2 *Am.Jur.2d* (2004 ed.), *Administrative Law* §327 et seq. *West's Key Number Digest*, *Administrative Law and Procedure* k.458 et seq.



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### IX. EVIDENCE IN ADMINISTRATIVE PROCEEDINGS

#### B. California Administrative Agencies.

*1 Witkin Cal. Evid. Intro § 53*

[§ 53] California Administrative Agencies.

A rough classification of California administrative agencies, for purposes of determining applicable rules of evidence, is as follows:

(1) *Constitutional State Agencies With Judicial Powers.* The California Constitution either creates, or authorizes the Legislature to create, a number of state agencies. Two examples are the Workers' Compensation Appeals Board and the Public Utilities Commission, which were created pursuant to constitutional enabling provisions that in some respects make them the equivalent of courts. Statutes comprehensively implement the enabling provisions, and each commission has power to make regulations on matters of procedure, including evidence. (See generally 2 *Summary* (9th), *Workers' Compensation*, §§3, 20, 343; 8 *Summary* (9th), *Constitutional Law*, §§889 et seq., 909 et seq.; on workers' compensation, see also C.E.B., *Workers' Compensation Practice* 3d, Chaps. 8, 9.)

(2) *The State Bar of California.* This unique agency, operating through a Board of Governors, Committee of Bar Examiners, and State Bar Court, regulates admission to the Bar and the conduct of attorneys. (See *B. & P.C.* 6000 et seq.; *Brotsky v. State Bar* (1962) 57 C.2d 287, 300, 19 C.R. 153, 368 P.2d 697; *Noland v. State Bar* (1965) 63 C.2d 298, 303, 46 C.R. 305, 405 P.2d 129; *In re Morse* (1995) 11 C.4th 184, 205, 44 C.R.2d 620, 900 P.2d 1170, 1 Cal. Proc. (4th), *Attorneys*, §579 [describing Supreme Court's role in reviewing discipline recommended by Review Department of State Bar Court]; 1 Cal. Proc. (4th), *Attorneys*, §§358 et seq., 374 et seq., 625 et seq.)

(3) *Other State Agencies: Administrative Procedure Act.* Most other state agencies were created by the Legislature or, in a few cases, by the voters through the initiative process (e.g., the Fair Political Practices Commission; see 7 *Summary* (9th), *Constitutional Law*, §204). Formerly, Govt.C. 11501 specified which agencies were covered by the Administrative Procedure Act. However, a new version of Govt.C. 11501 became effective on July 1, 1997, and it provides that the applicability of the Act's formal hearing provisions (Govt.C. 11500 et seq.) to each agency is to be determined by the statutes relating to that agency. Also, on the same date, a new Chapter 4.5, Govt.C. 11400 et seq. (the "administrative adjudication provisions" of the Act), became effective (see supra, §52), and these sections apply to all agencies of the state, except as otherwise expressly provided by statute (see, e.g., Pub.Util.C. 1701 [Govt.C. 11400 et seq. are inapplicable in Public Utilities Commission hearings]). (Govt.C. 11410.20.) (For a discussion of the Act, see C.E.B., *Administrative Hearing Practice*, Appendix; 9 Cal. Proc. (4th), *Administrative Proceedings*, §28 et seq.)

(4) *Local Agencies.* These are too numerous to recite, but include county boards of supervisors, city councils, civil service commissions, and retirement boards. Generally, local agencies are not covered by the Act's hearing procedures, but a specific statute may make them applicable or the agency may elect to adopt them. (Govt.C. 11410.30, 11410.40; see C.E.B., *Administrative Hearing Practice*, §1.29; on procedural due process requirements, which are applicable to all

agencies, see 7 *Summary* (9th), *Constitutional Law*, §518 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Constitutional State Agencies With Judicial Powers.*

*Cross-References:* 2 *Summary* (10th), *Workers' Compensation*, §§2, 13, 345; 8 *Summary* (10th), *Constitutional Law*, §§1084 et seq., 1106 et seq.(3) *Other State Agencies: Administrative Procedure Act.*

*Cross-Reference:* 7 *Summary* (10th), *Constitutional Law*, §274.

(4) *Local Agencies.*

*Cross-Reference:* 7 *Summary* (10th), *Constitutional Law*, §657 et seq.



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## CHAPTER I - Introduction

### IX. EVIDENCE IN ADMINISTRATIVE PROCEEDINGS

#### C. Basic Principles.

#### 1. Right To Present Evidence.

*1 Witkin Cal. Evid. Intro § 54*

[§ 54] Right To Present Evidence.

(1) *In General.* The right to notice and hearing, a basic element of administrative due process (see 7 *Summary (9th)*, *Constitutional Law*, §518), includes the right to present evidence and argument. This right is recognized in all of the administrative procedure acts. (See *Govt.C. 11509, 11513*; Model State Administrative Procedure Act (1981), §4-211, 15 U.L.A. (Master Ed.), p. 85; 2 *Am.Jur.2d (1994 ed.)*, *Administrative Law* §§294, 302.)

(2) *Provisions of Administrative Procedure Act.* An agency conducting an adjudicative proceeding must "give the person to which the agency action is directed notice and an opportunity to be heard, including the opportunity to present and rebut evidence." (*Govt.C. 11425.10(a)*.)

Each party has the right "to call and examine witnesses; to introduce exhibits; to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination; to impeach any witness regardless of which party first called him or her to testify; and to rebut the evidence against him or her." (*Govt.C. 11513(b)*; see *Mathew Zaheri Corp. v. New Motor Vehicle Bd. (1997) 55 C.A.4th 1305, 1313, 64 C.R.2d 705, 9 Cal. Proc. (4th)*, *Administrative Proceedings, Supp.*, §58 [in New Motor Vehicle Board proceedings, ex parte communication between franchisor's counsel and judge concerning threats by dealer did not violate *Govt.C. 11513*; reliance on secretly received evidence, with no opportunity for rebuttal, would constitute violation, but there was no indication that this information influenced judge's findings]; on right of confrontation and right to cross-examine, see *Jennings v. Jones (1985) 165 C.A.3d 1083, 1090, 212 C.R. 134* [pretermination hearing on welfare benefits].)

(3) *Discretion To Exclude.* "The presiding officer has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time." (*Govt.C. 11513(f)*; see *Fairfield v. Superior Court (1975) 14 C.3d 768, 782, 122 C.R. 543, 537 P.2d 375* [in dispute over denial of use permit, proof that councilmen made prehearing statements opposing application would not disqualify them and would thus be excludable on relevancy grounds].) However, the unreasonable curtailment of *necessary relevant evidence* on a party's claim or defense is a denial of a fair hearing which calls for annulment of the agency determination. (See *King v. Board of Med. Examiners (1944) 65 C.A.2d 644, 649, 650, 151 P.2d 282*; *Evans v. Industrial Acc. Com. (1945) 71 C.A.2d 244, 248, 162 P.2d 488*; *Kaiser Co. v. Industrial Acc. Com. (1952) 109 C.A.2d 54, 57, 240 P.2d 57*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General.* See 2 *Am.Jur.2d (2004 ed.)*, *Administrative Law* §§298, 305.

*Cross-Reference:* 7 Summary (10th), *Constitutional Law*, §657.

(3) *Discretion To Exclude*. See *Sinaiko v. Superior Court* (2004) 122 C.A.4th 1133, 1142, 19 C.R.3d 371 [in proceeding to revoke physician's license, Medical Board of California denied physician right to fair hearing, where it disqualified his experts on ground that they did not review individual cases in sufficient detail and offer opinions specific to allegations; board's objections went to weight, not admissibility, of testimony].



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## IX. EVIDENCE IN ADMINISTRATIVE PROCEEDINGS

## C. Basic Principles.

## 2. Technical Rules of Admissibility Not Applicable.

*1 Witkin Cal. Evid. Intro § 55*

[§ 55] Technical Rules of Admissibility Not Applicable.

(1) *In General.* Although it is difficult to generalize in a field so uncertain (see *supra*, §52), two basic principles have found recognition in the case law and statutes governing most types of administrative agencies. The first is that the admission of evidence is not controlled by normal trial rules. For example, in a proceeding held under the optional informal hearing provisions of the Administrative Procedure Act, "[t]he presiding officer may limit the use of witnesses, testimony, evidence, and argument, and may limit or eliminate the use of pleadings, intervention, discovery, prehearing conferences, and rebuttal." (*Govt.C. 11445.40(b)*.) And *Govt.C. 11513(c)*, relating to *formal* hearings, states: "The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions." Similarly, *Lab.C. 5708* declares that the Workers' Compensation Appeals Board or workers' compensation judge "shall not be bound by the common law or statutory rules of evidence and procedure, but may make inquiry in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this division." (See also *Pub.Util.C. 1701* [Public Utilities Commission: in conduct of hearings "the technical rules of evidence need not be applied"]; *Govt.C. 65010(a)* [formal rules of evidence and procedure do not apply in zoning proceedings].)

Illustrations are numerous. (See *Lake v. Reed* (1997) 16 C.4th 448, 461, 65 C.R.2d 860, 940 P.2d 311 [unsworn police report was admissible in driver's license suspension hearing, as it was type of evidence on which responsible persons are accustomed to rely]; *Anderson v. Board of Dental Examiners* (1915) 27 C.A. 336, 339, 149 P. 1006 [to require proceedings according to technical legal rules "would have the effect of seriously impairing the successful performance of the duties for which that body was created"]; *Tobinski v. Board of Med. Examiners* (1942) 49 C.A.2d 591, 594, 121 P.2d 861 [hospital records may not have been properly authenticated, but strict rules not controlling]; *Stuck v. Board of Med. Examiners* (1949) 94 C.A.2d 751, 760, 211 P.2d 389; *Mast v. State Bd. of Optometry* (1956) 139 C.A.2d 78, 85, 293 P.2d 148 [affidavit]; *Floresta v. City Council of San Leandro* (1961) 190 C.A.2d 599, 608, 12 C.R. 182, citing the text; *Cow Hollow Imp. Club v. Board of Permit App.* (1966) 245 C.A.2d 160, 172, 53 C.R. 610, citing the text [opinions of interested parties held admissible in proceeding before Board of Permit Appeals reviewing decision of Zoning Administrator]; *McCoy v. Board of Retirement* (1986) 183 C.A.3d 1044, 1055, 228 C.R. 567 [proceeding before retirement board to obtain service-connected disability retirement allowance; stipulations between plaintiff and county, from plaintiff's earlier workers' compensation proceeding, admitted as aid in interpreting medical reports]; see also 1 Wigmore (Tillers Rev.) §4c; Model State Administrative Procedure Act (1981) §4-212, 15 U.L.A. (Master Ed.), p. 86; 2 *Am.Jur.2d* (1994 ed.), *Administrative Law* §345; for an analysis of federal and California cases, see 12 *Pacific L. J.*



1177 et seq.)

(2) *Distinction: Evidence Must Be Relevant and Reliable.* Although evidence in an administrative proceeding is not subject to the restrictive rules normally applied in trials, it will not be admitted unless it is both "relevant and reliable"; hence, evidence of a polygraph (lie detector) test, rejected in civil proceedings because its scientific basis has not yet been accepted (see 2 *Cal. Evidence* (4th), *Demonstrative, Experimental, and Scientific Evidence*, §87 et seq.), is likewise inadmissible in administrative proceedings. (*Aengst v. Board of Med. Quality Assur.* (1980) 110 C.A.3d 275, 283, 167 C.R. 796.) (See also *Redner v. Work. Comp. App. Bd.* (1971) 5 C.3d 83, 95, 95 C.R. 447, 485 P.2d 799, 2 *Summary* (9th), *Workers' Compensation*, §398 [film of applicant obtained by fraud and deceit could not be relied on by Appeals Board; such procedure violated command of *Lab.C. 5708* to use methods "best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions" of workers' compensation laws]; *Seering v. Department of Social Services* (1987) 194 C.A.3d 298, 310, 239 C.R. 422 [administrative proceeding to revoke day care license; testimony based on "child sexual abuse accommodation syndrome" was inadmissible under *Frye-Kelly* standard (2 *Cal. Evidence* (4th), *Demonstrative, Experimental, and Scientific Evidence*, §42 et seq.) in absence of showing that scientific community accepted reliability of syndrome].)

The State Bar is unique in this respect as in others (see *supra*, §53). The normal rules of evidence are *generally* applicable to State Bar Court proceedings, but "no error in admitting or excluding evidence shall invalidate a finding of fact, decision or determination, unless the error complained of resulted in a denial of a fair hearing." (*Rules of Procedure of the State Bar*, Rule 214.) (See *Werner v. State Bar* (1944) 24 C.2d 611, 615, 150 P.2d 892 [dictum that rules of evidence need not be applied if unnecessary to ensure a fair hearing]; *Younger v. State Bar* (1974) 12 C.3d 274, 285, 113 C.R. 829, 522 P.2d 5 [although former Rules of Procedure of the State Bar, Rule 29, providing that only legal evidence should be received in formal proceedings, seemingly made the hearsay rule applicable, this question is uncertain in view of *Werner* dictum]; *Conway v. State Bar* (1989) 47 C.3d 1107, 1118, 255 C.R. 390, 767 P.2d 657, 1 *Cal. Proc.* (4th), *Attorneys*, §369 [involuntary inactive enrollment proceeding under *B. & P.C. 6007(c)*; statute requires that decision be based on "all the available evidence," thereby authorizing use of "reliable" hearsay]; 1 *Cal. Proc.* (4th), *Attorneys*, §§624, 658.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General.* See 2 *Am.Jur.2d* (2004 ed.), *Administrative Law* §344.(2) *Distinction: Evidence Must Be Relevant and Reliable.*

See *Ashford v. Culver City Unified School Dist.* (2005) 130 C.A.4th 344, 350, 29 C.R.3d 728 [school district board erred in terminating district plumber based on unauthenticated videotapes purportedly showing that plumber, on days he had claimed as sick days, was engaged in activities inconsistent with his claims of sickness; absent authentication, no responsible person would have relied solely on videotapes to determine that on specific dates at issue plumber was engaged in activities depicted on tapes].

*Redner v. Work. Comp. App. Bd.:*

*Cross-Reference:* 2 *Summary* (10th), *Workers' Compensation*, §401.*West's Key Number Digest*, Administrative Law and Procedure k.461



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#### C. Basic Principles.

#### 3. Substantial Evidence Required.

##### a. General Rule.

*1 Witkin Cal. Evid. Intro § 56*

[§ 56] General Rule.

The second basic principle is that evidence that may have come in under the relaxation of the common law rules will not necessarily be sufficient to support the agency determination on a judicial review. In other words, less emphasis is placed on admissibility of evidence than on its weight or probative force; and a court, reviewing the agency decision on certiorari or mandamus (8 *Cal. Proc.* (4th), *Extraordinary Writs*, §257), will sustain it only if there is substantial evidence to support it. (See *C.C.P. 1094.5*, 8 *Cal. Proc.* (4th), *Extraordinary Writs*, §275; *Pacific Freight Lines v. Industrial Acc. Com.* (1945) 26 *C.2d* 234, 239, 157 *P.2d* 634 [verdict of coroner's jury, mere opinion without foundation in facts and contrary to uncontradicted testimony, not substantial evidence]; *Hartford Acc. & Indem. Co. v. Industrial Acc. Com.* (1934) 140 *C.A.* 482, 486, 35 *P.2d* 366 [award annulled on ground that subject called for expert evidence and none produced]; *Brant v. Retirement Bd. of San Francisco* (1943) 57 *C.A.2d* 721, 733, 135 *P.2d* 396; *Simmons Co. v. Industrial Acc. Com.* (1945) 70 *C.A.2d* 664, 669, 161 *P.2d* 702 [award based on referee's view of machine, contrary to expert evidence that safety device not necessary]; *Guarantee Ins. Co. v. Industrial Acc. Com.* (1948) 88 *C.A.2d* 410, 413, 199 *P.2d* 12 [award contrary to expert evidence, annulled]; *Manning v. Watson* (1952) 108 *C.A.2d* 705, 711, 239 *P.2d* 688, *infra*, §65; Model State Administrative Procedure Act (1981) §5-116(c)(7), 15 *U.L.A.* (Master Ed.), p. 127 [reversal is authorized if decision is "not supported by evidence that is substantial when viewed in light of the whole record"]; 12 *Pacific L. J.* 41 [proposal for uniform substantial evidence rule]; 2 *Am.Jur.2d* (1994 ed.), *Administrative Law* §537 et seq.; on review of determinations of California Public Utilities Commission, see 13 *U.C.L.A. L. Rev.* 313.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 2 *Am.Jur.2d* (2004 ed.), *Administrative Law* §506 et seq.



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#### C. Basic Principles.

#### 3. Substantial Evidence Required.

##### b. Weight and Sufficiency.

*1 Witkin Cal. Evid. Intro § 57*

[§ 57] Weight and Sufficiency.

If substantial evidence is found in the record, its weight and sufficiency are regarded as matters of administrative discretion, and the decision will usually be upheld. (See *Williamson v. Railroad Com.* (1924) 193 C. 22, 35, 222 P. 803; *Union Oil Co. v. Industrial Acc. Com.* (1931) 211 C. 398, 401, 295 P. 513 [findings based on probable inferences from circumstantial evidence, as distinguished from mere conjecture]; *Nielsen v. Industrial Acc. Com.* (1934) 220 C. 118, 122, 29 P.2d 852; *Southern Calif. Jockey Club v. California Horse Racing Bd.* (1950) 36 C.2d 167, 176, 223 P.2d 1 [notwithstanding admission of some irrelevant or incompetent evidence]; *Winning v. Board of Dental Examiners* (1931) 114 C.A. 658, 667, 300 P.2d 866 [contradictions in testimony, asserted improbability and other matters involving credibility of witnesses are for agency to resolve]; *Camp v. Brock* (1946) 75 C.A.2d 169, 172, 170 P.2d 702; *Mast v. State Bd. of Optometry* (1956) 139 C.A.2d 78, 86, 293 P.2d 148; *Floresta v. City Council of San Leandro* (1961) 190 C.A.2d 599, 608, 12 C.R. 182, citing the text; *Security Environmental Systems v. South Coast Air Quality Management Dist.* (1991) 229 C.A.3d 110, 132, 280 C.R. 108 [reasonable doubts must be resolved in favor of administrative decision].)

However, though an administrative agency is empowered to resolve conflicts in the evidence and make its own credibility determination, it must accept as true the intended meaning of uncontradicted and unimpeached evidence. (*Martori Bros. Distributors v. Agricultural Lab. Rel. Bd.* (1981) 29 C.3d 721, 727, 728, 175 C.R. 626, 631 P.2d 60.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Administrative Law and Procedure k.462



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### IX. EVIDENCE IN ADMINISTRATIVE PROCEEDINGS

#### C. Basic Principles.

#### 3. Substantial Evidence Required.

#### c. Legally Admissible Evidence: Residuum Rule.

*1 Witkin Cal. Evid. Intro § 58*

[§ 58] Legally Admissible Evidence: Residuum Rule.

Must this "substantial evidence" (supra, §56) consist of *competent*, i.e., *legally admissible* evidence? The so-called residuum rule, announced in a leading New York case, requires a residuum of legally admissible evidence; and this view has considerable support in California decisions. (See *In re Richardson* (1930) 209 C. 492, 499, 288 P. 669 [State Bar disciplinary proceeding; "only legal evidence, as that term is understood among lawyers," will be considered on review]; *Walker v. San Gabriel* (1942) 20 C.2d 879, 881, 129 P.2d 349; *Bley v. Board of Dental Examiners* (1927) 87 C.A. 193, 195, 261 P. 1036 [inadmissible evidence "is to be disregarded in determining whether there is sufficient evidence to support the order"]; *Masters v. Board of Dental Examiners* (1936) 15 C.A.2d 506, 510, 59 P.2d 827; see also 1 Wigmore (Tillers Rev.) §4b, p. 119; 2 *Am.Jur.2d* (1994 ed.), *Administrative Law* §539.)

The residuum rule has been condemned by authoritative writers as an undesirable restriction on administrative powers, which virtually destroys the basic principle of freedom from technical rules of admissibility. (See 1 Wigmore (Tillers Rev.) §4b, p. 120.) And the Model State Administrative Procedure Act, which formerly authorized reversal if the decision was "unsupported by competent, material and substantial evidence," now provides that reversal is authorized only if the decision "is not supported by evidence that is substantial when viewed in light of the whole record before the court." (Model State Administrative Procedure Act (1981) §5-116(c)(7), 15 U.L.A. (Master Ed.), p. 127.) Under California's Administrative Procedure Act, hearsay evidence may constitute the sole support for a finding, but only if "it would be admissible over objection in civil actions." (*Govt.C. 11513(d)*, added in 1992; *infra*, §66.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 2 *Am.Jur.2d* (2004 ed.), *Administrative Law* §508.



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#### C. Basic Principles.

#### 4. Illegally Obtained Evidence.

1 Witkin Cal. Evid. Intro § 59

[§ 59] Illegally Obtained Evidence.

(1) *Exclusion Not Generally Required.* The exclusionary rule has been held inapplicable in various disciplinary proceedings. (See *Emslie v. State Bar* (1974) 11 C.3d 210, 229, 113 C.R. 175, 520 P.2d 991 [attorney]; *Governing Bd. of the Mountain View School Dist. of Los Angeles v. Metcalf* (1974) 36 C.A.3d 546, 551, 111 C.R. 724 [teacher]; *Pating v. Board of Med. Quality Assur.* (1982) 130 C.A.3d 608, 624, 625, 182 C.R. 20 [doctor]; *Gordon J. v. Santa Ana Unified School Dist.* (1984) 162 C.A.3d 530, 542, 208 C.R. 657 [student]; 37 *Hastings L. J.* 1133 [exclusionary rule in public school administrative disciplinary proceedings]; 2 *Am.Jur.2d* (1994 ed.), *Administrative Law* §349; 20 *A.L.R.4th* 546 [attorney and physician disciplinary proceedings]; 4 *Cal. Crim. Law* (3d), *Illegally Obtained Evidence*, §15.)

However, these decisions were based on a balancing of the costs and benefits of applying the exclusionary rule and they did not preclude its application in all administrative proceedings. (See, e.g., *Emslie v. State Bar*, *supra*, 11 C.3d 229 ["While we hold that the exclusionary rules are not part of administrative due process in State Bar disciplinary proceedings we do not intimate that circumstances could not be presented under which the constitutional demands of due process could not countenance use of evidence obtained by unlawful means in a proceeding conducted by such governmental agency or administrative arm of this court"]; on weight of authority in other jurisdictions favoring application of the exclusionary rule, see 1 LaFave 3d, §1.7(e).)

(2) *Distinction: Close Nexus Between Unconstitutional Search and Agency Initiating Administrative Proceeding.* In *Dyson v. State Personnel Bd.* (1989) 213 C.A.3d 711, 262 C.R. 112, plaintiff challenged his dismissal as a youth counselor at a Department of Youth Authority facility. The dismissal was based on the introduction at the administrative hearing of nine T-shirts and two intercoms belonging to the department that had been seized from plaintiff's home by the facility's security chief at the suggestion and with the cooperation of plaintiff's estranged wife. Prior to the administrative hearing, a criminal proceeding initiated against plaintiff on the department's complaint was dismissed after the evidence was excluded on the grounds that the search had violated plaintiff's constitutional rights. *Held*, the evidence should have been excluded from the administrative proceeding.

The court distinguished *Emslie* and *Metcalf*. Those cases involved searches by authorities having no relationship to the agency initiating the administrative proceeding, and suppression would have no deterrent effect. But in this case, "the unconstitutional search could not have a tighter nexus with the agency that seeks to profit from it," and the "policy that led to the exclusion of evidence in the related criminal proceeding fits foursquare with exclusion in the administrative proceedings." (213 C.A.3d 721.) (See also *Finkelstein v. State Personnel Bd.* (1990) 218 C.A.3d 264, 271, 267 C.R. 133 [distinguishing *Dyson*; search of plaintiff's briefcase by his supervisor uncovered evidence leading to disciplinary proceeding; because purpose of search was not to find evidence of criminal activity but to find confidential

records requiring special storage, application of exclusionary rule would have no deterrent effect[.]

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Exclusion Not Generally Required.* See *Park v. Valverde* (2007) 152 C.A.4th 877, 887, 61 C.R.3d 895 [even though all evidence obtained in connection with traffic stop was suppressed in criminal proceeding because stop was based on outdated police information indicating vehicle was stolen, suppression in administrative suspension proceeding arising from same incident was not required; relying on *Emslie v. State Bar* (1974) 11 C.3d 210, 113 C.R. 175, 520 P.2d 991, text, p. 64]; 2 *Am.Jur.2d* (2004 ed.), *Administrative Law* §348.



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#### D. Policy Reasons for Relaxing Common Law Rules.

*1 Witkin Cal. Evid. Intro § 60*

[§ 60] Policy Reasons for Relaxing Common Law Rules.

A clearer understanding of the meaning and practical application of the foregoing principles (*supra*, §55 et seq.) will be gained from a recital of the chief reasons given for allowing departures from the ordinary rules of evidence:

(1) Many of the rules are designed for the jury system, to protect untrained jurors from being misled. This danger does not exist where the administrative agency is composed of trained specialists or uses expert examiners or hearing officers. (See 1 Wigmore (Tillers Rev.) §4b, p. 116; 55 *Harv. L. Rev.* 371, 416.)

(2) Judicial proceedings are usually adversary proceedings, in which the parties are represented by counsel capable of preparing and introducing evidence pursuant to the technical rules and of objecting to inadmissible evidence. This is not necessarily true or desirable in administrative hearings. (See 1 Wigmore (Tillers Rev.) §4b, p. 116; 55 *Harv. L. Rev.* 379, 383, 396.)

(3) In judicial proceedings, a judge with legal training passes on questions of admissibility; in administrative proceedings, the agency members or hearing officers may lack this training. (See 1 Wigmore (Tillers Rev.) §4b, p. 116; 4 Jones 6th, §30:3; 55 *Harv. L. Rev.* 396.)

(4) Administrative proceedings are often small matters, nonadversary in character; informality of procedure in such cases results in a desirable saving of time and expense. (See 55 *Harv. L. Rev.* 386.)

(5) The public policy basis of some statutes creating administrative agencies calls for procedure different from that governing court trials. (See 55 *Harv. L. Rev.* 365, 393.)

(6) The common law rules of evidence are in many respects outmoded and in need of reform; administrative agencies should by experimentation and example further the cause of evidentiary reform. (See 4 Jones 6th, §30:1; 55 *Harv. L. Rev.* 369.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### E. Particular Problems.

##### 1. Burden of Proof.

*1 Witkin Cal. Evid. Intro § 61*

[§ 61] Burden of Proof.

The commonly declared rule that the burden is on the party having "the affirmative of the issue" applies in administrative proceedings. (See *La Prade v. Department of Water & Power* (1945) 27 C.2d 47, 51, 162 P.2d 13 [proceeding to discharge municipal employee; "The burden does not rest upon him to refute the charges made"]; *Loew's v. California Emp. Stabilization Com.* (1946) 76 C.A.2d 231, 238, 172 P.2d 938 [claim of unemployment benefits; burden on claimant to prove availability for work]; *Mueller v. MacBan* (1976) 62 C.A.3d 258, 271, 132 C.R. 222 [proceeding before Savings and Loan Commissioner on application for permission to institute stockholder's derivative suit; burden on stockholder to establish specified conditions for suit]; 2 *Am.Jur.2d* (1994 ed.), *Administrative Law* §360 et seq.; on workers' compensation proceeding, see *Lab.C.* 5705; *McAllister v. Work. Comp. App. Bd.* (1968) 69 C.2d 408, 417, 71 C.R. 697, 445 P.2d 313, 2 *Summary* (9th), *Workers' Compensation*, §222 [applicants must establish only that industrial causation of injury is reasonably probable]; C.E.B., *Workers Compensation Practice* 3d, §§8.45, 8.46; on Evidence Code's definition of burden of proof in judicial proceedings, see *1 Cal. Evidence* (4th), *Burden of Proof and Presumptions*, §6.)

As applied to licensing agencies, this means:

(1) The burden is on license applicants to establish their statutory qualifications. (*Spears v. State Bar* (1930) 211 C. 183, 188, 294 P. 697; *Southern Calif. Jockey Club v. California Horse Racing Bd.* (1950) 36 C.2d 167, 177, 223 P.2d 1.)

(2) In a disciplinary proceeding, the burden is on the agency to prove the grounds for suspension or revocation of a license, or for discharge of an employee. (*Walker v. San Gabriel* (1942) 20 C.2d 879, 880, 129 P.2d 349; *La Prade v. Department of Water & Power*, *supra*; *Parker v. Fountain Valley* (1981) 127 C.A.3d 99, 113, 179 C.R. 351 [termination of police officer for using excessive force in making arrest]; *Webster v. Trustees of Calif. State University* (1993) 19 C.A.4th 1456, 1463, 1464, 24 C.R.2d 150 [in proceeding to terminate professor who was over 70 for substandard job performance, it was error, although harmless, to place burden of proof on professor].)

(3) The burden of "going forward" or producing evidence may shift on an "affirmative defense" or on an issue peculiarly within the knowledge of the licensee. (*Anderson v. Board of Dental Examiners* (1915) 27 C.A. 336, 338, 149 P. 1006 [charge of having knowingly employed M, unlicensed person; burden on accused to show that M was licensed]; *Whetstone v. Board of Dental Examiners* (1927) 87 C.A. 156, 164, 261 P. 1077 [same]; see also *Lab.C.* 5705 [specifying affirmative defenses on which employer, in workers' compensation proceeding, has burden of proof].)



**SUPPLEMENT:** [This section is current through the latest supplement]  
See 2 *Am.Jur.2d* (2004 ed.), *Administrative Law* §354 et seq.

*McAllister v. Work. Comp. App. Bd.:*

*Cross-Reference:* 2 *Summary* (10th), *Workers' Compensation*, §231.*West's Key Number Digest*, Administrative Law and Procedure k.460



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2. Presumptions.

*1 Witkin Cal. Evid. Intro § 62*

[§ 62] Presumptions.

In *Bell v. Department of Motor Vehicles* (1992) 11 C.A.4th 304, 13 C.R.2d 830, intoxilyzer tests, administered approximately one-half hour after plaintiff had been arrested for driving under the influence of alcohol, indicated plaintiff's blood-alcohol concentration exceeded 0.08%. At an administrative hearing, defendant Department of Motor Vehicles upheld the suspension of plaintiff's driving privilege. Plaintiff sought review by mandamus, and the trial judge directed defendant to set aside the suspension order on the ground there was insufficient evidence of plaintiff's blood-alcohol concentration at the time he was driving. *Held*, reversed. *Veh.C. 23152(b)*, which creates a rebuttable presumption that a driver had an excessive blood-alcohol concentration when driving if the driver has an excessive blood-alcohol concentration when a chemical test is performed within 3 hours of driving, applies in an administrative suspension hearing. Although the statute states that the presumption arises "in any prosecution under this subdivision," the Legislature did not intend to impose different or more onerous proof requirements for establishing a driver's blood-alcohol concentration in administrative hearings. (11 C.A.4th 312.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Administrative Law and Procedure k.460



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#### 3. Quantum of Proof in Disciplinary Proceedings.

*1 Witkin Cal. Evid. Intro § 63*

[§ 63] Quantum of Proof in Disciplinary Proceedings.

(1) *Criminal Law Requirements Not Applicable.* Even though some administrative disciplinary proceedings may have penal consequences, the following strict requirements of quantum of proof peculiar to *criminal actions* do not apply:

(a) The requirement of proof beyond a reasonable doubt. (*Webster v. Board of Dental Examiners* (1941) 17 C.2d 534, 537, 110 P.2d 992; *Daggett v. State Bd. of Funeral Directors & Embalmers* (1941) 44 C.A.2d 742, 747, 112 P.2d 856; see 2 *Am.Jur.2d* (1994 ed.), *Administrative Law* §363.)

(b) The requirement of corroboration of the testimony of an accomplice. (*Suckow v. Alderson* (1920) 182 C. 247, 251, 187 P. 965; *Murphy v. Board of Med. Examiners* (1946) 75 C.A.2d 161, 168, 170 P.2d 510.)

(c) The requirement of corroboration to prove perjury. (*Fischer v. State Bar* (1936) 6 C.2d 671, 672, 58 P.2d 1277, 59 P.2d 805.)

(d) The requirement that the corpus delicti be established by independent evidence: Extrajudicial admissions of the petitioner may alone be sufficient to support disciplinary action. (*Hansen v. Civil Service Bd. of Alameda* (1957) 147 C.A.2d 732, 738, 305 P.2d 1012; *Shakin v. Board of Med. Examiners* (1967) 254 C.A.2d 102, 110, 62 C.R. 274.)

(2) *Revocation or Suspension of Professional License.* In a proceeding for revocation or suspension of a professional license, the proper standard should be "clear and convincing proof to a reasonable certainty and not a mere preponderance of the evidence." (*Ettinger v. Board of Med. Quality Assur.* (1982) 135 C.A.3d 853, 856, 185 C.R. 601; see *Silva v. Superior Court* (1993) 14 C.A.4th 562, 569, 17 C.R.2d 577 [following *Ettinger*; at hearing on Medical Board of California's application for interim order suspending physician's license under *Govt.C. 11529*, clear and convincing standard applies]; 74 *A.L.R.4th* 969 [necessity of expert testimony in proceeding to revoke license of physician, surgeon, or dentist]; on meaning of "clear and convincing evidence," see 1 *Cal. Evidence* (4th), *Burden of Proof and Presumptions*, §38.) However, under legislation enacted in 1985, only a preponderance of the evidence is required in proceedings to revoke or suspend the license of a *community care facility* (*Health & Saf.C. 1551(b)*), a *residential care facility for the elderly* (*Health & Saf.C. 1569.51(b)*), or a *child day care facility* (*Health & Saf.C. 1596.887(b)*).

(3) *Revocation or Suspension of Nonprofessional Business License.* In *San Benito Foods v. Veneman* (1996) 50 C.A.4th 1889, 58 C.R.2d 571, a food processor's state-issued license was suspended in an administrative proceeding in which the hearing officer applied the preponderance of the evidence standard. The processor petitioned for mandamus

relief, and the trial judge denied the petition. *Held*, although the trial judge utilized the wrong standard of review in the writ proceeding, the hearing officer properly applied the preponderance of the evidence standard in the administrative proceeding. Under *Ev.C. 115 (1 Cal. Evidence (4th), Burden of Proof and Presumptions, §35)*, the preponderance of the evidence standard applies "[e]xcept as otherwise provided by law." The food processing laws contain no indication of a legislative intent to require a higher standard of proof. Furthermore, a food processor's license is less like a doctor's or psychologist's license than it is like a license to operate a substance abuse treatment facility, a child day care facility, or a health care facility, and the statutes pertaining to the latter facilities (see *supra*) all explicitly impose a preponderance of the evidence standard. "Unlike the many time-consuming requirements which must be satisfied in order for an individual to obtain a professional license, the requirements for obtaining a food processor's license do not require the applicant to satisfy burdensome requirements but merely require the applicant to show good character and a sound financial position. Consequently, there is no rational basis for treating a food processor's license in the same manner as a professional's license." (*50 C.A.4th 1894.*)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Criminal Law Requirements Not Applicable.*

(a) *Proof beyond reasonable doubt:* See *2 Am.Jur.2d (2004 ed.), Administrative Law §357.(3) Revocation or Suspension of Nonprofessional Business License. See Mann v. Department of Motor Vehicles (1999) 76 C.A.4th 312, 318, 90 C.R.2d 277* [preponderance standard applies to revocation of vehicle salesperson's license].



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#### 4. Relevancy.

#### *1 Witkin Cal. Evid. Intro § 64*

[§ 64] Relevancy.

(1) *In General.* Despite the relaxation of the so-called technical rules (supra, §55), the basic requirement of relevancy remains. (See, on meaning and test of relevancy, *1 Cal. Evidence (4th), Circumstantial Evidence*, §§4, 26 et seq.; for illustrations of circumstantial evidence held admissible and sufficient, see *Western Grain & Sugar Products Co. v. Pillsbury* (1916) 173 C. 135, 139, 159 P. 423 [finding of compensable death of missing person]; *Union Oil Co. v. Industrial Acc. Com.* (1931) 211 C. 398, 401, 295 P. 513 [probable inferences from circumstantial evidence, to establish jurisdiction; i.e., death on land rather than in navigable waters]; and see also 2 *Am.Jur.2d* (1994 ed.), *Administrative Law* §350.) However, some of the common law rules of circumstantial evidence are "technical" in nature and should not be strictly applied in administrative proceedings. Thus, the Administrative Procedure Act states that relevant evidence is admissible "if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions." (*Govt.C. 11513*; see also Model State Administrative Procedure Act (1981) §4-212(a), 15 U.L.A. (Master Ed.), p. 86.)

(2) *Evidence of Other Proceedings.* Licensing and disciplinary agencies have been frequently presented with the question of admissibility of evidence of *other proceedings involving the accused*:

(a) It has been held that, in determining the nature or degree of discipline, prior criminal or disciplinary proceedings may be considered. (*Herron v. State Bar* (1944) 24 C.2d 53, 65, 147 P.2d 543; *McGregor v. State Bar* (1944) 24 C.2d 283, 288, 148 P.2d 865; *Lewis v. State Bar* (1973) 9 C.3d 704, 715, 108 C.R. 821, 511 P.2d 1173; 1 *Cal. Proc.* (4th), *Attorneys*, §§609, 659.)

(b) In conformity with the general evidentiary rule, a prior criminal conviction has been regarded as hearsay on the issue of commission of acts of misconduct, and consequently insufficient by itself to sustain a disciplinary order. (*Manning v. Watson* (1952) 108 C.A.2d 705, 711, 239 P.2d 688, *infra*, §65.) It should be noted, however, that the Evidence Code created a hearsay exception making a felony conviction admissible in judicial proceedings (*Ev.C. 1300*; see 1 *Cal. Evidence (4th), Hearsay*, §271), and the rule in administrative proceedings may therefore be open to reexamination. (But see *Los Angeles v. Civil Service Com.* (1995) 39 C.A.4th 620, 629, 46 C.R.2d 256 [despite changes in *Ev.C. 1300* making hearsay exception applicable where judgment of felony conviction is based on plea of *nolo contendere*, use of *nolo contendere* pleas as evidence in administrative proceedings remains barred].)

(c) Because of the fundamentally different objects of criminal and administrative proceedings, the favorable result of a prior criminal proceeding based on the same acts is not admissible. (*Bold v. Board of Med. Examiners* (1933) 135

*C.A. 29, 35, 26 P.2d 707; Stuck v. Board of Med. Examiners (1949) 94 C.A.2d 751, 757, 211 P.2d 389.)*

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General.* See *Jaramillo v. State Bd. for Geologists & Geophysicists (2006) 136 C.A.4th 880, 893, 39 C.R.3d 170* [in administrative proceeding in which business owner was charged with practicing geophysics without license, business owner, by failing to object, waived issue of whether geologist's testimony was relevant]; 2 *Am.Jur.2d (2004 ed.), Administrative Law §344.(3) (New) Exclusion for Policy Reasons.* As in civil and criminal actions generally, evidence that is relevant may nevertheless be excluded in an administrative proceeding on policy grounds. (See 1 *Cal. Evidence (4th), Circumstantial Evidence, §132.*) For example, *Govt.C. 11440.45*, added in 2002, makes inadmissible, as an admission of liability in a civil action, any portion of "statements, writings, or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering, or death of a person involved in an accident and made to that person or to the family of that person." The statute is modeled on *Ev.C. 1160 (1 Cal. Evidence (4th), Hearsay, Supp., §96)* and, like that statute, specifies that an actual statement of fault that accompanies the statement of sympathy is not inadmissible.



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#### 5. Hearsay.

#### a. Competent Hearsay Within an Exception.

*1 Witkin Cal. Evid. Intro § 65*

[§ 65] Competent Hearsay Within an Exception.

There is no reason for administrative bodies to be *more restrictive* than courts; consequently, evidence competent in judicial proceedings, including hearsay within an exception, is generally held competent in administrative proceedings. (See *Werner v. State Bar* (1944) 24 C.2d 611, 615, 150 P.2d 892 [transcript of former criminal trial, 1 Cal. Evidence (4th), Hearsay, §255]; *Lake v. Reed* (1997) 16 C.4th 448, 467, 65 C.R.2d 860, 940 P.2d 311 [in driver's license suspension hearing, unsworn laboratory report, although hearsay, was admissible under public employees record exception]; *Fox v. San Francisco Unified School Dist.* (1952) 111 C.A.2d 885, 891, 245 P.2d 603 [personnel reports admissible as business records, 1 Cal. Evidence (4th), Hearsay, §228]; *Arenstein v. State Bd. of Pharmacy* (1968) 265 C.A.2d 179, 190, 71 C.R. 357 [plea of guilty in prior criminal trial (see 1 Cal. Evidence (4th), Hearsay, §99) is admissible in later administrative disciplinary proceeding as an admission of element of offense warranting discipline]; *Borror v. Department of Inv.* (1971) 15 C.A.3d 531, 546, 92 C.R. 525 [admissions by real estate saleswoman not within hearsay rule and properly considered by administrative agency in disciplinary proceeding]; *Szmciarz v. State Personnel Bd.* (1978) 79 C.A.3d 904, 913, 145 C.R. 396 [admission]; *Douglass v. Board of Med. Quality Assur.* (1983) 141 C.A.3d 645, 659, 660, 190 C.R. 506 [admissions and vicarious admissions]; on admissibility of affidavits, see *infra*, §69.)

The Evidence Code expanded the number of hearsay exceptions, e.g., making admissible, in civil actions, a felony conviction (1 Cal. Evidence (4th), Hearsay, §§271, 272) and a dying declaration (1 Cal. Evidence (4th), Hearsay, §187). These new rules call for a reexamination of *Manning v. Watson* (1952) 108 C.A.2d 705, 711, 239 P.2d 688, holding that a prior federal court conviction of a broker was insufficient to sustain a disciplinary order; and *Thrasher v. Board of Med. Examiners* (1919) 44 C.A. 26, 29, 185 P. 1006, holding a dying declaration inadmissible in administrative proceedings.

**SUPPLEMENT:** [This section is current through the latest supplement]

(New) *Statutory exceptions created for particular administrative proceedings:* In some cases, statutory hearsay exceptions have been created for application in particular types of administrative proceedings. Thus, for example, out-of-court statements by minors under 12 years of age are admissible in certain administrative hearings under specific exceptions enacted in 2002. (See *Health & Saf.C. 1551.2* [community care facilities]; *Health & Saf.C. 1568.0652* [residential care facilities]; *Health & Saf.C. 1569.512* [residential care for elderly]; *Health & Saf.C. 1596.8872* [child day care facilities].) Similarly, prior testimony is admissible in administrative proceedings involving contractors, without proof of witness unavailability. (*B. & P.C. 7013.5*, added in 2003.)



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##### 5. Hearsay.

##### b. Incompetent Hearsay: Administrative Procedure Act.

*1 Witkin Cal. Evid. Intro § 66*

[§ 66] Incompetent Hearsay: Administrative Procedure Act.

*Govt.C. 11513(d)* states that "[h]earsay evidence may be used for the purpose of *supplementing or explaining other evidence* but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration." Thus:

(1) The hearing officer need not rule on admissibility and should not exclude incompetent hearsay. (See *Marlo v. State Bd. of Med. Examiners of the Dept. of Professional Standards* (1952) 112 C.A.2d 276, 282, 246 P.2d 69 [hospital reports]; *Mast v. State Bd. of Optometry* (1956) 139 C.A.2d 78, 85, 293 P.2d 148 [affidavit]; 15 *Hastings L. J.* 369; 8 *Southwestern U. L. Rev.* 579; 2 *Am.Jur.2d* (1994 ed.), *Administrative Law* §348; 36 *A.L.R.3d* 12 [hearsay evidence in proceedings before state administrative agencies]; 30 *A.L.R.4th* 936 [student disciplinary proceedings]; on the relationship of *Govt.C. 11513* and *Govt.C. 11514*, giving a party, upon proper request, the opportunity to cross-examine an affiant, see *Monaghan v. Department of Motor Vehicles* (1995) 35 C.A.4th 1621, 42 C.R.2d 167, *infra*, §69.)

(2) On judicial review, it may be used to supplement, explain, or corroborate direct evidence. (*Cooper v. State Bd. of Public Health* (1951) 102 C.A.2d 926, 932, 229 P.2d 27; *Dyer v. Watson* (1953) 121 C.A.2d 84, 92, 262 P.2d 873; *Swegle v. State Bd. of Equalization* (1954) 125 C.A.2d 432, 437, 270 P.2d 518; *Mast v. State Bd. of Optometry*, *supra*; *Moyer v. State Bd. of Equalization* (1956) 140 C.A.2d 651, 656, 295 P.2d 583; *Robertson v. Zolin* (1996) 44 C.A.4th 147, 151, 51 C.R.2d 420 [in mandamus proceeding challenging suspension of driver's license, evidence presented by driver (handwritten notation on results of second of three breath tests), even if insufficient by itself to sustain trial judge's ruling overturning suspension, was properly used to supplement and explain department's own evidence about manner of testing and results obtained].)

(3) It will not, by itself, sustain a finding or decision. (*Daniels v. Department of Motor Vehicles* (1983) 33 C.3d 532, 538, 189 C.R. 512, 658 P.2d 1313; *Walker v. San Gabriel* (1942) 20 C.2d 879, 881, 129 P.2d 349; *Kinney v. Sacramento City Employees' Retirement System* (1947) 77 C.A.2d 779, 782, 176 P.2d 775; *Desert Turf Club v. Board of Supervisors of Riverside County* (1956) 141 C.A.2d 446, 455, 296 P.2d 882; *Armistead v. Los Angeles* (1957) 152 C.A.2d 319, 322, 324, 313 P.2d 127; *Harris v. Alcoholic Bev. Control App. Bd.* (1963) 212 C.A.2d 106, 122, 28 C.R. 74, citing the text; *Sunseri v. Board of Med. Examiners* (1964) 224 C.A.2d 309, 317, 36 C.R. 553, citing the text; *Layton v. Merit System Com.* (1976) 60 C.A.3d 58, 67, 131 C.R. 318; *Carl S. v. Commission for Teacher Preparation & Licensing* (1981) 126 C.A.3d 365, 369, 371, 178 C.R. 753; *Gregory v. State Bd. of Control* (1999) 73 C.A.4th 584, 597, 598, 86 C.R.2d 575 [hearsay police department crime reports did not constitute substantial evidence supporting Board of Control's denial of claim for victim restitution, where reports were supplemented only by detective's opinion, which was



conclusory and not supported by any facts[.]

In the *Daniels* case, *supra*, the court held that an accident report made by a driver pursuant to *Veh.C. 16000* (see 2 *Cal. Evidence* (4th), *Witnesses*, §273) is not sufficient without additional evidence to support the suspension of the driver's license in a formal Department of Motor Vehicles hearing. The court distinguished *Burkhart v. Department of Motor Vehicles* (1981) 124 C.A.3d 99, 104, 112, 177 C.R. 175, suggesting that a police officer's sworn report might qualify as a business record or official record (*Ev.C. 1271, 1280*). The driver's accident (SR 1) report does not reflect the trustworthiness necessary to permit its use as the sole basis for a license suspension. Hence, when the licensee requests a hearing, the SR 1 report is insufficient to establish a *prima facie* showing of the facts supporting suspension. (33 C.3d 541.) (See also *Carlton v. Department of Motor Vehicles* (1988) 203 C.A.3d 1428, 1432, 1434, 250 C.R. 809 [suspension of driver's license based on computerized transcription of police report of officer's opinion as to person "most responsible" for accident is improper; following *Daniels*].)

The former version of *Govt.C. 11513(d)* did not mention the requirement of a timely objection. Under that version, an objection was not needed, and lack of an objection could not turn hearsay evidence into competent evidence that would independently support a finding. (*McNary v. Department of Motor Vehicles* (1996) 45 C.A.4th 688, 696, 53 C.R.2d 55.) The Law Revision Commission Comment explains that the language regarding "timely" objection, added in 1995, was "intended to avoid or eliminate routine objections to administrative hearsay. If a proposed finding is supported only by hearsay evidence, a single objection at the conclusion of testimony, or on petition for reconsideration by the agency, is sufficient and timely."

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *No need to rule on admissibility:* See 2 *Am.Jur.2d* (2004 ed.), *Administrative Law* §347.(2) *Supplementation, explanation, or corroboration of direct evidence:* See *Komizu v. Gourley* (2002) 103 C.A.4th 1001, 1007, 127 C.R.2d 229 [in writ proceeding challenging suspension of driver's license, even if report of blood-alcohol test did not satisfy *Ev.C. 1280(b)* (1 *Cal. Evidence* (4th), *Hearsay*, §246) because it was typed 6 days after test was conducted, trial judge could properly consider it in conjunction with officer's observations that driver acknowledged he had been drinking, smelled of alcohol, and had bloodshot or watery eyes]; *Berg v. Davi* (2005) 130 C.A.4th 223, 230, 29 C.R.3d 803 [in upholding Department of Real Estate's rejection of application for real estate salesperson's license on ground applicant had previously been disbarred, administrative law judge did not err in admitting hearsay facts contained in opinions of State Bar Court and Review Department, as they explained other properly admitted evidence, namely, actual disbarment]; *Hildebrand v. Department of Motor Vehicles* (2007) 152 C.A.4th 1562, 1572, 62 C.R.3d 234 [in administrative suspension proceeding, statements by fire captain indicating that driver had admitted he had been driving, which statements were incorporated in police officer's written report, were admissible as party admissions, and captain's other observations could be admitted under *Govt.C. 11513(d)* to clarify meaning of those statements].



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##### 5. Hearsay.

##### c. Incompetent Hearsay: Workers' Compensation Proceeding.

*1 Witkin Cal. Evid. Intro § 67*

[§ 67] Incompetent Hearsay: Workers' Compensation Proceeding.

The Workers' Compensation Act provides that the Appeals Board and its referees are not bound by "the common law or statutory rules of evidence" (*Lab.C. 5709*), and express provision is made for admission of various kinds of reports and other hearsay (*Lab.C. 5703*). It is clear, therefore, that hearsay evidence incompetent in judicial proceedings may be considered in a proceeding before the Appeals Board or referee, and may support an award or order. (*State Comp. Ins. Fund v. Industrial Acc. Com.* (1924) 195 C. 174, 177, 231 P. 996; *McAllister v. Work. Comp. App. Bd.* (1968) 69 C.2d 408, 413, footnote 2, 71 C.R. 697, 445 P.2d 313.)

However, on review the hearsay evidence may be held to be of such an unsubstantial character, particularly when contrary to relevant expert testimony, that the award will be annulled. (See *Pacific Employers Ins. Co. v. Industrial Acc. Com.* (1941) 47 C.A.2d 494, 499, 118 P.2d 334; *Skip Fordyce v. Work. Comp. App. Bd.* (1983) 149 C.A.3d 915, 926, 927, 197 C.R. 626; 2 *Summary* (9th), *Workers' Compensation*, §448.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*Cross-Reference:* 2 *Summary* (10th), *Workers' Compensation*, §445.



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6. Complainant's Sexual Conduct.

*1 Witkin Cal. Evid. Intro § 68*

[§ 68] Complainant's Sexual Conduct.

In a proceeding under *Govt.C. 12940(h)* or (i) (see 8 *Summary (9th)*, *Constitutional Law*, §760 et seq.), or *Govt.C. 19572* or *19702* (see 8 *Summary (9th)*, *Constitutional Law*, §747), in which conduct constituting sexual harassment, sexual assault, or sexual battery is alleged, evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is not discoverable unless it is to be offered at a hearing to attack the credibility of the complainant. If offered, it is not admissible unless an offer of proof is made establishing that the evidence is relevant and reliable, and that its probative value is not substantially outweighed by the probability that its admission will create substantial danger of undue prejudice or confuse the issue. (*Govt.C. 11440.40*; see 27 *Pacific L. J.* 967.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*Cross-References:* 8 *Summary (10th)*, *Constitutional Law*, §§925 et seq., 897.



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## 7. Affidavits and Reports.

## a. Administrative Procedure Act.

*1 Witkin Cal. Evid. Intro § 69*

[§ 69] Administrative Procedure Act.

(1) *In General. Govt.C. 11514* provides that *affidavits* may be used in lieu of oral testimony, with the same effect, but that prior notice must be given the opposing party, so that he or she may, on request, have the opportunity to cross-examine the affiant. The procedure is as follows: At least 10 days before the hearing a party may mail a copy of the affidavit, with notice of the right of cross-examination, to the opposing party; if the latter does not request cross-examination within 7 days, the right is waived and the affidavit has *the same effect as if the affiant testified orally*; if, however, opportunity to cross-examine is not afforded after request, the affidavit is admissible but has only the effect of hearsay evidence (see *Govt.C. 11513(d)*, supra, §66). (See *15 Hastings L. J. 258*; *21 So. Cal. L. Rev. 22*; on effect of party's failure to mail copy of affidavit to opposing party, see *McNary v. Department of Motor Vehicles (1996) 45 C.A.4th 688, 696, 53 C.R.2d 55* [in license suspension proceeding, driver's failure to comply with requirement that department receive copy of affidavit and notice of intent to admit it 10 days before hearing resulted in department's inability to request cross-examination of affiant, and, therefore, affidavit was inadmissible]; on other statutes authorizing admission of affidavits, see *1 Cal. Evidence (4th), Hearsay, §297*; on sufficiency of arresting officer's sworn statement to support driver's license suspension, see *2 Cal. Evidence (4th), Witnesses, §427*.)

The theory underlying *Govt.C. 11514* has a more general application: A party is entitled to know what evidence has been produced against him or her, in order to test or rebut it, and an agency cannot base its decision on reports or information not properly subject to official notice (infra, §72) and not introduced in evidence. (See *Brennan v. State Bd. of Med. Examiners (1950) 101 C.A.2d 193, 196, 225 P.2d 11* ["Unstated and unsworn opinions of the board members ... could not be considered for any purpose"].)

(2) *Sufficiency of Steps Taken To Secure Affiant's Attendance.* In *Monaghan v. Department of Motor Vehicles (1995) 35 C.A.4th 1621, 42 C.R.2d 167*, plaintiff's driver's license was suspended after he was arrested for driving under the influence of alcohol. A test of plaintiff's blood sample showed a blood-alcohol content of 0.23%. Plaintiff requested an administrative hearing and sent a letter to the Department of Motor Vehicles demanding that it provide him with copies of all documents, affidavits, or otherwise competent hearsay statements it intended to use at the hearing, along with the name and address of the individual who conducted the blood test. The letter also mentioned plaintiff's general right of cross-examination and objected to use of the affidavits and statements. At the hearing, the department produced no witnesses and relied solely on documentary evidence, including the arresting officer's sworn statement and the blood test results. The suspension was upheld. Plaintiff petitioned for writ relief, which the trial judge granted, finding that plaintiff's letter was sufficient to compel the department to produce the blood analyst. *Held*, reversed.

(a) Plaintiff did not properly invoke the subpoena procedures requiring the department to produce the analyst. Even if his letter could be construed as a request for the issuance of subpoenas, he took no further steps to secure the analyst's attendance after learning at the hearing that the analyst would not appear. *Govt.C. 11514* does not create an independent mechanism by which a plaintiff can compel production of a witness; it simply sets forth the evidentiary consequences of failing to satisfy the licensee's request for an opportunity to cross-examine the author of affidavits on which the department relies. (*35 C.A.4th 1627.*)

(b) Moreover, even if plaintiff properly invoked the subpoena procedures, the department's failure to comply would not necessarily result in rendering the laboratory report insufficient by itself to establish plaintiff's blood-alcohol content. Under *Govt.C. 11514(a)*, the result of a failure to satisfy a request for production of an affiant is that the affidavit is given only the same effect as other hearsay evidence; and under *Govt.C. 11513(c)* (now *Govt.C. 11513(d)*), hearsay evidence "may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." Thus, notwithstanding the department's failure to comply, the evidentiary weight of the laboratory report in question would depend on the report's admissibility, over objection, in civil actions. (*35 C.A.4th 1628.*)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## b. Local Agencies.

*1 Witkin Cal. Evid. Intro § 70*

[§ 70] Local Agencies.

The principle that a party must be afforded the opportunity to test the evidence produced against him or her (supra, §69) has been repeatedly stated in cases dealing with local agencies. Thus, in *La Prade v. Department of Water & Power* (1945) 27 C.2d 47, 162 P.2d 13, the Los Angeles Board of Civil Service Commissioners relied merely on an investigator's report on file, and produced no witnesses or evidence to support its order discharging a municipal employee. In annulling the order the court said: "Nothing may be treated as evidence which has not been introduced as such, inasmuch as a hearing requires that the party be apprised of the evidence against him in order that he may refute, test, and explain it." (27 C.2d 51, 52.)

Similarly, in *English v. Long Beach* (1950) 35 C.2d 155, 217 P.2d 22, where an order dismissing an employee was set aside for lack of a fair hearing, the court said: "There is considerable difference, however, between the alleged improper admission of evidence, such as hearsay, for example, and the consideration of and reliance upon information received without the knowledge of the parties and at a time and place other than that appointed for the hearing. In the former class of cases, the parties are informed of the evidence to be used against them, they may object to it, explain it, or test it and introduce countervailing evidence. None of those safeguards are available, however, when the board secretly obtains information and bases its determination thereon." (35 C.2d 159.) (See also *Kinney v. Sacramento City Employees' Retirement System* (1947) 77 C.A.2d 779, 782, 176 P.2d 775 [retirement board improperly received report of doctor on medical history of applicant for pension, based on letters of other physicians, without personal examination of applicant]; *Rogers v. Retirement Bd.* (1952) 109 C.A.2d 751, 757, 241 P.2d 611 [retirement board improperly considered letter of doctor who never appeared before board and whose opinion that decedent's heart condition had nothing to do with employment was only evidence to that effect]; 18 A.L.R.2d 552 [administrative decision based on evidence secured outside hearing and without presence of party or counsel]; infra, §83.)

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## 7. Affidavits and Reports.

## c. Workers' Compensation Proceeding.

*1 Witkin Cal. Evid. Intro § 71*

## [§ 71] Workers' Compensation Proceeding.

The Workers' Compensation Act makes admissible reports of doctors and hospital records, reports of investigators, books of employers, official governmental publications, and "[e]xcerpts from expert testimony received by the appeals board upon similar issues of scientific fact *in other cases* and the *prior decisions* of the appeals board upon similar issues." (*Lab.C. 5703*.) This broad statute is supplemented by the Appeals Board's Rules of Practice and Procedure, which contain detailed provisions on the admission of written evidence and reports; these, with respect to medical evidence, are favored by the Appeals Board. (*8 Cal. Code Reg. §§10600 et seq., 10606*.) Copies of reports, or of investigations made without notice, must always be furnished to adverse parties. (See *Lab.C. 5704*; *8 Cal. Code Reg. §10580*; *Peak v. Industrial Acc. Com.* (1947) 82 C.A.2d 926, 929, 187 P.2d 905.)

If a party refuses to produce a physician's report, the evidence thus suppressed will be presumed adverse. (*8 Cal. Code Reg. §10622*.) (See generally C.E.B., Workers' Compensation Practice 3d, §§8.18 et seq., 8.32 et seq.)

*Lab.C. 5703* and *5704* have been interpreted as requiring an opportunity to *cross-examine* the author of a report, if the author is available, regardless of whether the report was introduced during a hearing or merely filed. The reason is set forth in *Massachusetts Bonding & Ins. Co. v. Industrial Acc. Com.* (1946) 74 C.A.2d 911, 916, 170 P.2d 36, as follows: "It would make a farce of the law to hold that if the report is filed at the hearing the adverse party may be denied the rights of cross-examination and rebuttal but that if it is filed after the hearing he must be accorded those rights. The deprivation of due process lies not in the concealment of the evidence but in the lack of opportunity for cross-examination and rebuttal which results from the concealment. There is no magic in the mere disclosure of the evidence where the adverse party is denied all right to test or countervail it." The court also observed: "The reports, though hearsay, are testimonial in character. Unlike business entries, dying declarations, *res gestae* statements and other recognized exceptions to the hearsay rule, which derive their sanction of veracity from the circumstance that they are not made or uttered with litigation in mind or primarily for the purpose of being used as evidence, the reports of these physicians were expressly made for use as evidence in this proceeding. ... We may suggest that cross-examination, if successful, is the most effective method of rebuttal, and frequently does away with the necessity of producing other rebuttal evidence." (74 C.A.2d 915.) (See also *Columbia-Geneva Steel Div., United States Steel Co. v. Industrial Acc. Com.* (1953) 115 C.A.2d 862, 864, 253 P.2d 45; *Caesar's Restaurant v. Industrial Acc. Com.* (1959) 175 C.A.2d 850, 854, 1 C.R. 97 [cross-examination of doctor or rating expert]; 2 *Summary* (9th), *Workers' Compensation*, §396.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Cross-Reference: 2 Summary (10th), Workers' Compensation, §399.*





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#### 8. Official Notice.

*1 Witkin Cal. Evid. Intro § 72*

[§ 72] Official Notice.

(1) *In General.* The doctrine of *judicial notice* (*1 Cal. Evidence (4th), Judicial Notice, §1 et seq.*) is applicable to administrative proceedings, in which it is properly characterized as "official notice." But its scope may vary with particular agencies and may extend beyond the normal subjects of judicial notice, for an agency has an affirmative duty to carry out the policies of its program in the public interest, and often has a staff of specialists and a great store of information about its special field. (See generally *55 Harv. L. Rev. 410*; *60 Harv. L. Rev. 620*; *18 A.L.R.2d 552, 565* [agency's notice of its own records]; *2 Am.Jur.2d (1994 ed.), Administrative Law §351.*)

(2) *Agencies Under Administrative Procedure Act.* The California Administrative Procedure Act appears to be as liberal as any: "In reaching a decision official notice may be taken, either before or after submission of the case for decision, of any generally accepted technical or scientific matter within the agency's special field, and of any fact which may be judicially noticed by the courts of this State. Parties present at the hearing shall be informed of the matters to be noticed, and those matters shall be noted in the record, referred to therein, or appended thereto. Any such party shall be given a reasonable opportunity on request to refute the officially noticed matters by evidence or by written or oral presentation of authority, the manner of such refutation to be determined by the agency." (*Govt.C. 11515*; see *Franz v. Board of Med. Quality Assur. (1982) 31 C.3d 124, 140, 181 C.R. 732, 642 P.2d 792*; and see similar provisions of Model State Administrative Procedure Act (1981), §4-212(f), 15 U.L.A. (Master Ed.), p. 87.)

(3) *Illustrative Decisions.* The California cases appear to fall within the conservative scope of the judicial notice principle. (See *Anderson v. Board of Dental Examiners (1915) 27 C.A. 336, 340, 149 P. 1006* [dental board could notice its own records in determining who was or was not licensed]; *Southern Calif. Edison Co. v. Industrial Acc. Com. (1925) 75 C.A. 709, 714, 243 P. 455* [Commission can take notice of commonly known medical facts but not of a treatment familiar only to experts]; *Greif v. Dullea (1944) 66 C.A.2d 986, 998, 153 P.2d 581* [city board of permit appeals could take notice of existence and contents of permit and license ordinances]; *California Comp. Ins. Co. v. Industrial Acc. Com. (1948) 86 C.A.2d 861, 871, 195 P.2d 880* [Commission could take notice of fact that during March 1947, employment opportunities were good]; *Cantrell v. Board of Supervisors of Los Angeles (1948) 87 C.A.2d 471, 477, 197 P.2d 218* [zoning board, revoking permit for hog ranch, could take notice of fact that presence of large numbers of rats and flies is extremely detrimental to public health]; *Harris v. Alcoholic Bev. Control App. Bd. (1965) 62 C.2d 589, 596, 43 C.R. 633, 400 P.2d 745, 1 Cal. Evidence (4th), Judicial Notice, §21*; *Whispering Pines Mobile Home Park, Ltd. v. Scotts Valley (1986) 180 C.A.3d 152, 160, 225 C.R. 364* [discussing *Franz, supra*, and emphasizing necessity of opportunity to refute officially noticed matters].)

(4) *Effect of Evidence Code.* *Govt.C. 11515, supra*, calls for official notice "of any fact which may be judicially

noticed by the courts." This makes applicable the innovations of Division 4 (*1 Cal. Evidence (4th), Judicial Notice, §4*).

A concurring opinion of two justices in *Franz* calls attention to a problem created by the different language in the judicial notice provisions of the Evidence Code and the official notice provision of *Govt.C. 11515*. Matter judicially noticed must be accepted as a fact (*Ev.C. 457, 1 Cal. Evidence (4th), Judicial Notice, §3*); a party cannot offer evidence contrary to the fact noted. *Govt.C. 11515*, however, states that a party may "refute the officially noticed matters," and this statement could be interpreted to mean that the matter may be contradicted. The justices offer this solution: "Section 11515 antedates the Evidence Code by over two decades and was written at a time when there was a division of judicial and scholarly opinion on the issue whether judicially noticed facts could be contradicted. ... Today the trend, as exemplified by section 457 of our Evidence Code and *rule 201(g) of the Federal Rules of Evidence*, is unmistakably in favor of conclusiveness of facts judicially noticed. Reconciliation of section 11515 with the Evidence Code is, fortunately, easy enough: if the language concerning an opportunity to refute noticed matter is interpreted as applying before the tribunal makes its final decision on whether to take notice, the two codes are in harmony." (*31 C.3d 146*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General*. See 2 *Am.Jur.2d* (2004 ed.), *Administrative Law* §349. *West's Key Number Digest*, Administrative Law and Procedure k.459-



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## 9. Witnesses.

## a. Attendance and Compensation.

*1 Witkin Cal. Evid. Intro § 73*

[§ 73] Attendance and Compensation.

(1) *Power To Summon Witnesses.* The administrative power to summon witnesses and take testimony is usually declared in the statute creating the particular agency. (See, e.g., *Lab.C. 130* et seq. [Workers' Compensation Appeals Board]; *Lab.C. 1176* [Industrial Welfare Commission]; *Pub.Util.C. 311* [Public Utilities Commission]; *Corp.C. 25531* [Corporations Commissioner]; *B. & P.C. 6049, 6051, 6052* [State Bar Board of Governors and Local Administrative Committees (now replaced by State Bar Court and its departments; see 1 *Cal. Proc. (4th), Attorneys*, §625 et seq.)].)

As to agencies subject to the Administrative Procedure Act, detailed provision is made in *Govt.C. 11450.05* et seq. (see *infra*, §77) for the issuance of both subpoenas and subpoenas duces tecum at the request of any party pursuant to *C.C.P. 1985* et seq. (See *Fitzpatrick v. Department of Motor Vehicles (1993) 13 C.A.4th 1771, 1776, 17 C.R.2d 110* [in license suspension hearing, Department of Motor Vehicles' refusal to enforce driver's subpoena as well as its own against accusing officer violated driver's rights of confrontation and cross-examination]; 75 *Harv. L. Rev. 1222* [administrative subpoena]; 50 *Cal. L. Rev. 532* [subpoena on foreign corporation]; 2 *Am.Jur.2d (1994 ed.), Administrative Law* §338 et seq.; 27 *A.L.R.2d 1208* [administrative agency's power to subpoena persons not subject to its regulatory jurisdiction].)

Disobedience of a subpoena is a contempt, but an administrative agency lacks the power to punish; it must report the disobedience to the superior court and obtain a court order. (See *Parris v. Zolin (1996) 12 C.4th 839, 845, 847, 50 C.R.2d 109, 911 P.2d 9* [when subpoenaed witness fails to respond, it is agency's duty under *Govt.C. 11525* (now *Govt.C. 11455.20*) to transmit certification of facts of apparent contempt to superior court, which must then issue order to show cause; approving *Fitzpatrick*]; and see *Pub.Util.C. 1792* et seq. [Public Utilities Commission proceedings]; *C.C.P. 1991* [disobedience to subpoena is contempt; 2 *Cal. Evidence (4th), Witnesses*, §28]; *B. & P.C. 6049, 6051* [State Bar proceedings]; 2 *Am.Jur.2d (1994 ed.), Administrative Law* §341; 75 *Harv. L. Rev. 1222*.)

The Workers' Compensation Appeals Board may invoke the procedure of report to the court, but it also has the same power as a court to punish for contempt. (*Lab.C. 132*.)

(2) *Compensation.* A number of statutes make specific provision for witness fees and mileage. (See, e.g., *Pub.Util.C. 1791*; *B. & P.C. 108.5* [agencies within Consumer Affairs Department]; see also *McLeod v. Board of Pension Commrs. (1970) 14 C.A.3d 23, 31, 94 C.R. 58* [subpoenas may contain language requiring witnesses to be paid fees and mileage prescribed by *Govt.C. 68093*, 2 *Cal. Evidence (4th), Witnesses*, §16]; on compensation of witnesses appearing under compulsion of subpoena or subpoena duces tecum issued in accordance with Administrative Procedure Act, see *infra*, §77.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Power To Summon Witnesses*. See 2 *Am.Jur.2d* (2004 ed.), *Administrative Law* §337 et seq. *West's Key Number Digest*, *Administrative Law and Procedure* k.463



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## 9. Witnesses.

## b. Privileges.

*1 Witkin Cal. Evid. Intro § 74*

## [§ 74] Privileges.

(1) *In General.* It has been urged that administrative agencies break away from the strict rules and receive some privileged evidence in confidence. (See 55 *Harv. L. Rev.* 384.) But the Administrative Procedure Act probably states the generally accepted view: "The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing." (*Govt.C. 11513(e)*; see *Fairfield v. Superior Court* (1975) 14 C.3d 768, 777, 122 C.R. 543, 537 P.2d 375 [privilege of elected officials not to disclose basis of public vote]; *Welfare Rights Organization v. Crisan* (1983) 33 C.3d 766, 772, 190 C.R. 919, 661 P.2d 1073, 2 Cal. Evidence (4th), Witnesses, §103 [privilege protecting communications between welfare claimants and lay persons authorized to represent them in administrative hearings]; *Elder v. Board of Med. Examiners* (1966) 241 C.A.2d 246, 252, 50 C.R. 304 [physician-patient privilege]; *King v. Mobile Home Rent Review Bd.* (1989) 216 C.A.3d 1532, 1537, 265 C.R. 624 [confidentiality of tax returns]; 31 A.L.R.4th 1226 [*Crisan*]; 10 *Stanf. L. Rev.* 299, note 13 [attorney-client privilege]; and see similar provision of Model State Administrative Procedure Act (1981), §4-212(a), 15 U.L.A. (Master Ed.), p. 86.)

The Evidence Code, with its revised and somewhat expanded privileges, is expressly made applicable to administrative proceedings. (See 2 Cal. Evidence (4th), Witnesses, §65.) Where a claim of privilege is rejected by an administrative agency or officer without judicial powers, a court order to testify is a necessary basis for the sanction of contempt. (See 2 Cal. Evidence (4th), Witnesses, §93.)

The Administrative Procedure Act, in addition to acknowledging the applicability of the generally recognized privileges, creates its own privilege for statements made and documents prepared in the course of mediation under the Act's alternative dispute resolution provisions. (See *Govt.C. 11420.30*.)

(2) *Agency With Constitutional Powers.* In *Southern Calif. Gas Co. v. Public Util. Com.* (1990) 50 C.3d 31, 265 C.R. 801, 784 P.2d 1373, the question was whether the constitutional powers of the Public Utilities Commission were subject to the statutory limitation of the attorney-client privilege. The court commented:

"There is no indication in the relevant statutes that the privilege is limited to judicial proceedings. On the contrary, it is evident that the privilege applies in the administrative law setting. Evidence Code section 910, which codifies the scope of several evidentiary privileges including the attorney-client privilege, provides: 'Except as otherwise provided by statute, the provisions of this division apply in *all proceedings*. The provisions of any statute making rules of evidence inapplicable in particular proceedings, ... do not make this division inapplicable to such proceedings.' ... Evidence Code section 901 defines a 'proceeding' to include 'any action, hearing, investigation, inquest, or inquiry

(whether conducted by a court, *administrative agency*, hearing officer, arbitrator, legislative body, or any other person authorized by law) in which pursuant to law, testimony can be compelled to be given.' " (50 C.3d 38.)

(3) *Self-incrimination*. As administrative disciplinary proceedings are not criminal actions, there is no privilege of the accused licensee to refuse to take the stand. The licensee has, however, the witness' privilege against self-incrimination, i.e., to refuse to answer incriminating questions. (See *West Coast Home Imp. Co. v. Contractors' State License Bd.* (1945) 72 C.A.2d 287, 301, 164 P.2d 811; *Savoy Club v. Board of Supervisors* (1970) 12 C.A.3d 1034, 1038, 91 C.R. 198 [licensees charged with crimes which were basis for license revocation hearing held not entitled to continuance of hearing merely because of possibility of their asserting therein privilege against self-incrimination]; *Fielder v. Berkeley Properties Co.* (1972) 23 C.A.3d 30, 39, 99 C.R. 791 [propriety of question is subject to superior court determination]; 2 *Cal. Evidence* (4th), *Witnesses*, §446; 30 *A.L.R.4th* 243 [attorney's self-incrimination privilege in disciplinary proceeding]; see also *Govt.C. 11513(b)* [party not testifying on own behalf may be called and examined as if under cross-examination; *infra*, §84].)

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#### 10. Discovery and Production of Evidence.

##### a. In General.

*1 Witkin Cal. Evid. Intro § 75*

[§ 75] In General.

Prior to 1966, there was neither statutory nor case law authorizing the application of the discovery statutes (see 2 *Cal. Evidence* (4th), *Discovery*, §1 et seq.) to administrative proceedings. (See 16 *Stanf. L. Rev.* 1035.) *Brotsky v. State Bar* (1962) 57 *C.2d* 287, 301, 19 *C.R.* 153, 368 *P.2d* 697, authorized discovery in *attorneys' disciplinary proceedings*, but on the ground that these proceedings were the initial stages of court actions, rather than independent administrative adjudications. (See 83 *A.L.R.3d* 749 [records of disciplinary proceedings against attorney]; 83 *A.L.R.3d* 777 [state bar records of complaints against or investigations of attorney]; 1 *Cal. Proc.* (4th), *Attorneys*, §650.)

*Shively v. Stewart* (1966) 65 *C.2d* 475, 55 *C.R.* 217, 421 *P.2d* 65, *infra*, §76, and 1968 amendments to the Administrative Procedure Act (*infra*, §77 et seq.) established the right to discovery in administrative proceedings. (See 56 *Cal. L. Rev.* 756; 8 *Hastings Const. L. Q.* 645; 10 *Santa Clara Lawyer* 274; on difference between scope of A.P.A. and non-A.P.A. discovery, see 7 *U.S.F. L. Rev.* 306.)

In disciplinary hearings for permanent school district employees, discovery procedures are not limited to those set forth in the Administrative Procedure Act (see *Govt.C.* 11507.6, *infra*, §78), but include "the rights and duties of any party in a civil action brought in a superior court." (*Educ.C.* 44944; see also *Educ.C.* 87675 [same full discovery rights for contract and regular employees of community colleges].)

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## 10. Discovery and Production of Evidence.

## b. Discovery Right Judicially Established.

*1 Witkin Cal. Evid. Intro § 76*

[§ 76] Discovery Right Judicially Established.

(1) *Principle Declared.* In *Shively v. Stewart* (1966) 65 C.2d 475, 55 C.R. 217, 421 P.2d 65, petitioners, licensed physicians, were accused by the State Board of Medical Examiners of performing illegal abortions. They filed notices of defense and requested hearings. Then, a month before the scheduled hearing date, they requested subpoenas duces tecum to obtain (a) statements taken from the named women and their husbands; (b) copies of petitioners' bills, letters, and documents with respect to the treatment; and (c) all reports and documents gathered by the board's employees and investigators. Because former Govt.C. 11510 (see *infra*, §80) had been regarded as authorizing use of subpoenas duces tecum only to obtain evidence for the hearing, and they were sought here for the distinct purpose of discovery, the hearing officer refused to sign them. *Held*, mandamus granted to compel their issuance.

(a) *Necessity for judicial action.* In several situations, statutory administrative procedures have been augmented with common law rules when necessary to promote fair hearings and effective judicial review. The decisions illustrate Davis' observation that adequacy of administrative hearings "is mostly judge-made law," and that "the standards are essentially the same whether judges are giving content to due process, whether they are giving meaning to inexplicit statutory provisions, or whether they are developing a kind of common law." (65 C.2d 479.)

(b) *Analogy of criminal discovery.* Discovery in criminal cases was established by judicial decision as a necessary right of the accused (see 5 Cal. Crim. Law (3d), *Criminal Trial*, §39), and the analogy is appropriate here: The governmental agency has the resources of the state to obtain information, the disciplinary proceeding is punitive in nature, and the agency both accuses and decides the case; this concentration of functions calls for procedural safeguards. (65 C.2d 479.)

(c) *Additional policy reason.* It is important that full preparation before the hearing be facilitated, in order to avoid needless continuances. (65 C.2d 480.)

(d) *Review of denial by mandamus.* The objection that refusal of the subpoena was an interlocutory decision and not reviewable until administrative remedies were exhausted is untenable: There is no administrative remedy for erroneous denial of a subpoena before the hearing. And if, as here held, petitioners had a right to discovery, issuance of the subpoenas duces tecum was a ministerial act of the hearing officer that could be compelled by mandamus. (65 C.2d 480.)

(e) *Scope of subpoenas.* The papers sought were within the scope of proper discovery, with the exception of the overbroad demand for reports of board employees and investigators. The proper procedure was to take the deposition of



the board's attorney and executive secretary, to determine whether there was "good cause" to produce documents neither privileged nor protected as a work product. (65 C.2d 482.)

The court made it clear that the liberal test for inspection under *C.C.P. 2031*, and not the restrictive requirements of *C.C.P. 1985*, should govern:

"It is not necessary that the items be admissible in evidence to compel their production. When the agency's subpoena power is invoked to secure discovery, the good cause and materiality requirements of *Code of Civil Procedure section 1985* must be governed by discovery standards." (65 C.2d 481.) (See 55 Cal. L. Rev. 1068; 7 U.S.F. L. Rev. 318.)

(2) *Criminal Law Limitations Applied*. The analogy of criminal discovery was applied to limit the scope of discovery in *Everett v. Gordon* (1968) 266 C.A.2d 667, 72 C.R. 379. Petitioners, real estate brokers, were accused of misconduct in the sale of property owned by Mrs. B. They sought mandamus to compel the superior court to order prehearing depositions of Mrs. B and Mrs. T, her daughter, who had participated in the transaction, and to permit unspecified interrogatories to the Real Estate Commissioner. *Held*, the writ was properly denied.

(a) A criminal defendant is not entitled to take the deposition of a potential prosecution witness for discovery purposes. (266 C.A.2d 671, citing the text.) Hence, as to Mrs. B and Mrs. T, petitioners had only the right to compel inspection of statements.

(b) A criminal defendant must show better cause for interrogatories than a mere desire for information obtained by the prosecution in its investigation (see 5 Cal. Crim. Law (3d), *Criminal Trial*, §82). Hence, the showing of petitioners, which set forth no particular interrogatories, was insufficient. (266 C.A.2d 672.) They may, however, under *Shively*, *supra*, on a proper showing take the deposition of an executive employee of the administrative agency to determine whether the employee possesses any unprivileged documents that they are entitled to inspect. (266 C.A.2d 672.) (On Proposition 115, establishing a comprehensive discovery scheme for criminal trials, see 5 Cal. Crim. Law (3d), *Criminal Trial*, §27 et seq.)

(3) *Due Process Test Applied*. Denial of discovery was also held proper in *Mohilef v. Janovici* (1996) 51 C.A.4th 267, 58 C.R.2d 721, a nuisance abatement proceeding by a city seeking to terminate the bird farming activities of two property owners on their ranch within the city's boundaries. The court pointed out that there is no basic constitutional right to pretrial discovery in administrative proceedings, and that the extent of discovery allowed is primarily a matter to be determined by the particular agency involved. However, discovery must sometimes be permitted even when it is not provided for by statute or regulation. The question is whether a denial of discovery "would so prejudice a party as to deny him due process." (51 C.A.4th 302, citing and quoting federal case law.) In this case, the denial of prehearing discovery did not result in an unfair hearing, nor did it prejudice defendants' case. In light of the scientific data already collected by defendants, the requested discovery would not have affected the eventual outcome of the hearing. (51 C.A.4th 302, 303.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Principle Declared*. *C.C.P. 2031*, on inspection demands, was repealed and replaced by *C.C.P. 2031.010* et seq. in 2004 without substantive change. (3) *Due Process Test Applied*. In *Cimarusti v. Superior Court* (2000) 79 C.A.4th 799, 94 C.R.2d 336, Youth Authority correctional officers who were the subject of discipline for allegedly engaging in, or failing to stop or report, the use of unauthorized physical force sought disclosure of the files of certain wards and an opportunity to interview the wards. An administrative law judge denied their requests, and the denial was upheld in the officers' petition for writ relief. *Held*, denial of the requests was proper. Under Welf.C. 827, the juvenile court has exclusive authority to determine the extent to which juvenile court records may be disclosed. (79 C.A.4th 803, 804.) On remand to the trial court, the petition to compel discovery should be assigned to a juvenile court judge. If the judge determines that the records sought are juvenile court records within the meaning of Welf.C. 827, the judge must exercise his or her discretion by considering the best interests of the wards and balancing their interests in

confidentiality against the officers' interests and needs for disclosure. (79 C.A.4th 805, 806.) As to the requests for interviews, generally there is no due process right to prehearing discovery in administrative hearing cases, and particularly no constitutional right to take depositions. The officers have been provided with the wards' statements. At the hearing, the officers can call and examine witnesses, and rebut evidence. "The statutory prehearing discovery and hearing procedures are sufficient to satisfy petitioners' due process rights." (79 C.A.4th 808, 809.) (See *California Teachers Assn. v. California Com. on Teacher Credentialing* (2003) 111 C.A.4th 1001, 1012, 4 C.R.3d 369 [in investigation of misconduct by credentialed teacher, teacher was entitled only to prehearing discovery allowed by *Educ.C. 44244*; due process did not require more].)



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10. Discovery and Production of Evidence.

c. Discovery Under Administrative Procedure Act.

1. In General.

*1 Witkin Cal. Evid. Intro § 77*

[§ 77] In General.

In 1968, the Legislature responded to *Shively v. Stewart* (1966) 65 C.2d 475, 55 C.R. 217, 421 P.2d 65, supra, §76, by additions and amendments to the Administrative Procedure Act. There were two main changes affecting discovery:

First, it was specified that subpoenas duces tecum are to be used to compel the production of documents *at the hearing*. (Former Govt.C. 11510, replaced in 1997 by *Govt.C. 11450.05* et seq.; see infra, §80.)

Second, an *exclusive* procedure was established for *pretrial discovery* in adjudicatory hearings. (*Govt.C. 11507.5* et seq., infra, §78 et seq.; see C.J.E.R., Judges Benchbook, Discovery, §18.12 et seq.; 10 Santa Clara Lawyer 274; 7 U.S.F. L. Rev. 306.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### 2. Procedure.

*1 Witkin Cal. Evid. Intro § 78*

[§ 78] Procedure.

(1) *Notice of Right of Discovery*. Copies of the discovery statutes (*Govt.C. 11507.5, 11507.6, 11507.7*) must be served with an accusation made under *Govt.C. 11503* or a statement of issues filed under *Govt.C. 11504*, and the respondent must be informed of the appropriate person in the agency to contact for discoverable material. (*Govt.C. 11504, 11505*.)

(2) *Type of Proceeding*. Discovery may be sought after initiation of any proceeding "in which a respondent or other party is entitled to a hearing on the merits." (*Govt.C. 11507.6*.)

(3) *Request for Discovery*. A written request may be made to another party prior to the administrative hearing and within 30 days after the agency serves the initial pleading or within 15 days after service of an additional pleading. (*Govt.C. 11507.6*.) There is no requirement of a showing of good cause. (See *Romero v. Hern* (1969) 276 C.A.2d 787, 793, 81 C.R. 281 [main difference between *Govt.C. 11507.6* and *Shively v. Stewart* (1966) 65 C.2d 475, 55 C.R. 217, 421 P.2d 65, *supra*, §76, is that the former "eliminates the requirement of showing good cause for obtaining the information required by the section to be disclosed, while under the *Shively* rule, as to some of the information, good cause to receive it must be shown"].)

(4) *Scope of Discovery*. The party is entitled to obtain the names and addresses of all known witnesses, "including, but not limited to, those intended to be called to testify at the hearing." (*Govt.C. 11507.6*.) The party may also inspect and copy certain enumerated documents in the "possession or custody or under the control" of the other party. (See *Govt.C. 11507.6*.) Documents other than those enumerated in the statute must be relevant and admissible in evidence. (*Govt.C. 11507.6(e)*.)

A document "which is privileged from disclosure by law or otherwise made confidential or protected as the attorney's work product" may not be inspected or copied. (*Govt.C. 11507.6*.) (See 8 *Hastings Const. L. Q.* 645 [argument that limited administrative discovery provisions deprive accused in license revocation proceedings of due process].)

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#### 3. Proceedings To Compel Discovery.

*1 Witkin Cal. Evid. Intro § 79*

[§ 79] Proceedings To Compel Discovery.

(1) *Motion*. Under *Govt.C. 11507.7(a)*, a party claiming that its request for discovery has not been complied with may serve and file with the administrative law judge a motion to compel discovery. The motion must include:

(a) A statement of facts showing that the respondent failed or refused to comply with *Govt.C. 11507.6*.

(b) A description of the matters sought to be discovered.

(c) The reason or reasons why the matter is discoverable under *Govt.C. 11507.6*.

(d) A statement that a reasonable and good faith attempt to contact the respondent for an informal resolution of the issue has been made.

(e) The ground or grounds of the respondent's refusal so far as is known to the moving party.

(2) *Service and Filing*. The motion must be served upon the respondent and filed (a) within 15 days after the respondent first evidenced failure or refusal to comply with *Govt.C. 11507.6*, or (b) within 30 days after request was made, where the respondent has failed to reply to the request, or (c) within another time provided by stipulation, whichever period is longer. (*Govt.C. 11507.7(b)*.)

(3) *Hearing*. The hearing on the motion must be held within 15 days after the motion is made, "or a later time that the administrative law judge may on the judge's own motion for good cause determine." The respondent has the right to serve and file a written answer or other response to the motion before or at the time of the hearing. (*Govt.C. 11507.7(c)*.)

(4) *Determination of Discoverability*. Where the matter sought to be discovered is under the custody and control of the respondent and the respondent asserts that the matter is not discoverable under *Govt.C. 11507.6* or is privileged from disclosure under that statute, the administrative law judge may order lodged with him or her matters provided in *Ev.C. 915(b)* (see 2 *Cal. Evidence (4th)*, *Witnesses*, §88) and examine the matters in accordance with that statute's provisions. (*Govt.C. 11507.7(d)*.)

(5) *Basis of Decision*. The judge must decide the case on the basis of the matters examined in camera, the papers

filed by the parties, and "such oral argument and additional evidence as the administrative law judge may allow." (*Govt.C. 11507.7(e)*.)

(6) *Order*. Except as otherwise stipulated by the parties, the judge must make a written order denying or granting the motion no later than 15 days after the hearing, and serve a copy of the order by mail on the parties. The order must set forth the matters the moving party is entitled to discover under *Govt.C. 11507.6*. Where the motion is granted in whole or in part, the order becomes effective 10 days after the order is served. Where the order denies relief, it is effective on the date it is served. (*Govt.C. 11507.7(f)*.)

(7) *Sanctions*. *Govt.C. 11455.10* authorizes the imposition of contempt sanctions on the basis of "[f]ailure or refusal, without substantial justification, to comply with a deposition order, discovery request, subpoena, or other order of the presiding officer, or moving, without substantial justification, to compel discovery." (*Govt.C. 11455.10(e)*.) Additionally, the presiding officer may order a party, the party's attorney or other authorized representative, or both, to pay reasonable expenses, including attorneys' fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay as defined in *C.C.P. 128.5* (7 *Cal. Proc.* (4th), *Trial*, §§239, 240). That order is enforceable in the same manner as a money judgment or by contempt sanction. (*Govt.C. 11455.30*.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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##### d. Subpena or Subpena Duces Tecum.

*1 Witkin Cal. Evid. Intro § 80*

[§ 80] Subpena or Subpena Duces Tecum.

The use of subpoenas duces tecum in administrative proceedings was formerly covered by *Govt.C. 11510*, which specified that the subpoenas were to be used only for "production of documents at the hearing." (See *Gilbert v. Superior Court* (1987) 193 C.A.3d 161, 166, 167, 238 C.R. 220 [license revocation proceeding; *Govt.C. 11510* could not be used by community care facility to compel regional centers to produce patient records for inspection and copying at centers' place of business 21 days before hearing].) (On the general law governing production of papers by administrative subpoena, see 20 *So. Cal. L. Rev.* 66; 50 *Cal. L. Rev.* 532; 75 *Harv. L. Rev.* 1222; C.E.B., *Workers' Compensation Practice* 3d, §8.12 et seq.; on subpoena in aid of investigation, see 2 *Am.Jur.2d* (1994 ed.), *Administrative Law* §130 et seq.; 9 *Cal. Proc.* (4th), *Administrative Proceedings*, §86.)

Former *Govt.C. 11510* was replaced by *Govt.C. 11450.05* et seq., which became effective July 1, 1997. The new statute, governing the use of both subpoenas and subpoenas duces tecum in adjudicative proceedings under the Administrative Procedure Act, establishes the following procedures:

(1) *Issuance of Subpena or Subpena Duces Tecum.* Subpoenas or subpoenas duces tecum "may be issued for attendance at a hearing and for production of documents at any reasonable time and place or at a hearing." (*Govt.C. 11450.10(a)*.) They must be issued by the agency or presiding officer at the request of a party, or by the attorney of record for a party, in accordance with *C.C.P. 1985* et seq. (*Govt.C. 11450.20(a)*.)

(2) *Satisfaction of Subpena Duces Tecum.* The custodian of documents subject to a subpoena duces tecum may satisfy the subpoena by delivering the documents or a copy of them, or by making the documents available for inspection or copying, together with an affidavit complying with *Ev.C. 1561* (see 2 *Cal. Evidence* (4th), *Documentary Evidence*, §51). (*Govt.C. 11450.10(b)*.)

(3) *Service.* Process extends to all parts of the state, and service must be carried out in accordance with *C.C.P. 1987* and 1988. (See 2 *Cal. Evidence* (4th), *Witnesses*, §26.) The subpoena or subpoena duces tecum may also be delivered "by certified mail return receipt requested or by messenger." Service by messenger is effected when the witness acknowledges receipt of the subpoena to the sender by telephone, mail, or in person, and identifies himself or herself either by reference to date of birth and driver's license number or Department of Motor Vehicles identification number. Alternatively, the sender may verify receipt of the subpoena by obtaining other identifying information from the recipient. The sender must make a written notation of the acknowledgment. (*Govt.C. 11450.20(b)*.)

A subpoena issued and acknowledged in accordance with *Govt.C. 11450.20(b)* has the same force and effect as a subpoena personally served. (*Govt.C. 11450.20(b)*.) However, no witness is obliged to attend unless the witness is a resident of California at the time of service. (*Govt.C. 11450.20(c)*.)

(4) *Where Service Not Required.* "In the case of the production of a party to the record of a proceeding or of a person for whose benefit a proceeding is prosecuted or defended," service of the subpoena on the witness is not required if, instead, written notice requesting the witness' attendance and stating the time and place of the hearing is served on the attorney of the party or person. Service of the notice to attend must be made in compliance with *C.C.P. 1987*. (*Govt.C. 11450.50*.)

(5) *Failure To Comply and Continuance.* Failure to comply with a duly issued and acknowledged subpoena may be punished as a contempt, and the subpoena may so state. When a party requests a continuance because of a witness' failure to appear at the time and place required for appearance or testimony by a subpoena, the party must prove compliance with the service requirements. The continuance may be granted only "for a period of time that would allow personal service of the subpoena and in no event longer than that allowed by law." (*Govt.C. 11450.20(b)*.)

(6) *Motion for Protective Order.* The person served may object to the terms of the subpoena or subpoena duces tecum "by a motion for a protective order, including a motion to quash." The objection must be resolved by the presiding officer, who "may make another order that is appropriate to protect the parties or the witness from unreasonable or oppressive demands, including violations of the right to privacy." A subpoena or subpoena duces tecum issued by the agency on its own motion may be quashed by the agency. (*Govt.C. 11450.30*.)

(7) *Compensation.* A witness other than a party is entitled to receive the same mileage and fees as allowed by law to a witness in a civil case. The fees allowance, however, does not apply to an officer or employee of the state or a political subdivision of the state. The compensation must be paid by the party who requested the subpoena. (*Govt.C. 11450.40*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 2 *Am.Jur.2d* (2004 ed.), *Administrative Law* §111 et seq. *West's Key Number Digest*, Administrative Law and Procedure k.464, 465





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##### e. Depositions.

#### 1 Witkin Cal. Evid. Intro § 81

[§ 81] Depositions.

(1) *Administrative Procedure Act. Govt.C. 11511* makes provision for taking of depositions in the manner prescribed for civil actions, and calls for an order requiring the witness to appear before "an officer named in the petition." (See *Reimel v. House* (1969) 268 C.A.2d 780, 786, 74 C.R. 345 [taking of deposition before notary other than one named in petition held inconsequential irregularity].)

For depositions sought under *Govt.C. 11511*, the agency does not have to issue subpoenas until the petitioner has made an adequate showing by verified petition. (*Stevenson v. State Bd. of Med. Examiners* (1970) 10 C.A.3d 433, 440, 88 C.R. 815.)

In *Stevenson*, *supra*, the court commented on the relationship between *Shively v. Stewart* (1966) 65 C.2d 475, 55 C.R. 217, 421 P.2d 65, *supra*, §76, and the amendments to the Administrative Procedure Act (*supra*, §77) as follows:

(a) When *Shively* mentioned a ministerial duty to issue subpoenas, the court was referring to *former Govt.C. 11510(a)*. (10 C.A.3d 439.)

(b) The depositions authorized by *Shively* were of a limited nature, i.e., only of the administrative agency's executive employees. Prehearing depositions of alleged material witnesses other than these employees were not authorized. (10 C.A.3d 439.)

(c) The reference in *Shively* to "prehearing discovery" was limited to the production of evidentiary material in the possession or under the control of the deponent. General discovery was not approved. (10 C.A.3d 439.)

(d) *Govt.C. 11511* requires a showing by verified petition and speaks of an agency order; this "indicates the agency must itself assess the sufficiency of the applicant's showing, rather than suggesting that the agency must issue the subpoena and order the deposition regardless of that showing." (10 C.A.3d 439.)

(2) *Other Statutes*. Other statutes make express provision for depositions in particular situations. (See, e.g., *Lab.C. 5710* [Workers' Compensation Appeals Board; "in the manner prescribed by law for like depositions in civil actions"]; *Pub.Util.C. 1794* [similar]; *B. & P.C. 6052* [State Bar Board of Governors or Local Administrative Committee (now replaced by State Bar Court and its departments; see 1 Cal. Proc. (4th), *Attorneys*, §§625 et seq., 650); as provided in State Bar Rules of Procedure]; see also C.E.B., *Workers' Compensation Practice* 3d, §§7.7, 7.45; 2 Cal. Evidence (4th),

*Discovery*, §29 et seq.)

(3) *Due Process Concerns*. In *Blinder, Robinson & Co. v. Tom* (1986) 181 C.A.3d 283, 226 C.R. 339, plaintiff sought mandamus in the superior court to compel defendant Commissioner of Corporations to commence proceedings to enable plaintiff to take out-of-state depositions for introduction in an administrative proceeding by the Commissioner to revoke plaintiff's broker-dealer license. The superior court judge denied the petition and the Court of Appeal affirmed, holding that the Commissioner did not abuse his discretion in denying the request. The court also rejected a due process attack on the procedure of *Govt.C. 11511*, observing that the procedure had been upheld by decisions in California and elsewhere. (181 C.A.3d 290.) But the opinion adds the following comment:

"What troubles us about *Government Code section 11511*, and its application in this case is not merely the combination of investigatory, accusatory and adjudicative functions in one person. It is, rather, the additional power of that same person to make the decision denying the accused the right to produce evidence at the hearing. This is accomplished by effectively denying the accused the right to take depositions without affording it the right to a review of that denial by a neutral or impartial person at any early and meaningful stage of the administrative proceedings before the burden of proof has shifted to the accused." (181 C.A.3d 295.)

However, the court agreed with defendant Commissioner that superior court review of the administrative refusal satisfied due process. (181 C.A.3d 297.)

(4) *Equal Protection Concerns*. In *Kenneally v. Medical Bd.* (1994) 27 C.A.4th 489, 32 C.R.2d 504, a physician subject to a disciplinary hearing by the Medical Board of California filed a complaint for declaratory and injunctive relief, claiming that *Govt.C. 11511* denied him equal protection of the laws. He pointed out that lawyers facing license revocation proceedings may take preadministrative hearing depositions, while *Govt.C. 11511* denied him this right. The trial judge issued a preliminary injunction staying the hearing until plaintiff had an opportunity to take the depositions at issue. *Held*, reversed.

(a) Neither plaintiff, nor licensed physicians in general, belong to a suspect class, and plaintiff's right to continue to practice was not a fundamental right for equal protection purposes. Thus, to meet the physician's equal protection challenge, the statute only needed to pass the rational basis test. (27 C.A.4th 496, 498.)

(b) The restrictions on the use of depositions help prevent delay and reduce the overall cost of disciplinary proceedings for all parties. The legal profession's historical position--and especially the fact that its regulatory system is controlled by the Supreme Court--make it unlike other professions. And physicians have a greater and more immediate impact on the health and life of those they serve than do attorneys. For this reason, delay reduction in physician disciplinary proceedings is more imperative than in attorney disciplinary proceedings. The need to avoid delay and reduce costs provides a rational basis for restricting a physician's prehearing discovery rights. (27 C.A.4th 500, 501.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
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#### f. Interrogatories.

#### *1 Witkin Cal. Evid. Intro § 82*

[§ 82] Interrogatories.

Interrogatories are not mentioned in *Shively v. Stewart* (1966) 65 C.2d 475, 55 C.R. 217, 421 P.2d 65, supra, §76, *Everett v. Gordon* (1968) 266 C.A.2d 667, 72 C.R. 379, supra, §76, or *Govt.C. 11507.6*, supra, §77. However, where depositions can be used for administrative discovery, there is no logical objection to use of interrogatories for the production of evidentiary material that is in the possession or under the control of a party. (*Romero v. Hern* (1969) 276 C.A.2d 787, 793, 81 C.R. 281.)

*Romero* points out that *Govt.C. 11507.6* provides for *written requests*, and indicates that no difference should result because the information was sought through "interrogatories" rather than "requests." (276 C.A.2d 794.) No requirement exists, however, that the answers be given under oath. (276 C.A.2d 793.)

*Govt.C. 12963.2* authorizes the Department of Fair Employment and Housing to serve interrogatories after a complaint for employment or housing discrimination is filed with it. (See 8 *Summary* (9th), *Constitutional Law*, §767.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Cross-Reference:* 8 *Summary* (10th), *Constitutional Law*, §948.



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#### 11. Introduction of Evidence.

##### a. In General.

*1 Witkin Cal. Evid. Intro § 83*

[§ 83] In General.

There is little California case law on the "trial practice" aspect of administrative proceedings, except for the emphasis on the right to present evidence (*supra*, §54) and the right to cross-examine (*infra*, §84) and rebut (*infra*, §85). The following may be consulted on this subject:

(1) *Hearing Officers*. (See 9 *Cal. Proc. (4th)*, *Administrative Proceedings*, §45; 2 *Am.Jur.2d* (1994 *ed.*), *Administrative Law* §308; C.E.B., *Administrative Hearing Practice* 2d, §6.2 et seq.)

(2) *Confrontation of Witnesses and No Evidence Obtained Secretly by Agency*. (See 2 *Am.Jur.2d* (1994 *ed.*), *Administrative Law* §§302, 351, 355 et seq.; C.E.B., *Administrative Hearing Practice* 2d, §§7.15 et seq., 7.63 et seq.; on propriety of telephone testimony or hearings, see *C & C Partners, Ltd. v. Department of Industrial Relations* (1999) 70 *C.A.4th* 603, 611, 82 *C.R.2d* 783 [penalty proceeding against garment manufacturer for operating without registration certificate]; 88 *A.L.R.4th* 1094 [public welfare proceedings]; 90 *A.L.R.4th* 532 [unemployment compensation proceedings]; 9 *A.L.R.5th* 451 [prison proceedings].)

(3) *Testimony Under Oath*. Some statutes expressly require that testimony be taken under oath, and this is the usual practice. (See *Govt.C. 11513(a)* [Administrative Procedure Act: "Oral evidence shall be taken only on oath or affirmation"]; *Govt.C. 11528* [any agency member, secretary, or hearing officer has power to administer oath]; *Marlow v. Orange County Human Services Agency* (1980) 110 *C.A.3d* 290, 293, 167 *C.R.* 776; cf. *Tennant v. Civil Service Com. of Los Angeles* (1946) 77 *C.A.2d* 489, 498, 175 *P.2d* 568 [no oath given but defect waived by failure to object]; and see generally 2 *Am.Jur.2d* (1994 *ed.*), *Administrative Law* §344; C.E.B., *Administrative Hearing Practice* 2d, §7.102.)

(4) *Introduction of Evidence*. (See *Govt.C. 11425.10(a)* [person to whom agency action is directed has right to present and rebut evidence]; 2 *Am.Jur.2d* (1994 *ed.*), *Administrative Law* §§302, 338 et seq.; on objections, see C.E.B., *Administrative Hearing Practice* 2d, §§7.73, 7.81, 7.96; *Board of Trustees of the Contra Costa Junior College Dist. v. Schuyten* (1958) 161 *C.A.2d* 50, 54, 326 *P.2d* 223 [improper omnibus or compound question]; on impeachment of witness for bias, see *Byrd v. Savage* (1963) 219 *C.A.2d* 396, 401, 32 *C.R.* 881; C.E.B., *Administrative Hearing Practice* 2d, §7.108; on suggested use of mathematical tools known as "regression models," see 86 *Harv. L. Rev.* 1442.)

The workers' compensation hearing is fully discussed in the Continuing Education handbook. (See C.E.B., *Workers' Compensation Practice* 3d, §§8.1 et seq., 8.40, 8.41 [use of photographs, motion pictures, and diagrams].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Hearing Officers*. See 2 *Am.Jur.2d* (2004 ed.), *Administrative Law* §311 et seq.

(2) *Confrontation of Witnesses and No Evidence Obtained Secretly by Agency*. See 2 *Am.Jur.2d* (2004 ed.), *Administrative Law* §§305, 351 et seq.(4) *Introduction of Evidence*. On chain of custody requirement, see *Edgerton v. State Personnel Bd.* (2000) 83 C.A.4th 1350, 1357, 1358, 100 C.R.2d 491.*West's Key Number Digest*, Administrative Law and Procedure k.476, 477



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## b. Cross-Examination.

*1 Witkin Cal. Evid. Intro § 84*

[§ 84] Cross-Examination.

(1) *General Principle: No Denial of Right.* The right to cross-examine witnesses in quasi-judicial administrative proceedings is considered as fundamental an element of due process as it is in court trials. Hence, the denial or substantial curtailment of the right will be grounds for annulment of the agency action. (See *Pacific Employers Ins. Co. v. Industrial Acc. Com.* (1941) 47 C.A.2d 713, 715, 118 P.2d 848; *Massachusetts Bonding & Ins. Co. v. Industrial Acc. Com.* (1946) 74 C.A.2d 911, 913, 170 P.2d 36, supra, §71; *Langendorf United Bakeries v. Industrial Acc. Com.* (1948) 87 C.A.2d 103, 104, 195 P.2d 887; and see generally 2 *Am.Jur.2d* (1994 ed.), *Administrative Law* §355; Model State Administrative Procedure Act (1981) §4-211, 15 U.L.A. (Master Ed.), p. 85.)

In *Greene v. McElroy* (1959) 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377, the Government revoked the security clearance of petitioner, an engineer employed by a private manufacturer of military products. The Court held that, irrespective of constitutional due process, neither Congress nor the President had authorized the administrative agency to act without affording petitioner the safeguards of confrontation and cross-examination. The opinion quotes Wigmore, and restates the court's own position that the traditional rights of confrontation and cross-examination have been protected not only in criminal trials "but also in all types of cases where administrative and regulatory action were under scrutiny." (79 S.Ct. 1414, 3 L.Ed.2d 1391.) The security procedure was criticized as follows: "[N]ot only is the testimony of absent witnesses allowed to stand without the probing questions of the person under attack which often uncover inconsistencies, lapses of recollection, and bias, but, in addition, even the members of the clearance boards do not see the informants or know their identities, but normally rely on an investigator's summary report of what the informant said without even examining the investigator personally." (79 S.Ct. 1415, 3 L.Ed.2d 1391.) (See 73 *Harv. L. Rev.* 196; 75 *Harv. L. Rev.* 434 [new Defense Department regulation providing for limited confrontation].)

The right is recognized by the Administrative Procedure Act, but its method and scope are liberalized: Each party has the right "to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination; to impeach any witness regardless of which party first called him or her to testify." (*Govt.C. 11513(b)*.) This statute rejects the court trial limitation of cross-examination to the scope of the direct examination (3 *Cal. Evidence* (4th), *Presentation at Trial*, §231 et seq.), and removes the old restrictions on impeachment of a party's own witness (now also abolished by the Evidence Code, 3 *Cal. Evidence* (4th), *Presentation at Trial*, §356).

(2) *Distinction: Informal Proceedings.* *Govt.C. 11445.50(b)* provides that an agency may specify by regulation the categories of cases in which cross-examination is not deemed necessary under the informal hearing procedures of the

Administrative Procedure Act (*supra*, §52). However, the presiding officer "may allow cross-examination of witnesses in an informal hearing notwithstanding an agency regulation if it appears to the presiding officer that in the circumstances cross-examination is necessary for proper determination of the matter."

(3) *Cross-Examination of Respondent*. *Govt.C. 11513(b)*, *supra*, further states: "*If respondent does not testify in his or her own behalf* he or she may be called and examined as if under cross-examination." This provision was obviously designed to incorporate the practice of examining an adverse party as if under cross-examination (*3 Cal. Evidence (4th), Presentation at Trial*, §202 et seq.). But its peculiar introductory words (italicized, *supra*) raise a problem of interpretation not yet resolved: May the respondent be called by the agency *at any time*, or *only after the agency has presented a prima facie case*, at which time it first becomes necessary for the respondent to testify or refuse to testify "in his or her own behalf"? (See *44 Cal. L. Rev. 400*; for dictum that agency must first present a prima facie case, see *O'Mara v. State Bd. of Pharmacy (1966) 246 C.A.2d 8, 12, 54 C.R. 862* ["board under [*Govt.C. 11513(b)*] was required to rest its case temporarily to allow appellant to exercise his right to testify before they might call him as their own witness"]; see also C.E.B., *Administrative Hearing Practice* 2d, §7.113.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *General Principle: No Denial of Right*. See *2 Am.Jur.2d (2004 ed.)*, *Administrative Law* §351 et seq.



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CHAPTER I - Introduction

IX. EVIDENCE IN ADMINISTRATIVE PROCEEDINGS

E. Particular Problems.

11. Introduction of Evidence.

c. Rebuttal.

*1 Witkin Cal. Evid. Intro § 85*

[§ 85] Rebuttal.

The right to offer evidence in rebuttal is as fundamental as the right of cross-examination (*supra*, §84), and is expressly stated in *Govt.C. 11513(b)*. (See also *Govt.C. 11425.10(a)* [hearing rights include opportunity to rebut evidence]; *Lab.C. 5704* [workers' compensation proceedings]; *2 Am.Jur.2d (1994 ed.)*, *Administrative Law* §§302, 355 et seq.)

*Pence v. Industrial Acc. Com. (1965) 63 C.2d 48, 50, 45 C.R. 12, 403 P.2d 140*, characterizes "improper restrictions on the right to present evidence in rebuttal" as a denial of constitutional due process.

**SUPPLEMENT:** [This section is current through the latest supplement]  
See *2 Am.Jur.2d (2004 ed.)*, *Administrative Law* §§305, 351 et seq.





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## CHAPTER I - Introduction

## IX. EVIDENCE IN ADMINISTRATIVE PROCEEDINGS

## E. Particular Problems.

## 12. Preservation of Evidence.

*1 Witkin Cal. Evid. Intro § 86*

[§ 86] Preservation of Evidence.

In *Scott v. Meese* (1985) 174 C.A.3d 249, 219 C.R. 857, plaintiff, who had been arrested for driving under the influence of intoxicating liquor, petitioned for mandamus to prevent defendant Department of Motor Vehicles from suspending his license under *Veh.C. 13353* (the implied consent law). The only issues at the administrative hearing were whether plaintiff had refused to complete a chemical test after being requested to do so, and whether he had been informed that a refusal would result in license suspension. The hearing officer refused to strike the arresting officer's testimony concerning plaintiff's failure to complete the required test, even though a tape recording of the officer's admonitions and plaintiff's response had been inadvertently erased. The trial court denied plaintiff's petition. *Held*, affirmed.

(a) *Duty to preserve evidence.* "[T]he core duty to preserve constitutionally material evidence under the due process clause of the Fourteenth Amendment," imposed on the prosecution in a criminal case by *People v. Hitch* (1974) 12 C.3d 641, 117 C.R. 9, 527 P.2d 361, 3 Cal. Evidence (4th), *Presentation at Trial*, §124, and *California v. Trombetta* (1984) 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413, 3 Cal. Evidence (4th), *Presentation at Trial*, §125, also applies to administrative hearings. (174 C.A.3d 257.)

(b) *Sanctions.* Assuming that the erased tape recording was constitutionally material, and that comparable evidence (such as a neutral third party overhearing the conversation and recalling it precisely) was not obtainable, the dismissal of the administrative proceeding, or the exclusion of the officer's testimony, would be inappropriate:

(1) There was no conscious effort to suppress exculpatory evidence. Rather, the tape was erased when the arresting officer's partner unknowingly used the same tape to record another suspect's refusal to submit to testing. (174 C.A.3d 258.)

(2) Both plaintiff and the officer could testify and be cross-examined as to their conversation. Thus, the loss of the tape did not deprive plaintiff of his ability to present his defense, but simply placed him in the same position as a person charged with violating the implied consent law whose refusal is not recorded by the police. This is not to say that the officer had no duty to take reasonable steps to preserve the conversation once he decided to record it; however, the "windfall sanction" sought by plaintiff was "too drastic a remedy for the wrong." (174 C.A.3d 258.)

(3) Plaintiff had been advised of his right to take a blood or breath test in the event he was incapable of completing the urine test. The destroyed tape related only to whether he was later *readvised* of that right when he was unable to furnish a second specimen that was required 20 minutes after the first. (174 C.A.3d 259.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER II - Judicial Notice

### I. IN GENERAL

#### A. Nature of Power.

#### *1 Witkin Cal. Evid. Jud Notice § 1*

#### [§ 1] Nature of Power.

Under the doctrine of judicial notice, certain matters are assumed to be indisputably true, and the introduction of evidence to prove them will not be required. Judicial notice is thus a substitute for formal proof. (See generally *Ev.C.* 450 et seq.; *Del Bosque v. Singh* (1937) 19 C.A.2d 487, 489, 65 P.2d 951 [may be relied on to contradict other evidence and to support findings or judgment]; *Mann v. Mann* (1946) 76 C.A.2d 32, 42, 172 P.2d 369; *Post v. Prati* (1979) 90 C.A.3d 626, 633, 153 C.R. 511 [fundamental theory is that matter that is judicially noticed is one of law or fact that cannot reasonably be disputed]; 2 McCormick 5th, §328 et seq.; C.E.B., Effective Introduction of Evidence 2d, Chap. 31; 9 Wigmore (Chadbourn Rev.) §2565 et seq.; 2 Jefferson, California Evidence Benchbook 3d, Chap. 47; 29 *Am.Jur.2d* (1994 ed.), *Evidence* §24; 2 Wharton, *Crim. Evidence* (14th ed.), §204 et seq.; 57 *Harv. L. Rev.* 269; 18 *Hastings L. J.* 117; on judicial notice in federal courts, see *F.R. Evid.*, *Rule 201*; 1 Mueller & Kirkpatrick, *Federal Evidence* 2d, §47 et seq.; on procedure, see *infra*, §36; on power of reviewing court, see *infra*, §45 et seq.)

The use of judicial notice as a substitute for formal proof of matters that cannot be successfully controverted is a highly desirable means of saving time and money. Nevertheless, relevance considerations remain applicable. Even material for which judicial notice might seem mandatory (see *infra*, §7 et seq.) may be excluded under *Ev.C.* 350 (only relevant evidence is admissible; see 1 *Cal. Evidence* (4th), *Circumstantial Evidence*, §6) and *Ev.C.* 352 (exclusion of evidence where prejudice outweighs probative value; see 1 *Cal. Evidence* (4th), *Circumstantial Evidence*, §17). (*Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 C.4th 1057, 1063, 31 C.R.2d 358, 875 P.2d 73; see *Mozzetti v. Brisbane* (1977) 67 C.A.3d 565, 578, 136 C.R. 751 [in action by property owners against city and city engineer for flood damage, trial judge properly denied, on relevance grounds, plaintiffs' request for judicial notice of proclamation declaring county a federal disaster area, as proclamation did not specifically refer to area where plaintiffs' property was located].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Shamrock Foods Co.* (2000) 24 C.4th 415, 422, footnote 2, 101 C.R.2d 200, 11 P.3d 956 [precondition to judicial notice in either its mandatory or permissive form is that matter to be noticed be relevant to material issue]; 60 *Proof of Facts* 3d 175 [proving matters by judicial notice]; 2 McCormick 6th, §328 et seq.; Simons, *Cal. Evidence Manual*, §7:1 et seq. *West's Key Number Digest*, Criminal Law k.304(1); *Evidence* k.1



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## CHAPTER II - Judicial Notice

### I. IN GENERAL

#### B. Judge's Knowledge Distinguished.

*1 Witkin Cal. Evid. Jud Notice § 2*

#### [§ 2] Judge's Knowledge Distinguished.

By consulting pertinent sources of information, including experts, a judge may take judicial notice of matters of which he or she has no knowledge. (*Ev.C. 454*, *infra*, §40; see *People v. Mayes* (1896) 113 C. 618, 626, 45 P. 860; *Allen v. Industrial Acc. Com.* (1935) 3 C.2d 214, 215, 43 P.2d 787; *People v. Bartlett* (1962) 199 C.A.2d 173, 177, 18 C.R. 480; cf. *People v. Archerd* (1970) 3 C.3d 615, 638, 91 C.R. 397, 477 P.2d 421, 3 Cal. Evidence (4th), *Presentation at Trial*, §15 ["we disapprove the action of the trial judge in consulting experts outside of court"].)

But the judge's personal knowledge of a matter is not a sufficient basis for taking judicial notice of it, if it is not already a proper subject of judicial notice as determined by statute or case law. (*Varcoe v. Lee* (1919) 180 C. 338, 344, 181 P. 223; *Estate of Fulcher* (1965) 234 C.A.2d 710, 719, 44 C.R. 861, citing the text; see *Ev.C. 450*, *infra*, §6; 2 McCormick 5th, §329; 57 *Harv. L. Rev.* 292.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 2 McCormick 6th, §329.



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## CHAPTER II - Judicial Notice

### I. IN GENERAL

#### C. Effect of Judicial Notice.

##### *1 Witkin Cal. Evid. Jud Notice § 3*

[§ 3] Effect of Judicial Notice.

(1) *Substitute for Proof*. Former C.C.P. 1827 classified judicial notice as a type of *evidence*. (See 1 *Cal. Evidence* (4th), *Introduction*, §18.) The classification was unsound, for the judge does not proceed in accordance with the rules of competency of witnesses and authentication of writings; moreover, the exclusionary rules (opinion rule, hearsay rule, Secondary Evidence Rule, etc.) are inapplicable. A more important distinction, however, is its conclusive effect (*infra*, this section). Judicial notice is, therefore, better described as a *substitute* for proof, "a judicial shortcut, a doing away with the formal necessity for evidence because there is no real necessity for it." (*Varcoe v. Lee* (1919) 180 C. 338, 344, 181 P. 223; see *Sosinsky v. Grant* (1992) 6 C.A.4th 1548, 1564, 8 C.R.2d 552, citing the text; 2 C.E.B., Civ. Proc. During Trial 3d, §14.2.)

(2) *Conclusive*. Despite the contrary suggestion by Wigmore (9 Wigmore (Chadbourn Rev.) §2567), the weight of authority is that, where notice is mandatory, the effect is substantially that of a *conclusive* presumption; i.e., the fact must be accepted and no evidence can be offered to dispute it. (See 9 Wigmore (Chadbourn Rev.) §2567a; 1 Jones 7th, §2; 57 *Harv. L. Rev.* 279; 59 *Harv. L. Rev.* 482.) Unif. Rule 201(g) follows this view. (See 13A (Part 1A) U.L.A. (Master Ed.), p. 195.) It is also the California view, as reflected in *Ev.C.* 457 (*infra*, §42). (See 2 C.E.B., Civ. Proc. During Trial 3d, §14.6; 2 Jefferson, California Evidence Benchbook 3d, §47.60; as to distinction between notice of genuineness and content of official document, and truth of facts recited in document, see *infra*, §19.)

(3) *Operation Against the Pleader*. It has long been established in California that allegations in a pleading contrary to judicially noticed facts will be ineffectual; i.e., judicial notice operates against the pleader. (See *Arnold v. Universal Oil Land Co.* (1941) 45 C.A.2d 522, 529, 114 P.2d 408; *Watson v. Los Altos School Dist.* (1957) 149 C.A.2d 768, 771, 308 P.2d 872; *Carroll v. Puritan Leasing Co.* (1978) 77 C.A.3d 481, 485, 143 C.R. 772; *Four Star Elec. v. F & H Const.* (1992) 7 C.A.4th 1375, 1379, 10 C.R.2d 1; 4 *Cal. Proc.* (4th), *Pleading*, §401; 5 *Cal. Proc.* (4th), *Pleading*, §901.)

Insofar as mandatory judicial notice is concerned, the Evidence Code raises no problem in this connection. But as to matters that require notice to the adverse party and furnishing of information to the judge (see *infra*, §36 et seq.), a demurring party must specify, in the demurrer or in the supporting points and authorities, the matter to be judicially noticed "except as the court may otherwise permit." (*C.C.P.* 430.70; see 2 C.E.B., Civ. Proc. Before Trial 3d, §30.10; 5 *Cal. Proc.* (4th), *Pleading*, §914.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Conclusive*. See 13A U.L.A. (Master Ed.), p. 20 [Unif. Rule 201(g)]. *West's Key Number Digest*, Evidence k.52



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## CHAPTER II - Judicial Notice

### I. IN GENERAL

#### D. Former Law and Evidence Code.

##### *1 Witkin Cal. Evid. Jud Notice § 4*

[§ 4] Former Law and Evidence Code.

The former judicial notice law--one provision in the Code of Civil Procedure, supplemented by scattered provisions in other codes--was unclear in scope and wholly inadequate in procedural implementation and safeguards. Moreover, in many areas where judicial notice was proper, it was not clear that notice was mandatory. (See Law Rev. Com. Comment to *Ev.C. 451*.) These statutes were replaced in 1965 by new Evidence Code provisions, generally following the approach of the original Uniform Rules in distinguishing between matters as to which judicial notice is *mandatory* and those as to which it is *optional* unless requested by a party who gives adequate notice and furnishes sufficient information to the judge. (See Law Rev. Com. Comment to *Ev.C.*, Div. 4; C.E.B., Trial Attorney's Evidence Code Notebook 3d, §450 et seq.; 18 *Hastings L. J.* 117; on current version of Unif. Rules, Rule 201, see 13A (Part 1A) U.L.A. (Master Ed.), p. 195 et seq.)

Division 4 of the Evidence Code is organized as follows:

(1) *Compulsory judicial notice*. As to certain matters, judicial notice "shall be taken," regardless of whether a party makes a request. (*Ev.C. 451*; see *infra*, §7 et seq.)

(2) *Optional judicial notice*. A much broader list includes matters as to which judicial notice "may be taken." (*Ev.C. 452*; see *infra*, §16 et seq.)

The two sections overlap in some respects, and when they do, *Ev.C. 451* prevails; i.e., notice is optional only to the extent that the matter is not embraced within *Ev.C. 451*. (*Ev.C. 452*, introductory sentence; see Law Rev. Com. Comment to Division 4.)

(3) *Optional becomes compulsory on request*. The judge must take notice of any matter listed in *Ev.C. 452* if a party requests it and complies with certain procedural conditions (notification and information). (*Ev.C. 453*; see *infra*, §36 et seq.)

(4) *Procedure*. The statutes specify the procedure for requesting that notice be taken and giving the adverse party notice of the request (*Ev.C. 453(a)*, *infra*, §37); presenting information relating to the matter to be noticed (*Ev.C. 453(b)*, *infra*, §38; *Ev.C. 455*, *infra*, §41); instructing the jury (*Ev.C. 457*, *infra*, §42); and advising the parties of any denial of a request for notice and making a record of the denial (*Ev.C. 456*, *infra*, §39).

Additional sections deal with the judge's sources of information (*Ev.C. 454*, *infra*, §40), notice in subsequent trial proceedings (*Ev.C. 458*, *infra*, §43) and notice in the reviewing court (*Ev.C. 459*, *infra*, §45 et seq.).

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 13A U.L.A. (Master Ed.), p. 20 [Unif. Rule 201].



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CHAPTER II - Judicial Notice

I. IN GENERAL

E. Federal Rules of Evidence.

*1 Witkin Cal. Evid. Jud Notice § 5*

[§ 5] Federal Rules of Evidence.

*Rule 201 of the Federal Rules of Evidence*, entitled "Judicial Notice of Adjudicative Facts," reads as follows:

"(a) *Scope of Rule*. This rule governs only judicial notice of adjudicative facts."

"(b) *Kinds of Facts*. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

"(c) *When Discretionary*. A court may take judicial notice, whether requested or not."

"(d) *When Mandatory*. A court shall take judicial notice if requested by a party and supplied with the necessary information."

"(e) *Opportunity to be Heard*. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken."

"(f) *Time of Taking Notice*. Judicial notice may be taken at any stage of the proceeding."

"(g) *Instructing Jury*. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed." (See 1 Mueller & Kirkpatrick, *Federal Evidence* 2d, §47 et seq.; 1 Jones 7th, §2:8; 150 A.L.R. Fed 543 [what constitutes adjudicative facts within meaning of *F.R. Evid.*, *Rule 201*].)

**SUPPLEMENT:** [This section is current through the latest supplement]





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## CHAPTER II - Judicial Notice

### I. IN GENERAL

#### F. Matters Authorized by "Law."

*1 Witkin Cal. Evid. Jud Notice § 6*

[§ 6] Matters Authorized by "Law."

(1) *In General.* Although the statutes in effect before the adoption of the current judicial notice provisions (see *supra*, §4) enumerated matters that were subject to notice, the courts did not regard this as a limitation and frequently took notice of other matters of common knowledge. (See *People v. Tossetti* (1930) 107 C.A. 7, 10, 289 P. 881; *South Shore Land Co. v. Petersen* (1964) 226 C.A.2d 725, 744, 38 C.R. 392, quoting the text.)

The current provisions restrict the authority of trial judges, but recognize the power of the higher courts to create and expand the categories. "Judicial notice may not be taken of any matter unless authorized or required by law." (*Ev.C.* 450; see 2 C.E.B., Civ. Proc. During Trial 3d, §14.6.) Because "law" includes "decisional law" (*Ev.C.* 160, 1 *Cal. Evidence* (4th), *Introduction*, §17), the matters specified in *Ev.C.* 451 and 452 are not inclusive.

(2) *"Legislative Facts."* In determining constitutionality or construing statutes, courts--particularly appellate courts--necessarily take notice of social and economic conditions and views of social policy relevant to the issue. This has been termed "judicial notice of legislative facts." (See *Pearson v. State Social Welfare Bd.* (1960) 54 C.2d 184, 189, 5 C.R. 553, 353 P.2d 33 [notice by Supreme Court of "the public policy of this state to establish and to maintain conformity between the state law and the requirements of the federal act for the receipt of grants-in-aid in support of the state public assistance program"]; *Robinson v. Sacramento City Unified School Dist.* (1966) 245 C.A.2d 278, 284, footnote 3, 53 C.R. 781, citing the text [notice of history of high school fraternities, in determining validity of statute prohibiting them as undemocratic]; 100 *Harv. L. Rev.* 1539; 2 McCormick 5th, §331; 1 Jones 7th, §2:4.) Neither the Model Code of Evidence nor the Uniform Rules of Evidence cover this subject, and the Evidence Code recognizes but makes no attempt to define or regulate the practice:

"Under the Evidence Code, as under existing law, courts may consider whatever materials are appropriate in construing statutes, determining constitutional issues, and formulating rules of law. That a court may consider legislative history, discussions by learned writers in treatises and law reviews, materials that contain controversial economic and social facts or findings or that indicate contemporary opinion, and similar materials is inherent in the requirement that it take judicial notice of the law. In many cases, the meaning and validity of statutes, the precise nature of a common law rule, or the correct interpretation of a constitutional provision can be determined only with the help of such extrinsic aids. ... Section 450 will neither broaden nor limit the extent to which a court may resort to extrinsic aids in determining the rules of law that it is required to notice." (Law Rev. Com. Comment to *Ev.C.* 450; on judicial notice of matters relating to legislative history, see *Schmidt v. Southern Calif. Rapid Transit Dist.* (1993) 14 C.A.4th 23, 30, footnote 10, 17 C.R.2d 340, 3 *Cal. Proc.* (4th), *Actions*, §629 [recommendations of Law Revision Commission as to limitations period for personal injury claim against public entity]; *Wolfe v. State Farm Fire & Cas. Ins. Co.* (1996) 46 C.A.4th 554, 560, 53 C.R.2d 878 [fact that insurers stopped writing new policies because of fear of being unable to pay

claims in event of earthquake was judicially noticeable as part of legislative history of statutes enacted to address issue of availability of earthquake insurance]; *Estate of Joseph* (1998) 17 C.4th 203, 210, footnote 1, 70 C.R.2d 619, 949 P.2d 472, 12 Summary (9th), *Wills and Probate, Supp.*, §152 [citing *Schmidt*; Law Revision Commission recommendations on provision allowing intestate's estate to pass to foster or stepchild, even though child was never adopted]; cf. *People v. Patterson* (1999) 72 C.A.4th 438, 443, 84 C.R.2d 870 [where meaning of controlled substances statute was at issue, judicial notice of legislative materials reflecting views of individual legislators, staffers, or other interested persons was not proper, as these would not reveal collegial intent of Legislature in enacting statute].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General*. See *Orange v. Smith* (2005) 132 C.A.4th 1434, 1450, 34 C.R.3d 383 [on appeal by father from child support order, judicial notice of two law review articles, requested by father, was barred by *Ev.C. 450*, as judicial notice of law review articles is not authorized under either *Ev.C. 451* or *452*].

(2) "*Legislative Facts*." See 2 McCormick 6th, §331. *Cross-Reference*: 14 Summary (10th), *Wills and Probate*, §95.



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## CHAPTER II - Judicial Notice

### II. COMPULSORY JUDICIAL NOTICE

#### A. California and Federal Law.

##### 1. Constitutions and Statutes.

*1 Witkin Cal. Evid. Jud Notice § 7*

[§ 7] Constitutions and Statutes.

*Ev.C. 451(a)* provides for mandatory judicial notice of the "constitutional, and public statutory law of this state and of the United States." (See *Los Angeles v. San Fernando* (1975) 14 C.3d 199, 231, 123 C.R. 1, 537 P.2d 1250 [Spanish and Mexican laws governing property rights in California before annexation remain in effect unless repealed or altered and are therefore subject to mandatory judicial notice]; *Young v. Boy Scouts of America* (1935) 9 C.A.2d 760, 764, 51 P.2d 191 [act of Congress and corporation formed thereunder]; *People v. Moore* (1997) 59 C.A.4th 168, 178, 179, 69 C.R.2d 56 [in prosecution for conspiring with water district officer to take public monies from "district of this state," judicial notice was properly taken of Water Code provisions identifying water district as district of state]; 2 C.E.B., Civ. Proc. During Trial 3d, §14.8.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Gee v. Work. Comp. App. Bd.* (2002) 96 C.A.4th 1418, 1426, 118 C.R.2d 105 [Workers' Compensation Appeals Board was required to judicially notice former Lab.C. 4062.9 (presumption that treating physician's diagnosis is correct) where presumption's underlying conditions were met, even though no party raised presumption as issue]. *West's Key Number Digest*, Evidence k.27 et seq.



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CHAPTER II - Judicial Notice

II. COMPULSORY JUDICIAL NOTICE

- A. California and Federal Law.
- 2. California City and County Charters.

*1 Witkin Cal. Evid. Jud Notice § 8*

[§ 8] California City and County Charters.

*Ev.C. 451(a)*, pursuant to express constitutional directions, requires notice of "the provisions of any charter described in Section 3, 4 or 5 of Article XI of the California Constitution." (See *Spaulding v. Desmond* (1922) 188 C. 783, 790, 207 P. 896; *Clark v. Pasadena* (1951) 102 C.A.2d 198, 200, 227 P.2d 306; *Agostini v. Strycula* (1965) 231 C.A.2d 804, 806, 42 C.R. 314, citing the text; *Olson v. Sacramento* (1974) 38 C.A.3d 958, 964, 113 C.R. 664 [county charter and civil service rules]; *San Francisco Fire Fighters v. San Francisco* (1984) 152 C.A.3d 113, 121, 201 C.R. 176 [judicial notice of city charter provision to which neither party directed court's attention]; as to powers of such chartered cities and counties, see 8 *Summary* (9th), *Constitutional Law*, §799.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*Cross-Reference:* 8 *Summary* (10th), *Constitutional Law*, §993.



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## CHAPTER II - Judicial Notice

### II. COMPULSORY JUDICIAL NOTICE

#### A. California and Federal Law.

#### 3. Decisional Law.

*1 Witkin Cal. Evid. Jud Notice § 9*

[§ 9] Decisional Law.

*Ev.C. 451(a)* calls for mandatory notice of the "decisional" law of California and the United States. This also follows former California statutory rule. (See *Loranger v. Nadeau* (1932) 215 C. 362, 366, 10 P.2d 63 [judicial notice of a common law rule]; *People v. Lynam* (1967) 253 C.A.2d 959, 966, 61 C.R. 800 [judicial notice of statutes and cases in determining truthfulness of defendant's claims regarding legal consequences of trust plan]; *People v. Law* (1974) 40 C.A.3d 69, 75, 114 C.R. 708 [judicial notice of case law and comments regarding reliability of scientific test]; 24 Cal. L. Rev. 311, 313 [Loranger].)

However, requests for judicial notice should not be used as a way of circumventing appellate rules, including the normal briefing process. (*Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 C.4th 1057, 1064, 31 C.R.2d 358, 875 P.2d 73; see *People v. Webster* (1991) 54 C.3d 411, 428, footnote 4, 285 C.R. 31, 814 P.2d 1273 [prosecutor's request for judicial notice of Court of Appeal's *unpublished* decision in joint appeal of defendant's codefendants, for purpose of considering Court of Appeal's resolution of common appellate issues, was denied on ground that this would circumvent rule prohibiting citation or reliance on unpublished opinions; see 9 Cal. Proc. (4th), *Appeal*, §713].)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Evidence k.43 et seq.



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CHAPTER II - Judicial Notice

II. COMPULSORY JUDICIAL NOTICE

B. Governmental Regulations.

1. California Agencies.

*1 Witkin Cal. Evid. Jud Notice § 10*

[§ 10] California Agencies.

Judicial notice is taken of "[a]ny matter made a subject of judicial notice by *Section 11343.6, 11344.6, or 18576 of the Government Code.*" (*Ev.C. 451(b)*); see 2 C.E.B., Civ. Proc. During Trial 3d, §14.10.) *Ev.C. 451(b)* continues existing statutory law by requiring judicial notice of the following:

(1) Regulations or orders repealing regulations filed with the Secretary of State. (*Govt.C. 11343.6*.) (For the modern view, in accord, see 2 McCormick 5th, §335; 1 Jones 7th, §2:111.)

(2) Regulations printed or incorporated by reference into the California Code of Regulations, and the repeal of a regulation as published in the Regulatory Code Supplement. (*Govt.C. 11344.6*.)

(3) Rules of the State Personnel Board. (*Govt.C. 18576*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Regulations filed with Secretary of State:* See 2 McCormick 6th, §335.(2) *Code of Regulations:* *Govt.C. 11344.6* was amended in 2000 to substitute "Code of Regulations Supplement" for "Regulatory Code Supplement".



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## CHAPTER II - Judicial Notice

### II. COMPULSORY JUDICIAL NOTICE

#### B. Governmental Regulations.

##### 2. Federal Agencies.

#### *1 Witkin Cal. Evid. Jud Notice § 11*

[§ 11] Federal Agencies.

*Ev.C. 451(b)* also refers to matters made subjects of judicial notice by "Section 1507 of Title 44 of the United States Code," i.e., documents published in the Federal Register. This covers (1) presidential proclamations and executive orders of general applicability and (2) agency orders, regulations, rules, certificates, codes of fair competition, licenses, notices, and other similar instruments of general applicability. (Law Rev. Com. Comment to *Ev.C. 451*; see *Ahrens v. Superior Court* (1988) 197 C.A.3d 1134, 1141, 1147, 243 C.R. 420 [Environmental Protection Agency's statements in Federal Register regarding use of PCB transformers]; 2 C.E.B., Civ. Proc. During Trial 3d, §14.10.)

These matters were noticed in California even before adoption of the Evidence Code in 1965. (For illustrations, see *Downer v. Grizzly Livestock & Land Co.* (1935) 6 C.A.2d 39, 42, 43 P.2d 843 [rules and regulations of U.S. land department]; *Livermore v. Beal* (1937) 18 C.A.2d 535, 541, 64 P.2d 987 [acts of U.S. Department of Interior and General Land Office: regulations, withdrawal orders, surveys and other records and communications]; *Arnold v. Universal Oil Land Co.* (1941) 45 C.A.2d 522, 529, 114 P.2d 408 [similar records of General Land Office]; *People v. Mason* (1946) 72 C.A.2d 699, 706, 165 P.2d 481 [Congressional declarations and presidential and executive proclamations made in connection with prosecution of World War II]; *Pacific Solvents Co. v. Superior Court* (1948) 88 C.A.2d 953, 955, 199 P.2d 740 [U.S. War Food orders]; *Strother v. Pacific Gas & Elec. Co.* (1949) 94 C.A.2d 525, 530, 211 P.2d 624 [regulations of U.S. Department of Commerce]; *People v. International Steel Corp.* (1951) 102 C.A.2d Supp. 935, 939, 226 P.2d 587 [Ringelmann Chart of air contamination density--official act of Bureau of Mines]; *Mendez v. Pacific Gas & Elec. Co.* (1953) 115 C.A.2d 192, 195, 251 P.2d 773 [contract between defendant and United States for distribution of electricity].)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Criminal Law k.304(10)



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CHAPTER II - Judicial Notice

II. COMPULSORY JUDICIAL NOTICE

C. Rules of Court.

1. California Rules.

*1 Witkin Cal. Evid. Jud Notice § 12*

[§ 12] California Rules.

(1) *Judicial Council Rules*. "[R]ules of practice and procedure for the courts of this state adopted by the Judicial Council" must be noticed. (*Ev.C. 451(c)*; see 2 C.E.B., Civ. Proc. During Trial 3d, §14.11; for nature and effect of the rules, and published sources, see 2 *Cal. Proc.* (4th), *Courts*, §186 et seq.)

(2) *Rules of Professional Conduct*. The State Bar Rules of Professional Conduct, adopted under *B. & P.C. 6076* and approved by the Supreme Court, must be noticed. (*Ev.C. 451(c)*; for nature and effect of the rules, and published sources, see 1 *Cal. Proc.* (4th), *Attorneys*, §§476, 622.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Evidence k.42-





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CHAPTER II - Judicial Notice

II. COMPULSORY JUDICIAL NOTICE

C. Rules of Court.

2. Federal Rules.

*1 Witkin Cal. Evid. Jud Notice § 13*

[§ 13] Federal Rules.

Only those rules prescribed by the United States Supreme Court are covered by the mandatory provisions of *Ev.C. 451(d)*: "Rules of pleading, practice, and procedure prescribed by the United States Supreme Court, such as the Rules of the United States Supreme Court, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Admiralty Rules, the Rules of the Court of Claims, the Rules of the Customs Court, and the General Orders and Forms in Bankruptcy." (See 2 C.E.B., Civ. Proc. During Trial 3d, §14.12; on *optional* notice of other court rules, see *infra*, §26.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER II - Judicial Notice

### II. COMPULSORY JUDICIAL NOTICE

#### D. English Words and Phrases.

*1 Witkin Cal. Evid. Jud Notice § 14*

[§ 14] English Words and Phrases.

"The true signification of all English words and phrases and of all legal expressions" must be noticed. (*Ev.C. 451(e)*); see *Castro v. California* (1970) 2 C.3d 223, 239, footnote 28, 85 C.R. 20, 466 P.2d 244 [publication that consistently ignores political news is not "newspaper"]; *Davis v. Thayer* (1980) 113 C.A.3d 892, 902, 170 C.R. 328 [in ordinary usage "half a year" is equivalent of 6 months]; 2 C.E.B., Civ. Proc. During Trial 3d, §14.13; for illustrations under prior state statute, see *People v. Powell* (1934) 1 C.A.2d 222, 224, 36 P.2d 201 [slang used by criminals: "plant" and "knock over"]; *Irvine v. J. F. Shea Co.* (1940) 41 C.A.2d 458, 459, 107 P.2d 80 [nature of "spreader-board or cross brace"]; *Hom v. Clark* (1963) 221 C.A.2d 622, 637, 35 C.R. 11 [nature of "alley" as used in local traffic code].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Brockey v. Moore* (2003) 107 C.A.4th 86, 102, 131 C.R.2d 746 [meaning of "legal aid" as used in Judicial Council forms]. *West's Key Number Digest*, Criminal Law k.304(4); Evidence k.16



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CHAPTER II - Judicial Notice

II. COMPULSORY JUDICIAL NOTICE  
E. Facts Universally Known.

*1 Witkin Cal. Evid. Jud Notice § 15*

[§ 15] Facts Universally Known.

The Evidence Code distinguishes between facts subject to compulsory and to optional notice. In the highest category are "[f]acts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute." (*Ev.C. 451(f)*); see 2 C.E.B., Civ. Proc. During Trial 3d, §14.14; 1 Jones 7th, §2:9.)

Judicial notice of facts of this type should not require any request, and it is accordingly made compulsory. Moreover, "universally known" should be given the practical interpretation of "known among persons of reasonable and average intelligence and knowledge." (Law Rev. Com. Comment to *Ev.C. 451*.) (For illustrations, see *infra*, §30 et seq.)

By contrast, under *F.R. Evid., Rule 201* (*supra*, §5), a court is not required to judicially notice a fact--even one not subject to reasonable dispute--unless a party requests that it do so.

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER II - Judicial Notice

### III. OPTIONAL JUDICIAL NOTICE

#### A. Law of Sister State or Territory.

*1 Witkin Cal. Evid. Jud Notice § 16*

[§ 16] Law of Sister State or Territory.

(1) *State*. The first category of optional judicial notice (see *supra*, §4) is "[t]he decisional, constitutional, and statutory law of any state of the United States." (*Ev.C. 452(a)*.) State law is a commonly recognized subject of notice. (See *Smiley v. Citibank* (1995) 11 C.4th 138, 145, footnote 2, 44 C.R.2d 441, 900 P.2d 690 [sister state decisions relating to interest chargeable by credit card issuer that is national bank]; *Zinn v. Ex-Cell-O Corp.* (1957) 148 C.A.2d 56, 81, 306 P.2d 1017; 2 McCormick 5th, §335; 2 C.E.B., Civ. Proc. During Trial 3d, §14.16.)

The former California statute referred to the "laws" and their interpretation by "the highest courts of appellate jurisdiction" of the states. This apparent exclusion of intermediate appellate courts was abandoned in the Evidence Code, which refers broadly to "decisional" law, i.e., to law established by "judicial decisions" (*Ev.C. 160*). "If this be an extension of existing law, it is a desirable one, for the courts of sister states generally can be considered as responsive to the need for properly determining the law as are equivalent courts in California." (Law Rev. Com. Comment to *Ev.C. 452*.)

(2) *Territories*. The former California statute referred to "the several states," and its coverage of territories was doubtful (except under the later provision on notice of foreign law; *infra*, §27). (See *Perkins v. Benguet Consol. Mining Co.* (1942) 55 C.A.2d 720, 768, 132 P.2d 70; 16 Cal. L. Rev. 64; 17 Cal. L. Rev. 417.) The Evidence Code takes care of the problem by its definition of "state" to include "district, commonwealth, territory, or insular possession of the United States." (*Ev.C. 220*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *State*. See 2 McCormick 6th, §335. *West's Key Number Digest*, Evidence k.35



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CHAPTER II - Judicial Notice

III. OPTIONAL JUDICIAL NOTICE  
B. Governmental Resolutions and Private Acts.

*1 Witkin Cal. Evid. Jud Notice § 17*

[§ 17] Governmental Resolutions and Private Acts.

The "resolutions and private acts of the Congress of the United States and of the Legislature of this state" may be noticed. (*Ev.C. 452(a)*.) The reference to "this state" supersedes language of an original draft referring to "any state." (See Law Rev. Com. Comment to *Ev.C. 452*, overlooking the change; 2 C.E.B., Civ. Proc. During Trial 3d, §14.17; on *Ev.C. 452(c)*, which covers official acts of "any state," see *infra*, §19.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER II - Judicial Notice

### III. OPTIONAL JUDICIAL NOTICE

#### C. Regulations, Ordinances, and Similar Legislative Acts.

##### *1 Witkin Cal. Evid. Jud Notice § 18*

[§ 18] Regulations, Ordinances, and Similar Legislative Acts.

"Regulations and legislative enactments issued by or under the authority of the United States or any public entity in the United States" may be noticed. (*Ev.C. 452(b)*.)

(1) *State and Local Public Entities*. The lack of adequate and easily accessible records was the basis for the former view that municipal ordinances or rules of local boards could not be judicially noticed. (See *Oakland v. Brock* (1937) 8 C.2d 639, 641, 67 P.2d 344; *Fickeisen v. Civil Service Com.* (1950) 98 C.A.2d 419, 423, 220 P.2d 605; 2 *Stanf. L. Rev.* 672.) This limited view was criticized (see 2 McCormick 5th, §335; 2 *Stanf. L. Rev.* 673), and an exception was recognized for notice of local ordinances by local municipal courts. (See *People v. Crittenden* (1949) 93 C.A.2d Supp. 871, 877, 209 P.2d 161; *People v. Cowles* (1956) 142 C.A.2d Supp. 865, 867, 298 P.2d 732.)

*Ev.C. 452(b)*, supra, read in connection with the definition of "public entity" (infra, this section), abandons the limitation, and authorizes notice of ordinances or any similar legislative enactments. (Law Rev. Com. Comment to *Ev.C. 452*; see *Lab.C. 6304.5* [*Ev.C. 452* applies to occupational safety and health standards]; *Jordan v. Los Angeles* (1968) 267 C.A.2d 794, 798, 73 C.R. 516, citing the text; *Holmes v. Oakland* (1968) 260 C.A.2d 378, 384, 67 C.R. 197 [city ordinance, to show control and duty of inspection of railroad right of way over city-owned land]; *Cooke v. Superior Court* (1989) 213 C.A.3d 401, 416, 261 C.R. 706 [county resolution]; 2 C.E.B., Civ. Proc. During Trial 3d, §14.18.)

*Ev.C. 200* defines "public entity" as a "nation, state, county, city and county, city, district, public authority, public agency, or any other political subdivision or public corporation, whether foreign or domestic." However, because *Ev.C. 452(b)* refers to public entities "in the United States," the statute's coverage extends to public entities in sister states, territories, and possessions, but not to those in foreign countries. (See Law Rev. Com. Comment to *Ev.C. 452*.)

(2) *Federal Agencies*. *Ev.C. 452(b)* covers any federal regulations that do not fall within the mandatory class in *Ev.C. 451(b)*, supra, §11. (Law Rev. Com. Comment to *Ev.C. 452*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *State and Local Public Entities*. See 2 McCormick 6th, §335.

(3) *(New) Tribal Ordinance*. An Indian tribe's sovereign immunity ordinance is judicially noticeable. (*Smith v. Hopland Band of Pomo Indians* (2002) 95 C.A.4th 1, 7, footnote 8, 115 C.R.2d 455.) *West's Key Number Digest*, Criminal Law k.304(12); Evidence k.32, 47



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## CHAPTER II - Judicial Notice

### III. OPTIONAL JUDICIAL NOTICE

#### D. Official Acts.

##### 1. In General.

*1 Witkin Cal. Evid. Jud Notice § 19*

[§ 19] In General.

(1) *In General*. "Official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States" may be noticed. (*Ev.C. 452(c)*; see 2 C.E.B., Civ. Proc. During Trial 3d, §14.19.) Under the definition of "state," this also covers territories and possessions. (See *Ev.C. 220*, supra, §16.) Obviously, *Ev.C. 452(c)* partly overlaps *Ev.C. 451(a)* (supra, §7). (See Law Rev. Com. Comment to Division 4.)

The "official acts" category was part of the former statute, and illustrative cases under both that and the present statute are plentiful. (See *Harris v. Alcoholic Bev. Control App. Bd.* (1965) 62 C.2d 589, 595, 43 C.R. 633, 400 P.2d 745 [bulletin of department to area administrators containing schedule of penalties]; *E. H. Morrill Co. v. California* (1967) 65 C.2d 787, 794, 56 C.R. 479, 423 P.2d 551 [action by contractor against state; notice of section of "General Conditions" of contract, official record of state agency]; *Stanislaus Lumber Co. v. Pike* (1942) 51 C.A.2d 54, 56, 124 P.2d 190 [Governor's proclamation of legal holiday]; *Wilson v. Loew's* (1956) 142 C.A.2d 183, 188, 298 P.2d 152 [proceedings and reports of House Committee on Un-American Activities]; *Department of Mental Hygiene v. Rosse* (1960) 187 C.A.2d 283, 287, 9 C.R. 589 [records of Department of Mental Hygiene showing cost of support of insane person at state hospital]; *Chas. L. Harney v. California* (1963) 217 C.A.2d 77, 85, 31 C.R. 524 [records of state Board of Control]; *South Shore Land Co. v. Petersen* (1964) 226 C.A.2d 725, 745, 38 C.R. 392 [official maps, deed from Board of Tideland Commissioners, report of Chief Engineer of Board, United States patent, permit from United States Corps of Engineers, bylaw of reclamation district]; *Pratt v. Coast Trucking* (1964) 228 C.A.2d 139, 143, 39 C.R. 332 [files and order of Public Utilities Commission]; *Agostini v. Strycula* (1965) 231 C.A.2d 804, 806, 42 C.R. 314 [records and proceedings of San Francisco Civil Service Commission]; *People v. Ouellette* (1969) 271 C.A.2d 33, 36, 76 C.R. 346 [Navy regulations requiring enlisted personnel on active duty to carry identification cards]; *People v. Terry* (1974) 38 C.A.3d 432, 439, 113 C.R. 233 [death certificate]; *McGlothlen v. Department of Motor Vehicles* (1977) 71 C.A.3d 1005, 1015, 140 C.R. 168, citing the text [report by Department of Motor Vehicles to Legislature]; *Hogen v. Valley Hosp.* (1983) 147 C.A.3d 119, 125, 195 C.R. 5 [files of Board of Medical Quality Assurance]; *Smith v. State Bar* (1989) 212 C.A.3d 971, 975, 976, 261 C.R. 24, citing the text [State Bar's "Instructions for Applicants"; State Bar was enough like governmental agency to be treated as one]; *San Mateo County Coastal Landowners' Assn. v. San Mateo* (1995) 38 C.A.4th 523, 552, 45 C.R.2d 117 [Secretary of Resources' letter and declaration of authentication regarding Coastal Commission review of local coastal plan submittals]; *Washington v. Contra Costa* (1995) 38 C.A.4th 890, 901, 45 C.R.2d 646 [documents relating to county's regulation of chemical company; quality of documents was irrelevant as to whether they could be judicially noticed].)

(2) *Private Acts Not Included*. The matter must in some manner meet the test of an *official* act. Thus, governmental

surveys and maps will be noticed, but not private maps or other instruments by or between private parties. (*South Shore Land Co. v. Petersen*, *supra*, 226 C.A.2d 745.) Similarly, records of a county commission are noticed because counties are legal subdivisions of the state; records of a council created by a county but not acting for either the state or its subdivision are not. (*Edna Valley Assn. v. San Luis Obispo County & Cities Area Planning Coordinating Council* (1977) 67 C.A.3d 444, 449, 136 C.R. 665; see *People v. Thacker* (1985) 175 C.A.3d 594, 598, 599, 221 C.R. 37, citing the text [copies of articles of incorporation, statement by domestic corporation, and notice of issuance of shares were materials prepared by private person, merely on file with state agencies, and not official acts]; *Ojavan Investors v. California Coastal Com.* (1994) 26 C.A.4th 516, 527, 32 C.R.2d 103 [distinguishing *Thacker*; judicial notice was properly taken of declarations of restrictions explicitly crafted by Coastal Commission and required by it to be recorded by landowners]; *Stevens v. Superior Court* (1999) 75 C.A.4th 594, 607, 608, 89 C.R.2d 370 [applications and supporting documents filed by private parties with Department of Insurance were not official acts of department subject to judicial notice].)

(3) *Truth of Contents Not Established*. Judicial notice of the authenticity and contents of an official document does not establish the truth of all recitals therein, nor does it render inadmissible matter admissible. (*Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 C.4th 1057, 1063, 31 C.R.2d 358, 875 P.2d 73 [truth of government reports on tobacco use not judicially noticeable]; *Love v. Wolf* (1964) 226 C.A.2d 378, 403, 38 C.R. 183; *Beckley v. Reclamation Bd.* (1962) 205 C.A.2d 734, 741, 23 C.R. 428; *People v. Long* (1970) 7 C.A.3d 586, 591, 86 C.R. 590 ["While the courts take judicial notice of public records, they do not take notice of the truth of matters stated therein"]; *Marocco v. Ford Motor Co.* (1970) 7 C.A.3d 84, 88, 86 C.R. 526, citing the text.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General*. See *People v. Crusilla* (1999) 77 C.A.4th 141, 147, 91 C.R.2d 415, citing the text [publication of California Attorney General's Office relating to state and federal jurisdiction over border crossing]; *Rodas v. Spiegel* (2001) 87 C.A.4th 513, 518, 104 C.R.2d 439 [decision and order of Contractors' State License Board]; *Moehring v. Thomas* (2005) 126 C.A.4th 1515, 1523, 25 C.R.3d 118 [2000 decennial census found on United States Census Bureau's website, used to determine that Siskiyou County's population falls below 200,000]; *El Escorial Owners' Assn. v. DLC Plastering* (2007) 154 C.A.4th 1337, 1367, 65 C.R.3d 524 [Secretary of State's certificate showing that painting company's corporate status was suspended, and additional documents showing that its corporate status was revived after payment of back taxes].





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## CHAPTER II - Judicial Notice

### III. OPTIONAL JUDICIAL NOTICE

#### D. Official Acts.

#### 2. Customary Practice as Official Act.

#### *1 Witkin Cal. Evid. Jud Notice § 20*

[§ 20] Customary Practice as Official Act.

In *Cruz v. Los Angeles* (1985) 173 C.A.3d 1131, 219 C.R. 661, plaintiff sued defendant county for medical malpractice at a county medical center. Defendant demurred on the ground that plaintiff had failed to comply with *Govt.C. 945.6* (action must be filed within 6 months from date claimant is mailed notice of rejection of claim), and asked the trial court to take judicial notice of a letter from its employee stating that she had personally mailed the rejection. The trial court sustained the demurrer with leave to amend, and plaintiff filed an amended complaint alleging that the rejection was never received. Defendant again demurred, and repeated its request for judicial notice. Plaintiff responded by citing a portion of the employee's deposition indicating that the employee had not mailed the rejection herself, but had given it to a coworker to mail. The trial court sustained the demurrer without leave to amend. *Held*, the ruling was erroneous. Assuming that defendant's customary practice concerning the mailing of rejections constituted an official act of which judicial notice might be taken under *Ev.C. 452(c)*, "there was not incontrovertibly contained therein the fact that such practice had been followed in the present instance." (173 C.A.3d 1134.) Hence, it was inappropriate here to resolve at the demurrer stage the factual issue involved. (173 C.A.3d 1133, 1134.) (See *Childs v. California* (1983) 144 C.A.3d 155, 162, 192 C.R. 526 [individual's declaration describing general mailing practice of state agency, not governed by specific agency rules; not an official act].)

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## CHAPTER II - Judicial Notice

## III. OPTIONAL JUDICIAL NOTICE

## D. Official Acts.

## 3. Where No Official Notice Taken.

*1 Witkin Cal. Evid. Jud Notice § 21*

[§ 21] Where No Official Notice Taken.

In *Harris v. Alcoholic Bev. Control App. Bd.* (1965) 62 C.2d 589, 43 C.R. 633, 400 P.2d 745, petitioner sought mandamus to review the department's drastic penalty of revocation of a liquor license for minor infractions. The appeals board and superior court gave the requested relief, relying in part on an official department bulletin containing a schedule of penalties, under which the standard penalty for the acts in question was a mere suspension. But the bulletin had not been introduced in evidence in the administrative proceeding, nor had the procedure under *Govt.C. 11515* for taking official notice of it been followed (see 1 *Cal. Evidence* (4th), *Introduction*, §72). The department therefore argued that, although the bulletin was a proper subject of both judicial notice and official notice, a court in reviewing an administrative determination could not take judicial notice of a matter not officially noticed. And this position was supported by a strong dictum in *De Martini v. Department of Alcoholic Beverage Control* (1963) 215 C.A.2d 787, 811, 30 C.R. 668.

The Supreme Court, affirming the superior court judgment, took the opposite position, expressly disapproving the *De Martini* dictum: "There is nothing in the language of section 11515 indicating that failure to take official notice of a matter precludes a court from taking judicial notice of it, and the reasons for the procedural requirements in that section do not necessitate that such requirements always be complied with before a court may take judicial notice of a matter. The requirement in section 11515 that the parties be informed of, and given an opportunity to refute, the matters to be noticed was designed to protect the parties from unwarranted action by an agency, and the requirement that matters noticed be referred to in the record was to insure that the facts noticed would be brought to the attention of the reviewing court. ... In the present case no reason is apparent why the failure to make the bulletin a part of the administrative record should preclude our taking judicial notice of it." (62 C.2d 596.) (See *McGlothlen v. Department of Motor Vehicles* (1977) 71 C.A.3d 1005, 1015, 1016, 140 C.R. 168 [judicial notice taken of report by Department of Motor Vehicles to Legislature; following *Harris*].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER II - Judicial Notice

## III. OPTIONAL JUDICIAL NOTICE

## E. Court Records.

## 1. Former Law.

*1 Witkin Cal. Evid. Jud Notice § 22*

[§ 22] Former Law.

(1) *Records of Same Case.* It has long been held proper for a court to take judicial notice of its own records in a particular case. (See *Schomer v. R. L. Craig Co. (1934) 137 C.A. 620, 627, 31 P.2d 396* [trial court]; *Mason v. Drug (1939) 31 C.A.2d 697, 701, 88 P.2d 929* [same]; *Gackstetter v. Market Street Ry. Co. (1935) 10 C.A.2d 713, 716, 52 P.2d 998* [appellate court will notice its record on a prior appeal in same case]; *Hammell v. Britton (1941) 19 C.2d 72, 75, 119 P.2d 333* [same]; *Brock v. Fouchy (1946) 76 C.A.2d 363, 366, 172 P.2d 945* [trial court could be deemed to have considered its Register of Actions even though photostatic copy, marked as exhibit, may not have been properly introduced in evidence (filing date was subsequent to decision)]; *Estate of Wilson (1953) 116 C.A.2d 523, 527, 253 P.2d 1011* [probate court took judicial notice of independent actions pending in same superior court between parties to probate proceeding]; *Taliaferro v. Taliaferro (1960) 178 C.A.2d 140, 141, 2 C.R. 716* [related prior proceedings in same case]; *San Francisco v. Carraro (1963) 220 C.A.2d 509, 527, 33 C.R. 696*, citing the text; 2 McCormick 5th, §330.)

(2) *Records of Other Cases.* But, despite the broad language of former C.C.P. 1875, it was held that, except in unusual circumstances to avoid unreasonable hardship, a court would not notice the records or judgment in a different case, even though the other action was pending in or was determined by the same court, and was between the same parties. (See *Johnston v. Ota (1941) 43 C.A.2d 94, 96, 110 P.2d 507* [answer pleaded res judicata, based on dismissal of former action, but defendant failed to introduce judgment roll in evidence]; *Olds v. Peebler (1944) 66 C.A.2d 76, 82, 151 P.2d 901*; *Liberty Mut. Ins. Co. v. Superior Court (1944) 62 C.A.2d 601, 608, 145 P.2d 344* [no notice of findings or award of Industrial Accident Commission in prior proceeding]; *Wolfsen v. Hathaway (1948) 32 C.2d 632, 638, 198 P.2d 1* [opinion erroneously added that "authority" of court is limited]; *Alisal Sanitary Dist. v. Kennedy (1960) 180 C.A.2d 69, 80, 4 C.R. 379*; and see criticism, 2 McCormick 5th, §330; 2 *Stanf. L. Rev.* 666, footnote 7.)

The hardship exception, however, soon swallowed the rule; i.e., judicial notice was taken in the absence of a showing that this would be unfair to a party. (See *Stafford v. Ware (1960) 187 C.A.2d 227, 228, 9 C.R. 706*; *People v. Adams (1961) 194 C.A.2d 1, 7, 14 C.R. 604*.) Thereafter, the Supreme Court, in *Flores v. Arroyo (1961) 56 C.2d 492, 496, 15 C.R. 87, 364 P.2d 263*, abruptly ended the confusion by a flat declaration that judicial notice is taken in all cases; the contrary decisions were expressly overruled. (See also *People v. Rojas (1962) 57 C.2d 676, 679, 21 C.R. 564, 371 P.2d 300* [same rule applies in appellate court]; *Escobedo v. Travelers Ins. Co. (1961) 197 C.A.2d 118, 121, 17 C.R. 219*; *Palm Springs Paint Co. v. Arenas (1966) 242 C.A.2d 682, 687, 51 C.R. 747* [federal court judgment noticed by appellate court].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Records of Same Case*. See 2 McCormick 6th, §330.



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## CHAPTER II - Judicial Notice

## III. OPTIONAL JUDICIAL NOTICE

## E. Court Records.

## 2. Evidence Code.

## a. In General.

*1 Witkin Cal. Evid. Jud Notice § 23*

## [§ 23] In General.

Judicial notice of court records would doubtless be sanctioned by *Ev.C. 452(c)*, supra, §19, as "[o]fficial acts of the ... judicial departments." (See Law Rev. Com. Comment to *Ev.C. 452*.) But to make the right to unlimited judicial notice unmistakably clear, *Ev.C. 452(d)* specifies that judicial notice may be taken of "[r]ecords of (1) any court of this state or (2) any court of record of the United States or of any state of the United States." As pointed out above, "state" includes territories and possessions. (*Ev.C. 220*, supra, §16.) (See *Artucovich v. Arizmendiz* (1967) 256 C.A.2d 130, 133, 63 C.R. 810 [under "the encompassing eye of judicial notice," reviewing court affirmed summary judgment because separate court file showed plaintiff had failed to file necessary counterclaim in earlier action]; *Knoff v. San Francisco* (1969) 1 C.A.3d 184, 200, 81 C.R. 683 [trial court properly took judicial notice of testimony in grand jury transcript which was incorporated by reference in petition for mandamus, and of fact of indictment pursuant to grand jury action]; *People v. Bautista* (1970) 6 C.A.3d 344, 348, 85 C.R. 688 [motion to augment record on appeal, though defective, substantially complied with *Ev.C. 459* (infra, §49) and allowed court to take judicial notice of records of municipal court proceeding attached as exhibits to People's brief]; *Gravert v. De Luse* (1970) 6 C.A.3d 576, 580, 86 C.R. 93, citing the text [paternity case; trial judge properly refused to admit mother's juvenile court file in evidence because of confidential nature of those records, but took judicial notice of contents of file]; *Tarr v. Merco Const. Engineers* (1978) 84 C.A.3d 707, 712, 714, 148 C.R. 813 [records of bankruptcy court]; *In re Tanya F.* (1980) 111 C.A.3d 436, 440, 168 C.R. 713 [proceeding to free child from parental control; judicial notice of findings and orders of juvenile court in dependency proceedings]; *People v. Buckley* (1986) 185 C.A.3d 512, 525, 228 C.R. 329 [judicial notice of preliminary hearing transcript]; *In re Martin L.* (1986) 187 C.A.3d 534, 539, 232 C.R. 43 [wardship petition; court properly took judicial notice that prior petitions involving minor had been sustained for same offense, thereby establishing minor's knowledge that conduct was wrongful]; *Magnolia Square Homeowners Assn. v. Safeco Ins. Co.* (1990) 221 C.A.3d 1049, 1057, 271 C.R. 1 [judicial notice of complaint]; *People v. Harbolt* (1997) 61 C.A.4th 123, 126, 71 C.R.2d 459 [judicial notice of federal appellate opinion affirming conviction, to prove defendant had prior conviction within meaning of "three strikes" law]; C.E.B., 2 Civil Proc. During Trial 3d, §14.20; on limitation of judicial notice where it would deny defendant trial by jury on essential element of case, see *People v. Billon* (1968) 266 C.A.2d 537, 540, 72 C.R. 198.)

Under *Ev.C. 452.5*, the official acts and records of which a court may take judicial notice under *Ev.C. 452(d)*, as well as *Ev.C. 452(c)* (supra, §19), include computer-generated official court records relating to criminal convictions.

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Ross v. Creel Printing & Publishing Co.* (2002) 100 C.A.4th 736, 743, 122 C.R.2d 787 [appellate court declined to

take judicial notice of complaint filed in Nevada court, where it was not certified or provided under subpoena from Nevada court, and there was thus no assurance of its authenticity]; *Salazar v. Upland Police Dept.* (2004) 116 C.A.4th 934, 946, 11 C.R.3d 22 [in civil action for false arrest, it was proper to take judicial notice of stipulation signed by district attorney and plaintiff's attorney in related criminal action against plaintiff to effect that arrest was supported by probable cause]. *West's Key Number Digest*, Evidence k.43 et seq.



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### III. OPTIONAL JUDICIAL NOTICE

- E. Court Records.
- 2. Evidence Code.
- b. Truth of Findings.

*1 Witkin Cal. Evid. Jud Notice § 24*

[§ 24] Truth of Findings.

*Sosinsky v. Grant* (1992) 6 C.A.4th 1548, 8 C.R.2d 552, a malicious prosecution case, held that a court may not take judicial notice of the *truth* of the factual findings made by a judge who sat as the trier of fact in a previous case.

(a) While it may be proper to take judicial notice that the judge did in fact make a particular finding, it is a different matter to take judicial notice that the fact is necessarily true. (6 C.A.4th 1565.) Taking judicial notice of the truth of a judge's factual finding, even if the finding was made after a contested adversary hearing, is tantamount to taking judicial notice that the judge is infallible. "We resist the temptation to do so." (6 C.A.4th 1568, quoting the text, citing *People v. Tolbert* (1986) 176 C.A.3d 685, 222 C.R. 313, *infra*, this section, and disagreeing with *Weiner v. Mitchell, Silberberg & Knupp* (1980) 114 C.A.3d 39, 45, 170 C.R. 533, where the court took judicial notice of "pertinent facts" stated in a federal appeals court opinion.)

(b) In *Columbia Cas. Co. v. Northwestern Nat. Ins. Co.* (1991) 231 C.A.3d 457, 282 C.R. 389, the court said that judicial notice of the truth of the content of court records is appropriate only when the existence of the record itself precludes contravention of the content, e.g., where findings of fact are binding on a party for purposes of res judicata or collateral estoppel. This statement improperly merges the doctrine of judicial notice with the doctrines of res judicata and collateral estoppel. "Whether a factual finding is true is a different question than whether the truth of that factual finding may or may not be subsequently relitigated a second time. The doctrines of res judicata and collateral estoppel will, when they apply, serve to bar relitigation of a factual dispute even in those instances where the factual dispute was erroneously decided in favor of a party who did not testify truthfully." (6 C.A.4th 1569.) (See *Western Mut. Ins. Co. v. Yamamoto* (1994) 29 C.A.4th 1474, 1485, 35 C.R.2d 698 [judicial notice was properly taken of unpublished appellate court opinion in order to determine what issues had been previously adjudicated in juvenile court and could not therefore be relitigated in insurer's declaratory relief action; distinguishing *Sosinsky*].)

*People v. Tolbert*, *supra*, presented a slightly different issue: Should the trial judge have sustained defendant's demurrer to an information charging kidnapping because of a factual finding, made by the magistrate in the *same* case, that the alleged victim went willingly with defendant? *Held*, reversed. A magistrate is not the ultimate trier of fact; hence, although the finding appeared in the magistrate's records, the trial judge could not take judicial notice of the truth of that finding and give it conclusive effect in order to impugn the facial sufficiency of contrary allegations contained in the accusatory pleading. (176 C.A.3d 690.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 C.A.4th 875, 883, 884, 110 C.R.2d 877 [in legal malpractice action, trial judge erred in taking judicial notice of statement in concurring opinion in case involving same parties, to effect that defendant had not represented plaintiff in matter being currently litigated; nothing in record indicated that this finding was product of adversary hearing or that plaintiff was given opportunity to contest it]; *Kilroy v. California* (2004) 119 C.A.4th 140, 148, 14 C.R.3d 109 [in action by towing business owners against state for violation of civil rights resulting from search of plaintiffs' premises, trial judge properly denied plaintiffs' request for judicial notice of federal judge's order granting motion of one owner to suppress fruits of search; judge's factual findings were not proper subject of notice, and plaintiffs failed in trial court to raise collateral estoppel as basis for notice].





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- E. Court Records.
- 2. Evidence Code.
- c. Hearsay Allegations.

#### *1 Witkin Cal. Evid. Jud Notice § 25*

#### [§ 25] Hearsay Allegations.

Hearsay may not be treated as true simply because it is included in a court record that is properly noticed. (*Day v. Sharp* (1975) 50 C.A.3d 904, 914, 123 C.R. 918.)

Thus, in *People v. Rubio* (1977) 71 C.A.3d 757, 139 C.R. 750, a robbery trial, the prosecution sought to show defendant's flight as an implied admission of guilt. The showing consisted of minute orders, judicially noticed and read to the jury, stating that defendant's failure to appear for trial was "without sufficient excuse." The judge thereafter instructed the jury that a matter judicially noticed must be accepted as fact. *Held*, this was error. The entry in the minutes was a hearsay statement by a judge-declarant, and its inclusion in a document of which the court could take judicial notice did not render it admissible. (71 C.A.3d 766.) (See also *Williams v. Hartford Ins. Co.* (1983) 147 C.A.3d 893, 899, 195 C.R. 448 [trial judge in ruling on demurrer properly took judicial notice of fact of grand jury indictment, but improperly noticed the testimony on which indictment was based]; *Garcia v. Sterling* (1985) 176 C.A.3d 17, 22, 221 C.R. 349, 5 Cal. Proc. (4th), Pleading, §968 [court could judicially notice existence of statements contained in deposition transcript filed as part of its record, but not truth of those statements]; *Bach v. McNelis* (1989) 207 C.A.3d 852, 865, 255 C.R. 232; *Columbia Cas. Co. v. Northwestern Nat. Ins. Co.* (1991) 231 C.A.3d 457, 473, 282 C.R. 389, citing the text [in ruling on third party's motion for judgment on pleadings, court could not judicially notice truth of statements filed by plaintiff in its complaint and summary judgment motion against defendant]; *In re Rocco M.* (1991) 1 C.A.4th 814, 819, 2 C.R.2d 429 [in dependency proceeding in which, over mother's objection, judicial notice of file in previous dependency proceeding was taken, not every assertion in file could be accepted as true, but it was up to mother to identify and object to inadmissible portions].)

In *Joslin v. H.A.S. Ins. Brokerage* (1986) 184 C.A.3d 369, 228 C.R. 878, the court disagreed with the broadness of the rule stated in *Garcia*: The truth of statements in a deposition should be subject to judicial notice if there is not or cannot be a factual dispute concerning the matter sought to be noticed. (184 C.A.3d 375.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *North Beverly Park Homeowners Assn. v. Bisno* (2007) 147 C.A.4th 762, 778, 54 C.R.3d 644, citing the text [in proceeding on defendants' motion to disqualify trial judge, judge hearing motion properly took judicial notice of declarations filed in connection with motions to disqualify same trial judge in other cases, but not of truth of their hearsay contents, where no independent hearsay exception was applicable].



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III. OPTIONAL JUDICIAL NOTICE

F. Rules of Court.

*1 Witkin Cal. Evid. Jud Notice § 26*

[§ 26] Rules of Court.

California Judicial Council and State Bar rules, and rules prescribed by the United States Supreme Court, *must* be noticed. (*Ev.C. 451(c)*, (d), *supra*, §§12, 13, respectively.) California local court rules (see 2 *Cal. Proc.* (4th), *Courts*, §186 et seq.), rules of sister state courts, and local federal court rules are less accessible; hence, judicial notice of them is optional and subject to the procedural conditions of notification and information (*infra*, §36). On compliance with these conditions, notice is taken under *Ev.C. 452(e)* of "[r]ules of court of (1) any court of this state or (2) any court of record of the United States or of any state of the United States." (Note that "state" includes territories and possessions; *Ev.C. 220*, *supra*, §16.) (See 2 C.E.B., *Civ. Proc. During Trial* 3d, §14.21.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER II - Judicial Notice

### III. OPTIONAL JUDICIAL NOTICE

#### G. Foreign Law.

#### 1. Development of Rule.

*1 Witkin Cal. Evid. Jud Notice § 27*

[§ 27] Development of Rule.

(1) *Early Law.* Formerly, California courts (like those in the great majority of states) were not authorized to take judicial notice of the law of a foreign country. It was arbitrarily presumed, in the absence of contrary proof, that the foreign law involved was the same as California law, and to make the foreign law applicable it was necessary to plead and prove it as a fact. (See *Silveyra v. Harper* (1947) 82 C.A.2d 761, 765, 187 P.2d 83 [Mexican law]; *Estate of Johnson* (1950) 100 C.A.2d 73, 79, 223 P.2d 105 [Norwegian law]; 42 Cal. L. Rev. 701; 45 Cal. L. Rev. 23; 2 Stanf. L. Rev. 673, 677; 14 Stanf. L. Rev. 162; 2 McCormick 5th, §335; 75 A.L.R.3d 177 [presumption as to law of foreign country].) This rule not only placed a heavy burden on counsel to establish foreign law by strict methods of formal proof, but also had the undesirable effect of placing the ultimate determination of this "issue of fact" in the hands of the jury, and drastically limiting appellate review of that determination. (See 42 Cal. L. Rev. 707; 45 Cal. L. Rev. 26.)

(2) *Modern Statutes and Uniform Rules.* The Uniform Judicial Notice of Foreign Law Act, approved in 1936 and withdrawn in 1966, was widely adopted, and the Model Code of Evidence and original Uniform Rules likewise provided for judicial notice. (See 42 Cal. L. Rev. 708; 2 Stanf. L. Rev. 679; 2 McCormick 5th, §335; 21 Proof of Facts 2d 15; 23 A.L.R.2d 1437 [Uniform Act]; on *F.R. Civ. P.*, Rule 44.1 and *F.R. Crim. P.*, Rule 26.1, see 1967 A.S. 2; 9 Federal Practice & Procedure (Wright & Miller) §2441.)

In 1957, pursuant to a recommendation of the California Law Revision Commission, California joined the most advanced states by adopting a broad and practical amendment authorizing judicial notice of "[t]he law and statutes of foreign countries and of political subdivisions of foreign countries." (Former C.C.P. 1875(4).) The statute also contained an implementing procedure for notification and resort to reference materials or advice of experts, and gave the court discretion to refuse to take judicial notice when the foreign law could not be determined. (See *Estate of Gogabashvele* (1961) 195 C.A.2d 503, 508, 16 C.R. 77, citing the text; *Gallegos v. Union-Tribune Publishing Co.* (1961) 195 C.A.2d 791, 798, 16 C.R. 185, citing the text; *Estate of Eng* (1964) 228 C.A.2d 160, 167, 39 C.R. 254.)

The implementing procedure is now a general requirement in all optional notice cases (see *infra*, §36), and the discretion in foreign law cases is continued in the Evidence Code (*infra*, §29).

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Early Law.* See 2 McCormick 6th, §335.

(2) *Modern Statutes and Uniform Rules.* See 2 McCormick 6th, §335. *West's Key Number Digest*, Criminal Law k.304(11); Evidence k.37



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III. OPTIONAL JUDICIAL NOTICE

- G. Foreign Law.
- 2. Evidence Code.
- a. Scope of Notice.

*1 Witkin Cal. Evid. Jud Notice § 28*

[§ 28] Scope of Notice.

An exceptionally broad rule is set forth in *Ev.C. 452(f)*: Judicial notice may be taken of "[t]he law of an organization of nations and of foreign nations and public entities in foreign nations." Thus:

(1) Not only foreign countries, but "organizations" of nations are covered. (See Law Rev. Com. Comments on *Ev.C. 310, 452*.)

(2) Not only the nations and organizations, but their "public entities" are covered; the latter term includes any kind of public agency or subdivision. (See *Ev.C. 200, 1 Cal. Evidence (4th), Introduction, §17*.)

(3) Not only statutory law, but "law" (including decisional law, *Ev.C. 160*) is covered. "This makes all law, in whatever form, subject to judicial notice." (Law Rev. Com. Comment to *Ev.C. 452*; see 2 C.E.B., Civ. Proc. During Trial 3d, §14.22.) (On maritime law, see 2 McCormick 5th, §335.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(3) "*Law*" is covered: See 2 McCormick 6th, §335.



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#### G. Foreign Law.

#### 2. Evidence Code.

#### b. When Law Cannot Be Determined.

#### *1 Witkin Cal. Evid. Jud Notice § 29*

[§ 29] When Law Cannot Be Determined.

If, from the materials and sources made available, the court is unable to determine what the law is, the principal alternatives appear to be to follow the old presumption that it is the same as California law, or to refuse to decide a case that depends upon that determination. (See 2 McCormick 5th, §335.) The 1957 statute gave discretion to do either, and this statute was substantially restated in *Ev.C. 311*, as follows:

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

"(a) Apply the law of this state if the court can do so consistently with the Constitution of the United States and the Constitution of this state; or

"(b) Dismiss the action without prejudice or, in the case of a reviewing court, remand the case to the trial court with directions to dismiss the action without prejudice."

The language of the former statute--"If a court is unable to determine"--was changed to read "If the law ... cannot be determined." The Commission did this advisedly: "This revised language emphasizes that every effort should be made by the court to determine the applicable law before the case is otherwise disposed of under Section 311." (Law Rev. Com. Comment to *Ev.C. 311*.)

The Comment continues:

"The reason why the court cannot determine the applicable foreign or sister-state law may be that the parties have not provided the court with sufficient information to make such determination. In such a case, the court may, of course, grant the parties additional time within which to obtain such information and make it available to the court. If they fail to obtain such information and the court is not satisfied that they made a reasonable effort to do so, the court may dismiss the action without prejudice. On the other hand, where counsel have made a reasonable effort and when all sources of information as to the applicable foreign or sister-state law are exhausted and the court cannot determine it, the court may either apply California law, within constitutional limits, or dismiss the action without prejudice." (See 2 C.E.B., Civ. Proc. During Trial 3d, §14.39.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 2 McCormick 6th, §335.



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### III. OPTIONAL JUDICIAL NOTICE

#### H. Matters Commonly Known or Readily Determinable.

##### *1 Witkin Cal. Evid. Jud Notice § 30*

[§ 30] Matters Commonly Known or Readily Determinable.

*Ev.C. 451(f)* requires notice of matters "universally known"--the highest category. (See *supra*, § 15.) *Ev.C. 452(g)* and (h) provide for optional notice of matters that are not universally known and also of matters that are not known but are easily ascertainable.

(1) *Matters of Common Knowledge Within the Jurisdiction*. The court may take judicial notice of "[f]acts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute." (*Ev.C. 452(g)*; see *Jordan v. Worthen* (1977) 68 C.A.3d 310, 319, 137 C.R. 282, citing the text [historical use of road held not a matter of common knowledge within territorial jurisdiction of court]; 2 C.E.B., Civ. Proc. During Trial 3d, §14.23; 2 McCormick 5th, §329; for other examples, see *infra*, §§31, 32.) "Territorial jurisdiction" means the county for superior courts and the judicial district for municipal courts. (Law Rev. Com. Comment to *Ev.C. 452*; on unification of trial courts within each county, see 2 *Cal. Proc.* (4th), *Courts*, Supp., §169.)

(2) *Ascertainable Matters*. The courts may also take judicial notice of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (*Ev.C. 452(h)*; see *People v. Thomas* (1972) 8 C.3d 518, 520, 105 C.R. 366, 503 P.2d 1374 [judicial notice under *Ev.C. 452(h)* and 459 that, for several years immediately before his elevation to bench, challenged judge was assistant district attorney for Los Angeles County]; *People v. Flaxman* (1977) 74 C.A.3d Supp. 16, 22, 141 C.R. 799 [judicial notice, under *Ev.C. 452(h)*, of foundational facts underlying engineering and traffic survey]; *Easton v. Strassburger* (1984) 152 C.A.3d 90, 101, footnote 5, 199 C.R. 383 [judicial notice of relevant criteria in Code of Ethics of National Association of Realtors]; *Whispering Pines Mobile Home Park, Ltd. v. Scotts Valley* (1986) 180 C.A.3d 152, 162, 225 C.R. 364 [real estate "appraisal treatises" not shown to be sources of reasonably indisputable accuracy]; *Gould v. Maryland Sound Industries* (1995) 31 C.A.4th 1137, 1145, 37 C.R.2d 718 [in wrongful discharge action in which plaintiff claimed he was employed under oral contract, trial judge erred in taking judicial notice of written contract and sustaining defendant's demurrer on that basis; issue of which contract plaintiff was employed under was matter of dispute, not ascertainable fact]; 2 McCormick 5th, §330; 2 C.E.B., Civ. Proc. During Trial 3d, §14.24.)

What are "sources of reasonably indisputable accuracy"? They "include not only treatises, encyclopedias, almanacs, and the like, but also persons learned in the subject matter." But reference works would not be received in evidence; they would merely be consulted by the judge and parties to determine whether or not to take judicial notice and the tenor of the matter to be noticed. (Law Rev. Com. Comment to *Ev.C. 452*; see *People v. Archerd* (1970) 3 C.3d 615, 638, 91 C.R. 397, 477 P.2d 421, 3 *Cal. Evidence* (4th), *Presentation at Trial*, §15 [judge's consultation of medical

textbooks concerning nature of insulin].)

Except for the basic distinction between compulsory and optional notice, which separates matters universally known from those in the two lesser categories, the Evidence Code provisions do not materially change the preexisting California law, for state courts gave the concept of "matters of common knowledge" a quite liberal application. (See *infra*, §31 et seq.; *People v. Tossetti* (1930) 107 C.A. 7, 14, 289 P. 881 [giving numerous examples of judicially noticeable matters of general knowledge].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Matters of Common Knowledge Within the Jurisdiction*. See 2 McCormick 6th, §329.

(2) *Ascertainable Matters*. See *Fremont Indem. Co. v. Fremont General Corp.* (2007) 148 C.A.4th 97, 112, 55 C.R.3d 621, 5 Summary (10th), *Torts*, Supp., §702 [in action for misappropriation of funds, trial judge, in ruling on demurrer, erred in taking judicial notice of letter agreement and concluding that agreement allowed defendant to use net operating losses in manner alleged by plaintiff; judicial notice may be taken of existence of document but truth and proper interpretation of its contents remain disputable; relying on *Gould v. Maryland Sound Industries* (1995) 31 C.A.4th 1137, 37 C.R.2d 718, text, p. 124]; *Poseidon Dev. v. Woodland Lane Estates, LLC* (2007) 152 C.A.4th 1106, 1117, 62 C.R.3d 59 [in taking judicial notice of recorded documents showing assignment of plaintiff's interest in note and trust deed, trial judge was not precluded from concluding that plaintiff no longer had beneficial interest under documents; legal effect of assignment was not reasonably subject to dispute]; 2 McCormick 6th, §330. *West's Key Number Digest*, Criminal Law k.304(2); Evidence k.5 et seq.





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## CHAPTER II - Judicial Notice

### IV. WELL-KNOWN FACTS: ILLUSTRATIONS

#### A. Matters of General Knowledge.

*1 Witkin Cal. Evid. Jud Notice § 31*

[§ 31] Matters of General Knowledge.

The following matters are clearly within *Ev.C. 452(g)* or (h) (matters of common knowledge within jurisdiction, and matters that are easily ascertained; see *supra*, §30), and some undoubtedly come within *Ev.C. 451(f)* (universally known matters; see *supra*, §15).

(1) *Economic Facts*. (See *O'Meara v. Haiden* (1928) 204 C. 354, 367, 268 P. 334; *Alexander v. State Capital Co.* (1937) 9 C.2d 304, 312, 70 P.2d 619 [depression and declining real estate values]; *Kircher v. Atchison, Topeka & Santa Fe Ry. Co.* (1948) 32 C.2d 176, 187, 195 P.2d 427 [purchasing power of dollar has decreased to approximately one-half of what it was prior to "present inflationary spiral"]; *People v. Chambers* (1937) 22 C.A.2d 687, 703, 72 P.2d 746 [strikes and other labor disturbances in which violence and unlawful practices had occurred]; *Foster v. Pestana* (1947) 77 C.A.2d 885, 891, 177 P.2d 54 [rise in cost of living makes comparison of verdicts of past years improper]; *Holmes v. Southern Calif. Edison Co.* (1947) 78 C.A.2d 43, 50, 177 P.2d 32 [increase in values of real estate and personal property]; *Gamer v. DuPont Glore Forgan* (1976) 65 C.A.3d 280, 290, 135 C.R. 230 [changes in prime rate of interest]; *Rowe v. Dorrough* (1984) 150 C.A.3d 901, 905, 198 C.R. 131 [great number of Yamaha motorcycles are sold in California]; 12 A.L.R.2d 611 [changes in cost of living]; 42 A.L.R.3d 1439 [assessed valuations]; 21 A.L.R.4th 21 [effect of inflation on damages for future losses].)

(2) *War Conditions*. (See *People v. Mason* (1946) 72 C.A.2d 699, 706, 165 P.2d 481 [conditions at shipbuilding plants, including location, size, volume of employees, security regulations, and attempts at sabotage]; *McCulloch v. Liguori* (1948) 88 C.A.2d 366, 372, 199 P.2d 25 [shortage of building materials and foreseeability of government regulations, in 1946]; *Estate of Edwards* (1978) 82 C.A.3d 885, 888, 147 C.R. 458 [German occupation of Austria during World War II]; *United States v. Reynolds* (1953) 345 U.S. 1, 73 S.Ct. 528, 533, 97 L.Ed. 727 ["this is a time of vigorous preparation for national defense"; holding that accident report on Air Force plane testing secret electronic equipment was privileged from disclosure in a discovery proceeding in action under Federal Tort Claims Act].)

(3) *Intoxicating Liquor*. (See *People v. Silva* (1924) 67 C.A. 351, 358, 227 P. 976 ["jackass brandy is a distilled liquor containing a high percentage of alcohol"]; *People v. Brotherton* (1966) 239 C.A.2d 195, 204, 48 C.R. 513 [dicta: effect of drinking]; 49 A.L.R.2d 764 [intoxicating quality, from name].)

(4) *Crime and Criminals*. (See *People v. Torres* (1961) 56 C.2d 864, 867, 17 C.R. 495, 366 P.2d 823 [milk sugar and gelatin capsules used in processing narcotics]; *Solis v. Superior Court* (1966) 63 C.2d 774, 776, 48 C.R. 169, 408 P.2d 945 [heroin pushers are active at night]; *People v. Moore* (1963) 211 C.A.2d 585, 599, 27 C.R. 526 [colloquialism of criminals, "copped out," meaning admission of guilt, confession, or plea of guilty]; *People v. Hubbard* (1970) 9 C.A.3d 827, 831, 88 C.R. 411 ["reds," meaning capsules of Seconal]; *Powell v. Superior Court* (1991) 232 C.A.3d 785,

790, footnote 2, 283 C.R. 777 [judicial notice by appellate court of news media coverage of crime, in determining whether motion for change of venue should have been granted].)

(5) *Geographical and Historical Facts*. (See *People v. Stralla* (1939) 14 C.2d 617, 620, 96 P.2d 941 [geographical, historical and political data to determine whether Santa Monica Bay was within territorial boundary of state]; *Colberg v. California* (1967) 67 C.2d 408, 423, 62 C.R. 401, 432 P.2d 3, citing the text [tidal influence extends up San Joaquin River past port of Stockton]; *Estate of Rudolph* (1980) 112 C.A.3d 81, 83, 169 C.R. 126 [holographic will dated "Monday 26, 1978"; judicial notice of fact that only once did 26th day of a month occur on a Monday (June), hence, instrument contained "entire" date]; *Anaheim v. Work. Comp. App. Bd.* (1981) 116 C.A.3d 248, 261, 172 C.R. 92, 2 Summary (9th), *Workers' Compensation*, §344 [distance and travel time between places]; *Wolfe v. State Farm Fire & Cas. Ins. Co.* (1996) 46 C.A.4th 554, 560, 53 C.R.2d 878 [in action attacking insurers' refusal to write new home insurance policies following major earthquake, judicial notice of fact of earthquake was proper].)

(6) *Knowledge of Bench and Bar*. Sometimes "common knowledge" is merely that of the particular professional group that administers the judicial processes, i.e., the bench and bar. (See *People v. Adamson* (1949) 34 C.2d 320, 333, 210 P.2d 13 ["This court can take judicial notice, too, that it would be difficult to find in California any lawyers more experienced or better qualified in defending criminal cases than the Public Defender of Los Angeles County and his staff"]; *Denham v. Superior Court* (1970) 2 C.3d 557, 564, 86 C.R. 65, 468 P.2d 193, quoting the text [changes in membership of law firm as reason for delay in bringing action to trial]; *People v. Rhodes* (1974) 12 C.3d 180, 182, 115 C.R. 235, 524 P.2d 363 [judicial notice by appellate court of fact that appellant's appointed trial counsel was also, at time of trial, city attorney for county seat of county in which trial was held]; *Estate of Loud* (1945) 70 C.A.2d 399, 403, 161 P.2d 49 [in rejecting attempt to probate precatory writing as codicil to will, court took judicial notice of fact that decedent was a practicing lawyer]; *Heller v. Heller* (1948) 88 C.A.2d 603, 607, 199 P.2d 44 [Court of Appeal in Los Angeles district took judicial notice of a general order of the Los Angeles Superior Court designating all judges of that court to hear conciliation cases]; *Lee v. Cranford* (1951) 107 C.A.2d 677, 680, 237 P.2d 986 [judicial notice of fact that court clerks write up minutes as case progresses]; *Estate of Costa* (1952) 109 C.A.2d 735, 742, 241 P.2d 621 [appellate court took notice of fact that Legislature has assistance of efficient legislative counsel and was therefore aware of rule of certain case]; 61 A.L.R.5th 707 [judicial notice of customs and practices of attorneys].)

(7) *Groups*. (See *Gherna v. Ford Motor Co.* (1966) 246 C.A.2d 639, 652, 55 C.R. 94 [automobile manufacturers undertake large-scale advertising programs]; *People v. Coulon* (1969) 273 C.A.2d 148, 154, 78 C.R. 95 [term "hippies" provides generalized description of external appearance adequate for group identification, but does not create inference about group's living arrangements]; *Medina v. Hillshore Partners* (1995) 40 C.A.4th 477, 481, 46 C.R.2d 871 [street gangs generally claim "home territory" and attempt to prevent rival gang members from entering].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(5) *Geographical and Historical Facts*.

*Cross-Reference:* The discussion of *Anaheim v. Work. Comp. App. Bd.* was not carried over to the 10th edition of *Summary*.



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## CHAPTER II - Judicial Notice

### IV. WELL-KNOWN FACTS: ILLUSTRATIONS

#### B. Matters of Local Knowledge.

*1 Witkin Cal. Evid. Jud Notice § 32*

[§ 32] Matters of Local Knowledge.

A court sitting in a particular city may take judicial notice of the existence and location of streets, their character and relation to each other, the congestion of pedestrian or vehicular travel, etc. (See *Hom v. Clark* (1963) 221 C.A.2d 622, 637, 638, 35 C.R. 11 [San Francisco superior court judge could notice fact that Grant Avenue is a main heavily travelled artery in Chinatown and not an "alley"]; *People v. Kutz* (1960) 187 C.A.2d 431, 434, 9 C.R. 626 [well-known street in city where court sits]; 86 A.L.R.3d 484 [location of street address].)

There are many other examples of cases coming within *Ev.C. 452(g)*. (See *Varcoe v. Lee* (1919) 180 C. 338, 347, 181 P. 223 [locality where automobile accident occurred was a "business district"]; *Mogle v. Moore* (1940) 16 C.2d 1, 4, 104 P.2d 785 [local topography]; *People v. Tossetti* (1930) 107 C.A. 7, 14, 289 P. 881 [justice court took notice of population of township in order to establish its jurisdiction]; *Wood v. Kennedy* (1931) 117 C.A. 53, 59, 3 P.2d 366 [insolvency of a bank]; *Most Worshipful Hiram of Tyre Grand Lodge v. Most Worshipful Sons of Light Grand Lodge* (1949) 94 C.A.2d 25, 31, 210 P.2d 34 [knowledge of establishment of grand lodge of Masons in California prior to 1910]; *Marin v. Dufficy* (1956) 144 C.A.2d 30, 34, 300 P.2d 721 [Marin county superior court could take notice that Marin had no county hospital]; *People v. Jacobs* (1977) 72 C.A.3d Supp. 46, 48, 140 C.R. 141 [public beach at which defendant disrobed was in unincorporated part of county within meaning of county nudity ordinance]; *People v. Edwards* (1993) 17 C.A.4th 1248, 1255, footnote 2, 22 C.R.2d 3 [location of superior and municipal court buildings]; and see generally 2 McCormick 5th, §329; 48 A.L.R.2d 1102 [public thoroughfares and parks].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 2 McCormick 6th, §329.



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## CHAPTER II - Judicial Notice

### IV. WELL-KNOWN FACTS: ILLUSTRATIONS

#### C. Medical and Scientific Facts.

*1 Witkin Cal. Evid. Jud Notice § 33*

[§ 33] Medical and Scientific Facts.

"Subdivisions (g) and (h) include, for example, facts which are accepted as established by experts and specialists in the natural, physical, and social sciences, if those facts are of such wide acceptance that to submit them to the jury would be to risk irrational findings." (Law Rev. Com. Comment to *Ev.C.* 452.) The following are illustrative:

(1) *Medical Facts*. Judicial notice may be taken of medical facts that are commonly known, such as the nature and location of organs and the seriousness of certain diseases. (See *Gallentine v. Fierro* (1930) 110 C.A. 345, 346, 294 P. 59 [mortality tables]; *Thomsen v. Burgeson* (1938) 26 C.A.2d 235, 239, 79 P.2d 136 [location of tonsils, uvula and soft palate]; *Agnew v. Los Angeles* (1950) 97 C.A.2d 557, 567, 218 P.2d 66 [malpractice suit; failure to use X-ray in diagnosis of fracture is conduct below ordinary degree of care of practicing physicians]; *People v. Sanders* (1969) 268 C.A.2d 802, 805, footnote 1, 74 C.R. 350 [stoppage of blood flow to head until unconsciousness results is attended by serious danger]; *Knowles v. Work. Comp. App. Bd.* (1970) 10 C.A.3d 1027, 1033, 89 C.R. 356 [coronary arteriosclerosis amounts to "heart trouble"]; 72 A.L.R.2d 554 [diseases, wounds, injuries, etc., and procedures for prevention and treatment].) (See also *People v. Brotherton* (1966) 239 C.A.2d 195, 203, 48 C.R. 513 [dicta: effects of taking alcohol or drugs].)

(2) *Scientific Facts*. (See *McAllister v. Work. Comp. App. Bd.* (1968) 69 C.2d 408, 414, 71 C.R. 697, 445 P.2d 313, citing the text [judicial notice that smoke contains incompletely oxidized materials, and that firefighters are likely to inhale smoke]; *Markulics v. Maico Co.* (1946) 74 C.A.2d 66, 69, 168 P.2d 35 ["impotence of a B battery," on a hearing aid, to develop fire]; *Truck Ins. Exchange v. Industrial Acc. Com.* (1946) 77 C.A.2d 461, 464, 175 P.2d 884 [characteristics of lightning, including conductivity of wet objects and likelihood of discharge at particular place]; *Cantrell v. Board of Supervisors of Los Angeles* (1948) 87 C.A.2d 471, 477, 197 P.2d 218 [presence of large numbers of rats and flies is extremely detrimental to public health, and geographic situation of San Francisco is such as to make constant vigilance against bubonic plague necessary]; *People v. Helm* (1957) 156 C.A.2d 343, 344, 319 P.2d 644 [notice that "the sun set at 5:35 p.m. on February 13, 1957, and consequently that the burglary was committed in the nighttime"]; *People v. MacLaird* (1968) 264 C.A.2d 972, 973, 975, 71 C.R. 191 [validity and accuracy of scientific principle of radar devices must be judicially noticed, but accuracy and efficiency of particular apparatus must be established by testimony of police officer]; *People v. Law* (1974) 40 C.A.3d 69, 75, 114 C.R. 708 [judicial notice of case law and articles in scientific journals on reliability and acceptance of spectrographic voice identification]; *People v. Municipal Court (Sansone)* (1986) 184 C.A.3d 199, 200, 228 C.R. 798 [reliability of testing urine for blood-alcohol content]; *People v. Smith* (1989) 215 C.A.3d 19, 25, 263 C.R. 678 [judicial notice properly taken of prior hearings within same superior court in which blood analysis by electrophoresis was found reliable]; 28 A.L.R.2d 1115 [fingerprints, palm, footprint]; 84 A.L.R.2d 979 [driver's reaction time and stopping distance of motor vehicles traveling

at various speeds]; 2 McCormick 5th, §330.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Scientific Facts*. See 2 McCormick 6th, §330. *West's Key Number Digest*, Evidence k.9



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## CHAPTER II - Judicial Notice

### V. MATTERS NOT NOTICED: ILLUSTRATIONS

#### A. Medical and Scientific Matters.

*1 Witkin Cal. Evid. Jud Notice § 34*

[§ 34] Medical and Scientific Matters.

(1) *Medical Matters*. Proof is required of a method of medical or surgical treatment familiar only to experts. (*Southern Calif. Edison Co. v. Industrial Acc. Com.* (1925) 75 C.A. 709, 715, 243 P. 455.) And, while a blood test for intoxication is admissible (see 2 *Cal. Evidence* (4th), *Demonstrative, Experimental, and Scientific Evidence*, §§53, 54), the inference of intoxication from a concentration of over .15% alcohol is not so irresistible as to call for judicial notice. (*King v. Ludlow* (1958) 165 C.A.2d 620, 625, 332 P.2d 345 [rejecting defendant's contention that plaintiff's blood test should be deemed conclusive of his contributory negligence].)

Obstetricians are not wholly in agreement on whether a woman with a history of premature births will frequently have subsequent premature births; hence, no judicial notice will be taken on this controversial matter. (*Galloway v. Moreno* (1960) 183 C.A.2d 803, 809, 7 C.R. 349.) Neither will judicial notice be taken of the controversial propositions that the use of marijuana is harmless (*Comings v. State Bd. of Education* (1972) 23 C.A.3d 94, 101, 100 C.R. 73, citing the text), and that electric and magnetic fields cause cancer (*Ford v. Pacific Gas & Elec. Co.* (1997) 60 C.A.4th 696, 705, 706, 70 C.R.2d 359).

(2) *Scientific Matters*. The application of scientific principles to a particular case must be proved. (See *Roy v. Smith* (1933) 131 C.A. 148, 151, 21 P.2d 151; *Roy v. Smith* (1933) 134 C.A. 240, 25 P.2d 251.) Thus, in *People v. Plywood Mfrs. of Calif.* (1955) 137 C.A.2d Supp. 859, 869, 291 P.2d 587, the legislative premise of the Smog Control Law was challenged on the issue of identifiable opacity of smoke of the shade described on the Ringelmann Chart. Because the matter was one on which there was scientific dispute, the court refused to take judicial notice that the premise was unsound. (See also *People v. Leahy* (1994) 8 C.4th 587, 609, 34 C.R.2d 663, 882 P.2d 321 [judicial notice could not be taken of judicial decisions and published studies approving reliability of horizontal gaze nystagmus testing, as there was substantial opposing authority]; *Beckley v. Reclamation Bd.* (1962) 205 C.A.2d 734, 741, 23 C.R. 428 [no judicial notice taken of truth of publicly employed engineers' conclusions concerning diversion of flood waters, contained in official reports].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Medical Matters*. See *In re Andrews* (2002) 28 C.4th 1234, 1246, footnote 6, 124 C.R.2d 473, 52 P.3d 656 [in habeas corpus proceeding arising from capital trial, Supreme Court declined to take judicial notice of psychiatric materials that would allegedly rebut referee's conclusions regarding use of posttraumatic stress disorder as defense; psychiatric materials are not matters of such common knowledge that they are not reasonably subject to dispute].



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## CHAPTER II - Judicial Notice

### V. MATTERS NOT NOTICED: ILLUSTRATIONS

#### B. Other Uncertain or Controversial Matters.

##### *1 Witkin Cal. Evid. Jud Notice § 35*

#### [§ 35] Other Uncertain or Controversial Matters.

Some matters of so-called common knowledge are held not to meet the test because they are not really known or immediately ascertainable within the local area. (See *Estate of Wirt* (1929) 207 C. 106, 110, 277 P. 118 [no notice of charitable nature of Masonic lodge located outside the state]; *Berry v. Chaplin* (1946) 74 C.A.2d 669, 675, 169 P.2d 453 [court cannot take judicial notice of wealth of defendant Charles Chaplin from so-called common knowledge derived from newspapers and magazines]; *Oakland v. Darbee* (1951) 102 C.A.2d 493, 501, 227 P.2d 909 [no notice that bank defendant was doing business in a certain county]; *People v. Coulon* (1969) 273 C.A.2d 148, 154, 78 C.R. 95 [no judicial notice that particular group of "hippies" had set up single communal living establishment]; *Carleton v. Tortosa* (1993) 14 C.A.4th 745, 753, footnote 1, 17 C.R.2d 734 [advertisement and brochure of private corporations conducting real property tax-deferred exchanges, and one corporation's summary of changes in federal regulations were not matters of common knowledge within territorial jurisdiction of court].)

Others, though widely believed, are, on analysis, found to be controversial. Thus, in 1942, the California Supreme Court refused to take judicial notice that the Communist Party advocated forcible overthrow of the Government. (*Communist Party v. Peek* (1942) 20 C.2d 536, 546, 127 P.2d 889.) And in *Mack v. State Bd. of Education* (1964) 224 C.A.2d 370, 36 C.R. 677, the same conclusion was reached in a proceeding to revoke teaching credentials for alleged false swearing to the Levering Act loyalty oath. There was no evidence before the respondent board to the effect that the Communist Party advocated revolutionary action during the period involved (1953-1957). The board relied on legislative findings, federal and state, of a Communist conspiracy, and contended that this justified official notice (*Govt.C. 11515*, 1 *Cal. Evidence* (4th), *Introduction*, §72) of the crucial fact. The court recognized the increasing knowledge of the Party's aims and practices, but declared that "we do not believe that such knowledge has increased to the point where we can now say that it is a matter of common and general knowledge, certain and indisputable," that the Party was guilty of such advocacy in the period. (224 C.A.2d 374, citing the text.)

In *Weitzenkorn v. Lesser* (1953) 40 C.2d 778, 256 P.2d 947, the action was for damages for unlawful use of literary property--a story entitled "Tarzan in the Land of Eternal Youth." Defendants contended that judicial notice should be taken of the contents of published books in order to decide the issue of originality on demurrer. The court conceded that it could judicially notice the fictional character of Tarzan and the myth of the fountain of youth; "[h]owever, common and general knowledge may not be said to include the fact that, in previously published works, these characters and myth have been combined with the same treatment and manner of expression which Weitzenkorn has used." (40 C.2d 787.) (See also *Paramount Television Productions v. Bill Derman Productions* (1968) 258 C.A.2d 1, 10, 65 C.R. 473 [no judicial notice that in television industry a "network sale" has a specified meaning; literature cited shows much dispute]; *Comings v. State Bd. of Education* (1972) 23 C.A.3d 94, 102, 100 C.R. 73, citing the text [common use of

marijuana "is the subject of intense scientific and popular controversy; actual judicial knowledge of the relevant truths is limited; and there is no evidence ... supporting a conclusion either way"].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Aegis Sec. Ins. Co.* (2005) 127 C.A.4th 569, 574, 25 C.R.3d 623 [on appeal from order forfeiting bail bond, judicial notice of declaration of court clerk describing superior court's case management procedures was not appropriate; those procedures did not constitute facts of common knowledge within meaning of *Ev.C. 452(g)* (text, §30), nor were they matters capable of immediate and accurate determination within meaning of *Ev.C. 452(h)* (text, §30)].





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## CHAPTER II - Judicial Notice

### VI. PROCEDURE

#### A. Compulsory Notice on Request.

##### 1. In General.

*1 Witkin Cal. Evid. Jud Notice § 36*

[§ 36] In General.

(1) *Former Law.* The California statute, except as to notice of foreign law, was silent on any duty to request or furnish information to the judge. However, as a matter of practice, reversible error in failure to notice could rarely be shown where counsel failed to bring the matter to the judge's attention. (See *Popcorn Equipment Co. v. Page* (1949) 92 C.A.2d 448, 454, 207 P.2d 647; *People v. Bartlett* (1962) 199 C.A.2d 173, 177, 18 C.R. 480, citing the text; 57 Harv. L. Rev. 288; 60 Harv. L. Rev. 299; 69 Harv. L. Rev. 565.)

(2) *Uniform Rules and Evidence Code.* The original Uniform Rules distinction between compulsory and optional notice, with the notice and information requirement to make optional notice compulsory, was the basis for *Ev.C. 453*:

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

"(a) Gives each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request; and

"(b) Furnishes the court with sufficient information to enable it to take judicial notice of the matter." (See *Mitroff v. United Services Auto. Assn.* (1999) 72 C.A.4th 1230, 1243, 85 C.R.2d 759 [*Ev.C. 453* does not compel judge to admit irrelevant matters that would result in undue consumption of time].)

The theory of the requirement is set forth in the Law Revision Commission Comment on *Ev.C. 452*:

"The matters of law included under Section 452 may be neither known to the court nor easily discoverable by it because the sources of information are not readily available. ... [J]udicial notice of these matters of law is mandatory only if counsel adequately discharges his responsibility for informing the court as to the law applicable to the case. The simplified process of judicial notice can then be applied to all of the law applicable to the case, including such law as ordinances and the law of foreign nations." (See 2 C.E.B., Civ. Proc. During Trial 3d, §14.26.)

(3) *Burden on Requesting Party.* In invoking the optional notice section, the party making the request has a double burden: persuading the judge that the matter is one that properly can be noticed, and also persuading the judge of the tenor of the matter to be noticed. (Law Rev. Com. Comment to *Ev.C. 453*.)

The Commissioners also say: "The degree of the judge's persuasion regarding a particular matter is determined by the subdivision of Section 452 which authorizes judicial notice of the matter. For example, if the matter is claimed to be a fact of common knowledge under paragraph (g) of Section 452, the party must persuade the judge that the fact is of

such common knowledge within the territorial jurisdiction of the court that it cannot reasonably be subject to dispute, *i.e.*, that no reasonable person having the same information as is available to the judge could rationally disbelieve the fact. On the other hand, if the matter to be noticed is a city ordinance under paragraph (b) of Section 452, the party must persuade the judge that a valid ordinance exists and also as to its tenor; but the judge need not believe that no reasonable person could conclude otherwise." (Law Rev. Com. Comment to *Ev.C. 453*.)

(4) *Judicial Notice Despite Lack of Compliance*. The Commission's Comment on *Ev.C. 453* makes this distinction:

"Section 453 is intended as a safeguard and not as a rigid limitation on the court's power to take judicial notice. The section does not affect the discretionary power of the court to take judicial notice under Section 452 where the party requesting that judicial notice be taken fails to give the requisite notice to each adverse party or fails to furnish sufficient information as to the propriety of taking judicial notice or as to the tenor of the matter to be noticed. Hence, when he considers it appropriate, the judge may take judicial notice under Section 452 and may consult and use any source of pertinent information, whether or not furnished by the parties. However, where the matter noticed under Section 452 is one that is of substantial consequence to the action—even though the court may take judicial notice under Section 452 when the requirements of Section 453 have not been satisfied--the party adversely affected must be given a reasonable opportunity to present information as to the propriety of taking judicial notice and as to the tenor of the matter to be noticed." (See *Estate of Russell (1971) 17 C.A.3d 758, 765, 95 C.R. 88* [unrequested notice of decedent's will was improperly taken where opposing party was given no opportunity to present information on matter "of substantial consequence"]; *Estate of Nicholas (1986) 177 C.A.3d 1071, 1090, 223 C.R. 410*, *infra*, §41.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Evidence k.51



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CHAPTER II - Judicial Notice

VI. PROCEDURE

- A. Compulsory Notice on Request.
- 2. Request and Notice to Adverse Party.

*1 Witkin Cal. Evid. Jud Notice § 37*

[§ 37] Request and Notice to Adverse Party.

*Ev.C. 453(a)* merely calls for "sufficient notice," through the pleadings "or otherwise." (See *supra*, §36.) This lack of specification of the form, time, or place was purposeful, as explained in the Law Revision Commission Comment to *Ev.C. 453*:

"Since Section 452 relates to a wide variety of facts and law, the notice requirement should be administered with flexibility in order to insure that the policy behind the judicial notice rules is properly implemented. In many cases, it will be reasonable to expect the notice to be given at or before the time of the pretrial conference. In other cases, matters of fact or law of which the court should take judicial notice may come up at the trial. Section 453 merely requires reasonable notice, and the reasonableness of the notice given will depend upon the circumstances of the particular case." (See 2 C.E.B., Civ. Proc. During Trial 3d, §§14.27, 14.28.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER II - Judicial Notice

### VI. PROCEDURE

#### A. Compulsory Notice on Request.

##### 3. Information Furnished to Court.

*1 Witkin Cal. Evid. Jud Notice § 38*

[§ 38] Information Furnished to Court.

Again the statute is in general terms, calling only for "sufficient information" (*Ev.C. 453(b)*, supra, §36). And again the Law Revision Commission Comment justifies this lack of specific detail:

"Section 453 does not define 'sufficient information'; this will necessarily vary from case to case. While the parties will understandably use the best evidence they can produce under the circumstances, mechanical requirements that are ill-suited to the individual case should be avoided. The court justifiably might require that the party requesting that judicial notice be taken provide expert testimony to clarify especially difficult problems." (Law Rev. Com. Comment to *Ev.C. 453*; see *People v. Maxwell* (1978) 78 C.A.3d 124, 130, 144 C.R. 95 ["A court is not required to seek out on its own initiative indisputable sources of information"]; *Heist v. Colusa* (1984) 163 C.A.3d 841, 850, 213 C.R. 278 [essential fact to be determined, information insufficient]; *Willis v. California* (1994) 22 C.A.4th 287, 291, 27 C.R.2d 413 [trial judge properly refused to take judicial notice of sections of State Administrative Manual; request was not accompanied by any information]; 2 C.E.B., Civ. Proc. During Trial 3d, §14.29.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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CHAPTER II - Judicial Notice

VI. PROCEDURE

- A. Compulsory Notice on Request.
- 4. Notification and Record of Denial.

*1 Witkin Cal. Evid. Jud Notice § 39*

[§ 39] Notification and Record of Denial.

A party should have an opportunity to present evidence on a matter which the party thought would be judicially noticed but was not; and *Ev.C. 456* provides it:

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

However, under some circumstances, a failure to promptly advise the parties of a denial of judicial notice may be deemed harmless error. (*Heist v. Colusa* (1984) 163 C.A.3d 841, 850, 213 C.R. 278 [even if plaintiff had known of denial of notice request and had had opportunity to provide sufficient information to support request, evidence would not have supported judgment in his favor]; 2 C.E.B., Civ. Proc. During Trial 3d, §14.41.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### B. Court's Sources of Information.

*1 Witkin Cal. Evid. Jud Notice § 40*

[§ 40] Court's Sources of Information.

(1) *In General.* "In determining the propriety of taking judicial notice of a matter, or the tenor thereof" (*Ev.C. 454*), the judge is free from nearly all of the restrictions of the rules of evidence. Under *Ev.C. 454(a)*: "(1) Any source of pertinent information, including the advice of persons learned in the subject matter, may be consulted or used, whether or not furnished by a party. (2) Exclusionary rules of evidence do not apply except for Section 352 and the rules of privilege." (*Ev.C. 352* states the discretionary power to exclude evidence; see *1 Cal. Evidence (4th), Circumstantial Evidence, §17.*) (See 2 C.E.B., Civ. Proc. During Trial 3d, §14.36.)

The judge is also authorized to appoint one or more experts for advice on matters requiring expert opinion, and these are compensated in the same manner as court-appointed expert witnesses. (*Ev.C. 460*; see 2 C.E.B., Civ. Proc. During Trial 3d, §14.38.) But consultation with experts outside of court is improper. (*People v. Archerd (1970) 3 C.3d 615, 638, 91 C.R. 397, 477 P.2d 421, 3 Cal. Evidence (4th), Presentation at Trial, §15* [judge in prosecution for murder by insulin attempted to learn more about the drug from medical professionals at social gathering; error not prejudicial where facts of case not involved].)

(2) *Foreign Law.* The 1957 statute on judicial notice of foreign law (*supra*, §27) contained a procedural limitation that is continued in *Ev.C. 454(b)*:

"Where the subject of judicial notice is the law of an organization of nations, a foreign nation, or a public entity in a foreign nation and the court resorts to the advice of persons learned in the subject matter, such advice, if not received in open court, shall be in writing." (See *Volkswagenwerk Aktiengesellschaft v. Superior Court (1981) 123 C.A.3d 840, 852, 176 C.R. 874* [judicial notice taken of West German law of discovery, based on relevant material submitted by parties and published sources cited by court].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### C. Opportunity To Present Information.

*1 Witkin Cal. Evid. Jud Notice § 41*

[§ 41] Opportunity To Present Information.

Ordinarily, when a party requests that judicial notice be taken, or the judge proposes to do so on his or her own initiative, the judge must "afford each party reasonable opportunity" to present "information relevant to (1) the propriety of taking judicial notice of the matter and (2) the tenor of the matter to be noticed." (*Ev.C. 455(a)*; see Unif. Rule 201(e), 13A (Part 1A) U.L.A. (Master Ed.), p. 195; 2 *Stanf. L. Rev.* 668; 2 McCormick 5th, §333; 23 A.L.R.2d 1437 [Uniform Act]; 45 A.L.R.2d 1169.)

Specifically, *Ev.C. 455* provides as follows:

(1) *Scope*. It applies (1) to optional matters noticed under *Ev.C. 452*; and (2) to "universally known" facts required to be noticed under *Ev.C. 451(f)*. A proviso, however, limits it to matters that are "of substantial consequence to the determination of the action." (*Ev.C. 455*, first sentence.) Thus, in an action involving the propriety of a trustee's proposed sale of cattle that were part of the trust property, the trial judge could not take judicial notice of court records relating to the trust's previous financial condition without notice to the parties, as the records were "of substantial consequence" to the action. (*Estate of Nicholas* (1986) 177 C.A.3d 1071, 1090, 223 C.R. 410.)

(2) *Time*. In jury trials, the opportunity must be given before the jury is instructed; in nonjury trials, before the cause is submitted for decision. (*Ev.C. 455(a)*; see Law Rev. Com. Comment, observing that, if the judge overlooks a matter, the case may be reopened after submission; on reopening case, see 7 *Cal. Proc.* (4th), *Trial*, §180.)

(3) *Reasonable Opportunity*. What constitutes a reasonable opportunity depends on "the complexity of the matter and its importance to the case." Where the matter is simple and undisputed, no hearing will be necessary; but where a complex question is involved (e.g., the tenor of foreign law), a hearing might be required by procedural due process. (See Law Rev. Com. Comment to *Ev.C. 455*.)

(4) *Record of Information Received Out of Court*. *Ev.C. 455(b)* adds an additional protective requirement: If the judge "resorts to any source of information not received in open court, including the advice of persons learned in the subject matter," the information and its source must be made *a part of the record*, and each party must be given a reasonable opportunity to meet it before judicial notice is taken.

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 13A U.L.A. (Master Ed.), p. 20 [Unif. Rule 201(e)]; 2 McCormick 6th, §333.



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#### D. Instruction to Jury on Noticed Matter.

*1 Witkin Cal. Evid. Jud Notice § 42*

[§ 42] Instruction to Jury on Noticed Matter.

A matter judicially noticed is conclusive (see *supra*, §3), and the judge should, and on request must, "instruct the jury to accept as a fact the matter so noticed." (*Ev.C. 457*; see *People v. Moore* (1997) 59 C.A.4th 168, 186, 69 C.R.2d 56 [in prosecution for conspiring with water district officer to take public monies from "district of this state," instruction to jury, based on judicial notice of Water Code provisions, that water district was district of state did not deprive defendant of right to have jury determine all elements of crime]; 2 C.E.B., Civ. Proc. During Trial 3d, §14.33; 2 Jefferson, California Evidence Benchbook 3d, §§47.60, 47.61.) The former statute was to the same effect. (See *People v. Mayes* (1896) 113 C. 618, 625, 45 P. 860; 2 *Stanf. L. Rev.* 664.)

The new section applies to "a matter which would otherwise have been for determination by the jury," i.e., one involving an issue of fact. Instruction on issues of law is not a matter of evidence and is covered by other, general provisions of law. (Law Rev. Com. Comment to *Ev.C. 457*.)

**SUPPLEMENT:** [This section is current through the latest supplement]





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E. Notice in Subsequent Trial Proceeding.

*1 Witkin Cal. Evid. Jud Notice § 43*

[§ 43] Notice in Subsequent Trial Proceeding.

*Ev.C. 458* provides that (1) the failure or refusal of the judge to take judicial notice of a matter, or (2) to instruct the jury thereon, does not preclude the judge from noticing the matter, in accordance with the procedural requirements of the statute, "in subsequent proceedings in the action." (See *Ponce v. Tractor Supply Co.* (1972) 29 C.A.3d 500, 509, 105 C.R. 628 [notice of prior judgment requested at time of motion for new trial]; 2 C.E.B., Civ. Proc. During Trial 3d, §14.42.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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F. Effect of Error as to Notice.

*1 Witkin Cal. Evid. Jud Notice § 44*

[§ 44] Effect of Error as to Notice.

The Evidence Code declares the party's right and the trial judge's duty, but does not deal with the problems of appellate review and reversible error. Hence, even though the matter called for compulsory notice, or was appropriate for optional notice, and the appellant fully complied with the procedural requirements, refusal to take notice is merely error. Whether it is reversible error depends on the state of the record, and also involves considerations of estoppel and waiver. (See Law Rev. Com. Comment to *Ev.C. 451*; 9 *Cal. Proc. (4th), Appeal*, §§383 et seq., 408 et seq.) Likewise, the improper taking of notice is subject to harmless error analysis. (See *West Valley-Mission Community College Dist. v. Concepcion (1993) 16 C.A.4th 1766, 1778, 21 C.R.2d 5* [in mandamus review of discipline imposed on teacher, trial judge's error in judicially noticing transcripts from teacher's criminal trials was harmless, as evidence apart from transcripts adequately supported disciplinary findings].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Aquila v. Superior Court (2007) 148 C.A.4th 556, 569, 55 C.R.3d 803*, quoting the text.



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## G. Notice in Reviewing Court.

## 1. Former Law and Evidence Code.

*1 Witkin Cal. Evid. Jud Notice § 45*

[§ 45] Former Law and Evidence Code.

Even prior to enactment of the Evidence Code, an appellate court had the same power to take judicial notice as a trial court. (See *People v. Stralla* (1939) 14 C.2d 617, 620, 96 P.2d 941; *People v. Tossetti* (1930) 107 C.A. 7, 12, 289 P. 881; *Ahlgren v. Carr* (1962) 209 C.A.2d 248, 257, 25 C.R. 887, citing the text; *South Shore Land Co. v. Petersen* (1964) 226 C.A.2d 725, 742, 38 C.R. 392; *Pratt v. Coast Trucking* (1964) 228 C.A.2d 139, 144, 39 C.R. 332; *People v. Phillips* (1964) 229 C.A.2d 496, 498, 40 C.R. 403; *Colvig v. RKO General* (1965) 232 C.A.2d 56, 64, 42 C.R. 473; *People v. Melchor* (1965) 237 C.A.2d 685, 691, 47 C.R. 235; 2 *Stanf. L. Rev.* 671.)

*Ev.C. 459* specifies the power and the duty (infra, §46 et seq.) and establishes the same procedural safeguards for parties as in trial court notice (infra, §49). Additionally, C.R.C., Rule 14.5 requires the request to be made by a motion that includes a proposed order and either a copy of the matter to be noticed or an explanation why it is not practicable to include a copy. (See 15 California Lawyer 59 (December 1995) [use of judicial notice in appellate court to compensate for inadequate trial record].)

**SUPPLEMENT:** [This section is current through the latest supplement]

C.R.C., Rule 14.5 was repealed in 2002 and replaced by C.R.C., Rule 22(a) without substantive change. C.R.C., Rule 22(a) became C.R.C., Rule 8.252(a) in 2006.

See *Canal Ins. Co. v. Tackett* (2004) 117 C.A.4th 239, 243, 11 C.R.3d 626 [on appeal from order awarding plaintiff insurer attorney fees from interest that accrued on interpleaded funds, court declined to consider plaintiff's request for judicial notice of items included in its respondent's brief, where plaintiff failed to file separate motion with proposed order, as required by C.R.C., Rule 22(a), but instead included motion in its brief].

(New) *Motion for judicial notice of legislative history*: "Even where statutory language is ambiguous, and resort to legislative history is appropriate, as a general rule in order to be cognizable, legislative history must shed light on the collegial view of the Legislature as a whole." Thus, in order to help an appellate court determine what constitutes properly cognizable legislative history, and what does not, a motion for judicial notice of legislative history materials under C.R.C., Rule 22(a) should be in the following form: (1) It should identify each separate document for which judicial notice is sought as a separate exhibit; and (2) the moving party should submit a memorandum of points and authorities citing authority why each such exhibit constitutes cognizable legislative history. (*Kaufman & Broad Communities v. Performance Plastering* (2005) 133 C.A.4th 26, 29, 30, 34 C.R.3d 520 [criticizing motions for judicial notice of documents "resembling a telephone book," and listing documents that have been and have not been found to constitute cognizable legislative history].)



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#### G. Notice in Reviewing Court.

#### 2. Power and Duty of Court.

##### a. In General.

*1 Witkin Cal. Evid. Jud Notice § 46*

[§ 46] In General.

(1) *Compulsory Notice*. "The reviewing court *shall* take judicial notice of (1) each matter properly noticed by the trial court and (2) each matter that the trial court was required to notice under Section 451 or 453." (*Ev.C. 459(a)*; see *Hickey v. Roby* (1969) 273 C.A.2d 752, 755, 77 C.R. 486; 1 Civil Appellate Practice 3d, §11.87.)

Obviously, matters properly noticed by the trial judge must be noticed on appeal. But the Code goes further: If a party makes an appropriate request for notice of an optional matter and complies with the procedure (*supra*, §36), the judge's unwarranted failure or refusal to take notice is immaterial; the appellate court must do so. (See Law Rev. Com. Comment to *Ev.C. 459*.)

Finally, the Code makes the mandatory provisions of *Ev.C. 451*, on compulsory notice without request, binding on the appellate court. (See Law Rev. Com. Comment to *Ev.C. 459*.)

(2) *Optional Notice*. "The reviewing court may take judicial notice of any matter specified in Section 452." (*Ev.C. 459(a)*.) Thus, in addition to being bound by the compulsory notice statute in the same manner as the trial judge (*supra*), the appellate court has the same discretionary power as the trial judge to notice matters listed in the optional notice statute. (See *Palm Springs Paint Co. v. Arenas* (1966) 242 C.A.2d 682, 687, 51 C.R. 747 [records of federal suit]; *Pellandini v. Pacific Limestone Products* (1966) 245 C.A.2d 774, 776, 54 C.R. 290, citing the text [Public Utilities Commission decision]; *Holmes v. Oakland* (1968) 260 C.A.2d 378, 384, 67 C.R. 197 [city ordinance]; *Grinnell v. Charles Pfizer & Co.* (1969) 274 C.A.2d 424, 444, 79 C.R. 369, *infra*, §47 [United States Surgeon General's technical report]; *People v. Terry* (1974) 38 C.A.3d 432, 439, 113 C.R. 233 [death certificate]; *Hogen v. Valley Hosp.* (1983) 147 C.A.3d 119, 125, 195 C.R. 5 [files of Board of Medical Quality Assurance]; *Sebago v. Alameda* (1989) 211 C.A.3d 1372, 1380, 259 C.R. 918 [defendant's interrogatory response, which appeared in records of trial court; appellate court may take judicial notice of matter that is subject to notice despite trial judge's refusal to do so]; 1 Civil Appellate Practice 3d, §11.87.)

(3) *Different Tenor*. "The reviewing court may take judicial notice of a matter in a tenor different from that noticed by the trial court." (*Ev.C. 459(a)*; see 1 Civil Appellate Practice 3d, §11.86.)

(4) *Sources of Information*. "In determining the propriety of taking judicial notice of a matter, or the tenor thereof, the reviewing court has the same power as the trial court under Section 454." (*Ev.C. 459(b)*.) This makes available to the reviewing court the right under *Ev.C. 454* (*supra*, §40) to use reference works, consult experts, etc., in the exercise

of any aspect of its judicial notice power; i.e., to sustain or reject the trial judge's determination of propriety, to take or refuse to take judicial notice on its own initiative, or to take notice in a tenor different from that of the trial judge. (See Law Rev. Com. Comment to *Ev.C.* 459.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Compulsory Notice*. See *People v. Cunningham* (2001) 25 C.4th 926, 1012, footnote 12, 108 C.R.2d 291, 25 P.3d 519 [in capital murder trial, judicial notice of reporter's transcript of defendant's prior murder trial, along with search warrant and supporting documents, would have been compulsory in trial court if requested, but there was no request; thus, on appeal, Supreme Court was not required to notice it].

(2) *Optional Notice*. See *In re Karen G.* (2004) 121 C.A.4th 1384, 1390, 18 C.R.3d 301 [minute order of juvenile court at 6-month review hearing]; *Deveny v. Entropin* (2006) 139 C.A.4th 408, 418, 42 C.R.3d 807 [request to take judicial notice of records in related federal action declined; as appeal was from summary judgment and de novo standard of review applied, ruling of another court was not relevant or helpful].



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#### G. Notice in Reviewing Court.

##### 2. Power and Duty of Court.

##### b. Effect of Taking Notice.

*1 Witkin Cal. Evid. Jud Notice § 47*

[§ 47] Effect of Taking Notice.

*Ev.C. 459* merely deals with the power and duty *to take judicial notice* on appeal; the effect of matters thus noticed raises problems of appellate practice outside the scope of the Evidence Code. "For example, the appellate court is required to notice the matters of law mentioned in Section 451, but it may hold that an error which the appellant has 'invited' is not reversible error or that points not urged in the trial court may not be advanced on appeal, and refuse, therefore, to apply the law to the pending case. These principles do not mean that the appellate court does not take judicial notice of the applicable law; they merely mean that, for reasons of policy governing appellate review, the appellate court may refuse to apply the law to the case before it." (Law Rev. Com. Comment to *Ev.C. 459*; see *People v. Hamilton* (1986) 191 C.A.3d Supp. 13, 21, 236 C.R. 894 [although reviewing court may take judicial notice of matters not before trial court, it "need not give effect to such evidence"].)

In *Grinnell v. Charles Pfizer & Co.* (1969) 274 C.A.2d 424, 79 C.R. 369, the parties at trial and in their briefs referred to a technical report of the Surgeon General of the United States on the association of poliomyelitis cases with certain oral vaccines. The report itself was not introduced in evidence. Before oral argument on appeal, defendant moved that the reviewing court take judicial notice of the report. *Held*, motion granted for a limited purpose. Because the trial judge could have judicially noticed the report (*Ev.C. 452, 453*), the reviewing court may also do so (*Ev.C. 459*). But in this *jury* trial, the jury would ordinarily have been instructed on the judicially noticed material because those issues were for their determination. "Accordingly, as a reviewing court we can only take notice of the subject report insofar as it assists us in determining what portions of the report were before the jury and we therefore grant the motion for that limited purpose." (274 C.A.2d 444.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Evidence k.52



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## G. Notice in Reviewing Court.

## 2. Power and Duty of Court.

## c. Refusal To Take Notice.

*1 Witkin Cal. Evid. Jud Notice § 48*

[§ 48] Refusal To Take Notice.

Although the appellate court may take judicial notice of lower court records (see *supra*, §23), it may decline to do so where the matter noticed should not be considered on appeal. Thus, in *Simmons v. Southern Pac. Trans. Co.* (1976) 62 C.A.3d 341, 133 C.R. 42, plaintiff recovered damages for injuries suffered when struck by defendant's train. Defendant asked the appellate court to take judicial notice of proceedings in a trial court action in which it appeared that plaintiff's expert witness was an impostor. *Held*, judicial notice would not be taken for the following reasons: (a) Newly discovered evidence to impeach a witness is rarely sufficient to call for a new trial, and there is no authority for reversing a judgment on that ground. (b) Defendant's counsel did not question the witness' qualifications at the trial, and no reason appeared why the information concerning him could not have been discovered in time to move for a new trial. (62 C.A.3d 366, 367, quoting the text on the effect of taking notice.)

Similarly, judicial notice will not be taken of matters that should first be presented to the trial court for its initial consideration. (*People v. Preslie* (1977) 70 C.A.3d 486, 493, 138 C.R. 828, *infra*, §49; see *People v. Hamilton* (1986) 191 C.A.3d Supp. 13, 21, 22, 236 C.R. 894 [judicial notice not taken of notices of consent establishing that police officer was authorized to detain defendant; to do so "would allow the People to create a new theory which defendant had no opportunity to dispute in the lower court and which the magistrate was not given the opportunity to review"]; *Brosterhous v. State Bar* (1995) 12 C.4th 315, 325, 326, 48 C.R.2d 87, 906 P.2d 1242 [on review of trial court decision determining that arbitration was exclusive remedy of State Bar members unhappy with State Bar's finding as to portion of bar dues not chargeable to objecting members, Supreme Court declined to take judicial notice of record of arbitration proceeding, as it was matter that should have been presented first to trial court].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Waidla* (2000) 22 C.4th 690, 703, 94 C.R.2d 396, 996 P.2d 46 [on appeal of capital murder conviction, judicial notice of record on appeal in accomplice's case was inappropriate, as it would improperly augment record in defendant's case].

*Matters that should first be presented to trial court:* See *People v. Sakarias* (2000) 22 C.4th 596, 636, 94 C.R.2d 17, 995 P.2d 152 [on appeal of capital murder conviction, Supreme Court declined to take notice of transcripts of trial of defendant's accomplice, which defendant asserted would show prosecutor put forth factually inconsistent theories in the two trials, where issue was not presented to or considered by trial court]; cf. *Sacramento v. State Water Resources Control Bd.* (2007) 153 C.A.4th 1579, 1589, 64 C.R.3d 302 [on appeal of judgment upholding water quality orders

approved by State Water Resources Control Board, Court of Appeal declined to take judicial notice of materials that had not been before board at time it made its decision to approve orders].

"Ordinarily an appellate court will not take judicial notice of matters outside the appellate record, but we have the discretion to do so." (*Shamsian v. Atlantic Richfield Co.* (2003) 107 C.A.4th 967, 975, footnote 5, 132 C.R.2d 635 [appellate court chose to take judicial notice of "case reopen" letter from regional water quality control board to oil company, where review was de novo and letter was material].)





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#### G. Notice in Reviewing Court.

#### 3. Opportunity To Present Information.

*1 Witkin Cal. Evid. Jud Notice § 49*

[§ 49] Opportunity To Present Information.

*Ev.C. 459(c)* and (d) make applicable the procedural safeguards of *Ev.C. 455*, which require the court taking judicial notice to afford each party a reasonable opportunity to present information as to its propriety and tenor. (See *supra*, §41.) The purpose of this requirement "is to assure that the parties have the opportunity to present relevant argument to the court based on a fair understanding of the facts and issues which will serve as the foundation of the court's decision." (*Schneider v. Kaiser Foundation Hosp.* (1989) 215 C.A.3d 1311, 1315, footnote 2, 264 C.R. 227.)

Thus, *Ev.C. 459(c)* calls for compliance with *Ev.C. 455(a)* "if the matter was not theretofore judicially noticed in the action." A party who has already had the opportunity needs no other.

*Ev.C. 459(d)* calls for compliance with *Ev.C. 455(b)* "if the reviewing court resorts to any source of information not received in open court or not included in the record of the action." Because the reviewing courts hold sessions to hear arguments and not to receive "information ... in open court," the principal impact of this section is felt when parties include such information in one of the transcripts, in a document brought up as an original, or in a brief. (See *Holmes v. Oakland* (1968) 260 C.A.2d 378, 384, 67 C.R. 197 [appellate court requested city defendant to furnish pertinent information for purpose of judicial notice of city ordinance, "and we afforded plaintiff the opportunity to meet such information"]; *Smith v. Hatch* (1969) 271 C.A.2d 39, 49, 76 C.R. 350 [judicial notice of papers and records in other litigation; opportunity presented, and parties stipulated to notice]; 1 Civil Appellate Practice 3d, §11.89.)

In *People v. Preslie* (1977) 70 C.A.3d 486, 138 C.R. 828, the court made a number of suggestions as to the methods of invoking the power on appeal:

(a) The appellant moved to augment the record under C.R.C., Rule 12(a) (see 9 *Cal. Proc.* (4th), *Appeal*, §577), to consider an affidavit, search warrant and return, in reviewing the trial judge's denial of his motion to suppress evidence. The appellate court pointed out that judicial notice would not be taken unless the documents had been presented to the trial court (see *supra*, §48) and the issue to which they related was reviewable on appeal; hence, the decision to take judicial notice was postponed until consideration of the appeal on its merits. (70 C.A.3d 493, 494.)

(b) The formal motion to augment was unnecessary: The Code contemplates an informal request, and it can be made in a brief, "though it is desirable in the interest of orderly judicial procedure that it be made well before that time." (70 C.A.3d 494.)

(c) Although *Ev.C. 459(c)* and (d) impose a duty on *the court* to give the adverse party an opportunity to meet the

matter to be judicially noticed, "fairness dictates that in all cases a request for judicial notice be *served upon opposing parties* by the party making the request." (70 C.A.3d 494, footnote 6.)

(d) Because the request is to judicially notice an original trial court record, the appellate court must be assured that the original is actually on file below and that the copy is true and correct; accordingly, unless a good excuse is shown for not doing so, the party making the request should furnish the appellate court with a copy certified by its custodian. (70 C.A.3d 494.)

In *South Shore Land Co. v. Petersen* (1964) 226 C.A.2d 725, 742, 38 C.R. 392, a quiet title action decided prior to the enactment of Ev.C. 459, the cross-complainant and the cross-defendant sought and were granted augmentation of the record to include documents, to be judicially noticed, which were not called to the attention of the trial judge. Because both parties participated, they not only had their "reasonable opportunity," but waived any right to challenge the noticed matter.

**SUPPLEMENT:** [This section is current through the latest supplement]  
C.R.C., Rule 12(a) was renumbered C.R.C., Rule 8.155(a) in 2006.



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## CHAPTER III - Burden of Proof and Presumptions

### I. THE TWO BURDENS

#### A. In General.

#### *1 Witkin Cal. Evid. Burden § 1*

#### [§ 1] In General.

The term "burden of proof" is often used loosely in two senses: (1) the secondary meaning of the burden of *initially producing or going forward* with the evidence; and (2) the primary meaning of the burden of *proving the issues* of the case.

In the first sense, when the plaintiff offers a prima facie case, the burden shifts to the defendant until the case is met; in the second and proper sense, it rests throughout the case with the party who has the burden. (See generally *Valente v. Sierra Ry. Co. of Calif.* (1907) 151 C. 534, 538, 91 P. 481; *Bernesen v. Fish* (1933) 135 C.A. 588, 604, 28 P.2d 67; *Jolley v. Clemens* (1938) 28 C.A.2d 55, 68, 82 P.2d 51; *Donovan v. Security-First Nat. Bank of Los Angeles* (1945) 67 C.A.2d 845, 853, 155 P.2d 856; *Washington v. Washington* (1949) 91 C.A.2d 811, 813, 205 P.2d 736; *People v. Valverde* (1966) 246 C.A.2d 318, 321, 54 C.R. 528, citing the text; *Rancho Santa Fe Pharmacy v. Seyfert* (1990) 219 C.A.3d 875, 880, 268 C.R. 505, *infra*, §105; *Mathis v. Morrissey* (1992) 11 C.A.4th 332, 346, 13 C.R.2d 819, citing the text [burden of going forward with evidence does not operate to shift burden of proof]; *Mullaney v. Wilbur* (1975) 421 U.S. 684, 95 S.Ct. 1881, 1888, 44 L.Ed.2d 508, 517, footnote 20; *Director, Office of Workers' Comp. Programs v. Greenwich Collieries* (1994) 512 U.S. 267, 114 S.Ct. 2251, 2255, 2256, 129 L.Ed.2d 221, 228, 229 [distinction between two burdens]; 43 Cal. L. Rev. 119; 2 U.C.L.A. L. Rev. 13; 59 Harv. L. Rev. 491; 68 Harv. L. Rev. 1382; 2 McCormick 5th, §336; 9 Wigmore (Chadbourn Rev.) §§2485, 2487, 2489; 2 Jefferson, California Evidence Benchbook 3d, Chap. 45; Evidence Code Notebook 3d, §500 et seq.; 29 Am.Jur.2d (1994 ed.), *Evidence* §155; 23 A.L.R.2d 1243; *infra*, §§2, 3.)

The practical effect of the distinction is that (1) the burden of going forward or initially producing evidence calls the judge's powers into play (e.g., in ruling on a motion for nonsuit), while (2) the burden of proof in the fundamental sense operates when the case finally reaches the jury. (See 2 McCormick 5th, §336; 9 Wigmore (Chadbourn Rev.) §2487; 24 Pacific L. J. 1845, 1871; Law Rev. Com. Comment to Ev.C. 500; Law Rev. Com. Comment to Ev.C. 550.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 2 McCormick 6th, §336; Simons, Cal. Evidence Manual, §9:1 et seq. *West's Key Number Digest*, Criminal Law k.326 et seq.; Evidence k.90 et seq.



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### CHAPTER III - Burden of Proof and Presumptions

#### I. THE TWO BURDENS

##### B. Burden of Producing Evidence.

*1 Witkin Cal. Evid. Burden § 2*

[§ 2] Burden of Producing Evidence.

One party has the initial burden of introducing evidence, to make a "prima facie case," and thus avoid the risk of a nonsuit or other unfavorable determination on the issue. (See *Mathis v. Morrissey* (1992) 11 C.A.4th 332, 346, 13 C.R.2d 819, citing the text; 2 McCormick 5th, §336; *Ev.C.* 550, *infra*, §4.)

Descriptive terminology has varied: California courts have long used the phrase "burden of going forward with the evidence." (See *People v. Valverde* (1966) 246 C.A.2d 318, 321, 54 C.R. 528.) The Model Code of Evidence and the original Uniform Rules referred to the "burden of producing evidence," and *Ev.C.* 110 adopts this terminology:

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

**SUPPLEMENT:** [This section is current through the latest supplement]

See 2 McCormick 6th, §336.



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## CHAPTER III - Burden of Proof and Presumptions

### I. THE TWO BURDENS

#### C. Burden of Proof.

#### *1 Witkin Cal. Evid. Burden § 3*

[§ 3] Burden of Proof.

The more fundamental burden is the obligation of the party on whom it rests throughout the case to prove the particular fact. (See *Ev.C. 500*, *infra*, §6; *Abrams v. Motter* (1970) 3 C.A.3d 828, 838, footnote 5, 83 C.R. 855, *infra*, §9, citing the text; 2 McCormick 5th, §336; 2 U.C.L.A. L. Rev. 13.)

The Model Code rejected the traditional term "burden of proof" because of its history of ambiguity, and substituted the term "burden of persuasion" as more accurately describing the fundamental risk of nonpersuasion. (See also 2 McCormick 5th, §336.) But the original Uniform Rules restored the familiar phrase, and *Ev.C. 115* followed the Uniform Rule:

" 'Burden of proof' means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court."

*Ev.C. 115* further provides that, unless a different degree of proof is required, a "preponderance of the evidence" is sufficient. (See *infra*, §§35 et seq., 42, 45, 47; see also *Ev.C. 502* [instructions]; BAJI (8th ed.), No. 2.60.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See CACI, No. 200 [more-likely-than-not standard]; 2 McCormick 6th, §336.



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### CHAPTER III - Burden of Proof and Presumptions

#### II. ALLOCATION OF BURDENS IN CIVIL CASES

##### A. Burden of Producing Evidence.

###### 1 Witkin Cal. Evid. Burden § 4

#### [§ 4] Burden of Producing Evidence.

"The burden of producing evidence as to a particular fact is on the party against whom a finding on that fact would be required in the absence of further evidence." (*Ev.C. 550(a)*.) This abstraction, essentially a repetition of the definition (*supra*, §2), offers no test, because there is no single, significant test for either of the burdens. (See *infra*, §5.) However, *Ev.C. 550(b)* and its Comment add some specific content to the rule:

(1) "The burden of producing evidence as to a particular fact is *initially on the party with the burden of proof* as to that fact." (*Ev.C. 550(b)*); see *Baber v. Superior Court* (1980) 113 C.A.3d 955, 965, 966, 170 C.R. 353 [since party seeking to establish or reestablish conservatorship under Lanterman-Petris-Short Act (see 3 Cal. Proc. (4th), Actions, §46 et seq.) has burden of proving existence of grave disability, that party has initial burden of producing evidence on that point]; 2 McCormick 5th, §337; 9 Wigmore (Chadbourn Rev.) §2487.) This established principle makes applicable the considerable body of statutory and case law on burden of proof (*infra*, §5 et seq.).

(2) The burden of producing evidence will *shift* to the other party if the party with that initial burden (a) proves a fact giving rise to a *presumption* (*infra*, §52), or (b) produces *evidence of such weight* that a determination in that party's favor would necessarily be required in the absence of contradictory evidence. (Law Rev. Com. Comment to *Ev.C. 550*; see *St. Mary's Honor Center v. Hicks* (1993) 509 U.S. 502, 113 S.Ct. 2742, 2747, 125 L.Ed.2d 407, 416, 8 Summary (9th), *Constitutional Law, Supp.*, §737A [where plaintiff establishes *prima facie* case of employment discrimination, defendant must produce evidence that employment action was taken for legitimate reason]; 9 Wigmore (Chadbourn Rev.) §2487.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Burden of producing evidence initially on party with burden of proof:* See *National Council Against Health Fraud v. King Bio Pharmaceuticals* (2003) 107 C.A.4th 1336, 1344, 133 C.R.2d 207, citing the text [in action for false advertising, plaintiff has burden of producing evidence showing that challenged advertising claim is false or misleading]; 2 McCormick 6th, §337.(2) *Shift of burden of producing evidence:* See *Sargent Fletcher v. Able Corp.* (2003) 110 C.A.4th 1658, 1668, 3 C.R.3d 279, citing the text.

*Cross-Reference:* 8 Summary (10th), *Constitutional Law*, §870.



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### CHAPTER III - Burden of Proof and Presumptions

#### II. ALLOCATION OF BURDENS IN CIVIL CASES

##### B. Burden of Proof.

##### 1. Former Rule.

*1 Witkin Cal. Evid. Burden § 5*

[§ 5] Former Rule.

Former C.C.P. 1981 provided that "[t]he party holding the affirmative of the issue must produce the evidence to prove it; therefore, the burden of proof lies on the party who would be defeated if no evidence were given on either side." This general statement, which echoed the declarations of many courts, warned of the necessity of assuming the burden of proof and of the consequences of failure to assume it, but gave no inkling of a rule or test to determine where the burden of proof lies. The "affirmative of the issue" lacks any substantial objective meaning, and allocation of the burden actually requires the application of several rules of practice and policy. (See 2 McCormick 5th, §337; 9 Wigmore (Chadbourn Rev.) §§2486, 2488; 2 U.C.L.A. L. Rev. 14; 12 Stanf. L. Rev. 11; 29 Am.Jur.2d (1994 ed.), Evidence §158; Law Rev. Com. Comment to Ev.C. 500.)

The basic rule, followed in California and elsewhere, is that whatever facts a party must affirmatively plead, that party also has the burden of proving. As to the plaintiff, this means the elements of each cause of action pleaded. (See *Roddenberry v. Roddenberry* (1996) 44 C.A.4th 634, 654, 51 C.R.2d 907, citing the text; *Beck Dev. Co. v. Southern Pac. Trans. Co.* (1996) 44 C.A.4th 1160, 1205, 52 C.R.2d 518 ["the definitional elements of a plaintiff's cause of action describe the minimum showing which the plaintiff must make to support a favorable judgment"].)

As to the defendant, the rule means that affirmative defenses (sometimes called "new matter") cannot be raised by mere denial but must be specially pleaded. (See 2 McCormick 5th, §337; on elements of cause of action in particular cases, see 4 Cal. Proc. (4th), *Pleading*, §476 et seq.; on affirmative defenses that defendant must specially plead, see 5 Cal. Proc. (4th), *Pleading*, §1008 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 2 McCormick 6th, §337.



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II. ALLOCATION OF BURDENS IN CIVIL CASES

B. Burden of Proof.

2. Evidence Code.

a. General Rule: Facts Essential to Claim or Defense.

1. Theory of Rule.

*1 Witkin Cal. Evid. Burden § 6*

[§ 6] Theory of Rule.

"Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." (*Ev.C. 500.*)

*Ev.C. 500* is an expanded version of the basic rule that the burden of proof follows the burden of pleading. It is broader than the basic rule because it applies to issues that may not have been raised in the pleadings. And the test--whether the fact is essential to a party's claim for relief or defense--is merely stated in the Code; its application, to both pleading and proof, depends on the substantive law. (See Law Rev. Com. Comment to *Ev.C. 500.*)

Because the law determines the burden, the judge must instruct the jury as to which party bears the burden. (*Ev.C. 502*; see *BAJI* (8th ed.), No. 2.60.)

The burden in a declaratory relief action should normally be governed by the rules applicable to the issue if it were raised in an ordinary civil action. (See *American Home Assur. Co. v. Essy* (1960) 179 C.A.2d 19, 22, 3 C.R. 586 [in action by insurer, burden may be same as in cases where insured sues]; 23 A.L.R.2d 1243 [burden of proof under general declaratory judgment acts].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See CACI, No. 200 [explanation of burden of proof]. *West's Key Number Digest*, Evidence k.91





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#### II. ALLOCATION OF BURDENS IN CIVIL CASES

##### B. Burden of Proof.

##### 2. Evidence Code.

##### a. General Rule: Facts Essential to Claim or Defense.

##### 2. Facts Essential to Claim.

##### 1 Witkin Cal. Evid. Burden § 7

##### [§ 7] Facts Essential to Claim.

Where, under the substantive law, a fact is essential to the plaintiff's claim for relief, the burden of pleading and proof of that fact is on the plaintiff. (*Ev.C. 500*, supra, §6; see *Adams v. Murakami* (1991) 54 C.3d 105, 119, 284 C.R. 318, 813 P.2d 1348, 6 Summary (9th), *Torts, Supp.*, §1377A [plaintiff seeking punitive damages bears burden of producing evidence of defendant's financial condition]; *Lundquist v. Reusser* (1994) 7 C.4th 1193, 1211, 1212, 31 C.R.2d 776, 875 P.2d 1279 [adoption of *Ev.C. 500* did not change common law rule that once defamation defendant establishes that statement was otherwise protected by common interest privilege (see 5 Summary (9th), *Torts*, §§521, 523), plaintiff must prove malice]; *Fukuda v. Angels* (1999) 20 C.4th 805, 819, 820, 85 C.R.2d 696, 977 P.2d 693, 8 Cal. Proc. (4th), *Extraordinary Writs, Supp.*, §274 [normal rule of *Ev.C. 500* applies in administrative mandamus proceeding in which trial court exercises independent judgment: party attacking agency's decision bears burden of proving that its findings are incorrect]; *Carpenter Steel Co. v. Pellegrin* (1965) 237 C.A.2d 35, 42, 46 C.R. 502 [breach of warranty]; *People v. Shasta Pipe & Supply Co.* (1968) 264 C.A.2d 520, 530, 70 C.R. 618 [condemnation; plaintiff condemnor's interest]; *Jordan v. Worthen* (1977) 68 C.A.3d 310, 319, 137 C.R. 282 [person claiming prescriptive easement in roadway over another's property must prove all essential elements]; *In re Marriage of Iverson* (1992) 11 C.A.4th 1495, 1502, 15 C.R.2d 70, 7 Cal. Proc. (4th), *Trial*, §258 [in dissolution proceeding, party challenging validity of premarital agreement has burden of proof as to agreement's invalidity]; *Chrysler Credit Corp. v. Superior Court* (1993) 17 C.A.4th 1303, 1311, 22 C.R.2d 37, infra, §11 [secured party has burden of tracing funds received from sales of collateral so as to show they are identifiable proceeds]; *In re Lorenzo C.* (1997) 54 C.A.4th 1330, 1345, 63 C.R.2d 562 [in proceeding to terminate parental rights, once agency has presented clear and convincing proof of adoptability, it is parent's burden to prove existence of exception identified in *Welf.C. 366.26(c)(1)(A)*, since it is parent who is concerned with avoiding termination; citing the text]; *Buzgheia v. Leasco Sierra Grove* (1997) 60 C.A.4th 374, 389, 70 C.R.2d 427, 1 Summary (9th), *Contracts, Supp.*, §495, citing the text [in action by contractor against developer in which defendant produced evidence indicating plaintiff was not properly licensed, plaintiff had burden of proof on this issue, since due licensure was essential to his claim]; *Edson v. Anaheim* (1998) 63 C.A.4th 1269, 1272, 1273, 74 C.R.2d 614, 5 Summary (9th), *Torts, Supp.*, §376 [prima facie case of battery by police officer is not established unless and until plaintiff proves unreasonable force was used]; *Estate of Della Sala* (1999) 73 C.A.4th 463, 469, 470, 86 C.R.2d 569 [testator's son claiming right to share of estate as pretermitted heir bore burden of proving that testator believed he was dead]; 82 A.L.R.4th 598 [burden of proof as to reasonableness of force used in making arrest]; on various burdens in marital dissolution proceeding, see 24 *Am.Jur.2d, Divorce and Separation* §358 et seq.)

The defendant does not have the burden of proof on an allegation which, though affirmative in form, is in essence a denial. (*Cahill Bros. v. Clementina Co.* (1962) 208 C.A.2d 367, 386, 25 C.R. 301 [plaintiff alleged relationship as independent contract, defendant alleged that it was joint venture]; on general rule as to burden on defenses, see *infra*, §8.)

Where allegations of a complaint are denied, the plaintiff must produce evidence to establish a *prima facie* case; in the absence of such evidence, judgment for the plaintiff cannot be based on adverse inferences from the defendant's failure to appear in court. (*Vaughn v. Coccimiglio* (1966) 241 C.A.2d 676, 678, 50 C.R. 876.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
Welf.C. 366.26(c)(1)(A) was relettered Welf.C. 366.26(c)(1)(B)(i) in 2007.

See *Dart Industries v. Commercial Union Ins. Co.* (2002) 28 C.4th 1059, 1071, 1074, 124 C.R.2d 142, 52 P.3d 79 [in action on insurance policy, it is insured's burden to establish that occurrence forming basis of claim is within scope of coverage, and it is then insurer's burden to prove that claim is specifically excluded]; *Sargent Fletcher v. Able Corp.* (2003) 110 C.A.4th 1658, 1673, 3 C.R.3d 279 [in action for misappropriation of trade secrets, plaintiff has burden of proof as to every element of claim, including improper use, although once plaintiff produces evidence of improper use, burden of producing evidence on that issue shifts to defendant]; *Corbett v. Hayward Dodge* (2004) 119 C.A.4th 915, 926, 14 C.R.3d 741 [defendant seeking attorneys' fees under Consumers Legal Remedies Act (4 Summary (10th), Sales, §296) is subject to general rule that party seeking statutory attorneys' fees or sanctions has burden of proof]; *Huffman v. Interstate Brands Corp.* (2004) 121 C.A.4th 679, 702, 17 C.R.3d 397 [in employment discrimination case, plaintiff bears burden of proof, even though defendant may have burden of production to articulate nondiscriminatory reason for adverse employment action]; *Barnes v. Hussa* (2006) 136 C.A.4th 1358, 1366, 39 C.R.3d 659 [plaintiff property owners seeking to enjoin neighbor, who had license to convey water across plaintiffs' property to one parcel, from conveying water to additional parcel, had burden of showing that this change in use injured plaintiffs' water rights]; *Conservatorship of Hume* (2006) 140 C.A.4th 1385, 1391, 44 C.R.3d 906 [after conservator filed final inventory and appraisal of estate, trial judge properly placed burden of proof on objector to establish that appraisal was erroneous; it was objector who sought relief within meaning of *Ev.C.* 500]; *Cassady v. Morgan, Lewis & Bockius LLP* (2006) 145 C.A.4th 220, 234, 51 C.R.3d 527 [where attorney sought indemnity from his law firm under *Lab.C.* 2802 for attorneys' fees and costs incurred in defending malpractice action against him by former client, attorney bore burden of showing what work he performed for client while employed at firm].

*Adams v. Murakami:*

*Cross-Reference:* 6 Summary (10th), Torts, §1619.

*Common interest privilege:*

*Cross-Reference:* 5 Summary (10th), Torts, §§591, 594.

*Buzgheia v. Leasco Sierra Grove:*

*Cross-Reference:* 1 Summary (10th), Contracts, §491.

*Edson v. Anaheim:*

*Cross-Reference:* 5 Summary (10th), Torts, §424.



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### CHAPTER III - Burden of Proof and Presumptions

#### II. ALLOCATION OF BURDENS IN CIVIL CASES

##### B. Burden of Proof.

##### 2. Evidence Code.

##### a. General Rule: Facts Essential to Claim or Defense.

##### 3. Facts Essential to Defense.

##### 1 Witkin Cal. Evid. Burden § 8

##### [§ 8] Facts Essential to Defense.

(1) *In General.* Where, under the substantive law, a fact is essential to a defense raised by the defendant, the defendant has the burden of proof as to that fact. (*Ev.C. 500*, supra, §6; for illustrations, see *Wilson v. California Cen. R. Co.* (1892) 94 C. 166, 172, 29 P. 861 [carrier's defense that goods were destroyed by fire without its negligence]; *San Francisco v. Tillman Estate Co.* (1928) 205 C. 651, 653, 272 P. 585 [condemnation suit; value of defendant owner's property]; *Samuels v. Mix* (1999) 22 C.4th 1, 8, 91 C.R.2d 273, 989 P.2d 701 [defendant in legal malpractice action who raises 1 year from discovery limitation of C.C.P. 340.6(a) (see 3 Cal. Proc. (4th), Actions, §581) as defense, bears burden of proof on that issue]; *Lloyd v. Kleefisch* (1941) 48 C.A.2d 408, 416, 120 P.2d 97 [payment]; *Primm v. Joyce* (1948) 87 C.A.2d 288, 291, 196 P.2d 829 [lessee's defense of waiver of breach by acceptance of rent]; *Washington v. Washington* (1949) 91 C.A.2d 811, 813, 205 P.2d 736 [divorce action by wife for desertion; plaintiff need not prove that separation was without her consent (a negative); defendant who contends that there was consent has burden of proof on this issue; see 23 So. Cal. L. Rev. 277]; *Bellows v. San Francisco* (1951) 106 C.A.2d 57, 59, 234 P.2d 729 [contributory negligence]; *Baruh v. Kuhl* (1963) 213 C.A.2d 266, 273, 28 P.2d 573 [duty to minimize damages]; *Bartosh v. Banning* (1967) 251 C.A.2d 378, 386, 59 C.R. 382 [self-defense in assault and battery]; *Whitehouse v. Six Corp.* (1995) 40 C.A.4th 527, 534, 48 C.R.2d 600 [in third-party claim proceeding, creditor raising defense of fraudulent transfer has burden of proof on that issue]; *Kellogg v. Asbestos Corp., Ltd.* (1996) 41 C.A.4th 1397, 1408, 49 C.R.2d 256 [100% of liability for plaintiff's loss of consortium damages was properly allocated to defendant, even though Proposition 51 (several liability for noneconomic damages; see 5 Summary (9th), Torts, §53) was applicable, since defendant had burden of proving that others were partly responsible and offered no evidence on this issue]; and see 43 Cal. L. Rev. 119 [burden of proving self-defense in action for wrongful death]; 24 Am.Jur.2d, Divorce and Separation §362 [burdens in marital dissolution proceeding; 82 A.L.R.4th 598 [burden of proof as to reasonableness of force used in making arrest]].)

(2) *Insurance Exclusion.* In *Searle v. Allstate Life Ins. Co.* (1985) 38 C.3d 425, 437, 438, 212 C.R. 466, 696 P.2d 1308, plaintiff wife was the beneficiary of a life insurance policy issued by defendant to decedent, with a clause excluding coverage for "suicide, whether sane or insane," within 2 years of issuance. Ten months after issuance, decedent shot and killed himself, defendant denied coverage, and plaintiff sued. The judge instructed that plaintiff had the burden of proving that decedent did not intend to take his own life. *Held*, this was error: The burden of proving an excepted risk or condition subsequent which negates full liability is on the insurer, and suicide provisions are such conditions subsequent. (38 C.3d 437, 438.) "Although the beneficiary may introduce evidence indicating the insured did

not intend to commit suicide, the ultimate burden of proving the fact essential to a claim of nonliability rests with the insurer." (38 C.3d 440.) (See *Executive Aviation v. National Ins. Underwriters* (1971) 16 C.A.3d 799, 806, 94 C.R. 347 [burden is on insurer to bring itself within exculpatory clause of policy]; *Clemmer v. Hartford Ins. Co.* (1978) 22 C.3d 865, 879, 151 C.R. 285, 587 P.2d 1098 [same holding where defense is based on statutory exclusion of liability for wilful act of insured (*Ins.C.* 533)].)

In a coverage dispute under a commercial general liability policy, however, once the insurer carries the burden of proving that a general pollution exclusion applies, the insured has the normal burden under *Ev.C.* 500 of proving that the claim comes under an exception for "sudden and accidental" occurrences. (*Aydin Corp. v. First State Ins. Co.* (1998) 18 C.4th 1183, 1194, 77 C.R.2d 537, 959 P.2d 1213, 1 Summary (9th), *Contracts*, Supp., §700.)

(3) *Retaliatory Eviction*. In *Western Land Office v. Cervantes* (1985) 175 C.A.3d 724, 220 C.R. 784, the court, on an elaborate examination of the judicially developed defense of retaliatory eviction and its legislative recognition in C.C. 1942.5 (see 4 Summary (9th), *Real Property*, §693), came to the following conclusion: "[T]he tenant has the overall burden of proving his landlord's retaliatory motive by a preponderance of the evidence. If the landlord takes action for a valid reason not listed in the unlawful detainer statutes, he must give notice to the tenant of the ground upon which he proceeds; and if the tenant controverts that ground, the landlord has the burden of proving its existence by a preponderance of the evidence." (175 C.A.3d 742.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General*. See *Smith v. Santa Rosa Police Dept.* (2002) 97 C.A.4th 546, 569, 119 C.R.2d 72 [where truck was impounded for being driven by unlicensed driver, owner had burden of proof to show that he did not know his grandson, whom he had allowed to drive truck, had suspended license; "where a defendant claims that mitigating circumstances lessen culpability and warrant lesser or no discipline or punishment, assertion and proof of such is the burden of the person asserting the presence of mitigating circumstances"]; *Brentwood v. Central Valley Regional Water Quality Control Bd.* (2004) 123 C.A.4th 714, 725, 20 C.R.3d 322 [where violations of wastewater discharge permit are charged, alleged polluter has burden of proving that statutory exceptions from liability for mandatory minimum penalties (*Water C.* 13385(j)(1)) are applicable].

*Cross-Reference:* 5 Summary (10th), *Torts*, §53.

(2) *Insurance Exclusion*.

*Cross-Reference:* *Aydin Corp. v. First State Ins. Co.*, formerly discussed in *Contracts*, has been transferred to 2 Summary (10th), *Insurance*, §82.(3) *Retaliatory Eviction*.

*Cross-Reference:* 12 Summary (10th), *Real Property*, §712.



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CHAPTER III - Burden of Proof and Presumptions

II. ALLOCATION OF BURDENS IN CIVIL CASES

B. Burden of Proof.

2. Evidence Code.

a. General Rule: Facts Essential to Claim or Defense.

4. Negative Averments.

1 *Witkin Cal. Evid. Burden* § 9

[§ 9] Negative Averments.

It is sometimes said that negative allegations need not be proved, unless they are an essential part of the party's cause of action. (See *Hosang v. Minor* (1962) 205 C.A.2d 269, 274, 22 C.R. 794.) This statement was contained in former C.C.P. 1869, but was eliminated by the Evidence Code; because some negative allegations must be proved under the substantive law, the supposed rule is not helpful and could be misleading. (See 2 McCormick 5th, §337; 9 Wigmore (Chadbourn Rev.) §2486.)

Thus, in *Abrams v. Motter* (1970) 3 C.A.3d 828, 83 C.R. 855, plaintiff vendor alleged that defendant purchaser had failed to exercise due diligence in seeking a home loan, the obtaining of which was a condition precedent to defendant's obligation to purchase. *Held*, the burden was on the vendor to prove lack of due diligence. (3 C.A.3d 838, citing the text.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 2 McCormick 6th, §337. *West's Key Number Digest*, Evidence k.92



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#### II. ALLOCATION OF BURDENS IN CIVIL CASES

##### B. Burden of Proof.

##### 2. Evidence Code.

##### b. Factors Calling for Altered Burden.

##### 1. Bases for Exceptions.

#### 1 Witkin Cal. Evid. Burden § 10

#### [§ 10] Bases for Exceptions.

In a number of situations, reasons of policy, convenience, or mere tradition place the burden in a manner different from that which would normally be expected from the requirement of pleading. (See 2 McCormick 5th, §337; 9 Wigmore (Chadbourn Rev.) §2486; see also 9 U.C. Davis L. Rev. 679 [proposed reallocation of burden of proof in environmental nuisance cases].)

This is recognized by the proviso in *Ev.C. 500*--"Except as otherwise provided by law"--and by the Comment: "In determining whether the normal allocation of the burden of proof should be altered, the courts consider a number of factors: the knowledge of the parties concerning the particular fact, the availability of the evidence to the parties, the most desirable result in terms of public policy in the absence of proof of the particular fact, and the probability of the existence or non-existence of the fact." (Law Rev. Com. Comment to *Ev.C. 500*; see *Adams v. Murakami* (1991) 54 C.3d 105, 119, 284 C.R. 318, 813 P.2d 1348, 6 Summary (9th), *Torts, Supp.*, §1377A [discussion of applicable factors in determining who should have burden of producing evidence as to defendant's financial condition where punitive damages are sought]; *People v. Williams* (1999) 20 C.4th 119, 128, 83 C.R.2d 275, 973 P.2d 52, citing the text; *Worsley v. Municipal Court* (1981) 122 C.A.3d 409, 420, 176 C.R. 324; *Rosenfeld, Meyer & Susman v. Cohen* (1987) 191 C.A.3d 1035, 1051, 237 C.R. 14, citing the text.) (On shift of burden where laches is asserted and there is statute of limitations governing analogous action at law, see *Fountain Valley Regional Hosp. & Med. Center v. Bonta* (1999) 75 C.A.4th 316, 324, 325, 89 C.R.2d 139, 3 Cal Proc. (4th), *Actions, Supp.*, §419; for other illustrations, see *infra*, §11 et seq.)

*McGee v. Cessna Aircraft Co.* (1983) 139 C.A.3d 179, 188 C.R. 542, points out that the doctrines of negligence per se based on violation of a safety regulation (see 6 Summary (9th), *Torts*, §821), and strict liability for defective products (see 6 Summary (9th), *Torts*, §1247 et seq.) "shift the burden of proof onto defendants for reasons rooted in sound economic and public policy." (139 C.A.3d 190.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Miller v. Superior Court* (2002) 101 C.A.4th 728, 747, 124 C.R.2d 591, 4 Cal. Crim. Law (3d), *Pretrial Proceedings, Supp.*, §230, quoting the text [shifting of burden where prosecution relies on P.C. 1387.1 to file third complaint despite two-dismissal rule]; 2 McCormick 6th, §337.

*Adams v. Murakami:*

*Cross-Reference:* 6 Summary (10th), Torts, §1619.

*Violation of safety regulation:*

*Cross-Reference:* 6 Summary (10th), Torts, §876.

*Strict liability for defective products:*

*Cross-Reference:* 6 Summary (10th), Torts, §1435 et seq.



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#### II. ALLOCATION OF BURDENS IN CIVIL CASES

##### B. Burden of Proof.

##### 2. Evidence Code.

##### b. Factors Calling for Altered Burden.

##### 2. Knowledge of Party.

#### 1 Witkin Cal. Evid. Burden § 11

[§ 11] Knowledge of Party.

(1) *In General.* Knowledge of a party is a strong factor calling for alteration of the burden of proof. (See *Sanchez v. Unemp. Ins. App. Bd.* (1977) 20 C.3d 55, 71, 141 C.R. 146, 569 P.2d 740, 2 Summary (9th), *Agency and Employment*, §368 [unemployment claimant has burden of proving availability for work, but Department of Employment Development, which has greater knowledge of labor market, has burden of proving that claimant has not made self available to "substantial field of employment"]; *Webster v. Trustees of Calif. State University* (1993) 19 C.A.4th 1456, 1463, 1464, 24 C.R.2d 150 [even if general rule of *Ev.C. 500* would place burden of proof in grievance hearing on professor resisting termination, university trustees' greater knowledge and lack of proof of substandard job performance required placing it on trustees]; 9 Wigmore (Chadbourn Rev.) §2486; 2 McCormick 5th, §337.)

The "greater knowledge" factor does not, however, apply with any consistency. In *Heesy v. Vaughn* (1948) 31 C.2d 701, 192 P.2d 753, plaintiff buyer sued for treble damages for alleged violation of the O.P.A. price ceiling in a conditional sale, and proved a charge over the ceiling price. The defense was that customary financing charges had been added. *Held*, plaintiff had the burden of proving that defendant's charges were higher than had been his custom prior to the Price Control Act, even though defendant was in a superior position to offer evidence on this issue. (31 C.2d 708.) (See also *Charach v. Lansing* (1951) 106 C.A.2d 735, 737, 236 P.2d 1 [suit by plaintiff tenants for treble damages for excess rent; burden on them to show that premises were subject to rent control].)

(2) *Tracing Proceeds of Sales.* In *Chrysler Credit Corp. v. Superior Court* (1993) 17 C.A.4th 1303, 22 C.R.2d 37, plaintiff, a finance corporation that supplied vehicles to a dealer under a security agreement, sought to recover funds from the sale of those vehicles by the dealer. Third parties filed claims against those funds, and the trial judge placed the burden of proving that the funds were identifiable proceeds of sales on plaintiff, and not on the third parties. *Held*, this was proper. Under a bankruptcy court's ruling, the dealer owed a duty to the secured party to deposit the funds in a cash collateral account. However, the dealer breached that duty. As between plaintiff and the dealer, the burden of tracing the funds might be shifted to the dealer as a result of the dealer's wrongful act. The contest here, however, was between plaintiff and third parties, and the burden of tracing the proceeds would shift to the third parties only if they had knowledge of the wrongful disposition of collateral and plaintiff's interest in it. (17 C.A.4th 1311, 1312.)

(3) *Excuse for Employee's Absence.* In *Baker v. Wadsworth* (1970) 6 C.A.3d 253, 85 C.R. 880, a mandamus proceeding by three terminated city employees seeking reinstatement, the Court of Appeal approved application of a civil service rule requiring the employees to bear the burden of proving that their unauthorized absences from work



were excusable or justified. The court pointed out that the rule was in harmony with the case law principle that the burden may be placed on the party possessing special knowledge on the point at issue, and also in harmony with former Educ.C. 24311 and former Govt.C. 19503 (now *Govt.C. 19996.2*), which similarly placed the burden on the employee to explain an unauthorized absence to the satisfaction of the *State Personnel Board*. (6 C.A.3d 263.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General*. See *Orange v. Barratt Amer.* (2007) 150 C.A.4th 420, 438, 58 C.R.3d 542 [in action against county alleging that fees imposed on development projects were excessive, trial judge properly placed burden on county of showing that expenditures of amounts collected were reasonable and necessary; county was party with knowledge of and access to evidence regarding its compliance with statute]; 2 McCormick 6th, §337.

*Cross-Reference:* 3 Summary (10th), *Agency and Employment*, §476. *West's Key Number Digest*, Evidence k.93



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##### 3. Availability of Evidence.

##### 1 Witkin Cal. Evid. Burden § 12

#### [§ 12] Availability of Evidence.

The burden of proof may also be altered where there is a greater or almost exclusive availability of evidence to one party. Illustrations include the following:

(1) *Loss or Destruction of Goods*. A carrier, warehouseman, or other bailee, sued for loss or destruction of goods, has the burden of showing his or her freedom from negligence or other fault. (See *Missouri Pac. R. Co. v. Elmore & Stahl* (1964) 377 U.S. 134, 84 S.Ct. 1142, 1144, 12 L.Ed.2d 194; *Convey-All Corp. v. Pacific Intermountain Express Co.* (1981) 120 C.A.3d 116, 119, 120, 121, 174 C.R. 443 [burden on carrier even though goods were loaded by shipper, i.e., carrier has burden of proving that damage was caused by act of shipper; following *Missouri Pac. R. Co.*]; *Morris v. Williams* (1967) 67 C.2d 733, 760, 63 C.R. 689, 433 P.2d 697, citing the text; 64 Harv. L. Rev. 998; 13 A.L.R.2d 681 [loss or damage where Uniform Warehouse Receipts Act applies]; 65 A.L.R.2d 1228 [injury to or loss of vessel during bailment or charter]; 43 A.L.R.3d 607 [subject of bailment destroyed by windstorm or other weather phenomenon]; 44 A.L.R.3d 171 [subject of bailment destroyed by fire]; 4 Summary (9th), *Personal Property*, §147.)

(2) *Defectively Designed Product*. In a strict liability action based on allegations of injury caused by a defectively designed product, once the plaintiff makes a prima facie showing that injury was proximately caused by the product's design, the burden shifts to the manufacturer to prove that the product is not defective. (*Barker v. Lull Engineering Co.* (1978) 20 C.3d 413, 431, 143 C.R. 225, 573 P.2d 443, 6 Summary (9th), *Torts*, §1259.)

(3) *Brake Failure*. In *Harris v. Irish Truck Lines* (1974) 11 C.3d 373, 113 C.R. 489, 521 P.2d 481, a personal injury action arising from a traffic accident, defendant claimed that he had been unable to stop because of brake failure. The trial judge instructed the jury that defendant was required to show the cause of the brake failure to rebut the presumption of negligence which, under *Veh.C. 26453* (duty to maintain brakes in good working order), arose from that failure. *Held*, this was proper. "The defendant is the one who was in control of the vehicle prior to the accident and who had access to knowledge of its condition at that time. After the accident, the defendant generally retains possession of the defective vehicle and ... will often repair the brakes before any claim is made by the plaintiff. Under such circumstances, the defendant and his mechanic are in a far better position than the plaintiff to demonstrate what condition caused the brake failure as well as why such condition could not be detected by reasonable inspection and repair." (11 C.3d 378.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*General rule:* See *Wolf v. Superior Court* (2003) 107 C.A.4th 25, 36, 130 C.R.2d 860, quoting the text; cf. *Sander/Moses Productions v. NBC Studios* (2006) 142 C.A.4th 1086, 1096, 48 C.R.3d 525 [action by executive producers against television production company for money allegedly owed under production services contract; discussing general rule but finding no reason to apply it, and distinguishing *Wolf*].

(1) *Loss or Destruction of Goods.*

*Cross-Reference:* 13 *Summary* (10th), *Personal Property*, §174.

(2) *Defectively Designed Product.*

*Cross-Reference:* 6 *Summary* (10th), *Torts*, §1455.



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##### 4. Proof of Causation.

#### 1 Witkin Cal. Evid. Burden § 13

[§ 13] Proof of Causation.

(1) *Concurrent Negligence but Single Unidentified Cause.* In *Summers v. Tice* (1948) 33 C.2d 80, 199 P.2d 1, the court approved the following rule: "When two or more persons by their acts are possibly the sole cause of a harm, or when two or more acts of the same person are possibly the sole cause, and the plaintiff has introduced evidence that the one of the two persons, or the one of the same person's two acts, is culpable, then the defendant has the burden of proving that the other person, or his other act, was the sole cause of the harm." (33 C.2d 85.) (For full discussion of implications of *Summers*, see 7 *Stanf. L. Rev.* 265, 490; 28 *So. Cal. L. Rev.* 429; 3 *U.C.L.A. L. Rev.* 122; 6 *Summary* (9th), *Torts*, §971; and see also *Vahey v. Sacia* (1981) 126 C.A.3d 171, 174, 177, 178 C.R. 559, 6 *Summary* (9th), *Torts*, §971 [*Summers* doctrine applied even though plaintiff settled with all parties except defendant, i.e., *Summers* applies to multiple tortfeasors, not multiple defendants]; BAJI (8th ed.), No. 3.80.)

(2) *Defendant's Negligence Preventing Proof of Causation.* "[W]hen there is a substantial probability that a defendant's negligence makes it impossible, as a practical matter, for plaintiff to prove 'proximate causation' conclusively, it is more appropriate to hold the defendant liable than to deny an innocent plaintiff recovery, unless the defendant can prove that his negligence was not a cause of the injury." (*Haft v. Lone Palm Hotel* (1970) 3 C.3d 756, 774, footnote 19, 91 C.R. 745, 478 P.2d 465; see *Galanek v. Wismar* (1999) 68 C.A.4th 1417, 1426, 81 C.R.2d 236 [once malpractice plaintiff, who alleged defendant attorney's negligent spoliation of evidence caused her to lose her products liability action, presented prima facie case of causation, burden of proof on that issue shifted to defendant; following *Haft* case].)

The *Haft* rule was held inapplicable, however, in *McKeon v. Hastings College* (1986) 185 C.A.3d 877, 230 C.R. 176, an action by former tenants of residential hotels displaced by a public law school's expansion project. Plaintiffs moved for an order requiring the law school to bear the burden of proving what caused the displaced persons to move, on the ground that the school had neglected to perform its duty to survey and analyze the housing needs of displaced persons. *Held*, the motion was properly denied. The *Haft* rule is applied in tort actions, which this is not, and has never been applied to a public entity of quasi-governmental dimension. (185 C.A.3d 901.) (For full discussion of *Haft* rule and other cases considering its applicability, see 23 *Hastings L. J.* 650; 6 *Summary* (9th), *Torts*, §§972, 973; and see BAJI (8th ed.), No. 2.60, Use Note.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Concurrent Negligence but Single Unidentified Cause*. See CACI, No. 434 [concurrent negligence but single unidentified cause].

*Cross-Reference:* 6 *Summary* (10th), *Torts*, §1194.

*Vahey v. Sacia:*

*Cross-Reference:* 6 *Summary* (10th), *Torts*, §1194.

(2) *Defendant's Negligence Preventing Proof of Causation*.

*Cross-Reference:* 6 *Summary* (10th), *Torts*, §1195.



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##### a. Guilt of Crime or Wrong.

1 Witkin Cal. Evid. Burden § 14

[§ 14] Guilt of Crime or Wrong.

(1) *Former Law.* Former C.C.P. 1963(1) stated a disputable presumption, "[t]hat a person is innocent of crime or wrong." This was frequently invoked, and was described as "one of the strongest presumptions known to the law." (*Gong v. Firemen's Ins. Co. of Newark, New Jersey* (1962) 202 C.A.2d 686, 691, 21 C.R. 110; see also *Tri-Q v. Sta-Hi Corp.* (1965) 63 C.2d 199, 209, footnote 1, 45 C.R. 878, 404 P.2d 486, quoting the text; 29 Am.Jur.2d (1994 ed.), Evidence §236.)

Thus, where inferences of fraud or fair dealing were equally possible, that of *fair dealing* was drawn. (See *Michaels v. Pacific Soft Water Laundry* (1930) 104 C.A. 366, 368, 286 P. 172; *Farmers Auto. Inter-Ins. Exchange v. Calkins* (1940) 39 C.A.2d 390, 393, 103 P.2d 230 [action to cancel insurance policy on ground of fraud in the application]; *Royal Indem. Co. v. Sherman* (1954) 124 C.A.2d 512, 518, 269 P.2d 123; 37 Am.Jur.2d, *Fraud and Deceit* §438; see also C.C. 3400 [for purposes of contract reformation, it is presumed that parties intended "an equitable and conscientious agreement"].)

Likewise, it was presumed that *no crime had been committed* (*Lanfried v. Bosworth* (1941) 45 C.A.2d 408, 410, 114 P.2d 406 [presumption supported finding that driver of another's car operated it with consent of owner]; *Gong v. Firemen's Ins. Co.*, *supra*, 202 C.A.2d 691 [action on fire insurance policy; presumption operated against insurer's claim that insured had burned own property]), and that *death was by natural causes or accident*, rather than by suicide. The latter presumption was frequently invoked in actions on insurance policies. (See *Byers v. Pacific Mut. Life Ins. Co.* (1933) 133 C.A. 632, 636, 24 P.2d 829; *Housh v. Pacific States Life Ins. Co.* (1934) 2 C.A.2d 14, 20, 37 P.2d 741; 2 McCormick 5th, §343; 85 A.L.R.2d 722 [effect of physical facts in overcoming presumption of suicide].)

(2) *Evidence Code.* In consonance with the Law Revision Commission's theory that this was not a true presumption (see Law Rev. Com. Comment to Ev.C. 500), the objects of the old statute were substantially accomplished by restating it as a rule of burden of proof: "The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue." (Ev.C. 520.) (See *Lane & Pyron v. Gibbs* (1968) 266 C.A.2d 61, 66, 67, 71 C.R. 817 [old presumption replaced by new burden of proof, and defendant carried burden of proving that checks sued on by plaintiff were illegal because "gambling-tinged"; citing the text]; *Liodas v. Sahadi* (1977) 19 C.3d 278, 290, 137 C.R. 635, 562 P.2d 316; *Clemmer v. Hartford Ins. Co.* (1978) 22 C.3d 865, 879, 151 C.R. 285, 587 P.2d 1098 [insurer had burden of showing that insured's act of shooting victim was wilful, i.e., intentional murder, and thus outside policy coverage]; *Fisher v. Superior Court* (1980) 103 C.A.3d 434, 448, 163 C.R. 47 [where plaintiff and one of several joint tortfeasors settle, burden of proof that settlement is not in good faith rests with party claiming it is not].)

In *FMC Corp. v. Plaisted & Cos.* (1998) 61 C.A.4th 1132, 72 C.R.2d 467, a manufacturer sued its liability insurers, claiming that it was entitled to indemnification for costs arising from its release of toxic contaminants. The policies contained pollution exclusions, but an exception applied for damages arising from an "unexpected" occurrence. On appeal, plaintiff contended that Ev.C. 520 imposed on defendants the burden of proving that the property damage caused by its releases of contaminants was not unexpected. *Held*, the statute is inapplicable. The relevant test for "expected" damage is "whether the insured knew or believed its conduct was substantially certain or highly likely to result in that kind of damage." (61 C.A.4th 1160, quoting *Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 C.A.4th 715, 15 C.R.2d 815, 1 Summary (9th), *Contracts, Supp.*, §632F.) "The wording, history and prior judicial application of *Evidence Code* section 520 all support a finding that 'wrongdoing' connotes an element of moral disapprobation substantially greater than that which might be implied by the *Shell* test." (61 C.A.4th 1160.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Former Law.* See 2 McCormick 6th, §342.(2) *Evidence Code.*

*Cross-Reference:* The *Shell Oil* case, formerly discussed in *Contracts*, has been transferred to 2 *Summary* (10th), *Insurance*, §147.



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##### b. Failure To Exercise Due Care.

##### 1 *Witkin Cal. Evid. Burden* § 15

#### [§ 15] Failure To Exercise Due Care.

(1) *Former Law.* Former C.C.P. 1963(4) stated a disputable presumption, "[t]hat a person takes ordinary care of his own concerns." Coupled with the then rule that a presumption was evidence to be weighed by the jury against actual evidence of lack of due care (see *infra*, §49), it became an enormously important part of negligence litigation. The following outline and selection of cases will indicate the scope and effect of the former rule:

(a) *In favor of plaintiff or decedent.* The presumption was applied at the request of the *plaintiff* in personal injury or wrongful death suits on the issue of contributory negligence of the plaintiff or decedent. (See *Smellie v. Southern Pac. Co.* (1931) 212 C. 540, 548, 299 P. 529; *Klein v. Southern Pac. Co.* (1962) 203 C.A.2d 72, 76, 21 C.R. 233; *Bove v. Beckman* (1965) 236 C.A.2d 555, 558, 46 C.R. 164.) The *Smellie* rule was soon limited to situations where there was no testimony by eyewitnesses as to what actually occurred at the time of the accident. (See *Mundy v. Marshall* (1937) 8 C.2d 294, 296, 65 P.2d 65; *Coe v. Southern Pac. Co.* (1962) 203 C.A.2d 509, 514, 21 C.R. 731.) Later cases held, however, that despite testimony as to the actual circumstances, the presumption remained available in a wrongful death suit on behalf of a *decedent* (see *Westberg v. Wilde* (1939) 14 C.2d 360, 367, 94 P.2d 590; 4 *Hastings L. J.* 143), or in a personal injury action where the plaintiff, although living, was rendered incapable of testifying as a result of the accident. (See *Scott v. Sheedy* (1940) 39 C.A.2d 96, 101, 102 P.2d 575; *Brown v. Connolly* (1965) 62 C.2d 391, 395, 42 C.R. 324, 398 P.2d 596, citing the text.)

(b) *In favor of defendant.* The defendant in a personal injury or wrongful death suit could seek an instruction on the presumption in support of the defense of no negligence. (See *Scott v. Burke* (1952) 39 C.2d 388, 398, 247 P.2d 313; *Meyer v. Cooper* (1965) 233 C.A.2d 750, 753, 44 C.R. 57.)

(c) *Action for injuries to property.* It was also held appropriate to invoke the presumption in an action to recover damages for injuries to *property*. (See *Wells Truckways v. Cebrian* (1954) 122 C.A.2d 666, 679, 265 P.2d 557 [action by employer of decedent killed in collision, for damages to truck driven by decedent and its cargo; presumption that decedent exercised due care].)

(2) *Evidence Code.* The Evidence Code eliminated this as a presumption and restated it as a rule of burden of proof: "The party claiming that a person did not exercise a requisite degree of care has the burden of proof on that issue." (*Ev.C.* 521.) (See 57A *Am.Jur.2d* (1989 ed.), *Negligence*, §1096.)

**SUPPLEMENT:** [This section is current through the latest supplement]



(2) *Evidence Code*. See 57B *Am.Jur.2d* (2004 ed.), *Negligence* §940.



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c. Insanity.

1 *Witkin Cal. Evid. Burden* § 16

[§ 16] Insanity.

A nonstatutory presumption of sanity was formerly recognized in California in both civil and criminal cases. (See *Estate of Wright* (1936) 7 C.2d 348, 350, 60 P.2d 434, 12 Summary (9th), *Wills and Probate*, §180 [testator presumed sane, and contrary testimony of subscribing witnesses viewed with suspicion]; 18 Proof of Facts 2d 1, 17 [presumptions and burden of proof on issue of whether mentally disordered testator executed will during lucid interval]; on criminal cases, see *infra*, §27.)

*Ev.C.* 522 restates the old presumption as a rule of burden of proof: "The party claiming that any person, including himself, is or was insane has the burden of proof on that issue."

**SUPPLEMENT:** [This section is current through the latest supplement]

*Cross-Reference:* 14 Summary (10th), *Wills and Probate*, §123.



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#### d. Eminent Domain Proceedings.

*1 Witkin Cal. Evid. Burden § 17*

#### [§ 17] Eminent Domain Proceedings.

In an eminent domain proceeding, except as otherwise provided "neither the plaintiff nor the defendant has the burden of proof on the issue of compensation." (*C.C.P. 1260.210(b)*; see *BAJI* (8th ed.), No. 11.98 [instruction on *C.C.P. 1260.210(b)*, not necessarily recommended for every case]; 8 *Summary* (9th), *Constitutional Law*, §1007.)

The burdens of proof on other issues in eminent domain proceedings are as follows:

(1) *Taking property for future use.* If the defendant objects to the taking, unless the complaint states an estimated date of use that is not within 7 years from the date the complaint is filed, the defendant has the burden of proving that there is no reasonable probability that the date of use will be within 7 years from the complaint's filing date. (*C.C.P. 1240.230(a), 1240.230(b)*.) However, if the defendant objects to the taking and proves that there is no reasonable probability that the date of use will be within 7 years from the complaint's filing date, or if the complaint states an estimated date of use that is not within 7 years from the filing date, the plaintiff has the burden of proving that the taking for future use satisfies statutory requirements. (*C.C.P. 1240.230(a), 1240.230(c)*.)

(2) *Taking property already appropriated to public use.* A defendant who objects to the taking under *C.C.P. 1240.510* (the proposed use may not "unreasonably interfere with or impair the continuance of the public use as it then exists or may reasonably be expected to exist in the future") has the burden of proving that the property is appropriated to public use. If that fact is established, the plaintiff has the burden of proving that the property's proposed use satisfies the requirements of *C.C.P. 1240.510*. (*C.C.P. 1240.520*.)

(3) *Appropriation to more necessary public use.* A defendant who objects to the taking under *C.C.P. 1240.610* (property already appropriated for public use may be acquired if proposed use is more necessary public use than use to which property is currently appropriated) has the burden of proving that the property is appropriated to public use. If that fact is established, the plaintiff has the burden of proving that the proposed use satisfies the requirements of *C.C.P. 1240.610*. (*C.C.P. 1240.620*.)

(4) *Loss of goodwill.* The owner of a business seeking compensation for loss of goodwill has the burden of proving:

(a) The loss is caused by the taking of the property on which the business was conducted, or by injury to the remainder where the remainder is part of a larger parcel and the business was conducted on the remainder. (*C.C.P. 1263.510(a)(1)*.)

(b) The loss cannot reasonably be prevented by relocating the business or by taking other prudent steps. (*C.C.P. 1263.510(a)(2).*)

(c) Compensation for the loss will not be included in payments under *Govt.C. 7262*. (*C.C.P. 1263.510(a)(3).*)

(d) Compensation for the loss will not be duplicated in other compensation. (*C.C.P. 1263.510(a)(4).*)

(5) *Facts underlying resolution of necessity*. A resolution of necessity, once adopted, conclusively establishes the existence of the requirements for a taking (*C.C.P. 1245.250(a)*), *unless* the resolution is shown to have been influenced or affected by an abuse of discretion (*C.C.P. 1245.255(b)*). Once a defendant property owner establishes by substantial evidence that because of a gross abuse of discretion the resolution of necessity is not entitled to its ordinary conclusive effect, the burden of proving by a preponderance of evidence the elements for a particular taking rests on the governmental agency. (*Redevelopment Agency of Huntington Park v. Norm's Slauson (1985) 173 C.A.3d 1121, 1128, 219 C.R. 365.*)

**SUPPLEMENT:** [This section is current through the latest supplement]

BAJI, No. 11.98, as revised in 2004, states simply that "[n]either the plaintiff nor the defendant has the burden of proof on the issue of compensation."

See CACI, No. 3514 [neither condemner nor property owner has burden of proving amount of just compensation].

*Cross-Reference:* 8 *Summary* (10th), *Constitutional Law*, §1221.(4) *Loss of goodwill*. See *Regents of Univ. of Calif. v. Sheily (2004) 122 C.A.4th 824, 831, 19 C.R.3d 84* [property owner claiming benefits of *C.C.P. 1263.510* bears burden of proving entitlement to those benefits, and proof is by preponderance of evidence].



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##### e. Ownership of Motor Vehicle.

*1 Witkin Cal. Evid. Burden § 18*

[§ 18] Ownership of Motor Vehicle.

In *Enis v. Specialty Auto Sales* (1978) 83 C.A.3d 928, 148 C.R. 255, plaintiff brought an action for personal injuries sustained in an automobile accident against the driver, an automobile dealer, and D, a previous owner. Liability of the dealer and previous owner was based on their failure to comply with the Vehicle Code sections requiring sending of notice to the Department of Motor Vehicles (*Veh.C. 5602, 5900, 5901*; see 6 *Summary* (9th), *Torts*, §1032). The trial judge instructed the jury that plaintiff had the burden of proof on this issue. *Held*, reversed. The Department records, proved by plaintiff, showed that D was the registered owner and that timely notice of the transfer had not been received. This sustained plaintiff's burden of proving the "ownership" allegation of her complaint. Compliance with the statutory requirements for escaping liability was an affirmative defense, based on facts peculiarly within the knowledge of defendants (i.e., that they mailed notices of sale that, for reasons unknown, were not timely received). (83 C.A.3d 936, 937, 938.) (On facts within party's knowledge, see *supra*, §11.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Cross-Reference:* 6 *Summary* (10th), *Torts*, §1266.



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CHAPTER III - Burden of Proof and Presumptions

II. ALLOCATION OF BURDENS IN CIVIL CASES

B. Burden of Proof.

3. Burden on Specific Issues.

f. Land Patented or Granted by State.

*1 Witkin Cal. Evid. Burden § 19*

[§ 19] Land Patented or Granted by State.

*Ev.C. 523* affects the burden of proof in any action in which the state is a party and in which (1) the boundary of land patented or otherwise granted by the state is in dispute, or (2) the validity of any state patent or grant dated prior to 1950 is in dispute. The statute requires the state to bear the burden of proof as to all issues relating to (1) the historic locations of rivers, streams, and other bodies of water, and (2) the authority of the state in issuing the patent or grant. (See 26 *Pacific L. J.* 315; 4 *Summary* (9th), *Real Property*, §157.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*Cross-Reference:* 12 *Summary* (10th), *Real Property*, §§275, 277.



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#### A. Presumption of Innocence and Prosecution's Burden of Proof.

##### 1. Constitutional Basis.

#### 1 Witkin Cal. Evid. Burden § 20

[§ 20] Constitutional Basis.

"The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." (*Taylor v. Kentucky* (1978) 436 U.S. 478, 98 S.Ct. 1930, 1934, 56 L.Ed.2d 468, 474 [quoting *Coffin v. United States* (1895) 156 U.S. 432, 15 S.Ct. 394, 39 L.Ed. 481, and pointing out, in footnote 12, that the "presumption of innocence" is not technically a presumption (mandatory inference drawn from a fact in evidence) but rather an "assumption" that is indulged in the absence of contrary evidence]; *Mullaney v. Wilbur* (1975) 421 U.S. 684, 95 S.Ct. 1881, 1892, 44 L.Ed.2d 508, 522 [burden of establishing heat of passion on sudden provocation, i.e., justification for homicide, improperly placed on defendant]; *Sandstrom v. Montana* (1979) 442 U.S. 510, 99 S.Ct. 2450, 2457, 61 L.Ed.2d 39, 48, infra, §90 [presumption that person intends ordinary consequences of act cannot be applied to establish specific intent element of crime]; *Francis v. Franklin* (1985) 471 U.S. 307, 105 S.Ct. 1965, 1970, 85 L.Ed.2d 344, 352 [instructions that acts of person of sound mind are presumed to be product of person's will, and that person is presumed to intend natural consequences of own acts, unconstitutionally shifted burden of proof to defendant]; *Yates v. Aiken* (1988) 484 U.S. 211, 108 S.Ct. 534, 536, 98 L.Ed.2d 546, 552 [discussing *Sandstrom* and *Francis*]; *People v. Montalvo* (1971) 4 C.3d 328, 333, 93 C.R. 581, 482 P.2d 205 [narcotics statute applicable to person 21 years of age or over; burden of establishing minority improperly placed on defendant]; *People v. Henley* (1999) 72 C.A.4th 555, 562, 564, 85 C.R.2d 123 [prior felony was alleged to be serious because it caused great bodily injury to person other than accomplice; defendant's due process rights were violated by placing on him burden of proving injured person's accomplice status]; 89 Harv. L. Rev. 51 [*Mullaney*]; 1978 A.S. 17 [same]; 94 Harv. L. Rev. 1574 [Rationality, Presumptions, and Judicial Comment]; 94 Harv. L. Rev. 1795 [Constitutional Process of Proof Problems]; 40 Hastings L. J. 457 [The Reasonable Doubt Rule and the Meaning of Innocence]; 1 Wharton 14th, §10 et seq.; 5 Cal. Crim. Law (3d), Criminal Trial, §521 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

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### III. ALLOCATION OF BURDENS IN CRIMINAL CASES

#### A. Presumption of Innocence and Prosecution's Burden of Proof.

##### 2. Statutory Restatement.

##### 1 *Witkin Cal. Evid. Burden* § 21

[§ 21] Statutory Restatement.

The fundamental presumption of innocence, and the prosecution's burden of proving the defendant guilty beyond a reasonable doubt, are stated in P.C. 1096: "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his or her guilt is satisfactorily shown, he or she is entitled to an acquittal." (See *People v. Miller* (1916) 171 C. 649, 651, 154 P. 468; *People v. Daugherty* (1953) 40 C.2d 876, 896, 256 P.2d 911; *People v. Belton* (1979) 23 C.3d 516, 520, 153 C.R. 195, 591 P.2d 485; *People v. Gonzalez* (1990) 51 C.3d 1179, 1214, 1215, 275 C.R. 729, 800 P.2d 1159; 2 McCormick 5th, §341; 9 Wigmore (Chadbourn Rev.) §2497; 40 *Hastings L. J.* 457; 24 *So. Cal. L. Rev.* 496; 18 *U.C.L.A. L. Rev.* 157, 168; 29 *Am.Jur.2d* (1994 ed.), *Evidence* §168 et seq.; 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §521 et seq.; on instructions, see *infra*, §§22, 23.)

The existence and controlling effect of this statute are recognized in *Ev.C. 501*: "Insofar as any statute, except Section 522, assigns the burden of proof in a criminal action, such statute is subject to *Penal Code Section 1096*." (*Ev.C. 522*, *infra*, §27, deals with the burden of proving insanity.) The Law Revision Commission Comment states:

"Section 501 is intended to make it clear that the statutory allocations of the burden of proof appearing in this chapter and elsewhere in the codes are subject to *Penal Code Section 1096*, which requires that a criminal defendant be proved guilty beyond a reasonable doubt, *i.e.*, that the statutory allocations do not (except on the issue of insanity) require the defendant to persuade the trier of fact of his innocence." (Law Rev. Com. Comment to *Ev.C. 501*.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 2 McCormick 6th, §341.

(*New*) *Revocation of probation under Proposition 36*: Where the prosecution seeks to revoke a grant of probation under Proposition 36 on the ground that the defendant violated a non-drug-related condition of probation (see 2 *Cal. Crim. Law* (3d), *Crimes Against Public Peace and Welfare*, Supp., §126C), it bears the burdens of producing evidence and of persuasion that the particular violation did not involve a drug-related probation condition. (*People v. Atwood* (2003) 110 C.A.4th 805, 812, 813, 2 C.R.3d 67.)





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## A. Presumption of Innocence and Prosecution's Burden of Proof.

## 3. Instructions to Jury.

## a. Proper Instructions.

1 *Witkin Cal. Evid. Burden* § 22

[§ 22] Proper Instructions.

(1) *Right to Basic Instruction.* "In charging a jury, the court may read to the jury Section 1096, and no further instruction on the subject of the presumption of innocence or defining reasonable doubt need be given." (P.C. 1096a; see CALJIC (6th ed.), No. 2.90 [setting forth presumption of innocence and providing definition of reasonable doubt]; *People v. Light* (1996) 44 C.A.4th 879, 888, 52 C.R.2d 218 [reasonable doubt instruction based on 1994 revision of CALJIC, No. 2.90, which deleted references to "moral evidence" and "moral certainty," was proper]; 5 Cal. Crim. Law (3d), Criminal Trial, §§521, 637.) The reasonable doubt standard of proof is a constitutional requirement (see *infra*, §41), and omission of the basic instruction under P.C. 1096 and P.C. 1096a is reversible error. (*People v. Vann* (1974) 12 C.3d 220, 226, 228, 115 C.R. 352, 524 P.2d 824.)

(2) *Instruction on Presumption of Innocence.* In *Taylor v. Kentucky* (1978) 436 U.S. 478, 98 S.Ct. 1930, 56 L.Ed.2d 468, a robbery victim and defendant were the only witnesses, and they gave conflicting stories. Defendant's request for a specific instruction on the presumption of innocence was denied; the judge simply instructed that the state had the burden of proving defendant's guilt beyond a reasonable doubt. *Held*, conviction reversed. While an instruction on the "presumption of innocence" is not constitutionally mandated, under the circumstances, the refusal to give one resulted in a violation of defendant's right to a fair trial and therefore a denial of due process. (98 S.Ct. 1937, 56 L.Ed.2d 478.)

Subsequently, in *Kentucky v. Whorton* (1979) 441 U.S. 786, 99 S.Ct. 2088, 60 L.Ed.2d 640, the Court made it clear that failure to give a presumption of innocence instruction on request "does not in and of itself violate the Constitution." The failure must be evaluated in light of the totality of the circumstances, "including all the instructions to the jury, the arguments of counsel, whether the weight of the evidence was overwhelming, and other relevant factors." (99 S.Ct. 2090, 60 L.Ed.2d 643.) (See 7 *Pepperdine L. Rev.* 431.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Right to Basic Instruction.* See *People v. Mayo* (2006) 140 C.A.4th 535, 545, 550, 44 C.R.3d 497 [trial judge's inadvertent failure to give CALJIC, No. 2.90, defining reasonable doubt and setting forth presumption of innocence, did not constitute federal constitutional error; definition of reasonable doubt is not required, and other instructions given informed jurors that defendant was entitled to acquittal unless each element of crime was proved beyond reasonable doubt, and that guilt must be judged solely on evidence presented].



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##### 3. Instructions to Jury.

##### b. Improper Variations.

#### 1 Witkin Cal. Evid. Burden § 23

#### [§ 23] Improper Variations.

In *People v. Garcia* (1975) 54 C.A.3d 61, 126 C.R. 275, the trial judge instructed the jury on proof beyond a reasonable doubt according to P.C. 1096, but then amplified the instruction by adding: "In other words, reasonable doubt means just what the term implies, a doubt based upon reason, a doubt that presents itself in the minds of reasonable people who are weighing the evidence in the scales, one side against the other, in the logical manner in an effort to determine wherein lies the truth." *Held*, this "clarification" was prejudicial error.

(a) The language of P.C. 1096 was derived from a Massachusetts decision written in 1850. "It has with near, if not complete, universality been accepted as the best definition of the concept of proof beyond a reasonable doubt. Well intentioned efforts to 'clarify' and 'explain' these criteria have had the result of creating confusion and uncertainty, and have repeatedly been struck down by the courts of review of this state." (54 C.A.3d 63.)

(b) There was one *authoritative* departure in California from the strict language of P.C. 1096, in *People v. Hall* (1964) 62 C.2d 104, 112, 41 C.R. 284, 396 P.2d 700, 3 Cal. Evidence (4th), *Presentation at Trial*, §146: "To justify a criminal conviction, the trier of fact must be reasonably persuaded to a near certainty." The concept of "near certainty" is now a necessarily implied element of P.C. 1096, but it creates no new standard. "[I]t only more sharply defines that of section 1096." (54 C.A.3d 67.)

(c) The disputed instruction here used language like "reasonable doubt," "presumption of innocence" and the need for "an abiding conviction, to a moral certainty, of the truth of the charge." But the instruction called on the jury to *weigh* the evidence and thus the accused's guilt or innocence. "This 'weighing' process, where a tipping of the scales determines the 'truth,' is wholly foreign to the concept of proof beyond a reasonable doubt." (54 C.A.3d 69, citing the text on the similarity of the challenged instruction to the civil case rule on the preponderance of evidence.) (See also *People v. Brigham* (1979) 25 C.3d 283, 290, 157 C.R. 905, 599 P.2d 100; *People v. Yoshimura* (1979) 91 C.A.3d 609, 631, 632, 154 C.R. 314 [improvisations criticized, but verbal error held harmless]; *People v. Henderson* (1985) 163 C.A.3d 1001, 1012, 209 C.R. 883 [requested special instruction relating identification of defendant to reasonable doubt was redundant and argumentative and properly refused]; CALJIC (6th ed.), No. 2.90; for extensive analysis and criticism of previous version of CALJIC, No. 2.90, which referred to "moral evidence" and "moral certainty," see concurring opinion in *People v. Brigham*, *supra*; and see 38 *Hastings L. J.* 153 ["To a Moral Certainty": Theories of Knowledge and Anglo-American Juries 1600-1850].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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### III. ALLOCATION OF BURDENS IN CRIMINAL CASES

#### A. Presumption of Innocence and Prosecution's Burden of Proof.

##### 3. Instructions to Jury.

##### c. Right to Presence of Counsel During Instruction.

*1 Witkin Cal. Evid. Burden § 24*

[§ 24] Right to Presence of Counsel During Instruction.

The problem that occurred in *People v. Garcia* (1975) 54 C.A.3d 61, 126 C.R. 275, supra, §23--the judge's erroneous elaboration on the concept of reasonable doubt--was compounded in *People v. Rubalcava* (1988) 200 C.A.3d 295, 246 C.R. 75, a prosecution for lewd acts with children. At trial, defendant and his counsel stipulated that the judge could, in their absence, answer any jury question that did not require research or discussion. After being informed that the jury could not agree on the meaning of "moral certainty," the judge gave an extended answer. *Held*, this was prejudicial error:

"Just as in *Garcia*, ... the jury was properly instructed on reasonable doubt but the trial court ... , prompted by a jury question, provided an extended discussion of a constituent part of the concept of reasonable doubt. It did so without giving the notice which would have allowed defendant's counsel to be present. If present, defense counsel may well have successfully objected to the giving of any additional instruction on reasonable certainty or reasonable doubt or, at a minimum, may have assisted in the crafting of a different elaboration on that subject. However well-meaning the trial court was in its explanation of moral certainty it encroached upon the defendant's right to assistance of counsel." (200 C.A.3d 301.)

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#### III. ALLOCATION OF BURDENS IN CRIMINAL CASES

##### B. Burden of Producing Evidence on Certain Defenses.

###### 1 Witkin Cal. Evid. Burden § 25

[§ 25] Burden of Producing Evidence on Certain Defenses.

In a few situations, case law or a statute places the burden of producing evidence in support of a special defense on the defendant. The following are examples:

(1) Justification or excuse, after proof of abandonment or desertion of a child by the parent. (P.C. 270; see *In re Bryant* (1928) 94 C.A. 791, 794, 271 P. 926; *In re Clarke* (1957) 149 C.A.2d 802, 807, 309 P.2d 142; 2 Cal. Crim. Law (3d), Sex Offenses and Crimes Against Decency, §143.)

(2) The defense of lawful arrest, on a charge of false imprisonment. (See *People v. Agnew* (1940) 16 C.2d 655, 663, 107 P.2d 601, 1 Cal. Crim. Law (3d), Crimes Against the Person, §83 [defendant bears burden of producing evidence that raises reasonable doubt as to unlawfulness of arrest].)

(3) The defense of authority to sign another's name, in a prosecution for forgery. (*People v. Hassen* (1956) 144 C.A.2d 334, 343, 301 P.2d 80.)

(4) Circumstances that mitigate, justify, or excuse a homicide, once there is proof that the defendant committed it. (P.C. 189.5(a), formerly P.C. 1105.) P.C. 189.5(b) specifies that this burden is not applicable in a capital penalty proceeding. Rather, the statute is intended to place on the defendant, once it is shown he or she committed the crime, the burden of raising a reasonable doubt as to whether the killing was malicious. (*People v. Frye* (1992) 7 C.A.4th 1148, 1154, 1155, 10 C.R.2d 217; see *People v. Wells* (1938) 10 C.2d 610, 617, 76 P.2d 493; *People v. Deloney* (1953) 41 C.2d 832, 841, 264 P.2d 532; *People v. Loggins* (1972) 23 C.A.3d 597, 602, 603, 100 C.R. 528 ["only when the People's case embodies no evidence of mitigation or justification is section 1105 activated; at that point it warns the defendant that the task or responsibility of producing such evidence has now shifted to him"]; *People v. Banks* (1976) 67 C.A.3d 379, 384, 137 C.R. 652; 9 So. Cal. L. Rev. 405; 5 Cal. Crim. Law (3d), Criminal Trial, §524.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(5) (New) The defense of a good faith belief that a security is exempt, in a prosecution for sale of unregistered securities. (See *People v. Salas* (2006) 37 C.4th 967, 981, 38 C.R.3d 624, 127 P.3d 40, 2 Cal. Crim. Law (3d), Crimes Against Public Peace and Welfare, Supp., §305.) West's Key Number Digest, Criminal Law k.330



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#### III. ALLOCATION OF BURDENS IN CRIMINAL CASES

##### C. Burden of Proof on Certain Defenses.

##### 1. In General.

*1 Witkin Cal. Evid. Burden § 26*

[§ 26] In General.

Although it is a requirement of due process that the prosecution prove every fact necessary to constitute the charged offense (*People v. Jimenez* (1995) 33 C.A.4th 54, 61, 39 C.R.2d 12), the Constitution does not require the prosecution to prove that an affirmative defense is inapplicable. Thus, in *Martin v. Ohio* (1987) 480 U.S. 228, 107 S.Ct. 1098, 94 L.Ed.2d 267, the Supreme Court upheld an Ohio law that imposed on the accused the burden of proving the defense of self-defense by a preponderance of the evidence. (107 S.Ct. 1103, 94 L.Ed.2d 275, 276.) California law, by contrast, only requires the defendant to raise this defense; once that is done, the prosecution bears the burden of proving, beyond a reasonable doubt, that it does not apply. (*People v. Pineiro* (1982) 129 C.A.3d 915, 920, 179 C.R. 883.) But in a number of other situations, the defendant has the burden not only of raising, but also of proving, an affirmative defense. (See 75 Cal. L. Rev. 1665 [analysis and criticism of rule that defendant may bear burden of proof of affirmative defenses]; *infra*, §§27 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Dixon v. United States* (2006) 548 U.S. 1, 126 S.Ct. 2437, 2442, 165 L.Ed.2d 299, 309, 1 Cal. Crim. Law (3d), *Defenses, Supp.*, §57 [in federal prosecution for receiving firearm while under indictment, neither United States Constitution nor common law was violated by requiring defendant to prove her duress defense by preponderance of evidence, rather than requiring prosecution to disprove it beyond reasonable doubt].

*(New) Distinction: Medication defense in mentally disordered offender proceeding:* In a proceeding to extend a mentally disordered offender commitment (see 3 Cal. Crim. Law (3d), *Punishment*, §639), the defendant's claim that as a result of medication the mental condition at issue is in remission and he or she does not represent a substantial danger to others amounts to a claim that two of the three criteria for extension are not met. These are issues on which the prosecution must bear the burden of proof; thus, giving an instruction characterizing this claim as an affirmative defense as to which the defendant bears the burden of proof constitutes error. (*People v. Noble* (2002) 100 C.A.4th 184, 189, 190, 121 C.R.2d 918.)



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##### C. Burden of Proof on Certain Defenses.

##### 2. Insanity.

*1 Witkin Cal. Evid. Burden § 27*

[§ 27] Insanity.

The former judicially recognized presumption of sanity was applicable to both civil and criminal cases, and, under the old rule that a presumption was evidence, it could be weighed against testimony as to the defendant's sanity. (See *People v. Chamberlain* (1936) 7 C.2d 257, 260, 60 P.2d 299 [upholding jury's verdict of sanity against uncontradicted evidence that defendant was insane]; 25 Cal. L. Rev. 101 [criticizing *Chamberlain*]; 25 U.C.L.A. L. Rev. 637, 697 [criticizing *Chamberlain* and examining other jurisdictions' versions of presumption].)

Ev.C. 522 eliminated the presumption and substituted the rule that a person claiming insanity has the burden of proof on that issue, hence, must establish the defense by a preponderance of the evidence. This, in different terms, is the effect of preexisting law. (See *People v. Daugherty* (1953) 40 C.2d 876, 901, 256 P.2d 911; *In re Dennis* (1959) 51 C.2d 666, 674, 335 P.2d 657 [disapproving *Chamberlain*, and finding presumption dispelled by strong uncontroverted evidence of insanity]; *People v. Harmon* (1952) 110 C.A.2d 545, 554, 243 P.2d 15; *People v. Baker* (1954) 42 C.2d 550, 564, 268 P.2d 705; see also 1 Cal. Crim. Law (3d), Defenses, §15.)

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C. Burden of Proof on Certain Defenses.

3. Whether Witness Was Accomplice.

1 *Witkin Cal. Evid. Burden* § 28

[§ 28] Whether Witness Was Accomplice.

When a witness has in some way been connected with the crime charged against the defendant, who has the burden of proving that the witness was--or was not--an accomplice?

The issue may be of the highest significance because an accomplice's testimony must be corroborated while that of an accessory after the fact or of an ordinary witness does not require corroboration. (See *People v. Johnson* (1971) 18 C.A.3d 458, 463, 95 C.R. 316; *People v. Wolden* (1967) 255 C.A.2d 798, 803, 63 C.R. 467; 1 Cal. Crim. Law (3d), *Introduction to Crimes*, §§77, 90; 3 Cal. Evidence (4th), *Presentation at Trial*, §96 et seq.) The general rule, followed in California, places the burden of proving accomplice status on the defendant. (See *People v. Belton* (1979) 23 C.3d 516, 523, 153 C.R. 195, 591 P.2d 485; *People v. Fauber* (1992) 2 C.4th 792, 834, 9 C.R.2d 24, 831 P.2d 249; 7 Wigmore (Chadbourn Rev.) §2060; 19 A.L.R.2d 1352, 1358.)

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##### C. Burden of Proof on Certain Defenses.

##### 4. Other Special Defenses.

##### 1 Witkin Cal. Evid. Burden § 29

[§ 29] Other Special Defenses.

In several other situations, for reasons of policy or convenience, the burden of proof is placed on the defendant:

(1) *Arrest unlawful where made pursuant to warrant.* (See *Badillo v. Superior Court* (1956) 46 C.2d 269, 272, 294 P.2d 23; *People v. Cheatham* (1975) 50 C.A.3d 592, 598, 123 C.R. 361; on burden of justifying arrest where there is no warrant, see *infra*, §89; on search without lawful arrest or search warrant, see 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence*, §194 et seq.)

(2) *Defendant under 18, in prosecution for capital offense.* (P.C. 190.5; see *People v. Ellis* (1929) 206 C. 353, 356, 274 P. 353; *People v. Marquez* (1992) 1 C.4th 553, 580, 3 C.R.2d 710, 822 P.2d 418; 3 Cal. Crim. Law (3d), *Punishment*, §434.)

(3) *Discriminatory enforcement of law.* (See *People v. Superior Court (Hartway)* (1977) 19 C.3d 338, 348, 138 C.R. 66, 562 P.2d 1315; *People v. Gray* (1967) 254 C.A.2d 256, 265, 63 C.R. 211; on meeting burden, see *infra*, §47.)

(4) *Double jeopardy.* (See *People v. Newell* (1923) 192 C. 659, 667, 221 P. 622; *People v. Mason* (1962) 200 C.A.2d 282, 285, 19 C.R. 240; *People v. Ferguson* (1982) 129 C.A.3d 1014, 1023, 181 C.R. 593; 1 Cal. Crim. Law (3d), *Defenses*, §185.)

(5) *Drunk driving, constitutional challenge to validity of prior conviction.* (Veh.C. 41403(b)(2), formerly Veh.C. 23102.2; see *People v. Zavala* (1983) 147 C.A.3d 429, 435, 195 C.R. 527.)

(6) *Entrapment.* (See *People v. Terry* (1955) 44 C.2d 371, 372, 282 P.2d 19; *People v. Tewksbury* (1976) 15 C.3d 953, 963, 964, 127 C.R. 135, 544 P.2d 1335, *infra*, §47; *People v. Cordray* (1962) 209 C.A.2d 425, 431, 26 C.R. 42; *People v. Hawkins* (1962) 210 C.A.2d 669, 671, 27 C.R. 144; *People v. Valverde* (1966) 246 C.A.2d 318, 319, 54 C.R. 528, 1 Cal. Crim. Law (3d), *Defenses*, §98; *People v. Salas* (1975) 51 C.A.3d 151, 158, 123 C.R. 903; 73 Harv. L. Rev. 1344, 1345; CALJIC (6th ed.), No. 4.60; 1 Cal. Crim. Law (3d), *Defenses*, §98.)

(7) *Escape because of necessity.* (See *People v. Condley* (1977) 69 C.A.3d 999, 1013, 138 C.R. 515 [defense is founded on public policy and provides a justification distinct from elements required to prove escape].)

(8) *Evidence destroyed or suppressed had reasonably apparent exculpatory value.* (See *People v. Beeler* (1995) 9 C.4th 953, 977, 978, 39 C.R.2d 607, 891 P.2d 153 [even if prosecution's test firing of rifle found in murder victim's house made it impossible to subject it to further testing, defendant failed to show that further testing would have had



exculpatory value that would have been reasonably apparent at time of test firing]; 3 *Cal. Evidence (4th), Presentation at Trial*, §124 et seq.)

(9) *Good faith marriage, in bigamy prosecution.* (See *People v. Vogel* (1956) 46 C.2d 798, 803, 299 P.2d 850; 2 *Cal. Crim. Law (3d), Sex Offenses and Crimes Against Decency*, §134.)

(10) *Hypodermic needle lawfully possessed, in prosecution for unlawful possession.* (See *People v. Fuentes* (1990) 224 C.A.3d 1041, 1045, 274 C.R. 17 [in prosecution for violation of former B. & P.C. 4149 (now B. & P.C. 4140), trial judge properly instructed jury that defendant had burden of showing that his acquisition of hypodermic needle was lawful].)

(11) *Inability to pay, in contempt proceeding arising from failure to pay child support.* (See *Moss v. Superior Court* (1998) 17 C.4th 396, 426, 71 C.R.2d 215, 950 P.2d 59, 10 *Summary (9th), Parent and Child, Supp.*, §309A, citing the text.)

(12) *Permit for possession of articles otherwise unlawfully possessed.* (See *People v. Yoshimura* (1979) 91 C.A.3d 609, 626, 629, 154 C.R. 314; cf. *People v. Gott* (1994) 26 C.A.4th 881, 888, 889, 31 C.R.2d 840 [in prosecution under *Health & Saf.C. 11106* (interstate receipt, without permit, of ephedrine-containing substance of kind not transferable under federal law), prosecution had to prove that permit was required, as permit requirement was element of offense].)

(13) *Prescription's validity, in prosecution for narcotics possession or sale.* (See *People v. Bill* (1934) 140 C.A. 389, 392, 35 P.2d 645; *People v. Vasquez* (1964) 224 C.A.2d 206, 209, 36 C.R. 337; 2 *Cal. Crim. Law (3d), Crimes Against Public Peace and Welfare*, §94.)

(14) *Securities laws, applicability of exemption.* (See *People v. Figueroa* (1986) 41 C.3d 714, 720, 224 C.R. 719, 715 P.2d 680.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(11) *Inability to pay, in contempt proceeding arising from failure to pay child support.*

*Cross-Reference:* 10 *Summary* (10th), *Parent and Child*, §437.(12a) *(New) Possession of driver's license.* See *People v. Garcia* (2003) 107 C.A.4th 1159, 1164, 132 C.R.2d 694 [because possession of valid driver's license is complete defense to charge of misdemeanor driving without license, it is defendant's burden to produce license].

(15) *(New) Vehicle owner's consent, in prosecution for discharging firearm at unoccupied vehicle.* See *People v. Lam* (2004) 122 C.A.4th 1297, 1301, 19 C.R.3d 431 [P.C. 247(b) describes owner's nonconsent not as element of crime but as exception to applicability of statute].



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## CHAPTER III - Burden of Proof and Presumptions

### III. ALLOCATION OF BURDENS IN CRIMINAL CASES

#### D. Burden of Proving Incompetence.

##### 1 Witkin Cal. Evid. Burden § 30

[§ 30] Burden of Proving Incompetence.

Under P.C. 1369(f), a criminal defendant is presumed competent unless proved incompetent by a preponderance of the evidence. The effect of the presumption is to allocate the burden of proof on this issue to the defendant. (See *People v. Medina* (1990) 51 C.3d 870, 885, 274 C.R. 849, 799 P.2d 1282 [rejecting contention that placing on defendant burden of proving his or her own incompetence is denial of due process]; CALJIC (6th ed.), No. 4.10; 5 Cal. Crim. Law (3d), Criminal Trial, §§709, 710.)

*People v. Medina*, supra, was affirmed in *Medina v. California* (1992) 505 U.S. 437, 112 S.Ct. 2572, 120 L.Ed.2d 353:

(a) The proper analytical approach is that set forth in *Patterson v. New York* (1977) 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281, dealing with the defense of insanity (infra, §45), and *Martin v. Ohio* (1987) 480 U.S. 228, 107 S.Ct. 1098, 94 L.Ed.2d 267, dealing with self-defense (supra, §26). (112 S.Ct. 2577, 120 L.Ed.2d 363.)

(b) "Based on our review of the historical treatment of the burden of proof in competency proceedings, the operation of the challenged rule, and our precedents, we cannot say that the allocation of the burden of proof to a criminal defendant to prove incompetence 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " (112 S.Ct. 2577, 120 L.Ed.2d 363.)

(c) "Nothing in today's decision is inconsistent with our longstanding recognition that the criminal trial of an incompetent defendant violates due process. ... Rather, our rejection of petitioner's challenge to §1369(f) is based on a determination that the California procedure is 'constitutionally adequate' to guard against such results, ... and reflects our considered view that '[t]raditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused ha[s] been left to the legislative branch.' " (112 S.Ct. 2581, 120 L.Ed.2d 368.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Rells* (2000) 22 C.4th 860, 867, 94 C.R.2d 875, 996 P.2d 1184 [although P.C. 1372 (hearing on criminal defendant's recovery of mental competence; see 5 Cal. Crim. Law (3d), Criminal Trial, §714) does not expressly establish presumption of mental competence, presumption should be understood to apply, because it conforms with certificate of restoration filed by specified mental health official]; *People v. Johnwell* (2004) 121 C.A.4th 1267, 1273, 18 C.R.3d 286 [citing *Medina v. California* (1992) 505 U.S. 437, 112 S.Ct. 2572, 120 L.Ed.2d 353, text, p. 180].



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CHAPTER III - Burden of Proof and Presumptions

III. ALLOCATION OF BURDENS IN CRIMINAL CASES

E. Burden in O.R. Release of Arrestee.

*1 Witkin Cal. Evid. Burden § 31*

[§ 31] Burden in O.R. Release of Arrestee.

In *Van Atta v. Scott* (1980) 27 C.3d 424, 166 C.R. 149, 613 P.2d 210, the court held that the prosecution has the burden of proving that bail is necessary where an arrested person seeks release on his or her own recognizance. "This court has determined that the probable value of placing the burden of proof on the prosecution would be great and that the potential harm to the government's interests, including any administrative costs that the procedural requirement might entail, would be minimal. Accordingly, it is concluded that due process requires the burden of proof concerning the detainee's likelihood of appearing for future court proceedings to be borne by the prosecution at the OR hearing." (27 C.3d 444.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### III. ALLOCATION OF BURDENS IN CRIMINAL CASES

##### F. Burden in Eyewitness Identification.

###### 1 *Witkin Cal. Evid. Burden* § 32

[§ 32] Burden in Eyewitness Identification.

The defendant is entitled to an instruction that the jurors must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant as the person who committed the offense. (See CALJIC (6th ed.), No. 2.91.) Recent cases have examined the question whether a more detailed instruction (such as CALJIC (6th ed.), No. 2.92, which lists numerous factors that may affect the accuracy of an identification) must be given on request.

In *People v. Palmer* (1984) 154 C.A.3d 79, 203 C.R. 474, defendant was charged with armed robbery, and the only evidence against him was the eyewitness identification by four victims. None of the victims had any expertise in identification or law enforcement background, and of the six "positive" in-court identifications, only one was preceded by an unequivocal photo-lineup identification. Defendant requested a detailed instruction dealing with the matters to be considered in appraising identification testimony (154 C.A.3d 82, footnote 2). The judge refused the request, giving only the general CALJIC, No. 2.91. *Held*, refusal of a specific instruction was reversible error.

(a) The proposed instructions were aimed at identification factors uniquely relevant to the reliability of the eyewitness identifications; e.g., that in-court identifications are generally less reliable than those where selection is from among members of a similar group; the importance of considering the lapse of time from occurrence of the event until identification is made; the cross-racial nature of the identification; the length of time of the eye contact and the circumstances under which it occurred. (154 C.A.3d 86.)

(b) Although Court of Appeal decisions are in conflict on whether the failure to give specific instruction is error at all or prejudicial or harmless error, the statement in *People v. Hall* (1980) 28 C.3d 143, 159, 167 C.R. 844, 616 P.2d 826, that it is error to refuse such an instruction, is controlling; and *People v. West* (1983) 139 C.A.3d 606, 610, 189 C.R. 36, properly holds that refusal is reversible error where the case is close and evidence of identification was conflicting. (154 C.A.3d 87.)

(c) "[A]ny one-on-one confrontation is inherently suggestive . . . The reliability of these in-court identifications should be evaluated in light of psychological influences inherent in being asked to identify the only black person in the courtroom." (154 C.A.3d 88.)

(d) Mere multiplicity of concurring eyewitnesses does not necessarily make the failure to instruct harmless error. The testimony of each must be evaluated separately; and, in the absence of an instruction to that effect, "we find a substantial likelihood a juror would tend not to indulge in individual credibility analyses, but simply count the number of witnesses." (154 C.A.3d 89.) (See *People v. Aho* (1984) 152 C.A.3d 658, 661, 663, 199 C.R. 671 [reviewing the cases, and holding refusal to give instruction was error, but was harmless in light of record]; *People v. Coates* (1984)

152 C.A.3d 665, 670, 671, 199 C.R. 675 [reversible error to refuse instruction, where victim's opportunity to view robber was limited and search of defendant's home failed to turn up items of apparel victim had observed]; *People v. Wright* (1988) 45 C.3d 1126, 1141, 248 C.R. 600, 755 P.2d 1049 [instruction should focus jury's attention on facts relevant to existence of reasonable doubt as to identification by listing, in neutral manner, relevant factors supported by evidence; CALJIC, No. 2.92, which does this, is not deficient for failing to explain effect of each factor]; *People v. Gaglione* (1994) 26 C.A.4th 1291, 1302, 1303, 32 C.R.2d 169 [trial judge properly gave CALJIC, No. 2.92 without explaining effects of two of enumerated factors].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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CHAPTER III - Burden of Proof and Presumptions

IV. BURDENS IN DETERMINING PRELIMINARY FACTS

A. In General.

1 *Witkin Cal. Evid. Burden* § 33

[§ 33] In General.

In many situations, admissibility of "proffered evidence" is dependent on proof of a "preliminary fact" as a foundation. (*Ev.C. 400 et seq., 3 Cal. Evidence (4th), Presentation at Trial, §48 et seq.*) The Code states the following rules on burdens of producing evidence and proof:

(1) Where the preliminary fact is subject to redetermination by the jury after the judge's ruling in favor of admissibility (see *3 Cal. Evidence (4th), Presentation at Trial, §52 et seq.*) the "proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact." (*Ev.C. 403(a).*)

(2) Where the preliminary fact is finally determined by the judge (see *3 Cal. Evidence (4th), Presentation at Trial, §59 et seq.*), the judge indicates "which party has the burden of producing evidence and the burden of proof on the issue as implied by the rule of law under which the question arises." (*Ev.C. 405(a).*)

(3) Where a person claims the privilege against self-incrimination, that person has the burden of showing that the proffered evidence might tend to be incriminating. (*Ev.C. 404; see 2 Cal. Evidence (4th), Witnesses, §§462 et seq., 495.*)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Criminal Law k.334



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## CHAPTER III - Burden of Proof and Presumptions

### V. DEGREE OR MEASURE OF PROOF

#### A. Requisite Degree of Belief: In General.

##### *1 Witkin Cal. Evid. Burden § 34*

[§ 34] Requisite Degree of Belief: In General.

*Ev.C. 190* defines "proof" as the establishment by evidence of "a requisite degree of belief" concerning a fact. (See 1 *Cal. Evidence* (4th), *Introduction*, §19.) And *Ev.C. 115* states that the "burden of proof may require a party to raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt."

These, though not necessarily exclusive, are the typical burdens imposed in civil and criminal cases. (Law Rev. Com. Comment to *Ev.C. 115*; Law Rev. Com. Comment to *Ev.C. 500*; see *Addington v. Texas* (1979) 441 U.S. 418, 99 S.Ct. 1804, 1808, 60 L.Ed.2d 323, 329, 7 *Summary* (9th), *Constitutional Law*, §514, discussing the three standards; 2 McCormick 5th, §339 et seq.; 29 *Am.Jur.2d* (1994 ed.), *Evidence* §157 et seq.; *infra*, §§35 et seq., 41 et seq.; on mutually exclusive standards of proof on preliminary fact questions, see 27 *Stanf. L. Rev.* 271.) And *Ev.C. 502*, using the language of *Ev.C. 115*, *supra*, provides that the judge shall instruct the jury on which of the burdens is required of the party having the burden of proof on an issue. (See *Bruck v. Adams* (1968) 259 C.A.2d 585, 588, 66 C.R. 395 [reversible error to give instruction departing from standard of preponderance of evidence]; BAJI (8th ed.), Nos. 2.60, 2.62; CALJIC (6th ed.), No. 2.90.) In addition to meeting the appropriate standard of proof, some evidence requires corroboration. (See 3 *Cal. Evidence* (4th), *Presentation at Trial*, §96 et seq.)

Where the defendant defaults, a standard even lower than a preponderance of the evidence applies. To qualify for an award of damages, the plaintiff need only establish a *prima facie* case. (*Johnson v. Stanhiser* (1999) 72 C.A.4th 357, 361, 362, 85 C.R.2d 82.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See CACI, No. 200 [more-likely-than-not standard]; CACI, No. 201 [clear and convincing proof standard]; 2 McCormick 6th, §339 et seq.

*Addington v. Texas:*

*Cross-Reference:* 7 *Summary* (10th), *Constitutional Law*, §651. *West's Key Number Digest*, Evidence k.94



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## CHAPTER III - Burden of Proof and Presumptions

### V. DEGREE OR MEASURE OF PROOF

#### B. Civil Cases.

#### 1. Preponderance of Evidence.

##### a. In General.

*1 Witkin Cal. Evid. Burden § 35*

[§ 35] In General.

"Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." (*Ev.C. 115.*)

Although this requirement is occasionally found in criminal cases (see *infra*, §§42, 45, 47), its common application is to civil cases. And, as the above quotation makes clear, unless a greater or lesser burden is imposed by statute or judicial decision, the party with the burden of proof satisfies it by a preponderance of the evidence.

The phrase "preponderance of evidence" is usually defined in terms of probability of truth, e.g., "such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth." (BAJI (8th ed.), No. 2.60.) Cases discussing and applying this evidentiary standard are numerous. (See *Weiner v. Fleischman* (1991) 54 C.3d 476, 484, 286 C.R. 40, 816 P.2d 892, 9 Summary (9th), *Partnership, Supp.*, §17A [proof of oral joint venture or partnership agreement]; *Buss v. Superior Court* (1997) 16 C.4th 35, 53, 65 C.R.2d 366, 939 P.2d 766 [action by insurer seeking reimbursement for defense costs provided to insured for claims that were not potentially covered]; *Wirz v. Wirz* (1950) 96 C.A.2d 171, 175, 214 P.2d 839 [divorce for incurable insanity, all doctors testified that defendant would get progressively worse "in the realm of reasonable probability"]; *Barrett v. Bank of America* (1986) 183 C.A.3d 1362, 1370, 229 C.R. 16 [proof of oral modification of written contract]; *Glage v. Hawes Firearms Co.* (1990) 226 C.A.3d 314, 324, 325, 276 C.R. 430, 7 Cal. Proc. (4th), *Trial*, §337 [common meaning of "preponderance" includes notion of greater quantity, while legal meaning of "preponderance of evidence" is restricted to quality of evidence; citing the text]; *In re Marriage of Peters* (1997) 52 C.A.4th 1487, 1491, 61 C.R.2d 493, 11 Summary (9th), *Community Property, Supp.*, §11 [determination of date of separation in marital dissolution proceeding]; *Tusher v. Gabrielsen* (1998) 68 C.A.4th 131, 145, 80 C.R.2d 126 [existence of easement by implication]; *Wollersheim v. Church of Scientology Int.* (1999) 69 C.A.4th 1012, 1015, 81 C.R.2d 896 [determination whether judgment should be amended to add alleged alter ego as additional judgment debtor]; *Rivera v. Minnich* (1987) 483 U.S. 574, 107 S.Ct. 3001, 3004, 97 L.Ed.2d 473, 479, 480 [determination of paternity of child born out of wedlock]; for discussion of statutory confusion of the concepts of "preponderance," "clearly erroneous," and "unreasonable," see *Concrete Pipe & Products of Calif. v. Construction Laborers Pension Trust* (1993) 508 U.S. 602, 113 S.Ct. 2264, 2279, 124 L.Ed.2d 539, 563; and see 19 *Pepperdine L. Rev.* 1585 [Weiner]; 2 McCormick 5th, §339; 9 Wigmore (Chadbourn Rev.) §2498; 29 *Am.Jur.2d* (1994 ed.), *Evidence* §157.)

**SUPPLEMENT:** [This section is current through the latest supplement]



See *People v. Superior Court (Plascencia)* (2002) 103 C.A.4th 409, 423, 126 C.R.2d 793, 3 Cal. Crim. Law (3d), *Punishment, Supp.*, §218 [claimant's standing in civil proceeding for forfeiture of drug assets]; *Baxter Healthcare Corp. v. Denton* (2004) 120 C.A.4th 333, 365, 15 C.R.3d 430, citing the text [proof that product presents no significant risk of cancer in humans and therefore does not require Prop. 65 warning (see 12 *Summary* (10th), *Real Property*, §894)]; *In re Marriage of Balcof* (2006) 141 C.A.4th 1509, 1522, 47 C.R.3d 183 [proof that agreement transferring assets from husband to wife was product of undue influence]; *In re Marriage of Ettefagh* (2007) 150 C.A.4th 1578, 1584, 59 C.R.3d 419, *Supp.*, infra, §39 [rebutting presumption that property acquired during marriage is community property]; CACI, No. 200 [what party is trying to prove "is more likely to be true than not true"]; 2 McCormick 6th, §339.

*Weiner v. Fleischman*:

*Cross-Reference*: 9 *Summary* (10th), *Partnership*, §10.

*In re Marriage of Peters*:

*Cross-Reference*: 11 *Summary* (10th), *Community Property*, §11.

*(New) Distinction: Sexually violent predators proceeding*: Although the probable cause hearing in a commitment proceeding under the Sexually Violent Predators Act (Welf.C. 6600 et seq.; see 3 Cal. Crim. Law (3d), *Punishment*, §193 et seq.) is part of a civil proceeding, *Ev.C. 115* does not dictate that the preponderance standard be applied. The Legislature's use of the term "probable cause" in Welf.C. 6602(a) indicates that it contemplated a standard of proof similar to the one applied in the felony preliminary hearing context. Thus, the proper standard is: Could a reasonable person entertain a strong suspicion that the offender is a sexually violent predator? (*Cooley v. Superior Court* (2002) 29 C.4th 228, 251, 252, 127 C.R.2d 177, 57 P.3d 654, 3 Cal. Crim. Law (3d), *Punishment, Supp.*, §196.)



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## CHAPTER III - Burden of Proof and Presumptions

### V. DEGREE OR MEASURE OF PROOF

#### B. Civil Cases.

1. Preponderance of Evidence.
  - b. Proof of Crime or Fraud.

1 Witkin Cal. Evid. Burden § 36

[§ 36] Proof of Crime or Fraud.

(1) *Proof of Crime*. Even where the theory of the case involves the accusation of a crime, the burden of proving the crime (*supra*, §14) is met by a preponderance of the evidence; i.e., the high degree of proof demanded in criminal cases is not required in civil cases even on the issue of crime. (*Estate of Nelson* (1923) 191 C. 280, 286, 216 P. 368; *Cooper v. Spring Valley Water Co.* (1911) 16 C.A. 17, 21, 116 P. 298; *Pierce v. Harrold* (1982) 138 C.A.3d 415, 427, 188 C.R. 458 [crime of knowingly filing a false declaration of candidacy (former Elec.C. 29303; now *Elec.C. 18203*) must be established by preponderance of evidence; quoting the text]; see 2 McCormick 5th, §341; BAJI (8th ed.), No. 2.60.)

(2) *Proof of Fraud*. The former view that fraud must be proved by "clear and convincing evidence" has been disapproved; the proper standard of proof is a preponderance of the evidence. (See *Liodas v. Sahadi* (1977) 19 C.3d 278, 291, 137 C.R. 635, 562 P.2d 316, 5 Summary (9th), Torts, §674, disapproving *K. King & G. Shuler Corp. v. King* (1968) 259 C.A.2d 383, 396, 66 C.R. 330; *Herman & MacLean v. Huddleston* (1983) 459 U.S. 375, 103 S.Ct. 683, 692, 74 L.Ed.2d 548, 560 [action by defrauded purchasers of stock under Securities Exchange Act, §10(b)]; 5 U.S.F. L. Rev. 440 [argument that ordinary civil case burden of proof should apply to civil penalty suits under *B. & P.C. 17536* for false advertising, despite its criminal overtones].)

In *Grogan v. Garner* (1991) 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755, Grogan obtained a judgment against Garner for securities fraud, after a jury had been instructed on the preponderance of evidence standard. Garner filed for bankruptcy, listing the fraud judgment as a dischargeable debt. Grogan requested a determination that the fraud judgment was nondischargeable under §523(a) of the Bankruptcy Code, contending that the doctrine of collateral estoppel applied. Garner argued that collateral estoppel did not apply because the jury had reached its verdict under the preponderance standard instead of by clear and convincing evidence. *Held*, the preponderance standard applied. "We think it unlikely that Congress ... would have favored the interest in giving perpetrators a fresh start over the interest in protecting victims of fraud. Requiring the creditor to establish by a preponderance of the evidence that his claim is not dischargeable reflects a fair balance between these conflicting interests." (111 S.Ct. 659, 112 L.Ed.2d 765.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Proof of Crime*. See CACI, No. 200 [in civil trials, more-likely-than-not standard applies]; 2 McCormick 6th, §341.

(2) *Proof of Fraud*. See *People v. Muhyeldin* (2003) 112 C.A.4th 604, 610, 5 C.R.3d 492, quoting the text [in action by insurance company against physicians for insurance fraud, preponderance standard applied].

*Cross-Reference:* 5 *Summary* (10th), *Torts*, §769.



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## CHAPTER III - Burden of Proof and Presumptions

### V. DEGREE OR MEASURE OF PROOF

#### B. Civil Cases.

1. Preponderance of Evidence.
- c. Proof in Dependency Hearing.

1 Witkin Cal. Evid. Burden § 37

[§ 37] Proof in Dependency Hearing.

*In re Cheryl H.* (1984) 153 C.A.3d 1098, 200 C.R. 789, involved a dependency proceeding under Welf.C. 300 in which a 3-year-old child had been sexually molested by her father. The juvenile court judge made an order declaring the child a dependent, with custody remaining in her mother on condition that the child have no contact with her father. On appeal, the father contended that the judge should have applied the clear and convincing standard instead of that of preponderance of the evidence. *Held*, preponderance was the proper standard.

(a) In the jurisdictional phase of the hearing, Welf.C. 355 expressly provides that "proof by a preponderance of evidence" must be adduced to support the finding of dependency, and no higher degree is required. (153 C.A.3d 1112, 1113.)

(b) As to the dispositional phase, the statutes do not provide an express answer, but the same standard applies.

(1) Former Welf.C. 361(b) (now Welf.C. 361(c)) requires clear and convincing evidence where a child is removed from the custody of parents. Former C.C. 4600 (now *Family C. 3041*) provides that, before custody is awarded to a person other than a parent, there must be a finding that an award to a parent would be detrimental to the child; and this section has been interpreted to require clear and convincing evidence. (153 C.A.3d 1114, citing *In re B. G.* (1974) 11 C.3d 679, 696, 114 C.R. 444, 523 P.2d 244, 10 Summary (9th), *Parent and Child*, §666.)

(2) Here, however, the child was not removed from her home, nor was custody awarded to a nonparent. And there is neither statutory authority nor compelling policy to require a stringent standard that would make proof of neglect more difficult. (153 C.A.3d 1114, 1115.) (See *In re Jennifer V.* (1988) 197 C.A.3d 1206, 1211, 243 C.R. 441 [following *In re Cheryl H.*]; 10 Summary (9th), *Parent and Child*, §§572, 700.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Family C. 3041*, as amended in 2002, explicitly imposes a clear and convincing evidence standard, except in one specified circumstance. (See 10 Summary (10th), *Parent and Child*, §218.)

See *Katie V. v. Superior Court* (2005) 130 C.A.4th 586, 594, 30 C.R.3d 320 [in finding, at 18-month review hearing, that reasonable reunification services had been provided to mother, trial judge properly applied preponderance of evidence standard].

*In re B. G.:*

*Cross-Reference:* 10 *Summary* (10th), *Parent and Child*, §520.

*Standard of proof at jurisdiction and disposition hearings:*

*Cross-Reference:* 10 *Summary* (10th), *Parent and Child*, §§615, 632.



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### CHAPTER III - Burden of Proof and Presumptions

#### V. DEGREE OR MEASURE OF PROOF

##### B. Civil Cases.

##### 2. Clear and Convincing Evidence.

##### a. Nature of Requirement.

*1 Witkin Cal. Evid. Burden § 38*

[§ 38] Nature of Requirement.

(1) *Other Standards Distinguished.* In a few situations, for reasons of policy of the substantive law, the ordinary "preponderance of the evidence" is not considered sufficient to establish the fact in issue, and instead the party must prove it by "clear and convincing evidence." In such cases, of course, the jury or trial judge should not be satisfied with a slight preponderance in favor of the plaintiff. (See *Sheehan v. Sullivan* (1899) 126 C. 189, 193, 58 P. 543; *In re Jost* (1953) 117 C.A.2d 379, 383, 256 P.2d 71; *United Professional Planning v. Superior Court* (1970) 9 C.A.3d 377, 386, 88 C.R. 551, citing the text; *In re Marriage of Peters* (1997) 52 C.A.4th 1487, 1490, 1491, 61 C.R.2d 493, citing the text; *Addington v. Texas* (1979) 441 U.S. 418, 99 S.Ct. 1804, 1808, 60 L.Ed.2d 323, 329, 7 Summary (9th), *Constitutional Law*, §514; 2 McCormick 5th, §340; 9 Wigmore (Chadbourn Rev.) §2498; 29 Am.Jur.2d (1994 ed.), *Evidence* §157.)

The phrase has been defined as "clear, explicit and unequivocal," "so clear as to leave no substantial doubt," and "sufficiently strong to command the unhesitating assent of every reasonable mind." (*In re Jost, supra*, 117 C.A.2d 383.) Otherwise stated, a preponderance calls for probability, while clear and convincing proof demands a *high probability*. (See BAJI (8th ed.), No. 2.62; *Ev.C.* 115, 502, *supra*, §34 [recognizing the distinction but not defining the terms]; 25 Southwestern U. L. Rev. 173, 197.)

On the other hand, the evidence required to satisfy the clear and convincing standard falls well short of what is required for a criminal conviction. (See *Mattco Forge v. Arthur Young & Co.* (1997) 52 C.A.4th 820, 848, 849, 60 C.R.2d 780, 6 Summary (9th), *Torts, Supp.*, §805 [in malpractice action, proposed additions to BAJI, No. 2.62, requiring proof "so clear as to leave no substantial doubt" and "sufficiently strong to command the unhesitating assent of every reasonable mind" would have improperly raised proof level to nearly reasonable doubt standard].)

(2) *Review of Trier of Fact's Determination.* Appellate review of a determination under this standard is the same as in other cases, i.e., the question whether the plaintiff's evidence is clear and convincing is for the judge or jury, and if the trier of fact's determination is supported by substantial evidence, it will not be disturbed on appeal. (*Beeler v. American Trust Co.* (1944) 24 C.2d 1, 7, 147 P.2d 583; *Hansen v. Bear Film Co.* (1946) 28 C.2d 154, 173, 168 P.2d 946 [action to establish a trust, proof by circumstantial evidence held sufficient]; *Thomasset v. Thomasset* (1953) 122 C.A.2d 116, 123, 264 P.2d 626 [sufficiency of evidence to overcome presumption of community property]; *Marshall v. Marshall* (1965) 232 C.A.2d 232, 246, 42 C.R. 686, citing the text; *Boyd v. Bevilacqua* (1966) 247 C.A.2d 272, 292, 55 C.R. 610, citing the text; *Adams v. Young* (1967) 255 C.A.2d 145, 155, 62 C.R. 877 [proof that deed to convey land, apparently in fee simple, was intended to create trust]; cf. *Hoch v. Allied-Signal* (1994) 24 C.A.4th 48, 60, 29 C.R.2d

615 [appellate court should uphold nonsuit order in case requiring clear and convincing evidence where no reasonable jury could find that plaintiff met this standard]; 9 *Cal. Proc.* (4th), *Appeal*, §359.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Other Standards Distinguished.* See *People v. Mabini* (2001) 92 C.A.4th 654, 662, 112 C.R.2d 159, 1 Cal. Crim. Law (3d), *Defenses, Supp.*, §230 [following *Mattco Forge v. Arthur Young & Co.* (1997) 52 C.A.4th 820, 60 C.R.2d 780, text, p. 187; in prosecution for lewd acts on child, instruction patterned after BAJI, No. 2.62 adequately defined clear and convincing standard]; CACI, No. 201 [clear and convincing standard]; 2 McCormick 6th, §340.

*Addington v. Texas:*

*Cross-Reference:* 7 *Summary* (10th), *Constitutional Law*, §651.

*Mattco Forge v. Arthur Young & Co.:*

*Cross-Reference:* 6 *Summary* (10th), *Torts*, §994.



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## CHAPTER III - Burden of Proof and Presumptions

### V. DEGREE OR MEASURE OF PROOF

#### B. Civil Cases.

#### 2. Clear and Convincing Evidence. b. Issues Requiring Such Proof.

1 Witkin Cal. Evid. Burden § 39

[§ 39] Issues Requiring Such Proof.

The principal situations in which the Legislature or the courts have laid down the requirement of this higher degree of proof in civil cases are as follows:

(1) *Civil commitment of incompetent person.* (See *Addington v. Texas* (1979) 441 U.S. 418, 99 S.Ct. 1804, 1812, 60 L.Ed.2d 323, 335, 7 Summary (9th), *Constitutional Law*, §514; 97 A.L.R.3d 780.)

(2) *Conscientious objection: showing by alien applicant for naturalization without oath to bear arms that opposition is based solely on religious training and belief.* (*In re Jost* (1953) 117 C.A.2d 379, 383, 256 P.2d 71.)

(3) *Conservatee's lack of capacity to give written informed consent to convulsive treatment.* (See *Lillian F. v. Superior Court* (1984) 160 C.A.3d 314, 323, 324, 206 C.R. 603.)

(4) *Deed absolute in form as conveyance subject to trust.* (See *Sheehan v. Sullivan* (1899) 126 C. 189, 193, 58 P. 543; *Spaulding v. Jones* (1953) 117 C.A.2d 541, 545, 256 P.2d 637; *Adams v. Young* (1967) 255 C.A.2d 145, 155, 62 C.R. 877; *infra*, §87.)

(5) *Deed absolute in form as mortgage.* (See *Wehle v. Price* (1927) 202 C. 394, 397, 260 P. 878; *Beeler v. American Trust Co.* (1944) 24 C.2d 1, 7, 147 P.2d 583; 54A *Am.Jur.2d*, *Mortgages* (1996 ed.) §111; 3 Summary (9th), *Security Transactions in Real Property*, §§9, 10; *infra*, §87.)

(6) *Defamation of public official or public figure: proof of malice.* (See *Tague v. Citizens for Law & Order* (1977) 75 C.A.3d Supp. 16, 25, 142 C.R. 689; *Bindrim v. Mitchell* (1979) 92 C.A.3d 61, 72, 155 C.R. 29 [test met].)

(7) *Denaturalization proceeding: government's burden.* (See *Chaunt v. United States* (1960) 364 U.S. 350, 81 S.Ct. 147, 149, 5 L.Ed.2d 120, 123.)

(8) *Deportation proceeding: government's burden.* (See *Woodby v. Immigration & Naturalization Service* (1966) 385 U.S. 276, 87 S.Ct. 483, 488, 17 L.Ed.2d 362, 369; 18 *Stanf. L. Rev.* 1237.)

(9) *Minor's capacity to understand wrongfulness of conduct.* P.C. 26(One) provides that a child under the age of 14 is presumed to be incapable of committing a crime without clear proof that the child understood its wrongfulness. The statute imposes a clear and convincing evidence standard; the presumption of incapacity need not be rebutted beyond a



reasonable doubt. (*In re Manuel L.* (1994) 7 C.4th 229, 238, 239, 27 C.R.2d 2, 865 P.2d 718, 10 Summary (9th), *Parent and Child, Supp.*, §731 [distinguishing *In re Winship* (1970) 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368, which requires reasonable doubt standard for elements of offense].)

(10) *Oral agreement to make a will.* (See *Lynch v. Lichtenthaler* (1948) 85 C.A.2d 437, 441, 193 P.2d 77; 11 Summary (9th), *Equity*, §29.)

(11) *Oral transmutation of separate property into community property.* (See *In re Marriage of Weaver* (1990) 224 C.A.3d 478, 487, 273 C.R. 696; 11 Summary (9th), *Community Property*, §127.)

(12) *Paternity: proof to overcome rebuttable presumptions.* (See *Family C.* 7612, *infra*, §107.)

(13) *Establishment of probate conservatorship.* (See *Conservatorship of Sanderson* (1980) 106 C.A.3d 611, 620, 165 C.R. 217 [rejecting contention that stricter beyond reasonable doubt standard should be required].)

(14) *Property acquired after marriage as separate property.* (See *Estate of Nickson* (1921) 187 C. 603, 605, 203 P. 106; *Gagan v. Gouyd* (1999) 73 C.A.4th 835, 843, 86 C.R.2d 733; 11 Summary (9th), *Community Property*, §95.)

(15) *Public nuisance abatement action: proof of obscenity.* (See *People v. Mitchell Bros.' Santa Ana Theater* (1982) 128 C.A.3d 937, 940, 180 C.R. 728 [opinion after U.S. Supreme Court reversed prior decision requiring proof beyond reasonable doubt].)

(16) *Punitive damages: oppression, fraud, or malice.* (C.C. 3294(a), governing punitive damages, requires proof by clear and convincing evidence that defendant was guilty of oppression, fraud or malice; see 6 Summary (9th), *Torts*, §1327; 58 A.L.R.4th 878 [standard of proof as to conduct underlying punitive damage awards].)

(17) *Termination of parental rights.* (See *In re Angelia P.* (1981) 28 C.3d 908, 919, 171 C.R. 637, 623 P.2d 198, 10 Summary (9th), *Parent and Child*, §183; *In re Laura F.* (1983) 33 C.3d 826, 839, 191 C.R. 464, 662 P.2d 922; *Santosky v. Kramer* (1982) 455 U.S. 745, 102 S.Ct. 1388, 1402, 71 L.Ed.2d 599, 617 [requirement of due process].)

(18) *Waiver of known right.* (See *DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 C.A.4th 54, 60, 61, 35 C.R.2d 515 [waiver of known right must be shown by clear and convincing proof; Supreme Court opinion holding that preponderance standard applied to proof of oral joint venture or partnership agreement did not disapprove clear and convincing standard for all civil cases].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Civil commitment of incompetent person.*

*Cross-Reference:* 7 Summary (10th), *Constitutional Law*, §651.

(1a) *(New) Civil service employment action: defense to whistleblower's claim.* Where a state civil service employee demonstrates by a preponderance of the evidence that the employee's opposition to, or complaint regarding, an unlawful employment practice resulted in an adverse employment action against him or her, the burden of proof shifts to the opposing party to prove by clear and convincing evidence that the adverse action would have occurred for legitimate, independent reasons even if the employee had not engaged in protected activities. (*Govt.C.* 19702(h), added as *Govt.C.* 19702(j) in 2001 and relettered in 2004.)

(5) *Deed absolute in form as mortgage.*

*Cross-Reference:* 4 Summary (10th), *Security Transactions in Real Property*, §§10, 11.(8a) *(New) Donative transfer to drafter of instrument: determination of no fraud, duress, or undue influence.* (See *Prob.C.* 21351(d), 14 Summary (10th), *Wills and Probate*, §304.)

(8b) *(New) Equitable adoption: intent to adopt.* (See *Estate of Ford* (2004) 32 C.4th 160, 172, 8 C.R.3d 541, 82 P.3d 747.)

(9) *Minor's capacity to understand wrongfulness of conduct.*

*Cross-Reference:* 10 Summary (10th), *Parent and Child*, §732.

(10) *Oral agreement to make a will.*

*Cross-Reference:* 13 Summary (10th), *Equity*, §31.

(11) *Oral transmutation of separate property into community property.*

*Cross-Reference:* 11 Summary (10th), *Community Property*, §153.

(14) *Property acquired after marriage as separate property.* In *re Marriage of Ettefagh* (2007) 150 C.A.4th 1578, 59 C.R.3d 419, involved the proper characterization of real property acquired by the husband during marriage. The court described *Estate of Nickson* (1921) 187 C. 603, 203 P. 106, text, p. 189, as "questionable authority," and applied the preponderance of evidence standard in determining that the community property presumption was rebutted by evidence that the property was a gift to the husband. (150 C.A.4th 1588.)

*Cross-Reference:* 11 Summary (10th), *Community Property*, §15.

(15a) *(New) Public nuisance abatement action: street gang activity.* (See *People v. Englebrecht* (2001) 88 C.A.4th 1236, 1254, 1256, 106 C.R.2d 738, quoting the text.)

(16) *Punitive damages: oppression, fraud, or malice.* (See *Basich v. Allstate Ins. Co.* (2001) 87 C.A.4th 1112, 1118, 105 C.R.2d 153 [in action against insurer for breach of implied covenant of good faith and fair dealing, clear and convincing standard was applicable in ruling on defendant's motion for summary adjudication of issues as to plaintiff's punitive damages claim]; *Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 C.A.4th 1640, 1644, 3 C.R.3d 258 [clear and convincing standard applies not only to proof of oppression, fraud, or malice under C.C. 3294(a), but also to determination under C.C. 3294(b) whether employer should be liable for acts of employee].)

*Cross-Reference:* 6 Summary (10th), *Torts*, §1559.

(17) *Termination of parental rights.*

*Cross-Reference:* 10 Summary (10th), *Parent and Child*, §345.



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### CHAPTER III - Burden of Proof and Presumptions

#### V. DEGREE OR MEASURE OF PROOF

##### B. Civil Cases.

##### 3. Beyond Reasonable Doubt.

*1 Witkin Cal. Evid. Burden § 40*

[§ 40] Beyond Reasonable Doubt.

In some civil proceedings involving deprivation of important personal rights, as well as in quasi-criminal and Juvenile Court proceedings, the high standard of proof beyond reasonable doubt has been imposed by judicial decisions. The following are illustrations:

(1) *Juvenile Court proceedings involving adjudication of wardship.* (See *In re Winship* (1970) 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368, 10 Summary (9th), *Parent and Child*, §574; Welf.C. 701 [proof beyond reasonable doubt required to support finding that minor is ward because of violation of law]; 106 Harv. L. Rev. 1093 [*Winship* on Rough Waters: The Erosion of the Reasonable Doubt Standard].)

(2) *Contempt proceedings, considered "quasi-criminal."* (See *Ross v. Superior Court* (1977) 19 C.3d 899, 913, 141 C.R. 133, 569 P.2d 727, *infra*, §89.)

(3) *Narcotics addict commitment proceedings.* (See *People v. Thomas* (1977) 19 C.3d 630, 637, 139 C.R. 594, 566 P.2d 228.)

(4) *Conservatorship under Lanterman-Petris-Short Act for person "gravely disabled."* (See *Conservatorship of Roulet* (1979) 23 C.3d 219, 225, 152 C.R. 425, 590 P.2d 1; *Conservatorship of Walker* (1987) 196 C.A.3d 1082, 1097, 242 C.R. 289 [following *Roulet*].)

(5) *Conservatorship under Lanterman-Petris-Short Act for incompetent defendant charged with violent felony.* (See *Conservatorship of Hofferber* (1980) 28 C.3d 161, 178, 179, 167 C.R. 854, 616 P.2d 836 [dangerous mental condition must be shown by proof beyond reasonable doubt, but incompetency may be established by preponderance of evidence].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Juvenile Court proceedings involving adjudication of wardship.*

*Cross-Reference:* 10 Summary (10th), *Parent and Child*, §878.



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### V. DEGREE OR MEASURE OF PROOF

#### C. Criminal Cases.

##### 1. Prosecution's Burden.

##### a. Beyond Reasonable Doubt.

*1 Witkin Cal. Evid. Burden § 41*

[§ 41] Beyond Reasonable Doubt.

(1) *Guilt*. The defendant's presumption of innocence imposes the burden on the prosecution to prove the issue of guilt beyond a reasonable doubt. (P.C. 1096; *Ev.C.* 520; see 40 *Hastings L. J.* 457 [The Reasonable Doubt Rule and the Meaning of Innocence]; 108 *Harv. L. Rev.* 1955 [arguing against defining reasonable doubt for jury]; 1 *Wharton* 15th, §2:3; 29 *Am.Jur.2d* (1994 ed.), *Evidence* §168; *supra*, §21.)

In a federal habeas corpus proceeding challenging a state conviction, the petitioner is entitled to relief "if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 99 S.Ct. 2781, 2792, 61 L.Ed.2d 560, 576, 577; see 93 *Harv. L. Rev.* 210.)

(2) *Other issues*. The prosecution is also required to prove the following beyond a reasonable doubt:

(a) Special circumstances to justify a death sentence. (See P.C. 190.4(a); 3 *Cal. Crim. Law* (3d), *Punishment*, §438.) However, in the penalty phase of a capital trial, the reasonable doubt standard is not applicable in determining whether death is the appropriate penalty. (*People v. Berryman* (1993) 6 C.4th 1048, 1101, 25 C.R.2d 867, 864 P.2d 40; see 3 *Cal. Crim. Law* (3d), *Punishment*, §466.)

(b) Absence of heat of passion on sudden provocation in a homicide case. (See *Mullaney v. Wilbur* (1975) 421 U.S. 684, 95 S.Ct. 1881, 1892, 44 L.Ed.2d 508, 522.)

(c) Accuracy of an eyewitness identification. (See CALJIC (6th ed.), No. 2.91, *supra*, §32.)

Formerly, the voluntariness of a confession or admission had to be proved beyond a reasonable doubt. (See *People v. Jimenez* (1978) 21 C.3d 595, 605, 608, 147 C.R. 172, 580 P.2d 672.) The effect of Proposition 8 was to drop the applicable level of proof to that required by the federal Constitution--proof by a preponderance of the evidence. (See *People v. Markham* (1989) 49 C.3d 63, 71, 260 C.R. 273, 775 P.2d 1042, 1 *Cal. Evidence* (4th), *Hearsay*, §86.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Guilt*. See 36 U.C. Davis L. Rev. 85 [flexibility of reasonable doubt standard]. *West's Key Number Digest*, Criminal Law k.327



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#### V. DEGREE OR MEASURE OF PROOF

##### C. Criminal Cases.

##### 1. Prosecution's Burden.

##### b. Preponderance of Evidence.

1 Witkin Cal. Evid. Burden § 42

[§ 42] Preponderance of Evidence.

If the issue is not an element of the offense charged, the ordinary requirement of proof by a mere preponderance of the evidence may apply. Examples of such issues are:

(1) *Aggravated circumstances as basis for enhanced punishment.* (See *People v. Nelson* (1978) 85 C.A.3d 99, 101, 103, 149 C.R. 177; 3 Cal. Crim. Law (3d), *Punishment*, §254.)

(2) *Other offenses committed by defendant as circumstantial evidence of intent, motive, general plan, or scheme.* (See *People v. Lisenba* (1939) 14 C.2d 403, 429, 94 P.2d 569.)

(3) *Revocation of probation: proof of supporting facts.* (See *People v. Rodriguez* (1990) 51 C.3d 437, 440, 272 C.R. 613, 795 P.2d 783, 3 Cal. Crim. Law (3d), *Punishment*, §586.)

(4) *Statute of limitations: not run.* (See *People v. Lopez* (1997) 52 C.A.4th 233, 248, 250, 60 C.R.2d 511 [distinguishing between prosecution's burden of proving by preponderance of evidence that limitations period has not run from defendant's burden, on pretrial motion to dismiss, of proving as matter of law that limitations period has run]; citing the text.)

(5) *Statute of limitations: tolled by defendant's absence from state.* (See *People v. McGill* (1935) 10 C.A.2d 155, 159, 51 P.2d 433; 1 Cal. Crim. Law (3d), *Defenses*, §229.)

(6) *Territorial jurisdiction of the offense.* (See *People v. Cavanaugh* (1955) 44 C.2d 252, 262, 282 P.2d 53; 4 Cal. Crim. Law (3d), *Jurisdiction and Venue*, §1 et seq.)

(7) *Venue of the offense.* (See *People v. Megladdery* (1940) 40 C.A.2d 748, 764, 106 P.2d 84; *People v. Arline* (1970) 13 C.A.3d 200, 203, 91 C.R. 520; 4 Cal. Crim. Law (3d), *Jurisdiction and Venue*, §48.)

(8) *Voluntariness of confession or admission.* (See *People v. Jimenez* (1978) 21 C.3d 595, 605, 608, 147 C.R. 172, 580 P.2d 672, 1 Cal. Evidence (4th), *Hearsay*, §86.)

(9) *Voluntariness of consent to warrantless search.* (See *People v. James* (1977) 19 C.3d 99, 106, footnote 4, 137 C.R. 447, 561 P.2d 1135.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1a) *(New) Gang-relatedness of offense, for purposes of registration requirement.* (See *In re Jorge G.* (2004) 117 C.A.4th 931, 942, 12 C.R.3d 193, 2 Cal. Evidence (4th), Witnesses, Supp., §376A; on registration requirement, see 3 Cal. Crim. Law (3d), Punishment, §182.)

(5a) *(New) Statute of limitations: extension for specified sex crimes against child.* (See *People v. Riskin* (2006) 143 C.A.4th 234, 238, 49 C.R.3d 287 [under former P.C. 803(g) (now P.C. 803(f)), prosecution's burden of proof as to extension of statute of limitations beyond normal period for specified sex crimes against child is only by preponderance of evidence, while corroboration requirement, which is part of that proof, must be satisfied by clear and convincing evidence].)



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## CHAPTER III - Burden of Proof and Presumptions

### V. DEGREE OR MEASURE OF PROOF

#### C. Criminal Cases.

#### 1. Prosecution's Burden.

#### c. Other Standards.

1 Witkin Cal. Evid. Burden § 43

[§ 43] Other Standards.

(1) *Corpus Delicti: Slight Proof.* In the prosecution's preliminary proof of the corpus delicti as a basis for introducing the defendant's confession or admission, not even a preponderance is required; a "slight" or "prima facie" showing is sufficient. (See *People v. Cullen* (1951) 37 C.2d 614, 624, 234 P.2d 1; *People v. Amaya* (1952) 40 C.2d 70, 76, 251 P.2d 324; *In re Linda D.* (1970) 3 C.A.3d 567, 572, 83 C.R. 544 [corpus delicti proven by circumstantial evidence and any reasonable inference that may be drawn from it]; *People v. Martinez* (1994) 26 C.A.4th 1098, 1104, 31 C.R.2d 869; 1 Cal. Crim. Law (3d), *Elements*, §50.)

(2) *Proximate Cause: Reasonable Inference.* "The State has the burden of proving proximate cause as it has the burden of proving every material element of a crime. ... This burden is met if the State produces evidence from which it may be reasonably inferred that appellant's act was a substantial factor in producing the accident." (*People v. Scola* (1976) 56 C.A.3d 723, 726, 128 C.R. 477; see 1 Cal. Crim. Law (3d), *Elements*, §35.)

(3) *Preliminary Examination: Slight Evidence.* At a preliminary examination, only a reasonable probability of guilt need be shown, and "slight evidence" is sufficient. (See *People v. Dickinson* (1976) 59 C.A.3d 314, 320, 130 C.R. 561; 1 Cal. Evidence (4th), *Introduction*, §21.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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CHAPTER III - Burden of Proof and Presumptions

V. DEGREE OR MEASURE OF PROOF

C. Criminal Cases.

2. Defendant's Burden.

a. In General.

*1 Witkin Cal. Evid. Burden § 44*

[§ 44] In General.

In *People v. Tewksbury* (1976) 15 C.3d 953, 127 C.R. 135, 544 P.2d 1335, the court made the following distinctions:

(a) When an accused has the burden of interjecting a factual contention which, if established, would tend to overcome or negate proof of an element of the charged crime, as otherwise established by the prosecution, the accused need only *raise a reasonable doubt* as to the existence or nonexistence of the disputed fact. (15 C.3d 963.)

(b) Other considerations apply to other defenses, e.g., those which raise factual issues collateral to that of guilt and do not bear directly on any link in the chain of proving an element of the crime, or those which challenge the reliability of particular incriminating evidence. "Proof of such collateral factual issue, as in the case of the proof of the factual issue on which the public policy defense rests, is not one which must be established in the direct chain of proof of the accused's guilt. There is thus no constitutional compulsion that such collateral fact be proved beyond a reasonable doubt, nor does the presumption of the accused's innocence aid in the resolution of such fact." (15 C.3d 965.)

(c) Where an accused must establish factual matters that are preliminary to an attack on the reliability of incriminating evidence, the accused does not satisfy the burden of proof merely by raising a reasonable doubt that the preliminary fact does or does not exist, e.g., in challenging hearsay evidence, in attacking the credibility of a witness because of a prior felony conviction, or in establishing that a witness is an accomplice. (15 C.3d 965.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Criminal Law k.330





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CHAPTER III - Burden of Proof and Presumptions

V. DEGREE OR MEASURE OF PROOF

C. Criminal Cases.

2. Defendant's Burden.

b. Insanity.

1 *Witkin Cal. Evid. Burden* § 45

[§ 45] Insanity.

The defendant has the burden of proving insanity by a preponderance of the evidence. (See *People v. Daugherty* (1953) 40 C.2d 876, 901, 256 P.2d 911; *In re Franklin* (1972) 7 C.3d 126, 141, 101 C.R. 553, 496 P.2d 465; *People v. Drew* (1978) 22 C.3d 333, 348, 149 C.R. 275, 583 P.2d 1318 [requirement of proof by preponderance of evidence satisfies both federal and state due process]; *People v. Eckstrom* (1977) 71 C.A.3d 259, 261, 139 C.R. 341; *Patterson v. New York* (1977) 432 U.S. 197, 97 S.Ct. 2319, 2333, 53 L.Ed.2d 281, 300 [proof of "extreme emotional disturbance"]; 91 Harv. L. Rev. 94 [Patterson]; 1978 A.S. 30 [same]; 25 U.C.L.A. L. Rev. 670; Law Rev. Com. Comment to Ev.C. 501; 1 Cal. Crim. Law (3d), *Defenses*, §15; *supra*, §27; on burden of proving incompetence to stand trial, see *supra*, §30.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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### CHAPTER III - Burden of Proof and Presumptions

#### V. DEGREE OR MEASURE OF PROOF

##### C. Criminal Cases.

##### 2. Defendant's Burden.

##### c. Other Issues Relating to Guilt.

##### 1 Witkin Cal. Evid. Burden § 46

#### [§ 46] Other Issues Relating to Guilt.

Except for the insanity defense, the burden of proof of guilt beyond a reasonable doubt is placed on the prosecution by P.C. 1096 (supra, §21). Hence, even as to an issue on which the defendant has the burden of proof (see supra, §29), the defendant is only required to raise a reasonable doubt as to his or her guilt. (Law Rev. Com. Comment to *Ev.C. 500*, *Ev.C. 501*.) The following are illustrative:

(1) *Unconsciousness*. In *People v. Babbitt* (1988) 45 C.3d 660, 248 C.R. 69, 755 P.2d 253, defendant was convicted of first degree murder and other felonies, found sane, and sentenced to death. On appeal he asserted error in the instruction on the "presumption of consciousness" (CALJIC, No. 4.31). *Held*, judgment affirmed.

(a) "[B]ecause consciousness is not an element of the offense of murder (nor of any offense), CALJIC No. 4.31 does not impermissibly shift to the defendant the burden of negating an element, nor does the instruction violate due process by impermissibly lightening the prosecution's burden of proving every element beyond a reasonable doubt. Consequently, there is no constitutional impediment to the state's use of a rebuttable presumption in meeting its assumed burden--once the issue has been raised--to prove consciousness beyond a reasonable doubt." (45 C.3d 693.)

(b) In *Patterson v. New York* (1977) 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281, "because the emotional-distress defense raised factual issues collateral to the question of guilt and did not serve to negative any element of the crime charged, the state could constitutionally require the defendant to carry the burden of persuasion by a preponderance of the evidence. ... In the instant case, by contrast, defendant's burden was only to raise a reasonable doubt that he was conscious, and then only if the prosecution's proof did not itself raise such a doubt. ... Hence, it is immaterial for present purposes that the unconsciousness defense served to negative an element of the crime." (45 C.3d 694.)

(c) Considered together, the instructions clearly indicated that the prosecution had the burden of proving beyond a reasonable doubt "not only that defendant appeared to be conscious, but also that he in fact was conscious." (45 C.3d 696.) (See also *People v. Kitt* (1978) 83 C.A.3d 834, 842, 148 C.R. 447 [approving giving of previous version of CALJIC, No. 4.31 in murder trial, but suggesting rewording]; 1 Cal. Crim. Law (3d), *Defenses*, §33.)

(2) *Duress*. (See *People v. Graham* (1976) 57 C.A.3d 238, 240, 129 C.R. 31 [trial judge erred in instructing that defendant must prove duress by preponderance of evidence]; 1 Cal. Crim. Law (3d), *Defenses*, §53 et seq.)

(3) *Belief that victim of kidnapping and rape consented to accompany defendant and engage in sexual intercourse*.

(See *People v. Mayberry* (1975) 15 C.3d 143, 157, 125 C.R. 745, 542 P.2d 1337, citing the text [defendant was "only required to raise a reasonable doubt as to whether he had such a belief"]; *People v. Williams* (1992) 4 C.4th 354, 362, 14 C.R.2d 441, 841 P.2d 961 [giving of *Mayberry* instruction required where there is substantial evidence of equivocal conduct by victim that would have led a defendant to believe, reasonably and in good faith, that consent existed when it did not]; 1 Cal. Crim. Law (3d), *Defenses*, §§43, 44.)

(4) *Challenge of prior conviction on ground of infringement of right to counsel.* (See *People v. Coffey* (1967) 67 C.2d 204, 217, 60 C.R. 457, 430 P.2d 15, 3 Cal. Evidence (4th), *Presentation at Trial*, §300; 3 Cal. Crim. Law (3d), *Punishment*, §377.)

(5) *Exemption defense under state securities laws.* (See *People v. Figueroa* (1986) 41 C.3d 714, 722, 224 C.R. 719, 715 P.2d 680 [burden of proof on defendant accused of selling unregistered security "is merely to raise reasonable doubt that the offering did not require registration"].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2a) *(New) Belief in need to take child from legal custodian.* (See *People v. Neidinger* (2006) 40 C.4th 67, 79, 51 C.R.3d 45, 146 P.3d 502 [in prosecution for taking child from lawful custodian (P.C. 278.5(a)), in which defendant father raised defense under P.C. 278.7(a) that he was person with right to custody who had reasonable belief in need to take child, trial judge erred in requiring defendant to prove defense by preponderance of evidence; his burden was simply reasonable doubt].)



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### CHAPTER III - Burden of Proof and Presumptions

#### V. DEGREE OR MEASURE OF PROOF

- C. Criminal Cases.
- 2. Defendant's Burden.
- d. Miscellaneous Issues.

1 Witkin Cal. Evid. Burden § 47

[§ 47] Miscellaneous Issues.

(1) *Preponderance Standard*. On some issues, the defendant is required to meet the preponderance of evidence standard:

(a) *Constitutional invalidity of prior murder conviction underlying prior murder special circumstance*. (See *Curl v. Superior Court* (1990) 51 C.3d 1292, 1305, 276 C.R. 49, 801 P.2d 292.)

(b) *Defendant under 18 when offense committed*. (See *People v. Nguyen* (1990) 222 C.A.3d 1612, 1620, 272 C.R. 523 [party seeking certification to Juvenile Court under Welf.C. 604 must prove by preponderance of evidence that he was under 18 when offense was committed]; 10 Summary (9th), *Parent and Child*, §830.)

(c) *Discriminatory enforcement of the law, as a defense*. (See *People v. Gray* (1967) 254 C.A.2d 256, 265, 63 C.R. 211, 1 Cal. Crim. Law (3d), *Defenses*, §236 [instruction that there must be "clear and convincing proof" held improper]; *People v. Smith* (1984) 155 C.A.3d 1103, 1129, 203 C.R. 196 [following *Gray*].)

In *People v. Smith*, *supra*, the trial judge seemingly imposed the higher standard, and the appellate court had to determine whether this was federal constitutional error governed by *Chapman v. California* (1967) 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705, 6 Cal. Crim. Law (3d), *Reversible Error*, §10, or ordinary error measured by the probability test of *People v. Watson* (1956) 46 C.2d 818, 299 P.2d 243, 6 Cal. Crim. Law (3d), *Reversible Error*, §7. The conclusion reached was that, while nonrecognition of the defense of discriminatory prosecution would be federal constitutional error, measuring it by the wrong standard of proof would be governed by the *Watson* test. (155 C.A.3d 1131, 1132.)

(d) *Disposal defense in narcotics possession case*. (See *People v. Spry* (1997) 58 C.A.4th 1345, 1369, 68 C.R.2d 691.)

(e) *Entrapment defense*. The entrapment doctrine is one of policy; the defense does not relate to the issue of guilt. Hence, the defendant has the burden of proof by a preponderance of evidence. (*People v. Moran* (1970) 1 C.3d 755, 760, 83 C.R. 411, 463 P.2d 763; *People v. Valverde* (1966) 246 C.A.2d 318, 324, 325, 54 C.R. 528; *People v. Perez* (1972) 27 C.A.3d 352, 354, 103 C.R. 669; see 1 Cal. Crim. Law (3d), *Defenses*, §90 et seq.)

(f) *Restoration to sanity after commitment under P.C. 1026.2*. (See *In re Franklin* (1972) 7 C.3d 126, 148, 101 C.R. 553, 496 P.2d 465; *In re Moye* (1978) 22 C.3d 457, 462, 149 C.R. 491, 584 P.2d 1097; 5 Cal. Crim. Law (3d), *Criminal*

*Trial*, §679 et seq.)

(g) *Witness is an accomplice.* The degree of proof is the same as in other instances in which the defendant has the burden of establishing a collateral fact that conditions a challenge to the reliability of incriminating evidence. "As in other such instances he cannot satisfy that burden by merely raising a reasonable doubt that the collateral fact does or does not exist. If he is to prevail he must do so by proof by a preponderance of the evidence, the next lighter burden imposed on a party who has the burden of proof." (*People v. Tewksbury* (1976) 15 C.3d 953, 968, 127 C.R. 135, 544 P.2d 1335, supra, §44; *People v. Fauber* (1992) 2 C.4th 792, 834, 9 C.R.2d 24, 831 P.2d 249 [issue properly submitted to jury where defendant failed to establish that witness was accomplice as matter of law; following *Tewksbury*]; *People v. Frye* (1998) 18 C.4th 894, 967, 968, 77 C.R.2d 25, 959 P.2d 183 [*Tewksbury* standard does not violate due process principles].)

(2) *Clear and Convincing Standard.* In a few situations, the defendant must meet the higher "clear and convincing" standard:

(a) *Extradition warrant being resisted by petition for habeas corpus.* (See *In re Rock* (1958) 161 C.A.2d 723, 725, 326 P.2d 865.)

(b) *Motion to set aside a plea of guilty.* (See *People v. Brotherton* (1966) 239 C.A.2d 195, 200, 48 C.R. 513; *People v. Nance* (1991) 1 C.A.4th 1453, 1457, 2 C.R.2d 670.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(b) *Defendant under 18 when offense committed.*

*Cross-Reference:* 10 *Summary* (10th), *Parent and Child*, §§740, 741.



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CHAPTER III - Burden of Proof and Presumptions

VI. NATURE AND EFFECT OF REBUTTABLE PRESUMPTIONS

A. Former Law.

1. Presumptions and Inferences.

*1 Witkin Cal. Evid. Burden § 48*

[§ 48] Presumptions and Inferences.

Former statutes defined a presumption as a deduction that the law expressly directs to be made from particular facts, and an inference as a deduction that the jury may make from the facts. Because "the law" then meant "statutes," an unfortunate distinction arose between statutory presumptions and nonstatutory presumptions; the latter had to be classified as "inferences." This led to confusing and sometimes conflicting decisions as to their evidentiary effects, and also to reversals for error in using the term "presumption" in instructing the jury on an "inference." (See *infra*, §§49, 50.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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### CHAPTER III - Burden of Proof and Presumptions

#### VI. NATURE AND EFFECT OF REBUTTABLE PRESUMPTIONS

##### A. Former Law.

##### 2. Presumptions and Inferences as Evidence.

##### 1 *Witkin Cal. Evid. Burden* § 49

[§ 49] Presumptions and Inferences as Evidence.

(1) *Presumptions as Evidence.* Former statutes classified presumptions as a form of "indirect evidence," and stated that, unless a presumption was controverted, the jury had to find according to the presumption. Under these statutes, the rule became established that presumptions constituted independent evidence, to be somehow weighed against other evidence, and that a verdict or finding could rest upon a presumption even though all of the other evidence was opposed to it. The leading case declaring this rule was *Smellie v. Southern Pac. Co.* (1931) 212 C. 540, 549, 299 P. 529, a wrongful death action, in which uncontradicted testimony showed decedent's contributory negligence. The court held that a directed verdict was error, for the presumption of due care was evidence that created a conflict with the testimony and called for submission of the case to the jury.

The *Smellie* rule was consistently followed in cases involving the presumption of due care. (See *Lahey v. Southern Pac. Co.* (1936) 16 C.A.2d 652, 662, 61 P.2d 461; *Westberg v. Willde* (1939) 14 C.2d 360, 366, 94 P.2d 590; *Scott v. Burke* (1952) 39 C.2d 388, 394, 247 P.2d 313; *Orbach v. Zern* (1955) 138 C.A.2d 178, 181, 291 P.2d 120.)

It was also applied to other presumptions. (See *Hamilton v. Abadjian* (1947) 30 C.2d 49, 53, 179 P.2d 804 [presumptions of consideration and legality]; *Bradner v. Vasquez* (1954) 43 C.2d 147, 153, 272 P.2d 11 [former C.C. 2235, now *Prob.C. 16004*: presumption of undue influence in transaction between fiduciary and beneficiary]; *Halloran v. Isaacson* (1949) 95 C.A.2d 357, 213 P.2d 19 [former C.C. 164: property transferred to married woman presumed her separate property; held not overcome by uncontradicted testimony of interested witnesses]; *Savarese v. State Farm Mut. Auto. Ins. Co.* (1957) 150 C.A.2d 518, 520, 310 P.2d 142 [ordinary course of business and receipt of letter]; *Abrams v. Stone* (1957) 154 C.A.2d 33, 39, 315 P.2d 453 [former presumptions of innocence of crime or violation of law].)

(2) *Inferences as Evidence.* Later cases applied the *Smellie* rule to the nonstatutory presumptions or "inferences." (See *Bushnell v. Tashiro* (1931) 115 C.A. 563, 565, 2 P.2d 550 [inference of scope of employment from ownership of car and agency]; *Estate of Pitcairn* (1936) 6 C.2d 730, 732, 59 P.2d 90 [presumption of due execution of will]; *Freeman v. Superior Court* (1955) 44 C.2d 533, 538, 282 P.2d 857 ["presumption" that agent communicated facts to principal; held sufficient to sustain contempt adjudication]; *Hennelly v. Bank of America* (1951) 102 C.A.2d 754, 758, 228 P.2d 79 [inference of delivery of deed from its possession by grantee]; on *res ipsa loquitur*, see *infra*, §114 et seq.)

(3) *Criticism of Smellie Rule.* The California view of the evidentiary effect of presumptions was opposed in strong dissenting opinions (see *Speck v. Sarver* (1942) 20 C.2d 585, 590, 128 P.2d 16; *Scott v. Burke* (1952) 39 C.2d 388, 402, 247 P.2d 313), and found scant favor with commentators. (See 18 *Cal. L. Rev.* 418; 20 *Cal. L. Rev.* 189; 26 *Cal. L. Rev.* 519; 31 *Cal. L. Rev.* 105, 108, 316; 41 *Cal. L. Rev.* 751; 4 *Hastings L. J.* 125, 134; 16 *So. Cal. L. Rev.* 245; 2 *Stanf. L.*

*Rev.* 558; 12 *Stanf. L. Rev.* 5; 13 *Stanf. L. Rev.* 789; 2 *U.C.L.A. L. Rev.* 21; for judicial views both pro and contra, see 5 A.L.R.3d 19.) The Comment to *Ev.C.* 600 summarizes the objections to the *Smellie* line of cases as follows:

(a) "These decisions require the jury to perform an intellectually impossible task. The jury is required to weigh the testimony of witnesses and other evidence as to the circumstances of a particular event against the fact that the law requires an opposing conclusion in the absence of contrary evidence and to determine which 'evidence' is of greater probative force."

(b) "Moreover, the doctrine that a presumption is evidence imposes upon the party with the burden of proof a much higher burden of proof than is warranted. For example, if a party with the burden of proof has a presumption invoked against him and if the presumption remains in the case as evidence even though the jury believes that he has produced a preponderance of the evidence, the effect is that he must produce some additional but unascertainable quantum of proof in order to dispel the effect of the presumption. ... The doctrine that a presumption is evidence gives no guidance to the jury or to the parties as to the amount of this additional proof. The most that should be expected of a party in a civil case is that he prove his case by a preponderance of the evidence (unless some specific presumption or rule of law requires proof of a particular issue by clear and convincing evidence). The most that should be expected of the prosecution in a criminal case is that it establish the defendant's guilt beyond a reasonable doubt. To require some additional quantum of proof, unspecified and uncertain in amount, to dispel a presumption which persists as evidence in the case unfairly weights the scales of justice against the party with the burden of proof." (Law Rev. Com. Comment to *Ev.C.* 600.)

**SUPPLEMENT:** [This section is current through the latest supplement]





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### CHAPTER III - Burden of Proof and Presumptions

#### VI. NATURE AND EFFECT OF REBUTTABLE PRESUMPTIONS

##### A. Former Law.

##### 3. Presumption or Inference Dispelled.

##### 1 Witkin Cal. Evid. Burden § 50

[§ 50] Presumption or Inference Dispelled.

Although the rule of *Smellie v. Southern Pac. Co.* (1931) 212 C. 540, 549, 299 P. 529, supra, §49, did not succumb to its critics until the adoption of the Evidence Code (infra, §52), two qualifications developed in the case law to keep it within reasonable bounds:

(1) *Presumption: Contrary Testimony of Party or Party's Witness.* A presumption could be dispelled by the uncontradicted testimony of the party or the party's witnesses to a fact wholly irreconcilable with the presumption. This qualification, declared in *Mar Shee v. Maryland Assur. Corp.* (1922) 190 C. 1, 9, 210 P. 269, and recognized in the *Smellie* case, was mainly invoked against the presumption of due care, but was applicable to any presumption. (See *Levin v. Brown* (1947) 81 C.A.2d 913, 916, 185 P.2d 329 [plaintiff testified that, on clear day, he walked across track of defendant's electric railway, with only one glance in direction from which train struck him]; *Ringo v. Johnson* (1950) 99 C.A.2d 124, 130, 221 P.2d 267 [plaintiff's own testimony]; *Steward v. Paige* (1949) 90 C.A.2d 820, 824, 203 P.2d 858 [defendant, relying on presumption of wife's separate property under former C.C. 164, himself introduced evidence showing that it was community property]; *Elkinton v. California State Auto. Assn.* (1959) 173 C.A.2d 338, 346, 343 P.2d 396.)

(2) *Inference: Contrary Evidence That Is Clear, Positive, and Uncontradicted.* Later cases established a second qualification applicable to inferences (nonstatutory presumptions): Where the contrary evidence is "clear, positive, uncontradicted, and of such a nature that it can not rationally be disbelieved," the inference is dispelled as a matter of law. (*Blank v. Coffin* (1942) 20 C.2d 457, 461, 126 P.2d 868; see *Hicks v. Reis* (1943) 21 C.2d 654, 660, 134 P.2d 788 [dictum]; *Leonard v. Watsonville Community Hosp.* (1956) 47 C.2d 509, 515, 518, 305 P.2d 36 [res ipsa loquitur; testimony elicited from adverse witness]; *Teich v. General Mills* (1959) 170 C.A.2d 791, 799, 339 P.2d 627 [following *Leonard*]; *Estate of Gavin* (1952) 114 C.A.2d 354, 362, 250 P.2d 333 [delivery of deed]; *Redfoot v. J. T. Jenkins Co.* (1955) 138 C.A.2d 108, 120, 291 P.2d 134 [negligence of bailee].)

It was consistently held, however, that the qualification for testimony by the party or party's witness was the only one applicable to statutory presumptions; these could not be dispelled even by strong uncontradicted evidence of the opposing party. (See discussion, *Leonard v. Watsonville Community Hosp.*, supra, 47 C.2d 517; *Estate of Nidever* (1960) 181 C.A.2d 367, 380, 5 C.R. 343; *Sadberry v. Griffiths* (1961) 191 C.A.2d 610, 614, 12 C.R. 773.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Inference: Contrary Evidence That Is Clear, Positive, and Uncontradicted.* See *Ajaxo v. E\*Trade Group* (2005) 135 C.A.4th 21, 52, 37 C.R.3d 221, citing the text [*Hicks v. Reis* (1943) 21 C.2d 654, 134 P.2d 788, text, p. 200, and *Teich v.*

*General Mills (1959) 170 C.A.2d 791, 339 P.2d 627*, text, p. 200, applied to inferences or presumptions that must be overcome; neither case stands for proposition that circumstantial evidence fails when there is contradictory direct evidence].*Correction:* Page 200, line 14, "Gavin" should be "Galvin".



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### CHAPTER III - Burden of Proof and Presumptions

#### VI. NATURE AND EFFECT OF REBUTTABLE PRESUMPTIONS

##### B. Model Code, Uniform Rules, and Federal Rules.

###### *1 Witkin Cal. Evid. Burden § 51*

[§ 51] Model Code, Uniform Rules, and Federal Rules.

(1) *Thayer Doctrine and Model Code.* Thayer's view that a presumption is not evidence was supported by Wigmore, the federal courts, and many state jurisdictions, and was adopted by the Model Code of Evidence. (See Model C., Rule 704; 9 Wigmore (Chadbourn Rev.) §2490 et seq.; 2 McCormick 5th, §344; 2 *U.C.L.A. L. Rev.* 21; Law Rev. Com. Comment to *Ev.C.* 601; 1945 A.S. 1206.) The strictest aspect of this view, expressed in the Model Code, is that a presumption is dispelled when the adverse party produces any evidence contrary thereto, regardless of whether it is credible or substantial. (See 9 Wigmore (Chadbourn Rev.) §2491; 59 *Harv. L. Rev.* 496; 53 *Cal. L. Rev.* 1441; 2 *U.C.L.A. L. Rev.* 22; on alternatives to the Thayer theory, see 9 Wigmore (Chadbourn Rev.) §2493a et seq.; on the general law, see 29 *Am.Jur.2d* (1994 ed.), *Evidence* §181 et seq.)

(2) *Uniform Rules.* The more moderate approach of Morgan was embodied in the original Uniform Rules of Evidence, which gave special force to a presumption based on facts having probative value, and called for credible evidence to dispel any presumption. (See 9 Wigmore (Chadbourn Rev.) §2493f; 2 McCormick 5th, §344; 53 *Cal. L. Rev.* 1442; 2 *U.C.L.A. L. Rev.* 22; Law Rev. Com. Comment to *Ev.C.* 601; 1953 A.S. 788.)

(3) *Federal Rules.* The Federal Rules of Evidence deal with presumptions as follows:

(a) "In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast." (*F.R. Evid.*, Rule 301; see 1 Mueller & Kirkpatrick, *Federal Evidence* 2d, §61 et seq.; 9 Wigmore (Chadbourn Rev.) §2493h; 9 *U.C. Davis L. Rev.* 647, 655; 31 *U.C.L.A. L. Rev.* 1101.)

(b) "In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law." (*F.R. Evid.*, Rule 302; see 1 Mueller & Kirkpatrick, *Federal Evidence* 2d, §74 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Thayer Doctrine and Model Code.* See 2 McCormick 6th, §344.

(2) *Uniform Rules.* See 2 McCormick 6th, §344. (3) *Federal Rules.* See 38 *U.S.F. L. Rev.* 139 [comparing approaches of Evidence Code and Federal Rules of Evidence to presumptions].



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### CHAPTER III - Burden of Proof and Presumptions

#### VI. NATURE AND EFFECT OF REBUTTABLE PRESUMPTIONS

##### C. Evidence Code.

##### 1. Presumption Is Not Evidence.

*1 Witkin Cal. Evid. Burden § 52*

[§ 52] Presumption Is Not Evidence.

(1) *Definition.* "A presumption is an assumption of fact that *the law requires to be made* from another fact or group of facts found or otherwise established in the action." (*Ev.C. 600(a)*; see 2 McCormick 5th, §342; 9 Wigmore (Chadbourn Rev.) §2490.)

(2) *Repudiation of Smellie Rule.* "Evidence," as defined in *Ev.C. 140* (1 *Cal. Evidence* (4th), *Introduction*, §18), is limited to matters "offered" as proof, and thus does not include presumptions as defined in *Ev.C. 600(a)*. But to avoid any uncertainty as to its intent, the Commission added an express repudiation of the *Smellie* rule: "A presumption is not evidence." (*Ev.C. 600(a)*; see Law Rev. Com. Comment to *Ev.C. 600*.)

The conventional definition of "inference" is stated in *Ev.C. 600(b)*: It is "a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action." So defined, an inference--consisting of reasoning from evidence--cannot be classified as a form of evidence, and the peculiar application of the *Smellie* rule to "inferences" (*supra*, §49) is also obsolete. (See *Lane & Pyron v. Gibbs* (1968) 266 *C.A.2d* 61, 66, 71 *C.R. 817*, citing the text; *People v. Bland* (1995) 10 *C.4th* 991, 1003, footnote 5, 43 *C.R.2d* 77, 898 *P.2d* 391 [distinguishing between inference and rebuttable presumption]; 2 *Lincoln L. Rev.* 101; 9 *U.C. Davis L. Rev.* 647 [rebuttable criminal and civil presumptions].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Definition.* See 2 McCormick 6th, §342. *West's Key Number Digest*, Evidence k.53



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### CHAPTER III - Burden of Proof and Presumptions

#### VI. NATURE AND EFFECT OF REBUTTABLE PRESUMPTIONS

##### C. Evidence Code.

##### 2. Classification in Civil Cases.

##### a. In General.

##### *1 Witkin Cal. Evid. Burden § 53*

[§ 53] In General.

Eliminating the *Smellie* aberration that a presumption is evidence (supra, §52) merely cleared the slate; the question remained, what effect does a presumption have? Does it merely affect the burden of producing evidence, and disappear if the adverse party produces any contrary evidence (the Thayer-Wigmore-Model Code view), or does it shift the burden of proof to the adverse party (the Morgan-McCormick view)? (See supra, §51.) The Commission, accepting elements of both doctrines, adopted the theory that presumptions are of two distinct kinds, and the two kinds have different effects: "Every rebuttable presumption is either (a) a presumption affecting the burden of producing evidence or (b) a presumption affecting the burden of proof." (*Ev.C. 601.*)

The Comment states: "Underlying the presumptions provisions of the Evidence Code is the conclusion that the Thayer view is correct as to some presumptions, but that the Morgan view is right as to others. The fact is that presumptions are created for a variety of reasons, and no single theory or rationale of presumptions can deal adequately with all of them. Hence, the Evidence Code classifies all rebuttable presumptions as either (1) presumptions affecting the burden of producing evidence (essentially Thayer presumptions), or (2) presumptions affecting the burden of proof (essentially Morgan presumptions)." (Law Rev. Com. Comment to *Ev.C. 601*; for a comprehensive analysis and critical appraisal of this approach, see 53 *Cal. L. Rev.* 1439.)

The effect of the distinction, and the criteria for classification, are set forth in *Ev.C. 603* et seq. (infra, §54 et seq.), and a number of important presumptions established by prior California statutes are restated and assigned to the two categories (see infra, §§67 et seq., 86 et seq.). But no attempt was made to classify all existing statutory or judicially created presumptions. Hence, in the absence of further legislative action, it will be the task of the courts in particular cases to apply the criteria and thereby add unclassified presumptions to the classified list. (See Law Rev. Com. Comments on *Ev.C. 601, 602, 603, 630, 660*; *Gillette v. Work. Comp. App. Bd.* (1971) 20 *C.A.3d* 312, 319, 97 *C.R.* 542, 893 [quoting the text]; 9 Wigmore (Chadbourn Rev.) §2493i; 2 McCormick 5th, §344; 2 Jefferson, California Evidence Benchbook 3d, Chap. 46; BAJI (8th ed.), Appendix C, p. 491; 53 *Cal. L. Rev.* 1449; 2 *Lincoln L. Rev.* 107.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 2 McCormick 6th, §344.



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### CHAPTER III - Burden of Proof and Presumptions

#### VI. NATURE AND EFFECT OF REBUTTABLE PRESUMPTIONS

##### C. Evidence Code.

##### 2. Classification in Civil Cases.

##### b. Presumptions Affecting Burden of Producing Evidence.

##### 1. Nature.

##### *1 Witkin Cal. Evid. Burden § 54*

[§ 54] Nature.

"A presumption affecting the burden of producing evidence is a presumption established to implement no public policy other than to facilitate the determination of the particular action in which the presumption is applied." (*Ev.C. 603*; see *53 Cal. L. Rev. 1445*.) A number of presumptions falling within this class are listed in *Ev.C. 630* et seq. (See *infra*, §67 et seq.)

Presumptions are "expressions of experience," designed to dispense with unnecessary proof. "Typically, such presumptions are based on an underlying logical inference. In some cases, the presumed fact is so likely to be true and so little likely to be disputed that the law requires it to be assumed in the absence of contrary evidence. In other cases, evidence of the nonexistence of the presumed fact, if there is any, is so much more readily available to the party against whom the presumption operates that he is not permitted to argue that the presumed fact does not exist unless he is willing to produce such evidence. In still other cases, there may be no direct evidence of the existence or nonexistence of the presumed fact; but, because the case must be decided, the law requires a determination that the presumed fact exists in light of common experience indicating that it usually exists in such cases." (Law Rev. Com. Comment to *Ev.C. 603*.) (See also *Gillette v. Work. Comp. App. Bd. (1971) 20 C.A.3d 312, 319, 97 C.R. 542* [quoting the text]; *BAJI* (8th ed.), Appendix C, p. 491.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See Simons, *Cal. Evidence Manual*, §10:11 et seq.



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#### VI. NATURE AND EFFECT OF REBUTTABLE PRESUMPTIONS

##### C. Evidence Code.

##### 2. Classification in Civil Cases.

##### b. Presumptions Affecting Burden of Producing Evidence.

##### 2. Effect.

##### 1 Witkin Cal. Evid. Burden § 55

[§ 55] Effect.

"The effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until *evidence* is introduced which would *support a finding of its nonexistence*, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption. Nothing in this section shall be construed to prevent the drawing of any inference that may be appropriate." (*Ev.C. 604.*)

The Comment explains:

"Such a presumption is merely a preliminary assumption in the absence of contrary evidence, *i.e.*, evidence sufficient to sustain a finding of the nonexistence of the presumed fact. If contrary evidence is introduced, the trier of fact must weigh the inferences arising from the facts that gave rise to the presumption against the contrary evidence and resolve the conflict. For example, if a party proves that a letter was mailed, the trier of fact is required to find that the letter was received in the absence of any believable contrary evidence. However, if the adverse party denies receipt, the presumption is gone from the case. The trier of fact must then weigh the denial of receipt against the inference of receipt arising from proof of mailing and decide whether or not the letter was received.

"If a presumption affecting the burden of producing evidence is relied on, the judge must determine whether there is evidence sufficient to sustain a finding of the nonexistence of the presumed fact. If there is such evidence, the presumption disappears and the judge need say nothing about it in his instructions. If there is not evidence sufficient to sustain a finding of the nonexistence of the presumed fact, the judge should instruct the jury concerning the presumption. If the basic fact from which the presumption arises is established (by the pleadings, by stipulation, by judicial notice, etc.) so that the existence of the basic fact is not a question of fact for the jury, the jury should be instructed that the presumed fact is also established. If the basic fact is a question of fact for the jury, the judge should charge the jury that, if it finds the basic fact, the jury must also find the presumed fact." (*Slater v. Kehoe (1974) 38 C.A.3d 819, 832, 113 C.R. 790, infra, §118* [res ipsa loquitur is presumption that disappears once evidence to support contrary finding is introduced]; *Security Pac. Nat. Bank v. Associated Motor Sales (1980) 106 C.A.3d 171, 179, 180, 165 C.R. 38* [unless contradicting evidence is offered, there is no triable issue of fact, and summary judgment may be granted]; *Bonzer v. Huntington Park (1993) 20 C.A.4th 1474, 1479, 1481, 25 C.R.2d 278* [presumption that letter correctly addressed and properly mailed was received (*Ev.C. 641, infra, §78*) disappeared once defendant presented uncontradicted evidence of nonreceipt; Law Rev. Com. Comment to *Ev.C. 604*; see *BAJI (8th ed.)*, Appendix C, p.

491].)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Evidence k.85 et seq.





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#### VI. NATURE AND EFFECT OF REBUTTABLE PRESUMPTIONS

##### C. Evidence Code.

##### 2. Classification in Civil Cases.

##### c. Presumptions Affecting Burden of Proof.

##### 1. Nature.

##### 1 Witkin Cal. Evid. Burden § 56

[§ 56] Nature.

"A presumption affecting the burden of proof is a presumption established to *implement some public policy* other than to facilitate the determination of the particular action in which the presumption is applied, such as the policy in favor of the establishment of a parent and child relationship, the validity of marriage, the stability of titles to property, or the security of those who entrust themselves or their property to the administration of others." (*Ev.C. 605*; see *Gillette v. Work. Comp. App. Bd.* (1971) 20 C.A.3d 312, 319, 97 C.R. 542, 893, quoting the text; *Cline v. Lund* (1973) 31 C.A.3d 755, 761, 107 C.R. 629, citing the text; *Fisher v. Berkeley* (1984) 37 C.3d 644, 695, 209 C.R. 682, 693 P.2d 261, 1 Cal. Evidence (4th), Introduction, §15; *Hewitt v. Meaney* (1986) 181 C.A.3d 361, 366, 367, 226 C.R. 349 [presumption that common grantor intended to reserve easement through one parcel where necessary for access to road from adjacent parcel (see 4 Summary (9th), Real Property, §§459, 460) serves public policy promoting land use]; *William Dal Porto & Sons v. Agricultural Lab. Rel. Bd.* (1987) 191 C.A.3d 1195, 1210, 237 C.R. 206 [presumption that agricultural employer would have reached collective agreement had it bargained in good faith promotes public policy discouraging employers from unlawfully refusing to bargain]; 53 Cal. L. Rev. 1447; BAJI (8th ed.), Appendix C, p. 492.) A number of presumptions in this class (augmenting those recited in the definition) are listed in *Ev.C. 660 et seq.* (See *infra*, §86 et seq.)

The Comment on *Ev.C. 605* clarifies the distinction and explains the criteria as follows:

"Frequently, presumptions affecting the burden of proof are designed to facilitate determination of the action in which they are applied. Superficially, therefore, such presumptions may appear merely to be presumptions affecting the burden of producing evidence. What makes a presumption one affecting the burden of proof is the fact that there is always some further reason of policy for the establishment of the presumption. It is the existence of this further basis in policy that distinguishes a presumption affecting the burden of proof from a presumption affecting the burden of producing evidence. For example, the presumption of death from seven years' absence (Section 667) exists in part to facilitate the disposition of actions by supplying a rule of thumb to govern certain cases in which there is likely to be no direct evidence of the presumed fact. But the policy in favor of distributing estates, of settling titles, and of permitting life to proceed normally at some time prior to the expiration of the absentee's normal life expectancy (perhaps 30 or 40 years) that underlies the presumption indicates that it should be a presumption affecting the burden of proof."

"Frequently, too, a presumption affecting the burden of proof will have an underlying basis in probability and logical inference. For example, the presumption of the validity of a ceremonial marriage may be based in part on the

probability that most marriages are valid. However, an underlying logical inference is not essential. In fact, the lack of an underlying inference is a strong indication that the presumption affects the burden of proof. Only the needs of public policy can justify the direction of a particular assumption that is not warranted by the application of probability and common experience to the known facts. Thus, the total lack of any inference underlying the presumption of the negligence of an employer that arises from his failure to secure the payment of workmen's compensation (*Labor Code* §3708) is a clear indication that the presumption is based on public policy and affects the burden of proof. Similarly, the fact that the presumption of death from seven years' absence may conflict directly with the logical inference that life continues for its normal expectancy is an indication that the presumption is based on public policy and, hence, affects the burden of proof." (Law Rev. Com. Comment to *Ev.C.* 605.) The period of the presumption of death is now 5 years (see *infra*, §92).

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Dubon* (2001) 90 C.A.4th 944, 953, 108 C.R.2d 914, citing the text [presumption of P.C. 1016.5 (4 Cal. Crim. Law (3d), *Pretrial Proceedings*, §283) that, without record of advisement as to immigration consequences of plea, no such advisement was given, is one affecting burden of proof, as it was enacted to promote fairness by ensuring that defendants receive appropriate warnings]; Simons, Cal. Evidence Manual, §10:20 et seq.

*Cross-Reference:* 12 Summary (10th), *Real Property*, §§398, 399.



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##### C. Evidence Code.

##### 2. Classification in Civil Cases.

##### c. Presumptions Affecting Burden of Proof.

##### 2. Effect.

##### 1 Witkin Cal. Evid. Burden § 57

[§ 57] Effect.

"The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact." (*Ev.C. 606.*) (See BAJI (8th ed.), Appendix C, p. 492.)

Once a presumption of this type comes into play, the issue is one that must be presented to the trier of fact. The party "who has the benefit of a presumption affecting the burden of proof may rely on that alone and force the opponent to prove his or her case." (*Haycock v. Hughes Aircraft Co. (1994) 22 C.A.4th 1473, 1495, 28 C.R.2d 248* [in light of presumption of at-will employment (*Lab.C. 2922*; see 2 *Summary (9th)*, *Agency and Employment*, §165), trial judge erred in deciding as matter of law that there was implied-in-fact contract not to discharge plaintiff without good cause]; see *Xebec Dev. Partners, Ltd. v. National Union Fire Ins. Co. (1993) 12 C.A.4th 501, 545, 549, 15 C.R.2d 726*, citing the text [in insurance bad faith action by third party, presumption that settlement between insured and third party accurately represented insured's liability was presumption affecting burden of proof and required insurer to carry burden of proving contrary]; *Jackson v. Department of Motor Vehicles (1994) 22 C.A.4th 730, 739, 27 C.R.2d 712* [in suspension hearing in which officer's unsworn arrest report indicated that licensee stated he had been driving, presumption of official duty regularly performed shifted foundational, method-of-preparation burden to licensee to show that officer failed to observe and correctly report events described]; *Alexander v. Nextel Communications (1997) 52 C.A.4th 1376, 1381, 1382, 61 C.R.2d 293* [trial judge committed reversible error in failing to instruct jury on at-will presumption; following *Haycock*].)

The Comment explains:

"In the ordinary case, the party against whom it is invoked will have the burden of proving the nonexistence of the presumed fact by a preponderance of the evidence. Certain presumptions affecting the burden of proof may be overcome only by clear and convincing proof. When such a presumption is relied on, the party against whom the presumption operates will have a heavier burden of proof.

"If the party against whom the presumption operates already has the same burden of proof as to the nonexistence of the presumed fact that is assigned by the presumption, the presumption can have no effect on the case and no instruction in regard to the presumption should be given ... If the evidence is not sufficient to sustain a finding of the nonexistence of the presumed fact, the judge's instructions will be the same as if the presumption were merely a presumption affecting the burden of producing evidence ... If there is evidence of the nonexistence of the presumed fact, the judge

should instruct the jury on the manner in which the presumption affects the factfinding process. If the basic fact from which the presumption arises is so established that the existence of the basic fact is not a question of fact for the jury (as, for example, by the pleadings, by judicial notice, or by stipulation of the parties), the judge should instruct the jury that the existence of the presumed fact is to be assumed until the jury is persuaded to the contrary by the requisite degree of proof (proof by a preponderance of the evidence, clear and convincing proof, etc.). ... If the basic fact is a question of fact for the jury, the judge should instruct the jury that, if it finds the basic fact, it must also find the presumed fact unless persuaded of the nonexistence of the presumed fact by the requisite degree of proof." (Law Rev. Com. Comment to *Ev.C.* 606.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Cross-Reference:* 3 *Summary* (10th), *Agency and Employment*, §231. *West's Key Number Digest*, Evidence k.85 et seq.



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##### C. Evidence Code.

##### 3. Presumptions Establishing Element of Crime.

##### a. Nature and Effect of Presumption.

##### 1. Purpose: Policy or Convenience.

*1 Witkin Cal. Evid. Burden § 58*

[§ 58] Purpose: Policy or Convenience.

For reasons of policy or convenience, it is sometimes necessary to place on the defendant the burden of producing evidence or the burden of proof as to certain *defenses*. (See *supra*, §25 et seq.) And the legislative power to create presumptions against the defendant, even though they relate to an element of the crime, is well established, subject to the constitutional requirement of a rational connection between the fact proved and the additional fact presumed. (See *Tot v. United States* (1943) 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519, *infra*, §61 [requirement of rational connection]; *United States v. Gainey* (1965) 380 U.S. 63, 85 S.Ct. 754, 758, 13 L.Ed.2d 658, 663 [judge's power over judicial proceedings is not infringed by statute providing that defendant's unexplained presence at illegal still is sufficient evidence for conviction of illegal possession of still apparatus or conducting unlawful distilling business]; *People v. Stevenson* (1962) 58 C.2d 794, 797, 26 C.R. 297, 376 P.2d 297 [rational connection requirement]; *People v. Fuentes* (1990) 224 C.A.3d 1041, 1044, 1045, 274 C.R. 17 ["state may allocate the burden of persuasion to a criminal defendant through the device of an affirmative defense"; approving statute allocating to defendant burden regarding lawful acquisition of hypodermic needle or syringe]; 2 Jefferson, California Evidence Benchbook 3d, §46.49 et seq.; 2 McCormick 5th, §346 et seq.; 56 Harv. L. Rev. 1324; 17 So. Cal. L. Rev. 48, 384; 9 U.C. Davis L. Rev. 660; 5 Cal. Crim. Law (3d), Criminal Trial, §525 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 2 McCormick 6th, §346 et seq.



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##### C. Evidence Code.

##### 3. Presumptions Establishing Element of Crime.

##### a. Nature and Effect of Presumption.

##### 2. Effect.

##### 1 Witkin Cal. Evid. Burden § 59

[§ 59] Effect.

*Ev.C. 607* states:

"When a presumption affecting the burden of proof operates in a criminal action to establish presumptively any fact that is essential to the defendant's guilt, the presumption operates only if the facts that give rise to the presumption have been found or otherwise established beyond a reasonable doubt and, in such case, the defendant need only raise a reasonable doubt as to the existence of the presumed fact."

This statute lays down two distinct rules:

(1) The prosecution must establish the underlying facts beyond a reasonable doubt; i.e., the usual requirement in a criminal case (*supra*, §41) applies to proof of the facts giving rise to the presumption.

(2) The defendant's burden is less than that of a person against whom a presumption changing the burden of proof operates in a civil case (*supra*, §57). The defendant need not overcome the presumption by a preponderance of the evidence, but merely has to raise a reasonable doubt as to the existence of the presumed fact. (See *People v. Agnew* (1940) 16 C.2d 655, 665, 107 P.2d 601; *People v. Hardy* (1948) 33 C.2d 52, 64, 198 P.2d 865; *People v. Katz* (1975) 47 C.A.3d 294, 301, 120 C.R. 603; 2 Jefferson, California Evidence Benchbook 3d, §§46.50, 46.51.)

In *People v. Hampton* (1965) 236 C.A.2d 795, 46 C.R. 338, defendants issued to employees four checks that were dishonored for insufficiency of funds. To meet the presumption of knowledge under *Lab.C. 212(a)*, defendants merely testified, in response to formal questions, that they had no knowledge. *Held*, conviction affirmed; to overcome the burden, they had to show reasonable steps taken to inform themselves on whether funds would be available. (236 C.A.2d 805.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Criminal Law k.324



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##### C. Evidence Code.

##### 3. Presumptions Establishing Element of Crime.

##### a. Nature and Effect of Presumption.

##### 3. Presumption Construed as Inference.

##### 1 Witkin Cal. Evid. Burden § 60

[§ 60] Presumption Construed as Inference.

In *People v. Roder* (1983) 33 C.3d 491, 189 C.R. 501, 658 P.2d 1302, defendant secondhand dealer was convicted of receiving stolen property (P.C. 496). P.C. 496 then provided that if the prosecution proved three of the statute's four basic facts (defendant was a secondhand dealer, he or she bought or received stolen property, and did so under circumstances that should have caused defendant to make reasonable inquiry), the burden shifted to the defendant to show that such reasonable inquiry was made; and, if the defendant did not meet this burden, he or she "shall be presumed" to have bought or received such property "knowing it to have been so stolen or obtained." (On subsequent changes to P.C. 496, see 2 Cal. Crim. Law (3d), *Crimes Against Property*, §84.)

The trial judge gave an instruction embodying this presumption of guilty knowledge. *Held*, the presumption is unconstitutional and the instruction was reversible error.

(a) *Ulster County test*. In *County Court of Ulster County, New York v. Allen* (1979) 442 U.S. 140, 99 S.Ct. 2213, 2230, 60 L.Ed.2d 777, 796, 798, the United States Supreme Court emphasized the distinction between (1) a permissive inference or presumption that allows but does not require the trier of fact to infer the elemental fact from proof of the basic one, and (2) a mandatory presumption that tells the trier that, on proof of the basic fact, the elemental fact must be found unless the defendant comes forward with evidence to rebut the presumed connection. In that case, the court concluded that the jury instructions described only a proper permissive inference. Shortly thereafter, in *Sandstrom v. Montana* (1979) 442 U.S. 510, 99 S.Ct. 2450, 2458, 2459, 61 L.Ed.2d 39, 49, 50, 51, a murder case, an instruction that the law presumes that a person intends the ordinary consequences of his or her voluntary acts was held to have improperly relieved the prosecution of its burden of proving all elements of the offense beyond a reasonable doubt. (33 C.3d 497, 498, 499.) Thus, the threshold inquiry in the present case is whether a permissive inference or mandatory presumption is involved. (33 C.3d 499.)

(b) *Mandatory presumption involved*. (1) The statute clearly establishes a mandatory presumption within the meaning of the *Ulster County* and *Sandstrom* cases. (33 C.3d 499, 500, 501.) (2) The actual instruction given the jury was ambiguous, but the jurors could reasonably have interpreted it as relieving the prosecution of part of its burden, i.e., as an unconstitutional mandatory presumption. (33 C.3d 502, 503, 504.)

(c) *Chapman rule of reversible error applied*. The question whether the error is prejudicial per se or is subject to the lesser standard of harmless-beyond-a-reasonable-doubt under *Chapman v. California* (1967) 386 U.S. 18, 87 S.Ct.

824, 17 L.Ed.2d 705 (see 6 Cal. Crim. Law (3d), *Reversible Error*, §10) was left open in *Sandstrom*, *supra*, and need not be decided here; for, assuming that the *Chapman* standard applies, it cannot be found beyond a reasonable doubt that the instruction did not affect the verdict. (33 C.3d 504, 505.)

(d) *Construction of presumption as inference to avoid unconstitutionality.* Ev.C. 501 provides that, insofar as a statute assigns the burden of proof in a criminal case, "such statute is subject to *Penal Code section 1096*" (*supra*, §21). Hence, the constitutional reasonable doubt rule should be read into all California statutes which, through the use of presumptions or similar devices, assign the burden of proof in a criminal action. (33 C.3d 505, 506.)

(e) *Practical effects of construction as to P.C. 496.* (1) From the point of view of the defendant, an instruction that places the inference in context is comparable to a restrained form of judicial comment on the evidence. (33 C.3d 506.) (2) From the point of view of the prosecution, there is considerable benefit in retaining the "secondhand dealer" provision in revised form. It will enable the judge to inform the jury of an inference that the Legislature has concluded can often reasonably be drawn; and it will, even as a permissive inference, serve an important substantive function in regulating the conduct of such dealers. (33 C.3d 507.)

"Accordingly, we conclude that pursuant to *Evidence Code section 501*, section 496 should be construed as authorizing only a permissive inference, not a mandatory presumption. On remand, the trial court should fashion an appropriate instruction, which informs the jury of the permissive inference but at the same time makes clear that the prosecution retains the burden of proving every element of the offense beyond a reasonable doubt." (33 C.3d 507.)

*People v. Roder* was followed in *People v. Stevens* (1986) 189 C.A.3d 1020, 1025, 236 C.R. 296, where the Court of Appeal approved the trial judge's tailoring of the instruction to authorize a *permissive inference*, rather than a mandatory presumption, that defendant secondhand dealer bought property knowing it had been stolen. (See also *In re Feiock* (1986) 180 C.A.3d 649, 653, 225 C.R. 748 [presumption of contempt based on nonpayment of court-ordered child support must be construed as permissive]; *People v. Reyes Martinez* (1993) 14 C.A.4th 1412, 1416, 1417, 18 C.R.2d 300 [trial judge's instruction that movement of victim 500 feet or more was sufficiently substantial to support kidnapping conviction created impermissible mandatory presumption]; *People v. Moore* (1998) 65 C.A.4th 933, 938, 76 C.R.2d 872 [potential constitutional infirmity in P.C. 270, making it misdemeanor to wilfully omit to provide necessities of life for child and providing that proof of failure to provide is prima facie evidence of wilfulness, is avoided by CALJIC, No. 16.152, which instructs jury that failure to provide gives rise to permissible inference of wilfulness]; 38 *Stanf. L. Rev.* 423 [argument that distinction between mandatory and permissive presumptions should be abandoned, and that "reasonable doubt" due process scrutiny should be applied to all presumptions].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *In re Ivey* (2000) 85 C.A.4th 793, 805, 102 C.R.2d 447 [in criminal contempt proceeding based on father's failure to comply with pendente lite orders to pay wife attorneys' and expert fees, trial judge, in determining that father was aware of orders, would have erred in applying mandatory presumption to fact that father's counsel was present when orders were made and was thereafter served with formal orders; but record indicated that court properly applied permissive inference].





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##### 3. Presumptions Establishing Element of Crime.

##### b. Rational Connection Test.

*1 Witkin Cal. Evid. Burden § 61*

[§ 61] Rational Connection Test.

In *Tot v. United States* (1943) 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519, the court said: "[A] statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of courts." (63 S.Ct. 1246, 87 L.Ed. 1524.)

The due process rule of *Tot* has been reaffirmed in many subsequent opinions. (See *United States v. Gainey* (1965) 380 U.S. 63, 85 S.Ct. 754, 757, 13 L.Ed.2d 658, 663; *United States v. Romano* (1965) 382 U.S. 136, 86 S.Ct. 279, 282, 15 L.Ed.2d 210, 214, *infra*, §62; *Leary v. United States* (1969) 395 U.S. 6, 89 S.Ct. 1532, 1548, 23 L.Ed.2d 57, 91, *infra*, §64; *People v. Henderson* (1980) 109 C.A.3d 59, 63, 167 C.R. 47; *In re Heather B.* (1992) 9 C.A.4th 535, 561, 11 C.R.2d 891; 2 McCormick 5th, §347; *infra*, §§62 et seq.) (For a suggestion that the jury should be supplied with the facts on which the Legislature has based its presumption, see 18 U.C.L.A. L. Rev. 157, 183; for an argument that the rational connection test does not protect the right to acquittal unless guilt is proved beyond reasonable doubt, see 22 *Stanf. L. Rev.* 341.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 2 McCormick 6th, §347.



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##### C. Evidence Code.

##### 3. Presumptions Establishing Element of Crime.

##### c. Illustrations.

##### 1. Miscellaneous Offenses.

##### 1 Witkin Cal. Evid. Burden § 62

##### [§ 62] Miscellaneous Offenses.

Presumptions of this type have been established or attempted in connection with a wide variety of criminal offenses. The following cases are illustrative of the situations in which the presumption serves a useful purpose and of the limitations imposed by the rational connection test (*supra*, §61):

(1) *Firearms*. (See *Tot v. United States* (1943) 319 U.S. 463, 63 S.Ct. 1241, 1246, 87 L.Ed. 1519, 1524, *supra*, §61 [possession of firearm by person previously convicted of crime of violence made presumptive evidence that firearm was received in violation of Federal Firearms Act; presumption held invalid]; *County Court of Ulster County, New York v. Allen* (1979) 442 U.S. 140, 99 S.Ct. 2213, 2228, 2230, 60 L.Ed.2d 777, 796, 798 [possession of firearm in automobile presumptive evidence of its illegal possession by all persons then occupying the vehicle; presumption valid as applied]; *People v. Henderson* (1980) 109 C.A.3d 59, 63, 65, 167 C.R. 47 [possession of firearm did not provide sufficient proof of obliteration of manufacturer's number to satisfy reasonable doubt standard]; 87 A.L.R.3d 949 [possession of weapon in vehicle].)

(2) *Vehicle Offenses*. (See *People v. Bigman* (1940) 38 C.A.2d Supp. 773, 777, 100 P.2d 370 [presumption that illegally parked car was parked by registered owner; upheld].)

(3) *Illegal Possession of Still*. In *United States v. Romano* (1965) 382 U.S. 136, 86 S.Ct. 279, 15 L.Ed.2d 210, federal officers, entering a city industrial building with a search warrant, found defendants standing a few feet from an operating still. They were convicted of illegal possession of the still. *Held*, reversed for error in instructing, pursuant to statute, that presence at the still was "sufficient evidence to authorize conviction." The court said that, under *United States v. Gainey* (1965) 380 U.S. 63, 85 S.Ct. 754, 13 L.Ed.2d 658, a presumption that a person at the site of a secret still was "carrying on" an illegal enterprise is reasonable; but the presumption involved here, of possession from mere presence, was not. Presence was relevant on the issue of possession, but its connection was too tenuous to support the presumption. (86 S.Ct. 282, 15 L.Ed.2d 214.)

(4) *Theft and Related Offenses*. (See *People v. Hemmer* (1971) 19 C.A.3d 1052, 1060, 97 C.R. 516 [P.C. 484(b), establishing presumption of intent to commit theft after failure to return leased property on demand, is valid when construed to apply only if lessor sent demand in requisite manner, lessee received letter, and property was not returned in statutory period]; *Barnes v. United States* (1973) 412 U.S. 837, 93 S.Ct. 2357, 2361, 37 L.Ed.2d 380, 386 [unexplained possession of recently stolen mail justifies presumption that defendant possessed mail with knowledge it

was stolen; "[I]f a statutory inference submitted to the jury as sufficient to support conviction satisfies the reasonable-doubt standard (that is, the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt) as well as the more-likely-than-not standard, then it clearly accords with due process"; *Carella v. California* (1989) 491 U.S. 263, 109 S.Ct. 2419, 2420, 105 L.Ed.2d 218, 222 [prosecution for grand theft; due process violated by instructions stating that embezzlement of vehicle was presumed from failure to return within 5 days of expiration of rental agreement, and that intent to commit fraud was presumed from failure to return rented property within 20 days of demand]; and see *Veh.C. 11511* [presumption of knowledge when stolen vehicle is found with dismantler of automobiles]; 6 *Pacific L. J.* 352 [same]; 51 A.L.R.3d 727 [exclusive possession of stolen goods giving rise to inference of felonious taking]; 88 A.L.R.3d 1178 [presumption from possession of recently stolen goods].)

(5) *Wilful Failure To Support Minor Child*. (See *People v. Thompson* (1979) 89 C.A.3d 193, 200, 152 C.R. 478 [presumption that issue of wife cohabiting with husband who is not impotent or sterile is child of marriage; rational connection requirement satisfied].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Firearms*. See *In re Christopher K.* (2001) 91 C.A.4th 853, 857, 110 C.R.2d 914 [holding of *People v. Henderson* (1980) 109 C.A.3d 59, 167 C.R. 47, text, p. 212, applied in context of court trial].

(2) *Vehicle Offenses*. See *People v. Vanegas* (2004) 115 C.A.4th 592, 601, 9 C.R.3d 398, 1 *Cal. Crim. Law* (3d), *Crimes Against the Person, Supp.*, §202 [in prosecution for second degree murder and driving under influence, causing great bodily injury to another, jury instruction stating that any violation of basic speed law was inherently dangerous to human life created impermissible mandatory presumption; speed law can be violated by driving at speed that endangers life, but it can also be violated by driving at speed that endangers property or at speed greater than is reasonable or prudent].



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VI. NATURE AND EFFECT OF REBUTTABLE PRESUMPTIONS

C. Evidence Code.

3. Presumptions Establishing Element of Crime.

c. Illustrations.

2. Drugs.

aa. In General.

1 *Witkin Cal. Evid. Burden* § 63

[§ 63] In General.

A criminal defendant's knowledge or intent regarding the illegal drugs he or she is charged with possessing, selling, or transporting is usually an element of the crime the prosecution must prove. Presumptions that help the prosecution in this task have been attacked as unconstitutional in several notable cases and have also given rise to extensive commentary. (See *Leary v. United States* (1969) 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57, *infra*, §64; *Turner v. United States* (1970) 396 U.S. 398, 90 S.Ct. 642, 24 L.Ed.2d 610, *infra*, §65; *People v. Ruiz* (1975) 49 C.A.3d 739, 742, 122 C.R. 841; 1970/71 A.S. 183 [suggesting method of testing validity of statutory presumptions in light of *Leary* and *Turner*]; 1971/72 A.S. 105 [discussing confusion resulting from *Leary* and *Turner*]; 2 McCormick 5th, §347; 60 A.L.R.3d 1128 [possession of specified quantity of illegal drugs as basis for presumption of intent to sell].)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 2 McCormick 6th, §347.



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bb. Marijuana.

1 Witkin Cal. Evid. Burden § 64

[§ 64] Marijuana.

In *Leary v. United States* (1969) 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57, the court declared unconstitutional a statutory inference that the defendant *possessing* marijuana knew that it had been *illegally brought into the United States*.

(a) A criminal statutory presumption is "irrational" or "arbitrary," hence, unconstitutional, "unless it can at least be said with *substantial assurance* that the presumed fact is *more likely than not* to flow from the proved fact on which it is made to depend." (89 S.Ct. 1548, 23 L.Ed.2d 82.)

(b) If the inference of knowledge is to be sustained, "we must find on the basis of the available materials that a majority of marihuana possessors either are cognizant of the apparently high rate of importation or otherwise have become aware that *their* marihuana was grown abroad." (89 S.Ct. 1553, 23 L.Ed.2d 88.) Such a determination was impossible. (89 S.Ct. 1557, 23 L.Ed.2d 91.) (See 83 Harv. L. Rev. 103 [Leary]; 22 Hastings L. J. 873 [retroactivity of Leary].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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##### cc. Heroin.

#### 1 Witkin Cal. Evid. Burden § 65

[§ 65] Heroin.

In *Turner v. United States* (1970) 396 U.S. 398, 90 S.Ct. 642, 24 L.Ed.2d 610, defendant was indicted under former 21 U.S.C., §174 (now 21 U.S.C., §801 et seq.), for transporting heroin while knowing it had been unlawfully imported into the United States, and for possessing heroin not in the original stamped package. At the trial, the prosecution showed a seizure of narcotics from his possession in packages without federal tax stamps. No evidence was presented on the drugs' origin, and defendant did not testify. In accordance with the statute, the trial judge charged that the jury could infer from the unexplained possession that defendant knew the heroin had been unlawfully imported. He also instructed that possession of drugs not in a stamped package was prima facie evidence under the statute that defendant had purchased, sold, dispensed or distributed the drugs not in or from a stamped package. On defendant's conviction of the heroin offenses, *held*, affirmed.

(a) "For 60 years defendants charged under the statute have known that the section authorizes an inference of guilt from possession alone, that the inference is rebuttable by evidence that their heroin originated here, and that the inference itself is subject to challenge for lack of sufficient connection between the proved fact of possession and the presumed fact that theirs was smuggled merchandise." (90 S.Ct. 648, 24 L.Ed.2d 619.) To avoid conviction, a defendant should demonstrate, "not necessarily by his own testimony," a domestic source for heroin. Yet: "Over the years, thousands of defendants, most of them represented by retained or appointed counsel, have been convicted under §174. Although there was opportunity in every case to challenge or rebut the inference based on possession, we are cited to no case, and we know of none, where substantial evidence showing domestic production of heroin has come to light." (90 S.Ct. 648, 24 L.Ed.2d 620.) If heroin were being produced in this country in commercial quantities, "it is difficult to believe that resourceful lawyers with adversary proceedings at their disposal would not long since have discovered the truth and placed it on record." (90 S.Ct. 648, 24 L.Ed.2d 620.)

(b) The overwhelming evidence from "official sources," such as senate committee hearings and presidential commission reports, as well as United Nations documents and learned studies, showed that heroin consumed in the United States was illegally imported. (90 S.Ct. 649, 24 L.Ed.2d 620.) "To possess heroin is to possess imported heroin. Whether judged by the more-likely-than-not standard applied in *Leary*, ... or by the more exacting reasonable-doubt standard normally applicable in criminal cases, §174 is valid insofar as it permits a jury to infer that heroin possessed in this country is a smuggled drug." (90 S.Ct. 652, 24 L.Ed.2d 623, referring to *Leary v. United States* (1969) 395 U.S. 6,

89 S.Ct. 1532, 23 L.Ed.2d 57, supra, §64.)

(c) Defendant's possession of 275 glassine bags of heroin proved he was distributing the drug. But even if possession did not prove *distribution*, the conviction must be affirmed. The critical statutory inference could not be sustained to authorize an inference of *dispensing, distributing, or selling* the drug, because the possession was "far short" of sufficient evidence for those inferences. "But the inference of *purchasing* in or from an unstamped package is another matter." Possession was sufficient proof that the possessor did not receive the heroin from an original stamped package, "since it is so extremely unlikely that a package containing heroin would ever be legally stamped." The statute did not forbid a person's obtaining heroin by gift, theft or bailment, but because the drug is a high-priced product, "it would be very unreasonable to assume that any sizable number of possessors have not paid for it, one way or another." (90 S.Ct. 655, 24 L.Ed.2d 626.)

The dissenting justices argued that the decision seriously undercut due process standards, because the data relied on by the majority to classify the presumption as "reasonable" and "fair" were never introduced at trial. Defendant "was never given an opportunity to confront before the jury the many expert witnesses now arrayed against him in the footnotes of the Court's opinion." (90 S.Ct. 661, 24 L.Ed.2d 633.) (See also *People v. Ruiz* (1975) 49 C.A.3d 739, 743, 744, 122 C.R. 841 [following *Turner*; presumption of unlawful importation held valid].)

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##### dd. Cocaine.

#### 1 *Witkin Cal. Evid. Burden* § 66

[§ 66] Cocaine.

In *Turner v. United States* (1970) 396 U.S. 398, 90 S.Ct. 642, 24 L.Ed.2d 610, supra, §65, defendant was indicted for both heroin and cocaine offenses. The cocaine charges were brought under former 26 U.S.C., §4704(a) (now 21 U.S.C., §801 et seq.), for transporting cocaine while knowing it had been unlawfully imported into the United States, and for possessing cocaine not in the original stamped package. At the trial, the evidence and instructions on the cocaine charges were virtually identical to those on the heroin charges except that a much smaller amount of cocaine had been found. On defendant's conviction of the cocaine offenses, *held*, reversed.

(a) Much more cocaine is lawfully produced in this country than is smuggled here, and thefts from legal sources make the presumption of importation invalid. Under the standards of *Leary v. United States* (1969) 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57, supra, §64, "we cannot be sufficiently sure either that the cocaine that Turner possessed came from abroad or that Turner must have known that it did." (90 S.Ct. 654, 24 L.Ed.2d 625.)

(b) The small quantity of cocaine that defendant possessed was consistent with personal use rather than sale. The statutory inference was therefore critical, because the thief who steals cocaine "very probably obtains it in or from a stamped package." Therefore, because of the reasonable possibility that defendant had stolen the cocaine himself or had obtained it from a stamped package in the possession of the actual thief, the statutory presumption did not provide sufficient evidence to support the conviction. (90 S.Ct. 656, 24 L.Ed.2d 627.)

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A. In General.

*1 Witkin Cal. Evid. Burden § 67*

[§ 67] In General.

Article 3 of the Evidence Code sets forth a number of presumptions affecting the burden of producing evidence. (See *infra*, §68 et seq.) For the most part, these were transferred without change from former C.C.P. 1963. The Law Revision Commission Comment to *Ev.C.* 630 states:

"The list is not exhaustive. Other presumptions affecting the burden of producing evidence may be found in other codes. Others will be found in the common law. Specific statutes will classify some of these, but some must await classification by the courts. The list here, however, will eliminate any uncertainty as to the proper classification for the presumptions in the article." (See 2 Jefferson, California Evidence Benchbook 3d, §46.30.)

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B. Money Delivered Was Due.

*1 Witkin Cal. Evid. Burden § 68*

[§ 68] Money Delivered Was Due.

"Money delivered by one to another is presumed to have been due to the latter." (*Ev.C. 631*; see *Rolland v. Porterfield* (1920) 183 C. 466, 471, 472, 191 P. 913 [presumption that \$ 500 paid by plaintiff to decedent was owed to decedent].)

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C. Thing Delivered Was Owned.

*1 Witkin Cal. Evid. Burden § 69*

[§ 69] Thing Delivered Was Owned.

"A thing delivered by one to another is presumed to have belonged to the latter." (*Ev.C.* 632; see *Lady v. Barrett* (1941) 43 *C.A.2d* 685, 692, 111 *P.2d* 702 [presumption that bond interest check delivered to decedent belonged to him].)

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D. Obligation Delivered to Debtor.

*1 Witkin Cal. Evid. Burden § 70*

[§ 70] Obligation Delivered to Debtor.

"An obligation delivered up to the debtor is presumed to have been paid." (*Ev.C.* 633; see *Rosebrock v. San Diego Trust & Savings Bank* (1934) 139 C.A. 75, 78, 33 P.2d 438.)

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E. Possession of Own Order.

*1 Witkin Cal. Evid. Burden § 71*

[§ 71] Possession of Own Order.

"A person in possession of an order on himself for the payment of money, or delivery of a thing, is presumed to have paid the money or delivered the thing accordingly." (*Ev.C.* 634; see *Black v. Meyer* (1928) 204 C. 504, 507, 269 P. 173.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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F. Obligation Possessed by Creditor.

*1 Witkin Cal. Evid. Burden § 72*

[§ 72] Obligation Possessed by Creditor.

"An obligation possessed by the creditor is presumed not to have been paid." (*Ev.C.* 635, codifying a judicially recognized presumption; see *Light v. Stevens* (1911) 159 C. 288, 292, 113 P. 659.) "The linchpin of the presumption, however, is the near certainty that the face amount of a promissory note was advanced when the note was made"; the mere existence of a line of credit agreement would not support the presumption that the full amount of the line was ever advanced. (*Remington Inv. v. Hamedani* (1997) 55 C.A.4th 1033, 1041, 1042, 64 C.R.2d 376 ["Promissory Note" found in files of insolvent bank by assignee of Federal Deposit Insurance Corporation did not shift burden to borrower to show that debt had been paid, as note's terms indicated it was only conditional agreement to repay whatever sums might be advanced, not unconditional agreement to pay sum certain].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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G. Payment of Earlier Rent or Installments.

*1 Witkin Cal. Evid. Burden § 73*

[§ 73] Payment of Earlier Rent or Installments.

"The payment of earlier rent or installments is presumed from a receipt for later rent or installments." (*Ev.C.* 636; see *Chaplin v. Sullivan* (1945) 67 C.A.2d 728, 732, 155 P.2d 368 [plaintiff's concession that defendant paid \$ 280 to cover amount of installments called for by land sale contract for period from March 1935 to April 1936 gave rise to presumption that defendant had paid installments for period prior to March 1935].)

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H. Ownership of Things Possessed.

1 *Witkin Cal. Evid. Burden* § 74

[§ 74] Ownership of Things Possessed.

"The things which a person possesses are presumed to be owned by him." (*Ev.C.* 637; see *Reynolds v. Dryer* (1931) 112 C.A. 712, 714, 297 P. 563; *Syme v. Warden* (1931) 114 C.A. 707, 711, 300 P. 863; *Truck Ins. Exchange v. Torres* (1961) 193 C.A.2d 483, 487, 14 C.R. 408; *People v. Superior Court (McGraw)* (1979) 100 C.A.3d 154, 159, 160 C.R. 663 [in hearing regarding property that is seized by police from burglary suspects and is not claimed by burglary victims, property is presumed to be owned by suspects until evidence to contrary is presented]; 5 A.L.R.3d 19, 81 [effect of presumption as to ownership of property where controverting evidence is introduced]; 29 *Am.Jur.2d* (1994 ed.), *Evidence* §§288, 289; 4 *Summary* (9th), *Real Property*, §10.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*Cross-Reference:* 12 *Summary* (10th), *Real Property*, §208.





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VII. EVIDENCE CODE PRESUMPTIONS: BURDEN OF PRODUCING EVIDENCE

I. Exercise of Acts of Ownership.

*1 Witkin Cal. Evid. Burden § 75*

[§ 75] Exercise of Acts of Ownership.

"A person who exercises acts of ownership over property is presumed to be the owner of it." (*Ev.C. 638*; see *Syme v. Warden* (1931) 114 C.A. 707, 711, 300 P. 863; *Whiteside v. United Theatres* (1951) 106 C.A.2d 471, 477, 235 P.2d 261.) Former C.C.P. 1963(12) additionally provided that a presumption of ownership arose from "common reputation of ... ownership," but that provision was deleted as inaccurate when the remainder of C.C.P. 1963(12) was transferred to *Ev.C. 638*. (See Law Rev. Com. Comment to *Ev.C. 638*.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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J. Judgment Correctly Determines Rights.

1 *Witkin Cal. Evid. Burden* § 76

[§ 76] Judgment Correctly Determines Rights.

"A judgment, when not conclusive, is presumed to correctly determine or set forth the *rights* of the parties, but there is no presumption that the *facts* essential to the judgment have been correctly determined." (*Ev.C.* 639.)

The Law Revision Commission Comment to *Ev.C.* 639 explains:

"The presumption involved here is that the judgment correctly determines that one party owes another money, or that the parties are divorced, or their marriage has been annulled, or any similar rights of the parties. The presumption does not apply to the facts underlying the judgment. For example, a judgment of annulment is presumed to determine correctly that the marriage is void. ... However, the judgment may not be used to establish presumptively that one of the parties was guilty of fraud as against some third party who is not bound by the judgment." (See *Clark v. Los Angeles* (1960) 187 C.A.2d 792, 800, 9 C.R. 913 [presumption arising from annulment judgment].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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K. Writing Truly Dated.

1 *Witkin Cal. Evid. Burden* § 77

[§ 77] Writing Truly Dated.

"A writing is presumed to have been truly dated." (*Ev.C.* 640; see *Robinson v. Puls* (1946) 28 *C.2d* 664, 668, 171 *P.2d* 430 [books of account properly admitted as being made within reasonable proximity of time of respective transactions]; 30 *A.L.R.3d* 571 [presumption as to whether deed was altered before or after its execution]; on presumption that duly executed grant was delivered "at its date," see *C.C.* 1055; *Estate of Galvin* (1952) 114 *C.A.2d* 354, 360, 250 *P.2d* 333; 4 *Summary* (9th), *Real Property*, §175.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*Cross-Reference:* 12 *Summary* (10th), *Real Property*, §295.



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## VII. EVIDENCE CODE PRESUMPTIONS: BURDEN OF PRODUCING EVIDENCE

## L. Letter Received.

1 *Witkin Cal. Evid. Burden* § 78

[§ 78] Letter Received.

"A letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail." (*Ev.C.* 641; see *Johnson & Johnson v. Superior Court* (1985) 38 C.3d 243, 255, 211 C.R. 517, 695 P.2d 1058 [presumption furnished support for conclusion that affidavits of mailing included in return of summons provided sufficient notice of service to satisfy trial court that plaintiffs had completed all acts necessary to effect service within 3 years as required by former C.C.P. 581a, now C.C.P. 583.210]; *Carl v. Thomas* (1931) 116 C.A. 294, 300, 2 P.2d 872 [presumption held not to prevail over uncontradicted testimony that it was not received]; *Jensen v. Traders & General Ins. Co.* (1956) 141 C.A.2d 162, 164, 296 P.2d 434 [presumption controverted by plaintiff's testimony and circumstantial evidence]; *Idaho Maryland Mines Corp. v. Industrial Acc. Com.* (1959) 174 C.A.2d 693, 695, 345 P.2d 109 [finding that defendant was served by mail]; *Berger v. Limon* (1963) 214 C.A.2d 149, 151, 29 C.R. 483 [presumption overcome]; *Bunner v. Imperial Ins. Co.* (1986) 181 C.A.3d 14, 21, 225 C.R. 912 [*Ev.C.* 641 applies to *Ins.C.* 1063.7, requiring mailed notice of claim period for insolvent insurer; proof of mailing to insured's last known address creates presumption of receipt, which may be rebutted by evidence of nonreceipt]; *Bonzer v. Huntington Park* (1993) 20 C.A.4th 1474, 1479, 1481, 25 C.R.2d 278 [presumption that defendant received notice of hearing was improper basis for denying relief from default; once defendant presented uncontradicted evidence of nonreceipt, presumption disappeared and inference of receipt was inappropriate as matter of law]; 2 McCormick 5th, §343; 5 A.L.R.3d 19, 78; 7 Proof of Facts 417 [sufficiency of proof of mailing to raise presumption of receipt]; 35 Proof of Facts 2d 589 [proof of routine business practice of mailing letter]; on inapplicability of presumption to mailing of overtime parking penalty payment, see *Veh.C.* 40309; on receipt of telegram, see 24 A.L.R.3d 1434; 21 Proof of Facts 783.)

A party who invokes the presumption and seeks an instruction as to the ordinary mailing time between two cities must produce competent evidence on that subject. (*Enis v. Specialty Auto Sales* (1978) 83 C.A.3d 928, 943, 148 C.R. 255.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Craig v. Brown & Root* (2000) 84 C.A.4th 416, 421, 100 C.R.2d 818, citing the text [in wrongful termination action in which defendant employer petitioned for arbitration, defendant's evidence that it sent memorandum and brochure containing arbitration provision to plaintiff employee created presumption that she received them]; 2 McCormick 6th, §343. *West's Key Number Digest*, Evidence k.71



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M. Conveyance by Person Under Duty.

*1 Witkin Cal. Evid. Burden § 79*

[§ 79] Conveyance by Person Under Duty.

"A trustee or other person, whose duty it was to convey real property to a particular person, is presumed to have actually conveyed to him when such presumption is necessary to perfect title of such person or his successor in interest." (*Ev.C. 642.*)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### VII. EVIDENCE CODE PRESUMPTIONS: BURDEN OF PRODUCING EVIDENCE

##### N. Authenticity of Ancient Instrument.

###### 1 *Witkin Cal. Evid. Burden* § 80

[§ 80] Authenticity of Ancient Instrument.

(1) *In General.* *Ev.C. 643* creates a presumption of authenticity as to a "deed or will or other writing purporting to create, terminate, or affect an interest in real or personal property" where the document:

- "(a) Is at least 30 years old;
- (b) Is in such condition as to create no suspicion concerning its authenticity;
- (c) Was kept, or if found was found, in a place where such writing, if authentic, would be likely to be kept or found; and
- (d) Has been generally acted upon as authentic by persons having an interest in the matter."

The Commission emphasizes the importance of the "acted upon" condition, as "a requirement of the possession of property by those persons who would be entitled to such possession under the document if it were genuine." (Law Rev. Com. Comment to *Ev.C. 643*; see *Devereaux v. Frazier Mountain Park & Fisheries Co. (1967) 248 C.A.2d 323, 329, 56 C.R. 345*; 50 Proof of Facts 2d 321 [sufficiency of foundation for admission as ancient document].)

(2) *Limitation to Dispositive Documents.* Although the predecessor statute applied to documents and writings generally, *Ev.C. 643* applies only to *dispositive instruments*. The Law Revision Commission Comment to *Ev.C. 643* states: "Giving the ancient documents rule a presumptive effect--i.e., requiring a finding of the authenticity of an ancient document--seems justified when it is a dispositive instrument and the persons interested in the matter have acted upon the instrument for a period of at least 30 years as if it were genuine. Evidence which is not of this strength may be sufficient in particular cases to warrant an inference of genuineness and thus justify the admission of the document into evidence, but the presumption should be confined to those cases where the evidence of genuineness is not likely to be disputed." (On authentication generally, see 2 *Cal. Evidence (4th)*, *Documentary Evidence*, §3 et seq.; on *hearsay* exception for recitals in ancient documents, see 1 *Cal. Evidence (4th)*, *Hearsay*, §293.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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CHAPTER III - Burden of Proof and Presumptions

VII. EVIDENCE CODE PRESUMPTIONS: BURDEN OF PRODUCING EVIDENCE  
O. Publicly Published Book.

*1 Witkin Cal. Evid. Burden § 81*

[§ 81] Publicly Published Book.

"A book, purporting to be printed or published by public authority, is presumed to have been so printed or published."  
(*Ev.C. 644*; see also *F.R. Evid., Rule 902(5)* [no extrinsic evidence of authenticity required for admission of official publication].)

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VII. EVIDENCE CODE PRESUMPTIONS: BURDEN OF PRODUCING EVIDENCE

P. Reported Decisions.

*1 Witkin Cal. Evid. Burden § 82*

[§ 82] Reported Decisions.

"A book, purporting to contain reports of cases adjudged in the tribunals of the state or nation where the book is published, is presumed to contain correct reports of such cases." (*Ev.C. 645*; on judicial notice of "decisional law," see *1 Cal. Evidence (4th), Judicial Notice, §9.*)

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VII. EVIDENCE CODE PRESUMPTIONS: BURDEN OF PRODUCING EVIDENCE  
Q. Newspaper or Periodical.

*1 Witkin Cal. Evid. Burden § 83*

[§ 83] Newspaper or Periodical.

"Printed materials, purporting to be a particular newspaper or periodical, are presumed to be that newspaper or periodical if regularly issued at average intervals not exceeding three months." (*Ev.C. 645.1*; see *18 Pacific L. J. 658*; *F.R. Evid., Rule 902(6)* [printed materials purporting to be newspapers or periodicals do not require extrinsic evidence of authenticity].)

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VII. EVIDENCE CODE PRESUMPTIONS: BURDEN OF PRODUCING EVIDENCE  
R. Res Ipsa Loquitur Codified.

*1 Witkin Cal. Evid. Burden § 84*

[§ 84] Res Ipsa Loquitur Codified.

Res ipsa loquitur, which remained a judicial doctrine even after adoption of the Evidence Code, was codified in 1970 as a presumption affecting the burden of producing evidence. (See *Ev.C. 646*, *infra*, §118.)

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VII. EVIDENCE CODE PRESUMPTIONS: BURDEN OF PRODUCING EVIDENCE

S. Facts in Return of Process or Notice.

*1 Witkin Cal. Evid. Burden § 85*

[§ 85] Facts in Return of Process or Notice.

The return of process or notice, made by a registered process server (see *B. & P.C. 22350* et seq.), "establishes a presumption, affecting the burden of producing evidence, of the facts stated in the return." (*Ev.C. 647*; see *10 Pacific L. J. 350*; *3 Cal. Proc. (4th), Actions*, §983.)

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CHAPTER III - Burden of Proof and Presumptions

VIII. EVIDENCE CODE PRESUMPTIONS: BURDEN OF PROOF  
A. In General.

*1 Witkin Cal. Evid. Burden § 86*

[§ 86] In General.

The Evidence Code contains a number of presumptions specifically identified as ones affecting the burden of proof. For the most part, these are contained in Article 4 (*Ev.C. 660 et seq.*). The Law Revision Commission Comment to *Ev.C. 660* states:

"[I]t is desirable to classify as many presumptions as possible. Article 4 ... , therefore, lists several presumptions that are to be regarded as presumptions affecting the burden of proof. The list is not exclusive." (On classification problem, see *infra*, §104.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER III - Burden of Proof and Presumptions

## VIII. EVIDENCE CODE PRESUMPTIONS: BURDEN OF PROOF

## B. Legal and Beneficial Title.

1 *Witkin Cal. Evid. Burden* § 87

## [§ 87] Legal and Beneficial Title.

(1) *In General*. "The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof." (*Ev.C.* 662, codifying a judicially recognized presumption; see *Rench v. McMullen* (1947) 82 C.A.2d 872, 874, 187 P.2d 111; *Spaulding v. Jones* (1953) 117 C.A.2d 541, 545, 256 P.2d 637; *supra*, §39.)

Cases applying, or declining to apply, the statutory presumption are numerous. (See *Toney v. Nolder* (1985) 173 C.A.3d 791, 794, 219 C.R. 497 [there is no "confidential relationship" exception to requirement of clear and convincing evidence to rebut presumption]; *Tannehill v. Finch* (1986) 188 C.A.3d 224, 228, 232 C.R. 749 [following *Toney*]; *In re Marriage of Weaver* (1990) 224 C.A.3d 478, 486, 273 C.R. 696 [applying presumption in marital dissolution action]; *Murray v. Murray* (1994) 26 C.A.4th 1062, 1067, 1068, 31 C.R.2d 855 [presumption was inapplicable in quiet title action alleging that plaintiff's adoptive father fraudulently transferred title to her property to his wife; statute applies when valid legal title is undisputed and controversy only involves beneficial title].)

(2) *Inapplicability in Face of More Specific, Conflicting Presumption*. *In re Marriage of Haines* (1995) 33 C.A.4th 277, 39 C.R.2d 673, concerned a husband's claim, on dissolution of marriage, for reimbursement for his separate property contribution to the acquisition of the couple's community property residence. The trial judge awarded the husband reimbursement on the theory that at the time the husband had deeded the property to his wife and himself it had been his separate property, by virtue of an earlier quitclaim signed by the wife. *Held*, reversed; the presumption of *Ev.C.* 662 should not have been applied. The implied holding of the *Weaver* case, *supra*, that the presumption is applicable in marital proceedings, regardless of any conflict with other presumptions, is incorrect. Here, the stronger and more specific presumption of interspousal undue influence arising from the signing of the quitclaim deed (*Family C.* 721(b)) prevailed over the presumption as to ownership. Thus, instead of giving the wife the initial burden of rebutting the presumption of title, the trial judge should have required the husband to show that the quitclaim transaction did not violate his fiduciary duties. (33 C.A.4th 300, 301.) (See *In re Marriage of Barneson* (1999) 69 C.A.4th 583, 593, 81 C.R.2d 726 [presumption arising from *Family C.* 852(a) that transactions between spouses are not transmutations prevails over title presumption of *Ev.C.* 662; relying on *Haines*].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General*. See *People v. Semaan* (2007) 42 C.4th 79, 88, 64 C.R.3d 1, 163 P.3d 949 [in proceeding by third-party claimant seeking release of funds in bank account frozen under P.C. 186.11 (3 *Cal. Crim. Law* (3d), *Punishment*, §293), presumption of *Ev.C.* 662 was inapplicable where there was undisputed evidence that claimant's name was used as alias on account by participants in illegal credit card scheme, and prosecution disputed genuineness of claimant's title to

account; relying on *Murray v. Murray* (1994) 26 C.A.4th 1062, 31 C.R.2d 855, text, p. 222].

(2) *Inapplicability in Face of More Specific, Conflicting Presumption*. See *In re Marriage of Delaney* (2003) 111 C.A.4th 991, 999, 4 C.R.3d 378 [trial judge properly applied undue influence presumption in setting aside grant deed of husband's separate property to wife and husband as joint tenants; holding of *In re Marriage of Haines* (1995) 33 C.A.4th 277, 39 C.R.2d 673, text, p. 222, regarding conflicting presumptions applies to any interspousal property transaction where evidence is offered that one spouse has been disadvantaged by other]; *In re Marriage of Mathews* (2005) 133 C.A.4th 624, 630, 35 C.R.3d 1 [in awarding marital residence to husband as his separate property, trial judge erred in failing to apply presumption of *Family C.* 721 on basis that wife had quitclaimed her interest to husband; however, ruling could be upheld on ground that husband rebutted presumption of undue influence by preponderance of evidence].

The undue influence presumption discussed in *Haines* does not apply (a) to marital settlement agreements reached through mediation, (b) in the context of a motion for relief from judgment under *Family C.* 2122 (11 *Summary* (10th), *Community Property*, §243), at least where the time to act under *C.C.P.* 473 (8 *Cal. Proc.* (4th), *Attack on Judgment in Trial Court*, §152 et seq.) has expired, or (c) where the parties to a marital settlement agreement acknowledge that no undue influence was exercised. (*In re Marriage of Kieturakis* (2006) 138 C.A.4th 56, 87, 41 C.R.3d 119, 11 *Summary* (10th), *Community Property*, Supp., §243; see 37 *McGeorge L. Rev.* 33 [undue influence presumption].)



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CHAPTER III - Burden of Proof and Presumptions

VIII. EVIDENCE CODE PRESUMPTIONS: BURDEN OF PROOF

C. Ceremonial Marriage Valid.

1 *Witkin Cal. Evid. Burden* § 88

[§ 88] Ceremonial Marriage Valid.

"A ceremonial marriage is presumed to be valid." (*Ev.C.* 663, codifying a judicially recognized presumption; see *Estate of Hughson* (1916) 173 C. 448, 451, 160 P. 548; *Hamburgh v. Hys* (1937) 22 C.A.2d 508, 509, 71 P.2d 301; *In re Marriage of Recknor* (1982) 138 C.A.3d 539, 547, 187 C.R. 887 [where, in dissolution proceeding, husband contended marriage was invalid, presumption of *Ev.C.* 663 lent support to wife's position that husband's conduct estopped him to deny validity]; 36 Proof of Facts 2d 441 [proving validity of marriage]; 11 *Summary* (9th), *Husband and Wife*, §51.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Estate of DePasse* (2002) 97 C.A.4th 92, 107, 118 C.R.2d 143 [executor of decedent's estate successfully rebutted presumption arising from decedent's ceremonial marriage with estate claimant in hospital 1 day before she died, where he proved that claimant had never obtained marriage license].

*Cross-Reference:* 11 *Summary* (10th), *Husband and Wife*, §54.



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#### VIII. EVIDENCE CODE PRESUMPTIONS: BURDEN OF PROOF

##### D. Official Duty Regularly Performed.

###### 1 *Witkin Cal. Evid. Burden* § 89

[§ 89] Official Duty Regularly Performed.

(1) *General Presumption*. "It is presumed that official duty has been regularly performed." (*Ev.C.* 664, first sentence; see *People v. Tenner* (1993) 6 *C.4th* 559, 566, 24 *C.R.2d* 840, 862 *P.2d* 840, 3 *Cal. Crim. Law* (3d), *Punishment*, §378 [abstract of judgment and commitment form were sufficient, in light of presumption, to support inference prior prison term was served]; *Moyer v. State Bd. of Equalization* (1956) 140 *C.A.2d* 651, 655, 295 *P.2d* 583 [applied in answer to petitioner's contention that respondent board did not read transcript of hearing]; *People v. Stoliker* (1961) 192 *C.A.2d* 263, 267, 13 *C.R.* 437 [federal authorities delivering prisoner]; *Los Angeles v. Young* (1961) 196 *C.A.2d* 405, 409, 411, 16 *C.R.* 553 [board of supervisors' determination of ability of relatives to contribute to support of needy person]; *Fisk v. Department of Motor Vehicles* (1981) 127 *C.A.3d* 72, 77, 179 *C.R.* 379, 1 *Cal. Evidence* (4th), *Hearsay*, §247 [preparation of report by police officer]; *In re Martin L.* (1986) 187 *C.A.3d* 534, 540, 232 *C.R.* 43 [juvenile court was presumed to have properly determined, in sustaining prior wardship petitions, that minor understood wrongfulness of acts]; *Roelfsema v. Department of Motor Vehicles* (1995) 41 *C.A.4th* 871, 880, 48 *C.R.2d* 817 [in license revocation proceeding, presumption that authorities properly set up and operated sobriety checkpoint attached]; 2 *McCormick* 5th, §343.)

In *Ross v. Superior Court* (1977) 19 *C.3d* 899, 141 *C.R.* 133, 569 *P.2d* 727, petitioners challenged a contempt order on the ground that the record did not affirmatively show that the trial judge applied the correct standard of proof (beyond a reasonable doubt; see *supra*, §40). *Held*, the presumption of *Ev.C.* 664, applicable in civil, criminal, and quasi-criminal cases, "encompasses a presumption that the trial court applied the proper burden of proof in matters tried to the court." (19 *C.3d* 913, 914.) The opinion adds: "In the typical criminal case in which a jury trial is waived, the judge, of course, does not normally publicly announce that he is applying the reasonable doubt standard, but simply finds the defendant guilty or not guilty of the charged offense." (19 *C.3d* 914.)

(2) *Official Conduct Challenged in Criminal Proceeding*. Where a criminal defendant raises official misconduct as a defense, the placement of the burden of proof depends on the type of conduct at issue:

(a) *Discriminatory enforcement*. Where the defendant claims discriminatory enforcement of the law, the presumption of official conduct operates to require him or her to prove the facts supporting the defense. (See *People v. Gray* (1967) 254 *C.A.2d* 256, 265, 63 *C.R.* 211; *supra*, §29.)

(b) *Unlawful arrest pursuant to warrant*. Similarly, where an arrest was made pursuant to a warrant, the defendant has the burden of proving that the arrest was unlawful. (See *People v. Cheatham* (1975) 50 *C.A.3d* 592, 598, 123 *C.R.* 361; *supra*, §29.)



(c) *Unlawful arrest without warrant.* "This presumption does not apply on an issue as to the lawfulness of an arrest if it is found or otherwise established that the arrest was made without a warrant." (*Ev.C.* 664, *supra*, second sentence.) The exception codifies the holding of a number of cases to the effect that, on proof that an arrest was made without a warrant, the burden of proof is on the arresting officials to show that the circumstances justified the arrest. (See *Badillo v. Superior Court* (1956) 46 C.2d 269, 272, 294 P.2d 23 [once defendant makes *prima facie* case of illegal arrest by establishing that there was no warrant, burden rests on prosecution to prove arrest was legal].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *General Presumption.* See *People v. Allegheny Cas. Co.* (2007) 41 C.4th 704, 715, 61 C.R.3d 689, 161 P.3d 198, 4 Cal. Crim. Law (3d), *Pretrial Proceedings, Supp.*, §103 [where record was silent, it could be presumed that forfeiture of bail bond was duly declared in open court]; *Baker v. Gourley* (2000) 81 C.A.4th 1167, 1173, 97 C.R.2d 451 [in action challenging suspension of driver's license for driving under influence, official duty presumption as to testing of driver's blood was not rebutted by evidence that seal on blood sample was cut 6 days before testing, where relevant regulations imposed no requirements as to cutting of seal or lapse of time]; *Petricks v. Department of Motor Vehicles* (2001) 89 C.A.4th 1341, 1351, 107 C.R.2d 909 [in action challenging suspension of driver's license for driving under influence, trial judge erred in granting writ relief based on DMV's failure to prove that blood sample was properly collected; official duty presumption applied, and driver presented no evidence to rebut it]; *People v. Cruz* (2001) 93 C.A.4th 69, 73, 74, 113 C.R.2d 86 [in prosecution for sexual offenses, trial judge's failure to include in jurors' oath language requiring them to agree to follow judge's instructions did not constitute reversible error; under *Ev.C.* 664, it was presumed that they properly performed their duties, and defendant presented no evidence rebutting presumption]; *In re Raphael P.* (2002) 97 C.A.4th 716, 738, 118 C.R.2d 610 [where man seeking presumed father status presented *prima facie* evidence that he signed voluntary declaration of paternity at hospital, he was entitled to rely on official duty presumption to establish that hospital properly filed it and that it therefore had force of paternity judgment]; *Manriquez v. Gourley* (2003) 105 C.A.4th 1227, 1237, 130 C.R.2d 209 [fact that officer did not focus his eyes on defendant 100% of time while transporting him in his car after arresting him for driving under influence did not rebut presumption that he properly performed breath test, including requirement that defendant be under continuous observation for at least 15 minutes prior to collection of sample]; *Morgenstern v. Department of Motor Vehicles* (2003) 111 C.A.4th 366, 374, 4 C.R.3d 46 [even though officer failed to sign portion of sworn arrest report certifying that he obtained breath samples in regular course of duties, was qualified to operate equipment, and administered test in accordance with regulations, his signature at bottom of report was sufficient to trigger official duty presumption as to these matters]; *Taxara v. Gutierrez* (2003) 114 C.A.4th 945, 949, 951, 8 C.R.3d 172 [in driver's license suspension proceeding, driver failed to rebut presumption that blood-alcohol test requirements were complied with, including requirement that driver be observed continuously for 15 minutes before test; although officer administering test was not present during whole period, arresting officer was; citing *Manriquez, supra*]; *Marvin Lieblein v. Shewry* (2006) 137 C.A.4th 700, 725, 40 C.R.3d 547 [it was presumed that Department of Health Services mailed notice within 60 days, as required by former Welf.C. 14043.26(e)(1) (now Welf.C. 14043.26(h)(1)), to pharmacist that his application for continued enrollment as Medi-Cal pharmacist was rejected; pharmacist had burden of producing evidence that letter, which was dated within 60 days, was not timely mailed, and he made no such showing]; 2 McCormick 6th, §343.(2) *Official Conduct Challenged in Criminal Proceeding.*

(d) *(New) Postjudgment discovery by defendant sentenced to death or life without parole.* Where a defendant sentenced to death or life in prison without parole files a motion for postconviction discovery under P.C. 1054.9, the official duty presumption of *Ev.C.* 664 does not require the court to assume that the prosecution regularly performed its official duty at the time of trial and provided the defendant with whatever materials it was required to provide. Application of the presumption would require the defendant to prove the actual existence of the documents he or she is seeking before the court could order discovery. The Legislature did not intend this result. (*People v. Superior Court (Maury)* (2006) 145 C.A.4th 473, 484, 51 C.R.3d 670 [trial judge properly determined that defendant was not required to show that he had good faith basis for believing that requested materials actually existed and were in possession of prosecution].) *West's Key Number Digest*, Evidence k.83 et seq.



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### CHAPTER III - Burden of Proof and Presumptions

#### VIII. EVIDENCE CODE PRESUMPTIONS: BURDEN OF PROOF

##### E. Ordinary Consequences of Voluntary Act.

###### 1 *Witkin Cal. Evid. Burden* § 90

[§ 90] Ordinary Consequences of Voluntary Act.

(1) *General Presumption*. "A person is presumed to intend the ordinary consequences of his voluntary act." (*Ev.C.* 665, first sentence; see *People v. Sandoval* (1963) 222 C.A.2d 348, 351, 35 C.R. 227 [presumption supported finding of general criminal intent sufficient for conviction of assault with deadly weapon].)

(2) *Distinction: Consequences of Insured's Intentional Act*. In *Meyer v. Pacific Employers Ins. Co.* (1965) 233 C.A.2d 321, 43 C.R. 542, an action for a declaration of rights under a liability insurance policy, the court held that the presumption had no bearing on whether the consequences of plaintiff insureds' intentional act (the drilling of a water well on their property, thereby causing damage to their neighbors' buildings) were unexpected and thus accidental within the meaning of the policy. (233 C.A.2d 326.)

(3) *Exception: Crime Involving Specific Intent*. "This presumption is inapplicable in a criminal action to establish the specific intent of the defendant where specific intent is an element of the crime charged." (*Ev.C.* 665, second sentence.) The statutory exception reflects the holding of many decisions that it is error to instruct the jury in terms of the general presumption in such a case. (See *People v. Maciel* (1925) 71 C.A. 213, 218, 234 P. 877; 1 *Cal. Crim. Law* (3d), *Elements*, §6.) And the United States Supreme Court has declared that, whether regarded as a conclusive presumption or one shifting the burden of proof to the defendant, a jury instruction embodying it conflicts with the fundamental presumption of innocence and is constitutionally defective. (*Sandstrom v. Montana* (1979) 442 U.S. 510, 99 S.Ct. 2450, 2458, 2459, 61 L.Ed.2d 39, 49, 50, 51; *Francis v. Franklin* (1985) 471 U.S. 307, 105 S.Ct. 1965, 1977, 85 L.Ed.2d 344, 356 [reaffirming *Sandstrom* rule].)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Evidence k.68



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#### VIII. EVIDENCE CODE PRESUMPTIONS: BURDEN OF PROOF F. Jurisdiction of Court.

##### 1 Witkin Cal. Evid. Burden § 91

[§ 91] Jurisdiction of Court.

(1) *General Presumption.* "Any court of this state or the United States, or any court of general jurisdiction in any other state or nation, or any judge of such a court, acting as such, is presumed to have acted in the lawful exercise of its jurisdiction." (Ev.C. 666, first sentence; see *People v. Stoliker* (1961) 192 C.A.2d 263, 267, 13 C.R. 437, 4 Cal. Crim. Law (3d), *Jurisdiction and Venue*, §5 [presumption that superior court had jurisdiction to impose judgment and sentence on defendant for state robbery charges after he was released to federal authorities under writ of habeas corpus *ad prosequendum* and convicted on federal charges]; 8 Cal. Proc. (4th), *Attack on Judgment in Trial Court*, §5.)

The predecessor statute was interpreted as applicable only to a court of general jurisdiction; hence, there was no presumption of jurisdiction of an inferior court. (See *Santos v. Dondero* (1936) 11 C.A.2d 720, 722, 54 P.2d 764; 8 Cal. Proc. (4th), *Attack on Judgment in Trial Court*, §16.) The Evidence Code retained this qualification as to foreign courts, but eliminated it as to California and federal courts. The Law Revision Commission Comment to Ev.C. 666 states: "There is no reason to perpetuate this distinction insofar as the courts of California and of the United States are concerned. California's municipal and justice courts are served by able and conscientious judges and are no more likely to act beyond their jurisdiction than are the superior courts. Moreover, there is no reason to suppose that a superior court or a federal court is less respectful of its jurisdiction when acting in a limited capacity (for example, as a juvenile court) than it is when acting in any other capacity."

(2) *Exception: Direct Attack.* "This presumption applies only when the act of the court or judge is under collateral attack." (Ev.C. 666, second sentence; see *Starkweather v. Minarets Mining Co.* (1935) 5 C.A.4th 501, 503, 43 P.2d 321 [on "the direct attack of a judgment there is no presumption in favor of the existence of any fact essential to the jurisdiction of the court over the defendant"]; as to distinction between direct and collateral attack, see 8 Cal. Proc. (4th), *Attack on Judgment in Trial Court*, §16.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *General Presumption.* See *People v. Allegheny Cas. Co.* (2007) 41 C.4th 704, 715, 61 C.R.3d 689, 161 P.3d 198, 4 Cal. Crim. Law (3d), *Pretrial Proceedings, Supp.*, §103 [where nothing in record suggested trial court failed to declare forfeiture of bail in open court, it could be presumed that it performed that duty and acted in lawful exercise of its jurisdiction].



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#### VIII. EVIDENCE CODE PRESUMPTIONS: BURDEN OF PROOF

##### G. Death Presumed From 5 Years' Absence.

##### 1. Nature of Presumption and Proof of Absence.

##### *1 Witkin Cal. Evid. Burden § 92*

[§ 92] Nature of Presumption and Proof of Absence.

"A person not heard from in five years is presumed to be dead." (*Ev.C.* 667, amended in 1983 to reduce the period from 7 to 5 years; see *Benjamin v. District Grand Lodge* (1915) 171 C. 260, 266, 152 P. 731 [construing former statute]; *Estate of Bassi* (1965) 234 C.A.2d 529, 548, 44 C.R. 541; 45 Proof of Facts 3d 307; 6 So. Cal. L. Rev. 163.) This presumption has been criticized as arbitrary and undesirable (see 9 Wigmore (Chadbourn Rev.) §2531b; 2 McCormick 5th, §343), and absentee or missing persons statutes have been drafted to meet the need for administration without proof of death. (See *Prob.C.* 12400 et seq.; *Conservatorship of Geiger* (1992) 3 C.A.4th 127, 134, 135, 4 C.R.2d 252 [comparing presumptions of death contained in *Ev.C.* 667 and *Prob.C.* 12401]; 12 Summary (9th), *Wills and Probate*, §351 et seq.; see also Absence as Evidence of Death and Absentees' Property Act, 8A U.L.A. (Master Ed.), p. 1.)

Usually, some showing must be made of search and inquiry to locate the absentee before the presumption will arise. (See 45 Proof of Facts 3d 318; 99 A.L.R.2d 307, 312.) But there is no fixed rule, and the circumstances surrounding the disappearance may render search unnecessary. (See *Estate of Bassi*, *supra*, 234 C.A.2d 549; 99 A.L.R.2d 307, 350.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *In re Starr* (2002) 104 C.A.4th 487, 496, 128 C.R.2d 282 [proper test under *Prob.C.* 12401 is whether missing person's absence is capable of satisfactory explanation other than by death, not whether death is most satisfactory explanation for absence]; 2 McCormick 6th, §343.

*Cross-Reference:* 14 Summary (10th), *Wills and Probate*, §365 et seq.



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## CHAPTER III - Burden of Proof and Presumptions

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## G. Death Presumed From 5 Years' Absence.

## 2. Presumption of Life During Period.

1 *Witkin Cal. Evid. Burden* § 93

[§ 93] Presumption of Life During Period.

Normally, it is presumed that life continues through the entire statutory period. (*People v. Niccoli* (1951) 102 C.A.2d 814, 819, 228 P.2d 827 [decided under former statute requiring absence of 7 years]; *Liberty Transport v. Harry W. Gorst Co.* (1991) 229 C.A.3d 417, 441, 442, 280 C.R. 159 [in action against insurer that denied claim arising from disappearance of insured's employee with insured's truck on ground employee had stolen truck, it was improper to instruct jury on presumption, even though at time of trial employee had been gone 61/2 years, where at time of insured's claim, employee had been missing only 15 months].) However, evidence that the missing person was subject to some specific peril or illness, or other circumstances, may justify the inference of death prior thereto. Thus, in *Estate of Christin* (1933) 128 C.A. 625, 631, 17 P.2d 1068, a husband escaped from an insane asylum and was not heard from for over 7 years. His wife died 5 years after his escape. *Held*, evidence that he was seriously ill at the time of his escape justified the conclusion that he predeceased her. (See also *Pollack v. Hamm* (1970) 3 C.3d 264, 269, 90 C.R. 181, 475 P.2d 213 [judge lost at sea during boating accident presumed dead approximately 3 weeks later].)

On the other hand, in *People v. Niccoli*, *supra*, appellant, surety on defendant's bail bond, sought to avoid forfeiture of bail by a showing of defendant's death (P.C. 1305). The proof was that defendant disappeared, leaving his car near an airport, and that an intensive search failed to locate him. *Held*, evidence of disappearance *without motive* is admissible to "quicken the time," but, where a *motive* or doubt as to the reason for disappearance exists, the presumption of continued life remains. Here, the evidence showed that defendant was penniless, that he had been indicted, had removed labels from his clothing and license plates from his car, was a member of a group on whom a murderous assault had been made, etc., and thus had a good reason for flight. Accordingly, the court's discretion in ordering forfeiture was upheld. (102 C.A.2d 819, 820.)

It has been said that neither the presumption of death nor of continuing life has any place in a trial for homicide. Thus, in *People v. Scott* (1959) 176 C.A.2d 458, 501, 1 C.R. 600, the victim had disappeared and the corpus delicti was established entirely by circumstantial evidence. (See 1 *Cal. Crim. Law* (3d), *Elements*, §52.) Defendant's contention that the presumption of life negated the circumstantial evidence of death was rejected as wholly untenable. (176 C.A.2d 505.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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CHAPTER III - Burden of Proof and Presumptions

VIII. EVIDENCE CODE PRESUMPTIONS: BURDEN OF PROOF  
H. Unlawful Intent From Unlawful Act.

*1 Witkin Cal. Evid. Burden § 94*

[§ 94] Unlawful Intent From Unlawful Act.

"An unlawful intent is presumed from the doing of an unlawful act. This presumption is inapplicable in a criminal action to establish the specific intent of the defendant where specific intent is an element of the crime charged." (*Ev.C.* 668, repeating the exception stated in *Ev.C.* 665, *supra*, §90, for the same reason; see 1 *Cal. Crim. Law* (3d), *Elements*, §§3, 6.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Criminal Law k.312; Evidence k.64



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### CHAPTER III - Burden of Proof and Presumptions

#### VIII. EVIDENCE CODE PRESUMPTIONS: BURDEN OF PROOF

##### I. Negligence Per Se.

##### *1 Witkin Cal. Evid. Burden § 95*

[§ 95] Negligence Per Se.

(1) *General Presumption.* *Ev.C. 669* codifies the presumption that unexcused conduct below the standard prescribed by a statute or public regulation may be considered negligence per se. Following established case law, the statute classifies the presumption as one affecting the burden of proof. (See *DiRosa v. Showa Denko K.K.* (1996) 44 C.A.4th 799, 808, 52 C.R.2d 128 [federal statute or regulation may be adopted as standard of care in state negligence action]; BAJI (8th ed.), No. 3.45; 6 *Summary* (9th), *Torts*, §818 et seq.)

(2) *Proximate Cause Requirement.* In *Traxler v. Varady* (1993) 12 C.A.4th 1321, 16 C.R.2d 297, plaintiff sued defendants, a hospital and three physicians, for negligence after learning that she had received HIV-infected blood. Defendants had performed a dilation and curettage on plaintiff in an attempt to stop her from hemorrhaging, but failed to follow state regulations requiring that tissue removed during the procedure be sent to a pathologist. Plaintiff contended that this failure constituted negligence per se, but the trial judge refused to give an instruction to that effect. *Held*, refusal of the instruction was proper. There was no causal relationship between the decision to give plaintiff a transfusion and the failure to send the tissue to a pathologist. The transfusion had been ordered in response to plaintiff's loss of blood, independent of the presence or absence of a pathology finding. Thus, the alleged violation of the regulation did not proximately cause plaintiff's injury. (12 C.A.4th 1329.)

(3) *Exception: Local Rules and Policies.* In *Peterson v. Long Beach* (1979) 24 C.3d 238, 244, 155 C.R. 360, 594 P.2d 477, 6 *Summary* (9th), *Torts*, §822, the court held that guidelines for the discharge of a firearm, in a police department's manual, were standards having the force of law; hence, the presumption of *Ev.C. 669* applied where an officer violated the guidelines.

The Legislature's initial reaction to *Peterson* was to enact *Ev.C. 669.1*, providing that a local rule, regulation, or guideline setting forth the standards of conduct for *peace officers* in the use of deadly force was not to be considered a statute, ordinance, or regulation for purposes of *Ev.C. 669*, supra. In 1983, *Ev.C. 669.1* was repealed and reenacted in a broadened form. The revised statute provides that a state or local rule, policy, manual, or guideline setting forth standards of conduct or guidelines for *public employees* in the conduct of their employment will not be considered a statute, ordinance, or regulation of a public entity within the meaning of *Ev.C. 669*, unless formally adopted as a statute, ordinance, or regulation.

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *General Presumption.* See CACI, No. 418 [presumption of negligence per se].

*Cross-Reference:* 6 *Summary* (10th), *Torts*, §871 et seq.

(3) *Exception: Local Rules and Policies.*

*Cross-Reference:* 6 *Summary* (10th), *Torts*, §877.





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VIII. EVIDENCE CODE PRESUMPTIONS: BURDEN OF PROOF  
J. Official Writings Affecting Property.

*1 Witkin Cal. Evid. Burden § 96*

[§ 96] Official Writings Affecting Property.

The presumptions stated in *Ev.C. 1600* (official records of documents affecting property interests) and *Ev.C. 1603* (deeds by officers in pursuance of court process) originally did not specify the applicable burden. The statutes were amended in 1967 to classify the presumptions among those affecting the burden of proof. (See 2 *Cal. Evidence (4th)*, *Documentary Evidence*, §57.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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### CHAPTER III - Burden of Proof and Presumptions

#### VIII. EVIDENCE CODE PRESUMPTIONS: BURDEN OF PROOF

##### K. Impact of Zoning Ordinance.

*1 Witkin Cal. Evid. Burden § 97*

[§ 97] Impact of Zoning Ordinance.

(1) *In General.* Under *Ev.C. 669.5*, certain zoning ordinances are presumed to have an impact on the supply of residential units available in an area that includes territory outside the jurisdiction of the city or county; hence, in an action challenging the validity of the ordinance, the city or county has the burden of proof that the ordinance is necessary for the protection of the public health, safety, or welfare of the population of the city or county. *Ev.C. 669.5(a)* specifies the types of zoning ordinance giving rise to this presumption:

(a) Ordinances limiting the building permits that may be issued for residential construction.

(b) Ordinances limiting the buildable lots that may be developed for residential purposes.

(c) Ordinances changing the standards of residential development on vacant land so as to violate *Govt.C. 65913.1* (requiring a zoning authority to zone sufficient vacant land for residential use; see *8 Summary (9th), Constitutional Law*, §834).

*Ev.C. 669.5* recognizes that in certain instances the public health, safety, and welfare may warrant the enactment of ordinances that restrict the number of housing units that may be built; but it requires that local governments "exercise these powers only in a manner consistent with a proper respect for regional housing needs." (*Building Industry Assn. v. Superior Court* (1989) 211 C.A.3d 277, 292, 259 C.R. 325.)

(2) *Illustrations.* In *Building Industry Assn. v. Camarillo* (1986) 41 C.3d 810, 817, 226 C.R. 81, 718 P.2d 68, the issue was whether *Ev.C. 669.5* applies to initiative ordinances other than those adopted prior to the effective date of the statute and specifically described in *Ev.C. 669.5(d)*. Resolving an ambiguity arising from the statute's use of the term "governing body," the court held that *Ev.C. 669.5* applies to initiative measures adopted after the statute's effective date. "Concluding that section 669.5 does not apply to initiative measures would render subdivision (d) meaningless." It would also be "inconsistent with the statutory language and with the purpose of the statute, which is to support the public policy favoring construction of affordable housing." (41 C.3d 820; see 14 *Pepperdine L. Rev.* 194.)

In *Murphy v. Alameda* (1992) 11 C.A.4th 906, 14 C.R.2d 329, plaintiffs challenged the validity of a city charter amendment adopted by initiative and an ordinance implementing the amendment, both of which were enacted before the effective date of *Ev.C. 669.5*. The amendment declared that no multiple dwelling units should be built in the city, and the ordinance defined the prohibited multiple dwelling units. The trial judge ruled that *Ev.C. 669.5* was inapplicable to plaintiffs' attack on the validity of the amendment and ordinance. *Held*, the ruling was incorrect.

(a) Even though the challenged provisions did not impose any numerical limits on permits or lots, but instead regulated the type of units that could be constructed, it is the practical effect of such provisions, not their literal terms, that dictates whether the statute applies. The growth restrictions at issue effectively limited to zero the number of permits that could be issued for certain kinds of residential construction. Thus, the ordinance unquestionably fell within the scope of the statute. (11 C.A.4th 911.)

(b) The trial judge wrongly assumed that application of *Ev.C. 669.5* to this case would give the statute retroactive effect. However, because the statute does not change the legal consequences of the parties' past conduct, it operates prospectively. It simply subjects previously enacted ordinances to a rebuttable presumption of impact on the housing supply and places on the local entity a new burden of proof. (11 C.A.4th 912.)

(c) Even if it is assumed that application of the statute in this case would be retroactive, the Legislature intended that it so apply. "By expressly declaring that the section should not apply only to *certain* ordinances adopted by initiative or referendum adopted prior to its effective date, the Legislature impliedly indicated that it should apply to *all* other ordinances, whether adopted by legislative bodies or by the voters, including all ordinances adopted by initiative prior to its effective date but not specifically exempted." (11 C.A.4th 914.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General.*

*Cross-Reference:* 8 *Summary* (10th), *Constitutional Law*, §1019.



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VIII. EVIDENCE CODE PRESUMPTIONS: BURDEN OF PROOF  
L. Payment of Check by Bank.

*1 Witkin Cal. Evid. Burden § 98*

[§ 98] Payment of Check by Bank.

*Ev.C. 670* provides that in a dispute concerning payment by check, a copy of the check produced in accordance with *Ev.C. 1550* (see *2 Cal. Evidence (4th), Documentary Evidence, §46*), together with the original bank statement reflecting payment of the check by the bank on which it was drawn or a copy of the statement produced in the same manner, creates a presumption that the check has been paid.

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### CHAPTER III - Burden of Proof and Presumptions

#### IX. FORMER PRESUMPTIONS NOT RESTATED AS PRESUMPTIONS

##### A. Presumptions Eliminated.

##### *1 Witkin Cal. Evid. Burden § 99*

##### [§ 99] Presumptions Eliminated.

The Evidence Code restated as presumptions only about half of those set forth in former C.C.P. 1963. (For the listing and dispositions, see the Legislative Committee Comment on repealed C.C.P. 1963 contained in 7 Cal. Law Rev. Com. Reports, p. 1312.) Some were reclassified as general maxims (*infra*, §100), some as rules of burden of proof (*infra*, §101), and some as bases of permissible inferences (*infra*, §102).

Others were wholly eliminated:

(1) Former C.C.P. 1963(14), that a person acting in a public office was regularly appointed to it. This was discontinued as "unnecessary, inaccurate, and misleading," the subject being adequately covered by the *de facto* officer doctrine. (Legislative Committee Comment on repealed C.C.P. 1963.)

(2) Former C.C.P. 1963(18), that matters within an issue were passed on by the jury, and matters within an arbitration were passed on by the arbitrators. This was discontinued as useless, the subject being covered by the doctrine of *res judicata* and principles of appellate review. (Legislative Committee Comment on repealed C.C.P. 1963.)

(3) Former C.C.P. 1963(21), that a promissory note or bill of exchange was given or indorsed for sufficient consideration. This is covered by the Negotiable Instruments Law as restated in the Commercial Code. (U.C.C. 3303; 3 *Summary* (9th), *Negotiable Instruments*, *Supp.*, §206.)

(4) Former C.C.P. 1963(22), that an indorsement of a negotiable note or bill of exchange was made at the time and place of its making. The Commercial Code now occupies the field. (Legislative Committee Comment on repealed C.C.P. 1963.)

(5) Former C.C.P. 1963(29), that persons acting as copartners have entered into a contract of copartnership, was discontinued as unnecessary, the subject being covered by the doctrine of ostensible authority. (Legislative Committee Comment on repealed C.C.P. 1963; see 2 *Summary* (9th), *Agency and Employment*, §93.)

(6) Former C.C.P. 1963(38), that uninterrupted public use of land for 5 years as a burial ground, with the owner's unrestricted consent, is presumptive evidence of intention to dedicate the land for that purpose. This presumption, never applied in a reported case, was discontinued as unnecessary in view of the substantive law of dedication. (Legislative Committee Comment on repealed C.C.P. 1963; see 4 *Summary* (9th), *Real Property*, §120 et seq.)

(7) Former C.C.P. 1963(39), that there was a good and sufficient consideration for a written contract. The same presumption is contained in C.C. 1614. (See 1 *Summary* (9th), *Contracts*, §211.)

(8) Former C.C.P. 1963(40), that property owned at death by a person divorced more than 4 years prior thereto is separate property. This is incorporated in *Family C. 802*, not as a presumption of separate property, but as an exception to the general presumption of community property. (See *11 Summary (9th), Community Property, §95.*)

(9) Former C.C.P. 1847, that a witness is presumed to speak the truth, and that the "presumption" may be "repelled" by impeaching evidence, was eliminated; there is no such presumption, and impeachment is covered by other sections of the Code. (Law Rev. Com. Comment to repealed C.C.P. 1847; see *3 Cal. Evidence (4th), Presentation at Trial, §258 et seq.*)

**SUPPLEMENT:** [This section is current through the latest supplement]

(3) *Promissory note given for sufficient consideration:*

*Cross-Reference: 4 Summary (10th), Negotiable Instruments, §29.*

(5) *Persons acting as copartners have entered into contract:*

*Cross-Reference: 3 Summary (10th), Agency and Employment, §144.(6) Uninterrupted public use of land as intention to dedicate:*

*Cross-Reference: 12 Summary (10th), Real Property, §239 et seq.*

(7) *Good and sufficient consideration for written contract:*

*Cross-Reference: 1 Summary (10th), Contracts, §206.*

(8) *Property owned at death by divorced person:*

*Cross-Reference: 11 Summary (10th), Community Property, §15.*



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#### IX. FORMER PRESUMPTIONS NOT RESTATED AS PRESUMPTIONS

##### B. Presumptions Restated as Maxims.

##### *1 Witkin Cal. Evid. Burden § 100*

[§ 100] Presumptions Restated as Maxims.

Part 4 of Division IV of the Civil Code, entitled "Maxims of Jurisprudence," sets forth a number of general propositions "intended not to qualify any of the foregoing provisions of this code, but to aid in their just application." (C.C. 3509.) Included are such statements as "No one should suffer by the act of another" (C.C. 3520), "For every wrong there is a remedy" (C.C. 3523), and "No man is responsible for that which no man can control" (C.C. 3526).

According to the Legislative Committee Comment on C.C. 3545 et seq. (see 7 Cal. Law Rev. Com. Reports, p. 1293), the matters contained in several subdivisions of former C.C.P. 1963 did not fall within the definition of a presumption (*Ev.C. 600*, supra, §52) and were commonly cited in appellate opinions as makeweights in cases where the decision actually rested on a more basic ground. Thus, they were similar in purpose to the other maxims in Civil Code, Division IV, Part 4, and were accordingly added to that Code, as follows:

(1) C.C. 3545: "Private transactions are fair and regular." (Superseding former C.C.P. 1963(19); see *Janise v. Bryan* (1948) 89 C.A.2d Supp. 933, 943, 201 P.2d 466 [former presumption described as equivalent to a presumption of good faith].)

(2) C.C. 3546: "Things happen according to the ordinary course of nature and the ordinary habits of life." (Superseding former C.C.P. 1963(28), discussed in *Pfingsten v. Westenhaver* (1952) 39 C.2d 12, 21, 24, 244 P.2d 395 [tractor-trailer must have been carrying cargo of fuel oil immediately prior to accident, because, in ordinary course of nature, it would not have been empty before accident and full immediately thereafter].)

(3) C.C. 3547: "A thing continues to exist as long as is usual with things of that nature." (Superseding former C.C.P. 1963(32); on this former "presumption of continuity," see *Pfingsten v. Westenhaver*, supra, 39 C.2d 21; *Estate of Fosselman* (1957) 48 C.2d 179, 186, 308 P.2d 336; *Singer v. Marx* (1956) 144 C.A.2d 637, 646, 301 P.2d 440 [evidence that child threw rocks at people in 1952 justified presumption that his proclivities continued through 1953 when he threw again; "[t]raits of character and habits of conduct are in their nature continuous"].)

(4) C.C. 3548: "The law has been obeyed." (Superseding former C.C.P. 1963(33); on the former statute, see *Estate of Neilson* (1962) 57 C.2d 733, 745, 22 C.R. 1, 371 P.2d 745.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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IX. FORMER PRESUMPTIONS NOT RESTATED AS PRESUMPTIONS

C. Presumptions Restated as Rules of Burden of Proof.

*1 Witkin Cal. Evid. Burden § 101*

[§ 101] Presumptions Restated as Rules of Burden of Proof.

Three important former presumptions were restated in terms of the burden of proof on the party against whom the presumption had operated:

(1) The presumption of innocence of crime or wrong (former C.C.P. 1963(1)), now the burden of proving that a person is guilty of crime or wrongdoing. (*Ev.C. 520, supra, §14.*)

(2) The presumption of due care (former C.C.P. 1963(4)), now the burden of proving failure to exercise due care. (*Ev.C. 521, supra, §15.*)

(3) The judicially created presumption of sanity, now the burden of proving insanity. (*Ev.C. 522, supra, §16.*)

**SUPPLEMENT:** [This section is current through the latest supplement]





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##### D. Presumptions Treated as Bases for Inferences.

###### *1 Witkin Cal. Evid. Burden § 102*

[§ 102] Presumptions Treated as Bases for Inferences.

Some matters, formerly stated as presumptions, appear upon analysis not to meet the test of a law-directed presumption (*supra*, §52), and, whether or not restated in the Evidence Code, are treated as bases for permissible inferences that may be drawn by the trier of fact. These are:

(1) Evidence wilfully suppressed would be adverse. (Former C.C.P. 1963(5), restated in *Ev.C. 412* and *Ev.C. 413*; see *3 Cal. Evidence (4th), Presentation at Trial*, §115 et seq.)

(2) Available higher evidence would be adverse when inferior evidence is offered. (Former C.C.P. 1963(6), restated in *Ev.C. 412*; see *3 Cal. Evidence (4th), Presentation at Trial*, §114.)

(3) The ordinary course of business was followed. (Former C.C.P. 1963(20).) This was discontinued on the ground that evidence of business custom may or may not support an inference that the custom was followed on a particular occasion. (See *Ev.C. 1105*; *1 Cal. Evidence (4th), Circumstantial Evidence*, §67.) "There is no reason to compel the trier of fact to find that the custom was followed by applying a presumption." (Legislative Committee Comment on repealed C.C.P. 1963 (7 Cal. Law Rev. Com. Reports, p. 1314).)

(4) Identity of person could be presumed from identity of name. (Former C.C.P. 1963(25).) This was discontinued on the ground that the matter should be left to inference. (See Legislative Committee Comment on former C.C.P. 1963 (7 Cal. Law Rev. Com. Reports, p. 1314); *1 Cal. Evidence (4th), Circumstantial Evidence*, §130.)

(5) Acquiescence followed from a belief in the right or fact. (Former C.C.P. 1963(27).) This was occasionally applied to statements made in the presence of a person who remained silent, but it was discontinued on the ground that the matter should be left to inference. (See Legislative Committee Comment on former C.C.P. 1963 (7 Cal. Law Rev. Com. Reports, p. 1314); *1 Cal. Evidence (4th), Hearsay*, §103.)

(6) A man and woman depicting themselves as husband and wife have entered into a lawful contract of marriage. (Former C.C.P. 1963(30).) This is more accurately restated in expanded form as a hearsay exception for evidence of community reputation, which may support an inference. (*Ev.C. 1314*; see *1 Cal. Evidence (4th), Hearsay*, §284.)

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## CHAPTER III - Burden of Proof and Presumptions

## X. PRESUMPTIONS NOT IN EVIDENCE CODE

## A. In General.

## 1. Nature and Sources.

*1 Witkin Cal. Evid. Burden § 103*

[§ 103] Nature and Sources.

There are many presumptions in California law which are not restated in the Evidence Code. Grouping them according to their origin or source, rather than subject matter, they are of two kinds:

(1) *Presumptions Created by Legislature.* The legislative power to create presumptions, in civil and criminal cases, is well established. (See *People v. Fitzgerald* (1936) 14 C.A.2d 180, 191, 58 P.2d 718; *People v. Superior Court (Steven S.)* (1981) 119 C.A.3d 162, 175, 173 C.R. 788, citing the text; *Conservatorship of Geiger* (1992) 3 C.A.4th 127, 135, 4 C.R.2d 252, citing the text; 2 McCormick 5th, §§345, 347; 4 Wigmore (Chadbourn Rev.) §1356; see also *supra*, §62 [criminal cases].) Accordingly, presumptions now contained in any of the other codes, or enacted by future Legislatures as parts of some other codes, will have to be sought in those statutory sources. (For illustrations of statutes currently in force, see *infra*, §105 et seq.)

The Law Revision Commission's plan was, in general, to restate in the Evidence Code the retained presumptions listed in the repealed evidence sections of the Code of Civil Procedure, together with a few important judicially created presumptions. No attempt was made to extract the material from other codes, or to codify all judicially created presumptions.

The Evidence Code does, however, state a commonly accepted rule of interpretation for statutes that use the phrase "prima facie evidence" rather than the more precise term "presumption": "A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a rebuttable presumption." (*Ev.C.* 602; see *Hansen v. G & G Trucking Co.* (1965) 236 C.A.2d 481, 492, 46 C.R. 186; *infra*, §104.)

(2) *Presumptions Created by Courts.* California courts, following the theory that presumptions were evidence because so classified in the Code, refused to apply the designation to any not listed in a statute. But some of the nonstatutory "inferences" were given substantially the effect of presumptions (see *supra*, §49), and occasionally the supposed distinction was itself overlooked, as in the case of the judicially recognized presumptions of sanity and due execution (*supra*, §16; *infra*, §113). (See also, on judicial recognition of common law presumptions, *Yaeger v. City Council* (1965) 231 C.A.2d 557, 561, 41 C.R. 904.)

No such distinction can be made under the Evidence Code. The power of the higher courts to create presumptions is expressly recognized by *Ev.C.* 600 (assumption that "the law requires to be made") read in connection with *Ev.C.* 160 ("law" includes "decisional law"). Hence, an existing judicially created nonstatutory "inference," if it meets the test of a presumption, should be regarded as, and given the effect of, a presumption. (See *infra*, §113.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Presumptions Created by Legislature.* See 2 McCormick 6th, §§345, 347.



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## CHAPTER III - Burden of Proof and Presumptions

## X. PRESUMPTIONS NOT IN EVIDENCE CODE

## A. In General.

## 2. The Problem of Classification.

*1 Witkin Cal. Evid. Burden § 104*

## [§ 104] The Problem of Classification.

The Evidence Code, pursuant to its stated criteria (supra, §§54, 56), classifies many presumptions as affecting either the burden of producing evidence (supra, §67 et seq.), or the burden of proof (supra, §86 et seq.). Many others, created by statute or judicial decision, remain unclassified. The Law Revision Commission, in what seems to be careful understatement, observes: "In some cases it may be difficult to determine whether a particular presumption is a presumption affecting the burden of proof or a presumption affecting the burden of producing evidence." (Law Rev. Com. Comment to *Ev.C.* 660; see *People v. Superior Court (Steven S.)* (1981) 119 C.A.3d 162, 175, 173 C.R. 788, citing the text.)

Despite the difficulty, the task is one that the courts must undertake from time to time, as the situations arise. The guidelines will be the criteria of the Evidence Code, but the effect that prior decisions gave to particular presumptions will undoubtedly be considered.

The Commission offers one suggestion: A statute creating a presumption by use of the phrase "prima facie evidence" may have a public policy objective, but it is more likely that such a statute was not intended to affect the burden of proof. (Law Rev. Com. Comment to *Ev.C.* 602.) This section may call for a reexamination of prior California cases. Former C.C.P. 1833, defining "prima facie evidence," described it as sufficient "until contradicted *and overcome*" by other evidence; and, when this definition was read in connection with a statute making some act "prima facie" evidence of a fact, the effect was to shift the burden of proof. (See *Miller & Lux v. Secara* (1924) 193 C. 755, 770, 227 P. 171; *Overton v. Harband* (1935) 6 C.A.2d 455, 460, 44 P.2d 484; *People v. Van Gorden* (1964) 226 C.A.2d 634, 637, 38 C.R. 265.) With the repeal of C.C.P. 1833, there will be no automatic classification of such statutes in the burden-of-proof-shifting group.

Nevertheless, as the Law Revision Commission Comment to *Ev.C.* 602 states: "In some instances, these statutes have been enacted for reasons of public policy that require them to be treated as presumptions affecting the burden of proof." The Comment cites *People v. Schwartz* (1947) 31 C.2d 59, 63, 187 P.2d 12, and *People v. Mahoney* (1939) 13 C.2d 729, 732, 91 P.2d 1029, both dealing with Rev.C. 6714, on certificate of delinquency in sales tax. (See 9 *Summary* (9th), *Taxation*, §319.) To these may be added *People v. Van Gorden*, supra, a condemnation suit in which plaintiff, the state, relied on the declaration of public necessity by the Director of Parks and Recreation. Former Pub.Res.C. 5006.1 made this declaration "prima facie evidence." *Held*, "[u]ntil the prima facie case ... was overcome by contrary evidence," the plaintiff was under no duty to offer evidence. (226 C.A.2d 640.) (On the present effect of a resolution of public necessity, see 8 *Summary* (9th), *Constitutional Law*, §986.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Cross-References:* 9 *Summary* (10th), *Taxation*, §369; 8 *Summary* (10th), *Constitutional Law*, §1200.



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### CHAPTER III - Burden of Proof and Presumptions

#### X. PRESUMPTIONS NOT IN EVIDENCE CODE

##### B. Presumptions Stated in Other Codes.

##### 1. Contracts and Commercial Transactions.

##### *1 Witkin Cal. Evid. Burden § 105*

[§ 105] Contracts and Commercial Transactions.

(1) *Consideration for Written Contract.* "A written instrument is presumptive evidence of a consideration." (C.C. 1614; see *Estate of McConnell* (1936) 6 C.2d 493, 499, 58 P.2d 639; *Brooks v. Fidelity Savings & Loan Assn.* (1938) 26 C.A.2d 114, 116, 78 P.2d 1175; *Hamilton v. Abadjian* (1947) 30 C.2d 49, 52, 179 P.2d 804; *Estate of Lynch* (1978) 83 C.A.3d 296, 302, 147 C.R. 861; 1 *Summary* (9th), *Contracts*, §211.)

In *Rancho Santa Fe Pharmacy v. Seyfert* (1990) 219 C.A.3d 875, 268 C.R. 505, the issue was whether the presumption of consideration affected the burden of proof or only the burden of producing evidence. The court first pointed out that, although the particular burden has been legislatively declared as to a number of presumptions (see *supra*, §§67 et seq., 86 et seq.), the presumption of C.C. 1614 has not been so classified. (219 C.A.3d 883.) The court then gave two reasons for holding that only the burden of producing evidence was affected by the presumption:

(a) No public policy concern appears: "We think section 1614's presumption exists because the Legislature thought it was experientially sound. It is logically founded on the recognition that, in most cases, where there is writing, there is consideration. Section 1614 therefore merely relieves the party producing the written document of the need to make the initial showing on what in most cases will be a nonissue, i.e., consideration." (219 C.A.3d 883.)

(b) "We also note section 1614 involves the debtor-creditor relationship. This fact is significant since the Legislature has determined a number of presumptions arising from the debtor-creditor relationship affect the burden of producing evidence. For example, the presumption that money delivered to a person was owed him or her is one affecting the burden of production. (*Evid. Code*, §631.) Also affecting this burden is the presumption that an obligation in the creditor's possession has not been paid. (*Evid. Code*, §635.) In cases giving rise to these presumptions, then, the creditor retains the burden of proving the presumed fact when the debtor produces sufficient evidence to call the validity of the presumption into question." (219 C.A.3d 883; on *Ev.C.* 631, 635, see *supra*, §§68, 72.)

(2) *Joint and Several Contracts.* An obligation imposed on a number of persons is presumed to be joint (C.C. 1431); but where all the parties receive some benefit from the consideration, or the promise is in the singular number and is executed by all, the obligation is presumed to be joint and several (C.C. 1659, 1660). (See *Dewing v. Chow* (1933) 129 C.A. 441, 445, 19 P.2d 12; *Kaneko v. Okuda* (1961) 195 C.A.2d 217, 227, 15 C.R. 792; 1 *Summary* (9th), *Contracts*, §674 et seq.)

(3) *Penalties and Liquidated Damages.* Former C.C. 1671 provided that the parties to a contract could agree on an amount presumed to be the amount of damage sustained by a breach. The statute thus created a rebuttable presumption

that affected the burden of producing evidence. (See *United Savings & Loan Assn. v. Reeder Dev. Corp.* (1976) 57 C.A.3d 282, 296, 129 C.R. 113; *Barbera v. Sokol* (1980) 101 C.A.3d 725, 732, 161 C.R. 843.) In 1977, the statute was extensively revised (see 1 *Summary* (9th), *Contracts*, §528 et seq.) to provide "a new general rule favoring the enforcement of liquidated damages provisions except against a consumer in a consumer case"; as to consumer cases, the statutory revisions are "not intended to alter the substance" of the former statute "as interpreted by the courts." (Law Rev. Com. Comment to 1977 revision of C.C. 1671.) Accordingly, in consumer cases the rebuttable presumption should remain in effect.

(4) *Advantage Obtained by Fiduciary*. In a transaction between a trustee and beneficiary, in which the trustee obtains an advantage, the trustee's fiduciary duties are presumed to be violated. (*Prob.C. 16004(c)*, formerly C.C. 2235; see *Bradner v. Vasquez* (1954) 43 C.2d 147, 151, 272 P.2d 11; *Rader v. Thrasher* (1962) 57 C.2d 244, 250, 18 C.R. 736, 368 P.2d 360; *People v. Hewlett* (1951) 108 C.A.2d 358, 373, 239 P.2d 150; *Rebmann v. Major* (1970) 5 C.A.3d 684, 688, 85 C.R. 399; 13 *Hastings L. J.* 1 [advantage obtained by attorney]; 1 *Summary* (9th), *Contracts*, §425; 1 *Cal. Proc.* (4th), *Attorneys*, §119; *infra*, §158.) *Prob.C. 16004(c)* specifies that the presumption affects the burden of proof.

(5) *Negotiable Instruments*. A signature is presumed genuine or authorized. (U.C.C. 3308; see 3 *Summary* (9th), *Negotiable Instruments*, *Supp.*, §218.) This presumption, and all others in the Commercial Code except as otherwise provided in U.C.C. 1202, affect only the burden of producing evidence. (U.C.C. 1210; see *Security Pac. Nat. Bank v. Associated Motor Sales* (1980) 106 C.A.3d 171, 178, 165 C.R. 38 [U.C.C. 3505(a): presumption of dishonor of instrument]; 3 *Summary* (9th), *Sales*, §19.) U.C.C. 1202, dealing with the evidentiary effect of a bill of lading and other documents issued by a third party, provides that the document, in due form, is presumed to be authentic and genuine, and if found authentic and genuine, the facts stated therein are presumed to be true. The first presumption merely affects the burden of producing evidence; the second presumption affects the burden of proof. (See 3 *Summary* (9th), *Sales*, §19.)

(6) *Sales To Injure Competitors*. The selling or giving away of an article below cost or in limited quantities is rebuttably presumed to have been done with an intent to injure competitors. (*B. & P.C. 17071, 17071.5*; see *Dooley's Hardware Mart v. Food Giant Markets* (1971) 21 C.A.3d 513, 517, 518, 98 C.R. 543 [presumption created by *B. & P.C. 17071.5* is one affecting burden of proof]; *Western Union Financial Services v. First Data Corp.* (1993) 20 C.A.4th 1530, 1540, 25 C.R.2d 341 [presumption rebutted by evidence of defendant's good faith intent to use below-cost money transfer services to increase and maintain customer base].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Consideration for Written Contract*.

*Cross-Reference:* 1 *Summary* (10th), *Contracts*, §206.

(2) *Joint and Several Contracts*.

*Cross-Reference:* 1 *Summary* (10th), *Contracts*, §108 et seq.(3) *Penalties and Liquidated Damages*.

*Cross-Reference:* 1 *Summary* (10th), *Contracts*, §533 et seq.

(4) *Advantage Obtained by Fiduciary*.

*Cross-Reference:* 1 *Summary* (10th), *Contracts*, §318.

(5) *Negotiable Instruments*. In 2006, U.C.C. 1202 was repealed and replaced by U.C.C. 1307 without substantive change, and U.C.C. 1210 was repealed. Under U.C.C. 1206, added the same year, when the Code creates a presumption regarding a fact, or provides that a fact is presumed, "the trier of fact must find the existence of the fact unless and until evidence is introduced that supports a finding of its nonexistence."

*Cross-References: 4 Summary (10th), Negotiable Instruments, §41; 4 Summary (10th), Sales, §19.*





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#### X. PRESUMPTIONS NOT IN EVIDENCE CODE

##### B. Presumptions Stated in Other Codes.

##### 2. Property.

##### 1 Witkin Cal. Evid. Burden § 106

[§ 106] Property.

(1) *Appropriation of Property for Public Use.* In eminent domain proceedings, appropriations to public use and to more necessary public use and to the best and most necessary public use were made subject to presumptions by statutes enacted in 1975. (See *C.C.P.* 1240.660, 1240.670, 1240.680; 8 *Summary* (9th), *Constitutional Law*, §981.)

(2) *Community and Separate Property.* (a) Property acquired during marriage is presumed community. (*Family C.* 760; see *In re Marriage of Haines* (1995) 33 *C.A.4th* 277, 289, 290, 39 *C.R.2d* 673, *supra*, §87 ["This is a rebuttable presumption affecting the burden of proof"]; 11 *Summary* (9th), *Community Property*, §95.) This presumption does not apply to property owned at death by a person whose marriage was dissolved more than 4 years prior thereto. (*Family C.* 802; see 11 *Summary* (9th), *Community Property*, §95.) (b) Property acquired by a married woman prior to January 1, 1975, by an instrument in writing is presumed to be separate property; but if the property was acquired prior to that date by a husband and wife by an instrument in which they are described as husband and wife, it is presumed community unless a different intention is expressed in the instrument. (*Family C.* 803; see 11 *Summary* (9th), *Community Property*, §§99, 101.)

(3) *Compensation for Breach of Agreement To Transfer Real Property.* The presumption that breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation is a presumption affecting the burden of proof. However, the presumption is conclusive in the case of a single-family dwelling that the party seeking performance intends to occupy. (*C.C.* 3387; see 11 *Summary* (9th), *Equity*, §25.)

(4) *Exclusive Right To Use Fictitious Name.* The first person to file a fictitious business name in a county is rebuttably presumed to have the exclusive right to use that name, or a confusingly similar trade name, as his or her trade name, if the person is actually engaged in a trade or business using that name in the county. (*B. & P.C.* 14411 *et seq.*) Use of a corporate name as a fictitious name is rebuttably presumed to be the exclusive right of the first corporation, actually engaged in trade or business, to file the appropriate articles of incorporation or obtain a certificate of qualification. (*B. & P.C.* 14415.) If there is a conflict between the registrant under *B. & P.C.* 14411 and the corporation under *B. & P.C.* 14415, the presumption is that the earliest date gives the right. (*B. & P.C.* 14416.) (See 4 *Pacific L. J.* 279; 4 *Summary* (9th), *Personal Property*, §63.)

(5) *Fee Simple Title.* "A fee simple title is presumed to be intended to pass" by a grant of real property. (*C.C.* 1105; see *Manhattan Beach v. Superior Court* (1996) 13 *C.4th* 232, 242, 52 *C.R.2d* 82, 914 *P.2d* 160, 4 *Summary* (9th), *Real Property, Supp.*, §442 [statutory presumption supported finding that quitclaim deed of "right of way" conveyed fee title and not just railroad easement]; *Basin Oil Co. v. Inglewood* (1954) 125 *C.A.2d* 661, 664, 271 *P.2d* 73; 4 *Summary* (9th),

*Real Property*, §236.) This presumption places on the plaintiff the burden of proving that the presumed fact, i.e., that a grant deed conveyed a fee simple title, was nonexistent. (*Develop-Amatic Engineering v. Republic Mortg. Co.* (1970) 12 C.A.3d 143, 148, 91 C.R. 193.)

(6) *Gift in View of Impending Death*. A gift made under certain circumstances is presumed to be a gift in view of impending death. (*Prob.C.* 5703; see *Rosenberg v. Broy* (1961) 190 C.A.2d 591, 595, 12 C.R. 103 [presumption arising under former C.C. 1150]; 4 *Summary* (9th), *Personal Property*, §108.)

(7) *Joint Tenancy in Bank Deposit*. Funds remaining on deposit at the death of a party to a joint account belong to the surviving joint tenant "unless there is clear and convincing evidence of a different intent." (*Prob.C.* 5302(a); see Law Rev. Com. Comment to *Prob.C.* 5302 [statute "strengthens survivorship rights, since under prior law the presumption of survivorship arising from the joint tenancy form of the account could be overcome by a preponderance of the evidence"]; *Schmedding v. Schmedding* (1966) 240 C.A.2d 312, 316, 49 C.R. 523 [construing prior law]; on Multiple-Party Accounts Law, see 3 *Summary* (9th), *Negotiable Instruments*, §142 et seq.)

(8) *Purported Trust Without Named Beneficiary*. If an interest is conveyed to a "trustee" without naming a beneficiary, it is presumed that the grantee holds in his or her individual right, free from any trust. "This is a presumption affecting the burden of proof." (*Prob.C.* 18104(a); see *Hansen v. G & G Trucking Co.* (1965) 236 C.A.2d 481, 490, 46 C.R. 186 [applying similar predecessor statute].)

(9) *Sale Under Trust Deed*. A recital in a trustee's deed of compliance with statutory notice requirements is prima facie evidence of such compliance, and is "conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value and without notice." (C.C. 2924; see *Wolfe v. Lipsy* (1985) 163 C.A.3d 633, 639, 209 C.R. 801; 3 *Summary* (9th), *Security Transactions in Real Property*, §148.)

(10) *Term of Tenancy*. Where no limit is fixed, a tenancy in real property is presumed to be month to month, except in the case of lodgings or dwelling-houses, when it is for the length of time adopted for estimation of the rent. (C.C. 1943, 1944; see 4 *Summary* (9th), *Real Property*, §549.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Appropriation of Property for Public Use*.

Cross-Reference: 8 *Summary* (10th), *Constitutional Law*, §1195.

(2) *Community and Separate Property*.

Cross-References: 11 *Summary* (10th), *Community Property*, §§15, 20, 22.

(3) *Compensation for Breach of Agreement To Transfer Real Property*.

Cross-Reference: 13 *Summary* (10th), *Equity*, §28.

(4) *Exclusive Right To Use Fictitious Name*.

Cross-Reference: 13 *Summary* (10th), *Personal Property*, §87.(5) *Fee Simple Title*.

*Manhattan Beach v. Superior Court*:

Cross-Reference: 12 *Summary* (10th), *Real Property*, §390.

Cross-Reference: 12 *Summary* (10th), *Real Property*, §14.

(6) *Gift in View of Impending Death*.

*Cross-Reference: 13 Summary (10th), Personal Property, §134.*

*(7) Joint Tenancy in Bank Deposit.*

*Cross-Reference: 4 Summary (10th), Negotiable Instruments, §77 et seq.(9) Sale Under Trust Deed.*

*Cross-Reference: 4 Summary (10th), Security Transactions in Real Property, §164.*

*(10) Term of Tenancy.*

*Cross-Reference: 12 Summary (10th), Real Property, §524.West's Key Number Digest, Evidence k.57*



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#### X. PRESUMPTIONS NOT IN EVIDENCE CODE

##### B. Presumptions Stated in Other Codes.

##### 3. Family and Probate Issues.

##### a. Parent-Child Relationship.

*1 Witkin Cal. Evid. Burden § 107*

[§ 107] Parent-Child Relationship.

(1) *In General.* The Uniform Parentage Act (*Family C. 7600 et seq.*) eliminated the concept of legitimacy and replaced it with that of parent-child relationship. (See *10 Summary (9th), Parent and Child, §409 et seq.*) Under *Family C. 7611*, a man is presumed to be the natural father of a child if he meets the conditions set forth in *Family C. 7540 et seq.* (presumption arising from birth during marital cohabitation; see *10 Summary (9th), Parent and Child, Supp., §448B*) or *Family C. 7570 et seq.* (paternity by voluntary declaration; see *10 Summary (9th), Parent and Child, Supp., §448D*), or the conditions set forth in *Family C. 7611* itself, which are as follows:

(a) The man and the child's natural mother are or have been married to each other, and the child is born during the marriage or within 300 days after its termination by death, annulment, declaration of invalidity or divorce, or after a decree of separation. (*Family C. 7611(a).*)

(b) The man and the child's natural mother "have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid," and (1) if the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage or within 300 days after its termination; or (2) if it is invalid without a court order, the child is born within 300 days after the termination of cohabitation. (*Family C. 7611(b).*)

(c) After the child's birth, the man and the child's natural mother have married or attempted to marry by a marriage solemnized in apparent compliance with law, although it is or could be declared invalid, and (1) with his consent he is named as the father on the child's birth certificate; or (2) he is obligated to support the child under a written voluntary promise or by court order. (*Family C. 7611(c).*)

(d) The man "receives the child into his home and openly holds out the child as his natural child." (*Family C. 7611(d).*)

These rebuttable presumptions affect the burden of proof, and they may be rebutted only by "clear and convincing evidence" (see *supra*, §39) or by a court decree establishing paternity by another man; if two or more presumptions conflict, "the presumption which on the facts is founded on the weightier considerations of policy and logic controls." (*Family C. 7612*; see *10 Summary (9th), Parent and Child, §419.*)

(2) *Child Conceived as Result of Designated Crimes.* Where *Family C. 7611*, *supra*, is inapplicable, a man may not

be presumed to be the natural father of a child if: (a) the child was conceived as a result of a violation of P.C. 261 (rape), and the father was convicted; or (b) the child was conceived as a result of a violation of P.C. 261.5 (statutory rape), the father was convicted, and the mother was under 15 and the father was 21 or older at the time of conception. (*Family C. 7611.5.*)

(3) *Paternity Index Finding.* *Family C. 7555* provides a rebuttable presumption of paternity where the "paternity index" (defined in *Family C. 7555(b)(2)*), as calculated by experts qualified as examiners of "genetic markers" (defined in *Family C. 7555(b)(1)*), is 100 or greater. The presumption affects the burden of proof, and may be rebutted by a *preponderance of the evidence.* (*Family C. 7555(a).*) (See *Sonoma v. Grant W.* (1986) 187 C.A.3d 1439, 1447, 232 C.R. 471, 1 Cal. Evidence (4th), Hearsay, §242 [effect of statute is to shift burden of proof of paternity to putative father where genetic evidence warrants presumption that he is actual parent]; *El Dorado v. Misura* (1995) 33 C.A.4th 73, 88, 38 C.R.2d 908 [defendant failed to rebut presumption stemming from paternity index of 970; evidence that mother had sex with two untested, unexcluded men during period of conception did not constitute required preponderance of evidence].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General.*

*Elimination of concept of legitimacy:*

*Cross-Reference:* 10 Summary (10th), *Parent and Child*, §17 et seq.

*Presumption arising from birth during marital cohabitation:*

*Cross-Reference:* 10 Summary (10th), *Parent and Child*, §25.

*Paternity by voluntary declaration:*

*Cross-Reference:* 10 Summary (10th), *Parent and Child*, §32 et seq.(d) *Man receives child into home:* See *In re Nicholas H.* (2002) 28 C.4th 56, 63, 120 C.R.2d 146, 46 P.3d 932, 10 Summary (10th), *Parent and Child*, §36 [presumption of paternity under *Family C. 7611(d)* may apply even where man admits he is not biological father]; *In re A.A.* (2003) 114 C.A.4th 771, 784, 788, 7 C.R.3d 755 [in dependency proceeding, trial judge erred in denying presumed father status under *Family C. 7611(d)* to man who held minor out as his child, visited with her regularly, provided for her financial support, and took her into his home once she was removed from mother's care; although judge made finding, based on biological test, that another man was father, that was not "judgment establishing paternity of the child by another man" within meaning of *Family C. 7612*]; *Librers v. Black* (2005) 129 C.A.4th 114, 123, 28 C.R.3d 188, 10 Summary (10th), *Parent and Child*, Supp., §47 [trial judge erred in finding that mother's former live-in boyfriend lacked standing to prosecute paternity action as presumed father under *Family C. 7611(d)*, notwithstanding that child was not dependent child and genetic testing had determined that boyfriend was not biological father; holding of *Nicholas H.*, *supra*, is not confined to dependency context].

(e) *(New) Child born after father's death:* *Family C. 7611(f)*, added in 2004, provides that the presumption applies if the child "is in utero after the death of the decedent" and the conditions set forth in *Prob.C. 249.5* (inheritance rights of posthumously conceived child) are met.

*Rebuttal of presumption:* Biological paternity by a competing presumed father does not necessarily rebut another man's presumption of paternity under *Family C. 7612(a)*. "A juvenile court confronted with such a claim must instead consider whether rebuttal of the presumption would be appropriate in the circumstances of the case. ... This is a matter entrusted to the juvenile court's discretion." (*In re Jesusa V.* (2004) 32 C.4th 588, 606, 10 C.R.3d 205, 85 P.3d 2, 10 Summary (10th), *Parent and Child*, §12.)

*Conflicting presumptions:* When conflicting presumptions arise under *Family C. 7611(a)* and *Family C. 7611(d)*,

the court, under *Family C. 7612*, "must make factual findings with respect to each presumption and only then weigh which presumption is entitled, in that case, to greater weight. The nature of each presumed father's role in the life of a child and the marital circumstances will vary from case to case and thus the trial court must make its determination under section 7612 on a case-by-case basis. In resolving such a conflict, the trial court must at all times be guided by the principle that the goal of our paternity statutes is 'the protection of the child's well-being.' " (*Craig L. v. Sandy S. (2004) 125 C.A.4th 36, 52, 22 C.R.3d 606* [trial judge erred in failing to engage in any fact-finding and determining that husband's presumed father's status prevented biological father from asserting paternity under *Family C. 7611(d)*].)

*Cross-Reference:* 10 *Summary* (10th), *Parent and Child*, §35.

(3) *Paternity Index Finding.* The plain language of *Family C. 7555* clearly contemplates that evidence other than the presumption can be deemed more credible than the paternity index number. Nothing suggests that the evidentiary heft of the presumption established by the statute is increased by a higher number on the paternity index. "If there is evidence other than the presumption, the trial court is to consider all of it. ... Implicit in such a plenary examination is the chance of the other evidence being deemed more persuasive." (*San Francisco v. Givens (2000) 85 C.A.4th 51, 55, 56, 101 C.R.2d 859* [in proceeding by city and county to recover support payments from alleged father, trial judge did not err in determining, despite paternity index of 1290, that there was no probability that defendant was father, based on evidence that judge found to be clear and convincing that defendant had no access to mother].) *West's Key Number Digest*, Evidence k.56



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##### B. Presumptions Stated in Other Codes.

##### 3. Family and Probate Issues.

##### b. Other Issues.

#### 1 Witkin Cal. Evid. Burden § 108

[§ 108] Other Issues.

(1) *Birth Date: Judicial Determination.* A court order determining the date of an unregistered birth creates a presumption affecting the burden of proof. (*Health & Saf.C. 103485*, formerly *Health & Saf.C. 10557*; see *Schmidt v. Retirement Bd. of San Francisco City & County Employees* (1995) 37 C.A.4th 1204, 1211, 44 C.R.2d 297 [because statute specifies only birth orders, marriage orders are not entitled to same presumption].)

(2) *Capacity To Make Health Care Decisions.* Under *Prob.C. 4657*, a patient is presumed to have the capacity to make his or her own health care decisions, give or revoke an advance health care directive, and designate or disqualify a surrogate. (See 2 *Summary (9th)*, *Agency and Employment, Supp.*, §246ZZ.)

(3) *Intent To Abandon Minor.* Under *Family C. 7822*, a parent's failure to provide identification for a child under the age of 18 years, to provide for the child's support, or to communicate with the child for the periods specified in the statute is presumptive evidence that the parent intended to abandon the child. (See 10 *Summary (9th)*, *Parent and Child*, §184.)

(4) *Recorded Document Establishing Fact of Death.* A document establishing the fact of death of a person, when recorded under *Prob.C. 210* et seq. (see 12 *Summary (9th)*, *Wills and Probate*, §93), is prima facie evidence of death insofar as it identifies real property in the county, title to which is affected by death. (*Prob.C. 212*.)

(5) *Spousal Support: Decreased Need.* Except as otherwise agreed to by the parties in writing, *Family C. 4323* creates a rebuttable presumption, affecting the burden of proof, that there is a decreased need for spousal support if the supported party is cohabiting with a person of the opposite sex. (See 11 *Summary (9th)*, *Husband and Wife*, §264 et seq.)

(6) *Will Destroyed With Intent To Revoke.* Under *Prob.C. 6124*, if a will was last in the testator's possession, the testator was competent at death, and neither the will nor a copy can be found after the testator's death, it is presumed the will was destroyed with an intent to revoke it. This presumption affects the burden of producing evidence. (See 12 *Summary (9th)*, *Wills and Probate*, §522.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Capacity To Make Health Care Decisions.*

*Cross-Reference:* *Prob.C. 4657*, formerly discussed in *Agency and Employment*, has been transferred to 14 *Summary* (10th), *Wills and Probate*, §881.

(3) *Intent To Abandon Minor.*

*Cross-Reference:* 10 *Summary* (10th), *Parent and Child*, §312.

(4) *Recorded Document Establishing Fact of Death.*

*Cross-Reference:* 14 *Summary* (10th), *Wills and Probate*, §15.

(5) *Spousal Support: Decreased Need.*

*Cross-Reference:* 11 *Summary* (10th), *Husband and Wife*, §286 et seq.

(5a) *(New) Spousal Support: History of Domestic Violence.* In a marital dissolution proceeding, there is a rebuttable presumption affecting the burden of proof that an award of temporary or permanent spousal support should not be made to a spouse who has been convicted of domestic violence directed at the other spouse. (*Family C. 4325*, added in 2001.)

(6) *Will Destroyed With Intent To Revoke.* See *Lauermann v. Superior Court* (2005) 127 C.A.4th 1327, 1333, 26 C.R.3d 258 [presumption of *Prob.C. 6124* was applicable even though photocopy, not personally signed, survived].

*Cross-Reference:* 14 *Summary* (10th), *Wills and Probate*, §552.





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#### X. PRESUMPTIONS NOT IN EVIDENCE CODE

##### B. Presumptions Stated in Other Codes.

##### 4. Vehicle Code.

##### 1 Witkin Cal. Evid. Burden § 109

[§ 109] *Vehicle Code.*

(1) *Driving Under the Influence of Intoxicating Liquor.* In a criminal proceeding arising out of acts allegedly committed while the defendant was driving a vehicle and was under the influence of an alcoholic beverage, the results of a chemical analysis of the defendant's blood, breath, or urine are a basis for presumptions as to whether or not the defendant was under the influence of an alcoholic beverage. (*Veh.C. 23610*; see 2 *Cal. Evidence (4th)*, *Demonstrative, Experimental, and Scientific Evidence*, §54.) Additionally, in a prosecution for driving a vehicle while under the influence of an alcoholic beverage or drug, *Veh.C. 23152(b)* creates a rebuttable presumption that the defendant had an excessive blood-alcohol concentration when driving if the defendant had an excessive blood-alcohol concentration as shown by a chemical test performed within 3 hours of driving. (See *Bell v. Department of Motor Vehicles (1992) 11 C.A.4th 304, 312, 13 C.R.2d 830, 1 Cal. Evidence (4th)*, *Introduction*, §62 [presumption is applicable in an administrative suspension hearing].)

(2) *Driving When Privilege Is Suspended or Revoked.* *Veh.C. 14601* et seq., prohibiting the driving of a motor vehicle when the driver has knowledge that his or her license has been suspended or revoked because of specified violations, establish a conclusive presumption that the driver has such knowledge, if mailed notice has been given to the driver by the Department of Motor Vehicles under *Veh.C. 13106*. The presumption affects the burden of proof. (See 2 *Cal. Crim. Law (3d)*, *Crimes Against Public Peace and Welfare*, §241.)

(3) *Residence for Purposes of Vehicle Registration.* For purposes of *Veh.C. 4000*, requiring California registration of motor vehicles owned by California residents, possession of a California driver's license gives rise to a rebuttable presumption that the vehicle's owner is a California resident. (*Veh.C. 4000(g)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Driving Under the Influence of Intoxicating Liquor.* See *Komizu v. Gourley (2002) 103 C.A.4th 1001, 1008, 127 C.R.2d 229* [where officer received call "of a vehicle into the bay" at 11:57 p.m., arrived at scene approximately 3 minutes later, and driver's blood was drawn at 2:15 a.m., it was reasonable to conclude that accident occurred less than 3 hours before blood was drawn, and thus presumption of *Veh.C. 23152(b)* applied].



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### CHAPTER III - Burden of Proof and Presumptions

#### X. PRESUMPTIONS NOT IN EVIDENCE CODE

##### B. Presumptions Stated in Other Codes.

##### 5. Miscellaneous Presumptions.

##### 1 Witkin Cal. Evid. Burden § 110

[§ 110] Miscellaneous Presumptions.

(1) *At-Will Employment*. Under *Lab.C.* 2922, where there is no specified term, an employment is presumed to be terminable at the will of either party on notice to the other. (See *Foley v. Interactive Data Corp.* (1988) 47 C.3d 654, 665, 254 C.R. 211, 765 P.2d 373, 2 Summary (9th), *Agency and Employment, Supp.*, §184A.)

(2) *Compensable Injuries: Failure To Reject Claim*. *Lab.C.* 5402 provides that failure to reject liability for a workers' compensation injury claim within 90 days after the filing of the claim creates a rebuttable presumption that the injury is compensable. The statute was intended to affect the burden of proof rather than the burden of producing evidence. "As such, once the underlying facts have been established, its effect in workers' compensation litigation is to place on the defendant employer/carrier the burden of proving the employee/applicant does not have a compensable injury; in the absence of such proof, the consequences are adverse to the employer/carrier." (*State Comp. Ins. Fund v. Work. Comp. App. Bd.* (1995) 37 C.A.4th 675, 682, 683, 43 C.R.2d 660.)

(3) *Compensable Injuries: Peace Officer's Heart Trouble*. *Lab.C.* 3212.5 creates a rebuttable presumption that when a peace officer employed for 5 or more years develops "heart trouble," the condition arose out of and in the course of employment. (See *San Francisco v. Work. Comp. App. Bd.* (1978) 22 C.3d 103, 148 C.R. 626, 583 P.2d 151, 2 Summary (9th), *Workers' Compensation*, §233.)

(4) *Elections Code Presumptions*. *Elec.C.* 2154 provides the following rebuttable presumptions in the event the county elections official receives an affidavit of registration not containing certain information:

(a) If no middle name or initial is shown, it is presumed none exists.

(b) If no party affiliation is shown, it is presumed the affiant has none.

(c) If no execution date is shown, it is presumed that the affidavit was executed on or before the 29th day prior to the election, if (1) the county elections official receives the affidavit on or before that day, (2) the county elections official receives the affidavit by mail no later than the 4th day after the 29th day prior to the election, or (3) the affidavit is postmarked on or before the 29th day prior to the election and received by mail by the county elections official.

(d) If the affiant fails to identify a state of birth, it is presumed that the affiant was born in a state or territory of the United States if his or her birthplace is shown as "United States," "U.S.A.," or other recognizable term for the United States.

(5) *Emergency Rescue Personnel. Health & Saf.C. 1799.107* creates an immunity from tort liability for action taken by emergency rescue personnel acting within the scope of their employment, unless the action was performed in bad faith or in a grossly negligent manner. *Health & Saf.C. 1799.107(c)* states: "For purposes of this section, it shall be presumed that the action taken when providing emergency services was performed in good faith and without gross negligence. This presumption shall be one affecting the burden of proof."

(6) *Food and Agricultural Code Presumptions.* A number of presumptions are contained in this code. Some are conclusive (see *Food & Ag.C. 54266* [in action on marketing agreement, that landlord is able to control delivery of product produced on his or her land]), and others are rebuttable (see *Food & Ag.C. 12974* [person using pesticide without possessing written recommendation has assumed responsibility for recommendation].) Certain presumptions affect the burden of proof (see *Food & Ag.C. 64307* [certificate of Director of Food and Agriculture showing unpaid milk fees is prima facie evidence of delinquency], *Food & Ag.C. 64308* [certificate of Director of Food and Agriculture estimating amount of unpaid milk fees is prima facie evidence of delinquency of amount shown]), while others affect only the burden of producing evidence (see *Food & Ag.C. 5552* [cotton plant that is uncultivated or left from previous season harbors pests].)

(7) *Landlord's Breach of Statutory Habitability Requirements.* C.C. 1942.3 creates "a rebuttable presumption affecting the burden of producing evidence" that the landlord has breached the habitability requirements of C.C. 1941 if certain specified conditions exist. (See *17 Pacific L. J. 767*.)

(8) *Minor Not Fit for Juvenile Treatment.* Welf.C. 707 creates presumptions of unfitness for treatment under the juvenile court law based on previous felony violations (Welf.C. 707(a)(2)) or the nature of the current offense (Welf.C. 707(c)), unless the court, based on specified criteria, finds that the minor would be amenable to the care, treatment, and training program available through the juvenile court. (See *10 Summary (9th), Parent and Child, §757*.) The presumption relating to the nature of the current offense has been classified as one affecting the burden of proof. (*People v. Superior Court (Steven S.) (1981) 119 C.A.3d 162, 175, 177, 173 C.R. 788*; see also *Hicks v. Superior Court (1995) 36 C.A.4th 1649, 1659, 43 C.R.2d 269* [presumption that minor 14 or 15 years of age who commits certain types of murder is unfit for juvenile treatment is constitutional].)

(9) *Physical Handicap. Govt.C. 12940.1* creates a presumption that an individual with heart trouble cannot perform the duties of a *firefighter, firefighter trainee or active law enforcement officer* without endangering the safety of the individual or others. The presumption is rebutted if the individual establishes, by a preponderance of the evidence, his or her ability to perform the job. (See *16 Pacific L. J. 667*.)

(10) *Uninsured Employer's Negligence.* In a tort action by an employee, or a dependent of the employee, against an employer who has failed to obtain workers' compensation insurance, it is presumed that the injury or death was caused by the employer's negligence. (*Lab.C. 3708*; see *Chakmakjian v. Lowe (1949) 33 C.2d 308, 313, 201 P.2d 801*; *Hall v. Burton (1962) 201 C.A.2d 72, 79, 19 C.R. 797*; *2 Summary (9th), Workers' Compensation, §38*.)

(11) *Uninsured Motorist.* A certificate from the Department of Motor Vehicles that a person has not filed evidence of insurance or bond creates a presumption that the vehicle was uninsured. (*Ins.C. 11580.4*; see *6 Summary (9th), Torts, §1193*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *At-Will Employment.*

*Cross-Reference:* *3 Summary (10th), Agency and Employment, §271.*

(3) *Compensable Injuries: Peace Officer's Heart Trouble.* See *Pellerin v. Kern County Employees' Retirement Assn. (2006) 145 C.A.4th 1099, 1106, 52 C.R.3d 201* [*Govt.C. 31720.5*, which is part of County Employees' Retirement Law and contains language similar to *Lab.C. 3212.5* (text, p. 244), creates presumption affecting burden of proof, not

merely presumption affecting burden of producing evidence].

*Cross-Reference:* 2 *Summary* (10th), *Workers' Compensation*, §241.(4) *Elections Code Presumptions*.

(c) *Execution date:* If no execution date is shown, it is presumed that the affidavit was executed on or before the 15th day prior to the election, if (1) the affidavit is received by the county elections official on or before the 15th day prior to the election, or (2) the affidavit is postmarked on or before the 15th day prior to the election and received by mail by the county elections official. (*Elec.C. 2154(c)*, as amended in 2000.)(8) *Minor Not Fit for Juvenile Treatment*.

*Cross-Reference:* 10 *Summary* (10th), *Parent and Child*, §837.

(10) *Uninsured Employer's Negligence.* See *Huang v. L.A. Haute* (2003) 106 C.A.4th 284, 291, 130 C.R.2d 619 [presumption of *Lab.C. 3708* does not remove employee's burden of proving that injury occurred in scope of employment].

*Cross-Reference:* 2 *Summary* (10th), *Workers' Compensation*, §53.

(11) *Uninsured Motorist.*

*Cross-Reference:* The discussion of *Ins.C. 11580.4* has been transferred to 2 *Summary* (10th), *Insurance*, §210.



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### CHAPTER III - Burden of Proof and Presumptions

#### X. PRESUMPTIONS NOT IN EVIDENCE CODE

##### C. Nonstatutory Presumptions.

##### 1. Scope of Employment and Agency.

##### *1 Witkin Cal. Evid. Burden § 111*

#### [§ 111] Scope of Employment and Agency.

A nonstatutory "inference," which should now be regarded as a presumption (*supra*, §103), is invoked in automobile litigation where an employer is charged with responsibility for negligence of the operator (*respondeat superior*). If it is shown that the operator was an employee, and the car being driven belonged to the operator's employer, an "inference" arises that it was being driven within the scope of employment. (*Westberg v. Willde* (1939) 14 C.2d 360, 371, 94 P.2d 590; *Bushnell v. Tashiro* (1931) 115 C.A. 563, 569, 2 P.2d 550; *Rosenberg v. Berry* (1950) 101 C.A.2d 526, 532, 225 P.2d 620; *Halbert v. Berlinger* (1954) 127 C.A.2d 6, 17, 273 P.2d 274; see 13 Cal. L. Rev. 474; 19 Cal. L. Rev. 327.)

In *Nash v. Wright* (1947) 82 C.A.2d 467, 186 P.2d 686, decedent was killed by a truck negligently driven by W, an employee of B. In the wrongful death action, W had disappeared, and B offered testimony (1) that W had used the truck, contrary to instructions, for personal purposes, and had been discharged; and (2) that record title to the truck was in P Co., not B. Plaintiff showed that the truck had B's name on a sign bolted to it, and was part of a pool used by B and P Co. The trial court directed the jury to return a verdict against plaintiff. *Held*, this was error. Plaintiff's evidence, together with various presumptions of ownership (e.g., from possession, and from exercising acts of ownership--*Ev.C.* 637, 638, *supra*, §§74, 75), justified the "inference" that B was in practical effect the owner of the truck for the purpose of liability under the driving with permission law (*Veh.C.* 17150, *infra*, §112). And, because W was driving his employer's truck, the further "inference" that W was acting within the scope of his employment could be drawn. (82 C.A.2d 473, 474.) (See also 8 A.L.R.3d 826 [inference of agency or employment from name, color, etc., of taxicab].)

Even if there is no proof of employment, it has been suggested that an "inference" of agency arises from a showing that the operator was a member of the family group of the owner and that he or she had permission to use the car. (See *Sanfilippo v. Lesser* (1922) 59 C.A. 86, 88, 210 P. 44; *Stewart v. Norsigian* (1944) 64 C.A.2d 540, 553, 149 P.2d 46, 150 P.2d 554.) However, where nothing is shown but the ownership of a car by the defendant, the identity of the driver being undisclosed, no "inference" of agency arises. (*Wilson v. Droege* (1930) 110 C.A. 578, 582, 294 P. 726.) Nor does it arise from a showing that the driver was operating the car with the permission of the owner, without a further showing that the driver was an employee or belonged to the owner's family group. (*Stewart v. Norsigian*, *supra*, 64 C.A.2d 553; *Soils v. Oilfields Trucking Co.* (1979) 90 C.A.3d 349, 352, 153 C.R. 371 [following *Norsigian*]; and see 2 McCormick 5th, §§343, 344; 19 Cal. L. Rev. 327.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 2 McCormick 6th, §§343, 344.



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#### X. PRESUMPTIONS NOT IN EVIDENCE CODE

##### C. Nonstatutory Presumptions.

##### 2. Driving With Permission.

##### *1 Witkin Cal. Evid. Burden § 112*

[§ 112] Driving With Permission.

Even where it is not possible to show acts in the scope of employment (see *supra*, §111), proof of *ownership* and *employment* gives rise to an "inference" that the employee was driving with the owner's permission under *Veh.C. 17150* (imposing liability on owner for operator's acts where vehicle was driven with owner's permission; see 6 *Summary* (9th), *Torts*, §1028). (*Blank v. Coffin* (1942) 20 C.2d 457, 460, 126 P.2d 868 ["If the evidence shows that an automobile was being driven by an employee of the owner at the time of an accident, the jury may infer that the employee was operating the automobile with the permission of the owner"]; *Hicks v. Reis* (1943) 21 C.2d 654, 659, 134 P.2d 788; *Burgess v. Cahill* (1945) 26 C.2d 320, 324, 158 P.2d 393 [rule applied where employee's wife was driving car but employee was in car with her]; *Marquez v. Enterprise Rent-A-Car* (1997) 53 C.A.4th 319, 323, 61 C.R.2d 557 [noting in dictum that principal/agent relationship creates strong inference of implied permission].)

In *Flemmer v. Monckton* (1946) 73 C.A.2d 271, 166 P.2d 380, defendants employer and employee both testified that the negligent employee had wrongfully taken a truck for a personal errand in violation of express instructions restricting the use of that truck (which had no vehicle license) to the employer's premises. *Held*, however, the "inference" of driving with permission was properly drawn by the trial court on proof of the employer-employee relationship and the ownership of the car. (73 C.A.2d 274.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*Cross-Reference:* 6 *Summary* (10th), *Torts*, §1260.



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#### X. PRESUMPTIONS NOT IN EVIDENCE CODE

##### C. Nonstatutory Presumptions.

##### 3. Other Judicially Declared Presumptions.

##### *1 Witkin Cal. Evid. Burden § 113*

[§ 113] Other Judicially Declared Presumptions.

The judicial presumption (now codified) most frequently invoked in litigation is *res ipsa loquitur*, fully considered in this Chapter. (See *infra*, §114 et seq.) Other important presumptions, treated elsewhere, are:

(1) *Attorney's Authority*. The attorney's status and power to act for a client create a strong presumption that the attorney acted within the scope of his or her employment and authority. (*Gagnon Co. v. Nevada Desert Inn* (1955) 45 C.2d 448, 460, 289 P.2d 466; *Pacific Tel. & Tel. Co. v. Fink* (1956) 141 C.A.2d 332, 335, 296 P.2d 843; see 1 Cal. Proc. (4th), Attorneys, §263.)

(2) *Bilateral Contract*. The rule of interpretation favoring a bilateral rather than a unilateral contract has been expressed in terms of a presumption. (See *Davis v. Jacoby* (1934) 1 C.2d 370, 380, 34 P.2d 1026; 17A Am.Jur.2d (1991 ed.), Contracts §5; 1 Summary (9th), Contracts, §15.)

(3) *Deed: Delivery Presumed From Recordation or Possession*. Recordation of a deed at the request of the grantor raises a presumption of delivery with intent to convey the interest set forth in the deed. (*Butler v. Butler* (1961) 188 C.A.2d 228, 233, 10 C.R. 382; see 23 Am.Jur.2d (1983 ed.), Deeds §165; 4 Summary (9th), Real Property, §175.) And possession of the deed by the grantee raises the same presumption. (*Estate of Galvin* (1952) 114 C.A.2d 354, 360, 250 P.2d 333; *Estate of Pieper* (1964) 224 C.A.2d 670, 685, 37 C.R. 46; see 4 Summary (9th), Real Property, §175; 13 Proof of Facts 483, 489.)

(4) *Employment Discrimination*. In a civil rights action under 42 U.S.C., §2000e-2(a), for unlawful employment discrimination, plaintiff employee's establishment of a prima facie case in effect creates a presumption that defendant employer unlawfully discriminated against plaintiff. This presumption places on defendant the burden of producing evidence that the adverse employment actions were taken for a legitimate, nondiscriminatory reason. (*St. Mary's Honor Center v. Hicks* (1993) 509 U.S. 502, 113 S.Ct. 2742, 2747, 125 L.Ed.2d 407, 416, 8 Summary (9th), Constitutional Law, Supp., §737A.)

(5) *Housing Discrimination*. In a housing discrimination case under the federal Civil Rights Act of 1964 (42 U.S.C., §1982), if the plaintiff establishes a prima facie case creating a presumption of discrimination, the burden shifts to the defendant to rebut the presumption by producing evidence that the plaintiff was rejected for a legitimate, nondiscriminatory reason. If the defendant does so, the plaintiff must then demonstrate that the proffered reason was not the true reason. This burden merges with the ultimate burden of persuading the court that the plaintiff has been the victim of intentional discrimination. (*Barber v. Rancho Mortg. & Inv. Corp.* (1994) 26 C.A.4th 1819, 1834, 1835, 32

*C.R.2d 906, citing St. Mary's Honor Center, supra; 8 Summary (9th), Constitutional Law, Supp., §737A.)*

(6) *Will: Due Execution.* Upon proof of the genuine signatures of a testator and attesting witness, a presumption of due execution of a will arises, which is applied not only where witnesses are dead, unavailable, or unable to testify or recollect, but also where they are adverse and corrupt. Hence, this presumption may justify admission of the will to probate in spite of testimony by the attesting witnesses of lack of compliance with statutory formalities. (See *Estate of Pitcairn* (1936) 6 C.2d 730, 733, 59 P.2d 90; *Estate of Braue* (1941) 45 C.A.2d 502, 505, 114 P.2d 386; *Estate of Browne* (1958) 159 C.A.2d 99, 101, 323 P.2d 827; 40 A.L.R.2d 1223; 12 Summary (9th), *Wills and Probate*, §204.)

(7) *Will: Undue Influence.* A presumption of undue influence arises where a beneficiary is in a confidential relationship with the testator, actively participates in procuring execution of the will, and unduly profits by it. (See *Estate of Clegg* (1978) 87 C.A.3d 594, 602, 151 C.R. 158; 12 Summary (9th), *Wills and Probate*, §192.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Bilateral Contract.*

*Cross-Reference:* 1 Summary (10th), *Contracts*, §106.

(2a) *(New) Cause of Injury.* There is a general, rebuttable presumption that plaintiffs have knowledge of the wrongful cause of their injury. In order to rebut that presumption, a plaintiff whose complaint shows on its face that the claim would be barred by the statute of limitations without the benefit of the discovery rule must specifically plead facts to show the time and manner of discovery, and the inability to have made earlier discovery despite reasonable diligence. (*Grisham v. Philip Morris U.S.A.* (2007) 40 C.4th 623, 638, 54 C.R.3d 735, 151 P.3d 1151.)

(3) *Deed: Delivery Presumed From Recordation or Possession.*

*Cross-Reference:* 12 Summary (10th), *Real Property*, §295.(4) *Employment Discrimination.*

*Cross-Reference:* 8 Summary (10th), *Constitutional Law*, §870.

(5) *Housing Discrimination.*

*Cross-Reference:* 8 Summary (10th), *Constitutional Law*, §870.

(6) *Will: Due Execution.*

*Cross-Reference:* 14 Summary (10th), *Wills and Probate*, §147.

(7) *Will: Undue Influence.*

*Cross-Reference:* 14 Summary (10th), *Wills and Probate*, §135.





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## CHAPTER III - Burden of Proof and Presumptions

## XI. RES IPSA LOQUITUR

## A. Nature of Doctrine.

## 1. In General.

*1 Witkin Cal. Evid. Burden § 114*

[§ 114] In General.

The most important of the presumptions formerly termed "inferences" is that of *negligence*, embodied in the doctrine of *res ipsa loquitur* ("the thing speaks for itself").

The supposed three conditions that make the doctrine applicable have been stated as follows: (1) The accident must be caused by an agency or instrumentality under the exclusive control of the defendant; (2) the accident must be of a type that ordinarily does not happen unless someone is negligent; (3) it must not have been due to any voluntary act or contributory fault of the plaintiff. When these conditions are shown, a presumption arises that the accident arose from the defendant's want of proper care. (See generally *Michener v. Hutton* (1928) 203 C. 604, 609, 265 P. 238; *Ybarra v. Spangard* (1944) 25 C.2d 486, 490, 154 P.2d 687; *Seeley v. Combs* (1966) 65 C.2d 127, 130, 52 C.R. 578, 416 P.2d 810, *infra*, §125 [conditions shown]; *Brown v. Poway Unified School Dist.* (1993) 4 C.4th 820, 825, 15 C.R.2d 679, 843 P.2d 624, *infra*, §151; *Roddiscraft v. Skelton Logging Co.* (1963) 212 C.A.2d 784, 793, 28 C.R. 277, citing the text; *Cordova v. Ford* (1966) 246 C.A.2d 180, 186, 54 C.R. 508 [conditions not shown]; *Gotcher v. Metcalf* (1970) 6 C.A.3d 96, 102, 85 C.R. 566, *infra*, §131, citing the text; *Kohler v. Aspen Airways* (1985) 171 C.A.3d 1193, 1201, 1202, 214 C.R. 720, *infra*, §128 [accident was not type that ordinarily *only* happens because of negligence]; 9 Wigmore (Chadbourn Rev.) §2509; 57B Am.Jur.2d (1989 ed.), Negligence §§1819 et seq., 2074 et seq.; 48 Cal. L. Rev. 252; 38 So. Cal. L. Rev. 740; 7 Stanf. L. Rev. 482; 17 Stanf. L. Rev. 768; 8 U.S.F. L. Rev. 343; 84 A.L.R.2d 697; 59 A.L.R.4th 201 [action involving multiple nonmedical defendants]; 67 A.L.R.4th 544 [action involving multiple medical defendants]; BAJI (8th ed.), No. 4.00 et seq.; for instructions, see *infra*, §§126, 127; on effect of specific pleading or proof, see *infra*, §§123, 124.)

In *Seeley v. Combs*, *supra*, the court said: "The inferences resulting from the application of the doctrine of *res ipsa loquitur* are but a form of circumstantial evidence. The use of that battered and somewhat ambiguous phrase does not change the fact that what we are talking about is a special application of the rules surrounding the use and weight of circumstantial evidence ... and that the doctrine is applicable to nonjury as well as jury cases." (65 C.2d 130.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 57B Am.Jur.2d (2004 ed.), Negligence §1163 et seq.; CACI, No. 417 [*res ipsa loquitur*]. West's Key Number Digest, Negligence k.1610



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## CHAPTER III - Burden of Proof and Presumptions

## XI. RES IPSA LOQUITUR

## A. Nature of Doctrine.

## 2. Theory of Probability of Negligence.

1 *Witkin Cal. Evid. Burden* § 115

[§ 115] Theory of Probability of Negligence.

Various attempts, not entirely consistent, have been made to explain the res ipsa loquitur doctrine. (See cases and notes cited supra, §114.) One of the most frequently cited discussions of the subject is found in *Zentz v. Coca Cola Bottling Co. of Fresno* (1952) 39 C.2d 436, 247 P.2d 344, where the court explained that the *probability of negligence* is central to the doctrine: The notion that what has happened in the past, under the same conditions, will probably happen in the future, is both a reason for the doctrine and a basic condition for its application. (39 C.2d 442.) The court restated the doctrine as follows: "[R]es ipsa loquitur applies where the accident is of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone and that the defendant is probably the person who is responsible. In determining whether such probabilities exist with regard to a particular occurrence, the courts have relied both upon common knowledge and the testimony of expert witnesses, and they have considered the circumstances relating to the accident in each particular case, such as the extent of control exercised by the defendant, the plaintiff's own conduct, the likelihood of negligence by some third person, and, in some situations, evidence that the defendant is better able than the plaintiff to explain what happened. All of these matters have been treated as aids to help the courts in determining whether the accident was of such a nature that the injury was more probably than not the result of the defendant's negligence." (39 C.2d 446.)

The *Zentz* theory, sometimes described as the "conditional res ipsa loquitur" doctrine, has been consistently followed. (See *Borenkraut v. Whitten* (1961) 56 C.2d 538, 547, 15 C.R. 635, 364 P.2d 467; *Bedford v. Re* (1973) 9 C.3d 593, 597, 108 C.R. 364, 510 P.2d 724; *Newing v. Cheatham* (1975) 15 C.3d 351, 362, 124 C.R. 193, 540 P.2d 33; *Brown v. Poway Unified School Dist.* (1993) 4 C.4th 820, 828, 15 C.R.2d 679, 843 P.2d 624, *infra*, §151; *Reynolds v. Natural Gas Equipment* (1960) 184 C.A.2d 724, 731, 7 C.R. 879; *Gicking v. Kimberlin* (1985) 170 C.A.3d 73, 75, 215 C.R. 834.)

The theory, however, is something less than a formula, for the attempt to "balance the probabilities" often leads to sharp disagreement and some inconsistency in results. (See, e.g., *Fowler v. Seaton* (1964) 61 C.2d 681, 686, 39 C.R. 881, 394 P.2d 697, *infra*, §116; *Quintal v. Laurel Grove Hosp.* (1964) 62 C.2d 154, 164, 41 C.R. 577, 397 P.2d 161, *infra*, §139.) And the following observation in *Cho v. Kempler* (1960) 177 C.A.2d 342, 2 C.R. 167, perhaps offers a more realistic explanation:

"The increasing use of res ipsa loquitur exemplifies the growing recognition of the courts of the special obligations which arise from particular relationships. Prosser ... points out that 'where the particular defendant is in a position of some special responsibility toward the plaintiff or the public' ... the doctrine is designed to protect the dependent party from unexplained injury at the hands of one in whom he has reposed trust. The device 'has been used by the courts,

consciously or otherwise, as a deliberate instrument of policy imposing a procedural disadvantage upon the defendant which will require him to establish his freedom from negligence or to pay.' ... In an integrated society where individuals become inevitably dependent upon others for the exercise of due care, where these relationships are closely interwoven with our daily living, the requirement for explanation is not too great a burden to impose upon those who wield the instruments of injury and whose due care is vital to life itself." (177 C.A.2d 348, 349.)

Thus, even though the doctrine is inapplicable where there is no balance of probabilities in favor of negligence, "it may apply where the cause of the injury is a mystery, if there is a reasonable and logical inference that defendant was negligent and that such negligence caused the injury." (*Cline v. Lund* (1973) 31 C.A.3d 755, 762, 107 C.R. 629.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER III - Burden of Proof and Presumptions

## XI. RES IPSA LOQUITUR

## A. Nature of Doctrine.

## 3. Defendant's Superior Knowledge.

## a. As a Factor Justifying Application.

1 *Witkin Cal. Evid. Burden* § 116

[§ 116] As a Factor Justifying Application.

"[T]he particular force and justice of the rule, regarded as a presumption throwing upon the party charged the duty of producing evidence, consists in the circumstance that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him but inaccessible to the injured person." (*Ybarra v. Spangard* (1944) 25 C.2d 486, 490, 154 P.2d 687 [quoting Wigmore].) Thus, superior knowledge of the defendant may be a persuasive reason for *extending* application of the doctrine to new situations. (See *Ybarra v. Spangard*, *supra*, and other multiple defendant cases relaxing the control requirement, *infra*, §§147, 148; *Zentz v. Coca Cola Bottling Co. of Fresno* (1952) 39 C.2d 436, 445, 247 P.2d 344, *infra*, §142; *Fowler v. Seaton* (1964) 61 C.2d 681, 687, 39 C.R. 881, 394 P.2d 697, *infra*, this section; *Blackwell v. Hurst* (1996) 46 C.A.4th 939, 945, 54 C.R.2d 209 [wrongful death action arising from alleged dental malpractice: the doctrine "is especially suited to a medical or dental malpractice setting in which the unwitting and often unconscious or semiconscious patient is at an evidentiary disadvantage because of his or her inability to demonstrate what occurred"]; 7 *Stanf. L. Rev.* 480, 493 [applicability of doctrine where multiple defendants sued].)

One commentator has gone so far as to suggest that the controversy concerning the so-called "conditions" of the doctrine can readily be resolved in favor of both sides: "At present there really are two branches to the doctrine. Under one branch, evidence that the defendants controlled an instrumentality that normally does not cause injury in the absence of negligence makes it more probable than not that the defendants were negligent and the cause of the plaintiff's injury. The other and newer branch of the doctrine applies where the defendant has superior knowledge and there is a substantial possibility that he was responsible. Here the courts feel that it is proper to put pressure on the defendants to force them to come forward with an explanation." (7 *Stanf. L. Rev.* 495.)

*Fowler v. Seaton*, *supra*, shows how the factor of superior knowledge (often assumed rather than demonstrated) can be used to strain the probability requirement (*supra*, §115) to the breaking point. By stipulation, the issue of applicability of the doctrine was decided by a nonsuit granted on the opening statement, which was to this effect: Plaintiff, a girl nearly 4 years old, was left in defendant's nursery school in the morning, perfectly well. When picked up by her mother in the evening, she had a large bump on her forehead, which caused cross-eyes and required considerable surgery. Because of her age or shock, she was unable to give any information about the accident, and the other children, also of tender years, were likewise unable to give any. The only explanation came from defendant, who, after inquiry, first said that the child wet her pants, then that a little boy had suddenly without warning hit her with his hands. Counsel asserted that the evidence would show that the child no longer wet her pants, and that medical proof would show that such a blow would not cause such a concussion.

Reversing the judgment of nonsuit, the court stressed the special duty of supervision in a nursery school (*61 C.2d 688*), and held that the jury could have found a probability of violation in defendant's efforts to conceal the facts:

"Here we have a severe and unusual injury, one that does not normally occur in nursery schools if the children are properly supervised. We have a volunteer explanation that was inferably false, and, when faced with a demand to explain, the proffering of another inferably false explanation. We have a case where it appears that the plaintiff did not contribute to her own injuries. Thus the proffered evidence showed the existence of a duty of careful supervision owed by defendant to plaintiff. Under the circumstances it is inferable that defendant had a consciousness of guilt, knew the cause of the injury, was under a duty to explain, and was trying to conceal it. Thus it may be reasonably inferred that the duty was violated. Certainly it is more probable than not that the injury was the result of defendant's faulty supervision. Thus the jury could find that the doctrine of *res ipsa loquitur* is applicable, and for that reason it was error to grant the nonsuit." (*61 C.2d 690*.)

Two dissenters assert that "the majority opinion--when stripped of its tone of moral indignation--in effect holds defendant absolutely liable for this unexplained accident." (*61 C.2d 691*.) They argue that reasonable supervision is all that is required of any school; that plaintiff made no attempt, by discovery proceedings, to find out what kind of supervision was given; that the assertions in the opening statement did not justify the inference of false explanations indicating a consciousness of guilt, for it was equally inferable that defendant herself may not have known what caused the injury. They conclude that the decision allowed the case to go to the jury on a mere showing that the accident happened and the defendant was unable to produce a satisfactory explanation. (*61 C.2d 697*.) (See *17 Stanf. L. Rev. 768* [Fowler]; *38 So. Cal. L. Rev. 740* [same].)

**SUPPLEMENT:** [This section is current through the latest supplement]  
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### CHAPTER III - Burden of Proof and Presumptions

#### XI. RES IPSA LOQUITUR

##### A. Nature of Doctrine.

##### 3. Defendant's Superior Knowledge.

##### b. Not a Condition.

##### 1 Witkin Cal. Evid. Burden § 117

[§ 117] Not a Condition.

Some early opinions, misconceiving the superior knowledge factor as a limitation, declared that the doctrine was inapplicable where, under the facts, the information as to cause was no more accessible to the defendant than to the plaintiff. (See *Alexander v. Wong Yick* (1938) 25 C.A.2d 265, 269, 77 P.2d 476, listing prior cases; *Billeter v. Rhodes & Jamieson* (1951) 104 C.A.2d 137, 147, 231 P.2d 93.)

This view has been repudiated: "[T]he doctrine may be applied even though the defendant is not in a better position than plaintiff to explain what occurred if it appears more probable than not that the injury resulted from negligence on the part of defendant." (*Zentz v. Coca Cola Bottling Co. of Fresno* (1952) 39 C.2d 436, 445, 247 P.2d 344; *Seffert v. Los Angeles Transit Lines* (1961) 56 C.2d 498, 501, 15 C.R. 161, 364 P.2d 337; *Di Mare v. Cresci* (1962) 58 C.2d 292, 299, 23 C.R. 772, 373 P.2d 860 [disapproving inconsistent language in *Billeter*]; *Khanoyan v. All Amer. Sports Enterprises* (1964) 229 C.A.2d 785, 790, 40 C.R. 596; see 17 *Stanf. L. Rev.* 769 ["inclusion [of this element] in the doctrine has been criticized"].)

In *Khanoyan*, plaintiff was a paying spectator in the 12th row of the grandstand at a "Destruction Derby," in which the drivers of a number of "jalopies" deliberately collided until the winner was decided--the driver of the last operable vehicle. A portion of a fan blade fell off a colliding vehicle and struck plaintiff. *Held*, judgment for defendant reversed for refusal to instruct on the doctrine. The crucial question was whether defendant took proper precautions to protect spectators from injury; many factors could have been considered by the jury, e.g., proximity of seats, nature and extent of barriers, care exercised in inspection of vehicles, and special precaution to prevent parts jarring loose. "Thus, while precise knowledge as to what struck plaintiff and from whence the missile came is known and undisputed, whether such occurrence was the result of negligence on the part of defendant due to a faulty protective fence, or whatever cause, was an issue for the jury and concerning which plaintiff was entitled to the application of the doctrine." (229 C.A.2d 793.)

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### CHAPTER III - Burden of Proof and Presumptions

#### XI. RES IPSA LOQUITUR B. Codification of Doctrine.

##### 1 *Witkin Cal. Evid. Burden* § 118

[§ 118] Codification of Doctrine.

In 1969, the California Law Revision Commission recommended that *res ipsa loquitur* be codified as a presumption affecting the burden of producing evidence, in conformity with the existing case law. (See 9 Cal. Law Rev. Com. Reports, p. 141, citing the text.) "The result will be that, as under prior law, the finding of negligence is required when the facts giving rise to the doctrine have been established unless the adverse party comes forward with contrary evidence. If contrary evidence is produced, the trier of fact will then be required to weigh the conflicting evidence--deciding for the party relying on the doctrine if the inference of negligence preponderates in convincing force, and deciding for the adverse party if it does not." (Report, p. 142.)

The 1970 Legislature accordingly enacted *Ev.C. 646*, characterizing the "judicial doctrine" as a *presumption affecting the burden of producing evidence*, and stating the right to a *conditional res ipsa loquitur instruction* as follows:

"If the evidence, or facts otherwise established, would support a *res ipsa loquitur* presumption and the defendant has introduced evidence which would support a finding that he was not negligent or that any negligence on his part was not a proximate cause of the occurrence, the court may, and upon request shall, instruct the jury to the effect that:"

"(1) If the facts which would give rise to a *res ipsa loquitur* presumption are found or otherwise established, the jury may draw the inference from such facts that a proximate cause of the occurrence was some negligent conduct on the part of the defendant; and"

"(2) The jury shall not find that a proximate cause of the occurrence was some negligent conduct on the part of the defendant unless the jury believes, after weighing all the evidence in the case and drawing such inferences therefrom as the jury believes are warranted, that it is more probable than not that the occurrence was caused by some negligent conduct on the part of the defendant."

In *Slater v. Kehoe* (1974) 38 C.A.3d 819, 113 C.R. 790, the court said:

"The language of the statute and the legislative history clearly show that the mere introduction of evidence sufficient to sustain a finding of the nonexistence of the presumed fact causes the presumption, as a matter of law, to disappear. The legislative history also shows beyond dispute that this determination is to be made by the trial judge; if he finds there is evidence which, if believed, would rebut the presumption, he cannot give the jury the unqualified *res ipsa* instruction." (38 C.A.3d 833.)

The Law Revision Commission Comment to *Ev.C. 646* states the three judicially established conditions of the doctrine, and points out that the facts that give rise to *res ipsa loquitur* are themselves circumstantial evidence of negligence. (See also 2 *Pacific L. J.* 414; BAJI (8th ed.), No. 4.02; *Brown v. Poway Unified School Dist.* (1993) 4 C.4th 820, 825, 826, 15 C.R.2d 679, 843 P.2d 624, *infra*, §151; *Cline v. Lund* (1973) 31 C.A.3d 755, 761, 107 C.R. 629, citing the text; *Tobler v. Chapman* (1973) 31 C.A.3d 568, 585, 107 C.R. 614; *Pappas v. Carson* (1975) 50 C.A.3d 261, 267, 123 C.R. 343; *Levy-Zentner Co. v. Southern Pac. Trans. Co.* (1977) 74 C.A.3d 762, 777, 142 C.R. 1, citing the text [jury must determine whether plaintiff has satisfied the three conditions]; *Frantz v. San Luis Med. Clinic* (1978) 81 C.A.3d 34, 42, 146 C.R. 146.)

The Commission also lists, and gives illustrative examples of, four varying sets of circumstances under which the doctrine may be applicable:

"(1) Where the *facts* giving rise to the doctrine *are established as a matter of law* (by the pleadings, by stipulation, by pretrial order, or by some other means) and there is *no evidence* sufficient to sustain a finding either that the accident resulted from *some cause other than the defendant's negligence* or that *he exercised due care* in all possible respects wherein he might have been negligent."

"(2) Where the *facts* giving rise to the doctrine *are established as a matter of law*, but the defendant has introduced *evidence* sufficient to sustain a finding either of *his due care* or of *some cause for the accident other than his negligence*."

"(3) Where the defendant *introduces evidence* tending to show the *nonexistence of the essential conditions* of the doctrine but *does not introduce evidence to rebut* the presumption."

"(4) Where the defendant *introduces evidence* to contest both the *conditions of the doctrine* and the conclusion that *his negligence caused the accident*." (Law Rev. Com. Comment to *Ev.C. 646*.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See CACI, No. 417 [*res ipsa loquitur*].





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## CHAPTER III - Burden of Proof and Presumptions

## XI. RES IPSA LOQUITUR

## C. Effect of Doctrine.

## 1. Plaintiff's Burden of Proof.

*1 Witkin Cal. Evid. Burden § 119*

[§ 119] Plaintiff's Burden of Proof.

Res ipsa loquitur is generally considered a rebuttable presumption. (See 2 McCormick 5th, §342; 9 Wigmore (Chadbourn Rev.) §2509; 57B Am.Jur.2d (1989 ed.), Negligence §§1920 et seq., 2077, 2078.) Former California cases, carrying out the theory that presumptions were only created by statute (supra, §48), insisted on characterizing it as an "inference." (See *Hardin v. San Jose City Lines* (1953) 41 C.2d 432, 436, 260 P.2d 63; *Burr v. Sherwin Williams Co.* (1954) 42 C.2d 682, 688, 268 P.2d 1041; *Leonard v. Watsonville Community Hosp.* (1956) 47 C.2d 509, 514, 305 P.2d 36.) However, later decisions gave the "inference" of res ipsa loquitur the same effect as a statutory presumption. (See *Burr v. Sherwin Williams Co.*, supra, 42 C.2d 691; 43 Cal. L. Rev. 146; 48 Cal. L. Rev. 260.) (On uncertainty of the old law, see *Villa v. Shaffer* (1966) 242 C.A.2d 815, 818, 51 C.R. 856; 23 Cal. L. Rev. 169; 37 Cal. L. Rev. 218; 3 Santa Clara Lawyer 173; 1 Pacific L. J. 637.)

The problem of characterization was solved by the Evidence Code, under which a judicially created "inference" that meets the test of a presumption is regarded as one (see supra, §103). And *Ev.C. 646* (supra, §118) classifies res ipsa loquitur as a presumption affecting the burden of producing evidence. (See *Cline v. Lund* (1973) 31 C.A.3d 755, 761, 107 C.R. 629, citing the text; *Slater v. Kehoe* (1974) 38 C.A.3d 819, 832, 113 C.R. 790, supra, §118.)

Hence, application of the doctrine satisfies the plaintiff's first duty, that of offering a prima facie case to go to the jury; but ultimately the plaintiff must prove negligence by a preponderance of the evidence. (*Scarborough v. Urgo* (1923) 191 C. 341, 347, 216 P. 584; *O'Neill v. San Francisco* (1930) 209 C. 418, 420, 287 P. 449; *Druzanich v. Criley* (1942) 19 C.2d 439, 444, 122 P.2d 53; *Allbritton v. Interstate Transit Lines* (1939) 31 C.A.2d 149, 153, 87 P.2d 704; *Kohl v. Disneyland* (1962) 201 C.A.2d 780, 783, 20 C.R. 367; *Frantz v. San Luis Med. Clinic* (1978) 81 C.A.3d 34, 44, 146 C.R. 146; see 97 A.L.R.2d 522 [doctrine as ground for directed verdict in plaintiff's favor]; 12 Cal. L. Rev. 138 [weight of authority is that ultimate burden of proof does not shift]; 10 So. Cal. L. Rev. 166, 171 [same]; for argument that doctrine should be given effect of shifting burden of proof, see 48 Cal. L. Rev. 252, 256 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 57B Am.Jur.2d (2004 ed.), Negligence §1259 et seq.; 2 McCormick 6th, §342. *West's Key Number Digest*, Negligence k.1618 et seq.



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### CHAPTER III - Burden of Proof and Presumptions

#### XI. RES IPSA LOQUITUR

##### C. Effect of Doctrine.

##### 2. Defendant's Burden of Producing Evidence.

##### a. Rule and Test.

*1 Witkin Cal. Evid. Burden § 120*

[§ 120] Rule and Test.

(1) *Decisions Prior to Evidence Code.* The defendant had the initial burden of producing evidence (supra, §2); i.e., the defendant had to produce "evidence sufficient to meet the inference of negligence by offsetting or balancing it." (*Hardin v. San Jose City Lines* (1953) 41 C.2d 432, 437, 260 P.2d 63; see also *Dierman v. Providence Hosp.* (1947) 31 C.2d 290, 295, 188 P.2d 12; *Talbert v. Ostergaard* (1954) 129 C.A.2d 222, 228, 276 P.2d 880.)

The defendant satisfied this burden by producing evidence tending to show that the injury was due to natural causes, or that it could not reasonably have been anticipated, or that the defendant exercised due care in inspection, took precautions, etc. The trier of fact--jury or judge sitting without a jury--then could decide in favor of the defendant, and its decision would be affirmed. (See *Williams v. Long Beach* (1954) 42 C.2d 716, 718, 268 P.2d 1061; *Danner v. Atkins* (1956) 47 C.2d 327, 332, 303 P.2d 724; *Roberts v. Trans World Airlines* (1964) 225 C.A.2d 344, 352, 37 C.R. 291, *infra*, §121.)

(2) *Effect of Evidence Code.* Ev.C. 646 classifies res ipsa loquitur as a presumption affecting the burden of producing evidence. (See supra, §118.) Thus, under Ev.C. 604 (see supra, §55), the defendant's burden should merely be to introduce evidence that would support a finding of no negligence. Cases decided prior to the Evidence Code are of little value in construing the procedural effect of res ipsa loquitur under Ev.C. 604 and Ev.C. 646. (*Slater v. Kehoe* (1974) 38 C.A.3d 819, 832, footnote 11, 113 C.R. 790.)

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## CHAPTER III - Burden of Proof and Presumptions

### XI. RES IPSA LOQUITUR

#### C. Effect of Doctrine.

#### 2. Defendant's Burden of Producing Evidence.

##### b. Illustrations.

##### 1. Presumption Overcome.

#### *1 Witkin Cal. Evid. Burden § 121*

[§ 121] Presumption Overcome.

In *Kohl v. Disneyland* (1962) 201 C.A.2d 780, 20 C.R. 367, plaintiff rode in a horse-drawn "Surrey with the Fringe on Top" in defendant's amusement facility. The horses, for reasons not established, ran away and tipped over the vehicle. *Held*: (1) In a carrier case, the defendant must rebut the inference of negligence raised by the res ipsa loquitur doctrine with evidence that the carrier's duty of utmost care and diligence was met. (2) However, whether the evidence satisfies this burden is a question for the trier of fact; and here, the verdict for defendant was supported by proof that the horses were without runaway propensities, the driver was capable, and reasonable efforts were made to halt the horses. (201 C.A.2d 784.)

In *Roberts v. Trans World Airlines* (1964) 225 C.A.2d 344, 37 C.R. 291, a jet plane, landing on a slick runway, could not be stopped in time by use of ordinary methods, and the pilot turned it off into soft mud, injuring plaintiff passenger. The trial judge properly instructed on the doctrine, and the verdict was for defendants. *Held*, affirmed: (1) The pilot's conjectural opinion that a "shear wind" caused the accident was insufficient. (225 C.A.2d 354, citing the text.) (2) But proof of compliance with Federal Aviation Agency safety standards was substantial evidence of care which the jury could accept. (225 C.A.2d 357.)

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## XI. RES IPSA LOQUITUR

## C. Effect of Doctrine.

## 2. Defendant's Burden of Producing Evidence.

## b. Illustrations.

## 2. Burden Not Satisfied.

1 *Witkin Cal. Evid. Burden* § 122

## [§ 122] Burden Not Satisfied.

A typical mistaken approach is to offer "an explanation" of how the injury *might have occurred* without negligence, and to contend that this meets the burden. This contention was rejected in the second appeal in *Ybarra v. Spangard* (1949) 93 C.A.2d 43, 208 P.2d 445 (see *infra*, §147, for first decision). Plaintiff, after an operation, developed a condition which, he alleged, arose out of a traumatic injury. Defendants' expert witnesses offered the opinion that the probable cause was an infection, and each defendant (there were no other eyewitnesses) testified that he saw nothing occur during the operation that could have produced the condition. *Held*, the trial judge, sitting without a jury, was warranted in giving judgment for plaintiff if the explanation did not satisfy him. "It was for the trial judge to weigh the circumstantial evidence which made the prima facie case under the res ipsa rule against the positive testimony of the appellants and to determine whether the prima facie case had been met. ... There is nothing inherent in direct testimony which compels a trial court to accept it over the contrary inferences which may reasonably be drawn from circumstantial evidence." (93 C.A.2d 46.)

In *Newing v. Cheatham* (1975) 15 C.3d 351, 124 C.R. 193, 540 P.2d 33, a wrongful death action based on an airplane crash from which there were no survivors, plaintiff introduced sufficient evidence to satisfy all three conditions for the applicability of res ipsa loquitur as a matter of law. Defendant, however, argued that the crash could have resulted from causes other than the pilot's negligence. *Held*, negligence was properly established as a matter of law. After the presumption arose, defendant had the burden of introducing sufficient evidence to sustain a finding either that the accident resulted from some cause other than the pilot's negligence, or that the pilot had exercised due care in all possible respects where he might have been negligent. *Arguments* about other possible causes did not meet the burden. "Mere speculation of this sort is insufficient to discharge defendant's burden of explanation." (15 C.3d 365.)

To similar effect are *Dierman v. Providence Hosp.* (1947) 31 C.2d 290, 295, 188 P.2d 12 [suppressed evidence, presumed adverse, vitiated defendants' explanation]; *Rose v. Melody Lane of Wilshire* (1952) 39 C.2d 481, 487, 247 P.2d 335; *Doke v. Pacific Crane & Rigging* (1947) 80 C.A.2d 601, 607, 182 P.2d 284 [plaintiff cannot be deprived of benefits of doctrine "merely because some agency over which defendants had no control could have caused the accident"]; *Talbert v. Ostergaard* (1954) 129 C.A.2d 222, 229, 276 P.2d 880 [same]; *Nelson v. American Airlines* (1968) 263 C.A.2d 742, 746, 70 C.R. 33 [in action for injuries resulting from malfunction of airplane's automatic pilot, trial judge erred in finding presumption rebutted, where defendant's evidence showed neither definite cause of malfunction unconnected with defendant's lack of care, nor such overall care as to indicate that accident must have been

due to some unknown but unpreventable cause]; *Sanchez v. Bay General Hosp.* (1981) 116 C.A.3d 776, 789, 172 C.R. 342 [in medical malpractice action in which res ipsa requirements were satisfied, defendant hospital failed to carry its burden of producing sufficient evidence to sustain finding that patient's death resulted from cause other than defendant's negligence or that defendant exercised due care in all respects in which it might have been negligent].

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### CHAPTER III - Burden of Proof and Presumptions

#### XI. RES IPSA LOQUITUR D. Effect of Specific Pleading, Proof, or Findings. 1. Specific Pleading.

##### *1 Witkin Cal. Evid. Burden § 123*

[§ 123] Specific Pleading.

The earlier cases held the doctrine inapplicable unless the plaintiff pleaded negligence generally: "The rule that plaintiff cannot rely upon the doctrine where he pleads only specific acts of negligence has been predicated upon the principle that he may not prove a case outside the scope of his pleading and to permit him to have an inference of negligence which embraces acts or omissions not set forth in the complaint would violate that principle." (*Leet v. Union Pac. R. Co.* (1944) 25 C.2d 605, 619, 155 P.2d 42.) This rule was later relaxed by decisions holding that, where negligence was pleaded both generally and specifically, the specific allegations merely operated to confine the inference to the particular acts specified. Still later, a further relaxation was made which in effect ignored the specific allegations for the purposes of the doctrine, and made the inference fully available under the general allegations. (See *Leet* case, supra, 25 C.2d 618, 619; 37 Cal. L. Rev. 183, 214; 2 A.L.R.3d 1335 [pleading of particular act of negligence as waiving reliance on *res ipsa loquitur*]; 4 Cal. Proc. (4th), *Pleading*, §§567, 568.)

The present rule is, therefore, that specific pleading will do no harm if negligence is also pleaded generally, but without a general allegation, the inference cannot be invoked. (On what constitutes general pleading for this purpose, see 4 Cal. Proc. (4th), *Pleading*, §567.)

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## CHAPTER III - Burden of Proof and Presumptions

## XI. RES IPSA LOQUITUR

## D. Effect of Specific Pleading, Proof, or Findings.

## 2. Specific Proof.

*1 Witkin Cal. Evid. Burden § 124*

## [§ 124] Specific Proof.

The theory that res ipsa loquitur is grounded in part on the superior knowledge possessed by or accessible to the defendant led some courts to hold the presumption inapplicable where this superior knowledge did not exist. This, it has been pointed out, is erroneous; the defendant's superior knowledge may be a reason for *extending* application of the doctrine, but its absence is not a reason for rejecting it. (See *supra*, §§116, 117.) So if the plaintiff, in a proper res ipsa loquitur case, does not stop with proof of the happening of the accident and await the defendant's explanation of its cause, but goes on with proof of one or more specific acts or omissions, the plaintiff is not for this reason deprived of the benefit of the doctrine. It is only when the plaintiff goes so far as to prove facts that dispel the presumption as a matter of law that the benefit is lost. (*Leet v. Union Pac. R. Co.* (1944) 25 C.2d 605, 621, 155 P.2d 42; *Di Mare v. Cresci* (1962) 58 C.2d 292, 299, 23 C.R. 772, 373 P.2d 860 [disapproving inconsistent language in *McKenzie v. Pacific Gas & Elec. Co.* (1962) 200 C.A.2d 731, 735, 19 C.R. 628]; *Shahinian v. McCormick* (1963) 59 C.2d 554, 562, 563, 30 C.R. 521, 381 P.2d 377; *Roddiscraft v. Skelton Logging Co.* (1963) 212 C.A.2d 784, 803, 28 C.R. 277, quoting the text; *Hudspeth v. Jaurequi* (1965) 234 C.A.2d 526, 528, 44 C.R. 428; *Bedford v. Re* (1973) 9 C.3d 593, 599, 108 C.R. 364, 510 P.2d 724; see 37 Cal. L. Rev. 183, 212; 33 A.L.R.2d 791 [effect of evidence of specific negligence on availability of res ipsa loquitur].)

The court in the *Di Mare* case, *supra*, observed: "If the rule were otherwise, a plaintiff would be penalized for producing all of the evidence he has as to the cause of the accident, and in some cases the trier of fact might be denied evidence useful and relevant to the proper determination of the case." (58 C.2d 299.) (On the unavailability of the doctrine where, because of the introduction of specific evidence, the facts as to the accident's cause and the care exercised by defendant are shown as a matter of law, see *Keeton v. Henning* (1969) 1 C.A.3d 50, 54, 81 C.R. 424 [where there was no conflict as to manner in which accident occurred and what care defendant exercised, there was "clearly" no need to resort to res ipsa doctrine].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER III - Burden of Proof and Presumptions

### XI. RES IPSA LOQUITUR D. Effect of Specific Pleading, Proof, or Findings. 3. Specific Findings.

#### 1 Witkin Cal. Evid. Burden § 125

[§ 125] Specific Findings.

Even where the judge issues a statement of decision (see 7 *Cal. Proc.* (4th), *Trial*, §398 et seq.), the res ipsa doctrine may be available.

In *Seeley v. Combs* (1966) 65 C.2d 127, 52 C.R. 578, 416 P.2d 810, plaintiff, owner of a ranch, engaged defendant C to haul hay from the field and stack it in plaintiff's barn. Defendant backed his truck into the heavily stacked barn, heard his helper shout that the barn was on fire, drove his truck clear and saw flames leaping up the hay on the passenger side of the truck. At the trial, the helper was not available as a witness, and plaintiff relied on circumstantial evidence. Defendant asked for specific findings (now a statement of decision) under former C.C.P. 634. The judge found that defendant negligently drove his truck into the barn containing inflammable loose hay and straw, and that hot gas and sparks from the exhaust system caused the hay to ignite, proximately causing the damage. On appeal, defendant contended that the specific finding on causation was incompatible with res ipsa loquitur (cause not known). *Held*, judgment for plaintiff affirmed. Evidence of specific acts of negligence does not deprive a plaintiff of the benefit of the doctrine (see supra, §124), and it may be used to uphold a judgment even if it was not invoked at the trial or on appeal. (65 C.2d 132.) By analogy, therefore, the doctrine should be available in cases in which the judge finds the facts: "We see no reason for holding that a court cannot derive a specific ultimate fact from circumstantial evidentiary facts. If the critical evidence as to an issue is largely circumstantial, as sometimes happens, it is the only way that a court can comply with *Code of Civil Procedure* section 634 and make specific findings of ultimate facts." (65 C.2d 132.)

A strong dissent argued that there was a total absence of evidence to support the judge's specific finding, and that res ipsa loquitur could not save the judgment on appeal in this court trial because former C.C.P. 634 prohibited inferred findings against the appellant. (See 7 *Cal. Proc.* (4th), *Trial*, §407.)

**SUPPLEMENT:** [This section is current through the latest supplement]





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### CHAPTER III - Burden of Proof and Presumptions

#### XI. RES IPSA LOQUITUR

##### E. Instructions.

##### 1. BAJI Forms.

##### *1 Witkin Cal. Evid. Burden § 126*

[§ 126] BAJI Forms.

Res ipsa loquitur instructions may be tailored to the state of the evidence (depending, for example, on whether or not the conditions for application of the doctrine are in dispute) and the nature of the case. (See 57B Am.Jur.2d (1989 ed.), Negligence §2035 et seq.) In California, BAJI (8th ed.) covers res ipsa loquitur in four general instructions and two medical negligence instructions, as follows:

(1) *Res Ipsa Loquitur--Necessary Conditions for Application BAJI, (No. 4.00)*. "This conditional instruction of the res ipsa loquitur doctrine should never be given alone. It must be followed by BAJI 4.02 if there is evidence sufficient to support a finding that defendant was not negligent, or by Instruction 4.03 in the rare case where there is no evidence sufficient to support a finding." (Use Note to BAJI, No. 4.00, adding that in medical negligence cases, BAJI, No. 6.35 or BAJI, No. 6.36 should be used instead.) (See *infra*, this section.)

(2) *Res Ipsa Loquitur--Necessary Conditions for Application--Injury or Accident Denied (BAJI, No. 4.01)*. This instruction is designed to be used "in lieu of BAJI 4.00 where there is a question whether the alleged accident or incident occurred or, if it occurred, whether plaintiff was injured thereby." (Use Note to BAJI, No. 4.01, adding that in medical negligence cases, BAJI, No. 6.36 should be used instead.)

(3) *Res Ipsa Loquitur--Permissible Inference of Negligence (BAJI, No. 4.02)*. "The 'basic' instruction of the res ipsa loquitur doctrine must be preceded by BAJI 4.00 or BAJI 4.01, unless all three of the conditions for the application of the res ipsa loquitur doctrine are undisputed or are established as a matter of law by uncontradicted evidence or admissions." (Use Note to BAJI, No. 4.02, adding that in medical negligence cases where there is a question whether facts exist giving rise to the doctrine, BAJI, No. 4.02 must be preceded by BAJI, No. 6.35 and, if necessary, BAJI, No. 6.36.)

(4) *Res Ipsa Loquitur--Presumption of Negligence (BAJI, No. 4.03)*. "This instruction is designed for use in conjunction with BAJI 4.00, where the existence of the conditional facts of res ipsa loquitur are in issue but there is no evidence sufficient to sustain a finding of the nonexistence of defendant's negligence." (Use Note to BAJI, No. 4.03, adding that the instruction may be used alone in the extremely rare situation where the conditional facts are undisputed or established as a matter of law, and there is no evidence sufficient to sustain a finding of the nonexistence of defendant's negligence.)

(5) *Medical Negligence--Conditional Res Ipsa Loquitur (BAJI, No. 6.35)*. "This instruction should never be given alone. It must be followed by BAJI 4.02 if there is evidence sufficient to support a finding that there was no negligent

conduct; or by BAJI 4.03 if there is not sufficient evidence to support such a finding." (Use Note to BAJI, No. 6.35, adding that the instruction is unnecessary and that BAJI, No. 4.02 may be given alone if all three conditions are established as a matter of law; also, that if there is an issue whether the treatment administered by the defendant was a cause of the injury complained of, BAJI, No. 6.36 should be given as a preliminary to BAJI, No. 6.35.)

(6) *Medical Negligence--Necessity of Causal Relation Between Treatment and Injury--Res Ipsa Loquitur* (BAJI, No. 6.36). "This instruction is designed for use where it must be determined whether the treatment administered is the cause of the complained of condition in order for res ipsa loquitur to be considered." (Use Note to BAJI, No. 6.36, adding that the instruction, if given, must be immediately followed by BAJI, No. 6.35.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 57B Am.Jur.2d (2004 ed.), *Negligence* §1350 et seq.

(1) *Res Ipsa Loquitur--Necessary Conditions for Application* (BAJI, No. 4.00). In the ninth edition, the language quoted in the text from the Use Note was changed to read: "This conditional instruction of the res ipsa loquitur doctrine should never be given alone. It must be followed by BAJI 4.02 if there is evidence sufficient to support a finding that defendant was not negligent, or by BAJI 4.03 in the rare case where there is no evidence sufficient to support such a finding." (See also CACI, No. 417 [res ipsa loquitur].)(5) *Medical Negligence--Conditional Res Ipsa Loquitur* (BAJI, No. 6.35). See CACI, No. 518 [conditional res ipsa loquitur in medical malpractice case].



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### CHAPTER III - Burden of Proof and Presumptions

#### XI. RES IPSA LOQUITUR

##### E. Instructions.

##### 2. Necessary Conditions for Application.

###### *1 Witkin Cal. Evid. Burden § 127*

[§ 127] Necessary Conditions for Application.

(1) *Request by Plaintiff.* The plaintiff must ask for a res ipsa instruction; the judge is not required to give one, absent a request. (*Gagosian v. Burdick's Television & Appliances* (1967) 254 C.A.2d 316, 318, 62 C.R. 70; see 7 Cal. Proc. (4th), Trial, §273.) And the judge is under no duty to correct an erroneous instruction requested by a party. (*Clemens v. Regents of Univ. of Calif.* (1970) 8 C.A.3d 1, 14, 87 C.R. 108 [proposed instruction included defendant to whom doctrine was not applicable]; see 7 Cal. Proc. (4th), Trial, §277.)

(2) *Preliminary Instruction on Conditions of the Doctrine.* The existence of the three conditions making the doctrine applicable (see *supra*, §114) is normally a question of fact for the jury. Whenever there is an issue of fact as to the existence of any of the conditions, it is error to instruct that "[f]rom the happening of the accident involved in this case as established by the evidence" the inference arises. (See *Tallerico v. Labor Temple Assn.* (1960) 181 C.A.2d 15, 21, 4 C.R. 880; *Exploration Drilling Co. v. Heavy Transport* (1963) 220 C.A.2d 397, 404, 33 C.R. 747.) And where the theory of the case is constructive control (*infra*, §§145, 146), the instructions must inform the jurors that before they may accord the plaintiff the benefit of the doctrine, they must believe that there were no intervening harmful forces. (See *Gordon v. Aztec Brewing Co.* (1949) 33 C.2d 514, 520, 203 P.2d 522 [error held not prejudicial where additional qualifying instructions given]; *Zentz v. Coca Cola Bottling Co. of Fresno* (1949) 92 C.A.2d 130, 134, 206 P.2d 653 [instruction without sufficient qualification held reversible error]; *Burr v. Sherwin Williams Co.* (1954) 42 C.2d 682, 691, 268 P.2d 1041 [court should inform jury that plaintiffs "must show that the instrumentality which caused the damage was not mishandled or its condition otherwise changed after control was relinquished by the person against whom the doctrine is to be applied"].)

(3) *Defendant's Burden of Producing Evidence.* Pursuant to the holding in *Burr v. Sherwin Williams Co.*, *supra*, 42 C.2d 691, and using the terminology of the Evidence Code, the jury should be instructed that the defendant must present evidence sufficient to support a finding that he or she was not negligent.

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER III - Burden of Proof and Presumptions

### XI. RES IPSA LOQUITUR F. Illustrations of Application of Doctrine. 1. Carriers.

#### 1 Witkin Cal. Evid. Burden § 128

[§ 128] Carriers.

(1) *Ordinary Carriers*. Accidents on trains, streetcars, and buses furnish common examples of res ipsa loquitur cases. (See *McIntosh v. Los Angeles Ry. Corp.* (1936) 7 C.2d 90, 93, 59 P.2d 959 [streetcar, operating at excessive speed around curve, lurched and threw plaintiff out of window]; *Hardin v. San Jose City Lines* (1953) 41 C.2d 432, 436, 260 P.2d 63 [same]; *Sinan v. Atchison, Topeka & Santa Fe Ry. Co.* (1930) 103 C.A. 703, 708, 284 P. 1041 [train ran into open switch]; *Freitas v. Peerless Stages* (1952) 108 C.A.2d 749, 753, 239 P.2d 671 [bus stopped suddenly]; *Adam v. Los Angeles Transit Lines* (1957) 154 C.A.2d 535, 539, 317 P.2d 642 [streetcar seat in front of passenger broke and fell on her]; *Albers v. Greyhound Corp.* (1970) 4 C.A.3d 463, 471, 84 C.R. 846 [consignee of heavy package injured when package fell apart shortly after carrier delivered it]; 33 A.L.R.2d 814, 820 [evidence of specific negligence as affecting reliance on res ipsa loquitur: sudden start or stop, or derailment]; 57 A.L.R.2d 5 [liability for injury caused by sudden start, stop, or lurch]; 58 A.L.R.2d 937 [liability for injury inflicted on passenger who has alighted]; 60 A.L.R.2d 642 [action under F.E.L.A.; sudden stop, start or jerk of train]; 93 A.L.R.3d 776 [application of doctrine where passenger injured boarding or alighting from carrier]; 68 A.L.R.4th 14, 62 [application of doctrine where ambulance service passenger injured].)

The doctrine was also applied where bus passengers were struck by suitcases that fell from the baggage racks while the buses were in operation. (*Prunty v. Allred* (1946) 73 C.A.2d 67, 72, 165 P.2d 935 [bus passed truck and came back to its own lane]; *Williamson v. Pacific Greyhound Lines* (1947) 78 C.A.2d 482, 487, 177 P.2d 977 [bus swayed and jolted while rounding sharp curve in highway].)

Mere proof of injury while riding in a carrier does not justify the inference; the basic conditions for application of the doctrine (see *supra*, §114) must be present. But the passenger need not prove that the movement or operation was *unusual*; it is enough to show that the injury resulted from movement of a vehicle in control of the defendant. (*Mudrick v. Market Street Ry. Co.* (1938) 11 C.2d 724, 728, 81 P.2d 950; *Prunty v. Allred, supra*, 73 C.A.2d 73; *Dempsey v. Market Street Ry. Co.* (1947) 79 C.A.2d 216, 218, 179 P.2d 34.)

(2) *Airlines*. Airplane collisions and crashes are treated in the same manner as other carrier cases. (See *Smith v. O'Donnell* (1932) 215 C. 714, 719, 12 P.2d 933; *Roberts v. Trans World Airlines* (1964) 225 C.A.2d 344, 351, 37 C.R. 291; *Nelson v. American Airlines* (1968) 263 C.A.2d 742, 746, 70 C.R. 33; *Irwin v. Pacific Southwest Airlines* (1982) 133 C.A.3d 709, 716, 184 C.R. 228; 25 A.L.R.4th 1237 [application of doctrine in aviation accidents]; 64 A.L.R.5th 235, 312 [collision in air or on ground].) (On private airplane accidents, see *infra*, §131.)

In *Kohler v. Aspen Airways* (1985) 171 C.A.3d 1193, 214 C.R. 720, the doctrine was found inapplicable to injuries

arising from an airplane's encounter with clear air turbulence. Plaintiff alleged generally that defendant's negligence caused the airplane to drop 500 feet, and specifically that defendant should have followed a flight plan that would have minimized or avoided the effects of the turbulence. Defendant presented "overwhelming" evidence that the turbulence was unforeseeable and that the flight crew took an approved, safe route and handled all aspects of the flight properly. *Held*, plaintiff's proposed instructions on res ipsa loquitur were properly refused: Injuries arising from an airplane encountering air turbulence "cannot be said to ordinarily occur only because defendant was negligent." (171 C.A.3d 1202.)

(3) *Escalators*. An escalator in a department store is considered a common carrier, and the doctrine may be invoked in an action for injuries suffered in its use. (*Vandagriff v. J.C. Penney Co.* (1964) 228 C.A.2d 579, 582, 39 C.R. 671; see 33 A.L.R.2d 791, 829 [evidence of specific negligence as affecting reliance on res ipsa loquitur: escalators].)

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## CHAPTER III - Burden of Proof and Presumptions

### XI. RES IPSA LOQUITUR F. Illustrations of Application of Doctrine. 2. Motor Vehicles.

#### 1 Witkin Cal. Evid. Burden § 129

#### [§ 129] Motor Vehicles.

(1) *In General.* Where the element of control is satisfied, the doctrine should apply against the owner or operator of a motor vehicle. However, early cases held it inapplicable where the injury was caused by a collision between two or more vehicles, only one of which was in the control of the defendant. (See *Keller v. Cushman* (1930) 104 C.A. 186, 188, 285 P. 399; *Gritsch v. Pickwick Stages System* (1933) 131 C.A. 774, 778, 22 P.2d 554.)

Although the courts were initially reluctant to apply the doctrine in collision cases, they recognized an exception for cases involving *common carriers*: It was said that the high degree of care placed upon them justified the application of the doctrine even where there was more than one instrumentality involved. (See *Stark v. Yellow Cab Co.* (1949) 90 C.A.2d 217, 220, 202 P.2d 802 ["It is thoroughly established in this state that a passenger who is injured while riding in the vehicle of a carrier for hire is not deprived of the benefit of the doctrine of res ipsa loquitur merely because the accident involved another vehicle not under the control of the carrier"]; 37 Cal. L. Rev. 204.) And the carrier exception was applied to an analogous situation involving ordinary vehicles in *Godfrey v. Brown* (1934) 220 C. 57, 63, 29 P.2d 165, where plaintiff was a passenger in one automobile that collided with another.

More recently, the doctrine has been held applicable in the following cases: *Hudspeth v. Jaurequi* (1965) 234 C.A.2d 526, 527, 44 C.R. 428 [defendant's car struck rear of car in which plaintiff was riding]; *Getas v. Hook* (1965) 236 C.A.2d 705, 715, 46 C.R. 249 [multi-car accident caused by icy roadway]; *Mercer v. Perez* (1968) 68 C.2d 104, 126, 65 C.R. 315, 436 P.2d 315 [plaintiffs' car was struck from behind by defendants' car]; *Tobler v. Chapman* (1973) 31 C.A.3d 568, 584, 107 C.R. 614 [head-on collision].

The doctrine was held inapplicable in *Cordova v. Ford* (1966) 246 C.A.2d 180, 186, 54 C.R. 508, involving a two-car intersection collision; but the court in *Press v. Lyford* (1974) 36 C.A.3d 986, 996, 111 C.R. 817, a boating case, suggested that, despite the focus on the exclusive control issue in *Cordova*, the real basis of the holding was simply that neither party's right-of-way could be established. (See also 71 A.L.R.2d 375 [injury from contact with open door or tailgate of motor vehicle]; 79 A.L.R.2d 153 [stopping on highway]; 79 A.L.R.2d 211 [turning over on highway]; 55 A.L.R.3d 1260 [accidental starting up of parked motor vehicle]; 18 Am.Jur. Trials 443, 485 [application of doctrine in unwitnessed automobile cases].)

(2) *Action Against Manufacturer or Dealer.* The doctrine may be invoked in an action for property damage resulting from a defect in the automobile. (See *Ghera v. Ford Motor Co.* (1966) 246 C.A.2d 639, 647, 55 C.R. 94 [new car properly driven for about 1,600 miles, suddenly developed fire in engine compartment]; *Hinckley v. La Mesa R. V. Center* (1984) 158 C.A.3d 630, 639, 205 C.R. 22 [relatively new motor home destroyed by fire]; 79 A.L.R.3d 346

[wheel detached from automobile].)

(3) *Exception: Motor Vehicle and Animal.* Injury to a motor vehicle or its passenger resulting from a collision with a domestic animal at large on a street or highway could be a proper case for the doctrine. (See 29 A.L.R.4th 431, 466.) But in California, *Food & Ag.C. 16904* (replacing former Food & Ag.C. 423) provides that in a collision between a motor vehicle and a domestic animal on a highway, "there is no presumption or inference that the collision was due to negligence on behalf of the owner or the person in possession of the animal." (See *Pepper v. Bishop* (1961) 194 C.A.2d 731, 733, 15 C.R. 346 [applying former Food & Ag.C. 423].)

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XI. RES IPSA LOQUITUR  
F. Illustrations of Application of Doctrine.  
3. Boats.

*1 Witkin Cal. Evid. Burden § 130*

[§ 130] Boats.

The doctrine is applicable in actions against owners or operators of motor boats. (See *Shahinian v. McCormick* (1963) 59 C.2d 554, 559, 30 C.R. 521, 381 P.2d 377 [water skiing accident]; *Press v. Lyford* (1974) 36 C.A.3d 986, 994, 111 C.R. 817 [same]; 63 A.L.R.2d 343, 358 [action against owner or operator of motor boat]; 1 A.L.R.3d 642 [action involving injury or death on or about ship]; 35 A.L.R.4th 104, 123 [action against owner or operator of pleasure boat for injury or death of passenger].) However, it will not be applied where there is no balance of probabilities in favor of negligence, or where the element of control is negated by the intervention of natural forces. (*Carrick v. Pound* (1969) 276 C.A.2d 689, 692, 693, 81 C.R. 234, *infra*, §142 [sudden swell required defendant to decelerate boat, causing passenger to fall].)

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### CHAPTER III - Burden of Proof and Presumptions

#### XI. RES IPSA LOQUITUR F. Illustrations of Application of Doctrine. 4. Private Airplanes.

##### 1 *Witkin Cal. Evid. Burden* § 131

[§ 131] Private Airplanes.

(1) *In General.* In *Newing v. Cheatham* (1975) 15 C.3d 351, 124 C.R. 193, 540 P.2d 33, the court said:

"Whether aircraft accidents are more often than not the result of negligence is a question that has vexed the courts of many jurisdictions for decades. ... According to Prosser, many early cases took the position that not enough was known about the hazards of flight to permit an inference of negligence to arise from the mere fact of a plane crash. ... Advances in the safety and frequency of air travel, however, have led to a trend in the opposite direction. Thus, while judicial opinion on the subject is by no means unanimous, *res ipsa loquitur*, over the years, has been applied to an increasing variety of aircraft mishaps." (15 C.3d 360.) (See also *Mittelman v. Seifert* (1971) 17 C.A.3d 51, 79, 94 C.R. 654 [inference of negligence not rebutted]; 13 Am.Jur. Trials 557, 715, 726 [*res ipsa loquitur* in light aircraft litigation]; 25 A.L.R.4th 1237 [*res ipsa loquitur* in aviation accidents].)

(2) *Collisions.* In *Gotcher v. Metcalf* (1970) 6 C.A.3d 96, 85 C.R. 566, plaintiffs' decedent was killed following the collision of two single-engine planes. The pilot and passengers in the other plane survived, and the pilot testified that he did not see the first plane before the accident. *Held*, the trial judge properly refused to give plaintiffs' requested conditional *res ipsa loquitur* instruction. Because two moving planes were involved, the accident was not caused by an instrumentality under defendant's exclusive control. (6 C.A.3d 102, citing the text.) And the evidence failed to establish that "*it is more probable than not* that the accident was caused by the defendant's negligence or that he could have avoided it." (6 C.A.3d 103.) A concurring justice pointed out that plaintiffs had gone to trial against only one participant in the accident, i.e., the pilot of the other plane, rather than the pilots of both planes. "To apply *res ipsa loquitur* piecemeal in cases of concurring causation seems to me to place an unfair burden on the one party who is brought to trial." (6 C.A.3d 105.)

The dissenting justice argued that, in a collision of two or more vehicles, the exclusive control condition is met "if the defendant was in exclusive control of one of the vehicles, if the evidence warrants a finding by the jury that it is more probable than not that the collision could have been avoided regardless of the fault of the other driver had defendant been exercising the degree of care required of him, and if the evidence as to why defendant failed to do so is 'practically accessible' to him and inaccessible to the injured person." (6 C.A.3d 109.)

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### CHAPTER III - Burden of Proof and Presumptions

#### XI. RES IPSA LOQUITUR F. Illustrations of Application of Doctrine. 5. Falling Objects.

##### 1 Witkin Cal. Evid. Burden § 132

##### [§ 132] Falling Objects.

The doctrine of res ipsa loquitur originated in a falling object case (see 37 Cal. L. Rev. 183), and such cases continue to be common. (See *Raber v. Tumin* (1951) 36 C.2d 654, 657, 226 P.2d 574 [ladder fell on plaintiff invitee in defendant's store]; *Michener v. Hutton* (1928) 203 C. 604, 607, 265 P. 238 [vent pipe fell on plaintiff, working on floor below]; *Mintzer v. Wilson* (1937) 21 C.A.2d 85, 88, 68 P.2d 370 [plaster fell from ceiling on plaintiff, asleep in hotel bed]; *Helms v. Pacific Gas & Elec. Co.* (1937) 21 C.A.2d 711, 713, 70 P.2d 247 [glass globe of electrolier fell on plaintiff, standing on sidewalk]; *Khanoyan v. All Amer. Sports Enterprises* (1964) 229 C.A.2d 785, 40 C.R. 596, supra, §117 [flying debris from colliding vehicles in "Destruction Derby"]; 24 A.L.R.2d 643 [object falling from ceiling of public resort]; 33 A.L.R.2d 791, 826 [evidence of specific negligence as affecting reliance on doctrine: falling objects]; 41 A.L.R.2d 932 [object falling from train]; 66 A.L.R.2d 1255 [object falling from motor vehicle]; 81 A.L.R.2d 897 [glass falling from window, door, or wall]; 86 A.L.R.2d 838, 852 [tenant's injury from falling electrical equipment]; 97 A.L.R.2d 664, 674 [falling utility pole]; 97 A.L.R.2d 1431, 1444 [injury to person on street from object falling or thrown from building]; 61 A.L.R.4th 27 [falling object in store].)

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### CHAPTER III - Burden of Proof and Presumptions

#### XI. RES IPSA LOQUITUR F. Illustrations of Application of Doctrine. 6. Defective Appliances and Equipment.

##### 1 Witkin Cal. Evid. Burden § 133

#### [§ 133] Defective Appliances and Equipment.

Mishaps involving machinery and equipment of various kinds often give rise to the res ipsa loquitur presumption.

(1) *Vehicles and Their Accessories.* (See *Stanford v. Richmond Chase Co.* (1954) 43 C.2d 287, 292, 272 P.2d 764 [mechanized forklift used to load boxes on truck]; *McLaughlin v. Lasater* (1954) 129 C.A.2d 432, 434, 277 P.2d 41 [automobile wheel came off]; *Nungaray v. Pleasant Valley Lima Bean Growers & Warehouse Assn.* (1956) 142 C.A.2d 653, 660, 300 P.2d 285, *infra*, §154 [blocks to hold plaintiff's truck were too flat and truck moved]; *Khanoyan v. All Amer. Sports Enterprises* (1964) 229 C.A.2d 785, 790, 40 C.R. 596 [injury from flying fan blade at destruction derby]; *Springer v. Reimers* (1970) 4 C.A.3d 325, 332, 84 C.R. 486 [truck-trailer allegedly "jerked" suddenly]; *Preissman v. Ford Motor Co.* (1969) 1 C.A.3d 841, 852, 82 C.R. 108 [automobile parking gear failed to hold; parked car rolled into attendant]; 55 A.L.R.3d 1260 [accidental starting up of parked motor vehicle].)

(2) *Elevators, Hoists, Scaffolding, etc.* (See *Giardini v. Amship Corp.* (1947) 81 C.A.2d 751, 767, 185 P.2d 94 [collapse of scaffold on which man was working]; *Talbert v. Ostergaard* (1954) 129 C.A.2d 222, 227, 276 P.2d 880 [electrical swing stage used by painter gave way and fell]; *Rodin v. American Can Co.* (1955) 133 C.A.2d 524, 529, 284 P.2d 530 [construction elevator fell]; *Keller v. Morrison-Knudsen Co.* (1957) 149 C.A.2d 205, 206, 308 P.2d 370 [hoist from which pipe fell on plaintiff]; *Rollins v. Department of Water & Power* (1962) 209 C.A.2d 526, 535, 26 C.R. 162 [delivery person's foot was caught between elevator shaft wall and elevator floor]; 22 A.L.R.2d 1176 [scaffold injuries]; 56 A.L.R.2d 1059 [elevator injuries]; 17 Am.Jur. Trials 755, 803 [elevator shaft accidents].)

(3) *Sprinklers and Water Mains.* (See *Juchert v. California Water Service Co.* (1940) 16 C.2d 500, 515, 106 P.2d 886 [leaking water main]; *Buffums' v. Long Beach* (1931) 111 C.A. 327, 329, 295 P. 540 [same]; *Hercules Powder Co. v. Automatic Sprinkler Corp. of America* (1957) 151 C.A.2d 387, 395, 311 P.2d 907 [automatic sprinkler system failed to work and fire caused explosion].)

(4) *Heating and Electrical Equipment.* (See *Knell v. Morris* (1952) 39 C.2d 450, 454, 247 P.2d 352 [leaking water heater]; *Reynolds v. Natural Gas Equipment* (1960) 184 C.A.2d 724, 731, 7 C.R. 879 [gas burner, used to dry sand and gravel for blacktop road paving mix, exploded]; *Pappas v. Carson* (1975) 50 C.A.3d 261, 267, 123 C.R. 343 [fire started either from defendant's overloading of electrical circuits or from defect in installation of wiring]; 3 A.L.R.2d 1448 [injuries from heating unit or electrical appliance]; 21 A.L.R.4th 929 [cause of liability for real property fires].)

(5) *Furniture.* (See *Rose v. Melody Lane of Wilshire* (1952) 39 C.2d 481, 486, 247 P.2d 335, *infra*, §144 [barstool with defective pin fastening it to base broke and caused plaintiff to fall]; *Keena v. Scales* (1964) 61 C.2d 779, 782, 40

*C.R.* 65, 394 *P.2d* 809 [office swivel chair fell when tilted backward]; 21 *A.L.R.2d* 420 [injury from defect in or fall of seat]; *Owens v. White Memorial Hosp.* (1956) 138 *C.A.2d* 634, 638, 292 *P.2d* 288 [hospital bed with broken safety spring fell on plaintiff when she pressed release pedal].)

(6) *Other Appliances and Equipment.* (See *Burr v. Sherwin Williams Co.* (1954) 42 *C.2d* 682, 687, 268 *P.2d* 1041 [sealed metal drums containing insecticide used in cropdusting]; *Rafter v. Dubrock's Riding Academy* (1946) 75 *C.A.2d* 621, 627, 171 *P.2d* 459 [slipping of saddle on rented riding horse]; *Emerick v. Raleigh Hills Hosp.* (1982) 133 *C.A.3d* 575, 583, 184 *C.R.* 92 [sink on which patient in alcoholic rehabilitation hospital leaned or sat collapsed].)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Correction:* Page 270, line 12, "*Giondini*" should be "*Biondini*".



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### CHAPTER III - Burden of Proof and Presumptions

#### XI. RES IPSA LOQUITUR F. Illustrations of Application of Doctrine. 7. Explosions.

*1 Witkin Cal. Evid. Burden § 134*

[§ 134] Explosions.

Injuries from the explosion of tanks or other receptacles containing flammable gases are proper *res ipsa loquitur* cases. (See *Chutuk v. Southern Calif. Gas Co.* (1933) 218 C. 395, 397, 23 P.2d 285 [explosion of gas in service pipe]; *Hinds v. Wheadon* (1942) 19 C.2d 458, 460, 121 P.2d 724 [explosion of dehydrator tank]; *Dierman v. Providence Hosp.* (1947) 31 C.2d 290, 295, 188 P.2d 12 [tank of nitrous oxide used as anesthetic]; *Rohar v. Osborne* (1955) 133 C.A.2d 345, 350, 284 P.2d 125 [kerosene weed burner; see 7 *Hastings L. J.* 106]; *Reynolds v. Natural Gas Equipment* (1960) 184 C.A.2d 724, 732, 7 C.R. 879; 3 A.L.R.2d 1453 [gas stoves, furnaces, etc.]; 34 A.L.R.5th 1 [gas leak causing explosion].) The doctrine has also been applied in the case of explosions not involving flammable materials. (See *Baker v. B.F. Goodrich Co.* (1953) 115 C.A.2d 221, 223, 252 P.2d 24 [automobile tire burst while being inflated]; on exploding bottles, see *infra*, §135.)

The exploding of true *explosives* such as gunpowder usually gives rise to liability without fault and makes reliance on the presumption unnecessary. (See *McGrath v. Basich Bros. Const. Co.* (1935) 7 C.A.2d 573, 576, 46 P.2d 981; 6 *Summary* (9th), *Torts*, §1232.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*Cross-Reference:* 6 *Summary* (10th), *Torts*, §1418.



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#### XI. RES IPSA LOQUITUR F. Illustrations of Application of Doctrine. 8. Bursting Bottles.

##### 1 Witkin Cal. Evid. Burden § 135

#### [§ 135] Bursting Bottles.

Bursting bottle cases are similar to the exploding receptacle cases, and are so treated. (See *Escola v. Coca Cola Bottling Co.* (1944) 24 C.2d 453, 458, 150 P.2d 436 [Coca Cola]; *Gordon v. Aztec Brewing Co.* (1949) 33 C.2d 514, 523, 203 P.2d 522 [beer]; *Zentz v. Coca Cola Bottling Co. of Fresno* (1952) 39 C.2d 436, 440, 247 P.2d 344 [Coca Cola]; 36 So. Cal. L. Rev. 619 [discussing Colorado case involving carbonated beverage bottle exploding on grocery store shelf]; 36 A.L.R.4th 419 [explosion or breakage of beverage bottle]; 10 Am.Jur. Trials 381 [litigating claim for injury from exploding carbonated beverage bottle]; and see *infra*, §145.)

In *Honea v. City Dairy* (1943) 22 C.2d 614, 620, 140 P.2d 369, where a *milk bottle* broke in plaintiff's hands, the court held the doctrine inapplicable on the ground that the evidence showed reasonable inspection and no feasible means of discovering hidden defects or flaws. Whatever vitality is left in this opinion (see dissent, 22 C.2d 623; dissent in *Trust v. Arden Farms Co.* (1958) 50 C.2d 217, 230, 324 P.2d 583) is confined to bottles of ordinary liquids. Where the bottle contains carbonated beverages and bursts or "explodes," the record usually contains evidence of reasonable means of testing for defects. (See *Escola v. Coca Cola Bottling Co.*, *supra*, 24 C.2d 460; 33 Proof of Facts 2d 1 [proving due care in handling of carbonated beverage bottle].)

Thus, in *Zentz v. Coca Cola Bottling Co. of Fresno*, *supra*, defendant company delivered bottles of Coca Cola to plaintiff's restaurant, where they were placed by defendant's delivery man in a waist-high top opening cooler. About an hour after a new delivery to an empty cooler, plaintiff reached in, and, before she touched any bottles, one exploded, severely cutting her arm. *Held*, a *res ipsa loquitur* instruction was proper. "The bottle may have been improperly handled in such a manner as to damage it; there may have been a failure to make a proper inspection for defects; it could have been filled with an excessive charge of gas; or it might have been improperly manufactured. Common experience indicates that it would be unreasonable to hold that a bottle of carbonated liquid would be likely to explode if all persons who had anything to do with it had exercised proper care." (39 C.2d 447.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER III - Burden of Proof and Presumptions

XI. RES IPSA LOQUITUR  
F. Illustrations of Application of Doctrine.  
9. Medical Malpractice.  
a. Modern Development.

1 *Witkin Cal. Evid. Burden* § 136

[§ 136] Modern Development.

"The application of the doctrine of res ipsa loquitur in malpractice cases is a development of comparatively recent years. Before that time, the facts that medicine is not an exact science, that the human body is not susceptible to precise understanding, that the care required of a medical man is the degree of learning and skill common in his profession or locality, and that even with the greatest of care untoward results do occur in surgical and medical procedures, were considered paramount in determining whether the medical man in given circumstance had been negligent. But gradually the courts awoke to the so-called 'conspiracy of silence.' No matter how lacking in skill or how negligent the medical man might be, it was almost impossible to get other medical men to testify adversely to him in litigation based on his alleged negligence. Not only would the guilty person thereby escape from civil liability for the wrong he had done, but his professional colleagues would take no steps to insure that the same results would not again occur at his hands. This fact, plus the fact that usually the patient is by reason of anesthesia or lack of medical knowledge in no position to know what occurred that resulted in harm to him, forced the courts to attempt to equalize the situation. ... One other fact contributed to the application of the doctrine, namely, that certain medical and surgical procedures became so common that in many of them the laymen knew that if properly conducted untoward results did not occur, and in others medical men (when it was possible to get them to admit it) from their specialized knowledge knew that without negligence the result would have been a good one." (*Salgo v. Leland Stanford Jr. University Bd. of Trustees* (1957) 154 C.A.2d 560, 568, 317 P.2d 170.)

There are many other general discussions of this area of operation of the doctrine. (See *Ybarra v. Spangard* (1944) 25 C.2d 486, 494, 154 P.2d 687, *infra*, §147; *Seneris v. Haas* (1955) 45 C.2d 811, 825, 291 P.2d 915; *Quintal v. Laurel Grove Hosp.* (1964) 62 C.2d 154, 164, 41 C.R. 577, 397 P.2d 161, *infra*, §139; *Clark v. Gibbons* (1967) 66 C.2d 399, 408, 58 C.R. 125, 426 P.2d 525, *infra*, §139; *Meier v. Ross General Hosp.* (1968) 69 C.2d 420, 426, 71 C.R. 903, 445 P.2d 519, *infra*, §155; *Bardessono v. Michels* (1970) 3 C.3d 780, 788, 91 C.R. 760, 478 P.2d 480; *Folk v. Kilk* (1975) 53 C.A.3d 176, 183, 126 C.R. 172; *Blackwell v. Hurst* (1996) 46 C.A.4th 939, 943, 54 C.R.2d 209; 48 Cal. L. Rev. 131, 231; 30 So. Cal. L. Rev. 80; 14 Stanf. L. Rev. 251; 15 Stanf. L. Rev. 77; 77 Harv. L. Rev. 343; 8 U.S.F. L. Rev. 343; 6 West L.A. L. Rev. 40 [confronting conspiracy of silence]; 41 A.L.R.2d 355 [injury by X-ray]; 82 A.L.R.2d 1262 [application of doctrine in action against doctor]; 9 A.L.R.3d 1315 [application of doctrine in action against hospital]; *infra*, §§139, 147.)

For instructions, see BAJI (8th ed.), Nos. 6.35, 6.36; *supra*, §126; *Frantz v. San Luis Med. Clinic* (1978) 81 C.A.3d 34, 45, 146 C.R. 146 ([order in which instructions should be given].)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See CACI, No. 518 [res ipsa loquitur in medical malpractice action].





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### XI. RES IPSA LOQUITUR F. Illustrations of Application of Doctrine. 9. Medical Malpractice. b. Illustrations.

#### 1 Witkin Cal. Evid. Burden § 137

[§ 137] Illustrations.

The doctrine has been invoked in a wide variety of situations involving negligent medical treatment or hospital care. (For examples of proper bases for a jury's determination as to the probability of negligence, see *infra*, §139.)

(1) *Injuries while patient anesthetized, drugged, or sedated.* (See *Ybarra v. Spangard* (1944) 25 C.2d 486, 494, 154 P.2d 687, *infra*, §147; *Cavero v. Franklin General Benevolent Soc.* (1950) 36 C.2d 301, 309, 223 P.2d 471 [death of 3-year-old boy while anesthetized during tonsillectomy]; *Tomei v. Henning* (1967) 67 C.2d 319, 323, 62 C.R. 9, 431 P.2d 633 [plaintiff's ureter accidentally sutured during surgery]; *Brown v. Shortlidge* (1929) 98 C.A. 352, 357, 277 P. 134 [anesthetized child's tooth knocked out during tonsillectomy]; *Ybarra v. Spangard* (1949) 93 C.A.2d 43, 45, 208 P.2d 445 [injury to neck; patient anesthetized on operating table]; *Oldis v. La Societe Francaise de Bienfaisance Mutuelle* (1955) 130 C.A.2d 461, 464, 279 P.2d 184 [patient suffered third degree burn while heavily sedated in hospital bed]; *McDonald v. Foster Memorial Hosp.* (1959) 170 C.A.2d 85, 98, 338 P.2d 607 [sedated child fell out of hospital bed]; *Cho v. Kempler* (1960) 177 C.A.2d 342, 347, 349, 2 C.R. 167, *infra*, §139 [mastoidectomy; cranial nerve severed during surgery]; *Belshaw v. Feinstein* (1968) 258 C.A.2d 711, 718, 65 C.R. 788 [brain was cut during trephining of skull]; *Cline v. Lund* (1973) 31 C.A.3d 755, 761, 107 C.R. 629 [patient anesthetized during total abdominal hysterectomy; death resulted 2 days later from continuous hemorrhage at or about operative site]; *Blackwell v. Hurst* (1996) 46 C.A.4th 939, 944, 945, 54 C.R.2d 209 [sedated dental patient aspirated crown after dentist dropped it on her tongue]; 49 A.L.R.4th 63 [res ipsa loquitur in negligent anesthesia cases].)

(2) *Cardiac arrest during treatment.* (See *Quintal v. Laurel Grove Hosp.* (1964) 62 C.2d 154, 164, 41 C.R. 577, 397 P.2d 161, *infra*, §139 [cardiac arrest under anesthetic]; *Edelman v. Zeigler* (1965) 233 C.A.2d 871, 880, 44 C.R. 114 [same].)

(3) *Surgical tool left inside patient.* (See *Ales v. Ryan* (1936) 8 C.2d 82, 100, 64 P.2d 409 [sponge left in patient's abdomen by operating surgeon]; *Bowers v. Olch* (1953) 120 C.A.2d 108, 115, 260 P.2d 997 [surgical needle left in patient's abdomen].)

(4) *Harmful side effects.* (See *Seneris v. Haas* (1955) 45 C.2d 811, 825, 291 P.2d 915 [patient paralyzed following administration of spinal anesthetic for childbirth]; *Wolfsmith v. Marsh* (1959) 51 C.2d 832, 835, 337 P.2d 70 [injury to knee following injection there of sodium pentothal]; *Davis v. Memorial Hosp.* (1962) 58 C.2d 815, 817, 26 C.R. 633, 376 P.2d 561 [enema given; rectal abscess]; *Clark v. Gibbons* (1967) 66 C.2d 399, 413, 58 C.R. 125, 426 P.2d 525, *infra*, §147 [arthritis followed premature termination of ankle surgery]; *Bardessono v. Michels* (1970) 3 C.3d 780, 790,

91 C.R. 760, 478 P.2d 480 [pain and paralysis followed cortisone injections]; *Moore v. Steen* (1929) 102 C.A. 723, 725, 283 P. 833 [X-ray burns received by plaintiff in course of diagnosis of his case]; *Bauer v. Otis* (1955) 133 C.A.2d 439, 442, 284 P.2d 133 [injury to nerve in arm following injection]; *Ragusano v. Civic Center Hosp. Foundation* (1962) 199 C.A.2d 586, 591, 19 C.R. 118 [nerve pinched and leg permanently injured following injection of spinal anesthetic for childbirth]; *Rawlings v. Harris* (1968) 265 C.A.2d 452, 458, 71 C.R. 288 [fistula followed hysterectomy]; *Berkey v. Anderson* (1969) 1 C.A.3d 790, 799, 82 C.R. 67 ["rubber leg" followed pain caused during myelogram tests]; *Rimmele v. Northridge Hosp. Foundation* (1975) 46 C.A.3d 123, 129, 120 C.R. 39 [spinal osteomyelitis and probable sciatic nerve involvement were due to infection caused by injections in buttocks during childbirth]; *Hale v. Venuto* (1982) 137 C.A.3d 910, 919, 187 C.R. 357 [foot numbness following knee operation].)

(5) *Improper supervision.* (See *Vistica v. Presbyterian Hosp. & Med. Center of San Francisco* (1967) 67 C.2d 465, 470, 62 C.R. 577, 432 P.2d 193, *infra*, §155 [psychiatric patient committed suicide]; *Meier v. Ross General Hosp.* (1968) 69 C.2d 420, 421, 71 C.R. 903, 445 P.2d 519, *infra*, §155 [same]; *Gin Non Louie v. Chinese Hosp. Assn.* (1967) 249 C.A.2d 774, 793, 57 C.R. 906 [patient fell out of bed despite guardrails]; *Emerick v. Raleigh Hills Hosp.* (1982) 133 C.A.3d 575, 583, 585, 184 C.R. 92 [plaintiff alcoholic rehabilitation patient sat or leaned against sink which detached, causing serious injuries].)

(6) *Inadequate postoperative advice.* (See *Kerr v. Bock* (1971) 5 C.3d 321, 324, 95 C.R. 788, 486 P.2d 684, *infra*, §139 [plaintiff received no warning about lifting leg from which some bone had been removed].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(3) *Surgical tool left inside patient.* See *Fields v. Yusef* (2006) 144 C.A.4th 1381, 1390, 51 C.R.3d 277 [where sponge was left in patient's leg during surgery, it was reversible error to fail to instruct on *res ipsa loquitur*; following *Ales v. Ryan* (1936) 8 C.2d 82, 64 P.2d 409, text, p. 274].



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## XI. RES IPSA LOQUITUR

## F. Illustrations of Application of Doctrine.

## 9. Medical Malpractice.

## c. Common Knowledge and Expert Testimony.

## 1. Former Restrictive Rule.

1 *Witkin Cal. Evid. Burden* § 138

[§ 138] Former Restrictive Rule.

In medical malpractice cases, expert testimony is generally required to establish the applicable standard of care. (See *Sinz v. Owens* (1949) 33 C.2d 749, 753, 205 P.2d 3, 3 Cal. Evidence (4th), *Presentation at Trial*, §191.) Under a "common knowledge" exception, however, if the injury or treatment is within the common knowledge of laypersons, as where infection results from a vaginal examination conducted with unsterilized hands, no expert testimony is required. (See *Inderbitzen v. Lane Hosp.* (1932) 124 C.A. 462, 467, 12 P.2d 744, 13 P.2d 905; 1 Cal. Evidence (4th), *Opinion Evidence*, §86.) Originally, the jurors' common knowledge was also the only basis for determining, for purposes of res ipsa loquitur, whether the accident was of a type that ordinarily does not occur in the absence of negligence. Thus, in *Engelking v. Carlson* (1939) 13 C.2d 216, 88 P.2d 695, defendant surgeon, in performing an operation on an unconscious plaintiff's knee, severed the peroneal nerve. *Held*, judgment of nonsuit affirmed; res ipsa loquitur was inapplicable. The doctrine applies in malpractice cases only where a *layperson* may say as a matter of *common knowledge* that the injury would not have happened if due care had been exercised. Where, as here, the matter is not one of common knowledge, expert medical opinion is required, and the medical testimony was to the effect that occasionally the nerve is severed in this type of operation without negligence. (13 C.2d 221.)

Similarly, in *Farber v. Olkon* (1953) 40 C.2d 503, 510, 254 P.2d 520, plaintiff was given electric shock therapy. In a convulsive state, his brittle legs broke and he suffered a permanently deformed hip. *Held*, the doctrine was not applicable; expert opinion is required to evaluate the procedures and hazards of shock therapy in a particular case. (See also *Bennett v. Los Angeles Tumor Institute* (1951) 102 C.A.2d 293, 295, 227 P.2d 473 [doctrine was inapplicable; expert testimony was needed to determine whether negligent X-ray therapy for foot wart caused burns]; *Dees v. Pace* (1953) 118 C.A.2d 284, 288, 257 P.2d 756 [hysterectomy operation resulting in fistula in bladder was beyond realm of laypersons' common knowledge]; on interplay of "common knowledge" exception and res ipsa loquitur, see *Flowers v. Torrance Memorial Hosp. Med. Center* (1994) 8 C.4th 992, 1001, 35 C.R.2d 685, 884 P.2d 142 ["exception is principally limited to situations in which the plaintiff can invoke the doctrine of res ipsa loquitur"]; 77 Harv. L. Rev. 343; 14 Pacific L. J. 143.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## 9. Medical Malpractice.

## c. Common Knowledge and Expert Testimony.

## 2. Approach of Later Cases.

1 *Witkin Cal. Evid. Burden* § 139

[§ 139] Approach of Later Cases.

(1) *Jurors' Common Knowledge*. In a proper case, the jurors' common knowledge remains an acceptable basis for a determination as to the probability of negligence. (See *Bardessono v. Michels* (1970) 3 C.3d 780, 790, 91 C.R. 760, 478 P.2d 480 ["if the routine medical procedure is relatively commonplace and simple, rather than special, unusual and complex, the jury may properly rely upon its common knowledge in determining whether the accident is of a kind that would ordinarily not have occurred in the absence of someone's negligence"].)

In *Kerr v. Bock* (1971) 5 C.3d 321, 95 C.R. 788, 486 P.2d 684, the 67-year-old plaintiff underwent surgery for removal of some bone in her left leg. Defendant surgeon warned her to use crutches at all times, with minimal weight bearing, and to avoid violent motions. There was no evidence, however, that he warned her about danger from *lifting* her leg. On the day after she was discharged from the hospital, plaintiff was lying on a sofa and attempted to rise by lifting her left leg "just a little." The leg fractured at the site of the operation. She requested a *res ipsa loquitur* instruction but the trial judge refused to give it. *Held*, this was prejudicial error. A *res ipsa loquitur* instruction could not have been supported on the basis of expert testimony because there was no substantial expert evidence on the issue. But such an instruction could have been based on the considerable common knowledge among laypersons about the results of defendant's failure to instruct plaintiff that she faced a danger of breakage if she lifted her leg. "It is just common sense that after removing a substantial portion of a patient's leg bone, a doctor should warn his patient that there is considerable risk to the patient in lifting the leg horizontally until after the healing process has been completed. Neither such a warning nor the breaking of the leg is so uncommon or so complicated that expert testimony would be required in order to render a *res ipsa loquitur* instruction appropriate." (5 C.3d 324.)

(2) *Expert Testimony*. The strict view of *Engelking v. Carlson* (1939) 13 C.2d 216, 221, 88 P.2d 695, and similar cases (*supra*, §138) was repudiated in a number of important later decisions.

In *Cho v. Kempler* (1960) 177 C.A.2d 342, 2 C.R. 167, plaintiff, on recommendation of defendant doctor, underwent an operation in her left ear (mastoidectomy). Her seventh cranial nerve was severed, and she suffered partial paralysis and other serious injuries to her face and left eye. *Held*, an instruction on *res ipsa loquitur* was proper, and verdict for plaintiff affirmed. Evidence to establish the condition that the accident must be of a kind that ordinarily does not occur in the absence of someone's negligence was as follows: (a) solidity of the bone surrounding the nerve--a protective substance; (b) rarity of occurrence of this kind of injury in this kind of operation (testimony of three doctors of 1,630 operations without severance of the nerve); (c) medical testimony that severance was unlikely but might occur

if doctor got "disoriented" ("Disorientation in itself is a form of negligence"); and (d) defendant's statement that he was "at fault" (express admission) and his payment of costs of a second remedial operation and subsequent therapy treatments (implied admission). (177 C.A.2d 350, 351.)

As to this last item, defendant contended that the alleged admissions could only be applicable to negligence in this particular case, relying on *Dees v. Pace* (1953) 118 C.A.2d 284, 257 P.2d 756. But the court, disapproving the *Dees* case, declared: "The fact that even in one case the injury was caused by negligence, and not by other factors, would have some bearing, even if minor, upon the probability, in general, that the injury does not ordinarily occur except from negligence." (177 C.A.2d 351.)

In *Siverson v. Weber* (1962) 57 C.2d 834, 836, 22 C.R. 337, 372 P.2d 97, the *Engelking* test was disapproved, and the court declared that in determining probabilities, reliance may be placed on both common knowledge and expert testimony. The court pointed out, however, that rarity of the occurrence of an injury is not alone sufficient to justify application of the doctrine:

"To permit an inference of negligence under the doctrine of *res ipsa loquitur* solely because an uncommon complication develops would place too great a burden upon the medical profession and might result in an undesirable limitation on the use of operations or new procedures involving an inherent risk of injury even when due care is used. Where risks are inherent in an operation and an injury of a type which is rare does occur, the doctrine should not be applicable unless it can be said that, in the light of past experience, such an occurrence is more likely the result of negligence than some cause for which the defendant is not responsible." (57 C.2d 839.) (See *Gerhardt v. Fresno Med. Group* (1963) 217 C.A.2d 353, 360, 31 C.R. 633 [*Siverson* rule applied and doctrine held applicable]; 15 *Stanf. L. Rev.* 77 [*Siverson*].)

In *Quintal v. Laurel Grove Hosp.* (1964) 62 C.2d 154, 41 C.R. 577, 397 P.2d 161, the court held the conditional doctrine applicable to a case of cardiac arrest occurring in an eye operation on a 6-year-old boy. The testimony--all elicited on cross-examination of defendant doctors and their experts--indicated that 90% of deaths from cardiac arrest occurred by reason of faulty intubation; that if an operation had been performed within 3 minutes of the heart stoppage, no brain damage would have resulted; and that the patient's temperature and apprehension (both present), increase the risk. (62 C.2d 164, 166.) A strong dissent argues that the expert testimony was inadequate, and that facts that might be independent proof of negligence have no bearing on the question whether the *res ipsa loquitur* doctrine applies. (62 C.2d 170; see 18 *Hastings L. J.* 691 [criticizing *Quintal*].)

(3) *Examples: Doctrine Found Applicable.* (See *Clark v. Gibbons* (1967) 66 C.2d 399, 413, 58 C.R. 125, 426 P.2d 525 [patient suffered permanent arthritic condition following premature termination of surgery; expert testimony as to low incidence of accidents when due care is used, along with evidence of defendants' specific negligent acts, were sufficient basis to allow jury to make determination as to probability of negligence]; *Meier v. Ross General Hosp.* (1968) 69 C.2d 420, 431, 71 C.R. 903, 445 P.2d 519 [course of medical treatment was not necessarily beyond layperson's common knowledge; conditional *res ipsa* instruction was improperly refused]; *Belshaw v. Feinstein* (1968) 258 C.A.2d 711, 722, 65 C.R. 788 [following *Quintal* and *Clark, supra*; *res ipsa* instruction was proper where expert testified that stereotaxic trepanning operation involved low accident rate, and there was some evidence of negligence]; *Rawlings v. Harris* (1968) 265 C.A.2d 452, 458, 71 C.R. 288 [following *Clark, supra*; *res ipsa* instruction was improperly refused where plaintiff introduced expert testimony that her injury (bladder puncture and fistula resulting from hysterectomy) was necessarily caused by negligence of doctor]; *Hale v. Venuto* (1982) 137 C.A.3d 910, 919, 187 C.R. 357 [foot numbness following knee surgery; *res ipsa* instruction was improperly refused where there was expert testimony that negligence was probable cause of injury]; *Gannon v. Elliot* (1993) 19 C.A.4th 1, 7, 23 C.R.2d 86 [where defendant allegedly left surgical instrument cap in plaintiff's hip, jurors could rely on common knowledge to determine negligence issue, although expert testimony that defendant was within standard of care could be used to rebut inference of negligence arising from doctrine].)

(4) *Examples: Doctrine Found Inapplicable.* (See *Surabian v. Lorenz* (1964) 229 C.A.2d 462, 467, 40 C.R. 410

[uncontradicted medical witnesses testified that dental patient's reaction to anesthetic was inherent risk of approved injection]; *Inouye v. Black* (1965) 238 C.A.2d 31, 34, 47 C.R. 313 [steel wire used in neurosurgery broke into fragments; negligence on part of defendant surgeon was purely speculative]; *Crawford v. Sacramento* (1966) 239 C.A.2d 791, 797, 49 C.R. 115 [distinguishing *Quintal*, *supra*; cardiac arrest; accident was outside reach of lay experience, and there was no expert testimony to narrow field of possibilities and allow lay mind to draw inference of probability of negligence].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(4) *Examples: Doctrine Found Inapplicable.* See *Elcome v. Chin* (2003) 110 C.A.4th 310, 320, 1 C.R.3d 631 [in medical malpractice action by patient who suffered upper extremity injuries after pelvic surgery, defendants' summary judgment motion was properly granted despite plaintiff's assertion that *res ipsa loquitur* applied; plaintiff failed to present any evidence that injuries were of kind that do not ordinarily occur in absence of negligence or that they were caused by instrumentality within defendants' exclusive control].



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##### 9. Medical Malpractice.

##### c. Common Knowledge and Expert Testimony.

##### 3. Unusual Result Following Complex Procedure.

#### 1 Witkin Cal. Evid. Burden § 140

[§ 140] Unusual Result Following Complex Procedure.

In *Clemens v. Regents of Univ. of Calif.* (1970) 8 C.A.3d 1, 87 C.R. 108, plaintiff was treated by a new (but no longer experimental) isolation perfusion procedure to destroy a recurring tumor in his right arm. About 1 week after the surgery, he developed inflammation of an artery and circulation difficulties in that arm. As a result, he lost four fingers by surgical amputation and was restricted in the use of his arm. The trial judge refused to give either unconditional or conditional res ipsa loquitur instructions. *Held*, no error.

(a) The surgical procedure was highly complex, and plaintiff's injury, while unusual, was a possible complication of which he had been informed. (8 C.A.3d 12.) And a difference of medical opinion on desirability of a particular medical procedure does not establish that the determination to use it rather than another was negligent. (8 C.A.3d 13.)

(b) Plaintiff's suggestion that the rule of *Clark v. Gibbons* (1967) 66 C.2d 399, 413, 58 C.R. 125, 426 P.2d 525, and *Quintal v. Laurel Grove Hosp.* (1964) 62 C.2d 154, 41 C.R. 577, 397 P.2d 161 (*supra*, §139), should be applied to all situations in which a rare result flowed from a medical procedure, was unacceptable: "That extension by this court would be inappropriate. We do not have the means to determine such matters as the impact of the extension upon the development of progressive medical procedures ... , nor do we have the means to determine impact upon the cost of medical services to the public. A change in the present doctrine of conditional res ipsa loquitur should be considered only by a forum possessed of the facilities to determine the full consequences of the change." (8 C.A.3d 13.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Curtis v. Santa Clara Valley Med. Center* (2003) 110 C.A.4th 796, 803, 2 C.R.3d 73 [in action by patient who became partially blind after undergoing posterior spinal fusion surgery, trial judge did not err in refusing to give res ipsa loquitur instruction and in granting nonsuit for defendants in absence of expert testimony from plaintiff; procedure was complex and only expert testimony could establish whether there was deviation from standard of care].



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### CHAPTER III - Burden of Proof and Presumptions

#### XI. RES IPSA LOQUITUR F. Illustrations of Application of Doctrine. 10. Other Situations.

##### 1 Witkin Cal. Evid. Burden § 141

[§ 141] Other Situations.

Among other cases in which the doctrine was applied are the following:

(1) *Fire*. (See *Seeley v. Combs* (1966) 65 C.2d 127, 132, 52 C.R. 578, 416 P.2d 810, supra, §125 [fire in barn]; *Horner v. Barber* (1964) 229 C.A.2d 829, 836, 40 C.R. 570 [fire in garage]; *Hinckley v. La Mesa R. V. Center* (1984) 158 C.A.3d 630, 639, 205 C.R. 22 [motor home destroyed by fire]; 21 A.L.R.4th 929 [real property fires].)

(2) *Discharge of firearm*. (See *Robledo v. Los Angeles* (1967) 252 C.A.2d 285, 294, 60 C.R. 328; 46 A.L.R.2d 1216 [firearms accidents].)

(3) *Chemicals or electricity*. (See *Romero v. And'ra* (1963) 216 C.A.2d 295, 300, 30 C.R. 645 [injury from hair bleaching chemicals]; 25 A.L.R.2d 740 [damage by lightning transmitted on power lines]; 55 A.L.R.2d 134 [electrified guy wire].)

(4) *Business floors or stairways*. (See 55 A.L.R.2d 897 [stairway or steps of theatre or other place of amusement]; 61 A.L.R.2d 59 [debris on floor]; 61 A.L.R.2d 132 [obstacle on floor]; 61 A.L.R.2d 191 [debris on stairway]; 62 A.L.R.2d 57 [floor made slippery by water, oil, mud, etc.]; 62 A.L.R.2d 144 [steps made slippery by water, oil, mud, etc.]; 63 A.L.R.2d 635 [floor made slippery by waxing]; 63 A.L.R.2d 710 [floor made slippery by washing or cleaning]; 64 A.L.R.2d 365 [defective floor]; 64 A.L.R.2d 437 [defective stairway].)

(5) *Doors*. (See 16 A.L.R.2d 1167 [swinging door]; 93 A.L.R.3d 132 [revolving door].)

(6) *Broken glass*. (See *Dryden v. Continental Baking Co.* (1938) 11 C.2d 33, 39, 77 P.2d 833 [glass particles in bread]; *Young v. Gautier* (1938) 28 C.A.2d 494, 498, 82 P.2d 959 [broken glass on bottom of resort swimming pool]; *Dennis v. Carolina Pines Bowling Center* (1967) 248 C.A.2d 369, 376, 56 C.R. 453 [broken glass from door with loose aluminum frame].)

(7) *Escape or overflow of water*. (See *Diamond Springs Lime Co. v. American River Constructors* (1971) 16 C.A.3d 581, 601, 94 C.R. 200 [dam burst]; 91 A.L.R.3d 186.)

(8) *Contaminated food or beverage*. (See 59 A.L.R.4th 201, 290 [action against multiple defendants arising from contaminated food or beverage].)

(9) *Miscellaneous situations*. (See *Hansen v. Matich Corp.* (1965) 234 C.A.2d 129, 131, 44 C.R. 149 [depression in



highway]; 94 A.L.R.2d 1431 [skiing, tobogganing or bobsledding facilities]; 93 A.L.R.3d 897 [injury in beauty salon].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER III - Burden of Proof and Presumptions

## XI. RES IPSA LOQUITUR

## G. Limitations on Application of Doctrine.

## 1. Defendant's Control.

## a. In General.

## 1. Nature and Theory of Condition.

*1 Witkin Cal. Evid. Burden § 142*

[§ 142] Nature and Theory of Condition.

One of the stated conditions of the doctrine is that the injury must be caused by an instrumentality under the exclusive control of the defendant. (See *supra*, §114.) If such exclusive control is absent, *res ipsa loquitur* is, in theory, inapplicable. However, the concept of "control" is vague, and exceptions have been recognized that make it most uncertain in application. (See generally *37 Cal. L. Rev.* 199 et seq. [suggesting that control requirement is unnecessary and misleading and should be dropped]; for exceptions to the requirement, see *infra*, §145 et seq.)

In *Zentz v. Coca Cola Bottling Co. of Fresno* (1952) 39 C.2d 436, 247 P.2d 344, *infra*, §145, the court dissipated some of the mystery surrounding this supposed condition by pointing out that its purpose is to eliminate the possibility that the accident was caused by *someone other than the defendant*, and thus to aid in determination of the *probability of the defendant's negligence*. But, said the court: "The requirement of control is not an absolute one. Although, as we have seen, the doctrine will not ordinarily apply if it is equally probable that the negligence was that of someone other than the defendant, the plaintiff need not exclude all other persons who might possibly have been responsible where the defendant's negligence appears to be the more probable explanation of the accident." (39 C.2d 443.) (See also *Bedford v. Re* (1973) 9 C.3d 593, 597, 108 C.R. 364, 510 P.2d 724 [quoting *Zentz*]; *Brown v. Poway Unified School Dist.* (1993) 4 C.4th 820, 827, 15 C.R.2d 679, 843 P.2d 624, *supra*, §151 [slip and fall case; there was no basis for finding that lunch meat that plaintiff slipped on was within exclusive control of defendant school district]; *Roddiscraft v. Skelton Logging Co.* (1963) 212 C.A.2d 784, 798, 28 C.R. 277, citing the text [control found]; *Moreno v. Sayre* (1984) 162 C.A.3d 116, 125, 208 C.R. 444 [control not found]; *Gicking v. Kimberlin* (1985) 170 C.A.3d 73, 77, 215 C.R. 834 [same].)

An *intervening natural force* may defeat the element of defendant's exclusive control. Thus, in *Carrick v. Pound* (1969) 276 C.A.2d 689, 81 C.R. 234, plaintiff was a passenger in defendant's pleasure boat, which defendant was operating and over which he had exclusive control. Without warning, a swell appeared immediately in front of the boat. Defendant pulled back the throttle, the boat sharply decelerated and plaintiff fell backward onto a tackle box. *Held*, a *res ipsa loquitur* instruction was properly denied: "The instrumentality was two-fold, viz., an act of nature in the form of a sudden swell coupled with the respondent's very normal reaction of decelerating to minimize the impact." (276 C.A.2d 693.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Negligence k.1614



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### CHAPTER III - Burden of Proof and Presumptions

#### XI. RES IPSA LOQUITUR

##### G. Limitations on Application of Doctrine.

##### 1. Defendant's Control.

##### a. In General.

##### 2. Third Person in Control.

#### 1 Witkin Cal. Evid. Burden § 143

#### [§ 143] Third Person in Control.

The lack of control defense may be successfully advanced where the instrumentality was under the control of a third person. Here, the res ipsa loquitur doctrine is clearly inapplicable. (See *Olson v. Whitthorne & Swan* (1928) 203 C. 206, 208, 263 P. 518 [door of a building, partly operated by plaintiff who was struck]; *Cunningham v. Coca-Cola Bottling Co.* (1948) 87 C.A.2d 106, 111, 198 P.2d 333 [injury to oil company employee from explosion in Coca-Cola vending machine; machine owned and operated by oil company, defendant bottling company merely had duty of inspection and maintenance]; *Hubbert v. Aztec Brewing Co.* (1938) 26 C.A.2d 664, 688, 80 P.2d 185 [one of several instrumentalities caused explosion, but not all under defendant's control and no showing as to which did it]; *Sherman v. Hartman* (1955) 137 C.A.2d 589, 595, 290 P.2d 894 [defendant surgeon started giving patient blood transfusion, then left her in charge of registered nurse, and needle came out]; *Andrews v. Barker Bros. Corp.* (1968) 267 C.A.2d 530, 534, 73 C.R. 284 [chair that collapsed under plaintiff was on retailer's sales floor 60 to 90 days after passing from control of defendant manufacturer]; *Putensen v. Clay Adams* (1970) 12 C.A.3d 1062, 1074, 91 C.R. 319 [surgical tubing neither in defendant manufacturer's control nor in same condition as when it left defendant's possession]; *Bergman v. St. Louis Southwestern Ry. Co.* (1982) 134 C.A.3d 696, 704, 185 C.R. 150, citing the text [plaintiff was injured when handle broke off of box car door; defendant railway company owned box car but parted with possession of it 4 months earlier, and several other carriers used it prior to accident].)

In *Larson v. St. Francis Hotel* (1948) 83 C.A.2d 210, 188 P.2d 513, plaintiff, while on the sidewalk in front of defendant's hotel at a time of public celebration, was struck on the head by an armchair, which apparently came from some part of the hotel. *Held*, the doctrine was inapplicable, one reason being that a hotel "does not have exclusive control, either actual or potential, of its furniture. Guests have, at least, partial control." (83 C.A.2d 212.) This view seems highly questionable, for it would preclude application of the doctrine in the falling baggage cases where some other passenger who places the baggage in the rack has just as much partial control over it as the driver of the vehicle (see *supra*, §128), and it would also preclude its application in cases where a person was injured as a result of the collapse or breaking of hotel furniture.

Other cases take a more reasonable view. In *Doke v. Pacific Crane & Rigging* (1947) 80 C.A.2d 601, 182 P.2d 284, Acme Company prepared certain heavy machinery (a spark arrester) for installation on an incinerator, and defendant was engaged to lift it into place by a truck crane. An Acme employee was killed, and, in the action for wrongful death, defendant contended that it did not have exclusive control of all the instrumentalities because the arrester with its sling

had been hooked to the crane by Acme employees. *Held*, the element was satisfied because, from the time of hooking on the load, defendant had exclusive control over the hoisting equipment and the machinery. (80 C.A.2d 607.) (See also *Keller v. Morrison-Knudsen Co.* (1957) 149 C.A.2d 205, 212, 308 P.2d 370 [pipe rigged by plaintiff's co-employees but hoisted by defendant's employees fell and injured plaintiff; doctrine was applicable, as there was no evidence that plaintiff or co-employees did anything abnormal, and defendant's employees were in complete control of hoisting apparatus]; *Pappas v. Carson* (1975) 50 C.A.3d 261, 268, 123 C.R. 343 [although independent contractors probably caused fire, for purposes of doctrine, defendant, who hired them, was deemed in control of their actions].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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### XI. RES IPSA LOQUITUR

#### G. Limitations on Application of Doctrine.

##### 1. Defendant's Control.

##### a. In General.

##### 3. Plaintiff or Decedent in Control.

*1 Witkin Cal. Evid. Burden § 144*

[§ 144] Plaintiff or Decedent in Control.

The doctrine is also inapplicable where the instrumentality was entirely under the control of the plaintiff or decedent. (See *Hohnemann v. Pacific Gas & Elec. Co.* (1939) 35 C.A.2d 597, 602, 96 P.2d 350 [gas leak; meter under defendant's control, but pipe and cap under decedent's control]; 57B Am.Jur.2d (1989 ed.), Negligence §1901 et seq.)

Some cases, however, have found sufficient underlying control or right of control by the defendant, despite a superficial control by the plaintiff. Thus, in *Rose v. Melody Lane of Wilshire* (1952) 39 C.2d 481, 247 P.2d 335, plaintiff was injured by a fall from a bar stool that broke off its base. The court observed that "in one sense plaintiff was in control of the stool while using it," but it was the *condition* of the stool and not its use which caused the injury. "So far as construction, inspection, or maintenance of the stool were concerned, defendant had exclusive control." (39 C.2d 486, 487.) (See also *Albers v. Greyhound Corp.* (1970) 4 C.A.3d 463, 471, 84 C.R. 846, *infra*, §146 ["The mere fact that the box was in the custody and control of the plaintiff at the time the accident occurred does not prevent the application of the doctrine"]; *Bedford v. Re* (1973) 9 C.3d 593, 598, 108 C.R. 364, 510 P.2d 724 [sturdy-appearing wall collapsed, but plaintiff's young sisters subjected it to no greater stress than did defendant's children].)

In *Black v. Partridge* (1953) 115 C.A.2d 639, 252 P.2d 760, decedent was asphyxiated by an unvented gas heater in a room in which he was a lodger. Defendant argued that decedent had some control over the heater and that the accident could have happened because he tampered with it. But it also could have happened because of the control that defendant exercised in removing the chemicals used to absorb carbon monoxide from this dangerous type of heater; i.e., the jury could have found that death was caused by defendant's negligent failure to replenish the chemicals. Hence, plaintiffs were entitled to *res ipsa loquitur* instructions. (115 C.A.2d 646.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 57B Am.Jur.2d (2004 ed.), Negligence §1239 et seq.



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#### XI. RES IPSA LOQUITUR

##### G. Limitations on Application of Doctrine.

##### 1. Defendant's Control.

##### b. Constructive Control (Condition Unchanged).

##### 1. Bursting Bottles.

*1 Witkin Cal. Evid. Burden § 145*

[§ 145] Bursting Bottles.

"Constructive control" is a theory best illustrated by the breaking or bursting bottle cases. The instrumentality causing injury in these cases--the bottle--is under the manufacturer's control at the time of bottling, but afterwards is delivered to a retailer and to the customer. Although at the time of injury the bottle is technically no longer under the defendant's control, the doctrine of res ipsa loquitur may still be applied if the plaintiff shows that the condition of the bottle did not change after it left the manufacturer's possession. This showing negatives any explanation based upon an intervening cause. (See *Escola v. Coca Cola Bottling Co. (1944)* 24 C.2d 453, 458, 150 P.2d 436; *Zentz v. Coca Cola Bottling Co. of Fresno (1952)* 39 C.2d 436, 444, 247 P.2d 344; 73 Harv. L. Rev. 782; 81 A.L.R.2d 229, 350.)

The constructive control theory may be employed not only where the bottling company itself delivers the bottle, but also where others deliver it, provided that the test is met by proof of the absence of intervening harmful forces. (*Gordon v. Aztec Brewing Co. (1949)* 33 C.2d 514, 518, 203 P.2d 522 [beer delivered by trucking company to warehouse, then delivered to plaintiff by warehouse driver; evidence offered that no accidents occurred in transportation and cases were carefully handled]; *McClelland v. Acme Brewing Co. (1949)* 92 C.A.2d 698, 700, 207 P.2d 591 [similar facts].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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### XI. RES IPSA LOQUITUR

#### G. Limitations on Application of Doctrine.

1. Defendant's Control.
- b. Constructive Control (Condition Unchanged).
  2. Other Situations.

#### 1 Witkin Cal. Evid. Burden § 146

[§ 146] Other Situations.

In *Rafter v. Dubrock's Riding Academy* (1946) 75 C.A.2d 621, 171 P.2d 459, defendant riding academy was held to have constructive control over a horse and saddle that plaintiff had rented for a ride, and the res ipsa loquitur doctrine was applied where the saddle slipped and plaintiff was thrown to the ground. (75 C.A.2d 626.)

In *Albers v. Greyhound Corp.* (1970) 4 C.A.3d 463, 84 C.R. 846, plaintiff was injured when he took delivery of a box containing heavy milling cutters and it broke open, wounding his thigh. The trial judge granted defendant shipper's nonsuit motion. *Held*, reversed; the case should have gone to the jury under a res ipsa loquitur theory. "The mere fact that the box was in the custody and control of the plaintiff at the time the accident occurred does not prevent the application of the doctrine. ... There is nothing in the evidence to indicate that plaintiff mishandled the box in the brief interval commencing with the time he picked it up and culminating a few steps away in the accident." (4 C.A.3d 471, 472.)

In *Tallerico v. Labor Temple Assn.* (1960) 181 C.A.2d 15, 4 C.R. 880, defendant rented its hall to a club for a New Year's party. A member pulled a balloon drop installed on a chandelier, the chandelier fell shortly afterwards, and plaintiff was injured. *Held*, a res ipsa loquitur instruction was properly given; plaintiff met her burden of showing the absence of any mishandling of the chandelier by club members or party-goers in the installation and operation of the balloon drop. (181 C.A.2d 20.)

To similar effect are *Burr v. Sherwin Williams Co.* (1954) 42 C.2d 682, 687, 268 P.2d 1041 [insecticide spray was delivered in sealed drums by defendant manufacturer to agricultural cooperative; though defendant had relinquished control, there was sufficient evidence of no mishandling or other changing of condition thereafter]; *Baker v. B.F. Goodrich Co.* (1953) 115 C.A.2d 221, 227, 252 P.2d 24 [auto tire delivered by defendant manufacturer to plaintiff's employer and stored in suitable place and manner]; *Rohar v. Osborne* (1955) 133 C.A.2d 345, 349, 284 P.2d 125 [weed burner rented to plaintiff, who filled it with kerosene, operated it for a time, and was injured when it exploded]; *Hercules Powder Co. v. Automatic Sprinkler Corp. of America* (1957) 151 C.A.2d 387, 395, 311 P.2d 907 [sprinkler system manufactured, installed and inspected by defendant, with part recently replaced]; *Hinckley v. La Mesa R. V. Center* (1984) 158 C.A.3d 630, 640, 205 C.R. 22 ([mobile home destroyed several months after plaintiffs' purchase in fire allegedly resulting from negligent wiring; although plaintiffs made minor modifications to electrical system, there was evidence these were not cause of fire].)

**SUPPLEMENT:** [This section is current through the latest supplement]





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### CHAPTER III - Burden of Proof and Presumptions

#### XI. RES IPSA LOQUITUR

##### G. Limitations on Application of Doctrine.

##### 1. Defendant's Control.

##### c. Multiple Defendants.

##### 1. Medical Malpractice.

#### 1 Witkin Cal. Evid. Burden § 147

[§ 147] Medical Malpractice.

(1) *Unconscious Patient*. The test of *exclusive control over a particular instrumentality by a particular defendant* was repudiated in the leading case of *Ybarra v. Spangard* (1944) 25 C.2d 486, 154 P.2d 687. Plaintiff received an injury to his neck while unconscious on the operating table of a hospital, under anesthetic. The defendants, including several doctors and nurses and the owner of the hospital, objected that there was no showing of any *particular instrumentality* under the exclusive control of any *single defendant*. The court declared that strict adherence to the single instrumentality rule in such cases would nearly always result in denial of recovery, and held that "where a plaintiff receives unusual injuries while unconscious and in the course of medical treatment, all those defendants who had any control over his body or the instrumentalities which might have caused the injuries may properly be called upon to meet the inference of negligence by giving an explanation of their conduct." (25 C.2d 494.) (See 18 So. Cal. L. Rev. 310 [Ybarra]; 33 Cal. L. Rev. 248, 273, 331 [same]; 37 Cal. L. Rev. 223 [same]; and see also 48 Cal. L. Rev. 252 [future of res ipsa loquitur in medical malpractice cases]; 9 Stanf. L. Rev. 731, 738 [malpractice crisis arising, in part, from liberalization of res ipsa loquitur]; 67 A.L.R.4th 544 [applicability of doctrine in cases of multiple medical defendants--modern status]; 57B Am.Jur.2d (1989 ed.), Negligence §§1963 et seq., 2074.)

The rule of the *Ybarra* case was applied in a number of other decisions dealing with unconscious patients undergoing medical treatment. (See *Ybarra v. Spangard* (1949) 93 C.A.2d 43, 48, 208 P.2d 445 [decision affirming judgment for plaintiff after retrial]; *Cavero v. Franklin General Benevolent Soc.* (1950) 36 C.2d 301, 308, 223 P.2d 471 [death of child during removal of tonsils and adenoids]; *Bowers v. Olch* (1953) 120 C.A.2d 108, 115, 260 P.2d 997 [operating surgeon, two assistants and hospital which employed one assistant as resident surgeon]; *Seneris v. Haas* (1955) 45 C.2d 811, 825, 291 P.2d 915 [woman given spinal anesthetic for childbirth, awoke with paralysis]; *Ragusano v. Civic Center Hosp. Foundation* (1962) 199 C.A.2d 586, 19 C.R. 118 [same]; *Leonard v. Watsonville Community Hosp.* (1956) 47 C.2d 509, 514, 305 P.2d 36 [surgical clamp left in body; operating surgeon, hospital, surgical nurse].)

(2) *Patient Sedated or Given Local Anesthetic*. In *Oldis v. La Societe Francaise de Bienfaisance Mutuelle* (1955) 130 C.A.2d 461, 279 P.2d 184, plaintiff received a severe burn on his abdomen during the period after his return from surgery. He was under heavy sedation and only semiconscious. The court held that his situation was similar to that of the "unconscious patient" in the *Ybarra* case. (130 C.A.2d 464.)

In *Clark v. Gibbons* (1967) 66 C.2d 399, 58 C.R. 125, 426 P.2d 525, the rule was extended to injuries occurring while the patient was under local anesthetic. The court commented: "The plaintiff's lack of knowledge may exist not

only where he is totally unconscious but also where he is partially unconscious and largely, if not entirely, unaware of what the medical personnel are doing." (66 C.2d 411.)

The *Clark* court also made the following comments on the burden imposed on the individual doctor, once the rule has been invoked:

"*Ybarra* and *Leonard* establish that, if the conditions giving rise to the doctrine are present when the medical personnel are treated as a group acting in concert and they collectively have access to the chief evidence as to the cause of the injury but the plaintiff does not, a single doctor may not escape the inference as a matter of law merely by showing that as to him alone it is more probable than not that he was free from fault. The basis of the application of the doctrine to all defendants in the cases is that the medical personnel acted as a group, and that collectively, without regard to what any one may individually know, or did, they are in a position to explain the cause and produce the chief evidence bearing on the question whereas the plaintiff is not. To avoid the inference *as a matter of law* an individual doctor must go beyond showing that it was unlikely or not probable he was negligent and must establish that he is free from negligence by evidence which cannot be rationally disbelieved. Falling short of such a showing, it remains for the jury to determine whether the inference arising from the doctrine has been rebutted as to any particular doctor." (66 C.2d 411.) (See *O'Connor v. Bloomer* (1981) 116 C.A.3d 385, 392, 172 C.R. 128 [where doctrine is asserted against multiple defendants, summary judgment is proper to excise those defendants for whom factual predicates of doctrine have not been established]; 55 Cal. L. Rev. 1193 [*Clark*].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Unconscious Patient*. See 57B Am.Jur.2d (2004 ed.), *Negligence* §1299 et seq.



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### XI. RES IPSA LOQUITUR

#### G. Limitations on Application of Doctrine.

1. Defendant's Control.
- c. Multiple Defendants.
2. Other Situations.

#### 1 Witkin Cal. Evid. Burden § 148

[§ 148] Other Situations.

The opinion in *Ybarra v. Spangard* (1944) 25 C.2d 486, 154 P.2d 687, supra, §147, was carefully limited to the unconscious patient undergoing medical treatment. But its extension into other types of cases involving multiple defendants was inevitable. (See *Giondini v. Amship Corp.* (1947) 81 C.A.2d 751, 767, 185 P.2d 94 [plaintiff was injured by collapse of defective scaffold built by one defendant and used by two defendants]; *Rodin v. American Can Co.* (1955) 133 C.A.2d 524, 530, 284 P.2d 530 [plaintiff was injured as result of fall of construction elevator; both owner of plant being constructed, and contractor who was building it, were subject to doctrine]; *Poulsen v. Charlton* (1964) 224 C.A.2d 262, 268, 36 C.R. 347 [defendants--landlord, general contractor and roofing contractor--undertook replacement of roof, and left old roof off without temporary protection, thereby damaging plaintiff tenant's shop; doctrine applied]; 59 A.L.R.4th 201 [applicability of doctrine where multiple, nonmedical defendants sued]; 73 Harv. L. Rev. 782 [discussing District of Columbia bursting bottle action against bottler and retailer].)

In *Tobler v. Chapman* (1973) 31 C.A.3d 568, 107 C.R. 614, plaintiffs' vehicle was on the correct side of the road when it was struck head-on by defendant's vehicle, which assertedly had been forced into the wrong lane by X's trailer. (X apparently had settled with plaintiffs before counsel argued the case.) The trial judge refused to give a res ipsa instruction, because it was not reasonably probable that the negligence was attributable to defendants rather than to X. *Held*, the refusal was error. The probabilities might have been equal in an action between defendants and X or between a passenger in one of those vehicles and the driver of the other. Here, however, the probabilities were threefold: (a) The collision resulted solely from defendant's negligence; (b) it resulted solely from X's negligence; (c) it resulted from the concurrent negligence of both drivers. With such a probability, it would be proper to permit the jury to weigh the inference of negligence along with the evidence defendant produced in explanation. As admittedly innocent bystanders, plaintiffs were entitled to have all other actors explain their conduct. (31 C.A.3d 582.)

However, "[t]he doctrine of *Ybarra* has never been extended to a case ... where a conscious person receives an injury from a known object in a known way." (*Gobin v. Avenue Food Mart* (1960) 178 C.A.2d 345, 347, 2 C.R. 822.) In this case, plaintiff, a 6-year-old boy, was injured by a defective dart from a toy gun. He sued the manufacturer, wholesaler and retailer. The evidence showed that the gun and darts, when manufactured, were enclosed in a stapled plastic bag and never opened until purchased from the retailer. *Held*, because neither the wholesaler nor the retailer had a duty to inspect, the trial judge properly refused to instruct on res ipsa loquitur as to all defendants.

**SUPPLEMENT:** [This section is current through the latest supplement]  
*Correction:* Page 288, line 1, "*Giondini*" should be "*Biondini*".



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XI. RES IPSA LOQUITUR

G. Limitations on Application of Doctrine.

1. Defendant's Control.
- c. Multiple Defendants.
3. Special Relationship Between Defendants Not Required.

*1 Witkin Cal. Evid. Burden § 149*

[§ 149] Special Relationship Between Defendants Not Required.

The contention that the doctrine of res ipsa loquitur can be applied against multiple defendants only if some *special relationship* between the defendants warrants shared responsibility for the injury-causing event was rejected in *Martinides v. Mayer* (1989) 208 C.A.3d 1185, 256 C.R. 679. Plaintiff was injured in a hit-and-run accident, and, although no one was able to identify the driver of the offending vehicle, that vehicle was owned by one of two codefendants and driven only by the codefendants. The codefendants had the only sets of keys, and there was no evidence that the vehicle had been tampered with or stolen. The jury was given the conditional res ipsa loquitur instruction, and found defendants negligent. *Held*, the instruction was proper. Suit was brought against both parties who had joint and exclusive right of control and access to the vehicle, and neither party was able to rebut the inference that he negligently caused the accident. Thus, the requirements of the doctrine were satisfied, and California imposes no further requirement of a special relationship between the defendants. (208 C.A.3d 1195, 1196, citing the text.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER III - Burden of Proof and Presumptions

## XI. RES IPSA LOQUITUR

## G. Limitations on Application of Doctrine.

## 2. Circumstances Not Indicative of Negligence.

## a. Balancing Probabilities: In General.

1 *Witkin Cal. Evid. Burden* § 150

## [§ 150] Balancing Probabilities: In General.

The doctrine is intended to apply where the instrumentality was such that no injury would ordinarily have occurred except by reason of its negligent construction or operation, or by reason of failure to make proper inspection. Accordingly, it will be held inapplicable where it is shown that injury might normally occur in spite of the exercise of due care; under such circumstances, the happening of the accident cannot be said to justify an inference of negligence. Thus the court must *balance the probabilities*. (See *La Porte v. Houston* (1948) 33 C.2d 167, 169, 199 P.2d 665 [applicability of res ipsa loquitur depends on "whether it can be said, in the light of common experience, that the accident was more likely than not the result of their (defendants') negligence"]; *Zentz v. Coca Cola Bottling Co. of Fresno* (1952) 39 C.2d 436, 442, 247 P.2d 344; *Siverson v. Weber* (1962) 57 C.2d 834, 836, 22 C.R. 337, 372 P.2d 97, supra, §139; *Brocato v. Standard Oil Co.* (1958) 164 C.A.2d 749, 757, 331 P.2d 111 [doctrine properly held inapplicable to alleged emission of noxious gases from defendant's waste burner where there was no evidence identifying source of fumes]; *Guillory v. American President Lines, Ltd.* (1964) 230 C.A.2d 296, 306, 40 C.R. 796; ["Where reasonable men may differ as to the balance of probabilities, the question whether an inference of negligence is to be drawn should be submitted to the jury"]; *Blackwell v. Hurst* (1996) 46 C.A.4th 939, 944, 54 C.R.2d 209 [same]; for examples of the balancing of probabilities in medical malpractice cases, see supra, §139.)

In *Zentz v. Coca Cola Bottling Co. of Fresno*, supra, the rule was stated as follows: "[I]t must appear either as a matter of common experience or from evidence in the case, that the accident is of a type which probably would not happen unless someone was negligent. In the absence of such a probability there would be no basis for an inference of negligence which would serve to take the place of evidence of some specific negligent act or omission. The defendant, of course, should not be liable unless it appears from all the facts and circumstances that there is a sufficient causal connection between his conduct and the plaintiff's injury, and it has been held that res ipsa loquitur will not apply if it is equally probable that the negligence was that of someone other than the defendant." (39 C.2d 442.)

Because the determination of probability of negligence may depend on the evidence of common experience offered in the particular case, the result is not always predictable and is sometimes questionable. *La Porte v. Houston*, supra, is an extreme case. Plaintiff, owner of a car with a "hydramatic" transmission, brought it to defendant's garage for a carburetor adjustment. Plaintiff parked it, with the motor running, set the hand brake, left the gear lever in neutral, released the hood, and went out in front of the car to watch the mechanic working under the hood. After the latter had made various adjustments and raced the motor several times, the car lurched forward and struck plaintiff. The trial judge refused an instruction on res ipsa loquitur and a verdict for defendants resulted. *Held*, the doctrine was inapplicable.

Plaintiff's own expert witness testified that, because of a mechanical defect, the vibration of the motor will cause the gear to shift from neutral to drive "in about one car in a thousand," and the mechanic testified that he did nothing to affect the shifting mechanism but accelerate the motor. The opinion states: "It was at least equally probable that the accident was caused by some fault in the mechanism of the car for which defendants were not liable as that it resulted from any negligent act or omission of the mechanic." (33 C.2d 170.) The dissent, however, argues that the effect of this reasoning is to require the *plaintiff* to explain how the accident happened, a position wholly at odds with *res ipsa loquitur*. "[T]he majority opinion states that the probabilities are at least equal that the forward movement of the car was caused by a mechanical defect in the car. That cannot follow for the reason that plaintiff's evidence shows that there were no defects in the car and his expert witness eliminated such possibility when he testified that such defect only occurred once in a thousand times." (33 C.2d 171, 172.)

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## XI. RES IPSA LOQUITUR

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- 2. Circumstances Not Indicative of Negligence.
  - b. Slip and Fall Cases.

## 1 Witkin Cal. Evid. Burden § 151

[§ 151] Slip and Fall Cases.

In *Brown v. Poway Unified School Dist.* (1993) 4 C.4th 820, 15 C.R.2d 679, 843 P.2d 624, plaintiff, a computer repairman, was delivering computers to defendant district at its building at 9:30 a.m. On a trip back to his van plaintiff slipped and fell. Defendant's employees who helped him to his feet found a fresh slice of lunch meat stuck to the sole of his shoe. Although there was a picnic table outside the building where employees sometimes ate their lunches, no one had seen anyone eating at the table or in the hallway on the morning the accident occurred. In plaintiff's action against the district under Govt.C. 835 (see 5 Summary (9th), Torts, §183), the trial court granted summary judgment for defendant, the Court of Appeal reversed, and the Supreme Court reversed the judgment of the Court of Appeal.

(a) *Res ipsa loquitur* doctrine inapplicable.

(1) In order to recover from the district under Govt.C. 835(a), plaintiff had to prove that a negligent act or omission of an employee "created" the dangerous condition. Because there was no evidence that the lunch meat came to be on the floor through an employee's negligence, defendant was entitled to summary judgment unless the doctrine of *res ipsa loquitur* would permit a jury to infer that fact. (4 C.4th 825.)

(2) "Experience teaches that *slips and falls* are not so likely to be the result of negligence as to justify a presumption to that effect." (4 C.4th 826.) "This is true even when the fall is associated with a slippery object, because objects all too often appear on floors without sufficient explanation." Hence, something slippery on the floor affords no *res ipsa* case against the owner unless it is shown to have been there long enough so that he should have discovered and removed it. (4 C.4th 826, citing Prosser & Keeton.) "This common wisdom is reflected in a legion of cases from many jurisdictions declaring as a general rule that *res ipsa loquitur* does not apply to slip and fall cases." (4 C.4th 826.)

(3) "While we need not go so far as to say that *res ipsa loquitur* can never apply to a slip and fall, the evidence in this case fittingly illustrates why such an occurrence ordinarily does not 'speak for itself.' The lunch meat that apparently caused the accident went undetected until Brown fell; afterward, it was found stuck to the sole of his shoe. To be sure, the lunch meat might have been dropped by an employee, but it might also have been dropped by a visitor, tracked in from the outside or from Brown's own van, transported by an animal, or fallen from an object carried down the hall, even from one of the computers that Brown was delivering. Some of these explanations do not presuppose negligence, and none is inherently more probable than the others. In short, there is no basis whatever for a finding that either of the doctrine's first two conditions existed, i.e., (1) that the accident was of a kind which ordinarily does not occur in the absence of someone's negligence, or (2) that it was caused by an agency or instrumentality within the defendant's



exclusive control." (4 C.4th 827.)

(b) *Doctrine could not establish prima facie case under Govt.C. 835.*

(1) Even if the facts satisfied the requirements of the res ipsa loquitur doctrine, plaintiff could not use the doctrine to establish a prima facie case. His suit was not an ordinary negligence action, but an action against a public entity under Govt.C. 835 for injury caused by a dangerous condition of property; and that statute requires a showing either of a negligent act or omission of an employee or of the public entity's actual or constructive notice of the dangerous condition in time to have taken protective measures. Here there was no evidence of such notice. (4 C.4th 829.)

(2) Plaintiff nevertheless contended that the res ipsa loquitur doctrine permitted the inference that an employee "created" the dangerous condition. (4 C.4th 829.) But the legislative history of the codification of the doctrine (see supra, §118) refutes this contention. (4 C.4th 832, 836.) And "[o]ne searches the reported decisions in vain for an opinion applying section 835, subdivision (a), to facts like those of the case before us. Instead, one finds cases in which public employees actively created dangerous conditions under circumstances that would clearly justify a presumption of notice on the part of a public employer." (4 C.4th 837.) And to hold that the res ipsa loquitur presumption, alone, established a prima facie case would permit the jury to find the District liable even though there was no evidence that an employee was involved in creating the dangerous condition. "In such a case, the assumptions that underlie the Legislature's waiver of sovereign immunity for dangerous conditions created by public employees do not apply." (4 C.4th 838.) (See 22 Pepperdine L. Rev. 352.)

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*Cross-Reference:* 5 Summary (10th), Torts, §270.



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  - c. Other Situations.

#### 1 Witkin Cal. Evid. Burden § 152

[§ 152] Other Situations.

The following cases illustrate the use of the balance of probabilities test to exclude the res ipsa loquitur doctrine on the showing made:

(1) *Dangerous materials or equipment.* (See *Simmons v. Rhodes & Jamieson, Ltd.* (1956) 46 C.2d 190, 195, 293 P.2d 26 [ready-mixed cement to which plaintiff added water and which gave him serious burns through his clothes]; *Tucker v. Lombardo* (1956) 47 C.2d 457, 465, 303 P.2d 1041 [gunshot injury to boy operating shielded ejection apparatus at skeet-shooting range]; *Rodella v. Southern Calif. Edison Co.* (1957) 148 C.A.2d 708, 712, 307 P.2d 436 [defendant's power pole, near vent pipe of boiler in candle making factory, burned and crashed]; *Moreno v. Sayre* (1984) 162 C.A.3d 116, 124, 125, 208 C.R. 444 [punch press in which defendant manufacturer installed one component].)

(2) *Helicopter piloting procedures.* (See *Gradus v. Hanson Aviation* (1984) 158 C.A.3d 1038, 1055, 1056, 205 C.R. 211 [pilot's failure to complete successful autorotation in order to avoid accident after helicopter's engine failed].)

(3) *Horseback riding.* (See *Griffin v. Sardella* (1967) 253 C.A.2d 937, 941, 61 C.R. 834 [saddle slipped; question for jury whether accident caused by instrumentality within defendants' control (loose cinch knot), and judgment for defendants affirmed].)

(4) *Motorboat.* (See *Carrick v. Pound* (1969) 276 C.A.2d 689, 81 C.R. 234, supra, §142 [act of nature affected defendant's control so balance of probabilities did not favor negligence].)

(5) *Moving vehicles.* (See *Faulk v. Soberanes* (1961) 56 C.2d 466, 470, 14 C.R. 545, 363 P.2d 593 [evidence that another driver could have been negligent]; *Fuller v. Sears, Roebuck & Co.* (1982) 136 C.A.3d Supp. 1, 6, 186 C.R. 26 [blowout of 6-month-old tire did not create an inference of manufacturer's negligence].)

(6) *Ski lift.* (See *Houser v. Floyd* (1963) 220 C.A.2d 778, 784, 34 C.R. 96; 95 A.L.R.3d 203 [injury caused by ski lift or ski tow].)

(7) *Stationary carrier.* The mere fact that a person falls and is injured while boarding or alighting from a carrier that is not moving is not enough to justify application of the doctrine, for such accidents and similar ones on immovable premises frequently happen without the fault of others. (*Gray v. San Francisco* (1962) 202 C.A.2d 319, 322, 20 C.R.

894 [passenger slipped and fell while boarding streetcar].)

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G. Limitations on Application of Doctrine.  
3. Plaintiff's Voluntary Act.  
a. Contributory Fault.

## 1 Witkin Cal. Evid. Burden § 153

## [§ 153] Contributory Fault.

One of the three conditions of the doctrine is that the plaintiff's own conduct be eliminated as a responsible cause. (See *supra*, §114.) Thus, the doctrine does not apply where the accident is a result of the plaintiff's own contributory fault. (*Moore v. Belt* (1949) 34 C.2d 525, 531, 212 P.2d 509 [instruction that fails to include element of causation is erroneous]; *Cordova v. Ford* (1966) 246 C.A.2d 180, 187, 54 C.R. 508 [plaintiff, driving at early hour on dark and cloudy morning without headlights on, collided with defendant's car at intersection; res ipsa instruction was properly refused where plaintiff failed to explain why she proceeded at same speed after defendant's car appeared directly in front of her]; *Anderson v. Jones* (1968) 266 C.A.2d 284, 289, 72 C.R. 187 [plaintiff stopped on freeway to render aid to person whose car was apparently disabled, and was struck by another motorist while running down median strip to place flares; voluntary choice of this path made doctrine inapplicable]; *Davis v. Safeway Stores* (1969) 271 C.A.2d 365, 370, footnote 1, 76 C.R. 490 [plaintiff shopper put carton of cola bottles on bottom sloping rack of cart, from where they fell to cement floor; when picked up, one bottle exploded]; see 37 Cal. L. Rev. 201.)

The doctrine is similarly inapplicable when both parties are exercising "an equal right" and each is chargeable with the same degree of care. (*Duncan v. Queen of Angels Hosp.* (1970) 11 C.A.3d 665, 668, 90 C.R. 157 [70-year-old plaintiff was walking in hospital corridor when she was struck by food cart being pulled backwards by employee].)

It has been argued, in light of California's adoption of comparative negligence, that the plaintiff's own fault should not bar application of the doctrine (see *Emerick v. Raleigh Hills Hosp.* (1982) 133 C.A.3d 575, 585, 586, 184 C.R. 92; 57B Am.Jur.2d (1989 ed.), Negligence §1912); but more recent cases continue to require satisfaction of all three of the traditional conditions. (See *Hinckley v. La Mesa R. V. Center* (1984) 158 C.A.3d 630, 641, 205 C.R. 22; *Ford v. Miller Meat Co.* (1994) 28 C.A.4th 1196, 1202, 1203, 33 C.R.2d 899, citing the text.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 57B Am.Jur.2d (2004 ed.), Negligence §1250. West's Key Number Digest, Negligence k.1617



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## 3. Plaintiff's Voluntary Act.

## b. Conduct Not Responsible Cause.

*1 Witkin Cal. Evid. Burden § 154*

[§ 154] Conduct Not Responsible Cause.

A distinction has been recognized where the plaintiff merely participates in the events. In *Zentz v. Coca Cola Bottling Co. of Fresno* (1952) 39 C.2d 436, 247 P.2d 344, the court said of the factor of plaintiff's voluntary act: "This is allied to the condition of control by the defendant and has also been employed as a means of showing that the defendant, rather than the plaintiff, had control and was responsible for the injury. ... It should not be confused with the problem of contributory negligence, as to which defendant has the burden of proof, and its purpose, like that of control by the defendant, is merely to assist the court in determining whether it is more probable than not that the defendant was responsible for the accident. ... [A] plaintiff may properly rely upon *res ipsa loquitur* even though he has participated in the events leading to the accident if the evidence excludes his conduct as the responsible cause." (39 C.2d 444.)

So, in *Baker v. B.F. Goodrich Co.* (1953) 115 C.A.2d 221, 228, 252 P.2d 24, where plaintiff was injured by an exploding automobile tire, the fact that the accident occurred while he was mounting the tire did not render the doctrine inapplicable.

In *Nungaray v. Pleasant Valley Lima Bean Growers & Warehouse Assn.* (1956) 142 C.A.2d 653, 300 P.2d 285, plaintiff drove his employer's truck onto the platform of defendant's warehouse. Defendant's manager, C, placed blocks that were too flat, so that the truck moved and hit plaintiff. *Held*, the doctrine applied. C was in control of the hoisting apparatus and flat blocks; he lifted the platform, and tilted the truck; plaintiff had no contact with the truck after he backed it on the platform, set the brakes and dismounted. (142 C.A.2d 665.) (See also *Seffert v. Los Angeles Transit Lines* (1961) 56 C.2d 498, 502, 15 C.R. 161, 364 P.2d 337; *Shahinian v. McCormick* (1963) 59 C.2d 554, 560, 30 C.R. 521, 381 P.2d 377; *Keller v. Morrison-Knudsen Co.* (1957) 149 C.A.2d 205, 210, 308 P.2d 370 [following *Baker*, *Nungaray*, and similar cases]; *Rollins v. Department of Water & Power* (1962) 209 C.A.2d 526, 534, 535, 26 C.R. 162; 57B Am.Jur.2d (1989 ed.), Negligence §1903.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 57B Am.Jur.2d (2004 ed.), Negligence §1240.



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#### G. Limitations on Application of Doctrine.

##### 3. Plaintiff's Voluntary Act.

##### c. Self-Harm by Psychiatric Patient.

#### 1 Witkin Cal. Evid. Burden § 155

#### [§ 155] Self-Harm by Psychiatric Patient.

In *Vistica v. Presbyterian Hosp. & Med. Center of San Francisco* (1967) 67 C.2d 465, 62 C.R. 577, 432 P.2d 193, decedent, a mentally ill woman with a schizophrenic personality and suicidal and elopement tendencies, was a patient in the psychiatric ward of defendant hospital. The ward, of the "open type," had a solarium furnished with a radio console, light wooden chairs and a metal wastebasket; and its upper transom, though fitted with chains, could be opened wide. One day decedent was found in the solarium with dust on her dress, the chair and wastebasket mounted on the console, and the transom open. Her doctor ordered a 24-hour surveillance, but the following evening, during an 8-minute period when no nurse or orderly was in attendance, she stacked the furniture and went through the transom to her death three floors below. In this wrongful death action, the verdict was for defendant. *Held*, reversed, for error in giving the standard instruction.

The court emphasized the distinction made in the *Zentz* case (supra, §154), that the "no voluntary contribution" aspect of the *res ipsa loquitur* doctrine has nothing to do with the affirmative defense of contributory negligence, and is merely one element that helps to determine the probability that the defendant's act or omission was the responsible cause. In the bald form in which this element was stated in the instruction, the jury might have been led erroneously to conclude that, because decedent engineered her own escape, the doctrine was inapplicable:

"It was not sufficient for the court to instruct the jury with respect to the third requirement set forth in the instruction ... without explaining that Lorraine's voluntary conduct had to be the responsible cause of her death." (67 C.2d 470.)

*Meier v. Ross General Hosp.* (1968) 69 C.2d 420, 71 C.R. 903, 445 P.2d 519, applies the *Vistica* rule to similar facts. Decedent tried to commit suicide by slashing his wrists. His family brought him to defendant hospital where defendant Dr. S attended him. The hospital had adopted an "open door" policy for psychiatric patients, and decedent was in a room with a window. He refused medication, opened the window, and plunged two stories to his death. Verdict and judgment were for defendants after refusal of a *res ipsa loquitur* instruction. *Held*, reversed; the instruction, with the *Vistica* addition, should have been given.

The court also held that there was no need of expert testimony to lay the foundation for the instruction, because the negligence was of the ordinary type not involving medical matters: Dr. S, called as an adverse witness, testified that a secured type of unopenable window was compatible with the "open door" policy. "We hold that the trial court must submit a conditional *res ipsa* instruction, even absent expert testimony on the 'probabilities of negligence,' when the

evidence supports a conclusion that the cause of the accident (the openable window) was not inextricably bound up in a course of treatment involving the exercise of medical judgment beyond the common knowledge of laymen." (69 C.2d 421.)

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##### G. Limitations on Application of Doctrine.

##### 4. Action Based on Strict Liability.

##### a. Exclusive Reliance on Strict Liability.

*1 Witkin Cal. Evid. Burden § 156*

[§ 156] Exclusive Reliance on Strict Liability.

In *Tresham v. Ford Motor Co.* (1969) 275 C.A.2d 403, 79 C.R. 883, the driver of an automobile was injured when the vehicle went out of control, allegedly because of a faulty braking system. Plaintiffs requested a form of res ipsa loquitur instruction which substituted "defect" for "negligence" (was the accident the kind that ordinarily does not occur in the absence of some defect in the automobile?). *Held*, the instruction was properly refused. What plaintiffs sought to accomplish was a shifting, from themselves to defendants, of the burden of proof of showing the *existence of a defect* which proximately caused them injury or damage. "This would have the effect of making the respondents insurers unless they could produce satisfactory evidence that there was no defect or if there was that such defect was not the cause of the injury or damage. The application of such a doctrine in the cause before this court would require the respondents to exculpate themselves from circumstances where neither had control of the vehicle for some six weeks during which time the automobile had been driven some 1,500 miles by decedent Vandermark or others." (275 C.A.2d 407.) "There is no reason in law or logic why the doctrine embedded in the instruction requested by appellants should be extended to include the type of case before this court." (275 C.A.2d 407.) (See also *Lewis v. American Hoist & Derrick Co.* (1971) 20 C.A.3d 570, 579, 97 C.R. 798 ["Res ipsa loquitur has no application to strict liability in tort"]; *Barrett v. Atlas Powder Co.* (1978) 86 C.A.3d 560, 565, 150 C.R. 339 [same].)

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##### 4. Action Based on Strict Liability.

##### b. Reliance on Strict Liability and Negligence.

#### *1 Witkin Cal. Evid. Burden § 157*

[§ 157] Reliance on Strict Liability and Negligence.

In *Jiminez v. Sears, Roebuck & Co.* (1971) 4 C.3d 379, 387, 93 C.R. 769, 482 P.2d 681, the court said: "No valid reason appears to require a plaintiff to elect whether to proceed on the theory of strict liability in tort or on the theory of negligence."

In the *Jiminez* case, plaintiff bought a ladder from defendant and kept it in a storage room. A few days before the accident, he tried to use it to prune a tree but stopped because the ground was too muddy. The time of the accident was the only other occasion he used the ladder. He placed it on the cement floor of his garage and began to climb up towards the attic. While he was standing on the second highest step, the ladder broke, he fell on it and was injured. At the trial, experts for both sides presented conflicting testimony on whether the ladder met safety code standards. The trial judge refused at first to give instructions on negligence or res ipsa loquitur but, in granting plaintiff's motion for a new trial after a defense verdict, declared that plaintiff was entitled to have those issues go to the jury. *Held*, the judge's failure to give instructions on negligence and res ipsa loquitur required affirmance of his new trial order.

(a) Defendants contended that where instructions are given on strict liability, instructions on negligence and res ipsa loquitur would not benefit a plaintiff. They pointed out that, to recover under a strict liability theory, the plaintiff need only show that he was injured by a defect in the product and that the product was defective when it left the hands of the retailer or manufacturer. (See 6 *Summary (9th)*, *Torts*, §1241 et seq.) To recover in negligence, however, the plaintiff must prove an additional element: That the defect in the product was due to the defendant's negligence. (4 C.3d 383.) This argument is not persuasive:

"Although seemingly it would always be simpler for a plaintiff in a products case to recover under a theory of strict liability in tort where only two of the three elements of the negligence cause of action are necessary of proof, this is not necessarily true, and in some situations it will be to the plaintiff's advantage to have negligence instructions." (4 C.3d 383.)

(b) Res ipsa loquitur instructions could have been helpful to plaintiffs. Before adoption of the rules of strict liability, a plaintiff would have proved that the occurrence was of such a nature that it was probably the result of someone's negligence and that the defendant was probably the one responsible. The jury would then have been told to draw an inference of negligent causation by the defendant. The plaintiff could have prevailed if he failed to identify the inferred defect or even if he presented evidence of particular defects. This same proof supports application of the res ipsa loquitur doctrine, and current strict liability doctrines have not changed the rules. "Although the science of accident

investigation has proceeded apace, it obviously has not reached the point where the scientists are able to explain all accidents." (4 C.3d 385.)

Thus, expert witnesses might not be able to tell why a bottle broke, a motor caught fire or a drive shaft became disconnected, or may be able to give only weak evidence as to the cause of the occurrences. "In such cases, the plaintiff, assuming all requirements of the res ipsa loquitur doctrine are met, should be permitted to claim, and have the jury instructed, that from the happening of the accident an inference arises that the defendant manufacturer was negligent and that it is incumbent upon the defendant to meet or balance the inference. He should not be denied the inference of negligence merely because he has presented some evidence of a defect or of specific acts of negligence." (4 C.3d 385.)

(c) With respect to the breaking ladder, a res ipsa loquitur instruction would have focused consideration on inferences from the accident itself, as distinct from the inferences, if any, from the expert testimony. The jury might have rejected plaintiff's expert testimony and concluded that he failed to prove a specific defect in the design or manufacture of the ladder. But if the jurors accepted plaintiff's testimony about his minimal use of the ladder and his description of the accident, they could reasonably have found that "it is more likely than not that when such an accident occurs, the manufacturer or seller of the ladder is negligent. Under the instruction, the jury could properly have concluded that the happening of the accident itself warranted an inference of negligence and that the inference had not been balanced." (4 C.3d 386.) A plaintiff may need the inference most when, as here, the evidence is sharply conflicting as to any particular defect in design or construction. (4 C.3d 387.) (See *Bridgestone/Firestone v. Superior Court* (1992) 7 C.A.4th 1384, 1394, 9 C.R.2d 709 [strict liability and negligence action for wrongful death resulting from failure of automobile tire; court states in dictum that plaintiffs may rely on res ipsa loquitur].)

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*Cross-Reference:* 6 Summary (10th), Torts, §1428 et seq.



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### CHAPTER III - Burden of Proof and Presumptions

#### XII. INCONSISTENT PRESUMPTIONS

##### A. In General.

##### *1 Witkin Cal. Evid. Burden § 158*

[§ 158] In General.

On rare occasions, the plaintiff and defendant may each invoke some presumption in his or her favor on the same issue. This happened more frequently in the past than it does now. Under the Evidence Code, presumptions are no longer treated as evidence (*supra*, §52), and some presumptions have been eliminated (*supra*, §99). Nevertheless, conflicts may still occur, and their evidentiary and procedural effects must somehow be resolved.

Unif. Rule 301(b) states: "If presumptions are inconsistent, the presumption applies that is founded upon weightier considerations of policy. If considerations of policy are of equal weight neither presumption applies." (13A U.L.A. (Part 1A) (Master Ed.), p. 220.) (See also 2 McCormick 5th, §344; 29 *Am.Jur.2d* (1994 ed.), *Evidence* §201; 2 *U.C.L.A. L. Rev.* 29.)

The Evidence Code is silent on this subject, and a wholly different theory was invoked in *Rader v. Thrasher* (1962) 57 *C.2d* 244, 252, 18 *C.R.* 736, 368 *P.2d* 360. The special presumption of lack of consideration where a fiduciary obtains an advantage (former C.C. 2235, now *Prob.C.* 16004(c); see *supra*, §105) was held to prevail over the general presumption arising from a written instrument (former C.C.P. 1963(39), now C.C. 1614; see *supra*, §99). The court relied on the rule of statutory construction declared in *C.C.P.* 1859, that a particular statute prevails over a general statute. (See also *In re Marriage of Haines* (1995) 33 *C.A.4th* 277, 301, 39 *C.R.2d* 673, *supra*, §87 [conflict between presumption of undue influence arising from interspousal transactions and presumption that title reflects actual ownership resolved on basis of both overriding importance of interspousal presumption and its more specific nature].)

**SUPPLEMENT:** [This section is current through the latest supplement]

The substance of Unif. Rule 301(b), quoted in the text, was transferred to Unif. Rule 302(b) in the 1999 version of the Rules. (See 13A U.L.A. (Master Ed.), p. 23.)

See 2 McCormick 6th, §344. *West's Key Number Digest*, Criminal Law k.325; Evidence k.88



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## CHAPTER III - Burden of Proof and Presumptions

## XII. INCONSISTENT PRESUMPTIONS

## B. Validity of Second Marriage.

1 *Witkin Cal. Evid. Burden* § 159

## [§ 159] Validity of Second Marriage.

(1) *In General.* Conflict is likely to occur where the validity of a second marriage is attacked by evidence of a prior marriage, and there is no direct evidence of death or divorce (dissolution) terminating the prior marriage. Formerly, two presumptions were involved: (a) the presumption of continuity (former C.C.P. 1963(32)), based on probability and convenience, which supported the continuing status of the prior marriage; and (b) the presumption of innocence of crime or wrong (former C.C.P. 1963(1)), which, to avoid the crime of bigamy and incidental illegitimacy of children, supported the validity of the second marriage.

California, like most jurisdictions, gave greater weight to the presumption of innocence, hence, to the validity of the second marriage. This was expressed in a derivative presumption that the prior marriage was dissolved by death or divorce, and it was said that the party attacking the second marriage had a heavy burden of proving the negative fact that no divorce was obtained in any place in which the parties may have resided. (See *Estate of Borneman* (1939) 35 C.A.2d 455, 459, 96 P.2d 182; *Estate of Winder* (1950) 98 C.A.2d 78, 86, 219 P.2d 18; *Estate of Vinson* (1963) 212 C.A.2d 543, 546, 28 C.R. 94; *Leslie v. Leslie* (1966) 244 C.A.2d 516, 518, 519, 53 C.R. 402; 14 A.L.R.2d 7 [presumption of validity of second marriage]; on the effect of the conflicting presumptions in bigamy prosecutions, see *People v. Burke* (1941) 43 C.A.2d 316, 318, 110 P.2d 685.)

The Evidence Code abolished both of the statutory presumptions *as presumptions*--former C.C.P. 1963(32) became a maxim of jurisprudence (C.C. 3547; *supra*, §100), and former C.C.P. 1963(1) was restated in terms of burden of proof (Ev.C. 520; *supra*, §14). However, the derivative presumption survives. (See *Estate of Smith* (1973) 9 C.3d 74, 80, 106 C.R. 774, 507 P.2d 78; 11 *Summary* (9th), *Husband and Wife*, §§52, 53.)

(2) *Presumption Overcome or Inapplicable.* The presumption has been held overcome or inapplicable in the following cases: *Estate of Smith* (1949) 33 C.2d 279, 282, 201 P.2d 539 [plaintiff claimed portion of decedent's estate as his widow, even though after ceasing to live with him she remarried; evidence that records in counties where parties to first marriage were domiciled contained no divorce record, combined with decedent's mention of "wife" in will, were sufficient to overcome presumption]; *Bancroft v. Bancroft* (1935) 9 C.A.2d 464, 469, 50 P.2d 465 [presumption inapplicable in separate maintenance action; defendant contending he had divorced plaintiff (and married another) was testifying to fact peculiarly within his knowledge]; *Vargas v. Superior Court* (1970) 9 C.A.3d 470, 474, 477, 88 C.R. 281 ([presumption overcome where decedent lived with first wife continuously for 40 years up until his death, listed her as wife on tax returns, and held her out publicly as wife; it was not necessary to search records of all potential areas of conceivable divorce jurisdiction].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General.*

*Cross-Reference:* 11 *Summary* (10th), *Husband and Wife*, §§55, 56.



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## CHAPTER III - Burden of Proof and Presumptions

## XIII. CONCLUSIVE PRESUMPTIONS

## A. Nature of Conclusive Presumptions.

1 *Witkin Cal. Evid. Burden* § 160

[§ 160] Nature of Conclusive Presumptions.

The Evidence Code, following the usual practice, classifies presumptions as "conclusive or rebuttable." (*Ev.C. 601*; see also *Ev.C. 620*.) But a conclusive or indisputable presumption is entirely different from the ordinary rebuttable presumption: It need not have a logical basis, and no evidence may be received to contradict it. Hence, it is more accurately described as a rule of substantive law rather than of evidence. (See *Kusior v. Silver* (1960) 54 C.2d 603, 619, 7 C.R. 129, 354 P.2d 657; *Gayton v. Pacific Fruit Express Co.* (1932) 127 C.A. 50, 61, 15 P.2d 217; *Pacific Employers Ins. Co. v. Industrial Acc. Com.* (1947) 81 C.A.2d 37, 41, 183 P.2d 344; *In re Heather B.* (1992) 9 C.A.4th 535, 560, 11 C.R.2d 891; *Federal Deposit Ins. Corp. v. Superior Court* (1997) 54 C.A.4th 337, 346, 62 C.R.2d 713, citing the text; 9 Wigmore (Chadbourn Rev.) §2492; Law Rev. Com. Comments on *Ev.C. 601, 620*.)

The substantive nature of a conclusive presumption is illustrated by *Kusior v. Silver, supra*, in which the logical basis of the former conclusive presumption of legitimacy (*infra*, §161) was challenged. As the court pointed out, the Legislature has the power to determine, as a matter of social policy, that in a certain relationship between husband and wife, the husband is to be responsible and the integrity of the family maintained. (The presumption of legitimacy is now a presumption of parent-child relationship; see *infra*, §161.)

The Evidence Code continued, without change, the conclusive presumptions formerly set forth in *C.C.P. 1962* (see *infra*, §161) with three exceptions:

(1) "*A malicious and guilty intent, from the deliberate commission of an unlawful act, for the purpose of injuring another.*" This presumption (former *C.C.P. 1962(1)*) was eliminated after being disparaged by the Supreme Court as having "little meaning, either as a rule of substantive law or as a rule of evidence." (*People v. Gorshen* (1959) 51 C.2d 716, 731, 336 P.2d 492.)

(2) "*The judgment or order of a court, when declared by this code to be conclusive.*" This presumption (former *C.C.P. 1962(6)*) was eliminated as a statement of a meaningless truism. (Law Rev. Com. Comment to repeal of *C.C.P. 1962*.)

(3) "*Any other presumption which by statute is expressly made conclusive.*" This presumption (former *C.C.P. 1962(7)*) was replaced by the broader provision of *Ev.C. 620* (*infra*, §164).

**SUPPLEMENT:** [This section is current through the latest supplement]

Cf. *People v. McCall* (2004) 32 C.4th 175, 189, 8 C.R.3d 337, 82 P.3d 351, citing the text [former *Health & Saf.C. 11383(f)*, which provided that possession of red phosphorus and iodine "shall be deemed" possession of hydriodic acid,

did not create conclusive presumption but was simply definitional provision that specified conduct deemed criminal]; *People v. Williams* (2005) 130 C.A.4th 1440, 1446, 30 C.R.3d 909 [Veh.C. 2800.2(b) (driving while fleeing peace officer during which time three or more traffic violations occur or property damage occurs constitutes wilful or wanton disregard for safety of persons or property) establishes rule of substantive law rather than presumption that varies burden of proof]; *People v. Burroughs* (2005) 131 C.A.4th 1401, 1407, 32 C.R.3d 729 [in recommitment proceeding under mentally disordered offender law, prosecution, by presenting evidence of defendant's physical violence, did not rely on mandatory rebuttable presumption to meet requirement under P.C. 2970 that defendant could not be kept in remission without treatment, but simply proved conduct necessary to satisfy requirement; following *McCall*]; *People v. Laughlin* (2006) 137 C.A.4th 1020, 1027, 1028, 40 C.R.3d 737 [agreeing with *People v. Williams*].



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## CHAPTER III - Burden of Proof and Presumptions

## XIII. CONCLUSIVE PRESUMPTIONS

## B. Statutory Listing.

## 1. In Evidence Code.

*1 Witkin Cal. Evid. Burden § 161*

[§ 161] In Evidence Code.

The Evidence Code incorporates several conclusive presumptions drawn without substantive change from former C.C.P. 1962. Apart from the presumption of parentage, which was subsequently transferred to the Family Code (see *infra*, §162), these include:

(1) *Facts Recited in Written Instrument*. "The facts recited in a written instrument are conclusively presumed to be true as between the parties thereto, or their successors in interest; but this rule does not apply to the recital of a consideration." (Ev.C. 622, restating former C.C.P. 1962(2).) This is the doctrine of "estoppel by contract." (See *Estate of Watkins* (1940) 16 C.2d 793, 798, 108 P.2d 417, 109 P.2d 1; *Palermo v. Pyke* (1952) 111 C.A.2d 350, 354, 244 P.2d 726; *Estate of Wilson* (1976) 64 C.A.3d 786, 801, 134 C.R. 749, citing the text [provision in joint and mutual will transmuting joint tenancy property into community property]; on the consideration exception, see 2 *Cal. Evidence* (4th), *Documentary Evidence*, §99.) The doctrine does not apply to a declaration of homestead, which is not a "written instrument" between the parties. (*Rich v. Ervin* (1948) 86 C.A.2d 386, 390, 194 P.2d 809.)

(2) *Estoppel by Own Statement or Conduct*. "Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it." (Ev.C. 623, restating former C.C.P. 1962(3).) This is the doctrine of "estoppel in pais." (See *R. D. Reeder Lathing Co. v. Allen* (1967) 66 C.2d 373, 378, 57 C.R. 841, 425 P.2d 785; *San Diego Mun. Credit Union v. Smith* (1986) 176 C.A.3d 919, 922, 923, 222 C.R. 467; 11 *Summary* (9th), *Equity*, §177 et seq.)

(3) *Estoppel of Tenant To Deny Title of Landlord*. "A tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation." (Ev.C. 624, restating former C.C.P. 1962(4); see 4 *Summary* (9th), *Real Property*, §§570, 571.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Facts Recited in Written Instrument*. See *Santa Cruz v. Pacific Gas & Elec. Co.* (2000) 82 C.A.4th 1167, 1176, 99 C.R.2d 198 [estoppel by contract doctrine was inapplicable to recitals contained in complementary franchises entered into by cities and utilities; complementary franchise is contractual only in sense that parties mutually agree to enter into franchise relationship, but does not involve arm's-length negotiations and is offered on "take-it-or-leave-it" basis]; *Quintanilla v. Dunkelman* (2005) 133 C.A.4th 95, 117, 34 C.R.3d 557, 5 *Summary* (10th), *Torts*, Supp., §400 [Ev.C. 622 did not render recitals in Spanish-language written consent form signed by medical malpractice plaintiff conclusively binding on her as to issue of informed consent, where there was evidence that she was rushed through admissions



process with no real opportunity to read form, that, although fluent in oral Spanish, she was not able to read language on form, and that she did not understand what procedures were going to be performed on her]; *Stoneridge Parkway Partners, LLC v. MW Housing Partners III, L.P.* (2007) 153 C.A.4th 1373, 1382, 64 C.R.3d 61 [erroneous recitals in loan agreement were not entitled to presumption of Ev.C. 622 where they related to consideration].

(New) *Estoppel certificates*: "Estoppel certificates are almost always used in commercial real estate transactions. They inform lenders and buyers of commercial property of the tenant's understanding of the lease agreement. Lenders and buyers rely upon the certificates in finalizing loans and purchases. Thus, application of [Ev.C.] 622 to estoppel certificates would promote certainty and reliability in commercial transactions. A contrary conclusion would defeat the purpose behind the widespread practice of using estoppel certificates. ... [W]e hold that, under section 622, when a tenant signs and delivers an estoppel certificate, as required under the commercial lease agreement, that tenant is bound to the recitations of fact contained therein." (*Plaza Freeway Ltd. Partnership v. First Mountain Bank* (2000) 81 C.A.4th 616, 628, 629, 96 C.R.2d 865 [in unlawful detainer action, trial judge erred in determining that lease termination date was date later than that stated in estoppel certificate and that tenant's exercise of option to renew was therefore timely]; see *Robert T. Miner, M.D. v. Tustin Avenue Investors, LLC* (2004) 116 C.A.4th 264, 272, 10 C.R.3d 178 [estoppel certificate signed by tenant created ambiguity and thus did not extinguish tenant's option right, where it stated that lease, which contained option right, remained in full force and effect, but also stated that tenant had no options but those listed in certificate and it listed none; distinguishing *Plaza Freeway*].)

(2) *Estoppel by Own Statement or Conduct*.

*Cross-Reference*: 13 *Summary* (10th), *Equity*, §190 et seq.

(3) *Estoppel of Tenant To Deny Title of Landlord*.

*Cross-Reference*: 12 *Summary* (10th), *Real Property*, §607.



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### CHAPTER III - Burden of Proof and Presumptions

#### XIII. CONCLUSIVE PRESUMPTIONS

##### B. Statutory Listing.

##### 2. In Other Codes.

##### a. Parentage.

#### 1 Witkin Cal. Evid. Burden § 162

[§ 162] Parentage.

(1) *From Cohabitation of Spouses.* Former C.C.P. 1962(5), restated in former Ev.C. 621, established a conclusive presumption that "the issue of a wife cohabiting with her husband, who is not impotent" is legitimate. (See *Kusior v. Silver* (1960) 54 C.2d 603, 619, 7 C.R. 129, 354 P.2d 657.)

The Uniform Parentage Act (*Family C. 7600* et seq.) eliminated the concept of legitimacy and replaced it with that of parent-child relationship. (See *10 Summary* (9th), *Parent and Child*, §409 et seq.) *Family C. 7540*, to which the presumption was transferred, now states that "the child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage." (See *Steven W. v. Matthew S.* (1995) 33 C.A.4th 1108, 1114, 1115, 39 C.R.2d 535 [presumption was improperly applied where "cohabitation" consisted of mother spending weekend with husband with whom she was no longer living]; *In re Marriage of Freeman* (1996) 45 C.A.4th 1437, 1449, 53 C.R.2d 439 [presumption applied even though husband had only one-fourth live sperm count needed to be considered fertile; "sterility" within meaning of statute "is limited to cases where, by a preponderance of the evidence, a party can demonstrate that the presumed father could not produce live sperm count at the time of conception"]; 26 *Golden Gate L. Rev.* 337 [circumvention of presumption in order to protect rights of unwed fathers]; on constitutionality of the presumption, see *infra*, §§165, 166.)

The presumption, however, is no longer "conclusive" in one sense: The husband may obtain a finding of nonpaternity if blood tests administered pursuant to the Uniform Act on Blood Tests to Determine Paternity (*Family C. 7550* et seq.; see 2 *Cal. Evidence* (4th), *Demonstrative, Experimental, and Scientific Evidence*, §69) show that he is not the child's father. (*Family C. 7541*.)

(2) *From Voluntary Declaration.* Under *Family C. 7570* et seq., parents of a new-born infant may execute a voluntary declaration of paternity at the hospital or other place of birth, thereby establishing a conclusive presumption of paternity having the same force and effect as the presumption under *Family C. 7540*, *supra*. Procedures for rescinding or setting aside the declaration are set forth in *Family C. 7575*. (See *10 Summary* (9th), *Parent and Child*, *Supp.*, §448D.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *From Cohabitation of Spouses.* See 34 *McGeorge L. Rev.* 637 [proposal to abolish presumption arising from cohabitation and make related presumptions concerning paternity and maternity fully rebuttable].

*Cross-Reference: 10 Summary (10th), Parent and Child, §17 et seq.(2) From Voluntary Declaration.*

*Cross-Reference: 10 Summary (10th), Parent and Child, §31 et seq.*



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### XIII. CONCLUSIVE PRESUMPTIONS

#### B. Statutory Listing.

##### 2. In Other Codes.

##### b. Other Presumptions.

#### 1 Witkin Cal. Evid. Burden § 163

[§ 163] Other Presumptions.

Additional conclusive presumptions in codes other than the Evidence Code include:

- (1) *Consolidated or unified judicial districts' boundaries, as shown on approved and filed map.* (Govt.C. 71042.6.)
- (2) *Conviction of heir or beneficiary.* A final judgment of conviction of a felonious and intentional killing is conclusive, with respect to the loss of the perpetrator's right to take the victim's estate by will or succession. (Prob.C. 254(a); see 12 Summary (9th), Wills and Probate, §62.)
- (3) *Fraud against creditors, from transfer by insolvent person without consideration.* (C.C. 3439.05; see *Wright v. Salzberger* (1932) 121 C.A. 639, 643, 9 P.2d 860; *Bank One Texas v. Pollack* (1994) 24 C.A.4th 973, 980, 29 C.R.2d 510; 8 Cal. Proc. (4th), Enforcement of Judgment, §469).
- (4) *Partnership members.* Corp.C. 15010.5 creates a conclusive presumption, in favor of any bona fide purchaser for value of partnership real property, that the persons listed in the recorded partnership statement are actually partners of the partnership. (See *Federal Deposit Ins. Corp. v. Superior Court* (1997) 54 C.A.4th 337, 345, 346, 62 C.R.2d 713 [citing the text; in action by receiver of lender to recover loans, secured by partnership property, to two men who claimed, at time of loan, that they were partners, trial judge erred in applying presumption *against* plaintiff to find they were not partners on basis of amended partnership statements that deleted their names; presumption was not intended to bind anyone other than partnership itself]; 9 Summary (9th), Partnership, §27.)
- (5) *Payment of insurance premium, from acknowledgment of receipt in policy.* (Ins.C. 484; see 1 Summary (9th), Contracts, §§212, 871.)
- (6) *Payment of property tax, 30 years after it becomes a lien.* (Rev.C. 2195; see 3 Cal. Proc. (4th), Actions, §609.)
- (7) *Permissive use precluding acquisition of prescriptive right, from posting of specified notice.* (C.C. 1008; see 4 Summary (9th), Real Property, §466.)
- (8) *Priority of most recent legislation.* A later enacted statute in a legislative session is conclusively presumed to prevail over earlier enacted statutes in the same session, unless the later enacted statute contains an express provision to the contrary. However, a statute with a higher chapter number, and no express provisions to the contrary, is simply "presumed" (i.e., not conclusively) to prevail over statutes enacted at the same session, but with lower chapter numbers.

(Govt.C. 9605; see 7 *Summary* (9th), *Constitutional Law*, §94.)

(9) *Sale under trust deed*. Under C.C. 2924, a recital in a trustee's deed that statutory notice requirements were complied with is "conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value and without notice." (See *Homestead Savings v. Darmiento* (1991) 230 C.A.3d 424, 434, 435, 281 C.R. 367, 3 *Summary* (9th), *Security Transactions in Real Property*, Supp., §148 [upholding conclusive presumption against constitutional challenge].)

(10) *Sanity*. A defendant who does not plead "not guilty by reason of insanity" is conclusively presumed to have been sane at the time of the commission of the offense. (P.C. 1016; see 4 *Cal. Crim. Law* (3d), *Pretrial Proceedings*, §257.)

(11) *Survival of persons dying in same calamity, under simultaneous death rules*. (Prob.C. 220 et seq.; see 12 *Summary* (9th), *Wills and Probate*, §96 et seq.; 39 A.L.R.3d 1332, 1347 [presumptions under Uniform Simultaneous Death Act]; 3 *Proof of Facts* 235 [determination of order of death in case of common disaster].)

(12) *Workers' compensation benefits*. The following statutes create conclusive presumptions regarding workers' compensation benefits:

(a) *Ins.C. 11650* [statutory provisions included in workers' compensation insurance policy]. (See *Hubbert v. Industrial Acc. Com.* (1936) 14 C.A.2d 171, 173, 58 P.2d 171.)

(b) *Lab.C. 3501(a)* [dependency of child under 18 or incapacitated]. (See *Pacific Employers Ins. Co. v. Industrial Acc. Com.* (1947) 81 C.A.2d 37, 41, 183 P.2d 344; 2 *Summary* (9th), *Workers' Compensation*, §§309, 310.)

(c) *Lab.C. 3501(b)* [dependency of surviving spouse where he or she earned \$ 30,000 or less in 12 months preceding employee's death]. (See 2 *Summary* (9th), *Workers' Compensation*, Supp., §307.)

(d) *Lab.C. 4155* [election of governmental agency to bring excluded employments within Workers' Compensation Act]. (See 2 *Summary* (9th), *Workers' Compensation*, §183.)

(e) *Lab.C. 4662* [permanent total disability from certain kinds of serious injuries]. (See 2 *Summary* (9th), *Workers' Compensation*, §275.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Conviction of heir or beneficiary*.

*Cross-Reference:* 14 *Summary* (10th), *Wills and Probate*, §293 et seq.(4) *Partnership members*.

*Cross-Reference:* 9 *Summary* (10th), *Partnership*, §29.

(5) *Payment of insurance premium, from acknowledgment of receipt in policy*.

*Cross-Reference:* *Ins.C. 484*, formerly discussed in *Contracts*, has been transferred to 2 *Summary* (10th), *Insurance*, §§67, 219.

(7) *Permissive use precluding acquisition of prescriptive right, from posting of specified notice*.

*Cross-Reference:* 12 *Summary* (10th), *Real Property*, §404.

(8) *Priority of most recent legislation*.

*Cross-Reference:* 7 *Summary* (10th), *Constitutional Law*, §115 et seq.

(9) *Sale under trust deed.*

*Cross-Reference:* 4 Summary (10th), *Security Transactions in Real Property*, §164.(11) *Survival of persons dying in same calamity, under simultaneous death rules.*

*Cross-Reference:* 14 Summary (10th), *Wills and Probate*, §289 et seq.

(12) *Workers' compensation benefits.*

(b) *Lab.C. 3501(a):*

*Cross-Reference:* 2 Summary (10th), *Workers' Compensation*, §§312, 313.

(c) *Lab.C. 3501(b):*

*Cross-Reference:* 2 Summary (10th), *Workers' Compensation*, §313.

(d) *Lab.C. 4155:*

*Cross-Reference:* 2 Summary (10th), *Workers' Compensation*, §192.

(e) *Lab.C. 4662:*

*Cross-Reference:* 2 Summary (10th), *Workers' Compensation*, §287.



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## CHAPTER III - Burden of Proof and Presumptions

### XIII. CONCLUSIVE PRESUMPTIONS

#### C. Nonstatutory Conclusive Presumptions.

##### 1 Witkin Cal. Evid. Burden § 164

[§ 164] Nonstatutory Conclusive Presumptions.

(1) *In General*. "The presumptions established by this article, and all other presumptions declared by law to be conclusive, are conclusive presumptions." (Ev.C. 620.) Under the definition of "law" (1 Cal. Evidence (4th), Introduction, §17), this section recognizes the existence of judicially created conclusive presumptions. The former statute (C.C.P. 1962) did not, but in at least two instances, common law presumptions survived despite the "no others" provision:

(a) The much criticized conclusive presumption that a woman is capable of bearing children (the "fertile octogenarian rule"). (See *Fletcher v. Los Angeles Trust & Savings Bank* (1920) 182 C. 177, 184, 187 P. 425; 4 Summary (9th), Real Property, §388.)

(b) The agency doctrine of imputed notice, in civil actions (perhaps statutory, under C.C. 2332). (See *Jaffe v. Heffner* (1959) 173 C.A.2d 512, 518, 343 P.2d 374, citing the text; 2 Summary (9th), Agency and Employment, §99; on disputable nature of presumption in criminal action or contempt proceeding, see *Freeman v. Superior Court* (1955) 44 C.2d 533, 538, 282 P.2d 857.)

(2) *Serious Error in Criminal Trial*. The continued affirmation of common law rules, phrased as conclusive presumptions or otherwise, is quite a different matter from creating new conclusive presumptions. But in one area, that power appears to have been exercised: In criminal trials, the judicially developed doctrine of reversible error in effect conclusively presumes prejudice from certain types of serious error, e.g., denial of the right to counsel. In such cases, even overwhelming evidence of guilt will be disregarded. (See *People v. Ortiz* (1990) 51 C.3d 975, 988, 275 C.R. 191, 800 P.2d 547; 6 Cal. Crim. Law (3d), Reversible Error, §20 et seq.) The once numerous kinds of error subject to this rule, however, have been reduced in recent years. (See *Rose v. Clark* (1986) 478 U.S. 570, 106 S.Ct. 3101, 3106, 92 L.Ed.2d 460, 471, 6 Cal. Crim. Law (3d), Reversible Error, §14 ["if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis"]; *People v. Cahill* (1993) 5 C.4th 478, 509, 20 C.R.2d 582, 853 P.2d 1037, 6 Cal. Crim. Law (3d), Reversible Error, §12 [overruling earlier decisions to the effect that admission of involuntary confession was reversible error per se under California law].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General*.

(a) *Fertile octogenarian rule*:

*Cross-Reference: 12 Summary (10th), Real Property, §178.(b) Imputed notice:*

*Cross-Reference: 3 Summary (10th), Agency and Employment, §150.*





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## CHAPTER III - Burden of Proof and Presumptions

## XIII. CONCLUSIVE PRESUMPTIONS

## D. Constitutionality.

## 1. In General.

*1 Witkin Cal. Evid. Burden § 165*

[§ 165] In General.

A conclusive presumption, which prevents a party from offering evidence on the issue, may sometimes be successfully challenged as a denial of due process. (See *Vlandis v. Kline* (1973) 412 U.S. 441, 93 S.Ct. 2230, 2236, 37 L.Ed.2d 63, 71 ["In sum, since Connecticut purports to be concerned with residency in allocating the rates for tuition and fees at its university system, it is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of nonresidence, when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination"]; *Cleveland Bd. of Education v. LaFleur* (1974) 414 U.S. 632, 94 S.Ct. 791, 800, 39 L.Ed.2d 52, 64 [mandatory unpaid leaves for pregnant schoolteachers and mandatory limitations on their return to work after giving birth violated Due Process Clause; irrebuttable presumptions unduly penalized female teachers for deciding to bear children]; *Atkisson v. Kern County Housing Authority* (1976) 59 C.A.3d 89, 97, 130 C.R. 375 [regulation of public housing authority automatically presumed immorality, irresponsibility and demoralization of tenant relations from fact that tenant cohabited with person of opposite sex to whom tenant was not married; irrebuttable presumption was thus invalid as denial of due process because it was not necessarily universally true in fact]; 27 *Stanf. L. Rev.* 449 [appropriate question should be whether statutory relationship between criterion and consequence violates Constitution]; 7 *Summary* (9th), *Constitutional Law*, §513.)

On the other hand, where the conclusive presumption does not implicate a constitutionally protected right, and it is rationally related to a legitimate state objective, the challenge is rejected. (See *Weinberger v. Salfi* (1975) 422 U.S. 749, 95 S.Ct. 2457, 2470, 45 L.Ed.2d 522, 542, 543 [upholding Social Security survivor benefits' duration-of-relation requirements]; *Paterson v. Department of Motor Vehicles* (1985) 171 C.A.3d 1126, 1130, 217 C.R. 881 [to the extent statute requiring automatic suspension of license following three convictions for drunk driving within 5 years created conclusive presumption that driver could not be entrusted with license, it was valid as reasonably related to strong legislative policy of ridding state's highways of drunk drivers]; 89 *Harv. L. Rev.* 77 [*Salfi*]; 30 *U.C.L.A. L. Rev.* 211 [discussing *Salfi* and earlier cases it repudiated]; on due process challenges to presumptions implicating parent-child relationship, see *infra*, §166.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Cross-Reference:* 7 *Summary* (10th), *Constitutional Law*, §650.

*Valid presumptions:* See *Griffiths v. Superior Court* (2002) 96 C.A.4th 757, 779, 117 C.R.2d 445 [B. & P.C. 2239(a), by creating conclusive presumption of physician's unprofessional conduct based on two or more misdemeanor

convictions for offenses involving alcohol consumption, does not violate due process, as there is rational relationship between such offenses and ultimate fact (unprofessional conduct) required to be drawn; relying on *Weinberger v. Salfi* (1975) 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522, text, p. 307].



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## CHAPTER III - Burden of Proof and Presumptions

## XIII. CONCLUSIVE PRESUMPTIONS

## D. Constitutionality.

## 2. Parentage.

1 *Witkin Cal. Evid. Burden § 166*

[§ 166] Parentage.

The constitutionality of applying the conclusive presumption of parentage (see *supra*, §161) in a particular case is determined by balancing the parties' private interests in establishing paternity against the state's interests in familial stability and the welfare of the child. (See *Michelle W. v. Ronald W. (1985) 39 C.3d 354, 363, 216 C.R. 748, 703 P.2d 88.*) Because the facts of each situation are unique, the result of the balancing process varies, as illustrated below.

(1) *Challenge by Child.* In *Estate of Cornelious (1984) 35 C.3d 461, 198 C.R. 543, 674 P.2d 245*, a 27-year-old adult woman sought to prove she was the child of an intestate decedent. Because her mother was married and lived with her husband at the time plaintiff was conceived, and he was neither impotent nor sterile, she was conclusively presumed under former Ev.C. 621(a) (see *supra*, §162) to be the child of her mother's husband, and not of the decedent. Despite compelling evidence that the decedent was her father, the trial judge applied the presumption. *Held*, plaintiff's due process rights were not violated.

The presumption is ancient and promotes the important social policies of preserving the integrity of the family and protecting the welfare of children. (35 C.3d 465.) In response to criticism, it has been supplied with exceptions allowing a challenge, on the basis of blood test evidence, within 2 years of birth (see 2 *Cal. Evidence (4th), Demonstrative, Experimental, and Scientific Evidence*, §71), probably because during that early period there is less of a parent-child relationship to protect. (35 C.3d 465, 466.) Here the alleged natural father is dead, and plaintiff's main interest is simply to gain a right to inherit his estate (a right that his sisters also claim). The state's competing interests are well served by applying the presumption, because plaintiff had a true family relationship with her mother's husband, who reared and supported her and died thinking he was her father. (35 C.3d 467, distinguishing *Stanley v. Illinois (1972) 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551, 7 Summary (9th), Constitutional Law*, §513, and *In re Lisa R. (1975) 13 C.3d 636, 119 C.R. 475, 532 P.2d 123, 10 Summary (9th), Parent and Child*, §404, in which putative fathers sought to care for and nurture their own children.) (See also *Susan H. v. Jack S. (1994) 30 C.A.4th 1435, 1440, 1444, 37 C.R.2d 120* [application of conclusive parentage presumption did not infringe any interest of child's worthy of constitutional protection; there was no relationship between child and putative father, and putative father had no interest in creating one].)

(2) *Challenge by Natural Father: Presumption Properly Applied.* In *Michelle W. v. Ronald W.*, *supra*, two men claimed to be the father of a 7-year-old girl (Michelle). One man (Ronald) was the husband of the girl's mother at the time Michelle was conceived, he fulfilled all the responsibilities of a father to her and, after divorcing the mother, assumed the obligation of support. The other man (Donald) had had sexual relations with the mother at the time of conception and later married her, holding out Michelle as his natural child. The trial judge applied the presumption,

finding that Ronald was the father. *Held*, this was proper. In those cases where application of the presumption has been found violative of due process, the state was seeking to terminate or prevent the establishment of a parent-child relationship. (39 C.3d 362.) Here Donald was seeking a declaration of fatherhood notwithstanding the established and continuing relationship between Ronald and Michelle. His private interest in doing so did not outweigh the state's substantial interest in familial stability and the child's welfare. (39 C.3d 362, 363.)

Michelle's own due process claim, because it was asserted through a guardian ad litem, may or may not have represented her true wishes. In any case, she was not being threatened with a termination of her association with Donald, nor was she being prevented from obtaining information as to who her biological father was. The state's interests here too outweighed her abstract interest in vindicating true parentage. (39 C.3d 364.) (See *Michael H. v. Gerald D.* (1987) 191 C.A.3d 995, 1008, 1009, 236 C.R. 810 [presumption applied to defeat paternity claim of man who had had affair with child's mother at time of child's conception; even though blood tests showed he was almost certainly biological father, his claim, opposed by mother and her husband, would disrupt existing family unit]; *Michael H. v. Gerald D.* (1989) 491 U.S. 110, 109 S.Ct. 2333, 2346, 105 L.Ed.2d 91, 110, 111 [affirming Court of Appeal judgment and declining to decide whether child has liberty interest, symmetrical with parent's, in maintaining filial relationship]; *Dawn D. v. Superior Court* (1998) 17 C.4th 932, 942, 72 C.R.2d 871, 952 P.2d 1139 [following U.S. Supreme Court holding in *Michael H.*; because alleged biological father who lacked presumed father status had no constitutionally protected liberty interest in being allowed to form parental relationship with child, application against him of statutory presumption in favor of mother's husband did not deprive him of due process]; *Rodney F. v. Karen M.* (1998) 61 C.A.4th 233, 239, 71 C.R.2d 399 [presumption violates neither due process nor equal protection; following *Michelle W.*; 103 Harv. L. Rev. 177 [Supreme Court opinion in *Michael H.*; 20 Loyola L.A. L. Rev. 705, 734 [*Michelle W.*].)

(3) *Challenge by Natural Father: Presumption Violative of Due Process.* In *re Melissa G.* (1989) 213 C.A.3d 1082, 261 C.R. 894, was a dependency proceeding in which the court ordered blood tests establishing to a near certainty that the father of the subject minor was her mother's husband (Felix), with whom the minor had been living since shortly after her birth. Nevertheless, because the mother had been married to another man (Fermin) at the time the minor was conceived, the trial judge ruled that he was compelled to apply the presumption and ignore the results of the blood test. *Held*, reversed. Felix's interest in a paternal relationship with the minor was far more significant than that of the putative father in *Michael H.*. Felix had lived with her for several years, while Fermin had no ongoing relationship with her. Further, the public interest in the minor's welfare encompassed her sibling relationship with her younger sister (Felix's other daughter). (213 C.A.3d 1089.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Challenge by Child.*

*Stanley v. Illinois:*

*Cross-Reference:* 7 Summary (10th), *Constitutional Law*, §650.

*In re Lisa R.:*

*Cross-Reference:* 10 Summary (10th), *Parent and Child*, §603.(3) *Challenge by Natural Father: Presumption Violative of Due Process.* In *Brian C. v. Ginger K.* (2000) 77 C.A.4th 1198, 92 C.R.2d 294, a baby girl was conceived at a time when the girl's mother was having an affair with Brian but was still cohabiting with her husband. At the time the baby was born, the mother had left her husband and was living with Brian. Brian's name appeared on the birth certificate as the father, and Brian cared for the child as a parent for more than a year after her birth. When the mother reconciled with her husband, she attempted to cut off all contact with Brian, and Brian brought an action to establish his paternity. The trial judge granted the mother's summary judgment motion on the basis of the conclusive presumption of *Family C.* 7540; judge made no ruling on Brian's request for DNA tests. *Held*, reversed. "[T]here are times when the due process clause of the federal Constitution precludes states from applying substantive rules of paternity law which have the effect of terminating an *existing* father-child relationship. This case is one of them. In particular, because the

child was *not* 'born into' an extant marital union (in any meaningful sense) and because the plaintiff developed a substantial parent-child relationship with the child immediately upon her birth and for a year and one-half thereafter, he *can* bring an action to be declared the legal father of the child." (77 C.A.4th 1200.)



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## CHAPTER IV - Circumstantial Evidence

### I. IN GENERAL

#### A. Distinction Between Direct and Circumstantial Evidence.

##### *1 Witkin Cal. Evid. Circum Evid § 1*

#### [§ 1] Distinction Between Direct and Circumstantial Evidence.

"As used in this chapter, 'direct evidence' means evidence that directly proves a fact, without an inference or presumption, and which in itself, if true, conclusively establishes that fact." (*Ev.C. 410.*)

"Indirect evidence" was formerly defined by statute as evidence tending to establish the fact in dispute by proving another. This archaic term is seldom used to describe what is called "circumstantial evidence," and the definition was omitted from the Evidence Code. (See Law Rev. Com. Comment to repeal of C.C.P. 1832.)

The distinction between direct and circumstantial evidence is not, however, merely one of description or classification; it has a special significance in criminal cases where the defendant asks for the standard instruction on sufficiency of circumstantial evidence. (See *3 Cal. Evidence (4th), Presentation at Trial, §142.*) Accordingly, a working definition of the latter term and a practical means of distinguishing the two are important.

Both are given in *People v. Goldstein (1956) 139 C.A.2d 146, 152, 293 P.2d 495*: "Direct evidence is that which is applied to the fact to be proved, immediately and directly, and without the aid of any intervening fact or process: as where, on a trial for murder, a witness positively testifies he saw the accused inflict the mortal wound, or administer the poison. Circumstantial evidence is that which is applied to the principal fact, indirectly, or through the medium of other facts, from which the principal fact is inferred. The characteristics of circumstantial evidence, as distinguished from that which is direct, are, first, the existence and presentation of one or more evidentiary facts; and, second, a process of inference, by which these facts are so connected with the fact sought, as to tend to produce a persuasion of its truth. ... It has been said that circumstantial evidence, as distinguished from direct evidence, is testimony not based on actual personal knowledge or observation of the facts in controversy, but of other facts from which deductions are drawn, showing indirectly the facts sought to be proved." (See *People v. Malbrough (1961) 55 C.2d 249, 251, 10 C.R. 632, 359 P.2d 30*; *People v. Pruitt (1969) 269 C.A.2d 501, 505, 75 C.R. 125*; *People v. Nealy (1991) 228 C.A.3d 447, 451, 279 C.R. 36* [phone calls requesting "doves" and heard by officer while executing warrant in defendant's apartment were circumstantial evidence that rock cocaine seized was possessed for purpose of sale]; *1 McCormick 5th, §185, 1A Wigmore (Tillers Rev.) §25, 29 Am.Jur.2d (1994 ed.), Evidence §313*; *BAJI (8th ed.), No. 2.00*; *1 Jefferson, California Evidence Benchbook 3d, Chap. 19.*)

The term "circumstantial evidence" emphasizes the effect of the evidence--the necessity of drawing inferences from it. "An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action." (*Ev.C. 600(b).*) The other "fact or group of facts" from which the inferences are to be drawn may be established by any kind of competent and relevant evidence, e.g., testimony, real or demonstrative evidence, or documentary evidence.

**SUPPLEMENT:** [This section is current through the latest supplement]

See CACI, No. 202 [difference between direct evidence and circumstantial evidence (referred to as "indirect evidence")]; CALCRIM, No. 223 [Direct and Circumstantial Evidence: Defined]; 1 McCormick 6th, §185. *West's Key Number Digest*, Criminal Law k.338(2); Evidence k.100



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## CHAPTER IV - Circumstantial Evidence

### I. IN GENERAL

#### B. Testimony as Circumstantial Evidence.

##### 1 *Witkin Cal. Evid. Circum Evid* § 2

#### [§ 2] Testimony as Circumstantial Evidence.

It is obvious that the classification of circumstantial and testimonial evidence is not mutually exclusive; i.e., testimony may be direct evidence of one fact, but circumstantial evidence of another. Thus, "the testimony of a witness that the defendant admitted guilt would seem to be direct evidence that an admission or confession was *made* by defendant but circumstantial evidence of the *truth of what was admitted*." (*People v. Koenig* (1946) 29 C.2d 87, 91, 173 P.2d 1; see *People v. Gould* (1960) 54 C.2d 621, 629, 7 C.R. 273, 354 P.2d 865 [admission]; *People v. Di Giacomo* (1961) 193 C.A.2d 688, 696, 14 C.R. 574, 2 Cal. Crim. Law (3d), *Crimes Against Governmental Authority*, §76 [expert's comparison of handwriting]; 1 McCormick 5th, §185 [pointing out that testimony that A fled from scene of murder would be direct evidence of his flight and circumstantial evidence of guilt (1 Cal. Evidence (4th), Hearsay, §107)]; 1A Wigmore (Tillers Rev.) §25.)

In *People v. Goldstein* (1956) 139 C.A.2d 146, 293 P.2d 495, *supra*, §1, involving the circumstantial evidence instruction (3 Cal. Evidence (4th), *Presentation at Trial*, §142), the court held that expert testimony of an officer as to the nature of certain papers found on defendant's premises was circumstantial evidence from which the jury might infer that defendant acted as a bookmaker. The opinion reviews decisions in which the opinion of a chemist concerning the purity of tomato paste, testimony as to handwriting based on comparison of writings, the opinion of a ballistic expert that the death bullet was fired from defendant's gun, and testimony of officers that mash found in defendant's potato patch was suitable for distillation of alcoholic liquor, were held to be circumstantial evidence. (139 C.A.2d 153, 154.)

Another illustration is the use of testimony of a grantor, testator, or alleged incompetent as circumstantial evidence on the issue of mental capacity and condition. (See *Estate of Moore* (1919) 180 C. 570, 580, 583, 182 P. 285 [testator]; *Guardianship of Waite* (1939) 14 C.2d 727, 730, 97 P.2d 238 [right of alleged incompetent to testify in her own behalf]; *Anderson v. Torrey* (1951) 105 C.A.2d 671, 675, 234 P.2d 142 [grantor's confused testimony supported finding of his incapacity].)

In making a distinction between direct and circumstantial evidence, the *Koenig* case, *supra*, relied on the since-repealed provisions of C.C.P. 1832 (*supra*, §1). *People v. McRae* (1967) 256 C.A.2d 95, 111, footnote 4, 63 C.R. 854, suggests that repeal of the statute "may leave the way open for consideration of the general rule ... that oral confessions are direct and not circumstantial evidence."

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 1 McCormick 6th, §185.





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## CHAPTER IV - Circumstantial Evidence

### II. RELEVANCY AND MATERIALITY

#### A. Definitions and Distinctions.

##### 1. Materiality.

#### *1 Witkin Cal. Evid. Circum Evid § 3*

#### [§ 3] Materiality.

It is fairly common practice to use the terms "relevant" and "material," and particularly their opposites--"irrelevant" and "immaterial"--as interchangeable and synonymous. Modern writers, however, point out that, although relevant is the broader term and is often used in the double sense of relevant and material (see Uniform Rules of Evidence, Rule 401; *F.R. Evid.*, Rule 401; 1 Wharton, *Crim. Evidence* (15th ed.), §4:1; 29 *Cal. L. Rev.* 690), the distinction between the two concepts is substantial. A "material matter" is one "the existence or non-existence of which is provable in the action." (Model C., Rule 1(8).) In other words, materiality depends on the *issues in the case*; evidence that does not relate to a matter in issue is *immaterial*. (See *Andalon v. Superior Court* (1984) 162 *C.A.3d* 600, 604, footnote 3, 208 *C.R.* 899, quoting the text; 29 *Cal. L. Rev.* 690; 1 McCormick 5th, §185; 1 Wigmore (Tillers Rev.) §2; 29 *Am.Jur.2d* (1994 ed.), *Evidence* §304.)

What matters are in issue (and consequently material) is determined mainly by the pleadings, the rules in pleading, and the substantive law relating to the particular kind of case. (See 29 *Cal. L. Rev.* 690; 1 McCormick 5th, §185; 1 Wigmore (Tillers Rev.) §2; on effect of admissions of matters alleged in the pleadings, see 1 *Cal. Evidence* (4th), *Hearsay*, §97 et seq.) Under the liberal modern view, some matters not actually pleaded may become issues (and therefore material) when the case is tried on the theory that they are in issue. (See 9 *Cal. Proc.* (4th), *Appeal*, §402.) Conversely, matters pleaded and originally in issue may be eliminated by a pretrial order. (See 7 *Cal. Proc.* (4th), *Trial*, §56.) Evidence to impeach a witness is "within the area of dispute" (and therefore material), though it may not relate to an issue made by the pleadings. (See 1 McCormick 5th, §185.)

In *Trafton v. Youngblood* (1968) 69 *C.2d* 17, 69 *C.R.* 568, 442 *P.2d* 648, 5 *Cal. Proc.* (4th), *Pleading*, §1148, a suit by a client against his former attorney, the trial court received evidence of the attorney's services as background for the attorney's claim of an account stated. After judgment for the client, the attorney sought to direct the reviewing court's attention to that evidence, contending that it showed the reasonable value of his services. *Held*, judgment affirmed; the reasonableness of services was not before the court. Evidence offered on one issue may establish facts supporting a different issue, provided both issues are being tried. But the evidence cannot determine an issue that the parties have left out of their pleadings. (69 *C.2d* 32.) (See *Hughes v. Blue Cross of Northern Calif.* (1989) 215 *C.A.3d* 832, 858, 263 *C.R.* 850, quoting the text and *Trafton* and adding: "The rule arises from the fundamental consideration, implied by due process, that a party must have notice of a claim and an opportunity to defend"; but see *Lever v. Garoogian* (1974) 41 *C.A.3d* 37, 39, 115 *C.R.* 856, citing the text [evidence of fraud held properly admitted under defendant's general denial to plaintiff's complaint on promissory note].)

Unfortunately, the terms "material" and "immaterial" have not always been used with precision; evidence that is

within the issues (and therefore material), but is of slight probative value or significance in the case, has been described as "immaterial." To eliminate this confusing loose usage, the Evidence Code substitutes the word "disputed" for "material," and covers this correct concept of materiality in the single definition of "relevant evidence" (*Ev.C. 210*, *infra*, §4). (See *People v. Hill* (1992) 3 *C.A.4th* 16, 29, 4 *C.R.2d* 258, quoting the text.) "Remoteness" thus becomes a ground of discretionary exclusion under *Ev.C. 352* (*infra*, §17).

**SUPPLEMENT:** [This section is current through the latest supplement]

See 1 McCormick 6th, §185. *West's Key Number Digest*, Criminal Law k.338 et seq.; Evidence k.99 et seq.



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## CHAPTER IV - Circumstantial Evidence

### II. RELEVANCY AND MATERIALITY

#### A. Definitions and Distinctions.

##### 2. Relevancy.

#### 1 *Witkin Cal. Evid. Circum Evid* § 4

[§ 4] Relevancy.

(1) *General Definitions.* Relevancy is concerned with the probative quality of the evidence offered. (See 29 *Cal. L. Rev.* 690 ["Relevancy, as the word itself indicates, is not an inherent characteristic of any item of evidence but exists as a relation between an item of evidence and a proposition sought to be proved"]; 22 *Southwestern U. L. Rev.* 1039 [An Overview of Relevance and Hearsay: A Nine Step Analytical Guide]; 1 *McCormick* 5th, §185 ["The second aspect of relevance is probative value, the tendency of evidence to establish the proposition that it is offered to prove"]; 1 *Wigmore* (Tillers Rev.) §10; 29 *Am.Jur.2d* (1994 ed.), *Evidence* §307; 2 *U.C.L.A. L. Rev.* 5; *Firlotte v. Jessee* (1946) 76 *C.A.2d* 207, 210, 172 *P.2d* 710 ["Evidence is relevant not only when it tends to prove or disprove the precise fact in issue, but when it tends to establish a fact from which the existence or non-existence of the fact in issue can be directly inferred"]; *People v. Lint* (1960) 182 *C.A.2d* 402, 415, 6 *C.R.* 95, *infra*, §89, quoting the text; *Larson v. Solbakken* (1963) 221 *C.A.2d* 410, 419, 34 *C.R.* 450, quoting the text; *People v. Warner* (1969) 270 *C.A.2d* 900, 908, 76 *C.R.* 160, citing the text; *Marocco v. Ford Motor Co.* (1970) 7 *C.A.3d* 84, 91, 86 *C.R.* 526, citing the text; *Ruiz v. Minnesota Mining & Mfg. Co.* (1971) 15 *C.A.3d* 462, 467, footnote 3, 93 *C.R.* 270 ["Relevancy is probative worth. The most accepted test of relevancy is: Does the evidence offered render the desired inference more probable than it would be without the evidence?"]; *People v. Garceau* (1993) 6 *C.4th* 140, 177, 24 *C.R.2d* 664, 862 *P.2d* 664 ["The test of relevance is whether the evidence tends 'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive"]; *In re Romeo C.* (1995) 33 *C.A.4th* 1838, 1843, 40 *C.R.2d* 85 ["Evidence is relevant when no matter how weak it is it tends to prove a disputed issue"]; *F.R. Evid.*, *Rule 401* ["'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"]; 1 *Mueller & Kirkpatrick*, *Federal Evidence* 2d, §83.) (For exhaustive analysis of modern theories of relevancy, see 1A *Wigmore* (Tillers Rev.) §37.1 et seq.)

The Evidence Code defines relevant evidence as evidence "having a tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (*Ev.C.* 210.)

(2) *Erroneous Concept of "Legal Relevancy."* There are occasional expressions to the effect that inadmissible hearsay statements or opinions are irrelevant; also that evidence, though logically relevant (tending to prove a material matter), is so remote or conjectural, i.e., of so slight persuasive value, as to be legally irrelevant. And sometimes the exclusion of evidence for the policy reason of undue prejudice is placed on the ground of irrelevancy.

This splitting of the relevancy doctrine into "logical" and "legal" phases has been strongly criticized as useless and misleading. The better view seems to be to consider relevancy a single concept, and to treat all exclusions of logically relevant evidence as exceptions based on policy; e.g., remote or conjectural matter may be relevant but is excluded

because it would result in an undue consumption of time. (See 29 Cal. L. Rev. 701; 1 McCormick 5th, §185; 1 Wigmore (Tillers Rev.) §12; infra, §24.)

(3) *Relation to Circumstantial Evidence.* The test of materiality must be applied to any kind of evidence. But the concept of relevancy is normally discussed in connection with circumstantial evidence and not testimonial evidence. The reason is that, most often, in the case of testimony, the only inference sought to be drawn is the truth of the fact from the witness' statement of it, and this inference (that the witness properly recollected and truthfully stated the fact) is usually considered a part of the law of qualification of witnesses. (See 1 McCormick 5th, §185; 2 Wigmore (Chadbourn Rev.) §475.) It should be recalled, however, that testimonial, documentary, or real evidence may be circumstantial evidence and subject to the same test of relevancy. (See supra, §§1, 2.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *General Definitions.* See 1 McCormick 6th, §185.(2) *Erroneous Concept of "Legal Relevancy."* See The New Wigmore: Selected Rules of Limited Admissibility §1.9.2; 1 McCormick 6th, §185.

(3) *Relation to Circumstantial Evidence.* See 1 McCormick 6th, §185.



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#### CHAPTER IV - Circumstantial Evidence

#### II. RELEVANCY AND MATERIALITY

##### B. Admissibility and Exclusionary Rules.

##### 1. In General.

##### a. Admissibility of Relevant Evidence.

*1 Witkin Cal. Evid. Circum Evid § 5*

[§ 5] Admissibility of Relevant Evidence.

The Thayer doctrine, accepted by most authorities, is that all *relevant* evidence (see *supra*, §4) is admissible unless excluded for some special reason. (See 1 McCormick 5th, §184; 1 Wigmore (Tillers Rev.) §10; 13A (Part 1A) U.L.A. (Master Ed.), p. 289 [Uniform Rules of Evidence, Rule 402]; *People v. Jones* (1954) 42 C.2d 219, 222, 266 P.2d 38 [quoting Wigmore: "All facts having rational probative value are admissible, unless some specific rule forbids"]; *Dike v. Golden State Co.* (1954) 125 C.A.2d 6, 11, 269 P.2d 619 [exclusion of relevant evidence held reversible error]; *People v. Curtis* (1965) 232 C.A.2d 859, 869, 43 C.R. 286, quoting the text; *People v. Reeder* (1978) 82 C.A.3d 543, 552, 553, 147 C.R. 275, *infra*, §22; *Cramer v. Morrison* (1979) 88 C.A.3d 873, 879, 153 C.R. 865, 2 Cal. Evidence (4th), *Demonstrative, Experimental, and Scientific Evidence*, §74; *People v. Deletto* (1983) 147 C.A.3d 458, 478, 195 C.R. 233.)

*Ev.C. 351* uses this approach: "Except as otherwise provided by statute, all relevant evidence is admissible." (On exclusion of relevant evidence for policy reasons, see *infra*, §8.)

The Truth-in-Evidence provision of Proposition 8, adopted in June 1982, states that, except in the specified situations, "relevant evidence shall not be excluded in any criminal proceeding." (Cal. Const., Art. I, §28(d).) This provision has had a significant impact on California evidence law. (See 1 Cal. Evidence (4th), *Introduction*, §8 et seq.)

*F.R. Evid.*, Rule 402 states: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority." (See 1 Mueller & Kirkpatrick, Federal Evidence 2d, §§90, 91; 64 Am.Jur. Trials 543 [federal relevancy rules].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 13A U.L.A. (Master Ed.), p. 28 [Unif. Rules, Rule 402]; 1 McCormick 6th, §184.



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#### CHAPTER IV - Circumstantial Evidence

#### II. RELEVANCY AND MATERIALITY

##### B. Admissibility and Exclusionary Rules.

##### 1. In General.

##### b. Exclusion of Irrelevant Evidence.

*1 Witkin Cal. Evid. Circum Evid § 6*

[§ 6] Exclusion of Irrelevant Evidence.

"No evidence is admissible except relevant evidence." (*Ev.C.* 350; see 1 McCormick 5th, §184; 1 Wigmore (Tillers Rev.) §9; 29 *Cal. L. Rev.* 689; *F.R. Evid.*, Rule 402 ["Evidence which is not relevant is not admissible"]; 1 Mueller & Kirkpatrick, *Federal Evidence* 2d, §§90, 91; *Brokopp v. Ford Motor Co.* (1977) 71 *C.A.3d* 841, 853, 139 *C.R.* 888; *People v. Slone* (1978) 76 *C.A.3d* 611, 631, 143 *C.R.* 61; *People v. Kitt* (1978) 83 *C.A.3d* 834, 849, 148 *C.R.* 447 ["There is no discretion vested in a court to admit irrelevant evidence"]; *People v. Babbitt* (1988) 45 *C.3d* 660, 681, 248 *C.R.* 69, 755 *P.2d* 253.)

This basic proposition calls for application of the test of relevancy (*infra*, §26), but also, at times, for the rules governing misconduct of counsel. Indirect methods of bringing irrelevant matters before the jury, by improper questions on direct or cross-examination, will fail in accomplishing their ostensible purpose; i.e., objections will be sustained and the irrelevant evidence will be excluded. But the effect of the maneuver may be more prejudicial than the actual admission of the inadmissible evidence. The judge must then impose an appropriate sanction: rebuke to counsel, admonition to the jury, or, in extreme cases, a mistrial. (See 7 *Cal. Proc.* (4th), *Trial*, §234 et seq.; 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §§555, 556; on admissibility of evidence relating to uncontested issues, see *infra*, §11 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Stitely* (2005) 35 *C.4th* 514, 549, 26 *C.R.3d* 1, 108 *P.3d* 182 [in prosecution for capital murder with special circumstance of murder during commission of unlawful sodomy, trial judge properly excluded evidence that victim had .26 blood-alcohol level; nothing in defendant's offer of proof showed how evidence affected victim's judgment and behavior on night she was killed, or increased chance that she consented to vaginal and anal intercourse]; 1 McCormick 6th, §184.



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##### 1. In General.

##### c. Exclusion of Relevant Evidence Under Exclusionary Rules.

##### *1 Witkin Cal. Evid. Circum Evid § 7*

[§ 7] Exclusion of Relevant Evidence Under Exclusionary Rules.

(1) *General Principle.* The proviso in *Ev.C. 351* (supra, §5) makes applicable all rules of exclusion, in the Constitution, in the Evidence Code, or in other Codes. (See Law Rev. Com. Comment to *Ev.C. 351*; *Kaplan v. Superior Court* (1971) 6 C.3d 150, 160, 98 C.R. 649, 491 P.2d 1 [proviso makes applicable exclusionary rules based on constitutional principles].) And, because the relevancy concept includes materiality, it is always necessary to consider first whether the evidence relates to a fact in issue ("disputed fact"). (See supra, §4.)

However, exclusionary rules in criminal cases must be examined in the light of Proposition 8, which, with specified exceptions, requires admission of all relevant evidence. (See 1 *Cal. Evidence* (4th), *Introduction*, §8 et seq.)

(2) *Rejection of Original Uniform Rule.* The drafters of the Uniform Rules of Evidence, pursuant to a suggestion of Wigmore, supported by an A.B.A. Committee and the Model Code of Evidence, adopted the following rule: "If upon the hearing there is no bona fide dispute between the parties as to a material fact, such fact may be proved by any relevant evidence, and exclusionary rules shall not apply, subject, however, to Rule 45 [discretionary exclusion] and any valid claim of privilege." The theory of this exception is that invocation of exclusionary rules (e.g., opinion rule or hearsay rule) to keep out relevant evidence on a matter actually admitted results in waste of court time and unwarranted expense to litigants and the public. (See Model C., Rule 3, Comment.) In practice, the judge would be required, in some manner, to ascertain the fact that the adverse party, despite allegations or denials in the party's pleadings, does not really dispute the fact.

The Law Revision Commission rejected this rule for the following reasons: (1) In criminal trials, it would violate the fundamental principle that requires proper proof by the prosecution of all matters relating to guilt. (2) In civil cases, the basic objective is already attainable in discovery proceedings (requests for admissions, 2 *Cal. Evidence* (4th), *Discovery*, §157 et seq.) and at pretrial conferences (see 7 *Cal. Proc.* (4th), *Trial*, §52 et seq.), and it is not desirable to allow a party to bypass these statutory procedures and belatedly invoke their equivalent at the trial. (3) Determination of the issue of "no bona fide dispute" by the trial judge would be difficult, and could encourage appeals asserting error in the determination. (6 *Cal. Law Rev. Com. Reports*, p. 14.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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##### d. Exclusion of Relevant Evidence for Policy Reasons.

##### 1. In General.

#### 1 Witkin Cal. Evid. Circum Evid § 8

[§ 8] In General.

Relevant evidence is subject to a number of exclusionary rules making certain kinds of evidence incompetent because of doubtful reliability; e.g., the opinion rule, the hearsay rule, and the secondary evidence rule. (See 1 *Cal. Evidence (4th)*, *Opinion Evidence*, §31; 1 *Cal. Evidence (4th)*, *Hearsay*, §1; 2 *Cal. Evidence (4th)*, *Documentary Evidence*, §27.) But even when the evidence offered is relevant and not subject to any exclusionary rule of competency, it still may be excludable for policy reasons distinct from probative value. These so-called "counterbalancing factors" of "extrinsic policy" have been listed as (1) undue prejudice, (2) unfair surprise, (3) confusion of issues, and (4) undue consumption of time. (See 1 McCormick 5th, §§184, 185; 1 Wigmore (Tillers Rev.) §10A; Model C., Rule 303; 13A (Part 1A) U.L.A. (Master Ed.), p. 466 [Unif. Rules, Rule 403]; on exclusion as result of balancing probative value against potential prejudice, see *infra*, §17.)

*F.R. Evid.*, Rule 403 incorporates all of these factors: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." (See 1 Mueller & Kirkpatrick, *Federal Evidence* 2d, §92 et seq.; 29 *Am.Jur.2d* (1994 ed.), *Evidence* §324 et seq.; 49 *So. Cal. L. Rev.* 220.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 13A U.L.A. (Master Ed.), p. 46 [Unif. Rules, Rule 403]; 1 McCormick 6th, §§184, 185; 37 *Loyola L.A. L. Rev.* 1317 [arguing that federal court improperly applied elements of *F.R. Evid.*, Rule 403 to admit witness' racial voice identification testimony].





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##### 2. Miscellaneous Exclusionary Rules.

##### 1 Witkin Cal. Evid. Circum Evid § 9

#### [§ 9] Miscellaneous Exclusionary Rules.

(1) *Evidence Code and Other Statutes.* Under *Ev.C. 351* (supra, §5), all relevant evidence is admissible "[e]xcept as otherwise provided by statute." Thus, in addition to express exclusionary rules in the Evidence Code, there are provisions in other codes making certain matters confidential or inadmissible in evidence. (See statutory list set forth in Law Rev. Com. Comment to *Ev.C. 351*.)

The important rules are in the Evidence Code:

- (a) The hearsay rule (*1 Cal. Evidence (4th), Hearsay, §1 et seq.*).
- (b) The rules of privilege (*2 Cal. Evidence (4th), Witnesses, §59 et seq.*).
- (c) Rules of extrinsic policy excluding evidence involving undue prejudice (*infra, §132 et seq.*).
- (d) *Ev.C. 1156, 1157 et seq.* (*2 Cal. Evidence (4th), Witnesses, §503 et seq.*), excluding evidence of medical committee records.
- (e) *Ev.C. 351.1* (*2 Cal. Evidence (4th), Demonstrative, Experimental, and Scientific Evidence, §95*), excluding evidence of polygraph tests.
- (f) *Ev.C. 1150* (*7 Cal. Proc. (4th), Trial, §392 et seq.*, and *6 Cal. Crim. Law (3d), Criminal Judgment, §84*), limiting evidence in new trial proceedings to impeach a jury's verdict.

(2) *Judicially Declared Rules.* Another group of exclusionary rules has been judicially developed to implement constitutional guarantees, such as protection against unreasonable search and seizure, involuntary confessions or admissions, and the right to counsel and to remain silent at the accusatory stage of police interrogation. (See *42 U.C.L.A. L. Rev. 1* [guaranty of free speech and expression as limiting admission of evidence]; *1 Cal. Evidence (4th), Hearsay, §51 et seq.* [confessions and admissions]; *5 Cal. Crim. Law (3d), Criminal Trial, §131* [*Miranda* rule on right to remain silent at accusatory stage]; *4 Cal. Crim. Law (3d), Illegally Obtained Evidence, §1 et seq.* [protection against unreasonable search and seizure].) (On effect of Truth-in-Evidence measure (Proposition 8), see *1 Cal. Evidence (4th), Introduction, §8*.)

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##### 2. Evidence on Uncontested Issue.

##### a. General Rule of Exclusion.

*1 Witkin Cal. Evid. Circum Evid § 10*

[§ 10] General Rule of Exclusion.

(1) *Adoption of Rule.* A problem of policy arises where a particular matter is part of the cause of action but is either admitted in the pleadings or at the trial. The typical example is a personal injury or wrongful death action in which the defendant admits liability and seeks to confine the evidence to the amount of damages. There is some authority for the view, followed in earlier California cases, that the trial judge has discretion to allow the plaintiff to prove the relevant facts and circumstances giving rise to the cause of action, without which the jury might be unable to accord proper weight to the evidence. (See *Martin v. Pacific Gas & Elec. Co.* (1928) 203 C. 291, 299, 264 P. 246; *Rowe v. Rennick* (1931) 112 C.A. 576, 579, 297 P. 603; *Behrendt v. Times-Mirror Co.* (1938) 30 C.A.2d 77, 83, 85 P.2d 949; 19 Cal. L. Rev. 643.)

These cases were disapproved and a contrary rule laid down in *Fuentes v. Tucker* (1947) 31 C.2d 1, 187 P.2d 752. Plaintiffs in two consolidated cases sued for wrongful death of their minor sons, killed in an automobile accident. On the day of the trial, defendant filed an amended answer in each case admitting "that he was and is liable for the death of the deceased ... and the damages directly and proximately caused thereby." Plaintiffs were nevertheless allowed to prove the circumstances of the accident, including the facts that defendant was intoxicated and that the children were thrown 80 feet by the blow. *Held*, introduction of the evidence was *error* (although, in view of the small verdict, not prejudicial).

The court pointed out that facts alleged in the complaint and not controverted by the answer are *not in issue*; evidence of them is not only unnecessary, but also *immaterial and irrelevant*. Hence, where an issue has been completely removed from the case by an unequivocal admission in the answer, the trial judge should not receive evidence on it. One reason is to avoid confusion of the jury, but a broader policy is also involved. "This is merely one aspect of the larger problem of delay in the conduct of litigation. Every court has a responsibility to the public to see that justice is administered efficiently and expeditiously and that the facilities of the court are made available at the first possible moment to those whose cases are awaiting trial. It would be an unwarranted waste of public funds, and a manifest injustice to the many litigants seeking an early trial date, to allow counsel in a particular case to occupy substantial periods of time in the useless presentation of evidence on matters not in controversy." (31 C.2d 4.)

(2) *Illustrations.* In *Aramenta v. Churchill* (1954) 42 C.2d 448, 456, 267 P.2d 303, the action was for wrongful death resulting from a truck backing into decedent. Plaintiff sued D, the truck driver, and A, his wife who was the registered owner of the car, in two counts, alleging that (a) the driver was the agent of his wife, and (b) the wife was negligent in entrusting the truck to a reckless driver. Defendants admitted the first count, but denied the second. Thus,

superficially they denied recklessness of the driver, and plaintiff tried to introduce evidence of D's 37 traffic violations and conviction of manslaughter, all known to his wife. *Held*, this evidence was properly excluded where the wife, at the time of the offer, again admitted liability for all damages if the husband were found liable. Although her admission was not directly responsive to the second count, the two counts were merely alternative theories of liability of the wife; and, on liability for the husband's tort, if any, her admission was unqualified. "Since the legal issue of her liability for the alleged tort was thereby removed from the case, there was no material issue remaining to which the offered evidence could be legitimately directed." (42 C.2d 457.) (See *Sumrall v. Butler* (1951) 102 C.A.2d 515, 519, 227 P.2d 881 [admission at beginning of trial]; *People v. Hall* (1980) 28 C.3d 143, 152, 167 C.R. 844, 616 P.2d 826, *infra*, §15; 80 A.L.R.2d 1224 [evidence of circumstances of accident on issue of damages in tort action for personal injury, wrongful death, or property damage]; BAJI (8th ed.), No. 2.61.)

In *Albrecht v. Broughton* (1970) 6 C.A.3d 173, 85 C.R. 659, *infra*, §151, a personal injury case, plaintiff's receipt of a \$ 75,000 pretrial settlement from a codefendant was undisputed. Despite plaintiff's proposal that his prospective judgment be reduced by this amount, without calling the procedure to the jury's attention, the remaining defendant was allowed to introduce evidence about the settlement. *Held*, this was prejudicial error. The situation was closely analogous to an admission of liability by a defendant. Evidence of that liability is precluded unless it is relevant to some distinct issue remaining in the case. "[N]either side is entitled to litigate a nonexistent issue for no purpose other than to alter the decisional context in his favor." (6 C.A.3d 178, citing the text.)

Elimination of an issue in discovery proceedings has a similar effect. Thus, in *Campain v. Safeway Stores* (1972) 29 C.A.3d 362, 104 C.R. 752, plaintiff sought damages for personal injuries allegedly suffered when she slipped and fell in defendant's market. Her complaint asserted that the accident prevented her from attending to her usual occupation and her attorney intimated that there might be a claim for prospective loss of earnings, but the combined effect of her deposition and answers to interrogatories was that neither loss of earnings or earning capacity would be raised. At trial, however, she offered evidence of prospective employment. Over objection, the evidence was admitted. *Held*, this was error; the discovery had set the issue at rest. Defendant was genuinely surprised and unprepared to meet the claim, and the surprise prejudiced its defense. (29 C.A.3d 366.) (But see *Kelly v. New West Fed. Savings* (1996) 49 C.A.4th 659, 673, 56 C.R.2d 803, *infra*, §11.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Correction:* Page 331, second full paragraph, line 1, "*Aramenta*" should be "*Armenta*".



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##### b. Exceptions and Distinctions.

##### 1. Factual Description of Injury.

##### *1 Witkin Cal. Evid. Circum Evid § 11*

[§ 11] Factual Description of Injury.

In *Kelly v. New West Fed. Savings* (1996) 49 C.A.4th 659, 56 C.R.2d 803, an action for injuries suffered by plaintiffs when they exited an elevator, one plaintiff testified at her deposition that she believed the accident involved the smaller of defendants' two elevators. Defendants then moved *in limine* to preclude plaintiffs from presenting any evidence relating to the larger elevator. The trial judge granted the motion. *Held*, this was error. "It is a misuse of a motion *in limine* to attempt to compel a witness or a party to conform his or her trial testimony to a preconceived factual scenario based on testimony given during pretrial discovery. One purpose of pretrial discovery is to pin down the testimony of parties and witnesses which can be used for impeachment at the time of trial. Amtech clearly succeeded in this regard. Other than issue preclusion based on responses to requests for admissions, sanctions for abuse of the discovery process, or a clear case of waiver or estoppel, a court abuses its discretion when it precludes a party from trying a case on a theory consistent with existing evidence, even though the pretrial testimony of the party relating to how the accident occurred is contrary to the theory." (49 C.A.4th 672, 673.) Even in *Campain v. Safeway Stores* (1972) 29 C.A.3d 362, 104 C.R. 752, *supra*, §10, where the appellate court found that plaintiff's pretrial election not to seek damages for loss of earnings proved prejudicial to defendant, the court did not preclude plaintiff from making such a claim; rather, it reversed the judgment and remanded the matter so that the damages issue could be retried after defendant had an opportunity for further discovery. (49 C.A.4th 673, 674.)

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##### 2. Defective Admission or Stipulation.

##### *1 Witkin Cal. Evid. Circum Evid § 12*

[§ 12] Defective Admission or Stipulation.

(1) *Defective Admission.* Evidence on the circumstances of an accident may properly be received despite an express admission of liability, where the admission "is ambiguous in form or limited in scope or where, during the trial of a case, a party seeks to deprive his opponent of the legitimate force and effect of material evidence by the bald admission of a probative fact." (*Fuentes v. Tucker* (1947) 31 C.2d 1, 7, 187 P.2d 752, supra, §10; see *Sumrall v. Butler* (1951) 102 C.A.2d 515, 520, 227 P.2d 881, infra, §13.)

(2) *Stipulation With Unacceptable Conditions.* In *People v. Gambos* (1970) 5 C.A.3d 187, 84 C.R. 908, defendant offered to stipulate that he had knowledge of the narcotic nature of heroin, but conditioned his offer on the prosecution's being prevented from using or commenting on the stipulation during the trial. The trial judge refused the stipulation. *Held*, no error. "[T]he stipulation may be treated as *evidence*, or at least as *a substitute for evidence*. The stipulation must be made known to the jury, and the district attorney must be permitted to point out that a necessary element of the charge, i.e., knowledge of the narcotic nature of the substance, is established by the stipulation." (5 C.A.3d 195.) Fears of improper comment on the stipulation were baseless; the trial judge would have prevented or appropriately dealt with misconduct. (5 C.A.3d 195.) (See *People v. Lynn* (1971) 16 C.A.3d 259, 270, 94 C.R. 16 [defendants' offer to stipulate did not cover crucial probative facts].)

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##### 3. Evidence Relevant on Distinct Issue.

##### *1 Witkin Cal. Evid. Circum Evid § 13*

[§ 13] Evidence Relevant on Distinct Issue.

In a wrongful death action, where liability is admitted and the damages consist of pecuniary loss resulting from the death, the manner in which the death occurred is irrelevant. (*Fuentes v. Tucker* (1947) 31 C.2d 1, 5, 187 P.2d 752, supra, §10; *Sumrall v. Butler* (1951) 102 C.A.2d 515, 519, 227 P.2d 881.) But in a *personal injury action*, the force of the impact and other circumstances may tend to indicate the extent of the injuries suffered. (See *Martin v. Miqueu* (1940) 37 C.A.2d 133, 136, 98 P.2d 816.)

In the *Sumrall* case, supra, an automobile collision caused the death of parents and an injury to a daughter. The wrongful death and personal injury actions were, on motion of defendants, consolidated for trial; and, at the beginning of the trial, defendants admitted liability, and also admitted that the vehicles collided with great force and violence. *Held*, evidence of the nature of the accident was properly received under instructions that it was to be considered solely as proof of the daughter's injuries. The daughter sought, as one element, recovery for great shock, the allegation being denied by defendants. Her evidence was that the car was crushed, that she was trapped for some time, and that she was eventually released by someone breaking the back window and taking her out. The effect on her of this series of events was properly placed before the jury, and it could not have been covered by the bald admission of a violent impact. (102 C.A.2d 520.) (See 17 *Stanf. L. Rev.* 539 [Michigan automobile accident case; evidence of defendant son's reckless driving record admissible on issue of defendant father's negligent entrustment of car despite father's admission of vicarious liability]; *People v. Maler* (1972) 23 C.A.3d 973, 978, 100 C.R. 650 [defendant offered to stipulate that, if convicted of arson, he acted to defraud insurance company; evidence of prior fires was nonetheless admissible as relevant to arson count, for which there was no stipulation].)

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##### 4. Prosecution's Evidence on Element of Crime.

##### 1 *Witkin Cal. Evid. Circum Evid* § 14

[§ 14] Prosecution's Evidence on Element of Crime.

(1) *In General.* Where the prosecution must establish an element of the crime, a statement by counsel for the defendant that no issue will be made as to this element does not necessarily preclude its proof. This appears to be the effect of *People v. Solis* (1961) 193 C.A.2d 68, 75, 13 C.R. 813, although neither the reasoning nor the factual background make it a particularly strong authority. Defendant was charged with possession of marijuana, and knowledge of its character was an element of the crime (see 2 *Cal. Crim. Law* (3d), *Crimes Against Public Peace and Welfare*, §90). In chambers, his counsel said that the knowledge issue would not be raised, and, in view of the authority of trial counsel, it would seem that this statement made it an uncontested issue. The court declared that the prosecution had to prove the element despite counsel's statement (193 C.A.2d 76), but then it found the proof entirely proper for a distinct reason: Defendant did not make good on the promise; he testified that he was unfamiliar with marijuana cigarettes. (193 C.A.2d 76.)

(2) *Defense Cannot Force Election of Theory of Guilt.* *People v. McClellan* (1969) 71 C.2d 793, 80 C.R. 31, 457 P.2d 871, raised the problem of uncontested issue in a unique situation. Defendant and his accomplice M committed an armed robbery, during the course of which both fired shots and two victims were killed. M pleaded guilty and testified against defendant. At the trial defense counsel offered to stipulate that, if the jury found that defendant was one of the robbers, he was guilty of two counts of first degree murder under the felony-murder rule. His purpose was to prevent introduction of evidence that defendant fired the fatal shots; and his theory was that, in view of the felony-murder rule, the issue of the actual killer was of no probative value in the main trial, and should not be permitted in evidence until a possible later trial on penalty. If he could keep it out of the guilt trial, he could concentrate on disputing the evidence identifying defendant as one of the robbers, instead of tacitly conceding defendant's participation by trying to show that M was the killer. *Held*, the trial judge properly allowed the prosecutor to reject the stipulation and offer evidence that defendant fired the shots.

The court first pointed out that the stipulation probably would not have had its intended effect, for the prosecutor, in establishing the identity of defendant as one of the robbers, would have been able to introduce testimony concerning the firing of shots at particular times and places. But the more compelling reasons for the holding were two:

(a) "[T]here is a strong policy against depriving the state's case of its persuasiveness and forcefulness by forcing the prosecutor to accept stipulations that soften the impact of the evidence in its entirety." (71 C.2d 802.) This policy is particularly important when the stipulation would preclude a coherent presentation of the evidence; and here, deletion of



references to firing of shots would have made it difficult to prove what happened. (71 C.2d 802.)

(b) "[I]t is doubtful" whether the defendant could require the prosecution to seek conviction only under the felony-murder rule and prevent it from making out a case of first degree murder by premeditation as well. (71 C.2d 802.) (But see *People v. Hall* (1980) 28 C.3d 143, 167 C.R. 844, 616 P.2d 826, *infra*, §15.)

(3) *Distinction: Stipulation on Knowledge of Narcotic.* In a prosecution for selling narcotics, an essential element of the crime is knowledge of the narcotic nature of the substance sold, and one method of proof is by the highly prejudicial evidence of prior narcotic convictions. To avoid this damaging evidence, the defendant has a right to eliminate the issue by stipulation. In *People v. Washington* (1979) 95 C.A.3d 488, 157 C.R. 58, defendant's counsel said: "We are willing to stipulate Mr. Washington is familiar with heroin, the way it is packaged and the way it is sold. I'm not prepared to stipulate that Mr. Washington knew the contents of the yellow balloon in the prosecution's case." The trial judge refused to accept this limited stipulation, and the prosecution then offered evidence of a prior conviction. *Held*, this was reversible error. To require an admission of knowledge of the narcotic nature of the substance possessed or sold would be tantamount to a confession of guilt; and the stipulation offered would not have impaired the effectiveness of the prosecutor's case. (95 C.A.3d 492, citing *People v. Sherren* (1979) 89 C.A.3d 752, 152 C.R. 828, *infra*, §15.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General.* A fact, such as the defendant's intent, generally becomes disputed when it is raised by a plea of not guilty or a denial of an allegation. The general rule is that the prosecution in a criminal case cannot be compelled to accept a stipulation that would limit the prosecution's evidence if the effect would be to deprive the state's case of its persuasiveness and force. (*People v. Thornton* (2000) 85 C.A.4th 44, 48, 49, 101 C.R.2d 825, citing *People v. Rowland* (1992) 4 C.4th 238, 14 C.R.2d 377, 841 P.2d 897.) "We emphasize that this is a 'general rule.' The exception--which we count on the trial courts to recognize and enforce--is the instance in which the probative value of the evidence is substantially outweighed by its prejudicial effect." (85 C.A.4th 49, citing *Ev.C.* 352, text, §17 et seq.)



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##### c. Stipulation on Prior Conviction.

##### 1. Former Rule.

#### 1 Witkin Cal. Evid. Circum Evid § 15

#### [§ 15] Former Rule.

In *People v. Sherren* (1979) 89 C.A.3d 752, 152 C.R. 828, defendant, charged with violation of P.C. 12021 (felon in possession of firearm), offered to admit the prior felony conviction and moved that the jury not be informed of it. The motion was denied, and the fact of the prior conviction was brought out in the trial. *Held*, this was error. Although the prosecution cannot be compelled to accept a stipulation that deprives its case of forcefulness (see *People v. McClellan* (1969) 71 C.2d 793, 80 C.R. 31, 457 P.2d 871, *supra*, §14), where the defendant offers to stipulate to an element of the case that would involve highly prejudicial evidence, and the stipulation would not impair the effectiveness of the prosecution's case, it should be accepted. (89 C.A.3d 755.) In the present case, defendant "has given to the prosecution all the benefit, as it were, that the prosecution could legitimately obtain if it had to prove the conviction by the introduction of evidence." (89 C.A.3d 760.)

The *Sherren* rule was approved in *People v. Hall* (1980) 28 C.3d 143, 167 C.R. 844, 616 P.2d 826, a trial for robbery, in which defendant offered to stipulate that he was an ex-felon and would be guilty of violating P.C. 12021 if the jury found that he had possessed a firearm during the commission of the robbery. The prosecutor refused to stipulate, the trial judge denied defendant's motion to exclude evidence of his prior convictions, and evidence was offered of a prior robbery conviction. *Held*, this was error, though not prejudicial in this case.

(a) A fact that is "of consequence" to the prosecution's case is not "disputed" merely because the accused has pleaded not guilty. Hence, "if a defendant offers to admit the existence of an element of a charged offense, the prosecutor must accept that offer and refrain from introducing evidence of other crimes to prove that element to the jury." (28 C.3d 152.) The rule of exclusion is subject to exceptions where the facts retain some probative value or the stipulation is defective (see *supra*, §§12, 13). (28 C.3d 152, 153.)

(b) Defendant's offer to stipulate raised two issues: (1) He was entitled to prevent the jury from learning the *nature* of any prior felony conviction. P.C. 12021 makes it a crime for a person convicted of *any felony* to possess a concealable firearm; hence, omission of its nature would not impair the effectiveness of the prosecutor's case. (28 C.3d 153.) (2) He was also entitled to keep from the jury the fact that he had been convicted of *any felony*. Once he admitted his ex-felon status, the only remaining issue was whether he had possessed a concealable firearm. The prosecution's contention that this would allow the jury to acquit because they might not believe that simple possession should be criminal is not persuasive. "Instructions can be framed in such a manner that the potentially prejudicial prior conviction is not mentioned to the jury yet the jury can be informed that possession of a concealable firearm is not criminal under

all circumstances." (28 C.3d 154; see footnote 7, suggesting possible modification of CALJIC, No. 12.40.)

(c) "[I]n a prosecution for violating section 12021 the element of a prior conviction of a felony may not be given to a jury if the accused stipulates to it. This rule applies unless the state can clearly demonstrate that its application will *legitimately* impair the prosecutor's case or preclude presentation of alternate theories of guilt. No opinion is expressed on the application of this rule to any other section of the Penal Code." (28 C.3d 156; see footnote 8, disapproving to the extent inconsistent a long list of Court of Appeal cases.) The defendant should be informed of the effects of this tactical choice: "[T]rial courts in the future would be well-advised to assure the record adequately reflects the fact that a defendant is advised of any constitutional rights waived when stipulating to the status of an ex-felon. He should be informed as to the nature and the consequences of the stipulation. Such a requirement is already in use in cases which involve the admission of prior felony convictions. ... Therefore, the practice endorsed today should not unduly burden the judicial process." (28 C.3d 157, footnote 9.) (On effect of Proposition 8, see *infra*, §16.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER IV - Circumstantial Evidence

## II. RELEVANCY AND MATERIALITY

## B. Admissibility and Exclusionary Rules.

## 2. Evidence on Uncontested Issue.

## c. Stipulation on Prior Conviction.

## 2. Effect of Proposition 8.

## 1 Witkin Cal. Evid. Circum Evid § 16

## [§ 16] Effect of Proposition 8.

(1) *In General.* Under Proposition 8 (1 *Cal. Evidence* (4th), *Introduction*, §8), a prior felony conviction "shall subsequently be used without limitation for purposes of impeachment or enhancement of sentence in any criminal proceeding," and when such a conviction "is an element of any felony offense, it shall be proven to the trier of fact in open court." (Cal. Const., Art. I, §28(f).) This provision was aimed at, and operates to abrogate, much of the holding of *People v. Hall* (1980) 28 C.3d 143, 167 C.R. 844, 616 P.2d 826, supra, §15. (See *People v. Valentine* (1986) 42 C.3d 170, 176, 228 C.R. 25, 720 P.2d 913.) However, some aspects of the former rule survive, as demonstrated in the cases discussed below. (See *People v. Bouzas* (1991) 53 C.3d 467, 480, 279 C.R. 847, 807 P.2d 1076, 3 Cal. Crim. Law (3d), *Punishment*, §376 [contrary to dicta in *Hall* case, prior conviction and incarceration requirement of P.C. 666 is sentencing factor for trial court and not "element" of P.C. 666 offense that must be determined by jury, and therefore defendant may stipulate to prior conviction]; *Old Chief v. United States* (1997) 519 U.S. 172, 117 S.Ct. 644, 647, 136 L.Ed.2d 574, 584 [under *F.R. Evid.*, Rule 403, supra, §8, trial judge abused discretion by spurning offer to concede fact of prior conviction and admitting full record of prior judgment, where prior offense raised risk of verdict tainted by improper considerations, and where purpose of evidence was solely to prove element of prior conviction]; 111 *Harv. L. Rev.* 360 [*Old Chief*]; 49 *Hastings L. J.* 463 [same].)

(2) *Multiple Prior Felonies Inadmissible.* In *People v. Patino* (1984) 160 C.A.3d 986, 206 C.R. 762, defendant was charged with possession of PCP for sale and being an ex-felon in possession of a concealable firearm. Before trial, defendant admitted two prior felony convictions, but the trial judge, over objection, permitted the prosecutor to introduce both under the concealable firearm charge. *Held*, this was error, though harmless in the light of the evidence.

(a) The rule of *People v. Hall* that the stipulation precluded introduction of evidence of a prior conviction was changed by Proposition 8. (160 C.A.3d 991, 992.) But pre-Proposition 8 decisions precluded the use of more than one felony conviction to prove an element of the crime (160 C.A.3d 991, 992), and the proposition does not provide for unlimited use of prior convictions to prove an element of an offense. The phrase "without limitation" refers only to impeachment of credibility and sentence enhancement. (160 C.A.3d 993.)

(b) Where the charge is of possession of a firearm by an ex-felon, proof of a single prior felony is sufficient to meet the prior conviction element. Additional priors would be irrelevant, i.e., they would have no tendency in reason to prove or disprove any *disputed* fact of consequence. The Truth-in-Evidence provision (1 *Cal. Evidence* (4th), *Introduction*, §8), which applies only to "relevant evidence," does not mandate admission of multiple prior felony convictions. (160

*C.A.3d 994.*) In addition, admission of multiple priors would be both unnecessary and time-consuming, and any possible probative value would be outweighed by the substantial danger of undue prejudice under *Ev.C. 352* (*infra*, §17 et seq.). (*160 C.A.3d 994.*)

(3) *Nature of Prior Conviction Inadmissible.* In *People v. Valentine*, *supra*, defendant was charged with robbery and possession of a concealable firearm by an *ex-felon*. Defendant offered to stipulate to the element of prior felonies (robbery and assault with a deadly weapon) so that, under *People v. Hall*, *supra*, the jury would not be informed of them. The trial judge, following the language of Cal. Const., Art. I, §28(f) (on proof in open court), denied the request. The prior conviction count, specifying the prior as robbery, was then read to the jury; an abstract of judgment showing conviction of robbery and assault with a deadly weapon was introduced in evidence; and the jury was instructed that it could consider the priors only for purposes of the *ex-felon* element of the charge and for impeachment. *Held*, proof of the *nature* of the prior conviction was reversible error.

(a) The second sentence of Cal. Const., Art. I, §28(f) reads: "When a prior felony conviction is an element of any felony offense, it shall be proven to the trier of fact in open court." This language was obviously intended to nullify the holding in *Hall*, and to permit proof of the *fact* of a prior felony despite the stipulation. (*42 C.3d 176.*)

(b) Before *Hall*, California decisions permitted the defendant, by stipulation to his status as an *ex-felon*, to exclude evidence of the *nature* of the prior convictions. (*42 C.3d 177.*) Proposition 8 does not change that pre-*Hall* law. Because any prior felony, regardless of its nature, satisfies the *ex-felon* element of the offense, only the *fact*, not the nature of the prior, is an "element" of the current charge. This distinction must have been known to the drafters of Proposition 8. (*42 C.3d 177.*) Moreover, proof in open court of the *nature* of a prior conviction would have no "tendency in reason" to prove anything the prosecution must show under P.C. 12021, and might violate the fair-trial requirement "that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence." (*42 C.3d 177.*)

(c) Defendant contended that even the *fact* of a prior conviction must still be kept from the jury, because it would be an abuse of discretion under *Ev.C. 352* to refuse to withhold it. But the language of Cal. Const., Art. I, §28(f) "overrules *Hall's* holding that such a procedure is unduly prejudicial as a matter of law." (*42 C.3d 179.*) And even if the judge "theoretically retains some discretion with respect to the 'open court' provision, it is difficult to see how that discretion would apply in practice." In impeachment, the probative value is weighed against prejudicial effect principally by assessing the *nature* of the prior; where the defendant stipulates to *ex-felon* status the jury will learn only that fact, and there is little basis for a decision that disclosure is more or less "probative" or "prejudicial" in individual cases. (*42 C.3d 179.*)

(d) Defendant's argument that Cal. Const., Art. I, §28(f) must be harmonized with preexisting principles of state due process is unsound. "The people may adopt constitutional amendments which define the scope of existing state constitutional protections. The voters have decreed that henceforth the California Constitution not only permits, but requires, proof 'in open court' of *ex-felon* status when that status is a substantive element of a current charge. This clear, recent, and specific command supersedes any previous inconsistent interpretations of our state charter's due process guarantees." (*42 C.3d 181.*)

(e) Disclosure of the *nature* of the prior remains error in post-Proposition 8 trials (*42 C.3d 181, 182*), and the error was prejudicial under the test of *People v. Watson* (1956) 46 C.2d 818, 299 P.2d 243, 6 Cal. Crim. Law (3d), *Reversible Error*, §7. (*42 C.3d 183.*)

(4) *Prior Misdemeanor Convictions.* In *People v. Wade* (1996) 48 C.A.4th 460, 55 C.R.2d 855, a prosecution under P.C. 12021(c)(1) for possession of a firearm after conviction of prior specified misdemeanors, the trial judge denied defendant's request to stipulate to the prior misdemeanor convictions and thereby withhold the nature of the convictions from the jury. *Held*, this was error, although harmless. The "proof in open court" provision of Cal. Const., Art. I, §28(f) does not apply to prior misdemeanor convictions and thus did not bar the stipulation. (*48 C.A.4th 465.*) Because P.C. 12021(c)(1) does not require proof of the nature of the underlying misdemeanor conviction, only the fact, and not the

nature, of the conviction is required to establish the prior conviction element of the offense. The trial judge should have accepted defendant's offer to stipulate to the fact of the convictions. However, the error was harmless because the jury did not find defendant guilty of the offenses for which the prior convictions posed potential prejudice. (48 C.A.4th 469.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(3) *Nature of Prior Conviction Inadmissible.*

(New) *Distinction: No general stipulation: People v. Valentine (1986) 42 C.3d 170, 228 C.R. 25, 720 P.2d 913*, text, p. 339, was distinguished in *People v. Stewart (2004) 33 C.4th 425, 15 C.R.3d 656, 93 P.3d 271*. Defendant was charged with capital murder and being a felon in possession of a firearm, but defense counsel was unwilling to stipulate generally to defendant's status as a convicted felon, out of concern that the jury might assume that the unspecified felony was more serious than the convictions defendant had actually suffered. *Held*, the trial judge did not err in failing to force the prosecution to accept defense counsel's less-than-general stipulation. By refusing to stipulate generally to felon status, defendant lost his right to keep the details out. In any case, defense counsel had stated that he preferred the jury to hear the actual list of all prior felonies alleged in the possession count, and that is what ultimately occurred. (33 C.4th 478.)



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#### CHAPTER IV - Circumstantial Evidence

#### II. RELEVANCY AND MATERIALITY

##### B. Admissibility and Exclusionary Rules.

#### 3. Discretionary Exclusion Under Ev.C. 352.

##### a. Statutory Balancing Test.

#### 1 Witkin Cal. Evid. Circum Evid § 17

[§ 17] Statutory Balancing Test.

Ev.C. 352 states a policy of discretionary exclusion in the form of a balancing test:

"The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

Although a few specific rules of exclusion have crystallized (see *infra*, §132 et seq.), in most cases, these general policies are applied in the trial judge's discretion. Many decisions, both before and after the adoption of Ev.C. 352, illustrate this practice of discretionary exclusion of relevant evidence. (See *Moody v. Peirano* (1906) 4 C.A. 411, 418, 88 P. 380 ["a wide discretion is left to the trial judge"]; *People v. Boggess* (1924) 194 C. 212, 234, 228 P. 448 [remoteness is left to discretion of court]; *Cherrigan v. San Francisco* (1968) 262 C.A.2d 643, 655, 66 C.R. 42, citing the text [wrongful death action; testimony by sociologist, called by defendant, that, because of youthful age of spouses, short engagement, and plaintiff wife's pregnancy at time of marriage, marriage would not have lasted, was properly excluded on grounds of remoteness and prejudice]; *People v. Haston* (1968) 69 C.2d 233, 244, 70 C.R. 419, 444 P.2d 91, *infra*, §94; *People v. Sam* (1969) 71 C.2d 194, 77 C.R. 804, 454 P.2d 700, *infra*, §86; *People v. Coleman* (1969) 71 C.2d 1159, 1164, 80 C.R. 920, 459 P.2d 248; *Helfend v. Southern Calif. Rapid Transit Dist.* (1970) 2 C.3d 1, 16, 84 C.R. 173, 465 P.2d 61; *Acosta v. Southern Calif. Rapid Transit Dist.* (1970) 2 C.3d 19, 26, 27, 84 C.R. 184, 465 P.2d 72; *Hrnjak v. Graymar* (1971) 4 C.3d 725, 732, 94 C.R. 623, 484 P.2d 599, *infra*, §160; *People v. Maler* (1972) 23 C.A.3d 973, 980, 100 C.R. 650 [Ev.C. 352 applies to evidence admissible under Ev.C. 1101(b), *infra*, §75]; *Smith v. Lewis* (1975) 13 C.3d 349, 364, 118 C.R. 621, 530 P.2d 589 [legal malpractice action; declaration filed by defendant in underlying divorce proceeding in which he sought relief due to his mistake, inadvertence, and excusable neglect was properly excluded; jury could have confused quantum of asserted negligence necessary to permit amendment of judgment with that required to support finding of malpractice]; *People v. Phillips* (1985) 41 C.3d 29, 49, 222 C.R. 127, 711 P.2d 423; *Michail v. Fluor Mining & Metals* (1986) 180 C.A.3d 284, 286, 225 C.R. 403; *Hinson v. Clairemont Community Hosp.* (1990) 218 C.A.3d 1110, 1125, 267 C.R. 503; *People v. Sutton* (1993) 19 C.A.4th 795, 800, 801, 23 C.R.2d 632 [evidence that defendant fought extradition was more prejudicial than probative in prosecution for wilful failure to appear on felony charge]; *People v. Humiston* (1993) 20 C.A.4th 460, 481, 24 C.R.2d 515 [in murder case, trial judge erred in admitting evidence that defendant had communicated with boyfriend with beeper using code 187 (Penal Code section for murder); it was relevant only to prove defendant's disposition to commit murder and was highly prejudicial]; 69 So. Cal. L. Rev. 1389 [arguing that criminal defendant should have option of having court hear evidence

that is suggestive of innocence but highly prejudicial]; 1 Jefferson, California Evidence Benchbook 3d, Chap. 22; 18 A.L.R.5th 804 [defendant's involvement with witchcraft or satanism].)

Two distinctions must be stated: (1) The statute applies to evidence only; evidentiary *objections* are not within its compass. (*People v. Filson* (1994) 22 C.A.4th 1841, 1851, 1852, 28 C.R.2d 335, 3 Cal. Evidence (4th), *Presentation at Trial*, §122 [trial judge's ruling precluding defense from asking witnesses about any statements defendant might have made could not be justified on basis that prosecution would be prejudiced by its mere voicing of objections].) (2) *Ev.C.* 352 is frequently applied in the context of hearsay evidence, because, in judging probative value, the credibility of the *hearsay declarant* must be assessed; but the testimony of a *live witness* is not excludable on credibility grounds, except in the very rare case where the falsity is demonstrable. (*Vorse v. Sarasy* (1997) 53 C.A.4th 998, 1007, 1013, 62 C.R.2d 164; see *People v. Chandler* (1997) 56 C.A.4th 703, 711, 65 C.R.2d 687 [trial judge improperly excluded, on sole ground of unbelievability, testimony concerning alleged rape victim's sexual conduct that would have been used to attack her credibility].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Phillips* (2000) 22 C.4th 226, 234, 92 C.R.2d 58, 991 P.2d 145 [although fact that prosecution witness was prostitute was marginally relevant in capital murder case, trial judge did not err in determining that its relevance was outweighed by its prejudicial impact]; *People v. Hillhouse* (2002) 27 C.4th 469, 496, 117 C.R.2d 45, 40 P.3d 754, 1 Cal. Crim. Law (3d), *Crimes Against the Person, Supp.*, §265 [trial judge did not abuse his discretion in excluding toxicology report showing marijuana in murder victim's system; when defendant and victim were driving to location where victim was ultimately killed, victim asked where they were going and was told "to get some pot," but even if victim's marijuana use reflected on his purpose in going on drive, it had little relevance to defendant's purpose]; *People v. Jablonski* (2006) 37 C.4th 774, 805, 38 C.R.3d 98, 126 P.3d 938 [in competency phase of capital murder trial, tape recording defendant had made in which he graphically described his murders was strongly probative in that it demonstrated his ability to speak and remember; as to prejudice, there was no indication jury did not follow instruction to consider recording solely for competence determination]; *People v. Bell* (2007) 40 C.4th 582, 608, 54 C.R.3d 453, 151 P.3d 292 [in murder prosecution in which defendant declined to testify, trial judge properly balanced probativeness against prejudice in refusing to allow defense psychologist, who was to testify regarding his interview with defendant, to recount defendant's statements about events underlying charged crimes; although jury could have been instructed not to consider statements for truth, it would have been difficult to separate proper and improper uses of evidence]; *People v. Zambrano* (2007) 41 C.4th 1082, 1136, 63 C.R.3d 297, 163 P.3d 4 [in prosecution for murder and attempted murder, admission of expert testimony concerning recovery and rehabilitation of two attempted murder victims was proper; it was probative as to allegation of great bodily injury and was not presented in sensational way]; *People v. Bojorquez* (2002) 104 C.A.4th 335, 343, 344, 128 C.R.2d 411 [in prosecution for robbery and false imprisonment, admission of evidence regarding criminal gangs should have ended with rebuttal of defendant's and witness' denial of gang membership; additional testimony by detective, including repeated references to gang robberies, declaration that defendant's gang was involved in criminal activity, and accounts of gang members' use of violence to prevent testimony, was only minimally relevant and highly prejudicial]; *Ajaxo v. E\*Trade Group* (2005) 135 C.A.4th 21, 45, 37 C.R.3d 221 [in trade secret misappropriation action against wireless vendor and Internet stock trading company, trial judge did not err in failing to exclude evidence of venture capital funding received by wireless vendor (plaintiff's competitor), even though funding occurred after alleged misappropriation; it shed light on stock trading company's motive to give plaintiff's secrets to vendor, and it created no emotional bias against stock trading company]; *People v. Fulcher* (2006) 136 C.A.4th 41, 58, 38 C.R.3d 702 [in sexually violent predator proceeding, 3 pornographic photos, out of 200 found plastered to walls of defendant's bedroom at time defendant was arrested for predicate offense, were properly admitted; they were relevant to show evidence experts relied on, and to establishing defendant's state of mind, and they depicted only what had already been described]; *Geffcken v. D'Andrea* (2006) 137 C.A.4th 1298, 1308, 41 C.R.3d 80 [in action alleging that defendants caused plaintiffs to be exposed to mold mycotoxins, trial judge did not err in excluding expert witness' environmental sampling data; data had little probative value both because of chain of custody errors and because at most data showed presence of mold spores, not mycotoxins, and probability that data would mislead jury was high]; *People v. Celis* (2006) 141 C.A.4th 466, 476, 46 C.R.3d 139 [in murder prosecution, exclusion of evidence



showing that defendant's son, who was also charged in same murder, expected to receive sentence of life without parole was properly excluded under *Ev.C. 352*, despite defense counsel's argument that evidence enhanced son's credibility; probative value was actually low, as, faced with life without parole, son had nothing to lose by lying]; *People v. Albarran* (2007) 149 C.A.4th 214, 223, 57 C.R.3d 92 [in attempted murder prosecution in which gang enhancements were alleged, some of gang evidence admitted rendered trial fundamentally unfair; even if evidence of defendant's gang membership was relevant to issues of motive and intent, other portions of evidence, including threats by members of defendant's gang to kill police and references to "Mexican mafia," were extremely inflammatory and had no connection to charged crimes]; *People v. Gunder* (2007) 151 C.A.4th 412, 416, 59 C.R.3d 817 [in prosecution for murder and being ex-felon in possession of firearm, trial judge did not abuse discretion in refusing to exclude testimony by defendant's son about previous occasion on which defendant had displayed firearm; evidence was relevant to defendant's claim that police had planted firearm found in his possession, and it would not have caused emotional response in jury evoking bias against him for reason unrelated to guilt or innocence]; Simons, Cal. Evidence Manual, §1:25 et seq. *Testimony of live witness as to hearsay statement*: When hearsay evidence is offered under one of the recognized exceptions, the trial judge must determine, as preliminary facts, both that the out-of-court declarant made the statement as represented, and that the statement meets trustworthiness standards. However, the direct testimony of a single witness is sufficient to support a finding unless the testimony is physically impossible or its falsity is apparent without resorting to inferences or deductions. Thus, except in those rare instances of demonstrable falsity, doubts about the credibility of the in-court witness should be left for the jury's resolution; they do not afford a ground for refusing to admit hearsay evidence under an applicable exception. (*People v. Cudjo* (1993) 6 C.4th 585, 608, 610, 25 C.R.2d 390, 863 P.2d 635 [in capital murder case, trial judge's doubts about credibility of in-court witness (jail inmate who had been incarcerated together with defendant's brother and maintained that brother confessed to defendant's crime) did not constitute "prejudice" such that exclusion under *Ev.C. 352* was warranted].)



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##### B. Admissibility and Exclusionary Rules.

#### 3. Discretionary Exclusion Under Ev.C. 352.

##### b. Power Confirmed by Proposition 8.

*1 Witkin Cal. Evid. Circum Evid § 18*

[§ 18] Power Confirmed by Proposition 8.

*Ev.C. 352* is expressly excluded from the Truth-in-Evidence provision of Proposition 8, and the statute has become increasingly important as a basis for exclusion of evidence otherwise admissible under the constitutional provision. (See 1 *Cal. Evidence* (4th), *Introduction*, §8.)

Thus, in *People v. Castro* (1985) 38 *C.3d* 301, 211 *C.R.* 719, 696 *P.2d* 111, the court held that Proposition 8 did not authorize unlimited impeachment of a witness by proof of prior felony convictions, because the discretion to limit impeachment could still be exercised under *Ev.C. 352*. (See 3 *Cal. Evidence* (4th), *Presentation at Trial*, §303.) "The legislative and judicial history of sections 352 and 788, the circumstances under which article I, section 28, was enacted, the language of the enactment--concededly ambiguous--as well as certain policy considerations convince us that section 28 was not intended to abrogate the traditional and inherent power of the trial court to control the admission of evidence by the exercise of discretion to exclude marginally relevant but prejudicial matters--as, indeed, is provided by *Evidence Code* section 352." (38 *C.3d* 306.) (See *People v. Taylor* (1986) 180 *C.A.3d* 622, 633, 225 *C.R.* 733; *People v. Wheeler* (1992) 4 *C.4th* 284, 295, 14 *C.R.2d* 418, 841 *P.2d* 938, 3 *Cal. Evidence* (4th), *Presentation at Trial*, §286.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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##### 3. Discretionary Exclusion Under Ev.C. 352.

##### c. Judge's Duty To Exercise Discretion.

##### 1 Witkin Cal. Evid. Circum Evid § 19

##### [§ 19] Judge's Duty To Exercise Discretion.

"Because of conditions created by the law explosion, the concept of a kindly, benign trial judge who listens passively and patiently while the lawyers try their cases without his interference is no longer valid--if it ever was. To be a real factor in the administration of justice, a trial judge must alertly supervise proceedings in his court, curbing when necessary over-zealous advocates and, in his rulings on evidence strike a 'careful balance between the probative value of the evidence and the danger of prejudice, confusion and undue time consumption.' ... Lawyers are advocates. Asking them to police themselves is not fair. Admitting *all* evidence which has any probative value is sometimes unnecessary to the orderly ascertainment of the truth. The judicious use of the inherent powers of the court, set forth in *Evidence Code*, section 352, is to be encouraged." (*People v. Jackson* (1971) 18 C.A.3d 504, 509, 95 C.R. 919.) (See *People v. Allen* (1976) 65 C.A.3d 426, 435, 135 C.R. 276 [tenuous inference from defendant's statements (implied admission) involving danger of jury's treatment of it as character-trait evidence; abuse of discretion to refuse to exclude it under Ev.C. 352]; *People v. Ross* (1979) 92 C.A.3d 391, 407, 154 C.R. 783; *People v. Bush* (1978) 84 C.A.3d 294, 307, 148 C.R. 430 [evidence that merely points to a possible ground of suspicion could encourage jurors to engage in improper speculation and should be excluded].) (On procedure under Ev.C. 352, see *infra*, §20.)

However, in *Kessler v. Gray* (1978) 77 C.A.3d 284, 143 C.R. 496, the court upheld the trial judge's refusal to exclude evidence. "Reasonable exercise of trial court discretion ... requires that the trial judge balance the probative value of the offered evidence against its potential of prejudice, undue consumption of time, and confusion. ... That balancing process requires consideration of the relationship between the evidence and the relevant inferences to be drawn from it, whether the evidence is relevant to the main or only a collateral issue, and the necessity of the evidence to the proponent's case as well as the reasons recited in section 352 for exclusion. ... The more substantial the probative value of the evidence, the greater the danger of the presence of one of the excluding factors that must be present to support an exercise of trial court discretion excluding the evidence." (77 C.A.3d 291.)

The court then pointed out that (1) the testimony directly supported an inference relevant to a vital issue; (2) no other evidence approached its value on that issue; and (3) there was no possibility of confusion or undue consumption of time. Hence, there was no reasonable basis for exercise of the discretion to exclude. (77 C.A.3d 292.) (See *Hilliard v. A. H. Robins Co.* (1983) 148 C.A.3d 374, 398, 196 C.R. 117, *infra*, §123; *People v. Taylor* (1986) 180 C.A.3d 622, 633, 225 C.R. 733; *People v. Champion* (1995) 9 C.4th 879, 922, 39 C.R.2d 547, 891 P.2d 93 [in murder case, probative value of evidence that defendants were members of street gang outweighed prejudicial effect]; *People v. Williams* (1997) 16 C.4th 153, 193, 66 C.R.2d 123, 940 P.2d 710 [same]; *People v. Quartermain* (1997) 16 C.4th 600, 628, 66

*C.R.2d* 609, 941 *P.2d* 788, 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §122 [defendant's use of racial epithets during interviews with police was relevant to motive for murder and, because that language is regrettably not uncommon, would not inevitably bias jury against defendant]; *O'Mary v. Mitsubishi Electronics America* (1997) 59 *C.A.4th* 563, 574, 575, 69 *C.R.2d* 389 [in age discrimination action, evidence that employer's senior managing director had stated that company should get rid of older managers and that employer's president had concurred was more probative than prejudicial; direct evidence of intent in civil rights case is difficult to find and should not be lightly discarded]; *People v. Millwee* (1998) 18 *C.4th* 96, 128, 74 *C.R.2d* 418, 954 *P.2d* 990 [after defendant in capital murder case testified to his good relationship with victim (his mother), trial judge properly ruled admissible victim's statements of fear of defendant; evidence was highly relevant to assess defendant's credibility and his version of events, and inquiry into thefts and violent acts underlying victim's fear was avoided].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Kipp* (2001) 26 *C.4th* 1100, 1126, 113 *C.R.2d* 27, 33 *P.3d* 450 [in capital murder trial, trial judge did not abuse discretion in admitting evidence of defendant's attempted jail escape; although probative value of escape, as evidencing consciousness of guilt, was diminished by fact that defendant was already under death sentence for another crime, risk of undue prejudice was slight, in that attempt involved no overt violence, defendant having offered only brief resistance on being captured]; *People v. Carter* (2003) 30 *C.4th* 1166, 1195, 135 *C.R.2d* 553, 70 *P.3d* 981 [in capital murder prosecution, trial judge did not abuse discretion in admitting lay testimony that defendant belonged to gang and expert testimony concerning defendant's gang, a related gang, and an opposing gang, where gang evidence was relevant to both identity and motive]; *People v. Brown* (2003) 31 *C.4th* 518, 551, 3 *C.R.3d* 145, 73 *P.3d* 1137 [in capital murder case, trial judge did not abuse discretion in determining that any prejudice arising from admitting defendant's nickname ("Bam" or "Bam Bam") was outweighed by its probative value; several witnesses knew defendant only by that name]; *People v. Archer* (2000) 82 *C.A.4th* 1380, 1394, 99 *C.R.2d* 230 [in murder prosecution, trial judge erred in denying defendant's motion to exclude books, videotapes, and catalogs seized from his home and locker; some material related to use or purchase of knives, but it had little probative value, as there was no evidence indicating murder, although committed with knife, was carried out in manner requiring special training or would have required special instrument]; *People v. Leon* (2001) 91 *C.A.4th* 812, 817, 110 *C.R.2d* 776 [in child molestation case, trial judge should have excluded, as unduly prejudicial, testimony of court interpreter to effect that she saw defendant touching crotch area while victim testified; judge assumed that because charges were so serious, evidence would not be prejudicial, but opposite was true]; *People v. Houston* (2005) 130 *C.A.4th* 279, 304, 29 *C.R.3d* 818 [in prosecution of defendant accused of murdering his estranged wife, trial judge did not abuse his discretion in refusing under *Ev.C.* 352 to exclude evidence that defendant had had extramarital affairs, where defendant had put his own credibility at issue by testifying to good relationship with wife in months leading up to her death].



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##### d. Procedure Under Ev.C. 352.

##### 1 Witkin Cal. Evid. Circum Evid § 20

[§ 20] Procedure Under Ev.C. 352.

(1) In the absence of an objection based on *Ev.C. 352*, or a specific request for the court to exercise its discretion under that section, the judge is not required to engage in the weighing process. (*People v. Smith (1984) 151 C.A.3d 89, 97, 198 C.R. 623* [defendant's counsel objected to introduction of defendant's admission on ground that it was "irrelevant," merely adding brief statement that it was "prejudicial with no probative value"].)

(2) If, however, a proper objection is made, the record must affirmatively show that the trial judge weighed the possibility of prejudice against the probative value of the evidence. (*People v. Leonard (1983) 34 C.3d 183, 188, 193 C.R. 171, 666 P.2d 28*; *People v. Wright (1985) 39 C.3d 576, 582, 217 C.R. 212, 703 P.2d 1106*; *People v. Montiel (1985) 39 C.3d 910, 924, 218 C.R. 572, 705 P.2d 1248*; *People v. Lankford (1989) 210 C.A.3d 227, 241, 258 C.R. 322* [record failed to show that judge engaged in weighing process, but error was harmless because there was no grave doubt as to defendant's guilt]; *Burns v. 20th Century Ins. Co. (1992) 9 C.A.4th 1666, 1674, 12 C.R.2d 462* [record need not contain any "magic words" as long as it reflects that weighing process was carried out]; *People v. Triplett (1993) 16 C.A.4th 624, 628, 629, 20 C.R.2d 225* [same]; *In re Romeo C. (1995) 33 C.A.4th 1838, 1845, 40 C.R.2d 85, 1 Cal. Evidence (4th), Introduction, §47.*)

(3) There is no requirement, however, that the judge make an affirmative finding on the result of the weighing process. "[W]hen an objection to proffered evidence is made on the ground that its prejudicial effect will exceed its probative value, the record need only reflect that the judge did in fact weigh the conflicting factors so that the reviewing court can determine whether that discretion was properly exercised." (*People v. Holt (1972) 28 C.A.3d 343, 352, 104 C.R. 572*; *Michail v. Fluor Mining & Metals (1986) 180 C.A.3d 284, 287, 225 C.R. 403*; *Continental Airlines v. McDonnell Douglas Corp. (1989) 216 C.A.3d 388, 412, 264 C.R. 779*, citing the text.) (But see *People v. Love (1977) 75 C.A.3d 928, 939, 940, 142 C.R. 532* [suggesting that it might be helpful for judge to state on record the basis for exclusion, rather than merely to declare that exclusion was pursuant to *Ev.C. 352*].)

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##### e. Particular Grounds.

#### 1. Evidence Prejudicial to Prosecution.

##### *1 Witkin Cal. Evid. Circum Evid § 21*

[§ 21] Evidence Prejudicial to Prosecution.

In *People v. Arline* (1970) 13 C.A.3d 200, 205, 91 C.R. 520, the court said: "Cases almost without number hold that evidence unduly prejudicial to the defendant, compared with its probative value, must be excluded. ... It would seem to be an elementary although too seldom enunciated principle that the prosecution as well as the defendant is entitled to the protection of the court from prejudicial evidence."

The chief issue on appeal in the *Arline* case, a robbery prosecution, was whether the trial judge properly excluded evidence that a third party committed the robbery. *Held*, affirmed. There were no facts to connect the third party with the crime, and detailed questioning concerning the facts of the two robberies, followed by the third party's invocation of his self-incrimination privilege, might have created an impression of his possible guilt in the minds of the jurors that would have been "difficult, if not impossible," to erase by judicial admonition. (13 C.A.3d 204, 205.)

In *People v. Hall* (1986) 41 C.3d 826, 226 C.R. 112, 718 P.2d 99, the court rejected defendant's argument that exclusion of his proffered evidence of third-party culpability under Ev.C. 352 denied him his constitutional right to present a defense. But the court also rejected one aspect of *People v. Arline*, *supra*: its application of a "distinct and elevated standard" of admissibility. If relevant, evidence of this type, like any other, should be admitted unless its probative value is substantially outweighed by risk of undue delay, prejudice, or confusion. (41 C.3d 834.) (See *People v. Jackson* (1991) 235 C.A.3d 1670, 1677, 1 C.R.2d 778 [evidence of third-party culpability may be excluded as unduly prejudicial; citing *People v. Hall*]; on third-party culpability evidence generally, see *infra*, §122.)

*People v. Wright* (1985) 39 C.3d 576, 585, 217 C.R. 212, 703 P.2d 1106, adds these cautions: (1) The purported prejudice to the prosecution cannot be based on mere speculation and conjecture. (2) Evidence relevant to the prime theory of the defense cannot be excluded merely because the trial would be simpler without it.

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##### 2. Evidence Prejudicial Only to Codefendant.

##### *1 Witkin Cal. Evid. Circum Evid § 22*

[§ 22] Evidence Prejudicial Only to Codefendant.

In *People v. Reeder* (1978) 82 C.A.3d 543, 147 C.R. 275, defendant and his codefendant C were charged with selling and possessing narcotics. Defendant sought to introduce hearsay evidence of declarants who told defendant that C had committed reprehensible acts against defendant and his family, including an attempt to induce use of heroin. *Held*, exclusion of the evidence was prejudicial error.

(a) The declarations were relevant and admissible for the nonhearsay purpose of affording an inference of defendant's state of mind--dislike of C making it unlikely that he would have had narcotics dealing with C. (82 C.A.3d 550; see 1 Cal. Evidence (4th), Hearsay, §40.)

(b) The evidence was excluded on the theory that the jury could use the proffered evidence for its truth, i.e., for the inadmissible purpose of proving bad character of C. Thus, the danger of prejudice was not to the prosecution but to the codefendant C; and this danger did not justify exclusion of significant, relevant evidence for defendant. (82 C.A.3d 553, 554.) The proper course for C was to seek a limiting instruction under Ev.C. 355 (see *infra*, §30) or, if he felt that the danger could not be alleviated by an instruction, to move for a mistrial and separate trial. (82 C.A.3d 555.)

*People v. Greenberger* (1997) 58 C.A.4th 298, 352, 68 C.R.2d 61, cited the *Reeder* case for its rule requiring instruction or severance rather than exclusion. But it found the rule inapplicable, because the evidence at issue (a murder charged against two codefendants but not against defendant) was not significant to defendant's defense, was highly prejudicial to one codefendant, and was also cumulative.

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##### 3. Confusion of Issues and Misleading Jury.

##### 1 *Witkin Cal. Evid. Circum Evid* § 23

[§ 23] Confusion of Issues and Misleading Jury.

It is surely desirable to avoid confusing the issues or misleading the jury, but it is most difficult to conceive of relevant evidence (evidence relating to an issue and logically tending to prove it, *supra*, §4) that can be condemned on these grounds alone. (See 6 Wigmore (Chadbourn Rev.) §1904.) Even if there is some reason for believing that the evidence might confuse the issues or mislead the jury, the judge's authority to interfere with counsel's trial strategy is doubtful. In excluding useful, probative evidence (see 3 *Cal. Evidence* (4th), *Presentation at Trial*, §3 et seq.), the judge risks reversible error, except where a criminal defendant successfully invokes the rule against the prosecution (which has no appeal from a verdict of acquittal).

Nevertheless, where there is a possibility of undue prejudice (*infra*, §132) or undue consumption of time (*infra*, §24), the opinions sometimes stress the need to avoid confusing the issues and misleading the jury. (See *People v. Cegers* (1992) 7 C.A.4th 988, 1001, 9 C.R.2d 297 [where the evidence is cumulative, involves collateral matters, or would require a great amount of time, "the trial court serves as something of a referee, monitoring the progress of the case and precluding wasteful consumption of time, or excluding evidence of questionable pertinence to the issues of the case tending improperly to influence the jury"].)

In *People v. Ross* (1979) 92 C.A.3d 391, 154 C.R. 783, defendant and A were charged with burglary, robbery, arson, and murder by torture. After his arrest defendant confessed to the burglary, but asserted that his accomplice A tied the victim up, beat him, and set the fatal fire over his protests. At trial defendant did not testify, but called a roommate of A to testify to A's out of court declarations of his sole involvement in the crime, an admissible declaration against penal interest under Ev.C. 1230 (1 *Cal. Evidence* (4th), *Hearsay*, §143). In rebuttal, the prosecution--to impeach the hearsay declarant (see Ev.C. 1202, 3 *Cal. Evidence* (4th), *Presentation at Trial*, §358), offered inconsistent in-custody statements of A denying complicity in the arson and homicide, denying that he had made any such declaration to his roommate, and describing defendant as the active wrongdoer. *Held*, the evidence should have been excluded. It was admissible only for the limited purpose of impeachment, but it was highly likely that the jury would be misled into giving it substantive effect; and this danger of undue prejudice was enhanced by the prosecutor's misconduct in urging the jurors to consider A's statements in contrast to defendant's denials in his own confession. (92 C.A.3d 407.)

In *People v. Green* (1980) 27 C.3d 1, 164 C.R. 1, 609 P.2d 468, defendant sought an instruction on the opposite of the implied admission of guilt resulting from flight (see 1 *Cal. Evidence* (4th), *Hearsay*, §107), i.e., that the jury may consider the absence of flight as circumstantial evidence of an innocent frame of mind. *Held*, the instruction was



properly refused. There are other plausible reasons for not attempting flight; e.g., fear of recapture, the inference of guilt from a fruitless attempt, or a strong confidence in acquittal. (27 C.3d 37.) Thus, the absence of flight is so laden with conflicting interpretations that its probative value is slight and it involves the risk of confusing the issues and misleading the jury. (27 C.3d 38.) Although ordinarily the trial judge must perform a weighing process, "the scales tip so heavily against admission of evidence of absence of flight that it must be excluded as a matter of law." (27 C.3d 39.)

In *People v. Shoemaker* (1982) 135 C.A.3d 442, 185 C.R. 370, *infra*, §59, the trial judge in a deadly weapon assault case excluded defendant's proffered evidence of the victim's *subsequent* violent conduct (an alleged attack on an elderly couple). Upholding the ruling, the court pointed out that the evidence was cumulative (two defense witnesses testified that the victim, Kelly, was a violent, dangerous person who had committed prior assaults, and the jury had learned of the charges Kelly faced from the alleged assault on the elderly couple). "In light of the multiplicity of charges against Kelly, and the fact he had not yet been tried, undue consumption of time, as well as confusion of the issues and the jury, was substantially certain to result." (135 C.A.3d 449.)

There are numerous additional cases touching on these dangers. (See *People v. Harvey* (1984) 163 C.A.3d 90, 115, 208 C.R. 910 [citing *People v. Green*, *supra*; evidence of defendant's cooperative attitude when questioned by police was properly excluded, as there could be many reasons why a guilty defendant would want to appear cooperative]; *People v. Hall* (1986) 41 C.3d 826, 834, 226 C.R. 112, 718 P.2d 99, *infra*, §122; *Hilliard v. A. H. Robins Co.* (1983) 148 C.A.3d 374, 399, 196 C.R. 117, *infra*, §123 ["policy factors of undue prejudice, confusion of the issues, and misleading the jury are practically the same"]; *DePalma v. Westland Software House* (1990) 225 C.A.3d 1534, 1545, 276 C.R. 214, 1 Summary (9th), *Contracts*, *Supp.*, §866A [evidence of tax benefits, as offset to damages recoverable in breach of contract action, would raise complicated, time-consuming, and confusing issues, hence, may be excluded under *Ev.C.* 352]; *People v. McAlpin* (1991) 53 C.3d 1289, 1310, footnote 15, 283 C.R. 382, 812 P.2d 563, 1 *Cal. Evidence* (4th), *Opinion Evidence*, §19; *Webber v. Inland Empire Inv.* (1999) 74 C.A.4th 884, 909, 88 C.R.2d 594 [in action for intentional interference with contract, trial judge properly excluded letter from defendants' in-house counsel to bank vice-president, even though possibly relevant to claim of one defendant that he relied on advice of counsel, on ground that it contained incorrect legal conclusion and therefore would confuse jury].)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Cases illustrating dangers:* See *People v. Snow* (2003) 30 C.4th 43, 89, 132 C.R.2d 271, 65 P.3d 749 [in capital murder prosecution arising from defendant's killing of robbery victim to prevent his testimony, trial judge properly excluded evidence that during investigation of robbery, victim had made erroneous identification; defendant's knowledge of weakness of robbery case against him was slightly relevant as showing lack of motive, but jury might have lost sight of fact that victim's identification was not directly at issue in murder case]; *Thompson v. Los Angeles* (2006) 142 C.A.4th 154, 171, 47 C.R.3d 702 [in civil rights action stemming from injuries inflicted on plaintiff by police dog, trial judge properly excluded summaries of medical treatment provided to 43 persons bitten by sheriff's department dog used by specific handler; possibility of confusing jurors with information concerning dog handled by deputy who was not part of case outweighed any probative value].

*DePalma v. Westland Software House:*

*Cross-Reference:* 1 Summary (10th), *Contracts*, §923. *West's Key Number Digest*, Evidence k.146



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#### 4. Undue Consumption of Time.

##### 1 Witkin Cal. Evid. Circum Evid § 24

#### [§ 24] Undue Consumption of Time.

(1) *In General.* Relevant evidence may be excluded if "its probative value is substantially outweighed" by the unwarranted time it takes to present it. (Ev.C. 352, *supra*, §17.) (See *DePalma v. Westland Software House* (1990) 225 C.A.3d 1534, 1545, 276 C.R. 214, 1 Summary (9th), *Contracts, Supp.*, §866A; *People v. McAlpin* (1991) 53 C.3d 1289, 1310, footnote 15, 283 C.R. 382, 812 P.2d 563, 1 Cal. Evidence (4th), *Opinion Evidence*, §19; *People v. Rodrigues* (1994) 8 C.4th 1060, 1125, 36 C.R.2d 235, 885 P.2d 1 [even if evidence of bad relationship between murder victim and his brother had some slight relevance (defense was not based on theory that brother was killer), exploring it would lead to undue consumption of time and confuse issues]; *People v. Pelayo* (1999) 69 C.A.4th 115, 121, 81 C.R.2d 373 [in rape prosecution, trial judge did not err in excluding school records of one victim, which defendants offered to contradict her testimony that her grades suffered because of defendants' crimes; records were extensive, contained lengthy, differing opinions, and did not specifically contradict any critical prosecution evidence].)

Undue consumption of time is an amorphous concept, difficult to reduce to concrete terms, and it brings the trial judge to the danger point of reversible error. (See *People v. Torres* (1964) 61 C.2d 264, 267, 37 C.R. 889, 391 P.2d 161, *infra*, §28; and see 6 Wigmore (Chadbourn Rev.) §1865 [undue consumption of time is *not in itself ground for exclusion*].)

In *People v. Mayfield* (1972) 23 C.A.3d 236, 100 C.R. 104, the trial judge admitted the preliminary examination testimony of a deputy sheriff who had died before the trial, but excluded evidence attacking the decedent's credibility. *Held*, this was error. "The right of a defendant to attack the credibility of her hearsay accuser is so fundamental that consumption of time is irrelevant where the evidence is not cumulative. ... Thus to deny defendant the right to adduce pertinent evidence that bears upon the credibility of a witness unseen by the jury and who had not been fully cross-examined at the preliminary hearing was to deny her due process of law." (23 C.A.3d 243.)

Nevertheless, this ground of exclusion is specifically mentioned in Ev.C. 352, and is supported by most authorities. (See *supra*, §17.) It breaks down into two familiar categories: (a) cumulative or repetitive evidence, which has long been subject to discretionary exclusion (see 3 Cal. Evidence (4th), *Presentation at Trial*, §67); and (b) collateral or remote evidence (*infra*, this section).

(2) *Collateral or Remote Evidence.* Evidence relevant only indirectly, and so far removed from the fact in issue as to render its probative value slight and its usefulness in the case practically nil, may be excluded. Whether "collateral"

and "remote" are distinct or related concepts, the judge's discretion to apply them in the interests of expedition of the trial is clear, and in a few situations positive rules of exclusion have developed. (See, e.g., *People v. Mehaffey* (1948) 32 C.2d 535, 555, 197 P.2d 12; *People v. Gonzales* (1967) 66 C.2d 482, 499, 58 C.R. 361, 426 P.2d 929; *People v. Rocha* (1971) 3 C.3d 893, 900, 92 C.R. 172, 479 P.2d 372, 3 Cal. Evidence (4th), *Presentation at Trial*, §266; *People v. Lepe* (1997) 57 C.A.4th 977, 988, 67 C.R.2d 525, citing the text [in murder prosecution in which witness' preliminary hearing testimony was admitted at trial on basis of his unavailability, testimony as to reasons for witness' unavailability was evidence on collateral issue subject to discretionary exclusion by trial judge]; *People v. Hart* (1999) 20 C.4th 546, 607, 85 C.R.2d 132, 976 P.2d 683 [in capital murder trial, judge properly excluded evidence that surviving victim had filed civil suit alleging that county sheriff's department mistreated and lied to her when she reported murder; evidence would have shifted focus of testimony from events concerning charged offenses to officers' conduct after offenses were committed]; *infra*, §39 et seq. [character for care]; *infra*, §42 [character to prove conduct]; *infra*, §106 [absence of similar accidents]; *infra*, §109 [prior acts]; *infra*, §122 [motive of third person]; *infra*, §159 [other claims or litigation by plaintiff]; see also, on remoteness of prior offense, *infra*, §77; on discretionary exclusion of impeaching evidence on collateral matter, see 3 Cal. Evidence (4th), *Presentation at Trial*, §341 et seq.)

In *Hicks v. Hicks* (1967) 249 C.A.2d 964, 58 C.R. 63, a husband and wife were divorced, and custody of four children was given to the wife. The husband moved to modify, contending only that the children's association with their stepfather L would be detrimental to their interests. He offered evidence of arrests and a narcotics conviction of L some 12 years before the present proceedings. The trial judge excluded it as remote. *Held*, affirmed. In a custody case, the criminal background of a stepparent or close associate of a parent is a proper factor to be considered by the court. But the issue is present fitness; past misconduct, at an unreasonable period before the hearing, may be excluded as remote. (249 C.A.2d 968.)

Error in admitting testimony that was remote when originally offered may be cured when subsequent testimony makes it relevant. (*People v. Simms* (1970) 10 C.A.3d 299, 312, 89 C.R. 1.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General.* See *People v. Halvorsen* (2007) 42 C.4th 379, 410, 64 C.R.3d 721, 165 P.3d 512 [in murder prosecution in which, in cross-examining defense psychiatrist, prosecutor elicited opinion that defendant's case did not support any psychiatric defenses, trial judge did not err in refusing to allow defense counsel, on redirect, to explore psychiatrist's understanding of concept of legal insanity; exploring this issue risked undue consumption of time, as well as confusion of issues]; *People v. Vargas* (2001) 91 C.A.4th 506, 543, 544, 110 C.R.2d 210 [in murder prosecution, defendant was properly precluded from cross-examining two prosecution witnesses and conducting direct examination of one potential defense witness regarding uncharged homicide; defense would have used evidence to impeach one prosecution witness, but result would have been mini-trial on crime with which defendant was not charged].

*DePalma v. Westland Software House:*

*Cross-Reference:* 1 *Summary* (10th), *Contracts*, §923.(2) *Collateral or Remote Evidence.* See *People v. Basuta* (2001) 94 C.A.4th 370, 387, 114 C.R.2d 285 [in prosecution of day care operator for fatal assault on child, trial judge erred in excluding, as collateral, confusing, and time-consuming, evidence that child's mother, when angry or frustrated, had jerked and shaken child; medical evidence was conflicting and allowed for multiple possible causes of child's death]; *Gouskos v. Aptos Village Garage* (2001) 94 C.A.4th 754, 762, 114 C.R.2d 558, 8 Cal. Proc. (4th), *Enforcement of Judgment*, Supp., §4 [in action against automobile repair shop for violation of Rosenthal Fair Debt Collection Practices Act (C.C. 1788 et seq.), evidence regarding defendant's conduct with two customers other than plaintiff was properly excluded; whether defendant had habit of violating Act was collateral matter and would have been unduly time-consuming]; *People v. Feaster* (2002) 102 C.A.4th 1084, 1094, 125 C.R.2d 896 [in prosecution for assault with firearm, proffered impeachment evidence of prosecution witness' prior conviction for negligent discharge of firearm was properly excluded under *Ev.C.* 352; witness' offense was committed 12 years earlier, he had committed no subsequent offenses, and because offense was "wobbler," it would have to be determined whether conviction was for felony or misdemeanor].



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##### 5. Distinction: Unfair Surprise.

##### 1 Witkin Cal. Evid. Circum Evid § 25

[§ 25] Distinction: Unfair Surprise.

"Unfair surprise" is one of the generally stated bases for exclusion (see *supra*, §8). But there is a dearth of case law illustrating this supposed rule, and it seems both unnecessary and dangerous. Discovery (see 2 *Cal. Evidence (4th)*, *Discovery*, §1 et seq. ) and pretrial conference (see 7 *Cal. Proc. (4th)*, *Trial*, §52 et seq.) are means of preventing surprise. And if, despite diligent preparation and use of these procedures, evidence is introduced that is so important and so wholly outside reasonable anticipation that the other party is harmed by its sudden introduction, the appropriate statutory remedy is a request for a continuance. (See 6 Wigmore (Chadbourn Rev.) §1848; 7 *Cal. Proc. (4th)*, *Trial*, §7 et seq.; 5 *Cal. Crim. Law (3d)*, *Criminal Trial*, §331.) For these reasons, the Law Revision Commission eliminated this ground from *Ev.C. 352*.

In *Luque v. McLean (1972) 8 C.3d 136, 104 C.R. 443, 501 P.2d 1163*, plaintiff had claimed surprise at defendant manufacturer's introduction of a safety leaflet after defendant's answer to written interrogatories denied reliance on the leaflet. The court, citing the text, said: "It is a sufficient answer to plaintiff's contention that on retrial plaintiff will no longer be able to object to this evidence since he has now had ample time to prepare for its introduction." (8 *C.3d* 147.)

However, unfair surprise may be a factor in the exclusion of evidence as part of the trial judge's basic power to insure a fair trial. In *Castaline v. Los Angeles (1975) 47 C.A.3d 580, 121 C.R. 786*, defense counsel's request that plaintiffs be examined by defendant's physician was withdrawn when answers to interrogatories established that plaintiffs were fully recovered. A physician for plaintiffs examined one of them 3 days before trial (4 years after the accident), but was not allowed to testify. Plaintiffs' counsel did not specify what he hoped to accomplish by the excluded testimony. *Held*, no error; defendant's claim of unfair surprise had merit, and under all the circumstances, exclusion of the physician's testimony was justified. (47 *C.A.3d* 592.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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##### C. Test of Relevancy.

##### 1. General Principles.

*1 Witkin Cal. Evid. Circum Evid § 26*

[§ 26] General Principles.

(1) *Relevancy Determined by Logic and Experience.* "No precise or universal test of relevancy is furnished by the law. The question must be determined in each case according to the teachings of reason and judicial experience." (*Moody v. Peirano* (1906) 4 C.A. 411, 418, 88 P. 380 [quoting Thayer].) This admission of the impossibility of stating adequate legal tests of relevancy is reiterated by other authorities. (See *Larson v. Solbakken* (1963) 221 C.A.2d 410, 420, 34 C.R. 450, quoting the text; *Traxler v. Thompson* (1970) 4 C.A.3d 278, 286, 84 C.R. 211, citing the text; 29 Am.Jur.2d (1994 ed.), *Evidence* §309; 1A Wigmore (Tillers Rev.) §37 et seq.)

(2) *The Reasonable Inference Test.* "The general test of relevancy of indirect evidence is whether it tends logically, naturally, and by reasonable inference to prove or disprove a material issue." (*People v. Jones* (1954) 42 C.2d 219, 222, 266 P.2d 38; see *Ruiz v. Minnesota Mining & Mfg. Co.* (1971) 15 C.A.3d 462, 467, 93 C.R. 270; *People v. Stein* (1979) 94 C.A.3d 235, 240, 156 C.R. 299, quoting the text; *People v. Freeman* (1994) 8 C.4th 450, 491, 34 C.R.2d 558, 882 P.2d 249.)

In *People v. Graziadio* (1964) 231 C.A.2d 525, 42 C.R. 29, the court, answering the contention that the evidence was speculative, said: "The test is whether the inferences which it is alleged may be drawn from proffered evidence might be drawn by a reasonable mind and whether it is relevant to the issues to be determined by the jury. Although when stated as an abstract rule it may seem somewhat nebulous, it can be applied, nevertheless, with satisfactory practicality to the facts of a particular case." (231 C.A.2d 530.)

Sometimes the rule is stated in terms of "greater" or "more probable" inference; this kind of test, however, seems more appropriately directed to the sufficiency of circumstantial evidence to justify a verdict or finding (3 *Cal. Evidence* (4th), *Presentation at Trial*, §138) than to its initial admission. (See 1A Wigmore (Tillers Rev.) §37.4; 1 McCormick 5th, §185; *People v. Graves* (1934) 137 C.A. 1, 10, 29 P.2d 807, 30 P.2d 508; 2 U.C.L.A. L. Rev. 395.)

(3) *Application of Test to Single Items.* Circumstances that, taken singly, seem to afford no logical inference as to the issue, may, when considered with other circumstances, give rise to such an inference. Thus, the test of relevancy must not be too strictly applied to a single question asked of a witness or to any other single item of evidence. "The theory upon which evidence of circumstances is admitted ... is not that each circumstance stands flawless in its proof of the ultimate fact, but that each certain circumstance has a relation to and points reasonably to the fact sought to be proved." (*People v. Graves*, *supra*, 137 C.A. 10; see *People v. Andrews* (1963) 222 C.A.2d 242, 246, 35 C.R. 118, quoting the text; *People v. Manson* (1976) 61 C.A.3d 102, 153, 132 C.R. 265, quoting the text; 1 McCormick 5th, §185; on admission of superficially irrelevant evidence subject to its being "connected up," see 3 *Cal. Evidence* (4th),

*Presentation at Trial, §45.)*

(4) *Judicial Rules of Relevancy.* It follows from the foregoing principles that judicial decisions, no matter how numerous, cannot cover all of the problems of relevancy that may arise in the trial of cases. Nevertheless, a great many doctrines have developed in the course of repeated holdings on the admissibility of common types of circumstantial evidence; e.g., character, habit, similar acts, etc. (see *infra*, §38 et seq.). And many decisions illustrate the manner in which relevancy of separate bits of evidence is determined under the test set forth above. (See *infra*, §§27, 28.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Relevancy Determined by Logic and Experience.* See Simons, Cal. Evidence Manual, §1:1 et seq. (2) *The Reasonable Inference Test.* See 1 McCormick 6th, §185.

(3) *Application of Test to Single Items.* See 1 McCormick 6th, §185.



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#### CHAPTER IV - Circumstantial Evidence

#### II. RELEVANCY AND MATERIALITY

##### C. Test of Relevancy.

##### 2. Civil Cases.

##### *1 Witkin Cal. Evid. Circum Evid § 27*

[§ 27] Civil Cases.

In *I.E.S. Corp. v. Superior Court* (1955) 44 C.2d 559, 563, 283 P.2d 700, plaintiff, after having contracted to buy machinery from defendant, brought this action alleging (a) conspiracy of defendant with the sellers, and (b) fraud of defendant in representing that he had funds and organizational capacity to perform, that the engines were new, that the price was below market rates, etc. On deposition, defendant refused to answer many questions concerning the identities of persons who sold goods to him or from whom he intended to buy, and concerning his knowledge of engines and market values. *Held*, the questions were proper. Defendant's knowledge of engines and market values was relevant on the issue whether his representations were made without belief or reasonable grounds for belief in their truth. And the sources of goods and identities of the sellers were relevant on the issue whether defendant had an anticipated source of supply or made the promise without intention to perform.

In *Estate of Zalud* (1972) 27 C.A.3d 945, 104 C.R. 329, decedent, an elderly woman, left nearly all of her large estate to W, who was unrelated to her. The purported will was witnessed by W's brother and nephew, was completed some 4 months before her death, and decisively changed the beneficiaries named in her earlier will and codicil. The contestants claimed lack of execution and improper attestation. W testified that he had not discussed preparation of the will with decedent and that, when she handed the will to him, he did not know who had prepared it, where the printed form had been obtained, or whose typewriter had been used to type the provisions. Over objection, the contestants introduced evidence that two other deceased women had executed wills in which W was the principal beneficiary under one and his brother was the principal beneficiary under the other. The contestants also introduced decedent's prior wills. The judge found that decedent had not signed the disputed will. *Held*, affirmed.

(a) Admission of the unrelated wills was not error. They were similar in form to the disputed will, and the similarities, together with evidence that one will had been typed on W's typewriter, tended to impeach W's testimony that he did not know how the disputed will was prepared and lent support to the inference that he had that knowledge. "Irrespective of whether Joe Witt had committed any wrong insofar as either the Wells will or the Sammons will was concerned, his connection with each will supported the inference that he had knowledge of the availability of the Wolcott forms which could readily be used in the preparation of a will without recourse to the services of a lawyer. It was an unusual circumstance that in three instances he would have some relationship to a will which was prepared on such a form, the named testator in each instance not being related to the principal beneficiary and provisions having been inserted in each form which contain striking similarities to provisions so inserted in one or both of the other will forms." (27 C.A.3d 956.)

(b) Admission of decedent's prior wills was also proper to corroborate other evidence of forgery by showing

previous dispositions of her property inconsistent with the challenged disposition. (27 C.A.3d 957.) (See *Wanland v. Los Gatos Lodge* (1991) 230 C.A.3d 1507, 1523, 281 C.R. 890 [in action for intentional interference with employment contract, trial judge properly excluded evidence that, 6 months after plaintiff's termination, plaintiff's superior traveled to Hawaii with another employee, with whom he allegedly had romantic relationship and who disliked plaintiff; excluded evidence did not support inference that defendant acted under other employee's influence in removing plaintiff]; 86 A.L.R.4th 1135 [admissibility on issue of life expectancy, in action for personal injury or death, of injured party's use of intoxicants or illegal drugs].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Kotla v. Regents of Univ. of Calif.* (2004) 115 C.A.4th 283, 295, 8 C.R.3d 898 [in wrongful termination action alleging that defendant laboratory fired plaintiff for impermissible retaliatory reasons, trial judge erred in allowing plaintiff to testify that she had once been given permission to do what, according to defendant, she was fired for; testimony was irrelevant absent evidence that supervisors who fired her were aware of permission claim and failed to investigate it or consider it before discharging her].





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## CHAPTER IV - Circumstantial Evidence

### II. RELEVANCY AND MATERIALITY

#### C. Test of Relevancy.

#### 3. Criminal Cases.

#### 1 Witkin Cal. Evid. Circum Evid § 28

#### [§ 28] Criminal Cases.

(1) *Homicide*. In *People v. Reilly* (1970) 3 C.3d 421, 90 C.R. 417, 475 P.2d 649, the victim was last seen alive as she left her home soon after the second beating that defendant had given her that day. The next morning she was found lying in bed in her home, dead of multiple injuries. In the time between the victim's having left her home and the discovery of her body, defendant, a frequent visitor, had been seen sitting in her kitchen and sobbing. *Held*, conviction of manslaughter affirmed. Although the trial judge might have inferred that defendant's emotional state was due to his son's death in Vietnam, the evidence established defendant's propensity to beat the victim. "Twice within 24 hours of her death he committed a brutal assault upon her with his fists or hands, and from the recited evidence it may be inferred that during the fatal assault she was severely beaten, as well as being lacerated with a pointed instrument. Added to the foregoing is the inference which the trier of fact could consider from the evidence of defendant sitting by himself sobbing on the night of the homicide in the immediate vicinity of the place where the body was found the next morning." (3 C.3d 425.)

In *People v. Hamilton* (1985) 41 C.3d 408, 221 C.R. 902, 710 P.2d 981, defendant was charged with murdering a woman whose body was found bound and missing its head and hands. The prosecution's theory was that defendant had been surprised by the victim while he was breaking into her van, and he then murdered her because of his deathly fear of prison. The prosecution was permitted to introduce evidence that approximately a week later, after threatening a girlfriend to whom he had told incriminating facts, defendant purchased a pruning saw, a butcher knife, and two shanks of twine. *Held*, the evidence was admissible both to show defendant's consciousness of guilt and his identity as the murderer. (41 C.3d 429.)

In *People v. Thurmond* (1985) 175 C.A.3d 865, 221 C.R. 292, the prosecution's theory was that defendant shot his lover during an angry dispute over whether the victim would return to her husband. Defendant claimed that he had his gun out to defend himself from an unknown intruder, possibly the victim's husband; and, after the victim entered the room, the gun went off by accident. In response to questions as to why he thought the intruder was the victim's husband and his attitude toward the husband, defendant sought to testify that the victim's husband had threatened and "roughed around" the victim, but prosecution objections were sustained. Defendant was convicted of attempted murder. *Held*, reversed.

To succeed with his defense of accident or misfortune, defendant was required by P.C. 26(five) to establish the absence of evil design, intention, and culpable negligence. This required that defendant explain to the jury why he thought the husband would come to his house and why he needed to be ready to use deadly force in self-defense. The excluded testimony would have lent credibility to defendant's asserted state of mind, hence, was *relevant*, competent

evidence not precluded by the hearsay rule. (175 C.A.3d 871.)

In *People v. Anderson* (1990) 52 C.3d 453, 276 C.R. 356, 801 P.2d 1107, defendant's death sentence was reversed and the special circumstance was set aside for failure to instruct that intent to kill was an element of the special circumstance. He was then retried on the special circumstance issues and the penalty phase of his murder and robbery prosecution, and the prosecution presented evidence that, after killing the victim, defendant remained in her house and cooked and ate a bowl of noodles. The prosecution later called additional witnesses during the penalty phase to confirm the incident. *Held*, this evidence was properly admitted.

(a) "[T]hat defendant had the presence of mind to calmly cook and eat noodles after killing Mrs. Lyman indicated a lack of concern and remorse usually associated with an accidental or unintentional killing, and accordingly bore on the disputed issue of defendant's intent to kill." (52 C.3d 471.)

(b) "As for calling additional penalty phase witnesses to prove the point, the People reasonably deemed it appropriate to call these witnesses after defendant took the stand and recanted his recorded statement and denied cooking or eating the noodles." (52 C.3d 471.) (See *People v. Romero* (1999) 69 C.A.4th 846, 854, 81 C.R.2d 823 [sociologist's testimony about role of "honor" in Hispanic culture was irrelevant to murder defendant's claim of self-defense, as it shed no light on whether defendant was in actual fear of death or great bodily harm or whether his fear was objectively reasonable].)

(2) *Other Offenses*. In *People v. Graves* (1934) 137 C.A. 1, 11, 29 P.2d 807, 30 P.2d 508, a prosecution of defendant county official for taking a bribe from building contractors, evidence was offered that on a certain day the contractors withdrew \$ 80,000 in currency from a bank. *Held*, this was admissible when considered in connection with other evidence, e.g., that defendant on the same day made a secret trip to the same city under an assumed name and obtained a similar sum of money.

In *People v. Wissenfeld* (1951) 36 C.2d 758, 227 P.2d 833, defendant L testified that he alone stole a car and violated the Gun Law by obliterating serial numbers on a gun. It was nevertheless held that the evidence sustained the conviction of defendant W as well. The circumstantial evidence included the following: (a) *On theft of the car*: W's driving of the stolen car when apprehended; his false and equivocal statements when queried on ownership; the presence of the codefendant who claimed to be the thief and was an admitted associate in bookmaking; defendant's need for a car in gambling collections but not one in his own name (motive for theft); defendant's exercise of dominion over the car. (36 C.2d 763.) (b) *On violation of the Gun Law by tampering with identification marks*: Defendant's possession of the stolen car and guns in the glove compartment (inference that possessor of guns committed crime of tampering); defendant's need for the guns in his criminal activity. (36 C.2d 764.)

In *People v. Torres* (1964) 61 C.2d 264, 37 C.R. 889, 391 P.2d 161, defendant was charged with a sale of narcotics on January 25 at 8 p.m., 15 months before his arrest. His only real defense was the alibi that he and his wife on that evening had seen a certain motion picture at a particular theatre. To corroborate the testimony of his wife, sister, and mother on this issue, he called a meteorologist who testified that it rained on that day. But the judge refused to allow him to testify that it did not rain on any other day while that picture was showing. *Held*, this was reversible error. A fact, though collateral to the main issue, is relevant if it tends to make the essential facts in issue more certain. Here, proof that there was only one rainy evening while the picture was showing would connect up defendant's activities with a collateral matter which would normally be remembered, and the date of which could be established by incontrovertible scientific testimony. (61 C.2d 266.)

In *People v. Peters* (1972) 23 C.A.3d 522, 101 C.R. 403, defendant was charged with pilferages from only one department store, but evidence was admitted to show shortages in other stores of the same chain. *Held*, this was proper. Although the absence of direct evidence that there were shortages in the store from which defendant was charged with stealing merchandise would seemingly render the other evidence irrelevant, the testimony was admissible. The merchandise found in defendant's apartment came from the chain for which defendant worked, the serial numbers

matched those on missing merchandise, and these facts tended to prove the disputed fact. (23 C.A.2d 534.)

In *People v. Heller* (1979) 96 C.A.3d Supp. 1, 157 C.R. 830, defendant was charged with possession of an allegedly obscene film ("Swedish Erotica No. 17") dealing with abnormal sexual acts. His counsel offered to prove that similar films ("Deep Throat," "Devil in Miss Jones," and "Behind the Green Door") had been playing in the community for years to millions of adult viewers. *Held*, it was error to exclude the evidence. It was relevant on the issue of what was acceptable under contemporary community standards--the test of obscenity (see 7 Summary (9th), *Constitutional Law*, §§312, 313). (96 C.A.3d Supp. 6.)

In *People v. Harlan* (1990) 222 C.A.3d 439, 271 C.R. 653, after the 4-year-old victim of a sex crime testified that defendant was wearing women's underwear during commission of the crime, the trial judge admitted other evidence establishing that the defendant often wore women's underwear. *Held*, this was proper. Because the central issue was the victim's credibility, his ability to recall and describe the circumstances of the crime, including the clothing the defendant wore, was highly relevant. And the evidence did not involve such undue prejudice that it had to be excluded under *Ev.C.* 352 (supra, §17). (222 C.A.3d 446.)

In *People v. Alvarez* (1996) 49 C.A.4th 679, 56 C.R.2d 814, defendant confessed to having committed various drug offenses and later recanted. At trial, he sought to introduce evidence as to his potential punishment in order to explain his reasons for recanting. *Held*, the trial judge properly excluded this evidence. Evidence as to punishment is generally irrelevant to the question of guilt. The relevant question was why, if he was innocent, did he confess, and he was allowed to explain that he had done so to protect his wife. (49 C.A.4th 687, 688.)

(3) *Distinction: Profile Evidence.* In *People v. Derello* (1989) 211 C.A.3d 414, 259 C.R. 265, a prosecution for transporting cocaine, the trial judge admitted evidence of "the drug trafficker profile." In holding this error (though not prejudicial), the court said: "[I]t is clear that characteristics of the drug courier profile which are evidence of ongoing criminal activity may be introduced at trial to prove the elements of the crime charged. In the case at bench evidence of such activity could be found in the use of aliases, tagging of the luggage with the aliases, as well as the peculiar manner of these defendants' moving through the concourse. These characteristics were admissible because of their tendency to prove the material facts of knowledge and intent." However, "evidence of the amount of gold jewelry worn by Derello, of the amount of cash defendants carried, of the youth and casual dress of defendants, and of their rental of an expensive car had no tendency in reason to prove any issue in the trial. ... Moreover, there is no justification for admitting testimony concerning the existence and nature of the drug trafficker profile itself. Such evidence has absolutely no relevancy to the elements of the crime and might be perceived by the jury to be evidence of the character of defendants as drug couriers." (211 C.A.3d 426.) (See *People v. Castaneda* (1997) 55 C.A.4th 1067, 1071, 1072, 64 C.R.2d 395 [in prosecution for possession of heroin, admission of expert testimony regarding heroin dealer profile was error; evidence was inherently prejudicial, because profile fit defendant perfectly and defendant was not even charged with dealing; citing *Derello*].)

The *Derello* case was distinguished in *People v. Singh* (1995) 37 C.A.4th 1343, 44 C.R.2d 644, a prosecution arising from the fraudulent staging of automobile accidents. The trial judge admitted the opinions of two police officers that, based on circumstantial evidence presented by the prosecution, the collisions were staged. *Held*, this was proper; the opinions were not inadmissible profile evidence. The only element at issue in *Derello* ... was defendant's knowledge of the illegal nature of the substance transported. "Such is not the case here. Singh's posture at trial was that the collisions were not staged. Short of an admission from him or an accomplice, the prosecution was left to circumstantial evidence. The experts testified in order to explain the relationship between the various pieces of evidence, e.g., the extent of damage, type and extent of injuries, number of passengers in the car, use of a common caregiver or attorney, etc. ... These opinions were relevant because Singh was charged with ... a sophisticated course of conduct." (37 C.A.4th 1379, 1380.) (On admissibility of profile testimony as "other crimes" evidence, see *infra*, §83.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Homicide.* See *People v. Ortiz* (2003) 109 C.A.4th 104, 116, 134 C.R.2d 467 [in murder prosecution arising from

vehicular collision, evidence of past incidents of defendant's drunk driving was relevant to determination whether defendant had wanton disregard for human life, which was necessary for finding of implied malice, even though parties stipulated prior to trial that intoxication was not involved in present offense].(2) *Other Offenses. Test of obscenity:*

*Cross-Reference:* 7 *Summary* (10th), *Constitutional Law*, §§437, 438.(3) *Distinction: Profile Evidence.* See *People v. Robbie* (2001) 92 C.A.4th 1075, 1084, 112 C.R.2d 479 [in prosecution for kidnaping and sexual offenses, law enforcement officer's testimony as to behavior of persons who commit sexual assaults constituted inadmissible profile evidence; testimony, which was given in response to prosecutor's hypotheticals that incorporated victim's description of defendant's conduct, helped guide jury to conclusion that defendant was guilty because he fit profile]; cf. *People v. Prince* (2007) 40 C.4th 1179, 1226, 57 C.R.3d 543, 156 P.3d 1015 [in murder prosecution, opinion testimony of FBI agent that, based on his experience and common marks among six charged homicides, all six were committed by same person, was not profile evidence of type improperly admitted in *Robbie*; agent did not evaluate defendant's behavior against pattern or profile, and did not refer to defendant at all].



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## CHAPTER IV - Circumstantial Evidence

### II. RELEVANCY AND MATERIALITY

#### C. Test of Relevancy.

#### 4. Negative Evidence.

#### 1 Witkin Cal. Evid. Circum Evid § 29

[§ 29] Negative Evidence.

Testimony that the witness did not see or hear something is often admitted to show that the thing did not happen. Thus, testimony in an accident case, by witnesses in a position to hear and see, that they did not hear any warning bell or whistle, or observe any other signal given, is admissible and may support a verdict though there is direct testimony to the contrary. (*Jones v. Southern Pac. Co.* (1925) 74 C.A. 10, 26, 239 P. 429; *People v. McWilliams* (1931) 117 C.A. 732, 735, 4 P.2d 601; *Ostertag v. Bethlehem Shipbuilding Corp.* (1944) 65 C.A.2d 795, 800, 151 P.2d 647; *Quiroga v. Southern Pac. Co.* (1955) 130 C.A.2d 93, 99, 278 P.2d 80; *Beauchamp v. Los Gatos Golf Course* (1969) 273 C.A.2d 20, 36, 77 C.R. 914 [discussion and review of cases]; *Riddick v. Jim Hay Co.* (1975) 45 C.A.3d 464, 472, 119 C.R. 546, quoting the text [statement of truck driver that he looked and did not see lights on car in which plaintiff was passenger was "negative evidence," but admissible to show that vehicle did not have headlights on]; see 1958 A.S. 649 [proof that liquor buyers on defendant's books were fictitious, by checking local sources without locating such persons]; on negative evidence of character, see *infra*, §44; on absence of business entry, see 1 *Cal. Evidence* (4th), *Hearsay*, §234; on absence of official record, see 1 *Cal. Evidence* (4th), *Hearsay*, §254.)

In *Hamilton v. Pacific Elec. Ry. Co.* (1939) 12 C.2d 598, 603, 86 P.2d 829, an action for injuries received when plaintiff slipped on oil in a waiting room, the issue was whether defendant failed to make reasonable inspection. Plaintiff was allowed to testify that she sat in a waiting room 20-30 minutes, and saw no one enter, prior to the accident.

*Hinton v. California* (1954) 124 C.A.2d 622, 269 P.2d 154, quotes from Wigmore as follows: "Courts have often been asked to exclude testimony based on what may be called *negative knowledge*, i.e., testimony that a fact did not occur, founded on the witness' failure to hear or see a fact which he would supposedly have heard or seen if it had occurred. Yet there is no inherent weakness in this kind of knowledge. It rests on the same data of the senses. It may even sometimes be stronger than affirmative impressions. The only requirement is that the witness should have been so situated that *in the ordinary course of events he would have heard or seen the fact had it occurred*. This sort of testimony is constantly received--particularly in proof of the failure to give railroad signals, the loss of a chattel, the absence of a witness, the non-existence of a fictitious person, the non-payment of money, and other negative facts." (124 C.A.2d 625.) (See 2 Wigmore (Chadbourn Rev.), §664.)

In the *Hinton* case, *supra*, plaintiff, a pedestrian, was struck by a car while crossing a state highway. The automatic signal allowed only 10 seconds, insufficient for crossing. A pushbutton was available for a pedestrian to signal and get 24 seconds, enough for crossing, and a sign was placed there, explaining the use of the button. Plaintiff's evidence was that the sign had not been inspected for at least 7 days, that similar signs were frequently removed by children, that it was not there 4 days after the accident, and that plaintiff looked at the pole twice on the evening of the accident but did

not see it. *Held*, this negative evidence was sufficient to show that the sign was missing, and to sustain a verdict for plaintiff.

However, the evidence may sometimes be of such slight probative value that its exclusion by the trial judge will be upheld, either as a proper exercise of discretion, or as nonprejudicial error. Thus, in *People v. Mehafeey* (1948) 32 C.2d 535, 555, 197 P.2d 12, the prosecution, in a murder case, showed that the decomposed body of the deceased was found concealed 40 feet from an isolated country road. Defendant offered testimony that persons living in the vicinity and passing along the highway had not seen or smelled the body. *Held*, exclusion of this testimony was not prejudicial error; the circumstances were not such as to have caught the attention of anyone.

**SUPPLEMENT:** [This section is current through the latest supplement]

*West's Key Number Digest*, Evidence k.147



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## CHAPTER IV - Circumstantial Evidence

### II. RELEVANCY AND MATERIALITY

#### D. Limited Admissibility.

##### 1. In General.

##### a. Nature of Doctrine.

*1 Witkin Cal. Evid. Circum Evid § 30*

[§ 30] Nature of Doctrine.

Some evidence may be relevant for one purpose and inadmissible for another purpose, either because it is irrelevant or because some rule excludes it for that other purpose. It may be admitted, but only for the proper purpose, and under instructions of the court so limiting it. (See *Adkins v. Brett* (1920) 184 C. 252, 256, 193 P. 251; *Wagner v. Atchison, Topeka & Santa Fe Ry. Co.* (1930) 210 C. 526, 531, 292 P. 645; *Daggett v. Atchison, Topeka & Santa Fe Ry. Co.* (1957) 48 C.2d 655, 665, 313 P.2d 557; *Behr v. Santa Cruz* (1959) 172 C.A.2d 697, 704, 342 P.2d 987; *People v. Sweeney* (1960) 55 C.2d 27, 42, 9 C.R. 793, 357 P.2d 1049, *infra*, §35; *People v. Burton* (1961) 55 C.2d 328, 348, 11 C.R. 65, 359 P.2d 433; *Mecchi v. Picchi* (1966) 245 C.A.2d 470, 479, 54 C.R. 1, 1 Cal. Evidence (4th), Hearsay, §184, citing the text; *People v. Reyes* (1976) 62 C.A.3d 53, 61, 62, 132 C.R. 848; *People v. Miranda* (1987) 44 C.3d 57, 83, 241 C.R. 594, 744 P.2d 1127, citing the text; *Continental Airlines v. McDonnell Douglas Corp.* (1989) 216 C.A.3d 388, 412, 264 C.R. 779; 1 McCormick 5th, §59; 1 Wigmore (Tillers Rev.) §13; 1 Jefferson, California Evidence Benchbook 3d, §20.11 et seq.; 3 Cal. Evidence (4th), *Presentation at Trial*, §382; on limiting instructions, see BAJI (8th ed.), No. 2.05.)

The same is true in actions involving several parties, where certain evidence is admissible against one party and not against another. (See *Williams v. E. W. Robinson Van Lines* (1955) 46 C.2d 14, 16, 291 P.2d 453; *Stathos v. Lemich* (1963) 213 C.A.2d 52, 57, 28 C.R. 462.)

*Ev.C.* 355, based on Unif. Rules, Rule 105 (formerly Rule 106), codifies this doctrine: "When evidence is admissible as to *one party* or for *one purpose* and is inadmissible as to another party or for another purpose, the court upon request shall restrict the evidence to its *proper scope* and instruct the jury accordingly."

*F.R. Evid.*, Rule 105 is almost identical. (See 1 Mueller & Kirkpatrick, Federal Evidence 2d, §38 et seq.; 29 *Am.Jur.2d* (1994 ed.), Evidence §322.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See CACI, No. 206 [evidence admitted for limited purpose], CACI, No. 207 [evidence applicable to only one party]; CALCRIM, No. 303 [Limited Purpose Evidence in General]; CALCRIM, No. 304 [Multiple Defendants: Limited Admissibility of Evidence]; CALCRIM, No. 305 [Multiple Defendants: Limited Admissibility of Defendant's Statement]; 1 McCormick 6th, §59. *West's Key Number Digest*, Evidence k.114



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## CHAPTER IV - Circumstantial Evidence

### II. RELEVANCY AND MATERIALITY

#### D. Limited Admissibility.

##### 1. In General.

##### b. Procedural Rules.

*1 Witkin Cal. Evid. Circum Evid § 31*

[§ 31] Procedural Rules.

Several procedural rules have been developed in implementation of the doctrine of limited admissibility:

(1) *Statement of Proper Purpose for Admission*. The party offering the evidence must *state the proper purpose*. If the only theory expressed in offering it is an improper one, the judge may exclude the evidence. (See *Estate of Parkinson* (1923) 190 C. 475, 476, 213 P. 259; *Estate of Smead* (1933) 219 C. 572, 576, 28 P.2d 348; *Larson v. Solbakken* (1963) 221 C.A.2d 410, 422, 34 C.R. 450, *infra*, §109, citing the text; *Warner Const. Corp. v. Los Angeles* (1970) 2 C.3d 285, 298, footnotes 14, 15, 85 C.R. 444, 466 P.2d 996, citing the text [for evidence generally admissible, the theory under which it is admitted is immaterial, but when evidence should be admitted only for a limited purpose, "the theory of admission is crucial"].)

(2) *Request for Limiting Instruction*. The adverse party must act affirmatively to limit the effect of the evidence by *requesting the limiting instruction*; in the absence of a request, there is no reversible error in the unlimited admission. (See *Hatfield v. Levy Bros.* (1941) 18 C.2d 798, 810, 117 P.2d 841; *People v. Hawkins* (1960) 177 C.A.2d 714, 719, 2 C.R. 524, 1 Cal. Evidence (4th), Hearsay, §218; *Wicktor v. Los Angeles* (1960) 177 C.A.2d 390, 405, 2 C.R. 352; *Foreman & Clark Corp. v. Fallon* (1971) 3 C.3d 875, 887, 92 C.R. 162, 479 P.2d 362, *infra*, §32, citing the text; *People v. Kendrick* (1989) 211 C.A.3d 1273, 1278, 260 C.R. 27 [no sua sponte duty to instruct that prior conviction was admitted only for impeachment]; 3 Cal. Evidence (4th), *Presentation at Trial*, §382.)

This requirement may be excused where the request would be futile. In *Warner Const. Corp. v. Los Angeles*, *supra*, plaintiff introduced exhibits relating to settlement negotiations. Defendant unsuccessfully objected to their admissibility, but failed to request a limiting instruction. *Held*, defendant did not waive its objection.

(a) Defendant's opportunity to seek a limiting instruction was an insufficient remedy. "The evidence was offered generally; when defendant objected, plaintiff's counsel defended the offer primarily on the ground that the correspondence showed the actions of the parties under the contract. The trial court admitted the evidence without any hint of limited purpose, and to all appearances the trial judge had rejected defendant's contention that the correspondence constituted negotiations of compromise under section 1152. Under these circumstances defense counsel cannot be expected to speculate upon the possibility that the court received the evidence for some *undisclosed and limited purpose* other than that suggested by its proponent, or to prepare instructions based on any such speculation." (2 C.3d 298.)



(b) By the time the jury instructions were submitted, much trial testimony had been devoted to a discussion of the meaning and import of the disputed exhibits. "At this point a request for a *limiting instruction* would have been *doubly futile*; not only had the court apparently rejected the contention of the defense that the letters were offers of compromise under section 1152, but so much testimony had pertained to the letters that the jury could not reasonably be expected to follow any such instruction." (2 C.3d 299.)

(3) *Timing of Instruction.* An appropriate limiting instruction is required if properly requested. "However, ... the trial court is not obliged to give limiting instructions the moment they are requested or when the limited evidence is presented; subsequent instructions can be sufficient in a proper case." (*People v. Dennis* (1998) 17 C.4th 468, 533, 534, 71 C.R.2d 680, 950 P.2d 1035 [trial judge did not err in waiting until end of trial to give instruction that statements defendant made to medical expert in course of examination could only be used to show information on which expert based his opinion].)

(4) *Exclusion Where Prejudice Is Unavoidable.* Ev.C. 355 is subject to the broader discretionary rule of Ev.C. 352 (supra, §17); i.e., if the improper purpose is so prejudicial that the limiting instruction would be an inadequate protection for the adverse party, and the fact can be established by other evidence without the harmful effect, the judge can exclude the evidence offered. (See Law Rev. Com. Comment to Ev.C. 355; 1 Cal. Evidence (4th), Hearsay, §59 [confession of codefendant].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Request for Limiting Instruction.* See *People v. Hernandez* (2004) 33 C.4th 1040, 1051, 16 C.R.3d 880, 94 P.3d 1080 [trial judge had no sua sponte duty to give limiting instruction relating to evidence supporting criminal street gang enhancement]; *People v. Griggs* (2003) 110 C.A.4th 1137, 1139, 2 C.R.3d 380 [in prosecution for being felon in possession of firearm, trial judge had no sua sponte duty to instruct on limited purposes for which defendant's stipulation to prior felony convictions could be used].



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#### CHAPTER IV - Circumstantial Evidence

#### II. RELEVANCY AND MATERIALITY

##### D. Limited Admissibility.

##### 1. In General.

##### c. Doctrine in Bifurcated Trial.

##### *1 Witkin Cal. Evid. Circum Evid § 32*

##### [§ 32] Doctrine in Bifurcated Trial.

In *Foreman & Clark Corp. v. Fallon* (1971) 3 C.3d 875, 92 C.R. 162, 479 P.2d 362, the litigation was based on cross-claims between plaintiff lessee, who was suing for damages for nondelivery of the premises, and defendant landlords, who sought rescission and damages for plaintiff's alleged misrepresentations. By agreement between counsel and the trial judge, the trial was divided into four phases: defendants' liability, plaintiff's liability, the judge's opinion based on the two preceding stages, and damages. During the first phase, plaintiff introduced his written lease with defendant, apparently to establish its existence and the claimed breach. In the second phase, defendant introduced evidence of prior leases of the same premises to show the allegedly fraudulent conduct of plaintiff and his agent. In the last phase, the judge considered the prior leases and the agreed rent as factors in awarding plaintiff general damages of \$ 25,000 (the difference between the agreed rent and the rental value for the lease term). Appealing on the ground of inadequacy of damages, plaintiff argued that the judge should not have considered those factors because the evidence was introduced for a different purpose at a different stage of the trial. *Held*, judgment affirmed.

(a) Plaintiff contended, in effect, that each stage was an evidentiary compartment hermetically sealed off from the other stages because the usefulness of a bifurcated trial would be destroyed if evidence were considered at different stages on different issues. Plaintiff further argued that the divided trial could be a trap for unsuspecting counsel, who might neglect to request a limitation on admissibility to the sole issue being tried during the particular phase; hence, in the absence of an explicit agreement to the contrary, evidence in a bifurcated trial should be considered only on the issue presented at the stage in progress. This approach is unsupported by any authority and is directly contrary to the rule that the court may consider evidence for *any relevant and competent purpose* unless there is an *express agreement* between the trial judge and counsel limiting it to a particular matter. (*Ev.C.* 355.) (3 C.3d 887, citing the text.)

(b) "The major objective of bifurcated trials is to expedite and simplify the presentation of evidence. Yet this objective would be thwarted by the limitation of the scope of evidence introduced at one stage of a bifurcated trial to the issue presented at that stage. To assure that the trier of fact could consider all the evidence on each issue, the parties would be required to reintroduce every piece of evidence at each stage of the trial. Thus, in the present case, plaintiff had to show the difference between the agreed rent and the rental value of the premises to establish damages. If plaintiff's theory were applied, plaintiff would have been required to reintroduce the lease in evidence during the damages stage of the trial to show the agreed rent. The prior admission of the lease during the first stage of the trial would not suffice. Such duplication of effort is the very opposite of the purpose of bifurcated trials." (3 C.3d 888.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### CHAPTER IV - Circumstantial Evidence

#### II. RELEVANCY AND MATERIALITY

##### D. Limited Admissibility.

##### 1. In General.

##### d. Deletion of Inadmissible Matter.

*1 Witkin Cal. Evid. Circum Evid § 33*

[§ 33] Deletion of Inadmissible Matter.

The theory that an instruction will protect against improper consideration of the inadmissible part has been questioned, and in a few situations a different method of handling the problem has been prescribed: deletion of the inadmissible matter where this is feasible.

The principal illustration is the redaction of portions of a codefendant's confession (see *1 Cal. Evidence (4th)*, *Hearsay*, §59), but the procedure is used in other contexts as well. In *People v. Crosslin* (1967) 251 C.A.2d 968, 60 C.R. 309, a prosecution for armed robbery and felonious assault, defendant's fingerprint card, taken on his arrest, was introduced as an exhibit for comparison with fingerprints found on a beer can left by the victim's assailant. The card contained, on its back, a space for statistics concerning the person; and on the first line there appeared the date of taking the prints and a notation referring to various charges pending against defendant: "Charge 211 PC 11530 H&S 12951-21650 CVC." These other offenses were clearly inadmissible, and the prosecution offered to scratch out the entry, but defendant rejected the offer because it would call the jury's attention to something they were not to see. *Held*, there was no error in admitting the exhibit; either obliterating or covering the objectionable part, as the prosecution offered to do, was a sufficient protection. (251 C.A.2d 979.) (See *People v. Fairchild* (1967) 254 C.A.2d 831, 839, 62 C.R. 535 [police photograph with police record on the back, used by victim to identify defendant; judge blocked out objectionable matter]; *People v. Washington* (1969) 71 C.2d 1061, 1081, 1082, 80 C.R. 567, 458 P.2d 479 [trial judge did not abuse discretion in admitting medical testimony tending to show that defendant was once in prison; but when possible, judge "should give serious consideration to ordering the severance of portions of testimony so as to protect the rights of the defendant without totally destroying the value of the witness' testimony"]; *People v. Coleman* (1985) 38 C.3d 69, 92, 93, 211 C.R. 102, 695 P.2d 189, 1 Cal. Evidence (4th), *Hearsay*, §211.)

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#### CHAPTER IV - Circumstantial Evidence

#### II. RELEVANCY AND MATERIALITY

##### D. Limited Admissibility.

##### 2. Illustrations.

##### a. Civil Cases.

##### 1 *Witkin Cal. Evid. Circum Evid* § 34

[§ 34] Civil Cases.

(1) *Personal Injury Action: Prior Accidents.* In *Brown v. Affonso* (1960) 185 C.A.2d 235, 239, 8 C.R. 156, plaintiff sued for damages for head injuries received in 1957. Defendant, cross-examining her doctor, asked about his reports and testimony relating to prior accidents in 1954 and 1956, seeking to show that the injuries claimed in the present case were identical with those claimed in the previous cases. *Held*, the questions were proper. Although ordinarily evidence of prior litigation is objectionable as involving undue prejudice and confusion of issues, it was relevant for the limited purpose.

In a negligence action, evidence of other accidents of the driver of an automobile is excluded because its probative value is outweighed by the likelihood that the jury would improperly infer negligence from a trait of character (see *Ev.C. 1104*; *infra*, §39). But where the action is also against another defendant for negligent entrustment of the car to an incompetent driver, the prior accidents are admissible on the issue of that defendant's knowledge of the driver's unfitness. (*Allen v. Toledo* (1980) 109 C.A.3d 415, 419, 167 C.R. 270.)

(2) *Personal Injury Action: Plaintiff's Misconduct.* In *McGee v. Cessna Aircraft Co.* (1983) 139 C.A.3d 179, 185, 188 C.R. 542, the action was against an airplane manufacturer for injuries suffered in an airplane crash. On the strict liability cause of action, evidence of personal misconduct of the plaintiff was prejudicial and excludable, but on the negligence cause of action, it was probative and admissible.

(3) *Party's Poverty or Wealth.* *Poverty* of an injured plaintiff is ordinarily irrelevant and its suggestion is highly prejudicial (*infra*, §138), but relevant evidence of the nature of the plaintiff's work is admissible despite the incidental disclosure of low wages and straitened circumstances. (*Hughes v. Quackenbush* (1934) 1 C.A.2d 349, 358, 37 P.2d 99.) Similarly, *wealth* of the defendant cannot be shown in an action for damages for personal injuries; but where plaintiff sued a pharmaceutical company alleging overpromotion of a drug, proof of large sales volume was relevant to show motive, and was admissible with a limiting instruction. (*Love v. Wolf* (1964) 226 C.A.2d 378, 389, 38 C.R. 183, citing the text; see *infra*, §139.)

(4) *Impeachment.* The limited admissibility rule is frequently applied in cross-examination. Questions may be asked that incidentally bring out inadmissible matter, if they are offered in good faith for a legitimate purpose such as testing the recollection or accuracy of observation of the witness. Thus, evidence of precautions taken after an accident, though inadmissible to prove negligence (*infra*, §163), may be brought in to impeach testimony of a witness who says that he saw nothing wrong with the condition before the accident. (See *Wagner v. Atchison, Topeka & Santa Fe Ry. Co.* (1930)

210 C. 526, 531, 292 P. 645; *Hatfield v. Levy Bros.* (1941) 18 C.2d 798, 810, 117 P.2d 841; 3 Cal. Evidence (4th), *Presentation at Trial*, §239.)

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## II. RELEVANCY AND MATERIALITY

## D. Limited Admissibility.

## 2. Illustrations.

## b. Criminal Cases.

1 *Witkin Cal. Evid. Circum Evid* § 35

## [§ 35] Criminal Cases.

The limited admissibility doctrine has frequent application in the criminal context. In addition to the cases discussed below, see *People v. Gilliland* (1940) 39 C.A.2d 250, 255, 103 P.2d 179 [evidence was competent against one defendant but hearsay as to another, who was entitled to limiting instruction]; *People v. Miranda* (1987) 44 C.3d 57, 82, 83, 241 C.R. 594, 744 P.2d 1127, citing the text [in murder trial, failure to give requested limiting instruction after admitting evidence of incident (a robbery threat) preceding charged crimes constituted error, although harmless, where evidence was relevant to codefendant's state of mind and degree of participation but was cumulative on issue of defendant's identity and state of mind]; *People v. Olguin* (1994) 31 C.A.4th 1355, 1368, 37 C.R.2d 596 [evidence of threats against prosecution witness was properly admitted for limited purpose of establishing witness' state of mind, attitude, actions, bias, prejudice, or lack of prejudice].

(1) *Reference to Defendant's Parole Officer.* In *People v. Gilkey* (1970) 6 C.A.3d 183, 191, 85 C.R. 642, a key prosecution witness stated that he was a parole agent. Defense counsel demanded a mistrial on the ground that the jury was thus improperly informed that defendant had previously been convicted of a felony. *Held*, no error. Gratuitous reference to a defendant's parole officer would have been improper, but evidence from this witness was necessary to show defendant's use of a garage where stolen merchandise was found. "Since it was legitimate to use the officer's testimony, it was equally proper to identify him. The jury was entitled to know who he was and what office he held in judging his credibility." (6 C.A.3d 192.)

(2) *Reference to Civil Injunction Against Defendants.* In *People v. Lynam* (1968) 261 C.A.2d 490, 68 C.R. 202, defendants were charged with grand theft and conspiracy to commit grand theft by selling trust indentures ("pure trusts") to the public on false representations that they would avoid estate and inheritance taxes. Because knowledge of falsity and intent to defraud were essential elements of the offense, and innocent or inadvertent statements would not be punishable, the prosecution offered in evidence an injunction issued against defendants in a civil suit by the Attorney General, restraining them from making these false representations. *Held*, this evidence was properly received. (261 C.A.2d 497.)

(3) *Impeachment.* In *People v. Sweeney* (1960) 55 C.2d 27, 9 C.R. 793, 357 P.2d 1049, a prosecution for giving a narcotic to a hospital patient, the patient testified for defendant. She was then impeached for bias and interest by evidence that she lived with defendant at his expense as a common law wife (see 3 *Cal. Evidence* (4th), *Presentation at Trial*, §344). *Held*, this was proper despite the disclosure of the degrading conduct of defendant. "Here it is clear that the point to prove which this evidence was competent could not just as well, or at all, have been proved by other evidence,

nor can it be said that this evidence was of slight weight or importance upon the question of the witness' interest and bias. There is nothing in the record to support a conclusion that the real object for which the evidence was introduced was not to establish probable interest and bias or to get evidence before the jury for the purpose for which it was not competent. The prosecution did not introduce repeated declarations, but only the evidence of one conversation and the birth certificates, which were all reasonably necessary to establish the facts relied upon by the prosecution to prove interest and bias." (55 C.2d 43.)

In *People v. Mattison* (1971) 4 C.3d 177, 187, 93 C.R. 185, 481 P.2d 193, defendant was charged with murdering a fellow prisoner by means of poison. Prior to trial two inmates had given statements about certain remarks allegedly made by defendant but at the trial both inmates testified they did not remember their statements. To establish that the memory loss was feigned, the prosecution introduced a newspaper article which stated that defendant was charged with furnishing methyl alcohol to the victim and that prisoners would be the key prosecution witnesses. Because the article had been posted on the prison bulletin board, the prosecution sought to show that the witnesses were intimidated by the possibility of retaliation from other inmates. *Held*, the article was admissible for the limited purpose. "The record reflects that the article did not contain any prejudicial or inflammatory statements. Moreover, the jury was instructed to consider only the fact that such an article was published to the extent that it impeached the testimony of the two witnesses and not for the truth of the statements contained therein." (4 C.3d 187.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Holloway* (2004) 33 C.4th 96, 132, 14 C.R.3d 212, 91 P.3d 164 [in capital murder prosecution in which evidence that female victim had had homosexual relationship was admitted in connection with pubic hair evidence and also to aid jurors in understanding defendant's recorded statements to detective and his state of mind concerning his relationship with victim at time of interview, trial judge properly gave limiting instruction to jurors to prevent misuse of evidence as reflecting negatively on victim's character]; CALJIC, No. 17.24.3 [limiting instruction where evidence of gang activity introduced].





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#### II. RELEVANCY AND MATERIALITY

##### E. Entire Act To Explain Part.

##### 1. Rule and Theory.

*1 Witkin Cal. Evid. Circum Evid § 36*

[§ 36] Rule and Theory.

"Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence." (*Ev.C.* 356.)

The obvious purpose of this statute is to avoid distortion of acts or statements that should be viewed in their proper context. (See *Ashley v. Rivera* (1934) 220 C. 75, 79, 29 P.2d 199; *Hatfield v. Levy Bros.* (1941) 18 C.2d 798, 812, 117 P.2d 841; *Hawkinson v. Oesdean* (1943) 61 C.A.2d 712, 719, 143 P.2d 967; *Leboire v. Royce* (1950) 100 C.A.2d 610, 619, 224 P.2d 106; *Conderback v. Standard Oil Co. of Calif.* (1966) 239 C.A.2d 664, 685, 48 C.R. 901, citing the text; *Sprague v. Equifax* (1985) 166 C.A.3d 1012, 1035, 1036, 213 C.R. 69; *People v. Douglas* (1991) 234 C.A.3d 273, 285, 285 C.R. 609, 1 Cal. Evidence (4th), Hearsay, §60; *People v. Zapien* (1993) 4 C.4th 929, 959, 17 C.R.2d 122, 846 P.2d 704; 7 Wigmore (Chadbourn Rev.) §2097 et seq.; 1 Jefferson, California Evidence Benchbook 3d, §20.17 et seq.) It is an exception to the rule that cross-examination is confined to the scope of the direct examination. (See 3 Cal. Evidence (4th), *Presentation at Trial*, §231.)

There is no requirement of ambiguity in the primary admission; the rule merely calls for fair play. "If a statement is admissible in evidence as an admission or declaration, it is admissible as an entirety, including parts that are unfavorable, as well as those that are favorable, to the party offering it in evidence. In the event a statement admitted in evidence constitutes part of a conversation or correspondence, the opponent is entitled to have placed in evidence all that was said or written by or to the declarant in the course of such conversation or correspondence, provided the other statements have some bearing upon, or connection with, the admission or declaration in evidence and are not excluded by a rule of law other than the hearsay rule." (*Rosenberg v. Wittenborn* (1960) 178 C.A.2d 846, 852, 3 C.R. 459 [quoting Am.Jur. and citing the text].)

In the *Rosenberg* case, a personal injury action, defendant driver had talked with a police officer. Plaintiff called the officer and elicited from him the testimony that defendant said he was going about 30 miles an hour and crossed the intersection while the light was red (thus giving the impression that he ran the red light because he was going too fast). On cross-examination, over objection, the officer was allowed to read from his police report the whole of defendant's statement: that he stepped on the brakes, realized that they were not working, kept pumping and tried to stop, and that his brake had recently been fixed and had been all right. *Held*, this was proper.

In *People v. Williams* (1975) 13 C.3d 559, 119 C.R. 210, 531 P.2d 778, defendant testified that witness T had not

witnessed the fatal stabbing and that defendant did not say otherwise to a detective at the crime scene. On rebuttal, the detective testified that defendant *had* told him T witnessed the slaying. When cross-examining the detective, defense counsel asked, "What was the whole conversation you had with Mrs. Williams?" A prosecution objection that the question called for hearsay was sustained. *Held*, this was error. (13 C.3d 565.)

*F.R. Evid., Rule 106* is narrower in scope: "When a *writing or recorded statement* or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." (See 1 Mueller & Kirkpatrick, Federal Evidence 2d, §42 et seq.; 29 Am.Jur.2d (1994 ed.), Evidence §358 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Sakarias* (2000) 22 C.4th 596, 644, 94 C.R.2d 17, 995 P.2d 152 [where defense counsel, during cross-examination, asked detective about defendant's involvement with gangs, he opened door to admission under Ev.C. 356 of defendant's statements to detective concerning his violent intentions toward three gang members, even though trial judge had previously sustained defendant's *Miranda* objection to this evidence]; *People v. Harrison* (2005) 35 C.4th 208, 238, 25 C.R.3d 224, 106 P.3d 895 [in capital murder case in which defense witness, a police sergeant, was allowed to testify as to interview with unavailable witness who identified defendant as perpetrator of both charged murders, prosecutor was properly allowed to inquire about remainder of interview, in which unavailable witness described details of killings]; *People v. Harris* (2005) 37 C.4th 310, 334, 33 C.R.3d 509, 118 P.3d 545 [in prosecution for attempted murder and capital murder, once defendant presented evidence that attempted murder victim admitted he had participated in illegal loan shark activity, prosecution was entitled to present entire context in which admission was made--telephonic interview from hospital in which victim explained he had lent money to defendant, and while he was driving defendant to and from his apartment in effort to get money owed, defendant shot him]; *People v. Guerra* (2006) 37 C.4th 1067, 1121, 40 C.R.3d 118, 129 P.3d 321 [in capital murder prosecution, trial judge did not err in excluding defendant's proffered surrebuttal evidence (in form of testimony by defendant's wife) explaining why defendant did not tell his wife about finding victim's body; defendant himself was proponent of evidence that his wife would scold him for having tried to help victim, and thus he was not adverse party entitled to inquire into whole subject under Ev.C. 356]; 27 A.L.R.6th 183 [Uniform Rules of Evidence, Rule 106, which is identical to *F.R. Evid., Rule 106*].(New) *Effect of Crawford case*: Statements otherwise made admissible by Ev.C. 356 are not generally made inadmissible by *Crawford v. Washington* (2004) 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177, 3 Cal. Evidence (4th), Presentation at Trial, Supp., §21. "This is because, like forfeiture by wrongdoing, section 356 is not an exception to the hearsay rule that purports to assess the reliability of testimony. The statute is founded on the equitable notion that a party who elects to introduce a part of a conversation is precluded from objecting on Confrontation Clause grounds to introduction by the opposing party of other parts of the conversation which are necessary to make the entirety of the conversation understood." (*People v. Parrish* (2007) 152 C.A.4th 263, 272, 273, 60 C.R.3d 868 [where defendant claimed he was no longer part of gang and introduced evidence that one of his accomplices had said people were trying to kill defendant because he was snitch, prosecution was properly allowed to introduce other parts of accomplice's statement indicating that defendant had possessed handgun].) *West's Key Number Digest*, Criminal Law k.362 et seq.; Evidence k.118 et seq.



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## II. RELEVANCY AND MATERIALITY

## E. Entire Act To Explain Part.

## 2. Limitation: Matters Related to Part.

1 *Witkin Cal. Evid. Circum Evid* § 37

[§ 37] Limitation: Matters Related to Part.

The rule is not applied mechanically to permit the whole of a transaction to come in without regard to its competency or relevancy; other exclusionary rules may bar incompetent parts, and only those relevant to and necessary for an understanding of the part admitted may be introduced. (See *Witt v. Jackson* (1961) 57 C.2d 57, 67, 17 C.R. 369, 366 P.2d 641; *Russell v. Geis* (1967) 251 C.A.2d 560, 568, 59 C.R. 569; *People v. Gambos* (1970) 5 C.A.3d 187, 192, 84 C.R. 908; *People v. Perry* (1972) 7 C.3d 756, 786, 103 C.R. 161, 499 P.2d 129, quoting the text; *People v. Williams* (1975) 13 C.3d 559, 564, 119 C.R. 210, 531 P.2d 778, quoting the text; *Benson v. Honda Motor Co.* (1994) 26 C.A.4th 1337, 1349, 1350, 32 C.R.2d 322 [product liability action; trial judge properly refused, on grounds of relevancy and prejudice, plaintiffs' request to admit entire crash test report from which defendant used one photograph]; *People v. Sanchez* (1995) 12 C.4th 1, 58, 47 C.R.2d 843, 906 P.2d 1129, citing the text [evidence may not be admitted under Ev.C. 356 if it is protected from disclosure under newsperson's shield law (Cal. Const., Art. I, §2; see 2 *Cal. Evidence* (4th), *Witnesses*, §333 et seq.)].)

Thus, in *Magee v. Wyeth Laboratories* (1963) 214 C.A.2d 340, 29 C.R. 322, the action was for wrongful death based on breach of warranty in the sale of a drug. Plaintiff offered interrogatories including part of a report of the Council on Drugs of the American Medical Association dealing with fatalities in its use. Defendant then insisted on a reading of the last paragraph of the report commending defendant for its cooperation in warning physicians of the dangers. *Held*, this was improper. That portion of the report was not an official or business record, but only the hearsay statement of a voluntary association, not necessary for an understanding of the admissible part. (214 C.A.2d 355.)

The statute may be applied with reasonable restraint to voluminous writings. Thus, where portions of the defendant's testimony before the grand jury are introduced by the prosecution, the defendant cannot, on cross-examination of the reporter, require introduction of the entire record, but can only bring in those parts that are pertinent to the portions introduced on the prosecution's direct examination. Of course, during the defense's case-in-chief, the defendant is entitled to introduce all material and relevant parts of the previous record. (*People v. Snyder* (1958) 50 C.2d 190, 195, 324 P.2d 1.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### CHAPTER IV - Circumstantial Evidence

### III. PARTICULAR KINDS OF CIRCUMSTANTIAL EVIDENCE

#### A. Character.

#### 1. Nature and Distinctions.

##### a. Moral Character.

*1 Witkin Cal. Evid. Circum Evid § 38*

[§ 38] Moral Character.

"Character" is one of the most elusive concepts in the law of evidence, and certain basic distinctions are essential to any understanding of the highly specialized rules governing its admissibility and manner of proof.

The typical use of the term by courts and lawyers refers to *moral character*. This may relate to a defendant in a criminal case (infra, §50), a party in a civil case in which his or her character is in issue (infra, §45), a witness in any case (3 *Cal. Evidence (4th), Presentation at Trial*, §281), a victim of homicide or assault (infra, §57), or a rape victim (infra, §61). In all of these situations, the admissibility of character evidence is well established, and the problems relate to the manner of proof (infra, §43). (See *People v. McAlpin* (1991) 53 C.3d 1289, 1311, 283 C.R. 382, 812 P.2d 563, 1 *Cal. Evidence (4th), Opinion Evidence*, §19 [construing "high moral character"]; 22 *So. Cal. L. Rev.* 341 [distinctions in law of character evidence]; 21 *U.C. Davis L. Rev.* 123 [comprehensive analysis of law of character evidence]; 1 McCormick 5th, §186 et seq.; 1A Wigmore (Tillers Rev.) §52 et seq.; 2 Jefferson, California Evidence Benchbook 3d, Chap. 33; 1985 A.S. 683; 21 Proof of Facts 3d 629.)

There is, however, no single concept of "moral character" involved in these cases. There are *different traits of character*, and the evidence must relate to the particular trait involved: peaceableness of the defendant or victim in a criminal case (infra, §§51, 57); chastity of a rape victim (infra, §61); honesty or veracity of a witness (3 *Cal. Evidence (4th), Presentation at Trial*, §280). (See *People v. Shoemaker* (1982) 135 C.A.3d 442, 446, footnote 2, 185 C.R. 370, quoting the text.)

A further distinction must be made as to the *purpose* for which character is proved: Only in a very few situations is character an issue in the action (infra, §45); in most cases character is offered as circumstantial evidence, e.g., as tending to disprove the criminal defendant's guilt (infra, §51), as tending to prove the victim an aggressor (infra, §57), or as casting doubt on the credibility of a witness (3 *Cal. Evidence (4th), Presentation at Trial*, §280).

*F.R. Evid., Rule 404(a)*, entitled "Character evidence generally," reads as follows:

"Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

"(1) *Character of accused*. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

"(2) *Character of victim*. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

"(3) *Character of witness*. Evidence of the character of a witness, as provided in rules 607, 608 and 609." (See 1 Mueller & Kirkpatrick, *Federal Evidence* 2d, §99 et seq.; 29 *Am.Jur.2d* (1994 ed.), *Evidence* §363 et seq.; 56 A.L.R.4th 402 [admissibility of evidence of pertinent trait under identical Rule 404(a) of the Uniform Rules of Evidence].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 1 McCormick 6th, §186 et seq. *Federal rule: F.R. Evid., Rule 404(a)*, as amended in 2006, now reads:

"Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:"

"(1) *Character of accused*. In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;"

"(2) *Character of alleged victim*. In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;"

"(3) *Character of witness*. Evidence of the character of a witness, as provided in Rules 607, 608 and 609."

See 76 *So. Cal. L. Rev.* 1189 [proposing additional federal rule that would allow prosecution to attack defendant's character for racism where defense raises victim's race in manner insinuating violent stereotypes]. *West's Key Number Digest*, Evidence k.106 et seq.



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### III. PARTICULAR KINDS OF CIRCUMSTANTIAL EVIDENCE

#### A. Character.

##### 1. Nature and Distinctions.

##### b. Character for Care or Skill Inadmissible.

##### 1. Exclusionary Rule.

#### 1 Witkin Cal. Evid. Circum Evid § 39

#### [§ 39] Exclusionary Rule.

Except where it is relevant under *Ev.C. 1102, 1103* (conduct of defendant or victim in a criminal case, *infra*, §§50, 57), "evidence of a trait of a person's character with respect to care or skill is inadmissible to prove the quality of his conduct on a specified occasion." (*Ev.C. 1104*; see *Lowenthal v. Mortimer* (1954) 125 C.A.2d 636, 642, 270 P.2d 942; *Webb v. Van Noort* (1966) 239 C.A.2d 472, 478, 48 C.R. 823; *Downing v. Barrett Mobile Home Transport* (1974) 38 C.A.3d 519, 524, 113 C.R. 277 ["accident proneness": "evidence that a litigant was involved in a prior accident is inadmissible when its only purported relevance is to show a propensity for negligent acts, thus enhancing the probability of negligence on the occasion in suit"]; *Brokopp v. Ford Motor Co.* (1977) 71 C.A.3d 841, 851, 139 C.R. 888; *Hinson v. Clairemont Community Hosp.* (1990) 218 C.A.3d 1110, 1122, 267 C.R. 503 [evidence that defendant doctor performed poorly in medical school and during prior employment was inadmissible to show negligence on particular occasion]; 1 McCormick 5th, §189; 1A Wigmore (Tillers Rev.) §§65, 65.1.)

Thus, in *Towle v. Pacific Imp. Co.* (1893) 98 C. 342, 343, 33 P. 207, an action for wrongful death of plaintiff's wife, who was run over by a team of horses, defendant was allowed to introduce evidence that his driver was "first-class," and "careful in handling horses." *Held*, this was error; the negligence issue is determined by the nature of the act or omission, not by defendant's character for care; and evidence that defendant is a careful, prudent, and cautious person is inadmissible to negative any want of ordinary care on the particular occasion. (See Law Rev. Com. Comment to *Ev.C. 1104*: Slight probative value of the evidence, balanced against danger of confusion of issues, collateral inquiry, prejudice, etc., warrants fixed exclusionary rule.)

In *Stafford v. United Farm Workers* (1983) 33 C.3d 319, 188 C.R. 600, 656 P.2d 564, plaintiff's evidence showed that A, a striking farm worker about to picket, parked his truck in such a manner as to protrude onto a highway and partially block an access road to a tomato field; and that plaintiff hit the truck, swerved and hit another car, and was injured. Plaintiff sued defendant union on theories of (a) vicarious liability for A's negligence as an agent of the union, and (b) the union's negligence in failing to supervise the parking of pickets' vehicles. At trial, plaintiff offered in evidence a temporary restraining order issued against the union a week before the accident, prohibiting it from blocking access to the field, and barring violent and threatening behavior. The order was admitted, read to the jury, referred to during the trial, and emphasized in plaintiff's closing argument. The jury found the union liable and awarded \$ 100,000 in damages. *Held*, judgment reversed for error in admission of the order.

(a) In negligence per se cases, admissibility of the statute depends on a showing that the plaintiff was a member of

the class of persons the statute was designed to protect, and the harm must have been one the statute was designed to prevent. (*Ev.C. 669*; see 6 *Summary (9th)*, *Torts*, §818 et seq.) The same rule of relevancy should apply to an injunction or temporary restraining order. Here, the order by its terms protected only the class of tomato growers and those with whom they did business--not passing motorists; and, the order was designed to prevent labor violence, not automobile collisions. (33 *C.3d* 324.)

(b) Plaintiff argued that, even if the order was irrelevant on the issue of negligence in parking, the union's lack of due care in omitting to publicize the contents of the order was relevant on the question whether it was negligent in failing to tell the pickets where not to park their cars. "In other words, the jury was invited to infer the negligent quality of the latter omission from the union's negligence with respect to the former," which is precisely what is prohibited by *Ev.C. 1104*. (33 *C.3d* 325.)

(c) Even if the union's failure to communicate the portions of the order prohibiting the blocking of access did have some bearing on the union's negligence liability, admitting the entire order, with its prohibitions against violence and destruction of property, was highly prejudicial, and its irrelevant matter was effectively used in argument. "Plaintiff's counsel adroitly turned a simple issue of negligence into an OSC in re contempt--a referendum on whether the jury should 'send a message' to union that restraining orders cannot be violated with impunity." (33 *C.3d* 327.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 1 McCormick 6th, §189.

*Cross-Reference:* 6 *Summary (10th)*, *Torts*, §871 et seq.



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#### A. Character.

1. Nature and Distinctions.
- b. Character for Care or Skill Inadmissible.
2. Other Accidents of Driver.

*1 Witkin Cal. Evid. Circum Evid § 40*

[§ 40] Other Accidents of Driver.

The character of an automobile driver for care or skill cannot be shown in a negligence case by evidence of a reputation for careless or unskillful driving, by opinions to that effect, or by specific acts of negligent driving. The evidence is objectionable on two grounds: It is often remote and time-wasting (see *supra*, §24), and it is prejudicial (*supra*, §39). (See *Shmatovich v. New Sonoma Creamery* (1960) 187 C.A.2d 342, 344, 9 C.R. 630; 1 McCormick 5th, §189; 1A Wigmore (Tillers Rev.) §§65, 65.1; 20 A.L.R.2d 1210; 17 *Stanf. L. Rev.* 539 [suggesting separate trial of negligent entrustment cause of action, for which evidence of this type is relevant and should be admitted].)

In the *Shmatovich* case, *supra*, plaintiff's 17-year-old son, driving her car with permission, was killed in a head-on collision with a truck. She sued the truck driver, his employer, the county and certain other defendants. The trial judge admitted evidence (a) that the mother had obtained a cancellation of the son's driver's license for his previous careless operation; and (b) that in her presence he had pleaded guilty to reckless driving and hit-and-run driving and had been admitted to probation on condition of no driving for 1 year (the fatal accident occurred less than 3 months later). *Held*, judgment on verdict for defendants reversed. (a) Lack of a driver's license does not prove negligence in the particular case, and except in special situations, it is error to permit proof of it. (187 C.A.2d 344.) (b) Evidence of a driver's prior accidents is ordinarily immaterial in determining negligence on the occasion in question. (187 C.A.2d 344.) "It seems even clearer that evidence of conviction of a previous traffic offense would not normally be permitted in a civil action against the driver for negligent operation of an automobile." (187 C.A.2d 344.)

Defendants, conceding that the evidence was not admissible to prove *the son's contributory negligence*, nevertheless contended that it could be received on the issue of *contributory negligence of plaintiff mother in permitting him to drive*, with knowledge of his reckless driving habits and his lack of a license. (See 6 *Summary* (9th), *Torts*, §999; 17 *Stanf. L. Rev.* 539.) The court's answer was that this depended on proof of *causation*; i.e., the negligence of plaintiff mother in entrusting the car to her son could be a proximate cause of the collision only if the son in fact drove negligently. (187 C.A.2d 344.) Because the jury was not properly instructed on the special circumstances that would make the evidence admissible, the issue was left in confusion, and the error was prejudicial. (187 C.A.2d 347.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Jeld-Wen v. Superior Court* (2005) 131 C.A.4th 853, 869, 870, 32 C.R.3d 351 [in wrongful death action against truck driver employee and his employer arising from collision, once defendant employer made pretrial admission of



liability on respondeat superior theory, plaintiffs were precluded from presenting evidence of driver's prior accidents on their negligent entrustment cause of action; once employer admitted liability, there was no basis to attempt to prove employer's own negligence]; 1 McCormick 6th, §189.

*Cross-Reference: 6 Summary (10th), Torts, §1222.*



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#### A. Character.

##### 1. Nature and Distinctions.

##### b. Character for Care or Skill Inadmissible.

##### 3. Habit Distinguished.

*1 Witkin Cal. Evid. Circum Evid § 41*

[§ 41] Habit Distinguished.

"It is sometimes difficult to distinguish between character and habit, especially when the quality in question is skill or care. To have the habit of being *careful generally* is to have a *careful disposition or character*, while to have the habit of doing a *particular thing* in a careful manner is not, properly speaking, to have a careful disposition, for one might well be careless in all other respects." (Comment to Model C., Rule 307.) In other words, *character* (or "disposition," in Wigmore's language), e.g., for care or skill, means a general trait, exhibited in all situations; the *habit* is limited to a particular kind of situation or act, such as stopping and looking about at a railroad crossing. (See 1 McCormick 5th, §195; 1A Wigmore (Tillers Rev.) §§65, 92; *Webb v. Van Noort* (1966) 239 C.A.2d 472, 478, 48 C.R. 823, citing the text.)

Despite its thin line, this distinction must be understood and applied, for a *habit* of care or skill is admissible (see *infra*, §67), and the witness can often testify to it if the question is properly put. Thus, in *Webb v. Van Noort, supra*, an action for wrongful death of plaintiff's daughter, plaintiff was asked: "As far as you could observe when you rode with her, how did she drive?" *Held*, objection was properly sustained. "[T]he single question asked the witness was general in nature and called for a general answer. In response to the question as it was phrased, the witness could only have answered that Loretta drove carefully, or that she drove negligently, or that she drove in an average manner. Such an answer would run to a general character trait for driving, and not to the decedent's *habit* of doing a particular thing in a particular way. Counsel did not see fit to rephrase his question so as to elicit habit evidence." (239 C.A.2d 479.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 1 McCormick 6th, §195.



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#### A. Character.

##### 1. Nature and Distinctions.

##### c. Character To Prove Conduct Inadmissible.

*1 Witkin Cal. Evid. Circum Evid § 42*

[§ 42] Character To Prove Conduct Inadmissible.

(1) *Exclusionary Rule.* With certain exceptions, "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." (*Ev.C. 1101(a)*.) The reasons for exclusion are: "*First*, character evidence is of slight probative value and may be very prejudicial. *Second*, character evidence tends to distract the trier of fact from the main question of what actually happened on the particular occasion and permits the trier of fact to reward the good man and to punish the bad man because of their respective characters. *Third*, introduction of character evidence may result in confusion of issues and require extended collateral inquiry." (Law Rev. Com. Comment to *Ev.C. 1101*; see 1A Wigmore (Tillers Rev.) §54.1.)

(2) *Exceptions and Distinctions.* This rule is subject to several exceptions, and calls for some distinctions:

(a) In a criminal action, character may be proved as permitted under the conditions set forth in *Ev.C. 1102* (evidence of defendant's character where offered by defendant, or to rebut character evidence offered by defendant; see *infra*, §50), *Ev.C. 1103* (victim's character; see *infra*, §57), *Ev.C. 1108* (defendant's other sexual offenses; see *infra*, §97), and *Ev.C. 1109* (defendant's other domestic violence; *infra*, §98). (*Ev.C. 1101(a)*.)

(b) Other offenses of the defendant may be shown in a criminal or civil case to prove some relevant fact such as intent or knowledge. (*Ev.C. 1101(b)*; see *infra*, §75.)

(c) The rule only excludes evidence of character *to prove conduct*; where character is itself in issue, it may be proved. (See *infra*, §45.)

(d) Character may also be proved to support or attack the credibility of a witness. (*Ev.C. 1101(c)*; see *People v. Millwee* (1998) 18 C.4th 96, 130, 131, 74 C.R.2d 418, 954 P.2d 990 [where defendant claimed that he fatally shot his mother accidentally, evidence of subsequent shooting that he also claimed was accidental was admissible to show implausibility and untruthfulness of his testimony]; 3 *Cal. Evidence* (4th), *Presentation at Trial*, §280.)

(3) *Proposition 8.* Although Proposition 8 (Cal. Const., Art. I, §28(d), the Truth-in-Evidence provision, 1 *Cal. Evidence* (4th), *Introduction*, §8) does not expressly preserve *Ev.C. 1101*, that statute remains effective. (See *People v. Perkins* (1984) 159 C.A.3d 646, 650, 205 C.R. 625 [*Ev.C. 1101* survives]; *People v. Scott* (1987) 194 C.A.3d 550, 553, 239 C.R. 588 [even if Proposition 8 repealed statute by implication, it was reenacted by 1986 amendment by more than

two-thirds vote of Legislature]; *People v. Ewoldt* (1994) 7 C.4th 380, 390, 391, 27 C.R.2d 646, 867 P.2d 757, *infra*, §96 [approving reasoning of *Scott* court].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Exclusionary Rule*. See *People v. Holloway* (2004) 33 C.4th 96, 128, 14 C.R.3d 212, 91 P.3d 164 [trial judge may have violated *Ev.C. 1101* by failing to redact defendant's admissions to detective to remove statement that he could hurt someone when he was drunk, but failure did not render trial fundamentally unfair].

(2) *Exceptions and Distinctions*.

(a) *In criminal actions*: *Ev.C. 1109*, as amended in 2000 and 2005, encompasses elder abuse and child abuse, as well as domestic violence.



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#### A. Character.

#### 2. Methods of Proof.

##### a. In General.

#### 1 Witkin Cal. Evid. Circum Evid § 43

[§ 43] In General.

"Except as otherwise provided by statute, *any otherwise admissible evidence* (including evidence in the form of an *opinion*, evidence of *reputation*, and evidence of *specific instances* of such person's conduct) is admissible to prove a person's character or a trait of his character." (*Ev.C. 1100.*)

This statute purports to allow proof of a relevant trait of character by any of the three specified methods. But the apparent enlargement of existing law (by allowing proof of opinions and specific acts) is in great part dissipated by the proviso, which incorporates by reference a number of limiting rules on the kind of evidence that may be offered to prove character of the defendant or victim (*infra*, §54 et seq.), or character of a witness (3 *Cal. Evidence (4th)*, *Presentation at Trial*, §285).

Thus, *Ev.C. 1100* merely applies the general rule of admissibility of all relevant evidence (*Ev.C. 351*, *supra*, §5) specifically to character evidence. Judicially created restrictions on the kinds of proof are eliminated, but those established by statute remain. (Law Rev. Com. Comment to *Ev.C. 1100.*) The result is that reputation evidence (*infra*, §44) remains the chief method of proving the relevant character trait, but, in a few special situations, the other methods are *not expressly precluded*, and are therefore permissible. (As to specific acts, see *infra*, §§46, 58 et seq.; as to opinions, see *infra*, §§46, 55, 58 et seq.)

*F.R. Evid.*, Rule 405(a), entitled *Reputation or opinion*, reads as follows: "In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct." (See 1 Mueller & Kirkpatrick, *Federal Evidence* 2d, §119 et seq.; 29 *Am.Jur.2d* (1994 ed.), *Evidence* §375 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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### III. PARTICULAR KINDS OF CIRCUMSTANTIAL EVIDENCE

#### A. Character.

#### 2. Methods of Proof.

##### b. Reputation.

#### 1 *Witkin Cal. Evid. Circum Evid* § 44

[§ 44] Reputation.

(1) *Reputation Distinguished From Character.* Reputation, as such, is almost never in issue in a civil or criminal case. (See Model C., Rule 304, Comment; but see 68 A.L.R.2d 1300 [evidence of general reputation of *premises* in liquor nuisance prosecution].) Reputation evidence is, however, the traditional and most commonly used method of proving character, when character is relevant. The distinction is clear: "Character" is "disposition," what a person "is"; "reputation" is what the person is "reputed to be." From evidence of a bad reputation for peaceableness an inference of bad character (that particular trait) can be drawn; and the same is true of good reputation and good character. (See 1A Wigmore (Tillers Rev.) §52; 5 Wigmore (Chadbourn Rev.) §1608.)

(2) *Proof by Witness With Knowledge.* Reputation tends to prove character, but how is reputation proved? The ordinary and "preferred" method is by testimony of a witness who has *knowledge of the general reputation* of the person in the place where the person lives or works, for the traits of character involved. (See *Estate of Akers* (1920) 184 C. 514, 519, 194 P. 706 [reputation at remote time in another community; admissibility rests in court's discretion]; *Pyper v. Jennings* (1920) 47 C.A. 623, 630, 191 P. 565 ["Reputation ... is a fact to be proved by the testimony of witnesses who know it"]; *People v. Soules* (1940) 41 C.A.2d 298, 305, 106 P.2d 639 [specific violent acts by deceased victim, excluded]; *People v. Carnavacci* (1953) 119 C.A.2d 14, 17, 258 P.2d 1121 [knowledge of victim's reputation for peace and quiet limited to few people who came to witness' place of work; no proper foundation and stricken]; 1 McCormick 5th, §186; 5 Wigmore (Chadbourn Rev.) §1608; 21 Proof of Facts 3d 629; 3 *Cal. Evidence* (4th), *Presentation at Trial*, §288 et seq.)

In *Orloff v. Los Angeles Turf Club* (1951) 36 C.2d 734, 739, 227 P.2d 449, the court, in excluding the evidence, said: "The testimony was not given by persons who knew the defendant's reputation, but by witnesses who inquired of others as to the defendant's reputation. The rule is that evidence of reputation when relevant may not be shown by witnesses conducting an inquiry, but must be given by persons having knowledge thereof."

(3) *Proof by Negative Evidence.* A defendant's character witness may testify to never having heard the reputation discussed, the theory being that a person of good reputation may not inspire any discussion of it. (*People v. Adams* (1902) 137 C. 580, 582, 70 P. 662 ["it is a matter of common sense, common observation, and common knowledge that a man's reputation for peace and quiet is seldom a matter of discussion until some alleged breach of the law calls up its consideration"]; *People v. Stennett* (1921) 51 C.A. 370, 386, 197 P. 372 [error to reject testimony of character witness who admitted never having heard reputation discussed]; but see *People v. Pauli* (1922) 58 C.A. 594, 596, 209 P. 88 [rule presupposes sufficient period of residence and acquaintanceship to acquire reputation in community; hence, "a

stranger ... working for a single employer therein for a few months, going about little and forming no associations," has no such general reputation]; and see 5 Wigmore (Chadbourn Rev.) §1614.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Proof by Witness With Knowledge*. See 1 McCormick 6th, §186.



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#### A. Character.

#### 3. Proof of Character in Civil Cases.

##### a. In General.

##### 1. Character in Issue.

*1 Witkin Cal. Evid. Circum Evid § 45*

[§ 45] Character in Issue.

In a few situations, a party's good or bad character is directly in issue under the substantive law and the pleadings. (See generally 1 McCormick 5th, §187; 1A Wigmore (Tillers Rev.) §§54, 69.1; 21 Proof of Facts 3d 629; on admissibility of evidence of plaintiff's sexual conduct in sexual assault or harassment case, see *infra*, §§47, 48.) Some common examples of cases where character is, or may become, an issue are:

(1) *Malicious Prosecution*. In a malicious prosecution case, "the good reputation of the plaintiff has a direct bearing on the question of probable cause and may, therefore, be proven in chief, especially when such reputation is known to the defendant or defendants." (*Murphy v. Davids* (1919) 181 C. 706, 717, 186 P. 143.)

(2) *Libel*. In a libel action, although the plaintiff's character is involved, it is presumed to be good; hence, before the plaintiff can introduce evidence of character, it must be put in issue by the pleadings (by a plea of truth) or be attacked during cross-examination of his or her witnesses. (*Davis v. Hearst* (1911) 160 C. 143, 185, 116 P. 530; 1A Wigmore (Tillers Rev.) §§70, 70.1.)

(3) *Wrongful Termination*. In *Pugh v. See's Candies* (1988) 203 C.A.3d 743, 756, 250 C.R. 195, plaintiff held a managerial position. His ability to work well with the company's officers was crucial, and this made his character or personality in the workplace an issue. He asserted that he was a cooperative employee who was never criticized; hence, defendant was properly allowed to introduce evidence of specific acts revealing the negative attitude of other employee witnesses toward plaintiff. (203 C.A.3d 757, citing *Ev.C. 1100* and the text.)

(4) *Child Custody*. (See *Estate of Akers* (1920) 184 C. 514, 519, 194 P. 706 [proceeding to appoint guardian]; *Feist v. Feist* (1965) 236 C.A.2d 433, 435, 46 C.R. 93 [proceeding to modify award]; *Hicks v. Hicks* (1967) 249 C.A.2d 964, 967, 58 C.R. 63, *supra*, §24, citing the text.)

*In re Dorothy I.* (1984) 162 C.A.3d 1154, 209 C.R. 5, makes an obvious distinction. The juvenile court found the minor to be a dependent child under Welf.C. 300, on evidence that her father had sexually molested her and two other children, and on testimony of a child psychiatrist that there was a substantial danger in the father's continued custody as a result of his prolonged abusive conduct. The father had objected on the ground that *Ev.C. 1101* prohibits evidence of a trait of character to prove misconduct on a specified occasion. *Held*, the evidence was properly admitted. "[T]he character evidence is not being used to prove a charge of past conduct against appellant, but is being used in helping the



court determine his predisposition toward future sexual abuse with the minor Dorothy. This type of character evidence is essential, when available, to aid the court in dependency actions, which are concerned with the future well-being of a minor." (162 C.A.3d 1159.)

In the great majority of cases, character is not in issue and is excluded, e.g., *assault and battery*. (*Vance v. Richardson* (1895) 110 C. 414, 417, 42 P. 909; *Neely v. California State Personnel Bd.* (1965) 237 C.A.2d 487, 492, 47 C.R. 64.) (See generally 22 So. Cal. L. Rev. 343, 486; 91 A.L.R.3d 718 [civil action for assault]; 1 McCormick 5th, §192; 1A Wigmore (Tillers Rev.) §70 et seq.; 1955 A.S. 652.) (On evidence of defendant's rehabilitation or reformation as relevant on issue of punitive damages, see 39 A.L.R.4th 1122.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 1 McCormick 6th, §187.(4) *Child Custody*. See 1 McCormick 6th, §192. *West's Key Number Digest*, Evidence k.106 et seq.



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#### A. Character.

#### 3. Proof of Character in Civil Cases.

##### a. In General.

#### 2. Manner of Proof.

*1 Witkin Cal. Evid. Circum Evid § 46*

[§ 46] Manner of Proof.

*Ev.C. 1100* "applies without restriction only when character or a trait of character is an *ultimate fact in dispute* in the action." (Law Rev. Com. Comment to *Ev.C. 1100*.) In this situation, therefore, the statute permits proof by any of the three methods:

(1) *Reputation*. (See *Estate of Akers* (1920) 184 C. 514, 518, 194 P. 706; C.E.B., Effective Introduction of Evidence 2d, Chap. 15 [Character: Reputation Evidence].)

(2) *Specific acts*. (See *Guardianship of Casad* (1951) 106 C.A.2d 134, 135, 234 P.2d 647; *Guardianship of Wisdom* (1956) 146 C.A.2d 635, 639, 304 P.2d 221; *Hicks v. Hicks* (1967) 249 C.A.2d 964, 967, 58 C.R. 63, *supra*, §24, citing the text; 1 McCormick 5th, §187; 1A Wigmore (Tillers Rev.) §§70 et seq., 202; C.E.B., Effective Introduction of Evidence 2d, Chap. 16 [Character: Specific Acts Evidence]; *F.R. Evid., Rule 405(b)* ["In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct"]; see 1 Mueller & Kirkpatrick, Federal Evidence 2d, §§121, 122; 29 *Am.Jur.2d* (1994 ed.), *Evidence* §381.)

(3) *Opinions*. (See 1 McCormick 5th, §187; 7 Wigmore (Chadbourn Rev.) §1980 et seq.; C.E.B., Effective Introduction of Evidence 2d, Chap. 14 [Character: Opinion Evidence].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Specific acts*. See 1 McCormick 6th, §187.(3) *Opinions*. See 1 McCormick 6th, §187.



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#### 1. Nature and Purpose of Statutes.

#### 1 *Witkin Cal. Evid. Circum Evid* § 47

[§ 47] Nature and Purpose of Statutes.

(1) *In General.* The 1985 Legislature enacted statutes limiting admissibility of evidence of sexual conduct of a plaintiff in a civil suit, patterned on similar legislation dealing with sexual conduct of the victim in a criminal proceeding (see *infra*, §61 et seq.). (*Ev.C.* 783, 1106, *infra*, §48 et seq.; see 17 *Pacific L. J.* 632; *Govt.C.* 11440.40 (1 *Cal. Evidence* (4th), *Introduction*, §68), limiting admissibility of this type of evidence in administrative hearings; *F.R. Evid.*, *Rule* 412, *infra*, §66.)

The purpose of the statutes is set forth in the following declaration of legislative intent (*Stats.* 1985, *Chap.* 1328, §1):

"The Legislature finds and declares that it is the existing policy of the State of California to ensure that the causes of action for claims of sexual harassment, sexual assault, or sexual battery are given proper meaning. The discovery of sexual aspects of complainant's lives, as well as those of their past and current friends and acquaintances, has the clear potential to discourage complaints and to annoy and harass litigants. That annoyance and discomfort, as a result of defendant or respondent inquiries, is unnecessary and deplorable. Without protection against it, individuals whose intimate lives are unjustifiably and offensively intruded upon might face the "Catch-22" of invoking their remedy only at the risk of enduring further intrusions into details of their personal lives in discovery, and in open quasi-judicial or judicial proceedings."

"The Legislature is mindful that a similar state of affairs once confronted victims in criminal prosecutions for rape, who often ran the risk of finding their own moral characters on trial during the prosecution of their assailants. The Legislature has taken measures to curb those abuses in rape proceedings. It is the intent of the Legislature to take similar measures in sexual harassment, sexual assault, or sexual battery cases."

"The Legislature concludes that the use of evidence of a complainant's sexual behavior is more often harassing and intimidating than genuinely probative, and the potential for prejudice outweighs whatever probative value that evidence may have. Absent extraordinary circumstances, inquiry into those areas should not be permitted, either in discovery or at trial."

(2) *Distinction: Limitations Inapplicable in Malpractice Action.* In *Patricia C. v. Mark D.* (1993) 12 *C.A.4th* 1211, 16 *C.R.2d* 71, plaintiff brought an action against her psychologist for malpractice and infliction of emotional distress

through sexual contact with her. Plaintiff moved to exclude evidence of her sexual contact with persons other than defendant and evidence of her employment as a topless dancer. The trial judge ruled that the evidence was not barred by *Ev.C. 1106* and was essential to a fair trial on the issue of damages (whether plaintiff's mental condition was attributable to defendant's conduct or to her "pretreatment psychosexual history"). (*12 C.A.4th 1215.*) *Held*, the trial judge properly found the statute inapplicable. Whether the case was treated as an action for malpractice or for psychotherapist-patient sexual contact, it was not a civil action alleging conduct constituting sexual harassment, sexual assault, or sexual battery within the meaning of the statute. (*12 C.A.4th 1218.*) (On admissibility of evidence of plaintiff's sexual history in statutory action against psychotherapist for sexual contact, see *infra*, §48.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### 2. Limited Admissibility of Evidence.

#### 1 Witkin Cal. Evid. Circum Evid § 48

[§ 48] Limited Admissibility of Evidence.

(1) *Sexual Conduct of Plaintiff Not Admissible To Prove Consent or Absence of Injury.* In a civil action alleging conduct constituting *sexual harassment*, *sexual assault*, or *sexual battery*, evidence relating to the plaintiff's sexual conduct (whether opinion evidence, reputation evidence, or evidence of specific instances of conduct) may not be introduced by the defendant in order to prove the plaintiff's *consent* or the *absence of injury* to the plaintiff, unless the alleged injury is in the nature of loss of consortium. (*Ev.C. 1106(a)*.) (See 100 A.L.R.3d 569 [admissibility of character or reputation evidence regarding plaintiff in civil sexual assault action on issues other than impeachment]; on loss of consortium, see 6 *Summary* (9th), *Torts*, §1417 et seq.)

*Ev.C. 1106(b)* states an exception to the limiting rule of *Ev.C. 1106(a)*: It does not apply to evidence of the plaintiff's sexual conduct *with the alleged perpetrator*.

(2) *Cross-Examination and Rebuttal Evidence Where Plaintiff Raises Issue.* "If the plaintiff introduces evidence, including testimony of a witness, or the plaintiff as a witness gives testimony, and the evidence or testimony relates to the plaintiff's sexual conduct, the defendant may cross-examine the witness who gives the testimony and offer relevant evidence limited specifically to the rebuttal of the evidence introduced by the plaintiff or given by the plaintiff." (*Ev.C. 1106(c)*.)

(3) *Evidence To Attack Credibility of Plaintiff.* On a proper showing, the defendant may be allowed to introduce evidence of sexual conduct of the plaintiff for the purpose of attacking credibility. (*Ev.C. 783, 1106(d)*; see *infra*, §49.)

(4) *Discovery of Plaintiff's Sexual Conduct.* In a civil action alleging sexual harassment, sexual assault, or sexual battery, a party, in order to obtain discovery regarding the plaintiff's sexual conduct with *individuals other than the alleged perpetrator*, must "establish specific facts showing good cause for that discovery, and that the matter sought to be discovered is relevant to the subject matter of the action and reasonably calculated to lead to the discovery of admissible evidence." The showing must be made by noticed motion and may not be made or considered by the court at an *ex parte* hearing. The motion must be accompanied by a declaration indicating that a good faith attempt at informally resolving each issue presented by the motion was made. (*C.C.P. 2017(d)*.)

(5) *Distinction: Statutory Action Against Psychotherapist for Sexual Contact.* In an action under C.C. 43.93 against a psychotherapist for sexual contact (see 5 *Summary* (9th), *Torts*, §367), evidence of the plaintiff's sexual history is

neither subject to discovery nor admissible as evidence except where: (a) the plaintiff claims damage to sexual functioning; or (b) the defendant requests a hearing prior to conducting discovery and establishes that the history is relevant and that its probative value outweighs its prejudicial effect. Only that specific information or those examples of the plaintiff's conduct that are determined to be relevant are discoverable or admissible. (C.C. 43.93(d).)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Sexual Conduct of Plaintiff Not Admissible To Prove Consent or Absence of Injury.*

*Cross-Reference:* 6 Summary (10th), Torts, §1679 et seq.

*Exception for conduct with alleged perpetrator:* See *Rieger v. Arnold* (2002) 104 C.A.4th 451, 465, 128 C.R.2d 295 [in action for sexual harassment in which plaintiff's claim is based on hostile work environment theory and plaintiff does not allege failure to protect her from anyone other than individual named defendants, "alleged perpetrator" must be understood as including individual defendants, as well as others whose conduct plaintiff ascribes to employer, regardless of whether conduct occurred in or outside workplace]. (4) *Discovery of Plaintiff's Sexual Conduct.* C.C.P. 2017(d) was repealed and replaced by C.C.P. 2017.220(a) in 2004 without substantive change.

(5) *Distinction: Statutory Action Against Psychotherapist for Sexual Contact.*

*Cross-Reference:* 5 Summary (10th), Torts, §416.



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#### 3. Manner of Proof.

#### 1 Witkin Cal. Evid. Circum Evid § 49

[§ 49] Manner of Proof.

The defendant in a civil action for sexual assault or harassment may introduce evidence of sexual conduct of the plaintiff to attack the credibility of the plaintiff as a witness under *Ev.C. 780* (3 *Cal. Evidence* (4th), *Presentation at Trial*, §259). (*Ev.C. 783*.) Admissibility, however, must be determined according to the following procedure:

(1) *Written motion*. The defendant must make a written motion *to the court and the plaintiff's attorney* "stating that the defense has an *offer of proof* of the relevancy of evidence of the sexual conduct of the plaintiff proposed to be presented." (*Ev.C. 783(a)*.)

(2) *Affidavit*. The motion must be accompanied by an affidavit in which the offer of proof is stated. (*Ev.C. 783(b)*.)

(3) *Hearing*. Upon finding that the offer of proof is sufficient, the judge must order a hearing and, at the hearing, must allow the *questioning of the plaintiff regarding the offer of proof*. If there is a jury, the hearing must be held outside its presence. (*Ev.C. 783(c)*.)

(4) *Order*. At the conclusion of the hearing, if the proposed evidence is found relevant under *Ev.C. 780* and not inadmissible under *Ev.C. 352* (weighing of probative value against prejudicial effect; see *supra*, §17), "the court may make an *order stating what evidence may be introduced* by the defendant, and the *nature of the questions to be permitted*. The defendant may then offer evidence pursuant to the order of the court." (*Ev.C. 783(d)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### 4. Proof of Character in Criminal Cases.

##### a. Character of Defendant.

##### 1. Admissibility.

##### aa. Bad Character Initially Excluded.

*1 Witkin Cal. Evid. Circum Evid § 50*

[§ 50] Bad Character Initially Excluded.

"[E]vidence of the defendant's character or a trait of his character" is admissible in two situations: (a) when offered by the defendant, "to prove his conduct in conformity with such character or trait of character"; (b) when offered by the prosecution, "to rebut evidence adduced by the defendant." (*Ev.C. 1102.*)

The general rules codified in this section do not authorize proof of the bad character of the defendant as part of the prosecution's case-in-chief. Evidence of this type is some indication of the likelihood of the defendant's guilt and is therefore relevant, but it would be highly prejudicial in its tendency to draw the attention of the jury away from the evidence dealing with the crime charged. Hence, the universal rule prohibits the prosecution from introducing it in the first instance, i.e., where the defendant has not offered evidence of his or her good character. (*People v. McKelvey* (1927) 85 C.A. 769, 770, 260 P. 397; see 1 McCormick 5th, §190; 1A Wigmore (Tillers Rev.) §57.)

In *People v. Terry* (1970) 2 C.3d 362, 400, 85 C.R. 409, 466 P.2d 961, a homicide case, defendant J was questioned by attorneys for codefendant T to show that J had been found unfit to have custody of her eldest child and had committed welfare fraud. *Held*, the cross-examination was plainly impermissible. "That she had been found unfit to have custody of her child and that she was guilty of welfare fraud were not relevant to the question of her relationship to Terry. The cross-examination on these matters was an attempt to prove bad character, which cannot be done until and unless the accused first puts in evidence of his good character." (2 C.3d 400, citing the text.)

In *People v. Walkey* (1986) 177 C.A.3d 268, 223 C.R. 132, defendant was convicted of child endangerment and first degree murder by torture in connection with the death of a 2-year-old child who lived in defendant's house. The child's death was caused by a severe beating, and there were bite marks on the child's body. A physician testifying for the prosecution was permitted to describe the "battering parent syndrome," and he discussed the various factors constituting the profile of a child abuser, including the most important single factor, i.e., the alleged abuser had himself or herself been an abused child. The prosecution was additionally permitted to elicit from defendant, on cross-examination, that defendant had been disciplined as a child by being struck with a board and bitten. During closing argument, the prosecution argued that defendant fit the physician's profile of a battering parent. *Held*, the physician's testimony and the information elicited on cross-examination were impermissible character evidence (though the error was harmless in light of the prosecution's strong case).



Although the physician never expressly concluded that defendant fit the profile of a battering parent, his testimony clearly implicated defendant's character by tending to associate defendant with a group of persons who are often child abusers. This testimony, coupled with (a) defendant's admission that he had been physically disciplined as a child, and (b) other testimony that defendant had certain characteristics typical of a battering parent, impermissibly permitted the jury to infer that defendant was a battering parent and that he must have caused the child's injuries. (177 C.A.3d 279.) (On admissibility of syndrome evidence generally, see 1 Cal. Evidence (4th), Opinion Evidence, §48 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See CALCRIM, No. 350 [Character of Defendant]; 1 McCormick 6th, §190. *West's Key Number Digest*, Criminal Law k.375 et seq.



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##### 1. Admissibility.

##### bb. Good Character Admissible.

*1 Witkin Cal. Evid. Circum Evid § 51*

[§ 51] Good Character Admissible.

The good character of the defendant is relevant as tending in some slight degree to show that the defendant probably did not commit the crime, and here there is no danger of undue prejudice. The defendant therefore may call character witnesses in his or her defense, to testify to the relevant character trait. (See *People v. Ashe* (1872) 44 C. 288, 291; *People v. Stennett* (1921) 51 C.A. 370, 381, 197 P. 372; *People v. Jones* (1954) 42 C.2d 219, 223, 266 P.2d 38, *infra*, §55 [defendant's sexual normality]; but see *People v. Taylor* (1986) 180 C.A.3d 622, 629, 225 C.R. 733 [defendant's reputation for truth and veracity was not admissible under *Ev.C. 1102*, as it was not relevant to elements of charged rape]; and see generally 1 McCormick 5th, §191; 1A Wigmore (Tillers Rev.) §§56, 56.1.)

A defendant may sometimes introduce evidence of good character--and thus make impeachment possible--without specifically intending to do so. In *People v. Wagner* (1975) 13 C.3d 612, 119 C.R. 457, 532 P.2d 105, defendant testified on direct examination as to his civil activities, family background, and similar matters. By so doing, he placed his character in issue. "If defendant's purpose was solely to refute the prosecution's evidence of the lucrative nature of narcotics sales which inferred that defendant may have had a general financial motive, his testimony properly should have been limited to the subject of his personal wealth, or perhaps his business activities, to negate or minimize any financial motive. Instead, defendant's testimony in this connection ranged more broadly and included his family and civic activities as well. It constituted an attempt to show that he was not likely to commit, and therefore did not commit, the crime charged ... , not solely that he lacked financial motive. A defendant cannot bar the prosecution from rebutting favorable character evidence merely by characterizing the direct examination as being narrower in scope than in fact it was." (13 C.3d 617.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 1 McCormick 6th, §191.



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##### a. Character of Defendant.

##### 1. Admissibility.

##### cc. Bad Character in Rebuttal.

#### 1 *Witkin Cal. Evid. Circum Evid* § 52

[§ 52] Bad Character in Rebuttal.

After the defendant has introduced evidence of his or her good character, the prosecution may offer evidence of bad character in rebuttal. (*Ev.C. 1102(b)*; see *People v. Gin Shue* (1943) 58 C.A.2d 625, 634, 137 P.2d 742 [cross-examination of character witness]; *People v. Westek* (1948) 31 C.2d 469, 479, 190 P.2d 9 [rebuttal witnesses]; *People v. Ogg* (1968) 258 C.A.2d 841, 845, 66 C.R. 289; *People v. Wagner* (1975) 13 C.3d 612, 617, 618, 119 C.R. 457, 532 P.2d 105; *People v. Qui Mei Lee* (1975) 48 C.A.3d 516, 526, 122 C.R. 43; but see *People v. McKelvey* (1927) 85 C.A. 769, 770, 260 P. 397, supra, §50 [rebuttal witnesses were improper where no evidence of defendant's good character was introduced]; and see generally 1 McCormick 5th, §191; 1A Wigmore (Tillers Rev.) §58; on cross-examination of character witness, see 3 *Cal. Evidence* (4th), *Presentation at Trial*, §243 et seq.; on cross-examination of murder defendant who has introduced character evidence in mitigation at penalty trial, see 1 *Cal. Evidence* (4th), *Introduction*, §27.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 1 McCormick 6th, §191.



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##### a. Character of Defendant.

##### 1. Admissibility.

##### dd. Character for Violence.

#### 1 *Witkin Cal. Evid. Circum Evid* § 53

[§ 53] Character for Violence.

(1) *In General.* After the defendant has introduced evidence that the victim had a character or trait of character for violence (*Ev.C. 1103(a)*; see *infra*, §57), the prosecution may offer evidence of the defendant's character or trait of character for violence to prove "conduct of the defendant in conformity with the character or trait of character." (*Ev.C. 1103(b)*.) (See *People v. Walton* (1996) 42 C.A.4th 1004, 1014, 1015, 49 C.R.2d 917 [rejecting defendant's contention that testimony as to victim's bad character was offered under *Ev.C. 1101(b)* (see *infra*, §75), not *Ev.C. 1103(a)*, and that therefore testimony as to defendant's bad character was not allowed]; 23 *Pacific L. J.* 656; on methods of proving defendant's character for violence, see *infra*, §54 et seq.)

(2) *Constitutionality of Statute.* In *People v. Blanco* (1992) 10 C.A.4th 1167, 13 C.R. 176, the court rejected defendant's contention that admission of evidence under *Ev.C. 1103(b)* was a violation of due process.

(a) The California rule is a minority view in common law jurisdictions. It was originally espoused by Wigmore, but was criticized by the reviser of Wigmore's treatise. (10 C.A.4th 1173, 1174.) And most American jurisdictions bar the evidence as a matter of statutory construction, common law development, or application of theoretical and jurisprudential principles. (10 C.A.4th 1174.)

(b) Missouri, by judicial decision, has applied the Wigmore view for at least 50 years. "We have found no case law holding that Missouri's adoption of the Wigmore view offended constitutional due process principles." (10 C.A.4th 1174.) And "[w]e believe the federal Supreme Court would conclude that section 1103(b)'s allowance of certain types of character evidence in rebuttal, only after the defendant first raises the issue by presenting evidence of the victim's character in order to prove the defendant's own reasonable response to alleged provocation or attack, is not so 'extremely unfair' as to be within the 'very narrowly' defined class of evidentiary statutes which violate 'fundamental conceptions of justice.' " (10 C.A.4th 1175.) "Nor do we doubt that our own Supreme Court would reach the same result under the similar guarantee in the California Constitution." (10 C.A.4th 1175.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General.* See *People v. Myers* (2007) 148 C.A.4th 546, 552, 56 C.R.3d 27 [in prosecution for resisting officer and committing battery on officer, defendant's testimony did not open door to evidence of his violent character; his testimony about officer's aggressive conduct at time of incident was not character evidence within meaning of *Ev.C.*

1103].



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##### 2. Manner of Proof.

##### aa. Reputation.

#### 1 *Witkin Cal. Evid. Circum Evid* § 54

[§ 54] Reputation.

The usual method of proving either good or bad character as circumstantial evidence of conduct is by reputation in the place where the defendant lives or works. (See *People v. Fair* (1872) 43 C. 137, 148; *People v. McAlpin* (1991) 53 C.3d 1289, 1310, 1311, 283 C.R. 382, 812 P.2d 563, 1 Cal. Evidence (4th), *Opinion Evidence*, §19; C.E.B., *Effective Introduction of Evidence* 2d, Chap. 15 [Character: Reputation Evidence]; 1 McCormick 5th, §191; 5 Wigmore (Chadbourn Rev.) §1608 et seq.; 21 Proof of Facts 3d 629; 82 A.L.R.3d 525 [reputation at place of employment]; 87 A.L.R.2d 968 [admissibility of good reputation as affected by remoteness of time to which it relates].) Both *Ev.C. 1102*, supra, §50, and *Ev.C. 1103(b)*, supra, §53, specify reputation evidence as one of the permissible means of proof.

In *People v. Cobb* (1955) 45 C.2d 158, 287 P.2d 752, the trial judge excluded testimony of defendant's employer, who had 4 years of association with him at work but no contact outside the business area. Disapproving this limitation, the court said: "[I]t would be illogical to say that reputation evidence should be limited to the community of one's residence to the exclusion of the community of one's place of business; and if it is shown that a general reputation exists in the community of one's place of business, and that the witness has sufficient knowledge of it, the witness should be permitted to testify concerning such general reputation." (45 C.2d 164; see 3 Cal. Evidence (4th), *Presentation at Trial*, §289.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 1 McCormick 6th, §191.



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##### 2. Manner of Proof.

##### bb. Opinions.

#### 1 *Witkin Cal. Evid. Circum Evid* § 55

#### [§ 55] Opinions.

(1) *Former Law.* In the past, the courts almost invariably excluded opinion evidence to prove good or bad moral character. (See *People v. Spigno* (1957) 156 C.A.2d 279, 287, 319 P.2d 458; 7 Wigmore (Chadbourn Rev.) §1980 et seq.) But an exception was declared in *People v. Jones* (1954) 42 C.2d 219, 266 P.2d 38, a prosecution for violation of P.C. 288 (lewd conduct with a child under 14 years of age). Defendant offered the testimony of a psychiatrist that defendant was not a sexual deviate and was incapable of having the necessary intent to do the acts charged. *Held*, it was reversible error to exclude this evidence. The court, on the narrow issue before it, declared that the statutes dealing with sex perversions and sexual psychopathy show a legislative determination that a sexual psychopath is more likely to violate P.C. 288 than one who has no such propensity. Hence, "[e]vidence that a person has no such disposition is analogous to that in regard to character, for it bears upon the probability of the innocence of the accused. From evidence which tends to prove that a person is not a sexual psychopath, an inference reasonably may be drawn that he did not commit the act denounced by section 288." (42 C.2d 225.) *People v. Sellers* (1951) 103 C.A.2d 830, 230 P.2d 398, holding that a neurologist-psychiatrist could not express an opinion on whether the defendant was homosexual, was disapproved. (See 42 Cal. L. Rev. 880; 1956 A.S. 566.)

(2) *Evidence Code.* Ev.C. 1102, following Wigmore's view (7 Wigmore (Chadbourn Rev.) §1986) and Uniform Rules of Evidence, Rule 405(a), make opinion evidence admissible. "The opinions of those whose personal intimacy with a person gives them firsthand knowledge of that person's character are a far more reliable indication of that character than is reputation, which is little more than accumulated hearsay. ... The danger of collateral issues seems no greater than that inherent in reputation evidence." (Law Rev. Com. Comment to Ev.C. 1102.) (See *People v. Ogg* (1968) 258 C.A.2d 841, 846, 66 C.R. 289; *People v. Stoll* (1989) 49 C.3d 1136, 1153, 265 C.R. 111, 783 P.2d 698, 1 Cal. Evidence (4th), *Opinion Evidence*, §58 [expert opinion as to defendant's lack of sexual deviancy]; *People v. McAlpin* (1991) 53 C.3d 1289, 1306, 283 C.R. 382, 812 P.2d 563, 1 Cal. Evidence (4th), *Opinion Evidence*, §19 [lay opinion as to defendant's lack of sexual deviancy]; but see *People v. Honig* (1996) 48 C.A.4th 289, 348, 349, 55 C.R.2d 555, 2 Cal. Crim. Law (3d), *Crimes Against Governmental Authority*, §105 [character witnesses' ignorance of facts surrounding charges made their opinions whether defendant would have committed charged offenses inadmissible]; and see generally C.E.B., *Effective Introduction of Evidence* 2d, Chap. 14 [Character: Opinion Evidence].)

Ev.C. 1103(b), *supra*, §53, allowing proof of the defendant's character for violence after the defendant introduces

evidence regarding the victim's violent nature, also specifies that opinion evidence may be used.

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Evidence Code*. See *People v. Guerra* (2006) 37 C.4th 1067, 1118, 40 C.R.3d 118, 129 P.3d 321 [in prosecution for murder with attempted rape-murder special circumstance, trial judge erred in excluding testimony of expert witness as to defendant's passive character on ground that witness was not completely sure that defendant would not commit violent act under any circumstances; however, error was harmless, as testimony would have opened door to evidence of defendant's prior assault].





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##### 2. Manner of Proof.

##### cc. Specific Acts.

*1 Witkin Cal. Evid. Circum Evid § 56*

[§ 56] Specific Acts.

(1) *General Rule of Exclusion.* *Ev.C. 1102* retains the existing rule that specific acts of a defendant are inadmissible to prove either good or bad character. (See *People v. Gin Shue* (1943) 58 C.A.2d 625, 634, 137 P.2d 742; *People v. Cordray* (1962) 209 C.A.2d 425, 439, 26 C.R. 42, quoting the text [possession of marijuana; defendant's education and scholastic honors rejected]; *People v. McAlpin* (1991) 53 C.3d 1289, 1309, 283 C.R. 382, 812 P.2d 563, 1 Cal. Evidence (4th), *Opinion Evidence*, §19; *People v. Felix* (1999) 70 C.A.4th 426, 432, 82 C.R.2d 701 [restriction in *Ev.C. 1102* permitting proof of character only by opinion or reputation survived passage of Truth-in-Evidence provision (Cal. Const., Art. I, §28(d)); see 1 Cal. Evidence (4th), *Introduction*, §8]; C.E.B., *Effective Introduction of Evidence* 2d, Chap. 16 [Character: Specific Acts Evidence]; 1A *Wigmore* (Tillers Rev.) §§58.1, 58.2, 192; on inquiry into reports of specific acts in cross-examination of defendant's character witnesses, see 3 Cal. Evidence (4th), *Presentation at Trial*, §245.)

(2) *Exception for Proof of Violent Character.* The defendant's character or trait of character for violence (see *supra*, §53) may be proved by evidence of specific acts. (*Ev.C. 1103(b)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Criminal Law k.380



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##### b. Character of Victim.

##### 1. Admissibility.

*1 Witkin Cal. Evid. Circum Evid § 57*

[§ 57] Admissibility.

(1) *Rule in Homicide and Assault Cases.* An accused claiming self-defense in a prosecution for homicide or assault is entitled to prove the dangerous character of the victim. If this character was known to the defendant, the evidence tends to show the defendant's apprehension of danger; if it was not known, the evidence nevertheless tends to show that the victim was probably the aggressor. "[T]he law recognizes the well-established fact in human experience that the known reputation or character of an assailant as to violence and turbulence has a very material bearing on the degree and nature of the apprehension of danger on the part of a person assaulted; also that one who is turbulent and violent may the more readily provoke or assume the aggressive in an encounter." (*People v. Brophy* (1954) 122 C.A.2d 638, 647, 265 P.2d 593 [approving statement in A.L.R.]; see *People v. Lamar* (1906) 148 C. 564, 574, 83 P. 993; *People v. Mathis* (1965) 63 C.2d 416, 430, 46 C.R. 785, 406 P.2d 65; *People v. Gonzales* (1967) 66 C.2d 482, 499, 58 C.R. 361, 426 P.2d 929 [reputation for violence 7 years before the acts involved was properly excluded as too remote]; *People v. Castain* (1981) 122 C.A.3d 138, 142, 175 C.R. 651 [trial for battery of arresting officer in which defendant claimed that officer was not acting within scope of his duties in that he used excessive force; evidence of officer's past use of excessive force was relevant to show that he acted "in character" on night in question]; 25 Cal. L. Rev. 459 [discussing and explaining apparently contrary cases]; 1A Wigmore (Tillers Rev.) §§63, 63.1; 2 Wigmore (Chadbourn Rev.) §246; 1 McCormick 5th, §193; 1 A.L.R.3d 571.)

(2) *Statutory Extension to Other Crimes.* *Ev.C. 1103(a)* extended the rule of these cases to cover the victim of any crime. The defendant may offer evidence "of the character or a trait of character ... of the victim of the crime for which the defendant is being prosecuted" to prove "conduct of the victim in conformity with the character or trait of character."

In *People v. Wall* (1979) 95 C.A.3d 978, 157 C.R. 587, 3 Cal. Evidence (4th), *Presentation at Trial*, §287, evidence that the complainant in a rape case had threatened to make a false accusation of rape against a former boyfriend was excluded. *Held*, this was error. The evidence was admissible under *Ev.C. 1103(a)* as a specific instance of *nonsexual conduct* tending to disprove the truthfulness of the complainant's testimony. (95 C.A.3d 989.) (For restrictions on admissibility of evidence of complainant's *sexual conduct*, see *infra*, §63 et seq.)

In *People v. Burrell-Hart* (1987) 192 C.A.3d 593, 237 C.R. 654, defendant, accused of rape, offered the defense of denial and alibi. He sought to bolster his denial defense by showing that the complainant, with whom defendant had argued prior to the accusation, had previously falsely accused another man, with whom she had also argued, of

attempting to sexually assault her. *Held*, exclusion of the evidence was error (though harmless in this case).

(a) The evidence could support an inference that the complainant, having previously falsely accused a man with whom she had fought, would under similar circumstances have a motive to testify falsely against defendant. (192 C.A.3d 597, 598.)

(b) *People v. Jones* (1984) 155 C.A.3d 153, 202 C.R. 162, does not require exclusion. Regardless of whether *Ev.C.* 787 (3 *Cal. Evidence* (4th), *Presentation at Trial*, §285) would make evidence of the allegedly false prior accusation inadmissible if its only relevancy was to attack the complainant's credibility as a witness, the evidence was admissible under *Ev.C.* 1103(a) on the substantive issue of defendant's guilt or innocence. (192 C.A.3d 599.) *Ev.C.* 1103(a) permitted defendant to offer evidence of the complainant's character for the purpose of showing that the complainant acted in conformity with that character. (192 C.A.3d 598, citing the text.)

(c) The evidence was not subject to discretionary exclusion under *Ev.C.* 352 (supra, §17 et seq.). Defendant's fundamental due process right to a fair trial and to present all relevant evidence of probative value required admission of the "highly relevant" evidence of prior allegedly false accusations. Moreover, the trial judge's discretion should favor the defendant in cases of doubt; and here the evidence would not consume an undue amount of time or confuse the issues. (192 C.A.3d 599, 600.) (See *People v. Rowland* (1968) 262 C.A.2d 790, 797, 69 C.R. 269 [in assault case in which defendant claimed that his gun went off accidentally while he was trying to ward off homosexual advance, evidence that victim was aggressive homosexual was improperly excluded].)

(3) *Rebuttal Evidence: Victim's Good Character.* *Ev.C.* 1103(a) also codified existing law making admissible rebuttal evidence by the prosecution to show the good character of the victim. (See *People v. Fitch* (1938) 28 C.A.2d 31, 42, 81 P.2d 1019 [approving view that good character may be shown in rebuttal even though attack was by evidence of prior threats]; *People v. Clark* (1982) 130 C.A.3d 371, 384, 181 C.R. 682 [where defendant introduced evidence that victim was in violent rage at time he was killed, prosecution was entitled to present testimony that victim was cordial and friendly]; 1 McCormick 5th, §193.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Rule in Homicide and Assault Cases.* See 1 McCormick 6th, §193.(3) *Rebuttal Evidence: Victim's Good Character.* See 1 McCormick 6th, §193.



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2. Manner of Proof.

aa. Reputation and Opinions.

1 *Witkin Cal. Evid. Circum Evid* § 58

[§ 58] Reputation and Opinions.

*Ev.C. 1103(a)* approves the use of any of the three methods--reputation, opinions, or specific acts (*infra*, §59).

(1) *Reputation*. This is the usual method. (See *People v. Brophy* (1954) 122 C.A.2d 638, 647, 265 P.2d 593, *supra*, §57; *People v. Yokum* (1956) 145 C.A.2d 245, 259, 302 P.2d 406; *People v. Davis* (1965) 63 C.2d 648, 656, 47 C.R. 801, 408 P.2d 129; *Lemelle v. Superior Court* (1978) 77 C.A.3d 148, 163, 143 C.R. 450 [dictum: all three methods are available]; 25 Cal. L. Rev. 467.)

(2) *Opinions*. *Ev.C. 1103* makes opinion evidence of the character of the victim admissible for the same reason that *Ev.C. 1102* makes opinion evidence of the character of the defendant admissible. (See *supra*, §55.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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##### bb. Specific Acts.

#### 1 *Witkin Cal. Evid. Circum Evid* § 59

#### [§ 59] Specific Acts.

(1) *Former Law.* California cases prior to the Evidence Code sanctioned the admission of evidence of previous threats or attacks *on the defendant*, to show the defendant's reasonable apprehension of danger. (See *People v. Yokum* (1956) 145 C.A.2d 245, 260, 302 P.2d 406.) Evidence of attacks *on others* was generally excluded. (See *People v. Soules* (1940) 41 C.A.2d 298, 306, 106 P.2d 639; *People v. Keys* (1944) 62 C.A.2d 903, 912, 145 P.2d 589; *People v. Wong* (1947) 83 C.A.2d 60, 69, 187 P.2d 828; *People v. Kennedy* (1962) 200 C.A.2d 814, 818, 19 C.R. 683; *Villines v. Tomerlin* (1962) 206 C.A.2d 448, 452, 23 C.R. 617.)

But a distinction was made where the defendant claimed to have been in fear of the deceased victim of a homicide. The defendant's mental state was relevant on the issue of self-defense, and thus the defense could attempt to show the reasonableness of the defendant's fear by evidence of prior violent acts committed by the deceased against other persons. (See *People v. Mathis* (1965) 63 C.2d 416, 430, 46 C.R. 785, 406 P.2d 65; *People v. Davis* (1965) 63 C.2d 648, 656, 47 C.R. 801, 408 P.2d 129, following *People v. Carmichael* (1926) 198 C. 534, 548, 246 P. 62.) Thus, in the *Davis* case, defendant testified that he saw the deceased commit several acts of violence, beating and cutting his victims with a knife; that the deceased had told him of committing violent crimes; and that he had heard of other acts of violence of the deceased. He also called three of the victims as witnesses, but none was allowed to testify to the attacks by the deceased. *Held*, it was error (though not prejudicial here) to exclude this evidence.

(2) *Evidence Code.* Under *Ev.C. 1103(a)*, the distinction relating to homicide defendants claiming self-defense, *supra*, is obsolete: The defendant may offer specific acts of the victim and the prosecution may rebut with similar evidence. (See *People v. Smith* (1967) 249 C.A.2d 395, 404, 57 C.R. 508, quoting the text; *People v. Rowland* (1968) 262 C.A.2d 790, 797, 69 C.R. 269.)

(3) *Issue Other Than Self-Defense.* Although this type of evidence is usually offered in support of a claim of self-defense, there is no bar to its admission on another relevant theory, e.g., accidental killing. Thus, in *People v. Mizchele* (1983) 142 C.A.3d 686, 191 C.R. 245, defendant, charged with murder of his wife with her gun, testified that he knew she had a gun in the pocket of her jacket which had been thrown to the floor, that he was fearful that she might use it because of her prior violent conduct, that he picked up the jacket, removed the gun, and it accidentally discharged. His attorney then sought to offer testimony of the probation officer and others of specific acts of aggression by the victim. *Held*, exclusion of this testimony was reversible error. "The evidence before the jury, that defendant had

knowingly retrieved the gun from the pocket of the jacket on the floor with an apparent purpose to use it as a weapon, tended strongly to discredit the testimony of his intent not to use it. Evidence tending to establish a purpose other than to use it as such a weapon would, if believed by the jury, manifestly support his credibility and therefore be relevant under *Evidence Code section 210.*" (142 C.A.3d 690.)

(4) *Evidence of Subsequent Acts.* The reported decisions on evidence of the victim's acts have dealt with acts committed prior to the time of the charged crime, and it has been argued that admissibility is limited to prior conduct. But *People v. Shoemaker* (1982) 135 C.A.3d 442, 185 C.R. 370, found no such restriction in *Ev.C. 1103*, and quoted Wigmore on admissibility of subsequent acts: "Character at an earlier or later *time* than that of the deed in question is relevant only on the assumption that it was substantially unchanged in the meantime, i.e., the offer is really of character at one period to prove character at another, and the real question is of relevancy of this evidence to prove character, not of the character to prove the act. ... [T]here is no difficulty from the point of view of the relevancy of character; a man's trait or disposition a month or a year after a certain date is as evidential of his trait on that date as his nature a month or a year before that date; because character is a more or less permanent quality and we may make inferences from it either forward or backward." (135 C.A.3d 447.)

After adopting the Wigmore view on admissibility, the court upheld the trial judge's exclusion of the evidence under *Ev.C. 352.* (135 C.A.3d 448; see *supra*, §23.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
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##### c. Character of Victim's Associates.

*1 Witkin Cal. Evid. Circum Evid § 60*

[§ 60] Character of Victim's Associates.

In *People v. Minifie* (1996) 13 C.4th 1055, 56 C.R.2d 133, 920 P.2d 1337, defendant, charged with assault with a deadly weapon, claimed self-defense and made an offer of proof of evidence of threats directed against him by associates of the victim. The trial judge excluded the evidence, reasoning that the reputation for violence of the victim's "crowd" was character evidence made inadmissible by *Ev.C. 1101*. *Held*, the ruling constituted prejudicial error.

(a) *Ev.C. 1101(a)* limits the use of character evidence to prove conduct on a specific occasion. Here the evidence was offered not to prove the victim's intentions, but to explain defendant's state of mind, which was relevant because of his claim of self-defense. Moreover, nothing in the statute is intended to affect the admissibility of evidence offered to support or attack the credibility of a witness (*Ev.C. 1101(c)*), and in this case the evidence was offered to lend credibility to defendant's claim that he lived in fear of the victim's associates. (13 C.4th 1067.)

(b) Evidence of threats by the victim himself is clearly admissible when the defendant claims self-defense. The prosecution argued that the justification for this rule is that the victim, by his own actions, has "subjected himself to a quicker and harsher self-defense response on the part of the person threatened," and that this justification disappears when the threat is by a third party and is not adopted by the victim: The third party, who did nothing to cause the use of greater force, is entitled to the protections of the standard rules of self-defense. This argument misperceives the focus of the law of self-defense, which is on the reasonableness of the defendant's action. Reasonableness is judged by how the situation appeared to the defendant, not the victim. "The test, therefore, is not whether the victim adopted the third-party threats, but whether the defendant reasonably associated the victim with those threats." (13 C.4th 1068.)

(c) The trial court also ruled that the evidence was inadmissible under *Ev.C. 352* as more prejudicial than probative. Bearing as it did on defendant's state of mind, however, the evidence was highly probative, had no unique tendency to evoke an emotional bias against the prosecution, and would not have resulted in an undue consumption of time. (13 C.4th 1070, 1071.)

(d) The question of prejudice from the erroneous ruling must be decided in defendant's favor. Without the evidence, defendant could argue only that the victim was a friend of a person defendant had killed, and that defendant thought the unarmed victim was about to hit him with a crutch. The proffered evidence would have allowed defendant to argue that the victim's associates had in fact killed his friend and threatened that defendant would be "next." The jury might find, under these circumstances, that a stronger reaction on defendant's part was reasonable. (13 C.4th 1071.) (See 55 A.L.R.5th 449 [admissibility of third-party threats against defendant in assault or homicide prosecution].)

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##### d. Character of Victim in Sex Case.

##### 1. Former Law and Statutory Revision.

#### 1 *Witkin Cal. Evid. Circum Evid* § 61

[§ 61] Former Law and Statutory Revision.

(1) *Former Rule of Admissibility.* Where the crime charged was rape with force and violence, and the defense was that the victim voluntarily submitted to intercourse, the bad character (unchastity) of the victim could be proved by the defendant. The theory was that "a woman who has previously consented to an act of sexual intercourse would be more likely to consent again to such an act, thereby negating the charge that force and violence were used against her in order to accomplish the rape." (*People v. Walker* (1957) 150 C.A.2d 594, 601, 310 P.2d 110; see *People v. Pantages* (1931) 212 C. 237, 262, 297 P. 890; *People v. Battilana* (1942) 52 C.A.2d 685, 696, 126 P.2d 923; *In re Ferguson* (1971) 5 C.3d 525, 534, 96 C.R. 594, 487 P.2d 1234; 90 A.L.R.3d 1300.) *Ev.C. 1103*, as originally enacted, covered this rule by allowing evidence to be introduced of the bad character of the victim of any crime. (See *supra*, §57.)

(2) *Former Methods of Proof.* California cases upheld admissibility not only of the usual reputation evidence but also of evidence of specific acts of intercourse with others. (See *People v. Battilana*, *supra*, 52 C.A.2d 695; *People v. Pantages*, *supra*; *People v. Walker*, *supra*; 94 A.L.R.3d 257 [complainant's prior sexual acts]; 95 A.L.R.3d 1181 [complainant's general reputation for unchastity]; 81 A.L.R.4th 1076 [admissibility of evidence of victim's sexual activity after the offense].)

(3) *Statutory Revision.* The 1974 Legislature, responding to criticism of the traditional rules, enacted statutes restricting admissibility of evidence of the victim's prior sexual conduct to prove consent. *Ev.C. 782* was added to require an *offer of proof* showing relevancy of the evidence (see *infra*, §62), *Ev.C. 1103* was amended to establish *standards of admissibility* (see *infra*, §63), and P.C. 1127d was added to restrict jury instructions in cases of rape or related offenses (see *infra*, §65). (See 6 *Pacific L. J.* 261; 9 *U.C. Davis L. Rev.* 443, 452, 473 [analysis of statutes and suggestion of changes to avoid serious due process problems]; *People v. Blackburn* (1976) 56 C.A.3d 685, 691, 128 C.R. 864, *infra*, §§62, 63 [upholding constitutionality of statutes]; 1 A.L.R.4th 283 [constitutionality of "rape shield" statute]; 54 *So. Cal. L. Rev.* 35 ["Unchaste Character," Ideology, and the California Rape Evidence Laws]; 24 *U.C. Davis L. Rev.* 1013 [When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions]; for listing of "rape shield" statutes in other jurisdictions, see 1A *Wigmore* (Tillers Rev.) §62.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### 2. Manner of Proof.

#### 1 *Witkin Cal. Evid. Circum Evid* § 62

[§ 62] Manner of Proof.

(1) *Scope of Statute.* *Ev.C. 782*, as enacted in 1974, set forth the procedure for attacking the credibility of a complaining witness in rape and related cases when the witness' own sexual conduct was put in issue. (See *13 Pacific L. J. 658*.) Subsequent amendments have made it applicable to prosecutions for numerous other sexual offenses, including attempts and conspiracies to commit the listed offenses.

The section applies to preliminary hearings. (*People v. Jordan* (1983) 142 C.A.3d 628, 631, 191 C.R. 218.) (a) The purpose of the statute would be defeated if defense counsel could obtain the same information at the preliminary hearing that may not be elicited at trial. (142 C.A.3d 633.) (b) Because *Ev.C. 782* applies to "any prosecution," and refers to a hearing "out of the presence of the jury, if any," it encompasses court trials and preliminary hearings. (142 C.A.3d 634.) (c) The *Ev.C. 782* limitation of defendant's right to use the preliminary hearing for discovery is within the Legislature's power. (142 C.A.3d 635.)

(2) *Procedure.* The statutory procedure is as follows:

(a) The defendant must make a written motion stating that the defense has an offer of proof showing the relevancy of evidence about the complaining witness' sexual conduct and its relevancy in attacking the witness' credibility. (*Ev.C. 782(a)(1)*.) The motion must be accompanied by an affidavit in which the offer of proof is stated. (*Ev.C. 782(a)(2)*.) (See *People v. Harlan* (1990) 222 C.A.3d 439, 447, 271 C.R. 653 [masturbation qualifies as prior sexual conduct within meaning of statute; there is no requirement that conduct be "blameworthy"].)

(b) *If the trial judge finds that the offer of proof is sufficient, a hearing out of the jury's presence must be ordered.* At the hearing, the judge must allow questioning of the complaining witness about the offer of proof. (*Ev.C. 782(a)(3)*.)

(c) At the conclusion of the hearing, if the judge finds that the proffered evidence is relevant under *Ev.C. 780* (see 3 *Cal. Evidence* (4th), *Presentation at Trial*, §259) and is not inadmissible under *Ev.C. 352* (supra, §17 et seq.), the judge may make an order stating what evidence the defendant may introduce and the nature of the questions to be permitted. The defendant may then offer evidence according to this order. (*Ev.C. 782(a)(4)*.) (See *People v. Varona* (1983) 143 C.A.3d 566, 569, 192 C.R. 44 [evidence that complaining witness was on probation for prostitution was improperly excluded]; *People v. Rioz* (1984) 161 C.A.3d 905, 914, 207 C.R. 903, infra, §64; *People v. Chandler* (1997) 56 C.A.4th 703, 711, 65 C.R.2d 687 [following *Vorse v. Sarasy* (1997) 53 C.A.4th 998, 62 C.R.2d 164, supra, §17; in carrying out

weighing process required by *Ev.C. 352* concerning evidence sought to be admitted under *Ev.C. 782*, trial judge may not exclude witness' testimony on sole ground of unbelievability]; 26 *Hastings L. J.* 1551 [analysis of legislative approach, with suggestion that Legislature should give trial judge specific guidelines for *Ev.C. 352* weighing process when evidence of sexual conduct is offered on issue of consent]; 6 *Pacific L. J.* 261.)

(3) *Constitutionality. People v. Blackburn* (1976) 56 C.A.3d 685, 691, 692, 128 C.R. 864, upheld the constitutionality of *Ev.C. 782* against challenges of vagueness (no standard by which the offer of proof is to be tested as "sufficient") and violation of the defendant's privilege against self-incrimination.

(a) As to the vagueness challenge, the court said: "Read as a whole, the section empowers the trial judge first to accept the offer of proof as true. He then determines whether, if the evidence is as the defendant claims, it is relevant and if relevant whether its probative value is outweighed by the probability of undue prejudice or the undue consumption of trial time. ... Only if the judge determines both questions in favor of admissibility is the offer of proof 'sufficient.' Only if it is 'sufficient' is the trial court required to conduct the hearing to determine if the offer truly recites what the evidence will be." (56 C.A.3d 691.)

(b) On the self-incrimination contention, the court relied on the holding in *Jones v. Superior Court* (1962) 58 C.2d 56, 22 C.R. 879, 372 P.2d 919, 5 Cal. Crim. Law (3d), *Criminal Trial*, §28, that a reasonable demand for factual information on a particular defense is permissible. "The offer was related only to evidence of sexual conduct of Deborah not concerned with the crime charged. The offer came after the essence of the prosecution's case had been presented so that nothing in it could lessen the prosecution's burden. The offer concerned only evidence that defendant desired to present to the jury." (56 C.A.3d 692.) (See *People v. Jordan*, *supra*, 142 C.A.3d 634; *Michigan v. Lucas* (1991) 500 U.S. 145, 111 S.Ct. 1743, 1748, 114 L.Ed.2d 205, 214, 3 Cal. Evidence (4th), *Presentation at Trial*, §8 [Sixth Amendment is not violated *per se* by preclusion sanction for defendant's failure to comply with Michigan rape shield statute's notice and hearing requirements as to evidence of past sexual conduct with victim].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Scope of Statute. Ev.C. 782*, as amended in 2006, applies in any of the circumstances specified in *Ev.C. 782(c)* (see *infra*, this section), rather than to "any prosecution."

(2) *Procedure. Ev.C. 782(a)(2)* was amended in 2004 to additionally provide that the affidavit must be filed under seal. It may be unsealed by the court to determine whether the offer of proof is sufficient to order a hearing under *Ev.C. 782(a)(3)*, and then it must be resealed. (On subsequent access to sealed affidavit where defendant raises issue on appeal or collateral review relating to offer of proof, see *Ev.C. 782(a)(5)*, added in 2004.)

*Ev.C. 782* was further amended in 2006. *Ev.C. 782(a)*, as amended, states that the statute's procedures apply in any of the circumstances described in *Ev.C. 782(c)*, which was added in 2006. The circumstances specified in *Ev.C. 782(c)* include: (a) a prosecution for enumerated sex crimes; (b) when an alleged victim testifies under *Ev.C. 1101(b)* as a victim of an enumerated sex crime; (c) when an alleged victim of a sexual offense testifies under *Ev.C. 1108*. All three of the circumstances are made inapplicable if the crime is alleged to have occurred in a local detention facility or a state prison.



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#### 3. Restrictions on Admissibility.

#### 1 Witkin Cal. Evid. Circum Evid § 63

[§ 63] Restrictions on Admissibility.

(1) *Differing Standards of Admissibility.* *Ev.C. 1103(c)* applies to prosecutions for the same sexual offenses as *Ev.C. 782*, supra, §62. As amended in 1974, the subdivision establishes different standards of admissibility for different categories of evidence. (See 6 *Pacific L. J.* 263; 18 *Loyola L.A. L. Rev.* 895.)

(a) Evidence of the complaining witness' own sexual conduct with the defendant is unaffected by these restrictions. (*Ev.C. 1103(c)(3).*)

(b) If a prosecutor introduces any evidence about the complaining witness' sexual conduct, the defendant may *cross-examine* the witness giving that testimony and may offer evidence to *rebut specifically* the evidence introduced by the prosecutor or given by the complaining witness. (*Ev.C. 1103(c)(4).*)

(c) Neither opinion evidence, reputation evidence, nor evidence of specific instances of the complaining witness' sexual conduct is admissible for the defendant to prove the complaining witness' consent, unless the evidence satisfies the requirements for an attack on credibility under *Ev.C. 782*. (*Ev.C. 1103(c)(1), 1103(c)(5).*) (See *People v. Chandler* (1997) 56 *C.A.4th* 703, 708, 65 *C.R.2d* 687 [credibility exception is "utilized sparingly, most often in cases where the victim's prior sexual history is one of prostitution"]; 79 *Cal. L. Rev.* 541 [limits on using rape victim's sexual history to show defendant's mistaken belief in consent].)

(d) Evidence of the victim's manner of dress at the time of the offense is not admissible when offered by either party on the issue of consent "unless the evidence is determined by the court to be relevant and admissible in the interests of justice." For this purpose, "manner of dress" does not include the condition of the victim's clothing before, during, or after the offense. A party seeking to introduce evidence of this type must make its offer of proof outside the hearing of the jury, and the judge, in ruling on the request, must state his or her reasons on the record. (*Ev.C. 1103(c)(2).*)

(2) *Constitutionality.* The constitutionality of *Ev.C. 1103(c)* was upheld in *People v. Blackburn* (1976) 56 *C.A.3d* 685, 690, 128 *C.R. 864*, against the contentions that it denies the rights of confrontation and fair trial.

(a) The statute excludes evidence of the victim's sexual conduct only when it is offered to prove consent. "That limited exclusion no more deprives a defendant of a fair trial than do the rules of evidence barring hearsay, opinion

evidence, and privileged communications. Hearsay evidence tending to exonerate a defendant may be highly relevant to his innocence but is excluded from consideration by the jury. So also is testimony from a highly respected citizen that he believes the defendant did not commit the crime or, absent a waiver of privilege, testimony of a clergyman that another person has confessed the crime in a manner exonerating the defendant. In those situations, policy considerations dictate that the evidence be excluded, and those policy considerations are deemed incorporated within the definition of a fair trial." (56 C.A.3d 690.)

(b) "In contrast to the hearsay, opinion, and privilege bars, the effect upon the outcome of a trial of the 1974 exclusion is minimal. The relevance of past sexual conduct of the alleged victim of the rape with persons other than the defendant to the issue of her consent to a particular act of sexual intercourse with the defendant is slight at best. The historical rule allowing the evidence may be more a creature of a one-time male fantasy of the 'girls men date and the girls men marry' than one of logical inference." (56 C.A.3d 690.)

(c) Because the due process right to a fair trial does not require admission of all relevant evidence tending to exonerate a defendant, and the evidence barred by the statute is of limited probative value, the statute does not deprive the defendant of a fair trial. Because the statute does not bar evidence of sexual conduct of the victim or her cross-examination concerning that conduct to attack her credibility, the right of confrontation is not violated. (56 C.A.3d 691.)

(3) *Illustrations.* In *People v. Steele* (1989) 210 C.A.3d 67, 257 C.R. 687, defendant, after being convicted of various sex crimes against a minor, moved for a new trial on the basis of new evidence that, on the night before the alleged offenses occurred, the victim had sexual intercourse with another man under similar circumstances, i.e., in a car with a man she had just met. *Held*, motion properly denied; the evidence was inadmissible under former Ev.C. 1103(b)(1) (now Ev.C. 1103(c)(1)).

(a) Evidence of the character of the complaining witness in a sex case is inadmissible either under former Ev.C. 1103(b)(1) as evidence offered to prove consent, or under P.C. 1127d (infra, §65) as evidence of "sexual conduct in and of itself" offered to attack the witness' credibility. However, noncharacter evidence relevant to the witness' credibility may be admissible even though it involves prior sexual conduct: "[W]hen the evidence is offered on a noncharacter theory, the mere fact of prior sexual conduct is never in itself important. It becomes important only when linked with other facts that prove, for example, modus operandi or motive to lie. Put another way, it is not the fact of prior sexual activity as such that is important, but something about the special circumstances under which that prior sexual activity took place that renders it important." (210 C.A.3d 75, quoting Letwin, "Unchaste Character," Ideology, and the California Rape Evidence Laws, 54 So. Cal. L. Rev. 35, 71.)

(b) By tending to show the victim's promiscuity, the evidence offered here permits an inference that she consented to sexual activity on the occasion of the alleged offense. Hence, it is inadmissible under former Ev.C. 1103(b)(1). The evidence is also relevant to the victim's credibility because, by suggesting a predisposition to have sex with strangers in vehicles, it casts doubt on the truthfulness of her testimony of being forcibly abducted and sexually assaulted. However, because this predisposition relates primarily to her character, it is inadmissible under P.C. 1127d as relating to "sexual conduct in and of itself." (210 C.A.3d 75.)

(c) Defendant argued that the evidence was admissible on the noncharacter theory of tending to prove the modus operandi of having sex with strangers in vehicles. However, one prior occasion of sexual intercourse in vaguely parallel circumstances falls well short of indicating such a modus operandi. (210 C.A.3d 76.) (See *People v. King* (1979) 94 C.A.3d 696, 704, 156 C.R. 268 [evidence that alleged rape victim had suffered six previous unreported rapes was admissible on issue of consent, because it bore on her credibility; but inquiry into circumstances of prior rapes was prohibited under Ev.C. 1103(2)(a) (now Ev.C. 1103(c)(1))]; *People v. Perez* (1987) 194 C.A.3d 525, 529, 239 C.R. 569 [victim's prior sexual conduct with defendant is admissible under statute to show actual consent or defendant's reasonable, good faith belief that victim consented].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Differing Standards of Admissibility*. The scope of *Ev.C. 782* was widened in 2006. (See Supp., supra, §62.)



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#### 4. Illustrations.

#### 1 *Witkin Cal. Evid. Circum Evid* § 64

[§ 64] Illustrations.

(1) *Evidence Admissible*. In *People v. Rioz* (1984) 161 C.A.3d 905, 207 C.R. 903, defendant, charged with forcible rape, made a motion before trial to be allowed to introduce evidence of the complaining witness' activities and conviction as a prostitute. The judge initially denied the motion; at the trial, defendant testified that the complaining witness had agreed to intercourse for pay, and counsel then renewed the motion. The trial judge, relying on former Ev.C. 1103(b)(1) (now Ev.C. 1103(c)(1)), denied it. *Held*, this was error.

(a) Former Ev.C. 1103(b)(4) (now Ev.C. 1103(c)(5)) provides that nothing in this subdivision makes inadmissible evidence to attack the credibility of the complaining witness under Ev.C. 782. And in *People v. Varona* (1983) 143 C.A.3d 566, 569, 192 C.R. 44, it was held an abuse of discretion to refuse to permit evidence that the victim was a practicing prostitute. But the *Varona* court did not discuss "the inherent tension" between Ev.C. 782 and former Ev.C. 1103(b)(1). (161 C.A.3d 915.)

(b) "There is necessarily a certain amount of overlap between the issues of the victim's consent in a rape or other sex offense case and the victim's credibility. Presumably, any complaining witness in a rape case will deny consent to the sexual acts complained of; to avoid the harassment which has traditionally plagued complaining witnesses in cases of this type, the Legislature excluded evidence of prior sexual activity by the complaining witness with persons other than the defendant in order to prove consent. Thus, it seems clear under *Evidence Code* section 1103, subdivision (b)(1), that a defendant in a rape case cannot, based solely upon the victim's testimony and her presumed denial of consent, introduce evidence that she engaged in sexual activity with 1 other man, 10 other men, or 100 other men, nor that she engaged in such activity freely or for monetary compensation. This rule properly prevents the victim of sexual assault from being herself placed on trial." (161 C.A.3d 916.)

(c) However, once the defendant makes a *sworn* offer of proof under Ev.C. 782 concerning the relevance of the sexual conduct of the complaining witness to attack her credibility, even though it is the underlying issue of consent that is being challenged, the "absolute protection" afforded by Ev.C. 1103 "gives way to the detailed procedural safeguards" of Ev.C. 782. (161 C.A.3d 916.)

(d) Ev.C. 782, along with its other safeguards--including the requirement of a sworn offer of proof--gives the trial judge broad discretion to weigh the proffered evidence under Ev.C. 352 and exclude it as more prejudicial than probative. And this discretion and the safeguards provide a rational resolution of the tension. (161 C.A.3d 917.)

(e) Where, as here, multiple defendants are charged with sex offenses in concert, and only one of them intends to rely on the defense of consent or otherwise challenge the credibility of the complaining witness, the trial may be severed or a limiting instruction may be given. (161 C.A.3d 918.)

(f) The defendant who seeks to offer this evidence must affirmatively offer to prove its relevance. "It is not enough that a defendant alleges the complaining witness is a prostitute, has been convicted of prostitution, or engages in any particularized aspects of that profession *unless* the complaining witness has testified she did not consent to sex with that defendant *and* the defendant has presented evidence by his own testimony or otherwise which directly challenges the complaining witness' denial of consent *and* the defendant offers to prove, by sworn affidavit, that her prior sexual conduct is sufficient to attack her credibility as distinguished from her character. Notwithstanding the overlap between the issues of credibility and consent in such a case, *Evidence Code* section 782 applies only when the credibility of the complaining witness is attacked." (161 C.A.3d 918.)

In *People v. Daggett* (1990) 225 C.A.3d 751, 275 C.R. 287, a prosecution for sexual offenses against a child, the trial judge refused to hold an *Ev.C.* 782 hearing to evaluate defendant's offer of proof concerning similar molestations of the victim by others. In addition, the prosecutor was permitted to argue that the victim must have learned about the matters concerning which the victim testified as a result of having been molested by defendant. *Held*, this was reversible error.

"A child's testimony in a molestation case involving oral copulation and sodomy can be given an aura of veracity by his accurate description of the acts. This is because knowledge of such acts may be unexpected in a child who had not been subjected to them. In such a case it is relevant for the defendant to show that the complaining witness had been subjected to similar acts by others in order to cast doubt upon the conclusion that the child must have learned of these acts through the defendant. Thus, if the acts involved in the prior molestation are relevant to the acts of which the defendant stands accused, evidence of the prior molestation is relevant to the credibility of the complaining witness and should be admitted." (225 C.A.3d 757.)

(2) *Evidence Inadmissible.* In *People v. Casas* (1986) 181 C.A.3d 889, 226 C.R. 285, defendant, charged with forcible rape, contended that his act of intercourse with the complaining witness had been solicited by her at a price of \$ 20. Defendant made a motion to present evidence that on the evening of the alleged rape the complaining witness had offered his friend sex for money. The trial judge, relying on the *Rioz* case, *supra*, ruled that, because of evidence that the complaining witness had been beaten, the defendant's evidence was not relevant, and that any slight relevancy would be outweighed by prejudice to the complaining witness. *Held*, affirmed.

(a) Contrary to defendant's contention, solicitation of an act of prostitution is "sexual conduct" within the meaning of *Ev.C.* 782 and 1103, which the Legislature added to prevent rape victims from being questioned extensively about any prior sexual history without a showing of relevance. (181 C.A.3d 895.)

(b) The issues before the trial judge on the *Ev.C.* 782 motion were whether the proffered testimony was relevant to attack the witness' credibility and whether it was more prejudicial than probative. The only evidence that the victim was a prostitute came from defendant and his friend, and defendant's account "verges on the impossible" and was inconsistent with the victim's injuries; hence, the judge did not abuse his discretion in excluding the evidence. (181 C.A.3d 897.)

One justice strongly dissented. "I submit that when the issue is whether a woman was raped or had consensual relations, the fact that the woman is then in the business of prostitution has a strong tendency in reason to point to the truth of one of the alternative inferences." (181 C.A.3d 898.) "If prostitution is highly relevant, the effect of violence is for the jury. It is of course a factor which points towards defendant's guilt but it is not inconsistent with a woman having consented to sex but drawing the line at unexpected brutalization which, when it occurred, provided the motive for revenge and fabrication." (181 C.A.3d 899.)



**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Evidence Inadmissible.* See *People v. Woodward* (2004) 116 C.A.4th 821, 831, 10 C.R.3d 779, 2 Cal. Crim. Law (3d), *Sex Offenses and Crimes Against Decency, Supp.*, §100, citing the text [in prosecution for lewd conduct with child, trial judge properly excluded other incidents of molestation involving victim, which defendant wished to introduce to show victim's prior knowledge of sexual practices; other incidents were not similar to charged offense; distinguishing *People v. Daggett* (1990) 225 C.A.3d 751, 275 C.R. 287, text, p. 401].



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#### 5. Instructions.

#### *1 Witkin Cal. Evid. Circum Evid § 65*

[§ 65] Instructions.

P.C. 1127d and 1127e restrict jury instructions in cases of rape and related offenses (violation of P.C. 261, 261.5) or attempt or assault with intent to commit any such offense, as follows:

(1) *Prior consent to intercourse.* "[T]he jury shall not be instructed that it may be inferred that a person who has previously consented to sexual intercourse with persons other than the defendant or with the defendant would be therefore more likely to consent to sexual intercourse again." However, if evidence was presented indicating that the victim did previously engage in consensual intercourse with the defendant, "the jury shall be instructed that this evidence may be considered only as it relates to the question of whether the victim consented to the act of intercourse charged against the defendant in the case, or whether the defendant had a good faith reasonable belief that the victim consented to the act of sexual intercourse." The jury must be instructed not to consider the evidence for any other purpose. (P.C. 1127d(a).)

(2) *Prior sexual conduct.* "A jury shall not be instructed that the prior sexual conduct in and of itself of the complaining witness may be considered in determining the credibility of the witness." (P.C. 1127d(b).) (See *People v. Steele* (1989) 210 C.A.3d 67, 75, 257 C.R. 687, supra, §63.)

(3) *Use of term "unchaste character."* The term "unchaste character" may not be used in jury instruction "by any court in any criminal case" in which the defendant is charged with a violation of P.C. 261, 261.5, or 262, or attempt to commit or assault with intent to commit any crime defined in these sections. (P.C. 1127e.) (See 6 *Pacific L. J.* 261.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Prior consent to intercourse.* See CALCRIM, No. 1194 [Consent: Prior Sexual Intercourse].



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#### 6. Federal Rules of Evidence.

*1 Witkin Cal. Evid. Circum Evid § 66*

[§ 66] Federal Rules of Evidence.

*F.R. Evid., Rule 412 (The Privacy Protection for Rape Victims Act of 1978)* was extensively revised in 1994. As amended, it states a general rule of exclusion, creates separate exceptions for criminal and civil cases, and establishes a new procedure for admission that includes an in camera hearing:

(1) *General Rule.* Subject to exceptions stated in Rule 412(b), evidence offered to prove that the alleged victim engaged in other sexual behavior or to prove the victim's sexual predisposition is not admissible in any civil or criminal proceeding involving alleged sexual misconduct. (*F.R. Evid., Rule 412(a).*)

(2) *Exceptions Applicable in Criminal Proceeding.* Under *F.R. Evid., Rule 412(b)(1)*, the following evidence, if otherwise admissible, is not made inadmissible in a criminal case by the general rule of exclusion stated in *F.R. Evid., Rule 412(a)*:

(a) Evidence of specific instances of the alleged victim's sexual behavior if offered to prove that someone other than the accused was the source of semen, injury, or other physical evidence.

(b) Evidence of specific instances of the alleged victim's sexual behavior with the accused if offered by the accused to prove consent, or by the prosecution.

(c) Evidence "the exclusion of which would violate the constitutional rights of the defendant."

(3) *Exceptions Applicable in Civil Proceeding.* Under *F.R. Evid., Rule 412(b)(2)*, despite the general rule of exclusion, evidence offered to prove the alleged victim's sexual behavior or sexual predisposition may be admitted in a civil case if it is otherwise admissible and its probative value substantially outweighs the danger of harm to any victim and unfair prejudice to any party. However, evidence of the alleged victim's reputation may be admitted only if it has been placed in controversy by the victim.

(4) *Procedure.* A party intending to take advantage of one of the rule's exceptions must file a written motion at least 14 days before trial, unless the court, for good cause, imposes a different time limit or permits filing during trial. The motion must be served on all parties and the alleged victim must be notified. (*F.R. Evid., Rule 412(c)(1).*) The court then conducts an in camera hearing. Both the victim and the parties have a right to attend and be heard. Unless the court

orders otherwise, the motion, related papers, and record of the hearing must be sealed and remain under seal. (*F.R. Evid., Rule 412(c)(2).*) (See 2 Mueller & Kirkpatrick, *Federal Evidence* 2d, §155 et seq.; 29 *Am.Jur.2d* (1994 ed.), *Evidence* §496 et seq.; 25 *Southwestern U. L. Rev.* 363.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 57 *Hastings L. J.* 991 [role of *F.R. Evid., Rule 412* during discovery in sexual harassment action]; 166 *A.L.R. Fed* 639 [admissibility of victim's past sexual behavior under *F.R. Evid., Rule 412*].



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#### B. Habit or Custom of Party.

##### 1. Admissibility To Prove Conduct.

##### a. General Rule.

*1 Witkin Cal. Evid. Circum Evid § 67*

[§ 67] General Rule.

(1) *In General.* A person's *character* (general disposition or propensity) is not admissible to prove conduct on a particular occasion. (See *supra*, §42.) But the person's habit or custom (regular response to a repeated specific situation) is admissible "to prove conduct on a specified occasion in conformity with the habit or custom." (*Ev.C. 1105*; see Law Rev. Com. Comment, pointing out that such evidence is relevant and admissible under *Ev.C. 351*, but that *Ev.C. 1105* states a specific rule to avoid misconceptions from the rule excluding character; and see also *Driscoll v. Los Angeles* (1967) 67 C.2d 297, 312, 61 C.R. 661, 431 P.2d 245, citing the text; *Brawthen v. H & R Block* (1975) 52 C.A.3d 139, 148, 124 C.R. 845 [in suit for wrongful termination of employment contract, employee properly introduced statements defendant employer made to all its managers, not to prove terms of other contracts or of plaintiff's contract, but to show that employer had "standard pitch" for all prospective managers, thus showing common habit or usage]; *In re Charles G.* (1979) 95 C.A.3d 62, 66, 156 C.R. 832, *infra*, §68; *Dincau v. Tamayose* (1982) 131 C.A.3d 780, 793, 182 C.R. 855, *infra*, §69, citing the text; *People v. Memro* (1985) 38 C.3d 658, 681, 214 C.R. 832, 700 P.2d 446 [evidence that interrogating officers had custom or habit of obtaining confessions by unlawful means would be admissible on issue whether confession had been coerced]; C.E.B., *Effective Introduction of Evidence* 2d, Chap. 29 [Habit or Custom Evidence]; 1 McCormick 5th, §195; 1A Wigmore (Tillers Rev.) §92 et seq.; Uniform Rules of Evidence, Rule 406(a); 29 *Am.Jur.2d* (1994 ed.), *Evidence* §390 et seq.; 7 *Proof of Facts* 3d 523 [habit of person]; 64 A.L.R.4th 567 [habit or routine practice evidence under Uniform Rule 406].)

(2) *Federal Rule.* *F.R. Evid.*, Rule 406 states: "Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice." (See 2 Mueller & Kirkpatrick, *Federal Evidence* 2d, §123 et seq.; 29 *Am.Jur.2d* (1994 ed.), *Evidence* §390.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General.* See 1 McCormick 6th, §195. *West's Key Number Digest*, Evidence k.138, 139



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1. Admissibility To Prove Conduct.
  - b. Doing of Act.

*1 Witkin Cal. Evid. Circum Evid § 68*

[§ 68] Doing of Act.

Evidence of a habit or custom of doing something is admissible to show that the thing was done on a particular occasion as usual. (See *Hughes v. Pacific Wharf & Storage Co.* (1922) 188 C. 210, 223, 205 P. 105 [to prove that letter was sent, witness may testify to habit of sender's office in addressing and mailing letters]; *Shearer v. Pacific Gas & Elec. Co.* (1941) 43 C.A.2d 306, 309, 110 P.2d 690 [habit of plaintiff, to examine his truck to determine whether any articles should be removed, tends to show this was his purpose at time of accident]; *Conderback v. Standard Oil Co. of Calif.* (1966) 239 C.A.2d 664, 684, 48 C.R. 901 [similar contracts between same parties]; *Driscoll v. Los Angeles* (1967) 67 C.2d 297, 312, 61 C.R. 661, 431 P.2d 245, citing the text; *In re Lopez* (1970) 2 C.3d 141, 146, 84 C.R. 361, 465 P.2d 257 [trial judge had no independent recollection of particular case but recalled "invariable practice" of informing defendants of right to counsel and of appointing counsel for indigents who made requests; petitioner's "bare allegation" that he was not so informed was insufficient to refute judge's affidavit]; *Jenkins v. Tuneup Masters* (1987) 190 C.A.3d 1, 13, 14, 235 C.R. 214 [testimony of tenant's vice-president concerning tenant's custom and habit regarding mailing practices was sufficient to show proper mailing of lease extension notice]; *Ev.C. 1105*, supra, §67; 45 A.L.R.4th 476 [proof of mailing by evidence of office custom]; 35 Proof of Facts 589 [routine business practice of organization in mailing letter, etc.].)

*In re Charles G.* (1979) 95 C.A.3d 62, 156 C.R. 832, was a juvenile court proceeding on a Welf.C. 602 petition charging a minor with commission of burglary of an automobile. An essential element of the crime is that the vehicle must be locked (P.C. 459). The victim testified that "to the best of my knowledge" the car was locked, and "I make it a habit of locking my car because I realize that there are a lot of thefts." *Held*, the evidence was admissible, and supported the finding that the minor had committed the criminal act. (95 C.A.3d 65, 66.)

Formerly, a statutory presumption that "the ordinary course of business has been followed" served a similar purpose; e.g., when a telephone call was made, it was presumed from general experience that the operator gave the right number and that the person who answered was the one called; also, where a letter or telegram, properly addressed and prepaid, was delivered to the post office or telegraph company, it was presumed to have been delivered in due course. (See *Union Const. Co. v. Western Union Tel. Co.* (1912) 163 C. 298, 306, 125 P. 242.) The presumption was eliminated by the Evidence Code (see 1 *Cal. Evidence* (4th), *Burden of Proof and Presumptions*, §99), and now proof of the business custom simply permits an inference, depending upon the strength of the proof, that the custom was followed.

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#### B. Habit or Custom of Party.

##### 1. Admissibility To Prove Conduct.

##### c. Due Care or Negligence.

##### 1. Due Care.

*1 Witkin Cal. Evid. Circum Evid § 69*

[§ 69] Due Care.

(1) *In General.* A habit of care in certain activities may be shown to prove due care, or the absence of contributory negligence, on a particular occasion. (See *Wallis v. Southern Pac. Co.* (1921) 184 C. 662, 665, 195 P. 408; *Fowler v. Key System Transit Lines* (1951) 37 C.2d 65, 68, 230 P.2d 339 [custom of defendant to stop buses on crosswalk, relied on by plaintiff, admissible where defendant without warning departed therefrom]; 28 A.L.R.3d 1293 [pedestrian]; 29 A.L.R.3d 791 [motor vehicle driver or passenger]; 10 A.L.R.4th 1243 [propriety, in medical malpractice case, of admitting testimony regarding physician's usual custom or habit in order to establish nonliability].)

However, the evidence must not be too remote. Thus, a habit of stopping at a railroad crossing and looking about must be limited to habit at the place of the accident. Evidence of that habit at another place and under different circumstances is inadmissible. (*Lindsey v. Pacific Elec. Ry. Co.* (1931) 111 C.A. 482, 499, 296 P. 131.)

(2) *Illustrations.* *Romeo v. Jumbo Market* (1967) 247 C.A.2d 817, 823, 56 C.R. 26, was an action against a market operator for injuries sustained from a fall on a broken bottle of cherries on the floor. *Held*, citing the text, it was proper to ask a regular shopper whether, in her experience, the floor was always clean and orderly.

In *Dincau v. Tamayose* (1982) 131 C.A.3d 780, 182 C.R. 855, plaintiffs sued defendant doctors for malpractice in failing to make a timely diagnosis of spinal meningitis in plaintiffs' 8-week-old child. The mother testified that she talked to the doctors and their nurses on Friday, Saturday, and Sunday, describing the child's serious symptoms which were indicative of bacterial meningitis, and that in none of these contacts did either of the doctors or their employees advise that the child be seen. Defendant doctors and the nurse gave a different version of the mother's calls and the minor symptoms that she had described. Defendants also offered evidence of the habit and custom of the doctors and staff in responding to telephone calls about minors' conditions, including requests that a child be brought in under certain conditions. *Held*, admission of this evidence was proper.

(a) Habit evidence can be used to show due care on a particular occasion. (131 C.A.3d 794, citing the text.) Plaintiffs' contention that the evidence was not introduced for that purpose but rather to impeach the mother's testimony is unsound. "[I]f Doctor Tamayose and his staff habitually asked that an infant with a temperature of more than 100 be brought in for an examination, and did not prescribe over the telephone under such circumstances, this renders it less likely that Doctor Tamayose was negligent and more likely that he used care during the critical weekend. As an incidental effect, such habit evidence also tends to prove that it was less likely that the mother reported the telephone

conversation correctly, and thus tends to be impeaching evidence against mother. But such incidental effects should not render habit evidence inadmissible." (131 C.A.3d 794.)

(b) The further contention of plaintiffs, that the habit testimony of the receptionist and nurse should have been excluded because they were able to remember the particular conversations, was an attempt to apply the abrogated "eyewitness" limitation (infra, §71). (131 C.A.3d 795.)

In *People v. Cabral* (1983) 141 C.A.3d 148, 190 C.R. 194, defendant chiropractor was convicted of unlawful practice of medicine, after his patient, a 21-year-old epileptic, died as a result of a seizure. The patient had been under the treatment of a medical doctor who prescribed anticonvulsant drugs. The chief prosecution evidence was testimony of the parents of the patient, that defendant told them that the medication should be discontinued. Defendant testified that he did not discourage use of the medication but merely advised the parents that he could not prescribe or administer it; and he also testified that his habit in dealing with patients under treatment of a medical doctor was not to interfere with medication prescribed or administered. He then offered to prove through the testimony of other patients of his that he had adhered to this habit of noninterference. *Held*, it was reversible error to exclude this latter testimony. The entire case against defendant turned on the content of the advice given to the parents, and probative evidence to support his version of the conversation was crucial to the defense. (141 C.A.3d 154.)

In *United Pac. Ins. Co. v. Southern Calif. Edison Co.* (1985) 163 C.A.3d 700, 209 C.R. 819, plaintiffs sued defendant electrical utility for damages resulting from a fire when a kite became entangled in the electric conductors. The complaint alleged that the transmission lines were too close together for their amount of sag. The trial judge allowed defendant to introduce a Public Utilities Commission general safety order setting minimum standards for electric transmission lines, together with evidence that defendant had complied with the order. Defendant's theory was that the safety order was as relevant as custom, or tended to prove custom in the regulated industry. *Held*, the evidence was inadmissible. The safety order did not directly cover the defect alleged in the complaint; hence, its introduction did not tend to prove or disprove that defendant used due care. (163 C.A.3d 713.)

**SUPPLEMENT:** [This section is current through the latest supplement]





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2. Negligence.

1 *Witkin Cal. Evid. Circum Evid* § 70

[§ 70] Negligence.

Habit evidence may also be used to prove lack of due care, i.e., negligence of the defendant or contributory negligence of the plaintiff. (See *Craven v. Central Pac. R. Co.* (1887) 72 C. 345, 348, 350, 13 P. 878 [evidence that plaintiff frequently jumped off cars while they were in motion]; *Boone v. Bank of America* (1934) 220 C. 93, 95, 29 P.2d 409 [habit of deceased to drive his motorcycle at excessive speed along the highway in vicinity of accident].) (See 1A Wigmore (Tillers Rev.) §97; 70 *Harv. L. Rev.* 375; *Webb v. Van Noort* (1966) 239 C.A.2d 472, 477, 478, 48 C.R. 823, supra, §41 [distinguishing between character and habit].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### B. Habit or Custom of Party.

1. Admissibility To Prove Conduct.
  - c. Due Care or Negligence.
3. Abrogation of Eyewitness Limitation.

*1 Witkin Cal. Evid. Circum Evid § 71*

[§ 71] Abrogation of Eyewitness Limitation.

California cases decided before the Evidence Code, and perhaps confusing character and habit (see *supra*, §41), excluded habit evidence where there were eyewitnesses to the accident. (See *Lindsey v. Pacific Elec. Ry. Co. (1931) 111 C.A. 482, 498, 296 P. 131*; *White v. Shepardson (1931) 116 C.A. 716, 719, 3 P.2d 346*; *Boone v. Bank of America (1934) 220 C. 93, 95, 29 P.2d 409* [approving the limitation]; *Linde v. Emmick (1936) 16 C.A.2d 676, 685, 61 P.2d 338* [excluding testimony that plaintiff was "a careful, cautious driver" (really character) because plaintiff fully described his operation of car]; *Whittemore v. Lockheed Aircraft Corp. (1944) 65 C.A.2d 737, 752, 151 P.2d 670.*)

*Ev.C. 1105* abandoned this limitation. As the Law Revision Comment states: "Eyewitnesses frequently are mistaken, and some are dishonest. The trier of fact should be entitled to weigh the habit evidence against the eyewitness testimony as well as all of the other evidence in the case."

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### B. Habit or Custom of Party.

##### 2. Manner of Proof.

##### *1 Witkin Cal. Evid. Circum Evid § 72*

[§ 72] Manner of Proof.

"Any otherwise admissible evidence" of habit or custom may be offered to prove conduct in conformity therewith. (Ev.C. 1105; see 7 Proof of Facts 3d 523.) It usually takes one of two forms:

(1) *Opinions* of the person whose conduct is in question or of some other witness familiar with the person's conduct on a sufficient number of occasions. (See *Hughes v. Pacific Wharf & Storage Co.* (1922) 188 C. 210, 220, 224, 205 P. 105; *Whittemore v. Lockheed Aircraft Corp.* (1944) 65 C.A.2d 737, 750, 151 P.2d 670; *Lindsey v. Pacific Elec. Ry. Co.* (1931) 111 C.A. 482, 498, 296 P. 131 [improper question calling for general habit instead of habit at particular place]; 1 McCormick 5th, §195; 2 Wigmore (Chadbourn Rev.) §375; 29 Am.Jur.2d (1994 ed.), Evidence §402.)

(2) *Specific instances* of behavior. (See *Whittemore v. Lockheed Aircraft Corp.*, *supra*, 65 C.A.2d 751; *People v. Memro* (1985) 38 C.3d 658, 681, 214 C.R. 832, 700 P.2d 446 [habit or custom "is often established by evidence of repeated instances of similar conduct"]; 1 McCormick 5th, §195; 2 Wigmore (Chadbourn Rev.) §375.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Opinions*: See 1 McCormick 6th, §195.

(2) *Specific instances of behavior*: See 1 McCormick 6th, §195.



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3. Inadmissible in Products Liability Case.

*1 Witkin Cal. Evid. Circum Evid § 73*

[§ 73] Inadmissible in Products Liability Case.

The issue in a strict products liability case is whether the product is defective, not whether the defendant exercised reasonable care in design or manufacture. (See 6 *Summary* (9th), *Torts*, §1244.) Hence, evidence of custom or practice in the business or industry is irrelevant. (*Foglio v. Western Auto Supply* (1976) 56 C.A.3d 470, 477, 128 C.R. 545; *Titus v. Bethlehem Steel Corp.* (1979) 91 C.A.3d 372, 378, 154 C.R. 122; *Grimshaw v. Ford Motor Co.* (1981) 119 C.A.3d 757, 803, 174 C.R. 348 ["the jury's focus is properly directed to the condition of the product itself, and not to the reasonableness of the manufacturer's conduct"]; *Akers v. Kelley Co.* (1985) 173 C.A.3d 633, 652, 219 C.R. 513 [citing *Grimshaw*].)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*Cross-Reference:* 6 *Summary* (10th), *Torts*, §1431.



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## C. Similar or Related Acts or Circumstances.

## 1. Criminal Case: Other Offenses of Defendant.

## a. General Rule of Exclusion.

## 1 Witkin Cal. Evid. Circum Evid § 74

## [§ 74] General Rule of Exclusion.

The fact that the defendant in a criminal prosecution has committed other crimes may be evidence of bad character and a propensity or disposition to commit the crime charged. But bad character of a defendant cannot be shown for this purpose (see *supra*, §50), and if this is the only purpose, the evidence is excluded. (See *People v. Coan* (1927) 85 C.A. 580, 586, 259 P. 998; *People v. Kelley* (1967) 66 C.2d 232, 238, 57 C.R. 363, 424 P.2d 947; *People v. Schader* (1969) 71 C.2d 761, 772, footnote 4, 80 C.R. 1, 457 P.2d 841, *infra*, §86, citing the text; *People v. Long* (1970) 7 C.A.3d 586, 592, 86 C.R. 590 ["In the eyes of the jury, defendant's possible guilt of the crime charged made probable his complicity in the other three forgeries, while his possible complicity in the other three forgeries made probable his guilt of the crime charged"]; *People v. Matlock* (1970) 11 C.A.3d 453, 460, 89 C.R. 862, 3 Cal. Evidence (4th), *Presentation at Trial*, §352; *People v. Guzman* (1975) 47 C.A.3d 380, 389, 121 C.R. 69 ["Where it is possible to meet the issue by a stipulation it is error to refuse to do so and thus unnecessarily bring before the jury the evidence of other crimes"]; *People v. Gibson* (1976) 56 C.A.3d 119, 127, 128 C.R. 302 [extensive discussion of applicable principles]; *People v. Thompson* (1979) 98 C.A.3d 467, 474, 159 C.R. 615, *infra*, §85; *People v. Thompson* (1980) 27 C.3d 303, 316, 165 C.R. 289, 611 P.2d 883, *infra*, §84; *People v. Alcala* (1984) 36 C.3d 604, 630, 205 C.R. 775, 685 P.2d 1126; *People v. Valentine* (1988) 207 C.A.3d 697, 702, 704, 254 C.R. 822 [prosecution made no offer of proof to show purpose other than bad character, such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident]; *People v. Moten* (1991) 229 C.A.3d 1318, 1325, 280 C.R. 602 [evidence of prenatal drug use was inflammatory (see *supra*, §17 et seq.) in prosecution for murder and felony child endangerment arising from death by malnutrition and dehydration of defendant's 8-week-old infant]; 78 Harv. L. Rev. 436; 35 Cal. L. Rev. 131; 5 Hastings L. J. 73; 82 A.L.R.4th 913 [admissibility of evidence of other offense where record has been expunged]; 1 McCormick 5th, §196 et seq.; 1A Wigmore (Tillers Rev.) §58.2; 29 Am.Jur.2d (1994 ed.), *Evidence* §404 et seq.; on exclusionary rule as applied to evidence of third-party offenses, see *infra*, §100.)

The theory of exclusion is stated in *People v. Baskett* (1965) 237 C.A.2d 712, 47 C.R. 274, quoting Wigmore: "It may almost be said that it is because of this indubitable Relevancy of such evidence that it is excluded. It is objectionable, not because it has no appreciable probative value, but because it has too much. The natural and inevitable tendency of the tribunal--whether judge or jury--is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge. Moreover, the use of alleged particular acts ranging over the entire period of the defendant's life makes it impossible for him to be prepared to refute the charge, any or all of which may be mere fabrications." (237 C.A.2d 715, 716, citing the text.)

*Ev.C. 1101(a)*, supra, §42, and *F.R. Evid., Rule 404(b)*, affirm the exclusion of this type of evidence; *Ev.C. 1101(b)* and Rule 404(b) state the limited admissibility exception (infra, §75). (See 23 Southwestern U. L. Rev. 661 [*F.R. Evid., Rule 404(b)*]; 28 Loyola L.A. L. Rev. 1259 [same].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Armstead* (2002) 102 C.A.4th 784, 793, 125 C.R.2d 651, citing the text; 1 McCormick 6th, §190. *West's Key Number Digest*, Criminal Law k.369 et seq.



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## b. Exceptions Applicable and Other Offenses Admissible.

## 1. Theory of Limited Admissibility.

1 *Witkin Cal. Evid. Circum Evid* § 75

[§ 75] Theory of Limited Admissibility.

(1) *Admission To Prove Fact Other Than Character.* Where the purpose of introducing evidence of other crimes is not to show bad character but to establish some other fact in issue, the limited admissibility doctrine (*supra*, §30) allows its admission for that particular purpose. (See *People v. Phillips* (1960) 186 C.A.2d 231, 245, 8 C.R. 830, quoting the text; *People v. Kelley* (1967) 66 C.2d 232, 239, 57 C.R. 363, 424 P.2d 947; *People v. Covert* (1967) 249 C.A.2d 81, 57 C.R. 220; *People v. Rainville* (1974) 39 C.A.3d 982, 989, 114 C.R. 902 [evidence of past welfare fraud was admissible to show that defendant was willing to engage in dishonest conduct to "beat the system" and therefore had intent to defraud county by filing false homeowner's property tax exemption claim]; *People v. Beamon* (1973) 8 C.3d 625, 632, 105 C.R. 681, 504 P.2d 905 [evidence of prior robberies was admissible to establish accuracy and integrity of victim's identification of defendant, as well as to show defendant's motive, mens rea for robbery, and intent to commit bodily harm]; *People v. Powell* (1974) 40 C.A.3d 107, 154, 115 C.R. 109 [proof of defendant's parole status could reasonably tend to prove that he killed police officer to avoid revocation]; *People v. Douglas* (1990) 50 C.3d 468, 510, 268 C.R. 126, 788 P.2d 640 [where identity was at issue, evidence that defendant had previously planned crimes similar to ones charged was relevant]; *People v. Thomas* (1992) 2 C.4th 489, 520, 7 C.R.2d 199, 828 P.2d 101 [evidence that defendant charged with murder liked to "stalk," i.e., sneak up behind persons without their knowing it, was relevant to show opportunity]; *People v. Garrett* (1994) 30 C.A.4th 962, 967, 36 C.R.2d 33 [in prosecution for threatening another with great bodily injury, evidence of victim's knowledge of defendant's prior conviction for manslaughter and fact that defendant had beaten her was properly admitted to establish element of offense (victim's "sustained fear")]; 1 McCormick 5th, §190; 1A Wigmore (Tillers Rev.) §58 et seq.; 2 Wigmore (Chadbourn Rev.) §300 et seq.; 87 A.L.R.2d 891 [other fires in prosecution for criminal burning or maintaining fire hazard]; CALJIC (6th ed.), No. 2.50.)

(2) *Traditional Exceptions Not Exclusive.* There is no fixed category of mutually exclusive exceptions; i.e., intent, common plan, identity, etc., are merely illustrative of the types of relevant facts in proof of which other crimes may be shown as circumstantial evidence. (See 1 McCormick 5th, §190; 29 *Loyola L.A. L. Rev.* 939 [proposing additional exception for past incidents of abuse against victim in spousal homicide case]; on admissibility of evidence that defendant may have committed similar crimes, to prove *corpus delicti* of murder, i.e., that death of child was by criminal agency, see 87 *Harv. L. Rev.* 1074; on flight, resistance, or escape as admission by conduct, see 1 *Cal. Evidence* (4th), *Hearsay*, §106 et seq.; on impeachment of defendant as witness by proof of conviction of felony, see 3 *Cal. Evidence* (4th), *Presentation at Trial*, §292 et seq.)

(3) *Exclusionary Rule as Exception to General Rule of Admissibility.* The cases illustrating the exceptions are so much more numerous than those applying the exclusionary rule that it has been suggested that the true rule could be more realistically stated in affirmative form: that evidence of other crimes is admissible whenever it is relevant to a material issue, and that it should be excluded only where its sole purpose and effect is to show the defendant's bad moral character (disposition to commit crime). (See *People v. Peete* (1946) 28 C.2d 306, 314, 169 P.2d 924; *People v. Lindsey* (1961) 188 C.A.2d 471, 481, 10 C.R. 488, quoting the text; *People v. Haslouer* (1978) 79 C.A.3d 818, 825, 145 C.R. 234, quoting the text ["In practical terms this actually means that the defendant always starts his discussion with a quotation from *Evidence Code* section 1101, subdivision (a) and the Attorney General starts his with a quotation from *Evidence Code* section 1101, subdivision (b)"]; 13 So. Cal. L. Rev. 511; 22 So. Cal. L. Rev. 345; 7 U.C.L.A. L. Rev. 463 [criticizing present approach and proposing more rigorous analytical method for determining admissibility]; 78 Harv. L. Rev. 449 [proposing that admissibility become rule].)

(4) *Evidence Code. Ev.C. 1101(b)* states the exception as follows: "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act."

(5) *Federal Rule. F.R. Evid., Rule 404(b)* is similar. The substantive portion of the rule states: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." (See *Huddleston v. United States* (1988) 485 U.S. 681, 108 S.Ct. 1496, 1501, 99 L.Ed.2d 771, 782 [court need not make preliminary finding that prosecution has proved the "other act" by a preponderance of evidence; similar act evidence is admissible if there is sufficient evidence to support that finding]; *Dowling v. United States* (1990) 493 U.S. 342, 110 S.Ct. 668, 674, 107 L.Ed.2d 708, 720 [evidence of prior crime on issue of identity of defendant is admissible under Rule 404(b), despite fact that defendant was acquitted on trial of that prior crime; neither Double Jeopardy Clause nor due process bars such proof]; 25 *Loyola L.A. L. Rev.* 1297 [The Depraved Sexual Instinct Theory: An Example of the Propensity for Aberrant Application of *Federal Rule of Evidence §404(b)*]; 64 Am.Jur. Trials 543, 556 [*Huddleston* and *Dowling*]; 2 Mueller & Kirkpatrick, *Federal Evidence* 2d, §106; 29 Am.Jur.2d (1994 ed.), *Evidence §404 et seq.*)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Admission To Prove Fact Other Than Character.* See *People v. Roldan* (2005) 35 C.4th 646, 706, 27 C.R.3d 360, 110 P.3d 289 [in prosecution for murder that occurred during robbery at swap meet, admission of evidence of defendant's participation in robbery at prior swap meet was proper as relevant to issues of identity, intent, and motive]; CALCRIM, No. 375 [Evidence of Uncharged Offense to Prove Identity, Intent, Common Plan, etc.]; 1 McCormick 6th, §190.

(2) *Traditional Exceptions Not Exclusive.* See *People v. Catlin* (2001) 26 C.4th 81, 146, 109 C.R.2d 31, 26 P.3d 357, 1 Cal. Crim. Law (3d), *Defenses, Supp.*, §188, citing the text [in capital murder prosecution, evidence of uncharged crime (death of defendant's fifth wife by paraquat poisoning) could be used to establish cause of death of victims of charged crimes (defendant's mother and fourth wife)]; 1 McCormick 6th, §190.





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## b. Exceptions Applicable and Other Offenses Admissible.

## 2. Subsequent Offenses.

1 *Witkin Cal. Evid. Circum Evid* § 76

## [§ 76] Subsequent Offenses.

There is some authority, including a holding in an early California case, to the effect that other offenses subsequent to the crime charged are not admissible. Where, e.g., the charge is receiving stolen property, and the issue is receiving goods with *knowledge*, the theory is advanced that the subsequent similar acts do not indicate guilty knowledge at the time of the first act. (See *People v. Willard* (1891) 92 C. 482, 488, 28 P. 585.) The majority of courts and more recent California cases admit the evidence on the theory that a series of similar criminal acts may indicate guilty knowledge regardless of the time when they take place. (See *People v. Bean* (1957) 149 C.A.2d 299, 303, 308 P.2d 27 [knowledge that drugs were narcotics]; *People v. Freytas* (1958) 157 C.A.2d 706, 718, 719, 321 P.2d 782 [same]; *People v. Perez* (1974) 42 C.A.3d 760, 763, 117 C.R. 195 [same]; 13 So. Cal. L. Rev. 515.)

Where matters other than guilty knowledge are in issue, the admissibility of subsequent offenses is well established in California. (See *People v. Ferdinand* (1924) 194 C. 555, 561, 229 P. 341 [charge of murder in perpetration of robbery; subsequent robbery to show identity of murderers and acts part of general conspiracy]; *People v. Griffin* (1967) 66 C.2d 459, 464, 465, 58 C.R. 107, 426 P.2d 507 [later rape was admissible to prove intent to rape in charged offense]; *People v. Ward* (1968) 266 C.A.2d 241, 255, 72 C.R. 46 [in murder trial, subsequent murder was admissible to prove common plan]; *People v. Holliman* (1969) 274 C.A.2d 89, 92, 78 C.R. 826, citing the text.) In *People v. Coefield* (1951) 37 C.2d 865, 236 P.2d 570, a prosecution for murder in the course of robbery of a liquor store, the evidence was that defendant had participated in three other liquor store robberies within a month of the homicide, two before and one the night after. In each of the three others and in the one charged, the method was strikingly similar: a liquor store, late evening or early morning, a gun used to intimidate the victim, the victim forced into a back room or basement and struck with a gun to render him unconscious and permit escape. *Held*, the evidence of common method or plan (see *infra*, §92) was relevant on the issue of intent to rob, and was admissible "whether the other offenses were prior or subsequent." (37 C.2d 870.) (See 5 *Hastings L. J.* 77 [criticizing result in *Coefield* as undesirable extension of common plan exception]; 88 A.L.R.3d 8 [other sexual offenses]; 92 A.L.R.3d 545 [admissibility of subsequent offense as affected by proximity of time and place].)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Matters other than guilty knowledge in issue:* See *People v. Garcia* (2001) 89 C.A.4th 1321, 1335, 107 C.R.2d 889 [in prosecution for spousal rape, defendant's violation of restraining order and battery on victim were admissible, even though they occurred 1 year after charged offense].



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## b. Exceptions Applicable and Other Offenses Admissible.

## 3. Remoteness of Prior Offense.

1 *Witkin Cal. Evid. Circum Evid* § 77

[§ 77] Remoteness of Prior Offense.

(1) *In General.* The admissibility of other offenses is subject to some question when they long antedate the time of the crime charged. Remoteness may be a reason for exclusion, or it may be sufficiently explained so as to justify admission. (See 1 McCormick 5th, §190; 2 Wigmore (Chadbourn Rev.) §305.)

Thus, in *People v. Peete* (1946) 28 C.2d 306, 169 P.2d 924, defendant was charged with murdering the deceased as part of a scheme to acquire the latter's property. The prosecution was allowed to offer evidence of a prior murder by defendant, some 18 years before, with the same object, accomplished by the same means, and preceded and followed by similar unusual conduct. *Held*, the evidence was admissible as tending to show motive for the crime and identity of defendant as the murderer, and also as tending to rebut defendant's innocent explanation of her conduct. The court observed that remoteness of time was not significant in this case, for defendant had been convicted of the first murder and had spent most of the intervening period in prison. (28 C.2d 318.) (See 35 Cal. L. Rev. 131; *People v. Grimes* (1952) 113 C.A.2d 365, 373, 248 P.2d 130, *infra*, §92; *People v. Terry* (1969) 70 C.2d 410, 422, 77 C.R. 460, 454 P.2d 36 [to show that murder was committed intentionally to avoid arrest, evidence of robbery of a bank was properly admitted even though statute of limitations had run on the robbery]; *People v. Douglas* (1990) 50 C.3d 468, 511, 268 C.R. 126, 788 P.2d 640 [where defendant was charged with taking two women to desert to make pornographic films and then murdering them, 3-year time lag did not render testimony as to prior incident, involving pornographic photo session, too remote or unreliable]; *People v. Daniels* (1991) 52 C.3d 815, 857, 277 C.R. 122, 802 P.2d 906 [in trial for murder of police officers, 2-year time lag did not make evidence of prior crimes (bank robbery and ensuing shootout with police) too distant and remote]; 7 U.C.L.A. L. Rev. 475.)

In *People v. Burns* (1952) 109 C.A.2d 524, 241 P.2d 308, the charge was second degree murder, arising from the fatal beating of a woman after a nude swimming party. A prior plea of guilty to assault in Massachusetts 13 years before, on a girl who refused to engage in sex activity, was held admissible. (109 C.A.2d 534, 538.) A strong dissent argued that the line of reasonableness was passed in this case: "In other words, because defendant was charged and convicted some 13 years before of assaulting a woman, while under the influence of liquor, in which case she charged that he had first attempted sexual intercourse and then threatened to commit an unnatural sex act, it is now claimed that those facts are relevant in proving that, while under the influence of liquor, some 13 years later, he brutally beat the deceased and murdered her. While sex, in a general sense, was undoubtedly present in both cases, there is not one word of testimony that defendant attempted sexual intercourse in the instant case or threatened or attempted to perform any

unnatural sex act." (109 C.A.2d 554.)

In *People v. Lapin* (1956) 138 C.A.2d 251, 259, 291 P.2d 575, a prosecution for possession of marijuana, it was held error to admit evidence of a misdemeanor conviction for possession, which had occurred 9 years before.

(2) *Distinction: Penalty Phase of Capital Trial.* Possible remoteness of a defendant's prior offenses is not a proper ground of exclusion under P.C. 190.3 (determination of penalty for capital offense; see 3 Cal. Crim. Law (3d), *Punishment*, §473), because remoteness affects the weight, not admissibility, of the prior offense. (*People v. Anderson* (1990) 52 C.3d 453, 476, 276 C.R. 356, 801 P.2d 1107, *supra*, §28.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General.* See 1 McCormick 6th, §190. *West's Key Number Digest*, Criminal Law k.384



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- b. Exceptions Applicable and Other Offenses Admissible.
4. Defendant Not Prosecuted or Convicted.

*1 Witkin Cal. Evid. Circum Evid § 78*

[§ 78] Defendant Not Prosecuted or Convicted.

Because the relevant ultimate fact is not the guilt of the other crime, the evidence is admissible even though the defendant was never prosecuted for the other offense. (See *People v. Archerd* (1970) 3 C.3d 615, 638, 91 C.R. 397, 477 P.2d 421, *infra*, §82; *People v. Jenkins* (1970) 3 C.A.3d 529, 534, 83 C.R. 525 [evidence of other offense was admissible but it was error to exclude evidence that offense was never prosecuted]; *People v. Rogers* (1985) 173 C.A.3d 205, 212, 218 C.R. 494; *People v. Simon* (1986) 184 C.A.3d 125, 129, 228 C.R. 855, 3 Cal. Evidence (4th), *Presentation at Trial*, §55.)

Where the defendant was prosecuted for the other offense, the evidence can be admitted even though an acquittal resulted. (See *People v. Raleigh* (1948) 83 C.A.2d 435, 442, 189 P.2d 70; *People v. Griffin* (1967) 66 C.2d 459, 465, 58 C.R. 107, 426 P.2d 507 [evidence was admissible despite acquittal, but exclusion of evidence of acquittal was error]; 25 A.L.R.4th 934.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Mullens* (2004) 119 C.A.4th 648, 663, 14 C.R.3d 534, Supp., *infra*, §97 [in prosecution for lewd conduct with child, it was reversible error to admit evidence of defendant's conduct with other child without also admitting evidence that he was acquitted of charges arising from that conduct].



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5. Constitutionally Invalid Confession.

1 *Witkin Cal. Evid. Circum Evid* § 79

[§ 79] Constitutionally Invalid Confession.

Confessions to other crimes obtained in violation of constitutional safeguards (see 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §89 et seq.) are inadmissible as circumstantial evidence of the crime charged. (*People v. Jack* (1965) 233 C.A.2d 446, 463, 43 C.R. 566; *People v. Haston* (1968) 69 C.2d 233, 251, footnote 23, 70 C.R. 419, 444 P.2d 91; but see *People v. Coffey* (1967) 67 C.2d 204, 218, 60 C.R. 457, 430 P.2d 15, 3 *Cal. Evidence* (4th), *Presentation at Trial*, §300 [dictum that prior conviction obtained in violation of right to counsel could be used to circumstantially establish motive for charged offense].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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##### 6. Procedure.

#### 1 Witkin Cal. Evid. Circum Evid § 80

[§ 80] Procedure.

(1) *Test for Admissibility.* In *People v. Poulin* (1972) 27 C.A.3d 54, 65, 103 C.R. 623, the court described the procedure as follows: "Before evidence of a collateral offense can be admitted, (1) ground must first be laid implicating the accused in the charge under trial, and unless sufficient evidence of this has, in the opinion of the trial judge, first been adduced, all evidence of other offenses must be excluded; (2) the collateral offense cannot be put in evidence without proof that the accused was involved in its commission; (3) there must be identity of person or crime, scienter, intent, system, or some integral parts of the exceptions established between the charge under trial and that sought to be introduced, that clearly connect the accused, showing that the person who committed the one crime must have committed the other. ... The test of admissibility, thus, is whether there is some clear connection between the collateral offense and the one charged so that it may logically be inferred that if the defendant is guilty of one offense, he must be guilty of the other." (See *People v. Simon* (1986) 184 C.A.3d 125, 129, 228 C.R. 855, 3 Cal. Evidence (4th), *Presentation at Trial*, §55 [admissibility of prior act may depend on determination of preliminary fact pursuant to *Ev.C.* 403 (3 Cal. Evidence (4th), *Presentation at Trial*, §48 et seq.)].)

(2) *Burden of Proof.* The prosecution is not subject to the same burden of proof as on the main issue of guilt (1 Cal. Evidence (4th), *Burden of Proof and Presumptions*, §41 et seq.); i.e., the other offenses may be shown by a preponderance of the evidence, and need not be established beyond a reasonable doubt. (*People v. Lisenba* (1939) 14 C.2d 403, 429, 94 P.2d 569; *People v. Albertson* (1944) 23 C.2d 550, 579, 145 P.2d 7 [proof must be substantial]; *People v. Durham* (1969) 70 C.2d 171, 187, footnote 15, 74 C.R. 262, 449 P.2d 198 [proof by preponderance of substantial evidence]; *People v. Harris* (1977) 71 C.A.3d 959, 965, 139 C.R. 778; *People v. Carpenter* (1997) 15 C.4th 312, 382, 63 C.R.2d 1, 935 P.2d 708 [preponderance of evidence standard applies to proof of other offenses in guilt phase of capital trial, notwithstanding language in previous cases suggesting proper standard is clear and convincing evidence]; see 1 McCormick 5th, §190; 2 Wigmore (Chadbourn Rev.) §307; 13 So. Cal. L. Rev. 511.)

(3) *Distinction: Penalty Phase of Capital Case.* In the separate penalty trial for capital cases (see 3 Cal. Crim. Law (3d), *Punishment*, §463), the proof of other crimes is regarded as so damaging in its impact on the jury that a special rule has developed: The defendant is entitled to an instruction that the other crimes must be proved beyond a reasonable doubt. (*People v. Polk* (1965) 63 C.2d 443, 450, 47 C.R. 1, 406 P.2d 641.) But failure to give the instruction is subject to harmless error analysis. (*People v. Avena* (1996) 13 C.4th 394, 429, 53 C.R.2d 301, 916 P.2d 1000.)

(4) *Rebuttal by Defendant.* The defendant must be allowed to deny or explain the alleged offenses. (*People v.*

*Zerillo* (1950) 36 C.2d 222, 230, 223 P.2d 223; *People v. Griffin* (1967) 66 C.2d 459, 465, 58 C.R. 107, 426 P.2d 507 [right to show acquittal]; *People v. Jenkins* (1970) 3 C.A.3d 529, 534, 83 C.R. 525 [right to show no prosecution]; on argument for exclusion of evidence of acquittal, see 21 U.C.L.A. L. Rev. 892; on admissibility of defendant's evidence of other acts tending to rebut fraudulent intent, see 90 A.L.R.2d 903.)

Also, "[t]he possibility of severing relevant from irrelevant portions should, in every case, be considered, thereby protecting the defendant against reference to other crimes where it has no tendency to establish facts pertinent to the proof of the crime charged." (*People v. Dabb* (1948) 32 C.2d 491, 500, 197 P.2d 1; see *People v. Jackson* (1950) 36 C.2d 281, 285, 223 P.2d 236.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Burden of Proof*. See 1 McCormick 6th, §190.



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## 1. Criminal Case: Other Offenses of Defendant.

## c. Exceptions Inapplicable and Other Offenses Inadmissible.

## 1. Issue Uncontested.

## aa. General Rule.

1 *Witkin Cal. Evid. Circum Evid* § 81

## [§ 81] General Rule.

If the issue on which evidence of other offenses is offered is uncontested, the evidence is irrelevant and should be excluded. (*People v. Gonzales* (1968) 262 C.A.2d 286, 290, 68 C.R. 578; *People v. Anderson* (1970) 6 C.A.3d 364, 370, 85 C.R. 669; *People v. Swearington* (1977) 71 C.A.3d 935, 947, 140 C.R. 5.) (On elimination of issue by stipulation, see *supra*, §15.)

In *People v. Gregg* (1968) 266 C.A.2d 389, 71 C.R. 920, defendant was charged with sale of heroin. The prosecution proved sale to an officer, who testified that defendant was at the time giving himself an injection, and that defendant asked the officer whether he wanted to use the "outfit." Defendant's direct testimony made no claim of ignorance of the narcotic nature of heroin; and, on cross-examination, he stated, without objection, that he "might have been" using heroin "off and on." But the prosecutor, over objection, continued to question him on the nature of the drug, its usual form of packaging, its price, and its strength for a "fix." This brought to the jury's attention his apparent familiarity with *sale*, as distinguished from his own claim of being only an "off and on" *user*. One question was, "In fact, you have bought it in that particular amount, packaged in a balloon, haven't you?" *Held*, admission of this evidence was prejudicial error.

(a) One theory, supported by a number of cases, is that a plea of not guilty puts everything material in issue, hence permits proof of other offenses, even though the defendant does not actually raise the issue of knowledge by claiming lack of it. (266 C.A.2d 391.) Other cases, including *People v. Kelley* (1967) 66 C.2d 232, 242, 243, 57 C.R. 363, 424 P.2d 947, and *People v. Gonzales, supra*, take the opposite view, holding that where the defendant does not raise an issue, the sole effect of the evidence is to show criminal disposition. (266 C.A.2d 392.)

(b) The issue is clearly eliminated by a testimonial admission or a stipulation; but this is not the only way that the defendant can remove the issue and prevent the introduction of evidence of prior offenses. Here, e.g., the offer of his "outfit" obviously negated any inference of honest mistake as to knowledge of the narcotic character of the substance furnished. (266 C.A.2d 395.)

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## 1. Issue Uncontested.

## bb. Issues Part of Prosecution's Burden.

1 *Witkin Cal. Evid. Circum Evid* § 82

[§ 82] Issues Part of Prosecution's Burden.

In *People v. Archerd* (1970) 3 C.3d 615, 91 C.R. 397, 477 P.2d 421, defendant contended that until he put in issue either identity, intent, or some other fact, the prosecution was prohibited from anticipating the defense and presenting evidence of other acts in its case-in-chief. The court rejected the contention. "It is not necessary for the defendant to raise issues before the People may meet them where this is part of the prosecution's burden. The People have the burden of establishing intent and identity." (3 C.3d 639.) (See *People v. Lawrence* (1972) 25 C.A.3d 213, 220, 101 C.R. 671 [declaring that *People v. Gregg* (1968) 266 C.A.2d 389, 394, 71 C.R. 920, *supra*, §81, and *People v. Anderson* (1970) 6 C.A.3d 364, 370, 85 C.R. 669, are no longer authoritative in light of *People v. Archerd*; but see *People v. Perez* (1974) 42 C.A.3d 760, 767, 117 C.R. 195, observing that if *Archerd* were taken literally, it could be argued that evidence of other crimes could be admitted "at any time in any case"].)

In *People v. Perkins* (1984) 159 C.A.3d 646, 205 C.R. 625, defendant was charged with burglary, and the prosecution, for enhancement purposes, alleged a prior felony conviction for receiving stolen property. In order to avoid getting the evidence of the prior before the jury, defendant admitted it out of the jury's presence for enhancement purposes only. By a motion in limine, the prosecution sought to prove the prior conviction to show defendant's intent and knowledge, contending that these were elements of the charged crime. *Held*, it was error, though harmless, to admit the evidence.

(a) If defendant had placed these elements in issue, the evidence would have been admissible; if he did not, evidence of the uncharged offense would not be admissible. And here, the motion to admit the uncharged offense was made and granted in limine; defendant at that time had not put intent or knowledge in issue, and he did not do so later. (159 C.A.3d 651, 652.)

(b) To reduce the possibility that an uncharged offense will be admitted to prove an element of the crime before that element is placed in issue, trial judges are advised to follow the procedure used by the trial judge in *People v. Scott* (1980) 113 C.A.3d 190, 199, 169 C.R. 669: "He instructed the prosecutor to avoid reference to an uncharged offense in his case in chief, but ruled that, if the defense placed any ultimate facts into issue, he would consider allowing the prosecutor to use an uncharged offense in rebuttal. Evidence of the prior was admitted because the testimony of Scott's codefendant placed Scott's intent in issue and Scott, also, testified." (159 C.A.3d 652.)

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##### 2. Offenses Not Connected.

#### 1 Witkin Cal. Evid. Circum Evid § 83

#### [§ 83] Offenses Not Connected.

(1) *In General. People v. Jackson* (1967) 254 C.A.2d 655, 62 C.R. 208, condemns a completely improper use of other offense evidence.

(a) *No connection with anyone.* "Evidence of other similar crimes linked to no one at all is clearly inadmissible to prove any element of the crime charged against a defendant, even though the crime occurred within a reasonable proximity of time and place." Otherwise, a defendant charged with robbing a service station could be convicted on proof that four other stations were robbed in the same city and on the same night by persons unknown, simply because the modus operandi as to each was the same as that used in the crime charged. (254 C.A.2d 658.)

(b) *Connection with alleged accomplice not prosecuted.* The *Jackson* case presented a variation of the situation in which the other offenses were not connected with the defendant. An electric utility had suffered a number of thefts at substations. Officers apprehended defendant and L, who carried objects which they threw away. These turned out to be a bolt cutter and a wire cutter for achieving entry through the chain link fence. Defendant was charged with attempt to commit grand theft. To prove his specific intent the prosecution advanced the theory that L was his accomplice, and that L's intent was consequently imputed to him. L's intent was then proved by evidence of three similar offenses connected with L.

The defect in this approach was that L was not charged with the crime. If defendant and L had been jointly charged and tried, L's other crimes would have been admissible against L, and defendant might have been found guilty as an aider and abettor of L. Charging defendant alone, and giving him the impossible burden of refuting the evidence of other crimes allegedly committed by L, "violates the fundamental principles of due process of the law." (254 C.A.2d 660.) (See *People v. Long* (1970) 7 C.A.3d 586, 591, 86 C.R. 590 [in prosecution for passing forged check, it was reversible error to admit evidence that defendant was present when third party forged three other checks, where there was no substantial evidence of defendant's complicity in those other forgeries]; *People v. Hernandez* (1997) 55 C.A.4th 225, 242, 63 C.R.2d 769 [trial judge committed reversible error in admitting testimony by crime analyst concerning data in in-house police sex crimes data base indicating that two cases matching modus operandi of charged crimes had occurred in area searched while defendant lived there].)

(2) *Criminal Practices Involving Similar Offenses.* In *People v. Martinez* (1992) 10 C.A.4th 1001, 12 C.R.2d 838, a prosecution for unlawfully driving a stolen vehicle and other offenses, the trial court admitted expert opinion evidence

on how auto theft rings operate. (10 C.A.4th 1004.) Held, this was reversible error. The court, after discussing the *Jackson* and *Long* cases, supra, said: "Presumably the purpose of the evidence was to show that defendant was lying when he claimed he bought the car on a street corner and did not know it was stolen. The prosecution tried to prove this by showing that other drivers found driving similar vehicles under similar circumstances made the same claim. Here the prosecution implicitly asked the jury to use defendant's disavowal of knowledge to bolster the theory that the other drivers were lying when they denied knowledge and then using that conclusion in turn to reach the conclusion that defendant knew the vehicle was stolen. This sort of bootstrap reasoning is impermissible, and the trial court erred in admitting the evidence of other crimes without first requiring proof that defendant was connected with the other crimes." (10 C.A.4th 1007.) (But see *People v. Lopez* (1994) 21 C.A.4th 1551, 1555, 1556, 26 C.R.2d 741, distinguishing *Martinez* [narcotics agent's testimony about organization of methamphetamine manufacturing rings was not improper "profile" testimony, but was background testimony allowing jury to understand other evidence addressing guilt or innocence].)

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3. Unsupported Assertion of Admissible Purpose.

#### 1 Witkin Cal. Evid. Circum Evid § 84

[§ 84] Unsupported Assertion of Admissible Purpose.

(1) *Murder Prosecution: Evidence of Prior Rape.* In *People v. Guerrero* (1976) 16 C.3d 719, 724, 129 C.R. 166, 548 P.2d 366, the court declared that "admission of other crimes evidence cannot be justified merely by asserting an admissible purpose."

Defendant was charged with murdering a 17-year-old girl. He had given her an automobile ride shortly before her body was found with her blouse above her brassiere, with no sign of sexual molestation, and with wounds that could have been caused by a blunt instrument like a lug wrench. The trial judge admitted testimony from L, another 17-year-old girl, that 6 weeks before the alleged murder defendant had given her a ride in his automobile, forced her into acts of oral copulation and sexual intercourse, and threatened her with a lug wrench. *Held*, evidence of the earlier rape and threat should have been excluded.

(a) Testimony about L's rape was inadmissible on the issue of identity for two reasons. Defendant's presence at the crime scene had been well established by other evidence that defendant was with the victim at or near the time she died; evidence of the crimes against L was irrelevant. "If the victim had been attacked in a distinctive manner that was identical to a previous crime defendant had committed, then the evidence of the other crime might have probative value. But the only claimed connection that has any logical relevance is evidence of 'sexual activity' in both cases and the possible use of a wrench. Even if both facts were established ... it could not reasonably be claimed that the two offenses were committed in a particularly distinct manner that tends to inculcate defendant." (16 C.3d 725.)

(b) Could the testimony have been admitted to show that defendant killed his victim during an attempted rape? In *People v. Kelley* (1967) 66 C.2d 232, 242, 57 C.R. 363, 424 P.2d 947, other-crimes evidence was properly introduced to show intent where proof of intent was ambiguous. But other-crimes evidence may not be used to show the otherwise ambiguous intent behind an act when there is little evidence that the act was committed. "Indeed, the standard framework for admission of evidence of other crimes is if there is no doubt that defendant has committed an act, but some question as to his intent in doing so." (16 C.3d 726.)

Here, evidence on the cause of the victim's death was ambiguous; i.e., was she killed by blows from a blunt instrument or by a fall? Evidence of L's rape did nothing to resolve this ambiguity, because even if defendant's threatening gesture with a wrench was admitted, it would not prove that the present victim was killed intentionally rather than accidentally. Nor could evidence of L's rape be used to show that defendant killed the victim in the course of

an attempted rape, because there was no evidence whatsoever of sexual intercourse or attempted sexual intercourse which the L rape might explain. "Contrary to the prosecutor's broad assumption, boy plus girl does not invariably equal sex." (16 C.3d 727.)

(c) The prosecution argument is circular: "(1) sexual activity must have taken place in the Santana offense because defendant's rape of Miss Lopez demonstrates his aggressive sexual tendencies; (2) therefore, evidence of the Lopez rape may be introduced to show the intent with which defendant tried to engage in sex with Miss Santana. The first premise, of course, seeks to prove defendant's conduct in this case by means of evidence of his criminal disposition. Such proof is expressly prohibited by *Evidence Code section 1101*, subdivision (a). ... In short, the People may not conjure up an attempted rape in this instance in order to introduce evidence of another rape." (16 C.3d 728.)

(d) The similarities between the two offenses are not substantial enough to have probative value. "If aimless cruising and drinking beer were distinctive earmarks of criminal behavior, a large percentage of the teenage population of Southern California would be prime suspects in this case." (16 C.3d 729.)

(e) The harmful impact of the testimony about the threat would not alone justify reversal, but admission of evidence of the L rape--a brutal and abhorrent one--was prejudicial beyond a shadow of a doubt. "No limiting instruction, however thoughtfully phrased or often repeated, could erase from the jurors' minds the picture of defendant's role in raping a 17-year-old girl and forcing her to commit oral copulation." (16 C.3d 730.)

(2) *Felony-Murder Prosecution: Evidence of Prior Robbery.* In *People v. Thompson* (1980) 27 C.3d 303, 165 C.R. 289, 611 P.2d 883, the prosecution was for robbery, burglary, and felony-murder based on robbery and burglary. The specific intent to steal was an important issue, for, if the jury accepted defendant's contention that he lacked that intent, he would have established a defense to the special-circumstances allegations for first degree murder and to the robbery and burglary counts. The judge permitted the prosecution to introduce evidence of another robbery committed 2 weeks after the crimes charged. *Held*, this was error.

(a) Because defendant placed the element of specific intent to steal in issue, the requirements of materiality and necessity of other offense evidence were met. (27 C.3d 315, 318.) But under *People v. Guerrero*, mere assertion of an admissible purpose does not justify admission, and the question remains whether the particular evidence of defendant's other offenses is relevant to prove intent in the present case. (27 C.3d 319.)

(b) Here, the only similarities in the two crimes were that the defendant demanded an automobile and left the scene with a set of his victim's car keys. In other respects, his conduct was quite different; and "[e]vidence that an individual intended to steal car keys on one occasion does not, by itself, substantially tend to prove that he intended to steal them on a second occasion." (27 C.3d 321.)

(3) *Murder Prosecution: Evidence of Prior Offers To Implicate Others in Exchange for Leniency.* In *People v. Hamilton* (1985) 41 C.3d 408, 221 C.R. 902, 710 P.2d 981, the prosecution's theory was that the victim had surprised defendant while he was breaking into her van, and, because of his deathly fear of prison, defendant murdered the victim. The trial judge permitted the prosecution to introduce letters written by defendant while he was in prison years earlier in which, in exchange for release or reduction of sentence, he promised to implicate a number of persons, including his own brother, in various crimes. *Held*, this was error. "The proffered motive of killing eyewitnesses because of defendant's extreme fear of prison simply does not wash. It rests entirely on speculation on how an assumed 'normal' burglar would have behaved after being discovered, which, in turn, is based entirely on speculation on how such a 'normal' burglar would have weighed the possibility of going to prison against the problems associated with the taking of a human life. The jury is then asked to compare this supposed reaction of a 'normal' burglar with the assumed reaction of a person who dislikes prison with the intensity which the defendant's letters imply. It is difficult to imagine a more tenuous chain of inferences on which to base a finding that one person has killed another." (41 C.3d 426.)

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## 4. Inadmissible To Support Prosecution Witness.

1 *Witkin Cal. Evid. Circum Evid* § 85

[§ 85] Inadmissible To Support Prosecution Witness.

(1) *In General.* In *People v. Thompson* (1979) 98 C.A.3d 467, 159 C.R. 615, defendant was charged with a sex offense against F, a minor, and with furnishing marijuana to F. F testified to these facts, and defendant gave a completely contrary version of what took place. The trial judge then allowed F to testify that on several prior occasions defendant had provided him with marijuana cigarettes and that he had smoked them at defendant's apartment. The jury was instructed that this testimony was admitted for the limited purpose of supporting F's credibility with respect to his testimony as to the acts charged. *Held*, admission of this supporting evidence was error.

(a) *Ev.C. 1101(b)* (supra, §75) does not deal with character trait evidence offered on credibility of a witness; this subject is covered by *Ev.C. 786* et seq. (3 *Cal. Evidence* (4th), *Presentation at Trial*, §281 et seq.). (98 C.A.3d 473, quoting Law Rev. Com. Comment to *Ev.C. 1101*.)

(b) *Ev.C. 786* limits evidence of this type to the character traits of dishonesty and untruthfulness (see 1 *Cal. Evidence* (4th), *Presentation at Trial*, §281), and *Ev.C. 787* prohibits proof of specific wrongful acts (see 3 *Cal. Evidence* (4th), *Presentation at Trial*, §285). The general authorization of evidence to impeach a witness (*Ev.C. 780, 3 Cal. Evidence* (4th), *Presentation at Trial*, §259) is subject to the limitations of *Ev.C. 786* and *Ev.C. 787*. (98 C.A.3d 476, 477 et seq., analyzing *People v. Thomas* (1978) 20 C.3d 457, 143 C.R. 215, 573 P.2d 433.) "To hold that such evidence is admissible in the case at bench on a support-of-witness-credibility theory would espouse an evidentiary rule of law that would constitute an emasculation of the statutory prohibition (set forth in *Evid. Code*, §1101) against the admissibility of evidence that defendant committed a similar offense when the sole relevancy of such evidence is that of proof of defendant's disposition, propensity or character trait to commit such offenses from which it may be inferred that he acted in conformity with his propensity and committed the charged offense." (98 C.A.3d 481.)

(2) *Distinction: Evidence Explaining Witness' Fear of Testifying.* In *People v. Feagin* (1995) 34 C.A.4th 1427, 40 C.R.2d 918, a murder case, a prosecution witness was allowed to testify that defendant had previously tried to kill him. The trial judge found that most of the witness' testimony was admissible under the hearsay exceptions for admissions and adoptive admissions; the details of the murder attempt would be too hard to excise from the rest of the testimony and were more relevant than prejudicial. *Held*, the testimony was properly admitted. "Evidence that a witness is afraid to testify is relevant to the credibility of the witness. ... The testimony explained the fear Deitric felt when appellant's aunt followed him from the courtroom; his reaction to the assault on his brother in jail by Feagin two days after his earlier testimony; his reluctance to testify and inconsistent statements, his reasons for leaving a group in which he

overheard statements when approached by appellants; and his reasons for hiding his face while testifying." (34 C.A.4th 1433, 1434.)

(3) *Distinction: Prosecution for Sexual Offense.* In a prosecution for sexual offenses, where the victim's credibility is often at issue, admissibility of the defendant's other sexual offenses is controlled by *Ev.C. 1108*. (See *infra*, §97.)

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## 5. Discretionary Exclusion.

## 1 Witkin Cal. Evid. Circum Evid § 86

## [§ 86] Discretionary Exclusion.

In *People v. Sam* (1969) 71 C.2d 194, 77 C.R. 804, 454 P.2d 700, D, a stranger to defendant, became insulting and objectionable, challenged him to a fight, and leaped at him. Defendant threw him down, stamped his foot on his stomach, and left. D died 2 weeks later. Defendant was charged with murder, and to show a common plan or scheme (see *infra*, §92), the judge admitted evidence of two prior acts: (1) While living with C, defendant, in a drunken quarrel, kicked her in the ribs; she was hospitalized and he pleaded guilty to assault and battery and disturbing the peace. (2) Defendant had a fight with a longtime friend, and kicked him. Defendant was found guilty of involuntary manslaughter. *Held*, reversed.

(a) The evidence was of *doubtful relevance*. Crimes sharing common features may be shown to prove identity (*infra*, §92), but no such issue was involved. They may be shown where the offenses are connected (*infra*, §93), but there was no connecting link here. They may also be shown to prove criminal intent and thereby negate a claim of self-defense (*infra*, §89), but two drunken fights during a 2-year period had little probative value on a recent altercation. (71 C.2d 205.)

(b) Even if there was *some relevance*, its *prejudicial effect* was so great as to call for exclusion under *Ev.C.* 352 (*supra*, §17). "This case is a dramatic illustration of the prejudice that can be injected into a trial through the device of demonstrating prior criminal acts. By use of this stratagem, the prosecution was able to place before the jury the largely irrelevant but manifestly harmful information that defendant was a man who often drank to excess and was frequently drunk; that he was often belligerent and fought with others; that he had been living with a married woman not his wife; that he had struck that same woman with sufficient force to hospitalize her; that he had helped to assault his good friend Tubby so severely that an ambulance and the police had to be called; that he had admitted to one assault and battery and had been charged with another. In short, defendant was made to appear to be an antisocial individual of generally bad character, an immoral person unworthy of the jury's belief or consideration. Certainly a substantial showing of probative value was required to justify admission of this prejudicial and inflammatory evidence so that the jury could dispassionately perform its function of ascertaining the truth as to the events involved in *this case*." (71 C.2d 206.)

*People v. Schader* (1969) 71 C.2d 761, 80 C.R. 1, 457 P.2d 841, holding the evidence admissible, examines and restates the criteria of admissibility, again emphasizing the necessity of weighing probative value against prejudice likely to result: "Before permitting the jury to hear evidence of other offenses the court must ascertain that the evidence (a) 'tends logically, naturally and by reasonable inference' to prove the issue upon which it is offered; (b) is offered upon

an issue which will ultimately prove to be material to the People's case; and (c) is not merely cumulative with respect to other evidence which the People may use to prove the same issue. In determining relevance, the trial court must look behind the label describing the kind of similarity or relation between the other offense and the charged offense; it must examine the precise elements of similarity between the offenses with respect to the issue for which the evidence is proffered and satisfy itself that each link of the chain of inference between the former and the latter is reasonably strong. In order to assess materiality, the court must consider not merely the elements of the offense, but also the defendant's testimonial admissions." (71 C.2d 775.) (See *People v. Stanley* (1967) 67 C.2d 812, 818, 63 C.R. 825, 433 P.2d 913 ["The court should not permit the admission of other crimes until it has ascertained that the evidence tends logically and by reasonable inference to prove the issue upon which it is offered, that it is offered on an issue material to the prosecution's case, and is not merely cumulative"]; *People v. Perez* (1974) 42 C.A.3d 760, 766, 117 C.R. 195; *People v. Gibson* (1976) 56 C.A.3d 119, 130, 128 C.R. 302; *People v. Perry* (1985) 166 C.A.3d 924, 929, 931, 212 C.R. 793 [evidence of slight relevancy, cumulative, and extremely prejudicial]; *People v. Escobar* (1996) 48 C.A.4th 999, 1024, 55 C.R.2d 883 [reviewing relevant factors; under state of evidence and offer of proof then before court, trial judge did not abuse discretion in admitting evidence of one defendant's prior carrying of loaded firearm to show that other defendant acted out of fear of him].)

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## d. Required Degree of Similarity.

1 Witkin Cal. Evid. Circum Evid § 87

## [§ 87] Required Degree of Similarity.

(1) *In General.* Most of the exceptions specified in *Ev.C. 1101(b)*--"motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident"--can be lumped together in three categories: intent, common design or plan, and identity. In *People v. Ewoldt* (1994) 7 C.4th 380, 27 C.R.2d 646, 867 P.2d 757, a prosecution for lewd acts with a child, the Supreme Court pointed out that the required degree of similarity between the current offense and the uncharged misconduct depends upon the purpose for which the evidence is to be admitted. The least degree of similarity is required to prove intent; the similarity must merely be sufficient to support the inference that the defendant probably harbored the same intent in each instance. (7 C.4th 402.) A greater degree of similarity is required to prove the existence of a common design or plan; the uncharged misconduct must demonstrate "not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." (7 C.4th 402.) The greatest degree of similarity is required to prove identity; the common features of the uncharged misconduct and the current offense must be sufficiently distinctive as to support the inference that the same person committed both acts. (7 C.4th 403.) (See *People v. Nible* (1988) 200 C.A.3d 838, 850, 247 C.R. 396 [in burglary prosecution, evidence that defendant had previously climbed through windows of women's bedrooms after removing window screen, and touched the women, was admissible on issue of intent to rape, even if incidents were not similar enough to be admitted to prove identity]; *People v. Gallego* (1990) 52 C.3d 115, 171, 276 C.R. 679, 802 P.2d 169 [first degree murder and kidnapping prosecution; trial judge's belief that other crimes were insufficiently similar to justify their admission to prove identity did not preclude his ruling that they were sufficiently similar to permit admission to establish intent]; *People v. Wilson* (1991) 227 C.A.3d 1210, 1217, 278 C.R. 319 [following *People v. Nible*]; *People v. Delgado* (1992) 10 C.A.4th 1837, 1845, 13 C.R.2d 703 [same].)

(2) *Distinction: Prior Violent Acts Against Victim of Current Crime.* *People v. Linkenauger* (1995) 32 C.A.4th 1603, 38 C.R.2d 868, adopts a lenient standard of admissibility for evidence of prior violent acts directed against the victim of the current offense. Defendant was charged with murdering his wife, and the trial judge admitted evidence of defendant's past violent conduct toward his wife on the issues of intent, motive, and identity. *Held*, this was proper.

(a) *People v. Ewoldt*, *supra*, is distinguishable, and its standards of admissibility are inapplicable here. (1) *Ewoldt* did not involve a violent crime; (2) the issue in *Ewoldt* was common design or plan; and (3) the high degree of distinctiveness in the pattern and characteristics of the crimes required by the *Ewoldt* court to prove identity cannot be required under the present circumstances, because no one can kill the same victim more than once in a highly

characteristic fashion. A broader range of evidence should be admissible to show motive, intent, and identity where the prior misconduct and charged offense involve the identical perpetrator and victim. (32 C.A.4th 1613.)

(b) The evidence of marital discord and defendant's prior assaults against the victim had a tendency to show his intent to beat, torture, and ultimately kill her. The evidence was properly admitted to show ill will and motive, and it also supported the inference that it was defendant who committed the charged offense. (32 C.A.4th 1613, 1614.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### C. Similar or Related Acts or Circumstances.

#### 1. Criminal Case: Other Offenses of Defendant.

#### e. Illustrations of Admissible Evidence.

#### 1. Intent, Motive, and Knowledge.

#### aa. In General.

#### *1 Witkin Cal. Evid. Circum Evid § 88*

[§ 88] In General.

Evidence of other offenses is admissible to show criminal intent or knowledge, or motive, where they are disputed by defenses such as mistake, accident, or insanity. (See *Ev.C. 1101(b)*, supra, §75; *People v. Dabb* (1948) 32 C.2d 491, 499, 197 P.2d 1 [consciousness of guilt]; *People v. Raleigh* (1948) 83 C.A.2d 435, 440, 189 P.2d 70 [unlawful possession of gun, denied by defendant; evidence of possession of gun on other occasions]; *People v. Archerd* (1970) 3 C.3d 615, 638, 91 C.R. 397, 477 P.2d 421, 3 Cal. Evidence (4th), Presentation at Trial, §15; *People v. Maler* (1972) 23 C.A.3d 973, 978, 100 C.R. 650 [arson and insurance fraud case; evidence of prior fires relevant to show intent, motive, and knowledge, i.e., "familiarity with recovery"]; *People v. Terry* (1970) 2 C.3d 362, 396, 85 C.R. 409, 466 P.2d 961, 1 Cal. Evidence (4th), Hearsay, §109, citing the text; *People v. Johnson* (1991) 233 C.A.3d 425, 444, 284 C.R. 579, 2 Cal. Evidence (4th), Witnesses, §192 [prosecution for murder of woman defendant had formerly lived with; subsequent beating of wife, considered in light of defendant's simultaneous statement that what happened to victim would happen to wife, was admissible to prove motive, intent, and identity]; *People v. Arias* (1996) 13 C.4th 92, 130, 131, 51 C.R.2d 770, 913 P.2d 980 [motion to allow defendant to plead guilty to counts arising from one incident, so as to bar evidence of that incident in prosecution of counts arising from other incident, was properly denied; proposed stipulation would prevent prosecution from presenting material circumstantial evidence on consciousness of guilt and identity]; 1 McCormick 5th, §190; 2 Wigmore (Chadbourn Rev.) §300; 15 A.L.R.2d 1080 [other acts of abortion]; 64 A.L.R.2d 823 [other acts of gambling].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Harrison* (2005) 35 C.4th 208, 230, 25 C.R.3d 224, 106 P.3d 895 [in capital murder case, evidence of defendant's attempt to kill man to whom he had admitted both charged murders was properly admitted to show his consciousness of guilt]; *People v. Walker* (2006) 139 C.A.4th 782, 804, 805, 43 C.R.3d 257 [in prosecution for murder of prostitute, similarity between prior rape and beating (of another prostitute) and charged crime was sufficient for admission of prior crime on issue of identity, while lesser similarity between prior sexual assault (on another prostitute) and charged crime was sufficient for admission on issues of motive and intent; but evidence of third prior crime (rape of non-prostitute) was inadmissible, as there was little similarity to charged crime]; 1 McCormick 6th, §190.



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##### 1. Intent, Motive, and Knowledge.

##### bb. Criminal Intent.

#### 1 Witkin Cal. Evid. Circum Evid § 89

#### [§ 89] Criminal Intent.

Prior offenses are frequently admitted to show criminal intent and negative the defense of lack of such intent. (See 2 Wigmore (Chadbourn Rev.) §302; 78 A.L.R.2d 1359 [false pretenses]; 7 U.C.L.A. L. Rev. 468, 476.) The following cases are illustrative:

*People v. Wells* (1949) 33 C.2d 330, 342, 202 P.2d 53 [assault on guard by defendant prisoner; prior threats and attacks on guards and other prison officials were admissible to show "malice aforethought" and to negative claim of accident or self-defense].

*People v. McCaughan* (1957) 49 C.2d 409, 421, 317 P.2d 974 [involuntary manslaughter of psychiatric patient by hospital technician; prior mistreatment of patient was relevant on intent].

*People v. Zankich* (1961) 189 C.A.2d 54, 62, 11 C.R. 115 [in murder prosecution, evidence of unprovoked batteries by defendant within 24 hours of charged killing was admissible to show absence of provocation and infliction of injury with malice].

*People v. Claborn* (1964) 224 C.A.2d 38, 43, 36 C.R. 132 [previous fights with police were admissible to rebut defense that charged assault on police officer was inadvertent].

*People v. Terry* (1970) 2 C.3d 362, 396, 85 C.R. 409, 466 P.2d 961, 1 Cal. Evidence (4th), Hearsay, §109, citing the text [to rebut defendant's claim that she first acted out of ignorance and then out of fear, evidence that she had participated in prior robbery with codefendant was admissible].

*People v. Foster* (1974) 36 C.A.3d 594, 599, 111 C.R. 666 [defendant, charged with selling restricted dangerous drugs, relied on entrapment defense; evidence of prior conviction of possession for sale was properly admitted to show preexisting intent].

*People v. Nible* (1988) 200 C.A.3d 838, 848, 247 C.R. 396 [in burglary prosecution, testimony offered by defense that defendant was intoxicated immediately after commission of offense placed intent in issue so as to allow admission of prior incidents].

*People v. Hayes* (1990) 52 C.3d 577, 617, 276 C.R. 874, 802 P.2d 376 [other assault and robbery were admissible to prove that defendant intended to rob murder victim when he assaulted and killed him, based on striking similarities between two groups of offenses].

*People v. Memro* (1995) 11 C.4th 786, 864, 47 C.R.2d 219, 905 P.2d 1305 [in prosecution for murder of three boys in which there was evidence one victim had been molested, photographs and magazines, possessed by defendant and depicting clothed and unclothed youths, were properly admitted to show defendant's intent to molest].

*People v. Brandon* (1995) 32 C.A.4th 1033, 1049, 38 C.R.2d 751 [because defendant's actions (threatening victim with weapon and having her move to passenger seat of her car) were otherwise ambiguous, evidence as to his previous robberies was properly admitted to show intent to rob].

*People v. Singh* (1995) 37 C.A.4th 1343, 1380, 44 C.R.2d 644 [in prosecution arising from fraudulently staged automobile accidents, evidence of uncharged "accidents" was admissible to negate accident or inadvertence and establish intent as to charged offenses].

*People v. McCray* (1997) 58 C.A.4th 159, 172, 67 C.R.2d 872 [in prosecution based on defendant's alleged stalking of his wife, defendant's past violent conduct toward wife was admissible to show his intent to place her in fear for her safety and to prove that wife was reasonably caused to be in fear].

In *People v. Lint* (1960) 182 C.A.2d 402, 6 C.R. 95, defendant was charged with murder of the 41/2-year-old daughter of the woman with whom he was living. The evidence included testimony of the victim's cries, thuds against the wall, and multiple injuries that could not have come from a fall down the stairs (which defendant contended was the cause of death). A neighbor testified that, 2 days before, she heard defendant quarreling with the mother, the child victim crying, and the mother saying, "Don't hit her again, Bill." *Held*, the testimony was relevant. (a) It contradicted defendant's theory of death by accident, because it tended to show a course of conduct or pattern of behavior. (182 C.A.2d 415, citing a number of decisions admitting beatings, fights, arguments, threats, etc., for this purpose.) (b) The prosecution's theory was murder by torture, and the evidence had a bearing on this issue. (182 C.A.2d 416.)

In *People v. Denis* (1990) 224 C.A.3d 563, 273 C.R. 724, R, defendant's accomplice, shot and killed J, whom defendant and R were attempting to rob while selling him drugs. Defendant's prior admission that he and R had robbed prospective drug purchasers at the same site on four or five previous occasions was admitted into evidence over defendant's objection. *Held*, this was proper.

(a) Because defendant testified that he had no intent to rob J, but rather that he accepted R's invitation to join in a robbery only to humor R, who was known to be unpredictably violent, defendant's intent was the central disputed issue at the trial. The evidence of the prior robberies was relevant to this issue; it can be logically inferred that a person who acts similarly in similar situations probably has the same intent in each instance. (224 C.A.3d 568.)

(b) The prior robberies were sufficiently similar to the charged offense because they were perpetrated at the same location and involved potential drug purchasers. The fact that neither defendant nor R shot anyone during the prior offenses hardly destroys the logical inference that defendant intended to rob J also. (224 C.A.3d 568.)

(c) The evidence of the prior robberies was not unduly prejudicial (see *supra*, §17). The trial judge could properly find that its probative value on the primary disputed issue of intent outweighed its potential for undue prejudice. And defendant, having admitted that he was a cocaine dealer, and having been impeached by evidence of multiple felony convictions, could hardly argue that, in the absence of the prior robberies evidence, the jury would have regarded him as an honest and upright citizen. (224 C.A.3d 568.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Steele* (2002) 27 C.4th 1230, 1244, 1245, 120 C.R.2d 432, 47 P.3d 225 [in capital murder trial, evidence of defendant's prior murder was properly admitted on question of his mental state; under doctrine of chances, fact that

defendant killed twice under similar circumstances was logically probative of whether second killing was premeditated, even if no independent evidence existed that first killing was premeditated]; *People v. Yeoman* (2003) 31 C.4th 93, 121, 122, 2 C.R.3d 186, 72 P.3d 1166 [in capital murder trial in which prosecution, in order to establish robbery-murder special circumstance, was required to prove that defendant harbored intent to rob victim before killing her, trial judge did not err in admitting evidence of prior robbery by defendant; "Good Samaritan" ploy used by defendant in prior offense was similar to his conduct in charged offense]; *People v. Demetrulias* (2006) 39 C.4th 1, 14, 45 C.R.3d 407, 137 P.3d 229 [in capital murder prosecution in which defendant was charged with entering older man's home and fatally stabbing him, and in which defendant claimed self-defense, evidence of defendant's attack on another elderly man the same evening was properly admitted to show intent (robbery) and lack of justification]; *People v. Miller* (2000) 81 C.A.4th 1427, 1447, 1448, 97 C.R.2d 684 [in prosecution for grand theft by false pretenses involving two elderly victims, evidence of defendants' role in three prior incidents involving elderly men was properly admitted; whether defendants harbored requisite intent to defraud one victim was disputed material issue, and prior incidents had strong tendency to prove they had intent]; *People v. Zepeda* (2001) 87 C.A.4th 1183, 1212, 105 C.R.2d 187, 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence, Supp.*, §348 [in murder prosecution arising from gang-related shooting, evidence that defendant had previously committed gang-related drive-by shooting was properly admitted on issues of intent and motive]; *People v. Hawkins* (2002) 98 C.A.4th 1428, 1443, 121 C.R.2d 627 [in prosecution arising from defendant's having taken source code from computer system of former employer, admission of evidence that defendant had also stored another company's copyrighted operating system on his computer was not error; evidence as to prior offense was relevant to intent, as it negated inference of inadvertence]; *People v. Ortiz* (2003) 109 C.A.4th 104, 117, 118, 134 C.R.2d 467 [in murder prosecution arising from vehicular collision, evidence of past incidents of defendant's drunk driving was properly admitted to prove wanton disregard of human life in support of implied malice finding, even though intoxication was not involved in charged offense]; *People v. Burnett* (2003) 110 C.A.4th 868, 880, 881, 2 C.R.3d 120 [in prosecution for animal cruelty arising from incident in which defendant reached into car that had just rear-ended him, pulled out driver's dog, and threw it into crowded roadway, trial judge did not err in tentatively ruling that, if defendant raised defense of mistake or involuntary act (based on claim that dog first bit him and held onto his hand), prosecution could present evidence of prior incident in which defendant beat dog to death]. *West's Key Number Digest*, Criminal Law k.371 et seq.





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#### 1. Intent, Motive, and Knowledge.

#### cc. Knowledge.

*1 Witkin Cal. Evid. Circum Evid § 90*

[§ 90] Knowledge.

Where knowledge is an element of the crime charged (see 1 *Cal. Crim. Law* (3d), *Elements*, §8), prior similar offenses may be admitted to establish it. (See *People v. Torres* (1950) 98 C.A.2d 189, 192, 219 P.2d 480 [charge of illegal possession of marijuana; evidence of prior confiscation of car for carrying it, showing guilty knowledge]; *People v. Linyard* (1957) 151 C.A.2d 50, 55, 311 P.2d 57 [charge of possession of narcotics; prior misdemeanor conviction to show knowledge of narcotic nature of drug possessed]; *People v. Horn* (1960) 187 C.A.2d 68, 75, 9 C.R. 578 [other narcotic offenses to show knowledge of narcotic character of object possessed]; *People v. Cancimilla* (1961) 197 C.A.2d 242, 252, 17 C.R. 498 [knowledge of narcotics]; *People v. Soto* (1966) 245 C.A.2d 401, 406, 53 C.R. 832 [other offenses to show knowledge of character of narcotics]; *People v. McCarnes* (1986) 179 C.A.3d 525, 532, 224 C.R. 846 [second degree murder prosecution arising out of drunk driving collision; defendant's four prior drunk driving convictions to establish implied malice by showing that defendant knew his conduct was dangerous]; *People v. Johnson* (1994) 30 C.A.4th 286, 290, 291, 36 C.R.2d 4 [following *People v. McCarnes*]; 2 Wigmore (Chadbourn Rev.) §301; 7 U.C.L.A. L. Rev. 477.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Criminal Law k.370



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##### 1. Intent, Motive, and Knowledge.

##### dd. Motive.

#### *1 Witkin Cal. Evid. Circum Evid § 91*

[§ 91] Motive.

Where motive is relevant (see *infra*, §119), it may sometimes be shown by other criminal acts. (See 2 Wigmore (Chadbourn Rev.) §306; 7 *U.C.L.A. L. Rev.* 471, 476.) The following cases are illustrative:

*People v. David* (1939) 12 *C.2d* 639, 647, 86 *P.2d* 811 [prior acts reasonably close in time, and exhibiting deliberate plan, were properly admitted to show sane motive, where defense was insanity].

*People v. Gonzales* (1948) 87 *C.A.2d* 867, 877, 198 *P.2d* 81 ["evidence having a direct tendency, in view of the surrounding circumstances, to prove motive on the part of a person to commit the homicide, and thus to solve a doubt either as to the identity of the slayer, the degree of the offense, the insanity of the accused, or the justification or excusability of his act, is admissible, however discreditable it may reflect upon the defendant, and even where it may show him guilty of other crimes"].

*People v. Buice* (1964) 230 *C.A.2d* 324, 341, 40 *C.R.* 877, citing the text [prior quarrel with police was admissible to show motive for later assault on other officers].

*People v. Lopez* (1969) 1 *C.A.3d* 78, 85, 81 *C.R.* 386, *infra*, §119 [fight between defendant and victim's brother, and prosecution for that offense, were admissible as showing motive for later assault on victim].

*People v. Zack* (1986) 184 *C.A.3d* 409, 413, 415, 229 *C.R.* 317 [evidence of defendant's prior assaults on victim was admissible as proof of motive to commit murder].

*People v. Gallego* (1990) 52 *C.3d* 115, 171, 276 *C.R.* 679, 802 *P.2d* 169 [first degree murder and kidnaping prosecution; prior killings were admissible to prove motive and to disprove diminished capacity].

*People v. Daniels* (1991) 52 *C.3d* 815, 857, 277 *C.R.* 122, 802 *P.2d* 906 [first degree murder of two police officers by use of firearm; prior bank robbery, in which defendant exchanged gunfire with police and was rendered a paraplegic, was admissible to prove motive].

*People v. Padilla* (1995) 11 *C.4th* 891, 925, 47 *C.R.2d* 426, 906 *P.2d* 388 [first degree murder; defendant's prior shooting of his stepdaughter, who, he believed, together with victim of charged murder, had stolen drugs from him, was

relevant to prove motive of revenge in charged offense].

*People v. Kelley* (1997) 52 C.A.4th 568, 578, 579, 60 C.R.2d 653, 3 Cal. Crim. Law (3d), Punishment, §143 [in stalking prosecution, defendant's prior conviction of molesting stalking victim was admissible to show motive of placing victim in fear].

*People v. Barnett* (1998) 17 C.4th 1044, 1118, 1119, 74 C.R.2d 121, 954 P.2d 384 [in murder prosecution, evidence of prior violent struggle between defendant and victim was properly admitted for purpose of shedding light on roots of defendant's hostility toward victim and demonstrating motive for victim's torture and murder].

In *People v. Pertsoni* (1985) 172 C.A.3d 369, 218 C.R. 350, defendant, an Albanian, was charged with murdering a man he claimed worked for the Yugoslav secret police. To rebut defendant's claim of self-defense, the prosecution was permitted to introduce evidence that 5 years earlier, while participating in a demonstration at the Yugoslav consulate, defendant had fired four shots at a man he thought was the Yugoslav Ambassador. *Held*, the ruling was proper. (a) The evidence showed the extremes to which defendant's hatred of the Yugoslav Government would take him; hence, "the distinctive similarity of the victims' assumed affiliation with the Yugoslav government was sufficient to satisfy the relevancy requirement." (172 C.A.3d 374.) (b) Because defendant's commission of the murder was not disputed and his state of mind was the sole issue for the jury, the probative value of the evidence exceeded its prejudicial effect. (172 C.A.3d 375.)

In *People v. Funes* (1994) 23 C.A.4th 1506, 28 C.R.2d 758, defendant was charged with second degree murder and participating in a criminal street gang. Defendant moved to sever the street gang charges on the ground that evidence of gang affiliation and activity would be prejudicial on the murder charge. The trial judge denied the motion, finding that the street gang evidence would be admissible even if the street gang offense had not been charged and therefore it would come in in any event. *Held*, affirmed. It is proper to introduce evidence of gang affiliation and activity where that evidence is relevant to an issue of motive or intent. That evidence was clearly relevant to defendant's motive for attacking the murder victim and his intent in doing so. Even though some of the gang incidents did not directly involve defendant, they were relevant to the motive of retaliation, and they were arguably less prejudicial to defendant than those incidents in which he took an active role. (23 C.A.4th 1518, 1519.)

An illustration of how far this exception can go is furnished by *People v. Sykes* (1955) 44 C.2d 166, 280 P.2d 869. Defendant was charged with furnishing marijuana to B, a minor, and B testified that defendant handed her cigarettes to smoke. Over objection she also testified at length that defendant had recruited her as a prostitute. The prosecution's theory was that defendant had a plan or scheme (infra, §92) to reduce B to drug addiction so as to dominate her as a prostitute. The court, however, held the evidence admissible on the issue of motive; i.e., B did not pay for the cigarette, and the reason for giving it to her was the relationship of pimp and prostitute. (44 C.2d 170.) The dissenting opinion argued that the scheme to dominate her as a prostitute was wholly unproved, and that there was no reasonable basis for inferring this motive from pimping; the motive could have been to share the enjoyment of the cigarette.

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Rogers* (2006) 39 C.4th 826, 862, 48 C.R.3d 1, 141 P.3d 135 [in capital murder case, trial judge properly admitted rebuttal evidence concerning defendant's termination from sheriff's department as result of complaint made by prostitute, and his subsequent reinstatement; defendant was charged with murder of two prostitutes, and rebuttal evidence was admissible on issue of motive (that he committed charged murders to prevent victims from reporting him)]; *Rufo v. Simpson* (2001) 86 C.A.4th 573, 585, 586, 103 C.R.2d 492 [in wrongful death action arising from murder of defendant's former wife, prior instances of defendant's abuse of victim were properly admitted to show motive, intent, and identity; requirement of distinctive modus operandi does not apply where prior and charged acts involve same perpetrator and same victim]; *People v. Butler* (2005) 127 C.A.4th 49, 61, 25 C.R.3d 154 [in murder prosecution, evidence of incident occurring at party 5 days before murder, which incident involved defendant being chased by group that included youth who would become murder victim, was properly admitted to show motive for what otherwise would have appeared to be unprovoked attack by defendant on victim]; 34 *Loyola L.A. L. Rev.* 439 [examining problems

arising from use of uncharged misconduct to prove motive]. *West's Key Number Digest*, Criminal Law k.371 et seq.



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##### 2. Common Plan or Scheme.

##### aa. In General.

#### 1 Witkin Cal. Evid. Circum Evid § 92

[§ 92] In General.

(1) *Nature of Exception.* Other offenses may be admitted where they are similar to, and connected with, the crime charged so as to disclose a general plan or system of criminal acts. The principal purpose of this kind of evidence is to identify the defendant as the perpetrator of the crime charged. (See 1 McCormick 5th, §190; 2 Wigmore (Chadbourn Rev.) §321 et seq.; 23 Cal. L. Rev. 530; 5 Hastings L. J. 76; 13 So. Cal. L. Rev. 511; 7 U.C.L.A. L. Rev. 472, 477; 64 A.L.R.2d 823 [other acts of gambling]; 87 A.L.R.2d 891 [other fires].)

However, the mere fact that the defendant committed similar offenses does not make the exception applicable; this loose interpretation would undermine the basic exclusionary rule. The notion of "common plan" refers to a methodology or peculiar behavior pattern. (See *People v. Chambers* (1964) 231 C.A.2d 23, 31, 41 C.R. 551 ["the phrase is confined to the notion of *modus operandi*, a characteristic method or plan pursued by a defendant in the performance of repeated criminal acts"]; *People v. Scheer* (1998) 68 C.A.4th 1009, 1021, 80 C.R.2d 676 [in prosecution for felony hit-and-run, circumstances of defendant's prior conviction of fleeing police officers was not admissible under common scheme exception; although prior and current offenses were similar, each was spur-of-moment response to unexpected event].)

(2) *Illustrations.* The cases admitting evidence under this exception are exceedingly numerous. (See *People v. Lisenba* (1939) 14 C.2d 403, 427, 94 P.2d 569 [in prosecution for murder of defendant's wife for purpose of collecting insurance money, evidence of death, under suspicious circumstances, of defendant's previous wife, while insured in defendant's favor, was properly admitted]; *People v. Houston* (1963) 219 C.A.2d 187, 194, 33 C.R. 26, citing the text [similar *modus operandi* in robbery]; *People v. Griffin* (1967) 66 C.2d 459, 464, 58 C.R. 107, 426 P.2d 507 [behavior pattern: defendant became acquainted with man having common-law wife, used acquaintance for invitation to home and attack on woman in man's absence; admissible to show intent to rape victim]; *People v. Kerry* (1967) 249 C.A.2d 246, 252, 57 C.R. 289 [charge of indecent exposure at laundromat, defense of accidental fall of draped towel; evidence of other exposures in laundromats]; *People v. Haston* (1968) 69 C.2d 233, 245, 70 C.R. 419, 444 P.2d 91, *infra*, §94; *People v. Weisberg* (1968) 265 C.A.2d 476, 479, 71 C.R. 157, citing the text [prosecution of mother for murder of 7-week-old son; evidence of similar injuries to defendant's other child, showing peculiar behavior pattern]; *People v. Ward* (1968) 266 C.A.2d 241, 255, 72 C.R. 46, quoting the text [similar murder]; *People v. Rodriguez* (1970) 10 C.A.3d 18, 33, footnote 8, 88 C.R. 789 [prior thefts and charged theft committed at approximately same time of day, in same general locale, with same general sequence of events and taking of same general type of item]; *People v. Lynn* (1971)

16 C.A.3d 259, 267, 94 C.R. 16 [modus operandi in prior escape from custody was different from charged escape attempt, but chronology indicated that defendants jointly formulated common plan to escape]; *People v. Utter* (1972) 24 C.A.3d 535, 551, 101 C.R. 214 [evidence of uncharged fraudulent real estate transaction was properly admitted to show defendant's customary modus operandi: victims were elderly women, defendant used fictitious names for himself]; *People v. Gillard* (1997) 57 C.A.4th 136, 160, 66 C.R.2d 790 [in prosecution for workers' compensation fraud, evidence that defendant had concealed prior series of injuries when he sought benefits from prior employer was admissible to show his concealment on present occasion was not mistake but part of common scheme].) (On statutory rules for admission of defendant's prior sexual offenses or acts of domestic violence, see *infra*, §§97, 98.)

In *People v. Grimes* (1952) 113 C.A.2d 365, 372, 248 P.2d 130, defendant was convicted of burglary of a drugstore. Prior convictions of the same crime were held properly admitted. (a) Each case involved burglary of a drugstore (except one hardware store). (b) The *modus operandi* in gaining admission was the same: kicking or smashing a glass door. (c) Defendant's main purpose was to rifle cash registers for change. (d) He always took liquor before and after the event. (e) Each burglary indicated a similarly planned time and place. (f) A taxi was used as the means of transportation and the place for counting and changing small money into larger. (See 5 *Hastings L. J.* 77 [criticizing case as unduly extending the exception].)

In *People v. Garnica* (1981) 121 C.A.3d 727, 734, 175 C.R. 521, defendant, a member of a criminal organization, was convicted of the murder of an enemy of the organization. Evidence of a prior assault was properly admitted to show a common plan or design. (a) The two offenses occurred in the same city, 1 week apart; (b) both offenses occurred at defendant's direction and involved the same "hit man"; and (c) both offenses were committed to eliminate an enemy of the organization. The following differences were held insufficient to deprive the evidence of its substantial probative value: (a) Defendant participated in the earlier offense, but not in the charged offense; (b) the victim in the charged offense was a lone male, whereas the prior offense involved a woman and her brother; (c) the victim of the charged offense was a member of an enemy organization, whereas the victims of the prior attack were not so identified; and (d) the victim of the charged offense was shot, while the victims of the earlier attack were stabbed.

In *People v. Sully* (1991) 53 C.3d 1195, 283 C.R. 144, 812 P.2d 163, defendant was charged with murdering six prostitutes in his warehouse. The trial judge admitted evidence of other crimes committed by defendant on other victims consisting of (a) imprisonment and sadomasochistic acts; (b) luring a woman, Louisa, to the warehouse, forcing her to have sex with him and beating her when she tried to escape; and (c) engaging in sex with Christina, a prostitute. *Held*, these rulings were proper.

(a) *Imprisonment and Sadomasochistic Acts*. The prosecution sought to present this evidence because it included bondage and beating episodes, and one of the murder victims had undergone a similar ordeal. Defendant conceded the evidence was relevant to this murder victim, but asserted it was irrelevant to the other murder charges. However, the evidence was relevant to the issues of the identity and intent of the perpetrator of each of the six murders. Each murder occurred in defendant's warehouse, the five female victims were found nude, suggesting sexual motivation, and several of the victims were bound or physically abused. Illicit sex, cocaine and the abuse of prostitutes were common to all crimes, and thus a pattern was sufficient to support the admission of evidence of the other crimes. Moreover, the trial judge properly weighed the probative value of the evidence against its prejudicial effect (see *supra*, §17 et seq.). (53 C.3d 1224, 1225.)

(b) *Louisa Crime*. This evidence was relevant, because defendant admitted that he had killed two of the murder victims to compensate for disappointing an accomplice to the murders by not killing Louisa. Also the evidence showed both intent and modus operandi, because the principal difference between the Louisa incident and the two murders was merely the outcome that Louisa was not killed. (53 C.3d 1225, 1226.)

(c) *Christina Crime*. During this incident, Christina observed defendant retrieving some white rope from his truck and hiding it behind a couch in his warehouse. The murders had occurred in the warehouse, one of the victims was bound with similar rope, and more similar rope was found in defendant's van. Thus the evidence was relevant, and

properly admitted, because it showed that defendant had access to white cotton rope at the warehouse. (53 C.3d 1226.)

(3) *Doctrine of Chances*. In *People v. Erving* (1998) 63 C.A.4th 652, 73 C.R.2d 815, defendant was convicted of arson and attempt to burn in a trial in which the judge admitted evidence of 40 uncharged fires that had occurred in neighborhoods where defendant lived. *Held*, affirmed. "Few, if any, arson fires occurred in those immediate neighborhoods before appellant lived in them and they stopped when she moved. Appellant's proximity to nearly 40 arson fires in these circumstances provides the 'signature' required for the uncharged fires to be relevant to prove her identity as the arsonist." (63 C.A.4th 661.) Moreover, it was not improper for the trial judge to rely on the "doctrine of chances" in deciding to admit this evidence, and the prosecutor properly argued the doctrine to the jury. Under the doctrine of chances, it is extremely unlikely that an innocent person would live near so many arson fires occurring so frequently in so many different neighborhoods. The jury could logically infer from the uncharged fires that defendant was the arsonist; this inference is purely objective and has nothing to do with a subjective assessment of defendant's character. (63 C.A.4th 663.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Nature of Exception*. See 1 McCormick 6th, §190.

(2) *Illustrations*. See *People v. Carter* (2005) 36 C.4th 1114, 1149, 32 C.R.3d 759, 117 P.3d 476 [shared characteristics of three charged killings and two uncharged ones, as well as presence of evidence associated with each victim at events related to next victim in series of murders, indicated that when defendant committed crimes charged in current case as well as uncharged crimes, he acted pursuant to common plan to kill and steal from his victims]; *People v. Earley* (2004) 122 C.A.4th 542, 547, 18 C.R.3d 694 [in prosecution for possession of marijuana for sale arising out of incident in which police apprehended defendant near Dumpster and found marijuana on him, in Dumpster, and nearby, evidence that defendant had been found 1 month earlier in same location with marijuana on his person and nearby was properly admitted as showing both common plan and intent]. *West's Key Number Digest*, Criminal Law k.372 et seq.



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## 2. Common Plan or Scheme.

## bb. Interconnected Offenses.

1 *Witkin Cal. Evid. Circum Evid* § 93

[§ 93] Interconnected Offenses.

Other offenses may be shown where several crimes are interconnected so that proof of the others tends to establish the crime charged, or proof of one necessarily involves proof of the others. (*People v. Ciulla* (1919) 44 C.A. 719, 722, 187 P. 46 [where defendant abducted girl for purpose of rape, evidence of abduction was admissible on trial for rape, as part of an indivisible criminal transaction]; *People v. Hunt* (1936) 17 C.A.2d 284, 286, 61 P.2d 1208 [committing lewd acts on child; similar acts on playmates of victim at same time and place]; *People v. Lynn* (1971) 16 C.A.3d 259, 268, 94 C.R. 16 [prior escape from custody was part of continuing escape plan]; see 28 Cal. L. Rev. 516.)

Thus, in *People v. Jackson* (1950) 36 C.2d 281, 285, 223 P.2d 236, defendant pleaded guilty to murder and prior convictions. A hearing was held to determine the degree of the crime, after the probation officer had recommended life imprisonment. The trial judge admitted evidence of defendant's confession, in which he described a prior holdup about a week before the homicide, making several references to the later homicide and the use of the same shotgun. *Held*, this was proper.

In *People v. Carmen* (1954) 43 C.2d 342, 345, 273 P.2d 521, defendant was tried for the murder of W. Evidence was offered of the prior shooting of A, a member of the same family, after a threat to kill the whole family. *Held*, the shooting of A was part of the same transaction in which W was killed, and was also relevant on the issue of intent in shooting W.

**SUPPLEMENT:** [This section is current through the latest supplement]





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##### cc. Marks Distinctive: Evidence Admissible.

#### 1 Witkin Cal. Evid. Circum Evid § 94

[§ 94] Marks Distinctive: Evidence Admissible.

"[T]he inference of identity arises when the marks common to the charged and uncharged offenses, considered singly or in combination, logically operate to set the charged and uncharged offenses apart from other crimes of the same general variety and, in so doing, tend to suggest that the perpetrator of the uncharged offenses was the perpetrator of the charged offenses." (*People v. Haston* (1968) 69 C.2d 233, 246, 70 C.R. 419, 444 P.2d 91.)

In the *Haston* case, department stores were robbed by two armed and masked men. Defendant and M were charged with the robberies, and M pleaded guilty. The evidence against defendant was an identification in a police lineup, and other offenses--two prior restaurant robberies committed by defendant and M. Defendant admitted the prior robberies, but offered an alibi on the crime charged, and M testified that defendant was not his accomplice in the crime charged. The conviction of defendant was reversed for error under *Griffin v. California* (1965) 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106, 2 Cal. Evidence (4th), Witnesses, §433, but admission of the other offenses was held proper.

(a) *Common marks in this case.* The prior offenses and crime charged were similar in that the offenses were committed when the place was closed for business but employees were present; the robbers were two armed Caucasian men of middle height who wore handkerchiefs over their faces; they came in through the employees' entrance; they forced employees to lie face down on the floor; they did not physically injure any employee; one robber held the employees at bay, the other took money from the safe. (69 C.2d 247.)

(b) *One sufficient mark.* None of these was of the distinctive nature necessary to raise the inference; they are shared by many armed robberies. (69 C.2d 248.) The common mark which supported admission of the evidence was the presence of M as one of the perpetrators of the prior and charged offenses. Because defendant and his alibi witnesses and M all testified that defendant was not M's accomplice, evidence that on at least two other occasions defendant had been M's partner in similar robberies had great probative value. (69 C.2d 249.)

*People v. Thornton* (1974) 11 C.3d 738, 114 C.R. 467, 523 P.2d 267, summarized the *Haston* rule as follows: "To recapitulate, only common marks having some degree of distinctiveness tend to raise an inference of identity and thereby invest other-crimes evidence with probative value. The strength of the inference in any case depends upon two factors: (1) the *degree of distinctiveness* of individual shared marks, and (2) the *number* of minimally distinctive shared marks." (11 C.3d 756.) (See *People v. Malich* (1971) 15 C.A.3d 253, 266, 93 C.R. 87 [following *Haston*]; *People v.*

*Alvarez* (1975) 44 C.A.3d 375, 383, footnote 8, 118 C.R. 602 ["It is fair to say that all California cases on the point which antedate *Haston* are suspect and must be re-examined in the light of that case"]; *People v. Donnell* (1975) 52 C.A.3d 762, 773, 125 C.R. 310 [uncharged bank robbery was sufficiently similar to charged bank robbery to justify admission, e.g., three men in each robbery with same physical description, use of stolen getaway cars (found abandoned with ignition out), shorter robber jumped over teller's counter, men wore homemade hoods from same grey sweatshirt-like material]; *People v. Rodriguez* (1977) 68 C.A.3d 874, 883, 885, 886, 137 C.R. 594; *People v. Haslouer* (1978) 79 C.A.3d 818, 826, 145 C.R. 234; *People v. Jackson* (1980) 102 C.A.3d 620, 625, 162 C.R. 574; *People v. Tassell* (1984) 36 C.3d 77, 86, 201 C.R. 567, 679 P.2d 1 [pointing out that *Haston* was "a watershed decision" that overruled many cases]; *People v. Medina* (1995) 11 C.4th 694, 748, 47 C.R.2d 165, 906 P.2d 2 [in murder prosecution, admission of uncharged murders was justified; both charged and uncharged offenses involved robbery and murder of convenience store employee, each victim was shot in head execution-style, and ballistics reports indicated use of same handgun, later traced to defendant]; *People v. Robinson* (1995) 31 C.A.4th 494, 503, 37 C.R.2d 183 [following *People v. Ewoldt* (1994) 7 C.4th 380, 27 C.R.2d 646, 867 P.2d 757, *infra*, §96; in arson prosecution alleging that defendant and juvenile burned house, testimony that they burned car three nights earlier was properly admitted as establishing common "mark," but rebuttal testimony that juvenile set two previous fires alone was improperly excluded]; *People v. Kipp* (1998) 18 C.4th 349, 370, 371, 75 C.R.2d 716, 956 P.2d 1169 [in capital murder and rape case, common features shared by charged offense and prior rape-murder by defendant revealed highly distinctive pattern, making prior offense admissible on issue of identity; similarities were also sufficient for admissibility to show common design or plan and intent].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Kraft* (2000) 23 C.4th 978, 1061, 1062, 99 C.R.2d 1, 5 P.3d 68 [in capital trial for numerous homicides, instruction on modus operandi was proper even though victims were killed under varying circumstances, where certain unique circumstances were common to two or more murders; task of determining degree of distinctiveness and number of circumstances necessary to establish defendant's identity was for jury; following *People v. Thornton* (1974) 11 C.3d 738, 114 C.R. 467, 523 P.2d 267, text, p. 438]; *People v. Catlin* (2001) 26 C.4th 81, 120, 121, 109 C.R.2d 31, 26 P.3d 357, 1 Cal. Crim. Law (3d), *Defenses, Supp.*, §188 [in capital murder prosecution in which there was evidence that both victims (defendant's mother and fourth wife) died of paraquat poisoning, evidence that fifth wife also died of paraquat poisoning was admissible to show identity and common plan; it was also proper to use this evidence to bolster evidence indicating that paraquat was fourth wife's cause of death]; *People v. Gray* (2005) 37 C.4th 168, 203, 33 C.R.3d 451, 118 P.3d 496 [in capital murder case in which defendant was accused of sexually assaulting and fatally beating elderly woman, prior offense involving elderly woman and her granddaughter was properly admitted on issue of identity, where it was "eerily similar" to charged offense; evidence was not rendered inadmissible on issue of intent by fact that defendant did not kill prior victims, as he proclaimed his readiness to do so]; *People v. Prince* (2007) 40 C.4th 1179, 1270, 57 C.R.3d 543, 156 P.3d 1015 [in prosecution for murder of six young women, witness' testimony that defendant had followed her home at midday and stared at her as she entered her apartment was properly admitted; behavior witness described was similar to that of assailant in two of charged murders, and thus trial judge could properly conclude that it was relevant to identity and showed common scheme or plan].



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## dd. Marks Not Distinctive: Evidence Inadmissible.

1 *Witkin Cal. Evid. Circum Evid* § 95

[§ 95] Marks Not Distinctive: Evidence Inadmissible.

A number of decisions have held the evidence inadmissible because the test of identity was not met. (See *People v. Crawford* (1969) 273 C.A.2d 868, 874, 78 C.R. 628 [evidence of subsequent robbery was improper to show modus operandi; two persons participated in charged robbery, three in subsequent crime]; *People v. Zisner* (1969) 275 C.A.2d 660, 668, 80 C.R. 184, citing the text [no evidence that footprint found near window of nearby residence where attempted burglary occurred matched footprint found near window of burglarized residence]; *People v. Alvarez* (1975) 44 C.A.3d 375, 385, 118 C.R. 602 [similarities between earlier statutory rape of 13-year-old and later forced rape of 14-year-old were simply "necessary concomitants" of the crime, rather than distinctive marks tying defendant to both crimes]; *People v. Antick* (1975) 15 C.3d 79, 94, 123 C.R. 475, 539 P.2d 43 [fact that charged and uncharged offenses involved removal of personal property from private residence during owner's absence "cannot seriously be asserted as a distinctive and signature-like feature"; nor was evidence introduced to show uncharged offense was committed by defendant and deceased suspect in concert, to show they were crime partners in series of burglaries]; *People v. Guerrero* (1976) 16 C.3d 719, 728, 129 C.R. 166, 548 P.2d 366, supra, §84 [aimless cruising and drinking beer were not distinctive earmarks of criminal behavior linking earlier rape with charged murder]; *Williams v. Superior Court* (1984) 36 C.3d 441, 450, 204 C.R. 700, 683 P.2d 699 [two shootings, differing in location, time, date, number of people involved, and method; factor of common gang membership was of limited probative value and involved danger of prejudice]; *People v. Felix* (1993) 14 C.A.4th 997, 1005, 1006, 18 C.R.2d 113 [in robbery prosecution, evidence that defendants had pleaded guilty to prior robbery they committed together was not admissible; their alleged propensity to rob in concert added too little distinctiveness to qualify as criminal signature].)

In *People v. Banks* (1970) 2 C.3d 127, 84 C.R. 367, 465 P.2d 263, the only possibly distinctive mark was the language used by the robber who demanded money in each crime, i.e., "Give me what you got" compared with "Give it up. ... Your money." But the person speaking was different in each offense. "Thus, even if the language used in each robbery had been identical, rather than merely similar, any inference of identity would have to depend on the doubtful proposition that one who uses certain language in one robbery tends to associate in criminal activity with other persons who use the same language." (2 C.3d 139.)

In *People v. Rivera* (1985) 41 C.3d 388, 221 C.R. 562, 710 P.2d 362, defendant was charged with the felony murder of a man who was stabbed to death by one of four youths he followed after they had stolen beer from a

convenience store. The prosecution introduced evidence of an armed robbery conviction a year and a half before the murder to show identity, knowledge, and common scheme and design. The following nine "highly distinctive similarities" were asserted: (a) both crimes occurred on a Friday night; (b) both occurred at approximately 11:30 p.m.; (c) both involved convenience stores; (d) both stores were located in the same city; (e) both stores were on street corners; (f) both crimes involved three perpetrators; (g) both crimes involved getaway vehicles; (h) prior to both crimes, two or three people were seen outside the store; and (i) in both cases, defendant used an alibi defense. *Held*, admission of the evidence was reversible error.

"Taken alone or together, however, these characteristics are not sufficiently unique or distinctive so as to demonstrate a 'signature' or other indication that defendant perpetrated both crimes. Convenience stores are often on street corners and are prime targets for crimes; undoubtedly many of these offenses occur late on Friday evenings and involve a getaway car and more than one perpetrator; finally, alibi is a common defense. Moreover, the dissimilarities between the two crimes are significant: (1) the prior offense was an armed robbery, a crime against the person, whereas the charged offense was planned as a burglary, a crime against property; (2) the prior crime involved the taking of money, while the charged crime involved the taking of beer; (3) the coperpetrators in each case were different. In addition, in an attempt to reduce the prejudicial effect of the evidence, the court excluded any mention that guns were used in the prior offense, which further distinguishes it from the present crime, involving no firearm. In short, the prior offense was a robbery at gunpoint; the charged crime was a 'snatch' burglary plus a stabbing." (41 C.3d 392, 393.)

In *People v. Nottingham* (1985) 172 C.A.3d 484, 221 C.R. 1, defendant was charged with first degree murder under the felony-murder rule. On the theory that the murder took place in the course of an attempted rape, the prosecution introduced evidence of a rape by defendant 5 years before the murder. The asserted similarities were: (a) both victims were young women who were casual acquaintances of defendant; (b) both victims resided in the same neighborhood as defendant; (c) both attacks occurred in remote locations; (d) each victim had force applied to her neck and her clothing ripped. *Held*, the marks were not distinctive to the point that logically inferred identity. The ripping of clothes and application of force to the victim's neck are common in rapes, while the degree of force used in the two offenses was substantially different: the victim in the earlier attack was not beaten and was only startled, not injured, by defendant's hand on her neck, while the victim in this offense was savagely beaten and strangled to death with her blouse. (172 C.A.3d 500.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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##### f. Admissibility in Sex Crime Cases.

##### 1. In General.

*1 Witkin Cal. Evid. Circum Evid § 96*

[§ 96] In General.

(1) *Early Cases: Traditional Exceptions Applied.* Prior to *People v. Tassell* (1984) 36 C.3d 77, 201 C.R. 567, 679 P.2d 1, and subsequent legislative enactments (see *infra*, §97), the character evidence exceptions applied in other cases were generally applied in sex crimes cases as well. The illustrations are numerous:

(a) *Intent or motive.* (See *People v. Sylvia* (1960) 54 C.2d 115, 116, 4 C.R. 509, 351 P.2d 781; *People v. Kelley* (1967) 66 C.2d 232, 242, 57 C.R. 363, 424 P.2d 947; *People v. Salazar* (1983) 144 C.A.3d 799, 809, 193 C.R. 1 [because defendant in forcible rape case relied on defense of consent, his intent was in issue; hence, evidence that defendant had raped other women under similar circumstances was admissible]; but see *People v. Buchel* (1956) 141 C.A.2d 91, 97, 296 P.2d 113 [only other acts involving the prosecuting witness can be used]; and see 77 A.L.R.2d 841 [in prosecution for sexual offenses, evidence of other similar offenses]; 2 A.L.R.4th 330 [in rape case, evidence of defendant's rapes of other persons].)

(b) *Common plan or scheme.* (See *People v. Cramer* (1967) 67 C.2d 126, 130, 60 C.R. 230, 429 P.2d 582; *People v. Covert* (1967) 249 C.A.2d 81, 87, 88, 57 C.R. 220 [prosecution for incest; testimony of victim's sister as to similar acts was properly admitted]; *People v. Kazee* (1975) 47 C.A.3d 593, 596, 121 C.R. 221; *People v. Creighton* (1976) 57 C.A.3d 314, 325, 129 C.R. 249; but see *People v. Thomas* (1978) 20 C.3d 457, 466, 143 C.R. 215, 573 P.2d 433 [prosecution for lewd acts on daughter and stepdaughter; prior lewd acts on another daughter were too remote].)

Several cases implied that evidence of prior offenses, regardless of remoteness or lack of similarity to the charged offense, could also be used to corroborate the prosecuting witness. (See *People v. Covert*, *supra*, 249 C.A.2d 88; *People v. Kazee*, *supra*, 47 C.A.3d 596; *People v. Creighton*, *supra*, 57 C.A.3d 322.) This rule was rejected in *People v. Thomas*, *supra*, 20 C.3d 468, which held that the remoteness and similarity restrictions were crucial when evidence of prior offenses with persons other than the prosecuting witness was being introduced solely to corroborate the prosecuting witness' testimony. (See *People v. Stanley* (1967) 67 C.2d 812, 819, 63 C.R. 825, 433 P.2d 913 [where victim is sole witness and basic issue is his or her veracity, victim's testimony about other offenses by defendant may not be admitted].)

(2) *Tassel and Ewoldt Cases.* In *People v. Tassel*, *supra*, a prosecution for kidnaping, rape, and oral copulation, the trial judge admitted evidence of similar offenses against two other women to show a common design or plan and to corroborate the victim's testimony. *Held*, this was error. No one could rationally argue that the three sets of crimes were

part of one larger plan; and, with no issue of intent or identity, any similarity in modus operandi between the charged and uncharged crimes was simply irrelevant. (36 C.3d 88.)

The "novel, restricted view of the admissibility of evidence of uncharged criminal acts to establish a common design or plan" in *Tassel* was rejected in *People v. Ewoldt* (1994) 7 C.4th 380, 401, 27 C.R.2d 646, 867 P.2d 757, which held that the exception may apply even if the charged and uncharged acts are not part of a single, continuing conception or plot. The proper view is that "evidence of a defendant's uncharged misconduct is relevant where the uncharged misconduct and the charged offense are sufficiently similar to support the inference that they are manifestations of a common design or plan." (7 C.4th 401, 402.) (See *People v. Balcom* (1994) 7 C.4th 414, 422, 426, 27 C.R.2d 666, 867 P.2d 777 [in rape prosecution, evidence of subsequent rape committed by defendant in another state was properly admitted under common design or plan exception, even though it was cumulative as to issue of defendant's intent; following *Ewoldt*].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Early Cases: Traditional Exceptions Applied.*(a) *Intent or motive.* See 86 A.L.R.5th 59 [rapes of persons other than victim--prior offenses], 87 A.L.R.5th 181 [rapes of persons other than victim--subsequent acts], and 88 A.L.R.5th 429 [rapes of persons other than victim--offenses unspecified as to time], which together supersede 2 A.L.R.4th 330, text, p. 442. *West's Key Number Digest*, Criminal Law k.369.2(5)



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##### 2. Evidence Code.

#### 1 Witkin Cal. Evid. Circum Evid § 97

[§ 97] Evidence Code.

(1) *Amendment of Ev.C. 1101(b)*. In response to *People v. Tassell* (1984) 36 C.3d 77, 201 C.R. 567, 679 P.2d 1, supra, §96, the Legislature amended Ev.C. 1101(b) (supra, §75) in 1986 to specify that, in a prosecution for sexual crimes, the character evidence rule does not prohibit admission of a defendant's other acts on the issue of the defendant's reasonable and good faith belief in the victim's consent. (See Stats. 1986, Chap. 1432, §2.)

(2) *Enactment of Ev.C. 1108*. Ev.C. 1108, added in 1995, specifically allows the admission, in a prosecution for sexual crimes, of a defendant's other sexual offenses as long as the evidence is not inadmissible under Ev.C. 352 (probative value weighed against danger of undue prejudice; see supra, §17). (Ev.C. 1108(a).) (See *People v. Yovanov* (1999) 69 C.A.4th 392, 405, 81 C.R.2d 586 [in enacting Ev.C. 1108, "the Legislature decided evidence of uncharged sexual offenses is so uniquely probative in sex crimes prosecutions it is presumed admissible without regard to the limitations of Evidence Code section 1101"]; *People v. Callahan* (1999) 74 C.A.4th 356, 379, 87 C.R.2d 838 [once prosecution introduces character evidence under Ev.C. 1108(a), defendant may introduce opinion evidence, reputation evidence, or evidence of specific incidents in rebuttal].)

If evidence of this sort is to be offered by the prosecution, it must be disclosed to the defendant, including statements of witnesses or a summary of any testimony that is expected to be offered, at least 30 days before the scheduled trial date, or at a later time as allowed by the court for good cause. (Ev.C. 1108(b).) (See *People v. Soto* (1998) 64 C.A.4th 966, 979, 75 C.R.2d 605 [disclosure requirement was satisfied where, at preliminary hearing several months before trial, prosecutor informed defendant of his intent to introduce evidence of defendant's prior sexual conduct based on witness statements contained in deputy sheriff's report provided to defense, and defense counsel did not object].)

The statute is not intended to limit the admission or consideration of evidence under any other Evidence Code section. (Ev.C. 1108(c).) (See *People v. Harris* (1998) 60 C.A.4th 727, 738, 741, 70 C.R.2d 689 [in prosecution of mental health nurse for sexual offenses against patients, admission of evidence of prior offense constituted reversible error, where offense (violent rape) was very inflammatory, remote (23 years earlier), and nearly irrelevant because of its lack of similarity to charged offenses]; *People v. Soto*, supra, 64 C.A.4th 988 [balancing probative value versus prejudice is still applicable, but Legislature intended that courts liberally admit evidence of prior offenses]; *People v. Yovanov*, supra, 69 C.A.4th 406 [in prosecution for lewd acts on child, evidence of defendant's uncharged sexual misconduct was more probative than prejudicial]; *People v. Callahan*, supra, 74 C.A.4th 370, 371 [where defendant was

charged with molesting his daughter, testimony by victim of prior molestation committed by defendant was properly admitted; testimony was brief, circumstances of prior incident were no more inflammatory than those of current incident, and jury was not left with impression that prior offense went unpunished]; 27 *Pacific L. J.* 761; CALJIC (6th ed.), No. 2.50.01; see *F.R. Evid.*, Rules 413 and 414, allowing admission of evidence of other offenses in sexual assault and child molestation cases; 110 *Harv. L. Rev.* 563 [criticizing Rule 413]; 38 *Santa Clara L. Rev.* 961 [*F.R. Evid.*, Rules 413, 414, 415]; 49 *Hastings L. J.* 663 [criticizing Rule 413]; 49 *Hastings L. J.* 717 [discussing merits of extending approach of Rules 413, 414 to other types of crimes].)

(3) *Constitutionality of Ev.C. 1108.* In *People v. Falsetta* (1999) 21 *C.4th* 903, 89 *C.R.2d* 847, 986 *P.2d* 182, defendant was charged with forcible oral copulation, assault, and kidnapping involving a 16-year-old female victim. Under *Ev.C. 1108*, the trial judge permitted the prosecution to introduce evidence of two prior rapes to which defendant had pleaded guilty. Defendant was convicted, and the Court of Appeal rejected his due process challenge to *Ev.C. 1108*. *Held*, affirmed; the statute is constitutional.

(a) Whether or not the general exclusion of propensity evidence is considered "fundamental" from a historical perspective, the exception created by *Ev.C. 1108* may nevertheless be upheld if it does not unduly offend due process principles. (21 *C.4th* 915.)

(b) One of the reasons for the general exclusion of propensity evidence is that the defendant should not have to bear the burden of defending against both the charged offense and other uncharged offenses. But *Ev.C. 1108* does not permit a far-ranging attack on the defendant's character. It allows admission only of prior sex offenses when the current charge is a sex offense, and it requires pretrial notice, so that the defendant can prepare to rebut the proposed evidence. (21 *C.4th* 916.)

(c) Another reason for the general rule of exclusion is the need to avoid protracted "mini-trials" to determine the truth or falsity of the prior charges. However, *Ev.C. 1108* allows the trial judge to exclude the evidence under *Ev.C. 352*, and one of the grounds for exclusion under that statute is "undue consumption of time." (21 *C.4th* 916.)

(d) A third reason for the general rule is that undue prejudice may arise if the jury learns of the defendant's other offenses. But the effect of *Ev.C. 1108* is simply to remove a certain type of propensity evidence from the "prejudicial per se" category. The judge is still obligated to exercise the discretion granted under *Ev.C. 352* to determine whether the probative value of the evidence outweighs its potentially prejudicial effect. (21 *C.4th* 917.)

(e) Admission of evidence under the statute may add to the evidence the jury is permitted to consider, but it does not reduce the prosecution's burden of proving the defendant's guilt beyond a reasonable doubt. "A properly instructed jury will, as here, be given the usual instructions regarding the presumption of defendant's innocence and the prosecutor's burden of proof. Additionally ... , at the defendant's request, the jury may be told that evidence of his other sexual offenses is not sufficient by itself to prove his commission of the charged offense, that the weight and significance of the evidence, if any, is for the jury to decide, and that unless otherwise instructed, the jury may not consider this evidence for any other purpose. ... This instruction will help assure that the defendant will not be convicted of the charged offense merely because the evidence of his other offenses indicates he is a 'bad person' with a criminal disposition." (21 *C.4th* 920, approving CALJIC (6th ed.), No. 2.50.01, as revised in 1999, and the reasoning of *People v. Fitch* (1997) 55 *C.A.4th* 172, 63 *C.R.2d* 753, which upheld the statute against due process, equal protection, and ex post facto challenges.) (See *People v. Van Winkle* (1999) 75 *C.A.4th* 133, 142, 89 *C.R.2d* 28 [CALJIC, Nos. 2.50.1 and 2.50.01, which, taken together, allow jury to find by preponderance of evidence that defendant committed prior crime and to infer that he was therefore more likely to have committed current offense, do not violate due process].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Enactment of Ev.C. 1108.* See *People v. Abilez* (2007) 41 *C.4th* 472, 501, 61 *C.R.3d* 526, 161 *P.3d* 58 [trial judge did not err in refusing to admit, under *Ev.C. 1108*, evidence of codefendant's juvenile adjudication for attempted unlawful intercourse with minor, which defendant offered to show that it was more likely that codefendant, and not



defendant, sodomized victim; not only was adjudication more than 20 years old, it was not similar to current charged offenses (sodomy and murder of older woman)]; *People v. Pierce* (2002) 104 C.A.4th 893, 898, 128 C.R.2d 397 [assault with intent to commit rape is sexual offense within meaning of *Ev.C. 1108*, and thus, in prosecution for that offense, prior sexual offenses may be admitted as propensity evidence]; *People v. Medina* (2003) 114 C.A.4th 897, 902, 8 C.R.3d 158 [*Ev.C. 1108* allows admission of other subsequent, as well as prior, sexual offenses]; *People v. Wesson* (2006) 138 C.A.4th 959, 967, 41 C.R.3d 883 [commission of prior sexual offense may be proved by way of court records; *Ev.C. 452.5* (1 Cal. Evidence (4th), Hearsay, §245) allows certified official records of conviction to be used to prove not only fact of conviction but also commission of underlying offense].

*Limitation to prosecution for sexual crimes: Ev.C. 1108* "is properly limited to crimes in which sexual misconduct is an element of the charged offense (and of the offenses offered as evidence of the defendant's predisposition to commit the charged offense)." (*People v. Walker* (2006) 139 C.A.4th 782, 801, 43 C.R.3d 257 [in murder prosecution arising from killing of prostitute, defendant's three prior sexual attacks were not admissible under *Ev.C. 1108*; murder is not sexual offense enumerated in *Ev.C. 1108(d)(1)*, and crime with which defendant was charged did not involve as necessary adjudicated element deriving sexual pleasure or gratification from inflicting death, injury, or pain].)

*Advance disclosure requirement: Ev.C. 1108(b)*, as amended in 2002, provides that if evidence of a defendant's prior sexual offenses is to be offered by the prosecution, it must be disclosed to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, in accordance with P.C. 1054.7. (See 5 Cal. Crim. Law (3d), *Criminal Trial*, §§76, 79.) *Admission of evidence under other Evidence Code sections: See People v. Branch* (2001) 91 C.A.4th 274, 285, 109 C.R.2d 870 [in prosecution for lewd acts committed by defendant against step-great-granddaughter, trial judge's decision not to exclude, under *Ev.C. 352* (text, §17), uncharged prior sexual offenses committed more than 30 years earlier by defendant against stepdaughter was proper; significant similarities between prior and charged offenses more than balanced out remoteness of prior offenses].

*(New) Distinction: Character evidence requirements no longer applicable: When Ev.C. 1108* "swept away the general prohibition on character evidence set forth in section 1101, it rendered moot the exceptions to that prohibition created by section 1101, subdivision (b). Thus, in a sex crime prosecution, the 'signature test' is no longer the yardstick for admission of uncharged sexual misconduct to prove identity." (*People v. Britt* (2002) 104 C.A.4th 500, 506, 128 C.R.2d 290 [in prosecution for burglary and annoying or molesting child, defendant's prior sexual offenses were admissible even if traditional requirements for admission of prior misconduct to prove identity were not met].)

*(2a) (New) Effect of Acquittal of Charges Arising From Other Offense. In People v. Mullens* (2004) 119 C.A.4th 648, 14 C.R.3d 534, defendant was retried for lewd conduct on a child under the age of 14 years (P.C. 288(a)) after the first jury deadlocked by an 8-to-4 vote in favor of not guilty and also acquitted defendant on charges involving another child. In the second trial, evidence of defendant's conduct with the other child was admitted under *Ev.C. 1108*, but his request to admit evidence showing that the charges involving that conduct resulted in an acquittal was denied. The second jury found him guilty. *Held*, reversed; exclusion of evidence of the acquittal was error. "To give full meaning to the presumption of innocence in a case in which the prosecution is permitted to present section 1108 propensity evidence showing the defendant committed an uncharged sex crime, a trial court must grant the defense an opportunity to present evidence showing the defendant was acquitted of that alleged uncharged sex offense." (119 C.A.4th 666.) Given the history of this case, it was reasonably probable that the jury on retrial would have reached a result more favorable to defendant had the court not erroneously excluded the evidence of acquittal. (119 C.A.4th 670.)

### (3) Constitutionality of *Ev.C. 1108*.

*Pre-1999 version of CALJIC, No. 2.50.01: The 1999 revision of CALJIC, No. 2.50.01 added language specifying that evidence that the defendant committed a prior sexual offense is not itself sufficient to establish guilt. The Courts of Appeal have split as to whether the pre-1999 version of CALJIC, No. 2.50.01 unconstitutionally allowed the jury to find the defendant guilty of the current charge solely because he or she had committed prior sexual offenses. The following cases have held that it did: People v. Vichroy* (1999) 76 C.A.4th 92, 99, 90 C.R.2d 105; *People v. Orellano* (2000) 79

*C.A.4th 179, 184, 93 C.R.2d 866; People v. Frazier (2001) 89 C.A.4th 30, 35, 107 C.R.2d 100.* Other cases are consistent with the holding of *People v. Van Winkle (1999) 75 C.A.4th 133, 89 C.R.2d 28*, text, p. 445, that, given in conjunction with other proper instructions, the unrevised version of CALJIC, No. 2.50.01 did not lead the jury to apply an unconstitutionally low standard of proof. (See *People v. Regalado (2000) 78 C.A.4th 1056, 1062, 93 C.R.2d 83; People v. O'Neal (2000) 78 C.A.4th 1065, 1078, 93 C.R.2d 248; People v. Waples (2000) 79 C.A.4th 1389, 1398, 95 C.R.2d 45; People v. Jeffries (2000) 83 C.A.4th 15, 22, 98 C.R.2d 903.*)

*Revised instruction:* See *People v. Reliford (2003) 29 C.4th 1007, 1016, 130 C.R.2d 254, 62 P.3d 601, 5 Cal. Crim. Law (3d), Criminal Trial, Supp., §640* [dictum in *People v. Falsetta (1999) 21 C.4th 903, 1013, 89 C.R.2d 847, 986 P.2d 182*, text, p. 444, approving 1999 version of CALJIC, No. 2.50.01, was correct; further revision of instruction in 2002 appears to be improvement]. (New) CALCRIM, No. 1191: CALCRIM, No. 1191 [Evidence of Uncharged Sex Offense] does not violate due process any more than did CALJIC, No. 2.50.01, which was upheld in *Reliford, supra*. There is no material difference in the way each of these instructions allows the jury to conclude from prior conduct evidence that the defendant was disposed to commit sexual offenses and therefore likely committed the current offenses. (*People v. Crompt (2007) 153 C.A.4th 476, 480, 62 C.R.3d 848.*)

(4) (New) *Distinction: Opinion Evidence Not Admissible.* Opinion testimony regarding character is not rendered admissible by the interaction of *Ev.C. 1108* and *Ev.C. 1101(b)*. *Ev.C. 1108(a)* allows evidence of prior sexual offenses, and *Ev.C. 1101(b)* (character evidence to prove relevant fact such as intent or knowledge; see text, §75) is similarly limited to evidence of specific prior acts. Neither section purports to alter *Ev.C. 1102* (text, §50) to allow an expert witness to offer an opinion about the defendant's character during the prosecution's case-in-chief. (*People v. McFarland (2000) 78 C.A.4th 489, 495, 92 C.R.2d 884* [in prosecution for annoying or molesting child, trial judge erred in allowing psychiatrist to testify, based on his review of documents from defendant's prior prosecutions for lewd conduct with child, that defendant was motivated by unnatural or abnormal sexual interest in children when he touched victim].)



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## CHAPTER IV - Circumstantial Evidence

## III. PARTICULAR KINDS OF CIRCUMSTANTIAL EVIDENCE

## C. Similar or Related Acts or Circumstances.

## 1. Criminal Case: Other Offenses of Defendant.

## g. Admissibility in Domestic Violence Cases.

## 1 Witkin Cal. Evid. Circum Evid § 98

[§ 98] Admissibility in Domestic Violence Cases.

*Ev.C. 1109*, added in 1996 and modeled after the exception for other sexual offenses (see *supra*, §97), permits the introduction, in a prosecution for a domestic violence offense, of evidence of the defendant's commission of other domestic violence, if the evidence is not made inadmissible under *Ev.C. 352* (probative value weighed against danger of undue prejudice; see *supra*, §17). (*Ev.C. 1109(a)*.) "Domestic violence" has the meaning set forth in P.C. 13700. (*Ev.C. 1109(d)*.) (See *People v. Poplar* (1999) 70 C.A.4th 1129, 1138, 1139, 83 C.R.2d 320 [in prosecution charging defendant with rape of his girlfriend, with whom he was living, evidence of defendant's domestic violence committed against former girlfriends was admissible, even though *Ev.C. 1109* and P.C. 13700 do not specifically mention rape as act of domestic violence]; on P.C. 13700, see 11 Summary (9th), *Husband and Wife*, text and Supp., §§28, 36A.)

If evidence of other domestic violence is to be offered by the prosecution, it must be disclosed to the defendant, including statements of witnesses or a summary of any testimony that is expected to be offered, in compliance with P.C. 1054.7 (5 Cal. Crim. Law (3d), *Criminal Trial*, §§76, 79). (*Ev.C. 1109(b)*.)

Evidence of acts occurring more than 10 years before the charged offense is inadmissible "unless the court determines that the admission of this evidence is in the interest of justice." (*Ev.C. 1109(e)*.) However, *Ev.C. 1109* is not intended to limit or preclude the admission or consideration of evidence under any other statute or case law. (*Ev.C. 1109(c)*.) (See 28 Pacific L. J. 789; 69 So. Cal. L. Rev. 1463; CALJIC (6th ed.), No. 2.50.02.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Rucker* (2005) 126 C.A.4th 1107, 1117, 25 C.R.3d 62 [for purposes of *Ev.C. 1109*, defendant had dating relationship with her victim where they had frequent, intimate associations when victim was in town over period of approximately 9 months, he communicated his affection to her when he was out of town, and relationship was characterized by expectation of affection and sexual involvement]; *People v. Zavala* (2005) 130 C.A.4th 758, 770, 30 C.R.3d 398 [in prosecution in which defendant was accused of stalking his former wife, trial judge properly admitted evidence of defendant's prior violent acts toward wife, as stalking requires proof that victim reasonably feared for her safety; however, judge erred in giving jury propensity instruction under *Ev.C. 1109*, as stalking, which does not require victim to fear great bodily injury or death, is not crime of domestic violence within meaning of *Ev.C. 1109*]; *People v. Cabrera* (2007) 152 C.A.4th 695, 705, 61 C.R.3d 373 [in rape prosecution arising from defendant's attack on former girlfriend, testimony of two of defendant's previous girlfriends regarding domestic abuse was not made inadmissible by *Ev.C. 352* and thus was properly admitted under *Ev.C. 1109*; testimony created strong inference that defendant had

propensity to commit acts described by victim, it was not unnecessarily time-consuming, and it involved incidents that were no more inflammatory than charged offenses].

*Definition of domestic violence:* *Ev.C. 1109(d)* was amended in 2004 to provide that, subject to a hearing under *Ev.C. 352* (see text, §17), which must include consideration of any corroboration and remoteness in time, "domestic violence" has the further meaning set forth in *Family C. 6211* (see 11 *Summary* (10th), *Husband and Wife*, §374) if the act occurred no more than 5 years before the charged offense. (See *People v. Rucker*, *supra*, 126 C.A.4th 1118 [prior incident in which defendant pointed gun at her boyfriend constituted domestic violence; act could have been punished as assault with firearm].)

*Cross-Reference:* 11 *Summary* (10th), *Husband and Wife*, §372.

*(New) Constitutionality of statute and instruction:* The California Supreme Court, in *People v. Falsetta* (1999) 21 C.4th 903, 89 C.R.2d 847, 986 P.2d 182, text, §97, determined that *Ev.C. 1108*, allowing the admission of prior sex offenses, does not violate due process. The rationale underlying that opinion applies to *Ev.C. 1109* as well, "since the two statutes are virtually identical, except that one addresses prior sexual offenses while the other addresses prior domestic violence." (*People v. Johnson* (2000) 77 C.A.4th 410, 417, 91 C.R.2d 596; see *People v. Hoover* (2000) 77 C.A.4th 1020, 1027, 92 C.R.2d 208 [also relying on *Falsetta* to uphold statute]; *People v. Brown* (2000) 77 C.A.4th 1324, 1332, 1335, 92 C.R.2d 433 [*Ev.C. 1109* is constitutional, and language of instruction tracking 1999 revised version of CALJIC, No. 2.50.02 did not allow jury to find defendant guilty of current charge solely because he committed prior acts of same type]; *People v. Jennings* (2000) 81 C.A.4th 1301, 1310, 1316, 97 C.R.2d 727 [admission of prior acts of domestic violence under *Ev.C. 1109* did not violate defendant's right to equal protection, and trial judge had no sua sponte duty to give limiting instruction as to that evidence]; *People v. James* (2000) 81 C.A.4th 1343, 1356, 1364, 96 C.R.2d 823 [giving of pre-1999 version of CALJIC, No. 2.50.02 was erroneous as it would have allowed jury to find defendant guilty of current charge solely because he committed prior acts of same type; however, error was harmless, as it was clear jury used defendant's prior acts as corroborative circumstantial evidence supporting credibility of victim's testimony]; *People v. Escobar* (2000) 82 C.A.4th 1085, 1103, 1104, 98 C.R.2d 696 [any error in giving pre-1999 version of instruction was harmless beyond reasonable doubt]; *People v. Younger* (2000) 84 C.A.4th 1360, 1382, 101 C.R.2d 624 [giving of pre-1999 version of instruction was reversible error]; *People v. Pescador* (2004) 119 C.A.4th 252, 258, 14 C.R.3d 165 [inferences created by CALJIC, No. 2.50.02 do not violate due process; conclusions that defendant had propensity to commit crimes of domestic violence and was likely to commit and did commit charged offense all logically flow from proved prior acts of domestic violence].)

*(New) Inapplicability of statute to charged offenses:* *Ev.C. 1109* expressly conditions the admissibility of propensity evidence on the trial judge's power to evaluate the evidence under *Ev.C. 352*. Evidence relevant to other charged offenses, however, cannot be excluded under *Ev.C. 352*, no matter how prejudicial it may be. Accordingly, the statute cannot have been intended to allow the use of other charged offenses to prove a defendant's disposition to commit domestic violence, and an instruction allowing such use would be erroneous. "[W]e [do not] believe the Legislature meant for juries to weigh the evidence supporting domestic violence charges under two different standards of proof--beyond a reasonable doubt on each charged offense, but preponderance of the evidence for purposes of assessing a defendant's propensity." (*People v. Quintanilla* (2005) 132 C.A.4th 572, 583, 33 C.R.3d 782 [trial judge committed error, although harmless, in modifying CALJIC, No. 2.50.02 to permit jury to consider charged domestic violence offenses as evidence of criminal propensity in connection with other domestic violence charges joined for trial].)

*(New) Elder abuse:* *Ev.C. 1109* was amended in 2000 to broaden its scope to cover the abuse of elder or dependent persons. In a criminal action in which the defendant is accused of an offense of this type, evidence of the defendant's commission of previous offenses of this type is not made inadmissible by reason of the character evidence rule, provided it is not inadmissible under *Ev.C. 352* (see text, §17). (*Ev.C. 1109(a)(2)*.) However, evidence of the findings and determinations of administrative agencies regulating the conduct of health facilities licensed under *Health & Saf.C. 1250* is inadmissible under *Ev.C. 1109*. (*Ev.C. 1109(f)*.) "Abuse of an elder or a dependent person" means "physical or

sexual abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment that results in physical harm, pain, or mental suffering, the deprivation of care by a caregiver, or other deprivation by a custodian or provider of goods or services that are necessary to avoid physical harm or mental suffering." (*Ev.C. 1109(d)*, as amended in 2004; see CALCRIM, No. 853 [Evidence of Uncharged Abuse of Elder or Dependent Person]; CALJIC, No. 2.50.03.)

(*New*) *Child abuse*: *Ev.C. 1109* was amended in 2005 to broaden its scope to cover child abuse. In a criminal action in which the defendant is accused of an offense of this type, evidence of the defendant's commission of previous offenses of this type is not made inadmissible by reason of the character evidence rule, provided it is not inadmissible under *Ev.C. 352*. Admission of the evidence is subject to a hearing under *Ev.C. 352* that must specifically include "consideration of any corroboration and remoteness in time." However, "[n]othing in this paragraph prohibits or limits the admission of evidence" under *Ev.C. 1101(b)*. (*Ev.C. 1109(a)(3)*, added in 2005.)



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#### C. Similar or Related Acts or Circumstances.

##### 1. Criminal Case: Other Offenses of Defendant.

##### h. Procedural Evasions of Exclusionary Rule.

*1 Witkin Cal. Evid. Circum Evid § 99*

[§ 99] Procedural Evasions of Exclusionary Rule.

As indicated in the preceding sections, the exceptions cover a wide range. But the recognized exceptions do not reflect all of the allowable methods of bringing a defendant's prior offenses before the jury. The following practices, though seemingly contrary to the spirit of the exclusionary rule, are proper:

(1) If a defendant has offered evidence of good character, the prosecution may, in cross-examining the defendant's character witnesses, ask about other offenses, including arrests or charges that did not even result in convictions. (See 3 *Cal. Evidence (4th)*, *Presentation at Trial*, §246; 78 *Harv. L. Rev.* 438.)

(2) An otherwise admissible statement of the defendant introduced by the prosecution may contain an admission of other crimes. Thus, in *People v. Lindsey (1961)* 188 C.A.2d 471, 480, 10 C.R. 488, defendant, charged with a particular robbery, claimed that his oral confession was improperly obtained by a promise of immunity from prosecution for other robberies of which he was accused. *Held*, testimony of the police officers as to the circumstances of the making of the confession was admissible on the issue of voluntariness, despite the reference to other crimes. (Note, however, that under the Evidence Code, the judge determines admissibility of the confession outside the presence of the jury; 3 *Cal. Evidence (4th)*, *Presentation at Trial*, §51.)

(3) In a prosecution for theft by false pretenses, the corroboration requirement (see 2 *Cal. Crim. Law (3d)*, *Crimes Against Property*, §44) can be satisfied by evidence of the defendant's similar false representations to other persons. (See *People v. Phillips (1960)* 186 C.A.2d 231, 245, 8 C.R. 830.)

(4) A defendant who testifies may be impeached by proof of a prior conviction of a crime involving moral turpitude. (See 3 *Cal. Evidence (4th)*, *Presentation at Trial*, §303 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### C. Similar or Related Acts or Circumstances.

##### 2. Criminal Cases: Offenses of Third Party.

###### 1 *Witkin Cal. Evid. Circum Evid* § 100

[§ 100] Criminal Cases: Offenses of Third Party.

In *People v. Davis* (1995) 10 C.4th 463, 41 C.R.2d 826, 896 P.2d 119, a capital murder case, defendant sought to introduce evidence of other crimes committed by a third party to support his defense of third-party culpability in the murder. The trial judge concluded that the evidence did not relate to the third party's motive, intent, or identity, and was instead character evidence made inadmissible by *Ev.C. 1101*. *Held*, this conclusion was correct.

(a) The statute is not limited in its application to evidence concerning the defendant. Under *People v. Hall* (1986) 41 C.3d 826, 226 C.R. 112, 718 P.2d 99, *infra*, §122, the standard of relevancy is the same for evidence of third-party culpability as for any other evidence: it must be capable of raising a reasonable doubt as to the defendant's guilt, and must constitute direct or circumstantial evidence linking the third party to the actual perpetration of the crime. *Hall* did not abrogate *Ev.C. 1101* as applied to evidence of third-party culpability; evidence of that type must still be excluded if it is offered "not to show a fact other than the third party's criminal disposition, such as motive or intent, but merely to show that the third party was the more likely perpetrator because he had a history of violence." (10 C.4th 501, citing *People v. Farmer* (1989) 47 C.3d 888, 254 C.R. 508, 765 P.2d 940.)

(b) Here, the evidence defendant sought to introduce did not relate to motive or intent; defendant was essentially attempting to show that the third party was more likely to have been the killer because of his history of violence. Further, there was no evidence supporting defendant's testimony that the victim knew the third party or that the third party was present when the victim was assaulted. (10 C.4th 501, 502.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Lewis* (2001) 26 C.4th 334, 373, 110 C.R.2d 272, 28 P.3d 34 [in capital murder case, trial judge did not abuse discretion in excluding evidence that third party had engaged in violence in past when he was frustrated or encountered something he did not like; there was no evidence that he was frustrated or did not like victim, and prior acts were remote not only in time but also in pattern from present offense].



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#### C. Similar or Related Acts or Circumstances.

##### 3. Civil Case: Other Wrongful Acts.

##### 1 *Witkin Cal. Evid. Circum Evid* § 101

[§ 101] Civil Case: Other Wrongful Acts.

(1) *In General.* The same general rule of exclusion of other offenses, and most of the same exceptions (see *supra*, §88 et seq.) have been applied where evidence of another crime or civil wrong is offered in a civil case. (See *Ev.C. 1101(b)*, *supra*, §75 [stating the rule and exceptions in terms of evidence of "a crime, civil wrong, or other act"]; *F.R. Evid., Rule 404(b)* ["other crimes, wrongs, or acts"]; *Brokopp v. Ford Motor Co. (1977) 71 C.A.3d 841, 851, 139 C.R. 888*, citing the text; *13 So. Cal. L. Rev. 511*; *2 U.C.L.A. L. Rev. 402*; *7 U.C. Davis L. Rev. 523* [medical practice computer profile; proof of doctor's actions in series of similar cases]; *9 U.C. Davis L. Rev. 395* [similar facts evidence: balancing probative value against probable dangers of admission]; *1 McCormick 5th, §192*; *2 Wigmore (Chadbourn Rev.) §321 et seq.*; *66 A.L.R.2d 806* [assault and battery; other assaults, etc.]; *67 A.L.R.2d 232* [other usurious transactions]; *33 A.L.R.3d 1056* [evidence that malpractice defendant previously performed unnecessary surgery]; *73 A.L.R.4th 691* [admissibility of traffic conviction in later state civil trial]; *21 Proof of Facts 3d 629* [admission of character evidence and evidence of other acts in civil cases].)

Two exceptions that *do not* apply are *Ev.C. 1108* (sex crimes; *supra*, §97) and *Ev.C. 1109* (domestic violence; *supra*, §98), which, by their terms, apply only in criminal prosecutions. (But see *F.R. Evid., Rule 415* [admission of defendant's similar acts in civil action for sexual assault or child molestation].)

(2) *Illustrations: Evidence Admissible.* Evidence of the defendant's other wrongs has been found admissible in numerous cases. (See *Scott v. Times-Mirror Co. (1919) 181 C. 345, 358, 184 P. 672* [libel action; other libels by defendant, to show malice]; *Liberty Bank v. Nonnenmann (1929) 96 C.A. 478, 485, 274 P. 568* [other frauds]; *Atkins Corp. v. Tourny (1936) 6 C.2d 206, 215, 57 P.2d 480* [fraud and deceit; other similar frauds, at about same time, to show fraudulent intent]; *State Rubbish Collectors Assn. v. Siliznoff (1952) 38 C.2d 330, 339, 240 P.2d 282* [issue of plaintiff association's unfair methods of preventing competition from defendant nonmember; evidence of threats of association officers against other nonmembers]; *Janisse v. Winston Inv. Co. (1957) 154 C.A.2d 580, 588, 317 P.2d 48* [action for relief from usurious provisions of note, defense of bona fide purchase; evidence of four other identical transactions close in time]; *Morris Stulsaft Foundation v. Superior Court (1966) 245 C.A.2d 409, 420, 54 C.R. 12*; *Rousseau v. West Coast House Movers (1967) 256 C.A.2d 878, 887, 64 C.R. 655*; *Weeks v. Baker & McKenzie (1998) 63 C.A.4th 1128, 1162, 74 C.R.2d 510* [in sexual harassment action, evidence of defendant's conduct toward women other than plaintiff was properly admitted to prove intent (malice or oppression) required to establish his liability for punitive damages].)

In *Wright v. Rogers (1959) 172 C.A.2d 349, 363, 342 P.2d 447*, an action was brought to annul a deed obtained by fraud in the inception (document switch). *Held*, it was permissible to prove by the real estate commissioner's record that



at a prior time defendant had forged promissory notes and sold them to an innocent purchaser.

(3) *Illustrations: Evidence Inadmissible.* Where no recognized exception applies, the evidence is excluded. Thus, in *Pedreira v. Pedreira* (1917) 32 C.A. 711, 713, 164 P. 30, a suit by a wife for separate maintenance, it was error to permit her to testify to acts of illicit intercourse accompanied by promises to marry, 7 or 8 years before the marriage; the effect was to arouse sympathy for plaintiff and contempt for defendant. And in *Larson v. Larsen* (1925) 72 C.A. 169, 172, 236 P. 979, where plaintiff claimed that defendant farmer shot him while he was attempting to pick grapes in defendant's vineyard, it was improper to show that a year before defendant had shot another boy under similar circumstances. (See *Beyda v. Los Angeles* (1998) 65 C.A.4th 511, 521, 76 C.R.2d 547 [in sexual harassment action based on hostile work environment theory, evidence of defendants' sexual harassment of employees at location where plaintiff did not work was properly excluded, because there was no indication plaintiff was aware of these incidents].)

Evidence that otherwise comes within an exception may nevertheless be inadmissible because it fails to pass the balancing test of *Ev.C.* 352 (supra, §17). Thus, in *Brown v. Smith* (1997) 55 C.A.4th 767, 64 C.R.2d 301, 8 Summary (9th), *Constitutional Law, Supp.*, §765, an action by a tenant against her landlord for sexual harassment, the trial judge admitted evidence of the landlord's sexual conduct toward other female tenants without weighing the evidence's probative value against its possible prejudicial effect. Two relevant considerations were the extent to which the source of the uncharged acts evidence was independent of the charged offense evidence, and the fact that the uncharged acts had not resulted in criminal convictions or tort judgments. The failure to weigh these factors constituted reversible error. (55 C.A.4th 792.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General.* The scope of *Ev.C.* 1109 was broadened in 2000 and 2005 to cover abuse of elder and dependent adults and child abuse, as well as domestic violence. (See *Supp.*, supra, §98.)

See 171 A.L.R. Fed 483 [*F.R. Evid.*, Rule 404(b)]; 1 McCormick 6th, §192.(3) *Illustrations: Evidence Inadmissible.* Where the identity of the actor is in dispute and the uncharged misconduct fails to satisfy the "so unusual and distinctive as to be like a signature" standard enunciated in *People v. Ewoldt* (1994) 7 C.4th 380, 27 C.R.2d 646, 867 P.2d 757, text, §96, the uncharged conduct is not admissible on the issues of intent, motive, or lack of mistake or accident, all of which issues presume that the identity of the actor is known. "Indeed, it would make no sense to admit evidence of uncharged misconduct on the issue of intent, motive or lack of mistake or accident where the identity of the actor is not yet determined. ... If, [however], the trial court perceives there is no real issue of identity, it may admit the evidence of uncharged misconduct on such issues as intent or motive." (*Hassoldt v. Patrick Media Group* (2000) 84 C.A.4th 153, 166, 100 C.R.2d 662 [where identity of person who cut plaintiffs' trees was in issue and prior misconduct of defendant's employee involving tree-trimming was not unusual or distinctive, it was error to admit prior misconduct on issue of identity, and it would not have been admissible on intent, motive, or lack of mistake or accident].)

*Cross-Reference:* 8 Summary (10th), *Constitutional Law*, §947.



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## III. PARTICULAR KINDS OF CIRCUMSTANTIAL EVIDENCE

## C. Similar or Related Acts or Circumstances.

## 4. Other Accidents at Same or Similar Place.

## a. Rule and Purposes of Admission.

1 *Witkin Cal. Evid. Circum Evid* § 102

[§ 102] Rule and Purposes of Admission.

Where the circumstances are similar, and the happenings are not too remote in time, other accidents may be proved to show a defective or dangerous condition, knowledge or notice of it, or to establish the cause of an accident. (*McCormick v. Great Western Power Co. of Calif.* (1932) 214 C. 658, 664, 8 P.2d 145, *infra*, §103; *Hicks v. Ocean Shore R.* (1941) 18 C.2d 773, 782, 117 P.2d 850; *People v. Lang Trans. Corp.* (1941) 43 C.A.2d 134, 141, 110 P.2d 464; *Laird v. T. W. Mather* (1958) 51 C.2d 210, 220, 331 P.2d 617, *infra*, §104; *Martindale v. Mountain View* (1962) 208 C.A.2d 109, 116, 25 C.R. 148, citing the text; *Kopfinger v. Grand Cen. Public Market* (1964) 60 C.2d 852, 860, 37 C.R. 65, 389 P.2d 529, citing the text; *Ault v. International Harvester Co.* (1974) 13 C.3d 113, 121, 117 C.R. 812, 528 P.2d 1148; *Elsworth v. Beech Aircraft Corp.* (1984) 37 C.3d 540, 555, 208 C.R. 874, 691 P.2d 630; *Genrich v. California* (1988) 202 C.A.3d 221, 227, 228, 248 C.R. 303, *infra*, §103, quoting the text; C.E.B., *Effective Introduction of Evidence* 2d, Chap. 9 [Accidents: Prior or Subsequent Ones]; 1 *McCormick* 5th, §200; 2 *Wigmore* (Chadbourn Rev.) §458; 61 *Harv. L. Rev.* 205; 29 *Am.Jur.2d* (1994 ed.), *Evidence* §549; 46 A.L.R.2d 935 [railroad crossing accident; other failures of crossing devices]; 42 A.L.R.3d 780 [evidence of other accidents to prove hazardous nature of product]; 21 A.L.R.4th 472 [modern status of rules as to admissibility of evidence of prior accidents or injuries at same place]; on falling on store floors, see 62 A.L.R.2d 6, 20, 42, 43; 63 A.L.R.2d 591, 602, 626; 63 A.L.R.2d 694, 702; 64 A.L.R.2d 335, 345; 64 A.L.R.2d 398, 414; 64 A.L.R.2d 471, 476; as to injury or death of pedestrian at railroad crossing, see 64 A.L.R.2d 1199, 1214.)

The rule was stated in *Westman v. Clifton's Brookdale* (1948) 89 C.A.2d 307, 312, 200 P.2d 814, as follows: "Evidence showing that previous accidents have occurred under substantially the same general circumstances as the subsequent accident--the one in issue--tends to disclose the cause of the latter, tends to bring home to the person maintaining the place where the injury occurred knowledge of the dangerous condition of such place, and tends to establish negligence on his part." And in *Gilbert v. Pessin Grocery Co.* (1955) 132 C.A.2d 212, 282 P.2d 148, the court, commenting on *Wigmore's* analysis, said: "It will be observed that such proof may serve at least four different evidentiary functions,--as proof of (a) existence of defective or dangerous condition, (b) the cause of the subject accident, (c) knowledge or notice of the dangerous condition, (d) negligence in permitting that condition to continue. But it is not necessary that the proffered evidence of previous accidents be probative in all those respects. If it fairly raises an inference upon one phase of the case it is admissible." (132 C.A.2d 217.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 1 *McCormick* 6th, §200; 15 A.L.R.6th 1 [prior accidents or injuries at same place; superseding 21 A.L.R.4th 472,

text, p. 450]. *West's Key Number Digest*, Evidence k.141



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##### b. Illustrations.

#### 1 *Witkin Cal. Evid. Circum Evid* § 103

[§ 103] Illustrations.

In *McCormick v. Great Western Power Co. of Calif.* (1932) 214 C. 658, 665, 8 P.2d 145, plaintiffs were workmen employed in construction. While handling a steel bar they were shocked by defendant's high tension wires, which were strung about 10 feet from the building. Evidence that in *another building* on the same street *a year before*, several workmen were similarly burned, was held admissible; the jury might have inferred from it that defendant, with knowledge of the danger, was negligent in failing to insulate or remove the wires from close proximity to the structure.

In *Gilbert v. Pessin Grocery Co.* (1955) 132 C.A.2d 212, 218, 282 P.2d 148, plaintiff, a shopper, stumbled and fell over a 6-inch cement divider in defendant's parking lot, at night, when the area was insufficiently lighted. *Held*, it was error to exclude evidence of such a fall by another woman under similar conditions a few months before.

In *Leighton v. Dodge* (1965) 236 C.A.2d 54, 45 C.R. 820, an entirely different use of this kind of evidence was approved. Plaintiffs, driving at night on a recently installed wet asphalt road, stopped when a car in front began to spin on the pavement. Defendant, close behind, applied his brakes and skidded into a rear-end collision with plaintiffs. Defendant contended that the cause of the accident was the unusually slippery condition of the road. Plaintiffs called a highway patrol officer to testify that he had driven on the new road at high speed and stopped without difficulty. Defendant then offered evidence of three other skidding occurrences at about the same time and place. *Held*, the evidence was relevant and admissible for the limited purpose of showing the physical condition of the highway, to corroborate the testimony of defendant that skidding resulted from normal, nonnegligent braking. (236 C.A.2d 58.)

In *Genrich v. California* (1988) 202 C.A.3d 221, 231, 232, 248 C.R. 303, a personal injury action against the state by a pedestrian who was struck by a truck at an allegedly hazardous intersection, the trial judge allowed a nearby resident to testify to previous instances of "burning rubber," "fender-benders," "near misses," and "screeching tires" at the intersection. *Held*, admission of this evidence was proper on the question whether the state had notice of a dangerous condition at the intersection.

**SUPPLEMENT:** [This section is current through the latest supplement]



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##### c. Similarity of Conditions.

#### 1 Witkin Cal. Evid. Circum Evid § 104

[§ 104] Similarity of Conditions.

The evidence must relate to accidents that are *similar* and occur under *substantially the same* circumstances. (*Wilkerson v. El Monte* (1936) 17 C.A.2d 615, 618, 62 P.2d 790; *Martindale v. Mountain View* (1962) 208 C.A.2d 109, 116, 25 C.R. 148, citing the text; 2 Wigmore (Chadbourn Rev.) §458; 1 McCormick 5th, §200; 61 Harv. L. Rev. 225; 21 A.L.R.4th 472, 484.)

But substantial similarity is enough, for no two accidents happen in precisely the same way. (See *Magnuson v. Stockton* (1931) 116 C.A. 532, 535, 3 P.2d 30 [evidence of previous drownings in lake held admissible to indicate dangerous condition of lake without showing exact place and manner of previous accidents]; *McCormick v. Great Western Power Co. of Calif.* (1932) 214 C. 658, 667, 8 P.2d 145, supra, §103; *Hicks v. Ocean Shore R.* (1941) 18 C.2d 773, 782, 117 P.2d 850 [evidence of accidents at one portal of a tunnel held admissible where plaintiff was injured at other portal]; *Gilbert v. Pessin Grocery Co.* (1955) 132 C.A.2d 212, 218, 282 P.2d 148, supra, §103; *Elsworth v. Beech Aircraft Corp.* (1984) 37 C.3d 540, 555, 208 C.R. 874, 691 P.2d 630 [prior accidents caused by dangerous spinning characteristics of plane manufactured by defendant with design similar to that of plane that caused present accident].)

Moreover, the requirement of similarity may vary in strictness according to the purpose for which the evidence is introduced. Thus, if offered to show a dangerous condition of a particular thing--such as a step--the other accident must be connected in some way with that thing; but if offered only to show knowledge or notice of a dangerous condition, an accident at the place--a broader area--may be shown.

This distinction is illustrated by the mistaken conclusion in *Thompson v. Buffums'* (1936) 17 C.A.2d 401, 62 P.2d 171, a personal injury suit. Plaintiff's shoe caught in an unfilled groove on the tenth step in defendant's stairs, and she fell. Plaintiff's counsel asked a witness whether, before that time, any other women had "fallen upon these particular stairs." *Held*, the question was properly excluded, for it did not limit the inquiry to the tenth step, from which plaintiff fell and which was admittedly the only step from which the lead filling was missing. "Any number of persons may have fallen on other steps of this same stairway due to other causes, and yet such evidence would not be relevant or material to show the alleged dangerous condition of the tenth step upon which appellant fell, nor would such evidence tend in any way to bring home to respondent knowledge of the alleged dangerous condition of the step here in question." (17 C.A.2d 405.)

The *Thompson* case was expressly disapproved on this point in *Laird v. T. W. Mather* (1958) 51 C.2d 210, 220, 331 P.2d 617. Plaintiff fell on a stairway where the handrail ended before the bottom step. She offered testimony of a former

employee of defendant that, before the accident, he told defendant's officer he had heard of someone falling there. *Held*, though insufficient to show a dangerous condition in fact (because of no showing of similarity of conditions), the statement was properly received to show notice of the alleged dangerous condition. (See *Hilts v. Solano* (1968) 265 C.A.2d 161, 169, 71 C.R. 275; *Brake v. Beech Aircraft Corp.* (1986) 184 C.A.3d 930, 938, 229 C.R. 336; *Genrich v. California* (1988) 202 C.A.3d 221, 228, 248 C.R. 303, quoting the text.)

*Westman v. Clifton's Brookdale* (1948) 89 C.A.2d 307, 200 P.2d 814, illustrates another distinction. Plaintiff was injured by a fall on unlighted stairs in defendant's cafeteria. Evidence that others had fallen on the stairs was held admissible, without the necessity of showing that the same step was involved; here, unlike *Thompson v. Buffums*, *supra*, the theory of negligence was the absence of adequate illumination and a handrail.

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Goebel v. Santa Barbara* (2001) 92 C.A.4th 549, 557, 111 C.R.2d 901, 6 Cal. Proc. (4th), *Proceedings Without Trial*, Supp., §77 [in action against city for maintenance of dangerous condition of public property (water main) that damaged plaintiffs' home, trial judge properly excluded evidence of break in water main several years earlier; there was no evidence that damage caused by earlier break resulted in landslide condition similar to that for which plaintiffs were seeking recovery]; 1 McCormick 6th, §200.



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#### d. Subsequent Accidents.

#### 1 *Witkin Cal. Evid. Circum Evid* § 105

#### [§ 105] Subsequent Accidents.

In most cases, the evidence offered is of *prior* accidents, and often the rule is stated in that limited form, with the corollary that subsequent accidents are irrelevant and must be excluded. Thus, in *McCormick v. Great Western Power Co. of Calif.* (1932) 214 C. 658, 8 P.2d 145, *supra*, §103, the court, after approving the admission of evidence of previous accidents, added: "Plaintiffs sought also to show that subsequent to the time plaintiffs were injured, another workman employed on this same building was injured by said wires; but we think the testimony relating thereto was properly excluded because obviously the happening of the subsequent accident could not have tended to prove that by reason thereof the company might reasonably have anticipated the injury to plaintiffs." (214 C. 668.)

Other authorities have shown, however, that this analysis is faulty. The relevancy of other accidents, whether prior or subsequent, depends on the purpose for which the evidence is offered. A subsequent accident would not be relevant on the issue of *knowledge or notice* of a possibly dangerous condition at the time of the injury giving rise to the action. But a subsequent accident at the same or a similar place, under the same or similar conditions, is just as relevant as a prior accident to show that the condition was in fact *dangerous or defective*, or that the injury was *caused* by the condition. (See *Simmons v. Southern Pac. Trans. Co.* (1976) 62 C.A.3d 341, 365, 133 C.R. 42, quoting the text [admissible where similarity shown]; 61 *Harv. L. Rev.* 207, note 5; 1 *McCormick* 5th, §200; 2 *Wigmore* (Chadbourn Rev.) §§252, 437.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 1 *McCormick* 6th, §200.



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## 4. Other Accidents at Same or Similar Place.

## e. Absence of Similar Accidents.

1 *Witkin Cal. Evid. Circum Evid* § 106

[§ 106] Absence of Similar Accidents.

(1) *In General.* Evidence of "safety history" offered by the defendant, i.e., that a particular course of conduct was pursued or a particular instrumentality was used in a certain manner without accident, would seem to be relevant on the issues of danger or safety of a condition or notice thereof. And, where the period of safe use is long or the experience is otherwise extensive, the trend is to admit this kind of negative evidence. (See 1 McCormick 5th, §200; 2 Wigmore (Chadbourn Rev.) §448; 61 *Harv. L. Rev.* 213, 217, 233, 241; 29 *Am.Jur.2d* (1994 ed.), *Evidence* §§553, 554; for opposing view, see 42 A.L.R.2d 1055; 51 A.L.R.4th 1186; 10 A.L.R.5th 371; 1956 A.S. 564.)

(2) *California Law Prior to Evidence Code.* Some California cases decided prior to the Evidence Code held evidence of safety history inadmissible, although an exception was recognized where the evidence was offered to meet a prima facie case under the doctrine of *res ipsa loquitur*. (See *Oakland v. Pacific Gas & Elec. Co.* (1941) 47 C.A.2d 444, 448, 118 P.2d 328; *Thompson v. B.F. Goodrich Co.* (1941) 48 C.A.2d 723, 729, 120 P.2d 693; *Murphy v. Lake* (1951) 106 C.A.2d 61, 65, 234 P.2d 712; *Khanoyan v. All Amer. Sports Enterprises* (1964) 229 C.A.2d 785, 793, 40 C.R. 596.) However, many pre-Code decisions accepted the relevancy of such evidence without discussion. (See *McKinney v. San Francisco* (1952) 109 C.A.2d 844, 847, 241 P.2d 1060; *Ford v. Riverside City School Dist.* (1953) 121 C.A.2d 554, 562, 263 P.2d 626; *Richter v. Adobe Creek Lodge* (1956) 143 C.A.2d 514, 517, 299 P.2d 941; *Ziegler v. Santa Cruz City High School Dist.* (1959) 168 C.A.2d 277, 280, 335 P.2d 709.)

(3) *California Law Under Evidence Code.* Under Ev.C. 351, making all relevant evidence admissible unless otherwise provided by statute (*supra*, §5), it would seem clear that this evidence is admissible. (See *Beauchamp v. Los Gatos Golf Course* (1969) 273 C.A.2d 20, 37, 38, 77 C.R. 914 [taking this position, but observing that the trial judge may exclude it under Ev.C. 352 (*supra*, §17) "if there would be confusion of collateral issues"]; *Benson v. Honda Motor Co.* (1994) 26 C.A.4th 1337, 1345, 1348, 32 C.R.2d 322 [product liability action; trial judge properly admitted testimony by defendant's product analysis engineer of absence of similar claims]; C.E.B., *Effective Introduction of Evidence* 2d, Chap. 8 [Accidents: Absence of Similar Ones].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General.* See 1 McCormick 6th, §200.





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## 5. Prior and Subsequent Conditions or Acts.

## a. General Principle.

*1 Witkin Cal. Evid. Circum Evid § 107*

[§ 107] General Principle.

"Evidence of the existence of a particular condition, relationship, or status ... *before and after an act* in question is admissible to indicate the existence of the same status, condition or relationship at the time of the act." (*Blank v. Coffin* (1942) 20 C.2d 457, 463, 126 P.2d 868; see *Slovick v. James I. Barnes Const. Co.* (1956) 142 C.A.2d 618, 625, 298 P.2d 923, *infra*, §108; *Roddiscraft v. Skelton Logging Co.* (1963) 212 C.A.2d 784, 801, 28 C.R. 277, citing the text ["An inference that a state of affairs existed at a certain time may be reinforced by evidence that it continued to exist at a subsequent time, provided that too long a period has not elapsed and conditions have not changed"]; *People v. Wong* (1966) 245 C.A.2d 844, 848, 54 C.R. 273, *infra*, §108 [following Wigmore's analysis and *Blank* and *Slovick* cases]; *People v. Guntert* (1981) 126 C.A.3d Supp. 1, 9, 179 C.R. 426, citing the text; 2 Wigmore (Chadbourn Rev.) §437; 29 *Am.Jur.2d* (1994 ed.), *Evidence* §548; on action for fall on store stairway or floor, see 62 A.L.R.2d 6, 19, 43; 63 A.L.R.2d 591, 603; 64 A.L.R.2d 335, 345; 64 A.L.R.2d 398, 415; on exclusion of evidence of subsequent remedial acts, see *infra*, §163; on evidence of prior accidents of driver, see *supra*, §40.)

The danger of subsequent evidence is that too long an interval may have elapsed and conditions may have changed. The propriety of the inference may sometimes depend on the length of the interval and the likelihood of intervening circumstances. (See discussion of Wigmore's analysis in *Slovick v. James I. Barnes Const. Co.*, *supra*, exposing the "fallacy that presumptions do not run backward"; and see *Larson v. Solbakken* (1963) 221 C.A.2d 410, 422, 34 C.R. 450, *infra*, §109; *Atkins v. Bisigier* (1971) 16 C.A.3d 414, 425, 94 C.R. 49 [proffered evidence rejected as remote and speculative, where at least 15 witnesses could have been questioned as to condition at time of accident].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Buell-Wilson v. Ford Motor Co.* (2006) 141 C.A.4th 525, 542, 46 C.R.3d 147 [in products liability action against automobile manufacturer arising from rollover of sport utility vehicle, trial judge did not abuse discretion in admitting evidence concerning design of vehicle's predecessor; stability characteristics of two vehicles were substantially similar, and evidence was relevant both to prove cause of vehicle's stability defect and to show notice on manufacturer's part at time it was designing vehicle]. *West's Key Number Digest*, *Evidence* k.129 et seq.



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##### 5. Prior and Subsequent Conditions or Acts.

##### b. Subsequent Conditions.

#### 1 *Witkin Cal. Evid. Circum Evid* § 108

[§ 108] Subsequent Conditions.

In *Slovick v. James I. Barnes Const. Co.* (1956) 142 C.A.2d 618, 298 P.2d 923, defendant contractor constructed a catwalk. One week later it gave way due to faulty overlapping of planks, and plaintiff, employee of a subcontractor, was injured. On the issue whether the admittedly defective condition at the time of the accident was present at the time of construction (thus fastening liability for negligence on defendant), the court said: "The condition of such a structure is a fact which is of a continuous nature, certainly so for a period of a week or less in a building that is far from completion. It was unsafe on the day of the accident and on the second or third day before that event, and it is reasonably inferable that such was the case when it was built one week (or less) before the catastrophe." (142 C.A.2d 624.)

Other cases apply the principle to various kinds of property. (See *Dow v. Sunset Tel. & Tel. Co.* (1910) 157 C. 182, 188, 106 P. 587 [evidence that electric power wires and telephone wires were separated after an accident was properly admitted as tending to show dangerous condition of the premises at the time]; *Willard v. Valley Gas & Fuel Co.* (1915) 171 C. 9, 16, 151 P. 286 [evidence of condition of a gas heater several days after accident was admissible to show that pilot light had been turned off]; *Grossetti v. Sweasey* (1917) 176 C. 793, 800, 169 P. 687 [evidence of condition of brakeshoes on streetcar before and after accident was admissible].)

In *People v. Wong* (1966) 245 C.A.2d 844, 54 C.R. 273, defendant was charged with burglary of a telephone booth. The prosecution introduced the following evidence: (a) At 2 a.m. defendant was observed using a metal tine to release money from the box, and had a large quantity of dimes in his possession. (b) An officer arrested him and left the area without placing a guard at the booth or posting a notice that the telephone should not be used. (c) Six hours later, at 8 a.m., the box was found "stuffed" in such a manner as to permit release of the coins by use of the tine--an instrument commonly used by "stuffers." Defendant's objection, that there was no direct evidence that the box was in the same condition at 8 a.m. as it was at 2 a.m., was properly overruled. "The circumstances of the case at bench demonstrate no reasonable probability that the phone box was stuffed during the approximate six-hour interval when it was not under observation. Or, put another way, a reasonable inference to be drawn from the facts is that the box was stuffed before and at the time of defendant's arrest." (245 C.A.2d 850.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER IV - Circumstantial Evidence

## III. PARTICULAR KINDS OF CIRCUMSTANTIAL EVIDENCE

## C. Similar or Related Acts or Circumstances.

## 5. Prior and Subsequent Conditions or Acts.

## c. Prior or Subsequent Acts.

1 *Witkin Cal. Evid. Circum Evid* § 109

[§ 109] Prior or Subsequent Acts.

(1) *In General.* In *Blank v. Coffin* (1942) 20 C.2d 457, 463, 126 P.2d 868, an action against a car owner for injuries resulting from another's driving with permission, evidence that the owner permitted the driver to use the car *after* the accident was admissible to support an inference that he had permission at the time of the accident. And in *Scott v. Times-Mirror Co.* (1919) 181 C. 345, 358, 184 P. 672, it was held that plaintiff seeking to prove malice in a libel action could offer evidence of *other prior or subsequent libels* published about him by defendant, as tending to show ill feeling against him at the date of publication of the libel in question. (See 2 Wigmore (Chadbourn Rev.) §437; 89 A.L.R.2d 177 [admissibility, on issue of testamentary capacity, of previously executed wills].)

Many other cases are decided in accordance with this principle. (See *Mathews v. Dudley* (1931) 212 C. 58, 60, 297 P. 544 [manner of driving truck shortly *before* accident admitted as indicative of a course of conduct continuing until the accident]; *People v. Brazil* (1931) 112 C.A. 326, 327, 296 P. 639 [prosecution for failure to support illegitimate child; evidence of intercourse between defendant and complaining witness *before* alleged time of conception admitted as indicating probability of intercourse at that time]; *King v. Moore* (1934) 220 C. 449, 457, 31 P.2d 377 [acts of parties *subsequent* to alleged agreement may be admitted as indicative of such agreement or its terms]; *Jennings v. Arata* (1948) 83 C.A.2d 143, 146, 188 P.2d 298 [evidence that 1 minute *before* and one-half mile away from accident defendant drove in excess of speed limit and almost struck a highway worker; following *Mathews*]; *Estate of Fosselman* (1957) 48 C.2d 179, 185, 308 P.2d 336 [incompetency of testator at time of execution of will may be proved by evidence of acts before and after that time]; *Ungefug v. D'Ambrosia* (1967) 250 C.A.2d 61, 64, 58 C.R. 223 [decedent struck by automobile at crossing, defense of contributory negligence--intoxication; evidence that she crossed street shortly before, staggering and apparently intoxicated]; *Wilson v. Gilbert* (1972) 25 C.A.3d 607, 615, 102 C.R. 31 [medical malpractice case, evidence of defendant doctor's subsequent training and change of referral procedures]; *People v. Eagles* (1982) 133 C.A.3d 330, 340, 183 C.R. 784 [prosecution for vehicular manslaughter with gross negligence; evidence of defendant's reckless driving and near collision during afternoon before accident was properly admitted to prove knowledge of life-threatening dangers of excessive speed, thereby establishing implied malice]; *Hilliard v. A. H. Robins Co.* (1983) 148 C.A.3d 374, 398, 196 C.R. 117, *infra*, §123.)

(2) *Remoteness Limitation.* *Larson v. Solbakken* (1963) 221 C.A.2d 410, 34 C.R. 450, illustrates the remoteness limitation (*supra*, §24) on this kind of evidence. Defendant, in a car behind plaintiff, attempted to pass on the left. About 100 feet from the point of impact, plaintiff turned into the left lane for a left turn, and the vehicles collided. On deposition, defendant described a prior experience in attempting to pass a truck and getting back into his own lane in

time. Plaintiff sought to introduce this evidence at the trial. *Held*, exclusion was proper. It would have been relevant on the issue of defendant's *knowledge* of the probable consequences of his attempt to pass, but it was not offered for that purpose. Plaintiff's theory was that the prior incident (near accident) was evidence of *negligence*; but the incident happened 10 days before the accident involved in the suit, and the judge had discretion to reject it as remote. (221 C.A.2d 421.)

On the other hand, in *Isaacs v. Huntington Memorial Hosp.* (1985) 38 C.3d 112, 211 C.R. 356, 695 P.2d 653, an action to recover for injuries sustained by plaintiff when he was shot by an unknown assailant in defendant's parking lot, the trial judge excluded evidence of incidents that occurred 4 years before, ruling that the cutoff point was 3 years. *Held*, the limitation was too arbitrary; remoteness goes to probative value, and the judge should determine the admissibility of an incident on the basis of relevancy and discretionary exclusion under *Ev.C.* 352. (38 C.3d 133.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### C. Similar or Related Acts or Circumstances.

#### 6. Custom or Practice of Others on Negligence Issue.

##### a. Admissibility and Effect.

#### 1 Witkin Cal. Evid. Circum Evid § 110

[§ 110] Admissibility and Effect.

(1) *Rule and Theory.* Evidence of custom or usage in a business or industry, i.e., the practice of others similarly situated or performing similar acts under similar conditions, is admissible in negligence cases on the issue of what constitutes due care or negligence under the circumstances. (*Burke v. John E. Marshall* (1940) 42 C.A.2d 195, 203, 108 P.2d 738; *Thurman v. Clune* (1942) 51 C.A.2d 505, 507, 125 P.2d 59 [evidence of methods of operation of other ice hockey rinks was admissible for defendants on issue whether they used proper safeguards]; *Shurman v. Fresno Ice Rink* (1949) 91 C.A.2d 469, 474, 205 P.2d 77 [following *Thurman*]; *Miller v. Midway Fishing Tool Co.* (1951) 106 C.A.2d 612, 614, 235 P.2d 630 [injury on "handling elevator" of oil derrick; evidence for defendants of customary methods of inspection]; *Hargrave v. Acme Tool & Tester Co.* (1954) 125 C.A.2d 34, 39, 269 P.2d 913 [defendant's failure to follow custom was admissible for plaintiff as evidence of negligence]; *Hartford Acc. & Indem. Co. v. Bank of America* (1963) 220 C.A.2d 545, 561, 34 C.R. 23; 2 Wigmore (Chadbourn Rev.) §461; 8 A.L.R.2d 446 [depositor's negligence action against bank; banks' customs in handling checks]; 43 A.L.R.2d 618 [action under Federal Employers' Liability Act; rules and practices of other railroads]; 64 A.L.R.2d 1199, 1215 [action against railroad for injury or death of pedestrian at crossing; evidence of construction of other crossings]; 59 A.L.R.3d 1327 [usual business practice of notaries to identify person seeking acknowledgment].)

(2) *Not Determinative of Legal Standard.* The evidentiary principle should not be confused with the contrasting rule of substantive law, that custom cannot transform negligence into due care. The prevailing safety practices of a well-run industry or activity are highly probative, but not conclusive. The jury may still draw the inference of negligence, because custom of others cannot establish a legal standard of due care. "Evidence of custom is received not as proof of, or as a substitute for, the substantive law's standard of conduct, which is due care, but merely to aid the jury in determining from such evidence and all the other evidence in the case whether the particular conduct of a party does or does not measure up to the legal standard." (*Miller v. Midway Fishing Tool Co.*, *supra*, 106 C.A.2d 614 [citing Wigmore]; see *Haskins v. Southern Pac. Co.* (1934) 3 C.A.2d 177, 183, 39 P.2d 895; *Blumberg v. M. & T.* (1949) 34 C.2d 226, 230, 209 P.2d 1 [woman's narrow heel caught in opening of rubber-strip mat in front of elevator; "[t]he claim that the mat in question was widely used is no legal excuse for the maintenance of a dangerous condition"]; *Reagh v. San Francisco Unified School Dist.* (1953) 119 C.A.2d 65, 70, 259 P.2d 43; 6 *Summary* (9th), *Torts*, §754.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Rule and Theory.* See *Alvarez v. California* (1999) 79 C.A.4th 720, 733, 95 C.R.2d 719, 5 *Summary* (10th), *Torts*, §284, citing the text [action against state alleging that lack of median barrier caused accident; testimony of state

employees regarding state's custom and practice as to discretionary approval of roadway designs].

(2) *Not Determinative of Legal Standard.*

*Cross-Reference:* 6 *Summary* (10th), *Torts*, §897. *West's Key Number Digest*, Evidence k.111, 139



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#### C. Similar or Related Acts or Circumstances.

#### 6. Custom or Practice of Others on Negligence Issue.

##### b. Custom Differing From Statutory Standard.

#### 1 Witkin Cal. Evid. Circum Evid § 111

[§ 111] Custom Differing From Statutory Standard.

(1) *Custom Contrary to Standard.* In some situations, the standard of care is not the conduct of a prudent person under the circumstances, to be determined by evidence in the particular case, but is prescribed by statute or other binding regulation. Unexcused departure from the prescribed standard is "negligence per se," i.e., negligence as a matter of law. In these situations, a custom or practice differing from the statutory standard is irrelevant, and evidence of it is inadmissible, on the issue of negligence. (*Hurtel v. Albert Cohn* (1936) 5 C.2d 145, 148, 52 P.2d 922; see *Milton v. Los Angeles Motor Coach Co.* (1942) 53 C.A.2d 566, 570, 128 P.2d 178 [alleged custom of commercial photographers to stand in middle of street to take pictures, rejected]; *Ortega v. Garner* (1963) 218 C.A.2d 823, 827, 32 C.R. 632, citing the text.)

In *Transamerica Title Ins. Co. v. Green* (1970) 11 C.A.3d 693, 89 C.R. 915, an attorney-notary public relied on the representations of his law partner that the people whose signatures he was acknowledging were Mr. and Mrs. P and Mr. and Mrs. H. Actually, the purported wives were impostors. Over objection, four attorneys practicing in San Mateo County testified that the custom and practice there was for a notary in a law office to accept the identification of an attorney's client if introduced by an attorney in the same office. *Held*, admission of this testimony was error. C.C. 1185 and Govt.C. 8214 establish the duties of notaries public, and evidence that notaries in the county did not comply with these requirements was irrelevant. (11 C.A.3d 703, citing the text.)

However, in *Cucinella v. Weston Biscuit Co.* (1954) 42 C.2d 71, 73, 265 P.2d 513, plaintiff, partly across a highway, changed her mind, started to return without looking further at traffic, and was struck by defendant's car. The posted speed limit was 25 miles per hour, but the trial judge admitted defendant's evidence that the average speed of motorists there was 30 miles per hour (the speed of defendant's car, according to his testimony). *Held*, this was relevant, not as an excuse for defendant's negligence, but on the issue of plaintiff's contributory negligence. The facts and circumstances at the time and place of the accident and known to the parties were "part of the *res gestae*," and aided the jury in passing on the question whether plaintiff acted as a reasonable person.

(2) *Custom Higher Than Standard.* At first glance, it might appear that, if the statutory standard precludes proof of a lower standard, it must equally preclude proof of a higher one. But this is not true, for the statutory regulation lays down a *minimum*, not a maximum, requirement. (See 6 *Summary* (9th), *Torts*, §756.) Hence, the plaintiff may offer evidence of a custom or "standard practice" of higher care than the statute requires, to establish negligence of the defendant under the circumstances. (*Campbell v. Fong Wan* (1943) 60 C.A.2d 553, 557, 141 P.2d 43.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
(2) *Custom Higher Than Standard.*

*Cross-Reference:* 6 *Summary* (10th), *Torts*, §899.





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## 7. Contracts of Others.

## 1 Witkin Cal. Evid. Circum Evid § 112

[§ 112] Contracts of Others.

"It is the general rule that *in the absence of a common plan, scheme, habit or usage*, contracts between different parties have no probative value in the consideration and interpretation of other and different contracts even though one of the parties may be common to both." (*Lande v. Southern Calif. Freight Lines* (1948) 85 C.A.2d 416, 422, 193 P.2d 144 [evidence of similar contracts of defendant with other parties, offered on issue of interpretation of defendant's contract with plaintiff, held properly excluded]; see criticism, 2 U.C.L.A. L. Rev. 394.)

The italicized portion of this quotation makes it clear that, pursuant to the usual test of relevancy, other contracts between a party and a stranger may sometimes be shown. A number of cases were reviewed in *Moody v. Peirano* (1906) 4 C.A. 411, 88 P. 380, where defendant seller denied having made a warranty. The court declared that if it could be shown "that in all his other sales from this lot of wheat defendant had warranted to the respective purchasers that it was 'White Australian' wheat, such testimony would be relevant for the purpose of showing his course of business in selling the wheat, and it would tend to create a probability that he had made the same warranty in his sale to the plaintiff. The number and frequency of the sales in which the warranty had been made, and their proximity in time to the sale made to the plaintiff, would be circumstances addressed to the discretion of the court in determining the relevancy of the testimony." (4 C.A. 419.) (See *Lande v. Southern Calif. Freight Lines*, *supra*, 85 C.A.2d 423, distinguishing *Moody* and similar cases as involving a common plan or usage.)

The admissibility of this kind of evidence was again affirmed in *Firlotte v. Jessee* (1946) 76 C.A.2d 207, 211, 172 P.2d 710. Defendant, by an oral agreement, sold plaintiffs the feed for a grazing season on 200 acres of land for \$ 600. Then he grazed his own cattle there, which consumed much of the feed. In this action, defendant's position was that by the agreement he had reserved that right. Plaintiffs' witness testified that defendant had approached him prior to the agreement with plaintiffs, offering the same pasturage, for the same price, and making no statement reserving the right to graze his own cattle. *Held*, the evidence was admissible and tended to support the judgment for plaintiffs. (See 2 U.C.L.A. L. Rev. 401; *Brawthen v. H & R Block* (1975) 52 C.A.3d 139, 148, 124 C.R. 845 [distinguishing *Lande*, and allowing evidence of "standard pitch" used by defendant employer to all prospective managers as common habit or usage]; 1 McCormick 5th, §198; 2 Wigmore (Chadbourn Rev.) §377.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
 See 1 McCormick 6th, §198.



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#### 8. Experience of Others.

##### 1 Witkin Cal. Evid. Circum Evid § 113

[§ 113] Experience of Others.

In *Sill Properties v. CMAG* (1963) 219 C.A.2d 42, 33 C.R. 155, a leased restaurant burned down, the lessor refused to comply with his obligation to rebuild, and the lessee sued for damages. He testified that the business would earn substantial profits because of its location and the absence of any comparable restaurant there. The lessor, over objection, introduced evidence showing that the lessee's predecessors in that business had operated at a loss. *Held*, because the lessee relied on location and characteristics of the building to give the lease a special value, "evidence that the same kind of business over a period of years consistently lost money operating at the same location and in the particular building would be admissible as to that issue." (219 C.A.2d 54.) The lessee's contention that his predecessors were inept and inexperienced went only to the weight of the evidence. (219 C.A.2d 54.) (See *Estrada v. Darling-Croze Machine Co.* (1969) 275 C.A.2d 681, 684, 80 C.R. 266 [prejudicial exclusion of evidence showing what percentage of commission is customarily paid to salesperson who has left employment]; *Ruiz v. Minnesota Mining & Mfg. Co.* (1971) 15 C.A.3d 462, 93 C.R. 270, 1 Cal. Evidence (4th), *Opinion Evidence*, §45 [medical testimony, based on experience with glue-sniffing youngsters, was properly received to show that plaintiffs, adult cushion assemblers, suffered from toluene poisoning]; 2 Wigmore (Chadbourn Rev.) §461 et seq.)

However, the experience of others may not be sufficiently comparable to justify its proof. Thus, in *Braly v. Midvalley Chemical Co.* (1961) 192 C.A.2d 369, 379, 13 C.R. 366, plaintiff cotton farmers sued defendant chemical fertilizer company, alleging that the method by which defendant applied aqua ammonia fertilizer reduced the cotton yield. Plaintiffs made an offer to prove cotton crop failures of two farmers, several miles distant, who used the same method. Defense counsel objected that these farmers had brought actions, one resulting in a defense verdict and the other compromised on a nuisance value basis, and that admission of the evidence would open up issues relating to all farmers in the locality who had used this method, most of them with success. *Held*, rejection of the offer of proof was a proper exercise of discretion, for it was not shown that the conditions of soil, planting, etc., were sufficiently similar to make the comparison worthy of consideration. (See also *Pacific Gas & Elec. Co. v. Hacienda Mobile Home Park* (1975) 45 C.A.3d 519, 531, 119 C.R. 559 [evidence irrelevant where conditions not substantially similar].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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##### 9. Other Sales To Prove Value.

##### a. Sales of Similar Personal Property.

*1 Witkin Cal. Evid. Circum Evid § 114*

[§ 114] Sales of Similar Personal Property.

Evidence of sales of ordinary similar personal property in the open market is commonly introduced and admitted to prove its market value, e.g., in an action for damages for its destruction. (See *Tatone v. Bing* (1936) 12 C.A.2d 543, 545, 55 P.2d 933; *Foreman & Clark Corp. v. Fallon* (1971) 3 C.3d 875, 886, 92 C.R. 162, 479 P.2d 362, citing the text [general rule applied to show rental value of premises]; 1 McCormick 5th, §199; 22 Am.Jur.2d, Damages §955; on related methods of determining value, see U.C.C. 2724 [market quotations in trade journals or newspapers]; 60 Harv. L. Rev. 132 [governmental (OPA) ceiling prices].)

Similarly, in determining the value of *shares of stock*, evidence of other sales, made either on an exchange or privately, is admissible. (See *Estate of Spitly* (1932) 124 C.A. 642, 644, 13 P.2d 385 [current stock exchange price is not conclusive, can be challenged by evidence of manipulation]; *Estate of Goodhue* (1932) 127 C.A. 283, 286, 15 P.2d 771; *Holman v. Stockton Savings & Loan Bank* (1942) 49 C.A.2d 500, 510, 122 P.2d 120 [evidence of other sales was properly admitted where stock was unlisted and had no market value]; 21 Cal. L. Rev. 178; 6 So. Cal. L. Rev. 339; 18A Am.Jur.2d, Corporations §§451, 843.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 1 McCormick 6th, §199. *West's Key Number Digest*, Evidence k.113 et seq., 142 et seq.



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##### 9. Other Sales To Prove Value.

##### b. Sales of Same Real or Personal Property.

*1 Witkin Cal. Evid. Circum Evid § 115*

[§ 115] Sales of Same Real or Personal Property.

In *Bagdasarian v. Gragnon* (1948) 31 C.2d 744, 192 P.2d 935, a purchaser of land and growing fruit crops sought damages against the vendor for misrepresentation of the value of the property. On the issue of *market value of the crops*, the purchaser was allowed to show the actual price per ton obtained from *the sale of those crops*. *Held*, this was proper. Recognizing the criticism that had been directed at the former rule excluding evidence of sales of *other real property* (see *infra*, §116), the court said: "[A]uthorities elsewhere are practically unanimous in holding that evidence of other sales of the *identical real property* is admissible. ... There is no reason for extending the much-criticized exclusionary rule to evidence of sales of the *identical* property in question, *whether realty or personalty*." (31 C.2d 758.) (See *People v. Vinson* (1950) 99 C.A.2d 100, 101, 221 P.2d 161 [in condemnation suit, defendant owner's expert witness on value was properly cross-examined for knowledge of lower price paid by defendant for property 3 years before]; *Los Angeles County Flood Control Dist. v. McNulty* (1963) 59 C.2d 333, 337, 29 C.R. 13, 379 P.2d 493 [condemnation; owner on cross-examination was properly required to testify to price he paid for the land 4 years before suit]; *In re Marriage of Folb* (1975) 53 C.A.3d 862, 871, 126 C.R. 306 [*Bagdasarian* rule also applies to real property].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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##### 9. Other Sales To Prove Value.

##### c. Sales of Other Real Property.

#### 1 Witkin Cal. Evid. Circum Evid § 116

[§ 116] Sales of Other Real Property.

(1) *General Rule of Admissibility.* On the issue of the value of a parcel of real property, the price paid for similar property in the vicinity at about the same time seems clearly relevant. This evidence is admitted by most courts, and its admissibility is supported by practically all writers. (See 1 McCormick 5th, §199; 2 Wigmore (Chadbourn Rev.) §463; 9 *Hastings L. J.* 101; 31A *Am.Jur.2d*, *Expert and Opinion Evidence* §336.)

(2) *Former Minority and California Rule of Exclusion.* A small minority of courts still follows the older view that the introduction of evidence of this type might raise confusing side issues as to the similarity of the conditions in each of the other sales, and this was formerly the rule in California. (See *Estate of Ross* (1915) 171 C. 64, 66, 151 P. 1138; *Merchants Trust Co. v. Hopkins* (1930) 103 C.A. 473, 478, 284 P. 1072; *Atchison, Topeka & Santa Fe Ry. Co. v. Southern Pac. Co.* (1936) 13 C.A.2d 505, 512, 57 P.2d 575; *Los Angeles v. Cole* (1946) 28 C.2d 509, 516, 170 P.2d 928; *Heimann v. Los Angeles* (1947) 30 C.2d 746, 754, 185 P.2d 597; *People v. La Macchia* (1953) 41 C.2d 738, 744, 264 P.2d 15.)

The exclusionary rule did not extend to cross-examination or redirect, and its application on direct examination was subject to constant criticism by dissenting justices in condemnation cases. Thus, in the *Cole* and *Heimann* cases, *supra*, the dissenters argued that: (1) *Relevancy* of such comparison evidence is settled by common experience in the commercial world; (2) the objection of *unfairness* in the use, as a test of market value, of prices obtained by compromise, is one that goes merely to the weight of the evidence in the particular circumstances; and (3) the objection of *confusion of issues* is untenable because the same collateral issues may be (and usually are) fully developed on cross-examination. And in *People v. La Macchia*, *supra*, the dissenting justices asked: "Why is there no concern about collateral issues on cross or redirect examination and concern of phantom proportions on direct examination? The magnified risk of collateral issues must be balanced against the reality of inevitable confusion when jurors hear evidence of the greatest relevance and are then told that they cannot base the value of the property on that evidence." (41 C.2d 755.)

(3) *Abrogation of Rule of Exclusion.* In *Los Angeles v. Faus* (1957) 48 C.2d 672, 676, 312 P.2d 680, a condemnation suit, the exclusionary rule was repudiated and the evidence held admissible on both direct and cross-examination. The court also declared the safeguarding limits on admissibility in the following quotation from McCormick: "The sales of the other tracts must have been sufficiently near in time, and the other land must be located sufficiently near the land to be valued, and must be sufficiently alike in respect to character, situation, usability, and improvements, to make it clear that the two tracts are comparable in value and that the price realized for the other land

may fairly be considered as shedding light on the value of the land in question. Manifestly, the trial judge in applying so vague a standard must be granted a wide discretion." (48 C.2d 678.) (On safeguarding limits, see *People v. Murata* (1958) 161 C.A.2d 369, 375, 326 P.2d 947; and see generally 9 *Hastings L. J.* 101; 5 *U.C.L.A. L. Rev.* 151; 31 *So. Cal. L. Rev.* 204; 12 *Stanf. L. Rev.* 766; 4 *Proof of Facts* 649; C.E.B., 2 *Condemnation Practice in California* 2d, Chap. 4; 85 A.L.R.2d 110.)

(4) *Evidence Code*. The *Faus* rule was codified by former C.C.P. 1845.5, now superseded by *Ev.C. 810* et seq. The Evidence Code changed the rule by making the other sales not independently admissible, but only matters on which opinion testimony may be based. (See *Ev.C. 813, 816, 1 Cal. Evidence (4th)*, *Opinion Evidence*, §§101, 106.) *Ev.C. 810* and *Ev.C. 811* extended the Evidence Code rules to all actions in which the market value of real property, or of real property and tangible personal property valued as a unit, is to be ascertained. (See *1 Cal. Evidence (4th)*, *Opinion Evidence*, §99.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *General Rule of Admissibility*. See 1 *McCormick* 6th, §199.



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## D. Intent of Party.

## 1. Criminal Cases.

*1 Witkin Cal. Evid. Circum Evid § 117*

[§ 117] Criminal Cases.

The defendant's intent is relevant in most criminal prosecutions. (See 1 *Cal. Crim. Law* (3d), *Elements*, §1 et seq.) It may be shown circumstantially by acts, declarations, or other conduct. (See *People v. Van Wyke* (1949) 91 C.A.2d 839, 843, 206 P.2d 53; *People v. Phillips* (1960) 186 C.A.2d 231, 240, 8 C.R. 830, citing the text [intent to defraud, element of crime of obtaining money by false pretenses]; *People v. Corral* (1964) 224 C.A.2d 300, 304, 36 C.R. 591 [burglary: "The intruder's intent to commit theft within the houses was amply shown by the secret and noiseless entry in an unusual manner at an odd hour of the night into the homes where he was not an invited guest, the thefts of property, and his sudden flight on being discovered"]; *People v. Grever* (1989) 211 C.A.3d Supp. 1, 5, 259 C.R. 469, citing the text [specific intent to deprive custodial parent of right to physical custody of minor; see P.C. 278.5, 10 *Summary* (9th), *Parent and Child*, §67]; 2 Wigmore (Chadbourn Rev.) §309 et seq.; 29A Am.Jur.2d (1994 ed.), Evidence §1469; 64 A.L.R.2d 276, 279 [recantation as evidence of intent of accused in perjury prosecution]; 87 A.L.R.2d 926 [extent of injuries as proof of intent in battery].)

In *People v. Becker* (1934) 137 C.A. 349, 352, 30 P.2d 562, defendant, charged with issuance of a check with intent to defraud, was held entitled to offer evidence tending to show that he had a reasonable expectation of having money on deposit at the time the check would be presented. This was circumstantial evidence as to his lawful purpose, admissible on the issue of intent to defraud.

In *People v. Vogel* (1956) 46 C.2d 798, 805, 299 P.2d 850, a bigamy prosecution, evidence that defendant's first wife was generally reputed to be married to H was admissible to show defendant's *honest belief* that she had divorced him and that he was therefore free to marry the prosecuting witness.

In *People v. Clifton* (1967) 248 C.A.2d 126, 132, 56 C.R. 74, defendant was charged with assault with intent to commit rape. Evidence that, 2 hours before, he had made an indecent proposal to another woman, was held admissible as tending to show his intent in attacking the victim.

**SUPPLEMENT:** [This section is current through the latest supplement]

See CALCRIM, No. 223 [Direct and Circumstantial Evidence: Defined (circumstantial evidence may be used to prove intent)]; CALCRIM, No. 225 [Circumstantial Evidence: Intent or Mental State].

*Cross-Reference:* 10 *Summary* (10th), *Parent and Child*, §193.



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## D. Intent of Party.

## 2. Civil Cases.

1 *Witkin Cal. Evid. Circum Evid* § 118

[§ 118] Civil Cases.

A party's intent is occasionally relevant in civil cases, and may be shown by evidence of relevant circumstances affording an inference of intent. (See *Zitny v. State Bar* (1966) 64 C.2d 787, 792, 51 C.R. 825, 415 P.2d 521, citing the text; 2 Wigmore (Chadbourn Rev.) §371 et seq.; 29 Am.Jur.2d (1994 ed.), *Evidence* §556 et seq.)

Thus, prior or subsequent acts and declarations of a grantor or donor may be offered on the issue of intent to pass title to the property. (See *Dinneen v. Younger* (1943) 57 C.A.2d 200, 205, 134 P.2d 323; 1 *Cal. Evidence* (4th), *Hearsay*, §212.) (See 14 Proof of Facts 531 [use of secondary evidence after will has been lost or destroyed]; 2 Proof of Facts 2d 187 [statistical proof of racial discrimination in employment]; 4 Proof of Facts 2d 41 [grantor's intent that grantee hold realty in trust]; 10 Proof of Facts 2d 669 [testator's intent to exercise power of appointment]; 44 Proof of Facts 3d 377 [decedent's intent to change life insurance beneficiary]; 34 *Hastings L. J.* 553 [relevancy of statistics to prove discrimination].)

Circumstantial evidence of intent is particularly important in tax proceedings and actions for dissolution of marriage, on the issue of *domicile*. (See 9 *Summary* (9th), *Taxation*, §28 et seq.; 10 *Summary* (9th), *Parent and Child*, §22 et seq.; 11 *Summary* (9th), *Husband and Wife*, §96 et seq.; 61 *Harv. L. Rev.* 1235; *Rest.2d, Conflict of Laws* §18, Comment d [before acquiring domicile, person must intend to make that place his or her home "for the time at least," and intent must be determined in light of declarations and other conduct].)

Thus, in *Kopasz v. Kopasz* (1951) 107 C.A.2d 308, 237 P.2d 284, the husband, sent to Nevada military stations, obtained a Nevada divorce. The decree was held void on the following evidence showing no domicile: He did not come there voluntarily but by military order; he lived on an army base and in hotels; he never owned property, worked there as a civilian, or registered to vote; he constantly expressed dissatisfaction with living conditions there and voiced his desire to be transferred to the east; after the divorce he immediately remarried in California and resided here ever since. "Such behavior and declarations of appellant made without any apparent *object* to deceive those to whom they were addressed are competent evidence of his intention." (107 C.A.2d 310.)

**SUPPLEMENT:** [This section is current through the latest supplement]

**Cross-References:** 9 *Summary* (10th), *Taxation*, §31 et seq.; 11 *Summary* (10th), *Husband and Wife*, §130 et seq. The discussion of domicile, formerly located in *Parent and Child*, has been transferred to 2 *Cal. Proc.* (4th), *Jurisdiction*, Supp., §151A et seq. *West's Key Number Digest*, Evidence k.108





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## CHAPTER IV - Circumstantial Evidence

## III. PARTICULAR KINDS OF CIRCUMSTANTIAL EVIDENCE

## E. Motive.

## 1. Criminal Cases.

## a. Motive of Defendant.

## 1. In General.

*1 Witkin Cal. Evid. Circum Evid § 119*

## [§ 119] In General.

The defendant's motive is frequently relevant in a criminal prosecution, particularly in homicide cases, and it may be shown circumstantially. "[E]vidence having a direct tendency, in view of the surrounding circumstances, to prove motive on the part of a person to commit a homicide, and thus to solve a doubt either as to the identity of the slayer, the degree of the offense, the insanity of the accused, or the justification or excusability of his act, is admissible, however discreditable it may reflect upon the defendant, and even where it may show him guilty of other crimes." (*People v. Gonzales* (1948) 87 C.A.2d 867, 877, 198 P.2d 81; see *People v. Wolff* (1964) 61 C.2d 795, 807, 40 C.R. 271, 394 P.2d 959, *infra*, §125; *People v. Beyea* (1974) 38 C.A.3d 176, 194, 113 C.R. 254 [to show identity and motive defendants were properly identified as Hell's Angels]; *People v. Dominguez* (1981) 121 C.A.3d 481, 499, 175 C.R. 445 [following *Beyea*]; *People v. Contreras* (1983) 144 C.A.3d 749, 756, 192 C.R. 810 [same]; 1 *Cal. Crim. Law* (3d), *Elements*, §4; 1A *Wigmore* (Tillers Rev.) §117 et seq.; 2 *Wigmore* (Chadbourn Rev.) §385 et seq.; 29 *Am.Jur.2d* (1994 ed.), *Evidence* §558; 40A *Am.Jur.2d* (1999 ed.), *Homicide* §269; 39 A.L.R.4th 775 [evidence of gang membership].)

Thus, in a murder trial where the killing is admitted, but self-defense or accident or a sudden quarrel or heat of passion is asserted, the prosecution may show a motive or reason for intentional killing. (*People v. Hall* (1938) 27 C.A.2d 440, 445, 81 P.2d 248.)

In *People v. Mullen* (1953) 115 C.A.2d 340, 343, 252 P.2d 19, defendant convict was charged with assault on a fellow prisoner. The theory of the prosecution was that defendant had a homosexual desire for C, and that the victim, a friend of C, obstructed him. Evidence was introduced of defendant's homosexual advances toward C and threatening demands that C stop running around with the victim. *Held*, this evidence of antagonism and enmity was admissible on the issue of identity of the assailant. Experience shows that interference with sexual relationships creates passions of envy or jealousy; the typical situations involve a man's relationship with a woman, but the evidence is just as relevant where the relationship is homosexual.

In *People v. Lopez* (1969) 1 C.A.3d 78, 81 C.R. 386, a prosecution for assault with a deadly weapon, the prosecution introduced evidence that defendant had previously fought with the victim's brother, who then testified against defendant in a criminal trial based on that assault. Defendant objected to this proof of another crime. *Held*, no error. "Logically, the animosity which may have arisen between the two families as a result of defendant's fight with Garcia's brother and the felony prosecution which followed supplied the motive for defendant's behavior and was a meaningful link in the People's chain of incriminating evidence against him." (1 C.A.3d 85.) Because a motive

ordinarily is the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect. Wide latitude is permitted in admitting evidence of its existence. (1 C.A.3d 85.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. DePriest* (2007) 42 C.4th 1, 44, 63 C.R.3d 896, 163 P.3d 896 [in capital murder prosecution, evidence of motive (defendant told his parole officer he wanted to move to Missouri but he had no car, money, or other source of income), together with his opportunity to meet those needs by committing charged crime, was substantial evidence of defendant's identity as perpetrator]; *People v. Anderson* (2007) 152 C.A.4th 919, 942, 61 C.R.3d 903 [CALCRIM, No. 370 properly guides jury in evaluating evidence of motive]. *West's Key Number Digest*, Criminal Law k.342



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## III. PARTICULAR KINDS OF CIRCUMSTANTIAL EVIDENCE

## E. Motive.

## 1. Criminal Cases.

## a. Motive of Defendant.

## 2. Need To Obtain Money.

*1 Witkin Cal. Evid. Circum Evid § 120*

## [§ 120] Need To Obtain Money.

In a prosecution for theft or robbery, evidence of the defendant's lack of money prior to the act, or the sudden acquisition or possession of it after the act, may be relevant as tending to show motive and therefore the defendant's identity as the perpetrator. (See *People v. Orloff* (1944) 65 C.A.2d 614, 620, 151 P.2d 288 [stating rule but holding it inapplicable where no showing of these facts]; 1A Wigmore (Tillers Rev.) §152; 2 Wigmore (Chadbourn Rev.) §392; 91 A.L.R.2d 1046.)

*People v. Gorgol* (1953) 122 C.A.2d 281, 304, 265 P.2d 69, applies this principle to unusual facts. The charge was robbery and assault with a deadly weapon, the victim being a taxi driver with whom defendant was riding. Defendant admitted that he held a gun and received \$ 25 from the driver, but claimed that he had no need for such a sum and that it was voluntarily handed over by the latter under the mistaken belief that defendant was attempting to rob him. *Held*, in refutation of this defense, it was permissible to show that defendant was in financial difficulties. (See *People v. Hawkins* (1961) 196 C.A.2d 832, 836, 17 C.R. 66 [forgery, need for money a possible motive; defendant was properly asked about his financial condition, though it developed that his only source of income was a bookie establishment]; *People v. Martin* (1971) 17 C.A.3d 661, 668, 95 C.R. 250 [financial situation was admissible to show motive of sale in possession of heroin]; 1956 A.S. 564 [arson].)

Evidence of a life insurance policy or will of a decedent, under which the defendant would benefit, is admissible to show a motive for murder of the decedent, but only where it is also shown that the defendant knew of the existence of the policy or will. (See *People v. Goedecke* (1967) 65 C.2d 850, 860, 56 C.R. 625, 423 P.2d 777; 28 A.L.R.2d 857.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Koontz* (2002) 27 C.4th 1041, 1076, 119 C.R.2d 859, 46 P.3d 335 [in prosecution for capital murder, kidnapping, and theft, trial judge did not err in allowing prosecutor to cross-examine defendant on his earnings prior to charged offenses, where defendant had testified that he had ample resources in attempt to show he had no motive for theft]; *People v. Cornwell* (2005) 37 C.4th 50, 96, 97, 33 C.R.3d 1, 117 P.3d 622 [in prosecution for capital murder and robbery, trial judge did not err in admitting evidence of defendant's poverty preceding charged offenses, in light of his sudden wealth following them and his possession of currency in denominations taken in charged robbery, immediately following robbery]; *People v. Carrillo* (2004) 119 C.A.4th 94, 104, 13 C.R.3d 878 [in prosecution for aiding and abetting robbery and assault, erroneous admission of evidence of defendant's financial problems could not be considered

harmless, where case against defendant was entirely circumstantial, and she offered marginally plausible explanation of events consistent with innocence].



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## CHAPTER IV - Circumstantial Evidence

## III. PARTICULAR KINDS OF CIRCUMSTANTIAL EVIDENCE

## E. Motive.

1. Criminal Cases.
  - a. Motive of Defendant.
  3. Use of Narcotics.

## 1 Witkin Cal. Evid. Circum Evid § 121

## [§ 121] Use of Narcotics.

Evidence of an accused's narcotics addiction is admissible where the accused is charged with a drug-related crime or where obtaining narcotics was the direct object of the crime committed. (See *People v. Copeland* (1959) 169 C.A.2d 713, 715, 338 P.2d 1; *People v. Cardenas* (1982) 31 C.3d 897, 906, 184 C.R. 165, 647 P.2d 569; *People v. Felix* (1994) 23 C.A.4th 1385, 1392, 1394, 28 C.R.2d 860 [in burglary prosecution, evidence of defendant's heroin use was admissible to prove motive; direct connection between drug use and burglary was established by defendant's admission to detective].) But where the object of the charged offense is to obtain money or property other than narcotics, evidence of narcotic use is inadmissible. The probative value of the evidence is outweighed by the tendency to incite the jury to decide on the accused's character rather than on proof of the elements of the crime. (See *People v. Cardenas, supra*; *People v. Holt* (1984) 37 C.3d 436, 450, 208 C.R. 547, 690 P.2d 1207.) (See 2 A.L.R.4th 1298 [admissibility of evidence of accused's use of, or addiction to, drugs to show motive for theft of property other than drugs].)

In *People v. Reid* (1982) 133 C.A.3d 354, 184 C.R. 186, defendant, charged with robbery, contended that it was error to admit evidence that he had a drug paraphernalia "kit" and healing "track marks" on his arms. The trial judge allowed the evidence to come in on the ground that prior drug use by defendant was relevant to his motive for committing the robbery. *Held*, the evidence was improperly admitted. The extent and cost of the defendant's habit is an essential element; i.e., where the habit is costly, the evidence is relevant. (133 C.A.3d 363.) Here, the prosecution did not show what drugs defendant used, how often he used them, or how fresh the track marks were; thus, the link between the proffered evidence and the alleged motive was lacking. "The fact that appellant used drugs, without more, does not have a *tendency* to prove a motive for robbery." (133 C.A.3d 363.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## III. PARTICULAR KINDS OF CIRCUMSTANTIAL EVIDENCE

## E. Motive.

## 1. Criminal Cases.

## b. Motive of Third Person.

1 *Witkin Cal. Evid. Circum Evid* § 122

## [§ 122] Motive of Third Person.

(1) *Former Rule.* The motive of a third person is ordinarily not admissible unless coupled with other evidence tending to connect that person with the crime. This rule is one of necessity, carrying out the policy against extending the scope of inquiry into collateral issues and thereby prolonging trials beyond their normal period. (See *People v. Mendez* (1924) 193 C. 39, 52, 223 P. 65; *People v. Buono* (1961) 191 C.A.2d 203, 229, 12 C.R. 604; *People v. Arline* (1970) 13 C.A.3d 200, 204, 91 C.R. 520, *supra*, §21; *People v. Green* (1980) 27 C.3d 1, 22, 164 C.R. 1, 609 P.2d 468; *People v. Blankenship* (1985) 167 C.A.3d 840, 848, 213 C.R. 666.) The standard applied in these cases is that there must be "some competent and substantial proof of a probability" that a third person committed the offense; "the mere possibility that some third person did it is not enough." (*People v. Buono*, *supra*, 191 C.A.2d 228.) (See 29 *Am.Jur.2d* (1994 ed.), *Evidence* §587; 17 *U.S.F. L. Rev.* 441 [criticizing "*Mendez-Arline* exclusionary rule"]; 1A *Wigmore* (Tillers Rev.) §139 et seq. [criticizing limitations on use of third person evidence].)

(2) *Rejection of Substantial Evidence Requirement.* In *People v. Hall* (1986) 41 C.3d 826, 226 C.R. 112, 718 P.2d 99, a first degree murder case, defendant made an offer of proof to show that an informant responsible for defendant's arrest had a motive and opportunity to commit the crime. The trial judge, relying on *People v. Arline*, *supra*, rejected the offer. *Held*, this was error, though harmless in the light of all of the evidence. (41 C.3d 835.)

(a) *Nature of Mendez-Arline rule.* "What has come to be called the *Mendez-Arline* test is an exclusionary rule abstracted from case law articulating the minimum threshold for admitting evidence of third-party culpability that tends to exonerate a defendant. Simply expressed, it provides that such evidence is admissible only if it constitutes 'substantial evidence tending to directly connect that person with the actual commission of the offense.' " (41 C.3d 831, quoting *People v. Green*, *supra*.)

(b) *Analysis and criticism of rule.* The basis for exclusion in *Arline* is ambiguous. The opinion purports simply to apply *Ev.C.* 352, but also contains language calling for a threshold showing of substantial proof of probability of the third-party's guilt. "We believe the latter language sets too high a standard." (41 C.3d 833.) Third-party evidence need only be capable of raising a reasonable doubt of defendant's guilt. (41 C.3d 833.)

(c) *Correct approach for trial courts.* "We reject *Arline* to the extent that it creates a distinct and elevated standard for admitting this kind of exculpatory evidence. Rather than speaking in terms of a *Mendez-Arline* 'rule,' courts should simply treat third-party culpability evidence like any other evidence: if relevant it is admissible (§350) unless its probative value is substantially outweighed by the risk of undue delay, prejudice or confusion (§352). We recognize that

an inquiry into the admissibility of such evidence and the balancing required under section 352 will always turn on the facts of the case. Yet courts must weigh those facts carefully. They should avoid a hasty conclusion such as the trial court's finding in the present case that evidence of Foust's guilt was 'incredible.' Such a determination is properly the province of the jury." (41 C.3d 834.) And the court "must focus on the actual degree of risk that the admission of relevant evidence may result in undue delay, prejudice, or confusion." (41 C.3d 834, noting Wigmore's criticism of the limitations on use of this evidence.)

(d) *Discretionary exclusion of remote evidence distinguished.* Defendant contended that the constitutional right to present a defense precludes any application of Ev.C. 352 to third-party culpability evidence. This is unsound: (1) "[T]he ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense. Courts retain, moreover, a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice." (41 C.3d 834.) (2) None of the out-of-state cases cited suggests that third-party culpability evidence be admitted no matter how remotely relevant and without considering its potential to disrupt orderly proceedings. (3) The alternate proposition that the prosecution be required to show a compelling state interest before such evidence may be excluded "similarly overlooks the policy behind section 352, which incorporates a compelling state interest, i.e., the policy in favor of an orderly trial on the merits." (41 C.3d 835.)

The *Hall* standard has been applied in numerous cases. (See *People v. Sandoval* (1992) 4 C.4th 155, 176, 14 C.R.2d 342, 841 P.2d 862 [citing *Hall*; papers found in victim's residence and containing names other than defendant's were not admissible where defense had no evidence of another person's actual motive to commit charged crimes]; *People v. Cudjo* (1993) 6 C.4th 585, 609, 25 C.R.2d 390, 863 P.2d 635, 1 Cal. Evidence (4th), Hearsay, §20 [citing *Hall*; testimony that defendant's brother had confessed to murder within hours after crime was improperly excluded]; *People v. Bradford* (1997) 15 C.4th 1229, 1325, 65 C.R.2d 145, 939 P.2d 259 [in murder prosecution, statements by victim concerning her previous fear of "a man," even if not made inadmissible by hearsay rule, were not required to be admitted as evidence of third-party culpability, because they were insufficient to link someone other than defendant to murder]; 22 A.L.R.5th 1 [commission of similar crimes by person other than accused]; 14 *Pepperdine L. Rev.* 196 [*Hall*].)

(3) *Distinction: Motive of Third Person Imputed to Defendant.* In *People v. Hole* (1983) 139 C.A.3d 431, 188 C.R. 693, G, owner of a market in poor financial condition, procured a fire insurance policy on the property in the sum of \$ 610,000, and a month later it was destroyed by fire. Defendant H, G's nephew, and defendant C, who had worked for G, were charged with arson. The prosecution introduced evidence of financial difficulties and the insurance policy to show G's motive to burn the market. Defendants contended that, under *People v. Green*, *supra*, and similar cases, a third person's motive is inadmissible. *Held*, the evidence was properly admitted. (a) *Green* and similar cases involved attempts by the defendant to absolve himself by directing suspicion to the third person. (2) Here the evidence was of the motive of an uncharged conspirator, imputed to defendants. G's motive, coupled with strong circumstantial evidence linking defendants to G, had a tendency to prove that defendants shared the motive and burned the market at his request. Thus his motive was "derivatively" their motive. (139 C.A.3d 436.)

(4) *Distinction: Motive of Third Person for Testifying.* In *People v. Roberts* (1992) 2 C.4th 271, 6 C.R.2d 276, 826 P.2d 274, defendant, a prison inmate charged with the murder of another inmate, introduced evidence that R, a prosecution witness, had a motive to lie because he had been given benefits by the state. Over defendant's objection based on improper character evidence, R was allowed to state on rebuttal that he wanted to testify because defendant had given "the order to have me hit." *Held*, this was proper. R's statement was not improper character evidence. Instead, it tended to establish that his motive for testifying was his resentment of defendant rather than any inducement which the state had given him and which defendant had emphasized to impeach R's credibility. (2 C.4th 305, citing *People v. Green*, *supra*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Rejection of Substantial Evidence Requirement.* See *Holmes v. South Carolina* (2006) 547 U.S. 319, 126 S.Ct. 1727, 1734, 164 L.Ed.2d 503, 512 [state evidence rule under which defendant could not introduce proof of third-party guilt if

prosecution introduced forensic evidence strongly supporting guilty verdict was unconstitutional]; *People v. Gutierrez* (2002) 28 C.4th 1083, 1136, 1137, 124 C.R.2d 373, 52 P.3d 572 [in capital murder prosecution, trial judge did not err in excluding third-party culpability evidence; although defendant testified in hearing under *People v. Hall* (1986) 41 C.3d 826, 226 C.R. 112, 718 P.2d 99, text, p. 469, about victim's drug dealings with another person, there was no direct or circumstantial evidence to link that person or any other third party with victim in hours before her death]; *People v. Yeoman* (2003) 31 C.4th 93, 140, 2 C.R.3d 186, 72 P.3d 1166 [in capital murder prosecution, trial judge did not err in excluding evidence that third party had been charged with attempted burglary of murder victim's car approximately 1 week before murder; defendant's offer of proof showed motive but no direct or circumstantial evidence linking third party to murder]; *People v. Valdez* (2004) 32 C.4th 73, 108, 8 C.R.3d 271, 82 P.3d 296 [defendant was not deprived of due process and fair trial rights by exclusion of testimony that investigating officer found group of individuals in alley near murder victim's house and that one member of group, who appeared nervous, had blood on shirt and boots; defendant's offer of proof was not that member was perpetrator but that investigation at crime scene was inadequate, and thus claim of third-party culpability was never made]; *People v. Panah* (2005) 35 C.4th 395, 481, 25 C.R.3d 672, 107 P.3d 790 [mere presence of three men in parking lot of defendant's apartment complex at time murder victim disappeared, absent any evidence, direct or circumstantial, linking them to crime, did not qualify as admissible third-party culpability evidence]; *People v. Harris* (2005) 37 C.4th 310, 340, 33 C.R.3d 509, 118 P.3d 545 [in prosecution for attempted murder and capital murder, evidence regarding two persons who subsequently murdered defendant's attempted murder victim was properly excluded; prosecution established that defendant committed initial murder attempt, that he was in house where capital murder took place, that same weapon was used in both incidents, and no evidence was presented indicating that other two persons were present at either event]; *People v. Robinson* (2005) 37 C.4th 592, 625, 36 C.R.3d 760, 124 P.3d 363 [in capital murder prosecution, trial judge did not err in refusing to admit evidence of crimes for which two third parties were arrested approximately 10 days after defendant's arrest; evidence did not directly or even circumstantially link third parties to crimes with which defendant was charged]; *People v. Lewis & Oliver* (2006) 39 C.4th 970, 996, 47 C.R.3d 467, 140 P.3d 775 [in capital murder prosecution, trial judge properly excluded evidence of white bag found in church after charged murders occurred there; whether substance was cocaine or innocuous white powder, mere presence of saleable quality of suspicious powder at murder scene did not tend to prove that someone other than defendants committed murder as part of "drug deal gone bad"]; *People v. Prince* (2007) 40 C.4th 1179, 1242, 1272, 57 C.R.3d 543, 156 P.3d 1015 [in murder prosecution, proffered third-party culpability evidence--statements by victim concerning conflicts with her boyfriend, and testimony of witness that man who watched witness at fitness center fit general description of assailant in charged crimes--was properly excluded; in neither case was there anything that would link third party directly or indirectly to charged murders]; *People v. Adams* (2004) 115 C.A.4th 243, 253, 9 C.R.3d 170 [in prosecution for murder, with rape and sodomy special circumstances, trial judge did not err in refusing to allow defendant to present evidence of violent nature of relationship between victim and former boyfriend, where defendant presented no direct or circumstantial evidence linking boyfriend to charged murder].





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### III. PARTICULAR KINDS OF CIRCUMSTANTIAL EVIDENCE

#### E. Motive.

#### 2. Civil Cases.

##### 1 Witkin Cal. Evid. Circum Evid § 123

[§ 123] Civil Cases.

As illustrated in the following cases, when a party's motive is relevant in a civil action, it is usually because malice is an element of the claim or punitive damages are being sought. (See 5 *Summary (9th)*, *Torts*, §19.)

(1) *Fraudulent Denial of Benefits*. In *Sprague v. Equifax* (1985) 166 C.A.3d 1012, 213 C.R. 69, plaintiff, beneficiary under a credit disability insurance company, sued defendant insurer and defendant Equifax, a company providing investigating services to insurance companies, for conspiracy to fraudulently deny him benefits. Plaintiff sought both compensatory and punitive damages. At trial, he offered testimony concerning Equifax's business practice of obtaining adverse information about insureds for insurers. *Held*, the evidence was admissible. In *Neal v. Farmers Ins. Exchange* (1978) 21 C.3d 910, 922, 148 C.R. 389, 582 P.2d 980, evidence of an insurance company's policy on settlement of claims, in the claims representatives' field manual, was admitted to show the company's intent and its conscious course of conduct toward plaintiffs. In *Pistorius v. Prudential Ins. Co.* (1981) 123 C.A.3d 541, 556, 176 C.R. 660, episodes of cutting off disability benefits, to see if the insureds would complain, were admitted to show motive, intent, plan, etc., in terminating benefits. Here, the evidence was relevant to show company motives in arranging for medical examinations of disabled insureds, and was also relevant to the issues of intent, motive, etc., involved in the allegation of conspiracy to fraudulently terminate benefits. (166 C.A.3d 1033, 1034.)

(2) *Libel*. In a libel case where the plaintiff seeks punitive damages or the defendant pleads privilege and good faith, malice of the defendant may be shown by proof of other libels published by him concerning the plaintiff. (*Scott v. Times-Mirror Co.* (1919) 181 C. 345, 358, 184 P. 672.) (See 2 Wigmore (Chadbourn Rev.) §403 et seq.)

(3) *Malicious Prosecution*. In *Robinson v. McKnight* (1930) 103 C.A. 718, 722, 725, 284 P. 1056, a malicious prosecution suit, plaintiff testified to long inflammatory conversations with defendants, including many self-serving hearsay charges against them and their replies. *Held*, this testimony was properly admitted for the limited purpose of establishing the feud between the parties, and the animus of defendants toward plaintiff, all of which could indicate that defendants' motive in prosecuting was malicious.

(4) *Procuring of Will by Fraud and Undue Influence*. In *Morris Stulsaft Foundation v. Superior Court* (1966) 245 C.A.2d 409, 419, 54 C.R. 12, a will was contested on the theory that the sole beneficiary had conspired with G, the scrivener-witness, to procure it by fraud and undue influence. The contestants, on deposition, asked G about his bankruptcy. *Held*, the questions were a proper means of discovering a motive of personal profit in preparing and witnessing the will, and the evidence of his bad financial condition would be relevant on that issue in the trial. (245 C.A.2d 420.)

(5) *Products Liability: Punitive Damages Claim.* In *Hilliard v. A. H. Robins Co.* (1983) 148 C.A.3d 374, 196 C.R. 117, plaintiff brought a products liability action based on injuries resulting from use of the manufacturer's Dalkon Shield (intrauterine contraceptive device). To support her punitive damages claim under a conscious disregard of safety theory (see 6 *Summary* (9th), *Torts*, §1337 et seq.), plaintiff offered evidence of septic abortions and deaths caused to users of the device, and defendant's action in taking the device off the United States market. *Held*, exclusion of this evidence was error.

(a) "Evidence of death and septic abortions caused to Dalkon Shield users is relevant because it had a tendency in reason to prove that defendant was aware of the probable dangerous consequences of their plastic IUD. Evidence that defendant Robins took the Dalkon Shield off the domestic market as the result of some pressure or activity by the FDA in June 1974 is relevant if Robins was aware of the reasons of the FDA in seeking the removal of this device from the market because this evidence has a tendency in reason to prove that Robins, aware of the probable dangerous consequences of the product, wilfully and deliberately failed to avoid those consequences until pressured by the FDA." (148 C.A.3d 399.)

(b) "Evidence of any conduct by defendant, in continuing to manufacture and market the Dalkon Shield without change, in the United States, or elsewhere, aware of the probable dangerous consequences of the IUD, is evidence having a tendency in reason to prove Robins wilfully and deliberately failed to avoid these consequences. Evidence that Robins failed to adequately test the Dalkon Shield before marketing it or during marketing is evidence that Robins acted with conscious disregard for the safety of others. Evidence that Robins, aware of the state of the art in testing medical devices on animals, failed to conduct adequate animal testing is evidence that has a tendency in reason to prove that Robins acted in conscious disregard of the safety of others." (148 C.A.3d 399.)

(c) The trial judge's reliance on *Ev.C. 352* was unjustified. Malice or conscious disregard was a main issue in the punitive damage part of plaintiff's case, and the rejected evidence permitted a strong inference of the existence of these elements; hence, the prejudice to defendant was substantially outweighed by the probable value of the evidence. (148 C.A.3d 400.)

(6) *Transfer in Contemplation of Death.* The motive of a *decedent* in making a transfer in contemplation of death may be relevant in a tax controversy. (See *Estate of Adams* (1952) 39 C.2d 309, 318, 246 P.2d 625.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Cross-Reference:* 5 *Summary* (10th), *Torts*, §22.(5) *Products Liability: Punitive Damages Claim.*

*Cross-Reference:* 6 *Summary* (10th), *Torts*, §1574 et seq. *West's Key Number Digest*, Evidence k.108



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## III. PARTICULAR KINDS OF CIRCUMSTANTIAL EVIDENCE

## F. Knowledge.

1 *Witkin Cal. Evid. Circum Evid* § 124

[§ 124] Knowledge.

"The knowledge a person may have when material to an issue in a judicial proceeding is a fact to be proven as any other fact. It differs from physical objects and phenomena in that it is a state of mind like belief or consciousness and cannot be seen, heard, or otherwise directly observed by other persons. It may be evidenced by the affirmative statement or admission of the possessor of it. If he is silent or says he did not have that knowledge, it may be evidenced in other ways, e.g., by his conduct or by proof that the information was given him in writing and he read the document, or orally and he heard the statement made." (*Oil Workers Int. Union v. Superior Court* (1951) 103 C.A.2d 512, 533, 230 P.2d 71.)

The *Oil Workers* case was a contempt proceeding against a picket for violation of a restraining order in a labor dispute. Petitioner denied knowledge of the order. But testimony that warnings had been given to a number of men, at a time and place where he must have heard them, supported an inference that he had the requisite knowledge. (103 C.A.2d 531, 532.)

In *Dowden v. Industrial Acc. Com.* (1963) 223 C.A.2d 124, 35 C.R. 541, decedent employee was electrocuted while operating a harvester with a high elevator past power lines. On two prior occasions, the lack of adequate clearance caused contact with the lines, but in the workers' compensation proceeding an award for serious and wilful misconduct was refused. The decision was based on the employer's testimony of his own state of mind (see 1 *Cal. Evidence* (4th), *Opinion Evidence*, §8), that the work was "not dangerous if it were done right to my knowledge." *Held*, the element of actual knowledge of danger (see 2 *Summary* (9th), *Workers' Compensation*, §316) was shown by the circumstantial evidence, despite the employer's vague and qualified disclaimer. That opinion, measured against his admitted knowledge of the power lines and the evidence of known mishaps and close escapes, could not support the finding in his favor. "[T]he facts may belie his declarations. Past warnings, past experiences, may arouse premonitions of peril which no sensible person may ignore. ... Circumstantial evidence may justify or even compel a finding of knowledge in the face of testimony avowing ignorance." (223 C.A.2d 132, footnote 3, citing the text.) (See *Haft v. Lone Palm Hotel* (1970) 3 C.3d 756, 778, 91 C.R. 745, 478 P.2d 465 [swimming pool health inspection reports were admissible on wilful and wanton misconduct count to show defendants' knowledge of past safety violations]; 2 *Wigmore* (Chadbourn Rev.) §§245, 301; 29 *Am.Jur.2d* (1994 ed.), *Evidence* §557.) (On proof of knowledge by owner of dangerous instrumentality on probable presence of children, see 33 *Proof of Facts* 2d 611, 625; on proof of knowledge of animal's vicious propensities, see 13 *Proof of Facts* 2d 473.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Cross-Reference:* 2 *Summary* (10th), *Workers' Compensation*, §319. *West's Key Number Digest*, Evidence k.109



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#### CHAPTER IV - Circumstantial Evidence

### III. PARTICULAR KINDS OF CIRCUMSTANTIAL EVIDENCE

#### G. Insanity and Incompetency.

##### 1 *Witkin Cal. Evid. Circum Evid* § 125

[§ 125] Insanity and Incompetency.

(1) *Insanity*. The kinds of conduct that can be proved as circumstantial evidence of insanity are too numerous to list, for, as Wigmore points out, "any and all conduct" is admissible. (See 2 Wigmore (Chadbourn Rev.) §228.)

In a criminal case, the defendant's conduct within a reasonable time before or after the act is admissible to show his or her mental condition at the time of its commission. *People v. Wolff* (1964) 61 C.2d 795, 40 C.R. 271, 394 P.2d 959, summarizes the holdings of prior decisions: "Among the kinds of conduct of a defendant which our courts have held to constitute evidence of legal sanity are the following: 'an ability on the part of the accused to devise and execute a deliberate plan' [*David*]; 'the manner in which the crime was conceived, planned and executed' [*Darling*]; the fact that witnesses 'observed no change in his manner and that he appeared to be normal' [*Caetano*]; the fact that 'the defendant walked steadily and calmly, spoke clearly and coherently and appeared to be fully conscious of what he was doing' [*Van Winkle*]; and the fact that shortly after committing the crime the defendant 'was cooperative and not abusive or combative' [*Dennis*]; that 'questions put to him ... were answered by him quickly and promptly' [*Loomis*]; and that 'he appeared rational, spoke coherently, was oriented as to time, place and those persons who were present' [*Fraters*]." (61 C.2d 805, 806.)

In this case the court said: "[T]he jury could infer that defendant had a motive for his actions (gratification of his sexual desires), that he planned the attack on his mother for some time (obtaining the axe handle from the garage several days in advance; abortive attempt to strike his mother with it on the evening before the crime), that he knew that what he was doing was wrong (initial concealment of the handle underneath his mattress; excuse offered when his mother saw him with the weapon on the evening before the crime; renewed concealment of the handle under the mattress), that he persisted in the fatal attack (pursuit of his fleeing mother into the front room; actual infliction of death by strangling rather than bludgeoning), that he was conscious of having committed a crime (prompt surrender to the police), and that he was calm and coherent (testimony of desk officer and others)." (61 C.2d 807.)

(2) *Testamentary Capacity*. Conduct is frequently offered to show testamentary capacity or incapacity. (See *Estate of Halbert* (1947) 80 C.A.2d 666, 672, 182 P.2d 266 [general insanity]; *Estate of Turpin* (1963) 222 C.A.2d 57, 60, 34 C.R. 812; *Estate of Clegg* (1978) 87 C.A.3d 594, 600, 151 C.R. 158 [same]; 2 Wigmore (Chadbourn Rev.) §229; 12 *Summary* (9th), *Wills and Probate*, §178 et seq.)

In *Estate of Wochos* (1972) 23 C.A.3d 47, 99 C.R. 782, the testator was judicially declared incompetent some 6 months prior to the execution of a codicil. There was evidence showing that he suffered from progressive arteriosclerosis, that he evidenced a loss of memory and an impaired gait, and that he had filthy habits personally and in his home. On the date of execution of the codicil, he failed to inform his attorney of two other codicils that had been

executed only a few months earlier. *Held*, the evidence was sufficient to show that the testator's condition had not changed since the judicial determination of incompetency. (23 C.A.3d 54.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Testamentary Capacity*.

*Cross-Reference:* 14 *Summary* (10th), *Wills and Probate*, §121 et seq. *West's Key Number Digest*, Criminal Law k.354



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## CHAPTER IV - Circumstantial Evidence

## III. PARTICULAR KINDS OF CIRCUMSTANTIAL EVIDENCE

## H. Identity of Person.

## 1. Fingerprints and Palmprints.

*1 Witkin Cal. Evid. Circum Evid § 126*

[§ 126] Fingerprints and Palmprints.

Fingerprints are familiar circumstantial means of identification of a person as the perpetrator of a crime. (See *People v. Jones* (1931) 112 C.A. 68, 71, 296 P. 317; *People v. Gardner* (1969) 71 C.2d 843, 849, 79 C.R. 743, 457 P.2d 575, citing the text; *People v. Kellett* (1969) 1 C.A.3d 704, 713, 81 C.R. 917 [fingerprints found at burglarized premises gave probable cause to arrest defendant without warrant]; *People v. Reserva* (1969) 2 C.A.3d 151, 157, 82 C.R. 333 [prima facie assumption exists that fingerprints in official files are those of person from whom they were purportedly taken and under whose name they are filed]; *People v. Preciado* (1991) 233 C.A.3d 1244, 1246, 1247, 285 C.R. 22 [single fingerprint of defendant found on wristwatch box in burgled condominium was sufficient to support defendant's burglary conviction, where victim testified that box had never left condominium]; *People v. Nguyen* (1994) 23 C.A.4th 32, 39, 28 C.R.2d 140 [defendant's fingerprint found on open/closed sign of store that was robbed; fingerprint evidence "is the strongest evidence of identity, and is ordinarily sufficient alone to identify the defendant"]; 1A Wigmore (Tillers Rev.) §151a; 2 Wigmore (Chadbourn Rev.) §414; 29 Am.Jur.2d (1994 ed.), Evidence §569; 28 A.L.R.2d 1115; on fingerprint identification as subject of expert testimony, see 1 Cal. Evidence (4th), Opinion Evidence, §68.)

Palmprint evidence "is of equal force and sufficiency" with fingerprint evidence. (*People v. Atwood* (1963) 223 C.A.2d 316, 326, 35 C.R. 831; see *People v. Buckowski* (1951) 37 C.2d 629, 632, 233 P.2d 912; *People v. Reserva*, *supra* [identifiable palmprint led to more complete fingerprint identification]; *People v. Powers* (1984) 151 C.A.3d 905, 910, 199 C.R. 142; *People v. Figueroa* (1992) 2 C.A.4th 1584, 1587, 4 C.R.2d 40 [discussing and applying case law on fingerprints]; 28 A.L.R.2d 1115, 1127.) (On admissibility of partial fingerprints or palmprints, see *People v. Corral* (1964) 224 C.A.2d 300, 306, 36 C.R. 591.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Criminal Law k.475.5



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### III. PARTICULAR KINDS OF CIRCUMSTANTIAL EVIDENCE

#### H. Identity of Person.

#### 2. Footprints.

##### 1 Witkin Cal. Evid. Circum Evid § 127

[§ 127] Footprints.

"Bare footprints are as reliable an index of identity as fingerprints." (*People v. Corral* (1964) 224 C.A.2d 300, 305, 36 C.R. 591 [burglary; defendant's prints discovered on top of washer, justifying inference that he stood on its top, barefooted to eliminate noise, and crawled through kitchen window]; see *People v. Dwyer* (1938) 24 C.A.2d 639, 642, 75 P.2d 653 [burglary; footprints in soft slaked lime beneath window through which defendant entered]; 1A Wigmore (Tillers Rev.) §151a; 2 Wigmore (Chadbourn Rev.) §415; 35 A.L.R.2d 856 [footprint evidence]; 45 A.L.R.4th 1178 [admissibility of bare footprint evidence]; 43 Proof of Facts 2d 217.) (On admissibility of partial prints, see *People v. Corral*, *supra*, 224 C.A.2d 306.)

The concept of a "footprint" includes *bare footprints*, i.e., the track made by a naked foot, and *shoeprints*, i.e., the mark made by footgear. Use of the word "footprint" sometimes refers to both types. (See *People v. Zismer* (1969) 275 C.A.2d 660, 665, 80 C.R. 184.)

*People v. Zismer*, *supra*, discusses the foundation of expert testimony. Photographs of the footprints found at the crime scene were received in evidence, together with a pair of shoes worn by defendant on the night of his arrest. The prosecution contended that the jury could reasonably determine whether the shoe and the prints were similar, without the need for opinion evidence. The trial judge agreed. *Held*, this was reversible error.

(a) Footprint evidence is admissible when it shows such a similarity to the defendant's shoes as to justify an inference that the tracks were made by his shoes. (275 C.A.2d 665, citing the text.) But, as pointed out by Wigmore, the inference is apt to be weak because the basic features--size, depth, contour, etc.--may not be distinctive. (275 C.A.2d 665.)

(b) Expert testimony has been introduced in virtually all California cases to show the similarities between the prints and the shoes. And, while no California case squarely holds that footprint evidence is inadmissible without expert or lay testimony connecting the tracks with the defendant's shoes, this foundation is required in many other jurisdictions. (275 C.A.2d 667.)

(c) A qualified expert should be permitted to express a direct opinion that the tracks were made by the shoes, even though this is an ultimate issue of fact to be determined by the jury. (275 C.A.2d 667, footnote 4, citing the text.)

(d) Evidence of similarity may not be necessary in some situations, e.g., where tracks lead from the scene of a crime to the defendant. In those cases, there is independent evidence linking the defendant with the tracks. "But where

the fact that defendant made the tracks can only be established by a comparison of the tracks with defendant's shoes, the foundational requirements must be met." (275 C.A.2d 668.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
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#### H. Identity of Person.

##### 3. Telephone Call.

*1 Witkin Cal. Evid. Circum Evid § 128*

[§ 128] Telephone Call.

(1) *Person Answering Telephone Call.* Admissible evidence of the identity of a person answering the telephone arises under the following circumstances: the person's number, as listed in the telephone book, is dialed, the person listed is asked for, and the person who answered identifies himself or herself as the person sought. (See *Union Const. Co. v. Western Union Tel. Co.* (1912) 163 C. 298, 305, 125 P. 242, supra, §68; *People v. Horace* (1954) 127 C.A.2d 366, 369, 273 P.2d 923, 1 Cal. Evidence (4th), Hearsay, §217; 2 McCormick 5th, §226.)

(2) *Person Making Telephone Call.* The contents of a telephone conversation may be considered in establishing the identity of the person who made the call. In *People v. Hess* (1970) 10 C.A.3d 1071, 1078, 90 C.R. 268, a prosecution witness was properly allowed to describe a telephone call he had received from a person who identified herself as "Terry Lee Hess of Jamul, California," which was defendant's name and address. Even though the witness had never met defendant, the evidence satisfied the foundational requirement because it dealt with a subject which formed the basis of forged documents that were connected to defendant. Taken together, the forgeries and the contents of the call gave rise to the strong inference that defendant had in fact placed the call. (See *Maynard v. State Personnel Bd.* (1977) 67 C.A.3d 233, 239, 136 C.R. 503 [identity may be established by proof of recognition of voice or by other circumstances]; 79 A.L.R.3d 79 [identification by voice or other circumstances].) (On voice identification generally, see 2 Cal. Evidence (4th), *Demonstrative, Experimental, and Scientific Evidence*, §99.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Person Answering Telephone Call.* See 2 McCormick 6th, §228.



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## III. PARTICULAR KINDS OF CIRCUMSTANTIAL EVIDENCE

## H. Identity of Person.

## 4. Defendant's Possession of Stolen Articles.

1 *Witkin Cal. Evid. Circum Evid* § 129

[§ 129] Defendant's Possession of Stolen Articles.

Possession of stolen goods tends to identify the possessor as the thief, though it may not alone be sufficient to support a conviction. (See *People v. Russell* (1932) 120 C.A. 622, 625, 8 P.2d 209; *People v. Russell* (1939) 34 C.A.2d 665, 669, 94 P.2d 400; *People v. Corral* (1943) 60 C.A.2d 66, 72, 140 P.2d 172; *People v. Wissenfeld* (1951) 36 C.2d 758, 763, 227 P.2d 833; *People v. Rubio* (1977) 71 C.A.3d 757, 768, 139 C.R. 750, citing the text [CALJIC, No. 2.15 on this point should not be given unless the evidence establishes defendant's possession]; *People v. Anderson* (1989) 210 C.A.3d 414, 422, 258 C.R. 482 [upholding constitutionality of CALJIC, No. 2.15; requirement that defendant possess recently stolen property was met despite 41/2-month interval between theft and arrest]; *People v. Smithey* (1999) 20 C.4th 936, 978, 86 C.R.2d 243, 978 P.2d 1171 [where there was sufficient evidence to permit jury to find beyond reasonable doubt possession of stolen property and intent to steal, giving of CALJIC, No. 2.15 was not error]; 1A Wigmore (Tillers Rev.) §152 et seq.; 2 *Cal. Crim. Law* (3d), *Crimes Against Property*, §135.)

Possession of ordinary money has little tendency to prove theft, but possession of *identifiable money*, e.g., of a type not in general circulation, may be of more substantial evidentiary value. (See *People v. McClain* (1931) 115 C.A. 505, 508, 1 P.2d 1085; 1A Wigmore (Tillers Rev.) §154.)

The inference of identity based on possession may establish guilt of crimes other than theft. Thus, in *People v. Taylor* (1969) 2 C.A.3d 979, 83 C.R. 119, defendant originally was arrested for investigation of burglary. A search of his automobile revealed a gun belt, an empty holster, and some .22 ammunition, expended and unexpended. About 90 minutes after his arrest, in an area one block distant from where the police had questioned him, authorities found a .22 revolver which had been stolen nearly 6 months earlier. *Held*, defendant was properly convicted of receiving stolen property and being a former felon in possession of a concealable weapon. The evidence showed that the revolver had fired the expended cartridges found in his car, and finding of the weapon close to where he was apprehended supported the inference of possession. (2 C.A.3d 983.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See CALCRIM, No. 376 [Possession of Recently Stolen Property as Evidence of a Crime]; *People v. Solo'rzano* (2007) 153 C.A.4th 1026, 1035, 63 C.R.3d 659 [requirement in CALCRIM, No. 376, of "supporting evidence," rather than "corroborating evidence" as in CALJIC, No. 2.15, does not render instruction constitutionally defective]; *People v. O'Dell* (2007) 153 C.A.4th 1569, 1573, 64 C.R.3d 116 [in prosecution for unlawful driving or taking of vehicle, instruction in language of CALCRIM, No. 376, based on defendant's having jumped from truck on encountering police officer and having yelled that he did not steal truck, did not violate defendant's right to due process or his right to have

each element of offense proved beyond reasonable doubt].

*(New) Distinction: Inference not appropriate to establish guilt of murder:* Because of its corroboration requirement, CALJIC, No. 2.15 is a permissive, cautionary instruction that inures to a defendant's benefit when given with a theft-related offense. However, when "given with regard to murder, the court is essentially singling out the fact of possession of recently stolen property as one that, if the jury finds it, will support a murder conviction with merely slight corroborating evidence. Because we do not believe the same natural and logical inferences for the crime of murder flow from the possession of stolen property coupled with slight corroborating evidence as for theft-related offenses like receiving stolen property, robbery and burglary, we cannot approve such an extension of this theft-related principle to the general crime of murder." (*People v. Barker* (2001) 91 C.A.4th 1166, 1176, 111 C.R.2d 403 [in prosecution for murder and robbery, trial judge erred, although harmlessly, in altering CALJIC, No. 2.15 to apply to both crimes]; see *People v. Prieto* (2003) 30 C.4th 226, 248, 249, 133 C.R.2d 18, 66 P.3d 1123 [approving *Barker*; in capital murder prosecution, trial judge erred in failing to limit instruction to theft-related offenses, but error was harmless in light of overwhelming evidence of defendant's guilt of murder and rape]; *People v. Harden* (2003) 110 C.A.4th 848, 856, 2 C.R.3d 105 [distinguishing *Barker*; in murder case in which robbery and burglary special circumstances were alleged, it was not error to give CALJIC, No. 2.15 in connection with special circumstance allegations]; *People v. Snyder* (2003) 112 C.A.4th 1200, 1227, 5 C.R.3d 711 [distinguishing *Prieto*; in prosecution for murder, robbery, burglary, and automobile theft, instruction based on CALJIC, No. 2.15 specifically describing circumstances in which jury could draw inference of defendant's guilt "of the crime of robbery and/or burglary" was proper].)



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#### H. Identity of Person.

##### 5. Other Circumstances.

*1 Witkin Cal. Evid. Circum Evid § 130*

[§ 130] Other Circumstances.

The following are common types of circumstantial evidence used to establish identity:

(1) *Deceased: Clothing and Bodily Characteristics.* Identity of a person long dead may be established, though the features are unrecognizable, by clothing, jewelry, false teeth, and general contour and weight of the body. (*People v. Peete* (1921) 54 C.A. 333, 346, 202 P. 51.) (See 2 Wigmore (Chadbourn Rev.) §413; on identification of victim of homicide, see 86 A.L.R.2d 722.)

(2) *Defendant: Peculiar Conduct.* In *People v. Adamson* (1946) 27 C.2d 478, 165 P.2d 3, a woman was murdered and the top of her stocking removed. Stocking tops found in defendant's room were held admissible. "This interest in women's stocking tops is a circumstance that tends to identify defendant as the person who removed the stockings from the victim and took away the top of one." (27 C.2d 485.)

Identity of a defendant as perpetrator of a crime may also be shown circumstantially by evidence of similar or related offenses (see *supra*, §§75, 92), or by evidence of enmity or other facts supplying a motive (see *People v. Mullen* (1953) 115 C.A.2d 340, 343, 252 P.2d 19, *supra*, §119).

(3) *Identity of Name.* Former C.C.P. 1963(25) stated a presumption of "identity of person from identity of name." (See *People v. Sberno* (1937) 22 C.A.2d 392, 399, 71 P.2d 274.) Although the presumption was eliminated (see 1 *Cal. Evidence* (4th), *Burden of Proof and Presumptions*, §102), identity of name is a circumstance from which an inference may be drawn, the strength of which will depend on how unusual the name is. (See *People v. Roy* (1967) 251 C.A.2d 459, 464, 59 C.R. 636, citing the text; *People v. Luckett* (1969) 1 C.A.3d 248, 253, 81 C.R. 539, 3 *Cal. Crim. Law* (3d), *Punishment*, §378; *People v. Garcia* (1970) 4 C.A.3d 904, 911, 84 C.R. 624; *People v. Mendoza* (1986) 183 C.A.3d 390, 401, 228 C.R. 308; 2 Wigmore (Chadbourn Rev.) §411; 29 *Am.Jur.2d* (1994 ed.), *Evidence* §285.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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I. Ownership.

1 *Witkin Cal. Evid. Circum Evid* § 131

[§ 131] Ownership.

Wigmore, discussing "mechanical traces," points out that brands, tags, signs, and similar marks may be circumstantial evidence of ownership. (1A Wigmore (Tillers Rev.) §§150, 150a.) This theory has occasionally been invoked in California to establish the defendant's ownership of an automobile operated by a negligent driver. Proof that the car was painted with the distinctive colors, design, and name of the defendant's business supports an inference of ownership. (See *Brown-Forman Distillers Corp. v. Walkup Drayage & Warehouse Co.* (1945) 71 C.A.2d 795, 799, 163 P.2d 878; *Smith v. Deutsch* (1948) 89 C.A.2d 419, 420, 200 P.2d 802; *Shehtanian v. Kenny* (1958) 156 C.A.2d 576, 580, 319 P.2d 699; 8 A.L.R.3d 818, 826 [inference of agency or employment from name or color, etc., of taxicab].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER IV - Circumstantial Evidence

## IV. EVIDENCE INVOLVING UNDUE PREJUDICE

## A. In General.

1 *Witkin Cal. Evid. Circum Evid* § 132

[§ 132] In General.

"The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will ... create substantial danger of undue prejudice." (*Ev.C.* 352.) This power is exercised to exclude *relevant* evidence. (See *supra*, §17.) "[R]elevance is not always enough. There may remain the question, is its value worth what it costs? There are several counterbalancing factors which may move the court to exclude relevant circumstantial evidence if they outweigh its probative value. In order of their importance, they are these. First, the danger that the facts offered may unduly arouse the jury's emotions of prejudice, hostility or sympathy." (*Love v. Wolf* (1964) 226 C.A.2d 378, 404, 38 C.R. 183, quoting McCormick.) (See *People v. La Vergne* (1966) 64 C.2d 265, 271, 49 C.R. 557, 411 P.2d 309; *Garfield v. Russell* (1967) 251 C.A.2d 275, 59 C.R. 379, *infra*, §137; *O'Gan v. King City Joint Union High School Dist.* (1970) 3 C.A.3d 641, 83 C.R. 795; *Marocco v. Ford Motor Co.* (1970) 7 C.A.3d 84, 91, 86 C.R. 526, citing the text; *People v. Bisogni* (1971) 4 C.3d 582, 588, 94 C.R. 164, 483 P.2d 780; *People v. Peters* (1972) 23 C.A.3d 522, 533, 101 C.R. 403 [asking whether witness frequented alleged homosexual hangout in theft case would have been more prejudicial than probative]; *Carr v. Pacific Tel. Co.* (1972) 26 C.A.3d 537, 544, 103 C.R. 120 [evidence of decedent's extramarital affair with teenager and bad check conviction prejudicially affected wrongful death case]; 1 McCormick 5th, §185; 1 Wigmore (Tillers Rev.) §10A; *F.R. Evid.*, Rule 403, *supra*, §8.)

In a criminal case, evidence that is excludable on this ground is not just any evidence that may damage the defendant's case. All evidence that tends to prove guilt is prejudicial, but the "prejudice referred to in *Evidence Code* section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues." (*People v. Felix* (1994) 23 C.A.4th 1385, 1396, 28 C.R.2d 860.)

No complete listing is possible of the matters that might be found "unduly prejudicial" in particular cases. However, a number of categories have crystallized in the case law, and some have been codified in the Evidence Code. The important ones, discussed in the text, are:

- (1) liability insurance (*infra*, §133).
- (2) poverty of the plaintiff (*infra*, §138).
- (3) wealth of the defendant (*infra*, §139).
- (4) offer to settle or compromise (*infra*, §140).
- (5) offer to discount a claim (*infra*, §149).

- (6) information disclosed in mediation proceedings (*infra*, §152).
- (7) the defendant's settlement with another person (*infra*, §150).
- (8) other claims or litigation by the plaintiff (*infra*, §159).
- (9) compensation to the plaintiff from a collateral source (*infra*, §160).
- (10) subsequent precautions or repairs by the defendant (*infra*, §163).
- (11) gruesome or inflammatory real evidence (2 *Cal. Evidence* (4th), *Demonstrative, Experimental, and Scientific Evidence*, §§12, 13).
- (12) offer of or withdrawn plea of guilty (1 *Cal. Evidence* (4th), *Hearsay*, §138).
- (13) degrading collateral matter offered to impeach (3 *Cal. Evidence* (4th), *Presentation at Trial*, §348).

**SUPPLEMENT:** [This section is current through the latest supplement]

See 1 McCormick 6th, §185; Simons, *Cal. Evidence Manual*, §6:1 et seq.; 24 A.L.R.6th 747 [party's military service or failure to serve].



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#### IV. EVIDENCE INVOLVING UNDUE PREJUDICE

##### B. Insurance or No Insurance.

##### 1. General Rule: Evidence of Insurance Excluded.

##### *1 Witkin Cal. Evid. Circum Evid § 133*

[§ 133] General Rule: Evidence of Insurance Excluded.

"Evidence that a person was, at the time a harm was suffered by another, insured wholly or partially against loss arising from liability for that harm is inadmissible to prove negligence or other wrongdoing." (*Ev.C. 1155*.) (See Model C., Rule 310; Uniform Rules of Evidence, Rule 411; *F.R. Evid.*, Rule 411, *infra*, §134.)

The evidence is regarded as both irrelevant and prejudicial to the defendant. Hence, not only is it subject to objection and exclusion, but any attempt to inject it by question, suggestion, or argument is considered misconduct of counsel, and is often held reversible error. (See *Curtis v. McAuliffe* (1930) 106 C.A. 1, 9, 288 P. 675; *Squires v. Riffe* (1931) 211 C. 370, 373, 295 P. 517; *Nichols v. Smith* (1934) 136 C.A. 272, 275, 28 P.2d 693; *Mahnkey v. Bolger* (1950) 98 C.A.2d 628, 636, 220 P.2d 824; *Menefee v. Williams* (1968) 259 C.A.2d 56, 62, 66 C.R. 108, *infra*, §135, citing the text; *Helfend v. Southern Calif. Rapid Transit Dist.* (1970) 2 C.3d 1, 16, 84 C.R. 173, 465 P.2d 61; *Acosta v. Southern Calif. Rapid Transit Dist.* (1970) 2 C.3d 19, 26, 84 C.R. 184, 465 P.2d 72, citing the text; *Brainard v. Cotner* (1976) 59 C.A.3d 790, 794, 130 C.R. 915 [statement, "Don't worry, my insurance will take care of it," properly excluded]; but see *Douglass v. Webb* (1962) 209 C.A.2d 290, 299, 26 C.R. 60 [reference improper but not reversible error where first mentioned by defendants and cautionary instruction given]; and see also 11 *So. Cal. L. Rev.* 407; 21 *So. Cal. L. Rev.* 227; 4 A.L.R.2d 761 [evidence that defendant is insured]; 71 A.L.R.4th 1025 [medical malpractice cases]; 7 *Cal. Proc.* (4th), *Trial*, §230.)

The unequivocal statement of this rule in the Model Code, the Uniform Rules, and the Evidence Code makes any change unlikely, but, in light of widespread knowledge regarding insurance matters, the rule has been criticized as outmoded and unrealistic. (See *Causey v. Cornelius* (1958) 164 C.A.2d 269, 275, 330 P.2d 468, 7 *Cal. Proc.* (4th), *Trial*, §230; *Neumann v. Bishop* (1976) 59 C.A.3d 451, 473, 130 C.R. 786, citing the text [on new trial motion, judge "considered the existence of insurance as a matter which was understood and considered by every intelligent juror"]; 1 *McCormick* 5th, §201; 2 *Wigmore* (Chadbourn Rev.) §282a.)

In the occasional case in which the defendant is not insured, the question whether he or she may bring that fact to the attention of the jury has been considered in a few decisions in other states. (a) If the plaintiff has in some way (even though properly, as by examination of jurors) suggested that an insurance company is involved, it would seem reasonable to allow rebuttal of this damaging inference. (b) But if the plaintiff has not raised the issue, the defendant's denial of insurance coverage has been disapproved as not only irrelevant but as an improper means of seeking sympathy, much like evidence of poverty. (See 5 *Stanf. L. Rev.* 143; 1953 A.S. 778; *F. R. Evid.*, Rule 411, *infra*, §134 [includes prohibition against evidence that person was *not* insured against liability]; 4 A.L.R.2d 761, 773 [evidence that defendant is not insured].)



**SUPPLEMENT:** [This section is current through the latest supplement]

See The New Wigmore: Selected Rules of Limited Admissibility §6.1 et seq.; 1 McCormick 6th, §201.



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## CHAPTER IV - Circumstantial Evidence

## IV. EVIDENCE INVOLVING UNDUE PREJUDICE

## B. Insurance or No Insurance.

## 2. Admissible Evidence.

1 *Witkin Cal. Evid. Circum Evid* § 134

[§ 134] Admissible Evidence.

The fact of insurance or the terms of a policy may be relevant on an issue other than the quality of the insured's conduct, and therefore may be introduced under the doctrine of limited admissibility, with a limiting instruction (supra, §30), where its probative value outweighs the possible prejudice from its admission. (See Uniform Rules of Evidence, Rule 411; Model C., Rule 310; 1 McCormick 5th, §201; 2 Wigmore (Chadbourn Rev.) §282a.)

Thus, the fact of insurance may tend to prove *ownership* of an automobile (see *Perry v. A. Paladini* (1928) 89 C.A. 275, 285, 264 P. 580), or *employment* of a person covered by the policy (*Mullanix v. Basich* (1945) 67 C.A.2d 675, 682, 155 P.2d 130). (See 11 So. Cal. L. Rev. 431; 21 So. Cal. L. Rev. 239; 1 McCormick 5th, §201; 4 A.L.R.2d 776; and see also *Turner v. Mannon* (1965) 236 C.A.2d 134, 140, 45 C.R. 831 [*defendant*, to prevent possible double recovery by plaintiff, introduced evidence that defendant's insurance carrier had paid \$ 1,000 of plaintiff's medical bills].)

*F.R. Evid.*, Rule 411 states the rule and exceptions as follows: "Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness." (See 2 Mueller & Kirkpatrick, Federal Evidence 2d, §152 et seq.; 29 Am.Jur.2d (1994 ed.), Evidence §483.)

In *Brainard v. Cotner* (1976) 59 C.A.3d 790, 795, 130 C.R. 915, a police report contained defendant's statement that a car accident was caused by plaintiff's act in unzipping her dress in the moving automobile. Plaintiff unsuccessfully sought to show that, when defendant was questioned privately about the statement, she said, "Well, I did it because I was fearful of my insurance." *Held*, the reference to insurance was admissible, because this evidence of motive would have rebutted her testimony about plaintiff's conduct.

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Royal Surplus Lines Ins. Co. v. Ranger Ins. Co.* (2002) 100 C.A.4th 193, 200, 122 C.R.2d 459 [in action by apartment complex owner and its liability insurer against subcontractor and its insurer, joinder of defendants would not violate *Ev.C. 1155*, and thus trial judge erred in sustaining demurrer of subcontractor's insurer; to meet plaintiffs' claim that it failed to procure insurance naming owner as additional insured, subcontractor would be required to offer proof of insurance]; 1 McCormick 6th, §201.



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##### B. Insurance or No Insurance.

##### 3. Permissible Reference.

##### 1 Witkin Cal. Evid. Circum Evid § 135

[§ 135] Permissible Reference.

Even though the fact of insurance is not relevant and cannot be independently proved, reference to it in connection with other admissible matter may be proper:

(1) It may be incidentally included in an admission. (See 1 Cal. Evidence (4th), Hearsay, §96; 4 A.L.R.2d 781.) However, in *Menefee v. Williams* (1968) 259 C.A.2d 56, 63, 66 C.R. 108, plaintiff, on a deer hunting trip, was shot, possibly by defendant, who drove him to the hospital. Plaintiff offered to prove that on the way defendant said, "Don't worry, if your insurance doesn't cover this, mine will." And later, in the hospital, plaintiff asked defendant if he had shot him, defendant said no, and plaintiff asked, "Well, why did you tell me that your insurance would cover this incident?" Defendant replied, "Must have been out of my mind when I said that." Held, the test of the incidental admission exception was not met, and the trial judge properly ruled the evidence inadmissible, for neither statement could be considered an unequivocal admission of fault.

(2) It may come in as part of the cross-examination of a witness. (See *Elsey v. Domecq* (1931) 114 C.A. 42, 50, 299 P. 794; *Moniz v. Bettencourt* (1938) 24 C.A.2d 718, 724, 76 P.2d 535; *Hatfield v. Levy Bros.* (1941) 18 C.2d 798, 811, 117 P.2d 841; *Little v. Superior Court* (1961) 55 C.2d 642, 645, 12 C.R. 481, 361 P.2d 13; 21 So. Cal. Rev. 237.)

(3) The fact that an insurance company is conducting the defense justifies questions to prospective jurors on their voir dire examination, to ascertain whether they are connected with or interested in an insurance company. (See *Jones v. Bayley* (1942) 49 C.A.2d 647, 659, 122 P.2d 293; *Traxler v. Thompson* (1970) 4 C.A.3d 278, 281, footnote 1, 84 C.R. 211; 11 So. Cal. L. Rev. 419; 21 So. Cal. L. Rev. 234; 4 A.L.R.2d 792; 7 Cal. Proc. (4th), Trial, §231.)

In *Hart v. Wielt* (1970) 4 C.A.3d 224, 230, 84 C.R. 220, the name of defendant's insurance company was mentioned in three separate ways: On voir dire examination of the prospective jurors, in nonresponsive answers by plaintiff on his direct and cross-examination, and in a cross-examination question directed against a defense private investigator. Held, there was no prejudicial error. Although the court was "well aware of the thin line that exists in this area," it concluded that "the line was not crossed." (4 C.A.3d 232.) The trial judge had denied defendant's motions for new trial and judgment notwithstanding the verdict and had awarded costs to plaintiff. These rulings implied that no misconduct--or at least no prejudice--had occurred.

Even if a reference to insurance has been made improperly to the jury, the burden of showing prejudice remains on the party claiming it. (*Dorsic v. Kurtin* (1971) 19 C.A.3d 226, 235, 96 C.R. 528 [during jury deliberations court clerk erroneously sent copy of lease, with insurance provisions, to jury room; error harmless].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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##### B. Insurance or No Insurance.

##### 4. Weighing Relevancy and Prejudicial Effect.

##### *1 Witkin Cal. Evid. Circum Evid § 136*

[§ 136] Weighing Relevancy and Prejudicial Effect.

In *Blake v. E. Thompson Petroleum Repair Co.* (1985) 170 C.A.3d 823, 216 C.R. 568, plaintiff's machine shop, located next door to defendant's repair shop, suffered major damage in July 1979 from a fire and burglary allegedly the result of negligence of defendant's employee. Safeco, defendant's insurer, inquired as to plaintiff's business losses and then paid him monthly sums, which totaled \$ 50,624. In December 1979, the new owner of the building in which plaintiff's shop was located offered him a new lease at a higher rent, but plaintiff rejected it because his shop was not yet fully repaired. In March 1980, plaintiff started to look for another location, and finally found one and resumed business in July 1980. He brought suit against defendant in February 1980, seeking damages for negligence causing injuries to his business, including lost business profits. On deposition, plaintiff testified that he could not resume his business after the fire because he lacked sufficient funds. Anticipating that testimony at the trial, defendant's counsel moved that defendant be allowed to show that plaintiff received regular monthly payments, but not that they came from Safeco; i.e., counsel wanted to produce evidence that plaintiff had failed to mitigate damages, without revealing the fact of insurance. The judge denied the motion, placing defendant's counsel in a dilemma: "On the one hand, in order to prevent the jury from discovering that Thompson was insured, counsel would have had to forego the presentation of evidence showing that Blake had received any payments, and thus forego or significantly weaken his defense that Blake had failed to mitigate his own damages. On the other hand, in order to present evidence of nonmitigation, counsel would have had to bring up the fact of Thompson's insurance. Counsel chose the latter course." (170 C.A.3d 830.)

The jury brought in a verdict for plaintiff for \$ 120,722.51, offset by the insurer's payments of \$ 50,624, and defendant appealed from the judgment. The appellate court reversed the judgment for error in refusing defendant's proposed instruction that would have limited plaintiff's claim of lost profits to those lost during the time reasonably necessary to repair. But the opinion also explored the possible procedures to be used on retrial to solve the problem posed by evidence of insurance.

(a) Evidence of a defendant's insurance is ordinarily excluded as irrelevant and prejudicial (170 C.A.3d 830, citing the text), and evidence of a plaintiff's insurance is ordinarily excluded under the collateral source rule (*infra*, §160). However, insurance coverage may be coupled with other relevant evidence (see *supra*, §135); and in that case, the judge must determine, under *Ev.C.* 352 (*supra*, §17), whether the probative value of the other evidence outweighs the prejudicial effect of the mention of insurance. (170 C.A.3d 831.)

(b) An insurer has the duty "in good faith to effectuate prompt, fair and equitable settlement of claims in which liability has become reasonably clear" (*Ins.C.* 790.03(h)(5); see 11 *Summary* (9th), *Equity*, §94); and an advance or partial payment by a liability insurer cannot be construed as an admission of liability (*Ins.C.* 11583; *infra*, §142). (170

*C.A.3d 831.)*

(c) These rules bring the problem into sharper focus: "Evidence of the payments made to Blake was relevant to show (1) that Blake had received partial compensation for his alleged damages ... ; (2) that Blake had the financial wherewithal to defray the cost of repairing his equipment and relocating his shop; and (3) that Blake may intentionally have delayed the regeneration of his business. Thompson had the burden of producing such evidence ... Neither Thompson nor its insurer could be pilloried in court because the payments were made ... Thompson had no right to show *merely* (i.e., without more) the fact that Blake had received payments, because such evidence would lead the jury to speculate (a) that Blake was a very rich man, or (b) that Blake had wealthy friends or relatives, or (c) even worse, that Blake himself was insured." (170 *C.A.3d* 832.)

(d) Two possible solutions may be suggested: (1) Instruct the jury that the payments came from defendant itself, thus "sanitizing" the evidence by avoiding any mention of insurance; but this would mislead the jury. (2) Bifurcate the trial, so as to try the issue of damages separately; and, if bifurcation is requested, it must be granted. In that event, the jury could be instructed at the outset of the damages trial "(1) that payments were made to Blake by Thompson's insurance carrier; and (2) that the law imposes a duty on the carrier to investigate and attempt to adjust Blake's claim. Such an instruction would minimize the prejudice to either side, and would conform to the letter and spirit of *Insurance Code* section 11583." (170 *C.A.3d* 833.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Cross-Reference:* The discussion of *Ins.C. 790.03(h)(5)*, formerly located in *Equity*, has been transferred to 2 *Summary* (10th), *Insurance*, §252 et seq.



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##### B. Insurance or No Insurance.

##### 5. Plaintiff's Accident Insurance.

##### 1 Witkin Cal. Evid. Circum Evid § 137

[§ 137] Plaintiff's Accident Insurance.

In *Garfield v. Russell* (1967) 251 C.A.2d 275, 59 C.R. 379, plaintiff, injured in an automobile accident, made a strong showing of liability, but verdict and judgment went for defendant. On appeal she urged misconduct of defendant's counsel in deliberately bringing before the jury, on her cross-examination, the facts that she had three accident policies, each company paying her medical expenses, and that an insurance company representative had questioned the reasonableness of the charges. *Held*, judgment reversed.

(a) Under the collateral source rule (see *infra*, §160; 6 *Summary* (9th), *Torts*, §1388 et seq.), the insurance payments did not reduce the amount recoverable; hence, the evidence was not relevant on the issue of damages. But it did tend to show an improper motive in seeking medical aid and tended to impeach her as a witness.

(b) Although there was this proper ground for admission of the evidence, its prejudicial effect was great, and in this kind of situation the trial judge should consider whether its probative value is outweighed by its objectionable effects under *Ev.C.* 352 (*supra*, §17). (251 C.A.2d 279.)

(c) The court rejected plaintiff's argument that evidence of compensation from a collateral source should always be deemed prejudicial as a matter of law. Just as a defendant's liability insurance is sometimes relevant and may be shown by the plaintiff (see *supra*, §134), so plaintiff's accident insurance may be shown in a proper case, despite the incidental prejudice. "[W]hat reason is there for a different rule when the shoe is on the other foot?" (251 C.A.2d 279.) (See *Helfend v. Southern Calif. Rapid Transit Dist.* (1970) 2 C.3d 1, 16, 84 C.R. 173, 465 P.2d 61; *Acosta v. Southern Calif. Rapid Transit Dist.* (1970) 2 C.3d 19, 26, 84 C.R. 184, 465 P.2d 72; *Hrnjak v. Graymar* (1971) 4 C.3d 725, 731, 94 C.R. 623, 484 P.2d 599, *infra*, §161.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*Cross-Reference:* 6 *Summary* (10th), *Torts*, §1631 et seq.



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## C. Poverty of Plaintiff.

## 1 Witkin Cal. Evid. Circum Evid § 138

## [§ 138] Poverty of Plaintiff.

(1) *In General.* In an action for damages, a showing of poverty of the plaintiff is highly prejudicial, and where evidence of this type is deliberately introduced it is usually held reversible error. (See *Steinberger v. California Elec. Garage Co.* (1917) 176 C. 386, 390, 168 P. 570; *Ensign v. Southern Pac. Co.* (1924) 193 C. 311, 321, 223 P. 953 [wrongful death; widow testified that decedent had no money to obtain certain medical treatment, though this issue was not raised]; *Smellie v. Southern Pac. Co.* (1933) 128 C.A. 567, 578, 18 P.2d 97 [wrongful death; son testified that children had to work to support mother]; *Nakamura v. Los Angeles Gas & Elec. Corp.* (1934) 137 C.A. 487, 489, 30 P.2d 1022 [personal injuries; plaintiff's counsel drew answers from her disclosing fact that she was separated from her husband and supporting herself from her own earnings]; *Hart v. Wielt* (1970) 4 C.A.3d 224, 234, 84 C.R. 220, citing the text; 21 A.L.R.3d 936 [prejudicial effect of evidence as to poverty of landowner in eminent domain proceeding].)

(2) *Admission for Limited Purpose.* However, where the evidence comes in incidentally as part of some proper line of questioning, the doctrine of limited admissibility (*supra*, §30) justifies its admission for the limited purpose. Thus, in *Packard v. Moore* (1937) 9 C.2d 571, 576, 71 P.2d 922, a personal injury action, defendant's counsel, seeking to discredit plaintiff's doctor by showing his interest, asked, "Of course, you expect to be paid for the time you have given since?" The witness denied this, and, by permission of the court, added, "I can explain why I do not expect to be paid. Miss Packard is a penniless girl and she has no money to fight this through the higher court." *Held*, it was proper to allow the witness to explain his answer, so as to rebut any unfavorable inferences that might have been drawn from the question. (See *Muller v. Hale* (1902) 138 C. 163, 167, 71 P. 81 [plaintiff, on cross-examination, admitted that she had received no medical treatment since leaving hospital; on redirect she was allowed to explain why: no funds]; *Hughes v. Quackenbush* (1934) 1 C.A.2d 349, 358, 37 P.2d 99 [evidence incidental to questioning as to nature of work and extent of disability].)

(3) *Poverty or Family Distress as Relevant to Mental Suffering.* Unsuccessful attempts have been made to justify the introduction of evidence of the plaintiff's poverty or family distress in a personal injury suit, on the theory that it tends to show the extent of *mental suffering*, and is therefore relevant and material. Despite some probative value, this evidence is excluded because of its prejudicial effect and the confusing extraneous issues raised. (*Steinberger v. California Elec. Garage Co.*, *supra*.) In *Dillon v. Wallace* (1957) 148 C.A.2d 447, 306 P.2d 1044, evidence was received, over defendants' objection, that plaintiff had an invalid husband who died while she was recovering, and that the last times she saw her husband were when taken in an ambulance to his hospital and on a stretcher to his funeral. *Held*, this was prejudicial error: "[E]vidence of the family situation of the injured party ... may not be admitted to show the effect on the mental anguish suffered by the injured person by reason of his disability." (148 C.A.2d 454.) (See 37 A.L.R.3d 1082 [family circumstances, including financial dependence, in personal injury actions].)



**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Evidence k.107



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## IV. EVIDENCE INVOLVING UNDUE PREJUDICE

## D. Wealth.

1 Witkin Cal. Evid. Circum Evid § 139

[§ 139] Wealth.

(1) *General Rule of Exclusion.* Evidence of a defendant's wealth is ordinarily irrelevant to any issue of liability or damages, and a deliberate attempt to suggest it may be prejudicial misconduct. (See *Weaver v. Shell Oil Co.* (1933) 129 C.A. 232, 234, 18 P.2d 736 [argument in wrongful death case that defendant "is a great big, rich corporation ... and it can afford to take care of them"]; 21 A.L.R.3d 936 [prejudicial effect of evidence as to wealth of condemnor in eminent domain proceeding].)

(2) *Exceptions.* There are, however, some situations in which this evidence may be relevant. Thus, in *Miller v. Magill* (1933) 130 C.A. 414, 417, 20 P.2d 58, defendant, a longtime employee of plaintiff, had the latter's agent cable her a request for money to start a business, and plaintiff replied, "Pay Joe--hope he is successful." In this action, plaintiff claimed she lent the money, and defendant claimed it was a gift. Defendant was allowed to prove the fact that, prior to her marriage, plaintiff had little means, and that she inherited a large estate from her husband. This was upheld, on the theory that the disclosure of the comparative financial positions of the parties would aid the jury in deciding the issue of loan or gift.

The principal exception is an action in which punitive damages are sought. Evidence of the defendant's financial condition is a prerequisite to a punitive damages award, and the burden is on the plaintiff to introduce that evidence. (*Adams v. Murakami* (1991) 54 C.3d 105, 284 C.R. 318, 813 P.2d 1348, 6 Summary (9th), Torts, Supp., §1377A.) (On discovery of financial information and protective orders, see 2 Cal. Evidence (4th), Discovery, §§16, 17; on discretion of trial judge to admit evidence of financial worth when *civil penalties* are sought, see *People v. Superior Court (Kardon)* (1973) 35 C.A.3d 710, 712, 713, 111 C.R. 14.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Exceptions.* *Adams v. Murakami:*

*Cross-Reference:* 6 Summary (10th), Torts, §1619. *West's Key Number Digest*, Evidence k.107



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## IV. EVIDENCE INVOLVING UNDUE PREJUDICE

## E. Offer To Settle or Compromise.

## 1. Rule and Theory of Exclusion.

*1 Witkin Cal. Evid. Circum Evid § 140*

[§ 140] Rule and Theory of Exclusion.

(1) *General Rule.* An offer to settle or compromise a claim by paying a sum of money or giving other consideration is *not admissible to prove liability* on the part of the offeror. It has been persuasively argued that a settlement offer is an admission by conduct, furnishing an inference that the offeror concedes liability (particularly where the defendant offers nearly the whole amount demanded). The other view is that offers of this type are often motivated solely by a desire of the defendant to "buy peace," i.e., to avoid litigation. Neither courts nor writers are agreed on whether the evidence is relevant. But, irrespective of relevancy, the public policy in favor of settlement of disputes makes it inadvisable to penalize the person who seeks settlement by allowing the rejected offer to be used as an admission. Hence, the *offer* itself, and the *negotiations* relating to it, are excluded. (*Ev.C. 1152(a)*; see *Armstrong v. Kline* (1944) 64 C.A.2d 704, 715, 149 P.2d 445; *Potter v. Pacific Coast Lumber Co. of Calif.* (1951) 37 C.2d 592, 600, 234 P.2d 16; cf. *Carney v. Santa Cruz Women Against Rape* (1990) 221 C.A.3d 1009, 1023, 271 C.R. 30, quoting the text [in libel action against women's organization that had published newsletter identifying plaintiff as perpetrator of assault, *Ev.C. 1152(a)* did not preclude admission of assault victim's letter of apology, written to plaintiff as part of settlement and introduced not to establish victim's liability, but on issue of truth of newsletter account]; and see Uniform Rules of Evidence, Rule 408; Model C., Rule 309; 2 McCormick 5th, §266; 4 Wigmore (Chadbourn Rev.) §§1061, 1062; 39 *Hastings L. J.* 955 [Protecting the Confidentiality of Settlement Negotiations].)

*Ev.C. 1152(a)* broadened the scope of former C.C.P. 2078 in several respects (*infra*, §142 et seq.). But it eliminated any implication from the former statute that an offer introduced *without objection* cannot be considered. (Law Rev. Com. Comment to *Ev.C. 1152*; on sufficiency of incompetent evidence admitted without objection, see 3 *Cal. Evidence* (4th), *Presentation at Trial*, §393.)

(2) *Distinction: Judgment Debtor's Examination.* The rule of *Ev.C. 1152* applies to *trials*; information disclosed at settlement negotiations occurring after a judgment has been entered is admissible at a judgment debtor's examination under C.C.P. 708.110 (see 8 *Cal. Proc.* (4th), *Enforcement of Judgment*, §268). (*Young v. Keele* (1987) 188 C.A.3d 1090, 1093, 233 C.R. 850, 8 *Cal. Proc.* (4th), *Enforcement of Judgment*, §276.)

(3) *Offer for Civil Compromise of Property Crime.* *Ev.C. 1153.5* makes evidence of an *offer for civil resolution of a crime against property* pursuant to C.C.P. 33, or admissions made in the course of negotiations for the offer, inadmissible in any action. (See 2 Jefferson, California Evidence Benchbook 3d, §§34.40, 34.41.)

(4) *Federal Rule.* *F.R. Evid., Rule 408* reads as follows: "Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to

compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution." (See 2 Mueller & Kirkpatrick, *Federal Evidence* 2d, §134 et seq.; 29 *Am.Jur.2d* (1994 ed.), *Evidence* §507 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *General Rule.* See *Ev.C. 1160* (inadmissibility of expressions of sympathy), 1 *Cal. Evidence* (4th), *Hearsay, Supp.*, §96; *The New Wigmore: Selected Rules of Limited Admissibility* §3.1 et seq.; 2 *McCormick* 6th, §266.(4) *Federal Rule. F.R. Evid., Rule 408* was revised in 2006 and now reads:

"(a) *Prohibited uses.* Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:"

"(1) furnishing or offering or promising to furnish--or accepting or offering or promising to accept--a valuable consideration in compromising or attempting to compromise the claim; and"

"(2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority."

"(b) *Permitted uses.* This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution."

See 40 *Santa Clara L. Rev.* 547 [admissibility of settlement communications under *F.R. Evid., Rule 408*]. *West's Key Number Digest*, Evidence k.212 et seq.



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##### E. Offer To Settle or Compromise.

##### 2. Rule Applies in Discovery Proceeding.

##### 1 *Witkin Cal. Evid. Circum Evid* § 141

[§ 141] Rule Applies in Discovery Proceeding.

In *Covell v. Superior Court* (1984) 159 C.A.3d 39, 205 C.R. 371, D brought an action against C, judgment was entered in favor of C, and C filed a suit against D for malicious prosecution. D then took C's deposition, and sought to inquire about any settlement offers C or his counsel had made in the earlier action. *Held*, the inquiry was improper.

(a) To the extent that D sought discovery of these offers to establish the validity of his claim in the earlier action, *Ev.C. 1152* would make any such evidence inadmissible. (159 C.A.3d 43.)

(b) D contended, however, that the evidence was not sought to prove C's liability in the earlier action, but only to prove that the action was not without probable cause or initiated with malice; i.e., a settlement offer by C would show that he recognized the validity of D's claim. But no such inference may reasonably be drawn, for a defendant will often attempt to buy peace for economic reasons. (159 C.A.3d 43.)

(c) More importantly, the issue in the malicious prosecution action was not C's frame of mind as to the earlier suit; it was D's frame of mind and whether he believed that he had probable cause or acted with malice. C's state of mind was neither relevant to the subject matter of the malicious prosecution suit, nor reasonably calculated to lead to discovery of admissible evidence. (159 C.A.3d 43.) (On balancing right to privacy of settlement against party's need to discover relevant information, see 2 *Cal. Evidence* (4th), *Discovery*, §20.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Volkswagen of America v. Superior Court* (2006) 139 C.A.4th 1481, 1490, 1494, 43 C.R.3d 723 [in asbestos exposure action against automobile manufacturer, trial judge erred in denying defendant's discovery of documents submitted to bankruptcy trusts by plaintiff's attorney in support of claims for compensation for asbestos-related injuries; even if documents were inadmissible as offers to compromise, they could lead to admissible evidence; distinguishing *Covell v. Superior Court* (1984) 159 C.A.3d 39, 205 C.R. 371, text, p. 491].



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## CHAPTER IV - Circumstantial Evidence

## IV. EVIDENCE INVOLVING UNDUE PREJUDICE

## E. Offer To Settle or Compromise.

## 3. Scope of Rule.

## a. In General.

1 *Witkin Cal. Evid. Circum Evid* § 142

[§ 142] In General.

(1) *Offer of Services or Money*. "Evidence that a person has, *in compromise or from humanitarian motives*, furnished or offered or promised to furnish *money or any other thing, act, or service* to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage ... is inadmissible to prove his or her liability for the loss or damage or any part of it." (*Ev.C. 1152(a)*.)

Aid from "humanitarian motives" includes such acts as calling an ambulance, paying a doctor bill, repairing or restoring property, etc., with no thought of liability or compromise. (See *Oldenburg v. Sears, Roebuck & Co. (1957) 152 C.A.2d 733, 749, 314 P.2d 33* [plaintiff fell in front of defendant's store, defendant paid the doctor and ambulance bill for an emergency call].) In the *Oldenburg* case the court recalled the parable of the Good Samaritan, and also pointed out that the policy involved was the same as that excluding evidence of subsequent precautions (*infra*, §163): To allow this to be shown would tend to deter one who has injured another from giving aid. (See *People v. Muniz (1989) 213 C.A.3d 1508, 1516, 262 C.R. 743* [statute is not applicable to criminal cases].)

(2) *Advance or Partial Payment of Damages*. No admission of liability of any person or the person's insurer results from an advance or partial payment of damages, made as an accommodation to an injured person or to the heirs or dependents of a deceased person. (*Ins.C. 11583*; see 65 A.L.R.3d 932 [payment of, or offer to pay, medical expenses of injured party].) *F.R. Evid.*, Rule 409 is similar: "Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury." (See 2 Mueller & Kirkpatrick, *Federal Evidence* 2d, §139 et seq.; 29 *Am.Jur.2d (1994 ed.)*, *Evidence* §480 et seq.)

(3) *Offer To Allow Judgment To Be Taken*. If a party offers to allow judgment to be taken against him or her in accordance with the terms of a written offer served on another party, and the proposal is rejected, evidence of the offer is inadmissible. (*C.C.P. 998(b)(2)*; see 6 *Cal. Proc. (4th)*, *Proceedings Without Trial*, §76.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Offer of Services or Money*. See *Hasler v. Howard (2004) 120 C.A.4th 1023, 1026, 16 C.R.3d 217* [in fraud action by real estate seller against broker, trial judge properly excluded evidence that seller offered to compromise claim for amount of broker's commission; broker wished to show that return of her commission was element of plaintiff's damages claim, which would make her eligible as prevailing party for attorneys' fees under listing agreement, but this would be using evidence to establish liability, i.e., for attorneys' fees, in violation of *Ev.C. 1152*].



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##### E. Offer To Settle or Compromise.

##### 3. Scope of Rule.

##### b. Conduct or Statements in Negotiation.

*1 Witkin Cal. Evid. Circum Evid § 143*

[§ 143] Conduct or Statements in Negotiation.

It was formerly the rule in California that, despite inadmissibility of the offer itself, an admission of the defendant made in the course of the negotiations could be introduced. (See *Scott v. Sciaroni* (1924) 66 C.A. 577, 583, 226 P. 827 [admission of doctor that he "left the radium on too long" and that it was his fault]; *California Home Extension Assn. v. Hilborn* (1951) 37 C.2d 459, 465, 235 P.2d 369; *People v. Lagiss* (1958) 160 C.A.2d 28, 33, 324 P.2d 926; *People v. Forster* (1962) 58 C.2d 257, 263, 23 C.R. 582, 373 P.2d 630 [stating test]; *People v. Glen Arms Estate* (1964) 230 C.A.2d 841, 863, 41 C.R. 303 [applying *Forster* test and holding evidence properly excluded]; and see 2 McCormick 5th, §266.)

The *Forster* rule was criticized by the Law Revision Commission as placing a premium on the form of the statement and inhibiting the "complete candor between the parties that is most conducive to settlement." (Law Rev. Com. Comment to *Ev.C. 1152*.) Accordingly, *Ev.C. 1152(a)* abolished the rule by making inadmissible not only the offer, etc., but also "any conduct or statements made in negotiation thereof." (See *San Joaquin v. Galletti* (1967) 252 C.A.2d 840, 843, 61 C.R. 62, quoting the text; *Warner Const. Corp. v. Los Angeles* (1970) 2 C.3d 285, 296, 85 C.R. 444, 466 P.2d 996 [unlimited admission of settlement correspondence was error, but harmless under the circumstances]; 15 A.L.R.3d 13.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Tower Acton Holdings v. Los Angeles County Waterworks Dist. No. 37* (2002) 105 C.A.4th 590, 602, 129 C.R.2d 640 [enforcement of agreement not to use evidence from settlement negotiations in subsequent litigation is not against public policy]; *Caira v. Offner* (2005) 126 C.A.4th 12, 34, 24 C.R.3d 233 [in consolidated actions involving dispute among siblings over ownership of family company and its subsidiary, trial judge properly excluded e-mail sent by one sibling to other three concerning desirability of repurchasing shares that had been sold to third party; at time e-mail was sent, there were already ongoing attempts to resolve disputes regarding company, and message was sent with purpose of rekindling faltering negotiations]; 2 McCormick 6th, §266.



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##### E. Offer To Settle or Compromise.

##### 4. Exceptions and Distinctions.

##### a. Evidence Code Exceptions.

*1 Witkin Cal. Evid. Circum Evid § 144*

[§ 144] Evidence Code Exceptions.

*Ev.C. 1152* states several obvious exceptions to the rule making an offer to settle or compromise inadmissible (*supra*, §140):

(1) *Action for Breach of Covenant of Good Faith and Fair Dealing*. If an offer to compromise is admitted in an action for (a) breach of the covenant of good faith and fair dealing; or (b) violation of *Ins.C. 790.03(h)* (unfair claims settlement practices; see 6 *Summary* (9th), *Torts*, 1159 et seq.), evidence relating to other offers to compromise "the same or substantially the same claimed loss or damage" is admissible for the same purpose as the initial evidence regarding settlement. (*Ev.C. 1152(b)*) [further providing that evidence of settlement offers is not otherwise admissible in motion for new trial, in any proceeding involving additur or remittitur, or on appeal]; see 19 *Pacific L. J.* 610.)

(2) *Part Payment Without Disputing Claim*. Evidence of "[p]artial satisfaction of an asserted claim or demand without questioning its validity" is admissible to prove the validity of the claim. (*Ev.C. 1152(c)(1)*.)

(3) *Revival of Debt*. Evidence of a debtor's payment or promise to pay all or a part of a preexisting debt is admissible to prove the creation of a new duty on the debtor's part or a revival of the preexisting duty. (*Ev.C. 1152(c)(2)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Action for Breach of Covenant of Good Faith and Fair Dealing*.

*Cross-Reference:* The discussion of unfair claims settlement practices, formerly located in *Torts*, has been transferred to 2 *Summary* (10th), *Insurance*, §252.





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##### 4. Exceptions and Distinctions.

##### b. Independent Negotiations or Statements.

##### 1 *Witkin Cal. Evid. Circum Evid* § 145

[§ 145] Independent Negotiations or Statements.

(1) *Negotiations Involving Unrelated Claim.* In *Fieldson Associates v. Whitecliff Laboratories* (1969) 276 C.A.2d 770, 81 C.R. 332, the principal issue was whether a written purchase order referring to 100,000 units of coffee makers was intended to be a binding commitment. When the principals testified differently on their interpretations of the contract, the trial judge, over objection, allowed into evidence a collection of letters that had passed between them after transmittal of the purchase order. While no letter referred to lost profits based on a 100,000 unit purchase, which was the gist of the cross-complaint, several letters did contain offers of compromise. *Held*, the evidence was admissible.

The letters were not used to prove either liability for, or invalidity of, the claim about which the offer of compromise was made. They were received to show the invalidity of a *different* claim. (276 C.A.2d 772.) "The contents of the negotiations concerning the other claim were of no significance; the fact that there were negotiations at all was significant only as showing that the parties were in communication without appellant having asserted a claim which it would have been natural to mention. The admissibility of such evidence for the limited purpose described above could have had no tendency to inhibit candid discussion or deter either party from attempting to effect a compromise." (276 C.A.2d 773.)

(2) *Statements Independent of Compromise Offer.* In *Moving Picture Machine Operators Union v. Glasgow Theaters* (1970) 6 C.A.3d 395, 86 C.R. 33, defendant motion picture theater operator sent a letter to plaintiff labor union during negotiations about pension rights. The letter stated that "Mr. Glasgow admits he owes as follows" and that "defendants are prepared to pay this amount in full satisfaction of the matter sued upon in your complaint." *Held*, the letter was admissible; it disclosed "an apparent intent to admit liability in the stated sum and to make no other concessions." (6 C.A.3d 405.) Although the court quoted from *Ev.C. 1152*, it cited *People v. Forster* (1962) 58 C.2d 257, 23 C.R. 582, 373 P.2d 630, *supra*, §143, as authority for allowing admission of the evidence. (6 C.A.3d 402.)

(a) The rule excluding offers of compromise does not apply to statements of fact independent of an offer of compromise, e.g., evidence relative to an accord and satisfaction. (6 C.A.3d 402.) And "the statements of a party against whom a claim is made, that he is willing to settle the claim, when not connected with an offer of compromise, may be proved as an admission against interest." (6 C.A.3d 402.)

(b) The intention of the party is dispositive. (6 C.A.3d 402.) "[I]f the intention is apparent to admit liability and to secure relief against a liability recognized as such, or if the party making the proposal apparently intended to make no concessions but to exact all that he deemed himself entitled to, the proposal is an ordinary admission against interest and

not an attempt to compromise. Such an admission against interest is not subject to the rule which excludes offers of compromise." (6 C.A.3d 405.) (See *Truestone v. Simi West Industrial Park II* (1984) 163 C.A.3d 715, 725, 209 C.R. 757, citing the text [offer admitted to show account stated].)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Evidence k.213(4)



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4. Exceptions and Distinctions.

c. Statements Showing Good Faith.

1 *Witkin Cal. Evid. Circum Evid* § 146

[§ 146] Statements Showing Good Faith.

In *Warner Const. Corp. v. Los Angeles* (1970) 2 C.3d 285, 85 C.R. 444, 466 P.2d 996, supra, §31, an action for breach of warranty and fraud, plaintiff contractor sought to introduce its correspondence with defendant municipality about the need for additional expense to construct a retaining wall. Despite the city's objection that they were part of settlement negotiations, the trial judge admitted them. *Held*, the unlimited admission of the exhibits was harmless error, for they could have been admitted for a limited purpose.

(a) The principle of "practical construction" of a contract (1 *Summary* (9th), *Contracts*, §689) applies only to acts performed *before* a dispute has arisen. Whatever is said in negotiations after the date when the parties began disagreeing may not be admitted. (2 C.3d 296.) There are no valid grounds for distinction between contracts that specifically contemplate amendments and those that do not. The purpose of *Ev.C. 1152*--to promote candor in settlement negotiations--applies equally in both instances. (2 C.3d 297.)

(b) The correspondence, however, could have shown that during a delay period plaintiff, in good faith and pursuant to the contractual procedure, had engaged in negotiations in the reasonable hope that an agreement could be reached and the work resumed. (2 C.3d 297.) The evidence of negotiations might also have been admissible to rebut a claim that plaintiff failed to mitigate damages or, if defendant questioned the exhaustion of contractual remedies, to prove exhaustion. (2 C.3d 297, footnote 12.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Shade Foods v. Innovative Products Sales & Marketing* (2000) 78 C.A.4th 847, 914, 915, 93 C.R.2d 364 [in action alleging that liability insurer breached covenant of good faith and fair dealing, trial judge properly admitted evidence of insurer's settlement discussions with food manufacturer (an additional insured under policy), as relevant to insurer's defense that it accepted settlement offer].

*Cross-Reference:* 1 *Summary* (10th), *Contracts*, §749.



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d. Statements Showing Bad Motive.

*1 Witkin Cal. Evid. Circum Evid § 147*

[§ 147] Statements Showing Bad Motive.

*Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma* (1986) 42 C.3d 1157, 232 C.R. 567, 728 P.2d 1202, involved a claim that the privilege for statements made in the course of a judicial proceeding (former C.C. 47(2), now C.C. 47(b)) precludes the evidentiary use of statements made during negotiating sessions in an action for abuse of process.

Plaintiff O planned a residential development on property adjoining the home of defendant S in the city of Encino. S filed an administrative mandamus proceeding under CEQA challenging the sufficiency of the environmental impact report, and the trial court granted summary judgment in favor of the city. S then retained the law firm of defendant G, which took an appeal from the summary judgment, and also by mandamus obtained a stay order to prevent plaintiff from making further alterations on the property pending the appeal. While the appeal was pending, plaintiff filed this action for abuse of process against S and G, alleging that their sole purpose in the administrative mandamus proceedings was not to protect the environment, but to obtain the payment of money. In this respect the complaint alleged that defendants had offered to dismiss the CEQA action in return for plaintiff's payment of money or conveyance of a designated lot to S. Defendant G moved for summary judgment, relying on the decision in *Asia Inv. Co. v. Borowski* (1982) 133 C.A.3d 832, 842, 184 C.R. 317; plaintiff relied on *Spellens v. Spellens* (1957) 49 C.2d 210, 230, 317 P.2d 613. The trial judge, noting the uncertainty engendered by these apparently conflicting decisions, granted summary judgment for defendant. *Held*, affirmed, but only because the allegations of the complaint were insufficient to state a cause of action for abuse of process; C.C. 47(2) did not preclude plaintiff "from making evidentiary use of defendants' statements during negotiations to prove the intent with which defendants' conduct was undertaken." (42 C.3d 1168.)

(a) In *Asia Inv. Co.*, *supra*, plaintiff developer sued defendant B to resolve a dispute over ownership of a house; and while this "house case" was pending, B filed an action alleging that the developer and governmental entity had failed to comply with CEQA requirements in connection with the entire development. B's counsel allegedly told the developer's counsel that the developer really ought to settle the house case because if B won the CEQA action it would "blow" the developer's whole subdivision. The court held that the lawyer's comment was essentially a settlement proposal, and therefore "a privileged statement" under former C.C. 47(2). (42 C.3d 1165, 1166.)

(b) *Asia Inv. Co.* and the other abuse of process cases are distinguishable. *Block v. Sacramento Clinical Labs* (1982) 131 C.A.3d 386, 182 C.R. 438, 5 Summary (9th), *Torts*, §505, points out that the privileges of C.C. 47 operate as limitations on liability, and are unlike evidentiary privileges, which function by exclusion of evidence. (42 C.3d 1168.)

"Accordingly, when allegations of misconduct properly put an individual's intent at issue in a civil action, statements made during the course of a judicial proceeding may be used for evidentiary purposes in determining whether the individual acted with the requisite intent." (42 C.3d 1168, citing *White v. Western Title Ins. Co.* (1985) 40 C.3d 870, 887, 221 C.R. 509, 710 P.2d 309, and *Spellens v. Spellens*, *supra*.) Hence, C.C. 47(2) did not preclude the introduction of the statement allegedly made in the present case. (42 C.3d 1168.)

Three justices, concurring in the judgment, nevertheless thought that *Asia Inv. Co.* was correct in holding that the statements made in the course of settlement negotiations were inadmissible under former C.C. 47(2).

**SUPPLEMENT:** [This section is current through the latest supplement]

*Cross-Reference:* 5 *Summary* (10th), *Torts*, §568.



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##### E. Offer To Settle or Compromise.

##### 4. Exceptions and Distinctions.

##### e. Miscellaneous Exceptions.

*1 Witkin Cal. Evid. Circum Evid § 148*

[§ 148] Miscellaneous Exceptions.

Some authorities suggest other distinctions; e.g., an offer to pay a lesser sum in settlement of an *undisputed* claim should be admissible (see 2 McCormick 5th, §266); an *accepted* offer should be admissible if the offeror later repudiates (see 2 McCormick 5th, §266; 26 A.L.R.2d 858); and an offer to pay money to prevent a criminal prosecution is an implied admission (see *People v. Moore* (1945) 70 C.A.2d 158, 162, 160 P.2d 857; 4 Wigmore (Chadbourn Rev.) §1061, p. 46).

In *Farrington v. A. Teichert & Son* (1943) 59 C.A.2d 468, 474, 139 P.2d 80, plaintiff sued defendant for conversion of gravel. Defendant proved that plaintiff agreed to let defendant continue removing material by paying its reasonable value, and that the value was not agreed upon. *Held*, this was admissible; it was not an objectionable offer to compromise, but was relevant to show defendant's liability only in quantum meruit and not for conversion.

In *Home Ins. Co. v. Superior Court* (1996) 46 C.A.4th 1286, 1293, 54 C.R.2d 292, 2 Cal. Evidence (4th), *Discovery*, §20, a breach of contract action by plaintiff insured against its insurers, defendant, an excess insurer that refused to settle, had the right to discover the amounts of settlements between plaintiff and its other insurers.

Another exception was recognized in *Conderback v. Standard Oil Co. of Calif.* (1966) 239 C.A.2d 664, 683, 48 C.R. 901: Settlement discussions are admissible on the issue whether there was an accord and satisfaction, with a limiting instruction on the purpose for which the evidence may be considered.

**SUPPLEMENT:** [This section is current through the latest supplement]

Evidence of either party's conduct in the prelitigation procedures established by C.C. 910 et seq. for construction defect actions (see 6 *Summary* (10th), *Torts*, §1162 et seq.) may be introduced in a subsequent enforcement action, with the exception of any mediation, and any repair efforts by the builder "shall not be considered settlement communications or offers of settlement and are not inadmissible in evidence on such a basis." (C.C. 934, added in 2002.)

See 2 McCormick 6th, §266.



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IV. EVIDENCE INVOLVING UNDUE PREJUDICE  
F. Offer To Discount Claim.

*1 Witkin Cal. Evid. Circum Evid § 149*

[§ 149] Offer To Discount Claim.

An offer by a *creditor* to *accept* a lesser amount than due on a claim is just as much an offer to compromise as an offer by the *debtor* to *pay* a lesser amount (*supra*, §140), and the same policy calls for exclusion of the offer. (See *Anderson v. Yousem* (1960) 177 C.A.2d 135, 144, 1 C.R. 889.) Accordingly, *Ev.C. 1154*, based on Uniform Rules of Evidence, Rule 53 (but adding the language on negotiations), provides: "Evidence that a person has accepted or offered or promised to accept a sum of *money or any other thing, act, or service* in satisfaction of a claim, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove the invalidity of the claim or any part of it."

**SUPPLEMENT:** [This section is current through the latest supplement]



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## G. Defendant's Settlement With Another Person.

## 1. General Rule.

*1 Witkin Cal. Evid. Circum Evid § 150*

[§ 150] General Rule.

In *Brown v. Pacific Elec. Ry. Co.* (1947) 79 C.A.2d 613, 180 P.2d 424, the rule excluding compromise offers or settlements (supra, §140) was applied to the similarly objectionable showing of settlement with a *different* person. Plaintiff was injured in an accident involving defendant railway's train and defendant C's automobile, and defendant C was also injured by defendant railway's train. The railway set up the affirmative defense of C's negligence as the proximate cause. At the trial, C's counsel asked him: "Did the Pacific Electric Railway make a settlement with you for the injuries you sustained?" Over objection of defendant railway, C was allowed to show that it had paid \$ 771.37 for damages to C's car. *Held*, this was reversible error. Plaintiff argued on appeal that the evidence did not come within the exclusionary provisions of former C.C.P. 2078 because (a) it was not an offer of compromise but a completed settlement, and (b) the transaction was not between plaintiff and the railway. The court held, however, that the statutory language was not the sole basis of exclusion, and that by the weight of authority the same rules of policy applied here. "Evidence of a compromise settlement by the defendant of a claim which originated in the very tort alleged by the plaintiff is inherently harmful in the trial of an action for personal injuries. ... Proof of the settlement made by the corporation ... contains no evidence of the admission of the corporation's negligence. It shows no more than the diligence of appellant to buy its peace with the party whose claim was modest and whose automobile had actually been struck by the train." (79 C.A.2d 615, 616.) (See 21 So. Cal. L. Rev. 414; *Citti v. Bava* (1928) 204 C. 136, 138, 266 P. 954 [personal injuries sustained by A and plaintiff; evidence that defendant settled with A was not admissible in plaintiff's action against defendant]; *Curtis v. McAuliffe* (1930) 106 C.A. 1, 8, 288 P. 675 [same]; 2 McCormick 5th, §266; 20 A.L.R.2d 304.)

A challenge of the rule was unsuccessfully attempted in *Price v. Atchison, Topeka & Santa Fe Ry. Co.* (1958) 164 C.A.2d 400, 330 P.2d 933. The distinguishing fact relied on was that the other settlement was made after 11 days of trial, by stipulation for judgment in favor of plaintiffs in the amounts of \$ 110,000 and \$ 15,000. The majority opinion held the evidence inadmissible on the authority of the *Brown* case. The dissenting justice thought the *Brown* decision was not controlling: "That case involved an extrajudicial, out-of-court compromise settlement of a modest claim. Here we have a solemn, formal, judicial stipulation of liability which necessarily included an admission of negligence. The Santa Fe did not agree to a judgment against it for \$ 125,000 merely to buy its peace." (164 C.A.2d 414.)

*Ev.C. 1152* (supra, §142) applies to an offer "to *another* who has sustained or claims to have sustained loss or damage." This language sufficiently covers the third-party settlement in the *Brown* case, supra. (See *Ins.C. 11582* [settlement of a claim by automobile liability insurer shall not be construed as an admission of liability by the insured or the insurer "with respect to any other claim arising from the same accident or event"].)



*Ev.C. 1152* bars the evidence only when it is offered to prove liability. Where the third person whose claim was settled by the defendant appears as a witness for the defendant, the payment may be inquired into on cross-examination to show bias or prejudice. (See 3 *Cal. Evidence (4th), Presentation at Trial*, §272.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 2 McCormick 6th, §266.



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##### G. Defendant's Settlement With Another Person.

##### 2. Distinction: Reduction of Judgment.

*1 Witkin Cal. Evid. Circum Evid § 151*

[§ 151] Distinction: Reduction of Judgment.

In *Albrecht v. Broughton* (1970) 6 C.A.3d 173, 85 C.R. 659, plaintiff unsuccessfully sought to exclude evidence that he had already received a \$ 75,000 settlement from one defendant. Plaintiff stated that the court could deduct the settlement amount from any verdict received, and argued that the jury might consider it unfair for a corporate defendant to be released for \$ 75,000 while an individual defendant was being sued for over a million dollars. *Held*, judgment reversed; the judge could have required a clear stipulation as to procedure or accepted plaintiff's admission of settlement and directed an appropriate reduction of amount before entering judgment. "There can be no question that it was a great advantage to the defense to be able to let the jury know that appellant's injuries were not wholly uncompensated. But that advantage is not one which a party is *entitled* to enjoy in the absence of any issue in the determination of which the evidence will be relevant and proper for the jury to hear. The situation is closely analogous to an admission of liability by a defendant. Such an admission precludes the introduction of evidence of liability unless it is relevant to some distinct issue remaining in the case." (6 C.A.3d 178.) (See *Shepard v. Walley* (1972) 28 C.A.3d 1079, 1082, 105 C.R. 387 [following *Albrecht*]; *Self v. General Motors Corp.* (1974) 42 C.A.3d 1, 13, 116 C.R. 575 ["where the fact of settlement is undisputed and the fact of liability is disputed, that information may confuse the jury and prejudice the cause of the remaining litigants, and its use is frowned upon"].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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##### H. Information Disclosed in Mediation Proceeding.

##### 1. Purpose and Nature of Protection.

*1 Witkin Cal. Evid. Circum Evid § 152*

[§ 152] Purpose and Nature of Protection.

(1) *Recommendation and Enactment.* The California Law Revision Commission made a study of the need for legislation to make mediation of disputes a more useful alternative to a court or jury trial. The Commission concluded that comprehensive legislation governing mediation would not be desirable. "Many different techniques of mediation are now in use or are being developed. Legislation might limit this experimentation and preclude the development of new or improved mediation techniques." (18 Cal. Law Rev. Com. Reports, Appendix III, pp. 245, 246.)

The Commission therefore recommended enactment of a narrow statute that would protect information disclosed in a mediation from later disclosure in a judicial proceeding, supplementing the similar protection in *Ev.C. 1152* (supra, §140) for offers to settle or compromise. (18 Cal. Law Rev. Com. Reports, p. 245.) The proposed statute, former *Ev.C. 1152.5*, was enacted in 1985. Former *Ev.C. 1152.5* was repealed in 1997 and replaced by *Ev.C. 1115* et seq., a more comprehensive statute. (On general rule of confidentiality, see *infra*, §153; on types of statements and agreements that may be disclosed, see *infra*, §155; on termination of mediation, see *infra*, §156; on nonstatutory protection under constitutional right of privacy, see *infra*, §158.)

(2) *Definitions.* The following definitions apply:

(a) *"Mediation."* Mediation is the "process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement." (*Ev.C. 1115(a)*; the Law Revision Commission Comment notes that a proceeding may be a "mediation" for purposes of the statute, even though it is denominated differently.)

(b) *"Mediator."* A mediator is a neutral person who conducts mediation, and includes any person designated by a mediator to assist in the mediation or communicate with the participants in preparation for it. (*Ev.C. 1115(b)*.)

(c) *"Mediation Consultation."* Mediation consultation is "a communication between a person and a mediator for the purpose of initiating, considering, or reconvening a mediation or retaining the mediator." (*Ev.C. 1115(c)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Recommendation and Enactment.* See 41 *Santa Clara L. Rev.* 1093 [proposing changes to mediation confidentiality legislation to ensure that finalized agreements can be enforced]; 26 *California Lawyer* 42 (September 2006) [controversies surrounding California's mediation confidentiality statutes].



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## CHAPTER IV - Circumstantial Evidence

## IV. EVIDENCE INVOLVING UNDUE PREJUDICE

## H. Information Disclosed in Mediation Proceeding.

## 2. Scope of Protection and Remedies for Violations.

1 *Witkin Cal. Evid. Circum Evid* § 153

[§ 153] Scope of Protection and Remedies for Violations.

(1) *General Rule of Confidentiality.* Except as otherwise allowed in *Ev.C. 1115 et seq.*, *no evidence of statements or admissions made* "for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given." (*Ev. C. 1119(a).*) Writings prepared for, or in the course of, mediation are subject to the same protection. (*Ev.C. 1119(b).*) "All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential." (*Ev.C. 1119(c).*) Neither the mediator nor anyone else may submit to a court or other adjudicative body, and the court or other body may not accept, a report or any other kind of finding concerning a mediation (except a report that is mandated by court rule or other law and that states only whether an agreement was reached), unless all parties to the mediation expressly agree in writing, or orally in accordance with *Ev.C. 1118* (*infra*, §156), to the disclosure. (*Ev.C. 1121.*) Statements and writings that qualify for protection while mediation is in progress continue to be protected even after the mediation ends. (*Ev.C. 1126*; on termination of mediation, see *infra*, §156.)

Despite this broad rule of confidentiality, evidence that is otherwise admissible or subject to discovery outside the mediation context does not become inadmissible or protected from disclosure simply because it is introduced or used in a mediation or consultation. (*Ev.C. 1120(a).*) Further, the statute does not limit (a) the admissibility of an agreement to mediate; (b) the effect of an agreement not to take a default or an agreement to extend the time within which to act or refrain from acting in a pending civil action; or (c) disclosure of the mere fact that a mediator has served, is serving, will serve, or was contacted about serving as a mediator. (*Ev.C. 1120(b).*)

(2) *Remedies for Violation of Confidentiality Rule.* If a person subpoenas or seeks to compel a mediator to testify or produce a writing, and the material sought is ultimately ruled to be inadmissible or protected from disclosure under *Ev.C. 1115 et seq.*, the mediator may be awarded reasonable attorneys' fees and costs against the person seeking disclosure. (*Ev.C. 1127.*) A reference to mediation during a subsequent civil trial is an irregularity within the meaning of the new trial statute (*C.C.P. 657*; see 8 *Cal. Proc.* (4th), *Attack on Judgment in Trial Court*, §25), and a reference to mediation in any other subsequent noncriminal proceeding is grounds for vacating or modifying the decision in the proceeding, and granting a new or further hearing, if the reference materially affected the substantial rights of the party requesting relief. (*Ev.C. 1128*; see Law Revision Commission Comment ["An appropriate situation for invoking this section is where a party urges the trier of fact to draw an adverse inference from an adversary's refusal to disclose mediation communications."].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *General Rule of Confidentiality*. See 35 U.C. Davis L. Rev. 33 [conflicts arising from goals of protecting confidentiality and enforcing mediated agreements].

In *Rojas v. Superior Court* (2004) 33 C.4th 407, 15 C.R.3d 643, 93 P.3d 260, tenants in an apartment complex sued the complex owner, alleging that defective construction had caused microbes to infest the complex, resulting in health problems for plaintiffs. The owner had previously sued a contractor concerning the same problems. That litigation had settled as a result of mediation. Plaintiffs requested, and eventually moved to compel production of discovery exchanged between the parties in the earlier litigation; physical evidence of the condition of the buildings in question, including photographs, samples, and reports; written notes of observations made during inspections and witness interviews; and writings evidencing experts' opinions and conclusions. The material requested was found undiscoverable, for the most part, because of the mediation privilege of *Ev.C. 1119(b)*. The Court of Appeal granted plaintiffs' request for writ relief. In determining what material was discoverable, the court applied principles associated with the work product privilege. Thus, it concluded that (a) raw test data, photographs, and witness statements were nonderivative materials that were not protected by the statute; (b) material reflecting only an attorney's impressions, conclusions, opinions, or legal research was absolutely protected; and (c) derivative materials such as amalgamations of factual information, and attorney thoughts, impressions, and conclusions, were discoverable only on a showing of good cause, which involved balancing the need for the materials and the purposes served by mediation confidentiality. *Held*, reversed.

(a) Under *Ev.C. 1119*, photographs and written witness statements are writings and are not subject to discovery if they were prepared for the purpose of, or in the course of, mediation. While physical objects--such as samples collected at the apartment complex--are not writings and thus are unprotected, recorded analyses of those samples qualify as writings and may not be discovered. (33 C.4th 416.) This interpretation does not render *Ev.C. 1120(a)* (text, p. 502) surplusage. That subdivision provides that evidence otherwise admissible or subject to discovery outside of mediation does not become protected simply because it is used or introduced in mediation. Read together, the two statutes establish that a party cannot secure protection for a writing, including a photograph, witness statement, or analysis of a test sample, that was not prepared for the purpose of mediation, simply by using or introducing it in the mediation. *Ev.C. 1120* prevents parties from using mediation as a pretext to shield materials from disclosure. (33 C.4th 417.)

(b) As to derivative materials, the statute embodying the work product privilege (*C.C.P. 2018*) contains a good cause exception. The Legislature placed several narrowly drawn exceptions to *Ev.C. 1119* in *Ev.C. 1122* et seq. (text, §155), but a good cause exception is not among them. There is no evidence of a legislative intent supporting the existence of an exception that the Legislature had the ability to include but did not. If courts begin to apply the good cause test to material otherwise subject to mediation confidentiality, parties will be less willing to mediate. (33 C.4th 424.) (See 53 U.C.L.A. L. Rev. 1549 [resolving questions left unanswered by *Rojas*].)

In *Doe 1 v. Superior Court* (2005) 132 C.A.4th 1160, 34 C.R.3d 248, the Roman Catholic Archbishop of Los Angeles was defendant in numerous lawsuits alleging that various priests had committed acts of childhood sexual molestation against plaintiffs. The Los Angeles Archdiocese offered to prepare written summaries of its personnel and other files concerning certain of the priests. Once prepared, the summaries, which the Archdiocese called "proffers," and the information from which they were derived, were turned over to the court. The Archdiocese also made clear its intention to release the proffers publicly. The priests moved for a protective order, raising both privacy and privilege issues, and also claiming that mediation confidentiality applied. The trial judge denied the motion. *Held*, reversed.

(a) The proffers were prepared for mediation and settlement purposes. The objective was to allow the Archdiocese, in some instances, to concede that it had notice of a priest's sexual proclivities before the alleged misconduct took place. Although some of the meetings for which the proffers were prepared were called "settlement conferences," it is clear that mediation was occurring. "If counsel wish to avoid the effect of the mediation confidentiality rules, they should make clear at the outset that something other than a mediation is intended." (132 C.A.4th 1166.)

(b) The exception of *Ev.C. 1122(a)(2)* (text, §155) is inapplicable. Under that provision, one party, in this case the Archdiocese, could consent to disclosure of the proffers, as long as the party did not disclose anything that was said or done or admitted in the course of the mediation. However, the proffers concede that the Archdiocese had notice as to certain of the priests, and this amounts to an admission. As to the other priests, the proffers, in effect, reveal the Archdiocese's mediation stance. (132 C.A.4th 1167, 1168.)

(c) The exception of *Ev.C. 1122(a)(1)* (text, §155) is likewise inapplicable. That provision requires the consent of all mediation participants, and the priests, who resist disclosure, appear to have had some representation during mediation. (132 C.A.4th 1169.)

(d) The argument that the refusal to release the proffers functions as a prior restraint of free speech rests on the premise that the information was obtained independently of the discovery process. *In re Marriage of Candiotti* (1995) 34 C.A.4th 718, 40 C.R.2d 299, held that materials obtained through discovery could be restrained but those obtained elsewhere could not be. Here the material was obtained by a process "not substantively different" from formal discovery. (132 C.A.4th 1172.) However, "nothing in our decision today limits the Archdiocese from releasing information contained in the underlying personnel or other files that it has maintained. Our holding deals with only the specific written proffers developed through mediation." (132 C.A.4th 1173.) (1a) (*New*) *No Exception to General Rule Where Sanctions Sought*. In *Foxgate Homeowners' Assn. v. Bramalea Calif.* (2001) 26 C.4th 1, 108 C.R.2d 642, 25 P.3d 1117, plaintiff homeowners association brought an action for construction defects against defendant developer. Plaintiff filed a motion for sanctions against defendant and its attorney for failing to participate in good faith in court-ordered mediation and to comply with an order of the mediator, and it attached to its motion the report of the mediator and a declaration by plaintiff's counsel reciting statements made during mediation. The trial judge granted the sanctions motion. The Court of Appeal reversed, concluding that a mediator may reveal material necessary to place sanctionable conduct in context, including communications made during mediation, but that, here, the mediator's report included more information than was necessary. *Held*, judgment of the Court of Appeal affirmed, but only because it reversed the trial judge's ruling. *Ev.C. 1119*, text, p. 501, and *Ev.C. 1121*, text, p. 502, unambiguously and unqualifiedly bar disclosure of communications made during mediation in the absence of an express statutory exception. "[W]e do not agree with the Court of Appeal that the court may fashion an exception for bad faith in mediation because failure to authorize reporting of such conduct during mediation may lead to 'an absurd result' or fail to carry out the legislative policy of encouraging mediation. The Legislature has decided that the policy of encouraging mediation by ensuring confidentiality is promoted by avoiding the threat that frank expression of viewpoints by the parties during mediation may subject a participant to a motion for imposition of sanctions by another party or the mediator who might assert that those views constitute a bad faith failure to participate in mediation. Therefore, even were the court free to ignore the plain language of the confidentiality statutes, there is no justification for doing so here." (26 C.4th 17.) If, on remand, plaintiff wishes to pursue the sanctions motion, the trial judge may consider only plaintiff's assertion and evidence offered in support of the assertion that defendant engaged in conduct warranting sanctions. "No evidence of communications made during the mediation may be admitted or considered." (26 C.4th 18.)

(1b) (*New*) *No Implied Waiver*. In *Eisendrath v. Superior Court* (2003) 109 C.A.4th 351, 134 C.R.2d 716, plaintiff former husband filed a motion to correct a spousal support agreement that had been reached through mediation. In opposing the motion, defendant former wife sought to depose the mediator. Plaintiff then requested a protective order to bar discovery and evidence regarding mediation communications, except for certain conversations between the parties that formed the basis of plaintiff's motion to correct the support agreement. Finding that plaintiff had impliedly waived his confidentiality rights, the trial judge denied the protective order and decided to hold an in camera hearing on the mediator's potential testimony to determine whether it should be admitted. *Held*, the order was improper in both respects.

(a) *Ev.C. 1122* specifies the means by which mediation confidentiality may be expressly waived. The implied waiver provisions on which the trial judge relied (*Ev.C. 910* et seq.) are applicable only to the privileges to which they explicitly refer, and mediation confidentiality is not among them. Nothing in *Ev.C. 910* et seq. evidences any legislative intent to extend the principles of implied waiver to mediation confidentiality. (109 C.A.4th 362, 363.)

(b) A finding that plaintiff did not impliedly waive his confidentiality rights does not give him an unfair advantage. His attack on the support agreement rests largely on evidence of his conversations with defendant, but these conversations too come within the ambit of mediation confidentiality. Although the conversations were held outside the presence of the mediator, the confidentiality rule established by *Ev.C. 1119* "encompasses communications by participants before the end of mediation that are materially related to the purpose of the mediation, regardless of whether these communications are made in the mediator's presence." (109 C.A.4th 364.) Thus, evidence of the conversations is inadmissible absent suitable express waivers from both parties. This conclusion gives defendant a substantial measure of control over plaintiff's ability to present evidence supporting his motion, but "this result does not disturb our interpretation of the statutory scheme in question. ... [W]e assume that the Legislature considered these limitations on the presentation of evidence when it enacted the statutory scheme." (109 C.A.4th 365.)

(c) Under *Ev.C. 703.5*, the mediator himself is incompetent to testify, and thus it was error to order an in camera hearing to determine whether his testimony should be allowed. The two cases approving an in camera hearing for this purpose involved issues different from those present here. (109 C.A.4th 366, citing *Rinaker v. Superior Court* (1998) 62 C.A.4th 155, 74 C.R.2d 464, text, §154, and a federal case relying on *Rinaker*.) (See *In re Marriage of Kieturakis* (2006) 138 C.A.4th 56, 78, 93, 41 C.R.3d 119, 11 Summary (10th), *Community Property*, Supp., §243 [discussing same federal case at length, casting doubt on portion of its holding creating nonstatutory exception to confidentiality, but determining that any error in trial judge's reliance on that case was harmless].)

(1c) (*New*) *No Exception To Show Perjury or Inconsistent Statements*. In *Wimsatt v. Superior Court* (2007) 152 C.A.4th 137, 61 C.R.3d 200, a legal malpractice action arising from defendants' representation of plaintiff in a personal injury case, the trial judge denied defendants' motion for a protective order as to briefs and e-mails relating to mediation of the personal injury case, and as to a communication by defendant attorney to the personal injury defendants in which plaintiff's settlement demand was purportedly lowered. *Held*, writ of mandate issued; the briefs and e-mails were protected by the mediation confidentiality statutes, although the communication concerning the settlement demand was not.

(a) The mediation briefs were exactly the type of writing that the statutes were designed to protect from disclosure. (152 C.A.4th 158.) The e-mails quoted from the briefs, and mediation participants cannot be allowed to evade the protection of the statutes by transmitting otherwise confidential material by electronic means. (152 C.A.4th 159.) However, defendants did not carry their burden of showing that the settlement communication was "anything other than expected negotiation posturing that occurs in most civil litigation. ... All conversations between the parties are not protected by mediation confidentiality simply because the conversations might have occurred temporally before a scheduled mediation." (152 C.A.4th 160, 161.)

(b) The trial judge's ruling stemmed from plaintiff's argument that defendant attorney's deposition testimony was perjurious because it was inconsistent with other statements made by him. The judge believed he could create an exception to mediation confidentiality that would thwart attempts to shield perjury and inconsistent statements. The Supreme Court, however, has clearly and unequivocally stated that the courts may not craft exceptions to mediation confidentiality, and this precedent must be followed. (152 C.A.4th 163, citing *Foxgate*, *supra*.)

(c) "The stringent result we reach here means that when clients ... participate in mediation they are, in effect, relinquishing all claims for new and independent torts arising from mediation, including legal malpractice causes of action against their own counsel. Certainly clients, who have a fiduciary relationship with their lawyers, do not understand that this result is a by-product of an agreement to mediate. We believe that the purpose of mediation is not enhanced by such a result because wrongs will go unpunished and the administration of justice is not served." (152 C.A.4th 163.) "Given the number of cases in which the fair and equitable administration of justice has been thwarted, perhaps it is time for the Legislature to reconsider California's broad and expansive mediation confidentiality statutes and to craft ones that would permit countervailing public policies be considered." (152 C.A.4th 164.) Further, in light of the harsh and inequitable results that may occur, the parties and their attorneys should be warned of the unintended consequences of agreeing to mediate a dispute. If they do not intend to be bound by the confidentiality statutes, they

should make it clear at the outset that something other than a mediation is intended. (152 C.A.4th 164, citing *Doe 1*, *supra*.)





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##### 3. Proceedings Covered.

##### *1 Witkin Cal. Evid. Circum Evid § 154*

[§ 154] Proceedings Covered.

(1) *In General.* *Ev.C. 1115* et seq. apply to a mediation as defined in *Ev.C. 1115(a)* (supra, §152), but do not apply to family law conciliation proceedings under *Family C. 1800* et seq., custody and visitation mediation under *Family C. 3160* et seq., or a settlement conference under C.R.C., Rule 222 (see 7 *Cal. Proc. (4th), Trial*, §60). (*Ev.C. 1117*.) With respect to the investigation and mediation of labor disputes (see 2 *Summary (9th), Agency and Employment*, §298), *Ev.C. 1115* et seq. are applicable to a mediation conducted by the California State Mediation and Conciliation Service and any person conducting the mediation. (*Lab.C. 65*.)

(2) *Delinquency Proceedings.* In *Rinaker v. Superior Court (1998) 62 C.A.4th 155, 74 C.R.2d 464*, a juvenile delinquency proceeding arising from an incident in which two minors allegedly threw rocks at a car, the minors moved to compel a mediator to testify concerning statements made by the car's owner during a confidential mediation of a civil harassment action arising out of the same incident. In the statements, the car owner allegedly admitted that he had not actually seen the persons who threw the rocks. The trial judge granted the motion, rejecting the mediator's argument that the statements were protected from disclosure by *Ev.C. 1119* (supra, §153). *Held*, it was error to grant the motion without weighing the competing interests involved.

(a) The statute prohibits disclosure in a "civil action," and juvenile delinquency proceedings are civil in nature, not criminal. (*62 C.A.4th 164*.)

(b) Nevertheless, due process of law entitles juveniles to certain fundamental protections in proceedings that may result in confinement or other sanctions, whether the proceedings are labelled "criminal" or "civil." A juvenile delinquency proceeding falls into this category. Thus, due process may force the public policy served by the confidentiality provisions to yield when necessary to protect a juvenile's constitutional right to effective cross-examination and impeachment of an adverse witness. (*62 C.A.4th 167*.)

(c) Under the circumstances, the constitutional right of privacy is not an obstacle to disclosure. To be entitled to constitutional protection, a privacy interest must be based on a "reasonable expectation of privacy." However, it has long been established that, when balanced against the competing goals of preventing perjury and preserving the integrity of the truth-seeking process of trial in a juvenile delinquency proceeding, the interest in promoting settlements (in this case through confidential mediation) must yield to the constitutional right of effective impeachment. Thus, neither the car owner nor the mediator could have had a reasonable expectation that any statements made by the car owner during confidential mediation concerning the rock-throwing incident would remain private if (1) they were inconsistent with other statements he made, and (2) he were called as a witness to testify against the minors in a

delinquency proceeding. (62 C.A.4th 167, 168.)

(d) The minors did not waive their right to compel the car owner's testimony by agreeing to maintain the confidentiality of the mediation proceedings. "The party claiming that a fundamental right has been waived has the burden to prove the waiver by clear and convincing evidence which does not leave the matter to speculation; doubtful cases will be decided against waiver. ... Without knowing that Torres would make inconsistent statements during mediation concerning their alleged involvement in the rock-throwing incident, the minors had no knowledge of facts giving rise to their constitutional right to effective impeachment during the subsequent juvenile delinquency proceeding." (62 C.A.4th 168, 169.) Thus, they could not have knowingly and intelligently chosen to waive their right to use any such statements. (62 C.A.4th 169.)

(e) Although the minors' due process rights *may* require disclosure in this case, the trial judge "should have conducted an in camera hearing to weigh the public's interest in maintaining the confidentiality of mediation against the minors' constitutionally based claim of need for the testimony, and to determine whether the minors have established that the mediator's testimony is necessary to vindicate their right of confrontation. ... [R]equiring an in camera hearing maintains the confidentiality of the mediation process while the juvenile court considers factors bearing upon whether the minors' constitutional right of effective impeachment compels breach of the confidential mediation process." (62 C.A.4th 161.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General.* C.R.C., Rule 222 was renumbered C.R.C., Rule 3.1380 in 2006, and *Ev.C. 1117* was amended in 2007 to reflect that change.

See *Saeta v. Superior Court* (2004) 117 C.A.4th 261, 271, 11 C.R.3d 610 [in wrongful termination action, *Ev.C. 1119* did not prevent trial judge from requiring testimony of retired judge who had acted as member of termination review board that reviewed plaintiff's termination after she exercised hearing right under employment contract; review proceeding was not mediation within meaning of *Ev.C. 1115(a)*].

*Cross-Reference:* 3 Summary (10th), *Agency and Employment*, §323.



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##### 4. Exceptions and Distinctions.

##### *1 Witkin Cal. Evid. Circum Evid § 155*

[§ 155] Exceptions and Distinctions.

(1) *Disclosure of Communication or Writing.* Under *Ev.C. 1122*, a communication or writing made or prepared in the mediation context may be disclosed if either of the following conditions is satisfied:

(a) All persons who conducted or participated in the mediation expressly agree to the disclosure in writing, or orally under *Ev.C. 1118* (see *infra*, §156). The Law Revision Commission Comment notes that the agreement must be express, not implied. "For example, parties cannot be deemed to have agreed in advance to disclosure merely because they agreed to participate in a particular dispute resolution program."

(b) The communication, document, or writing was prepared by or on behalf of fewer than all the participants, those participants expressly agree to the disclosure in writing, or orally under *Ev.C. 1118*, to the disclosure, and the communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation.

(2) *Disclosure of Written Settlement Agreement.* Under *Ev.C. 1123*, a written settlement agreement prepared in the mediation context may be disclosed if it is signed by the settling parties and, additionally, one of the following conditions is satisfied:

(a) The agreement states that it is admissible or subject to disclosure.

(b) The agreement provides that it is enforceable or binding.

(c) All parties to the agreement expressly agree to the disclosure in writing, or orally under *Ev.C. 1118* (*infra*, §156).

(d) The agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

(3) *Disclosure of Oral Agreement.* Under *Ev.C. 1124*, an oral agreement made in the mediation context may be disclosed if any of the following conditions is satisfied:

(a) The agreement is "in accordance with Section 1118." (See *infra*, §156.)

(b) The agreement fulfills the requirements of *Ev.C. 1118*, except for the requirement that the parties state that the agreement is enforceable or binding, and all parties expressly agree to the disclosure in writing or orally under *Ev.C.*

1118.

(c) The agreement fulfills the requirements of *Ev.C. 1118*, except for the requirement that the parties state that the agreement is enforceable or binding, and the agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

The Law Revision Commission Comment notes that, except for the disclosures it specifically allows, *Ev.C. 1124* was intended to codify the approach of *Ryan v. Garcia* (1994) 27 C.A.4th 1006, 33 C.R.2d 158, which found oral statements regarding settlement inadmissible, and to reject the contrary approach of *Regents of Univ. of Calif. v. Sumner* (1996) 42 C.A.4th 1209, 50 C.R.2d 200.

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Disclosure of Written Settlement Agreement.* In *Stewart v. Preston Pipeline* (2005) 134 C.A.4th 1565, 36 C.R.3d 901, an action arising from a traffic accident, the parties engaged in mediation, and at the end of the process a settlement agreement was signed by plaintiff, plaintiff's attorney, and defendants' attorney. The agreement recited that the parties intended the settlement to be enforceable and exempt from certain confidentiality provisions of the Evidence Code. Plaintiff refused to accept the settlement check, defendants brought motions to enforce the settlement and for summary judgment, and the trial judge entered judgment in defendants' favor. *Held*, affirmed.

(a) The settlement agreement was admissible, notwithstanding the general rule of mediation confidentiality (*Ev.C. 1119*), because it met at least two of the statutory exceptions: (1) the agreement provided that it was admissible or used "words to that effect" (*Ev.C. 1123(a)*), and (2) by stating that it was a full and final settlement of claims and that the parties intended it to be enforceable under *C.C.P. 664.6*, the agreement provided that it was enforceable or binding (*Ev.C. 1123(b)*). (134 C.A.4th 1577, 1578.)

(b) In arguing that the waiver of confidentiality contained in the agreement was invalid because it was not signed personally by both parties, plaintiff relied on *Levy v. Superior Court* (1995) 10 C.4th 578, 41 C.R.2d 878, 896 P.2d 171, 6 Cal. Proc. (4th), *Proceedings Without Trial*, §97, but *Levy* is distinguishable for three reasons. First, it was decided under *C.C.P. 664.6*, not under the mediation statutes. Second, in *Levy*, it was the nonsignatory party who challenged his attorney's authority to sign the stipulation for an out-of-court settlement; here, neither defendants nor their insurer challenges defense counsel's authority to sign. Third, in *Levy*, the client's right affected by his attorney's stipulation (settlement of a dispute) was substantial; by contrast, a stipulation waiving mediation confidentiality must be deemed one that does not impact the substantial rights of the party. "To hold otherwise would exalt form over substance and would allow mediation confidentiality to nullify otherwise valid settlements agreed upon through mediation." (134 C.A.4th 1583.)

(c) Plaintiff also relied on *Levy* to argue that even if the settlement agreement can be admitted, it is unenforceable. However, *Levy* merely found that lack of the plaintiff's personal signature prevented enforcement under *C.C.P. 664.6*. Here, the trial judge properly determined that the agreement did not meet the requirements of *C.C.P. 664.6*, but additionally found that the agreement could be considered in connection with defendants' alternative motion for summary judgment. (134 C.A.4th 1585.) As there was no triable issue of material fact concerning either mutual consent or plaintiff's entitlement to rescind, summary judgment for defendants was proper. (134 C.A.4th 1589.)

In *Fair v. Bakhtiari* (2006) 40 C.4th 189, 51 C.R.3d 871, 147 P.3d 653, plaintiff brought an action alleging that defendants wrongfully excluded him from real estate syndications, denied him compensation, misappropriated profits, and that one of the defendants physically assaulted him. The parties engaged in mediation, producing a handwritten memorandum, signed by the mediator and the parties, that included an arbitration clause ("Any and all disputes subject to JAMS ... arbitration rules"). The parties informed the court that they had settled, but when they were unable to finalize the settlement, plaintiff demanded arbitration under the clause in the mediation memorandum. Defendants resisted, and the trial judge denied plaintiff's motion to compel arbitration, finding that the memorandum could not be admitted under *Ev.C. 1123(b)*, and that without it there was insufficient demonstration of an agreement to arbitrate. The

Court of Appeal reversed, finding that the arbitration clause in the memorandum satisfied the admissibility requirements of *Ev.C. 1123(b)*. *Held*, judgment of the Court of Appeal reversed. To satisfy *Ev.C. 1123(b)*, "a settlement agreement must include a statement that it is 'enforceable' or 'binding,' or a declaration in other terms with the same meaning. The statute leaves room for various formulations. However, arbitration clauses, forum selection clauses, choice of law provisions, terms contemplating remedies for breach, and similar commonly employed enforcement provisions typically negotiated in settlement discussions do not qualify an agreement for admission" under the statute. (40 C.4th 199, 200.) Defendants' postmediation conduct, as characterized by plaintiff, may well be consistent with a belief on their part that an enforceable settlement was intended, but "we do not believe the Legislature contemplated that in order to rule on the admissibility of a settlement agreement under section 1123(b), the court would examine extrinsic evidence to resolve competing claims over the parties' intent. ... [T]he statute is designed to produce documents that clearly reflect the parties' agreement that the settlement terms are 'enforceable or binding.' " (40 C.4th 198.)



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##### 5. Termination of Mediation.

##### *1 Witkin Cal. Evid. Circum Evid § 156*

[§ 156] Termination of Mediation.

Under *Ev.C. 1125(a)*, any one of the following events terminates a mediation:

- (1) The parties execute a written settlement agreement fully resolving the dispute.
- (2) The parties reach an oral agreement "in accordance with Section 1118" that fully resolves the dispute. *Ev.C. 1118* requires the agreement to have been recorded by a court reporter or by a reliable means of sound recording; the record must state the agreement's terms, that all parties agree to them, and that the agreement is enforceable or binding; and the recording must be reduced to a writing and signed within 72 hours after the recording.
- (3) The mediator gives the participants a signed writing stating that the mediation is terminated.
- (4) A party gives the mediator and other participants a written statement that the mediation is terminated. If more than two parties were involved, the remaining participants may continue to mediate, or the mediation may be terminated by one of the other events specified in *Ev.C. 1125*.
- (5) For 10 calendar days, there is no communication between the mediator and any of the parties regarding the dispute. The 10-day period may be shortened or extended by agreement.

In the case of mediation that partially resolves a dispute, mediation ends either when the parties execute a written settlement agreement partially resolving the dispute, or when they reach an oral agreement "in accordance with Section 1118" partially resolving the dispute. (*Ev.C. 1125(b)*.)

*Ev.C. 1125* does not preclude a party from ending a mediation without reaching an agreement, and it does not otherwise affect a party's power to terminate the mediation. (*Ev.C. 1125(c)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### IV. EVIDENCE INVOLVING UNDUE PREJUDICE

##### H. Information Disclosed in Mediation Proceeding.

##### 6. No Disqualification of Mediation Attorney From Related Case.

##### *1 Witkin Cal. Evid. Circum Evid § 157*

[§ 157] No Disqualification of Mediation Attorney From Related Case.

In *Barajas v. Oren Realty & Dev. Co.* (1997) 57 C.A.4th 209, 67 C.R.2d 62, after an attorney represented a bank in successful mediation of its claim against the builder of an apartment house damaged in an earthquake, he participated as cocounsel for tenants of the apartment house in their action against the same builder. The trial judge disqualified him, reasoning that the confidentiality concerns of former Ev.C. 1152.5 (see supra, §152) mandated that an attorney who represents a plaintiff in a mediation be disqualified from representing a different plaintiff in a related case against the same defendant. *Held*, disqualification order reversed.

(a) The trial judge concluded that disqualification was statutorily mandated in order to encourage mediation. It is true that this interpretation of the statute might encourage defendants to be forthcoming during mediation, but it would also discourage plaintiffs from agreeing to mediate in the first place. The net effect would probably be to inhibit agreements to mediate, because both sides must agree. (57 C.A.4th 213.)

(b) Mediation would be even more strongly discouraged if the disqualification rule were applied to the *same* case once mediation proved unsuccessful, because attorneys representing a party in mediation ordinarily continue to handle the case through trial and beyond. Yet the logic underlying a disqualification requirement in related cases would apply with even greater force to the same case, because an attorney participating in the unsuccessful mediation has information relating to the very case being litigated. (57 C.A.4th 215.)

(c) The statute itself does not explicitly impose the trial judge's disqualification rule. "If the Legislature had intended an interpretation so in conflict with the goal of encouraging voluntary mediation, but nevertheless deemed it necessary (as the trial court theorized) to promote candor once mediation was chosen, there would likely be some indication of such conflicting intents in the language or history of the statute. Nowhere is there any indication that the Legislature ever contemplated such an interpretation." (57 C.A.4th 218.)

(d) Finally, the trial judge's interpretation would represent a significant change from preexisting mediation practice. At the time the statute was enacted, it was common practice for a mediator to obtain permission before disclosing confidential information to the opposing party. Thus, a party could restrict the disclosure of confidential information either by not making the disclosure itself, or by not authorizing the mediator to do so. Further, it was common practice for the same counsel who represented a party in unsuccessful mediation to continue the representation when the case went to trial. It is unlikely the Legislature would have replaced these practices with a new mediation-disqualification rule without expressly so stating. "An attorney may therefore participate in mediation without exposing himself or herself to disqualification in other cases." (57 C.A.4th 218, 219.)

**SUPPLEMENT:** [This section is current through the latest supplement]





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## H. Information Disclosed in Mediation Proceeding.

## 7. Nonstatutory Protection.

*1 Witkin Cal. Evid. Circum Evid § 158*

## [§ 158] Nonstatutory Protection.

In *Garstang v. Superior Court* (1995) 39 C.A.4th 526, 46 C.R.2d 84, plaintiff, a university employee, brought an action for slander and intentional infliction of emotional distress based on rumors circulating in her workplace that she had been promoted in exchange for sexual favors. In depositions, plaintiff questioned three university employees about university ombudsman sessions that had been conducted concerning the rumors. The employees refused to answer the questions on the ground that statements made before an ombudsman are privileged. The trial judge denied plaintiff's motion to compel further responses. *Held*, writ relief denied; the ruling was proper.

(a) Even assuming that a university ombudsman session constitutes a mediation, the mediation privilege of former Ev.C. 1152.5 is inapplicable here because none of the parties participating in the sessions executed the writing then required by former Ev.C. 1152.5(c). (39 C.A.4th 531, 532.)

(b) Although the deponents can claim no statutory privilege, the right of privacy set forth in Cal. Const., Art. I, §1 (see 7 *Summary* (9th), *Constitutional Law*, §454) affords them a qualified protection that may be abridged only when there is a compelling and opposing state interest. One compelling interest of this type is the need to ascertain the truth in connection with legal claims. (39 C.A.4th 532.)

(c) If plaintiff is denied an opportunity to depose the employees as to what was said in the ombudsman sessions, her ability to ascertain the truth in connection with her lawsuit may be impaired. "We are of the opinion, however, that a proper balancing of the competing values would here necessarily weigh in favor of the right of privacy of those individuals participating in the ombudsman sessions since the communications related to the private affairs of various Caltech employees, and were maintained in confidence by the institution." (39 C.A.4th 533, 534.) The employees participated in the sessions believing that their communications would not be disclosed. Confidentiality is essential to maintenance of the relationship between the ombudsman's office and the university's employees and management, and that relationship is worthy of societal support. The harm caused by the disruption of this confidential relationship--loss of the effectiveness of a program that resolves many problems informally and more quickly than other more formal procedures--would be greater than any benefit accruing to plaintiff by disclosure. (39 C.A.4th 535.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*Cross-Reference:* 7 *Summary* (10th), *Constitutional Law*, §575.



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##### I. Other Claims or Litigation by Plaintiff.

##### *1 Witkin Cal. Evid. Circum Evid § 159*

[§ 159] Other Claims or Litigation by Plaintiff.

Evidence of repeated claims or lawsuits by the plaintiff might be relevant as showing the plaintiff's tendency to seek extravagant or unwarranted compensation and therefore as casting doubt on the legitimacy of the claim in litigation. But it involves the danger of both undue prejudice and time-wasting confusion of issues, and is accordingly held inadmissible. (See *Lowenthal v. Mortimer* (1954) 125 C.A.2d 636, 643, 270 P.2d 942; *Coleman v. Southern Pac. Co.* (1956) 141 C.A.2d 121, 133, 296 P.2d 386; 1 McCormick 5th, §196; 3A Wigmore (Chadbourn Rev.) §963; 69 A.L.R.2d 593 [cross-examination of personal injury plaintiff as to previous injuries, claims, or actions].)

In *Lowenthal v. Mortimer*, an automobile accident case, plaintiffs sought damages for emotional distress. Defendant's counsel, cross-examining plaintiff, inquired about 15 lawsuits involving herself and her husband within a period of 9 years prior to the suit. Substantially all were commercial suits (they operated a cafeteria and delicatessen). Defendant's theory was that this evidence would tend to show a reason for their irritability not attributable to the accident. *Held*, admission of this evidence was reversible error. Evidence of previous accidents is inadmissible on the issue of the driver's negligence on the occasion in question, and wholly unrelated commercial litigation is irrelevant and equally improper. It could have no other effect than to prejudice the jury against plaintiffs, for litigiousness in the eyes of most people reflects more upon character than upon impairment of health. The court commented on the danger of such cross-examination as follows:

(a) "Illustrative of collateral issues that might be raised if the 15 other lawsuits could properly be introduced is an exposition to a lay jury of the nature of plaintiffs' business operations and the lease problems, collection difficulties, and contract interpretations of a commercial enterprise that result in litigation. To negative any inference of unreasonable contentiousness, plaintiffs would be entitled to attempt an adequate explanation." (125 C.A.2d 643.)

(b) "If we were to hold that a businessman is to be penalized in a personal injury case because of precedent commercial litigation, we would be jeopardizing the rights of a trial lawyer who may be injured in an accident, or a physician who may have sued to collect on accounts, or insurance company and title company and collection agency representatives and numerous others who are frequently subjected to the vagaries of legal proceedings." (125 C.A.2d 643.)

(c) "Then, too, were other lawsuits allowed in evidence to show a reason for irritability, we would be flinging the gates wide open to discussion of the 1,001 other environmental aggravations that contribute to human nervousness in this modern complex society. That may come about in our jurisprudence some day, but when it does, trials will be interminable." (125 C.A.2d 643.)

This rule does not apply, however, where the evidence of a prior claim or suit has a relevant purpose in the case on trial. Thus, in *Brown v. Affonso* (1960) 185 C.A.2d 235, 238, 8 C.R. 156, plaintiff sued for damages for head injuries received in 1957. Defendant, cross-examining her doctor, asked about his reports and testimony relating to prior accidents in 1954 and 1956, seeking to show that the injuries claimed in the present case were identical to those claimed in the previous cases. *Held*, the questions were proper, for the evidence was relevant on this issue. (See 69 A.L.R.2d 593, 609.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 1 McCormick 6th, §196.



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## IV. EVIDENCE INVOLVING UNDUE PREJUDICE

## J. Compensation to Plaintiff From Collateral Source.

## 1. General Rule.

*1 Witkin Cal. Evid. Circum Evid § 160*

[§ 160] General Rule.

(1) *Evidence Inadmissible.* If a plaintiff, after satisfaction of a judgment for substantial damages against one joint or concurrent tortfeasor, seeks additional recovery from another, the rule against double recovery allows proof of the first recovery in mitigation of damages. (See 6 *Summary (9th), Torts, §1322.*) And the same is true where the defendant or the defendant's insurer pays the plaintiff's medical expenses. This amount is deducted from the recovery. (See *Dodds v. Bucknum (1963) 214 C.A.2d 206, 213, 29 C.R. 393, 6 Summary (9th), Torts, §1386.*) But where the benefits are received by the plaintiff from third persons, e.g., the plaintiff's own disability insurer or employer, or a public agency making pension payments, the "collateral source rule" applies and no deduction is made. (See 6 *Summary (9th), Torts, §1388 et seq.*)

Accordingly, in the joint or concurrent tortfeasor cases, evidence of a prior recovery or settlement is admissible. (*Steele v. Hash (1963) 212 C.A.2d 1, 3, 27 C.R. 853.*) But in a collateral source case, evidence of the benefits received is not admissible. (See *Savoia v. Moorehead (1948) 83 C.A.2d 147, 152, 188 P.2d 260; Morse v. Southern Pac. Trans. Co. (1976) 63 C.A.3d 128, 133, 135, 133 C.R. 577; Philip Chang & Sons Associates v. La Casa Novato (1986) 177 C.A.3d 159, 165, 173, 222 C.R. 800; Eichel v. New York Cen. R. Co. (1963) 375 U.S. 253, 84 S.Ct. 316, 317, 11 L.Ed.2d 307, 309 [disability pension payments]; 69 A.L.R.4th 131 [workers' compensation benefits].)*

In California, there is no specific statutory exclusion of this evidence. "Nevertheless, a pervasive public policy has been judicially expressed and California remains a firm proponent of the 'collateral source rule.' This doctrine provides that if an injured party received some compensation for his injuries from a source wholly independent of the tortfeasor, such payment should not be deducted from the damages which the plaintiff would otherwise collect from the tortfeasor." (*Hrnjak v. Graymar (1971) 4 C.3d 725, 729, 94 C.R. 623, 484 P.2d 599.*) (For the express statutory exception in the Medical Injury Compensation Reform Act, C.C. 3333.1, see 6 *Summary (9th), Torts, §787.*)

(2) *Distinction: Evidence Admissible To Explain Insurer's Refusal To Pay Benefits.* An insurer is subject to liability in tort if it unreasonably and in bad faith withholds payment of its insured's claim. There is no tort, however, if the insurer refuses to pay policy benefits with proper cause. Notwithstanding the collateral source rule, therefore, an insurer may present evidence of other insurance in order to establish that it was justified in not paying policy benefits. (*Kardly v. State Farm Mut. Auto. Ins. Co. (1995) 31 C.A.4th 1746, 1752, 37 C.R.2d 612* [in action against insurer for bad faith refusal to settle, trial judge erred in excluding evidence that plaintiffs had other insurance, where evidence was offered to show that defendant's refusal to pay was proper in that plaintiffs allegedly decided to pursue claim only against other insurer].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Evidence Inadmissible*. See *Lund v. San Joaquin Valley R.* (2003) 31 C.4th 1, 11, 1 C.R.3d 412, 71 P.3d 770

[collateral source rule applies where plaintiff seeks to introduce evidence that benefits from collateral source are not available; thus, except in unusual circumstances, jury in action under Federal Employers Liability Act (2 *Summary* (10th), *Workers' Compensation*, §118) should not be told of injured employee's ineligibility for workers' compensation benefits].

*Rule against double recovery:*

*Cross-Reference:* 6 *Summary* (10th), *Torts*, §1550.

*Dodds v. Bucknum:*

*Cross-Reference:* 6 *Summary* (10th), *Torts*, §1629.

*Collateral source rule:*

*Cross-Reference:* 6 *Summary* (10th), *Torts*, §1631 et seq.

*Express statutory exception:*

*Cross-Reference:* 6 *Summary* (10th), *Torts*, §956. *West's Key Number Digest*, Damages k.59



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## IV. EVIDENCE INVOLVING UNDUE PREJUDICE

## J. Compensation to Plaintiff From Collateral Source.

## 2. Attempts To Circumvent Rule.

1 *Witkin Cal. Evid. Circum Evid* § 161

[§ 161] Attempts To Circumvent Rule.

*Eichel v. New York Cen. R. Co.* (1963) 375 U.S. 253, 84 S.Ct. 316, 11 L.Ed.2d 307, was an unsuccessful attempt to circumvent the rule by invoking the limited admissibility doctrine (supra, §30). Defendant contended that evidence of disability pension payments to an injured railroad worker was admissible on the issue of the extent and duration of his disability, as indicative of a motive for not going back to work (i.e., malingering). *Held*, "the likelihood of misuse by the jury clearly outweighs the value of this evidence." (84 S.Ct. 317, 11 L.Ed.2d 309.)

In *Legg v. United Benefit Life Ins. Co.* (1951) 103 C.A.2d 228, 229, 229 P.2d 454, plaintiff, injured in a streetcar accident, sued on a health and accident policy, seeking \$ 100 per month for total disability. Defendant contested the nature and extent of her injuries, and over objection asked whether she had settled with the transit company and for how much (\$ 1,000). *Held*, the question was obviously prejudicial in suggesting to the jury that she was trying to collect twice for the same accident, and that, if there had been a disability, it must have ended at the time of the settlement. Nor was the evidence admissible for any legitimate purpose. It was not proper impeachment, for she had not denied any settlement; the answer sought and obtained was not an admission, because it did not admit or acknowledge any material fact. The issue against the transit company would have been *liability* as well as injuries; hence, the fact of settlement or the amount received would not tend to prove the extent of her injuries, the sole issue in this case.

In *Hrnjak v. Graymar* (1971) 4 C.3d 725, 729, 94 C.R. 623, 484 P.2d 599, supra, §160, the trial judge "apparently assumed" that defendants were entitled to prove receipt of collateral insurance benefits on the issue of plaintiff's motive to malingering. (4 C.3d 732.) *Held*, this failure to weigh the probative value and prejudicial impact was error. "[T]he court must examine all the relevant facts in the case, e.g., the amount of plaintiff's out-of-pocket medical expenses, his past and future earning capacity, the seriousness of his injuries and their prognosis, the length of his absence from work, etc., and then be satisfied that the evidence of collateral source receipts establishes a strong inference that plaintiff was motivated by the insurance receipts rather than by the actual disabling extent of his injuries. If defendants fail to make an adequate showing, the prejudicial impact of the collateral source evidence will render it inadmissible under *Evidence Code* section 352. Such determination should be made outside the presence of the jury." (4 C.3d 733.) (See *Helfend v. Southern Calif. Rapid Transit Dist.* (1970) 2 C.3d 1, 17, 84 C.R. 173, 465 P.2d 61 [judge properly refused to allow evidence where defense counsel made no attempt to inquire, out of jury's presence, as to facts that would permit assessment of prejudicial effect]; *Acosta v. Southern Calif. Rapid Transit Dist.* (1970) 2 C.3d 19, 26, 84 C.R. 184, 465 P.2d 72, citing the text [defendant refused to accept opportunity to develop possible relationship between insurance coverage and malingering so trial judge, out of jury's presence, could assess possible prejudice]; 47 A.L.R.3d 234.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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##### K. Wrongful Death: Spouse's Remarriage.

*1 Witkin Cal. Evid. Circum Evid § 162*

[§ 162] Wrongful Death: Spouse's Remarriage.

In an action for wrongful death of a spouse, the surviving spouse may recover damages for the pecuniary loss of benefits, including the value of future personal services or earnings for the life expectancy of the deceased spouse. (See *6 Summary (9th), Torts, §1423 et seq.*) If the surviving spouse remarries, it is possible that the pecuniary loss will be lessened, and remarriage could therefore be relevant to show mitigation of damages. However, for a number of reasons, evidence of remarriage is excluded, and the pecuniary loss is determined by conditions existing at the time of death. (See *6 Summary (9th), Torts, §1425; Benwell v. Dean (1967) 249 C.A.2d 345, 356, 57 C.R. 394.*)

In *Cavallaro v. Michelin Tire Corp. (1979) 96 C.A.3d 95, 157 C.R. 602*, defendant challenged this rule by invoking *Ev.C. 351*, which abolishes all limitations on admissibility of relevant evidence except those based on statute or constitutional provision (see *supra*, §5). *Held*, the rule was unaffected by the enactment of *Ev.C. 351*.

(a) *Relevancy*. Expressions in some opinions treat evidence of remarriage as irrelevant. But this is not the true basis of the exclusionary rule. The evidence would logically tend to prove that the surviving spouse did not suffer the full economic loss claimed for the life expectancy of the deceased spouse. (*96 C.A.3d 108.*)

(b) *Public policy and practical considerations*. (1) The principal basis for the rule is the same as that underlying other aspects of the collateral source rule (see *supra*, §160). A tortfeasor should not be permitted to reduce the amount he or she is required to pay because of benefits received by the injured person from a collateral source (here from the new spouse). (2) Another reason for the rule is that the mitigating effect of remarriage is speculative, and might necessitate trial of innumerable differences and similarities between the deceased spouse and the new spouse. (*96 C.A.3d 108.*)

(c) *Statute inapplicable*. Because the long-standing exclusionary rule is not based on irrelevancy, it is unaffected by *Ev.C. 351*, for the Law Revision Commission Comment on *Ev.C. 351* discloses no intention to alter exclusionary rules based on public policy. (*96 C.A.3d 109*, discussing *Kaplan v. Superior Court (1971) 6 C.3d 150, 98 C.R. 649, 491 P.2d 1*; see *supra*, §7.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*Surviving spouse's recovery of damages:*

*Cross-Reference:* *6 Summary (10th), Torts, §1690 et seq.*

*Exclusion of evidence of remarriage:*



*Cross-Reference:* 6 *Summary* (10th), *Torts*, §1692.



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## IV. EVIDENCE INVOLVING UNDUE PREJUDICE

## L. Subsequent Precautions or Repairs by Defendant.

## 1. Negligence Cases.

## a. Rule and Theory of Exclusion.

*1 Witkin Cal. Evid. Circum Evid § 163*

[§ 163] Rule and Theory of Exclusion.

In a negligence case, the question at issue is whether the defendant exercised due care at the time of the injury to the plaintiff, in the light of existing knowledge or notice of the circumstances. When an accident occurs, new knowledge is gained of possible risks, and the defendant may, to avoid future harm, make repairs or improvements or practice additional safety measures. Those subsequent precautions taken in the light of knowledge later acquired may not be relevant on the issue of negligence at the earlier time; and, even if relevancy is conceded, the effect of allowing the evidence would be to discourage persons from engaging in this highly beneficial activity. Accordingly, either on grounds of irrelevancy or public policy, the evidence is *excluded* on the issue of negligence. (*Helling v. Schindler* (1904) 145 C. 303, 312, 78 P. 710; *Gorman v. Sacramento* (1928) 92 C.A. 656, 665, 268 P. 1083; *Pierce v. J.C. Penney Co.* (1959) 167 C.A.2d 3, 6, 334 P.2d 117, 3 Cal. Evidence (4th), *Presentation at Trial*, §240; *Houser v. Floyd* (1963) 220 C.A.2d 778, 787, 34 C.R. 96; *Westbrooks v. Gordon H. Ball* (1967) 248 C.A.2d 209, 216, 56 C.R. 422, 3 Cal. Evidence (4th), *Presentation at Trial*, §240; see 9 *Hastings L. J.* 316; 9 *U.C. Davis L. Rev.* 421 [Evidence of Subsequent Repairs: Yesterday, Today, and Tomorrow]; 2 *Wigmore* (Chadbourn Rev.) §283; 29 *Am.Jur.2d* (1994 ed.), *Evidence* §463 et seq.; C.E.B., *Effective Introduction of Evidence* 2d, Chap. 52 [Subsequent Repairs or Other Remedial Conduct]; 15 *A.L.R.5th* 119 [admissibility of repairs, change of conditions, or precautions taken after accident]; 30 *Proof of Facts* 3d 307 [evidence of subsequent remedial measures in civil cases].)

*Ev.C. 1151* codifies this rule: "When, after the occurrence of an event, remedial or precautionary measures are taken, which, if taken previously, would have tended to make the event less likely to occur, evidence of such subsequent measures is inadmissible to prove negligence or culpable conduct in connection with the event." (See *Govt.C. 830.5(b)* [same rule in action against governmental agency].)

*F.R. Evid.*, *Rule 407* states the rule and its limited admissibility exception (infra, §164) as follows: "When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment." (See 2 *Mueller & Kirkpatrick*, *Federal Evidence* 2d, §127 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Fox v. Kramer* (2000) 22 C.4th 531, 548, 93 C.R.2d 497, 994 P.2d 343, 2 Cal. Evidence (4th), Witnesses, Supp., §505 [although nondiscoverable under hospital peer review committee privilege, Department of Health Services investigator's report, based on committee records, concerning incident that gave rise to medical malpractice action did not come within rule excluding evidence of subsequent remedial measures]; The New Wigmore: Selected Rules of Limited Admissibility §2.1 et seq.; 158 A.L.R. Fed 609 [admissibility under *F.R. Evid.*, Rule 407]. *West's Key Number Digest*, Evidence k.219.10 et seq.



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## L. Subsequent Precautions or Repairs by Defendant.

## 1. Negligence Cases.

## b. Limited Admissibility Exception.

1 *Witkin Cal. Evid. Circum Evid* § 164

## [§ 164] Limited Admissibility Exception.

Where evidence of subsequent precautions or repairs is independently relevant on some issue other than negligence, the policy objection is overcome by the limited admissibility doctrine (*supra*, §30). Thus, where the issue is whether a defendant was the owner, possessor, or person in control of property involved in the injury, the defendant's subsequent repairs (which would scarcely be made by a stranger) may be shown to meet any denial of control. (See *Alcaraz v. Vece* (1997) 14 C.4th 1149, 1168, 60 C.R.2d 448, 929 P.2d 1239, quoting the text; 2 McCormick 5th, §267; *F.R. Evid.*, Rule 407, *supra*, §163.)

Where evidence of *subsequent conditions* is admissible as indicating the probable condition at the time of the accident, or in cross-examination of witnesses on their observation of the scene or the basis of their opinions as to safety of the conditions, the fact of subsequent changes may sometimes be brought out. (See *Wagner v. Atchison, Topeka & Santa Fe Ry. Co.* (1930) 210 C. 526, 531, 292 P. 645, 3 *Cal. Evidence* (4th), *Presentation at Trial*, §239; *Hatfield v. Levy Bros.* (1941) 18 C.2d 798, 809, 117 P.2d 841; *Daggett v. Atchison, Topeka & Santa Fe Ry. Co.* (1957) 48 C.2d 655, 661, 313 P.2d 557, 3 *Cal. Evidence* (4th), *Presentation at Trial*, §239; 9 *Hastings L. J.* 316; 18 *Hastings L. J.* 677; 64 A.L.R.2d 1199, 1214 [injury or death of pedestrian at railroad crossing; repairs after accident]; 15 A.L.R.5th 119 [repairs, changes, or precautions taken after accident]; 30 *Proof of Facts* 3d 307.)

In *Baldwin Contracting Co. v. Winston Steel Works* (1965) 236 C.A.2d 565, 46 C.R. 421, a worker was injured when he fell after contact with high tension wires. He recovered judgment against plaintiff general contractor. Plaintiff then brought this action for indemnity against defendant subcontractors on the theory that the injury was caused by their active negligence. To defeat the right of indemnity by proof that plaintiff was also actively negligent (see 5 *Summary* (9th), *Torts*, §96), defendants offered evidence that, after the accident, plaintiff installed a wooden protective barricade in about an hour. *Held*, the evidence was admissible. It would have been objectionable in the first action on the issue of *plaintiff's liability* to the worker. But plaintiff's liability to the injured person was already established by the first judgment; and, on the issue in the second case--active negligence--the evidence was relevant and admissible on two theories: (a) Because plaintiff had the only carpenters on the job it had the duty to provide a needed barricade; (b) the prompt erection of such a barricade showed the feasibility of eliminating the cause of the accident. (236 C.A.2d 573.)

In *Wilson v. Gilbert* (1972) 25 C.A.3d 607, 102 C.R. 31, plaintiff's leg was amputated after an unsuccessful arterial graft by defendant, a general surgeon with no experience in vascular surgery. Prior to the operation, defendant did not perform an arteriogram to check for clotting in the artery. In a pretrial deposition, defendant attributed the failure of the operation to clotting, but at trial, he testified that it could have been caused by arterial spasm. Over objection, defendant

was required to testify that after this incident he had taken a course on arteriograms. Also over objection, deposition testimony that he now referred similar cases to vascular surgeons was admitted. *Held*, the evidence objected to was admissible, either as relating to plaintiff's probable condition when under defendant's treatment, or as tending to impeach defendant's testimony. (25 C.A.3d 615, citing the text.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Alpert v. Villa Romano Homeowners Assn.* (2000) 81 C.A.4th 1320, 1341, 96 C.R.2d 364 [in action arising from plaintiff's fall on sidewalk adjacent to condominium complex, minutes of postaccident homeowners association board meeting that included discussion of bids to repair sidewalk were admissible to show that association was aware of sidewalk's condition prior to accident and that association was in control of cause of defect as well as its repair]; 2 McCormick 6th, §267. *Proof of plaintiff's active negligence:*

*Cross-Reference:* 5 Summary (10th), Torts, §116.



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## IV. EVIDENCE INVOLVING UNDUE PREJUDICE

## L. Subsequent Precautions or Repairs by Defendant.

## 2. Strict Products Liability Actions.

## a. General Rule of Admissibility.

1 *Witkin Cal. Evid. Circum Evid* § 165

[§ 165] General Rule of Admissibility.

The exclusionary rule of *Ev.C. 1151* (supra, §163) does not apply to an action based on strict liability. In *Ault v. International Harvester Co.* (1974) 13 C.3d 113, 117 C.R. 812, 528 P.2d 1148, plaintiff was injured when the Scout motor vehicle in which he was a passenger plunged 500 feet to the bottom of a canyon. Because both plaintiff and the driver developed retrograde amnesia following the accident, the key evidence was a broken gearbox. Plaintiff contended that the break occurred while the Scout was on the highway, causing it to go out of control; defendant contended that driver negligence or a roadway collapse caused the accident and that the gearbox broke on impact as the vehicle hurtled down into the canyon. Included in plaintiff's evidence was a showing that 3 years after the accident, defendant substituted malleable iron for aluminum 380 in the manufacture of the gearbox. *Held*, the evidence was properly admitted.

(a) The language and legislative history of *Ev.C. 1151* demonstrate that the statute was designed for cases involving *negligence or culpable conduct* on defendant's part, rather than to circumstances where a manufacturer is alleged to be strictly liable for placing a defective product on the market. Defendant's argument that a "morally" blameworthy manufacturer is guilty of such culpable conduct as to bring it within the statute is not persuasive. "[I]f the Legislature had intended to encompass cases involving strict liability within the ambit of section 1151, it would have used an expression less related to and consistent with affirmative fault than 'culpable conduct'--a term which, under defendant's theory, would embrace a moral rather than a legal duty." (13 C.3d 118.)

(b) The statutory object--to encourage negligent persons to make repairs (see supra, §163)--would not be aided by extending the exclusionary rule to strict liability actions. "The contemporary corporate mass producer of goods, the normal products liability defendant, manufactures tens of thousands of units of goods; it is manifestly unrealistic to suggest that such a producer will forego making improvements in its product, and risk innumerable additional lawsuits and the attendant adverse effect upon its public image, simply because evidence of adoption of such improvement may be admitted in an action founded on strict liability for recovery on an injury that preceded the improvement. In the products liability area, the exclusionary rule of section 1151 does not affect the primary conduct of the mass producer of goods, but serves merely as a shield against potential liability. In short, the purpose of section 1151 is not applicable to a strict liability case and hence its exclusionary rule should not be gratuitously extended to that field." (13 C.3d 120.) (See *Aguiar v. Crompton & Knowles Corp.* (1986) 183 C.A.3d 1032, 1038, 1039, 228 C.R. 768 [despite *Ault* holding, trial judge still has discretion to apply *Ev.C. 352* and exclude evidence as remote, cumulative, or time consuming]; 74 A.L.R.3d 1001 [evidence of subsequent repairs in products liability case]; 84 A.L.R.3d 1220 [admissibility of

manufacturer's recall letter]; 19 Cal. Western L. Rev. 450 [admission of evidence of subsequent repairs in actions based on shipowner's absolute liability for injuries resulting from unseaworthiness]; 39 *Hastings L. J.* 1171 [Admissibility of Remedial Measures Evidence in Products Liability Actions: Towards a Balancing Test]; 39 *Santa Clara L. Rev.* 615 [arguing for application of California law where product liability case is filed in federal court under diversity jurisdiction]; 1982 A.S. 170.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Evidence k.219.30-



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CHAPTER IV - Circumstantial Evidence

IV. EVIDENCE INVOLVING UNDUE PREJUDICE

L. Subsequent Precautions or Repairs by Defendant.

2. Strict Products Liability Actions.

b. Failure To Make Changes.

*1 Witkin Cal. Evid. Circum Evid § 166*

[§ 166] Failure To Make Changes.

In *Hilliard v. A. H. Robins Co.* (1983) 148 C.A.3d 374, 196 C.R. 117, supra, §123, the court said: "The policy purpose of *Evidence Code section 1151* is to exclude evidence of affirmative remedial or precautionary conduct. The policy consideration was not to exclude evidence of the failure to make changes in a defective product or the failure to withdraw a dangerous product from the market. Admitting evidence of no product change or of no withdrawal from the market, on the issue of punitive damages, is consistent with the public policy consideration of *Evidence Code section 1151*. ... Such conduct is admissible evidence on the punitive damage issue in order to provide meaningful consumer protection against the manufacture and distribution of dangerous, defective products." (148 C.A.3d 401.)

**SUPPLEMENT:** [This section is current through the latest supplement]





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#### CHAPTER IV - Circumstantial Evidence

#### IV. EVIDENCE INVOLVING UNDUE PREJUDICE

##### L. Subsequent Precautions or Repairs by Defendant.

##### 2. Strict Products Liability Actions.

##### c. Subsequent Warning.

*1 Witkin Cal. Evid. Circum Evid § 167*

[§ 167] Subsequent Warning.

In *Schelbauer v. Butler Mfg. Co. (1984) 35 C.3d 442, 198 C.R. 155, 673 P.2d 743*, the issue was whether a *postaccident warning* alerting consumers to take safety precautions in using a product is admissible in a strict liability action against a manufacturer. The court, following the approach of *Ault v. International Harvester Co. (1974) 13 C.3d 113, 117 C.R. 812, 528 P.2d 1148*, supra, §165, and citing a federal court of appeals decision and several state court decisions, held that the evidence was admissible: "The rationale of *Ault* applies as clearly to postaccident warnings as it does to subsequent product repairs or improvements. Accordingly, the exclusionary rule of section 1151 was never intended to preclude admission of postaccident warning evidence in a strict liability action." (35 C.3d 452.) (See *West v. Johnson & Johnson Products (1985) 174 C.A.3d 831, 855, 220 C.R. 437* [action by tampon user who contracted toxic shock syndrome; warning inserted in tampon box by defendant manufacturer at request of Food and Drug Administration after plaintiff recovered from illness was admissible]; 38 A.L.R.4th 583.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### CHAPTER IV - Circumstantial Evidence

#### IV. EVIDENCE INVOLVING UNDUE PREJUDICE

##### L. Subsequent Precautions or Repairs by Defendant.

##### 2. Strict Products Liability Actions.

##### d. Remedial Measure by Nonparty.

##### 1 *Witkin Cal. Evid. Circum Evid* § 168

[§ 168] Remedial Measure by Nonparty.

In *Magnante v. Pettibone-Wood Mfg. Co.* (1986) 183 C.A.3d 764, 228 C.R. 420, plaintiff, employed by K, suffered injury when a truss boom attachment disconnected from a high lift truck and struck him. Plaintiff sued defendant manufacturer of the truck and attachment, and offered evidence that K, after the accident, had made modifications in the truss boom. Defendant argued that to allow this kind of evidence would expose every manufacturer to a suit alleging design defect "when someone else rigs up a post accident repair or modification." *Held*, the evidence was admissible. Even in jurisdictions excluding subsequent repairs or modifications *by the defendant* in strict liability actions, changes *by third parties* are admitted. The exclusionary rule is based on the policy that owners would be discouraged in making repairs (see *supra*, §163); this consideration is absent where "imposition of liability is not sought against the person taking the remedial action." (183 C.A.3d 768.) (See 64 A.L.R.5th 119 [subsequent remedial action by third party].)

*Magnante* was distinguished in *Santilli v. Otis Elevator Co.* (1989) 215 C.A.3d 210, 263 C.R. 496. Plaintiff, injured at work while using a freight elevator, sued defendant elevator manufacturer on strict liability grounds. Plaintiff did not sue his employer, as his exclusive remedy was a compensation claim. Following the accident, plaintiff's employer posted warnings and took other measures in an attempt to prevent future accidents. The trial judge excluded evidence of those remedial measures. *Held*, exclusion was proper.

(a) If defendant manufacturer had taken the remedial measures, evidence of those measures would have been admissible. Here, however, the employer took the measures, and its lien against a judgment in favor of plaintiff in plaintiff's suit against defendant would be reduced by the employer's percentage share of its responsibility for plaintiff's injuries. Thus, the jury was required to determine the percentage of the employer's responsibility for the injury, notwithstanding that the employer was not a party. Accordingly, admitting evidence of the employer's remedial measures would have deterred the employer from taking those measures. "The rationale behind the statute extends equally to the situation in which a nonparty will be adversely affected by a jury's determination of its negligence. We therefore conclude that where, as here, a jury is asked to determine if a nonparty was negligent, and there is no strict liability theory asserted against that nonparty, and where the jury's determination will have a direct effect on the amount of damages which that entity will be required to pay, section 1151 precludes the use at trial of evidence of remedial measures taken by the nonparty." (215 C.A.3d 214.)

(b) In *Magnante*, evidence of remedial measures taken by the employer was introduced for the purpose of showing that the product at issue was defective, *not* to demonstrate that the employer had any responsibility for the accident. Here the evidence related to whether the elevator's potential for injury could have been reduced by any action by the

employer. Further, *Magnante* did not state that the employee had obtained workers' compensation benefits from the employer, or that the jury was required to determine the employer's negligence. (215 C.A.3d 214.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER V - Opinion Evidence

### I. OPINION OF LAY WITNESS

#### A. Traditional Rule of Exclusion.

##### 1. Nature of Rule.

*1 Witkin Cal. Evid. Opinion Evid § 1*

[§ 1] Nature of Rule.

An opinion is an *inference* from facts observed. One of the fundamental theories of the law of evidence, expressed in the *opinion rule*, is that witnesses must *ordinarily* testify to *facts*, leaving inferences or conclusions to the jury or court. (See *Northern Calif. Power Co. v. Waller* (1917) 174 C. 377, 384, 163 P. 214; *Waizman v. Black* (1929) 101 C.A. 610, 613, 281 P. 1087; *Moore v. Norwood* (1940) 41 C.A.2d 359, 366, 106 P.2d 939; *Fireman's Fund Ins. Co. v. Romero* (1954) 128 C.A.2d 331, 336, 275 P.2d 83; *People v. Williams* (1992) 3 C.A.4th 1326, 1332, 5 C.R.2d 130, citing the text; 29 Cal. L. Rev. 430; 1 McCormick 5th, §11; 7 Wigmore (Chadbourn Rev.) §1917; 31A Am.Jur.2d (1989 ed.), *Expert and Opinion Evidence* §5; 1 Jefferson, California Evidence Benchbook 3d, Chap. 29; 3 Wharton, Crim. Evidence (14th ed.), §543 et seq.; *F.R. Evid.*, Rule 701 et seq.; 3 Mueller & Kirkpatrick, Federal Evidence 2d, §342 et seq.; 9 U.C. Davis L. Rev. 233 [study of federal and California rules]; *infra*, §§4, 30, 89, 90.)

The *opinion rule*, which often rejects testimony of a *competent witness* because of the *form* in which the testimony is given, is distinct from the *knowledge rule*, which lays down a requirement of *competency of witnesses*. A witness is not competent to testify on a matter--either as to facts or opinions--if the witness lacks personal knowledge of it. (See 2 Cal. Evidence (4th), *Witnesses*, §§46, 47.)

The opinion rule is applied not only to testimony of a witness on the stand (see 3 Cal. Evidence (4th), *Presentation at Trial*, §173), but to hearsay statements of a person not on the stand (see 1 Cal. Evidence (4th), *Hearsay*, §8). But the rule has been subjected to much criticism (see *infra*, §2), and has undergone so much relaxation in liberal jurisdictions that opinions are now received in a great many situations in which they are necessary or useful. (See *infra*, §3 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 1 McCormick 6th, §11.



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## CHAPTER V - Opinion Evidence

### I. OPINION OF LAY WITNESS

#### A. Traditional Rule of Exclusion.

##### 2. Criticism and Reforms.

*1 Witkin Cal. Evid. Opinion Evid § 2*

[§ 2] Criticism and Reforms.

Some writers and courts have denounced the opinion rule as historically inaccurate and practically unwise. They make the obvious point that the distinction between "fact" and "opinion" is merely one of degree, difficult for counsel, court, and witnesses to draw during the course of an examination. The result, according to the critics, is often to produce interruptions and haggling over the form of questions and answers which confuse the witness, distort the story, and unduly delay the trial. (See Model C., Int. Note, p. 198, and Comment on Rule 401; 1 McCormick 5th, §11; 7 Wigmore (Chadbourn Rev.) §§1919, 1929; *Healy v. Visalia & Tulare R. Co.* (1894) 101 C. 585, 589, 36 P. 125, *infra*, §3; *People v. Otis* (1959) 174 C.A.2d 119, 127, 344 P.2d 342, quoting the text; 29 Cal. L. Rev. 430.)

The Model C., Rule 401 proposed a radical change in the opinion rule by allowing a witness to give inferences *unless* the judge finds that the testimony does not meet accepted standards for admissibility of opinions. Under this view, admission of opinions would be the normal procedure and exclusion would usually depend on some affirmative showing that they should not be received.

The original Uniform Rules of Evidence sought the same objective of loosening the opinion rule, but did not make the complete shift of burdens proposed by the Model Code. They followed the traditional approach of requiring testimony as to facts unless the judge found that opinions were proper. (See 2 U.C.L.A. L. Rev. 356, 358; 1953 A.S. 793.) Rule 701 of the present Uniform Rules is in accord. (See 13B (Part 1A) U.L.A. (Master Ed.), p. 281.)

Progressive courts supported this discretionary approach, and the Evidence Code established it as California law. (See *infra*, §4.) The Federal Rules of Evidence also follow this approach. (See *F.R. Evid.*, Rule 701 et seq.; 3 Mueller & Kirkpatrick, Federal Evidence 2d, §342 et seq.; 9 U.C. Davis L. Rev. 233; *infra*, §§4, 26, 30, 90.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 13A U.L.A. (Master Ed.), p. 135 [Unif. Rules, Rule 701]; 1 McCormick 6th, §11.



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## CHAPTER V - Opinion Evidence

### I. OPINION OF LAY WITNESS

#### B. Modern Rule of Admissibility.

##### 1. Where Opinions Are Necessary.

*1 Witkin Cal. Evid. Opinion Evid § 3*

[§ 3] Where Opinions Are Necessary.

If the *facts cannot be accurately or adequately stated*, and what the witness knows can be testified to only in the form of an opinion, testimony in that form may be admitted. (See *Healy v. Visalia & Tulare R. Co.* (1894) 101 C. 585, 589, 36 P. 125; *Holland v. Zollner* (1894) 102 C. 633, 638, 36 P. 930 ["The paucity of language, and the incompetency of witnesses to describe graphically the photograph left upon the mind by observed facts, renders every effort to convey to a jury an adequate conception of the ultimate fact futile except by announcing the conclusion in their own minds"]; *Manney v. Housing Authority of Richmond* (1947) 79 C.A.2d 453, 459, 180 P.2d 69 ["The opinions of nonexpert witnesses are admitted as a matter of practical necessity when the matters which they have observed are too complex or too subtle to enable them accurately to convey them to court or jury in any other manner"]; *People v. Deacon* (1953) 117 C.A.2d 206, 210, 255 P.2d 98; *Albrecht v. Broughton* (1970) 6 C.A.3d 173, 181, 85 C.R. 659, *infra*, §22, citing the text; *People v. Sergill* (1982) 138 C.A.3d 34, 40, 187 C.R. 497 ["A lay witness may testify in the form of an opinion only when he cannot adequately describe his observations without using opinion wording"]; 29 Cal. L. Rev. 430; 31A Am.Jur.2d (1989 ed.), *Expert and Opinion Evidence* §26 et seq.) (On witness testifying to best recollection or thought, see 3 Cal. Evidence (4th), *Presentation at Trial*, §174.)

In *Healy v. Visalia & Tulare R. Co.*, *supra*, an action for injuries resulting from a railroad car leaving its track, the witness, a passenger, was asked: "Under the circumstances, was it possible for an ordinary person, sitting in the position Mrs. Healy was sitting in, to stand the force of the jars and still retain her seat upon the car?" *Held*, this was proper. The court said: "The border line between fact and opinion is often very indistinct, and the statement of a fact is frequently only an opinion of the witness. Impressions or sensations caused by external objects are not susceptible of exact reproduction or description in words, nor do they affect every individual alike, and the judgment or opinion of the witnesses by whom they have been experienced is the only mode by which they can be presented to a jury. ... The position of the plaintiff on the car, as well as his own position thereon, the jumping of the car from the track, the effect produced upon himself, the sensation which he experienced thereby, were all facts which it was competent to show by his testimony. ... The strength or force of this concussion was also a fact which it was proper to bring before the jury, and as it was not capable of exact measurement by any recognized standard, it was competent for the witness to state its strength or force according to the opinion or judgment which he formed at the time that he felt it. His judgment or opinion of its effect upon an ordinary person would be the most efficient mode of enabling the jury to fully appreciate it. ... Such testimony is competent upon the same principle that permits evidence showing the strength or force of a blow, the distance at which a sound can be heard, or the direction from which it comes, the speed of a horse, the degree of cold or heat, or of light or darkness. In any such instance a witness who had a personal experience or knowledge of the sensation is competent to testify, although his answer is only his opinion of the matter." (101 C. 590.)

In *Holland v. Zollner*, supra, the court observed that the exception is said to apply to "questions of identity, handwriting, quantity, value, weight, measure, time, distance, velocity, form, size, age, strength, heat, cold, sickness, and health; questions also concerning various mental and moral aspects of humanity, such as disposition and temper, anger, fear, excitement, intoxication, veracity, general character, etc." And the opinion adds this graphic illustration: "A witness may describe a person as having gray hair, a wrinkled face, an uncertain gait, and by such other facts as indicate advanced years, and a jury, from such statement, could determine nothing as to his exact age, beyond the conclusion that he was an old man; yet the witness who has detailed all the facts of which he was capable can give an opinion as to the age of the man he has described, which is almost exactly the truth." And further: "We identify men. We cannot tell how, because expressions of the face, gestures, motions, and even form, are beyond the power of accurate description. Love, hatred, sorrow, joy, and various other mental and moral operations, find outward expression, as clear to the observer as any fact coming to his observation, but he can only give expression to the fact by giving what to him is the ultimate fact, and which, for want of a more accurate expression, we call opinion." (102 C. 638.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See CALCRIM, No. 333 [Opinion Testimony of Lay Witness]. *West's Key Number Digest*, Criminal Law k.448 et seq.; Evidence k.470 et seq.



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## CHAPTER V - Opinion Evidence

### I. OPINION OF LAY WITNESS

#### B. Modern Rule of Admissibility.

##### 2. Where Opinions Are Helpful.

#### 1 Witkin Cal. Evid. Opinion Evid § 4

#### [§ 4] Where Opinions Are Helpful.

The modern tendency of the courts is to relax the "necessity" test and allow opinions where they are "helpful" in understanding testimony. This was the approach of the Uniform Rules of Evidence, and it was substantially restated in *Ev.C. 800*:

"If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is:"

"(a) Rationally based on the *perception* of the witness; and"

"(b) *Helpful* to a clear understanding of his testimony."

The reference to "such an opinion as is permitted by law" makes applicable rules of admissibility established by case law, such as a person's opinion on the value of his or her own property or services, regardless of whether the conditions of the statute are met. (Law Rev. Com. Comment to *Ev.C. 800*.) (See Law Rev. Com. Comment at beginning of Evidence Code, Division 7, pointing out that "opinion" is used to include "all opinions, inferences, conclusions, and other subjective statements made by a witness"; *People v. Moreno* (1973) 32 C.A.3d Supp. 1, 7, 108 C.R. 338, citing the text [eyewitness may state observations as to whether defendant provoked affray with police officer]; *Chatman v. Alameda County Flood Control & Water Conservation Control Dist.* (1986) 183 C.A.3d 424, 429, 228 C.R. 257 [statute "merely requires that witnesses express themselves at the lowest possible level of abstraction" when details observed are "too complex or too subtle for concrete description, the witness may state his general impression"]; 9 U.C. Davis L. Rev. 233 [liberal approach in California and federal courts]; see also 13B (Part 1A) U.L.A. (Master Ed.), p. 281 [Unif. Rule 701].)

In *Osborn v. Mission Ready Mix* (1990) 224 C.A.3d 104, 273 C.R. 457, an action for injuries sustained in a fall at a construction site on defendant's property, plaintiff was required on cross-examination to answer the question whether the condition of the site was "open and obvious." *Held*, this was proper; given the complex facts involved, plaintiff's opinion was helpful. "Here, whether the nature of the potential danger was obvious or not was a matter which could best be described to the jury by way of opinion testimony. A recitation of the size of the area, the depth and quality of the dirt, the size of the concrete pieces and whether and in what proportion they were totally exposed, completely hidden, or partially embedded in the dirt could be made, but, in our opinion, such facts alone would not make the obviousness of the risk involved so palpable to the jury that its means of forming an opinion would be practically equal to those of the witness." (224 C.A.3d 113.)



*F.R. Evid., Rule 701* is similar: "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." (See 3 Mueller & Kirkpatrick, *Federal Evidence* 2d, §342 et seq.; 63B *Am.Jur.2d* (1997 ed.), *Products Liability* §1848.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 13A U.L.A. (Master Ed.), p. 135 [Unif. Rules, Rule 701].

*F.R. Evid., Rule 701* was amended in 2000 to specify that the lay witness' opinion may not be based on scientific, technical, or other specialized knowledge. The amended rule reads: "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." (On *F.R. Evid., Rule 702*, see text, §26.)



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## CHAPTER V - Opinion Evidence

### I. OPINION OF LAY WITNESS

#### C. Proper Subjects of Nonexpert Opinion.

##### 1. Identity of Person.

##### a. In General.

1 Witkin Cal. Evid. Opinion Evid § 5

[§ 5] In General.

Identity of a person is a typical area in which opinions are necessary and acceptable. (See *In re Corey* (1964) 230 C.A.2d 813, 826, 41 C.R. 379; 7 Wigmore (Chadbourn Rev.) §1977; 31A Am.Jur.2d (1989 ed.), *Expert and Opinion Evidence* §278; 86 A.L.R.2d 727 [identification of homicide victim].)

The following are common methods:

(1) *Testimony of witness who saw the person.* (See *In re Corey*, *supra*, 230 C.A.2d 826; on dangers involved in eyewitness identification and necessity of cautionary instruction, see 2 U.C.L.A. L. Rev. 552; 23 A.L.R.4th 1089; 35 Proof of Facts 3d 1; *infra*, §70.)

(2) *Physical characteristics or marks.* A witness may identify a person by such characteristics as size, general build, clothing, tattoo marks, hair color, manner of moving, etc. (See *People v. Coley* (1943) 61 C.A.2d 810, 813, 143 P.2d 755; *People v. Lindsay* (1964) 227 C.A.2d 482, 494, 38 C.R. 755, citing the text [not necessary that witness see the person's face]; *In re Corey*, *supra*, 230 C.A.2d 826, citing the text [taxi driver identified juvenile robber by hair color, "silhouette," receding hairline, snuffing of nose and wriggling of upper lip].)

(3) *Voice.* "It is universally recognized that the voice, as well as the physical appearance of a person, is a means by which identification is made possible, there being no more similarity in the voices of different people than there is in their physical appearance. A definite impression of the one is made upon the mind through the medium of the sense of hearing, while the impression of the other is made on the mind through the sense of sight." (*Connell v. Clark* (1948) 88 C.A.2d 941, 947, 200 P.2d 26.) (See also *People v. Lorraine* (1938) 28 C.A.2d 50, 54, 81 P.2d 1004 [authentication of telephone conversation by recognition of voice]; *People v. Lindsay*, *supra*, 227 C.A.2d 494, citing the text; *People v. Osuna* (1969) 70 C.2d 759, 764, 76 C.R. 462, 452 P.2d 678; 2 Wigmore (Chadbourn Rev.) §660; 7 Wigmore (Chadbourn Rev.) §2155; 70 A.L.R.2d 995; 23 Proof of Facts 3d 315, 408 [audio recordings].)

(4) *Sound of footsteps.* Recognition of this sound may establish identity. (See *People v. Glab* (1936) 15 C.A.2d 120, 123, 59 P.2d 195.)

An identification need not be made in positive terms; a witness may testify that an accused "resembles" or "looks like" the person who committed the crime. (*People v. Waller* (1939) 14 C.2d 693, 700, 96 P.2d 344; *People v. Deal* (1940) 42 C.A.2d 33, 36, 108 P.2d 103; *People v. Harris* (1948) 87 C.A.2d 818, 824, 198 P.2d 60 ["It is not essential

that the witness be free from doubt as to one's identity. He may testify that in his belief, opinion or judgment the accused is the person who perpetrated the crime. The want of positiveness goes only to the weight of the testimony"]; *In re Corey*, *supra*, 230 C.A.2d 826.) Thus, in *People v. Harris*, *supra*, the witness said: "I didn't exactly recognize him. I say he resembled him." *Held*, the evidence was sufficient despite the fact that the witness, due to his "ignorance of semantics," used "recognize" to indicate certainty, and "resemble" to mean less than certainty. (See also *People v. Abner* (1962) 209 C.A.2d 484, 491, 25 C.R. 882, citing the text ["I think that he's over there. ... The one in the green jacket. ... I had a very quick glance at him, but he was very similar"]; *People v. Gonzales* (1968) 68 C.2d 467, 472, 67 C.R. 551, 439 P.2d 655, citing the text [clothing and specified characteristics appeared to be those of defendant, although witness did not see facial characteristics].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See Simons, Cal. Evidence Manual, §4:37 et seq. *West's Key Number Digest*, Criminal Law k.448(6), 453; Evidence k.471(12), 475



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## CHAPTER V - Opinion Evidence

### I. OPINION OF LAY WITNESS

#### C. Proper Subjects of Nonexpert Opinion.

1. Identity of Person.
- b. Photographs Taken at Crime Scene.

*1 Witkin Cal. Evid. Opinion Evid § 6*

#### [§ 6] Photographs Taken at Crime Scene.

One who identifies a suspect need not have been a witness to the crime. A person who is otherwise familiar with the suspect's appearance may base an identification on a photograph or film made during the commission of the crime.

Thus, in *People v. Perry* (1976) 60 C.A.3d 608, 131 C.R. 629, the robbery of a cashier's office was photographed by a concealed surveillance camera. The cashier could not identify defendant from the film or a lineup, but defendant's parole officer and a police officer gave their opinions that the person in the picture was defendant on the basis of defendant's features, particularly an abnormal right eye. Defendant contended that a lay person's opinion must be based on *perception* (Ev.C. 800(a)), and that the witnesses did not perceive *the crime*. *Held*, the evidence was admissible. The witnesses based their identification opinions upon their prior contacts with defendant, their awareness of his physical characteristics on the day of the robbery, and their perception of the film taken of the events. Thus, the opinions were sufficiently based on personal knowledge to permit their introduction. (60 C.A.3d 613.)

The court also rejected the contention that the evidence improperly invaded the jury's province, pointing to the analogy of nonexpert opinions on the identity of handwriting (see 2 Cal. Evidence (4th), *Documentary Evidence*, §11). "The same rationale which permits such evidence based upon personal knowledge applies to evidence of the identity of a pictorially depicted subject when such evidence is based upon personal knowledge of the person's physical characteristics at the time of the film depiction." (60 C.A.3d 614.)

*People v. Perry*, *supra*, was analyzed and followed in *People v. Mixon* (1982) 129 C.A.3d 118, 180 C.R. 772, in which a surveillance camera photographed two men who robbed a service station, and two police officers identified defendant from the photographs. *Held*, their testimony was admissible.

(a) The prosecution established an adequate personal knowledge foundation in a hearing outside the jury's presence: The officers had ample prior contact with defendant and had the requisite personal knowledge of his appearance. (129 C.A.3d 129.)

(b) The requirement that the testimony aid the trier of fact in determining the identity issue was also satisfied: The photograph was not a clear depiction of the subject, and defendant had changed his appearance before trial; the officers had seen him in a variety of contexts both indoors and outdoors, and could aid the jury in identifying the person in the unclear surveillance picture. (129 C.A.3d 131.)

(c) The contention that the prejudice in use of the testimony outweighed its probative value (*Ev.C. 352, 1 Cal. Evidence (4th), Circumstantial Evidence, §17*) was based on the concern expressed in federal cases where lay identification testimony comes from law enforcement officials: that the defendant is presented as a person subject to a certain degree of police scrutiny. (*129 C.A.3d 129.*) This danger of prejudice is dissipated, however, where the foundational facts supporting the officers' knowledge are established--as here--outside the jury's presence. (*129 C.A.3d 132, 133.*) On this point, the court added the following clarifying comment:

"This opinion should not be interpreted to stand for the proposition that if nonlaw enforcement testimony is available, law enforcement identification testimony must be excluded. The trial courts, in weighing possible prejudice, must determine if the nonlaw enforcement testimony available is 'adequate.' The prosecution should not be forced to rely on testimony that is weak simply because it comes from an individual not involved in law enforcement. The trial judge maintains the discretion to determine if the prejudicial effect of the officer's testimony substantially outweighs its probative value ... , and such a discretionary ruling will be overturned only if there is a clear abuse of discretion." (*129 C.A.3d 134.*)

The *Perry* and *Mixon* cases, *supra*, were followed in *People v. Ingle* (1986) 178 C.A.3d 505, 223 C.R. 723, where the quality of a videotape recording of a robbery was insufficient to establish conclusively defendant's identity as the perpetrator. The victim was permitted to give opinion testimony, based on her personal observations and perceptions during the robbery, that the person portrayed on the videotape was defendant. *Held*, the evidence was properly admitted. The victim had an adequate opportunity to view defendant's physical features during the robbery. Thus, her testimony satisfied the requirements of *Perry* and *Mixon* that (a) the witness testify from personal knowledge of the defendant's appearance at or before the time the videotape was taken; and (b) the testimony aid the trier of fact in determining the identity issue. (*178 C.A.3d 514.*) (On use of photographs as basis of eyewitness identification, see 2 *Cal. Evidence (4th), Witnesses, §408.*)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 74 A.L.R.5th 643 [interpretation of surveillance photograph or videotape].



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## CHAPTER V - Opinion Evidence

### I. OPINION OF LAY WITNESS

#### C. Proper Subjects of Nonexpert Opinion.

##### 2. Sanity.

#### 1 Witkin Cal. Evid. Opinion Evid § 7

#### [§ 7] Sanity.

Certain qualified lay witnesses may state opinions as to a person's sanity. (*Ev.C. 870*, restating former C.C.P. 1870(10).) The statute sets forth the two established categories, and adds a catch-all:

(1) *Subscribing Witness*. The subscribing witness to a writing signed by a person may give an opinion as to "the sanity of such person at the time the writing was signed." (*Ev.C. 870(b)*; see *Estate of Holloway* (1925) 195 C. 711, 733, 235 P. 1012; *Estate of McDonough* (1926) 200 C. 57, 62, 251 P. 916; 7 Wigmore (Chadbourn Rev.) §1936; 31A *Am.Jur.2d* (1989 ed.), *Expert and Opinion Evidence* §164 et seq.; 17 A.L.R.3d 503 [necessity of foundation for attesting witness' opinion as to testator's mental condition].)

(2) *Intimate Acquaintance*. An opinion on sanity may be given by a witness who is "an intimate acquaintance of the person whose sanity is in question." (*Ev.C. 870(a)*; see 7 Wigmore (Chadbourn Rev.) §§1933, 1938.) The purpose of the special requirement of *intimacy* is to limit the witnesses to those qualified by sufficient opportunity to observe and become familiar with the person's temperament and habits of mind, and casual acquaintances are not qualified. Hence, where a person testifying had merely called upon the alleged incompetent five times, for business reasons, he was not a proper witness. (*Atkins Corp. v. Tourny* (1936) 6 C.2d 206, 209, 57 P.2d 480.) On the other hand, two old friends of a testatrix, who had discussed her business affairs with her, were held to be qualified. (*Estate of Rich* (1947) 79 C.A.2d 22, 27, 179 P.2d 373.) (See also *People v. Vaughn* (1910) 14 C.A. 201, 206, 111 P. 620; *Estate of Clegg* (1978) 87 C.A.3d 594, 601, 151 C.R. 158 [letter written by longtime acquaintance of decedent indicating that after suffering blow to head, decedent "hardly knew what was going on"]; 29 *Cal. L. Rev.* 430; 18 *Stanf. L. Rev.* 1137; 40 A.L.R.2d 15 [requisite foundational showing].)

(3) *Any Person Qualified*. *Ev.C. 870(c)* adds a third type of witness on sanity: a person qualified under *Ev.C. 800* or *801* to testify in the form of an opinion. This merely incorporates by reference the general rules permitting a lay witness to give opinions when they are helpful (*supra*, §4) and an expert to testify on a matter within the expert's special knowledge, etc. (*infra*, §28 et seq.).

Two distinctions should be noted:

*First*, the opinion must be limited to the question of *sanity*. Thus, it was held objectionable (too strictly, it would seem) to ask a trained nurse who attended a grantor during illness whether the latter was "capable of reasoning upon a business proposition." (*In re Hill* (1936) 13 C.A.2d 326, 329, 57 P.2d 155; see also *Estate of Martin* (1915) 170 C. 657, 667, 151 P. 138.) And most courts reject opinions of lay witnesses in will contests on the issue of *undue influence*. (See

7 Wigmore (Chadbourn Rev.) §1937; 79 *Am.Jur.2d*, Wills §449; 29 *Cal. L. Rev.* 430.)

*Second*, where the evidence is offered not as an opinion on mental sanity but merely to show rational or irrational *appearance*, the witness need not have the qualifications prescribed by *Ev.C. 870*. (See *Pfingst v. Goetting* (1950) 96 *C.A.2d* 293, 304, 215 *P.2d* 93, *infra*, §11.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Criminal Law k.448(10), 456; Evidence k.471(14), 478 et seq.



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## CHAPTER V - Opinion Evidence

### I. OPINION OF LAY WITNESS

#### C. Proper Subjects of Nonexpert Opinion.

#### 3. Party's Own Intent, Motive, or Knowledge.

##### a. Civil Cases.

#### 1 Witkin Cal. Evid. Opinion Evid § 8

[§ 8] Civil Cases.

Intent, motive, or knowledge, when relevant, may be proved by circumstantial evidence (1 *Cal. Evidence* (4th), *Circumstantial Evidence*, §117 et seq.), by declarations (1 *Cal. Evidence* (4th), *Hearsay*, §204 et seq.), or by testimony of a person as to *his or her own intent or motive*. "The state of mind of a person, like the state or condition of the body, is a fact to be proved like any other fact when it is relevant to an issue in the case, and the person himself may testify directly thereto." (*Cope v. Davison* (1947) 30 C.2d 193, 200, 180 P.2d 873.) (See also *Johnston v. Benton* (1925) 73 C.A. 565, 569, 239 P. 60 ["Whenever the question of the intention of a person is at issue, it may be proved by the direct testimony of such person"]; *Kusmark v. Montgomery Ward & Co.* (1967) 249 C.A.2d 585, 591, 57 C.R. 678; 2 Wigmore (Chadbourn Rev.) §581; 31A *Am.Jur.2d* (1989 ed.), *Expert and Opinion Evidence* §362.) Testimony of this sort by a party may, however, be less persuasive than strong circumstantial evidence to the contrary. (See *Dowden v. Industrial Acc. Com.* (1963) 223 C.A.2d 124, 134, 35 C.R. 541, 1 *Cal. Evidence* (4th), *Circumstantial Evidence*, §124.)

The following are illustrations:

(1) A grantor may testify to the grantor's own intention or lack of intention to pass legal title in handing over a deed. (See *Howell v. Mays* (1930) 107 C.A. 751, 753, 290 P. 898; *Coffey v. Cooper* (1960) 185 C.A.2d 464, 468, 8 C.R. 358; 4 *Summary* (9th), *Real Property*, §173.)

(2) On the issue of mistake in signing an instrument, the plaintiff may testify as to his or her belief and intent. Thus, in *Walton v. Bank of California* (1963) 218 C.A.2d 527, 32 C.R. 856, plaintiff trustor sought to rescind her inter vivos trust for unilateral mistake as to its tax consequences. She was asked: "Would you have signed the trust agreement ... if you had known that you would have to pay gift tax because you signed it?" *Held*, the question was proper, for its purpose was to establish her belief that she was not making a gift involving payment of taxes. (218 C.A.2d 544.)

(3) In a tort action for fraud and deceit, reliance on the defendant's false representation or concealment is an issue to which the plaintiff may testify. (*Peskin v. Squires* (1957) 156 C.A.2d 240, 249, 319 P.2d 405; see 5 *Summary* (9th), *Torts*, §711.)

(4) In an action for malicious prosecution or defamation, the defendant may testify to having acted without malice. (*Fleet v. Tichenor* (1909) 156 C. 343, 348, 104 P. 458 [slander]; *Schubkegel v. Gordino* (1943) 56 C.A.2d 667, 674, 133 P.2d 475 [malicious prosecution]; see 5 *Summary* (9th), *Torts*, §§429, 519.)



(5) Where a person's residence or domicile is in issue, the purpose or intent with which the person left one place of abode for another may be relevant and is a proper subject of the person's opinion testimony. (*Johnston v. Benton*, *supra*, 73 C.A. 569 [residence; testimony on motion for change of venue]; see 3 *Cal. Proc.* (4th), *Actions*, §736 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Grantor's intention to pass title:*

*Cross-Reference:* 12 *Summary* (10th), *Real Property*, §294.

(3) *Reliance on false representation or concealment:*

*Cross-Reference:* 5 *Summary* (10th), *Torts*, §808 et seq.

(4) *Malicious prosecution or defamation:*

*Cross-Reference:* 5 *Summary* (10th), *Torts*, §§511, 592. *West's Key Number Digest*, Evidence k.471(9), 472(7)



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## CHAPTER V - Opinion Evidence

### I. OPINION OF LAY WITNESS

- C. Proper Subjects of Nonexpert Opinion.
- 3. Party's Own Intent, Motive, or Knowledge.
  - b. Criminal Cases.

#### 1 Witkin Cal. Evid. Opinion Evid § 9

[§ 9] Criminal Cases.

In a prosecution for a crime requiring specific intent, the defendant may testify as to lack of such intent. (*People v. Morley* (1928) 89 C.A. 451, 457, 265 P. 276; *People v. Becker* (1934) 137 C.A. 349, 352, 30 P.2d 562; see 2 Wigmore (Chadbourn Rev.) §581; 1 Cal. Crim. Law (3d), *Elements*, §6.)

Thus, in *People v. Wepplo* (1947) 78 C.A.2d Supp. 959, 178 P.2d 853, a prosecution for "willfully and lewdly" selling an obscene book, it was held error to exclude the question, directed at defendant by his own counsel, whether defendant had any lewd intent in making the sale. The court also suggested, without expressly holding, that it might be proper on that same issue to admit evidence that defendant had read and relied upon book reviews which commended the book without disclosing its obscene nature. (78 C.A.2d Supp. 966.)

In *People v. Gaines* (1951) 106 C.A.2d 176, 180, 234 P.2d 702, defendant, charged with issuing a check without funds, was prevented from testifying that he expected a third person to put money in the bank, hence, did not intend to defraud. *Held*, this was reversible error. (106 C.A.2d 180.)

In *People v. Taber* (1936) 13 C.A.2d 27, 55 P.2d 1189, a trial for arson, the question was whether there was sufficient corroboration of the testimony of R, an alleged accomplice. The prosecution stressed the fact that, after the crime was committed, defendant gave R money and hired an attorney for him. *Held*, it was reversible error to refuse to permit defendant to testify that he did these things under a threat of blackmail by R, for the testimony went directly to the motive of defendant in doing certain things which were relied upon as corroborating the evidence of the accomplice. (13 C.A.2d 33.)

A similar rule applies where a defendant is charged with a crime of violence, such as assault, and claims self-defense. After prima facie proof of facts showing reasonable cause to apprehend death or great bodily harm, the defendant may testify as to his or her own mental reaction--fear. (*People v. Sonier* (1952) 113 C.A.2d 277, 278, 248 P.2d 155.) In the foregoing decision, the court, quoting a Pennsylvania case, said: "He alone, of all the witnesses called by him, could testify as to whether he really thought he was in peril of his life or of great bodily harm, and no testimony could have been more competent than his own as to his belief that he was in such danger." (113 C.A.2d 278.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Criminal Law k.448(3), 449.2



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## CHAPTER V - Opinion Evidence

## I. OPINION OF LAY WITNESS

## C. Proper Subjects of Nonexpert Opinion.

## 4. Measure of Speed, Distance, Size, etc.

1 *Witkin Cal. Evid. Opinion Evid* § 10

[§ 10] Measure of Speed, Distance, Size, etc.

(1) *Speed*. The speed of an automobile, streetcar, or train may be stated as "unusual" or "very fast" or "much faster" than another, or "faster than the ordinary rate." (*Dawson v. San Diego Elec. Ry. Co.* (1927) 82 C.A. 141, 151, 255 P. 215; see also *Johnsen v. Oakland, San Leandro & Haywards Elec. Ry.* (1900) 127 C. 608, 611, 60 P. 170 [streetcar was going very fast]; *Schwenger v. Gaither* (1948) 87 C.A.2d 913, 914, 198 P.2d 108 [automobile going 40 miles per hour]; *Rash v. San Francisco* (1962) 200 C.A.2d 199, 204, 19 C.R. 266; 31A Am.Jur.2d (1989 ed.), *Expert and Opinion Evidence* §117; 83 A.L.R.2d 1329 [admissibility of train speed prior to grade-crossing accident, and competency of witness to testify thereto]; 92 A.L.R.2d 1391 [motor vehicle]; 29 A.L.R.3d 248 [expert and nonexpert opinions]; 11 Proof of Facts 1.)

An opinion of this type may even be given by a witness who did not see but merely heard a streetcar pass. (*Bennett v. Central Calif. Traction Co.* (1931) 115 C.A. 1, 7, 1 P.2d 47.) (See 33 A.L.R.3d 1405 [speed of motor vehicle based only on sounds heard by nonexpert].)

The lack of recent case law concerning lay opinion as to speed reflects the fact that today, where speed is an issue, the parties are likely to employ experts. (See *infra*, §§59, 60.)

(2) *Distance*. Distance may be stated as an opinion; e.g., the testimony of an 11-year-old girl that a car was "pretty close." "It is common knowledge that distance is frequently described by a witness by reference to objects in the court room." (*Dean v. Feld* (1946) 77 C.A.2d 327, 330, 175 P.2d 278.) (See also *Raymond v. Glover* (1898) 122 C. 471, 476, 55 P. 398 [witness properly allowed to state that he was within hearing distance of another].)

(3) *Other Subjects*. An opinion as to size is also proper. (See *People v. Helm* (1907) 152 C. 532, 546, 93 P. 99 [bicycle tracks about an inch wide].) And the same is true of *weight, time, direction, position*, etc. (See *Healy v. Visalia & Tulare R. Co.* (1894) 101 C. 585, 589, 36 P. 125, *infra*, §34; 7 Wigmore (Chadbourn Rev.) §1977.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*West's Key Number Digest*, Criminal Law k.448(9), 461; Evidence k.471(21) et seq., 474(8), 474(9)



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### I. OPINION OF LAY WITNESS

#### C. Proper Subjects of Nonexpert Opinion.

##### 5. Appearance or Demeanor.

#### 1 Witkin Cal. Evid. Opinion Evid § 11

[§ 11] Appearance or Demeanor.

(1) *Rational or Irrational Appearance.* In *Holland v. Zollner* (1894) 102 C. 633, 36 P. 930, on the issue of competency of an elderly grantor, a witness testified to circumstances of irrational behavior (disgusting eating habits, irritability, wild expressions, etc.), and then was asked: "What was the appearance of this man at that time with reference to his being rational or irrational?" *Held*, objection was properly overruled, and the answer "irrational" was competent evidence. The witness was not "an intimate acquaintance" and therefore could not testify to mental sanity (see *supra*, §7). But the question was nevertheless proper: "To say that a man acts *rational* or *irrational* is but to describe an outward manifestation drawn from observed facts. It is the last analysis, the ultimate fact, deduced from evidentiary facts coming under observation, but so transitory and evanescent as to be like drunkenness, easy of detection, and difficult of explanation. ... The conclusion is reached not as a sequence of knowledge in reference to occult mental conditions, but as a result of observed facts patent to all, concerning which the non-expert is as competent to judge as the trained specialist." (102 C. 639.)

The California cases on this point were extensively reviewed in *Pfingst v. Goetting* (1950) 96 C.A.2d 293, 215 P.2d 93, where evidence was offered to show that an elderly woman grantor was competent to make a gift. Such questions as "In your judgment, at that time could she understand what was explained to her?" were held proper. The court observed that direct questions on sanity or competency ("In your judgment ... was she competent to conduct her property and business affairs?") were too broad where the witness was not an intimate acquaintance (see *supra*, §7), but that questions as to the conversation, actions, alertness, and conduct during the transaction were appropriate. "Respondents were certainly entitled to show, if they could, that decedent when she made these transfers appeared to be rational and to act on her own volition, as a free agent and without pressure, to know what she was doing, and to comprehend the legal effects and consequences of her acts." (96 C.A.2d 304.)

(2) *Demeanor.* In *People v. Deacon* (1953) 117 C.A.2d 206, 255 P.2d 98, a prosecution for murder on the theory of an angry killing, the witness testified to the "spirit or tenor of voices" that he heard in a room directly above his own. He stated that the voices denoted "anger." *Held*, this was proper. "Anger, like speed or sobriety, must be described as a conclusion. ... How 'anger' could be evidenced other than by characterizing it as such is difficult to see. Anger is the fact, not the voices that evidence the anger. Every attempt at analyzing the voices heard would reproduce the same objection here made, if it were a good one." (117 C.A.2d 210.) (See *People v. Medina* (1990) 51 C.3d 870, 887, 274 C.R. 849, 799 P.2d 1282 [at competency hearing, deputy sheriff could testify that defendant appeared "very responsive" and "very descriptive" during discussion of need for protective custody while incarcerated]; *People v. Harris* (1969) 270 C.A.2d 863, 872, 76 C.R. 130, citing the text [witness testified that it looked as if defendant was trying to break up a

fight; error to sustain objection]; 7 Wigmore (Chadbourn Rev.) §1974.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Demeanor*. See *People v. Chatman* (2006) 38 C.4th 344, 397, 42 C.R.3d 621, 133 P.3d 534 [in penalty phase of capital murder trial, trial judge properly overruled objection to testimony by prosecution witness that, in prior incident, defendant seemed to be enjoying kicking school custodian; although lay witness may not give opinion about another's state of mind, witness may testify about objective behavior and describe behavior as being consistent with state of mind]. *West's Key Number Digest*, Criminal Law k.448(11), 455; Evidence k.471(13), 477 et seq.



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## I. OPINION OF LAY WITNESS

## C. Proper Subjects of Nonexpert Opinion.

## 6. Intoxication.

## 1 Witkin Cal. Evid. Opinion Evid § 12

[§ 12] Intoxication.

A witness who has observed the actions of a person may testify that the person was or was not intoxicated. (*People v. Smith* (1949) 94 C.A.2d Supp. 975, 977, 210 P.2d 98; see 7 Wigmore (Chadbourn Rev.) §1974; 31A Am.Jur.2d (1989 ed.), *Expert and Opinion Evidence* §209; 9 Proof of Facts 3d 459, 485; for discussion whether lay opinion as to drug-induced intoxication is admissible, see *People v. Williams* (1988) 44 C.3d 883, 914, 245 C.R.2d 336, 751 P.2d 395; 21 A.L.R.4th 905.)

Thus, in *People v. Ravey* (1954) 122 C.A.2d 699, 265 P.2d 154, a police officer had arrested defendant for driving while drunk. He testified that, during his years as an officer, he had observed many persons under the influence of intoxicating liquor, observed defendant on the day in question, formed an opinion, and that "he was drunk." Held, the evidence was admissible, not because the officer was an expert, but because opinion evidence of intoxication is not limited to expert testimony. (122 C.A.2d 702.) (See also *People v. Garcia* (1972) 27 C.A.3d 639, 643, footnote 3, 104 C.R. 69, citing the text [defendant's wife was erroneously restricted to testimony that shortly after the homicide, defendant's breath smelled of liquor, that he walked "like wabbly," spoke slurringly and thought incoherently; she should have been allowed to testify from personal observation that her husband was drunk].)

It has been held, however, that a conviction for serving intoxicating liquor to a person "obviously intoxicated" cannot be based on opinion evidence that the person was, because this is the ultimate issue for the jury. (*People v. Johnson* (1947) 81 C.A.2d Supp. 973, 975, 185 P.2d 105; see *infra*, §93.) On such a charge, circumstantial evidence--the facts of "outward manifestations" of intoxication--must be shown. (See *People v. Smith*, *supra*, 94 C.A.2d Supp. 977, 978 [customer's clothing disarranged, eyes bloodshot, face flushed, speech thick, balance poor, continual argument with another patron].) And a police officer who is not an expert cannot give an opinion on a defendant's blood-alcohol level based on a scientific test. (See *infra*, §25.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Navarette* (2003) 30 C.4th 458, 493, 133 C.R.2d 89, 66 P.3d 1182 [in capital murder case, trial judge did not err in refusing to admit testimony of two witnesses to effect that defendant appeared to be under influence of cocaine on day preceding charged murders; lay opinion regarding drug intoxication is admissible where foundation is established, but both these witnesses stated they had not previously seen persons intoxicated on drugs]. *West's Key Number Digest*, Criminal Law k.457



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### I. OPINION OF LAY WITNESS

#### C. Proper Subjects of Nonexpert Opinion.

##### 7. Health, Illness, or Injury.

#### 1 Witkin Cal. Evid. Opinion Evid § 13

[§ 13] Health, Illness, or Injury.

A person may testify to having had a particular disease or injury, but the facts must be within the person's knowledge. Thus, in *Frederick v. Federal Life Ins. Co.* (1936) 13 C.A.2d 585, 57 P.2d 235, defendant insurance company denied liability on a health policy on the ground of fraudulent concealment of gonorrhea, and introduced declarations of plaintiff tending to support its defense. On rebuttal, plaintiff was asked: "Have you at any time in your life had a disease commonly known as gonorrhea?" Held, it was reversible error to sustain defendant's objection to the question. The court referred to cases permitting persons to testify that they had suffered a broken breastbone, fractured ribs, abscesses, and falling of the womb. (13 C.A.2d 589.) (See also 7 Wigmore (Chadbourn Rev.) §1975.)

A witness may also give an opinion, based on having observed facts perceptible to the senses, of the health or disease of another. (*Robinson v. Exempt Fire Co. of San Francisco* (1894) 103 C. 1, 5, 36 P. 955 ["was he, or was he not, apparently well?"; objection was erroneously sustained]; *In re Marriage of Teegarden* (1986) 181 C.A.3d 401, 409, 226 C.R. 417, quoting the text; see also 31A Am.Jur.2d (1989 ed.), *Expert and Opinion Evidence* §203.)

The same is true of suffering from injury. In *Kline v. Santa Barbara Consol. Ry. Co.* (1907) 150 C. 741, 90 P. 125, an action for damages for injuries sustained by a woman streetcar passenger, a bystander testified that she was unable to stand and suffered intensely, and her daughter and a nurse gave similar testimony covering some days thereafter. The court said: "It does not require an expert to tell whether a person suffers. The appearance of a person who suffers severely is sufficient to manifest his condition to any one of ordinary intelligence and experience. These witnesses had all observed her, had heard her groans and complaints, and were competent to give an opinion as to her suffering." (150 C. 750.) (See also *Capelouto v. Kaiser Foundation Hosp.* (1972) 7 C.3d 889, 895, 103 C.R. 856, 500 P.2d 880 [expert testimony not needed to prove child's pain and suffering].)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Criminal Law k.455; Evidence k.471(13), 477 et seq.



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### I. OPINION OF LAY WITNESS

#### C. Proper Subjects of Nonexpert Opinion.

##### 8. Age and Parentage.

#### 1 Witkin Cal. Evid. Opinion Evid § 14

[§ 14] Age and Parentage.

In *People v. Caldwell* (1921) 55 C.A. 280, 203 P. 440, a prosecution for statutory rape, the adoptive parents of the prosecutrix, who had adopted her when a little girl some 9 years before, testified that she was more than 2 years under 18. *Held*: (a) Any witness who can describe a person (not present in court) may give an opinion on *minority or majority* of that person. (b) Where the issue is *exact age*, the witness is usually required to have had an acquaintance of some duration before the opinion is received. All tests were met here: "It is next to impossible that they did not know her actual age at the time of the adoption, although the knowledge might be hearsay when tested by the rules of evidence. It is next to impossible, granting for the moment that her age at the period of the adoption was unknown to them, that they did not know her approximate age at the time they testified." (55 C.A. 297.) (See also 7 Wigmore (Chadbourn Rev.) §1974; 31A Am.Jur.2d (1989 ed.), Expert and Opinion Evidence §387; 45 Proof of Facts 2d 659.)

In *Estate of Ganes* (1931) 114 C.A. 17, 299 P. 550, an applicant for letters of administration testified that she knew of her own knowledge that she was the *natural child* of the decedent. *Held*, a child may competently testify to the fact of his or her *parentage*. (114 C.A. 19.)

Similarly, testimony as to one's own age is allowable. (*People v. Lew* (1947) 78 C.A.2d 175, 179, 177 P.2d 60; 45 Proof of Facts 2d 644.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Criminal Law k.454; Evidence k.476





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### I. OPINION OF LAY WITNESS

#### C. Proper Subjects of Nonexpert Opinion.

##### 9. Ownership and Possession.

#### 1 Witkin Cal. Evid. Opinion Evid § 15

[§ 15] Ownership and Possession.

Ownership is usually regarded as a matter of permissible opinion on which a lay witness may testify. (See *Skinner v. Los Angeles* (1936) 5 C.2d 317, 318, 54 P.2d 446; *Strauss v. Dubuque Fire & Marine Ins. Co. of Dubuque, Iowa* (1933) 132 C.A. 283, 294, 22 P.2d 582; *Mendocino v. Barnard* (1943) 57 C.A.2d 450, 451, 134 P.2d 814; *Truck Ins. Exchange v. Torres* (1961) 193 C.A.2d 483, 487, 14 C.R. 408, citing the text; 7 Wigmore (Chadbourn Rev.) §1960; 31A Am.Jur.2d (1989 ed.), *Expert and Opinion Evidence* §139; 20 Proof of Facts 2d 321, 350 [status of property as separate, rather than community, property].)

Thus, in *Strauss v. Dubuque Fire & Marine Ins. Co.*, *supra*, an action on a fire insurance policy, the defense was that a corporation and not plaintiff insured was the sole owner. Defendants asked plaintiff, "And that corporation owned the property that was destroyed in the fire, didn't it?" *Held*, the question was properly allowed. (132 C.A. 294.)

In *Nolan v. Nolan* (1909) 155 C. 476, 101 P. 520, plaintiff was asked: "Is this note not your own property?" (Answer, yes.) And his daughter was asked: "Did you ever own it?" (Answer, no.) "Do you know who owns it?" (Answer, "My father does.") *Held*, it was within the trial judge's discretion to permit the questions and answers. (155 C. 480.) (But see *Winslow v. Glendale Light & Power Co.* (1913) 164 C. 688, 689, 130 P. 427, *infra*, §20 [dictum: where ownership is in dispute, to permit witness to say he owns property is to allow statement of conclusion that should be drawn by trier of fact].)

The same is true of possession. (See *Nathan v. Dierssen* (1905) 146 C. 63, 66, 79 P. 739; *People v. Lockhart* (1962) 200 C.A.2d 862, 874, 19 C.R. 719, quoting the text [occupation or possession: "I believe he was living there"]; 7 Wigmore (Chadbourn Rev.) §1960.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Evidence k.471(26), 471(27), 472(6)



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## CHAPTER V - Opinion Evidence

### I. OPINION OF LAY WITNESS

#### C. Proper Subjects of Nonexpert Opinion.

##### 10. Value of Services.

#### 1 Witkin Cal. Evid. Opinion Evid § 16

[§ 16] Value of Services.

A party suing for compensation may testify to the value of the party's own services. (*Rosenow v. Wiener* (1909) 11 C.A. 294, 295, 104 P. 839 [bookkeeper and salesperson]; *Coogan Finance Corp. v. Beatcher* (1932) 120 C.A. 278, 280, 7 P.2d 695 [manager of automobile finance company]; *Eltolad Music v. April Music* (1983) 139 C.A.3d 697, 709, 188 C.R. 858 [promoter of popular music artists and compositions]; see 31A Am.Jur.2d (1989 ed.), *Expert and Opinion Evidence* §339 et seq.; 3 Wigmore (Chadbourn Rev.) §715; 5 A.L.R.3d 947.) This is true even though the basis of the plaintiff's opinion is mainly information acquired by consulting others. (*Coogan Finance Corp. v. Beatcher*, *supra*.)

Other nonexpert witnesses may give evidence of the value of ordinary services as to which there is no "market value" or prevailing wage scale. (*Warder v. Hutchison* (1924) 69 C.A. 291, 299, 231 P. 563 [testimony of neighbors on value of board, lodging, and washing furnished to decedent].) Thus, in a suit for wrongful death of his wife, plaintiff husband was asked by his attorney what in his opinion it would cost him to replace his wife in the home as a housekeeper, and he said "between \$ 225 and \$ 250 a month." *Held*, this was admissible. (*Burke v. San Francisco* (1952) 111 C.A.2d 314, 317, 244 P.2d 708.)

In *Donahue v. Ziv Television Programs* (1966) 245 C.A.2d 593, 54 C.R. 130, plaintiffs sued for breach of an alleged implied contract to pay for an idea for a TV screenplay. One plaintiff, who had been in the entertainment industry for 20 years and had made many films, gave his opinion of the value of the submission at \$ 1 million. *Held*, he was competent to testify to the value of the idea, "or, perhaps more accurately, to the value of his services in disclosing it." (245 C.A.2d 609.) (See also *Donahue v. United Artists Corp.* (1969) 2 C.A.3d 794, 802, 83 C.R. 131 [coowner of idea for TV series also experienced in television production].)

Indeed, the judge or jury may, without any opinion evidence at all, estimate the value of ordinary services of a type within general knowledge. (*Nylund v. Madsen* (1928) 94 C.A. 441, 444, 271 P. 374 [jury; housekeeper]; *Estate of Reinhertz* (1947) 82 C.A.2d 156, 160, 185 P.2d 858 [probate judge properly allowed executor \$ 1 per hour and, later, 75 cents per hour for essential services though three witnesses for appellant testified that a handyman could have done the work at 50 cents per hour].)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Criminal Law k.460; Evidence k.471(20), 474(17)



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## CHAPTER V - Opinion Evidence

### I. OPINION OF LAY WITNESS

#### C. Proper Subjects of Nonexpert Opinion.

##### 11. Negligence.

#### *1 Witkin Cal. Evid. Opinion Evid § 17*

[§ 17] Negligence.

In *Easton v. Strassburger* (1984) 152 C.A.3d 90, 199 C.R. 383, plaintiff purchaser of a residence recovered damages from defendant, the vendor's real estate broker, for negligent failure to discover and disclose defects in the property (built on fill and subject to massive earth movements). On appeal, defendant contended that the judgment should be reversed because no expert testimony was received on the critical issues of standard of care applicable to defendant and defendant's failure to meet the standard. *Held*, no such testimony was necessary.

The court pointed out that expert testimony is not required where a question is resolvable by common knowledge. This rule, most fully developed in the medical malpractice cases (see 1 *Cal. Evidence* (4th), *Burden of Proof and Presumptions*, §136 et seq.), applies here: Defendant's agents knew of the fill and the settlement problems frequently associated with such soil, and were also aware of such indications as an uneven floor and the use of netting to repair an earlier slide. "It does not require an expert to explain to the jury the relationship between uneven floors and the possibility of unstable soil, or the relationship between past slide activity and the likelihood or possibility of future slide activity." (152 C.A.3d 106.) (See *Mast v. Magpusao* (1986) 180 C.A.3d 775, 779, 780, 225 C.R. 689 [common knowledge exception precluded need for expert testimony even if rest home operator was guilty of "professional negligence" in failing to protect plaintiff from aggressive resident]; on inadmissibility of nonexpert opinion where common knowledge requirement is not satisfied, see *infra*, §22; on necessity of expert testimony to show standard of care in negligence action against insurance agent or broker, see 52 A.L.R.4th 1232.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*West's Key Number Digest*, Evidence k.472(4), 481 et seq.



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## CHAPTER V - Opinion Evidence

### I. OPINION OF LAY WITNESS

#### C. Proper Subjects of Nonexpert Opinion.

##### 12. Value of Property Owned.

#### 1 Witkin Cal. Evid. Opinion Evid § 18

[§ 18] Value of Property Owned.

An opinion on value of *another's property* is received only from one familiar with property values in the area, i.e., an expert. (See *infra*, §65.) But the *owner of real or personal property* may testify to its value without showing any special qualifications. (*Willard v. Valley Gas & Fuel Co.* (1915) 171 C. 9, 14, 151 P. 286; *Golding v. R.K.O. Pictures* (1950) 35 C.2d 690, 701, 221 P.2d 95 [infringement of literary property]; *Schroeder v. Auto Driveaway Co.* (1974) 11 C.3d 908, 921, 114 C.R. 622, 523 P.2d 662, citing the text ["The opinion of an owner of personal property is in itself competent evidence of the value of that property, and sufficient to support a judgment based on that value"]; *Holmes v. Southern Calif. Edison Co.* (1947) 78 C.A.2d 43, 53, 177 P.2d 32 [negligent destruction of personal property; testimony that its reasonable market value was between \$ 12,000 and \$ 15,000]; *Chatterton v. Boone* (1947) 81 C.A.2d 943, 948, 185 P.2d 610 [conversion; evidence of cost of property, together with extent of use and condition]; *Wade v. Markwell & Co.* (1953) 118 C.A.2d 410, 431, 258 P.2d 497 [same]; *People v. Henderson* (1965) 238 C.A.2d 566, 567, 48 C.R. 114 [grand theft; victim, having purchased watch for \$ 1,800 and ring for \$ 1,200, was properly allowed to testify that this was their value]; see 3 Wigmore (Chadbourn Rev.) §§714, 716; 31A *Am.Jur.2d* (1989 ed.), *Expert and Opinion Evidence* §319 et seq.; 60 A.L.R.2d 1307 [for purposes of gift tax].)

Condemnation cases furnish the most common illustrations of this kind of permissible layperson's opinion. (See *Long Beach City High School Dist. of Los Angeles v. Stewart* (1947) 30 C.2d 763, 772, 185 P.2d 585; *People v. La Macchia* (1953) 41 C.2d 738, 746, 264 P.2d 15 [owner competent "upon a showing that he has resided thereon for a number of years"].) However, the law on this subject has been codified for both expert and lay opinions in a separate article of the Evidence Code (see *infra*, §98 et seq.), and was extended in 1980 to noncondemnation cases (*infra*, §99). (For the new enlarged definition of "owner of property," see *Ev.C. 813*, *infra*, §102.)

The owner's opinion must, of course, have a proper basis: "[A]n owner is bound by the same rules of admissibility as is any other witness." (*Sacramento & San Joaquin Drainage Dist. v. Goehring* (1970) 13 C.A.3d 58, 65, 91 C.R. 375 [owner was improperly allowed to testify about decrease in market value caused by loss of "right" that was not legally enforceable]; *Contra Costa Water Dist. v. Bar-C Properties* (1992) 5 C.A.4th 652, 661, 7 C.R.2d 91, 8 *Summary* (9th), *Constitutional Law, Supp.*, §1018 [subdivision owners whose opinion was based on inadmissible method of valuation, i.e., the "economic analysis" approach, were properly precluded from testifying].)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Proper basis for owner's opinion:*

*Cross-Reference:* 8 *Summary* (10th), *Constitutional Law*, §1230. *West's Key Number Digest*, Criminal Law k.460;

Evidence k.471(20), 474(18), 474(19)



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## CHAPTER V - Opinion Evidence

### I. OPINION OF LAY WITNESS

#### C. Proper Subjects of Nonexpert Opinion.

##### 13. Other Subjects.

#### 1 Witkin Cal. Evid. Opinion Evid § 19

[§ 19] Other Subjects.

(1) *Aggressor in Affray*. (See *People v. Moreno* (1973) 32 C.A.3d Supp. 1, 7, 108 C.R. 338 [eyewitness to confrontation between defendant and police officers could state his observations as to who was precipitating or "provoking" an affray].)

(2) *Alcoholic Beverages*. In *Oxman v. Department of Alcoholic Beverage Control of Calif.* (1957) 153 C.A.2d 740, 315 P.2d 484, appellant's liquor license was revoked for violation of the statute prohibiting use of female entertainers ("B-girls") to solicit alcoholic beverages from patrons. The testimony of one of the girls that she knew how champagne tasted, and that she had ordered and received "champagne cocktails" was held admissible. "[A] person who has tasted alcoholic beverages before may testify as to the nature of the drink." (153 C.A.2d 749.)

(3) *Cause of Injury*. In *McNeil v. Yellow Cab Co.* (1978) 85 C.A.3d 116, 147 C.R. 733, the question whether the failure of a taxicab company to provide visible seat belts in its cabs caused plaintiff's claimed injuries was held a matter of common knowledge not requiring expert testimony. (85 C.A.3d 118.)

(4) *Character*. Opinion evidence of character is admissible. (*Ev.C. 1100, 1 Cal. Evidence (4th), Circumstantial Evidence*, §§46, 55, 58.)

(5) *Defamation: Damage to Reputation*. (See *Weller v. American Broadcasting Cos.* (1991) 232 C.A.3d 991, 1008, 1009, 283 C.R. 644, 5 Summary (9th), *Torts, Supp.*, §549 [silver expert could offer lay opinion about implied meaning of allegedly defamatory television broadcasts about silver dealer, where opinion was not offered to prove that implied facts were understood as defamatory, but to explain basis of expert's opinion that such facts damaged dealer's reputation].)

(6) *Defamation: Identity of Person Defamed*. Where defamatory words are ambiguous as to the person to whom they relate, the opinions or "understanding" of those who have knowledge of the parties and circumstances may be offered to identify the person. (*Russell v. Kelly* (1872) 44 C. 641, 644; see 41 Cal. L. Rev. 146; 95 A.L.R.2d 239.)

(7) *Handwriting*. The opinion of an ordinary witness as to a person's handwriting, of which the witness has knowledge, is admissible. (*Ev.C. 1416, 2 Cal. Evidence (4th), Documentary Evidence*, §11.)

(8) *Lack of Sexual Deviancy*. In *People v. McAlpin* (1991) 53 C.3d 1289, 283 C.R. 382, 812 P.2d 563, defendant was convicted of molesting the 9-year-old daughter of a woman he was dating. He unsuccessfully sought to present lay

opinions that he was not sexually deviant. The opinion of a male witness, a friend of defendant's, was based on his observation of defendant's assertedly normal sexual conduct with adult women; the testimony of female witnesses, who had dated defendant, was premised on their normal personal sexual experiences with defendant and their observation of defendant's conduct with their daughters. Defendant was also prevented from offering testimony by the two females that defendant had a reputation for "normalcy in his sexual tastes" and was of "high moral character." (53 C.3d 1310.) *Held*, although any error was harmless, the following should not have been excluded: (a) the testimony of the two female witnesses, to the extent it was based on their personal observation of defendant's behavior with their daughters (53 C.3d 1309); (b) defendant's reputation for "normalcy"--the rule that lay opinion must be based on personal observation does not apply to reputation evidence (53 C.3d 1310, 1311); and (c) testimony as to defendant's "high moral character"--evidence of this sort is routinely admitted in trials for sex offenses (53 C.3d 1311).

(9) *Narcotics*. In a prosecution for furnishing narcotics to another, the person to whom the narcotics were furnished may testify to the nature of the substance, on a showing of prior use. (*People v. Chrisman* (1967) 256 C.A.2d 425, 434, 64 C.R. 733.) (See also 95 A.L.R.3d 978 [competency of addict or user to identify material as narcotic or controlled substance].)

(10) *Obviousness of Dangerous Condition*. (See *Osborn v. Mission Ready Mix* (1990) 224 C.A.3d 104, 112, 273 C.R. 457, *supra*, §4 [plaintiff could be required to state whether condition of construction site where he fell was "open and obvious"].)

(11) *Performance of Contract*. In *Kreuzberger v. Wingfield* (1892) 96 C. 251, 31 P. 109, a witness, having testified to the terms of a contract, was asked whether his work was "according to the contract." *Held*, under the circumstances, the question called for facts, i.e., whether he had furnished the work and materials which, as he had just testified, were specified in the contract. (96 C. 256.)

(12) *Sound*. In *People v. Chin Hane* (1895) 108 C. 597, 41 P. 697, a murder case, the prosecution contended that shots which killed the deceased were fired from inside a house. The witness, who was near the scene and heard the shots, was allowed to testify that they sounded as though fired from inside the building. (108 C. 602.) (See also *People v. Glab* (1936) 15 C.A.2d 120, 123, 59 P.2d 195 [sound of footsteps]; *People v. Deacon* (1953) 117 C.A.2d 206, 210, 255 P.2d 98, *supra*, §11 [angry voices].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(5) *Defamation: Damage to Reputation*.

*Cross-Reference:* 5 *Summary* (10th), *Torts*, §620.(11a) (*New*) *Shoeprints*. See *People v. Maglaya* (2003) 112 C.A.4th 1604, 1609, 6 C.R.3d 155 [police officer who investigated attempted burglary scene was properly allowed to offer lay testimony as to similarities between pictures of shoeprints found at scene and soles of tennis shoes found in defendant's bedroom].

(11b) (*New*) *Sidewalk Defect*. See *Caloroso v. Hathaway* (2004) 122 C.A.4th 922, 928, 19 C.R.3d 254 [in personal injury action by pedestrian who tripped over crack in sidewalk in front of defendant's residence, trial judge did not abuse discretion in determining that no expert testimony was needed to determine whether crack, which created difference in elevation of less than half-inch, was dangerous].



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## CHAPTER V - Opinion Evidence

### I. OPINION OF LAY WITNESS

#### D. Improper Subjects of Nonexpert Opinion.

#### 1. Employment, Agency, Authority, or Control.

#### *1 Witkin Cal. Evid. Opinion Evid § 20*

[§ 20] Employment, Agency, Authority, or Control.

In *Winslow v. Glendale Light & Power Co.* (1913) 164 C. 688, 130 P. 427, where the issue was agency or independent contract, a witness was asked, "By whom were you employed and for whom were you working?" He answered, "For the Glendale Light & Power Company." Other testimony showed that his actual negotiations were with S, the alleged independent contractor. *Held*, the answer was a mere conclusion, and the question was improper. "In such a case the rule limits the testimony of the witness to a statement of the person by whom he was employed, the nature, terms, and surrounding circumstances of his employment. From these, with such other evidence as the case presents, must the conclusion be drawn as to who in fact was the responsible employer." (164 C. 690.) (See also *Parker v. Otis* (1900) 130 C. 322, 331, 62 P. 571, 574 ["Did you delegate authority to your sister to act as your agent ... ?"].) However, in *Majors v. Connor* (1912) 162 C. 131, 121 P. 371, the witness was asked, "Under whose control did you do the work?" *Held*, this was proper, being equivalent to "Who gave the orders?" (162 C. 135.) (On proof of agency generally, see 3 Am.Jur.2d (1986 ed.), Agency §359 et seq.)

In *People v. Ware* (1924) 67 C.A. 81, 226 P. 956, a prosecution for criminal syndicalism, the state's witness was asked, "[B]y whom was the Central Labor Council controlled at that time?" His answer ("by members of the Industrial Workers of the World," defendants' organization) was described by the court as a "glaring violation" of the opinion rule. (67 C.A. 91.) But in *Kaltschmidt v. Weber* (1904) 145 C. 596, 79 P. 272, on the issue of community or separate character of plaintiff's earnings, her husband was asked, "Who has had the management and control of your wife's earnings during the past fifteen years?" *Held*, the court erred in sustaining an objection that eliminated all evidence on this crucial issue; the question did not call for a conclusion, "at least not to such an extent as to make it objectionable for that reason." (145 C. 599.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Evidence k.471(30) et seq.





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## CHAPTER V - Opinion Evidence

### I. OPINION OF LAY WITNESS

#### D. Improper Subjects of Nonexpert Opinion.

##### 2. Contract or Understanding.

#### *1 Witkin Cal. Evid. Opinion Evid § 21*

[§ 21] Contract or Understanding.

In *Nevills v. Moore Mining Co.* (1902) 135 C. 561, 67 P. 1054, the issue was whether an express contract had been made. Testimony of plaintiff that "I had an agreement," and "They understood I was to get a salary," was held inadmissible. (135 C. 563.) And in *Hanson v. Sherman* (1914) 25 C.A. 169, 143 P. 73, on the question whether stock was legally issued to defendant or received merely as security for a loan, the witness' statement that it "was issued ... as a bonus for a loan" was held an inadmissible conclusion based on undisclosed facts. (25 C.A. 173.) (See also *Crusoe v. Clark* (1899) 127 C. 341, 344, 59 P. 700 [asking whether other persons "understood" something or "expected" something]; *Evinger v. MacDougall* (1938) 28 C.A.2d 175, 180, 82 P.2d 194 ["Did you have any agreement" with another as to interest in a building and loan association passbook]; *Froomer v. Drollinger* (1962) 201 C.A.2d 90, 98, 19 C.R. 891 [agent, not party to lease, was asked "what was your understanding" in regard to use of an area]; 7 Wigmore (Chadbourn Rev.) §1962 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Morrow v. Los Angeles Unified School Dist.* (2007) 149 C.A.4th 1424, 1444, 57 C.R.3d 885 [in action for defamation and invasion of privacy by school principal against school administrators, declaration by school employee submitted by plaintiff in opposition to defendants' SLAPP suit motion (C.C.P. 425.16; see 5 Cal. Proc. (4th), Pleading, §963) was inadmissible in part because it included improper lay opinion as to meaning and legal effect of applicable collective bargaining agreement]. *West's Key Number Digest*, Evidence k.471(28)



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## CHAPTER V - Opinion Evidence

### I. OPINION OF LAY WITNESS

#### D. Improper Subjects of Nonexpert Opinion.

##### 3. Standard of Care.

#### 1 Witkin Cal. Evid. Opinion Evid § 22

[§ 22] Standard of Care.

A nonexpert opinion on what constitutes due care or negligence is inadmissible *unless the conduct involved is within the common knowledge of laypersons*. (See *Osborn v. Mission Ready Mix* (1990) 224 C.A.3d 104, 113, 273 C.R. 457 [plaintiff, a cement truck driver, could not be required to state whether construction site where he fell was in a reasonable condition]; 31A Am.Jur.2d (1989 ed.), *Expert and Opinion Evidence* §§348, 396; *supra*, §17.)

Thus, in *Albrecht v. Broughton* (1970) 6 C.A.3d 173, 85 C.R. 659, defense counsel was allowed, over objection, to ask several witnesses who had viewed an accident scene immediately after a collision whether they would have turned their lights on if they had been driving that morning. *Held*, this was error. "The nonscientific terms in which illumination must be described are, if anything, less precise than terms referring to speed, distance or size. The average person has some experience with estimating feet, inches, or even miles per hour, but 'foot candles' do not come within the same range of experience; an estimate of illumination necessarily has some conclusionary aspect. But the *conclusionary aspect* of such testimony ought to be kept under reasonable limits. Here, both witnesses were able, in other parts of their testimony, to give their recollections of the illumination at the scene of the accident in terms more concrete than whether the witness would, if driving, have been using headlights. The questions complained of thus had the *predominant effect* not of producing otherwise unavailable information on the *conditions of illumination* but of bringing before the jury the opinions of the witnesses bearing on the *standard of care* applicable to both parties to the accident. Under those circumstances, appellant's objections should have been sustained." (6 C.A.3d 181.)

In *Miller v. Los Angeles County Flood Control Dist.* (1973) 8 C.3d 689, 106 C.R. 1, 505 P.2d 193, the trial judge required plaintiffs to produce expert testimony to support their claim that the builder of their flood-demolished home failed to use the proper standard of care. When they did not do so, the judge granted a nonsuit in the builder's favor. *Held*, judgment affirmed. "[W]e are satisfied that it was not for nonexpert minds to determine whether Noble Manors failed to exercise due care in the construction of the home. Building homes is a complicated activity. The average layman has neither training nor experience in the construction industry and ordinarily cannot determine whether a particular building has been built with the requisite skill and in accordance with the standards prescribed by law or prevailing in the industry. In the instant case, the issue as to whether or not the Miller home had been negligently constructed involved a multitude of subsidiary questions bearing not only upon the erection of the structure itself but also upon the location of the house on the particular lot, the elevation of the lot, the influence of the surrounding terrain, the possibility of run-offs and floods, and the existence of the debris dam. These were not questions which the jury could have resolved from their common experience and the trial judge properly concluded that the issue of the allegedly negligent construction of the Miller residence was one within the knowledge of experts only." (8 C.3d 702.)

The same is true of care required of a legal specialist. In *Wright v. Williams* (1975) 47 C.A.3d 802, 121 C.R. 194, plaintiffs sought advice from defendant, an attorney specialist in maritime law, about acquiring title to a vessel free of liens and mortgages. The title documents which the attorney examined contained a statement, "As amended by section 27 of the Merchant Marine Act of June 5th, 1920, as amended, this vessel shall not engage in the coastwise trade." (That statute prohibited use of a vessel in coastwise trade if, at some time in its history, it had been owned by an alien.) When the attorney asked the purpose for which the vessel would be used, plaintiffs answered, "Pleasure," although they planned to offer cruises for skin divers in Southern California waters. The attorney then arranged for transfer of title, removal of an existing mortgage and provisions for an indemnity against liens. Soon after the vessel went into operation, however, the Coast Guard cited plaintiffs for violating the Merchant Marine Act because the vessel had once been owned by a Mexican national. At the trial (where the issue of the attorney's knowledge was disputed), plaintiffs contended that, irrespective of his lack of knowledge as to intended purpose, he had the duty of notifying plaintiffs of the legal effect of the restriction which appeared in the title documents. But plaintiffs offered no expert testimony relevant to their claim that the attorney failed to show due care. Judgment was granted for the attorney. *Held*, affirmed. "In some circumstances, the failure of attorney performance may be so clear that a trier of fact may find professional negligence unaided by the testimony of experts. Where, however, the malpractice action is brought against an attorney holding himself out as a legal specialist and the claim against him is related to his expertise as such, then only a person knowledgeable in the specialty can define the applicable duty of care and opine whether it was met. ... Without expert testimony that a reasonably prudent specialist in admiralty law would, under the facts as the trial court found them, have acted differently than did respondent, there is no basis to attach legal fault to his conduct." (47 C.A.3d 810.) (See also *Day v. Rosenthal* (1985) 170 C.A.3d 1125, 1147, 217 C.R. 89 [defendant's "numerous, blatant and egregious violations of attorney responsibility," as established by Rules of Professional Conduct, were not breaches of legal technicalities for which expert testimony was required, but where standards of competence in specialized field of tax law were at issue, expert testimony was necessary]; 14 A.L.R.4th 170 [admissibility and necessity of expert evidence as to standards of practice and negligence in legal malpractice action].)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Evidence k.471(17), 472(4), 474(6), 481



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## CHAPTER V - Opinion Evidence

### I. OPINION OF LAY WITNESS

#### D. Improper Subjects of Nonexpert Opinion.

##### 4. Veracity of Statements by Another.

##### *1 Witkin Cal. Evid. Opinion Evid § 23*

[§ 23] Veracity of Statements by Another.

In *People v. Sergill* (1982) 138 C.A.3d 34, 187 C.R. 497, defendant was charged with a violation of P.C. 288a, on evidence of oral copulation with his 8-year-old niece. The child testified to the acts and defendant denied them. Defendant called the two police officers who had investigated the matter to testify to discrepancies between the child's report to the police and her testimony. Then, on cross-examination of one officer, the prosecutor asked whether he had formed an opinion as to whether the child was telling the truth, and what that opinion was. The officer, over objection, answered that, in his opinion, the girl was being truthful, and explained that as a result of dealings with many children he could usually determine with a high degree of accuracy whether their statements were true. *Held*, admission of this evidence was reversible error.

(a) The testimony was not admissible reputation evidence as to a witness' character for honesty and veracity (see 1 *Cal. Evidence* (4th), *Circumstantial Evidence*, §44); the officers did not know the child and could not testify to her reputation. (138 C.A.3d 39.) Nor was it admissible as expert opinion: No authority suggests that the veracity of those who report crimes to the police is a proper subject of expert testimony; and, even if it were, the fact that the officers had taken numerous reports during their careers would not qualify them as experts in judging truthfulness. (138 C.A.3d 39.)

(b) The testimony was not admissible as a lay opinion under *Ev.C. 800(b)*: The officers had described their interviews with the child in concrete detail, and their opinions were not helpful to a clear understanding of their testimony. (138 C.A.3d 40.) Nor was it relevant as tending to affect the credibility of the witness: It did not fall within any of the categories listed in *Ev.C. 780* (3 *Cal. Evidence* (4th), *Presentation at Trial*, §259), for "the officers' opinions on the child's truthfulness during their limited contacts with her did not have a *reasonable* tendency to prove or disprove her credibility and were therefore not relevant." (138 C.A.3d 40.)

In *People v. Melton* (1988) 44 C.3d 713, 244 C.R. 867, 750 P.2d 741, the court generalized the rule of *People v. Sergill*, *supra*, as follows:

"Lay opinion about the veracity of particular statements by another is inadmissible on that issue. ... With limited exceptions, the fact finder, not the witnesses, must draw the ultimate inferences from the evidence. Qualified experts may express opinions on issues beyond common understanding, but lay views on veracity do not meet the standards for admission of expert testimony. A lay witness is occasionally permitted to express an ultimate opinion based on his perception, but only where 'helpful to a clear understanding of his testimony' ... , i.e., where the concrete observations on which the opinion is based cannot otherwise be conveyed. ... Finally, a lay opinion about the veracity of particular statements does not constitute properly founded character or reputation evidence ... , nor does it bear on any of the other

matters listed by statute as most commonly affecting credibility. ... Thus, such an opinion has no 'tendency in reason' to disprove the veracity of the statements." (44 C.3d 744.) (See also *People v. Smith* (1989) 214 C.A.3d 904, 915, 263 C.R. 155, 1 Cal. Evidence (4th), Hearsay, §188, [deputy sheriff should not have been allowed to testify that he believed victim's dying declaration; quoting *Melton*].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Brown* (2001) 96 C.A.4th Supp. 1, 33, 117 C.R.2d 738 [in domestic violence prosecution, trial judge did not err in admitting testimony of two police officers that they found victim credible, for limited purpose of determining whether police conduct was reasonable; distinguishing *People v. Sergill* (1982) 138 C.A.3d 34, 187 C.R. 497, text, p. 552].



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CHAPTER V - Opinion Evidence

I. OPINION OF LAY WITNESS

D. Improper Subjects of Nonexpert Opinion.

5. Mental Retardation.

*1 Witkin Cal. Evid. Opinion Evid § 24*

[§ 24] Mental Retardation.

Welf.C. 6500 provides for commitment of a mentally retarded person to a state hospital. (See 3 *Cal. Proc.* (4th), *Actions*, §41.) *In re Krall* (1984) 151 C.A.3d 792, 199 C.R. 91, points out that the statute requires evidence that the person has "(1) significantly subaverage general intellectual functioning, (2) that this functioning exists concurrently with deficits in adaptive behavior, and (3) that both of these deficits appeared in the developmental period." Because none of these factors has a meaning commonly understood by people of reasonable intelligence, they are not proper subjects for lay opinion. And legislative recognition of the necessity for expert diagnosis and opinion is found in several code sections. (151 C.A.3d 797.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER V - Opinion Evidence

### I. OPINION OF LAY WITNESS

#### D. Improper Subjects of Nonexpert Opinion.

##### 6. Intoxication Test.

#### 1 Witkin Cal. Evid. Opinion Evid § 25

#### [§ 25] Intoxication Test.

A lay witness may give an opinion, based on the witness' own perception, that a person was intoxicated. (See *supra*, §12.) To the extent that the lay opinion is based on a *scientific test*, however, there are limits on the scope of the testimony.

Thus, in *People v. Loomis* (1984) 156 C.A.3d Supp. 1, 203 C.R. 767, a police officer with long experience on a drinking driver detail had on many occasions administered a "lateral gaze nystagmus" test to drivers stopped on suspicion of drunken driving. The test involves a request to the driver to concentrate on an object held by the officer slightly above his eye level, following which the object is moved toward the outside of the driver's field of vision. "The officer then observes the onset of an involuntary oscillation of the eyeball, and measures the angle of onset of the oscillation in relation to the center point. The officer then calculates the blood-alcohol level based upon the angle of onset of the oscillation." (156 C.A.3d Supp. 4.) On this occasion, the officer stopped a suspect, administered the test, estimated the blood-alcohol level as between .15 and .16, and made the arrest. At the trial, the officer testified as a lay witness, giving his opinion based on the test. *Held*, conviction reversed. (a) The fact of oscillation of the driver's pupil was something the officer perceived with his senses, but the opinion that such oscillation indicated a particular level was not. (b) Even if the officer had qualified as an expert, the opinion would not have been admissible: The "lateral gaze nystagmus test" did not meet the criteria of *People v. Kelly* (1976) 17 C.3d 24, 130 C.R. 144, 549 P.2d 1240 (2 Cal. Evidence (4th), *Demonstrative, Experimental, and Scientific Evidence*, §42), for no showing was made of the general acceptance of the test in the scientific community. (156 C.A.3d Supp. 7.) (On subsequent determination that this test meets *Kelly* requirements, see 2 Cal. Evidence (4th), *Demonstrative, Experimental, and Scientific Evidence*, §48; on admissibility of nystagmus test results generally, see 60 A.L.R.4th 1129.)

The *Loomis* case was distinguished in *People v. Ojeda* (1990) 225 C.A.3d 404, 275 C.R. 472, where the officer who stopped defendant and administered a nystagmus (HGN) test to him was allowed at trial to describe what he observed while administering the test and to express his opinion, based on his training and experience, that defendant was under the influence of alcohol. *Held*, this was proper. The officer in *Loomis* purported to know defendant's exact blood-alcohol level; the officer in this case did not. "We do not hold that HGN is a reliable indicator of alcohol intoxication. ... We hold only that an officer with sufficient experience may testify, based on his or her own experience with the relationship between HGN and alcohol intoxication, to an opinion that a subject was or was not under the influence." (225 C.A.3d 409.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*West's Key Number Digest*, Criminal Law k.457; Evidence k.478(3)





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## CHAPTER V - Opinion Evidence

### II. EXPERT EVIDENCE

#### A. In General.

##### 1. Modern Law.

#### *1 Witkin Cal. Evid. Opinion Evid § 26*

[§ 26] Modern Law.

Expert evidence, i.e., the testimony of a person with special knowledge (see *infra*, §38), has become increasingly important in modern litigation. (See generally 1 McCormick 5th, §§13 et seq., 202 et seq.; 2 Wigmore (Chadbourn Rev.) §555 et seq.; 7 Wigmore (Chadbourn Rev.) §1933 et seq.; 31A *Am.Jur.2d* (1989 ed.), *Expert and Opinion Evidence* §32 et seq.; 2 *Am.Jur. Trials* 293, 357, 585; C.J.E.R., Judges Benchbook, Civil Proceedings: Trial §8.69 et seq.; C.E.B., *Expert Witness Guide* 2d, §1.1 et seq.; C.E.B., *Effective Introduction of Evidence* 2d, Chap. 24 [Expert Witnesses]; *BAJI* (8th ed.), No. 2.40 et seq.; 22 *U.C. Davis L. Rev.* 93 [use and misuse of expert testimony in summary judgment proceedings]; 29 *U.C. Davis L. Rev.* 413 [expert testimony by telephone]; on rule that experts may not testify as to issues of law, see *infra*, §97.) The rules and practices, however, have been under strong critical attack. The principal evils are said to be (1) the partisan expert chosen and compensated by the party; (2) the method of eliciting opinions by means of the hypothetical question (3 *Cal. Evidence* (4th), *Presentation at Trial*, §194); (3) the exclusion of useful opinions on an "ultimate issue" because they invade the province of the jury (*infra*, §88); and (4) the reluctance to give conclusiveness or special weight to certain kinds of expert evidence not properly open to dispute (*infra*, §85).

A number of reforms in the law and practice are embodied in the Evidence Code. (See *Ev.C.* 801 et seq.) (See also 1 McCormick 5th, §§16, 17; 7 Wigmore (Chadbourn Rev.) §1929.)

*F.R. Evid.*, Rule 702 reads as follows: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." (See 3 Mueller & Kirkpatrick, *Federal Evidence* 2d, §348 et seq.; 49 *Hastings L. J.* 1143 [arguing that expert testimony should be subject to sufficiency standard of *F.R. Evid.*, Rule 104(b) (see 3 *Cal. Evidence* (4th), *Presentation at Trial*, §48)].)

Some aspects of the subject of experts and expert testimony are covered in other chapters of this work. (On experimental and scientific evidence generally, see 2 *Cal. Evidence* (4th), *Demonstrative, Experimental, and Scientific Evidence*, §35 et seq.; on compelling attendance and compensation of expert, see 2 *Cal. Evidence* (4th), *Witnesses*, §21 et seq.; on qualification and direct examination, see 3 *Cal. Evidence* (4th), *Presentation at Trial*, §189 et seq.; on cross-examination, see 3 *Cal. Evidence* (4th), *Presentation at Trial*, §250 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See CACI, No. 219 et seq. [expert witness testimony]; Simons, *Cal. Evidence Manual*, §4:1 et seq.; 1 McCormick 6th, §§13 et seq., 202 et seq.; 37 *U.S.F. L. Rev.* 411 [comparing California and federal approaches to admission of expert testimony]. *F.R. Evid.*, Rule 702 was amended in 2000 to specify that a witness may provide an expert opinion only if

the testimony is based on sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

See 36 *San Diego L. Rev.* 1043 [admission of bioethics testimony under *F.R. Evid.*, *Rule 702*]; 177 A.L.R. Fed 77, 103 [United States Supreme Court cases on admissibility of expert evidence]. *West's Key Number Digest*, Criminal Law k.468 et seq.; Evidence k.505 et seq.



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## CHAPTER V - Opinion Evidence

### II. EXPERT EVIDENCE

#### A. In General.

#### 2. Expert Testimony as to Facts.

#### 1 *Witkin Cal. Evid. Opinion Evid* § 27

[§ 27] Expert Testimony as to Facts.

Expert testimony as to facts may be necessary where the facts from which conclusions are to be drawn are peculiarly within the expert's knowledge and are not a matter of common knowledge as to which an ordinary witness may competently testify. (See *31A Am.Jur.2d* (1989 ed.), *Expert and Opinion Evidence* §76 et seq.)

Thus, in *Long v. John Breuner Co.* (1918) 36 C.A. 630, 172 P. 1132, plaintiff fell on an incline in front of defendant's store. Architects and building contractors were permitted to testify that the grade was 35% to 50%, and that this was 16 times the standard grade of approaches to public buildings. *Held*, this was proper testimony of *facts*, and the conclusion--whether there was negligence--was properly left to the jury. (36 C.A. 636.)

Likewise, in *People v. Gaines* (1934) 1 C.2d 110, 34 P.2d 146, a handwriting expert sought to testify as to facts showing similarities between certain writings, but declared that through lack of time he had not reached a definite conclusion as to identity. *Held*, it was error (though not prejudicial in the particular case) to prevent his testifying to the facts. (See 1 C.2d 115.) (See 22 Cal. L. Rev. 571.)

Of course, questioning the expert on the basis of *assumed facts*, i.e., eliciting an opinion by means of hypothetical questions, is a proper and traditional means of conducting expert witness examination. (See 3 Cal. Evidence (4th), *Presentation at Trial*, §194 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER V - Opinion Evidence

## II. EXPERT EVIDENCE

## A. In General.

## 3. Opinion of Expert.

## a. Subject of Opinion.

## 1 Witkin Cal. Evid. Opinion Evid § 28

## [§ 28] Subject of Opinion.

Even though facts may be within the knowledge or understanding of the jury, the conclusions to be drawn from them may depend on knowledge or skill possessed only by an expert. In this situation, expert testimony in the form of an opinion is received. (See *People v. Stoll* (1989) 49 C.3d 1136, 1153, 1154, 265 C.R. 111, 783 P.2d 698, *infra*, §58; *Fonts v. Southern Pac. Co.* (1916) 30 C.A. 633, 639, 159 P. 215; *Manney v. Housing Authority of Richmond* (1947) 79 C.A.2d 453, 459, 180 P.2d 69; *Zelayeta v. Pacific Greyhound Lines* (1951) 104 C.A.2d 716, 724, 232 P.2d 572; *Natural Soda Products Co. v. Los Angeles* (1952) 109 C.A.2d 440, 443, 240 P.2d 993; *Wells Truckways v. Cebrian* (1954) 122 C.A.2d 666, 677, 265 P.2d 557; *People v. Torres* (1995) 33 C.A.4th 37, 45, 39 C.R.2d 103; 13B (Part 1A) U.L.A. (Master Ed.), p. 354 [Unif. Rule 702]; 1 McCormick 5th, §13; 38 A.L.R.2d 13; 31A Am.Jur.2d (1989 ed.), *Expert and Opinion Evidence* §75; C.E.B., Expert Witness Guide 2d, §2.1 et seq.; BAJI (8th ed.), No. 2.40; for illustrations, see *infra*, §45 et seq.)

One significant distinction between expert and nonexpert opinions is explained in *Manney v. Housing Authority of Richmond*, *supra*: "For a non-expert to be competent to give an opinion ... he must be testifying about facts that he has personally observed; but the expert in any case proper for the reception of expert testimony may give his opinion, although he did not personally observe the facts, basing his opinion upon the facts testified to by other witnesses put to him in the form of hypothetical questions. ... If the case is one for expert testimony this is so not because the expert has witnessed the facts, but because he is qualified by reason of his special knowledge to form an opinion on the facts while the ordinary juror is not." (79 C.A.2d 459, 460.) (See also *George v. Bekins Van & Storage Co.* (1949) 33 C.2d 834, 844, 205 P.2d 1037.)

Thus in *Rosenberg v. Goldstein* (1966) 247 C.A.2d 25, 55 C.R. 306, plaintiff, a guest of defendant's tenant, tripped when her foot became wedged under a sprinkler head on a lawn. Plaintiff called S, a licensed contractor with long experience in installation of sprinkler systems, to testify to the cause of such a dangerous condition in lawns (improper gardening practice of cutting away grass) and the remedy (raising the flange). Objection to his testimony was sustained on the ground that he had not seen defendant's lawn and sprinkler system. *Held*, this was reversible error. (247 C.A.2d 30.)

However, the value of an expert's opinion depends on the truth of the facts assumed. (See *Richard v. Scott* (1978) 79 C.A.3d 57, 63, 64, 144 C.R. 672, citing the text [factual assumptions made in arriving at opinion on speed of vehicle lacked evidentiary support]; *Hyatt v. Sierra Boat Co.* (1978) 79 C.A.3d 325, 338, 145 C.R. 47 [same; "an expert's assumption of facts contrary to the proof destroys the opinion"].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 13A U.L.A. (Master Ed.), p. 140 [Unif. Rules, Rule 702]; CACI, No. 219 [evaluation of expert testimony]; 1 McCormick 6th, §13.



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## CHAPTER V - Opinion Evidence

### II. EXPERT EVIDENCE

#### A. In General.

#### 3. Opinion of Expert.

#### b. Test: Assist Trier of Fact.

#### 1 Witkin Cal. Evid. Opinion Evid § 29

[§ 29] Test: Assist Trier of Fact.

(1) *In General.* A somewhat academic debate has taken place over the question whether expert opinion is accepted only where *necessary* (because a lay witness could not draw the inference), or where it would be *desirable* (as where a lay witness might be able to draw the inference but an expert opinion would be far more helpful). The California courts have not imposed a strict test of necessity. "Professor Wigmore has said the criterion for receiving opinion evidence from a qualified witness is: '... Can a jury from this person receive appreciable help?' " (*People v. Hopper* (1956) 145 C.A.2d 180, 191, 302 P.2d 94.) "[T]he decisive consideration in determining the admissibility of expert opinion evidence is whether the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness or whether, on the other hand, the matter is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (*People v. Cole* (1956) 47 C.2d 99, 103, 301 P.2d 854.) (See also *People v. Clay* (1964) 227 C.A.2d 87, 94, 38 C.R. 431; 2 U.C.L.A. L. Rev. 363; 7 Wigmore (Chadbourn Rev.) §1923.)

(2) *Evidence Code and Federal Rules.* Ev.C. 801(a), superseding former C.C.P. 1870(9), codified the established rule with the liberal test of helpfulness: An expert's opinion is admissible when "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert *would assist* the trier of fact." (See *People v. Stoll* (1989) 49 C.3d 1136, 1154, 265 C.R. 111, 783 P.2d 698, *infra*, §58 [Ev.C. 801(a) requires exclusion of evidence only when it would add nothing to jury's common fund of information].) F.R. Evid., Rule 702 is similar. (See *supra*, §26.)

(3) *Testimony Admissible.* In *New v. Consolidated Rock Products Co.* (1985) 171 C.A.3d 681, 217 C.R. 522, the witness R was a traffic safety engineer with expertise on the subject of driver reaction to highway warning signs. He was permitted to testify that drivers, including motorcyclists, driving 25 miles an hour or more, would not be able to read more than three words on a sign; hence, where the sign read "No Trespassing Quarry Property This Property May Be Used At Any Time For Excavation," the driver would not have read beyond the word "Quarry." *Held*, the ruling was proper. The testimony was not "within the ken of a lay juror insofar as it pertained to the capacity of an operator of a vehicle traveling at a speed of 25 miles an hour or more to perceive various posted warnings on signs containing more than three words." (171 C.A.3d 692.) (See also *People v. Champion* (1995) 9 C.4th 879, 924, 925, 39 C.R.2d 547, 891 P.2d 93 [street gang expert allowed to testify as to gang terminology used by defendants in tape-recorded conversation]; *Weller v. American Broadcasting Cos.* (1991) 232 C.A.3d 991, 1007, 1008, 283 C.R. 644, 5 Summary (9th), *Torts, Supp.*, §549A [opinion of linguistics professor would assist jury in determining whether average viewer understood television broadcasts as implying defamatory acts]; *People v. Harvey* (1991) 233 C.A.3d 1206, 1226, 285 C.R. 158, 1

*Cal. Evidence (4th), Hearsay, §49*, citing the text [police agent's opinion in narcotics case regarding significance of drug transactions and roles and levels of culpability of each defendant]; *People v. Gamez (1991) 235 C.A.3d 957, 965, 286 C.R. 894* [police officers allowed to testify as to criminal gang activities].)

(4) *Testimony Inadmissible*. In *Westbrooks v. California (1985) 173 C.A.3d 1203, 219 C.R. 674*, a wrongful death action against the state arising out of the collapse of a bridge, defendant offered expert testimony to the effect that no dangerous condition existed since the county had set up flares and had placed its deputy sheriffs in position to warn approaching motorists. *Held*, the proffered testimony was an improper subject of expert opinion: Whether a dangerous condition existed under the facts presented was a matter within the common experience of lay jurors. (*173 C.A.3d 1209, 1210.*)

In *People v. Johnson (1993) 19 C.A.4th 778, 23 C.R.2d 703*, defendants were accused of killing a prison guard, and the prosecution witnesses included prison inmates. Defendants sought to introduce the testimony of a sociologist and a former inmate, who was an "expert liar," as to the tendency of prison inmates to lie. *Held*, the trial judge properly excluded this evidence. The notion that prison inmates may lie is not outside the common understanding of jurors, and no expert testimony was needed by the jurors to assist them in ascertaining the relevant facts. A defendant may attack the credibility of inmate witnesses, but should do so with impeaching evidence relating to the particular witness in question. "Evidence of a generalized tendency of some groups of witnesses to lie, unrelated to the credibility of the specific witnesses in issue, is irrelevant and not the subject of legitimate scientific evidence from expert witnesses." (*19 C.A.4th 786.*) (See also *People v. Torres (1995) 33 C.A.4th 37, 45, 39 C.R.2d 103* [police officer should not have been asked whether crime was committed and whether defendant was guilty; this invaded province of jury, which was as competent as witness to weigh evidence and decide guilt]; *Loth v. Truck-A-Way Corp. (1998) 60 C.A.4th 757, 767, 70 C.R.2d 571, 6 Summary (9th), Torts, Supp., §1411* [in personal injury action, admission of expert testimony on "hedonic damages" was error; loss of enjoyment of life is not subject sufficiently beyond common experience that expert opinion would assist trier of fact].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Evidence Code and Federal Rules*. See *Everett v. Superior Court (2002) 104 C.A.4th 388, 393, 128 C.R.2d 418* [in civil rights action, statistical evidence showing that African Americans were more likely to be removed from amusement park for line cutting than other groups did not require expert testimony; simple comparison of percentages is not subject "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact" within meaning of *Ev.C. 801*].

(3) *Testimony Admissible*. See *People v. Smith (2005) 35 C.4th 334, 363, 25 C.R.3d 554, 107 P.3d 229* [in prosecution for capital murder and sodomy, prosecution expert was properly allowed to testify to children's reactions to sadistic molestation; experience of child victims of violent sexual assaults is sufficiently beyond common experience that expert assistance is required]; *People v. Robinson (2005) 37 C.4th 592, 631, 36 C.R.3d 760, 124 P.3d 363* [in capital murder case, testimony of forensic pathologist was properly admitted on probable respective positions of shooter and victim, as this would assist jurors in determining whether killing was premeditated and deliberate and in assessing testimony of prosecution witnesses concerning defendant's statements about how crime was carried out].

*Weller v. American Broadcasting Cos.:*

*Cross-Reference:* 5 *Summary (10th), Torts, §620.* (4) *Testimony Inadmissible*. See *People v. Smith (2003) 30 C.4th 581, 628, 134 C.R.2d 1, 68 P.3d 302* [in penalty phase of capital murder trial in which defendant's tape-recorded confession was played for jury, exclusion of expert testimony as to credibility of defendant's statements of remorse was proper, as jury could judge credibility for itself]; *People v. Coffman & Marlow (2004) 34 C.4th 1, 83, 17 C.R.3d 710, 96 P.3d 30* [in capital murder case, trial judge erred, although under circumstances error was harmless, in allowing expert witness (psychologist and expert on battered women's syndrome) to testify that, in her opinion, when codefendant testified regarding defendant's abuse of her, codefendant was telling truth]; *People v. Son (2000) 79 C.A.4th 224, 241, 93 C.R.2d 871, 1 Cal. Crim. Law (3d), Defenses, Supp., §62* [defendant's admission that his confession was false and

was made only because detective promised that defendant would serve no more than 1 year in custody was matter easily understood by layperson; thus, expert testimony as to other potential reasons for false confessions was unnecessary and was properly excluded]; *Kotla v. Regents of Univ. of Calif.* (2004) 115 C.A.4th 283, 293, 8 C.R.3d 898 [in wrongful termination action alleging that defendant laboratory fired plaintiff for impermissible retaliatory reasons, trial judge erred in allowing plaintiff's expert, who had degree in industrial psychology, to testify that certain predischARGE events were indicators of defendant's retaliatory motive; testimony did not assist jury in fact-finding and created unacceptable risk that jurors paid unwarranted deference to expert's purported expertise]; *People v. Ramos* (2004) 121 C.A.4th 1194, 1206, 1207, 18 C.R.3d 167 [in attempted murder prosecution in which defendant's confession to detective was admitted, trial judge did not abuse discretion in excluding expert testimony on police interrogation techniques and false confessions; defense's cross-examination of detective, as well as testimony of other witnesses that detective threatened them and attempted to coerce statements from them and defendant, could be evaluated without expert assistance]; on admissibility of expert testimony as to credibility of confessions generally, see 73 A.L.R.5th 581.

*Loth v. Truck-A-Way Corp.*:

*Cross-Reference:* 6 Summary (10th), Torts, §1673.

(*New*) *Medical malpractice:* In a medical malpractice action, expert testimony offered by the plaintiff will not assist the jury on the issue of causation unless the expert provides a reasoned explanation illuminating why the facts have convinced the expert, and therefore should convince the jury, that it is more probable than not that the negligent act was the cause-in-fact of the plaintiff's injury. An expert opinion that there is some theoretical possibility that the negligent act could have been a cause-in-fact of the injury is insufficient to establish causation. (*Jennings v. Palomar Pomerado Health Systems* (2003) 114 C.A.4th 1108, 1118, 1120, 8 C.R.3d 363 [in action alleging that defendant doctors negligently left retractor in plaintiff's abdominal cavity, thus causing him to develop infection after surgery, opinion of plaintiff's expert witness as to cause was properly excluded on ground that it was conclusory and failed to provide reasoned explanation connecting infection to location where retractor was left or reconciling his theory of migration route of infection with contradictory evidence]; see *Bushling v. Fremont Med. Center* (2004) 117 C.A.4th 493, 510, 11 C.R.3d 653 [in medical malpractice action, trial judge, in ruling on defendants' summary judgment motion, properly concluded that opinion of plaintiff's experts that plaintiff's injury was caused by defendants' negligence was of no evidentiary value and would not assist jury; opinion assumed that plaintiff was dropped, his arm was improperly positioned during surgery, or it was stretched, but there was no evidence to support these assumptions; relying on *Jennings*]; on subjects of expert testimony in medical malpractice case, see text, §§45, 46.)*West's Key Number Digest*, Criminal Law k.469.1





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## CHAPTER V - Opinion Evidence

### II. EXPERT EVIDENCE

#### A. In General.

#### 3. Opinion of Expert.

#### c. Bases of Opinions: In General.

#### 1 Witkin Cal. Evid. Opinion Evid § 30

[§ 30] Bases of Opinions: In General.

The opinion of an expert must not only be on a proper subject (*supra*, §28) but must be based on reliable "matter" ("facts, data, and such matters as a witness' knowledge, experience, and other intangibles upon which an opinion may be based"; Law Rev. Com. Comment to Ev.C., Div. 7). What are reliable matters depends on the particular subject, and no statutory listing is possible. The Evidence Code prescribes minimum requisites for all cases, leaving particular rules to be formulated, as in the past, by judicial decisions. (Law Rev. Com. Comment to *Ev.C.* 801.)

*Ev.C.* 801(b), the governing provision, makes an expert's opinion admissible if "[b]ased on matter (including his special knowledge, skill, experience, training, and education) *perceived by or personally known* to the witness or *made known to him* at or before the hearing, *whether or not admissible*, that is of a *type that reasonably may be relied upon* by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion." (See *infra*, §31 et seq.; and see generally *People v. Collins* (1968) 68 C.2d 319, 328, 66 C.R. 497, 438 P.2d 33, *infra*, §78, citing the text; *Pacific Gas & Elec. Co. v. Zuckerman* (1987) 189 C.A.3d 1113, 1134, 234 C.R. 630, quoting the text; 31A Am.Jur.2d (1989 ed.), *Expert and Opinion Evidence* §75; 6 Am.Jur. Trials 109 [basis of medical testimony]; C.E.B., Expert Witness Guide 2d, §4.1 et seq.)

In *Pacific Gas & Elec. Co. v. Zuckerman*, *supra*, the court said: "The value of opinion evidence rests not in the conclusion reached but in the factors considered and the reasoning employed. ... Where an expert bases his conclusion upon assumptions which are not supported by the record, upon matters which are not reasonably relied upon by other experts, or upon factors which are speculative, remote or conjectural, then his conclusion has no evidentiary value. ... When a trial court has accepted an expert's ultimate conclusion without critical consideration of his reasoning, and it appears the conclusion was based upon improper or unwarranted matters, then the judgment must be reversed for lack of substantial evidence." (189 C.A.3d 1136, citing *In re Marriage of Hewitson* (1983) 142 C.A.3d 874, 191 C.R. 392.)

*F.R. Evid.*, Rule 703 states: "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." (See 3 Mueller & Kirkpatrick, Federal Evidence 2d, §354 et seq.; 51 So. Cal. L. Rev. 129 [psychiatric opinions under Rule 703].)

**SUPPLEMENT:** [This section is current through the latest supplement]

*F.R. Evid.*, Rule 703, as amended in 2000, additionally provides that "[f]acts or data that are otherwise inadmissible

shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." *West's Key Number Digest*, Criminal Law k.486 et seq.; Evidence k.555 et seq.



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## CHAPTER V - Opinion Evidence

### II. EXPERT EVIDENCE

#### A. In General.

#### 3. Opinion of Expert.

##### d. Reliable Information.

#### 1. Statutory Rule and Qualification.

##### aa. Type Reasonably Relied Upon.

#### 1 Witkin Cal. Evid. Opinion Evid § 31

#### [§ 31] Type Reasonably Relied Upon.

(1) *General Rule.* When the opinion is not based on matter perceived by or personally known to the witness, but depends on information furnished by others, the opinion will be of little value unless the source is reliable. The statutory requisite is a general one: The information must be "of a type that reasonably may be relied upon" by the expert in forming an opinion on the subject. (*Ev.C. 801(b)*; see *Kelley v. Trunk* (1998) 66 C.A.4th 519, 524, 78 C.R.2d 122 [in medical malpractice action, summary judgment for defendant doctor, based on defendant's expert witness declaration, was not proper: "The required foundational showing that the opinion rest on matters of a type experts reasonably rely on is not made where, as here, the expert does not disclose what he relied on in forming his opinion"]; C.E.B., Expert Witness Guide 2d, §4.2.)

The matters need not be admissible. Both this provision in *Ev.C. 801(b)* and *F.R. Evid., Rule 703* (supra, §30) express, somewhat more broadly, a view previously recognized by California courts: Many types of information that could not be directly produced as competent evidence are nevertheless commonly used by experts in forming their opinions. (See *People v. Gardeley* (1996) 14 C.4th 605, 618, 620, 59 C.R.2d 356, 927 P.2d 713, 2 Cal. Crim. Law (3d), *Crimes Against Public Peace and Welfare*, §24, citing the text [police detective was properly allowed to testify, based on conversations with defendants and other gang members and his investigation of numerous gang crimes, as to whether conduct at issue was "gang-related activity" and whether gang in question was "criminal street gang" within meaning of Street Terrorism Enforcement and Prevention Act (P.C. 186.20 et seq.)]; *Board of Trustees of Placerville Union School Dist. v. Porini* (1968) 263 C.A.2d 784, 792, 70 C.R. 73; *Genrich v. California* (1988) 202 C.A.3d 221, 229, 248 C.R. 303; *Korsak v. Atlas Hotels* (1992) 2 C.A.4th 1516, 1524, 3 C.R.2d 833, quoting the text; *People v. Valdez* (1997) 58 C.A.4th 494, 509, 68 C.R.2d 135 [police officer was properly allowed to rely on hearsay in formulating opinions that were used to prove gang enhancement allegation; following *Gardeley*].)

(2) *Illustrations.* In *Arellano v. Moreno* (1973) 33 C.A.3d 877, 109 C.R. 421, plaintiff was helping his friend D push D's stalled car into the street when defendant drove on the scene and injured plaintiff. The investigating officer, basing his opinion on what D and defendant had pointed out to him, testified that the point of impact was on defendant's side of the street, i.e., defendant had not crossed over the center line. Held, the testimony was properly admitted; judgment for defendant affirmed. "[T]he location of the point of impact used by the officer was apparently agreed to by the owners of both cars involved in the accident immediately after its occurrence. It, therefore, would appear to be, at worst,

reasonably reliable hearsay and, accordingly, under *Evidence Code section 801*, subdivision (b), a proper basis for the officer's expert opinion." (33 C.A.3d 886, citing the text.)

In *Board of Trustees v. Porini*, *supra*, plaintiff school district brought a proceeding to dismiss a teacher for mental disability. Dr. S, a psychiatrist, testified that she suffered from schizophrenia, and based his diagnosis in part on materials sent to him by the school authorities, including a tape recording and letters not introduced in evidence. The court found no California authority approving expert testimony based on information received from lay third persons, and saw dangers in declaring a blanket rule of admissibility. "A case-by-case determination italicizing the *Evidence Code section 801* test of 'reasonable reliability' seems as definitive as a reviewing court should attempt to become." (263 C.A.3d 794.) (See also *Board of Education v. Haas* (1978) 82 C.A.3d 278, 282, 147 C.R. 88 [quoting *Porini* and approving admission of psychiatrist's opinion based in part on material in teacher's personnel file].)

In *Genrich v. California*, *supra*, an action by a pedestrian struck by a motorist at an allegedly hazardous intersection, plaintiff's expert testified that the intersection was in a dangerous condition because of prior accidents. In formulating his opinion, he relied in part on SWITRS, a computerized accident data retrieval system which stores data pertaining to accidents on state highways; and he testified that the SWITRS accident history from 1975 to 1985 disclosed 244 accidents. The defense objected that this testimony allowed the witness to "parade" before the jury "details" of the many accidents without the required showing of similar conditions (see 1 Cal. Evidence (4th), *Circumstantial Evidence*, §104). *Held*, judgment for plaintiff affirmed. The raw accident data would be inadmissible hearsay if offered for the truth of the matter asserted, but it was proper for the expert to identify the report and its contents as a basis for his opinion. (202 C.A.3d 229.) No details were given; and, while a limiting instruction on the purpose of admission of the evidence would have been proper, none was requested. (202 C.A.3d 230.)

(3) *Distinction: Hearsay Contents*. Although the opinion testimony may be based on hearsay, the expert may generally not testify to the content of the hearsay. (*Continental Airlines v. McDonnell Douglas Corp.* (1989) 216 C.A.3d 388, 414, 264 C.R. 779.) But where the jury cannot properly evaluate the expert's opinion without considering the hearsay on which it is based, the trial judge may protect a criminal defendant's interest in avoiding the substantive use of unreliable hearsay by instructing the jury that the evidence goes only to the basis for the expert's opinion and not to its truth. (*People v. Montiel* (1993) 5 C.4th 877, 919, 21 C.R.2d 705, 855 P.2d 1277 [trial judge erred in failing to tie limiting instruction specifically to drug history given by defendant to prosecution drug expert (a psychiatrist) and testified to by expert as basis for opinion; but because hearsay was defendant's own judicial statement, it fell within exception for party admissions]; see 89 A.L.R.4th 456 [admissibility of expert's testimony, as to basis of opinion, concerning matters otherwise excludable as hearsay]; on rejection of *unreliable* hearsay, see *infra*, §36.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *General Rule*. See *Hanson v. Grode* (1999) 76 C.A.4th 601, 608, footnote 6, 90 C.R.2d 396 [disagreeing with *Kelley v. Trunk* (1998) 66 C.A.4th 519, 78 C.R.2d 122, text, p. 561, to extent it "suggests that even on summary judgment, an expert's declaration must set forth in excruciating detail the factual basis of the opinions stated therein"]; *People v. Killebrew* (2002) 103 C.A.4th 644, 652, 126 C.R.2d 876 [distinguishing *People v. Gardeley* (1996) 14 C.4th 605, 59 C.R.2d 356, 927 P.2d 713, text, p. 561; in prosecution for conspiracy to possess handgun by active street gang member, trial judge erred, after expert witness testified about local gangs, in allowing expert to further testify that when one gang member possesses gun, every other member present knows of gun and will constructively possess it]; *Johnson v. Superior Court* (2006) 143 C.A.4th 297, 307, 49 C.R.3d 52 [in medical malpractice action arising from treatment of plaintiff for prostate cancer, summary judgment for defendants was not proper; declaration by defendants' expert witness said only that what was planned before operation and what was done at time radiation seeds were implanted were within standard of care; relying on *Kelley v. Trunk*]; *In re Alexander L.* (2007) 149 C.A.4th 605, 612, 57 C.R.3d 226 [distinguishing *Gardeley*, *supra*; gang expert's testimony lacked proper foundation, where he testified that he knew that gang in question had been involved in certain crimes, but no specifics were elicited about circumstances of these crimes, or where, when, or how expert had obtained information]; 25 California Lawyer 39 (July 2005) [uncertainties regarding proper test to apply in determining whether expert's opinion has adequate foundation]; 31 *Hastings Const. L.*

Q. 385 [criticizing *Gardeley*].

The seemingly conflicting holdings in *Kelley* and *Hanson*, both medical malpractice cases, can be reconciled. *Kelley* involved the sufficiency of the declaration of the defendant's expert supporting the defendant's summary judgment motion. When moving for summary judgment, the defendant bears the burden of persuasion that there is no genuine issue of material fact and that he or she is entitled to judgment as a matter of law. Thus the *Kelley* court was considering the burden of production to make a prima facie showing of the nonexistence of any genuine issue of material fact. To meet that burden, the declaration of the defendant's expert had to be detailed and with foundation. By contrast, *Hanson* involved the sufficiency of the declaration of the plaintiff's expert in opposition to the defendant's summary judgment motion. In that situation, the declaration submitted by the plaintiff did not have to be detailed, was entitled to all favorable inferences, and was deemed sufficient to defeat the summary judgment motion. The overall rule is that, when considering the declarations of the parties' experts, the declarations for the plaintiff's experts must be liberally construed and any doubts as to the propriety of granting the defendant's summary judgment motion must be resolved in favor of the plaintiff. (*Powell v. Kleinman* (2007) 151 C.A.4th 112, 125, 126, 59 C.R.3d 618 [declarations of plaintiff's expert, although lacking reasoned explanation in some respects, raised triable issues of fact concerning breach and causation, and thus summary judgment for defendant was improper].)(2) *Illustrations*. See *Westrec Marina Management v. Jardine Ins. Brokers Orange County* (2000) 85 C.A.4th 1042, 1051, 102 C.R.2d 673 [in marina managers' action against insurance brokers alleging that brokers wrongfully impeded managers' ability to offer insurance to their clients, opinion of managers' expert regarding profits lost during period when no coverage was available was properly excluded; proof as to anticipated profits dependent on future events must be based on reliable statistical information and data to analyze market, and proffered testimony did not meet this standard]; *People v. Clauser/Wells Partnership* (2002) 95 C.A.4th 1066, 1085, 116 C.R.2d 240 [in eminent domain action, trial judge abused his discretion in excluding, due to insufficient evidentiary foundation, testimony of plaintiff's expert as to value of defendant's auto salvage inventory; absent any precisely prescribed method for valuing such inventory, expert's conversations with unidentified distributors and dealers provided sufficient foundation, and lack of specificity would have affected only testimony's weight]; *Lockheed Litigation Cases* (2004) 115 C.A.4th 558, 564, 10 C.R.3d 34 [in action against two oil companies for damages for wrongful death allegedly caused by exposure to toxic chemicals, trial judge properly excluded, as lacking reasonable basis, declaration by plaintiff's expert which was based on 1989 study that showed that painters exposed to more than 130 listed substances contracted cancer at greater rate than national average, but that did not indicate whether persons exposed to only five chemicals supplied by defendants did so]; *People v. Thomas* (2005) 130 C.A.4th 1202, 1210, 30 C.R.3d 582 [*Crawford v. Washington* (2004) 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177, 3 Cal. Evidence (4th), Presentation at Trial, Supp., §21, holding that out-of-court statements that are testimonial in nature are inadmissible unless declarant is unavailable and accused has had prior opportunity to cross-examine declarant, does not undermine established rule that experts can testify to their opinions on relevant matters and relate information and sources on which they rely in forming those opinions]; *People v. Hallquist* (2005) 133 C.A.4th 291, 295, 34 C.R.3d 621 [in prosecution for driving under influence of alcohol, trial judge did not err in admitting testimony of highway patrol officer as to maintenance and accuracy of preliminary alcohol screening device that had been used to test defendant's blood-alcohol level, notwithstanding that officer relied on hearsay statement on label of test solution container to effect that content was .10% alcohol]; *Stephen v. Ford Motor Co.* (2005) 134 C.A.4th 1363, 1371, 37 C.R.3d 9 [in products liability action against vehicle manufacturer and tire manufacturer, testimony of plaintiff's tire expert was properly excluded; expert did not examine plaintiff's tire, relying instead on supposedly similar tire failures and amateur photographs taken by insurance adjuster and plaintiff's boyfriend]; *Geffcken v. D'Andrea* (2006) 137 C.A.4th 1298, 1311, 41 C.R.3d 80 [in action alleging that defendants caused plaintiffs to be exposed to mold mycotoxins at their residence or workplace, trial judge did not err in excluding testimony of plaintiffs' expert on ground that there was no reasonable basis for his opinion that exposure to mycotoxins had caused plaintiffs' ailments; in view of absence of reliable evidence that plaintiffs had been exposed at locations in question, expert's opinions were speculative and conjectural]; *People v. Cooper* (2007) 148 C.A.4th 731, 746, 56 C.R.3d 6 [in elder abuse prosecution, trial judge erred in excluding testimony of prosecution expert on ground that her opinions were based in part on testimonial interviews that were inadmissible under *Crawford v. Washington*; relying on *People v. Thomas*, supra]; *People v. Ramirez* (2007) 153 C.A.4th 1422, 1426, 64 C.R.3d 96 [hearsay relied on by gang expert was not testimonial within

meaning of *Crawford*]. *Correction:* Page 562, last full paragraph, 10th line, "263 C.A.3d 794" should be "263 C.A.2d 794".



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### II. EXPERT EVIDENCE

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#### d. Reliable Information.

#### 1. Statutory Rule and Qualification.

#### bb. Unless Precluded by Law.

#### 1 Witkin Cal. Evid. Opinion Evid § 32

[§ 32] Unless Precluded by Law.

The qualification of *Ev.C. 801* ("unless an expert is precluded by law from using such matter"; *supra*, §30) incorporates the limitations of judicial decisions as well as statutes. (Law Rev. Com. Comment to *Ev.C. 801*; see *In re Marriage of Hewitson* (1983) 142 C.A.3d 874, 886, 191 C.R. 392 [use of "comparable company method" in determining market value of closely held stock was "precluded by law" because prior judicial decision had determined that that method was unreliable]; C.E.B., Expert Witness Guide 2d, §4.11.)

In *Spencer v. G.A. MacDonald Const. Co.* (1976) 63 C.A.3d 836, 134 C.R. 78, plaintiff, employee of a subcontractor, sued defendant general contractor for injuries suffered in a fall from a scaffold. He offered expert opinions based on alleged violations of Construction Safety Orders, and sought to cross-examine defendant's expert witnesses by invoking the same violations. The trial judge ruled against him, citing *Lab.C. 6304.5*, which limits the application of the statutes to proceedings between employer and employee and adds that no part of the statutes "shall have any application to, nor be considered in, nor be admissible into, evidence in any personal injury or wrongful death action." (See 2 *Summary* (9th), *Workers' Compensation*, §95.) *Held*, the ruling was correct. *Ev.C. 801(b)* allows an expert to base an opinion on reliable matter even though it is not admissible in evidence (see *supra*, §31); but the qualification applies here. *Lab.C. 6304.5* makes it clear that the evidence of the violation of safety orders is not only inadmissible but also *cannot be considered*. Hence, it would not have been proper for plaintiff's experts to base their opinions on the violations, and it would have been equally improper to permit cross-examination of defendant's experts on those violations. (63 C.A.3d 857, 858, 859.)

**SUPPLEMENT:** [This section is current through the latest supplement]

On 1999 amendments to *Lab.C. 6304.5*, making safety orders admissible, see 1 *Cal. Evidence* (4th), *Hearsay*, §116.

*Cross-Reference:* 2 *Summary* (10th), *Workers' Compensation*, §102.



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#### 2. Opinions of Doctors and Mental Health Professionals.

#### aa. In General.

#### 1 Witkin Cal. Evid. Opinion Evid § 33

[§ 33] In General.

The kinds of information most frequently relied on by doctors and mental health professionals in forming their opinions come within the reliable information rule. (See C.E.B., Expert Witness Guide 2d, §6.25 et seq.) Under the proper circumstances, each of the following sources of information is considered reliable:

(1) *Information From Others*. A doctor may base an opinion on a diagnosis or examination made by another doctor. (See *Christiansen v. Hollings* (1941) 44 C.A.2d 332, 347, 112 P.2d 723; *Hope v. Arrowhead & Puritas Waters* (1959) 174 C.A.2d 222, 230, 344 P.2d 428; *Kelley v. Bailey* (1961) 189 C.A.2d 728, 737, 11 C.R. 448; *People v. Campos* (1995) 32 C.A.4th 304, 308, 38 C.R.2d 113 [psychiatrist was properly allowed to testify that she relied on other medical evaluations in forming her opinion that defendant met mentally disordered offender criteria, but other evaluations were hearsay and she should not have been allowed to reveal their contents]; 35 So. Cal. L. Rev. 194; 1 McCormick 5th, §15; 6 Am.Jur. Trials 147.)

(2) *Statements by Patient*. "[A] physician may take into consideration a patient's declarations as to his condition, if they are necessary to enable him in connection with his own observations to form an opinion as to the patient's past or present physical or mental condition." (*People v. Wilson* (1944) 25 C.2d 341, 348, 153 P.2d 720; see also *People v. Stoll* (1989) 49 C.3d 1136, 1155, 265 C.R. 111, 783 P.2d 698, *infra*, §58 [psychologist was entitled to base opinion on observations of, and statements made by, patient during routine psychological interview]; 35 So. Cal. L. Rev. 193 ["rule is recognized in most jurisdictions ... including California"; citing Wigmore and *Wilson* case, *supra*]; 52 Cal. L. Rev. 549 [psychiatrist's use of defendant's statements].)

(3) *Study of Medical Works*. Published material may also be considered in reaching an opinion. (See *infra*, §34.)

(4) *Standardized Tests*. A psychologist or psychiatrist may rely on standardized written personality tests. (See *People v. Stoll*, *supra*, 49 C.3d 1154.)

(5) *Probation Report*. In a mentally disordered offender proceeding (see 3 Cal. Crim. Law (3d), *Punishment*, §638), "a qualified mental health professional may refer to and consider the underlying probation report in expressing an opinion that the prisoner is a mentally disordered offender," including the criterion or element that the underlying offense is one involving "force or violence." (*People v. Miller* (1994) 25 C.A.4th 913, 917, 31 C.R.2d 423, quoting the



text.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Information From Others*. See 1 McCormick 6th, §15.(5) *Probation Report*. See *People v. Martin* (2005) 127 C.A.4th 970, 976, 977, 26 C.R.3d 174, following *People v. Miller* (1994) 25 C.A.4th 913, 31 C.R.2d 423, text, p. 565; cf. *People v. Dodd* (2005) 133 C.A.4th 1564, 1570, 1571, 35 C.R.3d 692 [distinguishing *Miller*; trial judge erred in finding that statutory criteria for mentally disordered offender commitment had been proven notwithstanding that experts' diagnoses were based on parole report that defendant molested young girl; parole report did not contain factual information giving it reliability comparable to that of probation report]. *West's Key Number Digest*, Criminal Law k.486(5); Evidence k.555.10



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#### bb. Reliance on Medical Works.

#### 1 Witkin Cal. Evid. Opinion Evid § 34

[§ 34] Reliance on Medical Works.

The physician's testimony may be based on a study of medical texts. (See *Healy v. Visalia & Tulare R. Co.* (1894) 101 C. 585, 591, 36 P. 125 [answer referring to "cases on record"]; *Brown v. Colm* (1974) 11 C.3d 639, 644, 114 C.R. 128, 522 P.2d 688; *Mann v. Cracchiolo* (1985) 38 C.3d 18, 37, 210 C.R. 762, 694 P.2d 1134 [quoting *Brown v. Colm*, *supra*]; *Forrest v. Fink* (1925) 71 C.A. 34, 40, 234 P. 860 [answer based on statistics concerning certain types of injury]; 12 So. Cal. L. Rev. 424.)

The *Healy* case, *supra*, points out that an expert's opinion is based "not merely upon the empirical knowledge which he has gained through his own practice, but also that which he has acquired in the study of his profession, and from his intercourse with other members of the same profession. As an expert it was competent for him to give the grounds upon which he based his opinion, as well as the opinion itself, and the fact that his opinion was based upon information derived from his reading did not make it incompetent for him to so state. ... This is entirely different from reading medical or scientific books to the jury, or seeking to influence them by opinions or theories contained in such books. The witness was only asked to give his own opinion ... which must be assumed to have been a conclusion reached by him after a judicious comparison of all that he had read or learned upon the subject." (101 C. 592.)

In *Brown v. Colm*, *supra*, plaintiff called Dr. B as an expert witness to testify about the prevailing standard of care for using stainless steel sutures to repair recto-vaginal fistulas in the year 1949, 10 years before Dr. B had engaged in active medical practice. The basis of Dr. B's claimed expertise was his knowledge of the standards after 1959 and his exhaustive study of virtually all available medical literature to show that the same standards had also prevailed in 1949. Defendant's objection, that Dr. B lacked occupational experience or practical knowledge of the 1949 standards, was sustained. *Held*, this was error.

(a) "[W]e have been unable to find any persuasive authority relating occupational experience exclusively to the precise time of the alleged malpractice. We hold that an invariable rule which would require in all cases that an expert must have acquired a personal, working knowledge of the standard of care at the precise time when the alleged malpractice occurred would be untenable." (11 C.3d 644.)

(b) Because there was little likelihood that plaintiff could have secured an expert witness to testify to the standard of care prevailing in a similar community for a rare operation performed 23 years earlier, the pragmatic result of

excluding Dr. B's testimony was to insulate defendant from responsibility for his alleged negligence. (11 C.3d 644.)

(c) Even if a doctor who practiced in 1949 would testify, medical literature, when evaluated by an expert who had acquired later practical experience, may be a more reliable guide to the 1949 standard. (11 C.3d 645.)

Cross-examination showing the reasons for the opinion and the evaluation of written material on which the expert relied are more than adequate to protect a defendant's interests. (11 C.3d 646.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Bui* (2001) 86 C.A.4th 1187, 1196, 103 C.R.2d 908 [in prosecution for vehicular manslaughter resulting from driving under influence of methamphetamine, forensic toxicologist's opinion that methamphetamine use in greater than therapeutic doses causes impaired driving was properly based on scientific literature, statistical data, and epidemiological study].



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#### 3. Opinions by Other Experts.

#### 1 Witkin Cal. Evid. Opinion Evid § 35

[§ 35] Opinions by Other Experts.

Many cases illustrate reliance on reliable information by experts other than doctors. The following are examples:

(1) Valuation expert's reliance on market reports and similar data. (See *Glantz v. Freedman* (1929) 100 C.A. 611, 614, 280 P. 704; *Hammond Lumber Co. v. Los Angeles* (1930) 104 C.A. 235, 248, 285 P. 896.)

(2) Electrical engineer's reliance on rules of former Industrial Accident Commission in testifying on standard of care observed by such engineers in guarding electrical conductors. (See *Young v. Bates Valve Bag Corp.* (1942) 52 C.A.2d 86, 96, 125 P.2d 840.)

(3) Accident reconstruction expert's reliance on pilots' training records in concluding that accident resulted from their confusion over landing procedures. (See *Buckwalter v. Airline Training Center* (1982) 134 C.A.3d 547, 554, 184 C.R. 659.)

(4) Criminal justice specialist's reliance on conversations with scrap dealers in formulating opinion on whether defendant dealer used due care in ascertaining sellers' authority. (See *People v. Cramblit* (1978) 84 C.A.3d 437, 448, 148 C.R. 440, quoting the text.)

(5) Architect's reliance in part on a cost estimator for mathematical computations, in testimony on the cost of construction of a home. (See *Appel v. Burman* (1984) 159 C.A.3d 1209, 1217, 206 C.R. 259.)

(6) Plant pathologist's reliance on field tests, general experience, crop yield data, and deposition testimony, in addition to consultations with other experts, in concluding that pesticide had not caused economic burn damage to plaintiff's crop. (See *Mosesian v. Pennwalt Corp.* (1987) 191 C.A.3d 851, 857, 863, 867, 236 C.R. 778, citing the text.)

(7) Insurance expert's reliance on technical trade publication regarding workers' compensation insurance in an employer's action against the State Compensation Insurance Fund for bad faith and unfair business practices. (*Notrica v. State Comp. Ins. Fund* (1999) 70 C.A.4th 911, 932, 83 C.R.2d 89, 11 Summary (9th), Equity, Supp., §95A.)

*Mosesian v. Pennwalt Corp.*, *supra*, makes an obvious distinction. During the course of his direct examination, the primary expert (the plant pathologist) *revealed the content* of what the other experts had told him. *Held*, this was error (but harmless in light of the judge's admonition and other evidence). The court said: "[I]f an expert does rely in part

upon the opinions of others, the expert may be cross-examined as to the content of those opinions. It is improper, however, to solicit the information on direct examination if the statements are inadmissible. ... The defendants in this action improperly solicited hearsay statements from Dr. Whaley on direct examination." (191 C.A.3d 864.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(7) *Insurance expert's reliance on technical trade publication:*

*Cross-Reference:* 13 Summary (10th), *Equity*, §124.

*Solicitation of hearsay:* See *People v. Vanegas* (2004) 115 C.A.4th 592, 597, 9 C.R.3d 398, 1 Cal. Crim. Law (3d), *Crimes Against the Person, Supp.*, §202 [in prosecution arising from fatal vehicular accident, trial judge properly refused to allow defense to ask its accident reconstruction expert witness about contents of report by another expert on which he relied in forming his opinion as to defendant's speed at time of accident; opinion in report was slightly more favorable to defendant than witness' own opinion, and contents of report would have been viewed by jury as proof of defendant's speed, rather than as basis for witness' opinion].



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#### 3. Opinion of Expert.

#### e. Unreliable Hearsay.

#### 1 Witkin Cal. Evid. Opinion Evid § 36

[§ 36] Unreliable Hearsay.

Where the basis of the opinion is unreliable hearsay, the courts will reject it. (See *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.* (1968) 69 C.2d 33, 43, 69 C.R. 561, 442 P.2d 641, 1 Cal. Evidence (4th), Hearsay, §15 [mechanical engineer; opinion that turbine repair costs were reasonable based on invoices, bills, and receipts for repair]; *Luque v. McLean* (1972) 8 C.3d 136, 148, 104 C.R. 443, 501 P.2d 1163, citing the text [trial judge's exclusion of magazine articles during expert's direct testimony was proper because articles were not professional technical literature to be relied on by experts]; *Isaacs v. Huntington Memorial Hosp.* (1985) 38 C.3d 112, 133, 211 C.R. 356, 695 P.2d 653 [trial judge erred in admitting expert's testimony as to city's crime rate, where it was based on information received from a "contact at a police department"]; *Ribble v. Cook* (1952) 111 C.A.2d 903, 906, 245 P.2d 593 [traffic officer's opinion as to point of impact of collision, based on what witnesses told him]; *Behr v. Santa Cruz* (1959) 172 C.A.2d 697, 705, 342 P.2d 987 [fire ranger's official report on cause of fire which he had not witnessed, based on statements of others]; *Mason v. Mason* (1960) 186 C.A.2d 209, 215, 8 C.R. 784 [court-appointed auditors: report based on out-of-court statements of escrow and loan officers]; C.E.B., Expert Witness Guide 2d, §4.6 et seq.)

The same is true where the witness, instead of stating an opinion based on information received from other persons, recites the hearsay statements of those persons. Thus, in *Frampton v. Hartzell* (1960) 179 C.A.2d 771, 4 C.R. 427, plaintiff claimed that she had become insane as a result of an injury sustained in an automobile accident. Hospital doctors had held a staff meeting on her case, and she called Dr. T and asked him about the result of the meeting. He testified that it was the opinion of himself *and all but one of the others* that the accident was a contributing factor to her mental illness. *Held*, it was error to admit this over objection. (179 C.A.2d 773.)

In *Furtado v. Montebello Unified School Dist.* (1962) 206 C.A.2d 72, 23 C.R. 476, a personal injury action, plaintiff's doctor was asked on direct examination about a certain kind of pathology, and answered giving the details of several individual case histories which he had read in medical journals. *Held*, distinguishing *Healy v. Visalia & Tulare R. Co.* (1894) 101 C. 585, 36 P. 125, *supra*, §34, this was error. (206 C.A.2d 80.) (See also *Fireman's Fund Ins. Co. v. Romero* (1954) 128 C.A.2d 331, 335, 336, 275 P.2d 83 [fire investigator, on stand ostensibly to give opinion as to cause of fire, recited statements made by a third person that defendant had been smoking in bed].)

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See *People v. Pollock* (2004) 32 C.4th 1153, 1172, 13 C.R.3d 34, 89 P.3d 353 [in capital murder prosecution, trial judge did not err in refusing to allow defense expert to explain how drug binge cycle he had described would apply to

defendant immediately before, during, and after charged murder; opinion would necessarily be based in large part on defendant's hearsay statements to expert during interview 4 years after crime occurred].



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## CHAPTER V - Opinion Evidence

### II. EXPERT EVIDENCE

#### A. In General.

#### 4. Erroneous Exclusion of Expert Testimony.

##### 1 *Witkin Cal. Evid. Opinion Evid* § 37

[§ 37] Erroneous Exclusion of Expert Testimony.

Exclusion of admissible expert testimony may be reversible error. (See *Lunghi v. Clark Equipment Co.* (1984) 153 C.A.3d 485, 490, 200 C.R. 387; *Lofleidir Icelandic Airlines v. McDonnell Douglas Corp.* (1984) 158 C.A.3d 83, 96, 204 C.R. 358; *People v. Cegers* (1992) 7 C.A.4th 988, 1001, 9 C.R.2d 297 [in prosecution for assault, exclusion of expert testimony relating to sleep disorders that allegedly influenced defendant's behavior required reversal, as it was reasonably probable, absent the error, that defendant would not have been found guilty]; on the test for reversible error in exclusion of evidence, see 9 *Cal. Proc.* (4th), *Appeal*, §439; 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §549.)

In *Lunghi v. Clark Equipment Co.*, *supra*, an action for wrongful death based on an alleged design defect in a machine, plaintiffs' expert testified that there was a design defect, and defendants' expert testified to the contrary. Plaintiffs also sought to introduce favorable testimony of S, an expert that defendants originally had intended to call, whose deposition had been taken by plaintiffs. The judge refused to admit this evidence (apparently on the mistaken theory that it was protected as attorney's work product). *Held*, this was reversible error. With the testifying experts in disagreement, the jury would have given heavy weight to the opinions favorable to plaintiffs of an expert who had been retained by defendants. (153 C.A.3d 490, 491.)

In *Lofleidir Icelandic Airlines v. McDonnell Douglas Corp.*, *supra*, plaintiff commercial airline brought an action against defendant manufacturer of its plane for damages arising out of a crash. At the trial, plaintiff called M as an expert witness, and the trial judge refused to allow him to testify on the ground that he had been employed by the National Transportation Safety Board (NTSB) at the time the NTSB had investigated the accident, and that his testimony was therefore prohibited by statute and regulations. *Held*, exclusion of the testimony was reversible error. (a) The statute prohibited only the testimony of an employee; M was not a current employee. (158 C.A.3d 90, 91.) (b) The regulations precluded use of the NTSB reports concerning the cause of an accident, but did not prohibit M from testifying to facts based on his independent investigation after he had left the NTSB and had been retained by plaintiff. (158 C.A.3d 92, 93.) (c) Exclusion of M's testimony on a particular design defect deprived plaintiff of the only expert opinion it offered on that issue. (158 C.A.3d 96.)

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## CHAPTER V - Opinion Evidence

## II. EXPERT EVIDENCE

## B. Who Are Experts.

## 1. Expertness Relative.

## a. In General.

## 1 Witkin Cal. Evid. Opinion Evid § 38

[§ 38] In General.

"A person is qualified to testify as an expert if he has *special knowledge, skill, experience, training, or education* sufficient to qualify him as an expert on the subject to which his testimony relates." (*Ev.C. 720(a)*, superseding former C.C.P. 1870(9) in part.)

*F.R. Evid., Rule 702* is similar: A witness may qualify as an expert "by knowledge, skill, experience, training, or education." (See 3 Mueller & Kirkpatrick, *Federal Evidence* 2d, §348.)

In other words, there is no rigid classification of expert and nonexpert witnesses, and experts need not necessarily be professionals. Expertness is relative to the subject, and any person who has special knowledge, skill, or experience in any occupation, trade, or craft may be qualified as an expert in his or her field. (See *Estate of Toomes* (1880) 54 C. 509, 514; *Miller v. Los Angeles County Flood Control Dist.* (1973) 8 C.3d 689, 701, 106 C.R. 1, 505 P.2d 193, *supra*, §22 [whether witness is qualified as expert on specific topic is issue within trial judge's broad discretion]; *Estate of Gore* (1953) 119 C.A.2d 796, 799, 260 P.2d 859, *infra*, §39; *People v. Smith* (1956) 142 C.A.2d 287, 293, 298 P.2d 540 ["A university degree, earned by scientific pursuits ... is not indispensable"]; *People v. King* (1968) 266 C.A.2d 437, 443, 72 C.R. 478, citing the text; *People v. Stuller* (1970) 10 C.A.3d 582, 597, 89 C.R. 158 [university degree not indispensable to expertise as fingerprint technician]; *Osborn v. Irwin Memorial Blood Bank* (1992) 5 C.A.4th 234, 274, 7 C.R.2d 101 [work in particular field is not absolute prerequisite to qualification as expert in that field]; 1 McCormick 5th, §13; 7 Wigmore (Chadbourn Rev.) §1923; 1965 A.S. 561; 1967 A.S. 112; 31A Am.Jur.2d (1989 ed.), *Expert and Opinion Evidence* §55 et seq.; C.E.B., *Expert Witness Guide* 2d, §3.1 et seq.; 2 Am.Jur. Trials 293, 585; BAJI (8th ed.), No. 2.40; see also *infra*, §39 et seq.)

A party may be his or her own expert. In *Pfingsten v. Westenhaver* (1952) 39 C.2d 12, 244 P.2d 395, an automobile collision case, plaintiff had been in the oil-trucking business for 8 years, previously for two oil companies and lately for himself; he showed knowledge of reasonable charges for towing and repairing tractors and trailers, and of reasonable rental value of such equipment. *Held*, he could testify as an expert on those items, against the objection that he was not engaged in the business of repairing or towing damaged vehicles. (39 C.2d 20.) (See also *Donahue v. United Artists Corp.* (1969) 2 C.A.3d 794, 803, 83 C.R. 131 [coowner of television property (scripts, story outlines, etc.), with experience in appraising such property, was competent to testify to its value]; *Douglas v. Ostermeier* (1991) 1 C.A.4th 729, 737, 2 C.R.2d 594 [in fraud action against auto dealership, plaintiff, a licensed real estate broker, was properly allowed to give expert opinion as to value of defendant's property, which was relevant to issue of punitive damages].)

There are a number of lists and compilations that may be consulted in selecting expert witnesses. (See 2 Am.Jur. Trials 293 [directory of scientific and technical experts]; 2 Am.Jur. Trials 357 [directory of medical experts].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Brown* (2001) 96 C.A.4th Supp. 1, 37, 117 C.R.2d 738, citing the text [in domestic violence prosecution, clinical director of domestic violence intervention project was properly allowed to testify regarding battered women's syndrome, even though she did not have clinical psychology license]; CACI, No. 219 [qualifications of expert]; 1 McCormick 6th, §13. *West's Key Number Digest*, Criminal Law k.477 et seq.; Evidence k.535 et seq.



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#### B. Who Are Experts.

##### 1. Expertness Relative.

##### b. Qualified Professional Expert.

#### 1 *Witkin Cal. Evid. Opinion Evid* § 39

[§ 39] Qualified Professional Expert.

In *Vallejo & Northern R. Co. v. Reed Orchard Co.* (1915) 169 C. 545, 147 P. 238, a civil engineer gave his opinion as to the amount of certain products that probably would be shipped over a new railroad when it was constructed. *Held*, this was proper. The court pointed out that it is not a person's reputation for superior sagacity, judgment, and reasoning power that makes him an expert; it is rather that his professional pursuit, peculiar skill, and knowledge in some department of science enable him to draw an inference that ordinary persons could not draw. (169 C. 570.) (See 2 Wigmore (Chadbourn Rev.) §§560, 561.)

In *Estate of Gore* (1953) 119 C.A.2d 796, 260 P.2d 859, a will contest, Dr. L, an eye, ear, nose and throat specialist, examined decedent for a civil aeronautics license 4 days after execution of the will. The doctor's sole contact with decedent was during this single 30-minute period. The proponent asked for his opinion on whether decedent was "sane or insane," and the doctor was permitted to answer, "To me he was absolutely sane, just as sane as I am." *Held*, this was proper; the evidence related to matters within the knowledge and observation of every physician and surgeon. A medical certificate is given only after intensive education in a wide variety of subjects, and "[w]e think such a person, particularly in view of the years of hospital and private practice experience this doctor had, is qualified to observe a person and form and give in evidence an opinion concerning that person's sanity. He need not specialize in psychiatry to do so." (119 C.A.2d 800.)

In *People v. Chavez* (1985) 39 C.3d 823, 218 C.R. 49, 705 P.2d 372, defendant, charged with murder, relied on the defense of diminished capacity, brought on by drinking and smoking marijuana for 10 hours. Prosecution witness Dr. M testified over objection that a person who performed the acts ascribed to defendant (pointing gun at victim, demanding his valuables, and, after victim delivered them and tried to drive away, shooting victim in the head) would have the requisite intent to commit robbery regardless of whether he had been drinking or was drunk. On appeal, defendant challenged Dr. M's qualification as an expert on that subject. *Held*, the trial judge acted within his discretion in admitting the testimony, on a showing that Dr. M had extensive experience in forensic pathology, had analyzed results of many postmortem blood-alcohol tests and related them to the circumstances surrounding death, and knew of the medical literature dealing with alcohol and behavior. (39 C.3d 829.) The court, however, observed that "the matter is not entirely free from doubt," and two justices thought that Dr. M was not an expert on the issue, but that admission of his testimony was harmless error. (39 C.3d 829, 834.)

In *Osborn v. Irwin Memorial Blood Bank* (1992) 5 C.A.4th 234, 7 C.R.2d 101, an action against a blood bank by the parents of a child who contracted AIDS from blood supplied by defendant, the trial judge allowed plaintiff's expert,

a doctor, to testify as to surrogate testing and questioning of donors, even though he had never worked for a nonprofit blood bank. *Held*, this was proper. The witness does not have to work in a particular field in order to qualify as an expert in that field. Members of a profession are naturally reluctant to testify against each other, and "an overly strict standard of qualification could make it inordinately difficult to secure a qualified expert." (5 *C.A.4th* 274, citing *Jeffer, Mangels & Butler v. Glickman* (1991) 234 *C.A.3d* 1432, 286 *C.R.* 243, *infra*, §40.)

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### II. EXPERT EVIDENCE

#### B. Who Are Experts.

##### 1. Expertness Relative.

#### c. Attorney Expert on Legal Malpractice.

*1 Witkin Cal. Evid. Opinion Evid § 40*

[§ 40] Attorney Expert on Legal Malpractice.

In *Jeffer, Mangels & Butler v. Glickman* (1991) 234 C.A.3d 1432, 286 C.R. 243, clients of a law firm alleged malpractice in the firm's failure to warn of the risks involved in a transaction, and offered expert testimony of an attorney with extensive experience in savings and loan law. *Held*, he was qualified under *Ev.C. 720(a)* (supra, §38), and it was error to disqualify him for lack of experience in the particular kind of transaction. Noting the total absence of California authority interpreting *Ev.C. 720* in the context of legal malpractice, the court held that the use of medical malpractice standards is both logical and appropriate.

(a) "Members of a profession, especially those members who specialize in a particular field, such as savings and loan law, will naturally be reluctant to testify against one another. Respect for fellow specialists, understanding of the complexities of the specialty and the margin for error, and fear of retaliation are motivations which could lead any professional to refuse to take the stand against a colleague. Such motivations are not unique to physicians and it requires no stretch of the imagination to believe an attorney who specializes in a field of law would be reluctant to testify against fellow specialists in that same field." (234 C.A.3d 1439.)

(b) A broad standard of qualifications is as appropriate in the legal malpractice context as it is in the medical malpractice context. "This case serves as an example. Not every attorney who specializes in savings and loan law has the opportunity to process applications through the Federal Home Loan Bank Board. ... But many attorneys, specializing in the savings and loan field, will be familiar with the Board's standards regarding change of control from having dealt with the Board in other matters." (234 C.A.3d 1440.)

(c) Private study of a subject and contact with other professionals in the field may qualify an attorney expert just as it may qualify a physician expert. "[A]n attorney who has studied the field of savings and loan law and has contacted other professionals for additional exposure to the subject is qualified to provide expert testimony on the subject. Actually having processed one particular form may not be necessary." (234 C.A.3d 1441.)

(d) The current standard in determining qualifications of a doctor witness is a liberal one. (234 C.A.3d 1441, 1442, quoting the text.) In general, the law favors permitting experts to testify in malpractice cases if they demonstrate sufficient knowledge of the subject that their opinions will be helpful to the jury. "If a witness has passed this threshold, the question of the degree of the witness' knowledge goes to the weight of the testimony rather than to its admissibility." (234 C.A.3d 1443.) (See C.E.B., Expert Witness Guide 2d, §6.24.)

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##### 1. Expertness Relative.

##### d. Qualified Nonprofessional Experts.

#### 1 Witkin Cal. Evid. Opinion Evid § 41

[§ 41] Qualified Nonprofessional Experts.

In *People v. Alexander* (1963) 212 C.A.2d 84, 27 C.R. 720, a condemnation suit, defendants' witness was the operator of a motel in the area who had extensively investigated locations in seeking sites for his own business. *Held*, it was error to reject his testimony on the highest and best use to which the land could be put. (212 C.A.2d 91.)

In *Naples Restaurant v. Coberly Ford* (1968) 259 C.A.2d 881, 66 C.R. 835, plaintiff sued defendant dealer for damages for fraud and breach of contract in selling him, as new, a used Thunderbird that had been stolen and repaired. Defendant's general manager testified that the car was worth more than plaintiff paid for it. Plaintiff called his expert, an automobile salesman of long experience, who had previously sold Fords but was now selling Chryslers, one series of which was competitive with the Thunderbird. The trial judge sustained objections on the ground that he was not qualified to give an opinion on the value of a Thunderbird. *Held*, this was error. (a) The witness had the necessary experience and capacity to understand and report. (b) As to the witness' observation and knowledge, the trial judge took too narrow a view of the class of articles on which the witness could give an opinion as an expert on value. Anyone actively engaged in the business of selling passenger automobiles is likely to have an informed opinion on the value of his own and comparable makes. (259 C.A.2d 884.)

In *Hyman v. Gordon* (1973) 35 C.A.3d 769, 111 C.R. 262, an explosion occurred when plaintiff knocked over a gasoline-filled can in his friend's garage and the escaping gasoline flowed near a gas-fired water heater. Alleging personal injuries, plaintiff sued the builder of the home on theories of negligence and strict liability. At the trial, the judge refused to allow plaintiff's expert, a former fireman, to testify that in his opinion the home's design constituted a fire hazard because of the water heater placement. *Held*, exclusion was prejudicial error. Although the witness was not a plumbing or building expert, plaintiff was not attacking the *internal construction* of the water heater. Because the *design* allegedly constituted a fire hazard, the witness should have been allowed to testify. He was "well qualified to offer what information he possessed concerning fire hazards and the properties of gasoline in relation to allegedly defective house design, subjects beyond the common knowledge of most jurors." (35 C.A.3d 774.)

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1. Expertness Relative.

e. Person Testifying for First Time.

*1 Witkin Cal. Evid. Opinion Evid § 42*

[§ 42] Person Testifying for First Time.

"A court should not exclude one from testifying because he has never testified before. If this were the practice of all courts, there would be no experts. On the other hand, the court should not disregard the factor entirely. When a proposed expert has not been qualified before, the court should take a closer look at his qualifications; however, primary reliance should not be placed on the fact that this will be his first time on the witness stand. To do so would deprive the court and the parties of valuable testimony of qualified experts." (*McCleery v. Bakersfield* (1985) 170 C.A.3d 1059, 1066, 216 C.R. 852.)

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#### B. Who Are Experts.

##### 1. Expertness Relative.

##### f. Unqualified Persons.

#### 1 Witkin Cal. Evid. Opinion Evid § 43

[§ 43] Unqualified Persons.

(1) *In General. People v. Chambers (1958) 162 C.A.2d 215, 328 P.2d 236*, illustrates a reasonable limitation on the recognition of nonprofessional experts. Defendant's fingerprint "expert" had taken a course in criminology at a state college, but never had any practical experience in criminology or with fingerprints, and at the time of trial was a junior high school counselor. *Held*, he was not qualified. (162 C.A.2d 219.)

In *People v. Murray (1967) 247 C.A.2d 730, 56 C.R. 21*, defendant advanced the defense of involuntary intoxication, from consumption of a mixture of liquor and "goofballs." He called M, a jail inmate, to testify to the effect of such a mixture. *Held*, citing the text, the judge could properly reject this layperson as an expert on a subject requiring a sophisticated knowledge of pharmacology, toxicology, and psychology. (247 C.A.2d 735.)

(2) *Professional Not Expert on Particular Subject*. A professional may not be an expert on the particular subject to which the testimony is directed. (See *Miller v. Los Angeles County Flood Control Dist. (1973) 8 C.3d 689, 700, 106 C.R. 1, 505 P.2d 193* [mechanical engineer with training in hydraulics and hydrology properly held not qualified to testify about reasonable construction practices on hillside area]; *People v. Hogan (1982) 31 C.3d 815, 852, 183 C.R. 817, 647 P.2d 93*; *Putensen v. Clay Adams (1970) 12 C.A.3d 1062, 1080, 91 C.R. 319* [surgeon was not qualified to testify to chemical composition, tensile strength, or material construction of tube that kinked during surgery and so could not testify as to alleged defect in tubing walls]; *Salasguevara v. Wyeth Laboratories (1990) 222 C.A.3d 379, 386, 271 C.R. 780* [no showing that treating physician had necessary training or experience to give opinion on whether administration of DPT vaccine caused plaintiff's injuries]; C.E.B., Expert Witness Guide 2d, §3.2.)

In *People v. Hogan, supra*, defendant was charged with first degree murder of a woman and her 4-year-old son, and with assault with intent to commit murder on her infant son. Kyle, a criminalist, testified as a prosecution witness on the source of the blood stains on defendant's pants and shoes at the time of his arrest. He gave the opinion that certain stains were "splatters" caused by blood flying through the air following impact rather than by mere contact with a bloody object. *Held*, the expert was not qualified to testify on that particular subject.

(a) He had read a book about flight patterns of blood, and had observed bloodstains at many crime scenes, and was qualified to testify that the stains were blood and about the bloodtyping of the stains. (31 C.3d 852, 853.)

(b) He was not, however, qualified to testify as an expert on whether blood was deposited by flying drops or by surface-to-surface contact: He had no formal education or training in the field, had never performed any laboratory

analyses to make such determinations, and had no reference standards to study or compare with the evidence in this case. (31 C.3d 852, 853, and footnote 21.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General.* See *People v. Holloway* (2004) 33 C.4th 96, 146, 14 C.R.3d 212, 91 P.3d 164 [in penalty phase of capital murder prosecution, trial judge did not abuse discretion in excluding opinion of deputy sheriff, who testified to defendant's good behavior in county jail, as to whether defendant would adjust well to life in state prison under life sentence; there was no showing that deputy had experience or other source of expertise concerning inmates' adjustment to prison life under life sentence].



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## CHAPTER V - Opinion Evidence

### II. EXPERT EVIDENCE

#### B. Who Are Experts.

#### 2. Types of Expert Witnesses.

#### 1 Witkin Cal. Evid. Opinion Evid § 44

[§ 44] Types of Expert Witnesses.

The following are illustrative of the concept of expertness as relative and the rule that any person--professional or nonprofessional--with special knowledge, skill, or experience in an occupation, trade, or craft may be qualified as an expert (see *supra*, §38).

(1) *Attorneys.* (See *Wright v. Williams* (1975) 47 C.A.3d 802, 810, 121 C.R. 194 [in malpractice action against marine law specialist, judgment for defendant was proper where plaintiffs failed to offer expert testimony on standard of care]; *Jeffer, Mangels & Butler v. Glickman* (1991) 234 C.A.3d 1432, 286 C.R. 243, *supra*, §40.)

(2) *Chemists, Physicists, and Laboratory Technicians.* (See *People v. Cooper* (1991) 53 C.3d 771, 813, 814, 281 C.R. 90, 809 P.2d 865 [forensic serologist was expert on both electrophoretic testing of dried blood stains and on saliva secretion testing]; *People v. Ashmus* (1991) 54 C.3d 932, 972, 2 C.R.2d 112, 820 P.2d 214, 2 Cal. Evidence (4th), *Demonstrative, Experimental, and Scientific Evidence*, §15 [forensic serologist was expert on electrophoretic testing of dried semen stains]; *Cloud v. Market Street Ry. Co.* (1946) 74 C.A.2d 92, 99, 168 P.2d 191 [graduate chemist and toxicologist of coroner's office, on effect of particular percentages of alcohol in bloodstream on ability of person to walk]; *People v. Taylor* (1957) 152 C.A.2d 29, 32, 312 P.2d 731 [criminalist in police department crime laboratory, on blood test for intoxication]; *Poggetto v. Owen* (1960) 187 C.A.2d 128, 132, 9 C.R. 395 [physicist; expert in light refraction]; *People v. Palmer* (1978) 80 C.A.3d 239, 254, 145 C.R. 466 [criminalist using scanning electron microscope for gunshot residue analysis]; C.E.B., Expert Witness Guide 2d, §§6.40, 6.48, 6.53; 70 A.L.R.2d 1029 [chemist; effect of poison on human body]; on fingerprint and ballistics experts, see *infra*, §§67, 68; on experts in chemical and physical tests, see 2 Cal. Evidence (4th), *Demonstrative, Experimental, and Scientific Evidence*, §41 et seq.)

(3) *Doctors.* (See *Sinz v. Owens* (1949) 33 C.2d 749, 753, 205 P.2d 3; *Huffman v. Lindquist* (1951) 37 C.2d 465, 478, 234 P.2d 34; *Estate of Gore* (1953) 119 C.A.2d 796, 799, 260 P.2d 859; *People v. Hines* (1954) 128 C.A.2d 421, 423, 275 P.2d 585; *People v. Rehman* (1967) 253 C.A.2d 119, 162, 61 C.R. 65; *Cline v. Lund* (1973) 31 C.A.3d 755, 765, 107 C.R. 629; *Osborn v. Irwin Memorial Blood Bank* (1992) 5 C.A.4th 234, 270, 273, 7 C.R.2d 101, *infra*, §46; C.E.B., Expert Witness Guide 2d, §6.25 et seq.; 9 *Stanf. L. Rev.* 733 [medical malpractice cases]; 16 *Proof of Facts* 2d 87 [time of death]; *infra*, §45 et seq.; 3 Cal. Evidence (4th), *Presentation at Trial*, §191.)

(4) *Engineers.* (See *Vallejo & Northern R. Co. v. Reed Orchard Co.* (1915) 169 C. 545, 570, 147 P.2d 238, *supra*, §39 [civil engineer]; *Richfield Oil Corp. v. Crawford* (1952) 39 C.2d 729, 741, 249 P.2d 600 [surveyors and civil engineers, on surveying methods]; *Blinkinsop v. Weber* (1948) 85 C.A.2d 276, 283, 193 P.2d 96 [civil engineer, on whether steps were built in accordance with standard construction and architectural practice]; *Jones v. Johnston Testers*

(1955) 132 C.A.2d 162, 170, 281 P.2d 602 [mechanical and industrial engineer who was safety engineer for insurance company, on danger of worn mechanism]; *Varas v. Barco Mfg. Co.* (1962) 205 C.A.2d 246, 253, 260, 22 C.R. 737 [chemical engineer, on escape of gasoline from machine]; *Troensegaard v. Silvercrest Industries* (1985) 175 C.A.3d 218, 225, 220 C.R. 712 [certified industrial hygienist, on source of unpleasant odor in mobilehome]; C.E.B., Expert Witness Guide 2d, §6.9 et seq.; 5 Proof of Facts 732 [highway construction engineer]; 15 Proof of Facts 557 [fire protection engineer]; 33 Proof of Facts 2d 504 [mechanical engineer]; 6 Am.Jur. Trials 555.)

(5) *Law Enforcement Officers.* (See *People v. Newman* (1944) 24 C.2d 168, 174, 148 P.2d 4 [officer, familiar with racetrack gambling in locality, on bookmakers' betting markers and other memoranda]; *People v. Haeussler* (1953) 41 C.2d 252, 261, 260 P.2d 8 [highway patrol officer on point of impact, from inspection of skid and gouge marks and location of oil, glass, and other debris]; *Kastner v. Los Angeles Metropolitan Transit Authority* (1965) 63 C.2d 52, 57, 45 C.R. 129, 403 P.2d 385 [traffic officer with experience in investigating accidents, opinion on point of impact]; *Wells Truckways v. Cebrian* (1954) 122 C.A.2d 666, 676, 265 P.2d 557 [experienced highway patrol officer on cause of collision]; *Risley v. Lenwell* (1954) 129 C.A.2d 608, 631, 277 P.2d 897 [highway patrol officer on proper methods of loading truck]; *People v. Smith* (1956) 142 C.A.2d 287, 292, 298 P.2d 540 [officer holding position of laboratory technician for 16 years, with some university training in chemistry, could testify that brown splotches on defendant's clothing were blood, and that fibers on his clothing matched others found at scene of crime]; *People v. Flynn* (1958) 166 C.A.2d 501, 509, 333 P.2d 37 [officer familiar with marijuana from experience with addicts]; *People v. Smith* (1967) 253 C.A.2d 711, 718, 61 C.R. 557 [officer with experience in narcotics, on whether person was under influence of drugs]; *People v. Cruz* (1968) 260 C.A.2d 55, 59, 66 C.R. 772 [officer with practical experience and academic study of narcotics, on whether injections of heroin 8 months previously would show scars]; *People v. Parks* (1968) 263 C.A.2d 490, 495, 69 C.R. 368 [officer experienced with firearms, student of guns and ballistics, on ballistics]; *Hart v. Wiet* (1970) 4 C.A.3d 224, 228, 84 C.R. 220 [highway patrol officer on reasonable speed when road conditions were ideal and when road was wet, with snow alongside]; *People v. Cramblit* (1978) 84 C.A.3d 437, 447, 148 C.R. 440, citing the text; *McCleery v. Bakersfield* (1985) 170 C.A.3d 1059, 216 C.R. 852, *infra*, §74; *People v. Ojeda* (1990) 225 C.A.3d 404, 408, 275 C.R. 472, *supra*, §25 [sheriff's deputy on whether, based on administration of horizontal gaze nystagmus test, defendant was under influence of alcohol]; C.E.B., Expert Witness Guide 2d, §6.34; 28 So. Cal. L. Rev. 420 [opinion on point of impact].)

(6) *Mechanics and Other Craftspersons.* (See *Giraudi v. Electric Imp. Co. of San Jose* (1895) 107 C. 120, 126, 40 P. 108 [electrician, on safe method of locating wires near a metallic roof]; *Gaumnitz v. Indemnity Ins. Co. of North America* (1934) 2 C.A.2d 134, 138, 37 P.2d 712 [auto mechanic or salesman may identify machine as truck, sedan, coupe, etc.]; *Wallace v. Speier* (1943) 60 C.A.2d 387, 392, 140 P.2d 900 [plumber, on frequency of inspection and life of hot water faucet assembly]; *People v. Haeussler*, *supra*, 41 C.2d 261 [speedometer mechanic, on impact breaking speedometer and fixing needle at certain point]; *Warren v. Pacific Intermountain Express Co.* (1960) 183 C.A.2d 155, 164, 6 C.R. 824 [garage owner]; 1946 A.S. 1168 [aviation mechanic may testify as to what part of plane structurally failed first].)

(7) *Mental Health Professionals and Social Workers.* (See *People v. Davis* (1965) 62 C.2d 791, 800, 44 C.R. 454, 402 P.2d 142 [psychologist]; *People v. Stoll* (1989) 49 C.3d 1136, 1153, 265 C.R. 111, 783 P.2d 698, *infra*, §58 [same]; *People v. Harlan* (1990) 222 C.A.3d 439, 448, 271 C.R. 653 [clinical social worker with master's degree, specialized training in treatment of sexual abuse, and extensive experience in working with sexually abused children, was expert on reactions of child molestation victims]; C.E.B., Expert Witness Guide 2d, §6.29 et seq.; 1 A.L.R.4th 837 [social worker on issues of child custody].)

(8) *Other Experts.* (See *People v. Ellis* (1922) 188 C. 682, 696, 206 P. 753 ["expert shot," experienced in firearms, on course of bullet through body]; *Pfingsten v. Westenhaver* (1952) 39 C.2d 12, 20, 244 P.2d 395, *supra*, §38 [person in trucking business, on rental value of tractors and trailers]; *Fonts v. Southern Pac. Co.* (1916) 30 C.A. 633, 638, 159 P. 215 [drayman on method of unloading boxcar]; *People v. Hopper* (1956) 145 C.A.2d 180, 190, 302 P.2d 94 [licensed mortician and deputy coroner, on whether abrasions found on body were such as would have resulted from fall from a moving car]; *Oakes v. Chapman* (1958) 158 C.A.2d 78, 82, 322 P.2d 241 [golf professional; but held not qualified here

to answer particular question]; *Naples Restaurant v. Coberly Ford* (1968) 259 C.A.2d 881, 884, 66 C.R. 835, supra, §41 [automobile salesman]; *Hyman v. Gordon* (1973) 35 C.A.3d 769, 774, 111 C.R. 262, supra, §41 [firefighter, on defective design of water heater as constituting fire hazard]; *People v. Craig* (1978) 86 C.A.3d 905, 916, 150 C.R. 676 [dog trainer on dog's ability to follow human trail]; *People v. Malgren* (1983) 139 C.A.3d 234, 238, 188 C.R. 569, infra, §77 [same]; 34 Proof of Facts 2d 547 [accountant]; 35 Proof of Facts 2d 650 [veterinarian]; 33 Proof of Facts 3d 98 [architect]; 18 A.L.R.3d 1221 [person handling bloodhound on trailing by dog]; on examiners of questioned documents, see infra, §66 and 2 *Cal. Evidence* (4th), *Documentary Evidence*, §10.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Chemists, Physicists, and Laboratory Technicians.* See *People v. Combs* (2004) 34 C.4th 821, 848, 22 C.R.3d 61, 101 P.3d 1007 [criminalist with bachelor of science degree in chemistry, with work experience in coroner's officer in serology section, on blood spatter evidence].(5) *Law Enforcement Officers.* See *People v. Hoyos* (2007) 41 C.4th 872, 909, 63 C.R.3d 1, 162 P.3d 528 [deputy sheriff who had bachelor's degree in police science and additional education in crime scene reconstruction and bloodstain patterns, and who had testified in courts throughout state on blood spatter evidence, was qualified to testify in capital murder trial on crime reconstruction using blood spatter analysis].(8) *Other Experts.* See *Los Altos El Granada Investors v. Capitola* (2006) 139 C.A.4th 629, 638, 657, 43 C.R.3d 434 [urban planner and attorney who had acted as consultant for numerous rent control jurisdictions, on what was appropriate base year for determining whether mobilehome park owner received fair return]; 24 A.L.R.6th 549 [nurses].



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## CHAPTER V - Opinion Evidence

## II. EXPERT EVIDENCE

## C. Subjects of Expert Testimony.

## 1. Medical Evidence.

## a. Civil Cases.

## 1. Injury or Disability.

## 1 Witkin Cal. Evid. Opinion Evid § 45

[§ 45] Injury or Disability.

In a personal injury case, a medical expert may give an opinion on whether a certain kind of agency, means, or instrument might have produced a particular injury or disability, or on the nature and extent of an injury or disability. (See *Perkins v. Sunset Tel. & Tel. Co.* (1909) 155 C. 712, 715, 103 P. 190; *Dow v. Oroville* (1913) 22 C.A. 215, 226, 134 P. 197; *Hagy v. Allied Chemical & Dye Corp.* (1953) 122 C.A.2d 361, 368, 265 P.2d 86 [whether sulphuric acid fumes would aggravate a dormant cancer]; 66 A.L.R.2d 1082 [opinion evidence as to cause of disease, death, or injury]; 31A Am.Jur.2d (1989 ed.), *Expert and Opinion Evidence* §211 et seq.; 6 Am.Jur. Trials 1; on pain and suffering, see 11 A.L.R.3d 1249; 5 Am.Jur. Trials 921; 6 Am.Jur. Trials 555; 31A Am.Jur.2d (1989 ed.), *Expert and Opinion Evidence* §264 et seq.; on emotional distress, see *Potter v. Firestone Tire & Rubber Co.* (1993) 6 C.4th 965, 997, 25 C.R.2d 550, 863 P.2d 795, 6 Summary (9th), *Torts, Supp.*, §857A [fear of cancer]; 23 Am.Jur. Trials 479.)

In *Ruiz v. Minnesota Mining & Mfg. Co.* (1971) 15 C.A.3d 462, 93 C.R. 270, plaintiffs were cushion assemblers who suffered damage to the nerves controlling the muscles of their extremities. Defendant manufacturer denied their contention that chemicals in specially developed glue had caused toluene poisoning which resulted in the observable symptoms. Over objection, plaintiffs introduced evidence from an internist who had examined over 1,000 juvenile hall inmates for the immediate physical and psychological effects of glue sniffing, i.e., toluene poisoning. *Held*, this evidence was admissible.

The witness, who was the only person having done extensive research on the effects of toluene poisoning on human beings, could testify that the common possession of two symptoms--numbness and tremors of the extremities--indicated that plaintiffs, like the juveniles, suffered from toluene poisoning. Despite arguments that the conditions of inhalation were different, the witness was specifically asked about the differences in age, concentration inhaled, and duration of inhalation. He answered that the differences were not controlling and that, instead, "whether a person became sick from exposure to toluene depended primarily on that person's susceptibility to the poisoning." (15 C.A.3d 468.)

Where the issue is future disability or other consequences, the legal test is whether they are *reasonably certain* to occur, and the jury is instructed that the evidence must meet this test. (See *Potter v. Firestone Tire & Rubber Co.*, *supra*, 6 C.4th 1009 [medical monitoring costs]; BAJI (8th ed.), No. 14.10.1 [same].) But the testimony of a medical witness is admissible where the witness testifies to the likelihood or probability of such consequences (as distinguished from mere conjecture), even though the witness does not or cannot express an opinion as to reasonable certainty. "As a rule, the physician whose opinion is most reliable is loath to give an opinion as to what consequences will or will not

follow as a result of an injury in a certain case, but at the same time willing, as here, to state the result of his own professional experience and observations in treating cases where like injuries have occurred, and as a result of that experience say that we might or might not expect like results to follow in this case." (*Cordiner v. Los Angeles Traction Co.* (1907) 5 C.A. 400, 404, 91 P. 436; see also *Bauman v. San Francisco* (1940) 42 C.A.2d 144, 164, 108 P.2d 989; *Hagy v. Allied Chemical & Dye Corp.*, *supra*, 122 C.A.2d 374; 75 A.L.R.3d 9 [admissibility as affected by expression in terms of probability or possibility]; 89 A.L.R.3d 783 [evidence as to employability, on issue of disability in health and accident insurance and workers' compensation cases].)

American Jurisprudence Proof of Facts (cited herein as Proof of Facts, Proof of Facts 2d, and Proof of Facts 3d) contains an exhaustive coverage of nearly every subject of personal injury recovery, with detailed illustrations of medical testimony on the nature, cause, and extent of injuries and disabilities. The material is arranged alphabetically under topical headings descriptive of the kind of injury, and a softcover multi-volume general index provides guidance to topics in all three series.

**SUPPLEMENT:** [This section is current through the latest supplement]

*Cross-Reference:* 6 *Summary* (10th), *Torts*, §1036. *Future disability:* See CACI, No. 3903B [medical monitoring costs]. *West's Key Number Digest*, Evidence k.528 et seq.



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## CHAPTER V - Opinion Evidence

### II. EXPERT EVIDENCE

#### C. Subjects of Expert Testimony.

##### 1. Medical Evidence.

##### a. Civil Cases.

#### 2. Disease and Professional Negligence.

#### 1 Witkin Cal. Evid. Opinion Evid § 46

[§ 46] Disease and Professional Negligence.

(1) *Disease*. The three series of American Jurisprudence Proof of Facts (see *supra*, §45) cover in great detail the methods of proving the existence, nature, cause, and extent of diseases. (See also 66 A.L.R.2d 1082.)

(2) *Malpractice*. In a malpractice case, a qualified doctor may testify as to what type of diagnosis or treatment of an injury or illness is in accord with the prevailing standards of good medical practice in the locality. (See *Sinz v. Owens* (1949) 33 C.2d 749, 753, 205 P.2d 3; *Moore v. Belt* (1949) 34 C.2d 525, 532, 212 P.2d 509 [discussing extent to which general practitioner may testify in matter involving medical specialty]; *Brown v. Colm* (1974) 11 C.3d 639, 643, 644, 114 C.R. 128, 522 P.2d 688 [physician as expert on standard of care prevailing before physician was admitted to practice]; *Landeros v. Flood* (1976) 17 C.3d 399, 409, 131 C.R. 69, 551 P.2d 389, 6 Summary (9th), Torts, §793 [expert opinion testimony required to establish standard of care for newly recognized diagnosis of battered child syndrome (see *infra*, §50)]; *Jambazian v. Borden* (1994) 25 C.A.4th 836, 849, 30 C.R.2d 768 [in informed consent case, expert opinion evidence was required to defeat defendant doctor's summary judgment motion]; 77 Harv. L. Rev. 333 [role of *res ipsa loquitur* (see 1 Cal. Evidence (4th), Burden of Proof and Presumptions, §114 et seq.) in relieving plaintiff of expert testimony burden]; 70 Am.Jur. Trials 101 [anesthesiology]; 31 A.L.R.3d 1163 [general practitioner as expert on medical specialty]; 36 A.L.R.3d 440 [expert on local hospital standards]; 18 Proof of Facts 187 [obstetrical malpractice]; 25 Proof of Facts 333 [obstetrical malpractice: use of inhalation anesthesia]; 10 Proof of Facts 2d 282 [misdiagnosis of appendicitis]; 12 Proof of Facts 2d 634, 642 [physician's negligent failure to x-ray]; 26 Proof of Facts 2d 220 [postoperative care]; 36 Proof of Facts 2d 680, 687 [negligent injection or infusion]; 34 Proof of Facts 3d 146 [jaw surgery by dentist]; 35 Proof of Facts 3d 98 [wisdom tooth extraction]; 40 Proof of Facts 3d 96 [unnecessary hysterectomy]; 51 Proof of Facts 3d 1 [failure to diagnose diabetes]; BAJI (8th ed.), No. 6.30; *infra*, §86; 3 Cal. Evidence (4th), Presentation at Trial, §191 et seq.)

(3) *Blood Bank's Negligence*. Whether a blood bank took reasonable steps to avoid contamination of blood is a question involving fulfillment of a *professional* standard of care. Hence, expert testimony is required to establish a *prima facie* case of negligence. (*Osborn v. Irwin Memorial Blood Bank* (1992) 5 C.A.4th 234, 270, 273, 7 C.R.2d 101, 6 Summary (9th), Torts, Supp., §§774, 968, citing *Landeros* case, *supra*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Malpractice*. See 73 Am.Jur. Trials 119 [oncology]; 75 Am.Jur. Trials 55 [diagnostic radiology]; 54 Proof of Facts



3d 1 [diagnosis and treatment of arthritis]; 55 Proof of Facts 3d 1 [malpractice by chiropractor]; 56 Proof of Facts 3d 177 [diagnosis and treatment of Parkinson's disease]; 57 Proof of Facts 3d 381 [tonsillectomy].

*Landeros v. Flood:*

*Cross-Reference:* 6 Summary (10th), *Torts*, §972.

(3) *Blood Bank's Negligence.* See 55 Proof of Facts 3d 89 [negligence in transfusion of blood and blood products].

*Osborn v. Irwin Memorial Blood Bank:*

*Cross-Reference:* 6 Summary (10th), *Torts*, §1188.



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## CHAPTER V - Opinion Evidence

### II. EXPERT EVIDENCE

#### C. Subjects of Expert Testimony.

1. Medical Evidence.
- b. Criminal Cases.

*1 Witkin Cal. Evid. Opinion Evid § 47*

[§ 47] Criminal Cases.

In *People v. Cole* (1956) 47 C.2d 99, 301 P.2d 854, a murder case, defendant claimed that the victim had shot herself. The autopsy surgeon testified for the prosecution that, from the location and course of the bullet and the obesity of the victim, the wound was probably not self-inflicted. Recognizing the split of authority, the court followed the line of cases holding admissible expert medical testimony as to whether a wound could have been self-inflicted. (47 C.2d 103.) (See also *People v. Ellis* (1922) 188 C. 682, 694, 206 P. 753 [course of bullet through body]; *People v. Smith* (1938) 25 C.A.2d 241, 245, 77 P.2d 277 [same]; *People v. Hopper* (1956) 145 C.A.2d 180, 191, 302 P.2d 94 [probability that abrasions on body of deceased were received in fall from defendant's car]; *People v. Mayfield* (1997) 14 C.4th 668, 765, 766, 60 C.R.2d 1, 928 P.2d 485 [testimony by autopsy surgeon that fatal gunshot wound could not have been inflicted during course of struggle for weapon, as contended by murder defendant]; 31A Am.Jur.2d (1989 ed.), *Expert and Opinion Evidence* §§243 et seq., 263; 3 Wharton, Crim. Evidence (14th ed.), §§577, 578; 56 A.L.R.2d 1447 [opinion evidence in homicide case as to whether death was self-inflicted]; 65 A.L.R.3d 283 [medical testimony in homicide case on cause of death]; 71 A.L.R.3d 1265 [testimony by coroner or mortician on cause of death].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER V - Opinion Evidence

### II. EXPERT EVIDENCE

#### C. Subjects of Expert Testimony.

##### 2. Syndrome Evidence.

##### a. In General.

1 *Witkin Cal. Evid. Opinion Evid* § 48

[§ 48] In General.

With increasing frequency, medical or mental health professionals are called on to testify regarding the characteristics typically exhibited by those who have undergone a specific type of traumatic experience--most often, rape, child molestation, or battering. The characteristics may be physical or mental or both, and the purpose for which the evidence is sought to be introduced varies. In a criminal case, it may be used by the defense, e.g., to support a homicide defendant's claim that she acted in self-defense after experiencing years of battering. (See *infra*, §51.) It may also be used by the prosecution to rebut a claim that the victim's behavior following the alleged crime was inconsistent with the crime having occurred. (See *infra*, §54.) In a libel action, the evidence may be used to explain why a woman, identified by defendant in its newsletter as a rape victim, might have withdrawn her rape accusation. (See *Carney v. Santa Cruz Women Against Rape* (1990) 221 C.A.3d 1009, 271 C.R. 30, *infra*, §52.)

The requirement of general acceptance in the scientific community, imposed by *People v. Kelly* (1976) 17 C.3d 24, 130 C.R. 144, 549 P.2d 1240, 2 Cal. Evidence (4th), *Demonstrative, Experimental, and Scientific Evidence*, §42, may be applicable depending on what tests the expert witness relies (see *In re Amber B.* (1987) 191 C.A.3d 682, 691, 236 C.R. 623, 2 Cal. Evidence (4th), *Demonstrative, Experimental, and Scientific Evidence*, §108 [dependency case; use of anatomically correct dolls was new scientific method subject to *Kelly* requirements) or for what purpose the syndrome evidence is offered (see *People v. Bledsoe* (1984) 36 C.3d 236, 251, 203 C.R. 450, 681 P.2d 291, *infra*, §52 [use of rape trauma syndrome to determine whether victim was in fact raped was novel application not satisfying *Kelly*]). (On syndrome evidence generally, see C.E.B., Expert Witness Guide 2d, §4.24 et seq.; 31A Am.Jur.2d (1989 ed.), *Expert and Opinion Evidence* §195 et seq.; 1994 A.S. 581, 599 [battered child and similar syndromes]; 24 Pacific L. J. 1449 [problems raised by psychological syndrome testimony].)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Criminal Law k.474.4 et seq.



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## CHAPTER V - Opinion Evidence

### II. EXPERT EVIDENCE

#### C. Subjects of Expert Testimony.

##### 2. Syndrome Evidence.

##### b. Credibility Exception.

1 *Witkin Cal. Evid. Opinion Evid* § 49

[§ 49] Credibility Exception.

Even where the syndrome evidence is inadmissible to prove that the incident in question occurred (see *infra*, §§52, 53), it may often be admitted, with proper limiting instructions, to support the victim's credibility, once that credibility is seriously attacked. (See *People v. Bledsoe* (1984) 36 C.3d 236, 247, 203 C.R. 450, 681 P.2d 291, *infra*, §52 [where defendant claims rape victim's delay in reporting rape is inconsistent with rape having occurred, "expert testimony on rape trauma syndrome may play a particularly useful role by disabusing the jury of some widely held misconceptions about rape and rape victims"]; *People v. Gilbert* (1992) 5 C.A.4th 1372, 1386, 7 C.R.2d 660 [expert testimony on posttraumatic syndrome affecting sexually abused children was proper where it was "fastidiously tailored to meet credibility issues defense counsel had raised"]; but see *People v. Roscoe* (1985) 168 C.A.3d 1093, 1100, 215 C.R. 45, *infra*, §53 [rehabilitation testimony by expert is limited to discussion of victims as class and "does not extend to discussion and diagnosis of the witness in the case at hand"].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER V - Opinion Evidence

### II. EXPERT EVIDENCE

#### C. Subjects of Expert Testimony.

##### 2. Syndrome Evidence.

#### c. Battered Child or Battered Woman.

##### 1. In General.

#### 1 Witkin Cal. Evid. Opinion Evid § 50

[§ 50] In General.

In *People v. Jackson* (1971) 18 C.A.3d 504, 95 C.R. 919, a prosecution for child beating, the trial judge allowed a medical doctor to give his conclusions about the "battered child syndrome." The criteria the witness used included a seriously injured child under 3 years of age who had received bone injuries at different times and also suffered from soft tissue injury and subdural hematomas, who had been neglected and whose injuries were inconsistent with his supposed history. *Held*, the expert medical testimony was properly received. The doctor's opinion did not indicate that any particular person had done anything but showed only that a child found with these injuries had not suffered them by accidental means. "This conclusion is based upon an extensive study of the subject by medical science. The additional finding that the injuries were probably occasioned by someone who is ostensibly caring for the child is simply a conclusion based upon logic and reason. Only someone regularly 'caring' for the child has the continuing opportunity to inflict these types of injuries; an isolated contact with a vicious stranger would not result in this pattern of successive injuries stretching through several months." (18 C.A.3d 507.) (See *People v. Morgan* (1997) 58 C.A.4th 1210, 1213, 68 C.R.2d 772 [where victim of alleged domestic battery recanted at trial, expert testimony on battered woman syndrome was properly admitted to bolster her earlier assertions that defendant beat her]; 98 A.L.R.3d 306 [admissibility of expert testimony on battered child syndrome]; 57 A.L.R.5th 315 [use of domestic-violence syndrome evidence to assist jury in evaluating victim's testimony or behavior]; 20 Cal. Western L. Rev. 485 [battered woman syndrome]; 34 U.C.L.A. L. Rev. 175 [intrafamily sexual abuse]; on use of evidence of battering as defense in criminal prosecution, see *infra*, §51; on distinguishable "battering parent" syndrome (concurrent characteristics typically shared by parents prone to commit child abuse), see 43 A.L.R.4th 1203.)

Expert testimony on battered woman syndrome is admissible only if it is relevant, and it is irrelevant unless there is a sufficient factual basis for a finding that the victim is a battered woman. The syndrome is a series of characteristics that appear in women who have been abused physically and psychologically over a period of time. A single violent incident, without evidence of other physical or psychological abuse, is not sufficient to establish that a woman suffers from the syndrome. (*People v. Gomez* (1999) 72 C.A.4th 405, 415, 417, 85 C.R.2d 101 [battered woman testimony was improperly admitted where, other than evidence of current offense, there was no evidence indicating that defendant abused or behaved violently toward victim, that defendant fit profile of batterer, or that victim and defendant were engaged in "battering" relationship].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Gadlin* (2000) 78 C.A.4th 587, 593, 92 C.R.2d 890 [in prosecution arising from defendant's knife attack on girlfriend, expert testimony on battered women's syndrome was sufficiently relevant where relationship in question was "troubled," lasted 21/2 years, and included two episodes of armed assault; distinguishing *People v. Gomez* (1999) 72 C.A.4th 405, 85 C.R.2d 101, text, p. 584]; *People v. Williams* (2000) 78 C.A.4th 1118, 1129, 93 C.R.2d 356 [nothing in statute suggests batterer should "get one free episode of domestic violence before admission of evidence to explain why a victim of domestic violence may make inconsistent statements about what occurred and why such a victim may return to the perpetrator"; disagreeing with *Gomez*]; CAL- CRIM, No. 850 [Testimony on Intimate Partner Battering and Its Effects: Credibility of Complaining Witness].

*Gomez* was disapproved in *People v. Brown* (2004) 33 C.4th 892, 16 C.R.3d 447, 94 P.3d 574. Defendant was charged with domestic violence offenses, and the prosecutor offered testimony from an expert witness to explain that domestic violence victims often later deny or minimize the assailant's conduct. Defense counsel objected that the testimony was not admissible under *Ev.C. 1107* (text, §51) because the prosecution, having offered proof of only one prior battering, had not shown that the victim was a battered woman within the meaning of the statute. The trial judge admitted the testimony, and defendant was convicted. *Held*, affirmed. The issue whether *Ev.C. 1107* requires more than one incident of prior battering need not be addressed, as the testimony was admissible under *Ev.C. 801* (text, §29), which allows the admission of expert testimony on any subject sufficiently beyond common experience that the opinion of an expert would assist the trier of fact. (33 C.4th 905.) This kind of evidence cannot be admitted to prove the occurrence of the charged crime. There must be independent evidence of domestic violence; otherwise, the expert testimony would lack foundation. Here, that foundation was supplied by the victim's testimony in court and by her earlier statement to the investigating officer. "Once there is evidence from which the trier of fact could find the charges true, evidence relating to the credibility of the witnesses becomes relevant and admissible." (33 C.4th 908.) *West's Key Number Digest*, Criminal Law k.474.4(3), 474.4(4)



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### II. EXPERT EVIDENCE

#### C. Subjects of Expert Testimony.

##### 2. Syndrome Evidence.

#### c. Battered Child or Battered Woman.

##### 2. As Defense in Criminal Case.

#### 1 Witkin Cal. Evid. Opinion Evid § 51

[§ 51] As Defense in Criminal Case.

(1) *Evidence Code. Ev.C. 1107*, added in 1991, addresses the admissibility of battered woman evidence in a criminal prosecution; its main significance is to approve the use of such evidence by a defendant to support her claim of self-defense. The statute codifies the holding in *People v. Aris* (1989) 215 C.A.3d 1178, 264 C.R. 167, 1 Cal. Crim. Law (3d), *Defenses*, §70, that expert testimony regarding the battered woman syndrome is admissible to show how a particular criminal defendant's circumstances may have led to a *genuine* belief that serious bodily harm was imminent. (See 23 *Pacific L. J.* 655; on overruling of *Aris* case on related question whether battered woman testimony is admissible on *reasonableness* of defendant's belief that harm was imminent, see *People v. Humphrey* (1996) 13 C.4th 1073, 56 C.R.2d 142, 921 P.2d 1, *infra*, this section; on doctrine of imperfect self-defense in homicide or assault prosecution, see 1 Cal. Crim. Law (3d), *Defenses*, §77; for argument that male defendants should be able to take advantage of statute as well, see 22 *Southwestern U. L. Rev.* 239; 70 *So. Cal. L. Rev.* 337; on use of battered child evidence on issue of self-defense, see 1985 A.S. 832; 22 A.L.R.5th 787; 26 *Pacific L. J.* 831; 16 *J. Juvenile Law* 91; 25 *Southwestern U. L. Rev.* 429.)

(a) *Scope of statute*. Both the defense and the prosecution may introduce expert testimony regarding the battered woman syndrome in a criminal proceeding, "including the physical, emotional, or mental effects upon the beliefs, perceptions, or behavior of victims of domestic violence, except when offered against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the charge." (*Ev.C. 1107(a)*.)

(b) *Legislative intent*. The statute is intended as a rule of evidence only and no substantive change affecting the Penal Code is intended. (*Ev.C. 1107(d)*.) Also, *Ev.C. 1107* is not intended to preclude the admissibility of evidence of battered woman syndrome under other statutory or case law. (Stats. 1991, Chap. 812, §2.)

(c) *Foundation*. Expert testimony about the syndrome must be relevant and properly qualified to be admissible; however, such testimony is not to be considered a new scientific technique the reliability of which must be proven (see 2 Cal. Evidence (4th), *Demonstrative, Experimental, and Scientific Evidence*, §42). (*Ev.C. 1107(b)*.)

(d) *Definitions*. "Abuse" and "domestic violence" are defined for purposes of the statute as provided in *Family C.* 6203, 6211 (see 11 *Summary* (9th), *Husband and Wife*, *Supp.*, §36A). (*Ev.C. 1107(c)*.)

(e) *Relation between Ev.C. 1107 and rule prohibiting testimony as to actual mental state*. "While syndrome

testimony has been held admissible to explain how the defendant's asserted subjective perception of a need to defend herself 'would reasonably follow from the defendant's experience as a battered woman' ... , an expert is not permitted to testify as to the expert's opinion that the defendant *actually perceived* that she was in danger and needed to defend herself. ... [I]t would be a dramatic departure for the Legislature to permit use of battered women's syndrome evidence to predict the actual state of mind of a particular individual at a given moment. Given the clear conflict of such a rule with the rule set forth in *Penal Code section 29*, as well as the scientifically controversial nature of such an undertaking," it would be surprising for the Legislature to decide so important a public policy matter in a silent or obscure manner. "Accordingly, we conclude section 1107(a) merely codifies existing rules concerning use of battered women's syndrome testimony." (*People v. Erickson* (1997) 57 C.A.4th 1391, 1400, 1401, 67 C.R.2d 740 [in murder prosecution, trial judge properly excluded expert testimony that battered woman syndrome caused defendant to believe her life was in danger at time she killed victim]; on P.C. 29, see *infra*, §94.)

(2) *Case Law*. In *People v. Humphrey*, *supra*, defendant was charged with murdering the man with whom she had been living. She testified that the victim had been beating her, and that she shot him only because she believed he was going to grab the gun from her and shoot her first. To bolster her claim of self-defense, she presented expert testimony regarding the battered woman syndrome. Although to win acquittal on the basis of self-defense, defendant had to establish both her *subjective belief* in the need to defend herself and the *objective reasonableness* of that belief, the trial judge instructed the jurors that they could consider the expert testimony only on the subjective belief issue. After asking for clarification of the terms "subjectively honest and objectively unreasonable," the jury found defendant guilty of voluntary manslaughter. (13 C.4th 1081.) *Held*, the instruction was erroneous.

(a) By enacting *Ev.C. 1107(a)*, the Legislature has determined that expert testimony regarding the battered woman syndrome is admissible if the proponent of the evidence establishes both its relevancy and the proper qualifications of the expert witness. Because there is no dispute as to the qualifications of defendant's witness, the question at hand is to what extent defendant established the relevancy of the witness' testimony. (13 C.4th 1082.)

(b) Evidence of the victim's behavior toward defendant was admittedly relevant on the issue of the reasonableness of her belief in the need to defend herself. Any purported distinction between this type of evidence and expert testimony as to the effects of this behavior on defendant is untenable, as far as relevancy is concerned. If, under the present circumstances, a defendant is to effectively present the situation as perceived by her and to show the reasonableness of her fear, she should have the option of giving the jury a professional explanation of the battering syndrome and its effects on the woman victim. (13 C.4th 1086, 1089, disapproving holdings to the contrary in *People v. Aris*, *supra*, and *People v. Day* (1992) 2 C.A.4th 405, 2 C.R.2d 916.)

(c) The expert testimony was also relevant to bolster defendant's credibility. For example, the prosecution urged the jury not to believe defendant's testimony that the victim had shot at her on the night preceding the killing, and argued that if defendant had really believed she had been shot at, she would have left the victim. The expert evidence could counter any "common sense" conclusion that if defendant had experienced so much violence at the hands of the victim, she would have left him much earlier. (13 C.4th 1087.)

(d) Not all of the expert testimony presented was relevant to both prongs of perfect self-defense. Thus, under similar circumstances, the following limiting instruction may be appropriate on request: "[I]n assessing reasonableness, the question is whether a reasonable person in the defendant's circumstances would have perceived a threat of imminent injury or death, and not whether killing the abuser was reasonable in the sense of being an understandable response to ongoing abuse; and ... therefore, in making that assessment, [you] may not consider evidence merely showing that an abused person's use of force against the abuser is understandable." (13 C.4th 1088.) Where it is the prosecution that offers the battered woman syndrome evidence, it may also be appropriate to give an instruction regarding the prohibition in *Ev.C. 1107(a)* against using this evidence to prove the occurrence of the act or acts of abuse forming the basis of the criminal charge. (13 C.4th 1088, footnote 5.)

(e) The jury's request for clarification suggests that the question of unreasonable self-defense was critical. "The jury



likely concluded that defendant actually believed in the need to defend, but her belief was unreasonable. If so, guilt or innocence hinged on the precise issue--objective reasonableness--on which the court told the jury not to consider the battered women's syndrome evidence." Thus, there is a reasonable probability that the erroneous instruction affected the verdict adversely to defendant, and the conviction must be reversed. (13 C.4th 1089, 1090.)

A concurring justice, with whom two other justices agreed, questioned whether expert testimony on the battered woman syndrome is *generally* relevant on the issue of reasonableness; but she stated that, under these particular facts, it "could assist the jury in determining whether a reasonable person in defendant's situation would have perceived from the totality of the circumstances imminent peril of serious bodily injury or death." (13 C.4th 1102.) (See 32 U.S.F. L. Rev. 225 [Humphrey]; 27 Southwestern U. L. Rev. 155 [same]; 58 A.L.R.5th 749 [admissibility of battered woman syndrome evidence on issue of self-defense].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Evidence Code. Ev.C. 1107(e)* was added in 2000 to give the statute a short title: "the Expert Witness Testimony on Battered Women's Experiences Section of the Evidence Code."

*Ev.C. 1107(e)* was amended in 2004 to change the title of the statute to the "Expert Witness Testimony on Intimate Partner Battering and Its Effects Section of the Evidence Code." In accordance with this change, the statute was amended throughout to refer to intimate partner battering and its effects, rather than battered women's syndrome. However, the change was not intended to "impact any existing decisional law regarding this section." (*Ev.C. 1107(f)*, added in 2004.)

See CALCRIM, No. 851 [Testimony on Intimate Partner Battering and Its Effects: Offered by the Defense]; 24 J. Juvenile Law 101 [admissibility of battering evidence on mens rea of battered woman charged with failing to protect child from abuse]; 31 *Pepperdine L. Rev.* 709 [expressing skepticism as to whether battering problem can be reduced by means of legislation].(a) *Scope of statute.* That portion of *Ev.C. 1107(a)* quoted in the text was amended in 2000 to read: "including the nature and effect of physical, emotional, or mental abuse on the beliefs, perceptions, or behavior of victims of domestic violence, except when offered against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge."

(d) *Definitions. Ev.C. 1107(c)* was amended in 2000 to add P.C. 242, 243(e), 262, 273.5, 273.6, 422, and 653m to those statutes providing the relevant definitions.

*Cross-Reference:* 11 *Summary* (10th), *Husband and Wife*, §374.(1a) (*New*) *Penal Code*. In a homicide prosecution, exclusion of evidence relating to intimate partner battering and its effect within the meaning of *Ev.C. 1107*, based on abuse committed on the defendant by the victim, may constitute grounds for habeas corpus relief. (P.C. 1473.5, added in 2001 and amended in 2004; see 36 *McGeorge L. Rev.* 905; 6 *Cal. Crim. Law* (3d), *Criminal Writs*, Supp., §36A.)

(2) *Case Law.* See *People v. Coffman & Marlow* (2004) 34 C.4th 1, 100, 17 C.R.3d 710, 96 P.3d 30 [in capital murder prosecution of two defendants, instructions properly informed jury that it could consider evidence of battered women's syndrome in determining whether female defendant had formed mental state or specific intent required for charged offenses; additional proposed instruction was properly refused as argumentative in that it directed jury to draw inferences favorable to female defendant from specific evidence on disputed question of fact]; *People v. Jaspas* (2002) 98 C.A.4th 99, 109, 110, 119 C.R.2d 470 [in prosecution in which defendant was accused of fatally shooting her boyfriend, instruction based on CALJIC, No. 9.35.1, which referred to "actual and reasonable belief of defendant," had potential of misleading jury into believing it could not consider battered women's syndrome evidence on question of imperfect self-defense (see 1 *Cal. Crim. Law* (3d), *Defenses*, §77); however, in light of other instructions, any error was harmless]; *People v. Romero* (2007) 149 C.A.4th 29, 44, 56 C.R.3d 678 [in murder prosecution in which defendant claimed self-defense, his proposed instructions on battered person's syndrome were defective, and properly rejected, as incorrectly suggesting that jury consider whether *reasonable battered person* was justified in killing victim; *People v. Humphrey* (1996) 13 C.4th 1073, 56 C.R.2d 142, 921 P.2d 1, text, p. 586, made clear that *reasonable person* standard

applies]; on separate admissibility of expert testimony regarding battered women's syndrome under *Ev.C. 801*, see *People v. Brown (2004)* 33 *C.4th* 892, 16 *C.R.3d* 447, 94 *P.3d* 574, Supp., *supra*, §50.



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## CHAPTER V - Opinion Evidence

### II. EXPERT EVIDENCE

#### C. Subjects of Expert Testimony.

##### 2. Syndrome Evidence.

##### d. Rape Trauma Syndrome.

#### 1 Witkin Cal. Evid. Opinion Evid § 52

#### [§ 52] Rape Trauma Syndrome.

(1) *Evidence Inadmissible*. In *People v. Bledsoe* (1984) 36 C.3d 236, 203 C.R. 450, 681 P.2d 291, defendant was charged with the forcible rape of M, a 14-year-old girl. The prosecution introduced testimony of the victim and several friends, and also called W, a rape counselor, who had treated M after the incident. She testified at length concerning "rape trauma syndrome," "the umbrella terminology for what a rape victim experiences," and then gave her opinion that M was suffering from it. The jury found defendant guilty. *Held*, the testimony was erroneously admitted, but, in view of the strong case, the error was harmless.

(a) Rape trauma syndrome evidence has been admitted to rebut an inference inconsistent with the claim of rape, e.g., where there is delay in reporting the sexual assault. "[I]n such a context expert testimony on rape trauma syndrome may play a particularly useful role by disabusing the jury of some widely held misconceptions about rape and rape victims, so that it may evaluate the evidence free of the constraints of popular myths." (36 C.3d 247.)

(b) In this case, however, the evidence was introduced as a means of proving--from the alleged victim's postincident trauma--that a rape had in fact occurred. Three states have dealt with the propriety of using the testimony for such a purpose; two have found it inadmissible and one admissible. (36 C.3d 248.)

(c) The battered child syndrome cases are distinguishable. (1) They fall within the scope of decisions permitting an expert medical witness to give an opinion on the basis of the expert's deduction from the appearance of the injury itself. (36 C.3d 249, citing the text.) (2) There is, however, a fundamental difference between rape trauma syndrome and both the battered child syndrome and other methods of proof that have met the reliability standard of proof imposed on scientific evidence (see 2 Cal. Evidence (4th), *Demonstrative, Experimental, and Scientific Evidence*, §42): "Unlike fingerprints, blood tests, lie detector tests, voiceprints or the battered child syndrome, rape trauma syndrome was not devised to determine the 'truth' or 'accuracy' of a particular past event--i.e., whether, in fact, a rape in the legal sense occurred--but rather was developed by professional rape counselors as a therapeutic tool, to help identify, predict and treat emotional problems experienced by the counselors' clients or patients." (36 C.3d 249.)

(d) "Thus, as a rule, rape counselors do not probe inconsistencies in their clients' descriptions of the facts of the incident, nor do they conduct independent investigations to determine whether other evidence corroborates or contradicts their clients' renditions. Because their function is to help their clients deal with the trauma they are experiencing, the historical accuracy of the clients' descriptions of the details of the traumatizing events is not vital to their task. To our knowledge, all of the studies that have been conducted in this field to date have analyzed data that

have been gathered through this counseling process and, as far as we are aware, none of the studies has attempted independently to verify the 'truth' of the clients' recollections or to determine the legal implication of the clients' factual accounts." (36 C.3d 250.)

(e) Hence, "we conclude that expert testimony that a complaining witness suffers from rape trauma syndrome is not admissible to prove that the victim was raped." (36 C.3d 251.) This does not mean that evidence of the emotional and psychological trauma is inadmissible; here, a number of witnesses described the severe emotional distress that M exhibited after the attack, and such evidence was properly received. But lay jurors are fully competent to consider such evidence in determining whether a rape occurred; and to permit an expert to suggest that, because the complainant exhibits these symptoms she was raped, unfairly prejudices the defendant "by creating an aura of special reliability and trustworthiness." (36 C.3d 251.) (See *People v. Stoll* (1989) 49 C.3d 1136, 1160, 265 C.R. 111, 783 P.2d 698, *infra*, §58 [discussing *Bledsoe*]; 1985 A.S. 835 [same]; 39 U.C.L.A. L. Rev. 251 [criticizing *Bledsoe*]; 49 *Hastings L. J.* 1511 [balancing use of rape trauma syndrome testimony with rights of accused]; 42 A.L.R.4th 879 [admissibility of rape trauma syndrome evidence in criminal trial]; 1986 A.S. 730 [same].)

(2) *Evidence Admissible*. In *Carney v. Santa Cruz Women Against Rape* (1990) 221 C.A.3d 1009, 271 C.R. 30, a libel action was brought against a women's organization for publishing in its newsletter that plaintiff had raped Karen. The court held that rape trauma syndrome evidence was admissible to explain why Karen, as part of a settlement of her cross-complaint for assault and battery, wrote a letter of apology, acknowledging that she had neither been raped by plaintiff nor had sexual relations with him. "[W]e believe that the implication most jurors would naturally draw from the letter was that Karen was withdrawing all allegations of nonconsensual sexual activity. Given that such behavior is at odds with a claim of sexual assault and assuming that SCWAR can establish that this conduct is in fact one aspect of rape trauma syndrome, we conclude that the evidence would be admissible for this purpose." (221 C.A.3d 1026.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Evidence Admissible*. See CALCRIM, No. 1192 [Testimony on Rape Trauma Syndrome]. *West's Key Number Digest*, Criminal Law k.474.4(2)



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## CHAPTER V - Opinion Evidence

### II. EXPERT EVIDENCE

#### C. Subjects of Expert Testimony.

##### 2. Syndrome Evidence.

##### e. Child Sexual Abuse.

##### 1. Evidence Inadmissible.

#### 1 Witkin Cal. Evid. Opinion Evid § 53

[§ 53] Evidence Inadmissible.

*People v. Bledsoe* (1984) 36 C.3d 236, 203 C.R. 450, 681 P.2d 291, supra, §52, recognized the propriety of psychological evidence to support the credibility of a witness who is the alleged victim of a sex crime. "[E]vidence on rape trauma syndrome" has been introduced to provide the jury with "recent findings of professional research on the subject of a victim's reaction to sexual assault." (36 C.3d 247.) In *People v. Roscoe* (1985) 168 C.A.3d 1093, 215 C.R. 45, the court considered the limitations on the admissibility of such evidence in the context of a prosecution for child molestation.

Defendant was charged with oral copulation and sodomy with a minor, and the victim, a 15-year-old boy, testified to numerous sexual acts. Dr. C, on the basis of many sessions with the victim, testified that tests corroborated his clinical findings that the boy was a victim of child molestation. *Held*, admission of this testimony was error, though not reversible in this case.

(a) The *Bledsoe* language suggests that the opinion testimony must be based on the literature in the field and the general professional experience of the witness, not upon an analysis and evaluation of the facts in the case being tried. "Thus, for example, a victim whose credibility is attacked for initially denying that he had been molested could be rehabilitated by expert testimony that such denials are more likely than not in molestation cases. The testimony would not be that this particular child was a victim of molestation, causing him to react in a certain way, but rather that as a class, victims of molestation typically make poor witnesses, and are reluctant to disclose or discuss the sordid episodes." (168 C.A.3d 1099.)

(b) "Credibility questions arise whenever the defendant denies the victim's story, explicitly or implicitly suggesting misrecollection or fabrication. If, in every such case, the jury could be informed that a doctor had diagnosed the complainant, based upon the specific facts in the case, as a child molest victim (or rape victim, or whatever), then the protection against misuse of psychologists' testimony erected by *Bledsoe* would be largely dismantled." (168 C.A.3d 1099.) The conclusion that the particular witness is credible rests on the premise that molestation had occurred, and that the defendant is guilty. (168 C.A.3d 1099.)

The court concludes that "the expert testimony authorized by *Bledsoe* to permit rehabilitation of a complainant's credibility is limited to discussion of victims as a class, supported by references to literature and experience (such as an expert normally relies upon) and does not extend to discussion and diagnosis of the witness in the case at hand." (168

*C.A.3d 1100.*)

In *People v. Bowker* (1988) 203 C.A.3d 385, 249 C.R. 886, the court examined the problem of admissibility of expert testimony on child sexual abuse accommodation syndrome (CSAAS) and concluded that the expert's testimony in this case exceeded the permissible limits without the necessary safeguards (although the error was held harmless).

(a) In *People v. Bledsoe*, *supra*, the court applied the requirement of general acceptance in the scientific community, imposed by *People v. Kelly* (1976) 17 C.3d 24, 130 C.R. 144, 549 P.2d 1240, 2 Cal. Evidence (4th), *Demonstrative, Experimental, and Scientific Evidence*, §42, to exclude expert psychological testimony based on the "rape-trauma syndrome." (203 C.A.3d 391.) Relying on *Bledsoe*, many Court of Appeal decisions have held that the *Kelly* rule similarly precludes an expert from testifying on the basis of CSAAS that a particular victim's report of alleged abuse is credible because the victim manifests certain defined characteristics that are generally exhibited by abused children. (203 C.A.3d 391.)

(b) "The issue we must confront, therefore, is whether Dr. Murphy's testimony runs afoul of the general *Bledsoe*-based rule prohibiting expert reference to CSAAS for the purpose of demonstrating abuse, or whether it falls within the *Bledsoe* exception which permits such testimony for the limited purpose of disabusing the jury of misconceptions as to how child victims react to abuse." (203 C.A.3d 392.) The prosecution contended that the sole effect of *Bledsoe* as applied to CSAAS evidence is to prohibit experts from testifying that the particular victim was abused, and that the same testimony is admissible, under *People v. Roscoe*, *supra*, if the expert's remarks are confined to the class of abuse victims in general. "In our view, however, this argument misconstrues the rationale underlying *Bledsoe* and reads *Roscoe* far too broadly. The Supreme Court cannot have intended the *Bledsoe* exception to give with one hand what had been previously taken away by the other." (203 C.A.3d 393.)

(c) "Fundamentally, *Bledsoe* must be read to reject the use of CSAAS evidence as a *predictor* of child abuse. It is one thing to say that child abuse victims often exhibit a certain characteristic or that a particular behavior is not inconsistent with a child having been molested. It is quite another to conclude that where a child meets certain criteria, we can predict with a reasonable degree of certainty that he or she has been abused. The former may be appropriate in some circumstances, the latter clearly is not." (203 C.A.3d 393.) The impropriety is also present when the expert "gives 'general' testimony describing the components of the syndrome in such a way as to allow the jury to apply the syndrome to the facts of the case and conclude the child was sexually abused." (203 C.A.3d 393.) "In fact, there may be more danger where the application is left to the jury because the juror's education and training may not have sensitized them to the dangers of drawing predictive conclusions." (203 C.A.3d 393.)

(d) To apply the *Bledsoe* exception without the danger that the information will be misapplied by the jury, two limitations must be observed:

*First*, the evidence must be tailored to the purpose for which it is being received, and at a minimum must be targeted to a specific "myth" or "misconception" suggested by the evidence. "For instance, where a child delays a significant period of time before reporting an incident or pattern of abuse, an expert could testify that such delayed reporting is not inconsistent with the secretive environment often created by an abuser who occupies a position of trust. Where an alleged victim recants his story in whole or in part, a psychologist could testify on the basis of past research that such behavior is not an uncommon response for an abused child who is seeking to remove himself or herself from the pressure created by police investigations and subsequent court proceedings. In the typical criminal case, however, it is the People's burden to identify the myth or misconception the evidence is designed to rebut. Where there is no danger of jury confusion, there is simply no need for the expert testimony." (203 C.A.3d 394.)

*Second*, the jury must be instructed that the expert's testimony is not intended and should not be used to determine whether the victim's molestation claim is true. "The jurors must understand that CSAAS research approaches the issue from a perspective opposite to that of the jury. CSAAS *assumes* a molestation has occurred and seeks to describe and explain common reactions of children to the experience. ... The evidence is admissible *solely* for the purpose of showing

that the victim's reactions as demonstrated by the evidence are not inconsistent with having been molested." (203 C.A.3d 394.)

(e) In this case, the evidence, introduced in the prosecution's case-in-chief, far exceeded the permissible limits of the *Bledsoe* exception. "Dr. Murphy's testimony accounted for nearly 70 pages of reporter's transcript and was replete with comments designed to elicit sympathy for child abuse victims and solicitations that children should be believed. Murphy in effect said regardless how inconsistent a child's accounts of abuse are, abused children give inconsistent accounts and are credible nonetheless. Moreover, the picture painted by Murphy happened to be the two children in the case. His comment, 'Why are they taking me away from my mom?' directly coincided with the fact that as a result of the investigation Tonya and Byron were removed from their mother's home and placed in foster care. He expressed how frightening it was 'for a child to come into *this* courtroom, and I know they have to, and tell their story.' " (203 C.A.3d 394.) Also, by delineating each stage of the CSAAS theory, "Murphy constructed a 'scientific' framework into which the jury could pigeonhole the facts of the case. Thus, even though he was precluded from using CSAAS as a predictor of child abuse, the jury was free to superimpose those children on the same theory and conclude abuse had occurred." (203 C.A.3d 394.)

A concurring justice, agreeing with affirmance of the judgment, nevertheless strongly criticized the majority's restrictions on the use of CSAAS testimony, and argued that the *Bledsoe* opinion should be differently interpreted. (203 C.A.3d 399, 400.) Evidence of this type has been rejected in numerous other cases. (See *In re Cheryl H.* (1984) 153 C.A.3d 1098, 1121, 200 C.R. 789 [psychiatrist's testimony was not admissible to show that father was perpetrator of sexual abuse]; *Seering v. Department of Social Services* (1987) 194 C.A.3d 298, 313, 239 C.R. 422 [admission was error, because requirements of *People v. Kelly*, *supra*, were not met]; *In re Sara M.* (1987) 194 C.A.3d 585, 591, 592, 239 C.R. 605 [child dependency proceeding; evidence was improperly admitted in petitioner's case-in-chief to show that molestation occurred]; *People v. Bothuel* (1988) 205 C.A.3d 581, 587, 252 C.R. 596 [following *People v. Bowker*, *supra*]; *People v. Bergschneider* (1989) 211 C.A.3d 144, 158, 259 C.R. 219 [although psychologist's testimony was somewhat overbroad under *Bowker*, error was harmless]; and see 22 *Loyola L.A. L. Rev.* 1130 [discussing *Bowker*]; 25 *Proof of Facts* 3d 189 [corroboration of child's sexual abuse allegations with behavioral evidence].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Wells* (2004) 118 C.A.4th 179, 189, 12 C.R.3d 762 [in prosecution for sexual molestation of two minors, trial judge did not err in excluding opinion of defense expert concerning usual reactions of children who have suffered trauma due to rape; testimony was not relevant to correct any common myth or misconception about behavior of molested children and amounted to little more than expert's opinion as to one victim's credibility]; 85 A.L.R.5th 595 [expert testimony on child sexual abuse accommodation syndrome in criminal case]; 87 A.L.R.5th 693 [expert testimony as to proper techniques for interviewing children].



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## CHAPTER V - Opinion Evidence

## II. EXPERT EVIDENCE

## C. Subjects of Expert Testimony.

## 2. Syndrome Evidence.

## e. Child Sexual Abuse.

## 2. Evidence Admissible.

## 1 Witkin Cal. Evid. Opinion Evid § 54

[§ 54] Evidence Admissible.

In *People v. Gray* (1986) 187 C.A.3d 213, 231 C.R. 658, a prosecution for lewd and lascivious conduct upon a child, a prosecution psychologist testified about child sexual abuse accommodation syndrome (CSAAS). The syndrome is not a diagnosis or test, but merely a description of experiences and behavioral traits common to child sexual abuse victims: specifically, secrecy, helplessness, entrapment and accommodation, delayed reporting and inconsistency, and retraction. *Held*, the testimony was admissible. It was not offered to prove that the victim had in fact been molested, but to rebut a defense claim that the victim's delay in reporting the alleged molestation, and her failure to disclose all incidents when she finally did inform an adult, was inconsistent with the victim's claim of molestation. (187 C.A.3d 218.) The reliability standard of *People v. Kelly* (1976) 17 C.3d 24, 130 C.R. 144, 549 P.2d 1240, 2 Cal. Evidence (4th), *Demonstrative, Experimental, and Scientific Evidence*, §42, was inapplicable, because the testimony did not concern a new scientific method of proving that a molestation had occurred. (187 C.A.3d 219.)

*People v. Luna* (1988) 204 C.A.3d 726, 250 C.R. 878, added a new twist to the facts of *People v. Gray*, *supra*: The doctor who examined the victim, and testified concerning the nature of her injuries, was the same expert who testified on CSAAS. The trial judge imposed the following conditions on the testimony: The prosecution must first complete the doctor's testimony concerning the victim, and not return to that subject on direct examination; and it must explain to the jury that the testimony regarding the syndrome related to victims in general, rather than to this particular victim. *Held*, the testimony was properly admitted.

The court said: "The People should not be precluded from calling one of the foremost experts in the area to testify regarding the child abuse accommodation syndrome merely because he also examined the victim, so long as his testimony is sufficiently separated so the jury is not confused and is able to distinguish the two types of testimony. Although the trial court ordered appropriate safeguards to ensure the separation of the testimony, a further measure which could be utilized in future cases ... would be to allow the expert to testify on one subject, complete with cross-examination, and then allow the expert to testify on the other subject." (204 C.A.3d 737.)

In *People v. McAlpin* (1991) 53 C.3d 1289, 283 C.R. 382, 812 P.2d 563, defendant was charged with molesting the 9-year-old daughter of a woman he was dating. He was arrested after the victim reported the incident to authorities at her school, who notified police; her mother never reported the molestation. At trial, a prosecution expert on child molestation investigations testified that it was not unusual for a parent to refrain from reporting a known molestation of his or her child. *Held*, this testimony was properly admitted.



The defense sought on cross-examination to impeach the credibility of the victim's mother, who was called by the prosecution to corroborate the victim's testimony that the molestation had occurred. The defense strongly implied that the mother's behavior in engaging in sexual intercourse with defendant after the incident, and in failing to report the offense, was inconsistent with that of a mother who believed her daughter had been molested. As with expert testimony on rape trauma syndrome (see *supra*, §52) and on child molestation (*People v. Gray, supra*), expert testimony here was admissible, not to prove that the offense occurred, but to rehabilitate the mother's credibility by suggesting other reasons for her conduct: a sense of shame or failure as a parent, or a psychological refusal to accept that the molestation had occurred. (53 C.3d 1300, citing *People v. Bledsoe* (1984) 36 C.3d 236, 203 C.R. 450, 681 P.2d 291, *supra*, §52.)

The rationale of *People v. Gray, supra*, has been applied in numerous subsequent cases. (See *People v. Sanchez* (1989) 208 C.A.3d 721, 733, 256 C.R. 446 [CSAAS testimony to dispel misconceptions was appropriate during prosecution's case-in-chief after cross-examination of victim presented credibility issue]; *People v. Stark* (1989) 213 C.A.3d 107, 115, 261 C.R. 479 [evidence was admissible to rehabilitate victim's testimony]; *People v. Harlan* (1990) 222 C.A.3d 439, 449, 271 C.R. 653 [prosecutor explicitly identified misconceptions about victims' behavior, i.e., delayed disclosure and inconsistent statements, that expert's testimony was intended to rebut]; *People v. Gilbert* (1992) 5 C.A.4th 1372, 1383, 1384, 7 C.R.2d 660 [prosecution's predicate for expert's testimony was "defense counsel's vigorous credibility-oriented cross-examination" of victims]; *People v. Patino* (1994) 26 C.A.4th 1737, 1745, 1747, 32 C.R.2d 345 [CSAAS evidence was properly admitted even though introduced as part of prosecution's case-in-chief, because victim's credibility was at issue; admission did not violate defendant's confrontation or cross-examination rights]; and see 17 *Pacific L. J.* 1361 [admissibility of CSAAS evidence]; 20 *Pepperdine L. Rev.* 317 [*McAlpin*]; 25 *Proof of Facts* 3d 189 [corroboration of child's sexual abuse allegations with behavioral evidence].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *In re S.C.* (2006) 138 C.A.4th 396, 418, 41 C.R.3d 453 [in dependency proceeding, trial judge did not err in admitting expert testimony on child sexual abuse accommodation syndrome; evidence was admissible and relevant because at one point minor had briefly recanted her complaint of being sexually abused by her stepfather].



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## CHAPTER V - Opinion Evidence

## II. EXPERT EVIDENCE

## C. Subjects of Expert Testimony.

## 2. Syndrome Evidence.

## e. Child Sexual Abuse.

## 3. Sua Sponte Instruction.

1 *Witkin Cal. Evid. Opinion Evid* § 55

[§ 55] Sua Sponte Instruction.

In *People v. Housley* (1992) 6 C.A.4th 947, 8 C.R.2d 431, the court pointed out that testimony regarding child sexual abuse accommodation syndrome (CSAAS) may be "unusually susceptible of being misunderstood and misapplied by a jury, perhaps because the expert commonly is asked to offer an opinion on whether the victim's behavior was typical of abuse victims, an issue closely related to the ultimate question of whether abuse actually occurred. ... Such testimony, especially from one recognized as an expert in the field of child abuse, easily could be misconstrued by the jury as corroboration for the victim's claims; where the case boils down to the victim's word against the word of the accused, such evidence could unfairly tip the balance in favor of the prosecution." (6 C.A.4th 958.) An instruction similar to that described in *People v. Bowker* (1988) 203 C.A.3d 385, 394, 249 C.R. 886, supra, §53, "would clearly define the proper use of such evidence and would prevent the jury from accepting the expert testimony as proof of the molestation. Furthermore, requiring such an instruction would avoid potentially erroneous convictions occasioned by counsel's inadvertent or incompetent failure to request a limiting admonition. Finally, there is no point in requiring that jurors be instructed concerning the proper weight to be accorded expert testimony (*Pen. Code, §1127b*) when they are not advised of the proper use of this testimony." (6 C.A.4th 958.)

"We thus conclude that because of the potential for misuse of CSAAS evidence, and the potential for great prejudice to the defendant in the event such evidence is misused, it is appropriate to impose upon the courts a duty to render a sua sponte instruction limiting the use of such evidence. Accordingly, in all cases in which an expert is called to testify regarding CSAAS we hold the jury must sua sponte be instructed that (1) such evidence is admissible solely for the purpose of showing the victim's reactions as demonstrated by the evidence are not inconsistent with having been molested; and (2) the expert's testimony is not intended and should not be used to determine whether the victim's molestation claim is true." (6 C.A.4th 958, 959.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See CALCRIM, No. 1193 [Testimony on Child Sexual Abuse Accommodation Syndrome].



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## CHAPTER V - Opinion Evidence

### II. EXPERT EVIDENCE

#### C. Subjects of Expert Testimony.

##### 3. Mental Condition.

##### a. Civil Cases.

1 Witkin Cal. Evid. Opinion Evid § 56

[§ 56] Civil Cases.

(1) *Wills: Testamentary Capacity.* Medical evidence on the issue of insanity or incompetency is frequently used in probate proceedings in which the competency of the testator is challenged. (See *Estate of Blake* (1902) 136 C. 306, 308, 68 P. 827; *Estate of Gore* (1953) 119 C.A.2d 796, 799, 260 P.2d 859, supra, §39; *Estate of Clegg* (1978) 87 C.A.3d 594, 601, 151 C.R. 158 [testator's physician opined that, due to senile dementia, testator lacked testamentary capacity]; 18 *Stanf. L. Rev.* 1139; 66 *Harv. L. Rev.* 1116 [psychiatric assistance in determination of testamentary capacity]; 40 *Proof of Facts* 2d 339 [lack of testamentary capacity because of insane delusion]; 38 *Proof of Facts* 3d 227 [mentally retarded testator]; 78 A.L.R.2d 919 [qualification of psychologist to testify as to mental condition or competency]; 12 *Summary* (9th), *Wills and Probate*, §178 et seq.; on whether handwriting expert can give opinion on insanity, based on examination of testator's writing, see 10 *So. Cal. L. Rev.* 96.)

(2) *Contractual Capacity.* A psychiatrist may also give an opinion as to the capacity of a patient to enter into a contract. (See *Mills v. Kopf* (1963) 216 C.A.2d 780, 784, 31 C.R. 80, infra, §87; 1 *Summary* (9th), *Contracts*, §358 et seq.)

(3) *Dependency or Family Law Proceedings.* Family C. 7827(c) provides that the testimony of two experts is required in a proceeding to free a child from parental custody and control on the ground of the parent's mental disability. (See 10 *Summary* (9th), *Parent and Child*, Supp., §448P; 24 *Pacific L. J.* 1465 [use of mental health experts in child dependency proceedings].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Wills: Testamentary Capacity.* See 62 *Proof of Facts* 3d 197 [proof of incompetency; superseding 40 *Proof of Facts* 2d 339, text, p. 596].

*Cross-Reference:* 14 *Summary* (10th), *Wills and Probate*, §121 et seq.

(2) *Contractual Capacity.*

*Cross-Reference:* 1 *Summary* (10th), *Contracts*, §52 et seq. (3) *Dependency or Family Law Proceedings.*

*Cross-Reference:* 10 *Summary* (10th), *Parent and Child*, §324. *West's Key Number Digest*, Evidence k.510



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## CHAPTER V - Opinion Evidence

### II. EXPERT EVIDENCE

#### C. Subjects of Expert Testimony.

##### 3. Mental Condition.

##### b. Criminal Cases.

#### 1. Subjects of Psychiatric Testimony.

#### 1 Witkin Cal. Evid. Opinion Evid § 57

[§ 57] Subjects of Psychiatric Testimony.

Doctors specializing in psychiatry are called upon to give opinions on a number of issues:

(1) *Sanity of defendant.* (See P.C. 1027; *People v. Drew* (1978) 22 C.3d 333, 341, 149 C.R. 275, 583 P.2d 1318 [discussion of psychiatric theories on insanity in connection with rejection of *M'Naghten* rule of insanity; on reinstatement of *M'Naghten* test by Proposition 8, see 1 Cal. Crim. Law (3d), *Defenses*, §14]; *People v. Smithey* (1999) 20 C.4th 936, 965, 86 C.R.2d 243, 978 P.2d 1171 [in capital murder trial, after defense experts testified as to defendant's amphetamine psychosis syndrome and amnesia, trial judge properly allowed rebuttal testimony from psychiatrist who opined that forensic psychiatry is unreliable; rebuttal did not deny defendant right to present psychiatric defense but merely went to weight to be given defense experts' opinions]; 52 Cal. L. Rev. 543; 62 Cal. L. Rev. 693 [psychiatric experts: "Flipping Coins in the Courtroom"]; 73 Cal. L. Rev. 411 ["Legal and Psychiatric Concepts and the Use of Psychiatric Evidence in Criminal Trials"]; 24 Pacific L. J. No. 3 [Colloquium: Psychology and the Law]; 31A Am.Jur.2d (1989 ed.), *Expert and Opinion Evidence* §176 et seq.; 41 Proof of Facts 2d 615 [proving defendant insane at time of offense]; 1 Cal. Crim. Law (3d), *Defenses*, §7 [insanity defense]; 5 Cal. Crim. Law (3d), *Criminal Trial*, §669 [insanity trial]; *infra*, §87.)

(2) *Other mental state of defendant.* (See *People v. Gorshen* (1959) 51 C.2d 716, 722, 336 P.2d 492, 1 Cal. Crim. Law (3d), *Crimes Against the Person*, §169 [malice aforethought in murder]; *People v. Steele* (1965) 237 C.A.2d 182, 187, 46 C.R. 704 [malice aforethought and premeditation in murder]; *People v. Hayes* (1985) 172 C.A.3d 517, 521, 218 C.R. 362 [same]; *People v. McCowan* (1986) 182 C.A.3d 1, 13, 14, 227 C.R. 23, *infra*, §94; *People v. Vu* (1991) 227 C.A.3d 810, 813, 278 C.R. 153 [effects of defendant's stress and expectancy on his belief in need for self-defense]; 16 A.L.R.4th 666 [specific intent]; 42 A.L.R.4th 937 [defendant's propensity toward sexual deviation]; 70 A.L.R.5th 491 [defendant's susceptibility to inducement for purpose of establishing entrapment]; 5 Proof of Facts 2d 189 [intoxication and specific intent]; *infra*, §87; on P.C. 29, which prohibits expert who is testifying as to defendant's mental illness from testifying as to whether defendant had required mental state, see *infra*, §94; see also *F.R. Evid.*, *Rule 704(b)*, *infra*, §90.)

(3) *Future dangerousness of defendant.* In *People v. Murtishaw* (1981) 29 C.3d 733, 175 C.R. 738, 631 P.2d 446, the court held that, in the penalty phase of a capital case, it was reversible error to permit testimony forecasting that the defendant would commit violent and possibly homicidal acts in prison. (29 C.3d 767.) The opinion discussed and took judicial notice of studies and commentaries showing the unreliability of attempts to predict dangerous behavior. (29 C.3d 768 et seq.) The court pointed out, however, that in a number of cases, such testimony has been admitted where

the trier of fact is required by statute to determine whether a person is "dangerous." (29 C.3d 772.) And an additional qualification was set forth:

"We acknowledge that despite the recognized general unreliability of psychiatric predictions concerning future violence, it may be possible for a party in a particular case to show that a reliable prediction is possible. A more reliable forecast, for example, might be possible if the psychiatrist had established a close, long-term relationship with defendant that gives him a greater understanding of defendant's behavior than can usually be attained in brief, often adversary, pretrial interviews. A reliable prediction might also be conceivable if the defendant had exhibited a long-continued pattern of criminal violence such that any knowledgeable psychiatrist would anticipate future violence. Thus, we do not adopt an absolute rule barring such predictions at the penalty phase of a capital trial." (29 C.3d 774.)

The dissenting justice in *Murtishaw* pointed to a number of cases holding that possible dangerousness or potential for future violence is admissible whenever such a condition is relevant to the issues. (29 C.3d 778.) And he cited *Jurek v. Texas* (1976) 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929, which upheld the admission of such testimony by nonexpert witnesses. (29 C.3d 777.) (On admissibility of nonexpert evidence as to future dangerousness, see 3 Cal. Crim. Law (3d), Punishment, §479.)

In *Barefoot v. Estelle* (1983) 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090, the Court, citing *Jurek*, said: "If the jury may make up its mind about future dangerousness unaided by psychiatric testimony, jurors should not be barred from hearing the view of the State's psychiatrists along with opposing views of the defendant's doctors." (103 S.Ct. 3397, 77 L.Ed.2d 1107.)

In a proceeding to commit a defendant as a sexually violent predator, two mental health experts must evaluate the defendant in order to determine the likelihood that he or she will reoffend. Their testimony is admissible, and is not subject to the requirement that a scientific method or technique have gained general acceptance in the scientific community. (See 2 Cal. Evidence (4th), *Demonstrative, Experimental, and Scientific Evidence*, §43.) That requirement "applies to cases involving novel devices or processes, not to expert medical testimony, such as a psychiatrist's prediction of future dangerousness or a diagnosis of mental illness." (*People v. Ward* (1999) 71 C.A.4th 368, 373, 83 C.R.2d 828, distinguishing *People v. Bledsoe* (1984) 36 C.3d 236, 203 C.R. 450, 681 P.2d 291, supra, §52, which involved the use of testimony regarding rape trauma syndrome to prove that the rape actually occurred.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Other mental state of defendant.* See 82 A.L.R.5th 591 [reliability of mentally defective accused's confession]. *West's Key Number Digest*, Criminal Law k.474



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## CHAPTER V - Opinion Evidence

### II. EXPERT EVIDENCE

#### C. Subjects of Expert Testimony.

##### 3. Mental Condition.

##### b. Criminal Cases.

#### 2. Opinion of Psychologist.

#### 1 Witkin Cal. Evid. Opinion Evid § 58

#### [§ 58] Opinion of Psychologist.

(1) *In General.* Earlier cases were uncertain on whether a properly qualified psychologist, without a medical degree, could offer an expert opinion on a defendant's mental condition. (See *People v. Davis* (1965) 62 C.2d 791, 800, 44 C.R. 454, 402 P.2d 142; *People v. Spigno* (1957) 156 C.A.2d 279, 288, 319 P.2d 458; 78 A.L.R.2d 919.) In *People v. Davis*, a murder prosecution in which the defense theory was that "a temporary functional psychosis" rendered defendant incapable of premeditation, the trial judge rejected defendant's witness, a psychologist, on the ground that only a medical doctor was qualified to testify on the issue. The judgment was reversed, but for guidance of the parties on retrial, the court declared that W was qualified, and that the trial judge's ruling was error: "The alleged disability did not involve a matter of mental illness completely within the realm of a physician. A functional disorder is by definition nonorganic and without a biological cause." (62 C.2d 801.)

The necessity of qualifying the particular witness still remains: "Many practicing psychologists are not concerned with problems of abnormal psychology and are not familiar with the clinical branch of their field. A certain level of training and experience is also necessary; one with only an undergraduate interest in psychology who has since pursued other fields would certainly not be qualified to give an expert opinion. ... Moreover, not all questions relating to legal sanity can be answered by a psychologist. ... The interpretation of an electroencephalogram or the physiological effect of drugs, for example, may be beyond the ken of a psychologist without medical training. Whether a psychologist qualifies as an expert on sanity in a particular case depends on the facts of that case, the questions propounded to the witness, and his peculiar qualifications." (62 C.2d 801.) (See also *People v. Pennington* (1967) 66 C.2d 508, 519, 58 C.R. 374, 426 P.2d 942 [certified psychologist on staff of state hospital qualified; *Davis* case followed]; *People v. Turner* (1994) 8 C.4th 137, 195, 32 C.R.2d 762, 878 P.2d 521, 1 Cal. Evidence (4th), Hearsay, §50 [proposed testimony of psychologist that defendant was "follower" and thus less likely than companion to be actual killer was properly excluded as irrelevant and more prejudicial than probative]; on testimony of psychologist as to eyewitness identification issues, see *infra*, §72.)

(2) *Penal Code: Opinion as to Sanity.* P.C. 1027, as amended in 1978, permits appointment of a psychologist to examine a defendant who pleads insanity; but he or she must be licensed and have "a doctoral degree in psychology and at least 5 years of postgraduate experience in the diagnosis and treatment of emotional and mental disorders." (See 10 *Pacific L. J.* 101.)

(3) *Applicability of Kelly Rule.* In *People v. Stoll* (1989) 49 C.3d 1136, 265 C.R. 111, 783 P.2d 698, defendant

Grafton was one of several defendants charged with committing lewd and lascivious acts upon children. She sought to introduce a psychologist's testimony that, based on an interview with her and his professional interpretation of standardized written personality tests she self-administered at his direction--the Minnesota Multiphasic Personality Inventory (MMPI), and the Millon Clinical Multiaxial Inventory (MCMI)--she displayed no signs of "deviance" or "abnormality." The trial judge excluded the testimony as failing to meet the requirement of *People v. Kelly* (1976) 17 C.3d 24, 130 C.R. 144, 549 P.2d 1240, 2 Cal. Evidence (4th), *Demonstrative, Experimental, and Scientific Evidence*, §42, that the technique at issue have gained general acceptance in the scientific community. *Held*, conviction reversed.

(a) The proffered testimony is relevant character evidence, bearing on the defense claim that the charged acts did not occur. *Ev.C. 1102*, which codified the rule of *People v. Jones* (1954) 42 C.2d 219, 266 P.2d 38 (see 1 Cal. Evidence (4th), *Circumstantial Evidence*, §55), allows an accused to present expert opinion testimony of this kind to indicate a nondisposition to commit the charged sex offense. (49 C.3d 1153.)

(b) The evidence meets the requirement of *Ev.C. 801(a)* (see *supra*, §29) that an opinion assist the jury. Without the psychologist's testimony the jury would be unaware of personality traits that are inconsistent with the homosexual, incestuous, and group-sex acts with which defendant was charged. (49 C.3d 1153, 1154.)

(c) The fact that the psychologist's testimony was based in part on standardized written personality tests and an interview does not violate the requirement of *Ev.C. 801(b)* that an expert's opinion be based on reliable information. (See *supra*, §30 et seq.) "No precise legal rules dictate the proper basis for an expert's journey into a patient's mind to make judgments about his behavior. In effect, however, California courts have deferred to a qualified expert's decision to rely on 'standardized' psychological tests such as the MMPI to reach an opinion on mental state at the time acts were committed. ... Such deference is no less appropriate here. Indeed, voir dire testimony indicated that qualified professionals routinely use raw material from the MMPI and MCMI as a basis for assessing personality, and drawing behavioral conclusions therefrom." (49 C.3d 1154.)

(d) The testimony is not subject to the *Kelly* rule for the admissibility of "new scientific techniques." (See 2 Cal. Evidence (4th), *Demonstrative, Experimental, and Scientific Evidence*, §42 et seq.) It raises none of the concerns addressed by that rule; the methods employed are not new to psychology or the law and carry no misleading aura of scientific infallibility; and, analogous defense expert opinion has been routinely admitted by California courts with no suggestion that *Kelly* applies. (49 C.3d 1157.) "[N]o reasonable juror would mistake an expert's reliance on standardized tests as a source of infallible 'truth' on issues of personality, predisposition, or criminal guilt." (49 C.3d 1159.) More importantly, the standardized tests are obviously a springboard for a more normative and subjective diagnostic process that is "a learned professional art, rather than the purported exact 'science' with which *Kelly/Frye* is concerned." (49 C.3d 1159.)

Two justices joined in a strong dissent, arguing that the standardized tests should be subjected to the *Kelly* rule and expressing concern about the potential consequences of the majority's holding: "I foresee complicated and time consuming 'mini-trials' devoted not to the factual issue of guilt or innocence of the accused, but focusing instead on his 'personality profile' and its correlation with the profile displayed by the average child molester, robber, arsonist, or whomever." (49 C.3d 1169.) (See also *People v. Rowland* (1992) 4 C.4th 238, 266, 14 C.R.2d 377, 841 P.2d 897 ["In *People v. Stoll* ... , we broadly held that 'absent some special feature which effectively blindsides the jury, expert opinion testimony is not subject to *Kelly/Frye*.'"]; *People v. Ruiz* (1990) 222 C.A.3d 1241, 1245, 272 C.R. 368 [under *Stoll* case, *supra*, expert could opine that defendant did not fit profile of pedophile, if it was first established that scientific community had developed such a profile]; *People v. Cegers* (1992) 7 C.A.4th 988, 999, 9 C.R.2d 297 [psychologist's testimony as to defendant's sleep disorders should not have been excluded; it was "simply the testimony of an expert who had examined a subject and whose diagnosis might have been helpful in determining the mental state of the subject"]; 17 *Pepperdine L. Rev.* 1124 [Stoll]; 33 *U.S.F. L. Rev.* 379 [same]; but see *People v. Parnell* (1993) 16 C.A.4th 862, 869, 870, 20 C.R.2d 302 [where psychologist had viewed videotapes of defendant making statements under hypnosis to another psychotherapist, he could testify about posttraumatic stress disorder generally, but not to defendant's mental state based on hypnotized statements, because there was no showing that this use of hypnotized

statements had gained scientific acceptance].)

(4) *Credibility of Victim-Witness*. In a prosecution for sexual offenses against a mentally retarded victim, a psychologist's testimony on the victim's mental condition may be introduced in the prosecution's case-in-chief in order to support the victim's credibility. Although the normal use of such testimony would be for rehabilitation, the prosecution does not have to wait to see if the defense will try to capitalize on the victim's "halting responses and inconsistencies." (*People v. Herring* (1993) 20 C.A.4th 1066, 1072, 1073, 25 C.R.2d 213, 5 Cal. Crim. Law (3d), Criminal Trial, §571; see also *People v. Stark* (1989) 213 C.A.3d 107, 114, 261 C.R. 479 [in prosecution for forcible sexual contact with child, psychologist could testify as to victim's learning disability, which affected his ability to put events in chronological order, as this would assist jury in assessing victim's testimony]; 28 *Loyola L.A. L. Rev.* 1345 [testimony on repressed memory in child sexual abuse case].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General*. See 72 A.L.R.5th 529 [testimony of nonmedical psychologist as to mental condition or competency].(3) *Applicability of Kelly Rule*. See *People v. Therrian* (2003) 113 C.A.4th 609, 615, 6 C.R.3d 415 [opinions of psychologist and psychiatrist in sexually violent predator proceeding as to whether defendant was likely to engage in predatory and sexually violent criminal behavior in future were not subject to *Kelly* test, even though they relied in part on Static-99 test; following *People v. Stoll* (1989) 49 C.3d 1136, 265 C.R. 111, 783 P.2d 698, text, p. 600]; 34 *Golden Gate L. Rev.* 349 [use of MMPI-2 test in murder trials].





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## CHAPTER V - Opinion Evidence

### II. EXPERT EVIDENCE

#### C. Subjects of Expert Testimony.

##### 4. Automobile Accidents.

##### a. In General.

#### 1 Witkin Cal. Evid. Opinion Evid § 59

[§ 59] In General.

Highway patrol officers, garage owners, automobile mechanics, and others with similar special experience may testify on various matters at issue in automobile accident cases. (*Visueta v. General Motors Corp.* (1991) 234 C.A.3d 1609, 1616, 286 C.R. 402, quoting the text.) The following are illustrations:

(1) *Point of impact.* (See *People v. Haeussler* (1953) 41 C.2d 252, 261, 260 P.2d 8 [speedometer mechanic on impact breaking needle]; *Kastner v. Los Angeles Metropolitan Transit Authority* (1965) 63 C.2d 52, 57, 45 C.R. 129, 403 P.2d 385; *Zelayeta v. Pacific Greyhound Lines* (1951) 104 C.A.2d 716, 727, 232 P.2d 572; *Wells Truckways v. Cebrian* (1954) 122 C.A.2d 666, 674, 265 P.2d 557; 66 A.L.R.2d 1048; *supra*, §44.)

(2) *Speed from skid marks.* In *Linde v. Emmick* (1936) 16 C.A.2d 676, 61 P.2d 338, the court raised, though it did not expressly decide, the point of admissibility of expert opinion on *speed*, from *skid marks*. Two experts were permitted to testify that, if a car of the type involved, similarly equipped and occupied, skidded on dry, level concrete pavement for 150 feet after application of the brakes, its speed was 65 or 75 miles per hour. The court pointed out that the weight of authority allows such opinions, but held the particular hypothetical question erroneous in its assumed facts. (16 C.A.2d 685.) (See *Jobe v. Harold Livestock Com. Co.* (1952) 113 C.A.2d 269, 272, 247 P.2d 951 [brief statement upholding admissibility]; *Ungefug v. D'Ambrosia* (1967) 250 C.A.2d 61, 65, 58 C.R. 223 [testimony based on chart objectionable where special conditions not taken into account]; 23 A.L.R.2d 141; 29 A.L.R.3d 248 [expert and nonexpert testimony].)

(3) *Fraudulent staging of accident.* (See *People v. Singh* (1995) 37 C.A.4th 1343, 1377, 44 C.R.2d 644 [three police officers were qualified to testify, even though two of them did not personally investigate accidents in question].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(4) *(New) Seat belt use.* See *Lara v. Nevitt* (2004) 123 C.A.4th 454, 459, 460, 19 C.R.3d 865 [in personal injury action arising from accident in which plaintiff, passenger in truck, was thrown from sleeping berth after truck was hit by defendant's car, trial judge did not err in allowing orthopedic surgeon to testify that plaintiff would have been less likely to have been injured if he had used passenger restraint system, but no expert testimony was required as to degree of aggravation of injuries caused by failure to use system]. *West's Key Number Digest*, Evidence k.514 et seq.



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## II. EXPERT EVIDENCE

## C. Subjects of Expert Testimony.

## 4. Automobile Accidents.

## b. Reconstruction of Accident.

1 *Witkin Cal. Evid. Opinion Evid* § 60

## [§ 60] Reconstruction of Accident.

A garage owner, with experience handling wrecks and repairs, may give an opinion as to the probable cause of a collision. Thus, after an examination of a truck and another car on the highway where he was called for a tow, a garage owner was allowed to testify as to whether it was possible for the collision to have occurred by the kind of blow asserted by plaintiffs. (*Warren v. Pacific Intermountain Express Co.* (1960) 183 C.A.2d 155, 165, 6 C.R. 824, citing the text.) And a brake expert may testify to the *improper adjustment of brakes*, based on the length and nature of skid marks. (*Vedder v. Bireley* (1928) 92 C.A. 52, 57, 267 P. 724.) (See also *Hughes v. Kilgore* (1965) 233 C.A.2d 541, 542, 43 C.R. 820 [angle of car at time of impact]; 3 Proof of Facts 14 [brakes]; 22 Proof of Facts 2d 214, 220 [police officer's testimony as to whether headlights were in operation or defective]; 9 Proof of Facts 3d 115 [accident reconstruction].)

Expert evidence is sometimes rejected in automobile accident cases where the circumstances involve too many varying and uncertain factors to warrant any opinion. (See *Fishman v. Silva* (1931) 116 C.A. 1, 8, 2 P.2d 473 [testimony of garage mechanic who regularly towed wrecks off the highway, as to probable course of colliding cars after impact]; *Johnston v. Peairs* (1931) 117 C.A. 208, 213, 3 P.2d 617 [testimony of automobile mechanic, based upon observation after accident, as to manner in which it occurred, relative speed of the cars, etc.]; *Rudat v. Carithers* (1934) 137 C.A. 92, 93, 30 P.2d 435 [hypothetical question to "alleged physicist" on nature and effect of forces at moment of collision of cars].) In *Burch v. Valley Motor Lines* (1947) 78 C.A.2d 834, 179 P.2d 47, the *Fishman*, *Johnston*, *Rudat* and similar cases were classified as unsuccessful attempts "to reconstruct what had happened, by persons who were not eyewitnesses and with nothing on which to base their opinions but the position of the cars after they had come to rest." (78 C.A.2d 844.)

In *Box v. California Date Growers Assn.* (1976) 57 C.A.3d 266, 129 C.R. 146, plaintiff's accident reconstruction expert was permitted to testify as to the path and trajectory of plaintiff's motorcycle after impact with defendant's truck. *Held*, admission of the testimony was proper.

(a) *Johnston v. Peairs*, *supra*, and *Fishman v. Silva*, *supra*, held that the probable course a vehicle follows after impact is not a proper subject for expert opinion. However, the purported experts in those cases were a garage mechanic and a tow-truck operator, and it is unlikely that those witnesses would be permitted to render an opinion on the same question today. By contrast, plaintiff's expert was highly qualified. (57 C.A.3d 274.)

(b) "The object of accident reconstruction is to reach satisfactory--not infallible--conclusions as to the operational factors and dynamic situation contributing to the collision. It is as impossible to reconstruct an accident with absolute

accuracy as for a witness to relate precisely what occurred. Nevertheless, expert reconstruction often is more accurate than statements of witnesses." (57 C.A.3d 274.)

(c) Although indefinite factors may enter into the determination of a vehicle's course after impact, they affect the weight, not admissibility, of an expert's opinion if a proper foundation has been laid. Here, the expert based his opinion on a sufficient consideration of the following factors: the *distance* traveled by the motorcycle after the collision; the *point of rest* of the plaintiff's body; the *type of damage* to the left front fender of the pickup truck; an examination of the *same make and model of motorcycle*; and an inspection of the *accident scene*. (57 C.A.3d 275.) (See also *Williams v. Volkswagenwerk Aktiengesellschaft* (1986) 180 C.A.3d 1244, 1263, 1264, 226 C.R. 306 [mechanical engineer with experience in accident reconstruction was properly allowed to testify as to movement of allegedly defective steering mechanism in relation to plaintiff's body].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER V - Opinion Evidence

### II. EXPERT EVIDENCE

#### C. Subjects of Expert Testimony.

#### 5. Mechanical Condition, Defect, or Similar Cause.

##### 1 *Witkin Cal. Evid. Opinion Evid* § 61

[§ 61] Mechanical Condition, Defect, or Similar Cause.

(1) *In General.* An engineer or other competent person may give an opinion as to the cause of the breaking of a structure or mechanical device, or as to the defective condition of machines or appliances. (See *Burch v. Valley Motor Lines* (1947) 78 C.A.2d 834, 840, 179 P.2d 47, *infra*, §92 [extensive review of authorities]; *Dyas v. Southern Pac. Co.* (1903) 140 C. 296, 303, 73 P. 972 [cause of fracture of pivot on derrick, and sufficiency of counterbalance]; *Lemley v. Doak Gas Engine Co.* (1919) 40 C.A. 146, 151, 180 P. 671 [machinist on cause of breaking of flywheel]; *Risley v. Lenwell* (1954) 129 C.A.2d 608, 630, 277 P.2d 897 [whether logging truck was properly equipped and loaded]; *Reynolds v. Natural Gas Equipment* (1960) 184 C.A.2d 724, 739, 7 C.R. 879, *infra*, §92; 31A Am.Jur.2d (1989 ed.), *Expert and Opinion Evidence* §§342, 343; 46 Am.Jur. Trials 631 [use of biomechanical experts in products liability litigation]; 62 A.L.R.2d 1426 [safety of condition, place, or appliance]; 4 A.L.R.4th 651 [opinion that product is or is not defective, dangerous, or unreasonably dangerous]; 8 Proof of Facts 127 [metal failures]; 6 Proof of Facts 2d 425 [product's failure to meet manufacturer specifications or standards]; 16 Proof of Facts 2d 447 [bicycle design]; 33 Proof of Facts 2d 447 [power lawn mower].)

In *Ault v. International Harvester Co.* (1974) 13 C.3d 113, 117 C.R. 812, 528 P.2d 1148, 1 Cal. Evidence (4th), *Circumstantial Evidence*, §165, plaintiff contended that a gear box on a Scout vehicle broke because the aluminum 380 from which it was made had suffered metal fatigue. At the trial, plaintiff's expert witnesses testified to failures of aluminum 380 in other accidents. Defendant objected that no showing was made of substantial similarity between the other accidents and the disputed accident and that defendant, in effect, had to try three separate lawsuits to prove that in every case the gear box broke on impact. *Held*, the evidence was properly admitted. The expert witnesses had been retained in other litigation to analyze the properties of the gear boxes, and concluded that metal fatigue had caused the failures. At the present trial, they testified about the tests they performed and said that the physical properties of all three gear boxes were similar and that the present failure was also due to metal fatigue. "[A]lthough the purpose of the testimony was to indicate that all three accidents occurred because of the failure of the gear box, the focus was not on the accidents themselves but upon the inherent similarity in the physical and mechanical properties of the three gear boxes, all of which purportedly contained similar defects. Since there was no dispute that all three instruments were manufactured out of aluminum 380, we cannot conclude that the evidence was erroneously admitted." (13 C.3d 122.)

(2) *Floor, Steps, or Entrance.* The defective condition of the floor, steps, or entrance to a building is a frequent subject of expert evidence. (See *Long v. John Breuner Co.* (1918) 36 C.A. 630, 633, 636, 172 P. 1132 [excessive grade or slope of apron leading from store entrance to sidewalk]; *McStay v. Citizens Nat. Trust & Savings Bank of Los Angeles* (1935) 5 C.A.2d 595, 601, 43 P.2d 560 [steps without guard or handrail]; *Massing v. Babcock* (1944) 64 C.A.2d

752, 755, 149 P.2d 293 [cement sidewalk at entrance to building, slippery because smoothly troweled without abrasives or perforations]; 28 Proof of Facts 2d 167, 253 [slippery floors].)

(3) *Cause of Fire*. A purported rule that expert evidence is not admissible to show the cause of a *fire* was examined and repudiated in *Manney v. Housing Authority of Richmond* (1947) 79 C.A.2d 453, 180 P.2d 69. The court pointed out that there is no rule peculiar to opinions in cases of fire, flood, or other catastrophes, and that such evidence is excluded only where the matter is within the common experience of ordinary persons. (79 C.A.2d 458.) (See also *George v. Bekins Van & Storage Co.* (1949) 33 C.2d 834, 843, 205 P.2d 1037 [expert evidence admissible as to cause of warehouse fire]; *Hyman v. Gordon* (1973) 35 C.A.3d 769, 774, 111 C.R. 262, *supra*, §41; *People v. Sundlee* (1977) 70 C.A.3d 477, 484, 138 C.R. 834 [member of State Division of Forestry surveillance team could testify as arson expert that fire had been ignited by flammable liquid, even though he found no residue, taste, or smell]; 88 A.L.R.2d 230; 27 Proof of Facts 2d 1 [fire's point of origin].)

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## CHAPTER V - Opinion Evidence

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## 6. Operating Standards and Practices.

1 *Witkin Cal. Evid. Opinion Evid* § 62

## [§ 62] Operating Standards and Practices.

Engineers and other experts may give testimony as to the recognized and accepted standards in their profession, trade, or business, on the issue of whether those standards have been met or violated. (See *Vallejo & Northern R. Co. v. Reed Orchard Co.* (1915) 169 C. 545, 570, 147 P. 238, supra, §39 [operation of railroad in new area]; *Richfield Oil Corp. v. Crawford* (1952) 39 C.2d 729, 741, 249 P.2d 600 [surveyors on proper method of surveying a line]; *Alber v. Owens* (1967) 66 C.2d 790, 800, 59 C.R. 117, 427 P.2d 781 [construction safety practices, and whether lack of railings on construction balcony conformed to custom]; *Fonts v. Southern Pac. Co.* (1916) 30 C.A. 633, 638, 159 P. 215 [experienced drayman on proper and safe method of unloading 1,500 lb. shaft from boxcar]; *Long v. John Breuner Co.* (1918) 36 C.A. 630, 636, 172 P. 1132 [architects and building contractors on approved grade of approaches to public buildings]; *McStay v. Citizens Nat. Trust & Savings Bank of Los Angeles* (1935) 5 C.A.2d 595, 601, 43 P.2d 560 [architect and safety engineer on safety requirement of guard or handrail on steps]; *Young v. Bates Valve Bag Corp.* (1942) 52 C.A.2d 86, 96, 125 P.2d 840 [electrical engineer on standard requiring guards to be placed around electrical conductors]; *Wallace v. Speier* (1943) 60 C.A.2d 387, 392, 140 P.2d 900 [plumbers on life of plumbing fixtures and frequency of inspection required]; *Natural Soda Products Co. v. Los Angeles* (1952) 109 C.A.2d 440, 443, 240 P.2d 993 [civil engineers with experience in water problems, on proper engineering practice in operation of aqueduct]; *Eger v. May Dept. Stores* (1953) 120 C.A.2d 554, 558, 261 P.2d 281 [frequency of cleaning and inspection necessary for safe operation of self-service parking lot of department store]; *Reynolds v. Natural Gas Equipment* (1960) 184 C.A.2d 724, 739, 7 C.R. 879, infra, §92; *Skelly v. Richman* (1970) 10 C.A.3d 844, 866, 89 C.R. 556 [action for inducing client to breach contingent fee agreement; customs of legal profession in settling cases]; 31A *Am.Jur.2d* (1989 ed.), *Expert and Opinion Evidence* §§350, 396; on legal malpractice, see infra, §86.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
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## 7. Practices of Criminals.

## 1 Witkin Cal. Evid. Opinion Evid § 63

[§ 63] Practices of Criminals.

The cases generally approve the use of expert testimony of qualified law enforcement officers on the *modus operandi* of criminals engaging in various kinds of criminal activity. (See *People v. Newman* (1944) 24 C.2d 168, 174, 148 P.2d 4 [meaning of signs, symbols, letters and numbers appearing in bookmakers' betting markers and other memoranda]; *People v. Jenkins* (1975) 13 C.3d 749, 755, 119 C.R. 705, 532 P.2d 857 [tools found in trunk of defendants' car were type commonly used to commit burglaries]; *People v. Champion* (1995) 9 C.4th 879, 924, 925, 39 C.R.2d 547, 891 P.2d 93 [meaning of words used by members of street gang]; *People v. Clay* (1964) 227 C.A.2d 87, 95, 38 C.R. 431 [till tapping]; *People v. Arguello* (1966) 244 C.A.2d 413, 417, 53 C.R. 245, *infra*, §89; *People v. Crooks* (1967) 250 C.A.2d 788, 789, 59 C.R. 39 [the "creeper"--practice of two prostitutes working together, one keeping victim in bathroom while the other secretly takes valuables from his clothes; following *Clay*]; *People v. Hardy* (1969) 271 C.A.2d 322, 327, 76 C.R. 557 [till tapping]; *Anaya v. Turk* (1984) 151 C.A.3d 1092, 1105, 199 C.R. 187 [modus operandi of drug dealers, using baby laxative as cutting agent for narcotics]; *People v. Lopez* (1994) 21 C.A.4th 1551, 1555, 1556, 26 C.R.2d 741 [organization of methamphetamine manufacturing rings]; *People v. Singh* (1995) 37 C.A.4th 1343, 1378, 44 C.R.2d 644 [fraudulent staging of automobile accidents]; *People v. Manriquez* (1999) 72 C.A.4th 1486, 1492, 86 C.R.2d 69 [street gangs do not usually commit drive-by shootings with nonmembers in car]; 31A Am.Jur.2d (1989 ed.), Expert and Opinion Evidence §403; 31 A.L.R.4th 798 [expert testimony on *modus operandi*]; 83 A.L.R.4th 629 [whether drugs were possessed with intent to distribute]; 83 A.L.R.4th 660 [whether particular knife was, or could have been, weapon used in crime]; 69 A.L.R.5th 425 [drug courier profile testimony].)

In *People v. Clay*, *supra*, defendants C and D robbed a market in the following manner: C asked the checker for snuff or cigarette papers, compelling him to turn away from the register, whereupon D grabbed money from the till. *Held*, it was proper for an expert to testify on the procedure used in this crime of "till tapping." (227 C.A.2d 93.)

In narcotics cases involving marijuana and heroin, an experienced officer may give the opinion that drugs are held for purposes of sale, basing it on such matters as quantity, packaging, and the normal use of an individual. But where the drug is one that can be lawfully purchased by prescription, e.g., methedrine, "there is no reason to believe that he will have any substantial experience with the numerous citizens who lawfully purchase the drugs for their own use as medicine for illness." (*People v. Hunt* (1971) 4 C.3d 231, 237, 93 C.R. 197, 481 P.2d 205.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Ochoa* (2001) 26 C.4th 398, 438, 110 C.R.2d 324, 28 P.3d 78 [detective's testimony in capital murder case as to significance of defendant's gang-related tattoos]; *People v. Ward* (2005) 36 C.4th 186, 210, 30 C.R.3d 464,

114 P.3d 717 [in capital murder case, testimony of two gang experts as to defendant's motivation for entering rival gang territory and his likely reaction to language or actions he perceived as gang challenges]; *People v. Gonzalez* (2006) 38 C.4th 932, 946, 44 C.R.3d 237, 135 P.3d 649 [in capital murder trial, no error resulted from admission of expert testimony of police sergeant on gang culture and psychology; in answering hypothetical questions about witness intimidation, he did not improperly express opinion on whether particular witnesses had been intimidated]; *People v. Zepeda* (2001) 87 C.A.4th 1183, 1208, 105 C.R.2d 187, 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence*, Supp., §348 [testimony by police officer who was expert on gangs as to why someone would go to particular location, ask individual where he was from, and then shoot him]; *People v. Duran* (2002) 97 C.A.4th 1448, 1465, 119 C.R.2d 272 [testimony by police officer, based on conversations with gang members, personal investigation of crimes committed by gang members, and information obtained from colleagues, to establish gang's primary activities for purpose of street gang enhancement statute (see 2 Cal. Crim. Law (3d), *Crimes Against Public Peace and Welfare*, §24)]; *People v. Killebrew* (2002) 103 C.A.4th 644, 657, 658, 126 C.R.2d 876 [distinguishing *Ochoa* and *Zepeda*; in prosecution for conspiracy to possess handgun by active street gang member, expert should not have been allowed to testify that when one gang member possesses gun, every other member present knows of gun and will constructively possess it; this was improper opinion on ultimate issue]; *People v. Martinez* (2003) 113 C.A.4th 400, 413, 7 C.R.3d 49 [testimony by gang expert that gang member who "rats" on another member can be beaten or killed, and on concept of "paybacks"; testimony was relevant to motive and intent, and would have helped jurors understand why some witnesses changed their stories after their initial statements to police]; *People v. Gonzalez* (2005) 126 C.A.4th 1539, 1549, 1551, 25 C.R.3d 124 [distinguishing *Killebrew*; in prosecution in which defendant was charged with stabbing fellow prisoner, trial judge did not err in allowing prosecution's gang expert to testify as to motives of jailhouse gang members in general]. *West's Key Number Digest*, Criminal Law k.474.5





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## CHAPTER V - Opinion Evidence

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##### 8. Value of Services.

1 *Witkin Cal. Evid. Opinion Evid* § 64

[§ 64] Value of Services.

The value of technical or skilled services may be proved by opinions of a qualified expert. (See *Laiblin v. San Joaquin Agricultural Corp.* (1923) 60 C.A. 516, 532, 213 P. 529 [construction of levees, etc., under contract]; 31A *Am.Jur.2d* (1989 ed.), *Expert and Opinion Evidence* §§339, 340; 12 A.L.R.3d 1386 [medical services]; 13 *Proof of Facts* 199 [housewife's services]; on opinion of lay witness on value of ordinary services, see *supra*, §16.)

The value of legal services is frequently shown by the expert testimony of experienced lawyers of high standing. (See *Treadwell v. Nickel* (1924) 194 C. 243, 263, 228 P. 25; *Kurland v. Simmons* (1954) 126 C.A.2d 79, 81, 271 P.2d 553; *California v. Westover Co.* (1956) 140 C.A.2d 447, 453, 295 P.2d 96; *Martino v. Denevi* (1986) 182 C.A.3d 553, 558, 559, 227 C.R. 354; 1 *Cal. Proc.* (4th), *Attorneys*, §229.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
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## CHAPTER V - Opinion Evidence

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#### C. Subjects of Expert Testimony.

##### 9. Value of Property.

#### 1 Witkin Cal. Evid. Opinion Evid § 65

[§ 65] Value of Property.

(1) *In General.* A property owner may testify to the value of the owner's own property without any special qualifications. (See *supra*, §18.) But ordinarily value is proved by the expert opinion evidence of a witness having knowledge of values. (See *Los Angeles v. Deacon* (1932) 119 C.A. 491, 493, 7 P.2d 378; *Joint Highway Dist. No. 9 v. Ocean Shore R. Co.* (1933) 128 C.A. 743, 750, 18 P.2d 413; 31A Am.Jur.2d (1989 ed.), *Expert and Opinion Evidence* §334 et seq.; 16 A.L.R.2d 1113 [probable profits if land is devoted to particular agricultural purpose]; 60 A.L.R.2d 1308 [for purpose of gift tax]; 1 A.L.R.3d 1006 [value of dog]; 59 Am.Jur. Trials 155 [business appraiser as expert witness]; 2 Proof of Facts 631 [book value]; 5 Proof of Facts 505 [value of good will]; 2 Proof of Facts 2d 1 [stock of closely held corporation]; 5 Proof of Facts 2d 411 [market value of single-family residence]; *infra*, §98 et seq.)

(2) *Qualifications of Expert.* The expert is usually a professional appraiser or real estate broker. But, as in other situations, skill and experience, rather than professional status, are determinative: "If a witness, by reason of his skill, learning, or technical training, understands the adaptability of the lands in question for a particular purpose, and the demand for land for such purpose, he may state the market value of the land, although he may be entirely unacquainted with the other elements which would be considered by different buyers competing for the same property. On the other hand, if the witness has knowledge of the market value of the lands, even though he possesses no technical skill, training, or ability, he may state the market value." (*Stockton v. Ellingwood* (1929) 96 C.A. 708, 716, 275 P. 228; see also *Los Angeles City High School Dist. v. Rodriguez* (1955) 135 C.A.2d 760, 768, 287 P.2d 871 ["It is sufficient that the witness has some peculiar means of forming an intelligent judgment as to value beyond that which is presumed to be possessed by men generally. ... Owners of land in the vicinity, familiar with the character of the land in question frequently have a better idea of land values than strangers who are engaged in the business of selling land"]; *Los Angeles v. Frew* (1956) 139 C.A.2d 859, 867, 294 P.2d 1073; *People v. Arthofer* (1966) 245 C.A.2d 454, 463, 54 C.R. 878; *San Bernardino County Flood Control Dist. v. Sweet* (1967) 255 C.A.2d 889, 898, 63 C.R. 640 [witness with knowledge and experience on land value, though not real estate appraiser or broker, qualified]; *Naples Restaurant v. Coberly Ford* (1968) 259 C.A.2d 881, 884, 66 C.R. 835, *supra*, §41 [automobile salesman qualified to give opinion on value of car]; *In re Marriage of Hokanson* (1998) 68 C.A.4th 987, 995, 80 C.R.2d 699 [marital dissolution proceeding; no error in allowing expert testimony on value of family home by real estate agent who had extensive experience selling homes in same area, was familiar with home in question, and was consistently one of top salespersons in her office].)

Mere ownership of adjacent land does not of itself qualify a witness. (See *Sacramento & San Joaquin Drainage Dist. v. Jarvis* (1959) 51 C.2d 799, 804, 336 P.2d 530; *Sooy v. Kunde* (1947) 80 C.A.2d 347, 354, 181 P.2d 758 [value of farm land; witness, a neighboring rancher familiar with three prior sales but without special knowledge of values];

*People v. Murray* (1959) 172 C.A.2d 219, 231, 342 P.2d 485.) Likewise, former ownership of the *same* property does not entitle one to testify to its present value, unless the former owner can "demonstrate such familiarity with the land, its uses, and its value as to satisfy the trial judge of his competency." (*Everts v. Matteson* (1945) 68 C.A.2d 577, 581, 157 P.2d 651.)

(3) *Market Value of Real or Tangible Personal Property.* The Legislature elaborately codified the special rules on valuation in condemnation cases (*Ev.C. 810* et seq.) and, in 1980, made these rules applicable to all actions in which the market value of real property or tangible personal property is in issue (*Ev.C. 810(a)*). (See *infra*, §98 et seq.; 60 Am.Jur. Trials 447 [landowner's evidence in eminent domain proceeding].)

**SUPPLEMENT:** [This section is current through the latest supplement]  
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## CHAPTER V - Opinion Evidence

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## 10. Handwriting and Typewriting.

## 1 Witkin Cal. Evid. Opinion Evid § 66

[§ 66] Handwriting and Typewriting.

(1) *Handwriting and Questioned Documents*. "Handwriting identification is based upon the principle that every person's handwriting is distinctive. ... The possibility that one person could imitate the handwriting of another and successfully deceive an expert document examiner is very remote." (*People v. Graves* (1966) 64 C.2d 208, 211, 49 C.R. 386, 411 P.2d 114, footnote 2.) (See also *Estate of Newell* (1925) 75 C.A. 554, 559, 243 P. 33 [banker with 23 years' experience, though not a professional examiner, held qualified]; *People v. Horowitz* (1945) 70 C.A.2d 675, 689, 161 P.2d 833; *People v. Norwoods* (1950) 100 C.A.2d 281, 285, 223 P.2d 490; *People v. Bullock* (1958) 166 C.A.2d 494, 497, 333 P.2d 88; *Estate of Zalud* (1972) 27 C.A.3d 945, 952, 104 C.R. 329 [expert testimony that signature on will was by someone other than decedent]; *People v. Tai* (1995) 37 C.A.4th 990, 998, 44 C.R.2d 253 [in prosecution for credit card offenses, expert testimony that defendant disguised his handwriting on exemplar was admissible evidence of consciousness of guilt and did not implicate privilege against self-incrimination]; 1 McCormick 5th, §§207, 221; 7 Wigmore (Chadbourn Rev.) §§1998, 2008 et seq., 2023 et seq.; 31A Am.Jur.2d (1989 ed.), *Expert and Opinion Evidence* §153; 11 A.L.R.3d 1015 [illegible document]; 1955 A.S. 1216; 20 Proof of Facts 335 [questioned documents bibliography]; 50 Proof of Facts 2d 321 [ancient documents]; 15 Proof of Facts 3d 595 [identification of handwriting]; 24 Proof of Facts 3d 667 [handprinting and numerals]; 25 Proof of Facts 3d 637 [illegible signatures and writing in litigation]; 27 Proof of Facts 3d 489 [forensic identification of handwriting]; 9 Am.Jur. Trials 619.)

(2) *Typewriting*. Evidence as to the identity of typewriting may also be admitted. (See *People v. Cline* (1934) 138 C.A. 184, 194, 31 P.2d 1095; 31A Am.Jur.2d (1989 ed.), *Expert and Opinion Evidence* §158; 20 Proof of Facts 265; 36 A.L.R.4th 598 [evidence as to linguistics or typing style (forensic linguistics) as basis of identification of typist or author]; Law Rev. Com. Comment to Ev.C. 1418 ["[E]xperts can now compare typewriting specimens and other forms of writing as accurately as they could compare handwriting specimens in 1872".])

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Handwriting and Questioned Documents*. See 183 A.L.R. Fed 333 [admissibility of expert testimony on handwriting in federal criminal case]; 1 McCormick 6th, §207; 2 McCormick 6th, §221. *West's Key Number Digest*, Evidence k.511



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##### 11. Ballistics.

*1 Witkin Cal. Evid. Opinion Evid § 67*

[§ 67] Ballistics.

In its narrower sense of identification of bullets and cartridge cases to determine whether a gun was used in the commission of a crime, ballistics is a familiar field of scientific evidence. (See *People v. Trujillo* (1948) 32 C.2d 105, 109, 194 P.2d 681; *People v. Palmer* (1978) 80 C.A.3d 239, 250, 254, 145 C.R. 466 [use of scanning electron microscope for gunshot residue]; 53 Harv. L. Rev. 295; 2 Wigmore (Chadbourn Rev.) §417a; 31A Am.Jur.2d (1989 ed.), *Expert and Opinion Evidence* §303 et seq.; 26 A.L.R.2d 892 [identity of gun from which bullet or cartridge was fired]; 31 A.L.R.4th 486 [testimony that bullet could or might have come from particular gun]; 29 Proof of Facts 65 [firearms identification].)

Experts in the use of firearms, as well as surgeons with experience in gunshot wounds, may also give opinions as to the course of a bullet through the body of a victim. (*People v. Ellis* (1922) 188 C. 682, 694, 206 P. 753; *People v. Cole* (1956) 47 C.2d 99, 103, 301 P.2d 854, supra, §47; *People v. Parks* (1968) 263 C.A.2d 490, 495, 69 C.R. 368 [bullet causing death came from high-powered rifle, pursued certain course]; cf. *People v. Fierro* (1991) 1 C.4th 173, 224, 3 C.R.2d 426, 821 P.2d 1302 [in murder trial, retired deputy sheriff could properly testify as ballistics expert, based on his previous experience examining spent projectiles, but could not give medical testimony about nature of victim's injuries or bullet trajectory, because he had no training or experience in these areas].) (See also *Long v. California-Western States Life Ins. Co.* (1955) 43 C.2d 871, 882, 279 P.2d 43 [testimony on wounds that might result from tripping and falling with a gun].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 60 Proof of Facts 3d 1 [firearms forensics--firearms identification at trial; superseding 29 Proof of Facts 65, text, p. 611]. *West's Key Number Digest*, Criminal Law k.476.1



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#### C. Subjects of Expert Testimony.

#### 12. Fingerprints and Footprints.

1 *Witkin Cal. Evid. Opinion Evid* § 68

[§ 68] Fingerprints and Footprints.

(1) *Fingerprints*. Scientific fingerprint identification is made possible by the difference in ridge patterns of the inner surface of the finger joints. The techniques and admissibility have long been established. (See *People v. Jones* (1931) 112 C.A. 68, 71, 296 P. 317; *People v. Riser* (1956) 47 C.2d 566, 579, 589, 305 P.2d 1; *People v. Ang* (1962) 204 C.A.2d 553, 555, 22 C.R. 455; 53 *Harv. L. Rev.* 295; 2 Wigmore (Chadbourn Rev.) §§414, 414a; 31A *Am.Jur.2d* (1989 ed.), *Expert and Opinion Evidence* §279 et seq.; 28 A.L.R.2d 1115; 36 *Proof of Facts* 2d 285.)

(2) *Footprints*. "Evidence of footprints is admissible where they bear such similarity to those of the shoes worn by a defendant as to justify an inference that the tracks were made by his shoes." (*People v. Zismer* (1969) 275 C.A.2d 660, 665, 80 C.R. 184, 1 *Cal. Evidence* (4th), *Circumstantial Evidence*, §127, citing the text; see *People v. Farmer* (1989) 47 C.3d 888, 910, 912, 254 C.R. 508, 765 P.2d 940 [comparison of photos of footprints found at murder scene with imprint left by shoes defendant was wearing when arrested]; 2 Wigmore (Chadbourn Rev.) §415; 7 Wigmore (Chadbourn Rev.) §1977; 31A *Am.Jur.2d* (1989 ed.), *Expert and Opinion Evidence* §287 et seq.; 45 A.L.R.4th 1178 [admissibility of bare footprint evidence].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Fingerprints*. See 37 *Golden Gate L. Rev.* 39 [prevalence and causes of wrongful conviction by fingerprint evidence]; 110 A.L.R.5th 213 [use of fingerprint evidence obtained by chemical, laser, and digitally enhanced imaging processes]. *West's Key Number Digest*, Criminal Law k.475.5, 475.6



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## CHAPTER V - Opinion Evidence

## II. EXPERT EVIDENCE

## C. Subjects of Expert Testimony.

## 13. Teeth Marks on Victim.

*1 Witkin Cal. Evid. Opinion Evid § 69*

[§ 69] Teeth Marks on Victim.

In *People v. Marx* (1975) 54 C.A.3d 100, 126 C.R. 350, an elderly strangulation victim was found with "an elliptical laceration of the nose," which the coroner believed consisted of teeth marks. A dentist made impressions of defendant's upper and lower teeth; following this, the victim's body was exhumed and impressions were made of the wound on her nose. Defendant objected to the expert dental testimony on the ground that there was insufficient evidence of a match between defendant's dentition and the victim's wounds to enable the experts to identify defendant and to eliminate other persons as suspect. *Held*, the testimony was admissible.

(a) The science--or art--of *identifying persons through their teeth* is well established. "While the field is relatively new and experts do not agree on the exact number of similarities necessary to make a positive identification, the prosecution experts stressed the obvious point that it is not the number of similarities, but their quality which is most helpful. Further, this being a case involving identification by bite marks, rather than by comparing a dentition with two-dimensional X-rays and charts, the experts were able to use a virtually unprecedented three-dimensional approach." (54 C.A.3d 107.)

(b) What is attacked is the experts' asserted ability to prove identity from *similarities between bite marks and the dentition of a suspect*. But here, the trial judge (sitting without a jury) was shown models, photographs, X-rays and slides of the victim's wounds and defendant's teeth. The judge could see the extent to which the wounds changed in appearance between the time of autopsy and the time the body was exhumed and also the conformance between the purported bite marks and the irregularities in defendant's teeth. "Thus the basic data on which the experts based their conclusions were verifiable by the court. Further, in making their painstaking comparisons and reaching their conclusions, the experts did not rely on untested methods, unproven hypotheses, intuition or revelation. Rather, they applied scientifically and professionally established techniques--X-rays, models, microscopy, photography--to the solution of a particular problem which, though novel, was well within the capability of those techniques." (54 C.A.3d 111.) (See also *People v. Slone* (1978) 76 C.A.3d 611, 619, 625, 143 C.R. 61 [bite-mark identification evidence met test of acceptance of scientific technique laid down in *People v. Kelly* (1976) 17 C.3d 24, 130 C.R. 144, 549 P.2d 1240, 2 Cal. Evidence (4th), *Demonstrative, Experimental, and Scientific Evidence*, §42; following *Marx*] 77 A.L.R.3d 1122 [identity through bite marks]; 51 So. Cal. L. Rev. 309 [same]; 25 Proof of Facts 765.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 75 Proof of Facts 3d 317 [proof of identity of bite marks; superseding 25 Proof of Facts 765, text, p. 613]. *West's Key Number Digest*, Criminal Law k.475.7



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## CHAPTER V - Opinion Evidence

### II. EXPERT EVIDENCE

#### C. Subjects of Expert Testimony.

##### 14. Eyewitness Identification.

##### a. Substantial Corroboration Rule.

1 Witkin Cal. Evid. Opinion Evid § 70

[§ 70] Substantial Corroboration Rule.

"We address here a contention that is increasingly heard in the courts of California and our sister jurisdictions, i.e., that it may be an abuse of discretion to exclude the testimony of a *psychologist* who is a qualified expert witness on *psychological factors* shown by the evidence that may affect the *accuracy of an eyewitness identification* of the defendant." (*People v. McDonald* (1984) 37 C.3d 351, 355, 208 C.R. 236, 690 P.2d 709.)

Defendant, a black male, was charged with murder committed during an attempt to rob the victim. The jury verdict was guilty with special circumstances (P.C. 190.2(a)(17)(i)), and the death penalty was imposed. The only evidence offered by the prosecution to connect defendant with the crime was the testimony of seven eyewitnesses. Their testimony, however, was not positive, and was contradicted by six defense alibi witnesses. Defendant's counsel, prior to trial, moved for an order to permit Dr. S, a distinguished practicing psychologist, to testify on the psychological factors that may affect the accuracy of eyewitness identification:

(a) *Perception*, which may be affected by "the observer's state of mind, his expectations, his focus of attention at the time, the suddenness of the incident, the stressfulness of the situation, and differences in the race and/or age of the observer and the observed." (37 C.3d 361.)

(b) *Memory*, which "is both a selective and a constructive process, in which old elements fade and are lost while new elements--subsequent information or suggestions--are unconsciously interwoven into the overall recollection until the subject cannot distinguish one from the other." (37 C.3d 361.)

(c) *Retrieval*, which may be affected by "the subject's expectations, his suggestibility, the phrasing of the questions asked of him, and even the size and type of the photographs he is shown." (37 C.3d 362.)

Dr. S also intended to point out various psychological factors that could have affected identification in the present case (e.g., shooting on a busy street corner some distance away from witnesses, and the "cross-racial factor"), and to explain to the jury that empirical research has undermined a number of widespread lay beliefs about the psychology of eyewitness identification (e.g., that the accuracy of a witness' recollection increases with his certainty, and that accuracy is also improved by stress). (37 C.3d 362.)

On objection by the prosecutor, defense counsel made it clear that *Dr. S would not give an opinion on the credibility of any particular witness*. Nevertheless, the trial judge, relying on *People v. Johnson* (1974) 38 C.A.3d 1, 7,



112 C.R. 834, and decisions following it (e.g., *People v. Guzman* (1975) 47 C.A.3d 380, 385, 121 C.R. 69), excluded the evidence as an invasion of the province of the jury. (37 C.3d 363.) *Held*, conviction reversed.

(a) *Dangers of eyewitness identification.* In *United States v. Wade* (1967) 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149, the Court referred to "the vagaries of eyewitness identification" and "the high incidence of miscarriage of justice" caused by mistaken identifications. (37 C.3d 363.) Other federal court decisions have expressed similar concerns; in one case, the judge "called on the courts to face up to the reliability problems of eyewitness identification, to inform themselves of the results of scientific studies of those problems, and to allow juries access to that information in aid of their factfinding tasks." (37 C.3d 364.)

(b) *Judicial opposition to expert testimony.* "[A]ppellate decisions almost unanimously hold that rulings excluding such evidence do not constitute an abuse of discretion." (37 C.3d 365.) But the opinion in *People v. Johnson, supra*, is an unsatisfactory treatment of the subject:

*First*, the court says that the Evidence Code does not give a party the right to impeach a witness by calling another witness to testify as to the former's capacity. This argument misses the point, for the experts in *Johnson* and in the present case were not called to testify as to the capacity of a particular witness. (37 C.3d 366.)

*Second*, the court says that *Ev.C. 801(a)* limits expert testimony to subjects beyond the range of common experience. However, the statute refers only to *expert opinion*; it does not apply to *expert testimony as to facts*. And much of the proposed testimony would have related to matters of fact: the contents of studies reported in professional literature, their methodology, their data, and their findings. (37 C.3d 366.)

*Third*, the statute does not limit expert testimony as broadly as the *Johnson* court declared: It limits testimony to such subjects "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." Hence, even if the jury has some knowledge of the matter, the expert opinion is admissible whenever it would assist the jury. (37 C.3d 367.)

(c) *Application of test to present case.* Dr. S would have testified to results of studies not widely known or not fully appreciated by lay persons (including the pitfalls of cross-racial identification). (37 C.3d 368, 369.) "We conclude that although jurors may not be totally unaware of the foregoing psychological factors bearing on eyewitness identification, the body of information now available on these matters is 'sufficiently beyond common experience' that in appropriate cases expert opinion thereon could at least 'assist the trier of fact.'" (37 C.3d 369.)

(d) *Impeachment by psychiatric testimony distinguished.* *People v. Johnson, supra*, citing *Ballard v. Superior Court* (1966) 64 C.2d 159, 49 C.R. 302, 410 P.2d 838, 3 Cal. Evidence (4th), *Presentation at Trial*, §263, states the familiar objection to such impeachment; but the *Ballard* rule is irrelevant, for no attempt was to be made to attack the truth-telling ability of any witness. (37 C.3d 370.)

(e) *Invasion of province of jury.* The *Johnson* court also declared that to admit expert psychological evidence on eyewitness identification would usurp the function of the jury, because the evidence would embrace the ultimate issue. The answers to this assertion are: (1) The proffered testimony does not tell the jury that any particular witness is or is not truthful or accurate. (2) The jury's function is not usurped because the jurors remain free to reject the expert's opinion (P.C. 1127b). (3) California has abandoned the "ultimate issue" rule, and follows the modern view that an expert opinion is not inadmissible merely because it coincides with an ultimate issue of fact. (37 C.3d 370, 371.) (See *infra*, §89.)

(f) *Scientific acceptance of this type of testimony.* The trial judge relied on the rule of *People v. Kelly* (1976) 17 C.3d 24, 130 C.R. 144, 549 P.2d 1240 (2 Cal. Evidence (4th), *Demonstrative, Experimental, and Scientific Evidence*, §42), that evidence based on a new scientific method of proof is admissible only on a showing that the procedure has been generally accepted as reliable in the scientific community in which it developed. But this rule has been invoked primarily in cases involving novel devices or processes, i.e., cases involving scientific evidence. (37 C.3d 372, 373.)

"We have never applied the *Kelly-Frye* rule to expert medical testimony, even when the witness is a psychiatrist and the subject matter is as esoteric as the reconstruction of a past state of mind or the prediction of future dangerousness, or even the diagnosis of an unusual form of mental illness not listed in the diagnostic manual of the American Psychiatric Association." (37 C.3d 373.) "We see no reason to require a greater foundation when the witness is a qualified psychologist who will simply explain to the jury how certain aspects of everyday experience shown by the record can affect human perception and memory, and through them, the accuracy of eyewitness identification testimony." (37 C.3d 373.)

(g) *Discretion of court abused.* An Arizona decision (*Arizona v. Chapple* (1983) 135 Ariz. 281, 660 P.2d 1208) illustrates the kind of case in which the exclusion of expert testimony on psychological factors affecting eyewitness identification is a prejudicial abuse of discretion. (37 C.3d 374, 375.) The present case is similar: The record establishes that Dr. S's testimony would have been of significant assistance to the jury. "Because no other evidence connected defendant with the crime, the crucial factor in the case was the accuracy of the eyewitness identifications." ... "[I]n the testimony of each of the witnesses who identified defendant in the courtroom there were elements that could have raised reasonable doubts as to the accuracy of the identification. These elements included the suddenness and unexpectedness of the event, discontinuity and other difficulty of observation, fear and other stress at the time of perception, overestimation of the duration of the event, 'feedback' factors following the event, failure or uncertainty of several witnesses in selecting defendant's photograph from police displays, and, particularly important, apparent cross-racial identification discrepancies." (37 C.3d 375.) There was therefore reversible error under the probability-of-prejudice test (see 6 Cal. Crim. Law (3d), *Reversible Error*, §7). (37 C.3d 376.)

The court concludes: "We expect that such evidence will not often be needed, and in the usual case the appellate court will continue to defer to the trial court's discretion in this matter. Yet deference is not abdication. When an eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability, and the defendant offers qualified expert testimony on specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known to or understood by the jury, it will ordinarily be error to exclude that testimony." (37 C.3d 377.)

The opinion adds a practice point: "Because the admissibility of expert testimony on eyewitness identification thus turns on the nature and quality of the prosecution's case, the motion to admit such testimony will most appropriately be made and ruled on after that case has been presented to the jury." (37 C.3d 377, footnote 25.) (See *People v. Wright* (1988) 45 C.3d 1126, 1141, 248 C.R. 600, 755 P.2d 1049 [approving CALJIC, No. 2.92]; 73 Cal. L. Rev. 1402 [exhaustive discussion of *McDonald* and general law]; 23 A.L.R.4th 1089 [necessity of cautionary instruction on factors to be considered]; 46 A.L.R.4th 1047 [admissibility of expert testimony on reliability of eyewitness testimony]; 35 Proof of Facts 3d 1 [use of expert testimony to challenge eyewitness identification]; CALJIC (6th ed.), No. 2.92 [factors to consider in proving identification by eyewitness testimony].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Goodwillie* (2007) 147 C.A.4th 695, 724, 54 C.R.3d 601 [trial judge did not err in refusing to allow defendant to present testimony of eyewitness identification expert in attempt to raise reasonable doubt as to witnesses' identification of defendant as perpetrator; there were at least four witnesses who positively identified defendant, and there was substantial corroborating evidence, including defendant's own admissions]; 92 Proof of Facts 3d 379 [reliability of eyewitness and earwitness testimony]. *West's Key Number Digest*, Criminal Law k.474.3(2)



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## C. Subjects of Expert Testimony.

## 14. Eyewitness Identification.

## b. Illustrations.

## 1 Witkin Cal. Evid. Opinion Evid § 71

[§ 71] Illustrations.

(1) *Expert Testimony Not Required.* In *People v. Plasencia* (1985) 168 C.A.3d 546, 223 C.R. 786, defendant, charged with robbery and assault with a deadly weapon, set up an alibi defense, and then sought to introduce testimony of Dr. R, a qualified psychologist, on the possible errors in eyewitness identification. The trial judge rejected the proffered evidence on the ground that the subject matter was too conjectural and speculative to support an opinion. The Court of Appeal, on direction of the Supreme Court to consider the case in light of *People v. McDonald* (1984) 37 C.3d 351, 208 C.R. 236, 690 P.2d 709, supra, §70, concluded that *McDonald* was distinguishable and that the judge's ruling was not an abuse of discretion. In *McDonald*, the prosecution's case was based solely on the eyewitness testimony; here, there was other evidence. (168 C.A.3d 555.) (See also *People v. Sanders* (1995) 11 C.4th 475, 508, 509, 46 C.R.2d 751, 905 P.2d 420 [exclusion of expert testimony was not error; eyewitness testimony was strong and unequivocal and was corroborated by independent evidence of crime and conspiracy leading to it].)

(2) *Expert Testimony Required.* In *People v. Walker* (1986) 185 C.A.3d 155, 229 C.R. 591, defendant was charged with one count of attempted robbery and three counts of robbery. He admitted committing one of the robberies, but denied the other charges. The four victims (all of whom had their purses either taken or demanded at knifepoint) and two other eyewitnesses positively identified defendant as the perpetrator. The trial judge refused to admit the expert testimony of defendant's psychologist concerning factors bearing on the reliability of eyewitness identifications. *Held*, this was error, though harmless.

(a) The independently reliable evidence sufficient to satisfy the substantial corroboration requirement of *People v. McDonald*, supra, must be something other than the inference drawn from defendant's commission of other similar crimes. Here, the robbery that defendant admitted committing was similar to the other crimes in that (1) the crimes occurred within a period of less than 2 hours; (2) all victims were women; (3) the perpetrator was a young black male wearing essentially the same clothing; (4) the robber threatened each victim with a knife and used similar language; and (5) a vehicle was used as a means of escape. However, a "typical" purse snatcher might operate similarly, and thus, the "shared marks" were of such common occurrence that the "modus operandi" could not be viewed as signatorially unique. (185 C.A.3d 165, 166.) "Where the inference is merely suggestive--as it is here--and reasonable persons could still disagree on the defendant's identity, a defendant cannot be denied the opportunity to present evidence on an issue crucial to his defense." (185 C.A.3d 165.)

(b) *McDonald* required reversal because it was a much more closely balanced case. Here, a substantial body of circumstantial evidence linked defendant to the crimes, and the defendant's own testimony was unbelievable.

Accordingly, it was not reasonably probable that the jury would have reached a different result had the expert been permitted to testify. (185 C.A.3d 166.) (See also *People v. Sanders* (1990) 51 C.3d 471, 506, 273 C.R. 537, 797 P.2d 561 [exclusion of expert testimony held harmless error where there was "some corroboration" of eyewitness identification].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Expert Testimony Not Required.* See *People v. Jones* (2003) 30 C.4th 1084, 1112, 135 C.R.2d 370, 70 P.3d 359 [relying on *People v. McDonald* (1984) 37 C.3d 351, 208 C.R. 236, 690 P.2d 709, text, p. 617; witness' identification of defendant was corroborated by testimony of five others].



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#### C. Subjects of Expert Testimony.

##### 14. Eyewitness Identification.

##### c. Lineups.

1 Witkin Cal. Evid. Opinion Evid § 72

[§ 72] Lineups.

In *People v. Sandoval* (1994) 30 C.A.4th 1288, 36 C.R.2d 646, a robbery and attempted murder case, two lineups including defendant were conducted and videotaped prior to trial, and the videotapes were played for the jury. The trial judge excluded a clinical psychologist's proposed testimony that the lineups were unfair in that "(1) some of the persons in the first lineup were not viable alternative choices and (2) the videotape of the second lineup, which had been seen by the victims of the shoe store robbery (of which Sandoval was acquitted), showed Sandoval in the background for an inordinate time." (30 C.A.4th 1297.) Held, the ruling was proper. Neither of the prongs of the test stated in *People v. McDonald* (1984) 37 C.3d 351, 208 C.R. 236, 690 P.2d 709, supra, §70, for assigning error was met: the identity of defendant as the perpetrator was fully corroborated, and the "similarity in appearance of members of a lineup, relevant to the weight to be accorded an identification, is completely within the task of the trier of fact to resolve." In fact, the witness was no more expert than any juror. (30 C.A.4th 1298.) (See *People v. Brandon* (1995) 32 C.A.4th 1033, 1053, 38 C.R.2d 751 [portion of expert's testimony relating to mock lineup experiment and how it affected case was properly excluded as it dealt with fair selection of persons in lineup, a matter likely to be fully understood by jury; quoting *McDonald*].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### 15. Business Usage or Trade Practice.

#### 1 *Witkin Cal. Evid. Opinion Evid* § 73

[§ 73] Business Usage or Trade Practice.

A few cases contain expressions to the effect that custom or usage must be established as a fact, by proof of instances, and not by opinions. (See *Peterson v. Permanente Steamship Corp.* (1954) 129 C.A.2d 579, 590, 277 P.2d 495; *Dutcher v. Santa Rosa High School Dist.* (1957) 156 C.A.2d 256, 263, 319 P.2d 14; *Wise v. Reeve Electronics* (1960) 183 C.A.2d 4, 9, 6 C.R. 587.)

The better view, however, is that expert evidence is admissible on the existence of a particular custom, usage, or mercantile practice. (See *Ecco-Phoenix Elec. Corp. v. Howard J. White* (1969) 1 C.3d 266, 271, 81 C.R. 849, 461 P.2d 33 [custom and usage in electrical contracting business]; *Anaheim Builders Supply v. Lincoln Nat. Life Ins. Co.* (1965) 233 C.A.2d 400, 412, 43 C.R. 494; *Balfour, Guthrie & Co., Ltd. v. Gourmet Farms* (1980) 108 C.A.3d 181, 187, 166 C.R. 422 [custom and usage in grain brokerage industry, to interpret contract's pricing mechanism]; 7 Wigmore (Chadbourn Rev.) §1954.) Thus, in the *Anaheim* case, an action to recover on a life insurance policy, the defense was false representations and concealment by the insured. Defendant called several experts to testify to the usages of companies in rejecting risks, and to give the opinion that defendant would not have issued the policy if the insured had truthfully answered the medical questions asked. The court held, on the authority of brief remarks in two prior Supreme Court decisions, that this was proper. (233 C.A.2d 412, 413.)

In *Conolley v. Bull* (1968) 258 C.A.2d 183, 65 C.R. 689, although the expert admitted that he did not know the exact percentage of housing developers who would consult a soil engineer after becoming aware of a nearby slide area, he was allowed to give the opinion that the average competent and experienced developer would do so in these circumstances. (258 C.A.2d 191, citing the text.) (On opinion evidence as to recognized standards in various professions, trades, and businesses, see *supra*, §62.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *PM Group v. Stewart* (2007) 154 C.A.4th 55, 63, 64 C.R.3d 227 [in action by concert promoter and two subpromoters against singer, his company, manager, attorney, and agent, opinions of entertainment attorney, offered by plaintiffs, as to customs and practices in music concert business were generally admissible; even if some of his opinions invaded province of jury, there was no reversible error, as opinions were countered by several experts testifying for defendants]. *West's Key Number Digest*, Evidence k.515, 516



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## 16. Police Officer's Conduct.

1 *Witkin Cal. Evid. Opinion Evid* § 74

## [§ 74] Police Officer's Conduct.

In *McCleery v. Bakersfield* (1985) 170 C.A.3d 1059, 216 C.R. 852, police officers Mahan and Mudryk responded to a call reporting that a man with a gun was disturbing the peace. The caller pointed to M, who walked toward Mahan and made a motion to his waistband; Mahan, mistaking M's shiny belt buckle for a weapon, yelled "Stop" and at the same time shot M, fatally wounding him. In this wrongful death action against Mahan and the city, the testimony of Mahan and Mudryk was in some respects inconsistent, and defendants sought to offer Higbie as an expert witness to support the defenses of self-defense and no negligence. *Held*, the expert evidence would have been admissible, but was properly excluded for lack of an offer of proof (see 3 *Cal. Evidence* (4th), *Presentation at Trial*, §401 et seq.).

(a) *Proposed testimony.* Higbie, a police lieutenant for 16 years, had investigated 1,000 officer-involved shootings, had investigatory, supervisory, and instructional experience in this field, and for the past several years had been in charge of the officer-related shooting division of the Los Angeles Police Department. His testimony would have included explanation of inconsistencies in the testimony of Mahan and Mudryk, statistical information relative to years in service of officers involved in shootings, statistical information relative to location of handguns on suspects involved in officer-related shootings, and opinions on the use of deadly force by Mahan and on the conduct of Mudryk. Defense counsel asserted that the witness would testify that inconsistencies in police officers' testimony as to distance, who was present, and how many shots were fired, are not unusual. (170 C.A.3d 1062, 1063.)

(b) *Admissibility of testimony.* The trial judge ruled that the testimony would be inadmissible because it would go to the ultimate issue. This ruling was contrary to the holdings in *People v. McDonald* (1984) 37 C.3d 351, 208 C.R. 236, 690 P.2d 709, *supra*, §70, *People v. Bledsoe* (1984) 36 C.3d 236, 203 C.R. 450, 681 P.2d 291, *supra*, §52, and *People v. Roscoe* (1985) 168 C.A.3d 1093, 215 C.R. 45, *supra*, §53.

(1) "[T]he trial court's conclusions that Higbie's opinion was going to involve 'the sole question' before the jury; that Higbie's testimony, that inconsistent statements after shootings are not unusual, would cause the jurors to ignore the instruction (CALJIC, No. 2.20) that they could consider inconsistencies in judging the credibility of a witness; and that Higbie's opinion on whether Mahan 'acted in self-defense or properly within the law' involved the 'ultimate issue' in the case, are at the very least questionable grounds for refusing to admit the testimony." (170 C.A.3d 1070.)

(2) "It is possible that Higbie could have demonstrated sufficient expertise to permit him to advise the jury as to the factors that may affect an officer's reaction when involved in a shooting, and to explain to the jury the potential effects of these factors on the officer's recollection. It is even possible that Higbie might have qualified to express an opinion on an 'ultimate issue' in the case." (170 C.A.3d 1070.) "[T]he sole purpose of his testimony (like that of the experts in

*McDonald, Bledsoe and Roscoe*) would be to explain the effects of a stress-causing event on one's perceptions and recollections. The jurors would retain both the power and the duty to weigh all the testimony and to judge the credibility of the witnesses, including Higbie." (170 C.A.3d 1070.)

(3) *The facts presented a close question on the issues of negligence and self-defense.* Plaintiff's counsel questioned the two officers at length about inconsistencies in various statements and testimony, and in argument, hinted at a police coverup. The expert's testimony might have imparted a higher degree of credibility to the testimony of the officers. (170 C.A.3d 1072.)

**SUPPLEMENT:** [This section is current through the latest supplement]





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##### 17. Other Subjects.

#### 1 Witkin Cal. Evid. Opinion Evid § 75

[§ 75] Other Subjects.

The fields of expert evidence are relatively unlimited, and in practice, the topics of expert and scientific evidence (2 *Cal. Evidence (4th), Demonstrative, Experimental, and Scientific Evidence, §1*) tend to overlap. To the examples in the preceding sections (§45 et seq.), the following may be added:

- (1) *Accountant's malpractice.* (See 16 Proof of Facts 2d 641.)
- (2) *Air pollution.* (See 37 Proof of Facts 3d 501.)
- (3) *Animal diseases.* (See 49 A.L.R.2d 932.)
- (4) *Architect's malpractice.* (See 19 Am.Jur. Trials 231.)
- (5) *Attorney malpractice.* (See *Lysick v. Walcom* (1968) 258 C.A.2d 136, 155, 65 C.R. 406; *Starr v. Mooslin* (1971) 14 C.A.3d 988, 996, 92 C.R. 583; 14 A.L.R.4th 170; 16 Proof of Facts 2d 549; 1 *Cal. Proc.* (4th), *Attorneys*, §311 et seq.; *infra*, §86.)
- (6) *"Blood spatter" interpretation.* (See 9 A.L.R.5th 369.)
- (7) *Chemical and other scientific tests.* (See *Melaleuca v. Clark* (1998) 66 C.A.4th 1344, 1356, 78 C.R.2d 627, 5 *Summary* (9th), *Torts, Supp.*, §573 [either party in defamation action may use expert testimony on truth or falsity of statement at issue, where statement concerns chemical or biological makeup of particular material]; 52 Am.Jur. Trials 473 [use of experts in actions arising from use and mishandling of toxic chemicals]; 39 Proof of Facts 3d 539 [proof of contamination in toxic tort cases]; 2 *Cal. Evidence (4th), Demonstrative, Experimental, and Scientific Evidence, §41.*)
- (8) *Clothing item belonged to or was worn by particular individual.* (See 71 A.L.R.4th 1148.)
- (9) *Coin collection's value.* (See 5 Proof of Facts 3d 577.)
- (10) *Concrete failures.* (See 19 Proof of Facts 455.)
- (11) *Driver's capacity to perceive posted warning sign.* (See *New v. Consolidated Rock Products Co.* (1985) 171 C.A.3d 681, 687, 692, 217 C.R. 522, *supra*, §29.)

- (12) *Electronic mail: recovery and reconstruction.* (See 41 Proof of Facts 3d 1.)
- (13) *Environmental litigation.* (See 50 Am.Jur. Trials 471.)
- (14) *Fingernail comparison.* This is similar to comparison of teeth marks (*supra*, §69) to show identity. (See 40 A.L.R.4th 575.)
- (15) *Life expectancy.* (See 7 Proof of Facts 215.)
- (16) *Literary or musical plagiarism.* (See *Rich v. Paramount Pictures* (1955) 130 C.A.2d 775, 778, 279 P.2d 782; 4 Summary (9th), *Personal Property*, §36.)
- (17) *Meteorological conditions.* (See 5 Proof of Facts 3d 191.)
- (18) *Motion pictures and X-ray pictures.* (See 2 Cal. Evidence (4th), *Demonstrative, Experimental, and Scientific Evidence*, §20 et seq.)
- (19) *Products liability: adequacy of warning.* (See *Jackson v. Deft* (1990) 223 C.A.3d 1305, 1320, 273 C.R. 214 [insufficient showing that psychologist specializing in the "area of human factors" was qualified to give opinion on adequacy of warning labels on paint containers]; 26 A.L.R.4th 377; 6 Summary (9th), *Torts*, §951 et seq.)
- (20) *Sexual harassment.* (See 35 Santa Clara L. Rev. 651 [reasonable woman standard]; 51 Stanf. L. Rev. 357 [educative role of expert testimony].)
- (21) *Solvency and insolvency.* (See 7 Wigmore (Chadbourn Rev.) §1959; 6 Proof of Facts 367.)
- (22) *Water pollution.* (See 18 Am.Jur. Trials 495.)
- (23) *Witness unavailability due to physical or mental trauma resulting from alleged crime.* (See 1 Cal. Evidence (4th), *Hearsay*, §22.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1a) *(New) Age.* (See *People v. Kurey* (2001) 88 C.A.4th 840, 847, 106 C.R.2d 150 [age of actors in pornographic video clips].)

(7) *Chemical and other scientific tests.*

*Melaleuca v. Clark:*

*Cross-Reference:* 5 Summary (10th), *Torts*, §650.(12a) *(New) Employment.* (See 82 Am.Jur. Trials 97 [use of expert witnesses to defend lawsuits by employees].)

(13a) *(New) Fair rate of return for purpose of calculating mobilehome park owner's right to rent increase.* (See *H.N. & Frances C. Berger Foundation v. Escondido* (2005) 127 C.A.4th 1, 11, 25 C.R.3d 19.)

(13b) *(New) Fiber's or fabric's identity.* (See 61 Proof of Facts 3d 501.)

(14a) *(New) Fire's cause or origin.* (See 84 A.L.R.5th 69 [civil cases]; 85 A.L.R.5th 187 [criminal cases].)

(14b) *(New) Highway design approval and construction.* (See *Alvarez v. California* (1999) 79 C.A.4th 720, 732, 95 C.R.2d 719, 5 Summary (10th), *Torts*, §284.)

(16) *Literary or musical plagiarism.*

*Cross-Reference:* 13 Summary (10th), *Personal Property*, §46.

(18a) *(New) Paper: identification and use as evidence.* (See 88 Proof of Facts 3d 195.)

(19) *Products liability: adequacy of warning.*

*Cross-Reference:* 6 Summary (10th), *Torts*, §1171 et seq.

(21a) *(New) Vest as body armor within meaning of P.C. 12370(a).* (See *People v. Chapple* (2006) 138 C.A.4th 540, 548, 41 C.R.3d 680.)

(21b) *(New) Voice identification.* (See 54 Hastings L. J. 373.)



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### II. EXPERT EVIDENCE

#### C. Subjects of Expert Testimony.

##### 18. Distinctions.

##### a. Obscenity.

1 Witkin Cal. Evid. Opinion Evid § 76

[§ 76] Obscenity.

In an obscenity trial, where the issue involves the determination of contemporary community standards and the artistic merit and social importance of the publication, experts may testify to these matters. (*Landau v. Fording* (1966) 245 C.A.2d 820, 824, 54 C.R. 177 [motion picture; literary critic, film program director, psychiatrist, and others]; 18 *Hastings L. J.* 161.) However, in P.C. 312.1, the 1969 Legislature expressly rejected the view that, in a criminal trial, expert evidence on the obscene or harmful character of the matter or conduct in question must be introduced by either the prosecution or the defense. (See *People v. Enskat* (1973) 33 C.A.3d 900, 913, 109 C.R. 433.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 55 Proof of Facts 3d 249 [motion picture's obscenity or harmfulness to minors]. *West's Key Number Digest*, Criminal Law k.476.5



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##### 18. Distinctions.

##### b. Trailing by Trained Dogs.

#### 1 Witkin Cal. Evid. Opinion Evid § 77

#### [§ 77] Trailing by Trained Dogs.

(1) *In General.* The opinion of a witness qualified as an expert in dog training and handling is admissible on the issue of the ability of a particular dog to follow a trail of a suspected criminal. (See *People v. Craig* (1978) 86 C.A.3d 905, 915, 150 C.R. 676; *People v. Malgren* (1983) 139 C.A.3d 234, 238, 188 C.R. 569; 18 A.L.R.3d 1221; 42 *Hastings L. J.* 15 [Does the Cold Nose Know? The Unscientific Myth of the Dog Scent Lineup].)

(2) *Corroboration Requirement.* In *People v. Malgren, supra*, the court, on an examination of the case law (139 C.A.3d 237; see also dissent, 139 C.A.3d 243, 244), followed the majority view that evidence of dog trailing is admissible on the issue of identity of a defendant, but is not sufficient by itself to support a conviction. (139 C.A.3d 239.) The proper practice is for the trial judge to instruct on his or her own motion that "(1) when dog tracking evidence is used to prove the identity of a defendant, there must be some other evidence, either direct or circumstantial, which supports the accuracy of that identification evidence; and (2) in determining what weight to give such evidence, the jury should consider the training, proficiency, experience, and proven ability, if any, of the dog, its trainer, and its handler, together with all the circumstances surrounding the trailing in question." (139 C.A.3d 242.)

In *People v. Gonzales* (1990) 218 C.A.3d 403, 267 C.R. 138, a police officer saw a man of Mexican ancestry running away from a burglarized house. Approximately 25 minutes later, a pillowcase containing some household items and located near the spot where the running man had last been seen was sniffed by a police dog. About 10 to 12 feet from the pillowcase were footprints leading in the direction taken by the man and the dog. Along the route, more footprints were seen and a clean dime was found. Defendant, a man of Mexican ancestry, was found nine-tenths of a mile from the house, lying prone in tall grass in an unplowed vineyard. He refused to obey the officer's order to come out, but responded after being bitten by the dog. At the trial for burglary, the judge gave the second part of the instruction required by *People v. Malgren, supra*, but failed to instruct on the necessity of corroboration. *Held*, this constituted prejudicial error.

(a) The *Malgren* case held that even if all the factors assuring the trustworthiness of the dog's tracking ability were present, there must still be other evidence aside from what the dog did that demonstrates the accuracy of *what he did*. Here, the jury was instructed to consider whether the dog was placed on the track shown to have been used by the guilty party and whether the trail had become stale or contaminated. However, such factors, although helping to ensure that the dog has a fresh scent, do not corroborate that the person located was the person who was tracked. "The dog's actions in locating an individual require assurance that the person located is the person pursued, as well as being the person who in fact left the initial scent followed by the dog." (218 C.A.3d 409.)

(b) Defendant's argument that the corroborating evidence must *independently* link the accused to the crime misjudges the reservations expressed by the courts concerning dog-tracking evidence. Such evidence, unlike accomplice testimony (3 *Cal. Evidence* (4th), *Presentation at Trial*, §96 et seq.), is not inherently suspect because of a self-interested source. Rather, the concern is that there be other evidence supporting the accuracy of the inferences drawn from the dog-tracking evidence. (218 C.A.3d 413.) Hence, the corroborating circumstances need not consist of evidence which, standing alone, independently links the accused to the crime; it need only support the accuracy of the tracking itself. (218 C.A.3d 414.)

(c) Here, the failure to instruct on the necessity of corroboration was prejudicial, because there was no unambiguous corroborative evidence supporting the identification of defendant. There was no evidence linking defendant to the footprints seen near the pillowcase, no evidence linking the shiny dime to either defendant or the burglary, and no evidence, other than defendant's Mexican surname, linking him to the fact that the man seen running from the house was of Mexican ancestry. And defendant's lack of cooperation upon being found in the tall grass does not necessarily support the dog-tracking evidence, because the inferences from such behavior are susceptible to too many interpretations. (218 C.A.3d 415.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General*. See CALCRIM, No. 374 [Dog Tracking Evidence]; 81 A.L.R.5th 563 (superseding 18 A.L.R.3d 1221, text, p. 623); on canine scent lineups, see *People v. Mitchell* (2003) 110 C.A.4th 772, 786, 2 C.R.3d 49.



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##### 18. Distinctions.

##### c. Mathematical Probability.

#### 1 Witkin Cal. Evid. Opinion Evid § 78

[§ 78] Mathematical Probability.

Mathematical probability statistics were held to be an improper subject of expert testimony in *People v. Collins* (1968) 68 C.2d 319, 66 C.R. 497, 438 P.2d 33. Defendant C and his wife were convicted of second degree robbery, and C appealed. The prosecution's evidence was of two kinds: (1) The victim's neighbor heard cries and observed a Caucasian woman with a dark blond ponytail run out of an alley and enter an automobile driven by a black man with a mustache and beard. (2) To support the unsure identification of defendants by the victim and the neighbor, the prosecutor called a mathematics instructor, who testified that there was but one chance in 12 million that any couple possessed the distinctive characteristics of defendants. "Accordingly, under this theory, it was to be inferred that there could be but one chance in 12 million that defendants were innocent and that another equally distinctive couple actually committed the robbery." (68 C.2d 325.) Held, admission of this testimony was error. In an elaborate discussion of statistical theory and the fallacies underlying this approach, the court found no support in the record for the factors used by the witness, no proof that the characteristics selected were mutually independent, and no foundation, in expert knowledge, for the questions asked. (68 C.2d 327, 330.)

The condemnation of this particular misuse of "the mystique of the mathematical demonstration" (68 C.2d 332) was tempered with a recognition of its permissible use: "Although we make no appraisal of the proper applications of mathematical techniques in the proof of facts ... , we have strong feelings that such applications, particularly in a criminal case, must be critically examined in view of the substantial unfairness to a defendant which may result from ill-conceived techniques with which the trier of fact is not technically equipped to cope." (68 C.2d 332.) (See also *People v. Cella* (1983) 139 C.A.3d 391, 403, 188 C.R. 675 [mathematician's testimony that probability was two or three in 100,000 that list of names in search warrant affidavit would be in same order as one supplied by witness after earlier illegal search did not establish connection between affidavit and search; following *People v. Collins*]; *People v. Louie* (1984) 158 C.A.3d Supp. 28, 48, 49, 205 C.R. 247 [doctor charged with preparing false disability certification; admission of prosecution's evidence of statistical comparison of diagnoses by defendant with those of other health practitioners held prejudicial error]; 1 McCormick 5th, §210; 36 A.L.R.3d 1194; 83 Harv. L. Rev. 489 [*Collins* case and use of "Bayesian" probability analysis]; 84 Harv. L. Rev. 1329 [criticizing trend toward acceptance of mathematical approaches]; 84 Harv. L. Rev. 1801 [defense of Bayesian analysis]; 103 Harv. L. Rev. 530 [Statistical-Probability Evidence and the Appearance of Justice]; 1983 A.S. 198.)

On the other hand, mathematical probabilities play an important role in the application of certain well-accepted scientific techniques. (See *People v. Marx* (1975) 54 C.A.3d 100, 112, 126 C.R. 350, supra, §69 [in teeth mark

identification problem, expert properly confirmed his view as to unusualness of defendant's dentition by acquainting himself with mathematical probabilities that another human being would have same combination of unusual dental features]; on "paternity index" used in genetic testing, see *10 Summary (9th)*, *Parent and Child, Supp.*, §448C; 1 McCormick 5th, §211; on role played by mathematical probabilities in DNA analysis, see *People v. Venegas (1998) 18 C.4th 47*, 74 C.R.2d 262, 954 P.2d 525, 2 Cal. Evidence (4th), *Demonstrative, Experimental, and Scientific Evidence*, §65.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 1 McCormick 6th, §210. *Paternity index*:

*Cross-Reference:* 10 Summary (10th), *Parent and Child*, §41.





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### II. EXPERT EVIDENCE

#### D. Appointment of Experts by Court.

##### 1. In General.

1 Witkin Cal. Evid. Opinion Evid § 79

[§ 79] In General.

(1) *Criticism of Practice of Party's Expert.* In *Estate of Dolbeer* (1906) 149 C. 227, 86 P. 695, three psychiatrists who had not known the decedent testified in response to carefully slanted hypothetical questions (see 3 Cal. Evidence (4th), *Presentation at Trial*, §194) that she was insane. The court said: "This kind of expert testimony, given under such circumstances, even the testimony of able and disinterested witnesses, as no doubt these were, is in the eye of the law of steadily decreasing value. The remedy can only come when the state shall provide that the courts and not the litigants shall call a disinterested body or board of experts who shall review the whole situation and then give their opinion with their reasons therefor to the court and jury regardless of the consequences to either litigant." (149 C. 243.) This criticism is echoed by many authorities, and the proposed remedy, court-appointed experts, is strongly supported by modern writers, bar groups, and judges. (See 1 McCormick 5th, §17; 2 Wigmore (Chadbourn Rev.) §563.)

(2) *Statutory Reform: Uniform and Federal Rules.* The inherent power of the trial judge to call and examine witnesses (see 3 Cal. Evidence (4th), *Presentation at Trial*, §80) has not been invoked with any great frequency, but it has indicated the proper statutory solution. The Model Code of Evidence (Rule 403 et seq.) and the Uniform Rules of Evidence provided a procedure for obtaining the opinions of court-appointed experts. (See 13B (Part 1B) U.L.A. (Master Ed.), p. 92; on the New York Medical Expert Testimony Project, to make available in personal injury cases court-appointed impartial medical witnesses, see 45 Cal. L. Rev. 572; 8 Stanf. L. Rev. 730; on indigents' right to expert witnesses, see 1967 A.S. 187.)

*F.R. Evid.*, Rule 706 provides for appointment, compensation, and disclosure of appointment, and also preserves the right of parties to call their own experts. (See 3 Mueller & Kirkpatrick, Federal Evidence 2d, §§366, 367.)

(3) *Statutory Reform: California.* P.C. 1027 was enacted in 1927 to require the court to appoint expert witnesses (originally called "alienists"; the term was replaced by "psychiatrists" in 1965) to investigate the defendant's mental status whenever the defendant pleads not guilty by reason of insanity. As amended in 1978, the statute permits the appointment of *either* psychiatrists or psychologists. A 1981 amendment further specifies that the "section does not presume that a psychiatrist or psychologist can determine whether a defendant was sane or insane at the time of the alleged offense." (P.C. 1027(c).) The use of experts to determine a criminal defendant's sanity is treated exhaustively in another treatise. (See 5 Cal. Crim. Law (3d), *Criminal Trial*, §674.)

Former C.C.P. 1871, applicable in "any action or proceeding, civil, criminal, or juvenile court," and to any kind of issue, established for California a procedure similar, but not identical, to that contained in the Uniform Rules. (See 2 U.C.L.A. L. Rev. 366; 95 A.L.R.2d 390; 40 So. Cal. L. Rev. 728 [use of impartial medical testimony in personal injury

suits in Los Angeles County].) The Evidence Code retained, without substantial change, the provisions of former C.C.P. 1871, as superior to the comparable Uniform Rules. (See *infra*, §80 et seq.; on appointment of experts to administer blood test for nonpaternity, see 2 *Cal. Evidence (4th), Demonstrative, Experimental, and Scientific Evidence*, §77.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Criticism of Practice of Party's Expert*. See 1 McCormick 6th, §17.

(2) *Statutory Reform: Uniform and Federal Rules*. See 13A U.L.A. (Master Ed.), p. 161 [Unif. Rules, Rule 706]; 6 Pepperdine Dispute Resolution L. J. 333 [use of court-appointed experts in alternative dispute resolution].



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#### D. Appointment of Experts by Court.

##### 2. California Statute.

##### a. Any Case and Any Issue.

*1 Witkin Cal. Evid. Opinion Evid § 80*

[§ 80] Any Case and Any Issue.

Under *Ev.C. 730*, "[w]hen it appears to the court, at *any time* before or during the trial of *an action*, that expert evidence is or may be required by the court or by any party to the action, the court on its own motion or on motion of any party may appoint one or more experts to investigate, to render a report as may be ordered by the court, and to testify as an expert at the trial of the action relative to the fact or matter as to which such expert evidence is or may be required." However, the statute is not to be construed "to permit a person to perform any act for which a license is required unless the person holds the appropriate license to lawfully perform that act." (See *California v. Superior Court (Woolsey)* (1998) 66 *C.A.4th* 421, 440, 78 *C.R.2d* 88 [in action for refund of excessive vehicle license fees, trial judge properly sought expert advice on questions of class action management, including efficient means of notifying class members]; C.E.B., Expert Witness Guide 2d, §7.30; *infra*, §81 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Ayala* (2000) 23 *C.4th* 225, 264, 96 *C.R.2d* 682, 1 *P.3d* 3 [in capital murder prosecution, trial judge did not err in denying defendant's motion to compel psychiatric and neurological examinations of prosecution witness; defendant failed to meet his burden under *Ev.C. 701(a)* (2 *Cal. Evidence* (4th), *Witnesses*, §41) of showing that witness was incapable of expressing himself or understanding duty to tell truth].



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## 2. California Statute.

## b. Motion or Court's Own Motion.

## 1 Witkin Cal. Evid. Opinion Evid § 81

## [§ 81] Motion or Court's Own Motion.

(1) *In General.* The appointment may be made by the court "on its own motion or on motion of any party." (*Ev.C.* 730.) The rule of the discovery cases, that a party compelled to submit to a physical or mental examination under *C.C.P.* 2032 is entitled to have his or her counsel and a reporter present (see 2 *Cal. Evidence (4th)*, *Discovery*, §150), does not apply to an examination ordered by the court on its own motion under *Ev.C.* 730. "Petitioner does not require protection and suffers no prejudice since the physician is appointed by the court as an impartial expert. He suffers no detriment by the exclusion of both his attorney and the defendant's attorney because the examining physician is not in the position of an adversary." (*Durst v. Superior Court* (1963) 222 *C.A.2d* 447, 452, 35 *C.R.* 143 [psychiatric examination].)

A party cannot complain of the court's failure to act on its own initiative where no request for the appointment is made. (*Daly City v. Smith* (1952) 110 *C.A.2d* 524, 533, 243 *P.2d* 46.)

(2) *Discretion of Trial Judge.* Refusal to appoint is within the judge's discretion even though the case is one in which the experts of the parties are in radical disagreement. Thus, in *Laguna Salada Union Elementary School Dist. v. Pacific Dev. Co.* (1953) 119 *C.A.2d* 470, 259 *P.2d* 498, a condemnation suit, defendant S, awarded only \$ 150 for his lot, claimed error in the court's denial of his motion. He argued that a private expert did not meet his needs, for if he received a low award, he would lose the real value of his land, and if he received a good award, plaintiff might abandon the proceedings. In upholding the trial judge's order, the court pointed out that this reasoning would call for the appointment of an expert in virtually every condemnation suit, and also that upon abandonment, the defendant receives his costs including the expense of the expert's preparation for trial (a large percentage of the latter's fee). (119 *C.A.2d* 473.) (See also *Collins v. Superior Court* (1977) 74 *C.A.3d* 47, 52, 141 *C.R.* 273 [denial upheld]; *People v. Hurley* (1979) 95 *C.A.3d* 895, 899, 157 *C.R.* 364 [same].)

When an indigent defendant requests appointment of an expert under *Ev.C.* 730, the trial court has discretion to grant or deny the motion. But if the court grants the motion, the examination and report must be made confidential under *Ev.C.* 952 (see 2 *Cal. Evidence (4th)*, *Witnesses*, §119 et seq.). (*Torres v. Municipal Court* (1975) 50 *C.A.3d* 778, 784, 123 *C.R.* 553.) (On indigent's constitutional right to appointment of ancillary defense experts generally, see 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §173.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General.* *C.C.P.* 2032 was repealed and replaced by *C.C.P.* 2032.010 et seq. in 2004 without substantive change.



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2. California Statute.

c. Examination and Cross-Examination.

1 *Witkin Cal. Evid. Opinion Evid* § 82

[§ 82] Examination and Cross-Examination.

"Any expert appointed by the court under Section 730 may be called and examined by the court or by any party to the action. When such witness is called and examined by the court, the parties have the same right as is expressed in Section 775 to cross-examine the witness and to object to the questions asked and the evidence adduced." (*Ev.C. 732.*) (On direct examination of expert, see 3 *Cal. Evidence (4th), Presentation at Trial*, §189 et seq.; on cross-examination, see 3 *Cal. Evidence (4th), Presentation at Trial*, §250 et seq.; on cross-examination of witness called by the court under *Ev.C. 775*, see 3 *Cal. Evidence (4th), Presentation at Trial*, §83.)

*Ev.C. 722(a)* permits disclosure to the jury of the fact of court appointment (and therefore presumed impartiality) of the expert.

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Criminal Law k.482 et seq.; Evidence k.547 et seq.



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D. Appointment of Experts by Court.

2. California Statute.

d. Compensation and Allowance as Costs.

*1 Witkin Cal. Evid. Opinion Evid § 83*

[§ 83] Compensation and Allowance as Costs.

The Evidence Code makes the following provisions for compensation of the court-appointed expert:

(1) *Civil Cases*. The court fixes the compensation "at the amount as seems reasonable." (*Ev.C. 730*.) It is apportioned and charged to the several parties "in such proportion as the court may determine." (*Ev.C. 731(c)*.) It may thereafter be taxed and allowed in the same manner as other costs. (*Ev.C. 731(c)*.)

A special exception is authorized for payment of medical experts: In any county in which the board of supervisors so provides, the compensation "shall be a charge against and paid out of the treasury of such county on order of the court." (*Ev.C. 731(b)*.)

(2) *Criminal Cases and Juvenile Court Proceedings*. The court fixes the compensation in the same manner as in civil cases (*Ev.C. 730*, *supra*), but it is a charge against the county and payable out of the treasury on order of the court. (*Ev.C. 731(a)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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2. California Statute.

e. Additional Experts Called by Parties.

1 *Witkin Cal. Evid. Opinion Evid* § 84

[§ 84] Additional Experts Called by Parties.

The parties may call their own expert witnesses in any case "on the same fact or matter mentioned in *Ev.C. 730*" (*supra*, §80). (*Ev.C. 733*.)

These experts, however, are paid by the party calling them, and only ordinary witness fees may be taxed as costs in the action. (*Ev.C. 733*; see *C.C.P. 1033.5(a)(8)* [allowable items of costs include fees of "expert witnesses ordered by the court"]; *Metropolitan Water Dist. of Southern Calif. v. Adams* (1944) 23 C.2d 770, 773, 147 P.2d 6; *Sanchez v. Bay Shores Med. Group* (1999) 75 C.A.4th 946, 950, 951, 89 C.R.2d 634 [in medical malpractice action, trial judge erred in awarding plaintiffs fees for their expert witnesses, where witnesses were employed by plaintiffs, not ordered by court]; 17 *So. Cal. L. Rev.* 407.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Niko v. Foreman* (2006) 144 C.A.4th 344, 367, 50 C.R.3d 398 [in proceeding to modify joint custody arrangement, trial judge did not abuse discretion under *Ev.C. 733* in refusing to allow father's expert to reexamine child regarding his preferences and instead in limiting expert to reviewing and critiquing existing clinical notes, tests, and reports produced during court-ordered evaluation].



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#### E. Effect of Expert Testimony.

##### 1. In General.

*1 Witkin Cal. Evid. Opinion Evid § 85*

[§ 85] In General.

(1) *Not Conclusive.* The jurors are not bound by an expert's opinions, but may draw their own conclusions and, if they choose, follow nonexpert testimony. "The jury is permitted to consider the credibility of the expert witnesses, the reasons given for their opinions, and the facts and other matters upon which their opinions are based, in determining what weight, if any, to give such opinion." (*People v. Prince* (1988) 203 C.A.3d 848, 858, 250 C.R. 154 [holding admissible prosecution psychiatrist's testimony criticizing reports of defense psychiatrists on defendant's competency to stand trial]; see *Zimmer v. Kilborn* (1913) 165 C. 523, 525, 132 P. 1026; *Treadwell v. Nickel* (1924) 194 C. 243, 263, 228 P. 25; *Estate of Iser* (1921) 52 C.A. 405, 408, 198 P. 1014 [probate court may fix value of attorneys' service contrary to expert testimony]; *Blye v. Affonso* (1960) 185 C.A.2d 241, 243, 8 C.R. 155, citing the text; *People v. Gentry* (1968) 257 C.A.2d 607, 611, 65 C.R. 235; *Conservatorship of McKeown* (1994) 25 C.A.4th 502, 508, 509, 30 C.R.2d 542, citing the text [except in medical malpractice actions, expert testimony, like any other, may be rejected by trier of fact]; *Lauderdale Associates v. Department of Health Services* (1998) 67 C.A.4th 117, 127, 78 C.R.2d 802, citing the text; *Howard v. Owens Corning* (1999) 72 C.A.4th 621, 636, 85 C.R.2d 386 [in personal injury action arising from exposure to asbestos products, jury could reject expert testimony offered by plaintiff even though defendant manufacturer did not offer expert testimony of its own]; C.E.B., Expert Witness Guide 2d, §5.5 et seq.; 14 Cal. L. Rev. 70; 1 Cal. Proc. (4th), Attorneys, §230.) (For exceptions in medical and legal malpractice cases, see *infra*, §86.)

(2) *No Arbitrary Rejection.* The jury or trial judge may reject the conclusion of an expert even though it is uncontradicted. (See *Barker v. Gould* (1898) 122 C. 240, 243, 54 P. 845; *Layne & Bowler Corp. v. Grogan* (1921) 56 C.A. 31, 33, 204 P. 252; *People v. Williams* (1957) 151 C.A.2d 173, 185, 187, 311 P.2d 117; *Lucientes v. Bliss* (1958) 157 C.A.2d 565, 571, 321 P.2d 526.) This does not mean, however, that the uncontradicted and unimpeached opinion testimony of an expert may be arbitrarily disregarded; the rule in this respect is the same as that which applies to uncontradicted testimony of an ordinary witness. (*Wirz v. Wirz* (1950) 96 C.A.2d 171, 176, 214 P.2d 839; *Krause v. Apodaca* (1960) 186 C.A.2d 413, 417, 9 C.R. 10, quoting the text; *In re Marriage of Battenburg* (1994) 28 C.A.4th 1338, 1345, 33 C.R.2d 871, citing the text; 3 Cal. Evidence (4th), Presentation at Trial, §89 et seq.)

(3) *Instructions: Criminal Cases.* In criminal cases, an instruction on the effect of expert opinion evidence is provided by statute (P.C. 1127b), and must be given on the court's own motion. (*People v. Long* (1940) 15 C.2d 590, 607, 103 P.2d 969; *People v. Williamson* (1933) 134 C.A. 775, 780, 26 P.2d 681; *People v. Reeder* (1976) 65 C.A.3d 235, 241, 135 C.R. 421 [admission, on stipulation, of expert testimony on results of polygraph examinations indicating that victim was telling the truth and defendant was not; failure to give P.C. 1127b instruction held error because credibility was most significant issue in case]; CALJIC (6th ed.), No. 2.80.)



(4) *Instructions: Civil Cases*. It is proper to instruct the jury that they are not bound by expert opinion, but may give it the weight to which they feel it is entitled considering the expert's qualifications and credibility and the reasons for the expert's testimony. (BAJI (8th ed.), No. 2.40; see 7 *Cal. Proc.* (4th), *Trial*, §303.)

An earlier version of BAJI, No. 2.40 stated that uncontradicted expert testimony was to be given conclusive effect. In *Conservatorship of McKeown, supra*, 25 *C.A.4th* 508, the court held that that portion of the instruction "does not withstand analysis." The instruction was revised in 1995 to delete the criticized language.

**SUPPLEMENT:** [This section is current through the latest supplement]

(3) *Instructions: Criminal Cases*. See CALCRIM, No. 332 [Expert Witness Testimony]. (4) *Instructions: Civil Cases*. See CACI, No. 219 [effect of expert opinion testimony in civil case]. *West's Key Number Digest*, Criminal Law k.494; Evidence k.569 et seq.



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## CHAPTER V - Opinion Evidence

## II. EXPERT EVIDENCE

## E. Effect of Expert Testimony.

## 2. Medical and Legal Malpractice.

1 *Witkin Cal. Evid. Opinion Evid* § 86

[§ 86] Medical and Legal Malpractice.

(1) *Medical Malpractice*. An exception to the rule that expert evidence is not conclusive (*supra*, §85) is made in medical malpractice suits. The issue is the standard of due care that prevails among doctors in the locality. Accordingly, it has been held that only experts, i.e., doctors familiar with that standard, may testify on the issue (see 3 *Cal. Evidence* (4th), *Presentation at Trial*, §191), and that in the absence of such expert medical testimony, no recovery can be had. Other cases have extended this theory by holding that, when such expert evidence is introduced on either side, it cannot be contradicted by nonexpert evidence. (See *Engelking v. Carlson* (1939) 13 C.2d 216, 221, 88 P.2d 695; *Lawless v. Calaway* (1944) 24 C.2d 81, 86, 147 P.2d 604; *Cobbs v. Grant* (1972) 8 C.3d 229, 104 C.R. 505, 502 P.2d 1; *Markart v. Zeimer* (1924) 67 C.A. 363, 369, 227 P. 683 [admission of doctor held insufficient to establish liability]; *Nicholas v. Jacobson* (1931) 113 C.A. 382, 386, 298 P. 505; *Williamson v. Prida* (1999) 75 C.A.4th 1417, 1424, 89 C.R.2d 868 [rule requiring expert testimony as to standard of care applies in actions for veterinarian malpractice]; C.E.B., *Expert Witness Guide* 2d, §5.5; 18 So. Cal. L. Rev. 67; 33 Cal. L. Rev. 248, 269; 86 A.L.R.2d 1038.)

In *Cobbs v. Grant*, *supra*, plaintiff produced no expert witness to support his claim that defendant negligently performed surgery on an intractable peptic duodenal ulcer. *Held*, the verdict in plaintiff's favor was not supported by substantial evidence. "Defendant and his expert witnesses gave uncontradicted testimony that injuries not apparent during an operation may subsequently become manifest. In light of this testimony and the additional uncontradicted testimony that the surgery was performed with due care, it would have been improper speculation for the jury to infer the injury should have been apparent to a careful surgeon." (8 C.3d 238.) (See also *Folk v. Kilk* (1975) 53 C.A.3d 176, 185, 126 C.R. 172 ["the etiology of brain abscesses and the standards of care prevailing in the medical community as concern tonsillectomies are not matters of common knowledge and therefore we are bound by the expert testimony"].)

The foregoing doctrine is, however, subject to an important limitation: Where the injury or treatment is one within the common knowledge of laypersons, neither the requirement of expert evidence nor its conclusive effect is recognized. (*Bardessono v. Michels* (1970) 3 C.3d 780, 790, 91 C.R. 760, 478 P.2d 480; *Inderbitzen v. Lane Hosp.* (1932) 124 C.A. 462, 467, 13 P.2d 905 [infection from vaginal examination with unsterilized hands]; *Dean v. Dyer* (1944) 64 C.A.2d 646, 653, 149 P.2d 288 [injury to eye]; *Agnew v. Los Angeles* (1947) 82 C.A.2d 616, 619, 186 P.2d 450 [plaintiff fell and fractured hip; no X-ray taken]; *Friedman v. Dresel* (1956) 139 C.A.2d 333, 342, 293 P.2d 488 [same injury; X-rays taken of knee but not hip]; *Gannon v. Elliot* (1993) 19 C.A.4th 1, 10, 23 C.R.2d 86 [defendant left cap from surgical instrument in plaintiff's hip during surgery; jury was erroneously instructed to ignore common knowledge and consider only expert testimony]; see 33 Cal. L. Rev. 248, 272; 14 *Pacific L. J.* 133 [Common Knowledge in Medical Malpractice Litigation: A Diagnosis and Prescription].)

(2) *Legal Malpractice*. In *Lysick v. Walcom* (1968) 258 C.A.2d 136, 156, 65 C.R. 406, the court said: "[T]here is no reason why the rules of evidence for malpractice against a *lawyer* should not be the same as those governing cases against doctors. ... Accordingly, when the matter in issue is within the knowledge of experts only and not within the common knowledge of laymen, expert evidence is conclusive and cannot be disregarded." (On the requirement of expert testimony, see *supra*, §22; see also 1 *Cal. Proc.* (4th), *Attorneys*, §311 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Medical Malpractice*. See *Betterton v. Leichtling* (2002) 101 C.A.4th 749, 756, 124 C.R.2d 644 [in medical malpractice action in which plaintiff alleged defendant failed to obtain informed consent before going ahead with surgery despite increased risk of bleeding due to plaintiff's aspirin use, rule making expert testimony conclusive as to duty of care did not apply to question whether defendant failed to disclose significant risk, but did apply to question whether significant risk existed].



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## CHAPTER V - Opinion Evidence

## II. EXPERT EVIDENCE

## E. Effect of Expert Testimony.

## 3. Psychiatric Testimony.

1 *Witkin Cal. Evid. Opinion Evid* § 87

## [§ 87] Psychiatric Testimony.

(1) *Civil Cases*. "The science of psychiatry ... has not reached the plateau of infallibility where courts must cede their powers of adjudication even when a pronouncement has been made by a psychiatrist in answering the ultimate question at issue, that his patient was incompetent." (*Mills v. Kopf* (1963) 216 C.A.2d 780, 785, 31 C.R. 80 [testimony of psychiatrist that promisor was completely without understanding held not prevailing over convincing testimony of others, including promisor's attorney who drafted the agreement].)

(2) *Criminal Cases*. Psychiatric testimony is no more conclusive in criminal than in civil cases. In *People v. Williams* (1957) 151 C.A.2d 173, 311 P.2d 117, defendant, charged with homicide, made several confessions. At the trial, an expert psychiatrist testified that he was a pathological liar and psychopathic personality, wholly unreliable. On appeal, defendant contended that, because this was the only expert evidence on the subject, the confessions should have been excluded. *Held*, the malpractice rule does not apply and the expert's opinion is to be weighed in the light of the reasons given and the other facts in evidence. (151 C.A.2d 187.)

In *People v. Wolff* (1964) 61 C.2d 795, 40 C.R. 271, 394 P.2d 959, a homicide case, four psychiatrists testified that defendant suffered from schizophrenia and was legally insane. Defendant's contention that this established his insanity defense was rejected: "Sound mind" and "legal sanity" are not synonymous; and to accept his view would be to create a new defense of "not guilty by reason of schizophrenia." (61 C.2d 815, 816.) The court observed that "strictly speaking, a psychiatrist is not an 'expert' at all when it comes to determining whether the defendant is *legally* responsible under the terms of the California rule." (61 C.2d 811.)

In *People v. Coogler* (1969) 71 C.2d 153, 77 C.R. 790, 454 P.2d 686, testimony of a psychiatrist and clinical psychologist supported defendant's then recognized diminished capacity defense (see 1 *Cal. Crim. Law* (3d), *Defenses*, §23 et seq.). Although the prosecution offered no expert testimony to the contrary, the jury rejected the defense. *Held*, this was proper. "Although unanimity of expert opinion carries persuasive value, a jury, under certain circumstances, can properly reject such opinions. ... The chief value of an expert's testimony in this field, as in all other fields, rests upon the *material* from which his opinion is fashioned and the *reasoning* by which he progresses from his material to his conclusion." (71 C.2d 166.) (See also *People v. Drew* (1978) 22 C.3d 333, 350, 149 C.R. 275, 583 P.2d 1318; *People v. Cruz* (1980) 26 C.3d 233, 247, 162 C.R. 1, 605 P.2d 830; *People v. Huddleston* (1969) 275 C.A.2d 859, 864, 80 C.R. 496; *People v. Ruiz* (1970) 11 C.A.3d 852, 858, 90 C.R. 110; *People v. Neustice* (1972) 24 C.A.3d 178, 191, 100 C.R. 783; *People v. McCowan* (1986) 182 C.A.3d 1, 13, 14, 227 C.R. 23, *infra*, §94; *People v. Skinner* (1986) 185 C.A.3d 1050, 1063, 228 C.R. 652 [defendant found sane at time of homicide, despite unanimous psychiatric testimony to the contrary; substantial evidence supported inference that defendant had merely experienced temporary,

cocaine-induced psychosis].)

*In re Perkins* (1958) 165 C.A.2d 73, 331 P.2d 712, a habeas corpus proceeding seeking release of a committed criminal on the ground of recovery of sanity, expresses a contrasting view: "[T]he policy of the state," evidenced by the statutes on insanity proceedings, is that opinions of psychiatrists "are entitled to great weight." (165 C.A.2d 79.) And in *People v. Duckett* (1984) 162 C.A.3d 1115, 209 C.R. 96, the court held that the jury erred in finding defendant legally sane in the face of unanimous expert opinion that he was insane. (162 C.A.3d 1123.) (See critical dissent, 162 C.A.3d 1128, citing *People v. Drew*, *supra*, *People v. Wolff*, *supra*, and other cases holding that a jury may reasonably reject expert psychiatric opinion that a defendant is insane; and see also *People v. Green* (1984) 163 C.A.3d 239, 244, 209 C.R. 255 [disagreeing with *Duckett*].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Civil Cases*. See *Ewing v. Northridge Hosp. Med. Center* (2004) 120 C.A.4th 1289, 1302, 16 C.R.3d 591 [rule that expert testimony as to standard of care is required in medical malpractice action (see text, §86) was inapplicable in action by parents alleging that psychotherapist violated C.C. 43.92 by failing to warn their son of threat to his life by therapist's patient; liability under C.C. 43.92 is not premised on breach of standard of care, and jury does not need expert guidance to determine if statutory duty to warn was breached]. *West's Key Number Digest*, Evidence k.571(2)



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## CHAPTER V - Opinion Evidence

## III. OPINION ON ULTIMATE ISSUE

## A. Former Rule of Exclusion.

1 *Witkin Cal. Evid. Opinion Evid* § 88

[§ 88] Former Rule of Exclusion.

Many cases purport to state a general rule excluding an opinion on an *ultimate basic issue* of the case. The theory is that conclusions of this type are for the jury to make, and that offering an opinion that is directly decisive of the case *invades the province of the jury*. (See *Wilkerson v. El Monte* (1936) 17 C.A.2d 615, 622, 62 P.2d 790; *Estate of Rich* (1947) 79 C.A.2d 22, 25, 179 P.2d 373; 2 U.C.L.A. L. Rev. 359; 28 So. Cal. L. Rev. 420; 1 McCormick 5th, §12.)

Thus, in *Estate of Rich*, an intimate acquaintance of the testatrix was allowed to answer, over objection, the question: "Do you have an opinion as to whether or not Maude Rich was mentally competent to make a valid will?" *Held*, the question was improper (although not, in the light of the record, reversible error). The court emphatically declared that the question must be limited to *mental sanity* alone, and must not touch upon *capacity to make a will*. "In allowing a witness to answer the aforesaid question, the province of both the court and jury was invaded and the whole issue of law and fact was determined by the mere opinion of the witness. The vice of the question lies in the fact that capacity to make a will is not a simple question of fact, but is a conclusion which the law draws from certain facts as premises." (79 C.A.2d 26.)

In *Thomason v. Hethcock* (1935) 7 C.A.2d 634, 637, 46 P.2d 832, it was held improper to ask a doctor whether a certain kind of operation constituted due care or negligence. And in *Criss v. Angelus Hosp. Assn. of Los Angeles* (1936) 13 C.A.2d 412, 416, 56 P.2d 1274, it was held improper to ask whether the particular defendant doctor exercised ordinary skill in treating the particular patient. (See also *Sim v. Weeks* (1935) 7 C.A.2d 28, 38, 45 P.2d 350 [quoting Michigan case: "When a result may or may not be occasioned by malpractice, an expert medical witness invades the province of the jury when permitted to go beyond stating that it *could* and in saying that it *did* occasion the result"].)

The decisions seem reasonable enough when the answer sought is clearly a conclusion that is for the jury and not the witness to state, e.g., whether the defendant was *negligent*. (See 1 McCormick 5th, §12; 2 U.C.L.A. L. Rev. 359; *infra*, §91.) But no reliable test of an "ultimate issue" can be devised, and both by statute and case law certain opinions of this type have been sanctioned, e.g., opinions on sanity, handwriting, and value. Most writers have condemned the strict exclusionary rule as unsound in principle, and inconsistent and unworkable in practice. (See 1 McCormick 5th, §12; 7 Wigmore (Chadbourn Rev.) §1921.)

The trend of modern decisions, in California and elsewhere, is to admit such opinions whenever they are useful; and the strict exclusionary rule was expressly repudiated by the Model Code of Evidence (Rule 401), the Uniform Rules of Evidence (Rule 704), the Federal Rules of Evidence (Rule 704), and the Evidence Code. (See *infra*, §90; on Unif. Rule 704, see 13B (Part 1B) U.L.A. (Master Ed.), p. 55.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 13A U.L.A. (Master Ed.), p. 159 [Unif. Rules, Rule 704]; 1 McCormick 6th, §12. *West's Key Number Digest*, Criminal Law k.470 et seq.; Evidence k.472(1) et seq.



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## CHAPTER V - Opinion Evidence

### III. OPINION ON ULTIMATE ISSUE

#### B. Repudiation of Rule.

##### 1. California Case Law.

*1 Witkin Cal. Evid. Opinion Evid § 89*

[§ 89] California Case Law.

The modern view is illustrated by the following excerpts from California decisions:

"It is certainly contrary to the unmistakable trend of authority to exclude expert opinion testimony merely upon the ground that it amounts to an opinion upon ultimate facts. The modern tendency is to make no distinction between evidential and ultimate facts subject to expert opinion. The courts consider that it is more important to get to the truth of the matter than to quibble over distinctions in this regard which are in many cases impracticable." (*Wells Truckways v. Cebrian* (1954) 122 C.A.2d 666, 678, 265 P.2d 557 [quoting Am.Jur.].)

"We believe, therefore, that there is no hard and fast rule that experts may not be asked questions that coincide with the ultimate issue in the case, and that the true rule is that admissibility depends on the nature of the issue and the circumstances of the case, there being a large measure of discretion involved. We believe further that the modern tendency is against making a distinction between evidentiary and ultimate facts as subjects of expert opinion." (*People v. King* (1951) 104 C.A.2d 298, 304, 231 P.2d 156.)

"Oftentimes an opinion may be received on a simple ultimate issue, even when it is the sole one, as for example where the issue is the value of an article, or the sanity of a person; because it cannot be further simplified and cannot be fully tried without hearing opinions from those in better position to form them than the jury can be placed in." (*People v. Wilson* (1944) 25 C.2d 341, 349, 153 P.2d 720 [quoting federal case].)

"[I]n this state we have followed the modern tendency and have refused to hold that expert opinion is inadmissible merely because it coincides with an ultimate issue of fact." (*People v. Cole* (1956) 47 C.2d 99, 105, 301 P.2d 854, *supra*, §47.)

Similar statements may be found in *Burch v. Valley Motor Lines* (1947) 78 C.A.2d 834, 838, 179 P.2d 47, *infra*, §92, reviewing the authorities at great length; *California Bank v. Diamond* (1956) 144 C.A.2d 387, 391, 301 P.2d 60 [permissible for witness to testify that neither he nor his corporation had been indebted to D--ultimate fact of lack of indebtedness]; *Carey v. Lima, Salmon & Tully Mortuary* (1959) 168 C.A.2d 42, 45, 335 P.2d 181 [quoting *Cole* case, *supra*, but holding exclusion not an abuse of discretion under the circumstances]; *People v. Peoples* (1963) 212 C.A.2d 581, 583, 28 C.R. 120 [following *Cole* case]; *Magee v. Wyeth Laboratories* (1963) 214 C.A.2d 340, 357, 29 C.R. 322, quoting the text; *People v. Clay* (1964) 227 C.A.2d 87, 99, 38 C.R. 431 [following *Cole* case]; *People v. Arguello* (1966) 244 C.A.2d 413, 417, 53 C.R. 245; *State Comp. Ins. Fund v. Operated Equipment Co.* (1968) 265 C.A.2d 759, 765, 71 C.R. 531, citing the text; *Corn v. State Bar* (1968) 68 C.2d 461, 67 C.R. 401, 439 P.2d 313, *infra*, §96; *People v. Martin*



(1971) 17 C.A.3d 661, 668, 95 C.R. 250; *People v. Douglas* (1987) 193 C.A.3d 1691, 1694, 239 C.R. 252, citing the text [following *Cole* case]; *Paez v. Alcoholic Bev. Control App. Bd.* (1990) 222 C.A.3d 1025, 1026, 272 C.R. 272.

The proper approach, according to *People v. Arguello*, *supra*, is to permit a question that cannot be further simplified, even if it does touch on the ultimate issue, e.g., value of an article, or sanity; the opinion on the ultimate issue is the only practicable way of obtaining the necessary expert knowledge of the witness. But if the question can be further simplified, it should be, for then the objection is not the empty one of "ultimate issue," but rather that the answer goes beyond the point where the expert can assist the court, and draws conclusions that the jury itself can draw. (244 C.A.2d 418.) (See also *Paez v. Alcoholic Bev. Control App. Bd.*, *supra*, 222 C.A.3d 1027 [notwithstanding *Ev.C.* 805, *infra*, §90, judge retains discretion to disallow question on ultimate issue under Evidence Code provisions relating to undue prejudice, expert witnesses, and proper mode of questioning]; 1 McCormick 5th, §12; 7 Wigmore (Chadbourn Rev.) §1921; 1967 A.S. 113.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Proper approach:* See *Mitchell v. United Nat. Ins. Co.* (2005) 127 C.A.4th 457, 478, 25 C.R.3d 627, 2 Summary (10th), *Insurance*, Supp., §225 [citing the text; in breach of contract action against insurer in which insurer defended on ground of insured's misrepresentations, trial judge properly excluded, as containing inadmissible conclusions, declaration of insured's expert to effect that insurer's reliance on insured's representations was not reasonable because underwriter should have carried out certain investigations].

See 1 McCormick 6th, §12.



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## CHAPTER V - Opinion Evidence

### III. OPINION ON ULTIMATE ISSUE

#### B. Repudiation of Rule.

#### 2. Evidence Code and Federal Rules.

#### *1 Witkin Cal. Evid. Opinion Evid § 90*

[§ 90] Evidence Code and Federal Rules.

(1) *Evidence Code. Ev.C. 805* codifies the modern view: "Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact." (See *McCleery v. Bakersfield* (1985) 170 C.A.3d 1059, 1071, 216 C.R. 852; C.E.B., Expert Witness Guide 2d, §5.2.)

In view of this double repudiation of the exclusionary rule by late decisions and the new statute, the earlier cases must be read with caution. Some probably still exemplify the discretion of the trial judge to exclude opinions that might improperly influence the jury to shirk their duty of drawing the ultimate conclusions from the evidence offered; others will no longer be controlling; but it is impossible to sift them successfully at this time. (See *infra*, §91 et seq.)

(2) *Federal Rules of Evidence. F.R. Evid., Rule 704* originally read: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

The Rule was amended in 1984 to read as follows:

"(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

"(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone." (See 3 Mueller & Kirkpatrick, *Federal Evidence* 2d, §360 et seq.; C.E.B., *Expert Witness Guide* 2d, §5.11.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER V - Opinion Evidence

## III. OPINION ON ULTIMATE ISSUE

## C. Illustrations: Negligence Cases.

## 1. Decisions Excluding Opinions.

*1 Witkin Cal. Evid. Opinion Evid § 91*

## [§ 91] Decisions Excluding Opinions.

*Sampson v. Hughes* (1905) 147 C. 62, 67, 81 P. 292, furnishes a simple illustration of the "ultimate issue" type of question: Defendant was asked whether he "wilfully, negligently, or carelessly" did the thing charged; the trial judge erred in overruling an objection. (See also, following the *Sampson* case, *Roberts v. Patterson* (1959) 170 C.A.2d 661, 666, 339 P.2d 236 [injury from tripping over folded rug placed at entrance to apartment house; defendant manager was asked whether she realized that rug "could be a hazard"; objection was correctly sustained].)

In *Wilkerson v. El Monte* (1936) 17 C.A.2d 615, 621, 62 P.2d 790, a personal injury case, plaintiff's engineer testified that the street condition was "a dangerous one," and a contractor said "it is constructed wrong," and is "not safe for travel." These opinions were held inadmissible. (See, following the *Wilkerson* case, *Martindale v. Mountain View* (1962) 208 C.A.2d 109, 124, 25 C.R. 148 [whether condition at crossing was hazardous to motorists]; *Blinkinsop v. Weber* (1948) 85 C.A.2d 276, 283, 193 P.2d 96 [expert could properly testify as to whether steps were built in accordance with standard and accepted construction methods and architectural practice, but could not give opinion that they were safe].)

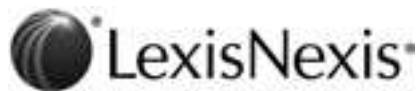
In *Waller v. Southern Calif. Gas Co.* (1959) 170 C.A.2d 747, 339 P.2d 577, plaintiff was injured in a collision of his car and the rear of defendant's truck. His expert, a mechanical engineer, relying on an examination of the scene and photographs of the vehicles, testified that the accident could only have happened in a certain way. *Held*, admission of this testimony on the ultimate issue was reversible error; it was based on "a cumulation of assumptions," some of which were unsupported by any evidence. The court added that "[a]s a general rule such opinions upon the ultimate issue should not be received in automobile accident cases." (170 C.A.2d 754.) (See also *Moore v. Norwood* (1940) 41 C.A.2d 359, 366, 106 P.2d 939 [opinion as to whether the accident could have been avoided if one of the drivers had acted differently].)

In *Schauf v. Southern Calif. Edison Co.* (1966) 243 C.A.2d 450, 52 C.R. 518, an intersection collision case, a traffic engineer who had examined photographs of the area was called by plaintiff. He was asked whether the intersection presented a hazard to westbound traffic, and whether a westbound driver "had basis for expectancy of a stop sign." *Held*, the trial judge did not abuse his discretion in rejecting the evidence; he may have concluded that the subject was within the jurors' experience, and that the unnecessary expert's opinion might have been given undue weight. (243 C.A.2d 456.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Piscitelli v. Friedenber* (2001) 87 C.A.4th 953, 971, 105 C.R.2d 88 [in legal malpractice action, admission of

testimony of plaintiff's expert on ultimate issue of who would have prevailed in underlying arbitration was error; it was jurors' role to step into shoes of arbitrators, consider facts of plaintiff's underlying claims, and determine their merits].



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## III. OPINION ON ULTIMATE ISSUE

## C. Illustrations: Negligence Cases.

## 2. Decisions Upholding Admissibility.

1 *Witkin Cal. Evid. Opinion Evid* § 92

[§ 92] Decisions Upholding Admissibility.

In *Burch v. Valley Motor Lines* (1947) 78 C.A.2d 834, 179 P.2d 47, two trailer-trucks collided, following which the cast steel drawbar connecting defendant's truck and trailer was found to have been broken. Defendant's theory was that it had been broken by compression from a rear end collision for which plaintiff was responsible; plaintiff's theory was that it had been broken before the collision, in time for defendant to have avoided the accident. Defendant called a qualified mechanical engineer who would have testified that, from an inspection of the broken pieces of steel, he could give an opinion concerning the type of force necessary to break them in that manner, that it was a compression force such as would be created by a rear end collision, and that the drawbar could not have been broken by the swaying of defendant's vehicles. The trial judge excluded the evidence, and the exclusion was held prejudicial error. The court said: "The ultimate question which the jury had to answer ... was, whose negligence caused this collision or contributed thereto? In seeking such answer the subsidiary and secondary inquiry was relevant and proper, i.e., whether the drawbar was broken by a side-to-side jerking, swaying or whipping motion on the one hand, or by a blow from the rear on the other. ... The rejected testimony would not have been subject to the criticism that it coincided with the ultimate issue, for conceivably the jury might be convinced that the drawbar was fractured by a blow from the rear, and still conclude that appellant was guilty of negligence." (78 C.A.2d 842.)

In *Reynolds v. Natural Gas Equipment* (1960) 184 C.A.2d 724, 7 C.R. 879, plaintiff sued for injuries resulting from the explosion of a large industrial gas burner. A properly qualified expert was asked whether the burner met with the general engineering standards in the area. The trial judge refused to allow the answer on the ground that the opinion would be speculative, and that the jury should reach its own conclusions on the issue. He also struck out subsequent testimony of the expert as to the proper design of the machine to make it safe. *Held*, this was prejudicial error; evidence as to the proper equipment or adjustment of machinery, and as to the necessity and feasibility of adding a safety device, is admissible and within the scope of expert opinion. (184 C.A.2d 739, 740.)

Other examples are *Alber v. Owens* (1967) 66 C.2d 790, 800, 59 C.R. 117, 427 P.2d 781; *Lemley v. Doak Gas Engine Co.* (1919) 40 C.A. 146, 151, 180 P. 671 [cause of breaking of fly-wheel]; *Wallace v. Speier* (1943) 60 C.A.2d 387, 394, 140 P.2d 900 [safe life of plumbing fixtures and frequency of necessary inspection]; *Magee v. Wyeth Laboratories* (1963) 214 C.A.2d 340, 348, 29 C.R. 322 [breach of warranty in sale of drug, judgment for defendant; expert's opinion that warning in direction circular was adequate]; *Smith v. Lockheed Propulsion Co.* (1967) 247 C.A.2d 774, 783, 56 C.R. 128, citing the text; *State Comp. Ins. Fund v. Operated Equipment Co.* (1968) 265 C.A.2d 759, 765, 71 C.R. 531 [qualified engineer was asked whether, on evidence presented, release of crane's jib was safe or unsafe practice]; *Majetich v. Westin* (1969) 276 C.A.2d 216, 219, 80 C.R. 787 [error, though harmless, in excluding expert

testimony on whether defendant's failure to meet standard of postoperative care was proximate cause of plaintiff's injuries]; *McCleery v. Bakersfield* (1985) 170 C.A.3d 1059, 1067, 1070, 1071, 216 C.R. 852, supra, §74.

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER V - Opinion Evidence

## III. OPINION ON ULTIMATE ISSUE

## D. Illustrations: Criminal Cases.

## 1. Decisions Excluding Opinions.

*1 Witkin Cal. Evid. Opinion Evid § 93*

## [§ 93] Decisions Excluding Opinions.

It has been held that the opinion of a lay witness as to whether the defendant could "distinguish right from wrong" is inadmissible. (*People v. O'Brien* (1932) 122 C.A. 147, 150, 9 P.2d 902; but see *People v. Woods* (1937) 19 C.A.2d 556, 65 P.2d 940, *infra*, §95.) And in *People v. Mason* (1960) 183 C.A.2d 168, 173, 6 C.R. 649, the court, citing the text, held it wholly improper to ask a police officer, who had signed the original complaint against defendant, for his opinion on guilt or innocence. (On inadmissibility of expert testimony on accused's capacity to form necessary specific intent, see *infra*, §94.)

In *People v. Johnson* (1947) 81 C.A.2d Supp. 973, 185 P.2d 105, a prosecution under the Alcoholic Beverage Control Act for selling liquor to "an obviously intoxicated person," a police officer was allowed to answer this question: "Officer, based upon your experience and your observation of this man Holalek on that evening, in your opinion was he obviously intoxicated?" *Held*, this was prejudicial error. The facts concerning his conduct and appearance should have been presented, but whether those facts made him an "obviously" intoxicated person was exclusively for the jury to determine. (81 C.A.2d Supp. 975.)

In *People v. Brown* (1981) 116 C.A.3d 820, 172 C.R. 221, a police officer defined a "runner" in narcotics transactions as one who assists a dealer, then answered a question directed to the role defendant was playing: "It's my opinion that the defendant, Ben Brown, was working as a runner for Lucille Carson." *Held*, this was error, since the jurors were as well qualified as the witness to make that determination. (116 C.A.3d 829.) (See also *People v. Torres* (1995) 33 C.A.4th 37, 45, 39 C.R.2d 103 [in prosecution for murder committed during attempted robbery, police officer was improperly allowed to express opinion on definition of crimes, on whether crime was committed, and on defendant's guilt].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Frederick* (2006) 142 C.A.4th 400, 412, 48 C.R.3d 585 [in prosecution for operating endless chain scheme, trial judge properly limited testimony of prosecution and defense expert witnesses to prevent them from opining as to whether defendant's organization was in fact endless chain scheme (this would invade jury's province) and from instructing on law of endless chain schemes (this would usurp trial judge's function)].



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## CHAPTER V - Opinion Evidence

### III. OPINION ON ULTIMATE ISSUE

#### D. Illustrations: Criminal Cases.

#### 2. Statutory Exclusion of Opinion on Capacity To Form Intent.

##### *1 Witkin Cal. Evid. Opinion Evid § 94*

[§ 94] Statutory Exclusion of Opinion on Capacity To Form Intent.

P.C. 29 prohibits the admission of expert testimony at the guilt phase of a criminal trial on the question whether the defendant had the required mental state. (See *1 Cal. Crim. Law (3d)*, *Defenses*, §§23, 24.) In *People v. McCowan (1986) 182 C.A.3d 1*, 227 C.R. 23, defendant was charged with first degree murder, second degree murder, and attempted murder. The trial judge, relying on P.C. 29, refused to permit defense counsel to ask psychiatric experts whether defendant had the *capacity* to form a mental state in issue on the date he allegedly committed the offenses, and further barred expert testimony on whether defendant *had* formed the required mental state at the time of the crimes. *Held*, the ruling was proper. Although P.C. 29 forbids an expert from testifying on the *ultimate issue* of whether defendant *had* the requisite mental state, defendant was permitted to present expert testimony suggesting that his mental condition prevented him from forming the required mental state when he committed his offenses. (*182 C.A.3d 13, 14.*) "The Legislature has determined that judges and jurors are capable of deciding whether a defendant's mental illness resulted in an inability to form the mental state required to sustain the charge. Such testimony is not 'sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.'" (*182 C.A.3d 14.*) (See 16 A.L.R.4th 666 [admissibility of expert testimony as to whether defendant had requisite specific intent].)

In *People v. Molina (1988) 202 C.A.3d 1168*, 249 C.R. 273, the court took note of P.C. 28 (which abolished the defense of diminished capacity) and P.C. 29, and said: "The apparent meaning of the statutory language is that evidence of mental problems is inadmissible to show that a defendant *lacked the capacity to form* the requisite mental state, but is admissible to show that the defendant *actually lacked the requisite mental state*. An expert may testify regarding the defendant's mental condition so long as the expert gives no opinion on the ultimate question of whether or not the defendant actually had the requisite mental state." (*202 C.A.3d 1173.*)

In *People v. Rangel (1992) 11 C.A.4th 291*, 14 C.R.2d 529, a murder prosecution, the trial judge struck a defense expert's opinion testimony that, given defendant's voluntary intoxication, defendant did not deliberate, premeditate, or harbor the requisite specific intent to kill. *Held*, exclusion of this opinion testimony was proper. P.C. 29 applies to expert testimony encompassing the effects of voluntary intoxication. (*11 C.A.4th 302.*) Furthermore, even if the statute did not support exclusion of the stricken testimony, any error was harmless in light of the expert's extensive testimony as to the effects of alcohol generally and specifically on defendant's state of mind. (*11 C.A.4th 303.*)

In *People v. Nunn (1996) 50 C.A.4th 1357*, 58 C.R.2d 294, a prosecution for attempted murder and assault with a deadly weapon, the defense proposed to present expert testimony to the effect that defendant's "tendency to overreact, coupled with his level of inebriation, resulted in his impulsive firing of the weapon." (*50 C.A.4th 1362.*) The trial judge ruled this opinion inadmissible under P.C. 28 and 29. *Held*, the ruling was correct. P.C. 29 "does not simply forbid the



use of certain words, it prohibits an expert from offering an opinion on the ultimate question of whether the defendant had or did not have a particular mental state at the time he acted. An expert may not evade the restrictions of section 29 by couching an opinion in words which are or would be taken as synonyms for the mental states involved. Nor may an expert evade section 29 by offering the opinion that the defendant at the time he acted had a state of mind which is the opposite of, and necessarily negates, the existence of the required mental state." (50 C.A.4th 1364.)

In *People v. Samayoa* (1997) 15 C.4th 795, 64 C.R.2d 400, 938 P.2d 2, a murder case, the court held that the prosecutor did not engage in misleading or otherwise improper conduct by commenting on defendant's failure to present expert testimony as to his mental disorders at the time of the charged crimes: Neither P.C. 28 and 29, nor the trial judge's ruling that defense witnesses should not express their opinion on what was in defendant's mind at the critical moment, would have barred defendant from presenting expert testimony as to his mental disorders, "short of an opinion that as a result of defendant's mental disorders he lacked the capacity to form the intent to kill, or did not in fact have the intent to kill, when committing the crimes." (15 C.4th 837.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. San Nicolas* (2004) 34 C.4th 614, 662, 21 C.R.3d 612, 101 P.3d 509 [in capital murder case in which defendant was accused of murdering his wife and her niece, trial judge did not abuse discretion in excluding psychiatrist's testimony on spillover rage that related to whether defendant actually had requisite mental state, his testimony on general brain physiology that dealt with capacity to form mental state, and his testimony on neurotransmitters and those elements of spillover that amounted to capacity evidence]; *People v. Vieira* (2005) 35 C.4th 264, 291, 25 C.R.3d 337, 106 P.3d 990 [in capital murder case, testimony of sheriff's detective as to whether defendant was under mind control of cult at time of murders was properly excluded; P.C. 28, 29 would have prevented detective from offering opinion on whether defendant had mental capacity to form mental state required for murder, and trial judge properly found that detective, who was not mental health professional, was not qualified to opine whether defendant suffered from mental illness at time of murders]. *West's Key Number Digest*, Criminal Law k.474, 474.1



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## CHAPTER V - Opinion Evidence

## III. OPINION ON ULTIMATE ISSUE

## D. Illustrations: Criminal Cases.

## 3. Decisions Upholding Admissibility.

1 *Witkin Cal. Evid. Opinion Evid* § 95

## [§ 95] Decisions Upholding Admissibility.

In *People v. Woods* (1937) 19 C.A.2d 556, 65 P.2d 940, at the trial on defendant's *insanity plea*, psychiatrists were permitted over his objection to give their opinions concerning his ability to *distinguish right from wrong*. *Held*, this was not error. There are different legal tests for insanity in criminal cases, probate proceedings, and proceedings for commitment of an insane person; and, if the expert is limited to the mere statement that a person is insane, the jury will be unable to determine whether he applied the correct test. Hence, it is proper in a criminal case for the expert to express an opinion on sanity, coupled with the correct legal test, i.e., ability to distinguish right from wrong. (19 C.A.2d 562.) The court distinguished *People v. O'Brien* (1932) 122 C.A. 147, 9 P.2d 902, *supra*, §93, as involving nonexpert witnesses. (19 C.A.2d 563.)

In *People v. Martinez* (1952) 38 C.2d 556, 241 P.2d 224, a first degree murder case, the court, referring to defendant's attack on a question calling for an opinion on his state of mind, said: "Defendant's argument is based on the erroneous assumption that an expert cannot be asked a question that coincides with the ultimate issue in the case. ... Counsel could properly have asked Dr. Neal whether a man whose blood had a 2.35 alcohol content could understand that the actions he contemplated would culminate in the wrongful death of another human being." (38 C.2d 564.)

In *People v. Carter* (1997) 55 C.A.4th 1376, 64 C.R.2d 747, a prosecution for possession of cocaine base for sale, a police officer was allowed to render an expert opinion that, based on the quantity of drug possessed, defendant possessed cocaine for purposes of sale. *Held*, this was proper; *People v. Arguello* (1966) 244 C.A.2d 413, 53 C.R. 245, which stated a rule excluding expert testimony on this issue, is no longer good law. (55 C.A.4th 1377.)

Other instructive cases are *People v. Cole* (1956) 47 C.2d 99, 105, 301 P.2d 854, *supra*, §47 [autopsy surgeon's opinion that wound was probably not self-inflicted]; *People v. Polk* (1964) 61 C.2d 217, 233, 37 C.R. 753, 390 P.2d 641 [murder penalty trial; even assuming that conclusion of prosecution's psychiatrist, that defendant was severe sociopath whose chances of rehabilitation were "extremely improbable," coincided with ultimate issue, it was not objectionable]; *People v. Taylor* (1957) 152 C.A.2d 29, 30, 312 P.2d 731 [driving while drunk; police department criminalist, after intoximeter test, answered hypothetical question as to whether defendant was under influence of intoxicating liquor at time of accident]; *People v. Harvey* (1991) 233 C.A.3d 1206, 1227, 285 C.R. 158, 1 *Cal. Evidence* (4th), *Hearsay*, §49, citing the text [expert testimony about nature of various drug transactions and various roles and levels of culpability of each codefendant was admissible in prosecution for conspiracy to sell drugs]; *People v. Valdez* (1997) 58 C.A.4th 494, 507, 68 C.R.2d 135 [in murder prosecution in which gang enhancement was alleged, police officer was properly allowed to give opinion on whether defendant acted for benefit of gang, which was ultimate factual issue for jury to decide]. (See also 52 *Cal. L. Rev.* 560 [psychiatric testimony on ultimate issue].)

**SUPPLEMENT:** [This section is current through the latest supplement]

In *People v. Coddington* (2000) 23 C.4th 529, 97 C.R.2d 528, 2 P.3d 1081, a capital murder case, the trial judge and counsel discussed in advance the scope of mental state evidence that would be admitted. The judge ultimately ruled that the defense could offer any relevant evidence on mental defect or disease. However, no questions could be asked of defendant's expert about whether or how any mental defect or disease would affect defendant's mental state, or whether it would impair his ability to form intent, deliberate, or premeditate, unless the expert would testify, out of the jury's presence, that he believed defendant did not premeditate or deliberate the charged killings. *Held*, the ruling was overly restrictive. "An expert's opinion that a form of mental illness can lead to impulsive behavior is relevant to the existence *vel non* of the mental states of premeditation and deliberation regardless of whether the expert believed appellant actually harbored those mental states at the time of the killing." (23 C.4th 582.)

See *People v. Garcia* (2007) 153 C.A.4th 1499, 1513, 1514, 64 C.R.3d 104 [in prosecution for street terrorism and carrying loaded unregistered firearm in public, trial judge did not err in allowing gang expert to testify, in response to hypothetical questions, that under specific circumstances, crimes would be committed to benefit criminal street gang, "even though the topics as to which he rendered an opinion ... were, in fact, the ultimate issues of the case"].



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CHAPTER V - Opinion Evidence

III. OPINION ON ULTIMATE ISSUE

E. Illustrations: Quasi-Criminal Cases.

1 *Witkin Cal. Evid. Opinion Evid* § 96

[§ 96] Illustrations: Quasi-Criminal Cases.

In *Corn v. State Bar* (1968) 68 C.2d 461, 67 C.R. 401, 439 P.2d 313, petitioner, claiming authority to indorse a check in his client's name pursuant to an agreement giving him half as fees, signed her name and his and took the whole amount. She notified the bank of the forgery. In this disciplinary proceeding, two handwriting experts were asked to compare the handwriting used for her name and his, with an exemplar of his own, and they offered the opinion that he had attempted to disguise his own handwriting, so as to cause a lay person to think the two had been written by different persons. *Held*, although this question called for an opinion of petitioner's state of mind, one of the ultimate issues, it was admissible. (68 C.2d 466.) (See also *Paez v. Alcoholic Bev. Control App. Bd.* (1990) 222 C.A.3d 1025, 1027, 272 C.R. 272 [in license suspension proceeding, an officer could give expert opinion that customer to whom defendant bar owner sold alcohol was "obviously" drunk].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER V - Opinion Evidence

## III. OPINION ON ULTIMATE ISSUE

## F. Distinction: Opinion on Issue of Law.

1 *Witkin Cal. Evid. Opinion Evid* § 97

[§ 97] Distinction: Opinion on Issue of Law.

In *Downer v. Bramet* (1984) 152 C.A.3d 837, 199 C.R. 830, plaintiff, former wife of defendant, brought an action to determine a community property interest in the proceeds of a ranch conveyed to her husband by his former employer. The husband claimed that the conveyance was a gift to him, hence his separate property; the wife contended that it was made in recognition of the husband's services, as deferred compensation, hence was community property. The wife called an attorney as an expert witness "to delineate for the jury the standards to use in determining whether the transfer was a gift or deferred compensation." *Held*, the trial judge properly excluded the testimony. Although evidence is not inadmissible simply because it embraces the ultimate issue, an expert cannot testify to legal conclusions in the guise of expert opinion:

"While in many cases expert opinions that are genuinely needed may happen to embrace the ultimate issue of fact (e.g., a medical opinion whether a physician's actions constitute professional negligence), the calling of lawyers as 'expert witnesses' to give opinions as to the application of the law to particular facts usurps the duty of the trial court to instruct the jury on the law as applicable to the facts, and results in no more than a modern day 'trial by oath' in which the side producing the greater number of lawyers able to opine in their favor wins." (152 C.A.3d 842.)

In *Summers v. A. L. Gilbert Co.* (1999) 69 C.A.4th 1155, 82 C.R.2d 162, plaintiffs brought a wrongful death action alleging theories of liability based on nondelegable duty and negligent hiring and retention of an incompetent contractor. The action arose from an accident in which a trailer loaded with corn became detached and tipped over onto the decedent's vehicle. The defendants included the owner of the truck and trailer and the owner of the corn. At trial, plaintiffs' counsel called as an expert witness a lawyer who specialized in the field of transportation and practiced primarily before the Public Utilities Commission. He was allowed to give opinions to the effect that the corn owner had a nondelegable duty, the truck owner was hauling illegally, the contracts between the two owners were illegal, the corn owner was legally required to be registered as a contract carrier rather than a private carrier, and he was liable for the truck owner's acts. The jury found both defendants liable. *Held*, admission of the expert's testimony was error.

(a) California law allows expert testimony that is related "to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (*Ev.C. 801(a)*.) Although the testimony may embrace an ultimate issue (*Ev.C. 805*; see *supra*, §90), it may not contain legal conclusions. Federal law is the same: the federal courts have uniformly held that allowing an expert to voice an opinion on an issue of law usurps the authority of the court to instruct the jury on the law applicable to the case. (69 C.A.4th 1181.) Here, plaintiffs' expert "was advocating, not testifying. In essence, cloaked with the impressive mantle of 'expert,' [he] made plaintiffs' closing argument from the witness stand. This is a misuse of expert witnesses, and renders his testimony inadmissible under *Evidence Code section 801*." (69 C.A.4th 1185.)

(b) The effect of admitting this testimony was clearly prejudicial and necessitates reversal of the judgment. The trial judge's own instructions on the issue of nondelegable duty were inadequate, and the expert's testimony on this issue both filled the void left by the judge and attempted to dictate the outcome of the case. (69 C.A.4th 1187.) The evidence on the issue of negligent hiring and retention presented a very close question of fact, and "we cannot say it was unlikely the admission of [the expert's] opinion on the subject did not affect the verdict." (69 C.A.4th 1190.) (See also *Williams v. Coombs* (1986) 179 C.A.3d 626, 638, 224 C.R. 865 [testimony expressing opinion on legal question of probable cause was inadmissible as improper expert opinion].)

The authorities are generally in accord with this view. (See 7 Wigmore (Chadbourn Rev.) §1952; 1 McCormick 5th, §12; 31A Am.Jur.2d (1989 ed.), *Expert and Opinion Evidence* §136 et seq.) The strict prohibition has, however, been criticized, and it has been suggested that courts should develop a functional approach of discretionary admissibility to take account of the difference between jury and court trials, and to recognize that much testimony legal in nature is now admitted either openly or in the guise of testimony on mixed questions of law and fact. (See *Staten v. Superior Court* (1996) 45 C.A.4th 1628, 1635, 1636, 53 C.R.2d 657, 6 Summary (9th), *Torts, Supp.*, §1090C [expert testimony on question of duty owed by skater to fellow skaters was inadmissible under traditional rule; but rule should be reexamined, because issue of duty in unfamiliar sports will often have to be decided by judge in summary judgment context without benefit of helpful factual input]; 97 Harv. L. Rev. 797 [arguing against blanket prohibition of expert legal testimony]; 66 A.L.R.5th 135 [expert testimony on questions of domestic law].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Asplund v. Selected Inv. in Financial Equities* (2000) 86 C.A.4th 26, 49, 50, 103 C.R.2d 34 [in fraud action by plaintiff purchasers of promissory notes from registered representative of defendant broker-dealer, trial judge properly excluded declaration of plaintiffs' expert to effect that defendant had duty to supervise representative; existence of duty is legal issue within province of court to decide]; *Thompson v. Sacramento City Unified School Dist.* (2003) 107 C.A.4th 1352, 1372, 132 C.R.2d 748 [in action against school district by student who was punched by another student, it was error to allow experts to testify that attack would not have occurred if certain security measures had been taken and there had been effective intervention with respect to assailant; party cannot rely on expert's opinion to establish duty, and speculative conclusion that different measures might have prevented injury cannot be used to establish causation; citing *Asplund*]; 1 McCormick 6th, §12. *Staten v. Superior Court*:

*Cross-Reference:* 6 Summary (10th), *Torts*, §1348. *West's Key Number Digest*, Criminal Law k.448(16); Evidence k.471(25) et seq.



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## CHAPTER V - Opinion Evidence

## IV. OPINION ON VALUE OF PROPERTY

## A. In General.

## 1. Law Revision Commission Study.

*1 Witkin Cal. Evid. Opinion Evid § 98*

[§ 98] Law Revision Commission Study.

The Law Revision Commission, as a separate project, made a study of evidence in eminent domain proceedings, which culminated in recommendations for statutory changes. The recommendations were substantially embodied in legislation enacted in 1965 as Title 7.1 of the Code of Civil Procedure, superseded by *Ev.C. 810* et seq. on adoption of the Evidence Code. (See *infra*, §99.) Because of the independent enactment of this legislation, no Comments are found on these sections in the Official Code, but their purposes are explained in Volume 3 of the California Law Revision Commission Reports (cited herein as 3 Com. Reports), p. A-5 et seq.

In deciding to codify the rules, the Commission took note of previous reluctance to legislate in this area, but concluded that such legislation was imperative. The principal reasons assigned were: (1) The existing state of the law was uncertain, with particularly serious problems raised by *Los Angeles v. Faus* (1957) 48 C.2d 672, 312 P.2d 680, 1 Cal. Evidence (4th), *Circumstantial Evidence*, §116, abrogating the former California rule excluding evidence of other sales on direct examination. (2) Questionable decisions had been rendered concerning permissible and preferable methods of proving market value. (3) Modern concepts of appraising have changed, and legal concepts have not kept pace with business practices. The Report, however, adds a caution: "A good deal of discretion must remain with the courts simply because no definition can cover the wide gamut of situations that arise regarding this subject matter. The science of appraising, as such, cannot be put into legislation. Only limited areas can be controlled." (3 Com. Reports, p. A-22.) (See 18 *Hastings L. J.* 143 [discussing Commission recommendations and enacted statutes]; 20 *Hastings L. J.* 431 et seq. [symposium consisting of 17 articles, comments, and notes on eminent domain].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## IV. OPINION ON VALUE OF PROPERTY

## A. In General.

## 2. Original Statute and Subsequent Legislation.

*1 Witkin Cal. Evid. Opinion Evid § 99*

[§ 99] Original Statute and Subsequent Legislation.

(1) *Original Statute*. As originally enacted, *Ev.C. 810* et seq. provided special rules "applicable only to eminent domain and inverse condemnation proceedings." (*Ev.C. 810*.) (On the nature of these proceedings, see *8 Summary (9th)*, *Constitutional Law*, §§918 et seq., 1015 et seq.; on valuation evidence prior to the Evidence Code, see *12 Stanf. L. Rev.* 766; 3 Com. Reports, p. A-11 et seq.)

(2) *Changes in Eminent Domain Law*. Former C.C.P. 1237 et seq., which set forth the substantive and procedural aspects of the eminent domain law, were repealed in 1975 and replaced by C.C.P. 1230.010 (see *8 Summary (9th)*, *Constitutional Law*, §918 et seq.).

(3) *Changes in Evidence Code*. The 1978 Legislature, following recommendations of the Law Revision Commission, made a number of changes in the valuation rules by amendments to *Ev.C. 810, 811, 812, 813, 817*, and *822*, and also amended *Rev.C. 4986* (cancellation of property tax; *9 Summary (9th)*, *Taxation*, §237). (See 14 Cal. Law Rev. Com. Reports 105; *10 Pacific L. J.* 545; *infra*, §100 et seq.)

The 1980 Legislature made changes in *Ev.C. 811, 813, 814*, and *822*, and added *Ev.C. 823*. (See *12 Pacific L. J.* 531; *infra*, §100 et seq.)

(4) *Extension of Provisions to All Actions*. Responding to recommendations of the Commission (see 14 Cal. Law Rev. Com. Reports 110; 15 Cal. Law Rev. Com. Reports 301), the 1980 Legislature also amended *Ev.C. 810* to extend application of the valuation rules beyond eminent domain and inverse condemnation proceedings. The amended statute makes the valuation rules applicable "to any action in which the value of property is to be ascertained." (*Ev.C. 810(a)*.) The Legislative Committee Comment states that the proceedings covered "include, but are not limited to," the following: eminent domain; breach of contract of sale of real property (see C.C. 3306, 3307); mortgage deficiency judgments (see C.C.P. 580a, 726); fraud in the purchase, sale, or exchange of property (see C.C. 3343); and other cases in which no statutory standard of market value or its equivalent is prescribed but in which the court is required to make a determination of market value, such as marriage dissolution.

The Comment notes also that *Ev.C. 810* et seq. apply only where *market value* is to be determined, whether for computing damages and benefits or for any other purpose.

Two exceptions to the general rule of applicability are stated:



(a) *Where another rule is provided by statute. (Ev.C. 810(a).)*

(b) *Ad valorem property tax assessment or equalization proceedings. (Ev.C. 810(b); see Legislative Com. Comment, pointing out that these are governed by a well-developed and adequate set of rules.) (See also 12 Pacific L. J. 531.)*

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Original Statute.*

*Cross-Reference:* 8 *Summary* (10th), *Constitutional Law*, §§1112 et seq., 1229 et seq.(2) *Changes in Eminent Domain Law.*

*Cross-Reference:* 8 *Summary* (10th), *Constitutional Law*, §1112 et seq.

(3) *Changes in Evidence Code.*

*Cross-Reference:* 9 *Summary* (10th), *Taxation*, §284.



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### IV. OPINION ON VALUE OF PROPERTY

#### A. In General.

#### 3. Statutory Scope.

#### *1 Witkin Cal. Evid. Opinion Evid § 100*

[§ 100] Statutory Scope.

(1) *Existing Substantive Law Unaffected.* *Ev.C. 810* et seq. are "not intended to alter or change the existing substantive law, whether statutory or decisional, interpreting the meaning of 'market value,' whether denominated 'fair market value' or otherwise." (*Ev.C. 812.*)

(2) *Value of Property.* The "value of property" means "market value of any of the following: (a) Real property or any interest therein. (b) Real property or any interest therein and tangible personal property valued as a unit." (*Ev.C. 811.*)

The Legislative Committee Comment on a 1978 amendment of *Ev.C. 811* explains that the valuation rules do not apply to valuation of intangible personal property that is not an interest in real property, e.g., goodwill of a business. The Committee Comment on a 1980 amendment explains the restrictive phrase "valued as a unit": The rules apply only where personal property is valued together with real property, i.e., in actions involving real and personal property combined. "Actions involving personal property alone are governed by general law, including the general rules of evidence prescribed in this code, although where appropriate the court may look to the special rules prescribed in this article." (See *Aetna Life & Cas. Co. v. Los Angeles (1985) 170 C.A.3d 865, 878, 216 C.R. 831 [Ev.C. 811, rather than general rules of evidence, applied in inverse condemnation action against city by homeowners for real and personal property losses resulting from brush fire, even though personal property losses as testified to by homeowners were not lumped with real property].*)

(3) *Property Without Relevant Market.* *Ev.C. 823*, enacted in 1980, provides: "Notwithstanding any other provision of this article, the value of property for which there is no relevant, comparable market may be determined by any method of valuation that is just and equitable." The Legislative Committee Comment points out that this section, drawn from *C.C.P. 1263.320(b)* (see *8 Summary (9th), Constitutional Law, §1016*), is included because there may be no relevant market for some types of special purpose properties such as schools, churches, cemeteries, parks, and utilities.

In *Redevelopment Agency of Concord v. Tobriner (1989) 215 C.A.3d 1087, 264 C.R. 481*, plaintiff agency sought to condemn parking easements held by defendants and located in the rear of a shopping center parking lot. Defendants contended that valuation evidence that they sought to introduce was admissible under *C.C.P. 1263.320(b)* and *Ev.C. 823*. *Held*, the statutes are inapplicable. The rule stated in those statutes is aimed at special purpose properties for which there is little or no market. This is not such property: It is not the fair market value of the easements that must be determined; the value of the easements is measured by the fair market value of the defendants' dominant estates before and after the taking. Evidence of the market value of these dominant estates was available and was used by plaintiff's

appraiser. (215 C.A.3d 1102, citing the text.)

(4) *Nonprofit, Special Use Property*. C.C.P. 1235.155 defines "nonprofit, special use property" as property operated for a special nonprofit, tax-exempt use, such as a school, church, cemetery, hospital or similar property, but excluding property owned by a public entity.

*Ev.C. 824*, added in 1992, provides a just and equitable means of evaluating this property, for which there is no relevant, comparable market: "the cost of purchasing land and the reasonable cost of making it suitable for the conduct of the same nonprofit, special use, together with the cost of constructing similar improvements." (*Ev.C. 824(a)*.) An opinion on the value of reproducing the improvements must be made without taking into consideration any depreciation or obsolescence of the improvements. (*Ev.C. 824(b)*.)

*Ev.C. 824* is inapplicable to actions or proceedings commenced by a public entity or utility to acquire real property or any interest in real property for the use of "water, sewer, electricity, telephone, natural gas, or flood control facilities or rights-of-way," where these acquisitions neither require removal or destruction of existing improvements nor render the property unfit for the owner's present or proposed use. (*Ev.C. 824(c)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(3) *Property Without Relevant Market*.

*Cross-Reference:* 8 Summary (10th), *Constitutional Law*, §1230.



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## CHAPTER V - Opinion Evidence

### IV. OPINION ON VALUE OF PROPERTY

#### B. Value Shown Only by Opinion.

##### 1. General Rule.

*1 Witkin Cal. Evid. Opinion Evid § 101*

[§ 101] General Rule.

The decision in *Los Angeles v. Faus* (1957) 48 C.2d 672, 676, 312 P.2d 680, and the statement of its rule in former C.C.P. 1845.5, authorized proof of other sales as substantive evidence. *Ev.C. 813(a)* does not: "The value of property may be shown only by the opinions" of qualified persons (*infra*, §102). (See BAJI (8th ed.), No. 11.80; *Aetna Life & Cas. Co. v. Los Angeles* (1985) 170 C.A.3d 865, 877, 216 C.R. 831.) The reason for this unequivocal position is thus stated:

"The value of property has long been regarded as a matter to be established in judicial proceedings by expert opinion. If this rule were changed to permit the court or jury to make a determination of value upon the basis of comparable sales or other basic valuation data, the trial of an eminent domain case might be unduly prolonged as witness after witness is called to present such testimony. In addition, the court or jury would be permitted to make a determination of value without the assistance of experts qualified to analyze and interpret the facts established by the testimony and to make an award far above or far below what any expert who testified considers the property is worth--even though the court or jury may know little or nothing of property values and may never have seen the property being condemned or the comparable property mentioned in the testimony. The Commission believes that the net result would be lengthened condemnation proceedings and awards which would often not realize the constitutional objective of just compensation. To avoid these consequences, the long established rule that value is a matter to be established by opinion evidence should be reaffirmed and codified." (3 Com. Reports, p. A-6.)

Under this rule, a *view of the scene* is only *illustrative* of the testimony. (*Ev.C. 813(b)*, 2 *Cal. Evidence* (4th), *Demonstrative, Experimental, and Scientific Evidence*, §31.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See CACI, No. 3515 [valuation testimony in eminent domain case]. *West's Key Number Digest*, Evidence k.471(20), 474(18), 488



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## CHAPTER V - Opinion Evidence

### IV. OPINION ON VALUE OF PROPERTY

#### B. Value Shown Only by Opinion.

#### 2. Opinions of Expert or Owner.

#### 1 *Witkin Cal. Evid. Opinion Evid* § 102

[§ 102] Opinions of Expert or Owner.

(1) *General Rule.* *Ev.C. 813(a)* codifies the familiar rule that opinions on value may be given not only by an expert (see *supra*, §65), but by the owner of the property (see *supra*, §18). (See *Long Beach City High School Dist. of Los Angeles v. Stewart* (1947) 30 C.2d 763, 772, 185 P.2d 585; *Los Angeles City High School Dist. v. Rodriguez* (1955) 135 C.A.2d 760, 765, 287 P.2d 871; *People v. Nahabedian* (1959) 171 C.A.2d 302, 309, 340 P.2d 1053; *San Bernardino County Flood Control Dist. v. Sweet* (1967) 255 C.A.2d 889, 898, 63 C.R. 640 [witness with knowledge and experience can give opinion though not a real estate appraiser or broker]; *People v. Douglas* (1971) 15 C.A.3d 814, 822, 93 C.R. 644 [landowner may properly call state appraiser who made valuation on which security deposit was based]; *Padre Dam Mun. Water Dist. v. Burkhardt* (1995) 38 C.A.4th 988, 993, 45 C.R.2d 506 [in eminent domain proceeding, although coowner of property had right to testify as to value, it was reversible error to admit that testimony in absence of compliance with exchange requirements of C.C.P. 1258.250; see 2 *Cal. Evidence* (4th), *Discovery*, §204]; 20 *Hastings L. J.* 650 [comparison of federal and California practices regarding discovery of expert knowledge and opinion in condemnation proceedings]; 66 A.L.R.4th 213 [right to compel testimony of opponent's expert].)

(2) *Who Is Owner.* *Ev.C. 813(a)* originally referred merely to "[t]he owner of the property interest being valued." Amendments in 1978 and 1980 expanded the coverage to include the following:

(a) "A *person entitled to possession* of the property." (*Ev.C. 813(c)(1)*.) This includes those claiming ownership, e.g., in litigation between a buyer and seller under a contract of sale of real property, or between a landlord and tenant over trade fixtures. (Legislative Com. Comment on 1980 amendment.)

(b) The *spouse* of the owner. (*Ev.C. 813(a)(2)*.) Thus, either husband or wife may testify to the value of community property and to the value of the *separate property of either*. This may be useful in cases where the character of the property is in dispute between them, and also where the nonowning spouse may be a more competent valuation witness than the owning spouse. (Legislative Com. Comment on 1980 amendment.)

(c) "Either party in an action or proceeding to determine the ownership of the property between the parties if the court determines that it would not be in the interest of efficient administration of justice to determine the issue of ownership prior to the admission of the opinion of the party." (*Ev.C. 813(c)(2)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *General Rule.* See *Redevelopment Agency of San Diego v. Attisha* (2005) 128 C.A.4th 357, 378, 27 C.R.3d 126 [in eminent domain proceeding, trial judge properly excluded lessee's proffered testimony on goodwill valuation, where

testimony was based on informal discussions with brokers whose names she could not recall and a few store owners, there was no showing she had expertise in any valuation methods, and she had not been designated as expert witness under *C.C.P. 1258.250*; relying on *Padre Dam Mun. Water Dist. v. Burkhardt* (1995) 38 *C.A.4th* 988, 45 *C.R.2d* 506, text, p. 650]. *West's Key Number Digest*, Evidence k.474(18)



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CHAPTER V - Opinion Evidence

IV. OPINION ON VALUE OF PROPERTY

B. Value Shown Only by Opinion.

3. Opinions of Knowledgeable Designees.

*1 Witkin Cal. Evid. Opinion Evid § 103*

[§ 103] Opinions of Knowledgeable Designees.

In *Pleasant Hill v. First Baptist Church* (1969) 1 C.A.3d 384, 411, 413, 82 C.R. 1, the pastor of a church was held not to be "an owner" and therefore not qualified to testify to the value of church land.

This holding was nullified by a 1978 amendment to *Ev.C. 813*, adding the following: "An officer, regular employee, or partner designated by a corporation, partnership, or unincorporated association that is the owner of the property or property interest being valued, if the designee is knowledgeable as to the value of the property or property interest." (*Ev.C. 813(a)(3)*.) The designee may be knowledgeable as a result of being instrumental in its acquisition or management or as a result of being knowledgeable as to its character and use. (Law Rev. Com. Comment to 1978 amendment to *Ev.C. 813*.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER V - Opinion Evidence

### IV. OPINION ON VALUE OF PROPERTY

#### C. Bases of Opinion.

##### 1. In General.

#### *1 Witkin Cal. Evid. Opinion Evid § 104*

[§ 104] In General.

*Ev.C. 814* states a broad general principle concerning the matters upon which an opinion may be based, in terms similar to those in *Ev.C. 801(b)* (*supra*, §30), but adding language appropriate to eminent domain. (See 3 Com. Reports, p. A-6.)

The section was amended in 1975 to eliminate as unnecessary the listing of particular matters constituting fair market value (see *C.C.P. 1263.320*; 8 *Summary (9th)*, *Constitutional Law*, §1016). As further amended in 1980 to make technical changes in wording, the section reads as follows:

"The opinion of a witness as to the value of property is limited to such an opinion as is based on matter *perceived by or personally known* to the witness *or made known* to the witness at or before the hearing, *whether or not admissible*, that is of a *type that reasonably may be relied upon* by an expert in forming an opinion as to the value of property, including but not limited to the matters listed in Sections 815 to 821, inclusive, *unless a witness is precluded by law* from using such matter as a basis for an opinion." (See 18 *Hastings L. J.* 152.)

The Legislative Committee offered this comment on amended *Ev.C. 814*: "While the value of property may be determined by reference to matters listed in Sections 815 to 821 where appropriate, an opinion as to value may also be based on any other matter that satisfies the general requirements of Section 814. See, e.g., *City of Los Angeles v. Retlaw Enterprises, Inc.* 16 *Cal.3d* 473, 486 n. 8, 546 *P.2d* 1380, 1388 n.8, 128 *Cal. Rptr.* 436, 444 n.8 (1976) (price trend data admissible); *People ex rel. Dep't of Transp. v. Southern Pac. Transp. Co.*, 84 *Cal. App.3d* 315, 325, 148 *Cal. Rptr.* 535, 541 (1978) (replacement cost of land as opposed to improvements admissible); *South Bay Irr. Dist. v. California-American Water Co.*, 61 *Cal. App.3d* 944, 980, 133 *Cal. Rptr.* 166, 191 (1976) (capitalization based on nonrental income admissible); *Redevelopment Agency v. Del-Camp Invs., Inc.*, 38 *Cal. App.3d* 836, 842, 113 *Cal. Rptr.* 762, 766-67 (1974) (capitalization based on gross rentals admissible); *People ex rel. Dep't of Pub. Works v. Home Trust Inv. Co.*, 8 *Cal. App.3d* 1022, 1026, 87 *Cal. Rptr.* 722, 724 (1970) (noncomparable sales admissible in appropriate circumstances)."

The trial judge is vested with considerable discretion in determining whether to admit or exclude valuation evidence, and where the witness' opinion has both proper and improper bases, the judge may strike it or permit it to remain and consider the impropriety in determining what weight to give it. (*County Sanitation Dist. No. 8 v. Watson Land Co.* (1993) 17 *C.A.4th* 1268, 1282, 22 *C.R.2d* 117.)

**SUPPLEMENT:** [This section is current through the latest supplement]



See *Fragale v. Faulkner* (2003) 110 C.A.4th 229, 240, 1 C.R.3d 616, 6 Summary (10th), Torts, §1717 [in home buyer's action against seller and broker for misrepresentations as to defects, trial judge did not err in denying plaintiff's motion to reopen case to allow him to testify as to value of property; offer of proof, which indicated plaintiff was familiar with homes in area, provided no foundation for opinion as to what market value would have been if true facts regarding lack of permits and failure to comply with building codes were known].

*Cross-Reference:* 8 Summary (10th), Constitutional Law, §1230. West's Key Number Digest, Evidence k.501(7), 555.6 et seq.



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#### C. Bases of Opinion.

#### 2. Sales.

#### a. Other Sales of Property Being Condemned.

*1 Witkin Cal. Evid. Opinion Evid § 105*

[§ 105] Other Sales of Property Being Condemned.

"When relevant to the determination of the value of property, a witness may take into account as a basis for an opinion the price and other terms and circumstances of any sale or contract to sell and purchase which included the property or property interest being valued or any part thereof if the sale or contract was freely made in good faith within a reasonable time before or after the date of valuation, except that in an eminent domain proceeding where the sale or contract to sell and purchase includes only the property or property interest being taken or a part thereof, such sale or contract to sell and purchase may not be taken into account if it occurs after the filing of the lis pendens." (*Ev.C. 815*; see *Garden Grove School Dist. of Orange v. Hendler* (1965) 63 C.2d 141, 145, 45 C.R. 313, 403 P.2d 721; *San Diego Gas & Elec. Co. v. 3250 Corp.* (1988) 205 C.A.3d 1075, 1084, 252 C.R. 853 [sale of fee interest in 4,000-acre parcel after lis pendens was filed did not include *only* the property interest taken, which was merely a nonexclusive easement; thus, *Ev.C. 815* did not exclude evidence of sale]; *18 Hastings L. J. 146*; 55 A.L.R.2d 791 [admissibility, in eminent domain proceeding, of evidence of price paid for subject property in sale occurring prior to proceeding].)

In commenting on the applicability of *Ev.C. 815* to cases of project enhancement (see *infra*, §109), the court said in *Los Angeles v. Retlaw Enterprises* (1976) 16 C.3d 473, 128 C.R. 436, 546 P.2d 1380: "[A] project enhanced sale of property other than the subject property is not inadmissible per se; its admissibility is committed to the discretion of the trial court. No different rule is required merely because the proffered project enhanced sale is a sale of the subject property itself. The test for the admissibility of sales of the subject property under section 815 is substantially identical to that for the admissibility of comparable properties under section 816; sales are admissible when they illuminate the value of the subject property at the date of valuation." (16 C.3d 482, 483.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Evidence k.555.6(10)



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## CHAPTER V - Opinion Evidence

### IV. OPINION ON VALUE OF PROPERTY

#### C. Bases of Opinion.

##### 2. Sales.

##### b. Other Sales of Comparable Property.

##### 1 Witkin Cal. Evid. Opinion Evid § 106

[§ 106] Other Sales of Comparable Property.

(1) *Statutory Rule and Test of Comparability.* A witness may take into account the price and other terms and circumstances of a normal sale or contract to sell "comparable property." (*Ev.C. 816*; see *Los Angeles v. Faus* (1957) 48 C.2d 672, 676, 312 P.2d 680 [abrogating former California rule of exclusion]; 9 *Hastings L. J.* 101; 5 *U.C.L.A. L. Rev.* 151; 31 *So. Cal. L. Rev.* 204; 85 A.L.R.2d 110 [admissibility of evidence of sale price of other real property].)

The section spells out the requisites: "In order to be considered comparable, the sale or contract must have been made sufficiently near in time to the date of valuation, and the property sold must be located sufficiently near the property being valued, and must be sufficiently alike in respect to character, size, situation, usability, and improvements, to make it clear that the property sold and the property being valued are comparable in value and that the price realized for the property sold may fairly be considered as shedding light on the value of the property being valued." (See *Los Angeles v. Faus*, *supra*, 48 C.2d 678, quoting McCormick to this effect; *Covina Union High School Dist. of Los Angeles v. Jobe* (1959) 174 C.A.2d 340, 350, 345 P.2d 78 [parcels may be similar though different in size]; *People v. Silveira* (1965) 236 C.A.2d 604, 623, 46 C.R. 260 [same]; *Pacific Gas & Elec. Co. v. Zuckerman* (1987) 189 C.A.3d 1113, 1130, 234 C.R. 630 ["Property cannot be considered comparable where it includes various fixtures, rights, improvements, and personal property which the property being condemned does not include"]; 1 C.E.B., *Condemnation Practice* 2d, §4.28; 85 A.L.R.2d 130 [criteria of similarity]; 89 A.L.R.4th 456, 493 [testimony of property valuation expert, as to basis for opinion, on matters otherwise excludable as hearsay].)

(2) *Judge's Discretion in Determining Comparability.* The trial judge's obligation in considering admissibility of evidence on an allegedly noncomparable sale "is to determine whether the sale price of one property could shed light upon the value of the condemned property, notwithstanding the differences that might exist between them. If it resolves that question affirmatively, it can admit the evidence. The jury then, on the basis of all the evidence, determines the extent to which any differences between the condemned property and the comparable property affect their relative values." (*Los Angeles v. Retlaw Enterprises* (1976) 16 C.3d 473, 482, 128 C.R. 436, 546 P.2d 1380.) (See also *San Luis Obispo v. Bailey* (1971) 4 C.3d 518, 526, 93 C.R. 859, 483 P.2d 27 [comparable sales 30 to 50 miles away from condemned land; admitted]; *People v. Wasserman* (1966) 240 C.A.2d 716, 738, 50 C.R. 95; *Community Redevelopment Agency of Los Angeles v. Henderson* (1967) 251 C.A.2d 336, 342, 59 C.R. 311 [properties much larger, in different areas with different zoning and uses; rejected]; *Los Angeles v. Union Distr. Co.* (1968) 260 C.A.2d 125, 130, 67 C.R. 107 [property across the street, improved, rented and used, excluded; condemned property was unimproved and vacant for over 40 years]; *Pleasant Hill v. First Baptist Church* (1969) 1 C.A.3d 384, 415, 82 C.R. 1 [properties less than one

mile apart but in different cities; admitted]; *Golden Gate Bridge & Highway Trans. Dist. v. Muzzi* (1978) 83 C.A.3d 707, 717, 148 C.R. 197 [evidence of sale of similar bayfront property was properly admitted, even though sale was by estate and involved no bidding].)

(3) *Distinction: Exchange of Property.* A transaction involving only an exchange of properties, with no monetary value fixed for either property, is not admissible as a comparable sale. (*People v. Reardon* (1971) 4 C.3d 507, 515, 93 C.R. 852, 483 P.2d 20 [harmless error in trial judge's refusal to permit cross-examination to indicate that "trade" was actually "sale"].)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Evidence k.555.6(10)



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IV. OPINION ON VALUE OF PROPERTY

C. Bases of Opinion.

2. Sales.

c. Contract To Sell.

*1 Witkin Cal. Evid. Opinion Evid § 107*

[§ 107] Contract To Sell.

The fact that a sale has not yet been consummated by transfer of the title has no bearing on the circumstances of negotiation which make the sale price useful evidence of value. On the other hand, there is a danger that a landowner anticipating condemnation may hastily conclude a collusive agreement of sale for an artificially high price. The correct approach should be to admit the evidence, subject to challenge by a showing of bad faith. (See 3 Com. Reports, p. A-47.) *Ev.C. 815* and *816* establish this rule by allowing consideration of any sale "or contract to sell and purchase," with the usual good faith qualification.

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C. Bases of Opinion.

2. Sales.

d. Subsequent Sales.

*1 Witkin Cal. Evid. Opinion Evid § 108*

[§ 108] Subsequent Sales.

There is some danger in considering a sale occurring after the condemnation proceeding has begun, for the proceeding may itself affect property values in the area. However, the evidence is too useful to be arbitrarily excluded. Subsequent sales may indicate a trend in the market, and they are particularly important when prior sales are few or more remote from the date of taking. (See 3 Com. Reports, p. A-37; and see also *Los Angeles v. Hoe* (1955) 138 C.A.2d 74, 79, 291 P.2d 98 [brief statement indicating admissibility].) *Ev.C. 815* and *816*, supra, §§105, 106, authorize such proof by referring to sales made within a reasonable time "before or after the date of valuation." (See 1 C.E.B., Condemnation Practice 2d, §4.30.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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### IV. OPINION ON VALUE OF PROPERTY

#### C. Bases of Opinion.

#### 2. Sales.

#### e. Trend in Sales Prices or Values.

*1 Witkin Cal. Evid. Opinion Evid § 109*

[§ 109] Trend in Sales Prices or Values.

The trial judge has discretion to admit evidence of the price trend of neighboring properties, whether comparable or noncomparable, if the evidence can shed light on the value of the condemned property. "To deny such discretionary power would be to sanctify a wooden conception of comparability that would unjustifiably shackle the fact-finding process." (*Los Angeles v. Retlaw Enterprises* (1976) 16 C.3d 473, 485, 128 C.R. 436, 546 P.2d 1380.) But price-trend data based on dissimilar property is not necessarily relevant. "Consequently, the mere fact that a witness testifies that he thinks evidence of price trends for dissimilar property will serve to illuminate the valuation of the subject property will not insure the admissibility of such evidence. The trial court must consider the objection of the opposing party and admit the evidence only if it concludes that it has probative value." (16 C.3d 487.) (See 65 Cal. L. Rev. 512.)

Enhancement due to speculation based on anticipation of imminent taking of the designated parcel is an improper element, but enhancement due to increase in land values of other property near the project is a proper element. Hence, evidence of other sales of such property is admissible. (*Merced Irr. Dist. v. Woolstenhulme* (1971) 4 C.3d 478, 499, 501, 93 C.R. 833, 483 P.2d 1.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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### IV. OPINION ON VALUE OF PROPERTY

#### C. Bases of Opinion.

#### 3. Leases.

#### *1 Witkin Cal. Evid. Opinion Evid § 110*

[§ 110] Leases.

(1) *Lease of Property Being Condemned.* *Ev.C. 817* provides that a witness may consider the rent and other circumstances of a lease of the property being condemned, as follows:

(a) *Ordinary lease.* "[W]hen relevant to the determination of the value of property, a witness may take into account as a basis for an opinion the rent reserved and other terms and circumstances of any lease which included the property or property interest being valued or any part thereof which was in effect within a reasonable time before or after the date of valuation." (*Ev.C. 817(a)*.)

An exception is made to exclude untrustworthy leases (made with knowledge of the pendency of the action), similar to that made for evidence of other sales of the property being condemned (*Ev.C. 815*, supra, §105): "[I]n an eminent domain proceeding where the lease includes only the property or property interest being taken or a part thereof, such lease may not be taken into account in the determination of the value of property if it is entered into after the filing of the *lis pendens*." (*Ev.C. 817(a)*.)

(b) *Percentage lease.* *Ev.C. 817(b)* applies to a *percentage lease* providing for a rental fixed by a portion of the gross income from a business conducted on the leased property. But the witness may consider such a lease only for the purpose of arriving at an opinion as to "the reasonable net rental value attributable to the property or property interest being valued as provided in Section 819 or determining the value of a leasehold interest." (See 1 C.E.B., *Condemnation Practice* 2d, §458; on *Ev.C. 819*, see *infra*, §111.)

(2) *Lease of Comparable Property.* The witness may take into account the rent reserved and other terms and circumstances of "any lease of comparable property," provided that it was "freely made in good faith within a reasonable time before or after the date of valuation." But this may be considered only to determine the capitalized value of the reasonable net rental value or the value of a leasehold interest. (*Ev.C. 818*.) (See *Ontario v. Kelber* (1972) 24 C.A.3d 959, 969, 101 C.R. 428 [leases on airport property smaller in size than condemned property and up to 75 miles distant; admitted].)

**SUPPLEMENT:** [This section is current through the latest supplement]





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#### C. Bases of Opinion.

#### 4. Other Matters.

#### 1 Witkin Cal. Evid. Opinion Evid § 111

#### [§ 111] Other Matters.

The Evidence Code specifies three additional matters that may be considered by the witness in reaching an opinion on value:

(1) *Capitalization of Income*. "[T]he capitalized value of the reasonable net rental value attributable to the land and existing improvements thereon (as distinguished from the capitalized value of the income or profits attributable to the business conducted thereon)." (*Ev.C. 819*; see 3 Com. Reports, p. A-55; *California v. Covich* (1968) 260 C.A.2d 663, 666, 67 C.R. 280 [discussing techniques of the "income approach"--"building residual" or "gross multiplier" and "property reversion" or "property residual"]; *San Diego Metropolitan Transit Dev. Bd. v. Cushman* (1997) 53 C.A.4th 918, 930, 62 C.R.2d 121 [where sole issue was amount of severance damages stemming from reduced ability to expand existing retail building, landowner's income approach, which was based on square-foot value of nonexistent improvements, was improper methodology; *Ev.C. 819* does not sanction capitalization of reasonable rental value attributable to planned or future improvements not in existence as of date of value]; 18 *Hastings L. J.* 151.)

(2) *Reproduction Cost*. "[T]he value of the property or property interest being valued as indicated by the value of the land together with the cost of replacing or reproducing the existing improvements thereon, if the improvements enhance the value of the property or property interest for its highest and best use, less whatever depreciation or obsolescence the improvements have suffered." (*Ev.C. 820*; see 3 Com. Reports, p. A-61; 18 *Hastings L. J.* 150.)

(3) *Conditions in Vicinity*. "[T]he nature of the improvements on properties in the general vicinity of the property or property interest being valued and the character of the existing uses being made of such properties." (*Ev.C. 821*, based on former C.C.P. 1845.5.)

The "appraisal trinity," approved by many authorities, was described in *California v. Covich, supra*, 260 C.A.3d 665, as follows: "This combines three methods of 'approaches' by appraisers to reach the market value of real estate: (1) the current cost of reproducing the property less depreciation from all sources; (2) the 'market data' approach or value indicated by recent sales of comparable properties in the market, and (3) the 'income approach,' or the value which the property's net earning power will support based upon the capitalization of net income. This three-approach means of reaching market value is usually combined." (See also *California v. Stevenson* (1970) 5 C.A.3d 60, 63, 84 C.R. 742 [*Ev.C. 815* et seq. substantially codified "trinity" method].)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Evidence k.555.6(6)



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CHAPTER V - Opinion Evidence

IV. OPINION ON VALUE OF PROPERTY

D. Improper Bases.

1. In General.

*1 Witkin Cal. Evid. Opinion Evid § 112*

[§ 112] In General.

*Ev.C. 822(a)*, expressly applicable to eminent domain and inverse condemnation proceedings, lists a number of improper matters (see *infra*, §113 et seq.). *Ev.C. 822(b)*, added in 1980, states that in other proceedings, these matters are likewise inadmissible and not a basis for an opinion, "except to the extent permitted under the rules of law otherwise applicable." The Legislative Committee Comment on the 1980 amendment explains the purpose of this subdivision: The express exclusion of these matters in eminent domain and inverse condemnation cases does not imply that they are admissible in other cases; in other cases admissibility is governed by *Ev.C. 814* (*supra*, §104) and the general rules of relevancy, prejudice, etc.

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER V - Opinion Evidence

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## D. Improper Bases.

## 2. Forced Sale or Sale to Possible Condemnor.

*1 Witkin Cal. Evid. Opinion Evid § 113*

[§ 113] Forced Sale or Sale to Possible Condemnor.

(1) *Forced Sales in General.* The theory on which another sale is admitted necessarily assumes that the circumstances permitted the negotiation of a price based on the fair market value of the property. If the sale was made under compulsion, e.g., by foreclosure or execution, the price is not freely determined. Accordingly, such forced sales are not a proper basis for an opinion on value. (*Ev.C. 815, 816, supra*, §105 ["If the sale or contract was freely made in good faith"]; 3 Com. Reports, p. A-40; but see *Redevelopment Agency of Santa Monica v. Zwerman* (1966) 240 C.A.2d 70, 75, 49 C.R. 443 [probate sale is not a forced sale]; *San Diego Gas & Elec. Co. v. 3250 Corp.* (1988) 205 C.A.3d 1075, 1083, 252 C.R. 853 [following reasoning of *Zwerman* case; bankruptcy sale of subject property to condemnees was not a forced sale].)

An ordinary private sale, however, cannot be excluded on the theory that necessity "forced" the seller to agree to a lower price than would have been acceptable in the absence of financial difficulties. In *Garden Grove School Dist. of Orange v. Hendler* (1965) 63 C.2d 141, 45 C.R. 313, 403 P.2d 721, the trial judge allowed plaintiff to show a prior sale of the same property to defendants, and also allowed defendants to show that their vendor was in financial distress, thus leaving for the jury the determination of the weight to be given to the sale price. *Held*, this was proper. (63 C.2d 145.) (See also 3 Com. Reports, p. A-41.)

(2) *Sale to Possible Condemnor.* California formerly took the position that a sale to a possible condemnor might be either a forced sale or sufficiently voluntary to constitute a reasonable indication of market value; hence, it could be admitted with a cautionary instruction. (See *People v. Murata* (1958) 161 C.A.2d 369, 374, 326 P.2d 947; *Covina Union High School Dist. of Los Angeles v. Jobe* (1959) 174 C.A.2d 340, 345, 347, 345 P.2d 78.) Many courts were opposed, and the Law Revision Commission sided with the opposition: "Such a sale does not involve a willing buyer and a willing seller. The costs, risks and delays of litigation are factors that often affect the ultimate price. Moreover, sales to condemnors often involve partial takings. In such cases valid comparisons are made more difficult because of the difficulty in allocating the compensation between the value of the part taken and the severance damage or benefit to the remainder. These sales, therefore, are not sales in the 'open market' and should not be considered in a determination of market value." (3 Com. Reports, p. A-7; see also p. A-37.)

Accordingly, *Ev.C. 822(a)(1)* prohibits consideration of "[t]he price or other terms and circumstances of an acquisition of property or a property interest if the acquisition was for a public use for which the property could have been taken by eminent domain." (See *18 Hastings L. J.* 155.) A 1987 amendment, however, states an exception for "the price or other terms and circumstances of an acquisition of property appropriated to a public use or a property interest so appropriated ... if the acquisition was for the same public use for which the property could have been taken by eminent

domain." In *San Francisco v. Golden Gate Heights Inv.* (1993) 14 C.A.4th 1203, 1210, 18 C.R.2d 467, an eminent domain proceeding involving a city's condemnation of defendant's property for open space purposes, the court approved the use of this exception to allow consideration of the city's purchase, for the same purpose, of privately owned parcels adjacent to the subject property. (But see 1 C.E.B., Condemnation Practice 2d, §§4.29, 9.54 [criticizing the approach of the *Golden Gate Heights* court and arguing that the exception was intended to apply only where the sale property was already devoted to a public use]; see also *Ventura County Flood Control Dist. v. Campbell* (1999) 71 C.A.4th 211, 221, 222, 83 C.R.2d 725 [in condemnation proceedings by flood control district to acquire ranch, which included underground aggregate, *Ev.C. 822(a)(1)* did not, as means of determining aggregate's value, preclude consideration of open bids to remove it; bids likely reflected aggregate's value on open market rather than any enhanced value resulting from need for removal resulting from district's flood control plans].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Sale to Possible Condemnor.* As amended in 2000, *Ev.C. 822(a)(1)* excludes the price or other terms and circumstances of an acquisition of property or a property interest if the acquisition was for a public use for which the property could have been taken by eminent domain. However, evidence of this type is not inadmissible in a proceeding involving the valuation of all or part of a water system as defined in *Pub.Util.C. 240*.

According to the Law Revision Commission, the special exception relating to property appropriated to public use (text, p. 659) was deleted "in reliance on general evidentiary principles. See, e.g., Section 823 ('Notwithstanding any other provision of this article, the value of property for which there is no relevant, comparable market may be determined by any method of valuation that is just and equitable.');" see also *Code Civ. Proc. §1263.320(b)* (fair market value). Thus, evidence of an acquisition that is otherwise inadmissible under subdivision (a)(1) may, in an appropriate case, be admissible under Section 823 if a private market is lacking, e.g., the acquisition involves a special purpose property such as a school, church, cemetery, park, utility corridor, or similar property."

"The new exception added to subdivision (a)(1) is intended to apply in an eminent domain or inverse condemnation proceeding that relates to a public agency's acquisition or taking of all or any part of a water system owned by a water company." (Law Rev. Com. Comment on 2000 amendment of *Ev.C. 822*.)

See *Emeryville Redevelopment Agency v. Harcros Pigments* (2002) 101 C.A.4th 1083, 1096, 125 C.R.2d 12 [in eminent domain proceeding by redevelopment agency, trial judge erred in allowing landowner to use agency's purchases of nearby properties as evidence of comparable sales; properties were purchased for public use within meaning of *Ev.C. 822(a)(1)*, and they did not come within former exception for property appropriated to public use (text, p. 659)].



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## CHAPTER V - Opinion Evidence

### IV. OPINION ON VALUE OF PROPERTY

#### D. Improper Bases.

#### 3. Offer, Option, or Listing.

##### *1 Witkin Cal. Evid. Opinion Evid § 114*

[§ 114] Offer, Option, or Listing.

Offers to buy or sell the same or comparable property are as relevant as actual sales, and their admissibility under appropriate conditions has been recognized. (See *Los Angeles City High School Dist. v. Kita* (1959) 169 C.A.2d 655, 661, 663, 338 P.2d 60; 1 C.E.B., Condemnation Practice 2d, §4.29; 25 A.L.R.4th 571 [unaccepted offer for purchase of real property]; 25 A.L.R.4th 615 [unaccepted offer to sell or buy comparable real property]; 25 A.L.R.4th 983 [unaccepted offer to sell, or listing of, real property].)

But the Law Revision Commission, following the majority view, thought the dangers of this type of evidence outweighed its usefulness. (See 3 Com. Reports, p. A-41.) The Report (p. A-7) points out that oral offers, not enforceable because of the statute of frauds, are loosely made without risk, and are easy to fabricate; and that written offers, though better evidence, open up too wide a range of collateral inquiry as to the motives of the absent offeror or his or her ability to buy. The recommendation, that offers be entirely excluded as bases for an opinion on market value, and be allowed only as admissions, was carried out in *Ev.C. 822(a)(2)*, making inadmissible the price at which "*an offer or option to purchase or lease the property or property interest being valued or any other property was made, or the price at which such property or interest was optioned, offered, or listed for sale or lease, except that an option, offer, or listing may be introduced by a party as an admission of another party to the proceeding.*" The section further precludes use of an admission "as direct evidence upon any matter that may be shown only by opinion evidence under Section 813." (See *18 Hastings L. J.* 156.)

Where the limited admission provision of *Ev.C. 822* conflicts with *Ev.C. 1152*, making offers of compromise inadmissible (see *1 Cal. Evidence (4th), Circumstantial Evidence, §142*), the latter prevails. (See *People v. Southern Pac. Trans. Co.* (1973) 33 C.A.3d 960, 968, 109 C.R. 525 [condemnor's offer made during settlement negotiations, although admissible under *Ev.C. 822(a)(2)* as admission that condemnor had opinion as to value, held violative of strong public policy of encouraging settlements expressed in *Ev.C. 1152*].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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4. Assessed Valuation.

1 *Witkin Cal. Evid. Opinion Evid* § 115

[§ 115] Assessed Valuation.

Assessments of property are seldom based on fair market value, and evidence of them is generally excluded. (See 3 Com. Reports, p. A-48.) The California rule allowing assessment valuations to be brought out on cross-examination (see *Central Pac. Ry. Co. v. Feldman* (1907) 152 C. 303, 310, 92 P. 849) was strongly criticized by the Law Revision Commission (see 3 Com. Reports, p. A-49), and *Ev.C. 822(a)(3)* states a positive rule of *exclusion* of "[t]he value of any property or property interest as assessed for taxation purposes or the amount of taxes which may be due on the property."

However, the following proviso is added: "[N]othing in this subdivision prohibits the consideration of actual or estimated taxes for the purpose of determining the *reasonable net rental value* attributable to the property or property interest being valued."

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#### 5. Opinion on Value of Other Property.

*1 Witkin Cal. Evid. Opinion Evid § 116*

[§ 116] Opinion on Value of Other Property.

Actual sales of comparable property are properly considered (see *supra*, §106), but a mere opinion as to the value of other property raises too many collateral questions to justify its admission, and it is accordingly excluded. (*Ev.C. 822(a)(4)*; see 3 Com. Reports, p. A-8; *Sacramento & San Joaquin Drainage Dist. v. Jarvis* (1959) 51 C.2d 799, 804, 336 P.2d 530; *People v. Nahabedian* (1959) 171 C.A.2d 302, 309, 340 P.2d 1053 [asking prices are objectionable on that ground]; *California v. Stevenson* (1970) 5 C.A.3d 60, 63, 84 C.R. 742, citing the text [evidence excluded as to valuation but admissible to impeach expert witness; see 3 *Cal. Evidence (4th)*, *Presentation at Trial*, §253]; *Los Angeles v. Waller* (1979) 90 C.A.3d 766, 775, 776, 154 C.R. 12 [same]; but see *Merced Irr. Dist. v. Woolstenhulme* (1971) 4 C.3d 478, 502, 93 C.R. 833, 483 P.2d 1 [in using comparable sales under *Ev.C. 816* as basis of opinion of subject property's value, expert is not precluded by *Ev.C. 822(a)(4)* from explaining any adjustments that must be made in the comparable sales price].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Escondido Union School Dist. v. Casa Suen os De Oro* (2005) 129 C.A.4th 944, 983, 29 C.R.3d 89 [in eminent domain proceeding, failure of property owner's appraisal expert to verify comparable sales data contained in his appraisal did not render data inadmissible but rather went to weight and credibility of expert's comparison methodology]. *West's Key Number Digest*, Evidence k.555.6(10)



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#### 6. Other Improper Matters.

#### 1 Witkin Cal. Evid. Opinion Evid § 117

[§ 117] Other Improper Matters.

*Ev.C. 822* lists the following additional matters that are inadmissible and not to be taken into account as the basis for an opinion:

(1) *Noncompensable Items*. "The influence upon the value of the property or property interest being valued of any noncompensable items of value, damage, or injury." (*Ev.C. 822(a)(5)*; see *People v. Curtis* (1967) 255 C.A.2d 378, 393, 63 C.R. 138 [concurring opinion]; *Sacramento & San Joaquin Drainage Dist. v. Goehring* (1970) 13 C.A.3d 58, 65, 91 C.R. 375 [landowner improperly allowed to testify about unenforceable "right" to cross over creek].)

(2) *Capitalized Income of Other Property*. "The capitalized value of the income or rental from any property or property interest other than that being valued." (*Ev.C. 822(a)(6)*.) (See *People v. Andresen* (1987) 193 C.A.3d 1144, 1165, 238 C.R. 826, 8 Summary (9th), *Constitutional Law*, §1020 [capitalization of basalt royalties was not excludable under *Ev.C. 822(a)(6)* where it related to *subject* property and not *other* property]; 23 A.L.R.3d 731 [admissibility, in eminent domain proceeding, of rental value of other real property].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Capitalized Income of Other Property*. Cf. *Hurwitz v. Orange* (2004) 122 C.A.4th 835, 855, 856, 19 C.R.3d 213 [in eminent domain proceeding, trial judge did not err in allowing property owner's valuation expert to testify to 8% capitalization rate based on expert's own general experience; as long as expert does not rely on particular and identifiable acquisition, *Ev.C. 822(a)(6)* is not violated].

*Cross-Reference:* 8 Summary (10th), *Constitutional Law*, §1234.





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## CHAPTER VI - Hearsay

### I. IN GENERAL

#### A. Reasons for Exclusion.

#### *1 Witkin Cal. Evid. Hearsay § 1*

#### [§ 1] Reasons for Exclusion.

(1) *Hearsay Defined.* Hearsay evidence is evidence of a statement made out of court and offered to prove the truth of the matter stated. Unless it comes within one of the established exceptions to the *hearsay rule*, evidence of this type is inadmissible. (*Ev.C. 1200*, *infra*, §4; see Unif. Rule 801(c) (13B (Part 1B) U.L.A. (Master Ed.), p. 97); for the history of the rule and its various explanations, see Model Code of Evidence, Int. Note, p. 217; 2 McCormick 5th, §246; 5 Wigmore (Chadbourn Rev.) §1361; 2 Wharton, *Crim. Evidence* (14th ed.), §257 et seq.; 40 *Harv. L. Rev.* 712; 48 *Harv. L. Rev.* 1138; 62 *Harv. L. Rev.* 177; 9 *U.C. Davis L. Rev.* 1; 29 *Am.Jur.2d* (1994 ed.), *Evidence* §658 et seq.)

(2) *Traditional Rationale for Exclusion.* The chief reasons for excluding hearsay evidence are said to be: (a) The statements are not made under *oath*; (b) the adverse party has *no opportunity to cross-examine* the person who made them; and (c) the jury cannot observe the person's *demeanor* as he or she makes them. (See *Englebreton v. Industrial Acc. Com.* (1915) 170 C. 793, 798, 151 P. 421; *People v. Nagy* (1926) 199 C. 235, 237, 248 P. 906; *People v. Bob* (1946) 29 C.2d 321, 325, 175 P.2d 12; *Korsak v. Atlas Hotels* (1992) 2 C.A.4th 1516, 1523, 3 C.R.2d 833, quoting the text; 2 McCormick 5th, §245.) Protection of the constitutional right of confrontation is an additional justification for the exclusion of hearsay. (See *People v. Valdez* (1947) 82 C.A.2d 744, 749, 187 P.2d 74; 5 Wigmore (Chadbourn Rev.) §§1365, 1395 et seq.; 3 *Cal. Evidence* (4th), *Presentation at Trial*, §21.)

(3) *Criticism of Traditional Rationale.* Courts sometimes add the disparaging observation that hearsay is in its very nature and by common experience a weak and unreliable kind of evidence. This view, which would tend to apply the rule strictly and confine its exceptions within narrow limits, has been strongly criticized by modern writers, who give these answers: (a) The rule was developed for jury trials and is in part based on a questionable distrust of the jury, while today, the majority of cases are tried before judges and administrative tribunals. (b) The numerous and continually expanding exceptions to the rule demonstrate the belief of courts and Legislatures that hearsay evidence is valuable in many situations. (c) The statutory abrogation of the hearsay rule in many kinds of administrative proceedings is a similar demonstration of the need for and usefulness of hearsay evidence. (d) The rule that hearsay admitted without objection is evidence sufficient to sustain a verdict or finding is a further demonstration of the judicial recognition of its value. (See *People v. Dalton* (1959) 172 C.A.2d 15, 18, 341 P.2d 793, *infra*, §35; 2 McCormick 5th, §§245, 325; 5 Wigmore (Chadbourn Rev.) §§1363, 1427; 2 *U.C.L.A. L. Rev.* 43, 45; 1967 A.S. 117 [trend toward liberal application of hearsay rule].)

(4) *Modern View.* The emphasis today, both as a justification for the rule and as a test for its application, is on the absence of opportunity for cross-examination of the declarant, to expose dishonesty and faulty perception or memory. "The basic theory is that the many possible deficiencies, suppressions, sources of error and untrustworthiness, which lie underneath the bare untested assertion of a witness, may be best brought to light and exposed by the test of

cross-examination." (*Buchanan v. Nye* (1954) 128 C.A.2d 582, 585, 275 P.2d 767.) "The essence of the hearsay rule is that the witness is not in court and subject to cross-examination and is not available for the jury to judge his credibility." (*People v. Bob*, *supra* [hearsay objection held sufficiently stated, though word "hearsay" not used, where counsel argued that the declarant should be produced and placed on the stand]; see 2 U.C.L.A. L. Rev. 43 [discussing views of noted experts]; 62 Harv. L. Rev. 183 [modern basis for rule]; 87 Harv. L. Rev. 957 [rule's structure and underlying values]; 75 Cal. L. Rev. 495 [discussion of underlying values, and argument that proposals for changing rule should take those values into account]; 75 Cal. L. Rev. 1339 [suggested alternative to hearsay rule or new approach to existing system of categorical exceptions]; 49 Hastings L. J. 545 [role of hearsay rule in truth determination]; 49 Hastings L. J. 477 [hearsay hazards in criminal trial]; 2 McCormick 5th, §245.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Hearsay Defined*. See 13A U.L.A. (Master Ed.), p. 163 [Unif. Rules, Rule 801(a)(2), defining hearsay]; 2 McCormick 6th, §246.

(2) *Traditional Rationale for Exclusion*. See 2 McCormick 6th, §245.

(3) *Criticism of Traditional Rationale*. See 2 McCormick 6th, §§245, 325. (4) *Modern View*. See 2 McCormick 6th, §245; Simons, Cal. Evidence Manual, §2:1 et seq. *West's Key Number Digest*, Criminal Law k.419 et seq.; Evidence k.314 et seq.



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## CHAPTER VI - Hearsay

### I. IN GENERAL B. Evidence Code.

#### 1 Witkin Cal. Evid. Hearsay § 2

[§ 2] Evidence Code.

(1) *Prior California Law.* Former California statutes contained no definition of hearsay or statement of the rule, and the exceptions were unclear, poorly organized and incomplete. (See Law Rev. Com. Comment to *Ev.C. 1200*; *People v. Spriggs* (1964) 60 C.2d 868, 872, 36 C.R. 841, 389 P.2d 377.)

(2) *Division 10.* A comprehensive Evidence Code was adopted in 1965, operative January 1, 1967. Division 10 (*Ev.C. 1200* et seq.), entitled "Hearsay Evidence," is a combination of the former Uniform Rules, prior California law, and some provisions found in neither source. Adequate definitions are given, and the rule and its exceptions are stated with far greater clarity and precision than in former California statutes and decisions. Most of the clarification and expansion came from the Uniform Rules, as will be indicated in the discussion of particular provisions, but some of that source's innovations were rejected.

(3) *Provisions Not Exclusive.* Although the Evidence Code contains a comprehensive statement of all generally recognized exceptions, it does not exclude other statutory or case law exceptions:

(a) "Nothing in this division shall be construed to repeal by implication any other statute relating to hearsay evidence." (*Ev.C. 1205*.) This assures the continued validity of a number of narrowly drawn special exceptions in other codes. (Law Rev. Com. Comment to *Ev.C. 1205*; see, e.g., *Dahl v. Dahl* (1965) 237 C.A.2d 407, 413, 46 C.R. 881 [report of juvenile probation officer].)

(b) "Except as provided by law," hearsay evidence is inadmissible. (*Ev.C. 1200*.) Thus, the Legislature may create additional hearsay exceptions, and, because "law" includes "decisional law" (1 *Cal. Evidence* (4th), *Introduction*, §17), the courts may do likewise. (Law Rev. Com. Comment to *Ev.C. 1200*; see *People v. Spriggs* (1964) 60 C.2d 868, 872, 36 C.R. 841, 389 P.2d 377 [recognizing power prior to its affirmation in Evidence Code]; *In re Cindy L.* (1997) 17 C.4th 15, 22, 31, 69 C.R.2d 803, 947 P.2d 1340, *infra*, §172 [noting 1996 amendments of Welf.C. 355 providing for admission, in juvenile court jurisdictional hearing, of social study and hearsay evidence contained in it, and approving court-created "child dependency hearsay exception"]; 23 *Santa Clara L. Rev.* 157 [California's Dormant Hearsay Exception; urging judicial creation of new exceptions for trustworthy and necessary hearsay evidence].)

(4) *Definitions.* "Hearsay evidence" is defined in Division 10 (*Ev.C. 1200*, *infra*, §4). In Division 2, the Code also defines several terms that occur frequently in hearsay problems:

(1) " 'Conduct' includes all active and passive behavior, both verbal and nonverbal." (*Ev.C. 125*.)

(2) "'Declarant' is a person who makes a statement." (*Ev.C. 135.*) Thus, a *witness* on the stand testifies to the content of the statement of a *declarant*. (Law Rev. Com. Comments on *Ev.C. 135, 1200.*)

(3) "'Statement' means (a) oral or written verbal expression or (b) nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression." (*Ev.C. 225.*) This definition is the basis for the distinction between assertive conduct (inadmissible; *infra*, §7) and nonassertive conduct (admissible; *infra*, §46). (See Law Rev. Com. Comment to *Ev.C. 1200.*)

**SUPPLEMENT:** [This section is current through the latest supplement]

(3) *Provisions Not Exclusive.*

(b) "*Except as provided by law*": See *People v. Demetrulias* (2006) 39 C.4th 1, 27, 45 C.R.3d 407, 137 P.3d 229 [even if exception for "critical reliable evidence" in capital cases should be recognized by courts, defendant's capital murder case did not provide suitable occasion, as evidence that victim paid rent shortly before he was murdered (thus making it unlikely defendant stole from him) was neither critical nor entirely reliable].



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## CHAPTER VI - Hearsay

### I. IN GENERAL

#### C. Federal and Uniform Rules.

##### *1 Witkin Cal. Evid. Hearsay § 3*

[§ 3] Federal and Uniform Rules.

The Federal Rules of Evidence cover hearsay in the following six parts (see generally 4 Mueller & Kirkpatrick, Federal Evidence 2d, Chap. 8; 29 *Am.Jur.2d* (1994 ed.), *Evidence* §658 et seq.):

Rule 801 (Definitions). (See 4 Mueller & Kirkpatrick, Federal Evidence 2d, §368 et seq.; 29 *Am.Jur.2d* (1994 ed.), *Evidence* §661 et seq.)

Rule 802 (Hearsay Rule). (See 4 Mueller & Kirkpatrick, Federal Evidence 2d, §431 et seq.; 29 *Am.Jur.2d* (1994 ed.), *Evidence* §659 et seq.)

Rule 803 (Hearsay Exceptions: Availability of Declarant Immaterial). (See 4 Mueller & Kirkpatrick, Federal Evidence 2d, §433 et seq.; 29 *Am.Jur.2d* (1994 ed.), *Evidence* §679 et seq.)

Rule 804 (Hearsay Exceptions: Declarant Unavailable). (See 4 Mueller & Kirkpatrick, Federal Evidence 2d, §479 et seq.; 29 *Am.Jur.2d* (1994 ed.), *Evidence* §690 et seq.)

Rule 805 (Hearsay Within Hearsay). (See 4 Mueller & Kirkpatrick, Federal Evidence 2d, §§508, 509; 29 *Am.Jur.2d* (1994 ed.), *Evidence* §704.)

Rule 806 (Attacking and Supporting Credibility of Declarant). (See 4 Mueller & Kirkpatrick, Federal Evidence 2d, §§510, 511; 29 *Am.Jur.2d* (1994 ed.), *Evidence* §705.)

Each Rule is quoted at appropriate places in this work.

Rule 807 (a consolidation of former Rules 803(24) and 804(b)(5)) creates a residual or catch-all hearsay exception: "A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant." (See 4 Mueller & Kirkpatrick, Federal Evidence 2d, §512; 15 *San Diego L. Rev.* 239 [scope of federal residual hearsay exceptions]; 51 A.L.R.4th 999 [former Rule 803(24)]; 75 A.L.R.4th 199 [former Rule 804(b)(5)]; 155 A.L.R. Fed 409 [notice requirement under Rule

807, where availability of declarant is immaterial].)

The approach of the 1974 revision of the Uniform Rules is identical to that taken by the Federal Rules of Evidence. (See Prefatory Note to Original 1974 Rules of Evidence, 13A (Part 1A) U.L.A. (Master Ed.), p. 5.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See Prefatory Note to Original 1974 Rules of Evidence, 13A U.L.A. (Master Ed.), p. 213; 173 A.L.R. Fed 1 [*F.R. Evid., Rule 807*]; 37 *Loyola L.A. L. Rev.* 1373 [criticizing Michigan rule similar to Rule 807]; 37 *U.S.F. L. Rev.* 351 [comparing federal rules relating to hearsay to Evidence Code provisions].



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## CHAPTER VI - Hearsay

### I. IN GENERAL

#### D. Nature and Scope of Rule.

##### 1. Statement of Rule.

#### *1 Witkin Cal. Evid. Hearsay § 4*

#### [§ 4] Statement of Rule.

The hearsay rule, set forth in *Ev.C. 1200*, is in two parts: *First*, "hearsay evidence" is defined as "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (*Ev.C. 1200(a)*.) *Second*, an exclusionary rule is stated: "Except as provided by law, hearsay evidence is inadmissible." (*Ev.C. 1200(b)*.)

The Federal Rules of Evidence are similar: "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." (*F.R. Evid., Rule 801(c)*; see 4 Mueller & Kirkpatrick, *Federal Evidence* 2d, §369; 29 *Am.Jur.2d* (1994 ed.), *Evidence* §661.) "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." (*F.R. Evid., Rule 802*; see 4 Mueller & Kirkpatrick, *Federal Evidence* 2d, §431; 29 *Am.Jur.2d* (1994 ed.), *Evidence* §659.)

These succinct provisions involve several important concepts:

(1) The rule excludes hearsay statements only when they are offered to prove the truth of the matter stated. (See *infra*, §5.)

(2) The rule excludes only statements made outside of court. The principal justification for exclusion of hearsay is that the statement is not made on the stand by a witness subject to cross-examination. (See *supra*, §1.) The definition makes it clear that hearsay consists of "extra-judicial" or out-of-court statements. California cases invoking the hearsay rule to exclude testimony of a witness whose supposed knowledge is based solely on hearsay are, under the Evidence Code, inaccurate in analysis, though sound in result. The correct objection is that the witness lacks personal knowledge, hence, is not qualified to testify on the matter. (See 2 *Cal. Evidence* (4th), *Witnesses*, §47.) Similarly, where a witness testifies to an opinion that lacks a proper basis because it is founded on unreliable hearsay, the objection is a violation of the opinion rule. (See 1 *Cal. Evidence* (4th), *Opinion Evidence*, §31.)

(3) The phrase "except as provided by law" refers to the numerous exceptions to the rule declared by statute or judicial decision. (See *supra*, §2; *infra*, §51 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Browne v. Turner Const. Co.* (2005) 127 C.A.4th 1334, 1349, 26 C.R.3d 433 [in action by worker injured at construction site against property owner and general contractor, deposition testimony, relied on by plaintiff, to effect

that defendants wanted safety devices at site removed was not subject to hearsay rule, as it purported neither to recount statement nor to prove what was stated].





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## CHAPTER VI - Hearsay

### I. IN GENERAL

#### D. Nature and Scope of Rule.

#### 2. Must Be Offered To Prove Truth.

##### 1 Witkin Cal. Evid. Hearsay § 5

#### [§ 5] Must Be Offered To Prove Truth.

The rule excludes hearsay statements only when they are offered for the same purpose as testimony of a witness on the stand and therefore depend for probative value on the credibility of the declarant. (See Unif. Rule 801 (13B (Part 1B) U.L.A. (Master Ed.), p. 97); Model C., Rule 501; *People v. Radley* (1945) 68 C.A.2d 607, 609, 157 P.2d 426 [quoting Wigmore]; *Rogers v. Whitson* (1964) 228 C.A.2d 662, 675, 39 C.R. 849, citing the text; *Marshall v. Marshall* (1965) 232 C.A.2d 232, 254, 42 C.R. 686, citing the text; *Am-Cal Inv. Co. v. Sharlyn Estates* (1967) 255 C.A.2d 526, 540, 63 C.R. 518, *infra*, §31; *People v. Ireland* (1969) 70 C.2d 522, 529, 75 C.R. 188, 450 P.2d 580, *infra*, §201, citing the text; *People v. Sundlee* (1977) 70 C.A.3d 477, 482, 138 C.R. 834, *infra*, §16; 6 Wigmore (Chadbourn Rev.) §1766; 2 McCormick 5th, §246; 1 Jefferson, California Evidence Benchbook 3d, §1.9 et seq.; 2 U.C.L.A. L. Rev. 48; 1956 A.S. 526; 29 Am.Jur.2d (1994 ed.), *Evidence* §661 et seq.)

The importance of this qualification is that out-of-court statements not offered to prove the truth of the matter stated are not regarded as hearsay. No special exception to the hearsay rule need be invoked for their admission; *they are not within the hearsay rule at all*. (See 6 Wigmore (Chadbourn Rev.) §1766 [giving example of statement, "I am the Emperor of Africa," used not to prove assertion is true or false but to prove that declarant is insane]; *People v. Radley*, *supra*; *People v. Dalton* (1959) 172 C.A.2d 15, 20, 341 P.2d 793, *infra*, §35, quoting the text; *First Western Bank & Trust Co. v. Omizzolo* (1959) 176 C.A.2d 555, 563, 1 C.R. 758, citing the text; *People v. Young* (1964) 224 C.A.2d 420, 424, 36 C.R. 672 [driving while drunk; tape recordings of conversations with defendant at time, showing manner of speech, relevant on issue of intoxication]; *Am-Cal Inv. Co. v. Sharlyn Estates*, *supra*, citing the text; *Younger v. State Bar* (1974) 12 C.3d 274, 286, 113 C.R. 829, 522 P.2d 5, citing the text [attorney was charged with soliciting employment through cappers and runners; testimony that prior to dialing attorney's telephone number, C (an alleged runner) had said that attorney was in his office was not hearsay because it was offered to prove C's *knowledge* that attorney was there]; *People v. Duran* (1976) 16 C.3d 282, 295, footnote 14, 127 C.R. 618, 545 P.2d 1322, *infra*, §45 [defendant had fled from stabbing scene, wished to bolster his state of mind testimony by introducing evidence of warnings from third persons, and was improperly prohibited from presenting that nonhearsay evidence]; *infra*, §31 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Plancarte v. Guardsmark, LLC*. (2004) 118 C.A.4th 640, 647, 13 C.R.3d 315 [in action against security service company alleging that its employee sexually assaulted plaintiff, letter from company's attorney to employee's attorney, which confirmed their agreement that employee's attorney should submit his bills to company's attorney's law firm, was inadmissible hearsay, as it was offered by plaintiff to prove truth of matter asserted (that agreement existed) and no

hearsay exception applied]; 13A U.L.A. (Master Ed.), p. 163 [Unif. Rules, Rule 801]; 2 McCormick 6th, §245; 30 West L.A. L. Rev. 135 [distinguishing between hearsay and nonhearsay]. *Statements not offered to prove truth of matter stated*: See *People v. Jurado* (2006) 38 C.4th 72, 117, 41 C.R.3d 319, 131 P.3d 400 [out-of-court declarant's question whether another individual could get gun for her was not hearsay; "a request, by itself, does not assert the truth of any fact"]; *People v. Archer* (2000) 82 C.A.4th 1380, 1391, 99 C.R.2d 230 [in murder trial in which prosecution witness testified as to his telephone conversation with defendant in which defendant indicated he had killed victim, trial judge erred in excluding, as hearsay, testimony of another witness who was present during conversation; testimony was not offered to prove that defendant was not involved with murder, but rather to impeach testimony of first witness as to what defendant had said]; *People v. Mitchell* (2005) 131 C.A.4th 1210, 1224, 32 C.R.3d 613 [in prosecution for robbery, carjacking, and several counts stemming from subsequent police pursuit, bulk of police dispatch tape introduced by prosecution was not subject to hearsay objection as it was offered not to establish truth of matter asserted but simply to show how pursuit unfolded and to describe police officers' actions]; *Levin v. Ligon* (2006) 140 C.A.4th 1456, 1466, 45 C.R.3d 560 [in action by husband against former wife for civil partition of financial assets, trial judge properly denied husband's objection to admission of documents from English court proceeding, where documents were admitted to show position husband took in that proceeding, not to show that position was in fact correct].



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## CHAPTER VI - Hearsay

### I. IN GENERAL

#### D. Nature and Scope of Rule.

##### 3. Multiple Hearsay.

#### 1 Witkin Cal. Evid. Hearsay § 6

#### [§ 6] Multiple Hearsay.

(1) *Statutory Rule.* May an admissible hearsay statement be used to prove another admissible hearsay statement? Former California statutes and case law gave no indication whether "double hearsay" or "hearsay upon hearsay" should be received. *Ev.C. 1201* expressly authorizes its admission:

"A statement within the scope of an exception to the hearsay rule is not inadmissible on the ground that the evidence of such statement is hearsay evidence if such hearsay evidence consists of one or more statements each of which meets the requirements of an exception to the hearsay rule."

The Law Revision Commission Comment gives this illustration: A reporter's transcript of the testimony at a previous trial may be received under *Ev.C. 1290* (infra, §257) to prove that a party made a statement amounting to an admission receivable under *Ev.C. 1220* (infra, §90). "Thus, under Section 1201, the evidence of the admission contained in the transcript is admissible because each of the hearsay statements involved is within an exception to the hearsay rule." (See *People v. Collup* (1946) 27 C.2d 829, 834, 167 P.2d 714, which, as the Comment points out, tacitly approved this practice; *People v. Lew* (1968) 68 C.2d 774, 778, 69 C.R. 102, 441 P.2d 942; *In re George G.* (1977) 68 C.A.3d 146, 155, 137 C.R. 201; *People v. Reed* (1996) 13 C.4th 217, 224, 225, 52 C.R.2d 106, 914 P.2d 184 [certified transcript of preliminary hearing containing testimony by unavailable witnesses was properly admitted]; 2 McCormick 5th, §324.1; on use of multiple hearsay in preliminary examination, see *Whitman v. Superior Court* (1991) 54 C.3d 1063, 2 C.R.2d 160, 820 P.2d 262, 4 Cal. Crim. Law (3d), *Pretrial Proceedings*, §143.)

(2) *Prior Inconsistent Statements.* In *People v. Zapien* (1993) 4 C.4th 929, 17 C.R.2d 122, 846 P.2d 704, a capital murder case, the trial judge admitted evidence embodying statements by defendant's niece that defendant had come to her house the day of the murder with bloody hands and clothing and had told her that he had committed the killing. At trial, the niece denied having told her sister about these events, the sister denied having told her friend, and the friend, who, after being told, went to the police, was unable to recall part of what she had earlier said the sister told her. The trial court admitted the evidence under the exception for prior inconsistent statements (*Ev.C. 1235*, infra, §156). *Held*, the evidence was properly admitted. "We are unaware of any published decision addressing the precise question whether multiple hearsay is admissible where each hearsay level constitutes a prior inconsistent statement. But none of the decisions addressing similar questions suggests that such evidence is inadmissible." (4 C.4th 952.)

(a) Defendant contended that the multiple hearsay should have been excluded because each declarant denied having made the alleged prior inconsistent statement. However, "[t]his concern, that an alleged prior inconsistent statement, which the declarant denied having made, may have been fabricated, applies equally to single hearsay and to multiple

hearsay." (4 C.4th 953, 954.)

(b) Defendant asserted that if this type of hearsay is admissible, a single person may by his own testimony introduce statements inconsistent with statements of any number of prior declarants, each of whom denies ever making the statements. To forestall this occurrence, defendant urged the court to establish a "bright-line" rule that a prior inconsistent statement may be used only to contradict a single prior declarant. However, "[i]f such a rule is desirable, it must be established by the Legislature." (4 C.4th 954.)

(3) *Federal Rule. F.R. Evid., Rule 805* is similar to *Ev.C. 1201*: "Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." (See 4 Mueller & Kirkpatrick, *Federal Evidence* 2d, §§508, 509; 29 *Am.Jur.2d* (1994 ed.), *Evidence* §704.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Statutory Rule.* See *Correa v. Superior Court* (2002) 27 C.4th 444, 448, 117 C.R.2d 27, 40 P.3d 739, Supp., infra, §125 [translation of witnesses' statements to investigating officers did not constitute extra layer of hearsay; rather, translation by unbiased and adequately skilled translator simply serves as "language conduit"]; *People v. Thoma* (2007) 150 C.A.4th 1096, 1103, 58 C.R.3d 855 [testimony by police officer at preliminary hearing on prior crime to effect that nurse had said that victim was in surgery for multiple fractures and blunt trauma constituted multiple hearsay when offered in later prosecution to establish nature of prior, and should not have been admitted; officer's statement fell within former testimony exception, but nurse's statement did not fit any exception]; 2 McCormick 6th, §324.1. *West's Key Number Digest*, Criminal Law k.419(13)



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CHAPTER VI - Hearsay

I. IN GENERAL

D. Nature and Scope of Rule.

4. Assertive Conduct.

1 *Witkin Cal. Evid. Hearsay* § 7

[§ 7] Assertive Conduct.

Acts such as nodding or shaking the head in answer to a question, pointing to an object or person for identification, or using sign language to convey a thought are equivalent to verbal statements, and are equally subject to the hearsay rule when an attempt is made to prove them by testimony of a witness.

This is made clear by the definition of "statement" to include "non-verbal conduct of a person intended by him as a substitute for oral or written verbal expression." (*Ev.C.* 225, *supra*, §2; see *In re Cheryl H.* (1984) 153 C.A.3d 1098, 1126, 200 C.R. 789, *infra*, §47; 2 McCormick 5th, §250; 5 Wigmore (Chadbourn Rev.) §1362; 14 *Stanf. L. Rev.* 682; 25 West L.A. L. Rev. 59, 117 [giving examples of assertive and nonassertive conduct]; on nonassertive conduct as outside hearsay rule, see *infra*, §46.)

*F.R. Evid.*, Rule 801(a) is similar: "Statement" includes "nonverbal conduct of a person, if it is intended by the person as an assertion." (See 4 Mueller & Kirkpatrick, *Federal Evidence* 2d, §374; 29 *Am.Jur.2d* (1994 ed.), *Evidence* §662.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 2 McCormick 6th, §250.



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## CHAPTER VI - Hearsay

### I. IN GENERAL

#### D. Nature and Scope of Rule.

#### 5. Other Exclusionary Rules and Impeachment.

##### *1 Witkin Cal. Evid. Hearsay § 8*

[§ 8] Other Exclusionary Rules and Impeachment.

(1) *Other Exclusionary Rules.* The hearsay rule is a rule of *exclusion* (supra, §4), but its exceptions are *not rules of admission*. All of the sections of the Evidence Code specifying hearsay exceptions provide that the particular statement "is not made inadmissible by the hearsay rule." In other words, a statement within a hearsay exception satisfies the hearsay rule, but it may be objectionable under other exclusionary rules, such as the opinion rule, the Secondary Evidence Rule, or a claim of privilege. (See Law Rev. Com. Comments on *Ev.C. 240, 1200*; and *Ev.C.*, Division 10; 5 Wigmore (Chadbourn Rev.) §1424.)

Thus, a hearsay statement within an exception may be challenged, in the same manner as testimony on the stand, by the *opinion rule*; and to the extent that it embodies inadmissible conclusions of the declarant, it may be excluded. (See *People v. Lanagan* (1889) 81 C. 142, 144, 22 P. 482; *People v. Taylor* (1881) 59 C. 640, 645; *McClafflin v. Bayshore Equipment Rental Co.* (1969) 274 C.A.2d 446, 455, 79 C.R. 337, *infra*, §14 [conclusionary recital rendered coroner's record inadmissible]; 14 So. Cal. L. Rev. 99, 107; *infra*, §193; for an argument to the contrary, see 1 McCormick 5th, §18.) *Admissions*, however, are not subject to the opinion rule. (See *infra*, §95.)

Special exclusionary rules also apply to confessions and admissions of the defendant in a criminal case. (See *infra*, §§52 et seq., 136 et seq.)

(2) *Impeachment.* A hearsay declarant may be called to the stand and examined as if under cross-examination by the adverse party (see 3 *Cal. Evidence* (4th), *Presentation at Trial*, §210), and, whether called or not, the declarant may be impeached on the same grounds as a witness (see 3 *Cal. Evidence* (4th), *Presentation at Trial*, §357).

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Other Exclusionary Rules.* See 1 McCormick 6th, §18. *West's Key Number Digest*, Criminal Law k.419(2.10)



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CHAPTER VI - Hearsay

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D. Nature and Scope of Rule.

6. Analysis of Hearsay Problem.

1 *Witkin Cal. Evid. Hearsay* § 9

[§ 9] Analysis of Hearsay Problem.

Bearing in mind the rules and distinctions set forth in the preceding sections, there are five principal questions to ask in a practical approach to the admissibility and sufficiency of a relevant statement made out of court:

(1) Is it hearsay subject to the exclusionary rule; i.e., is it offered to prove the truth of the matter stated (hearsay) or offered for some other purpose (nonhearsay)? (See *supra*, §5; *infra*, §31 et seq.)

(2) If hearsay, is it within an exception; i.e., if it is offered to prove the truth of the matter stated and is therefore subject to the exclusionary rule, is it within one of the exceptions to the rule? (See *infra*, §51 et seq.)

(3) If it is within an exception to the hearsay rule, is it nevertheless subject to *any other exclusionary rule*? (See *supra*, §8.)

(4) If it is within an exception to the hearsay rule and not subject to any other exclusionary rule, *may the declarant be impeached* for incompetency, lack of knowledge, bias or interest, inconsistent statement, or on any other ground tending to weaken his credibility? (See 3 *Cal. Evidence* (4th), *Presentation at Trial*, §357.)

(5) If it is inadmissible hearsay, was it nevertheless *admitted without proper objection*, so as to become evidence in the case? (See 3 *Cal. Evidence* (4th), *Presentation at Trial*, §394; see 22 *Southwestern U. L. Rev.* 1039 [analytical approach to relevance and hearsay].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER VI - Hearsay

### I. IN GENERAL

#### D. Nature and Scope of Rule.

#### 7. Illustrations of Inadmissible Hearsay.

##### a. Self-Serving Statements.

##### 1. In General.

*1 Witkin Cal. Evid. Hearsay § 10*

[§ 10] In General.

(1) *Informal Statements.* Declarations in the interest of the declarant, such as statements made by a grantor after parting with title and in disparagement of it, are ordinarily inadmissible. (See *Kershaw v. Madsen* (1923) 62 C.A. 11, 15, 216 P. 55; *Rulofson v. Billings* (1903) 140 C. 452, 457, 74 P. 35; *Barcroft v. Livacich* (1939) 35 C.A.2d 710, 718, 96 P.2d 951; *Carlston v. Shenson* (1941) 47 C.A.2d 52, 56, 117 P.2d 408 [self-serving declaration of party in collateral transaction]; *Wagner v. Worrell* (1946) 76 C.A.2d 172, 181, 172 P.2d 751 [self-serving declarations of decedent in letter written before his death]; 29A Am.Jur.2d (1994 ed.), *Evidence* §794.)

(2) *Criminal Defendant's Statements.* A confession or incriminating admission may be introduced by the prosecution only under the exceptions to the hearsay rule based on the reliability of such serious statements against interest. If the defendant seeks to offer his own prior statement on the theory that it contains some inculpatory facts, but with the real object of putting before the jury other self-serving matters in the statement, it will be excluded. Otherwise, the defendant would be giving the equivalent of his testimony to the jury without submitting to cross-examination. (*People v. Williams* (1957) 151 C.A.2d 173, 187, 311 P.2d 117; see *People v. Swain* (1962) 200 C.A.2d 344, 351, 19 C.R. 403, *infra*, §203; *People v. Williamson* (1977) 71 C.A.3d 206, 213, 139 C.R. 222.)

In *People v. Clay* (1984) 153 C.A.3d 433, 200 C.R. 269, defendant H, charged with the rape of Margaret T, did not testify at trial. His counsel sought to introduce evidence that, immediately after the crime, he had made a statement to codefendant V which the jury could have interpreted to implicate V rather than H as the rapist ("man, you sick, doing that old woman that way"). H contended that this statement should have been received as nonhearsay circumstantial evidence of innocence, because it showed that he was revolted by acts of rape and forcible oral copulation. *Held*, exclusion was proper. The possible probative value was outweighed by its prejudicial impact. It would have made relevant and admissible H's convictions for rape and sodomy of Paula H, committed 6 hours before the assault on Margaret T. (153 C.A.3d 456, 457.)

(3) *Statements in Presence of Adverse Party.* A statement made in the presence of the adverse party is not necessarily admissible. The only justification for receiving it is that the adverse party's *conduct* may be proved either (a) as circumstantial evidence--the hearsay rule inapplicable (*infra*, §36 et seq.), or (b) as an implied or adoptive admission (*infra*, §102 et seq.). (See *People v. White* (1941) 44 C.A.2d 183, 186, 112 P.2d 60; *People v. Bob* (1946) 29 C.2d 321, 325, 175 P.2d 12; 1957 A.S. 544.)



(4) *Distinctions*. The fact that a statement is self-serving does not preclude its introduction under an appropriate hearsay exception, e.g., a declaration of intent (*infra*, §212 et seq.), a spontaneous exclamation (*infra*, §173 et seq.), or an implied admission (*infra*, §106 et seq.). And when a witness has been impeached by some kinds of attack on his or her credibility, a prior consistent statement is admissible in rehabilitation. (See *infra*, §161.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Criminal Defendant's Statements*. See *People v. Williams (2006) 40 C.4th 287, 317, 52 C.R.3d 268, 148 P.3d 47* [defendant's crying during interview with detective, which defendant wanted admitted to show remorse, was properly excluded because it was intertwined with self-serving hearsay]. *West's Key Number Digest*, Criminal Law k.413 et seq.; Evidence k.271 et seq.



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## CHAPTER VI - Hearsay

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#### D. Nature and Scope of Rule.

7. Illustrations of Inadmissible Hearsay.
  - a. Self-Serving Statements.
2. Statements in Judicial Proceedings.

#### 1 Witkin Cal. Evid. Hearsay § 11

[§ 11] Statements in Judicial Proceedings.

An allegation in a pleading or similar paper, though verified, is not evidence in favor of the pleader. (*Mitsuuchi v. Security-First Nat. Bank of Los Angeles* (1951) 103 C.A.2d 214, 219, 229 P.2d 376; 29A Am.Jur.2d (1994 ed.), Evidence §774.)

In *Reid v. Overland Machined Products* (1961) 55 C.2d 203, 209, 10 C.R. 819, 359 P.2d 251, an action on certain claims, the trial judge instructed plaintiff's counsel to prepare judgment and findings for \$ 4,948.95. Plaintiff submitted a "Memorandum After Examining Change Order, Purchase Orders and Invoices," stating that he had reviewed defendant's invoices, and suggesting a different sum, whereupon the judge awarded judgment for \$ 11,486.52. *Held*, judgment reversed; this memorandum, like a statement in a pleading, was incompetent hearsay.

Answers to interrogatories may be used "so far as admissible under the rules of evidence." (C.C.P. 2030(n), 2 Cal. Evidence (4th), Discovery, §102.) But a party cannot use its own self-serving answers to its opponent's interrogatories on its own behalf; they are merely affidavits and incompetent hearsay (infra, §297). (*Estate of Horman* (1968) 265 C.A.2d 796, 805, 71 C.R. 780; *Giesler v. Berman* (1970) 6 C.A.3d 919, 929, 86 C.R. 205; *Castaline v. Los Angeles* (1975) 47 C.A.3d 580, 587, 121 C.R. 786 [improper hearsay use of one defendant's answers against another defendant].)

**SUPPLEMENT:** [This section is current through the latest supplement]

C.C.P. 2030(n), on the use of interrogatory answers, was repealed and replaced by C.C.P. 2030.410 in 2004 without substantive change. *West's Key Number Digest*, Evidence k.271(20)



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## CHAPTER VI - Hearsay

## I. IN GENERAL

## D. Nature and Scope of Rule.

7. Illustrations of Inadmissible Hearsay.  
b. Reports and Similar Writings.

## 1 Witkin Cal. Evid. Hearsay § 12

## [§ 12] Reports and Similar Writings.

(1) *In General.* Formal writings and reports, unless made competent evidence by one of the exceptions to the rule, are inadmissible hearsay. (See *People v. Murphy* (1936) 17 C.A.2d 575, 591, 62 P.2d 592 [unverified report by Corporation Commissioner or his agent]; *Oppenheimer v. Clunie* (1904) 142 C. 313, 322, 75 P. 899 [report of grand jury]; *Moon v. Moon* (1944) 62 C.A.2d 185, 188, 144 P.2d 596 [report of court's domestic relations investigator]; *Filipino Federation of America v. Repollo* (1961) 191 C.A.2d 89, 12 C.R. 467, *infra*, §241; *Conservatorship of Manton* (1985) 39 C.3d 645, 647, 217 C.R. 253, 703 P.2d 1147 [conservatorship report, although properly considered at initial hearing on petition for conservatorship, is not admissible at contested trial on issue of whether proposed conservatee is gravely disabled]; 2 McCormick 5th, §248; 10 A.L.R.2d 1035 [written recitals or statements as hearsay]; 85 A.L.R.2d 436 [credit report of mercantile agency]; for possible exceptions, see *infra*, §90 et seq. [admissions]; §226 et seq. [business records]; §244 et seq. [official records]; §297 [affidavits]; and see *Dahl v. Dahl* (1965) 237 C.A.2d 407, 413, 46 C.R. 881 [probation officer's report on child custody admissible under former Welf.C. 582 (now Welf.C. 281)].)

Highly persuasive evidence may be wholly excluded when counsel are unfamiliar with the technical nature and scope of the hearsay exceptions. In *Bebington v. California Western States Life Ins. Co.* (1947) 30 C.2d 157, 160, 180 P.2d 673, plaintiff beneficiary sued on an insurance policy on the life of her son. Defendant relied on the provision excluding liability for death resulting from an airplane accident except where the decedent was a fare-paying passenger on a regular passenger flight. The decedent, an aviation pilot, had been killed in a training flight, as shown by newspaper clippings, a letter from the squadron captain to the decedent's mother, and a certified statement of a general to the effect that Army records showed this as the cause of death. In affirming judgment for plaintiff, the court held that defendant had failed to sustain its burden of proving this affirmative defense. (a) The newspaper clippings and letter were hearsay, and were not adoptive admissions (*infra*, §102). Although they were sent to defendant by plaintiff as proof of death as required by the policy, plaintiff would not be deemed to have accepted as her own the recitals in papers submitted under such compulsion. (b) The general's statement was not admissible under the Business Records Act (*infra*, §227) because "it was *not a certified copy of a record*, but merely an officer's statement of what the record showed." (30 C.2d 161; see criticism, 61 Harv. L. Rev. 535; 1948 A.S. 890; on newspaper articles, see 55 A.L.R.3d 663.)

(2) *Proof of Prior Crime.* "A document is admissible to prove a prior conviction only if the facts asserted are admissible under the rules of evidence, including hearsay rules." (*People v. Lewis* (1996) 44 C.A.4th 845, 852, 853, 52 C.R.2d 338 [out-of-state documents were improperly admitted to prove nature of defendant's prior crime, where they

contained hearsay and no hearsay exception applied]; see *People v. Williams* (1990) 222 C.A.3d 911, 918, 272 C.R. 212 [probation report with multiple hearsay, i.e., sheriff said victim said defendant used knife, was inadmissible to prove defendant's personal use of deadly weapon during prior offense]; *People v. Reed* (1996) 13 C.4th 217, 230, 52 C.R.2d 106, 914 P.2d 184 [statements in probation report were inadmissible to show that defendant used dangerous or deadly weapon in course of prior assault; citing *Williams*.]

*Williams* was distinguished in *People v. Sohal* (1997) 53 C.A.4th 911, 916, 62 C.R.2d 110, where, in a prior trial, the prosecutor stated the factual basis for defendant's plea of guilty to assault with a deadly weapon, with which defense counsel agreed, and defendant then pleaded guilty. This constituted an adoptive admission of the truth of the facts underlying the plea, and the plea transcript could then be relied on in subsequent criminal proceedings in determining the nature of the assault conviction. (See *People v. Woodell* (1998) 17 C.4th 448, 459, 71 C.R.2d 241, 950 P.2d 85 [out-of-state appellate opinion was admissible to prove that defendant's prior assault conviction qualified as strike; opinion itself came within official records exception, and material within it was not used for hearsay purpose of proving what defendant did, but for nonhearsay purpose of showing what original trial court found was basis of conviction]; *People v. Superior Court (Howard)* (1999) 70 C.A.4th 136, 153, 82 C.R.2d 481 [prohibition against use of hearsay statements contained in probation report does not apply in probable cause hearing under Sexually Violent Predators Act (see 3 Cal. Crim. Law (3d), Punishment, §196); distinguishing *People v. Reed*]; on proper methods of proving prior conviction generally, see 3 Cal. Crim. Law (3d), Punishment, §§343, 377; on use of preliminary hearing transcript, see *infra*, §260; on use of prior conviction for impeachment, see 3 Cal. Evidence (4th), Presentation at Trial, §292 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General*. See *People v. Zunis* (2005) 134 C.A.4th Supp. 1, 5, 36 C.R.3d 489 [in prosecution for speeding in which defendant had been apprehended by highway patrol officer using stopwatch, admission of letter from stopwatch manufacturer concerning accuracy of its stopwatches constituted error, although harmless, as it was offered for truth of matter asserted]; 2 McCormick 6th, §248.(2) *Proof of Prior Crime*. See *In re Cruse* (2003) 110 C.A.4th 1495, 1500, 2 C.R.3d 548 [counsel did not render ineffective assistance in advising defendant to plead guilty to possession of marijuana for sale and admit prior conviction of violent or serious felony; great bodily injury element of prior crime was proven by victim's preliminary hearing testimony, and unsworn, unauthenticated medical report included in superior court file of prior case would not have been admissible to contradict victim's testimony]. *West's Key Number Digest*, Criminal Law k.419(12); Evidence k.318 et seq.



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CHAPTER VI - Hearsay

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c. Court's Interlocutory Order.

*1 Witkin Cal. Evid. Hearsay § 13*

[§ 13] Court's Interlocutory Order.

A court's interlocutory order may be hearsay. In *Weak v. Weak* (1962) 202 C.A.2d 632, 21 C.R. 9, J, the husband, sued for divorce or annulment of his marriage with P. She asked for temporary alimony and costs, and the judge denied her motion by a minute order reciting that she had been guilty of fraud in marrying while aware of the existence of her prior marriage. In the present action by P against J to establish a half-interest in property acquired jointly by the parties, the minute order was admitted in evidence and relied on by the trial judge in concluding that P was not entitled to the rights of a de facto wife. *Held*, this was error. (a) The order was not res judicata because the issues of the two proceedings were different, and it was modifiable and therefore not final. (202 C.A.2d 634.) (b) It was not admissible in evidence because it was hearsay not within any recognized exception, and its admission would require the second judge to consider the opinion of the first judge without any of the evidence before the first judge. (202 C.A.2d 636.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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##### d. Proceedings at Coroner's Inquest.

*1 Witkin Cal. Evid. Hearsay § 14*

[§ 14] Proceedings at Coroner's Inquest.

The verdict of a coroner's jury, or the decision of the coroner where no jury is appointed, is inadmissible in any civil or criminal proceeding. (*Govt.C. 27502.2*; see *Estate of Dolbeer* (1906) 149 C. 227, 246, 86 P. 695 [verdict of coroner's jury]; *Shee v. Maryland Assur. Corp., Baltimore* (1922) 190 C. 1, 3, 210 P. 269 [same]; 5 Wigmore (Chadbourn Rev.) §1671; on required contents of verdict or decision, see *Govt.C. 27504*.) A transcript of the testimony taken at a coroner's inquest is also inadmissible. (*People v. Lessard* (1962) 58 C.2d 447, 455, 25 C.R. 78, 375 P.2d 46; see 5 Wigmore (Chadbourn Rev.) §1374.)

However, a coroner's death certificate is prima facie evidence of the facts stated in it. (*Health & Saf.C. 103550*, formerly *Health & Saf.C. 10577*.)

In *McClafin v. Bayshore Equipment Rental Co.* (1969) 274 C.A.2d 446, 79 C.R. 337, a coroner's record was correctly excluded, notwithstanding former *Health & Saf.C. 10577*, where the entry contained a prefatory clause--"When leg of step ladder broke"--which did not state a fact but was the *recital* of a fact. The statute "does not make the certified copy prima facie evidence of the *fact* to which the recital refers." Since the *conclusionary language* affected the entire entry, it was inadmissible. (274 C.A.2d 455.) (See *Bohrer v. San Diego* (1980) 104 C.A.3d 155, 164, 163 C.R. 419 [trial judge improperly used conclusion of "suicide" on death certificate in sustaining demurrer to complaint in wrongful death action; cases decided under former *Health & Saf.C. 10577* deal with *admissibility at time of trial*].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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##### e. Invoice, Bill, and Receipt.

#### 1 Witkin Cal. Evid. Hearsay § 15

[§ 15] Invoice, Bill, and Receipt.

*Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co. (1968) 69 C.2d 33, 69 C.R. 561, 442 P.2d 641*, throws some light on a difficult hearsay problem. To prove damages sustained to its turbine rotor, plaintiff offered invoices received from the manufacturer and repairer, the drafts in payment, and testimony that payment had been made. After objection, plaintiff also called a mechanical engineer as a qualified expert on repair of turbines, who testified to the kind of work necessary to repair the damage shown in photographs; then, on a showing of similar repairs listed in the invoices, he testified over objection that the amounts charged were reasonable. *Held*, this was inadmissible hearsay.

(a) Invoices, bills, and receipts for repairs are hearsay, and cannot independently prove that liability for the repairs was incurred, that payment was made, or that the charges were reasonable. (69 C.2d 42.)

(b) If a party testifies that he did incur or discharge a liability for repairs, those documents may be admitted for the limited purpose of corroborating his testimony. And if payment was made, the testimony and documents are evidence that the charges were reasonable. Here, however, the individual items were read, not to corroborate payment or reasonableness of charges, *but to prove that these specific repairs had actually been made*. No qualified witness was called to testify that the invoices accurately recorded the work done, and there was no other evidence as to what repairs were made. This use of the invoices was error. (69 C.2d 43.)

(c) The invoice of a third party might come in under the business records exception (*infra*, §226) if supported by testimony as to identity and mode of preparation, but this showing was not made. (69 C.2d 43.)

(d) Because the expert's testimony as to reasonableness of the charges was based on hearsay inadmissible to prove that the repairs had been made, objection should have been sustained; an expert's opinion must be based either on facts personally observed or on hypotheses that find support in the evidence. (69 C.2d 43.)

The corroboration exception described in the *Thomas Drayage* case was applied in *Jones v. Dumrichob (1998) 63 C.A.4th 1258, 1267, 74 C.R.2d 607*, where that court held that bills for defendant's expert witnesses were properly admitted in a hearing to tax costs. Corroboration of expert testimony on the reasonableness of medical treatment is also a proper basis for admitting medical bills. (See *Rodgers v. Kemper Const. Co. (1975) 50 C.A.3d 608, 626, 124 C.R. 143* [experts testified that treatment received by plaintiffs was reasonably necessary, and plaintiffs' testimony connected the bills to the treatment and showed the reasonableness of the charges].) And invoices may be admissible as proof of the

method of maintaining business records. (See *Exclusive Florists v. Kahn* (1971) 17 C.A.3d 711, 715, 95 C.R. 325.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Evidence k.318(5)





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f. Recording of Nonparty's Statements.

*1 Witkin Cal. Evid. Hearsay § 16*

[§ 16] Recording of Nonparty's Statements.

In *People v. Sundlee* (1977) 70 C.A.3d 477, 138 C.R. 834, defendant was placed under surveillance by state forestry agents after he was suspected of setting fires in wooded foothills near a dam construction site. As the members of the surveillance team watched defendant on the night in question, they exchanged comments and observations by radio, including an identification of defendant as the person under observation and descriptions of his movements. At defendant's trial for arson, the prosecutor laid a foundation and offered in evidence the tape recording and a transcript of the radio observations. *Held*, the recorded out-of-court conversations, aimed at convincing the jury that the events described had in fact taken place, were inadmissible hearsay. "An electronic voice recording has no more sanctity than the oral testimony of a witness recounting the same extrajudicial declarations. In their recorded conversation the members of the surveillance team were not under oath and could not be tested by cross-examination. The recording could not make their inadmissible statements admissible. The tape recording was 'evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.'" (70 C.A.3d 483.)

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#### g. Hearsay Introduced by Cross-Examination or Redirect.

#### 1 Witkin Cal. Evid. Hearsay § 17

[§ 17] Hearsay Introduced by Cross-Examination or Redirect.

As illustrated in the following cases, incompetent hearsay may also appear in cross-examination that, on the surface, does not seem improper, or on redirect following proper cross-examination:

(1) *Buchanan v. Nye* (1954) 128 C.A.2d 582, 585, 275 P.2d 767. Defendant offered evidence in an automobile accident case that S, an eyewitness, was concealing himself. Plaintiff's counsel testified on cross-examination that, from a reading of S's police statement and coroner's inquest testimony, he considered S unreliable and so did not call him. Defendant thereupon, by further questions directed to plaintiff's counsel, *read the entire police report of S. Held*, this was error; cross-examination of counsel on the reasons for his failure to call a witness does not justify the injection of a hearsay statement of the absent witness.

(2) *Crosby v. Martinez* (1958) 159 C.A.2d 534, 539, 324 P.2d 26. In this automobile collision case, the issue was whether defendants or plaintiffs entered against the red light. Plaintiffs and their witnesses testified that it was defendants; defendants alone testified that it was plaintiffs. But defendants called an officer who on cross-examination was asked if he had the name of H as a witness, and said yes. Thereupon, defendants on redirect proceeded to obtain from the officer testimony that a defendant told him that H said plaintiffs had run the red signal. *Held*, this was inadmissible. *Ev.C.* 356, permitting introduction of the rest of an act, etc., testified to in part, does not authorize the introduction of incompetent matter not related to the subject of the previous testimony. (See 1 *Cal. Evidence* (4th), *Circumstantial Evidence*, §§36, 37.)

(3) *People v. Harris* (1969) 270 C.A.2d 863, 76 C.R. 130. Defendant, in state prison, participated in a fracas. The prosecution's theory was that defendant intended to join J in assaulting D, the victim. The defense was that he had tried to break up the fight. D, called as a witness for the prosecution, claimed the self-incrimination privilege. The judge then allowed the prosecutor to "impeach" him by asking a series of questions concerning *his prior statements to officers* that implicated defendant. D answered all by the same claim of privilege, and no officer was called to contradict him. *Held*, this was reversible error, as in *Douglas v. Alabama* (1965) 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934, 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §532. The cross-examination brought in a quantity of damaging hearsay, and there was no way in which defendant could test the truth of these statements attributed to D but denied by him. (270 C.A.2d 869.)

(4) *In re Bushman* (1970) 1 C.3d 767, 83 C.R. 375, 463 P.2d 727. This case arose from a dispute between an attorney-pilot and an airport board of directors. After the attorney testified that the airport runways were improperly kept, he was impeached with a letter he *received* from the Federal Aviation Administration, stating that the runways

were properly maintained. *Held*, the letter was inadmissible hearsay because the attorney did not testify that it said anything other than what it did say. "One letter disagreeing with petitioner on the condition of the runways cannot be used to impeach his testimony since it is not inconsistent with it." (1 C.3d 775.)

(5) *People v. Shipe* (1975) 49 C.A.3d 343, 122 C.R. 701. In this homicide case, the prosecutor, relying on the forgetful witness theory of *People v. Green* (1971) 3 C.3d 981, 92 C.R. 494, 479 P.2d 998, *infra*, §159, contended that when his witnesses claimed the privilege against self-incrimination, he could ask leading questions as a foundation for impeachment. *Held*, *Green* was not in point. "[E]ach witness answered a few innocuous preliminary questions but steadfastly refused to answer any inquiry pertaining to the night of the crime or concerning any fact or circumstance relating to the crime. There was no occasion to impeach the witnesses, and the leading questions propounded by the prosecutor were not asked for that purpose." (49 C.A.3d 354.) These questions improperly created the almost irrefutable inference that their statements to the authorities were true. (49 C.A.3d 349.) (See 43 A.L.R.3d 1413 [refusal to testify on self-incrimination grounds as justifying reception of prior statements].)

(6) *People v. Blackington* (1985) 167 C.A.3d 1216, 213 C.R. 800. Defendant Blackington and codefendant Donald were jointly charged with the murder of Eric. Blackington contended that he shot Eric in self-defense. Donald had made a lengthy postarrest statement to police that incriminated Blackington, and Blackington moved for a severance under *People v. Aranda* (1965) 63 C.2d 518, 47 C.R. 353, 407 P.2d 265, *infra*, §59. The prosecutor opposed the motion, stating that he did not intend to offer Donald's statement as evidence, but would use it only if Donald took the stand. The judge denied the severance and Donald did not testify, but the prosecutor, in cross-examining Blackington, constantly and openly referred to Donald's statement in framing a number of leading questions, including the following: "You don't recall you talked to Donald about taking care of Eric?" "You never told Donald, 'Don't worry, just get him outside, and I will take care of him at that point.' " Both defendants then moved for a mistrial, and the judge granted the motion as to Donald, but denied it as to Blackington. *Held*, Blackington was also entitled to a mistrial.

(a) The prosecutor's position was that he did not violate his promise not to use Donald's statement in evidence, and that he was entitled to look at any report or other material to formulate questions in cross-examining a witness. But his attempt to get before the jury information not admissible as evidence violated defendant's right of confrontation, under the principles laid down in *Douglas v. Alabama*, *supra*. (167 C.A.3d 1222.)

(b) The prosecutor's misconduct went to the critical issue in the case, i.e., by suggesting planning and an intent to "take care" of Eric, the alleged statements of defendant to Donald both before and after the shooting seriously undermined the claim of self-defense. And, as in *Douglas*, once Donald's statements were presented to the jury, defendant was denied his right to confront and cross-examine Donald by the latter's invocation of the self-incrimination privilege. (167 C.A.3d 1223.)

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## CHAPTER VI - Hearsay

### I. IN GENERAL

#### E. Unavailable as a Witness.

##### 1. In General.

#### *1 Witkin Cal. Evid. Hearsay § 18*

[§ 18] In General.

(1) *Statutory Grounds.* Former statutes contained nonuniform provisions specifying certain kinds of unavailability of a witness for particular hearsay exceptions (e.g., death, insanity, or absence), but the case law sometimes departed from the strict statutory language. The original Uniform Rules established uniformity by defining the phrase "unavailable as a witness" to include all of the kinds of unavailability, and then using the phrase when unavailability was a condition. The Evidence Code does the same, and *Ev.C. 240(a)* specifies the following bases for a finding of unavailability:

- (a) Privilege. (See *infra*, §20.)
- (b) Disqualification. (See *infra*, §19.)
- (c) Death, insanity, or illness. (See *infra*, §22.)
- (d) Absence. (See *infra*, §27.)

*Ev.C. 240(b)* makes it clear that the unavailability must be *honest*: "A declarant is not unavailable as a witness if the exemption, preclusion, disqualification, death, inability, or absence of the declarant was brought about by the procurement or wrongdoing of the proponent of his or her statement for the purpose of preventing the declarant from attending or testifying." Thus, "a party may not arrange a declarant's disappearance in order to use the declarant's out-of-court statement"; and if one of the parties was the declarant, that party may not create "unavailability" by invoking a privilege. (Law Rev. Com. Comment to *Ev.C. 240*; see *Ev.C. 240(c)*, *infra*, §22.)

(2) *Nonstatutory Grounds.* The courts have not interpreted *Ev.C. 240* and the former testimony provision (*Ev.C. 1291*, *infra*, §264), which requires unavailability, "so strictly as to preclude unlisted variants of unavailability. Rather, courts have given the statutes a realistic construction consistent with their purpose, i.e., to ensure that certain types of hearsay, including former testimony, are admitted only when no preferable version of the evidence, in the form of live testimony, is legally and physically available." (*People v. Reed* (1996) 13 C.4th 217, 226, 227, 52 C.R.2d 106, 914 P.2d 184 [statements in preliminary hearing transcript from trial of prior crime were admissible under former testimony provision, because statements were by witnesses who were unavailable by reason of rule precluding proof of prior crime by evidence outside record of conviction]; see *People v. Bartow* (1996) 46 C.A.4th 1573, 1580, 54 C.R.2d 482 [trial judge erred in refusing to admit trial transcript from prior trial for wilful discharge of firearm in which defendant's companion admitted that gun was hers and that she fired it; under reasoning of *Reed*, companion was unavailable witness, and thus hearsay exceptions for former testimony and statements against penal interest applied].)

(3) *Federal Rule. F.R. Evid., Rule 804(a)* defines unavailability to include the following situations:

(a) The declarant "is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement." (*F.R. Evid., Rule 804(a)(1).*)

(b) The declarant "persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so." (*F.R. Evid., Rule 804(a)(1).*)

(c) The declarant "testifies to a lack of memory of the subject matter of the declarant's statement." (*F.R. Evid., Rule 804(a)(1).*)

(d) The declarant "is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity." (*F.R. Evid., Rule 804(a)(1).*)

(e) The declarant "is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivisions (b)(2), (3) or (4), his attendance or testimony) by process or other reasonable means." (*F.R. Evid., Rule 804(a)(1).*)

However: "A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying." (*F.R. Evid., Rule 804(a).*) Moreover, *F.R. Evid., Rule 804(b)(6)*, added in 1997, creates a hearsay exception for a "statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." (See 4 Mueller & Kirkpatrick, *Federal Evidence* 2d, §486; 29 *Am.Jur.2d* (1994 ed.), *Evidence* §700.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Nonstatutory Grounds.* See *People v. Smith* (2003) 30 *C.4th* 581, 624, 134 *C.R.2d* 1, 68 *P.3d* 302 [in capital murder case, witness was unavailable within meaning of *Ev.C.* 240 where she refused to testify unless she was permitted to express her opposition to death penalty; court had no power to incarcerate her for refusing to testify, and was not required to fine her for contempt as prerequisite to finding her unavailable]; *People v. Coffman & Marlow* (2004) 34 *C.4th* 1, 79, 17 *C.R.3d* 710, 96 *P.3d* 30 [in capital murder case, trial judge did not err in ruling that witness was not unavailable, notwithstanding that judge found her deliberately evasive in claiming that she did not remember certain facts; ruling precluded wholesale reading of witness' testimony from her own trial on charges arising from same facts, but it did not preclude appropriate impeachment on further findings that she was feigning loss of memory].

(3) *Federal Rule.* See 174 A.L.R. Fed 1 [unavailability within meaning of *F.R. Evid., Rule 804*]; 193 A.L.R. Fed 703 [*F.R. Evid., Rule 804(b)(6)*]. *West's Key Number Digest*, Criminal Law k.662.9



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## CHAPTER VI - Hearsay

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- E. Unavailable as a Witness.
- 2. Privilege or Disqualification.
- a. Statutory Rule and Distinction.

*1 Witkin Cal. Evid. Hearsay § 19*

[§ 19] Statutory Rule and Distinction.

A declarant is unavailable if "[e]xempted or precluded on the ground of privilege from testifying concerning the matter to which his statement is relevant" (*Ev.C. 240(a)(1)*), or if the declarant is "[d]isqualified from testifying to the matter" (*Ev.C. 240(a)(2)*). (On privilege, see 2 *Cal. Evidence (4th)*, *Witnesses*, §59 et seq.; on disqualification, see 2 *Cal. Evidence (4th)*, *Witnesses*, §37 et seq.)

But a distinction must be borne in mind: The hearsay rule may be overcome by an exception where the condition of unavailability is shown, but the statement itself must still meet the test of other exclusionary rules, including those of privilege. Hence, if the declaration is itself a privileged communication, it will be excluded on that ground even if it comes within a hearsay exception. (Law Rev. Com. Comment to *Ev.C. 240*; see *supra*, §8.)

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- E. Unavailable as a Witness.
  - 2. Privilege or Disqualification.
    - b. Privilege Against Self-Incrimination.

*1 Witkin Cal. Evid. Hearsay § 20*

[§ 20] Privilege Against Self-Incrimination.

*Ev.C. 240* was upheld against a constitutional challenge in *People v. Williams* (1968) 265 C.A.2d 888, 71 C.R. 773. Defendant was convicted of first degree murder, and his conviction was reversed. On the retrial, witness S was called against him, the trial judge advised her of her self-incrimination privilege, and she claimed it. Then the prosecution read her testimony at the first trial. *Held*, this was not error. *Pointer v. Texas* (1965) 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923, 5 Cal. Crim. Law (3d), *Criminal Trial*, §531, recognized that the right of confrontation is protected where the prior testimony was taken at a full-fledged hearing with defendant represented by counsel with adequate opportunity to cross-examine. That was the case here: At the first trial, defendant, represented by able counsel, fully cross-examined witness S. (See *People v. Hill* (1971) 19 C.A.3d 306, 313, 315, 96 C.R. 813 [witness' preliminary hearing testimony was properly admitted after he refused to testify on self-incrimination grounds; defendant waived his constitutional confrontation right by opposing grant of immunity for witness]; *People v. Maxwell* (1979) 94 C.A.3d 562, 570, 156 C.R. 630, *infra*, §21; *People v. Malone* (1988) 47 C.3d 1, 23, 252 C.R. 525, 762 P.2d 1249 [rejecting argument that, in capital case, former testimony of accomplice who asserts self-incrimination privilege should be inadmissible].)

In *People v. Cudjo* (1993) 6 C.4th 585, 25 C.R.2d 390, 863 P.2d 635, a capital murder prosecution, the trial judge found defendant's brother to be an unavailable witness based on his assertion of the self-incrimination privilege, and admitted his preliminary hearing testimony. *Held*, this was proper.

(a) The witness' intent to assert the privilege was adequately demonstrated. At a foundational hearing out of the jury's presence, the prosecutor asked the witness whether he intended to answer any questions about the murder and whether he had conversed with defendant about another crime defendant had committed on the day of the murder. He refused to answer each question on the ground of privilege. Defense counsel then stipulated that the witness would assert the privilege as to any testimony he might give. (6 C.4th 616, 617.)

(b) The witness had been taken into custody as a suspect in the offense, and defendant argued at trial that the evidence was consistent with the hypothesis that the witness himself was the murderer. As it did not "clearly appear" that the witness' proposed testimony could not have tended to incriminate him for the murder, the witness' entitlement to assert the privilege was sufficiently established. (6 C.4th 617.)

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#### E. Unavailable as a Witness.

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#### c. Self-Incrimination Privilege Invoked Because of Fear of Perjury Prosecution.

#### 1 Witkin Cal. Evid. Hearsay § 21

[§ 21] Self-Incrimination Privilege Invoked Because of Fear of Perjury Prosecution.

In *People v. Maxwell* (1979) 94 C.A.3d 562, 570, 156 C.R. 630, the victim of a kidnaping testified at the preliminary hearing, but at the trial, refused to testify because of possible conflict with her earlier testimony (on the issue whether she went with defendant voluntarily) and exposure to charges of perjury. The trial judge sustained her claim of privilege and admitted her preliminary hearing testimony. On appeal, defendant contended that the normal rule on the unavailability of a witness because of a claim of self-incrimination privilege should not apply in this situation. *Held*, the ruling was correct. No authority suggests such an exception to the rule, and the only case in point (a Michigan decision in which perjury charges were pending) found no basis for the distinction. (94 C.A.3d 573.)

In the extraordinary circumstances present in *People v. Garner* (1989) 207 C.A.3d 935, 255 C.R. 257, however, admission of preliminary hearing testimony under the unavailability rule was improper. At the trial, the prosecution's entire case-in-chief consisted of (a) an autopsy report indicating that the victim had died of gunshot wounds, and (b) preliminary examination testimony of Phillips, the only witness at the examination. Phillips testified that he was a member of a gang present at the scene of the killing, and identified defendant as the shooter. Later, he told the deputy district attorney that he had lied because of antipathy toward defendant; but he refused to testify at trial, asserting that to do so would permit the prosecution to charge him with perjury. The trial judge allowed the preliminary examination testimony to be read, and instructed the jury under CALJIC, No. 2.25 that they were not to draw any inference as to credibility of the witness or guilt or innocence of the defendant from the claim of privilege. *Held*, admission of the testimony resulted in reversible error.

(a) The CALJIC instruction is appropriate where the witness fears his own potential prosecution, but it was entirely unwarranted in the present unique situation. "[W]hen a witness refuses to respond to relevant questioning upon the express averment that to do so would reveal the falsity of his earlier testimony, it is eminently reasonable and proper for the jury to draw an unfavorable inference therefrom regarding his credibility. In fact, since a witness's intention to commit *future* perjury could not possibly serve to sustain an invocation of the privilege, only two truly rational inferences are possible, (1) his earlier testimony was, indeed, false, or (2) he is currently lying concerning his reason for refusing to testify." (207 C.A.3d 938.)

(b) "Further, where the witness's earlier avowedly false testimony provides a basis for determining the accused's guilt, the jury ought properly to be instructed that it should, rather than it should not, draw all appropriate inferences regarding the defendant's actual guilt or innocence from the witness's refusal to speak." *People v. Maxwell, supra*, is "manifestly distinguishable." There, even if the witness' admission that she lied in one particular were deemed true, the



remainder of her testimony constituted substantial evidence of defendant's guilt. (207 C.A.3d 939.)

(c) In the present case defendant was completely precluded from questioning his sole accuser concerning a primary issue (admission of false swearing), because the admission occurred after the preliminary examination had been completed. This was a denial both of the constitutional right of confrontation and the right of cross-examination. (207 C.A.3d 940.)

(d) "When the People wish to go forward in reliance upon the testimony of a recanting witness, fundamental fairness would require, at a minimum, that the jury (1) be advised precisely why the witness is being allowed to refuse to testify, i.e., an alleged fear of a perjury prosecution, and (2) be instructed that they should draw all reasonable and appropriate inferences therefrom concerning the witness's credibility and the guilt or innocence of the accused." (207 C.A.3d 941.)

(e) The preferable approach would have been for the judge to condition the prosecution's request to introduce the testimony upon granting Phillips immunity; obviously the prosecution could not have urged that the very testimony on which they relied was so untrustworthy that they wished to retain the right to prosecute the declarant for perjury. (207 C.A.3d 941.) "It is entirely possible, of course, that the reluctant witness may abandon his amended assertions after he once again has been sworn to tell the truth, but even if he does not, the prosecution will be free to demonstrate through its questioning that it is his recantation, rather than his prior testimony, that should be deemed unworthy of belief." (207 C.A.3d 942.)

(f) "Lest there be any confusion concerning the extremely limited nature of the remedy we here recommend, we emphasize that a need therefor will arise if, *and only if*, (1) the witness's invocation of the privilege is based upon a claimed fear of a perjury prosecution, and (2) it is the People who wish to use this witness's earlier, and assertedly false, testimony as evidence against the accused. While the district attorney may not be required to seek a grant of immunity even in such an instance, his request to make affirmative use of that testimony may be conditioned upon his willingness to expose the witness to full and complete cross-examination before the triers of fact." (207 C.A.3d 942.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER VI - Hearsay

### I. IN GENERAL

E. Unavailable as a Witness.

3. Death, Insanity, or Illness.

1 Witkin Cal. Evid. Hearsay § 22

[§ 22] Death, Insanity, or Illness.

(1) *In General.* A declarant is unavailable if "[d]ead or unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity." (Ev.C. 240(a)(3); see *People v. Crandall* (1941) 43 C.A.2d 238, 241, 110 P.2d 682 [insanity]; *People v. Hernandez* (1968) 263 C.A.2d 242, 252, 69 C.R. 448 [witness injured and unconscious in hospital]; *People v. King* (1969) 269 C.A.2d 40, 74 C.R. 679 [witness in hospital in serious condition, unable to speak, condition would not clear up for 8 weeks]; *People v. Alcala* (1992) 4 C.4th 742, 779, 15 C.R.2d 432, 842 P.2d 1192 [witness' complete inability to recall relevant information amounted to mental infirmity within meaning of Ev.C. 240(a)(3)]; on Ev.C. 1231 et seq., allowing admission of prior statement by declarant, now dead due to unnatural causes, regarding gang-related activity, see *infra*, §154.)

*People v. Williams* (1979) 93 C.A.3d 40, 155 C.R. 414, illustrates the type of situation in which Ev.C. 240(a)(3) is not applicable. R, a rape victim, had suffered a severe emotional strain in a prior trial of several defendants. *Held*, the trial judge erred in finding her unavailable. "At best the evidence established that, understandably, Rebecca, the declarant, did not want to go through another ordeal of testifying, and that it could be anticipated that she would suffer some mental anguish and physical effects from testifying. But the evidence also established that the anguish and physical effects which she suffered from testifying at the first trial were temporary in nature and disappeared upon the conclusion of the first trial." (93 C.A.3d 54.) The applicable test requires that the infirmity be so severe as to render the witness' attendance or testifying *relatively impossible* and not merely inconvenient. Here, the preliminary-facts evidence showed only a condition rendering her ability to testify *merely inconvenient*. (93 C.A.3d 54.)

(2) *Evidence To Establish Insanity or Illness.* There was formerly some uncertainty about the type of evidence needed to establish that the declarant was indeed unavailable because of insanity or other illness. (See *People v. Stritzinger* (1983) 34 C.3d 505, 518, 525, 194 C.R. 431, 668 P.2d 738 [preliminary hearing testimony of victim of sexual molestation was admitted at trial after victim's mother testified that victim had been suffering from emotional difficulties; majority held this to be error, but dissent argued that lay testimony was not necessarily incompetent on this issue].)

Ev.C. 240(c), enacted in 1984, deals with the problem as follows: "Expert testimony which establishes that physical or mental trauma resulting from an alleged crime has caused harm to a witness of sufficient severity that the witness is physically unable to testify or is unable to testify without suffering substantial trauma may constitute a sufficient showing of unavailability. ... As used in this section, the term 'expert' means a physician and surgeon, including a psychiatrist, or any person described by subdivision (b), (c), or (e) of Section 1010." (See *People v. Turner* (1990) 219 C.A.3d 1207, 1216, 268 C.R. 686 [clinical social worker's opinion, based on testimony, hypothetical questions and

personal contact, that testifying would inflict substantial trauma on rape victim, established medical unavailability under *Ev.C. 240(c)*; on *Ev.C. 1010(b)*, (c), and (e), listing licensed psychologist, licensed clinical social worker, and marriage, family and child counselor as protected by the psychotherapist-patient privilege, see 2 *Cal. Evidence (4th)*, *Witnesses*, §211 et seq.)

The introduction of expert testimony to establish witness unavailability due to trauma resulting from a crime will not be deemed "procurement of unavailability" (see *supra*, §18), in the absence of contrary proof. (*Ev.C. 240(c)*; see 20 *Pacific L. J.* 648.)

(3) *No Requirement of Diligence or Permanent Unavailability.* In *People v. Gomez* (1972) 26 C.A.3d 225, 103 C.R. 80, defendant was convicted of unlawful sexual intercourse with a female under the age of 18, largely on the preliminary hearing testimony of the complaining witness, who was in Camarillo State Hospital under psychiatric care at the time of trial. *Held*, the testimony was properly admitted.

(a) *Ev.C. 240(a)(3)* requires no showing of diligence when illness or infirmity is the cause of the absence. "To require proof of reasonable attempts to secure the attendance of a witness who, in any event, could not come to court even if subpoenaed, would be an asinine bow to futility." (26 C.A.3d 228.)

(b) There is no constitutional requirement that the witness be deceased or beyond the reach of court process. "To require proof that a witness's unavailability is permanent would be, except in case of death, to require speculation. ... In like fashion, the witness presently unavailable because of disabling illness ultimately may recover; but if the fact or time of recovery lies only in an uncertain or distant future, no good reason appears for denying the admission of testimony previously given." (26 C.A.3d 229.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Evidence To Establish Insanity or Illness.* *Ev.C. 1010(e)* was amended in 2001 to refer to "marriage and family therapists" instead of "marriage, family, and child counselors".

See *People v. Winslow* (2004) 123 C.A.4th 464, 471, 19 C.R.3d 872 [trial judge's determination that child molestation victim was unavailable within meaning of *Ev.C. 240(a)(3)*, (c) because he was suffering from posttraumatic stress syndrome as result of charged offense was subject to independent review; relying on *People v. Cromer* (2001) 24 C.4th 889, 103 C.R.2d 23, 15 P.3d 243, *Supp.*, *infra*, §29].



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## CHAPTER VI - Hearsay

### I. IN GENERAL

#### E. Unavailable as a Witness.

##### 4. Contumacious Witness.

#### 1 Witkin Cal. Evid. Hearsay § 23

[§ 23] Contumacious Witness.

In *People v. Sul* (1981) 122 C.A.3d 355, 175 C.R. 893, Leon, an apparent accomplice, was granted immunity and testified at the preliminary hearing, implicating defendant. At trial, Leon refused to testify, and was sentenced to 5 days in jail for contempt; the jury deadlocked, and a mistrial was declared. At the second trial, Leon, despite repeated warnings of further sanctions, refused to answer questions without the presence of his attorney, who was currently engaged in another trial. Leon was allowed to telephone his attorney, but continued in his refusal to testify without his attorney present. The trial judge then allowed the reading of the preliminary hearing testimony. *Held*, this was error.

(a) The question whether a court faced with a contumacious witness has the duty to adjourn proceedings for a reasonable time to determine whether the witness will change his mind is new and difficult. (122 C.A. 362, 363.) *People v. Rojas* (1975) 15 C.3d 540, 125 C.R. 357, 542 P.2d 229, *infra*, §24, involved threats and fear; this case does not. (122 C.A.3d 363.)

(b) A federal case offers a test: The former testimony may be admitted "if the court makes a finding of unavailability only after taking reasonable steps to induce the witness to testify unless it is obvious that such steps would be unavailing." (122 C.A.3d 364.)

(c) There were such reasonable steps to be taken here; e.g., (1) the trial could not have been completed on the day Leon was on the stand, and the attorney would have been available shortly thereafter (122 C.A.3d 365), (2) the district attorney knew of the problem, and should have apprised the judge of it, so that the judge could institute coercive contempt proceedings (122 C.A.3d 366).

(d) Here, the judge did nothing directed toward obtaining the witness' testimony other than finding him in contempt and sending him to jail; this was insufficient. (122 C.A.3d 367.) (See concurring opinion, 122 C.A.3d 369, observing that trial judges should not have to take extreme measures, and that adjourning trial to allow Leon to reach his attorney would have been enough.) (See *People v. Walker* (1983) 145 C.A.3d 886, 894, 193 C.R. 812 [following *People v. Sul*]; 92 A.L.R.3d 1138.)

In *People v. Francis* (1988) 200 C.A.3d 579, 245 C.R. 923, defendant was a member of a group of six that committed a murder. Two other members entered into plea bargains in exchange for their testimony against the rest, but refused to testify at the trial. The judge, after extensive efforts to persuade them to testify, found them unavailable and permitted the reading of their preliminary hearing testimony. *Held*, this was proper. The judge took all of the reasonable steps suggested in *People v. Sul*. "The purpose behind *Evidence Code* section 240 is to ensure that a witness is

unavailable before the court can determine if the witness's prior testimony can be utilized. Naturally physical unavailability is such a situation, but the witness is no more available when his body is present but he refuses to testify and the court is unable to compel him to do so by its process. There is no reason why a physically available but unwilling to testify witness should not be included as an unavailable witness." (200 C.A.3d 588.)

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CHAPTER VI - Hearsay

I. IN GENERAL

E. Unavailable as a Witness.

5. Witness' Fear of Safety.

*1 Witkin Cal. Evid. Hearsay § 24*

[§ 24] Witness' Fear of Safety.

In *People v. Rojas* (1975) 15 C.3d 540, 125 C.R. 357, 542 P.2d 229, the witness was present in court, and was physically and mentally able to testify, but refused because he was in fear of his safety and that of his family. *Held*, *Ev.C. 240(a)(3)*, specifying "mental illness or infirmity" as a ground, can be construed to permit a trial judge to consider "a mental state induced by fear of personal or family harm." (15 C.3d 551.) "[I]f a witness who has given former testimony where he was subjected to cross-examination can be prevented from testifying in a subsequent hearing because of threats and fear the ends of justice would be thwarted and the judicial system endangered." (15 C.3d 552.) (See *People v. Quaintance* (1978) 86 C.A.3d 594, 600, 150 C.R. 281 [following *Rojas*]; 10 U.S.F. L. Rev. 587.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER VI - Hearsay

### I. IN GENERAL

#### E. Unavailable as a Witness.

#### 6. Witness Killed or Kidnaped.

#### 1 Witkin Cal. Evid. Hearsay § 25

[§ 25] Witness Killed or Kidnaped.

(1) *In General.* *Ev.C. 1350*, enacted in 1985, creates an unavailable witness rule for a particular class of criminal proceedings, and specifies conditions of admissibility of the statement as well as the procedure for its introduction. "In a criminal proceeding charging a *serious felony*, evidence of a statement made by a declarant is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness," and all of six specified conditions "are true." (*Ev.C. 1350(a)*.) "Serious felony" means any of the felonies listed in P.C. 1192.7(c) (see 3 *Cal. Crim. Law (3d)*, *Punishment*, §340 et seq.) or any violation of *Health & Saf.C. 11351, 11352, 11378, or 11379* (see 2 *Cal. Crim. Law (3d)*, *Crimes Against Public Peace and Welfare*, §§81, 94). (*Ev.C. 1350(d)*.) (On conditional examination of the witness, see P.C. 1335, 1336, 1337, 1341, 5 *Cal. Crim. Law (3d)*, *Criminal Trial*, §66.)

(2) *Conditions of Admissibility.* The statute applies only if "all of the following are true":

(a) "There is clear and convincing evidence that the declarant's unavailability was knowingly caused by, aided by, or solicited by the party against whom the statement is offered for the purpose of preventing the arrest or prosecution of the party and is the result of the death by homicide or the kidnapping of the declarant." (*Ev.C. 1350(a)(1)*.)

(b) "There is no evidence that the unavailability of the declarant was caused by, aided by, solicited by, or procured on behalf of, the party who is offering the statement." (*Ev.C. 1350(a)(2)*.)

(c) "The statement has been memorialized in a tape recording made by a law enforcement official, or in a written statement prepared by a law enforcement official and signed by the declarant and notarized in the presence of the law enforcement official, prior to the death or kidnapping of the declarant." (*Ev.C. 1350(a)(3)*.)

(d) "The statement was made under circumstances which indicate its trustworthiness and was not the result of promise, inducement, threat, or coercion." (*Ev.C. 1350(a)(4)*.)

(e) "The statement is relevant to the issues to be tried." (*Ev.C. 1350(a)(5)*.)

(f) "The statement is corroborated by other evidence which tends to connect the party against whom the statement is offered with the commission of the serious felony with which the party is charged. The corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." (*Ev.C. 1350(a)(6)*.)

(3) *Distinction: Statement by Person Other Than Declarant.* If a statement to be admitted under *Ev.C. 1350* includes hearsay statements made by *anyone other than the declarant* who is unavailable under *Ev.C. 1350(a)*, those

hearsay statements are inadmissible unless they meet the requirements of an exception to the hearsay rule. (*Ev.C. 1350(e).*)

(4) *Notice of Intention.* The prosecution must serve a *written notice* on the defendant of its intention to offer the statement "at least 10 days prior to the hearing or trial." However, its failure to provide the notice may be *excused on a showing of good cause*, and in that event, the defendant is entitled to a *reasonable continuance*. (*Ev.C. 1350(b).*)

(5) *Offer of Statement During Trial.* The court's *determination* (i.e., of the existence of the conditions) must be made *out of the presence of the jury*. (*Ev.C. 1350(c).*)

(6) *Defendant's Election To Testify at Hearing.*

(a) *Exclusion of unnecessary persons.* If the defendant elects to testify at the hearing on the motion, the court *must exclude* "every person except the clerk, the court reporter, the bailiff, the prosecutor, the investigating officer, the defendant and his or her counsel, an investigator for the defendant, and the officer having custody of the defendant." (*Ev.C. 1350(c).*)

(b) *Transcript of testimony.* If a transcript is made of the defendant's testimony, it must be *sealed and transmitted* to the clerk of the court in which the action is pending. (*Ev.C. 1350(c).*)

(c) *Testimony inadmissible in other proceeding.* "Notwithstanding any other provision of law, the defendant's testimony at the hearing shall not be admissible in any other proceeding." (*Ev.C. 1350(c).*)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Conditions of Admissibility.* See *People v. Zambrano (2007) 41 C.4th 1082, 1143, 63 C.R.3d 297, 163 P.3d 4* [in prosecution for murder and attempted murder, tape-recorded statements by colleague of defendant to police met conditions for admissibility under *Ev.C. 1350*, where there was strong evidence that defendant subsequently killed colleague in order to prevent his testimony, and circumstances under which statements were made indicated that they were trustworthy].





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## CHAPTER VI - Hearsay

### I. IN GENERAL

#### E. Unavailable as a Witness.

#### 7. Elder or Dependent Witness.

#### 1 Witkin Cal. Evid. Hearsay § 26

[§ 26] Elder or Dependent Witness.

(1) *In General.* *Ev.C. 1380*, added in 1999, creates a hearsay exception for certain statements by victims who are elder or dependent adults. Under *Ev.C. 1380(a)*, a hearsay statement is not inadmissible in a prosecution under P.C. 368 (crimes against elder or dependent adults; see 2 *Cal. Crim. Law (3d)*, *Sex Offenses and Crimes Against Decency*, §168) if the declarant is an unavailable witness, as defined in *Ev.C. 240* (supra, §18), and the following conditions are satisfied:

(a) The party offering the statement makes a showing that the statement is trustworthy. In determining whether this showing is sufficient, the judge "may consider only the circumstances that surround the making of the statement and that render the declarant particularly worthy of belief."

(b) There is no evidence that the declarant's unavailability was caused by or procured on behalf of the party offering the statement.

(c) The entire statement has been memorialized in a videotape recording by a law enforcement official prior to the declarant's death or disability.

(d) The statement was made by the victim of the alleged crime.

(e) The statement is supported by corroborating evidence.

(f) The victim was 65 years of age or a dependent adult when the alleged crime occurred, *and*, at the time of the criminal proceeding (including but not limited to the preliminary hearing or trial), the victim is deceased or so mentally or physically disabled that the victim cannot provide adequately for his or her own care or protection.

(2) *Notice.* If the prosecution intends to offer a statement under *Ev.C. 1380*, it must provide written notice to the defendant at least 10 days prior to the hearing or trial where the statement will be offered, unless it can show good cause for failing to do so. If a showing of good cause is made, the defendant is entitled to a reasonable continuance. (*Ev.C. 1380(b).*)

(3) *Hearing on Motion.* Where the statement is offered during trial, the judge's determination as to the witness' unavailability must be made outside the presence of the jury. If the defendant testifies at the hearing on the motion, all persons must be excluded from the examination, except the clerk, the court reporter, the bailiff, the prosecutor, the investigating officer, the defendant and his or her counsel, an investigator for the defendant, and the officer having

custody of the defendant. The defendant's testimony is not admissible in any other proceeding. Any transcript made of the defendant's testimony must be sealed and transmitted to the clerk of the court in which the action is pending. (*Ev.C. 1380(c)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General*. See *People v. Tatum* (2003) 108 C.A.4th 288, 298, 300, 133 C.R.2d 267 [in prosecution arising from defendant's beating of elderly victim, admission of victim's videotaped testimony was not error, where victim died of natural causes before trial; although sometimes confused or forgetful, victim appeared to be competent, and his statements were corroborated by DNA evidence].

(4) *(New) Statute Unconstitutional*. In *People v. Pirwani* (2004) 119 C.A.4th 770, 14 C.R.3d 673, defendant was charged with embezzlement and grand theft. The victim was a dependent adult in a residential intermediate care facility, and defendant was her caretaker. By the time of trial, the victim had died, and a videotaped statement by her was admitted. In it, she told law enforcement officials that defendant had asked her for a large loan, that defendant was supposed to pay the victim's rent, and that she was not aware that defendant was not doing so. She also reviewed her checkbook register and pointed out that some entries were not in her handwriting and were not for transactions of which she was aware. Defendant was convicted. *Held*, reversed; the videotaped statement should not have been admitted. The trial judge admitted it under *Ev.C. 1380*, which incorporates the standards of *Ohio v. Roberts* (1980) 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597, 3 Cal. Evidence (4th), *Presentation at Trial*, §21. Those standards allow admission of an out-of-court statement, despite the absence of an opportunity for confrontation and cross-examination, if the declarant is unavailable and the statement bears adequate indicia of reliability. The *Roberts* standards were rendered obsolete by *Crawford v. Washington* (2004) 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177, 3 Cal. Evidence (4th), *Presentation at Trial, Supp.*, §21. Under *Crawford*, an out-of-court statement made in a testimonial setting must be excluded unless the declarant is unavailable and there was a prior opportunity for cross-examination. Here, the Attorney General concedes that *Ev.C. 1380* is unconstitutional on its face because it fails to meet the requirements of *Crawford*. (119 C.A.4th 786.) The videotaped statement at issue likewise fails to withstand analysis under *Crawford*. It was an ex parte, unsworn statement given to law enforcement agents, and it must be considered testimonial because there was a reasonable expectation that it would be used at trial if the declarant became unavailable. As defendant had no opportunity to cross-examine the declarant at the time the statement was made, the Confrontation Clause requires its exclusion. (119 C.A.4th 786, 787.)



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CHAPTER VI - Hearsay

I. IN GENERAL

E. Unavailable as a Witness.

8. Absence.

a. Statutory Rules.

*1 Witkin Cal. Evid. Hearsay § 27*

[§ 27] Statutory Rules.

Unavailability will be found where the declarant is either (1) "[a]bsent from the hearing and the court is unable to compel his attendance by its process" (*Ev.C. 240(a)(4)*), or (2) "[a]bsent from the hearing and the proponent of his statement has exercised reasonable diligence but has been unable to procure his attendance by the court's process" (*Ev.C. 240(a)(5)*). (On witness out of jurisdiction, see *infra*, §28; on diligence to procure witness, see *infra*, §29; on distinction between *Ev.C. 240(a)(4)* and *Ev.C. 240(a)(5)*, see *People v. Ware* (1978) 78 C.A.3d 822, 830, 144 C.R. 354.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER VI - Hearsay

### I. IN GENERAL

#### E. Unavailable as a Witness.

##### 8. Absence.

#### b. Witness Out of Jurisdiction.

### 1 Witkin Cal. Evid. Hearsay § 28

[§ 28] Witness Out of Jurisdiction.

(1) *Out of Jurisdiction but Subject to Process.* The earlier cases took the position that a defendant who was out of the jurisdiction was beyond the reach of process and was therefore unavailable. (See *People v. Carswell* (1959) 51 Cal.2d 602, 605, 335 P.2d 99; 5 Wigmore (Chadbourn Rev.) §1404.)

This theory is no longer tenable in criminal cases. In *Barber v. Page* (1968) 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255, codefendant W, at a preliminary hearing, incriminated defendant. At defendant's trial 7 months later, W was in a federal prison in Texas, 225 miles away. The state, on this showing, was allowed over objection to use W's preliminary hearing testimony. *Held*, reversed. Some courts and writers (including Wigmore) have assumed that absence from the jurisdiction makes the witness unavailable because compulsory process cannot be used. But this is not true today:

(a) For a witness not in prison, the Uniform Act To Secure the Attendance of Witnesses from Without the State in Criminal Cases (2 Cal. Evidence (4th), Witnesses, §9) can be used. (88 S.Ct. 1321, 20 L.Ed.2d 259, footnote 4.)

(b) For a witness in a state prison, the common law writ of habeas corpus ad testificandum (2 Cal. Evidence (4th), Witnesses, §13) can be used on a showing of adequate safeguards to keep the witness in custody. (88 S.Ct. 1321, 20 L.Ed.2d 259, footnote 4.)

(c) For a witness in federal custody, a federal court may issue the writ at the request of state authorities (28 U.S.C., §2241(c)), and it is the policy of the U.S. Bureau of Prisons to permit federal prisoners to testify in state criminal proceedings pursuant to the writ. (88 S.Ct. 1321, 20 L.Ed.2d 259.) Thus, an imprisoned witness is not "unavailable" unless the authorities have made a good faith effort, under these statutes, to obtain his presence. (88 S.Ct. 1322, 20 L.Ed.2d 259.) (See *People v. Casarez* (1968) 263 Cal.2d 130, 133, 69 Cal.R. 187 [witness--paid informer in narcotic cases--had gone to Chicago; no effort to persuade him to come here or to invoke Uniform Act]; *People v. St. Germain* (1982) 138 Cal.3d 507, 517, 187 Cal.R. 915 [where witness was permanent legal resident of U.S. in foreign country, prosecution, which made no effort to invoke subpoena procedure of 28 U.S.C., §1783, failed to exercise due diligence]; *People v. Blackwood* (1983) 138 Cal.3d 939, 947, 188 Cal.R. 359 [failure to use Uniform Act because of belief that state of witness' residence would not issue subpoena was not an excuse; prosecution's duty was to invoke Act, not to decide whether this step would be fruitful]; 2 McCormick 5th, §253; 29 Am.Jur.2d (1994 ed.), Evidence §699.)

However, a nonresident of the United States in a foreign country is beyond the reach of process and can be

considered per se unavailable. (See *Mancusi v. Stubbs* (1972) 408 U.S. 204, 92 S.Ct. 2308, 33 L.Ed.2d 293; *People v. Ware* (1978) 78 C.A.3d 822, 833, 144 C.R. 354; *People v. Denson* (1986) 178 C.A.3d 788, 792, 224 C.R. 63.) And where a witness, a legal resident of the United States, was served with a state subpoena before going back to his native country and ignoring demands that he return, resort to the procedure of 28 U.S.C., §1783 was not required. (*People v. Watson* (1989) 213 C.A.3d 446, 453, 454, 261 C.R. 635 [distinguishing *St. Germain*].)

(2) *Unjustified Reliance on Witness' Promise To Appear*. In *People v. Masters* (1982) 134 C.A.3d 509, 185 C.R. 134, the court considered an issue of first impression: "the effect of a broken promise to appear at trial given by a prospective witness who is out-of-state and who has not been subjected to compulsory court process to compel trial attendance." (134 C.A.3d 520.) The witness, the alleged victim and sole witness to a robbery, had left the state, obtained a new job, and repeatedly sought to evade contact with the California authorities, but finally agreed to return and testify if her expenses were paid. (134 C.A.3d 522.) She subsequently repudiated the promise and sought to conceal her location. *Held*, the showing was inadequate. This was not a case of a promise by a cooperative witness, or one in which it was not feasible to make use of the Uniform Act; her whereabouts were known and she was still amenable to legal process. (134 C.A.3d 526.) "It would be anomalous to conclude in the instant case that the promise to appear made in reluctance, preceded by a broken promise to maintain contact and evasiveness, makes an adequate showing of unavailability simply because the witness was out of state." (134 C.A.3d 528.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Out of Jurisdiction but Subject to Process*. See 2 McCormick 6th, §253. *Nonresident of United States located in foreign country*: See *People v. Sandoval* (2001) 87 C.A.4th 1425, 1440, 1442, 105 C.R.2d 504, 3 Cal. Evidence (4th), *Presentation at Trial, Supp.*, §21 [in light of recent cooperation between United States and Mexico in criminal matters, trial judge erred in determining that Mexican citizen who had testified at preliminary examination was unavailable simply on basis that he was now in Mexico; defendant's confrontation right required that prosecution make reasonable, good faith effort to obtain his attendance].



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## CHAPTER VI - Hearsay

### I. IN GENERAL

#### E. Unavailable as a Witness.

##### 8. Absence.

#### c. Diligent Search for Witness.

### 1 Witkin Cal. Evid. Hearsay § 29

#### [§ 29] Diligent Search for Witness.

(1) *In General.* A considerable body of California case law has accumulated on the issue of reasonable diligence ("due diligence" under the former statute), where the prosecution in a criminal trial seeks to introduce preliminary hearing testimony on the basis of unavailability. It has been held that defendant, ordinarily entitled to confrontation, may insist on strict compliance with the reasonable diligence requirement in attempting to locate the missing witness, and that the burden is on the prosecution to make an adequate showing. (See 3 A.L.R.4th 87 [sufficiency of efforts to locate missing witness to justify admission of former testimony]; on different standards for prosecution and defendant, see *People v. Linder* (1971) 5 C.3d 342, 348, 96 C.R. 26, 486 P.2d 1226, *infra*, §30; *People v. Forgason* (1979) 99 C.A.3d 356, 160 C.R. 263.)

(2) *Insufficient Showing of Diligence.* The following cases held that the burden had not been met and that it was error to admit the former testimony: *People v. Hayes* (1925) 72 C.A. 292, 301, 305, 237 P. 390; *People v. Redston* (1956) 139 C.A.2d 485, 492, 494, 293 P.2d 880 [no check at place of employment, employment agencies, labor unions, hospitals, utility companies, etc., i.e., no showing of "thorough, painstaking and systematic effort to locate the witnesses"]; *People v. Enriquez* (1977) 19 C.3d 221, 235, 236, 137 C.R. 171, 561 P.2d 261 [17-year-old high school student with uncooperative mother; no effort made to locate him through school or at home or through employer or employee organizations or friends or acquaintances]; *People v. Louis* (1986) 42 C.3d 969, 974, 232 C.R. 110, 728 P.2d 180 [prosecution witness whose credibility was indisputably minimal and who was "known to be highly unreliable and likely to disappear," was released from custody on own recognizance through efforts of prosecution and "promptly vanished"]; *People v. Mendieta* (1986) 185 C.A.3d 1032, 1035, 230 C.R. 162 [prosecution, on notice that witness might not appear, failed to show that he could not have been served with subpoena while still in California, and otherwise showed nothing more than desultory and indifferent search]; *People v. Walton* (1996) 42 C.A.4th 1004, 1010, 49 C.R.2d 917 [defense investigator failed to obtain witness' high school records or ask district attorney for current address, and did not check with Department of Motor Vehicles, hospitals, jails, phone companies, utility companies, voter registration, unions, Social Security, welfare agencies, or the military]. (See 18 Santa Clara L. Rev. 271 [Enriquez].)

(3) *Sufficient Showing of Diligence.* (See *People v. Day* (1933) 219 C. 562, 564, 279 P.2d 909; *People v. Cavazos* (1944) 25 C.2d 198, 201, 153 P.2d 177; *People v. Williams* (1973) 9 C.3d 24, 33, 106 C.R. 622, 506 P.2d 998; *People v. Johnson* (1974) 39 C.A.3d 749, 757, 114 C.R. 545; *People v. Ventura* (1985) 174 C.A.3d 784, 792, 220 C.R. 269 [police investigator began search 5 months prior to date set for trial, went to witness's residence and was told that witness had moved, went to six apartments and asked witness's whereabouts and left cards, checked with witness's

former employer, investigated second address obtained from Department of Motor Vehicles, and checked police department and federal government records]; *People v. Perez* (1989) 207 C.A.3d 431, 435, 254 C.R. 869 [prosecution served witness with subpoena by mail, witness acknowledged receipt and promised to be available, and prosecution later made appropriate attempts to effect personal service]; *People v. McElroy* (1989) 208 C.A.3d 1415, 1427, 256 C.R. 853 [subpenas issued 24 days before trial, and significant efforts by investigators to locate witnesses]; *People v. Robinson* (1991) 226 C.A.3d 1581, 1585, 277 C.R. 504 [police officer forwarded subpoena to private subpoena service agency, ran computer check on witness, and issued "Be on the Lookout" bulletin]; *People v. Wise* (1994) 25 C.A.4th 339, 343, 344, 30 C.R.2d 413 [prosecution did not have duty to keep tabs on witness, who was citizen-victim with no known motive to disappear; its attempts to locate him, including trying repeatedly to serve him at his address and two other addresses, and contacting post office, jail, hospital, and coroner, were adequate].)

(4) *Discretion in Allowing Proof Before Jury*. No hard and fast rule exists on whether the jury must be excluded while proof of reasonable diligence is being presented. "Thus, the absence of a material witness well may affect the weight which a jury will accord his testimony, given on an earlier occasion, when it is read into the evidence and it is arguable that the prosecution should not be denied the right to explain the witness's unavailability. On the other hand, where the explanatory evidence is of a nature prejudicial to the defendant, the trial court must exercise discretion in determining which side is likely to suffer more from the evidence or from its exclusion." (*People v. Rodriguez* (1971) 18 C.A.3d 793, 798, 96 C.R. 162.)

(5) *Standard of Review*. After pointing out that statements in *People v. Louis*, *supra*, and *People v. Hovey* (1988) 44 C.3d 543, 244 C.R. 121, 749 P.2d 776, had created uncertainty with respect to whether "independent review" or "abuse of discretion" was the appropriate standard for reviewing the reasonable diligence issue, *People v. McElroy*, *supra*, held that abuse of discretion remained the proper standard.

(a) In considering whether to abandon the abuse of discretion standard confirmed in *People v. Jackson* (1980) 28 C.3d 264, 168 C.R. 603, 618 P.2d 149, and to substitute the broader standard of independent review, the *Louis* court indicated that the issue of reasonable diligence was a mixed question of law and fact, and surmised that the proper standard *may* be independent review. However, it did not impose that standard because, under the facts involved, due diligence was not established under either standard. (208 C.A.3d 1425.)

(b) In *People v. Hovey*, *supra*, the court said: "We have *held* that the question of due diligence is a factual one depending on the circumstances in each case, and that the trial court's determination of the issue will not be disturbed in the absence of a showing of an abuse of discretion. ... In *People v. Louis*, ... we *suggested (but did not decide)* that an appellate court should independently review the ... due diligence issue.'" The *Hovey* court apparently applied the abuse of discretion standard because it concluded that the trial judge's finding of due diligence was supported by substantial evidence. (208 C.A.3d 1426.)

(c) "Thus, the most recent Supreme Court guidance on this issue both reaffirmed the vitality of prior cases applying the 'abuse of discretion' standard, and cautioned that any contrary analysis or suggestions in *People v. Louis* ... were dicta. We adhere to the Supreme Court's guidance, and therefore apply the abuse of discretion standard to this case." (208 C.A.3d 1426.)

The abuse of discretion standard has been applied in numerous subsequent cases. (See *People v. Turner* (1990) 219 C.A.3d 1207, 1214, 268 C.R. 686 [following *McElroy*]; *People v. Wright* (1990) 222 C.A.3d 1002, 1006, 272 C.R. 219 [same]; *People v. Robinson*, *supra*, 226 C.A.3d 1585 [same]; *People v. Saucedo* (1995) 33 C.A.4th 1230, 1235, 40 C.R.2d 153 [same]; *People v. Walton*, *supra*, 42 C.A.4th 1010, 1011 [citing *Saucedo*].) By contrast, in *People v. Watson* (1989) 213 C.A.3d 446, 452, 261 C.R. 635, *supra*, §28, the court cited *People v. Louis*, *supra*, and applied the independent review standard without further discussion. (See *People v. Lopez* (1998) 64 C.A.4th 1122, 1127, 76 C.R.2d 38 [agreeing with *Watson*, but finding that under either standard reasonable diligence was exercised].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Insufficient Showing of Diligence*. See *People v. Avila* (2005) 131 C.A.4th 163, 170, 31 C.R.3d 441 [trial judge erred in finding that prosecution exercised reasonable diligence in attempting to locate witness who testified against defendant in first trial, which ended in mistrial, and therefore in admitting her testimony in retrial; prosecution gave its confidence that she would be available on short notice as its reason for waiting until first day of retrial to contact her, but this was inconsistent with its expressed reluctance to give her advance warning out of fear she might flee].

(3) *Sufficient Showing of Diligence*. See *People v. Smith* (2003) 30 C.4th 581, 610, 611, 134 C.R.2d 1, 68 P.3d 302 [prosecutor's information (witness testified at preliminary hearing that he was Japanese exchange student and planned to leave country before trial; his host parent told district attorney that witness had left country; investigator called witness' number in Japan and person who answered identified himself as witness) may have been legally incompetent, as hearsay, but was sufficient to show that reasonable efforts were made to procure witness' attendance]; *People v. Wilson* (2005) 36 C.4th 309, 341, 30 C.R.3d 513, 114 P.3d 758 [in retrial of capital murder case, prosecution exercised reasonable diligence in attempting to locate witness who had testified in first trial where, over 2-day period, detective visited witness' last known address, attempted to locate witness' known associates, and checked police, county, and state records with 15 different names witness had used; prosecution was not required to monitor witness once original judgment was reversed]; *People v. Diaz* (2002) 95 C.A.4th 695, 706, 707, 115 C.R.2d 799 [prosecution exercised due diligence in attempting to secure witness' attendance at trial, where police officer made more than five attempts to personally serve her, spoke to her mother, went to schools she had attended, asked other officers to look for her, and where, given difficulty in obtaining her preliminary hearing testimony, it was clear she would do everything she could to avoid testifying at trial]; *People v. Martinez* (2007) 154 C.A.4th 314, 324, 64 C.R.3d 580 [prosecution was sufficiently diligent in attempting to obtain presence of witness who had testified at preliminary hearing and then relocated to Canada, where he was involved in Canadian asylum proceedings and would not leave out of fear that he would not be allowed to return; although prosecution did not maintain contact with witness after his preliminary hearing testimony, it had no reason to believe that he had left jurisdiction or would be unavailable].

(5) *Standard of Review*. In *People v. Cromer* (2001) 24 C.4th 889, 103 C.R.2d 23, 15 P.3d 243, a robbery prosecution, the trial judge admitted the preliminary hearing testimony of a prosecution witness after determining that she was unavailable and that the prosecution had exercised due diligence in attempting to locate her. The Court of Appeal independently reviewed the reasonable diligence determination, ruled that the preliminary hearing testimony should not have been admitted, and reversed defendant's conviction. *Held*, Court of Appeal judgment affirmed. Independent review is the appropriate standard to apply to a trial court's determination that the prosecution's failed efforts to locate an absent witness are sufficient to justify an exception to the defendant's constitutionally guaranteed right of confrontation. Without independent review, a policy of sweeping deference would permit, in the absence of any significant difference in the facts, the application of the confrontation right to turn on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute due diligence. "Our conclusion that a trial court's due diligence determination is subject to independent review comports with this court's usual practice for review of mixed question determinations affecting constitutional rights." (24 C.4th 901, disapproving the long line of cases that applied the abuse of discretion standard, including *People v. Williams* (1973) 9 C.3d 24, 106 C.R. 622, 506 P.2d 998, text, p. 710, *People v. Enriquez* (1977) 19 C.3d 221, 137 C.R. 171, 561 P.2d 261, text, p. 710, *People v. Jackson* (1980) 28 C.3d 264, 168 C.R. 603, 618 P.2d 149, text, p. 711, *People v. McElroy* (1989) 208 C.A.3d 1415, 256 C.R. 853, text, p. 711, *People v. Turner* (1990) 219 C.A.3d 1207, 268 C.R. 686, text, p. 712, *People v. Wright* (1990) 222 C.A.3d 1002, 272 C.R. 219, text, p. 712, *People v. Robinson* (1991) 226 C.A.3d 1581, 277 C.R. 504, text, p. 711, *People v. Saucedo* (1995) 33 C.A.4th 1230, 40 C.R.2d 153, text, p. 712, *People v. Walton* (1996) 42 C.A.4th 1004, 49 C.R.2d 917, text, p. 710, and *People v. Lepe* (1997) 57 C.A.4th 977, 67 C.R.2d 525, text, §30.) "Here, as the Court of Appeal correctly concluded, the undisputed facts do not demonstrate that the prosecution exercised reasonable diligence to secure [the witness'] attendance at defendant's trial." (24 C.4th 904.)





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## CHAPTER VI - Hearsay

### I. IN GENERAL

#### E. Unavailable as a Witness.

##### 8. Absence.

##### d. When Search for Witness Should Begin.

*1 Witkin Cal. Evid. Hearsay § 30*

[§ 30] When Search for Witness Should Begin.

(1) *Trial Setting Date or Date of Trial.* "If the prosecution had moved alertly after the *setting* of the case, it seems clear that it could have had the witness present at the trial, and it is for this reason that we feel that his evidence given at the preliminary examination was not properly introduced at the trial." (*People v. Harris* (1968) 266 C.A.2d 426, 434, 72 C.R. 423 [6 weeks elapsed after trial date set before district attorney made any effort to have witness available for trial]; see *People v. Nieto* (1968) 268 C.A.2d 231, 237, 73 C.R. 844 [quoting *Harris* and holding inexcusable 5-month delay pending trial before district attorney tried to procure witness' attendance through court process].) On the other hand, in *People v. Saucedo* (1995) 33 C.A.4th 1230, 1236, 40 C.R.2d 153, the prosecution's 8-day long effort to locate a witness was held adequate, even though it began only on the first day of trial, where the trial date had been uncertain due to a pending suppression motion, and the trial might have been continued had the motion been granted. (See *People v. Lepe* (1997) 57 C.A.4th 977, 986, 67 C.R.2d 525 [following *Saucedo*].)

A lesser degree of effort to procure the witness is required of the *defendant*, whose resources and ability to search are more limited than those of the prosecution. (See *People v. Linder* (1971) 5 C.3d 342, 347, 348, 96 C.R. 26, 486 P.2d 1226; *People v. Forgason* (1979) 99 C.A.3d 356, 362, 363, 364, 160 C.R. 263 [quoting *Linder*, pointing out that trial dates in criminal cases are often tentative, and declaring that it would be unreasonable to require subpoenas to be issued and served when it is likely that the trial will not commence].)

(2) *Conduct of Witness.* The proper date on which to begin a diligent search is affected by "whether it appeared likely to a prosecuting attorney preparing for trial that there would be no difficulty in securing the attendance of the witnesses." (*People v. Horn* (1964) 225 C.A.2d 1, 8, 36 C.R. 898.) In the following cases, the conduct of the witness affected the court's determination that, under the circumstances, the timing of the prosecution's efforts satisfied the reasonable diligence requirement: *People v. Benjamin* (1970) 3 C.A.3d 687, 697, 83 C.R. 764 [witness was Viet Nam-bound Marine; although search was slight and began at late date, prior cooperation of witness justified assumption that if he had not been sent away on military service, he would have been available]; *People v. Rodriguez* (1971) 18 C.A.3d 793, 797, 96 C.R. 162 [witness actively avoiding service; trial judge could have concluded that earlier efforts to complete service would have been unsuccessful]; *People v. Smith* (1971) 22 C.A.3d 25, 31, 99 C.R. 171 [unsuccessful attempt had been made to subpoena witness for trial of defendant's companion; more timely attempt to subpoena him for defendant's trial would, therefore, have been of no avail].

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Trial Setting Date or Date of Trial.* *People v. Saucedo* (1995) 33 C.A.4th 1230, 40 C.R.2d 153, text, p. 713, and *People v. Lepe* (1997) 57 C.A.4th 977, 67 C.R.2d 525, text, p. 713, were disapproved in *People v. Cromer* (2001) 24 C.4th 889, 901, footnote 3, 103 C.R.2d 23, 15 P.3d 243, Supp., supra, §29, to the extent they applied an abuse of discretion standard in reviewing the trial court's reasonable diligence determination.



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## CHAPTER VI - Hearsay

### II. STATEMENTS NOT WITHIN THE RULE

#### A. Words Part of Issue.

##### 1. General Principle.

*1 Witkin Cal. Evid. Hearsay § 31*

[§ 31] General Principle.

"There is a well-established exception or departure from the hearsay rule applying to cases in which the very fact in controversy is whether certain things were said or done and not as to whether these things were true or false, and in these cases the words or acts are admissible not as hearsay but as original evidence." (*People v. Henry* (1948) 86 C.A.2d 785, 789, 195 P.2d 478, *infra*, §35; see *People v. Rosson* (1962) 202 C.A.2d 480, 486, 487, 20 C.R. 833, *infra*, §45; *Russell v. Geis* (1967) 251 C.A.2d 560, 571, 59 C.R. 569, quoting the text; *Weathers v. Kaiser Foundation Hosp.* (1971) 5 C.3d 98, 109, 95 C.R. 516, 485 P.2d 1132, citing the text; *People v. Freeman* (1971) 20 C.A.3d 488, 492, 97 C.R. 717, citing the text; *People v. Patton* (1976) 63 C.A.3d 211, 219, 133 C.R. 533, *infra*, §35, citing the text; *Stewart v. Estate of Bohnert* (1980) 101 C.A.3d 978, 990, 162 C.R. 126, citing the text; *Simon v. Steelman* (1990) 224 C.A.3d 1002, 1006, footnote 3, 274 C.R. 218; *Anderson v. United States* (1974) 417 U.S. 211, 94 S.Ct. 2253, 2260, 41 L.Ed.2d 20, 28.)

In these situations, the words themselves, written or oral, are "operative facts," and an issue in the case is whether they were uttered or written. (See 2 McCormick 5th, §249; 6 Wigmore (Chadbourn Rev.) §1770; 29 *Am.Jur.2d* (1994 ed.), *Evidence* §665; 2 *U.C.L.A. L. Rev.* 48; 19 *Cal. L. Rev.* 246; *infra*, §32 et seq.)

This rule is, of course, inapplicable where the issue does involve truth. Thus, in *Am-Cal Inv. Co. v. Sharlyn Estates* (1967) 255 C.A.2d 526, 540, 63 C.R. 518, plaintiff purchaser sued for specific performance of a land contract. To show that he had a legal commitment of funds with which to pay, he called a loan broker to testify that he had received a letter of commitment from Authorized Investors, a lending institution. The letter was never produced. *Held*, citing the text, the testimony was inadmissible hearsay. The issue was not simply whether an offer of a loan had been made, but rather the truth of the statements therein, i.e., that the lender had the ability to lend and was willing to lend the money for this land. (255 C.A.2d 541.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 2 McCormick 6th, §249. *West's Key Number Digest*, Criminal Law k.419(2); *Evidence* k.267



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## CHAPTER VI - Hearsay

### II. STATEMENTS NOT WITHIN THE RULE

#### A. Words Part of Issue.

#### 2. Illustrations: Civil Cases.

##### a. Formation of Contract or Novation.

*1 Witkin Cal. Evid. Hearsay § 32*

[§ 32] Formation of Contract or Novation.

Proof of the oral or written words of offer and acceptance, or other statements constituting a contract or novation, may be made in an action based upon it. (See 6 Wigmore (Chadbourn Rev.) §1770; 2 McCormick 5th, §249.) Thus, in *Bank of America v. Taliaferro* (1956) 144 C.A.2d 578, 581, 301 P.2d 393, S, defaulting conditional buyer of a refrigerator, abandoned her apartment, and defendant landlord took the refrigerator. Plaintiff bank, assignee of the conditional seller, sued the landlord for conversion, and introduced the conditional sales contract and assignment. *Held*, the objection (that the transaction was between strangers to the suit and that the writing was therefore hearsay) was properly overruled.

In *Young v. Benton* (1913) 21 C.A. 382, 390, 131 P. 1051, the issue was whether plaintiff Y agreed to a proposed novation substituting defendant B as debtor in place of a corporation. B objected to a question asked of a witness, as to what Y said, on the ground that his self-serving statement made out of B's presence was hearsay. *Held*, the question was proper, and the answer of the witness--that Y said that he was satisfied with the contemplated arrangement--was admissible. "[T]he court followed the only method of ascertaining whether Young agreed to the substitution of the new debtor and the release of the old. The evidence was not hearsay for the reason that the issue involved the very statement that Young made." (See *Zuckerman v. Pacific Savings Bank* (1986) 187 C.A.3d 1394, 1404, footnote 2, 232 C.R. 458 [documents offered to show *nonexistence* of accord and satisfaction were not hearsay; dispute involved legal effect of documents, not truth of material therein].)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 2 McCormick 6th, §249.



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CHAPTER VI - Hearsay

II. STATEMENTS NOT WITHIN THE RULE

A. Words Part of Issue.

2. Illustrations: Civil Cases.

b. Defamation or Deceit.

*1 Witkin Cal. Evid. Hearsay § 33*

[§ 33] Defamation or Deceit.

In an action for defamation or deceit, the words spoken, written, or printed may be proved. (See 2 McCormick 5th, §249; 6 Wigmore (Chadbourn Rev.) §1770.)

In *Russell v. Geis* (1967) 251 C.A.2d 560, 571, 59 C.R. 569, defendant employer made false charges of dishonesty against plaintiff, which resulted in her indictment and trial. After her acquittal, she brought an action for defamation, seeking damages for humiliation and mental suffering. On this issue, she was permitted to testify that her daughter told her that friends called her mother a thief and refused to play with her. (25 C.A.2d 571.)

In *Stoneking v. Briggs* (1967) 254 C.A.2d 563, 62 C.R. 249, defendant made slanderous statements about plaintiff to newspaper reporters, and newspapers of wide circulation repeated them in a number of articles. Plaintiff sued defendant alone, for slander, seeking damages on the basis of foreseeable republication of the oral statements. The newspaper articles were offered in evidence and held admissible. Although they were hearsay on the truth of the matters recited, plaintiff obviously did not offer them for that purpose; the sole and proper purpose of the offer was to show the extent of circulation of the slander and the aggravated harm caused. (254 C.A.2d 577.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 2 McCormick 6th, §249.



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## CHAPTER VI - Hearsay

### II. STATEMENTS NOT WITHIN THE RULE

#### A. Words Part of Issue.

#### 2. Illustrations: Civil Cases.

#### c. Other Examples.

#### 1 *Witkin Cal. Evid. Hearsay* § 34

[§ 34] Other Examples.

(1) *Words of Notice*. Where the giving of notice is in issue, the words constituting notice may be proved. (See 6 Wigmore (Chadbourn Rev.) §1770; *People v. Rosson* (1962) 202 C.A.2d 480, 486, 487, 20 C.R. 833, *infra*, §45; see *Marshall v. Marshall* (1965) 232 C.A.2d 232, 254, 42 C.R. 686 [letter with self-serving hearsay properly offered for limited purpose of showing that it was received].)

(2) *Words of Authorization*. In *Bumb v. Bennett* (1958) 51 C.2d 294, 301, 333 P.2d 23, partnership real property was in the names of partners E and B. An assignment was executed by E alone. To prove the necessary authorization, E testified that he had discussed the assignment with B and B had said "Go ahead." *Held*, this was admissible, for the witness was testifying to the fact that the statement was made.

(3) *Words of Relationship*. In *Rogers v. Whitson* (1964) 228 C.A.2d 662, 675, 39 C.R. 849, bills submitted by D to defendant owner were properly offered, not as proof of the matters recited therein, but as evidence of D's relationship as an independent contractor.

(4) *Words of Solicitation*. *Greenblatt v. Munro* (1958) 161 C.A.2d 596, 601, 326 P.2d 929, involved review of an order revoking a liquor license for allowing an employee to solicit alcoholic drinks. M, an enforcement agent, testified that Anna, defendant's entertainer, asked him to buy her "mists," which she said contained brandy, vodka, and orange juice. *Held*, admissible. The evidence was incompetent hearsay on the alcoholic content of the drink, but it was relevant and competent direct evidence of the fact of solicitation.

In *Los Robles Motor Lodge v. Department of Alcoholic Beverage Control* (1966) 246 C.A.2d 198, 205, 54 C.R. 547, involving review of an order revoking a liquor license for keeping a disorderly house, investigators testified to conversations with females who solicited them on a number of occasions. *Held*, citing the text, the conversations were admissible on two theories: (a) original evidence on the issue, i.e., the fact of solicitation for prostitution. (b) Adoptive admission: The statements were made in the presence of a bartender, whose conduct manifested his assent (see *infra*, §103).

**SUPPLEMENT:** [This section is current through the latest supplement]

(5) (New) *Words Imparting Information That Is Acted Upon*. In *Holland v. Union Pac. R. Co.* (2007) 154 C.A.4th 940, 65 C.R.3d 145, the issue was whether plaintiff's failure to file a timely administrative complaint was excusable. He maintained that the Department of Fair Employment and Housing had told him that his submission of a questionnaire

was sufficient to make his claim timely. The evidence supporting this argument was excluded as hearsay, and defendant's summary judgment motion was granted. *Held*, reversed. The excluded evidence was not offered for truth of the facts it contained; rather, it was offered to prove that plaintiff obtained certain information, whether accurate or not, and acted in accordance with it. (154 C.A.4th 947.)



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## CHAPTER VI - Hearsay

### II. STATEMENTS NOT WITHIN THE RULE

#### A. Words Part of Issue.

#### 3. Illustrations: Criminal Cases.

#### 1 Witkin Cal. Evid. Hearsay § 35

[§ 35] Illustrations: Criminal Cases.

(1) *Aiding and Abetting*. In *People v. Dalton* (1959) 172 C.A.2d 15, 18, 341 P.2d 793, defendant was charged with aiding and abetting a violation of *Health & Saf.C. 11502* (selling promised narcotic but delivering another substance). An enforcement agent testified that defendant told him he had no narcotics, but that his man J had them (pointing to J). The agent then spoke to J out of defendant's presence, and J said he would get them, took the agent's money, and returned with the false narcotics. *Held*, the statements of J were admissible against defendant. They were not offered to prove their truth (that J could or would get *narcotics*), but they did tend to prove a fact essential to the conviction of defendant for aiding and abetting, namely, J's commission of the crime of selling a narcotic and furnishing a substitute.

(2) *Conspiracy*. In *People v. Collier* (1931) 111 C.A. 215, 240, 295 P. 898, a prosecution for conspiracy to commit bribery, the oral conversations constituting the criminal agreement were admitted. "Thus, when, as a part of the agreement, one or more of the conspirators undertakes to ask for a bribe, one or more agrees to accept a bribe, one or more agrees to do or not to do some act for the purpose of effectuating the compact, and one or more of the conspirators gives his assent to the compact either by express words or by actions from which such assent might be implied, evidence of such facts, when the agreement is in parol, is competent evidence of the acts or declarations which form 'a part of the transaction' which is in dispute." (See *People v. Curtis* (1951) 106 C.A.2d 321, 326, 235 P.2d 51; *Anderson v. United States* (1974) 417 U.S. 211, 94 S.Ct. 2253, 41 L.Ed.2d 20 [in prosecution for conspiracy to commit election fraud, prior testimony of alleged conspirators was properly admitted to prove they had made the statements]; *infra*, §132.)

(3) *Drug Sales*. In *People v. Gonzales* (1968) 68 C.2d 467, 67 C.R. 551, 439 P.2d 655, police officer M testified that an informer in his presence telephoned a bar, asked for defendant by name, and told the person answering that he wanted to see him in 10 minutes to buy narcotics. At about this time, police officer H saw a man believed to be defendant leave the bar. A few minutes later, police officer M observed defendant arrive, take money from the informer, and deliver the narcotics. *Held*, the testimony was admissible. It was offered merely to show that the conversation was held; and defendant's connection with the conversation was shown by evidence of his leaving the bar, meeting the informer, and selling the drug, at the approximate time of the conversation. (68 C.2d 471.)

(4) *Fraud*. In *People v. Henry* (1948) 86 C.A.2d 785, 789, 195 P.2d 478, a prosecution for obtaining narcotics by fraud, evidence was offered as follows: A pharmacist testified that he received a phone call from a man representing himself to be Dr. L, ordering narcotics to be delivered to Mrs. M; that he called Dr. L who said he had made no such request; that later defendant came in to obtain the prescribed drug. *Held*, this testimony was admissible although defendant was not a party to the conversations.



(5) *Prostitution and Pandering*. In *People v. Patton* (1976) 63 C.A.3d 211, 219, 133 C.R. 533, a prosecution for pandering, a girl arrested as a runaway agreed to telephone defendant about his offer to engage her as a prostitute. She did so, and the police tape recorded the conversation in which he repeated the offer. *Held*, the tape was admissible. The statements of defendant were not hearsay; they constituted the substantive offense of which he was charged (encouraging a woman to become a prostitute). (See *People v. Dell* (1991) 232 C.A.3d 248, 258, 283 C.R. 361 [words of solicitation for prostitution are "operative facts or verbal acts"; thus police officers' testimony that escorts offered to perform sex for fee was admissible against escort service operator in prosecution for pimping and pandering].)

(6) *Rescue*. In *People v. Jones* (1962) 205 C.A.2d 460, 467, 23 C.R. 418, defendant was charged with rescue and obstructing officers in an attempted arrest and escape of X, an unidentified youth who had been arrested for using lewd language in the presence of women and children. To establish the fact of lawful custody of X (as a necessary basis for the charge of rescue), a police officer was allowed to testify to his conversation with X, reciting the language used by X. *Held*, quoting the text, this was proper.

(7) *Other Situations*. Other cases applying the rule are *People v. Freeman* (1971) 20 C.A.3d 488, 492, 97 C.R. 717 [defendant, Norman Freeman, claimed to be asleep at time in question; witness could properly testify she overheard her daughter greet a man with words, "Hi, Norman," at daughter's home; citing the text]; *People v. Reyes* (1976) 62 C.A.3d 53, 67, 132 C.R. 848 [witness testified to overhearing persons in bar giving defendant series of numbers; spoken words were part of issue making up elements of bookmaking]; *People v. Burnham* (1986) 176 C.A.3d 1134, 1144, footnote 10, 222 C.R. 630 ([rape victim's consent is nonhearsay "operative fact"; hence, testimony of defendant that victim uttered words of consent is admissible].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Aiding and Abetting*. The crime for which the defendant was being prosecuted in *People v. Dalton* (1959) 172 C.A.2d 15, 341 P.2d 793, text, p. 717--selling promised narcotic but delivering another substance--is now covered in *Health & Saf.C. 11355*.



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## CHAPTER VI - Hearsay

### II. STATEMENTS NOT WITHIN THE RULE B. Statements Relevant as Circumstantial Evidence. 1. In General.

#### *1 Witkin Cal. Evid. Hearsay § 36*

[§ 36] In General.

Frequently, an utterance may justify an inference concerning a fact in issue, regardless of the truth or falsity of the utterance itself. It is admitted as *circumstantial evidence* of that independent fact. The distinction between these two uses of the evidence is not always readily apparent. In *People v. Williams* (1992) 3 C.A.4th 1535, 5 C.R.2d 372, the court held that a fishing license and two checks bearing defendant's name, found by police in an apartment and offered by defendant to establish his standing to contest the propriety of the search, were improperly excluded as hearsay. The court first described Jefferson's analysis of a similar situation: A utility bill is relevant to establish that defendant is the possessor of the premises only by accepting as true the implied statement of the utility company that defendant, as the person named on the utility bill, is the possessor or occupant; therefore, it is hearsay. But the court rejected this view: "[T]he fishing license and two checks at issue here are more likely to be found in the residence of the person named on those documents than in the residence of any other person. Accordingly, regardless of the truth of any express or implied statement contained in those documents, they are circumstantial evidence that a person with the same name as the defendant resided in the apartment from which they were seized. Therefore, when introduced for the purpose of showing that residency, they are admissible nonhearsay evidence." (3 C.A.4th 1542, 1543.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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- II. STATEMENTS NOT WITHIN THE RULE
- B. Statements Relevant as Circumstantial Evidence.
  - 2. Evidence of Mental State of Declarant.
    - a. Inference as to Belief, Intent, or Motive.

*1 Witkin Cal. Evid. Hearsay § 37*

[§ 37] Inference as to Belief, Intent, or Motive.

If an utterance, regardless of its truth or falsity, justifies an inference concerning the declarant's mental state (e.g., belief, intent, motive), it may be admissible as *circumstantial evidence* of that mental state. (See *Skelly v. Richman* (1970) 10 C.A.3d 844, 858, 89 C.R. 556 [quoting Wigmore: "The Hearsay Rule makes no opposition, because the utterance is not used for the sake of inducing belief in any assertion it may contain. The assertion, if in form there is one, is to be disregarded, and the indirect inference alone regarded"]; *Estate of Stevenson* (1992) 11 C.A.4th 852, 863, 14 C.R.2d 250, citing the text; 2 McCormick 5th, §§250, 294; 6 Wigmore (Chadbourn Rev.) §§1715, 1790; 29 Am.Jur.2d (1994 ed.), *Evidence* §667; 1962 A.S. 344.)

There has been much discussion of the application of this theory to public opinion polls or surveys, e.g., in trademark and unfair competition cases. (See 1 McCormick 5th, §208; 66 Harv L. Rev. 498, 501; 98 A.L.R. Fed 20; 18 Proof of Facts 2d 305; 29 Am.Jur.2d (1994 ed.), *Evidence* §683; 1962 A.S. 341; 1963 A.S. 296.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Colarossi v. Coty US* (2002) 97 C.A.4th 1142, 1150, 119 C.R.2d 131, citing the text [in wrongful termination action alleging that plaintiff was discharged for cooperating in sexual harassment investigation, trial judge erred in excluding statement of another employee that target of investigation (employer's director of merchandising) threatened to get revenge on those who participated in it; statement was not hearsay, as it showed target's mental state, i.e., that she felt wronged and harbored ill will toward those she held responsible]; 2 McCormick 6th, §§250, 294.

*Public opinion polls or surveys:* See 2 McCormick 6th, §208. *West's Key Number Digest*, Criminal Law k.415(3), 419(2.20); *Evidence* k.268, 317(3)



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### II. STATEMENTS NOT WITHIN THE RULE B. Statements Relevant as Circumstantial Evidence. 2. Evidence of Mental State of Declarant. b. Civil Cases.

#### 1 Witkin Cal. Evid. Hearsay § 38

[§ 38] Civil Cases.

(1) *In General.* One class of utterances, inadmissible for truth but admissible as circumstantial evidence, consists of charges of immorality, wrongdoing, etc., when the issue is the hatred or malice of the declarant. (See *Robinson v. McKnight* (1930) 103 C.A. 718, 727, 284 P. 1056, 1 Cal. Evidence (4th), *Circumstantial Evidence*, §123; 6 Wigmore (Chadbourn Rev.) §1790.)

Another class consists of obviously irrational or delusive statements, which, like irrational conduct, are offered to prove the incompetency of the declarant. (See 6 Wigmore (Chadbourn Rev.) §1766.)

#### (2) Illustrations.

(a) *Fear of clouded title.* In *Phillips v. Glazer* (1949) 94 C.A.2d 673, 211 P.2d 37, defendant posted disparaging signs in front of plaintiff's property ("Anyone buying No. 20 Malibu is buying law suit ... Title clouded"). Plaintiff, suing for slander of title, called realtors, who testified to declarations of *prospective purchasers* ("didn't want to get himself into litigation," "I can't go on and make any deal and buy myself a headache," etc.). *Held*, the evidence was admissible. It was not offered to prove the truth of the declarations that the title was clouded; plaintiff, who offered the evidence, was contending the exact opposite. It was properly offered to prove the state of mind of the prospective purchasers--fear or suspicion that the title was clouded. (94 C.A.2d 676.)

(b) *Fear of molesting parent.* In *re Cheryl H.* (1984) 153 C.A.3d 1098, 200 C.R. 789, was a juvenile court proceeding to adjudge a 3-year-old girl a dependent child on findings that she had been sexually molested by her father. Cheryl's declarations that her father had molested her were inadmissible hearsay on the issue whether he had done so, but were admissible *nonhearsay* on the issue of her state of mind. (153 C.A.3d 1131, citing the text.) And its relevancy was clear. A child's belief that her father had harmed her tends to prove that it is not in the child's best interests to permit his continued contact with her. (153 C.A.3d 1131, 1132.) (See *In re Dorinda A.* (1992) 10 C.A.4th 1657, 1662, 13 C.R.2d 653, 10 Summary (9th), *Parent and Child, Supp.*, §689A [following *In re Cheryl H.*].)

*In re Clara B.* (1993) 20 C.A.4th 988, 998, 25 C.R.2d 56, 10 Summary (9th), *Parent and Child, Supp.*, §689A, distinguished *In re Cheryl H.* and *In re Dorinda A.* The *Clara B.* court explained that in the *jurisdictional* portion of the proceedings, the minor's out-of-court statements showing that she feared her father were inadmissible hearsay, because there their use was to prove or disprove that he molested her. (20 C.A.4th 999.) (On child dependency hearsay exception, see *infra*, §172.)

(c) *Knowledge of danger or defect.* In *Taylor v. Centennial Bowl* (1966) 65 C.2d 114, 52 C.R. 561, 416 P.2d 793, plaintiff had been assaulted by another patron of defendant's bowling establishment. Plaintiff's theory was that defendant failed to warn or otherwise protect her against the known danger of such attacks. A police officer was called to testify that he had frequently been summoned by defendant to quell violent disturbances. *Held*, exclusion of this evidence was error; it was relevant to show defendant's knowledge of the danger to patrons and consequently of the nature of his duty. (65 C.2d 125.) (See *Magnolia Square Homeowners Assn. v. Safeco Ins. Co.* (1990) 221 C.A.3d 1049, 1057, 271 C.R. 1 [complaint was not hearsay where offered to prove that plaintiff had notice or knowledge of structural defects in condominium, rather than that such defects in fact existed]; on knowledge of *recipient* of statement, see *infra*, §41.)

(d) *Sobriety.* In *Sandoval v. Southern Calif. Enterprises* (1950) 98 C.A.2d 240, 219 P.2d 928, plaintiff sued for compensatory and punitive damages for a beating, false arrest, and prosecution after ejection from a dance hall for alleged intoxication. Over objection, he was allowed to testify to conversations between himself, a physician, and police officers, to show his recollection of what was said. *Held*, this was admissible on the issue of his mental state, as tending to negate intoxication. (98 C.A.2d 244.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General.* See *Rufo v. Simpson* (2001) 86 C.A.4th 573, 591, 103 C.R.2d 492, citing the text [in wrongful death action arising from murder of defendant's wife, telephone call made to battered women's shelter, apparently by victim, was properly admitted to show how she felt about defendant and to explain her termination of relationship, which in turn was alleged to have provoked defendant to murder; statements were not admitted for truth and thus were not hearsay].(2) *Illustrations.*

(b) *Fear of molesting parent.*

*Cross-Reference:* The discussions of *In re Dorinda A.* and *In re Clara B.* were deleted from the 10th edition of *Summary*.



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## CHAPTER VI - Hearsay

### II. STATEMENTS NOT WITHIN THE RULE B. Statements Relevant as Circumstantial Evidence. 2. Evidence of Mental State of Declarant. c. Criminal Cases.

#### 1 Witkin Cal. Evid. Hearsay § 39

[§ 39] Criminal Cases.

(1) *Preliminary Distinction.* Obviously, a person's express declaration of belief or intent (e.g., "I hate X"; "I am going to kill X"), offered to prove the truth of the matter stated, is hearsay. It is admissible only under the exception allowing declarations of the declarant's state of mind (infra, §198 et seq.). If, however, the statements are not express declarations of belief, intent, or other state of mind, but are nevertheless of such a nature that an *inference* of the declarant's state of mind may be drawn therefrom, the hearsay rule does not apply at all. (See 6 Wigmore (Chadbourn Rev.) §1715.)

(2) *Statements Subject to Multiple Classification.* Even where statements are express declarations of a mental state and therefore hearsay, they may be received for a distinct, nonhearsay purpose. Thus, statements of a defendant before or after the commission of an alleged criminal act, admitting the act and disclosing knowledge of its wrongfulness, could be both (a) an admission, within the hearsay exception, and (b) circumstantial evidence of a rational mental state, to rebut the defense of insanity. (See *People v. Wolff* (1964) 61 C.2d 795, 810, 40 C.R. 271, 394 P.2d 959.) And statements of the owner of a vehicle to law enforcement officers giving consent to a search may be admitted as words of authorization, in the same way that words of offer and acceptance are admitted to prove the formation of a contract (see supra, §36). (*People v. Nelson* (1985) 166 C.A.3d 1209, 1215, 212 C.R. 799, pointing out alternative analysis of *People v. Donnell* (1975) 52 C.A.3d 762, 772, 125 C.R. 310, where statement of consent was found admissible under state of mind exception.) A similar possibility of multiple classification exists in connection with the complaint of the victim in a rape case. (See infra, §167.)

#### (3) *Illustrations.*

(a) *Guilty knowledge.* In *People v. Tahl* (1967) 65 C.2d 719, 739, 56 C.R. 318, 423 P.2d 246, defendant was charged with the murder of two persons. Less than 2 hours after the crime, he was with a woman, and they heard a radio announcement of the killing of two persons. She said, "I wonder who that was," and he replied, "That was Vic and his wife." *Held*, admissible to show his knowledge of the identity of the victims before any member of the public was so informed.

In *People v. Putty* (1967) 251 C.A.2d 991, 996, 59 C.R. 881, defendant was charged with receiving stolen goods. His statements to a prospective buyer that the goods were "cool" after 7 months was admissible, not to prove that they were stolen (fully established by other evidence), but on the issue of his knowledge that they were.

(b) *Intention to form conspiracy.* In *People v. Sanders* (1995) 11 C.4th 475, 517, 518, 46 C.R.2d 751, 905 P.2d 420,

a witness' testimony that a codefendant asked him if he wanted to make money by robbing a restaurant was properly admitted for the nonhearsay purpose of establishing the codefendant's intention to form a conspiracy to rob the restaurant.

(c) *Victim's fear of strangers.* In *People v. Arguello* (1967) 65 C.2d 768, 773, 56 C.R. 274, 423 P.2d 202, the prosecution was for murder of an elderly widow by defendant, her handyman. The prosecution called a next-door neighbor of the victim to testify to the victim's statement that she did not allow strangers in the house. *Held*, citing the text, this was admissible to show that she was fearful of strangers, relevant to the theory that the murderer was not a stranger to her.

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER VI - Hearsay

### II. STATEMENTS NOT WITHIN THE RULE B. Statements Relevant as Circumstantial Evidence. 3. Evidence of Mental State of Recipient. a. In General.

*1 Witkin Cal. Evid. Hearsay § 40*

[§ 40] In General.

A statement by the declarant may be admitted if it tends to show the mental state or attitude of the person who heard it or read it. (See *People v. Marsh* (1962) 58 C.2d 732, 737, 26 C.R. 300, 376 P.2d 300; *People v. Reeder* (1978) 82 C.A.3d 543, 550, 147 C.R. 275; *Stewart v. Estate of Bohnert* (1980) 101 C.A.3d 978, 990, 162 C.R. 126, citing the text; *People v. Bolden* (1996) 44 C.A.4th 707, 715, 52 C.R.2d 485, citing the text [in arson prosecution, testimony of defendant's girlfriend that she conveyed her godmother's message to defendant not to come around her house anymore was not hearsay, as it was offered to show that defendant had motive (i.e., anger) to set fire to house]; 1 Jefferson, California Evidence Benchbook 3d, §1.28 et seq.; 2 McCormick 5th, §249; 6 Wigmore (Chadbourn Rev.) §1789.) This rule applies only where the recipient's reaction to the statement is relevant; if that reaction does not tend to prove any issue in the case, it is excluded as irrelevant. (*People v. Scalzi* (1981) 126 C.A.3d 901, 906, 907, 179 C.R. 61.)

Typical issues on which these statements are commonly offered are knowledge (infra, §41), belief (infra, §§42, 43), and good faith (infra, §§44, 45).

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 2 McCormick 6th, §249.





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### II. STATEMENTS NOT WITHIN THE RULE B. Statements Relevant as Circumstantial Evidence. 3. Evidence of Mental State of Recipient. b. Knowledge.

#### 1 Witkin Cal. Evid. Hearsay § 41

[§ 41] Knowledge.

(1) *Dangerous or Defective Condition*. The principle allowing admission of a statement that tends to show the mental state of its recipient (*supra*, §40) finds frequent application in negligence cases where liability is based on the dangerous condition of the defendant's property. Statements of a third person concerning a dangerous condition are admissible for the limited purpose of showing knowledge on the part of the defendant who heard them, though they are inadmissible hearsay on the issue whether there was in fact a defect or dangerous condition. (*Smith v. Whittier* (1892) 95 C. 279, 290, 293, 30 P. 529.)

In *Westman v. Clifton's Brookdale* (1948) 89 C.A.2d 307, 310, 200 P.2d 814, plaintiff, alleging that he fell down defendant's unlighted stairs, offered evidence that defendant's floor manager had admitted to plaintiff's husband that others had fallen on the stairs. Defendant objected that the manager's statement might have been based on hearsay. *Held*, the evidence was admissible as tending to show knowledge of the condition by an authorized agent, imputable to the principal.

In *Jensen v. Southern Pac. Co.* (1954) 129 C.A.2d 67, 75, 276 P.2d 703, the issue was whether a grade crossing was sufficiently protected. Plaintiff introduced applications made by the city of Burlingame to the Public Utilities Commission requesting added safeguards, including gates. *Held*, admissible; this indirect notification to the railroad that the city considered the crossing dangerous tended to show knowledge of the possibility of such danger.

In *Hickman v. Arons* (1960) 187 C.A.2d 167, 171, 9 C.R. 379, a fire gutted defendant's brick building, leaving an unsupported wall, which fell 15 days later and killed decedent. In this wrongful death action, plaintiffs introduced a notice mailed to defendants by the chief building inspector of the city advising them of the dangerous condition. *Held*, this was admissible to show knowledge of the condition.

(2) *Employee's Harassing Behavior*. The same principle was applied in *Bihun v. AT&T Information Systems* (1993) 13 C.A.4th 976, 16 C.R.2d 787, an action for sexual harassment of plaintiff employee by one of defendant employer's senior officials. The trial judge admitted communications by employees to some of defendant's managers concerning the senior official's sexual misconduct with other female employees. *Held*, these statements were properly admitted; they demonstrated defendant's knowledge of the official's behavior and complaints about that behavior, which defendant itself had made an issue on the question of liability. (13 C.A.4th 988, 989.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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      - 1. Civil Cases.

### *1 Witkin Cal. Evid. Hearsay § 42*

[§ 42] Civil Cases.

In *Johnson v. Nicholson* (1958) 159 C.A.2d 395, 411, 324 P.2d 307, plaintiff and decedent J were injured by an explosion of gasoline with which they were cleaning a floor in close proximity to another workman with a blowtorch. One issue was whether the use of gasoline by the two workmen was directed by defendant contractor's superintendent. Plaintiff sought to testify to what J told plaintiff about directions received by J from the superintendent. *Held*, admissible, to show that J believed he had been instructed by the superintendent to use gasoline.

In *First Western Bank & Trust Co. v. Omizzolo* (1959) 176 C.A.2d 555, 563, 1 C.R. 758, decedent had designated her husband as the beneficiary under her retirement fund, and had failed to change the designation on their divorce. The issue was whether their property settlement nevertheless terminated the husband's rights. Decedent's attorney had written a letter to her after the divorce, stating that the money in the fund was, under the agreement, her sole and separate property. *Held*, this was admissible, not as proof of that fact, but to meet the argument of the husband that her failure to change the beneficiary showed an intent to leave the money to him. The receipt of the letter tended to show her belief that no further act was necessary to divest the husband of his interest.

In *San Francisco v. City Inv. Corp.* (1971) 15 C.A.3d 1031, 1037, 93 C.R. 690, the agent for a building owner testified that the owner believed an agreement he had with the city permitted him to leave a building vacant and barricaded for an indefinite time. On cross-examination, however, he admitted seeing a letter from the city to the owner's attorney, stating that the agreement was a temporary stopgap measure. *Held*, the letter was properly admitted to impeach the agent's testimony. (15 C.A.3d 1038, citing the text.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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##### c. Belief.

##### 2. Criminal Cases.

#### 1 Witkin Cal. Evid. Hearsay § 43

[§ 43] Criminal Cases.

In *People v. Vogel* (1956) 46 C.2d 798, 805, 299 P.2d 850, a bigamy prosecution, the statement of defendant's first wife, that she was going to divorce him, was held admissible on the issue of *his belief* that she had done so (defense of bona fide belief in right to remarry).

In *People v. Roberson* (1959) 167 C.A.2d 429, 431, 334 P.2d 666, defendant, charged with selling narcotics to S, an undercover police agent, denied the sale, and the evidence consisted solely of testimony of the defendant and S. Because no person would knowingly sell narcotics to an enforcement officer, defendant offered, as circumstantial evidence to support his denial, proof that he believed S to be a policeman. The proof consisted of the testimony of P, that P had told defendant that he, P, had heard that S was an officer. *Held*, it was reversible error to exclude this testimony. (See *People v. Reeder* (1978) 82 C.A.3d 543, 551, 147 C.R. 275 [discussing *Roberson* and other cases].)

In *People v. Marsh* (1962) 58 C.2d 732, 737, 26 C.R. 300, 376 P.2d 300, a prosecution for obtaining money under false pretenses as to the curative value of a machine, a major defense was that defendants believed the machines possessed the curative powers represented, and hence, lacked intent to defraud. On the issue of good faith belief, they sought to introduce reports and conversations with doctors and scientists commenting on the effectiveness of the machines. The trial judge permitted defendants to testify that they had engaged in conversations and had received communications of this nature, but refused to permit proof of the contents of the conversations and communications. *Held*, this was reversible error.

In *People v. Arguello* (1967) 65 C.2d 768, 774, 56 C.R. 274, 423 P.2d 202, defendant handyman was charged with the murder of his employer, an elderly widow. He had tried unsuccessfully to borrow \$ 5 from the victim's sister-in-law 2 days before; he told a friend, Mrs. M, the next day that he had only \$ 2; about \$ 58 was missing from the victim's purse; on the day of the killing, defendant had about \$ 35. A prosecution witness testified that, the day before the killing, male and female voices were heard in the victim's home, and that the female voice said, "No, I'm not going to give you any more. You got all you are going to get from me. I am not giving you any more money. ... Get away from me." *Held*, citing the text, this was admissible. Because there was no evidence of anyone else living in the house, it could be inferred that the female voice was the victim's. Evidence that defendant was a male she would allow in the house, and that he had borrowed from her before and tried to borrow from her sister-in-law, supported the inference that the male voice was his. And the statement was admissible to prove that the man to whom the victim spoke believed she would not voluntarily give him more money, thus furnishing a motive for the killing (robbery).

The principle allowing admission of a statement that tends to show the mental state of its recipient may also be applied in a preliminary hearing of the issue of voluntariness of a confession. In *People v. Padden* (1965) 238 C.A.2d 708, 48 C.R. 311, one defendant's counsel called him for voir dire purposes only, and asked him whether Officer Jones had made any promises as an inducement to confess. The judge sustained an objection. *Held*, this was error. "Here there was neither claim nor issue that any promise made by Jones was binding or truthful. What the defense was trying to establish was that the promise had been made and that defendants, believing Jones, had experienced a state of mind inducing them to confess. Thus, the evidence offered by defendants was not to prove the truth of Jones' statements but to show the mental state these statements produced in defendants." (238 C.A.2d 714.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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### 1 Witkin Cal. Evid. Hearsay § 44

[§ 44] Civil Cases.

Where the good faith or the reasonableness of the conduct of a person is in question, statements of others on the basis of which the person acted may be shown. (See *Central Heights Imp. Co. v. Memorial Parks* (1940) 40 C.A.2d 591, 609, 105 P.2d 596; *Gilbert v. Gilbert* (1950) 98 C.A.2d 444, 446, 220 P.2d 573; *Weber v. Leuschner* (1966) 240 C.A.2d 829, 839, 50 C.R. 86, citing the text; *Silva v. Lucky Stores* (1998) 65 C.A.4th 256, 265, 76 C.R.2d 382, citing the text [reasonableness of employer's investigation into employee's alleged misconduct before firing him]; 29 Am.Jur.2d (1994 ed.), *Evidence* §666.)

In *Aitken v. White* (1949) 93 C.A.2d 134, 145, 208 P.2d 788, an action for false arrest and imprisonment, the defense was reasonable and probable cause to believe that plaintiff had committed theft in defendants' store. Defendants sought to introduce the report of a detective agency received by them prior to the arrest, concerning plaintiff's association with S, an ex-convict, who had been seen together with plaintiff in the store on the day of the theft. *Held*, the report was admissible; plaintiff's reputation and any prior acts of misconduct were relevant to the issue of defendants' grounds of suspicion and the existence of probable cause.

In *Dussault v. Condon* (1959) 170 C.A.2d 693, 696, 339 P.2d 896, a false imprisonment action was based on defendant's arrest of boys at a racetrack. Defendant officer was allowed to testify that several persons not personally known to him complained that three boys were causing a disturbance. *Held*, this was admissible to show that defendant could reasonably have believed that the three he found were the only ones disturbing the peace in his presence.

In *Castaline v. Los Angeles* (1975) 47 C.A.3d 580, 121 C.R. 786, plaintiff was physically able to return to her job in November 1969, but did not do so until April 1970. To support her personal injury claim for lost earnings until the April date, she testified, "I went back to work in November, but I found they didn't want me; they hired a new girl. They told me it was too long to wait." *Held*, the evidence was admissible (though the last sentence of the testimony might have been vulnerable to a proper objection). "Plaintiff Marilyn was testifying to what occurred when she attempted to go back to her job. She acted on what she heard and observed and her testimony was, for the purpose of establishing that she had not worked for the county for some period after she was physically well, no more hearsay than if she had testified that a supervisor shut the door in her face." (47 C.A.3d 591.)

Another illustration is the use of statements of others on the issue of *diligence* in attempting to discover a party or witness for purposes of service of process. The process server makes inquiries in various likely places, and receives

many negative answers as to the whereabouts of the missing person. Proof of these unsuccessful inquiries is admissible. (See 5 Wigmore (Chadbourn Rev.) §1414; 6 Wigmore (Chadbourn Rev.) §1789; 3 *Cal. Proc.* (4th), *Actions*, §955.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Wiz Technology v. Coopers & Lybrand* (2003) 106 C.A.4th 1, 13, 130 C.R.2d 263, citing the text [in breach of contract action by plaintiff computer software company against defendant auditing firm, declaration of defendant's partner that he learned that plaintiff had breached condition of parties' agreement from plaintiff's securities attorney or its chief financial officer was properly admitted; it was not hearsay, as it was offered to show that defendant's resignation as auditor for plaintiff was reasonable].



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## CHAPTER VI - Hearsay

- II. STATEMENTS NOT WITHIN THE RULE
- B. Statements Relevant as Circumstantial Evidence.
  - 3. Evidence of Mental State of Recipient.
  - d. Good Faith or Reasonableness of Conduct.
  - 2. Criminal Cases.

### 1 Witkin Cal. Evid. Hearsay § 45

[§ 45] Criminal Cases.

The rule that statements on which a recipient acted are admissible to show the recipient's good faith or reasonable conduct (see *supra*, §44) is also applied in criminal cases. (See *People v. Nichols* (1970) 3 C.3d 150, 157, 89 C.R. 721, 474 P.2d 673 [in murder prosecution in which defendant's estranged wife accused him of setting fire that killed two small girls, wife's testimony that shortly before fire girls told her defendant had been ringing doorbell was properly allowed, as it showed reasonable basis for her testimony, thus rebutting inference of bias raised by defense on cross-examination].)

An out-of-court statement may be admitted to show that police officers had probable cause to make an arrest. (See *People v. King* (1956) 140 C.A.2d 1, 5, 294 P.2d 972.) However, this rule is applicable only where the legality of police conduct is at issue; if it is not, then the statement is excludable for lack of relevancy. (*People v. Lucero* (1998) 64 C.A.4th 1107, 1109, 1110, 75 C.R.2d 806.)

In *People v. Rosson* (1962) 202 C.A.2d 480, 486, 20 C.R. 833, defendant was charged with grand theft as a result of renting a car that he did not return. Because the jury might determine that he had no fraudulent intent at the time of renting, the issue whether he later conceived that intent, sufficient to support a conviction for embezzlement, was crucial. On that issue, he claimed that, unaware of express restrictions on use, he lent the car to C, thought it had been returned, and did not discover the truth until he returned to the locality after having been in custody in Nevada. The evidence consisted of an attempt to show by testimony of Mrs. E that he asked Mrs. E to get the car from C, that C falsely stated to her that he had returned it, and that she reported this answer to defendant. *Held*, it was error to exclude the questions dealing with Mrs. E's extrajudicial conversations with C and with defendant.

(a) *Words part of issue.* The questions were asked not to prove the truth of anything said, but merely to show "that words of demand, refusal and notice were uttered," i.e., that defendant made an effort to get the car back to the owner. (202 C.A.2d 486, 487; see *supra*, §31.)

(b) *Mental state (good faith) of recipient.* Another purpose of the questions was to show that defendant took no further steps to return the car because he relied on Mrs. E's report to him of C's statement that he had returned the car. (202 C.A.2d 486, 487.)

In *People v. Duran* (1976) 16 C.3d 282, 294, 127 C.R. 618, 545 P.2d 1322, defendant was charged with assault

with a deadly weapon by a life-term prisoner. After prosecution witnesses identified him as the inmate who ran from the stabbing scene, defendant sought to explain the circumstances of his flight. He made an offer of proof that at a time when he had been punished for prison rule infractions, correctional officers had warned him that he could not again afford to become involved in any further incident or investigation while a prisoner, and he fled the scene to avoid involvement. The trial judge allowed him to testify about his reasons for fleeing, but refused to permit him to bolster his testimony by relating the warnings he had previously received. *Held*, exclusion of the warnings was error. "The extrajudicial statements which he offered are not his statements and are not declarations of his state of mind. They constitute only background material which, with other evidence, accounted for the state of mind testified to by defendant. The warnings were thus not offered to prove the matters asserted in the warnings, i.e., that defendant could not afford to become involved in an investigation, but rather were offered to prove that defendant reasonably entertained the particular state of mind which he claimed. Such extrajudicial statements which lend credibility to an asserted state of mind are relevant, competent evidence." (16 C.3d 295.)

**SUPPLEMENT:** [This section is current through the latest supplement]





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## CHAPTER VI - Hearsay

### II. STATEMENTS NOT WITHIN THE RULE

#### C. Nonassertive Conduct.

##### 1. Nature of Problem.

#### *1 Witkin Cal. Evid. Hearsay § 46*

[§ 46] Nature of Problem.

Where conduct is actually a substitute for words (assertive conduct), it is excluded for the same reasons that would call for exclusion of the words. (See *supra*, §7.) But if the conduct is not intended as a substitute for words, the applicability of the hearsay rule is more questionable. One view is that the conduct is merely circumstantial evidence and outside the rule. The other is that, if the conduct is offered in proof of some fact, in order to draw inferences as to the person's belief in the truth of that fact, the conduct is an *implied assertion* of the fact and just as objectionable as an express assertion. (See 2 McCormick 5th, §250; 2 Wigmore (Chadbourn Rev.) §267; 2 *U.C.L.A. L. Rev.* 45; 62 *Harv. L. Rev.* 190; 14 *Stanf. L. Rev.* 682; 1962 A.S. 339; 1964 A.S. 357.) (On whether acts indicative of attempted suicide are assertive or nonassertive conduct, see *People v. Salcido* (1966) 246 *C.A.2d* 450, 457, 54 *C.R.* 820, *infra*, §216, citing the text.)

No California case prior to the Code had analyzed the problem, but a few expressions indicated acceptance of the second view, that such conduct may be inadmissible hearsay. (See *Estate of De Laveaga* (1913) 165 *C.* 607, 624, 133 *P.* 307 [dictum: "the manner in which a person whose sanity is in question was treated by his family is not, taken alone, competent substantive evidence tending to prove insanity, for it is a mere extra-judicial expression of opinion on the part of the family"]; *People v. Mendez* (1924) 193 *C.* 39, 52, 223 *P.* 65 [circumstances of flight of third persons "are in the nature of confessions by such third persons" and therefore hearsay]; but see *People v. Layman* (1931) 117 *C.A.* 476, 478, 4 *P.2d* 244 [train dispatchers allowed to testify that they had received no report of an accident; "not hearsay, but direct proof" of material fact]; and see cases on proof of telephone calls to suspected bookmaker, *infra*, §48.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 2 McCormick 6th, §250.



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## CHAPTER VI - Hearsay

### II. STATEMENTS NOT WITHIN THE RULE

#### C. Nonassertive Conduct.

#### 2. Uniform Rules and Evidence Code.

##### *1 Witkin Cal. Evid. Hearsay § 47*

[§ 47] Uniform Rules and Evidence Code.

The Evidence Code takes the same position as the Uniform Rules of Evidence in making nonassertive conduct admissible. This is accomplished by limiting the definition of "statement" to verbal expressions, or conduct intended as a substitute. (*Ev.C.* 225, *supra*, §2.) Thus, nonassertive conduct is not a "statement" within the hearsay rule (*Ev.C.* 1200, *supra*, §4). The Law Revision Commission Comment to *Ev.C.* 1200 justifies the choice of this view as follows:

"Under the Evidence Code, nonassertive conduct is not regarded as hearsay for two reasons. *First*, one of the principal reasons for the hearsay rule--to exclude declarations where the veracity of the declarant cannot be tested by cross-examination--does not apply because such conduct, being nonassertive, does not involve the veracity of the declarant. *Second*, there is frequently a guarantee of the trustworthiness of the inference to be drawn from such nonassertive conduct because the actor has based his actions on the correctness of his belief, *i.e.*, his actions speak louder than words.

"Of course, if the probative value of evidence of nonassertive conduct is outweighed by the probability that such evidence will be unduly prejudicial, confuse the issues, mislead the jury, or consume too much time, the judge may exclude the evidence under Section 352." (See 5 Wigmore (Chadbourn Rev.) §1362; 1 Jefferson, California Evidence Benchbook 3d, §1.49; 25 West L.A. L. Rev. 59, 117.)

In *People v. Clark* (1970) 6 C.A.3d 658, 668, 86 C.R. 106, the court approved the admission of testimony that defendant's wife fainted in reaction to a question put to her by defendant. "[B]ecause it was nonassertive conduct it was not objectionable hearsay." (See *People v. Warner* (1969) 270 C.A.2d 900, 907, 76 C.R. 160 [citing *Ev.C.* 1200 and bookmaking cases, *infra*, §48]; *People v. Snow* (1987) 44 C.3d 216, 227, 242 C.R. 477, 746 P.2d 452 [citing *Clark*].)

In *re Cheryl H.* (1984) 153 C.A.3d 1098, 200 C.R. 789, involved a juvenile court proceeding to declare a 3-year-old girl a dependent child on findings that she had been sexually molested by her father. Dr. P, the court-appointed psychiatrist, testified to conduct of Cheryl during play therapy typical of that exhibited by victims of child molestation. If this conduct was intended by Cheryl as a substitute for verbal expression, it was inadmissible (*Ev.C.* 225; see *supra*, §2). But it was not. Her actions were sometimes observed while she was playing alone and sometimes after Dr. P asked her a direct question. "A child playing with dolls and posing them in sexual positions is not trying to substitute her conduct for words to the effect that she has been molested. This conclusion is especially applicable when the child is playing by herself." (153 C.A.3d 1127.)

The evidence was relevant: (a) "When a three-year-old child puts a male doll on top of a female doll or orally

copulates a male doll, it can be inferred that the child has been exposed to inappropriate sexual contact." (b) The acts of holding a female doll close to her and rejecting the male doll, and of reverting to a disassociated state when the subject of molestation was broached permit a similar inference. (c) Cheryl's recoil at the mention of her father was likewise nonassertive conduct. An *adult* might deliberately recoil as a gesture substituting for speech, but the child's recoil was involuntary and not intended as a statement. It was admissible as evidence that her father had molested her, and also as circumstantial proof that she was afraid of him. (153 C.A.3d 1127, 1128.)

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## CHAPTER VI - Hearsay

### II. STATEMENTS NOT WITHIN THE RULE

#### C. Nonassertive Conduct.

#### 3. Proof of Bookmaking.

*1 Witkin Cal. Evid. Hearsay § 48*

[§ 48] Proof of Bookmaking.

Even under prior California law (see *supra*, §46), one type of nonassertive conduct was regularly admitted in California in prosecutions for violation of P.C. 337a (using premises for illegal horseracing bets). The arresting officer or detective enters the room of the suspected bookmaker, answers the telephone, and later testifies to the statements made by unknown callers who phone to place bets. The inference that the location is a bookmaker's establishment is drawn from the belief of the declarant (the unknown caller) that it is such an establishment; i.e., the caller's conduct in placing the call is used to prove the fact. (See 2 *U.C.L.A. L. Rev.* 46; 1951 A.S. 854; 1957 A.S. 540; 1964 A.S. 357.)

As the court said in *People v. Reifentuhl* (1940) 37 C.A.2d 402, 405, 99 P.2d 564: "The use of the room occupied by defendant was in issue and the nature of the telephonic call was a circumstance to establish the truth. The uses to which a telephone is put reveal more truthfully the character of the establishment that houses the instrument than do the words of description attached to the listing. When a call comes to one surrounded by paraphernalia in use for the very purposes that would serve the patron so calling, the communication becomes a part of the *res gestae*." (To the same effect, see *People v. Radley* (1945) 68 C.A.2d 607, 609, 157 P.2d 426; *People v. Klein* (1945) 71 C.A.2d 588, 592, 163 P.2d 71; *People v. Fischer* (1957) 49 C.2d 442, 447, 317 P.2d 967; *People v. Carella* (1961) 191 C.A.2d 115, 139, 12 C.R. 446; and see 13 A.L.R.2d 1409 [evidence of fact of making or receiving phone call].)

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## CHAPTER VI - Hearsay

### II. STATEMENTS NOT WITHIN THE RULE

#### C. Nonassertive Conduct.

#### 4. Proof of Selling Illegal Drugs.

1 Witkin Cal. Evid. Hearsay § 49

[§ 49] Proof of Selling Illegal Drugs.

(1) *Telephonic Orders*. *People v. Bullock* (1990) 226 C.A.3d 380, 277 C.R. 63, 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence*, §270, held that orders for cocaine, which were received by a police officer when he returned calls that came in on defendant's pager during the booking process, were properly admitted in a prosecution for possession of cocaine and marijuana for sale. The statements constituted nonhearsay circumstantial evidence of defendant's guilt, i.e., they tended to show that he was in the business of selling cocaine. (226 C.A.3d 389.) (See *People v. Nealy* (1991) 228 C.A.3d 447, 452, 279 C.R. 36 [orders for drugs that police officer executing search warrant received when he answered defendant's telephone and when he returned calls coming in on defendant's beeper were properly admitted in prosecution for possession of drugs for sale]; *People v. Ventura* (1991) 1 C.A.4th 1515, 1518, 2 C.R.2d 586 [following *Nealy* on similar facts].)

(2) *Telephone Number Displayed on Pager*. In *People v. Fields* (1998) 61 C.A.4th 1063, 72 C.R.2d 255, a prosecution for sale of cocaine, the trial judge admitted, over defendant's hearsay objection, testimony concerning a telephone number displayed on defendant's pager. The telephone number was that of a cocaine dealer who was assisting undercover police investigators. *Held*, the ruling was proper. Defendant's possession of a pager displaying that particular number was nonassertive conduct indicating both that he had a relationship with a drug dealer and that he was using the pager for the purpose of supplying crack cocaine. (61 C.A.4th 1069, 1070, citing the text.)

(3) *Pay-Owe Ledgers*. In *People v. Harvey* (1991) 233 C.A.3d 1206, 285 C.R. 158, defendants were convicted of various offenses arising from a conspiracy to sell or transport cocaine and a conspiracy to possess cocaine for sale. At trial, pay-owe ledgers found in defendants' residences were admitted. *Held*, the ledgers were properly admitted. They were circumstantial evidence of cocaine sales and possible conspiracies involving cocaine sales, for it is a common practice of narcotics dealers to keep records of their dealings. (233 C.A.3d 1219.) (See 25 West L.A. L. Rev. 59, 92 [criticizing *Harvey*].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Telephonic Orders*. See *People v. Morgan* (2005) 125 C.A.4th 935, 945, 946, 23 C.R.3d 224 [in prosecution for possession of methamphetamine for sale, admission of evidence that officer who was executing search warrant at defendants' residence answered telephone and caller asked to buy drugs was not error; evidence of this kind has been treated by prior case law as circumstantial evidence rather than hearsay, but is more appropriately treated as hearsay subject to an exception].



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CHAPTER VI - Hearsay

II. STATEMENTS NOT WITHIN THE RULE  
D. Statements Admitted To Provide Context.

*1 Witkin Cal. Evid. Hearsay § 50*

[§ 50] Statements Admitted To Provide Context.

In *People v. Turner* (1994) 8 C.4th 137, 32 C.R.2d 762, 878 P.2d 521, a murder case, a jailhouse informant testified about a conversation between defendant and a coperpetrator occurring on a county jail bus. The trial judge admitted defendant's statements under the party admissions exception (*Ev.C. 1220*, *infra*, §90), and admitted the coperpetrator's part of the conversation for the purpose of giving meaning to defendant's statements. *Held*, this was proper. Defendant's statements could have referred to another shooting; it was necessary to hear the coperpetrator's statements in order to understand that defendant was referring to the shooting in the present case. Because the coperpetrator's statements were admitted to put defendant's statements in context, they were admitted for a nonhearsay purpose. Furthermore, they were relevant, as they bore on a central issue in the case--the identity of the actual shooter. (8 C.4th 190.)

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## CHAPTER VI - Hearsay

### III. EXCEPTIONS TO THE RULE

#### A. Confession of Defendant.

##### 1. In General.

##### a. Nature and Admissibility.

*1 Witkin Cal. Evid. Hearsay § 51*

[§ 51] Nature and Admissibility.

(1) *Confession and Admission Compared.* A confession is a declaration by a person that he or she is guilty of the crime charged. It differs from an admission of an accused in that the confession is an express and complete acknowledgment of guilt of the crime, while an admission may be either express or implied, and is merely an acknowledgment of some fact that tends to prove guilt. Both are within long-established exceptions to the hearsay rule. (See generally *People v. Ferdinand* (1924) 194 C. 555, 568, 229 P. 341; *People v. Speaks* (1957) 156 C.A.2d 25, 34, 319 P.2d 709; *People v. Ford* (1962) 200 C.A.2d 905, 920, 19 C.R. 758, citing the text [admission]; *People v. Garner* (1961) 57 C.2d 135, 145, 18 C.R. 40, 367 P.2d 680; *People v. Williams* (1984) 157 C.A.3d 145, 150, 203 C.R. 562 [upholding trial judge's determination of voluntariness]; 1 McCormick 5th, §144 et seq.; 3 Wigmore (Chadbourn Rev.) §§816, 821; 1 Jefferson, California Evidence Benchbook 3d, Chap. 3; C.E.B., Effective Introduction of Evidence 2d, Chap. 10 [Admissions and Confessions]; 4 Wharton, Criminal Evidence 14th, §616 et seq.; 79 Harv. L. Rev. 951; 29A Am.Jur.2d (1994 ed.), Evidence §708 et seq.; CALJIC (6th ed.), No. 2.70 et seq.) (On admissibility in civil action of confession inadmissible in criminal action, see 43 A.L.R.3d 1375; on admissibility, in prosecution in another jurisdiction, of confession or admission made under plea bargain with state authorities, see 90 A.L.R.4th 1133; on inadmissibility of confession or admission in civil proceeding for commitment of mentally retarded person, see *Cramer v. Shay* (1979) 94 C.A.3d 242, 246, 156 C.R. 303; on admissions of defendant, see *infra*, §§99, 106 et seq., 132 et seq.)

A statement may be both a confession and an admission. Thus, in *People v. Fitzgerald* (1961) 56 C.2d 855, 861, 17 C.R. 129, 366 P.2d 481, defendant, accused of murder of Y and B for purposes of robbery, told the sheriff on his arrest that he had robbed them at gunpoint, but had been struck from behind and could not explain their wounds. *Held*, it was proper to instruct on both confessions and admissions, for the declarations could be regarded as confessions of robbery and deadly assault, but merely as admissions of murder.

(2) *Conditions for Admissibility.* The admissibility of an extrajudicial confession or admission is subject to two conditions: (a) proof of voluntariness (see *infra*, §§54, 136); and (b) independent proof of the *corpus delicti* (see 1 Cal. Crim. Law (3d), *Elements*, §46). After independent proof is found to exist, however, the confession may be considered by the jury to strengthen and fortify it. (*People v. McMonigle* (1947) 29 C.2d 730, 738, 177 P.2d 745; see CALJIC (6th ed.), No. 2.72; 1 McCormick 5th, §145; 7 Stanf. L. Rev. 378; 14 So. Cal. L. Rev. 475; 79 Harv. L. Rev. 1072 [exhaustive discussion of corpus delicti requirement]; 27 U.S.F. L. Rev. 385 [arguing for abolishment of corpus delicti requirement]; 45 A.L.R.2d 1308 [corroboration of confession or admission]; 33 A.L.R.5th 571 [sufficiency of corroboration of confession as question of law or fact]; on federal "substantial independent evidence" requirement, see *Oppen v. United*

*States (1954) 348 U.S. 84, 75 S.Ct. 158, 163, 99 L.Ed. 101, 109.)*

(3) *Establishing Corpus Delicti Where Child Molestation Involved.* *Ev.C. 1228* makes admissible the statement of a minor to establish the *corpus delicti* of certain child abuse offenses in order to admit in evidence the confession of the defendant: "Notwithstanding any other provision of law, for the purpose of establishing the elements of the crime in order to admit as evidence the confession of a person accused of violating *Section 261, 264.1, 285, 286, 288, 288a, 289, or 647a of the Penal Code*, a court, in its discretion, may determine that a statement of the complaining witness is not made inadmissible by the hearsay rule."

Admission of the statement is conditioned on the following:

(a) It must have been made by a child under the age of 12, and its contents must have been included in a written report by a law enforcement official or county welfare department employee.

(b) It must describe the child as a sexual abuse victim.

(c) It must have been made prior to the confession.

(d) There must be no circumstances (such as significant inconsistencies regarding material facts) rendering the statement unreliable.

(e) The child must be unavailable under *Ev.C. 240(a)(2)* or (a)(3) (see *supra*, §§19, 22), or refuse to testify.

(f) The confession must be memorialized in a trustworthy fashion by a law enforcement official.

The procedural requirements for admission of the statement include: (a) at least 10 days' notice to the defendant prior to the hearing or trial; (b) if the statement is offered during trial, a determination of admissibility made out of the presence of the jury; and (c) if the statement is found admissible, admission out of the presence of the jury and solely for the purpose of determining the confession's admissibility. (*Ev.C. 1228*; see *Creutz v. Superior Court (1996) 49 C.A.4th 822, 832, 833, 56 C.R.2d 870* [trial judge erred in denying defendant's motion to dismiss charge of lewd and lascivious conduct with child; *Ev.C. 1228* did not allow consideration of child's statements, because defendant only made admissions and not full confession, and without statements there was insufficient evidence to support charge]; *17 Pacific L. J. 917* [origin, purpose and need for corpus delicti rule; argument that Sixth Amendment right to confrontation may be violated by *Ev.C. 1228*].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Confession and Admission Compared.* See CALCRIM, No. 358 [Evidence of Defendant's Statements]; 1 McCormick 6th, §144 et seq. (2) *Conditions for Admissibility.* See 1 McCormick 6th, §145. *West's Key Number Digest*, Criminal Law k.516 et seq.





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CHAPTER VI - Hearsay

III. EXCEPTIONS TO THE RULE

A. Confession of Defendant.

1. In General.

b. Exclusionary Rules.

1. Theories and Grounds.

*1 Witkin Cal. Evid. Hearsay § 52*

[§ 52] Theories and Grounds.

The earlier cases excluded some confessions because of the likelihood that they might be false. The later cases are largely concerned with the protection of personal rights and the elimination of illegal police practices, regardless of the possible or probable truth of the confession. (See generally 1 McCormick 5th, §144 et seq.; 3 Wigmore (Chadbourn Rev.) §822; 29 *Am.Jur.2d* (1994 ed.), *Evidence* §714 et seq.; Model C., Rule 505, Comment c; 79 *Harv. L. Rev.* 954.)

Thus, confessions have been excluded on two basic grounds: (1) incapacity of the defendant; and (2) improper means used to obtain the confession (involuntary confession; see *infra*, §54). However, Proposition 8, with some exceptions, eliminated independent state grounds for the exclusion of evidence (see *supra*, §§7, 8). This has made the ground of incapacity largely unavailable. (See *infra*, §53.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 1 McCormick 6th, §144 et seq.



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## CHAPTER VI - Hearsay

### III. EXCEPTIONS TO THE RULE

#### A. Confession of Defendant.

##### 1. In General.

##### b. Exclusionary Rules.

##### 2. Incapacity of Defendant.

#### 1 Witkin Cal. Evid. Hearsay § 53

#### [§ 53] Incapacity of Defendant.

(1) *In General.* Prior to the enactment of Proposition 8, the confession of a defendant who lacked the mental capacity to understand what he or she was doing was regarded as unknowing and involuntary and was therefore inadmissible. (See *People v. Boyington* (1935) 3 C.A.2d 655, 656, 39 P.2d 867; *People v. Johnson* (1973) 32 C.A.3d 988, 1000, 109 C.R. 118 [influence of sodium amytal]; 3 Wigmore (Chadbourn Rev.) §841; 20 *Stanf. L. Rev.* 1269 [intoxication, drugs]; 42 *Proof of Facts* 3d 147 [proving invalidity of confession or *Miranda* waiver by mentally retarded person]; 1957 A.S. 565 [sedatives]; 8 A.L.R.4th 16 [mental subnormality]; 25 A.L.R.4th 419 [effect of alcohol or drugs].)

The mere fact of voluntary consumption of alcohol, however, did not necessarily establish impairment of capacity; the court could still find that the defendant was able to comprehend and answer the questions posed. (See *People v. Hendricks* (1987) 43 C.3d 584, 591, 238 C.R. 66, 737 P.2d 1350 [defendant offered to confess to murder if provided with alcoholic beverage and Bible; evidence showed that drinking did not impair his capacity for purposes of admitting his subsequent confession].)

(2) *Effect of Proposition 8.* In *People v. Cox* (1990) 221 C.A.3d 980, 270 C.R. 730, defendant argued that even if the police conduct was not coercive, his confession was inadmissible because his mental condition (due to the ingestion of methamphetamine) precluded a knowledgeable and voluntary decision to make incriminating statements. *Held*, the confession was admissible; under federal law, made applicable by Proposition 8 (see 1 *Cal. Evidence* (4th) *Introduction*, §§7, 8), it is not unconstitutional to admit the confession of a mentally defective defendant in the absence of police coercion.

(a) *Colorado v. Connelly* (1986) 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473, *infra*, §54, emphasized the necessity of police coercion as a predicate to a claim of involuntariness arising from a psychotic state. (221 C.A.3d 986.) Earlier California cases, such as *People v. MacPherson* (1970) 2 C.3d 109, 84 C.R. 129, 465 P.2d 17, and *People v. Sultana* (1988) 204 C.A.3d 511, 251 C.R. 115, indicated that a confession or admission would be deemed involuntary and inadmissible because of the defective mental condition of the defendant regardless of the existence of coercion. These cases created a standard of constitutional admissibility higher than that required by the federal standard, and hence are no longer viable under Proposition 8. (221 C.A.3d 987.)

(b) Although *People v. Markham* (1989) 49 C.3d 63, 260 C.R. 273, 775 P.2d 1042, *infra*, §86, dealt with the burden of proving voluntariness, it followed *Connelly* in holding that Proposition 8 requires conformity to federal standards of

admissibility. (221 C.A.3d 987.)

(c) *Connelly* specifically preserved to state law the determination whether to exclude noncoerced evidence of questionable reliability. Hence, defendant's confession might have been excludable under *Ev.C. 352 (1 Cal. Evidence (4th), Circumstantial Evidence, §17)* without reference to federal constitutional protections. However, defendant sought to exclude his confession solely on a constitutional ground, i.e., that his mental state precluded a free and knowing waiver of constitutional rights. (221 C.A.3d 986, footnote 3.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General.* See 96 A.L.R.5th 523 [sufficiency of showing that voluntariness of confession was affected by drugs administered as part of medical treatment or provided by police; partially superseding 25 A.L.R.4th 419, text, p. 735]; 9 A.L.R.6th 1 [sufficiency of showing that voluntariness of confession was affected by self-administered alcohol or drugs; partially superseding 25 A.L.R.4th 419, text, p. 735]. *West's Key Number Digest*, Criminal Law k.524 et seq.



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## CHAPTER VI - Hearsay

### III. EXCEPTIONS TO THE RULE

#### A. Confession of Defendant.

##### 1. In General.

##### b. Exclusionary Rules.

##### 3. Involuntary Confession.

#### 1 Witkin Cal. Evid. Hearsay § 54

[§ 54] Involuntary Confession.

(1) *In General.* Confessions that are produced by coercion are inadmissible. (See *People v. Ditson* (1962) 57 C.2d 415, 437, 20 C.R. 165, 369 P.2d 714, *infra*, §55; *People v. Haydel* (1974) 12 C.3d 190, 197, 115 C.R. 394, 524 P.2d 866 [involuntary confession made to security guards (private persons) was inadmissible]; *People v. Jimenez* (1978) 21 C.3d 595, 602, 147 C.R. 172, 580 P.2d 672; *Cramer v. Shay* (1979) 94 C.A.3d 242, 245, 156 C.R. 303, quoting the text; *People v. McElheny* (1982) 137 C.A.3d 396, 401, 187 C.R. 39; *People v. Benson* (1990) 52 C.3d 754, 778, 276 C.R. 827, 802 P.2d 330; *Jackson v. Denno* (1964) 378 U.S. 368, 84 S.Ct. 1774, 1785, 12 L.Ed.2d 908, *infra*, §81; 1 McCormick 5th, §148; 75 Harv. L. Rev. 173; 79 Harv. L. Rev. 968; 1961 A.S. 119.)

The rule of exclusion applies equally to confessions and admissions (see *infra*, §§64 et seq., 136), and to the use of either to impeach the defendant as a witness (see 89 A.L.R.2d 478 [confession]; *infra*, §136 [admission]).

(2) *Rationale for Exclusion.* The policies calling for exclusion of involuntary confessions are set forth in *Rogers v. Richmond* (1961) 365 U.S. 534, 81 S.Ct. 735, 5 L.Ed.2d 760, as follows:

(a) "[C]onvictions following the admission into evidence of confessions which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system--a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth." (81 S.Ct. 739, 5 L.Ed.2d 766.)

(b) The court pointed out that in many of the cases the evidence left little doubt of the truth of what the defendant confessed, but held that the state court acted on an erroneous theory when it determined that the circumstances had no tendency to produce a false confession. "The attention of the trial judge should have been focused, for purposes of the Federal Constitution, on the question whether the behavior of the State's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined--a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth." (81 S.Ct. 741, 5 L.Ed.2d 768.)

Although this rationale would seem to demand a reversible per se standard on appeal, the test currently applied is whether the erroneous admission of a coerced confession was harmless beyond a reasonable doubt. (See *People v.*

*Cahill* (1993) 5 C.4th 478, 20 C.R.2d 582, 853 P.2d 1037, *infra*, §89.)

(3) *Coercion Required*. In *Colorado v. Connelly* (1986) 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473, defendant approached a police officer and, without prompting, stated that he had murdered someone and wished to talk about it. Defendant, who did not appear to be suffering from any mental illness, was advised of his rights, and thereafter gave a detailed confession. At his preliminary hearing, defendant moved to suppress his statements, and presented psychiatric evidence that he suffered from chronic schizophrenia and had been experiencing "command hallucinations" at the time of his confession, which destroyed his free will and compelled him to confess. *Held*, neither the Due Process Clause of the Fourteenth Amendment nor the Fifth Amendment required that defendant's statements be suppressed.

(a) Coercive police activity is necessary to a finding that a confession is not voluntary under the Due Process Clause; the mere taking of defendant's statements, and their subsequent admission into evidence, do not constitute sufficient state action. Here, the police committed no wrongful act related to the confession and thus suppressing it would serve no purpose in enforcing constitutional guarantees. (107 S.Ct. 521, 522, 93 L.Ed.2d 484.) "Respondent would now have us require sweeping inquiries into the state of mind of a criminal defendant who had confessed, inquiries quite divorced from any coercion brought to bear on the defendant by the State. We think the Constitution rightly leaves this sort of inquiry to be resolved by state laws governing the admission of evidence and erects no standard of its own in this area. A statement rendered by one in the condition of respondent might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum ... and not by the Due Process Clause of the Fourteenth Amendment." (107 S.Ct. 522, 93 L.Ed.2d 484.)

(b) There was no violation of defendant's Fifth Amendment rights. There is no reason to require more of a "voluntariness" inquiry in the context of a Miranda waiver than in the Fourteenth Amendment confession context. (107 S.Ct. 523, 93 L.Ed.2d 486.) "Respondent urges this Court to adopt his 'free will' rationale, and to find an attempted waiver invalid whenever the defendant feels compelled to waive his rights by reason of any compulsion, even if the compulsion does not flow from the police. But ... Miranda protects defendants against government coercion leading them to surrender rights protected by the Fifth Amendment; it goes no further than that. Respondent's perception of coercion flowing from the 'voice of God,' however important or significant such a perception may be in other disciplines, is a matter to which the United States Constitution does not speak." (107 S.Ct. 524, 93 L.Ed.2d 486, 487.)

One justice concurred in part and dissented in part, and two other justices dissented. (See 101 Harv. L. Rev. 179 [Connelly]; 48 A.L.R.5th 555 [resolution of Connelly issue under state statute or Constitution].)

(4) *Evidence Code*. The original Uniform Rules of Evidence summarized the types of improper coercion or inducement that make a confession involuntary. The Evidence Code made no attempt to restate the elements or to keep up with the flow of decisions, but merely called attention to the constitutional limitations, and thus indirectly incorporated by reference the controlling case law:

"A statement that is otherwise admissible as hearsay evidence is inadmissible against the defendant in a criminal action if the statement was made, either by the defendant or by another, under such circumstances that it is inadmissible against the defendant under the Constitution of the United States or the State of California." (Ev.C. 1204.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General*. See 1 McCormick 6th, §148; 93 Cal. L. Rev. 465 [Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination].

(2) *Rationale for Exclusion*. See 30 Hastings Const. L. Q. 57 [U.S. Const., Fourth Amendment, as basis for exclusion of coerced confessions]. (3a) *(New) Nexus Between Misconduct and Confession Required*. In *People v. Hall* (2000) 78 C.A.4th 232, 92 C.R.2d 687, defendant, while in state prison, wrote a letter to a district attorney's office stating that he wished to confess to a murder, and that the confession was being forced from him. During trial for the murder, the trial judge found that although prison guards may have engaged in some misconduct, they did not threaten

or abuse him to get him to confess. In light of this finding, defendant, on appeal from the conviction of murder, did not argue that the guards had attempted to compel him to confess, but rather that his confession was rendered involuntary by the acts of violence instigated against him by the guards. *Held*, affirmed. Past cases in which an involuntariness claim was made have always involved misconduct directed at compelling a defendant to confess, and the vocabulary used in those cases includes terms such as "extracting" or "wringing" confessions from suspects. "We conclude a confession should be excluded when the process undertaken to secure it involves threats, promises, violence or other forms of improper influence. ... We do not believe that exclusion is required when general governmental misconduct, unrelated to any investigation or process of investigation, results by mere happenstance in a confession." (78 C.A.4th 240, 241, distinguishing *People v. McElheny* (1982) 137 C.A.3d 396, 187 C.R. 39, text, p. 737, where the alleged misconduct was intimately related to the investigation of the crime.) *West's Key Number Digest*, Criminal Law k.517.1 et seq., 519 et seq.



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### III. EXCEPTIONS TO THE RULE

#### A. Confession of Defendant.

##### 1. In General.

##### b. Exclusionary Rules.

#### 4. Evidence Obtained Through Involuntary Confession.

##### 1 Witkin Cal. Evid. Hearsay § 55

[§ 55] Evidence Obtained Through Involuntary Confession.

(1) *Evidentiary Product of Involuntary Confession Also Inadmissible.* In *People v. Ditson* (1962) 57 C.2d 415, 20 C.R. 165, 369 P.2d 714, codefendant C gave a confession. The trial judge found it involuntary, but admitted evidence obtained by the use of it. On appeal, the Supreme Court held that the confession was voluntary, and further that the evidence was not its product but a mere lead, and that no proper objection had been made. (57 C.2d 433, 442, 443.) Accordingly, the conviction was affirmed; but, in view of the importance of the question, the court assumed the correctness of the trial judge's theory of coerced confession in order to lay down the rule that evidence secured by means of an involuntary confession is inadmissible. The common law theory of exclusion of a confession was its presumed untrustworthiness; physical facts discovered by use of it were not untrustworthy and were admissible. The present view, that the use of an involuntary confession is a denial of due process (infra, §89), makes this approach untenable. If it offends the sense of fair play to convict by use of an involuntary confession, it must also offend that sense to convict on evidence discovered by extorting it:

"It follows also that the reason for the common-law rule permitting the introduction of *real evidence* discovered by means of an involuntary confession--that such evidence tends to prove the 'trustworthiness' of the confession--must now be deemed constitutionally indefensible, and hence that the rule itself must be abandoned. The inquiry should instead be directed to the issue of whether the introduction of the challenged evidence--the confession itself or its asserted product--in a criminal prosecution which culminated in a conviction denied the defendant, in the particular circumstances of that case, any essential element of a fair trial or due process of law." (57 C.2d 439.) (See 50 Cal. L. Rev. 723 [Ditson]; 1962 A.S. 364 [same].)

(2) *Doctrine Extended.* *Harrison v. United States* (1968) 392 U.S. 219, 88 S.Ct. 2008, 20 L.Ed.2d 1047, greatly extends this "fruit of the poisonous tree" doctrine. Defendant was charged with felony murder. In the first trial, he was convicted on illegally obtained confessions that he and two other armed men had gone to the victim's house to rob him, and had killed him when he resisted. At that trial, defendant testified that he and the others had gone to the victim's home to pawn the shotgun, and that it went off by accident. After reversal, on retrial, the illegal confessions were ignored, but the prosecution introduced defendant's prior exculpatory testimony, which placed him at the scene of the crime with the shotgun. *Held*, reversed; the prosecution had failed to negate defendant's claim that the confessions impelled and therefore tainted the testimony. The Court of Appeal had reached the opposite conclusion on the theory that defendant had made a conscious tactical decision to testify, on advice of counsel. But the Supreme Court declared

that the "question is not *whether* the petitioner made a knowing decision to testify, but *why*." (88 S.Ct. 2010, 20 L.Ed.2d 1052.)

Three justices disagreed. The principal dissenting opinion speaks of the court's "fuzzy ideology about confessions" and the "procedural ploy" of switching the burden of proof to the prosecution on the issue when the only person who can tell why he took the stand is the defendant; it concludes that "common sense and policy are squarely opposed" to the decision. (See 82 Harv. L. Rev. 220, 224 [observing that it is unlikely prosecution will ever succeed in carrying burden placed on it, hence, that only in exceptional circumstances may defendant's testimony given after introduction of inadmissible confession be used in subsequent proceeding]; 56 Cal. L. Rev. 579, 611 [confession as "poisonous tree"].)

(3) *Other Applications of Doctrine*. The "fruit of the poisonous tree" doctrine is also applied to the product of evidence obtained by illegal search and seizure (see 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence*, §22 et seq.), but is no longer applied to the fruits of noncoercive *Miranda* violations (see *People v. Whitfield* (1996) 46 C.A.4th 947, 955, 54 C.R.2d 370, 5 Cal. Crim. Law (3d), *Criminal Trial*, §97). It has also been held inapplicable to testimony obtained in violation of a defendant's right of self-representation. (See *People v. Jones* (1998) 66 C.A.4th 760, 770, 78 C.R.2d 265.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Doctrine Extended*. Cf. *People v. Boyer* (2006) 38 C.4th 412, 463, 42 C.R.3d 677, 133 P.3d 581 [mental health expert, presented by defense in trial in which defendant's illegal confession was not introduced, could be impeached with information voluntarily compiled by defense itself, notwithstanding that defense obtained information out of concern that prosecution would introduce confession in earlier trial; tainted fruit doctrine of *Harrison v. United States* (1968) 392 U.S. 219, 88 S.Ct. 2008, 20 L.Ed.2d 1047, text, p. 740, was inapplicable].

(3) *Other Applications of Doctrine*. See *United States v. Patane* (2004) 542 U.S. 630, 124 S.Ct. 2620, 2629, 159 L.Ed.2d 667, 678, 5 Cal. Crim. Law (3d), *Criminal Trial*, Supp., §97 [failure to give *Miranda* warnings does not require exclusion of physical evidence obtained as result of voluntary but unwarned confession].





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## CHAPTER VI - Hearsay

### III. EXCEPTIONS TO THE RULE

#### A. Confession of Defendant.

##### 1. In General.

##### b. Exclusionary Rules.

#### 5. Distinction: Voluntary Second Confession.

*1 Witkin Cal. Evid. Hearsay § 56*

[§ 56] Distinction: Voluntary Second Confession.

If a first confession is obtained improperly (see *infra*, §64 et seq.), a later confession may likewise be excluded where it appears that the improper conduct continued to influence the defendant's mind. (*People v. Jones* (1944) 24 C.2d 601, 609, 150 P.2d 801; *People v. Adams* (1983) 143 C.A.3d 970, 991, 192 C.R. 290; *Leyra v. Denno* (1954) 347 U.S. 556, 74 S.Ct. 716, 98 L.Ed. 948; 1954 A.S. 798.) If, however, a second voluntary confession is made under circumstances which show no remaining coercive effect of the first, it is admissible. (See *Lyons v. Oklahoma* (1944) 322 U.S. 596, 64 S.Ct. 1208, 88 L.Ed. 1481; *Stroble v. California* (1952) 343 U.S. 181, 72 S.Ct. 599, 96 L.Ed. 872 [affirming *People v. Stroble* (1951) 36 C.2d 615, 623, 226 P.2d 330]; 1 McCormick 5th, §159; 66 Harv. L. Rev. 125.)

The test is stated in *People v. Jones, supra*, as follows: "If a defendant is subjected to threats or violence and within a few days thereafter he makes a confession, it may not be introduced in evidence unless it clearly appears that such improper treatment did not cause him to confess. In a situation such as here presented, there is a presumption that the influence of the prior improper treatment continues to operate on the mind of the defendant and that the subsequent confession is the result of the same influence which rendered the prior confession inadmissible, and the burden is upon the prosecution to clearly establish the contrary. ... The determination of the extent of the influence persisting at the time the subsequent confession is made rests, of course, upon attendant circumstances, and the inquiry is whether, considering the age and intelligence of the defendant, the nature and degree of the influence, and the time intervening between the confessions, it can be said that defendant was not induced to confess by reason of the pressure which motivated him to make the first statement, or was not influenced so to do by reason of the prior confession itself." (24 C.2d 609.)

Thus, in the *Jones* case, a 17-year-old black defendant was questioned and brutally beaten by Los Angeles police twice a day for 3 days while protesting his innocence, and on the 4th day, under further torture, he made some admissions. He was then taken to San Diego for further questioning by other officers, to whom he confessed again without knowledge that his previous statement could not be used. *Held*, "the entire situation" was so inherently coercive that the confession could not be regarded as voluntary.

But in *People v. Stroble, supra*, defendant, of somewhat weakened mentality, was struck and kicked, questioned for 2 hours by many officers and deputy prosecutors, and not allowed to see his attorney. The first confession was therefore "the result of physical abuse or psychological torture or a combination of the two." (36 C.2d 623.) However, it did not affect the fairness of his trial because he made five other confessions after consultation with his counsel. As described in

*Stroble*, "petitioner was anxious to confess to anybody who would listen--and as much so after he had consulted with counsel as before." (72 S.Ct. 604, 96 L.Ed. 881.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Terrell* (2006) 141 C.A.4th 1371, 1385, 46 C.R.3d 927 [even though trial judge found that defendant's confession to police was coerced, admission of defendant's subsequent telephonic confession to mother was not error; it was defendant's idea to call mother, his motivation in speaking to family members was different from his motivation in confessing to police, and neither defendant nor mother knew that police were listening]; 1 McCormick 6th, §159. *West's Key Number Digest*, Criminal Law k.519(2)



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## CHAPTER VI - Hearsay

### III. EXCEPTIONS TO THE RULE

#### A. Confession of Defendant.

##### 1. In General.

##### c. Limiting Rules.

#### 1. Standing To Challenge Admission of Third Party's Statement.

*1 Witkin Cal. Evid. Hearsay § 57*

[§ 57] Standing To Challenge Admission of Third Party's Statement.

In *People v. Badgett* (1995) 10 C.4th 330, 41 C.R.2d 635, 895 P.2d 877, two brothers were convicted of murder partly on the basis of the testimony of an immunized prosecution witness. The Court of Appeal reversed, concluding that (a) contrary to the finding of the trial judge, defendants did not lack standing to assert that the witness' testimony was the product of earlier involuntary statements she made to the police, and (b) evidence of one defendant's statements to the witness should have been excluded on the basis of the marital communications privilege. *Held*, judgment of the Court of Appeal reversed.

(a) *Standing as to confessions or statements of others.* A defendant's involuntary confession is excluded regardless of its reliability, and any statements following it are also excluded unless any "taint" has been attenuated by the passage of time or by other factors. (10 C.4th 347.) However, a defendant seeking to exclude the trial testimony of a third party must allege more than that coercion was applied against the third party, producing an involuntary statement at trial. The defendant must assert a violation of *his or her own* due process rights, and therefore must allege that the pretrial coercion would actually have affected the reliability of the evidence to be presented at trial. (10 C.4th 344, 350, citing *People v. Douglas* (1990) 50 C.3d 468, 268 C.R. 126, 788 P.2d 640, and disapproving *In re J. Clyde K.* (1987) 192 C.A.3d 710, 237 C.R. 550, to the extent it asserted that a defendant's right to exclude his or her own involuntary confession or statement and its fruits is coextensive with the defendant's right to exclude the involuntary confessions or statements of others and their fruits on due process grounds.)

(b) *Violation of fair trial right properly asserted.* In the present case, defendants adequately asserted a violation of their own right to a fair trial. "Two of the asserted grounds for exclusion were not based on the claimed coercion of the extrajudicial statements, but claimed that later events rendered the witness's *testimony* coerced. Even as to the claim that the statements were involuntary, it does not appear that the motion sought to exclude trial testimony purely because of the earlier allegedly involuntary statement by the third party. Rather, the motion sought exclusion of trial testimony because the witness was compelled to *testify* consistently with the allegedly involuntary statement at trial by reason of a coercive immunity agreement and other coercive conduct on the part of the prosecutor." (10 C.4th 345.)

(c) *No coercion found.* Nevertheless, an examination of the entire record indicates that the witness' trial testimony was not coerced:

(1) The witness was arrested by an officer from one county and transferred to that county for custody, although the

offense with which she was charged occurred in another county. However, even assuming that the arrest violated P.C. 830.1 (4 *Cal. Crim. Law* (3d), *Pretrial Proceedings*, §4) and Welf.C. 626 (10 *Summary* (9th), *Parent and Child*, §512), these were technical violations and would not have had a coercive effect on her statement or her trial testimony. (10 *C.4th* 353.)

(2) The offer by police officers to release the witness from custody in return for her statements would not have rendered those statements coerced, and there is no evidence she felt compelled to testify in conformity with those statements. (10 *C.4th* 354, 355.)

(3) Although defendants assert that the prosecution engaged in unethical conduct involving attempts to relieve the witness' counsel, the witness herself testified that she failed to understand what the lawyers were arguing about and that she did not feel threatened or pressured. In any event, the prosecution was concerned not with affecting her testimony but with preventing what they considered to be premature discovery for the defense. (10 *C.4th* 356, 357.)

(4) An immunity agreement that requires the witness to testify consistently with a previous statement to police is coercive, and any testimony produced by the agreement is subject to exclusion. Here, however, although there was some mention of consistency in the initial understanding regarding immunity, the agreement under which the witness actually testified did not contain that condition, and it is this latter agreement that is determinative of defendants' claim. (10 *C.4th* 358.)

(d) *Marital communication privilege inapplicable.* California does not recognize common law marriages, but it does recognize the validity of a marriage contracted in another state that would be valid by the laws of that state. The trial judge concluded that, under Texas law, the witness and one of the defendants did not have a common law marriage. His ruling displayed an accurate understanding of Texas law, and his factual determinations that the witness and the defendant did not have a serious agreement to be married and had not sufficiently held themselves out as married were supported by the evidence. The privilege for confidential communications between spouses, therefore, did not bar the witness' testimony. (10 *C.4th* 365.) (See 23 *Pepperdine L. Rev.* 1401.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Jenkins* (2000) 22 *C.4th* 900, 967, 968, 95 *C.R.2d* 377, 997 *P.2d* 1044, 4 *Cal. Crim. Law* (3d), *Illegally Obtained Evidence*, §65 [extending rule of *People v. Badgett* (1995) 10 *C.4th* 330, 41 *C.R.2d* 635, 895 *P.2d* 877, text, p. 742, to situation where challenged evidence consisted not of third party's allegedly coerced statement but of items discovered as product of that statement; evidence was properly admitted where defendant did not claim it was unreliable or that its reliability was affected by coercion]; *People v. Lee* (2002) 95 *C.A.4th* 772, 787, 115 *C.R.2d* 828 [where defendant sought to exclude witness' out-of-court statement identifying defendant as murderer, on ground that statement was coerced, he was required only to prove unlawful coercion and did not need to further show that evidence was unreliable; distinguishing *Jenkins*].

*Cross-Reference:* 10 *Summary* (10th), *Parent and Child*, §759.



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III. EXCEPTIONS TO THE RULE

A. Confession of Defendant.

1. In General.

c. Limiting Rules.

2. Voluntary False Confession.

*1 Witkin Cal. Evid. Hearsay § 58*

[§ 58] Voluntary False Confession.

A voluntary confession is admissible (see *supra*, §51) even though it is false. But the effect of a false confession is different from that of a true confession in that it does not justify an inference of its truth.

Thus, in *People v. Liss* (1950) 35 C.2d 570, 219 P.2d 789, defendant confessed to theft from a store cash register, but later repudiated the confession. The court instructed that, even if the jurors found the confession false, they could nevertheless give it such significance as they might determine under the court's instructions. *Held*, this was error (though, in view of ample evidence of guilt, not prejudicial). "As is true of any other false evidence, a false confession cannot support an inference of the truth of the matter untruthfully stated. Obviously, the false confession of guilt of a specific act cannot be used as proof of the commission of that act." (35 C.2d 574.) But it may be admissible to impeach, or to prove a fact other than the matter confessed, e.g., the commission of an entirely different act, or the illegal conduct of some third person. (35 C.2d 574.)

A false confession must, however, meet the usual test of voluntariness. (*People v. Sigal* (1963) 221 C.A.2d 684, 693, 34 C.R. 767.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER VI - Hearsay

### III. EXCEPTIONS TO THE RULE

#### A. Confession of Defendant.

##### 1. In General.

##### c. Limiting Rules.

#### 3. Confession of Codefendant.

##### aa. In General.

#### 1 *Witkin Cal. Evid. Hearsay* § 59

[§ 59] In General.

(1) *Aranda-Bruton Rule*. A special problem is presented when one of two or more codefendants has voluntarily confessed. The confession is of course admissible against the defendant who made it, and, if that defendant takes sole responsibility for the crime, introduction of the confession in the joint trial causes no trouble. (See *People v. La Peluso* (1966) 239 C.A.2d 715, 726, 49 C.R. 85 [defendant has no standing to object to declarations that only affect his nonobjecting codefendant].) But if the confession also implicates a codefendant, the situation is radically changed. The confession is still admissible only against the confessing defendant, and the jury will be so instructed, but the psychological impossibility of the jurors erasing the reference to the codefendant from their minds has been the subject of frequent comment. (See *People v. Aranda* (1965) 63 C.2d 518, 529, 47 C.R. 353, 407 P.2d 265; 1963 A.S. 312.)

Formerly, California admitted the confession with a limiting instruction. But in *People v. Aranda*, the court established new rules of practice, essentially requiring that the reference to the codefendant be deleted from the statement introduced, or that the defendants be given separate trials. (63 C.2d 530.)

The *Aranda* rule became a requirement of federal due process in *Bruton v. United States* (1968) 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476. The Court held that introduction of the codefendant's confession with its statements incriminating the defendant violated the defendant's right of cross-examination secured by the Confrontation Clause. (See 82 Harv. L. Rev. 231.) However, admission of a confession in these circumstances is not reversible error per se; the *Chapman* test (whether the court cannot say that the error was harmless beyond a reasonable doubt) applies. (See *Harrington v. California* (1969) 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284; *People v. Fulks* (1980) 110 C.A.3d 609, 616, 168 C.R. 203.) (For full discussion of the *Aranda-Bruton* rule and its applications, see 5 Cal. Crim. Law (3d), Criminal Trial, §375 et seq.; on application of the rule to admissions, see *infra*, §142; on methods of editing the confession so that the rule is satisfied, see *infra*, §60; on the standard for determining the voluntariness of a confession by a codefendant being separately tried, see *People v. Leach* (1985) 41 C.3d 92, 102, 221 C.R. 826, 710 P.2d 893.)

(2) *Limitation to Facially Incriminating Confessions*. In *Richardson v. Marsh* (1987) 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176, defendant was convicted of felony murder and assault to commit murder. At a joint trial, the judge admitted the confession of a codefendant who did not testify. The confession described a conversation between the codefendant and an accomplice that took place as they were driving toward a house where they planned to commit a robbery. During that conversation, the accomplice stated that they would have to kill the residents of the home.

Defendant was present in the car, but the confession was redacted to omit any reference to the presence of a third person. Defendant testified, however, that she had been in the car but had not heard the conversation. The trial judge instructed the jury not to use the codefendant's confession against defendant. *Held*, admission of the confession with a limiting instruction did not violate the Confrontation Clause.

(a) The codefendant's confession was not incriminating on its face, but became incriminating only when linked with defendant's subsequent testimony placing herself in the car. Thus, the jury was much more likely to obey the instruction to disregard the confession than in a case where a codefendant's confession specifically states that a defendant helped commit the crime. (107 S.Ct. 1707, 95 L.Ed.2d 186.)

(b) Limiting *Bruton* to facially incriminating confessions permits compliance by redaction, thereby facilitating efficiency and fairness in the criminal justice system by permitting joint trials and the use of codefendant confessions. (107 S.Ct. 1708, 1709, 95 L.Ed.2d 186, 187.)

Three justices dissented, arguing as follows: (a) Certain codefendant confessions are so damaging and difficult to discount that they should be excluded even if they do not specifically mention the defendant. (107 S.Ct. 1710, 95 L.Ed.2d 189.) (b) The interest in maximizing the use of joint trials for the sake of efficiency and convenience does not prevail over the interests of justice, which sometimes require the prosecution to choose between severance and not offering a codefendant's confession. (107 S.Ct. 1712, 95 L.Ed.2d 192.) (See *People v. Mitcham* (1992) 1 C.4th 1027, 1046, 5 C.R.2d 230, 824 P.2d 1277 [discussing *Richardson*]; *People v. Hampton* (1999) 73 C.A.4th 710, 720, 86 C.R.2d 665 [in robbery case, codefendant's statement, with limiting instruction, was properly admitted; it was redacted so that it mentioned no other participants in robbery, and defendant's involvement could be inferred only after statement was linked with other evidence; following *Richardson*]; 101 Harv. L. Rev. 1876 [Richardson].)

(3) *Effect of Proposition 8. People v. Boyd* (1990) 222 C.A.3d 541, 271 C.R. 738, held that an additional requirement of *Aranda* (but not *Bruton*; see *Nelson v. O'Neil* (1971) 402 U.S. 622, 91 S.Ct. 1723, 29 L.Ed.2d 222) did not survive Proposition 8 (see 1 Cal. Evidence (4th), Introduction, §§7, 8). "[T]o the extent *Aranda* required exclusion of inculpatory extrajudicial statements of codefendants, even when the codefendant testified and was available for cross-examination at trial, *Aranda* was abrogated by Proposition 8. There is no federal constitutional basis for requiring exclusion of a codefendant's statements when the codefendant testifies at trial and is subject to cross-examination. ... However, to the extent *Aranda* duplicates the protections available under the federal Constitution, as defined in *Bruton* and *O'Neil*, the *Aranda* rule survives the passage of Proposition 8. The California rule is now coextensive with the federal rule." (222 C.A.3d 562, 563.) (See *People v. Walkkein* (1993) 14 C.A.4th 1401, 1409, 18 C.R.2d 383 [Proposition 8 abrogates *Aranda* to extent it prohibited admission of codefendant's statement incriminating accused in trial to court]; *In re Jose M.* (1994) 21 C.A.4th 1470, 1479, 27 C.R.2d 55, 10 Summary (9th), *Parent and Child*, Supp., §602 [in juvenile delinquency proceeding arising from rape, taped conversation between codefendant and victim was admissible against defendant; following *Walkkein* and *Boyd*].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Aranda-Bruton Rule*. See *People v. Castille* (2005) 129 C.A.4th 863, 878, 29 C.R.3d 71, 5 Cal. Crim. Law (3d), *Criminal Trial*, Supp., §538 [in murder prosecution of two defendants tried jointly, admission of defendants' statements, made in joint interview with police, did not violate *Aranda-Bruton* rule, as statements were admitted as adoptive admissions; each defendant's statement implicating other defendant was admitted not for its truth, but to supply meaning to second defendant's response adopting first defendant's statement as his own]. (3) *Effect of Proposition 8*.

*In re Jose M.*:

*Cross-Reference:* 10 Summary (10th), *Parent and Child*, §786. *West's Key Number Digest*, Criminal Law k.417(9), 422 et seq.



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## CHAPTER VI - Hearsay

### III. EXCEPTIONS TO THE RULE

#### A. Confession of Defendant.

##### 1. In General.

##### c. Limiting Rules.

#### 3. Confession of Codefendant.

##### bb. Editing of Confession.

#### 1 Witkin Cal. Evid. Hearsay § 60

[§ 60] Editing of Confession.

(1) *Deletion of Identifying References.* In *People v. Jacobs* (1987) 195 C.A.3d 1636, 241 C.R. 550, the court reviewed the background case law on the *Aranda-Bruton* rule (supra, §59), and the state and federal practice of redaction (editing). (195 C.A.3d 1648, 1649.) In this case the confession of codefendant O was redacted to delete all identifying references to defendant J. But, as pointed out in *Aranda*, the editing out of statements of identification may not be enough, and was not enough in this case: Two statements remained that "could be employed against" the defendant, and failure to edit these out was error (though harmless in this case). (195 C.A.3d 1651, 1652.)

In *People v. Douglas* (1991) 234 C.A.3d 273, 285 C.R. 609, appellant and his brother, B, were charged and jointly tried for murder, and the jury returned verdicts of guilty. On appeal appellant contended that it was error to deny his motion for severance of the trials. The basis of the motion was that the prosecution used a redacted version of appellant's confession without reviewing the verbatim version; i.e., the court failed to first ascertain whether the parts implicating B could be effectively deleted without prejudice to appellant. *Held*, it was error to admit the statement.

(a) "While *Aranda* offers as an option the redaction of the confession, it expressly limits that option to cases in which deletions are made without prejudice to the declarant. ... When deletions cannot be made without prejudice to the declarant the court should either grant severance or exclude the statement." (234 C.A.3d 285.)

(b) "[T]he deletion of references to Bobby in appellant's statement clearly, and inaccurately, implied that appellant admitted his involvement in conduct he had explicitly disclaimed. Appellant was then improperly prevented from presenting evidence that his actual statement was exculpatory on major points. The prejudice to him is obvious and serious. If the court had granted the severance motion, deletions of appellant's statement would not have been required to protect Bobby under *Aranda/Bruton*." (234 C.A.3d 287.) (See *People v. Bryden* (1998) 63 C.A.4th 159, 176, 73 C.R.2d 554 [defendant's confrontation right was not violated by admission of jailhouse communication between nontestifying codefendant and prosecution witness, where communication was redacted to delete defendant's name and all statements directly implicating him, jury had to use inference to connect communication with defendant, and main adverse impact on defendant was simply to bolster witness' credibility; distinguishing *Gray v. Maryland* (1998) 523 U.S. 185, 118 S.Ct. 1151, 140 L.Ed.2d 294, and *People v. Fletcher* (1996) 13 C.4th 451, 53 C.R.2d 572, 917 P.2d 187].)

(2) *Replacement of Name With Pronoun or Other Neutral Term.* The Court in *Richardson v. Marsh* (1987) 481 U.S.



200, 107 S.Ct. 1702, 95 L.Ed.2d 176, supra, §59, expressly reserved the question whether the replacement, in a nontestifying codefendant's extrajudicial confession, of the nondeclarant's name with a pronoun or similar neutral and nonidentifying term is sufficient to avoid a Confrontation Clause violation. This question was decided in *Gray v. Maryland*, supra, a joint homicide prosecution in which one codefendant's confession was admitted with all references to his codefendant replaced by blanks (read in court as "deleted" or "deletion") and with a cautionary instruction that the confession could be used only against the defendant who made it. *Held*, this was reversible error. "Redactions that simply replace a name with an obvious blank space or a symbol or other similarly obvious indications of alteration ... leave statements that, considered as a class, so closely resemble *Bruton*'s unredacted statements that, in our view, the law must require the same result." (118 S.Ct. 1155, 140 L.Ed.2d 301.) Although *Richardson* placed outside the scope of the *Bruton* rule those statements that incriminate inferentially, the holding in *Richardson* "must depend in significant part upon the *kind* of, not the simple *fact* of, inference. *Richardson*'s inferences involved statements that did not refer directly to the defendant himself and which became incriminating 'only when linked with evidence introduced later at trial.' ... The inferences at issue here involve statements that, despite redaction, obviously refer directly to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial." (118 S.Ct. 1157, 140 L.Ed.2d 303.) (See *People v. Fletcher*, supra, 13 C.4th 469, 470 [introduction of codefendant's confession with all references to defendant replaced by pronoun or "another person" was reversible error; even as redacted, confession "powerfully" incriminated defendant]; 112 Harv. L. Rev. 142 [Gray].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Deletion of Identifying References.* See *People v. Archer* (2000) 82 C.A.4th 1380, 1388, 99 C.R.2d 230 [in murder prosecution, admission of codefendant's extrajudicial statement violated defendant's right of cross-examination, even though it was redacted to delete all references to defendant, where it still unmistakably implicated defendant].



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## CHAPTER VI - Hearsay

### III. EXCEPTIONS TO THE RULE

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##### 1. In General.

##### c. Limiting Rules.

#### 3. Confession of Codefendant.

##### cc. Interlocking Confessions.

#### 1 *Witkin Cal. Evid. Hearsay* § 61

[§ 61] Interlocking Confessions.

In *Cruz v. New York* (1987) 481 U.S. 186, 107 S.Ct. 1714, 95 L.Ed.2d 162, the issue was whether the holding of *Bruton v. United States* (1968) 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476, supra, §59, applies where defendant's own confession, corroborating that of his codefendant, is introduced against him. Defendant confessed to N, a friend, that the codefendant (defendant's brother) had killed the victim during the course of an attempted robbery by the defendant and codefendant. The nontestifying codefendant's videotaped confession to the police was consistent with defendant's confession to N, and both confessions were admitted at the trial, although the jury was warned not to use the codefendant's confession against defendant. *Held*, admission of the codefendant's interlocking confession violated the Confrontation Clause.

(a) In *Parker v. Randolph* (1979) 442 U.S. 62, 99 S.Ct. 2132, 60 L.Ed.2d 713, the Court held that the *Bruton* rule does not call for reversal where the defendant himself confesses and his confession "interlocks" with and supports the confession of his codefendant. The basis of that decision was that introduction of a codefendant's confession is not "devastating" where the defendant has himself confessed. "In fact, it seems to us that 'interlocking' bears a positively inverse relationship to devastation. A codefendant's confession will be relatively harmless if the incriminating story it tells is different from that which the defendant himself is alleged to have told, but enormously damaging if it confirms, in all essential respects, the defendant's alleged confession. It might be otherwise if the defendant were *standing by* his confession, in which case it could be said that the codefendant's confession does no more than support the defendant's very own case. But in the real world of criminal litigation, the defendant is seeking to *avoid* his confession--on the ground that it was not accurately reported, or that it was not really true when made." (107 S.Ct. 1718, 95 L.Ed.2d 171.)

(b) Defendant sought to establish that N had a motive for falsely reporting a confession that never occurred; thus, a codefendant's confession corroborating defendant's confession significantly harms defendant's case, while one that is incompatible supports defendant's assertion that his alleged confession was nonexistent or false. (107 S.Ct. 1718, 95 L.Ed.2d 171.) Accordingly, it is illogical to believe that a codefendant's confession is less likely to be considered by a jury the more it is corroborated by a defendant's own admissions. (107 S.Ct. 1719, 95 L.Ed.2d 172.)

Four justices dissented, arguing that (a) a defendant's own confession is the most probative and damaging evidence that can be admitted against him; and (b) the jury will not be tempted, in every interlocking confession case, to disobey its instructions and fail to understand that presumptively unreliable evidence must not be used against a defendant. (107

*S.Ct. 1720, 95 L.Ed.2d 173.)*

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Crawford v. Washington* (2004) 541 U.S. 36, 124 S.Ct. 1354, 1373, 158 L.Ed.2d 177, 3 Cal. Evidence (4th), *Presentation at Trial, Supp.*, §21 [interlocking nature of defendant's and wife's statements did not render wife's statement more reliable].



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#### A. Confession of Defendant.

##### 1. In General.

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##### 3. Confession of Codefendant.

##### dd. Improper Substantive Use Against Defendant.

#### 1 Witkin Cal. Evid. Hearsay § 62

#### [§ 62] Improper Substantive Use Against Defendant.

In *Lee v. Illinois* (1986) 476 U.S. 530, 106 S.Ct. 2056, 90 L.Ed.2d 514, defendant confessed that she and her boyfriend murdered her aunt and another woman. Then defendant was permitted to meet with her boyfriend, she reminded him that he had promised that neither would "take the rap alone," and he gave a statement confessing to the crimes. The boyfriend's confession paralleled defendant's in several respects, but differed by stating that the two had previously discussed murdering the victims and by referring to a conversation immediately prior to the murders that suggested a premeditated plan. Defendant and her boyfriend were tried jointly in a bench trial, at which the judge relied on the boyfriend's confession in finding defendant guilty of premeditated murder. *Held*, reversed.

(a) Because the codefendant's confession was used as substantive testimony against defendant, this case is similar to *Douglas v. Alabama* (1965) 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934, 5 Cal. Crim. Law (3d), *Criminal Trial*, §532, and differs from *Bruton v. United States* (1968) 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476, *supra*, §59, where the issue was the effectiveness of limiting instructions. "The danger against which the Confrontation Clause was erected--the conviction of a defendant based, at least in part, on presumptively unreliable evidence--actually occurred." (106 S.Ct. 2063, 90 L.Ed.2d 527.)

(b) Although the presumption of unreliability that attaches to a codefendant's confession may be rebutted if the confession bears sufficient "indicia of reliability," the codefendant's confession does not meet the required standard of being supported by a "showing of particularized guarantees of trustworthiness." (106 S.Ct. 2064, 90 L.Ed.2d 528; quoting *Ohio v. Roberts* (1980) 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597, 3 Cal. Evidence (4th), *Presentation at Trial*, §21.) He confessed only after being implored to share "the rap," and his unsworn statement was not tested by cross-examination or its equivalent. That the confession was found to be voluntary for Fifth Amendment purposes does not mean that he was free from any desire, motive, or impulse to mitigate the appearance of his own culpability by spreading the blame or to overstate defendant's involvement in retaliation for her having implicated him in the murders. Codefendant not only had a theoretical motive to distort the facts to defendant's detriment, but prior to trial he actively considered becoming defendant's adversary by testifying for the state against her. "This record evidence documents a reality of the criminal process, namely that once partners in a crime recognize that the 'jig is up,' they tend to lose any identity of interest and immediately become antagonists, rather than accomplices." (106 S.Ct. 2064, 90 L.Ed.2d 528.)

(c) That defendant's and codefendant's confessions "interlock" on some points does not mean that codefendant's

confession should be deemed trustworthy in its entirety. "If those portions of the codefendant's purportedly 'interlocking' statement which bear to any significant degree on the defendant's participation in the crime are not thoroughly substantiated by the defendant's own confession, the admission of the statement poses too serious a threat to the accuracy of the verdict to be countenanced by the Sixth Amendment. In other words, when the discrepancies between the statements are not insignificant, the codefendant's confession may not be admitted. ... The subjects upon which these two confessions do not 'interlock' cannot in any way be characterized as irrelevant or trivial. The discrepancies between the two go to the very issues in dispute at trial: the roles played by the two defendants in the killing of Odessa, and the question of premeditation in the killing of Aunt Beedie." (106 S.Ct. 2064, 2065, 90 L.Ed.2d 529.)

(d) Although admission of her codefendant's confession violated defendant's Confrontation Clause rights, the error may have been harmless, a matter to be determined in the first instance by the state courts. (106 S.Ct. 2065, 2066, 90 L.Ed.2d 530; see 5 Cal. Crim. Law (3d), Criminal Trial, §532.)

Four justices dissented, contending that the court's opinion ignored the "realities" of criminal cases, that the indicia of reliability required by *Ohio v. Roberts*, *supra*, were provided by the fact that codefendant's statements were thoroughly and unambiguously against his penal interest, and that there was little reason to believe that he was motivated by a desire to shift blame to defendant. (106 S.Ct. 2066, 90 L.Ed.2d 530.)

The *Lee* case was relied on in *Lilly v. Virginia* (1999) 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117, a murder trial in which a nontestifying accomplice's confession, containing some statements against the accomplice's penal interest and others inculcating defendant, was admitted against defendant. Defendant's conviction was affirmed by the state's highest court, which reasoned that the concerns of the Confrontation Clause were satisfied because the accomplice's statements fell within a "firmly rooted hearsay exception," and because there were "particularized guarantees" that they were trustworthy. (119 S.Ct. 1899, 144 L.Ed.2d 133.) Held, admission of the confession was improper. (a) Not all statements against penal interest can be considered to fall within a "firmly rooted" exception for Confrontation Clause purposes; an accomplice's statement, like the one here, that shifts or spreads the blame to a criminal defendant is outside the realm of hearsay exceptions that are so trustworthy that adversarial testing can be expected to add little to their reliability. (119 S.Ct. 1898, 144 L.Ed.2d 132.) (b) The particularized guarantees of trustworthiness that would otherwise allow admission of an accomplice's confession in this type of situation cannot be found in other, corroborating evidence; the required indicia of reliability must attend the confession itself. In this case, neither the words the accomplice spoke nor the setting in which he was questioned provided any basis for concluding that his comments needed no adversarial testing. (119 S.Ct. 1901, 144 L.Ed.2d 135, 136.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Ohio v. Roberts* (1980) 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597, text, p. 750, was overruled in *Crawford v. Washington* (2004) 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177, 3 Cal. Evidence (4th), Presentation at Trial, Supp., §21.

See *People v. Miranda* (2000) 23 C.4th 340, 350, 96 C.R.2d 758, 1 P.3d 73 [testimony by qualified law enforcement officer relating confession by defendant's nontestifying accomplice is admissible at preliminary hearing as against defendant; distinguishing *Lilly v. Virginia* (1999) 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117, text, p. 751]; *People v. Jennings* (2003) 112 C.A.4th 459, 472, 5 C.R.3d 243, Supp., infra, §141; 113 Harv. L. Rev. 233 [*Lilly*]; cf. *People v. Parrish* (2007) 152 C.A.4th 263, 276, 60 C.R.3d 868, 1 Cal. Evidence (4th), Circumstantial Evidence, Supp., §36 [by claiming that he was no longer part of gang and introducing evidence that one of his accomplices had said people were trying to kill defendant because he was snitch, defendant forfeited right under *Lilly* to object to prosecution's introduction of other parts of accomplice's statement indicating defendant had possessed handgun].



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### III. EXCEPTIONS TO THE RULE

#### A. Confession of Defendant.

##### 1. In General.

#### d. Confession of Accomplice Offered for Nonhearsay Purpose.

#### *1 Witkin Cal. Evid. Hearsay § 63*

[§ 63] Confession of Accomplice Offered for Nonhearsay Purpose.

In *Tennessee v. Street* (1985) 471 U.S. 409, 105 S.Ct. 2078, 85 L.Ed.2d 425, defendant, on trial for murder, made a detailed confession to Papantoniou, the sheriff. At trial, defendant maintained that the confession was coercively derived from a written statement given the sheriff by Peele, an accomplice in the murder; i.e., defendant testified that the sheriff read from Peele's statement and directed defendant to say the same thing. In rebuttal, the prosecution called the sheriff, who first contradicted defendant's testimony, and then read Peele's confession, answering questions that emphasized the differences between the two. The trial judge informed the jury that Peele's confession was admitted, not for the purpose of proving its truthfulness, but to rebut defendant's claim that his own confession was a coerced imitation of Peele's. *Held*, admission of the accomplice's confession was proper.

(a) Before the details of Peele's confession were admitted, the jury could evaluate the reliability of defendant's confession only by weighing the testimony of defendant and the sheriff. When Peele's statement was introduced, the jury could compare the two confessions to determine the plausibility of defendant's account. (105 S.Ct. 2081, 85 L.Ed.2d 430.)

(b) "The *nonhearsay* aspect of Peele's confession--not to prove what happened at the murder scene but to prove what happened when respondent confessed--raises no Confrontation Clause concerns. ... If respondent's counsel doubted that Peele's confession was accurately recounted, he was free to cross-examine the Sheriff. By cross-examination respondent's counsel could also challenge Sheriff Papantoniou's testimony that he did not read from Peele's statement and direct respondent to say the same thing. In short, the State's rebuttal witness against respondent was not Peele, but Sheriff Papantoniou." (105 S.Ct. 2082, 85 L.Ed.2d 431.)

(c) Unlike the situation in *Bruton v. United States* (1968) 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476, *supra*, §59, editing the Peele confession would have been impractical; i.e., if all of Peele's references to defendant had been deleted, it would have been more difficult for the jury to evaluate defendant's testimony that his confession was a coerced imitation. (105 S.Ct. 2082, 85 L.Ed.2d 432.) The trial judge's instructions were the appropriate way to limit the jury's use of the evidence. (105 S.Ct. 2083, 85 L.Ed.2d 432.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### A. Confession of Defendant.

#### 2. Involuntary Confessions.

#### a. Physical Abuse or Threat of Abuse.

#### 1 Witkin Cal. Evid. Hearsay § 64

[§ 64] Physical Abuse or Threat of Abuse.

(1) *Physical Torture.* A confession obtained by physical torture or abuse is inadmissible, and the conviction of a defendant on a confession so obtained is a violation of due process. (See *Brown v. Mississippi* (1935) 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682; *People v. Williams* (1942) 20 C.2d 273, 284, 125 P.2d 9; *People v. Rodriguez* (1943) 58 C.A.2d 415, 422, 136 P.2d 626; *People v. Jones* (1944) 24 C.2d 601, 610, 150 P.2d 801; *People v. McElheny* (1982) 137 C.A.3d 396, 402, 187 C.R. 39 [physical abuse of 18-year-old defendant rendered statements inadmissible; following *Williams*]; 1 McCormick 5th, §148; 29A Am.Jur.2d (1994 ed.), Evidence §736 et seq.; 4 So. Cal. L. Rev. 83; 6 Stanf. L. Rev. 414; 43 Harv. L. Rev. 617; 79 Harv. L. Rev. 962, 964.)

Where the suspect is physically abused, a subsequent warning of *Miranda* rights (see *infra*, §76) does not break the chain, and the confession may be held inadmissible from the totality of the circumstances. (*People v. Sanchez* (1969) 70 C.2d 562, 576, 75 C.R. 642, 451 P.2d 74.) However, the use of reasonable force in arresting a defendant does not impair the voluntariness of a statement made during or after the arrest. (*In re Walker* (1974) 10 C.3d 764, 777, 112 C.R. 177, 518 P.2d 1129 ["Although petitioner sustained injuries at the time of his arrest and undoubtedly was in pain during some of the interviews, such pain does not appear from the officers' testimony to have reflected on his competency"].)

(2) *Threats of Physical Abuse.* The same rule of inadmissibility applies to a confession obtained by *threats* of harm to the accused or to someone close to the accused. (*People v. Loper* (1910) 159 C. 6, 17, 112 P. 720; *People v. Mellus* (1933) 134 C.A. 219, 223, 25 P.2d 237 [threat to lock up defendant's mother under the same charge]; *People v. Flores* (1936) 15 C.A.2d 385, 405, 59 P.2d 517; *People v. Rand* (1962) 202 C.A.2d 668, 673, 674, 21 C.R. 89 [threat to put defendant's wife in jail and his children in juvenile detention]; *Payne v. Arkansas* (1958) 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975 [mentally dull black youth held incommunicado for 3 days, denied food for long periods, and told by police chief that there would be 30 or 40 people outside in a few minutes who wanted to get him]; *Lynnum v. Illinois* (1963) 372 U.S. 528, 83 S.Ct. 917, 920, 9 L.Ed.2d 922 [woman defendant, with no previous criminal experience, "encircled in her apartment by three police officers and a twice convicted felon who had purportedly 'set her up,' " was threatened with termination of state aid for her infant children if she did not "cooperate"]; 3 Wigmore (Chadbourn Rev.) §833; 7 So. Cal. L. Rev. 239.)

(3) *Torture and Threats by Private Persons.* A confession obtained without coercion by the police, but induced by torture and threats by private persons, is inadmissible. In *People v. Berve* (1958) 51 C.2d 286, 332 P.2d 97, defendant allegedly performed a negligent abortion on M, from which she died. Her husband and other relatives kidnaped defendant, beat him unmercifully for 2 hours, and threatened to kill him and harm his parents unless he confessed.

While he was in a dazed condition and in great pain, a police officer arrived, arrested him, and took him to the station. There, without rest or medical attention, he was interrogated until he confessed. The trial judge found the confession voluntary. In reversing the conviction, the court expressed the strongest condemnation of the conduct of the authorities:

"The actual physical and psychological effects of the beating the defendant absorbed were painfully fresh when he confessed. The police made no effort to assuage his physical suffering by giving him medical attention, opportunity to rest, or even sufficient water to drink or to wash himself. Although there was no threat of further violence by the police, this element was provided by the clear threats of his kidnapers. Torture destroys not only physically but psychologically. Elements of despair, fatigue, craving for companionship, identifying one's interrogator as a friend and source of aid, and suggestions of guilt were all present in a crude, haphazard form in this case. They are the prime elements in the more devious and elaborate systems of menticide employed to obtain confession in totalitarian states." (51 C.2d 292.)

(4) *Offer To Protect From Physical Abuse*. In *Arizona v. Fulminante* (1991) 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302, defendant was convicted in a state court of the murder of his 11-year-old stepdaughter. Prior to trial, defendant was incarcerated in federal prison for an unrelated federal crime. While there, defendant was befriended by a fellow inmate, who was a paid F.B.I. informant. The informant stated he was aware that defendant was receiving "tough treatment" from other inmates because of a rumor that he had murdered a child, and offered to protect defendant from his fellow inmates. Defendant then confessed to the informant. *Held*, based on the totality of the circumstances, the confession was coerced, thus inadmissible.

(a) Unless defendant confessed, there was a credible threat of physical violence from fellow inmates without the informant's protection. (111 S.Ct. 1252, 1253, 113 L.Ed.2d 316, 317.)

(b) These additional facts supported a finding of coercion: (1) Defendant, who possessed a low-average to average intelligence, dropped out of school in the fourth grade; (2) defendant was short in stature and slight in build; (3) although defendant had been in prison before, he had not always adapted well to the stress of prison life; (4) the informant's position as defendant's friend may have made defendant particularly susceptible to the informant's entreaties. (111 S.Ct. 1252, 113 L.Ed.2d 316, footnote 3.)

(c) The informant acted as an agent of the government when he questioned defendant about the murder and elicited the confession. (111 S.Ct. 1253, 113 L.Ed.2d 316, footnote 4.) (See 105 Harv. L. Rev. 152 [*Fulminante*] ; 19 Hastings Const. L. Q. 911 [same]; 22 Southwestern U. L. Rev. 285 [same].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Physical Torture*. See 1 McCormick 6th, §148; 26 Thomas Jefferson L. Rev. 469 [arguing in favor of legalizing and regulating use of torture in situations where greater evil could be prevented]; 16 A.L.R. Fed 2d 257 [admissibility of evidence procured by torture occurring in another country].

(2) *Threats of Physical Abuse*. Cf. *People v. Haley* (2004) 34 C.4th 283, 298, 17 C.R.3d 877, 96 P.3d 170 [in capital murder prosecution, defendant's confession was voluntary and thus properly admitted, notwithstanding defendant's claim that detective threatened to kill him and, because he was under influence of cocaine, he was susceptible to threat; evidence supported trial judge's findings that there was no threat and defendant was not under influence of cocaine]. *West's Key Number Digest*, Criminal Law k.519 et seq.





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## CHAPTER VI - Hearsay

### III. EXCEPTIONS TO THE RULE

- A. Confession of Defendant.
  - 2. Involuntary Confessions.
    - b. Other Threats or Inducements.
      - 1. General Principle and Distinction.

*1 Witkin Cal. Evid. Hearsay § 65*

[§ 65] General Principle and Distinction.

Threats, express or implied, of certain conviction and heavy punishment, are usually accompanied by promises or suggestions of leniency or other advantage if a confession is given. Both methods of procurement render the confession inadmissible. (See 1 McCormick 5th, §148; 3 Wigmore (Chadbourn Rev.) §§824, 825, 831 et seq.; 4 *So. Cal. L. Rev.* 90; 79 *Harv. L. Rev.* 978; 27 A.L.R.3d 1185 [compelling accused to view corpse of victim]; 89 A.L.R.3d 230 [confession made in anticipation of, during, or following polygraph examination]; 51 A.L.R.4th 495 [police statements that suspect's relatives will benefit by confession]; for examples, see *infra*, §66.)

A distinction must be made for situations in which an exhortation to confess is unaccompanied by either threat or inducement, apart perhaps from an emphasis on the natural psychological relief arising from telling the truth. Exhortations of this type do not render a confession involuntary. (See *People v. Haney* (1920) 46 C.A. 317, 322, 189 P. 338 [officer told defendant that "the truth would not hurt him and he better come out and tell it," and that "they expected him to tell the truth"; this was permissible admonition, not coupled with either threat or promise]; *People v. Nelson* (1964) 224 C.A.2d 238, 250, 36 C.R. 385 [officers told defendant he should get himself "straightened out" by telling the truth]; *People v. Hill* (1967) 66 C.2d 536, 549, 58 C.R. 340, 426 P.2d 908; *People v. Spears* (1991) 228 C.A.3d 1, 27, 28, 278 C.R. 506 [suggesting to defendant that it was "time [he] got this off [his] chest," and that he would be better off after he gave them "the scoop" were not implied promises of benefit beyond mere psychological relief that would flow from telling truth]; *People v. Higareda* (1994) 24 C.A.4th 1399, 1409, 29 C.R.2d 763 [detective's statement that if defendant told truth he would talk to district attorney, and any further action would be up to district attorney, did not constitute promise of leniency]; 3 Wigmore (Chadbourn Rev.) §832; 29A *Am.Jur.2d* (1994 ed.), *Evidence* §740.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 1 McCormick 6th, §148.



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### III. EXCEPTIONS TO THE RULE

- A. Confession of Defendant.
  - 2. Involuntary Confessions.
- b. Other Threats or Inducements.
  - 2. Confessions Inadmissible.

#### *1 Witkin Cal. Evid. Hearsay § 66*

[§ 66] Confessions Inadmissible.

In *People v. Brommel* (1961) 56 C.2d 629, 15 C.R. 909, 364 P.2d 845, defendant, arrested for murder, was continuously questioned for hours and repeatedly denied the crime. Then an officer told him he had been lying, that he could "take it the hard way or ... the easy way," that unless he told them the truth they would write on "a little paper" the word "liar," and that this would be presented to the judge, after which it would be useless for him to ask for any "breaks." *Held*, the statements were both an implied promise of a "break" and a threat of no leniency, and rendered the confession inadmissible. (56 C.2d 632.)

In *People v. Manriquez* (1965) 231 C.A.2d 725, 42 C.R. 157, the police, entering defendant's house after an informer purchased heroin there, arrested defendant, his wife, and other persons present. Then, talking privately with defendant, an arresting officer told him that if they searched and found narcotics and nobody claimed ownership, all persons there would have to be arrested. Defendant said: "If I give you the narcotics, you will not take my wife to jail?" The officer said yes, and defendant left the room and got the drugs. *Held*, defendant's admission that he possessed narcotics in addition to those sold to the informer was induced by the promise of his wife's release, hence, was inadmissible. (231 C.A.2d 730, citing the text.)

*People v. Denney* (1984) 152 C.A.3d 530, 199 C.R. 623, involved the recital of a hypothetical situation in which the cooperative suspect received a lighter sentence than the other suspects who did not. (152 C.A.3d 541.) The court said: "[I]t is clear that appellant was induced to confess by the officer's hypothetical story and pressured by the implied threat that he would get the gas chamber if he did not confess." (152 C.A.3d 544.)

In *People v. Rogers* (1943) 22 C.2d 787, 141 P.2d 722, a murder and arson case, S, an acquaintance of defendant, was allowed by the police to confer with defendant on several occasions. Defendant testified that S told him that if he didn't confess, the district attorney was going to charge him with first degree murder and he would be executed; but that if he would confess, they would let him go to a mental institution from which he would shortly be released. The court thought the record justified the inference that S was used by the police to make the inducements, and reversed the conviction. "[N]o court should countenance the use of a confession which was made under the influence of either threats or inducement. ... Moreover, although the promises or inducements are made by one without actual authority to give them effect, if they are made in the presence of one who has such authority under circumstances from which the accused has a right to assume that they were authorized, the confession so obtained is involuntary." (22 C.2d 805.)

In *People v. Clark* (1921) 55 C.A. 42, 203 P. 781, the record superficially showed mere exhortation without promise (see supra, §65). But the court made this distinction: "[W]here, in a case such as this, a prisoner is denied the benefit of counsel and is repeatedly assured by the police officers and matrons that they are her friends and will do nothing to harm her, and is brought to a weak physical and mental condition by long-sustained examination without food or other nourishment, the statement by one of those in authority that it is the best thing for her to tell the truth could not help but give her the impression that by telling the truth regarding the homicide those who professed to be her friends would aid her in getting a lighter punishment." (55 C.A. 45.)

The case law contains numerous other examples of impermissible inducements or threats. (See *People v. Williams* (1901) 133 C. 165, 167, 65 P. 323 [suggested promise of freedom if confession, threat of prosecution if none made]; *People v. Loper* (1910) 159 C. 6, 14, 112 P. 720 [threats, relentless grilling]; *People v. Trout* (1960) 54 C.2d 576, 585, 6 C.R. 759, 354 P.2d 231 [defendant was questioned while his wife was separately held, despite no grounds for her arrest; this constituted impermissible implied threat making wife's release dependent on defendant's confessing]; *People v. Clark* (1968) 263 C.A.2d 87, 90, 69 C.R. 218 [defendant confessed after parole officer physically detained and brutally questioned wife]; *People v. Terry* (1974) 38 C.A.3d 432, 113 C.R. 233 [defendant's claim that he was offered low bail while suffering from heroin withdrawal symptoms, in exchange for confession, merited proper factual determination]; *People v. Jimenez* (1978) 21 C.3d 595, 611, 147 C.R. 172, 580 P.2d 672 [promise of leniency]; *People v. Flores* (1983) 144 C.A.3d 459, 470, 471, 192 C.R. 772 [threat of death penalty followed by implied promises of more lenient sentence if defendant confessed and of freedom pending trial if his statement supported self-defense]; *In re J. Clyde K.* (1987) 192 C.A.3d 710, 720, 722, 237 C.R. 550 [officer's statement to boys suspected of receiving stolen property: "If you tell me a lie, and I find out the boxes are stolen, you will go to jail, but if you tell me the truth you will get a citation"]; *People v. Montano* (1991) 226 C.A.3d 914, 935, 277 C.R. 327, infra, §80 [interrogator's use of his and defendant's common religion to conjure in defendant's mind the picture of confession to avoid going to hell]; *In re Shawn D.* (1993) 20 C.A.4th 200, 213, 214, 24 C.R.2d 395, 10 Summary (9th), Parent and Child, Supp., §595 [officer falsely stated that minor's companion had implicated him and that there was enough evidence to convict him, and told him that he would be treated leniently if he confessed, and that his girlfriend would be in trouble if he did not].)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Examples of impermissible inducements or threats:* *In re Shawn D.*:

*Cross-Reference:* 10 Summary (10th), Parent and Child, §793.



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## CHAPTER VI - Hearsay

### III. EXCEPTIONS TO THE RULE

- A. Confession of Defendant.
  - 2. Involuntary Confessions.
- b. Other Threats or Inducements.
  - 3. Confessions Admissible.

#### 1 Witkin Cal. Evid. Hearsay § 67

[§ 67] Confessions Admissible.

In *People v. Benson* (1990) 52 C.3d 754, 276 C.R. 827, 802 P.2d 330, defendant confessed to a murder after an exchange with a detective during the course of which the detective stated, "There's no death penalty here." *Held*, the confession was properly admitted. It is unclear whether an objective or subjective standard applies in determining whether police conduct amounts to a "promise," but under either standard, there was no promise in this case. From the objective point of view, the detective's statement was no more than an observation that proved incorrect, and the observation was effectively withdrawn by the subsequent comment of another investigator, "Wait a minute, ... we don't know what happened in that house." From the subjective point of view, defendant's own admissions in the hearing on the matter indicate that he thought the statement reflected that the death penalty was "dormant" in *California*. (52 C.3d 780, 781.)

In *People v. Lindsey* (1961) 188 C.A.2d 471, 10 C.R. 488, defendant, charged with robbery and identified by the victim, made an oral confession. At trial, police officers testified that he confessed first, and that afterwards they questioned him on other robberies, advising him that if he cleared them up they would only charge him with this one. Defendant's version was that they accused him of the other robberies and told him that if he would confess to this one they would make it the sole charge. *Held*, conviction affirmed. (a) If defendant's version were accepted, the confession would probably be inadmissible as having been induced by a promise of immunity. (b) But the jury and trial judge resolved the conflict in the evidence against the defendant; hence, the confession, preceding the promise of immunity, was not induced by it and was properly received in evidence. (188 C.A.2d 476.)

There are numerous other examples. (See *People v. Castello* (1924) 194 C. 595, 601, 229 P. 855 [officer told defendants "we had the goods on them and that they had just as well come clean"; statement carried no threat or hope of reward]; *People v. Morris* (1991) 53 C.3d 152, 201, 279 C.R. 720, 807 P.2d 949 [allowing defendant to speak with his girlfriend was insufficient "inducement" to render his murder confession involuntary]; *People v. Clark* (1993) 5 C.4th 950, 988, 22 C.R.2d 689, 857 P.2d 1099, 5 Cal. Crim. Law (3d), *Criminal Trial*, §108 [officer's statement regarding defendant's probable amount of prison time constituted neither promise of leniency nor inducement]; *People v. Ray* (1996) 13 C.4th 313, 340, 52 C.R.2d 296, 914 P.2d 846 [where defendant offered to discuss crimes only if detective could guarantee death penalty would be imposed, detective's statement that prosecution would pursue death penalty did not constitute improper promise]; *People v. Massie* (1998) 19 C.4th 550, 576, 79 C.R.2d 816, 967 P.2d 29 [confession was voluntary where defendant said he would make statement on condition that he was given separate cell, and officer

promised to try and secure one for him but never told him his effort to do so was contingent on defendant's decision to give statement[.])

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Weaver* (2001) 26 C.4th 876, 921, 111 C.R.2d 2, 29 P.3d 103 [substantial evidence supported trial judge's determination that defendant, properly informed of his rights, waived them, and that waiver was not coerced by threats to arrest his family members; as officers did not engage in misconduct, claim that defendant was on medication at time was insufficient to establish involuntariness]; *People v. Ramos* (2004) 121 C.A.4th 1194, 1203, 18 C.R.3d 167

[detective's statement to defendant that his cooperation in investigation would benefit defendant during judicial process did not amount to improper promise of leniency, and thus defendant's ensuing confession was properly admitted; under circumstances, statement would have been understood to mean that defendant's cooperation might be useful in later plea bargain negotiations].



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## CHAPTER VI - Hearsay

## III. EXCEPTIONS TO THE RULE

- A. Confession of Defendant.
- 2. Involuntary Confessions.
- c. Psychological Coercion.

1 Witkin Cal. Evid. Hearsay § 68

[§ 68] Psychological Coercion.

"The question posed by the due process clause in cases of claimed psychological coercion is whether the influences brought to bear upon the accused were 'such as to overbear petitioner's will to resist and bring about confessions not freely self-determined.' " (*People v. Hogan* (1982) 31 C.3d 815, 841, 183 C.R. 817, 647 P.2d 93 [quoting *Rogers v. Richmond* (1961) 365 U.S. 534, 81 S.Ct. 735, 5 L.Ed.2d 760]; see 29A Am.Jur.2d (1994 ed.), *Evidence* §731; 22 Proof of Facts 2d 539 [psychological coercion].) Often the coercion takes the form of implied threats (supra, §65) or prolonged questioning (infra, §72). Where police tactics do not appear to have exploited the suspect's particular vulnerabilities to the extent of overcoming his or her free will, the claim of involuntariness is rejected. (See *People v. Kelly* (1990) 51 C.3d 931, 953, 275 C.R. 160, 800 P.2d 516 [telling defendant that he had violated his religious beliefs and caused grief to his family; confession held voluntary]; *People v. Jacobo* (1991) 230 C.A.3d 1416, 1423, 281 C.R. 750 [probation officer's admonished defendant to be "responsible for what you do," without even implying it would be better for him to tell the truth].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Maury* (2003) 30 C.4th 342, 410, 411, 133 C.R.2d 561, 68 P.3d 1 [defendant's statements to psychologist were not product of coercion, where defendant offered to talk with her, met with her twice, knew that he was not required to speak with her, was not in custody, and was free to end interviews; although psychologist attempted to trick defendant into admitting guilt, he recognized trick and was not influenced]; 20 A.L.R.6th 479 [appeal to suspect's religious beliefs as affecting voluntary nature of confession].



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### III. EXCEPTIONS TO THE RULE

#### A. Confession of Defendant.

#### 2. Involuntary Confessions.

##### d. Fraud.

#### 1. Confessions Admissible.

#### 1 *Witkin Cal. Evid. Hearsay* § 69

[§ 69] Confessions Admissible.

The traditional view, supported by leading authorities, is that fraud will not render a confession inadmissible unless the misrepresentations are of such a nature as would probably result in an untrue statement. (See *People v. Castello* (1924) 194 C. 595, 602, 229 P. 855; *People v. Connelly* (1925) 195 C. 584, 597, 234 P. 374 [dictum; statements probably admissions rather than confessions]; *People v. Stadnick* (1962) 207 C.A.2d 767, 774, 25 C.R. 30; *In re Walker* (1974) 10 C.3d 764, 777, 112 C.R. 177, 518 P.2d 1129, citing the text [after defendant was shot during arrest and was en route to hospital, officer said defendant was in pretty bad shape and might not live until destination and that "smart thing" to do was tell about alleged crimes; even if officer's statement about defendant's condition was deception, it was not of type reasonably likely to procure untrue statement]; *People v. Felix* (1977) 72 C.A.3d 879, 885, 886, 139 C.R. 366; *People v. Musselwhite* (1998) 17 C.4th 1216, 1240, 74 C.R.2d 212, 954 P.2d 475 [although detectives told defendant that they had lifted his fingerprints from victim's body when, in fact, they did not yet have forensics report, this did not render confession involuntary; it could not be said that misrepresentation was proximate cause of confession]; *People v. Chutan* (1999) 72 C.A.4th 1276, 1280, 85 C.R.2d 744 [questioning of defendant was not coercive simply because detective failed to reveal that he was conducting criminal investigation relating to sexual molestation and not just asking questions about placement of defendant's children]; 3 Wigmore (Chadbourn Rev.) §841; 79 *Harv. L. Rev.* 958; 31 *San Diego L. Rev.* 729; 99 A.L.R.2d 772 [admissibility of confession as affected by trickery or fraud].)

Thus, in *People v. Castello*, supra, officer S told defendants that the officers could introduce them to persons who saw them steal the property. In fact, the officers merely knew (among other facts) persons to whom defendants had sold part of the stolen property. *Held*, the fact that a confession is procured by a police officer's falsehood, artifice, or deception does not exclude it where, as here, it was not calculated to procure an untrue statement. (194 C. 602.)

Similarly, in *People v. Connelly*, supra, involving robbery and murder in a saloon, the sheriff falsely stated to defendant that fingerprints taken from a cash register matched his. *Held*, "[w]hile the indulgence in deceptive methods of false statements is not morally justifiable or a commendable practice, this alone would not render even a confession of guilt inadmissible." (195 C. 597.) (See 1953 A.S. 777 [confession to tampering with rail obtained by concealment of fact that train wreck caused deaths].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Farnam* (2002) 28 C.4th 107, 182, 121 C.R.2d 106, 47 P.3d 988 [in capital murder prosecution, trial

judge did not err in admitting defendant's confession to robbery and assault, which was introduced as aggravating evidence of other violent crimes, even though confession was made after police falsely told defendant that his fingerprints had been found on victim's wallet; deception was not of type likely to produce false confession].





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#### A. Confession of Defendant.

#### 2. Involuntary Confessions.

##### d. Fraud.

#### 2. Confessions Inadmissible.

#### 1 Witkin Cal. Evid. Hearsay § 70

[§ 70] Confessions Inadmissible.

(1) *In General.* The cases holding fraudulently obtained confessions inadmissible usually involve something more than fraud. Thus, in *Leyra v. Denno* (1954) 347 U.S. 556, 74 S.Ct. 716, 98 L.Ed. 948, petitioner, in police custody, suffered a sinus attack, and the police brought him Dr. H for supposed medical treatment. Dr. H, a psychiatrist, gave him no medical advice but continued the questioning. "For an hour and a half or more the techniques of a highly trained psychiatrist were used to break petitioner's will in order to get him to say he had murdered his parents. Time and time again the psychiatrist told petitioner how much he wanted to and could help him, how bad it would be for petitioner if he did not confess, and how much better he would feel, and how much lighter and easier it would be on him if he would just unbosom himself to the doctor. Yet the doctor was at that very time the paid representative of the state whose prosecuting officials were listening in on every threat made and every promise of leniency given." (74 S.Ct. 718, 98 L.Ed. 952.) *Held*, on habeas corpus, "use of confessions extracted in such a manner from a lone defendant unprotected by counsel is not consistent with due process." (74 S.Ct. 719, 98 L.Ed. 952.) (See 68 Harv. L. Rev. 110; 43 Cal. L. Rev. 114; 2 U.C.L.A. L. Rev. 127; and see also *People v. Hogan* (1982) 31 C.3d 815, 840, 855, 183 C.R. 817, 647 P.2d 93 [police falsely indicated that they had eyewitness evidence of defendant's guilt, and suggested he had committed homicides while "berserk"].)

In *Massiah v. United States* (1964) 377 U.S. 201, 84 S.Ct. 1199, 1203, 12 L.Ed.2d 246, incriminating statements obtained by trickery (conversations with codefendant, cooperating with police, monitored by police agent) were held inadmissible because defendant was under indictment and entitled to have his attorney present. (For full discussion, see 5 Cal. Crim. Law (3d), *Criminal Trial*, §268; and see *People v. Goedecke* (1967) 65 C.2d 850, 859, 56 C.R. 625, 423 P.2d 777; *Milton v. Wainwright* (1972) 407 U.S. 371, 92 S.Ct. 2174, 33 L.Ed.2d 1 [violation of *Massiah* rule as harmless error]; 78 Harv. L. Rev. 217, 221 [*Massiah*]; 79 Harv. L. Rev. 998 [extension of *Massiah* rule in subsequent cases]; 40 Stanf. L. Rev. 1593 [police use of trickery in obtaining confession].)

(2) *False Promise of Immunity.* A confession induced by a false governmental promise of immunity is no more free than one obtained by coercion, and is inadmissible. This proposition was stated in *Shotwell Mfg. Co. v. United States* (1963) 371 U.S. 341, 83 S.Ct. 448, 453, 9 L.Ed.2d 357, but held inapplicable under the facts. Petitioners, suspected of failure to report income, took advantage of the Treasury's "voluntary disclosure policy," which allows delinquent taxpayers to escape criminal prosecution by full disclosure before any investigation is commenced. *Held*, their motions to suppress the evidence at the trial were properly denied, for two reasons: (a) The Treasury's policy was addressed to

the public generally, and, unlike promises of immunity made directly to suspected persons, was not an attempt to extract confessions of guilt from petitioners as individuals; they were wholly free to act and their disclosure was entirely voluntary. (b) Their purported disclosure was fraudulent, misrepresenting material facts; hence, the Treasury's general offer was impliedly withdrawn as to them. (83 S.Ct. 453, 454, 9 L.Ed.2d 365, 366.) (See 77 Harv. L. Rev. 108; 11 U.C.L.A. L. Rev. 302.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER VI - Hearsay

## III. EXCEPTIONS TO THE RULE

- A. Confession of Defendant.
  - 2. Involuntary Confessions.
    - e. Prolonged Questioning.
      - 1. Questioning Without Coercion.

## 1 Witkin Cal. Evid. Hearsay § 71

## [§ 71] Questioning Without Coercion.

It is possible to conduct questioning in such a manner that the accused is able to act freely and to choose to confess voluntarily; therefore, the factor of lengthy questioning, by itself, does not require a conclusion that coercion was exerted. (See 29A Am.Jur.2d (1994 ed.), Evidence §735.) This proposition is asserted in a number of cases, although the sharp dissenting opinions show how difficult it is to draw the factual distinctions.

(1) *United States Supreme Court Opinions.* In *Lisenba v. California* (1941) 314 U.S. 219, 62 S.Ct. 280, 86 L.Ed. 166 [affirming *People v. Lisenba* (1939) 14 C.2d 403, 421, 94 P.2d 569], although the court criticized the officers' conduct, no violation of due process was found. "The petitioner has said that the interrogation would never have drawn an admission from him had his confederate not made a statement; he admits that no threats, promises, or acts of physical violence were offered him during this questioning or for eleven days preceding it. Counsel had been afforded full opportunity to see him and had advised him. He exhibited a self-possession, a coolness, and an acumen throughout his questioning ... which negatives the view that he had so lost his freedom of action that the statements made were not his but were the result of the deprivation of his free choice to admit, to deny, or to refuse to answer." (62 S.Ct. 292, 86 L.Ed. 182.)

In *Stein v. New York* (1953) 346 U.S. 156, 73 S.Ct. 1077, 97 L.Ed. 1522, where the suspects were questioned intermittently for 12 hours over a 32-hour period, the Court observed that "[i]nterrogation is not inherently coercive, as is physical violence" (73 S.Ct. 1092, 97 L.Ed. 1542), that its "limits are not defined merely by calling an interrogation an 'inquisition,' " and that the "relay" technique may sometimes be reasonably employed (73 S.Ct. 1093, 97 L.Ed. 1543). (See 67 Harv. L. Rev. 118; 41 Cal. L. Rev. 672; 6 Stanf. L. Rev. 423.)

In *Thomas v. Arizona* (1958) 356 U.S. 390, 78 S.Ct. 885, 2 L.Ed.2d 863, petitioner, a person of normal intelligence with an extensive criminal record, confessed under ordinary questioning by the county attorney after being advised of his rights. Some 20 hours before, after apprehension by a sheriff's posse, local ranchers twice lassoed him, but the sheriff promptly had the rope removed and there was no threat of lynching. *Held*, the confession was admissible.

(2) *California Opinions.* California cases have upheld confessions obtained in a similar manner. (See *People v. Lisenba*, *supra*; *People v. Gonzales* (1944) 24 C.2d 870, 875, 151 P.2d 251; *People v. Mehafeey* (1948) 32 C.2d 535, 552, 197 P.2d 12; *People v. Cucco* (1948) 85 C.A.2d 448, 452, 193 P.2d 86; *People v. Millum* (1954) 42 C.2d 524, 527, 267 P.2d 1039 [sporadic questioning, interrupted by search and time to eat, not objectionable]; *People v. Matlock*

(1959) 51 C.2d 682, 696, 336 P.2d 505 [criticizing implied threat to accused's family, but holding that under all the circumstances, confession was admissible]; *People v. Andersen* (1980) 101 C.A.3d 563, 578, 582, 583, 161 C.R. 707 [defendant voluntarily sought dialogue with police in which they commented on realities of her position and courses of conduct open to her; "strong implication that defendant wanted the facts to come out and wanted to be nudged into a confession"]; *People v. Maestas* (1987) 194 C.A.3d 1499, 1505, 240 C.R. 360 [16-year-old murder suspect was in custody 71/2 hours before confessing, but was interrogated for only 4 hours; providing suspect with food after he started confessing was insignificant under circumstances].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER VI - Hearsay

### III. EXCEPTIONS TO THE RULE

#### A. Confession of Defendant.

#### 2. Involuntary Confessions.

##### e. Prolonged Questioning.

#### 2. Questioning as Coercion.

### 1 Witkin Cal. Evid. Hearsay § 72

#### [§ 72] Questioning as Coercion.

(1) *In General: Ashcraft Rule.* Even though no violence or threats are employed, prolonged questioning under some circumstances may constitute such coercion as to render a confession ineffective. This rule was laid down in the leading case of *Ashcraft v. Tennessee* (1944) 322 U.S. 143, 64 S.Ct. 921, 88 L.Ed. 1192, where 36 hours of continuous questioning by experienced investigators was held inherently coercive and a denial of due process. "[I]ts very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom its full coercive force is brought to bear." (64 S.Ct. 926, 88 L.Ed. 1199.) (See 6 *Stanf. L. Rev.* 417.)

(2) *Subsequent United States Supreme Court Opinions.* United States Supreme Court decisions applying the *Ashcraft* doctrine include *Haley v. Ohio* (1948) 332 U.S. 596, 68 S.Ct. 302, 92 L.Ed. 224 [15-year-old black boy questioned alone by police from midnight until 5 a.m.]; *Watts v. Indiana* (1949) 338 U.S. 49, 69 S.Ct. 1347, 93 L.Ed. 1801 [accused questioned persistently by officers in relays, for long hours, during period of 6 days]; *Fikes v. Alabama* (1957) 352 U.S. 191, 77 S.Ct. 281, 1 L.Ed.2d 246 [Black of low mentality kept isolated for a week and questioned for hours at a time for 5 days]; *Payne v. Arkansas* (1958) 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975; *Blackburn v. Alabama* (1960) 361 U.S. 199, 80 S.Ct. 274, 279, 4 L.Ed.2d 242 ["A prolonged interrogation of an accused who is ignorant of his rights and who has been cut off from the moral support of friends and relatives is not infrequently an effective technique of terror"]; *Reck v. Pate* (1961) 367 U.S. 433, 81 S.Ct. 1541, 6 L.Ed.2d 948 [19-year-old boy of subnormal intelligence confessed to murder after 8 days of interrogation without permission to see his father, friends, or a lawyer]; *Culombe v. Connecticut* (1961) 367 U.S. 568, 81 S.Ct. 1860, 6 L.Ed.2d 1037 [illiterate defendant of low intelligence confessed after repeated questioning and denial of request for counsel]; *Davis v. North Carolina* (1966) 384 U.S. 737, 86 S.Ct. 1761, 16 L.Ed.2d 895; *Greenwald v. Wisconsin* (1968) 390 U.S. 519, 88 S.Ct. 1152, 20 L.Ed.2d 77. (See 22 *So. Cal. L. Rev.* 300 [Haley]; 75 *Harv. L. Rev.* 158 [Culombe]; 79 *Harv. L. Rev.* 969 [Ashcraft and Haley].)

In *Spano v. New York* (1959) 360 U.S. 315, 79 S.Ct. 1202, 3 L.Ed.2d 1265, petitioner was indicted for murder. Accompanied by counsel, he surrendered to the authorities and refused to answer questions on counsel's advice. Persistent interrogation nevertheless continued for 8 hours, during which he was refused several times an opportunity to consult his attorney. At the end, a confession was obtained by bringing in his close friend to play on his sympathies with deliberately contrived falsehoods. *Held*, conviction reversed. "[P]etitioner's will was overborn by official pressure, fatigue and sympathy falsely aroused." (79 S.Ct. 1207, 3 L.Ed.2d 1272.) The Court observed that the brutality described in earlier cases is today uncommon. "But as law enforcement officers become more responsible, and the methods used

to extract confessions more sophisticated, our duty to enforce federal constitutional protections does not cease. It only becomes more difficult because of the more delicate judgements to be made." (79 S.Ct. 1206, 3 L.Ed.2d 1271.) (See 79 Harv. L. Rev. 980.)

In *Blackburn v. Alabama*, *supra*, petitioner, a black man 24 years old at the time of the crime, was convicted of robbery. His prior history was one of insanity and insanity commitments; he was in a mental hospital for over 4 years before being declared mentally competent to stand trial, and two of the three psychiatrists agreed that he had probably been incompetent when he made the confession; the other psychiatrist, in an inconsistent report, described him as both insane and sane. The confession itself was obtained by 8 or 9 hours of interrogation in a small room with several officers present. *Held*, conviction reversed.

(a) First, as in the *Fikes* and *Spano* cases, *supra*, low mentality and emotional instability were important factors. (80 S.Ct. 281, 4 L.Ed.2d 249.) And, considering the long interrogation in a tiny room filled with police officers, the absence of friends, and a confession composed by the deputy sheriff, "the chances of the confession having been the product of a rational intellect and a free will becomes even more remote and the denial of due process even more egregious." (80 S.Ct. 280, 4 L.Ed.2d 249.)

(b) Second, there was a strong probability that the defendant was actually incompetent: "Surely in the present stage of our civilization a most basic sense of justice is affronted by the spectacle of incarcerating a human being upon the basis of a statement he made while insane; and this judgment can without difficulty be articulated in terms of the unreliability of the confession, the lack of rational choice of the accused, or simply a strong conviction that our system of law enforcement should not operate so as to take advantage of a person in this fashion." (80 S.Ct. 280, 4 L.Ed.2d 248.) (See 79 Harv. L. Rev. 976.)

(3) *California Opinions*. California cases in accord with the *Ashcraft* rule include *People v. Clark* (1921) 55 C.A. 42, 45, 203 P. 781 [murder; defendant, a woman in low mental and physical condition, subjected to almost daily grilling for hours at a time by several officers for over 2 weeks; "a relentless sweating process"]; *People v. Dye* (1931) 119 C.A. 262, 270, 6 P.2d 313 [illegal detention without communication with friends or counsel, continual questioning for several days; "The wearing-out process of inquisition"]; *People v. Day* (1932) 125 C.A. 106, 108, 13 P.2d 855 [woman defendant kept in custody for about 6 days without charge and regularly questioned, with threats and vague promises]; *People v. Speaks* (1957) 156 C.A.2d 25, 38, 319 P.2d 709 [epileptic woman confined with drunks and psychopaths and repeatedly questioned for several days; "a calculated endeavor to secure a confession through psychological pressure"]; *People v. Alfieri* (1979) 95 C.A.3d 533, 545, 157 C.R. 304; *People v. Nicholas* (1980) 112 C.A.3d 249, 262, 265, 266, 169 C.R. 497; *People v. Montano* (1991) 226 C.A.3d 914, 931, 277 C.R. 327, *infra*, §80.

(4) *Effect of Miranda*. *Miranda v. Arizona* (1966) 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, *infra*, §76, which requires police to give a detailed warning of constitutional rights prior to custodial interrogation, provides a mechanism for cutting off questioning. Today, therefore, the focus of analysis is likely to be on whether the *Miranda* requirements were observed rather than on whether the length of questioning overbore the accused's free will. (See 1 McCormick 5th, §149.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(4) *Effect of Miranda*. See 1 McCormick 6th, §149.



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## CHAPTER VI - Hearsay

### III. EXCEPTIONS TO THE RULE

#### A. Confession of Defendant.

#### 2. Involuntary Confessions.

##### f. Illegal Detention.

##### 1. In Federal Trials.

#### 1 Witkin Cal. Evid. Hearsay § 73

[§ 73] In Federal Trials.

(1) *McNabb Rule*. A confession obtained from a defendant *held illegally in custody* is inadmissible in the federal courts. (*McNabb v. United States* (1943) 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819; *Upshaw v. United States* (1948) 335 U.S. 410, 69 S.Ct. 170, 93 L.Ed. 100; *Mallory v. United States* (1957) 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479; see 1 McCormick 5th, §157; 56 Harv. L. Rev. 1008; 71 Harv. L. Rev. 1562; 74 Harv. L. Rev. 1222; 79 Harv. L. Rev. 984; 50 Cal. L. Rev. 348.) "[T]his Court in recent years has enforced a judicially created federal rule of evidence, to which the label 'McNabb rule' has been applied, that confessions shall be excluded if obtained during 'illegal detention due to failure promptly to carry a prisoner before a committing magistrate, whether or not the confession is the result of torture, physical or psychological.' " (*United States v. Carignan* (1951) 342 U.S. 36, 72 S.Ct. 97, 100, 96 L.Ed. 48.)

But if the detention is *not illegal*, the fact of *custody* does not constitute a ground of attack on the confession. So, in *United States v. Carignan*, *supra*, a defendant legally arrested and promptly taken before a magistrate on one charge was properly questioned about a different offense. The Court said: "An extension of a mechanical rule based on the time of a confession would not be a helpful addition to the rules of criminal evidence. We decline to extend the McNabb fixed rule of exclusion to statements to police or wardens concerning other crimes while prisoners are legally in detention on criminal charges." (72 S.Ct. 102, 96 L.Ed. 54.) (See 66 Harv. L. Rev. 129; 3 Stanf. L. Rev. 727 [discussing Court of Appeals decision].)

Moreover, where the detention, though illegal, *occurs after the confession*, the confession is admissible; i.e., the *McNabb* rule is not a penalty for violation of the duty of prompt commitment. (*United States v. Mitchell* (1944) 322 U.S. 65, 64 S.Ct. 896, 88 L.Ed. 1140; see 18 So. Cal. L. Rev. 63; 25 So. Cal. L. Rev. 215; 79 Harv. L. Rev. 992.)

(2) *Statutory Safe-Harbor Exception*. Under 18 U.S.C., §3501(c), a confession made by a person under arrest or other detention is not rendered inadmissible solely because of delay in bringing the person before a magistrate if the confession is found by the trial judge to have been voluntarily made and if the confession was made or given within 6 hours immediately following the arrest or detention. The statute creates a kind of "safe harbor" exception to the *McNabb* rule. (See 29A Am.Jur.2d (1994 ed.), Evidence §732; 4 Wharton, Criminal Evidence 14th, §632.)

However, if "the person is arrested and held on state charges, §3501(c) does not apply, and the safe harbor is not implicated. This is true even if the arresting officers (who, when the arrest is for a violation of state law, almost certainly will be agents of the State or one of its subdivisions) believe or have cause to believe that the person also may

have violated federal law. ... As long as the person is arrested and held only on state charges by state or local authorities, the provisions of §3501(c) are not triggered." (*United States v. Alvarez-Sanchez* (1994) 511 U.S. 350, 114 S.Ct. 1599, 1603, 1604, 128 L.Ed.2d 319, 327, 328.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *McNabb Rule*. See 1 McCormick 6th, §157.(2) *Statutory Safe-Harbor Exception*. Related provisions of 18 U.S.C., §3501 were declared unconstitutional in *Dickerson v. United States* (2000) 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405, 5 Cal. Crim. Law (3d), *Criminal Trial*, §92.West's Key Number Digest, Criminal Law k.519(8)





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## CHAPTER VI - Hearsay

### III. EXCEPTIONS TO THE RULE

#### A. Confession of Defendant.

#### 2. Involuntary Confessions.

##### f. Illegal Detention.

##### 2. In State Trials.

#### 1 Witkin Cal. Evid. Hearsay § 74

[§ 74] In State Trials.

(1) *In General.* The *McNabb* rule (supra, §73) deals with federal procedure and not due process. And the United States Supreme Court has held that, so far as state criminal trials are concerned, unlawful arrest and detention do not necessarily render a resulting confession inadmissible. (See *Gallegos v. Nebraska* (1951) 342 U.S. 55, 72 S.Ct. 141, 96 L.Ed. 86; *Crooker v. California* (1958) 354 U.S. 908, 77 S.Ct. 1300, 1 L.Ed.2d 1426; 66 Harv. L. Rev. 124; 1951 A.S. 839.) The result has been that few states have shown any inclination to adopt the *McNabb* doctrine. (See 4 U.C.L.A. L. Rev. 138; 28 A.L.R.4th 1121 [delay in arraignment--modern state cases].)

(2) *Confession During Illegal Detention.* In California, a double problem was presented: Should a confession obtained during illegal detention be rejected under the *McNabb* doctrine? If not, should it be rejected under *People v. Cahan* (1955) 44 C.2d 434, 282 P.2d 905, which held that evidence obtained in violation of constitutional guarantees must be excluded? (See 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence*, §4.) In *Rogers v. Superior Court* (1955) 46 C.2d 3, 291 P.2d 929, a case dealing with incriminating admissions and treating them as raising the issue of admissibility of confessions, the court answered *no* to both questions. Defendant was arrested and illegally detained (90 hours until conversation with police, and 8 days until taken before magistrate). The admissions connecting him with the crime were made while under this detention. His petition for prohibition on the ground that the information was based on no competent evidence was denied. The court declared that "none of the states following the rule excluding illegally obtained evidence have adopted the rule of the *McNabb* case; and we are not disposed to adopt it." (46 C.2d 10.) The distinction, said the court, is that (a) evidence obtained by search and seizure or by a coerced confession is a necessary product of the search or the coercion--the victim cannot select items to be taken; but (b) a voluntary admission is not a necessary product of the illegal detention, for the suspect may remain silent or make any statement that serves his interest. (46 C.2d 10.) (See 4 U.C.L.A. L. Rev. 136 [somewhat critical of result, and suggesting (p. 140) that "in a more *McNabb*-like case, the California court will be more willing to adopt a *McNabb*-like rule"]; and see cases concerning defendants held incommunicado, *infra*, §75.)

The *Rogers* case was followed in subsequent decisions. (See *People v. Teitelbaum* (1958) 163 C.A.2d 184, 210, 329 P.2d 157; *People v. Hanson* (1961) 197 C.A.2d 658, 664, 17 C.R. 334, citing the text; *In re Walker* (1974) 10 C.3d 764, 779, 112 C.R. 177, 518 P.2d 1129; *People v. Haydel* (1974) 12 C.3d 190, 199, 115 C.R. 394, 524 P.2d 866, citing the text; *People v. Thompson* (1980) 27 C.3d 303, 329, 165 C.R. 289, 611 P.2d 883; *In re Michael E.* (1980) 112 C.A.3d 74, 79, 169 C.R. 62.)

But the flagrant disregard of the statutory requirement of promptly taking the accused before a magistrate (P.C. 825) was heartily condemned in *People v. Grace* (1958) 166 C.A.2d 68, 332 P.2d 811: "The ordinary motive for extended failure to take a prisoner before a magistrate is not unrelated to the purpose of extracting a confession. In the federal courts the illegal detention of a person under arrest is ground for excluding a confession. ... It would seem that the only possible way of stopping the illegal practices of the police is a similar rule in the state courts. But, as an intermediate reviewing court, we are bound by the decisions of the Supreme Court holding that the mere illegal detention of a person under arrest, no matter for how long, is not ground for excluding a confession." (166 C.A.2d 79.)

(3) *Distinction: Confession Following Illegal Arrest.* A confession made after *an illegal arrest* may be admissible if the connection between the arrest and the statement has become so attenuated as to dissipate the taint; but, if the confession is obtained by exploitation of the illegal arrest, it must be excluded. (See *People v. DeVaughn* (1977) 18 C.3d 889, 897, 899, 135 C.R. 786, 558 P.2d 872 [following *Brown v. Illinois* (1975) 422 U.S. 590, 95 S.Ct. 2254, 2262, 45 L.Ed.2d 416, 428]; *In re Jorge S.* (1977) 74 C.A.3d 852, 858, 141 C.R. 722; *People v. Gonzalez* (1998) 64 C.A.4th 432, 446, 447, 75 C.R.2d 272 [where defendant was arrested without probable cause for liquor store robbery, his confession, made within hours of arrest and without intervening events, was inadmissible; but subsequent confession to restaurant robbery, made to officers from different city who were unaware of circumstances of arrest, was properly admitted].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER VI - Hearsay

### III. EXCEPTIONS TO THE RULE

- A. Confession of Defendant.
  - 2. Involuntary Confessions.
    - g. Defendant Kept Incommunicado.

1 Witkin Cal. Evid. Hearsay § 75

[§ 75] Defendant Kept Incommunicado.

*Gallegos v. Colorado* (1962) 370 U.S. 49, 82 S.Ct. 1209, 8 L.Ed.2d 325, made an enormous but unclear expansion of the classes of involuntary confessions. Petitioner, a child of 14, with another juvenile, assaulted and robbed an elderly man. On January 1, petitioner was picked up by the police and immediately admitted the assault and robbery; on January 2, he was examined by the police in Juvenile Hall and made a confession taken down by an officer; on January 7, he signed a formal confession. The victim died on January 26, and petitioner was then charged with murder, convicted, and sentenced to life imprisonment. *Held*, reversed; the confession was inadmissible. The principal ground was that petitioner was kept in Juvenile Hall from January 1 to January 7, and, during this 5-day detention, saw neither his parents nor an attorney. This, the court thought, gave the case "an ominous cast," and it was immaterial that there was no prolonged questioning, that he had been advised of his right to counsel, that he did not ask either for a lawyer or his parents, and that he had promptly confessed when arrested (82 S.Ct. 1212, 8 L.Ed.2d 328). The uncertainty of the holding is emphasized by the court's conclusion:

"There is no guide to the decision of cases such as this, except the totality of circumstances that bear on the two factors we have mentioned. The youth of the petitioner, the long detention, the failure to send for his parents, the failure immediately to bring him before the judge of the Juvenile Court, the failure to see to it that he had the advice of a lawyer or a friend--all these combine to make us conclude that the formal confession ... was obtained in violation of due process." (82 S.Ct. 1213, 8 L.Ed.2d 329.) (See critical dissent; and see 50 Cal. L. Rev. 902; 76 Harv. L. Rev. 108; 79 Harv. L. Rev. 977; 1962 A.S. 362.)

Another expansion of uncertain scope was made in *Haynes v. Washington* (1963) 373 U.S. 503, 83 S.Ct. 1336, 10 L.Ed.2d 513. Defendant, arrested for robbery within a half hour of the crime, orally admitted it to officers while en route to the station and again after his arrival; and on the following morning, he admitted it for a third time and signed a written confession. He testified, however, that during the 16-hour period between the arrest and signing he was denied the right to telephone his wife or anyone else unless he signed, was not advised of his right to remain silent, and was held incommunicado for over 5 days while the police unsuccessfully sought to obtain another statement. *Held*, the signed confession was inadmissible, having been obtained "in an atmosphere" of substantial coercion and inducement. (83 S.Ct. 1343, 10 L.Ed.2d 521.) "Confronted with the express threat of continued incommunicado detention and induced by the promise of communication with and access to family Haynes understandably chose to make and sign the damning written statement; given the unfair and inherently coercive context in which made, that choice cannot be said to be the voluntary product of a free and unconstrained will." (83 S.Ct. 1343, 10 L.Ed.2d 521.)

Four justices dissented, pointing out that defendant was a mature adult of at least average intelligence, with a criminal record and experience with police procedures, and not unaware of his rights; that none of the typical methods of nonphysical coercion--extended interrogation, deprivation of sleep or food, use of psychiatric techniques, etc.--was shown. (83 S.Ct. 1349, 10 L.Ed.2d 527, 528.)

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## CHAPTER VI - Hearsay

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#### A. Confession of Defendant.

##### 2. Involuntary Confessions.

##### h. Failure To Advise of Miranda Rights.

##### 1. In General.

#### 1 Witkin Cal. Evid. Hearsay § 76

[§ 76] In General.

(1) *Former Law*. Originally, it was held that the right to consult with counsel at the time of arrest and police interrogation was not an element of due process, and that, in the absence of some showing of coercion, a confession obtained from a person denied the right to obtain or consult with counsel was admissible. (See *Crooker v. California* (1958) 357 U.S. 433, 78 S.Ct. 1287, 2 L.Ed.2d 1448 [attempt to obtain a lawyer]; *Cicenia v. La Gay* (1958) 357 U.S. 504, 78 S.Ct. 1297, 2 L.Ed.2d 1523 [petitioner's attorney came to station and repeatedly requested opportunity to talk to him].)

(2) *The Escobedo Case*. In *Escobedo v. Illinois* (1964) 378 U.S. 478, 84 S.Ct. 1758, 1765, 12 L.Ed.2d 977, the *Crooker* and *Cicenia* cases were repudiated, and a new doctrine was declared: Where an investigation has begun to focus on a suspect in police custody, the police carry out a process of interrogation that lends itself to eliciting incriminating statements, and the accused has been denied an opportunity to consult with an attorney, the statements are inadmissible unless the accused has been warned of the right to remain silent. The doctrine was further developed in *People v. Dorado* (1965) 62 C.2d 338, 351, 42 C.R. 169, 398 P.2d 361, holding that a request for counsel was unnecessary; the statements could not be admitted unless the accused was warned as to the right to counsel and the right to remain silent, and both were effectively waived. (See 53 Cal. L. Rev. 337; 38 So. Cal. L. Rev. 156; 79 Harv. L. Rev. 21, 998; 1964 A.S. 329.)

(3) *The Miranda Case*. The *Escobedo* holding was expanded in *Miranda v. Arizona* (1966) 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694. *Miranda* requires that, prior to custodial interrogation, the accused be advised (a) of the right to remain silent, (b) that anything the accused says can be used against him or her, and (c) of the right to the presence of counsel. The case further requires that questioning cease if, at any time after these warnings are given, the accused invokes the right to remain silent. Any waiver of these rights must be voluntary, knowing, and intelligent. (For a full discussion of the *Miranda* rule, see 5 Cal. Crim. Law (3d), *Criminal Trial*, §89 et seq.; see also 69 Cal. L. Rev. 633 [review of Kamisar, Police Interrogation and Confessions]; 43 U.C.L.A. L. Rev. 933 [three articles on impact of *Miranda* rule].) (On renewed interrogation after suspect invokes *right to silence*, see *infra*, §77; on renewed interrogation after suspect invokes *right to counsel*, see *infra*, §78; on statement *not result of interrogation*, see *infra*, §79; on determination whether suspect invoked rights, see 5 Cal. Crim. Law (3d), *Criminal Trial*, §123; on effect of admonition administered by suspect, see *People v. Nitschmann* (1995) 35 C.A.4th 677, 683, 41 C.R.2d 325.)

(4) *Standard of Review*. Admission of a confession obtained in violation of the *Miranda* requirements is subject to

the harmless error standard. (*People v. Sims* (1993) 5 C.4th 405, 447, 20 C.R.2d 537, 853 P.2d 992, *infra*, §191.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(3) *The Miranda Case*. See *Dickerson v. United States* (2000) 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405, 5 Cal. Crim. Law (3d), *Criminal Trial*, §92 [reaffirming *Miranda* rule]. *West's Key Number Digest*, Criminal Law k.518 et seq.



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## CHAPTER VI - Hearsay

### III. EXCEPTIONS TO THE RULE

#### A. Confession of Defendant.

#### 2. Involuntary Confessions.

#### h. Failure To Advise of Miranda Rights.

#### 2. Interrogation After Right to Silence Invoked.

#### 1 Witkin Cal. Evid. Hearsay § 77

[§ 77] Interrogation After Right to Silence Invoked.

(1) *Former Rule. People v. Pettingill* (1978) 21 C.3d 231, 145 C.R. 861, 578 P.2d 108, involved a defendant, arrested for burglary, who was advised of his rights and refused to talk, was advised a second time of his rights 2 hours later and again refused to talk, and then, 2 days later, confessed following a third advisement. The court held that a statement taken under these circumstances violates not only the *Miranda* rule but also the self-incrimination privilege of the *California Constitution*. (21 C.3d 238.)

(2) *Effect of Proposition 8.* In *People v. Warner* (1988) 203 C.A.3d 1122, 1126, 1127, 250 C.R. 462, defendant was arrested for rape and after being taken to the police station and advised of his rights, invoked his right to remain silent. The next day, an officer who had reviewed a crime report relating to defendant but was unaware defendant had previously cut off questioning, re-advised him of his rights. Defendant waived his rights and made a statement that was used against him at trial. *Held*, the statement was properly admitted.

(a) In *People v. May* (1988) 44 C.3d 309, 243 C.R. 369, 748 P.2d 307, the Supreme Court determined that Proposition 8, which, with some exceptions, eliminated independent state grounds for the exclusion of relevant evidence (see 1 *Cal. Evidence* (4th), *Introduction*, §8), abrogated the rule of *People v. Disbrow* (1976) 16 C.3d 101, 127 C.R. 360, 545 P.2d 272, that a defendant's extrajudicial statements elicited in violation of the *Miranda* rule are inadmissible for impeachment. "May's rationale and result apply equally to *Pettingill* which addressed the same issue of the privilege against self-incrimination as *Disbrow* 'in a closely related context.' " (203 C.A.3d 1127, disagreeing with *People v. Navarez* (1985) 169 C.A.3d 936, 215 C.R. 519.)

(b) *Pettingill* was not preserved by *Ev.C. 940*, embodying the self-incrimination privilege, because it relates only to substantive, not remedial, rights. The exclusion of evidence for a *Miranda* violation is a judicially declared *remedy*. Under the circumstances of this case, federal law does not impose a rule of per se exclusion, and "[i]t is clear to us that the people did not intend to preserve California decisions construing the state constitutional privilege against self-incrimination to afford greater protection than that of the federal privilege under *Miranda* ... and its progeny." (203 C.A.3d 1128.)

(c) The applicable federal rule was stated in *Michigan v. Mosley* (1975) 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313, 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §131: "The admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether the suspect's *Miranda* right to cut off questioning was

respected in the totality of the circumstances." (203 C.A.3d 1129.) Here, defendant's right to remain silent was respected at the initial interview, and the record is free of any suggestion that either deception or coercion was involved in obtaining his statement after the second advisement. Although in *Mosley*, unlike the present case, the second interrogation involved an entirely different crime, that is but one factor to be considered in applying *Mosley's* factual test. The totality of the circumstances suggests that defendant's right to remain silent was respected. (203 C.A.3d 1130, 1131.) (See *People v. Harris* (1989) 211 C.A.3d 640, 647, 259 C.R. 462 [following *People v. Warner*]; *People v. Montano* (1991) 226 C.A.3d 914, 930, 277 C.R. 327, *infra*, §80.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Effect of Proposition 8.* See *People v. Peracchi* (2001) 86 C.A.4th 353, 361, 362, 102 C.R.2d 921, 5 Cal. Crim. Law (3d), *Criminal Trial*, Supp., §110A [defendant's statements to interrogator were improperly admitted; his invocation of right to silence, although initially ambiguous, soon became clear, and it was not "scrupulously honored" within meaning of *Michigan v. Mosley* (1975) 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313, text, p. 772]; *People v. Riva* (2003) 112 C.A.4th 981, 994, 5 C.R.3d 649 [where defendant was advised of his rights and, after being questioned, stated, "I don't want to say anything else right now," police were not required to readvise him of his rights before reinitiating questioning 1 hour later; defendant's statement indicated he might wish to speak in future, and 1-hour interval was not so short as to constitute badgering].





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## CHAPTER VI - Hearsay

### III. EXCEPTIONS TO THE RULE

- A. Confession of Defendant.
  - 2. Involuntary Confessions.
    - h. Failure To Advise of Miranda Rights.
- 3. Interrogation After Right to Counsel Invoked.

#### 1 Witkin Cal. Evid. Hearsay § 78

[§ 78] Interrogation After Right to Counsel Invoked.

(1) *Edwards Rule*. In *Edwards v. Arizona* (1981) 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378, Edwards, charged with robbery, burglary and murder, was arrested and informed of his rights. He denied involvement in the crime, but sought to make a deal and requested an attorney. The next day the guard said that two detectives wished to speak with him; he replied that he didn't want to talk to anyone, but was told that he had to do so. The detectives informed him of his rights, he asked to hear the taped statement of an accomplice who had implicated him in the crime, and then he made his own confession. The Arizona Supreme Court concluded that his statements were voluntary and admissible. *Held*, reversed.

(a) *Additional safeguards when accused asks for counsel*. The Arizona court applied an erroneous standard in holding that Edwards voluntarily waived his right to counsel on the second day after having invoked it on the first day. The waiver must not only be voluntary, but also *knowing and intelligent*. (101 S.Ct. 1883, 1884, 68 L.Ed.2d 385, 386.) "[A]lthough we have held that after initially being advised of his *Miranda* rights, the accused may himself validly waive his rights and respond to interrogation, ... additional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police." (101 S.Ct. 1884, 68 L.Ed.2d 386.)

(b) *Distinction: Valid waiver of counsel where no custodial interrogation*. If Edwards had himself initiated the meeting on the second day, the police could have listened to his volunteered statements and used them against him at the trial. "The Fifth Amendment right identified in *Miranda* is the right to have counsel present at any custodial interrogation. Absent such interrogation, there would have been no infringement of the right that Edwards invoked and there would be no occasion to determine whether there had been a valid waiver." (101 S.Ct. 1885, 68 L.Ed.2d 387, citing *Rhode Island v. Innis* (1980) 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297, *infra*, §79.) (See *Shea v. Louisiana* (1985) 470 U.S. 51, 105 S.Ct. 1065, 1070, 84 L.Ed.2d 38, 47 [*Edwards* rule applies to cases pending on direct appeal when rule was announced]; *People v. Denney* (1984) 152 C.A.3d 530, 540, 199 C.R. 623 [interrogation after suspect says that he wants attorney renders resulting confession inadmissible]; *People v. Mickey* (1991) 54 C.3d 612, 652, 286

*C.R. 801, 818 P.2d 84* [*Edwards* rule was satisfied where defendant told officer he would like to continue discussion at later time; it was not necessary that defendant initiate later meeting]; *People v. Sims* (1993) 5 C.4th 405, 441, 20 C.R.2d 537, 853 P.2d 992 [defendant did not waive previously invoked rights by asking police officers what was going to happen to him, with reference to extradition]; *People v. Bradford* (1997) 14 C.4th 1005, 1040, 60 C.R.2d 225, 929 P.2d 544 [effect of *Edwards* violation on subsequent voluntary statement obtained after knowing waiver of right to counsel].)

(2) *Interrogation Concerning Unrelated Offense*. In *Arizona v. Roberson* (1988) 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704, defendant, arrested at the scene of a burglary and informed of his rights, told the arresting officer that he wanted a lawyer before answering any questions. Three days later, while defendant was still in custody, a second officer interrogated him about a different, earlier burglary. The second officer, who was unaware that defendant had previously requested the assistance of counsel, advised defendant of his rights and obtained an incriminating statement from him concerning the earlier burglary. The trial judge in the prosecution for that earlier offense suppressed the statement on the basis of *Edwards*. *Held*, affirmed.

"Roberson's unwillingness to answer any questions without the advice of counsel, without limiting his request for counsel, indicated that he did not feel sufficiently comfortable with the pressures of custodial interrogation to answer questions without an attorney. This discomfort is precisely the state of mind that *Edwards* presumes to persist unless the suspect himself initiates further conversation about the investigation." (108 S.Ct. 2099, 100 L.Ed.2d 715.) (See *People v. Morris* (1991) 53 C.3d 152, 203, 279 C.R. 720, 807 P.2d 949 [following *Arizona v. Roberson*].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Edwards Rule*. See *People v. Sapp* (2003) 31 C.4th 240, 268, 2 C.R.3d 554, 73 P.3d 433 [in capital murder prosecution, defendant's confessions were voluntary and thus properly admitted; after he unequivocally requested counsel, his rights under *Edwards v. Arizona* (1981) 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378, text, p. 773, were respected, and confessions came 24 hours later, after he requested that investigators return so that he could confess].



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  - 4. Statements Admissible.
  - aa. Statement Not Result of Interrogation.

#### 1 Witkin Cal. Evid. Hearsay § 79

[§ 79] Statement Not Result of Interrogation.

(1) *United States Supreme Court Cases.* In *Rhode Island v. Innis* (1980) 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297, defendant, suspected of killing a taxicab driver with a shotgun blast, was arrested, was advised of his rights, and asked for a lawyer. He was placed in a police car to be taken to the station, and en route one of the officers started a conversation with another about the dangers involved in handicapped children of the neighborhood finding a weapon with shells. Defendant interrupted the conversation, telling the officers to turn the car around so he could show them the location of the gun. The officers did so, and prior to a search again advised him of his rights; he replied that he "wanted to get the gun out of the way because of the kids in the area in the school." The gun was found, and defendant was indicted and convicted of murder, but the state Supreme Court set aside the conviction on the ground that defendant's *Miranda* rights had been violated. On certiorari, *held*, reversed.

(a) Confessions of a suspect in custody are admissible unless they are the product of "interrogation" in violation of the *Miranda* rule; and "interrogation" may be either "express questioning or its functional equivalent." Thus, the term refers also "to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police." (100 S.Ct. 1689, 64 L.Ed.2d 308.) However, "since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response." (100 S.Ct. 1690, 64 L.Ed.2d 308.)

(b) Under this test, defendant was not interrogated. "Given the fact that the entire conversation appears to have consisted of no more than a few off-hand remarks, we cannot say that the officers should have known that it was reasonably likely that Innis would so respond. This is not a case where the police carried on a lengthy harangue in the presence of the suspect. Nor does the record support the respondent's contention that, under the circumstances, the officers' comments were particularly 'evocative.'" (100 S.Ct. 1690, 64 L.Ed.2d 309.)

Three justices dissented. (See *Edwards v. Arizona* (1981) 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378, *supra*, §78 [discussing the *Innis* distinction]; 1981 A.S. 588.)

(2) *California Cases*. In *People v. Dominick* (1986) 182 C.A.3d 1174, 227 C.R. 849, defendant, a suspect in a brutal rape, attempted murder, and murder, was taken into custody, and was read his *Miranda* rights and waived them. At the end of his ensuing narrative, during which he admitted being at the scene of the crime with a codefendant, defendant made statements about seeing bloody people and about a knife or knifing people, and concluded, "I think I should call an attorney." As the officers gathered their materials to leave, one of them told defendant that the codefendant was in custody and that the surviving victim had identified defendant's photograph, the latter statement being untrue. Approximately 5 minutes after requesting an attorney, defendant said that he needed to talk about the case and didn't need an attorney. The officers responded that they could not talk with him further and departed; but, after consulting with a prosecuting attorney, they returned, readvised defendant of his *Miranda* rights, and, after a waiver, tape-recorded defendant's confession. *Held*, the recorded confession was self-initiated and properly admitted.

(a) The officer's comments about the codefendant being in custody and defendant being identified were in explanation of why defendant was being held, although he had earlier been told that he was not under arrest. "We do not find these comments to constitute interrogation, nor, in the circumstances of this case, to be a subtle form of softening up." (182 C.A.3d 1190.)

(b) The part of the officer's remarks that was false does not compel a different construction of the facts. "Whether or not the detective's statement was false does not in any way change the actuality of the defendant's state of mind with respect to voluntariness." (182 C.A.3d 1192.)

Other California cases approving the admission of voluntary confessions or statements following the invocation of *Miranda* rights and not resulting from interrogation are numerous. (See *People v. Hayes* (1985) 169 C.A.3d 898, 909, 215 C.R. 595 ["*Miranda* does not proscribe a suspect from changing his mind concerning speaking to the police, when his change of heart is a voluntary one, based on factors that do not involve coercion by the police"]; *People v. Stephens* (1990) 218 C.A.3d 575, 582, 267 C.R. 66 [defendant's remark, during conversation initiated by him to discuss plea bargain, that he was not the one with the gun, was not result of police interrogation]; *People v. Ray* (1996) 13 C.4th 313, 337, 52 C.R.2d 296, 914 P.2d 846, 5 Cal. Crim. Law (3d), *Criminal Trial*, §109 [defendant's statements to correctional official did not result from interrogation where defendant himself initiated contact with official and volunteered information for personal reasons]; *People v. Mobley* (1999) 72 C.A.4th 761, 792, 85 C.R.2d 474 [defendant's comment about "liking boys," made during casual conversation with police officer, and not as result of questioning, while defendant was being transported in police car, was admissible in prosecution for sodomy and oral copulation, even though he had previously invoked his *Miranda* rights].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *California Cases*. See *People v. Waidla* (2000) 22 C.4th 690, 730, 731, 94 C.R.2d 396, 996 P.2d 46 [statements by defendant, including his confession, were properly admitted, even though they were made following invocation of his *Miranda* rights, where record indicated they were made as part of defendant-initiated discussion relating to investigation].



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        - bb. Second Statement Untainted by Prior Violation.

#### 1 Witkin Cal. Evid. Hearsay § 80

[§ 80] Second Statement Untainted by Prior Violation.

(1) *Failure To Advise of Miranda Rights. Oregon v. Elstad* (1985) 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222, rejects application of the "fruit of the poisonous tree" doctrine of Fourth Amendment search and seizure cases (see 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence*, §22 et seq.) to *Miranda* violations.

Defendant, arrested at his home, was questioned concerning his involvement in a burglary, and answered, "Yes, I was there." He was then taken to the sheriff's office, his *Miranda* rights were read, and he gave a full confession. The Oregon court held that the voluntary confession was tainted and rendered inadmissible by the prior questioning without *Miranda* warnings. *Held*, reversed.

(a) Failure to administer *Miranda* warnings creates a rebuttable presumption of compulsion, but the presumption does not require that the statements and their fruits be discarded as inherently tainted. Thus, in *Michigan v. Tucker* (1974) 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182, the unwarned confession was suppressed, but introduction of testimony of a third-party witness whose identity was discovered as a result of the statement was held not to violate defendant's Fifth Amendment right. "[T]his reasoning applies with equal force when the alleged 'fruit' of a noncoercive *Miranda* violation is neither a witness nor an article of evidence but the accused's own voluntary testimony." (105 S.Ct. 1293, 84 L.Ed.2d 232.) "It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. Though *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made." (105 S.Ct. 1293, 84 L.Ed.2d 232.)

(b) "This Court has never held that the psychological impact of voluntary disclosure of a guilty secret qualifies as state compulsion or compromises the voluntariness of a subsequent informed waiver. The Oregon court, by adopting this expansive view of Fifth Amendment compulsion, effectively immunizes a suspect who responds to pre-*Miranda* warning questions from the consequences of his subsequent informed waiver of the privilege of remaining silent. ... This immunity comes at a high cost to legitimate law enforcement activity, while adding little desirable protection to the individual's interest in not being *compelled* to testify against himself. ... When neither the initial nor the subsequent admission is coerced, little justification exists for permitting the highly probative evidence of a voluntary confession to

be irretrievably lost to the factfinder." (105 S.Ct. 1295, 84 L.Ed.2d 234.)

(c) "There is a vast difference between the direct consequences flowing from coercion of a confession by physical violence or other deliberate means calculated to break the suspect's will and the uncertain consequences of disclosure of a 'guilty secret' freely given in response to an unwarned but noncoercive question, as in this case. ... We must conclude that, absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement. In such circumstances, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to waive or invoke his rights." (105 S.Ct. 1296, 84 L.Ed.2d 234.)

(d) "The Court today in no way retreats from the bright line rule of *Miranda*. We do not imply that good faith excuses a failure to administer *Miranda* warnings; nor do we condone inherently coercive police tactics or methods offensive to due process that render the initial admission involuntary and undermine the suspect's will to invoke his rights once they are read to him. A handful of courts has, however, applied our precedents relating to confessions obtained under coercive circumstances to situations involving wholly voluntary admissions, requiring a passage of time or break in events before a second, fully warned statement can be deemed voluntary. Far from establishing a rigid rule, we direct courts to avoid one; there is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of *Miranda*, was voluntary. The relevant inquiry is whether, in fact, the second statement was also voluntarily made. As in any such inquiry, the finder of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements. The fact that a suspect chooses to speak after being informed of his rights is, of course, highly probative. We find that the dictates of *Miranda* and the goals of the Fifth Amendment proscription against use of compelled testimony are fully satisfied in the circumstances of this case by barring use of the unwarned statement in the case in chief." (105 S.Ct. 1298, 84 L.Ed.2d 237.)

Three justices dissented in two opinions. (105 S.Ct. 1298 et seq., 1322 et seq., 84 L.Ed.2d 238 et seq., 268 et seq.) (See *People v. Gastile* (1988) 205 C.A.3d 1376, 1385, 253 C.R. 283 [because of passage of Proposition 8 (see 1 Cal. Evidence (4th), Introduction, §8), *Elsdad* standard applies in California]; *People v. Harris* (1989) 211 C.A.3d 640, 649, 259 C.R. 462 [same]; *People v. Torres* (1989) 213 C.A.3d 1248, 1251, 1255, 262 C.R. 323 [following *Elsdad*]; *People v. Sims* (1993) 5 C.4th 405, 444, 20 C.R.2d 537, 853 P.2d 992 [same]; *People v. Wash* (1993) 6 C.4th 215, 240, 24 C.R.2d 421, 861 P.2d 1107 [same]; *People v. Thongvilay* (1998) 62 C.A.4th 71, 84, 72 C.R.2d 738 [same]; 99 Harv. L. Rev. 141 [*Elsdad*]; 1985 A.S. 298 [same]; on issue of applicability of *Elsdad* rule to *nontestimonial* evidence seized as result of noncoercive *Miranda* violation, see *People v. Whitfield* (1996) 46 C.A.4th 947, 956, 957, 54 C.R.2d 370, 5 Cal. Crim. Law (3d), Criminal Trial, §97.)

(2) *Edwards Violation*. Continued interrogation of a defendant after he has invoked his right to counsel, though violative of *Edwards v. Arizona* (1981) 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378, *supra*, §78, does not necessarily so taint the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. Instead, an inquiry along the lines required in *Elsdad* for *Miranda* violations must be made: If the statement made after the *Edwards* violation is voluntary, the admissibility of any subsequent statement should turn solely on whether it is knowingly and voluntarily made. (*People v. Bradford* (1997) 14 C.4th 1005, 1040, 60 C.R.2d 225, 929 P.2d 544 [defendant's voluntary statement to police detective was admissible where it followed knowing and intelligent waiver of right to counsel, even though it was preceded by two other voluntary statements obtained in violation of *Edwards*].)

(3) *Distinction: Flagrant Police Misconduct*. In *People v. Montano* (1991) 226 C.A.3d 914, 277 C.R. 327, a murder and rape case, defendant was apprehended by police and advised of his *Miranda* rights. He finally made admissions tantamount to a confession during a prolonged interrogation that continued after he invoked his right to remain silent on 11 occasions, and after an interrogator used his and defendant's common religion to conjure in defendant's mind the

picture of confession to avoid going to hell. The interrogation concluded when one of the interrogating officers gave defendant a business card and told him "if you want to talk with me, give me a call and I'll come down and talk with you." About 4 hours later, defendant told his jailer he wished to speak to that officer. A second interview was commenced, defendant was again read his *Miranda* rights, and he confessed a second time. The trial judge suppressed defendant's first confession, but refused to suppress the second. *Held*, this was reversible error.

Defendant's initial confession was obtained by the kind of coercive police tactics condemned in *Elstad*, and the following factors demonstrate that the taint of those tactics was not dissipated before defendant made his second confession: (a) The *Miranda* warnings preceding the second confession would have had little effect, because defendant's previous attempts to invoke his *Miranda* rights were ignored (226 C.A.3d 938); (b) the gap between the two confessions would, under the circumstances, have seemed only a pause in an ongoing interrogation (226 C.A.3d 938); (c) although defendant initiated the second interrogation, he had never been removed from an inherently coercive atmosphere (226 C.A.3d 939); and (d) the officers' activities, aimed at reducing defendant's resistance to confessing, constituted "a glaring example of misconduct" (226 C.A.3d 939). "We therefore conclude that defendant's suppression motion should have been granted in its entirety." (226 C.A.3d 941.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Failure To Advise of Miranda Rights.* See *Missouri v. Seibert* (2004) 542 U.S. 600, 124 S.Ct. 2601, 2613, 159 L.Ed.2d 643, 658, 5 Cal. Crim. Law (3d), *Criminal Trial*, Supp., §138 [defendant's statements were inadmissible where they were obtained under police protocol allowing officers to give no *Miranda* warnings until interrogation has produced confession, then to give warnings, and then to elicit repetition of confession; distinguishing *Oregon v. Elstad* (1985) 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222, text, p. 777]; *People v. Haley* (2004) 34 C.4th 283, 303, 17 C.R.3d 877, 96 P.3d 170 [in capital murder prosecution, even if defendant's initial statements were obtained in violation of *Miranda*, his subsequent tape-recorded statement at police station, which was made after proper advisements, was voluntary and thus was properly admitted; following *Elstad*]; *People v. San Nicolas* (2004) 34 C.4th 614, 639, 21 C.R.3d 612, 101 P.3d 509 [where defendant's statements to detective, made without benefit of *Miranda* warnings, were voluntary and not particularly incriminating, his 2-hour statement, made 6 days later and after he was read his rights and waived them, was admissible]; *People v. Lujan* (2001) 92 C.A.4th 1389, 1409, 112 C.R.2d 769, 1 Cal. Crim. Law (3d), *Crimes Against the Person*, Supp., §213 [defendant's trial testimony was not rendered inadmissible even though his similar, pretrial statements, given without benefit of proper *Miranda* warnings, were erroneously admitted; there was no contention that either his pretrial statements or his decision to testify at trial was involuntary]. (2) *Edwards Violation.* The *Edwards* rule is not violated "when the police recontact a suspect after a break in custody which gives the suspect reasonable time and opportunity, while free from coercive custodial pressures, to consult counsel if he or she wishes to do so. We do not suggest the police can avoid *Edwards* simply by allowing the suspect to step outside the station house at midnight on a Saturday, then promptly rearresting him without affording any realistic opportunity to seek counsel's assistance free of the coercive atmosphere of custody." (*People v. Storm* (2002) 28 C.4th 1007, 1024, 1025, 124 C.R.2d 110, 52 P.3d 52, 5 Cal. Crim. Law (3d), *Criminal Trial*, Supp., §129 [in capital murder prosecution, trial judge properly admitted statements made by defendant during home interview, even though police had previously obtained statements from him at station house after he requested counsel; 2-day midweek hiatus between two interviews was sufficient to dissipate custodial pressures and permit defendant to consult counsel]; see *People v. Neal* (2003) 31 C.4th 63, 83, 1 C.R.3d 650, 72 P.3d 280, 3 Cal. Evidence (4th), *Presentation at Trial*, Supp., §320 [distinguishing *Storm*; overnight interval between initial interrogation and resumption of questioning was not real break in custody because 18-year-old defendant was already under arrest and spent night in jail].)



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#### A. Confession of Defendant.

#### 3. Procedure in Determining Voluntariness.

##### a. Constitutional Requirements.

#### *1 Witkin Cal. Evid. Hearsay § 81*

#### [§ 81] Constitutional Requirements.

The defendant has a "constitutional right at some stage in the proceedings to object to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession." (*Jackson v. Denno* (1964) 378 U.S. 368, 84 S.Ct. 1774, 1780, 12 L.Ed.2d 908, 915.) In *Jackson*, the Supreme Court rejected long-approved state procedures and imposed a new requirement of determination of the issue by the judge.

Petitioner robbed a hotel, then fatally shot a policeman who also shot him. At the hospital, at 2 a.m., in response to a detective's question, he admitted both the robbery and killing. At 3:55 a.m., after receiving demerol and scopolamine in preparation for an operation, he was questioned and again admitted the acts. Both statements were introduced at the trial without objection. However, he challenged the confessions by testifying that he had been refused water and was in pain and could not remember what he said. The prosecution countered with ample rebuttal testimony. The trial judge submitted the issue of voluntariness to the jury with the other issues. A verdict of first degree murder with the death penalty was rendered, and the New York Court of Appeals affirmed after passing on voluntariness of the confessions. *Held*, reversed.

(a) *The New York procedure.* The trial judge, under this system, makes only a preliminary determination. If there is a fair question as to voluntariness, he cannot resolve conflicting evidence or arrive at an independent determination, but must receive the confession and leave it to the jury to determine the issue. However, the jury returns only a general verdict on the ultimate question of guilt or innocence. Thus: "It is impossible to discover whether the jury found the confession voluntary and relied upon it, or involuntary and supposedly ignored it. Nor is there any indication of how the jury resolved disputes in the evidence concerning the critical facts underlying the coercion issue. Indeed, there is nothing to show that these matters were resolved at all, one way or the other." (84 S.Ct. 1782, 12 L.Ed.2d 917.)

(b) *Stein rule repudiated.* In *Stein v. New York* (1953) 346 U.S. 156, 73 S.Ct. 1077, 1089, 97 L.Ed. 1522, the Court sustained the constitutionality of the New York procedure on alternative assumptions: That the jury either found the confession voluntary and relied on it, or found it involuntary and disregarded it as instructed, relying on the other evidence of guilt. Neither assumption is acceptable:

As to the *first assumption*: The jury, receiving the confession with other evidence indicating its truth, cannot properly assess its voluntariness; they may find it difficult to understand the policy forbidding reliance on a coerced but true confession, and this may generate pressure to find it voluntary if it is believed true. "Under the New York



procedure, the evidence given the jury inevitably injects irrelevant and impermissible considerations of truthfulness of the confession into the assessment of voluntariness. ... As a consequence, it cannot be assumed, as the Stein Court did, that the jury reliably found the facts against the accused. This unsound assumption undermines Stein's authority as a precedent and its view on the constitutionality of the New York procedure. The admixture of reliability and voluntariness in the considerations of the jury would itself entitle a defendant to further proceedings in any case in which the essential facts are disputed, for we cannot determine how the jury resolved these issues and will not assume that they were reliably and properly resolved against the accused." (84 S.Ct. 1786, 12 L.Ed.2d 921.)

As to the *second assumption*: The fact of the confession is solidly implanted in the jury's mind. "If it finds the confession involuntary, does the jury--indeed, can it--then disregard the confession in accordance with its instructions? If there are lingering doubts about the sufficiency of the other evidence, does the jury unconsciously lay them to rest by resort to the confession? Will uncertainty about the insufficiency of the other evidence to prove guilt beyond a reasonable doubt actually result in acquittal when the jury knows the defendant has given a truthful confession?" (84 S.Ct. 1787, 12 L.Ed.2d 922.) With expanded concepts of subtle coercion, there is greater complexity in determining whether the will is overborne, and disputed facts, questions of credibility, and inferences are frequently determinative. This "exceedingly sensitive task" requires facing the issue "in illuminating isolation and unclouded by other issues and the effect of extraneous but prejudicial evidence." (84 S.Ct. 1788, 12 L.Ed.2d 923.)

Four justices dissented, one arguing that the constitutionality of the New York rule was not ripe for decision (84 S.Ct. 1805, 12 L.Ed.2d 943), and the others arguing that the requirements imposed by the majority invaded an area traditionally and properly left to the states and showed a distrust of the jury system. (84 S.Ct. 1807, 12 L.Ed.2d 945.) (See *Boles v. Stevenson* (1964) 379 U.S. 43, 85 S.Ct. 174, 13 L.Ed.2d 109 [per curiam decision following *Jackson* rule in West Virginia case]; 78 Harv. L. Rev. 211; 79 Harv. L. Rev. 1059; 1964 A.S. 336; 1 A.L.R.3d 1251 [constitutional aspects of procedure for determining voluntariness].)

An attempt to establish an exception to the rule failed in *Sims v. Georgia* (1967) 385 U.S. 538, 87 S.Ct. 639, 643, 17 L.Ed.2d 593, 597. The Georgia court thought that the jury could be allowed to determine voluntariness because in that state the confession must not only be voluntary but must also be corroborated. *Held*, despite this safeguard, the *Jackson* rule applies. A jury must not be given a confession "unless and until the trial judge has determined that it was freely and voluntarily given"; and, though the judge need not make formal findings of fact or write an opinion, the conclusion that it is voluntary "must appear from the record with unmistakable clarity."

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Criminal Law k.531 et seq.



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##### b. Former California Practice.

#### 1 Witkin Cal. Evid. Hearsay § 82

[§ 82] Former California Practice.

The court in *Jackson v. Denno* (1964) 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908, supra, §81, classifying the three types of procedures used in testing a confession, approved the "Massachusetts" system, under which the judge first independently passes on the issue, and then, if it is resolved against the accused, submits it to the jury for its additional determination. Under this system, the judge's factual findings and conclusions are ascertainable from the record.

Prior to the adoption of *Ev.C. 405* (infra, §82), California followed this approved practice: (1) The burden was on the prosecution to show voluntariness. (*People v. Berve* (1958) 51 C.2d 286, 291, 332 P.2d 97; *People v. Trout* (1960) 54 C.2d 576, 583, 6 C.R. 759, 354 P.2d 231.) Accordingly, the prosecutor was first required to lay a foundation by preliminary proof of the confession's free and voluntary nature. (2) Then the defendant, on request, was permitted to offer evidence to contradict this showing. (3) The judge then, in the first instance, decided the question and excluded the confession on a finding that it was improperly obtained. (4) If the judge initially found it to be free and voluntary, it could be introduced. But the jurors were required to be informed that they had the final power of determining the voluntariness, and that they could disregard the confession if they believed that it was not properly obtained. (See *People v. Gonzales* (1944) 24 C.2d 870, 876, 151 P.2d 251; *People v. Baldwin* (1954) 42 C.2d 858, 866, 270 P.2d 1028; *People v. Zarate* (1921) 54 C.A. 372, 376, 201 P. 955; *In re Schlette* (1965) 232 C.A.2d 407, 414, 42 C.R. 708 [California procedure corresponds to Massachusetts practice approved in *Jackson*].)

Under the *Gonzales* rule, the defendant on request was required to be allowed to offer evidence to contradict the prosecution's prima facie showing. (*People v. Neighbors* (1947) 79 C.A.2d 202, 205, 179 P.2d 647; *People v. Padden* (1965) 238 C.A.2d 708, 713, 48 C.R. 311; *People v. Williams* (1960) 187 C.A.2d 143, 147, 9 C.R. 540, citing the text.) But violation of this rule was not necessarily reversible error. If the defendant was ultimately given that opportunity, and the testimony the defendant introduced would have made no difference in the determination of voluntariness, the refusal to allow an earlier opportunity was a procedural error and not prejudicial. (*People v. Williams*, supra, 187 C.A.2d 147.) And failure to lay the foundation was not prejudicial error where the confession was admitted without objection, and the omitted proof of voluntariness was supplied by later testimony. (*People v. Grace* (1958) 166 C.A.2d 68, 73, 332 P.2d 811.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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##### c. Final Determination by Judge.

#### 1 Witkin Cal. Evid. Hearsay § 83

[§ 83] Final Determination by Judge.

(1) *In General.* The requirements of *Jackson v. Denno* (1964) 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908, supra, §81, are met by either an independent *final* determination by the judge, or an independent determination by the judge with resubmission of the issue to the jury if the judge finds the confession voluntary. (See supra, §§81, 82.) California formerly followed the second method. (See supra, §82.) The Evidence Code changed this rule: Confessions are governed by *Ev.C. 405*, under which the preliminary fact of admissibility is finally determined by the judge without resubmission of the issue to the jury. (See 3 *Cal. Evidence* (4th), *Presentation at Trial*, §63.) Thus, if the judge finds the confession *involuntary*, the procedure is the same as before: the confession is withheld from the jury. But if the judge finds it *voluntary*, it goes to the jury without the former instruction to disregard it if the jury's finding differs from the judge's and the jury believes it to have been involuntary.

The Law Revision Commission explains its choice as follows: "Under existing law, a court that is in doubt may 'pass the buck' concerning such a confession to the jury when there is a difficult factual question to resolve. ... Under the Evidence Code, however, the court is required to withhold a confession from the jury unless the court is persuaded that the confession was made freely and voluntarily. The court has no 'discretion' to avoid difficult decisions by shifting the responsibility to the jury. If the court is in doubt, if the prosecution has not persuaded it of the voluntary nature of the confession, Section 405 requires the court to exclude the confession. Thus, Section 405 makes the procedure for determining the admissibility of a confession the same as the procedure for determining the admissibility of physical evidence claimed to have been seized in violation of constitutional guarantees."

"The existing law is based on the belief that a jury, in determining the defendant's guilt or innocence, can and will refuse to consider a confession that it has determined was involuntary even though it believes that the confession is true. Section 405, on the other hand, proceeds upon the belief that it is unrealistic to expect a jury to perform such a feat. Corroborating facts stated in a confession cannot but assist the jury in resolving other conflicts in the evidence. The question of voluntariness will inevitably become merged with the question of guilt and the truth of the confession; and, as a result of this merger, the admitted confession will inevitably be considered on the issue of guilt. The defendant will receive a greater degree of protection if the court is deprived of the power to shift its fact-determining responsibility to the jury and is required to exclude a confession whenever it is not persuaded that the confession was voluntary." (Law Rev. Com. Comment to *Ev.C. 405*.)

(2) *Questions of Law and Fact.* In *People v. Carroll* (1970) 4 C.A.3d 52, 84 C.R. 60, the trial judge refused to instruct the jurors to disregard any admission or confession unless it was voluntarily made. Defendant contended that

this ruling denied him his rights under the Sixth and Fourteenth Amendments. *Held*, conviction affirmed; in making his contention, defendant misunderstood the import of *Ev.C. 405* by failing to distinguish between questions of law and of fact.

(a) The sole issue on a voir dire hearing by the judge is the admissibility of evidence. Because this question is one of law, the procedure does not deny a defendant either trial by jury or due process of law. (4 C.A.3d 60.)

(b) The same evidence offered to prove voluntariness may also be relevant to the *integrity* of the confession. "Manifestly, to deny a defendant the right to produce evidence before the jury that bears upon the *truth or falsity* of his confession, that is, the *weight* to be given such evidence as contrasted with its admissibility, would constitute reversible error." (4 C.A.3d 60.) The jury should therefore be allowed to take into account whether the confession is true, partially true or false, but may not treat the confession as "nonevidence" by disregarding it. (4 C.A.3d 60.)

(c) Even though the same evidence relates to admissibility as to integrity, the jury should not be informed of the judge's factual resolution in the voir dire hearing. In that way, the judge does not impinge on the jury's fact-finding province as to guilt or innocence. (4 C.A.3d 60.) (See *People v. Burton* (1971) 6 C.3d 375, 389, 99 C.R. 1, 491 P.2d 793 ["The Legislature's finding that a defendant will be better protected by thrusting the full responsibility upon the trial judge is entirely reasonable"].)

(3) *Which Judge Makes Determination.* *Jackson v. Denno*, supra, left unresolved the question whether the voir dire hearing on admissibility had to be conducted by a *different judge* from the one trying the case. In *Carroll*, the reviewing court declared that the statutory term "the court," as used in *Ev.C. 405*, includes "any judge of the court in which the case is pending, so that the judge who tries the case need not call in another judge, but himself may hear the *voir dire* examination." (4 C.A.3d 59.)

Also, when a defendant *waives a jury trial*, there is no need for a second judge to make preliminary fact determinations. "[I]t is permissible for a trial judge trying a case without a jury to conduct the *voir dire* hearing and determine the admissibility of a confession." (*People v. Acosta* (1971) 18 C.A.3d 895, 903, 96 C.R. 234.)

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##### d. Hearing Without Jury Present.

1 Witkin Cal. Evid. Hearsay § 84

[§ 84] Hearing Without Jury Present.

(1) *Former Law.* Prior California cases had held that it is within the judge's discretion to try the preliminary issue of voluntariness without exclusion of the jury. (See *People v. Gonzales* (1944) 24 C.2d 870, 877, 151 P.2d 251; *People v. Oats* (1966) 239 C.A.2d 261, 48 C.R. 579; 37 So. Cal. L. Rev. 367.) Whether this practice meets the "fair trial" requirements of *Jackson v. Denno* (1964) 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908, supra, §81, was not expressly determined in that case. In *People v. Oats*, supra, the court observed that the desirable practice is to exclude the jury but that that procedure is not required "unless the defendant so requests and accompanies his request with a showing that evidence proffered or to be adduced is inadmissible as to the question of guilt." (239 C.A.2d 261, 268; see *People v. Nelson* (1964) 224 C.A.2d 238, 243, 36 C.R. 385 [extended hearing in chambers, with examination and cross-examination of police officers and defendant, before returning to court and allowing officer to testify].)

(2) *Statutory Rule.* The Evidence Code provides that the hearing must be out of the presence of the jury "if any party so requests." (Ev.C. 402(b).) However, in *People v. Rowe* (1972) 22 C.A.3d 1023, 1029, 99 C.R. 816, the court said: "While no request was made herein for an *in camera* session, it is a matter of common knowledge in the legal profession that in all instances where the defendant objects to the admission of a confession that the court, whether requested or not, should conduct the hearing outside the presence of the jury, the painfully obvious reason being that in the event the hearing is held in the jury's presence and the court finds the confession to be involuntary, the court would undoubtedly be confronted with a motion for mistrial or a claim of prejudicial error on appeal. While there may be circumstances where a defendant would want his hearing in the presence of the jury, the best rule for the trial court to follow in general is that the hearing should be private." (22 C.A.3d 1030.) (See *People v. Blair* (1975) 51 C.A.3d 480, 484, 124 C.R. 123 [trial court had discretion to prohibit defendant from conducting voir dire on voluntariness in jury's presence; following *Rowe*]; *People v. Torrez* (1987) 188 C.A.3d 723, 733, 734, 236 C.R. 627 [it was error, although harmless, to hold hearing in jury's presence, even though neither party requested in camera hearing and actual substance of defendant's responses to interrogation were not disclosed].)

In *Allegrezza v. Superior Court* (1975) 47 C.A.3d 948, 121 C.R. 245, defendant was accused of murdering four members of a family, and purportedly confessed to the crimes. At a hearing under Ev.C. 402(b) on the voluntariness of the confession, attended by press and public, defendant moved that the proceedings be held in camera. The trial court denied the motion but allowed defendant time to apply for a writ of mandamus. *Held*, writ issued. A concern for fairness demands that a confession disallowed as evidence should not reach the eyes or ears of persons who may become jurors in the case. "Any reasonable doubt whether it will should be resolved in favor of the accused." (47

*C.A.3d 951.*) Here, defendant was charged with several sordid murders. "Few things would more likely deny to him a fair trial of those charges, than a pretrial public media announcement and elaboration of a confession which for good reason is later denied acceptance in evidence." (47 *C.A.3d 952.*)

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##### e. Evidence and Ruling.

#### 1 Witkin Cal. Evid. Hearsay § 85

[§ 85] Evidence and Ruling.

(1) *Defendant's Right To Introduce Evidence.* In *People v. Rice* (1971) 16 C.A.3d 337, 94 C.R. 4, after the defense had rested, the prosecutor offered statements that defendant had allegedly made to police officers following his arrest. To determine the admissibility of this rebuttal evidence, the trial judge heard testimony from three officers outside the jury's presence, but declared that defendant could testify to voluntariness only before the jury in surrebuttal, rather than at the preliminary fact determination. *Held*, the judge's refusal to allow defendant to take the stand during the voir dire hearing was reversible error. This was an attempt to shift the responsibility for the determination to the jury, the very procedure which *Ev.C. 405* sought to change. (16 C.A.3d 343.)

In *People v. Rowe* (1972) 22 C.A.3d 1023, 99 C.R. 816, the trial judge refused defense counsel's offer to call witnesses to attack the voluntariness of defendant's confessions and noted that defendant could do so after the prosecution rested its case-in-chief. *Held*, this was error.

"It has long been established that once the state has laid a foundation for the introduction of a confession and has made a prima facie showing that it was freely and voluntarily made, it is absolutely incumbent upon the court to permit the defendant an opportunity to overcome the prima facie showing of voluntariness." (22 C.A.3d 1030.) (See *Crane v. Kentucky* (1986) 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 [evidence concerning circumstances surrounding confession, properly admitted in hearing on voluntariness, was also required to be admitted at trial, where defense was that confession was unworthy of belief]; *People v. Page* (1991) 2 C.A.4th 161, 184, 2 C.R.2d 898 [trial judge limited testimony on circumstances surrounding confession but did not impose blanket exclusion; discussing and distinguishing *Crane*].)

In *re Juma P.* (1988) 204 C.A.3d 1228, 251 C.R. 739, follows *Rowe*. Defendant's counsel objected to admission of his statement on the ground of involuntariness, but the judge refused to take evidence or rule on the issue because defendant had not made a motion to suppress. *Held*, judgment reversed with directions to hold a hearing to determine voluntariness. The court observed that there are two proper ways in which a defendant may seek exclusion: (a) a pretrial common law motion to suppress, not pursuant to P.C. 1538.5, and (b) the more common practice of objection at the trial, without making a motion. (204 C.A.3d 1235, 1236.)

(2) *Necessity of Express Ruling on Voluntariness.* A defendant is entitled to an express ruling by the trial court on the issue of voluntariness. (See *People v. Blair* (1975) 51 C.A.3d 480, 485, 124 C.R. 123 [because trial court had been alerted to defense counsel's desire to raise issue of voluntariness, trial court should have ruled on issue despite renewed

objection by defendant].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Defendant's Right To Introduce Evidence*. See *People v. Smithson* (2000) 79 C.A.4th 480, 497, 94 C.R.2d 170 [in murder trial, defendant was not deprived of due process by denial of his request for full evidentiary hearing on motion to exclude his confession, where he had full hearing on that issue before magistrate, and, at trial, judge allowed him to submit any additional evidence not presented to magistrate and then considered all evidence independently]. *West's Key Number Digest*, Criminal Law k.531(4)





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##### f. Standard of Proof.

#### 1 Witkin Cal. Evid. Hearsay § 86

[§ 86] Standard of Proof.

(1) *Constitutional Requirement.* In *Lego v. Twomey* (1972) 404 U.S. 477, 92 S.Ct. 619, 626, 30 L.Ed.2d 618, 627, the Court said: "[W]hen a confession challenged as involuntary is sought to be used against a criminal defendant at his trial, he is entitled to a reliable and clear-cut determination that the confession was in fact voluntarily rendered. Thus, the prosecution must prove at least by a preponderance of the evidence that the confession was voluntary. Of course, the States are free, pursuant to their own law, to adopt a higher standard. They may indeed differ as to the appropriate resolution of the values they find at stake." (See *Colorado v. Connelly* (1986) 479 U.S. 157, 107 S.Ct. 515, 523, 93 L.Ed.2d 473, 485 [when defendant moves to suppress statement on ground that it was obtained in violation of *Miranda*, state has burden of proving by preponderance of evidence that defendant waived *Miranda* protections; following *Lego*]; 1 McCormick 5th, §163; 12 U.S.F. L. Rev. 331 [*Lego*].)

(2) *California Standard.* In *People v. Jimenez* (1978) 21 C.3d 595, 147 C.R. 172, 580 P.2d 672, the court exercised the power, referred to in *Lego*, to impose a higher standard. In light of the strong policies underlying the privilege against self-incrimination, the court held proof beyond a reasonable doubt is required. (21 C.3d 606, 608.)

Following the passage of Proposition 8 (Cal. Const., Art. I, §28(d); see 1 Cal. Evidence (4th), Introduction, §8), the court revisited the issue in *People v. Markham* (1989) 49 C.3d 63, 260 C.R. 273, 775 P.2d 1042.

(a) *People v. May* (1988) 44 C.3d 309, 243 C.R. 369, 748 P.2d 307, 3 Cal. Evidence (4th), Presentation at Trial, §319, determined that Proposition 8 abrogated judicially declared procedural rules. "The *Jimenez* rule was likewise a judicially declared rule of criminal procedure adopted in the face of the conflicting, less demanding federal preponderance of the evidence standard of *Lego v. Twomey*. ... It is not a rule defining a substantive right dealing with the scope of a defendant's Fifth Amendment privilege against self-incrimination, and consequently is not encompassed by Evidence Code section 940 nor exempt from the operation of section 28(d)." (49 C.3d 69.)

(b) "The *Jimenez* rule reflected a policy decision, a balancing of competing values squarely at odds with that previously arrived at by the United States Supreme Court in *Lego v. Twomey*, in which case the high court entertained and rejected policy arguments similar to those accepted in *Jimenez*." (49 C.3d 70.)

(c) "[T]he procedural rule of *Jimenez* accomplishes what a rule founded on independent state constitutional grounds, in the wake of Proposition 8, cannot--exclusion of relevant evidence based upon a standard of proof of voluntariness more stringent than that mandated by the federal Constitution. We have explained that the intent of the

electorate in passing Proposition 8 was to *curtail* the exclusion of relevant evidence based upon independent state grounds, except as required by the Constitution of the United States. ... The Constitution of the United States requires no more than that the voluntariness of confessions or admissions be proved by a preponderance of the evidence at trial. ... Section 28(d) establishes that standard as the rule in California." (49 C.3d 71.) (See 17 *Pepperdine L. Rev.* 1074 [Markham].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Constitutional Requirement.* See 1 McCormick 6th, §163.



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##### g. Review by California Courts.

1 Witkin Cal. Evid. Hearsay § 87

[§ 87] Review by California Courts.

(1) *Appeal*. The normal method of review is on appeal from the judgment of conviction. Formerly, the reviewing court would almost invariably uphold the trial judge's or jury's determination of voluntariness on conflicting evidence. (See *People v. Mehaffey* (1948) 32 C.2d 535, 548, 553, 197 P.2d 12; *People v. Chessman* (1951) 38 C.2d 166, 178, 238 P.2d 1001; *People v. Jackson* (1954) 125 C.A.2d 776, 778, 271 P.2d 196; *People v. Crooker* (1956) 47 C.2d 348, 352, 303 P.2d 753; *People v. Grace* (1958) 166 C.A.2d 68, 72, 232 P.2d 811.) The present approach, following that of the United States Supreme Court (*infra*, §88), is to make an independent examination of the record for uncontradicted facts showing involuntariness. (See *People v. Trout* (1960) 54 C.2d 576, 583, 6 C.R. 759, 354 P.2d 231; *People v. Johnson* (1969) 70 C.2d 469, 476, 74 C.R. 889, 450 P.2d 265; *People v. Hosner* (1975) 15 C.3d 60, 68, 123 C.R. 381, 538 P.2d 1141; *People v. Barker* (1986) 182 C.A.3d 921, 931, 227 C.R. 578; *People v. Howard* (1988) 44 C.3d 375, 394, 398, 243 C.R. 842, 749 P.2d 279 [where there is conflicting testimony, court must accept version most favorable to prosecution if supported by the record]; *People v. Thompson* (1990) 50 C.3d 134, 166, 266 C.R. 309, 785 P.2d 857.)

(2) *Failure To Object in Trial Court*. The normal requirement of objection to improper evidence (see 3 *Cal. Evidence* (4th), *Presentation at Trial*, §371) has no application to coerced confessions, the use of which constitutes a denial of federal due process. The appellate court must itself inquire into voluntariness, and make its independent determination in conformity with the rule of *Jackson v. Denno* (1964) 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908, *supra*, §81. (See *People v. Matteson* (1964) 61 C.2d 466, 469, 39 C.R. 1, 393 P.2d 161; *In re Cameron* (1968) 68 C.2d 487, 503, 67 C.R. 529, 439 P.2d 633; *People v. Hinds* (1984) 154 C.A.3d 222, 237, 201 C.R. 104; 3 *Cal. Evidence* (4th), *Presentation at Trial*, §397.)

(3) *Habeas Corpus*. On a proper showing, habeas corpus will lie to collaterally attack a final judgment of conviction based on an involuntary confession. (See 6 *Cal. Crim. Law* (3d), *Criminal Writs*, §44.)

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##### h. Review by U.S. Supreme Court.

#### 1 Witkin Cal. Evid. Hearsay § 88

[§ 88] Review by U.S. Supreme Court.

(1) *No Time Limit*. In *Reck v. Pate* (1961) 367 U.S. 433, 81 S.Ct. 1541, 1548, 6 L.Ed.2d 948, 956, petitioner, under coercive interrogation, confessed to a murder, and was convicted and sentenced by an Illinois court to a long term of imprisonment. In this federal habeas corpus proceeding, 25 years later, the judgment was held violative of his constitutional rights, and the federal district court was directed to issue orders to allow the state court a reasonable time to retry the case.

(2) *No Need To Exhaust State Remedy*. In *Jackson v. Denno* (1964) 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908, *supra*, §81, the issue was not seasonably tendered to the New York courts, but was nevertheless held reviewable. Only knowing waiver can defeat the federal remedy for violation of a constitutional right. (84 S.Ct. 1777, 12 L.Ed.2d 912, footnote 1; see *Lee v. Mississippi* (1948) 332 U.S. 742, 68 S.Ct. 300, 301, 92 L.Ed. 330, 332 [inconsistent positions of no confession and improperly obtained confession did not preclude raising issue of coercion]; *Blackburn v. Alabama* (1960) 361 U.S. 199, 80 S.Ct. 274, 282, 4 L.Ed.2d 242, 250 [some facts of involuntariness came out during trial after judge's ruling in favor of admissibility, and no request made for reconsideration of ruling; issue nevertheless properly raised in federal review].)

(3) *Independent Examination of Record*. Earlier cases were in great conflict on whether the United States Supreme Court would overturn a state court's determination on conflicting evidence. The present rule is clear: "[W]e are bound to make our own examination of the record to determine whether the claim is meritorious. 'The performance of this duty cannot be foreclosed by the finding of a court, or the verdict of a jury, or both.' " (*Payne v. Arkansas* (1958) 356 U.S. 560, 78 S.Ct. 844, 847, 2 L.Ed.2d 975, 978; see *Spano v. New York* (1959) 360 U.S. 315, 79 S.Ct. 1202, 1208, 3 L.Ed.2d 1265, 1267; *Blackburn v. Alabama*, *supra*, 80 S.Ct. 281, 4 L.Ed.2d 249; *Jackson v. Virginia* (1979) 443 U.S. 307, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573; *Miller v. Fenton* (1985) 474 U.S. 104, 106 S.Ct. 445, 451, 88 L.Ed.2d 405, 410 [voluntariness of confession is not state-court finding "presumed to be correct" in federal habeas corpus proceeding under former 28 U.S.C., §2254(d) (now 28 U.S.C., §2254(e)); independent federal review is required].)

(4) *Remand for Retrial of Issue*. In *Jackson v. Denno*, *supra*, the Supreme Court did not determine the issue of voluntariness, but remanded the case to the state court because the state procedure was held improper. The Court pointed out, however, that while New York could grant a complete new trial, due process did not require this. The state could simply grant a proper hearing to determine the issue of voluntariness, and, unless the result was a determination of involuntariness, the matter would end there. Accordingly, the case was remanded to the district court to allow the state a reasonable time to afford the petitioner either a hearing or a new trial, failing which he would be entitled to

release. (84 S.Ct. 1790, 1791, 12 L.Ed.2d 925.) (See *Boles v. Stevenson* (1964) 379 U.S. 43, 85 S.Ct. 174, 176, 13 L.Ed.2d 109, 111 [same].)

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#### A. Confession of Defendant.

#### 4. Harmless or Reversible Error.

#### 1 Witkin Cal. Evid. Hearsay § 89

[§ 89] Harmless or Reversible Error.

(1) *Federal Standard*. Previously, the United States Supreme Court took the view that admission of a coerced confession required reversal: "[W]here, as here, a coerced confession constitutes a part of the evidence before the jury and a general verdict is returned, no one can say what credit and weight the jury gave to the confession. And in these circumstances this Court has uniformly held that even though there may have been sufficient evidence, apart from the coerced confession, to support a judgment of conviction, the admission in evidence, over objection, of the coerced confession vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment." (*Payne v. Arkansas* (1958) 356 U.S. 560, 78 S.Ct. 844, 850, 2 L.Ed.2d 975, 981.)

However, in *Rose v. Clark* (1986) 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460, 6 Cal. Crim. Law (3d), *Reversible Error*, §14, the Court stated that there is a strong presumption that constitutional errors are subject to *harmless error* analysis, rather than being reversible per se, whenever the defendant was represented by counsel and afforded the opportunity to present evidence and argument before an impartial judge and jury. And in *Arizona v. Fulminante* (1991) 499 U.S. 279, 111 S.Ct. 1246, 1263, 113 L.Ed.2d 302, 329, the Court applied the *Rose* rationale specifically to coerced confessions, holding that the erroneous admission of such a confession should be evaluated, for purposes of the United States Constitution, under the harmless beyond a reasonable doubt standard.

(2) *California View*. Prior to 1993, California followed the approach of *Payne v. Arkansas*. (See *People v. Trout* (1960) 54 C.2d 576, 583, 6 C.R. 759, 354 P.2d 231; *People v. Matteson* (1964) 61 C.2d 466, 470, 39 C.R. 1, 393 P.2d 161; *In re Cameron* (1968) 68 C.2d 487, 503, 67 C.R. 529, 439 P.2d 633; *People v. Hinds* (1984) 154 C.A.3d 222, 239, 201 C.R. 104.)

In *People v. Cahill* (1993) 5 C.4th 478, 20 C.R.2d 582, 853 P.2d 1037, 6 Cal. Crim. Law (3d), *Reversible Error*, §12, a capital homicide prosecution, the trial judge admitted defendant's confession, which had been elicited through an implied promise of benefit or leniency. *Held*, assuming that the confession was involuntary and thus should not have been admitted, the error was not reversible per se.

(a) Because of *Fulminante*, a state court may now affirm a conviction *without violating the federal Constitution*, despite the erroneous admission of an involuntary confession, if the error was harmless beyond a reasonable doubt. (5 C.4th 487.)

(b) Proposition 8 (see 1 Cal. Evidence (4th), *Introduction*, §8) does not compel California's adoption of the federal standard; the proposition relates to the *admission of evidence*, and does not "purport to affect the standard for

determining *the prejudicial effect*, under state law, of the introduction at trial of evidence that remains inadmissible under California law." (5 C.4th 500.)

(c) Nevertheless, the standard of automatic reversal previously applied in this state seems unjustified. Official misconduct that renders a confession "involuntary" ranges from physical violence to the improper offer of a benefit, and in the latter case the conduct is no more egregious, and often less so, than that involved in obtaining evidence by means of an unreasonable search or other constitutional violations--violations that do not require automatic reversal. Further, if an automatic reversal rule were necessary to deter police misconduct, the rule would be applied to involuntary admissions as well, but such admissions have always been subject to harmless error analysis. (5 C.4th 506, 507.)

(d) "Accordingly ... we overrule the line of California decisions holding that the erroneous admission of a coerced confession is reversible per se under California law. The prejudicial effect of such error is to be determined, for purposes of California law, under the generally applicable reasonable-probability test embodied in article VI, section 13, of the California Constitution. ... Of course, because [that] standard is less demanding than the harmless-beyond-a-reasonable-doubt standard mandated by the applicable constitutional authorities ... , whenever a confession admitted in a California trial has been obtained by means that render the confession inadmissible under the federal Constitution, the prejudicial effect of the confession must be determined under the federal standard." (5 C.4th 509, 510.) (See 22 *Pepperdine L. Rev.* 251; 27 *Loyola L.A. L. Rev.* 1559; on reasonable probability test, see 6 *Cal. Crim. Law* (3d), *Reversible Error*, §1 et seq.; and see *In re Shawn D.* (1993) 20 C.A.4th 200, 24 C.R.2d 395, 10 *Summary* (9th), *Parent and Child, Supp.*, §595, citing Supreme Court's holding in *Cahill* [error in admitting minor's confession must be deemed prejudicial, as no other evidence linked him to burglary]; *People v. Cahill* (1994) 22 C.A.4th 296, 318, 319, 28 C.R.2d 1, *infra*, §137 [no reasonable possibility that defendant's statements induced by promise of leniency contributed to his felony murder conviction; in light of other evidence, only alternative explanation for victim's death was too incredible to be believed by fair-minded jury].)

Admission of a confession obtained in violation of the *Miranda* requirements is also subject to harmless error analysis. (*People v. Sims* (1993) 5 C.4th 405, 447, 20 C.R.2d 537, 853 P.2d 992, citing Supreme Court's holding in *Cahill*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *California View*. *In re Shawn D.*:

*Cross-Reference:* 10 *Summary* (10th), *Parent and Child*, §793.



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## CHAPTER VI - Hearsay

### III. EXCEPTIONS TO THE RULE

#### B. Admission of Party.

##### 1. In General.

##### a. Nature and Theory.

#### *1 Witkin Cal. Evid. Hearsay § 90*

[§ 90] Nature and Theory.

(1) *Nature of Admission.* An admission consists of a statement or conduct of a party to the action (or a representative of the party) that is offered against the party at the trial. *Ev.C. 1220* states the hearsay exception: The statement is admissible "when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity." (See *People v. Brackett* (1991) 229 C.A.3d 13, 18, 20, 280 C.R. 305 [CALJIC, No. 2.71, on admission in criminal case]; *People v. Medina* (1995) 11 C.4th 694, 752, 47 C.R.2d 165, 906 P.2d 2 [in light of ambiguous nature of defendant's comment to officer, "If I could only cry, but I can't cry. I couldn't even cry when my mother died," trial judge properly admitted it and left it to jury to decide if it was admission]; Model C., Rule 506 et seq.; 2 McCormick 5th, §254 et seq.; 1 Jefferson, California Evidence Benchbook 3d, Chap. 3; C.E.B., Effective Introduction of Evidence 2d, Chap. 10 [Admissions and Confessions]; 1 U.C.L.A. L. Rev. 18; 2 U.C.L.A. L. Rev. 68; 29A Am.Jur.2d (1994 ed.), Evidence §760 et seq.)

(2) *Theory of Admissibility.* Although admissions are hearsay (usually made out of court and not subject to oath or cross-examination), the policy of the exclusionary rule cannot reasonably be invoked by a party who is present and can testify in explanation or contradiction of the prior statement or conduct. (See Law Rev. Com. Comment to *Ev.C. 1220*; 28 Southwestern U. L. Rev. 221 [arguing that apologies should be excepted from this general rule of admissibility].)

(3) *Federal Rules of Evidence.* *F.R. Evid., Rule 801(d)(2)* provides that a statement "is not hearsay" if it "is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E)." (See 4 Mueller & Kirkpatrick, Federal Evidence 2d, §411 et seq.; 29A Am.Jur.2d (1994 ed.), Evidence §760; 156 A.L.R.Fed 217 [F.R. Evid., Rule 801(d)(2)(B)].)

**SUPPLEMENT:** [This section is current through the latest supplement]



(1) *Nature of Admission*. See *People v. Kraft* (2000) 23 C.4th 978, 1035, 99 C.R.2d 1, 5 P.3d 68 [in prosecution for numerous murders, list found in defendant's car containing entries prosecution asserted referred to victims was properly admitted under Ev.C. 1220, even though entries were coded and required interpretation; party admissions exception does not require statement to be clear and unambiguous]; 2 McCormick 6th, §254 et seq.

(3) *Federal Rules of Evidence*. See 191 A.L.R. Fed 27 [F.R. Evid., Rule 801(d)(2)(A)]. West's Key Number Digest, Criminal Law k.405 et seq.; Evidence k.221 et seq.



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#### B. Admission of Party.

##### 1. In General.

##### b. Affirmative Evidence.

*1 Witkin Cal. Evid. Hearsay § 91*

[§ 91] Affirmative Evidence.

Admissions of a party (including statements and conduct of others admissible against the party; *infra*, §119 et seq.) are received to prove the truth of the assertions; i.e., they constitute affirmative or substantive evidence that the jury or court may believe as against other evidence, including the party's own contrary testimony on the stand. (*Gates v. Pendleton* (1925) 71 C.A. 752, 756, 236 P. 365; *Langensand v. Obert* (1933) 129 C.A. 214, 218, 18 P.2d 725; *Lashley v. Koerber M.D.* (1945) 26 C.2d 83, 89, 156 P.2d 441; *Bonebrake v. McCormick* (1950) 35 C.2d 16, 19, 215 P.2d 728; *Fibreboard Paper Products Corp. v. East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL-CIO* (1964) 227 C.A.2d 675, 706, 39 C.R. 64; *Boogaert v. Occidental Life Ins. Co.* (1983) 150 C.A.3d 875, 881, 198 C.R. 357, quoting the text; *Estate of Anderson* (1997) 60 C.A.4th 436, 441, 70 C.R.2d 266, 11 Summary (9th), *Husband and Wife, Supp.*, §112 ["statement must assert facts which would have a tendency in reason to prove some portion of the proponent's defense, or to rebut some portion of the party declarant's cause of action"]; Model C., Rule 506, Comment; 2 McCormick 5th, §254; 1 U.C.L.A. L. Rev. 18; 42 A.L.R.5th 1 [use of defendant's admission in medical malpractice case to establish standard of care and breach].)

In *People v. Smith* (1984) 151 C.A.3d 89, 96, 198 C.R. 623, defendant, charged with assault with a deadly weapon on a deputy sheriff, had said when taken into custody: "If that fucking pig wouldn't have pulled his gun, I would have done him in." *Held*, the statement was relevant on the issue of his wilful intent to commit a battery on the officer, and was properly introduced as an admission. (See *People v. Hamilton* (1985) 41 C.3d 408, 427, 221 C.R. 902, 710 P.2d 981 [murder defendant's statement to deputy, "I'll kill a lot more, too, and you may be first on my list," was relevant to guilt as admission that he had killed someone].)

Admissions are merely evidence, however; they are not conclusive on the party and may be rebutted by contradictory evidence. (See *Lewetzow v. Sapiro* (1961) 188 C.A.2d 841, 847, 11 C.R. 126; *Frankenheimer v. Frankenheimer* (1964) 231 C.A.2d 101, 110, 41 C.R. 636, citing the text; for the rule on binding judicial admissions, see *infra*, §97.)

The substantive aspect of admissions was formerly a significant difference between them and prior inconsistent statements of a nonparty witness; but now the latter statements are also admitted under a hearsay exception. (See *infra*, §155.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 2 McCormick 6th, §254.

*Cross-Reference:* 11 *Summary* (10th), *Husband and Wife*, §142.



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### III. EXCEPTIONS TO THE RULE

#### B. Admission of Party.

##### 1. In General.

#### c. Classifications and Distinctions.

#### 1 Witkin Cal. Evid. Hearsay § 92

[§ 92] Classifications and Distinctions.

The apparently simple concept of "admissions" is actually complex and confusing, and the following distinctions should be noted:

(1) *Express and Implied Admissions*. Admissions may be express statements, or may arise from conduct--acts or silence (*infra*, §106 et seq.). Express admissions may be oral or written. (For cautionary instruction on oral admissions, see 3 *Cal. Evidence* (4th), *Presentation at Trial*, §113.) Written admissions are found in many types of informal and formal documents, and the fact that a writing is made pursuant to statute, e.g., an income tax return, does not preclude its use. (See *Balkema v. Deiches* (1949) 90 C.A.2d 427, 430, 202 P.2d 1068; *Shenson v. Shenson* (1954) 124 C.A.2d 747, 752, 269 P.2d 170 [action by cotenant for accounting of rents and profits; returns showed that defendant credited amounts to other cotenants but never paid them]; 31 *So. Cal. L. Rev.* 215; on privileged character of return, see 2 *Cal. Evidence* (4th), *Witnesses*, §255.)

In *Sill Properties v. CMAG* (1963) 219 C.A.2d 42, 55, 33 C.R. 155, minutes of a board meeting of a lessee corporation, stating the value of the assets purchased from the lessee's predecessor, were offered by the lessor. The minute entry had been made pursuant to former Corp.C. 1112 (now *Corp.C. 409(b), (e)*), requiring a statement by resolution of the directors' determination of fair value of consideration. *Held*, citing the text, this was admissible on the same theory as an income tax return; i.e., it was an admission, and there was no statutory privilege against its use.

(2) *Personal, Vicarious, and Adoptive Admissions*. Admissions may be *personal* (statements or conduct by the party), *vicarious* (statements or conduct of another admissible against the party; *infra*, §119 et seq.), or *adoptive* (statements or conduct of another adopted as the party's own; *infra*, §102 et seq.).

A personal admission may be offered against a party who is litigating in either an individual or representative capacity. The original Uniform Rules of Evidence provided that where the party was litigating in a representative capacity, only an admission made while acting in that capacity could be proved. The Evidence Code omitted this limitation as a needless refinement that would engender time-wasting debate; *Ev.C. 1220* provides that the statement may be received regardless of whether it was made in an individual or representative capacity. (See 9 *U.C. Davis L. Rev.* 37 [advocate's guide to personal, adoptive, and judicial admissions].)

(3) *Admissions of Criminal Defendant*. "Party" includes a defendant in a criminal case. The important distinctions between admissions of parties to civil and criminal actions are that admissions of a defendant in a criminal case are

subject to the same condition of voluntariness as confessions (*infra*, §136); they must meet the test of the *Miranda* rule requiring information on constitutional rights (*supra*, §76 and *infra*, §141); and they cannot be introduced unless the corpus delicti is independently proved (*supra*, §51). (On proof of admissions made through interpreter, see *infra*, §125.)

(4) *Judicial Admissions: Pleadings, Pretrial Conference, and Discovery.* The term "admissions" is also commonly applied to admissions in *pleadings*, but these are not merely evidentiary. They are conclusive in that they remove the admitted matters from the issues. (See *infra*, §97.)

Matters admitted in a pretrial, or in a case management conference and embodied in a *conference order* also have this effect. The order supersedes the pleadings, and an issue raised in the pleadings may be eliminated by the order. (See 7 *Cal. Proc.* (4th), *Trial*, §§54, 56.) And the same is true of matters stated in response to a *request for admissions* under C.C.P. 2033. (See 2 *Cal. Evidence* (4th), *Discovery*, §171.)

(5) *Distinction: Rules of Substantive Law.* Evidentiary admissions of facts recited in a contract must be distinguished from the conclusive effect of the *parol evidence rule* establishing the terms of the contract. (See 2 *Cal. Evidence* (4th), *Documentary Evidence*, §62.) And the substantive effect of a statement as an *estoppel*, *waiver*, or *warranty* must likewise be distinguished. (See 3 *Summary* (9th), *Negotiable Instruments*, §2; 3 *Summary* (9th), *Sales*, §55; 11 *Summary* (9th), *Equity*, §176.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(4) *Judicial Admissions: Pleadings, Pretrial Conference, and Discovery.* C.C.P. 2033, on requests for admissions, was repealed and replaced by C.C.P. 2033.010 et seq. in 2004 without substantive change.

(5) *Distinction: Rules of Substantive Law.*

*Cross-References:* 4 *Summary* (10th), *Negotiable Instruments*, §10; 4 *Summary* (10th), *Sales*, §56; 13 *Summary* (10th), *Equity*, §193.

(6) *(New) Distinction: Other Crimes Requirements Inapplicable.* The law does not require an admission relevant to a completed crime, made in part in the form of a threat, to be independently admissible as proof of identity under *Ev.C. 1101(b)* (1 *Cal. Evidence* (4th), *Circumstantial Evidence*, §97), in order to qualify for use at trial. *Ev.C. 1101(b)* "deals with evidence of a crime or other act that is relevant to prove a fact such as motive, opportunity, intent or identity. In order to prove identity, the act must contain distinctive characteristics that are so unusual as to be like a signature. ... Admissions that tend to prove the declarant committed a charged offense, however, are not offered as other crimes evidence, and instead are offered simply as statements made by a defendant that in and of themselves tend to prove he committed a charged offense. Such statements are admissible to prove identity of the perpetrator regardless of whether they demonstrate 'distinctive characteristics' akin to a signature." (*People v. Robinson* (2000) 85 C.A.4th 434, 445, 102 C.R.2d 179 [in capital murder case, defendant's statement to woman in car in Oxnard that if something happened to her, he would get rid of her body by dumping it in Los Angeles, was properly admitted as admission, where it was made only 5 days after charged murder, involving Oxnard woman whose body was dumped in Los Angeles; "unique signature" standard for proof of identity under *Ev.C. 1101(b)* was inapplicable].)



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#### B. Admission of Party.

##### 1. In General.

##### d. Declarant's Interest Immaterial.

*1 Witkin Cal. Evid. Hearsay § 93*

[§ 93] Declarant's Interest Immaterial.

Admissions are sometimes loosely called "admissions against interest." (See *Gates v. Pendleton* (1925) 71 C.A. 752, 756, 236 P. 365; *Shenson v. Shenson* (1954) 124 C.A.2d 747, 752, 269 P.2d 170.) This unfortunate phrase, coupled with the circumstance that prior statements that are useful to an opponent are most likely to be those against the party's interest when made, tend to create the erroneous impression that only dis-serving statements are admissible. The correct rule, however, is that any prior statement of a party may be offered against the party, even though it may not have been against the party's interest or even may have been self-serving when made. (See *People v. Zack* (1986) 184 C.A.3d 409, 417, 229 C.R. 317, quoting the text; *People v. Mendoza* (1987) 192 C.A.3d 667, 675, 238 C.R. 1, quoting the text; Model C., Rules 506, 509, Comments; 1 Jefferson, California Evidence Benchbook 3d, §3.20; 1 U.C.L.A. L. Rev. 20.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Carpenter* (1999) 21 C.4th 1016, 1049, 90 C.R.2d 607, 988 P.2d 531 [defendant's out-of-court statement that he was thief was admissible under Ev.C. 1220 even if it was not "admission"; statute is satisfied as long as evidence consists of statement, declarant is party, and statement is offered against party].



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III. EXCEPTIONS TO THE RULE

B. Admission of Party.

1. In General.

e. No Requirement of Personal Knowledge.

*1 Witkin Cal. Evid. Hearsay § 94*

[§ 94] No Requirement of Personal Knowledge.

The testimonial qualification of personal knowledge is dispensed with in the case of admissions. The theory is (at least as to the great bulk of admissions against interest when made) that one does not make statements against oneself in the absence of information satisfactory to oneself. (See *Abbett Elec. Corp. v. Sullwold* (1987) 193 C.A.3d 708, 714, footnote 8, 238 C.R. 496, citing the text [company president's deposition testimony concerning employee's suspected drinking problem, whether speculative or merely evasive, constituted party admission]; Model C., Rule 506, Comment; 2 McCormick 5th, §255; 1 U.C.L.A. L. Rev. 19; 54 A.L.R.2d 1069 [party's admissions as to torts occurring when party was absent]; but see *Kerr v. Milatovich* (1930) 209 C. 765, 766, 290 P. 289 [court seems to assume applicability of knowledge requirement but holds it satisfied].)

Whether statements made by a person lacking minimum mental capacity to testify should be excluded has been a subject of some discussion. (See 2 McCormick 5th, §255; 1 U.C.L.A. L. Rev. 20; 12 A.L.R.3d 1051 [admissions by infants].)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 2 McCormick 6th, §255.



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### III. EXCEPTIONS TO THE RULE

#### B. Admission of Party.

##### 1. In General.

##### f. Opinion Rule Not Applicable.

*1 Witkin Cal. Evid. Hearsay § 95*

[§ 95] Opinion Rule Not Applicable.

The better modern authorities take the position that, because the party-declarant need not even have had personal knowledge (see *supra*, §94), it is no ground of objection that the declarant's statement is in a form that, had it been testimony on the stand, would have been excluded as an inadmissible opinion or conclusion. (See Model C., Rule 506, Comment; 2 McCormick 5th, §256; 1 *U.C.L.A. L. Rev.* 19.)

Prior to the adoption of the Evidence Code, the California rule was said to be contra: "[T]he declaration or utterance must be one of *fact* and not a conclusion of law, opinion, legal contention, or argument." (*Fibreboard Paper Products Corp. v. East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL-CIO* (1964) 227 C.A.2d 675, 709, 39 C.R. 64, *infra*, §101.) If this decision correctly appraises former case law as making the opinion rule applicable to admissions, it is no longer correct. *Ev.C. 1220* refers to a "statement," which is broadly defined in *Ev.C. 225* to include any "oral or written verbal expression." The language of *Ev.C. 1220* was taken without substantial change from the original Uniform Rule, which was in turn based on Model C., Rule 506. The Comment to the Model Code Rule indicates that neither the knowledge requirement nor the opinion rule should apply to admissions. And the Law Revision Commission Comment to *Ev.C. 1220* observes that "[t]he statement need not be one which would be admissible if made at the hearing." (See *Levy-Zentner Co. v. Southern Pac. Trans. Co.* (1977) 74 C.A.3d 762, 787, footnote 19, 142 C.R. 1 [contrary holding in *Breidert v. Southern Pac. Co.* (1969) 272 C.A.2d 398, 412, 77 C.R. 262, relied on the pre-Code *Fibreboard* case; citing the text and McCormick]; 1 Jefferson, California Evidence Benchbook 3d, §3.13.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 2 McCormick 6th, §256.





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### III. EXCEPTIONS TO THE RULE

#### B. Admission of Party.

##### 1. In General.

##### g. Statement Containing Additional Matters.

*1 Witkin Cal. Evid. Hearsay § 96*

[§ 96] Statement Containing Additional Matters.

(1) *Introduction Under Limited Admissibility Doctrine.* A statement may be received as an admission even though it contains inadmissible matter. Thus, where the defendant makes a statement that acknowledges responsibility for an accident, it may be introduced in evidence, notwithstanding that the statement makes mention of insurance coverage. (*Noble v. Bacon* (1933) 129 C.A. 177, 183, 18 P.2d 699; *North v. Vinton* (1936) 17 C.A.2d 214, 219, 61 P.2d 950 [doctor told to "take care" of victim, that defendant "was insured"; admitted, with reference to insurance stricken out]; *McCullough v. Langer* (1937) 23 C.A.2d 510, 518, 73 P.2d 649 [defendant doctor denied burning plaintiff in treatment; doctor's letter containing contrary statement was properly admitted, even though it was addressed to his insurance company]; *Freeman v. Nickerson* (1946) 77 C.A.2d 40, 55, 174 P.2d 688; *Kroplin v. Huston* (1947) 79 C.A.2d 332, 339, 179 P.2d 575; *Nungaray v. Pleasant Valley Lima Bean Growers & Warehouse Assn.* (1956) 142 C.A.2d 653, 668, 300 P.2d 285; but see *Connor v. Jackson* (1949) 94 C.A.2d 462, 467, 210 P.2d 897 [defendant's letter expressing concern over plaintiff's injuries and stating that insurance company would do everything necessary, held not an admission and properly excluded]; see 4 A.L.R.2d 781 [admissibility of fact of insurance coverage as part of party admission].)

Under the same general principle, a statement may be received as an admission against one of several parties, with an instruction limiting its effect to that party. (See *Shaver v. United Parcel Service* (1928) 90 C.A. 764, 771, 266 P. 606; on codefendant's confession in joint trial, see *supra*, §59.)

Express exceptions are made by *Ev.C. 1152* as to admissions in the course of compromise negotiations (see *1 Cal. Evidence* (4th), *Circumstantial Evidence*, §140), and by *Ev.C. 1116(b)* as to admissions in the course of mediation (see *1 Cal. Evidence* (4th), *Circumstantial Evidence*, §152 et seq.); these are excluded.

(2) *Proof of Entire Statement.* Where one party offers part of a statement as an admission, the other is entitled to introduce the pertinent parts of the remainder to explain the meaning of the part first introduced. (See *1 Cal. Evidence* (4th), *Circumstantial Evidence*, §§36, 37.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(3) *(New) Expressions of Sympathy.* Any portion of a statement, writing, or benevolent gesture "expressing sympathy or a general sense of benevolence relating to the pain, suffering, or death of a person involved in an accident and made to that person or to the family of that person" is inadmissible as an admission of liability in a civil action. However, an actual statement of fault that is part of, or accompanies, such a statement, writing, or gesture is not inadmissible. (*Ev.C. 1160*, added in 2000; see 28 Western State L. Rev. 141.)



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## CHAPTER VI - Hearsay

## III. EXCEPTIONS TO THE RULE

## B. Admission of Party.

## 2. Admissions in Judicial and Administrative Proceedings.

## a. Pleadings in Civil Cases.

## 1. Same Case.

*1 Witkin Cal. Evid. Hearsay § 97*

[§ 97] Same Case.

(1) *In General.* A judicial admission in a pleading (either by affirmative allegation or by failure to deny an allegation) is entirely different from an evidentiary admission. The judicial admission is not merely evidence of a fact; it is a conclusive concession of the truth of a matter and has the effect of removing it from the issues. Nor is a judicial admission treated procedurally as evidence; the particular pleading or allegation is not formally offered in evidence but may nevertheless be relied upon and treated in argument as part of the case. (See *Welch v. Alcott* (1921) 185 C. 731, 754, 198 P. 626; *Lifton v. Harshman* (1947) 80 C.A.2d 422, 431, 182 P.2d 222; *Garrado v. Collins* (1955) 136 C.A.2d 323, 325, 288 P.2d 620; *Walker v. Dorn* (1966) 240 C.A.2d 118, 120, 49 C.R. 362, quoting the text; *Smith v. Walter E. Heller & Co.* (1978) 82 C.A.3d 259, 269, 147 C.R. 1, quoting the text; *Electronic Equipment Express v. Donald H. Seiler & Co.* (1981) 122 C.A.3d 834, 850, 176 C.R. 239, quoting the text; *Kirby v. Albert D. Seeno Const. Co.* (1992) 11 C.A.4th 1059, 1066, footnote 4, 14 C.R.2d 604, citing the text; 2 McCormick 5th, §257; 9 Wigmore (Chadbourn Rev.) §2588 et seq.; 29A Am.Jur.2d (1994 ed.), *Evidence* §770 et seq.; 22 *Pepperdine L. Rev.* 981 [comparison of judicial and evidentiary admissions made by party's counsel]; 49 *Hastings L. J.* 565 [admissibility of statements in pleadings as means of preventing false or inaccurate pleading]; 4 *Cal. Proc.* (4th), *Pleading*, §415 et seq.)

(2) *Distinction: Inconsistent Counts or Defenses.* It should be remembered that no judicial admission results from the permissible use of inconsistent counts or defenses unless they involve contradictions of fact in a verified pleading. (See *Beatty v. Pacific States Savings & Loan Co.* (1935) 4 C.A.2d 692, 697, 698, 41 P.2d 378; *Walker v. Dorn*, *supra*; 9 *So. Cal. L. Rev.* 388; 4 *Cal. Proc.* (4th), *Pleading*, §§372, 414; 2 McCormick 5th, §257.)

(3) *Superseded Pleading.* An allegation or failure to deny in a pleading superseded by later amendment is of course not a judicial admission. The majority of American jurisdictions, however, treat it as a prior statement of a party, i.e., as an evidentiary admission (unless made by mistake, inadvertence, or inadequate knowledge, which may be shown). (See 2 McCormick 5th, §257; 49 *Hastings L. J.* 605 [admissibility of factual statements in prior pleadings]; 52 A.L.R.2d 516 [admissibility of withdrawn, superseded, or amended pleading as containing admission against interest].)

In *Meyer v. State Bd. of Equalization* (1954) 42 C.2d 376, 385, 267 P.2d 257, the court reviewed the decisions and took the extreme minority view that the superseded pleading was *not even an evidentiary admission*, but was only a prior inconsistent statement that could be used solely for impeachment and not as affirmative evidence. Because prior inconsistent statements are now admissible under their own hearsay exception (see *infra*, §155), the *Meyer* rule has lost its significance; and, unless the courts should decide to exclude it altogether, the superseded pleading will have

evidentiary effect.

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General*. See 2 McCormick 6th, §257.(2) *Distinction: Inconsistent Counts or Defenses*. See 2 McCormick 6th, §257.

(3) *Superseded Pleading*. See 2 McCormick 6th, §257.*West's Key Number Digest*, Evidence k.208 et seq.



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#### 2. Admissions in Judicial and Administrative Proceedings.

##### a. Pleadings in Civil Cases.

##### 2. Prior Case.

#### 1 Witkin Cal. Evid. Hearsay § 98

[§ 98] Prior Case.

(1) *Admission Against Pleader.* A pleading in a prior civil proceeding may be offered as an evidentiary admission against the pleader in a subsequent proceeding. In *Dolinar v. Pedone* (1944) 63 C.A.2d 169, 176, 146 P.2d 237, a negligence case against an employee and corporation employer, the corporation did not deny that the employee acted within the scope of his employment. In another case arising out of the same accident, in which the corporation did deny the allegation, plaintiff was held entitled to introduce the earlier answer, despite the fact that it had been verified only by the attorney and not by an officer of the corporation client. Under modern pleading theories, the allegations of fact are presumed to be those of the party, and are therefore accepted as admissions, subject to the right of the party to controvert them by showing that they were unauthorized, or were made inadvertently or under mistake of fact. (See 2 McCormick 5th, §257; 29A Am.Jur.2d (1994 ed.), Evidence §781 et seq.; 1 U.C.L.A. L. Rev. 24; 63 A.L.R.2d 412 [admissibility of pleading in one case as evidence against pleader in second case].)

In *Jones v. Tierney-Sinclair* (1945) 71 C.A.2d 366, 373, 162 P.2d 669, defendant claimed an easement of right of way by prescription over plaintiff's land. Plaintiff offered in evidence defendant's answer in a prior suit against her by a third party, in which defendant was claiming a right of way by grant over the third party's property. In that answer, as one of several separate and inconsistent defenses, defendant had alleged that, unless the easement by grant was found valid, *she would have no means of ingress or egress* for her land. This allegation was, of course, contrary to her claim in the present case that, during the same period, she had acquired a prescriptive easement over plaintiff's land. *Held*, the answer was admissible. Inconsistent defenses may be freely pleaded in a case without being regarded as admissions in that case. But "where, as here, a defendant alleges facts in detail in an inconsistent defense in one action and those facts are inconsistent with a position taken by the same party in a subsequent action between such defendant and other parties, the first verified pleading may be used as evidence against the pleader in the subsequent action as an admission against interest." (71 C.A.2d 374.)

(2) *Default Judgment: Admission Against Defendant.* The failure of a defendant to answer a complaint is conduct (silence) indicating a belief in the truth of the essential allegations, and these may be offered in a subsequent civil proceeding as judicial admissions. (*Estate of McCarthy* (1932) 127 C.A. 80, 87, 15 P.2d 223; *Bohn v. Watson* (1954) 130 C.A.2d 24, 33, 278 P.2d 454; 6 Cal. Proc. (4th), *Proceedings Without Trial*, §153; but see *J. M. Wildman v. Stults* (1959) 176 C.A.2d 670, 674, 1 C.R. 651 [default of one defendant is not judicial admission as to answering codefendant].)

**SUPPLEMENT:** [This section is current through the latest supplement]  
(1) *Admission Against Pleader*. See 2 McCormick 6th, §257.



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#### 2. Admissions in Judicial and Administrative Proceedings. b. Guilty Plea in Criminal Case.

*1 Witkin Cal. Evid. Hearsay § 99*

[§ 99] Guilty Plea in Criminal Case.

(1) *In General.* A plea of guilty in a criminal case may be proved as an admission in a subsequent civil proceeding involving the same act or omission, because the plea is obviously inconsistent with a later claim of freedom from fault or wrong. (*Olson v. Meacham* (1933) 129 C.A. 670, 675, 19 P.2d 527 [plea of guilty to charge of negligent driving, admitted in death action for damages]; *Langensand v. Obert* (1933) 129 C.A. 214, 218, 18 P.2d 725 [plea of guilty to charge of reckless driving, admitted in personal injury action]; 29A Am.Jur.2d (1994 ed.), *Evidence* §783.)

In *Langensand*, the court said: "If the defendant, in the case before us, had stated to any person that he was driving his car in a reckless manner and without due regard for the safety of others, and regardless of traffic, there would be little question as to the admissibility of the statement. ... Under conditions much more solemn, the defendant did so state, and under pain of penalty, when his every interest lay in stating to the contrary, were it not for the pains of perjury."

There is much controversy over the desirability of allowing evidence, in a subsequent civil action, of a plea of guilty to a traffic offense, in view of the common tendency to make the plea and accept a small fine for reasons of convenience. (See 74 Harv. L. Rev. 1453; 29A Am.Jur.2d (1994 ed.), *Evidence* §784; 73 A.L.R.4th 691, 699.)

(2) *Subsequent Use in Criminal Case.* A defendant's admission that the factual basis for a guilty plea is true may justify use of the plea transcript in a later criminal proceeding to prove the nature of the prior conviction. (See *People v. Sohal* (1997) 53 C.A.4th 911, 916, 62 C.R.2d 110 [where prosecutor stated factual basis for plea of guilty to assault with deadly weapon and defendant then pleaded guilty, he made adoptive admission of truth of facts underlying plea, and admission could be relied on in subsequent criminal proceeding in determining nature of assault conviction]; on admissibility of plea of guilty to perjury charge in prosecution for subornation of perjury, see 63 A.L.R.2d 825; on methods of proving nature of prior conviction generally, see 3 Cal. Crim. Law (3d), *Punishment*, §378.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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##### c. Stipulations and Other Attorneys' Admissions.

##### 1. Judicial Admissions.

#### 1 Witkin Cal. Evid. Hearsay § 100

#### [§ 100] Judicial Admissions.

(1) *In General.* A stipulation is an agreement between attorneys for adverse parties relating to a matter involved in a judicial proceeding. It may relate to evidence or facts, and, if it is not in excess of the attorney's authority, and conforms to procedural requirements, it results in a judicial admission removing issues from the case. (For complete discussion, see 1 *Cal. Proc.* (4th), *Attorneys*, §289 et seq.; see *Palmer v. Long Beach* (1948) 33 C.2d 134, 141, 199 P.2d 952 [general discussion of law, but holding that defendant never agreed to stipulation in question]; *Gonzales v. Pacific Greyhound Lines* (1950) 34 C.2d 749, 754, 214 P.2d 809 [wrongful death; liability stipulated, leaving only issue of damages]; *In re Marriage of Hahn* (1990) 224 C.A.3d 1236, 1240, 273 C.R. 516, quoting the text [where parties stipulated to value of community home, and there was no intervening sale, forfeiture, or change in its nature, judge was not required to reopen trial to allow husband to prove increased value]; 9 Wigmore (Chadbourn Rev.) §2588 et seq.) (On construction of stipulations, and relief where stipulation is entered into by mistake or inadvertence, etc., see *Bare v. Parker* (1921) 51 C.A. 106, 108, 196 P. 280; *Back v. Farnsworth* (1938) 25 C.A.2d 212, 219, 77 P.2d 295; *Berry v. Chaplin* (1946) 74 C.A.2d 652, 656, 169 P.2d 442; *Palmer v. Long Beach*, *supra*; 1 *Cal. Proc.* (4th), *Attorneys*, §304 et seq.; on request for admissions under discovery statutes, see 2 *Cal. Evidence* (4th), *Discovery*, §157; on related doctrine of judicial estoppel, see *Prilliman v. United Air Lines* (1997) 53 C.A.4th 935, 956, 62 C.R.2d 142; 7 *Cal. Proc.* (4th), *Judgment*, §283.)

(2) *Implied Stipulation.* An unusual situation involving what might be termed an *implied stipulation* arose in *People v. Peters* (1950) 96 C.A.2d 671, 216 P.2d 145. Defendant was charged with involuntary manslaughter arising out of the stabbing of a third person who intervened in a quarrel. Defendant correctly contended on appeal that the *corpus delicti* was not proved by evidence. It appeared that both the prosecution and the defense assumed at the trial that the deceased died from the knife wound inflicted by defendant, and that the only issue was whether defendant could be excused under his claim of self-defense or accident. *Held*, a defendant cannot mislead the court and jury by seeming to take a position on issues and then repudiating it on appeal. Express admissions of counsel at the trial are binding. "The principle laid down applies equally to the unequivocal conduct of counsel from which the jury could properly and reasonably consider that the fact was conceded." (96 C.A.2d 677.)

(3) *Concession Without Agreement.* Sometimes, the judicial admission is a result of a concession by one party, in a brief or argument on appeal, without any agreement. (See *Browne v. Superior Court* (1940) 16 C.2d 593, 597, 107 P.2d 1; 9 *Cal. Proc.* (4th), *Appeal*, §597; but see *Janes v. LeDeit* (1964) 228 C.A.2d 474, 487, 39 C.R. 559, 9 *Cal. Proc.*

(4th), *Appeal*, §597 [disregarding a "cavalier concession"].) And the same is true of a concession by counsel in the trial. (See *Horn v. Atchison, Topeka & Santa Fe Ry. Co.* (1964) 61 C.2d 602, 605, 39 C.R. 721, 394 P.2d 561, 9 Cal. Proc. (4th), *Appeal*, §392 [personal injury suit; defense counsel's opening statement, telling jury to give plaintiff some recovery, held an admission of liability that removed issue from case]; *People v. Pijal* (1973) 33 C.A.3d 682, 697, 109 C.R. 230, citing the text.)

Because litigants cannot confer subject matter jurisdiction by consent where none exists by law, a concession as to timeliness of a motion subject to a jurisdictional time limit is not conclusive. (*People v. American Bankers Ins. Co.* (1991) 227 C.A.3d 1289, 1296, 278 C.R. 314.)

(4) *Distinction: Effect of Settling Defendant's Admission on Nonsettling Parties.* "[T]he sanctity and solemnity of the judicial process requires that a judicial admission contained in a stipulated judgment be presumptive evidence of the facts stated therein, but the due process rights of nonsettling defendants require that contradictory evidence be permitted unless the nonsettling defendants had notice and a full opportunity to be heard at the time of the initial judicial acceptance of the admission." (*Knowles v. Tehachapi Valley Hosp. Dist.* (1996) 49 C.A.4th 1083, 1093, 57 C.R.2d 192, 5 Summary (9th), *Torts, Supp.*, §71.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(4) *Distinction: Effect of Settling Defendant's Admission on Nonsettling Parties.*

*Cross-Reference:* 5 Summary (10th), *Torts*, §94. *West's Key Number Digest*, Evidence k.206 et seq.





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## 2. Evidentiary Admissions.

1 *Witkin Cal. Evid. Hearsay* § 101

## [§ 101] Evidentiary Admissions.

(1) *In Judicial Proceeding.* A stipulation made in one trial may constitute an admission in a subsequent proceeding. In *Nungaray v. Pleasant Valley Lima Bean Growers & Warehouse Assn.* (1956) 142 C.A.2d 653, 300 P.2d 285, plaintiff was injured while backing his employer's truck onto defendant's loading platform. In a prior action by defendant against its insurer to determine rights under its policies, C, defendant's warehouse manager, intervened and received a judgment requiring the insurer to defend him. In the stipulation of facts in that action, signed on behalf of C by his present attorneys, it was stated that if the present plaintiff were called as a witness he would testify that *C directed him to back his truck onto the particular platform.* In the present trial, C testified that *plaintiff selected the platform himself.* Held, the statement in the stipulation of facts, not denied by C, and used by his attorneys to gain an advantage for him (judgment against the insurer), was an *adoptive* admission. (142 C.A.2d 666.) (See 29A Am.Jur.2d (1994 ed.), Evidence §§772, 773.)

(2) *In Administrative Proceeding.* In *Fibreboard Paper Products Corp. v. East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL-CIO* (1964) 227 C.A.2d 675, 39 C.R. 64, plaintiff corporation sued defendant labor union and pickets for damages suffered from illegal picketing, contending that its production workers stayed away because of fear of violence. Defendants contended that they stayed away because of union principles. In support of this defense, defendants showed that plaintiff had opposed payment of unemployment compensation to the workers on the ground that they left their work because of a trade dispute, i.e., out of respect for the picket line, and were consequently ineligible under *Unemp.Ins.C.* 1262. This inconsistent position was taken in appeals from a referee's decision, and in oral argument to the Unemployment Insurance Appeals Board. Held, the documents were admissions and should not have been excluded.

The administrative appeal procedure required the party to set forth "the grounds or reasons for the appeal." Hence, the appeal forms were in the nature of pleadings in a prior case, and could constitute evidentiary admissions. "To hold that a party may plead inconsistent defenses in different proceedings without incurring procedural sanctions would stultify the rule which permits the use of pleadings in prior proceedings as evidentiary admissions in subsequent proceedings." (227 C.A.2d 712.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In Judicial Proceeding.* See *Salazar v. Upland Police Dept.* (2004) 116 C.A.4th 934, 947, 11 C.R.3d 22 [in civil

action for false arrest, stipulation entered into by plaintiff's attorney and district attorney in related criminal action against plaintiff to effect that arrest was supported by probable cause was properly admitted as party admission, where there was no evidence stipulation was inadvertent, involuntary, or unauthorized].



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#### 3. Adoptive Admissions in Civil Cases.

##### a. Nature of Admission.

#### *1 Witkin Cal. Evid. Hearsay § 102*

#### [§ 102] Nature of Admission.

A party may expressly or by implication adopt another's declaration as the party's own; in this case, the declaration, although made by another, may be treated as a party admission. *Ev.C. 1221* codifies this concept of adoptive admission: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth."

"The theory of adoptive admissions is that the hearsay declaration is in effect repeated by the party; his conduct is intended by him to express the same proposition as that stated by the declarant." (Model C., Rule 507, Comment b; see *Estate of Gaines (1940)* 15 C.2d 255, 262, 100 P.2d 1055 [appellant repeated to witness, without challenge, statement that decedent had previously made to appellant; admissible against appellant]; *Nungaray v. Pleasant Valley Lima Bean Growers & Warehouse Assn. (1956)* 142 C.A.2d 653, 666, 300 P.2d 285, supra, §101; *Los Robles Motor Lodge v. Department of Alcoholic Beverage Control (1966)* 246 C.A.2d 198, 205, 54 C.R. 547, supra, §34; *People v. Richards (1976)* 17 C.3d 614, 618, 131 C.R. 537, 552 P.2d 97; *Brown v. Surety Co. of Pacific (1981)* 122 C.A.3d 614, 618, 176 C.R. 143 [statements to plaintiff by workers at construction site that defendant had no interest in construction project, contrary to defendant's representations to plaintiff, were admissible as adoptive admissions after defendant admitted their truth during confrontation with plaintiff]; 2 McCormick 5th, §261; 1 U.C.L.A. L. Rev. 20; 2 U.C.L.A. L. Rev. 70; 29A Am.Jur.2d (1994 ed.), Evidence §796 et seq.; 1963 A.S. 293.)

In *J. & J. Builders Supply v. Caffin (1967)* 248 C.A.2d 292, 298, 56 C.R. 365, J and C, seeking materials on credit from plaintiff, called on plaintiff's president, and J, in C's presence, said "This is my new partner." *Held*, J's statement was properly received as an adoptive admission of C, and he was liable as a partner by estoppel.

However, an admission is ordinarily personal, and the mere recital or description of another's statement does not necessarily constitute an adoption of it. "[A] statement describing another's declaration is normally not regarded as an admission of the fact asserted by the other. One does not admit everything he recounts or describes merely by reason of the relating of it." (*Estate of Gaines, supra*, 15 C.2d 262; *People v. Hayes (1999)* 21 C.4th 1211, 1258, 91 C.R.2d 211, 989 P.2d 645, quoting the text.)

Nor does an admission result from *furnishing required papers*. Where, e.g., a life or accident insurance policy requires the submission of proof of death or injury, by a doctor's or coroner's report, the beneficiary, in order to maintain a claim, has no choice but to comply. In that case, there is no voluntary act on the beneficiary's part, and consequently

the recitals and declarations in the reports are not admissible as an adoptive admission. (*Shee v. Maryland Assur. Corp.*, *Baltimore* (1922) 190 C. 1, 6, 210 P. 269; *Bebbington v. California Western States Life Ins. Co.* (1947) 30 C.2d 157, 161, 180 P.2d 673, *supra*, §12; see 58 A.L.R.2d 429 [extent to which insured is bound by statements in proof of loss].)

Special considerations apply in criminal cases. (See *infra*, §§140, 141.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 2 McCormick 6th, §261. *West's Key Number Digest*, Evidence k.220 et seq.



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##### b. Adoption by Conduct.

##### 1. In General.

#### *1 Witkin Cal. Evid. Hearsay § 103*

[§ 103] In General.

A person may adopt another's admission not only by express words but by "other conduct" manifesting a "belief in its truth." (*Ev.C. 1221*, *supra*, §102.) The theory is stated in Model C., Rule 507, Comment b, as follows: "The party's conduct may be such that no reasonable person could find therefrom an intention to concede the truth of the declarant's statement; indeed, it may indicate a purpose to convey exactly the opposite impression; and yet one might reasonably conclude from it that the party really believed the declaration to be true. Thus his silence, or his attempted explanation, or even a halting or otherwise suspiciously spoken denial, in the face of a damaging accusation, may furnish ample ground for an inference of consciousness of its truth even though it would afford no sufficient basis for an inference of adoption." (See *Tibbet v. Sue* (1899) 125 C. 544, 546, 58 P. 160; *Estate of Snowball* (1910) 157 C. 301, 311, 107 P. 598; *Baldarachi v. Leach* (1919) 44 C.A. 603, 606, 186 P. 1060, *infra*, §104; *Los Robles Motor Lodge v. Department of Alcoholic Beverage Control* (1966) 246 C.A.2d 198, 205, 54 C.R. 547, *supra*, §34; 2 McCormick 5th, §261; 2 U.C.L.A. L. Rev. 70; 32 Proof of Facts 2d 253 [conduct or silence as admission]; 29A Am.Jur.2d (1994 ed.), *Evidence* §799 et seq.; 1963 A.S. 293; BAJI (8th ed.), No. 2.26.)

Thus, in *Tibbet v. Sue*, *supra*, an action on a promissory note, plaintiff's witness gave the following evidence of the loan: In the presence of several others, plaintiff counted out and handed \$ 500 to defendant maker and stated that he was lending him the money; defendant took the money and walked away. *Held*, this was admissible.

An implied admission may result from silence in the face of another's declaration that would normally call for an answer. (See *infra*, §104.) But the mere fact that a party was present while another's declaration was made does not by itself constitute the basis for proof of the declaration as an implied admission. (See *supra*, §10.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See CACI, No. 214 [admission by silence]; 2 McCormick 6th, §261.



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##### b. Adoption by Conduct.

#### 2. Silence or Evasive Response in Negligence Action.

##### *1 Witkin Cal. Evid. Hearsay § 104*

[§ 104] Silence or Evasive Response in Negligence Action.

A troublesome question arises where, after an automobile accident, the defendant is accused by observers of being at fault. Because the defendant may be injured or shocked, or concerned with helping the victim, or intimidated by express or implied threats of reprisal, silence can scarcely be regarded as an admission of negligence. (See generally 2 McCormick 5th, §262; 28 Southwestern U. L. Rev. 337 [adoptive admission by silence]; 70 A.L.R.2d 1099 [silence as admission regarding circumstances of accident]; 1958 A.S. 659; BAJI (8th ed.), No. 2.26.)

The correct result was almost reached in *Baldarachi v. Leach* (1919) 44 C.A. 603, 186 P. 1060. The witness, a bystander, testified that he told defendant at the time that he "ought to be strung up by the heels for running into a woman in that fashion," and that defendant made no reply. The court observed that "it may be apparent" that the nature of the declaration and surrounding circumstances were such that no fair inference of an admission of negligence could be drawn (44 C.A. 609); that "it is extremely improbable that the jury attached any significance to his silence" ; and that "it may seem clear to us that the significance of defendant's silence in the face of this declaration was practically negligible as evidence of an admission" (44 C.A. 610). Nevertheless, the court held he could have answered, and "many men" would have answered (44 C.A. 608), and "we are not prepared to say that the court was not right in holding it to be a matter for the jury to pass upon" (44 C.A. 610).

This decision can best be explained as an illustration of the reluctance to find reversible error in the admission of a single item of proof. For the purposes of the law of evidence, the following dictum seems more significant than the holding: "It is apparent in the case at bar that the declaration testified to did not entitle the party making it to a reply. He was a mere bystander, with no more interest in the affair than any other one of the crowd that doubtless had already assembled. The nature of his statement was truculent and offensive, and did not in terms call for a response. It was a situation where any self-respecting and self-restraining man in the position of defendant, no matter how conscious of innocence, might properly keep silent and where, if a response had been made, it would most likely have been an angry retort." (44 C.A. 608.)

The instructions given transit company employees to refuse to discuss an accident may lead to unexpectedly unfavorable results under the rule of implied admissions. Thus, in *Keller v. Key System Transit Lines* (1954) 129 C.A.2d 593, 596, 277 P.2d 869, plaintiff was struck by defendant's train. A police officer testified that he took an accident report from R, the motorman, who answered numerous questions, and then was asked, "Where was the woman when you first saw her when she was struck by the train?" R answered: "You are putting me in an awful spot. I have given

you all the information I have been instructed to give by my employers. ... My hands are tied." *Held*, his evasive answer was properly offered as an admission.

Obviously, no admission results where the question is not accusatory. Thus, in *Gilbert v. Los Angeles* (1967) 249 C.A.2d 1006, 1009, 58 C.R. 56, plaintiff tripped on a crack in the sidewalk and sued the city. The trial judge permitted the introduction of a statement by a police officer, who asked her after the fall if she had seen the raised portion of the sidewalk on previous occasions. Her only response to this thrice-repeated inquiry was to ask if the city was going to pay for her injuries. *Held*, it was error to admit the evidence. There was no accusation in asking "if" (not "when") she saw the defect, hence, her allegedly equivocal response raised no inference of any kind.

**SUPPLEMENT:** [This section is current through the latest supplement]  
See CACI, No. 214 [admission by silence]; 2 McCormick 6th, §262.



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##### b. Adoption by Conduct.

#### 3. Ignoring Written Communication.

#### *1 Witkin Cal. Evid. Hearsay § 105*

[§ 105] Ignoring Written Communication.

It is sometimes stated as a general rule that an admission is not implied from the failure to reply to a letter; there are many reasons, other than belief in the truth of the matters referred to, why a person does not reply. "Silence, under such circumstances, is never the equivalent of consent; such a doctrine would place the whole world at the mercy of letter writers." (*Security-First Nat. Bank of Los Angeles v. Spring Street Properties* (1937) 20 C.A.2d 618, 626, 67 P.2d 720; see *Hughes v. Pacific Wharf & Storage Co.* (1922) 188 C. 210, 225, 205 P. 105; *A. B. Leach & Co. v. Peirson* (1927) 275 U.S. 120, 48 S.Ct. 57, 72 L.Ed. 194 ["A man cannot make evidence for himself by writing a letter containing the statements that he wishes to prove"]; 2 McCormick 5th, §262; 29A Am.Jur.2d (1994 ed.), *Evidence* §801; 32 Proof of Facts 2d 287.)

Nevertheless, the theory of implied admissions can be and is applied in situations where an answer would normally be made denying the statements if they were untrue. "[T]he instances in which such letters have been admitted have usually been cases where they were part of a mutual correspondence, or referred to an existing contract." (*Simpson v. Bergmann* (1932) 125 C.A. 1, 8, 13 P.2d 531; see 2 McCormick 5th, §262; on failure to dispute an account rendered, and the substantive law doctrine of *account stated*, see 1 Summary (9th), *Contracts*, §917 et seq.)

In *Simpson*, B, owner, sought to hold S Co., a lumber subcontractor, on its bond as surety for a defaulting contractor. B offered evidence that B's attorney wrote to S Co., referring to the bond, stating that S Co. had executed it as surety, and notifying it of default in the contractor's performance. *Held*, although there was no previous correspondence or contract between the parties, the circumstances were such that the letter reasonably called for some reply.

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 2 McCormick 6th, §262.

*Cross-Reference:* 1 Summary (10th), *Contracts*, §972 et seq.





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#### B. Admission of Party.

#### 4. Other Admissions by Conduct.

#### a. Flight, Resistance, or Escape of Accused.

#### 1. In General.

#### *1 Witkin Cal. Evid. Hearsay § 106*

[§ 106] In General.

Acts of an accused, designed to prevent arrest, may afford an inference of consciousness of guilt, and are receivable against the accused as implied admissions. (See *People v. Wong* (1973) 35 C.A.3d 812, 830, 111 C.R. 314, citing the text [principle applied to allow evidence that victim's body was concealed]; *People v. James* (1976) 56 C.A.3d 876, 889, 128 C.R. 733 [defendant's conduct after commission of crime, whether flight, evasion of apprehension, attempted suicide, or escape from custody may be relevant circumstantial evidence to show consciousness of guilt and, by further inference, commission of offense]; 2 McCormick 5th, §263 et seq.; 2 Wigmore (Chadbourn Rev.) §276 et seq.; 1 U.C.L.A. L. Rev. 22; 29A Am.Jur.2d (1994 ed.), Evidence §805; 1966 A.S. 397; 22 A.L.R.3d 843 [suicide attempt as analogy to flight].)

The most common examples are *flight* (see *infra*, §107) and *attempted escape from custody* (see *infra*, §109). Resistance to arrest may also be proved as an implied admission. (See *People v. Flannelly* (1900) 128 C. 83, 87, 60 P. 670 [shooting at officers to avoid capture]; *People v. Dabb* (1948) 32 C.2d 491, 499, 500, 197 P.2d 1 [same]; 2 Wigmore (Chadbourn Rev.) §276.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See CALCRIM, No. 372 [Defendant's Flight]; 2 McCormick 6th, §263 et seq.

*(New) Distinction: Invocation of Fourth Amendment rights:* A defendant's invocation of the constitutional right to insist on a warrant prior to entry onto his or her property may not be used for the purpose of showing that the defendant had something to hide, i.e., demonstrating a consciousness of guilt. (*People v. Wood* (2002) 103 C.A.4th 803, 809, 127 C.R.2d 132 [in prosecution for animal abuse, trial judge erred in allowing animal control officer to testify that defendant refused officer access to pasture where animal in question was kept; however, error was harmless, as evidence would have been admissible in cross-examination of defendant or as rebuttal, in light of his denial that he owned pasture].)



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#### 4. Other Admissions by Conduct.

#### a. Flight, Resistance, or Escape of Accused.

#### 2. Flight.

#### 1 Witkin Cal. Evid. Hearsay § 107

[§ 107] Flight.

(1) *In General.* Flight or attempted flight of the accused affords an inference of consciousness of guilt. (See *People v. Sanchez* (1939) 35 C.A.2d 231, 237, 95 P.2d 169; *People v. Waller* (1939) 14 C.2d 693, 702, 96 P.2d 344 [defendant also assumed aliases to avoid detection]; *People v. Hurd* (1970) 5 C.A.3d 865, 876, 85 C.R. 718, citing the text [defendant, charged with sex crimes against his daughter, fled from California when contacted by police after daughter was taken to juvenile hall]; *People v. Mulqueen* (1970) 9 C.A.3d 532, 543, 88 C.R. 235; *People v. Terry* (1970) 2 C.3d 362, 395, 85 C.R. 409, 466 P.2d 961; *People v. Marchialette* (1975) 45 C.A.3d 974, 981, 119 C.R. 816 [defendant left shooting scene hastily without explanation or attempting to render assistance, which innocent law-abiding citizen would normally do, and could not be found when people searched for him moments later]; *People v. Bigam* (1975) 49 C.A.3d 73, 78, 122 C.R. 252 [defendant's flight when confronted by uniformed police and his spontaneous exclamatory statement--"Jesus Christ, the cops"--coupled with his earlier sale of marijuana, were indicative of consciousness of criminal involvement that constituted probable cause to arrest]; *People v. Vargas* (1975) 53 C.A.3d 516, 529, 126 C.R. 88 [defendant, on bail, failed to appear for second day of trial; instruction on flight did not violate his Fifth Amendment right to remain silent and to be free of adverse inferences from his failure to testify]; *People v. Snyder* (1976) 56 C.A.3d 195, 198, 128 C.R. 297 [defendant appeared for first day of trial, but then disappeared until months after verdict was rendered; jurors properly considered his flight as factor in guilt]; *People v. Moody* (1976) 59 C.A.3d 357, 361, 131 C.R. 923; *People v. Sanchez* (1978) 86 C.A.3d Supp. 8, 11, 150 C.R. 772; *People v. Neely* (1993) 6 C.4th 877, 26 C.R.2d 189, 864 P.2d 460 [evidence indicating that defendant was in flight following crime was highly probative of participation in crime and consciousness of guilt]; 2 McCormick 5th, §263; 2 Wigmore (Chadbourn Rev.) §276; 29A Am.Jur.2d (1994 ed.), Evidence §805; on flight from scene of accident, see *infra*, §118.)

In *People v. Jack* (1965) 233 C.A.2d 446, 43 C.R. 566, defendant, in a pharmacy attempting to fill a false prescription for dangerous drugs, observed a sheriff's officer, and left for his car parked outside. *Held*, this justified an instruction on flight. The act of running away, which affords the basis for the inference of consciousness of guilt, "requires neither a physical act of running nor a far-away haven." (233 C.A.2d 458, citing the text.)

(2) *Statutory Instruction.* Where evidence of a defendant's flight is relied on as tending to show guilt, the jury must be instructed substantially as follows:

"The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed is not sufficient in itself to establish his guilt, but is a fact which if proved, the jury may consider in deciding

his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine." (P.C. 1127c.)

"No further instruction on the subject of flight need be given." (P.C. 1127c.)

The instruction need not be in the exact language of P.C. 1127c, and the judge may inform the jury of the reason why flight is a factor to consider, i.e., that it shows a consciousness of guilt. (*People v. Hill* (1967) 67 C.2d 105, 120, 60 C.R. 234, 429 P.2d 586.) (See *People v. Olea* (1971) 15 C.A.3d 508, 515, 93 C.R. 265 ["The very purpose of enacting Penal Code section 1127c was to abolish the rule stated in early California cases that the jury could not be instructed to consider flight as evidence of guilt unless it had been proved the defendant knew he had been accused of the commission of a particular crime"]; *People v. Hedrington* (1985) 171 C.A.3d 517, 520, 217 C.R. 754 [in voluntary manslaughter prosecution in which defendant claimed that victim was aggressor and defendant fled scene of fight to protect himself, flight instruction was not improper; instruction did not assume that defense of justification was not proved]; *People v. Turner* (1990) 50 C.3d 668, 694, 268 C.R. 706, 789 P.2d 887 [modification of instruction to provide that "if there was such flight," its weight is for jury determination properly allowed jury to determine whether flight had been proved]; *People v. Pensinger* (1991) 52 C.3d 1210, 1243, 278 C.R. 640, 805 P.2d 899 [knowledge requirement referred to in *Olea* case, supra, need not be revived as matter of due process]; CALJIC (6th ed.), No. 2.52.)

Although P.C. 1127c does not contain the word "attempted," the inference may also be drawn from attempted flight. (*People v. Kessler* (1968) 257 C.A.2d 812, 814, 65 C.R. 248, citing the text.)

(3) *Flight Remote in Time From Charged Crime.* In *People v. Mason* (1991) 52 C.3d 909, 277 C.R. 166, 802 P.2d 950, defendant was charged with multiple counts of first degree murder. At trial, the prosecution introduced evidence of a high-speed automobile chase that involved defendant and sheriff's deputies and that took place 4 weeks after, and in the same jurisdiction as, one of the murders. As the chase ended, defendant allegedly abandoned his vehicle and escaped on foot; he was arrested about 1 month later. *Held*, admission of the flight evidence and issuance of the flight instruction were proper.

(a) Defendant contended that the flight was so remote in time from the charged offenses that it was of marginal probative value. "Common sense, however, suggests that a guilty person does not lose the desire to avoid apprehension for offenses as grave as multiple murders after only a few weeks. Nor do our decisions create inflexible rules about the required proximity between crime and flight. Instead, the facts of each case determine whether it is reasonable to infer that flight shows consciousness of guilt." (52 C.3d 941.) Moreover, contrary to the holding in *People v. Newton* (1966) 244 C.A.2d 82, 85, 52 C.R. 727, it was not necessary that defendant knew he was charged with the crimes involved. "While the rule ... was good law at the time ... we have long since rejected it." (52 C.3d 941, 942, footnote 11.)

(b) Admission of the flight evidence did not unduly prejudice defendant, even though he was forced to admit two uncharged crimes to explain the flight. The uncharged offenses were no less remote than the charged murder that occurred most proximate to defendant's flight. One uncharged offense was committed in a different jurisdiction and more than a hundred miles from the place where defendant fled from the sheriff's deputies; the other uncharged crime occurred only 4 days after the charged murder. Because the inference that defendant fled to avoid apprehension for the charged murders was at least as strong as the inference that he fled to avoid apprehension for the uncharged offenses, it was within the trial judge's discretion under *Ev.C. 352* (1 *Cal. Evidence* (4th), *Circumstantial Evidence*, §17 et seq.) to conclude that any danger of undue prejudice associated with the flight evidence did not outweigh the evidence's probative value. (52 C.3d 942.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General.* See 2 McCormick 6th, §263 et seq. (2) *Statutory Instruction.* See *People v. Mendoza* (2000) 24 C.4th 130, 179, 180, 99 C.R.2d 485, 6 P.3d 150 [in murder trial, giving of instruction in words of CALJIC, No. 2.52 did not violate defendant's due process rights, as permissive conclusion it allowed could be justified on basis of reason and common sense in light of proven facts before jury]; *People v. Navarette* (2003) 30 C.4th 458, 502, 133 C.R.2d 89, 66

*P.3d 1182* [in capital murder case, instructing jury in words of CALJIC, No. 2.52 was not error, even though one of charged crimes was robbery and crime of robbery continues as long as loot is being carried to place of temporary safety; asportation element of robbery is satisfied with slight movement, and thus defendant did not need to flee crime scene to be guilty of robbery]; *People v. Henderson (2003) 110 C.A.4th 737, 743, 2 C.R.3d 32* [where defendant relies on third-party culpability defense, offers proof that third party was aware of discovery of charged crime, and requests instruction on alleged flight of third party, instruction must be given; however, absent request, court has no sua sponte duty to give instruction of this type]. *West's Key Number Digest*, Criminal Law k.351(3)



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#### 3. Instruction Where Fleeing Person's Identity Is in Issue.

##### *1 Witkin Cal. Evid. Hearsay § 108*

[§ 108] Instruction Where Fleeing Person's Identity Is in Issue.

In *People v. Mason* (1991) 52 C.3d 909, 277 C.R. 166, 802 P.2d 950, the Supreme Court rejected broad dictum in *People v. Anjell* (1979) 100 C.A.3d 189, 160 C.R. 669, to the effect that if the identity of the person who fled is in issue, an instruction on flight is improper. The court observed:

"If there is evidence identifying the person who fled as the defendant, and if such evidence 'is relied upon as tending to show guilt,' then it is proper to instruct on flight. (§1127c.) 'The jury must know that it is entitled to infer consciousness of guilt from flight and that flight, alone, is not sufficient to establish guilt. ... The jury's need to know these things does not change just because identity is also an issue. Instead, such a case [only] requires the jury to proceed logically by deciding first whether the [person who fled] was the defendant and then, if the answer is affirmative, how much weight to accord to flight in resolving the other issues bearing on guilt. The jury needs the instruction for the second step.' " (52 C.3d 943, quoting *People v. London* (1988) 206 C.A.3d 896, 254 C.R. 59, and disapproving *People v. Anjell* and its progeny.) (See *People v. Pensinger* (1991) 52 C.3d 1210, 1244, 1245, 278 C.R. 640, 805 P.2d 899 [repeating holding and explanation in *Mason*].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### 4. Attempted Escape From Custody.

*1 Witkin Cal. Evid. Hearsay § 109*

[§ 109] Attempted Escape From Custody.

An attempt to escape from custody also affords an inference of consciousness of guilt. (See *People v. Ellis* (1922) 188 C. 682, 693, 206 P. 753; *People v. Arnold* (1926) 199 C. 471, 497, 250 P. 168; *People v. Otis* (1959) 174 C.A.2d 119, 128, 344 P.2d 342 [hacksaw blades found in defendant's cell while he was awaiting trial for crime of possession of knives]; *People v. Morris* (1991) 53 C.3d 152, 196, 279 C.R. 720, 807 P.2d 949 [evidence of attempted escape is admissible even when multiple crimes have been charged, despite difficulty of knowing which charge defendant attempted to flee from]; 2 Wigmore (Chadbourn Rev.) §276; 3 A.L.R.4th 1085 [evidence of escape or attempted escape occurring while defendant is detained for more than one offense, where trial is on less than all pending charges].)

In *People v. Terry* (1970) 2 C.3d 362, 85 C.R. 409, 466 P.2d 961, defendant tried to escape from jail 6 months after his arrest on two homicide charges. During the attempt, he fired a revolver and stated to a policeman, "I have killed two men already. It doesn't make any difference to me if I kill you too." Following his conviction, defendant contended on appeal that the probative value of this evidence was slight in relation to its prejudicial effect because it was likely that, after several months in jail, he escaped because he could not bear further incarceration. *Held*, the evidence was admissible. Defendant's theory was possible, "but it is also probable that only one who expects his guilt to be proved at trial will attempt an escape and that an innocent man will stay for trial in order to clear his name and win lawful liberty." (2 C.3d 395.) The *time* of an escape affects the weight of the evidence, not its admissibility. (2 C.3d 395.) The escape was also "probably admissible" to show the circumstances surrounding his admission of the two killings. "To say the least, this statement made during the escape tends to demonstrate consciousness of guilt." (2 C.3d 395, footnote 15.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Criminal Law k.351(9)



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## 4. Other Admissions by Conduct.

## b. False Excuse or Alibi.

1 *Witkin Cal. Evid. Hearsay* § 110

[§ 110] False Excuse or Alibi.

(1) *General Rule.* False statements deliberately made by defendants to arresting officers concerning matters within their own knowledge, and relating materially to the issue of guilt or innocence, "cogently evidence consciousness of guilt and suggest that there is no honest explanation for incriminating circumstances." (*People v. Osslo* (1958) 50 C.2d 75, 93, 323 P.2d 397.) (See *People v. Liss* (1950) 35 C.2d 570, 576, 219 P.2d 789 [use of false name]; *People v. Downs* (1952) 114 C.A.2d 758, 761, 251 P.2d 369 [attempt to manufacture alibi by false registration card at hotel]; *People v. Cramer* (1967) 67 C.2d 126, 131, 60 C.R. 230, 429 P.2d 582, citing the text [sex offense with boy; denial of identity and attempted concealment of relationship with victim]; *People v. Showers* (1968) 68 C.2d 639, 643, 68 C.R. 459, 440 P.2d 939 [defendant, searching in ivy patch, said he was looking for \$ 50 a friend had lost; police immediately found balloon with heroin there]; *People v. Louis* (1984) 159 C.A.3d 156, 160, 161, 205 C.R. 306 [criticizing former version of CALJIC, No. 2.03 for not including the word "wilfully"; CALJIC (6th ed.), No. 2.03 includes the term]; *People v. Zack* (1986) 184 C.A.3d 409, 418, 229 C.R. 317 [defendant said he had been fishing in Carmel when murder occurred; in fact, Carmel had experienced severe storm on night in question]; *People v. Mendoza* (1987) 192 C.A.3d 667, 672, 238 C.R. 1 [defendant said he had been washing truck when attack on victim occurred, but arresting officers observed coating of dust on truck]; *People v. Benson* (1989) 210 C.A.3d 1223, 1232, 259 C.R. 9 [in murder prosecution, defendant's pretrial statement that third person grabbed at either her or the gun, causing gun to fire, was properly admitted even if it was not inconsistent with her trial testimony; inference of fabrication was provided by inconsistency with statements she made to police and others that victim had grabbed gun]; *People v. Kaurish* (1990) 52 C.3d 648, 682, 276 C.R. 788, 802 P.2d 278 [evidence of defendant's false statements at time of arrest is admissible whether statements are contradicted by defendant at trial or by statements of other witnesses]; *People v. Carrillo* (1995) 37 C.A.4th 1662, 1669, 45 C.R.2d 16, citing the text [defendant denied ownership of car in which cocaine was found]; *People v. Arias* (1996) 13 C.4th 92, 141, 51 C.R.2d 770, 913 P.2d 980 [in light of eyewitness accounts suggesting that defendant deliberately stabbed murder victim, CALJIC, No. 2.03 was properly given regarding defendant's statement to his mother that he did not mean to stab anyone but did so because he was startled, notwithstanding that statement also included expressions of remorse]; 2 Wigmore (Chadbourn Rev.) §278.)

Of course, consciousness of guilt is not shown by mere slips or errors in a recital of events, "but by fabrications which, like devious alibis, are apparently motivated by fear of detection, or which, like devious explanations of the possession of stolen goods, suggest that there is no honest explanation for incriminating circumstances." (*People v. Albertson* (1944) 23 C.2d 550, 582, 145 P.2d 7 [concurring opinion].)

(2) *Distinction: Plausible Explanation for Falsehoods.* In *People v. Blakeslee* (1969) 2 C.A.3d 831, 82 C.R. 839, 3 Cal. Evidence (4th), Presentation at Trial, §146, defendant was convicted of murdering her mother. On the night of the crime, she gave police a false account of her movements and denied knowledge of her brother's .22 rifle, the suspected (but never located) murder weapon. *Held*, judgment reversed. Defendant's falsehoods may properly have formed the basis for unfavorable inferences against her. (2 C.A.3d 839, citing the text.) "But inferences of what? The refutation of these falsehoods did not directly implicate defendant in the slaying. Rather their refutation merely destroyed defendant's asserted alibi for the time of the crime and rebutted her claimed ignorance of an accessible weapon which could have been used to commit the crime. This negation of a negative (she was not there) does not amount to affirmation of a positive (she did the shooting). Inferences drawn from her tender of a false alibi do not directly support a murder accusation against the defendant. While it is said that a false alibi tends to establish a consciousness of guilt ... , the logical force of this deduction is weakened when there is some plausibility to the defendant's subsequent explanation of the reason for the falsehood. Here, defendant's explanation was that in giving these falsehoods she was trying to protect her brother Michael." (2 C.A.3d 839.) (See *People v. Rankin* (1992) 9 C.A.4th 430, 436, 11 C.R.2d 735 [CALJIC, No. 2.03 should not be given if it appears that false statement was made to protect someone else].)

(3) *Statement at Time Other Than Arrest.* A false statement by the defendant may be found to evidence consciousness of guilt even if it was made at a time other than upon arrest. "The inference of guilt comes from the fact that a falsehood was told in order to mislead the authorities and avoid suspicion, not the time at which the statement was made." (*People v. White* (1995) 35 C.A.4th 758, 772, 41 C.R.2d 510 [statement, made in open court at hearing on preliminary motion, that defendant was not at motel where killing took place and where he was arrested was properly admitted at trial].)

(4) *Civil Cases.* A false exculpatory statement "is evidence of a guilty conscience in the context of criminal cases. The underlying principle is that a false statement is evidence of a declarant's state of mind and demonstrates his knowledge he has committed a wrong. Furthermore, from this consciousness of guilt the jury is entitled to infer other facts bearing on a defendant's guilt. The logic of this principle applies as much in civil cases as it does in criminal prosecutions." (*Donchin v. Guerrero* (1995) 34 C.A.4th 1832, 1841, 41 C.R.2d 192 [citing *People v. Mendoza*, *supra*; defendant landlord's false statement that he did not know his tenant had dogs could be used to infer that he had guilty conscience about dogs and his responsibility for injuries they caused]; see *Fowler v. Seaton* (1964) 61 C.2d 681, 690, 39 C.R. 881, 394 P.2d 697, 1 Cal. Evidence (4th), *Burden of Proof and Presumptions*, §116.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *General Rule.* See *People v. Williams* (2000) 79 C.A.4th 1157, 1167, 1168, 94 C.R.2d 727, citing the text [where defendant voluntarily introduced own exculpatory statement made to police following his arrest for robbery, CALJIC, No. 2.03 was properly given, even though statement was made before he received required *Miranda* advisements; defendant may not introduce own false statement and escape risk that it may be basis for inference of wrongdoing]; *People v. Vu* (2006) 143 C.A.4th 1009, 1029, 1030, 49 C.R.3d 765 [in murder conspiracy case arising from incident in which victim was killed in mistaken belief he was member of rival gang, defendant's conduct displayed consciousness of guilt where, in hours after killing, he told fellow gang member to say that he was with her watching movie at time of killing, where he repeated this story to police, and where he had no plausible explanation for lying; distinguishing *People v. Blakeslee* (1969) 2 C.A.3d 831, 82 C.R. 839, text, p. 815]; cf. *People v. Fritz* (2007) 153 C.A.4th 949, 955, 62 C.R.3d 885 [where defendant was detained outside department store and, after being transported to police station and asked whether he knew his girlfriend had been stealing clothing while inside store, said "no" and further volunteered that he had never stolen anything from store in past, latter statement, which was false, was not admissible to show consciousness of guilt; statement had no relevance except to impeach, and defendant never testified]; CALCRIM, No. 362 [Consciousness of Guilt: False Statements].





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#### c. Attempt To Corrupt Witness or Suppress Evidence.

#### 1. In General.

#### *1 Witkin Cal. Evid. Hearsay § 111*

[§ 111] In General.

An attempt by an accused to corrupt a witness or suppress adverse evidence may be shown. (See *People v. Moore* (1945) 70 C.A.2d 158, 162, 160 P.2d 857 [defendant's cousin, with defendant's authority, promised to reimburse prosecuting witness if he "would ease up a little" on his testimony]; *People v. Wong* (1973) 35 C.A.3d 812, 831, 111 C.R. 314 ["[A]ny act proving or tending to prove an effort or desire on the part of a defendant to obliterate or remove evidence of a crime as by his hiding of the decedent's body, if unexplained, warrants an inference of consciousness of guilt on his part and will be given probative force in connection with other facts as a relevant circumstance tending to show guilt"]; *People v. Cooper* (1991) 53 C.3d 771, 833, 281 C.R. 90, 809 P.2d 865 [CALJIC, No. 2.06 implies that defendant must be aware that items he destroys are evidence in order to show consciousness of guilt; thus there was no requirement to expressly augment instruction to that effect]; *People v. Williams* (1996) 46 C.A.4th 1767, 1780, 54 C.R.2d 521 [CALJIC, No. 2.06 was properly given where police searched defendant's apartment and found certain clothing items worn by defendant during alleged attacks but could not find shoes and shorts worn by him that day; it was reasonable to assume he hid them to thwart efforts to identify him]; *People v. Williams* (1997) 16 C.4th 153, 201, 66 C.R.2d 123, 940 P.2d 710 [evidence of attack by third person on prosecution witness was properly admitted as witness intimidation evidence in light of testimony indicating that attack was authorized by defendant]; 2 Wigmore (Chadbourn Rev.) §278.)

In a *civil* case, evidence of spoliation or suppression permits an inference of consciousness of the weakness of the whole case. (See 2 Wigmore (Chadbourn Rev.) §278; 2 McCormick 5th, §265; *Thor v. Boska* (1974) 38 C.A.3d 558, 567, 113 C.R. 296 [quoting Wigmore and McCormick].) In *Thor*, defendant doctor, sued for malpractice, was unable to produce his original clinical records of treatment of plaintiff. He obtained a ruling prohibiting reference to the missing records by a partial admission of negligence. *Held*, judgment for defendant reversed; the effect of the evidence of spoliation could not be neutralized by admitting one issue out of several.

In California, there was formerly a statutory presumption that evidence suppressed was adverse. Under the Evidence Code, suppression may be considered by the jury in weighing the evidence. (*Ev.C.* 413, 3 *Cal. Evidence* (4th), *Presentation at Trial*, §115.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See CALCRIM, No. 371 [Consciousness of Guilt: Suppression and Fabrication of Evidence]; 2 McCormick 6th, §265.

1 Witkin Cal. Evid. Hearsay § 111

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#### 2. Threats.

#### 1 Witkin Cal. Evid. Hearsay § 112

[§ 112] Threats.

"A threat made by a defendant against a prospective prosecution witness whom he expects to testify against him, with the apparent intention of intimidating the witness, is proper evidence; efforts of an accused to suppress testimony against himself indicate a consciousness of guilt." (*People v. Slocum* (1975) 52 C.A.3d 867, 887, 125 C.R. 442 [threat was admissible even though no indictment had issued when defendant made it; at time, he knew of ongoing investigation probing his Medi-Cal billing practices]; see *People v. Manson* (1976) 61 C.A.3d 102, 156, 157, 132 C.R. 265, citing the text; *People v. Hamilton* (1985) 41 C.3d 408, 428, 221 C.R. 902, 710 P.2d 981 [defendant wrote letter from jail, knowing that authorities would copy it, stating that third person had proposed to "take out" witness, two prosecutors, and defense attorney if defendant was convicted; admissible as attempt to intimidate persons named in letter].)

A threat made *after the witness has testified* is distinguishable. Threats against a prospective witness are admitted on the theory that the defendant is attempting to suppress testimony. If the witness has already testified, no such purpose could be achieved, and the evidence of a threat--highly prejudicial and not supporting an inference of consciousness of guilt--should be excluded. (*People v. Cruz* (1968) 260 C.A.2d 55, 60, 66 C.R. 772 [noting view of some courts that evidence is admissible if witness is still subject to recall, and therefore could be intimidated]; *People v. Foster* (1988) 201 C.A.3d 20, 25, 246 C.R. 855 [citing *Cruz*; evidence of threatening gesture was admissible because witness was subject to recall].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER VI - Hearsay

### III. EXCEPTIONS TO THE RULE

#### B. Admission of Party.

#### 4. Other Admissions by Conduct.

#### c. Attempt To Corrupt Witness or Suppress Evidence.

#### 3. Attempt by Unauthorized Person.

#### 1 *Witkin Cal. Evid. Hearsay* § 113

[§ 113] Attempt by Unauthorized Person.

An attempt to corrupt a witness or suppress evidence constitutes an admission only where the attempt is made by the defendant or someone with authority to represent the defendant. In *People v. Weiss* (1958) 50 C.2d 535, 553, 327 P.2d 527, an abortion trial, the prosecution examined the abortee witness about a purported telephone call from someone describing himself as defendant's attorney, but in no way identified by the witness as such. *Held*, this was inadmissible hearsay. "If the attempt is made by a third person, not in the presence of a defendant or shown to have been authorized by him, it should at once be suspect as a mere purporting attempt to suppress evidence and in truth an endeavor to prejudice the defendant before the jury in a way which he cannot possibly rebut satisfactorily because he does not know the true identity of the pretender." (50 C.2d 554.) (See *People v. Perez* (1959) 169 C.A.2d 473, 477, 337 P.2d 539; *People v. Hannon* (1977) 19 C.3d 588, 599, 600, 138 C.R. 885, 564 P.2d 1203 ["At the very most the record merely supports the conclusion that some unidentified attorney ordered Brown not to speak with representatives of the People before testifying at trial"]; 79 A.L.R.3d 1156 [authorized and unauthorized persons].)

In *People v. Terry* (1962) 57 C.2d 538, 21 C.R. 185, 370 P.2d 985, the prosecution introduced a telegram to defendant W from the wife of the brother of defendant T's wife, reading: "Does your cigarette taste different, lately? Switch from hots to Kools." The prosecution's theory was that defendant T had threatened W if he became a witness against him, and that this telegram was corroboration of T's alleged threat. *Held*, it was inadmissible, for there was no showing--other than the fact of relationship--that the sender was authorized by the defendant to make the attempt to suppress. (57 C.2d 565.)

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#### d. Employer's Precautionary Rules.

#### 1. Operating Rules of Carrier.

#### *1 Witkin Cal. Evid. Hearsay § 114*

[§ 114] Operating Rules of Carrier.

When a railroad or other carrier has adopted precautionary rules or regulations to avoid injury, these afford some evidence of the standard of care believed appropriate. Accordingly, if a rule is violated, the plaintiff in a negligence action may introduce it as an implied admission. (See *Simon v. San Francisco* (1947) 79 C.A.2d 590, 597, 180 P.2d 393 ["the jury could have found that the motorman violated the company rules, and it was entitled to consider that fact in determining whether the motorman's conduct constituted negligence"]; *Powell v. Pacific Elec. Ry. Co.* (1950) 35 C.2d 40, 46, 216 P.2d 448 ["The rule was properly admitted in evidence as bearing on the standard of care respondent thought appropriate to insure the safety of others at its track crossings"]; *Davis v. Johnson* (1954) 128 C.A.2d 466, 472, 275 P.2d 563 ["It is well settled that such rules are admissible in evidence and their violation is a circumstance to be considered in determining negligence"]; *Herrera v. Southern Pac. Co.* (1957) 155 C.A.2d 781, 788, 318 P.2d 784 [company-imposed maximum speed of 35 miles for train is admission that higher speed is improper in that locality]; *Hartford Acc. & Indem. Co. v. Bank of America* (1963) 220 C.A.2d 545, 561, 34 C.R. 23; *MacColl v. Los Angeles Metropolitan Transit Authority* (1966) 239 C.A.2d 302, 308, 48 C.R. 662; 2 Wigmore (Chadbourn Rev.) §282; 50 A.L.R.2d 16 [admissibility of defendant's rules in negligence action]; 1963 A.S. 390.)

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## 2. Safety Rules.

1 *Witkin Cal. Evid. Hearsay* § 115

[§ 115] Safety Rules.

In *Dillenbeck v. Los Angeles* (1968) 69 C.2d 472, 72 C.R. 321, 446 P.2d 129, decedent was killed in an automobile collision with a car driven by Officer W of the Los Angeles Police Department in the course of his employment. The accident took place at an intersection, at 2 p.m., on a rainy day. The officer had both his red lights and siren operating, but decedent had his car windows closed, windshield wipers operating, and radio playing. Plaintiffs' witnesses testified that the officer crossed the intersection with the light red, and that his speed was 40-60 miles per hour in a posted limit of 35 miles. The verdict was for the city. On plaintiffs' appeal, the sole issue was the judge's refusal to admit in evidence "Daily Training Bulletins" issued by the police department. One of them stated that an officer is seldom justified in traveling at a speed greater than the district speed, another that an emergency vehicle proceeding against a traffic control device should decelerate to about 15 miles per hour. There was evidence that Officer W violated both rules. *Held*, exclusion was reversible error.

(a) *Safety rules as substantive evidence of defendant's negligence.* "The safety rules of an employer are thus admissible as evidence that due care requires the course of conduct prescribed in the rule. Such rules implicitly represent an informed judgment as to the feasibility of certain precautions without undue frustration of the goals of the particular enterprise." (69 C.2d 478, citing the text.) Although hearsay, they are within the exception for admissions. (69 C.2d 478, citing the text.) The opinion rule is not an objection because the safety rules are the equivalent of expert testimony--the defendant is well qualified to give it and the occasion is one which calls for it. (69 C.2d 478, footnote 2.) They may even be admissible as nonhearsay on the theory that failure to obey the employer's rule, like failure to comply with custom, is in itself negligence. (69 C.2d 481.)

The city's contention that the bulletins were only informative and instructive, not rules within the meaning of the employer's safety rule doctrine, was held untenable. A "rule" need not be a detailed unequivocal directive; it may be a discretionary guideline, if it indicates the employer's reconciliation of the conflict between maximum efficiency in operations and maximum safety to the public. (69 C.2d 479.)

The further contention that they should be excluded for the policy reason that the employer might not establish safety rules if it feared they would be used against it was likewise rejected. Unlike subsequent repairs (1 *Cal. Evidence* (4th), *Circumstantial Evidence*, §163), safety rules almost certainly serve to minimize the employer's total tort liability by controlling employee behavior. (69 C.2d 481, footnote 5.) The employer may, of course, attempt to rebut by explaining that the rule is not an opinion on due care, but is issued solely from an excess of caution, or that it does not

apply in a particular situation. (69 C.2d 480.)

(b) *Cross-examination of officer on knowledge of rules.* Plaintiffs should have been permitted to prove that Officer W, by reason of extensive training and experience, possessed superior knowledge of risks. Cross-examination showing his knowledge of the rules would have justified an instruction that the jury should measure his conduct according to that of a reasonably prudent man possessing similar knowledge. (69 C.2d 482.) This would be like charging a doctor with the standard of a reasonably prudent person with the same training and knowledge. (69 C.2d 483, footnote 10.) Alternatively, if W had indicated ignorance of the rules, this might be evidence of negligence--unawareness of what an officer should know. (69 C.2d 483.)

(c) *Safety rules as substantive evidence of lack of contributory negligence.* Whether decedent was contributorily negligent in proceeding across the intersection depended on whether a reasonably prudent person would have heard the siren and remained stationary despite the green light. The bulletins contained statements relative to whether a person in a closed car with the radio playing could have heard the siren. These were implied admissions by the city's experts on the operation and effect of sirens. (69 C.2d 484.) (See *Grudt v. Los Angeles* (1970) 2 C.3d 575, 588, 86 C.R. 465, 468 P.2d 825 [error to exclude police manual prescribing officers' use of firearms; rules were admissible on negligence issue in wrongful death action]; 2 Wigmore (Chadbourn Rev.) §282; 58 A.L.R.3d 148 [safety codes or standards]; 82 A.L.R.3d 1285 [safety rules].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### 3. Distinction: Labor Code Regulations.

#### *1 Witkin Cal. Evid. Hearsay § 116*

[§ 116] Distinction: Labor Code Regulations.

The provisions of Division 5 of the Labor Code (*Lab.C. 6300 et seq.*) and occupational safety and health standards and orders promulgated under the Code were intended to be applicable in proceedings against employers "for the exclusive purpose of maintaining and enforcing employee safety." The issuance of, or failure to issue, a citation *may not be considered or admitted into evidence* in any personal injury or wrongful death action, except between an employer and its employee. (*Lab.C. 6304.5.*)

The constitutionality of this section was upheld against due process and equal protection challenges in *Spencer v. G. A. MacDonald Const. Co.* (1976) 63 C.A.3d 836, 134 C.R. 78. Violation of a safety order is negligence per se; the plaintiff need not prove common law negligence. (63 C.A.3d 854.) But the Legislature, in enacting *Lab.C. 6304.5*, restricted admissibility of this evidence to actions between an employee and the party most directly concerned with the employee's safety (the employer). In other actions (e.g., here, a subcontractor's employee suing the general contractor), it is proper to require that the plaintiff prove the case in the same manner as any other personal injury plaintiff. (63 C.A.3d 855.)

Under a 1999 amendment of *Lab.C. 6304.5*, however, *Ev.C. 452* (optional judicial notice; see *1 Cal. Evidence (4th)*, *Judicial Notice*, §16 et seq.) and *Ev.C. 669* (presumption of failure to exercise due care; see *1 Cal. Evidence (4th)*, *Burden of Proof and Presumptions*, §95) "apply to this division and to occupational safety and health standards adopted under this division in the same manner as any other statute, ordinance, or regulation."

**SUPPLEMENT:** [This section is current through the latest supplement]

Following the 1999 amendments of *Lab.C. 6304.5*, "plaintiffs may use Cal-OSHA provisions to show a duty or standard of care to the same extent as any other regulation or statute, whether the defendant is their employer or a third party. The lone exception arises when the state is the defendant based on actions it took or failed to take in its regulatory capacity; in such cases, Cal-OSHA provisions remain inadmissible to show liability based on breach of the statutory duty to inspect worksites and enforce safety rules." (*Elsner v. Uveges* (2004) 34 C.4th 915, 935, 936, 22 C.R.3d 530, 102 P.3d 915.) However, the amendments should not be applied retroactively. To do so would change the legal consequences of a defendant's past conduct by making the defendant liable for conduct that might have satisfied the applicable 1998 common law standard of care but not specific Cal-OSHA provisions. Nothing in the text of the amendments or their legislative history indicates that the Legislature intended retroactive application. (34 C.4th 938,



939.)



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## e. Contradictions in Testimony.

*1 Witkin Cal. Evid. Hearsay § 117*

## [§ 117] Contradictions in Testimony.

In some jurisdictions, the deliberate testimony of a party to a fact may be regarded as the equivalent of a judicial admission to which an opponent may hold the testifying party in the same case. (See 2 McCormick 5th, §258; 9 Wigmore (Chadbourn Rev.) §2594a; but see *Trembley v. Benedetti* (1955) 134 C.A.2d 553, 555, 286 P.2d 426 [even if rule applies in California, no admission results from testimony in *prior case* that opponent then challenged and now insists is conclusive]; on testimony in prior trial, see 42 Cal. L. Rev. 176.)

This view has been criticized by Wigmore (see 9 Wigmore (Chadbourn Rev.) §2594a, p. 844), and several California cases take the contrary position. The opinions recognize that contradictions in testimony may be a result of faulty observation or memory, or confusion and perplexity on the stand. As the court said in *Weingetz v. Cheverton* (1951) 102 C.A.2d 67, 78, 226 P.2d 742 (quoting Wigmore): "Testimony in court is an elusive matter of mental operations. It is the culmination of much talk and reflection and memory-stirring between all concerned. It is full of surprises at the trial. The truth of the case depends upon a comparison of what all the witnesses say and all the circumstances indicate. A rule which binds a party to a particular statement uttered on the stand becomes an artificial rule. It is out of place in dealing with testimony. Let the judge test each case by itself."

To similar effect is *Frost v. Los Angeles Ry. Co.* (1913) 165 C. 365, 371, 132 P. 442: "A party who testifies in his own behalf does not do so at the peril of having every slip of his tongue taken as conclusively true, if his inadvertently used words causes him to appear to have made a statement which is not true, but is against his own interest in the case. It is the province of the jury to observe the witness, note his manner of speech, and consider his testimony as a whole in connection with other evidence, and it is for it to determine therefrom whether he stated the facts as he intended and understood them to be, or whether he unintentionally used words not expressing his real meaning in any particular utterances he may have made." (See *Richey v. Pedersen* (1950) 100 C.A.2d 512, 518, 224 P.2d 100; 2 McCormick 5th, §258.)

In an extreme case, however, *false testimony* may give rise to an implied admission. In *People v. Wayne* (1953) 41 C.2d 814, 264 P.2d 547, defendant, charged with soliciting M to offer a bribe to the police, testified to a peculiar, unbelievable explanation of a claimed loan to M. *Held*, this afforded an inference against him. Disbelief of evidence is of course not the equivalent of affirmative evidence to the contrary; e.g., disbelief of a defendant's testimony of no negligence cannot supply proof that he was negligent. "But where a material fact is established by evidence and it is shown that a defendant's testimony as to that fact was wilfully untrue, this circumstance not only furnishes a ground for disbelieving other testimony of this defendant ... but also tends to show consciousness of guilt or liability on his part and

has probative force in connection with other evidence on the issue of such guilt or liability. Such false testimony is in the nature of an admission from which with other evidence guilt or liability may be inferred." (41 C.2d 823.)

The court added this caution: "[O]nly where the false statement or testimony is intentional rather than merely mistaken and where such statement or testimony suggests that defendant has no true exculpatory explanation can it be considered as an admission of guilt. ... Here defendant did not simply deny his guilt; he ventured upon an explanation so unusual that the triers of fact could conclude that it was an intentional fabrication indicating consciousness of guilt and the absence of any true exculpatory explanation." (41 C.2d 823.) (See *People v. Amador* (1970) 8 C.A.3d 788, 791, 87 C.R. 662 [quoting *Wayne*].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Duran* (2001) 94 C.A.4th 923, 932, 114 C.R.2d 595 [in prosecution for manufacture of methamphetamine, defendant's implausible explanation for his fingerprints on methamphetamine lab equipment and for his presence at lab indicated consciousness of guilt and supported his conviction; relying on *People v. Wayne* (1953) 41 C.2d 814, 264 P.2d 547, text, p. 822]; 2 McCormick 6th, §258. *West's Key Number Digest*, Evidence k.211



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## f. Miscellaneous Examples.

1 *Witkin Cal. Evid. Hearsay* § 118

## [§ 118] Miscellaneous Examples.

(1) *Allowing Bail Forfeiture.* Allowing bail to be forfeited, like flight of an accused (*supra*, §107), indicates a consciousness of guilt. (See *People v. Robinson* (1948) 87 C.A.2d 772, 775, 197 P.2d 776; 2 Wigmore (Chadbourn Rev.) §276.) And, possibly, where a defendant is charged with manslaughter arising from a motor vehicle accident, and forfeits a substantial bail, this conduct would be admissible against the defendant in a subsequent civil action for wrongful death, just as the flight of a hit-and-run driver is admitted. (See suggestion, 41 Cal. L. Rev. 338.) But forfeiture of a small amount posted as bail for a traffic violation affords no adverse inference in a subsequent negligence action. It is common practice to handle traffic offenses in this manner without trial as a convenience to all parties. (See 41 Cal. L. Rev. 337; 1951 A.S. 850.)

(2) *Disposing of Property Without Consideration.* Disposal of property without consideration, during or immediately prior to litigation, is evidence of the transferor's belief that he or she may be liable. (See 2 Wigmore (Chadbourn Rev.) §282; 38 A.L.R.3d 996.)

(3) *Flight From Scene of Accident.* In *Brooks v. E. J. Willig Truck Trans. Co.* (1953) 40 C.2d 669, 255 P.2d 802, the rule that flight indicates consciousness of guilt (*supra*, §107) was applied in a negligence case. Defendant truck driver hit decedent and drove on without stopping. The court approved an instruction that driving away from the scene might be considered a circumstance showing consciousness of responsibility for the accident and death. "We have found no case in this state where an instruction of this type has been given in a civil action, but it has been held in other jurisdictions in negligence cases that failure to stop and render aid is some evidence of a consciousness of responsibility for an accident. ... Such an inference appears to be a reasonable one." (40 C.2d 676.) (See *Karl v. C. A. Reed Lumber Co.* (1969) 275 C.A.2d 358, 362, 79 C.R. 852 [failure to instruct on duty to stop and render aid was error]; 41 Cal. L. Rev. 338 [listing cases from other jurisdictions].)

(4) *Noncooperation With Child Welfare Services Case Plan.* A parent's or guardian's failure to cooperate, except for good cause, with the provisions of a child welfare services case plan may be used as evidence, if relevant, in a hearing under Welf.C. 366.21, 366.22, or 388, and at a jurisdictional or dispositional hearing on a petition under Welf.C. 300, 342, or 387. (Ev.C. 1228.1(b).) However, neither the parent's or guardian's signature on the case plan, nor the acceptance of services prescribed in the plan, constitutes an admission of guilt, and neither may be used as evidence against the parent or guardian in a court of law. (Ev.C. 1228.1(a); on child welfare services case plans (reunification plans), see 10 Summary (9th), *Parent and Child*, §703.)

(5) *Offer To Sell Property*. An owner's offer to sell, or listing of property at a certain price, may be proved as an admission of its value at or near the time of offer or listing. (See *Hull v. Sheehan* (1952) 108 C.A.2d 804, 239 P.2d 704.)

(6) *Possession of False Identification*. Possession of a false driver's license and registration report indicates a scheme to avoid apprehension and supports an inference of consciousness of guilt. (See *People v. Ott* (1978) 84 C.A.3d 118, 127, 148 C.R. 479.)

(7) *Possession or Concealment of Stolen Property*. The possession or concealment of recently stolen goods without a satisfactory explanation will support an inference of knowledge that they were stolen. (See *People v. McClain* (1931) 115 C.A. 512, 515, 1 P.2d 1023 [concealment]; *People v. Golembiewski* (1938) 25 C.A.2d 115, 117, 76 P.2d 717 [possession]; *People v. McFarland* (1962) 58 C.2d 748, 754, 26 C.R. 473, 376 P.2d 449; *People v. Estrada* (1965) 234 C.A.2d 136, 157, 44 C.R. 165; *People v. Du Bont* (1965) 235 C.A.2d 844, 848, 45 C.R. 717; 1A Wigmore (Tillers Rev.) §152; 9 Wigmore (Chadbourn Rev.) §2513.)

(8) *Refusal To Take Intoxication Test*. Refusal of a defendant charged with drunk driving to take an intoxication test has been held to constitute an implied admission of guilt. (See *People v. McGinnis* (1953) 123 C.A.2d Supp. 945, 267 P.2d 458; *People v. Municipal Court (Gonzales)* (1982) 137 C.A.3d 114, 117, 186 C.R. 716; 42 Cal. L. Rev. 697; but see *People v. Zavala* (1966) 239 C.A.2d 732, 742, 49 C.R. 129 [no admission from refusal to take Nalline test for narcotics; statutory right to refuse]; on statutory authorization for using refusal to take blood-alcohol test against defendant, see *Veh.C. 23157(a)(4)*; on self-incrimination issue, see 2 *Cal. Evidence* (4th), *Witnesses*, §427.)

(9) *Refusal To Take Voice Identification Test*. Refusal to take a voice identification test is similar to escape from custody, false alibi, flight, suppression of evidence, and failure to respond to accusatory statements when not in police custody as indicating consciousness of guilt. (See *People v. Ellis* (1966) 65 C.2d 529, 536, 55 C.R. 385, 421 P.2d 393, 2 *Cal. Evidence* (4th), *Witnesses*, §389.)

(10) *Signature on Car Rental Invoice*. In *People v. Maki* (1985) 39 C.3d 707, 217 C.R. 676, 704 P.2d 743, defendant's probation was revoked on a finding that he had traveled to Chicago without permission from his probation officer. The principal evidence against him was a car rental invoice showing rental of a car at Chicago's O'Hare Airport, found in a search of defendant's home. The judge concluded that defendant, by signing the invoice, adopted its contents. *Held*, the signature alone, without testimony regarding preparation of the document or its purpose, was insufficient; *there would have been an adoptive admission if he had read the document and then signed it.* (39 C.3d 712.) (For the holding affirming the order on the ground that revocation could be based on otherwise inadmissible hearsay when accompanied by reasonable indicia of reliability, see 1 *Cal. Evidence* (4th), *Introduction*, §32.)

(11) *Threatening With Gun*. Pointing a gun and uttering threats or warnings of its intended use may constitute an admission by conduct that the gun is loaded. (See *People v. Mearse* (1949) 93 C.A.2d 834, 837, 209 P.2d 960; *People v. Rodriguez* (1999) 20 C.4th 1, 12, 82 C.R.2d 413, 971 P.2d 618 [defendant's act of putting gun to victim's chin and warning him to keep his mouth shut or "I could do to you what I did to them" could reasonably be interpreted by jury as admission that gun was loaded].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(4) *Noncooperation With Child Welfare Services Case Plan*.

*Cross-Reference:* 10 *Summary* (10th), *Parent and Child*, §642 et seq.(7a) (New) *Refusal To Remove Sunglasses for Purposes of Identification*. A defendant's refusal to remove sunglasses so that a witness may better identify him or her may show consciousness of guilt. (See *People v. Ramirez* (2006) 39 C.4th 398, 456, 46 C.R.3d 677, 139 P.3d 64.)(12) (New) *Attempting Suicide*. Evidence that the defendant attempted suicide after committing the alleged crime or being arrested may be admitted to show consciousness of guilt. (See *People v. Butler* (1970) 12 C.A.3d 189, 193, 90 C.R. 497; 73 A.L.R.5th 615.)



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#### B. Admission of Party.

#### 5. Vicarious Admissions.

##### a. Persons Authorized.

#### 1. Theory and Test of Admissibility.

#### *1 Witkin Cal. Evid. Hearsay § 119*

[§ 119] Theory and Test of Admissibility.

The admissions of an agent or employee who is a party to the action are, of course, received in evidence against that party. But the introduction of these statements against the principal or employer raises problems of substantive law as well as evidence. (See *Markley v. Beagle* (1967) 66 C.2d 951, 957, 59 C.R. 809, 429 P.2d 129, *infra*, §128; *Labis v. Stopper* (1970) 11 C.A.3d 1003, 89 C.R. 926; 2 McCormick 5th, §259; 29A Am.Jur.2d (1994 ed.), *Evidence* §813 et seq.; 9 U.C. Davis L. Rev. 89 [employee admissions in negligence cases]; 19 *Hastings L. J.* 1395 [*Markley*]; Rest.2d, Agency, Appendix, Reporter's Notes to §§284, 285, 286; 1963 A.S. 291; 27 A.L.R.3d 966 [admission of fault by agent on issue of principal's secondary liability].)

The general theory is set forth in *Miller v. Anson-Smith Const. Co.* (1960) 185 C.A.2d 161, 166, 8 C.R. 131, quoting Wigmore: "So, whatever is said by an agent, either in the making of a contract for his principal, or at the time, and accompanying the performance of any act, within the scope of his authority, having relation to, and connected with, and in the course of the particular contract or transaction in which he is then engaged, is, in legal effect, said by his principal. ... But declarations or admissions by an agent, of his own authority, and not accompanying the making of a contract, or the doing of an act, in behalf of his principal, nor made at the time he is engaged in the transaction to which they refer, are not binding upon his principal, not being part of the 'res gestae,' and are not admissible in evidence, but come within the general rule of law, excluding hearsay evidence; being but an account or statement by an agent of what has passed or been done or omitted to be done--not a part of the transaction, but only statements or admissions respecting it." (See *Marshall v. Marshall* (1965) 232 C.A.2d 232, 257, 42 C.R. 686, citing the text; 1963 A.S. 291; on scope of agent's authority, see *infra*, §121; for limited rule applied to statements admitting tort liability, see *infra*, §122; for rule applied to statements admitting contract liability, see *infra*, §123; for rule applied to statements admitting other types of liability, see *infra*, §124.)

Partners and joint adventurers are, for certain purposes, mutual agents, and the rule governing admissions of agents also applies to declarations of a partner within the scope of the partnership. (See *Swanson v. Siem* (1932) 124 C.A. 519, 525, 12 P.2d 1053; 6 U.L.A. (Master Ed.), p. 438; 2 McCormick 5th, §259; 1 U.C.L.A. L. Rev. 25.)

Of course, the declarations, to be admissible, must have been made during the existence of the relationship. (*Taylor v. Bernheim* (1922) 58 C.A. 404, 409, 209 P. 55 [declarations made after termination of agency not admissible]; *Taylor v. Socony Mobil Oil Co.* (1966) 242 C.A.2d 832, 834, 51 C.R. 764, citing the text.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Thompson v. Los Angeles* (2006) 142 C.A.4th 154, 169, 47 C.R.3d 702 [in civil rights action stemming from injuries inflicted on plaintiff by police dog, trial judge properly excluded report by retired judge on use of force by deputy sheriffs, one chapter of which addressed canine unit of sheriff's department; judge did not occupy high-ranking position in county hierarchy, nor did terms of his retention include authorization to speak on county's behalf]; 2 McCormick 6th, §259. *West's Key Number Digest*, Evidence k.237 et seq.



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#### 5. Vicarious Admissions.

##### a. Persons Authorized.

#### 2. Independent Proof of Authority.

*1 Witkin Cal. Evid. Hearsay § 120*

[§ 120] Independent Proof of Authority.

The agent's declarations cannot prove the *fact* of agency or authority; the existence of the relationship must be shown independently, e.g., by *testimony* of the agent or another. (See *Dooley v. West Amer. Commercial Ins. Co. (1933) 133 C.A. 58, 62, 23 P.2d 766*; *People v. Frangadakis (1960) 184 C.A.2d 540, 549, 7 C.R. 776* [circumstantial evidence]; *Marshall v. Marshall (1965) 232 C.A.2d 232, 257, 42 C.R. 686*; *Younger v. State Bar (1974) 12 C.3d 274, 285, 286, 113 C.R. 829, 522 P.2d 5* [circumstantial evidence used to establish that "cappers" were working to solicit professional employment for attorneys]; *Rochlis v. Walt Disney Co. (1993) 19 C.A.4th 201, 217, 23 C.R.2d 793* [in defamation action, statement about plaintiff was inadmissible where no foundation was laid showing that declarant was authorized to speak on behalf of defendants]; *Cruey v. Gannett Co. (1998) 64 C.A.4th 356, 366, 76 C.R.2d 670* [citing *O'Mary v. Mitsubishi Electronics America (1997) 59 C.A.4th 563, 69 C.R.2d 389, infra, §124*; whether statement is authorized admission is to be determined under substantive law of agency]; 2 McCormick 5th, §259; 29A *Am.Jur.2d* (1994 ed.), *Evidence* §816; 5 *So. Cal. L. Rev.* 334; 20 *Cal. L. Rev.* 656; 21 *Cal. L. Rev.* 620; 2 *Summary* (9th), *Agency and Employment*, §38.)

*Ev.C. 1222(b)* restates this basic condition: The agent's declaration may be offered "either after admission of evidence sufficient to sustain a finding of such authority or, in the court's discretion as to the order of proof, subject to the admission of such evidence."

In practice, however, this rule is subject to some evasion: (1) The agent's statement may be used to *impeach* testimony the agent gave to the effect that he or she was not an agent. (*Carter v. Carr (1934) 139 C.A. 15, 25, 33 P.2d 852.*) (2) The agent's statement may perhaps be offered as affirmative *circumstantial evidence*, e.g., to show that the other party dealt with him or her as an agent, or to show the agent's own intent to act for the principal. (See *Carter v. Carr, supra*, 139 C.A. 24; 2 McCormick 5th, §259.) (On whether an agent's spontaneous exclamation can be used to prove agency, see 47 *Cal. L. Rev.* 939; 10 *Hastings L. J.* 219.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 2 McCormick 6th, §259.

*Cross-Reference:* 3 *Summary* (10th), *Agency and Employment*, §94.





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## CHAPTER VI - Hearsay

## III. EXCEPTIONS TO THE RULE

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  - a. Persons Authorized.
  - 3. Scope of Authority.

1 *Witkin Cal. Evid. Hearsay* § 121

[§ 121] Scope of Authority.

(1) *Rejection of Original Uniform Rule Extension.* Some writers have contended that the substantive law authority approach is wrong, and that, from an evidentiary standpoint, the agent's declarations against the employer's interest are more likely to be trustworthy than the agent's testimony on the stand. Accordingly, the Model Code of Evidence and the Uniform Rules of Evidence dispensed with the condition of authority, and made admissible any agent's statement if it "concerned a matter within the scope of an agency or employment," e.g., driving a car. (Model C., Rule 508(a); see 2 McCormick 5th, §259; 2 U.C.L.A. L. Rev. 70; 1962 A.S. 348; 1963 A.S. 291.) *Ev.C.* 1222, however, retained the traditional condition; the hearsay exception is only for a statement "made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement." (See *Crawford v. Sacramento* (1966) 239 C.A.2d 791, 800, 49 C.R. 115.)

(2) *Statements Directly Authorized.* In the infrequent case in which the particular oral or written statement was made at the express direction or express or implied authorization of the principal, it is in practical effect the declaration of the principal, and is received as the principal's admission. (See *Guberman v. Weiner* (1935) 10 C.A.2d 401, 404, 51 P.2d 1141 [employee-driver's report to insurance carrier made by direction of employer]; Rest.2d, Agency §286; Model C., Rule 507(a).)

(3) *Statements Within Scope of Agent's Authority.* In most cases, the particular statement is not made under express direction or authorization of the principal. The test then, as laid down in the Agency Restatement, is the same as that governing substantive liability for the agent's acts: The principal is liable (and the statement is admissible against the principal) if the statement was within the scope of the agency or authority, i.e., if the agent had express or implied authority to make that kind of statement for the principal. (See Law Rev. Com. Comment to *Ev.C.* 1222; *O'Mary v. Mitsubishi Electronics America* (1997) 59 C.A.4th 563, 572, 573, 69 C.R.2d 389, *infra*, §124; 2 McCormick 5th, §259; Rest.2d, Agency §§286, 288; 60 Harv. L. Rev. 976; *infra*, §122 et seq.; on authority of attorney, see 1 *Cal. Proc.* (4th), Attorneys, §269 et seq.; 2 McCormick 5th, §259.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Rejection of Original Uniform Rule Extension.* See 2 McCormick 6th, §259.

(3) *Statements Within Scope of Agent's Authority.* See *O'Neill v. Novartis Consumer Health* (2007) 147 C.A.4th 1388, 1403, 55 C.R.3d 551 [in products liability action against pharmaceutical manufacturer, trial judge did not err in

refusing to admit, as authorized admission, minutes of meetings that were signed by director of regulatory affairs for one of defendant's predecessors; no evidence of director's authority to speak for company was presented, and his title alone was insufficient to establish that he had authority]; 2 McCormick 6th, §259. *West's Key Number Digest*, Evidence k.242 et seq.



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## 4. Statement Admitting Tort Liability.

1 *Witkin Cal. Evid. Hearsay* § 122

## [§ 122] Statement Admitting Tort Liability.

The most numerous cases on vicarious admissions are those in which the statements of an agent or employee admit negligence or other tort liability. The substantive law test distinguishes between authority to *do acts* and authority to *make statements* (see *supra*, §121). The employee-driver of a car, mechanic, manager of a store, etc., is employed and authorized to drive the car, operate the machine, or supervise the store business, etc., and not to negotiate or settle claims, or make statements on tort liability. Hence, the cases usually hold the ordinary agent's admissions not competent evidence against the employer. (See *Luman v. Golden Ancient Channel Mining Co.* (1903) 140 C. 700, 709, 74 P. 307 [declaration of mine superintendent as to condition of mine machinery]; *Shaver v. United Parcel Service* (1928) 90 C.A. 764, 770, 266 P. 606; *Hollander v. Wilson Estate Co.* (1932) 214 C. 582, 586, 7 P.2d 177 [elevator operator, hired only to run elevator, told witnesses that it was in bad repair]; *Dillon v. Wallace* (1957) 148 C.A.2d 447, 452, 306 P.2d 1044 [store manager admitted fault in neglecting slippery floor]; *Souza v. Pratico* (1966) 245 C.A.2d 651, 664, 54 C.R. 159, quoting the text [hod carrier for masonry subcontractor made statement to doctor indicating negligence of his employer]; *Markley v. Beagle* (1967) 66 C.2d 951, 957, 59 C.R. 809, 429 P.2d 129, *infra*, §128.)

A few cases, seemingly *contra*, have been explained on the theory that an agent high in the "hierarchy," such as a corporate officer, can make binding declarations. (See *Shields v. Oxnard Harbor Dist.* (1941) 46 C.A.2d 477, 488, 116 P.2d 121 [general manager]; *Johnson v. Bimini Hot Springs* (1943) 56 C.A.2d 892, 902, 133 P.2d 650 [declarations of assistant manager and assistant secretary of defendant corporation as to slippery condition of floor].) In *Crawford v. Sacramento* (1966) 239 C.A.2d 791, 800, 49 C.R. 115, a wrongful death action, a statement by a hospital intern regarding use of an anesthetic on the decedent was held inadmissible because the intern was neither present during the administration of the drug nor high enough in the hospital hierarchy to speak for the hospital.

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## 5. Statement Admitting Contract Liability.

*1 Witkin Cal. Evid. Hearsay § 123*

## [§ 123] Statement Admitting Contract Liability.

The analysis employed in tort liability cases (*supra*, §122) is also used where contract liability is involved. Thus, in *Handley v. Guasco* (1958) 165 C.A.2d 703, 708, 332 P.2d 354, defendant store owners advised plaintiffs that W, a realtor, was in charge of leasing. Plaintiffs delivered written proposals to W, who thereafter told them that both defendants had signed and were using the signed agreements to process a loan. W later destroyed the writings, and his statement was the only evidence of defendant husband's signing. *Held*, it was admissible. Distinguishing *Dillon v. Wallace* (1957) 148 C.A.2d 447, 306 P.2d 1044, *supra*, §122, the court said that, although W had no authority to bind defendants on a contract, he did have authority to conduct the negotiations for a lease; hence, his statement in explanation of his failure to return the signed contracts to plaintiffs was within the scope of his agency.

In *Miller v. Anson-Smith Const. Co.* (1960) 185 C.A.2d 161, 8 C.R. 131, plaintiff painting subcontractor sued defendant general contractor for work done. At the time the job was 98% complete, plaintiff and defendant became engaged in a dispute over progress payments and character of the performance, and the work was finished by others. But at that time, defendant's general superintendent, who supervised the job and had power to approve or reject the work, wrote a letter of recommendation addressed "To Whom It May Concern," in which he stated that plaintiff had performed this particular work to the entire satisfaction of everyone. *Held*, the letter was properly received as an admission of an authorized agent of defendant principal. The fact that it was contained in a letter of recommendation was immaterial; "the issue is not whether Wright had the authority to write the letter, but rather whether or not Wright had the authority to make a statement as to the quality of the work performed by the plaintiff." (185 C.A.2d 166.)

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## 6. Other Statements.

*1 Witkin Cal. Evid. Hearsay § 124*

## [§ 124] Other Statements.

In *People v. Frangadakis* (1960) 184 C.A.2d 540, 7 C.R. 776, an action was brought to abate defendants' restaurant as a public nuisance for selling liquor without a license. Conversations between enforcement agents and the doorman and waitresses, in the course of which liquor was purchased and served, were held properly admitted after the following proof of agency (employment) and authority: In the presence of defendants, the doorman collected admission fees and deposited them in the cash register; the doorman took money for liquor and withdrew money from the cash register; the waitresses took and filled liquor orders at the bar.

In *W. T. Grant Co. v. Superior Court* (1972) 23 C.A.3d 284, 287, 100 C.R. 179, the statement of a retail store manager on the company practice of selling used television sets as new was properly admitted in a criminal prosecution of the company for grand theft.

In *O'Mary v. Mitsubishi Electronics America* (1997) 59 C.A.4th 563, 69 C.R.2d 389, an action for age discrimination, the trial judge excluded, as hearsay, a deposition statement by a company manager concerning a managers' meeting he had attended. According to the declarant, the meeting was called by a company vice-president, who told those present that, at another meeting, a senior managing director of the company had discussed getting rid of managers over the age of 40 and replacing them with younger, more aggressive managers, and that the company president had concurred. *Held*, exclusion of this testimony was error. The first level of hearsay--the manager's deposition--was admissible because the manager was now unavailable, and the third level--the statements by the managing director and company president--was admissible as authorized admissions, since those individuals were clearly authorized to speak for the company. (59 C.A.4th 567.) As to the second level--the vice-president's statement--the vice-president may not have had authority to establish or interpret company policy, but it is within the usual and customary authority of a vice-president to convey that policy to subordinate managers. (59 C.A.4th 572, 573.)

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7. Interpreter as Agent.

*1 Witkin Cal. Evid. Hearsay § 125*

[§ 125] Interpreter as Agent.

In *People v. Torres* (1989) 213 C.A.3d 1248, 262 C.R. 323, defendant, 3 days after his arrest, telephoned the police from the county jail to give a statement concerning a homicide in which he was an accessory after the fact. Sergeant Greer, who neither spoke nor understood Spanish, was assigned to interview defendant, and Officer Wagner, who had translated for defendant on the night of his arrest, acted as interpreter. At trial, Officer Wagner testified to his qualifications and the accuracy of his translation of the questions and responses. Sergeant Greer then testified to the content of defendant's statements. Defendant made a hearsay objection to the testimony, on the ground that Greer testified not to defendant's statements but merely to the translations. The judge overruled the objection and defendant was convicted. *Held*, affirmed.

(a) Defendant relied on early Supreme Court opinions (*People v. Lee Fat* (1880) 54 C. 527, *People v. Ah Yute* (1880) 56 C. 119, and *People v. John* (1902) 137 C. 220, 69 P. 1063), in which the prosecution attempted to admit testimony given by the defendant through an interpreter during a previous court proceeding. In each case the court reporters read their transcriptions, and the Supreme Court held that instead of permitting a witness to testify to what the interpreter said that defendant said, the interpreter or some other witness who understood the statements should have testified. (213 C.A.3d 1257.)

(b) These cases are distinguishable; in the present case the interpreter was not a court officer but a person specially selected by parties who desired to communicate with each other. "When two persons speaking different languages select an interpreter as a medium of their communication, the interpreter is regarded as their joint agent for that purpose. Therefore, the statements of the interpreter 'are regarded as the statements of the persons themselves, and like any other admission may be shown by the testimony of any person who heard them without calling the interpreter as a witness.' " (213 C.A.3d 1258, citing federal authorities and Wigmore; see 12 A.L.R.4th 1016 [conflicting holdings in other jurisdictions].)

(c) The agency theory applies unless the circumstances negate the presumption of agency; e.g., where there is a substantial possibility that the interpreter had a motive to misrepresent. (213 C.A.3d 1258.) But the fact that the interpreter was a law enforcement officer or other employee of government does not preclude his acting as agent. Here, though Sergeant Greer selected the interpreter, defendant desired to make a statement, and knowingly and willingly used the services of *Officer Wagner*. (213 C.A.3d 1259.)

(d) The *Lee Fat*, *Ah Yute* and *John* holdings are unrealistic and unworkable, and call for reexamination by the Supreme Court. "Trial courts must employ numerous court interpreters, whose services in many languages and dialects are essential to the proper administration of our judicial system. On any given day, a court interpreter may be summoned to translate in a number of courtrooms and cases, particularly in law and motion matters and preliminary hearings. The role of the interpreter simply is to accurately convey the substance of the communication between interested parties and the court. The interpreter is not asked and should not be expected to memorialize and remember the content of every communication. That is the role of the official court reporter. It would be impractical and virtually impossible to impose such a duty on court interpreters. In fact, to expect and require interpreters to be able to recall every communication they interpret would place upon them an immense burden which could adversely affect their ability to quickly, accurately and intelligibly communicate the statements they translate." (213 C.A.3d 1260.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*People v. Lee Fat* (1880) 54 C. 527, *People v. Ah Yute* (1880) 56 C. 119, and *People v. John* (1902) 137 C. 220, 69 P. 1063, text, p. 830, were disapproved in *Correa v. Superior Court* (2002) 27 C.4th 444, 117 C.R.2d 27, 40 P.3d 739, an assault case in which, at the preliminary hearing, the investigating officers related statements made at the scene by the victim and a witness. The statements were made in Spanish and translated for the officers by lay interpreters. Held, the statements did not constitute multiple hearsay and were properly admitted under Proposition 115 (1 Cal. Evidence (4th), Introduction, §24). The court cited *People v. Torres* (1989) 213 C.A.3d 1248, 262 C.R. 323, text, p. 830, with approval, but rather than relying on that case's interpreter-as-agent theory, the court applied a more widely applicable "language conduit" theory. "[T]he weight of recent authority in this and other jurisdictions does not treat the participation of a translator in such circumstances as interposing a layer of hearsay. Rather, a generally unbiased and adequately skilled translator simply serves as a 'language conduit,' so that the translated statement is considered to be the statement of the original declarant, and not that of the translator." (27 C.4th 448.) In determining whether, in any particular case, the conduit theory applies, a court should consider such factors as (a) which party supplied the interpreter, (b) whether the interpreter had any motive to mislead or distort, (c) the interpreter's qualifications and language skill, and (d) whether actions taken subsequent to the conversation were consistent with the statements as translated. (27 C.4th 458, adopting the approach of federal case law.) Here, "we observe that the translators were not 'supplied' by the police, but ... just happened to be on the scene. Their neutrality is evident from the record, and there is no contrary suggestion of a motive to mislead or distort. The investigating officers observed the process of translation and did not report any apparent hesitation or difficulty in communicating, or any bias. In addition, evidence produced during the investigation tended to corroborate the substance of the translated statements. Moreover, the translators appeared and testified at the preliminary hearing with respect to the course of the translations, their neutrality, and their language skills, and ample evidence supports the conclusion that they were skilled in English and Spanish and were capable of providing accurate translations." (27 C.4th 466.)



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## 8. Distinctions.

1 *Witkin Cal. Evid. Hearsay* § 126

[§ 126] Distinctions.

(1) *Spontaneous Exclamations*. Only statements expressly or impliedly authorized can be received as *vicarious admissions*. In practice, however, many contemporaneous statements of employee-drivers and other agents are admitted under the extremely liberal California application of the hearsay exception for *spontaneous exclamations*. (See *Lane v. Pacific Greyhound Lines* (1945) 26 C.2d 575, 582, 160 P.2d 21; Rest.2d, Agency §289; *infra*, §183.)

The distinction between inadmissibility under the admissions exception and admissibility under the spontaneous exclamations (or *res gestae*) exception is neatly illustrated by *Dillon v. Wallace* (1957) 148 C.A.2d 447, 306 P.2d 1044. The action was for damages for injuries from a fall in a market aisle. (a) Defendant K, general manager of the store, was called by another customer and arrived at the scene shortly after the accident. Plaintiff showed him the vegetable on which she had slipped, he examined her knee, and he said: "Don't you worry about this ... we are insured and we will pay your bills." (b) Later, while plaintiff was waiting to be taken to the hospital, a further conversation occurred in which K said, "Now, this is the store's fault, don't you worry about a thing, we will pay all bills." *Held*: (a) The first statement was properly admitted against defendant employer as a spontaneous exclamation; it was a "declaration at the scene of the fall and under the impact of Kent's first discovery of the facts." (148 C.A.2d 452.) (b) The second was not, and the question whether it was within the scope of his authority should not have been left to the jury. K, as general manager, had a duty to see that an injured customer received the necessary attention; but the negotiation or settlement of legal claims is not part of the ordinary authority of a store manager, and there was no showing of any special authority in K. (148 C.A.2d 452, 453.) (See 10 *Hastings L. J.* 219.)

(2) *State of Mind and Imputed Notice*. The agent's statement may sometimes come in under the hearsay exception for declarations of mental state (*infra*, §198 et seq.) to show the agent's knowledge or notice, in situations where under the substantive law the agent's knowledge or notice is imputed to the principal. Thus, in *Van Horn v. Southern Pac. Co.* (1956) 141 C.A.2d 528, 535, 297 P.2d 479, a wooden manhole cover, apparently solid, was actually floating in rainwater. On the issue of defendant employer's knowledge of this dangerous condition of the premises, plaintiff offered the statement of defendant's chief clerk: "Don't tell me that thing has flowed over again." *Held*, it was error to exclude the statement as not part of the *res gestae*. (See *Hollander v. Wilson Estate Co.* (1932) 214 C. 582, 586, 7 P.2d 177; *Dressel v. Parr Cement Co.* (1947) 80 C.A.2d 536, 540, 181 P.2d 962 [quoting Am.Jur.: "Post rem statements of an agent ... may be introduced in evidence against the principal for the purpose of showing his knowledge of the transaction"]; 29A Am.Jur.2d (1994 ed.), *Evidence* §818.)



**SUPPLEMENT:** [This section is current through the latest supplement]



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## b. Declarant Whose Liability Is in Issue.

## 1. General Principle.

*1 Witkin Cal. Evid. Hearsay § 127*

## [§ 127] General Principle.

(1) *Prior to Adoption of Evidence Code.* Where the plaintiff's right to recover against the defendant depends on proof of the liability of a *third person* (see 6 *Summary (9th)*, Torts, §997 et seq.), any statement of that third person is admissible against the defendant. This principle was recognized by former state statute and case law and the former Uniform Rules of Evidence, and is set forth in the Model Code of Evidence. (See *Piggly Wiggly Yuma Co. v. New York Indem. Co.* (1931) 116 C.A. 541, 542, 3 P.2d 15; *Nye & Nissen v. Central Surety & Ins. Corp.* (1945) 71 C.A.2d 570, 576, 163 P.2d 100; *Mahoney v. Founders' Ins. Co.* (1961) 190 C.A.2d 430, 435, 12 C.R. 114; Model C., Rule 508; 1 U.C.L.A. L. Rev. 26; 65 A.L.R.2d 631 [admissibility, in action on employee fidelity bond or policy, of employee's statements where employee is not available as witness].) (For employer tort liability exception, see *infra*, §128.)

(2) *Codification of Principle in Evidence Code.* Ev.C. 1224 codified the rule as follows: "When the liability, obligation, or duty of a party to a civil action is based in whole or in part upon the liability, obligation, or duty of the declarant, or when the claim or right asserted by a party to a civil action is barred or diminished by a breach of duty by the declarant, evidence of a statement made by the declarant is as admissible against the party as it would be if offered against the declarant in an action involving that liability, obligation, duty, or breach of duty."

The significance of the carefully chosen language of the Code is explained in the Law Revision Commission's Comment: It is not limited to cases where the third person's "liability" is involved, but extends to those where that person's breach of duty is in issue, "without regard to whether that breach *gives rise to a liability* of the party against whom the statements are offered or *merely defeats a right* being asserted by that party." (Law Rev. Com. Comment to Ev.C. 1224.)

In a case involving indemnity, Ev.C. 1224 applies where the indemnitor (e.g., an insurance company) is sued and the evidence would be admissible against its indemnitee (the insured). It does not apply in the reverse situation, where the indemnitee is sued. Thus, an accident report prepared by an insurance company investigator cannot be admitted in support of an injured plaintiff in a negligence action against the insured. (*Young v. Aro Corp.* (1973) 36 C.A.3d 240, 245, 111 C.R. 535.) (See *Atlas Assurance Co. v. McCombs Corp.* (1983) 146 C.A.3d 135, 146, 194 C.R. 66 [in insurer's declaratory relief action against insured, and cross-action against insurer by insured, who was being sued over property stolen by insured's employee, trial judge properly considered employee's admissions from criminal prosecution in determining that policy exclusion for criminal acts by employee of insured was applicable].)

(3) *Distinctions*. Two related statutes must be distinguished:

(a) The statement would also be admissible under *Ev.C. 1230* as a *declaration against interest* provided that it was against the declarant's interest when made (*infra*, §143). As an admission, it need not have been against interest when made (see *supra*, §93). (Law Rev. Com. Comment to *Ev.C. 1224*.)

(b) If the liability is fixed in a *judgment* against the third person, it is also admissible under *Ev.C. 1302* (*infra*, §274).

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Prior to Adoption of Evidence Code*.

*Cross-Reference:* 6 *Summary* (10th), *Torts*, §1220 et seq. *West's Key Number Digest*, Evidence k.228



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## b. Declarant Whose Liability Is in Issue.

## 2. Exception for Employer's Tort Liability.

1 *Witkin Cal. Evid. Hearsay* § 128

[§ 128] Exception for Employer's Tort Liability.

(1) *Nature and Theory of Exception.* When an injured person sues an innocent principal or employer for the tort of an agent or employee under the doctrine of respondeat superior, the plaintiff's right to recover against the employer depends on proof of the employee's liability. Hence, the literal language of *Ev.C. 1224* would seem to allow the employee's admissions of fault to come in against the employer, and the Law Revision Commission's study of the predecessor statute (former C.C.P. 1851) suggested that this should be the rule, despite the absence of any direct authority. (See *18 Hastings L. J. 114.*) This, however, would contradict the long-established rule to the contrary in agency and employment cases (see *supra*, §119 et seq.).

In *Markley v. Beagle* (1967) 66 C.2d 951, 59 C.R. 809, 429 P.2d 129, the question was directly presented, and it was held that neither *Ev.C. 1224* on admissions nor *Ev.C. 1302* on judgments (*infra*, §274) applies to respondeat superior situations. Similar language in former C.C.P. 1851 had never been invoked in these situations. And this "was not the result of oversight, but reflected a tacit understanding that section 1851 did not change the settled and apparently universally followed rule that hearsay statements of an agent or employee not otherwise admissible against the principal or employer are not made admissible merely because they may tend to prove negligence of the agent or employee that may be imputed to the principal or employer under the doctrine of *respondeat superior*." (66 C.2d 959.) "The rule that would allow an agent, after a transaction is closed, to admit away the rights of his principal, would be too dangerous to be tolerated for a moment." (66 C.2d 959, quoting Michigan case.)

What, then, is the scope of the statute? It contemplates situations in which "the obligation or duty" of a third person is "an essential operative fact in establishing the cause of action or defense involved"; e.g., where there is privity of interest in property involved, or the party has assumed responsibility for obligations of the declarant (guarantor, surety, insurer, shareholder). In these situations, involving the same interest and motive and means of obtaining knowledge, admissions are reliable. (66 C.2d 959.) (See criticisms, *19 Hastings L. J. 1395*; 8 Santa Clara Lawyer 59; 4 Cal. Western L. Rev. 210; 9 U.C. Davis L. Rev. 111.)

(2) *Distinction: Specific and Detailed Act of Employee Declarant.* *Markley v. Beagle*, *supra*, was distinguished in *Labis v. Stopper* (1970) 11 C.A.3d 1003, 1005, 89 C.R. 926. Plaintiff was injured when he fell down as he was walking on a canvas drop cloth being used by defendant's firm in a painting job. Some 3 hours later, a police officer interviewed the foreman and two painters who made up defendant's crew. One worker, whose name the officer did not take, said he had moved the drop cloth "but he didn't realize anybody was standing on it at the time." Over objections, the officer's

testimony was received in evidence. *Held*, this was proper. "In *Markley*, the employee did not purport to give any *detail* of the manner or method of his performance of the work. He said only that his employer had removed and reinstalled the railing there in issue." This statement, which the court in *Markley* characterized as *vague*, was made to a private investigator for plaintiff about a year after the accident happened and after the employee was no longer working for defendant. (11 C.A.3d 1005.) Here, "the statement related a *specific and detailed act* by the employee. It recited only that act, and not the frequent conclusion that 'It was my fault,' or 'I was wrong.' It was made to a police officer acting in the discharge of his public duty to investigate accidents. It was made some three hours after the accident, on the same day, and when declarant's employment by defendant continued upon the very job here involved ... it would be an unfair extension of the true rule of *Markley* to broaden its language beyond its holding and apply it to reverse the judgment in the case before us." (11 C.A.3d 1005.) (See 8 Cal. Western L. Rev. 355.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### 5. Vicarious Admissions.

#### c. Declarant Whose Right or Title Is in Issue.

#### 1. Nature of Rule.

#### *1 Witkin Cal. Evid. Hearsay § 129*

[§ 129] Nature of Rule.

(1) *Traditional Rule.* The relationship of "privity" is considered a sufficient basis for the introduction of admissions of a predecessor in title against his successor in interest, or of one joint owner against another jointly interested in the property. (See *Wilcox v. Berry* (1948) 32 C.2d 189, 192, 195 P.2d 414 [joint owners of automobile]; *People v. One 1948 Chevrolet Convertible Coupe* (1955) 45 C.2d 613, 619, 290 P.2d 538 [forfeiture (in rem proceeding) of automobile used in illegal transportation of narcotics; declarations of person in control admissible against vehicle and all claimants]; *Altwater v. Breckenridge* (1959) 174 C.A.2d 790, 797, 345 P.2d 358, citing the text [predecessor in title]; 1 U.C.L.A. L. Rev. 27; 29A Am.Jur.2d (1994 ed.), Evidence §824 et seq.) Although the former statute referred only to real property, California followed the general rule admitting declarations against successors to either real or personal property. (*Smith v. Goethe* (1911) 159 C. 628, 636, 115 P. 223; see 2 McCormick 5th, §260.)

(2) *Codification of Rule.* The Model Code of Evidence and original Uniform Rules of Evidence treated these statements not as vicarious admissions, but as declarations against interest. (See Model C., Rule 508, Comment, p. 253.)

*Ev.C. 1225* codified the conventional rule: "When a right, title, or interest in any property or claim asserted by a party to a civil action requires a determination that a right, title, or interest exists or existed in the declarant, evidence of a statement made by the declarant during the time the party now claims the declarant was the holder of the right, title, or interest is as admissible against the party as it would be if offered against the declarant in an action involving that right, title, or interest." (See *Hewitt v. Meaney* (1986) 181 C.A.3d 361, 369, 226 C.R. 349 [in action by property owners claiming easement of necessity over defendants' property, disclaimer of easement by agent of common grantor was admissible and relevant to establish grantor's intent].)

*Ev.C. 1225* does not apply where the evidence is offered against a party who is not a successor in interest. (See *Gordon v. D & G Escrow Corp.* (1975) 48 C.A.3d 616, 625, 122 C.R. 150, citing the text [plaintiff sought to introduce statements of his estranged wife against defendant escrow company, which allegedly violated escrow instructions].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Traditional Rule.* See 2 McCormick 6th, §260. *West's Key Number Digest*, Evidence k.229 et seq.



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#### c. Declarant Whose Right or Title Is in Issue.

#### 2. Time of Statements.

#### 1 *Witkin Cal. Evid. Hearsay* § 130

[§ 130] Time of Statements.

(1) *Statements Made Before Acquiring Title.* The rule admits statements made "during the time" the declarant was assertedly the holder of the title; statements made before the declarant's title accrued are not received. (See Law Rev. Com. Comment to *Ev.C.* 1225; *Darnold v. Voges* (1956) 143 C.A.2d 230, 252, 300 P.2d 255.)

(2) *Statements Made After Parting With Title.* Disparaging declarations made by the grantor *after* parting with title are not competent as admissions. (*Kershaw v. Madsen* (1923) 62 C.A. 11, 15, 216 P. 55; *Rocha v. Rocha* (1925) 197 C. 396, 405, 240 P. 1010; *Shaver v. Canfield* (1937) 21 C.A.2d 734, 740, 70 P.2d 507.) But subsequent statements of the grantor may be admissible as declarations of *intent*, on the issue of *delivery* of the deed. (See *infra*, §212.) And where a fraudulent conveyance is alleged, acts and declarations of the grantor, such as continued possession and claim of ownership, may be shown by the creditor in proof of the fraud. (*Bush & Mallett Co. v. Helbing* (1901) 134 C. 676, 679, 66 P. 967; *McGee v. Allen* (1936) 7 C.2d 468, 476, 60 P.2d 1026; see 29A Am.Jur.2d (1994 ed.), *Evidence* §825.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### d. Declarant in Action for Injury or Death.

#### *1 Witkin Cal. Evid. Hearsay § 131*

[§ 131] Declarant in Action for Injury or Death.

(1) *Former Law.* The wrongful death act, *C.C.P. 377.60* et seq., unlike a survival statute, created a new right of action in the heirs and personal representatives. (See 6 *Summary (9th), Torts, §1197.*) Accordingly, it was held that a statement by the deceased was not admissible against the plaintiffs suing on this wholly distinct cause of action. (See *Marks v. Reissinger (1917) 35 C.A. 44, 54, 169 P. 243.*)

This view was criticized in a strong dictum in *Carr v. Duncan (1949) 90 C.A.2d 282, 285, 202 P.2d 855*: "So long as the defense of contributory negligence is permitted in a wrongful death suit, evidence on that subject which would be competent in a personal injury suit by the deceased in his lifetime, it would seem, should also be competent in an action for his wrongful death." (See 2 *McCormick 5th, §260.*)

(2) *Evidence Code: Wrongful Death.* *Ev.C. 1227* changed the rule and allowed the decedent's statements to be proved. The Law Revision Commission Comment points out that the old technical distinction between the causes of action resulted in unequal treatment of two decedents killed in the same accident. The plaintiff's executor or administrator was entitled to introduce admissions of the defendant's decedent to establish liability under *Ev.C. 1224* (*supra*, §127), but those of the plaintiff's decedent to establish contributory negligence and defeat liability could not be proved.

(3) *Evidence Code: Injury to Child.* The action by a parent or guardian under *C.C.P. 376*, for injury to a child (see 5 *Summary (9th), Torts, §634*), presents the same conflict between procedural technicalities and substance, and *Ev.C. 1226* makes the same rule applicable; i.e., the statement of the injured child is admissible against the plaintiff parent or guardian. (See 1 *Jefferson, California Evidence Benchbook 3d, §3.57 et seq.*)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Former Law.* See 2 *McCormick 6th, §260.*

*Cross-Reference:* 6 *Summary (10th), Torts, §1378.*

(3) *Evidence Code: Injury to Child.*

*Cross-Reference:* 5 *Summary (10th), Torts, §726.*





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## e. Coconspirators.

## 1. General Rule.

*1 Witkin Cal. Evid. Hearsay § 132*

[§ 132] General Rule.

*Ev.C. 1223* codified the established rule making admissible a statement of the declarant "while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy." (See generally *People v. Tinnin* (1934) 136 C.A. 301, 306, 28 P.2d 951; *People v. Kynette* (1940) 15 C.2d 731, 756, 104 P.2d 794; *People v. Griffin* (1950) 98 C.A.2d 1, 33, 219 P.2d 519; *People v. Curtis* (1951) 106 C.A.2d 321, 325, 235 P.2d 51; *People v. Towery* (1985) 174 C.A.3d 1114, 1132, 220 C.R. 475 [statement made to police agent defendant believed to be coconspirator was properly admitted; there is no requirement that statement be made to fellow conspirator]; *People v. Von Villas* (1992) 11 C.A.4th 175, 231, 15 C.R.2d 112 [calendar with date of victim's disappearance blackened out was properly admitted as coconspirator admission]; 2 McCormick 5th, §259; 1 U.C.L.A. L. Rev. 25; 72 Harv. L. Rev. 984; 16 Santa Clara L. Rev. 1; 9 U.C. Davis L. Rev. 63; 16 Am.Jur.2d (1998 ed.), Conspiracy §45; CALJIC (6th ed.), No. 6.24; Law Rev. Com. Comment to *Ev.C. 1223* ["Section 1223 is a specific example of a kind of authorized admission that is admissible under Section 1222"].)

*F.R. Evid., Rule 801(d)(2)(E)* achieves the same result by treating statements by conspirators made during the course of and in furtherance of the conspiracy as "not hearsay." (See 4 Mueller & Kirkpatrick, Federal Evidence 2d, §425.)

It is not necessary that the accusatory pleading formally charge a conspiracy. (*People v. Wallace* (1970) 13 C.A.3d 608, 617, 91 C.R. 643; *People v. Jourdain* (1980) 111 C.A.3d 396, 404, 168 C.R. 702.) And the rule of *People v. Aranda* (1965) 63 C.2d 518, 529, 47 C.R. 353, 407 P.2d 265, and *Bruton v. United States* (1968) 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476, prohibiting use of a defendant's confession implicating a codefendant (see *supra*, §59), does not apply to statements coming within the conspiracy exception to the hearsay rule. (*People v. Morales* (1968) 263 C.A.2d 368, 373, 69 C.R. 402, citing the text; *People v. Brawley* (1969) 1 C.3d 277, 286, 82 C.R. 161, 461 P.2d 361, citing the text.)

Admission of a coconspirator's statements is subject to three conditions: (1) The conspiracy must be independently proved. (See *infra*, §133.) (2) The statement must have been made during the conspiracy. (See *infra*, §134.) (3) The statement must have been made in furtherance of the objective of the conspiracy. (See *infra*, §135.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See CALCRIM, No. 418 [Coconspirator's Statements]; 2 McCormick 6th, §259. *West's Key Number Digest*, Criminal

Law k.422 et seq.; Evidence k.253 et seq.



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## 2. Independent Proof of Conspiracy.

1 *Witkin Cal. Evid. Hearsay* § 133

[§ 133] Independent Proof of Conspiracy.

The conspiracy must be independently proved. (*Ev.C. 1223(c)*; see 46 A.L.R.3d 1148.) Ordinarily, proof of the existence of the conspiracy and the fact of the declarant's participation should precede proof of the statement. But this rule yields to convenience, and the trial judge has power to allow the statements to be introduced, subject to a continuing objection and a later motion to strike if the prosecution does not connect them up. (See *People v. Ferlin* (1928) 203 C. 587, 599, 265 P. 230; *People v. Griffin* (1950) 98 C.A.2d 1, 47, 219 P.2d 519; 72 Harv. L. Rev. 987; 1963 A.S. 292; 3 *Cal. Evidence* (4th), *Presentation at Trial*, §46.)

The proof may be by circumstantial evidence. (See *People v. Leach* (1975) 15 C.3d 419, 430, footnote 10, 124 C.R. 752, 541 P.2d 296; *People v. Lipinski* (1976) 65 C.A.3d 566, 575, 135 C.R. 451; *People v. Perez* (1978) 83 C.A.3d 718, 729, 148 C.R. 90; *People v. Towery* (1985) 174 C.A.3d 1114, 1131, 220 C.R. 475; *People v. Longines* (1995) 34 C.A.4th 621, 626, 40 C.R.2d 356 [conspiracy to sell marijuana].) And prima facie evidence is sufficient. (See *People v. Earnest* (1975) 53 C.A.3d 734, 741, 126 C.R. 107; *People v. Jourdain* (1980) 111 C.A.3d 396, 404, 405, 168 C.R. 702; *People v. Jeffery* (1995) 37 C.A.4th 209, 215, 43 C.R.2d 526 [conspiracy to manufacture and sell methamphetamine].)

The existence of the conspiracy cannot be proved by declarations of an alleged coconspirator out of the presence of the others. (*People v. Linde* (1933) 131 C.A. 12, 19, 20 P.2d 704.) But the acts and declarations constituting the agreement are admissible as "part of a transaction" that is in issue and therefore outside the hearsay rule. (*People v. Curtis* (1951) 106 C.A.2d 321, 326, 235 P.2d 51, 122; see *supra*, §35.)

Under *F.R. Evid.*, *Rule 801(d)(2)*, the contents of a coconspirator's statement are not alone sufficient to establish the existence of a conspiracy or participation in it by the declarant and the party against whom the statement is offered. This limitation was added by a 1997 amendment, which resolved a question on which the U.S. Supreme Court had reserved decision in *Bourjaily v. United States* (1987) 483 U.S. 171, 107 S.Ct. 2775, 2781, 97 L.Ed.2d 144, 156.

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Criminal Law k.427 et seq.



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#### 3. Statement Made During Conspiracy.

#### 1 Witkin Cal. Evid. Hearsay § 134

[§ 134] Statement Made During Conspiracy.

Under the general rule, the statement must have been made *during the conspiracy*, not before it commenced or after it terminated. (See *People v. Oldham* (1896) 111 C. 648, 652, 44 P. 312; *Del Campo v. Camarillo* (1908) 154 C. 647, 653, 98 P. 1049; *People v. McFarland* (1971) 17 C.A.3d 807, 822, 95 C.R. 369 [on evening of murder by shooting, coconspirators tried to sell pistol; statements made during attempt to dispose of weapon were admissible]; *People v. Saling* (1972) 7 C.3d 844, 853, 103 C.R. 698, 500 P.2d 610; *People v. Leach* (1975) 15 C.3d 419, 436, 124 C.R. 752, 541 P.2d 296; *People v. Humphries* (1986) 185 C.A.3d 1315, 1333, 230 C.R. 536, citing the text [object of conspiracy was not murder, but collection of life insurance proceeds; hence, conspiracy continued after murder]; 72 *Harv. L. Rev.* 986; 16 *Santa Clara L. Rev.* 1; 16 *Am.Jur.2d* (1998 ed.), *Conspiracy* §45.)

The statute does not directly address this issue, but does specify that the statement must have been made while *the declarant* was participating in the conspiracy (*Ev.C. 1223(a)*), and must have been made before or during the time *the party* was participating (*Ev.C. 1223(b)*).

**SUPPLEMENT:** [This section is current through the latest supplement]

"In order for a declaration to be admissible under the coconspirator exception to the hearsay rule, the proponent must proffer sufficient evidence to allow the trier of fact to determine that the conspiracy exists by a preponderance of the evidence. A prima facie showing of a conspiracy for the purposes of admissibility of a coconspirator's statement under *Evidence Code section 1223* simply means that a reasonable jury could find it more likely than not that the conspiracy existed at the time the statement was made." (*People v. Herrera* (2000) 83 C.A.4th 46, 62, 63, 98 C.R.2d 911

[characterizing as misleading dicta in earlier cases indicating that, for admission of coconspirator's statement, existence of conspiracy need not be established even by preponderance of evidence].) *West's Key Number Digest*, Criminal Law k.423(5) et seq.; *Evidence* k.253(2)



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## 4. Statement Made To Further Objective.

1 *Witkin Cal. Evid. Hearsay* § 135

[§ 135] Statement Made To Further Objective.

The statement must have been made "in furtherance of the objective" of the conspiracy. (*Ev.C. 1223(a)*.) This provision codified a limitation not expressly declared in the prior statute, but recognized by the case law. (See *People v. Lorraine* (1928) 90 C.A. 317, 327, 329, 265 P. 893; *Callan v. Superior Court* (1962) 204 C.A.2d 652, 664, 22 C.R. 508, citing the text; *People v. Sanders* (1995) 11 C.4th 475, 515, 516, 46 C.R.2d 751, 905 P.2d 420 [in prosecution for murder and robbery of restaurant, codefendant's statements, made in advance of charged offenses to restaurant employee and third party, that robbery would occur, were made in furtherance of conspiracy]; *People v. Jeffery* (1995) 37 C.A.4th 209, 216, 43 C.R.2d 526 [coconspirator's statement to undercover officer that defendant was in jail for spousal abuse was in furtherance of conspiracy to make and sell drugs; trier of fact could reasonably infer that it was attempt to forestall officer's anger that drugs were not immediately available]; see *Krulewitch v. United States* (1949) 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790 [limitation strictly applied in federal courts]; 72 *Harv. L. Rev.* 985 [reviewing various approaches of state and federal courts].) The Model Code of Evidence and the original Uniform Rules of Evidence rejected this limitation, and allowed declarations "relevant to the plan or its subject matter." (See 2 McCormick 5th, §259; 2 U.C.L.A. L. Rev. 71; 1953 A.S. 773; 1957 A.S. 546.)

In *People v. Saling* (1972) 7 C.3d 844, 103 C.R. 698, 500 P.2d 610, defendant and M were charged with conspiracy to commit first degree murder and the first degree murder of M's wife, through a scheme that also involved C and J. At defendant's separate trial, C was granted immunity and testified that 3 days after the homicide, but before M had fully paid the money that was promised, C and J had a conversation outside defendant's home in which J described how the killing occurred. Defendant was present during part of this conversation and told C to "keep his mouth shut." *Held*, admission of the testimony about the conversation was proper.

"Clearly the money offered by Murphy for killing his wife motivated defendant and Jerry Carnes to participate in the plan, and the transfer of the money was one of its main objectives as far as defendant and Carnes were concerned. Since payment to either defendant or Carnes had not yet occurred by the time of the conversation between Carnes and Jurgenson only three days after the murder, Jurgenson's statements to Carnes were admissible as being made during the conspiracy." (7 C.3d 852.) C was necessarily being kept informed of a departure from the original scheme so that he could maintain the integrity of the conspirators' security until they received payment for participating in the crime. (7 C.3d 852, footnote 8.)

The effect of *Saling* was to extend the life of the conspiracy by several days so that incriminating conversations

about payment could be introduced against a defendant. The implication seemed to be that any conspiracy involving a hired killer would be deemed to continue until he had been paid. But in *People v. Leach* (1975) 15 C.3d 419, 124 C.R. 752, 541 P.2d 296, the court gave a narrower interpretation of the *Saling* rule.

(a) The *Saling* opinion neither declared that all conspiracies where one conspirator was hired by another were to be deemed as a matter of law to continue until the hireling was paid to his satisfaction, nor did it contradict the explicit language of *Ev.C. 1223* with the three-fold requirement of independent proof of preliminary facts. In *Saling*, before any substantive consideration was given to the content of the proffered declaration, there was ample independent proof of the continuing nature of the conspiracy to establish preliminarily that the evidence was admissible under *Ev.C. 1223*. (15 C.3d 432.)

(b) "[A] presumption that conspirators who stand in an unenforceable debtor-creditor relationship are going to be motivated by a continuing common desire to make a full and satisfactory accounting, and are going to act in concert towards this objective in continuation of their conspiracy to commit the crime for which payment was promised, belies common sense and adds but another layer of tarnish to the already dull finish of conspiracy doctrine." (15 C.3d 436.) (See 16 *Santa Clara L. Rev.* 1; and see also *People v. Dominguez* (1981) 121 C.A.3d 481, 495, 496, 175 C.R. 445 [discussing *Saling* and *Leach*, and following *Saling* in holding that there was a continuing conspiracy when the statements were made].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 2 McCormick 6th, §259. *West's Key Number Digest*, Criminal Law k.423 et seq.; Evidence k.253(2)



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#### 6. Excluded Admissions in Criminal Cases.

##### a. Involuntary Admissions.

#### 1. Inadmissible as Evidence or Impeachment.

#### *1 Witkin Cal. Evid. Hearsay § 136*

[§ 136] Inadmissible as Evidence or Impeachment.

(1) *In General.* A number of earlier California cases held that an admission, less serious than a complete acknowledgment of guilt, did not come within the rule excluding involuntary confessions (*supra*, §52). (See *People v. Cronevitch* (1927) 86 C.A. 646, 650, 261 P. 309; *People v. Whitaker* (1932) 127 C.A. 370, 373, 15 P.2d 883; *People v. Wagner* (1944) 62 C.A.2d 597, 600, 145 P.2d 646; *People v. Kristy* (1952) 111 C.A.2d 695, 704, 715, 245 P.2d 547; 79 Harv. L. Rev. 1030.)

This view was repudiated in *People v. Atchley* (1959) 53 C.2d 160, 170, 346 P.2d 764. "Involuntary confessions are excluded because they are untrustworthy, because it offends 'the community's sense of fair play and decency' to convict a defendant by evidence extorted from him, and because exclusion serves to discourage the use of physical brutality and other undue pressures in questioning those suspected of crime. ... All these reasons for excluding involuntary confessions apply to involuntary admissions as well. ... Accordingly, any statement by an accused relative to the offense charged is inadmissible against him if made involuntarily." (See 48 Cal. L. Rev. 697; 8 U.C.L.A. L. Rev. 193; 79 Harv. L. Rev. 1033; 1959 A.S. 645; 1960 A.S. 579; for same rule on admissions obtained without informing accused of constitutional rights to silence and counsel (*Miranda* rule), see *supra*, §76 et seq.; on voluntariness as affected by use of alcohol or drugs, see 25 A.L.R.4th 419; on procedure to determine voluntariness (same as that governing confessions), see *Ev.C.* 405, *supra*, §83 et seq.)

The *Atchley* holding has been followed in a number of later cases. (See *People v. Moranda* (1960) 181 C.A.2d 600, 604, 5 C.R. 522; *People v. Brown* (1961) 198 C.A.2d 253, 260, 17 C.R. 884, *infra*, §137; *People v. Quinn* (1964) 61 C.2d 551, 554, 39 C.R. 393, 393 P.2d 705; *People v. MacPherson* (1970) 2 C.3d 109, 115, 84 C.R. 129, 465 P.2d 17, *supra*, §53; *People v. Harrington* (1970) 2 C.3d 991, 999, 88 C.R. 161, 471 P.2d 961.)

(2) *Use for Impeachment.* Use of an involuntary admission as impeachment is equally improper. "The credibility of an accused who takes the stand may be of critical importance to the trier of fact in determining whether or not a defense has been established, and we should not permit an accused's credibility to be attacked by use of an involuntary statement which would be inadmissible as affirmative evidence under the rule of *People v. Atchley*." (*People v. Underwood* (1964) 61 C.2d 113, 121, 37 C.R. 313, 389 P.2d 937; see 37 So. Cal. L. Rev. 473.)

(3) *Standard of Review.* Use of an involuntary admission is subject to the test of *Chapman v. California* (1967) 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705, 6 Cal. Crim. Law (3d), *Reversible Error*, §10 (reversible error unless prosecution

shows beyond reasonable doubt that error did not contribute to the verdict). This is the same test now applied when an involuntary confession is admitted in violation of federal constitutional rights (*supra*, §89). (See *People v. Maynarich* (1978) 83 C.A.3d 476, 483, 147 C.R. 823; *People v. Murtishaw* (1981) 29 C.3d 733, 175 C.R. 738, 631 P.2d 446; *People v. Hogan* (1982) 31 C.3d 815, 844, 183 C.R. 817, 647 P.2d 93; *People v. Morris* (1987) 192 C.A.3d 380, 391, 392, 237 C.R. 402.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(3) *Standard of Review.* See *People v. Coffman & Marlow* (2004) 34 C.4th 1, 60, 62, 17 C.R.3d 710, 96 P.3d 30 [in capital murder trial, even if trial judge erred in finding that statements by both defendants were voluntary, their admission could not have contributed to verdict and thus reversal was not required; evidence of one defendant's guilt was overwhelming, and other defendant's only defense was that he lacked intent to kill but evidence of intent to kill was overwhelming]. *West's Key Number Digest*, Criminal Law k.412.1 et seq.





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##### a. Involuntary Admissions.

##### 2. Illustrations.

#### 1 Witkin Cal. Evid. Hearsay § 137

[§ 137] Illustrations.

(1) *Physical Abuse*. Physical brutality necessarily makes the admission involuntary. (See *People v. Underwood* (1964) 61 C.2d 113, 120, 37 C.R. 313, 389 P.2d 937 [uncontradicted testimony of police pressure and beatings by members of victim's family].)

(2) *Threats of Conviction or Punishment or Promises of Leniency*. Involuntariness may also result from threats or promises of leniency, express or implied (see supra, §65). Thus, in *People v. Cahill* (1994) 22 C.A.4th 296, 28 C.R.2d 1, a prosecution for murder with special circumstances, the trial judge admitted statements defendant made when questioned by an officer soon after his arrest. By representing to defendant that he could avoid a charge of murder in the first degree if the killing was not premeditated, the officer was able to persuade defendant to admit that he was inside the house where the murder occurred and that he had knowledge of the killing. *Held*, admission of the statements was error, although harmless.

(a) The officer's remarks amounted to a threat or false promise of leniency. He also misrepresented the law of murder by failing to refer to the felony-murder doctrine. This omission made more plausible the officer's implicit promise that murder in the first degree could be avoided if there was a confession showing no premeditation. (22 C.A.4th 314, 315.)

(b) Defendant's youth, his limited education, and the initial resistance he offered to the officer's exhortations provided sufficient grounds for a finding that his statements resulted from the officer's implied promise. (22 C.A.4th 316, 317.)

(c) Nevertheless, the error in admitting the statements failed to prejudice defendant. Uncontroverted evidence indicated that he was in the victim's house the night of the murder. The only alternative explanation for the victim's death--that an unrelated third party, with a blood type compatible with defendant's, entered her house the same night--was "so incredible that no honest, fair-minded jury would entertain it as a ground for reasonable doubt of defendant's guilt." (22 C.A.4th 319.)

Admissions have been found involuntary on this basis in a number of cases. (See *People v. Quinn* (1964) 61 C.2d 551, 554, 39 C.R. 393, 393 P.2d 705 [probation officer's statement to defendant, after he pleaded guilty and before he withdrew plea, that if he was not telling truth he would not be recommended for probation, constituted improper threat

or implied promise of leniency]; *People v. Honable* (1964) 229 C.A.2d 480, 484, 40 C.R. 414 [admission was improperly induced by officer's promise that if defendant talked he would not be prosecuted for other crimes]; *People v. Vasila* (1995) 38 C.A.4th 865, 873, 45 C.R.2d 355 [interrogators' promises not to institute federal prosecution and to release defendant on own recognizance if he told them location of illegal firearms, and their threats of the converse if he did not, rendered his statement involuntary].)

Often, however, as where the police merely stress the moral or psychological benefits of telling the truth, their statements are not deemed coercive threats or promises. (See *People v. Wallace* (1992) 9 C.A.4th 1515, 1521, 12 C.R.2d 230 [even assuming that defendant's wife was acting as police agent when she entered his cell, her urging him to tell truth and quit shielding his friend did not constitute coercion]; *People v. Steger* (1976) 16 C.3d 539, 550, 128 C.R. 161, 546 P.2d 665 [where no threat or promise was made, suspect's belief that cooperation with police would benefit relative did not make statement inadmissible]; *People v. Thompson* (1990) 50 C.3d 134, 169, 170, 266 C.R. 309, 785 P.2d 857 [interrogators' pointing out that they had two alternative theories (accidental killing, or intentional killing to prevent identification) and that, absent evidence refuting one theory, both would be asserted, constituted accurate statement of circumstances, not improper threat or promise]; *People v. Haskett* (1990) 52 C.3d 210, 244, 276 C.R. 80, 801 P.2d 323 [even if considered state action, statements by psychiatrist to murder defendant that if he did not confide in him he would probably get death penalty were not coercive, given that psychiatrist's mission was to acquire mitigating evidence for penalty phase].) Where a threat or promise is made, but it is not the motivating cause of the admission, the admission is not considered involuntary. (*People v. Williams* (1997) 16 C.4th 635, 661, 66 C.R.2d 573, 941 P.2d 752.)

(3) *Psychological Coercion*. In *People v. Adams* (1983) 143 C.A.3d 970, 192 C.R. 290, the sheriff, who knew defendant through her church and was aware that she was suffering from nervousness and difficulty in sleeping, played on her religious anxiety and her fear of being placed in a mental institution. (143 C.A.3d 983, 985, 986, 988.) "To bring appellant's profound fears to the surface of her consciousness, he suggested that appellant would be consumed with guilt because she had sinned and refused to conform to God's law." (143 C.A.3d 988.) Held, the admissions of defendant were involuntary and inadmissible. "Religious beliefs are not matters to be used by governmental authorities to manipulate a suspect to say things he or she otherwise would not say. The right to worship without fear is too precious a freedom for us to tolerate an invasion and manipulation of state officials of the religious beliefs of individuals, including those accused of crime." (143 C.A.3d 988.) (See *People v. Esqueda* (1993) 17 C.A.4th 1450, 1486, 22 C.R.2d 126 [police used lies, accusations, exhaustion, isolation, and threats to overcome defendant's resistance and obtain statements].)

(4) *Misrepresentations*. Giving false information to a suspect does not by itself render the suspect's resulting statement involuntary, but it is a factor that weighs against a finding of voluntariness. On the other hand, where the police use a misrepresentation to lure a suspect into custody and then reveal the misrepresentation before the suspect makes the statement, the voluntariness of the statement is not called into question. (*People v. Jackson* (1996) 13 C.4th 1164, 1206, 1207, 56 C.R.2d 49, 920 P.2d 1254.)

(5) *Inducement by Private Person*. Improper inducement by a person who is not a law enforcement officer may make a confession or admission inadmissible, where the defendant reasonably believes that the person is speaking for the authorities. Thus, in *People v. Brown* (1961) 198 C.A.2d 253, 17 C.R. 884, the sheriff's inspector took defendant to H, a polygraph expert, explaining that they worked together. Defendant made damaging admissions, on H's promise that he would not be charged. Held, the statements were inadmissible. "The cajoled confession is no less obnoxious because the person who procured it is one step removed from the police or the prosecutor. It is no defense that the authorities only threw a figurative arm around the cajoler but did not make him an official agent. It is enough if the action of the authorities reasonably led the confessor to believe that the word of the persuader would be heeded and his promise probably fulfilled." (198 C.A.2d 263.)

In *People v. Atchley* (1959) 53 C.2d 160, 346 P.2d 764, although the exclusionary rule was authoritatively declared (supra, §136), the statements were actually held admissible. While defendant was in jail after his arrest, his insurance broker, a former police officer, came there at the request of the police. In their conversations, defendant admitted

arming himself, waiting in concealment, surprising his wife, and firing the fatal shot. These statements were secretly tape-recorded according to plan. Defendant contended that the broker held out as an inducement to his disclosures the payment of the proceeds of a policy on the wife's life to her children. *Held*, conviction affirmed. It was clear that the broker referred to the insurance to explain why he was asking questions and not as an inducement for any particular answers. Hence, though defendant was *deceived*, he was *not mentally coerced*. "The deception itself does not render defendant's statements inadmissible, for it was not of a type reasonably likely to procure an untrue statement." (53 C.2d 171, citing *People v. Castello* (1924) 194 C. 595, 602, 229 P. 855, and *People v. Connelly* (1925) 195 C. 584, 597, 234 P. 374, *supra*, §69.)

(6) *Statements to Probation Officer*. Admissions made to a probation officer in the hope that they will produce a favorable report are excluded (see *People v. Harrington* (1970) 2 C.3d 991, 999, 88 C.R. 161, 471 P.2d 961); and admissions made by a minor to a Juvenile Court judge or probation officer are excluded in criminal proceedings to avoid frustration of the protective and rehabilitative objects of the Juvenile Court system (*Bryan v. Superior Court* (1972) 7 C.3d 575, 586, 102 C.R. 831, 498 P.2d 1079). (See also *People v. Quinn*, *supra*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Threats of Conviction or Punishment or Promises of Leniency*. See *People v. Holloway* (2004) 33 C.4th 96, 115, 14 C.R.3d 212, 91 P.3d 164 [officers' mention of possible death penalty and suggestions that defendant would benefit from giving truthful, mitigated version of crimes did not cross line from proper exhortations to tell truth to impermissible threats of punishment or promises of leniency; distinguishing *People v. Cahill* (1994) 22 C.A.4th 296, 28 C.R.2d 1, text, p. 843]. (3) *Psychological Coercion*. Cf. *People v. Perdomo* (2007) 147 C.A.4th 605, 617, 53 C.R.3d 918 [in prosecution for felony vehicular manslaughter while intoxicated, defendant's admission to police officers that he was driver was properly admitted even though it was made at time he was in hospital and under influence of pain medication; nothing in tape of interview indicated defendant's thinking was impaired, and there was no evidence that officers resorted to physical or psychological pressure].

(4) *Misrepresentations*. See *People v. Smith* (2007) 40 C.4th 483, 505, 54 C.R.3d 245, 150 P.3d 1224 [defendant's change in his story about events occurring at time of shooting was not rendered inadmissible even though it followed officers' administration of "Neutron Proton Negligence Intelligence Test," fictitious test that supposedly proved defendant had recently fired gun].



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## CHAPTER VI - Hearsay

### III. EXCEPTIONS TO THE RULE

#### B. Admission of Party.

#### 6. Excluded Admissions in Criminal Cases.

##### b. Ineffective or Withdrawn Plea.

##### 1. Penal Code and Case Law.

#### 1 Witkin Cal. Evid. Hearsay § 138

[§ 138] Penal Code and Case Law.

(1) *Conditional Plea*. P.C. 1192.4 authorizes a conditional plea to a lesser offense or degree which, if unaccepted, is deemed withdrawn and cannot be received in evidence. (See 4 Cal. Crim. Law (3d), *Pretrial Proceedings*, §313.) Thus, although the plea would normally be received as an implied admission, the Legislature sought to encourage settlement of criminal cases by removing this hazard. (See *People v. Wilson* (1963) 60 C.2d 139, 155, 32 C.R. 44, 383 P.2d 452.)

(2) *Rejected Offer*. It was formerly held that an offer to plead guilty to a lesser offense could be proved as an implied admission. (*People v. Cooper* (1947) 81 C.A.2d 110, 117, 183 P.2d 67.) But the underlying policy is the same as that involved in the conditional plea, and *People v. Wilson*, *supra*, abrogated the rule: "If it is in the public interest to deny admissibility to a plea of guilty to a lesser degree that was formally entered but is 'deemed withdrawn' because it was 'not accepted by the prosecuting attorney' ... it is equally in the public interest to deny admissibility to evidence of an offer to plead guilty to the same lesser degree that was 'not accepted by the prosecuting attorney.'" (60 C.2d 156.) (See also *People v. Hamilton* (1963) 60 C.2d 105, 113, 32 C.R. 4, 383 P.2d 412; *People v. Tanner* (1975) 45 C.A.3d 345, 350, 119 C.R. 407.)

(3) *Withdrawn Plea*. Earlier California cases also took the position that a guilty plea, even though later withdrawn, could be shown at the criminal trial, or in a subsequent civil case. (See *People v. Boyd* (1924) 67 C.A. 292, 302, 227 P. 783 [opinion of Supreme Court on denial of hearing]; *People v. Snell* (1929) 96 C.A. 657, 662, 274 P. 560 [plea of guilty before trial]; *People v. Sanderson* (1933) 129 C.A. 531, 533, 18 P.2d 982 [offer to waive preliminary examination and plead guilty]; *People v. Ivy* (1958) 163 C.A.2d 436, 438, 329 P.2d 505 [two counts of sale of narcotics; prior plea of guilty to one count]; *People v. Caruso* (1959) 174 C.A.2d 624, 642, 345 P.2d 282, citing the text; *People v. Clay* (1962) 208 C.A.2d 773, 777, 25 C.R. 464; 86 A.L.R.2d 326.)

This rule was repudiated in *People v. Quinn* (1964) 61 C.2d 551, 554, 39 C.R. 393, 393 P.2d 705. The court took note of several reasons for the majority rule of exclusion, and particularly stressed the point that to allow proof of the plea practically nullified the privilege of withdrawal for good cause. (61 C.2d 555.) (See 79 Harv. L. Rev. 1044.)

(4) *Plea of Nolo Contendere*. This plea, which does not concede guilt, does not support an inference of guilt. Accordingly, P.C. 1016(3), authorizing the plea, provides that it "may not be used against the defendant as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based." (See 4 Cal. Crim. Law (3d), *Pretrial Proceedings*, §260; *Caminetti v. Imperial Mut. Life Ins. Co.* (1943) 59 C.A.2d 476, 490, 139 P.2d

681; 41 Cal. L. Rev. 339; 52 Cal. L. Rev. 408.)

However, the prohibition against using the plea in a civil action applies in cases "other than those punishable as felonies." (P.C. 1016(3).) (See *Interinsurance Exchange of the Auto. Club of Southern Calif. v. Flores* (1996) 45 C.A.4th 661, 672, 53 C.R.2d 18 [insured's plea of nolo contendere to felony charge of aiding and abetting assault with deadly weapon was admissible in insurer's declaratory relief action as admission that he acted with intent to harm another, thus entitling insurer to deny coverage under Ins.C. 533 (1 Summary (9th), Contracts, §632)].)

(5) *Admission in Plea Bargaining.* In order to effectuate the purpose of Ev.C. 1153 (infra, §139) and P.C. 1192.4, supra, admissions made in the course of bona fide plea bargaining negotiations are excluded. (*People v. Tanner*, supra, 45 C.A.3d 351.) This exclusionary rule was held inapplicable in *People v. Mangana* (1993) 17 C.A.4th 1371, 1377, 22 C.R.2d 59, where the prosecutor referred to defendant's statement in a letter to a fellow gang member that he would accept a good deal if offered; the statement was not made in bona fide plea negotiations.

The rule's application is limited to situations in which the defendant's statements are offered, in the prosecution's case-in-chief or otherwise, as substantive evidence of guilt. It "does not prevent the prosecution from using evidence of those statements for the limited purpose of impeaching the defendant regarding testimony which was elicited either during the direct examination of the defendant or during cross-examination which is plainly within the scope of the defendant's direct examination." (*People v. Crow* (1994) 28 C.A.4th 440, 452, 33 C.R.2d 624.)

(6) *Statement Obtained Under Breached Agreement.* There is "a slight precedential tilt" toward the holding that, at least in the absence of an explicit contrary term in the plea bargain agreement, statements obtained as a result of cooperation under the agreement are involuntary and therefore inadmissible to prove guilt of the crimes for which the defendant was originally indicted. However, significant differences exist between using the defendant's statements as evidence of guilt and using them to prove breach of the agreement. In the latter context, "the government is seeking relief from a contractual agreement that the defendant has allegedly breached in order to return to the status quo ante and try the defendant. To rule such evidence inadmissible would not advance the goals and purposes of pleas bargaining." (*People v. Collins* (1996) 45 C.A.4th 849, 868, 869, 53 C.R.2d 367, 4 Cal. Crim. Law (3d), Pretrial Proceedings, §340 [even accepting premise that plea bargain agreement rendered defendant's statements involuntary, they were admissible in hearing to vacate his sentence and plea on basis of material breach of agreement].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(4) *Plea of Nolo Contendere.* See *People v. Yartz* (2005) 37 C.4th 529, 538, 36 C.R.3d 328, 123 P.3d 604 [in sexually violent predator proceeding, defendant's plea of no contest to prior sexually violent offense was not made inadmissible by P.C. 1016(3); sexually violent predator proceeding is not civil suit but rather "special proceeding of a civil nature"]; *Rusheen v. Drews* (2002) 99 C.A.4th 279, 285, 120 C.R.2d 769 [in action for fraud, conversion, and negligent misrepresentation arising from defendant's having taken plaintiff's car out of state, trial judge erred in excluding defendant's no contest plea to felony grand theft charge arising from same incident, even though charge was ultimately reduced to misdemeanor].

*Cross-Reference:* The discussion of Ins.C. 533, formerly located in *Contracts*, has been transferred to 2 *Summary* (10th), *Insurance*, §100.



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#### 6. Excluded Admissions in Criminal Cases.

##### b. Ineffective or Withdrawn Plea.

#### 2. Evidence Code and Federal Rules.

##### 1 *Witkin Cal. Evid. Hearsay* § 139

[§ 139] Evidence Code and Federal Rules.

(1) *Evidence Code. Ev.C. 1153* codifies the statutory and case law rules (supra, §138) as follows: "Evidence of a plea of guilty, later withdrawn, or of an offer to plead guilty to the crime charged or to any other crime, made by the defendant in a criminal action is inadmissible in any action or in any proceeding of any nature, including proceedings before agencies, commissions, boards, and tribunals."

(2) *Federal Rules of Evidence. F.R. Evid., Rule 410* is entitled "*Inadmissibility of Pleas, Plea Discussions, and Related Statements.*" It provides that, in any civil or criminal proceeding, the following are not admissible against the defendant:

(1) a plea of guilty by the defendant that is later withdrawn.

(2) a plea of nolo contendere by the defendant.

(3) a statement made by the defendant in the course of proceedings under *F.R. Crim. Proc., Rule 11*, or comparable state procedure relating to either of the foregoing pleas.

(4) a statement made by the defendant in the course of plea discussions with an attorney for the prosecution, where the discussions do not result either in a guilty plea or a guilty plea that is later withdrawn.

"However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel." (*F.R. Evid., Rule 410*.) (See *United States v. Mezzanatto* (1995) 513 U.S. 196, 115 S.Ct. 797, 806, 130 L.Ed.2d 697, 710 [agreement by criminal defendant to waive exclusionary provisions of federal plea-statement rules, including Rule 410, is valid and enforceable, lacking affirmative indication that agreement was entered into unknowingly or involuntarily]; 2 Mueller & Kirkpatrick, *Federal Evidence* 2d, §142 et seq.; 109 Harv. L. Rev. 249 [Mezzanatto]; 29 Am.Jur.2d (1994 ed.), *Evidence* §517 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Evidence Code. See People v. Leonard* (2007) 40 C.4th 1370, 1404, 58 C.R.3d 368, 157 P.3d 973 [defendant's

outburst in court ("I am guilty") during murder trial did not constitute offer to plead guilty within meaning of *Ev.C. 1153*, and thus motion to exclude statement was properly denied]; *People v. Brock (2006) 141 C.A.4th 1320, 1324, 46 C.R.3d 896* [in prosecution for escape without force or violence, defendant's statement, made during plea negotiations that did not lead to plea agreement, that he "went out there and smoked crack" and "didn't come back" was inadmissible under *Ev.C. 1153*; however, because defendant's trial testimony clearly established that he left residential work furlough program, error in admitting statement was harmless].



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#### 6. Excluded Admissions in Criminal Cases.

#### c. Silence or Equivocal Reply to Charge of Crime.

##### 1. Former Law.

#### *1 Witkin Cal. Evid. Hearsay § 140*

[§ 140] Former Law.

Prior to the decisions in *Miranda v. Arizona* (1966) 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, supra, §76, and *Griffin v. California* (1965) 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106, 2 Cal. Evidence (4th), Witnesses, §433, a large body of law developed on implied admissions resulting from accusatory statements made to defendants. The principles are briefly summarized in this section.

(1) *Theory of Admissibility.* If a person is accused (e.g., by police, a victim, or an accomplice) of having committed a crime under circumstances fairly affording an opportunity to reply, and the person fails to speak or makes an evasive or equivocal reply, both the *accusatory statement* and the fact of *silence or equivocation* may be offered as an *implied admission of guilt*. The accusatory statement is itself incompetent hearsay, and is not received as proof of its truth. But the conduct of the accused is properly proved on the theory that silence is an admission of the truth or the theory that failure to deny is unnatural and an indication of a guilty conscience. (See *People v. Yeager* (1924) 194 C. 452, 486, 229 P. 40; *People v. Davis* (1954) 43 C.2d 661, 670, 276 P.2d 801; *People v. Moore* (1963) 211 C.A.2d 585, 596, 27 C.R. 526; Model C., Rule 507(b).)

(2) *Nature of Accusatory Statement.* The statement may be a direct charge of commission of the crime. (See *People v. Willmurth* (1947) 77 C.A.2d 605, 614, 176 P.2d 102 [charge by accomplice].) But it need not be. (See *People v. Moore*, supra, 211 C.A.2d 597 [inspector told defendant that police had two others in custody and that one had confessed and implicated the three].)

(3) *Conduct of Accused: Denial of Charge.* If the person accused immediately denies the accusation, evidence of the charge and denial cannot be introduced. The charge alone is hearsay, and when it is denied there is no admission by conduct. (*People v. Goltra* (1931) 115 C.A. 539, 550, 2 P.2d 35; *People v. Staker* (1957) 154 C.A.2d 773, 783, 316 P.2d 725.)

(4) *Conduct of Accused: Justifiable Silence or Refusal To Answer.* If it appears that the accused was attempting to rely on the constitutional privilege against self-incrimination (now described as the "absolute right to remain silent"), or was following the advice of counsel in refusing to answer the charge, the statement cannot be introduced. (See *People v. Simmons* (1946) 28 C.2d 699, 715, 172 P.2d 18; *Martinez v. Superior Court* (1964) 224 C.A.2d 755, 757, 37 C.R. 115 ["A person accused of crime has no duty to discuss the case with his accusers"].) And the same is true if the defendant's physical or mental condition justifies silence. (See *People v. Bracamonte* (1961) 197 C.A.2d 385, 390, 17 C.R. 62)



[defendant drugged].)

(5) *Conduct of Accused: Justifiable Reply.* If the accused replies to the charge, and the reply is neither equivocal nor evasive, it does not indicate either acquiescence in the truth of the statement or a consciousness of guilt. In this situation, neither the statement nor the reply is admissible. (See *People v. Wochnick* (1950) 98 C.A.2d 124, 129, 219 P.2d 70 [told by officer that lie detector machine had "violent reaction" to his responses, defendant replied that "he could not explain it"]; *People v. Robinson* (1964) 61 C.2d 373, 402, 38 C.R. 890, 392 P.2d 970.)

(6) *Conduct of Accused: Equivocal or Evasive Reply.* If the accused chooses to reply, and the reply is equivocal or evasive, it may be received as an admission. (See *People v. Davis*, *supra*; *People v. Moore*, *supra*, 211 C.A.2d 598; *People v. Whitehorn* (1963) 60 C.2d 256, 262, 32 C.R. 199, 383 P.2d 783.)

(7) *Foundation for Proof.* A foundation requirement, similar to that required for introduction of a confession, was laid down in *People v. Simmons*, *supra*, 28 C.2d 718: The trial judge must decide in the first instance whether the circumstances were such that the accusatory statement might give rise to an admission, and the jury must then decide whether the defendant's reply or silence indicated a consciousness of guilt. (See *People v. Moore*, *supra*, 211 C.A.2d 597.)

(8) *Failure To Object to Introduction.* A number of cases apply the general principle that failure to object to the introduction of the statement is a waiver of any error in admitting it. (See *People v. Stepp* (1947) 82 C.A.2d 49, 51, 185 P.2d 417; *People v. Millum* (1954) 42 C.2d 524, 528, 267 P.2d 1039; *People v. Vacca* (1960) 185 C.A.2d 125, 129, 8 C.R. 64; *People v. Gaines* (1961) 192 C.A.2d 128, 132, 13 C.R. 359.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER VI - Hearsay

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## B. Admission of Party.

## 6. Excluded Admissions in Criminal Cases.

## c. Silence or Equivocal Reply to Charge of Crime.

## 2. Effect of Miranda and Griffin Rules.

1 *Witkin Cal. Evid. Hearsay* § 141

[§ 141] Effect of Miranda and Griffin Rules.

*Miranda v. Arizona* (1966) 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, supra, §76, makes inadmissible an incriminating statement at the accusatory stage where the accused has not been informed of the rights of counsel and silence, and *Griffin v. California* (1965) 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106, 2 *Cal. Evidence* (4th), Witnesses, §433, prohibits comment on or inference from claim of the privilege against self-incrimination. The holdings of these cases drastically curtail the doctrine of implied admissions from conduct of an accused.

(1) *When Conduct Cannot Be Proved.*

(a) If the accusatory stage has been reached, no warning has been given, and the accusation is by police or police agents, silence or an equivocal answer will be excluded under the *Miranda* rule. (See 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §89 et seq.) Silence after a warning is similarly excluded. (*People v. Andrews* (1970) 14 C.A.3d 40, 47, 92 C.R. 49; *People v. Gaines* (1980) 103 C.A.3d 89, 92, 94, 96, 162 C.R. 827 [holding error harmless beyond a reasonable doubt, under standard of *Chapman v. California* (1967) 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705, 6 *Cal. Crim. Law* (3d), *Reversible Error*, §10].)

(b) Regardless of the stage, silence or an express refusal to answer on advice of attorney or on claim of the privilege is inadmissible under the *Griffin* rule. Thus, in *People v. Cockrell* (1965) 63 C.2d 659, 47 C.R. 788, 408 P.2d 116, codefendant P, at the police station, said in defendant's presence that she had bought marijuana from him. The officer asked defendant what he had to say about "that," and defendant did not reply. *Held*, "[t]he rationale of *Griffin* implicitly proscribes drawing an inference adverse to the defendant from his failure to reply to an accusatory statement if the defendant was asserting his constitutional privilege against self-incrimination." (63 C.2d 669.) And it is not necessary to make an express claim of the privilege; silence alone makes the accusation inadmissible. (63 C.2d 670.) (See *People v. Ridley* (1965) 63 C.2d 671, 676, 47 C.R. 796, 408 P.2d 124; *People v. Stewart* (1965) 236 C.A.2d 27, 31, 45 C.R. 712; *People v. Maldonado* (1966) 240 C.A.2d 812, 816, 50 C.R. 45; 79 Harv. L. Rev. 1042.)

(2) *When Conduct Can Be Proved.* Whether any remnants of the old admission doctrine still survive is largely guesswork, but the following possibilities must be considered:

(a) Before the accusatory stage has been reached, an equivocal or evasive explanation may be proved. The *Miranda* rule is not yet operative, and the accused, by answering, has waived the *Griffin* rule. (See 5 *Cal. Crim. Law* (3d),

*Criminal Trial*, §575.)

(b) After the accusatory stage has been reached, if the warning is given, an equivocal or evasive explanation may be proved. The *Miranda* rule is satisfied, and the *Griffin* rule is waived. (See *People v. Hurd* (1998) 62 C.A.4th 1084, 1091, 73 C.R.2d 203, 3 Cal. Evidence (4th), Presentation at Trial, §323 [after defendant waived *Miranda* rights and talked freely about circumstances of his wife's shooting, his refusal to demonstrate shooting and take polygraph examination were insufficient to invoke general right to silence and could be used against him]; 5 Cal. Crim. Law (3d), *Criminal Trial*, §135.)

(3) *Accusation by Private Person*. If the accusation is by a private person, not a police agent, the *Miranda* rule is inapplicable, and an equivocal reply or silence may be shown. (See *People v. Preston* (1973) 9 C.3d 308, 313, 107 C.R. 300, 508 P.2d 300, citing the text; *People v. Silva* (1988) 45 C.3d 604, 624, 247 C.R. 573, 754 P.2d 1070 [following *Preston*]; *People v. Rodrigues* (1994) 8 C.4th 1060, 1137, 1138, 36 C.R.2d 235, 885 P.2d 1 [adoptive admission instruction was proper; defendant was party to discussions planning crime and did not refuse to participate or disassociate himself from plans]; *People v. Mayfield* (1997) 14 C.4th 668, 741, 60 C.R.2d 1, 928 P.2d 485 [hostage's telephone statement to third party that defendant had shot him and was even now threatening him was admissible as adoptive admission, where defendant was able to hear both sides of conversation and would have been able to reply to any untrue or unfair accusations against him]; 5 Cal. Crim. Law (3d), *Criminal Trial*, §119.)

In *People v. Medina* (1990) 51 C.3d 870, 274 C.R. 849, 799 P.2d 1282, the court followed *People v. Silva*, *supra*, in holding that, even assuming that defendant had been given his *Miranda* warning, his silence when asked by his sister why he had killed the three victims was admissible as an adoptive admission. However, the court cautioned that it was not addressing the situation where a defendant is confronted with an accusatory statement by a private person under circumstances justifying a presumption that the conversation is being monitored by the police. (51 C.3d 891.)

(4) *Instruction Required*. The United States Supreme Court has held that the "no-inference" instruction, when requested by the defendant, must be given. "No judge can prevent jurors from speculating about why a defendant stands mute in the face of a criminal accusation, but a judge can, and must, if requested to do so, use the unique power of the jury instruction to reduce that speculation to a minimum." (*Carter v. Kentucky* (1981) 450 U.S. 288, 101 S.Ct. 1112, 1120, 67 L.Ed.2d 241, 252.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 35 *Loyola L.A. L. Rev.* 101 [use at trial of defendant's pretrial silence].

(1) *When Conduct Cannot Be Proved*.

(b) *Silence or express refusal to answer*: See *People v. Lucero* (2000) 23 C.4th 692, 713, 714, 97 C.R.2d 871, 3 P.3d 248 [in penalty phase of murder prosecution, trial judge did not err in denying mistrial motion after sheriff's lieutenant, during cross-examination, mentioned that defendant had invoked his *Miranda* rights during questioning; there was no danger of impermissible inference of guilt, as guilt had already been established].

In *People v. Jennings* (2003) 112 C.A.4th 459, 5 C.R.3d 243, a prosecution for murder, a videotape of a police interview with defendant and his codefendant was played for the jury. The interview had been conducted after both defendants were advised of their rights under *Miranda v. Arizona* (1966) 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, text, p. 851. During the interview, defendant remained silent in the face of several statements by the codefendant implicating defendant in the crime. *Held*, the statements were not admissible as adoptive admissions. Although unequivocal, express adoptive admissions resulting from joint custodial interrogations have been found admissible, equivocal conduct, such as defendant's silence here, remains constitutionally protected. (112 C.A.4th 472.) Further, the fact that defendant waived her *Miranda* rights at the beginning of the interview did not mean that her silence as to some of her codefendant's accusations could be used against her. A rule to that effect would mark a drastic departure from *Miranda*, in which the high court indicated that its aim was to assure that the individual's right to choose between

silence and speech remains unfettered throughout the interrogation process. (112 C.A.4th 473.)(2) *When Conduct Can Be Proved.*

(a) *Before accusatory stage has been reached:* See 33 U.C. Davis L. Rev. 449 [use of prearrest silence in prosecution's case-in-chief].

(3) *Accusation by Private Person.* See *People v. Riel* (2000) 22 C.4th 1153, 1189, 96 C.R.2d 1, 998 P.2d 969, 3 Cal. Crim. Law (3d), Punishment, §373 [statements of defendant's two accomplices to two different women about what "they" did were admissible as adoptive admissions against defendant; circumstances warranted inference that "they" referred to all three]; *People v. Carter* (2003) 30 C.4th 1166, 1196, 135 C.R.2d 553, 70 P.3d 981 [even if defendant was present during conversation between defendant's coparticipant and third party in which coparticipant described robbery and shooting that formed basis for charged offenses, admission of conversation, as adoptive admission, by way of written statement by third party was error, although harmless, because statement did not directly accuse defendant of anything, and thus there was nothing to deny]; *People v. Roldan* (2005) 35 C.4th 646, 710, 27 C.R.3d 360, 110 P.3d 289 [in capital murder case, testimony of two witnesses who heard discussion between defendant and two accomplices following murder was properly admitted against defendant under adoptive admissions exception; discussion included incriminating comments, and defendant presented no evidence suggesting that he did not hear comments or that he failed to speak because he was relying on his constitutional rights]; *People v. Davis* (2005) 36 C.4th 510, 539, 31 C.R.3d 96, 115 P.3d 417 [adoptive admission instruction was not defective for failing to inform jurors that admission must be in response to direct accusation; "it is enough that the evidence showed that the defendant participated in a private conversation in which the crime was discussed and the circumstances offered him the opportunity to deny responsibility or otherwise dissociate himself from the crime, but that he did not do so"]; *People v. Geier* (2007) 41 C.4th 555, 589, 61 C.R.3d 580, 161 P.3d 104 [in murder prosecution, evidence supported giving adoptive admission instruction, where, during telephone conversation following defendant's arrest, his former girlfriend asked him if he killed victim for insurance money and he remained silent]; CALCRIM, No. 357 [Adoptive Admissions]. *West's Key Number Digest*, Criminal Law k.412.2 et seq.



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## CHAPTER VI - Hearsay

### III. EXCEPTIONS TO THE RULE

#### B. Admission of Party.

#### 6. Excluded Admissions in Criminal Cases.

##### d. Admissions of Codefendant.

*1 Witkin Cal. Evid. Hearsay § 142*

[§ 142] Admissions of Codefendant.

The rule of *People v. Aranda* (1965) 63 C.2d 518, 529, 47 C.R. 353, 407 P.2d 265, and *Bruton v. United States* (1968) 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476, supra, §59, was applied to admissions in *People v. Anderson* (1987) 43 C.3d 1104, 240 C.R. 585, 742 P.2d 1306. Defendant and his codefendant were prosecuted for murder, kidnaping, and robbery. The codefendant did not testify, but presented a diminished capacity defense through three experts who had interviewed her. During cross-examination, the experts recounted statements made by the codefendant that incriminated herself and defendant. *Held*, admission of these statements was error (though harmless).

(a) The codefendant's statements were the type the *Aranda-Bruton* rule was designed to bar. The statements were potentially prejudicial, amounting to an accusation by one who claimed to have witnessed defendant's criminal acts and to have participated in them. The statements were also unreliable, for those the codefendant made to the police implicating a man other than the defendant were in conflict with the statements she made to the experts. Further, all of the statements attempted to shift blame from the codefendant to another. (43 C.3d 1122.)

(b) The *Aranda-Bruton* rule applies not only to formal confessions, but also to any statement that incriminates the defendant as well as the declarant codefendant. "[W]hat is material for *Bruton-Aranda* analysis is not *how* the statement under review should be classified in the abstract--as a confession, an admission, or even an exculpatory declaration--but rather *whether on the facts of the individual case it operates to inculcate the other defendant*." (43 C.3d 1123.)

(c) The *Aranda-Bruton* rule applies whether the codefendant's statements were admitted for their truth to implicate her in the crimes, or solely to impeach the experts' opinion of her mental state. Neither the unreliability of the codefendant's incriminating statements nor their impact are affected by the purpose for which they are introduced. Whatever the purpose, the statements are "manifestly the kind of evidence that jurors cannot put out of their minds." (43 C.3d 1124.)

One justice concurred in the judgment, but argued that because the codefendant's statements implicating defendant were elicited on cross-examination of the codefendant's psychiatrists for the limited purpose of impeaching their opinions, and because the jury was so advised, defendant was not denied his right of confrontation. (43 C.3d 1151.) A second justice concurred in the judgment, but dissented from the conclusion that *Aranda-Bruton* error occurred. (43 C.3d 1167.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Smith* (2005) 135 C.A.4th 914, 923, 38 C.R.3d 1 [in murder trial, admission of one defendant's out-of-court statements, made to his girlfriend, did not violate *Aranda-Bruton* rule, even though statements implicated other defendant as perpetrator of murder, as statements were directly admissible against other defendant under spontaneous statement exception].



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## CHAPTER VI - Hearsay

### III. EXCEPTIONS TO THE RULE

#### C. Declarations Against Interest.

##### 1. Modern Expanded Rule.

*1 Witkin Cal. Evid. Hearsay § 143*

[§ 143] Modern Expanded Rule.

(1) *In General.* A declaration of a nonparty against his or her own interest is admitted on the theory that one will not speak falsely or mistakenly where this would be prejudicial to oneself. (See *Wallace v. Oswald* (1922) 57 C.A. 333, 337, 207 P. 51 [quoting Jones: "It is a fair presumption that men will neither falsify accounts nor commit mistakes, when such falsehoods or mistakes would be prejudicial to their own pecuniary interests"]; Model C., Rule 509, Comment; 2 McCormick 5th, §316; 5 Wigmore (Chadbourn Rev.) §1455; 1 Jefferson, California Evidence Benchbook 3d, Chap. 6; 29A Am.Jur.2d (1994 ed.), Evidence §785; 2 U.C.L.A. L. Rev. 73; 58 Harv. L. Rev. 1; 9 U.C. Davis L. Rev. 119 [declarations in California and federal courts].)

The traditional rule, as set forth in former overlapping state statutes, was of narrow scope. Admissible declarations were those of a *decedent*, against his or her *pecuniary* or *proprietary* interest. (See *Wallace v. Oswald*, *supra*, 57 C.A. 336; *Newby v. Gibson* (1935) 6 C.A.2d 359, 360, 44 P.2d 468; *Wright v. Best* (1942) 19 C.2d 368, 379, 121 P.2d 702; *People v. Weatherford* (1945) 27 C.2d 401, 421, 164 P.2d 753; 13 Cal. L. Rev. 395.) This limited exception was the subject of much criticism, and occasional departures were made. (See *People v. Spriggs* (1964) 60 C.2d 868, 872, 36 C.R. 841, 389 P.2d 377, *infra*, §149; 2 McCormick 5th, §317 et seq.; 5 Wigmore (Chadbourn Rev.) §§1476, 1477; Model C., Rule 509 and Comment.)

(2) *Evidence Code.* Ev.C. 1230 enacted the expanded form of the exception: A statement "by a declarant having sufficient knowledge of the subject" is admissible "if the declarant is unavailable as a witness," and the statement, when made, "was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true."

(3) *Federal Rule.* F.R. Evid., Rule 804(b)(3), also applicable where the declarant is unavailable as a witness, similarly defines an admissible declaration: "A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." (See C.E.B., Effective Introduction of Evidence 2d, Chap. 20 [Declarations Against Interest]; 4 Mueller & Kirkpatrick, Federal Evidence 2d, §496; 29A Am.Jur.2d (1994 ed.), Evidence §785 et seq.)

(4) *Overlap With Other Exceptions.* The exceptions for declarations against interest and admissions sometimes

overlap where the declarant is a predecessor in interest or in some other relationship with the party against whom the statement is offered. (See *supra*, §119 et seq.; 2 McCormick 5th, §316; Model C., Rule 509, p. 256; 58 Harv. L. Rev. 63; *Wright v. Best, supra*; *Wallace v. Oswald, supra*.) And sometimes the same statement may be both a declaration against interest and a spontaneous exclamation (*infra*, §175).

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General.* See 2 McCormick 6th, §316 et seq. (4) *Overlap With Other Exceptions.* See 2 McCormick 6th, §316. *West's Key Number Digest*, Criminal Law k.416 et seq.; Evidence k.272 et seq.





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## C. Declarations Against Interest.

## 2. Conditions of Admissibility.

## a. Against Interest.

*1 Witkin Cal. Evid. Hearsay § 144*

[§ 144] Against Interest.

The basic condition of admissibility is that the statement must be against the declarant's interest. (*Ev.C. 1230*, *supra*, §143.) This calls for exclusion of two types of declarations:

(1) *Neutral Declarations*. In *Wicktor v. Los Angeles* (1956) 141 C.A.2d 592, 297 P.2d 115, decedent husband left a writing designating his sister, Mrs. S, as beneficiary of his county retirement benefits. Plaintiff, his widow, claimed the pension. She testified that decedent, after marrying her, declared his intention to change the designation to herself, subsequently told her he had made the change, and made calculations of the amount of monthly payments she would get. *Held*, the evidence was improperly received. (a) If offered to show decedent's *belief* that he had changed his beneficiary, it was immaterial, for the issue was whether a legally effective change had been made. (b) If offered to prove that decedent *had changed the beneficiary*, it was hearsay. And, since he could freely change beneficiaries at any time, the statement that he had named plaintiff his beneficiary was in no way against his interest. (141 C.A.2d 597.) (Cf. 68 Harv. L. Rev. 1077 [testator's direction in will].)

In *People v. Huggins* (1986) 182 C.A.3d 828, 227 C.R. 547, defendant was charged with breaking into a home and stealing money from a letter he found there. In an attempt to exculpate himself by showing third-person culpability (see 1 Cal. Evidence (4th), *Circumstantial Evidence*, §21), defendant sought to introduce a hearsay statement of N, a neighbor of the victim, to the effect that, while watering the victim's yard, she had discovered the rear door broken, entered the house, picked up mail from the hallway floor and placed it on a counter, and then attempted to locate the victim. *Held*, the evidence was properly excluded. The statement contained no admission of criminal conduct, and furnished an explanation for the neighbor's presence on the premises totally inconsistent with criminal intent. A reasonable person in the neighbor's position would not consider that such a statement exposed her to risk of criminal liability. (182 C.A.3d 831, 832.)

(2) *Self-serving Declarations*. Obviously, a statement in the declarant's own interest is inadmissible hearsay. (See *supra*, §10.) But a declaration may on its face be partly against interest and partly neutral or self-serving, or extrinsic facts may disclose this dual character. The decisions are in conflict whether to admit the entire statement, or only the parts against interest. (See 2 McCormick 5th, §316; 5 Wigmore (Chadbourn Rev.) §1465; 58 Harv. L. Rev. 49, 57.) Model C., Rule 509(2) proposed a test of admissibility of such additional parts "as the judge finds to be so closely connected with the declaration against interest as to be equally trustworthy." But the draftsmen of the Uniform Rules dropped this attempt to solve the problem, and the Evidence Code is equally silent.

Application of *F.R. Evid., Rule 804(b)(3)* requires an examination of the entire statement so as to identify those portions that are not against interest. The rule does not allow admission of non-self-inculpatory statements, even if made within a broader narrative that is generally self-inculpatory. "The district court may not just assume for purposes of Rule 804(b)(3) that a statement is self-inculpatory because it is part of a fuller confession, and this is especially true when the statement implicates someone else." (*Williamson v. United States (1994) 512 U.S. 594, 114 S.Ct. 2431, 2435, 129 L.Ed.2d 476, 483.*)

**SUPPLEMENT:** [This section is current through the latest supplement]  
(2) *Self-serving Declarations*. See 2 McCormick 6th, §316.



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#### 2. Conditions of Admissibility.

#### b. Declarant Unavailable.

#### 1 *Witkin Cal. Evid. Hearsay* § 145

[§ 145] Declarant Unavailable.

Former California statutes seemingly restricted declarations to those of a decedent. (See *supra*, §143.) Modern courts have applied the broader test of unavailability of the witness by reason of insanity or absence from the jurisdiction. (See 2 McCormick 5th, §320; 5 Wigmore (Chadbourn Rev.) §1456; 58 *Harv. L. Rev.* 2; for meaning of "unavailability," see *supra*, §18 et seq.) *People v. Spriggs* (1964) 60 C.2d 868, 875, 36 C.R. 841, 389 P.2d 377, *infra*, §149, took a further step in holding the declaration admissible regardless of availability of the declarant. (See 12 U.C.L.A. L. Rev. 638; 17 *Stanf. L. Rev.* 322; 37 *So. Cal. L. Rev.* 621; 2 *San Diego L. Rev.* 149.)

*Ev.C. 1230*, departing from *Spriggs*, limits the declarations to those of unavailable witnesses. The purpose of the condition is "to require the proponent of the evidence to use the in-court testimony of the declarant if it is possible to do so." If the declarant testifies contrary to expectation, "the proponent may then show the prior inconsistent statement as substantive evidence of the facts stated." (Law Rev. Com. Comment to *Ev.C. 1230*; see *Ev.C. 1235* and Law Rev. Com. Comment, *infra*, §156; *People v. Cudjo* (1993) 6 C.4th 585, 607, 25 C.R.2d 390, 863 P.2d 635, *supra*, §20 [defendant's brother was unavailable as witness for purposes of exception for declarations against interest where he had exercised his self-incrimination privilege].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Elliot* (2005) 37 C.4th 453, 483, 35 C.R.3d 759, 122 P.3d 968 [defendant's statements (two letters written while in jail, assertions regarding his prior crimes, and expressions of remorse) were properly excluded; defendant could not render himself unavailable for purposes of penal interest exception by exercising his privilege not to testify]; 2 McCormick 6th, §320.



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### III. EXCEPTIONS TO THE RULE

#### C. Declarations Against Interest.

##### 2. Conditions of Admissibility.

##### c. Trustworthiness and Knowledge.

*1 Witkin Cal. Evid. Hearsay § 146*

[§ 146] Trustworthiness and Knowledge.

In order to exclude untrustworthy statements, *Ev.C. 1230* adopts the general test of Unif. Rule 804(b)(3): The statement must be so far contrary to the declarant's interests "that a reasonable man in his position would not have made the statement unless he believed it to be true." (See *People v. Chapman* (1975) 50 C.A.3d 872, 878, 123 C.R. 862; *People v. Bullard* (1977) 75 C.A.3d 764, 769, 142 C.R. 473; *People v. Fuentes* (1998) 61 C.A.4th 956, 961, 72 C.R.2d 237, quoting the text.)

The remaining condition, that the declarant have had "sufficient knowledge of the subject," is not found in the Uniform Rules; it preserves a traditional requirement of the common law and earlier statutes. (See Law Rev. Com. Comment to *Ev.C. 1230*; *Estate of Huntington* (1976) 58 C.A.3d 197, 209, 129 C.R. 787; 5 Wigmore (Chadbourn Rev.) §1471; 2 McCormick 5th, §316.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Brown* (2003) 31 C.4th 518, 535, 536, 3 C.R.3d 145, 73 P.3d 1137, quoting the text [in capital murder trial, statements by defendant's accomplice to effect that he was present with defendant when murder occurred, he heard fatal shot, and he helped defendant steal victim's car were sufficiently against his penal interests to indicate trustworthiness]; 2 McCormick 6th, §316.



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#### C. Declarations Against Interest.

##### 3. Illustrations.

##### a. Declarations Against Pecuniary Interest.

*1 Witkin Cal. Evid. Hearsay § 147*

[§ 147] Declarations Against Pecuniary Interest.

The traditional exception has generally been applied to declarations by decedents, as illustrated in the following situations:

(1) *Statement of Indebtedness*. A statement admitting or acknowledging indebtedness to another is a declaration against interest and, in some cases, a vicarious admission. (See *Newby v. Gibson* (1935) 6 C.A.2d 359, 360, 44 P.2d 468 [statement of deceased in deposition in another action that he owed plaintiff's assignor \$ 10,000]; *Mayfield v. Fidelity & Cas. Co. of New York* (1936) 16 C.A.2d 611, 617, 61 P.2d 83 [action by beneficiary of accident insurance policy; statement of deceased insured that he was indebted to defendant insurance company]; *Wright v. Best* (1942) 19 C.2d 368, 379, 121 P.2d 702 [declaration of deceased predecessor in title that he received money from mine company for privilege of polluting stream; held binding on successors either as declaration against interest or vicarious admission]; 2 McCormick 5th, §317; 58 Harv. L. Rev. 35.)

(2) *Pedigree Declaration*. In *Estate of Weis* (1964) 224 C.A.2d 19, 25, 36 C.R. 266, a pedigree declaration (infra, §279), listing a half-sister as an heir and thereby conceding a right that would lessen the declarant's share in the estate, was held admissible also as a declaration against interest.

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Statement of Indebtedness*. See 2 McCormick 6th, §317.



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#### C. Declarations Against Interest.

##### 3. Illustrations.

#### b. Declaration Against Proprietary Interest.

##### *1 Witkin Cal. Evid. Hearsay § 148*

[§ 148] Declaration Against Proprietary Interest.

(1) *In General.* Where the declarant is now dead and the statement is to the effect that the declarant did not own land, or that the declarant's interest was less than a fee, the statement is clearly admissible, and often comes in both as a declaration against interest and as an admission of a predecessor in title. (See *Horton v. Winbigler* (1917) 175 C. 149, 157, 165 P. 423 [declaration of decedent that she had only life interest]; *People v. Weatherford* (1945) 27 C.2d 401, 421, 164 P.2d 753 [decedent's declaration that she had sold her interest in cafe]; 2 McCormick 5th, §317; 58 Harv. L. Rev. 35; supra, §129.)

On the issue whether a decedent husband's estate was community or separate property, his income tax return, which had reported the property as community and split the income with his wife, was admissible as his declaration against interest. (*Estate of Raphael* (1949) 91 C.A.2d 931, 939, 206 P.2d 391.) And on the issue whether separate property had been transformed into community property by an executed oral agreement of the spouses, the declarations of the decedent husband, that the property was community, were admissible. (*Estate of Cummins* (1955) 130 C.A.2d 821, 831, 280 P.2d 128.)

(2) *Payment Receipt.* Although there is authority supporting the view that a receipt acknowledging payment is admissible as a declaration against interest (see 5 Wigmore (Chadbourn Rev.) §§1456, 1460), a contrary conclusion was reached in *Plonley v. Reser* (1960) 178 C.A.2d Supp. 935, 3 C.R. 551 (doubtless because of the former *decedent* limitation). Plaintiffs, suing a grading contractor for damages to property caused by dust and dirt, introduced receipted bills for repairs and replacements. *Held*, it was error to admit them over objection. (a) As between the parties to the transaction, a receipt is admissible as prima facie proof of settlement. (b) As against strangers, it is a hearsay declaration of the signer, and inadmissible, except where it is an official receipt made pursuant to statute, e.g., by a tax officer. (See *Pacific Gas & Elec. Co. v. Thomas Drayage & Rigging Co.* (1968) 69 C.2d 33, 43, 69 C.R. 561, 442 P.2d 641, supra, §15 [citing *Plonley*]; 80 A.L.R.2d 915 [admissibility of receipt by third person].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General.* See 2 McCormick 6th, §317. *West's Key Number Digest*, Evidence k.273 et seq., 276 et seq.



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##### 3. Illustrations.

#### c. Declaration Involving Criminal Liability.

##### 1. Modern Rule of Admissibility.

*1 Witkin Cal. Evid. Hearsay § 149*

[§ 149] Modern Rule of Admissibility.

(1) *Abandonment of Traditional Rule.* Under the traditional rule, in a criminal prosecution of a defendant, a third person's declaration confessing the commission of the crime was not admissible. (*People v. Hall* (1892) 94 C. 595, 599, 30 P. 7; *Donnelly v. United States* (1913) 228 U.S. 243, 33 S.Ct. 449, 57 L.Ed. 820; see 2 McCormick 5th, §318; 5 Wigmore (Chadbourn Rev.) §§1476, 1477; 58 Harv. L. Rev. 39.)

This limitation was abandoned in *People v. Spriggs* (1964) 60 C.2d 868, 36 C.R. 841, 389 P.2d 377. Defendant and R were arrested for possession of heroin. Defendant's counsel, cross-examining the arresting officer, elicited the fact that he had inquired of R whether the narcotics were hers. Counsel then asked, "What did she say?" *Held*, it was error to sustain the prosecutor's objection, for an affirmative answer would have been evidence that she, not defendant, had possession. (60 C.2d 876.) The court thought the test of a hearsay exception--trustworthiness--was met, and overruled *People v. Hall*, *supra*. (60 C.2d 874, 875.) (See 12 U.C.L.A. L. Rev. 638 [*Spriggs*]; 17 Stanf. L. Rev. 322 [same]; 37 So. Cal. L. Rev. 621 [same]; 90 A.L.R.3d 1173 [admissibility in civil case]; 92 A.L.R.3d 1164 [admissibility in criminal case].)

(2) *Evidence Code.* The Evidence Code, following *Spriggs*, makes the declaration admissible. (*Ev.C. 1230*, *supra*, §146; on preliminary finding as to trustworthiness, see *infra*, §150.)

In *People v. Frutos* (1984) 158 C.A.3d 979, 205 C.R. 204, a prosecution for murder in a gang killing, G, a gang member, told K, his cellmate in the county jail, that he had participated in the killing by providing weapons and driving two others to the scene. At trial, G invoked his Fifth Amendment privilege, and K testified to the G statement. *Held*, admission was proper. The statement was clearly inculpatory, G had sufficient knowledge of the facts, and the circumstances of the spontaneous disclosure to a stranger were such that the declarant had no reason to lie. (158 C.A.3d 985.) (See also *People v. Leach* (1975) 15 C.3d 419, 438, 124 C.R. 752, 541 P.2d 296 [background of exception, views of commentators on scope]; *People v. Jackson* (1991) 235 C.A.3d 1670, 1677, 1 C.R.2d 778 [declarations against penal interest "must be 'distinctly' against the declarant's penal interest and must be 'clothed with indicia of reliability' "]; *People v. Cudjo* (1993) 6 C.4th 585, 607, 25 C.R.2d 390, 863 P.2d 635, *supra*, §20 [testimony that defendant's brother had confessed to murder came within exception for statements against penal interest]; *People v. Wilson* (1993) 17 C.A.4th 271, 276, 21 C.R.2d 420 [wife's statements implicating husband came within exception because they also implicated her as accessory]; *People v. Fuentes* (1998) 61 C.A.4th 956, 962, 72 C.R.2d 237 [in murder prosecution, statements of defendant's coparticipants, as carefully limited to information that specifically disserved only their own

interests, were properly admitted after coparticipants made themselves unavailable by claiming privilege against self-incrimination].)

(3) *Federal Rules of Evidence*. The Federal Rules of Evidence add a condition to admissibility of a declaration designed to exculpate the defendant in a criminal case. "A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." (*F.R. Evid.*, Rule 804(b)(3); see 4 Mueller & Kirkpatrick, *Federal Evidence* 2d, §500 et seq.; 66 *Cal. L. Rev.* 1189; 29A *Am.Jur.2d* (1994 ed.), *Evidence* §789 et seq.)

(4) *Admissibility of Statement in Joint Trial*. A declaration against interest by one defendant may be admitted in a joint trial, even though it implicates a codefendant, provided that the statement satisfies the statutory definition and otherwise satisfies the constitutional requirement of trustworthiness. There is no litmus test for the determination whether these requirements are met. "The trial court must look to the totality of the circumstances in which the statement was made, whether the declarant spoke from personal knowledge, the possible motivation of the declarant, what was actually said by the declarant and anything else relevant to the inquiry. ... [S]pecial attention must be paid to any statements that tend to inculcate the nondeclarant. This is so because a statement's content is most reliable in that portion which inculcates the declarant. It is least reliable in that portion which shifts responsibility." (*People v. Greenberger* (1997) 58 C.A.4th 298, 334, 335, 68 C.R.2d 61.) (See *People v. Bryden* (1998) 63 C.A.4th 159, 73 C.R.2d 554 [jailhouse communication between nontestifying codefendant and prosecution witness lacked sufficient indicia of trustworthiness, where statement may have been embellished or distorted by motivation to please witness, and much of communication was not directly against codefendant's penal interests]; on admissibility of codefendant's extrajudicial confession or statement in joint trial, under party admissions exception, see *supra*, §§59, 142.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Abandonment of Traditional Rule*. See 2 McCormick 6th, §318.(2) *Evidence Code*. See *People v. Lawley* (2002) 27 C.4th 102, 154, 115 C.R.2d 614, 38 P.3d 461 [in guilt phase of capital murder prosecution, trial judge properly ruled admissible testimony as to out-of-court statement by defendant's acquaintance to effect that acquaintance was hired and paid to kill victim, and trial judge properly excluded portions of statement indicating that prison gang was party that hired him; nothing about identity of hirer made acquaintance more culpable than other portions of statement]; *People v. Samuels* (2005) 36 C.4th 96, 120, 121, 30 C.R.3d 105, 113 P.3d 1125 [in capital murder case, witness' testimony as to statement by out-of-court declarant to effect that declarant had committed murder, that third party had helped him, and that defendant had paid him was properly admitted under exception for statements against penal interest; although reference to defendant did not make that portion of statement more inculpatory, it was inextricably tied to overall statement and did not require severance; distinguishing *Lawley*].

(4) *Admissibility of Statement in Joint Trial*. See *Lilly v. Virginia* (1999) 527 U.S. 116, 119 S.Ct. 1887, 1901, 144 L.Ed.2d 117, 135, 136, text, §62; *People v. Schmaus* (2003) 109 C.A.4th 846, 856, 135 C.R.2d 521, 3 Cal. Evidence (4th), *Presentation at Trial, Supp.*, §21 [discussing *Lilly* and questioning aspects of holding in *People v. Greenberger* (1997) 58 C.A.4th 298, 68 C.R.2d 61, text, p. 861]; *People v. Cervantes* (2004) 118 C.A.4th 162, 175, 12 C.R.3d 774 [in murder prosecution of three defendants, out-of-court statement by one defendant to neighbor was properly admitted against other two defendants as declaration against interest; statement was made within 24 hours of crime to lifelong friend from whom defendant sought medical treatment, and it attributed blame both to his codefendants and to himself]. *West's Key Number Digest*, Criminal Law k.416 et seq.





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##### 3. Illustrations.

#### c. Declaration Involving Criminal Liability.

##### 2. Preliminary Fact Determination.

##### *1 Witkin Cal. Evid. Hearsay § 150*

[§ 150] Preliminary Fact Determination.

*Ev.C. 1230*, codifying the requirement of trustworthiness as a condition to admissibility (see *supra*, §146), calls for a determination of preliminary fact by the judge (*Ev.C. 404, 405, 3 Cal. Evidence (4th), Presentation at Trial, §§48, 63*). (See *People v. Chapman (1975) 50 C.A.3d 872, 878, 123 C.R. 862*, citing the text; *People v. Bullard (1977) 75 C.A.3d 764, 769, 142 C.R. 473*; *People v. Rios (1985) 163 C.A.3d 852, 867, 210 C.R. 271*; *People v. Sanders (1990) 221 C.A.3d 350, 379, 271 C.R. 534* ["confession" was not against declarant's penal interest, where five witnesses said he was innocent and he could retract it on ground he was only trying to help defendant, his brother]; *People v. Frierson (1991) 53 C.3d 730, 743, 280 C.R. 440, 808 P.2d 1197, 2 Cal. Evidence (4th), Witnesses, §449* ["confession" was not against declarant's penal interest, because it was made 14 years after offense, he knew defendant had been found guilty of offense, and defendant was friend whom declarant could aid at little risk to himself]; *People v. Jackson (1991) 235 C.A.3d 1670, 1678, 1 C.R.2d 778* [test is objective--"would the statement subject its declarant to criminal liability such that a reasonable person would not have made the statement without believing it true"].)

In making this preliminary determination, the judge may take into account not just the words of the statement but the circumstances under which it was made, "and may analyze the possible motivation of the declarant and his relationship to the defendant on the case." (*People v. Chapman, supra, 50 C.A.3d 879*.)

In *People v. Blankenship (1985) 167 C.A.3d 840, 213 C.R. 666*, defendant, charged with robbery and attempted murder, sought to introduce evidence of an oral confession made to defendant by H, to the commission of the charged offenses. At a hearing during trial, H was examined under oath, but when questioned on these crimes, invoked his self-incrimination privilege. The judge ruled that H could not be called, and defense counsel then attempted to call defendant to testify to the statements of H as declarations against penal interest. *Held*, the statements were inadmissible; the circumstances and possible motivation of the declarant justified the conclusion that the declarations lacked trustworthiness: "As the proposed testimony was to come from defendant himself it was highly suspect both because defendant had a motive to falsify and because accurate details concerning the crime could be explained by defendant's own knowledge and guilt rather than Hahn's." (*167 C.A.3d 849*.) The record strongly suggested "the existence of a plan by three fellow prisoners to have one person take the blame for another's crime under circumstances where the one taking the blame could not suffer any real detriment to his own interests." (*167 C.A.3d 849*, quoting *Chapman*.)

*Vorse v. Sarasy (1997) 53 C.A.4th 998, 1011, 1012, 62 C.R.2d 164, 1 Cal. Evidence (4th), Circumstantial Evidence, §17*, disagreed with one aspect of *Chapman* and *Blankenship*--their suggestion that the trial judge may

exclude a statement against penal interest because, in applying *Ev.C. 352* (weighing of probative value against danger of prejudice; see *infra*, §151), the judge disbelieves the live witness who is testifying as to the statement.

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Geier* (2007) 41 C.4th 555, 585, 61 C.R.3d 580, 161 P.3d 104 [in murder prosecution, trial judge did not err in excluding as untrustworthy videotaped statement by wife of one of victims in which she stated that she killed her husband; statement was one of three in which she gave entirely contradictory versions of what happened, and she was having affair with defendant's confederate and thus had motive to take blame, thereby deflecting it from confederate and, by extension, from defendant]. *Judge's disbelief of live witness*: See *People v. Cudjo* (1993) 6 C.4th 585, 608, 610, 25 C.R.2d 390, 863 P.2d 635, 1 Cal. Evidence (4th), *Circumstantial Evidence*, Supp., §17.



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##### 3. Distinctions.

#### 1 Witkin Cal. Evid. Hearsay § 151

[§ 151] Distinctions.

(1) *Statement Both Inculpatory and Exculpatory.* A statement that is in part inculpatory and in part exculpatory, e.g., one that admits some complicity but places the major blame on another, does not meet the test of trustworthiness and is inadmissible. (See *People v. Shipe* (1975) 49 C.A.3d 343, 354, 122 C.R. 701; *People v. Coble* (1976) 65 C.A.3d 187, 191, 135 C.R. 199; *People v. Bullard* (1977) 75 C.A.3d 764, 770, 142 C.R. 473.)

Thus, a conspirator's statement may be against the conspirator's own penal interest, but may also incriminate the other conspirators. If the statement does not come within the conspirators' exception (see *supra*, §132), admissibility is limited to those parts that are against the declarant's interest. (*People v. Leach* (1975) 15 C.3d 419, 441, 124 C.R. 752, 541 P.2d 296.)

(2) *Claim of Fifth Amendment Privilege.* Although a claim of the privilege against self-incrimination provides the type of witness unavailability required for introducing the claimant's out-of-court declaration against interest (see *People v. Frutos* (1984) 158 C.A.3d 979, 205 C.R. 204, *supra*, §149), it does not ensure that the other requirements of the hearsay exception are met. In *People v. Traylor* (1972) 23 C.A.3d 323, 100 C.R. 116, defendant contended that he had never been a passenger in an automobile where heroin was found and that he did not know the driver of the car. At trial, he called the driver to testify but was met with a refusal on the ground that the answers would tend to incriminate the witness. The trial judge ruled that the privilege was properly taken. Defendant then put his own attorney on the stand to testify conditionally about a conversation the attorney had with the driver, covering the same ground as the questions the driver had refused to answer. *Held*, the statements were properly excluded. A witness' claim of the self-incrimination privilege does not automatically make his extrajudicial declarations admissible under *Ev.C. 1230*. (23 C.A.3d 330.) Wigmore points out that a statement distinctly against one's interest is unlikely to be deliberately false or heedlessly incorrect and is therefore trustworthy. But "[i]t is hard to see how, under all the circumstances, the driver should have realized that the statement he made to defendant's counsel was 'distinctly' against his own penal interest." (23 C.A.3d 331.) (See *People v. Johnson* (1974) 39 C.A.3d 749, 760, 114 C.R. 545 [citing both Wigmore and *Traylor*].)

(3) *Discretionary Exclusion.* Where the probative value of the statement is slight, and its admission might confuse the jury, discretionary exclusion under *Ev.C. 352* (1 *Cal. Evidence* (4th), *Circumstantial Evidence*, §17) is proper. (*People v. Chapman* (1975) 50 C.A.3d 872, 880, 123 C.R. 862, *supra*, §150.) Even where the declarations satisfy the requirements for admissibility, they may be excluded "if they are so ripe with condemning facts against the defendant that they are devastating or crucial to his case." (*People v. Rios* (1985) 163 C.A.3d 852, 867, 210 C.R. 271 [no other

evidence implicated defendant in murder].)

In *People v. Leonard* (1983) 34 C.3d 183, 193 C.R. 171, 666 P.2d 28, J was arrested at the same time as defendant. J gave a negotiated guilty plea to one count, but, at the time of defendant's trial, J had not been sentenced, and he claimed privilege and was declared unavailable as a witness. His guilty plea was then introduced as a declaration against penal interest, and, despite defense counsel's urging, the trial judge ruled the plea admissible with no indication that he had weighed the probative value against its prejudicial effect. *Held*, conviction reversed. The probative value of the coarrestee's guilty plea was questionable, and its prejudicial effect--inviting an inference of guilty by association--was great. (34 C.3d 188.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Statement Both Inculpatory and Exculpatory.* In *People v. Duarte* (2000) 24 C.4th 603, 101 C.R.2d 701, 12 P.3d 1110, defendant was charged with shooting at an inhabited dwelling, conspiracy, and assault with a firearm. Citing the hearsay exception for statements against penal interest, the trial judge permitted a police sergeant to relate, in redacted form, postarrest statements made by an alleged accomplice. Before convicting defendant, the jury twice inquired about those statements. *Held*, reversed. To be admissible under the penal interests exception, a statement must be disserving to the declarant and must carry indicia of trustworthiness. (24 C.4th 612, 614, citing the text.) Here, neither requirement was satisfied. Even as redacted, the statements the trial judge admitted had both self-serving and disserving aspects. Although they admitted the declarant's participation in the events in question, they tended to describe the events in a manner sympathetic to him, to minimize his responsibility, and to imply that there were others who might bear a greater share of responsibility. (24 C.4th 613.) As to trustworthiness, an examination of the full, unredacted version of the statements indicates that they were unmistakably attempts to shift blame or curry favor. And the fact that they were made after the declarant had been taken into custody calls their reliability even further into question. (24 C.4th 617.) In light of the absence of any eyewitnesses, the lack of physical evidence linking defendant to the crime, and the serious impeachment of the one witness the prosecution relied on most heavily, it seems likely that the jury would have reached a result more favorable to defendant had the police sergeant's testimony not been erroneously admitted. (24 C.4th 619.)



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#### d. Declaration Against Social Interest.

##### *1 Witkin Cal. Evid. Hearsay § 152*

[§ 152] Declaration Against Social Interest.

*Ev.C. 1230* covers a declaration that creates a risk of making the declarant "an object of hatred, ridicule, or social disgrace in the community." (See *supra*, §143; 2 McCormick 5th, §318; 58 *Harv. L. Rev.* 39; 69 *So. Cal. L. Rev.* 1427 [arguing for more frequent use of the exception].)

This innovation was, in a sense, anticipated, and a technical limitation in the old rule overcome, in *People v. Parriera* (1965) 237 C.A.2d 275, 46 C.R. 835. The statement of a victim of a crime, exculpating the defendant, ordinarily is not against the declarant's interest, and is inadmissible under this exception. (See *People v. McLaughlin* (1872) 44 C. 435; *People v. Dalton* (1962) 201 C.A.2d 396, 405, 20 C.R. 51; 95 A.L.R.2d 637 [admissibility of homicide victim's statement exculpating accused].) But what if the statement shows that the victim's own conduct in the transaction is disgraceful? Here, defendant was charged with attempted murder of his wife. She testified that defendant shot her, but two hospital nurses testified to her voluntary declaration that she shot herself. The trial judge instructed the jury that the declaration could only be considered as impeachment of the wife, and not as substantive evidence of attempted suicide. *Held*, this was error. (a) Under the traditional rule, this was not an admissible declaration against interest; and it was not even a declaration against penal interest under the extended rule of *People v. Spriggs* (1964) 60 C.2d 868, 36 C.R. 841, 389 P.2d 377, *supra*, §149, for suicide is not a crime in California (see 1 *Cal. Crim. Law* (3d), *Crimes Against the Person*, §101). (b) But an attempted suicide might lead to insanity proceedings and possible confinement in an institution, which would subject the declarant to "odium"; and such a declaration is as trustworthy as the one held admissible in *Spriggs*. (237 C.A.2d 284.) (See *People v. Salcido* (1966) 246 C.A.2d 450, 461, 54 C.R. 820, *infra*, §216 [statement by alleged victim of homicide, made while she was being transported to hospital, that she shot herself, held admissible; following *Parriera*].)

Both the content of the statement and the fact that it was made must be against the declarant's social interest. "Otherwise, each time a witness broke a confidence, he could claim that his revelations were against social interest, because by betraying the trust placed in him, he had incurred social opprobrium." (*In re Weber* (1974) 11 C.3d 703, 722, 114 C.R. 429, 523 P.2d 229 [declaration by prisoner, seeking to benefit second prisoner at third prisoner's expense, did not make declarant "snitch" whom fellow inmates would regard with social disgrace].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Wheeler* (2003) 105 C.A.4th 1423, 1428, 129 C.R.2d 916 [in murder prosecution, statement by defendant's wife to defendant, made shortly before murder, that she had committed adultery with victim was properly

admitted; statement sufficiently risked making wife object of social disgrace to qualify under social interest exception];  
2 McCormick 6th, §318.



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e. Other Declarations.

1 *Witkin Cal. Evid. Hearsay* § 153

[§ 153] Other Declarations.

(1) *Declaration Involving Civil Liability.* The exception for a declaration subjecting the declarant to the risk of civil liability (*Ev.C. 1230*, supra, §143) covers declarations of liability in tort or for breach of contract. (See 2 McCormick 5th, §317; 4 Mueller & Kirkpatrick, *Federal Evidence* 2d, §497 [reviewing federal cases]; 58 *Harv. L. Rev.* 29; 1964 A.S. 363.)

(2) *Declaration Rendering Claim Invalid.* *Ev.C. 1230* also covers a declaration tending to render invalid a claim by the declarant against another. (See supra, §143; 2 McCormick 5th, §317; 58 *Harv. L. Rev.* 33.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Declaration Involving Civil Liability.* See 2 McCormick 6th, §317.

(2) *Declaration Rendering Claim Invalid.* See 2 McCormick 6th, §317.



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#### D. Sworn Statement Regarding Gang-Related Crime.

##### *1 Witkin Cal. Evid. Hearsay § 154*

[§ 154] Sworn Statement Regarding Gang-Related Crime.

(1) *In General.* *Ev.C. 1231* et seq., added in 1997, create a hearsay exception for a prior statement about gang-related activity by a declarant who is now deceased. (See 29 *McGeorge L. Rev.* 605.) Under *Ev.C. 1231*, the proponent of the statement must establish all of the following:

(a) The statement relates to acts or events that are subjects of a criminal prosecution under the California Street Terrorism Enforcement and Prevention Act (P.C. 186.20 et seq.; see 2 *Cal. Crim. Law* (3d), *Crimes Against Public Peace and Welfare*, §23).

(b) The statement is preserved in a verbatim transcript, copy, or record (which may be made by means of audio or video recording or equivalent technology).

(c) The acts or events to which the statement relates are within the personal knowledge of the declarant.

(d) The statement was made under oath or affirmation under penalty of perjury in an affidavit, or at a deposition, preliminary hearing, grand jury hearing, or "other proceeding in compliance with law." (See *Ev.C. 1231.2* ["A peace officer may administer and certify oaths for purposes of this article"].)

(e) The declarant died from other than natural causes.

(f) The statement was made under circumstances indicating that it is trustworthy and "particularly worthy of belief."

(2) *Trustworthiness Determination.* Under *Ev.C. 1231(f)*, the following factors, among others, may be considered in determining whether the statement is sufficiently trustworthy:

(a) Whether the statement was made in contemplation of a pending or anticipated criminal or civil matter in which the declarant had an interest, other than as a witness.

(b) Whether the declarant had a bias or motive for fabrication, and if so, the extent of the bias or motive.

(c) Whether the statement is corroborated by evidence other than statements that are admissible only under *Ev.C. 1231*.

(d) Whether the statement was against the declarant's interest.



(3) *Notice*. The proponent of the statement must make known to the opposing party the intention to offer the statement, and the statement's particulars, sufficiently in advance to give the opposing party a fair opportunity to prepare to meet it. (*Ev.C. 1231.1.*)

(4) *Testimony by Law Enforcement Officer*. A law enforcement officer who testifies as to a hearsay statement admitted under *Ev.C. 1231* must have 5 years of law enforcement experience, or must have completed a certified training course that included the investigation and reporting of cases and testifying at preliminary hearings and trials. (*Ev.C. 1231.3.*)

(5) *Statement to Jury*. The jury must not be told that the declarant died from other than natural causes, but must be told simply that the declarant is not available. (*Ev.C. 1231.4.*)

(6) *Other Evidentiary Requirements Not Affected*. In enacting *Ev.C. 1231* et seq., the Legislature did not intend (a) to affect other evidentiary requirements, such as those of relevance (*Ev.C. 351*; see *1 Cal. Evidence (4th), Circumstantial Evidence*, §5) and the weighing of probative value against prejudicial impact (*Ev.C. 352*; see *1 Cal. Evidence (4th), Circumstantial Evidence*, §17); (b) to impair a party's right to attack the declarant's credibility under *Ev.C. 1202* (see *3 Cal. Evidence (4th), Presentation at Trial*, §357); (c) to affect the defendant's right to discover rebuttal evidence to attack the declarant's credibility; or (d) to impair the defendant's constitutional rights of due process and confrontation. (1997 Stats., Chap. 499, §2.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### E. Prior Statements of Witnesses.

1. Prior Inconsistent and Consistent Statements.
  - a. Former Law and Code Changes.

*1 Witkin Cal. Evid. Hearsay § 155*

[§ 155] Former Law and Code Changes.

(1) *Former Law.* The former rule gave no substantive evidentiary effect to the prior statement of a nonparty witness: (a) If the prior statement was inconsistent with the present testimony, it could be offered only to impeach the witness. (See 3 *Cal. Evidence (4th)*, *Presentation at Trial*, §315.) (b) If the prior statement was consistent with the present testimony, it could be offered, under certain conditions, only to rehabilitate the witness. (See 3 *Cal. Evidence (4th)*, *Presentation at Trial*, §364 et seq.) In neither case, however, was it "affirmative" evidence sufficient to make a case for the jury or to sustain a verdict or finding, and the jury was so instructed. (On *inconsistent statements*, see *Albert v. McKay & Co.* (1917) 174 C. 451, 456, 163 P. 666; *Kroplin v. Huston* (1947) 79 C.A.2d 332, 343, 179 P.2d 575; *People v. Orcalles* (1948) 32 C.2d 562, 572, 197 P.2d 26; *Meyer v. State Bd. of Equalization* (1954) 42 C.2d 376, 384, 267 P.2d 257; *People v. Ballard* (1963) 218 C.A.2d 295, 309, 32 C.R. 233, quoting the text; *Fibreboard Paper Products Corp. v. East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL-CIO* (1964) 227 C.A.2d 675, 699, 39 C.R. 64, citing the text; 1 McCormick 5th, §§34, 36; 3A Wigmore (Chadbourn Rev.) §1018; 1 Jefferson, California Evidence Benchbook 3d, Chap. 10; 2 U.C.L.A. L. Rev. 49; 1947 A.S. 1072; 1948 A.S. 888; 1953 A.S. 771; 1955 A.S. 619; on *consistent statements*, see *Kroplin v. Huston*, *supra*, 79 C.A.2d 343; 1 McCormick 5th, §47; 2 U.C.L.A. L. Rev. 49; 78 Harv. L. Rev. 887; 1947 A.S. 1072; 1948 A.S. 888; 1955 A.S. 619; 1957 A.S. 542.)

(2) *Proposals for Change.* A number of authorities, including a few courts, took the position that the fundamental objection to hearsay is removed when the declarant is available for confrontation and cross-examination, and therefore statements of this type should be admitted as substantive evidence. (Model C., Rule 503, Comment b.) (See 2 McCormick 5th, §251; 3A Wigmore (Chadbourn Rev.) §1018; 2 U.C.L.A. L. Rev. 49; 62 Harv. L. Rev. 192; 78 Harv. L. Rev. 887; 1947 A.S. 1072; 1948 A.S. 888; 1955 A.S. 619.) The opposing authorities, favoring retention of the restrictive rule, argued that (a) the principal value of cross-examination is lost unless it takes place at the time the witness speaks; and (b) admissibility of prior statements would offer the temptation and opportunity for manufacture of evidence. (See 2 U.C.L.A. L. Rev. 51.)

(3) *Evidence Code.* Ev.C. 1235 and Ev.C. 1236 adopted the view of the Model Code giving substantive evidentiary effect to both kinds of statements. (See 1 Jefferson, California Evidence Benchbook 3d, Chap. 10; *infra*, §§156, 161.)

(4) *Federal Rules of Evidence.* F.R. Evid., Rule 801(d)(1) provides that a statement is not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express

or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person." (See *Tome v. United States* (1995) 513 U.S. 150, 115 S.Ct. 696, 700, 130 L.Ed.2d 574, 581 [Rule 801(d)(1) embodies common law requirement that, to be admissible, prior consistent statement must have been made before alleged fabrication, or before alleged improper influence or motive arose]; 4 Mueller & Kirkpatrick, Federal Evidence 2d, §402 et seq.; 30 *Hastings L. J.* 575; 10 *Pacific L. J.* 1; 10 *Loyola L.A. L. Rev.* 497; 26 *U.C.L.A. L. Rev.* 967; 10 *Southwestern U. L. Rev.* 985; 29 *Am.Jur.2d* (1994 ed.), *Evidence* §670 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Former Law.* See 1 McCormick 6th, §§34, 36, 47.



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## CHAPTER VI - Hearsay

### III. EXCEPTIONS TO THE RULE

#### E. Prior Statements of Witnesses.

#### 1. Prior Inconsistent and Consistent Statements.

##### b. Prior Inconsistent Statements.

##### 1. In General.

*1 Witkin Cal. Evid. Hearsay § 156*

[§ 156] In General.

(1) *Rule of Admissibility.* A prior statement of a witness, inconsistent with the witness' present testimony, is admissible if "offered in compliance with" *Ev.C. 770*. (*Ev.C. 1235*.) *Ev.C. 770* states the requirement of opportunity to explain or deny. (See *3 Cal. Evidence (4th), Presentation at Trial, §333*.) (On admissibility of statement of forgetful witness, see *3 Cal. Evidence (4th), Presentation at Trial, §338*.)

The Law Revision Commission Comment to *Ev.C. 1235* makes the following argument in support of this significant change in California law: "[T]he dangers against which the hearsay rule is designed to protect are largely nonexistent. The declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter. In many cases, the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation. The trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency. Hence, it is in as good a position to determine the truth or falsity of the prior statement as it is to determine the truth or falsity of the inconsistent testimony given in court. Moreover, Section 1235 will provide a party with desirable protection against the 'turncoat' witness who changes his story on the stand and deprives the party calling him of evidence essential to his case."

The Comment further points out that the new section permits a party to introduce inconsistent statements of its own witness, regardless of whether the party is surprised or damaged. (See *3 Cal. Evidence (4th), Presentation at Trial, §356*.)

(2) *Limitations.* The rule has its limitations, however. It "does not permit the wholesale admission into evidence of entire works" in which an inconsistent statement appears. (*Benson v. Honda Motor Co. (1994) 26 C.A.4th 1337, 1349, 32 C.R.2d 322* [products liability action; trial judge properly admitted only relevant portions of papers coauthored by defendant's expert].) And, in light of the legislative intent to protect the integrity of the judicial arbitration process, a statement made at an arbitration hearing may not be admitted for impeachment as a prior inconsistent statement. (*Jimena v. Alesso (1995) 36 C.A.4th 1028, 1030, 1031, 43 C.R.2d 18*.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## 1. Prior Inconsistent and Consistent Statements.

## b. Prior Inconsistent Statements.

## 2. Rule in Criminal Cases.

*1 Witkin Cal. Evid. Hearsay § 157*

[§ 157] Rule in Criminal Cases.

(1) *Former Rule.* In *People v. Johnson* (1968) 68 C.2d 646, 68 C.R. 599, 441 P.2d 111, the court applied the theory of *Pointer v. Texas* (1965) 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923, 5 Cal. Crim. Law (3d), *Criminal Trial*, §531, to hold that *Ev.C. 1235*, applied in a criminal case, was an unconstitutional deprivation of the Sixth Amendment right of confrontation. (68 C.2d 660.) (See 56 Cal. L. Rev. 1727; 6 San Diego L. Rev. 92.) *Johnson* was followed by a number of Court of Appeal decisions, and by *People v. Green* (1969) 70 C.2d 654, 665, 75 C.R. 782, 451 P.2d 422. (See 58 Cal. L. Rev. 262.)

(2) *New Rule of Admissibility.* In *California v. Green* (1970) 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489, the United States Supreme Court rejected the holding in *Johnson*, and vacated the California judgment in *Green*.

(a) *Hearsay and confrontation.* Hearsay rules and the Confrontation Clause protect similar values, but there is no "congruence" between the concepts. "[M]erely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied." (90 S.Ct. 1934, 26 L.Ed.2d 495.) What confrontation does is ensure that the witness will give statements under *oath*, force the witness to submit to *cross-examination* and permit the jury to observe the witness' *demeanor*. (90 S.Ct. 1935, 26 L.Ed.2d 497.) (See 3 Cal. Evidence (4th), *Presentation at Trial*, §21.)

(b) *The oath.* If the declarant is *present and testifying at the trial*, and the declarant *admits* to making the statement or that fact is shown by *other evidence*, the danger of *faulty reproduction* is negligible. "[T]he jury can be confident that it has before it two conflicting statements by the same witness. Thus, as far as the oath is concerned, the witness must now affirm, deny or qualify the truth of the prior statement under the penalty of perjury; indeed, the very fact that the prior statement was not given under a similar circumstance may become the witness' explanation for its inaccuracy--an explanation a jury may be expected to understand and take into account in deciding which, if either, of the statements represents the truth." (90 S.Ct. 1935, 26 L.Ed.2d 497.)

(c) *Cross-examination.* The inability to cross-examine the witness at the time the prior statement was made is not crucial as long as the defendant is assured of *full and effective* cross-examination at the trial. A defendant "could hardly hope to accomplish more than has already been accomplished by the fact that the witness is now telling a different, inconsistent story, and--in this case--one that is favorable to the defendant." (90 S.Ct. 1935, 26 L.Ed.2d 497.) The *main danger* in substituting subsequent for timely cross-examination is the possibility that the witness' *false testimony will*

*harden*. "That danger, however, disappears when the witness has changed his testimony so that, far from 'hardening,' his prior statement has softened to the point where he now repudiates it." (90 S.Ct. 1936, 26 L.Ed.2d 498.) A witness favorable to the defense "should be more than willing to give the usual suggested explanations for the inaccuracy of his prior statement, such as faulty perception or undue haste in recounting the event." (90 S.Ct. 1936, 26 L.Ed.2d 498.)

(d) *Demeanor*. The trial jury was foreclosed from viewing the declarant's demeanor when the out-of-court statement was made. But the witness who now relates a different story about the events in question "must necessarily assume a position as to the truth value of his prior statement, thus giving the jury a chance to observe and evaluate his demeanor as he either disavows or qualifies his earlier statement. The jury is alerted by the inconsistency in the stories, and its attention is sharply focused on determining either that one of the stories reflects the truth or that the witness who has apparently lied once, is simply too lacking in credibility to warrant its believing either story." (90 S.Ct. 1936, 26 L.Ed.2d 498.)

(e) *Prior decisions distinguished*. Decisions such as *Pointer v. Texas*, *supra*, do not interpret the Confrontation Clause as excluding out-of-court statements of a witness who testifies at trial. Those decisions dealt with the opposite situation, where statements were admitted in the declarant's absence, *without* any chance to cross-examine the declarant. Where the declarant is present to testify and submit to cross-examination, "our cases, if anything, support the conclusion that the admission of his out-of-court statements does not create a confrontation problem." (90 S.Ct. 1937, 26 L.Ed.2d 499.)

(f) *Preliminary hearing testimony*. Wholly apart from the confrontation issue, the witness' statements in preliminary hearing testimony were admissible because they were given "under circumstances closely approximating those that surround the typical trial." (90 S.Ct. 1938, 26 L.Ed.2d 501.) The witness had been under oath, defendant was represented by counsel (the same one who represented defendant at the trial), defendant had every opportunity to cross-examine the witness as to the statement, and the proceedings were conducted before a judicial tribunal equipped to provide a judicial record of the hearings. Under these circumstances, the statement would have been admissible at the trial even in the witness' absence if the witness had been actually unavailable, despite the state's good faith efforts to produce him. (90 S.Ct. 1938, 26 L.Ed.2d 501.) (See 84 Harv. L. Rev. 108; 59 Cal. L. Rev. 580; 26 Hastings L. J. 361.)

(3) *California Cases Following Green*. In *People v. Green* (1971) 3 C.3d 981, 92 C.R. 494, 479 P.2d 998, on remand from the United States Supreme Court, the prior inconsistent statement was held admissible. (See *Clifton v. Ullis* (1976) 17 C.3d 99, 104, 130 C.R. 155, 549 P.2d 1251; *People v. Morgan* (1978) 87 C.A.3d 59, 73, 74, 150 C.R. 712; *People v. Buttles* (1990) 223 C.A.3d 1631, 1638, 273 C.R. 397; *People v. Zapien* (1993) 4 C.4th 929, 955, 17 C.R.2d 122, 846 P.2d 704, *supra*, §6 [multiple hearsay consisting of prior inconsistent statements].) The argument that such evidence should be excluded as violative of the Confrontation Clause of the California Constitution (under the "independent grounds doctrine") was rejected in *People v. Chavez* (1980) 26 C.3d 334, 356, 358, 360, 161 C.R. 762, 605 P.2d 401. (See 15 U.C. Davis L. Rev. 1093 [Due Process and the Sufficiency of Prior Inconsistent Statements as Evidence for Criminal Convictions]; 30 A.L.R.4th 414 [prior inconsistent statements of witness as substantive evidence--modern state cases].)

(4) *Distinction: Statement Not Sufficiently Inconsistent*. The *Green* rule applies when there is a reasonable basis for concluding that the trial testimony and the prior statement are inconsistent; trial testimony that is merely ambiguous, and not necessarily inconsistent with the prior statement, is insufficient. (*People v. Johnson* (1992) 3 C.4th 1183, 1219, 1220, 14 C.R.2d 702, 842 P.2d 1; see *People v. Arias* (1996) 13 C.4th 92, 153, 51 C.R.2d 770, 913 P.2d 980 [testimony of defendant's mother, a prosecution witness, was not sufficiently inconsistent with her prior statements to detective; however, erroneous admission of detective's testimony was harmless; to extent it did not differ from mother's testimony, it was merely cumulative].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *New Rule of Admissibility*. See CALCRIM, No. 318 [Prior Statements as Evidence]; *People v. Solo'rzano* (2007) 153 C.A.4th 1026, 1038, 63 C.R.3d 659 [CALCRIM, No. 318, like CALJIC, No. 2.13 before it, allows jury to use prior

statements as substantive evidence without finding those statements inconsistent with witness' testimony; it optionally characterizes as inconsistent testimony to effect that witness no longer remembers event if jury disbelieves that testimony].(3) *California Cases Following Green*. See *People v. Ochoa* (2001) 26 C.4th 398, 445, 110 C.R.2d 324, 28 P.3d 78 [in capital murder case in which witness' extrajudicial statements were admitted under *Ev.C.* 1235, trial judge did not err in refusing to instruct that such statements should be viewed with extreme caution; cautionary instruction of this type is required only for extrajudicial statements made by party]; *People v. Guerra* (2006) 37 C.4th 1067, 1143, 40 C.R.3d 118, 129 P.3d 321 [in capital murder prosecution in which victim of prior offense testified that she recognized defendant as her attacker, trial judge erred in refusing to admit testimony of victim's son that, after attack, victim had said she did not recognize her attacker; however, error was harmless, as on cross-examination victim admitted that she had previously stated that she had not seen attacker's face]; *People v. Avila* (2006) 38 C.4th 491, 579, 43 C.R.3d 1, 133 P.3d 1076 [in capital trial for murder with rape-murder special circumstance, in which witness testified that defendant was not involved in rape, trial judge did not err in allowing detective to testify that witness had told him that defendant was involved in rape; statement to detective was clearly inconsistent with trial testimony, and witness was still subject to recall, thus satisfying *Ev.C.* 770].



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  3. Absent Witness.

#### *1 Witkin Cal. Evid. Hearsay § 158*

[§ 158] Absent Witness.

(1) *In General.* *Ev.C. 1235* does not apply to the statements of a person who was not a witness at the trial; i.e., prior inconsistent statements are admissible only when they are contradictory to the declarant's testimony at the trial. (*People v. Williams* (1976) 16 C.3d 663, 668, 669, 128 C.R. 888, 547 P.2d 1000, disapproving contrary decisions in *People v. Bynum* (1971) 4 C.3d 589, 94 C.R. 241, 483 P.2d 1193, and *People v. Browning* (1975) 45 C.A.3d 125, 119 C.R. 420.)

(2) *Exception: Witness Unavailable and Former Testimony Admitted.* Under *Ev.C. 1294*, added in 1996, either a videotaped statement properly introduced as a prior inconsistent statement at a preliminary hearing or a prior proceeding concerning the same criminal matter, or a transcript of the preliminary hearing or the prior proceeding containing the prior inconsistent statement is not made inadmissible by the hearsay rule if: (1) the witness is unavailable (see *supra*, §18); and (2) former testimony of the witness is admitted under *Ev.C. 1291* (see *infra*, §264). (*Ev.C. 1294(a)*.) The party against whom the prior inconsistent statement is offered may examine or cross-examine any person who testified at the preliminary hearing or a prior proceeding as to the prior inconsistent statement. (*Ev.C. 1294(b)*.) *Ev.C. 1294* is aimed at situations, particularly common where criminal gangs are involved, in which a witness recants at the preliminary hearing and by the time of trial has hidden, fled, or died. (Assembly Judiciary Committee analysis of A.B. 2483; see 28 *Pacific L. J.* 809 [Confrontation Clause and Evidentiary Admissions].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Exception: Witness Unavailable and Former Testimony Admitted.* See *People v. Martinez* (2003) 113 C.A.4th 400, 409, 7 C.R.3d 49 [trial judge erred in admitting nontestifying accomplice's recorded statement to police, which implicated defendant, after accomplice's preliminary hearing testimony, in which he denied ever implicating defendant, was introduced; recorded statement was never introduced at preliminary hearing, as required by *Ev.C. 1294(a)*]; CALCRIM, No. 319 [Prior Statements of Unavailable Witness].





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4. Forgetful or Amnesiac Witness.

*1 Witkin Cal. Evid. Hearsay § 159*

[§ 159] Forgetful or Amnesiac Witness.

(1) *Witness Present but Forgetful.* In *People v. Green* (1971) 3 C.3d 981, 92 C.R. 494, 479 P.2d 998, the court observed that ordinarily the testimony of a witness that he or she does not remember an event is not inconsistent with the witness' prior statement describing that event. "But justice will not be promoted by a ritualistic invocation of this rule of evidence. Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness' prior statement, and the *same principle* governs the case of the forgetful witness." (3 C.3d 988.) Moreover, the witness in this case stated on cross-examination that when he gave the statement to the officer, he believed he was telling the truth, but defense counsel made no attempt to explore this inconsistency. "Whether or not a witness is actually cross-examined, the fact the defendant has an adequate *opportunity* to carry out such an inquiry satisfies the confrontation clause." (3 C.3d 990.) (See *People v. Petersen* (1972) 23 C.A.3d 883, 892, 100 C.R. 590; *People v. Loyd* (1977) 71 C.A.3d Supp. 1, 8, 10, 139 C.R. 693 [where witness recalls part but not all of given event or statement, proponent must be allowed opportunity to test witness' memory]; *People v. O'Quinn* (1980) 109 C.A.3d 219, 225, 226, 167 C.R. 141; 99 A.L.R.3d 934 [denial of recollection as inconsistent with prior statement].)

(2) *Amnesiac Witness.* *People v. Green, supra*, was distinguished in *People v. Simmons* (1981) 123 C.A.3d 677, 177 C.R. 17. In *Green*, the trial judge found the witness to be evasive and uncooperative, and his testimony was held to be an implied denial of the facts contained in his earlier statements. In *Simmons*, J made a written, signed statement to the police describing how defendant had discussed the crime and boasted of having done it shortly afterwards. Before defendant's preliminary hearing, J received a serious head injury causing amnesia, and at the hearing, he testified that, while able to remember some past events, he had no recall of any admission by defendant, or of making the statement to the police. *Held*, the statement was inadmissible. (a) The witness was not shown to be evasive; the failure of recollection was legitimate; hence, there was no implied inconsistency. (123 C.A.3d 680, 681.) (b) Admissibility of a prior inconsistent statement without the opportunity to cross-examine would amount to a denial of the constitutional right of confrontation (see *supra*, §157); cross-examination of the amnesiac witness on what he is incapable of recalling would be meaningless. (123 C.A.3d 681, 682.) (See *People v. Levesque* (1995) 35 C.A.4th 530, 544, 545, 41 C.R.2d 439 [in prosecution for sexual molestation of child, trial judge properly excluded testimony as to statements made by victim's mother, who, outside jury's presence, testified that she was under influence of drugs at time of statements and did not remember them].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## b. Prior Inconsistent Statements.

## 5. Uncooperative Witness.

*1 Witkin Cal. Evid. Hearsay § 160*

## [§ 160] Uncooperative Witness.

(1) *Refusal To Testify*. In *People v. Rios* (1985) 163 C.A.3d 852, 210 C.R. 271, at defendant's trial for murder, two key prosecution witnesses who were to corroborate testimony of an accomplice refused to answer any questions. The trial judge then allowed the prosecution to introduce their prior statements made to a police detective. *Held*, the evidence was inadmissible hearsay. "[T]here is no relevant legal difference between the situation where the stonewalling witness refuses to answer any questions and the situation where the witness totally recalls no facts, for purposes of determining inconsistency under *Evidence Code* section 1235. In both situations there is simply no 'statement' in the record which is inconsistent, or for that matter consistent, with prior statements; there is no 'express testimony' at all from which to infer or deduce implied inconsistency." (163 C.A.3d 864.)

(2) *Denial of Statement*. In *People v. Freeman* (1971) 20 C.A.3d 488, 492, 97 C.R. 717, defendant was charged with being the getaway man in an armed robbery allegedly committed by F and another accomplice. To show a connection between defendant and F, the prosecution attempted to establish that on the morning of the robbery defendant visited F at the home of F's girlfriend. Mrs. D, the girlfriend's mother, was called as a prosecution rebuttal witness, admitted that she had given some information to a district attorney's investigator, and denied that she had identified defendant as having visited F twice on that morning and having left the home with F. Over objection, the investigator testified that, in an interview, Mrs. D had told him defendant twice visited F on the morning of the robbery and that the men had gone off together. *Held*, the investigator's testimony was properly admitted as evidence that Mrs. D's interview statements were true.

Defendant argued that the prosecution could not place Mrs. D on the stand to elicit her version of the interview as a device for getting in the investigator's inconsistent version of these statements, ostensibly as impeachment but really to prove the truth of the investigator's testimony. Regardless of which side calls the witness, his availability for cross-examination permits the jury to choose between his former version and his present testimony. (20 C.A.3d 494.) "The witness' recantation permits the inference that he has something to hide, and this inference provides the earlier version a measure of reliability. The jury may choose which version to believe or reject both versions altogether. When a litigant intentionally brings in the declarant for the purpose of eliciting a predictably false version, he is not misusing section 1235 but utilizing it for the very purpose it is designed to fulfill--that is, to open the door to a second witness with a conceivably reliable indicator of the actual events. The technique conforms to the letter and spirit of section 1235, which supplies factfinders with a formerly unavailable means for uncovering the truth." (20 C.A.3d 495.) (See

*People v. Jenkins* (1973) 34 C.A.3d 893, 898, 110 C.R. 465; *People v. Brown* (1995) 35 C.A.4th 1585, 1597, 42 C.R.2d 155 [witness' prior statements were properly admitted; they were clearly inconsistent with trial testimony, and this was true even though she did not deny making them but only denied their truth; following *Freeman*.)]

**SUPPLEMENT:** [This section is current through the latest supplement]



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*1 Witkin Cal. Evid. Hearsay § 161*

[§ 161] Prior Consistent Statements.

A prior statement of a witness, consistent with the witness' present testimony, is admissible if "offered in compliance with" *Ev.C. 791*. (*Ev.C. 1236*.) *Ev.C. 791*, the impeachment statute, limits the use of prior consistent statements to situations where the credibility of the witness has been attacked. Two changes were made in existing law by *Ev.C. 791* and *1236*: (1) *Ev.C. 791* broadens the grounds for rehabilitation. (See *3 Cal. Evidence (4th), Presentation at Trial, §364 et seq.*) (2) Although *Ev.C. 1236* does not permit unlimited use of the prior consistent statement (it must meet the conditions of *Ev.C. 791*), it comes in as affirmative evidence. (See *People v. Cannady (1972) 8 C.3d 379, 385, 105 C.R. 129, 503 P.2d 585* [rejecting contentions that *Ev.C. 1236* violates federal right of confrontation and California due process]; *People v. Bunyard (1988) 45 C.3d 1189, 1208, 249 C.R. 71, 756 P.2d 795*; *People v. Fair (1988) 203 C.A.3d 1303, 1309, 250 C.R. 486* [after defense counsel implied that victim had fabricated claim that defendant told her she would be taken to hospital and have tube stuck in her if she disclosed molestation, victim's prior consistent statement to her cousin was properly admitted].)

The abandonment of the "subtle distinction" between mere impeachment and affirmative evidence is justified in the Law Revision Commission Comment as follows: "It is not realistic to expect a jury to understand that it cannot believe that a witness was telling the truth on a former occasion even though it believes that the same story given at the hearing is true."

As with prior *inconsistent* statements (*supra*, §156), *Ev.C. 1236* allows the admission of a prior consistent statement only where the witness testifies at the hearing at which the question of the admissibility of the prior statement arises. (*People v. Hitchings (1997) 59 C.A.4th 915, 921, 922, 69 C.R.2d 484* [following *People v. Williams (1976) 16 C.3d 663, 128 C.R. 888, 547 P.2d 1000*, *supra*, §158; where murder defendant did not take stand but testimony from his prior trial for same crime was read, recording of his jailhouse conversation with his girlfriend was not admissible as prior consistent statement].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Williams (2002) 102 C.A.4th 995, 1011, 125 C.R.2d 884* [in assault prosecution, trial judge did not err in admitting, as prior consistent statements, videotaped police interviews with two witnesses, after defense counsel implied during cross-examination that they had fabricated portions of their testimony]. *West's Key Number Digest, Witnesses k.414(2)*



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##### 2. Past Recollection Recorded.

##### *1 Witkin Cal. Evid. Hearsay § 162*

[§ 162] Past Recollection Recorded.

(1) *In General.* Under prior law, the doctrine of "past recollection recorded" was developed to allow a witness to use a previously recorded memorandum on the stand as part of the witness' testimony, when his or her recollection was insufficient. Upon laying the proper foundation to assure trustworthiness, the writing could be read into evidence. (See 3 Wigmore (Chadbourn Rev.) §734 et seq.; 9 *U.C. Davis L. Rev.* 147 [comparison of past recollection recorded and business records].)

*Ev.C. 1237* restates former C.C.P. 2047 with some modifications, and provides that the writing can be introduced by the adverse party but not by the proponent. (*Ev.C. 1237(b)*.) The importance of the codification is in the recognition and classification of this type of evidence as a hearsay exception. (See *People v. Miller* (1996) 46 *C.A.4th* 412, 423, 424, 53 *C.R.2d* 773 [trial judge properly concluded that witness' past statements to detective, who recorded them, were reliable and met statutory requirements, where she acknowledged in court having spoken to detective, asserted she had tried to tell him the truth, remembered discussing with him statements she overheard regarding shooting police, but could not recall if she told him that defendant made such a statement]; on foundation requirements, see 3 *Cal. Evidence* (4th), *Presentation at Trial*, §182 et seq.)

(2) *Federal Rule.* *F.R. Evid.*, Rule 803(5) is similar to *Ev.C. 1237*. It excepts from the hearsay rule "[a] memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party." (See 4 Mueller & Kirkpatrick, *Federal Evidence* 2d, §443; 29A *Am.Jur.2d* (1994 ed.), *Evidence* §1258 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Witnesses k.253 et seq.



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## 3. Prior Identification.

## a. Independent Evidence.

*1 Witkin Cal. Evid. Hearsay § 163*

## [§ 163] Independent Evidence.

(1) *Former Restrictive Rule.* Victims or observers of crime are often called upon to identify an accused in a police lineup, and later, at trial, either the victim or some other witness testifies to identity. The prior identification is the equivalent of a prior statement--inconsistent if the witness testifies differently at trial, consistent if the same identification is made. Many courts reject this as independent evidence, admitting it only to corroborate a witness' present testimony attacked as a fabrication. And this was originally assumed to be the California rule. (See *People v. Slobodion* (1948) 31 C.2d 555, 560, 191 P.2d 1; *People v. Kerns* (1960) 181 C.A.2d 1, 3, 4 C.R. 925; and see generally 4 Wigmore (Chadbourn Rev.) §1130; 8 U.C.L.A. L. Rev. 467; 71 A.L.R.2d 449; 1952 A.S. 738; 1955 A.S. 619; 1956 A.S. 526; 1958 A.S. 649; 1960 A.S. 556; on constitutionality of compulsory lineup, see 2 *Cal. Evidence* (4th), *Witnesses*, §392 et seq.)

(2) *Current Rule: Independent Evidence.* In *People v. Gould* (1960) 54 C.2d 621, 626, 7 C.R. 273, 354 P.2d 865, the court repudiated the restrictive language of the *Slobodion* case: "[E]vidence of an extrajudicial identification is admitted regardless of whether the testimonial identification is impeached, because the earlier identification has greater probative value than an identification made in the courtroom after the suggestions of others and the circumstances of the trial may have intervened to create a fancied recognition in the witness' mind." Moreover, "[t]he failure of the witness to repeat the extrajudicial identification in court does not destroy its probative value, for such failure may be explained by loss of memory or other circumstances." And, "[t]he extrajudicial identification tends to connect the defendant with the crime, and the principal danger of admitting hearsay evidence is not present since the witness is available at the trial for cross-examination." (See *People v. Cook* (1967) 252 C.A.2d 25, 60 C.R. 133; 8 U.C.L.A. L. Rev. 467; 78 *Harv. L. Rev.* 887; 1964 A.S. 356; 1965 A.S. 564.)

*Ev.C. 1238* codified the *Gould* rule by making a hearsay exception for a prior statement of a witness which would have been admissible if made by the witness while testifying, and which is "an identification of a party or another as a person who participated in a crime or other occurrence."

Thus, if the witness admits the prior identification, it is admissible under *Ev.C. 1238*; if the witness denies it or testifies contrary to it, the prior identification is admissible as a prior inconsistent statement under *Ev.C. 1235*, supra, §156. (Law Rev. Com. Comment to *Ev.C. 1238*; see *People v. Holmes* (1993) 12 C.A.4th 1094, 1097, 1098, 16 C.R.2d 52, infra, §166, citing the text; on overruling of certain aspects of *Gould* case, see infra, §166.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Current Rule: Independent Evidence.* See *People v. Boyer* (2006) 38 C.4th 412, 480, 42 C.R.3d 677, 133 P.3d 581 [in capital murder trial, witness' out-of-court identification of defendant, in photographic lineup, as perpetrator of prior murder was sufficient, together with some independent evidence, to support jury's conclusion that defendant committed this crime]. *West's Key Number Digest*, Criminal Law k.339.11 et seq.; Evidence k.317(14)



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CHAPTER VI - Hearsay

III. EXCEPTIONS TO THE RULE

E. Prior Statements of Witnesses.

3. Prior Identification.

b. Conditions of Admissibility.

*1 Witkin Cal. Evid. Hearsay § 164*

[§ 164] Conditions of Admissibility.

*Ev.C. 1238* lays down the following foundation requirements: (a) The statement must have been made at a time when the crime or other occurrence "was fresh in the witness' memory"; and (b) the witness must first testify "that he made the identification and that it was a true reflection of his opinion at that time."

The statement is *inadmissible when the declarant is unavailable*. In *People v. Mayfield* (1972) 23 C.A.3d 236, 100 C.R. 104, deputy sheriff M, who had the only direct knowledge about defendant's alleged drug sales, died after testifying at the preliminary examination but before the trial. At the trial, the prosecutor introduced evidence, over objection, that M had identified a photograph of defendant after the first sale. *Held*, the evidence was inadmissible. Under *Ev.C. 1238(c)*, the hearsay exception applies where "the statement is offered after the witness testifies that he made the identification." Here, M did not testify to the photographic identification at the preliminary hearing and was not present to testify at the trial. (23 C.A.3d 241.) (See 29 A.L.R.4th 104 [admissibility and weight of pretrial identification where witness is unable or fails to make in-court identification].)

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##### 3. Prior Identification.

##### c. Methods of Identification.

*1 Witkin Cal. Evid. Hearsay § 165*

[§ 165] Methods of Identification.

The identification is frequently made at a police lineup. (See *People v. Slobodion* (1948) 31 C.2d 555, 560, 191 P.2d 1; *People v. Kerns* (1960) 181 C.A.2d 1, 3, 4 C.R. 925.) (On constitutional requirements for police lineup, see 2 *Cal. Evidence* (4th), *Witnesses*, §392 et seq.)

But it need not be. In *People v. Ford* (1959) 175 C.A.2d 109, 345 P.2d 573, a prosecution for sale of narcotics to a deputy sheriff, the latter testified to the sale; on cross-examination, he stated that he only saw defendant in person once on that day; on redirect, he stated that he saw a photograph of defendant in the "mug" records 1 hour after the arrest, and identified defendant as the man who made the sale. Upholding admission, the court said:

"In examining him extensively concerning his appearance and identity, defendant invited the subsequent effort of the prosecution to show that there could be neither a mistake on the deputy's part, nor a recent contrivance by him in identifying the defendant; and to strengthen the deputy's testimony and reestablish his identification as positive, it offered the defendant's photograph to show that immediately after the commission of the offense, at a time when defendant's appearance was freshest in his mind and the deputy was least subject to suggestion, he positively identified the man as the one shown in the photograph." (175 C.A.2d 112.) (See *People v. Lockhart* (1962) 200 C.A.2d 862, 868, 19 C.R. 719 [pretrial identification of defendant from photograph in family album, admitted as corroboration]; *People v. Leung* (1992) 5 C.A.4th 482, 497, 7 C.R.2d 290 [photographic lineup]; *People v. Johnson* (1992) 3 C.4th 1183, 1215, 14 C.R.2d 702, 842 P.2d 1 [same]; 2 *Cal. Evidence* (4th), *Witnesses*, §409.)

In *People v. Imbler* (1962) 57 C.2d 711, 716, 21 C.R. 568, 371 P.2d 304, the witness C saw defendant flee the scene of the crime, and identified him at the lineup. The defense attacked this by showing that it took place only after C had heard other witnesses do so. The prosecution was then allowed to introduce a police artist's drawing of the killer made from C's description, which constituted a reasonable likeness of defendant. This "pictorial embodiment of a physical description" was held admissible for the same purpose as an extrajudicial identification.

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## d. Sufficiency and Weight.

1 *Witkin Cal. Evid. Hearsay* § 166

[§ 166] Sufficiency and Weight.

(1) *Former Rule Requiring Corroboration.* *People v. Gould* (1960) 54 C.2d 621, 7 C.R. 273, 354 P.2d 865, *supra*, §163, held that a prior identification, though *admissible* as independent evidence, has *insufficient weight* to sustain a judgment of conviction. Thus, unless there is other evidence to connect the defendant with the crime, the extrajudicial identification must be "confirmed by an identification at the trial." (54 C.2d 631.) (See 8 U.C.L.A. L. Rev. 467.)

The *Gould* holding was the subject of a number of subsequent decisions, most of which found the prior identification sufficient to sustain the judgment. (See *People v. Chavez* (1980) 26 C.3d 334, 362, 161 C.R. 762, 605 P.2d 401 [sufficient other evidence to allow jury to credit witness' preliminary hearing testimony over his contradictory trial testimony]; *People v. Ford* (1981) 30 C.3d 209, 215, 178 C.R. 196, 635 P.2d 1176 [because pretrial identification was made under oath at preliminary hearing, reliability concerns under *Gould* rule were satisfied]; *In re Miguel L.* (1982) 32 C.3d 100, 107, 185 C.R. 120, 649 P.2d 703 [*Gould* rule was not satisfied, where earlier identification was unsworn extrajudicial statement by accomplice and was repudiated at trial]; *People v. Garcia* (1983) 138 C.A.3d 976, 985, 188 C.R. 353 [sufficient other evidence to support admission of extrajudicial identification].)

The *Gould* rule was held inapplicable in *People v. Holmes* (1993) 12 C.A.4th 1094, 16 C.R.2d 52, where the woman whose identification of defendant was at issue was neither a victim of the crime nor a direct witness. Rather, she had been present both when defendant declared his intention to commit a robbery and later when he returned, saying he had accomplished the crime and shot the victim. *Held*, the trial judge's failure to instruct on the need for independent corroboration was not error; the *Gould* rule comes into play only when a nonaccomplice witness to a criminal offense--victim or bystander--makes an out-of-court identification of the defendant and subsequently fails to identify the defendant at trial. (12 C.A.4th 1097, 1098, citing the text.)

(2) *Corroboration Requirement Abolished.* In *People v. Cuevas* (1995) 12 C.4th 252, 48 C.R.2d 135, 906 P.2d 1290, the Supreme Court abolished the corroboration requirement of *Gould*. After a shooting incident, one eyewitness identified defendant as the perpetrator, and another eyewitness gave a description of the perpetrator that matched defendant and was consistent with the first witness' description. At trial, both witnesses recanted. Defendant moved for a judgment of acquittal on the ground that there was no in-court identification of him as the shooter and no other evidence linking him to the crimes. The trial judge denied both that motion and defendant's subsequent request to instruct the jury that it could not convict defendant on the basis of an out-of-court identification unless it found that the identification was corroborated by other evidence tending to connect defendant to the offense. The jury found defendant guilty of assault with a firearm. The Court of Appeal concluded that each out-of-court statement corroborated the other,

thus there was sufficient evidence to support the conviction, but the court reversed because of the trial judge's prejudicial failure to instruct on the need for corroboration. *Held*, judgment of the Court of Appeal reversed.

(a) The *Gould* rule "deems an uncorroborated out-of-court identification insufficient evidence *as a matter of law* to support a conviction regardless of the identification's probative value or the existence of other evidence in the record." It conflicts with the substantial evidence test normally applied to determine the sufficiency of evidence to support a criminal conviction, and for that reason alone the rule would bear a heavy burden if the question were whether to adopt it for the first time. (12 C.4th 264.)

(b) The *Gould* opinion offers no convincing justification for adoption of the rule, and the *Gould* court itself recognized that an out-of-court identification generally has greater probative value than an in-court identification, even when the identifying witness does not confirm the out-of-court identification. Logically, both types of identification should be measured by the same standard in judging their sufficiency to support a conviction. Indeed, no other jurisdiction has adopted a rule as strict as *Gould*, and numerous courts have held that an out-of-court identification can be sufficient by itself to support a conviction even in the absence of other evidence connecting the defendant to the crime. The circumstances surrounding the out-of-court identification, while not constituting the independent corroboration *Gould* requires, can themselves adequately demonstrate the accuracy and reliability of the identification. (12 C.4th 266, 267.)

(c) "We conclude that, considerations of stare decisis notwithstanding, this approach--individually assessing the circumstances of the out-of-court identification to determine whether it is sufficient to support a criminal conviction--is a sound one and should be applied to all out-of-court identifications. Accordingly, we hereby overrule that portion of *Gould* ... holding that an out-of-court identification is in all cases insufficient by itself to sustain a conviction and must be corroborated by other evidence linking the defendant to the crime. Instead, the substantial evidence test ... should be used to determine whether an out-of-court identification is sufficient to support a criminal conviction." (12 C.4th 271, 272; also disapproving: (1) the requirement of *People v. Marquez* (1993) 16 C.A.4th 115, 121, 20 C.R.2d 365, that the trial judge instruct the jury sua sponte on the corroboration requirement; (2) former CALJIC (5th ed.), No. 3.11.1, which embodied the *Marquez* holding; and (3) *People v. Armijo* (1990) 221 C.A.3d 271, 278, 270 C.R. 496, and *In re Stephen P.* (1983) 145 C.A.3d 123, 193 C.R. 263, to the extent they applied the corroboration requirement.) "[T]he availability of the identifying witness for cross-examination, the opportunity of the defense to present other evidence questioning the reliability of the out-of-court identification and to request appropriate jury instructions, and the requirement that substantial evidence support the conviction are adequate safeguards against the unjust conviction of a defendant solely on the basis of an unreliable out-of-court identification." (12 C.4th 274, 275.)

(d) Here, based on the circumstances of the out-of-court identifications, a reasonable jury could have found that the two witnesses were telling the truth originally and that they recanted their statements in court for gang-related reasons. The out-of-court statements were substantial evidence from which the jury could conclude beyond a reasonable doubt that defendant committed assault with a firearm. (12 C.4th 276, 277.) (See 24 *Pepperdine L. Rev.* 749 [Cuevas].)

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#### 4. Complaint of Victim in Sex Case.

##### a. In General.

*1 Witkin Cal. Evid. Hearsay § 167*

[§ 167] In General.

Under the "fresh complaint" doctrine, the fact that the victim of a rape or similar sexual offense complained to someone after the alleged offense may be shown; but the theories of admissibility are conflicting. Some traditional justifications are: (1) making the complaint supports the credibility of the victim's testimony; (2) the complaint is circumstantial evidence tending to show the victim's lack of consent; and (3) the complaint comes within the "res gestae" exception to the hearsay rule. (See 4 Wigmore (Chadbourn Rev.) §1134 et seq.; 6 Wigmore (Chadbourn Rev.) §§1760, 1761; 2 McCormick 5th, §272.1.) Freshness of the complaint is no longer a requirement in California. (See *People v. Brown* (1994) 8 C.4th 746, 35 C.R.2d 407, 883 P.2d 949, *infra*, §168 [rejecting traditional views and formulating new approach based on current psychological studies of victim behavior].)

The doctrine is applied to male, as well as female, victims of sexual molestation. (See *People v. Butler* (1967) 249 C.A.2d 799, 805, 57 C.R. 798, citing the text [10-year-old boy].)

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See 2 McCormick 6th, §272.1. *West's Key Number Digest*, Criminal Law k.366 et seq.



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#### b. Freshness Requirement Abandoned.

#### *1 Witkin Cal. Evid. Hearsay § 168*

[§ 168] Freshness Requirement Abandoned.

*People v. Burton* (1961) 55 C.2d 328, 351, 11 C.R. 65, 359 P.2d 433, offered the following explanation for the fresh complaint doctrine: "It is natural to expect that the victim of such a crime would complain of it, and the prosecution can show the fact of complaint to forestall the assumption that none was made and that therefore the offense did not occur." In other words, the complaint is admitted not for the truth of its recitals, but because the fact that it was made is relevant on the issue of whether the offense occurred. (See *People v. Meacham* (1984) 152 C.A.3d 142, 158, 199 C.R. 586 [instructions to this effect were proper].) Under this reasoning, if it is assumed that a complaint is a natural response to the offense, then the longer the victim remains silent, the greater the likelihood that there was no offense at all. (See *People v. Hubbell* (1942) 54 C.A.2d 49, 63, 64, 128 P.2d 579; *In re Cheryl H.* (1984) 153 C.A.3d 1098, 1129, footnotes 33, 34, 200 C.R. 789, and [child molestation victim's declarations were not admissible because they were made 1 to 2 months after the incidents and only in response to questioning by psychologist]; 89 A.L.R.3d 102 [time element as affecting admissibility on theory of res gestae, spontaneous exclamation, or excited utterance].)

This justification for the freshness requirement was rejected in *People v. Brown* (1994) 8 C.4th 746, 35 C.R.2d 407, 883 P.2d 949, a prosecution for lewd and lascivious conduct with a child. The trial judge admitted evidence of the victim's out-of-court statements in which she disclosed incidents of sexual molestation, even though the statements were not made promptly after the incidents occurred and were made only in response to questioning by an adult friend. *Held*, affirmed.

(a) Current studies indicate that "it is *not* inherently 'natural' for the victim to confide in someone or to disclose, immediately following commission of the offense, that he or she was sexually assaulted." (8 C.4th 758.)

(b) Evidence of the victim's complaint may nevertheless be relevant for a number of nonhearsay purposes, regardless of how promptly it was made. If it was made promptly, the circumstances under which it was made may help the jury to determine whether the alleged offense occurred, and may eliminate the risk that the jury will erroneously infer that no prompt complaint was made. On the other hand, if the complaint was delayed, evidence of the circumstances surrounding it, "including those that might shed light upon the reason for the delay, will reduce the risk that the jury, perhaps influenced by outmoded myths regarding the 'usual' or 'natural' response of victims of sexual offenses, will arrive at an erroneous conclusion with regard to whether the offense occurred." (8 C.4th 761, 762.)

(c) Often it is the defendant who believes that the circumstances under which the complaint was made will be helpful, and indeed, the defense, unlike the prosecution, has generally been free to introduce and rely on the contents of

the complaint as a prior inconsistent statement. (8 C.4th 762, citing the text.)

(d) Although recently acquired knowledge has undercut the rationale for the fresh complaint doctrine, it does not support a rule excluding all evidence relating to the circumstances under which an alleged sex-offense victim complained. *In re Cheryl H.*, *supra*, stated limitations on the admission of such evidence that can no longer be justified, but, shorn of those limitations, the doctrine remains viable. (8 C.4th 762, 763.)

(e) Therefore, "*under principles generally applicable to the determination of evidentiary relevance and admissibility*, proof of an extrajudicial complaint, made by the victim of a sexual offense, disclosing the alleged assault, may be admissible for a limited, nonhearsay purpose--namely, to establish the fact of, and the circumstances surrounding, the victim's disclosure of the assault to others--whenever the fact that the disclosure was made and the circumstances under which it was made are relevant to the trier of fact's determination as to whether the offense occurred." The "freshness" of a complaint, and its "volunteered" nature, should not be viewed as essential prerequisites to admissibility. (8 C.4th 749, 750.)

(f) In the present case, the trial judge did not err in admitting the evidence. The victim testified to a series of sexual offenses occurring over a period of several years during which she failed to report the incidents to anyone. The circumstances under which the alleged molestation came to light were reasonably probative of whether the molestation actually occurred. Furthermore, the testimony relating to the victim's complaint was properly limited to the timing of the complaint and the circumstances under which it was made. The content of the statements and any description of the molestation itself were omitted. (8 C.4th 764.) (See *People v. Snyder* (1993) 14 C.A.4th 1166, 1172, 18 C.R.2d 496 [testimony of defendant's wife that victim told her about assault was admissible even though victim waited all night to speak to wife]; 23 *Pepperdine L. Rev.* 255 [Brown]; 17 *J. Juvenile Law* 226 [same].)

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##### c. Inadmissibility of Details.

#### 1 *Witkin Cal. Evid. Hearsay* § 169

[§ 169] Inadmissibility of Details.

Whatever may be the proper theory or theories of admission (see *supra*, §167), it is well settled that only the *complaint* may be proved; the details of the alleged offense are incompetent hearsay, and the witness should not be allowed to recite those details in testifying to the complaint. (See *People v. Wilmot* (1903) 139 C. 103, 106, 72 P. 838; *People v. Ewing* (1925) 71 C.A. 138, 142, 234 P. 917; *People v. Gutierrez* (1932) 126 C.A. 526, 529, 14 P.2d 838; *People v. Adams* (1939) 14 C.2d 154, 157, 93 P.2d 146; 1 Jefferson, California Evidence Benchbook 3d, §18.27; 4 Wigmore (Chadbourn Rev.) §1134 et seq.; on *defendant's* right to introduce not only fact of complaint, but also its contents, see *People v. Brown* (1994) 8 C.4th 746, 762, 35 C.R.2d 407, 883 P.2d 949, *supra*, §168.)

But limiting the testimony to the "bare fact" of the complaint is unwarranted. In *People v. Burton* (1961) 55 C.2d 328, 11 C.R. 65, 359 P.2d 433, the court disapproved overstrict language in *Wilmot* and *Adams*, pointing out that a complaint as to an unspecified subject matter would be meaningless. Hence, "although details cannot be recounted, it can be shown by the People 'that the complaint related to the matter being inquired into, and not a complaint wholly foreign to the subject' ... that is, the alleged victim's statement of the nature of the offense and the identity of the asserted offender, without details, is proper." (55 C.2d 351.) (See *People v. Meacham* (1984) 152 C.A.3d 142, 159, 199 C.R. 586 [following *Burton*]; *People v. Fair* (1988) 203 C.A.3d 1303, 1313, 250 C.R. 486 [statements to doctor concerning nature of possible injuries to guide him in his examination and expert opinion were not recital of details and were admissible for limited purpose].)

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##### d. Testimony by Alleged Victim.

#### *1 Witkin Cal. Evid. Hearsay § 170*

#### [§ 170] Testimony by Alleged Victim.

In *People v. Wade* (1960) 181 C.A.2d 314, 315, 5 C.R. 63, a prosecution for violation of P.C. 288, the court assumed the basic rule to be that the evidence is merely corroborative of the victim's testimony, and is inadmissible hearsay where the victim does not testify, except where the victim is too young to do so. (See 4 Wigmore (Chadbourn Rev.) §1136.)

In *People v. Nankervis* (1960) 183 C.A.2d 744, 7 C.R. 263, on unusual facts, the court referred to this supposed limitation, but left the question open (183 C.A.2d 747). Defendant was charged with statutory rape and lewd conduct with child, committed on his own 14-year-old daughter. A police officer, called to the stand, was asked whether the daughter "made a complaint to you of a sexual nature." He answered "yes." The daughter was then called, and she testified to her age, unmarried status, residence, relationship, and the time when defendant was at home; but she refused to answer questions relating to the offenses, claiming the self-incrimination privilege. Defendant contended that, although the victim did take the stand, she gave no testimony to corroborate. *Held*, there was no reversible error.

(a) At the time the officer testified to the complaint, the daughter had not yet been called as a witness. Defendant might have challenged the order of proof, but instead raised the untenable objections that the testimony was hearsay, incompetent, irrelevant, and immaterial. (183 C.A.2d 737, 748.)

(b) When the daughter did take the stand and refused to testify to the acts, the hearsay objection to the officer's testimony was appropriate; but at that time the evidence was in, and defendant, by failing to move to strike (see 3 Cal. Evidence (4th), *Presentation at Trial*, §385), waived the objection. (183 C.A.2d 748.)

In *People v. Meacham* (1984) 152 C.A.3d 142, 199 C.R. 586, the children were too young to testify, and it was contended that in such a case, the person testifying can state only that the victim "made a complaint." This contention was rejected and the rule of *People v. Burton* (1961) 55 C.2d 328, 11 C.R. 65, 359 P.2d 433, *supra*, §169, was held applicable. (152 C.A.3d 160.)

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#### F. Statement of Victim of Child Abuse or Neglect.

##### 1 Witkin Cal. Evid. Hearsay § 171

[§ 171] Statement of Victim of Child Abuse or Neglect.

(1) *In General.* *Ev.C. 1360* provides that in a criminal prosecution in which the victim is a minor, a statement made by the victim when under the age of 12 describing any act of child abuse or neglect (as defined in *Ev.C. 1360(c)*) "performed with or on the child by another, or describing any attempted act of child abuse or neglect with or on the child by another," is not made inadmissible by the hearsay rule. (*Ev.C. 1360(a)*.) The following conditions apply:

(a) The statement is not otherwise admissible under a statute or court rule.

(b) In a hearing outside the presence of the jury, the court finds that the time, content, and circumstances of the statement indicate reliability.

(c) The child either testifies at the proceedings, or is unavailable as a witness, in which case the statement may be admitted only if there is evidence of the child abuse or neglect that corroborates the child's statement. (*Ev.C. 1360(a)*.)

(2) *Advance Disclosure Requirement.* The proponent of the statement must make known to the adverse party the intention to offer the statement and the particulars of the statement far enough in advance to provide the adverse party with a fair opportunity to prepare to meet the statement. (*Ev.C. 1360(b)*.) (See *People v. Brodit* (1998) 61 C.A.4th 1312, 1329, 1330, 72 C.R.2d 154, *infra*, §197 [victim's statements to aunt, social worker, and detective concerning abuse were sufficiently reliable, where they were repeated, with only minor variations, to five adults, there was nothing about victim's mental state indicating unreliability, her knowledge of sexual matters was beyond what would ordinarily be expected of one so young, and she had no motive to invent accusations]; 27 *Pacific L. J.* 768; on admissibility of statements by child abuse or neglect victim made during course of treatment or diagnosis, see *infra*, §197; on court-created "child dependency hearsay exception," which, unlike *Ev.C. 1360*, may be applicable in *noncriminal* proceeding, see *In re Cindy L.* (1997) 17 C.4th 15, 69 C.R.2d 803, 947 P.2d 1340, *infra*, §172.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General.* In *People v. Roberto V.* (2001) 93 C.A.4th 1350, 113 C.R.2d 804, defendant was charged with committing lewd acts against his two daughters, aged 3 and 7 at the time of the offenses. After the jury was selected, the prosecutor informed the trial judge and the defense that he intended to introduce the younger daughter's out-of-court statements by way of the mother's testimony. The trial court reserved ruling on the statements' admissibility. After the mother began testifying, the prosecutor requested that the statements be admitted pursuant to *Ev.C. 1360*. The trial judge ruled the statements admissible, the mother related them in her testimony, and defendant was found guilty. *Held*, reversed; the statements were improperly admitted.

(a) Although the prosecutor initially offered the statements for a nonhearsay purpose, the statements were clearly hearsay because, under the circumstances, the minor's belief that her father had molested her was relevant only if true. Further, because the trial judge ultimately admitted the statements for their truth, it could not be found on appeal that they were properly admitted for a nonhearsay purpose. (93 C.A.4th 1366, 1367.)

(b) The trial judge found that the statute's unavailability requirement was met because, at the time of trial, the minor was only 4 years old. However, 4-year-olds are not always unable to qualify as witnesses, and no hearing was held to determine this minor's competence. In the absence of such a determination, the unavailability requirement was not satisfied. (93 C.A.4th 1368, 1369.)

(c) The advance notice requirement was also unmet. The statute requires notice "in advance of the proceedings." For purposes of *Ev.C. 1360*, the proceedings begin when the jury is sworn. "As a practical matter, the parties need to know what evidence may be offered in order to make opening statements and to prepare for the examination of witnesses." (93 C.A.4th 1372.) Here, the prosecutor did not announce his intention to utilize *Ev.C. 1360* until the mother was already midway through her testimony. (93 C.A.4th 1372, 1373.)

(d) Admission of the testimony violated not only *Ev.C. 1360*, but also defendant's constitutional rights. The Confrontation Clause of the Sixth Amendment precludes the admission of hearsay evidence unless the prosecution demonstrates that the statement possesses adequate indicia of reliability. Reliability may be inferred if the hearsay is admitted under a firmly rooted exception, but *Ev.C. 1360* is not a firmly rooted hearsay exception and, in any case, its requirements were not met. Although it appears that the minor had no motive to fabricate, there is little in the record regarding either the circumstances in which the statements were made or the minor's state of mind that would suggest reliability. Because the other evidence in the case was far from conclusive, admission of the minor's statements, which amounted to assertions that defendant had molested her and supported the confusing testimony of the other daughter, must be deemed prejudicial. (93 C.A.4th 1376, 1377.) (3) (*New*) *Constitutionality*. In *People v. Eccleston* (2001) 89 C.A.4th 436, 107 C.R.2d 440, a prosecution for sexual molestation of a child under the age of 14, the prosecution moved under *Ev.C. 1360* to admit statements by the victim in a videotaped interview, on the ground that testifying at trial would be harmful to her. The trial judge found the victim to be unavailable within the meaning of the statute and granted the motion. The videotape was played for the jury, and defendant was convicted. *Held*, affirmed; the videotaped statements were properly admitted.

(a) *Ev.C. 1360* is too new to be considered a firmly rooted hearsay exception because it does not reflect longstanding judicial and legislative experience in assessing the trustworthiness of the statements it covers. In order to pass muster under the Confrontation Clause, therefore, any statements admitted under the statute must contain "particularized guarantees of trustworthiness." (89 C.A.4th 445, quoting *Idaho v. Wright* (1990) 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638.)

(b) Here, the required guarantees were present. The victim's statements regarding the molestation were spontaneously made and consistently repeated. (89 C.A.4th 446.) Although she came into defendant's home as a foster child and still suffered the aftereffects of previous instability, she appeared to have a clear understanding of the basic factual matters she was describing. She also appeared to have a knowledge of sexual matters that was unexpectedly advanced for her age. (89 C.A.4th 447.) She did not have any apparent motive to fabricate her accusations, and the environment in which she made her statements was comforting and calming, and would not have put any undue pressure on her. (89 C.A.4th 448.)

(c) Not only does *Ev.C. 1360* ensure that the constitutional trustworthiness guarantees are satisfied, it imposes additional safeguards where, as here, the victim does not testify at the proceedings: the victim must be found to be unavailable, and there must be evidence of abuse or neglect corroborating the victim's statements. The trial judge's findings as to both of these additional requirements were amply supported by the evidence. There was no constitutional violation. (89 C.A.4th 449, 450.)



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### III. EXCEPTIONS TO THE RULE G. Child Dependency Hearsay Exception.

#### *1 Witkin Cal. Evid. Hearsay § 172*

[§ 172] Child Dependency Hearsay Exception.

*In re Cindy L.* (1997) 17 C.4th 15, 69 C.R.2d 803, 947 P.2d 1340, was a child dependency proceeding in which the trial judge admitted the minor's hearsay statements concerning sexual abuse, even though she was found incompetent to testify. The judge did this in reliance on the "child dependency hearsay exception" created by the Court of Appeal in the case of *In re Carmen O.* (1994) 28 C.A.4th 908, 33 C.R.2d 848, 10 Summary (9th), *Parent and Child, Supp.*, §689B. *Held*, affirmed. The appellate courts have the authority to create hearsay exceptions, and the *Carmen O.* court was correct in determining that a child dependency hearsay exception was needed (17 C.4th 26, 28). However, before the exception can be applied, the following requirements must be met: (a) The court must find that the time, content, and circumstances of the statement provide sufficient indicia of reliability; (b) either the child must be available for cross-examination or there must be evidence of child sexual abuse that corroborates the statement; and (c) other interested parties must have adequate notice of the public agency's intention to introduce the statement. (17 C.4th 29.) (See 29A Am.Jur.2d (1994 ed.), *Evidence* §868; 10 Summary (9th), *Parent and Child, Supp.*, §689B.)

**SUPPLEMENT:** [This section is current through the latest supplement]

On admissibility of hearsay contained in social study, see 1 *Cal. Evidence* (4th), *Introduction*, §46.

*In re Carmen O.:*

*Cross-Reference:* 10 Summary (10th), *Parent and Child*, §619.

*Child dependency exception generally:*

*Cross-Reference:* 10 Summary (10th), *Parent and Child*, §619.



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## CHAPTER VI - Hearsay

## III. EXCEPTIONS TO THE RULE

## H. Spontaneous Statements.

## 1. Modern Development of Doctrine.

## a. Theory of Admissibility.

*1 Witkin Cal. Evid. Hearsay § 173*

[§ 173] Theory of Admissibility.

Statements of any person (participant or observer) made at or near the time of some exciting event under the stress of excitement produced by the event, and relating to the event, are admissible in civil and criminal cases. The theory is that the declarant has had no opportunity to fabricate a false story, and the test laid down by Wigmore has been approved in California: "(1) [T]here must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it." (*Showalter v. Western Pac. R. Co.* (1940) 16 C.2d 460, 468, 106 P.2d 895; see *People v. Keelin* (1955) 136 C.A.2d 860, 868, 289 P.2d 520; *People v. Garcia* (1986) 178 C.A.3d 814, 820, 224 C.R. 198, citing the text; *People v. Poggi* (1988) 45 C.3d 306, 318, 246 C.R. 886, 753 P.2d 1082, *infra*, §181; *People v. Farmer* (1989) 47 C.3d 888, 903, 254 C.R. 508, 765 P.2d 940, *infra*, §178; *People v. Provencio* (1989) 210 C.A.3d 290, 301, 258 C.R. 330, quoting the text; *People v. Pensinger* (1991) 52 C.3d 1210, 1266, 278 C.R. 640, 805 P.2d 899 ["[s]pontaneous declarations are admissible for their truth, not merely for the state of mind of the declarant"].)

Commentary on the doctrine is extensive. (See 6 Wigmore (Chadbourn Rev.) §1745 et seq.; C.E.B., *Effective Introduction of Evidence* 2d, Chap. 49 [Spontaneous and Contemporaneous Statements]; 2 McCormick 5th, §268 et seq.; 1 Jefferson, *California Evidence Benchbook* 3d, Chap. 13; 2 *U.C.L.A. L. Rev.* 59; 47 *Cal. L. Rev.* 939; 85 *Cal. L. Rev.* 161 [feminist critique of exception]; 23 *Loyola L.A. L. Rev.* 453 [argument against reliability of statements admitted under spontaneous exclamation exception]; 29 *Loyola L.A. L. Rev.* 203 [same]; 4 *A.L.R.3d* 149 [accusatory utterances by homicide victim after the act]; 74 *A.L.R.3d* 963 [accusatory utterances by homicide victim before the act]; 80 *A.L.R.3d* 369 [rape victim's complaint or statement made in response to questions].)

The early cases used the phrase "declarations part of the *res gestae*" loosely to describe several sorts of admissible hearsay and nonhearsay statements, including verbal acts (*infra*, §183) and excited or spontaneous utterances. However, the terminology of Wigmore is now established in California, and the statements coming under this exception are properly described as "spontaneous exclamations," "spontaneous declarations," or "spontaneous statements." (See *Showalter v. Western Pac. R. Co.*, *supra*; *People v. Keelin*, *supra*, 136 C.A.2d 868 [trial judge announced that he would permit introduction of statements as part of the *res gestae*; "we feel sure the court referred to spontaneous declarations, rather than verbal acts"]; *People v. Butler* (1967) 249 C.A.2d 799, 804, 57 C.R. 798, citing the text; *People v. Lares* (1968) 261 C.A.2d 657, 663, 68 C.R. 144, citing the text; *People v. Walther* (1968) 263 C.A.2d 310, 320, 69 C.R. 434,

citing the text; *People v. Orduno* (1978) 80 C.A.3d 738, 744, footnote 1, 145 C.R. 806, citing the text ["the new Evidence Code, modern writers and modern courts have abandoned the use of this rather ill-defined phrase"]; 29 Cal. L. Rev. 433; 14 So. Cal. L. Rev. 345.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Riva* (2003) 112 C.A.4th 981, 996, 5 C.R.3d 649 [defendant allegedly shot at one car but bullet missed and hit pedestrian; statement by occupant of car that was target, to effect that defendant was firing at his car but he ducked, was properly admitted as spontaneous declaration even if it expressed opinion or belief]; *People v. Corella* (2004) 122 C.A.4th 461, 468, 18 C.R.3d 770 [in prosecution for corporal injury to spouse, spontaneous statements of defendant's wife to 911 operator and to police who responded to call were not subject to requirements of *Crawford v. Washington* (2004) 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177, 3 Cal. Evidence (4th), *Presentation at Trial, Supp.*, §21, as they were not made in response to interrogation]; 2 McCormick 6th, §268 et seq. *West's Key Number Digest*, Criminal Law k.366 et seq.; Evidence k.120 et seq.



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## CHAPTER VI - Hearsay

## III. EXCEPTIONS TO THE RULE

## H. Spontaneous Statements.

1. Modern Development of Doctrine.
- b. Evidence Code and Federal Rules.

*1 Witkin Cal. Evid. Hearsay § 174*

[§ 174] Evidence Code and Federal Rules.

(1) *Evidence Code. Ev.C. 1240* codifies the modern rule, making admissible a statement which "(a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and (b) was made spontaneously while the declarant was under the stress of excitement caused by such perception." (See *People v. Anthony O. (1992) 5 C.A.4th 428, 436, 6 C.R.2d 794*, citing the text; *infra*, §178 et seq.)

Formerly, the judge's preliminary determination of the conditions of admissibility was subject to redetermination by the jury. (*People v. Keelin (1955) 136 C.A.2d 860, 872, 289 P.2d 520*; 56 A.L.R.2d 372 [question of spontaneity as for court or jury].) Under *Ev.C. 405*, the issue is finally determined by the judge without resubmission to the jury. (See Law Rev. Com. Comment to *Ev.C. 405*; *People v. Tewksbury (1976) 15 C.3d 953, 966*, footnote 13, 127 C.R. 135, 544 P.2d 1335; 3 *Cal. Evidence (4th)*, *Presentation at Trial*, §63.)

(2) *Federal Rules of Evidence. F.R. Evid., Rule 803(2)* states the exception for *Excited Utterance*: "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." (See 4 Mueller & Kirkpatrick, *Federal Evidence* 2d, §435; 29A *Am.Jur.2d (1994 ed.)*, *Evidence* §865; 155 A.L.R. Fed 583 [what is excited utterance within meaning of rule].) *F.R. Evid., Rule 803(1)* states a separate exception for *Present Sense Impression*: "A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." (See *People v. Hines (1997) 15 C.4th 997, 1036, 64 C.R.2d 594, 938 P.2d 388* [admission of testimony about telephone conversation between witness and murder victim, one portion of which tended to indicate that defendant was with murder victim, came within federal hearsay exception for present sense impressions and therefore could not have violated Confrontation Clause of Sixth Amendment]; 4 Mueller & Kirkpatrick, *Federal Evidence* 2d, §434; 29A *Am.Jur.2d (1994 ed.)*, *Evidence* §864.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Federal Rules of Evidence. See* 165 A.L.R. Fed 491 [*F.R. Evid., Rule 803(1)*]; 125 A.L.R.5th 357 [admissibility of call to 911 operator as statement of present sense impression under Unif. R. Evid., Rule 803(1) or similar state rule]; 7 A.L.R.6th 233 [admissibility of call to 911 operator as excited utterance under Unif. R. Evid., Rule 803(2) or similar state rule].



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## CHAPTER VI - Hearsay

## III. EXCEPTIONS TO THE RULE

## H. Spontaneous Statements.

## 1. Modern Development of Doctrine.

## c. Relation to Other Exceptions.

1 Witkin Cal. Evid. Hearsay § 175

## [§ 175] Relation to Other Exceptions.

The spontaneous exclamation doctrine allows proof of certain important types of utterances that do not meet the tests of other exceptions:

(1) An agent's or employee's admission of fault, not a vicarious admission against the employer because outside the scope of the employment or the agent's authority. "[A] spontaneous declaration made by an employee may be admissible against his employer as an exception to the hearsay rule ... separate and apart from the question of whether it was made in the scope of employment." (*Lane v. Pacific Greyhound Lines* (1945) 26 C.2d 575, 582, 160 P.2d 21 [bus driver].) (On whether spontaneous declaration of agent may be used to prove fact of agency, or scope of employment, see 2 McCormick 5th, §272; 47 Cal. L. Rev. 939; 10 Hastings L. J. 219.)

(2) A statement of the victim of a homicide, inadmissible as a dying declaration because of lack of the foundation showing of sense of impending death. (See 2 McCormick 5th, §310; 2 U.C.L.A. L. Rev. 59, note 56; 1955 A.S. 627; 4 A.L.R.3d 149 [accusatory utterance by homicide victim after the act]; and see *People v. Bazaure* (1965) 235 C.A.2d 21, 37, 44 C.R. 831 [fatally stabbed prison guard's identification of his assailant was admissible under both exceptions].)

(3) If the conditions of the doctrine are met, self-serving statements. (*People v. Haskell* (1960) 185 C.A.2d 267, 273, 8 C.R. 228, *infra*, §181.)

*People v. Anthony O.* (1992) 5 C.A.4th 428, 436, 6 C.R.2d 794, summarizes the advantages of the spontaneous exclamation doctrine over other hearsay exceptions: (a) Admissibility does not depend on declarant unavailability (citing *People v. Jones* (1984) 155 C.A.3d 653, 202 C.R. 289, *infra*, §177); (b) the exclamation need not be made at the time of the event at issue (citing *People v. Jones, supra* [30-40 minute delay]), and can even be made in response to questions (citing *People v. Farmer* (1989) 47 C.3d 888, 254 C.R. 508, 765 P.2d 940, *infra*, §178); (c) the declarant need not be identified (citing *People v. Provencio* (1989) 210 C.A.3d 290, 258 C.R. 330); (d) unlike an accomplice-witness' statement, a spontaneous exclamation does not need to be corroborated (citing *People v. Sully* (1991) 53 C.3d 1195, 283 C.R. 144, 812 P.2d 163); (e) the declarant need not satisfy witness qualifications (see *infra*, §176); (f) the exclamation may alone support a conviction (citing *People v. Poggi* (1988) 45 C.3d 306, 246 C.R. 886, 753 P.2d 1082, *infra*, §181); and (g) the exclamation is particularly likely to be truthful, and because of its trustworthiness, is likely to be better evidence than can be obtained from the same person on the stand (citing *People v. Hughey* (1987) 194 C.A.3d 1383, 240 C.R. 269, *infra*, §181).

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Agent's or employee's admission of fault:* See 2 McCormick 6th, §272.(2) *Statement of victim of homicide:* See 2 McCormick 6th, §310.





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## III. EXCEPTIONS TO THE RULE

## H. Spontaneous Statements.

## 1. Modern Development of Doctrine.

## d. Effect of Other Rules.

1 *Witkin Cal. Evid. Hearsay* § 176

[§ 176] Effect of Other Rules.

(1) *Competency of Declarant.* There is some authority supporting a challenge to the declarant's competency. (See 15 A.L.R.4th 1043 [admissibility of spontaneous declarations made by one incompetent to testify at trial]; on attack on declarant's credibility, see 3 *Cal. Evidence* (4th), *Presentation at Trial*, §357.) But in *People v. Butler* (1967) 249 C.A.2d 799, 806, 57 C.R. 798, involving the declaration of a 5-year-old girl, the court held that a declarant's incompetency to testify as a witness, for minority or other reasons, does not affect the admissibility of the declarant's spontaneous exclamations. (See *People v. Orduno* (1978) 80 C.A.3d 738, 745, 145 C.R. 806 [approving *Butler*]; *In re Daniel Z.* (1992) 10 C.A.4th 1009, 1022, 13 C.R.2d 139, 10 *Summary* (9th), *Parent and Child, Supp.*, §689A [citing *Orduno*]; 6 *Wigmore* (Chadbourn Rev.) §1751; on relation of spontaneous statement exception to court-created child dependency hearsay exception, see *In re Cindy L.* (1997) 17 C.4th 15, 23, 28, 69 C.R.2d 803, 947 P.2d 1340, 10 *Summary* (9th), *Parent and Child, Supp.*, §689B.)

(2) *Right of Confrontation.* In *People v. Hughey* (1987) 194 C.A.3d 1383, 240 C.R. 269, *infra*, §181, the court, relying on the coconspirator case of *United States v. Inadi* (1986) 475 U.S. 387, 106 S.Ct. 1121, 89 L.Ed.2d 390, held that unavailability of the declarant need not be shown. The basis of the *Inadi* holding was that statements made while the conspiracy was in progress provided evidence of the conspiracy's context that could not be replicated even if the coconspirator were to testify to the same matters. Applying that reasoning here, the basis for the spontaneous statement exception to the hearsay rule shows the value of and necessity for that evidence whether or not the declarant is unavailable to testify. A spontaneous statement is particularly likely to be truthful because it is made while under the stress of excitement and without opportunity to contrive or reflect. Thus, as in *Inadi*, "the victim's spontaneous statements are not a 'weaker substitute for live testimony' but a valuable form of evidence 'that cannot be replicated, even if the declarant testifies to the same matters in court,' and are therefore 'usually irreplaceable as substantive evidence, and of great value in furthering the purpose of the confrontation clause to advance the accuracy of the truth-determining process in criminal trials.'" (194 C.A.3d 1393; quoting *Inadi*.)

The court added, however, that defendant did have an opportunity to confront the declarant, who was in the courtroom under prosecution subpoena and could have been called as a witness and questioned as if under cross-examination. (194 C.A.3d 1393.) (See *People v. Farmer* (1989) 47 C.3d 888, 905, 254 C.R. 508, 765 P.2d 940, *infra*, §178; *People v. Sully* (1991) 53 C.3d 1195, 1229, 283 C.R. 144, 812 P.2d 163, 1 *Cal. Evidence* (4th), *Circumstantial Evidence*, §92; *People v. Gallego* (1990) 52 C.3d 115, 176, 276 C.R. 679, 802 P.2d 169; *People v. Pensinger* (1991) 52 C.3d 1210, 1266, 278 C.R. 640, 805 P.2d 899 [evidence admitted under traditional hearsay

exception does not violate Confrontation Clause if there are sufficient indicia of reliability to allow trier of fact to evaluate truth of statement; spontaneous declarations have that reliability].)

In *White v. Illinois* (1992) 502 U.S. 346, 112 S.Ct. 736, 116 L.Ed.2d 848, the Court reaffirmed the reasoning of *Inadi* and added this comment: "We therefore think it clear that the out-of-court statements admitted in this case had substantial probative value, value that could not be duplicated simply by the declarant later testifying in court. To exclude such probative statements under the strictures of the Confrontation Clause would be the height of wrong-headedness, given that the Confrontation Clause has as a basic purpose the promotion of the 'integrity of the factfinding process.' ... Given the evidentiary value of such statements, their reliability, and that establishing a generally applicable unavailability rule would have few practical benefits while imposing pointless litigation costs, we see no reason to treat the out-of-court statements in this case differently from those we found admissible in *Inadi*." (112 S.Ct. 743, 116 L.Ed.2d 859.)

(3) *Opinion Rule*. Excited utterances may be excluded on the basis that they are inadmissible opinions. (See *Gatlin v. Union Oil Co. of Calif.* (1916) 31 C.A. 597, 608, 161 P. 29; *People v. Miron* (1989) 210 C.A.3d 580, 582, 258 C.R. 494 [spontaneous declarant's opinion as to intruder's motive was properly excluded]; 53 A.L.R.2d 1287 [opinion as to cause of or responsibility for traffic accident]; 4 A.L.R.3d 1987 [victim's accusatory utterance after act of homicide]; on conflict elsewhere on this point, and argument against applying opinion rule, see 2 McCormick 5th, §272; 1955 A.S. 629; 1957 A.S. 547; 1964 A.S. 361.)

(4) *Aranda-Bruton Rule*. In *People v. Jackson* (1987) 192 C.A.3d 209, 237 C.R. 373, the *Aranda-Bruton* editing rule (supra, §59) was applied to a burglary defendant's spontaneous statement. The police spotted a car fleeing the scene of a burglary, and during the ensuing chase the car crashed. Defendant was subsequently found crouched near the freeway. As the police led him back to the accident scene, and before he was given his *Miranda* warnings, he stated that he was the driver of the car, that he had picked up friends on the street where the burglary occurred, and that he knew nothing about a burglary. The trial judge ruled that the statements were spontaneous utterances, but edited them in accordance with the *Aranda-Bruton* rule. *Held*, this was proper. Defendant's statement that he was driving the car was admissible; but in order to avoid improperly prejudicing a codefendant, the trial judge was compelled to exclude the statement that he was merely driving along the street in question and picked up some friends. Defendant could not complain about the exclusion of his statement that he knew nothing about any burglary, because he had requested that his statements be excluded unless the one about picking up some friends was also admitted. (192 C.A.3d 215.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Competency of Declarant*.

*In re Daniel Z.:*

*Cross-Reference:* *In re Daniel Z.*, formerly discussed in *Parent and Child*, was not carried over to the 10th edition of *Summary*.

*In re Cindy L.:*

*Cross-Reference:* 10 *Summary* (10th), *Parent and Child*, §619.(3) *Opinion Rule*. See 2 McCormick 6th, §272.*Correction:* Page 891, line 18, "*Gatlin*" should be "*Catlin*".



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## CHAPTER VI - Hearsay

## III. EXCEPTIONS TO THE RULE

## H. Spontaneous Statements.

## 2. Statement Related to Act, Condition, or Event.

*1 Witkin Cal. Evid. Hearsay § 177*

[§ 177] Statement Related to Act, Condition, or Event.

(1) *In General.* The statement must purport to "narrate, describe, or explain an act, condition, or event perceived by the declarant." (*Ev.C. 1240(a)*.) Automobile or railroad accidents are common examples. (For accident cases, see *infra*, §§181, 182; see also *People v. Butler* (1967) 249 C.A.2d 799, 804, 806, 57 C.R. 798 [statements of boy victim and girl observer concerning defendant's lewd acts]; *People v. Hughey* (1987) 194 C.A.3d 1383, 1388, 240 C.R. 269, *infra*, §181; *People v. Gallego* (1990) 52 C.3d 115, 171, 276 C.R. 679, 802 P.2d 169 [statements by friend of victim that he had seen both victims in defendant's car were admissible, where they were made after friend was sworn at and told to leave by victim and slapped by strange woman]; 6 Wigmore (Chadbourn Rev.) §1754; 78 A.L.R.2d 300 [statements of bystanders at time of arrest]; 13 A.L.R.3d 1114 [statements relating to origin or cause of or responsibility for fire]; on whether declaration itself is sufficient evidence of occurrence of startling event, see 2 McCormick 5th, §272; 1956 A.S. 535; 38 A.L.R.4th 1237 [necessity, in criminal prosecution, of independent evidence of principal act].)

In *People v. Arias* (1996) 13 C.4th 92, 150, 51 C.R.2d 770, 913 P.2d 980, testimony relating a statement by a robbery victim to the effect that defendant said, during the robbery, that he was the perpetrator of a prior murder and robbery was held to have been properly admitted. Even though the victim was not a percipient witness to the prior crimes, the "act" or "event" she was describing was defendant's incriminating statement, which she did witness.

(2) *Statement by Driver-Employee.* The requirement that the statement relate to the act perceived may have a limiting effect in negligence actions against employers for injuries received in automobile accidents. The driver's statement admitting *fault* relates to the accident, but the driver's statement admitting *agency* and *scope of employment* deals with a matter distinct from the accident itself and is excluded. Nor can it be received as a vicarious admission (*supra*, §119 et seq.), for the agent's own statements of agency are outside the scope of the agent's authority. (See 2 McCormick 5th, §272; 1952 A.S. 737; 1957 A.S. 548; for criticisms of limitation, see 10 *Hastings L. J.* 219; 47 *Cal. L. Rev.* 939.)

(3) *Statement by Unidentified Declarant.* A statement by an *unidentified declarant* must still meet the test of act, condition, or event "perceived" by the declarant. Thus, in *Ungefug v. D'Ambrosia* (1967) 250 C.A.2d 61, 68, 58 C.R. 223, plaintiff alleged that decedent was struck by defendant's automobile, negligently driven at a crossing. One defense theory was that she was struck by another car that failed to stop. The ambulance driver, called by defendant, testified that he heard someone say that decedent had been hit twice, once by another car that did not stop. *Held*, this was error. *Ev.C. 1240* presupposes that the declarant "perceived" the event, and, here, there was nothing but speculation. It was not shown that there were eyewitnesses to the accident (as distinguished from the group that gathered afterwards).

(4) *Evidence as to Perception by Declarant.* In *People v. Jones* (1984) 155 C.A.3d 653, 202 C.R. 289, defendant was charged with murder of a victim who died from injuries suffered from being burned by gasoline. The victim's treating physician was allowed to testify that he asked the victim what had happened and the latter answered, "The crazy nigger that I live with threw gasoline on me." Defendant contended that there was insufficient proof that the victim perceived the act, because if he had actually seen defendant doing this, he would have attempted to deflect the flow or remove his clothes and would have received burns on his hands, which he did not have. The court said that the victim's statement itself indicated that he observed the event, and also noted that there was direct evidence that the victim was alert and percipient at the time. (155 C.A.3d 661.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General.* See *People v. Phillips* (2000) 22 C.4th 226, 236, 237, 92 C.R.2d 58, 991 P.2d 145 [in capital murder case, trial judge did not err in excluding testimony of witness relating statement by defendant's deceased acquaintance concerning circumstances of charged crime, where statement itself did not indicate that acquaintance had personally witnessed crime, and evidence supported trial judge's finding that acquaintance could have been repeating what he heard someone else say]; *People v. Roldan* (2005) 35 C.4th 646, 714, 27 C.R.3d 360, 110 P.3d 289 [in capital murder case, multiple, nested hearsay (police tape of caller's description of her son's and another witness' observation of robbery and murder) was properly admitted under spontaneous utterance exception; all three persons were acting under stress and excitement, and although mother did not witness crimes, she was witness to statements of others]; 2 McCormick 6th, §272.

(2) *Statement by Driver-Employee.* See 2 McCormick 6th, §272.



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## CHAPTER VI - Hearsay

### III. EXCEPTIONS TO THE RULE

#### H. Spontaneous Statements.

#### 3. Spontaneous Statement During Excitement.

##### a. Statement in Response to Questioning.

*1 Witkin Cal. Evid. Hearsay § 178*

[§ 178] Statement in Response to Questioning.

In *People v. Farmer* (1989) 47 C.3d 888, 254 C.R. 508, 765 P.2d 940, the statements were made by the victim, Schmidt-Till, to Officer Strigotte at the scene of the crime, and by telephone to a police dispatcher. In holding that they met the tests for admissibility, the court said:

(a) "In one sense, a 'spontaneous' utterance is one that is voluntary and is initiated by, or at least not elicited from, the speaker. Under this literal interpretation of spontaneity, few of Schmidt-Till's statements would qualify. The dispatcher urged him to answer her questions, refusing to let him wait until help arrived. While his answers to Strigotte were more voluntary, none of the information was given on his own initiative, but likewise was elicited by specific questions." (47 C.3d 903.)

(b) "But 'spontaneous' may also be used in a slightly different sense: to describe actions undertaken without deliberation or reflection. That is what is intended by *Evidence Code section 1240*, which codifies the earlier common law exception to the hearsay rule." (47 C.3d 903.)

(c) "The crucial element in determining whether a declaration is sufficiently reliable to be admissible under this exception to the hearsay rule is thus not the nature of the statement but the mental state of the speaker. The nature of the utterance--how long it was made after the startling incident and whether the speaker blurted it out, for example--may be important, but solely as an indicator of the mental state of the declarant. The fact that a statement is made in response to questioning is one factor suggesting the answer may be the product of deliberation, but it does not ipso facto deprive the statement of spontaneity. Thus, an answer to a simple inquiry has been held to be spontaneous. ... More detailed questioning, in contrast, is likely to deprive the response of the requisite spontaneity. ... But ultimately each fact pattern must be considered on its own merits, and the trial court is vested with reasonable discretion in the matter." (47 C.3d 903.)

(d) "On the record before us we conclude that the court did not err in admitting both conversations. It is true that we have rarely held the answers to such extensive questioning to be spontaneous utterances. ... Nonetheless, there is no doubt that Schmidt-Till was excited, or perhaps more accurately, distraught and in severe pain. He was not merely an uninjured witness whose excitement might wane--and would thus be in a position to fabricate answers--through the sobering interrogation of an investigator. His responses were not self-serving. ... Nor were the questions suggestive. ... While he was being questioned, the intense pain of his gunshot wounds and the concern he rightfully had about his survival no doubt preoccupied him so that he could not have contemplated spinning a false tale. In sum, he had so little

opportunity and incentive to deliberate that under these unusual circumstances we can dispense with the testimonial requirements of an oath and cross-examination." (47 C.3d 904, citing *People v. Poggi* (1988) 45 C.3d 306, 246 C.R. 886, 753 P.2d 1082, *infra*, §181.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Morrison* (2004) 34 C.4th 698, 719, 21 C.R.3d 682, 101 P.3d 568 [victim's statement, made soon after she had been shot, qualified as spontaneous statement even though it was in response to police questioning and consisted of naming perpetrator rather than describing act or event]; *People v. Pedroza* (2007) 147 C.A.4th 784, 791, 54 C.R.3d 636 [in prosecution for murder and arson arising from incident in which defendant threw gasoline on his wife and burnt her, wife's statements to police qualified as spontaneous declarations even though they were in response to prolonged police questioning; her response, given minutes after sustaining severe burns and while still suffering from resulting intense pain, suggested her statements were product of stress of moment].



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## CHAPTER VI - Hearsay

### III. EXCEPTIONS TO THE RULE

#### H. Spontaneous Statements.

#### 3. Spontaneous Statement During Excitement.

##### b. Importance of Time Element.

#### *1 Witkin Cal. Evid. Hearsay § 179*

#### [§ 179] Importance of Time Element.

The statement must have been made "spontaneously while the declarant was under the stress of excitement caused by such perception." (*Ev.C. 1240(b)*.) The trustworthiness of this kind of evidence depends on the condition of excitement that gave rise to it; the excited person has no time or opportunity to reflect and contrive or fabricate a false statement. (See *supra*, §173.)

Under this theory the time element, though not mechanically applied, is important. (See *Wiley v. Easter* (1962) 203 C.A.2d 845, 854, 21 C.R. 905, *infra*, §182; 53 A.L.R.2d 1265 [remoteness in time as factor in admitting statement about traffic accident]; 89 A.L.R.3d 102 [time element as affecting admissibility of sex crime victim's statement]; on admissibility of accusatory utterances by homicide victim before the event, see *People v. Garcia* (1986) 178 C.A.3d 814, 821, 224 C.R. 198; 74 A.L.R.3d 963.) Whether the statement was made "while the declarer's reflective powers are yet in abeyance" is a question of fact. (*Showalter v. Western Pac. R. Co.* (1940) 16 C.2d 460, 468, 106 P.2d 895, *supra*, §173 and *infra*, §180; see *Box v. California Date Growers Assn.* (1976) 57 C.A.3d 266, 273, 129 C.R. 146, citing the text; *People v. Jones* (1984) 155 C.A.3d 653, 662, 202 C.R. 289; *People v. Peach* (1991) 229 C.A.3d 1282, 1290, 280 C.R. 584 [trial judge improperly engaged in speculation as to what event victim was describing, when event occurred, and whether victim was still under its effect]; 6 Wigmore (Chadbourn Rev.) §1750; 4 A.L.R.3d 149 [homicide victim's statements made after the act].)

The exercise of discretion by the trial judge may lead to different results in closely similar cases dealing with statements made some time after the event:

(1) If statements are made at a time substantially after the event, they are likely to be excluded. (See *People v. Perkins* (1937) 8 C.2d 502, 516, 66 P.2d 631 [self-serving declarations of defendant made half hour later]; 1960 A.S. 561; *infra*, §182.)

(2) If the period is accounted for by shock, unconsciousness, or fear, there is authority for admitting belated statements. (See *People v. Costa* (1953) 40 C.2d 160, 168, 252 P.2d 1, *infra*, §181; 2 McCormick 5th, §272.)

(3) If the circumstances strongly suggest opportunity to reflect, the statements will be excluded. In *People v. Keelin* (1955) 136 C.A.2d 860, 870, 289 P.2d 520, statements of the victim of a killing, rejected as dying declarations (because not made with a sense of impending death), were admitted as spontaneous statements. *Held*, this was error; they were made in response to questions, over a considerable period of time, and indicated reflection and fabrication by the

declarant.

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Period accounted for by shock:* See 2 McCormick 6th, §272.





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## c. Statement Immediately After Event.

1 Witkin Cal. Evid. Hearsay § 180

[§ 180] Statement Immediately After Event.

The California cases dealing with time were formerly in conflict. A number of opinions insisted that the statement be contemporaneous, and excluded any made afterwards as narratives of past events. (See, e.g., *Williams v. Southern Pac. Co.* (1901) 133 C. 550, 554, 65 P. 1100; *Losleben v. California State Life Co.* (1932) 119 C.A. 556, 558, 6 P.2d 1012; *Salvo v. Market Street Ry. Co.* (1931) 116 C.A. 339, 345, 2 P.2d 585.) On the other hand, several early cases sanctioned the admission of statements made shortly after the event. (See *People v. Vernon* (1868) 35 C. 49, 50; *Coryell v. Clifford F. Reid* (1931) 117 C.A. 534, 536, 4 P.2d 295; 21 Cal. L. Rev. 460.) These early cases were followed by the Supreme Court in *Showalter v. Western Pac. R. Co.* (1940) 16 C.2d 460, 106 P.2d 895, establishing the California rule in accordance with Wigmore's conditions (supra, §173). (See 6 Wigmore (Chadbourn Rev.) §1756; 29A Am.Jur.2d (1994 ed.), Evidence §865.)

The *Showalter* case was an action for wrongful death resulting from a fall from a train, and the defense was decedent's contributory negligence. Plaintiff's witness, a fellow brakeman, was allowed to testify that he ran to the scene of the accident, asked what had happened, and decedent replied, "I got knocked off." *Held*, the statement was properly admitted. Although not contemporaneous, "where a declaration is made under the immediate influence of the occurrence to which it relates and so near the time of that occurrence as to negative any probability of fabrication," it is admissible. (16 C.2d 467.) The court further held that the trial judge has a certain amount of discretion in determining admissibility under this test, and may consider such matters as the spontaneity, opportunity for fabrication, lapse of time, attendant excitement, and mental and physical condition of the declarant. (See *Foster v. Pestana* (1947) 77 C.A.2d 885, 888, 177 P.2d 54 [defendant, immediately after dropping pipe on plaintiff, exclaimed, "Damn, I didn't see it, it was my fault, I should have looked"]; *People v. Butler* (1967) 249 C.A.2d 799, 804, 806, 57 C.R. 798 [charge of lewd acts with child; statement of victim to his mother after she called him, and statement of another child present at the time]; *People v. Lares* (1968) 261 C.A.2d 657, 663, 68 C.R. 144; 50 A.L.R.3d 716 [admissibility of unidentified bystander's statement when testified to by interested party]; 29 Cal. L. Rev. 433; 14 So. Cal. L. Rev. 345; 29 Cal. L. Rev. 433; 14 So. Cal. L. Rev. 345.)

In *People v. Cooper* (1967) 249 C.A.2d 479, 57 C.R. 588, the exception was applied to the issue of probable cause for an arrest and search. Three robbers escaped in an automobile. A bystander pointed out the direction of their flight to officers, entered their patrol car by invitation, and, during the pursuit, described the getaway car. When they reached defendants' car, the bystander left and was not located for the trial. A search of the car produced a concealable weapon, and defendant C, a former felon, was convicted of its possession. *Held*, the statement was admissible and conviction

affirmed.

(a) The statement concerning flight from the robbery did not relate to the charge on which defendant was convicted--possession of the weapon. But it was relevant on the issue of reasonable cause to stop the car and make the arrest and search. (249 C.A.2d 481.)

(b) Inadmissible hearsay evidence may be relied on for such probable cause, but ordinarily it must come from a reliable informer (see 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence*, §99 et seq.). The bystander was unknown and untested, hence, an inadmissible hearsay statement from him (e.g., a description furnished hours after the event) would not be sufficient. However, this statement was admissible hearsay. "The same factors which warrant admission of such spontaneous declarations as evidence of the truth of their content serve even more strongly to warrant police reliance upon them. The urgent need for prompt pursuit of fleeing wrongdoers precluded independent investigation of the antecedents and integrity of the bystander passenger, whose obvious agitation in his position of danger carried its own indicia of honesty." (249 C.A.2d 482.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(New) *Effect of taking time to write statement:* In *People v. Gutierrez* (2000) 78 C.A.4th 170, 92 C.R.2d 626, defendant was charged with a robbery that occurred in a parking lot. At trial, the judge admitted a slip of paper given to the victim right after the robbery by an unidentified witness. The paper contained the license number of the van used in the commission of the offense and was used by police to locate defendant. *Held*, the paper was properly admitted. Although no previous California case has considered whether a writing can qualify under the hearsay exception for spontaneous statements, it appears that here all the requirements of the exception were satisfied. "In the court's view the act of reducing an observation to writing a short time after the exciting event makes a statement no less reliable than an identical oral statement made under the same circumstances." (78 C.A.4th 181.)



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##### d. Statement Some Time Afterward.

##### 1. Statements Held Admissible.

#### *1 Witkin Cal. Evid. Hearsay § 181*

[§ 181] Statements Held Admissible.

(1) *Traffic Accident Cases.* In *White v. Los Angeles Ry. Corp.* (1946) 73 C.A.2d 720, 724, 167 P.2d 530, a streetcar accident case, the motorman made a statement to a police officer who arrived shortly after the accident. The court said that the motorman "had just been through the tragic experience of having struck and killed a man, the body was lying in full view at the side of the tracks, and we believe it may be fairly said that his statements were spontaneous."

In *People v. Costa* (1953) 40 C.2d 160, 252 P.2d 1, the victim of an automobile collision was rendered unconscious for a brief period. He was asked by an officer 5 or 10 minutes after the accident, "What happened?" He replied, "The man hit us in the rear." *Held*, the statement was admissible. (a) The interval did not allow time for fabrication because he was unconscious. (b) It was spontaneous even though elicited by an inquiry. "The natural reaction of anyone arriving at the place where an accident has occurred is to make such inquiry. ... If the statement otherwise meets the tests of the res gestae rule, it should not be held inadmissible simply because it was prompted by the question of another person." (40 C.2d 168.)

In *People v. Haskell* (1960) 185 C.A.2d 267, 273, 8 C.R. 228, defendant was charged with felony drunk driving. His wife sought to testify that when she arrived at the scene he was lying against the car, she asked him who was driving, and he answered, "Bruce" (the other occupant). *Held*, it was error, though not reversible under the circumstances, to exclude this statement as hearsay, without considering the spontaneous exclamation exception. (See *Lane v. Pacific Greyhound Lines* (1945) 26 C.2d 575, 581, 160 P.2d 21 [trial judge erred in instructing that bus driver's statements, made during period from 2 to 20 minutes after accident, were not binding on his employer].)

(2) *Other Cases.* In *People v. Hughey* (1987) 194 C.A.3d 1383, 1388, 240 C.R. 269, defendant was charged with assault and child endangerment arising out of a domestic altercation involving his wife and 3-month-old child. Investigating officers arrived at defendant's residence and heard a woman scream, "Help me." They then saw her run crying from the house, and noticed abrasions on her arm and neck. While standing on the porch, the woman, defendant's wife, told the officers that defendant had struck her and had tried to smother their child. Three or 4 minutes later, while inside the house, the wife said that defendant had stomped her in the stomach, grabbed her around the neck, repeatedly threw her backwards, and hit her breast with his elbow. The wife was subpoenaed by the prosecution and was present at trial, but was not called to testify by either party. The declarations she made after the assault were introduced through testimony of one investigating officer as spontaneous statements. *Held*, admission of the evidence was proper. The fact that the wife was screaming when the officers arrived clearly indicated that the short interval between the time of the

assault and the statements did not destroy their spontaneity. (194 C.A.3d 1388.)

In *People v. Poggi* (1988) 45 C.3d 306, 246 C.R. 886, 753 P.2d 1082, the murder victim made her statement to a police officer about 30 minutes after she had been stabbed. *Held*, the trial judge did not abuse his discretion in finding that the statement was spontaneous.

(a) "When the statements were made and whether they were delivered directly or in response to a question are important factors to be considered on the issue of spontaneity." But, as emphasized in *People v. Washington* (1969) 71 C.2d 1170, 81 C.R. 5, 459 P.2d 259, neither lapse of time nor the fact that the declarations were elicited by questioning deprives them of spontaneity "if it nevertheless appears that they were made under the stress of excitement and while the reflective powers were still in abeyance." (45 C.3d 319, quoting *Washington*.)

(b) "Under the same reasoning, the fact that the declarant has become calm enough to speak coherently also is not inconsistent with spontaneity. ... To conclude otherwise would render the exception virtually nugatory; practically the only 'statements' able to qualify would be sounds devoid of meaning." (45 C.3d 319.)

(c) "Here the record supports the finding of spontaneity. First, although Musgrove made the statements at issue about 30 minutes after the attack, it is undisputed that she was still under its influence. Second, it is also undisputed that she remained excited as she made the statements, even though she had become calm enough to speak coherently. Finally, the fact that the statements were delivered in response to questioning does not render them nonspontaneous. With one exception, Officer Flores' questions appear to have been simple and nonsuggestive--in substance, 'What happened?', 'What happened then?', and so on." (45 C.3d 319.)

In *People v. Bernalley* (1960) 185 C.A.2d 326, 330, 8 C.R. 375, the victim of defendant's mayhem was found by a policeman, bloody and incoherent. To the last of several questions, he replied, "Sam cut my eyes." *Held*, it was not error to admit the officer's testimony as to this statement. (See *People v. Walther* (1968) 263 C.A.2d 310, 320, 69 C.R. 434 [statements within 10 minutes after defendant hit victim on the head]; *People v. Gonzales* (1969) 269 C.A.2d 586, 589, 75 C.R. 267 [victim, 10 minutes after fatal stabbing, cried out that "they" chased him and tried to take his money]; *People v. Washington*, *supra*, 71 C.2d 1177, citing the text [beaten victim, unconscious for over an hour, regained consciousness for a few minutes and answered questions]; *McClafflin v. Bayshore Equipment Rental Co.* (1969) 274 C.A.2d 446, 453, 79 C.R. 337, citing the text [statement made within 15 minutes of accident, including period of unconsciousness; length of time lapse, though significant, not controlling; admissibility was question for trial judge]; *People v. Jones* (1984) 155 C.A.3d 653, 662, 202 C.R. 289 [statement made 30 to 40 minutes after injury; court quotes 6 Wigmore (Chadbourn Rev.) §1750 argument that compliance with time condition should be left to discretion of trial judge]; *People v. Trimble* (1992) 5 C.A.4th 1225, 1234, 7 C.R.2d 450 [facts showed continued state of extreme agitation of child declarant; statements made nearly 2 days after event were admissible]; *In re Emily A.* (1992) 9 C.A.4th 1695, 1713, 12 C.R.2d 294 [young child's remarks a day or two after event while she was still in pain came within exception].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Other Cases.* See *People v. Brown* (2003) 31 C.4th 518, 526, 541, 3 C.R.3d 145, 73 P.3d 1137 [in capital murder trial, witness' testimony that she heard her brother-in-law say, "I know [defendant] shot her. I know she is hurt bad," was properly admitted under spontaneous utterance exception, even though statement was made 21/2 hours after crime, where brother-in-law was crying and shaking when he spoke]; *People v. Pirwani* (2004) 119 C.A.4th 770, 789, 14 C.R.3d 673 [in prosecution for em- bezzlement and grand theft, trial judge erred in admitting statement by victim, a dependent adult, to program coordinator at community living center under spontaneous utterance exception; victim telephoned coordinator in excited state, but statement at issue was not made until 2 days later, and by then victim had had time to reflect and regain composure; distinguishing *People v. Trimble* (1992) 5 C.A.4th 1225, 7 C.R.2d 450, text, p. 899]; *People v. Rincon* (2005) 129 C.A.4th 738, 751, 28 C.R.3d 844 [statements by attempted murder victim to prosecution witness shortly after violent shoot-out, during which victim was shot in ankle, were properly admitted as spontaneous statements, notwithstanding that it was not known what activities victim engaged in during short time between shooting and his arrival at location where he made statements, and there was no specific evidence of what his

emotional state was when he arrived there]; *People v. Saracoglu* (2007) 152 C.A.4th 1584, 1590, 62 C.R.3d 418 [in prosecution for corporal injury to spouse, victim's statements, made at police station about 30 minutes after physical assault occurred, qualified as excited utterances; even if victim was responding to questions, they were routine and nonsuggestive].



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##### d. Statement Some Time Afterward.

##### 2. Statements Held Inadmissible.

##### 1 *Witkin Cal. Evid. Hearsay* § 182

[§ 182] Statements Held Inadmissible.

In *Dolberg v. Pacific Elec. Ry. Co.* (1954) 126 C.A.2d 487, 488, 272 P.2d 527, plaintiff's automobile was struck by defendant's train. The officers arrived about 5 minutes afterward, and 5 or 10 minutes later talked with the motorman, who made statements supporting defendant's position. After a verdict for defendant, the judge granted a new trial for error in permitting the motorman's statement to be introduced. *Held*, affirmed.

In *People v. Fain* (1959) 174 C.A.2d 856, 345 P.2d 305, defendant was charged with manslaughter in driving a vehicle and killing his passenger. He offered testimony of a witness that, within 5 minutes after the accident, while defendant was lying in an unconscious or semiconscious condition, a police officer asked defendant who was driving and he replied, "My buddy." *Held*, the trial judge properly exercised his discretion in refusing to admit the evidence. "Considering the lapse of time here involved, the doubt as to whether the defendant was conscious or unconscious, or even understood the officer's question, the prior convictions for speeding, the loss of license and the recovery thereof the day before, all of which were likely to weigh heavily on the conscious or subconscious mind of the defendant, thus producing strong motives for fabrication and all the other attendant circumstances, we are unable to affirmatively say that the trial court's discretion was abused." (174 C.A.2d 861.)

In *Wiley v. Easter* (1962) 203 C.A.2d 845, 21 C.R. 905, the statement was inadmissible under the most liberal application of the tests. After an automobile accident, an officer asked defendant a series of questions about what happened, made notes on the questions and answers, and later typed up a report embodying this information. At the trial he was allowed to read from the report, although he had no independent recollection of the conversation, and could not establish the exact time or place, which was admittedly between 20 minutes and an hour after the event. *Held*, this was reversible error. "[I]t appears that defendant failed to show when or where her statements were made, whether the excitement of the accident had worn off, whether she was under the influence of sedatives at the time, what portions of her statement were volunteered and what were elicited by questions of the officer which were perhaps suggestive, or by questions which required deliberation in answering." (203 C.A.2d 855.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Ramirez* (2006) 143 C.A.4th 1512, 1525, 50 C.R.3d 110 [it was error, although harmless, to admit statements by victim where, after she was allegedly raped, she returned to hotel room, showered, asked to be driven home, fell asleep in car, and, after awaking in strange apartment, related details of rape; evidence indicated not only that

she was able to deliberate and reflect but also that she did so].



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## I. Contemporaneous Explanatory Statement (Verbal Act).

## 1. Theory of Admissibility.

*1 Witkin Cal. Evid. Hearsay § 183*

[§ 183] Theory of Admissibility.

Where a person's *conduct* is relevant but is equivocal or ambiguous, the *statements accompanying it* may be admitted to explain and make the conduct understandable. These statements have been called "verbal acts." (See *Airola v. Gorham* (1942) 56 C.A.2d 42, 50, 133 P.2d 78, *infra*, §184; *People v. Kennedy* (1960) 180 C.A.2d 862, 868, 4 C.R. 862; *People v. Baranov* (1962) 201 C.A.2d 52, 60, 19 C.R. 866; 2 McCormick 5th, §249; 6 Wigmore (Chadbourn Rev.) §1772 *et seq.*; 1 Jefferson, California Evidence Benchbook 3d, §13.11 *et seq.*; 19 Cal. L. Rev. 246, 248; 1960 A.S. 556.)

A verbal act is often regarded as matter "outside the rule," i.e., as nonhearsay. (See 6 Wigmore (Chadbourn Rev.) §1772.) The Evidence Code, to avoid doubt as to admissibility of the evidence, classifies it as a hearsay exception. *Ev.C. 1241* makes admissible a statement (1) "offered to explain, qualify, or make understandable conduct of the declarant," if (2) it was made "while the declarant was engaged in such conduct." (See *Mecchi v. Picchi* (1966) 245 C.A.2d 470, 478, 54 C.R. 1, *infra*, §184; *People v. Marchialette* (1975) 45 C.A.3d 974, 980, 119 C.R. 816, citing the text [suggesting that authorities disagree on whether evidence is nonhearsay or exception to hearsay rule, and noting that *Ev.C. 1241* does not specifically characterize it].)

Self-serving declarations may be introduced under this exception. Thus, declarations of an adverse possessor, made while in possession and before commencement of the action, and tending to show the hostile character of the occupation, are admissible. (*Weller v. Chavarria* (1965) 233 C.A.2d 234, 245, 43 C.R. 364, citing the text; see *Turney v. Sousa* (1956) 146 C.A.2d 787, 790, 304 P.2d 1025 [citing 6 Wigmore (Chadbourn Rev.) §1778, but holding the rule inapplicable under the facts].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 2 McCormick 6th, §249. *West's Key Number Digest*, Criminal Law k.364 *et seq.*; Evidence k.120 *et seq.*





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## 2. Illustrations: Statements Accompanying Acts.

*1 Witkin Cal. Evid. Hearsay § 184*

[§ 184] Illustrations: Statements Accompanying Acts.

In *Airola v. Gorham* (1942) 56 C.A.2d 42, 133 P.2d 78, an administrator sued to establish a trust against grantees, sons of decedent, to reconvey to decedent grantor. The granddaughter of decedent grantor testified that, after the deed was prepared but a day or two before decedent signed it, decedent *said to her* that decedent was signing away all the property, but that the grantees "were to make an agreement" protecting decedent's interest. *Held*, this was admissible as a verbal act. The court pointed out that the inquiry is not whether the conversation was contemporaneous with the physical execution of the deed, but whether it was a part of the transaction culminating in its execution. Here, from the time the deed was given to decedent to execute, and while he was deciding whether or not to do so, the transaction was in progress. (56 C.A.2d 51.)

Similarly, in *Sethman v. Bulkley* (1937) 9 C.2d 21, 24, 68 P.2d 961, the issue was whether plaintiff's mother, before her death, had made transfers of property to defendants *on their promise to pay plaintiff* certain sums of money. Plaintiff introduced a *letter*, written by the mother and bearing the same date as the instruments of transfer, in which the mother stated that arrangements for the payments had been made. *Held*, the letter was part of the transaction, admissible to show the intent with which the transfers were made. The fact that the letter had not been delivered, but was found in the mother's safe deposit box after her death, did not affect its admissibility.

In *People v. Frangadakis* (1960) 184 C.A.2d 540, 549, 7 C.R. 776, enforcement agents purchased liquor from a doorman and waitresses in a restaurant that had no liquor license. *Held*, the conversations with these employees were integral parts of the transaction and admissible as tending to explain the nature of the illegal act of sale.

In *Mecchi v. Picchi* (1966) 245 C.A.2d 470, 54 C.R. 1, a grantor executed an affidavit, referred to in the deed, setting forth his motive for making grants to his daughters (to right a previous wrong done to them). *Held*: (a) The statements were inadmissible as evidence of the truth of the past events of wrongdoing (see *infra*, §185). (245 C.A.2d 479.) (b) They were admissible as declarations connected with the transaction and explaining it, as in *Airola* and *Sethman*. (245 C.A.2d 478.) (c) They were also admissible as declarations of intent of a grantor on the issue of delivery. (245 C.A.2d 478.)

In *People v. Marchialette* (1975) 45 C.A.3d 974, 119 C.R. 816, an "ear witness," C, provided the most damaging testimony against defendant's claim of self-defense. C had telephoned a number that he found in a classified ad and was speaking to an unidentified man when the man and someone else began arguing. The second voice threatened to blow the other's brains out. Then C heard a burglar alarm, screams, shots, and the telephone falling; finally, "everything got quiet and faded away and the guy stopped hollering." At first, C believed someone was playing a game but, after

retelephoning the number and learning that an accident had happened, he called the police. *Held*, the evidence was properly admitted. (a) If C had been in the victim's office at the time, he could testify to what he saw and heard; if C had been present but *blind*, he could testify to what he *heard*; if C had been outside the office, he could testify to what he heard through the door or through a public address system or an intercommunication box. "The result does not change merely because what he heard was heard by means of a telephone." (45 C.A.3d 980.) (b) A sufficient foundation--a showing that defendant was the speaker--appeared from "the totality of the evidence": another witness testified that defendant had entered the victim's office before the burglar alarm went off and left while it was still ringing; defendant admitted pumping four shots into the victim, which the autopsy report showed was the cause of death; C had telephoned the victim's number. (45 C.A.3d 980.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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3. Subsequent Statements Inadmissible.

*1 Witkin Cal. Evid. Hearsay § 185*

[§ 185] Subsequent Statements Inadmissible.

If the particular transaction is completed, any subsequent declarations concerning it are not verbal acts and are excluded as inadmissible hearsay. (See *Northwestern Redwood Co. v. Dicken* (1910) 13 C.A. 689, 696, 110 P. 591 [issue whether writing given to R by defendant was option or executory contract of sale; declarations of R, after execution of the writing, that he had bought the property, held inadmissible]; *Alhambra Bldg. & Loan Assn. v. DeCelle* (1941) 47 C.A.2d 409, 412, 118 P.2d 19 [letters, not contemporaneous with transmission of money, and merely mentioning money previously sent, were recitals of past events and not admissible]; *Wagner v. Worrell* (1946) 76 C.A.2d 172, 182, 172 P.2d 751 [self-serving letter, constituting merely "an ordinary hearsay assertion" of what had already been done]; 6 Wigmore (Chadbourn Rev.) §1776.)

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#### J. Dying Declaration.

##### 1. In General.

*1 Witkin Cal. Evid. Hearsay § 186*

[§ 186] In General.

A declaration made by a person about to die has a substantial guarantee of trustworthiness. "The very solemnity of the circumstances under which a declaration *in extremis* is made is very justly considered by the law as creating an obligation equal to that which is imposed by a positive oath in a court of justice." (*People v. Dallen* (1913) 21 C.A. 770, 781, 132 P. 1064; see *People v. Cord* (1910) 157 C. 562, 568, 108 P. 511; 2 McCormick 5th, §309 et seq.; 5 Wigmore (Chadbourn Rev.) §1430 et seq.; 1 Jefferson, California Evidence Benchbook 3d, Chap. 7; C.E.B., Effective Introduction of Evidence 2d, Chap. 22 [Dying Declarations]; 29A Am.Jur.2d (1994 ed.), Evidence §828 et seq.)

In a criminal case, the defendant as well as the prosecution may offer a dying declaration in evidence. (See *People v. Costa* (1924) 67 C.A. 175, 180, 227 P. 201; *People v. Southern* (1898) 120 C. 645, 646, 53 P. 214; 2 McCormick 5th, §312.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 2 McCormick 6th, §309 et seq. *West's Key Number Digest*, Criminal Law k.415 et seq.; Evidence k.126(5), 275.5



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#### J. Dying Declaration.

#### 2. Evidence Code and Federal Rules.

##### *1 Witkin Cal. Evid. Hearsay § 187*

[§ 187] Evidence Code and Federal Rules.

(1) *Former California Law.* The former statute set forth the narrow exception restricted to declarations in homicide prosecutions for the death of the declarant. Hence: (a) The declaration was not admissible in a civil case. (*Thrasher v. Board of Med. Examiners of Calif.* (1919) 44 C.A. 26, 29, 185 P. 1006; see 47 A.L.R.2d 526 [admissibility in civil case].) (b) It was not admissible in a criminal prosecution for some other crime. (See 2 McCormick 5th, §311.)

(2) *Broadened Rule of Evidence Code.* The limitations of the traditional rule were condemned by most writers. (See 5 Wigmore (Chadbourn Rev.) §1436; 2 McCormick 5th, §311; 2 U.C.L.A. L. Rev. 65; 1953 A.S. 795.) The original Uniform Rules of Evidence eliminated them and allowed proof of any dying declaration, even though it was not related to the cause of death. *Ev.C. 1242*, not quite so radical, dropped the homicide limitation; it permits proof of "a statement made by a dying person respecting the cause and circumstances of his death," if it was made "upon his personal knowledge and under a sense of immediately impending death." (See *People v. Smith* (1989) 214 C.A.3d 904, 910, 263 C.R. 155, *infra*, §188 [reviewing history of exception and disapproving trial judge's instruction telling jury what weight it must give declaration]; *infra*, §189 *et seq.*)

Formerly, the judge's preliminary determination of the conditions of admissibility was subject to redetermination by the jury. (See *People v. Singh* (1920) 182 C. 457, 476, 188 P. 987.) Under *Ev.C. 405*, admissibility is finally determined by the judge without resubmission to the jury. (See Law Rev. Com. Comment to *Ev.C. 405*; *People v. Tewksbury* (1976) 15 C.3d 953, 966, footnote 13, 127 C.R. 135, 544 P.2d 1335; 3 *Cal. Evidence* (4th), *Presentation at Trial*, §63.)

(3) *Federal Rules of Evidence.* *F.R. Evid., Rule 804(b)(2)* provides an exception, in a homicide prosecution or a civil action or proceeding, for "a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death." (See 4 Mueller & Kirkpatrick, *Federal Evidence* 2d, §495; 29A *Am.Jur.2d* (1994 ed.), *Evidence* §829.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Former California Law.* See 2 McCormick 6th, §311.

(2) *Broadened Rule of Evidence Code.* See 2 McCormick 6th, §311.



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## CHAPTER VI - Hearsay

### III. EXCEPTIONS TO THE RULE

#### J. Dying Declaration.

#### 3. Instructions to Jury.

#### *1 Witkin Cal. Evid. Hearsay § 188*

[§ 188] Instructions to Jury.

In *People v. Smith* (1989) 214 C.A.3d 904, 910, 263 C.R. 155, the judge, over defendant's objection, gave this instruction: "A declaration made by a person about to die has a substantial guarantee of trustworthiness. 'The very solemnity of the circumstances under which the declaration in extremis is made is very justly considered by the law as creating an obligation equal to that which is imposed by a positive oath in a court of justice.' " *Held*, the instruction was error, although not prejudicial.

(a) "The dying declaration stands as one of the earliest recognized exceptions to the rule excluding most hearsay evidence from trial proceedings, and the foundation for this exception is deeply rooted in policy considerations of human philosophy and psychology. Yet, since well before the enactment of the Evidence Code in 1967, appellate courts have not addressed the question of what instruction, if any, the trial court should provide the jury in its evaluation of such evidence." (214 C.A.3d 908.)

(b) Wigmore explained the nature of the circumstantial guarantee of trustworthiness: "(1) The declarant, being at the point of death 'must lose the use of all deceit'--in Shakespeare's phrase. There is no longer any temporal self-serving purpose to be furthered. (2) If a belief exists in a punishment soon to be inflicted by Higher Power upon human ill-doing, the fear of this punishment will outweigh any possible motive for deception, and will even counterbalance the inclination to gratify a possible spirit of revenge. (3) Even without such a belief, there is a natural and instinctive awe at the approach of an unknown future--a physical revulsion common to all men, irresistible, and independent of theological belief." (214 C.A.3d 910.)

(c) "Despite the substantial guarantee of trustworthiness underlying this exception, courts have warned against uncritical acceptance." (214 C.A.3d 911.) The testimony should be received with the greatest caution; the primary facts upon which admissibility is grounded must be carefully scrutinized; the declaration is subject to the same credibility evaluations as in court testimony; and the trial court should not unduly emphasize this evidence. (214 C.A.3d 911.)

(d) McCormick makes the following observation on instructions: "There has been much theorizing in texts and opinions as to the weight to be given to dying declarations, abstractly or in comparison with the testimony of a witness. In consequence the practice has grown up in some states of requiring or permitting the judge to instruct the jury that these declarations are to be received with caution. In other states such instructions have been held to be improper. Again one court has required that the jury be told that a dying declaration is not to be regarded as having the same value and weight as sworn testimony. ... While there may be merit in a standardized practice of giving cautionary instructions, the direction to give the declaration a predetermined fixed weight seems of questionable wisdom. The weight of particular

dying declarations depends upon so many factors varying from case to case that no standardized instruction will fit all situations. Certainly in jurisdictions where the judge retains his common law power to comment on the weight of the evidence, the dying declaration is a most appropriate subject for individualized comment." (214 C.A.3d 912.)

(e) "We find the foregoing commentary persuasive, particularly in light of the general rule resolving conflicts in the law in favor of criminal defendants. In the instant case, laudable as the court's efforts may have been in elucidating a point of law, the instruction tended to draw the jury's attention to this evidence, isolating it and thereby implying some authoritative assessment of its credibility and effect upon the determination of defendant's guilt. As such, it was more than an expression of the court's evaluation of the evidence in the form of sanctioned comment. The hallowed right to trial by jury cannot countenance any invasion of the province occupied exclusively by the trier of fact. To the extent the instruction tended to do so, we disapprove the practice. Once the court makes a preliminary determination to admit a statement as a dying declaration ... , only the jury can assay the weight of that evidence." (214 C.A.3d 912.)

(f) In the present case the error was not prejudicial. "First, the instruction correctly stated the law even if the legal principle should not have been reduced to a specific direction to the jury. ... Second, it did not create a presumption or otherwise require the jury to draw any particular conclusion as to the declarant's veracity. ... Third, the court could have made the same point in the form of comment on the evidence. ... Hence, the instruction did not improperly imply an opinion as to defendant's guilt." (214 C.A.3d 913.) Moreover, defense counsel in closing argument adequately apprised the jury of the factors and considerations appropriate to the credibility assessment of a dying declarant. (214 C.A.3d 913.) (See 2 McCormick 5th, §314.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 2 McCormick 6th, §314.



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#### 4. Conditions of Admissibility.

##### a. Relation to Cause of Death.

*1 Witkin Cal. Evid. Hearsay § 189*

[§ 189] Relation to Cause of Death.

The declaration must relate to "the cause and circumstances" of the declarant's death (*Ev.C. 1242*), sometimes described as the "res gestae" of the death. (See *People v. Taylor* (1881) 59 C. 640, 648.) "[T]he *res gestae* embrace, not only the actual facts of the assault and the circumstances surrounding it, but the matters immediately antecedent to and having a direct causal connection with the assault as well as acts, immediately following the assault and so closely connected with it as to form in reality a part of the occurrence." (*People v. Cipolla* (1909) 155 C. 224, 227, 100 P. 252; see *People v. Gatson* (1998) 60 C.A.4th 1020, 1025, 1026, 70 C.R.2d 729, citing the text [in murder case, victim's statement, "They robbed me," was admissible even though it did not mention murder, because it was part of comprehensive description of cause of injuries and ultimate death]; 2 McCormick 5th, §311; 5 Wigmore (Chadbourn Rev.) §1434; 29A Am.Jur.2d (1994 ed.), *Evidence* §829.)

Because the statute retains the restriction to statements of the *dying person* respecting the cause of *that person's death*, a deathbed confession of a *third person* that he killed a victim does not qualify as a dying declaration. (See *People v. Hall* (1892) 94 C. 595, 598, 30 P. 7.) But it will now be admitted as a declaration against penal interest (admitting criminal liability). (*Ev.C. 1230*, *supra*, §146.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 2 McCormick 6th, §311.





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#### 4. Conditions of Admissibility.

##### b. Hope of Life Abandoned.

##### 1. Test.

#### 1 Witkin Cal. Evid. Hearsay § 190

[§ 190] Test.

The chief condition and characteristic of a dying declaration is the "sense of immediately impending death." (*Ev.C.* 1242.) The declarant must have abandoned all expectation of living; if the declarant had any lingering hope of recovery at the time the statement was made, it is not admissible. (See *People v. Taylor* (1881) 59 C. 640, 646, 649; *People v. Fuhrig* (1899) 127 C. 412, 414, 59 P. 693; *People v. Keelin* (1955) 136 C.A.2d 860, 873, 289 P.2d 520; *People v. Adams* (1990) 216 C.A.3d 1431, 265 C.R. 568, *infra*, §192 [statement made after declarant chose not to prolong life artificially was admissible]; *Shepard v. United States* (1933) 290 U.S. 96, 54 S.Ct. 22, 78 L.Ed. 196; 2 McCormick 5th, §310; 6 So. Cal. L. Rev. 241; 8 So. Cal. L. Rev. 48; 1963 A.S. 296.)

On the other hand, it is not necessary that death actually take place immediately or even shortly after the statement. If the declarant believed that he or she was about to die, the statement is admissible even though death did not actually occur until days or weeks later, and even though the declarant may have subsequently begun to hope for recovery. (See *People v. Cord* (1910) 157 C. 562, 566, 108 P. 511 [victim, fatally wounded and believing himself about to die, made statement; held admissible though he lived 2 weeks and was considered on road to recovery]; *People v. Ybarra* (1924) 68 C.A. 259, 262, 228 P. 868 [declarant did not die until 11 days afterwards]; *People v. Hoffman* (1925) 195 C. 295, 308, 232 P. 974; *People v. Jones* (1961) 197 C.A.2d 503, 508, 17 C.R. 252, citing the text; *People v. Tahl* (1967) 65 C.2d 719, 727, 56 C.R. 318, 423 P.2d 246, *infra*, §191; 2 McCormick 5th, §310; 5 Wigmore (Chadbourn Rev.) §1439 et seq.; 53 A.L.R.3d 785 [declarant's statements as showing consciousness of impending death].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 2 McCormick 6th, §310.



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##### 2. Foundation.

#### 1 *Witkin Cal. Evid. Hearsay* § 191

[§ 191] Foundation.

The belief in impending death will often be shown by the declarant's own statement. (See *People v. Bemmerly* (1890) 87 C. 117, 119, 25 P. 266 [victim's doctor took notes of what he said, wrote out a statement and read it to the victim, who assented separately to each sentence and signed it]; *People v. Cord* (1910) 157 C. 562, 566, 108 P. 511; *People v. Hoffman* (1925) 195 C. 295, 306, 307, 232 P. 974; but see *People v. Fuhrig* (1899) 127 C. 412, 415, 59 P. 693 [phrase "knowing I am about to die" inserted by stenographer in 184-word statement read to victim; *held*, no ratification and declaration inadmissible].)

But this is not essential; the belief may be inferred from such circumstances as the declarant's physical condition, the nature of the wounds or injuries, and the declarant's conduct, statements, and knowledge of his or her condition. (See *People v. Gray* (1882) 61 C. 164, 175; *People v. Cipolla* (1909) 155 C. 224, 226, 227, 100 P. 252 [shocking wounds, obviously fatal]; *People v. Wilson* (1942) 54 C.A.2d 434, 441, 129 P.2d 149; 2 McCormick 5th, §310; 5 Wigmore (Chadbourn Rev.) §1442; 1954 A.S. 779; 53 A.L.R.3d 1196 [circumstances other than declarant's statements to show consciousness of impending death].)

In *People v. Tahl* (1967) 65 C.2d 719, 56 C.R. 318, 423 P.2d 246, the husband victim said to the officer when he arrived at the scene, "We are dying, help us." The wife victim said, "Please hurry, I'm dying." Each, in response to questions, said that the killer was "Art," "Stahl," or "Tall," a man who worked for the husband, thus identifying him as defendant. *Held*, the foundation was sufficient. (65 C.2d 727.)

In *People v. Sims* (1993) 5 C.4th 405, 20 C.R.2d 537, 853 P.2d 992, a capital murder case, the prosecution moved to admit statements by the victim of an unadjudicated murder in another state that defendant was his murderer. When a paramedic found the victim, he was bleeding actively from gunshot wounds. Blood was spewing both from his mouth and from underneath his eye. He pleaded with the paramedic, "Please don't let me die." The paramedic assured him that he would survive, but he rejected these assurances and stated, "I feel like I am going to die." The trial court admitted the statements under the dying declaration exception. *Held*, the evidence was properly admitted. The victim had the requisite sense of immediately impending death, even though he pleaded for help in saving his life. There is "no incompatibility between the belief of a mortally wounded victim that he is about to die and his desire to receive whatever benefit might be afforded by immediate medical treatment." (5 C.4th 459.) (See *People v. Bagwell* (1974) 38 C.A.3d 127, 132, 113 C.R. 122 [after being stabbed, victim drove to service station where he appeared to be extremely weak, gasping for air and choking; his statement, "I don't think I'm going to make it," was sufficient basis for admitting

declaration that his wife had stabbed him while he was asleep]; *People v. Black* (1979) 96 C.A.3d 846, 850, 158 C.R. 449 [admissible though declarant did not expressly state that he was going to die ("help me, I don't want to die").]

**SUPPLEMENT:** [This section is current through the latest supplement]

See 2 McCormick 6th, §310.



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## b. Hope of Life Abandoned.

## 3. Where Victim Chooses To Die.

*1 Witkin Cal. Evid. Hearsay § 192*

[§ 192] Where Victim Chooses To Die.

In *People v. Adams* (1990) 216 C.A.3d 1431, 265 C.R. 568, defendant shot Hughes, inflicting wounds so serious that Hughes died 5 days later. At trial, the prosecution introduced statements Hughes made to a detective 2 days before his death, to the effect that defendant intended to kill him. On the issue of belief in impending death, the prosecution introduced the following: (a) On the day of the shooting, following surgery, the attending physician advised Hughes that he would probably be placed on a respirator that would sustain his life only for "days or weeks," and Hughes refused life support. (b) On the day after the shooting, Hughes told his pastor he was suffering and that "I'm not going to make it." (c) Soon thereafter the detective asked Hughes whether he thought he was going to die and Hughes responded "Now? Yeah." On appeal from the conviction of second degree murder, defendant contended that his constitutional right of confrontation was violated by admission of the victim's dying declarations made after the victim chose not to prolong his life through artificial life support. *Held*, the evidence was admissible.

(a) *State had no duty to keep witness alive.*

(1) Defendant contended that the state, aware of Hughes' intention to hasten his death, had a duty to ensure that he was kept on a respirator until after the preliminary hearing; and that, by breaching this duty, the state created the necessity for admitting Hughes' statements instead of producing him as a witness. This contention requires a balancing of the right of a witness to refuse life support and defendant's right of confrontation. (216 C.A.3d 1437.)

(2) A competent adult has a constitutional right to die rather than live by artificial means. This right outweighs competing state interests in preserving the patient's life, preventing suicide, protecting innocent third parties, and maintaining the ethical integrity of the medical profession. (216 C.A.3d 1437, 1438; see 5 *Summary* (9th), *Torts*, §§276, 277.) This right also prevails over an accused's right to confrontation. "While it may be convenient to insist on artificially continuing a witness's life so the person will be available for cross-examination, 'it is quite another matter to do so at the patient's sole expense and against his competent will.'" (216 C.A.3d 1439, quoting a Florida case.) And the fact that life support would be necessary for only a short time is immaterial. "If this right must be balanced against the number of days in which one desires to override the patient's wish, it would lose its value and meaning." (216 C.A.3d 1439.)

(3) "Accordingly, the state had no power, and consequently no duty, to ensure Hughes's presence at the preliminary examination by compelling him to be placed on a life-support respirator." (216 C.A.3d 1439.)

(b) *Trustworthiness of statements made after witness chooses to die.* Defendant contended that the statements were "suicide declarations" and untrustworthy, because Hughes committed the "evil" act of suicide. But making the decision to forego living by artificial means is not equivalent to an election to commit suicide, and is neither illegal nor immoral. (216 C.A.3d 1440.) "We find no reason to distinguish Hughes's dying declarations from other such declarations simply because they were made after he decided not to artificially prolong his life. The fact the statements were made after the witness chose to die rather than accept life-support treatment does not render them untrustworthy. The crucial element in determining whether a declaration is sufficiently trustworthy for admission under the dying declaration exception to the hearsay rule is the declarant's sense of impending death--not the precipitating cause of death." (216 C.A.3d 1440.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Cross-Reference:* 5 Summary (10th), Torts, §127.



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#### J. Dying Declaration.

#### 5. Other Rules Applicable.

#### 1 Witkin Cal. Evid. Hearsay § 193

[§ 193] Other Rules Applicable.

(1) *Competency of Declarant.* As with other hearsay exceptions, the competency of the declarant may be challenged. (See 5 Wigmore (Chadbourn Rev.) §1445; 1959 A.S. 617 [inquiry into mental condition]; 8 So. Cal. L. Rev. 50; 2 U.C.L.A. L. Rev. 66; but see 5 So. Cal. L. Rev. 327 [declarant's lack of religious belief no bar to admissibility].)

(2) *Impeachment by Inconsistent Statements.* If the declaration is not immediately followed by death, it is subject to impeachment by subsequent inconsistent statements. (See *People v. Collup* (1946) 27 C.2d 829, 837, 167 P.2d 714; 5 Wigmore (Chadbourn Rev.) §1446; 3 Cal. Evidence (4th), *Presentation at Trial*, §357 et seq.)

(3) *Knowledge Requirement and Opinion Rule.* The statement must have been made upon the "personal knowledge" of the declarant. (Ev.C. 1242.) This seemingly codifies prior cases holding both the knowledge requirement and the opinion rule applicable, and excluding matters that would not be admissible as testimony. (See *People v. Taylor* (1881) 59 C. 640, 644, 645 ["I guess Taylor has poisoned me"]; *People v. Wasson* (1884) 65 C. 538, 539, 4 P. 555 ["I think that this man ... is the man that shot me"]; *People v. Lanagan* (1889) 81 C. 142, 144, 22 P. 482.)

There has been some criticism of confusing the knowledge qualification with the opinion rule. The knowledge requirement is generally accepted. (See 5 Wigmore (Chadbourn Rev.) §1445.) But it has been said that the better view allows some opinions to come in. (See 2 McCormick 5th, §313; 5 Wigmore (Chadbourn Rev.) §1447; 1950 A.S. 821; 1962 A.S. 346; 86 A.L.R.2d 905 [dying declaration involving opinion or conclusion].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(3) *Knowledge Requirement and Opinion Rule.* See 2 McCormick 6th, §313.



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## CHAPTER VI - Hearsay

### III. EXCEPTIONS TO THE RULE K. Statements of Mental or Physical State. 1. In General.

#### *1 Witkin Cal. Evid. Hearsay § 194*

[§ 194] In General.

(1) *Evidence Code*. The large and difficult area of hearsay exceptions for declarations of mental state or physical condition is covered by three sections of the Evidence Code:

(a) *Declarant's then existing state*. Evidence of "a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health)" is admissible when "(1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or (2) The evidence is offered to prove or explain acts or conduct of the declarant." (*Ev.C. 1250*.) (See 57 A.L.R.5th 141; *infra*, §§195, 199 et seq.)

(b) *Declarant's previously existing state*. Evidence of "a statement of the declarant's state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) at a time prior to the statement" is admissible if "(a) The declarant is unavailable as a witness; and (b) The evidence is offered to prove such prior state of mind, emotion, or physical sensation when it is itself an issue in the action and the evidence is not offered to prove any fact other than such state of mind, emotion, or physical sensation." (*Ev.C. 1251*.) (See *infra*, §§196, 202; on statutory exception for statements concerning infliction or threat of physical injury on declarant, see *infra*, §220.)

(c) *Limitation*. Any statement offered under *Ev.C. 1250* or *1251* is inadmissible if it "was made under circumstances such as to indicate its lack of trustworthiness." (*Ev.C. 1252*.) (See *People v. Hamilton* (1961) 55 C.2d 881, 895, 13 C.R. 649, 362 P.2d 473, *infra*, §210; *People v. Cruz* (1968) 264 C.A.2d 350, 358, 70 C.R. 603, *infra*, §213; *People v. Howard* (1988) 44 C.3d 375, 404, 243 C.R. 842, 749 P.2d 279 [quoting Wigmore, and rejecting defendant's contention that statements he made were untrustworthy because they were merely expressions of his rage at the time]; *People v. Karis* (1988) 46 C.3d 612, 635, 250 C.R. 659, 758 P.2d 1189 [defendant's statement during conversation with friend, not under any compulsion to speak, properly admitted as trustworthy]; *People v. Whitt* (1990) 51 C.3d 620, 643, 274 C.R. 252, 798 P.2d 849 [defendant's statements concerning his Christian rebirth, made while appeal of first murder conviction was pending, were excludable as untrustworthy at penalty phase of second trial]; *People v. Edwards* (1991) 54 C.3d 787, 819, 820, 1 C.R.2d 696, 819 P.2d 436 [defendant's statements, made 9 days after offense when he had compelling motive to deceive and to seek to exonerate himself, were properly excluded as untrustworthy].)

(2) *Federal Rules of Evidence*. *F.R. Evid.*, Rules 803(3) and 803(4) except from operation of the hearsay rule the following:

(a) *Statements as to then existing mental, emotional, or physical condition.* "A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will." (*F.R. Evid.*, 803(3); see 4 Mueller & Kirkpatrick, *Federal Evidence* 2d, §437 et seq.; 29A *Am.Jur.2d* (1994 ed.), *Evidence* §866.)

(b) *Statements for purposes of medical diagnosis or treatment.* "Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." (*F.R. Evid.*, Rule 803(4); see 4 Mueller & Kirkpatrick, *Federal Evidence* 2d, §442; 29A *Am.Jur.2d* (1994 ed.), *Evidence* §867; 39 *Santa Clara L. Rev.* 867 [misapplication of Rule 803(4)]; 38 *A.L.R.5th* 433.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(c) *Limitation.* See *People v. Smith* (2003) 30 *C.4th* 581, 629, 134 *C.R.2d* 1, 68 *P.3d* 302 [in penalty phase of capital murder trial, exclusion of defendant's jailhouse statements to wife, which could be interpreted as expressions of remorse, was proper, where trial judge found that primary motivation for statements was to placate wife and there were ample grounds to doubt defendant's sincerity]. *West's Key Number Digest*, Criminal Law k.419(2.20); *Evidence* k.317(3)





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## III. EXCEPTIONS TO THE RULE

## K. Statements of Mental or Physical State.

## 2. Physical Condition.

## a. Declarant's Then Existing Condition.

*1 Witkin Cal. Evid. Hearsay § 195*

[§ 195] Declarant's Then Existing Condition.

When the "physical sensation" (including pain or bodily health) of a person is relevant, the person's declarations of "then existing" physical sensations are admissible. (*Ev.C. 1250.*) This section expresses the generally accepted theory that a spontaneous statement descriptive of present pain or other bodily condition is likely to be true. The declarations may consist of *inarticulate* groans or screams, or voluntary and *articulate* complaints and descriptions of pain. (See *Dow v. Oroville* (1913) 22 C.A. 215, 226, 134 P. 197 [plaintiff, after personal injury, declared to witness that he was still suffering physical pain]; *Bloomberg v. Lavalent* (1919) 179 C. 616, 619, 178 P. 496 [plaintiff, after assault, stated that he had pains in the head and could not sleep]; 2 McCormick 5th, §273; 6 Wigmore (Chadbourn Rev.) §§1714, 1718 et seq.; 1 Jefferson, California Evidence Benchbook 3d, Chap. 14; 10 Cal. L. Rev. 234; 13 Cal. L. Rev. 468; 2 U.C.L.A. L. Rev. 74; 29A Am.Jur.2d (1994 ed.), Evidence §866; 90 A.L.R.2d 1071 [testimony by lay witness as to another's expression of pain]; 37 A.L.R.3d 778 [statements by patient to physician]; BAJI (8th ed.), No. 2.43 [same].)

A declaration of condition not involving pain or suffering comes within the same principle. (See *People v. Wright* (1914) 167 C. 1, 8, 138 P. 349 [abortion case; woman's statement that she was pregnant]; *People v. Northcott* (1920) 45 C.A. 706, 712, 189 P. 704 [same]; *People v. Brown* (1958) 49 C.2d 577, 587, 320 P.2d 5 [same]; 19 Cal. L. Rev. 238 [Wright]; 6 Wigmore (Chadbourn Rev.) §1714; but see *Thrasher v. Board of Med. Examiners of Calif.* (1919) 44 C.A. 26, 29, 185 P. 1006 [rejecting deceased woman's statement of pregnancy on old ground that dying declaration is not admissible in civil case, overlooking exception for declarations of condition].)

In *People v. Pike* (1960) 183 C.A.2d 729, 7 C.R. 188, a prosecution for lewd act with child, the victim's mother was allowed to testify to the content of the child's complaint, which was inadmissible (see *supra*, §169). *Held*, quoting the text, the evidence was nevertheless properly received, because the child told her mother that her rectum hurt, and this declaration of the physical condition of the child's body at a time close to the alleged offense was relevant and competent. (183 C.A.2d 735.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 2 McCormick 6th, §273.



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## K. Statements of Mental or Physical State.

## 2. Physical Condition.

## b. Declarant's Previously Existing Condition.

1 *Witkin Cal. Evid. Hearsay* § 196

[§ 196] Declarant's Previously Existing Condition.

(1) *Former Rule of Exclusion.* California cases decided prior to enactment of the Evidence Code held that statements describing previous pain, suffering, or symptoms were not admissible. (See *Estate of James* (1899) 124 C. 653, 659, 57 P. 578; *People v. Bray* (1919) 42 C.A. 465, 470, 183 P. 712; 13 Cal. L. Rev. 468; 19 Cal. L. Rev. 240.) A qualification was recognized, however, giving indirect effect to statements of this type: A doctor, testifying as an expert, could give an opinion that in part relied on the patient's statements of condition. (See 1 Cal. Evidence (4th), *Opinion Evidence*, §33.) But the statements, although received as reasons for the expert's opinion, were not directly admissible as affirmative evidence. (See *Willoughby v. Zylstra* (1935) 5 C.A.2d 297, 300, 42 P.2d 685; *Groat v. Walkup Drayage & Warehouse Co.* (1936) 14 C.A.2d 350, 357, 58 P.2d 200; *People v. Wilson* (1944) 25 C.2d 341, 348, 153 P.2d 720; *People v. Brown* (1958) 49 C.2d 577, 585, 320 P.2d 5; *People v. Williams* (1960) 187 C.A.2d 355, 365, 9 C.R. 722, citing the text [applying the rule to statements in hospital record].)

(2) *Admission Under Evidence Code.* Modern writers have pointed out that a patient who consults a doctor for treatment is likely to tell the doctor the truth about the condition, because the success of the treatment may often depend upon full disclosure. Hence, statements of past pain or symptoms, though lacking in spontaneity, have a distinct guarantee of trustworthiness. (See 2 McCormick 5th, §277; 2 U.C.L.A. L. Rev. 75.) And the original Uniform Rules of Evidence made admissible, as affirmative evidence, statements of previous pain or symptoms made to a physician.

*Ev.C. 1251* goes further; it admits *all* statements of previously existing physical sensation (including pain or bodily health) on the same basis as statements of previously existing mental state (*infra*, §202). "Both kinds of statements are equally subjective, and there is no reason to believe that one kind is more unreliable than the other." (Law Rev. Com. Comment to *Ev.C. 1251*; see *Gillette v. Work. Comp. App. Bd.* (1971) 20 C.A.3d 312, 321, 97 C.R. 542, citing the text [despite insurance carrier's claim that injured worker's description of incident was unbelievable as self-serving, subjective history was admissible]; 37 A.L.R.3d 778, 791, 820 [statements by patient to physician].)

Admissibility, however, is subject to the condition of unavailability of the witness (*Ev.C. 1251(a)*; see *infra*, §202), and to the rule precluding use of the statement to prove other facts (*Ev.C. 1251(b)*).

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Admission Under Evidence Code.* See CACI, No. 218 [statements by patient regarding previously existing condition]; 2 McCormick 6th, §277.



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## c. Diagnosis or Treatment of Child Abuse.

1 *Witkin Cal. Evid. Hearsay* § 197

[§ 197] Diagnosis or Treatment of Child Abuse.

Subject to the requirement of trustworthiness imposed by *Ev.C. 1252* (see *supra*, §194), a statement is not inadmissible as hearsay if it "was made for purposes of medical diagnosis or treatment and describes medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." (*Ev.C. 1253*.) This exception applies only to a statement made by a victim who is a minor at the time of the proceedings and was under the age of 12 when the statement was made; further, the statement must describe an act, or attempted act, of child abuse or neglect. "Child abuse" and "child neglect" have the meanings provided by *Ev.C. 1360(c)* (see *supra*, §171), and "child abuse" additionally means any act proscribed by P.C. 281 et seq. (see 2 *Cal. Crim. Law* (3d), *Sex Offenses and Crimes Against Decency*, §37 et seq.). (*Ev.C. 1253*.) (See 27 *Pacific L. J.* 768; on general hearsay exception in criminal prosecution for statements by victim of child neglect or abuse, see *supra*, §171; on child dependency hearsay exception, see *supra*, §172.)

In *People v. Brodit* (1998) 61 *C.A.4th* 1312, 72 *C.R.2d* 154, a prosecution for continuous sexual abuse of a child, the trial judge admitted, under *Ev.C. 1253*, the victim's statements to a nurse and a therapist. *Held*, this was proper. *Ev.C. 1253* was modeled after *F.R. Evid., Rule 803(4)* (*supra*, §194). Even though the victim did not go to the nurse for diagnosis or treatment, the federal courts have consistently admitted a child's statements describing the nature and circumstances of sexual abuse made in the course of a sexual abuse examination such as the nurse performed in this case. The federal courts also admit a child victim's statements identifying the abuser, when the abuser, as here, is a member of the victim's family or household. (61 *C.A.4th* 1331.) Finally, as to the statements to the therapist, the federal rule mentions only *medical* diagnosis or treatment but the federal courts have interpreted it to allow admission of a child's statements describing sexual abuse, and the identity of the abuser, which are made to a psychologist for the purpose of obtaining a *psychological* diagnosis. (61 *C.A.4th* 1312.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *In re Daniel W.* (2003) 106 *C.A.4th* 159, 164, 130 *C.R.2d* 412 [in juvenile court proceeding in which minor was accused of sodomy with person under age of 14 and more than 10 years younger than minor, 4-year-old victim's statement, made to five different adults, including doctor, and identifying minor as cause of his rectal injury, was properly admitted under *Ev.C. 1253*; following *People v. Brodit* (1998) 61 *C.A.4th* 1312, 72 *C.R.2d* 154, text, p. 914].



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##### a. General Principles.

##### 1. Nonhearsay and Admissible Hearsay.

#### *1 Witkin Cal. Evid. Hearsay § 198*

[§ 198] Nonhearsay and Admissible Hearsay.

The early California cases explain the admission or exclusion of these declarations in terms of the *res gestae* doctrine. (See *Estate of Gleason* (1913) 164 C. 756, 760, 130 P. 872.) But this term, loosely used, embraces two theories of admissibility not always distinguished:

(1) Statements that do not directly declare a mental or emotional state, but are merely circumstantial evidence of it, are outside the hearsay rule. (See *supra*, §37 et seq.; Law Rev. Com. Comment to *Ev.C. 1250*; 2 McCormick 5th, §274; 6 Wigmore (Chadbourn Rev.) §1715; 19 *Cal. L. Rev.* 245.)

(2) Declarations of mental condition, which directly assert it, are hearsay, and admissible only under this hearsay exception. (See 2 McCormick 5th, §274; 1 Jefferson, California Evidence Benchbook 3d, Chap. 14; 19 *Cal. L. Rev.* 248.)

This distinction is illustrated, although not explicitly stated by the court, in *Adkins v. Brett* (1920) 184 C. 252, 193 P. 251. The action was brought for alienation of affections (now abolished in California). Plaintiff husband was allowed to testify to conversations with his wife, in which she stated that she had gone riding with defendant, dined with him, and received flowers from him, that "he was able to give her a good time" and plaintiff was not, that she intended to continue to accept his attentions and plaintiff could do what he pleased, and that plaintiff was distasteful to her. (184 C. 254.) *Held*, the state of the wife's feelings toward plaintiff and defendant, a material issue, could be shown by these conversations. As to the inadmissible hearsay assertions concerning defendant's acts, the doctrine of limited admissibility (1 *Cal. Evidence* (4th), *Circumstantial Evidence*, §30) normally calls for admission of the statements with a limiting instruction to the jury (3 *Cal. Evidence* (4th), *Presentation at Trial*, §382), although the judge may sometimes, in his or her discretion, wholly exclude the evidence if its prejudicial character outweighs the advantage of its admission. (184 C. 258.)

The foregoing facts disclose (1) a direct declaration of mental state within the hearsay exception (plaintiff was distasteful to her), and (2) statements that were merely circumstantial evidence of that mental state, and nonhearsay (her acts and defendant's acts). (See *People v. Brust* (1957) 47 C.2d 776, 785, 306 P.2d 480, *infra*, §208 [in murder case, victim's statements regarding defendant would have been admissible either under hearsay exception or as circumstantial evidence, but their exclusion was not prejudicial]; *Benwell v. Dean* (1967) 249 C.A.2d 345, 351, 57 C.R. 394, citing the text; *People v. Ireland* (1969) 70 C.2d 522, 528, 75 C.R. 188, 450 P.2d 580, *infra*, §201; *Smith v. Slifer* (1969) 1 C.A.3d

748, 752, 81 C.R. 871; *People v. Donnell* (1975) 52 C.A.3d 762, 772, 125 C.R. 310 [quoting McCormick: Courts "have tended to lump together declarations asserting the declarant's state of mind with those tending to prove the state of mind circumstantially"]; *People v. Frye* (1985) 166 C.A.3d 941, 950, 213 C.R. 319; 2 McCormick 5th, §274; 9 U.C. Davis L. Rev. 199 [state of mind: "The Elusive Exception"]; 25 West L.A. L. Rev. 59 [distinguishing between hearsay and nonhearsay]; 18 Proof of Facts 2d 305 [admissibility of opinion surveys].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Statements not directly declaring mental state:* See 2 McCormick 6th, §274.

(2) *Declarations directly asserting mental state:* See 2 McCormick 6th, §274.



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## aa. Present Mental State in Issue.

1 *Witkin Cal. Evid. Hearsay* § 199

## [§ 199] Present Mental State in Issue.

When the "state of mind" or "emotion" (including "intent, plan, motive, design, mental feeling") of a person is relevant, the person's declarations of "then existing" state of mind are admissible. (*Ev.C. 1250*.) This principle allows proof of statements indicating present belief, knowledge, intention, feeling, or emotion (affection, hatred, fear, etc.). "The rule is without exception, so far as occurs to us at the moment, that whenever the intention, feeling, belief, or other mental state of a person at a particular time, including his bodily feeling, is material to an issue under trial, evidence of such person's declarations at the time indicative of his then mental state are admissible in evidence. It is wholly immaterial whether such declarations were made in the presence of an adverse party to the litigation or not, or what the character of the litigation is. The sole tests are, is the intention, belief, or other mental state of the declarant at the time material to the issues under trial, and, does the declaration indicate what the declarant's intention, belief, or other mental state at the time was." (*Estate of Carson* (1920) 184 C. 437, 445, 194 P. 5; see *Adkins v. Brett* (1920) 184 C. 252, 255, 193 P. 251, *supra*, §198; *People v. Weatherford* (1945) 27 C.2d 401, 422, 164 P.2d 753, *infra*, §217; *Benwell v. Dean* (1967) 249 C.A.2d 345, 351, 57 C.R. 394, citing the text; *People v. Ireland* (1969) 70 C.2d 522, 529, 75 C.R. 188, 450 P.2d 580, *infra*, §201; *People v. Farr* (1967) 255 C.A.2d 679, 688, 63 C.R. 477, *infra*, §213; *People v. Donnell* (1975) 52 C.A.3d 762, 770, 125 C.R. 310 [incriminating evidence against defendant was found by F.B.I. agents who searched third person's house trailer; to show third person's state of mind and thus establish his consent to search, witness agent could properly introduce written consent form from third person and could testify about third person's statements allowing search]; *People v. Von Villas* (1992) 11 C.A.4th 175, 250, 15 C.R.2d 112 [in prosecution arising from contract killing, testimony that defendant had expressed willingness to commit contract killings was admissible as statement of his then existing state of mind]; *People v. Sword* (1994) 29 C.A.4th 614, 635, 34 C.R.2d 810 [proceeding for outpatient status by defendant found not guilty of murder by reason of insanity and committed to state hospital; hospital records containing statements by defendant and conversations with him were admissible under state of mind exception]; *People v. Smithey* (1999) 20 C.4th 936, 971, 86 C.R.2d 243, 978 P.2d 1171 [after defendant testified that he had good relationship with murder victim, evidence that victim suspected defendant of having stolen her husband's welder was admissible under *Ev.C. 1250* to show her state of mind]; 2 McCormick 5th, §274; 6 Wigmore (Chadbourn Rev.) §1714, 1725 et seq.; 19 Cal. L. Rev. 240; BAJI (8th ed.), No. 2.43.)

The reasons for admission, as stated by Wigmore, were quoted by the court in *People v. Brust* (1957) 47 C.2d 776, 785, 306 P.2d 480: "[T]hough the person's testimony on the stand may still be both actually and conveniently

practicable, yet the probability of there receiving from him testimony which shall be in value equal or superior to certain hearsay statements is small; thus, while there is hardly a necessity in the strict sense, there is at least a desirability of resorting also to the hearsay statements."

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Han* (2000) 78 C.A.4th 797, 805, 93 C.R.2d 139 [in prosecution of woman and two teenage boys for conspiracy to commit murder of woman's sister, woman's statements, made prior to formation of conspiracy, expressing desire to arrange her sister's murder were admissible under *Ev.C. 1250* against all three defendants]; 2 McCormick 6th, §274.



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##### bb. Continuing Mental State.

#### *1 Witkin Cal. Evid. Hearsay § 200*

#### [§ 200] Continuing Mental State.

A theory of "continuity" of mental state has been developed by some courts, to permit proof of mental state at a particular time by evidence of prior or subsequent declarations. "When intent is a material element of a disputed fact, declarations of a decedent made after as well as before an alleged act that indicate the intent with which he performed the act are admissible in evidence as an exception to the hearsay rule, and it is immaterial that such declarations are self-serving." (*Whitlow v. Durst* (1942) 20 C.2d 523, 524, 127 P.2d 530, *infra*, §214.) "[T]he stream of consciousness has enough continuity so that we may expect to find the same characteristics for some distance up or down the current." (*People v. One 1948 Chevrolet Convertible Coupe* (1955) 45 C.2d 613, 621, 290 P.2d 538, *infra*, §205.) (See *Watenpaugh v. State Teachers' Retirement System* (1959) 51 C.2d 675, 679, 336 P.2d 165, citing the text; *Wicktor v. Los Angeles* (1960) 177 C.A.2d 390, 405, 2 C.R. 352 [following *Watenpaugh*]; *Estate of Nidever* (1960) 181 C.A.2d 367, 380, 5 C.R. 343, *infra*, §293 [statements of woman in affidavits in pension application respecting belief in legitimacy of marriage]; *People v. Hamilton* (1961) 55 C.2d 881, 895 13 C.R. 649, 362 P.2d 473, *infra*, §210 [describing theory but ruling that murder victim's declarations were inadmissible because they were not trustworthy and referred to defendant's past acts]; *People v. Dalton* (1962) 201 C.A.2d 396, 405, 20 C.R. 51; *Estate of Truckenmiller* (1979) 97 C.A.3d 326, 332, 158 C.R. 699, *infra*, §203; 6 Wigmore (Chadbourn Rev.) §1722; 1960 A.S. 563.)

**SUPPLEMENT:** [This section is current through the latest supplement]





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##### cc. Mental State Not in Issue.

#### 1 *Witkin Cal. Evid. Hearsay* § 201

[§ 201] Mental State Not in Issue.

*Ev.C. 1250(a)(1)* deals with state of mind that is "itself an issue," and *Ev.C. 1250(a)(2)* with state of mind to "prove or explain acts or conduct of the declarant." (See *supra*, §194.) Cases decided before the Evidence Code was enacted sometimes treated the two purposes as the same.

In *People v. Ireland* (1969) 70 C.2d 522, 530, footnote 6, 75 C.R. 188, 450 P.2d 580, the court saw good reason to preserve the distinction. Defendant, embittered by his wife's extramarital affairs, went through quarrels and attempted reconciliations until one evening when he shot and killed her. The details were given by the eyewitness, his 6-year-old daughter, whose statement to the police was admitted by stipulation. Defendant gave testimony about his bad emotional state, and as to drinking a great deal of wine and taking various prescribed medications on the afternoon of the killing. He also related an incident occurring several years before, in which his wife had attacked him with a knife in the course of an argument. In rebuttal, the prosecution called Mrs. B, a longtime family friend, who testified to the substance of a phone conversation with the wife on the morning of the killing, in which the wife said: "I know he's going to kill me. I wish he would hurry up and get it over with. He'll never let me leave." *Held*, admission of this evidence was reversible error.

(a) The wife's state of mind on the day of her death was not itself an issue; hence, the exception of *Ev.C. 1250(a)(1)* was inapplicable. (70 C.2d 529.)

(b) The evidence was offered under *Ev.C. 1250(a)(2)*, to explain acts or conduct of the declarant wife. But, unlike *People v. Brust* (1957) 47 C.2d 776, 306 P.2d 480, *infra*, §208, and *People v. Lew* (1968) 68 C.2d 774, 69 C.R. 102, 441 P.2d 942, defendant did not raise any issue of fact as to his wife's conduct immediately preceding her death; the testimony of the eyewitness child was left unchallenged, and the defense was based entirely on defendant's own mental state. (70 C.2d 530.)

(c) Thus the evidence, not within the state of mind exception, was incompetent hearsay--an opinion of the wife that defendant intended to kill her, from which the jury could infer premeditation. (See *People v. Johnson* (1978) 77 C.A.3d 866, 871, 143 C.R. 852; *People v. Coleman* (1985) 38 C.3d 69, 84, 211 C.R. 102, 695 P.2d 189, *infra*, §211; *People v. Bunyard* (1988) 45 C.3d 1189, 1204, 249 C.R. 71, 756 P.2d 795; *People v. Noguera* (1992) 4 C.4th 599, 621, 15 C.R.2d 400, 842 P.2d 1160 [admission of murder victim's statements expressing fear and hatred of defendant was error because

her state of mind and conduct were not in issue].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Guerra* (2006) 37 C.4th 1067, 1115, 40 C.R.3d 118, 129 P.3d 321 [in prosecution for murder with attempted rape-murder special circumstance, trial judge properly excluded evidence of victim's statements regarding third parties; as there was no evidence of third-party culpability or that victim feared those third parties, her state of mind as to them was not at issue].



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#### 3. Declarant's Previously Existing State.

##### *1 Witkin Cal. Evid. Hearsay § 202*

[§ 202] Declarant's Previously Existing State.

(1) *Admissibility.* A declaration of mental state of the declarant "at a time prior to the statement" is admissible under the same conditions as a declaration of prior physical sensation; i.e., when that prior state of mind "is itself an issue in the action." (*Ev.C. 1251*, supra, §194; see *People v. One 1948 Chevrolet Convertible Coupe* (1955) 45 C.2d 613, 621, 290 P.2d 538, infra, §205; *Estate of Truckenmiller* (1979) 97 C.A.3d 326, 332, 158 C.R. 699, infra, §203; *People v. Bradford* (1997) 15 C.4th 1229, 1324, 65 C.R.2d 145, 939 P.2d 259 [murder victim's statements concerning her previous fear of "a man" were not admissible; condition of admissibility is that statement not be used to prove fact other than state of mind or emotion, but defense was seeking to suggest factual basis for victim's state of mind].)

(2) *Condition: Declarant Unavailable.* *Ev.C. 1251(a)* requires a showing of unavailability of the witness (see supra, §194) as a condition of admissibility of declarations of past mental state. The reason, says the Law Revision Commission, is that there is "a greater opportunity for the declarant to remember inaccurately or even to fabricate." Hence, declarations of this type should be admitted only when the declarant's unavailability necessitates their use. (Law Rev. Com. Comment to *Ev.C. 1251*.) (See *People v. Edwards* (1991) 54 C.3d 787, 819, 820, 1 C.R.2d 696, 819 P.2d 436 [criminal defendant who invoked his privilege not to testify was not unavailable for purposes of *Ev.C. 1251(a)*].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### 4. Statement of Memory or Belief Inadmissible.

##### 1 *Witkin Cal. Evid. Hearsay* § 203

[§ 203] Statement of Memory or Belief Inadmissible.

A statement "of memory or belief" is not admissible to prove "the fact remembered or believed." (*Ev.C. 1250(b)*.) "This limitation is necessary to preserve the hearsay rule. Any statement of a past event is, of course, a statement of the declarant's then existing state of mind--his memory or belief--concerning the past event. If the evidence of that state of mind--the statement of memory--were admissible to show that the fact remembered or believed actually occurred, any statement narrating a past event would be, by a process of circuitous reasoning, admissible to prove that the event occurred." (Law Rev. Com. Comment to *Ev.C. 1250*.) (See *Estate of Jones* (1913) 166 C. 108, 117, 135 P. 288; *Estate of Anderson* (1921) 185 C. 700, 718, 719, 198 P. 407; *People v. Lee* (1990) 219 C.A.3d 829, 840, 268 C.R. 595 [testimony as to contents of ship's log was properly excluded under *Ev.C. 1250(b)*]; *Shepard v. United States* (1933) 290 U.S. 96, 54 S.Ct. 22, 78 L.Ed. 196; 2 McCormick 5th, §276; 6 Wigmore (Chadbourn Rev.) §1714; 1956 A.S. 533; for exception where memory or belief (past mental state) is in issue, see *Ev.C. 1251*, *supra*, §202.)

In *People v. Swain* (1962) 200 C.A.2d 344, 19 C.R. 403, defendant was charged with wilful burning of his motor vehicle and making a false insurance claim. To rebut motive, he sought to have his wife testify that, some hours after the fire, he telephoned her, saying that he did not know whether he had any insurance, and asking her to call the finance company to find out about it. *Held*, rejection was proper. "[T]he purported statement of the defendant was not directed at the future false claim but rather at the past fact of his memory at the time the alleged criminally-set fire occurred. It was not part of the *res gestae*; it was not a statement of future intent; it was a statement relating to the accused's past memory of a past fact in connection with an alleged criminal act already committed." (200 C.A.2d 352.)

In *Estate of Truckenmiller* (1979) 97 C.A.3d 326, 158 C.R. 699, decedent made a gift of property to himself and Mrs. W, a close friend, as joint tenants. After his death, his administrator sued Mrs. W to set aside the transfer on the ground of undue influence. He offered testimony of Mrs. P and Mrs. S on decedent's declarations that he had been "tricked" into the transaction and that Mr. W caught decedent in bed with Mrs. W. *Held*, the evidence could have been admitted for a limited purpose.

(a) The decedent's state of mind at the time of the gift was in issue, and his declarations as to that state of mind would be admissible under the "stream of consciousness" theory (*supra*, §200). (97 C.A.3d 332, 333.)

(b) The question, however, is whether the statements were admissible evidence of decedent's state of mind or inadmissible evidence of past events. "The testator's assertion that a person, named or unnamed, has procured him by

fraud or by pressure to execute a will or to insert a provision, is plainly obnoxious to the hearsay rule, if offered as evidence that the fact asserted did occur." (97 C.A.3d 333, quoting Massachusetts case.) Here, decedent's statements were (1) admissible evidence of his state of mind--a *belief* that he had been tricked--and (2) inadmissible evidence that he *had been caught in bed* with Mrs. W and that Mr. and Mrs. W *had tricked him*. (97 C.A.3d 333, 334.)

(c) Thus, under *Ev.C. 355 (1 Cal. Evidence (4th), Circumstantial Evidence, §30)*, the trial judge should have admitted the proffered evidence for its limited purpose. (97 C.A.3d 334, 335.) But this evidence alone (belief of the decedent) would not have been sufficient to sustain a finding of undue influence where there was no admissible evidence of improper conduct of the donee; hence, exclusion of the evidence was nonprejudicial error. (97 C.A.3d 334.)

In *People v. Deeney* (1983) 145 C.A.3d 647, 193 C.R. 608, defendant was convicted of involuntary manslaughter in the death of his wife, on evidence that she was found dead with bruises on her body. Defendant maintained that his wife, a chronic alcoholic, had died accidentally from a fall. A witness testified that the wife had told her of a previous beating by her husband shortly before her death. *Held*, admission of this testimony was reversible error. The statements were of the declarant's memory of an event, inadmissible under *People v. Hamilton* (1961) 55 C.2d 881, 13 C.R. 649, 362 P.2d 473, *infra*, §210, and *Shepard v. United States, supra*. "If the evidence in issue here were only that June said she had been bruised, it may have qualified as a statement of physical condition. However, the statement like those in *Hamilton* and *Truckenmiller*, principally related to the *cause* of June's condition and therefore fails the first requirement of section 1250." (145 C.A.3d 652.) (On abrogation of limitations imposed by *Hamilton*, see *People v. Ortiz* (1995) 38 C.A.4th 377, 44 C.R.2d 914, *infra*, §210.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 2 McCormick 6th, §276.



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b. Illustrations: Belief, Knowledge, or Emotion.

1. Belief.

*1 Witkin Cal. Evid. Hearsay § 204*

[§ 204] Belief.

In *Estate of Carson* (1920) 184 C. 437, 194 P. 5, the testator left the bulk of her estate to "my husband J. Gamble Carson." Certain heirs contested the will, claiming that the marriage was void because of Carson's preexisting marriage, and that he had deceived her into thinking it was legal and thereby induced the testamentary disposition to him. They offered evidence of statements by the testator in conversations with others to the effect that she was lawfully married. *Held*, exclusion of this evidence was error. Her belief was material on the issue of fraudulent inducement, and declarations, indicating her then belief, were competent evidence. (184 C. 445.)

This hearsay exception has been suggested as a basis for admissibility of *public opinion surveys*; i.e., the recorded answers are evidence of consumer-declarants' belief. (See 66 *Harv. L. Rev.* 503; 1953 A.S. 766; 1958 A.S. 651; 76 A.L.R.2d 630 ["state of mind" exception as basis for admitting public survey or poll]; for a different theory, see *supra*, §37.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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##### 2. Knowledge.

#### 1 *Witkin Cal. Evid. Hearsay* § 205

[§ 205] Knowledge.

In *People v. One 1948 Chevrolet Convertible Coupe* (1955) 45 C.2d 613, 290 P.2d 538, the driver of a car, shortly after his arrest and seizure of the car, made a statement admitting his knowledge of the presence of narcotics in the vehicle. *Held*, this statement was relevant and admissible to show that knowledge at the prior time of the arrest and seizure. (See *supra*, §202.)

In *Hall v. San Jose Abstract & Title Ins. Co.* (1959) 172 C.A.2d 421, 429, 342 P.2d 362, defendant's title policy recited that the property of a husband and wife was in joint tenancy. Defendant, however, mistakenly made the deed to them as tenants in common. In the surviving widow's action for damages, her son testified to decedent husband's declaration that his wife would be protected because the property was in joint tenancy and he was going to keep it that way. *Held*, admissible, to show the husband's knowledge of the policy recital and his reliance on it in making his will.

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Cox* (2003) 30 C.4th 916, 962, 135 C.R.2d 272, 70 P.3d 277 [in capital murder trial in which prosecution witness' credibility was at issue, admission of sheriff sergeant's testimony that witness accurately directed sheriffs to murder scene was proper].



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##### 3. Mental State.

#### b. Illustrations: Belief, Knowledge, or Emotion.

##### 3. Affection or Dislike.

##### aa. Husband and Wife.

#### 1 *Witkin Cal. Evid. Hearsay* § 206

[§ 206] Husband and Wife.

Declarations indicating feelings of affection, dislike, or hatred between spouses were frequently encountered in the now abolished action for alienation of affections. (See *Bourne v. Bourne* (1919) 43 C.A. 516, 519, 520, 185 P. 489; *Adkins v. Brett* (1920) 184 C. 252, 193 P. 251, supra, §198; 19 Cal. L. Rev. 241; 6 Wigmore (Chadbourn Rev.) §1730.)

In an action for wrongful death of a spouse, the monetary benefit of the lost comfort, society, and protection is an element of damages, and evidence concerning the nature of the relationship--affectionate or otherwise--is relevant on that issue. In *Benwell v. Dean* (1967) 249 C.A.2d 345, 57 C.R. 394, a statement of the decedent husband, made shortly before his death, that he was getting ready to leave plaintiff widow and he could not stand her behavior, was held admissible on two theories: (a) Circumstantial evidence of dislike inferred from his intention to leave (nonhearsay); (b) hearsay within the exception--a direct statement of his dislike. (249 C.A.2d 351.) However, the trial judge excluded the evidence, and his ruling was upheld. While admissible for its limited purpose of showing the husband's state of mind, it was highly prejudicial in its suggestion of the fact of the wife's misconduct--an inadmissible recital of past events. The judge therefore properly exercised his discretion under Ev.C. 352 (1 Cal. Evidence (4th), *Circumstantial Evidence*, §17) to determine that its probative value was outweighed by the prejudicial effect. The factors supporting his conclusion were (a) there was only a single declaration to this effect, (b) it was introduced in testimony of a hostile witness, (c) there was no corroborating evidence, and (d) plaintiff was not cross-examined on her testimony of an affectionate relationship. (249 C.A.2d 353.)

**SUPPLEMENT:** [This section is current through the latest supplement]





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## bb. Testator.

1 *Witkin Cal. Evid. Hearsay* § 207

[§ 207] Testator.

A will contestant charging undue influence ordinarily seeks to show that the will would have favored the contestant had it not been for the improper influence exercised. The testator's *affection* or lack of affection for the contestant or beneficiaries is relevant on this issue, and that emotional state can be shown by declarations of the testator. These declarations, of course, are admitted only to show the testator's state of mind; they are inadmissible hearsay if offered to prove acts constituting undue influence. (See *In re Calkins* (1896) 112 C. 296, 300, 44 P. 577; *Estate of Arnold* (1905) 147 C. 583, 593, 82 P. 252; *Estate of Snowball* (1910) 157 C. 301, 308, 107 P. 598; 6 Wigmore (Chadbourn Rev.) §1738; 19 Cal. L. Rev. 242, 380; but see *Estate of Gleason* (1913) 164 C. 756, 761, 130 P. 872 [evidence of statements made by testator shortly after executing will was admissible on issue of mental capacity but not on undue influence issue]; 19 Cal. L. Rev. 244 [Gleason].)

Thus, in *Estate of Trefren* (1948) 86 C.A.2d 139, 144, 194 P.2d 574, the surviving husband contested his wife's will leaving her share of community property to a son by a former marriage. Declarations of the testator, some made 6 months before the will and others during her last illness, to the effect that she thought her husband should have their accumulations and that the son's wife wanted her to leave the property to the son, were held admissible to show the *effect* of any undue influence proved by other evidence, i.e., the declarations related to her *mental attitude* toward various objects of her bounty.

Similarly, in *Estate of Pohlmann* (1949) 89 C.A.2d 563, 573, 201 P.2d 446, declarations of the testator prior to signing a will leaving everything to her son, that she had to do it in order to escape from Nazi persecution, were admitted as throwing light on her attitude toward the legatee, her son.

**SUPPLEMENT:** [This section is current through the latest supplement]



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##### cc. Victim.

#### 1 Witkin Cal. Evid. Hearsay § 208

[§ 208] Victim.

In *People v. Brust* (1957) 47 C.2d 776, 306 P.2d 480, defendant, charged with *first degree* murder of his wife, raised the defense of a long-continued provocatory course of conduct impairing his capacity for deliberation (i.e., no premeditation). He offered declarations of the wife, months before the killing, as follows: (a) She said, "Some day he [defendant] is going to make me so mad that I will kill him," and (b) "she hated Mr. Brust and didn't know whether she was going back to California with him." (47 C.2d 784.) The declarations were held *relevant* as circumstantial evidence of hostility toward defendant, tending to show provocation and passion and therefore either excuse or a lesser crime. (47 C.2d 784; see 1 Cal. Evidence (4th), *Circumstantial Evidence*, §119.) As to the hearsay rule: (a) The first declaration was not offered for its truth ("I will kill him") but as circumstantial evidence of hostile feeling of the declarant, and therefore was outside the hearsay rule (supra, §39). (b) The second declaration was admissible under dual theories. It was both circumstantial evidence of her hostile feeling ("didn't know whether she was going back to California with him") and a direct declaration of emotional state ("she hated Mr. Brust"). (47 C.2d 785.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Geier* (2007) 41 C.4th 555, 585, 61 C.R.3d 580, 161 P.3d 104 [in murder prosecution, evidence of statements by one victim, who was raped and murdered, indicating that she preferred muscular African-American men as sexual partners was properly admitted as relevant to issue of whether she would have consented to sex with defendant, who was Caucasian].



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##### 4. Victim's Fear.

##### aa. Admissibility.

#### 1 Witkin Cal. Evid. Hearsay § 209

[§ 209] Admissibility.

(1) *General Principle.* A victim's fear of the defendant is an emotional state that, if relevant, may be proved by the victim's declarations. (See *People v. Atchley* (1959) 53 C.2d 160, 172, 346 P.2d 764 [relevant to defendant's claim that victim was aggressor in struggle for gun and he acted in self-defense]; *People v. Finch* (1963) 213 C.A.2d 752, 763, 29 C.R. 420 [relevant to defendant's theories of self-defense and accidental killing]; *People v. Garcia* (1986) 178 C.A.3d 814, 822, 224 C.R. 198 [relevant to negate defendant's claims that victim was bad-tempered, violent, and unpredictable and that his behavior caused or contributed to his death]; *People v. Thompson* (1988) 45 C.3d 86, 103, 246 C.R. 245, 753 P.2d 37; Law Rev. Com. Comment to Ev.C. 1240.)

In *People v. Pinn* (1971) 17 C.A.3d 99, 94 C.R. 741, a 12-year-old witness testified that on the day before his aunt, B, was stabbed to death, she "told me he [defendant] was going to kill her, and she wanted to get into the house to get some clothes and find my grandmother's gun." *Held*, the statement was admissible under Ev.C. 1250(a).

(a) *Relevancy.* Defendant introduced evidence about his conduct with B during the afternoon and evening immediately preceding the murder. He contended that she had willingly engaged in "heavy petting" and accompanied him to an isolated place for voluntary sexual intercourse. But the victim's statement indicated her fear of defendant and thus provided a basis for reasonable inference to contradict defendant's position and show she was probably killed for repelling his advances. (17 C.A.3d 105.)

(b) *Reliability of statement.* Nothing in the record indicated that B spoke to her nephew in anything but a natural manner. No motive for B to lie was shown, and, on the basis of past relations between B and defendant, it was reasonable for B to foresee the possibility of violence. B's statement was therefore trustworthy. (17 C.A.3d 106.)

(2) *Distinction: Threats Not Admissible for Truth.* In *People v. Merkouris* (1959) 52 C.2d 672, 344 P.2d 1, the victims' statements of threats by the defendant were admitted to show the "probability that the fear had been aroused by the victims' knowledge of the conduct of defendant indicating his intent to harm them." (52 C.2d 682.) (See *People v. Feasby* (1960) 178 C.A.2d 723, 732, 735, 3 C.R. 230; *People v. Cooley* (1962) 211 C.A.2d 173, 200, 201, 27 C.R. 543.) The Evidence Code repudiates this use of evidence of threats as proof of their truth, i.e., that the defendant made them and carried them out: "The exception [to the principle of Ev.C. 1250(b)] created by *Merkouris* is not based on any probability of reliability; it is based on a rationale that destroys the very foundation of the hearsay rule." (Law Rev.

Com. Comment to *Ev.C. 1250*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *General Principle.* In *People v. Sakarias* (2000) 22 C.4th 596, 94 C.R.2d 17, 995 P.2d 152, a capital murder case, the trial judge allowed an FBI agent to testify that the victim had told him that defendant asked to come to her house and retrieve property, that there was no such property, and that she refused the request because she was frightened of him. *Held*, the evidence was properly admitted under *Ev.C. 1250(a)*. It was relevant to show that, because of her fear, the victim would not voluntarily have given defendant any of her property, and that he must therefore have obtained it by illegal means. Although defendant offered to stipulate that the victim did not make him a gift of her personal property, the prosecution cannot be forced to accept a stipulation if its effect would be to deprive the prosecution case of its persuasiveness. (22 C.4th 629.)

See *People v. Waidla* (2000) 22 C.4th 690, 723, 94 C.R.2d 396, 996 P.2d 46 [in capital murder prosecution, trial judge properly admitted testimony regarding statements made by victim indicating that she feared defendant; statements were relevant to prove her lack of consent in burglary and robbery related to her murder]; *People v. Burgener* (2003) 29 C.4th 833, 868, 129 C.R.2d 747, 62 P.3d 1 [after defense attempted to impeach prosecution witness' testimony at penalty retrial with her inability to recall certain details during her testimony at guilt phase, and witness explained that she was afraid to tell truth at guilt phase, trial judge did not err in allowing prosecution to present evidence of threats defendant had made against witness; threats were not hearsay and were relevant to credibility]; *People v. Crew* (2003) 31 C.4th 822, 829, 840, 3 C.R.3d 733, 74 P.3d 820 [in capital murder trial, prosecution witness' testimony that, shortly before leaving on trip with defendant, victim had said to her, "If you don't hear from me in two weeks, send the police," was properly admitted, where defense had placed victim's state of mind in issue by asserting that she was troubled person who had disappeared of her own accord]; *People v. Guerra* (2006) 37 C.4th 1067, 1113, 40 C.R.3d 118, 129 P.3d 321 [in prosecution for murder with attempted rape-murder special circumstance, evidence that victim feared defendant was relevant to issue of lack of consent to sexual intercourse]; *People v. Escobar* (2000) 82 C.A.4th 1085, 1103, 98 C.R.2d 696 [where defendant claimed that murder victim acted aggressively toward him and he killed her in heat of passion, testimony regarding victim's statements about desire to leave defendant and his threats to kill her if she did was properly admitted to impeach defendant's claims about her state of mind]; *People v. Romero* (2007) 149 C.A.4th 29, 37, 56 C.R.3d 678 [in light of defendant's reliance on self-defense in murder prosecution, his victim's statements about threats defendant had made against him were admissible]; cf. *People v. Jablonski* (2006) 37 C.4th 774, 818, 38 C.R.3d 98, 126 P.3d 938 [trial judge erred in admitting, under *Ev.C. 1250(a)*, out-of-court statements by two victims regarding their fear of defendant, as victims' state of mind was not relevant to any disputed issue; however, to extent statement by one victim was admitted to show its effect on defendant, statement was not hearsay and was relevant to his mental state in going to visit victim].

(2) *Distinction: Threats Not Admissible for Truth.* See *People v. Hernandez* (2003) 30 C.4th 835, 872, 134 C.R.2d 602, 69 P.3d 446 [in penalty phase of capital murder trial, it was error to permit victim's sister to testify that victim had stated that he feared defendant would kill him; victim's state of mind was not at issue, and victim's fear was only relevant to whether defendant was victim's killer].



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##### bb. Former Limitations Abolished.

#### 1 *Witkin Cal. Evid. Hearsay* § 210

[§ 210] Former Limitations Abolished.

(1) *The Hamilton Case*. A major difficulty with the declarations to show the victim's fear (*supra*, §209) is that, while they are admissible only to show the state of mind of the declarant victim, they nearly always contain damaging *recitals of fact* about the defendant. And for the jury to separate mental state from the truth of the charges is a psychological impossibility. Hence, the trial judge must determine (under *Ev.C. 352, 1 Cal. Evidence (4th), Circumstantial Evidence, §17*) whether the probative value of the evidence is substantially outweighed by the probability that its admission will be unduly prejudicial to the defendant.

*People v. Hamilton* (1961) 55 C.2d 881, 13 C.R. 649, 362 P.2d 473, a murder case, laid down two additional limitations on the admission of declarations of this type: (a) There must be at least circumstantial evidence that the declarations are probably trustworthy and credible; and (b) the declarations should be excluded if they refer to past acts of the defendant. (55 C.2d 895.) The statements at issue in *Hamilton* (to the effect that defendant had repeatedly threatened the victim with death, beaten her, and forced his attentions on her) lacked indicia of reliability, because the victim made them to authorities while trying to excuse herself for carrying a gun. (55 C.2d 895.) The statements also allowed the prosecutor to tell the jury, through the mouths of the law enforcement witnesses, that defendant had frequently beaten the victim. (55 C.2d 896.) To have admitted the statements under these circumstances was reversible error. (55 C.2d 900.) (See *People v. Dalton* (1962) 201 C.A.2d 396, 404, 20 C.R. 51 [*Hamilton* limitations applied to reverse situation; trial judge properly refused to allow defendant to try to show that victim, after deadly assault, was friendly to him in hospital and said that defendant had not previously beaten him]; *People v. Lew* (1968) 68 C.2d 774, 780, 69 C.R. 102, 441 P.2d 942 [declarations as to defendant's threats to kill victim were inadmissible because they referred to defendant's past conduct and there was no circumstantial evidence of trustworthiness]; *People v. Finch* (1963) 213 C.A.2d 752, 29 C.R. 420 [*Hamilton* limitations were satisfied: testimony as to defendant's threats and beatings of victim was by persons close to her, not law enforcement officials; recitals of past brutality would not have been inflammatory, because defendant himself testified to his own brutality; and jury was carefully apprised of limited purpose of evidence].)

(2) *Effect of Evidence Code and Proposition 8*. The *Hamilton* limitations are no longer the law. In *People v. Ortiz* (1995) 38 C.A.4th 377, 44 C.R.2d 914, a murder case in which defendant was convicted of stabbing his aunt to death, defendant claimed that he was involved sexually with her and that she died when a quarrel turned into a physical fight

and he had to defend himself. The trial judge admitted testimony concerning the following statements by the victim: (a) invitations by the victim to three other females to visit her on the day of the killing; (b) the victim's statement that she was "fed up" with having defendant live in her house because he was "always bothering her"; and (c) specific complaints by the victim concerning defendant's sexual behavior toward her. *Held*, affirmed; the statements were properly admitted.

(a) *Hamilton* was rendered invalid by two subsequent events: the enactment of the Evidence Code and the electorate's approval of the Truth-in-Evidence provision of Proposition 8 (Cal. Const., Art. I, §1(d); see 1 *Cal. Evidence* (4th), *Introduction*, §§8, 9). The Law Revision Commission Comments on the new Evidence Code make clear that *Hamilton* is repudiated, and the Truth-in-Evidence provision abolished judicially created rules of exclusion, which the *Hamilton* limitations were. (38 C.A.4th 387, 388.) "Thus, under current authority, the court must be guided by the Evidence Code sections governing hearsay, section 352, and article I, section 28, subdivision (d) of the Constitution, when addressing the admissibility of statements attributed to a deceased victim. Further, to be admissible, the evidence must not violate constitutional provisions ensuring a fair trial." (38 C.A.4th 388, 389.)

(b) The invitations issued by the victim on the day of her murder were not hearsay at all. They were admissible circumstantial evidence tending to show that she had not asked defendant to come to her house on that day for a romantic liaison. (38 C.A.4th 390, 391.)

(c) The statements that the victim was "fed up" with defendant living in her house were classic state of mind hearsay, admissible as direct evidence of her attitude toward him. The portion of the statements indicating that defendant was always bothering her was a reference to past conduct, but it was vague and contained little prejudicial information. (38 C.A.4th 391.)

(d) The victim's statements regarding defendant's prior sexual behavior toward her would have been inadmissible hearsay if offered to prove that behavior. But they were relevant circumstantial evidence of the victim's unwillingness to have consensual sex with defendant, particularly when considered with the witnesses' descriptions of her demeanor as she related these statements. As the statements related to defendant's past conduct, *Hamilton* would have proscribed their admission; however, "*Hamilton* is no longer dispositive on the admissibility of such evidence." The concerns addressed by *Hamilton* are now taken into account when the trial judge weighs potential prejudice against probative value under *Ev.C.* 352. (38 C.A.4th 391, 392.)

(e) There is nothing in federal case law that would reimpose the *Hamilton* limitations as a means of protecting the constitutional right to confrontation. Indeed, under *F.R. Evid.*, *Rule* 803(3), evidence of state of mind is admissible unless it is a statement of memory or belief offered to prove the fact or event remembered. There is no separate requirement that the statement not refer to defendant's past conduct. (38 C.A.4th 393.)

(f) Although in his initial ruling the trial judge found the victim's statements admissible as hearsay under *Ev.C.* 1250(a)(1), (a)(2), rather than as statements not offered for truth, when he admitted them during the trial he correctly and repeatedly admonished the jury that the statements were admitted only to show her state of mind. The prosecutor did, at one point in her closing argument, suggest that the truth of one statement's content had been established. "However, the prosecutor's comment was brief, especially in the context of a lengthy argument, and is clearly distinguishable from the repeated transgressions described in *Hamilton*." (38 C.A.4th 396.) (On *Ev.C.* 1370, which creates a separate hearsay exception for statements concerning the infliction or threat of physical injury on a now unavailable declarant, see *infra*, §220.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### cc. Adequacy of Limiting Instructions.

#### *1 Witkin Cal. Evid. Hearsay § 211*

#### [§ 211] Adequacy of Limiting Instructions.

(1) *Coleman Case*. In *People v. Coleman* (1985) 38 C.3d 69, 211 C.R. 102, 695 P.2d 189, defendant was convicted of murdering of his wife, son, and niece. The sentence was life imprisonment without possibility of parole, and the jury found him sane. The major issue on appeal involved the admission in evidence of three hearsay letters written by the wife a substantial period of time before her death, which referred to alleged prior threats against her by defendant and her fear of future violence. The trial judge admitted them for the limited purposes of impeaching defendant's credibility and to explain and challenge the basis for the opinions of the psychiatric experts. *Held*, admission of this evidence was reversible error; the judge's instructions could not adequately insure that the letters would not be considered as proof of the truth of the hearsay accusations.

(a) "The potential for unfair prejudice from the admission of prior statements of a victim declarant regarding either past or future conduct by an accused has been recognized repeatedly by this court and the United States Supreme Court. The limitations imposed on the admissibility of such evidence have been sufficiently stringent as to virtually preclude the evidence unless the victim's state of mind has been placed in issue or the statements are relevant to prove or explain the actions of the victim (e.g., where the defendant claims provocation or self-defense). ... The rationale is that the 'true evidentiary bearing of the evidence is at best slight and remote' and is outweighed by its prejudicial effect." (38 C.3d 83, citing *People v. Hamilton* (1961) 55 C.2d 881, 13 C.R. 649, 362 P.2d 473, *supra*, §210.)

(b) *Hamilton* also recognized the danger that the jury will be unable to separate the state of mind of the declarant from the truth of the facts contained in the declarations. (38 C.3d 84; on the undercutting of this rationale by subsequent enactments, see *People v. Ortiz* (1995) 38 C.A.4th 377, 44 C.R.2d 914, *supra*, §210.)

(c) In the present case, the judge correctly ruled that the wife's state of mind was not in issue, and that the letters did not tend to prove the state of mind of the defendant at the time of the alleged crime; hence, they were not admissible under any exception to the hearsay rule. However, the prosecutor was allowed to use them for two limited purposes: (1) The expert witnesses had considered the letters in reaching their opinions and were subject to cross-examination on the materials. (2) The prosecutor could cross-examine defendant to cast doubt on the truth of defendant's testimony pertaining to the "To Whom It May Concern" letter, in which the wife described her feelings of hopelessness and despair. Defendant testified that he had not thought of killing his family before the killings occurred; the prosecutor, outside the presence of the jury, proved that defendant had found the "To Whom" letter a month before. (38 C.3d 85.)

(d) Although in *Hamilton* the evidence was admitted under the state of mind exception, the judge's attempt to limit the jury's consideration of the letters was equally futile in this case. The true danger is that the jury cannot separate the state of mind of the declarant from the truth of the facts contained in the declarations, and that danger is also present when the hearsay is offered for the ostensibly limited purpose of undermining the veracity of an expert or other witnesses. (38 C.3d 85, 86.) Thus, in the cross-examination of defendant, by a series of largely unsuccessful attempts to fashion proper questions, the prosecutor was able to bring the most prejudicial portions of the hearsay letters before the jury. (38 C.3d 86, 87.)

(e) An expert may rely on inadmissible hearsay in forming a psychiatric opinion. (38 C.3d 90, discussing *Board of Education of Pasadena Unified School Dist. v. Haas* (1978) 82 C.A.3d 278, 147 C.R. 88, and *Board of Trustees v. Porini* (1968) 263 C.A.2d 784, 70 C.R. 73, 1 Cal. Evidence (4th), *Opinion Evidence*, §31.) But neither in *Haas* nor *Porini* was the hearsay itself presented to the trier of fact to explain the expert's opinion. And in *People v. Chapman* (1975) 50 C.A.3d 872, 123 C.R. 862, the hearsay statement relied on by a defense psychiatric expert was itself excluded from evidence. In other words, the expert may state on direct examination the matters relied on, but the expert may not testify to their details if they are otherwise inadmissible. (38 C.3d 92.)

(f) Ordinarily, a limiting instruction cures the hearsay problem, but in aggravated situations it will not; the judge must then exercise his or her discretion under *Ev.C.* 352 to exclude portions of the inadmissible hearsay not related to the expert opinion. (38 C.3d 92.) In some cases, the risk of improper use is so great that it may be necessary to exclude the evidence altogether. (38 C.3d 93, citing *People v. Modesto* (1963) 59 C.2d 722, 31 C.R. 225, 382 P.2d 33, and *People v. Reyes* (1974) 12 C.3d 486, 116 C.R. 217, 526 P.2d 225.) In the present case, the judge abused his discretion in permitting extensive questioning of the expert witnesses on the contents of the letters: (1) Accusatory statements "from the grave" have a great potential to unfairly prejudice the defendant. (2) The letters were only a small portion of the material on which the psychiatrists based their opinions and were not cited by them as items of major significance. (3) The portions that were legitimately offered could have been selected and presented in a fashion that would have lessened their emotional impact and avoided the improper inference that the accusations were true. (38 C.3d 93.) (See *People v. Thompson* (1988) 45 C.3d 86, 246 C.R. 245, 753 P.2d 37 [victim, only hours before her death, made statement indicating her personal fear of defendant; statement was directly relevant to her subsequent conduct and recounted no past conduct of defendant: "*Coleman's* conclusion as to the inadequacy of limiting instructions just does not apply in this context"].)

(2) *Statutory Enactment.* Situations such as those described in *Coleman*, *Hamilton*, and *Thompson* will sometimes come within *Ev.C.* 1370, enacted in 1996. That section creates a separate hearsay exception for statements concerning the infliction or threat of physical injury on an unavailable declarant. (See *infra*, §220.)

**SUPPLEMENT:** [This section is current through the latest supplement]





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## c. Illustrations: Intent.

## 1. Declarations of Grantor or Donor.

*1 Witkin Cal. Evid. Hearsay § 212*

[§ 212] Declarations of Grantor or Donor.

(1) *Intent To Pass Title*. The deed of a grantor or the gift of a donor is frequently challenged on the ground that there was no intent to part with title. *Intent is then directly in issue* under the substantive law and pleadings. It may be shown by direct or circumstantial evidence (1 *Cal. Evidence (4th)*, *Circumstantial Evidence*, §118; 1 *Cal. Evidence (4th)*, *Opinion Evidence*, §8), and a common and useful method of circumstantial proof is by declarations of the alleged grantor or donor. The declarations, if directly accompanying the act of handing over an instrument or chattel and providing an explanation of the conduct, are admissible as *verbal acts*. (See *supra*, §183 et seq.)

Where the declarations are not contemporaneous with the acts of handing over an instrument or other property, the verbal act doctrine does not apply. Moreover, in a strict sense, the declarations do not come within the exception for declarations of present mental state: i.e., they are made either before or after the time at which intent is relevant. But the rule is well established that the state of mind before or after execution or delivery is circumstantial evidence of the intent at the time of execution or delivery. Older cases often speak vaguely of "res gestae"; writers and modern courts use such phrases as "continuity of state of mind" and "stream of consciousness" to explain the rule. (See generally 2 *McCormick* 5th, §274; 6 *Wigmore* (Chadbourn Rev.) §1734 et seq.; 19 *Cal. L. Rev.* 242, 249, 367; 26 *Cal. L. Rev.* 631; 34 *A.L.R.2d* 588; 51 *A.L.R.2d* 820.)

California cases have held admissible both prior and subsequent declarations. (On *prior declarations*, see *Kyle v. Craig* (1899) 125 C. 107, 113, 57 P. 791; *Casey v. Casey* (1950) 97 C.A.2d 875, 879, 218 P.2d 842 [declarations a year or more prior to making deed]; *Fahrney v. Wilson* (1960) 180 C.A.2d 694, 697, 4 C.R. 670, citing the text; on *subsequent declarations*, see *Williams v. Kidd* (1915) 170 C. 631, 648, 151 P. 1; *Schooler v. Williamson* (1923) 192 C. 472, 478, 221 P. 195; *Dinneen v. Younger* (1943) 57 C.A.2d 200, 205, 134 P.2d 323; *Katz v. Enos* (1945) 68 C.A.2d 266, 275, 156 P.2d 461 [declarations 2 years after signing deed]; *Hansen v. Bear Film Co.* (1946) 28 C.2d 154, 174, 168 P.2d 946; *Pailhe v. Pailhe* (1952) 113 C.A.2d 53, 63, 247 P.2d 838; *Mecchi v. Picchi* (1966) 245 C.A.2d 470, 478, 54 C.R. 1, *supra*, §184; *Alocco v. Fouche* (1961) 190 C.A.2d 244, 252, 11 C.R. 818 [declarations of grantor before and after time of execution of deed to show mental capacity and susceptibility to influence].)

(2) *Self-Serving Declarations on Deed as Mortgage*. In *Wilcox v. Salomone* (1953) 118 C.A.2d 704, 711, 258 P.2d 845, the action was brought to have a deed declared a mortgage. The trial judge admitted oral and written declarations of plaintiff's deceased wife on the nature of the transaction, all supporting the contention that a loan and mortgage were intended by defendants. Thus, they were all self-serving, but were held admissible as declarations of intent. (See

*Schnepfe v. Schnepfe* (1953) 120 C.A.2d 463, 466, 261 P.2d 321 [similar declarations of decedent grantor admitted, following *Wilcox*.]

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Intent To Pass Title*. See 2 McCormick 6th, §274.



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## 2. Self-Serving Declarations of Defendant.

1 *Witkin Cal. Evid. Hearsay* § 213

[§ 213] Self-Serving Declarations of Defendant.

The general feeling that self-serving statements are subject to suspicion and should not be admitted (see *supra*, §10) has led some courts to exclude proof of a criminal defendant's own prior exculpatory declaration, e.g., that the defendant did not intend to attack the victim, or that the defendant's feeling toward the victim was friendly. (See *People v. Smith* (1940) 15 C.2d 640, 648, 104 P.2d 510 [murder of wife; defendant's affectionate letters to her written several days prior to homicide excluded as self-serving and remote].) This attitude is denounced by Wigmore, and there is some authority for admission of this type of evidence. (See *People v. Farr* (1967) 255 C.A.2d 679, 63 C.R. 477; 2 McCormick 5th, §270; 6 Wigmore (Chadbourn Rev.) §1732, p. 160; 19 Cal. L. Rev. 255; 1954 A.S. 775; see *supra*, §204 et seq., for other self-serving declarations admitted under state of mind exception.)

In *People v. Farr*, *supra*, defendant was charged with murder of his wife. He had previously written a long memorandum covering his relationship with her. The mood was love and compassion, and was relevant to prove his state of mind--inconsistent with an intention to kill her. The court held that, on the retrial after reversal for other reasons, the memorandum would be admissible unless there was evidence to indicate lack of trustworthiness. "Such cases as *People v. Smith*, ... which flatly reject such evidence as 'self-serving' must be deemed no longer valid. Their inflexibility has been replaced by the more elastic standards of section 1252." (255 C.A.2d 688.)

In *People v. Cruz* (1968) 264 C.A.2d 350, 70 C.R. 603, defendant killed a woman in his apartment with two shots from a rifle. He immediately told his landlady that he had shot her but did not know why, and an hour later gave police an exculpatory statement. In affirming his conviction of second degree murder, the court analyzed the admissibility of the tape-recorded statement as follows: (a) It was not admissible under the state of mind exception (*supra*, §199) because, applying the trustworthiness limitation of *Ev.C. 1252* (*supra*, §194), there was an obvious motive for misstatement. (264 C.A.2d 358.) (b) There is no special hearsay exception for exculpatory statements showing lack of consciousness of guilt (Wigmore's proposed "consciousness of innocence"). (264 C.A.2d 361.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
 See 2 McCormick 6th, §270.



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##### 3. Other Declarations.

#### *1 Witkin Cal. Evid. Hearsay § 214*

[§ 214] Other Declarations.

(1) *Declarations of Possessor of Land.* On the issue of adverse possession, the possessor's declarations of intent in occupying the land, i.e., whether the possessor claims as owner or otherwise, are admissible. (*Stockton Savings Bank v. Staples* (1893) 98 C. 189, 192, 32 P. 936; see 19 Cal. L. Rev. 254.)

(2) *Declarations as to Residence or Domicile.* Because domicile is based on intent to make a permanent home, a person's declarations of intent, like testimony on this matter (1 Cal. Evidence (4th), Opinion Evidence, §8), are admitted. (See *Estate of Brady* (1918) 177 C. 537, 539, 171 P. 303; *Kopasz v. Kopasz* (1951) 107 C.A.2d 308, 310, 237 P.2d 284; *Guardianship of Mosier* (1966) 246 C.A.2d 164, 172, 54 C.R. 447 [statements of elderly person under conservatorship, originally from Texas, that he regarded Los Angeles as his residence, coupled with act of leaving Texas and coming to California to stay]; 6 Wigmore (Chadbourn Rev.) §1727, 1784; 61 Harv. L. Rev. 1237.)

(3) *Declarations of Spouse on Reconciliation.* In *Whitlow v. Durst* (1942) 20 C.2d 523, 524, 127 P.2d 530, the issue was whether a property settlement agreement had been revoked by a reconciliation between the wife and husband before his death. *Held*, declarations of the husband, shortly after the time of the alleged reconciliation, to the effect that they would never be reconciled, were admissible. They tended to show his intent, and therefore the probability that no reconciliation did occur. The court, following the deed cases (*supra*, §207), approved the admissibility of both prior and subsequent declarations.

(4) *Decedent's Intention To Work After Retirement.* In *Foss v. Anthony Industries* (1983) 139 C.A.3d 794, 189 C.R. 31, a wrongful death action, plaintiff sought to introduce a statement of the decedent to a witness that decedent intended to take a job after he retired from the Navy. *Held*, exclusion of the evidence was prejudicial error. An expert testified that the decedent's children would have received \$ 200,000 in support if he did not take a new job, but \$ 100,000 more if he did. The jury awarded only \$ 200,000; i.e., they fixed damages on the assumption that he would not have continued working after retirement. (139 C.A.3d 801.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## 1. General Rule of Admissibility.

*1 Witkin Cal. Evid. Hearsay § 215*

[§ 215] General Rule of Admissibility.

In *Mutual Life Ins. Co. v. Hillmon* (1892) 145 U.S. 285, 12 S.Ct. 909, 36 L.Ed. 706, an action on H's life insurance policy, defendant insurer set up the defense of conspiracy by H and B to make a false claim of death. To corroborate its evidence that the body found in Colorado was that of W, the company introduced letters of W to others stating that he was going to Colorado with H. These declarations were held admissible as evidence that the declarant, W, went there, and also that he went there with H. This case has been the subject of much discussion, and its broad implication that the declaration is admissible not only to prove the declarant's future act, but the future act of another person who was with the declarant, has been criticized. (See 19 Cal. L. Rev. 367, 371; 35 Harv. L. Rev. 444; 38 Harv. L. Rev. 709.)

The issue involved in this type of case is whether *an act occurred*. Intent is not directly in issue, but the statement of *present intention, plan, or design* is offered as circumstantial evidence that the intention, plan, or design was carried out, i.e., that the planned or intended act was done. The admissibility of such declarations, with some qualifications, is now well established. (See *People v. Alcalde* (1944) 24 C.2d 177, 185, 148 P.2d 627, *infra* §218; *People v. Watson* (1961) 198 C.A.2d 707, 721, 18 C.R. 234; 19 Cal. L. Rev. 372; 2 McCormick 5th, §275; 6 Wigmore (Chadbourn Rev.) §1725; 1962 A.S. 342.)

The *Hillmon* doctrine was fully explored in *People v. Alcalde*, *supra*, where the court rejected the explanation in terms of *res gestae* (24 C.2d 187), and stated the rule as follows: "From the declared intent to do a particular thing an inference that the thing was done may fairly be drawn. Such declarations have been deemed admissible where they possessed a high degree of trustworthiness. Where they are relevant to an issue in the case and the declarant is dead or otherwise unavailable the necessity for their admission has been recognized." (24 C.2d 186.) "No attempt need be made here to define or summarize all the limitations or restrictions upon the admissibility of declarations of intent to do an act in the future or to indicate what degree of unavailability or corroboration should exist in every case. Elements essential to admissibility are that the declaration must tend to prove the declarant's intention at the time it was made; it must have been made under circumstances which naturally give verity to the utterance; it must be relevant to an issue in the case." (24 C.2d 187.)

Ev.C. 1250(a)(2) codifies the rule, allowing proof of declarations of state of mind (including intent) "to prove or explain acts or conduct of the declarant." (See *Smith v. Slifer* (1969) 1 C.A.3d 748, 752, 753, 81 C.R. 871, quoting the text; *People v. Earnest* (1975) 53 C.A.3d 734, 743, 126 C.R. 107 [statements of R, a boy allegedly hired by defendant to burn down defendant's house for insurance proceeds, that R intended to burn the house and how he intended to do it];

*People v. Williams* (1997) 16 C.4th 153, 205, 66 C.R.2d 123, 940 P.2d 710 [citing *Alcalde*, defendant's statement to cellmate about suppressing testimony was not inadmissible even though it disclosed future intent to do so rather than completed act]; *People v. Majors* (1998) 18 C.4th 385, 404, 405, 75 C.R.2d 684, 956 P.2d 1137 [murder victim's statements to third parties that he intended to conduct drug deal on night he was killed were properly admitted; even though statements did not mention defendant, there was ample evidence linking defendant to planned deal].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Griffin* (2004) 33 C.4th 536, 579, 15 C.R.3d 743, 93 P.3d 344 [in penalty phase of capital murder prosecution, trial judge did not err in failing to exclude testimony of friend of victim to effect that, on day of murder, victim told her defendant had been fondling her and that if fondling continued, she would confront him and tell her mother; victim's statement was admissible under state of mind exception to prove future conduct in accordance with her expressed intent]; 2 McCormick 6th, §275.



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##### 2. Intention To Commit Suicide.

##### 1 *Witkin Cal. Evid. Hearsay* § 216

#### [§ 216] Intention To Commit Suicide.

In an action on a life insurance policy, where the fact of death is challenged, the insured's declaration of intention to commit suicide is admissible to prove death. (*Rogers v. Manhattan Life Ins. Co.* (1903) 138 C. 285, 289, 291, 71 P. 348; *Benjamin v. District Grand Lodge* (1915) 171 C. 260, 267, 152 P. 731; see 4 Cal. L. Rev. 145; 19 Cal. L. Rev. 375.)

A suicide declaration of the alleged victim in a homicide case is also admissible on behalf of the defendant to support his denial of unlawful killing, because it suggests the probability of the alleged victim's self-destruction. (See *People v. Tugwell* (1915) 28 C.A. 348, 359, 152 P. 740; *People v. Taylor* (1980) 112 C.A.3d 348, 362, 364, 169 C.R. 290, citing the text; 6 Wigmore (Chadbourn Rev.) §1726, p. 139; but see 1954 A.S. 777 [discretion to exclude where too remote].) Once a declaration expressing suicidal intentions has been admitted, the prosecution may offer declarations of a state of mind inconsistent with those intentions. (*People v. Selby* (1926) 198 C. 426, 430, 245 P. 426.) (See 19 Cal. L. Rev. 377.)

The alleged victim's prior unsuccessful *attempt to commit suicide* is also admissible as evidence of suicidal intent, and therefore of probable suicide. In *People v. Salcido* (1966) 246 C.A.2d 450, 54 C.R. 820, defendant, riding in the back seat of a car with the victim, his paramour, quarreled with her and threatened her with his gun. Later, a shot was fired, and the witness in the front seat saw the victim wounded and defendant wiping his gun. Defendant's conviction of first degree murder was, however, reversed, for exclusion of the following evidence: (a) The victim's declaration to defendant and the ambulance driver, made on the way to the hospital, that she had shot herself (see *supra*, §149); (b) prior attempts by the victim to commit suicide, as evidence of a predisposition and indicating a probability of suicide. As to the latter evidence, the theory of exclusion was remoteness, i.e., that on the day of the killing she was happy and looking forward to an impending marriage with defendant, hence, that the "stream of consciousness" had been broken. The court's answer was that the evidence showed the victim's inclination or propensity to take her own life under emotional stress, and that this was "highly significant," even though the acts took place many months prior to her death. (246 C.A.2d 460.)

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## 3. Intention To Go to or Leave Place.

1 *Witkin Cal. Evid. Hearsay* § 217

[§ 217] Intention To Go to or Leave Place.

In *People v. Chenault* (1946) 74 C.A.2d 487, 495, 169 P.2d 29, defendant, charged with a robbery in Fresno, claimed an alibi. He called a witness to testify to his self-serving declarations made to her in Fresno shortly before the time of the alleged offense, to the effect that he was coming from Los Angeles and on his way to San Francisco. *Held*, exclusion of the testimony was error. (See *People v. Fong Sing* (1918) 38 C.A. 253, 258, 175 P. 911 [declaration of defendant that he intended to go to certain place admissible to show that he did not go to scene of crime]; 19 Cal. L. Rev. 379.)

In *People v. Horace* (1954) 127 C.A.2d 366, 368, 273 P.2d 923, the issue was whether due diligence had been exercised in trying to locate the complaining witness. The witness had told a California officer that he intended to leave California and had given him a Minneapolis phone number of the place he intended to visit. The officer called the number and asked for the witness, a man identified himself by that name, and a conversation was had. *Held*, this was sufficient proof that he was the missing witness.

The principle was given an expanded application in *People v. Weatherford* (1945) 27 C.2d 401, 164 P.2d 753. Defendant was charged with murdering a woman tenant of his cafe. The prosecution's theory was that he wanted to get her out of the premises. Defendant, in support of his claim that the victim had promised to leave voluntarily, produced a witness to testify that the victim had said that she was going to leave town on a trip. The trial court excluded the evidence, reasoning that, because her body was found on the premises, she had not in fact gone away. *Held*, the exclusion was reversible error. The declarations of intent to leave were relevant in support of defendant's denial of the prosecution's theory of motive, i.e., they tended to disprove the claim that he killed her to get rid of her. Thus, the case holds that declarations of intention to do an act are admissible not only to prove that the act was done but *for any other purpose* for which any declarations of intent or state of mind might be *relevant*. "The declarations of the intent are admissible not only as evidence of the probable doing of the act, but also as evidence of the intent itself even if the act has not been done." (27 C.2d 422.) "This case is the converse of the *Alcalde* case. There the evidence of intent led to an inference of identity of the defendant as the murderer; here the evidence of intent leads to the inference that defendant lacked any motive and may not have been the murderer." (27 C.2d 423, referring to *People v. Alcalde* (1944) 24 C.2d 177, 148 P.2d 627; see *infra*, §218.) (See 19 So. Cal. L. Rev. 449.)

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##### 4. Intention To Go With Person.

#### *1 Witkin Cal. Evid. Hearsay § 218*

[§ 218] Intention To Go With Person.

In *People v. Alcalde* (1944) 24 C.2d 177, 148 P.2d 627, defendant Frank Alcalde was charged with murder of a woman. The evidence of identity of the killer was circumstantial. Over defendant's objection, the prosecution offered the declaration of the victim, made on the date of the crime, that she was going out with Frank that evening. *Held*, this was admissible for the limited purpose of showing the *victim's intention*, from which an inference could be drawn that she was with defendant. "Unquestionably the deceased's statement of her intent and the logical inference to be drawn therefrom, namely, that she was with the defendant that night, were relevant to the issue of the guilt of the defendant." (24 C.2d 188.)

This decision raises the disturbing problem of *Mutual Life Ins. Co. v. Hillmon* (1892) 145 U.S. 285, 12 S.Ct. 909, 36 L.Ed. 706, *supra*, §215--whether one person's declaration of intention to do an act with another person should be admitted when it is inadmissible hearsay as to the other. The dissenting opinion in the *Alcalde* case points up the danger: "The declaration of the deceased in this case that she was going out with Frank is also a declaration that *he was going out with her*, and it could not be admitted for the limited purpose of showing that she went out with him at the time in question without necessarily showing that he went with her. ... Such a declaration could not be admitted without the risk that the jury would conclude that it tended to prove the acts of the defendant as well as of the declarant, and it is clear that the prosecution used the declaration to that end. There is no dispute as to the identity of the deceased or as to where she was at the time of her death. Since the evidence is overwhelming as to who the deceased was and where she was when she met her death, no legitimate purpose could be served by admitting her declarations of what she intended to do on the evening of November 22d. The only purpose that could be served by admitting such declarations would be to induce the belief that the defendant went out with the deceased, took her to the scene of the crime and there murdered her. Her declarations cannot be admitted for that purpose without setting aside the rule against hearsay." (24 C.2d 189.)

The *Alcalde* rule was applied in *People v. Hawkins* (1960) 177 C.A.2d 714, 718, 2 C.R. 524. The victim of an abortion had told her sister that she was going to see defendant and the sister so testified. Defendant correctly contended on appeal that the declaration was only admissible to establish her condition of pregnancy and the avowed purpose of her visit, and was inadmissible hearsay on the issue of actual commission of the abortion. But failure to request a limiting instruction was a waiver of the objection. (See *People v. Chambers* (1982) 136 C.A.3d 444, 451, 452, 186 C.R. 306 [discussing dissent in *Alcalde*, but pointing out that decision is still binding precedent]; *People v. Jones* (1996) 13 C.4th 535, 548, 54 C.R.2d 42, 917 P.2d 1165 [in murder prosecution, testimony of victim's daughter that victim said she

was going with defendant and to call her aunt if she did not return was properly admitted "to prove or explain acts or conduct of the declarant"; citing *Alcalde*; 24 *Pepperdine L. Rev.* 1416 [*Jones*].)

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## 5. Threats of Accused or Victim.

*1 Witkin Cal. Evid. Hearsay § 219*

[§ 219] Threats of Accused or Victim.

(1) *Declarations of Defendant.* On a charge of homicide or assault, to meet the defense of lack of criminal intent, the prosecution may introduce prior threats of the defendant to kill or attack the victim, on either of two theories: (a) proof of the mental state of the defendant (i.e., criminal intent) at the time of the killing or assault. (See *People v. Craig* (1896) 111 C. 460, 465, 44 P. 186; 6 Wigmore (Chadbourn Rev.) §1732; 19 Cal. L. Rev. 255.) (b) Proof of intention to commit the future act threatened. (See *People v. Wilt* (1916) 173 C. 477, 482, 160 P. 561; *People v. Karis* (1988) 46 C.3d 612, 636, 637, 250 C.R. 659, 758 P.2d 1189 [statements "reflecting intent to kill a particular category of victims in specific circumstances"]; 6 Wigmore (Chadbourn Rev.) §1732; 19 Cal. L. Rev. 255; on statutory exception for victim's statements concerning defendant's threats of physical abuse, see *infra*, §220.)

(2) *Declarations of Victim.* If the victim of a homicide or assault threatened the defendant and the latter knew of the threat, this is circumstantial evidence of the defendant's fear of attack (1 Cal. Evidence (4th), *Circumstantial Evidence*, §59). But even if the threat was *not communicated* so that the declaration is not relevant for this purpose, it may nevertheless be offered by the defendant on the issue of self-defense, as circumstantial evidence that the victim carried out his threat and became the *aggressor*. (See *People v. Thomson* (1891) 92 C. 506, 510, 28 P. 589; 2 McCormick 5th, §275; 19 Cal. L. Rev. 372; 25 Cal. L. Rev. 461; 98 A.L.R.2d 195 [admissibility of uncommunicated threats on self-defense issue in assault prosecution]; but see *People v. Spraic* (1927) 87 C.A. 724, 729, 262 P. 795 [some other evidence must show that deceased was aggressor]; on threats by victim's associates, see *People v. Minifie* (1996) 13 C.4th 1055, 1065, 56 C.R.2d 133, 920 P.2d 1337, 1 Cal. Evidence (4th), *Circumstantial Evidence*, §60.)

It would appear equally proper for the prosecution to offer peaceful declarations of the victim, i.e., statements that the victim did not intend to attack the defendant, on this same issue. But an early California case, mechanically applying the *res gestae* test, held such statements inadmissible except as rebuttal. (*People v. Carlton* (1880) 57 C. 83, 85; see 19 Cal. L. Rev. 374.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Declarations of Victim.* See 2 McCormick 6th, §275.



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L. Statements Concerning Physical Abuse.

*1 Witkin Cal. Evid. Hearsay § 220*

[§ 220] Statements Concerning Physical Abuse.

(1) *In General.* *Ev.C. 1370*, added in 1996, creates a hearsay exception for statements purporting to narrate, describe, or explain the infliction or threat of physical injury on the declarant if the following requirements imposed by *Ev.C. 1370(a)* are met:

(a) The declarant is an unavailable witness under *Ev.C. 240* (see *supra*, §18).

(b) The statement was made at or near the time of the injury or threat. Statements made more than 5 years before the action or proceeding was filed are inadmissible.

(c) The statement was made under circumstances indicating its trustworthiness.

(d) The statement was made in writing, was electronically recorded, or was made to a law enforcement official.

(2) *Factors Relevant to Trustworthiness Determination.* Under *Ev.C. 1370(b)*, the factors relevant to the determination whether the statement is trustworthy include, but are not limited to:

(a) Whether the statement was made in contemplation of litigation in which the declarant was interested.

(b) Whether there was a bias or motive for fabricating the statement, and, if so, the extent of the bias or motive.

(c) Whether the statement is corroborated by evidence admissible other than under *Ev.C. 1370*.

(3) *Notice.* The proponent of the statement must make known to the adverse party the intention to offer the statement, along with the particulars of the statement, far enough in advance of the proceedings to provide the adverse party with "a fair opportunity to prepare to meet the statement." (*Ev.C. 1370(c)*.) (See *Guardianship of Simpson (1998)* 67 C.A.4th 914, 937, 79 C.R.2d 389 [in guardianship proceeding arising out of same facts that were basis for murder prosecution that caused Legislature to enact *Ev.C. 1370*, trial judge erred in excluding decedent mother's diary entries on ground that they referred to financial rather than physical threats; entries should have been admitted, with each side permitted to argue its own interpretation]; *People v. Hernandez (1999)* 71 C.A.4th 417, 422, 424, 83 C.R.2d 747 [statute is constitutional; due process is satisfied because reciprocity is provided, and statute is similar to spontaneous statement exception, which is firmly rooted exception to hearsay rule]; 110 Harv. L. Rev. 805 [arguing that admission of personal diaries and other statements by victim may violate Confrontation Clause]; 28 Pacific L. J. 809 [same]; 27 Golden Gate L. Rev. 497 [describing statute as response to O. J. Simpson case and assessing its utility in future cases].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General.* See *People v. Quitiquit* (2007) 155 C.A.4th 1, 9, 65 C.R.3d 674 [in murder prosecution in which it was alleged that defendant twisted his wife's neck, causing her to die several months later, trial judge erred in admitting wife's statement to doctor and police officer to effect that defendant had twisted her neck; statement was made nearly two months after injury and was not substantiated by other admissible evidence].

(d) *Form of statement or to whom made:* *Ev.C. 1370(a)* was amended in 2000 to provide that the statement may be made to physicians, nurses, and paramedics as well as law enforcement officials.

(2) *Factors Relevant to Trustworthiness Determination.* See *People v. Price* (2004) 120 C.A.4th 224, 239, 15 C.R.3d 229 [in light of *Crawford v. Washington* (2004) 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177, 3 Cal. Evidence (4th), *Presentation at Trial, Supp.*, §21, trustworthiness prong of *Ev.C. 1370* must be interpreted as requiring prior opportunity to cross-examine declarant]; *People v. Pantoja* (2004) 122 C.A.4th 1, 11, 13, 18 C.R.3d 492 [in murder prosecution, admission of declaration by victim in support of application for restraining order against defendant was error, as trustworthiness requirement was not met; there was no information indicating time, place, and circumstances under which declaration was prepared, it was unclear who wrote it, and it was prepared "in contemplation of pending or anticipated litigation" within meaning of *Ev.C. 1370(b)*].

(3) *Notice.* See *People v. Kons* (2003) 108 C.A.4th 514, 523, 133 C.R.2d 520 [disagreeing with suggestion in *People v. Hernandez* (1999) 71 C.A.4th 417, 83 C.R.2d 747, text, p. 940, that *Ev.C. 1370* passes constitutional muster simply because it is akin to firmly rooted spontaneous declaration hearsay exception].



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## CHAPTER VI - Hearsay

### III. EXCEPTIONS TO THE RULE

#### M. Testator's Statements Concerning Will.

##### 1. In General.

*1 Witkin Cal. Evid. Hearsay § 221*

[§ 221] In General.

(1) *Development of Rule.* The policy against admitting recitals of past acts (supra, §203) has been subjected to an exception in cases dealing with a testator's declarations. These may concern either the testator's will or the lack of a will. The influential considerations have been necessity (declarant deceased and issue of vital importance) and trustworthiness (special knowledge of testator, unlikelihood of false statements). (See infra, §222.) It is difficult to explain these cases consistently with others excluding declarations of past acts, and it was suggested that a new exception to the hearsay rule should be formulated for will cases. (See 2 McCormick 5th, §276; 6 Wigmore (Chadbourn Rev.) §1736, p. 169; 19 Cal. L. Rev. 381.) (On admissibility of declarations to show state of mind on ambiguous provisions, see *Estate of Fries* (1963) 221 C.A.2d 725, 730, 34 C.R. 749; see also 5 A.L.R.3d 360 [testator's declarations on issue of mistake of fact].)

(2) *Evidence Code. Ev.C. 1260*, codifies the case law, creating a specific will exception, along with its own trustworthiness limitation: Evidence of "a statement made by a declarant who is unavailable as a witness that he has or has not made a will, or has or has not revoked his will, or that identifies his will," is admissible, unless "made under circumstances such as to indicate its lack of trustworthiness." (*Ev.C. 1260*.) (See infra, §222 et seq.)

It should be remembered, however, that broadening the hearsay exception does not necessarily result in admissibility of relevant declarations; the parol evidence rule may still be a barrier. (See 2 Cal. Evidence (4th), *Documentary Evidence*, §59.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Development of Rule.* See 2 McCormick 6th, §276. *West's Key Number Digest*, Evidence k.269(2)



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## CHAPTER VI - Hearsay

## III. EXCEPTIONS TO THE RULE

## M. Testator's Statements Concerning Will.

## 2. Declaration on Making or Revocation.

*1 Witkin Cal. Evid. Hearsay § 222*

[§ 222] Declaration on Making or Revocation.

(1) *Declaration on Making of Will.* The testator's subsequent declaration that the will has been made is admissible. (*Estate of Morrison* (1926) 198 C. 1, 7, 242 P. 939; see 6 Wigmore (Chadbourn Rev.) §1736; 19 Cal. L. Rev. 384.) It may be noted also that a prior declaration of intent to make a will is admissible under the distinct doctrine of intention as evidence of a future act. (See *Estate of Spitzer* (1925) 196 C. 301, 306, 237 P. 739; supra, §215; 6 Wigmore (Chadbourn Rev.) §1735; and see generally 21 A.L.R.2d 355.)

(2) *Declaration on Nonrevocation.* Where the issue is whether a lost will or one defaced was intentionally revoked, the testator's declarations made prior to death that a certain will is in effect are admissible. (See *Estate of Thompson* (1927) 200 C. 410, 417, 253 P. 697; *Estate of Janes* (1941) 18 C.2d 512, 516, 116 P.2d 438; *Estate of Thompson* (1941) 44 C.A.2d 774, 776, 112 P.2d 937 [order admitting lost will fraudulently destroyed by surviving spouse]; *Estate of Boyer* (1944) 67 C.A.2d 83, 85, 153 P.2d 793 [same]; *Estate of Ronayne* (1951) 103 C.A.2d 852, 858, 230 P.2d 423; *Estate of Zalud* (1972) 27 C.A.3d 945, 954, 104 C.R. 329, citing the text [decendent's statements in 1970 about her 1967 will and codicil were admissible to show that her state of mind was such that 1967 will had not been revoked, despite existence of purported will dated in 1969]; 3 A.L.R.2d 960 [testator's declarations as to nonrevocation]; 59 A.L.R.2d 157 [testator's declarations as to first will, where later will or codicil is executed]; but see *Estate of Smith* (1948) 31 C.2d 563, 568, 191 P.2d 413 [under parol evidence rule, unambiguous express revocation clause cannot be overcome by extrinsic evidence].)

(3) *Declaration on Revocation.* Similarly, where a will was made, but is shown to have been mutilated by the testator, or cannot be found, subsequent declarations of purposes inconsistent with the will or of intent to revoke should be admissible. (See 2 McCormick 5th, §276, p. 849; 6 Wigmore (Chadbourn Rev.) §1737.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(3) *Declaration on Revocation.* See 2 McCormick 6th, §276.



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M. Testator's Statements Concerning Will.

3. Declaration on Kind of Will or No Will.

*1 Witkin Cal. Evid. Hearsay § 223*

[§ 223] Declaration on Kind of Will or No Will.

On the issue whether the writing was a *forgery*, the decedent's declarations to the effect that he or she did make a will of the tenor of the questioned document are admitted. (See *Estate of Morrison* (1926) 198 C. 1, 13, 242 P. 939; *Estate of Thompson* (1927) 200 C. 410, 417, 253 P. 697; *Estate of Janes* (1941) 18 C.2d 512, 516, 116 P.2d 438 [duplicate writings, issue of revocation; decedent's deathbed declaration that he had made testamentary disposition in accord with instrument]; 6 Wigmore (Chadbourn Rev.) §1736, p. 169; 19 Cal. L. Rev. 384; 62 A.L.R.2d 855 [admissibility of testator's declarations on issue of genuineness or due execution].)

The testator's declarations are also received to show that *no will was made* or that *a particular writing was not intended* to constitute a will. This rule was applied in *Estate of Sargavak* (1950) 35 C.2d 93, 96, 216 P.2d 850, where an apparently testamentary instrument was attacked as *sham*, i.e., intended for a different nontestamentary purpose. Declarations of the testator indicating that this was so were held admissible as evidence of the intent with which the instrument was executed (although ultimately, the will was held good).

**SUPPLEMENT:** [This section is current through the latest supplement]





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M. Testator's Statements Concerning Will.

4. Distinction: Declaration on Contract.

*1 Witkin Cal. Evid. Hearsay § 224*

[§ 224] Distinction: Declaration on Contract.

In *Estate of Tassi* (1961) 196 C.A.2d 494, 16 C.R. 616, petitioner, surviving spouse of decedent, claimed a share in the will under former Prob.C. 70 (now *Prob.C. 21610* et seq.). The beneficiary resisted, contending that, although not mentioned in the will, petitioner was provided for in a marriage contract. Proof of the contract was offered in the form of declarations of the decedent that he had entered into such an agreement. *Held*, the evidence was inadmissible. "Where the declaration is as to the making of a will, the situation is one where the testator alone has special knowledge, since the making or revoking of a will is an act completely within his control and is one which he may perform wholly unaided. Indeed, in many situations, no one other than the testator could possibly have knowledge of whether the testator revoked a specific will. In the case of a marriage contract, however, it is necessary that the consent of both contracting parties be manifested. Where, as in the case at bar, the declaration of a testator provides the only evidence that such a contract exists, such a declaration must of necessity support two inferences--that the testator himself consented to the contract, and that a third party, whose acts were certainly not within the testator's control, also assented to the contract. The statement of the testator thus serves as evidence of his own acts and those of another person as well. It would be most illogical to extend the hearsay exception relating to the testator's will to encompass such a situation." (196 C.A.2d 506.)

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N. Decedent's Statement in Action Against Estate.

*1 Witkin Cal. Evid. Hearsay § 225*

[§ 225] Decedent's Statement in Action Against Estate.

Formerly, under California's "dead man statute," a party suing on a claim against a decedent's estate could not testify to any fact occurring prior to the decedent's death. The basic theory was that it would be unfair to permit the living plaintiff to testify to facts that the decedent could not rebut.

This much criticized statute was eliminated by the Evidence Code (see *2 Cal. Evidence (4th)*, Witnesses, §§39, 40). But to equalize the positions of the parties as much as possible, *Ev.C. 1261* creates a new hearsay exception, allowing the decedent's declaration to come in, subject to strict limitations. It is admissible if it was made "upon the personal knowledge of the declarant at a time when the matter had been recently perceived by him and while his recollection was clear." (*Ev.C. 1261(a)*.) And it is inadmissible if "made under circumstances such as to indicate its lack of trustworthiness." (*Ev.C. 1261(b)*.) (See 1 Jefferson, California Evidence Benchbook 3d, §15.7 et seq.)

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## CHAPTER VI - Hearsay

## III. EXCEPTIONS TO THE RULE

## O. Business Records.

## 1. In General.

## a. Common Law.

*1 Witkin Cal. Evid. Hearsay § 226*

[§ 226] Common Law.

(1) *Account Books*. At common law, a party was incompetent as a witness, but was allowed to offer account books in evidence under the "shop-book rule," an exception to the hearsay rule permitting delivery of goods and performance of services to be proved by entries in the party's books. The shop book rule persisted for some time even after abolishment of the party-witness disability, but development of a broader rule of regular business entries eventually rendered it unimportant. (See *14 Cal. L. Rev.* 263; *35 Cal. L. Rev.* 435; 2 McCormick 5th, §285; 5 Wigmore (Chadbourn Rev.) §1517 et seq.; 1 Proof of Facts 89.)

(2) *Business Entries*. The modern doctrine of *entries in the regular course of business*, today more succinctly termed the *business records* exception to the hearsay rule, allows proof of any regularly kept records (not merely books of account), including those kept by third parties (not merely the party's own books). The guarantee of *trustworthiness* lies in the habit or practice of accurate and systematic bookkeeping by trained persons. Accordingly, the courts (prior to the Uniform Business Records as Evidence Act, infra, §227) required a showing of the following conditions of admissibility of the books or records offered: (a) that they were kept in the regular course of business; (b) that it was customary in that business to keep books; (c) that the entries were the original or first permanent ones; (d) that they were made close to the time of the transactions; (e) that the person making the entries had personal knowledge of the transactions, or obtained knowledge from a regular report of one who had; and (f) that the person who made the entries or the person who had knowledge of the transactions was unavailable as a witness. (See *Chan Kui Sing v. Gordon* (1915) 171 C. 28, 31, 151 P. 657; *Warren v. Hiltcher* (1931) 111 C.A. 318, 320, 295 P. 536; *14 Cal. L. Rev.* 263, 273; *35 Cal. L. Rev.* 434; 2 McCormick 5th, §286; 29A Am.Jur.2d (1994 ed.), *Evidence* §1292 et seq.; on admission of electronic documents under this exception, see *Overly on Electronic Evidence in California* §10.04.)

(3) *Other Bases of Admissibility*. Even if an entry failed to meet the requisite conditions, it could often be used in various ways independent of this exception, e.g., as an admission of a party, a declaration against interest, or a means of refreshing the memory of a witness. (See *London v. Guberman* (1963) 214 C.A.2d 215, 220, 29 C.R. 279, quoting the text [admission]; 2 McCormick 5th, §284; 5 Wigmore (Chadbourn Rev.) §1557.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Account Books*. See 2 McCormick 6th, §285.

(2) *Business Entries*. See 2 McCormick 6th, §286. (3) *Other Bases of Admissibility*. See 2 McCormick 6th, §284. *West's Key Number Digest*, Evidence k.318 et seq., 350 et seq.



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#### O. Business Records.

##### 1. In General.

##### b. Uniform Act, Evidence Code, and Federal Rules.

*1 Witkin Cal. Evid. Hearsay § 227*

[§ 227] Uniform Act, Evidence Code, and Federal Rules.

(1) *Former Uniform Business Records as Evidence Act.* This Act was approved in 1936 and was adopted in California in 1941, but it was withdrawn in 1966. The purpose of the Act was to eliminate the impractical refinements of the common law doctrine, with the inevitable accompanying differences in application in the different states, and to enlarge the scope of the doctrine. (See *Loper v. Morrison* (1944) 23 C.2d 600, 607, 145 P.2d 1; *People v. Gorgol* (1953) 122 C.A.2d 281, 296, 265 P.2d 69; *People v. Torres* (1962) 201 C.A.2d 290, 296, 20 C.R. 315, citing the text; 2 McCormick 5th, §286; 5 Wigmore (Chadbourn Rev.) §1520; 35 Cal. L. Rev. 434; 29A Am.Jur.2d (1994 ed.), *Evidence* §1296 et seq.; 21 A.L.R.2d 773 [Uniform Act and similar model acts].)

(2) *Other Acts.* A prior and somewhat similar Commonwealth Fund Act was adopted in a few states and was the basis of a federal statute. (See *Palmer v. Hoffman* (1943) 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645, *infra*, §233; 2 McCormick 5th, §286; 47 Harv. L. Rev. 1044; 22 So. Cal. L. Rev. 190.) And the *Uniform Photographic Copies of Business and Public Records as Evidence Act* allows substitution of photographs or microfilms for original records and the introduction of reproductions or enlargements in evidence. (See 2 Cal. Evidence (4th), *Documentary Evidence*, §45.)

(3) *Evidence Code.* Ev.C. 1270, 1271, and 1272 retain the provisions of the Uniform Act formerly found in C.C.P. 1953e et seq. Under Ev.C. 1271, evidence of "a writing made as a record of the act, condition, or event" is admissible "to prove the act, condition, or event" if all of the following circumstances apply:

(a) "The writing was made in the regular course of a business." (Ev.C. 1271(a).)

(b) "The writing was made at or near the time of the act, condition, or event." (Ev.C. 1271(b).)

(c) "The custodian or other qualified witness testifies to its identity and the mode of its preparation." (Ev.C. 1271(c).)

(d) "The sources of information and method and time of preparation were such as to indicate its trustworthiness." (Ev.C. 1271(d).) (See *People v. Campos* (1995) 32 C.A.4th 304, 309, 38 C.R.2d 113 [in proceeding to review defendant's classification as mentally disordered offender, reports of nontestifying medical experts and defendant's probation report did not qualify for admission under business records exception, as they were records of conclusions, not "act, condition, or event"].)

(4) *Federal Rules of Evidence. F.R. Evid., Rule 803(6)*, entitled *Records of Regularly Conducted Activity*, makes the following admissible: "A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term 'business' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit." (See 4 Mueller & Kirkpatrick, *Federal Evidence* 2d, §444 et seq.; 20 *Southwestern U. L. Rev.* 473 [Confrontation Clause and *F.R. Evid., Rule 803(6)*]; 29A *Am.Jur.2d* (1994 ed.), *Evidence* §1300 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Former Uniform Business Records as Evidence Act*. See 2 McCormick 6th, §286.

(2) *Other Acts*. See 2 McCormick 6th, §286.(4) *Federal Rules of Evidence. F.R. Evid., Rule 803(6)* was amended in 2000 to provide that, as an alternative to presenting a foundation witness, the foundational requirements of the rule may be met "by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification." (On *F.R. Evid., Rule 902(11)* and *902(12)*, added in 2000, see 2 *Cal. Evidence (4th)*, *Documentary Evidence*, *Supp.*, §26.)



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## CHAPTER VI - Hearsay

## III. EXCEPTIONS TO THE RULE

## O. Business Records.

## 2. Business, Profession, or Other Activity.

1 *Witkin Cal. Evid. Hearsay* § 228

[§ 228] Business, Profession, or Other Activity.

(1) *Scope of Statute.* The record must have been made in the regular course of "a business." (*Ev.C. 1271(a)*.) But the term "business" includes "every kind of business, governmental activity, profession, occupation, calling or operation of institutions, whether carried on for profit or not." (*Ev.C. 1270*.) Under this broad language, the records of various types of business and professional organizations, including nonprofit institutions, are admissible. (See *People v. Gorgol* (1953) 122 C.A.2d 281, 296, 265 P.2d 69; 35 Cal. L. Rev. 437; 2 *Hastings L. J.* 11; 5 Wigmore (Chadbourn Rev.) §1523; 1 Jefferson, California Evidence Benchbook 3d, Chap. 4.)

"The definition is sufficiently broad to encompass institutions not customarily thought of as businesses. For example, the baptismal and wedding records of a church would be admissible under the section to prove the events recorded." (Law Rev. Com. Comment to *Ev.C. 1270*.)

(2) *Public Agencies.* In situations in which the exception for official records does not clearly apply, or perhaps overlapping that exception (see *infra*, §245), the business records doctrine has been successfully invoked to obtain admission of the records of various public agencies. (See *Brown v. Los Angeles* (1947) 77 C.A.2d 814, 817, 176 P.2d 753 [account of deceased indigents with county, for welfare aid]; *Nichols v. McCoy* (1952) 38 C.2d 447, 449, 240 P.2d 569, *infra*, §240 [coroner's office record of blood test for alcohol in body of deceased]; *Fox v. San Francisco Unified School Dist.* (1952) 111 C.A.2d 885, 892, 245 P.2d 603 [personnel reports of school board on work of probationary schoolteacher]; *People v. Crosslin* (1967) 251 C.A.2d 968, 976, 60 C.R. 309 [fingerprint card made up for arrested person by sheriff's office]; 1944 A.S. 1135 [autopsy in homicide case]; 57 A.L.R.4th 1111 [admissibility of school records].) *Ev.C. 1270* now includes "governmental activity" within the definition.

(3) *Applicability to Criminal Cases.* Despite contentions that the business record provisions violate a criminal defendant's right to confrontation, the greater certainty of trustworthy business records over fallible human memories benefits criminal defendants and is otherwise in the interest of justice. Hence, *Ev.C. 1270*, 1271, and 1272 "when properly applied are without constitutional fault." (*People v. Gambos* (1970) 5 C.A.3d 187, 194, 84 C.R. 908.) (See *People v. Aguilar* (1971) 16 C.A.3d 1001, 94 C.R. 492, *infra*, §239.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER VI - Hearsay

### III. EXCEPTIONS TO THE RULE

#### O. Business Records.

#### 3. What Is Admissible Business Record.

##### a. Any Kind of Record.

*1 Witkin Cal. Evid. Hearsay § 229*

[§ 229] Any Kind of Record.

The common law rule called for "original entries" or "books of original entry," on the theory that these were more likely to be accurate than copies subsequently entered. Business practices, however, often made literal compliance with this requirement impossible. And modern cases, both before and after the former Uniform Act (which eliminated the requirement), tend to admit records kept under any kind of bookkeeping system, whether original or copied, and whether in book, looseleaf, card, or other form. (On computer records, see *infra*, §230.) (See *Patrick v. Tetzlaff* (1920) 46 C.A. 243, 245, 189 P. 115 [automobile repair shop; work cards transcribed by bookkeeper]; *Arques v. National Superior Co.* (1945) 67 C.A.2d 763, 777, 155 P.2d 643 [lien claimant's informal "composition book" containing his entries of hours worked and materials used]; *Oakland Calif. Towel Co. v. Zanes* (1947) 81 C.A.2d 343, 344, 184 P.2d 21 [linen service; duplicate delivery tag or ticket showing amounts delivered on particular dates]; *Gallup v. Sparks-Mundo Engineering Co.* (1954) 43 C.2d 1, 7, 271 P.2d 34 [ambulance company "trip ticket" and "log book"]; *Cole v. Ames* (1957) 155 C.A.2d 8, 15, 317 P.2d 662 [Veterans Loan appraisal file kept by bank]; *People v. Woods* (1958) 157 C.A.2d 617, 621, 321 P.2d 477 [chain store produce clerk's tally sheet]; *Phillips v. G. L. Truman Excavation Co.* (1961) 55 C.2d 801, 809, 13 C.R. 401, 362 P.2d 33 [reports of doctors to group health service]; *People v. Crosslin* (1967) 251 C.A.2d 968, 976, 60 C.R. 309 [fingerprint card made by sheriff's office]; *Exclusive Florists v. Kahn* (1971) 17 C.A.3d 711, 715, 716, 95 C.R. 325 [time cards and payroll records]; *People v. Beeler* (1995) 9 C.4th 953, 980, 981, 39 C.R.2d 607, 891 P.2d 153 [autopsy report on murder victim; although it contained medical opinion, conclusion that victim died from bullet wound to heart was statement of fact based on direct observation by doctor conducting autopsy]; 2 McCormick 5th, §287; 5 Wigmore (Chadbourn Rev.) §1548 et seq.; 9 U.C. Davis L. Rev. 147 [comparison of business records and past recollection recorded]; 17 A.L.R.2d 235 [what constitutes book of original entry]; 57 A.L.R.3d 713 [weather reports and records]; 68 A.L.R.3d 1069 [letters to or from customers]; 1 A.L.R.4th 316 [bills and invoices under Uniform Rules of Evidence].)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 2 McCormick 6th, §287.



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### III. EXCEPTIONS TO THE RULE

#### O. Business Records.

#### 3. What Is Admissible Business Record.

##### b. Computer Records.

*1 Witkin Cal. Evid. Hearsay § 230*

[§ 230] Computer Records.

(1) *In General.* Records stored in computer files are admissible under the business records exception, provided they meet the requirements imposed by that exception on all business records. (See *People v. Lugashi* (1988) 205 C.A.3d 632, 638, 252 C.R. 434; 1965 A.S. 564; 13 *Loyola L.A. L. Rev.* 345; 7 A.L.R.4th 8 [computerized private business records]; 14 *Proof of Facts* 2d 173 [same]; on special foundation problems, see 2 *McCormick* 5th, §294.)

(2) *Testimony on Hardware and Software Not Required.* In *People v. Lugashi*, *supra*, involving allegedly fraudulent credit card transactions, defendant merchant's convictions were based in part on computer-generated evidence. This evidence was derived from a bank program (a "dump") that reordered credit card transaction entries by customer and merchant account numbers. A tape was then made, from which a microfiche record was prepared. Printed copies of the microfiche were introduced to show merchant queries and system responses involving the transactions. The authenticating witness was Norris, a bank employee specializing in credit card fraud. *Held*, the evidence was properly admitted under *Ev.C. 1271*.

(a) *Rejection of defendant's proposed test.* Defendant urged the adoption of a test requiring, as a prerequisite to admissibility under *Ev.C. 1271*, that the proponent of computer evidence introduce testimony on the acceptability and reliability of the hardware and software involved, as well as on internal maintenance and accuracy checks. This proposal is rejected for the following reasons:

(1) The proposed test incorrectly presumes that computer data is unreliable. (205 C.A.3d 640.)

(2) The test would require the proponent of computer data to disprove the possibility of error, not in order to convince the trier of fact to accept it, but merely to meet the minimal showing required for admissibility. This would be the equivalent of requiring the proponent of conventional hand-entered records to introduce not only the testimony of the custodian, but also that of an expert in accounting theory that the particular system used, if properly applied, would yield accurate information. (205 C.A.3d 640.)

(3) The test would require production of a "horde of witnesses," representing each department of a company's data processing system, merely to meet the minimal requirement of admissibility. Here, for example, it would in all probability require at least three additional witnesses: one who operated the program, one who created the microfiche, and one who maintained the microfiche records. Hence, with no real benefit gained, it would burden the state's already crowded trial courts, and would be especially hard on small businesses, which lack the resources to produce a phalanx



of witnesses without ceasing normal operations. (205 C.A.3d 640.)

(b) *Norris was a qualified authenticating witness.* Defendant contended that Norris was unqualified because she could not explain the bank's hardware or software, could not physically perform each step involved, and was forced to rely on hearsay, rather than personal knowledge. This is incorrect. "Norris was an experienced credit card fraud investigator familiar with merchant authorization terminals, counterfeit cards, credit card sales, and the manner in which sales are recorded. She personally produced the printed records from the microfiche. Although she did not do the 'dump' or physically convert the resulting tape into microfiche, she worked and spoke with those who did. She understood the records and interpreted them in great detail, she assembled the bank copies of the actual charges and compared them with the computer records. That some of her knowledge came from 'hearsay' discussions with fellow workers ... no more renders her testimony incompetent than if it resulted from reading 'hearsay' information manuals from the hardware or software manufacturers or Wells Fargo computer management. If appellant were correct, only the original hardware and software designers could testify since everyone else necessarily could understand the system only through hearsay." (205 C.A.3d 641.) Any question concerning the competency of the bank's other employees could be resolved by subpoena and examination. And much of the information on the printout could be verified by comparison with the bank's copy of the actual charges. Hence, while Norris' testimony might not convince a jury of the data's accuracy beyond a reasonable doubt, it was more than adequate to render it admissible. (205 C.A.3d 641.)

(3) *Use of Printouts.* Printouts are admissible and presumed to be an accurate representation of the data in the computer. (See 2 Cal. Evidence (4th), *Documentary Evidence*, §48.) When offered for truth, however, they must qualify under a hearsay exception, and often the applicable exception is the one for business records. In *Aguimatang v. California State Lottery* (1991) 234 C.A.3d 769, 797, 286 C.R. 57, the printouts containing the number of winners in the State Lottery were challenged on the ground that they were not made at or near the time of the event, as required by *Ev.C. 1271(b)*; instead, they were printed out only on an as needed basis. In rejecting the contention, the court said: "[A]lthough to qualify as a business record the 'writing' must be made at or near the time of the event, 'writing' is not limited to the commonly understood forms of writing but is defined very broadly to include all 'means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds or symbols, or combinations thereof.' (*Evid. Code*, §250.) Here, the 'writing' is the magnetic tape. The data entries on the magnetic tapes are made contemporaneously with the Lotto transactions, hence qualify as business records." (234 C.A.3d 798.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General.* See 2 McCormick 6th, §294.(3) *Use of Printouts.*

(*New*) *Distinction: Computer's internal operations.* A printout of the results of a computer's internal operations is not hearsay evidence at all, and thus the business records exception is inapplicable. Such a printout does not represent the output of statements placed in the computer by an out-of-court declarant. With a machine, there is no possibility of conscious misrepresentation. "[T]he true test for admissibility of a printout reflecting a computer's internal operations is not whether the printout was made in the regular course of business, but whether the computer was operating properly at the time of the printout." (*People v. Hawkins* (2002) 98 C.A.4th 1428, 1449, 1450, 121 C.R.2d 627 [in prosecution arising from defendant's having taken source code from computer system of former employer, trial judge did not err in admitting computer printouts showing when computer files were last accessed, where evidence was introduced showing that computer was functioning properly and its clock was accurate].)



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c. Special Reports.

*1 Witkin Cal. Evid. Hearsay § 231*

[§ 231] Special Reports.

The statute refers to the record of "an act, condition or event" (*Ev.C. 1271*); i.e., its coverage goes beyond bookkeeping entries of debit and credit. A special report, or record of a nonrecurring act or event, may be received if it was made in the course of business or professional duty. Thus, in *De Hart v. Allen (1945) 26 C.2d 829, 831, 161 P.2d 453*, an action by a landlord against a defaulting tenant, proof that the landlord gave notice to the tenant of reletting for the latter's benefit was made by offering in evidence an *affidavit of service* of such notice, signed by the process server (who died before trial) but not notarized. *Held*, the writing was admissible, for it had been prepared by the process server *in the usual course of his occupation or calling*. (See *Carruth v. Madera (1965) 233 C.A.2d 688, 694, 43 C.R. 855* [letter by mayor of city to Real Estate Commissioner advising him that city would install water facilities, etc., in a subdivision]; 2 McCormick 5th, §288.) (On accident reports, see *infra*, §§233, 239.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 2 McCormick 6th, §288.



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##### d. Hospital Records.

*1 Witkin Cal. Evid. Hearsay § 232*

[§ 232] Hospital Records.

There was formerly a tendency to classify the entries of doctors, nurses or other attendants, in hospital records, as inadmissible hearsay. (See *Lusardi v. Prukop* (1931) 116 C.A. 506, 508, 2 P.2d 870; 14 So. Cal. L. Rev. 100; 27 Cal. L. Rev. 466.) One of the chief liberalizing effects of the former Uniform Act (see supra, §227) was to make it clear that records of this type are admissible *if properly authenticated*. (See *People v. Gorgol* (1953) 122 C.A.2d 281, 296, 265 P.2d 69, infra, §238; *People v. Moore* (1970) 5 C.A.3d 486, 492, 85 C.R. 194, citing the text [admissible to show that defendant had been committed to mental institutions and diagnosed while there as mentally ill]; *In re Troy D.* (1989) 215 C.A.3d 889, 902, 903, 263 C.R. 869 [dependency petition alleged that minor was born under influence of harmful drugs; hospital records concerning minor and his mother were properly admitted]; 2 McCormick 5th, §293; 27 Cal. L. Rev. 466; 35 Cal. L. Rev. 437; 17 So. Cal. L. Rev. 409; 44 A.L.R.2d 553 [hospital records as to cause or circumstances of injury]; 69 A.L.R.3d 22 [hospital records in criminal cases]; 69 A.L.R.3d 104 [report by consulting physician to treating physician]; 80 A.L.R.3d 456 [hospital record relating to intoxication or sobriety of patient]; 38 Proof of Facts 2d 145 [hospital records and x-rays]; on discovery of hospital records, see 15 Am.Jur. Trials 376; on authentication and conditions of admissibility, see infra, §238 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 2 McCormick 6th, §293.



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#### e. Accident Reports Prepared for Litigation.

*1 Witkin Cal. Evid. Hearsay § 233*

[§ 233] Accident Reports Prepared for Litigation.

Next to hospital records (*supra*, §232 and *infra*, §238), one of the most useful special records is the report of an accident by an employee or investigator. Its admissibility, however, was sharply limited by the leading case of *Palmer v. Hoffman* (1943) 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645, decided under a federal act (*supra*, §227). The action arose out of a grade crossing accident, and defendant railroad offered a written statement of the deceased train engineer, made to an assistant superintendent of the road and a representative of the state Public Utilities Commission. In holding this statement correctly *excluded*, the Court said:

"It is not a record made for the systematic conduct of the business as a business. An accident report may affect that business in the sense that it affords information on which the management may act. It is not, however, typical of entries made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls. The conduct of a business commonly entails the payment of tort claims incurred by the negligence of its employees. But the fact that a company makes a business out of recording its employees' versions of their accidents does not put those statements in the class of records made 'in the regular course' of the business within the meaning of the Act. If it did, then any law office in the land could follow the same course, since business as defined in the Act includes the professions. We would then have a real perversion of a rule designed to facilitate admission of records which experience has shown to be quite trustworthy. Any business by installing a regular system for recording and preserving its version of accidents for which it was potentially liable could qualify those reports under the Act. The result would be that the Act would cover any system of recording events or occurrences provided it was 'regular' and though it had little or nothing to do with the management or operation of the business as such. Preparation of cases for trial by virtue of being a 'business' or incidental thereto would obtain the benefits of this liberalized version of the early shop book rule. ... In short, it is manifest that in this case those reports are not for the systematic conduct of the enterprise as a railroad business. Unlike payrolls, accounts receivable, accounts payable, bills of lading and the like these reports are calculated for use essentially in the court, not in the business. Their primary utility is in litigating, not in railroading." (63 S.Ct. 480, 87 L.Ed. 649.)

The broad language of the *Palmer* case has been criticized on the theory that investigation of the probable causes and effects of an accident is an act in the regular course of the railroad or other transportation business. But the result was probably justified by the obviously partisan purpose and self-serving nature of the statement. (See 2 McCormick 5th, §288; 56 Harv. L. Rev. 458; 59 Harv. L. Rev. 565; 4 Stanf. L. Rev. 288; 17 So. Cal. L. Rev. 165; 23 A.L.R.2d 1360 [report on airplane accident].) And the case has been followed in two California decisions. (*Reisman v. Los Angeles City*

*School Dist.* (1954) 123 C.A.2d 493, 503, 267 P.2d 36 [wrongful death of child playing on blacktop surfaced playground; subsequent report prepared for school department praising blacktop]; *Hoel v. Los Angeles* (1955) 136 C.A.2d 295, 309, 288 P.2d 989.) But in *Levy-Zentner Co. v. Southern Pac. Trans. Co.* (1977) 74 C.A.3d 762, 142 C.R. 1, the court approved the admission of a "final accident report" prepared by an assistant terminal superintendent of defendant railroad, in which the source of the terminal fire that caused plaintiffs' property damage was identified as activity by transients on defendant's property. The report was offered by plaintiffs, and, in holding it admissible, the court relied in part on its character as an admission against interest. (74 C.A.3d 786.) (On admissibility of reports required by federal law, see 18 *Hastings L. J.* 181; for other problems of admissibility of accident reports, see *infra*, §239.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 2 McCormick 6th, §288. *West's Key Number Digest*, Evidence k.356



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##### f. Absence of Business Entry.

#### *1 Witkin Cal. Evid. Hearsay § 234*

[§ 234] Absence of Business Entry.

(1) *Uniform Rules and Evidence Code.* The original Uniform Rules of Evidence resolved an uncertainty in the former Uniform Act (see *supra*, §227) on which the few cases were conflicting. Subject to the usual test--that it was the regular course of business to make a record of the acts, events, or conditions--the Rules made admissible evidence of the absence of a memorandum or record to prove that an act or event did not occur or that a condition did not exist. (See 2 McCormick 5th, §287; 5 Wigmore (Chadbourn Rev.) §1531.)

*People v. Torres* (1962) 201 C.A.2d 290, 297, 20 C.R. 315, approved this extension of the Act. "[I]f a business record is otherwise admissible ... we see no reason why it should not be equally as admissible to disprove an affirmative as to prove an affirmative, just as competent to prove the falsity of a fact affirmed as to prove the truth of the fact affirmed."

*Ev.C. 1272* enacted the Uniform Rule with minor changes. Evidence of "the absence from the records of a business of a record of an asserted act, condition, or event" is admissible "to prove the nonoccurrence of the act or event, or the nonexistence of the condition," if both of the following conditions exist:

(a) "It was the regular course of that business to make records of all such acts, conditions, or events at or near the time of the act, condition, or event and to preserve them." (*Ev.C. 1272(a)*.)

(b) "The sources of information and method and time of preparation of the records of that business were such that the absence of a record of an act, condition, or event is a trustworthy indication that the act or event did not occur or the condition did not exist." (*Ev.C. 1272(b)*.)

*People v. Dickinson* (1976) 59 C.A.3d 314, 320, 130 C.R. 561, points out that records may be introduced or a qualified officer may testify to the absence of particular items from voluminous or otherwise unproduceable records; but in a criminal case, affidavits cannot be used by the prosecution in violation of the defendant's right of confrontation.

(2) *Federal Rules of Evidence.* *F.R. Evid., Rule 803(7)* makes the following admissible: "Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness." (See 4 Mueller & Kirkpatrick, Federal Evidence

2d, §452; 29A Am.Jur.2d (1994 ed.), Evidence §1319.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Uniform Rules and Evidence Code*. See 2 McCormick 6th, §287.



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##### g. Miscellaneous Inadmissible Entries.

#### 1 Witkin Cal. Evid. Hearsay § 235

[§ 235] Miscellaneous Inadmissible Entries.

(1) *Statement Not Constituting a Record.* A letter or statement that is not itself a record, but merely refers to the record, is inadmissible. (*Bebbington v. California Western States Life Ins. Co.* (1947) 30 C.2d 157, 161, 180 P.2d 673, supra, §12; *Fuller v. White* (1948) 33 C.2d 236, 242, 201 P.2d 16 [letter from insurance company's supervisor of claims interpreting statements in another record].)

(2) *Private Memorandum.* Several cases decided before the former Uniform Act (see supra, §227) excluded records as mere private memoranda not amounting to regular business entries. (See *Thompson v. Orena* (1901) 134 C. 26, 30, 66 P. 24; *Creighton v. Creighton* (1935) 6 C.A.2d 270, 271, 43 P.2d 1104 ["ledger" with a few entries of personal loans by plaintiff who was not regularly engaged in business]; *Gough v. Security Trust & Savings Bank* (1958) 162 C.A.2d 90, 94, 327 P.2d 555; but see *Franco Western Oil Co. v. Fariss* (1968) 259 C.A.2d 325, 333, 66 C.R. 458 [decided under predecessor of Ev.C. 1271; where president of plaintiff corporation kept diary of daily business events, entry he made regarding conversation concerning oil and gas leases that were subject of dispute should have been admitted]; 94 A.L.R.3d 975 [memorandum of telephone conversation].)

(3) *Oral Reports.* Although some courts have admitted oral reports made in the regular course of business (see 2 McCormick 5th, §287; 5 Wigmore (Chadbourn Rev.) §1528), the former Uniform Act did not mention them, and Ev.C. 1271 expressly refers to "a writing made as a record."

**SUPPLEMENT:** [This section is current through the latest supplement]

(3) *Oral Reports.* See 2 McCormick 6th, §287.

(4) *(New) Records of Family Violence Clinic.* In *People v. Ayers* (2005) 125 C.A.4th 988, 23 C.R.3d 242, a prosecution for spousal battery, the trial judge admitted records maintained by a family violence clinic stemming from the victim's 911 call and her later visit to the clinic. *Held*, this was error, although harmless. The records involved double hearsay. The information in them was recorded by clinic employees under a duty to do so in an accurate fashion, and thus came within the business records exception, but the underlying layer of hearsay was supplied by the victim herself, who had no such duty. Because the records were offered to prove their contents (the violent incident the victim reported), their admission was improper. (125 C.A.4th 995.) However, the jury did not see the records, the prosecutor only briefly mentioned them, and there was overwhelming evidence of defendant's guilt. (125 C.A.4th 996.)





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#### 4. Time of Entry.

#### *1 Witkin Cal. Evid. Hearsay § 236*

[§ 236] Time of Entry.

(1) *General Rule.* The common law requirement of prompt recording (*supra*, §226) is retained in the statutory provision, "at or near the time of the act, condition, or event," and in the further provision that the court must find that the "time of preparation" was such as to indicate trustworthiness. (*Ev.C. 1271(b), (c).*) (See *Reisman v. Los Angeles City School Dist. (1954) 123 C.A.2d 493, 503, 267 P.2d 36* [accident report made 2 years and 2 months after accident, too late]; *People v. Champion (1995) 9 C.4th 879, 916, 39 C.R.2d 547, 891 P.2d 93* [testimony of fingerprint expert who had been employed at lab where fingerprint report was prepared was sufficient to establish that preparer of report was obligated to prepare it at or near time she did acts described in report]; 2 McCormick 5th, §289; 5 Wigmore (Chadbourn Rev.) §1550.)

(2) *Distinction: Decedent's Account Books.* In *Robinson v. Puls (1946) 28 C.2d 664, 668, 171 P.2d 430*, the general rule was virtually abandoned with respect to account books of a *decedent*, the court holding that "evidence that the books of account were in his handwriting, and that they were kept correctly, is sufficient foundation for their admission." The opinion also relied on the statutory presumption, that "a writing is truly dated" (*1 Cal. Evidence (4th), Burden of Proof and Presumptions, §77*) and the former presumption that "the ordinary course of business has been followed" (*1 Cal. Evidence (4th), Circumstantial Evidence, §68*) as obviating the necessity for any showing of the contemporaneous nature of the entry. This argument begs the question, for if contemporaneous entry is established by a presumption it need never be established, despite the language of *Ev.C. 1271(b)*. (See *35 Cal. L. Rev. 439; 19 So. Cal. L. Rev. 453.*) Moreover, a presumption is no longer evidence. (See *1 Cal. Evidence (4th), Burden of Proof and Presumptions, §52.*)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *General Rule.* See *Prato-Morrison v. Doe (2002) 103 C.A.4th 222, 229, 126 C.R.2d 509* [in action by plaintiff couple seeking to prove that they were genetic parents of defendant couple's daughters, trial judge properly excluded list made by fertility clinic biologist indicating that defendant wife received eggs supplied by plaintiff wife, where list was made 8 years after events in question, and biologist did not attempt to establish her personal knowledge of information contained in list]; 2 McCormick 6th, §289.



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#### 5. Sources of Information and Method of Preparation.

##### a. In General.

*1 Witkin Cal. Evid. Hearsay § 237*

[§ 237] In General.

The business records exception (*supra*, §227) was not devised to allow unreliable hearsay to be introduced merely because it was reduced to writing in a book of records. The theory of admissibility is that either the "entrant" (who entered the record, e.g., the bookkeeper or accountant) or an "informant" (e.g., a salesman, mechanic, or other person handling the transaction) had knowledge of the facts from personal observation. (See 2 McCormick 5th, §290; 5 Wigmore (Chadbourn Rev.) §1530.) "The statute ... merely provides a method of proof of an admissible 'act, condition or event.' It does not make the record admissible when oral testimony of the same facts would be inadmissible." (*McGowan v. Los Angeles* (1950) 100 C.A.2d 386, 392, 223 P.2d 862.)

The former Uniform Act (see *supra*, §227) provided that "the sources of information" must have been "such as to justify its admission." *Ev.C. 1271(d)* enacted the version used in the Uniform Rules of Evidence: "The sources of information and method and time of preparation were *such as to indicate its trustworthiness*." The Law Revision Commission Comment observes that "[t]he language of Section 1271 is more accurate, for the cases hold that admission of a business record is not justified when there is no preliminary showing that the record is reliable or trustworthy." (See *People v. Williams* (1973) 36 C.A.3d 262, 274, 111 C.R. 378 [trustworthiness of monthly profit guidebook was established even though witness could not testify as to who filled out gasoline storage forms on weekend of alleged embezzlement]; 1 A.L.R.4th 316 [authentication of bills and invoices]; 29A *Am.Jur.2d* (1994 ed.), *Evidence* §1307.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 2 McCormick 6th, §290.



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##### b. Hospital Records.

#### *1 Witkin Cal. Evid. Hearsay § 238*

#### [§ 238] Hospital Records.

Hospital records are business records (see *supra*, §232), but, like police reports (*infra*, §239), frequently contain matters learned from the patient or victim that are not within the personal knowledge of the entrant (doctor, nurse or other attendant), as well as opinions of the entrant. (See *People v. Williams* (1960) 187 C.A.2d 355, 363, 9 C.R. 722 [murder; hospital records of victim's psychotic behavior, consisting largely of hearsay statements of victim and police officers, rejected].)

However, as the court said in *People v. Gorgol* (1953) 122 C.A.2d 281, 300, 265 P.2d 69: "[I]f a proper foundation is laid, the fact that the records are hearsay and that the particular nurse, doctor or person making the record has not been called, does not preclude their admission. Nor does the fact that they contain inadmissible matter prevent their admission. Such parts should be omitted or proper instruction of the court given concerning them. Admissible matter seems to be such matter as is customarily contained in a hospital record, for example, the data required by the above mentioned Hospital Manual, and such matter as would be admissible were the person making the record present in court." (See 2 McCormick 5th, §293; 29A Am.Jur.2d (1994 ed.), Evidence §1315; 55 A.L.R.2d 1031 [physician's opinion whether patient is malingering or feigning injury]; 80 A.L.R.3d 456 [hospital records relating to patient's intoxication or sobriety]; on laying foundation, see 38 Proof of Facts 2d 145; 44 A.L.R.2d 567.)

If a medical witness refers a patient to another doctor, who sends back a report that the witness uses as part of the case history in arriving at a diagnosis and then includes in the patient's hospital records for other doctors to see, the report is admissible even though the reporting doctor is not called to the stand. Like a patient's history of an accident, however, the report is not independent proof of the facts stated. (*Springer v. Reimers* (1970) 4 C.A.3d 325, 338, 84 C.R. 486.) (See *People v. O'Tremba* (1970) 4 C.A.3d 524, 527, 84 C.R. 336 [cases are in conflict on whether hospital record may be received as evidence of medical diagnosis it contains]; *F.R. Evid.*, Rule 803(6) ["diagnoses" are admissible].)

Where the doctor's report is offered *against* the patient, the latter may invoke the statutory physician-patient privilege to exclude it. (See 14 So. Cal. L. Rev. 108; 2 Cal. Evidence (4th), Witnesses, §196.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 2 McCormick 6th, §293.



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##### c. Police and Other Accident Reports.

*1 Witkin Cal. Evid. Hearsay § 239*

[§ 239] Police and Other Accident Reports.

(1) *Inadmissible Reports.* The requirement of personal knowledge as the basis of a record is the chief barrier to the introduction of a police report of an accident. The report is a "record of an act, condition, or event" (see *supra*, §227), but is often made by an officer who did not see the accident and includes both hearsay statements of others and opinions of the officer. If so, it is inadmissible. (See *Hoel v. Los Angeles* (1955) 136 C.A.2d 295, 309, 288 P.2d 989 [accident reports "based on statements of participants, bystanders, measurements, deductions and conclusions of their own"]; *Taylor v. Centennial Bowl* (1966) 65 C.2d 114, 126, 52 C.R. 561, 416 P.2d 793; *Carlton v. Department of Motor Vehicles* (1988) 203 C.A.3d 1428, 1432, 1433, 250 C.R. 809, citing the text; *People v. Hernandez* (1997) 55 C.A.4th 225, 240, 63 C.R.2d 769 [crime analyst's testimony concerning data contained in in-house police sex crimes data base identifying crimes with modus operandi matching defendant's was improperly admitted, because data were based on police reports containing observations by persons with no official duty to observe and report relevant facts]; 2 McCormick 5th, §290; 4 *Stanf. L. Rev.* 288; 1966 A.S. 404; 69 A.L.R.2d 1148 [report as to cause of or responsibility for accident, injury, or damage]; 77 A.L.R.3d 126 [cases not admitting police reports as business records].)

In *MacLean v. San Francisco* (1957) 151 C.A.2d 133, 311 P.2d 158, the report stated that defendant city's bus was unable to stop in the bus zone because another vehicle was parked there, and that a woman passenger alighted and slipped on wet mortar apparently washed down from a construction job at a designated location. (151 C.A.2d 141.) This report did not show on its face whether it was based on the officers' own observations or those of third parties, and was therefore excluded; but the officers who prepared it were called as witnesses, and were properly allowed to use the report to refresh their recollections (3 *Cal. Evidence* (4th), *Presentation at Trial*, §177) on all matters of which they had knowledge and as to which the report would have been admissible. (151 C.A.2d 143.)

In *Reisman v. Los Angeles City School Dist.* (1954) 123 C.A.2d 493, 506, 267 P.2d 36, a wrongful death action arising out of a child's death on a blacktop-surfaced school playground, the school department, after the suit was commenced, procured a lengthy report on playground surfacing. It was designed to make out a case for blacktop hardsurfacing as the best and safest kind, and it contained a great many individual opinions of school principals and others favoring this method. *Held*, it was reversible error to admit the report.

(2) *Admissible Reports or Records.* In *People v. Aguilar* (1971) 16 C.A.3d 1001, 94 C.R. 492, an undercover agent bought balloons of heroin from defendant and delivered them to Officer B. B took the balloons to police headquarters, made a quick test and placed them in envelopes, on which he made notations. He then stored the envelopes in a police evidence locker for a few days, until he found time to bring them to a nearby state narcotics bureau depository.

Chemists made appropriate tests and kept the material in an evidence vault. Except for the officer's removing the envelopes from the police evidence locker and placing them in the chemists' depository, his other acts were corroborated. For the uncorroborated link, however, only B's notations on the face of the envelope indicated what he had done. Because B died before trial, defense counsel objected to introduction of the notations to remedy this hiatus in the chain of possession, contending that the hearsay deprived him of his constitutional right to confrontation. (See 3 *Cal. Evidence (4th), Presentation at Trial, §14.*) *Held*, the notations were properly received. The officer had followed "a practical procedure developed by the police, a procedure that has had to stand the scrutiny of defense counsel in the many narcotics cases that have been before the court." (16 *C.A.3d 1005.*) (See *Rousseau v. West Coast House Movers (1967) 256 C.A.2d 878, 886, 64 C.R. 655, 3 Cal. Evidence (4th), Presentation at Trial, §340* [arrest records, reflecting direct observations of officers, were admissible]; 77 A.L.R.3d 124 [cases admitting police reports as business records].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Inadmissible Reports*. See 2 McCormick 6th, §290; 111 A.L.R.5th 1, 116 [cases not admitting police reports as business records; superseding 77 A.L.R.3d 126, text, p. 956]. (2) *Admissible Reports or Records*. See 111 A.L.R.5th 1, 114 [cases admitting police reports as business records; superseding 77 A.L.R.3d 124, text, p. 957].



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##### d. Report of Test.

#### *1 Witkin Cal. Evid. Hearsay § 240*

#### [§ 240] Report of Test.

In *McGowan v. Los Angeles* (1950) 100 C.A.2d 386, 390, 223 P.2d 862, an action for negligent injury in a collision with a police automobile, defendant city claimed that decedent driver, Cox, was intoxicated. Toxicologists of the county coroner's office testified that a bottle labeled "Charles Cox" was received from a mortuary for blood-alcohol determination, and that the test was made. The *writing* containing the record of the test was then offered in evidence. *Held*, it was properly excluded. There was no showing that the blood was taken from the body of Cox, or of the identity of the person taking it, or when it was taken--before or after the injection of embalming fluid containing alcohol; and neither the label nor the bottle was introduced. (See *Madden v. Madden* (1958) 160 C.A.2d 422, 325 P.2d 538 [blood test for nonpaternity rejected where blood not identified; *McGowan* followed].)

The *McGowan* case should not, however, be given undue significance. It seems more than likely that the blood was that of Cox, that the test was properly performed, and that the record *could* have been admitted; but, as the court observed, "No excuse, explanation or justification was given for failure to lay the necessary foundation." (100 C.A.2d 392.) And the decision was distinguished on that ground in *Nichols v. McCoy* (1952) 38 C.2d 447, 449, 240 P.2d 569. In *Nichols*, evidence was admitted of a record of the Los Angeles County coroner's office stating that a blood test of decedent indicated the presence of 0.11 alcohol. The foundation was as follows: testimony that as a part of the regular operation of the office blood samples were collected from undertakers and analyses made; testimony of the embalmer that he took the sample before embalming, labeled the bottle, and was informed of the name of the decedent at the time of embalming and again the next day. (There was additional identification in the fact that decedent's body was the only one in the mortuary on the night the sample was taken.) *Held*, the record was properly admitted; the trial judge was justified in concluding that the embalmer's sources of information were accurate and that he would not label a bottle unless reasonably sure of its identity. (See *Wagner v. Osborn* (1964) 225 C.A.2d 36, 43, 37 C.R. 27 [report of blood-alcohol content was properly admitted; distinguishing *McGowan*]; *Sonoma v. Grant W.* (1986) 187 C.A.3d 1439, 232 C.R. 471, *infra*, §242; *People v. Champion* (1995) 9 C.4th 879, 915, 39 C.R.2d 547, 891 P.2d 93 [report of testing for fingerprints; testimony by tester's colleague sufficiently established that report was trustworthy]; 19 A.L.R.3d 1008 [report of test carried out by independent third party].)

In *Rodwin Metals v. Western Non-Ferrous Metals* (1970) 10 C.A.3d 219, 88 C.R. 778, the total price for a disputed contract depended on the exact weight and metallic content of lead fume delivered by plaintiff to defendant. The only evidence as to weight and quality was presented by plaintiff's president, who offered a signed report purporting to be on the letterhead of an assayist whom the president described as "the most respected man in his field in the City of

Philadelphia." Plaintiff had ordered the assay by telephone without any of its representatives having seen the actual sample that was tested. When the trial judge pointed out that plaintiff had not adequately proven the mode of preparation to qualify the report as a business record under *Ev.C. 1271*, defense counsel stated he did not claim the report was "fictitious." The judge then said, "This is enough for me. ... If you are trying to show it is fraudulent, that's different. But a record like this is an ordinary business record. It is something from a neutral party, a person who has an organization as a chemist and assayer and their report is entitled to great weight, especially in a field as simple as this one." *Held*, admission of the report was prejudicial error; counsel did not have to claim *fraud* to insist that hearsay be rejected unless a proper foundation for an exception was established. Although the trial judge had some discretion in determining just how much proof is required for the *mode of preparation* of a chemical analysis, in the present case, there was *none at all*. (10 C.A.3d 225.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER VI - Hearsay

### III. EXCEPTIONS TO THE RULE

#### O. Business Records.

#### 5. Sources of Information and Method of Preparation.

##### e. Other Records and Reports.

#### *1 Witkin Cal. Evid. Hearsay § 241*

[§ 241] Other Records and Reports.

(1) *Letter Warning of Product's Dangers.* In *Gall v. Union Ice Co.* (1951) 108 C.A.2d 303, 239 P.2d 48, the action was for wrongful death arising out of an explosion of a drum of sulphuric acid purchased by Union Ice Co. from defendant B and stored outside. B's sales manager testified that 4 years before the accident his company sent a warning letter to customers (including Union) about the dangers of the acid, and then B's counsel attempted to introduce the letter. *Held*, "assuming" that this came within the business records statute, the only proof offered that the letters were actually sent was testimony as to the custom of the office and the presence of a copy of the letter in the files; hence, the trial judge did not abuse his discretion in excluding the document. (108 C.A.2d 315.)

(2) *Corporate Minutes.* In *Filipino Federation of America v. Repollo* (1961) 191 C.A.2d 89, 12 C.R. 467, the court observed that former Corp.C. 832 (now Corp.C. 314), making certified minutes of a corporation admissible to show action taken at a meeting, did not make the minutes admissible for all purposes. As pointed out in *Reisman v. Los Angeles City School Dist.* (1954) 123 C.A.2d 493, 267 P.2d 36, *supra*, §239, and *McGowan v. Los Angeles* (1950) 100 C.A.2d 386, 390, 223 P.2d 862, *supra*, §240, the test is whether the contents would have been admissible as oral testimony. Here, the issue was whether plaintiff corporation, as it contended, lent defendant money for adding a room to his home, or whether, as he contended, the money was given to create a place for plaintiff's president to stay when in the area. *Held*, it was reversible error to admit, against defendant, plaintiff's minutes stating that the money was a loan. (191 C.A.2d 92, 93.)

(3) *School Records.* School records are admissible when made in the regular course of school business, but this does not mean that everything contained in the records is admissible. Those portions of a school record that would be inadmissible if the person making the record was called as a witness and examined concerning it remain inadmissible. (*People v. Arauz* (1970) 5 C.A.3d 523, 532, 85 C.R. 266 [school vice principal, called to testify from school records that defendant had been suspended, at which time he appeared sleepy and unable to talk plainly, was properly prevented from testifying that defendant was suspected of being under the influence of depressant].)

**SUPPLEMENT:** [This section is current through the latest supplement]





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## CHAPTER VI - Hearsay

### III. EXCEPTIONS TO THE RULE

#### O. Business Records.

#### 6. Laying Foundation by Authenticating Witness. a. Custodian or Other Qualified Witness.

*1 Witkin Cal. Evid. Hearsay § 242*

[§ 242] Custodian or Other Qualified Witness.

(1) *Former Law.* The early common law rule allowed the introduction of the business record as a matter of necessity when all the entrants were dead or otherwise unavailable. The later cases relaxed the requirement of producing entrants or showing unavailability as wholly impracticable in modern large business establishments, and permitted authentication of the records by persons familiar with them who were not the actual entrants. (See *Patrick v. Tetzlaff* (1920) 46 C.A. 243, 245, 189 P. 115; *Warren v. Hiltcher* (1931) 111 C.A. 318, 320, 295 P. 536; *Storm & Butts v. Lipscomb* (1931) 117 C.A. 6, 19, 3 P.2d 567; 2 McCormick 5th, §292; 5 Wigmore (Chadbourn Rev.) §1530.)

(2) *Evidence Code.* The liberal modern view is contained in the Evidence Code provision that "the custodian or other qualified witness" may testify to the conditions of admissibility. (*Ev.C. 1271(c)*; see *Doyle v. Chief Oil Co.* (1944) 64 C.A.2d 284, 292, 148 P.2d 915; *People v. Fowzer* (1954) 127 C.A.2d 742, 747, 274 P.2d 471 [forgery; assistant bank cashier, having had access to records despite not being custodian, properly testified to deposit]; *People v. Lugashi* (1988) 205 C.A.3d 632, 641, 252 C.R. 434, supra, §230; C.E.B., Effective Introduction of Evidence 2d, Chap. 13 [Business Records].)

(3) *Testimony of Technician Conducting Test Not Required.* In *Sonoma v. Grant W.* (1986) 187 C.A.3d 1439, 232 C.R. 471, a paternity action, results of a blood test (see 2 *Cal. Evidence* (4th), *Demonstrative, Experimental, and Scientific Evidence*, §74 et seq.) were offered on the testimony of Dr. Geyer, the director of the paternity testing department of Roche, the national laboratory that performed the test. Defendant objected on the ground that, without testimony of the technicians who performed the test, there was no proper foundation as to the chain of custody of the blood samples tested. *Held*, the evidence was properly admitted.

(a) The absence of the testimony of the technicians who performed the test did not preclude admission of the tests. "Dr. Geyer testified to the chain of custody—including the identification of the individuals who witnessed the drawing of the blood samples and packaged them for transmission to Roche, and who received the package at Roche and unpacked it—and how this chain of custody was documented. All normal bookkeeping entries in the chain of custody had been completed; all appropriate records and worksheets had been filled out, completed, and signed by the appropriate technologist; and the names and numbers on the test tubes used for the blood samples corresponded with the names and numbers on the technologists' worksheet." (187 C.A.3d 1449.) This testimony provided a sufficient basis for the trial court's conclusion that the laboratory's "procedures were so inherently reliable and trustworthy that a proper foundation was established as to the chain of custody of the blood samples." (187 C.A.3d 1450.)

(b) The report meets the requirements of *Ev.C. 1271*. "It records an act (blood analysis) and is offered to prove the occurrence of that act. It was made in the regular course of Roche's business and was produced at or near the time of the act. A custodian or 'other qualified witness' has testified as to the identity of the report and its mode of preparation, and his testimony provided substantial evidence of the trustworthiness both of the sources of information and the procedures employed in preparing the report." (187 *C.A.3d* 1450, 1451.) (See *Nichols v. McCoy* (1952) 38 *C.2d* 447, 449, 240 *P.2d* 569 [coroner's record of blood test of decedent; unnecessary to call person who supplied embalmer with information]; *People v. Crosslin* (1967) 251 *C.A.2d* 968, 976, 60 *C.R.* 309 [fingerprint card of sheriff's office, authenticated by officer in charge of fingerprint section; no need to produce officer who actually took prints]; *People v. Beeler* (1995) 9 *C.4th* 953, 979, 39 *C.R.2d* 607, 891 *P.2d* 153 [in admitting autopsy of murder victim, trial judge did not abuse discretion in allowing testimony by pathologist working in same office as doctor who conducted autopsy and who apparently left coroner's office under unfavorable conditions].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Former Law*. See 2 McCormick 6th, §292.

(3) *Testimony of Technician Conducting Test Not Required*. See 77 A.L.R.5th 201 [proving chain of custody for purposes of admitting blood test results]. *West's Key Number Digest*, Evidence k.369 et seq.



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### III. EXCEPTIONS TO THE RULE

#### O. Business Records.

#### 6. Laying Foundation by Authenticating Witness.

##### b. Laying the Foundation.

#### 1 Witkin Cal. Evid. Hearsay § 243

[§ 243] Laying the Foundation.

To lay the foundation for introduction of a record, the witness must testify "to its identity and the mode of its preparation." (*Ev.C. 1271(c)*.) The following are illustrative of this requirement:

(1) *Cases holding foundation properly laid.* (See *Doyle v. Chief Oil Co.* (1944) 64 C.A.2d 284, 289, 292, 148 P.2d 915; *Nichols v. McCoy* (1952) 38 C.2d 447, 449, 240 P.2d 569; *People v. Gorgol* (1953) 122 C.A.2d 281, 301, 265 P.2d 69; *Cole v. Ames* (1957) 155 C.A.2d 8, 13, 317 P.2d 662; *People v. Woods* (1958) 157 C.A.2d 617, 621, 321 P.2d 477; *People v. Williams* (1973) 36 C.A.3d 262, 275, 111 C.R. 378; *Sonoma v. Grant W.* (1986) 187 C.A.3d 1439, 1448, 232 C.R. 471, *supra*, §242.)

(2) *Cases excluding record for lack of proper foundation.* (See *McGowan v. Los Angeles* (1950) 100 C.A.2d 386, 392, 223 P.2d 862, *supra*, §240; *Pruett v. Burr* (1953) 118 C.A.2d 188, 202, 257 P.2d 690; *Gee v. Timineri* (1967) 248 C.A.2d 139, 148, 56 C.R. 211 [not prepared in normal course of business, but in anticipation of lawsuit]; *People v. Matthews* (1991) 229 C.A.3d 930, 939, 280 C.R. 134 [rap sheets used to prove defendant's prior conviction were inadmissible as business records, where custodian neither compiled information in them nor described their mode of preparation].)

A special statute enacted in 1959 streamlined the methods for production of *hospital records* in response to a subpoena duces tecum (see *Ev.C. 1560 et seq.*, 2 *Cal. Evidence* (4th), *Documentary Evidence*, §50). And in 1969, these same procedures were authorized for the records of "every kind of business" described in *Ev.C. 1270*. (*Ev.C. 1560(a)(1)*; see 2 *Cal. Evidence* (4th), *Documentary Evidence*, §50.) However, as pointed out in *Taggart v. Super Seer Corp.* (1995) 33 C.A.4th 1697, 1706, 40 C.R.2d 56, 2 *Cal. Evidence* (4th), *Documentary Evidence*, §53, a custodian's declaration may fully comply with *Ev.C. 1560*, 1561, and yet fail to provide a sufficient foundation for admission of the records under *Ev.C. 1271*.

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Cases holding foundation properly laid.* See *People v. Martinez* (2000) 22 C.4th 106, 113, 126, 91 C.R.2d 687, 990 P.2d 563 [approving *People v. Dunlap* (1993) 18 C.A.4th 1468, 23 C.R.2d 204, text, §246, which disagreed with *People v. Matthews* (1991) 229 C.A.3d 930, 280 C.R. 134, text, p. 962, as to admissibility of computer printout of criminal history records to prove prior convictions].



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## CHAPTER VI - Hearsay

### III. EXCEPTIONS TO THE RULE

#### P. Official Records and Writings.

##### 1. In General.

*1 Witkin Cal. Evid. Hearsay § 244*

[§ 244] In General.

(1) *Theory of Admissibility.* A long-established hearsay exception makes admissible the *statement of a public official*, provided the official was under a *duty to make it* and it was based on facts within the official's *personal knowledge*. The regular practice of the public office and the official duty make the statement trustworthy, and public functions could not be conveniently performed if officers and deputies were constantly called as witnesses to testify to the matters covered by official statements. (See 2 McCormick 5th, §295; 5 Wigmore (Chadbourn Rev.) §1630 et seq.; 29A *Am.Jur.2d* (1994 ed.), *Evidence* §1351; 80 A.L.R.3d 414 [admissibility of public record in absence of express statutory authorization].)

(2) *Former California Statutes.* The admissibility of official records was formerly covered in many sections of the Code of Civil Procedure and other codes, some dealing with authentication, i.e., the method of proving the record, and some with official records as evidence, i.e., their admissibility under this exception to the hearsay rule as proof of the facts recited.

(3) *Evidence Code.* The Code of Civil Procedure provisions were superseded by *Ev.C. 1280* et seq., entitled "Official Records and Other Official Writings." (See *infra*, §245 et seq.) The principal section, *Ev.C. 1280*, deals with a record by a public employee (see *infra*, §245 et seq.); others deal with special types of records (see *infra*, §250 et seq.), and with absence of a record (see *infra*, §254). (See *Fisk v. Department of Motor Vehicles* (1981) 127 C.A.3d 72, 76, 179 C.R. 379, *infra*, §247; 1 Jefferson, California Evidence Benchbook 3d, Chap. 5; C.E.B., Effective Introduction of Evidence 2d, Chap. 36 [Official Records and Writings]; 6 Santa Clara Lawyer 1; on admission of electronic documents under this exception, see *Overly on Electronic Evidence in California* §10.04.)

(4) *Federal Rules of Evidence.* *F.R. Evid., Rule 803(8)*, entitled *Public Records and Reports*, makes admissible "[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness." (See *Beech Aircraft Corp. v. Rainey* (1988) 488 U.S. 153, 109 S.Ct. 439, 450, 102 L.Ed.2d 445, 463 [portions of investigatory reports otherwise admissible under Rule 803(8)(C) are not inadmissible merely because they state a conclusion or opinion]; 29 A.L.R.5th 534 [admissibility of government factfinding under Rule 803(8) and similar state rules in products liability actions]; 4 Mueller & Kirkpatrick, *Federal Evidence* 2d, §453 et seq.; 96 *Harv. L. Rev.* 492 [The Trustworthiness of Governmental Evaluative Reports Under *Federal Rule of Evidence 803(8)(C)*]; 29A *Am.Jur.2d* (1994 ed.), *Evidence* §1352 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Theory of Admissibility*. See 2 McCormick 6th, §295.(4) *Federal Rules of Evidence*. See 180 A.L.R. Fed 61 [*F.R. Evid.*, Rule 803(8)(C)]. *West's Key Number Digest*, Evidence k.325 et seq.



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### III. EXCEPTIONS TO THE RULE

#### P. Official Records and Writings.

##### 2. Report of Public Employee.

##### a. What Constitutes Official Record.

*1 Witkin Cal. Evid. Hearsay § 245*

[§ 245] What Constitutes Official Record.

(1) *In General.* "Evidence of a writing made as a record of an act, condition, or event," made "by and within the scope of duty of a public employee," is admissible in any civil or criminal proceeding to prove the act, condition, or event. (*Ev.C. 1280*; for illustrations under former statutes, see *Ames v. Empire Star Mines Co. (1941) 17 C.2d 213, 224, 110 P.2d 13* [official reports of the Mineral Resources of the Public Domain to the Secretary of the Treasury]; *People v. Williams (1959) 174 C.A.2d 364, 390, 345 P.2d 47* [murder; coroner's autopsy record admitted as prima facie evidence of cause of death]; and see *People v. Flaxman (1977) 74 C.A.3d Supp. 16, 22, 141 C.R. 799* [engineering and traffic survey]; *People v. Parker (1992) 8 C.A.4th 110, 117, 10 C.R.2d 38* [laboratory reports detailing test and procedures used by criminalists employed by county regional laboratory]; 5 Wigmore (Chadbourn Rev.) §1639 et seq.; on whether records of public hospital come within this classification as well as under the business records exception, see *14 So. Cal. L. Rev. 104.*)

(2) *Record of Conviction.* An official record of conviction certified under *Ev.C. 1530(a)* (see *2 Cal. Evidence (4th), Documentary Evidence, §41*) is admissible under *Ev.C. 1280* to prove "the commission, attempted commission, or solicitation of a criminal offense, prior conviction, service of a prison term, or other act, condition, or event recorded by the record." (*Ev.C. 452.5(b).*) (See *People v. Woodell (1998) 17 C.4th 448, 458, 71 C.R.2d 241, 950 P.2d 85* [out-of-state appellate opinion was admissible under official records exception to prove that defendant's out-of-state assault conviction qualified as strike because it was based on personal use of weapon].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Record of Conviction.* *Ev.C. 452.5* "does not define the term 'official record of conviction,' but ... there seems little doubt that a minute order reflecting a guilty plea must fall within any definition of the record of conviction." (*People v. Duran (2002) 97 C.A.4th 1448, 1462, 119 C.R.2d 272* [in robbery prosecution in which street gang enhancement was alleged, certified minute order documenting that another member of defendants' gang suffered felony conviction was properly admitted to prove predicate offenses needed to establish pattern of criminal activity within meaning of enhancement statute].) *West's Key Number Digest, Evidence k.333 et seq.*



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### III. EXCEPTIONS TO THE RULE

#### P. Official Records and Writings.

##### 2. Report of Public Employee.

##### b. Conditions of Admissibility.

*1 Witkin Cal. Evid. Hearsay § 246*

[§ 246] Conditions of Admissibility.

(1) *Statutory Requirements.* Although the former statutes were unclear, the cases tended to require much the same showing of trustworthiness as required by the Business Records Act (*Ev.C. 1270 et seq.*). (See *supra*, §227.) The Evidence Code codified the requirement by stating two conditions of admissibility:

(a) The writing must have been made "at or near the time of the act, condition, or event." (*Ev.C. 1280(b).*)

(b) "The sources of information and method and time of preparation" must have been such as "to indicate its trustworthiness." (*Ev.C. 1280(c).*)

The Law Revision Commission Comment to *Ev.C. 1280* notes a distinction between the business records and official records exceptions: "The evidence that is admissible under this section is also admissible under Section 1271, the business records exception. However, Section 1271 requires a witness to testify as to the identity of the record and its mode of preparation in every instance. In contrast, Section 1280, as does existing law, permits the court to admit an official record or report without necessarily requiring a witness to testify as to its identity and mode of preparation if the court takes judicial notice or if sufficient independent evidence shows that the record or report was prepared in such a manner as to assure its trustworthiness."

(2) *Illustrations.* Cases finding the conditions satisfied are numerous. (See *People v. Flaxman* (1977) 74 C.A.3d Supp 16, 20, 141 C.R. 799 [certified copy of engineering and traffic survey, justifying admission of radar evidence of speeding, met trustworthiness requirement]; *Snelgrove v. Department of Motor Vehicles* (1987) 194 C.A.3d 1364, 1374, 240 C.R. 281 [arresting officer's sworn statement was admissible at suspension hearing under *Veh.C. 13353* without officer's testimony]; *People v. Dunlap* (1993) 18 C.A.4th 1468, 1476, 23 C.R.2d 204 [California Law Enforcement Telecommunications System rap sheet was admissible under *Ev.C. 1280* to prove prior convictions]; *Jackson v. Department of Motor Vehicles* (1994) 22 C.A.4th 730, 736, 737, 27 C.R.2d 712 [in administrative suspension hearing, driver's statement, contained in arresting officer's unsworn arrest report, that he had been driving, was competent evidence of that fact under hearsay exceptions for public employee records and party admissions]; *People v. George* (1994) 30 C.A.4th 262, 273, 35 C.R.2d 750 [in prosecution for possession of controlled substance in jail, card showing lock number assigned to defendant was properly admitted; deputy testified that card was filled out as routine procedure by jail personnel immediately after lock number was assigned to incoming inmate]; *Lake v. Reed* (1997) 16 C.4th 448, 467, 65 C.R.2d 860, 940 P.2d 311 [unsworn laboratory report was admissible in driver's license suspension hearing, as it indicated that it was prepared within scope of public employee's duty, near time that urine sample was tested, and

"sources of information and method and time of preparation" indicated it was trustworthy]; *People v. Monreal* (1997) 52 C.A.4th 670, 677, 678, 60 C.R.2d 737 [portions of probation report containing defendant's admissions, which established that prior crime involved use of knife and was serious felony, were admissible under *Ev.C. 1280*, as they recorded defendant's statements at or near time they were made, and nothing about preparation of report suggested untrustworthiness]; 31 A.L.R.4th 913 [admissibility of police reports].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Illustrations.* See *People v. Trujillo* (2006) 40 C.4th 165, 178, 51 C.R.3d 718, 146 P.3d 1259, 3 Cal. Crim. Law (3d), *Punishment, Supp.*, §343 [disapproving *People v. Monreal* (1997) 52 C.A.4th 670, 60 C.R.2d 737, text, p. 965; statements appearing in probation report that were made by defendant after plea of guilty was accepted are not part of record of prior conviction, and thus may not be considered in determining nature of conviction]; *Solovij v. Gourley* (2001) 87 C.A.4th 1229, 1234, 105 C.R.2d 278 [distinguishing *Lake v. Reed* (1997) 16 C.4th 448, 65 C.R.2d 860, 940 P.2d 311, text, p. 965; trial judge properly overturned Department of Motor Vehicle's order suspending driver's license on ground there was no competent evidence in arresting officer's sworn report to justify initial stop and detention; although officer's unsworn report was admissible, DMV could not rely on it to evade requirement of *Veh.C. 13380* that sworn report include "all information relevant to the enforcement action"]; *Dibble v. Gourley* (2002) 103 C.A.4th 496, 501, 503, 126 C.R.2d 709 [although arresting officer's unsworn report would have been inadmissible, over objection, in administrative hearing concerning suspension of driver's license, driver waived objection by failing to attend, and, in any case, sworn report, to which unsworn report was attached, supported finding of probable cause to believe driver was driving under influence of alcohol]; *Grundy v. Gourley* (2003) 110 C.A.4th 20, 24, 1 C.R.3d 104 [trial judge erred in overturning license suspension based on finding that officer's sworn report failed to establish probable cause for driver's arrest, and on belief that live testimony from administrative hearing could not be considered; *Solovij* precludes department from basing suspension on sworn report consisting only of legal conclusion, without supporting facts, but does not prohibit trial judge's consideration of additional evidence from administrative record]; *Morgenstern v. Department of Motor Vehicles* (2003) 111 C.A.4th 366, 376, 377, 4 C.R.3d 46 [distinguishing *Solovij*; omissions in officer's sworn report may be remedied by introducing officer's sworn testimony]; *Bhatt v. Department of Health Services* (2005) 133 C.A.4th 923, 929, 35 C.R.3d 335 [in administrative hearing following Office of Medi-Cal Dental Services' findings of irregularities in dentist's Medi-Cal billings, administrative law judge did not err in admitting claim detail reports for Medi-Cal patients as official records, even though reports were prepared by private company; private company was acting as fiscal intermediary for state]; 112 A.L.R.5th 621 [admissibility of police reports; superseding 31 A.L.R.4th 913, text, p. 965].

At an administrative per se review hearing conducted by the Department of Motor Vehicles, the department may, in addition to considering the arresting officer's sworn statement, also consider any unsworn statement by the same officer. *Veh.C. 13380* provides that the arresting officer's sworn report will contain "all information relevant to the enforcement action." Thus, "the Legislature clearly anticipates the sworn report will contain all or nearly all of the information necessary to remove the offender's license. In light of this legislative intent, the sworn report cannot be wholly devoid of relevant information. However, so long as a sworn report is filed, it is consistent with the relaxed evidentiary standards of an administrative per se hearing that technical omissions of proof can be corrected by an unsworn report filed by the arresting officer." (*MacDonald v. Gutierrez* (2004) 32 C.4th 150, 153, 159, 8 C.R.3d 48, 81 P.3d 975 [after driver was arrested for driving with illegal blood-alcohol level and department, at administrative hearing, upheld license suspension, trial judge erred in setting aside suspension on ground that unsworn statements of arresting officer were inadmissible and sworn statement did not by itself provide reasonable cause for stop; disapproving *Solovij* and *Dibble*, *supra*, to extent they suggested that department may not consider unsworn report by arresting officer that is intended to supplement officer's sworn report].)





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### III. EXCEPTIONS TO THE RULE

#### P. Official Records and Writings.

##### 2. Report of Public Employee.

##### c. Relation to Presumption of Official Duty.

*1 Witkin Cal. Evid. Hearsay § 247*

[§ 247] Relation to Presumption of Official Duty.

In *Fisk v. Department of Motor Vehicles* (1981) 127 C.A.3d 72, 179 C.R. 379, F was arrested by a highway patrol officer for driving while drunk, and the officer, in accordance with the implied consent statute (2 Cal. Evidence (4th), Witnesses, §427), submitted to the Department of Motor Vehicles a document entitled "Officer's Statement, Section 13353 Vehicle Code," reciting his observations of F's driving, appearance, speech, walking and odor of alcohol, and also reciting the officer's warning on the effect of refusal to submit to a test and F's refusal to do so. At the administrative hearing, the officer testified that he had prepared the document when the events were fresh in his mind, though he had no independent recollection of the incident. *Held*, the document was admissible and sufficient to sustain a license suspension. The conditions of Ev.C. 1280 were satisfied, and the presumption of official duty regularly performed under Ev.C. 664 (1 Cal. Evidence (4th), Burden of Proof and Presumptions, §89) was also applicable, and could help lay the foundation for admissibility. (127 C.A.3d 77.) Although Ev.C. 664 is expressly inapplicable on an issue as to lawfulness of a warrantless arrest, it does apply to other issues involved in this proceeding. (127 C.A.3d 78.) Hence, Fisk has the burden of showing that the officer failed in his duty to observe the events and describe them correctly. (127 C.A.3d 78.)

The opinion adds: "Commentators have recognized the interrelationship between the official records hearsay exception and the presumption of proper performance of official duty. Thus, Wigmore points out that the essential 'circumstantial probability of trustworthiness' justifying the common law exception to the hearsay rule for official statements 'is related in its thought to the presumption that public officers do their duty. When it is a part of the *duty of a public officer* to make a statement as to a fact coming within his official cognizance, the great probability is that he does his duty and makes a correct statement. ... It is the influence of the official duty, broadly considered, which is taken as the sufficient element of trustworthiness, justifying the acceptance of the hearsay statement.' " (See *Snelgrove v. Department of Motor Vehicles* (1987) 194 C.A.3d 1364, 1375, 240 C.R. 281 [following *Fisk*]; *Jackson v. Department of Motor Vehicles* (1994) 22 C.A.4th 730, 738, 739, 27 C.R.2d 712 [following *Fisk* and *Snelgrove*]; *Poland v. Department of Motor Vehicles* (1995) 34 C.A.4th 1128, 1136, 40 C.R.2d 693 [no extrinsic evidence needed to show that documents were in fact made by public employee; under Ev.C. 1453 (2 Cal. Evidence (4th), Documentary Evidence, §24), highway patrol officer's signature provided sufficient authentication].)

In *Shea v. Department of Motor Vehicles* (1998) 62 C.A.4th 1057, 72 C.R.2d 896, a driver challenged the administrative suspension of his license for driving with an illegal blood-alcohol concentration. Because the forensic alcohol tests were performed by unsupervised, and therefore unqualified, trainees, the trial judge set aside the suspension. *Held*, this was proper. Under the circumstances, the official duty presumption could not be used to bring the

test results in under the official records exception. "Since a trainee has no official duty to report the test results, his or her results are not entitled to the presumption that official duty was performed." (62 C.A.4th 1061.) (See *Manning v. Department of Motor Vehicles* (1998) 61 C.A.4th 273, 275, 276, 71 C.R.2d 647 [forensic report was inadmissible where computer printout stated that urine sample was not submitted to laboratory until day after test was supposedly performed, and test was performed by trainee, with no indication she was supervised].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Martinez* (2000) 22 C.4th 106, 126, 91 C.R.2d 687, 990 P.2d 563 [uncertified computer printout reporting criminal history information was properly admitted under *Ev.C. 1280* to show that defendant served prior prison terms; testimony of paralegal familiar with state and county criminal history records, together with presumption that official duties were performed (*Ev.C. 664*), established that printout was made by, and within scope of duty of, public employee]; *Furman v. Department of Motor Vehicles* (2002) 100 C.A.4th 416, 422, 122 C.R.2d 520 [driver's license suspension was properly set aside; DMV conceded that document entitled "Forensic Alcohol Analysis," which showed driver's blood-alcohol level was beyond legal limit, was hearsay, and official duty presumption could not apply, as department provided no foundational evidence to support finding that criminalist who signed report had official duty to perform test and record results]; *Shannon v. Gourley* (2002) 103 C.A.4th 60, 65, 126 C.R.2d 327 [distinguishing *Shea v. Department of Motor Vehicles* (1998) 62 C.A.4th 1057, 72 C.R.2d 896, text, p. 966; DMV produced substantial evidence that trainee who performed blood-alcohol test was adequately supervised]; *Hernandez v. Gutierrez* (2003) 114 C.A.4th 168, 175, 7 C.R.3d 307 [in driver's license suspension proceeding, driver failed to rebut presumption that breath test results were obtained in compliance with applicable regulations; although officer, rather than test operator, observed driver for required 15 minutes before test was performed, regulations do not require observation to be by operator; distinguishing *Shea*]; *Glatman v. Valverde* (2006) 146 C.A.4th 700, 705, 53 C.R.3d 319 [trial judge did not err in ordering Department of Motor Vehicles to set aside license suspension on ground that blood-alcohol test results were not timely recorded as required by *Ev.C. 1280(b)*; timely recordation could not be presumed under *Ev.C. 664*, as no particular statute or regulation imposed timeliness duty that could be presumed to have been met].



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## CHAPTER VI - Hearsay

### III. EXCEPTIONS TO THE RULE

#### P. Official Records and Writings.

##### 2. Report of Public Employee.

##### d. Public Employee Record Containing Other Employee's Observations.

#### *1 Witkin Cal. Evid. Hearsay § 248*

[§ 248] Public Employee Record Containing Other Employee's Observations.

In *Gananian v. Zolin* (1995) 33 C.A.4th 634, 39 C.R.2d 384, the court disagreed with prior holdings or dicta to the effect that the public employee records exception is applicable only if the person making the record has personal knowledge of the recorded facts. Plaintiff petitioned the superior court to set aside the suspension of his driver's license. In administrative proceedings concerning the suspension, the Department of Motor Vehicles had relied on the sworn report of a Highway Patrol officer containing observations of a deputy sheriff as to plaintiff's erratic driving. The trial judge granted the petition, finding that the sworn report qualified under the public records exception only insofar as it reported the personal observations of the Highway Patrol officer, and without the unsworn observations of the deputy sheriff there was insufficient evidence that plaintiff had been driving. *Held*, reversed.

(a) The Highway Patrol officer's report qualified as an admissible public employee record under *Ev.C. 1280* even to the extent that it reported the deputy sheriff's personal observations. *Imachi v. Department of Motor Vehicles* (1992) 2 C.A.4th 809, 3 C.R.2d 478, states a contrary rule, but neither of the cases it relies on (*Fisk v. Department of Motor Vehicles* (1981) 127 C.A.3d 72, 179 C.R. 379, and *Snelgrove v. Department of Motor Vehicles* (1987) 194 C.A.3d 1364, 1375, 240 C.R. 281, *supra*, §247) establishes that personal knowledge is a prerequisite to application of the public employee records exception. In both cases, the court simply found that the sworn statement at issue was trustworthy because it contained the firsthand observations of the reporting officer. (33 C.A.4th 642.)

(b) The court in *Cantrell v. Zolin* (1994) 23 C.A.4th 128, 28 C.R.2d 238, asserted that a sworn statement by one officer reporting another officer's observations of the licensee's driving would be insufficient to support a finding that the licensee was driving, as the second officer's observations were hearsay. However, this assertion was not supported by any analysis and, in any event, was dictum because the licensee did not object to the report's introduction as proof that he was driving. (33 C.A.4th 644.)

(c) In the present case, plaintiff offered no evidence contradicting the deputy sheriff's observations. Because those observations were admissible under the public employee records exception, there was sufficient evidence that plaintiff was driving and the department's action should have been upheld. (33 C.A.4th 641.) (See *McNary v. Department of Motor Vehicles* (1996) 45 C.A.4th 688, 695, 53 C.R.2d 55 [following *Gananian*]; on admissibility of reports containing observations by third parties who are not officials, see *infra*, §249.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Hildebrand v. Department of Motor Vehicles* (2007) 152 C.A.4th 1562, 1571, 62 C.R.3d 234 [police officer's

written report, which contained statements by fire captain who had observed driver's vehicle stuck on railroad tracks and, in helping him out of vehicle, had noticed that he appeared inebriated, was admissible in administrative suspension hearing to establish that driver had been driving].



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### III. EXCEPTIONS TO THE RULE

#### P. Official Records and Writings.

#### 2. Report of Public Employee.

#### e. Inadmissible Reports and Statements.

#### 1 *Witkin Cal. Evid. Hearsay* § 249

[§ 249] Inadmissible Reports and Statements.

(1) *In General.* The general tendency of the courts is to exclude matters that would not be permitted as testimony if the official were appearing personally. Thus, where the statement contains the observations of persons other than the official making the report, application of the trustworthiness requirement (*supra*, §246) may result in the report's exclusion. Reports containing conclusions are also subject to exclusion. (See *McGowan v. Los Angeles* (1950) 100 C.A.2d 386, 391, 223 P.2d 862 [verdict of coroner's jury cannot be offered to prove cause of death]; *Reisman v. Los Angeles City School Dist.* (1954) 123 C.A.2d 493, 506, 267 P.2d 36, *supra*, §239; *Behr v. Santa Cruz* (1959) 172 C.A.2d 697, 705, 342 P.2d 987 [official report of fire ranger on cause of fire, based primarily on statements made to him by others]; *People v. Baeske* (1976) 58 C.A.3d 775, 781, 130 C.R. 35 [source of information was telephone call from witness to robbery, giving license number of getaway car; witness was not public employee with duty to observe facts correctly or report observations accurately to police department]; *Elsworth v. Beech Aircraft Corp.* (1984) 37 C.3d 540, 554, 208 C.R. 874, 691 P.2d 630 [report to congressional subcommittee, author unknown, did not meet test]; *People v. Campos* (1995) 32 C.A.4th 304, 309, 38 C.R.2d 113 [in proceeding to review defendant's classification as mentally disordered offender, reports of nontestifying medical experts and defendant's probation report did not qualify for admission under official records exception, as they were records of conclusions, not "act, condition, or event"]; on admissibility of police officer's report, containing observations by other officers, to support driver's license suspension, see *supra*, §247.)

(2) *Conclusions as to Cause of Injury.* The exclusionary rule is strictly applied where the report states the cause of and responsibility for injury to person or property. In *Pruett v. Burr* (1953) 118 C.A.2d 188, 257 P.2d 690, plaintiff sued for damage to his cotton crop caused by contaminated spray used by defendant. The trial judge admitted in evidence a letter and memorandum written by officers of the State Department of Agriculture, reciting the facts of their investigation of the damage, their conferences with interested parties, inspection and tests, etc., and tending to show the presence of a contaminant. *Held*, this was prejudicial error. "[R]ecords of investigations and inquiries conducted either voluntarily or pursuant to requirement of law by public officers concerning causes and effects, and involving the exercise of judgement and discretion, expressions of opinion, and the making of conclusions, are not admissible in evidence as public records." (118 C.A.2d 200, quoting *Am.Jur.*) (See 29A *Am.Jur.2d* (1994 ed.), *Evidence* §1363 et seq.; 69 A.L.R.2d 1148 [official report as to cause of accident or injury].)

(3) *Proof of Contents Not Proof of Truth.* In *re Shannon C.* (1986) 179 C.A.3d 334, 224 C.R. 516, a proceeding to declare a child free from defendant father's custody and control, analyzes *Ev.C. 1280* and *Ev.C. 1530* (2 *Cal. Evidence*

(4th), *Documentary Evidence*, §41). Defendant had been on active duty with the United States Navy when his daughter was made a dependent of the juvenile court. A plan of family reunification called for defendant to visit his daughter whenever possible and to become as involved as he could with programs that met her needs. Defendant testified that his involvement had been limited because he had been at sea much of the time. The trial judge relied on *Ev.C. 1530* to admit copies of what were allegedly the originals of employment plans or schedules of defendant's ship showing its whereabouts for the months in question. Based on those naval records, the judge concluded that defendant had failed to comply with the reunification plan. *Held*, reversed.

(a) *Ev.C. 1530* did not authorize admission of the copies of the naval records to prove the *truth* of the matters stated therein; the section deals with the use of a copy of a writing in official custody to prove the *content* of the original. (179 C.A.3d 342.)

(b) In order to overcome the hearsay rule and establish the truth of the information contained in the writing, the foundational requirements of *Ev.C. 1280* must be satisfied, and there was no testimony to establish those requirements. "The records do not show who prepared them, when they were prepared, or the method of preparation. Indeed, although the records were admitted for the purpose of showing the whereabouts of the *U.S.S. Carpenter* between April and July 1979, the records are described on their face as 'employment schedules' and by the certificate of authenticity as 'planned employment schedules.' If language is given its ordinary meaning, the documents are schedules showing where the ship was supposed to go, not where it actually went." (179 C.A.3d 343.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General*. See *Alvarez v. Jacmar Pac. Pizza Corp.* (2002) 100 C.A.4th 1190, 1206, 122 C.R.2d 890 [in premises liability action against restaurant by survivors of patron who was murdered on premises, records of 911 calls from restaurant concerning previous incidents at restaurant were multiple hearsay and were properly excluded because individuals who placed calls had no duty to correctly observe and reports facts; relying on *People v. Baeske* (1976) 58 C.A.3d 775, 130 C.R. 35, text, p. 968].



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CHAPTER VI - Hearsay

III. EXCEPTIONS TO THE RULE

P. Official Records and Writings.

3. Report of Vital Statistics.

a. Admissible Public Records.

*1 Witkin Cal. Evid. Hearsay § 250*

[§ 250] Admissible Public Records.

Marriage, birth, and death certificates by clergy and physicians, when recorded or filed, are admissible public records. (See 2 McCormick 5th, §297; 5 Wigmore (Chadbourn Rev.) §1642 et seq.; on death certificate, see 21 A.L.R.3d 418; on census records, see 2 *Hastings L. J.* 9.)

*Health & Saf.C. 103550* expressly provides for admissibility of California records of vital statistics. *Ev.C. 1281* goes further, making admissible reports of this type from other jurisdictions. Evidence of "a writing made as a record of a birth, fetal death, death, or marriage" is admissible "if the maker was required by law to file the writing in a designated public office and the writing was made and filed as required by law."

*F.R. Evid., Rule 803(9)* makes admissible "records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law." (See 4 Mueller & Kirkpatrick, *Federal Evidence* 2d, §459; 29A *Am.Jur.2d* (1994 ed.), *Evidence* §1372 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 2 McCormick 6th, §297. *West's Key Number Digest*, Evidence k.334 et seq.



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#### P. Official Records and Writings.

##### 3. Report of Vital Statistics.

##### b. Knowledge and Opinion Rule.

*1 Witkin Cal. Evid. Hearsay § 251*

[§ 251] Knowledge and Opinion Rule.

The personal knowledge requirement and the opinion rule have sometimes been held to exclude that part of a doctor's death certificate that attempts to state the *cause* of death on the basis of hearsay or conjecture. (See 2 McCormick 5th, §297; 5 Wigmore (Chadbourn Rev.) §1646.) There is similar authority regarding coroner's records. (See *Pacific Freight Lines v. Industrial Acc. Com.* (1945) 26 C.2d 234, 238, 157 P.2d 634 [Arizona certificate of coroner's jury held mere opinion, dependent on facts]; *McClafflin v. Bayshore Equipment Rental Co.* (1969) 274 C.A.2d 446, 455, 79 C.R. 337, supra, §14 [coroner's death record; conclusory statement--"when leg of step ladder broke"--excluded].)

However, statutes requiring a statement of the cause may make the certificate prima facie evidence of the facts stated therein. (See *Health & Saf.C. 102825, 102860, 103550.*)

In *People v. Holder* (1964) 230 C.A.2d 50, 40 C.R. 655, defendant, charged with manslaughter by vehicle, stipulated to submit the case on the record of the preliminary examination. Then, when found guilty, he appealed, challenging sufficiency of the proof that the collision was the proximate cause of death of the two victims. The prosecution relied mainly on the death certificates. The court found the evidence otherwise sufficient; but, in a strong dictum, it questioned the use of a death certificate to establish the cause of death in a criminal case, where the defendant is entitled to confrontation of witnesses against him, and the author of the document is not available for cross-examination. (230 C.A.2d 54.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 2 McCormick 6th, §297.





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#### P. Official Records and Writings.

#### 4. Federal Finding of Presumed Death.

##### *1 Witkin Cal. Evid. Hearsay § 252*

[§ 252] Federal Finding of Presumed Death.

(1) *The Statute.* *Ev.C. 1252* provides a convenient method of proof of death of persons covered by the Federal Missing Persons Act. "A written finding of presumed death made by an employee of the United States authorized to make such finding pursuant to the Federal Missing Persons Act ... as enacted or as heretofore or hereafter amended, shall be received in any court, office, or other place in this state as evidence of the death of the person therein found to be dead and of the date, circumstances, and place of his disappearance." (On administration of estates of missing persons presumed dead, see *12 Summary (9th), Wills and Probate, §350 et seq.*)

The Federal Missing Persons Act was repealed in 1966 and replaced by a "missing employees" statute (*5 U.S.C., §5561 et seq.*) and a "missing service members" statute (*37 U.S.C., §551 et seq.*).

(2) *Distinction: Date of Death.* The statute gives evidentiary effect to the finding of the date of *disappearance*, but not the date of *death*. This is explained by the Law Revision Commission: "The determination by the federal employee of the *date* of the presumed death is a determination ordinarily made for the purpose of determining whether the pay of a missing person should be stopped and his name stricken from the payroll. The date so determined should not be given any consideration in the California courts since the issues involved in the California proceedings require determination of the date of death for a different purpose. Hence, Section 1282 does not make admissible the finding of the *date* of presumed death. On the other hand, the determination of the date, circumstances, and place of *disappearance* is reliable information that will assist the trier of fact in determining the date when the person died and is admissible under this section. Often the date of death may be inferred from the circumstances of the disappearance." (Law Rev. Com. Comment to *Ev.C. 1282.*)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *The Statute.*

*Cross-Reference:* *14 Summary (10th), Wills and Probate, §365 et seq.*



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P. Official Records and Writings.

5. Federal Report of Missing Person.

*1 Witkin Cal. Evid. Hearsay § 253*

[§ 253] Federal Report of Missing Person.

An official written report or record of an authorized federal employee is admissible as evidence that a person "is missing, missing in action, interned in a foreign country, captured by a hostile force, beleaguered by a hostile force, besieged by a hostile force, or detained in a foreign country against his will, or is dead or is alive." (*Ev.C. 1283.*) (On setting aside property of missing federal personnel, see *12 Summary (9th), Wills and Probate, §829 et seq.*; on conservatorship of estates of missing persons, see *12 Summary (9th), Wills and Probate, §876 et seq.*)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Property of missing federal personnel:*

*Cross-Reference:* *14 Summary (10th), Wills and Probate, §1073 et seq.*

*Conservatorship of estates of missing persons:*

*Cross-Reference:* *14 Summary (10th), Wills and Probate, §949.*



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P. Official Records and Writings.

6. Statement of Absence of Public Record.

*1 Witkin Cal. Evid. Hearsay § 254*

[§ 254] Statement of Absence of Public Record.

(1) *Evidence Code*. The absence of a public record in a public office may be proved by a "writing made by the public employee who is the official custodian of the records." The writing must recite "diligent search and failure to find" the record. (*Ev.C. 1284*.)

The justifications for this provision are the likelihood of accuracy of the statement, and the necessity of providing a simple and inexpensive method of proof. (*Law Rev. Com. Comment to Ev.C. 1284*.)

(2) *Federal Rules of Evidence*. *F.R. Evid., Rule 803(10)* makes the following admissible: "To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry." (See 4 Mueller & Kirkpatrick, *Federal Evidence* 2d, §460; 29A *Am.Jur.2d* (1994 ed.), *Evidence* §1376 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER VI - Hearsay

## III. EXCEPTIONS TO THE RULE

## Q. Former Testimony.

## 1. In General.

## a. Nature and Theory of Exception.

*1 Witkin Cal. Evid. Hearsay § 255*

[§ 255] Nature and Theory of Exception.

The "former testimony" exception to the hearsay rule permits the introduction of evidence of the testimony of a witness at a former civil or criminal action or proceeding where the witness is unavailable and cannot be produced at the present trial. The common law rule is usually codified by statutes varying in language and calling for interpretation to give them scope and effect. (See generally *Ev.C. 1290* et seq.; Model C., Rule 511; Unif. Rule 804(b)(1); *People v. Bird* (1901) 132 C. 261, 263, 64 P. 259 [discussing statute prior to 1911 amendment allowing prosecution and defendant to offer testimony at former criminal trial]; *Gates v. Pendleton* (1925) 71 C.A. 752, 758, 236 P. 365 [former statute construed in accordance with common law rule]; *Werner v. State Bar* (1944) 24 C.2d 611, 616, 150 P.2d 892 [purpose of former requirement of same parties and subject matter]; 2 McCormick 5th, §301 et seq.; 5 Wigmore (Chadbourn Rev.) §1372 et seq.; 29A *Am.Jur.2d* (1994 ed.), *Evidence* §891; 28 Proof of Facts 2d 1; 74 A.L.R.2d 521.)

Because the major policy underlying the hearsay rule is the need for cross-examination to test credibility (*supra*, §1), former testimony subject to cross-examination is a highly reliable kind of evidence, and it is sometimes said that the evidence is admitted because the rule "is satisfied." (See 5 Wigmore (Chadbourn Rev.) §1370; *People v. Bianchi* (1934) 140 C.A. 698, 700, 35 P.2d 1032 [quoting Wigmore]; 8 *So. Cal. L. Rev.* 247.)

The conventional approach, however, treats former testimony as hearsay because the witness is not subject to cross-examination in the present trial. The evidence is then received under this exception to the hearsay rule. (2 McCormick 5th, §301; *Ev.C. 1291*.) It may also be used as a prior inconsistent statement to impeach the witness. (See 2 McCormick 5th, §301; 3 *Cal. Evidence* (4th), *Presentation at Trial*, §315 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See CALCRIM, No. 317 [Former Testimony of Unavailable Witness]; 2 McCormick 6th, §301 et seq. *West's Key Number Digest*, Criminal Law k.539 et seq.; *Evidence* k.575 et seq.



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#### Q. Former Testimony.

##### 1. In General.

##### b. Former Law.

*1 Witkin Cal. Evid. Hearsay § 256*

[§ 256] Former Law.

Former C.C.P. 1870(8) narrowly restricted the scope of this exception as follows:

(1) *Requirement of Identity of Parties (Mutuality)*. The present parties--the proponent of the evidence and the opponent--had to be parties to the former action. (See *Redwing v. Moncravie* (1934) 138 C.A. 432, 434, 32 P.2d 408; *Smith v. Schwartz* (1939) 35 C.A.2d 659, 664, 96 P.2d 816.)

The cases liberalized the requirement so that substantial identity sufficed. (See *People v. Bianchi* (1934) 140 C.A. 698, 700, 35 P.2d 1032; *Werner v. State Bar* (1944) 24 C.2d 611, 616, 150 P.2d 892; 2 U.C.L.A. L. Rev. 56; 5 So. Cal. L. Rev. 209; 5 *Stanf. L. Rev.* 535.) And where both proponent and opponent were parties to the prior action, the fact that there were also additional parties to either action was not an objection. (See *Gates v. Pendleton* (1925) 71 C.A. 752, 756, 236 P. 365; *People v. Bianchi, supra*.)

A further liberalization was made by applying the "privity" theory to satisfy the requirement where a present party was a successor in interest or otherwise related in interest to a former party. (See *Fredericks v. Judah* (1887) 73 C. 604, 608, 15 P. 305; *Briggs v. Briggs* (1889) 80 C. 253, 256, 22 P. 334; 5 So. Cal. L. Rev. 209.)

(2) *Requirement of Identity of Issues (Same Subject Matter)*. The prior action must have related to "the same matter," so that the issues were the same in both cases. (See *Werner v. State Bar, supra*; *Kuck v. Raftery* (1931) 117 C.A. 755, 762, 4 P.2d 552; *Redwing v. Moncravie, supra*; *Smith v. Schwartz, supra*; 70 A.L.R.2d 494.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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### III. EXCEPTIONS TO THE RULE

#### Q. Former Testimony.

##### 1. In General.

#### c. Evidence Code and Federal Rules.

*1 Witkin Cal. Evid. Hearsay § 257*

[§ 257] Evidence Code and Federal Rules.

(1) *Evidence Code*. Both of the restrictions in former C.C.P. 1870(8) (supra, §256) were criticized. (See 2 McCormick 5th, §§303, 304; 5 Wigmore (Chadbourn Rev.) §1388; 5 *Stanf. L. Rev.* 535; 2 *U.C.L.A. L. Rev.* 57; 1953 A.S. 774; 1954 A.S. 773; 1963 A.S. 294.) Both were eliminated by the Uniform Rules of Evidence, which substituted the test of identity of interest and motive, and *Ev.C. 1291* and *1292* followed the Uniform Rule. (See *infra*, §264 et seq.)

The Code covers the exception in four sections: (1) *Ev.C. 1290*, defining "former testimony" by listing the types of prior proceedings (see *infra*, §258 et seq.); (2) *Ev.C. 1291*, on former testimony offered against a party to the former proceeding (see *infra*, §§264, 265); (3) *Ev.C. 1292*, on former testimony offered against a person not a party to the former proceedings (see *infra*, §266); and (4) *Ev.C. 1293*, on former testimony of a minor child victim of a crime (see *infra*, §261). (1 Jefferson, California Evidence Benchbook 3d, Chap. 8; C.E.B., Effective Introduction of Evidence 2d, Chap. 28 [Former Testimony]; see 9 *U.C. Davis L. Rev.* 167.)

Former testimony can only be offered when the witness is *unavailable*. (*Ev.C. 1291, 1292*.) The reasons for this condition are that present cross-examination is a valuable right, and that the judge or jury should, if possible, "obtain the elusive and incommunicable evidence of a witness' deportment while testifying." (*Blache v. Blache* (1951) 37 *C.2d* 531, 535, 233 *P.2d* 547 [quoting Wigmore]; see *Williams v. Hartford Ins. Co.* (1983) 147 *C.A.3d* 893, 899, 195 *C.R.* 448; *People v. Pitts* (1990) 223 *C.A.3d* 1547, 1557, 273 *C.R.* 389 [unavailability not established]; *L & B Real Estate v. Superior Court* (1998) 67 *C.A.4th* 1342, 1348, 79 *C.R.2d* 759 [unavailability requirement applied in summary judgment proceeding in wrongful death action in which defendant attempted to introduce transcript testimony from prior criminal proceeding arising from same incident]; 2 McCormick 5th, §302; 5 Wigmore (Chadbourn Rev.) §§1395, 1396, 1402 et seq.; on what constitutes unavailability, see *supra*, §18 et seq.)

(2) *Federal Rules of Evidence*. *F.R. Evid., Rule 804(b)(1)* makes admissible the following: "Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." (See *United States v. Salerno* (1992) 505 *U.S.* 317, 112 *S.Ct.* 2503, 2507, 120 *L.Ed.2d* 255, 262 [construing "similar motive" requirement]; 4 Mueller & Kirkpatrick, *Federal Evidence* 2d, §488 et seq.; 29A *Am.Jur.2d* (1994 ed.), *Evidence* §891 et seq.; 149 *A.L.R. Fed* 231 [admissibility of grand jury testimony by unavailable witness under federal rules].)

**SUPPLEMENT:** [This section is current through the latest supplement]  
(1) *Evidence Code*. See 2 McCormick 6th, §§303, 304.



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CHAPTER VI - Hearsay

III. EXCEPTIONS TO THE RULE

- Q. Former Testimony.
- 2. Former Proceeding.
- a. Prior Civil Proceeding.

*1 Witkin Cal. Evid. Hearsay § 258*

[§ 258] Prior Civil Proceeding.

The first class of proceedings listed in *Ev.C. 1290* includes "another action" or "a former hearing or trial of the same action." (*Ev.C. 1290(a)*.) This makes admissible former testimony taken in the prior trial of a civil action. (See *Gates v. Pendleton* (1925) 71 C.A. 752, 758, 236 P. 365; 2 McCormick 5th, §305; 5 Wigmore (Chadbourn Rev.) §1401; 29A *Am.Jur.2d* (1994 ed.), *Evidence* §891.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 2 McCormick 6th, §305. *West's Key Number Digest*, Evidence k.577.5





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## CHAPTER VI - Hearsay

### III. EXCEPTIONS TO THE RULE

- Q. Former Testimony.
- 2. Former Proceeding.
- b. Prior Criminal Proceeding.
- 1. Prior Criminal Trial.

#### 1 Witkin Cal. Evid. Hearsay § 259

[§ 259] Prior Criminal Trial.

(1) *Former Law*. P.C. 686(3)(a), which formerly covered this subject, provided: "Hearsay evidence may be admitted to the extent that it is otherwise admissible in a criminal action under the law of this state." (On the former law, see *People v. Murphy* (1872) 45 C. 137, 143; *People v. Bianchi* (1934) 140 C.A. 698, 700, 35 P.2d 1032; *Werner v. State Bar* (1944) 24 C.2d 611, 614, 150 P.2d 892 [former criminal prosecution, subsequent disbarment proceeding]; *People v. Carswell* (1959) 51 C.2d 602, 605, 335 P.2d 99; *People v. Lint* (1960) 182 C.A.2d 402, 420, 6 C.R. 95 [coroner's inquest not a former trial, testimony not admissible in criminal trial].)

(2) *Evidence Code*. Because "action" includes "criminal action" (*Ev.C. 105*), *Ev.C. 1291*, dealing with evidence against a former party (*infra*, §264), is applicable. And, as stated by the Law Revision Commission: "Section 1291 will also permit a broader range of hearsay to be introduced against the defendant in a criminal action than has been permitted under *Penal Code Section 686*. Under that section, former testimony has been admissible against the defendant in a criminal action only if the former testimony was given in the same action--at the preliminary examination, in a deposition, or in a prior trial of the action. Likewise, Section 1291 will permit a broader range of hearsay to be introduced against the prosecution in a criminal action since the people of the State of California are a party to all criminal actions." (Law Rev. Com. Comment to *Ev.C. 1291*; see *People v. Ashford* (1968) 265 C.A.2d 673, 678, 71 C.R. 619 [witness at first trial away on trip at time of second trial, and 60-day period for speedy trial would expire shortly]; *People v. Williams* (1968) 265 C.A.2d 888, 892, 71 C.R. 773, *supra*, §20; 5 Wigmore (Chadbourn Rev.) §1397 et seq.; 70 A.L.R.2d 1179 [use of criminal action testimony in later civil case].)

*Ev.C. 1292*, dealing with evidence against a person not a former party (*infra*, §266), permits use of former testimony from a civil or criminal action in a subsequent *civil* action, but does not permit former testimony to be used in a subsequent *criminal* action. It would be a serious, and doubtless unconstitutional, violation of the defendant's right of confrontation. (See Law Rev. Com. Comment to *Ev.C. 1292*; on constitutional right of confrontation, see *Pointer v. Texas* (1965) 380 U.S. 400, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923, 926, 5 Cal. Crim. Law (3d), *Criminal Trial*, §531; *Barber v. Page* (1968) 390 U.S. 719, 88 S.Ct. 1318, 1322, 20 L.Ed.2d 255, 260.)

Another limiting rule applies to *the defendant's testimony at a probation revocation hearing* held before disposition of criminal charges arising from the same activities. At the subsequent criminal proceedings, the defendant's former testimony is inadmissible except for impeachment or rebuttal and, even then, only if the direct testimony is so clearly inconsistent with the revocation hearing testimony that perjury is probable. (*People v. Coleman* (1975) 13 C.3d 867,

889, 120 C.R. 384, 533 P.2d 1024, 2 Cal. Evidence (4th), Witnesses, §380.)

In *People v. O'Connell* (1984) 152 C.A.3d 548, 199 C.R. 542, defendant was charged with burglary, defendant testified, and the jury was unable to agree. In a second trial, he did not testify, but a police officer testified to incriminating admissions made by defendant in his earlier testimony. *Held*, the testimony was admissible. (a) Testimony by a probationer at a probation revocation hearing is not admissible at the subsequent trial on the related criminal charge; the probationer is not forced to choose between his privilege against self-incrimination and his opportunity to be heard in the revocation proceeding. Similarly, testimony given by a defendant in support of a motion to suppress cannot later be used against him over objection, because he cannot be required to waive his Fifth Amendment privilege in order to assert a Fourth Amendment claim. (b) However, defendant was not put to such a choice when he decided to testify at the first trial, and his voluntary testimony was a waiver of his Fifth Amendment privilege. (152 C.A.3d 553, 554.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Evidence Code*. See *People v. Marlow* (2004) 34 C.4th 131, 150, 17 C.R.3d 825, 96 P.3d 126 [in penalty phase of capital murder prosecution, trial judge did not err in admitting, under *Ev.C. 1291*, defendant's testimony from prior murder trial; notwithstanding that defendant testified in former trial only because of assertions made by codefendant that reflected on him, his decision to testify was tactical choice, and thus testimony was not "impelled" so as to make it unusable at later proceeding].



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## CHAPTER VI - Hearsay

## III. EXCEPTIONS TO THE RULE

- Q. Former Testimony.
- 2. Former Proceeding.
- b. Prior Criminal Proceeding.
- 2. Preliminary Examination.

1 *Witkin Cal. Evid. Hearsay* § 260

[§ 260] Preliminary Examination.

(1) *In General.* The introduction of preliminary examination testimony was formerly covered by P.C. 686(3)(a). (See *People v. Crandall* (1929) 100 C.A. 785, 790, 281 P. 81; *People v. Crandall* (1941) 43 C.A.2d 238, 241, 110 P.2d 682; *People v. Horace* (1954) 127 C.A.2d 366, 368, 273 P.2d 923; *People v. Terry* (1960) 180 C.A.2d 48, 55, 4 C.R. 597; *People v. Dozier* (1965) 236 C.A.2d 94, 102, 45 C.R. 770 [constitutional right of confrontation not impaired].) It is now covered by the Evidence Code (see *supra*, §259). (See *People v. Banks* (1966) 242 C.A.2d 373, 379, 51 C.R. 398; *People v. Moran* (1974) 39 C.A.3d 398, 406, 114 C.R. 413, *infra*, §268; *People v. Johnson* (1975) 46 C.A.3d 701, 704, 120 C.R. 372; 38 A.L.R.4th 378 [use of preliminary hearing testimony in criminal trial].)

It must appear, however, that the defendant had an opportunity to cross-examine. In *People v. Brock* (1985) 38 C.3d 180, 211 C.R. 122, 695 P.2d 209, the preliminary hearing of a key prosecution witness was taken in a hospital where the witness was being treated for terminal diseases. She had been given synthetic opiates, was fatigued, uncomfortable, and forgetful, and her recollections were contradictory. However, because of her condition, the magistrate restricted defense counsel's cross-examination to a few questions. *Held*, the witness' testimony, read to the jury after her death, was inadmissible; defendant was denied a meaningful opportunity for cross-examination as a result of the restrictions imposed and the witness' difficulty in communicating. (38 C.3d 198.) (See *People v. Robinson* (1991) 226 C.A.3d 1581, 1587, 277 C.R. 504 [witness' preliminary hearing testimony was admissible; defense counsel at preliminary hearing cross-examined both witness' identification of defendant as perpetrator and witness' perception of events occurring on day of crime]; *People v. Ceja* (1994) 26 C.A.4th 78, 87, 88, 31 C.R.2d 475 [although a defendant must have had opportunity for *effective* cross-examination at preliminary hearing, defendant failed to show that he was denied that opportunity by ineffective assistance of counsel]; *People v. Lepe* (1997) 57 C.A.4th 977, 982, 67 C.R.2d 525 [changes effectuated by Proposition 115 (see 4 *Cal. Crim. Law* (3d), *Pretrial Proceedings*, §142) did not so alter nature of preliminary hearing that it no longer meets requirement of *Ev.C. 1291(a)(2)* that party against whom former testimony is offered has had opportunity to cross-examine declarant at prior proceeding].)

(2) *To Prove Nature of Prior Conviction.* In *People v. Castellanos* (1990) 219 C.A.3d 1163, 269 C.R. 93, defendant pleaded guilty to first degree residential burglary and admitted that he was the person involved in the four prior burglary convictions alleged as enhancements. The prosecution then introduced the transcripts of the preliminary hearings for each of the priors to prove that they also involved burglary of inhabited dwellings. *Held*, the transcripts were admissible for this purpose even though unavailability of the witnesses was not shown. "If this were a proceeding where a

defendant's guilt on the offense bound over from the preliminary hearing was being litigated or his probation or parole was being revoked on the basis of a new offense, the lack of a specific showing of unavailability of the witnesses would certainly preclude the admission of the preliminary hearing transcripts. ... However, the nature of the proceeding here, to determine whether a defendant has suffered a prior *serious* felony conviction (not to determine whether he is guilty of the earlier offense), is a different breed of animal. Because the preliminary hearing transcript testimony and other relevant court documents, albeit hearsay, are not being offered against the defendant in the traditional sense, but are merely being offered for the neutral inquiry as to the nature of the earlier offense, i.e., to explain the defendant's conduct which comprised the crime he admitted to have suffered in the earlier proceeding, they are admissible as exceptions to the hearsay rule to explain his admissions." (219 C.A.3d 1174.) (See *People v. Goodner* (1990) 226 C.A.3d 609, 616, 276 C.R. 542 [defendant's statements in entire preliminary hearing transcript were admissible to determine residential nature of defendant's two alleged prior burglary convictions; adopting reasoning of *Castellanos*]; *People v. Reed* (1996) 13 C.4th 217, 223, 229, 52 C.R.2d 106, 914 P.2d 184 [finding that statements in preliminary hearing transcript reliably reflected conduct for which defendant was convicted and were admissible on basis of witness' unavailability (under rule that proof of prior crime is restricted to record of conviction and may not be by live testimony) but declining to adopt "neutral inquiry" rationale of *Castellanos*]; *People v. Best* (1997) 56 C.A.4th 41, 46, 64 C.R.2d 809 [in proceeding to determine nature of defendant's prior assault, police officer's preliminary hearing testimony was admissible for reasons stated in *Reed*, but hearsay statements contained in that testimony were inadmissible because they fit into no recognized hearsay exception].)

In *People v. Houck* (1998) 66 C.A.4th 350, 77 C.R.2d 837, the Court of Appeal applied the reasoning of the *Reed* case, to reach a different result: Where a defendant pleads guilty, as in *Reed*, the preliminary hearing transcript is part of the record of conviction in that it reliably reflects the conduct of which the defendant was convicted; where, as here, the defendant pleads not guilty, the transcript is not reliable as to what evidence was presented to or relied on by the jury in reaching its verdict. (66 C.A.4th 356, 357.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General.* See *People v. Carter* (2005) 36 C.4th 1114, 1173, 32 C.R.3d 759, 117 P.3d 476 [in capital murder case, trial judge properly admitted preliminary hearing testimony of prosecution witness who died before trial, where defendant's motive and interest in cross-examining witness at preliminary hearing were closely similar, if not identical, to his objectives at guilt phase of trial (to attempt to discredit prosecution's theory as to date on which defendant initially encountered witness' girlfriend, an uncharged murder victim of defendant's)]; *People v. Gonzales* (2005) 131 C.A.4th 767, 774, 32 C.R.3d 172 [admission of preliminary hearing transcript to prove that defendant's prior conviction qualified as strike was proper; defendant had had opportunity at hearing to cross-examine witness whose testimony was used to show that he had used firearm, and his interest and motive at both proceedings were similar, i.e., to prevent finding that he had personally discharged firearm].



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## CHAPTER VI - Hearsay

### III. EXCEPTIONS TO THE RULE

- Q. Former Testimony.
- 2. Former Proceeding.
- b. Prior Criminal Proceeding.
- 3. Testimony of Minor Victim.

#### *1 Witkin Cal. Evid. Hearsay § 261*

[§ 261] Testimony of Minor Victim.

(1) *In General.* *Ev.C. 1293* creates a hearsay exception for "former testimony made at a preliminary examination by a minor child who was the complaining witness." (*Ev.C. 1293(a)*.) (See *21 Pacific L. J. 487*.) A "complaining witness" is defined as "the alleged victim of the crime for which a preliminary examination was held." (*Ev.C. 1293(e)*.)

(2) *Conditions for Admissibility.* (a) The former testimony must be offered in a *dependency proceeding* (see *10 Summary (9th), Parent and Child, §648 et seq.*); and (b) the issues must be such that a defendant in the preliminary examination had the right and opportunity to cross-examine the minor with an interest and motive similar to that possessed by the parent or guardian against whom the testimony is offered in the dependency proceeding. (*Ev.C. 1293(a)*.)

(3) *Objections.* The admissibility of the minor's former testimony is subject to the same limitations and objections as though the minor were testifying at the dependency proceeding. (*Ev.C. 1293(b)*.) And the attorney for the parent or guardian against whom the former testimony is offered or, if none, the parent or guardian himself or herself, may challenge admissibility by showing that new substantially different issues are present in the dependency proceeding. (*Ev.C. 1293(c)*.)

(4) *Statute Upheld.* *In re Elizabeth T.* (1992) 9 C.A.4th 636, 12 C.R.2d 10, rejected a father's constitutional challenge to *Ev.C. 1293* based on the right of confrontation: "In enacting section 1293, the Legislature incorporated as nearly as possible the exact language of *Evidence Code* sections 1291 and 1292, which have never been held to infringe impermissibly on the due-process right of confrontation and cross-examination. Section 1293 differs materially from sections 1291 and 1292 in only one respect: it requires no showing that the witness whose former testimony is to be used is unavailable. ... Given that the court's main purpose is to protect the minors ... , and that the United States Supreme Court has determined that a state's interest in protecting child sex-crime victims from further trauma may outweigh the right of confrontation even in criminal cases ... , the Legislature could properly find it unnecessary to require a showing of unavailability before a juvenile court may admit the preliminary hearing testimony of a minor in a section 300 proceeding." (9 C.A.4th 641.)

The court also rejected the father's contention that *Ev.C. 1293* denies due process because it deprives the juvenile court of the means to determine the minors' credibility. The basis for the contention was that the judge presiding over a *Welf.C. 300* proceeding will normally not be the same judge who presided over the preliminary hearing in the criminal

case. "This argument proves too much; if it were correct, then it would equally bar the use of former testimony in any type of proceeding, even where the witness was shown to be unavailable. ... No such condition has been grafted onto *Evidence Code sections 1291 and 1292*, the predecessors of section 1293, and we see no reason to graft on such a condition here. The presumption underlying section 1293, like its predecessor statutes, is that the testimony and cross-examination in the former proceeding, as recorded in the transcript thereof, provide a sufficient means for the court to assess the credibility of the nontestifying witness." (9 *C.A.4th* 642.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
(2) *Conditions for Admissibility*.

*Cross-Reference:* 10 *Summary* (10th), *Parent and Child*, §519 et seq.



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### III. EXCEPTIONS TO THE RULE

#### Q. Former Testimony.

#### 2. Former Proceeding.

#### c. Deposition in Civil or Criminal Case.

#### 1 Witkin Cal. Evid. Hearsay § 262

[§ 262] Deposition in Civil or Criminal Case.

(1) *Deposition in Civil Case.* "A deposition taken in compliance with law in another action" is admissible under this exception. (*Ev.C. 1290(c)*; see *Briggs v. Briggs* (1889) 80 C. 253, 608, 22 P. 334 [subsequent action involving successors in interest]; 5 *Stanf. L. Rev.* 535; 3 *Cal. Evidence (4th)*, *Presentation at Trial*, §157.) The use of depositions taken in the same action is governed by the discovery statutes (*C.C.P. 2025(u)*, 3 *Cal. Evidence (4th)*, *Presentation at Trial*, §153).

(2) *Deposition in Criminal Case.* "Another action" in *Ev.C. 1290(c)* includes a criminal action (*Ev.C. 105*). P.C. 686(3)(b), which formerly covered this subject, now provides merely that a deposition taken in *the action* may be read "to the extent that it is otherwise admissible under the law of this state." In other words, depositions taken in the same criminal action will be governed by P.C. 1345 and P.C. 1362 (5 *Cal. Crim. Law* (3d), *Criminal Trial*, §§66, 67), but depositions taken in a prior criminal action to which the defendant was a party will be governed by *Ev.C. 1291*. (See Law Rev. Com. Comments on *Ev.C. 1290*, 1291.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Deposition in Civil Case.* *C.C.P. 2025(u)* was repealed and replaced by *C.C.P. 2025.620* in 2004 without substantive change.



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Q. Former Testimony.

2. Former Proceeding.

d. Administrative or Arbitration Proceeding.

*1 Witkin Cal. Evid. Hearsay § 263*

[§ 263] Administrative or Arbitration Proceeding.

There is some authority for the use of testimony given at a former proceeding other than a trial before a judicial tribunal. (See 2 McCormick 5th, §305; 5 Wigmore (Chadbourn Rev.) §1373.) The prior statute was silent on this matter, but the Evidence Code covers two kinds of nonjudicial proceedings:

(a) "A proceeding to determine a controversy conducted by or under the supervision of an agency that has the power to determine such a controversy and is an agency of the United States or a public entity in the United States." (*Ev.C. 1290(b).*)

(b) An *arbitration proceeding* if the evidence of the former testimony is a *verbatim transcript*. (*Ev.C. 1290(d).*)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 2 McCormick 6th, §305.





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### III. EXCEPTIONS TO THE RULE

#### Q. Former Testimony.

##### 3. Parties.

##### a. Evidence Against Former Party.

##### 1. In General.

#### *1 Witkin Cal. Evid. Hearsay § 264*

[§ 264] In General.

*Ev.C. 1291* deals with former testimony of an unavailable witness offered against a *person who was a party to the former proceeding*. "For example, if a series of cases arises involving several plaintiffs and but one defendant, Section 1291 permits testimony given in the first trial to be used against the defendant in a later trial if the conditions of admissibility stated in the section are met." (Law Rev. Com. Comment to *Ev.C. 1291*.)

Where *the present opponent is the party who offered the testimony* in the former trial, the party's previous direct and redirect examination of the witness ought to compensate for the deprivation of the right to cross-examine the witness. (Law Rev. Com. Comment to *Ev.C. 1291*.) Accordingly, *Ev.C. 1291(a)(1)* authorizes introduction of former testimony "against a person who offered it in evidence in his own behalf on the former occasion or against the successor in interest of such person."

In *People v. Salas* (1976) 58 C.A.3d 460, 129 C.R. 871, defendant called witness T at the preliminary examination and developed facts harmful to the defense case, apparently to provide material for T's impeachment at the trial itself. When T later became unavailable as a witness, however, the prosecution was permitted to introduce the preliminary examination testimony. *Held*, this was proper, despite defendant's contention that his motive and interest in the preliminary examination testimony were different from those in examining the witness at trial. *Ev.C. 1291(a)* contains no requirement for similarity of interest and motive when the former testimony is being presented against the party who originally *offered* it. Furthermore, it would be speculation to ascribe to defense counsel any particular reason for calling T as a witness and, at the preliminary hearing, defense counsel conducted a searching, direct examination of T, including use of leading questions. (58 C.A.3d 469.) Under *Ev.C. 1291(a)(1)*, a party's previous direct and redirect examination of the party's own witness is an adequate substitute for a present right to cross-examine the witness-declarant. Like *Ev.C. 1291(a)(2)* (*infra*, §265), *Ev.C. 1291(a)(1)* is constitutionally valid. (58 C.A.3d 469.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Malone* (2003) 112 C.A.4th 1241, 1244, 5 C.R.3d 741 [where defendant's first trial for burglary and possession of check with intent to defraud ended in mistrial, his testimony from that trial, including his admission that he had two prior convictions, was properly admitted in his retrial after he invoked his privilege not to testify]. *West's Key Number Digest*, Evidence k.580



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### III. EXCEPTIONS TO THE RULE

#### Q. Former Testimony.

##### 3. Parties.

##### a. Evidence Against Former Party.

#### 2. Evidence Offered Against Opponent.

##### 1 *Witkin Cal. Evid. Hearsay* § 265

[§ 265] Evidence Offered Against Opponent.

*Ev.C. 1291(a)(2)* deals with the situation where the present opponent is the party against whom the testimony was offered in the former trial, and "had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing."

The Commission explains the purpose and operation of this rule as follows: "Since the party has had his opportunity to cross-examine, the primary objection to hearsay evidence--lack of opportunity to cross-examine the declarant--is not applicable. On the other hand, paragraph (2) does not make the former testimony admissible where the party against whom it is offered did not have a similar interest and motive to cross-examine the declarant. The determination of similarity of interest and motive in cross-examination should be based on practical considerations and not merely on the similarity of the party's position in the two cases. For example, testimony contained in a deposition that was taken, but not offered in evidence at the trial, in a different action should be excluded if the judge determines that the deposition was taken for discovery purposes and that the party did not subject the witness to a thorough cross-examination because he sought to avoid a premature revelation of the weakness in the testimony of the witness or in the adverse party's case. In such a situation, the party's interest and motive for cross-examination on the previous occasion would have been substantially different from his present interest and motive." (Law Rev. Com. Comment to *Ev.C. 1291*; see *Wahlgren v. Coleco Industries* (1984) 151 C.A.3d 543, 546, 547, 198 C.R. 715 [depositions in former trial were properly excluded where present defendant's interest and motive in cross-examination were not similar].)

In *People v. Ogen* (1985) 168 C.A.3d 611, 215 C.R. 16, defendant was charged with murder. At trial, the murder victim's preliminary hearing testimony at an earlier assault and rape prosecution of defendant was admitted to show defendant's intent and motive for the killing. *Held*, the evidence was admissible. Defendant's interest and motive were similar in both proceedings: "In both, the victim's testimony was adverse to Ogen's claim of innocence. Regardless of the specific defense involved, his primary motive was to undermine the victim's credibility and to exploit weaknesses in her testimony bearing on his culpability. The 68 transcript pages of cross-examination reveal close, methodical and penetrating questioning of the victim's characterization of Ogen's dogged pursuit of her and his histrionic displays of anger and hostility." (168 C.A.3d 617.) (See *People v. Sul* (1981) 122 C.A.3d 355, 367, 175 C.R. 893 [actual cross-examination need not have taken place as long as the opportunity existed]; *People v. Sanders* (1995) 11 C.4th 475, 525, 46 C.R.2d 751, 905 P.2d 420 [witness' testimony at suppression hearing was properly excluded at trial under *Ev.C. 1291(a)(2)*, because prosecution did not have opportunity at hearing to cross-examine witness with same interest

and motive it had at trial]; *People v. Samayoa* (1997) 15 C.4th 795, 850, 851, 64 C.R.2d 400, 938 P.2d 2 [in penalty phase of murder prosecution, preliminary hearing testimony of victim of prior rape and burglary committed by defendant was properly admitted, where victim was unavailable due to death, and defendant's motive and interest in cross-examining her at preliminary hearing were closely similar to his objectives at present trial]; *People v. Jones* (1998) 66 C.A.4th 760, 768, 78 C.R.2d 265 [although defendant was denied self-representation right at previous trial, testimony by now unavailable witnesses was admissible at retrial because constitutional defect was not directly related to effectiveness of cross-examination, which was conducted by appointed counsel].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Harris* (2005) 37 C.4th 310, 333, 33 C.R.3d 509, 118 P.3d 545 [in capital murder case, trial judge did not err in admitting preliminary hearing testimony of witness who was subsequently murdered and therefore was unavailable to testify at trial, even if information about witness' drug dealing coming to light after his murder might have altered way defense counsel cross-examined him at hearing; "interest and motive" referred to in *Ev.C. 1291(a)(2)* simply need be similar, not identical].



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### III. EXCEPTIONS TO THE RULE

#### Q. Former Testimony.

##### 3. Parties.

##### b. Evidence Against Person Not Former Party.

*1 Witkin Cal. Evid. Hearsay § 266*

[§ 266] Evidence Against Person Not Former Party.

*Ev.C. 1292(a)* permits the introduction, *in a civil action*, of former testimony of an unavailable witness, given in a *prior civil or criminal action*, against a stranger to that prior action. "For example, if one occurrence gives rise to a series of cases involving one defendant and several plaintiffs, Section 1292 permits testimony given against the plaintiff in the first action to be used against a different plaintiff in a subsequent action if the conditions of admissibility stated in the section are met." (Law Rev. Com. Comment to *Ev.C. 1292*; see 1958 A.S. 652; on inapplicability of exception in criminal case, see *supra*, §259.)

The conditions are stated in *Ev.C. 1292(a)(3)*: "The issue is such that the party to the action or proceeding in which the former testimony was given had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which the party against whom the testimony is offered has at the hearing." (See *Wahlgren v. Coleco Industries (1984) 151 C.A.3d 543, 547, 198 C.R. 715* [depositions were properly excluded where party to former proceeding did not have similar interest]; *Gatton v. A. P. Green Services (1998) 64 C.A.4th 688, 692, 693, 75 C.R.2d 523* [same].)

At first glance this is a radical step, for the party against whom the testimony is offered never had an opportunity either to examine or cross-examine the witness. But this is not a fundamental objection; hearsay exceptions authorize admission of statements by declarants never subject to any cross-examination. The principal justifications for a hearsay exception are the need for the evidence and its trustworthiness (see *supra*, §2), and these support the rule: "The trustworthiness of the former testimony is sufficiently guaranteed because the former adverse party had the right and opportunity to cross-examine the declarant with an interest and motive similar to that of the present adverse party. Although the party against whom the former testimony is offered did not himself have an opportunity to cross-examine the witness on the former occasion, it can be generally assumed that most prior cross-examination is adequate if the same stakes are involved. If the same stakes are not involved, the difference in interest or motivation would justify exclusion. Even where the prior cross-examination was inadequate, there is better reason here for providing a hearsay exception than there is for many of the presently recognized exceptions to the hearsay rule." (Law Rev. Com. Comment to *Ev.C. 1292*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Rufo v. Simpson (2001) 86 C.A.4th 573, 606, 607, 103 C.R.2d 492*, citing the text [in wrongful death action arising from murder of defendant's wife, trial judge properly refused to permit defendant to present prior testimony given by

now unavailable police officer in murder prosecution arising from same facts; officer's prior direct examination by prosecution in criminal case was no substitute for plaintiffs' right to cross-examine him in present case]; *Byars v. SCME Mortg. Bankers* (2003) 109 C.A.4th 1134, 1150, 135 C.R.2d 796 [in action by borrower against lender, trial judge properly excluded deposition testimony by expert witness, offered by plaintiff, from prior, similar case against different lender; as deponent was witness for defendant in earlier case, that defendant would not have had same incentive to cross-examine deponent as would defendant in present action]; *O'Neill v. Novartis Consumer Health* (2007) 147 C.A.4th 1388, 1403, 55 C.R.3d 551 [in products liability action against pharmaceutical manufacturer, testimony by two of defendant's experts in prior case against it, offered by plaintiffs to show that drug at issue in present case could cause strokes, was not admissible under *Ev.C. 1292(a)*; prior case involved different drug and at that time defendant had motive to suggest that drug involved in present case might have been cause of injuries giving rise to prior case].



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## CHAPTER VI - Hearsay

### III. EXCEPTIONS TO THE RULE

#### Q. Former Testimony.

##### 4. Methods of Proof.

##### a. In General.

*1 Witkin Cal. Evid. Hearsay § 267*

[§ 267] In General.

In the usual case, the testimony of the witness will have been reported. It may then be offered either by introducing a transcript properly certified by the reporter (see *C.C.P. 273(a)*), or by placing the reporter on the stand to read his or her notes. (See *People v. Stevenson (1978)* 79 C.A.3d 976, 990, 145 C.R. 301 [improper to give each juror copy of the transcript to follow reading by reporter; unduly emphasizes testimony]; 28 Proof of Facts 2d 1 [foundation for offering deposition or other former testimony].) But the older cases established the rule that a transcript or reporter's notes are not essential; proof may be made by the oral testimony of a person present at the former trial, whose recollection (with or without notes to refresh it) is sufficient. (See *People v. Murphy (1872)* 45 C. 137, 145 [relatively impossible to give exact language of former testimony, substance is enough]; *Meyer v. Foster (1905)* 147 C. 166, 169, 81 P. 402; 2 McCormick 5th, §307.)

Even where a transcript is available, a witness may ordinarily give the substance of the former testimony. The former best evidence rule (replaced in 1998 by the Secondary Evidence Rule; see 2 *Cal. Evidence (4th)*, *Documentary Evidence*, §31) was generally held to be inapplicable. (See 4 Wigmore (Chadbourn Rev.) §1330; 23 *So. Cal. L. Rev.* 113; 11 A.L.R.2d 36; 28 Proof of Facts 2d 45.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 2 McCormick 6th, §307. *West's Key Number Digest*, Criminal Law k.547 et seq.; Evidence k.582 et seq.



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## CHAPTER VI - Hearsay

### III. EXCEPTIONS TO THE RULE

#### Q. Former Testimony.

#### 4. Methods of Proof.

#### b. Videotape of Preliminary Examination.

*1 Witkin Cal. Evid. Hearsay § 268*

[§ 268] Videotape of Preliminary Examination.

In *People v. Moran* (1974) 39 C.A.3d 398, 114 C.R. 413, P, a prosecution witness in a murder case, was dying of cancer. He testified under immunity at defendant's preliminary examination, and his testimony was videotaped. At trial, after his death, the videotape was offered in evidence after an extensive foundation on the qualifications of the technicians and the procedures used. *Held*, the tape was properly admitted.

(a) No specific provisions of California law expressly authorize use of videotapes, but *Ev.C. 250* (2 *Cal. Evidence* (4th), *Documentary Evidence*, §32) includes photographing and every other means of recording on a tangible thing any form of communication, e.g., words, pictures, sounds or symbols. Although videotape recording differs from ordinary recording methods in that an image is recorded electronically rather than photographically, with the liberal concept of a writing under the statute, the Legislature has recognized the widespread use of videotape in our society and its relevance to legal proceedings. (39 C.A.3d 407.)

(b) As to the alleged technical distortions and inaccurate transmission of the witness' demeanor, "the advantages and disadvantages of the 'filtering' effect of the medium fall equally on both sides. Therefore, its use is 'fair' and there is no inherent unfairness. ... Conceding that testimony through a television set differs from live testimony, the process does not significantly affect the flow of information to the jury. ... Videotape is sufficiently similar to live testimony to permit the jury to properly perform its function. Fair new procedures that facilitate proper factfinding are allowable, although not traditional. ... In any event, we do not comprehend defendant's contention that the tape is less valid or less reliable than the reading of the written transcript of the preliminary hearing." (39 C.A.3d 410.)

The court concluded by noting with approval the observation of a federal court that "video tape is a modern technique that better protects the rights of all concerned." (39 C.A.3d 411.) (See *People v. Ware* (1978) 78 C.A.3d 822, 827, 144 C.R. 354 [videotape was properly admitted under authority of *Moran*]; but see *People v. Watkins* (1996) 45 C.A.4th 485, 491, 492, 53 C.R.2d 13 [disagreeing with *Ware* to extent it suggests that videotape of conditional examination (5 *Cal. Crim. Law* (3d), *Criminal Trial*, §66) may be admitted at trial]; and see generally 25 *Hastings L. J.* 1017 [videotape in criminal proceedings]; 26 *Hastings L. J.* 975 [juror responses to prerecorded videotape trial presentations in California and Ohio]; 26 *Hastings L. J.* 999 [social and psychological concerns about videotaped trials]; 1 *Western State L. Rev.* 104 [videotape in drunk driving case]; 23 *Am.Jur. Trials* 95 [use of videotape in the preparation and trial of civil cases].) (On statutory authorization of videotape of sex victim's preliminary examination testimony, see 1 *Cal. Evidence* (4th), *Introduction*, §23; on *Ev.C. 1294*, permitting, under specified conditions, admission of videotaped statement properly introduced as prior inconsistent statement at preliminary hearing or prior proceeding

concerning same criminal matter, see *supra*, §158.)

**SUPPLEMENT:** [This section is current through the latest supplement]





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## CHAPTER VI - Hearsay

### III. EXCEPTIONS TO THE RULE

#### Q. Former Testimony.

##### 5. Objections.

*1 Witkin Cal. Evid. Hearsay § 269*

[§ 269] Objections.

(1) *Objections to Form of Questions.* The former testimony is admitted "subject to the same limitations and objections as though the declarant were testifying at the hearing." (*Ev.C. 1291(b), 1292(b)*; see 2 McCormick 5th, §306; 40 A.L.R.4th 514 [availability of ordinary objections and exceptions where former testimony is used at subsequent trial].) But an obvious distinction is made. An opponent who was a *party* to the former proceeding either put the questions to his or her own witness or had an opportunity to object to questions put to the other party's witness. The opponent's failure to object to the form of the questions at that time constitutes a *waiver* of those objections, and they may not be raised at the new trial. (*Ev.C. 1291(b)(1)*; 15 U.C.L.A. L. Rev. 118.) If the opponent was *not a former party*, there was *no waiver* and proper objections can be made. (*Ev.C. 1292(b)*.)

(2) *Objections Based on Competency or Privilege.* These are determined as of the time of the former proceeding. Hence, if grounds for the objection did not exist at that time, the objection cannot be made in the new proceeding. (*Ev.C. 1291(b)(2), 1292(b)*.)

However, if grounds for the objection existed at the time of the former proceeding, the failure to object does not constitute a waiver. In *People v. Lyons* (1992) 10 C.A.4th 837, 13 C.R.2d 112, a prosecution witness was permitted to testify at the preliminary hearing over defendant's objection, under *Ev.C. 702* (2 Cal. Evidence (4th), Witnesses, §46), that she lacked the ability to recall. At trial, the witness was disqualified, under *Ev.C. 701* (2 Cal. Evidence (4th), Witnesses, §41), on the ground that she was incapable of appreciating her duty to tell the truth. However, her preliminary hearing testimony was admitted under *Ev.C. 1291*, i.e., her unavailability to testify, even though defendant objected on the ground that her inability to tell the truth also existed at the preliminary hearing. *Held*, admission of the preliminary hearing testimony was error.

(a) The record supports defendant's contention that the witness was incapable of telling the truth at the preliminary hearing. And no ruling was made on this issue, because the competency objection at the preliminary hearing was based on *Ev.C. 702*, not on *Ev.C. 701*. Hence, *People v. Liddicoat* (1981) 120 C.A.3d 512, 174 C.R. 649, relied on by the prosecution, is distinguishable; there, the objection at both the preliminary hearing and at trial was based on *Ev.C. 701*. (10 C.A.4th 844.)

(b) The prosecution's argument that defendant waived the *Ev.C. 701* objection by not making it at the preliminary hearing is without merit. "[W]here the examination of a record indicates a witness is incompetent, it is manifestly unfair to affirm a conviction merely because his counsel failed to make the proper objection." (10 C.A.4th 844, citing *People v. Burton* (1961) 55 C.2d 328, 11 C.R. 65, 359 P.2d 433, 3 Cal. Evidence (4th), Presentation at Trial, §345.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Objections to Form of Questions*. See 2 McCormick 6th, §306.



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## CHAPTER VI - Hearsay

### III. EXCEPTIONS TO THE RULE

#### R. Judgments.

1. Judgment of Felony Conviction.
  - a. Traditional Rule of Exclusion.

*1 Witkin Cal. Evid. Hearsay § 270*

[§ 270] Traditional Rule of Exclusion.

Under certain circumstances, a judgment in a criminal case may be res judicata (i.e., a collateral estoppel) in a subsequent civil action involving an issue necessarily determined. (See *Teitelbaum Furs v. Dominion Ins. Co. (1962) 58 C.2d 601, 605, 606, 25 C.R. 559, 375 P.2d 439; 36 So. Cal. L. Rev. 416; 10 U.C.L.A. L. Rev. 942; 7 Cal. Proc. (4th), Judgment, §332.*)

If the conditions for application of the doctrine of collateral estoppel are not present, the judgment is nevertheless evidence of the facts determined. But it is hearsay--the statement of a jury or judge in a different proceeding. If based on a plea of guilty, it is, by reason of that plea, an admission. (See *supra*, §99.) But if it is the result of a contested trial on a plea of not guilty, the majority rule, previously followed in California, excludes it. (See *Marceau v. Travelers' Ins. Co. (1894) 101 C. 338, 344, 35 P. 856; Board of Education of Long Beach v. King (1947) 82 C.A.2d 857, 859, 187 P.2d 427; American Fire Protection Service v. Williams (1959) 171 C.A.2d 397, 401, 340 P.2d 644; 40 Cal. L. Rev. 225; 2 U.C.L.A. L. Rev. 76; 7 U.C.L.A. L. Rev. 534; 2 McCormick 5th, §298; 4 Wigmore (Chadbourn Rev.) §1346a; 5 Wigmore (Chadbourn Rev.) §1671a; 29 Am.Jur.2d (1994 ed.), Evidence §407; 1950 A.S. 825; 18 A.L.R.2d 1287.*)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 2 McCormick 6th, §298. *West's Key Number Digest*, Evidence k.162(2)



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## CHAPTER VI - Hearsay

### III. EXCEPTIONS TO THE RULE

#### R. Judgments.

1. Judgment of Felony Conviction.
- b. Evidence Code and Federal Rules.

*1 Witkin Cal. Evid. Hearsay § 271*

[§ 271] Evidence Code and Federal Rules.

(1) *Evidence Code*. The Model Code of Evidence and the Uniform Rules of Evidence allow evidence of a judgment of felony conviction to come in. (See Model C., Rule 521, Comment; Unif. Rule 803(22); 2 McCormick 5th, §298; 5 Wigmore (Chadbourn Rev.) §1671a; 40 Cal. L. Rev. 225, 248; 1950 A.S. 825; 1957 A.S. 541.)

*Ev.C. 1300* is in accord, but also covers a judgment based on a plea of nolo contendere: "Evidence of a final judgment adjudging a person guilty of a crime punishable as a felony is not made inadmissible by the hearsay rule when offered in a civil action to prove any fact essential to the judgment whether or not the judgment was based on a plea of nolo contendere."

The Comment states: "[T]he evidence involved is peculiarly reliable. The seriousness of the charge assures that the facts will be thoroughly litigated, and the fact that the judgment must be based upon a determination that there was no reasonable doubt concerning the defendant's guilt assures that the question of guilt will be thoroughly considered." (Law Rev. Com. Comment to *Ev.C. 1300*; see *People v. One 1964 Chevrolet Corvette Convertible* (1967) 251 C.A.2d 424, 428, footnote 1, 59 C.R. 594, citing the text; *Miller v. Superior Court* (1985) 168 C.A.3d 376, 381, 214 C.R. 125; *In re L.S.* (1987) 189 C.A.3d 407, 414, 234 C.R. 508 [*Ev.C. 1300* requires final judgment; hence, father's conviction of child molestation that was on appeal was improperly considered as evidence in dependency proceeding involving father's child].)

(2) *Federal Rules of Evidence*. *F.R. Evid.*, Rule 803(22) states the exception but excludes a judgment based on a plea of nolo contendere: "Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility." (See 4 Mueller & Kirkpatrick, Federal Evidence 2d, §472; 29A Am.Jur.2d (1994 ed.), *Evidence* §1343 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Evidence Code*. See 2 McCormick 6th, §298.



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### III. EXCEPTIONS TO THE RULE

#### R. Judgments.

#### 1. Judgment of Felony Conviction.

##### c. Scope of Statutory Rule.

*1 Witkin Cal. Evid. Hearsay § 272*

[§ 272] Scope of Statutory Rule.

Two limitations on the scope of this hearsay exception should be noted:

(1) It applies only to *civil actions*. In criminal prosecutions, a prior judgment rarely operates as a collateral estoppel against the defendant (see *1 Cal. Crim. Law (3d), Defenses, §207*), and the defendant's right of confrontation and fundamental objections of policy preclude its evidentiary use to prove any element of the crime charged. (See Law Rev. Com. Comment to *Ev.C. 1300*; on use of judgment to prove independent issue of prior conviction for purposes of increased penalties, see *3 Cal. Crim. Law (3d), Punishment, §378*.)

A judgment of acquittal in a criminal trial of a *codefendant* is necessarily an adjudication of some issues adversely to the prosecution. But it is neither a collateral estoppel nor evidence admissible on behalf of the remaining defendant on a retrial. (*People v. Collins (1966) 242 C.A.2d 626, 634, 51 C.R. 604*.)

(2) Only *felony* convictions come within the statute. The Model Code of Evidence went so far as to allow evidence of a misdemeanor conviction, but the Uniform Rules of Evidence rejected this innovation, and the Evidence Code followed the Uniform Rule, with this difference: The test is whether the crime was "punishable" as a felony, i.e., whether it comes within the class of felonies or felony-misdemeanors. Certain crimes are punishable either as felonies or misdemeanors, and as to those crimes the judgment of conviction is admissible even though the sentence is for the misdemeanor. (Law Rev. Com. Comment to *Ev.C. 1300*; see *1 Cal. Crim. Law (3d), Introduction to Crimes, §72*; on inadmissible misdemeanor conviction, see *Manes v. Wiggins (1967) 247 C.A.2d 756, 757, 56 C.R. 120*, quoting the text [evidence of misdemeanor conviction for assault and battery inadmissible in later tort action for assault and battery]; *Rousseau v. West Coast House Movers (1967) 256 C.A.2d 878, 888, 64 C.R. 655* [evidence of three convictions of plaintiff for misdemeanor drunk driving to show reason for not driving, contradicting his claim that injuries from accident prevented him; inadmissible].)

The rule against use of misdemeanor convictions was limited, without reference to *Ev.C. 1300*, in *Leader v. California (1986) 182 C.A.3d 1079, 226 C.R. 207, 3 Cal. Evidence (4th), Presentation at Trial, §340*, an action for assault and battery in which plaintiff alleged that defendants used excessive force in arresting him. While not disagreeing with the result in *Manes v. Wiggins, supra*, the *Leader* court held that the admissibility of a misdemeanor conviction for collateral estoppel purposes in a subsequent civil trial must be determined on a case-by-case basis. Upon satisfaction of the following conditions, the conviction should be admitted: (a) the conviction was for a serious offense, so that the defendant was motivated to litigate the charges fully; (b) a full and fair misdemeanor trial actually occurred;

and (c) the issue on which the prior conviction is offered was of necessity decided in the criminal trial. (*182 C.A.3d 1087.*) Because all of these conditions were satisfied in plaintiff's case, his misdemeanor convictions for resisting arrest and battery of a police officer should have been admitted to collaterally estop him on issues decided against him in the criminal trial. (*182 C.A.3d 1088.*)

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III. EXCEPTIONS TO THE RULE

R. Judgments.

2. Judgment Against Person Entitled to Indemnity.

1 *Witkin Cal. Evid. Hearsay* § 273

[§ 273] Judgment Against Person Entitled to Indemnity.

(1) *In General.* *Ev.C. 1301* permits a judgment debtor to introduce the underlying judgment in a subsequent action by the judgment debtor against others "to prove any fact which was essential to the judgment." Three kinds of subsequent actions by the judgment debtor are specified:

(a) To recover partial or total indemnity or exoneration for money paid or liability incurred because of the judgment. (*Ev.C. 1301(a).*)

(b) To enforce a warranty to protect the judgment debtor against the liability determined by the judgment. (*Ev.C. 1301(b).*)

(c) To recover damages for breach of warranty substantially the same as the warranty determined by the judgment to have been breached. (*Ev.C. 1301(c).*)

(2) *Limitations.* The principle is obviously sound, but its application may be quite limited:

(a) Normally, a defendant who is protected by a right of indemnity or warranty should give notice to the indemnitor or warrantor to come in and conduct or participate in the defense. The indemnitor or warrantor is thereafter bound by the judgment. (See *C.C.P. 1912*; *C.C. 2778(5)*; *Pezel v. Yerex* (1922) 56 *C.A. 304, 307, 205 P.475*; *Rest.2d, Judgments* §§57, 58.)

(b) If the defendant fails to give the notice and thereby loses the benefit of the doctrine of res judicata, the defendant may still, under *Ev.C. 1301*, use the judgment as evidence of the liability to be indemnified, subject to the right of the indemnitor or warrantor, in the new action, to challenge it by contradictory evidence.

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III. EXCEPTIONS TO THE RULE

R. Judgments.

3. Judgment Determining Liability of Third Person.

*1 Witkin Cal. Evid. Hearsay § 274*

[§ 274] Judgment Determining Liability of Third Person.

When the defendant's liability or duty is based on the liability or duty of a third person, the statement of that third person is admissible against the defendant under *Ev.C. 1224* (supra, §127).

*Ev.C. 1302* supplements *Ev.C. 1224* by making a similar exception for a *judgment* against the third person: "When the liability, obligation, or duty of a third person is in issue in a civil action, evidence of a final judgment" against the third person is admissible to prove that liability, obligation, or duty. (See *Nordin v. Bank of America* (1936) 11 C.A.2d 98, 100, 52 P.2d 1018.)

*Ev.C. 1302* does not apply to judgments against an employee in a subsequent action against an employer based on respondeat superior. (See *Markley v. Beagle* (1967) 66 C.2d 951, 59 C.R. 809, 429 P.2d 129, supra, §128.)

**SUPPLEMENT:** [This section is current through the latest supplement]





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## CHAPTER VI - Hearsay

## III. EXCEPTIONS TO THE RULE

## S. Family History.

## 1. In General.

## a. Necessity of Hearsay.

*1 Witkin Cal. Evid. Hearsay § 275*

[§ 275] Necessity of Hearsay.

Family history may, of course, be proved, as any other fact, by testimony of a witness with knowledge. (See *Estate of Ross* (1921) 187 C. 454, 467, 202 P. 641; 12 Proof of Facts 2d 459 [determination of inheritance rights]; 45 Proof of Facts 2d 631 [age]; on requirement of personal knowledge, see 2 *Cal. Evidence* (4th), Witnesses, §46.) Often, however, there is no available witness with personal knowledge of birth, death, marriage, descent, relationship, etc., and this essential information must be furnished through the medium of declarations, records, or reputation. The admissibility of hearsay of this type (and multiple hearsay, where the declarant, lacking personal knowledge, relies on family reputation) has long been recognized. The older term "pedigree," applied to these declarations, is being replaced by the more inclusive and accurate term "family history." (See generally Model C., Rule 524, Comment; 2 McCormick 5th, §322; 5 Wigmore (Chadbourn Rev.) §§1481 et seq., 1602; 29 *Am.Jur.2d* (1994 ed.), Evidence §691; 2 *Hastings L. J.* 1; 31 A.L.R.2d 989.)

In *Estate of Hartman* (1910) 157 C. 206, 213, 107 P. 105, *infra*, §279, the court said of these declarations: "They are admitted from reasons of necessity, because otherwise it would frequently be impossible to prove the kinship of members of a family after those who knew the facts are dead. Their evidential value comes not from their being admissions against the interest of the person making them, but, as Wigmore points out, from 'the probability that the "natural effusions" ... of those who talk over family affairs when no special reason for bias or passion exists are fairly trustworthy.' " (See *Estate of Flood* (1933) 217 C. 763, 782, 21 P.2d 579, *infra*, §277; *Estate of Nidever* (1960) 181 C.A.2d 367, 372, 5 C.R. 343, *infra*, §293; *Estate of Berg* (1964) 225 C.A.2d 423, 431, 37 C.R. 538, citing the text.)

Usually, the declarations are offered in a "case of pedigree" or "genealogical controversy," i.e., a proceeding in which birth, marriage, relationship, etc., is directly in issue. And there is considerable early authority restricting admissibility of declarations to controversies of this sort. (See 2 *Hastings L. J.* 4.) The modern view, however, is that the declarations are admissible in any type of case in which the fact is relevant. (See *Estate of Paulsen* (1918) 179 C. 528, 532, 178 P. 143; 5 Wigmore (Chadbourn Rev.) §1503; 2 *Hastings L. J.* 4.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 2 McCormick 6th, §322. *West's Key Number Digest*, Evidence k.285 et seq.



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## CHAPTER VI - Hearsay

### III. EXCEPTIONS TO THE RULE

#### S. Family History.

##### 1. In General.

##### b. Evidence Code and Federal Rules.

*1 Witkin Cal. Evid. Hearsay § 276*

[§ 276] Evidence Code and Federal Rules.

(1) *Evidence Code*. The following Evidence Code provisions deal with the family history hearsay exceptions:

- (a) *Ev.C. 1310*, infra, §278 [statement concerning declarant's own family history].
- (b) *Ev.C. 1311*, infra, §§279, 280 [statement concerning family history of another].
- (c) *Ev.C. 1312*, infra, §282 [entries in family records and the like].
- (d) *Ev.C. 1313*, infra, §283 [reputation in family concerning family history].
- (e) *Ev.C. 1314*, infra, §284 [reputation in community concerning family history].
- (f) *Ev.C. 1315*, infra, §285 [church records concerning family history].
- (g) *Ev.C. 1316*, infra, §286 [marriage, baptismal, and similar certificates].

The former statute (*C.C.P. 1870(4)*) referred only to the declaration of a deceased person; *Ev.C. 1310* and *1311* follow the modern view, making the declaration admissible if the declarant "is unavailable as a witness." (See *Estate of Paulsen* (1918) 179 C. 528, 178 P. 143 [declarations in Denmark]; 2 McCormick 5th, §322; 5 Wigmore (Chadbourn Rev.) §1481; on meaning of "unavailable witness," see supra, §18 et seq.)

(2) *Federal Rules of Evidence*. *F.R. Evid., Rule 804(b)(4)* covers the following: "(A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared." (See 4 Mueller & Kirkpatrick, *Federal Evidence* 2d, §504; 29 *Am.Jur.2d* (1994 ed.), *Evidence* §691.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Evidence Code*. See 2 McCormick 6th, §322.



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## CHAPTER VI - Hearsay

### III. EXCEPTIONS TO THE RULE

#### S. Family History.

##### 1. In General.

##### c. Facts of Family History.

#### *1 Witkin Cal. Evid. Hearsay § 277*

[§ 277] Facts of Family History.

(1) *In General*. "There is no definite or formal limitation as to the kind of fact that may be the subject of the statement. The general inquiry ... should be: Were the circumstances named in the statement such a marked item in the ordinary family history and so interesting to the family in common that statements about them in the family would be likely to be based on fairly accurate knowledge and to be sincerely uttered?" (*Estate of Berg* (1964) 225 C.A.2d 423, 431, 37 C.R. 538, quoting 5 Wigmore (Chadbourn Rev.) §1502.)

*Ev.C. 1310(a)* and *1311(a)* list the following: "birth, marriage, divorce, a parent and child relationship, relationship by blood or marriage, race, ancestry, or other similar fact" of family history.

(2) *Fact of Birth, Death, Marriage, or Relationship*. In *Estate of Flood* (1933) 217 C. 763, 767, 21 P.2d 579, petitioner, claiming as a pretermitted heir, sought to prove that she was the illegitimate daughter of the testator, "legitimated" by reception into the family. The testimony showed that the testator and his wife had taken the girl into their household; that the testator had addressed her as "daughter"; and that she was known as "Constance M. Flood." *Held*, these acts and declarations were admissible to show paternity as well as reception into the family. (See *Estate of Paulsen* (1918) 179 C. 528, 532, 178 P. 143 [to prove death of B in Denmark for purposes of special administration, cablegram and letters from B's sister and children admitted]; *Lam Ong v. Pacific Motor Trucking Co.* (1935) 10 C.A.2d 329, 331, 51 P.2d 1112 [decendent's declarations admitted to show relationship of heirs seeking damages for wrongful death]; *Estate of Connors* (1942) 53 C.A.2d 484, 487, 128 P.2d 200 [decendent's declaration to her sister that claimant was her illegitimate child]; *Estate of Smith* (1949) 33 C.2d 279, 282, 201 P.2d 539 [testator's declaration that he was divorced from respondent and that she was his "ex-wife"]; *Estate of Monticelli* (1951) 107 C.A.2d 90, 91, 236 P.2d 661 [testator's will gave legacy to "Antonia Cataldi (Mother)"; held equivalent to statement that Antonia was his mother, so that Antonia's other children would take under antilapse statute]; *Estate of Stevenson* (1992) 11 C.A.4th 852, 863, 14 C.R.2d 250 [decendent's intention to adopt stepchildren]; 5 Wigmore (Chadbourn Rev.) §1500 et seq.; 31 A.L.R.2d 989 [parentage].)

Even a "nonpedigree declaration" may be received, e.g., a statement by a decedent that he had *no living relatives*; this is, in effect, a declaration on *death*. (*Estate of Friedman* (1918) 178 C. 27, 35, 172 P. 140; *Estate of Morgan* (1928) 203 C. 569, 575, 576, 265 P. 241.)

(3) *Place of Birth, Death, or Marriage*. The place, as well as the fact of birth, death, or marriage, may be shown, by way of identification of a person or family. (*Estate of Strong* (1942) 54 C.A.2d 604, 608, 129 P.2d 493.)

In *Estate of Berg, supra*, the issue was whether decedent, remarried, had been divorced from his first wife. This could be resolved by an examination of the records in the places where he had lived. The trial judge accordingly allowed evidence of decedent's statement to his son of his previous places of residence. *Held*, this was proper.

"Where a man has deserted his family for an extended period of time and has not kept them informed of his movements, his declarations as to his subsequent places of residence may offer the only basis for the acquisition of information with respect to whether he has altered his family relationships by acts having legal consequences. ... The places in which a man has resided form an important part of his personal history and his declarations with respect thereto may ordinarily be assumed to have been sincere and trustworthy." (225 C.A.2d 432.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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S. Family History.

2. Declarations.

a. Declarant's Own Family History.

*1 Witkin Cal. Evid. Hearsay § 278*

[§ 278] Declarant's Own Family History.

Subject to the lack of trustworthiness restriction (*infra*, §281), "evidence of a statement by a declarant who is unavailable as a witness concerning his own birth, marriage, divorce, a parent and child relationship, relationship by blood or marriage, race, ancestry, or other similar fact of his family history" is admissible "even though the declarant had no means of acquiring personal knowledge of the matter declared." (*Ev.C. 1310(a).*)

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#### S. Family History.

#### 2. Declarations.

#### b. Declarant Related to Family.

*1 Witkin Cal. Evid. Hearsay § 279*

[§ 279] Declarant Related to Family.

(1) *Reason for Foundation Requirement.* Subject to the lack of trustworthiness restriction (*infra*, §281), "evidence of a statement concerning the birth, marriage, divorce, death, parent and child relationship, race, ancestry, relationship by blood or marriage, or other similar fact of the family history of a person other than the declarant" is admissible if the declarant is unavailable as a witness and "was related to the other by blood or marriage." (*Ev.C. 1311(a).*)

Where the declarant's *own* family history is the subject of the statement, the only condition to admission is the declarant's *unavailability*. (*Ev.C. 1310(a)*, *supra*, §278.) But where the declaration concerns the family history of *another*, an additional foundation must be laid. It must be shown that the declarant is related to the family whose history is involved. The reason is that the knowledge requirement is dispensed with in pedigree declarations only because a member of or person related to the family is considered likely to be well informed on family matters. (See 2 McCormick 5th, §322; 5 Wigmore (Chadbourn Rev.) §1491; 2 *Hastings L. J.* 2.)

Thus, in *Estate of Hartman* (1910) 157 C. 206, 210, 107 P. 105, Annie Hartman Burns claimed a share in William Hartman's estate, as the daughter of the testator's brother, Peter Hartman. In addition to other evidence, she relied on Peter's declarations, *first testifying* that Peter was her father, thus establishing her relationship to the declarant, and *then introducing declarations* of Peter that he had a brother named William.

(2) *Relationship by Birth or Marriage.* The declaration is admissible if the declarant is related by "blood or marriage" to the person who is the subject of the declaration. (*Ev.C. 1311(a).*) This permits proof of declarations of any relatives, including persons not actually members of the immediate family. Thus, in *Estate of Flood* (1933) 217 C. 763, 782, 21 P.2d 579, the court held that declarations of *relatives of the testator's wife*, with whom petitioner had lived for a time, to the effect that she was the testator's daughter, were admissible, either on the theory that they were made by members of the *testator's* family connected by marriage, or as evidence of common reputation in the family in which *petitioner* had lived (*infra*, §283). (See *Estate of Weis* (1964) 224 C.A.2d 19, 25, 36 C.R. 266, citing the text; 2 *Hastings L. J.* 3.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Reason for Foundation Requirement.* See 2 McCormick 6th, §322. *West's Key Number Digest*, Evidence k.289 et seq.



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S. Family History.

2. Declarations.

c. Declarant Intimately Associated With Family.

*1 Witkin Cal. Evid. Hearsay § 280*

[§ 280] Declarant Intimately Associated With Family.

The strict common law requirement of actual relationship excludes declarations of such well-informed persons as family housekeepers and doctors. The Uniform Rules of Evidence follow Wigmore's liberalizing suggestion in admitting the declarations of one intimately associated with the other's family. (Unif. Rule 804(b)(4); see 5 Wigmore (Chadbourn Rev.) §§1486, 1487; 1952 A.S. 737; 15 A.L.R.2d 1412.)

*Ev.C. 1311(a)(2)* adopted the Uniform Rule: The statement is admissible if "[t]he declarant was otherwise so intimately associated with the other's family as to be likely to have had accurate information concerning the matter declared and made the statement (i) upon information received from the other or from a person related by blood or marriage to the other or (ii) upon repute in the other's family."

Under this provision, a family housekeeper, doctor, or close friend, included by the family in discussions of the subject, is a competent declarant. (Law Rev. Com. Comment to *Ev.C. 1311*.)

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2. Declarations.

d. Circumstances Indicating Untrustworthiness.

1 *Witkin Cal. Evid. Hearsay* § 281

[§ 281] Circumstances Indicating Untrustworthiness.

The traditional statement of this limitation, recognized by former case law, was that the statement must have been made before a controversy arose, i.e., before an interest or motive to falsify was present. (*Estate of Walden* (1913) 166 C. 446, 448, 137 P. 35; *Peterson v. Peterson* (1953) 121 C.A.2d 1, 11, 262 P.2d 613; *Estate of Nidever* (1960) 181 C.A.2d 367, 375, 376, 5 C.R. 343, *infra*, §293; see 5 Wigmore (Chadbourn Rev.) §§1483, 1484; 31 A.L.R.2d 1001.)

*Ev.C. 1310(b)* and *1311(b)* phrase it more generally: "Evidence of a statement is inadmissible under this section if the statement was made under circumstances such as to indicate its *lack of trustworthiness*." As the Law Revision Commission Comment to *Ev.C. 1310* observes, this language "permits the judge to consider the declarant's motives to tell the truth as well as his reasons to deviate therefrom in determining whether the statement is sufficiently trustworthy to be admitted as evidence."

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### III. EXCEPTIONS TO THE RULE

#### S. Family History.

#### 3. Admissible Evidence.

#### a. Entries in Family Records.

*1 Witkin Cal. Evid. Hearsay § 282*

[§ 282] Entries in Family Records.

"Evidence of entries in family Bibles or other family books or charts, engravings on rings, family portraits, engravings on urns, crypts, or tombstones, and the like," is admissible when offered to prove "the birth, marriage, divorce, death, parent and child relationship, race, ancestry, relationship by blood or marriage, or other similar fact of the family history of a member of the family by blood or marriage." (*Ev.C. 1312.*)

*F.R. Evid., Rule 803(13)* is similar: "Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like." (See 4 Mueller & Kirkpatrick, *Federal Evidence* 2d, §463; 29A *Am.Jur.2d* (1994 ed.), *Evidence* §1255 et seq.)

Entries of this type are admitted without an identified declarant on the theory that they are evidence of common reputation in the family. (See Model C., Rule 524, Comment, p. 287; *People v. Ratz* (1896) 115 C. 132, 134, 46 P. 915 ["The admissibility of the book did not depend upon proof of the handwriting or authorship of the entries"]; 2 *Hastings L. J.* 4; C.E.B., *Effective Introduction of Evidence* 2d, Chap. 25 [Family History: Statements, Reputation, and Records]; 5 Wigmore (Chadbourn Rev.) §§1495, 1496; *infra*, §283; on whether recitals in ancient deeds may be admitted to prove pedigree, see 2 *Hastings L. J.* 8; *infra*, §293.)

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*West's Key Number Digest*, Evidence k.287-



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#### 3. Admissible Evidence.

#### b. Reputation in Family.

#### *1 Witkin Cal. Evid. Hearsay § 283*

[§ 283] Reputation in Family.

It has been pointed out that even a specific declaration of pedigree is seldom based on personal knowledge, and that, like pedigree entries in family records, the declarations are simply evidence of what is reputed and believed to be true in the family. Accordingly, reputation in the family may be shown in proof of a fact of family history, even though it is multiple hearsay, because the determination of pedigree issues would be seriously hampered without it. (See *Ev.C. 1313*; *Estate of Flood* (1933) 217 C. 763, 783, 21 P.2d 579; *Estate of Newman* (1939) 34 C.A.2d 706, 712, 94 P.2d 356; *Estate of Connors* (1942) 53 C.A.2d 484, 487, 128 P.2d 200; *Estate of Nidever* (1960) 181 C.A.2d 367, 372, 5 C.R. 343, *infra*, §293; 2 *Hastings L. J.* 4; C.E.B., *Effective Introduction of Evidence* 2d, Chap. 25 [Family History: Statements, Reputation, and Records]; 2 *Jefferson, California Evidence Benchbook* 3d, §16.13 et seq.)

The former statute limited reputation to that which existed "previous to the controversy." The Evidence Code *omits this restriction*: "[I]t is unlikely that a family reputation on a matter of pedigree would be influenced by the existence of a controversy even though the declaration of an individual member of the family, covered in Sections 1310 and 1311, might be." (Law Rev. Com. Comment to *Ev.C. 1313*.)

*F.R. Evid., Rule 803(19)*, entitled *Reputation Concerning Personal or Family History*, makes admissible "[r]eputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history." (See 4 *Mueller & Kirkpatrick, Federal Evidence* 2d, §467.)

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#### 3. Admissible Evidence.

#### c. Community Reputation.

#### 1 *Witkin Cal. Evid. Hearsay* § 284

#### [§ 284] Community Reputation.

(1) *Marriage*. Former C.C.P. 1963(30) contained a presumption of marriage from proof of cohabitation and repute. Although the presumption has been eliminated, *Ev.C. 1314* codifies what was in effect a hearsay exception, allowing evidence of "reputation in a community" to prove the fact of marriage "of a person resident in the community at the time of the reputation." (See *Estate of Baldwin* (1912) 162 C. 471, 488, 123 P. 267 [pointing out that this was the explanation of the disputable presumption]; *Estate of Gill* (1937) 23 C.A.2d 212, 214, 72 P.2d 771; *People v. Vogel* (1956) 46 C.2d 798, 805, 299 P.2d 850 [in bigamy prosecution, general repute admissible to prove marriage and honest belief in marriage]; *People v. Bailey* (1961) 55 C.2d 514, 517, 11 C.R. 543, 360 P.2d 39 [prosecution for obtaining welfare aid by false pretenses]; 5 Wigmore (Chadbourn Rev.) §1602; 26 Cal. L. Rev. 270; 10 So. Cal. L. Rev. 98; 2 *Hastings L. J.* 7; 11 *Summary* (9th), *Husband and Wife*, §50; and see *F.R. Evid.*, Rule 803(19), *supra*, §283.)

However, *In re Marriage of Sasson* (1982) 129 C.A.3d 140, 180 C.R. 815, upholding the trial judge's exclusion of evidence of remarriage, expresses doubt as to the weight of such evidence: "[E]vidence of community repute, standing alone, must be accorded little significance where the solemnization of marriage is required; to do otherwise would be to render the necessity for solemnization a practical nullity." (129 C.A.3d 145.)

(2) *Other Facts of Family History*. Former statutory provisions were construed as excluding community reputation to prove other pedigree facts. (See *Estate of Heaton* (1902) 135 C. 385, 388, 67 P. 321.) Wigmore's suggestion was adopted by the Uniform Rules of Evidence, which admitted evidence of community reputation as to facts "which the judge finds likely to have been the subject of a reliable reputation in that community." (See 5 Wigmore (Chadbourn Rev.) §1605; 15 A.L.R.2d 1432.) *Ev.C. 1314* is not so broad; it permits evidence of community reputation to prove only four facts: marriage (*supra*), birth, divorce, or death. (See C.E.B., *Effective Introduction of Evidence* 2d, Chap. 25 [Family History: Statements, Reputation, and Records]; 2 Jefferson, *California Evidence Benchbook* 3d, §16.17 et seq.; for *F.R. Evid.*, Rule 803(19), see *supra*, §283.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Marriage*.

*Cross-Reference:* 11 *Summary* (10th), *Husband and Wife*, §53.



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#### 3. Admissible Evidence.

#### d. Church Records.

#### 1 *Witkin Cal. Evid. Hearsay* § 285

[§ 285] Church Records.

A church record could be an admissible business record under *Ev.C. 1271* (supra, §228) to prove church activities known to the person making the entries. But to prove facts of family history not known to the church officer or employee though commonly recorded in its baptismal, confirmation, marriage or funeral records, a special hearsay exception is necessary. (Law Rev. Com. Comment to *Ev.C. 1315*.)

"Evidence of a statement concerning a person's birth, marriage, divorce, death, parent and child relationship, race, ancestry, relationship by blood or marriage, or other similar fact of family history which is contained in a writing made as a record of a church, religious denomination, or religious society" is admissible under the following conditions:

(a) "The statement is contained in a writing made as a record of an act, condition, or event that would be admissible as evidence of such act, condition, or event" under *Ev.C. 1271*. (*Ev.C. 1315(a)*.)

(b) "The statement is of a kind customarily recorded in connection with the act, condition, or event recorded in the writing." (*Ev.C. 1315(b)*.) (See *Estate of Bell* (1926) 198 C. 32, 44, 243 P. 423 [baptismal records of church, and books of account of convent]; on use of baptismal certificate or other church record as documentary evidence to establish record of birth, see *Health & Saf.C. 102580*.)

*F.R. Evid.*, Rule 803(11) is similar: "Statement of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization." (See 4 Mueller & Kirkpatrick, *Federal Evidence* 2d, §461; 29A *Am.Jur.2d* (1994 ed.), *Evidence* §1282.)

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#### 3. Admissible Evidence.

#### e. Marriage, Baptismal, and Similar Certificates.

#### *1 Witkin Cal. Evid. Hearsay § 286*

[§ 286] Marriage, Baptismal, and Similar Certificates.

*Ev.C. 1316* is broader than former C.C.P. 1919a, which covered only church records, and the original Uniform Rules of Evidence, which contained a provision covering only marriage certificates. *Ev.C. 1316* provides for admission of a statement on family history (birth, marriage, divorce, death, parent and child relationship, race, ancestry, relationship by blood or marriage, or other similar fact) under the following conditions:

- (1) The statement "is contained in a certificate that the maker thereof performed a marriage or other ceremony or administered a sacrament."
- (2) "The maker was a clergyman, civil officer, or other person authorized to perform the acts reported in the certificate by law or by the rules, regulations, or requirements of a church, religious denomination, or religious society."
- (3) "The certificate was issued by the maker at the time and place of the ceremony or sacrament or within a reasonable time thereafter."

*F.R. Evid., Rule 803(12)* reads as follows: "Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter." (See 4 Mueller & Kirkpatrick, *Federal Evidence* 2d, §462; 29A *Am.Jur.2d* (1994 ed.), *Evidence* §1283.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Evidence k.334 et seq.



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#### T. Reputation.

##### 1. Community History.

*1 Witkin Cal. Evid. Hearsay § 287*

[§ 287] Community History.

(1) *Nature and Scope of Exception.* Common (community) reputation is admitted on certain subjects as to which community discussion would be likely to produce an accurate general opinion. There is some conflict as to the scope of the exception, and as to the requirement in many jurisdictions that the reputation be "ancient," e.g., going back to a former generation or 30 years. (See *Jordan v. Worthen* (1977) 68 C.A.3d 310, 318, 137 C.R. 282 [use of this evidence "is of doubtful validity where private rights are concerned"]; 2 McCormick 5th, §322; 5 Wigmore (Chadbourn Rev.) §1580 et seq.)

(2) *Evidence Code.* "Evidence of reputation in a community" is admissible if the reputation concerns "an event of general history of the community or of the state or nation of which the community is a part and the event was of importance to the community." (*Ev.C. 1320.*) (See C.E.B., Effective Introduction of Evidence 2d, Chap. 18.)

The Evidence Code dropped the former 30-year-old limitation: "The important question would seem to be whether a community reputation on the matter involved exists; its age would appear to go more to its venerability than to its truth. Nor is it necessary to include in Section 1320 the requirement that the reputation existed previous to controversy. It is unlikely that a community reputation respecting an event of general history would be influenced by the existence of a controversy." (Law Rev. Com. Comment to *Ev.C. 1320.*)

(3) *Federal Rules of Evidence.* *F.R. Evid., Rule 803(20)* makes admissible "[r]eputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located." (See 4 Mueller & Kirkpatrick, Federal Evidence 2d, §470.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Nature and Scope of Exception.* See 2 McCormick 6th, §322. *West's Key Number Digest*, Criminal Law k.375 et seq.; Evidence k.322 et seq.



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T. Reputation.

2. Public Interest in Property.

*1 Witkin Cal. Evid. Hearsay § 288*

[§ 288] Public Interest in Property.

"Evidence of reputation in a community" is admissible if it concerns "the interest of the public in property in the community." (*Ev.C. 1321.*) But *title* to property cannot be so proved. (*Simons v. Inyo Cerro Gordo Mining & Power Co. (1920) 48 C.A. 524, 531, 192 P. 144*; for discussion of similar provisions in other jurisdictions, see 5 Wigmore (Chadbourn Rev.) §1626.)

As in the exception for community history (*supra*, §287), the 30-year-old limitation is abandoned, but another limitation is added: The reputation must have arisen before there was a "controversy" concerning the matter. (*Ev.C. 1321.*)

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*West's Key Number Digest*, Evidence k.298 et seq.



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T. Reputation.

3. Boundary or Custom Affecting Land.

*1 Witkin Cal. Evid. Hearsay § 289*

[§ 289] Boundary or Custom Affecting Land.

"Evidence of reputation in a community" is admissible if it concerns "boundaries of, or customs affecting, land in the community." (*Ev.C. 1322.*) (See *F.R. Evid., Rule 803(20)*, *supra*, §287; *Muller v. Southern Pac. Branch Ry. Co.* (1890) 83 C. 240, 242, 23 P. 265; *Ames v. Empire Star Mines Co.* (1941) 17 C.2d 213, 224, 110 P.2d 13 [original location of mine]; 2 McCormick 5th, §322; 5 Wigmore (Chadbourn Rev.) §1587; 79 A.L.R.4th 1044 [admissibility under Unif. Rule 803(20), and similar formulations].)

As with the exception for community reputation concerning public interest in property (*supra*, §288), the reputation as to boundaries or customs must have arisen "before controversy." (*Ev.C. 1322.*)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 2 McCormick 6th, §322.





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T. Reputation.

4. Character.

*1 Witkin Cal. Evid. Hearsay § 290*

[§ 290] Character.

When character of a party or a witness is relevant (see *1 Cal. Evidence (4th), Circumstantial Evidence, §38 et seq.*), it may be proved in several ways (see *1 Cal. Evidence (4th), Circumstantial Evidence, §43*). One of the methods of proof is by "common" or community reputation. "Evidence of a person's general reputation with reference to his character or a trait of his character at a relevant time in the community in which he then resided or in a group with which he then habitually associated" is admissible. (*Ev.C. 1324.*) (On impeachment by evidence of reputation, see *3 Cal. Evidence (4th), Presentation at Trial, §288 et seq.*)

*F.R. Evid., Rule 803(21)* is similar: "Reputation of a person's character among associates or in the community." (See *4 Mueller & Kirkpatrick, Federal Evidence 2d, §471.*)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest, Criminal Law k.375 et seq.; Evidence k.322(2)*



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U. Statement Concerning Boundary.

*1 Witkin Cal. Evid. Hearsay § 291*

[§ 291] Statement Concerning Boundary.

*Ev.C. 1323* codifies a case law exception making admissible "[e]vidence of a statement concerning the boundary of land." (See *Morcom v. Baiersky* (1911) 16 C.A. 480, 117 P. 560 [surveyor's map]; 5 Wigmore (Chadbourn Rev.) §1563.) Three conditions are specified:

- (1) The declarant must be unavailable as a witness.
- (2) The declarant must have had sufficient knowledge of the subject.
- (3) The statement is not admissible if made under circumstances indicating lack of trustworthiness.

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Evidence k.274 et seq.



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V. Recitals in Dispositive Instruments.

1 *Witkin Cal. Evid. Hearsay* § 292

[§ 292] Recitals in Dispositive Instruments.

"Evidence of a statement contained in a deed of conveyance or a will or other writing purporting to affect an interest in real or personal property" is admissible if (1) the matter stated "was relevant to the *purpose of the writing*," and (2) the matter stated "would be relevant to *an issue* as to an interest in the property." (*Ev.C. 1330(a), (b).*)

No limitation relating to age is imposed: "There is a sufficient likelihood that the statements made in a dispositive document, when related to the purpose of the document, will be true to warrant the admissibility of such documents without regard to their age." (Law Rev. Com. Comment to *Ev.C. 1330*.) But another condition is specified: that "the dealings with the property since the statement was made have not been inconsistent with the truth of the statement." (*Ev.C. 1330(c).*)

*F.R. Evid., Rule 803(15)* is similar. It provides for admission of a "statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document." (See 4 Mueller & Kirkpatrick, *Federal Evidence* 2d, §465; 29A *Am.Jur.2d* (1994 ed.), *Evidence* §§1244, 1249.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Evidence k.353(3)



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## CHAPTER VI - Hearsay

## III. EXCEPTIONS TO THE RULE

## W. Recitals in Ancient Writings.

1 *Witkin Cal. Evid. Hearsay* § 293

[§ 293] Recitals in Ancient Writings.

(1) *Former Law.* California law formerly covered ancient documents (more than 30 years old) by a statutory presumption (former C.C.P. 1963(34)). It was clear that this dispensed with authentication of the document by presuming its genuineness (see 1 *Cal. Evidence (4th), Burden of Proof and Presumptions*, §80), but whether it also overcame the hearsay rule so as to give evidentiary effect to its recitals was uncertain. (See *Gwin v. Calegaris* (1903) 139 C. 384, 389, 73 P. 851 [age merely establishes genuineness, does not import verity to recitals]; cf. *Kirkpatrick v. Tapo Oil Co.* (1956) 144 C.A.2d 404, 411, 301 P.2d 274 ["Ancient documents would have no effect or potency as evidence unless they served to import verity to the facts written therein"]; *Estate of Nidever* (1960) 181 C.A.2d 367, 376, 5 C.R. 343 [following *Kirkpatrick*]; *Devereaux v. Frazier Mountain Park & Fisheries Co.* (1967) 248 C.A.2d 323, 331, 56 C.R. 345 [following *Kirkpatrick* and *Nidever*]; 2 McCormick 5th, §323.)

(2) *Evidence Code.* *Ev.C. 1331* resolved the conflict by making a hearsay exception for a statement "contained in a writing more than 30 years old." But it retained the requirement of the old presumption statute, sometimes ignored in the cases, that "the statement has been since generally acted upon as true by persons having an interest in the matter." The Comment states: "The age of a document alone is not a sufficient guarantee of the trustworthiness of a statement contained therein to warrant the admission of the statement into evidence." (Law Rev. Com. Comment to *Ev.C. 1331*; see C.E.B., *Effective Introduction of Evidence* 2d, Chap. 21 [Dispositive Instruments and Ancient Writings]; 5 Wigmore (Chadbourn Rev.) §1573a [discussing California statute]; 39 *Santa Clara L. Rev.* 719 [applicability of rule against multiple hearsay to statements in ancient documents]; 50 *Proof of Facts* 2d 321 [Ancient Documents]; 46 A.L.R.2d 1318 [ancient maps and the like].)

(3) *Federal Rules of Evidence.* The federal time period is shorter: *F.R. Evid., Rule 803(16)*, provides for admission of "[s]tatements in a document in existence twenty years or more the authenticity of which is established." (See 4 Mueller & Kirkpatrick, *Federal Evidence* 2d, §466; 29A *Am.Jur.2d* (1994 ed.), *Evidence* §§1211, 1253; 63 A.L.R.5th 331 [Unif. Rule 803(16)].)

(4) *No-Controversy Requirement Inapplicable.* There is no requirement that the recitals have been made "ante litem motam," i.e., before a controversy. Thus, in *Estate of Nidever, supra*, the issue was whether Joseph was legally married to Anna after his divorce from Hester. The trial judge admitted declarations in writing by Anna and by Hester, each claiming a pension from the United States as widow of Joseph. Appellants contended that, because a controversy already existed between them (*supra*, §281), the declarations were not admissible under the family history exception as it then read. However, they were held admissible as ancient documents (made about 1880), not subject to the controversy limitation. (181 C.A.2d 377.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Former Law.* See 2 McCormick 6th, §323.(3) *Federal Rules of Evidence.* See 186 A.L.R. Fed 485 [admissibility of ancient documents under *F.R. Evid., Rule 803(16)*]. *West's Key Number Digest*, Evidence k.372 et seq.



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## CHAPTER VI - Hearsay

### III. EXCEPTIONS TO THE RULE

#### X. Commercial and Similar Lists.

##### *1 Witkin Cal. Evid. Hearsay § 294*

[§ 294] Commercial and Similar Lists.

"Evidence of a statement, other than an opinion, contained in a tabulation, list, directory, register, or other published compilation" is admissible if "the compilation is generally used and relied upon as accurate in the course of a business as defined in Section 1270." (*Ev.C. 1340.*) (On *Ev.C. 1270*, see *supra*, §228.)

*F.R. Evid.*, Rule 803(17) is similar, providing for admission of "[m]arket quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations." (See 4 Mueller & Kirkpatrick, *Federal Evidence* 2d, §467; 29A Am.Jur.2d (1994 ed.), Evidence §1429.)

The importance of the statutory condition of reliability is pointed out in *Miller v. Modern Business Center* (1983) 147 C.A.3d 632, 636, 195 C.R. 279: "Commercial lists and other compilations often derive different types of information from different sources. The same publication may assemble some classes of information from reliable sources yet have to look to less dependable sources for other data. Businesses thus may have learned to place great faith in some portions of a publication but to approach other sections with great skepticism."

The following are illustrative of such publications:

(1) *Market reports in trade journals.* "Whenever the prevailing price or value of any goods regularly bought and sold in any established commodity market is in issue, reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such market shall be admissible in evidence. The circumstances of the preparation of such a report may be shown to affect its weight but not its admissibility." (U.C.C. 2724; see 6 Wigmore (Chadbourn Rev.) §1704; 7 A.L.R.4th 638 [professional directories].)

(2) *Mortality and annuity tables.* In a wrongful death action, *mortality tables* of life insurance companies may be used to show the life expectancy of a decedent in years, and *annuity tables* may be used to determine the present value of prospective pecuniary loss. (See *Christiansen v. Hollings* (1941) 44 C.A.2d 332, 340, 112 P.2d 723; *Emery v. Southern Calif. Gas Co.* (1946) 72 C.A.2d 821, 824, 165 P.2d 695; 6 Wigmore (Chadbourn Rev.) §1698; 19 So. Cal. L. Rev. 451; 7 Proof of Facts 220; 79 A.L.R.2d 275 [testimony of actuary or mathematician as to present value of loss or impairment of injured person's general earning capacity]; BAJI (8th ed.), No. 14.69 [life expectancy instruction]; BAJI (8th ed.), No. 14.70 [present value instruction]; BAJI (8th ed.), Appendix A [life expectancy table], Appendix B [present value table].)

(3) *Ingredients listed on product label.* In *re Michael G.* (1993) 19 C.A.4th 1674, 24 C.R.2d 260, was a juvenile court proceeding under Welf.C. 602 in which it was alleged that the minor had possessed a substance containing toluene

with the intent to inhale for the purpose of intoxication in violation of P.C. 381(a) (see 2 *Cal. Crim. Law (3d)*, *Crimes Against Public Peace and Welfare*, §79). The spray paint can and other items seized from the minor were not chemically analyzed, but the label on the can stated that toluene was an ingredient. The trial judge took judicial notice of the fact that the public relies on the dangers and antidotes listed on a can label, and admitted the label into evidence under *Ev.C. 1340*. *Held*, affirmed. A label listing a dangerous substance is inherently trustworthy, because a manufacturer would have no interest in proclaiming that the product contains a dangerous substance if it does not. Thus, the trial judge was entitled to take judicial notice of public reliance on such labels and to conclude that the label was generally used and relied on as accurate in the course of a business within the meaning of the hearsay exception contained in *Ev.C. 1340*. (19 *C.A.4th* 1678.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Lockyer v. R.J. Reynolds Tobacco Co.* (2004) 116 *C.A.4th* 1253, 1269, 11 *C.R.3d* 317 [in action alleging that defendant tobacco company violated settlement agreement incorporated into consent decree by targeting youth through its magazine advertisements, data based on survey showing that levels of exposure of defendant's advertising to youth and adults were essentially same were properly admitted under *Ev.C. 1340*].(2) *Mortality and annuity tables*. See CACI, No. 3904 [present cash value], CACI, No. 3932 [life expectancy]. *West's Key Number Digest*, Evidence k.364, 365



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CHAPTER VI - Hearsay

III. EXCEPTIONS TO THE RULE

Y. Treatises, Maps, and Charts.

1. Noncontroversial Publications.

*1 Witkin Cal. Evid. Hearsay § 295*

[§ 295] Noncontroversial Publications.

"Historical works, books of science or art, and published maps or charts, made by persons indifferent between the parties," are admissible to prove "facts of general notoriety and interest." (*Ev.C. 1341.*) (See 6 Wigmore (Chadbourn Rev.) §1690 et seq.; *29A Am.Jur.2d* (1994 ed.), *Evidence* §1413 et seq.; on *F.R. Evid.*, *Rule 803(18)*, see *infra*, §296.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Evidence k.358 et seq.





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## CHAPTER VI - Hearsay

## III. EXCEPTIONS TO THE RULE

## Y. Treatises, Maps, and Charts.

## 2. Medical Texts.

1 *Witkin Cal. Evid. Hearsay* § 296

## [§ 296] Medical Texts.

(1) *In General.* The broad category of "books of science" could include medical books. The original Uniform Rules of Evidence allowed the introduction of a "published treatise" on "a subject of ... science," if the judge took judicial notice, or an expert witness testified, that it is a reliable authority. This rule was expected to overcome the objection to introducing medical works. (See 2 McCormick 5th, §321; 6 Wigmore (Chadbourn Rev.) §1690.)

*F.R. Evid., Rule 803(18)* also supports admissibility. It provides for admission, "[t]o the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination," of statements in "published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice." Statements that are admitted "may be read into evidence but may not be received as exhibits." (See 4 Mueller & Kirkpatrick, *Federal Evidence* 2d, §468; 29A *Am.Jur.2d* (1994 ed.), *Evidence* §§1416, 1417.)

(2) *Evidence Code.* The objection was repeatedly declared in negligence cases in California and elsewhere that medical works are controversial statements of the author and therefore undesirable hearsay. (See *Gallagher v. Market Street Ry. Co.* (1885) 67 C. 13, 15, 6 P. 869; *People v. Conrad* (1973) 31 C.A.3d 308, 321, footnote 9, 107 C.R. 421, [exclusion of Physicians' Desk Reference book to show uses and side effects of drugs administered to defendant was proper]; *Intoximeters v. Younger* (1975) 53 C.A.3d 262, 272, 125 C.R. 864, quoting the text [rejected evidence consisted of hearsay writings found in medical journals; "Experience has shown that isolated reports of this nature are as often as not rebutted by the opinions and experiences of other writers, and that they are unreliable as proof"]; 12 *So. Cal. L. Rev.* 424; 23 *So. Cal. L. Rev.* 403; 2 *U.C.L.A. L. Rev.* 252; 9 *Stanf. L. Rev.* 742; 72 A.L.R.2d 931 [counsel's right, in argument, to read medical or other text to jury]; 84 A.L.R.2d 1338 [medical book or treatise as independent evidence].)

By rejecting the former Uniform Rule and restating the former statute in *Ev.C. 1341* (supra, §295), the Legislature retained the exclusionary rule. But a 1997 addition to *Ev.C. 721*, on the cross-examination of expert witnesses, brought the California approach into harmony with that of *F.R. Evid., Rule 803(18)*, supra. (See 3 *Cal. Evidence* (4th), *Presentation at Trial*, §255; on expert's indirect use of medical texts in reaching opinion on which expert testifies, see 1 *Cal. Evidence* (4th), *Opinion Evidence*, §34.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General.* See 2 McCormick 6th, §321.



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## CHAPTER VI - Hearsay

### III. EXCEPTIONS TO THE RULE

#### Z. Affidavits.

1 Witkin Cal. Evid. Hearsay § 297

[§ 297] Affidavits.

(1) *Affidavit as Hearsay.* In the absence of statutory permission, an affidavit is not competent evidence; though made under oath, it is hearsay because there has been no opportunity to cross-examine the affiant. (See *C.C.P. 2003* [defining affidavit]; *Fewel v. Fewel* (1943) 23 C.2d 431, 438, 144 P.2d 592; *Moon v. Moon* (1944) 62 C.A.2d 185, 188, 144 P.2d 596; *Estate of Fraysher* (1956) 47 C.2d 131, 135, 301 P.2d 848 [rule stated, but no error where admitted by consent or without objection]; *People v. Dickinson* (1976) 59 C.A.3d 314, 319, 130 C.R. 561; 6 Wigmore (Chadbourne Rev.) §1709.)

(2) *Statutory Authorization.* Because affidavits are admissible only in particular situations under express statutory authorization, no general hearsay exception for them was stated in the Evidence Code. The existing statutes remain, and *Ev.C. 1205* (supra, §2) recognizes their continued validity. The following are the principal situations:

(a) To verify a pleading or a paper in a special proceeding. (*C.C.P. 2009*.) But this is no longer essential; an unsworn, unnotarized verification is now permissible under *C.C.P. 446*. (See 4 *Cal. Proc.* (4th), *Pleading*, §423.)

(b) To prove the service of a summons, notice, or other paper in an action or special proceeding. (*C.C.P. 2009*; see *Conservatorship of Jones* (1986) 188 C.A.3d 306, 309, 310, 232 C.R. 600, citing the text [affidavit as proof of service of citation and petition for conservatorship].)

(c) To obtain a provisional remedy, the examination of a witness, or a stay of proceedings. (*C.C.P. 2009*; see 6 *Cal. Proc.* (4th), *Provisional Remedies*, §2.)

(d) Upon a motion. (*C.C.P. 2009*; see 6 *Cal. Proc.* (4th), *Proceedings Without Trial*, §39.)

(e) In any uncontested proceeding to establish a record of birth. (*C.C.P. 2009*; see *Health & Saf.C. 103450* et seq.)

(f) In any other case expressly permitted by other provisions of the Code of Civil Procedure. (*C.C.P. 2009*.)

(g) In an application for a default judgment, in the discretion of the court. (*C.C.P. 585(d)*; see 6 *Cal. Proc.* (4th), *Proceedings Without Trial*, §147.)

(h) In economic litigation cases, as prepared testimony. (*C.C.P. 98*; see 2 *Cal. Proc.* (4th), *Courts*, §266.)

(i) In an uncontested probate proceeding. (*Prob.C. 1022*; see *Prob.C. 210(a)* [establishment of fact of death]; *Prob.C. 8220* [evidence of subscribing witnesses]; 12 *Summary* (9th), *Wills and Probate*, §§93, 361; and see *Estate of*

*Fraysher, supra* [no statutory authority for use in contested proceeding for settlement of account].)

(j) In a criminal trial, to show, by means of a nurse's or laboratory technologist's affidavit, the technique used in taking blood samples. (*Ev.C.* 712; see *10 Pacific L. J.* 435.)

(k) In administrative proceedings. (*Govt.C.* 11514, 1 *Cal. Evidence* (4th), *Introduction*, §69.)

(3) *Administrative Mandamus Proceedings.* The use of affidavits as evidence in *administrative proceedings* is authorized by statute (*Govt.C.* 11514, 1 *Cal. Evidence* (4th), *Introduction*, §69). *C.C.P.* 1094.5, providing for judicial review of agency decisions by administrative mandamus (see 8 *Cal. Proc.* (4th), *Extraordinary Writs*, §262), authorizes the court to admit evidence that "could not have been produced or which was improperly excluded" at the administrative hearing. (*C.C.P.* 1094.5(e).) In *Windigo Mills v. Unemp. Ins. App. Bd.* (1979) 92 *C.A.3d* 586, 598, 155 *C.R.* 63, the court said: "If an affidavit should be wrongly excluded at the administrative hearing, it would be admissible in the superior court. Similarly, if by the exercise of due diligence a party was unable to present evidence at the administrative hearing which could have been admitted by way of affidavit, he should be permitted to introduce the same evidence in the superior court by affidavit. ... We conclude therefore that *Code of Civil Procedure* section 1094.5, subdivision (e) constitutes statutory authority for the use of affidavits as direct evidence at administrative mandamus hearings in the superior court, subject of course, to the rules governing the right of cross-examination and to the prohibition against double hearsay." (92 *C.A.3d* 598.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Statutory Authorization.* On fee for taking affidavit, see *Govt.C.* 70626.(d) *Upon a motion:* Cf. *Elkins v. Superior Court* (2007) 41 *C.4th* 1337, 1355, 63 *C.R.3d* 483, 163 *P.3d* 160 [local court rule requiring parties in marital dissolution matters to present case by written declarations was invalid; *C.C.P.* 2009 authorizes affidavits or declarations in motion matters but not at contested trial leading to judgment]; *Pajaro Valley Water Management Agency v. McGrath* (2005) 128 *C.A.4th* 1093, 1107, 27 *C.R.3d* 741, citing the text [although declaration presented by water agency in support of its summary judgment motion would have been admissible in and of itself, it included two further levels of hearsay (attachment that was not incorporated into declaration, and description of "amount owed" derived from bills for which no foundation had been laid), and thus hearsay objection was properly sustained].

(i) *Uncontested probate proceeding:*

*Cross-Reference:* 14 *Summary* (10th), *Wills and Probate*, §§15, 376. *West's Key Number Digest*, Evidence k.318(7)



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## CHAPTER VII - Demonstrative, Experimental, and Scientific Evidence

### I. GENERAL PRINCIPLES A. Definitions and Classification.

#### 2 Witkin Cal. Evid. Demo Evid § 1

#### [§ 1] Definitions and Classification.

(1) *Demonstrative or Real Evidence*. The statutory definition of "evidence" covers "material objects, or other things presented to the senses." (*Ev.C. 140*.) And the Law Revision Commission Comment to the statute points out that this includes "sights (such as a jury view or the appearance of a person exhibited to a jury), sounds (such as the sound of a voice demonstrated for a jury), and any other thing that may be presented as a basis of proof."

This kind of evidence is commonly termed "demonstrative evidence" or "real evidence." It usually consists of physical objects such as clothing, weapons, machines, photographs, or models, introduced for examination by the judge and jury. Its evidentiary value lies in considerable part in demonstration of matters that are readily perceived by the senses. (See *infra*, §3 *et seq.*)

Former C.C.P. 1954 contained an express declaration of admissibility of relevant objects, in the court's discretion. In view of the definition in *Ev.C. 140*, the relevancy rules of *Ev.C. 210* and *351*, and the discretion rule of *Ev.C. 352*, C.C.P. 1954 was deemed superfluous and was not restated.

(2) *Experimental Evidence*. This is evidence of the result of an experiment conducted either out of court or in the courtroom, under conditions similar to those that gave rise to the controverted issue, and offered as circumstantial evidence on that issue. (See *infra*, §35 *et seq.*)

(3) *Scientific Evidence*. This is a nontechnical term that refers loosely to evidence produced by expert scientific techniques such as experiments and chemical and other tests. (See *infra*, §§35 *et seq.*, 41 *et seq.*)

(4) *Practice Works and Commentary*. The use of demonstrative, experimental, and scientific evidence has expanded enormously in recent years, and a considerable body of literature deals with the techniques. (See generally 2 McCormick 5th, §212 *et seq.*; 4 Wigmore (Chadbourn Rev.) §1150 *et seq.*; 3 Wharton, Crim. Evidence (14th ed.), §585 *et seq.*; 29A *Am.Jur.2d* (1994 ed.), *Evidence* §934 *et seq.*; C.J.E.R., Judges Benchbook, Civil Proceedings: Trial, Chap. 7 [exhibits and demonstrations].)

The U.C. Davis Law Review, Volume 25, No. 4 (Summer 1992), contains a comprehensive analysis of this subject under the title "The Derivative Relevance of Demonstrative Evidence: Charting Its Proper Evidentiary Status." (25 *U.C. Davis L. Rev.* 957.)

The article covers the subject under the following headings:

(a) The Nature of Demonstrative Evidence. (25 *U.C. Davis L. Rev.* 967.)

(b) The Disjunctive History of Demonstrative Evidence. (25 U.C. Davis L. Rev. 986.)

(c) Modifying the Rules of Relevancy. (25 U.C. Davis L. Rev. 1018.)

The article concludes with a proposed revision of *F.R. Evid., Rule 401* (definition of relevant evidence; see 1 *Cal. Evidence (4th), Circumstantial Evidence, §4*) and the Advisory Committee's Note. (25 U.C. Davis L. Rev. 1023.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(4) *Practice Works and Commentary*. See 2 McCormick 6th, §212 et seq. *West's Key Number Digest*, Criminal Law k.388 et seq., 404.5 et seq.; Evidence k.150, 188 et seq.



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## CHAPTER VII - Demonstrative, Experimental, and Scientific Evidence

### I. GENERAL PRINCIPLES

#### B. Relation to Rules of Evidence.

2 *Witkin Cal. Evid. Demo Evid* § 2

[§ 2] Relation to Rules of Evidence.

The lumping together of demonstrative and scientific evidence in this chapter serves a practical purpose, for a great deal of demonstrative evidence is scientific in nature, and much scientific evidence is presented by way of demonstration. But this kind of evidence is not governed by a distinct set of rules; the usual rules apply in the following manner:

(1) *Relevancy of Circumstantial Evidence*. In a few situations (e.g., exhibition of a person's body in a personal injury case, *infra*, §33), demonstrative evidence is direct. But in most cases, the objects are introduced as circumstantial evidence or as illustrative of testimony, and are subject to the usual tests of relevancy, and to the objections of undue prejudice and undue consumption of time. (See 2 McCormick 5th, §212; 4 Wigmore (Chadbourn Rev.) §§1151, 1154, 1157, 1158; 1 *Cal. Evidence* (4th), *Circumstantial Evidence*, §§17 et seq., 26.)

(2) *Opinion Rule*. Evidence of experiments or scientific tests is usually produced and offered in court by an expert witness, whose qualifications and testimony are subject to the rules relating to examination of experts. (See 1 *Cal. Evidence* (4th), *Opinion Evidence*, §38 et seq.; 3 *Cal. Evidence* (4th), *Presentation at Trial*, §189 et seq.)

(3) *Knowledge Requirement*. Where an expert relies on facts in reaching an opinion, the expert's testimony must show knowledge of those facts. (See 1 *Cal. Evidence* (4th), *Opinion Evidence*, §31.)

(4) *Evidence Illegally Obtained*. Demonstrative evidence obtained by illegal search and seizure (see 4 *Cal. Crim. Law* (3d), *Illegally Obtained Evidence*, §1 et seq.) or by brutal body examination (2 *Cal. Evidence* (4th), *Witnesses*, §413 et seq.) will be excluded. But the privilege against self-incrimination does not apply to compulsory production of nontestimonial real evidence. (See 2 *Cal. Evidence* (4th), *Witnesses*, §385 et seq.) Nor does the *Miranda* rule apply. (See *People v. Graves* (1966) 64 C.2d 208, 210, 49 C.R. 386, 411 P.2d 114, 2 *Cal. Evidence* (4th), *Witnesses*, §387.)

(5) *General Acceptance of Scientific Principle*. Before expert testimony may be offered about a scientific technique or test, there must be a preliminary showing of its general acceptance in the relevant scientific community. (See *infra*, §42 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Relevancy of Circumstantial Evidence*. See 2 McCormick 6th, §212.



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CHAPTER VII - Demonstrative, Experimental, and Scientific Evidence

II. REAL OR DEMONSTRATIVE EVIDENCE

A. Admission of Relevant Objects.

1. General Rule.

2 *Witkin Cal. Evid. Demo Evid* § 3

[§ 3] General Rule.

"Material objects, or other things presented to the senses," are admissible. (*Ev.C. 140*, supra, §1.) (See generally 2 McCormick 5th, §212; 4 Wigmore (Chadbourn Rev.) §1152; 29A *Am.Jur.2d* (1994 ed.), *Evidence* §936 et seq.; 68 A.L.R.2d 903 [clothing of deceased in homicide case]; 95 A.L.R.2d 681 [samples of article or substance of which quality or condition is involved in litigation].)

Most of the California cases deal with criminal prosecutions. And, although the courts occasionally explain the admissibility of demonstrative evidence in terms of the "res gestae" rule (see *People v. Lisenba* (1939) 14 C.2d 403, 412, 94 P.2d 569), the test is the same as that for circumstantial evidence generally, namely, relevancy: The object must be connected with the issues. (See *People v. McCall* (1935) 10 C.A.2d 503, 505, 52 P.2d 500, infra, §7; *People v. Riser* (1956) 47 C.2d 566, 577, 305 P.2d 1, infra, §7; supra, §2.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 2 McCormick 6th, §212. *West's Key Number Digest*, Criminal Law k.404.5 et seq.; Evidence k.188 et seq.



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## CHAPTER VII - Demonstrative, Experimental, and Scientific Evidence

### II. REAL OR DEMONSTRATIVE EVIDENCE

#### A. Admission of Relevant Objects.

##### 2. Illustrations.

##### a. Instruments Used To Commit Crimes.

*2 Witkin Cal. Evid. Demo Evid § 4*

#### [§ 4] Instruments Used To Commit Crimes.

(1) *Weapons*. Numerous cases hold that evidence relating to a weapon used to commit a crime is relevant:

*People v. Peete* (1921) 54 C.A. 333, 347, 202 P. 51 [revolver and cartridges, one empty, of about same caliber as that probably inflicting fatal wound, and found in defendant's room after killing].

*People v. Bannon* (1922) 59 C.A. 50, 56, 209 P. 1029 [bank passbook, taken from body of deceased, to show course and direction of bullet that had pierced it].

*People v. Radovich* (1932) 122 C.A. 176, 180, 9 P.2d 542 [gun found in defendant's trunk, shown to be similar to one used in commission of crime].

*People v. Trujillo* (1948) 32 C.2d 105, 115, 194 P.2d 681 [hammer with initials of defendant and other tools found near body of deceased whose head and face were severely lacerated].

*People v. Player* (1958) 161 C.A.2d 360, 361, 327 P.2d 83 [rape; pocket knife found on defendant, prosecutrix testified that it looked very similar to knife used in threatening her].

*People v. Tahl* (1967) 65 C.2d 719, 741, 56 C.R. 318, 423 P.2d 246 [sap (bludgeoning device), related to attack on murder victim by circumstantial evidence].

*People v. Spencer* (1972) 22 C.A.3d 786, 798, 99 C.R. 681 ["weapon found in defendant's possession when he is arrested, but not identified as the one used in the commission of the underlying offense, can properly be admitted on the issue of the minimum penalty"].

*People v. DeVaney* (1973) 33 C.A.3d 630, 635, 109 C.R. 276 [prosecution's evidence was circumstantial as to exact weapon used in robbery; three handguns connected with defendant were properly admitted "as an implement by means of which it is likely that a crime was committed"].

In *People v. Rinegold* (1970) 13 C.A.3d 711, 92 C.R. 12, a witness testified that he saw defendant place a revolver in a knapsack the day before the victim was shot. There was no showing that the weapon seen was the one that had been fired, and no weapon was placed in evidence. *Held*, admission of this testimony was proper. Where the prosecution's evidence is circumstantial, an implement likely to have been used is admissible if connected with the defendant;



testimony to that effect is similarly admissible. (13 C.A.3d 720, restating the distinction made in *People v. Riser* (1956) 47 C.2d 566, 305 P.2d 1, *infra*, §7.)

(2) *Other Instruments*. Courts have held that the following other types of instruments of a crime are relevant evidence:

*People v. Stone* (1949) 89 C.A.2d 853, 863, 873, 202 P.2d 333 [conspiracy to commit abortion; caustic soap and surgical instruments taken from possession of coconspirator].

*People v. Wilson* (1965) 238 C.A.2d 447, 461, 48 C.R. 55 [plastic strips used by burglars to slip lock on door].

*People v. Darling* (1989) 210 C.A.3d 910, 912, 258 C.R. 588 [screwdriver carried by burglar, who was caught on premises holding stolen items, was relevant to rebut his argument that he was too drunk to form specific intent to commit larceny or felony].

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Weapons*. See *People v. Cox* (2003) 30 C.4th 916, 956, 957, 135 C.R.2d 272, 70 P.3d 277 [in capital murder case, admission of evidence that defendant kept guns in his car was proper, even though cause of death of the three victims was unknown, where guns were possible murder weapons or could have been used to coerce victims into defendant's car or otherwise subdue them]; *People v. Roldan* (2005) 35 C.4th 646, 709, 27 C.R.3d 360, 110 P.3d 289 [in capital murder case, admission of 2 Uzi-like weapons was proper even though they were not weapons used by defendant; foundation was laid to establish that one Uzi was substantially similar to actual weapon used by defendant, and evidence would have helped jury understand prosecution's theory that defendant's weapon had jammed, making metal-on-metal clicking sound and causing him to manually eject live rounds later found by police]; *People v. Prince* (2007) 40 C.4th 1179, 1248, 57 C.R.3d 543, 156 P.3d 1015 [in murder prosecution, it was not error to admit evidence of knives found in defendant's car when he was arrested; although they were apparently not used in murders, it was reasonable to conclude that they were used in one or more of charged burglaries or attempted burglaries that occurred subsequent to murders; distinguishing *People v. Riser* (1956) 47 C.2d 566, 305 P.2d 1, text, §7]. *West's Key Number Digest*, Criminal Law k.404.50; Evidence k.193



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CHAPTER VII - Demonstrative, Experimental, and Scientific Evidence

II. REAL OR DEMONSTRATIVE EVIDENCE

A. Admission of Relevant Objects.

2. Illustrations.

b. Stolen Property.

2 Witkin Cal. Evid. Demo Evid § 5

[§ 5] Stolen Property.

Evidence of property stolen or otherwise taken from a victim or a crime scene and linked to the defendant has been held relevant:

*People v. Adamson* (1946) 27 C.2d 478, 485, 165 P.2d 3 [woman's stocking tops found in defendant's room; identifying factor in murder and burglary prosecution].

In *People v. Coffman* (1969) 2 C.A.3d 681, 82 C.R. 782, a bar was burglarized of four boxes of cigars (one unopened, three partially filled) and four to six "six-packs" of beer. Witnesses placed defendant at the scene. Approximately 7 weeks later, a police search of defendant's station wagon and apartment revealed four boxes of cigars (one filled, three partially filled) and an empty beer case. Defendant contended that this evidence was inadequate to convict him because the articles were of "fungible" character and could be purchased anywhere. *Held*, defendant's possession of articles corresponding to the stolen property and the eyewitness testimony of his activities outside the burglarized premises amounted to substantial evidence of his guilt. (2 C.A.3d 686.) The prosecution may prove the defendant's possession of items resembling, and that may actually be, the stolen ones; and here the brands and shapes of the four varieties of cigar "corresponded precisely" with the missing items. (2 C.A.3d 686.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Criminal Law k.404.75; Evidence k.194-



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CHAPTER VII - Demonstrative, Experimental, and Scientific Evidence

II. REAL OR DEMONSTRATIVE EVIDENCE

A. Admission of Relevant Objects.

2. Illustrations.

c. Other Objects.

2 Witkin Cal. Evid. Demo Evid § 6

[§ 6] Other Objects.

(1) *Controlled Substances*. In *People v. Salas* (1936) 17 C.A.2d 75, 61 P.2d 771, a prosecution for possession and transportation of morphine, defendant, driving erratically, was pursued by officers. The next day a box of morphine tablets, similar to morphine found in the car, was discovered about 100 feet away from the place the pursuing officers first sounded their siren. *Held*, the box was admissible; the jury might have concluded that it was thrown there by defendant. (17 C.A.2d 77.)

(2) *Body Parts of Murder Victim*. In *People v. Thomas* (1992) 2 C.4th 489, 7 C.R.2d 199, 828 P.2d 101, teeth and bone fragments of a murder victim were held relevant, because they corroborated testimony that they were found at the crime scene, and clarified the testimony of an expert. (2 C.4th 524.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Criminal Law k.404.45, 404.60



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## CHAPTER VII - Demonstrative, Experimental, and Scientific Evidence

### II. REAL OR DEMONSTRATIVE EVIDENCE

#### B. Exclusion of Irrelevant Objects.

##### 1. Weapons.

##### *2 Witkin Cal. Evid. Demo Evid § 7*

#### [§ 7] Weapons.

Courts have excluded as irrelevant evidence of a weapon used to commit a crime, where the weapon is not sufficiently connected to the defendant:

In *People v. Smith* (1921) 55 C.A. 324, 203 P. 816, a trial for murder by cyanide poisoning, it was held error to introduce a can of cyanide kept in a tool room at defendant's place of employment. There was no evidence that defendant ever saw the can or knew it was there. (55 C.A. 332.)

In *People v. McCall* (1935) 10 C.A.2d 503, 52 P.2d 500, defendant testified that, in a quarrel in deceased's car, he struck the deceased in self-defense, and that the latter fell to the pavement, fracturing his skull. The prosecution introduced an auto crank, wrench, hammer handle and tire iron, all found in the car, as possible weapons used against the victim. *Held*, this was error; it was not defendant's car, there were no bloodstains or fingerprints on the implements, and consequently there was nothing to connect them with the defendant. (10 C.A.2d 505.)

In *People v. Riser* (1956) 47 C.2d 566, 305 P.2d 1, the court made the following distinction: (a) If the specific type of weapon used to commit a homicide is not known, any weapons found in the defendant's possession after the crime that could have been employed are admissible. (b) But if the prosecution relies on a specific weapon or type, it is error to admit evidence that other weapons were found in defendant's possession; this tends to show not that he committed the crime but only that he is the sort of person who carries deadly weapons. (47 C.2d. 577.)

In *People v. Vaiza* (1966) 244 C.A.2d 121, 52 C.R. 733, defendant was charged with assault with a deadly weapon on a peace officer. The officer testified that defendant pointed "a gun" at him, saying, "stick 'em up," then turned and ran. The defense was that the weapon was a toy. The prosecution then introduced a real gun for "illustrative purposes only." *Held*, this was reversible error. The officer had seen defendant's gun in poor light for only a second and heard no metallic sound; also, his testimony showed dissimilarities between the weapon seen and the one offered in evidence. (244 C.A.2d 126.)

*People v. Lo Cigno* (1961) 193 C.A.2d 360, 379, 381, 14 C.R. 354 [error to introduce guns not connected with crime or defendant].

*People v. Henderson* (1976) 58 C.A.3d 349, 360, 129 C.R. 844 [same; "Evidence of possession of a weapon not used in the crime charged against a defendant leads logically only to an inference that defendant is the kind of person who surrounds himself with deadly weapons--a fact of no relevant consequence to determination of the guilt or

innocence of the defendant"].

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Barnwell* (2007) 41 C.4th 1038, 1056, 63 C.R.3d 82, 162 P.3d 596 [in murder prosecution, trial judge erred in admitting, as relevant to identity, testimony of police officer indicating that year before charged murders, defendant possessed handgun similar to murder weapon, where prosecution did not claim that weapon found by officer was murder weapon; however, error was harmless, as another officer saw defendant shoot two of victims of current offenses and precisely described weapon he used].



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## CHAPTER VII - Demonstrative, Experimental, and Scientific Evidence

### II. REAL OR DEMONSTRATIVE EVIDENCE

#### B. Exclusion of Irrelevant Objects.

##### 2. Other Objects.

*2 Witkin Cal. Evid. Demo Evid § 8*

[§ 8] Other Objects.

(1) *Controlled Substances*. Courts have excluded evidence relating to controlled substances as irrelevant in criminal prosecutions for a variety of reasons. The following are illustrative:

*People v. Morgan (1958) 157 C.A.2d 756, 757, 321 P.2d 873* [narcotics supposedly obtained from defendant by unidentified informer while out of sight of officers].

In *People v. Wong (1973) 35 C.A.3d 812, 111 C.R. 314*, defendant sought to exhibit his arms to the jury, to show that he had no needle marks and thereby to contradict a witness' testimony that he had a fresh needle mark the day after a homicide. *Held*, the offer was properly rejected. "The arm was being offered on May 12, 1971, to show the condition of defendant's arm on June 5, 1970." (35 C.A.3d 835; on exhibition of accused generally, see *infra*, §33.)

(2) *Photographs of Crime Scene*. In *People v. Turner (1984) 37 C.3d 302, 208 C.R. 196, 690 P.2d 669*, a murder case, four photographs of the crime scene, depicting bodies of the victims, were introduced. The pictures were not gruesome, but they were unnecessary to prove any part of the prosecution's case, which was based on felony murder, and the only probative value could be on intent to kill, a nonissue. *Held*, admission of the irrelevant evidence was error, although harmless in this case. (37 C.3d 321.)

*People v. Turner* does not purport to create a broad rule rejecting or limiting the admissibility of crime scene photographs in all felony-murder cases. Rather, the usual principles of relevance prescribed in *Ev.C. 210* apply to evidence of this type. (*People v. Scheid (1997) 16 C.4th 1, 17, 18, 65 C.R.2d 348, 939 P.2d 748* [crime scene photos showing victims handcuffed together, one dead and other badly injured, were properly admitted even though defendant had departed scene before shootings took place and was being prosecuted on felony-murder theory; photos were relevant to corroborate testimony of witnesses].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER VII - Demonstrative, Experimental, and Scientific Evidence

## II. REAL OR DEMONSTRATIVE EVIDENCE

## C. Inflammatory Matter.

## 1. General Rule.

## a. Admission Despite Some Prejudice.

2 Witkin Cal. Evid. Demo Evid § 9

[§ 9] Admission Despite Some Prejudice.

In some cases, e.g., personal injury or wrongful death actions or murder prosecutions, relevant photographs or physical objects may be so gruesome or shocking as to prejudice a party before the jury. Thus, the trial judge has discretion to exclude them. (*Ev.C.* 352; see *Akers v. Miller* (1998) 68 C.A.4th 1143, 1147, 80 C.R.2d 857 [in elder abuse action against nursing home, any error in excluding autopsy photographs depicting bedsores was harmless, because objective jury would not have reached different result had photographs been admitted]; 1 *Cal. Evidence* (4th), *Circumstantial Evidence*, §17; *infra*, §§12, 13.) However, the general practice is to let them come in: "[E]xcept in rare cases of abuse, demonstrative evidence that tends to prove a material issue or clarify the circumstances of the crime is admissible despite its prejudicial tendency." (*People v. Adamson* (1946) 27 C.2d 478, 486, 165 P.2d 3; see generally 4 Wigmore (Chadbourn Rev.) §§1157, 1158; 4 *Stanf. L. Rev.* 589; 58 A.L.R.2d 689 [skeleton or model of human body or part]; 68 A.L.R.2d 903 [clothing of deceased victim].)

As the court observed in *People v. Long* (1974) 38 C.A.3d 680, 113 C.R. 530, a murder prosecution involving the admission of allegedly prejudicial photographs, many attorneys underestimate a jury's stability. "A juror is not some kind of a dithering nincompoop, brought in from never-never land and exposed to the harsh realities of life for the first time in the jury box. There is nothing magic about being a member of the bench or bar that makes these individuals capable of dispassionately evaluating gruesome testimony that, it is often contended, will throw jurors into a paroxysm of hysteria. Jurors are our peers, often as well educated, as well balanced, as stable, as experienced in the realities of life as the holders of law degrees. The average juror is well able to stomach the unpleasantness of exposure to the facts of a murder without being unduly influenced. The supposed influence on jurors of allegedly gruesome or inflammatory pictures exists more in the imagination of judges and lawyers than in reality." (38 C.A.3d 689.) (See *People v. Thompson* (1992) 7 C.A.4th 1966, 1973, 10 C.R.2d 15 [quoting *People v. Long*]; for a criticism of the *Long* court's reserved ruling on admissibility of prejudicial physical evidence introduced by the prosecution, see *People v. Bowen* (1971) 22 C.A.3d 267, 291, 99 C.R. 498, 3 *Cal. Evidence* (4th), *Presentation at Trial*, §387.)

**SUPPLEMENT:** [This section is current through the latest supplement]*West's Key Number Digest*, Criminal Law k.338(7)



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## CHAPTER VII - Demonstrative, Experimental, and Scientific Evidence

### II. REAL OR DEMONSTRATIVE EVIDENCE

#### C. Inflammatory Matter.

##### 1. General Rule.

##### b. Illustrations: Photographic Evidence.

2 Witkin Cal. Evid. Demo Evid § 10

[§ 10] Illustrations: Photographic Evidence.

In *People v. Reese* (1956) 47 C.2d 112, 301 P.2d 582, a murder case, the prosecution first introduced photographs of the mutilated body of the female victim (breasts amputated and abdomen cut from vagina to navel), obviously relevant on the intent, motive and circumstances of the killing. Defendant complained, however, of the subsequent testimony of doctors and police officers describing these mutilations. *Held*, there was no error in admitting this cumulative relevant evidence. (47 C.2d 119.)

In *People v. Carter* (1957) 48 C.2d 737, 312 P.2d 665, a trial for murder, colored slides of the victim were introduced, showing the head, face, and neck, and the wounds. *Held*, this was a proper part of the testimony of the autopsy surgeon on the kind of weapon that probably caused the death (an instrument like that belonging to defendant). The court restated the rule as follows: "If the principal effect of demonstrative evidence such as photographs is to arouse the passions of the jury and inflame them against the defendant because of the horror of the crime, the evidence must of course be excluded. ... On the other hand, if the evidence has probative value with respect to a fact in issue that outweighs the danger of prejudice to the defendant, the evidence is admissible even if it is gruesome and may incidentally arouse the passions of the jury." (48 C.2d 751.)

In *People v. Atchley* (1959) 53 C.2d 160, 346 P.2d 764, defendant was found guilty of first degree murder by lying in wait and shooting his wife once in the head, once in the left breast, three times under the left arm, and once in the back. His defense was that he and his wife struggled, the gun went off, and then he fired it several more times. Photographs were admitted of (a) the deceased as found in the yard with bullet holes and bloodstains on her dress and face--to show the relative positions in which the body and items of evidence were discovered; and (b) the deceased on a table at the mortuary, naked above the waist with blood on her face--to show the location and nature of the wounds and to explain the basis for expert opinions on the position of the gun when the shots were fired. *Held*, there was no abuse of discretion in admitting this evidence. (53 C.2d 168.)

In *People v. Mathis* (1965) 63 C.2d 416, 46 C.R. 785, 406 P.2d 65, a murder case, defendant claimed self-defense. To discredit this theory the prosecution introduced color photographs of the victim's body as discovered, showing brutal beating and severe blows struck after he had been disabled. *Held*, this was not improper, even though black and white pictures might have been less inflammatory. (63 C.2d 423.)

In *People v. Cruz* (1968) 264 C.A.2d 350, 70 C.R. 603, a murder case, gruesome pictures of the nude body of the victim, with many cuts and abrasions, were held admissible despite defendant's stipulation that the cause of death was



gunshot wounds. The photographs of wounds inflicted before the killing were probative on defendant's state of mind, and supported the prosecution's theory of premeditation, necessary for first degree murder. (264 C.A.2d 356.)

Many other cases are to the same effect:

*People v. Davis* (1930) 106 C.A. 179, 190, 289 P. 194 [photographs taken in morgue].

*People v. Burkhart* (1931) 211 C. 726, 732, 297 P. 11 [although photograph showing position and condition of murder victim's body when found was obscene and shocking, and its introduction by prosecution was not necessary, it was nevertheless admissible].

*People v. Sisson* (1934) 1 C.2d 510, 511, 36 P.2d 116 [photograph of partially nude woman].

*People v. Love* (1960) 53 C.2d 843, 852, 3 C.R. 665, 350 P.2d 705 [color photographs of nude body on hospital table, with 4" hole in back and blood all over, to show how shooting occurred--shotgun at close range].

*People v. Lindsey* (1961) 56 C.2d 324, 328, 14 C.R. 678, 363 P.2d 910 [photographic evidence of body of crime victim, to show wounds]; *People v. Darling* (1962) 58 C.2d 15, 20, 22 C.R. 484, 372 P.2d 316 [same]; *People v. Harrison* (1963) 59 C.2d 622, 627, 30 C.R. 841, 381 P.2d 665 [same].

*People v. Campbell* (1965) 233 C.A.2d 38, 43, 43 C.R. 237 [murder and attempt to dispose of body by burning; photographs of body in burned condition to establish that three areas on it were subjected to humanly induced fires].

*People v. Talbot* (1966) 64 C.2d 691, 706, 51 C.R. 417, 414 P.2d 633 [color photograph of murder victim's body was relevant to aid pathologist in testifying to the cause of death].

*People v. King* (1966) 240 C.A.2d 389, 403, 49 C.R. 562 [murder; photographs of victim's body].

*People v. Ray* (1967) 252 C.A.2d 932, 956, 61 C.R. 1 [murder victim was smothered and thrown over sea cliff; photographs properly admitted where used by pathologist to illustrate her testimony on condition of body as she first saw it, and on injuries incurred before death, and where gruesomeness was due to natural exposure and not to human agency].

*People v. Stanworth* (1969) 71 C.2d 820, 838, 80 C.R. 49, 457 P.2d 889 [in penalty phase of murder prosecution, admission of photographs of nude body of victim was relevant to issue of aggravation].

*People v. Brawley* (1969) 1 C.3d 277, 295, 82 C.R. 161, 461 P.2d 361 [nude color photographs of victim admissible to illustrate and clarify autopsy surgeon's testimony, provide circumstantial evidence of malice, and show facts in aggravation of penalty].

*People v. Seastone* (1969) 3 C.A.3d 60, 66, 82 C.R. 907 [photographs of infant's body revealed brutal injuries indicative of abandoned and malignant heart (one test of implied malice) and supported prosecution's theory of sexual motivation].

*People v. Terry* (1970) 2 C.3d 362, 402, 85 C.R. 409, 466 P.2d 961 ["hideous and grotesque" photographs of nude, bloodstained victim admissible as aid in understanding medical testimony, though of little use in determining how victim died].

*People v. Long* (1974) 38 C.A.3d 680, 689, 113 C.R. 530, supra, §9 [where photographs were "neither 'better' nor 'worse' than those in the average murder case," admission of photographs that were "fair, if unpleasant, representations of an unpleasant situation which happened to be brought on by this defendant's actions" was proper].

*People v. Moran* (1974) 39 C.A.3d 398, 412, 114 C.R. 413 ["Although counsel on both sides admitted that some of

the photographs were gory, the nature of the case precluded the possibility of any other kinds of evidence"].

*People v. Burden* (1977) 72 C.A.3d 603, 611, 613, 140 C.R. 282 [photographs of child's emaciated body, relevant on issue of defendant's understanding that child was starving to death].

*People v. Phillips* (1985) 41 C.3d 29, 53, 222 C.R. 127, 711 P.2d 423 [photographs of murder victim's charred remains].

*People v. Williamson* (1985) 172 C.A.3d 737, 746, 747, 218 C.R. 550 [photographs of victim's body disclosing and corroborating manner in which homicide was committed; relevant to malice].

*People v. Allen* (1986) 42 C.3d 1222, 1255, 232 C.R. 849, 729 P.2d 115 [color photographs of murder victims, relevant to corroborate and illustrate testimony of autopsy surgeon concerning nature and extent of wounds; though cumulative and subject to discretionary exclusion, they were not exceptionally gruesome, and error, if any, was harmless].

*People v. Hendricks* (1987) 43 C.3d 584, 594, 238 C.R. 66, 737 P.2d 1350 [murder prosecution; two photographs of victim's body showing wounds were relevant to malice and not unduly gruesome].

*People v. Turner* (1990) 50 C.3d 668, 706, 268 C.R. 706, 789 P.2d 887 [murder prosecution; videotape of crime scene and photos of victim's wounds supported prosecution's theory of murder for robbery].

*People v. Pitts* (1990) 223 C.A.3d 1547, 1557, 273 C.R. 389 [mayhem prosecution; photograph of victim's wounds were not unduly gruesome given nature of crime].

*People v. Ashmus* (1991) 54 C.3d 932, 974, 2 C.R.2d 112, 820 P.2d 214, *infra*, §15 [admission of photographs and slides of murder victim in death and photographs of victim shortly before crime and defendant shortly afterwards was not unduly prejudicial].

*People v. Zapien* (1993) 4 C.4th 929, 983, 17 C.R.2d 122, 846 P.2d 704 [photograph of attractive, well-dressed victim prior to murder was admissible; victim was carrying on affair with defendant's brother-in-law, and defendant's sister's anger was motivating factor in murder].

*People v. Wader* (1993) 5 C.4th 610, 655, 20 C.R.2d 788, 854 P.2d 80 [murder prosecution; photograph of person whom defendant had raped 12 years before murdering victim, taken 5 to 7 days after reconstructive surgery, was admissible as relevant to defendant's use of force or violence].

*People v. Wash* (1993) 6 C.4th 215, 245, 24 C.R.2d 421, 861 P.2d 1107 [murder prosecution; autopsy slides of victims were relevant to prosecution's theory of deliberation and premeditation and not unduly cumulative or gruesome].

*People v. Crittenden* (1994) 9 C.4th 83, 134, 36 C.R.2d 474, 885 P.2d 887 [photographs of murder victims' wounds, although unpleasant, were highly probative, indicating kind and degree of force used and establishing intent to cause cruel suffering and actual causation of extreme pain].

*People v. Scheid* (1997) 16 C.4th 1, 19, 20, 65 C.R.2d 348, 939 P.2d 748, *supra*, §8 [in murder prosecution, photos of bloodied victims were not so unduly gruesome as to have impermissibly swayed jury, in light of testimony detailing every fact relevant to crime scene and victims].

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. McDermott* (2002) 28 C.4th 946, 998, 123 C.R.2d 654, 51 P.3d 874 [in capital murder prosecution, admission of 18-minute videotape of crime scene made by police shortly after they arrived was not error, even though it

contained 30-second view of victim's mutilated groin area]; *People v. Heard* (2003) 31 C.4th 946, 973, 976, 4 C.R.3d 131, 75 P.3d 53 [in capital murder case, photographs of victim, who had been beaten, molested, bitten, and strangled, were properly admitted as relevant to establishing injuries, savageness of attack, and ferocious nature of struggle; although scenes depicted were bloody, they were not unduly gory or inflammatory].



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CHAPTER VII - Demonstrative, Experimental, and Scientific Evidence

II. REAL OR DEMONSTRATIVE EVIDENCE

C. Inflammatory Matter.

1. General Rule.

c. Illustrations: Physical Objects.

2 Witkin Cal. Evid. Demo Evid § 11

[§ 11] Illustrations: Physical Objects.

Cases involving relevant physical objects alleged to be unduly prejudicial are far fewer in number than are cases involving photographic evidence, but they are no less subject to the general practice of allowing their admission. The following are illustrative:

*People v. Besold* (1908) 154 C. 363, 368, 97 P. 871 [garments and skull were properly admitted].

*People v. Lisenba* (1939) 14 C.2d 403, 411, 94 P.2d 569 [murder; poisonous snakes in boxes, identified by witness as used to bite victim, were not unduly prejudicial].

*People v. King* (1966) 240 C.A.2d 389, 404, 49 C.R. 562 [murder; victim's clothing that bore holes showing 16 stab wounds was relevant, material, and had clear probative value outweighing any prejudicial effect].

*People v. Pitts* (1990) 223 C.A.3d 1547, 1557, 273 C.R. 389 [mayhem prosecution; victim's bloodstained clothes were not unduly gruesome given nature of crime].

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER VII - Demonstrative, Experimental, and Scientific Evidence

### II. REAL OR DEMONSTRATIVE EVIDENCE

- C. Inflammatory Matter.
- 2. Discretionary Exclusion.
  - a. Harmless Error.

2 Witkin Cal. Evid. Demo Evid § 12

[§ 12] Harmless Error.

Occasionally, an appellate court, upholding a criminal conviction obtained with the aid of inflammatory evidence (supra, §9 et seq.), has criticized the practice where the necessity of the evidence was slight or nonexistent. (See *People v. Burkhardt* (1931) 211 C. 726, 732, 297 P. 11; *People v. Sisson* (1934) 1 C.2d 510, 511, 36 P.2d 116; *People v. Logan* (1953) 41 C.2d 279, 284, 260 P.2d 20.)

The same view was expressed in *People v. Cavanaugh* (1955) 44 C.2d 252, 282 P.2d 53, affirming a first degree murder conviction. The victim's body was found decomposed. Identification could have been made by testimony of a fingerprint expert, but instead the prosecution introduced fingers cut off at the autopsy, photographs of the decomposed body, a bloodstained sleeve, and other horrible objects. *Held*, no useful purpose was served by this evidence, it was error to admit it, and in a close case (which this was not) the admission would justify a reversal. (44 C.2d 267.) (See dissenting opinion, 44 C.2d 271, asserting that prosecutor deliberately sought to inflame the jury, and adding: "I cannot say that he did not succeed in this purpose or that a different verdict would have been improbable had the evidence been excluded.")

In *People v. Smith* (1973) 33 C.A.3d 51, 108 C.R. 698, the prosecution introduced three photographs of the semi-nude, mutilated body of a murder victim. The court said:

"Not infrequently, evidentiary resort to such vivid horrors is rationalized by the statement that they tend to prove malice ... or that they are relevant in relation to aggravation of the crime and the penalty. ... Such pictures are always offered as parts of an evidentiary mosaic; thus it is more appropriate to appraise their probative value as cumulative, not isolated, evidence. To say, moreover, that an exhibit bears upon aggravation of the penalty impliedly admits that it infuses the finding of guilt with the inadmissible element of moral condemnation. In this case there were ample descriptions of the positions and appearances of these two bodies. There was autopsy testimony regarding the precise location and nature of the wounds, which needed no clarification or amplification. ... The record does not reveal what evidentiary purpose was expressed by the district attorney in presenting these pictures to the jury. The Attorney General points to no added probative value possessed by these exhibits. They supplied no more than a blatant appeal to the jury's emotions. Their prejudice-arousing effect heavily outweighed their probative value. The trial court erred in admitting them." However, because of other overwhelming evidence of defendant's guilt, "[t]he error nevertheless did not cause a miscarriage of justice and furnishes no ground for reversal." (33 C.A.3d 69.)

Similarly, in *People v. Marsh* (1985) 175 C.A.3d 987, 221 C.R. 311, defendant was convicted of second degree

murder of a 2-year-old child who died from multiple head injuries. Seven autopsy photographs in vivid color were blown up and projected onto a screen for the jurors to see. The photographs, which the prosecution admitted were "terribly gruesome and terribly upsetting," included (a) an almost full view of the victim's nude body, with a closeup shot of his exposed brain and bloody scalp, and a background shot of his blood-spattered torso "field dressed" with the ribcages rolled back to expose his bowels; and (b) various other pictures showing the victim's brain and skull with dangling or "peeled" scalp. *Held*, admission of the inflammatory photographs was error, and only "the lack of any viable defense" prevented reversal.

(a) Because defendant contended that the child's death had resulted from an accidental fall, the photographs were relevant to the cause of death; but their probative value was outweighed by their prejudicial effect. "[T]he jury was not enlightened one additional whit by viewing these seven gory autopsy photographs. The oral testimony of the autopsy surgeon describing his findings comprehensively advised the jury of his observations and why he concluded there were multiple fatal impact sites that could not have been caused by a fall from the sofa to the hearth. The primary cause of death, i.e., intercranial brain swelling, was never disputed. There was no expert medical testimony contradicting the autopsy surgeon's conclusions and various other medical witnesses testified to the cause of death without referring to the autopsy photographs." (175 C.A.3d 998.)

(b) It was not necessary to show the autopsy photographs to prove malice or to justify aggravation of the crime and penalty. (175 C.A.3d 998.)

(c) Unlike those cases where the photographs merely depict the victim's wounds, the inflammatory nature of the photographs here was "greatly enhanced" by the work of the autopsy surgeon, who had removed the victim's skull, exposed the victim's body cavity, and covered the victim's face with the exposed underside of the bloody scalp. (175 C.A.3d 999.)

(d) However, the erroneous admission of the photographs was not reversible error. (1) There was overwhelming evidence of guilt. (2) The showing was brief. (3) "Most importantly, the photographs were shown in sequence with numerous other photographs of the child before removing the life supports and, after they were removed, while lying on the autopsy table. The inflammatory nature of these other photographs, the admission of which is not an issue on appeal, diminishes the prejudicial impact of the other seven." (175 C.A.3d 998, 999.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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CHAPTER VII - Demonstrative, Experimental, and Scientific Evidence

II. REAL OR DEMONSTRATIVE EVIDENCE

C. Inflammatory Matter.

2. Discretionary Exclusion.

b. Reversible Error.

2 Witkin Cal. Evid. Demo Evid § 13

[§ 13] Reversible Error.

In *People v. Burns* (1952) 109 C.A.2d 524, 241 P.2d 308, a particularly flagrant case, reversible error was found: "Surely, there is a line between admitting a photograph which is of some help to the jury in solving the facts of the case and one which is of no value other than to inflame the minds of the jurors. That line was crossed in this case. ... There was an abuse of discretion here." (109 C.A.2d 542.)

In the *Burns* case, a prosecution for murder, there was no dispute as to the fact that the victim suffered bruises, defendant having claimed that they resulted from a fall. Nevertheless, the prosecution, over objection, was allowed to offer revolting photographs of the deceased, taken after the autopsy, showing a shaved head, incisions, punctures, flesh held apart, and instruments. "[I]t is obvious that the only purpose of exhibiting them was to inflame the jury's emotions against defendant." (109 C.A.2d 541.) (See *People v. Redston* (1956) 139 C.A.2d 485, 490, 293 P.2d 880 [similar photographs, no relevant purpose; held, with other errors, ground for reversal]; 4 *Stanf. L. Rev.* 589 [discussing *Burns*].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER VII - Demonstrative, Experimental, and Scientific Evidence

### II. REAL OR DEMONSTRATIVE EVIDENCE

#### D. Photographic Evidence.

#### 1. Admissibility in General.

##### a. Statement of Rule.

*2 Witkin Cal. Evid. Demo Evid § 14*

[§ 14] Statement of Rule.

(1) *In General.* The admissibility of authenticated photographs of places, persons, or things relevant to an issue is well established. (See generally 2 McCormick 5th, §214; 3 Wigmore (Chadbourn Rev.) §§790, 792; 8 *Hastings L. J.* 310; 53 *Harv. L. Rev.* 291; 29A *Am.Jur.2d* (1994 ed.), *Evidence* §960 et seq.; 9 Proof of Facts 147 [Photographs as Evidence]; 3 *Am.Jur.* Trials 1 [photographic evidence in civil cases], 335 [photographic evidence in criminal cases]; 11 A.L.R.2d 870, 895 [photographs of accused to show prior conviction]; 23 A.L.R.2d 112, 142 [photographs of tire tracks or marks]; 35 A.L.R.2d 874 [photographs of footprints]; 73 A.L.R.2d 769 [corpse in homicide or wrongful death case]; 23 A.L.R.3d 825 [photographs of property condemned; eminent domain proceeding]; 94 A.L.R.3d 357 [photographs of stolen property]; *infra*, §17 et seq.; on discretion to admit or exclude inflammatory photographs, see *supra*, §9 et seq.)

(2) *Types of Photographic Evidence.* The conventional black and white picture taken by an ordinary camera is, of course, only one type of photographic evidence used in trials. Other types include the following:

(a) Motion pictures and videotape. (See *infra*, §20 et seq.)

(b) Enlarged photographs or photostatic copies. (See 72 A.L.R.2d 308.)

(c) Aerial pictures. (See 3 *Am.Jur.* Trials 1, 289; 9 Proof of Facts 147, 199; 57 A.L.R.2d 1351.)

(d) Color pictures. (See 53 A.L.R.2d 1102.)

(e) Infrared pictures. (See 3 *Am.Jur.* Trials 1, 327.)

(f) X-ray pictures and similar imaging. (See *infra*, §23.)

(g) Neuroimaging evidence (as distinguished from photographic or X-ray evidence). (See 49 *Stanf. L. Rev.* 1249.) (On computer animation, see *infra*, §24.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General.* See 2 McCormick 6th, §214.

(2) *Types of Photographic Evidence.*



(c) Aerial pictures. See 85 A.L.R.5th 671 [superseding 57 A.L.R.2d 1351, text, p. 23]. *West's Key Number Digest*, Criminal Law k.438 et seq.; Evidence k.359 et seq.



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#### D. Photographic Evidence.

##### 1. Admissibility in General.

##### b. Illustrations of Rule.

2 Witkin Cal. Evid. Demo Evid § 15

[§ 15] Illustrations of Rule.

Cases upholding the rule that photographs relevant to an issue are admissible are legion:

*People v. Crandall* (1899) 125 C. 129, 133, 57 P. 785 [photographs of places with prosecutor's marks showing where crime was committed and victim's body was found].

*Berkovitz v. American River Gravel Co.* (1923) 191 C. 195, 201, 215 P. 675 [personal injuries; photographs of wrecked automobile].

*People v. Isby* (1947) 30 C.2d 879, 891, 186 P.2d 405 [homicide; enlarged photograph of locale of crime, with deceased's body lying in foreground].

*Olson v. Meacham* (1933) 129 C.A. 670, 673, 19 P.2d 527 [wrongful death; photographs of victim's wounds to support theory that defendant's automobile was cause of death].

*People v. Mondshine* (1933) 132 C.A. 395, 397, 22 P.2d 779 [photographs of fires in other buildings under similar conditions, to illustrate effect of insufficient oxygen in closed room].

*Miller v. Silvester* (1934) 140 C.A. 345, 347, 35 P.2d 387 [automobile accident; pictures of intersection showing skid marks].

*People v. Jackson* (1946) 74 C.A.2d 22, 25, 167 P.2d 776 [homicide; photograph showing position of deceased on bed where he had been found in dying condition].

*Barone v. Jones* (1947) 77 C.A.2d 656, 660, 176 P.2d 392 [automobile collision; photographs of scene, showing highway and ditch, admissible though taken after slight changes had been made in conditions, where witnesses fully explained changes].

*People v. Sassounian* (1986) 182 C.A.3d 361, 401, 226 C.R. 880 [first degree murder prosecution; photographs picturing defendant in fatigues and holding guns showed knowledge and means to commit crime, and corroborated testimony of prosecution witness to whom defendant had confessed].

*People v. Sanders* (1990) 51 C.3d 471, 514, 273 C.R. 537, 797 P.2d 561 [murder prosecution; photographs showing

location of victim's body and nature of her head wound].

*People v. Kelly* (1990) 51 C.3d 931, 963, 275 C.R. 160, 800 P.2d 516 [murder prosecution; photographs showing placement of wounds and powder burns to support theory that murder was cold-blooded and intentional].

*People v. Kaurish* (1990) 52 C.3d 648, 683, 276 C.R. 788, 802 P.2d 278 [murder prosecution; photographs of victim's corpse depicting various wounds and other marks to identify perpetrator].

*People v. Benson* (1990) 52 C.3d 754, 786, 276 C.R. 827, 802 P.2d 330 [murder prosecution; photographs depicting victims in death to show circumstances of crimes and thus demonstrate appropriateness of death penalty].

*People v. Mason* (1991) 52 C.3d 909, 944, 277 C.R. 166, 802 P.2d 950, 1 Cal. Evidence (4th), Hearsay, §107 [murder prosecution; photographs showing victims and crime scenes to corroborate defendant's detailed confession after he had repudiated it].

*People v. Cooper* (1991) 53 C.3d 771, 821, 281 C.R. 90, 809 P.2d 865 [murder prosecution; photographs showing four victims while alive and depicting their relative physical size to prove that one person could have killed all of them].

*People v. Spears* (1991) 228 C.A.3d 1, 28, 278 C.R. 506 [murder and robbery prosecution; autopsy photographs of victim to corroborate and illustrate testimony of autopsy surgeon and to establish malice].

In *People v. Ashmus* (1991) 54 C.3d 932, 2 C.R.2d 112, 820 P.2d 214, a capital murder case, the trial judge admitted photographs and slides of the victim in death, and photographs of the victim shortly before the crime and defendant shortly afterwards. *Held*, this was proper.

(a) *Photographs and slides of victim in death*. This evidence was relevant, because it had "at least some tendency" to prove malice. Moreover, the evidence, though unpleasant, was not unduly prejudicial, because it was not gruesome. (54 C.3d 974.)

(b) *Photographs of victim before crime and of defendant after crime*. This evidence was also relevant. At the time of the judge's ruling, the prosecution intended to, and subsequently did, call a number of witnesses to give testimony bearing directly on identity and indirectly on intent to kill. The prosecution intended to, and did, use the photographs, at least in part, to support the witnesses' credibility. The testimony linked defendant and the victim, and defendant had changed in appearance since the crime. Identity and intent to kill were material, as was the credibility of the witnesses testifying thereon. Moreover, the evidence was not unduly prejudicial: it threatened no unfair detriment to defendant and its admission did not implicate defendant's constitutional rights. (54 C.3d 974.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Carey* (2007) 41 C.4th 109, 126, 59 C.R.3d 172, 158 P.3d 743 [in murder prosecution, autopsy photographs depicting victim's wounds were properly admitted; they were relevant to prove how crime occurred and to prove malice, and, although unpleasant, they were more probative than prejudicial].



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## CHAPTER VII - Demonstrative, Experimental, and Scientific Evidence

### II. REAL OR DEMONSTRATIVE EVIDENCE

#### D. Photographic Evidence.

##### 2. Foundation.

2 Witkin Cal. Evid. Demo Evid § 16

[§ 16] Foundation.

To authenticate a photograph, a foundation must be laid by showing that the picture is a faithful representation of the objects or persons depicted. The showing must be made by a competent witness who can testify to personal knowledge of the correctness of the representation. But it is not essential that the photographer be produced; any witness with such personal knowledge may lay the foundation. (See *Berkovitz v. American River Gravel Co.* (1923) 191 C. 195, 202, 215 P. 675; *Holland v. Kerr* (1953) 116 C.A.2d 31, 37, 253 P.2d 88; *People v. Bowley* (1963) 59 C.2d 855, 859, 31 C.R. 471, 382 P.2d 591, 3 Cal. Evidence (4th), Presentation at Trial, §105, and *infra*, §17; *People v. Bowley* (1964) 230 C.A.2d 269, 270, 40 C.R. 859, *infra*, §17; 9 Proof of Facts 147 [Photographs as Evidence]; 9 A.L.R.2d 899 [authentication or verification of photograph as basis for introduction in evidence].)

The foundation was held insufficient in *People v. Vaiza* (1966) 244 C.A.2d 121, 52 C.R. 733, *supra*, §7, citing the text. Pictures were introduced to show lighting conditions at the scene of the crime; but the crime took place at 2 a.m. and the pictures were taken at 7:30 p.m. under far different conditions. *Held*, this was reversible error. (244 C.A.2d 126.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### D. Photographic Evidence.

#### 3. "Silent Witness" Theory.

2 Witkin Cal. Evid. Demo Evid § 17

[§ 17] "Silent Witness" Theory.

A photograph is often said to be "illustrative" of the testimony of a witness on the stand. But this does not mean that it can never have independent effect as "substantive" evidence. An authenticated photograph may be "a silent witness," i.e., evidence of the facts depicted independent of testimony to those facts by a witness. (See *People v. Bowley* (1963) 59 C.2d 855, 859, 860, 861, 31 C.R. 471, 382 P.2d 591; *South Santa Clara Valley Water Conservation Dist. v. Johnson* (1964) 231 C.A.2d 388, 397, 41 C.R. 846, citing the text; 8 *Hastings L. J.* 310 [pointing out necessity of this rule where there are no eyewitnesses].)

The "silent witness" theory was approved in *People v. Bowley*, supra, where the court said: "There is no reason why a photograph or film, like an X-ray, may not, in a proper case, be probative in itself. To hold otherwise would illogically limit the use of a device whose memory is without question more accurate and reliable than that of a human witness. It would exclude from evidence the chance picture of a crowd which on close examination shows the commission of a crime that was not seen by the photographer at the time. It would exclude from evidence pictures taken with a telescopic lens. It would exclude from evidence pictures taken by a camera set to go off when a building's door is opened at night. ... We hold, therefore, that a photograph may, in a proper case, be admitted into evidence not merely as illustrated testimony of a human witness but as probative evidence in itself of what it shows." (59 C.2d 861.)

In *People v. Doggett* (1948) 83 C.A.2d 405, 188 P.2d 792, defendants, husband and wife, conducted a business of producing obscene pictures. In a prosecution for violation of P.C. 288a, the sole proof of the criminal act was a picture of defendants engaged in it, found in their apartment along with considerable photographic equipment and other pictures. As a foundation, the landlord and a police officer testified that the picture accurately portrayed the room and the articles therein, and an expert gave his opinion that the picture was genuine and not composite or faked. *Held*, it was admissible. Thus, the photograph was used not merely to illustrate testimony but as proof of the corpus delicti and the identity of defendants as the guilty persons. (83 C.A.2d 407.)

In *People v. Bowley*, supra, a moving picture showing lewd acts of defendant and his accomplice was excluded because the only authentication was by uncorroborated testimony of the accomplice. (See 3 *Cal. Evidence* (4th), *Presentation at Trial*, §105.) On the retrial (*People v. Bowley* (1964) 230 C.A.2d 269, 271, 40 C.R. 859), the prosecution called a police photographic expert, who testified that he had examined the film, that it showed no tampering, and that it correctly represented "what the camera saw." *Held*, the foundation was sufficient. The only thing he could not testify to was the time when the film was taken; but this, in the particular circumstances (no statute of limitations issue, e.g.) was not material.

Other uses of photographs as independent evidence are the admission of photographic copies of public or private records in lieu of originals or certified copies (see 2 *Cal. Evidence (4th)*, *Documentary Evidence*, §46), and of motion pictures or videotape as evidence of the voluntariness of a confession (see *infra*, §22).

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 116 A.L.R.5th 373 [cases addressing silent witness theory].



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#### D. Photographic Evidence.

#### 4. Photographic Identification of Absent Defendant.

*2 Witkin Cal. Evid. Demo Evid § 18*

[§ 18] Photographic Identification of Absent Defendant.

In *People v. Yonko* (1987) 196 C.A.3d 1005, 242 C.R. 269, defendant was charged with robbery and sexual battery, and was present in court only on the first day of trial when a jury was selected. He did not appear thereafter, and the trial judge determined that he was voluntarily absenting himself, and granted the prosecutor's motion to conduct the trial under P.C. 1043(b)(2). At the trial the victim and a security guard who had helped to apprehend defendant identified him from his booking photograph. On appeal defendant contended that the identification procedure was impermissibly suggestive. *Held*, the procedure was proper.

(a) Ordinarily a criminal defendant can be required to be present in the courtroom for purpose of identification unless counsel stipulates to the issue of identity (P.C. 1043); and where the defendant cannot be found, some other means of identification must be used. (196 C.A.3d 1008.) A single person photographic showup is not inherently unfair (see 2 Cal. Evidence (4th), Witnesses, §405); and showing the witness a single photograph of the defendant is no more impermissibly suggestive than an in-court identification of the defendant personally sitting at the defense counsel table. (196 C.A.3d 1008.)

(b) Defendant's suggestion that the prosecution should have been required to assemble a photographic showup would impose unreasonable burdens on the judge, prosecution, witnesses and jury. And in this case there was no reasonable likelihood of misidentification. The perpetrator of the crime was chased as he fled the scene with the victim's purse in his hand, and was immediately captured one block away; the victim and the security guard identified him at the preliminary hearing; and on several occasions thereafter defendant approached the security guard and made statements concerning the event. (196 C.A.3d 1009.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Criminal Law k.438(3)



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#### D. Photographic Evidence.

#### 5. Posed Photograph or Film.

2 Witkin Cal. Evid. Demo Evid § 19

[§ 19] Posed Photograph or Film.

(1) *In General*. Sometimes the photograph or film offered is not a picture of the actual condition of a person, object or place, but is an attempted reconstruction or reenactment to illustrate graphically the scene and acts involved in a crime, collision or other event. Though the cases are conflicting, the better view seems to be that such a posed picture is admissible where relevant and where a proper foundation is laid by testimony that shows that the reconstruction or reenactment is accurate. (See *People v. O'Brien* (1976) 61 C.A.3d 766, 780, 132 C.R. 616, quoting the text; *DiRosario v. Havens* (1987) 196 C.A.3d 1224, 1232, 242 C.R. 423 [no reversible error in showing videotape recreating automobile accident; tape was made under conditions "substantially similar" to accident conditions]; *People v. Rodrigues* (1994) 8 C.4th 1060, 1114, 1115, 36 C.R.2d 235, 885 P.2d 1 [in murder prosecution, videotaped reenactment of what witness saw was properly admitted; witness confirmed that videotape accurately showed where she was and what she saw, and would aid jurors in determining facts notwithstanding claimed inaccuracies]; 2 McCormick 5th, §214; 3 Wigmore (Chadbourn Rev.) §798; 19 A.L.R.2d 877 [admissibility of posed photograph based on recollection of position of persons or movable objects]; 9 Proof of Facts 147, 212 [Photographs as Evidence]; but see *People v. Logan* (1953) 41 C.2d 279, 284, 260 P.2d 20 [brief criticism of unnecessary use of picture of defendant taken with officers and bleeding victim, but held not reversible error]; on posed reenactments of crime as part of confession, see *infra*, §22.)

(2) *Slanted or Misleading Pictures*. In *Anello v. Southern Pac. Co.* (1959) 174 C.A.2d 317, 344 P.2d 843, plaintiff sued for wrongful death from a railroad crossing collision of decedent's automobile with defendant's freight train. Instead of a photograph of the black steam locomotive involved, defendant introduced colored slides of a diesel switch engine with the entire front painted a bright orange, an orange strip along its side, and the words "Southern Pacific" in large orange letters. Although the reversal of judgment for defendants was based on an erroneous instruction, the court left no doubt of its opinion that admission of the misleading colored slides was error. (174 C.A.2d 323.)

But in *Greeneich v. Southern Pac. Co.* (1961) 189 C.A.2d 100, 11 C.R. 235, the court took a different view. Decedent passenger was killed when his driver, with poor eyesight, tried to cross defendant's tracks at night. The trial judge permitted introduction of colored sound motion pictures of a train running over the crossing, although the picture was taken in daytime, the sound of the train whistle and bell in the courtroom had a spectacular effect, and the evidence was offered as a final dramatic conclusion to defendant's case. *Held*, despite these dissimilarities, admission was not an abuse of the trial judge's discretion. (189 C.A.2d 108.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General*. See 2 McCormick 6th, §214.





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#### D. Photographic Evidence.

#### 6. Motion Pictures and Videotape.

##### a. Admissibility in General.

2 *Witkin Cal. Evid. Demo Evid* § 20

[§ 20] Admissibility in General.

Motion pictures and videotape are admissible on the same basis as still photographs, namely, where relevant, and after a foundation is laid by testimony that the picture or videotape is a true representation of the scene. (See *Heiman v. Market Street Ry. Co.* (1937) 21 C.A.2d 311, 315, 69 P.2d 178; *People v. Dabb* (1948) 32 C.2d 491, 498, 197 P.2d 1; *People v. Mayfield* (1997) 14 C.4th 668, 747, 60 C.R.2d 1, 928 P.2d 485 [foundation was sufficient for admission of video recording of crime scene, even though it was made almost 18 months after relevant events and during daylight, while crime occurred at night, where purpose of recording was simply to show heights of walls and fences, and testimony indicated these had not changed]; 2 McCormick 5th, §214; 3 Wigmore (Chadbourn Rev.) §798a; 29A Am.Jur.2d (1994 ed.), Evidence §979 et seq.; 9 A.L.R.2d 899, 921 [authentication or verification of motion picture as basis for introduction in evidence]; 41 A.L.R.4th 812 [visual recording of event or matter giving rise to litigation or prosecution]; 41 A.L.R.4th 877 [visual recording of event or matter other than that giving rise to litigation or prosecution]; 58 Am.Jur. Trials 481 [Videotape Technology]; 8 Proof of Facts 153 [Motion Pictures as Evidence].)

However, the foundation must be laid with care, because of the greater danger of falsification. As an early decision opined: "Moving pictures should be received as evidence with caution, because the modern art of photography and the devices of an ingenious director frequently produce results which may be quite deceiving. ... Telescopic lenses, ingenious settings of the stage, the elimination of unfavorable portions of a film, an angle from which a picture is taken, the ability to speed up the reproduction of the picture and the genius of a director may tend to create misleading impressions." (*Harmon v. San Joaquin Light & Power Corp.* (1940) 37 C.A.2d 169, 174, 98 P.2d 1064; see *People v. Boyd* (1990) 222 C.A.3d 541, 566, 271 C.R. 738 [insufficient showing that lighting conditions displayed on film were similar to lighting conditions on night of crime].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Gonzalez* (2006) 38 C.4th 932, 952, 44 C.R.3d 237, 135 P.3d 649 [in capital murder trial, videotape of crime scene, which was offered to show lighting conditions at time of shooting, was properly excluded on ground it did not accurately show those conditions]; 2 McCormick 6th, §214. *West's Key Number Digest*, Criminal Law k.438(8); Evidence k.359(6)



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#### 6. Motion Pictures and Videotape.

##### b. Use in Civil Cases.

2 Witkin Cal. Evid. Demo Evid § 21

[§ 21] Use in Civil Cases.

Videotape or motion pictures are commonly used in personal injury actions. The following are illustrative:

(1) *To Minimize Plaintiff's Injuries*. A film that shows the plaintiff engaging in normal activities may be introduced in support of the defendant's contention that the plaintiff was malingering. (See *Heiman v. Market Street Ry. Co.* (1937) 21 C.A.2d 311, 314, 69 P.2d 178 [plaintiff claimed to be confirmed invalid; pictures showed her driving automobile in traffic, shopping, carrying grocery bundles].)

However, in *Harmon v. San Joaquin Light & Power Corp.* (1940) 37 C.A.2d 169, 173, 98 P.2d 1064, supra, §20, a particular film introduced after plaintiff's accident tending to minimize the effect of his alleged deafness and limitation of vision was criticized as not probative. The film merely created a conflict in the evidence, and it was the province of the jury to reconcile the conflict, if possible, or to determine the weight and sufficiency of the evidence in that regard.

(2) *"Day in the Life" Films*. In *Jones v. Los Angeles* (1993) 20 C.A.4th 436, 24 C.R.2d 528, an action arising from an automobile accident in which plaintiff was rendered a paraplegic, plaintiff sought to introduce a 20-minute-long videotape of her daily activities after the accident. The videotape showed plaintiff being moved from her bed by attendants, being bathed, being placed in her wheelchair, and attempting to move around in the chair. Over defendant city's objection that the videotape was more prejudicial than probative, the trial judge ruled it admissible. *Held*, the ruling was proper.

(a) The videotape was highly probative of the extent of plaintiff's injuries. It also had substantial probative value on the extent of her pain and suffering and was therefore helpful to the jury in calculating damages. "Day in the Life" videotapes, such as plaintiff's, "can uniquely demonstrate the nature and extent of an accident victim's injuries." (20 C.A.4th 442.) Because both plaintiff and her nurse (who narrated the videotape) could be cross-examined at trial, the risk of any prejudice was greatly reduced. (20 C.A.4th 445.)

(b) Despite the nurse's oral testimony in narrating the videotape, the videotape could not be considered cumulative evidence. Rather, it "best describes the problems Ms. Jones encounters on a daily basis in a way mere oral testimony may not convey to the jurors." (20 C.A.4th 446.) (See 39 Am.Jur. Trials 261 [Planning and Producing a "Day-in-the-Life" Videotape in a Personal Injury Lawsuit].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### D. Photographic Evidence.

#### 6. Motion Pictures and Videotape.

##### c. Use in Criminal Cases.

2 Witkin Cal. Evid. Demo Evid § 22

[§ 22] Use in Criminal Cases.

(1) *In General.* As the following criminal cases illustrate, motion pictures and videotape have been used for a variety of purposes:

*People v. Green* (1956) 47 C.2d 209, 215, 302 P.2d 307 [as part of prosecutor's opening statement].

*People v. Bowley* (1963) 59 C.2d 855, 859, 860, 861, 31 C.R. 471, 382 P.2d 591, supra, §17 [as substantive evidence of commission of criminal acts].

*People v. Perry* (1976) 60 C.A.3d 608, 612, 131 C.R. 629, 1 Cal. Evidence (4th), *Opinion Evidence*, §6 [film from concealed surveillance camera used to identify defendant as perpetrator of robbery].

*People v. Sims* (1993) 5 C.4th 405, 451, 20 C.R.2d 537, 853 P.2d 992 [videotape of murder scene, showing victim in bathtub with face submerged, to establish malice and intent to kill, and to corroborate testimony as to appearance of crime scene].

*People v. Carpenter* (1997) 15 C.4th 312, 386, 63 C.R.2d 1, 935 P.2d 708 [videotape used to depict scenes relating to shootings, one of them fatal]; see 37 A.L.R.5th 515 [visual recording of homicide scene].

(2) *To Show Voluntariness of Confession.* Pictures with sound have been approved as an appropriate means of receiving and recording a confession. But in such cases, a double foundation must be laid, showing that the picture was an accurate reproduction and that the confession was voluntary. (See *People v. Hayes* (1937) 21 C.A.2d 320, 321, 71 P.2d 321; *People v. Dabb* (1948) 32 C.2d 491, 498, 197 P.2d 1; *People v. Walker* (1957) 150 C.A.2d 594, 599, 310 P.2d 110 [tape recording admitted with film, and jury allowed to play recording again in jury room]; *People v. Long* (1974) 38 C.A.3d 680, 689, 113 C.R. 530 [filmed reenactment of crime; *People v. Dabb*, supra, followed]; *People v. Moran* (1974) 39 C.A.3d 398, 114 C.R. 413, 1 Cal. Evidence (4th), *Hearsay*, §268 [videotaped confession]; 58 A.L.R.2d 1024 [sound recordings]; 10 A.L.R.4th 1092 [same]; 100 A.L.R.2d 1257 [film of accused's reenactment of crime]; 66 A.L.R.3d 637 [use of videotape to take deposition for presentation at civil trial in state court]; 41 A.L.R.4th 812, 877 [visual recording of event or matter giving rise to prosecution].)

In *People v. Dabb*, supra, defendants, after making oral and written confessions, agreed to reenact the crime before the camera. A rehearsal was first held, then the scene was shot, and the resulting film, with sound, was exhibited to the

jury, after a foundation was laid by testimony of defendants' consent and of the authenticity of the film. The court said: "It is argued that a motion picture is susceptible of fabrication, but the same objection has been made to still photographs, which have long been used as evidence, and no valid ground for distinction between still and sound motion pictures presents itself. Protection against falsification or misrepresentation lies in the requirement of preliminary proof that the picture is an accurate reproduction of the scene or event that it depicts, and in the opportunity for cross-examination of the witnesses making such proof." (32 C.2d 498.)

The opinion further gives both a warning and additional approval of the practice as follows: "A motion picture of the artificial recreation of an event may unduly accentuate certain phases of the happening, and because of the forceful impression made upon the minds of the jurors by this kind of evidence, it should be received with caution. As pointed out by Wigmore, such a portrayal of an event is apt to cause a person to forget that 'it is merely what certain witnesses say was the thing that happened' and may 'impress the jury with the convincing impartiality of Nature herself.' ... However, when the events that are being photographed consist of a voluntary reenactment by the accused of what occurred, there is little, if any, danger of misleading emphasis that is unfavorable to him. Moreover, as a method of presenting confessions, sound motion pictures appear to have a unique advantage in that, while presenting the admission of guilt, they simultaneously testify to facts relevant to the issue of volition." (32 C.2d 498.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General.* See *People v. Marks* (2003) 31 C.4th 197, 225, 226, 2 C.R.3d 252, 72 P.3d 1222 [videotape of daily activities of brain-damaged victim of attempted murder; even if portions of 37-minute tape were cumulative and should not have been played, any error was harmless]; *People v. Harrison* (2005) 35 C.4th 208, 234, 25 C.R.3d 224, 106 P.3d 895 [in capital murder case in which evidence of attempted murder by defendant was admitted to show consciousness of guilt, videotaped reenactment of route to location where murder attempt occurred was properly admitted, even though reenactment took place during day and actual murder attempt occurred at night; trial judge instructed jurors that tape was not intended to show lighting conditions but rather to show route taken, as described by victim]; *People v. Pedroza* (2007) 147 C.A.4th 784, 794, 54 C.R.3d 636 [in prosecution for murder and arson in which it was alleged that defendant threw gasoline on his wife and burnt her, trial judge did not err in admitting videotaped demonstration of investigator, with gas-doused hands, lighting paper towel and throwing it to ground; tape rebutted defense claims that towel would extinguish in midair, and that defendant could not have been in kitchen at time of fire because he was covered with gas and would have ignited]; *People v. Ibarra* (2007) 151 C.A.4th 1145, 1151, 61 C.R.3d 22 [in prosecution for attempted murder, trial judge did not abuse discretion in allowing playing of reality show videotape showing victim being rescued by police; tape was relevant to rebut defendant's claim that he acted out of heat of passion, and it indicated that until he was forcefully restrained he was intent on causing victim's death].



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## CHAPTER VII - Demonstrative, Experimental, and Scientific Evidence

### II. REAL OR DEMONSTRATIVE EVIDENCE

#### D. Photographic Evidence.

#### 7. X-Ray Pictures and Similar Imaging.

2 *Witkin Cal. Evid. Demo Evid* § 23

[§ 23] X-Ray Pictures and Similar Imaging.

It has been observed that X-ray photographs and similar imaging call for a somewhat different foundation from that of an ordinary photograph. Its very function is to portray an internal part of the body that cannot be seen by the eye, and therefore cannot be verified by an eyewitness as a portrayal of something seen. But when a proper foundation is laid by testimony as to the competency of the operator, the accuracy of the machine, and the standard procedure used in taking the picture, an X-ray photograph is admitted on the same basis as an ordinary photograph. (See *Sim v. Weeks* (1935) 7 C.A.2d 28, 40, 45 P.2d 350 [enlargement of X-ray photograph held properly admitted]; *Wilburn v. United States Gypsum Co.* (1936) 16 C.A.2d 111, 113, 60 P.2d 188 [X-rays taken 4 years after accident to show permanent injuries]; 49 *Stanf. L. Rev.* 1249 [on use of neuroimaging evidence]; 2 McCormick 5th, §214; 3 Wigmore (Chadbourn Rev.) §795; 29A *Am.Jur.2d* (1994 ed.), *Evidence* §§977, 978; 5 A.L.R.3d 303 [exhaustive note on authentication].)

X-rays of strangers may also be offered for purposes of comparison. (See *DeMartini v. McDonnell* (1936) 14 C.A.2d 405, 406, 58 P.2d 170 [X-ray of normal limb].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 2 McCormick 6th, §214. *West's Key Number Digest*, Criminal Law k.438(8); Evidence k.359(4)



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## CHAPTER VII - Demonstrative, Experimental, and Scientific Evidence

### II. REAL OR DEMONSTRATIVE EVIDENCE E. Diagrams, Maps, Models, and Computer Animation.

2 Witkin Cal. Evid. Demo Evid § 24

[§ 24] Diagrams, Maps, Models, and Computer Animation.

(1) *In General.* Distinct from photographs of actual persons or things (supra, §14 et seq.), but admissible under similar principles, are prepared diagrams, maps, models, or computer animations designed to give visual effect to testimony. Their use "as testimony to the objects represented rests fundamentally on the theory that they are the pictorial communications of a qualified witness who uses this method of communication instead of or in addition to some other method." (*People v. Kynette* (1940) 15 C.2d 731, 755, 104 P.2d 794; *St. George v. Superior Court* (1949) 93 C.A.2d 815, 816, 209 P.2d 823 [map or plat used by a witness "is as much a part of the witness' testimony as his oral statements"]; see generally 2 McCormick 5th, §213; 3 Wigmore (Chadbourn Rev.) §§790, 791; 15 U.C. Davis L. Rev. 951 [use of computer simulation to predict future physical events or to explain past ones]; 29A Am.Jur.2d (1994 ed.), Evidence §988 et seq.; 44 Proof of Facts 2d 707 [Foundation for Admission of Map, Diagram, or Chart]; 2 Am.Jur. Trials 669 [maps]; 3 Am.Jur. Trials 377 [models]; 9 A.L.R.2d 1044 [maps, plats, and other drawings to illustrate or express testimony]; 69 A.L.R.2d 424; 80 A.L.R.2d 1270 [chart, diagram, or blackboard in condemnation suit]; 86 A.L.R.2d 239 [same, personal injury case]; 23 A.L.R.3d 825 [eminent domain proceeding; model of property condemned]; 9 A.L.R.3d 976 [charts showing braking distance, reaction times, etc. in automobile litigation]; 23 A.L.R.5th 672 [composite picture or sketch prepared for police to identify offender]; on handwriting exemplars, see 2 Cal. Evidence (4th), Documentary Evidence, §14 et seq.)

(2) *Evidence Admissible.* Diagrams, maps, models, and computer animations were held admissible in the following cases:

*People v. Williams* (1997) 16 C.4th 153, 214, 66 C.R.2d 123, 940 P.2d 710 [in murder prosecution, plastic foam head pierced with knitting needles to illustrate trajectory of bullets was not unduly prejudicial].

*People v. Glab* (1936) 15 C.A.2d 120, 123, 59 P.2d 195 [maps and photographs to show premises where murder was committed].

*Haase v. Central Union High School Dist.* (1938) 27 C.A.2d 319, 322, 80 P.2d 1044 [diagram showed that bus driver had acted negligently on leaving narrow bridge by turning bus so sharply to right that its overhanging rear protruded over center of roadway and into path of truck].

*Pleasant Hill v. First Baptist Church* (1969) 1 C.A.3d 384, 400, 82 C.R. 1 [condemnation action; defendant church produced plan and large scale model that depicted appearance of property before condemnation and also portrayed how it could be used for future church purposes].

*People v. Sassounian* (1986) 182 C.A.3d 361, 400, 401, 226 C.R. 880 [first degree murder prosecution; map of area where homicide took place, prepared by jail trustee to whom defendant had allegedly confessed, tended to corroborate trustee's testimony].

*People v. Hood* (1997) 53 C.A.4th 965, 969, 62 C.R.2d 137 [in murder prosecution, computer animation of shooting, based on information from witness and experts, was properly admitted without being held to requirements of *People v. Kelly* (1976) 17 C.3d 24, 130 C.R. 144, 549 P.2d 1240, infra, §42; animation was tantamount to drawing by expert to illustrate testimony]; see 32 U.S.F. L. Rev. 561, 581 [*Hood*].

In *People v. Kynette*, *supra*, the charges were, in part, conspiracy to commit murder and malicious use of explosives. Prosecution experts testified as to the facts concerning bomb fragments at the scene of the crime, then gave opinions as to the kind of bomb used, and finally were allowed to offer a model bomb in evidence, as being approximately the type used. (15 C.2d 755.)

In *People v. Robillard* (1960) 55 C.2d 88, 98, 10 C.R. 167, 358 P.2d 295, a prosecution for murder by shooting, the county pathologist testified concerning the wounds in the victim's body and the trajectory of the bullets. He was then allowed to use a prepared manikin to illustrate the testimony. (See 83 A.L.R.2d 1097 [use of skeleton or model of human body or part].)

In *People v. Ham* (1970) 7 C.A.3d 768, 86 C.R. 906, a prosecution for armed robbery and assault with a deadly weapon, the prosecutor showed a .22 caliber pistol to various witnesses to determine if the weapon used by the robber was similar in appearance. *Held*, this was proper. In clarifying a witness' testimony, a pistol may be admitted in evidence if a foundation is laid to show that it was substantially similar to the weapon it is supposed to illustrate. (7 C.A.3d 780, citing the text.)

In *People v. McDaniel* (1976) 16 C.3d 156, 127 C.R. 467, 545 P.2d 843, a trial for assault with intent to commit murder, defendant had befriended P after her male companion had beaten her up outside a tavern, but P declined defendant's offer to get rid of her lover-attacker. Soon afterwards, defendant borrowed a clothespin from P. The next morning, when P's companion and another person opened a house trailer door, they were severely injured by an explosion. At the trial, an expert witness testified that an explosive charge had been placed inside the screen door and triggered with a pull-type device. Over objection, the expert was permitted to demonstrate a model bomb that incorporated a clothespin as part of a triggering device. The model was meant to illustrate how pressure on a triggering device would cause an electrical circuit to close and a dynamite cap to detonate and explode a dynamite charge. According to the witness, several mechanisms (e.g., a mercury switch, a metal washer, a mousetrap or a clothespin) could be employed as a trigger, but the witness had used a clothespin in his model only because it was easily available to him. The witness testified that he did not know what device was actually used in the bomb. Defense evidence showed that no clothespin or portion had been found in the debris at the trailer site, that defendant had borrowed the clothespin to attach a road map to the dashboard of his car, and that when he was arrested a clothespin was attached to his dashboard in a manner that would serve his claimed purpose. *Held*, under the conditions imposed by the trial court there was no abuse of discretion in allowing use of the model. "The role of the clothespin was not emphasized, and the court carefully kept the use of the model and implications therefrom in proper perspective." (16 C.3d 175.)

(3) *Evidence Excluded*. The court, of course, has discretion to exclude this type of evidence for lack of proper foundation or possible misleading or prejudicial effects. Thus, in *San Mateo v. Christen* (1937) 22 C.A.2d 375, 378, 71 P.2d 88, a condemnation suit, the judge's refusal to admit a model of a tract was upheld on the ground that disparity in size may make it misleading. (22 C.A.2d 378.)

Other cases are to the same effect. (See *People v. Jones* (1962) 205 C.A.2d 460, 467, 23 C.R. 418, citing the text [map drawn by counsel excluded]; *Dameron v. Ansbro* (1918) 39 C.A. 289, 298, 178 P. 874 [trial judge could grant or deny right to illustrate testimony with human skeleton].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General.* See 2 McCormick 6th, §213; 57 Proof of Facts 3d 455 [foundation for admitting computer-generated evidence as demonstrative evidence]; 111 A.L.R.5th 529 [computer-generated animation as demonstrative evidence to illustrate witness' testimony]. *West's Key Number Digest*, Criminal Law k.437; Evidence k.358





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## CHAPTER VII - Demonstrative, Experimental, and Scientific Evidence

### II. REAL OR DEMONSTRATIVE EVIDENCE

#### F. View of the Scene.

##### 1. In General.

2 Witkin Cal. Evid. Demo Evid § 25

[§ 25] In General.

(1) *View by Jury*. The jury may be conducted to a place where a relevant fact can be observed, to obtain a view of the scene. (C.C.P. 651 [civil cases]; P.C. 1119 [criminal cases]; see *People v. Milner* (1898) 122 C. 171, 182, 54 P. 833; *Shields v. Oxnard Harbor Dist.* (1941) 46 C.A.2d 477, 489, 116 P.2d 121; *People v. Pompa* (1923) 192 C. 412, 422, 221 P. 198; *Nunneley v. Edgar Hotel* (1950) 36 C.2d 493, 501, 225 P.2d 497; 2 McCormick 5th, §216; 4 Wigmore (Chadbourn Rev.) §1162 et seq.)

(2) *View by Judge*. The trial judge may likewise view the scene. (C.C.P. 651 [view by "trier of fact"]; *People v. Jackson* (1990) 218 C.A.3d 1493, 1505, 267 C.R. 841 [in criminal case, C.C.P. 651 governs view by judge unaccompanied by jury]; [see 4 Wigmore (Chadbourn Rev.) §1169]; 2 Cal. Proc. (4th), Courts, §223.)

(3) *Discretionary Power of Judge*. The order is discretionary (C.C.P. 651), and the judge's determination to grant or deny a request, in a civil or criminal case, is seldom disturbed. (See *People v. Pompa*, supra.) Thus, where conditions have changed since the accident or incident, a view may be ordered under proper instructions to the jury to disregard the changes. (See *Nunneley v. Edgar Hotel*, supra; 85 A.L.R.2d 512 [propriety of permitting view by jury in civil personal injury or death action as affected by claimed change of conditions since accident or incident].) And a view may be denied where other measures, such as diagrams, would be more convenient and would avoid security problems. (*People v. Fudge* (1994) 7 C.4th 1075, 1104, 1105, 31 C.R.2d 321, 875 P.2d 36.)

The Legislative Committee Comment to C.C.P. 651 observed that, in making the determination, "the court should weigh the need for the view against such considerations as whether the view would necessitate undue consumption of time or create a danger of misleading the trier of fact because of changed conditions."

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *View by Jury*. See 2 McCormick 6th, §216. *West's Key Number Digest*, Criminal Law k.651; Trial k.28-



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### II. REAL OR DEMONSTRATIVE EVIDENCE

#### F. View of the Scene.

##### 2. Scope of View.

2 Witkin Cal. Evid. Demo Evid § 26

[§ 26] Scope of View.

(1) *View by Trier of Fact in Civil Case or by Judge in Criminal Case.* Former C.C.P. 610 limited the view of a scene to the place where an offense was committed, where property in litigation was located, or where any other material fact occurred. The section was repealed in 1975, and its replacement, C.C.P. 651, enlarged the possibilities for a view. The court may order a view when it finds that the view would be proper and would aid the trier of fact in its determination of the case. (C.C.P. 651(a).) As previously mentioned (see supra, §25), C.C.P. 651 governs a view by a judge unaccompanied by a jury in a criminal prosecution. (See *People v. Jackson* (1990) 218 C.A.3d 1493, 1505, 267 C.R. 841.) The view may be ordered for any of the following:

(a) Property that is the subject of litigation. (C.C.P. 651(a)(1).)

(b) The place where any relevant event occurred. (C.C.P. 651(a)(2).)

(c) An object, demonstration, or experiment that is relevant and admissible in the case, and that cannot with "reasonable convenience" be viewed in the courtroom. (C.C.P. 651(a)(3).)

(2) *View by Jury in Criminal Case.* P.C. 1119, dealing with jury views in criminal cases, is more restricted: "[T]he place in which the offense is charged to have been committed, or in which any other material fact occurred, or any personal property which has been referred to in the evidence and cannot conveniently be brought into the courtroom."

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### F. View of the Scene.

#### 3. Procedure: View by Trier of Fact in Civil Case or by Judge in Criminal Case.

2 Witkin Cal. Evid. Demo Evid § 27

[§ 27] Procedure: View by Trier of Fact in Civil Case or by Judge in Criminal Case.

(1) *On Party's or Court's Own Motion.* The view may be ordered on the court's own motion or on motion of a party. (C.C.P. 651(a).)

(2) *Presence of Judge, Jury, and Court Officers.* Because the court is "in session" during the view (C.C.P. 651(b)), the judge, jury (if there is one), and necessary court officials, including the court reporter, must be present. (Legislative Committee Comment to C.C.P. 651(b); see *Rau v. Redwood City Woman's Club* (1952) 111 C.A.2d 546, 554, 245 P.2d 12 [judge should accompany jury as part of judge's duty to be present at all times during trial].) The Legislative Committee adds: "It is anticipated that ordinarily the jury will go to and return from the view in a body under the charge of an officer. However, this is a matter left to the court's discretion, and the court may direct that the jury be permitted to assemble at the view and leave separately."

(3) *Presence of Parties and Counsel.* Ordinarily, parties and counsel are allowed to be present (see 2 McCormick 5th, §216), and cases decided under California's former statute recognized their presence as a right or privilege that could be waived by failure to object. (See *People v. White* (1912) 20 C.A. 156, 159, 128 P. 417; *South Santa Clara Valley Water Conservation Dist. v. Johnson* (1964) 231 C.A.2d 388, 405, 41 C.R. 846.) Although C.C.P. 651(b) is silent on the point, the Legislative Committee calls attention to the decisions holding that counsel should be present.

However, the former requirement in a court-tried case, that all of the parties had to consent to the view in order for the information to be considered independent evidence (*Noble v. Kertz & Sons Feed & Fuel Co.* (1945) 72 C.A.2d 153, 158, 164 P.2d 257), was not continued. (Legislative Committee Comment to C.C.P. 651.)

(4) *Court in Session.* "The court shall be in session throughout the view." (C.C.P. 651(b).) Thus, the view "is a session of court, essentially the same as a session inside the courtroom." (Legislative Committee Comment.) Hence, under the judge's general authority to control the proceedings (C.C.P. 128), the judge may appoint a person to show the premises, and may allow or refuse to allow the jurors to question witnesses at the view. (Legislative Committee Comment.)

(5) *Examination of Witnesses.* "At the view, the court may permit testimony of witnesses." (C.C.P. 651(b).) "Thus, where appropriate, the court should provide the parties with the opportunity to examine witnesses (direct and cross-examination) at the view and to note crucial aspects of the view for the record. Yet there may be occasions where it will be inconvenient or unnecessary to permit testimony outside the courtroom." (Legislative Committee Comment.)

(6) *Proceedings Recorded*. "The proceedings at the view shall be recorded to the same extent as the proceedings in the courtroom." (*C.C.P.* 651(b).)

(7) *Effect of Noncompliance*. If a view is ordered or conducted in violation of *C.C.P.* 651, the view is not independent evidence sufficient to support a finding. However, the court is not required to follow the statutory procedure where it is proper to take judicial notice of facts obtainable at a view. (Legislative Committee Comment.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(3) *Presence of Parties and Counsel*. See 2 McCormick 6th, §216.



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### II. REAL OR DEMONSTRATIVE EVIDENCE

#### F. View of the Scene.

#### 4. Procedure: View by Jury in Criminal Case.

*2 Witkin Cal. Evid. Demo Evid § 28*

[§ 28] Procedure: View by Jury in Criminal Case.

(1) *General Requirements.* P.C. 1119 sets forth the following procedure for a view by a jury in a criminal case:

(a) The jury must be "conducted in a body" in the custody of a sheriff or marshal.

(b) The place or property to be viewed must be shown to the jury by a person appointed by the court for that purpose.

(c) That officer "must be sworn to suffer no person to speak or communicate with the jury, nor to do so himself or herself, on any subject connected with the trial."

(d) The officer must return the jury to court "without unnecessary delay, or at a specified time." (See *People v. Pampa* (1923) 192 C. 412, 422, 221 P. 198 [objections to shower, if not made at time of defendant's designation, are waived].)

(2) *Defendant's Right To Attend.* A defendant's right to be present when evidence is taken before the trier of fact (see P.C. 977(b), 1043) includes the right to be present during a jury view of the premises. (See *People v. Benjamin* (1975) 52 C.A.3d 63, 76, 124 C.R. 799.) However, this right may be waived. (See *People v. Lindsay* (1964) 227 C.A.2d 482, 506, 38 C.R. 755 [any irregularity in fact that defendant was 100 yards away while jury was viewing premises was waived by his failure to object]; *People v. Benjamin, supra*, 52 C.A.3d 76 [defendant's express waiver of right to be present during view was implied waiver of right to be present during preliminary determination (by questioning witness) that lighting conditions were same as those on night of crime].) And, although confrontation of witnesses is now recognized as an element of due process (see 5 Cal. Crim. Law (3d), *Criminal Trial*, §531 et seq.), an earlier case held that the right of the defendant to accompany the jury to a view was not. (*Snyder v. Massachusetts* (1934) 291 U.S. 97, 54 S.Ct. 330, 332, 78 L.Ed. 674, 677.)

(3) *Judge's Duty To Attend.* A view by the jury is considered a part of the trial, and thus the judge should be present at the view. (*People v. Yut Ling* (1888) 74 C. 569, 16 P. 489 [failure to attend was prejudicial error]; *People v. White* (1907) 5 C.A. 329, 336, 90 P. 471; *People v. Akens* (1914) 25 C.A. 373, 376, 143 P. 795.) However, the judge's absence is an irregularity that may be waived by the defendant's failure to timely object. Or, it may be cured by a jury instruction to disregard the view and the conducting of a second view in the judge's presence. (*People v. White, supra*, 5 C.A. 337.) (See generally 47 A.L.R.2d 1227 [necessity for presence of judge at view by jury in criminal case].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Defendant's Right To Attend*. See *People v. Garcia* (2005) 36 C.4th 777, 802, 31 C.R.3d 541, 115 P.3d 1191, 5 Cal. Crim. Law (3d), *Criminal Trial*, Supp., §552 [when jury has visited crime scene during presentation of evidence at trial and, after jury deliberations have begun, requests and is permitted to revisit scene, defendant and counsel have right to be present as well]. *Correction:* Page 38, line 11 of section, "*Pampa*" should be "*Pompa*".



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## CHAPTER VII - Demonstrative, Experimental, and Scientific Evidence

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#### F. View of the Scene.

#### 5. View as Independent Evidence.

##### a. View by Judge.

2 Witkin Cal. Evid. Demo Evid § 29

[§ 29] View by Judge.

The definition of "evidence" covers a view (*Ev.C. 140*), and a proper view by the trial judge is considered independent evidence on which a finding may be made and sustained. (See *Brugger v. Lee Yim* (1936) 12 C.A.2d 38, 50, 55 P.2d 564; *Pohl v. Anderson* (1936) 13 C.A.2d 241, 244, 56 P.2d 992.) The following cases are illustrative:

*Otey v. Carmel Sanitary Dist.* (1933) 219 C. 310, 312, 26 P.2d 308 [court's observation of effect of artificial agencies on deposit of sands, in case involving claim of title by accession].

*Ethel D. Co. v. Industrial Acc. Com.* (1934) 219 C. 699, 704, 28 P.2d 919 [referee in Industrial Accident Commission hearing visited scene of accident].

*White v. Walsh* (1951) 105 C.A.2d 828, 831, 234 P.2d 276 [issue whether amount of gravel placed on road unreasonably interfered with plaintiffs' farming land by preventing drainage of surface or flood water].

*Formosa Corp. v. Rogers* (1951) 108 C.A.2d 397, 411, 239 P.2d 88 [issue whether partition of property in kind could be made without prejudice to owners].

*Stegner v. Bahr & Ledoyen* (1954) 126 C.A.2d 220, 225, 272 P.2d 106 [issue whether quarry constituted nuisance].

*Key v. McCabe* (1960) 54 C.2d 736, 739, 8 C.R. 425, 356 P.2d 169 [action to enforce equitable servitudes; judge's view of premises held substantial evidence in support of finding of changed conditions].

*Wade v. Campbell* (1962) 200 C.A.2d 54, 62, 19 C.R. 173, citing the text [dairy enjoined as nuisance].

*South Santa Clara Valley Water Conservation Dist. v. Johnson* (1964) 231 C.A.2d 388, 399, 41 C.R. 846 [issue of existence of watercourse].

**SUPPLEMENT:** [This section is current through the latest supplement]



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F. View of the Scene.

5. View as Independent Evidence.

b. View by Jury.

2 *Witkin Cal. Evid. Demo Evid* § 30

[§ 30] View by Jury.

A view by the jury is also considered independent evidence. (See *MacPherson v. West Coast Transit Co.* (1928) 94 C.A. 463, 466, 271 P. 509; *Neel v. Mannings* (1942) 19 C.2d 647, 654, 122 P.2d 576; *Downey v. Santa Fe Trans. Co.* (1955) 134 C.A.2d 720, 725, 286 P.2d 40 [issue whether defendant maintained adequate warning signs at crossing]; *Hogue v. Southern Pac. Co.* (1969) 1 C.3d 253, 258, 81 C.R. 765, 460 P.2d 965, citing the text [jury's view of accident scene, with other evidence, sufficient to support implied finding of defendant's negligence]; 4 Wigmore (Chadbourn Rev.) §1168.)

**SUPPLEMENT:** [This section is current through the latest supplement]





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## CHAPTER VII - Demonstrative, Experimental, and Scientific Evidence

### II. REAL OR DEMONSTRATIVE EVIDENCE

#### F. View of the Scene.

#### 5. View as Independent Evidence.

##### c. Exceptions.

2 Witkin Cal. Evid. Demo Evid § 31

[§ 31] Exceptions.

(1) *View by Judge: Irrelevant and Cumulative.* The following cases are illustrative of the grounds on which a view by a judge will not be considered as independent evidence:

*Sylva v. Kuck* (1966) 240 C.A.2d 127, 136, 49 C.R. 512 [under circumstances, view was irrelevant].

*Specialty Restaurants Corp. v. Los Angeles* (1977) 67 C.A.3d 924, 941, 136 C.R. 904 [issue whether floating ship was fixture and taxable as real property; judge's remarks showed that his view was merely illustrative of testimonial and documentary evidence and was not independent substantial evidence sufficient to uphold judgment].

(2) *View by Jury: Value in Condemnation Proceeding.* In *People v. McCullough* (1950) 100 C.A.2d 101, 223 P.2d 37, a condemnation suit, the jury gave more than the highest value placed by any of the witnesses. Defendant owner contended that, because the jury viewed the scene, their knowledge could justify the finding. *Held*, a new trial on the issue of value was properly granted. "The true rule appears to be that a jury cannot disregard the evidence as to value and render a verdict in excess of that shown by the testimony of the witnesses. The view of the premises cannot be the sole basis for an award. Value must be arrived at from the opinion of well-informed persons based upon the purposes for which the property is suitable. While the view of the premises is evidence in a condemnation proceeding, it is merely corroborative of the quantitative oral testimony." (100 C.A.2d 105.)

The theory of this case has been codified: A view of property being valued, or other admissible evidence (including the character of the improvement proposed to be constructed by the plaintiff in an eminent domain proceeding), is admissible for the limited purpose of enabling the court, jury, or referee to understand and weigh expert testimony as to the property's value. Except in the case of an eminent domain proceeding, this type of evidence is subject to impeachment and rebuttal. (Ev.C. 813(b).)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER VII - Demonstrative, Experimental, and Scientific Evidence

### II. REAL OR DEMONSTRATIVE EVIDENCE

#### G. Physical Examination and Exhibition.

##### 1. Physical Examination.

##### *2 Witkin Cal. Evid. Demo Evid § 32*

[§ 32] Physical Examination.

Physical examination is in part a discovery procedure (see 2 *Cal. Evidence (4th)*, *Discovery*, §140 et seq.), and, in part, a matter of demonstrative evidence:

(1) *Autopsies*. In both criminal and civil cases (e.g., homicide and wrongful death), an examination of the body of the deceased by a trained pathologist is sometimes made, and the pathologist's testimony given on issues relating to the cause of death. (See 8 Wigmore (McNaughton Rev.) §2221; 16 *So. Cal. L. Rev.* 143; 21 A.L.R.2d 538 [power of court to order disinterment and autopsy or examination in civil case]; 4 *Cal. Crim. Law (3d)*, *Introduction to Criminal Procedure*, §43 [coroner].)

(2) *Physical Examination: Defendant in Criminal Case*. Examination of the body of the defendant in a reasonable manner is not considered violative of the accused's constitutional right of privacy or privilege against self-incrimination; but a brutal body examination is a denial of due process and the resulting evidence is inadmissible. (See 2 *Cal. Evidence (4th)*, *Witnesses*, §413 et seq.)

(3) *Physical Examination: Plaintiff in Personal Injury Case*. A compulsory pretrial physical examination of the plaintiff to determine the nature and extent of his or her injuries, designed to furnish information for later testimony, is generally held to be within the court's power, and is now expressly authorized by California's discovery statutes. (See *Harabedian v. Superior Court (1961)* 195 C.A.2d 26, 31, 15 C.R. 420; 8 Wigmore (McNaughton Rev.) §2220; 29A *Am.Jur.2d (1994 ed.)*, *Evidence* §§952, 953; 36 A.L.R.2d 946 [*F.R. Civ. P.*, 35(b)]; 62 A.L.R.2d 1291 [right to physically examine victim in personal injury action by victim's parent or spouse]; 33 A.L.R.3d 1012 [defendant's right to choose physician]; 84 A.L.R.4th 558 [right of party to have attorney present during physical or mental examination]; 2 *Cal. Evidence (4th)*, *Discovery*, §140 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### G. Physical Examination and Exhibition.

##### 2. Exhibition.

2 Witkin Cal. Evid. Demo Evid § 33

[§ 33] Exhibition.

(1) *Exhibition of Body or Injury in Civil Case.* The Comment to Ev.C. 140 points out that "evidence" includes "the appearance of a person exhibited to the jury."

Thus, in a personal injury action the plaintiff may exhibit an injured arm, leg or other part of his or her body, as demonstrative evidence of the nature and extent of the injury. (See *Willoughby v. Zylstra* (1935) 5 C.A.2d 297, 301, 42 P.2d 685 [medical witness manipulated plaintiff's neck and pinched cervical vertebrae in presence of jury]; 2 McCormick 5th, §215; 4 Wigmore (Chadbourn Rev.) §1158; 82 A.L.R.4th 980 [in-court demonstration to show effect of injury in action for bodily injury].)

In a filiation proceeding by a child of unmarried parents, the court may require the alleged father to stand close to the child to enable the jury to compare their physical features. (*Berry v. Chaplin* (1946) 74 C.A.2d 652, 665, 169 P.2d 442; see 1A Wigmore (Tillers Rev.) §166; 1951 A.S. 278 [statutory rape; baby born to girl produced for comparison of features and characteristics]; 55 A.L.R.3d 1087 [exhibition of child to jury to show family resemblance, or lack of it, on issue of paternity]; on genetic test for nonpaternity or paternity, see *infra*, §68 et seq.)

(2) *Exhibition of Accused or Victim in Criminal Case.* In a criminal case, the accused may show his or her body as evidence of violence in obtaining a confession. (See 72 A.L.R.2d 1322.) It has been held that a criminal defendant may be required to exhibit himself or herself and to perform a physical act during the trial. (See *People v. Turner* (1971) 22 C.A.3d 174, 181, 99 C.R. 186 [modeled scarf and sunglasses]; *People v. Holt* (1972) 28 C.A.3d 343, 350, 104 C.R. 572 [wore certain hat, stood and held gun in left hand, and repeated words uttered by robber]; *People v. Breckenridge* (1975) 52 C.A.3d 913, 936, 125 C.R. 425 [exhibited himself to witness at same distance separating witness and suspect at time of crime]; *People v. Sims* (1976) 64 C.A.3d 544, 552, 134 C.R. 566 [read statements for voice identification]; 3 A.L.R.4th 374 [propriety of requiring criminal defendant to exhibit self, or perform physical act, or participate in demonstration, during trial and in presence of jury]; 2 Cal. Evidence (4th), Witnesses, §385.)

And in a prosecution for rape of a person incapable of giving consent because of mental disease, defect, or disorder (P.C. 261(a)(1)), the alleged victim, without being sworn, could be questioned while sitting in the spectator section by the prosecution about her name, its spelling, her age, and the color of a purse she was shown. The reason is that the victim was not a witness, but an exhibit, demonstrative evidence of an essential element of the crime charged: that she was incapable of consenting to sexual intercourse and this was or should have been known to the defendant. (*People v. Morgan* (1987) 191 C.A.3d 29, 38, 236 C.R. 186.)

(3) *Reenactment of Crime*. A crime may be reenacted for the jury by a motion picture or videotape (see *supra*, §22) or by a live visual demonstration. (See *People v. Buttles* (1990) 223 C.A.3d 1631, 1639, 273 C.R. 397 [witness' demonstration of how defendant pointed gun out of car window before firing it allowed jury to conclude that he was aiming at passing vehicle]; 100 A.L.R.2d 1257 [admissibility of evidence of accused's reenactment of crime].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Exhibition of Body or Injury in Civil Case*. See 2 McCormick 6th, §215. *West's Key Number Digest*, Criminal Law k.404.45; Evidence k.188, 192



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#### H. Samples.

*2 Witkin Cal. Evid. Demo Evid § 34*

[§ 34] Samples.

Samples may be admitted in evidence to show the quality and condition of the entire lot or mass from which they were taken. (See 2 Wigmore (Chadbourn Rev.) §439; 29A *Am.Jur.2d* (1994 ed.), *Evidence* §§943, 944.)

Admissibility, however, is subject to certain conditions: (1) the samples must be properly identified as to source; (2) they must be shown to be in the same or substantially the same condition as they were at the time that condition became material to the issues involved; (3) where offered to show the condition of a large amount of material, they must appear fairly representative of the whole; and (4) the circumstances and uses of the sample, at the time of its taking, must be similar to the circumstances and uses of the mass. (*People v. Porpora* (1979) 91 *C.A.3d Supp.* 13, 20, footnotes 3, 4, 154 *C.R.* 400.)

In the *Porpora* case, the court reviewed and found sufficient the foundation evidence of the technique involved (taking samples of fish from a conveyor belt unloading a fishing boat's catch to determine whether an excessive amount of Pacific mackerel had been caught). (91 *C.A.3d Supp.* 18, 19, 20.) The court also pointed out that sampling is not a scientific analysis of an experimental nature, nor a novel technique; "[i]n essence, sampling is an assay." (91 *C.A.3d Supp.* 21.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 80 *So. Cal. L. Rev.* 969 [use of sampling evidence in consolidated and class actions]. *West's Key Number Digest*, Criminal Law k.404.45



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### III. EXPERIMENTS

#### A. Experiments Before Trial.

2 Witkin Cal. Evid. Demo Evid § 35

[§ 35] Experiments Before Trial.

(1) *In General.* The principal use of experimental evidence is to test theories of the case by performing controlled experiments out of court and then calling an expert witness to testify about the results. The experiment is thus merely the basis of the expert testimony as to facts and opinions, and demonstrative evidence is only incidentally involved, as where the expert offers in evidence physical objects connected with the experiment. (See generally 1 McCormick 5th, §202 et seq.; 2 Wigmore (Chadbourn Rev.) §441 et seq.; 29A Am.Jur.2d (1994 ed.), Evidence §996 et seq.; 76 A.L.R.2d 354, 402 [determining chemical or physical qualities of substance]; 78 A.L.R.2d 152, 218 [showing visibility or line of vision]; 11 A.L.R.5th 497 [ascertaining distance from gun to victim when gun was fired].)

(2) *Authority To Conduct Experiments.* Sometimes a statute or rule expressly governs whether an experiment may be conducted. For example, *Ev.C. 1159* prohibits the admission of evidence pertaining to live animal experimentation (including injury, impact, or crash experimentation) in a products liability action involving a motor vehicle. (See 24 *Pacific L. J.* 881.)

In the absence of statute or rule, experiments are conducted entirely on the initiative of the parties, and often without notice to the other side. This practice often presents serious questions concerning the similarity of the conditions and the accuracy of the observations. Some experiments, moreover, have a tendency to confuse rather than clarify the issue. For these reasons, the trial judge has a broad discretion to admit or exclude experimental evidence. (See *People v. Ely* (1928) 203 C. 628, 633, 265 P. 818; *Martin v. Angel City Baseball Assn.* (1935) 3 C.A.2d 586, 590, 40 P.2d 287 [injuries from fall on stairway; experiments made by witness walking up and down excluded as too individual to be probative]; *People v. Roberts* (1953) 40 C.2d 483, 490, 254 P.2d 501; *People v. Skinner* (1954) 123 C.A.2d 741, 750, 267 P.2d 875; *Long v. California-Western States Life Ins. Co.* (1955) 43 C.2d 871, 882, 279 P.2d 43 [experiments of ballistics expert on tripping and falling with pistol, to show where bullet wound occurs, excluded as speculative and not proper subject of expert testimony]; *Odell v. Frueh* (1956) 146 C.A.2d 504, 511, 304 P.2d 45; *Holling v. Chandler* (1966) 241 C.A.2d 19, 23, 50 C.R. 219; *People v. Williams* (1973) 36 C.A.3d 262, 272, 11 C.R. 378, *infra*, §37; *People v. Terry* (1974) 38 C.A.3d 432, 444, 113 C.R. 233, *infra*, §37; *People v. Roehler* (1985) 167 C.A.3d 353, 385, 213 C.R. 353, *infra*, §37; 2 Wigmore (Chadbourn Rev.) §§442, 443, 444; 19 A.L.R.3d 1008 [hearsay; report of test or experiment performed by independent third party].) (On application of the *Kelly* test to exclude improper experimental evidence, see *People v. Dellinger* (1984) 163 C.A.3d 284, 293, 209 C.R. 503, *infra*, §42.)

In *Schauf v. Southern Calif. Edison Co.* (1966) 243 C.A.2d 450, 52 C.R. 518, an automobile collision occurred at an intersection. To show that a stop sign was obstructed by a utility pole so as not to become visible in time to serve as a warning to traffic, the father of one injured party went to the scene. He was not allowed to testify, however, as to how the sign and pole appeared as he drove toward the intersection. This was not testimony as to facts observed, but an

experiment; and the differences between conditions of the accident and the experiment, e.g., speed and position of vehicle, observer's position in the vehicle, illumination and acuteness of vision, would have made the result confusing rather than clarifying. (243 C.A.2d 455, citing the text.) (See *People v. Manson* (1977) 71 C.A.3d 1, 43, 139 C.R. 275 [denial of defendant's request to conduct "screaming lineup" to test truthfulness of witness' testimony that she heard screams of victim; *People v. Spencer* (1922) 58 C.A. 197, 208 P. 380, distinguished].)

(3) *Suggested Procedure*. To make scientific evidence of this kind more often available and more reliable, a procedure similar to that employed in discovery proceedings has been suggested (see 1 McCormick 5th, §202; 16 So. Cal. L. Rev. 124):

(a) Notice to the adverse party of the intention to conduct the experiment, with an opportunity to be present and perhaps to make suggestions as to method.

(b) Discretionary power in the court to appoint an impartial expert to conduct or supervise the experiment (this might be done at the pretrial conference).

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General*. See 1 McCormick 6th, §202 et seq. (3) *Suggested Procedure*. See 1 McCormick 6th, §202. *West's Key Number Digest*, Criminal Law k.388 et seq.; Evidence k.150-



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### III. EXPERIMENTS

#### B. Experiments in Courtroom.

2 Witkin Cal. Evid. Demo Evid § 36

[§ 36] Experiments in Courtroom.

(1) *Discretion To Permit*. The judge may permit experiments in court that do not unduly delay the trial or confuse or prejudice the jury. (See *People v. McDaniel* (1976) 16 C.3d 156, 174, 127 C.R. 467, 545 P.2d 843, supra, §24 [demonstration of how bomb operates, with light bulb substituted for explosives in model]; 2 McCormick 5th, §215; 2 Wigmore (Chadbourn Rev.) §445; 4 Wigmore (Chadbourn Rev.) §§1154a, 1160; 29A Am.Jur.2d (1994 ed.), Evidence §997; 76 A.L.R.2d 354, 402 [to determine chemical or physical qualities of substance]; 78 A.L.R.2d 1281 [to test qualifications of expert].)

(2) *Discretion To Refuse*. The discretion to refuse permission is very broad. (See *People v. Skinner* (1954) 123 C.A.2d 741, 750, 267 P.2d 875 [too many variables involved]; *People v. King* (1951) 104 C.A.2d 298, 307, 231 P.2d 156 [unlikely that conditions would be same]; *People v. Sherman* (1950) 97 C.A.2d 245, 252, 217 P.2d 715 [arson; defense request to perform experiment with fire rejected for dissimilarity of conditions and danger]; *Grupe v. Glick* (1945) 26 C.2d 680, 685, 160 P.2d 832 [delay in making arrangements]; *People v. Gilbert* (1992) 5 C.A.4th 1372, 1388, 7 C.R.2d 660 [child sexual abuse; defense request to use live models to reenact events involving defendant and victim rejected for physical dissimilarity of models].)

(3) *Experiments by Jury*. It is, of course, serious misconduct for jurors to carry on private experiments. (*Higgins v. Los Angeles Gas & Elec. Co.* (1911) 159 C. 651, 656, 115 P. 313, 7 Cal. Proc. (4th), Trial, §339.) However, jurors may conduct experiments in the jury room if done in the presence of all jurors and if the experiments relate to exhibits received in evidence. (Comment to BAJI (8th ed.), No. 1.00.5; *People v. Bogle* (1995) 41 C.A.4th 770, 778, 779, 48 C.R.2d 739.) (See generally 31 A.L.R.4th 566 [propriety of juror's tests or experiments in jury room]; 7 Cal. Proc. (4th), Trial, §339.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Discretion To Permit*. See 2 McCormick 6th, §215. West's Key Number Digest, Trial k.27





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### III. EXPERIMENTS

#### C. Illustrations.

2 Witkin Cal. Evid. Demo Evid § 37

[§ 37] Illustrations.

No classification of the innumerable subjects appropriate for experimental evidence is possible, but valuable suggestions will be found in some of the texts and law reviews. (See 1 McCormick 5th, §202 et seq.; 4 Wigmore (Chadbourn Rev.) §1160; 54 A.L.R.2d 922 [experiments in actions against electric power companies]; 76 A.L.R.2d 354 [to determine chemical or physical qualities of material]; 76 A.L.R.2d 402 [explosion]; 64 A.L.R.4th 125 [to disprove defect in motor vehicle]; 82 A.L.R.4th 980 [to show effect of injury in action for bodily injury].)

The following cases are also instructive:

*People v. Spencer* (1922) 58 C.A. 197, 228, 208 P. 380 [murder; test of hearing woman's scream at certain place from certain distance under similar atmospheric conditions].

*People v. Willis* (1924) 70 C.A. 465, 472, 233 P. 812 [murder; firearms expert experimented with gun that killed deceased to test defendant's theory of self-defense].

*People v. Halbert* (1926) 78 C.A. 598, 606, 248 P. 969 [vehicle killing; test of visibility of path of car at street intersection].

*People v. Crawford* (1940) 41 C.A.2d 198, 205, 106 P.2d 219 [murder by automobile assertedly out of control; prosecution's experiments with similar cars descending same grade to show different stopping point].

*Chambers v. Silver* (1951) 103 C.A.2d 633, 637, 230 P.2d 146 [automobile accident; test run of similar car with similar defects (unfastened spring) to show stability].

*Beresford v. Pacific Gas & Elec. Co.* (1955) 45 C.2d 738, 748, 290 P.2d 498 [experiment by electrical engineers to see whether power escaping down telephone lines into telephone switchboard could cause fire].

*People v. Modell* (1956) 143 C.A.2d 724, 300 P.2d 204, *infra*, §40 ([vehicle killing; experiment with alcohol swabbed arm and arm with alcohol evaporated, to determine effect of alcohol swab on alcoholic content of blood test].)

*People v. Carter* (1957) 48 C.2d 737, 749, 312 P.2d 665, *supra*, §10 and *infra*, §§39, 91 [murder by beating; experimental beating of bloody objects with various instruments to determine relationship between blood spots and their causes].

In *Culpepper v. Volkswagen of America* (1973) 33 C.A.3d 510, 109 C.R. 110, plaintiff sought to show that a

defective design in her VW Bug caused it to roll over when she attempted a lane change maneuver. Over defendant's objection, the trial judge permitted her to exhibit a film that depicted a test known as the Bungee Cord Experiment, designed to use a driverless car to eliminate human error in the measurement of rollovers. *Held*, the film was properly admitted. "[T]he main issue in the lawsuit involved the capability of the VW to hold the road when the front wheels were subjected to a sharp turning maneuver. Although the Corvair-VW test involved a driverless car, the driver was omitted to eliminate the human error factor. The test was conducted on a dry, flat, smooth-surfaced road--the exact kind of surface as that involved at the accident scene." (33 C.A.3d 522.)

In *People v. Williams* (1973) 36 C.A.3d 262, 111 C.R. 378, defendant truck driver was charged with embezzling gasoline from his employer after he allegedly made an unauthorized stop and delivery of gas while en route to his proper destination. The truck he used was equipped with a tachograph, i.e., a device attached to the speedometer cable that measured the engine revolutions, the vehicle's speed, the distance the vehicle traveled, and the time. Using the tachograph data, a company expert sought to determine the location of a supposed "coffee stop" on the truck's chart. After analyzing the chart, the expert used his own car and a map and, by a trial and error method, determined where defendant had driven and that the location of the "coffee stop" was a service station that presumably received the unauthorized delivery. Defendant argued that the expert's method of calculating this location was in the nature of a scientific test like blood testing, fingerprinting, and voiceprinting, and that the tachograph interpretation was neither generally accepted in the scientific community nor reliable. *Held*, the expert's testimony was properly admitted and defendant's analogy to scientific tests was fallacious.

The court said: "What appellant really objects to is not Martineau's conclusions about the speed and distance traveled by appellant, but rather Martineau's experiment with a car and a map which indicated that the described route to Crenshaw and Adams was consistent with the chart. What Martineau did was not a scientific test which had to be validated by experts in the field. He read a map, read an odometer, and used his eyes to observe whether freeway ramps and other intersections existed on a route of travel--perfectly ordinary investigative techniques. Moreover, the reliability of Martineau's method was confirmed by the fact that he was not given the suspected location to work backwards from and yet after he arrived at his conclusions three other tachograph charts showing trips by other drivers from the terminal to Han Ho Choe's service station revealed the same pattern." (36 C.A.3d 273.)

In *People v. Terry* (1974) 38 C.A.3d 432, 444, 113 C.R. 233, defendants were charged with the armed robbery of a South San Francisco finance company. They offered an alibi to show they were in the vicinity of Fifth Street, San Francisco, at the relevant time. To rebut this evidence, the prosecution offered the testimony of a detective that, 8 months after the robbery, he drove between the two locations in 13 minutes without exceeding the speed limit. *Held*, the evidence was properly admitted. "[T]here was a sufficient showing that the conditions of the experiment were substantially similar to those existing on the date of the robbery. The robbery occurred on a weekday, and the fact that the experiment took place on a Thursday rather than on a Wednesday is not significant since the traffic conditions should be substantially similar on both days at the same hour. The fact that the experiment took place some eight months after the robbery is equally insignificant since it is not contended that the subject highway and traffic conditions at each of these times were dissimilar." (38 C.A.3d 445.)

In *People v. Roehler* (1985) 167 C.A.3d 353, 213 C.R. 353, defendant was charged with murder of his wife and stepson. The deaths occurred while defendant and the victims were in a dory, and defendant claimed that the boat accidentally capsized. But the evidence showed premortem head injuries resulting in death by drowning, and the prosecution was allowed to introduce evidence of two experiments, which were held admissible.

(a) *Testing of the dory.* Dr. H, a professor of mechanical engineering with experience as a swimmer and sailor, conducted tests of the boat with individuals of size and weight similar to those of defendant and the victims. The tests showed that there was no way to overturn the dory by accidental means; that only concentrated and purposeful effort would cause it to turn over; and that it then capsized so slowly that persons in the boat had time to swim free of it. (167 C.A.3d 369.) This evidence met the basic requirements of *Culpepper, supra*; "What the dory testing tended to show was that it was very unlikely that the dory had capsized accidentally; that it had been deliberately turned over, intentionally

so. Further, it was established that the slowness with which it turned over should have allowed the persons in the boat to swim free of it." (167 C.A.3d 387.) And it was significant that the test was conducted with the identical boat used by defendant: "Use of the identical equipment is not a requirement to introduce experimental evidence, but it does produce evidence more solid and credible." (167 C.A.3d 387.)

(b) *Testing of the dummy.* Dr. W, an engineer specializing in biomechanics, performed tests with a dummy to determine the maximum force that could be applied to the head of the stepson victim if the dory capsized and the child was hit by the boat while rising from the water. The conclusion was that the maximum force would have resulted in from 210-240 pounds of pressure on the skull--a relatively small amount. (167 C.A.3d 370.) This experiment, using new rather than well established techniques, nevertheless produced admissible evidence.

(1) The issue was different from that involved in *People v. Kelly* (1976) 17 C.3d 24, 130 C.R. 144, 549 P.2d 1240, infra, §42; "[w]e are not asked here to analyze and deliver an opinion on the emerging field of biomechanics, the application of engineering principles to biology." (167 C.A.3d 388.) The test of the potential force applied to the head of the dummy and the dory was only a small part of the evidence; and the trial judge ruled that, although the engineering experts could testify concerning engineering principles, only qualified medical experts could testify concerning the head injuries involved. (167 C.A.3d 388.)

(2) A live subject could not be used for the test; it was necessary to use an anthropomorphic dummy designed to have the same weight and mass distribution as the victim, and the test demonstrated that the maximum force generated by the experimental collisions could not produce a force sufficient to produce the injuries. (167 C.A.3d 389.)

(3) *People v. Dellinger* (1984) 163 C.A.3d 284, 209 C.R. 503, infra, §42, is distinguishable: here, engineering principles to establish velocity figures were used, and there was adequate expert evidence supporting the reliability of the method used to measure the velocity. Moreover, the evidence of the dummy experiment was not the basis for the conclusion that the boy's head injuries were the result of premeditated murder, but was offered as corroboration of the conclusions of the medical examiner pathologist. (167 C.A.3d 390.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 1 McCormick 6th, §202 et seq.; 57 *Hastings L. J.* 509 [use of neural imaging for credibility impeachment]. *Use of tachograph:* See 18 A.L.R.6th 613 [admissibility of tachograph or similar paper or tape recording of speed].



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### III. EXPERIMENTS

#### D. Foundation: Showing of Similar Conditions.

##### 1. Necessity of Showing.

##### 2 *Witkin Cal. Evid. Demo Evid* § 38

[§ 38] Necessity of Showing.

The relevancy of experimental evidence ordinarily depends upon a showing that the conditions of the experiment were substantially similar to those that gave rise to the issue on which the evidence is offered. Thus, a foundation must be laid by testimony as to the manner in which the experiment was performed. (See *Cervantes v. Maco Gas Co.* (1960) 177 C.A.2d 246, 251, 2 C.R. 75 [insufficient]; *Andrews v. Barker Bros. Corp.* (1968) 267 C.A.2d 530, 537, 73 C.R. 284 [insufficient]; *Culpepper v. Volkswagen of America* (1973) 33 C.A.3d 510, 521, 109 C.R. 110, supra, §37 [sufficient]; *Hasson v. Ford Motor Co.* (1977) 19 C.3d 530, 548, 550, 138 C.R. 705, 564 P.2d 857 [sufficient]; *Ehrhardt v. Brunswick* (1986) 186 C.A.3d 734, 740, 231 C.R. 60 [insufficient]; *People v. Turner* (1994) 8 C.4th 137, 198, 32 C.R.2d 762, 878 P.2d 521, 1 Cal. Evidence (4th), Hearsay, §50 [sufficient]; *People v. Bradford* (1997) 15 C.4th 1229, 1326, 65 C.R.2d 145, 939 P.2d 259 [sufficient]; 1 McCormick 5th, §202; 29A Am.Jur.2d (1994 ed.), Evidence §1002 et seq.)

In *Andrews v. Barker Bros. Corp.*, supra, plaintiff sued for injuries suffered from collapse of a chair on which he sat in defendant's store. To show contributory negligence, defendant produced an engineer who testified to experiments: he sat with the chair tilted back, and succeeded in collapsing it. *Held*, admission was error. Although this may have been a logical explanation of the accident, it was based entirely on speculation: there was no evidence that plaintiff sat on the chair in that manner. (267 C.A.2d 537.) (For other cases in which experimental evidence was excluded for lack of such showing, see supra, §§35, 36.)

The requirement is only of substantial similarity, not identity, of conditions. (See *People v. Spencer* (1922) 58 C.A. 197, 228, 208 P. 380 [conditions of experiment even more strict than those of crime]; *Chambers v. Silver* (1951) 103 C.A.2d 633, 641, 230 P.2d 146; *Odell v. Frueh* (1956) 146 C.A.2d 504, 512, 304 P.2d 45; *Yecny v. Eclipse Fuel Engineering Co.* (1962) 210 C.A.2d 192, 203, 204, 205, 26 C.R. 402 [determination for trial judge, but judge may instruct jury to consider matter of similarity in giving it evidentiary value]; 2 Wigmore (Chadbourn Rev.) §442.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 1 McCormick 6th, §202. *West's Key Number Digest*, Criminal Law k.388.3



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CHAPTER VII - Demonstrative, Experimental, and Scientific Evidence

III. EXPERIMENTS

- D. Foundation: Showing of Similar Conditions.
- 2. Distinction: Relevant Without Similar Conditions.

2 *Witkin Cal. Evid. Demo Evid* § 39

[§ 39] Distinction: Relevant Without Similar Conditions.

The relevancy of some experiments does not depend on proof of similarity of conditions, and in that event, a different foundation is appropriate. (See 1 McCormick 5th, §202.)

Thus, in *People v. Carter* (1957) 48 C.2d 737, 750, 312 P.2d 665, a trial for murder by beating the victim to death, Dr. K, a prosecution witness, was permitted to testify to his general knowledge of chemistry, physics and "blood dynamics," and also that he had conducted experiments in beating bloody objects with various instruments to determine the relationship between blood spots and their causes. Then he testified to blood spots at the murder scene and on defendant's clothes, and gave his opinion on the conditions of the murder. *Held*, this was admissible.

The court made this distinction: (a) "It may be that" when a specific experiment is the sole basis for an expert opinion, the same showing of similar conditions is required as in a case in which the results of an experiment are offered as direct evidence. (b) But here the experiments were offered "to qualify him as an expert in blood dynamics, to show that by training and experience he was able from an analysis of the size and shape of blood spots to determine their source with some degree of accuracy, and to enable the jury to test the reliability of his opinions by revealing their foundation." (48 C.2d 750.) (See *People v. Guillebeau* (1980) 107 C.A.3d 531, 550, 166 C.R. 45 [following *Carter*].)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 1 McCormick 6th, §202.



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## CHAPTER VII - Demonstrative, Experimental, and Scientific Evidence

### III. EXPERIMENTS

#### D. Foundation: Showing of Similar Conditions.

##### 3. Necessity of Specific Objection.

*2 Witkin Cal. Evid. Demo Evid § 40*

[§ 40] Necessity of Specific Objection.

Objections to evidence must be specific, and a general objection does not raise the specific defect of lack of a proper foundation. (See *3 Cal. Evidence (4th), Presentation at Trial, §380.*)

*People v. Modell (1956) 143 C.A.2d 724, 300 P.2d 204*, goes a step further, requiring informative precision in the objection to lack of a proper foundation for experimental evidence where the alleged defect is curable. Defendant, arrested for a vehicle killing at 6:30 a.m., voluntarily submitted to a blood test for alcohol at 10:30 a.m. The expert, testifying that the test showed the influence of intoxicating liquor, nevertheless admitted that sterilizing the skin with an alcohol swab would increase the alcoholic content of the test blood. The prosecution then offered the result of an experiment with blood taken from different arms, one just swabbed and one with the alcohol evaporated, to support the result of the original blood test. Defendant objected that a "proper foundation has not been laid" in that "there is no proper showing ... that the conditions were the same in the test." On appeal, defendant suggested that the needle may have been larger or smaller, or a pure or weak solution of alcohol used, in the two tests. *Held*, these objections were waived by failure to refer to the precise alleged defects.

The court said: "There is an obvious difference between the receipt of evidence of an experiment made under conditions materially different from those of the occurrence sought to be illustrated and the present case, in which the conditions might have been substantially the same. In the former there is a factual basis upon which to rest a claim of prejudice; in the present case there is none. Any question as to the reliability of the experiment could have been answered readily in the trial court. Upon the appeal unreliability can be urged only as a remote possibility. We can only conclude that appellant's failure to register a sufficient objection amounted to a waiver of the right to claim error in the admission of the evidence." (*143 C.A.2d 731.*)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER VII - Demonstrative, Experimental, and Scientific Evidence

### IV. CHEMICAL AND PHYSICAL TESTS

#### A. Nature and Scope of Subject.

*2 Witkin Cal. Evid. Demo Evid § 41*

[§ 41] Nature and Scope of Subject.

The use of scientific tests in the investigation and preparation of cases for trial, and sometimes in trial, has become increasingly popular. Although case law is somewhat conservative in regard to admissibility, the literature on the subject is not. (See generally 1 McCormick 5th, §202 et seq.; 108 Harv. L. Rev. 1482 [new challenges of scientific evidence]; 110 Harv. L. Rev. 941 [proposing use of technical advisors to help court in making pretrial decisions on admissibility]; 46 Stanf. L. Rev. 1 [jurors' problems in properly assessing complex scientific evidence]; 29A Am.Jur.2d (1994 ed.), Evidence §996 et seq.; 1 Jefferson, California Evidence Benchbook 3d, §21.45 et seq.; 56 A.L.R.4th 1105 [use of thermography to detect cancer and soft tissue injuries]; 22 Proof of Facts 385 [instrumental analysis; identifying substances by chemical composition]; 29 Proof of Facts 461 [identifying substances by thin layer and paper chromatography]; 24 Proof of Facts 3d 609 [admissibility and reliability of laboratory analysis of soil, water, and air samples in environmental litigation].)

The following are illustrative of tests frequently encountered in the cases:

- (1) Tests for intoxication. (See infra, §48 et seq.)
- (2) Tests for narcotics. (See infra, §56.)
- (3) Genetic tests to prove identity. (See infra, §57 et seq.)
- (4) Genetic tests to establish nonpaternity and paternity. (See infra, §68 et seq.)
- (5) Radar speedmeter. (See infra, §82 et seq.)
- (6) Polygraph. (See infra, §87 et seq.)
- (7) Truth serum. (See infra, §§96, 97.)
- (8) Voiceprint. (See infra, §§98, 99.)
- (9) Hypnosis. (See infra, §100 et seq.)
- (10) Penile plethysmograph. (See infra, §107.)
- (11) Dolls used to detect child abuse. (See infra, §108.)

For other tests less frequently encountered in the cases, see *infra*, §109.

**SUPPLEMENT:** [This section is current through the latest supplement]

See 1 McCormick 6th, §202 et seq.; 95 *Cal. L. Rev.* 721 [hazards of new forensic techniques]; 54 Proof of Facts 3d 381 [use of instrumental analysis to identify substance; superseding 22 Proof of Facts 385 and 29 Proof of Facts 461, text, p. 52]. *West's Key Number Digest*, Criminal Law k.388 et seq.; Evidence k.150





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## CHAPTER VII - Demonstrative, Experimental, and Scientific Evidence

### IV. CHEMICAL AND PHYSICAL TESTS

#### B. Scientific Basis and Reliability.

##### 1. California's Kelly Rule.

2 Witkin Cal. Evid. Demo Evid § 42

[§ 42] California's Kelly Rule.

(1) *Statement of Rule.* It has long been the rule in California that evidence of a scientific test will not be admitted unless its scientific basis and reliability are generally recognized by competent authorities. (See *People v. Spigno* (1957) 156 C.A.2d 279, 290, 319 P.2d 458; *People v. Williams* (1958) 164 C.A.2d Supp. 858, 860, 331 P.2d 251; *Huntingdon v. Crowley* (1966) 64 C.2d 647, 653, 51 C.R. 254, 414 P.2d 382.)

But a specific, three-pronged test for establishing scientific basis and reliability, first set forth in the federal district court case of *Frye v. United States*, was approved by the California Supreme Court in *People v. Kelly* (1976) 17 C.3d 24, 31, 130 C.R. 144, 549 P.2d 1240, as follows:

(a) The reliability of the method must be generally accepted by recognized authorities in the scientific field in which the test belongs. This is usually established by expert testimony. (On clarifications of and distinctions to term, see *infra*, §43 et seq.; on appellate review of trial court's determination, see *infra*, §43.)

(b) A witness giving expert testimony must be qualified as an expert on the subject.

(c) It must be shown that correct scientific procedures were used in administering the method.

California courts initially referred to the test as the *Frye-Kelly* rule, but shortly after the United States Supreme Court abrogated the *Frye* formulation in federal trials in 1993 (see *infra*, §47), California decisions began calling the test by its more accurate name: the *Kelly* rule. (See *People v. Leahy* (1994) 8 C.4th 587, 591, 34 C.R.2d 663, 882 P.2d 321, *infra*, §43.)

(2) *Purpose of Rule.* The *Kelly* opinion makes this observation about the test:

"Rather than permitting the trial judge to admit such evidence in his sound discretion, the *Frye* line of decisions have assigned the task of determining reliability to members of the scientific community from which the new method emerges. This should promote a degree of uniformity of decision; i.e., judges whose particular conclusion may differ may discover substantial agreement and consensus in the scientific community." (17 C.3d 31.) And the test is essentially conservative, supporting "a posture of judicial caution," for "[l]ay jurors tend to give considerable weight to 'scientific' evidence when presented by 'experts' with impressive credentials." (17 C.3d 31.)

(3) *Illustration of Rule.* In *People v. Dellinger* (1984) 163 C.A.3d 284, 209 C.R. 503, defendant was charged with murder of his 2-year-old stepdaughter, who died from swelling of the brain due to blunt force trauma to the head, with a

skull fracture. To contradict the defense contention that the child's injuries resulted from a fall down the stairs, the prosecution called Dr. W, a biomedical engineer, as an expert witness. She testified to the following:

(a) An experiment with an anthropomorphic dummy similar to the child in height and weight. The dummy was dropped down the stairs from different positions, and, from indentations on its metal head, Dr. W determined the amount of force the head sustained on impact; then, using a chart prepared by General Motors, she concluded that the child could not have sustained the injuries from a fall.

(b) A finite element analysis, in which the characteristics of the brain and skull were fed into a computer, a force was mechanically applied, and the computer then predicted the pressures and stresses in the brain and skull. Dr. W concluded that the stress received from a fall could not have resulted in the brain injury or skull fracture.

In holding admission of this evidence prejudicial error, the court applied the *Kelly* three-part test as follows:

*First prong: Reliability of method must be established.* There was no evidence of prior experiments conducted with an anthropomorphic dummy in a fall situation, and Dr. W was the only witness to the acceptability of the finite element computer analysis. This uncorroborated testimony of a single witness was insufficient to show acceptance by the scientific community. (163 C.A.3d 293, 294.)

*Second prong: Witness must be qualified as an expert on the subject.* Dr. W had a degree in biomedical engineering and had done research with animals and cadavers, but she had no medical background or experience with variances attributable to the brain and skull of a child, and no expertise in fall-related injuries. (163 C.A.3d 294, 295.)

*Third prong: Showing that correct scientific procedures were used.* Dr. W neglected to consider such factors as the mass of the child's body and the compressibility of the carpet, skull and scalp, and did not offer a rational or scientific basis for her decision not to use such factors. These foundational omissions invalidated the scientific conclusions offered to the jury. (163 C.A.3d 296.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Purpose of Rule.* The *Kelly* test is intended to forestall the jury's uncritical acceptance of scientific evidence or technology that is so foreign to everyday experience as to be unusually difficult for laypersons to evaluate. But where a procedure isolates physical evidence whose existence, appearance, nature, and meaning are obvious to the senses of a layperson, the *Kelly* standards do not apply. (*People v. Ayala* (2000) 24 C.4th 243, 281, 99 C.R.2d 532, 6 P.3d 193 [where, for comparison purposes, both bullet in victim's body and bullet taped to body were X-rayed, and radiologist testified that X-ray would not have distorted their appearance, *Kelly* rule was inapplicable].)



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## CHAPTER VII - Demonstrative, Experimental, and Scientific Evidence

### IV. CHEMICAL AND PHYSICAL TESTS

#### B. Scientific Basis and Reliability.

#### 2. Clarifications and Distinctions.

##### a. General Scientific Acceptance.

2 Witkin Cal. Evid. Demo Evid § 43

#### [§ 43] General Scientific Acceptance.

(1) *Judicial Notice*. In determining whether a new scientific test or process has passed from the experimental into the demonstrable stage and has received general acceptance by recognized experts in the scientific field to which it belongs, so as to warrant receiving expert testimony based on the procedure, a court may, and should, take judicial notice of the case law and comments on the particular field of scientific endeavor and of articles from reliable sources that appear in scientific journals and other publications that suggest either the possibility of error in tests and experiments (*People v. Law* (1974) 40 C.A.3d 69, 75, 114 C.R. 708) or their reliability (*People v. Palmer* (1978) 80 C.A.3d 239, 252, 145 C.R. 466). And, the trial judge may take judicial notice of earlier *Kelly* hearings held within the same court. (*People v. Smith* (1989) 215 C.A.3d 19, 25, 263 C.R. 678.)

(2) *General Acceptance as Consensus*. The *Kelly* rule requirement of general acceptance means a consensus drawn from a typical cross-section of the relevant, qualified scientific community. *People v. Shirley* (1982) 31 C.3d 18, 55, 56, 181 C.R. 243, 723 P.2d 1354, *infra*, §100, which indicated that "considerations of judicial economy" could permit a court to scrutinize "published writings in scholarly treatises and journals" in lieu of live testimony, did not modify or abandon the *Kelly* rule's insistence on ascertaining, if possible, whether the technique has become generally accepted by a typical cross-section of the relevant scientific community. (*People v. Leahy* (1994) 8 C.4th 587, 611, 612, 34 C.R.2d 663, 882 P.2d 321.)

(3) *Appellate Review*. "The question of how to characterize the 'general acceptance' issue under *Kelly/Frye* for purposes of defining appellate review of a trial court's determination has not been clearly stated in the case law. We believe, however, that 'general acceptance' is best described as a mixed question of law and fact subject to limited *de novo* review. ... The trial court's determination cannot be sustained, for example, on a mere finding that the record contains 'sufficient evidence' of the reliability of the challenged method." (*People v. Reilly* (1987) 196 C.A.3d 1127, 1134, 242 C.R. 496, *infra*, §61.)

The *Reilly* opinion points out that (a) the court may go outside the record and consider the scientific literature; (b) it should examine relevant decisions from other jurisdictions, bearing in mind, however, that the needed consensus is that of scientists, not courts; and (c) it should review the trial court's determination with deference to "findings of 'historical' fact or credibility, and then decide as a matter of law, based on those assumptions, whether there has been general acceptance." (196 C.A.3d 1134, 1135.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *General Acceptance as Consensus*. See *Geffcken v. D'Andrea* (2006) 137 C.A.4th 1298, 1309, 41 C.R.3d 80 [in action alleging that defendants caused plaintiffs to be exposed to mold mycotoxins at their residence or workplace, trial judge did not err in excluding, on ground of lack of scientific acceptance, both blood serology test to assess human exposure to toxogenic mold and mycotoxin antibody test; in each case, lab that supplied results was only lab performing test].



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### IV. CHEMICAL AND PHYSICAL TESTS

#### B. Scientific Basis and Reliability.

##### 2. Clarifications and Distinctions.

##### b. Distinction: Established Scientific Technique.

2 Witkin Cal. Evid. Demo Evid § 44

[§ 44] Distinction: Established Scientific Technique.

The *Kelly* rule is limited to new scientific methods of proof. Thus, because the urine test for blood-alcohol content (see *infra*, §48) is an established scientific procedure that has been routinely used in California for decades, and because of the lack of any new scientific data concerning the test's reliability, it cannot be challenged. (*People v. Municipal Court (Sansone)* (1986) 184 C.A.3d 199, 201, 228 C.R. 798.)

The rule is similarly inapplicable to "blood spatter" tests. (*People v. Clark* (1993) 5 C.4th 950, 1018, 22 C.R.2d 689, 857 P.2d 1099.) (On criticism of distinction, see 28 Southwestern U. L. Rev. 417.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Farnam* (2002) 28 C.4th 107, 160, 121 C.R.2d 106, 47 P.3d 988 [in capital murder prosecution, admission of testimony concerning police department's use of computerized database for fingerprint matching did not violate *Kelly* rule; database was used to narrow range of candidates whose fingerprints might match latent prints found at crime scene, but prosecution relied on long-established technique--fingerprint comparison performed by experts--to show jury that defendant's fingerprints matched latent prints]; *People v. Bui* (2001) 86 C.A.4th 1187, 1195, 103 C.R.2d 908 [in prosecution for vehicular manslaughter resulting from driving under influence of methamphetamine, expert's testimony that use of methamphetamine in greater than therapeutic doses causes impaired driving was not subject to *Kelly* rule; testimony was based on epidemiological studies, which are common, valid, and accepted scientific tools]; *O'Neill v. Novartis Consumer Health* (2007) 147 C.A.4th 1388, 1398, 55 C.R.3d 551 [in products liability action against pharmaceutical manufacturer, trial judge did not err in allowing defendant to challenge validity of study that found ingredient in defendant's nasal decongestants to be unsafe by asserting that some cases in study were misclassified; evidence of misclassification was not based on new scientific methodology but rather was challenge to professionalism with which methodology was applied, and thus *Kelly* was inapplicable].



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## CHAPTER VII - Demonstrative, Experimental, and Scientific Evidence

### IV. CHEMICAL AND PHYSICAL TESTS

#### B. Scientific Basis and Reliability.

##### 2. Clarifications and Distinctions.

##### c. Distinction: Expert Opinion.

2 Witkin Cal. Evid. Demo Evid § 45

[§ 45] Distinction: Expert Opinion.

In *People v. Mendibles* (1988) 199 C.A.3d 1277, 245 C.R. 553, a prosecution for lewd conduct with children, the prosecution called Dr. H, who had examined the victims and formed the opinion that they had suffered injuries consistent with sexual abuse. Dr. H relied primarily on patterns of scarring, deformities and other non-normal changes in the hymens of the children; and for part of her examination she used a colposcope (a binocular device allowing microscopic examination of the area). Defendant objected that this was the use of a new scientific technique subject to the requirements of the *Kelly* rule, and that the prosecution had failed to demonstrate that it was accepted as reliable in the scientific community. *Held*, admission of Dr. H's medical opinion was proper.

(a) There is a scientific difference between the development of a new scientific technique and the development of a body of medical knowledge and expertise; and an expert medical opinion is not subject to the *Kelly* rule. Illustrative are opinions that (1) death resulted from strangulation; (2) rectal abrasions indicate anal intercourse without the use of a lubricant; (3) death was caused by a blunt instrument similar to or consistent with a baseball bat; (4) a wound was self-inflicted; (5) death was caused by a heavy instrument such as a bolo machete; (6) certain bruises were not caused by a fall. (199 C.A.3d 1294.) Less typical, but still within the realm of expert medical opinion, is the diagnosis of an esoteric form of mental illness known as "Munchausen's syndrome," based on the existence of a body of literature on such cases. (199 C.A.3d 1294.)

(b) Here, Dr. H was well versed in the growing body of literature that describes the changes in the hymen of prepubescent females resulting from sexual abuse. No novel device was involved; the colposcope is in general use in the medical community, and is nothing more than a weak microscope. Nor did Dr. H's methodology involve the application of a new scientific technique: her opinion was based entirely on visual examination, and was similar to the analysis of any other wound or injury. (199 C.A.3d 1294, 1295.)

Other cases are to the same effect. (See *People v. Luna* (1988) 204 C.A.3d 726, 733, 250 C.R. 878, 1 Cal. Evidence (4th), Opinion Evidence, §54 [following *Mendibles*; testimony of physician, who examined victim, about child abuse accommodation syndrome]; *People v. Harlan* (1990) 222 C.A.3d 439, 449, 271 C.R. 653 [social worker's testimony on reactions of child molestation victims]; *Texaco Producing v. Kern* (1998) 66 C.A.4th 1029, 1048, 1049, 78 C.R.2d 433 [in action challenging assessment of oil producing property, ratios developed by assessor's expert to analyze sales of other properties and to compare them to subject property]; *Wilson v. Phillips* (1999) 73 C.A.4th 250, 253, 86 C.R.2d 204 [psychologist's testimony about effects of repressed memory on victims of childhood sexual abuse]; on applicability of *Kelly* rule to psychologist testifying as to defendant's mental condition, see 1 Cal. Evidence (4th), Opinion Evidence,

§58.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Therrian* (2003) 113 C.A.4th 609, 615, 6 C.R.3d 415 [opinions of psychologist and psychiatrist in sexually violent predator proceeding as to whether defendant was likely to engage in predatory and sexually violent criminal behavior in future]; *Roberti v. Andy's Termite & Pest Control* (2003) 113 C.A.4th 893, 901, 904, 6 C.R.3d 827 [opinion of experts as to cause of plaintiff's autism; threshold reliability analysis of *Daubert v. Merrell Dow Pharmaceuticals* (1993) 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469, text, §47, was also inapplicable].



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## CHAPTER VII - Demonstrative, Experimental, and Scientific Evidence

### IV. CHEMICAL AND PHYSICAL TESTS

#### B. Scientific Basis and Reliability.

##### 2. Clarifications and Distinctions.

#### d. Distinction: Administrative Proceeding Where Issue Is Test Results.

2 *Witkin Cal. Evid. Demo Evid* § 46

[§ 46] Distinction: Administrative Proceeding Where Issue Is Test Results.

In *Harris Trans. Co. v. Air Resources Bd.* (1995) 32 C.A.4th 1472, 38 C.R.2d 431, a mandamus proceeding challenging enforcement of the Heavy-Duty Vehicle Inspection Program, plaintiff heavy vehicle owners alleged that they were denied a fair hearing at the administrative level because results of the "snap-idle" test, used by the inspection program to measure the opacity of vehicle emissions, were received over their *Kelly* objection. The trial judge denied relief, ruling that the *Kelly* test was inapplicable. *Held*, affirmed.

(a) As a general matter, the test applies in administrative proceedings. (32 C.A.4th 1478, citing *Seering v. Department of Social Services* (1987) 194 C.A.3d 298, 239 C.R. 422.)

(b) If the dispositive issue in the present case were the particular opacity level of plaintiffs' vehicles, proof of general scientific acceptance of the snap-idle test would be required. However, Air Resources Board regulations prohibit the operation of heavy duty motor vehicles that fail the snap-idle test, and therefore the dispositive issue was simply whether plaintiffs' vehicles failed the test. In this context, the *Kelly* test was inapplicable. (32 C.A.4th 1478.)

(c) Although plaintiffs had the right to challenge the regulations by which the snap-idle test was adopted, they expressly abandoned that challenge in the trial court. (32 C.A.4th 1480.)

**SUPPLEMENT:** [This section is current through the latest supplement]





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### IV. CHEMICAL AND PHYSICAL TESTS

#### B. Scientific Basis and Reliability.

##### 3. Federal Rule.

2 Witkin Cal. Evid. Demo Evid § 47

[§ 47] Federal Rule.

(1) *Frye Abrogated by Federal Rule.* In *Daubert v. Merrell Dow Pharmaceuticals* (1993) 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469, a products liability action against a drug manufacturer, the United States Supreme Court determined that the "general acceptance" test announced in the federal district court case of *Frye v. United States* (see supra, §42 et seq.) had been superseded by *F.R. Evid.*, Rule 702 (see 1 Cal. Evidence (4th), Opinion Evidence, §26):

"Given the Rules' permissive backdrop and their inclusion of a specific rule [Rule 702] on expert testimony that does not mention 'general acceptance', the assertion that the Rules somehow assimilated *Frye* is unconvincing. *Frye* made 'general acceptance' the exclusive test for admitting expert scientific testimony. That austere standard, absent from and incompatible with the Federal Rules of Evidence, should not be applied in federal trials." (113 S.Ct. 2794, 125 L.Ed.2d 480.)

The court noted several factors that might bear on a judge's determination as to the admissibility of novel scientific evidence at trial: whether the theory or technique can be or has been tested; whether it has been subjected to peer review and publication; its known or potential rate of error; and its general acceptance in the scientific community. This last factor comes from *Frye* and can yet "be an important factor in ruling particular evidence admissible. ... '[A] known technique that has been able to attract only minimal support within the community,' ... may properly be viewed with skepticism." (113 S.Ct. 2797, 125 L.Ed.2d 483.) However, " '[g]eneral acceptance' is not a necessary precondition to the admissibility of scientific evidence," and the Federal Rules of Evidence "assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." (113 S.Ct. 2799, 125 L.Ed.2d 485.)

The trial court may consider one or more of the *Daubert* factors where doing so will help it determine the testimony's reliability, but the test of reliability is flexible, and the list of specific factors in *Daubert* is not exclusive and does not necessarily apply in every case. (*Kumho Tire Co. v. Carmichael* (1999) 526 U.S. 137, 119 S.Ct. 1167, 1175, 143 L.Ed.2d 238, 251.)

The trial court's decision to admit or exclude expert testimony under *Daubert* is reviewed under the abuse of discretion standard. (*General Elec. Co. v. Joiner* (1997) 522 U.S. 136, 118 S.Ct. 512, 517, 139 L.Ed.2d 508, 517; see 112 Harv. L. Rev. 232 [Joiner]; 48 Hastings L. J. 969 [same]; 32 U.C. Davis L. Rev. 289 [same].) The same standard of review applies to the trial court's determination of how to test an expert's reliability and to what proceedings (such as a special briefing) are necessary in investigating reliability. Thus, the trial court has broad latitude to determine whether the *Daubert* factors are reasonable measures of an expert's reliability in a particular case. (*Kumho Tire Co. v.*

*Carmichael*, *supra*, 119 S.Ct. 1176, 143 L.Ed.2d 252.)

The *Daubert* holding applies not only to testimony based on "scientific" knowledge, but also to testimony based on "technical" and "other specialized" knowledge. (*Kumho Tire Co. v. Carmichael*, *supra*, 119 S.Ct. 1174, 1176, 143 L.Ed.2d 249, 253 [Daubert factors applied to exclude testimony of automobile tire failure analyst that particular tire failed due to manufacturing or design defect]; but see 84 Cal. L. Rev. 1657 [Daubert should not be extended to apply to "specialized" knowledge that is not scientific].)

(2) *Commentary on Federal Rule*. Commentary on the *Daubert* case has been extensive. (See 107 Harv. L. Rev. 254; 46 Hastings L. J. 555; 27 Loyola L.A. L. Rev. 1513; 21 Pepperdine L. Rev. 1391; 34 San Diego L. Rev. 1719 [Daubert principles should apply to all expert evidence]; 37 Santa Clara L. Rev. [same]; 36 Santa Clara L. Rev. 1187 [post-Daubert problems]; 69 So. Cal. L. Rev. 855 [arguing for application of *Daubert* standard to recovered memories of childhood sexual abuse]; 30 U.C. Davis L. Rev. 1013 [criticizing *Daubert* decision]; 41 U.C.L.A. L. Rev. 487; 21 Western State L. Rev. 605; 60 Am.Jur. Trials 1 [challenging scientific evidence under federal rules and *Daubert*].)

(3) *California's Kelly Rule Unaffected*. California's *Kelly* rule (see *supra*, §42) survives *Daubert*. (*People v. Leahy* (1994) 8 C.4th 587, 604, 34 C.R.2d 663, 882 P.2d 321, *supra*, §43; see 22 Pepperdine L. Rev. 1274 [Leahy].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Frye Abrogated by Federal Rule*. F.R. Evid., Rule 702, as amended in 2000, explicitly incorporates principles set forth in *Daubert v. Merrell Dow Pharmaceuticals* (1993) 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469, text, p. 58. (See 1 Cal. Evidence (4th), Opinion Evidence, Supp., §26.) (2) *Commentary on Federal Rule*. See 90 Cal. L. Rev. 1 [implications of observer effects in light of *Kumho Tire Co., Ltd. v. Carmichael* (1999) 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238, text, p. 59]; 35 Cal. Western L. Rev. 313 [United States Supreme Court's changes in admission of scientific evidence]; 34 Golden Gate L. Rev. 37 [application of *Daubert* analysis to expert testimony in employment discrimination cases]; 36 Golden Gate L. Rev. 459 [exclusion under *Daubert* of opinions based on animal studies in birth defects cases]; 113 Harv. L. Rev. 1467 [application of *Daubert* principles in situations of "strong scientific uncertainty"]; 116 Harv. L. Rev. 2142 [trial courts' need, following *Daubert*, for guidance regarding what factors should be considered for evaluation of particular kinds of expert evidence]; 55 Hastings L. J. 1 [applicability of *Daubert* rule to expert predictions of future behavior of mentally ill individuals]; 30 Pepperdine L. Rev. 403 [behavioral science testimony as affected by *Daubert*]; 31 Pepperdine L. Rev. 323 [impact of *Daubert* rule on forensic science]; 42 Santa Clara L. Rev. 995 [admissibility of data from "black box" technology in automobiles under F.R. Evid., Rule 702]; 73 So. Cal. L. Rev. 705 [how reliability prong of *Daubert* test should be applied]; 75 So. Cal. L. Rev. 605 [fingerprint analysis does not meet *Daubert* test]; 40 U.S.F. L. Rev. 109 [what empirical studies reveal about application of *Daubert*]; 90 A.L.R.5th 453 [admissibility of scientific and other expert evidence in state courts following *Daubert*].



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## CHAPTER VII - Demonstrative, Experimental, and Scientific Evidence

### IV. CHEMICAL AND PHYSICAL TESTS

#### C. Tests for Intoxication.

##### 1. In General.

2 Witkin Cal. Evid. Demo Evid § 48

[§ 48] In General.

(1) *Blood, Breath, Urine, and Saliva Tests.* Traditionally, intoxication has been scientifically determined by testing the subject's blood, breath, urine, or saliva. (See *People v. Conterno* (1959) 170 C.A.2d Supp. 817, 823, 339 P.2d 968; 1 McCormick 5th, §205; 53 Harv. L. Rev. 288; 6 Hastings L. J. 212; 1 U.C.L.A. L. Rev. 610; 29A Am.Jur.2d (1994 ed.), Evidence §§1021, 1022; 77 A.L.R.2d 971 [qualification of expert]; 16 A.L.R.3d 748 [statutory presumption of intoxication based on percent of alcohol in system]; on breath test, see *infra*, §49 et seq.; on blood test, see *infra*, §§53, 54; on procedures to take blood, breath, or urine tests, see *Pub.Util.C.* 21407.2 [aircraft operators], *Veh.C.* 23158 [motor vehicle operators; see 2 Cal. Crim. Law (3d), Crimes Against Public Peace and Welfare, §231]; on constitutionality of those tests, see 2 Cal. Evidence (4th), Witnesses, §422 et seq.)

The *urine* test consists of obtaining a urine sample and subjecting it to chemical analysis to determine its alcoholic content. (See generally *Quesada v. Orr* (1971) 14 C.A.3d 866, 92 C.R. 640; *People v. Municipal Court* (Sansone) (1986) 184 C.A.3d 199, 228 C.R. 798, *supra*, §44.)

(2) *Field Sobriety Tests.* The traditional field sobriety test requires the suspect to walk heel to toe on an imaginary line, touch a finger to his or her nose, and do balancing exercises. The test is ordinarily performed before the arresting officer near the place where the vehicle was stopped. (See *Whalen v. Municipal Court* (1969) 274 C.A.2d 809, 810, 79 C.R. 523; 9 Proof of Facts 3d 459 [proof of alcohol induced driving impairment through evidence of observable intoxication and coordination testing]; 68 A.L.R.4th 776 [physical inability to take tests as justification for refusal].)

Under a more recent field sobriety test, the suspect is asked to look, while stationary, at a particular object in front of the suspect's face and to follow that object with only his or her eyes. An inability of the eyes to maintain visual fixation as they are turned from side to side (in other words, jerking or bouncing) is known as horizontal gaze nystagmus (HGN), and is exhibited by intoxicated persons. (See *People v. Williams* (1992) 3 C.A.4th 1326, 1330, 1335, 5 C.R.2d 130; 60 A.L.R.4th 1129 [use of HGN in impaired driving prosecution]; 4 Proof of Facts 3d 439 [same].) The HGN test is subject to the *Kelly* requirement of general acceptance in the scientific community, and a police officer's testimony regarding the mere administration of the test is insufficient to establish that acceptance. (*People v. Leahy* (1994) 8 C.4th 587, 608, 609, 34 C.R.2d 663, 882 P.2d 321, *supra*, §43.) However, once the HGN test has been shown by other expert testimony to have met that requirement, the arresting police officer may then use HGN findings as a basis for his opinion that the defendant was driving while under the influence. (*People v. Joehnk* (1995) 35 C.A.4th 1488, 1507, 1508, 42 C.R.2d 6.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Blood, Breath, Urine, and Saliva Tests*. The holding of *People v. Bransford* (1994) 8 C.4th 885, 35 C.R.2d 613, 884 P.2d 70, text, §51, was premised on a statute allowing the offense to be proved simply by evidence of breath-alcohol level, and thus it has no application where the defendant's blood-alcohol level is determined by a urine test. A defendant whose prosecution is based on a urine test for blood-alcohol has the right to present evidence of individual variation in partition levels. (*People v. Acevedo* (2001) 93 C.A.4th 757, 764, 766, 113 C.R.2d 437.)

See 1 McCormick 6th, §205; 119 A.L.R.5th 379 [use of extrapolation evidence in prosecutions for driving under influence]. *West's Key Number Digest*, Criminal Law k.388.2



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### IV. CHEMICAL AND PHYSICAL TESTS

#### C. Tests for Intoxication.

##### 2. Breath Tests.

##### a. Alcoholic Concentration Tests.

2 Witkin Cal. Evid. Demo Evid § 49

#### [§ 49] Alcoholic Concentration Tests.

There are two basic types of tests for capturing the subject's breath in a sealed container for later testing for alcoholic concentration:

(1) The "wet" type, the most common of which employs the "breathalyzer." This device determines blood-alcohol content by measuring the results of a chemical reaction between a solution contained in an ampoule and the alcohol found in the suspect's breath. Except for New York, very few jurisdictions continue to use this type of device. (20 Southwestern U. L. Rev. 247, 253; see *People v. Hitch* (1974) 12 C.3d 641, 644, 117 C.R. 9, 527 P.2d 361 [describing operation of breathalyzer test to show evidentiary significance of ampoules used in determining blood-alcohol level].)

(2) The "dry" type, the most common of which employs the "intoxilyzer" and the "intoximeter." These devices use infrared radiation to measure a breath sample to determine alcohol concentration. Most jurisdictions, including California, use dry devices. (20 Southwestern U. L. Rev. 247, 253; see *Intoximeters v. Younger* (1975) 53 C.A.3d 262, 267, 125 C.R. 864 [discussing alleged shortcomings of intoximeters in context of manufacturer attacking award of state contract to rival manufacturer]; *People v. Miller* (1975) 52 C.A.3d 666, 668, 125 C.R. 341 [describing operation of intoxilyzer test]; *People v. French* (1978) 77 C.A.3d 511, 517, 143 C.R. 782 [same].)

All of these breath machines are simple and portable; the test itself may be given by a police officer; and the chemical analysis made by a qualified expert is admissible. (See *People v. Kiss* (1954) 125 C.A.2d 138, 140, 269 P.2d 924; *People v. Conterno* (1959) 170 C.A.2d Supp. 817, 823, 339 P.2d 968; *Covington v. Municipal Court* (1969) 273 C.A.2d 470, 78 C.R. 563; 6 *Hastings L. J.* 212, 229; 1 *U.C.L.A. L. Rev.* 610; 6 *West L.A. L. Rev.* 11 [administrative guidelines on reliability of test]; 1950 A.S. 816; 1952 A.S. 727; 4 *Proof of Facts* 3d 229 [Proof and Disproof of Alcohol-Induced Driving Impairment Through Breath Alcohol Testing]; 70 *Am.Jur. Trials* 1 [trial defenses to breath test score].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER VII - Demonstrative, Experimental, and Scientific Evidence

### IV. CHEMICAL AND PHYSICAL TESTS

#### C. Tests for Intoxication.

##### 2. Breath Tests.

##### b. Preliminary Alcohol Screening Test.

2 Witkin Cal. Evid. Demo Evid § 50

#### [§ 50] Preliminary Alcohol Screening Test.

In *Coniglio v. Department of Motor Vehicles* (1995) 39 C.A.4th 666, 46 C.R.2d 123, the license of a 20-year-old driver was suspended under the zero tolerance law (*Veh.C. 23136 et seq.*) based on preliminary alcohol screening (PAS) test results indicating a blood-alcohol concentration of 0.01% or more. The driver petitioned for a writ of mandamus, and the trial judge granted the petition, finding that the screening device did not meet the breath-alcohol analysis standards set forth in the California Code of Regulations and that the department failed to show the reliability of the test. *Held*, affirmed.

(a) The trial judge erred in finding that the screening test did not meet standards imposed by the California Code of Regulations. Those standards are applicable to breath testing instruments used to determine the *concentration* of alcohol in the blood (see *supra*, §49). The PAS test is used for a different purpose--to detect the mere *presence* of alcohol. The 0.01% threshold level specified in *Veh.C. 23136(a)* simply represents a recognition that a lower level is tantamount to a finding of no alcohol. (39 C.A.4th 679.)

(b) The zero tolerance law specifically mandates use of the PAS test, and this constitutes a legislative determination that the PAS test is generally a reliable means of enforcing that law. (39 C.A.4th 677.) Nevertheless, due process requires that the reliability of the particular device used be demonstrated before the test results can be admitted. The official duty presumption cannot be relied on, because there are no governing statutes or regulations regarding the testing and reliability of the PAS test. Thus, in this case, the department had the burden of showing that (1) the device used was in proper working order, (2) the test was properly administered, and (3) the operator was competent and qualified. (39 C.A.4th 683, 684.) The police officer's testimony met none of these requirements: there was no testimony about how the device was maintained or whether the standards for calibration were established; there was no evidence showing that the test was properly administered or explaining how it should be administered; and the testimony did not prove that the officer was competent and qualified. "Accordingly, we conclude that the reliability of the PAS test was not established." (39 C.A.4th 684, 685.)

In *People v. Bury* (1996) 41 C.A.4th 1194, 1201, 1202, 49 C.R.2d 107, the court followed the *Coniglio* court's holding that the PAS test is scientifically reliable, but disagreed with its suggestion that regulations do not apply to any PAS device used by law enforcement. (On use of PAS test to determine if there is probable cause to arrest for a drunk driving violation, see 2 Cal. Crim. Law (3d), *Crimes Against Public Peace and Welfare*, §226.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 28 *Lincoln L. Rev.* 1 [scientific issues regarding use of PAS test].



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### IV. CHEMICAL AND PHYSICAL TESTS

#### C. Tests for Intoxication.

##### 2. Breath Tests.

##### c. Challenges to Test.

##### 1. Partition Ratio Variability.

#### 2 Witkin Cal. Evid. Demo Evid § 51

#### [§ 51] Partition Ratio Variability.

Prior to 1990, California's driving while under the influence statute (*Veh.C. 23152(b)*) defined the offense solely in terms of blood-alcohol concentration (grams of alcohol per 100 milliliters of blood). Thus, the prosecution was required to convert breath test readings to equivalent blood-alcohol concentration levels using a standard "partition ratio," representing an average ratio for the general public (2100 to 1; see *17 Cal. Code Reg. §1220.4(f)*). Because an individual's actual ratio may vary (see *20 San Diego L. Rev. 301, 327*; *20 Southwestern U. L. Rev. 247, 256*; *90 A.L.R.4th 155* [challenges to breath tests based on inaccurate partition ratio]), courts initially allowed defendants to prove only that their personal ratio differed from the standard ratio (*People v. Pritchard (1984) 162 C.A.3d Supp. 13, 17, 209 C.R. 314*; *People v. Herst (1987) 197 C.A.3d Supp. 1, 3, 243 C.R. 83*). Subsequently, defendants were also permitted to show that partition ratios differ among individuals generally. (*People v. Lepine (1989) 215 C.A.3d 91, 101, 263 C.R. 543*.) (For an historical overview, see *People v. Bransford (1994) 8 C.4th 885, 888, 35 C.R.2d 613, 884 P.2d 70*.)

However, *Veh.C. 23152(b)* was amended in 1990 to provide that the percent, by weight, of alcohol in a person's blood is based on grams of alcohol per 100 milliliters of blood or 210 liters of breath. In *People v. Bransford, supra*, the Supreme Court concluded that the amendment was intended to prohibit a defendant from presenting evidence that his or her particular partition ratio is different from the state standard, thereby avoiding conviction for driving with a blood-alcohol level of .08% or higher.

(a) The 1990 amendment effected a substantive change: it allows the prosecution to prove the offense "solely by proof of a prohibited breath-alcohol level." Doing so promotes the state interest in reducing the danger presented by drunk drivers by increasing the likelihood of conviction, because the prosecution need not prove actual impairment. (*8 C.4th 891*.)

(b) The statute does not create an unconstitutional conclusive presumption that the alcohol in 210 liters of breath is the same as that in 100 milliliters of blood. Rather, it defines the substantive offense as driving with a specified concentration of alcohol in the body. (*8 C.4th 892*.)

(c) Because the statute defines the offense as it does, evidence of the variability of individual partition ratios is irrelevant. (*8 C.4th 893*.) (See *Kerollis v. Department of Motor Vehicles (1999) 75 C.A.4th 1299, 1304, 89 C.R.2d 826* [*Bransford* rule applies to administrative hearings to suspend or revoke driver's license on basis of breath-alcohol



reading]; 22 *Pepperdine L. Rev.* 1721 [discussing *Bransford*.])

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Acevedo* (2001) 93 C.A.4th 757, 764, 766, 113 C.R.2d 437, Supp., supra, §48 [rule of *People v. Bransford* (1994) 8 C.4th 885, 35 C.R.2d 613, 884 P.2d 70, text, p. 63, has no applicability where defendant's blood-alcohol was determined by urine test].



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### IV. CHEMICAL AND PHYSICAL TESTS

#### C. Tests for Intoxication.

##### 2. Breath Tests.

##### c. Challenges to Test.

##### 2. Other Challenges.

2 Witkin Cal. Evid. Demo Evid § 52

[§ 52] Other Challenges.

As in the case of blood tests (see *infra*, §§53, 54), the manner in which the test was administered and the reliability of the machine must be considered in interpreting breath test results (*People v. Bransford* (1994) 8 C.4th 885, 893, 35 C.R.2d 613, 884 P.2d 70, *supra*, §51), including the machine's margin of error (*People v. Pritchard* (1984) 162 C.A.3d Supp. 13, 15, 209 C.R. 314; *People v. Gineris* (1984) 162 C.A.3d Supp. 18, 22, 209 C.R. 317).

However, in *People v. Randolph* (1989) 213 C.A.3d Supp. 1, 262 C.R. 378, defendant was convicted under *Veh.C.* 23152(b) of driving with .10% or more of alcohol in his blood (now .08%; see *infra*, §54). Two breath tests taken after defendant's arrest resulted in readings of .10%. An expert witness testified that the test instrument's accuracy was plus or minus .010%, and the .10% results could reasonably be interpreted as .09% or .11%. Defendant therefore contended that his conviction should be reversed on the authority of *People v. Campos* (1982) 138 C.A.3d Supp. 1, 188 C.R. 366, *infra*, §54. *Held*, conviction affirmed. *People v. Campos* was decided before *Burg v. Municipal Court* (1983) 35 C.3d 257, 198 C.R. 145, 673 P.2d 732, *infra*, §55, which held that circumstantial evidence other than test results is admissible to establish that a defendant did or did not have the proscribed level of blood alcohol. The jury was not required to assume that defendant's blood-alcohol level was at the low end of the margin of error. (213 C.A.3d Supp. 10, 12.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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### IV. CHEMICAL AND PHYSICAL TESTS

#### C. Tests for Intoxication.

##### 3. Blood Test.

##### a. Nature of Test.

2 *Witkin Cal. Evid. Demo Evid* § 53

[§ 53] Nature of Test.

The blood test consists of taking a sample of blood and determining its alcoholic content. Most states have enacted statutes providing that if the test shows a specified percentage of alcohol by volume, the subject is deemed under the influence of alcohol. (See generally *People v. Duroncelay* (1957) 48 C.2d 766, 772, 312 P.2d 690; *People v. Frederick* (1952) 109 C.A.2d 897, 899, 241 P.2d 1039 [.21%]; *People v. Haeussler* (1953) 41 C.2d 252, 255, 260 P.2d 8 [.215%]; *People v. Quarles* (1954) 123 C.A.2d 1, 3, 266 P.2d 68 [.286%]; *Breithaupt v. Abram* (1957) 352 U.S. 432, 77 S.Ct. 408, 409, 1 L.Ed.2d 448, 450; *Wagner v. Osborn* (1964) 225 C.A.2d 36, 42, 37 C.R. 27; *Burg v. Municipal Court* (1983) 35 C.3d 257, 264, 198 C.R. 145, 673 P.2d 732, *infra*, §55; *People v. Bransford* (1994) 8 C.4th 885, 888, 35 C.R.2d 613, 884 P.2d 70, *supra*, §51; 2 Proof of Facts 585 [Blood Tests]; 22 Proof of Facts 385, 413 [instrumental analysis; identifying substances by chemical composition].) (On California statute, see *infra*, §54; on constitutionality of compulsory tests, see 2 *Cal. Evidence* (4th), *Witnesses*, §422 *et seq.*; on accused's right to a test, see 2 *Cal. Crim. Law* (3d), *Crimes Against Public Peace and Welfare*, §§229, 230.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 76 A.L.R.5th 1 [authentication of blood sample taken to determine blood-alcohol content].



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### IV. CHEMICAL AND PHYSICAL TESTS

#### C. Tests for Intoxication.

##### 3. Blood Test.

##### b. California Statute.

2 Witkin Cal. Evid. Demo Evid § 54

[§ 54] California Statute.

*Veh.C. 23610* specifies the evidentiary effect of the blood test, in a "criminal action" or "preliminary proceeding in a criminal action," as follows:

(1) *Presumption Where Test Shows .08%*. It is presumed that the suspect was under the influence of an alcoholic beverage at the time of the alleged violation of driving under the influence of alcohol (*Veh.C. 23152(a)*) or causing bodily injury while doing so (*Veh.C. 23153(a)*) if, at the time of the test, there was .08% or more by weight of alcohol in the suspect's blood. (*Veh.C. 23610(a)(3)*.)

(2) *Contrary Presumption Where Test Shows Less Than .05%*. If the test shows less than .05% by weight of alcohol in the suspect's blood, it is presumed that the suspect was not under the influence. (*Veh.C. 23610(a)(1)*.) However, the presumption is rebuttable, not conclusive. By affecting the burden of proof, it places a further burden on the party adversely affected by the presumption to go forward with sufficient proof to defeat it. (*People v. Gallardo* (1994) 22 C.A.4th 489, 496, 27 C.R.2d 502 [presumption sufficiently rebutted by evidence of conduct before and after accident, objective blood-alcohol level and symptoms of alcohol use].)

(3) *Evidentiary Effect of Test Showing .05%-.08%*. If the test shows .05% or more but less than .08%, no presumption arises, but the fact may be considered with other competent evidence. (*Veh.C. 23610(a)(2)*.)

In *People v. Wood* (1989) 207 C.A.3d Supp. 11, 255 C.R. 537, decided under a prior version of the statute establishing a .05% to .10% range, defendant's blood test produced results of .089 and .090%, and he was convicted of driving under the influence. Despite the fact that defendant came within former *Veh.C. 23155(a)(2)* (now *Veh.C. 23610(a)(2)*), i.e., no presumption arose concerning whether he was under the influence, the jury instruction quoted former *Veh.C. 23155(a)(1)*, (a)(3), and (a)(2) (now *Veh.C. 23610(a)(1)*, (a)(3), and (a)(2), respectively). *Held*, reversed. The trial judge erred by injecting the concept of presumption into this case. "The vice in the reading of the instruction is that it allowed the jury to theoretically borrow the .10-percent level." (207 C.A.3d Supp. 15.) And because it cannot be said beyond a reasonable doubt that the jurors did not borrow the scant one-hundredth of 1% to "presume" defendant guilty, the error was prejudicial. (207 C.A.3d Supp. 16.)

(4) *Other Evidence Admissible*. The statute does not limit the introduction of "any other competent evidence" on the issue. (*Veh.C. 23610(c)*.)

(5) *Nature of Presumptions.* All of the presumptions specified in *Veh.C. 23610* affect the burden of proof. (*Veh.C. 23610(a).*)

*Veh.C. 109* sets forth a chemically precise definition of an alcoholic beverage that includes an intoxicating liquor along with other specifically described liquids and beverages. (See *People v. Lachman* (1972) 23 C.A.3d 1094, 1097, 100 C.R. 710 [presumption is founded on scientifically established relationship between blood-alcohol level and degree of intoxication]; *People v. Schreiber* (1975) 45 C.A.3d 917, 921, 923, 119 C.R. 812 [statute is constitutional]; 20 *San Diego L. Rev.* 201; 16 *U.S.F. L. Rev.* 817.)

The statutory presumptions apply only in driving cases. (*People v. Roberts* (1975) 51 C.A.3d 125, 135, 123 C.R. 893 [murder case; level of intoxication impairing ability to drive vehicle not relevant on issue of diminished capacity].)

In interpreting test results, the margin of error of the test must be considered. Thus, in *People v. Campos* (1982) 138 C.A.3d Supp. 1, 188 C.R. 366, a reading of .10% on a test having a margin of error of .005% did not establish beyond a reasonable doubt that the actual amount of alcohol in the blood was .10% (triggering the presumption of intoxication under a prior version of the statute), because it was just as likely that the amount was below .10% as that it was above. (138 C.A.3d Supp. 3.) However, *People v. Randolph* (1989) 213 C.A.3d Supp. 1, 262 C.R. 378, supra, §52, a case involving breath test readings, declined to follow *Campos*, holding that a margin of error of .010% was insufficient to require the jury to exonerate the defendant. (213 C.A.3d Supp. 5.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Presumption Where Test Shows .08%.* See CALCRIM, No. 2100 [Driving Under the Influence Causing Injury (*Veh. Code*, § 23153(a))].



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### IV. CHEMICAL AND PHYSICAL TESTS

#### C. Tests for Intoxication.

#### 4. Constitutionality of Statute.

2 Witkin Cal. Evid. Demo Evid § 55

[§ 55] Constitutionality of Statute.

In *Burg v. Municipal Court* (1983) 35 C.3d 257, 198 C.R. 145, 673 P.2d 732, the court reviewed the history of drunk driving legislation and rejected constitutional challenges to the similar, prior version of the present statute (*Veh.C. 23152(b)*).

(a) *The problem.* Nearly half of the traffic deaths in California between 1976-1980 involved drinking drivers, and nearly one-quarter of all traffic accidents resulting in injury involved the use of alcohol. Traffic deaths in the United States exceed 50,000 annually, and approximately one-half of these fatalities are alcohol-related. (35 C.3d 261.) "The monstrous proportions of the problem have often been lamented in graphic terms by this court and the United States Supreme Court." (35 C.3d 262, citing leading cases.)

(b) *The legislative response.* State legislatures early in the century attempted to regulate such conduct by prohibiting driving while intoxicated. With the development of scientific measurement of blood-alcohol levels, statutes were enacted that created a presumption of being under the influence of alcohol where the level was 0.10% or more. (35 C.3d 263.) These laws, however, proved inadequate, for the ultimate question was defined in terms of the defendant's subjective behavior and condition; i.e., was the defendant under the influence of alcohol when he or she drove? As a result, most states enacted additional legislation fashioned after the "Scandinavian model," defining the substantive offense not by the subjective term "driving under the influence," but instead by the act of driving with a specified blood-alcohol level. "The statutes represent a legislative determination that public safety is endangered when a person drives a motor vehicle while having a specified percentage (typically 0.10) or more by weight of alcohol in his blood." (35 C.3d 264.)

(c) *Nature of offense under Veh.C. 23152(b).* *Veh.C. 23152*, as revised in 1981, retained the "driving under influence" provision in subdivision (a), and added subdivision (b), providing that it is unlawful for a person who has 0.10% (now .08%; see *supra*, §54) or more of alcohol in his or her blood to drive a vehicle. Similar statutes have been enacted in 28 states and the District of Columbia--some creating a new offense, others an alternative definition of driving under the influence. (35 C.3d 264.) "Our statute establishes a new and separate offense." (35 C.3d 265.) In other words, *Veh.C. 23152(b)* does not create a conclusive presumption of intoxication and does not eliminate the prosecutor's burden of proof: instead, "the statute defines, in precise terms, the conduct proscribed." (35 C.3d 265.) And, though the prosecutor need not prove that the defendant was under the influence, the prosecutor must still prove beyond a reasonable doubt that at the time of driving, the defendant's blood-alcohol level was 0.10% or more. (35 C.3d 265.) (See *People v. Bransford* (1994) 8 C.4th 885, 892, 893, 35 C.R.2d 613, 884 P.2d 70, *supra*, §51 [construing current statute and reaching same conclusion about amendment defining offense based on specified alcoholic concentration determined

from breath test].)

(d) *Valid exercise of police power.* The scientific evidence of threat to the safety of the public and the driver where the level exceeds 0.10%, and the legislative determination to that effect, make it clear that the figure fixed by *Veh.C. 23152(b)* is rationally related to the exercise of the state's police power. (35 C.3d 266, 267, 268.)

(e) *No unconstitutional uncertainty.* Due process requires a statute to be definite enough to provide a standard of conduct for those whose activities are proscribed and a standard for police enforcement and for ascertainment of guilt. (35 C.3d 269; see 7 Summary (9th), *Constitutional Law*, §104.) The statute could not be more precise as a standard for law enforcement. (35 C.3d 270.) It is also adequate in giving "fair notice" to potential violators. The fact that it is impossible to determine by one's senses whether one's blood-alcohol level is a legal 0.09% or an illegal 0.10% is not a valid constitutional objection: fair notice requires only a "reasonable degree of certainty," which gives "fair warning," and the consumption of a quantity of alcohol gives a person of ordinary intelligence notice of the possibility of violating the statute. (35 C.3d 270, 271.) Moreover, charts, readily available to the public, show with reasonable certainty the number of different alcoholic beverages necessary for a particular individual to reach the prohibited blood-alcohol level. (35 C.3d 272.) (See *People v. Lewis* (1983) 148 C.A.3d 614, 196 C.R. 161 [decided before *Burg*, and reaching same conclusion on constitutional issue of certainty].)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Cross-Reference:* 7 Summary (10th), *Constitutional Law*, §134.



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## CHAPTER VII - Demonstrative, Experimental, and Scientific Evidence

### IV. CHEMICAL AND PHYSICAL TESTS

#### D. Tests for Narcotics.

2 Witkin Cal. Evid. Demo Evid § 56

[§ 56] Tests for Narcotics.

(1) *Nalline Test*. The Nalline test to determine narcotic addiction consists of an injection of Nalline ("a synthetic opiate antinarcotic in action") under the skin, and measurement of the pupils of the eyes. If the person tested has opiates in his or her system, the pupils will dilate. (See *People v. Williams* (1958) 164 C.A.2d Supp. 858, 860, 331 P.2d 251 [test voluntarily taken by defendant admissible]; *People v. Zavala* (1966) 239 C.A.2d 732, 737, 49 C.R. 129; *People v. Sarkissian* (1978) 81 C.A.3d 660, 664, 146 C.R. 508; 48 Cal. L. Rev. 282.)

(2) *Statutory Authorization of Other Tests*. Probationers, parolees, and suspected addicts may be tested for addiction to controlled substances by "whatever means is available." (*Health & Saf.C. 11551* and *11552*; see *People v. Mendoza* (1977) 76 C.A.3d Supp. 5, 8, 143 C.R. 404; 47 Proof of Facts 3d 203 [hair sample analysis to prove illegal drug use]; 2 Cal. Crim. Law (3d), *Crimes Against Public Peace and Welfare*, §76.)

(3) *Refusal and Improper Comment*. Arrestees suspected of drug addiction must give their written consent before they can be tested. (*Health & Saf.C. 11552*.) Thus, where the suspect refuses to give such consent, it is error to admit the fact of the refusal in evidence, or to comment thereon. (*People v. Zavala, supra*, 239 C.A.2d 741.)

However, in *People v. Sarkissian, supra*, defendant, charged with being under the influence of a controlled substance (*Health & Saf.C. 11550*; 2 Cal. Crim. Law (3d), *Crimes Against Public Peace and Welfare*, §73), refused to submit to a urine test. The fact of refusal was admitted in evidence despite defendant's contention that the ruling violated *Health & Saf.C. 11552*. Held, admission was proper. "[T]he applicability of section 11552 turns upon the giving of a test to determine addiction. In the absence of medical authority or evidence that addiction can be determined by urine testing, the request for a urine sample is not within the statute. As a consequence, ... [defendant] did not have the right to refuse to furnish the urine sample, and his refusal may be used against him at trial." (81 C.A.3d 664.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Statutory Authorization of Other Tests*. See *People v. Nolan* (2002) 95 C.A.4th 1210, 1214, 116 C.R.2d 331 [testing of probationer's urine with ADX Abbott Bench Analyzer was not new scientific technique; urinalysis is medically accepted method of drug testing, and fact that machine was designed for use by drug counselors instead of laboratory technicians did not make it subject to *Kelly* rule (see text, §42)]; 22 California Lawyer 38 (December 2002) [effective examination regarding drug test results]. *West's Key Number Digest*, Criminal Law k.388.2





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IV. CHEMICAL AND PHYSICAL TESTS

E. Genetic Tests To Prove Identity.

1. In General.

2 *Witkin Cal. Evid. Demo Evid* § 57

[§ 57] In General.

A number of scientific tests have been employed to analyze human blood, semen, saliva, tissue, hair, and other genetic material. Typically, these tests are performed in a criminal prosecution where the genetic material of a suspected perpetrator or victim is discovered at the crime scene, or in a civil action involving paternity or a claim of inheritance by a child born out of wedlock. (See *29 Am.Jur.2d* (1994 ed.), *Evidence* §560 et seq.) The most important and commonly used tests today are the following:

- (1) Blood group test. (See *infra*, §58.)
- (2) Electrophoresis. (See *infra*, §59 et seq.)
- (3) DNA typing. (See *infra*, §62 et seq.)

Other less frequently utilized tests include the agglutination inhibition test and presumptive tests to detect the presence of blood or other bodily fluids. (See *infra*, §67.)

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2. Blood Group Test.

*2 Witkin Cal. Evid. Demo Evid § 58*

[§ 58] Blood Group Test.

Blood, semen, saliva, and other bodily fluids may be typed or grouped by antigens classified under the traditional ABO blood grouping system as type A, AB, B, or O. (2 A.L.R.4th 500, 505 [Blood Grouping Tests--Criminal Cases]; see generally 3 Wharton, Criminal Evidence (14th ed.), §594; 40 Proof of Facts 2d 1 [Blood Typing].) In the case of bodily fluids other than blood, this grouping may only be performed if the fluid's source was a secretor, i.e., the subject secreted his or her blood type into his or her bodily fluids. Approximately 75% to 80% of humans are considered to be secretors. (See 75 A.L.R.4th 897, 903 [admissibility in prosecution for sex-related offense of results of tests on semen or seminal fluids].) Although the results of blood grouping tests can establish that a sample is *not* the blood of a particular person, it cannot conclusively establish that the sample *is* the blood of a particular person. (See 2 A.L.R.4th 500, 506.) This limitation has led to the use of the test primarily in paternity cases. (See *infra*, §68 et seq.; on use of test in criminal case not involving paternity, see *infra*, §81.)

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3. Electrophoresis.

a. Nature of Test.

2 *Witkin Cal. Evid. Demo Evid* § 59

[§ 59] Nature of Test.

Electrophoresis consists of the sophisticated typing of individual proteins and enzymes. A sample of blood stains or other bodily fluids is placed on a gel medium in an ionized buffer solution. When an electric current is run through the solution, the sample separates and migrates on the medium into characteristic patterns. These are then fixed, dyed, and read visually by the analyst. Although these patterns are not unique for each individual, their possible sources are more limited than those of other tests, such as the traditional blood grouping test (see *supra*, §58). Also, the test is a useful tool in crime scene analysis because only small samples of dried stains are needed. (*People v. Yorba* (1989) 209 C.A.3d 1017, 1022, footnote 1, 257 C.R. 641; see generally 66 A.L.R.4th 588 [electrophoresis of bloodstains]; 75 A.L.R.4th 897 [electrophoresis of semen stains]; 29 *Am.Jur.2d* (1994 ed.), *Evidence* §573; 1 Jefferson, California Evidence Benchbook 3d, §21.61.)

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#### E. Genetic Tests To Prove Identity.

##### 3. Electrophoresis.

#### b. Former Law: Reliability of Test Unproven.

*2 Witkin Cal. Evid. Demo Evid § 60*

[§ 60] Former Law: Reliability of Test Unproven.

In *People v. Brown* (1985) 40 C.3d 512, 230 C.R. 834, 726 P.2d 516, defendant was convicted of rape and first degree murder. Two criminalists from the state Department of Justice were permitted to compare their genetic analyses of dried fluid and stain samples obtained from the victim's body and clothing with the results of electrophoretic blood grouping tests they had run on blood samples from the defendant and the victim. The crime scene stain samples were collected 8 to 12 hours after the victim's death, and in one instance, testing occurred 2 1/2 months later. Although the criminalists reported inconclusive results in certain instances, they determined that the crime scene stains were semen, the typing of which matched defendant's blood in certain of the categories tested, and that no test excluded defendant as a potential donor. *Held*, admission of the evidence was error, although harmless in view of an overwhelming amount of valid incriminating evidence.

(a) The prosecution failed to demonstrate the scientific acceptance of the electrophoretic stain test evidence. The criminalists, who were competent, well credentialed forensic technicians, testified that the tests were accepted and reliable. However: (1) These witnesses were unqualified to state the view of the relevant community of *impartial* scientists inasmuch as both had an identification with law enforcement, a career interest in acceptance of the tests, and a lack of formal training in the applicable scientific disciplines. (2) Neither witness backed up his opinion with a discussion of relevant scientific literature. (3) The witnesses' testimony indicated that procedures for testing the samples varied substantially from laboratory to laboratory and from analyst to analyst, with little attention to scientific confirmation of reliability. (4) The witnesses conceded that aged, dried, or contaminated samples could produce misleading results, and failed to explain how their test procedures overcame these dangers. (40 C.3d 533.)

(b) Electrophoretic stain testing is a technically complex, recent development, and the vast amount of literature on the subject could not be assimilated by lay judges without the help of expert testimony. Thus, the absence at trial of the interpretive assistance of qualified experts precluded an independent judicial determination that a consensus existed among the scientific community concerning the reliability of the test. (40 C.3d 533, 534.) "We do not suggest that such a consensus is lacking. We simply conclude that the answer must abide an adequate future trial record made with the help of live witnesses qualified in the applicable scientific disciplines. We therefore do not foreclose future attempts to admit stain-typing evidence based on a foundation such as we have described." (40 C.3d 534, 535.) (On reversal of *People v. Brown* by United States Supreme Court on other grounds, see *California v. Brown* (1987) 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934, 3 Cal. Crim. Law (3d), Punishment, §495.)

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##### 3. Electrophoresis.

#### c. Current Law: Reliability of Test Established.

*2 Witkin Cal. Evid. Demo Evid § 61*

[§ 61] Current Law: Reliability of Test Established.

In *People v. Reilly* (1987) 196 C.A.3d 1127, 242 C.R. 496, a murder case, the issue concerned the testing of dried bloodstains found in the house in which the crime took place, which were typed through electrophoresis and other processes as excluding any of the victims and statistically including defendant as a source. *Held*, the prosecution met its burden of showing that electrophoretic testing had gained general acceptance and that the technique was properly used.

(a) *Relevant scientific community*. "The important point with regard to disinterest is that the court had before it a broad range of backgrounds. It was able to assess general acceptance through their *combined* testimony regardless of any shortcomings that any of them would have suffered as a *sole* spokesperson for the general scientific community. The court did not limit its inquiry to particular witnesses but, instead, found that the 'totality' of witnesses constituted the relevant field. We agree. It would be a strange perversion of *Kelly/Frye* to exclude the opinions of analysts, at least well-credentialed ones. Those who work closest to a technique may be uniquely aware of inherent reliability problems. Also, it was particularly important to have actual analysts testify in this case because a major part of defendant's challenge was to the ability of analysts to differentiate between reliable and unreliable results." (196 C.A.3d 1140.)

(b) *General acceptance*. The trial court found no significant dispute in the scientific community, despite the testimony of a defense expert who "stands virtually alone in his opposition" to this kind of evidence. The *Kelly* test is met if use of the technique is supported by a clear majority of the members of that community. (196 C.A.3d 1148.)

(c) *Expert's qualifications and use of correct scientific procedures*. The *Kelly* standard also requires a showing that the expert presenting the scientific evidence is qualified to give an opinion and that correct scientific procedures were used. "The fact that our courts impose this case-specific burden bolsters our conclusion that potentially unresolved questions of deterioration or contamination do not invalidate the technique as a whole. Rather, if those questions are serious enough on the facts of a particular case, they can be addressed in the second phase of *Kelly/Frye* and, of course, before the trier of fact at trial should the evidence be ruled admissible. The trial court in this case observed, and we agree, that competent attorneys will be able to absorb enough of the relevant literature to effectively cross-examine on the subject. The record before us confirms that." (196 C.A.3d 1153.)

Following the *Reilly* case, a succession of decisions from the California Courts of Appeal upheld the scientific validity of electrophoretic testing of dried bloodstains and other bodily fluids. (See *People v. Morris* (1988) 199 C.A.3d 377, 383, 245 C.R. 52; *People v. Yorba* (1989) 209 C.A.3d 1017, 1022, 1024, 257 C.R. 641; *People v. Ashmus* (1991) 54 C.3d 932, 2 C.R.2d 112, 820 P.2d 214, *supra*, §15.)

The court in *People v. Smith* (1989) 215 C.A.3d 19, 26, 263 C.R. 678, observed that appellate endorsement of electrophoretic multisystem testing of stains eliminates the need for further case by case adjudication. And this view ultimately was adopted by the California Supreme Court. (See *People v. Morris* (1991) 53 C.3d 152, 207, 279 C.R. 720, 807 P.2d 949; *People v. Cooper* (1991) 53 C.3d 771, 812, 281 C.R. 90, 809 P.2d 865; *People v. Fierro* (1991) 1 C.4th 173, 214, 3 C.R.2d 426, 821 P.2d 1302.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Bolden* (2002) 29 C.4th 515, 545, 127 C.R.2d 802, 58 P.3d 931 [because prior appellate decisions have found electrophoretic multisystem testing of blood to be scientifically accepted technique, trial judge in murder prosecution did not err in limiting *Kelly* hearing to whether person who performed test at issue used correct scientific procedures]; *People v. Cook* (2007) 40 C.4th 1334, 1344, 58 C.R.3d 340, 157 P.3d 950 [electrophoretic test results of blood found on shoes in defendant's garage, which results indicated blood could be from one of two murder victims, met all three prongs of *Kelly* test and were properly admitted; questions regarding proper database went to weight of evidence rather than admissibility].



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#### E. Genetic Tests To Prove Identity.

##### 4. DNA Typing.

##### a. Nature and Types of Tests.

2 *Witkin Cal. Evid. Demo Evid* § 62

[§ 62] Nature and Types of Tests.

(1) *Nature of Tests.* Deoxyribonucleic acid (DNA) typing is based on fundamental principles of human genetics, and was originally developed by molecular biologists to determine the genes responsible for a variety of inherited diseases. The methodology involves the isolation, identification, and comparison of certain highly distinguishing characteristics in the genetic structure of individuals, as revealed by an analysis of DNA extracted from bodily fluid or tissue samples, and a statistical calculation of the frequency with which these characteristics may be expected to appear in the population. (84 A.L.R.4th 313, 318 [admissibility of DNA profiling evidence]; see 22 *Hastings Const. L. Q.* 1 [DNA mapping and matching; legal complications of classifying individuals by group]; 18 *Pepperdine L. Rev.* 123 [DNA profiling: the case for caution]; 22 *Pepperdine L. Rev.* 1288 [admissibility of DNA profiling evidence]; 26 *San Diego L. Rev.* 377 [DNA profiling]; 42 *Stanf. L. Rev.* 465 [same]; 8 Proof of Facts 3d 749 [Foundation For DNA Fingerprint Evidence]; 36 Proof of Facts 3d 1, 18 [proof of identity or paternity by use of Polymerase Chain Reaction test].)

DNA typing is based on the universally accepted principle that no two people (other than identical twins) share exactly the same genetic configuration; that the length and composition of certain DNA base-pair sequences varies from one individual to another at several million sites along the human chromosome; and that by examining the sizes of enough fragments at different sites on different chromosomes, statistical procedures based on known sequence frequencies in the population may be employed to establish the uniqueness of any one person's DNA pattern. (29 *Am.Jur.2d* (1994 ed.), *Evidence* §574.)

DNA testing, which is currently performed by several commercial laboratories and the Federal Bureau of Investigation, may become an issue in a criminal prosecution where human bodily fluids or tissue from a suspected perpetrator or a victim are discovered at a crime scene, or in a civil action involving paternity (see *infra*, §68 et seq.) or a claim of inheritance by a child born out of wedlock. (84 A.L.R.4th 313, 319; 36 Proof of Facts 3d 1, 18; see 108 *Harv. L. Rev.* 1557 [DNA evidence and criminal defense]; 22 *U.C. Davis L. Rev.* 609 [DNA fingerprinting and paternity testing].)

(2) *Types of Tests.* Two kinds of DNA tests are now in forensic use:

(a) *Restriction fragment length polymorphism (RFLP)* analysis generally is considered to be the DNA typing method of choice because it employs a greater number of genetic markers in producing the DNA typing, which provides a higher level of discrimination from one person to the next. (36 Proof of Facts 3d 1, 30.) RFLP testing has three discrete steps: (1) processing of a DNA sample from a relevant source (e.g., suspected genetic material found at a crime



scene) and a DNA sample from a relevant subject (e.g., genetic material of criminal defendant) to produce X-ray films (autorads) that indicate the lengths of the polymorphic fragments of each sample; (2) examination of the autorads of both samples to determine whether any sets of fragments match; and (3) if there is a match, determination of the match's statistical significance. (*People v. Venegas* (1998) 18 C.4th 47, 60, 74 C.R.2d 262, 954 P.2d 525, *infra*, §65; see *infra*, §63 et seq.)

(b) *Polymerase chain reaction (PCR)* amplification analysis is utilized for forensic DNA typing where the DNA in a sample is so minuscule or degraded, or is of such poor genetic quality, that standard RFLP analysis, which requires a substantially large and environmentally undegraded sample of DNA, cannot be employed. PCR testing first requires that the sample be cleaned and purified to remove foreign debris and noncellular material. Thereafter, the sample is subjected to a three-step process of denaturation, primer annealing, and amplification. Lastly, a three-step methodology, similar to that used in RFLP testing, is conducted. (36 Proof of Facts 3d 1, 16, 30; see *infra*, §66.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Nature of Tests.* See P.C. 680 [Sexual Assault Victims' DNA Bill of Rights]; 74 So. Cal. L. Rev. 1275 [how DNA-match statistics may be used to seem impressive or insufficient]; 23 California Lawyer 40 (April 2003) [practical applications of DNA analysis]; 97 Proof of Facts 3d 249 [identification of seminal fluids].(3) (*New Distinction: DNA Database as Investigative Tool.* Use of a DNA database to identify a possible suspect (i.e., a "cold hit") is an investigative technique and is not subject to the *Kelly* rule (text, §42). *Kelly* is concerned with the effect of scientific evidence on the jury. The fact that the perpetrator's features appear to match those of someone in the database does not affect the strength of the evidence against the eventual defendant; it is simply a starting point for the investigation. (*People v. Johnson* (2006) 139 C.A.4th 1135, 1150, 1151, 43 C.R.3d 587 [submission of sperm cells found on vaginal smear to FBI's Combined DNA Index System led to "hit" on defendant, then in state prison, and further investigation led to his being charged with rape; opinion did not address situation where fact of preliminary, "cold hit" match from offender database is offered as evidence of guilt].)



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##### 4. DNA Typing.

##### b. RFLP Test.

##### 1. Uncertainty in Court of Appeals.

##### aa. Test Found Reliable.

2 *Witkin Cal. Evid. Demo Evid* § 63

[§ 63] Test Found Reliable.

"The issue presented is one of first impression in this state: does DNA typing evidence meet the legal requirements for admissibility of novel scientific evidence and, if so, whether the basis for the calculation of statistical probability employed by the testing laboratory, Cellmark in this case, satisfied the foundation requirements of *People v. Collins*. We answer both questions in the affirmative." (*People v. Axell* (1991) 235 C.A.3d 836, 842, 1 C.R.2d 411, citing *People v. Collins* (1968) 68 C.2d 319, 66 C.R. 497, 438 P.2d 33, 1 Cal. Evidence (4th), *Opinion Evidence*, §78.)

The elaborate opinion in *People v. Axell* covers the scientific and legal background of this subject, as follows:

(a) *The nature of DNA.* (235 C.A.3d 844.)

(b) *DNA "fingerprinting."* (235 C.A.3d 846.)

(c) *Statistical analysis.* (235 C.A.3d 847.)

(d) *Expert witnesses.* (235 C.A.3d 848.)

(e) *Standard of review.* (235 C.A.3d 853.)

(f) *Relevance of decisions in other jurisdictions.* (235 C.A.3d 854.)

(g) *Qualifications of experts.* "Since DNA profiling is an amalgamation of primarily two disciplines, molecular biology and population genetics ... , it appears logical to consider its acceptance by those communities for forensic use." (235 C.A.3d 857.) "Here, the trial court heard the opinion of a wider spectrum of scientists than simply molecular biologists and population geneticists. Evidence disclosed that where forensic scientists, molecular biologists, population geneticists, attorneys, and government policymakers gathered at a multidisciplinary conference in December 1988, they concluded that DNA typing was usable in the analysis of forensic evidence." (235 C.A.3d 857.)

(h) *Procedures used by testing laboratory.* "It is the weaknesses both in actual procedures followed and in statistical calculations revealed by concerted defense challenges that have prevented introduction of this new technique in some criminal trials." (235 C.A.3d 861.) "Due to the complexity of the DNA multisystem identification tests and the

powerful impact that this evidence may have on a jury, satisfying *Frye* alone is insufficient to place this type of evidence before a jury without a preliminary critical examination of the actual testing procedures performed. ... Accordingly, we adhere to the traditional view that the third prong of the *Kelly* test is also the subject of a pretrial hearing on the question of admissibility." (235 C.A.3d 862.)

"We hold that the procedures used in this case were the ones generally accepted as reliable in the scientific community. That defense witnesses found fault with particular aspects of the test or thought the protocol could have been improved did not invalidate the testimony of prosecution witnesses, especially since some of the improvements suggested, such as the ASCLD and CACLD guidelines, are not mandatory and suggestions such as the 'mixing' experiment were not shown to be generally acceptable to forensic scientists." (235 C.A.3d 862.)

(i) *Foundation for calculating statistical probability.* Because a match between two DNA samples means little without data on probability, the calculation of statistical probability is an integral part of the process and the underlying method of arriving at that calculation must pass muster under *Kelly*. (235 C.A.3d 866.) In *People v. Collins, supra*, the technique suffered from two basic and pervasive defects--an inadequate evidentiary foundation and an inadequate proof of statistical independence which is essential to the proper application of the "product" or "multiplication" rule. (235 C.A.3d 865.) Here the prosecution showed that the method used by Cellmark to arrive at its database and statistical probabilities was generally accepted in the scientific community. "Any question or criticism of the size of the data base or the ratio pertains to weight of the evidence and not to its admissibility." (235 C.A.3d 868.) (See *People v. Barney* (1992) 8 C.A.4th 798, 811, 814, 10 C.R.2d 731, *infra*, §64 [DNA processing and matching steps have achieved general acceptance, but "product rule" of statistical analysis had not achieved general acceptance]; *People v. Taylor* (1995) 33 C.A.4th 262, 269, 40 C.R.2d 132 [ceiling frequency approach of statistical analysis step discussed in *Barney* has achieved general acceptance].)

The California Supreme Court ultimately approved the use of DNA evidence as a tool in identifying the perpetrator in a criminal case (see *People v. Venegas* (1998) 18 C.4th 47, 74 C.R.2d 262, 954 P.2d 525, *infra*, §65), and held that the "unmodified product rule" approach of calculating statistical probability discussed in *Barney* has now achieved general acceptance (*People v. Soto* (1999) 21 C.4th 512, 518, 88 C.R.2d 34, 981 P.2d 958, *infra*, §65).

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##### b. RFLP Test.

##### 1. Uncertainty in Court of Appeals.

##### bb. Test Not Found Reliable.

#### 2 Witkin Cal. Evid. Demo Evid § 64

[§ 64] Test Not Found Reliable.

*People v. Barney* (1992) 8 C.A.4th 798, 10 C.R.2d 731, covers the scientific and legal background of DNA testing (8 C.A.4th 805), and agrees with some of the conclusions reached in *People v. Axell* (1991) 235 C.A.3d 836, 1 C.R.2d 411, supra, §63. (8 C.A.4th 811, 817, 823.) But the court nevertheless held that one element of DNA analysis--the then current "unmodified product rule" of determining the statistical significance of a match between a defendant's DNA and the DNA in bodily material found at the crime scene--did not satisfy the *Kelly test*. (8 C.A.4th 802, 817, 820, 822.)

The opinion contains a number of comments on this issue:

(a) "To end the *Kelly-Frye* inquiry at the matching step, and leave it to jurors to assess the current scientific debate on statistical calculation as a matter of weight rather than admissibility, would stand *Kelly-Frye* on its head. We would be asking jurors to do what judges carefully avoid--decide the substantive merits of competing scientific opinion as to the reliability of a novel method of scientific proof. We cannot reasonably ask the average juror to decide such arcane questions as to whether genetic substructuring and linkage disequilibrium preclude use of the Hardy-Weinberg equation and the product rule, when we ourselves have struggled to grasp these concepts. The result would be predictable. The jury would simply skip to the bottom line--the only aspect of the process that is readily understood--and look at the ultimate expression of match probability, without competently assessing the reliability of the process by which the laboratory got to the bottom line." (8 C.A.4th 817.)

(b) "Whatever the merits of the prior decisions on the statistical calculation process--including *Axell*--the debate that erupted in Science in December 1991 changes the scientific landscape considerably, and demonstrates indisputably that there is no general acceptance of the current process. It has become irrelevant how *Axell* addressed this issue at the time of the decision's filing in October 1991. The situation is somewhat analogous to a 'change in the attitude of the scientific community' which undermines a previously correct judicial determination of general acceptance. ... Simply put, *Axell* has been eclipsed on this point by subsequent scientific developments. In reaching a conclusion different from that in *Axell*, we do not express disagreement with *Axell's* reasoning at the time, but rather have progressed to a point on the continuum of scientific debate which neither the *Axell* court nor the two trial courts in the present cases could have anticipated." (8 C.A.4th 820.)

(c) The National Research Council (NRC) report on DNA analysis appears to point the way to a common ground as

to which there is general scientific agreement. "The report proposes a method of statistical calculation which accounts for the possibility of population substructuring, eliminates ethnicity as a factor in the calculation process, and permits the use of the product rule while ensuring that probability estimates are appropriately conservative. The report proposes a 'ceiling frequency' approach, in which DNA samples from 15 to 20 homogeneous populations will be analyzed for allele frequencies. In subsequent analysis of the DNA of a suspect or crime scene sample, each allele will be assigned the highest frequency that appears in the tested populations, or 5 percent, whichever is greater. These frequencies will then be multiplied together using the product rule." (8 C.A.4th 821.) Until the ceiling approach is in place, the report suggests interim methods that should be used. (8 C.A.4th 822.) (See *People v. Wallace* (1993) 14 C.A.4th 651, 660, 17 C.R.2d 721 [following *Barney*]; 30 Cal. Western L. Rev. 145, 170 [*Barney*]; 24 Western State L. Rev. 115 [describing case law conflict created by *Barney* and suggesting methods for avoiding inconsistent admission of scientific evidence].)

In *People v. Pizarro* (1992) 10 C.A.4th 57, 12 C.R.2d 436, defendant, an Hispanic, was convicted of rape and murder partly on the basis of DNA testing establishing that DNA from semen taken from the victim matched defendant's known blood sample. An expert witness testified that the likelihood of finding another unrelated Hispanic individual with a similar profile was approximately 1 in 250,000. The testing had been performed by the FBI, which used a different methodology from that employed by Cellmark, the laboratory which had performed the testing in *People v. Axell*, *supra*.

Defendant objected to the introduction of the test results, but presented no rebuttal evidence. However, on appeal he submitted numerous articles criticizing the use of DNA identification. *Held*, judgment reversed, and case remanded with directions to determine whether the testing procedure and database used by the FBI are generally accepted by the scientific community.

(a) *DNA identification evidence.*

(1) "In the context of the *Axell* case, the reviewing court and the trial court concluded that the test performed by Cellmark passed *Kelly/Frye* muster. Assuming the manner in which Cellmark performs the RFLP tests has passed *Kelly/Frye* scrutiny then, under the *Kelly* case, the proponent of such evidence in subsequent cases would not need to re-address the *Kelly/Frye* foundation. ... However, assuming the RFLP test were to come up before a different trial court having the benefit of the *Axell* decision, and the protocol for performing the test was distinct from the Cellmark procedure, then the trial court would not be relieved from *Kelly/Frye* scrutiny of that distinct protocol." (10 C.A.4th 77.) And the reason that this would not be merely an issue of weight, but instead would be one of admissibility, "is because the question would not be whether a particular method deemed reliable *was followed*, but whether the particular method *followed may be deemed reliable*." (10 C.A.4th 77.)

(2) Defendant argued that the protocols, restraining enzymes, probes, matching criteria and data bases used by the FBI were different from those used by Cellmark. In the absence of proof that the FBI's protocol for performing the RFLP test is the same as Cellmark's, it is impossible to determine whether the FBI protocols enjoy the same acceptance in the scientific community as did the Cellmark protocol at the time *Axell* was decided. And from the record here it is impossible to evaluate whether the purported differences between the two protocols have any scientific consequences with respect to the reliability of the process or are nothing more than the distinction between using a brand name drug and its generic equivalent. (10 C.A.4th 78.)

(3) The only testimony regarding the procedures used by the FBI was presented by Dr. Adams, an FBI agent who had been assigned to the DNA unit since its inception. Despite Dr. Adams' stellar qualifications, his testimony was insufficient to establish general acceptance in the scientific community. "Prior to admitting testimony as potentially damaging as DNA forensic identification, the prosecutor should have been required to demonstrate through the testimony of at least one *impartial* expert witness that the protocols and/or procedure of the FBI were generally accepted within the scientific community as reliable. This is particularly so since the resolution of the *Kelly/Frye* issue regarding the FBI DNA test will resolve that issue for the trial courts." (10 C.A.4th 80.)

(b) *Viability of database study.*

(1) In order to establish the significance of a match, within a particular racial or ethnic population, between the DNA bands of the perpetrator and the suspect, tests are performed to determine the frequency of appearance of the different bands within the target population, i.e., the population to which the suspect belongs. "The underlying theory behind all of this is that the ratio of band patterns will vary among different racial and ethnic groups. In other words, while a band pattern may not be distinct to particular racial or ethnic groups, it may occur with different frequency within different racial or ethnic groups. For purposes of illustration, a particular band pattern may appear 3 percent of the time in the Black population, 5 percent of the time in the Hispanic population and 7 percent of the time in the non-Hispanic Caucasian population." (10 C.A.4th 81.)

(2) However, there is a dispute within the scientific community on the effect of subgrouping. "Generally speaking, the selection of a data base from a general population group (Black) as opposed to a subgroup (Blacks of Nigerian descent, for illustration purposes) is predicated on a concept of random mating within the general group without regard to religion, ethnicity and geography. ... The concept of subgrouping assumes that within each ethnic/racial population group there are subgroups that tend to mate within the specific subgroups ... based upon such factors as religion or like ethnicity or geographical differences, etc. Subgrouping would assume that based upon actual mating practices, as opposed to general mating practices, that genetic differences would develop between subgroups. Therefore, subgroups (Puerto Rican Hispanics, for example) within a general population (Hispanic, for example) would show significant differences in the frequency of a given allele pattern which is reflected in the banding pattern." (10 C.A.4th 81.) Within the scientific community, some experts argue that there is a need to account for subcultural deviation within the general population, while others contend that such deviation is of relatively little importance in determining how common or rare an event is within a particular population. (10 C.A.4th 84, 86.)

(3) *Axell* utilized an ethnic database to reach a statistical probability, but did not specifically resolve the question whether the effect or lack of effect of subgrouping is generally accepted in the scientific community. This issue must be resolved by a *Kelly* analysis; i.e., "[i]n order for the data base to be reliable the theory of genetics upon which it is predicated must be an established scientific principle which we assess by its having gained general acceptance in the particular field to which it belongs." (10 C.A.4th 83.)

(4) Nothing in the record before the trial judge, which consisted only of Dr. Adams' testimony as to the validity of both the RFLP test and the database, deals with this controversy. And based upon the submitted documents, which serve only to make it clear that sharp controversy exists, it would be inappropriate for an appellate court to conclude that there is or is not general acceptance in the scientific community of the genetic theory underlying the database employed by the FBI. In cases of this complexity, the issue of general scientific acceptance must first be resolved by the trial court. (10 C.A.4th 89.)

(5) Even assuming that there is a consensus as to the genetic theory upon which the database is predicated, it must be remembered that the validity of the database is also dependent upon the DNA test utilized to analyze the individual allele pattern of each of the persons in the population chosen to make up the database. "Thus, the DNA testing aspect of the data base cannot escape foundational scrutiny." (10 C.A.4th 90.)

(c) *Validity of statistical method utilized.*

(1) The DNA identification of defendant as the perpetrator of the crime was based on the following reasoning: (a) defendant's DNA banding patterns matched the patterns obtained from the semen samples taken from the victim; (b) the frequency of that banding pattern in the Hispanic population is 1 in 250,000; (c) defendant is Hispanic; (d) hence, the chance that the semen came from someone other than defendant is 250,000 to 1. The problem with this reasoning is that the relevance of the statistical probability depends on the *perpetrator* being the same racial or ethnic background as the suspect. But, because all population groups share common allele patterns, it is impossible to determine the perpetrator's race or ethnicity from evidence left at the crime scene. (10 C.A.4th 92.)

(2) In terms of *Ev.C. 403* (3 *Cal. Evidence* (4th), *Presentation at Trial*, §54), the *proffered evidence* is the result of a statistical analysis which utilizes ratios assigned to particular racial or ethnic databases, and the *preliminary fact* upon which the relevance of this evidence depends is the racial or ethnic background of the perpetrator, not the suspect. "If the only way you can conclude that the perpetrator fits a racial/ethnic category is to assume the perpetrator was the same race/ethnic background as the suspect then the reasoning is circular, i.e.: proof of the racial/ethnic background of the perpetrator depends on the racial/ethnic background of the suspect from which we infer a statistical probability that the perpetrator is the suspect. Absent proof sufficient under *Evidence Code section 403* to support the preliminary fact as to the racial/ethnic background of the perpetrator, we see no relevancy to a data base selected because of the racial/ethnic background of the suspect/defendant." (10 *C.A.4th* 94.) Whether such proof exists in this case must be determined on remand. (10 *C.A.4th* 94.)

(3) The *Ev.C. 403* problem does not occur if the *general population* database, which has been created without regard to race or ethnic background, is utilized. This approach establishes a degree of probability that the suspect is the perpetrator, but it does so without assuming that the suspect and the perpetrator belong to the same ethnic/racial background. And the probative value of DNA matches using the general population may well be substantial, e.g., one in 5,000 or even one in 5 million. (10 *C.A.4th* 94.)

In closing, the court directed the trial judge to reinstate the conviction and sentence if, after a "full blown" *Kelly* hearing, the judge determines that the procedures employed by the FBI as well as the database in question are generally accepted in the relevant scientific community. (10 *C.A.4th* 95.)

The California Supreme Court ultimately approved the use of DNA evidence as a tool in identifying the perpetrator in a criminal case, criticized, in part, the *Pizarro* opinion (see *People v. Venegas* (1998) 18 *C.4th* 47, 74 *C.R.2d* 262, 954 *P.2d* 525, *infra*, §65), and held that the "unmodified product rule" approach of calculating statistical probability discussed in *Barney* has now achieved general acceptance (*People v. Soto* (1999) 21 *C.4th* 512, 518, 88 *C.R.2d* 34, 981 *P.2d* 958, *infra*, §65).

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Pizarro* (2003) 110 *C.A.4th* 530, 621, 629, 3 *C.R.3d* 21 [second appeal arising from same facts as in *People v. Pizarro* (1992) 10 *C.A.4th* 57, 12 *C.R.2d* 436, text, p. 78; improper reliance on defendant's traits to establish facts necessary to render DNA evidence relevant provided insufficient foundation for admission, resulting in jury's receiving unreliable and irrelevant evidence regarding match between perpetrator's and defendant's genetic profiles and rarity of perpetrator's profile in population]; on disapproval of one aspect of this holding, see *People v. Wilson* (2006) 38 *C.4th* 1237, 45 *C.R.3d* 73, 136 *P.3d* 864, *Supp.*, *infra*, §66A.



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## CHAPTER VII - Demonstrative, Experimental, and Scientific Evidence

## IV. CHEMICAL AND PHYSICAL TESTS

## E. Genetic Tests To Prove Identity.

## 4. DNA Typing.

## b. RFLP Test.

## 2. Reliability of Test Established.

2 Witkin Cal. Evid. Demo Evid § 65

[§ 65] Reliability of Test Established.

In *People v. Venegas* (1998) 18 C.4th 47, 74 C.R.2d 262, 954 P.2d 525, the California Supreme Court reversed defendant's conviction but generally approved the use of DNA evidence as a tool in identifying the perpetrator in a criminal case. Defendant was found guilty of rape based on evidence that his DNA profile matched the DNA profile of semen recovered from the victim's body and from the crime scene, and that the probability of a match between those profiles and the profile of a person chosen at random from the general population was 1 in 65,000. The Court of Appeal reversed, finding (a) that the prosecution failed to prove that the methodology used by the Federal Bureau of Investigation (FBI) in performing its DNA analysis had gained general scientific acceptance; and (b) that the FBI had failed to comply with procedures recommended by the National Research Council (NRC) for determining the statistical probability of a random match. *Held*, judgment of the Court of Appeal affirmed; the FBI's failure to use correct procedures in this case required exclusion of the DNA evidence.

(a) *Kelly requirements satisfied by processing and matching of DNA fragments.* The technique used by the FBI in this case--restriction fragment length polymorphism (RFLP) analysis--has three discrete steps: (1) processing of DNA from the suspect and crime scene to produce X-ray films (autorads) indicating the lengths of the polymorphic fragments; (2) examination of the autorads to determine whether any sets of fragments match; and (3) if there is a match, determination of the match's statistical significance. (18 C.4th 60.) As to the first two of these steps, the cases of *People v. Axell* (1991) 235 C.A.3d 836, 842, 1 C.R.2d 411, *supra*, §63, and *People v. Barney* (1992) 8 C.A.4th 798, 10 C.R.2d 731, *supra*, §64, have already established that the general scientific acceptance requirement of *People v. Kelly* (1976) 17 C.3d 24, 130 C.R. 144, 549 P.2d 1240, *supra*, §42, is satisfied. The Court of Appeal erred in concluding that *Axell* established scientific acceptance of the RFLP procedures used by Cellmark (the laboratory in that case), but not the FBI's. The record of the *Kelly* hearing held in the trial court also supports the trial judge's determination that, at least up through the matching of defendant's known DNA samples with the questioned DNA samples, another of the *Kelly* requirements--that the procedures actually used in the case be in compliance with the methodology and technique as generally accepted by the scientific community--was satisfied. (18 C.4th 78, 79, criticizing the opinion in *People v. Pizarro* (1992) 10 C.A.4th 57, 12 C.R.2d 436, *supra*, §64, for overlooking the distinction between these two *Kelly* requirements and subjecting the actual FBI procedures used to their own scientific acceptance test.)

(b) *General scientific acceptance of statistical probability methodology.* The statistical phase of the DNA analysis is subject to the same *Kelly* requirements: the methodology used must be generally accepted in the scientific



community, and the calculations in the particular case must follow correct scientific procedures. Application of the "product rule" is the most straightforward method for determining the statistical probability that the DNA profile of any one person selected at random from the relevant population will match the features of the evidentiary sample. However, the product rule, used in conjunction with the separate racial or ethnic databases maintained by each laboratory engaging in DNA analysis, has been criticized for failing to take into account the existence of genetically distinct subpopulations within each racial or ethnic category. For this reason, the FBI applied a "modified ceiling principle," which is specifically designed to avoid any possible prejudice to a suspect resulting from an unmodified product rule approach. (18 C.4th 67, 68.) "Based on our review of the NRC reports, legal commentaries, scientific literature, and consideration and acceptance of the modified ceiling method in the published decisions of several California appellate courts as well as courts of many other jurisdictions, we conclude such methodology has been generally accepted in the relevant scientific community, and that statistical probability calculations of random matches of DNA profiles computed under that methodology are admissible under the *Kelly* test." (18 C.4th 89.)

(c) *Failure to follow correct scientific procedures.* At the *Kelly* hearing in the trial court, an expert witness for the defense testified that the FBI's "floating bins" (the ranges that the database bands representing the size of DNA fragments were sorted into, for purposes of producing the statistical probabilities) were too narrow. The trial judge ruled that this testimony raised only factual questions going to the weight of the evidence. This was error. "The Court of Appeal should have recognized the trial court's error in this regard, and held instead that the FBI's use of improperly sized floating bins was a failure to follow correct scientific procedures" under the *Kelly* test. As testimony from both sides confirmed the defect pointed out by the defense expert, "[t]here was no substantial evidence upon which to base a contrary conclusion, and therefore the trial court abused its discretion in not excluding the flawed statistical approach." (18 C.4th 92, 93.)

(d) *Prejudice and retrial.* The prosecutor conceded below that without the DNA evidence there was insufficient evidence for a finding of guilt beyond a reasonable doubt, and the Attorney General did not argue to the contrary on appeal. Therefore, it is reasonably probable that defendant would have had a more favorable verdict in the absence of the erroneously admitted DNA evidence, and the conviction must be reversed.

"In the event of a retrial, the prosecution will be free to introduce one or more recomputed analyses of the relevant DNA data in this case after demonstrating that such statistical results were generated by either of the following means: (1) recalculation of statistical probabilities under the NRC's modified ceiling approach, arrived at through use of correct scientific procedures consistent with the views expressed herein, or (2) recalculation made by using correct scientific procedures under any other statistical methodology that is otherwise demonstrated to have gained general acceptance in the relevant scientific community, within the purview of the *Kelly* test, since the first trial." (18 C.4th 95.)

In *People v. Soto* (1999) 21 C.4th 512, 88 C.R.2d 34, 981 P.2d 958, the Supreme Court revisited the "unmodified product rule" approach of calculating statistical probability discussed in *Barney*. The *Barney* court correctly observed that substantial debate was ensuing at the time of its decision over the effects, if any, of population substructuring on probability calculations made using the unmodified product rule. (21 C.4th 537.) However, subsequent to *Barney*, it is evident from "the clear weight of judicial authority, and the published scientific commentary, that the unmodified product rule, as used in DNA forensic analysis in this case, has gained general acceptance in the relevant scientific community and therefore meets the *Kelly* standard for admissibility." (21 C.4th 541.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## E. Genetic Tests To Prove Identity.

## 4. DNA Typing.

## c. Reliability of PCR Test Established.

2 Witkin Cal. Evid. Demo Evid § 66

[§ 66] Reliability of PCR Test Established.

In *People v. Morganti* (1996) 43 C.A.4th 643, 657, 50 C.R.2d 837, defendant challenged the admission of the results of DNA typing using polymerase chain reaction (PCR) analysis. Although this type of stain testing had not previously been approved in any published California opinion, the court, after conducting "a fair overview of the literature," approved the trial judge's findings that "there is no significant controversy or dispute with respect to the reliability of this method and that the evidence did not indicate any flaw in the method or its use." (43 C.A.4th 663.) (See *People v. Wright* (1998) 62 C.A.4th 31, 41, 72 C.R.2d 246 [following *Morganti* as to scientific acceptance of PCR analysis; defendant's contentions regarding possible contamination of samples and lack of rigorousness of lab procedures went to weight of evidence, not admissibility]; *People v. Allen* (1999) 72 C.A.4th 1093, 1099, 85 C.R.2d 655 [short tandem repeat (STR) testing approach of identifying DNA in PCR analysis has achieved general acceptance].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Hill* (2001) 89 C.A.4th 48, 58, 107 C.R.2d 110 [full hearing was not required on whether DNA test kit using polymerase chain reaction (PCR) and short tandem repeat (STR) methods had gained general acceptance; each new PCR/STR test kit need not, as matter of law, be subjected to first prong of *Kelly* test (text, §42) to determine scientific reliability]; *People v. Reeves* (2001) 91 C.A.4th 14, 41, 48, 109 C.R.2d 728 [unmodified product rule has been validated by general consensus in scientific community in its use with PCR databases, and random match frequencies may be calculated using fixed bins]; *People v. Brown* (2001) 91 C.A.4th 623, 654, 110 C.R.2d 750 [in rape trial, DNA evidence based on PCR testing was properly admitted; after satisfaction of third prong of *Kelly* test (correct and accepted technique is one that was actually used), questions as to accuracy of database and whether proper procedures were used in testing are for jury]; *People v. Smith* (2003) 107 C.A.4th 646, 665, 132 C.R.2d 230 [use of PCR and short tandem repeats technology to analyze mixed-source forensic sample has gained general acceptance in scientific community]; *People v. Henderson* (2003) 107 C.A.4th 769, 785, 788, 132 C.R.2d 255 [in prosecution for murder and rape, trial judge did not err in finding that capillary electrophoresis, used in conjunction with PCR method of DNA testing of stain found on victim's thigh, was generally accepted within relevant scientific community].



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## E. Genetic Tests To Prove Identity.

## 5. Other Tests.

2 Witkin Cal. Evid. Demo Evid § 67

[§ 67] Other Tests.

(1) *Agglutination Inhibition Test*. This process detects the presence of specific genetic markers in the bloodstream. Samples are dissolved in a saline solution and centrifuged to remove debris. A chemical known as an "agglutinator" is added to a liquid that remains to determine the presence of a specific genetic marker. If the marker is present, the agglutinator will chemically bind with it and neutralize. To discover whether this has occurred, antigen coated indicator cells are added to the extract; these cells react only to the specific agglutinator used. There is no reaction if the agglutinator has neutralized. If it has not, however, the indicator cells clump together; and it is then known that the sample does not contain the particular genetic marker tested. Separate tests determine the presence of other genetic markers. (*People v. Yorba* (1989) 209 C.A.3d 1017, 1024, footnote 5, 257 C.R. 641.)

Scientific acceptance of the test has been established, and the results obtained are admissible. (*People v. Yorba*, *supra*; *People v. Morganti* (1996) 43 C.A.4th 643, 657, 50 C.R.2d 837, *supra*, §66.)

(2) *Presumptive Tests To Detect Blood and Other Bodily Fluids*. Presumptive tests to detect the presence of blood and other bodily fluids have been admissible in California for more than 50 years. (See *People v. Alcalde* (1944) 24 C.2d 177, 182, 148 P.2d 627 [type of test not identified]; *People v. Talbot* (1966) 64 C.2d 691, 708, 51 C.R. 417, 414 P.2d 633 [same]; *People v. Burgener* (1986) 41 C.3d 505, 526, 224 C.R. 112, 714 P.2d 1251 [same]; 1 Am.Jur. Trials 555 [benzidine tests]; 22 Proof of Facts 385, 429 [infrared absorption analysis]; 29 Proof of Facts 461, 500 [thin layer and paper chromatography].)

However, in *People v. Coleman* (1988) 46 C.3d 749, 251 C.R. 83, 759 P.2d 1260, the court, though acknowledging the general admissibility of these tests, held that the results of a "hemostick" blood test were not admissible because there was no evidence as to the type of presumptive test performed. "[W]e cannot simply assume it is ... generally accepted." (46 C.3d 775.)

And neutron activation analysis, which is a method using radiation to detect trace elements in samples of materials for the purpose of identifying the source of those materials, is not a reliable scientific technique to identify bodily fluids because of sample contamination problems. (See 59 Cal. L. Rev. 997, 1057; 50 A.L.R.3d 117, 120; 15 Proof of Facts 115, 134; on permissible uses of neutron activation analysis, see *infra*, §109.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Agglutination Inhibition Test*. See *People v. Riel* (2000) 22 C.4th 1153, 1192, 96 C.R.2d 1, 998 P.2d 969, 3 Cal. Crim. Law (3d), Punishment, §373 [approving *People v. Yorba* (1989) 209 C.A.3d 1017, 257 C.R. 641, text, p. 85, and

*People v. Morganti* (1996) 43 C.A.4th 643, 50 C.R.2d 837, text, p. 85].

(2) *Presumptive Tests To Detect Blood and Other Bodily Fluids*. See 82 A.L.R.5th 67 [presence of blood].



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## CHAPTER VII - Demonstrative, Experimental, and Scientific Evidence

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## F. Genetic Tests for Nonpaternity or Paternity.

## 1. Tests for Nonpaternity.

## a. Nature of Test and Former Law.

2 *Witkin Cal. Evid. Demo Evid* § 68

[§ 68] Nature of Test and Former Law.

The Landsteiner classification of blood groups, as improved by later scientific studies, is the basis of a widely recognized test of nonpaternity of a person asserted to be the father of a child. The medical profession generally regards this test, when properly conducted, as practically conclusive on that issue. And this is the present view of courts and commentators: "As far as the accuracy, reliability, dependability--even infallibility--of the test are concerned, there is no longer any controversy. The result of the test is universally accepted by distinguished scientific and medical authority. There is, in fact, no living authority of repute, medical or legal, who may be cited adversely. ... [T]here is now ... practically universal and unanimous judicial willingness to give decisive and controlling evidentiary weight to a blood test exclusion of paternity." (*Little v. Streater* (1981) 452 U.S. 1, 101 S.Ct. 2202, 2206, 68 L.Ed.2d 627, 633, quoting Schatkin, Disputed Paternity Proceedings; see 2 McCormick 5th, §211; 1A Wigmore (Tillers Rev.) §165a; 43 A.L.R.4th 579 [admissibility and weight of blood grouping tests in disputed paternity cases]; 87 A.L.R.4th 572 [admissibility and compellability of blood test to establish testee's nonpaternity for purpose of challenging testee's parental rights]; on DNA typing to prove identity, see *supra*, §62 et seq.)

In *Arais v. Kalensnikoff* (1937) 10 C.2d 428, 432, 74 P.2d 1043, a finding of paternity, based on evidence of frequent sexual relations and other facts, was upheld despite a court-appointed physician's report that the Landsteiner test showed that defendant could not be the father. The court pointed to former C.C.P. 1978 ("no evidence is by law made conclusive or unanswerable unless so declared" by the Code), and held that the weight of the expert testimony was a matter for the trier of fact. (See *Berry v. Chaplin* (1946) 74 C.A.2d 652, 664, 169 P.2d 442 [following *Arais* case]; 39 Cal. L. Rev. 277.)

The *Arais* case is no longer law, and C.C.P. 1978 was repealed in 1965. (See *infra*, §69.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 1 McCormick 6th, §211. *West's Key Number Digest*, Children Out-of-Wedlock k.45-



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#### F. Genetic Tests for Nonpaternity or Paternity.

##### 1. Tests for Nonpaternity.

##### b. Uniform Act and Family Code.

2 Witkin Cal. Evid. Demo Evid § 69

[§ 69] Uniform Act and Family Code.

(1) *In General.* The Uniform Act on Blood Tests To Determine Paternity was approved by the Commissioners in 1952, and in 1960 was incorporated into the Uniform Act on Paternity (9B U.L.A. (Master Ed.), p. 347), which was withdrawn in 1973. As of 1973, the Uniform Act on Blood Tests To Determine Paternity had been enacted in nine jurisdictions, and the Uniform Act on Paternity in four jurisdictions. (See 9B U.L.A. (Master Ed.), p. 347.) The Uniform Act on Blood Tests to Determine Paternity was adopted in California in 1953 and now is *Family C. 7550 et seq.* It applies in civil actions in which paternity is a "relevant fact" (*Family C. 7551*), and in criminal cases (*Family C. 7556*). (See *infra*, §76 et seq.; for rule of uniform construction, see *Family C. 3*.)

(2) *Civil Paternity Proceedings.* The basic provision of the statute is as follows:

In a civil action or proceeding in which paternity is a relevant fact, the court *may*, on its own initiative, or on the suggestion of a person who is involved, order the mother, child, and alleged father to submit to genetic tests. The court *must* issue the order on a timely motion of a party. If a party refuses to submit to the tests, the court may resolve the question of paternity against that party, or enforce its order if the rights of others and the interests of justice so require. A party's refusal to submit also is admissible in evidence in a proceeding to determine paternity. "Genetic tests" means any genetic test that is generally acknowledged as reliable by accreditation bodies designed by the United States Secretary of Health and Human Services. (*Family C. 7551*.)

Although ordinarily the "alleged father" is the defendant, the statute does not expressly exclude others. Hence, the test may be requested for other men where the defendant offers evidence of their possible paternity. (*Huntingdon v. Crowley* (1966) 64 C.2d 647, 651, 51 C.R. 254, 414 P.2d 382.)

(3) *Support Enforcement Proceedings by District Attorney.* In a case in which the district attorney's office is providing support enforcement services, the district attorney may issue an administrative order requiring the mother, child, and alleged father to submit to genetic testing, providing one of several enumerated conditions exists. However, any person ordered to submit to testing may seek judicial relief, in which case the court must proceed as specified in *Family C. 7551* to determine whether testing should be ordered. If, after being ordered to submit to testing, a person refuses to do so and fails to seek judicial relief either prior to testing or within 10 days after the tests are scheduled, the court may resolve the paternity question against that person or enforce the administrative order "if the rights of others or the interest of justice so require." (*Family C. 7558*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General*. The Uniform Act on Paternity is now found at 9C U.L.A. (Master Ed.), p. 1.

(2) *Civil Paternity Proceedings*. See *In re Joshua R.* (2002) 104 C.A.4th 1020, 1025, 128 C.R.2d 241 [in dependency proceeding, paternity was not "relevant fact" within meaning of *Family C. 7551*, and thus trial judge did not err in denying alleged father's request for paternity testing, where alleged father did not qualify as presumed father; relying on *In re Zacharia D.* (1993) 6 C.4th 435, 24 C.R.2d 751, 862 P.2d 751, 10 Summary (10th), *Parent and Child*, §644].

(3) *Support Enforcement Proceedings by District Attorney*. *Family C. 7558* was amended in 2000 to substitute "local child support agency" for "district attorney" throughout the section.



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### IV. CHEMICAL AND PHYSICAL TESTS

#### F. Genetic Tests for Nonpaternity or Paternity.

##### 1. Tests for Nonpaternity.

##### c. Applicable Where Conclusive Presumption Involved.

##### 1. Former Law and Uniform Act.

##### 2 *Witkin Cal. Evid. Demo Evid* § 70

[§ 70] Former Law and Uniform Act.

(1) *Former Law.* The Uniform Act, §5, stated that the presumption of legitimacy of a child born during wedlock could be overcome by evidence of the test. In California, the strong policy favoring the conclusive presumption where the parties are living together (see *Family C. 7540*, 1 *Cal. Evidence* (4th), *Burden of Proof and Presumptions*, §278) influenced the Legislature to delete §5 from California's version of the Act. Blood test evidence was therefore not admissible to challenge the conclusively presumed fact of parentage. (See *Kusior v. Silver* (1960) 54 C.2d 603, 617, 7 C.R. 129, 354 P.2d 657; *Wareham v. Wareham* (1961) 195 C.A.2d 64, 68, 15 C.R. 465; 48 *Cal. L. Rev.* 852; 35 *So. Cal. L. Rev.* 437; 7 *Stanf. L. Rev.* 388.)

(2) *Presumption May Be Overcome.* The 1980 Legislature restored the rule set forth in §5 of the Uniform Act. The conclusive presumption now may be overcome: "[I]f the court finds that the conclusions of all the experts, as disclosed by the evidence based upon blood tests" performed pursuant to *Family C. 7550* et seq. "are that the husband is not the father of the child, the question of paternity of the husband shall be resolved accordingly." (*Family C. 7541(a)*; see 12 *Pacific L. J.* 369.)

(3) *Exceptions.* *Family C. 7541(a)* does not apply to any of the following (see 13 *Pacific L. J.* 671):

(a) A case that had reached final judgment of paternity on September 30, 1980 (the effective date of the 1980 legislation). (*Family C. 7541(e)(1)*.)

(b) A case coming within the provisions of C.C. 7005 (husband treated as father after consent to artificial insemination by another man). (*Family C. 7541(e)(2)*.)

(c) A case in which the wife, with the consent of the husband, conceived by means of a surgical procedure. (*Family C. 7541(e)(3)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Correction:* Page 88, fifth line of section, "§278" should be "§162".





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1. Tests for Nonpaternity.

c. Applicable Where Conclusive Presumption Involved.

2. Procedure.

2 Witkin Cal. Evid. Demo Evid § 71

[§ 71] Procedure.

*Family C. 7541* sets forth the following procedure for seeking blood tests to establish nonpaternity:

(1) The husband, the presumed father (as defined in *Family C. 7611* and *7612*; see 1 *Cal. Evidence* (4th), *Burden of Proof and Presumptions*, §204), or the child (through or by a guardian ad litem) may file a notice of motion within 2 years of the child's date of birth. (*Family C. 7541(b)*.)

(2) The mother may file a notice of motion within 2 years of the child's date of birth if the biological father has filed an affidavit acknowledging paternity. (*Family C. 7541(c)*.)

(3) The notice of motion must be supported by the moving party's declaration under oath stating the factual basis for placing the issue of paternity before the court. (*Family C. 7541(d)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Correction:* Page 89, fifth line of section, "§204" should be "§107".



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##### c. Applicable Where Conclusive Presumption Involved.

##### 3. Illustration: Presumption Overcome.

2 Witkin Cal. Evid. Demo Evid § 72

[§ 72] Illustration: Presumption Overcome.

In *Alicia R. v. Timothy M.* (1994) 29 C.A.4th 1232, 34 C.R.2d 868, an action for child support by a mother against a man she alleged was the biological father of her child, the trial judge refused to apply the conclusive presumption, which would have established that a man other than defendant was the father. Even though more than 2 years had passed since the child's birth, the judge ordered blood tests, and when these indicated that defendant was the biological father, the judge so found. *Held*, affirmed.

(a) There are times when application of the presumption would not further its underlying policies; in such circumstances, the court must balance the competing private and state interests. (29 C.A.4th 1237, citing *Orange v. Leslie B.* (1993) 14 C.A.4th 976, 17 C.R.2d 797, 10 Summary (9th), *Parent and Child*, Supp., §416, and *In re Lisa R.* (1975) 13 C.3d 636, 119 C.R. 475, 532 P.2d 123, 10 Summary (9th), *Parent and Child*, §404.)

(b) Here, blood tests established that defendant was the biological father and that the man presumed under the statute to be the father was not. Furthermore, there had been a judgment of nullity of the marriage between the mother and the presumed father and a finding by the trial judge that there were no children from their union. The presumed father no longer resided with the mother, and there was no longer a parent/child relationship between him and the child. "While the state has a legitimate interest in promoting marriage and not impugning a family unit, that interest cannot be served here where there is no marital union or family unit to disrupt. Additionally, the state's interest in ensuring that the child is supported would be furthered by refusing to apply the presumption of former Evidence Code section 621 (now *Family C. 7540*) and requiring M. to support the child he fathered." (29 C.A.4th 1238.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Orange v. Leslie B.:*

*Cross-Reference:* 10 Summary (10th), *Parent and Child*, §§28, 30.

*In re Lisa R.:*

*Cross-Reference:* 10 Summary (10th), *Parent and Child*, §451.



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##### 2. Tests for Paternity.

##### a. Former Law: Inadmissible.

2 Witkin Cal. Evid. Demo Evid § 73

[§ 73] Former Law: Inadmissible.

The blood grouping test is now considered conclusive in its showing of nonpaternity. (*Family C. 7554*, supra, §68.) It is also highly persuasive in some situations (where the blood type is rare) as an indication of probable paternity. The Uniform Act, §4, contained the provision that, if the experts find a possibility of the alleged father's paternity, this evidence may be admitted in the discretion of the court, "depending upon the infrequency of the blood type." And the Uniform Parentage Act, §12, permits evidence of paternity to include "blood test results, weighed in accordance with evidence, if available, of the statistical probability of the alleged father's paternity." (9B U.L.A. (Master Ed.), p. 347.)

The foregoing provisions were without precedent in statute or case law, and were not included in the California statute. And originally, most authorities took the position that blood test evidence to show paternity should be excluded as dangerously prejudicial. (See *Dodd v. Henkel* (1978) 84 C.A.3d 604, 608, 148 C.R. 780, citing the text; *Everett v. Everett* (1984) 150 C.A.3d 1053, 1065, 201 C.R. 351; 2 McCormick 5th, §211; 1A Wigmore (Tillers Rev.) §165a; 39 Cal. L. Rev. 277.)

**SUPPLEMENT:** [This section is current through the latest supplement]

The Uniform Parentage Act of 1973, §12, quoted in the text, p. 90, is now found at 9B U.L.A. (Master Ed.), p. 452. The Uniform Parentage Act of 2000, §503, provides that a specimen "used in genetic testing may consist of one or more samples, or a combination of samples, of blood, buccal cells, bone, hair, or other body tissue or fluid." (9B U.L.A. (Master Ed.), p. 330.)

See 1 McCormick 6th, §211.



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## 2. Tests for Paternity.

## b. Current Rule of Admissibility.

## 1. HLA Test.

## 2 Witkin Cal. Evid. Demo Evid § 74

[§ 74] HLA Test.

In *Cramer v. Morrison* (1979) 88 C.A.3d 873, 153 C.R. 865, the court held that the newly developed HLA (human leucocyte antigen) test is admissible to establish parentage in a civil paternity suit.

The action was brought by the district attorney, and defendant, the alleged father, made a motion in limine to exclude the results of the test. The trial judge granted the motion mainly on the ground that, though available data indicated reliability of the test, under present California law it was not admissible. *Held*, reversed.

(a) Under the general rule that all relevant evidence is admissible except as otherwise provided by statute (*Ev.C. 351, 1 Cal. Evidence (4th), Circumstantial Evidence, §5*), the results of the test are admissible because they reveal a very high probability of paternity. (88 C.A.3d 879, 880.)

(b) The contention that the Legislature, in omitting §4 of the Uniform Act (see *supra*, §73), intended to exclude all blood tests for paternity is unsound. The terminology of the Act, the language used in the opinions, and the writings of commentators, made it clear that the reference was to the common Landsteiner red cell blood grouping tests. (88 C.A.3d 880, 881, and footnote 13, quoting the text.) The later developed HLA test is not a red cell blood grouping test; it consists of tissue typing of the white blood cells, employs a much larger number of factors, and shows a 90% probability of parentage. (88 C.A.3d 878, 881.) Moreover, the Uniform Act expressly stated that it does not prevent the production of "other expert evidence" (see *Family C. 7557, infra*, §77), and the omission of §4 must be interpreted as intended to exclude only the existing Landsteiner test then in general use in this state in 1975, and not the HLA test that was not used here at that time. (88 C.A.3d 882, 883.)

(c) The trial judge also rejected the evidence as unduly prejudicial (*Ev.C. 352; see 1 Cal. Evidence (4th), Circumstantial Evidence, §17 et seq.*). This was an abuse of discretion.

"We are not aware of any public policy which would require exclusion of highly probative scientific evidence on the issue of paternity in the absence of a statutory mandate. On the contrary, all the policy considerations advanced by California commentators and case law argue for broad inclusion of such evidence in paternity proceedings. These considerations include protecting children from the stigma of illegitimacy, preservation of the family, and insuring that individuals rather than the government bear responsibility for child support. ... Further, we note that the recent and growing recognition of the right of illegitimates to equal protection with legitimates before the law has served to

heighten the significance of paternity litigation throughout the United States." (88 C.A.3d 885.)

The use of the test in a criminal case was approved in *Shults v. Superior Court* (1980) 113 C.A.3d 696, 170 C.R. 297. Petitioner, mother of a young child (Tanya) was charged with welfare fraud and perjury, in part on the ground of failure to report the presence of Tanya's father in her home. The trial court, on motion of the district attorney, ordered petitioner to present herself and Tanya for an HLA blood test in order to compare blood samples with those previously obtained from Tanya's alleged father. *Held*, the order was valid. "First, the type of blood test ordered yields scientifically reliable results. ... Second, fraud and perjury, while not life-threatening crimes, are certainly serious offenses violative of the basic fabric of modern society. Third, the 'law enforcement suspicions' that the tests will reveal the paternity of the alleged father are supported by testimony at the preliminary examination that he and petitioner lived together since the spring of 1976 and referred to Tanya as their daughter. Fourth, although the evidence will not be determinative of the ultimate issues of fraud and perjury, it is relevant to the threshold issue of Tanya's paternity and thus petitioner's alleged false reporting. Fifth, we conceive of no possible alternative means less violative of Fourth Amendment freedoms than the drawing of blood samples to obtain the evidence sought." (113 C.A.3d 699.)

In *Ventura v. Marcus* (1983) 139 C.A.3d 612, 189 C.R. 8, an HLA paternity test resulted in a report that, in the opinion of the experts, there was an 85.95% probability that M was the father of the child. The court, citing several medical authorities, pointed out that only 95% or higher is considered useful evidence of likelihood of paternity, and added: "[T]he reported probability of 85.95 percent with respect to defendant does little more than determine that he is not excluded as a possible father of the minor. It is totally indecisive and places him in the category of putative fathers whose parentage is 'not resolvable.' It is therefore equally valid to infer therefrom that he is not the father as to infer that he is the father." (139 C.A.3d 618.) Accordingly, the trial judge's determination of nonpaternity was affirmed. (139 C.A.3d 619.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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##### b. Current Rule of Admissibility.

##### 2. Statutory Authorization.

2 Witkin Cal. Evid. Demo Evid § 75

[§ 75] Statutory Authorization.

The use of genetic tests on the issue of paternity was authorized by the Legislature in 1981. (See generally 1A Wigmore (Tillers Rev.) §165a; 13 *Pacific L. J.* 670 [suggesting that, in view of lack of certainty of Landsteiner tests, they should be excluded under *Ev.C.* 352]; 22 *Santa Clara L. Rev.* 667; 37 A.L.R.4th 167 [admissibility, weight, and sufficiency of HLA tissue typing tests in paternity cases]; 43 A.L.R.4th 579 [admissibility and weight of Landsteiner blood grouping tests]; on DNA typing, see *supra*, §62 et seq.) The relevant statute provides as follows:

If the court finds that the conclusions of all the experts are that the alleged father is not the child's father, the question of paternity must be "resolved accordingly." (*Family C. 7554(a)*.) If the experts disagree in their findings or conclusions, or if the tests show the probability of the alleged father's paternity, the question, if not unduly prejudicial under *Ev.C.* 352 (see 1 *Cal. Evidence (4th)*, *Circumstantial Evidence*, §17 et seq.), must be submitted on all the evidence, including that based on the tests. (*Family C. 7554(b)*; see *Sonoma v. Grant W.* (1986) 187 C.A.3d 1439, 1447, 232 C.R. 471, 1 *Cal. Evidence (4th)*, *Hearsay*, §242 [statute permits *all* blood test results, both inclusionary or exclusionary ones and probability-of-paternity percentages, to be admitted on issue of paternity]; on rebuttable presumption of paternity from "paternity index" finding, see *Family C. 7555*, 1 *Cal. Evidence (4th)*, *Burden of Proof and Presumptions*, §204.)

All hospitals, local child support agencies, welfare offices, and family courts must facilitate genetic testing. This may include having a health care professional available to extract samples for testing. (*Family C. 7551.5*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Correction:* Page 93, line 5, "§204" should be "§107".



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##### 3. Procedure in Civil Cases.

##### a. Request and Order.

2 Witkin Cal. Evid. Demo Evid § 76

[§ 76] Request and Order.

(1) *In General.* The procedure for requesting the court to order genetic tests to prove paternity, and sanctions for failure to comply with the order, are the same as that for a request for an order for genetic tests to disprove paternity. (See *Family C. 7551*, supra, §69; *Michael B. v. Superior Court* (1978) 86 C.A.3d 1006, 1010, 150 C.R. 586 [trial court erred in failing to order blood test on alleged father's motion]; *Huntingdon v. Crowley* (1966) 64 C.2d 647, 652, 51 C.R. 254, 414 P.2d 382 [trial judge has discretion to deny untimely motion]; *William M. v. Superior Court* (1990) 225 C.A.3d 447, 450, 275 C.R. 103 [putative paternal grandparents could not be required to submit to blood tests in paternity action]; *San Francisco v. Cartagena* (1995) 35 C.A.4th 1061, 1069, 41 C.R.2d 797 [child and mother could not be forced to undergo blood test while stipulated judgment of paternity was in effect, but only if judgment was vacated].)

(2) *Constitutionality of Sanctions for Refusal To Comply.* In *El Dorado v. Schneider* (1987) 191 C.A.3d 1263, 237 C.R. 51, plaintiff county, seeking to establish defendant's paternity of a minor child for child support purposes, obtained an order requiring that defendant submit to a variety of blood tests. Upon defendant's refusal to submit to the tests, the trial judge invoked former Ev.C. 892, the substantially similar predecessor to *Family C. 7551*, and entered an order declaring defendant to be the child's father. *Held*, the order establishing paternity did not violate defendant's constitutional rights.

(a) The paternity action was civil, not criminal, and neither the federal nor the California Constitution requires a jury trial of the issue. (191 C.A.3d 1270, 1272, 1280.)

(b) The claim that there was a violation of due process by denial of the right to confront witnesses at a hearing is untenable. Former Ev.C. 892 is properly viewed as a discovery statute that establishes procedures for obtaining information in a civil action, and provides sanctions for refusing to supply the information. (191 C.A.3d 1272.) And determination of the paternity issue adversely to defendant was a "just" sanction specifically related to the claim at issue:

(1) Defendant's wrongful refusal to take the test deprived the court of the opportunity to evaluate the probative value of the blood test evidence; accordingly, it was proper to assume that the test results would have had "potent probative value" in establishing defendant's paternity. (191 C.A.3d 1276.)

(2) The trial judge was not required to give defendant repeated warnings concerning potential sanctions, because defendant, who had been put on notice by plaintiff's moving papers and at the hearing on plaintiff's motion to establish

paternity, failed to indicate at any time a willingness to take the blood tests. (*191 C.A.3d 1277.*)

**SUPPLEMENT:** [This section is current through the latest supplement]





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##### b. Experts.

2 Witkin Cal. Evid. Demo Evid § 77

[§ 77] Experts.

(1) *Tests by Accredited Laboratories.* The genetic tests must be performed by a laboratory approved by an accreditation body that has been approved by the United States Secretary of Health and Human Services. (*Family C.* 7552; on service of test results and foundation for admission, see *infra*, §79.)

(2) *Experts Called by Parties.* A party or person at whose suggestion the tests were ordered may demand that experts "qualified as examiners of blood types," their number and qualifications to be determined by the court, perform independent tests, and the results may be offered in evidence. (*Family C.* 7552.) The demanding party need not show good cause for a more precise test that is available, and the trial judge has no discretion to deny an HLA test (see *supra*, §74) on demand of a party at whose suggestion an original test was ordered. (*Fresno v. Superior Court* (1979) 92 C.A.3d 133, 137, 154 C.R. 660.)

(3) *Compensation of Experts.* An expert witness appointed by the court is entitled to compensation fixed at a reasonable amount. It must be paid by the parties, or by the county if so directed, in the proportions and at the times the court prescribes. The court may order that all or part or none of it be taxed as costs in the proceeding. (*Family C.* 7553.)

Where the alleged father is indigent and the child and the mother are receiving public assistance, the court must order compensation paid by the county, subject to its being later taxable to the parties as costs; the court cannot order prepayment by the indigent defendant. (*Michael B. v. Superior Court* (1978) 86 C.A.3d 1006, 1010, 150 C.R. 586; see *Little v. Streater* (1981) 452 U.S. 1, 101 S.Ct. 2202, 2204, 2211, 68 L.Ed.2d 627, 631, 632, 638, 639 [Connecticut statute requiring party requesting test to bear costs held denial of due process to indigent defendant who denies paternity]; 95 Harv. L. Rev. 132.)

Any party may produce other expert evidence, but must pay the fees of his or her experts, and only ordinary witness fees for them are taxable as costs. (*Family C.* 7557.)

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##### 3. Procedure in Civil Cases.

##### c. Additional Tests on Request.

2 Witkin Cal. Evid. Demo Evid § 78

[§ 78] Additional Tests on Request.

In *Everett v. Everett* (1984) 150 C.A.3d 1053, 201 C.R. 351, the court held that the trial judge has power, under the broad language of former Ev.C. 892 (now *Family C. 7551*; see *supra*, §69) to order additional blood tests on request of a party. (150 C.A.3d 1064.) The opinion also offers guidance to trial courts in interpreting the requirements of the section.

(a) *Background of scientific developments and case law.* At the time of California's adoption of the Uniform Act, only the Landsteiner series of red cell blood grouping tests were deemed acceptable, and the results were held inadmissible as affirmative proof of paternity. (150 C.A.3d 1065, citing the text.) By 1984, there were 62 blood typing procedures that, if applied in combination, would establish nonpaternity for approximately 98% of mistakenly accused men. In 1979, *Cramer v. Morrison* (1979) 88 C.A.3d 873, 153 C.R. 865, held admissible the results of an HLA test to prove paternity (see *supra*, §74); and *Fresno v. Superior Court* (1979) 92 C.A.3d 133, 154 C.R. 660, held that under *Cramer* and former Ev.C. 893 (now *Family C. 7552*), the trial court has no discretion to deny an HLA test on demand (see *supra*, §77). In 1981, the Legislature removed any uncertainty by amending former Ev.C. 895 (now *Family C. 7554*; see *supra*, §75) to permit affirmative use to prove paternity. (150 C.A.3d 1066.)

(b) *Mandatory tests on request of party, or tests on own motion.*

(1) As to traditional extended blood factor tests and HLA tests, the trial court has little discretion to refuse to order them on a timely request of a party. (150 C.A.3d 1067.) As to other tests yet to be developed or fully accepted in the scientific community, "we interpret the provisions of section 892 to be mandatory in requiring the trial court to order the mother, child, and alleged father to submit to any blood tests requested by a party upon a timely motion, and discretionary only when the trial court orders blood tests on its own initiative." (150 C.A.3d 1067.)

(2) However, with the numerous procedures available and to be developed, application of all is neither feasible nor cost effective; and "the trial court must strike a balance between the costs involved, the danger of harassment, the inconvenience to the parties on the one hand, and the increased ability to determine paternity based on the cumulative effect of the results from a number of tests on the other hand." (150 C.A.3d 1067.) If an objection is made to a request for a specific test, the requesting party "must make a minimal showing that the probative value of the results will outweigh the financial burden and inconvenience to the party sought to be tested; if such showing is not made, the trial court may properly reject the request." (150 C.A.3d 1067.) And repeated requests for additional tests, which are calculated to harass rather than to produce reliable evidence, may also be denied, just as oppressive discovery motions are denied. (150 C.A.3d 1067.)

(3) "By requiring trial courts to order more than one blood test, we are by no means ruling on the admissibility of such tests." The results are still subject to the usual rules of evidence, including a showing of relevance and laying of an adequate foundation by a pretrial evidentiary hearing on scientific acceptance of the test. (*150 C.A.3d 1068.*)

(4) Former Ev.C. 895 required submission of the question of paternity on all the evidence, including that based on the tests. "There is no requirement in section 895 or elsewhere that the preliminary fact question whether intercourse occurred be submitted upon evidence which assumes the answer that it purports to prove." (*150 C.A.3d 1072.*)

**SUPPLEMENT:** [This section is current through the latest supplement]



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##### 3. Procedure in Civil Cases.

##### d. Service of Test Results and Foundation.

2 Witkin Cal. Evid. Demo Evid § 79

[§ 79] Service of Test Results and Foundation.

The results of genetic tests performed under *Family C. 7552* (supra, §77) or 7558 (supra, §69) must be served on all parties no later than 20 days before the hearing at which the test results may be admitted into evidence. (*Family C. 7552.5(a)*.) The test results must be accompanied by the following declaration, executed under penalty of perjury:

(1) The declaration must state that the declarant is the duly authorized custodian of the records or other qualified employee of the laboratory and has authority to certify the records. (*Family C. 7552.5(a)(1)*.)

(2) The declaration must include statements (a) establishing the chain of custody of all genetic samples collected (*Family C. 7552.5(a)(2)*); (b) that the procedures used by the laboratory to conduct the tests are used in the laboratory's ordinary course of business to ensure accuracy and proper identification of genetic samples (*Family C. 7552.5(a)(3)*); and (c) that the results were prepared at or near the time of completion of the genetic tests by personnel qualified to perform genetic tests in the ordinary course of business (*Family C. 7552.5(a)(4)*).

If a genetic test reflects a paternity index of 100 or more, the test results must be accompanied by a voluntary declaration of paternity form prepared according to *Family C. 7552*. (*Family C. 7552.5(d)*.)

The genetic tests may then be admitted into evidence without foundation testimony of authenticity and accuracy, unless a written objection is filed and served. (*Family C. 7552.5(b)*, (c).)

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##### 4. Right and Procedure in Criminal Cases.

###### a. In General.

2 Witkin Cal. Evid. Demo Evid § 80

[§ 80] In General.

(1) *Applicability*. The statute applies to criminal actions with the following limitations: (a) an order for tests may be made only on a party's application or the court's initiative; (b) the expert's compensation must be paid by the county; (c) the court may direct a verdict of acquittal on the conclusions of all the experts under *Family C. 7554* (supra, §75); otherwise, the case must be submitted for determination on all the evidence. (*Family C. 7556*.)

(2) *Indigent's Right to Test at Public Expense*. The defendant's right to a blood test at public expense was affirmed in *People v. Bynon* (1956) 146 C.A.2d 7, 303 P.2d 75. Defendant was charged with lewd conduct (P.C. 288) with his 12-year-old adopted daughter, who had given birth to a child. The daughter testified that her sexual relations were only with defendant. Defendant, an indigent represented by the public defender, requested an order for a blood test. *Held*, denial of the request was reversible error. Although paternity of the child was not a main issue, the daughter's testimony was highly prejudicial to defendant, and a blood test favorable to him would have effectively impeached that testimony. (146 C.A.2d 11.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### F. Genetic Tests for Nonpaternity or Paternity.

##### 4. Right and Procedure in Criminal Cases.

##### b. Cases Not Involving Paternity.

2 Witkin Cal. Evid. Demo Evid § 81

[§ 81] Cases Not Involving Paternity.

In *People v. Lindsey* (1978) 84 C.A.3d 851, 149 C.R. 47, a prosecution for forcible rape, the prosecution introduced evidence that defendant's blood type was the same as that found on vaginal slides taken from the victim. On a review of the case law in other jurisdictions, the court followed the majority rule that such evidence is admissible under the general rule of relevancy in cases where the issue of paternity is not involved. (84 C.A.3d 863, 866.) The Uniform Act provisions and the rules developed under it apply only to criminal actions involving the paternity issue, e.g., child desertion. (84 C.A.3d 866.)

The *Lindsey* opinion, however, approved the limitation set forth in a Pennsylvania decision that blood type evidence can be used only to corroborate other evidence. Proof that a criminal defendant shares a blood type with that of samples found near the crime scene is not admissible unless there is additional, independent evidence "tending to show either (1) that the man who committed the crime did lose blood in the process or (2) that the defendant was present at the scene." (84 C.A.3d 866.) (See 2 A.L.R.4th 500 [admissibility, weight, and sufficiency of blood grouping tests in criminal cases].)

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#### G. Radar Speedmeter.

##### 1. Admissibility of Evidence.

2 *Witkin Cal. Evid. Demo Evid* § 82

[§ 82] Admissibility of Evidence.

The Radar Speedmeter is a machine that beams electromagnetic waves at a moving object, and thereby measures the speed of a motor vehicle for the purpose of enforcing speed laws. "[B]asically it consists of an ultrahigh frequency radio transmitter and receiver operating on a frequency of 2445 megacycles, a visual speed indicator calibrated to show miles per hour, and a graphic recorder on which speed in miles per hour is recorded." (*People v. Beamer* (1955) 130 C.A.2d Supp. 874, 875, 279 P.2d 205; see *In re Beamer* (1955) 133 C.A.2d 63, 67, 283 P.2d 356; 1 McCormick 5th, §204; 43 Cal. L. Rev. 710; 29 So. Cal. L. Rev. 240.)

The scientific accuracy of the device, properly handled, is now established. (See *In re Beamer*, *supra*, 133 C.A.2d 68; *People v. MacLaird* (1968) 264 C.A.2d 972, 975, 71 C.R. 191, quoting the text [judicial notice taken]; *People v. Flaxman* (1977) 74 C.A.3d Supp. 16, 23, 141 C.R. 799 [police officer's testimony sufficient to establish accuracy of radar reading]; 47 A.L.R.3d 822 [proof by radar or similar device of violation of speed regulations].) (On inadmissibility of speed trap evidence, see *infra*, §83 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 1 McCormick 6th, §204. *West's Key Number Digest*, Criminal Law k.388.4 et seq.



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## G. Radar Speedmeter.

## 2. Inadmissibility of Speed Trap Evidence.

## a. Primary Definition of Speed Trap.

2 Witkin Cal. Evid. Demo Evid § 83

## [§ 83] Primary Definition of Speed Trap.

A speed trap consists of either of the following:

(1) *Highway Measured as to Distance To Allow Calculation of Vehicle's Speed.* A section of a highway "measured as to distance and with boundaries marked, designated, or otherwise determined" so that a vehicle's speed may be calculated by ascertaining the time it takes the vehicle to travel that distance. (*Veh.C. 40802(a)(1).*)

(2) *Highway With Prima Facie Speed Limit Not Justified By Survey.* A section of highway with a prima facie speed limit that is not justified by an engineering and traffic survey conducted within 5 years before the date of the violation, and that is enforced by using radar or other electronic device that measures the speed of moving objects. A "prima facie" speed limit is one provided by the Vehicle Code or by local ordinance under *Veh.C. 22352(a)(2)(A)* or established under *Veh.C. 22354, 22357, 22358, or 22358.3.* (*Veh.C. 40802(a)(2)*, further specifying that it does not apply to a local street, road, or school zone, as defined in *Veh.C. 40802(b).*)

The prosecution must produce the survey even without the defendant's request. (*People v. DiFiore* (1987) 197 C.A.3d Supp. 26, 28, 30, 243 C.R. 359.) An original survey or certified copy must be produced; a summary of the survey or the testimony of the citing officer regarding the survey does not suffice. (*People v. Earnest* (1995) 33 C.A.4th Supp. 18, 21, 23, 40 C.R.2d 304; *People v. Ellis* (1995) 33 C.A.4th Supp. 25, 29, 40 C.R.2d 111.) And, the survey is required whenever radar is used to enforce the posted speed limit, even if the citing officer only testifies as to his or her visual determination of speed. (*People v. Conzelman* (1994) 33 C.A.4th Supp. 6, 9, 39 C.R.2d 156.)

However, the survey is not necessary where the violation is for exceeding the 25 miles per hour speed limit of a marked and posted school zone (*Veh.C. 22350*). (*People v. Goodrich* (1994) 33 C.A.4th Supp. 1, 4, 39 C.R.2d 154.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Highway With Prima Facie Speed Limit Not Justified By Survey.* See *People v. Huffman* (2000) 88 C.A.4th Supp. 1, 3, 4, 106 C.R.2d 820 [conviction of violating *Veh.C. 22350(a)* (basic speed law) for driving 66 miles per hour in area posted as 50-miles-per-hour zone was not supported by substantial evidence, where settled statement referred to area being "surveyed" for 50 miles per hour but failed to indicate that prosecution introduced required traffic and engineering survey and, if so, when it was prepared and whether it justified posted limit]; *People v. Singh* (2001) 92 C.A.4th Supp. 13, 17, 112 C.R.2d 74 [speed trap rules did not apply where radar established that defendant was traveling in excess of 65 miles per hour, but officer cited him for exceeding maximum speed law and not for exceeding lower, posted, prima



facie limit].



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##### b. Alternate Definition of Speed Trap.

*2 Witkin Cal. Evid. Demo Evid § 84*

[§ 84] Alternate Definition of Speed Trap.

(1) *When Alternate Definition Applies.* When all of the following criteria are met, an alternate definition of speed trap applies in lieu of the definition under *Veh.C. 40802(a)* (see *supra*, §83):

(a) When radar is used, the officer issuing the citation has successfully completed a certified course on use of police traffic radar.

(b) When laser or other electronic device is used, the officer issuing the notice to appear has completed a certified course on use of police traffic radar and an additional certified training course of not less than 2 hours.

(c) The prosecution has proved (1) that the officer complied with the training requirements mentioned above; (2) that an engineering and traffic survey was conducted in accordance with *Veh.C. 40802(c)(2)(B)* (see *infra*, this section); (3) that, prior to issuing the notice to appear, the officer established that the radar or other device met or exceeded the minimal standards of the National Traffic Highway Safety Administration and was independently calibrated within the previous 3 years; and (4) that the accused's speed was unsafe for the conditions present at the time of the violation, unless the citation was for a violation of *Veh.C. 22349*, *22356*, or *22406* (see *2 Cal. Crim. Law (3d), Crimes Against Public Peace and Welfare, §253*). (*Veh.C. 40802(c)(1).*)

(2) *Statement of Alternate Definition.* If the above criteria are met, a speed trap consists of either of the following:

(a) *Highway measured as to distance to allow calculation of vehicle's speed.* "A particular section of a highway measured as to distance and with boundaries marked, designated, or otherwise determined in order that the speed of a vehicle may be calculated by securing the time it takes the vehicle to travel the known distance." (*Veh.C. 40802(c)(2)(A).*)

(b) *Highway with prima facie speed limit not justified by survey.* A section of a highway or state highway with a prima facie speed limit that is enforced by using radar or other electronic device that measures the speed of moving objects, and that is not justified by an engineering and traffic survey conducted within one of the following time periods: (1) 10 years, where an engineering and traffic survey was conducted more than 7 years prior to the date of the alleged violation, and a registered engineer evaluates the section of highway and determines that no significant changes in roadway or traffic conditions have occurred; (2) otherwise, 7 years. A "prima facie" speed limit is one provided by the Vehicle Code or by local ordinance under *Veh.C. 22352(a)(2)(A)* or established under *Veh.C. 22354*, *22357*, *22358*,

or 22358.3. (*Veh.C. 40802(c)(2)(B)*, further specifying that it does not apply to a local street, road, or school zone, as defined in *Veh.C. 40802(b)*; on prosecution's obligation to produce survey, see *supra*, §83.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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##### c. Statutory Prohibition.

2 Witkin Cal. Evid. Demo Evid § 85

[§ 85] Statutory Prohibition.

(1) *In General.* Veh.C. 40800 et seq. prohibits speed trap evidence as follows:

(a) A speed trap may not be used to arrest a person or secure evidence for the purpose of arrest or prosecution. (Veh.C. 40801.)

(b) Speed trap evidence is inadmissible in a prosecution under the Vehicle Code of a charge involving the vehicle's speed. (Veh.C. 40803(a).)

(c) An officer whose testimony is based on speed trap evidence is incompetent as a witness. (Veh.C. 40804(a).)

(d) A court is deprived of jurisdiction to convict if speed trap evidence is admitted. (Veh.C. 40805.)

(2) *Purpose of Statute.* The purpose of the speed trap statute is to prevent the local establishment of unreasonably low speed zones as an adjunct revenue source and to encourage observance of the traffic laws by a visible police presence. Nevertheless, a close reading of the statute indicates that "the Legislature's antipathy toward any radar-based prosecution of any speed law violation in any posted zone, where the prima facie speed limit is not justified by proof of a timely engineering survey, is absolute and unequivocal." (*People v. Studley* (1996) 44 C.A.4th Supp. 1, 3, 52 C.R.2d 461 [where traffic and engineering survey was not proved at trial, exclusion of all evidence of speed was compelled even though motorist was cited, by use of radar, for speed in excess of 50 miles per hour posted speed limit on *nonlocal* road].)

(3) *Burden of Proof on Prosecution.* Originally, case law promulgated the rule that violation of the speed trap provisions of the Vehicle Code was not an affirmative defense; the burden was placed on the prosecution to disclose any material evidence bearing on the potential applicability of the prohibitory legislation. (See *People v. Halopoff* (1976) 60 C.A.3d Supp. 1, 5, 7, 131 C.R. 531; *People v. Sterritt* (1976) 65 C.A.3d Supp. 1, 3, 135 C.R. 522; *People v. Flaxman* (1977) 74 C.A.3d Supp. 16, 19, 141 C.R. 799.)

A 1981 amendment codifies this rule: In a prosecution involving excessive speed as determined by the use of radar or similar electronic device, the prosecution must establish, as part of its prima facie case, that the evidence or testimony is not based on a speed trap. (Veh.C. 40803(b).)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General.* See *People v. Hardacre* (2004) 116 C.A.4th 1292, 1299, 11 C.R.3d 214, 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence*, Supp., §244A [speed trap exclusionary rules do not apply in prosecution for Vehicle Code offenses other than speeding violations, even if initial stop of vehicle that led to charges being brought was for speeding].

(2) *Purpose of Statute.* See *People v. Singh* (2001) 92 C.A.4th Supp. 13, 16, 17, 112 C.R.2d 74 [disagreeing with *People v. Studley* (1996) 44 C.A.4th Supp. 1, 52 C.R.2d 461, text, p. 101, to extent it would make speed trap rules applicable where officer, not relying on prima facie or posted speed limit, testifies that defendant was clocked on radar at speed in excess of maximum lawful limit].



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##### d. Effect of Proposition 8.

2 Witkin Cal. Evid. Demo Evid § 86

[§ 86] Effect of Proposition 8.

(1) *Abrogation by Proposition 8.* Speed trap evidence originally was prohibited by statute in California in 1923. (See *People v. Johnson* (1972) 29 C.A.3d Supp. 1, 3, 105 C.R. 212; *People v. Halopoff* (1976) 60 C.A.3d Supp. 1, 5, 131 C.R. 531; 14 Hastings L. J. 427; 43 Cal. L. Rev. 710; 29 So. Cal. L. Rev. 240.)

However, in *People v. Sullivan* (1991) 234 C.A.3d 56, 58, 285 C.R. 553, the court said: "We hold that *Vehicle Code* section 40803, subdivision (a), rendering evidence derived from a speed trap inadmissible, was abrogated by the Proposition 8 'Right to Truth in Evidence' provision contained in article I, section 28, subdivision (d), of the California Constitution." (On Proposition 8, see 1 Cal. Evidence (4th), Introduction, §§8, 9.)

The court explained its holding as follows:

"We can find no principled way to avoid the plain effect of section 28(d) upon the remedial provision at issue here. Section 40803, subdivision (a), purports to exclude evidence of the speed of a vehicle derived from a speed trap in all prosecutions under the Vehicle Code--despite the fact that such evidence may be relevant and otherwise admissible (*Evid. Code*, §210). Although the speed trap statutes may have once been 'firmly rooted in California law,' ... the explicit language of section 28(d) necessitates the conclusion that the constitutional amendment abrogated section 40803, subdivision (a)." (234 C.A.3d 63.)

(2) *Reenactment of Speed Trap Law.* In *People v. Sullivan*, *supra*, the court pointed out that the decision did not constitute the last word: "Should the Legislature deem it appropriate, it may, with the requisite majority and with a clear manifestation of its intent, reenact the longstanding remedial provisions of the speed trap laws and thereby override the mandate of section 28(d)." (234 C.A.3d 65.)

The 1992 Legislature responded by the enactment of *Veh.C. 40808*, stating that "Subdivision (d) of Section 28 of Article I of the California Constitution shall not be construed as abrogating the evidentiary provisions of this article." (See *People v. Goulet* (1992) 13 C.A.4th Supp. 1, 14, 17 C.R.2d 801 [with enactment of *Veh.C. 40808*, speed trap rules apply only to charges involving speed of a vehicle, and are not abrogated by Proposition 8]; *People v. Munoz* (1992) 11 C.A.4th 1190, 1192, 15 C.R.2d 21 [*Veh.C. 40808* applies to cases pending before its passage].)

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## IV. CHEMICAL AND PHYSICAL TESTS

## H. Polygraph ("Lie Detector").

## 1. Nature of Test.

2 *Witkin Cal. Evid. Demo Evid* § 87

[§ 87] Nature of Test.

The polygraph, popularly known as the lie detector, is an electrical device that, when attached to a person, registers and charts the person's changes in blood pressure and pulse, respiration, and perspiration while under questioning. Its principal use is in criminal investigation. More recently, a "lie detector" has additionally been defined as including a "deceptograph, voice stress analyzer, psychological stress evaluator, or any similar device." (*Govt.C. 3307* [right of private and public employees to refuse to take employer mandated test]; see 2 *Summary (9th), Agency and Employment*, §§197, 312.)

The theory is that the subject (usually a suspect or accused) undergoes emotional excitement when lying, and that, under skillful questioning by an expert, the lie detector record affords a reliable, though far from conclusive, indication of truthfulness or falsehood. (See 1 *McCormick* 5th, §206; 3A *Wigmore* (Chadbourn Rev.) §999; 49 *Hastings L. J.* 895 [admissibility in light of *Daubert v. Merrell Dow Pharmaceuticals* (1993) 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469, supra, §47]; 49 *Hastings L. J.* 925 [arguing that courts are reluctant to admit results even if they are reliable]; 29A *Am.Jur.2d* (1994 ed.), *Evidence* §1007 et seq.; 14 *Proof of Facts* 2d 14 [Reliability of Polygraph Examination]; 42 *Am.Jur.* Trials 313 [Uses, Techniques, and Reliability of Polygraph Testing]; 11 A.L.R.4th 733 [right of defendant to obtain test at public expense where necessary to prepare defense]; 89 A.L.R.4th 527 [employee's tort action against party administering test at request of actual or prospective employer]; 7 A.L.R.5th 143 [admissibility of polygraph or similar lie detector test results, or willingness to submit to test, on issues of coverage under insurance policy, or insurer's good faith belief that claim was not covered]; 10 A.L.R.5th 663 [admissibility of evidence of polygraph test results, or offer or refusal to take test, in action for malicious prosecution]; 140 A.L.R. Fed. 525 [admissibility in federal criminal cases postdating *Daubert*]; on regulation of polygraph examiners, see *B. & P.C. 9300* et seq.)

The majority of the courts as yet find insufficient certainty in the test to justify admission of its results as scientific evidence. (See *infra*, §89 et seq.) (On prohibition of compulsory polygraph examination of complaining witness in case involving force or threat in commission of sex offense as prerequisite to filing accusatory pleading, see *P.C. 637.4*; on validity of imposing submission to test as probation condition, see *People v. Miller* (1989) 208 C.A.3d 1311, 1314, 256 C.R. 587.)

**SUPPLEMENT:** [This section is current through the latest supplement]See 1 *McCormick* 6th, §206.

*Cross-Reference:* 3 *Summary* (10th), *Agency and Employment*, §§299, 351. *West's Key Number Digest*, Criminal Law k.388.5 et seq.



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#### H. Polygraph ("Lie Detector").

##### 2. Admission by Stipulation.

2 Witkin Cal. Evid. Demo Evid § 88

[§ 88] Admission by Stipulation.

(1) *Criminal Cases*. Because almost any incompetent evidence may be received when offered without objection (see 3 Cal. Evidence (4th), *Presentation at Trial*, §393), in a criminal case the prosecution and defendant may stipulate to the taking of the test and the admission in evidence of its results. (See *People v. Houser* (1948) 85 C.A.2d 686, 694, 193 P.2d 937; *People v. Reeder* (1976) 65 C.A.3d 235, 239, 135 C.R. 421 [attorney's authority to stipulate, and defendant's "personal imprimatur" by signing it]; *People v. Trujillo* (1977) 67 C.A.3d 547, 554, 136 C.R. 672, citing the text [no grounds shown for relief from stipulation]; 29A Am.Jur.2d (1994 ed.), *Evidence* §1008; 53 A.L.R.3d 1005 [admissibility of lie detector test by stipulation]; on statutory authorization for admission of test results, see *Ev.C.* 351.1(a), *infra*, §95.)

(2) *Civil Cases*. The rule governing criminal cases is equally applicable to civil cases. (See *Robinson v. Wilson* (1974) 44 C.A.3d 92, 99, 118 C.R. 569 [trial judge properly considered results of polygraph examination, even against minor plaintiff in paternity action, when stipulation on admissibility was properly made]; 39 Cal. L. Rev. 443.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
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#### H. Polygraph ("Lie Detector").

#### 3. Evidence Inadmissible Against Defendant.

##### a. Evidence of Test.

2 Witkin Cal. Evid. Demo Evid § 89

[§ 89] Evidence of Test.

"It is not at all unlikely that a popular belief has been formed from press, radio, television, stage and screen that the lie detector is an accomplishment of modern science the results of which are as reliable as those of fingerprinting, blood tests and ballistics. However, this is not correct. It is general knowledge among those familiar with the lie detector machines that the results are greatly dependent upon the training, experience and skill of the operators and that the results vary with different types of subjects." (*People v. Aragon* (1957) 154 C.A.2d 646, 658, 316 P.2d 370.)

The foregoing quotation states the generally accepted view of the authorities that the test lacks the necessary scientific acceptance for use of its results as proof. (See *People v. Wochnick* (1950) 98 C.A.2d 124, 127, 219 P.2d 70; *People v. Carter* (1957) 48 C.2d 737, 752, 312 P.2d 665, supra, §§10, 39 and infra, §91; *People v. Parrella* (1958) 158 C.A.2d 140, 147, 322 P.2d 83 [improper for prosecution to refer to test on cross-examination even though defendant mentioned it on direct]; *People v. Andrews* (1970) 14 C.A.3d 40, 45, 92 C.R. 49 [trial judge's reference to successful lie detector test by prosecution witness was error]; *People v. Schiers* (1971) 19 C.A.3d 102, 108, 96 C.R. 330 ["Evidence of the willingness of a party or witness to take a lie detector test or of the results of a lie detector test is inadmissible and is generally held to constitute prejudicial error"]; 1 McCormick 5th, §206; 3A Wigmore (Chadbourn Rev.) §999; 29A Am.Jur.2d (1994 ed.), Evidence §1007 et seq.; 88 A.L.R.3d 227 [propriety and prejudicial effect of informing jury that accused has taken polygraph test]; 15 A.L.R.4th 824 [same, as to witness].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Rufo v. Simpson* (2001) 86 C.A.4th 573, 603, 103 C.R.2d 492 [after defendant stated, on cross-examination, that he had not taken or failed polygraph examination, trial judge's instruction that jury was bound by that answer was sufficient to cure any contrary insinuations in counsel's questioning]; 1 McCormick 6th, §206; 10 A.L.R.6th 463 [admissibility of polygraph results in state criminal case following *Daubert v. Merrell Dow Pharmaceuticals* (1993) 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469, text, §47].



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#### 3. Evidence Inadmissible Against Defendant.

##### b. Admissions Connected With Test.

*2 Witkin Cal. Evid. Demo Evid § 90*

[§ 90] Admissions Connected With Test.

In *People v. Aragon* (1957) 154 C.A.2d 646, 316 P.2d 370, a bribery case, the charge was that defendant boxer had offered a bribe to another fighter to throw a fight. At the request of a boxing commissioner, defendant voluntarily took a test, and then held a conversation with the commissioner in which he made certain admissions. At the trial, in opening statement and examination of witnesses, the prosecutor repeatedly, over strong objection, brought up the conversation and mentioned the test that preceded it. *Held*, this was reversible error. "If the result of the lie detector test is inadmissible in the first instance, surely no one would contend that the results can be cloaked in the raiment of an accusatory statement and then slipped into evidence. If we were to hold that such a course is proper we would have sanctioned the receipt of damaging evidence that, but for such masking, could not be heard by the jury. We believe that the prosecution should not be permitted to introduce into evidence by indirection what would be highly improper if done directly." (154 C.A.2d 658.)

However, the court in *People v. McHenry* (1962) 204 C.A.2d 764, 769, 22 C.R. 621, held that admissions that defendant had voluntarily made in a conversation preparatory to a polygraph test were properly received into evidence.

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#### 3. Evidence Inadmissible Against Defendant.

##### c. Evidence of Refusal To Take Test.

2 Witkin Cal. Evid. Demo Evid § 91

[§ 91] Evidence of Refusal To Take Test.

Since an accused cannot be compelled to take the test, it is error to refer to the accused's refusal to submit to it. (*People v. Wochnick* (1950) 98 C.A.2d 124, 127, 219 P.2d 70; *People v. Carter* (1957) 48 C.2d 737, 752, 312 P.2d 665, supra, §§10, 39; see 95 A.L.R.2d 819 [propriety and prejudicial effect of comment or evidence as to accused's willingness to take lie detector test].)

In the *Carter* case, on a trial for murder, a previous suspect was allowed to testify that he had been willing to take a lie detector test (the implication being that *defendant* had refused and thereby indicated guilt). *Held*, this was error; because the test is not considered reliable enough to justify proof of its result, a defendant's unwillingness to take the test is without substantial probative value. "The suspect may refuse to take the test, not because he fears that it will reveal consciousness of guilt, but because it may record as a lie what is in fact the truth. A guilty suspect, on the other hand, may be willing to hazard the test in the hope that it will erroneously record innocence, knowing that even if it does not the results cannot be used as evidence against him." (48 C.2d 752.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
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3. Evidence Inadmissible Against Defendant.

d. Distinction: Collateral Use.

2 *Witkin Cal. Evid. Demo Evid* § 92

[§ 92] Distinction: Collateral Use.

In *People v. Lara* (1974) 12 C.3d 903, 117 C.R. 549, 528 P.2d 365, an investigating officer testified that the material witness on probable cause for defendant's arrest had submitted to a test and that this substantiated the officer's belief that the story was credible. The court said: "[W]e are cited to no authority holding such collateral use of the test for investigative purposes to be improper." (12 C.3d 909.) (See 92 A.L.R.3d 1317 [admissibility of polygraph evidence on issue of voluntariness of confession].)

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## IV. CHEMICAL AND PHYSICAL TESTS

## H. Polygraph ("Lie Detector").

## 3. Evidence Inadmissible Against Defendant.

## e. Evidence Inadmissible for Defendant.

## 2 Witkin Cal. Evid. Demo Evid § 93

[§ 93] Evidence Inadmissible for Defendant.

(1) *Inadmissible on Direct Examination.* The same objection of lack of scientific recognition (see *supra*, §89) applies to use of the test on behalf of the defendant in either a civil or criminal case. (See *United States v. Scheffer* (1998) 523 U.S. 303, 118 S.Ct. 1261, 1266, 140 L.Ed.2d 413, 421 [military rule excluding all polygraph evidence in court-martial proceedings does not abridge defendant's right to present defense; rule is "rational and proportional means of advancing the legitimate interest in barring unreliable evidence"]; *People v. Porter* (1950) 99 C.A.2d 506, 510, 222 P.2d 151 [no error to deny request of defendant that court submit him to test]; *People v. Spigno* (1957) 156 C.A.2d 279, 280, 319 P.2d 458; *Gideon v. Gideon* (1957) 153 C.A.2d 541, 546, 314 P.2d 1011 [divorce; defendant husband contended that lie detector tests he took established truth of his testimony]; *People v. Thornton* (1974) 11 C.3d 738, 763, 114 C.R. 467, 523 P.2d 267 [evidence of defendant's willingness to take test, offered as "badge of innocence," was properly excluded under reasoning of *People v. Carter* (1957) 48 C.2d 737, 312 P.2d 665, *supra*, §§10, 39, 91]; *People v. Adams* (1975) 53 C.A.3d 109, 112, 125 C.R. 518 [evidence of defendant's successful taking of test excluded; great majority of decisions in all jurisdictions hold tests inadmissible]; *In re Joaquin S.* (1979) 88 C.A.3d 80, 85, 151 C.R. 508 [test results showing that minor had not participated in robberies that were basis for his commitment to Youth Authority held inadmissible in proceeding to vacate order of commitment].)

The court in the *Gideon* case, *supra*, commented on the danger that each witness could repeat his or her testimony to an expert: "Then the expert could testify that that witness' testimony was true when tested by the lie detector. And then the judge or jury charged with finding the truth could be confounded by as many lie-detector opinions as to whether or not witnesses who gave conflicting testimony told the truth as there were conflicts." (153 C.A.2d 546.)

(2) *Inadmissible on Cross-Examination.* An unsuccessful attempt was made to evade the rule by cross-examination in *People v. Paul* (1978) 78 C.A.3d 32, 144 P.2d 431. The prosecution introduced a tape recording of defendant's police interrogation that included statements indicating that he was willing to take a test and had voluntarily done so. On cross-examination of the interrogating officer, defense counsel sought to have the test results admitted on the ground that the prosecution had opened up the issue. The judge rejected the offer, struck out all references to the test, and instructed the jury that no consideration of the test should enter into their deliberations. *Held*, the error in originally allowing reference to the test, with no objection from defense counsel, was not prejudicial. "It would appear that the trial strategy of defense counsel backfired." (78 C.A.3d 38.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Inadmissible on Direct Examination.* See 36 Cal. Western L. Rev. 514 [*United States v. Scheffer*].



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## CHAPTER VII - Demonstrative, Experimental, and Scientific Evidence

## IV. CHEMICAL AND PHYSICAL TESTS

## H. Polygraph ("Lie Detector").

## 4. Witherspoon Rule and Legislative Repudiation.

## a. Witherspoon Case: Blanket Exclusion Rule Rejected.

2 Witkin Cal. Evid. Demo Evid § 94

[§ 94] Witherspoon Case: Blanket Exclusion Rule Rejected.

The "unbroken line of appellate decisions in California stating a blanket exclusion" of polygraph evidence was challenged in *Witherspoon v. Superior Court* (1982) 133 C.A.3d 24, 183 C.R. 615. Petitioner, awaiting trial for armed robbery, moved under *Ev.C. 402* for a pretrial evidentiary hearing on the preliminary fact of voluntariness of a confession alleged to have been made by him. He proposed to prove the validity and admissibility of a polygraph examination administered to him on that issue. The trial judge denied the motion on the ground that the results of any such examination would be inadmissible, and petitioner sought mandamus to compel the trial court to hold the hearing. *Held*, writ granted; on a proper showing such evidence may be admitted.

(a) The California rule is based on the declaration in the 1923 case of *Frye v. United States* (supra, §42 et seq.) that reliability of the results of a polygraph examination has not been established. But in none of the California cases is there any detailed discussion of the basis for this conclusion. The case law has failed to identify the "scientific field" in which acceptance must be achieved, and suggests a lack of understanding of a test that is widely accepted for use in many areas of government and society. (133 C.A.3d 28, 29.)

(b) The California Evidence Code contains no positive rule that provides a blanket exclusion of such evidence. (133 C.A.3d 29, 30, 31.) "The consistent and persistent rejection of polygraph evidence by the courts appears at this time to be based more on considerations of policy rather than any demonstrated lack of reliability of the test. These policy considerations in turn appear to be based on the fear that evidence of the results of polygraph examinations will tend to usurp the function of the trier of fact, and that lay juries would tend to be overly impressed with the results of polygraph examinations. Whatever may be the validity of those considerations they are more properly matters for legislative rather than judicial determination." (133 C.A.3d 31.)

(c) Petitioner offered to show "that a qualified polygraph examiner can express a professional, expert and reliable opinion concerning the analysis of the examination, based on broad experience in examining a large number of individuals and verifying the results against objective criteria." He also offered the results of a number of studies demonstrating the accuracy and significance of such examinations. (133 C.A.3d 33.) There is no sound legal basis for denying him the opportunity "to persuade a trial judge of the expert qualifications of the polygraph examiner and of the validity of the basic premises upon which the examiner's opinion is based." (133 C.A.3d 33.) *Ev.C. 801* et seq. provide adequate machinery for exclusion of opinion testimony of unqualified persons or the proffering of opinions that lack a proper basis or foundation; *Ev.C. 400* et seq. provide adequate procedure for barring evidence that proceeds from unproven necessary preliminary facts; and *Ev.C. 352* provides the court with ample ability "to prevent esoteric ventures

into the unknown." (133 C.A.3d 34.)

The opinion adds: "We are not unmindful of the fact that the use of the results of polygraph examinations as evidence may pose some procedural problems which will have to be dealt with. Those problems, however, can be resolved by legislation which either totally excludes evidence of the results of polygraph examinations or, on the other hand, establishes a procedure which prescribes when and under what circumstances such evidence may be used. Until such legislation is forthcoming, however, it is our opinion that evidence of the results of a polygraph examination can be dealt with under the provisions of the Evidence Code and the procedures which presently exist for other types of physical and mental examinations of individuals involved in litigation." (133 C.A.3d 35.) (See 14 *Pacific L. J.* 1130.)

**SUPPLEMENT:** [This section is current through the latest supplement]





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### IV. CHEMICAL AND PHYSICAL TESTS

#### H. Polygraph ("Lie Detector").

#### 4. Witherspoon Rule and Legislative Repudiation.

##### b. Legislative Repudiation.

2 Witkin Cal. Evid. Demo Evid § 95

[§ 95] Legislative Repudiation.

(1) *Criminal Proceedings*. Proposition 8 (the "Victim's Bill of Rights") allows the Legislature by a two-thirds vote of each house to provide for exclusion of relevant evidence in a criminal proceeding or juvenile court hearing on a criminal offense. (See 14 *Pacific L. J.* 1128; 1 *Cal. Evidence* (4th), *Introduction*, §§8, 9.) Pursuant to this authorization, the 1983 Legislature added *Ev.C. 351.1* nullifying the holding in *Witherspoon v. Superior Court* (1982) 133 *C.A.3d* 24, 183 *C.R.* 615, *supra*, §94 (see 15 *Pacific L. J.* 588) as follows:

(a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or a reference to an offer to take, failure to take, or the taking of a polygraph examination are inadmissible in criminal proceedings. Included in this exclusionary rule are pretrial and postconviction motions and hearings and trials or hearings of juveniles for criminal offenses (whether heard in juvenile or adult court). However, the exclusionary rule does not apply if all parties stipulate to the admission of the polygraph. (*Ev.C. 351.1(a)*; see *In re Aontae D.* (1994) 25 *C.A.4th* 167, 173, 30 *C.R.2d* 176 [statute applicable in proceeding under *Welf.C.* 602 (adjudication of wardship based on criminal violation; see 10 *Summary* (9th), *Parent and Child*, §728 et seq.)].)

(b) The statute is not intended to exclude "statements made during a polygraph examination which are otherwise admissible." (*Ev.C. 351.1(b)*.)

*People v. Seldomridge* (1984) 154 *C.A.3d* 362, 365, 201 *C.R.* 377, pointing out that the statute merely changed a rule of evidence, held that it could properly be applied to cases arising prior to its enactment without violating the constitutional provision on ex post facto laws.

(2) *Civil Proceedings*. Although *Ev.C. 351.1* applies only to criminal proceedings specifically, its enactment by the Legislature nullifying the *Witherspoon* decision "reflects a continuing doubt in the law about the reliability of polygraph examination results." (*Arden v. State Bar* (1987) 43 *C.3d* 713, 723, 239 *C.R.* 68, 739 *P.2d* 1236 [attorney's proffered polygraph examination evidence in State Bar disciplinary proceeding inadmissible in absence of stipulation between attorney and State Bar].)

(3) *Constitutionality*. *Ev.C. 351.1* is constitutional. (See *People v. Kegler* (1987) 197 *C.A.3d* 72, 89, 242 *C.R.* 897 [no violation of defendant's due process right to present exculpatory evidence or his right to compulsory process]; *In re Aontae D.*, *supra*, 25 *C.A.4th* 176 [no violation of accused minor's due process right to present exculpatory evidence]; *People v. Fudge* (1994) 7 *C.4th* 1075, 1122, 1123, 31 *C.R.2d* 321, 875 *P.2d* 36 [in penalty phase of murder prosecution,

no violation of defendant's right to present all relevant mitigating evidence[.])

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Criminal Proceedings*. See *People v. Ayala* (2000) 23 C.4th 225, 263, 96 C.R.2d 682, 1 P.3d 3 [in capital murder prosecution, trial judge did not err in refusing defendant's request to compel prosecution witness to undergo polygraph examination; results would not be admissible under *Ev.C. 351.1*, and thus requiring test would be idle act]; *People v. Basuta* (2001) 94 C.A.4th 370, 390, 114 C.R.2d 285 [in prosecution of day care operator for fatal assault on child, police officer's testimony to effect that defendant's housekeeper had agreed to take polygraph examination resulted in prejudicial error; housekeeper's credibility was crucial to prosecution's case, and, under circumstances, reasonable juror could conclude that housekeeper had passed examination and therefore was worthy of belief]; *People v. Lee* (2002) 95 C.A.4th 772, 790, 115 C.R.2d 828 [in murder prosecution, trial judge erred in admitting polygraph examination of witness and officer's subsequent interrogation of witness based on examination results; admission was purportedly to show witness' state of mind when he changed story and admitted seeing defendant commit killing, but there is no state of mind exception in *Ev.C. 351.1*].

(a) *General rule of exclusion:*

*Cross-Reference:* 10 *Summary* (10th), *Parent and Child*, §731 et seq.(3) *Constitutionality*. See *People v. Maury* (2003) 30 C.4th 342, 413, 133 C.R.2d 561, 68 P.3d 1 [in capital murder case, exclusion of evidence that defendant passed polygraph examination did not violate his constitutional right to present defense]; *People v. Wilkinson* (2004) 33 C.4th 821, 849, 850, 16 C.R.3d 420, 94 P.3d 551 [in prosecution for battery and driving under influence, defendant was not deprived of right to present defense by trial judge's refusal to grant hearing in which defendant could demonstrate reliability of polygraph evidence; in light of conflicting views of experts and courts on value of polygraph evidence, rule of per se exclusion embodied in *Ev.C. 351.1* is not unreasonable].



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## CHAPTER VII - Demonstrative, Experimental, and Scientific Evidence

## IV. CHEMICAL AND PHYSICAL TESTS

## I. Truth Serum.

## 1. Nature of Test.

2 *Witkin Cal. Evid. Demo Evid* § 96

## [§ 96] Nature of Test.

Another method of lie detection is by the use of drugs (chiefly sodium amytal and sodium pentothal) that deprive the subject of power to conceal or fabricate while undergoing questioning. Like the polygraph (*supra*, §87 et seq.), truth serum is not yet accepted as a scientific technique that uniformly produces truthful answers. Thus, the statements of the subject are not admissible against him or her, and cannot be offered by the subject for the additional reason that they are self-serving hearsay. (See *People v. McNichol* (1950) 100 C.A.2d 554, 556, 224 P.2d 21; *People v. Cullen* (1951) 37 C.2d 614, 626, 234 P.2d 1; *People v. Johnson* (1973) 32 C.A.3d 988, 1001, 109 C.R. 118 [confession given under influence of sodium amytal should have been excluded]; 1 McCormick 5th, §206; 3A Wigmore (Chadbourn Rev.) §998; 42 Cal. L. Rev. 880; 69 Harv. L. Rev. 683.)

The general rule excluding the answers is reaffirmed in *People v. Jones* (1959) 52 C.2d 636, 343 P.2d 577, where defendant's offer to repeat his testimony under truth serum was rejected. "The courts have consistently held that whether the test is a polygraph test, or a sodium amytal or sodium pentothal test, the results are not such as to be admissible for or against the defendant because of a lack of scientific certainty about the results." (52 C.2d 653, citing the text.)

Similarly, in *Ramona v. Superior Court* (1997) 57 C.A.4th 107, 66 C.R.2d 766, defendant was entitled to summary judgment in an action by his daughter alleging childhood sexual abuse. The only evidence of abuse was based on memories the daughter claimed to have recalled following sodium amytal therapy, or memories she recalled 2 years later, which also may have been tainted. (57 C.A.4th 121, 123.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 1 McCormick 6th, §206. *West's Key Number Digest*, Criminal Law k.388.10



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### IV. CHEMICAL AND PHYSICAL TESTS

#### I. Truth Serum.

#### 2. Distinction: Opinion Based on Test.

2 Witkin Cal. Evid. Demo Evid § 97

[§ 97] Distinction: Opinion Based on Test.

A dent in the exclusionary rule was made in *People v. Jones* (1954) 42 C.2d 219, 225, 266 P.2d 38. Defendant, charged with lewd acts with a child, offered opinion testimony of a psychiatrist that he was not a sexual deviate. This was held admissible even though the doctor's opinion was formed after an examination of the defendant under sodium pentothal. Defendant's answers were of course inadmissible and were not offered for proof of their truth; the evidence admitted was the doctor's expert analysis of those answers. "The inference that Jones did not commit the offenses charged was to be drawn, if at all, from the psychiatrist's opinion in regard to the sexual propensities of Jones and not from any answers given by him while under the influence of the drug. Jones' responses were the means to an end, the end being proof of the fact that Jones was not a sexual deviate." (42 C.2d 226.)

The principle of the *Jones* case was followed in *People v. Cartier* (1959) 51 C.2d 590, 335 P.2d 114. Defendant offered to prove that Dr. L examined him under sodium pentothal and would testify that, from this examination, he was of the opinion that defendant was insane at the time of the crime. Held, it was error to sustain an objection. (51 C.2d 601.) (See *People v. Hiser* (1968) 267 C.A.2d 47, 61, 72 C.R. 906 [medical expert was allowed to testify to reasons for his opinions, but tape recordings of sodium pentothal and hypnotic interviews were properly excluded in judge's discretion]; 41 A.L.R.3d 1369 [admissibility of results of truth serum and other tests to support physician's testimony]; 1 Cal. Evidence (4th), Opinion Evidence, §§31 et seq., 57.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## IV. CHEMICAL AND PHYSICAL TESTS

## J. Voiceprint.

## 1. Nature of Test.

2 *Witkin Cal. Evid. Demo Evid* § 98

## [§ 98] Nature of Test.

Voiceprint identification is based on the comparison of graphic representations ("spectrograms") made of human voices. A spectrograph separates the voice sounds into three component elements--time, frequency and intensity--and plots these variables across electronically sensitive paper. The result is a spectrogram of the speaker's acoustical signal, with certain cue words, e.g., "the," "me," "on," "is," "I" and "it," serving as a basis of comparison for a known voice and an unknown voice. "An examiner then visually compares the spectrograms of the same words, as spoken, and also listens to the two voices. Based upon these visual and aural comparisons, the examiner states his opinion whether or not the voices, known and unknown, are the same. ... Since the identification process is essentially an exercise in pattern matching, the examiner's opinion is to a large extent a subjective one based upon the relative aural similarity or dissimilarity of the two voices and visual comparison of their spectrograms. ... In some instances, the examiner is unable to declare positively either that there is a match or nonmatch of the sample tests, in which event no opinion is rendered." (*People v. Kelly* (1976) 17 C.3d 24, 29, 130 C.R. 144, 549 P.2d 1240, supra, §42; see 1 McCormick 5th, §207; 19 Proof of Facts 423 [voicegram identification evidence]; 54 Am.Jur. Trials 1 [same]; 17 A.L.R.5th 851 [jury instructions on voice identification testimony].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 1 McCormick 6th, §207. *West's Key Number Digest*, Criminal Law k.475.3



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### IV. CHEMICAL AND PHYSICAL TESTS

#### J. Voiceprint.

#### 2. Admissibility of Evidence.

2 Witkin Cal. Evid. Demo Evid § 99

[§ 99] Admissibility of Evidence.

(1) *Conflicting Decisions*. Admissibility of voiceprint evidence has been the subject of conflicting decisions in California and elsewhere. (See *People v. King* (1968) 266 C.A.2d 437, 456, 460, 72 C.R. 478 [rejecting testimony as founded on experimental technique not generally accepted by scientific community]; *Hodo v. Superior Court* (1973) 30 C.A.3d 778, 780, 786, 106 C.R. 547 [admitting testimony on theory that technique had gained sufficient acceptance by experts]; *People v. Law* (1974) 40 C.A.3d 69, 84, 114 C.R. 708 [*King* view reaffirmed, and voiceprint testimony inadmissible to identify disguised or mimicked voice]; *People v. Kelly* (1976) 17 C.3d 24, 32, 34, 130 C.R. 144, 549 P.2d 1240, supra, §42 [review of California, out-of-state, and federal cases]; 97 A.L.R.3d 294 [admissibility and weight of voiceprint evidence].)

(2) *Kelly Test Governs*. In *People v. Kelly*, supra, the court first laid down a conservative test for determining reliability of a new scientific technique, and then held the evidence inadmissible because of three infirmities in the testimony of Nash, the sole expert witness on the reliability issue:

(a) "[W]e think it questionable whether the testimony of a single witness alone is ever sufficient to represent, or attest to, the views of an entire scientific community regarding the reliability of a new technique. Ideally, resolution of the general acceptance issue would require consideration of the views of a typical cross-section of the scientific community, including representatives, if there are such, of those who oppose or question the new technique." (17 C.3d 37.)

(b) A serious question existed about the witness' ability fairly and impartially to assess the position of the scientific community because he was one of the leading proponents of voiceprint analysis; "he has virtually built his career on the reliability of the technique." (17 C.3d 38.)

(c) There was doubt as to whether he possessed the necessary academic qualifications to express a competent opinion on the issue of whether the voiceprint technique was generally accepted in the scientific community; his credentials were those of a technician and law enforcement officer, not a scientist. (17 C.3d 39.) "In considering the position of the scientific community, a court is bound to let scientists speak for themselves." (17 C.3d 40.)

The opinion concluded with the statement that the prosecution failed to establish reliability of the evidence in this case, but added: "We emphasize, however, that our decision is not intended in any way to foreclose the introduction of voiceprint evidence in future cases. We simply circumscribe, carefully and deliberately, the admission of evidence born of new techniques until the time when there is demonstrated solid scientific approval and support of the new methods.

... Although the present record is insufficient to justify the admissibility of voiceprint evidence, the future proponent of such evidence may well be able to demonstrate in a satisfactory manner that the voiceprint technique has achieved that required general acceptance in the scientific community." (17 C.3d 41.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Conflicting Decisions*. See 95 A.L.R.5th 471 [superseding 97 A.L.R.3d 294, text, p. 111].



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### IV. CHEMICAL AND PHYSICAL TESTS

#### K. Hypnosis.

1. Exclusion of Testimony of Hypnotized Witness.
  - a. Promulgation of Rule.

*2 Witkin Cal. Evid. Demo Evid § 100*

[§ 100] Promulgation of Rule.

In *People v. Shirley* (1982) 31 C.3d 18, 181 C.R. 243, 723 P.2d 1354, the court laid down a strict rule excluding testimony of a witness who has undergone hypnosis for the purpose of restoring his or her memory of the events in issue.

Defendant was charged with rape and forcible oral copulation, and convicted of rape. C, the complaining witness, gave testimony that was in many instances vague, changeable, self-contradictory, or prone to unexplained lapses of memory. Prior to the trial, and more than 3 months after the events in question, the deputy district attorney had C hypnotized by another deputy district attorney, and she made statements under hypnosis that differed significantly from her testimony at the preliminary hearing. Counsel for defendant then moved to exclude all of her testimony that resulted from the hypnosis, but the trial judge denied the motion, ruling that hypnosis affects only the weight of the testimony. C then testified to a number of matters which she had been unable to recall when she gave statements to the police and when she testified at the preliminary hearing. The defense called Dr. S, a psychiatrist with extensive training in hypnosis, who gave his expert opinion that there is no way of assessing the reliability of something produced by hypnosis. The prosecution did not discredit S's opinion and did not call any experts. *Held*, conviction reversed.

(a) *Preliminary note on inadmissibility of exculpatory statements.* Evidence of statements made under hypnosis that are favorable to the defendant have uniformly been excluded, and *People v. Blair* (1979) 25 C.3d 640, 665, 159 C.R. 818, 602 P.2d 738, adopted this rule for *California*. (31 C.3d 33.) The opinions generally rely on the *Kelly* approach, holding that the scientific community has not accepted such evidence as reliable. (31 C.3d 34; see *supra*, §42 et seq.)

(b) *Inadmissibility of testimony of witness whose memory has been refreshed.*

(1) In the last 2 decades, a considerable body of case law has been developed on this issue. The early cases held that the fact of hypnosis goes only to the weight of the evidence; later cases, taking notice of the dangers of using hypnosis, devised elaborate safeguards. (31 C.3d 36, 37, 38.)

(2) These safeguards do not avoid all of the risks, and even adequate requirements could inject undue delay and confusion into the judicial process. (31 C.3d 39, 40.) Hence: "[W]e join instead a growing number of courts that have abandoned any pretense of devising workable 'safeguards' and have simply held that hypnotically induced testimony is so widely viewed as unreliable that it is inadmissible under the *Frye* test. This disposition, of course, is consistent with the above-discussed case law uniformly excluding evidence of the truth of statements made under hypnosis." (31 C.3d



40.) From a review of the later cases (31 C.3d 40 et seq.), it appears that the correct analysis of the problem is to determine whether hypnotically recalled testimony is subject to the *Kelly* rule, and if so, whether it meets the test of that rule. (31 C.3d 51.)

(3) The contention that hypnotizing a witness to improve his or her memory is like any other method of refreshing a witness' recollection is unsound. "[T]he hypnotic process does more than permit the witness to retrieve real but repressed memories; it actively contributes to the formation of pseudomemories, to the witness' abiding belief in their veracity, and to the inability of the witness (or anyone else) to distinguish between the two. ... And if the testimony is thus only as reliable as the hypnotic process itself, it must be judged by the same standards of admissibility." (31 C.3d 53.) *People v. Diggs* (1980) 112 C.A.3d 522, 530, 169 C.R. 386, properly used this approach, but improperly determined that the evidence was reliable on the opinion of one expert. (31 C.3d 53, 54, and footnote 32, disapproving that part of *Diggs*.)

(4) To determine whether such evidence satisfies the *Kelly* standard it is necessary to examine the published writings in scholarly treatises and journals. "From this review it clearly appears that major voices in the scientific community oppose the use of hypnosis to restore the memory of potential witnesses, with or without procedural safeguards, on the ground of its intrinsic unreliability. This unreliability is due both to certain properties of human memory and to factors inherent in the nature of hypnosis." (31 C.3d 56; see 31 C.3d 57 et seq. for detailed analysis of published writings.) "We therefore hold, in accord with the decisions discussed above ... , that the testimony of a witness who has undergone hypnosis for the purpose of restoring his memory of the events in issue is inadmissible as to all matters relating to those events, from the time of the hypnotic session forward." (31 C.3d 66.)

(c) *Limitations on rule.*

(1) A previously hypnotized witness is not incompetent in the strict sense of being unable to express himself or herself comprehensibly or understand his or her duty to tell the truth, or of lacking the general capacity both to perceive and remember. "Accordingly, if the prosecution should wish to question such a witness on a topic *wholly unrelated* to the events that were the subject of the hypnotic session, his testimony as to that topic would not be rendered inadmissible by the present rule." (31 C.3d 67.)

(2) When the defendant submits to pretrial hypnosis he or she may elect to take the stand and the resulting testimony will be admissible. This exception is necessary to protect the fundamental right of an accused to testify in his or her own behalf. (31 C.3d 67; see *infra*, §103.)

(3) The use of hypnosis by the police for investigative purposes is not foreclosed, and evidence discovered by such an investigation is not ipso facto inadmissible. However, a person who has been hypnotized for investigative purposes will not be allowed to testify as a witness to the events that were the subject of the hypnotic session. (31 C.3d 67, 68.)

(d) *Test of reversible error.* The effect of error in admitting such testimony is judged under the probability test of *People v. Watson* (1956) 46 C.2d 818, 299 P.2d 243, 6 Cal. Crim. Law (3d), *Reversible Error*, §7. (31 C.3d 68, 70.) Applying that test, the error in admitting C's testimony was prejudicial, because it constituted virtually the sole incriminating evidence against defendant. (31 C.3d 70.)

One justice concurred in the judgment solely because the hypnotic session was conducted by a deputy district attorney rather than a trained neutral professional. (31 C.3d 72.) Another justice, also concurring in the judgment, nevertheless felt that the majority should not have adopted the sweeping "per se" rule laid down. (31 C.3d 74, 75, 76.) He also saw no basis for the exception allowing the testimony of previously hypnotized defendants. (31 C.3d 77.) (See 1 McCormick 5th, §206; 20 Cal. Western L. Rev. 332; 21 *Loyola L.A. L. Rev.* 635 [use of hypnosis in criminal trials]; 14 Southwestern U. L. Rev. 777; 1983 A.S. 204; 1985 A.S. 817; 31 A.L.R.4th 1239 [state decisions prior to *Shirley*]; 16 A.L.R.5th 841 [sufficiency of evidence that witness was hypnotized].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 1 McCormick 6th, §206; 27 *Pepperdine L. Rev.* 193 [arguing that testimony from witness with multiple personality disorder should be excluded because of its connection with hypnosis]. *West's Key Number Digest*, Criminal Law k.418.10; Witnesses k.257.10



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#### K. Hypnosis.

1. Exclusion of Testimony of Hypnotized Witness.
  - b. Reaffirmation of Rule.

2 Witkin Cal. Evid. Demo Evid § 101

#### [§ 101] Reaffirmation of Rule.

In *People v. Guerra* (1984) 37 C.3d 385, 208 C.R. 162, 690 P.2d 635, the court rejected a challenge to the exclusionary rule based on the contention that subsequent developments in the scientific literature and the case law had undermined its foundations.

(a) *Recent scientific literature.* It is not the function of the court to resolve disputes within the scientific community or to determine whether posthypnotic testimony is reliable as a matter of scientific fact. The courts view the professional literature on hypnosis as evidence, not of the actual reliability of the new scientific technique, but of its acceptance in the scientific community. (37 C.3d 418.) And a review of recent scientific studies by two distinguished scholars identifies four principal effects of using hypnosis to restore memory that render it inherently unreliable:

(1) "[T]he demand characteristics of the process cannot be eliminated; for example, when as frequently occurs, the police ask to hypnotize a witness whom they have already questioned in some detail, the witness naturally infers there must be additional useful information 'stored' in his memory that can be 'retrieved' by the hypnosis." (37 C.3d 422.)

(2) "[T]he subject (and often the police hypnotist as well) shares a widespread but erroneous belief that hypnotized persons always tell the truth." (37 C.3d 422.)

(3) The videotape technique commonly used by law enforcement hypnotists "gives the subject an apparently 'scientific' rationale for believing the reality of every 'memory' that may occur to him during hypnosis." (37 C.3d 422.)

(4) "[E]ven if the hypnotist does not know all the facts of the crime under investigation, he will normally have a hypothesis about what happened in the case that it may be difficult for him to avoid communicating to the subject." (37 C.3d 422.)

The court concluded on this point that "it is evident in the light of the recent literature that the consensus of the scientific community on the reliability of hypnotically induced testimony remains unchanged since *Shirley*." (37 C.3d 424.)

(b) *Recent case law.* Although the courts of several states have declined to follow *People v. Shirley* (1982) 31 C.3d 18, 181 C.R. 243, 723 P.2d 1354, supra, §100, they sharply disagree among themselves as to their holdings, and offer no rationale that has not already been considered and rejected by other cases. (37 C.3d 425.) In contrast, the basic rule

adopted in *Shirley* "continues to draw new adherents." (37 C.3d 426, listing a number of decisions.) (See *People v. Brown* (1985) 40 C.3d 512, 527, 230 C.R. 834, 726 P.2d 516 [following *Shirley* and *Guerra*; on reversal by United States Supreme Court on other grounds, see *California v. Brown* (1987) 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934, 3 Cal. Crim. Law (3d), Punishment, §495]; *People v. Miller* (1990) 50 C.3d 954, 984, 269 C.R. 492, 790 P.2d 1289 [admission of witness' posthypnosis identification of defendant was improper under *Shirley*, but constituted harmless error]; 77 A.L.R.4th 927 [hypnotically refreshed or enhanced testimony].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER VII - Demonstrative, Experimental, and Scientific Evidence

### IV. CHEMICAL AND PHYSICAL TESTS

#### K. Hypnosis.

1. Exclusion of Testimony of Hypnotized Witness.
  - c. Rule Retroactive.

2 Witkin Cal. Evid. Demo Evid § 102

[§ 102] Rule Retroactive.

(1) *Conflict in Courts of Appeal. People v. Shirley* (1982) 31 C.3d 18, 181 C.R. 243, 723 P.2d 1354, *supra*, §100, left open the question of retroactive or prospective operation of the exclusionary rule: "The principles stated in this opinion will govern the admissibility of the testimony of any witness who submits to pretrial hypnosis after the date of this decision. We take no position at this time as to the application of those principles to witnesses hypnotized before the date of this decision." (31 C.3d 67, footnote 53.)

Several Court of Appeal opinions dealt inconclusively with the issue. (See *People v. Williams* (1982) 132 C.A.3d 920, 925, 183 C.R. 498 [favoring view that it should not be given a retroactive application]; *People v. Parrison* (1982) 137 C.A.3d 529, 538, 187 C.R. 123 [noting *Williams* decision and pendency of issue before Supreme Court and rejecting defendant's reliance on *Shirley*]; *People v. Glaude* (1983) 141 C.A.3d 633, 639, 190 C.R. 479 [assuming that rule was retroactive, admission of evidence was harmless].)

(2) *Resolution by Supreme Court: Rule Retroactive.* In *People v. Guerra* (1984) 37 C.3d 385, 208 C.R. 162, 690 P.2d 635, *supra*, §101, the court, on a review of all of the significant cases dealing with the determination of retroactive or prospective operation (37 C.3d 399 et seq.), and an analysis of the relevant factors as applied to the *Shirley* rule (37 C.3d 406 et seq.), concluded that the rule should apply to all cases not yet final; i.e., neither good faith reliance on prior law or accepted practice, nor severe impact on the administration of justice, required prospective application. (37 C.3d 413.) *People v. Williams, supra*, was disapproved. (37 C.3d 413, footnote 24.) The court added:

"We find further support for our holding in the fact that in virtually every sister state in which hypnotically induced testimony has been declared inadmissible, the rule has also been applied in cases pending on appeal at the time it was adopted." (37 C.3d 413.) (See *People v. Brown* (1985) 40 C.3d 512, 527, 230 C.R. 834, 726 P.2d 516 [applying *Guerra* rule, but holding that admission of hypnotized witness' testimony was harmless error; on reversal by United States Supreme Court on other grounds, see *California v. Brown* (1987) 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934, 3 Cal. Crim. Law (3d), *Punishment*, §495].)

One justice dissented, quoting extensively from *People v. Williams, supra*, on the "devastating" effect of the retroactive rule on pending cases. (37 C.3d 434, 435.) He also expressed apprehension concerning the majority's refusal to rule out the possible application of the holding in a collateral attack on a *final judgment*. (See majority opinion, 37 C.3d 413, footnote 24: "we do not reach the question whether the *Shirley* rule applies on collateral attack to cases now final.")

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## K. Hypnosis.

## 2. Hypnotized Defendant's Right To Present Evidence.

2 Witkin Cal. Evid. Demo Evid § 103

[§ 103] Hypnotized Defendant's Right To Present Evidence.

In *Rock v. Arkansas* (1987) 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37, defendant, charged with manslaughter in the death of her husband, was unable to remember the precise details of the shooting. At her attorney's suggestion, she was hypnotized twice by a licensed neuropsychologist, who recorded the sessions on tape. She did not relate any new information during the sessions, but subsequently remembered that, although she had not held her finger on the trigger, the handgun had discharged during a scuffle with her husband. The defense introduced testimony by a gun expert that the gun was defective and prone to fire without the trigger being pulled. The trial judge ruled that, under Arkansas law, no hypnotically refreshed testimony would be admitted, and thus limited defendant's description of the events surrounding the shooting to a reiteration of the sketchy information contained in the neuropsychologist's prehypnosis notes. *Held*, Arkansas' per se rule excluding all posthypnosis testimony violated the accused's constitutional right to testify on her own behalf.

(a) An accused's right to testify is derived from the Due Process Clause of the Fourteenth Amendment, the *Compulsory Process Clause of the Sixth Amendment*, and the *Fifth Amendment*. (107 S.Ct. 2709, 2710, 97 L.Ed.2d 46, 47.) State restrictions on that right, designed to ensure trustworthy evidence, must not be arbitrary or disproportionate to the purposes they are designed to serve. (107 S.Ct. 2711, 97 L.Ed.2d 49.) The Arkansas rule, which prohibits the admission of hypnotically refreshed testimony on the ground that such testimony is *always* unreliable, limits an accused's testimony to matters that can be recalled before hypnosis. "This rule operates to the detriment of any defendant who undergoes hypnosis, without regard to the reasons for it, the circumstances under which it took place, or any independent verification of the information it produced." (107 S.Ct. 2712, 97 L.Ed.2d 49.)

(b) Application of the Arkansas rule here had a significant adverse effect on petitioner's ability to testify: "It virtually prevented her from describing any of the events that occurred on the day of the shooting, despite corroboration of many of those events by other witnesses. Even more importantly, under the court's rule petitioner was not permitted to describe the actual shooting except in the words contained in Doctor Back's notes. The expert's description of the gun's tendency to misfire would have taken on greater significance if the jury had heard petitioner testify that she did not have her finger on the trigger and that the gun went off when her husband hit her arm." (107 S.Ct. 2712, 97 L.Ed.2d 49, 50.)

(c) The inaccuracies of hypnosis can be reduced by certain procedural safeguards, such as requiring that it be performed by a psychologist or psychiatrist having special training and who is independent of the investigation; conducting the session in a neutral setting with no one present but the hypnotist and subject; and recording all interrogations before, during, and after the sessions. And the "more traditional means of assessing accuracy of

testimony" remain applicable: verification by corroborating evidence of information recalled as a result of hypnosis; cross-examination; expert testimony concerning the risks of hypnosis; and cautionary instructions. Here, the defective condition of the gun corroborated defendant's posthypnosis recollection, and the tape recordings provided grounds for concluding that the neuropsychologist had not suggested responses with leading questions. (107 S.Ct. 2714, 97 L.Ed.2d 51, 52.) "Those circumstances present an argument for admissibility of petitioner's testimony in this particular case, an argument that must be considered by the trial court." (107 S.Ct. 2714, 97 L.Ed.2d 52, 53.)

(d) "We are not now prepared to endorse without qualifications the use of hypnosis as an investigative tool; scientific understanding of the phenomenon and of the means to control the effects of hypnosis is still in its infancy. Arkansas, however, has not justified the exclusion of *all* of a defendant's testimony that the defendant is unable to prove to be the product of prehypnosis memory. ... The State would be well within its powers if it established guidelines to aid trial courts in the evaluation of posthypnosis testimony and it may be able to show that testimony in a particular case is so unreliable that exclusion is justified. But it has not shown that hypnotically enhanced testimony is always so untrustworthy and so immune to the traditional means of evaluating credibility that it should disable a defendant from presenting her version of the events for which she is on trial." (107 S.Ct. 2714, 97 L.Ed.2d 52.) (See 101 Harv. L. Rev. 119 [Rock]; 21 Loyola L.A. L. Rev. 696 [same].)

Four justices dissented, arguing that (a) nothing in the Constitution justifies a rule requiring state trial courts to make their own case-by-case scientific assessment of the reliability of hypnotically induced testimony; (b) an accused's right to present evidence on the accused's own behalf is not absolute, and should give way to an evidentiary rule designed to exclude testimony that is inherently untrustworthy; and (c) the deference traditionally accorded state criminal trial rules and procedures should be "at its highest in an area such as this, where, as the Court concedes, 'scientific understanding ... is still in its infancy.'" (107 S.Ct. 2716, 97 L.Ed.2d 55.)

However, in *People v. Parnell* (1993) 16 C.A.4th 862, 869, 870, 20 C.R.2d 302, the court held that a psychologist's opinion as to defendant's mental state at the time of the alleged crimes was not admissible where it was based on statements that defendant had made under hypnosis.

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## CHAPTER VII - Demonstrative, Experimental, and Scientific Evidence

### IV. CHEMICAL AND PHYSICAL TESTS

#### K. Hypnosis.

#### 3. Admissibility of Prehypnotic Evidence.

##### a. Nature of Problem.

*2 Witkin Cal. Evid. Demo Evid § 104*

[§ 104] Nature of Problem.

The question whether the exclusionary rule should bar a victim from testifying about facts or memories that were not created during the hypnotic session was raised but not decided in *People v. Guerra* (1984) 37 C.3d 385, 208 C.R. 162, 690 P.2d 635, *supra*, §101.

(a) "There is a superficially appealing simplicity to this view: because the evidence in question is recalled *before* the hypnotic experience, the argument goes, it must ipso facto be untainted by that experience. The rub, however, is that the testimony by which that evidence is put before the jury is given *after* the witness has been hypnotized." (37 C.3d 427.)

(b) "The soundness of an exception for prehypnotic evidence has already been questioned in the scientific community. The proposed exception has also been vigorously attacked in the scholarly literature. ... In addition to the obvious hearsay problems presented by most types of prehypnotic evidence ... , the proposal raises constitutional issues of impairment of the right to confrontation and potential denial of a fair trial that may be different in degree but are not different in kind from those presented by the use of pretrial hypnosis in general." (37 C.3d 428.)

(c) "We decline to render an advisory opinion answering those difficult questions in the case at bar. ... It will be time enough to grapple with such questions in a case in which they are presented as dispositive issues on a satisfactory record and after full briefing." (37 C.3d 429.)

Two justices joined in an opinion taking a strong position on admissibility:

(a) "[T]here is a special need to ensure that in our zeal to protect the citizenry from the hazards of hypnosis, we do not create a greater injustice by an after-the-fact disqualification of crucial witnesses who have relevant--frequently vital--information that is not tainted by the hypnosis." (37 C.3d 431.)

(b) "[V]irtually all of the other states that have adopted a 'per se' rule excluding hypnotically induced testimony, have at the same time expressly declared that a witness is not necessarily barred from testifying to events which the witness recalled and related to others before undergoing hypnosis." (37 C.3d 431.)

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##### b. Statutory Authorization.

2 Witkin Cal. Evid. Demo Evid § 105

[§ 105] Statutory Authorization.

The testimony of a witness who has previously undergone hypnosis for the purpose of recalling events that are the subject of the witness' testimony may be admitted in a criminal proceeding under specified conditions. (*Ev.C. 795(a)*.) All of the following must be satisfied:

(1) *Subject of Testimony*. The testimony is limited to matters that the witness recalled and related prior to the hypnosis. (*Ev.C. 795(a)(1)*.)

(2) *Preservation of Memory*. "The substance of the prehypnotic memory was preserved in written, audiotape, or videotape form prior to the hypnosis." (*Ev.C. 795(a)(2)*.)

(3) *Procedure in Hypnosis*. The hypnosis was conducted under all of the following procedures:

(a) Prior to hypnosis, a written record was made documenting the subject's description of the event and the information provided to the hypnotist concerning the subject matter of the hypnosis. (*Ev.C. 795(a)(3)(A)*.)

(b) "The subject gave informed consent to the hypnosis." (*Ev.C. 795(a)(3)(B)*.)

(c) The hypnosis session, including the pre- and posthypnosis interviews, was videotaped for later review. (*Ev.C. 795(a)(3)(C)*.)

(d) The hypnosis was performed by a psychologist or by a licensed medical doctor, clinical social worker, or marriage, family, and child counselor. The expert must be experienced in the use of hypnosis and the hypnosis session must be independent, and not conducted in the presence, of law enforcement, the prosecution, or the defense. (*Ev.C. 795(a)(3)(D)*); see *People v. Burroughs* (1987) 188 C.A.3d 1162, 1167, 233 C.R. 872 [law enforcement officer is not statutorily qualified hypnotist, and evidence obtained at session conducted by officer is not admissible].)

(4) *Hearing on Admissibility*. Before admission of the testimony, the court holds a hearing under *Ev.C. 402* (determination of preliminary facts; see 3 *Cal. Evidence* (4th), *Presentation at Trial*, §48 et seq.). The proponent of the evidence must prove by clear and convincing evidence (see 1 *Cal. Evidence* (4th), *Burden of Proof and Presumptions*, §§160, 161) that the hypnosis (a) did not make the witness' prehypnosis recollection unreliable or (b) substantially impair the ability to cross-examine the witness about his or her prehypnosis recollection. Each side is entitled to present expert testimony and to cross-examine witnesses. (*Ev.C. 795(a)(4)*.)

(5) *Impeachment of Witness and Other Grounds of Admission or Exclusion.* *Ev.C. 795* does not prevent a party from attacking the credibility of a hypnotized witness or from raising other legal grounds to admit or exclude the witness' testimony. (*Ev.C. 795(b).*)

**SUPPLEMENT:** [This section is current through the latest supplement]

(3) *Procedure in Hypnosis.*

(d) *Who may perform hypnosis:* *Ev.C. 795(a)(3)(D)* was amended in 2002 to substitute "marriage and family therapist" for "marriage, family, and child counselor".



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## c. Clarifications and Distinctions.

2 Witkin Cal. Evid. Demo Evid § 106

[§ 106] Clarifications and Distinctions.

(1) *Statute Not Retroactive.* In *People v. Hayes* (1989) 49 C.3d 1260, 265 C.R. 132, 783 P.2d 719, the court, relying on the concurring opinion in *People v. Guerra* (1984) 37 C.3d 385, 208 C.R. 162, 690 P.2d 635, *supra*, §101, and sister state and federal cases, held that a witness who has undergone hypnosis is not barred from testifying to events that the court finds were recalled and related to others prior to the hypnotic session. (49 C.3d 1270, 1272, 1273.) "In turn, the opposing party is permitted to introduce evidence of the fact and method of hypnosis, and its potential effects on the witness's recollection." (49 C.3d 1273.) This standard, and not the regulatory provisions of Ev.C. 795, governs the admissibility of all prehypnotic evidence predating January 1, 1985, the effective date of the statute, regardless of when the evidence was or may be introduced at trial. (49 C.3d 1273, 1274.) (See *People v. Alcala* (1992) 4 C.4th 742, 771, 772, 773, 15 C.R.2d 432, 842 P.2d 1192 [discussing and following *People v. Hayes*].)

(2) *Statute Not Applicable in Civil Cases.* The rules of *People v. Shirley* (1982) 31 C.3d 18, 181 C.R. 243, 723 P.2d 1354, *supra*, §100, and *People v. Hayes*, *supra*, continue to govern the admissibility of hypnotically restored testimony in civil cases. "Thus, when faced with an evidentiary challenge in a civil case based upon *Shirley-Hayes*, a trial court must necessarily conduct a hearing to determine (a) whether the witness underwent hypnosis, (b) for the purpose of restoring memory about the subject of the hypnotic session, and (c) if applicable, whether any proposed testimony is about events recalled and related to others prior to the hypnotic session." (*Schall v. Lockheed Missiles & Space Co.* (1995) 37 C.A.4th 1485, 1492, 44 C.R.2d 191 [in sexual harassment case, plaintiff's testimony regarding harassment was inadmissible, as she did not remember harassment until she underwent hypnosis].)

(3) *Statute Not Applicable to Testimony of Hypnotized Defendant.* In *People v. Aguilar* (1990) 218 C.A.3d 1556, 267 C.R. 879, the court explained its holding that Ev.C. 795 was inapplicable to the testimony of a defendant who testifies in his or her own behalf, as follows: "*Shirley* established that a defendant's submission to pretrial hypnosis will not render his testimony inadmissible. Proposition 8 did not affect this holding as it enlarged, rather than diminished, the scope of admissible evidence. By its terms, *Evidence Code* section 795 imposes limits on the *admissibility* of posthypnosis testimony. Unless and until our Supreme Court modifies its holding in *Shirley*, that decision controls admissibility of the posthypnosis testimony of a defendant in this state." (218 C.A.3d 1563.)

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L. Penile Plethysmograph.

2 *Witkin Cal. Evid. Demo Evid* § 107

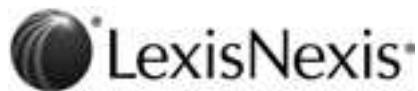
[§ 107] Penile Plethysmograph.

In *People v. John W.* (1986) 185 C.A.3d 801, 229 C.R. 783, defendant was convicted of committing a lewd and lascivious act upon a child, and of engaging in unlawful sexual intercourse. The trial judge excluded testimony by defendant's psychologist that the results of an electronic physiological test, known as a penile plethysmograph, indicated that defendant did not exhibit behavior characteristics consistent with those of persons likely to commit sexual crimes against children. *Held*, the testimony was properly excluded.

(a) The test, which involves measuring erectile response to slides of nude girls and women and tapes describing sexual activity with children and adults, was not shown to have been generally accepted in the relevant scientific community as a reliable means of diagnosing sexual deviancy. (185 C.A.3d 805.)

(b) The psychologist, who was a proponent of this new test and therefore likely to be biased, was the only witness who testified as to the test's general acceptance. In addition, the inherent reliability of the test was questionable in view of the psychologist's admission that 20% of the men tested (including defendant) failed to respond at all to *any* of the stimuli. (185 C.A.3d 805, 806.)

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#### M. Dolls Used To Detect Child Abuse.

*2 Witkin Cal. Evid. Demo Evid § 108*

[§ 108] Dolls Used To Detect Child Abuse.

*In re Amber B. (1987) 191 C.A.3d 682, 236 C.R. 623*, involved the psychological technique of detecting child abuse by observing a child's behavior with anatomically correct dolls and analyzing the child's report of abuse. At a proceeding to declare two minors dependent children, petitioner county Department of Social Services was allowed to present testimony by a psychologist that, in his opinion, the older child had been sexually molested and she believed that she had been molested by her father. The opinion was based on the older child's description of the abuse, and on her behavior with an anatomically correct female doll in the psychologist's office. The juvenile court judge declared both children dependents of the juvenile court. *Held*, reversed.

(a) The purpose of the *Kelly* rule (see *supra*, §42) is to prevent fact finders from being misled by an "aura of infallibility" that might surround unproven scientific methods. (*191 C.A.3d 690.*) "Accordingly, a scientific procedure, technique or theory should be characterized as a 'new scientific method of proof,' " subject to the requirement that there be a showing of general acceptance within the relevant scientific community if fact finders would tend to ascribe to it "an inordinately high degree of certainty." (*191 C.A.3d 690, 691.*)

(b) "We conclude that the practice of detecting child sexual abuse by (1) observing a child's behavior with anatomically correct dolls, and (2) analyzing the child's reports of abuse, is ... 'a new scientific process operating on purely psychological evidence' ... and is subject to the *Kelly-Frye* test. The specific causes of age-inappropriate child sexual behavior, and indeed the entire field of child sexuality since the theories of Sigmund Freud, are beyond the scope of critical analysis by the average lay person. Thus a psychologist's examination and analysis employing the technique used by Dr. Raming may be surrounded by an 'aura of infallibility,' and a trier of fact would tend to ascribe 'an inordinately high degree of certainty' to the technique." (*191 C.A.3d 691.*)

(c) The failure to show general scientific acceptance of the reliability of the technique was not harmless error, because petitioner's entire case was based upon the psychologist's analysis of the child's reports of abuse and her behavior with the dolls. (*191 C.A.3d 691.*)

The opinion adds the following observation:

"We recognize that unique problems of proof are presented whenever it is claimed that a young child was the victim of sexual abuse by a parent. The child may be incompetent to testify, the act of testifying could be as traumatic as the abuse itself, and the child may be subjected to strong parental influences. The trial judge, the parties, and society in general would greatly benefit from *reliable* expert testimony addressing the question whether the child was abused, either in lieu of or in addition to testimony by the child. However, we cannot approve such expert testimony until its

reliability is shown pursuant to *Kelly-Frye*." (191 C.A.3d 691.) (See *In re Christie D.* (1988) 206 C.A.3d 469, 477, 253 C.R. 619 [*In re Amber B.* followed].)

*In re Christine C.* (1987) 191 C.A.3d 676, 236 C.R. 630, dealing with the same issue, found the erroneous admission of the psychiatric testimony to be harmless error, because the children gave believable testimony and the judge provided a detailed oral explanation of the order declaring the children dependent. (191 C.A.3d 680.)

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#### N. Other Tests.

#### 2 Witkin Cal. Evid. Demo Evid § 109

[§ 109] Other Tests.

Results of the following scientific tests have been held to be admissible evidence:

(1) *Gunshot Residue Test*. This process uses a scanning electron microscope to detect the presence of particles of gunshot residue. (See *People v. Palmer* (1978) 80 C.A.3d 239, 250, 145 C.R. 466; 1 A.L.R.4th 1072 [Results of Residue Detection Tests].)

(2) *Bite Mark Identification*. This is a technique to prove identity from similarities between bite marks, usually found on a victim, and the dentition of a suspect. (See *People v. Marx* (1975) 54 C.A.3d 100, 107, 126 C.R. 350; *People v. Slone* (1978) 76 C.A.3d 611, 619, 143 C.R. 61.)

(3) *Probability Extrapolation*. This is a method to calculate the statistical likelihood of a theory by using randomly selected samples. In a leading California case involving a drug prosecution, a criminalist using probability extrapolation testified that there was less than a 1 in 300,000 chance that the amount of cocaine seized in a shipment contained less than 100 pounds. This constituted sufficient and admissible evidence that the amount of cocaine was at least 100 pounds, even though the calculation was based on a random sampling of the total shipment. (See *People v. Peneda* (1995) 32 C.A.4th 1022, 1030, 38 C.R.2d 312.)

(4) *Photographic Segmentation*. This technique involves using computers to extract the boundaries and regions of a photograph based on their color or luminance. The image is then "mapped" through a mathematical formula to create a more discernible image. Segmentation has primarily been used in the medical field, e.g., locating the precise boundaries of brain tumors and tracking their development, and in the environmental field, e.g., locating pollution or hazardous waste sites. However, it has also been used to enhance crime scene photographs. (See *People v. Williams* (1996) 46 C.A.4th 1767, 1777, 54 C.R.2d 521 [defendant had rose tattoo on his arm; enhanced photograph taken during commission of crime depicted undefined mark on perpetrator's arm].)

(5) *Neutron Activation Analysis*. This method uses radiation to detect trace elements in samples of materials for the purpose of identifying the source of those materials. Although not a reliable method for identifying bodily fluids because of sample contamination problems (see *supra*, §67), it has been held to be a valid test to identify other substances, including hair, thread, bomb fragments, and various fibers. (See 59 Cal. L. Rev. 997; 15 Proof of Facts 115; 50 A.L.R.3d 117.)

(6) *Ringlemann Chart Observations of Air Pollution*. Estimates of the density and opacity of smoke may be made by comparing it to this chart, which by optical illusion creates a series of gray rectangles of differing color densities.



(See *People v. International Steel Corp.* (1951) 102 C.A.2d Supp. 935, 939, 226 P.2d 587; *People v. Plywood Mfrs. of Calif.* (1955) 137 C.A.2d Supp. 859, 869, 871, 291 P.2d 587, 1 Cal. Evidence (4th), Judicial Notice, §34; 51 A.L.R.3d 1026.)

(7) *Electrocardiogram and Electroencephalogram Tests.* An electrocardiograph (EKG) and an electroencephalograph (EEG) are diagnostic tools that electronically measure and record heartbeats and brain waves, respectively, to detect illness or injury. (See *Hays v. Viscome* (1953) 122 C.A.2d 135, 137, 264 P.2d 173 [EEG]; 4 Proof of Facts 641 [EEG]; 4 Proof of Facts 3d 73 [EKG]; 66 A.L.R.2d 536 [EKG and EEG].)

(8) *Syncrometer Tests.* A syncrometer is a device that detects the presence of carcinogenic chemicals in people or products. (See *Melaleuca v. Clark* (1998) 66 C.A.4th 1344, 1357, 78 C.R.2d 627, 5 Summary (9th), Torts, Supp., §573.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Bite Mark Identification.* See 1 A.L.R.6th 657 [identification of accused from bite mark evidence].

(2a) *(New) Forensic Hair Comparison.* Hair comparison evidence that identifies a suspect or victim as a possible donor "has been routinely admitted." (*People v. Huggins* (2006) 38 C.4th 175, 200, 41 C.R.3d 593, 131 P.3d 995 [in capital murder prosecution with rape-murder special circumstance, there was no error in admitting criminalist's testimony that hairs found on victim's body were consistent with defendant's pubic hair, where criminalist acknowledged that such evidence is of limited significance].)(8) *Syncrometer Tests.*

*Cross-Reference:* 5 Summary (10th), Torts, §650.

(9) *(New) Speedometer Readings.* Where a police officer paced the defendant and the officer's speedometer showed that the defendant was traveling at speeds above the legal limit, the officer's testimony to that effect can be considered reliable evidence of the defendant's speed, even in the absence of speedometer calibration test results. (See *People v. Lowe* (2002) 105 C.A.4th Supp. 1, 6, 130 C.R.2d 249.)

*(New) Results of following scientific tests held inadmissible or subject to Kelly test:* A scent transfer unit, used in the preparation of gauze pads employed in a canine scent lineup, is a novel device, and, therefore, evidence produced with the aid of the unit cannot be admitted without a *Kelly* hearing (see text, §42). (*People v. Mitchell* (2003) 110 C.A.4th 772, 789, 2 C.R.3d 49; *People v. Willis* (2004) 115 C.A.4th 379, 385, 9 C.R.3d 235.) *West's Key Number Digest*, Criminal Law k.388.2; Evidence k.150-



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## CHAPTER VIII - Documentary Evidence

### I. GENERAL PRINCIPLES

#### A. Nature and Kinds of Writings.

#### 2 Witkin Cal. Evid. Doc Evid § 1

[§ 1] Nature and Kinds of Writings.

(1) *Classification.* Former C.C.P. 1887 et seq. described documents or writings as either public or private; and public writings were classified as laws, judicial records, other official documents, and public records kept in this state of private writings. These sections were repealed in 1968 and replaced by the California Public Records Act. (See *Govt.C. 6250 et seq.*, 2 *Cal. Evidence (4th)*, *Witnesses*, §278 et seq.)

The Act defines "public records" to include various specified writings (*Govt.C. 6252(e)*), and further defines "writing" (*Govt.C. 6252(f)*). It does not define private writings, which are elsewhere classified as either sealed or unsealed (*C.C.P. 1929*), although there is no legal significance in the seal (*C.C.P. 1932*). (See generally 2 McCormick 5th, §218 et seq.; 3 Wharton, *Crim. Evidence* (14th ed.), §469 et seq.)

(2) *Expanded Code Definition.* *Ev.C. 250* defines "writing" more broadly than any of California's prior statutes, and includes forms of expression seldom thought of as writings: The term covers "handwriting, typewriting, printing, photostating, photographing, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof." (On tape recordings, see *infra*, §§12, 13; on writings within meaning of the secondary evidence rule, see *infra*, §32 et seq.)

(3) *Federal Rules of Evidence.* " 'Writings' and 'recordings' consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation." (*F.R. Evid., Rule 1001(1)*.) "Photographs" include "still photographs, X-ray films, video tapes, and motion pictures." (*F.R. Evid., Rule 1001(2)*; see 5 Mueller & Kirkpatrick, *Federal Evidence* 2d, §551 et seq.; 29A *Am.Jur.2d* (1994 ed.), *Evidence* §1023.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Classification.* *Govt.C. 6252(f)*, defining "writing," was relettered *Govt.C. 6252(g)* in 2004 without substantive change.

See 2 McCormick 6th, §218 et seq.

(2) *Expanded Code Definition.* *Ev.C. 250* was amended in 2002 to add "photocopying" and "transmitting by electronic mail or facsimile" to the definition of writing. Additionally, a writing includes "any record thereby created, regardless of the manner in which the record has been stored."

See 103 *Am.Jur. Trials* 123 [admissibility of e-mail evidence in civil trials].(3) *Federal Rules of Evidence.* See 41

*U.S.F. L. Rev. 1* [comparison of California and federal rules on issues of authentication and best and secondary evidence]. *West's Key Number Digest*, Criminal Law k.429 et seq.; Evidence k.325 et seq.



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CHAPTER VIII - Documentary Evidence

I. GENERAL PRINCIPLES  
B. Applicable Rules of Evidence.

2 Witkin Cal. Evid. Doc Evid § 2

[§ 2] Applicable Rules of Evidence.

The following are the primary evidentiary rules that apply to documentary evidence:

(1) *Relevancy*. Documentary evidence must, of course, meet the usual test of relevancy. (See 1 Cal. Evidence (4th), Circumstantial Evidence, §26.)

(2) *General Exclusionary Rules*. Documentary evidence is subject to general exclusionary rules such as the opinion rule (see 1 Cal. Evidence (4th), Opinion Evidence, §1) and the hearsay rule (see 1 Cal. Evidence (4th), Hearsay, §4).

(3) *Specific Exclusionary Rules*. Documentary evidence may be excluded under the secondary evidence rule (replacing the best evidence rule; see *infra*, §31 et seq.) and the parol evidence rule (see *infra*, §59 et seq.).

(4) *Privileges and Constitutional Guarantees*. Admission of a party's documents may also be opposed on a claim of privilege (see 2 Cal. Evidence (4th), Witnesses, §59), or because they were illegally obtained by an unconstitutional search and seizure (see 4 Cal. Crim. Law (3d), Illegally Obtained Evidence, §1 et seq.). And a writing containing a defendant's involuntary confession or admission is inadmissible in a criminal case (see 1 Cal. Evidence (4th), Hearsay, §§54, 136).

(5) *Authentication*. Introduction of a writing in evidence requires a foundation by authentication (see *infra*, §3 et seq.), and a number of presumptions deal with authenticity or effect of writings (*infra*, §22 et seq.).

(6) *Translators*. Writings in a foreign language may require a translator. (See 3 Cal. Evidence (4th), Presentation At Trial, §27.)

(7) *Judicial Notice*. Introduction in evidence is unnecessary where a writing is judicially noticed. (See 1 Cal. Evidence (4th), Judicial Notice, §1 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER VIII - Documentary Evidence

### II. AUTHENTICATION

#### A. Requirement of Authentication.

##### 1. Nature and Purpose.

2 *Witkin Cal. Evid. Doc Evid* § 3

[§ 3] Nature and Purpose.

(1) *California Law. Ev.C. 1400* provides that "authentication" of a writing means either of the following:

(a) The introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is.

(b) The establishment of these facts "by any other means provided by law."

Thus, even though a writing is relevant and not subject to an exclusionary rule (see *supra*, §2), a foundation must be laid by authentication before it can be introduced into evidence. (*Ev.C. 1401(a)*; see *Ten Winkel v. Anglo Calif. Sec. Co.* (1938) 11 C.2d 707, 720, 81 P.2d 958; *Magee v. Wyeth Laboratories* (1963) 214 C.A.2d 340, 355, 29 C.R. 322 [photostatic copy of printed congressional committee report, not certified, inadmissible]; *Continental Baking Co. v. Katz* (1968) 68 C.2d 512, 526, 67 C.R. 761, 439 P.2d 889 [hearing on preliminary injunction; counsel offered letters of purported predecessor in interest of adverse party, as admissions, said "I can have a witness testify," but never got any; error to receive documents]; 2 McCormick 5th, §219 et seq.; 7 Wigmore (Chadbourn Rev.) §2128 et seq.; 1 Jefferson, California Evidence Benchbook 3d, Chap. 30; C.E.B., Effective Introduction of Evidence 2d, Chap. 11; 3 *Cal. Evidence* (4th), *Presentation At Trial*, §147.)

(2) *Federal Rules of Evidence*. Federal practice is governed by similar *F.R. Evid.*, Rule 901 et seq. (See 28 *Loyola L.A. L. Rev.* 1259, 1265; 5 Mueller & Kirkpatrick, *Federal Evidence* 2d, §512 et seq.; 29A *Am.Jur.2d* (1994 ed.), *Evidence* §1032 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *California Law*. See *Stockinger v. Feather River Community College* (2003) 111 C.A.4th 1014, 1027, 1028, 4 C.R.3d 385 [distinguishing between authentication requirement and hearsay rule]; Simons, *Cal. Evidence Manual*, §8:1 et seq.; 2 McCormick 6th, §221 et seq.

(*New*) *Distinction: petition to compel arbitration*: For purposes of a petition to compel arbitration, the normal procedures of document authentication need not be followed. *C.C.P. 1281.2* (6 *Cal. Proc.* (4th), *Proceedings Without Trial*, §496) "does not require the petitioner to introduce the agreement into evidence. A plain reading of the statute indicates that as a preliminary matter the court is only required to make a finding of the agreement's existence, not an evidentiary determination of its validity." (*Condee v. Longwood Management Corp.* (2001) 88 C.A.4th 215, 218, 219, 105 C.R.2d 597, citing the text.) *West's Key Number Digest*, Criminal Law k.444; Evidence k.368 et seq.



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CHAPTER VIII - Documentary Evidence

II. AUTHENTICATION

A. Requirement of Authentication.

2. Writing Not Genuine.

2 Witkin Cal. Evid. Doc Evid § 4

[§ 4] Writing Not Genuine.

(1) *In General*. "Authentication" is generally thought to be related to authenticity and due execution, and in this narrow sense, authentication involves a showing that the writing is genuine, i.e., actually made or signed by the person who appears as the maker. *Ev.C. 1400* (supra, §3) defines the term more broadly, to cover proof of the nature or source of a writing that is relevant even though it is not genuine.

Thus, in *People v. Adamson* (1953) 118 C.A.2d 714, 720, 258 P.2d 1020, a letter was offered to prove that P had acted pursuant thereto. *Held*, authentication was not required. "Whether it be genuine or a forgery, it was merely offered to show that Mr. Pugh was motivated by it in his actions." (See 7 Wigmore (Chadbourn Rev.) §2132.)

The conclusion in the *Adamson* case, that proof of genuineness is not required where genuineness is not in issue, is of course sound. But the court's statement that "authentication" was not required was based on the narrow definition of the term. "The writing involved in the *Adamson* case was a letter that a witness claimed he had received and acted upon. Under the Evidence Code, the requirement of authentication would require a showing that the letter offered in evidence was in fact the one received and acted upon; and this is the preliminary showing that was found sufficient in the *Adamson* case." (Law Rev. Com. Comment to *Ev.C. 1401*.)

(2) *Writing Signed by Agent*. If the writing is not signed by a party but by another as his or her agent, a double foundation must be laid by proof of the genuineness of the agent's signature and proof of the agent's authority. (See 2 McCormick 5th, §218.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Writing Signed by Agent*. See 2 McCormick 6th, §221.



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## CHAPTER VIII - Documentary Evidence

### II. AUTHENTICATION

#### A. Requirement of Authentication.

#### 3. For Admission of Secondary Evidence.

*2 Witkin Cal. Evid. Doc Evid § 5*

[§ 5] For Admission of Secondary Evidence.

(1) *In General.* "Authentication of a writing is required before secondary evidence of its content may be received in evidence." (*Ev.C. 1401(b), 1521(c)*; see *C.E.B., 2 Civil Proc. During Trial 3d, §13.65.*) In other words, the secondary evidence rule (see *infra, §31 et seq.*) authorizes the *introduction* of the writing, but not its *authentication*. "[T]herefore, if a person offers in evidence a copy of a writing, he must make a sufficient preliminary showing of the authenticity of both the copy and the original (*i.e.*, the writing sought to be proved by the copy)." (*Law Rev. Com. Comment to Ev.C. 1401*; see *Law Rev. Com. Comment to Ev.C. 1521* ["Under Section 1401, the proponent must not only authenticate the original writing, but must also establish that the proffered evidence is secondary evidence of the original"].)

(2) *Recorded Deed.* Where a copy of a recorded deed is offered, authentication of the copy, by attestation or certification of the official custodian (*Ev.C. 1530, infra, §41 et seq.*), also authenticates the original: The authenticated copy is *prima facie* evidence of the existence and content of the official record (*Ev.C. 1530*), and the official record is *prima facie* evidence of the existence, content and execution of the original (*Ev.C. 1600*). "Thus, the duly attested or certified copy of the record meets the requirement of authentication for the copy itself, for the official record, and for the original deed." (*Law Rev. Com. Comment to Ev.C. 1401*; see *infra, §41.*)

(3) *Transcript of Tape Recording.* In *O'Laskey v. Sortino (1990) 224 C.A.3d 241, 273 C.R. 674*, a personal injury action, the trial judge refused to admit a transcript of a taped telephone conversation between defendant and a private investigator hired by plaintiff to determine whether defendant had left the state for more than 8 days during the year following the accident. (According to the transcript, defendant had gone to Las Vegas for 2 weeks, and under *C.C.P. 351*, the statute of limitations would be tolled during this time.) *Held*, exclusion was proper; although there was no violation of *P.C. 632 (4 Cal. Crim. Law (3d), Illegally Obtained Evidence, §343 et seq.)*, the transcript was properly excluded because the tape was not authenticated.

(a) A tape recording is a "writing" that must be authenticated before it can be received into evidence, and without authentication of the tape, the transcript is irrelevant. (*224 C.A.3d 249*, citing the text; see *infra, §§12, 19.*)

(b) In offering the transcript, plaintiff submitted a declaration by his attorney stating that counsel had retained a private investigator from whom he had received the transcript and the tape; that he had listened to the tape, and the transcript was an accurate record of it; and that the voice on the tape was defendant's, which he recognized from defendant's deposition. (*224 C.A.3d 249.*)

(c) The declaration is insufficient to authenticate the *tape* for the following reasons:

(1) It does not show whether the tape was what plaintiff claimed it to be, because no sworn testimony of the investigator was offered to describe when, where, how, or by whom the tape was made. (224 C.A.3d 249.)

(2) There is nothing in either the transcript or declaration identifying the investigator as the second party to the conversation. (224 C.A.3d 249.)

(3) There is no evidence regarding the completeness or accuracy of the tape. Although counsel, in his declaration, attested to the accuracy of the *transcript*, the investigator was the only person competent to testify to the accuracy of the tape, i.e., whether it had been altered or edited or included the entire conversation. (224 C.A.3d 250.)

(4) *Electronic Record or Signature*. The Uniform Electronic Transactions Act (C.C. 1633.1 et seq. ; see 1 *Summary* (9th), *Contracts, Supp.*, §3A et seq.) provides that "evidence of a record or signature may not be excluded solely because it is in electronic form." (C.C. 1633.13.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(4) *Electronic Record or Signature*.

*Cross-Reference:* 1 *Summary* (10th), *Contracts*, §11 et seq.





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CHAPTER VIII - Documentary Evidence

II. AUTHENTICATION

A. Requirement of Authentication.

4. For Admission of Altered Writing.

2 *Witkin Cal. Evid. Doc Evid* § 6

[§ 6] For Admission of Altered Writing.

A party producing a writing as genuine, which has or appears to have been altered after its execution as to a material fact, must account for the alteration. "If he does that, he may give the writing in evidence, but not otherwise." (*Ev.C. 1402*; see *King v. Tarabino* (1921) 53 C.A. 157, 165, 199 P. 890.)

*Ev.C. 1402* specifies the kinds of showing that will meet the requirement:

(1) That the alteration "was made by another, without his concurrence."

(2) That it "was made with the consent of the parties affected by it."

(3) That it "was otherwise properly or innocently made."

(4) That it "did not change the meaning or language of the instrument." (See *Consolidated Loan Co. v. Harman* (1957) 150 C.A.2d 488, 491, 310 P.2d 450 [mere identification of intended obligee not a material alteration, and instrument unaffected]; 29 Proof of Facts 3d 549 [proving alteration of document].)

In *People v. Morris* (1991) 53 C.3d 152, 279 C.R. 720, 807 P.2d 949, the court held that defendant's letter to his girlfriend, which contained damaging admissions, was properly authenticated. Defendant claimed that the letter was an inadmissible altered document because a page was missing. A handwriting expert acknowledged the possibility of a missing page based on certain features of the letter. However, the girlfriend testified that the copy offered by the prosecution was true and accurate (she had destroyed the original in jail), and that defendant had often written fragmented letters. (53 C.3d 205.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER VIII - Documentary Evidence

### II. AUTHENTICATION

#### B. Methods of Authentication.

##### 1. In General.

##### 2 Witkin Cal. Evid. Doc Evid § 7

[§ 7] In General.

(1) *List of Methods*. A writing may be authenticated by "evidence" or "by any other means provided by law." (*Ev.C. 1400*, supra, §3.) *Ev.C. 1410* et seq. specify the principal methods of authentication by evidence, direct or circumstantial. (See *infra*, §8 et seq.; on authentication of graffiti in a vandalism prosecution, see *infra*, §20.) Other methods are:

- (a) Admission in the pleadings, in discovery proceedings, or at pretrial conference. (See *infra*, §21.)
- (b) Presumptions. (See *infra*, §22 et seq.)

The statutory listing of evidentiary means is not exclusive: "[I]t would be impossible to specify all of the varieties of circumstantial evidence that may be sufficient in particular cases to sustain a finding of the authenticity of a writing." (Law Rev. Com. Comment to *Ev.C. 1410*.) Thus, *Ev.C. 1410* states that "[n]othing in this article shall be construed to limit the means by which a writing may be authenticated or proved." (See C.C. 1633.13, supra, §5 ["evidence of a record or signature may not be excluded solely because it is in electronic form"]; *People v. Olquin* (1994) 31 C.A.4th 1355, 1372, 37 C.R.2d 596 [rap lyrics found in defendant's home were properly authenticated as his creation based on their location and references they contained, even though means of authentication listed in *Ev.C. 1410* et seq. were not employed]; 35 Proof of Facts 3d 567 [use of ink analysis to date handwriting].)

(2) *Foundation of Authentication*. The foundation of authentication is laid by "the introduction of evidence sufficient to sustain a finding." (*Ev.C. 1400*; on similar federal practice, see *F.R. Evid.*, Rule 901(a); 5 Mueller & Kirkpatrick, Federal Evidence 2d, §512; 29A Am.Jur.2d (1994 ed.), Evidence §1032.) In other words, the preliminary fact of authenticity is first determined by the judge in ruling on admissibility, but is then subject to redetermination by the jury. (*Ev.C. 1400*; *People v. Fonville* (1973) 35 C.A.3d 693, 708, 111 C.R. 53, *infra*, §19; see 3 Cal. Evidence (4th), Presentation At Trial, §57.) The lack of a sufficient foundation, however, must be raised by a specific objection, or the defect is waived. (See *Bank of America v. Taliaferro* (1956) 144 C.A.2d 578, 582, 301 P.2d 393; 3 Cal. Evidence (4th), Presentation At Trial, §380.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *List of Methods*. See *People v. Gibson* (2001) 90 C.A.4th 371, 383, 108 C.R.2d 809, 2 Cal. Crim. Law (3d), Sex Offenses and Crimes Against Decency, Supp., §67 [in prosecution for pimping, two manuscripts seized from defendant's premises were properly authenticated based on location where they were found and references contained in them, even if authentication methods enumerated in *Ev.C. 1410* et seq. were not used].



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## CHAPTER VIII - Documentary Evidence

### II. AUTHENTICATION

#### B. Methods of Authentication.

##### 2. Testimony.

##### a. Subscribing Witness.

2 Witkin Cal. Evid. Doc Evid § 8

[§ 8] Subscribing Witness.

(1) *Definition.* "A subscribing witness is one who *sees a writing executed or hears it acknowledged*, and at the *request* of the party thereupon signs his name as a witness." (C.C.P. 1935; see C.E.B., 2 Civil Proc. During Trial 3d, §13.65.)

(2) *Ordinarily Not Essential.* At common law, all subscribing witnesses ("attestors") had to be called or a showing made of their unavailability. This requirement is now quite generally abolished *except where attestation is a statutory condition*. Thus, while production of the subscribing witness is desirable, it is not required, "[e]xcept as provided by statute." (Ev.C. 1411; see Ev.C. 1413, *infra*, §9; *Estate of Cecala* (1949) 92 C.A.2d 834, 839, 208 P.2d 436 ["That a will may be proved otherwise than by the subscribing witnesses is definitely settled"]; 2 McCormick 5th, §220.)

*F.R. Evid.*, Rule 903 is to the same effect: "The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing." (See 5 Mueller & Kirkpatrick, Federal Evidence 2d, §§549, 550; 29A Am.Jur.2d (1994 ed.), Evidence §1039.)

(3) *When Required by Statute.* The principal statutory requirement is in the proof of wills: if there is no contest, and if a subscribing witness is available, the evidence of *one* subscribing witness as to the due execution of the will in all particulars is sufficient. (Prob.C. 8220; see 12 Summary (9th), Wills and Probate, §516.) However, if a required subscribing witness "denies or does not recollect the execution of the writing," authentication by other evidence is permissible. (Ev.C. 1412.) (On the presumption of due execution, see 12 Summary (9th), Wills and Probate, §204.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Ordinarily Not Essential.* See 2 McCormick 6th, §222.(3) *When Required by Statute.*

*Cross-Reference:* 14 Summary (10th), Wills and Probate, §545.

*Presumption of due execution:*

*Cross-Reference:* 14 Summary (10th), Wills and Probate, §147.West's Key Number Digest, Evidence k.374 et seq.



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CHAPTER VIII - Documentary Evidence

II. AUTHENTICATION

B. Methods of Authentication.

2. Testimony.

b. Other Witness to Execution or Making.

*2 Witkin Cal. Evid. Doc Evid § 9*

[§ 9] Other Witness to Execution or Making.

Proof may be made by anyone who saw the writing either (1) "executed" (i.e., signed) or (2) "made," whether signed or not. (*Ev.C. 1413*; see *C.E.B.*, 2 Civil Proc. During Trial 3d, §13.70.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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CHAPTER VIII - Documentary Evidence

II. AUTHENTICATION

B. Methods of Authentication.

2. Testimony.

c. Handwriting Expert.

*2 Witkin Cal. Evid. Doc Evid § 10*

[§ 10] Handwriting Expert.

"A writing may be authenticated by evidence of the genuineness of the handwriting of the maker." (*Ev.C. 1415.*) This may be given by a layman familiar with the writing (*infra*, §11) or by a handwriting expert (see *1 Cal. Evidence (4th), Opinion Evidence*, §66). The expert may compare a questioned writing with another found to be genuine. (*Ev.C. 1418, infra*, §14.) (See 24 Proof of Facts 3d 667 [identification of hand printing and numerals]; 27 Proof of Facts 3d 489 [forensic identification of handwriting].)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Evidence k.375



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## CHAPTER VIII - Documentary Evidence

### II. AUTHENTICATION

#### B. Methods of Authentication.

##### 2. Testimony.

##### d. Nonexpert Familiar With Handwriting.

*2 Witkin Cal. Evid. Doc Evid § 11*

[§ 11] Nonexpert Familiar With Handwriting.

(1) *Requirement of Personal Knowledge of Handwriting.* A witness who is not otherwise qualified to testify as an expert may state his or her opinion whether a writing is in the handwriting of a supposed writer if the court finds that the witness has personal knowledge of the handwriting of the supposed writer. (*Ev.C. 1416*; see *Gibson v. Mailhebuau* (1929) 96 C.A. 455, 459, 274 P. 566 [paying teller of bank]; *Armstrong v. Kline* (1944) 64 C.A.2d 704, 711, 149 P.2d 445; *People v. Porter* (1950) 99 C.A.2d 506, 509, 222 P.2d 151; 2 McCormick 5th, §221; C.E.B., 2 Civil Proc. During Trial 3d, §13.71; but see *Spottiswood v. Weir* (1889) 80 C. 448, 450, 22 P. 289 [insufficient showing made of knowledge of handwriting].)

*F.R. Evid., Rule 901(b)(2)* is to the same effect. (See 5 Mueller & Kirkpatrick, Federal Evidence 2d, §515; 29A *Am.Jur.2d* (1994 ed.), *Evidence* §1212 et seq.)

(2) *Required Showing.* *Ev.C. 1416* lists, but not restrictively, alternative ways by which the requisite personal knowledge may have been acquired:

(a) The witness saw the supposed writer write. (*Ev.C. 1416(a)*.)

(b) The witness saw a writing purporting to be in the handwriting of the supposed writer and upon which the supposed writer has acted or been charged. (*Ev.C. 1416(b)*.)

(c) The witness received letters in the mail purporting to be from the supposed writer in response to letters the witness had addressed and mailed to the writer. (*Ev.C. 1416(c)*.)

(d) The witness obtained that knowledge by "[a]ny other means." (*Ev.C. 1416(d)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Requirement of Personal Knowledge of Handwriting.* See 2 McCormick 6th, §223.



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## CHAPTER VIII - Documentary Evidence

## II. AUTHENTICATION

## B. Methods of Authentication.

## 2. Testimony.

## e. Witness to Tape Recording.

## 1. In General.

## 2 Witkin Cal. Evid. Doc Evid § 12

[§ 12] In General.

(1) *California Law*. A tape recording of a conversation or interrogation is a "writing" within the definition of *Ev.C.* 250 (*supra*, §1). Authenticity of the recording may be established by a person who listened to the oral statements and can testify that the recording is an accurate reflection of them. (See *People v. Ketchel* (1963) 59 C.2d 503, 518, 30 C.R. 538, 381 P.2d 394; *People v. Spencer* (1963) 60 C.2d 64, 77, footnote 5, 78, 31 C.R. 782, 383 P.2d 134 [district attorney examined interrogating officer on time, place, recording apparatus, accuracy of recording, etc.; questions reproduced]; 52 So. Cal. L. Rev. 1273 [criticizing liberal California standards for admission in criminal cases and proposing stricter standards]; 48 Am.Jur. Trials 1 [admission and use of audio recordings as evidence]; 23 Proof of Facts 3d 315 [same].) (On authentication by content, see *People v. Fonville* (1973) 35 C.A.3d 693, 709, 111 C.R. 53, *infra*, §19.)

It is not necessary that the tape recording be transcribed by the reporter; it is admitted in evidence after being played, and a reviewing court may--as in *People v. Spencer*, *supra*--listen to it. However, if a transcription is to be used, "it would be preferable to have it prepared prior to trial or outside the presence of the jury so that the tape could be stopped and portions replayed to facilitate accurate transcription." (*People v. Bowie* (1977) 72 C.A.3d 143, 152, 140 C.R. 49; see *supra*, §5.)

(2) *Federal Rules of Evidence*. "Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording," may be made by "opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker." (*F.R. Evid.*, Rule 901(b)(5); see 5 Mueller & Kirkpatrick, *Federal Evidence* 2d, §§523, 524; 29A *Am.Jur.2d* (1994 ed.), *Evidence* §§1221 et seq., 1227.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Evidence k.380



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#### B. Methods of Authentication.

##### 2. Testimony.

##### e. Witness to Tape Recording.

#### 2. Effect of Partially Unintelligible Tape.

2 Witkin Cal. Evid. Doc Evid § 13

#### [§ 13] Effect of Partially Unintelligible Tape.

To be admissible, a tape recording need not be completely intelligible for the entire conversation so long as enough of it is intelligible to be relevant without creating an inference of speculation or unfairness. (See 57 A.L.R.3d 746 [omission or inaudibility of portions of tape as affecting admissibility].) "Thus, a partially unintelligible tape is admissible unless the audible portions of the tape are so incomplete the tape's relevance is destroyed." (*People v. Polk* (1996) 47 C.A.4th 944, 952, 956, 54 C.R.2d 921 [in murder trial, tape recording of defendants' conversation in back of police car was properly admitted even though portions were inaudible, and trial judge did not abuse discretion in admitting transcript of recording based on finding that it was substantially complete and accurate]; see *People v. Von Villas* (1992) 11 C.A.4th 175, 225, 15 C.R.2d 112 [tape recording of jailhouse conversation between defendant and wife was properly admitted even though portions were unintelligible].)

In *People v. Spencer* (1963) 60 C.2d 64, 31 C.R. 782, 383 P.2d 134, the recording was played to the jury. On appeal, defendant challenged its authentication by pointing out that the reporter's transcript contained 162 instances listed "unintelligible." The record on appeal also contained the tape as an exhibit, and the Supreme Court had it played and compared with the transcript, finding it clear and comprehensible in all of these instances. The explanation was that the reporters took down the words from their seats in the courtroom, some distance away from the place where the recording was played so the jurors could hear it best. Because no juror complained of lack of understanding, and trial counsel made no such objection, the challenge was unfounded. (60 C.2d 79, 80.) The court observed, however, that the better practice is for the trial judge to listen to recordings before allowing them to be played to the jury, in order to rule in advance on objections to completeness, accuracy and intelligibility. (60 C.2d 80, footnote 9.)

**SUPPLEMENT:** [This section is current through the latest supplement]





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#### B. Methods of Authentication.

#### 3. Circumstantial Evidence.

#### a. Comparison With Exemplar.

#### 1. Nature of Proof.

2 Witkin Cal. Evid. Doc Evid § 14

[§ 14] Nature of Proof.

A common method of proof is by comparison of the offered writing with some other admittedly genuine writing, called an "exemplar." The comparison may, of course, be made by an expert witness (*supra*, §10) in order to form his or her opinion. (*Ev.C. 1418*.) But the two writings--the disputed and the exemplar--may be offered in evidence, and considered by the jury or other trier of fact as circumstantial evidence to prove genuineness or lack thereof. (*Ev.C. 1417*; see *Castor v. Bernstein* (1906) 2 C.A. 703, 705, 84 P. 244; *People v. Storke* (1900) 128 C. 486, 488, 60 P. 1090; *People v. Gaines* (1934) 1 C.2d 110, 115, 34 P.2d 146; *People v. Davis* (1944) 65 C.A.2d 255, 257, 150 P.2d 474 [prosecution for maintaining illegal betting establishment; comparison of questioned betting marker with admittedly genuine loan application]; C.E.B., 2 Civil Proc. During Trial 3d, §13.74; 2 McCormick 5th, §221; 41 A.L.R.2d 575 [mode and degree of proof required to establish genuineness of handwriting]; 80 A.L.R.2d 272 [comparison by trier of fact without expert testimony].)

Federal practice is similar. (See *F.R. Evid.*, Rule 901(b)(3) ["Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated"]; 5 Mueller & Kirkpatrick, *Federal Evidence* 2d, §516; 29A *Am.Jur.2d* (1994 ed.), *Evidence* §1215.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Rodriguez* (2005) 133 C.A.4th 545, 554, 34 C.R.3d 886 [in prosecution for presenting fraudulent claims, trial judge did not err in allowing jury, without benefit of testimony from handwriting expert, to compare signatures on disputed documents with exemplar of defendant's signature (his driver's license) to determine that questioned signatures were made by defendant]; 2 McCormick 6th, §223.



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##### a. Comparison With Exemplar.

#### 2. Foundation: Requisites of Exemplar.

*2 Witkin Cal. Evid. Doc Evid § 15*

[§ 15] Foundation: Requisites of Exemplar.

(1) *In General.* The foundation for this type of circumstantial evidence is proof of the preliminary fact of genuineness of the exemplar. The court must find that it was "admitted or treated as genuine" by the adverse party, or it must be "otherwise proved to be genuine to the satisfaction of the court." (*Ev.C. 1417.*)

The exemplar must be one which was written naturally and independently of the purposes of the litigation. A specimen writing or signature prepared specially for the use of an expert after litigation has commenced ("*post litem motam*") is not admissible. (*People v. Sauer (1958) 163 C.A.2d 740, 745, 329 P.2d 962* [holding, however, that admission was not reversible error because other proper specimens were used and other sufficient evidence of forgery was introduced]; see 72 A.L.R.2d 1274 [competency, as standard of comparison to establish genuineness of handwriting, of writings made after controversy arose].)

And a defendant cannot offer exemplars of his or her handwriting, made at the trial or after his arrest, because of the possibility of fraud in allowing the defendant to corroborate his or her own testimony by a prepared specimen. (*People v. Briggs (1931) 117 C.A. 708, 711, 4 P.2d 593; People v. Golembiewski (1938) 25 C.A.2d 115, 119, 76 P.2d 717.*)

(2) *Ancient Writings.* The foundation requirement is relaxed for proof of ancient writings, i.e., those that are more than 30 years old. For these writings, the comparison may be made "with a writing purporting to be genuine, and generally respected and acted upon as such, by persons having an interest in knowing whether it is genuine." (*Ev.C. 1419*; see *Devereaux v. Frazier Mountain Park & Fisheries Co. (1967) 248 C.A.2d 323, 330, 56 C.R. 345* [both documents over 30 years old].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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##### a. Comparison With Exemplar.

#### 3. Exemplars Requested by Opposing Party.

2 Witkin Cal. Evid. Doc Evid § 16

[§ 16] Exemplars Requested by Opposing Party.

Ordinarily, a witness who denies that a particular signature is his or hers is prohibited from writing his or her name in the jury's presence and offering the result as a standard of handwriting comparison. If a witness could corroborate his or her own testimony with his or her own written specimens, the risk of fraud would be too great. (See *supra*, §15.) But despite this exclusion on *direct* examination, compelled preparation of current handwriting exemplars is proper on *cross-examination*. The witness may be required to write the disputed name and give other written samples for comparison with the signature in question. (*People v. Villarino* (1970) 7 C.A.3d 56, 66, 86 C.R. 338 [defendant's wife testified on direct examination that she had filled in and signed checks her husband was accused of forging; district attorney entitled to obtain samples of her handwriting on cross-examination]; *People v. Najera* (1972) 8 C.3d 504, 513, 105 C.R. 345, 503 P.2d 1353 [it is not improper to use *post litem motam* exemplar (i.e., one made after commencement of litigation) against party who made it].)

In *People v. Hess* (1970) 10 C.A.3d 1071, 90 C.R. 268, the prosecution obtained an order requiring defendant to furnish a sample of her writing with a backhand slant in addition to her already-furnished normal handwriting. (The allegedly forged bills of sale and loss claims were written in that backhand way.) On advice of counsel, who stressed the unfairness of compelling her to write in an unnatural hand, disguised in the same manner as the forged writing, she refused. Evidence of this refusal was introduced. In a related move, to rebut an inference that a witness, Mrs. T, had committed the forgeries, the prosecutor introduced expert testimony that an analysis of the forged documents showed that the handwriting was different from specially prepared samples made by Mrs. T. The prosecutor then argued to the jury that defendant's refusal raised an inference of guilt. *Held*, no error.

(a) If defendant had prepared a backhand exemplar, the result would have facilitated either her identification or her elimination as the author of the forged documents. (10 C.A.3d 1077.)

(b) Because none of the persons on whom suspicion focused wrote *naturally* in backhand, it was proper to compare the forged documents with a sample of Mrs. T's handwriting, given after the litigation had begun. The rule excluding *post litem motam* samples presupposes that existing samples, adequate for comparison purposes, will normally be available. "[W]e doubt the rule should be applied where the questioned writing is in a *disguised style* precluding the pre-existence of samples which will enable an expert to make a definitive analysis." (10 C.A.3d 1078.)

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b. Evidence That Writing Was Reply.

2 *Witkin Cal. Evid. Doc Evid* § 17

[§ 17] Evidence That Writing Was Reply.

If a letter or telegram is sent to a person and a reply is received in due course purporting to come from that person, this is sufficient evidence of genuineness. (*House Grain Co. v. Finerman & Sons* (1953) 116 C.A.2d 485, 492, 253 P.2d 1034 ["A reply-telegram authenticates itself"]; see 2 McCormick 5th, §225; 7 Wigmore (Chadbourn Rev.) §§2153, 2154; C.E.B., 2 Civil Proc. During Trial 3d, §1375; but see *People v. Rosenbloom* (1931) 119 C.A. Supp. 759, 768, 2 P.2d 228 [no foundation laid where no showing of mailing, contents, or subject matter of previous letter].)

This rule has been codified as follows: A writing may be authenticated by evidence that it was received in response to a communication sent to the person that the proponent of the evidence claims is the writing's author. (*Ev.C. 1420*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 2 McCormick 6th, §224. *West's Key Number Digest*, Evidence k.378(2)



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##### c. Authentication by Content.

##### 1. Letter or Other Writing.

2 *Witkin Cal. Evid. Doc Evid* § 18

[§ 18] Letter or Other Writing.

(1) *California Law*. The authenticity of a letter or other writing may appear from its contents, as where it states facts that would be known to the person whose letter it purports to be, or appears to be part of a series of letters between two parties. "If its tenor, subject-matter, and the parties between whom it purports to have passed make it fairly fit into an admitted or proved course of correspondence and constitute an evident connecting link or part thereof, these circumstances justify its admission." (*Chaplin v. Sullivan* (1945) 67 C.A.2d 728, 734, 155 P.2d 368; see *McAllister v. George* (1977) 73 C.A.3d 258, 263, 140 C.R. 702 [dental bill; "by referring to the same matters testified to by plaintiff, matters as to which only plaintiff and the party who performed the dental services would likely have knowledge," it was authenticated by its contents in light of the circumstances]; 2 McCormick 5th, §225; 7 Wigmore (Chadbourn Rev.) §2148; C.E.B., 2 Civil Proc. During Trial 3d, §13.76.)

This rule has been codified as follows: A writing may be authenticated by evidence that it refers to or states matters that are unlikely to be known to anyone other than the person who the proponent of the evidence claims is the author of the writing. (*Ev.C. 1421*.)

(2) *Federal Rules of Evidence*. Federal practice permits similar authentication based on "[a]pppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." (*F.R. Evid., Rule 901(b)(4)*); see 5 Mueller & Kirkpatrick, *Federal Evidence* 2d, §517 et seq.; 29A *Am.Jur.2d* (1994 ed.), *Evidence* §§1044, 1045.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *California Law*. See 2 McCormick 6th, §224. *West's Key Number Digest*, Evidence k.378 et seq.



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c. Authentication by Content.

2. Tape Recording.

2 *Witkin Cal. Evid. Doc Evid* § 19

[§ 19] Tape Recording.

A tape recording also may be authenticated by content. Thus, in *People v. Fonville* (1973) 35 C.A.3d 693, 111 C.R. 53, defendant was visited in jail by his uncle. Unknown to them, as they communicated through a telephone intercom, the sheriff's office was recording their conversation at the district attorney's request. The conversation included incriminating statements which the prosecutor sought to introduce at trial, but without calling any witness to identify the voices or testify that the tape was an accurate reproduction of the conversation. *Held*, the evidence was properly admitted.

The recorded statements dealt with matters that defendant had both denied and told to the police about his state of intoxication, the quantity of intoxicants taken and the time the victim left a cafe, thus indicating that in fact it was defendant whose words were on the recording. "They are matters that are unlikely to have been known by anyone other than the appellant. In effect, the conversation proves itself." (35 C.A.3d 709.) (See 52 So. Cal. L. Rev. 1290, 1298, criticizing "laxity" of *Fonville* holding.)

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d. Graffiti in Vandalism Prosecution.

2 Witkin Cal. Evid. Doc Evid § 20

[§ 20] Graffiti in Vandalism Prosecution.

*For purposes of our authentication statute, a writing includes graffiti consisting of written words, insignia, symbols, or other markings that convey a particular meaning. (Ev.C. 1410.5(a).) Graffiti, or a photograph of it, may be admitted into evidence in an action for vandalism to prove that it was made by the defendant. (Ev.C. 1410.5(b).)*

The admissibility of facts offered to prove that the graffiti was made by the defendant must, upon motion of the defendant, be ruled on outside the jury's presence, and is subject to the testimonial and circumstantial evidence requirements of *Ev.C. 1416, 1417, and 1418* (see *supra*, §§11, 14 et seq.). (*Ev.C. 1410.5(c).*)

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#### B. Methods of Authentication.

#### 4. Admission by Adverse Party.

2 Witkin Cal. Evid. Doc Evid § 21

[§ 21] Admission by Adverse Party.

(1) *Before Trial*. The authenticity of an instrument relied on by the plaintiff or defendant may be established *prior to the trial*, in discovery proceedings (request for admissions; see 2 Cal. Evidence (4th), Discovery, §157 et seq.) or at a pretrial conference (see 7 Cal. Proc. (4th), Trial, §52 et seq.; 9 Wigmore (Chadbourn Rev.) §2597).

(2) *During Trial*. A writing may be authenticated at trial by evidence of either of the following (see C.E.B., 2 Civil Proc. During Trial 3d, §13.77):

(a) That the adverse party "has at any time admitted its authenticity." (Ev.C. 1414(a).)

(b) That the writing "has been acted upon as authentic" by the adverse party. (Ev.C. 1414(b); see *Vista v. Sutro & Co.* (1997) 52 C.A.4th 401, 412, 413, 60 C.R.2d 488 [client agreement between city and brokerage firm requiring city to arbitrate claims against firm was properly authenticated based on evidence agreement had been acted on by city as authentic].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *During Trial*.

(b) *Writing acted on as authentic*: See *Ambriz v. Kelegian* (2007) 146 C.A.4th 1519, 1527, 53 C.R.3d 700 [in legal malpractice action, trial judge erred in sustaining defendants' objections to deposition excerpt offered by plaintiff based on plaintiff's attorney's failure to attest to personal knowledge of excerpt, lay foundation, or authenticate excerpt; defendants admitted authenticity by using portions of deposition in support of summary judgment motion, and plaintiff's attorney attested, under penalty of perjury, that copy of excerpt submitted constituted true and correct copy of what it purported to be].





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#### C. Presumptions of Authenticity.

##### 1. Private Writings.

#### 2 *Witkin Cal. Evid. Doc Evid* § 22

[§ 22] Private Writings.

The foundation for authentication may be furnished by a presumption that places the burden of producing evidence challenging the writing on the adverse party and requires a finding of authenticity if the burden is not met. (*Ev.C. 1450*; on effect of this type of presumption, see 1 *Cal. Evidence* (4th), *Burden of Proof and Presumptions*, §177.) There are five important situations:

(1) *Acknowledged Writing*. Except for wills, which require special proof (see *supra*, §8), a certificate "of the acknowledgment" or "of the proof" of a writing, pursuant to C.C. 1180 et seq., "is prima facie evidence of the facts recited in the certificate and the genuineness of the signature of each person by whom the writing purports to have been signed." (*Ev.C. 1451*; see *Thomas v. Fursman* (1918) 177 C. 550, 553, 171 P. 301; *Thomas v. Peterson* (1931) 213 C. 672, 674, 3 P.2d 306; 4 *Summary* (9th), *Real Property*, §165 et seq.) (On federal practice, see *F.R. Evid.*, Rule 902(b)(8).)

(2) *Ancient Instrument*. (*Ev.C. 643*; see 1 *Cal. Evidence* (4th), *Burden of Proof and Presumptions*, §199.)

(3) *Document of Title*. The Uniform Commercial Code provides that a document in due form purporting to be a bill of lading, policy or certificate of insurance, official weigher's or inspector's certificate, consular invoice, "or any other document authorized or required by the contract to be issued by a third party," is presumed to be authentic and genuine. (U.C.C. 1202.) The statute is designed to supply judicial recognition for documents "which have traditionally been relied upon as trustworthy by commercial men." (Official Comment to U.C.C. 1202.) (On federal practice, see *F.R. Evid.*, Rule 902(9).)

(4) *Corporate Instrument*. Instruments signed by specified corporate officers are presumptively valid as to the corporation. (*Corp.C. 313*; see *Associates Discount Corp. v. Tobbs Co.* (1966) 241 C.A.2d 541, 547, 50 C.R. 738 [discussing predecessor statute]; 9 *Summary* (9th), *Corporations*, §§86, 115.)

(5) *Book, Newspaper, or Periodical*. Books and printed materials purporting to be particular newspapers or periodicals are presumed to have been published and to be those publications, and books purporting to contain case reports are presumed to contain correct reports. (*Ev.C. 644* et seq.; see 1 *Cal. Evidence* (4th), *Burden of Proof and Presumptions*, §200 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Acknowledged Writing*.

*Cross-Reference:* 12 *Summary* (10th), *Real Property*, §283 et seq.(3) *Document of Title*. U.C.C. 1202 was repealed and replaced by U.C.C. 1307 in 2006 without substantive change.

(4) *Corporate Instrument*.

*Cross-Reference:* 9 *Summary* (10th), *Corporations*, §§56, 109, 110.*Corrections:* Page 148, fifth line of section, "§177" should be "§55".Page 149, line 8, "§199" should be "§80".

Page 149, second to last line of section, "§200" should be "§81".*West's Key Number Digest*, Evidence k.70 et seq.



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#### C. Presumptions of Authenticity.

##### 2. Public Writings.

##### a. Seal of Entity or Official.

2 Witkin Cal. Evid. Doc Evid § 23

[§ 23] Seal of Entity or Official.

Formerly, official seals were judicially noticed in California. (See *People v. Hollander* (1958) 163 C.A.2d 379, 382, 329 P.2d 740 [conviction for issuing bad checks drawn on Arizona bank, evidence of protest admitted and judicial notice taken of seal of Arizona notary].) But matters judicially noticed cannot be controverted (see 1 Cal. Evidence (4th), Judicial Notice, §3), and there are occasions when the authenticity of official documents is in dispute. Thus, *Ev.C. 1452* substitutes a presumption, which normally dispenses with proof but which safeguards the right to contest. Under the statute, a seal is presumed to be genuine and its use authorized if it purports to be the seal of any of the following entities or officials:

- (1) The United States or a department, agency, or public employee of the United States. (*Ev.C. 1452(a).*)
- (2) A public entity in the United States or a department, agency, or public employee of that public entity. (*Ev.C. 1452(b).*)
- (3) A nation recognized by the executive power of the United States or a department, agency, or officer of that nation. (*Ev.C. 1452(c).*)
- (4) A public entity in a nation recognized by the executive power of the United States or a department, agency, or officer of such public entity. (*Ev.C. 1452(d).*)
- (5) A court of admiralty or maritime jurisdiction. (*Ev.C. 1452(e).*)
- (6) A notary public within a state of the United States. (*Ev.C. 1452(f).*)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Jacobson v. Gourley* (2000) 83 C.A.4th 1331, 1334, 1335, 100 C.R.2d 349 [emblem of county sheriff's department on report stating driver's blood-alcohol level did not give rise to presumption under *Ev.C. 1452* where there was no accompanying signature; seal attests to execution of document, and if there is no signature, there can be no seal].



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C. Presumptions of Authenticity.

2. Public Writings.

b. Signature of Domestic Public Employee or Notary.

*2 Witkin Cal. Evid. Doc Evid § 24*

[§ 24] Signature of Domestic Public Employee or Notary.

A signature is presumed to be genuine and authorized if it purports to be the signature, affixed in the official capacity, of any of the following persons:

(1) A public employee of the United States. (*Ev.C. 1453(a).*)

(2) A public employee of a public entity in the United States. (*Ev.C. 1453(b)*; see *Poland v. Department of Motor Vehicles* (1995) 34 C.A.4th 1128, 1135, 40 C.R.2d 693 [highway patrol officer's signature on his reports supplied sufficient authentication to allow reports to be admitted in license suspension proceedings, absent evidence indicating reports were not authentic].)

(3) A notary public within a state of the United States. (*Ev.C. 1453(c).*)

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#### C. Presumptions of Authenticity.

##### 2. Public Writings.

##### c. Signature of Foreign Officer.

*2 Witkin Cal. Evid. Doc Evid § 25*

[§ 25] Signature of Foreign Officer.

Under *Ev.C. 1454*, a signature is presumed to be genuine and authorized if it purports to be the signature, affixed in the official capacity, of an officer (or the officer's deputy) of a nation (or a public entity therein) recognized by the Executive Branch of the United States. The writing to which the signature is affixed must be accompanied by a final statement made only by a secretary of an embassy or legation, consul general, consul, vice consul, consular agent, or other officer in the foreign service of the United States stationed in the nation and authenticated by the seal of the person's office. The final statement must certify the genuineness of the signature and the official position of either of the following:

(1) The person who executed the writing. (*Ev.C. 1454(a).*)

(2) A foreign official who has certified either (a) the genuineness of the signature and the official position of the person executing the writing, or (b) the genuineness of the signature and the official position of another foreign official who has executed a similar certificate in a chain of certificates beginning with a certificate of the genuineness of the signature and the official position of the person executing the writing. (*Ev.C. 1454(b).*)

The Law Revision Commission Comment states: "The procedure ... is necessary for the reason that a United States foreign service officer may not be able to certify to the official position and signature of a particular foreign official. Accordingly, this section permits the original signature to be certified by a higher foreign official, whose signature can in turn be certified by a still higher official, and such certifications can be continued in a chain until a foreign official is reached as to whom the United States foreign service officer has adequate information upon which to base his final certification."

**SUPPLEMENT:** [This section is current through the latest supplement]



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## C. Presumptions of Authenticity.

## 2. Public Writings.

## d. Federal Rules of Evidence.

2 Witkin Cal. Evid. Doc Evid § 26

[§ 26] Federal Rules of Evidence.

*F.R. Evid., Rule 902* provides that extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following (see 5 Mueller & Kirkpatrick, *Federal Evidence* 2d, §538 et seq.; 29A *Am.Jur.2d* (1994 ed.), *Evidence* §1180 et seq.):

(1) *Domestic Public Documents Under Seal*. A document bearing a seal purporting to be that of the United States, a state, district, commonwealth, territory, or insular possession of the United States, the Panama Canal Zone, the Trust Territory of the Pacific Islands, or a political subdivision, department, officer, or agency of these entities and a signature purporting to be an attestation or execution. (*F.R. Evid., Rule 902(1)*.)

(2) *Domestic Public Documents Not Under Seal*. A document purporting to bear the signature, without seal, of a person acting in the official capacity of an officer or employee of an entity mentioned in *F.R. Evid., Rule 902(1)*. The document must be accompanied by a statement under seal, as prescribed, attesting to the veracity of the signer's official capacity and the genuineness of the signature. (*F.R. Evid., Rule 902(2)*.)

(3) *Foreign Public Documents*. A document purporting to be executed or attested by a person acting in the official capacity to do so under the laws of a foreign country, and accompanied by a proper final certification. The final certification may be made by a secretary of an embassy or a legation, the consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. A proper final certification must attest to the genuineness of the signature and the official position of the (a) executing or attesting person, or of (b) a foreign official whose final certification relates to the execution or attestation, or is in a chain of final certificates relating to the execution or attestation. However, if reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification, or permit them to be evidenced by an attested summary with or without final certification. (*F.R. Evid., Rule 902(3)*.)

(4) *Certified Copies of Public Records*. An apparent copy of a public record or any document recorded or filed in a public office as authorized by law, when accompanied by proper certification that the copy is true and correct. Proper certification means a certificate satisfying the criteria of *F.R. Evid., Rule 902(1)*, (2), or (3), a federal statute, or a United States Supreme Court rule. (*F.R. Evid., Rule 902(4)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(5) *(New) Domestic Records of Regularly Conducted Activity.* *F.R. Evid., Rule 902(11)*, added in 2000, provides for self-authentication of domestic records of regularly conducted activity "that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record (A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters; (B) was kept in the course of the regularly conducted activity; and (C) was made by the regularly conducted activity as a regular practice." (On *F.R. Evid., Rule 803(6)*, see *1 Cal. Evidence (4th), Hearsay, §227.*)

(6) *(New) Foreign Records of Regularly Conducted Activity.* *F.R. Evid., Rule 902(12)*, added in 2000, provides for self-authentication of foreign records of regularly conducted activity "that would be admissible under Rule 803(6) if accompanied by a written declaration by its custodian or other qualified person certifying that the record (A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters; (B) was kept in the course of the regularly conducted activity; and (C) was made by the regularly conducted activity as a regular practice. The declaration must be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed."



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## CHAPTER VIII - Documentary Evidence

## III. SECONDARY EVIDENCE

## A. Former Best Evidence Rule.

## 1. Nature of Rule.

2 *Witkin Cal. Evid. Doc Evid* § 27

[§ 27] Nature of Rule.

(1) *Statement of Rule.* California's former best evidence rule, concerned solely with proof of writings, was stated as follows: "*Except as otherwise provided by statute, no evidence other than the original of a writing is admissible to prove the content of a writing.*" (Former Ev.C. 1500; see generally Model C., Rule 602; Unif. Rule 1002; *Lawrence v. Premier Indem. Assur. Co.* (1919) 180 C. 688, 697, 182 P. 431; 2 McCormick 5th, §229 et seq.; 4 Wigmore (Chadbourn Rev.) §1177 et seq.; 3 Wharton, Crim. Evidence (14th ed.), §489 et seq.; C.E.B., 2 Civil Proc. During Trial 3d, §13.122 et seq.; 35 Proof of Facts 2d 147 [foundation for admission of secondary evidence]; on similar federal rule, see *F.R. Evid.*, Rule 1002; 5 Mueller & Kirkpatrick, Federal Evidence 2d, §567 et seq.; 29A *Am.Jur.2d* (1994 ed.), Evidence §1049.)

(2) *Purpose of Rule.* The reasons for the former rule are stated in the Model Code: "Slight differences in written words or other symbols may make vast differences in meaning; there is great danger of inaccurate observation of such symbols, especially if they are substantially similar to the eye. Consequently there is opportunity for fraud and likelihood of mistake in proof of the content of a writing unless the writing itself is produced. Hence it should be produced if available." (Model C., Rule 602, Comment, p. 300; see 2 McCormick 5th, §231; 4 Wigmore (Chadbourn Rev.) §1179; Law Rev. Com. Comment to former Ev.C. 1500.)

(3) *Repeal and Replacement by Secondary Evidence Rule.* The 1998 Legislature repealed the best evidence rule and replaced it with the secondary evidence rule (Ev.C. 1520 et seq.). (See *infra*, §31 et seq.; for transitional provisions, see *infra*, §31.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Statement of Rule.* See 2 McCormick 6th, §230 et seq.

(2) *Purpose of Rule.* See 2 McCormick 6th, §232. *West's Key Number Digest*, Criminal Law k.398 et seq.; Evidence k.157 et seq.





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## CHAPTER VIII - Documentary Evidence

### III. SECONDARY EVIDENCE

#### A. Former Best Evidence Rule.

##### 2. Exceptions to Rule.

##### a. Original Lost or Destroyed.

2 Witkin Cal. Evid. Doc Evid § 28

[§ 28] Original Lost or Destroyed.

(1) *In General*. The most important exception to the former best evidence rule was dictated by necessity: When the original writing had been "lost or destroyed," secondary evidence of its contents was admissible. (Former Ev.C. 1501; see *Kenniff v. Caulfield* (1903) 140 C. 34, 40, 73 P. 803; *Guardianship of Levy* (1955) 137 C.A.2d 237, 249, 290 P.2d 320; 2 McCormick 5th, §237; 4 Wigmore (Chadbourn Rev.) §1192 et seq.; on similar federal rule, see *F.R. Evid.*, Rule 1004(1); 5 Mueller & Kirkpatrick, *Federal Evidence* 2d, §577; 29A *Am.Jur.2d* (1994 ed.), *Evidence* §1054.)

(2) *Good Faith Requirement*. For the exception to apply, the loss or destruction must have been "without fraudulent intent on the part of the proponent of the evidence." (Former Ev.C. 1501; see *Hibernia Savings & Loan Soc. v. Boyd* (1909) 155 C. 193, 199, 100 P. 239 [judgment in foreclosure suit, destroyed in San Francisco fire of 1906]; *People v. Guasti* (1952) 110 C.A.2d 456, 462, 243 P.2d 59 [destruction by third person]; *People v. Morris* (1991) 53 C.3d 152, 205, 279 C.R. 720, 807 P.2d 949, supra, §6 [same; defendant's letter to girlfriend destroyed by her in jail].)

(3) *Establishing Loss*. It was sufficient to show exhaustion of ordinary sources of information and means of discovery, and the matter was largely committed to the discretion of the trial judge. "The general rule concerning proof of a lost instrument is, that reasonable search shall be made for it in the place where it was last known to have been, and, if such search does not discover it, then inquiry should be made of persons most likely to have its custody, or who have some reason to know of its whereabouts." (*Kenniff v. Caulfield* (1903) 140 C. 34, 41, 73 P. 803; see *Ulm v. Prather* (1920) 49 C.A. 141, 144, 192 P. 878; *Cotton v. Hudson* (1941) 42 C.A.2d 812, 814, 110 P.2d 70; *People v. Jackson* (1937) 24 C.A.2d 182, 198, 74 P.2d 1085; *Cheek v. Whiston* (1958) 159 C.A.2d 472, 477, 323 P.2d 1028; 2 McCormick 5th, §237; 4 Wigmore (Chadbourn Rev.) §1194 et seq.)

(4) *Intentional Innocent Destruction*. Writings are often intentionally destroyed for wholly innocent reasons unconnected with any contemplation of litigation, and proof of that occurrence was a sufficient foundation for offer of secondary evidence. (See *Guardianship of Levy* (1955) 137 C.A.2d 237, 249, 290 P.2d 320; *People v. King* (1950) 101 C.A.2d 500, 507, 225 P.2d 950.)

(5) *Statutory Restoration Proceeding*. C.C.P. 1953.10 et seq. establishes a proceeding for proof and restoration of a writing made unavailable by public calamity. (See *infra*, §56.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General*. See 2 McCormick 6th, §237.

(3) *Establishing Loss*. See 2 McCormick 6th, §237. *West's Key Number Digest*, Criminal Law k.398(2); Evidence k.178 et seq.



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## CHAPTER VIII - Documentary Evidence

### III. SECONDARY EVIDENCE

#### A. Former Best Evidence Rule.

##### 2. Exceptions to Rule.

#### b. Original Under Control of Opponent.

2 Witkin Cal. Evid. Doc Evid § 29

[§ 29] Original Under Control of Opponent.

(1) *Notice To Produce: Civil Action.* A special type of impracticability occurs where the writing is in the control of the adverse party. If the proponent wishes to inspect or introduce the original in evidence, the proponent may employ the discovery procedure of inspection or serve a subpoena duces tecum. (See 2 Cal. Evidence (4th), Discovery, §§118 et seq., 218 et seq.) But if the proponent merely wishes to lay a foundation for the introduction of secondary evidence of its contents, he or she may give the adverse party a simple notice to produce it, which need not be in any particular form and may be oral or written.

Thus, former Ev.C. 1503 made a copy admissible "if, at a time when the writing was under the control of the opponent, the opponent was *expressly or impliedly notified*, by the *pleadings or otherwise*, that the writing would be needed at the hearing, and *on request at the hearing* the opponent has *failed to produce* the writing." (See *Harloe v. Lambie* (1901) 132 C. 133, 136, 64 P. 88 [pleadings alleged execution and defendant and his attorney did not produce it when requested]; 2 McCormick 5th, §239; 4 Wigmore (Chadbourn Rev.) §§1199 et seq., 1202 et seq.; 35 Proof of Facts 2d 147, 171, 200 [foundation for admission of secondary evidence]; on similar federal rule, see *F.R. Evid.*, Rule 1004(3); 5 Mueller & Kirkpatrick, Federal Evidence 2d, §579; 29A Am.Jur.2d (1994 ed.), Evidence §1057.)

(2) *Notice To Produce: Criminal Action.* Originally, the prosecution was probably not required to give the defendant a notice to produce a document that was in his or her possession. The theory of the excuse was that the defendant could withhold the writing under the self-incrimination privilege. (See *People v. Chapman* (1921) 55 C.A. 192, 200, 203 P. 126; 2 McCormick 5th, §239; 4 Wigmore (Chadbourn Rev.) §1207.)

The Evidence Code took the position that the defendant was entitled to the notice, but should be protected against the possible prejudice from the jury hearing the prosecution's request for the original; also, the prosecution should be protected against the jury hearing the defendant's request for a privileged writing. Accordingly, no excuse for failure to give notice to produce was recognized; but, "[i]n a criminal action, the request at the hearing to produce the writing *may not be made in the presence of the jury*." (Former Ev.C. 1503(a); see *People v. Enskat* (1971) 20 C.A.3d Supp. 1, 4, 98 C.R. 646.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Notice To Produce: Civil Action.* See 2 McCormick 6th, §237.

(2) *Notice To Produce: Criminal Action.* See 2 McCormick 6th, §237. West's Key Number Digest, Evidence k.179

et seq.



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## III. SECONDARY EVIDENCE

## A. Former Best Evidence Rule.

## 2. Exceptions to Rule.

## c. Other Exceptions.

## 2 Witkin Cal. Evid. Doc Evid § 30

## [§ 30] Other Exceptions.

(1) *Printed Representations of Computer Information and Programs and Images Stored on Video or Digital Media.* Former Ev.C. 1500.5 created an exception to the best evidence rule by making computer recorded information or computer programs, or copies of them, admissible. Former Ev.C. 1500.6 created a similar exception for printed representations of images stored on video or digital media.

(2) *Original Unavailable.* The best evidence rule was inapplicable if the writing "was not reasonably procurable by the proponent by use of the court's process or by other available means." (Former Ev.C. 1502; see *People v. Powell* (1925) 71 C.A. 500, 515, 236 P. 311; 2 McCormick 5th, §238; 4 Wigmore (Chadbourn Rev.) §1211 et seq.) (On similar *F.R. Evid.*, Rule 1004(2), see 5 Mueller & Kirkpatrick, Federal Evidence 2d, §578; 29A Am.Jur.2d (1994 ed.), Evidence §1056.)

(3) *Writing Only Collaterally Involved.* The best evidence rule applied when an attempt was made to *prove the contents of a writing*. There were situations, however, in which the terms of the writing were not directly in issue. The writing was then said to be "only collaterally involved," and secondary evidence was admissible. (Former Ev.C. 1504; see *Marriner v. Dennison* (1889) 78 C. 202, 213, 20 P. 386, infra, §40; *People v. Royce* (1895) 106 C. 173, 180, 39 P. 524; *Lawrence v. Premier Indem. Assur. Co.* (1919) 180 C. 688, 697, 182 P. 431, infra, §40; *Ponce v. Marr* (1956) 47 C.2d 159, 162, 301 P.2d 837; *People v. Sweeney* (1960) 55 C.2d 27, 9 C.R. 793, 357 P.2d 1049, infra, §38; *People v. Kulwin* (1951) 102 C.A.2d 104, 109, 226 P.2d 672, infra, §38; *Vickter v. Pan Pac. Sales Corp.* (1952) 108 C.A.2d 601, 603, 239 P.2d 463; *People v. Johnson* (1974) 39 C.A.3d 749, 763, 114 C.R. 545; 2 McCormick 5th, §234; 4 Wigmore (Chadbourn Rev.) §§1242 et seq., 1252 et seq.) (On similar *F.R. Evid.*, Rule 1004(4), see 5 Mueller & Kirkpatrick, Federal Evidence 2d, §580.)

(4) *Public Records and Recorded Writings.* A copy was admissible if the writing was "a record or other writing that is in the custody of a public entity." (Former Ev.C. 1506; see 2 McCormick 5th, §240; 4 Wigmore (Chadbourn Rev.) §1269.)

A copy also was admissible if (a) the writing had been recorded, and (b) "the record or an attested or a certified copy thereof is made evidence of the writing by statute." (Former Ev.C. 1507; see 2 McCormick 5th, §240; 4 Wigmore (Chadbourn Rev.) §1215 et seq.)

Where the writing was a public record in the custody of a public entity, or a recorded private writing (former Ev.C.

1506 and 1507), other secondary evidence could be offered if the proponent "could not in the exercise of reasonable diligence have obtained a copy." (Former Ev.C. 1508; see *People v. Bizieff* (1991) 226 C.A.3d 1689, 1697, 277 C.R. 678.)

Where an original private writing was lost or destroyed (former Ev.C. 1501, supra, §28), was unavailable (former Ev.C. 1502, supra), was under the control of the adverse party (former Ev.C. 1503, supra, §29), or was only collaterally involved (former Ev.C. 1504, supra), the proponent who did not have a copy could offer other secondary evidence such as oral testimony of its contents. (Former Ev.C. 1505; see *People v. Bizieff*, supra.) The difference between this section and former Ev.C. 1508 (supra) was that *no showing of diligence* to obtain a copy was necessary.

*F.R. Evid., Rule 1005* is similar to former California law. (See 5 Mueller & Kirkpatrick, Federal Evidence 2d, §§581, 582; 29A Am.Jur.2d (1994 ed.), Evidence §1090.)

(5) *Voluminous Writings*. There was another exception where papers were "numerous accounts or other writings that cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole." (Former Ev.C. 1509; see *Globe Mfg. Co. v. Harvey* (1921) 185 C. 255, 261, 196 P. 261; *People v. Doble* (1928) 203 C. 510, 514, 265 P. 184; *Exclusive Florists v. Kahn* (1971) 17 C.A.3d 711, 714, 95 C.R. 325; *Vanguard Recording Soc. v. Fantasy Records* (1972) 24 C.A.3d 410, 418, 100 C.R. 826; *Wolfen v. Clinical Data* (1993) 16 C.A.4th 171, 182, 19 C.R.2d 684; *Eaton v. Brock* (1954) 124 C.A.2d 10, 15, 268 P.2d 58; 4 Wigmore (Chadbourn Rev.) §1230; 80 A.L.R.3d 405 [requirement of notice as condition for admission of summary]; 59 A.L.R.4th 971 [admissibility of summary].) (On federal practice, see *F.R. Evid., Rule 1006*; 5 Mueller & Kirkpatrick, Federal Evidence 2d, §583 et seq.; 29A Am.Jur.2d (1994 ed.), Evidence §1060 et seq.)

(6) *Original Produced at Hearing*. Another exception gave a desirable alternative to the party whose original business records could not be left with the court as exhibits for an indefinite time without great inconvenience. He or she could produce the original writing and make it available for the adverse party's inspection, along with the copy; then he or she could take the original back and leave only the copy. (Former Ev.C. 1510.)

(7) *Admissibility of Duplicates*. A duplicate was admissible to the same extent as an original unless a genuine question was raised as to the authenticity of the original, or if it would have been unfair to admit the duplicate in lieu of the original. (Former Ev.C. 1511; see 2 McCormick 5th, §236; 4 Wigmore (Chadbourn Rev.) §1233; 64 Harv. L. Rev. 1369.) (On continuation of exception under current secondary evidence rule, see *infra*, §36; on identical *F.R. Evid., Rule 1003*, see 5 Mueller & Kirkpatrick, Federal Evidence 2d, §572 et seq.; 29A Am.Jur.2d (1994 ed.), Evidence §1085 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Original Unavailable*. See 2 McCormick 6th, §237.

(3) *Writing Only Collaterally Involved*. Where both a tape recording of a conversation and a witness to the conversation are available at trial, the testimony of the witness is not barred by the best evidence rule. This is because the witness is not testifying as to what the recording contains but rather as to what he or she observed or knows. The witness' testimony is primary evidence, whether or not part of the same matter is incorporated into a sound recording. (*People v. Samuels* (2005) 36 C.4th 96, 129, 30 C.R.3d 105, 113 P.3d 1125 [detective could testify as to prearrest conversation that took place at police station between defendant and third party, even though conversation was recorded; best evidence rule, and not secondary evidence rule, applied because trial commenced prior to effective date of secondary evidence rule].)

See 2 McCormick 6th, §239.(4) *Public Records and Recorded Writings*. See 2 McCormick 6th, §240.

(5) *Voluminous Writings*. See *Heaps v. Heaps* (2004) 124 C.A.4th 286, 21 C.R.3d 239, Supp., *infra*, §40; 198 A.L.R. Fed 427 [admissibility of charts or summaries under *F.R. Evid., Rule 1006*].(7) *Admissibility of Duplicates*. See

2 Witkin Cal. Evid. Doc Evid § 30

2 McCormick 6th, §236.



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## CHAPTER VIII - Documentary Evidence

### III. SECONDARY EVIDENCE

#### B. Current Secondary Evidence Rule.

##### 1. Nature of Rule.

*2 Witkin Cal. Evid. Doc Evid § 31*

[§ 31] Nature of Rule.

(1) *Enactment of Secondary Evidence Rule.* Acting on the recommendation of the California Law Revision Commission, the 1998 Legislature repealed the statutes incorporating the former best evidence rule and its exceptions (former Ev.C. 1500 et seq.; see supra, §27 et seq.) and replaced them with a new Article of the Evidence Code (Ev.C. 1520 et seq.) entitled "Proof of the Content of a Writing." This Article sets forth the new secondary evidence rule. (See 1 Jefferson, California Evidence Benchbook 3d, Chap. 31.)

(2) *Statement of New Rule.* Like its predecessor, the new rule permits proof of the content of a writing by "an otherwise admissible original." (Ev.C. 1520, and Law Rev. Com. Comment.) As was the case under prior law, an "original" means the writing itself or any counterpart intended to have the same effect by a person executing or issuing it. An original of a photograph includes the negative or a print made from it. If data is stored in a computer or similar device, a printout or other output readable by sight, shown to reflect the data accurately, is also an "original." (Ev.C. 255; on similar F.R. Evid., Rule 1001(3), see 5 Mueller & Kirkpatrick, Federal Evidence 2d, §556 et seq.)

But unlike the former best evidence rule, the new rule does not make secondary evidence presumptively inadmissible to prove the content of a writing. Instead, the new rule makes that evidence generally admissible. (See 26 Cal. Law Rev. Com. Reports, pp. 376, 377.) Thus, Ev.C. 1521, entitled the "Secondary Evidence Rule" (Ev.C. 1521(d)), expressly permits proof of the content of a writing "by otherwise admissible secondary evidence." (Ev.C. 1521(a).) "The nature of the evidence offered affects its weight, not its admissibility." (Law Rev. Com. Comment to Ev.C. 1521.)

However, the court must exclude secondary evidence if it determines either that a "genuine dispute exists concerning material terms of the writing and justice requires the exclusion," or that admission of the evidence would be unfair. (Ev.C. 1521(a); see infra, §36.) Oral testimony that is otherwise inadmissible to prove the content of a writing under Ev.C. 1523 (infra, §39) is not made admissible by Ev.C. 1521. (Ev.C. 1521(b).) Authentication under Ev.C. 1401 is still required. (Ev.C. 1521(c); see *In re Kirk* (1999) 74 C.A.4th 1066, 1071, 88 C.R.2d 648 [Ev.C. 1521(c) requires that psychological evaluations of defendant's mental disorder for purposes of commitment under Sexually Violent Predators Act (see 3 Cal. Crim. Law (3d), Punishment, §193 et seq.) must be certified (see Ev.C. 1530 and 1531, infra, §41)]; supra, §3.) And a limited exception to the rule applies in criminal proceedings. (See Ev.C. 1522, infra, §§37, 38.)

(3) *Purpose of New Rule.* The Law Revision Commission explained the purpose of the new legislation when it recommended its enactment in 1996:

"The Best Evidence Rule is unnecessary in a system with broad pretrial discovery. Its intended functions are to



guard against fraud and prevent misinterpretation of writing. In civil cases, those functions are satisfactorily served by existing pretrial opportunities to inspect original documents, coupled with the proposed Secondary Evidence Rule and the normal motivation of the parties to present convincing evidence. In criminal cases, discovery is narrower, so the Secondary Evidence Rule would incorporate a limited exception to address that difference."

"Because the Best Evidence Rule has many exceptions, most secondary evidence is already admissible to prove the content of a writing. Adoption of the Secondary Evidence Rule would, however, simplify the law, avoid difficulties in interpretation, and reduce injustice and waste of resources, including scarce judicial resources." (See 26 Cal. Law Rev. Com. Reports, pp. 371, 372.)

(4) *Transitional Provisions.* *Ev.C. 1520* et seq. apply to an action or proceeding commenced before, on, or after January 1, 1999. However, evidentiary determinations made under the former law are not invalidated. If an action or proceeding is pending on January 1, 1999 (the effective date of *Ev.C. 1520* et seq.), the proponent of evidence excluded under the former law may, before entry of judgment, make a new request for admission of the evidence under the new law. (Stats. 1998, Chap. 100.)

(5) *Federal Practice.* Federal law continues to be governed by the best evidence rule. (See *F.R. Evid., Rule 1002*, supra, §27.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Statement of New Rule.* See *Penny v. Wilson (2004) 123 C.A.4th 596, 602, 20 C.R.3d 212* [in action involving dispute over decedent's transfer of property from family trust into trust benefiting one of his children, trial judge did not err in admitting unsigned copy of trust document, where original signed by decedent could not be located; copy was authenticated through testimony of attorney who prepared document, there was no dispute as to contents, and admission of copy was not unfair].

(*New*) *Insurance policies:* There is no special rule applicable to lost insurance policies requiring that their actual language be proved. Where "it is undisputed that there was an insurance policy covering the relevant time period and that the policy was lost in good faith and not recovered after diligent search, there is no reason either in the law of contract or of evidence why secondary evidence that attests to the substance but not the precise language of an insurance policy should be insufficient as a matter of law to establish the insurer's contractual obligations." (*Dart Industries v. Commercial Union Ins. Co. (2002) 28 C.4th 1059, 1073, 1074, 124 C.R.2d 142, 52 P.3d 79* [insured could prove, by way of oral and documentary evidence, that lost policy was occurrence-based, covered claims for injuries caused by exposure to diethylstilbestrol (DES), and had policy limits of \$ 100,00 per person and \$ 300,000 per occurrence].)



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III. SECONDARY EVIDENCE

B. Current Secondary Evidence Rule.

2. Writings Within Rule.

a. Written, Typewritten, or Mechanical Reproductions.

2 *Witkin Cal. Evid. Doc Evid* § 32

[§ 32] Written, Typewritten, or Mechanical Reproductions.

(1) *Written and Typewritten Documents.* The secondary evidence rule applies to all ordinary written or typewritten documents. (*Ev.C.* 250, *supra*, §1; see, construing former best evidence rule, *Lawrence v. Premier Indem. Assur. Co.* (1919) 180 C. 688, 697, 182 P. 431, *infra*, §40 [minutes of corporation meeting; rule applies to proof of "the contents of any writing, no matter what its character"]; *Miley v. Harper* (1967) 248 C.A.2d 463, 468, 56 C.R. 536 [affidavit or declaration filed in support of motion for summary judgment].)

(2) *Printed and Other Mechanically Reproduced Writings.* Under the broad definition of writing contained in *Ev.C.* 250, printed and other mechanically reproduced writings are covered. (See, construing former best evidence rule, 2 McCormick 5th, §236; 4 Wigmore (Chadbourn Rev.) §1237; *Wilson v. Atchison, Topeka & Santa Fe Ry. Co.* (1935) 6 C.A.2d 735, 736, 45 P.2d 372 [wrongful death of brakeman; printed rules of defendant company on duties of brakeman].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Printed and Other Mechanically Reproduced Writings.* See 2 McCormick 6th, §236. *West's Key Number Digest*, Criminal Law k.403; Evidence k.186 et seq.



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III. SECONDARY EVIDENCE  
B. Current Secondary Evidence Rule.  
2. Writings Within Rule.  
b. Recordings.

2 *Witkin Cal. Evid. Doc Evid* § 33

[§ 33] Recordings.

Recorded communications, on tape or disk, are also within the definition of *Ev.C. 250*. (See, construing former best evidence rule, 2 McCormick 5th, §232; 4 Wigmore (Chadbourn Rev.) §1183; 58 A.L.R.3d 598 [sound recording as affected by hearsay and best evidence rules]; 3 A.L.R.5th 784 [admissibility of tape recording or transcript of "911" emergency telephone call]; 48 Am.Jur. Trials 1 [admission and use of audio recordings as evidence]; *F.R. Evid., Rule 1002*.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 2 McCormick 6th, §233.



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## CHAPTER VIII - Documentary Evidence

### III. SECONDARY EVIDENCE

#### B. Current Secondary Evidence Rule.

##### 2. Writings Within Rule.

##### c. Films and Videotapes.

*2 Witkin Cal. Evid. Doc Evid § 34*

[§ 34] Films and Videotapes.

(1) *Films*. A single photographic transparency is a writing under *Ev.C. 250* because it is a picture recorded on a tangible thing, i.e., the celluloid; a motion picture film is a series of pictures recorded on a celluloid filmstrip, and each one is a writing. (See, construing former best evidence rule, *People v. Enskat* (1971) 20 *C.A.3d Supp.* 1, 3, 98 *C.R.* 646 [obscenity case; because content of film is always in issue, best evidence rule applied]; *People v. Goulet* (1971) 21 *C.A.3d Supp.* 1, 4, 98 *C.R.* 782 [after proper foundation is laid, secondary evidence would have been admissible]; 4 Wigmore (Chadbourn Rev.) §1183; 29A *Am.Jur.2d* (1994 ed.), *Evidence* §1070; C.E.B., 2 Civil Proc. During Trial 3d, §13.94 et seq.)

(2) *Videotapes*. Although videotape differs from ordinary methods of recording in that the image is recorded electronically rather than photographically, it is regarded as a "writing" under *Ev.C. 250*. (See, construing former best evidence rule, *People v. Moran* (1974) 39 *C.A.3d* 398, 407, 408, 114 *C.R.* 413, 1 *Cal. Evidence* (4th), *Hearsay*, §268; 21 Southwestern U. L. Rev. 1199 ["Truths, Lies, and Videotapes: Are Current Federal Rules of Evidence Adequate?"]; 44 *Am.Jur. Trials* 171 [Videotape Evidence]; 16 *Proof of Facts* 3d 493 [laying foundation].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER VIII - Documentary Evidence

### III. SECONDARY EVIDENCE

#### B. Current Secondary Evidence Rule.

##### 2. Writings Within Rule.

##### d. Distinction: Inscribed Chattels.

*2 Witkin Cal. Evid. Doc Evid § 35*

[§ 35] Distinction: Inscribed Chattels.

*Ev.C. 250* defines writing to include words or symbols recorded "upon any tangible thing." The authorities, however, were in conflict as to the applicability of the former best evidence rule to inscribed chattels. (See 2 McCormick 5th, §232; 4 Wigmore (Chadbourn Rev.) §1182; 94 A.L.R.3d 824 [applicability of rule to proof of ownership of allegedly stolen personal property in theft prosecution].) Those authorities are relevant in considering whether the secondary evidence rule applies. (See 1 Jefferson, California Evidence Benchbook 3d, §§31.12, 31.15.)

In *People v. Mastin* (1981) 115 C.A.3d 978, 171 C.R. 780, defendant was charged with burglary, and the police found stolen property in his home, including four guns and a knife inscribed with the owner's initials. At the trial, to prove the victim's ownership of the chattels, the prosecution introduced photographs of them. Defendant objected that the inscriptions on the chattels were writings and that the original chattels should be produced. *Held*, the photographs were admissible. They were not secondary evidence of writings because the inscriptions (owner's initials) were not visible in the pictures; they were properly admitted to illustrate the testimony of the victim. Thus, application of the best evidence rule was not really an issue, but the court nevertheless discussed the state of the law on the assumption that the initials were visible, i.e., that secondary evidence had been offered of an inscribed chattel. (115 C.A.3d 983.)

(a) Secondary evidence of inscribed chattels has been sanctioned by both federal and state courts. (115 C.A.3d 978, 979, citing cases dealing with shirt with laundry marks, photocopies of \$ 20 bills, license plates, plastic credit cards.) A 1972 federal case (*United States v. Duffy*) states the rule and test approved by most commentators: (1) When the evidence is an object bearing a mark or inscription, and is therefore a chattel *and* a writing, the trial judge has *discretion* to treat it as *either*. (2) In reaching a decision, the judge should consider the policy of the best evidence rule. In *Duffy*, the evidence--a marked laundry shirt--did not require treatment as a writing, for the inscription was simple (thus the chance of inaccuracy in perception or memory was minimal) and was not a critical part of the case against the defendant. (115 C.A.3d 983.)

(b) Practical difficulties in connection with production are pointed out by McCormick; e.g., where the inscription is on a piece of heavy equipment, or an item of personal property which should be promptly returned to the owner, or a sign on a house or a name on a tombstone. (115 C.A.3d 984.)

(c) The discretionary approach is the proper rule for California. "The more critical the fact to be proved by the inscription, and the lesser the quantity and quality of other evidence to prove that fact, the greater is the importance of the inscribed chattel's production. The more difficult the production or the more inconvenience to the owner by

temporary loss of the chattel, the greater must be the importance of examining the original before production is required." (115 C.A.3d 985.) "Where the fact to be proved is critical, the inscription lengthy, and the secondary and other evidence weak, the inscribed chattel's production should be required to insure the reliability of the fact finding process." (115 C.A.3d 985.) Applying these considerations to the facts of this case, production of the originals was not required. The inscriptions were simple, and highly probative circumstantial evidence of the victim's ownership was presented; there was little danger of misinterpretation in the use of secondary evidence. (115 C.A.3d 986.)

In *People v. Bizieff* (1991) 226 C.A.3d 1689, 277 C.R. 678, defendant was convicted of three counts of robbery. At a minimart, which was the scene of the third robbery, Gilbert, defendant's accomplice, used a credit card belonging to Verduzco, the victim of the second robbery. A minimart employee showed the credit card receipt to a police officer. At trial, the officer testified that the receipt contained the imprint of the name of the victim of the second robbery. *Held*, admission of the receipt did not violate the former best evidence rule. "A credit card falls under California's best evidence rule as an inscribed chattel, an object that is both a writing and a chattel." (226 C.A.3d 1696, citing the text.) "In this case, the 'writing' which connected appellant to both the second and third robbery was the Verduzco credit card. The contents of the card--the name Yvonne Verduzco--were in issue. The receipt was evidence that Miss Gilbert had Verduzco's credit card. But the credit card, not the receipt, was the object that directly tied appellant to both crimes. Thus, the trial court correctly concluded the credit card itself was the original writing in issue." (226 C.A.3d 1696.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 2 McCormick 6th, §233.



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## CHAPTER VIII - Documentary Evidence

### III. SECONDARY EVIDENCE

#### B. Current Secondary Evidence Rule.

##### 3. Exceptions to Rule.

##### a. General Exceptions.

*2 Witkin Cal. Evid. Doc Evid § 36*

[§ 36] General Exceptions.

There are two general mandatory exceptions to the secondary evidence rule: A court must exclude secondary evidence if it determines either (1) that a "genuine dispute exists concerning material terms of the writing and justice requires the exclusion" (*Ev.C. 1521(a)(1)*), or (2) that admission of the evidence would be unfair (*Ev.C. 1521(a)(2)*).

These exceptions are based on former *Ev.C. 1511* and on identical *F.R. Evid., Rule 1003*, both of which authorize the admission of a duplicate to the same extent as the original. (See *supra*, §30.) Cases interpreting those statutes provide guidance in applying *Ev.C. 1521(a)(1)*, (a)(2). (Law Rev. Com. Comment to *Ev.C. 1521*, discussing federal cases and *People v. Garcia* (1988) 201 C.A.3d 324, 328, 330, 247 C.R. 94, citing the text [claim of unfairness "must be based on substance, not mere speculation that the original might contain some relevant difference"]; see also *People v. Atkins* (1989) 210 C.A.3d 47, 55, 258 C.R. 113 [photostatic copies of Department of Correction records, and of certification by custodian that copies were from department's files, were admissible to prove defendant's prior prison term]; *Osswald v. Anderson* (1996) 49 C.A.4th 812, 819, 57 C.R.2d 23 [photocopy of quitclaim deed, proffered by trust beneficiary to show that trust was properly funded, was not admissible, because trustee raised genuine questions as to authenticity of both deed and copy].)

The Law Revision Commission further advises that when ruling on these exclusions, "[c]ourts may consider a broad range of factors, for example: (1) whether the proponent attempts to use the writing in a manner that could not reasonably have been anticipated, (2) whether the original was suppressed in discovery, (3) whether discovery conducted in a reasonably diligent (as opposed to exhaustive) manner failed to result in production of the original, (4) whether there are dramatic differences between the original and the secondary evidence (e.g., the original but not the secondary evidence is in color and the colors provide significant clues to interpretation), (5) whether the original is unavailable and, if so, why, and (6) whether the writing is central to the case or collateral." (Law Rev. Com. Comment to *Ev.C. 1521*, also observing that a "classic circumstance for exclusion" under *Ev.C. 1521(a)(2)* "is if the proponent destroyed the original with fraudulent intent or the doctrine of spoliation of evidence otherwise applies.")

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER VIII - Documentary Evidence

### III. SECONDARY EVIDENCE

#### B. Current Secondary Evidence Rule.

##### 3. Exceptions to Rule.

##### b. Exception in Criminal Actions.

##### 1. Nature of Exception.

#### 2 *Witkin Cal. Evid. Doc Evid* § 37

[§ 37] Nature of Exception.

(1) *In General.* In addition to the general exceptions specified in *Ev.C. 1521* (supra, §36), the court in a criminal action must exclude secondary evidence if it determines "that the original is in the proponent's possession, custody, or control, and the proponent has not made the original reasonably available for inspection at or before trial." (*Ev.C. 1522(a).*)

The Law Revision Commission Comment observes: "Section 1522 sets forth a mandatory exception applicable only in criminal cases, which are governed by narrower discovery rules than civil cases. ... Section 1522 does not expand discovery obligations, it simply conditions use of secondary evidence on making the original reasonably available for inspection if the proponent has it. In determining whether the proponent of secondary evidence has made the original 'reasonably available,' the court should examine specific circumstances, such as the time, place, and manner of allowing inspection. The concept is fluid, not rigid. For example, making the original available moments before using secondary evidence may in general suffice if a defendant is rebutting a surprise contention, but not if the prosecution is presenting its case in chief. Similarly, what constitutes reasonable access to computer evidence may vary from system to system."

(2) *Request Must Be Made Outside of Jury's Presence.* The request to exclude the secondary evidence, "under this section or any other law," may not be made in the jury's presence. (*Ev.C. 1522(b).*) The Law Revision Commission Comment notes that this provision continues a requirement of former *Ev.C. 1503* (copy of writing under control of opponent admissible notwithstanding best evidence rule; see supra, §29), "but applies it to all requests for exclusion of secondary evidence in a criminal trial."

**SUPPLEMENT:** [This section is current through the latest supplement]





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## III. SECONDARY EVIDENCE

## B. Current Secondary Evidence Rule.

## 3. Exceptions to Rule.

## b. Exception in Criminal Actions.

## 2. When Inapplicable.

## 2 Witkin Cal. Evid. Doc Evid § 38

[§ 38] When Inapplicable.

Th exception does not apply to any of the following types of secondary evidence:

(1) *Duplicates*. A duplicate is admissible. (*Ev.C. 1522(a)(1)*, based on former *Ev.C. 1511*, supra, §30.) A "duplicate" is a counterpart produced by the same impression as the original, from the same matrix, by means of photography (including enlargements and miniatures), by mechanical or electronic rerecording, by chemical reproduction, or by other equivalent technique that accurately reproduces the original. (*Ev.C. 260*.) (See *People v. Marcus* (1973) 31 C.A.3d 367, 370, 107 C.R. 264 [decided before statute and holding rerecording admissible].)

(2) *Collateral Writings*. A writing that is not closely related to the controlling issues in the action is admissible. (*Ev.C. 1522(a)(2)*.) This exception is based on former *Ev.C. 1504*, supra, §30 (see Law Rev. Com. Comment), and the following cases construing that statute are instructive:

In *People v. Kulwin* (1951) 102 C.A.2d 104, 226 P.2d 672, a prosecution for conspiracy to violate the bookmaking law, a police officer listened to conversations of defendants from a hidden microphone connected with a recording instrument (before the exclusionary rule had been declared). He was allowed to testify to what he heard, over the objection that the recordings were the best evidence. "Where one testifies to what he has seen or heard such testimony is primary evidence, regardless of whether such fact or facts are reduced to writing or incorporated in a record or document. In other words, the witness is not testifying as to what the writing contains, but as to what he observed and knew because he heard it." (102 C.A.2d 109.)

The *Kulwin* case was followed in *People v. Sweeney* (1960) 55 C.2d 27, 9 C.R. 793, 357 P.2d 1049. An officer, to whom defendant offered a bribe, had a concealed miniphone with him. The record, however, proved unintelligible, and the prosecution did not introduce it but called the officer to testify to the conversation. (55 C.2d 38.) (See *People v. Royce* (1895) 106 C. 173, 180, 39 P. 524 [in prosecution for embezzling proceeds of bank draft, testimony describing draft cashed by bank was admissible to identify it as draft received by defendant and delivered to bank]; *People v. Johnson* (1974) 39 C.A.3d 749, 763, 114 C.R. 545 [defendant gave statements to police officer after his arrest; although statements had been tape-recorded, officer was properly allowed to give detailed testimony about what defendant had said to him]; on construction of similar exception to exclusion of oral testimony of content of writing, see *infra*, §40.)

(3) *Writings in Custody of Public Entity*. A copy of a writing in the custody of a public entity is admissible. (*Ev.C.*

1522(a)(3), based on former Ev.C. 1506, supra, §30.)

(4) *Writings Recorded in Public Records.* A copy of a writing that is recorded in the public records is admissible, if the record or a certified copy of it is made evidence of the writing by statute. (*Ev.C. 1522(a)(4)*, based on former Ev.C. 1507, supra, §30.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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III. SECONDARY EVIDENCE

B. Current Secondary Evidence Rule.

3. Exceptions to Rule.

c. Oral Testimony Exception.

1. Nature of Exception.

*2 Witkin Cal. Evid. Doc Evid § 39*

[§ 39] Nature of Exception.

Oral testimony is inadmissible to prove the content of a writing "[e]xcept as otherwise provided by statute." (*Ev.C. 1523(a).*)

The Law Revision Commission Comment explains that the exception "preserves former law" and "is based on an assumption that oral testimony as to the content of a writing is typically less reliable than other proof of the content of a writing."

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Evidence k.186(2)



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### III. SECONDARY EVIDENCE

#### B. Current Secondary Evidence Rule.

##### 3. Exceptions to Rule.

##### c. Oral Testimony Exception.

##### 2. When Inapplicable.

2 Witkin Cal. Evid. Doc Evid § 40

[§ 40] When Inapplicable.

Under the following circumstances, the general rule of inadmissibility does not apply:

(1) *No Possession or Control and Original Lost or Destroyed*. The proponent does not have possession or control of a copy of the writing, and the original is lost or has been destroyed without fraudulent intent on the part of the proponent. (Ev.C. 1523(b), based on former Ev.C. 1501, and 1505, supra, §§28, 30.)

(2) *No Possession or Control and Original Unavailable*. The proponent does not have possession or control of the original or a copy, and neither one was reasonably procurable using the court's process or by other available means. (Ev.C. 1523(c)(1), based on former Ev.C. 1502, 1503, 1505, 1506, 1507, and 1508, supra, §§29, 30.)

(3) *No Possession or Control and Writing Collateral*. The proponent does not have possession or control of the original or a copy, the writing is not closely related to the controlling issues, and it would be inexpedient to require its production. (Ev.C. 1523(c)(2).) This exception is based on former Ev.C. 1504 and 1505, supra, §30 (see Law Rev. Com. Comment), and the following cases construing prior law are instructive:

In *Marriner v. Dennison* (1889) 78 C. 202, 20 P. 386, a suit for breach of contract to convey, defendant vendor contended that plaintiff had agreed to accept other consideration because defendant had *previously* contracted to sell to S. Plaintiff put S on the stand to testify that his contract of purchase from defendant was made *after* plaintiff's contract. *Held*, this was proper without production of S's contract, for the issue was not the contents of that contract but only whether and when it was made. (78 C. 213.)

In *Lawrence v. Premier Indem. Assur. Co.* (1919) 180 C. 688, 182 P. 431, an action by plaintiff to establish ownership of stock, the defense was that plaintiff had not performed conditions precedent to its issuance. Plaintiff introduced the corporation *minutes* to support his claim. Defendant was then allowed to prove that the minutes did not cover the entire transaction, and to introduce evidence that conditions were agreed upon at the meeting. *Held*, admission of this evidence was proper. Defendant could not show the *contents of the minutes* by testimony, because the written minutes would be the best evidence thereof; but it could offer oral testimony of the *facts of the transaction which occurred* at the meeting, because this would not be an attempt to prove the contents of a writing. (180 C. 697.)

A number of cases construing this former best evidence rule exception have held that a party may testify to the fact

of payments made and the amount thereof, notwithstanding the fact that there is a writing (such as a receipt, account book, or cancelled note) that also discloses that fact. (*Vickter v. Pan Pac. Sales Corp.* (1952) 108 C.A.2d 601, 603, 239 P.2d 463 [testimony of sums paid for merchandise, though business records would show complete transaction]; *Ponce v. Marr* (1956) 47 C.2d 159, 162, 301 P.2d 837 [testimony that loan was repaid, though cancelled note might also show that fact]; on construction of similar exception in criminal proceedings, see *supra*, §38.)

(4) *Voluminous Writings*. The writing consists of "numerous accounts or other writings that cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole." (*Ev.C.* 1523(d), based on former *Ev.C.* 1509, *supra*, §30.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(4) *Voluminous Writings*. In *Heaps v. Heaps* (2004) 124 C.A.4th 286, 21 C.R.3d 239, a dispute concerning the assets of a living trust, the trial judge admitted a schedule of assets, even though it was based partially on nonadmitted evidence. *Held*, this was proper because the schedule was a general compilation of documents that could not be examined individually without great loss of time. (124 C.A.4th 293.) The court appeared to rely on *Ev.C.* 1523(d) and quoted language from that subdivision, which actually makes clear that it applies to *oral testimony*. (124 C.A.4th 293, 294.) However, its predecessor, former *Ev.C.* 1509 (see text, §30), was not so limited.



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## CHAPTER VIII - Documentary Evidence

### III. SECONDARY EVIDENCE C. Official and Recorded Writings. 1. Writing in Official Custody. a. In General.

2 *Witkin Cal. Evid. Doc Evid* § 41

[§ 41] In General.

(1) *Former Law and Evidence Code.* The Code of Civil Procedure formerly contained a great many provisions on authentication and proof of public writings. *Ev.C. 1530* substitutes two simple rules, one applicable to all writings in official custody within the United States (*infra*, §42), and the other applicable to all of those writings found outside the United States (*infra*, §43). (See generally *In re Shannon C. (1986) 179 C.A.3d 334, 341, 342, 224 C.R. 516, 1 Cal. Evidence (4th), Hearsay, §249.*)

The Law Revision Commission Comment to *Ev.C. 1530* points out that the statute deals with three evidentiary problems:

- (a) The former best evidence rule (now the secondary evidence rule), i.e., the content of an original writing is proved by means of an accurate representation.
- (b) Authentication, i.e., the copy must be authenticated as a copy of the original.
- (c) The hearsay exception, i.e., the certification or attestation, made out of court, is nevertheless offered to prove the truth of its statement.

*In re Kirk (1999) 74 C.A.4th 1066, 88 C.R.2d 648*, noted that all three evidentiary concerns of the Law Revision Commission justified the conclusion that the 1998 repeal of the best evidence rule and its replacement by the secondary evidence rule (*Ev.C. 1520 et seq.*; see *supra*, §31 *et seq.*) did not obviate the certification requirements of *Ev.C. 1530* and *1531*. Thus, the court held that the trial judge erred in admitting uncertified psychological evaluations of defendant's mental disorder during a probable cause hearing to commit him under the Sexually Violent Predators Act (see *3 Cal. Crim. Law (3d), Punishment, §193 et seq.*). (*74 C.A.4th 1071.*)

(2) *Presumption of Existence and Content.* *Ev.C. 1530* establishes a presumption where "[a] purported copy of a writing" is "in the custody of a public entity," "[t]he copy purports to be published by the authority of the nation or state, or public entity therein in which the writing is kept," and it is properly attested or certified. Such a copy, or a copy of an entry in the writing, "is prima facie evidence of the existence and content of such writing or entry." (On attestation and certification, see *infra*, §§42, 43.) The "prima facie evidence" provision creates a presumption affecting the burden of producing evidence. (*Ev.C. 1530(b)*; on effect of this type of presumption, see *1 Cal. Evidence (4th), Burden of Proof and Presumptions, §177.*)

(3) *Form of Certificate or Attestation*. "For the purpose of evidence, whenever a copy of a writing is attested or certified, the attestation or certificate must state in substance that the copy is a correct copy of the original, or of a specified part thereof, as the case may be." (*Ev.C. 1531*; see Law Rev. Com. Comment to *Ev.C. 1530*; *Harting v. Cebrian* (1935) 10 C.A.2d 10, 17, 51 P.2d 195 [no particular words required]; *In re Smith* (1949) 33 C.2d 797, 801, 205 P.2d 662 [same]; but see *People v. Gabriel* (1943) 57 C.A.2d 788, 794, 135 P.2d 378 [insufficient certificate containing mere conclusion of officer].)

(4) *Right To Inspect and Copy*. This subject is covered by the California Public Records Act (*Govt.C. 6250 et seq.*). (See 2 *Cal. Evidence (4th)*, *Witnesses*, §278 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Presumption of Existence and Content*. See *Ambriz v. Kelegian* (2007) 146 C.A.4th 1519, 1529, 53 C.R.3d 700 [in legal malpractice action, trial judge erred in excluding copy of city ordinance and copy of declaration of restrictions applicable to apartment complex on ground that plaintiff's attorney failed to provide sufficient authentication and foundation; plaintiff included certification of deputy city clerk on both documents, thus bringing into play presumptions of *Ev.C. 1530 et seq.* that documents were what they purported to be, and defendants offered no contrary evidence]. *Correction:* Page 167, last line of subdivision (2), "\$177" should be "\$55". *West's Key Number Digest*, Criminal Law k.400(2), 400(3); Evidence k.162 et seq.



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CHAPTER VIII - Documentary Evidence

III. SECONDARY EVIDENCE

C. Official and Recorded Writings.

1. Writing in Official Custody.
  - b. In United States.

2 *Witkin Cal. Evid. Doc Evid* § 42

[§ 42] In United States.

*Ev.C. 1530(a)(2)* deals with writings kept in offices within the United States, the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands. It provides that the copy may be attested or certified as a correct copy of the writing or entry "by a public employee, or a deputy of a public employee, having the legal custody of the writing." Thus, the custodian alone may certify, without the signature of a higher official certifying the custodian's authority and signature. (Law Rev. Com. Comment to *Ev.C. 1530*.)

**SUPPLEMENT:** [This section is current through the latest supplement]





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## III. SECONDARY EVIDENCE

## C. Official and Recorded Writings.

## 1. Writing in Official Custody.

## c. Outside United States.

2 *Witkin Cal. Evid. Doc Evid* § 43

[§ 43] Outside United States.

*Ev.C. 1530(a)(3)* deals with writings kept in offices outside the places listed in the preceding subdivision (*supra*, §42). Following *F.R. Civ. P., Rule 44*, it authorizes attestation of the copy "by a person having authority to make attestation." Because, in foreign countries, the attester is not necessarily the custodian, certification of the attester's signature and official position is required. The attestation must be accompanied by a final statement certifying the genuineness of the signature and the official position of either of the following:

(1) The person who attested the copy as a correct copy. (*Ev.C. 1530(a)(3)(i).*)

(2) A foreign official who has certified either (a) the genuineness of the signature and the official position of the person attesting the copy, or (b) the genuineness of the signature and the official position of another foreign official who has executed a similar certificate in a chain of certificates beginning with a certificate of the genuineness of the signature and the official position of the person attesting the copy. (*Ev.C. 1530(a)(3)(ii).*)

As an exception to the general provision, *Ev.C. 1530(a)(3)* provides: "If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without the final statement or (ii) permit the writing or entry in foreign custody to be evidenced by an attested summary with or without a final statement."

**SUPPLEMENT:** [This section is current through the latest supplement]



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III. SECONDARY EVIDENCE

C. Official and Recorded Writings.

2. Official Record of Recorded Writing.

*2 Witkin Cal. Evid. Doc Evid § 44*

[§ 44] Official Record of Recorded Writing.

A certified copy of the record may be offered to prove the official record, i.e., the recorded writing or entry therein. (*Ev.C. 1530*; see *supra*, §41.) The official record "is prima facie evidence of the existence and content of the original recorded writing," if (1) the record "is in fact a record of an office of a public entity," and (2) a statute "authorized such a writing to be recorded in that office." (*Ev.C. 1532(a)*.) (On official writings affecting real property, see *infra*, §§57, 58.)

The "prima facie evidence" provision creates a presumption affecting the burden of producing evidence. (*Ev.C. 1532(b)*; on effect of this type of presumption, see 1 *Cal. Evidence* (4th), *Burden of Proof and Presumptions*, §177.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Correction:* Page 169, last line of section, "§177" should be "§55".



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## CHAPTER VIII - Documentary Evidence

### III. SECONDARY EVIDENCE

#### D. Photographic Copies and Printed Representations of Writings.

##### 1. Nature of Uniform Act in Evidence Code.

##### *2 Witkin Cal. Evid. Doc Evid § 45*

[§ 45] Nature of Uniform Act in Evidence Code.

The modern trend, both in keeping and certifying private and public records, is toward use of photographic copies, either full-size or on nonerasable optical imaging such as microfilm (see Com. Note, Uniform Photographic Copies of Business and Public Records as Evidence Act, 14 U.L.A. (Master Ed.), p. 185), and more recently, toward use also of printed representations of computer programs and of images stored on video or digital media. But a photograph or printout of an existing writing is obviously a copy, and, apart from statute, was inadmissible secondary evidence under the former best evidence rule without a showing of unavailability of the original. (See *supra*, §27 et seq.)

The Uniform Photographic Copies of Business and Public Records as Evidence Act was drafted to meet this problem. The Act is now (as of 1998) in force in 30 jurisdictions (see 14 U.L.A. (Master Ed.), 1998 Supp., p. 43). (See Federal Business Records Act as amended, 28 U.S.C., §1732 [similar]; 2 McCormick 5th, §236.)

The Act was adopted in California in 1951 (former C.C.P. 1953e et seq.), and was incorporated, with a slight change, in *Ev.C. 1550* et seq. California's statute was recast in 1998 to (1) reflect the replacement of the best evidence rule by the secondary evidence rule (see *supra*, §31 et seq.), and (2) add two sections dealing with printed representations of computer information and programs and of images stored on video or digital media (*infra*, §§48, 49). (See 26 Cal. Law Rev. Com. Reports, p. 396.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See Com. Note, Uniform Photographic Copies of Business and Public Records as Evidence Act, 14 U.L.A. (Master Ed.), p. 270; 2 McCormick 6th, §236. *West's Key Number Digest*, Evidence k.186(6)



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## CHAPTER VIII - Documentary Evidence

## III. SECONDARY EVIDENCE

## D. Photographic Copies and Printed Representations of Writings.

## 2. Photographic Copies as Business Records.

## 2 Witkin Cal. Evid. Doc Evid § 46

[§ 46] Photographic Copies as Business Records.

(1) *In General.* "A nonerasable optical image reproduction ... , a photostatic, microfilm, microcard, miniature photographic, or other photographic copy or reproduction, or an enlargement thereof," of a writing is as admissible as the writing itself if the copy or reproduction was made and preserved as a part of the records of a "business" (as defined by *Ev.C. 1270, 1 Cal. Evidence (4th), Hearsay, §228*) in the regular course of that business. The introduction of the copy, reproduction, or enlargement does not preclude admission of the original writing if it is still in existence. An optical image reproduction is admissible only if additions, deletions, or changes to the original document are not permitted by the technology, and a court may require introduction of a hard copy printout of the document. (*Ev.C. 1550*; see *People v. Jones (1998) 17 C.4th 279, 308, 70 C.R.2d 793, 949 P.2d 890* [in murder case, bank's microfiche records showing that someone tried to make automatic teller withdrawals from victim's account the day after murder and shortly before defendant's arrest were admissible under *Ev.C. 1550*]; 23 Proof of Facts 3d 621 [examination and identification of photocopies and photocopiers].)

(2) *Applicable to Admissible Writing.* The Uniform Act (*supra*, §45) limits its application to records of a business or governmental agency. *Ev.C. 1550* removes this limitation for the following reason: "As long as the original writing is admissible under any exception to the hearsay rule, its trustworthiness is sufficiently assured; and the requirement that the photographic copy be made in the regular course of business sufficiently assures the trustworthiness of the copy. If the original is admissible not as an exception to the hearsay rule but as evidence of an ultimate fact in the case (e.g., a will or a contract), a photographic copy, the trustworthiness of which is sufficiently assured by the fact that it was made in the regular course of business, should be as admissible as the original." (Law. Rev. Com. Comment.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General.* *Ev.C. 1550* was amended and subdivided in 2002. Under the amended statute, the following types of evidence are as admissible as the writing itself, if they were made and preserved as a part of the records of a business as defined in *Ev.C. 1270* (see *1 Cal. Evidence (4th), Hearsay, §228*): (a) a nonerasable optical image reproduction or any other reproduction of a public record by a trusted system (as defined in *Govt.C. 12168.7*), if additions, deletions, or changes to the original document are not permitted by the technology; (b) a photostatic copy or reproduction; (c) a microfilm, microcard, or miniature photographic copy, reprint, or enlargement; (d) any other photographic copy or reproduction, or an enlargement thereof. (*Ev.C. 1550(a)*.) However, the introduction of evidence of a writing under *Ev.C. 1550(a)* does not preclude admission of the original writing if it is still in existence, and a court may require the introduction of a "hard copy printout of the document." (*Ev.C. 1550(b)*.) (2a) (*New*) *Criminal Justice Records.* Reproductions of "files, records, writings, photographs, fingerprints or other instruments in the official custody of a

criminal justice agency that were microphotographed or otherwise reproduced" in accordance with P.C. 11106.1 et seq. (standards for reproduction and storage of criminal justice files and records) are admissible to the same extent and under the same circumstances as the original would be admissible. (*Ev.C. 1550.1*, added in 2004.)



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3. Photographic Copies Where Original Lost or Destroyed.

2 *Witkin Cal. Evid. Doc Evid* § 47

[§ 47] Photographic Copies Where Original Lost or Destroyed.

Where records are microfilmed and then destroyed (a common practice in large organizations), the objection of intentional destruction might be raised when the enlargement is offered under the secondary evidence rule (*supra*, §31 et seq.). This objection has been overcome by statutes taking photographs and microfilm enlargements out of the rule in such cases. The California statute (*Ev.C. 1551*) provides as follows:

(1) "A print, whether enlarged or not, from a photographic film (including a photographic plate, microphotographic film, photostatic negative, or similar reproduction) of an original writing destroyed or lost after such film was taken or a reproduction from an electronic recording of video images on magnetic surfaces is admissible as the original writing itself" if the film or electronic recording was taken in compliance with the certification requirement.

(2) The certification requirement specifies that the person under whose direction and control the film or electronic recording was taken must, at the time of taking, *attach* to the film or electronic recording or to its sealed container, or *incorporate* in the film or electronic recording, a *certification* complying with *Ev.C. 1531* (*supra*, §41) and stating the *date and fact of the taking*.

**SUPPLEMENT:** [This section is current through the latest supplement]



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D. Photographic Copies and Printed Representations of Writings.

4. Computer Information and Programs.

*2 Witkin Cal. Evid. Doc Evid § 48*

[§ 48] Computer Information and Programs.

A printed representation of computer information or a computer program is presumed to be an accurate representation of the computer information or program that it purports to represent. The presumption is one affecting the burden of producing evidence. If a party introduces evidence indicating that the printed representation of the information or program is inaccurate or unreliable, the proponent of the printed representation has the burden of proving, by a preponderance of evidence, that it is "an accurate representation of the existence and content of the computer information or computer program that it purports to represent." (*Ev.C. 1552(a)*), based on former *Ev.C. 1500.5(a)*, *supra*, §30; see *Aguimatang v. California State Lottery (1991) 234 C.A.3d 769, 797, 286 C.R. 57, 1 Cal. Evidence (4th)*, *Hearsay*, §230; 71 A.L.R.3d 232 [proof of public records kept or stored on electronic computing equipment]; *Overly on Electronic Evidence in California*, Chap. 8 et seq.; 71 Am.Jur. Trials 111 [Computer Technology in Civil Litigation].)

The presumption does not apply to computer generated official records certified under *Ev.C. 452.5* (see *1 Cal. Evidence (4th)*, *Judicial Notice*, §23) or *Ev.C. 1530* (see *supra*, §41 et seq.). (*Ev.C. 1552(b)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 57 Proof of Facts 3d 455 [foundation for admitting computer-generated evidence as substantive evidence].



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D. Photographic Copies and Printed Representations of Writings.

5. Video or Digital Images.

2 *Witkin Cal. Evid. Doc Evid* § 49

[§ 49] Video or Digital Images.

*Ev.C. 1553*, based on former *Ev.C. 1500.6* (see *supra*, §30), is similar to *Ev.C. 1552* (*supra*, §48). Under the statute, a printed representation of images stored on a video or digital medium is presumed to be an accurate representation of the images it purports to represent. The presumption is one affecting the burden of producing evidence. If a party introduces evidence indicating that a printed representation of this type is inaccurate or unreliable, the party introducing the representation must prove, by a preponderance of the evidence, that it is "an accurate representation of the existence and content of the images that it purports to represent." (See 20 Thomas Jefferson L. Rev. 303 [authentication of photographic evidence in digital age].)

**SUPPLEMENT:** [This section is current through the latest supplement]





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### III. SECONDARY EVIDENCE

#### E. Business Records.

##### 1. Nature of Statute.

2 *Witkin Cal. Evid. Doc Evid* § 50

[§ 50] Nature of Statute.

(1) *In General.* To alleviate the burden on businesses of requiring an officer or employee to testify in court to the authenticity of a business record, the 1959 Legislature authorized a simpler procedure for the ordinary case: introducing a *copy* of the record, with an *affidavit* in lieu of authenticating testimony. (See *Ev.C. 1560* et seq.)

(2) *Applicability of Statute.* The statute originally covered only hospitals, which are continually called upon to furnish records for personal injury cases. However, the statute was revised in 1969 to make it applicable to records of every kind of "business," as described in *Ev.C. 1270* (broad definition of business in hearsay exception; see *1 Cal. Evidence (4th), Hearsay, §228*). (*Ev.C. 1560(a)(1)*.) The special procedure is not available, however, if the business is a party to the action or is the place where a cause of action is alleged to have arisen. (*Ev.C. 1560(b)*.) "Record" includes every kind of record maintained by a business. (*Ev.C. 1560(a)(2)*.)

The statute applies "in any proceeding in which testimony can be compelled." (*Ev.C. 1566*.) And *Ev.C. 1567* authorizes the admission, in a proceeding to modify or terminate child, family, or spousal support, of an income and benefit form described in *Family C. 3664* completed by an employer (see *10 Summary (9th), Parent and Child, Supp.*, §326-I) if:

(a) The form complies with *Ev.C. 1561* and *1562*. (*Ev.C. 1567(a)*; see *infra*, §51 et seq.)

(b) A copy of the completed form and notice was served on the employee as required by *Family C. 3664*. (*Ev.C. 1567(b)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Applicability of Statute.* P.C. 1326(b), (c), added in 2004, make the procedures of *Ev.C. 1560(b)* (text, §51) applicable in a criminal case in which business records are sought by means of a subpoena. (See *5 Cal. Crim. Law (3d), Criminal Trial, Supp.*, §530.)

*Cross-Reference:* *11 Summary (10th), Husband and Wife, §291*. *West's Key Number Digest*, Criminal Law k.400(6) et seq.; Evidence k.164 et seq.



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#### E. Business Records.

##### 2. Procedure.

##### a. Delivery of Copy and Affidavit.

*2 Witkin Cal. Evid. Doc Evid § 51*

[§ 51] Delivery of Copy and Affidavit.

(1) *Delivery of Sealed Copy.* Except as provided in *Ev.C. 1564* (personal attendance and production, *infra*, §54), on service of a subpoena duces tecum, "the custodian of records or other qualified witness" may deliver to the clerk (or judge if there is no clerk) or to the officer taking a deposition, by mail or otherwise, "a true, legible and durable copy of all the records described." (*Ev.C. 1560(b).*)

The *time of delivery* is specified as follows: (a) Within 5 days after receipt of the subpoena in a *criminal action*. (b) Within 15 days after such receipt in a *civil action*. However, in *either* a criminal or civil action, the party serving the subpoena and the custodian or other qualified witness *may agree on the time*. (*Ev.C. 1560(b).*)

The copy must be separately enclosed in a sealed inner envelope or wrapper, inscribed with the title and number of the action, the name of the witness, and the date of the subpoena. The sealed envelope or wrapper must then be enclosed in an outer envelope or wrapper, sealed, and directed to the proper officer (clerk, judge if no clerk, officer before whom deposition is to be taken, or officer, body, or tribunal conducting the hearing). (*Ev.C. 1560(c).*)

Unless the parties otherwise agree, or the sealed envelope or wrapper is returned to a witness who is to appear personally, the copy remains sealed, and is opened only at the time of trial, deposition, or other hearing, on direction of the judge, officer, body, or tribunal conducting the proceeding, in the presence of all parties who have appeared. Records not introduced in evidence or required as part of the record must be returned to the person or entity from whom they are received. (*Ev.C. 1560(d).*)

(2) *Affidavit of Sender.* The records must be accompanied by an affidavit of the custodian or other qualified witness, stating the facts essential to a foundation (*Ev.C. 1561(a)*):

(a) The affiant is the duly authorized custodian or other qualified witness and has authority to certify the records.

(b) The copy is a true copy of all records described in the subpoena duces tecum, or, under *Ev.C. 1560(e)*, the records were delivered to the attorney, the attorney's representative, or a deposition officer for copying at the custodian's or witness' place of business.

(c) The records were prepared in the ordinary course of business at or near the time of the act, condition, or event.

(d) The identity of the records.

(e) A description of the mode of preparation of the records.

If the business has none or only part of the records, the affidavit must so state, and such records as are available must be delivered. (*Ev.C. 1561(b).*)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Delivery of Sealed Copy.* Under *Ev.C. 1560(b)*, as amended in 2005, the copy may be delivered to the court clerk or to "another person described in" *C.C.P. 2026.010(d)* (see 2 *Cal. Evidence (4th), Discovery, Supp.*, §§35, 84).

*Ev.C. 1560(c)* was amended in 2005 to delete the judge as one of the persons to whom the copy might be sent.(2) *Affidavit of Sender.* See *Cooley v. Superior Court (2006) 140 C.A.4th 1039, 1045, 45 C.R.3d 183* [trial judge erred in granting motion to enforce subpoena duces tecum against nonparty district attorney; as district attorney did not prepare or generate any of documents sought, he was not in position to attest that documents were prepared in ordinary course of business at or near time of event in question, and thus he was not custodian within meaning of *Ev.C. 1561*].



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#### E. Business Records.

##### 2. Procedure.

##### b. Alternative: Inspection or Copying and Affidavit.

*2 Witkin Cal. Evid. Doc Evid § 52*

[§ 52] Alternative: Inspection or Copying and Affidavit.

(1) *Inspection or Copying by Attorney, Representative, or Deposition Officer.* As an alternative to the procedures described in *Ev.C. 1560(b)*, (c), and (d) (*supra*, §51), the subpoenaing party may direct the witness to make the records available for inspection or copying by the party's attorney, the attorney's representative, or a professional copier serving as a deposition officer under *C.C.P. 2020(d)(3)* (see *2 Cal. Evidence (4th), Discovery*, §\*35). The inspection or copying must take place at the witness' business address under reasonable conditions during normal business hours (defined as "those hours that the business of the witness is normally open for business to the public"). When provided with at least 5 business days' notice, the witness must designate at least 6 continuous hours on "a date certain" for copying the records subject to the subpoena. It is the responsibility of the attorney's representative to deliver any copy of the records as directed in the subpoena. Disobedience of the subpoena may be punished under *C.C.P. 2020(h)* (see *2 Cal. Evidence (4th), Discovery*, §260 et seq.). (*Ev.C. 1560(e).*)

(2) *Affidavit of Attorney, Representative, or Deposition Officer.* In addition to the affidavit required by *Ev.C. 1561(a)* (*supra*, §51), where the records were delivered to the attorney, his or her representative, or the deposition officer for copying at the custodian's or witness' place of business, the records must be accompanied by an affidavit by the attorney, representative, or deposition officer stating that the copy is a true copy of all records delivered to the attorney, representative, or deposition officer. (*Ev.C. 1561(c).*)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Inspection or Copying by Attorney, Representative, or Deposition Officer.* *Ev.C. 1560(e)* was amended in 2004 to specify that the alternative procedure applies "in a civil action."

*C.C.P. 2020(d)(3)*, concerning professional photocopier services, was repealed and replaced by *C.C.P. 2020.420* in 2004 without substantive change.

*C.C.P. 2020(h)*, concerning punishment for disobedience of a subpoena, was repealed and replaced by *C.C.P. 2020.240* in 2004 without substantive change. *Ev.C. 1560(e)* was amended in 2005 to reflect the replacement of *C.C.P. 2020(d)(3)* with *C.C.P. 2020.420*, and *C.C.P. 2020(h)* with *C.C.P. 2020.240*.



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#### E. Business Records.

##### 2. Procedure.

#### c. Admissibility of Copy or Affidavit.

#### 2 Witkin Cal. Evid. Doc Evid § 53

[§ 53] Admissibility of Copy or Affidavit.

(1) *Admissibility of Copy.* The copy is admissible if (a) the original records would be admissible if the custodian or other qualified witness had been present and testified to the matters stated in the affidavit, and (b) the requirements of *Ev.C. 1271* (business records hearsay exception; see *1 Cal. Evidence (4th)*, *Hearsay*, §228 et seq.) have been met. (*Ev.C. 1562*; see *28 Pacific L. J. 816.*)

In *Taggart v. Super Seer Corp.* (1995) 33 C.A.4th 1697, 40 C.R.2d 56, a motorcycle rider was injured in an accident. He and his wife sued the manufacturer of the helmet he had been wearing for product liability, negligence, and loss of consortium. Plaintiffs sought to introduce reports of tests conducted by a research institute showing that a helmet model similar to plaintiff's failed certain "impact attenuation tests." The reports were supplied along with a declaration complying with *Ev.C. 1560* and *1561*. Initially the trial judge admitted one page of the reports, finding that the remainder did not come within the business records exception to the hearsay rule. Later he reversed himself and excluded the reports in their entirety. *Held*, the second ruling was proper.

(a) "It will readily be seen that a custodian's declaration may state all the matters it is required to state under section 1561, yet fail to provide a sufficient foundation for admission of the records under section 1271. ... Most significantly, the custodian's declaration is not required to state the 'identity' or 'mode of preparation' of the records." Thus it will usually fail to show that the sources of information and method and time of preparation of the records indicate their trustworthiness. (33 C.A.4th 1706; see *supra*, §51, for 1996 amendment of *Ev.C. 1561*, requiring affidavit to state identity of records and describe mode of preparation.)

(b) Although *In re Troy D.* (1989) 215 C.A.3d 889, 263 C.R. 869, held that a custodian's declaration in compliance with section 1561 provided sufficient foundation for admission of the underlying records, a 1989 amendment of *Ev.C. 1562* makes clear that that is not the case: a copy of the records is admissible based on the custodian's declaration only "if the requirements of Section 1271 have been met." The new language indicates that *Ev.C. 1562* is not a hearsay exception. (33 C.A.4th 1707.)

(c) Here, the custodian's declaration complied with *Ev.C. 1561*, but it contained no evidence as to what the reports were, how they were prepared, or what sources of information they were based on. It offered no evidence that the reports were trustworthy. The reports therefore failed to qualify for admission as business records under *Ev.C. 1271*. (33 C.A.4th 1706.)

(2) *Admissibility of Affidavit.* The affidavit is admissible as evidence of the foundation facts, "and the matters so stated are presumed true." The presumption, however, only affects the burden of producing evidence. (*Ev.C. 1562.*)

**SUPPLEMENT:** [This section is current through the latest supplement]



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E. Business Records.

2. Procedure.

d. Personal Attendance and Official Records.

*2 Witkin Cal. Evid. Doc Evid § 54*

[§ 54] Personal Attendance and Official Records.

A party may require personal attendance of the witness by including the following *clause in the subpoena duces tecum*: "The personal attendance of the custodian or other qualified witness and the production of the original records are required by this subpoena. The procedure authorized pursuant to subdivision (b) of Section 1560, and *Sections 1561 and 1562, of the Evidence Code* will not be deemed sufficient compliance with this subpoena." (*Ev.C. 1564.*)

If more than one subpoena duces tecum is served and personal attendance is required, the witness is deemed to be *the witness of the party serving the first subpoena.* (*Ev.C. 1565.*)

**SUPPLEMENT:** [This section is current through the latest supplement]



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### III. SECONDARY EVIDENCE

#### E. Business Records.

##### 2. Procedure.

##### e. Fees and Costs.

2 Witkin Cal. Evid. Doc Evid § 55

[§ 55] Fees and Costs.

*Ev.C. 1563* covers costs and fees as follows:

(1) *One Fee*. Unless otherwise agreed, only one witness and mileage fee need be tendered or paid. (*Ev.C. 1563(a)*.)

(2) *Reasonable Costs*. "All reasonable costs incurred in a civil proceeding by any witness which is not a party with respect to the production of all or any part of business records the production of which is requested pursuant to a subpoena duces tecum may be charged against the party serving the subpoena duces tecum." (*Ev.C. 1563(b)*.) *Ev.C. 1563(b)* also includes an elaborate statutory scheme for costs and expenses incurred in complying with the subpoena:

(a) "Reasonable costs" means (1) 10 cents per page for documents eight and one-half by fourteen inches or smaller; (2) 20 cents per page for copying documents from microfilm; (3) actual costs of reproducing oversize documents and those requiring special handling; (4) clerical costs incurred in locating and making the records available, billed at \$ 24 per hour per person and computed on the basis of \$ 6 per quarter hour or fraction thereof; (5) actual postage charges; and (6) actual costs charged to the witness by a third party for retrieval and return of records stored off-site by the third party. (*Ev.C. 1563(b)(1)*.)

(b) The witness may demand payment of charges simultaneously with the actual delivery of the subpoenaed records and is allowed to withhold delivery until the charges are paid. (*Ev.C. 1563(b)(2)*.)

(c) The requesting party or a deposition officer is entitled to an itemized statement of the clerical, reproduction, and other costs charged by the witness for complying with the subpoena. If the costs exceed those authorized in *Ev.C. 1563(b)(1)*, or if the witness refuses to produce the itemized statement of costs, the requesting party or the deposition officer may demand that the witness furnish a statement detailing the actions the witness took in justification of the costs. (*Ev.C. 1563(b)(3)*.)

(d) Claims of excessive charges may be determined by the court at an order to show cause hearing with an allowance of costs and attorneys' fees to the prevailing party. (*Ev.C. 1563(b)(4)*.)

(e) The witness may seek recoupment of costs and charges where the subpoena is withdrawn, quashed, modified, or limited. (*Ev.C. 1563(b)(5)*.)

(f) Where the records are delivered to the attorney, his or her representative, or a deposition officer for inspection or



photocopying at the witness' place of business, the fee for complying with the subpoena must not exceed \$ 15, plus actual costs charged to the witness by a third person for retrieval and return of records held offsite. If the records are retrieved from microfilm, the reasonable cost (defined in *Ev.C. 1563(b)(1)*) also applies. (*Ev.C. 1563(b)(6)*.)

(3) *When Personal Attendance Required.* In a civil proceeding in which the custodian or other qualified witness must personally attend, he or she is entitled to the same witness fees and mileage as a witness required to attend and testify, plus any additional costs incurred as provided by *Ev.C. 1563(b)*. (*Ev.C. 1563(c)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER VIII - Documentary Evidence

### III. SECONDARY EVIDENCE F. Statutory Restoration Procedure.

2 *Witkin Cal. Evid. Doc Evid* § 56

[§ 56] Statutory Restoration Procedure.

The 1961 Legislature created the following proceeding (*C.C.P. 1953.10* et seq.) for proof and restoration of a writing made unavailable by public calamity:

(1) *Subject Matter*. Covered originals consist of "any memorandum, book, map, chart, manuscript, writing, account, entry, record, print, document, representation, or combination thereof." (*C.C.P. 1953.10*.)

(2) *Conditions*. To be covered, an original must be "damaged, rendered wholly or partially illegible, destroyed in whole or in part or lost by explosion, conflagration, earthquake, disaster or other public calamity." (*C.C.P. 1953.10*.)

(3) *Parties*. The proceeding may be brought by a "person, corporation, copartnership, organization, institution, business, member of profession or calling" interested in restoring the writing. (*C.C.P. 1953.10*.) Notice of hearing is given "to such persons, if any, as the court shall designate by its order." (*C.C.P. 1953.11*.)

(4) *Procedure*. The interested person files a verified petition. (*C.C.P. 1953.10*.) Notice of hearing is given to the persons (*C.C.P. 1953.11*, *supra*), and in the manner directed by the court (publication, posting, personal service or otherwise). (*C.C.P. 1953.11*.)

At the hearing, proof of notice is made and evidence is received. (*C.C.P. 1953.11, 1953.12*.) If satisfied with the proof, the court makes an order referring to the writing, reciting its "existence, substance, genuineness or authenticity." (*C.C.P. 1953.12, 1953.13*.) The order "shall be deemed in lieu of the original and have the same effect as if the original had not been damaged, destroyed or otherwise rendered wholly or partially illegible." (*C.C.P. 1953.13*; see *Daddario v. Snow Valley* (1995) 36 *C.A.4th* 1325, 1338, 43 *C.R.2d* 726 [once statutory procedure was complied with, former best evidence rule did not apply].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER VIII - Documentary Evidence

### IV. OFFICIAL WRITINGS AFFECTING PROPERTY

#### A. Nature and Scope of Provisions.

2 Witkin Cal. Evid. Doc Evid § 57

[§ 57] Nature and Scope of Provisions.

*Ev.C. 1600* et seq. give added effect to certain writings covered by *Ev.C. 1532* (supra, §44): "The provisions of some sections provide hearsay exceptions; other sections provide exceptions to the best evidence rule; still others provide authentication procedures." (Law Rev. Com. Comment to *Ev.C. 1600*.) (On duty to disclose written evidence in action involving land patented or granted by state, see 2 *Cal. Evidence (4th), Discovery*, §123.)

(1) *Official Record of Document Affecting Property Interest*. The official authorized record of a "document purporting to establish or affect an interest in property" is prima facie evidence of the existence and content of the original recorded document "and its execution and delivery by each person by whom it purports to have been executed." (*Ev.C. 1600(a)*; see *Thomas v. Peterson* (1931) 213 C. 672, 674, 3 P.2d 306.) The presumption established by this section is one affecting the burden of proof. (*Ev.C. 1600(b)*.)

(2) *Deed by Officer in Pursuance of Court Process*. A deed purporting to have been executed by a proper officer under legal process of a court of record of this state and acknowledged and recorded in the county where the real property is situated is prima facie evidence that the property or interest described "was thereby conveyed to the grantee named in such deed." The same is true of a record of that deed or a certified copy of the record. (*Ev.C. 1603*.) This also is a presumption affecting the burden of proof. (*Ev.C. 1603*.)

(3) *Certificate of Purchase or of Location of Lands*. A certificate of purchase or location of lands in this state, issued pursuant to federal or California law, is prima facie evidence that the holder or assignee is the owner of the described land. However, this presumption may be overcome by proof that, at the time of the location or of filing a preemption claim, (a) the land was in the adverse possession of the opponent (or those under whom the opponent claims), or (b) the opponent is holding the land for mining purposes. (*Ev.C. 1604*.)

(4) *Authenticated Spanish Title Records*. Duplicate copies and authenticated translations of original Spanish title papers, prepared and authenticated pursuant to an old statute, are admissible as evidence with the effect of originals and without proving execution of the originals. (*Ev.C. 1605*.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Evidence k.335 et seq., 342 et seq.



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CHAPTER VIII - Documentary Evidence

IV. OFFICIAL WRITINGS AFFECTING PROPERTY

B. Lost Official Record Affecting Property.

2 Witkin Cal. Evid. Doc Evid § 58

[§ 58] Lost Official Record Affecting Property.

*Ev.C. 1601* authorizes secondary evidence of the contents of "the official record of any writing lost or destroyed by conflagration or other public calamity" as follows:

(1) *Foundation: Proof of Loss or Destruction.* The proponent must offer "proof of such loss or destruction" (*Ev.C. 1601(a)*); but no proof of loss of the original is required other than the fact that the original is not known by the proponent to be in existence (*Ev.C. 1601(b)*).

(2) *Secondary Evidence To Prove Contents.* Two kinds of evidence are authorized:

(a) An *abstract of title* made, issued, and certified as correct prior to its loss or destruction, and purporting to have been made in the ordinary course of business by a person engaged in the business. (*Ev.C. 1601(a)(1)*.)

(b) An abstract of title or other instrument affecting title that is made, issued, and certified as correct by a person engaged in the business of insuring titles or issuing abstracts of title. This is true whether this occurs before or after the instrument's loss or destruction, and whether the instrument was made from the original records or from the abstract and notes taken in the ordinary course of the insurer's or issuer's business. (*Ev.C. 1601(a)(2)*.)

(3) *Pretrial Notice and Inspection.* The proponent must give "reasonable notice in writing" of his or her intention to use the evidence to all other parties who have appeared. The proponent must also give them "a reasonable opportunity to inspect the evidence, and also the abstracts, memoranda, or notes from which it was compiled, and to take copies thereof." (*Ev.C. 1601(c)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER VIII - Documentary Evidence

### V. PAROL EVIDENCE RULE

#### A. Nature of Rule.

##### 1. General Principles.

2 Witkin Cal. Evid. Doc Evid § 59

[§ 59] General Principles.

(1) *In General.* The parol evidence rule, with certain exceptions, prohibits the introduction of any *extrinsic evidence* (oral or written) to vary or add to the terms of an *integrated written instrument* (a contract, deed, or will). (See generally *Estate of Gaines* (1940) 15 C.2d 255, 264, 100 P.2d 1055; *Imbach v. Schultz* (1962) 58 C.2d 858, 860, 27 C.R. 160, 377 P.2d 272, citing the text; *Masterson v. Sine* (1968) 68 C.2d 222, 227, 65 C.R. 545, 436 P.2d 561, *infra*, §88; *Tahoe Nat. Bank v. Phillips* (1971) 4 C.3d 11, 23, 92 C.R. 704, 480 P.2d 320, *infra*, §64, citing the text; *Price v. Wells Fargo Bank* (1989) 213 C.A.3d 465, 486, 261 C.R. 735, citing the text; *Alling v. Universal Mfg. Corp.* (1992) 5 C.A.4th 1412, 1433, 7 C.R.2d 718, citing the text; 9 Wigmore (Chadbourn Rev.) §§2425 et seq., 2443 et seq.; 3 Corbin §573 et seq.; 11 Williston 4th, Chap. 33; 25 Southwestern U. L. Rev. 1 [analyzing recent cases and arguing for abolishment of rule]; 29A Am.Jur.2d (1994 ed.), *Evidence* §1092 et seq.; 69 A.L.R.3d 1353 [parol evidence rule in action on contract for architect's services]; 36 Proof of Facts 3d 331 [introducing evidence over parol evidence objection]; C.E.B., *Effective Introduction of Evidence* 2d, Chap. 37; 2 Jefferson, *California Evidence Benchbook* 3d, Chap. 32.)

(2) *Nature of Rule.* Although the various statements (see *infra*, §§60, 61) are usually thought of as expressing the *parol evidence rule*, Wigmore has asserted that there are several distinct propositions involved, including the following (see 9 Wigmore (Chadbourn Rev.) §2401):

- (a) A rule determining whether there was a valid legal act. (See *infra*, §95.)
- (b) The "integration" rule, determining whether that act was intended to supersede all other negotiations and constitute the complete expression of the intentions of the parties. (See *infra*, §65.)
- (c) A rule relating to the interpretation of the act. (See *infra*, §74.)
- (d) A rule of solemnization or form, e.g., the statute of frauds. (See *infra*, §63.)

The parol evidence rule is not regarded as a rule of *evidence* and is not covered in the Evidence Code. (See *infra*, §62.)

(3) *Relevant Inquiry.* The application of the rule and its exceptions has given rise to many difficult distinctions and much debate by text writers. The practicing lawyer's chief question, however, is whether extrinsic evidence is or is not admissible in a particular case. Thus, the following questions should be asked:

- (a) Is the writing one to which the rule applies, i.e., an integration? (See *infra*, §65 et seq.)

(b) Was the extrinsic evidence admissible because it was not inconsistent with the writing (evidence to interpret, or consistent collateral agreement)? (See *infra*, §§74 et seq., 86, 87.)

(c) Was the extrinsic evidence admissible, though inconsistent, under one of the exceptions to the rule? (See *infra*, §93 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Criminal Law k.447; Evidence k.384 et seq.



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## CHAPTER VIII - Documentary Evidence

### V. PAROL EVIDENCE RULE

#### A. Nature of Rule.

#### 2. Statements of Rule.

##### a. Restatement and U.C.C.

*2 Witkin Cal. Evid. Doc Evid § 60*

[§ 60] Restatement and U.C.C.

(1) *Second Restatement of Contracts*. The *Second Restatement of Contracts*, §213, states the rule as follows:

- (a) "A binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them."
- (b) "A binding completely integrated agreement discharges prior agreements to the extent that they are within its scope."
- (c) "An integrated agreement that is not binding or that is voidable and avoided does not discharge a prior agreement. But an integrated agreement, even though not binding, may be effective to render inoperative a term which would have been part of the agreement if it had not been integrated."

Subsequent sections of the Restatement deal with various aspects of the rule's application: §214 [Evidence of Prior or Contemporaneous Agreements and Negotiations]; §215 [Contradictions of Integrated Terms]; §216 [Consistent Additional Terms]; §217 [Integrated Agreement Subject to Oral Requirement of a Condition]; §218 [Untrue Recitals; Evidence of Consideration].

(2) *Uniform Commercial Code*. This Code states the rule with express recognition of several of the situations in which extrinsic evidence is admissible. (U.C.C. 2202 and Official Comments.) U.C.C. 2202 reads as follows:

"Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement *but may be explained or supplemented*"

"(a) By *course of dealing or usage of trade* (Section 1205) or by *course of performance* (Section 2208); and"

"(b) By evidence of *consistent additional terms* unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement." (See 2 Anderson 3d (1997 ed.), §2-202:1 et seq.; 71 A.L.R.3d 1059 [parol evidence rule of U.C.C. 2202 on fraud in sale of goods].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Uniform Commercial Code*. U.C.C. 2202(a) was amended in 2006 to read: "(a) By course of dealing, course of

performance, or usage of trade (Section 1303); and".





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### V. PAROL EVIDENCE RULE

- A. Nature of Rule.
- 2. Statements of Rule.
  - b. California Statute.

*2 Witkin Cal. Evid. Doc Evid § 61*

[§ 61] California Statute.

*C.C.P. 1856*, as revised in 1978 to conform to the Uniform Commercial Code formulation, states the parol evidence rule as follows:

(1) *Final Agreement Cannot Be Contradicted*. "Terms set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement." (*C.C.P. 1856(a)*; see Law Rev. Com. Comment; on integration rule, see *infra*, §65 et seq.)

(2) *Consistent Additional Terms*. The terms of the final agreement "may be explained or supplemented by evidence of consistent additional terms unless the writing is intended also as a complete and exclusive statement of the terms of the agreement." (*C.C.P. 1856(b)*; see Law Rev. Com. Comment; *infra*, §86 et seq.)

(3) *Evidence of Dealing, Usage, or Performance*. The terms of the final agreement "may be explained or supplemented by course of dealing or usage of trade or by course of performance." (*C.C.P. 1856(c)*; see Law Rev. Com. Comment; *infra*, §85.)

(4) *Court Determines Finality of Agreement*. The court must determine whether the writing is intended by the parties as a final expression of their agreement as to the terms included in the writing, and whether the writing is intended as a complete and exclusive statement of those terms. (*C.C.P. 1856(d)*; see Law Rev. Com. Comment; *infra*, §§68, 69.)

(5) *Evidence of Mistake or Imperfection*. Relevant evidence is admissible to clarify or explain a mistake or imperfection in the writing that is put in issue by the pleadings. (*C.C.P. 1856(e)*; see *infra*, §96.)

(6) *Evidence of Invalidity*. Where the validity of the agreement is in dispute, evidence relevant to that issue is admissible. (*C.C.P. 1856(f)*; see *infra*, §95 et seq.)

(7) *Evidence To Interpret or Establish Illegality or Fraud*. Other evidence of the circumstances under which the agreement was made or to which it relates, to explain an extrinsic ambiguity or otherwise interpret the terms of the agreement, or to establish illegality or fraud is admissible. (*C.C.P. 1856(g)*; see Law Rev. Com. Comment; *infra*, §§74 et seq., 95 et seq.)

(8) *Agreements Covered by Rule*. The parol evidence rule covers deeds, wills, and contracts. (*C.C.P. 1856(h)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Final Agreement Cannot Be Contradicted*.

*(New) Distinction: Subsequent promises are not barred: C.C.P. 1856(a)* bars resort to evidence of a prior agreement or a contemporaneous oral agreement to contradict a plain and unambiguous term in a fully integrated agreement. It is inapplicable to promises made subsequent to the execution of the integrated agreement. (*Charnay v. Cobert* (2006) 145 C.A.4th 170, 186, 51 C.R.3d 471 [client's fraud claim against former attorney, based on assurances by attorney that she would recoup her attorneys' fees in property dispute, was not barred by parol evidence rule, even though parties' retainer agreement included "no guarantees" clause, where assurances were made subsequent to retainer agreement].)



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## CHAPTER VIII - Documentary Evidence

### V. PAROL EVIDENCE RULE

#### A. Nature of Rule.

#### 3. Rule of Substantive Law.

*2 Witkin Cal. Evid. Doc Evid § 62*

[§ 62] Rule of Substantive Law.

It is almost universally agreed that the parol evidence rule is not a mere rule of evidence concerned with the method of proving an agreement. "It does not exclude evidence for any of the reasons ordinarily requiring exclusion, based on the probative value of such evidence or the policy of its admission. The rule as applied to contracts is simply that as a matter of substantive law, a certain act, the act of embodying the complete terms of an agreement in a writing (the 'integration'), *becomes the contract of the parties*. The point then is, not how the agreement is to be proved, because as a matter of law the writing is the agreement. Extrinsic evidence is excluded because it cannot serve to prove what the agreement was, this being determined as a matter of law to be the writing itself." (*Estate of Gaines* (1940) 15 C.2d 255, 264, 100 P.2d 1055; see *Guerin v. Kirst* (1949) 33 C.2d 402, 410, 202 P.2d 10; *Hale v. Bohannon* (1952) 38 C.2d 458, 465, 241 P.2d 4; *Buffalo Arms v. Remler Co.* (1960) 179 C.A.2d 700, 709, 4 C.R. 103 [affidavit contradicting written contract insufficient against motion for summary judgment]; *Riley v. Bear Creek Planning Committee* (1976) 17 C.3d 500, 508, 131 C.R. 381, 551 P.2d 1213, *infra*, §83; *BMW of North America v. New Motor Vehicle Bd.* (1984) 162 C.A.3d 980, 990, 209 C.R. 50, citing the text; *Hall v. Harker* (1999) 69 C.A.4th 836, 844, 82 C.R.2d 44, citing the text; *Rest.2d, Contracts* §213, Comment a; 3 Corbin §573; 9 Wigmore (Chadbourn Rev.) §2400; on objection and waiver, see *infra*, §64.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER VIII - Documentary Evidence

## V. PAROL EVIDENCE RULE

## A. Nature of Rule.

## 4. Statute of Frauds Distinguished.

2 *Witkin Cal. Evid. Doc Evid* § 63

[§ 63] Statute of Frauds Distinguished.

The statute of frauds requires a writing as evidence of certain kinds of contracts. And, because both it and the parol evidence rule may operate to exclude oral evidence of contractual terms, the two rules are sometimes confused in contract cases. (See *Ellis v. Klaff* (1950) 96 C.A.2d 471, 477, 216 P.2d 15; *Riley v. Bear Creek Planning Committee* (1976) 17 C.3d 500, 509, 131 C.R. 381, 551 P.2d 1213, *infra*, §83, citing the text; 3 Corbin §575; 9 Wigmore (Chadbourn Rev.) §2454; 1 *Summary* (9th), *Contracts*, §261 et seq.) The following distinctions should be borne in mind:

(1) *Different Purposes and Scope.* The object of the statute of frauds is to prevent perjured testimony in proof of purported contracts of important types, and the statute applies only to those enumerated types. (See 1 *Summary* (9th), *Contracts*, §282 et seq.) The parol evidence rule applies to any type of contract, and its purpose is to make sure that the parties' final understanding, deliberately expressed in writing, shall not be changed. (See *supra*, §59 et seq.)

(2) *Different Kinds of Writings.* To meet the requirements of the statute of frauds, a written memorandum that refers to the essential elements of the contract is sufficient; it need not be complete and its details may be filled in by parol evidence. (See 1 *Summary* (9th), *Contracts*, §269 et seq.) To bring the parol evidence rule into operation, however, there must be a final writing or integration, completely covering the agreement of the parties. (See *infra*, §65 et seq.)

(3) *Parol Evidence May Not Establish Essential Elements of Memorandum.* Even though there is an integration, parol evidence of oral terms not inconsistent with the contract may be admitted. (See *infra*, §86.) But no essential element of a memorandum required by the statute of frauds can be supplied by parol evidence. (See *Ellis v. Klaff*, *supra*, 96 C.A.2d 477; 1 *Summary* (9th), *Contracts*, §269 et seq.)

(4) *Estoppel Does Not Overcome Parol Evidence Rule.* Estoppel may preclude the defense of the statute of frauds (see 1 *Summary* (9th), *Contracts*, §322 et seq.), but this doctrine may not serve to overcome the parol evidence rule. Thus, in *Alameda County Title Ins. Co. v. Panella* (1933) 218 C. 510, 24 P.2d 163, defendant asserted that plaintiff wrongfully sold his property at a trustee's sale, because, prior to the execution of the note and deed of trust, plaintiff orally agreed to "hold and carry" the obligation until defendant could dispose of the property advantageously, and defendant signed the instruments in reliance on this oral promise. Defendant's contention was that plaintiff should be estopped to deny the oral agreement. *Held*, this was not a defense. A party may be estopped to plead the statute of frauds, under certain circumstances, where there is no writing. Here, however, there was a formal writing, which, under the parol evidence rule, superseded prior understandings. (218 C. 516.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Cross-Reference:* 1 *Summary* (10th), *Contracts*, §342 et seq.

(1) *Different Purposes and Scope.* See *Casa Herrera v. Beydoun* (2004) 32 C.4th 336, 345, 9 C.R.3d 97, 83 P.3d 497, quoting the text.

*Cross-Reference:* 1 *Summary* (10th), *Contracts*, §363 et seq.

(2) *Different Kinds of Writings.*

*Cross-Reference:* 1 *Summary* (10th), *Contracts*, §350 et seq.

(3) *Parol Evidence May Not Establish Essential Elements of Memorandum.*

*Cross-Reference:* 1 *Summary* (10th), *Contracts*, §350 et seq. (4) *Estoppel Does Not Overcome Parol Evidence Rule.*

*Cross-Reference:* 1 *Summary* (10th), *Contracts*, §406 et seq.

(*New*) *Distinction: Use of means or key to define land:* The statute of frauds may be satisfied where the contract provides that a buyer will select and acquire certain lands after the original written contract is executed. Extrinsic evidence may then be considered to show which lands were acquired, and their boundaries. This result is in accord with the general principle that a "means" or "key" may be used to define the relevant land, so as to avoid invalidity under the statute of frauds. (*Alameda Belt Line v. Alameda* (2003) 113 C.A.4th 15, 22, 5 C.R.3d 879 [parol evidence coming into existence after execution of written contract containing option to repurchase could be used to show boundaries of land subject to option; contractual language, "said belt line railroad including all extensions thereof," was adequate key].)



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## CHAPTER VIII - Documentary Evidence

## V. PAROL EVIDENCE RULE

## A. Nature of Rule.

## 5. Objection in Lower Court.

2 Witkin Cal. Evid. Doc Evid § 64

[§ 64] Objection in Lower Court.

The question whether violation of the parol evidence rule may be raised for the first time on appeal has been the subject of conflicting decisions both in California and elsewhere. (See 81 A.L.R.3d 249 [modern status of rules governing legal effect of failure to object].)

(1) *Theory of Waived Objection.* This theory stresses the fundamental policy requiring the raising of issues in the lower court as a prerequisite to appellate review, and the courts that invoke the theory hold that incompetent evidence admitted without objection, including parol evidence varying the terms of an integration, may sustain a judgment. A number of California cases followed this view. (See *Pao Ch'en Lee v. Gregoriou* (1958) 50 C.2d 502, 505, 326 P.2d 135; *Tsarnas v. Bailey* (1960) 179 C.A.2d 332, 338, 3 P.2d 629; *Santa Clara Properties Co. v. R. L. C.* (1963) 217 C.A.2d 840, 854, 32 C.R. 333; *Martin v. Town & Country Dev.* (1964) 230 C.A.2d 422, 427, 41 C.R. 47; *Crummer v. Zalk* (1967) 248 C.A.2d 794, 797, 57 C.R. 185; *San Francisco v. City Inv. Corp.* (1971) 15 C.A.3d 1031, 1038, 93 C.R. 690.)

(2) *Repudiation of Waiver View.* Many cases decided prior to *Pao Ch'en Lee*, *supra*, stressed the substantive nature of the rule, and held that parol evidence contradicting an integration should be disregarded on appeal as of no probative force in determining the sufficiency of the evidence to support the judgment. (See *Dollar v. International Banking Corp.* (1910) 13 C.A. 331, 343, 109 P. 499; *Harding v. Robinson* (1917) 175 C. 534, 540, 166 P. 808; *Rottman v. Hevener* (1921) 54 C.A. 474, 479, 202 P. 329; *Middlecamp v. Zumwalt* (1929) 100 C.A. 715, 723, 280 P. 1003; *Hanrahan-Wilcox Corp. v. Jenison Machinery Co.* (1937) 23 C.A.2d 642, 645, 73 P.2d 1241; *Lifton v. Harshman* (1947) 80 C.A.2d 422, 432, 182 P.2d 222; *El Zarape Tortilla Factory v. Plant Food Corp.* (1949) 90 C.A.2d 336, 344, 203 P.2d 13.)

This substantive approach was adopted and the contrary view of *Pao Ch'en Lee* was rejected in *Tahoe Nat. Bank v. Phillips* (1971) 4 C.3d 11, 92 C.R. 704, 480 P.2d 320. Defendant executed an instrument involving her home entitled "Assignment of Rents and Agreement Not to Sell or Encumber Real Property." Plaintiff bank sought foreclosure, offering extrinsic evidence to show that the purported assignment, on its own form, was an equitable mortgage. Defendant did not object to the evidence, and the trial judge sustained the bank's contention. On appeal, defendant contended that the assignment was not reasonably susceptible of this construction. *Held*, judgment decreeing foreclosure reversed; the instrument could not properly be construed as a mortgage. (See 3 *Summary* (9th), *Security Transactions in Real Property*, §15.)

Plaintiff bank, relying on *Pao Ch'en Lee*, argued that the extrinsic evidence admitted without objection supported

its construction. The court's answer made this distinction: Extrinsic evidence may be admitted provisionally in order that the judge may determine if it is relevant to establish an interpretation to which the writing is reasonably susceptible; but extrinsic evidence cannot support a construction contrary to its terms. (4 C.3d 22.)

"If we treat the parol evidence rule as one of *substantive law*, we cannot consistently subjugate that rule to the principles of objection and waiver codified in the Evidence Code. ... To be sure, a party who has not objected to the introduction of extrinsic evidence cannot complain if that evidence is considered by the trier of fact. But in determining whether substantial evidence supports a judgment, extrinsic evidence inconsistent with any interpretation to which the instrument is reasonably susceptible becomes *irrelevant*; as a matter of substantive law such evidence cannot serve to create or alter the obligations under the instrument. Irrelevant evidence cannot support a judgment." (4 C.3d 23.)

Thus, defendant, not having objected at the trial, cannot contend on appeal that it was error to admit the extrinsic evidence; but "she may argue on appeal that such extrinsic evidence conflicts with any interpretation to which the instrument is reasonably susceptible." (4 C.3d 23.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Repudiation of Waiver View*. Cross-Reference: 4 Summary (10th), *Security Transactions in Real Property*, §16.



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## CHAPTER VIII - Documentary Evidence

### V. PAROL EVIDENCE RULE

#### B. Integration Rule Excluding Extrinsic Evidence.

##### 1. What Constitutes Integration.

##### a. Writing Intended as Final Expression.

*2 Witkin Cal. Evid. Doc Evid § 65*

[§ 65] Writing Intended as Final Expression.

(1) *Second Restatement of Contracts*. "An integrated agreement is a writing or writings constituting a final expression of one or more terms of an agreement." (*Rest.2d, Contracts §209(1)*.) "No particular form is required for an integrated agreement. Written contracts, signed by both parties, may include an explicit declaration that there are no other agreements between the parties, but such a declaration may not be conclusive. The intention of the parties may also be manifested without explicit statement and without signature. A letter, telegram or other informal document written by one party may be orally assented to by the other as a final expression of some or all of the terms of their agreement." (*Rest.2d, Contracts §209, Comment b.*)

(2) *California Statute. C.C.P. 1856(a)*, without using the term "integration," refers to "[t]erms set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein." (See *supra*, §61.)

Thus, if there has been a legally effective act (i.e., a legally effective instrument was intended and there are no invalidating factors such as mistake, fraud, or lack of consideration; see *infra*, §96 et seq.), the exclusionary aspect of the parol evidence rule comes into operation when the parties have adopted a writing or writings as a final and complete expression of their understanding. (See *Estate of Gaines (1940) 15 C.2d 255, 264, 100 P.2d 1055*; *Pollyanna Homes v. Berney (1961) 56 C.2d 676, 679, 16 C.R. 345, 365 P.2d 401*, citing the text; *Imbach v. Schultz (1962) 58 C.2d 858, 860, 27 C.R. 160, 377 P.2d 272*; *Gerdlund v. Electronic Dispensers Int. (1987) 190 C.A.3d 263, 270, 235 C.R. 279*; *Wagner v. Glendale Adventist Med. Center (1989) 216 C.A.3d 1379, 1386, 265 C.R. 412*, citing the text; *Banco Do Brasil v. Latian (1991) 234 C.A.3d 973, 1000, 285 C.R. 870*, citing the text; *Alling v. Universal Mfg. Corp. (1992) 5 C.A.4th 1412, 1434, 1435, 7 C.R.2d 718*; *EPA Real Estate Partnership v. Kang (1992) 12 C.A.4th 171, 176, 177, 15 C.R.2d 209* [citing *Wagner, Banco Do Brasil, and Alling*]; 9 *Wigmore (Chadbourn Rev.) §2425 et seq.*; 3 *Corbin §§573, 588*; 11 *Williston 4th, §33:14 et seq.*; *supra*, §§60, 61.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *California Statute*. See *Founding Members of the Newport Beach Country Club v. Newport Beach Country Club (2003) 109 C.A.4th 944, 954, 135 C.R.2d 505* [club's governing regulations, which contained both integration clause and "right of first offer" clause, were fully integrated, at least as to right of first offer; understanding of right of first offer of those entering into governing regulations would not naturally be made subject of separate agreement]. *West's Key Number Digest*, Evidence k.442 et seq.





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V. PAROL EVIDENCE RULE

B. Integration Rule Excluding Extrinsic Evidence.

1. What Constitutes Integration.

b. Integration Includes Implied Term.

2 *Witkin Cal. Evid. Doc Evid* § 66

[§ 66] Integration Includes Implied Term.

Terms implied by law are as much a part of the contract as its written provisions, and implied terms are similarly protected by the parol evidence rule. (*Standard Box Co. v. Mutual Biscuit Co.* (1909) 10 C.A. 746, 750, 103 P. 938; *LaFrance v. Kashishian* (1928) 204 C. 643, 645, 269 P. 655; *Fogler v. Purkiser* (1932) 127 C.A. 554, 559, 16 P.2d 305.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER VIII - Documentary Evidence

### V. PAROL EVIDENCE RULE

#### B. Integration Rule Excluding Extrinsic Evidence.

##### 1. What Constitutes Integration.

##### c. Partial Integration.

#### 2 *Witkin Cal. Evid. Doc Evid* § 67

#### [§ 67] Partial Integration.

The parties may reduce only a part of their agreement to writing, leaving the rest to their oral understanding. In such a case, the integrated part is protected by the parol evidence rule in the same manner as if the whole contract were integrated. (See *Rest.2d, Contracts* §209(1) ["final expression of one or more terms of an agreement"]; §214(b) [evidence to establish "that the integrated agreement, if any, is completely or partially integrated"]; *Schwartz v. Shapiro* (1964) 229 C.A.2d 238, 250, 40 C.R. 189, quoting the text; *Goodman v. Citizens Life & Cas. Ins. Co.* (1967) 253 C.A.2d 807, 815, 61 C.R. 682; *Slivinsky v. Watkins-Johnson Co.* (1990) 221 C.A.3d 799, 805, 270 C.R. 585 [evidence that plaintiff's employment was terminated without good cause was inadmissible where integrated termination provision defined employment as being at will]; *Haggard v. Kimberly Quality Care* (1995) 39 C.A.4th 508, 520, 46 C.R.2d 16 [citing *Slivinsky* case; where written employment agreement contained at will provision with integration clause, implied oral agreement to terminate only for cause was not admissible, even if written agreement did not cover other employment terms such as salary, hours, or benefits]; 9 Wigmore (Chadbourn Rev.) §2430.)

However, one commentator has argued that where there is no complete integration of an entire agreement, courts should be slow in finding that the parties intended a partial writing to be conclusive as to anything. (See 3 Corbin §§581, 587.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER VIII - Documentary Evidence

### V. PAROL EVIDENCE RULE

#### B. Integration Rule Excluding Extrinsic Evidence.

##### 2. Determination of Intent.

##### a. In General.

*2 Witkin Cal. Evid. Doc Evid § 68*

[§ 68] In General.

(1) *Nature of Problem and Former Test.* A writing is an integration when the parties manifest or express their intention that it shall be a final statement of their agreement. (See *supra*, §65.) In the absence of an express statement to that effect (*infra*, §70), how that manifested intent is ascertained is one of the most controversial problems in the application of the parol evidence rule. (See 9 Wigmore (Chadbourn Rev.) §2429; *Rest.2d, Contracts* §209, Comment b.)

California courts formerly applied the "face of the document test," making finality determinable from the document itself. Under this test, if the document on its face purports to be a complete expression of the agreement, it is conclusively presumed to contain all of the agreed terms, and extrinsic evidence should be excluded. (See *Harrison v. McCormick* (1891) 89 C. 327, 330, 26 P. 830; *Germain Fruit Co. v. J. K. Armsby Co.* (1908) 153 C. 585, 594, 96 P. 319; *Johnson v. D. H. Bibb Lumber Co.* (1903) 140 C. 95, 98, 73 P. 730; *United Iron Works v. Outer Harbor Dock & Wharf Co.* (1914) 168 C. 81, 84, 141 P. 917; *Thoroman v. David* (1926) 199 C. 386, 390, 249 P. 513; *Morgan v. Green* (1927) 86 C.A. 216, 222, 260 P. 596; *El Zarape Tortilla Factory v. Plant Food Corp.* (1949) 90 C.A.2d 336, 343, 203 P.2d 13; *Pollyanna Homes v. Berney* (1961) 56 C.2d 676, 679, 16 C.R. 345, 365 P.2d 401, citing the text.)

This test was strongly criticized and later repudiated. (See *infra*, §69.)

(2) *Determination by Judge.* The integration doctrine, which brings the parol evidence rule into operation, raises a question of law for the judge, not a question of fact for the jury. (See *C.C.P. 1856(d)*, *supra*, §61; U.C.C. §2202(b), and Comment 3; *Harrison v. McCormick*, *supra*, 89 C. 330; *Stephan v. Lagerqvist* (1921) 52 C.A. 519, 523, 199 P. 52; *Brawthen v. H & R Block* (1975) 52 C.A.3d 139, 146, 124 C.R. 845, citing the text; *Mobil Oil Corp. v. Handley* (1978) 76 C.A.3d 956, 961, 143 C.R. 321; *Wagner v. Glendale Adventist Med. Center* (1989) 216 C.A.3d 1379, 1386, 265 C.R. 412, citing the text; *Alling v. Universal Mfg. Corp.* (1992) 5 C.A.4th 1412, 1434, 7 C.R.2d 718; *Heller v. Pillsbury Madison & Sutro* (1996) 50 C.A.4th 1367, 1381, 1382, 58 C.R.2d 336; *Rest.2d, Contracts* §§209(2), 210(3), 214, Comment a; 9 Wigmore (Chadbourn Rev.) §2430; 3 Corbin §595.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER VIII - Documentary Evidence

### V. PAROL EVIDENCE RULE

#### B. Integration Rule Excluding Extrinsic Evidence.

##### 2. Determination of Intent.

##### b. Admissibility of Parol Evidence.

*2 Witkin Cal. Evid. Doc Evid § 69*

[§ 69] Admissibility of Parol Evidence.

The strict "face of the document test" has been criticized by writers as inadequate. It operates correctly when it holds the parol evidence rule *inapplicable* to informal writings which clearly do not purport to be integrations. (See *infra*, §72.) But a writing may be formal or complete in appearance without necessarily indicating the intention of the parties to cover all aspects of the subject matter therein and to supersede other written or oral transactions; and, as to such a writing, the "face of the document" test would operate to exclude parts of the actual agreement of the parties. There is, therefore, both principle and authority for the introduction of evidence of the surrounding circumstances and prior negotiations for the limited purpose of determining whether the writing in question was intended to supersede all other transactions. (See *Schwartz v. Shapiro* (1964) 229 C.A.2d 238, 251, footnote 8, 40 C.R. 189; *Wagner v. Glendale Adventist Med. Center* (1989) 216 C.A.3d 1379, 1386, 1387, 265 C.R. 412, citing the text; *Wedek v. Unocal Corp.* (1997) 59 C.A.4th 848, 863, 69 C.R.2d 501, citing the text [in personal injury action by temporary worker against oil refinery owner, trial judge properly admitted extrinsic evidence to determine that, despite plaintiff's claim that it was integrated, ambiguous terms on back of purchase order generated by defendant and signed by temporary agency employee were not intended to vary prior agreement that made plaintiff special employee of defendant]; 9 Wigmore (Chadbourn Rev.) §§2430, 2431; 3 Corbin §582.)

Where more than one writing is offered, parol evidence is clearly admissible to show that the several papers were intended to constitute a single contract. (See *Torrey v. Shea* (1916) 29 C.A. 313, 316, 155 P. 820; cf. *Mayers v. Loew's* (1950) 35 C.2d 822, 827, 221 P.2d 26; *Roberts v. Reynolds* (1963) 212 C.A.2d 818, 824, 28 C.R. 261; and see 1950 A.S. 423.) And in *Shelley v. Hart* (1931) 112 C.A. 231, 240, 297 P. 82, evidence was admitted to show that the promisor, in signing a filled-in printed contract form, did so on the express understanding that he was not to be bound by the additional printed matter on the bottom and back of the page, following his signature. The terms before the signature did not refer to the other provisions, and the court declared that "extrinsic evidence is competent to determine just what portion of the document constitutes the real contract."

In *Masterson v. Sine* (1968) 68 C.2d 222, 226, 65 C.R. 545, 436 P.2d 561, *infra*, §88, the court reviewed the conflicting expressions in California cases and repudiated the face of the document test. *Birsner v. Bolles* (1971) 20 C.A.3d 635, 637, 97 C.R. 846, is to the same effect.

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER VIII - Documentary Evidence

### V. PAROL EVIDENCE RULE

#### B. Integration Rule Excluding Extrinsic Evidence.

##### 3. Merger Clause.

##### a. General Rule: Parol Evidence Inadmissible.

*2 Witkin Cal. Evid. Doc Evid § 70*

[§ 70] General Rule: Parol Evidence Inadmissible.

Written agreements (particularly those between sellers and buyers of real or personal property, negotiated by sellers' agents) often contain a standard "merger clause" to the effect that the writing shall constitute the entire contract, and that there are no agreements, warranties, or representations other than those expressly mentioned. (See 3 Corbin §578; *1 Summary (9th), Contracts, §410 et seq.*)

This type of clause has been held conclusive on the *issue of integration*, so that parol evidence to show that the parties did not intend the writing to constitute the sole agreement will be excluded. (See *Hanrahan-Wilcox Corp. v. Jenison Machinery Co. (1937) 23 C.A.2d 642, 646, 73 P.2d 1241*; *Salyer Grain & Milling Co. v. Henson (1970) 13 C.A.3d 493, 501, 91 C.R. 847, infra, §90*; *Blumenfeld v. R.H. Macy & Co. (1979) 92 C.A.3d 38, 44, 154 C.R. 652*; *Malmstrom v. Kaiser Aluminum & Chemical Corp. (1986) 187 C.A.3d 299, 315, 231 C.R. 820*; *Haggard v. Kimberly Quality Care (1995) 39 C.A.4th 508, 518, 519, 46 C.R.2d 16* [admission of evidence as to implied oral agreement to terminate plaintiff's employment only for cause was improper; at will provision in written contract stated that there were no express or implied agreements to the contrary, and provision was not reasonably susceptible of interpretation that cause was required]; *Rest.2d, Contracts §216, Comment e* [such a clause "if agreed to is likely to conclude the issue whether the agreement is completely integrated"].)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Cross-Reference:* *1 Summary (10th), Contracts, §349.*



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### V. PAROL EVIDENCE RULE

#### B. Integration Rule Excluding Extrinsic Evidence.

##### 3. Merger Clause.

##### b. Exceptions.

*2 Witkin Cal. Evid. Doc Evid § 71*

[§ 71] Exceptions.

(1) *Invalidity Exceptions.* The merger clause (*supra*, §70) has no effect on the invalidity exceptions to the parol evidence rule (*infra*, §95 et seq.). Thus, it cannot prevent the introduction of evidence of fraud, mistake, or other invalidating matters, because a showing of invalidity nullifies the clause along with the rest of the contract. (See *Rothstein v. Janss Inv. Corp.* (1941) 45 C.A.2d 64, 68, 113 P.2d 465; 3 Corbin §578; 1 *Summary* (9th), *Contracts*, §410.)

(2) *Policy Exceptions.* The same is true of the policy exceptions to the parol evidence rule. (See *infra*, §106 et seq.) Thus, in *Beeler v. American Trust Co.* (1944) 24 C.2d 1, 147 P.2d 583, plaintiff executed a deed, and at the same time, signed an affidavit stating that the instrument was intended as an absolute conveyance and not as security. *Held*, parol evidence was nevertheless admissible to show that the instrument was intended as a mortgage. (24 C.2d 7.)

(3) *Interpretation Exceptions.* It would seem clear also that evidence to *interpret* the contract (*infra*, §74 et seq.) does not contravene the merger clause. (See 3 Corbin §578; *Rest.2d, Contracts* §216, Comment e ["such a clause does not control the question whether the writing was assented to as an integrated agreement, the scope of the writing if completely integrated, or the interpretation of the written terms"].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Invalidity Exceptions.*

*Cross-Reference:* 1 *Summary* (10th), *Contracts*, §304.



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## CHAPTER VIII - Documentary Evidence

### V. PAROL EVIDENCE RULE

#### B. Integration Rule Excluding Extrinsic Evidence.

##### 4. What Are Not Integrations.

##### a. Noncontractual Writings.

2 Witkin Cal. Evid. Doc Evid § 72

[§ 72] Noncontractual Writings.

Although the intent of the parties governs in each case, certain types of writings are, by their nature, not designed as final and complete expressions of an understanding. (See *Wagner v. Glendale Adventist Med. Center* (1989) 216 C.A.3d 1379, 1385, 1386, 265 C.R. 412, citing the text; 9 Wigmore (Chadbourn Rev.) §§2429, 2432, 2451; 3 Corbin §588.) Typical examples include the following:

(1) *Minutes of meeting*. (See *Lawrence v. Premier Indem. Assur. Co.* (1919) 180 C. 688, 697, 182 P. 431, *supra*, §40.)

(2) *Receipt*. An ordinary receipt is a mere admission and rarely intended as a contract. (See *Lawrence v. Premier Indem. Assur. Co.*, *supra*; *Bevis v. Murphey* (1932) 127 C.A. 518, 520, 16 P.2d 178; *Haidinger-Hayes v. Marvin Hime & Co.* (1962) 206 C.A.2d 46, 52, 23 C.R. 455.)

Of course, the term "receipt" is sometimes applied to written contracts which are integrations, such as a *deposit receipt* evidencing an agreement to purchase real property. (See 1 *Summary* (9th), *Contracts*, §273; 9 Wigmore (Chadbourn Rev.) §2432; 42 A.L.R.2d 600 [admissibility of extrinsic evidence to explain or contradict bank deposit slips, deposit entries in passbooks, certificates of deposit, or similar instruments].)

(3) *Offer*. (See *Lawrence v. Premier Indem. Assur. Co.*, *supra*.)

(4) *Book account*. (See *Epley v. Cunningham* (1955) 134 C.A.2d 769, 770, 286 P.2d 380.)

(5) *Automobile registration certificate*. (See *Lynn v. Herman* (1946) 72 C.A.2d 614, 616, 165 P.2d 54 [rejecting plaintiff's contention that certificate, showing plaintiff to be legal owner, was conclusive by virtue of *Veh.C. 5600* and therefore free from contradiction by parol evidence].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Receipt*.

*Cross-Reference:* 1 *Summary* (10th), *Contracts*, §354.



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### V. PAROL EVIDENCE RULE

#### B. Integration Rule Excluding Extrinsic Evidence.

##### 4. What Are Not Integrations.

##### b. Incomplete Contractual Writings.

*2 Witkin Cal. Evid. Doc Evid § 73*

#### [§ 73] Incomplete Contractual Writings.

A writing contractual in form may, nevertheless, show on its face that the parties did not intend it to express their entire agreement. (See 3 Corbin §588.) As the following cases illustrate, informal letters or memoranda, or separate writings not complete or not expressly assented to, are examples:

*Weil v. California Bank* (1933) 219 C. 538, 540, 27 P.2d 904 [written agreement referred to defendant's obligation as "part of the consideration"; plaintiff could prove oral agreement imposing further obligation upon defendant].

*Crawford v. France* (1933) 219 C. 439, 443, 27 P.2d 645 [agreement to pay architect percentage of cost of construction; oral evidence of agreed limit on cost admissible, the contract being silent on this matter].

*Kohl v. Lytle Creek Water & Imp. Co.* (1938) 24 C.A.2d 353, 357, 75 P.2d 71 [letters, deed and bill of sale, no indication that they covered all elements of agreement].

*India Paint & Lacquer Co. v. United Steel Products Corp.* (1954) 123 C.A.2d 597, 604, 267 P.2d 408 [informal shipping document described as "invoice," held mere memorandum and its printed disclaimer of warranty not conclusive].

*Bowman v. Santa Clara* (1957) 153 C.A.2d 707, 712, 315 P.2d 67 [memorandum: "Dig ditch for 18" x 21" x 24" pipe at 50 cent per foot"].

*Bert G. Gianelli Distr. Co. v. Beck & Co.* (1985) 172 C.A.3d 1020, 1038, 219 C.R. 203 ["short form" beer distribution agreements were intended primarily to satisfy filing requirements of the Department of Alcoholic Beverage Control, and were not intended as complete terms of beer distributors' relationship with brewery].

*McLain v. Great Amer. Ins. Cos.* (1989) 208 C.A.3d 1476, 1485, 256 C.R. 863 [standardized application form omitted key aspects of employment and stated that terms could be changed; plaintiff could prove implied contract requiring cause for termination].

**SUPPLEMENT:** [This section is current through the latest supplement]





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## CHAPTER VIII - Documentary Evidence

### V. PAROL EVIDENCE RULE

#### C. When Extrinsic Evidence Is Admissible.

##### 1. Evidence To Interpret Integration.

##### a. Nature and Scope of Interpretation.

##### 1. General Principles.

#### 2 Witkin Cal. Evid. Doc Evid § 74

[§ 74] General Principles.

(1) *Parol Evidence Admissible To Interpret Meaning of Writing.* If there is a legally effective act expressed in a final and complete writing or integration, parol evidence is not admissible to contradict its terms. (See *supra*, §59.) But the meaning of the instrument must still be ascertained, and parol evidence is admissible, within certain limitations, to interpret it. (See *Bartel v. Associated Dental Supply Co.* (1952) 114 C.A.2d 750, 752, 251 P.2d 16; *Schmidt v. Macco Const. Co.* (1953) 119 C.A.2d 717, 730, 260 P.2d 230; *Masterson v. Sine* (1968) 68 C.2d 222, 225, 65 C.R. 545, 436 P.2d 561, *infra*, §88; *Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.* (1968) 69 C.2d 33, 39, 69 C.R. 561, 442 P.2d 641, *infra*, §80; *Delta Dynamics v. Arioto* (1968) 69 C.2d 525, 530, 72 C.R. 785, 446 P.2d 785, *infra*, §82; *Diamond v. Insurance Co. of North America* (1968) 267 C.A.2d 415, 419, 72 C.R. 862, *infra*, §82; *Estate of Gilliland* (1969) 276 C.A.2d 258, 261, 80 C.R. 876; *People v. West-A-Rama* (1973) 35 C.A.3d 786, 790, 111 C.R. 197; *Riley v. Bear Creek Planning Committee* (1976) 17 C.3d 500, 508, 131 C.R. 381, 551 P.2d 1213, *infra*, §83; *Garcia v. Truck Ins. Exchange* (1984) 36 C.3d 426, 435, 204 C.R. 435, 682 P.2d 1100; *Heston v. Farmers Ins. Group* (1984) 160 C.A.3d 402, 412, 413, 206 C.R. 585; *Mobil Oil Corp. v. Exxon Corp.* (1986) 177 C.A.3d 942, 947, 948, 223 C.R. 392; *Esbensen v. Userware Int.* (1992) 11 C.A.4th 631, 636, 637, 14 C.R.2d 93, *infra*, §89, citing the text; *WYDA Associates v. Merner* (1996) 42 C.A.4th 1702, 1713, 50 C.R.2d 323 [extrinsic evidence was properly admitted to determine when financing period in real estate option began to run]; *Rest.2d, Contracts* §214(c), and Comment b; 9 Wigmore (Chadbourn Rev.) §2458 et seq.; 3 Corbin §579; 11 Williston 4th, §33:38 et seq.)

(2) *Standards and Sources of Interpretation.* These subjects are considered at length in texts on *contracts* and *wills*. (See 9 Wigmore (Chadbourn Rev.) §§2458 et seq., 2470 et seq.; 3 Corbin §532 et seq.; 1 *Summary* (9th), *Contracts*, §681 et seq.; 12 *Summary* (9th), *Wills and Probate*, §244 et seq.; on review of trial court's interpretation, see *Parsons v. Bristol Dev. Co.* (1965) 62 C.2d 861, 866, 44 C.R. 767, 402 P.2d 839, 9 *Cal. Proc.* (4th), *Appeal*, §377.)

(3) *Scope of Interpretation.* U.C.C. 2202 (*supra*, §60) broadens the scope of admissible extrinsic evidence by rejecting (a) the premise that the language used has the meaning attributable to it by legal rules of construction "rather than the meaning which arises out of the commercial context in which it was used"; (b) the requirement of an original determination that the language used is "ambiguous" before evidence to interpret may be received. (U.C.C. 2202, Comment 1.) (On evidence of business customs or usage under U.C.C. 2202(a), see *Hegglblade-Marguleas-Tenneco v. Sunshine Biscuit* (1976) 59 C.A.3d 948, 954, 131 C.R. 183; see also *C.C.P. 1856(c)*, *supra*, §61.)

In *Stockton v. Stockton Plaza Corp.* (1968) 261 C.A.2d 639, 68 C.R. 266, a lease made no provision for the lessor's

right to terminate if the lessee were unable to obtain financing. Prior drafts, containing such a provision, were held admissible to show that omission of the right was intentional. (261 C.A.2d 643, citing the text.)

In *Garcia v. Truck Ins. Exchange*, *supra*, the action involved the interpretation of a policy of malpractice insurance for a hospital, with an exclusion of coverage of a physician sued by his own patient. The trial judge admitted testimony of L, general counsel to the California Hospital Association, who represented the hospitals in negotiating the policy. *Held*, the testimony was properly admitted, and supported the judge's determination that coverage was excluded. (36 C.3d 439.) Two justices, concurring in the judgment, agreed that the interpretation of the policy was proper, but strongly condemned admission of the testimony of the negotiating attorney, pointing out that the parol evidence rule states that execution of the written contract "supersedes all the negotiations." (36 C.3d 440.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
(2) *Standards and Sources of Interpretation.*

*Cross-References:* 1 *Summary* (10th), *Contracts*, §741 et seq.; 14 *Summary* (10th), *Wills and Probate*, §184 et seq. *West's Key Number Digest*, Evidence k.413 et seq., 448 et seq.



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#### C. When Extrinsic Evidence Is Admissible.

1. Evidence To Interpret Integration.
  - a. Nature and Scope of Interpretation.
2. Evidence of Intention Excluded.

2 Witkin Cal. Evid. Doc Evid § 75

[§ 75] Evidence of Intention Excluded.

(1) *Statement of Rule.* There is a fundamental limitation on the admissibility of evidence to interpret a writing: Once it is accepted as a final expression of a contract or a will, any declarations or testimony of *intention* contrary to its express terms do not give it meaning but substitute a different meaning, and they are consequently excluded. (See *Fraters Glass & Paint Co. v. Southwestern Const. Co.* (1927) 200 C. 688, 696, 254 P. 1097 [agreement expressly waived mechanic's lien; could not show additional waiver of right of action on bond]; *Brant v. California Dairies* (1935) 4 C.2d 128, 134, 48 P.2d 13 ["one party is not permitted to escape from its obligations by showing that he did not intend to do what his words bound him to do"]; *Kunz v. Anglo & London Paris Nat. Bank of San Francisco* (1931) 214 C. 341, 347, 5 P.2d 417 [instrument expressly assigned claims for purpose of collection only; evidence to establish absolute, beneficial assignment excluded]; *Estate of Watterson* (1933) 130 C.A. 741, 745, 20 P.2d 772; *Gore v. Bingaman* (1938) 29 C.A.2d 460, 470, 85 P.2d 172; *Estate of Pagel* (1942) 52 C.A.2d 38, 42, 125 P.2d 853; *Crow v. P.E.G. Const. Co.* (1957) 156 C.A.2d 271, 277, 319 P.2d 47; *Imbach v. Schultz* (1962) 58 C.2d 858, 860, 27 C.R. 160, 377 P.2d 272, citing the text; *Waverly Productions v. RKO General* (1963) 217 C.A.2d 721, 730, 32 C.R. 73, quoting the text; *Wm. E. Doud & Co. v. Smith* (1967) 256 C.A.2d 552, 558, 64 C.R. 222, citing the text; *Houghton v. Kerr Glass Mfg. Corp.* (1968) 261 C.A.2d 530, 537, 68 C.R. 43; *Larsen v. Johannes* (1970) 7 C.A.3d 491, 500, 86 C.R. 744; *Sunniland Fruit v. Verni* (1991) 233 C.A.3d 892, 898, 284 C.R. 824 [grower's testimony that he understood that crop advance was payment from corporation under contract to pick, pack and market grapes, rather than loan as stated in agreement, was inadmissible statement of grower's subjective intent]; 9 Wigmore (Chadbourn Rev.) §2471.)

Properly applied, this limitation would have compelled a different result in *Hansen v. Bear Film Co.* (1946) 28 C.2d 154, 168 P.2d 946. A son, acting on legal advice as to the proper procedure, executed a writing transferring "all his right, title and interest" in certain shares of stock to his mother, "for value received." The document further recited that he thereby intended "to divest himself of title ... and vest such title absolutely" in the transferee. Appropriate entries were later made in the corporation books, and the certificates were delivered to the transferee. Held, nevertheless, the "circumstances" and "inferences" therefrom supported the trial judge's determination that the son intended to transfer only the *bare legal title* to his mother in trust, and to retain for himself *the full beneficial ownership*. The court said: "Here the written instrument purported only to divest the transferor of title. ... It contained no recital that the transferee was to hold the property for her own benefit, nor did it mention a trust or beneficial interest." (28 C.2d 175.) However, the language used by the transferor could not be interpreted as conveying the bare legal title in trust, and, therefore, the extrinsic evidence was used not to explain but to contradict the unambiguous terms of the delivered instrument.

(2) *Distinction: To Explain Meaning of Contract.* Statements of intention and even positive promises are admissible to show the meaning of a written contract. (See *Masterson v. Sine* (1968) 68 C.2d 222, 227, 65 C.R. 545, 436 P.2d 561, *infra*, §88; *Delta Dynamics v. Arioto* (1968) 69 C.2d 525, 528, 72 C.R. 785, 446 P.2d 785, *infra*, §82; *Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.* (1968) 69 C.2d 33, 39, 69 C.R. 561, 442 P.2d 641, *infra*, §80; *Diamond v. Insurance Co. of North America* (1968) 267 C.A.2d 415, 418, 72 C.R. 862, *infra*, §82; *Rest.2d, Contracts* §212(1), Comment c [noting that contrary rule applies to wills]; 3 Corbin §543 [same]; *infra*, §§76 *et seq.*, 79 *et seq.*)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Distinction: To Explain Meaning of Contract.* See *Fischer v. First Int. Bank* (2003) 109 C.A.4th 1433, 1449, 1 C.R.3d 162, citing the text [in borrowers' action against bank for breach of loan agreement, parol evidence was admissible to resolve ambiguity as to whether parties to agreement intended to permit cross-collateralization].



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### V. PAROL EVIDENCE RULE

#### C. When Extrinsic Evidence Is Admissible.

1. Evidence To Interpret Integration.
- b. Evidence To Explain Ambiguity.
1. Former Rule: Latent-Patent Distinction.

2 *Witkin Cal. Evid. Doc Evid* § 76

[§ 76] Former Rule: Latent-Patent Distinction.

(1) *Parol Evidence May Explain Latent Ambiguity.* Although the instrument is clear on its face, evidence may be offered to show that the description of a person or property does not accurately apply to anyone or anything. Extrinsic evidence is necessary and has long been admissible to disclose both the existence of this latent ambiguity and to explain it. (See *C.C.P. 1856(g)*, supra, §61; *Estate of Donnellan* (1912) 164 C. 14, 17, 127 P. 166; *Estate of Dominici* (1907) 151 C. 181, 184, 90 P. 448; *Estate of Greenwald* (1937) 19 C.A.2d 291, 296, 65 P.2d 70; *Pacific Indem. Co. v. California Elec. Works, Ltd.* (1938) 29 C.A.2d 260, 272, 84 P.2d 313; *Blumenthal v. Neider* (1960) 183 C.A.2d 419, 421, 6 C.R. 317, citing the text; 9 Wigmore (Chadbourn Rev.) §§2472, 2474, 2476, 2477; 12 *Summary* (9th), *Wills and Probate*, §302 et seq.)

(2) *Parol Evidence May Not Explain Patent Ambiguity.* A patent ambiguity is one that appears on the face of the instrument. According to an old theory, it could be explained only by other parts of the writing itself, and not by extrinsic evidence. Although this theory is almost universally repudiated, some early California cases, pointing out that the Code distinguishes between patent and latent ambiguities, seem to hold that *ordinarily* parol evidence is not admissible to explain a patent ambiguity. (See *Payne v. Commercial Nat. Bank of Los Angeles* (1917) 177 C. 68, 72, 169 P. 1007; *Scott v. Woodworth* (1917) 34 C.A. 400, 167 P. 543; *Lundin v. Hallmark Productions* (1958) 161 C.A.2d 698, 703, 327 P.2d 166 [dictum citing early cases]; 50 *Cal. L. Rev.* 287; 14 *Stanf. L. Rev.* 409.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Parol Evidence May Explain Latent Ambiguity.*

*Cross-Reference:* 14 *Summary* (10th), *Wills and Probate*, §237 et seq. *West's Key Number Digest*, Evidence k.451, 452



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## C. When Extrinsic Evidence Is Admissible.

1. Evidence To Interpret Integration.
- b. Evidence To Explain Ambiguity.
2. Current Rule: No Distinction.

2 Witkin Cal. Evid. Doc Evid § 77

[§ 77] Current Rule: No Distinction.

The correct rule would seem to be that *in any case*, parol evidence may be freely offered to explain an ambiguity, whether latent or patent, and that is what current law provides. (See *C.C.P. 1856(g)*, supra, §61 [does not exclude evidence to explain "an extrinsic ambiguity"]; *Estate of Dean* (1945) 68 C.A.2d 86, 92, 155 P.2d 901 [inconsistency between caption and body of agreement]; *Decter v. Stevenson Properties* (1952) 39 C.2d 407, 416, 247 P.2d 11; *Chastain v. Belmont* (1954) 43 C.2d 45, 51, 271 P.2d 498; *Estate of White* (1970) 9 C.A.3d 194, 200, 87 C.R. 881; *Walter E. Heller Western v. Tecrim Corp.* (1987) 196 C.A.3d 149, 158, 241 C.R. 677 [inconsistency between introductory recital and subsequent paragraph of subordination agreement]; *Pistone v. Superior Court* (1991) 228 C.A.3d 672, 680, 681, 279 C.R. 173, citing the text [extrinsic evidence was admissible to determine whether dealer who sold vehicle to buyer was agent and leasing company was principal in selling of service contract to buyer, even though contract referred to company as "administrator"]; *John B. Kilroy Co. v. Douglas Furniture of Calif.* (1993) 21 C.A.4th 26, 34, 25 C.R.2d 752, 2 Summary (9th), *Agency and Employment, Supp.*, §278 [ambiguity as to broker's entitlement to commission for extension of occupancy by tenant originally procured by him]; 9 Wigmore (Chadbourn Rev.) §2473.)

In *Von Rohr v. Neely* (1946) 76 C.A.2d 713, 173 P.2d 828, a lease was made of premises described by street number, "together with the appurtenances," for use as a lunch room. The lessee claimed that the "appurtenances" included an unoccupied area of parking space for the patrons. *Held*, evidence offered by lessee of prior and subsequent use of the property as a "drive-in" restaurant was admissible. (76 C.A.2d 715.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Denver D. Darling v. Controlled Environments Const.* (2001) 89 C.A.4th 1221, 1236, 108 C.R.2d 213 [flatness requirement in building contract was ambiguous, and thus trial judge properly considered extrinsic evidence to determine that there had been no meeting of minds as to required flatness].

*John B. Kilroy Co. v. Douglas Furniture of Calif.:*

*Cross-Reference:* 3 Summary (10th), *Agency and Employment*, §88.



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## V. PAROL EVIDENCE RULE

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1. Evidence To Interpret Integration.
- b. Evidence To Explain Ambiguity.
3. Wills.

## 2 Witkin Cal. Evid. Doc Evid § 78

[§ 78] Wills.

(1) *Former Rule: Proof of Circumstances Admissible, but Testator's Oral Declarations Excluded.* Former Prob.C. 105 permitted explanation of ambiguities by evidence of the circumstances surrounding the execution of the will, the nature and condition of the estate, the testator's relations with his or her family and others, and similar matters. (See *Estate of Winbigler* (1913) 166 C. 434, 437, 137 P. 1; *Estate of Flint* (1919) 179 C. 552, 555, 177 P. 451; *Estate of Kurtz* (1922) 190 C. 146, 149, 210 P. 959 [will made day before marriage; evidence of engagement admissible to show that clause giving \$ 1 to any person "who if I died intestate would be entitled to any part of my estate" was intended to include wife and unborn child]; *Estate of Wolf* (1932) 128 C.A. 305, 308, 17 P.2d 1052 [ungrammatical holographic will; evidence admissible to show that named street and house numbers referred to real property when owned by testatrix]; *Estate of Olsen* (1935) 9 C.A.2d 374, 381, 50 P.2d 70 [testator of foreign birth, not particularly familiar with English language; "personal property" taken as including real property]; *Estate of Hollingsworth* (1940) 37 C.A.2d 432, 436, 99 P.2d 599 [will, drawn by experienced draftsman, left legacies to employees "based on salary or wage"; evidence of employment and commissions paid a salesman admissible to prove status as legatee]; *Estate of Jones* (1961) 55 C.2d 531, 536, 11 C.R. 574, 360 P.2d 70; 12 *Summary* (9th), *Wills and Probate*, §250 et seq.)

However, former Prob.C. 105 excluded, with some exceptions, "the oral declarations of the testator as to his intentions." (See 12 *Summary* (9th), *Wills and Probate*, §246.)

(2) *Criticism and Legislative Abrogation of Exclusionary Rule.* "The rule embodied in section 105 excluding the testator's oral declarations is perhaps the last remnant of the old common law policy, now repudiated by the California Supreme Court, which excluded extrinsic evidence in most probate cases on the basis of the omnipotence of the written word. With the demise of this outdated concept, our courts have understandably attempted to circumvent section 105 by creating exceptions and making subtle and often tenuous distinctions." (*Estate of Kime* (1983) 144 C.A.3d 246, 263, 193 C.R. 718.) The *Kime* opinion concluded with a recommendation that the Legislature abolish the rule, and the Legislature responded by doing so in its 1983 revision and by renumbering the statutes governing wills and intestate succession. Former Prob.C. 105 was repealed effective January 1, 1985, and new Prob.C. 105 deals with a different subject. (See 12 *Summary* (9th), *Wills and Probate*, §5 et seq.) (On admissibility of evidence "contrary to plain meaning" to explain will, see *infra*, §84.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Former Rule: Proof of Circumstances Admissible, but Testator's Oral Declarations Excluded.*

*Cross-Reference:* 14 *Summary* (10th), *Wills and Probate*, §188 et seq.

*Oral declarations:*

*Cross-Reference:* 14 *Summary* (10th), *Wills and Probate*, §186.

(2) *Criticism and Legislative Abrogation of Exclusionary Rule.*

*Cross-Reference:* 14 *Summary* (10th), *Wills and Probate*, §22 et seq.





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## 1. Evidence To Interpret Integration.

## c. Evidence Contrary to Plain Meaning.

## 1. Former Rule Excluding Parol Evidence.

## 2 Witkin Cal. Evid. Doc Evid § 79

[§ 79] Former Rule Excluding Parol Evidence.

(1) *Statement of Former Rule.* Earlier cases followed the rule that, if no ambiguity or uncertainty is asserted, and the writing has a clear meaning on its face, parol evidence is inadmissible to interpret it. The underlying theory was that unless there is some ambiguity or uncertainty there is no need for the extrinsic evidence; the *plain meaning* of the words should be accepted and not disturbed by evidence showing that they were used in a different sense. (See *Barnhart Aircraft v. Preston* (1931) 212 C. 19, 23, 297 P. 20; *Holliday v. Porter* (1934) 136 C.A. 480, 483, 29 P.2d 276; *Palm Springs-La Quinta Dev. Co. v. Palm Springs Land & Irr. Co.* (1940) 36 C.A.2d 730, 735, 98 P.2d 530; *Nourse v. Kovacevich* (1941) 42 C.A.2d 769, 771, 109 P.2d 999; *Laux v. Freed* (1960) 53 C.2d 512, 523, 2 C.R. 265, 348 P.2d 873; *William B. Logan & Associates v. Monogram Precision Industries* (1960) 184 C.A.2d 12, 15, 7 C.R. 212.)

(2) *Analysis and Criticism of Rule.* Able critics have attacked the "plain meaning" rule as unsound, for (a) words have no such absolute meaning, but must always derive their sense from the objects to which they refer, and (b) words which have a "plain" ordinary meaning are sometimes used by the parties in a special, technical or local sense. The exclusionary rule is properly applicable only where the *intention* of the parties with respect to their obligations and rights is clearly stated in the writing, and parol evidence of a *contrary intention* is offered (see *supra*, §75). Accordingly, the modern tendency is to hold that evidence is admissible to show the meaning of words used even though no ambiguity is asserted. (See *Paley v. Superior Court* (1955) 137 C.A.2d 450, 456, 290 P.2d 617; *Anderson v. Tahoe Keys* (1962) 202 C.A.2d 640, 642, 20 C.R. 891; *Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.* (1968) 69 C.2d 33, 37, 69 C.R. 561, 442 P.2d 641, *infra*, §80; *Estate of Russell* (1968) 69 C.2d 200, 209, 70 C.R. 561, 444 P.2d 353, *infra*, §84; U.C.C. 2202, *supra*, §74; *Rest.2d, Contracts* §212, Comment b; 9 Wigmore (Chadbourn Rev.) §§2461, 2462; 3 Corbin §542; *supra*, §75.)

(3) *Exceptions to Rule.* Even where, as in California, the courts were ostensibly committed to the "plain meaning rule," exceptions and qualifications were recognized which robbed it of much of its controlling force:

(a) Parol evidence is always admissible to explain a *latent* ambiguity, which may exist though the writing is plain on its face. (See *supra*, §§76, 77.)

(b) Even though the words in an instrument, taken in their ordinary sense, are entirely certain, parol evidence is admissible to show that by a *custom or usage* they were used in a different sense. (See *infra*, §85.)

(c) The rule was often ignored in effect by first declaring the language "ambiguous," a relatively simple matter in view of the variety of meanings which legal terminology may have. (See *Wachs v. Wachs* (1938) 11 C.2d 322, 325, 79 P.2d 1085; *Universal Sales Corp. v. California Press Mfg. Co.* (1942) 20 C.2d 751, 761, 128 P.2d 665; *Wells v. Wells* (1946) 74 C.A.2d 449, 456, 169 P.2d 23; *Union Oil Co. of Calif. v. Union Sugar Co.* (1948) 31 C.2d 300, 306, 188 P.2d 470; *Nofziger v. Holman* (1964) 61 C.2d 526, 528, 39 C.R. 384, 393 P.2d 696; *Hulse v. Juillard Fancy Foods Co.* (1964) 61 C.2d 571, 573, 39 C.R. 529, 394 P.2d 65; *Connell v. Zaid* (1969) 268 C.A.2d 788, 793, 74 C.R. 371.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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- c. Evidence Contrary to Plain Meaning.
  2. Repudiation of Former Rule.

2 Witkin Cal. Evid. Doc Evid § 80

[§ 80] Repudiation of Former Rule.

In *Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.* (1968) 69 C.2d 33, 69 C.R. 561, 442 P.2d 641, the court made a number of general observations about this confused subject:

(a) A judge who interprets a contract on the basis of its "plain meaning" does so in accordance with the judge's own linguistic education and experience, and under a judicial belief in the possibility of perfect verbal expression. "This belief is a remnant of a primitive faith in the inherent potency and inherent meaning of words." But words "do not have absolute and constant referents," and contractual obligations do not flow from the mere use of certain words. (69 C.2d 38.)

(b) The source of contractual rights and duties is the intention of the parties expressed in the contract, and the judge must ascertain and give effect to this intention by determining what the parties meant by the words they used. (69 C.2d 38.) And, although extrinsic evidence is not admissible to vary the terms, the terms must first be ascertained before it can be determined whether the evidence is offered for a prohibited purpose. (69 C.2d 39.)

(c) Extrinsic evidence is often admitted on the ground that the contract is ambiguous (see *supra*, §76 et seq.). "This statement of the rule is harmless if it is kept in mind that the ambiguity may be exposed by extrinsic evidence that reveals more than one possible meaning." (69 C.2d 40, footnote 8.)

(d) The correct test of admissibility of extrinsic evidence is not whether the meaning appears plain and unambiguous on the face of the instrument, but whether the evidence is relevant to prove a meaning to which the language is reasonably susceptible. (69 C.2d 37.)

In this case, defendant agreed to remove and replace the cover of plaintiff's steam turbine. The contract provided that defendant would indemnify plaintiff against all loss resulting from "injury to property" connected with the performance. The cover fell and injured the exposed rotor. Plaintiff contended that the indemnity covered liability for injury to plaintiff's own property. The trial judge thought this was the "plain meaning" of the language, and excluded defendant's offer of evidence of admissions of plaintiff's agents, defendant's conduct under similar contracts, and other proof that the parties intended to cover injury to property of third parties only. *Held*, this was error. The extrinsic evidence was admissible to show that the indemnity clause was reasonably susceptible of the restricted meaning urged by defendant, and, because this was so, it was also admissible to show that the clause did have that meaning. (69 C.2d

40.) (See 58 Cal. L. Rev. 196; 31 Loyola L.A. L. Rev. 557, 576 [discussing *Pacific Gas & Elec. Co.* and federal case criticizing its rejection of plain meaning rule]; 40 A.L.R.3d 1384 [use of extrinsic evidence to establish and clarify ambiguities]; on current approach applied to other contracts, see *infra*, §§81, 82; on application to deeds, see *infra*, §83; on application to wills, see *infra*, §84; for statutory statement of this approach, see C.C.P. 1856(c), *infra*, §85, and C.C.P. 1856(g), *supra*, §61.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Dore v. Arnold Worldwide* (2006) 39 C.4th 384, 391, 394, 46 C.R.3d 668, 139 P.3d 56 [employment letter stating that employee could be terminated "at any time" unambiguously created at-will employment, and proffered extrinsic evidence did not support inference that employee reasonably understood letter to require cause for termination; concurring opinion notes that holding in *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.* (1968) 69 C.2d 33, 69 C.R. 561, 442 P.2d 641, text, p. 199, has been strongly criticized and argues that it should be reexamined]; *Franklin v. USX Corp.* (2001) 87 C.A.4th 615, 621, 623, 105 C.R.2d 11, 9 Summary (10th), Corporations, §17 [applying analytical approach of *Pacific Gas & Elec. Co.*; where purchase agreement was unambiguous integrated document, and parol evidence created no ambiguity and was consistent with agreement, trial judge erred in considering extrinsic evidence to vary or modify agreement]; 28 California Lawyer 40 (February 2008) [development of California law on admission of extrinsic evidence].



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3. Illustrations of Current Approach.
- aa. Parol Evidence To Explain Settlement Agreement.

#### 2 Witkin Cal. Evid. Doc Evid § 81

[§ 81] Parol Evidence To Explain Settlement Agreement.

(1) *Marriage Settlement Agreement. Hynum v. First Nat. Bank of San Diego* (1968) 267 C.A.2d 540, 73 C.R. 507, follows *Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.* (1968) 69 C.2d 33, 69 C.R. 561, 442 P.2d 641, supra, §80, but is actually supportable on the long established ambiguity exception. Plaintiff and his wife were divorced, and a division of community property was made in which she received a \$ 150,000 promissory note. But to avoid discharge in bankruptcy, the note expressly provided that it was given "as alimony." On the wife's death, plaintiff sought a declaration that it was alimony and terminated on her death. *Held*, judgment for defendant executor affirmed. Evidence of the circumstances surrounding the making showed that the parties intended it as part of a property settlement. The court pointed out that the instrument was uncertain on its face: It is unusual to express an alimony agreement in the form of a promissory note; the instrument included a number of matters not ordinarily incident to pure alimony, e.g., interest, acceleration on default, attorney fees and security; and it referred to the divorce action, thus inviting examination of the proceedings to determine the intention of the parties in using the note form. (267 C.A.2d 544.)

*In re Marriage of Benson* (1985) 171 C.A.3d 907, 217 C.R. 589, held that when a marital settlement agreement is incorporated into a judgment, it no longer exists as an independent contract, and parol evidence concerning the intentions of litigants is of no use in interpretation of a court's judgment. (171 C.A.3d 912.)

*In re Marriage of Trearse* (1987) 195 C.A.3d 1189, 241 C.R. 257, takes the opposite position:

"We respectfully disagree with *Benson's* conclusion that parol or extrinsic evidence is categorically inadmissible to determine the intentions of the parties to a marital settlement agreement incorporated in a judgment of dissolution of marriage." Relevant cases either appear to sanction the introduction of extrinsic evidence or are decided narrowly on the ground that former C.C. 4811(b) (now *Family C. 3590* and *3591*) requires that nonmodifiability of support be set forth "specifically" in writing. "There is no legal ground upon which to jettison the long history of California law allowing the courts to receive extrinsic evidence to ascertain the intent of the parties to a marital settlement agreement even where it is incorporated and merged in a judgment." (195 C.A.3d 1194.)

The opinion adds that *Benson's* broad prohibition leaves trial courts without a rational way to resolve ambiguity in their judgments. Unless admission of extrinsic evidence is precluded by a statute, such as former C.C. 4811, "such

evidence should be admissible to ascertain the intent of an agreed interlocutory judgment of dissolution of marriage to the same extent such evidence would be admissible to ascertain the meaning of any other written agreement." (195 C.A.3d 1194.)

(2) *Other Settlement Agreements.* *Winet v. Price* (1992) 4 C.A.4th 1159, 6 C.R.2d 554, involved the scope of a general release-of-claims provision contained in a settlement agreement between defendant attorney and plaintiff client. *Held*, the trial court properly granted summary judgment in favor of defendant, despite parol evidence offered by plaintiff to show that he had an intent contrary to the literal meaning of the words of the release (see *supra*, §75). The issue of whether a specific later-discovered claim was intended to be covered by a broad release cannot always be made a disputable issue of fact. A general release may not necessarily be avoided merely by the releasor testifying that he or she was unaware of a claim and did not intend to waive the right to pursue that claim. The parties to the provision at issue declared their intention in three distinct places in the agreement to release each other from all claims. Parol evidence is not admissible to flatly contradict the express terms of an agreement, and plaintiff sought to prove that his release of unknown or unsuspected claims was not intended to include those claims. (4 C.A.4th 1165, 1167.) (See *General Motors Corp. v. Superior Court* (1993) 12 C.A.4th 435, 441, 15 C.R.2d 622, citing the text [following *Winet*]; but see *Neverkovec v. Fredericks* (1999) 74 C.A.4th 337, 349, 87 C.R.2d 356, 5 Summary (9th), *Torts, Supp.*, §59 [extrinsic evidence was admissible to explain ambiguous clause of general release and to determine whether parties intended release to cover third party].)

In *Dewart v. Berkeley Forge & Tool* (1992) 9 C.A.4th 1087, 1094, 11 C.R.2d 865, defendants claimed that under the express terms of their settlement agreement in a personal injury action, they were entitled to an offset for an advance payment they made to plaintiff. *Held*, the agreement was also reasonably susceptible to plaintiff's interpretation that the advance had been factored into the settlement, and thus parol evidence was admissible to prove that meaning. (9 C.A.4th 1094.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Other Settlement Agreements.* See *Butler v. The Vons Cos.* (2006) 140 C.A.4th 943, 949, 45 C.R.3d 151 [where employee, employer, and union signed "Compromise and Release Settlement Agreement" following resolution of altercation between employee and fellow employee, language included in waiver was ambiguous as to whether it was intended to extend to other claims by employee, and thus when employee brought new, unrelated claim against employer, extrinsic evidence was admissible on this issue]. *Neverkovec v. Fredericks*:

*Cross-Reference:* 5 Summary (10th), *Torts*, §73.



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##### 3. Illustrations of Current Approach.

#### bb. Parol Evidence To Explain Other Contract.

### 2 Witkin Cal. Evid. Doc Evid § 82

[§ 82] Parol Evidence To Explain Other Contract.

(1) *Extrinsic Evidence Admissible*. In the following cases, the rule of *Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.* (1968) 69 C.2d 33, 69 C.R. 561, 442 P.2d 641, supra, §80, was applied to hold that parol evidence was admissible to explain contract language:

In *Delta Dynamics v. Arioto* (1968) 69 C.2d 525, 72 C.R. 785, 446 P.2d 785, plaintiff Delta manufactured a device. It entered into a written contract with defendant Pixey, a partnership, under which Pixey was appointed exclusive distributor for the United States for 5 years with a renewal option. Pixey promised to sell not less than 50,000 units within 1 year, and, in the event of its failure to do so, "this agreement shall be subject to termination" by Delta, on 30 days' notice. Pixey failed to meet the quota by 30,000. Delta terminated and also brought this action for damages. The judge interpreted the contract as requiring Pixey to buy 50,000 the first year, excluding extrinsic evidence offered to show that termination was the exclusive remedy. *Held*, reversed. The termination clause may have been included to spell out a condition of Delta's excuse from its own performance, or to set forth an exclusive remedy, or for both purposes; thus, it was susceptible of the meaning urged by Pixey, and the extrinsic evidence should have been considered in determining the meaning. (69 C.2d 528.)

In *Diamond v. Insurance Co. of North America* (1968) 267 C.A.2d 415, 72 C.R. 862, plaintiff had a fire insurance policy providing for payment of "actual cash value" of the loss. He obtained an endorsement giving him the election of receiving, in addition, the further amount of replacement cost, but with an express proviso that the insurer should not be liable unless the property was actually repaired or replaced within a reasonable time after the loss. Plaintiff suffered a loss and was paid the actual cash value. He then sued for the additional amount of replacement cost, though he did not plead actual replacement. The trial judge, following the plain meaning of the contractual language, gave defendant judgment on demurrer. *Held*, reversed. Plaintiff had alleged that by the endorsements, the parties intended for plaintiff to recover replacement cost without replacement. Thus, despite the appearance of a clear meaning to the judge, extrinsic evidence was admissible where relevant to prove a meaning to which the language was reasonably susceptible. (267 C.A.2d 419.)

*Connell v. Zaid* (1969) 268 C.A.2d 788, 791, 74 C.R. 371 [refinancing clause in trust deed purporting to be conventional agreement to subordinate encumbrances could also be interpreted as agreement to consolidate or substitute encumbrances; parol evidence admissible to resolve ambiguity].

In *Warner Const. Corp. v. Los Angeles* (1970) 2 C.3d 285, 85 C.R. 444, 466 P.2d 996, plaintiff sued defendant city for breach of warranty and fraudulent concealment in connection with a construction contract. *Held*, plaintiff was entitled to offer extrinsic evidence that certain general notes in the plans and specifications prohibited rotary mud drilling of holes required on the job without a change order, where the language of the notes was reasonably susceptible of that meaning. (2 C.3d 293.)

*Southern Pac. Land Co. v. Westlake Farms* (1987) 188 C.A.3d 807, 815, 233 C.R. 794; *Pacific Gas & Elec. Co. v. Zuckerman* (1987) 189 C.A.3d 1113, 1141, 234 C.R. 630, citing the text [refusal to admit extrinsic evidence in disputes involving interpretation of oil and gas leases was reversible error].

*Wallis v. Farmers Group* (1990) 220 C.A.3d 718, 731, 269 C.R. 299 [extrinsic evidence was admissible to ascertain whether integrated provision permitting termination of agency on 3 months' notice required showing of good cause for termination; but see criticism *infra*, this section].

*Southern Calif. Edison Co. v. Superior Court* (1995) 37 C.A.4th 839, 848, 851, 44 C.R.2d 227, 1 Summary (9th), *Contracts, Supp.*, §689 [extrinsic evidence was admissible to determine which time period governed long-term electricity contracts under which rate varied depending on period].

*Southern Pac. Trans. Co. v. Santa Fe Pac. Pipelines* (1999) 74 C.A.4th 1232, 1241, 88 C.R.2d 777 [failure to admit extrinsic evidence of proper formula for calculating rent payable for hydrocarbon pipeline easements was reversible error].

(2) *Parol Evidence Excluded*. In the following cases, courts held that parol evidence was not admissible to explain contract language:

In *Blumenfeld v. R.H. Macy & Co.* (1979) 92 C.A.3d 38, 45, 154 C.R. 652, plaintiff, the lessee of a shopping center, sued defendants--the owner and the lessor of the shopping center--seeking a determination that plaintiff had not assigned to defendant lessor, under a written contract calling for defendant lessor to purchase plaintiff's leasehold interest, any right of action that plaintiff might have had against defendant owner for breach of an agreement to sublease space in the shopping center. *Held*, the terms of the contract were not reasonably susceptible to plaintiff's interpretation, and thus extrinsic evidence was not admissible for that purpose. (92 C.A.3d 45.)

*Curry v. Moody* (1995) 40 C.A.4th 1547, 1555, 48 C.R.2d 627 [trial judge erred in admitting extrinsic evidence on question whether promissory note required payment of compound interest from date of inception of loan; note was not reasonably susceptible of that interpretation, and, in any case, "extrinsic evidence of the parties' intent is not admissible to show that a loan bears compound interest"].

*Bionghi v. Metropolitan Water Dist. of Southern Calif.* (1999) 70 C.A.4th 1358, 1363, 83 C.R.2d 388 [parol evidence was not admissible to show that employment contract was terminable only for good cause, where contract was integrated and unambiguously provided for termination only on 30 days' notice, with or without cause; disagreeing with *Wallis v. Farmers Group, supra*].

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Extrinsic Evidence Admissible*. *Southern Calif. Edison Co. v. Superior Court*:

*Cross-Reference:* 1 Summary (10th), *Contracts*, §749.(2) *Parol Evidence Excluded*. See *Chino v. Jackson* (2002) 97 C.A.4th 377, 384, 385, 118 C.R.2d 349 [indemnity agreement unambiguously covered any bond executed and delivered by indemnitee; as it was not susceptible to interpretation that it did not apply to bonds incurred in connection with certain tracts of land, parol evidence to that effect was inadmissible]; *Founding Members of the Newport Beach Country Club v. Newport Beach Country Club* (2003) 109 C.A.4th 944, 960, 135 C.R.2d 505 [where club's regulations granted "right of first offer" to member organization "then in existence," and where club agreed to sell stock to third party, letter written by club officers after club was founded, stating that founding members had right of first offer, was



not admissible in founding members' breach of contract action; regulations were not susceptible of interpretation that founding members, who, at time of sale, had not formed organization, enjoyed right of first offer]; *250 L.L.C. v. PhotoPoint Corp. (USA) (2005)* 131 C.A.4th 703, 726, 32 C.R.3d 296 [in consolidated actions arising from dispute between lessor and lessee, trial judge properly excluded parol evidence concerning whether security deposit could be applied against future as well as past due rent, where lease clearly stated that deposit could be used in accordance with C.C. 1950.7 to satisfy past due rent; these words could not be taken to refer to future rent]; *Wagner v. Columbia Pictures Industries (2007)* 146 C.A.4th 586, 592, 52 C.R.3d 898 [in action alleging actor was entitled to profits from motion pictures based on television series in which he starred, evidence of history of negotiations between actor and studio was not admissible to show actor's entitlement to profits "from all sources" without limitation, where it directly contradicted final agreement between parties, which entitled actor to share only in profits from exhibition of photoplays of original series and from exploitation of "ancillary, music and subsidiary rights in connection therewith"].



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3. Illustrations of Current Approach.
- cc. Parol Evidence To Explain Deed.

#### 2 Witkin Cal. Evid. Doc Evid § 83

#### [§ 83] Parol Evidence To Explain Deed.

(1) *Parol Evidence Admissible.* Where otherwise proper, parol evidence is admissible to explain the terms of a deed. (See *Masterson v. Sine* (1968) 68 C.2d 222, 228, 65 C.R. 545, 436 P.2d 561, *infra*, §88 [option in grant deed was meant to be personal in nature]; *Continental Baking Co. v. Katz* (1968) 68 C.2d 512, 521, 67 C.R. 761, 439 P.2d 889 [easement was intended to be appurtenant to granted parcel and to another parcel owned by grantee]; *Murphy Slough Assn. v. Avila* (1972) 27 C.A.3d 649, 653, 655, 104 C.R. 136; *Scruby v. Vintage Grapevine* (1995) 37 C.A.4th 697, 705, 43 C.R.2d 810 [easement granted owner of servient tenement right to place improvements on easement]; 46 Proof of Facts 2d 695 [Intent of Parties to Ambiguous Deed].)

In *Murphy Slough Assn. v. Avila*, *supra*, an unincorporated association of water users contended that the disputed deed was clear and unambiguous on its face and conveyed a clear title, resulting in defendant landowners' loss of riparian rights. The trial court admitted extrinsic evidence which showed that the language of the deed was susceptible to an interpretation that the interest conveyed was a right of way rather than a fee interest. Under that interpretation, the deed neither conveyed a riparian interest to the grantee nor severed riparian rights from the grantors' remaining lands. *Held*, extrinsic evidence and the deed itself properly supported the trial court's judgment. (27 C.A.3d 658.)

(2) *Exceptions.* The foregoing rule is subject to a substantive exception where a deed is made without restrictions or reference to any recorded declaration of restrictions. Under the rule of *Werner v. Graham* (1919) 181 C. 174, 184, 183 P. 945, 4 Summary (9th), *Real Property*, §500, extrinsic evidence cannot be admitted to establish such restrictions. *Masterson v. Sine*, *supra*, did not impliedly overrule *Werner*. The *Werner* holding was based on the statute of frauds as well as the parol evidence rule and is supported by practical considerations involving the recording statutes. (*Riley v. Bear Creek Planning Committee* (1976) 17 C.3d 500, 511, 131 C.R. 381, 551 P.2d 1213, 4 Summary (9th), *Real Property*, §499; see 65 Cal. L. Rev. 438.)

A similar view has been expressed where the issue is whether language in a deed constitutes a condition subsequent giving the grantor a right of reentry for breach. In *Springmeyer v. South Lake Tahoe* (1982) 132 C.A.3d 375, 381, 183 C.R. 43, the court said that in such cases, the law requires a clear expression of intent, and extrinsic evidence is not admissible to resolve a *latent* ambiguity. (132 C.A.3d 381.)

In contrast, *Mason v. Superior Court* (1985) 163 C.A.3d 989, 210 C.R. 63, involving a *patent* ambiguity, states that

the question "must be resolved and can only be resolved on the basis of evidence of what the parties said, both orally and in writing, and from evidence of the circumstances surrounding the conveyance." (163 C.A.3d 999.) (On evidence to explain latent and patent ambiguities, see *supra*, §§76, 77.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Exceptions.*

*Werner v. Graham:*

*Cross-Reference:* 12 *Summary* (10th), *Real Property*, §449.

*Riley v. Bear Creek Planning Committee:*

*Cross-Reference:* 12 *Summary* (10th), *Real Property*, §448. *West's Key Number Digest*, Evidence k.450(3)



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- c. Evidence Contrary to Plain Meaning.
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- dd. Parol Evidence To Explain Will.

2 *Witkin Cal. Evid. Doc Evid* § 84

[§ 84] Parol Evidence To Explain Will.

The current approach is not confined to contracts and deeds (see *supra*, §81 et seq.); it also applies to wills: "[A] court cannot determine whether the terms of the will are clear and definite in the first place until it considers the circumstances under which the will was made so that the judge may be placed in the position of the testator whose language he is interpreting." (*Estate of Russell* (1968) 69 C.2d 200, 210, 70 C.R. 561, 444 P.2d 353, 12 Summary (9th), *Wills and Probate*, §247; see *Estate of Balyeat* (1968) 268 C.A.2d 556, 561, 74 C.R. 120; *Estate of Taff* (1976) 63 C.A.3d 319, 324, 133 C.R. 737; 58 Cal. L. Rev. 196.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*Estate of Russell*:

*Cross-Reference:* 14 Summary (10th), *Wills and Probate*, §187.



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#### C. When Extrinsic Evidence Is Admissible.

##### 1. Evidence To Interpret Integration.

##### d. Evidence of Dealing, Usage, or Performance.

#### 2 Witkin Cal. Evid. Doc Evid § 85

[§ 85] Evidence of Dealing, Usage, or Performance.

(1) *Case Law*. Many cases hold that, though the words in an instrument, taken in their ordinary sense, are entirely certain, parol evidence is admissible to show that by a *custom or usage* they were used in a different sense. (See *Ermolieff v. R.K.O. Radio Pictures* (1942) 19 C.2d 543, 550, 122 P.2d 3 [evidence admissible that words "United Kingdom" in a moving picture distribution contract, by usage in the industry, include Eire]; *Body-Steffner Co. v. Flotill Products* (1944) 63 C.A.2d 555, 558, 147 P.2d 84; *Beneficial Fire & Cas. Ins. Co. v. Kurt Hitke & Co.* (1956) 46 C.2d 517, 524, 297 P.2d 428; *Paramount Television Productions v. Bill Derman Productions* (1968) 258 C.A.2d 1, 10, 65 C.R. 473; *Hayter Trucking v. Shell Western E & P* (1993) 18 C.A.4th 1, 20, 21, 22 C.R.2d 229 [evidence of custom or usage was admissible to supplement termination provisions of service contract]; 9 Wigmore (Chadbourn Rev.) §§2463, 2464; 3 Corbin §555 et seq.; 30 Cal. L. Rev. 679; 1 Summary (9th), Contracts, §696.)

(2) *Codification*. C.C.P. 1856(c), comparable to U.C.C. 2202(a) (supra, §60), states this rule in expanded form: It permits explanation or supplementation of a final agreement by "course of dealing or usage of trade or by course of performance." (See supra, §61.)

The Law Revision Commission comments as follows: "Such writings are to be read on the assumption that the course of prior dealings between the parties and the usages of trade were taken for granted when the document was phrased. Unless carefully negated, they have become an element of the meaning of the words used. Similarly, the course of actual performance by the parties is considered the best indication of what the parties intended the writing to mean. Subdivision (c) thus definitely rejects (1) the premise that the language used has the meaning attributable to such language by rules of construction existing in the law rather than the meaning which arises out of the context in which it was used and (2) the requirement that a condition precedent to the admissibility of the type of evidence specified in the subdivision is an original determination that the language used is ambiguous. ... It is expected that the courts will look to the definitions in *Commercial Code Sections 1205 and 2208* for guidance in interpreting the meaning of the terms 'course of dealing,' 'usage of trade,' and 'course of performance.' "

(3) *Second Restatement of Contracts*. The Second Restatement of Contracts also follows the Commercial Code definition (U.C.C. 1205) and rule (U.C.C. 2202). (See *Rest.2d, Contracts* §219 [Usage]; §220 [Usage Relevant to Interpretation]; §221 [Usage Supplementing an Agreement]; §222 [Usage of Trade]; §223 [Course of Dealing].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Case Law*. See *Wolf v. Superior Court* (2004) 114 C.A.4th 1343, 1358, 8 C.R.3d 649 [in action by author against

entertainment company to recover royalties allegedly owed to him, trial judge erred in rejecting extrinsic evidence and in concluding "gross receipts," as used in parties' contract, was not reasonably susceptible to plaintiff's interpretation that it included noncash consideration; plaintiff's extrinsic evidence of trade usage exposed latent ambiguity in contract language and presented interpretation to which term was reasonably susceptible].

*Cross-Reference:* 1 *Summary* (10th), *Contracts*, §755.

(2) *Codification.* U.C.C. 1205 and 2208, on course of dealing, usage of trade, and course of performance, were repealed and replaced by U.C.C. 1303 in 2006.(3) *Second Restatement of Contracts.* U.C.C. 1205 was repealed and replaced by U.C.C. 1303 in 2006.



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## 2. Evidence of Collateral Agreement.

## a. Consistent Collateral Agreement.

## 1. Nature of Exception.

## 2 Witkin Cal. Evid. Doc Evid § 86

## [§ 86] Nature of Exception.

(1) *In General.* An apparent exception, though in accord with the purposes of the rule, is that a prior or contemporaneous *collateral oral agreement* may sometimes be shown where it is *not inconsistent* with the terms of the integration, even though it relates to the same subject matter. (See *C.C.P. 1856(b)*, supra, §61; *U.C.C. 2202*, supra, §60; *Whittier v. Home Savings Bank of Los Angeles* (1911) 161 C. 311, 315, 119 P. 92; *Greathouse v. Daleno* (1922) 57 C.A. 187, 189, 206 P. 1019; *Lindsay v. Mack* (1935) 5 C.A.2d 491, 496, 43 P.2d 350; *Cotton v. Riverside Cement Co.* (1938) 29 C.A.2d 588, 592, 85 P.2d 136; *American Industrial Sales Corp. v. Airscope* (1955) 44 C.2d 393, 397, 282 P.2d 504; *Simmons v. California Institute of Technology* (1949) 34 C.2d 264, 274, 209 P.2d 581 [determinative question is "whether the writing was intended to cover a certain subject of negotiation; for if it was not, then the writing does not embody the transaction on that subject"]; *Crumley v. Walter M. Ballard Corp.* (1950) 100 C.A.2d 698, 703, 224 P.2d 455; *Graddon v. Knight* (1956) 138 C.A.2d 577, 580, 292 P.2d 632; *Mangini v. Wolfschmidt, Ltd.* (1958) 165 C.A.2d 192, 198, 331 P.2d 728; *Pollyanna Homes v. Berney* (1961) 56 C.2d 676, 679, 16 C.R. 345, 365 P.2d 401; *Amco Plastic Pipe Co. v. Jet Specialties Co.* (1961) 194 C.A.2d 32, 36, 14 C.R. 712; *Carruth v. Madera* (1965) 233 C.A.2d 688, 699, 43 C.R. 855; *Masterson v. Sine* (1968) 68 C.2d 222, 227, 65 C.R. 545, 436 P.2d 561, *infra*, §88; *Skone v. Quanco Farms* (1968) 261 C.A.2d 237, 243, 68 C.R. 26, citing the text; 9 Wigmore (Chadbourn Rev.) §2442; 3 Corbin §§583, 584, 594; 11 Williston 4th, §33:23 *et seq.*; 60 A.L.R.2d 1135 [applicability of parol evidence rule to agreement between stockbroker and customer]; 85 A.L.R.2d 1331 [admissibility of oral agreement as to duration of employment or agency where written contract is silent].)

(2) *Second Restatement of Contracts View.* The Second Restatement of Contracts makes evidence of "a consistent additional term" admissible unless the court finds that the agreement was "completely integrated." (*Rest.2d, Contracts* §216(1).) And the agreement is *not completely integrated* if the writing "omits a consistent additional agreed term" which is "(a) agreed to for separate consideration, or (b) such a term as in the circumstances might naturally be omitted from the writing." (*Rest.2d, Contracts* §216(2).)

The Restatement conditions are separate and independent factors; i.e., either a separate consideration or a kind of agreement that might naturally be made separately satisfies the requirement. (See *Birsner v. Bolles* (1971) 20 C.A.3d 635, 638, 97 C.R. 846.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*West's Key Number Digest*, Evidence k.416, 439 et seq.





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## 2. Evidence of Collateral Agreement.

## a. Consistent Collateral Agreement.

## 2. Illustrations.

2 Witkin Cal. Evid. Doc Evid § 87

[§ 87] Illustrations.

In *Simmons v. California Institute of Technology* (1949) 34 C.2d 264, 209 P.2d 581, a written contract between plaintiff inventor and defendant Institute provided that royalties received from a license of plaintiff's invention should be paid to the Institute. Plaintiff sued to rescind, offering evidence that the Institute's agent had falsely promised that the royalties would be used by the Institute for research in his particular field. *Held*, the extrinsic evidence was admissible. If the false promise had conflicted with the written terms the evidence would have been excluded (*infra*, §98, and see dissent, 34 C.2d 291). The court held, however, that it did not contradict the terms of the writing, for the writing dealt with the *form of payment* (to the Institute), while the evidence related to the *use of the money*. (34 C.2d 274.) (See *American Industrial Sales Corp. v. Airscope* (1955) 44 C.2d 393, 397, 282 P.2d 504 [contract silent on place of payment, crucial on right of plaintiff to attach].)

In *Graddon v. Knight* (1956) 138 C.A.2d 577, 292 P.2d 632, a mortgaged and uninsured home was destroyed by fire. The mortgage contained the usual provision obligating the mortgagor to procure fire insurance. The trial judge, however, allowed the mortgagor to introduce parol evidence of a typical contemporaneous oral agreement of the mortgagee-bank to act as the mortgagor's agent to obtain the insurance. *Held*, this was proper; there was no inconsistency in the one agreement imposing the *obligation* and the other delegating the duty to perform the *physical act*; i.e., the mortgage did not require the mortgagor personally to procure the insurance. (138 C.A.2d 580.)

In *Schmidt v. Cain* (1928) 95 C.A. 378, 272 P. 803, a contract to manufacture and sell contained the words "in accordance with ... verbal understanding," and was silent on the question of warranty. *Held*, a parol warranty could be shown. Because the general rule is that where the contract is silent on express warranties, they are deemed intentionally excluded, this case seems to rest more properly on the reference to a "verbal understanding," and therefore is a case of *no integration* (*supra*, §73). (95 C.A. 380.)

In *Mangini v. Wolfschmidt, Ltd.* (1958) 165 C.A.2d 192, 331 P.2d 728, plaintiff orally agreed to represent defendant liquor manufacturer exclusively in certain California territory for a specified commission. The oral agreement was confirmed by a letter from defendant which was silent on *duration*, and, less than a year later, defendant attempted to terminate. Plaintiff, in this action for damages, sought to prove an oral understanding that at least 3 years would be necessary to build up the desired sales volume, and that this period was assumed to be the minimum duration. *Held*, the evidence was admissible. (165 C.A.2d 198.) (See 85 A.L.R.2d 1269 [oral agreement as to specific time for performance]; 85 A.L.R.2d 1331 [oral agreement to show duration of employment or agency]; 84 A.L.R.2d 1324 [oral

limitation on cost of structure where builder has cost-plus-fee construction contract].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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##### 2. Evidence of Collateral Agreement.

##### b. Collateral Agreement Contrary to Implied Term.

##### 1. Nature of Exception.

#### 2 Witkin Cal. Evid. Doc Evid § 88

[§ 88] Nature of Exception.

*Masterson v. Sine* (1968) 68 C.2d 222, 65 C.R. 545, 436 P.2d 561, went far beyond prior decisions in admitting evidence of an oral collateral agreement contrary to an implied term of the integration (see *supra*, §65).

Dallas Masterson and his wife owned a ranch as tenants in common. They conveyed it to Dallas' sister and her husband (Mr. and Mrs. Sine) by grant deed, reserving an option in the grantors to purchase for the same consideration plus the depreciation value of improvements made by the grantees. Dallas became bankrupt, and his trustee and his wife sought declaratory relief to establish their right to enforce the option, relying on the rule that such an interest is assignable by law unless expressly made unassignable (see 1 *Summary* (9th), *Contracts*, §925). Defendants offered extrinsic evidence to show that the parties wanted the property kept in the Masterson family and that the option was therefore personal to the grantors. This evidence, consisting of the testimony of Dallas himself, was excluded. *Held*, this was reversible error.

(a) *Test for determining admissibility of collateral agreement.* In determining whether a writing is an integration, the appearance of completeness on the face of the document (*supra*, §68) is not controlling. (68 C.2d 226.) Parol evidence should be excluded only when the fact finder is likely to be misled; the *Contracts Restatement* (*Rest.2d*, *Contracts* §240(1)(b)) suggests that proof of a collateral agreement should be admitted if it is one which "might naturally be made as a separate agreement" by parties so situated. (68 C.2d 227.) Applying this test, the evidence was admissible: It is difficult to accommodate the formal structure of a deed to collateral agreements; the statement of a reserved option might have been placed there solely to preserve the grantors' rights against possible future purchasers; this function would be served without any mention of an agreement to make the option personal; and there was no indication that the parties to this family transaction had any warning of the disadvantages of failing to put the entire agreement in the deed. (68 C.2d 228.)

(b) *Collateral agreement contrary to term implied by law.* Plaintiffs relied on cases holding that parol evidence cannot be admitted to prove a collateral agreement contrary to a term which the law presumes in the absence of agreement (see *supra*, §68). But these cases deal with writings found to be complete integrations, thus merely applying the basic parol evidence rule. (68 C.2d 229, footnote 3.) In the absence of statute, parties may expressly agree that a contract right is personal and nontransferable; and even without express agreement an intent to that effect may be effectuated if the circumstances indicate that performance by a substituted person would be different from that contracted for. (68 C.2d 230.)

The lengthy dissenting opinion restates the origin and development of the parol evidence rule and strikes hard at the weak point of the main opinion--its lack of authority or reasoning to support the conclusion that a collateral agreement may be proved contrary to a term implied by law. It also points out that the transaction was carried out through a title company on escrow instructions without any indication that the option was intended to be personal, and warns of the dangers involved in the result approved here: The bankrupt was allowed, by his own testimony, to deprive his creditors of an asset. (68 C.2d 231.) (See 56 Cal. L. Rev. 1671; for the revised statute, see C.C.P. 1856(b), supra, §61.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Cross-Reference:* 1 Summary (10th), Contracts, §712.



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##### b. Collateral Agreement Contrary to Implied Term.

##### 2. Illustrations.

2 Witkin Cal. Evid. Doc Evid § 89

[§ 89] Illustrations.

*Masterson v. Sine* (1968) 68 C.2d 222, 65 C.R. 545, 436 P.2d 561, supra, §88, has been followed in a number of cases:

*Birsner v. Bolles* (1971) 20 C.A.3d 635, 637, 638, 97 C.R. 846 [promissory note between family members; parol evidence admissible to show collateral agreement for conditional payment; note was formal document that did not lend itself to express inclusion of collateral agreement].

*Brawthen v. H & R Block* (1972) 28 C.A.3d 131, 138, 104 C.R. 486 [written employment agreement had uncertain termination provision; oral agreement as to nontermination if manager did good job might naturally be made as separate agreement].

In *Bank of Beverly Hills v. Catain* (1982) 128 C.A.3d 28, 180 C.R. 67, defendants, about to engage in a new business, borrowed \$ 40,000 from plaintiff bank, and executed a promissory note for payment on demand or on September 20. On that date, the note was unpaid and plaintiff sued to collect. Defendants alleged that plaintiff had represented that on maturity, a quarterly or monthly repayment schedule would be adopted and the terms of the note renegotiated. In summary judgment proceedings brought by plaintiff, defendants relied on the declaration of D, formerly Chairman of the Board and Chief Loan Officer of the bank, and on a "Loan Approval Sheet" in the bank's files. D's declaration confirmed defendants' allegation of a repayment agreement, stated that it followed normal, customary and generally accepted practices in the banking industry under the circumstances involved, and added D's opinion that the agreement would have been carried out had his association with the bank not been terminated. The "Loan Approval Sheet" likewise referred to a quarterly repayment program. The trial court rejected this evidence and granted summary judgment. *Held*, reversed; the proffered evidence came within the twin-pronged test of *Masterson v. Sine*.

(a) The collateral agreement was one that might naturally be made in a separate agreement by the parties: a bank was lending \$ 40,000 to set up a new business, and D's declaration indicated that it would be entirely appropriate to have future payment terms set forth in a separate agreement. (128 C.A.3d 37.)

(b) The collateral agreement was not of a type that would certainly have been included in the written instrument: D's declaration indicated that the agreement would be appropriately left to the bank's records, for it could impair

negotiability of a note if it was disclosed in the note itself. (128 C.A.3d 37.)

In *Esbensen v. Userware Int.* (1992) 11 C.A.4th 631, 14 C.R.2d 93, a wrongful termination action, plaintiff sought to introduce parol evidence of oral assurances that plaintiff's employment contract would be perpetually renewed as long as plaintiff performed his job competently. The written contract itself provided for a term of 1 year. The trial judge found that the written contract was an integrated 1-year agreement and that plaintiff was therefore precluded from introducing parol evidence relating to continued employment based on his performing capably. *Held*, the parol evidence was admissible.

(a) The written contract, which did not state that it constituted the complete agreement and was silent as to grounds for termination, was only partially integrated. "Because it is only by implication that we can determine what the parties intended with regard to the proper bases for termination, that reasoning process ought to be informed by whatever relevant extrinsic evidence exists which casts light on the parties' intent." (11 C.A.4th 638.)

(b) The 1-year term provision must have had some meaning, but there were possible reasons for its inclusion other than simply to allow for plaintiff's termination at the end of the year for any reason. If the written contract was supplemented by an oral understanding that employment would be continued absent good cause, then the 1-year term might merely reflect the interval between salary reviews. The failure of the contract to specify grounds might imply that any reason for termination was acceptable. However, "the fact that something is presumed or implied in the absence of an express statement to the contrary does not preclude a party to an incomplete written contract from attempting to demonstrate an express oral agreement contrary to the term which would otherwise be presumed or implied." (11 C.A.4th 640.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## 2. Evidence of Collateral Agreement.

## c. Distinction: Unnatural Collateral Agreement.

## 1. Nature of Distinction.

## 2 Witkin Cal. Evid. Doc Evid § 90

[§ 90] Nature of Distinction.

*Masterson v. Sine* (1968) 68 C.2d 222, 65 C.R. 545, 436 P.2d 561, supra, §88, allowed proof of a collateral agreement which might "naturally" have been made as a separate agreement in connection with the basic written understanding. In *Salyer Grain & Milling Co. v. Henson* (1970) 13 C.A.3d 493, 91 C.R. 847, the court held that extrinsic evidence of an "unnatural" collateral agreement was inadmissible.

Plaintiff farming company entered into a written agreement with defendant trucker for defendant to haul grain in semi-trailers furnished by plaintiff. The agreement provided that defendant was to maintain insurance coverage for liability and workers' compensation, but was *silent* on insurance for damage to the trailers, their cargo or loss of their use, and also made no mention of defendant's liability or exculpation from liability for damages caused by his employees' negligence. The agreement expired in 1 year, and was extended for another year with a recital that the terms and conditions remained unchanged.

The trailer and its cargo were damaged through the negligence of defendant's employee. In plaintiff's action for damages, defendant offered evidence of conversations with plaintiff's president before the original agreement was completed and again before the extension was executed. In these conversations, the parties discussed responsibility for collision damage, and the president stated that plaintiff assumed responsibility for damage to the trailers and would continue to bear the cost of insurance. *Held*, the evidence was properly excluded.

(a) Cases in which there is an *ambiguity* in the instrument or a clause susceptible of *more than one interpretation* (see *Delta Dynamics v. Arioto* (1968) 69 C.2d 525, 72 C.R. 785, 446 P.2d 785, supra, §82), or where there is a *necessary missing term* (see *Consolidated Theatres v. Theatrical Stage Employees Union, Local 16* (1968) 69 C.2d 713, 724, 73 C.R. 213, 447 P.2d 325), are distinguishable. The present case deals with a purported agreement *separate from or additional to* the original one. The basic question, therefore, is "whether the written agreement was intended at the time of its execution by the parties to be the whole of their agreement, integrating all previous agreements and negotiations." (13 C.A.3d 499, footnote 4.)

(b) Substantial evidence indicated that the written extension agreement was integrated: The parties dealt at *arm's length* and were *experienced businessmen* presumed to know the effect of written agreements; the alleged oral agreements came up in conversations before execution of both the original and the extension agreement, so the parties had *two opportunities* to include the oral discussions if they were meant as binding agreements; even though the original

agreement was *filed* with the Public Utilities Commission and used as *a basis for rate approval*, risk of loss (which affects rates) was not mentioned in the filed data; no evidence about loss of cargo or loss of use was offered, despite the fact that these were risks as obvious as damage to the trailers and that it would be illogical to make an agreement about one risk and not the others. (13 C.A.3d 501.) In addition, the merger clause (see *supra*, §§70, 71), reasonably construed, indicated an absence of antecedent or intervening collateral agreements. (13 C.A.3d 501.)

(c) An agreement about collision insurance would not naturally have been made in a collateral oral agreement, because the written agreements "carefully provided for liability insurance in specified amounts and for workmen's compensation insurance and for the furnishing of certificates in connection therewith." Insurance was thus a subject treated in detail in the written agreements. It would have been *unnatural* for the parties to have had a separate agreement with regard to one particular type of insurance and one particular risk of loss, omitting other obvious risks such as cargo insurance. (13 C.A.3d 502.)

**SUPPLEMENT:** [This section is current through the latest supplement]





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## 2. Evidence of Collateral Agreement.

## c. Distinction: Unnatural Collateral Agreement.

## 2. Illustrations.

## 2 Witkin Cal. Evid. Doc Evid § 91

[§ 91] Illustrations.

The following cases have followed the rule of *Salyer Grain & Milling Co. v. Henson* (1970) 13 C.A.3d 493, 91 C.R. 847, *supra*, §90:

*American Nat. Ins. Co. v. Continental Parking Corp.* (1974) 42 C.A.3d 260, 116 C.R. 801, upheld the exclusion of defendant lessee's offer to prove a collateral agreement by the lessor to construct an office building on top of a leased garage and to renegotiate or terminate the lease if revenues dropped below previous levels. The court said that the alleged collateral agreement "first, totally contradicted the written lease; second, dealt with a matter on which the lease was explicit--the effect of loss of business on the lease; third, 'would *certainly* have been included in the document itself'--since that document on its face, imposes an ironclad obligation on defendant for 25 years; and, finally, for the same reason, would not '*naturally* be made as a separate agreement,' since it leaves nothing of the pertinent clauses of the written agreement." (42 C.A.3d 266.)

*Mobil Oil Corp. v. Handley* (1978) 76 C.A.3d 956, 962, 143 C.R. 321 [(renewal provisions of lease would almost inevitably be found in lease itself, not in a collateral agreement, and were dealt with in the lease involved).]

*Marani v. Jackson* (1986) 183 C.A.3d 695, 703, 704, 228 C.R. 518 [terms of commission agreement were covered so explicitly and extensively in written contract that they would *not naturally* be made as separate oral agreement].

In *Banco Do Brasil v. Latian* (1991) 234 C.A.3d 973, 285 C.R. 870, the trial court ruled that the parol evidence rule did not bar evidence of a bank's alleged oral agreement to extend a \$ 2 million line of credit to two guarantors as a condition of their guaranty of an outstanding loan secured by a company's inventory they had purchased. *Held*, this was error; the collateral agreement was not one that naturally would be the subject of a separate agreement. The guarantors were sophisticated businessmen who were represented by counsel, and while they contended the line of credit was a significant part of the transaction, it was not mentioned in the documents or any contemporaneous writings or correspondence. It was inconceivable that the bank, having made such an effort to document the transaction, would have made a cavalier oral promise to extend further credit. Although language in one document stated that the debtor agreed to certain terms to induce the bank from time to time make a line of credit available to the borrowers, that language anticipated extension of a line of credit not to the guarantors, but to the seller of the inventory they purchased, which was the "borrower" defined by the document. (234 C.A.3d 1005.)

*Software Design & Application, Ltd. v. Price Waterhouse* (1996) 49 C.A.4th 464, 470, 471, 57 C.R.2d 36 [citing *Banco Do Brasil* case; in action by investors in corporation against corporation's accounting firm, trial judge properly excluded alleged oral agreement making plaintiffs third-party beneficiaries of defendant's letters of engagement with corporation: those letters constituted complete agreement and alleged oral agreement was not one that might naturally have been made separately].

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER VIII - Documentary Evidence

### V. PAROL EVIDENCE RULE

#### C. When Extrinsic Evidence Is Admissible.

##### 2. Evidence of Collateral Agreement.

##### d. Distinction: Oral Condition Inconsistent With Admissions.

*2 Witkin Cal. Evid. Doc Evid § 92*

[§ 92] Distinction: Oral Condition Inconsistent With Admissions.

In *FPI Dev. v. Nakashima* (1991) 231 C.A.3d 367, 282 C.R. 508, an action on a promissory note, plaintiffs moved for summary judgment. Defendants contended that they had set up a triable issue of material fact: whether their obligation to pay the note was subject to a condition (sale of certain real property) embodied in a collateral oral agreement. *Held*, the evidence of the oral condition was inadmissible because it was inconsistent with defendant's admissions that the note was enforceable.

The court undertook an elaborate examination of *Masterson v. Sine* (1968) 68 C.2d 222, 65 C.R. 545, 436 P.2d 561, *supra*, §88, and its codification in 1978 (C.C.P. 1856, *supra*, §61), and then discussed the role of the court in dealing with a parol evidence question in a summary judgment proceeding.

(a) Prior to *Masterson* a party to a written contract was precluded from employing evidence of a collateral oral agreement which conditioned the terms of the writing; integration was determined solely from the face of the instrument. (231 C.A.3d 387, 388.) *Masterson* rejected this doctrine, and advanced two normative tests of credibility, the first taken from *Rest.2d, Contracts §240*, and the second from the Unif.Com.C. §2-202. "An oral agreement is creditable if it might naturally have been made as a separate agreement by parties similarly situated. It is also creditable unless it can be said with certainty that the parties would have included the oral agreement in the writing." (231 C.A.3d 388.)

(b) Defendants' claim that enforcement of the note was conditioned upon the sale of the optioned property is inconsistent with their assertions that they obtained the assignment in return for executing the note, and that the note would be given an "extension" if they found a buyer before the due date. "A note that is unenforceable in the absence of a sale needs no extension. ... Defendants' assertions amount to admissions that the note was enforceable, even if there is not a sale of the property. These assertions, coupled with the terms of the note, *do* contradict their claim of an unstated condition." (231 C.A.3d 396.) And the admissions of a party are binding in summary judgment proceedings unless there is a credible explanation for the inconsistent positions taken by the party. (231 C.A.3d 396; see 6 Cal. Proc. (4th), *Proceedings Without Trial*, §207.)

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#### C. When Extrinsic Evidence Is Admissible.

##### 3. Evidence of Different Consideration.

##### a. Different Executed Consideration.

2 *Witkin Cal. Evid. Doc Evid* § 93

[§ 93] Different Executed Consideration.

If a contract recites, e.g., that a consideration of \$ 100 was received, evidence may be admitted to show that instead only \$ 10 or a used car was received; i.e., *the true consideration*, different from that recited, may be shown. (See *Andrews v. De Lorm* (1929) 102 C.A. 623, 627, 283 P. 393; *Johnston v. Courtial* (1932) 216 C. 506, 509, 14 P.2d 771; *Lewis v. McWhirter Petroleum Co.* (1948) 89 C.A.2d 453, 455, 200 P.2d 856; *Kennerson v. Salih Bros.* (1954) 123 C.A.2d 371, 373, 266 P.2d 871 [true consideration shown to establish illegality]; *Feinberg v. Teitelbaum Furs* (1965) 236 C.A.2d 744, 751, 46 C.R. 428; 3 Corbin §§585, 586; 1 *Summary* (9th), *Contracts*, §212.)

The Second Restatement of Contracts points out that a *recital of fact* in an integrated agreement may be shown to be untrue (in the absence of an estoppel), and that an *incorrect statement of consideration* does not prevent proof either of no consideration or a different consideration. (*Rest.2d, Contracts* §218, and Comment e.) (On admissibility of evidence of lack or failure of consideration, see *infra*, §99.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Cross-Reference:* 1 *Summary* (10th), *Contracts*, §207. *West's Key Number Digest*, Evidence k.419 et seq.



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  - 3. Evidence of Different Consideration.
    - b. Distinction: Different Executory Promises.

2 Witkin Cal. Evid. Doc Evid § 94

[§ 94] Distinction: Different Executory Promises.

One party cannot by parol evidence prove *additional or different promises or obligations* of the other party merely on the theory that they are part of the true consideration. The distinction is that parol evidence is admissible to contradict a recital of *executed consideration*, i.e., money, property or services which the contract states have been received; but where the contract states the *executory promises* of the parties, no evidence can be received to vary or add to those promises and thus change the fundamental character of the agreement. "Where the statement in a written instrument as to the consideration is *more than a mere statement of fact* or acknowledgment of payment of a money consideration, and is of a *contractual nature*, as where the consideration consists of a specific and direct promise by one of the parties to do certain things, this part of the contract can no more be changed or modified by parol or extrinsic evidence than any other part." (*Harding v. Robinson* (1917) 175 C. 534, 542, 166 P. 808; see *First Fed. Trust Co. v. Stockfleth* (1929) 98 C.A. 21, 27, 276 P. 371; *W. Ross Campbell Co. v. Sears, Roebuck & Co.* (1934) 136 C.A. 765, 768, 29 P.2d 910; *Koeberle v. Hotchkiss* (1935) 4 C.A.2d 252, 255, 40 P.2d 911 [unconditional agreement to pay money for acts performed; evidence that promise was contingent upon performance of future services inadmissible]; *Mulholland v. Parker* (1938) 26 C.A.2d 107, 110, 78 P.2d 1045 [property settlement agreement between husband and wife, stating promises in full; improper to admit parol evidence of alleged additional promise by husband to leave property by will]; *Molybdenum Corp. of America v. Kasey* (1959) 176 C.A.2d 357, 363, 1 C.R. 400, citing the text; 9 Wigmore (Chadbourn Rev.) §2433.)

*Shiver v. Liberty Bldg.-Loan Assn.* (1940) 16 C.2d 296, 106 P.2d 4, appears to depart from this principle. Plaintiff debtor and defendant mortgagee entered into a refinancing plan with Home Owners' Loan Corporation, and a written agreement was made whereby defendant agreed to accept \$ 1,579 "in full settlement" and to "release" its claim against the property. But defendant, by a separate transaction, received a \$ 300 note and second deed of trust from plaintiff for its consent to the plan. Plaintiff relied on the written agreement as an accord and satisfaction, contending that the additional promise to pay \$ 300 was without consideration. *Held*, the statements in the writing were recitals of consideration, and parol evidence of the other transaction was admissible to show the true consideration. Thus, the court permitted the *addition of a promise* to a written instrument which in terms purported to express the complete agreement of the parties. (16 C.2d 299.) (See dissent, 16 C.2d 301, and criticism, 29 Cal. L. Rev. 249.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### C. When Extrinsic Evidence Is Admissible.

#### 4. Evidence That Writing Is Invalid or Ineffective.

##### a. Theory and Scope of Exception.

*2 Witkin Cal. Evid. Doc Evid § 95*

[§ 95] Theory and Scope of Exception.

Evidence to prove that the instrument is void or voidable for mistake, fraud, duress, undue influence, illegality, alteration, lack of consideration, or other invalidating cause is admissible. This evidence does not contradict the terms of an effective integration, because it shows that the purported instrument has no legal effect. (See *C.C.P. 1856(e)*, (f), and (g), *supra*, §61; 3 Corbin §580; *Rest.2d, Contracts §214(d)*, and Comment c; *infra*, §96 et seq.)

Comment c of *Rest.2d, Contracts §214*, *supra*, explains: "What appears to be a complete and binding integrated agreement may be a forgery, a joke, a sham, or an agreement without consideration, or it may be voidable for fraud, duress, mistake, or the like, or it may be illegal. Such invalidating causes need not and commonly do not appear on the face of the writing. They are not affected even by a 'merger' clause."

*Rest.2d, Contracts §214(e)* also makes admissible evidence to establish "ground for granting or denying *rescission, reformation, specific performance, or other remedy*." Comment d describes this exception as follows: "A contract which is fully enforceable in an action for damages may be subject to equitable remedies such as rescission or reformation by reason of fraud, mistake or the like. Specific performance may be denied by reason of oppression or unfairness, or other remedies may be withheld or limited where the contract or a term is unconscionable. ... Evidence of the circumstances in which the contract was made may be relevant to such remedial issues, even though it also shows an agreement or proposal superseded by a later integrated contract."

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Pacific State Bank v. Greene* (2003) 110 C.A.4th 375, 387, 1 C.R.3d 739, quoting the text. *West's Key Number Digest*, Evidence k.428 et seq.



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4. Evidence That Writing Is Invalid or Ineffective.

b. Mistake.

2 *Witkin Cal. Evid. Doc Evid* § 96

[§ 96] Mistake.

Evidence of mistake, as a basis for rescission or reformation, is admissible. (See *C.C.P. 1856(e)*, supra, §61; *Palma v. Leslie* (1935) 6 C.A.2d 702, 709, 45 P.2d 391; *Stock v. Meek* (1950) 35 C.2d 809, 815, 221 P.2d 15; *Sapin v. Security First Nat. Bank* (1966) 243 C.A.2d 201, 207, 52 C.R. 254; *People v. West-A-Rama* (1973) 35 C.A.3d 786, 793, 111 C.R. 197, citing the text; 9 Wigmore (Chadbourn Rev.) §§2413 et seq., 2433 et seq.; *Rest.2d, Contracts* §214(d), supra, §95; 3 Corbin §580; 1 *Summary* (9th), *Contracts*, §§368 et seq., 382 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Cross-Reference:* 1 *Summary* (10th), *Contracts*, §§260 et seq., 276 et seq. *West's Key Number Digest*, Evidence k.433 et seq.



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## 4. Evidence That Writing Is Invalid or Ineffective.

## c. Fraud.

## 1. In General.

## 2 Witkin Cal. Evid. Doc Evid § 97

[§ 97] In General.

Evidence of fraud is also admissible in an action for rescission or reformation. (See *C.C.P. 1856(g)*, supra, §61; *J. B. Colt Co. v. Freitas* (1926) 76 C.A. 278, 284, 244 P. 916; *Ferguson v. Koch* (1928) 204 C. 342, 346, 268 P. 342; *Kent v. First Trust & Savings Bank of Pasadena* (1950) 101 C.A.2d 361, 369, 225 P.2d 625 [deed; fraud or undue influence]; *Morris v. Harbor Boat Bldg. Co.* (1952) 112 C.A.2d 882, 887, 247 P.2d 589; *Massow v. Gianacis* (1953) 120 C.A.2d 24, 27, 260 P.2d 655, infra, §108; *Chastain v. Belmont* (1954) 43 C.2d 45, 51, 271 P.2d 498; *Richard v. Baker* (1956) 141 C.A.2d 857, 863, 297 P.2d 674; *People v. West-A-Rama* (1973) 35 C.A.3d 786, 793, 111 C.R. 197, citing the text; *Edwards v. Centex Real Estate Corp.* (1997) 53 C.A.4th 15, 42, 61 C.R.2d 518, 5 Summary (9th), *Torts, Supp.*, §505, citing the text [in action to rescind settlement agreements and releases, trial judge erred in granting motion in limine to exclude evidence of fraudulent misrepresentations allegedly made to induce plaintiffs to enter into settlements]; 9 *Wigmore* (Chadbourn Rev.) §2439; *Rest.2d, Contracts* §214(d), supra, §95; 3 *Corbin* §580; 1 *Summary* (9th), *Contracts*, §392 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Edwards v. Centex Real Estate Corp.*:

*Cross-Reference:* 5 *Summary* (10th), *Torts*, §571.

*Cross-Reference:* 1 *Summary* (10th), *Contracts*, §285 et seq. *West's Key Number Digest*, Evidence k.434 et seq.





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#### 4. Evidence That Writing Is Invalid or Ineffective.

##### c. Fraud.

##### 2. False Promise.

2 Witkin Cal. Evid. Doc Evid § 98

[§ 98] False Promise.

(1) *Independent Promise Without Intention To Perform.* If, to induce the plaintiff to enter into an agreement, the defendant makes an independent promise without intention to perform, this separate false promise is fraud, and it may be shown in order to avoid or nullify the main agreement. (See *Coast Bank v. Holmes* (1971) 19 C.A.3d 581, 591, 592, 97 C.R. 30; *Ron Greenspan Volkswagen v. Ford Motor Land Dev. Corp.* (1995) 32 C.A.4th 985, 995, 38 C.R.2d 783 [parol evidence is admissible to prove fraud in inducement even when contract recites that all conditions and representations are embodied therein]; 37 *Santa Clara L. Rev.* 1031 [arguing that merger clause should preclude claim for fraud in inducement]; 1 *Summary* (9th), *Contracts*, §393 et seq.; 5 *Summary* (9th), *Torts*, §685 et seq.)

(2) *Distinction: False Promise Covered by Main Agreement.* However, a plaintiff who attempts to show a false promise with respect to a matter covered by the main agreement contradicts the terms of the agreement in direct violation of the rule, and this cannot be permitted. (See *Lindemann v. Coryell* (1922) 59 C.A. 788, 791, 212 P. 47; *W. Ross Campbell Co. v. Sears, Roebuck & Co.* (1934) 136 C.A. 765, 769, 29 P.2d 910; *Bank of America v. Pendergrass* (1935) 4 C.2d 258, 263, 48 P.2d 659 [oral promise to extend or postpone payments under note which contained unconditional promise to pay on demand]; *Cobbs v. Cobbs* (1942) 53 C.A.2d 780, 784, 128 P.2d 373; *Newmark v. H. & H. Products Mfg. Co.* (1954) 128 C.A.2d 35, 37, 274 P.2d 702; *Abbot v. Stevens* (1955) 133 C.A.2d 242, 246, 284 P.2d 159; *Shyvers v. Mitchell* (1955) 133 C.A.2d 569, 572, 284 P.2d 826; *Bank of America v. Lamb Finance Co.* (1960) 179 C.A.2d 498, 502, 3 C.R. 877 [defendant signed as guarantor of corporation note, sought to testify that bank officer told her she would not be personally liable]; *Green v. Del-Camp Inv.* (1961) 193 C.A.2d 479, 482, 14 C.R. 420, citing the text ["Where, as here, the claimed fraud consists of a false promise with respect to a matter covered by the agreement itself, the oral evidence would contradict the terms of the agreement, in direct contravention of the rule"]; *Glendale Fed. Savings & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 C.A.3d 101, 160, 135 C.R. 802; *Continental Airlines v. McDonnell Douglas Corp.* (1989) 216 C.A.3d 388, 419, 421, 264 C.R. 779, citing the text; *Price v. Wells Fargo Bank* (1989) 213 C.A.3d 465, 484, 486, 261 C.R. 735; *West v. Henderson* (1991) 227 C.A.3d 1578, 1583, 278 C.R. 570; *Alling v. Universal Mfg. Corp.* (1992) 5 C.A.4th 1412, 1436, 7 C.R.2d 718.)

In *Coast Bank v. Holmes*, *supra*, the court took note of criticisms of the rule against admitting evidence of an inconsistent false promise (see, e.g., 49 *Cal. L. Rev.* 877), and added the dictum that "recent decisions liberalizing the parol evidence rule cast some doubt on the continued validity of the distinction." (19 C.A.3d 592.) But in *Price v. Wells Fargo Bank*, *supra*, the court also took note of this criticism, as well as the doubt of continued vitality of *Pendergrass*,

*supra*, expressed by the *Coast Bank* court (213 C.A.3d 484), and nevertheless concluded that the case still represents the governing law (213 C.A.3d 485), and "is based on an entirely defensible decision favoring the policy considerations underlying the parol evidence rule over those supporting a fraud cause of action." (213 C.A.3d 485.) (To the same effect, see *Glendale Fed. Savings & Loan Assn. v. Marina View Heights Dev. Co.*, *supra*, 66 C.A.3d 161; *West v. Henderson*, *supra*, 227 C.A.3d 1583, 1584; *Banco Do Brasil v. Latian* (1991) 234 C.A.3d 973, 1009, 1010, 285 C.R. 870.)

(3) *Tort Action for Damages*. It has been assumed that the preceding rule applies, i.e., the parol evidence rule is a bar, where the plaintiff sues in tort to recover damages for the fraud. "If it were not so, one party to a written contract could change its terms, adding to the promises made by the other party, by the device of bringing his action in tort rather than on contract, and alleging an inducing promise made without intention of performance." (*Kett v. Graeser* (1966) 241 C.A.2d 571, 574, 50 C.R. 727 [dictum; recovery allowed on basis of collateral agreement; parol evidence rule not violated].)

This view may, however, be questioned today in the light of a decision of the Supreme Court on contracts within the statute of frauds. It was formerly the rule that a tort action for damages could not be based on a false promise where the promise itself was unenforceable under the statute of frauds. (*Kroger v. Baur* (1941) 46 C.A.2d 801, 803, 117 P.2d 50, 5 Summary (9th), *Torts*, §687.) The *Kroger* rule was followed for more than 40 years by Court of Appeal decisions, but was criticized in *Southern Calif. Dist. Council, Assemblies of God v. Shepherd of the Hills Evangelical Lutheran Church* (1978) 77 C.A.3d 951, 958, footnote 3, 144 C.R. 46, citing *Rest.2d, Torts* §530, Comment c, as contra. And in *Tenzer v. Superscope* (1985) 39 C.3d 18, 29, 216 C.R. 130, 702 P.2d 212, 5 Summary (9th), *Torts*, §688, the Supreme Court took note of the criticism and disapproved *Kroger v. Baur*.

The Restatement Comment states that the tort action for damages is available "whether or not the promise is enforceable as a contract." If, e.g., the agreement is without consideration, the tort action for fraud may be brought; and "[t]he same is true when the agreement is oral and made unenforceable by the statute of frauds, or when it is unprovable and so unenforceable under the parol evidence rule. ... In all of these cases, it is immaterial to the tort liability that the damages recoverable are identical with, or substantially the same as, those which could have been recovered in an action of contract if the promise were enforceable." (*Rest.2d, Torts* §530, Comment c.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Independent Promise Without Intention To Perform*.

*Cross-References:* 1 Summary (10th), *Contracts*, §286 et seq.; 5 Summary (10th), *Torts*, §781 et seq.

(2) *Distinction: False Promise Covered by Main Agreement*. See *Wang v. Massey Chevrolet* (2002) 97 C.A.4th 856, 875, 876, 118 C.R.2d 770 [in action by automobile lessees against lessor, alleging that defendant falsely represented that plaintiffs could purchase vehicle soon after lease began and without penalty by paying specified sum, parol evidence to that effect was inadmissible, where it was directly at variance with terms of lease].

The judicial limitation stated in *Bank of America v. Pendergrass* (1935) 4 C.2d 258, 48 P.2d 659, text, p. 219, "should not be further extended to preclude parol evidence of a misrepresentation of *fact* over the content of the physical document at the time of signing. Such an extension would conflict with the Legislature's express and unqualified statutory exception for fraud--a policy judgment that we have no power to overrule--and is unnecessary to safeguard the vitality of the parol evidence rule (which was *Pendergrass's* purpose in narrowing the scope of the fraud exception)." (*Pacific State Bank v. Greene* (2003) 110 C.A.4th 375, 379, 390, 394, 1 C.R.3d 739, citing the text [in action by bank against guarantor of loans by bank to construction company, trial judge erred in excluding declaration stating that bank employee told guarantor several times that guaranties applied only to one loan, where guaranty agreement referenced only one loan number but, in fine print, defined indebtedness to include "all of Borrower's liabilities"; disagreeing with *Bank of America v. Lamb Finance Co.* (1960) 179 C.A.2d 498, 3 C.R. 877, text, p. 219].)(3) *Tort Action for Damages*.

*Kroger v. Baur:*

*Cross-Reference:* 5 *Summary* (10th), *Torts*, §783.

*Tenzer v. Superscope:*

*Cross-Reference:* 5 *Summary* (10th), *Torts*, §783.



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#### C. When Extrinsic Evidence Is Admissible.

#### 4. Evidence That Writing Is Invalid or Ineffective.

##### d. Lack or Failure of Consideration.

2 Witkin Cal. Evid. Doc Evid § 99

[§ 99] Lack or Failure of Consideration.

(1) *Lack of Consideration*. Because an instrument lacking in consideration is invalid, this fact may be shown by extrinsic evidence (see *C.C.P. 1856(f)*), and a recital of consideration in the written agreement is ordinarily not binding (*Ev.C. 622*). Hence, even though a contract recites that a consideration was received, it may be shown by parol evidence that none was in fact received. (See *Ruess v. Baron* (1932) 217 C. 83, 88, 17 P.2d 119; *Braselton v. Vokal* (1921) 53 C.A. 582, 584, 200 P. 670; *Doria v. International Union, Allied Industrial Workers of America, AFL-CIO* (1961) 196 C.A.2d 22, 39, 16 C.R. 429, citing the text; *Walter E. Heller Western v. Tecrim Corp.* (1987) 196 C.A.3d 149, 155, 158, 241 C.R. 677 [extrinsic evidence admissible concerning what, if anything, constituted consideration for subordination agreement]; *Rest.2d, Contracts* §214(d); 9 Wigmore (Chadbourn Rev.) §2433; 3 Corbin §586; 1 *Summary* (9th), *Contracts*, §§211, 212; on admissibility of evidence of different consideration, see *supra*, §§93, 94.)

(2) *Failure of Consideration*. Subsequent failure of a promised consideration may be shown, not only because it renders the instrument ineffective (by discharge), but also because it does not contradict the terms of the instrument. (See *Lewis Publishing Co. v. Henderson* (1930) 103 C.A. 425, 428, 284 P. 713; *Coast Bank v. Holmes* (1971) 19 C.A.3d 581, 590, 97 C.R. 30; 3 Corbin §591; 1 *Summary* (9th), *Contracts*, §757.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Lack of Consideration*.

*Cross-Reference:* 1 *Summary* (10th), *Contracts*, §§206, 207.

(2) *Failure of Consideration*.

*Cross-Reference:* 1 *Summary* (10th), *Contracts*, §813. *West's Key Number Digest*, Evidence k.432



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4. Evidence That Writing Is Invalid or Ineffective.

e. Illegality.

2 Witkin Cal. Evid. Doc Evid § 100

[§ 100] Illegality.

Parol evidence is always admissible to show a consideration or object in violation of law which renders the purported agreement void. (See *C.C.P. 1856(g)*, supra, §61; *De Armas v. Dickerman* (1952) 108 C.A.2d 548, 551, 239 P.2d 65; *Kennerson v. Salih Bros.* (1954) 123 C.A.2d 371, 374, 266 P.2d 871; *May v. Herron* (1954) 127 C.A.2d 707, 711, 274 P.2d 484; *Geffen v. Moss* (1975) 53 C.A.3d 215, 222, 125 C.R. 687; *Mitchell v. Leslie* (1995) 39 C.A.4th Supp. 7, 12, 46 C.R.2d 419 [in action by tenant against landlord to recover excess rent charged separately for furniture rental, tenant's extrinsic evidence contradicting terms of written furniture rental agreement was admissible to establish that agreement was not separate from premises lease and thus was invalid under local rent control ordinance]; *Rest.2d, Contracts* §214(d); 9 Wigmore (Chadbourn Rev.) §2439; 1 *Summary* (9th), *Contracts*, §441 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Cross-Reference:* 1 *Summary* (10th), *Contracts*, §431 et seq. *West's Key Number Digest*, Evidence k.437



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4. Evidence That Writing Is Invalid or Ineffective.

f. Alteration.

2 Witkin Cal. Evid. Doc Evid § 101

[§ 101] Alteration.

Parol evidence is admissible to show that an instrument has been nullified by a material alteration. (See *Akopoff v. Mesropian* (1929) 96 C.A. 128, 129, 273 P. 604 [evidence that note did not bear figure \$ 606 at time of execution]; *Smith v. Lagerstrom* (1950) 34 C.2d 858, 861, 215 P.2d 450 [payee filled in blanks; evidence admissible to show that he acted in excess of authority given him]; on alteration generally, see 3 *Summary* (9th), *Negotiable Instruments*, §§92 et seq., 231.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Cross-Reference:* 4 *Summary* (10th), *Negotiable Instruments*, §55 et seq. *West's Key Number Digest*, Evidence k.412



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### V. PAROL EVIDENCE RULE

#### C. When Extrinsic Evidence Is Admissible.

#### 4. Evidence That Writing Is Invalid or Ineffective.

##### g. Writing Not Intended To Be Effective.

##### 1. Sham Instrument.

##### aa. Parol Evidence Admissible.

#### 2 Witkin Cal. Evid. Doc Evid § 102

[§ 102] Parol Evidence Admissible.

(1) *Statement of Rule.* Even though a writing purports on its face to be a complete *agreement*, it may be shown that it was not intended to take effect at all. Thus, in *P. A. Smith Co. v. Muller* (1927) 201 C. 219, 256 P. 411, the purported contract was a mere sham, intended to deceive third parties, and not to bind the parties at all. The court said: "Such evidence does not change a written contract by parol, but serves to establish that such contract had no force, efficacy, or effect." (201 C. 222.) (See *Texas Co. v. Berry Garage* (1932) 121 C.A. 455, 458, 9 P.2d 241; *Boies v. Wylie* (1952) 113 C.A.2d 243, 246, 248 P.2d 76; *San Diego v. Vilorio* (1969) 276 C.A.2d 350, 354, 80 C.R. 869; 9 Wigmore (Chadbourn Rev.) §2406; 3 Corbin §577; 71 A.L.R.2d 382 [oral evidence to show that writing was sham agreement]; 1 *Summary* (9th), *Contracts*, §130 et seq.)

(2) *Writing Intended as Different Instrument.* The same principle has been applied to a writing intended to take effect, but as a different kind of instrument. In *Halldin v. Usher* (1958) 49 C.2d 749, 321 P.2d 746, a writing signed by a husband and wife declared that they "herewith agree" that the survivor should have their property, and that, on their death, it should go to their children in a certain manner. After death of the husband, plaintiff son sued for a declaration that this was a third-party beneficiary contract. *Held*, parol evidence (mainly testimony of the widow concerning conversations with her husband) was properly received to show that the instrument was to be effective only on death, i.e., as a will and not as a contract. (49 C.2d 752.) (See *Haidinger-Hayes v. Marvin Hime & Co.* (1962) 206 C.A.2d 46, 51, 23 C.R. 455 [following the *Halldin* case; evidence admissible to show that purported contract was only a receipt].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Statement of Rule.*

*Cross-Reference:* 1 *Summary* (10th), *Contracts*, §127 et seq.



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#### C. When Extrinsic Evidence Is Admissible.

#### 4. Evidence That Writing Is Invalid or Ineffective.

##### g. Writing Not Intended To Be Effective.

##### 1. Sham Instrument.

##### bb. Distinctions.

2 Witkin Cal. Evid. Doc Evid § 103

[§ 103] Distinctions.

(1) *Parol Evidence May Not Vary Terms of Instrument.* The sham instrument exception may only be invoked to negate the existence of the agreement. Thus, in *Yarus v. Yarush (1960) 178 C.A.2d 190, 203, 3 C.R. 50*, plaintiff wife claimed that the parties had intended by their agreement to provide for alimony, but used the form of a property division because of income tax advantages to the wife. *Held*, this evidence was inadmissible. Instead of attacking the entire instrument as sham, she was attempting to exclude part of it as sham, i.e., to enforce the agreement but to vary its terms. (See also *Nelkin v. Marvin Hime & Co. (1964) 228 C.A.2d 744, 747, 39 C.R. 701, 1 Summary (9th), Contracts, §122.*)

(2) *Parol Evidence May Not Deny Execution of Instrument.* In *FPI Dev. v. Nakashima (1991) 231 C.A.3d 367, 282 C.R. 508*, *supra*, §92, plaintiffs brought an action on a promissory note, and moved for summary judgment. Defendants denied execution of the note, and contended that their denial raised the triable issue of sham agreement. But the facts necessary to establish that the note was not intended as a jural act were not encompassed in the denial of the ultimate fact of execution alleged in the complaint. "Where a party participates in a sham the intention is that the note be taken as a jural act by the one upon whom the sham is perpetrated. It will not lie in the mouth of the participant to say there was no execution of the note. The defense, if any, is that there was an execution but that the plaintiff cannot take advantage of it. For that reason a denial of the execution does not put such a theory in issue." (231 C.A.3d 403.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Parol Evidence May Not Vary Terms of Instrument.*

*Nelkin v. Marvin Hime & Co.:*

*Cross-Reference:* 1 Summary (10th), *Contracts*, §120.





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#### 4. Evidence That Writing Is Invalid or Ineffective.

##### g. Writing Not Intended To Be Effective.

##### 2. Conditional Writing.

##### aa. External Condition Precedent Admissible.

2 Witkin Cal. Evid. Doc Evid § 104

[§ 104] External Condition Precedent Admissible.

(1) *Statement of Rule.* It may be shown that the writing was not intended as a final act because it is not to become effective until some condition happens. (See 9 Wigmore (Chadbourn Rev.) §§2410, 2435; 3 Corbin §589; *Rest.2d, Contracts* §217, and Comment b.) Thus, in *Gleeson v. Dunn* (1931) 113 C.A. 347, 298 P. 119, plaintiff, an architect, sued on a contract of employment to render services in connection with certain property. *Held*, it was error to exclude evidence offered by defendant that the agreement was not to become binding until the latter obtained title to the described property. (113 C.A. 351.)

Other cases are to the same effect. (See *Harper v. French* (1938) 29 C.A.2d 214, 216, 84 P.2d 216 [defendant makers could show that delivery of a promissory note was conditional, the obligation not to become effective until condition precedent happened]; *Unger v. Hall* (1943) 61 C.A.2d 535, 537, 143 P.2d 497; *Paratore v. Scharetg* (1942) 53 C.A.2d 710, 713, 128 P.2d 560; *Embassy Realty Associates v. Southwest Products Co.* (1954) 126 C.A.2d 725, 730, 272 P.2d 899 [assignments of stock for convenience in obtaining financing; no beneficial interest in assignee intended until financing obtained]; *Fontana v. Upp* (1954) 128 C.A.2d 205, 207, 275 P.2d 164 [reviewing and distinguishing cases]; *Louis Lesser Enterprises, Ltd. v. Roeder* (1962) 209 C.A.2d 401, 410, 25 C.R. 917 [condition of execution of formal document]; *Thomson v. International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of the United States & Canada* (1965) 232 C.A.2d 446, 453, 42 C.R. 785, quoting the text; *Clyde Bldg. Assn. v. Walsh* (1967) 248 C.A.2d 513, 515, 56 C.R. 617.)

(2) *Distinction: Deeds.* A different rule applies to deeds: The common law doctrine that a deed cannot be conditionally delivered to the *grantee* is followed in California. (See C.C. 1056; 9 Wigmore (Chadbourn Rev.) §2408; 4 *Summary* (9th), *Real Property*, §177.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Distinction: Deeds.*

*Cross-Reference:* 12 *Summary* (10th), *Real Property*, §297. *West's Key Number Digest*, Evidence k.420 et seq.



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#### 4. Evidence That Writing Is Invalid or Ineffective.

##### g. Writing Not Intended To Be Effective.

##### 2. Conditional Writing.

#### bb. Condition Precedent to Term or Condition Subsequent Excluded.

2 Witkin Cal. Evid. Doc Evid § 105

[§ 105] Condition Precedent to Term or Condition Subsequent Excluded.

(1) *In General.* In applying the principle just considered (*supra*, §104), it is necessary to keep clearly in mind this distinction: The condition must be one which renders the entire purported agreement inchoate, so that the parol evidence proves that there is no legal act, e.g., no contract. If, on the other hand, an attempt is made to show that *one of the terms of a contract* is not to take effect until the condition happens, or that the obligations in whole or in part are to be absolved by the operation of a *condition subsequent*, the parol evidence rule is a bar; for once the existence of a legally effective contract is admitted, its terms cannot be varied or defeated by any extrinsic evidence. (See *Seth v. Lew Hing* (1932) 125 C.A. 729, 736, 14 P.2d 537 [maker of note cannot prove oral agreement not to hold maker liable on note]; *Scatena v. Lawson* (1928) 95 C.A. 720, 724, 273 P. 592 [note and mortgage expressly made payable on certain date; maker could not show that payment was contingent upon sale of certain assets]; *McArthur v. Johnson* (1932) 216 C. 580, 582, 15 P.2d 151 [negotiable note, same holding; court discusses distinction between proper showing of conditional delivery (instrument does not become effective) and conditions of payment in conflict with terms of instrument]; *Hanrahan-Wilcox Corp. v. Jenison Machinery Co.* (1937) 23 C.A.2d 642, 644, 73 P.2d 1241; *L. B. Williams Organization v. Winter* (1951) 106 C.A.2d 604, 605, 235 P.2d 407; *Stafford v. Russell* (1953) 117 C.A.2d 326, 331, 255 P.2d 814; *Katz v. Haskell* (1961) 196 C.A.2d 144, 157, 16 C.R. 453, quoting the text; *McDonald v. Filice* (1967) 252 C.A.2d 613, 625, 60 C.R. 832, citing the text; 9 Wigmore (Chadbourn Rev.) §2435.)

(2) *Illustration.* In *Hanrahan-Wilcox Corp. v. Jenison Machinery Co.*, *supra*, plaintiff contracted to rent a machine from defendant. Later, he returned the machine and sought to avoid the obligation by proving an oral agreement that, if the machine did not do satisfactory work, the contract would not be binding. *Held*, the evidence was inadmissible, being in conflict with the provisions of the contract calling for rent to begin on its delivery. In other words, plaintiff was trying to prove an oral condition *subsequent* as a means of escaping his express obligations under the contract.

(3) *Second Restatement of Contracts View.* The Second Restatement of Contracts takes a different position: "A major rationale expressed by courts for the rule of this Section is that it has to do with an oral condition that must occur before the written contract comes into existence. Thus, if the oral condition is not met there is no subsequent and superseding agreement and no reason to apply the parol evidence rule. ... [T]his approach is of limited use. It is not the rationale expressed in this Comment, and is often not the rationale expressed by courts. In addition, oral conditions have been admitted merely to modify a later written contract, not to prevent it from coming into effect." (*Rest.2d, Contracts*

§217, Comment b.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Evidence k.444 et seq.



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V. PAROL EVIDENCE RULE

C. When Extrinsic Evidence Is Admissible.

5. Evidence of Discharge or Modification of Contract.

a. Mutual Rescission or Novation.

2 Witkin Cal. Evid. Doc Evid § 106

[§ 106] Mutual Rescission or Novation.

Although an integration supersedes prior and contemporaneous negotiations, *agreements made afterwards* are effective. Thus, parol evidence is admissible to establish mutual rescission or novation. (See *Haberman v. Sawall* (1925) 72 C.A. 576, 581, 237 P. 776 [rescission]; *Grant v. Aerodraulics Co.* (1949) 91 C.A.2d 68, 74, 204 P.2d 683 [rescission]; *McKeon v. Giusto* (1955) 44 C.2d 152, 156, 280 P.2d 782 [novation]; 9 Wigmore (Chadbourn Rev.) §2441; 3 Corbin §574; 44 Cal. L. Rev. 158; 1 Summary (9th), Contracts, §§876, 906 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

**Cross-Reference:** 1 Summary (10th), Contracts, §§928 et seq., 961 et seq. *West's Key Number Digest*, Evidence k.464 et seq.



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#### C. When Extrinsic Evidence Is Admissible.

#### 5. Evidence of Discharge or Modification of Contract. b. Oral Modification.

2 Witkin Cal. Evid. Doc Evid § 107

[§ 107] Oral Modification.

Parol evidence is admissible to prove an oral modification of a written contract under C.C. 1698 as follows:

(1) To the extent that the oral agreement is executed by the parties. (C.C. 1698(b); see *Coldwell Banker & Co. v. Pepper Tree Office Center Associates* (1980) 106 C.A.3d 272, 280, 165 C.R. 51; *Conley v. Matthes* (1997) 56 C.A.4th 1453, 1465, 1466, 66 C.R.2d 518 [exchange of promissory note and second trust deed for cash loan constituted executed oral modification of original real property sale agreement, which had precluded second trust deeds].)

(2) Unless the contract otherwise expressly provides, if the oral agreement is supported by new consideration. (C.C. 1698(c); see *Beggerly v. Gbur* (1980) 112 C.A.3d 180, 188, 189, 190, 169 C.R. 166 [evidence of oral modification properly stricken where contrary to written agreement and no new consideration]; *Marani v. Jackson* (1986) 183 C.A.3d 695, 704, 228 C.R. 518 [same].) (On oral modification of contracts generally, see 1 *Summary* (9th), *Contracts*, §911 et seq.)

*Chohon v. Kersey Kinsey Co.* (1959) 173 C.A.2d 548, 343 P.2d 614, deals with distinguishable facts. Plaintiff alleged that defendant orally agreed to build two buildings for him; that the air conditioning of one proved inadequate and they orally agreed that plaintiff should give a note for the full sum and defendant would allow him an offset for the cost of correcting it; that plaintiff delivered the note, repaired the system, and offered payment of the note less the cost, which defendant refused. Plaintiff had to pay the full sum to release the escrow, and sued for the agreed offset. The trial judge sustained an objection to all evidence on the theory that plaintiff was trying to modify a written agreement by an oral agreement. *Held*, reversed; plaintiff was not suing on the note but on the collateral agreement for the discharge of defendant's obligation arising from his original breach. (173 C.A.2d 551.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *New consideration:*

*Cross-Reference:* 1 *Summary* (10th), *Contracts*, §966 et seq.



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### V. PAROL EVIDENCE RULE

#### C. When Extrinsic Evidence Is Admissible.

##### 6. Miscellaneous Exceptions to Rule.

##### a. Absolute Deed as Mortgage.

2 Witkin Cal. Evid. Doc Evid § 108

[§ 108] Absolute Deed as Mortgage.

A deed or other instrument absolute in form and apparently transferring title may be shown to be intended as a mortgage, creating a security interest only. This exception to the parol evidence rule applies to any kind of deed except a deed of trust (the substantial equivalent of a mortgage). (See C.C. 2888, 2924; *Beeler v. American Trust Co.* (1944) 24 C.2d 1, 7, 147 P.2d 583, supra, §71; *Wilcox v. Salomone* (1953) 118 C.A.2d 704, 710, 258 P.2d 845; *Sherman v. Panno* (1954) 129 C.A.2d 375, 381, 277 P.2d 80; 9 Wigmore (Chadbourn Rev.) §2437; 11 Williston 4th, §33:44; 3 Summary (9th), *Security Transactions in Real Property*, §9.)

The following distinction may be noted: The deed-as-mortgage exception applies even though the borrower-grantor, not acting under fraud or mistake, voluntarily uses the deed form, so long as both parties intend it to operate only as security. If, however, the borrower-grantor is induced by fraudulent representations to sign a grant deed, believing it to be a deed of trust or mortgage, he or she is entitled to *reformation*. And the borrower-grantor may prove his or her case by parol evidence not under this special exception, but under the general exception allowing evidence of fraud to attack the validity of the instrument. (See *Massow v. Gianacis* (1953) 120 C.A.2d 24, 27, 260 P.2d 655.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Cross-Reference:* 4 Summary (10th), *Security Transactions in Real Property*, §10. *West's Key Number Digest*, Evidence k.395 et seq., 417(8)



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#### C. When Extrinsic Evidence Is Admissible.

##### 6. Miscellaneous Exceptions to Rule.

##### b. Absolute Transfer as Limited Transfer.

2 Witkin Cal. Evid. Doc Evid § 109

[§ 109] Absolute Transfer as Limited Transfer.

(1) *Absolute Transfer as Trust*. An apparently absolute transfer may be shown to have been a transfer in trust, and a resulting or constructive trust may be imposed. (*Brison v. Brison* (1888) 75 C. 525, 533, 17 P. 689; *Nishi v. Downing* (1937) 21 C.A.2d 1, 3, 67 P.2d 1057; *Hansen v. Bear Film Co.* (1946) 28 C.2d 154, 168 P.2d 946, *supra*, §75; *Jarkieh v. Badagliacco* (1946) 75 C.A.2d 505, 511, 170 P.2d 994; 9 Wigmore (Chadbourn Rev.) §2437; but see *Estate of Gaines* (1940) 15 C.2d 255, 265, 100 P.2d 1055 [evidence of trust held insufficient].)

But the *converse is not true*; an instrument which in terms is a pledge, mortgage or assignment for collection cannot by parol evidence be shown to be an absolute transfer of title or beneficial interest; "the right to defeat an expressed equity by destructive parol proof is not comprehended within the rule." (*Keifer v. Myers* (1910) 14 C.A. 338, 340, 111 P. 1038; *Kunz v. Anglo & London Paris Nat. Bank of San Francisco* (1931) 214 C. 341, 347, 5 P.2d 417.)

(2) *Other Absolute Transfers Limited*. In *Huber v. Huber* (1946) 27 C.2d 784, 167 P.2d 708, a divorce action, the husband was allowed to testify that land taken by himself and wife as joint tenants, but purchased with his separate funds, was not intended to create a joint tenancy. The court said: "Parol evidence is admissible to establish the absence of an intention to make a gift of either separate or community property, although the instrument of conveyance is made by the husband to the wife alone or as joint tenant with him or is from a third person to the wife or to both as joint tenants at the husband's direction in cases where there is no showing of fraud, mistake or undue influence." (27 C.2d 788.) (See 33 A.L.R.2d 381 [bill of sale as chattel mortgage]; 11 *Summary* (9th), *Community Property*, §188 et seq.; but see *Wells v. Wells* (1946) 74 C.A.2d 449, 169 P.2d 23 [apparently absolute assignment interpreted as separation agreement].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Other Absolute Transfers Limited*.

*Cross-Reference:* 11 *Summary* (10th), *Community Property*, §218 et seq.



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### V. PAROL EVIDENCE RULE

- C. When Extrinsic Evidence Is Admissible.
  - 6. Miscellaneous Exceptions to Rule.
    - c. Undisclosed Principal or Party in Interest.

2 Witkin Cal. Evid. Doc Evid § 110

[§ 110] Undisclosed Principal or Party in Interest.

Except as to negotiable instruments, extrinsic evidence may be admitted to show that a party to a contract acted as agent for an undisclosed principal, who is bound by and may enforce the contract. (See *Geary Street, Park & Ocean R. Co. v. Rolph* (1922) 189 C. 59, 65, 207 P. 539 [principal liable]; *Anglin v. Conway* (1953) 41 C.2d 683, 688, 263 P.2d 1 [same]; *Pratt v. Hopper* (1936) 12 C.A.2d 291, 293, 55 P.2d 517 [negotiable instruments exception]; *Purviance v. Shostak* (1949) 90 C.A.2d 295, 297, 202 P.2d 755 [principal may enforce]; *Sumner v. Flowers* (1955) 130 C.A.2d 672, 674, 279 P.2d 772 [same]; 9 Wigmore (Chadbourn Rev.) §2438; 2 *Summary* (9th), *Agency and Employment*, §107; 3 *Summary* (9th), *Negotiable Instruments*, §§99 et seq., 216 et seq.)

This doctrine goes beyond strict agency cases: Identity of parties in interest may be shown by extrinsic evidence "when it appears that the agreement has been made in the name of a partnership or joint venture, or an agent, especially when the nature of the entity named as a party or the names of the parties to the partnership or venture do not affirmatively appear in the writing." (*Greenwood v. Mooradian* (1955) 137 C.A.2d 532, 543, 290 P.2d 955; see 70 A.L.R.3d 1276 [parol evidence to show whether guaranty was made in representative or individual capacity].)

The converse, however, is not true; parol evidence is not admissible to relieve from liability an agent who signs personally without disclosing (on the face of the instrument) the name of the principal. (See *Otis Elevator Co. v. Berry* (1938) 28 C.A.2d 430, 432, 82 P.2d 704; *Van Haaren v. Whitmore* (1934) 2 C.A.2d 632, 635, 38 P.2d 829; *Firestone v. Wahl* (1955) 133 C.A.2d 501, 504, 284 P.2d 499; 2 *Summary* (9th), *Agency and Employment*, §146 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Cross-References:* 3 *Summary* (10th), *Agency and Employment*, §158; 4 *Summary* (10th), *Negotiable Instruments*, §39 et seq.; 3 *Summary* (10th), *Agency and Employment*, §197 et seq. *West's Key Number Digest*, Evidence k.424





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## CHAPTER VIII - Documentary Evidence

## V. PAROL EVIDENCE RULE

## D. Contract Between Party and Stranger.

## 1. Rule Under Former Statute.

2 *Witkin Cal. Evid. Doc Evid* § 111

[§ 111] Rule Under Former Statute.

*C.C.P. 1856* formerly contained this introductory phrase: "between the parties and their representatives, or successors in interest." Pursuant to this statutory limitation, the parol evidence rule was held inapplicable in an action between one party to the contract and a stranger, and both were permitted to introduce evidence contradicting the terms of the writing. (See *Luckie v. Diamond Coal Co.* (1919) 41 C.A. 468, 478, 183 P. 178; *Spraul v. Garliepp & Mack* (1934) 138 C.A. 491, 494, 32 P.2d 657; *Mayfield v. Fidelity & Cas. Co. of New York* (1936) 16 C.A.2d 611, 619, 61 P.2d 83; *Lynn v. Herman* (1946) 72 C.A.2d 614, 617, 165 P.2d 54; *Jegen v. Berger* (1946) 77 C.A.2d 1, 8, 174 P.2d 489; *Broder v. Epstein* (1950) 101 C.A.2d 197, 198, 225 P.2d 10; *Penberthy v. Vahl* (1950) 101 C.A.2d 1, 4, 224 P.2d 907; *Mason v. Rolando Lumber Co.* (1952) 111 C.A.2d 79, 82, 243 P.2d 814 [bill of lading, contract between shipper and carrier; defendant buyer could show true title to goods]; *Jackson v. Donovan* (1963) 215 C.A.2d 685, 690, 30 C.R. 755; *Kassianov v. Raissis* (1962) 200 C.A.2d 573, 575, 19 C.R. 614; 13 A.L.R.3d 313 [person not party to contract of release].)

The exception was applied in *Nichols v. Arthur Murray* (1967) 248 C.A.2d 610, 612, 56 C.R. 728, to establish liability of defendant corporation to third persons on contracts made by its local licensees. The contracts disclaimed any agency relationship, but extrinsic evidence was admissible to show control sufficient to support an inference of agency. (See also *Gordon v. D & G Escrow Corp.* (1975) 48 C.A.3d 616, 626, 122 C.R. 150, quoting the text [plaintiff was improperly prevented from explaining or interpreting circumstances under which he entered into stipulation with estranged wife on which property was separate property, when he claimed escrow company wrongly disposed of community property].)

The limitation was given as one reason for the inapplicability of the rule in a *criminal case*: The state, prosecuting for a crime committed in relation to a contract, is not a party to it and can show the true nature of the transaction. (*People v. Chait* (1945) 69 C.A.2d 503, 519, 159 P.2d 445.) Thus, in *People v. Frankfort* (1952) 114 C.A.2d 680, 700, 251 P.2d 401, a prosecution for obtaining money under false pretenses, defendant attempted to set up the exculpatory (merger) clause of the agreement between himself and the defrauded investors. This was properly held no defense. (See *People v. Bennett* (1953) 122 C.A.2d 244, 250, 264 P.2d 664; *People v. Nesseth* (1954) 127 C.A.2d 712, 716, 274 P.2d 479; *People v. Woolson* (1960) 181 C.A.2d 657, 668, 5 C.R. 766; 94 A.L.R.2d 570 [merger clause as precluding conviction for false pretenses based on earlier oral false representations].)

But a *successor in interest* has the same right as a party to invoke the parol evidence rule. Thus, plaintiff, a debtor-trustor, could not vary the terms of a note and deed of trust against defendants, who purchased at the trustee's sale and were therefore successors in interest of the trustee. (*Stafford v. Russell* (1953) 117 C.A.2d 326, 330, 255 P.2d

814.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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V. PAROL EVIDENCE RULE

D. Contract Between Party and Stranger.

2. Deletion of Statutory Language.

2 *Witkin Cal. Evid. Doc Evid* § 112

[§ 112] Deletion of Statutory Language.

This limitation on the operation of the rule (*supra*, §111) was criticized on principle. (See 9 Wigmore (Chadbourn Rev.) §2446; 3 Corbin §596.) And the Law Revision Commission's amendment of *C.C.P. 1856* deleted the quoted phrase. (See *supra*, §61).

The Commission Report does not comment on the omission. However, it would seem that the purpose of the deletion was to change the rule and thereby to preclude the introduction of evidence contradicting the terms of a writing even though the action is between a party to the contract and a stranger, and at least two courts have stated that this is so. (See *Kern County Water Agency v. Belridge Water Storage Dist.* (1993) 18 C.A.4th 77, 86, 22 C.R.2d 354, citing the text; *Neverkovec v. Fredericks* (1999) 74 C.A.4th 337, 350, footnote 8, 87 C.R.2d 856, 5 Summary (9th), *Torts, Supp.*, §59, citing the text [stating rule, but holding extrinsic evidence nevertheless was admissible under circumstances of case]; 10 *Pacific L. J.* 275.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*Neverkovec v. Fredericks*:

*Cross-Reference:* 5 Summary (10th), *Torts*, §73.



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CHAPTER IX - Witnesses

I. ATTENDANCE AND COMPENSATION

A. Who May Compel Attendance.

2 *Witkin Cal. Evid. Witnesses* § 1

[§ 1] Who May Compel Attendance.

(1) *Court or Judicial Officer.* A court has *inherent power* to compel the attendance of witnesses in an action or proceeding before it, and to punish as contempt the refusal to attend. (See generally *C.C.P. 128(a)(6)*; *Walker Mining Co. v. Industrial Acc. Com.* (1939) 35 C.A.2d 257, 262, 95 P.2d 188; *Burns v. Superior Court* (1903) 140 C. 1, 4, 73 P. 597; see also *Prob.C. 800* [power of probate court]; on penalty of contempt, see *infra*, §28 et seq., 2 *Cal. Evidence* (4th), *Discovery*, §260 et seq.; on practice, see C.E.B., 1 Civil Proc. During Trial 3d, Chap. 4; C.J.E.R., Judges Benchbook, Civil Proceedings: Trial §8.13 et seq.; 2 Wharton, Criminal Evidence (14th ed.), §459 et seq.)

The Code of Civil Procedure further provides that every *judicial officer* has the same power. (*C.C.P. 177(3)*.)

(2) *Administrative Agency.* By statute, many administrative bodies and officers have power to summon witnesses, but ordinarily not to punish for contempt. (See 1 *Cal. Evidence* (4th), *Introduction*, §73.)

(3) *Legislature.* The Legislature has power to summon witnesses and to punish for contempt. (*Govt.C. 9401* et seq.; see *In re Coon* (1941) 44 C.A.2d 531, 540, 112 P.2d 767 [prosecution under P.C. 87].)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Witnesses k.1



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CHAPTER IX - Witnesses

I. ATTENDANCE AND COMPENSATION

B. When Witnesses Must Attend.

1. Civil Cases.

a. Witness Residing in County.

2 *Witkin Cal. Evid. Witnesses* § 2

[§ 2] Witness Residing in County.

A witness who is served with a subpoena must attend at the time appointed and bring any papers under his or her control that are lawfully required by the subpoena. The witness must answer all pertinent and legal questions and, unless discharged sooner, must remain until the testimony is closed. (*C.C.P.* 2064.)

There is no territorial limitation on attendance of a resident witness. (See *C.C.P.* 1989.) Thus, the witness can be compelled to attend a proceeding *within the county of his or her residence* no matter how far away it is, and residence is a question of fact to be determined by the court. (See *Hall v. Superior Court* (1932) 124 C.A. 603, 605, 12 P.2d 1057 [here, however, contempt order annulled for failure of affidavit to allege place of residence].) (On attendance of law enforcement officers, see *infra*, §4; on attendance of other state employees, see *infra*, §5; on attendance of prisoners, see *infra*, §13.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Witnesses k.6



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## CHAPTER IX - Witnesses

### I. ATTENDANCE AND COMPENSATION

#### B. When Witnesses Must Attend.

##### 1. Civil Cases.

##### b. Witness Residing Outside County.

#### 2 *Witkin Cal. Evid. Witnesses* § 3

[§ 3] Witness Residing Outside County.

(1) *Abolition of Territorial Limitations.* *C.C.P. 1989* formerly provided that a witness was not obliged to attend out of the county of his or her residence unless the distance was less than a specified number of miles from that residence. The original distance of 30 miles (in 1872) was constantly increased, and a 1980 amendment made it 500 miles. But in 1981, the Legislature dropped the territorial limitation, and the section now simply states that the witness need not attend unless he or she "is a resident within the state at the time of service." Effective July 1, 1987, the statute was partially and impliedly repealed by *C.C.P. 2025* (see 2 *Cal. Evidence (4th), Discovery*, §41), which permits depositions of nonresidents in California. (*Glass v. Superior Court* (1988) 204 C.A.3d 1048, 1051, 1052, 251 C.R. 690.) (See generally C.E.B., 1 Civil Proc. During Trial 3d, §4.18.)

(2) *What Constitutes Place of Residence.* Residence under *C.C.P. 1989* is "residence in fact and not domicile"; the subpoena section "envisages nothing more than an abode, possibly combined with a professional base of operations, which gives the 'resident' a sojourning connection with the area of a type and duration related to the status of a witness and which makes it not a hardship for him to attend the legal proceedings at which he is commanded to appear." (*In re Morelli* (1970) 11 C.A.3d 819, 831, 91 C.R. 72.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Abolition of Territorial Limitations.* *C.C.P. 2025*, allowing depositions of nonresidents in California, was repealed and replaced by *C.C.P. 2025.010* et seq. in 2004 without substantive change. *West's Key Number Digest*, Witnesses k.6



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B. When Witnesses Must Attend.

1. Civil Cases.

c. Law Enforcement Officers.

2 *Witkin Cal. Evid. Witnesses* § 4

[§ 4] Law Enforcement Officers.

(1) *Statutory Listing.* *Govt.C. 68097* et seq. provide for attendance, compensation, and deposit of compensation for specified law enforcement officers, as well as for other state employees (see *infra*, §5), when called as witnesses. However, some of these provisions apply exclusively to law enforcement officers. (See C.E.B., 1 Civil Proc. During Trial 3d, §4.27.) The following law enforcement officers are covered (*Govt.C. 68097*):

- (a) Department of Justice peace officers or technical analysts.
- (b) Peace officers of the Department of the California Highway Patrol (including vehicle inspection specialists).
- (c) Peace officer members of the State Fire Marshal's Office.
- (d) Sheriffs and deputy sheriffs.
- (e) Marshals and deputy marshals.
- (f) District attorney inspectors.
- (g) Probation officers.
- (h) Building inspectors.
- (i) Firefighters (including volunteer firefighters).
- (j) City police officers.

(2) *Subject of Testimony.* The officer may be called "in connection with a matter regarding an event or transaction which he or she has perceived or investigated in the course of his or her duties." (*Govt.C. 68097.1(a).*)

(3) *Service of Subpoena.* The subpoena may be served either by delivering a copy to the officer personally, or by delivering two copies to his or her immediate superior or to an agent designated by the superior. (*Govt.C. 68097.1(a).*)

(4) *Deposit and Reimbursement.* The officer receives his normal salary and all reasonable traveling expenses from the public entity. (*Govt.C. 68097.2(a).*) These costs must be reimbursed in full by the summoning party. Prior to

issuance of the subpoena, the summoning party must deposit with the clerk the subpoena, together with a specified sum for each day the officer's attendance is required. (*Govt.C. 68097.2(b)*.) Depending on the amount of the actual expenses, the summoning party will be entitled to a refund or required to make additional payment. (*Govt.C. 68097.2(c), (d)*.)

However, a party may be relieved of the duty to make a deposit or payment "upon good cause shown, including the fact that the party is proceeding in forma pauperis." (*Govt.C. 68097.55*.) And the prepayment requirement is inapplicable where the governmental agency that employs the officer is itself a party in the proceeding. (*Fox v. State Personnel Bd. (1996) 49 C.A.4th 1034, 1041, 1042, 57 C.R.2d 279* [in disciplinary proceeding involving corrections department employee, department was itself a party and thus could not demand witness fees for correctional peace officers subpoenaed by employee; demand was also improper because *Govt.C. 68097.2* is conditioned on *Govt.C. 68097.1* and correctional peace officers are not listed in latter section].)

(5) *Return for Subsequent Proceedings.* A new deposit must be made before the officer can be ordered to return for subsequent proceedings beyond either the date stated in the subpoena or an alternative date agreed to by the party (see *Govt.C. 68097.9*). (*Govt.C. 68097.5*.) However, if the court continues a proceeding on its own motion, no additional witness fee may be required prior to issuance of a subpoena or making of an order directing the officer to appear on the new date. (*Govt.C. 68097.2(e)*.)

(6) *Depositions.* The above sections are also applicable to depositions of the officers. (*Govt.C. 68097.6*.)

(7) *Payment of Officer Prohibited.* It is a misdemeanor for a person to offer or pay, or for an officer to ask or receive, "any money or other form of consideration" in return for the officer's testimony. (*Govt.C. 68097.7*.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Witnesses k.4, 5-





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## CHAPTER IX - Witnesses

### I. ATTENDANCE AND COMPENSATION

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##### 1. Civil Cases.

##### d. Other State Employees.

2 *Witkin Cal. Evid. Witnesses* § 5

[§ 5] Other State Employees.

(1) *Statutory Listing.* *Govt.C. 68097* was amended in 1992 to add "other state employees" to the list of witnesses subject to the statute previously covering only the attendance and compensation of law enforcement officers. (See *Govt.C. 68097* et seq., supra, §4.) However, as discussed previously, some of the provisions were not amended and remain applicable only to law enforcement officers. (See *Govt.C. 68097.5, 68097.55, 68097.6, 68097.7, 68097.9*; supra, §4.)

(2) *Subject of Testimony.* The employee may be called "in connection with a matter, event, or transaction concerning which he or she has expertise gained in the course of his or her duties." (*Govt.C. 68097.1(b).*)

(3) *Service of Subpena.* The subpoena may be served either by delivering a copy to the employee personally, or by delivering two copies to his or her immediate superior or to an agent designated by the superior. (*Govt.C. 68097.1(b).*)

(4) *Deposit and Reimbursement.* The employee receives his or her normal salary and all reasonable traveling expenses from the public entity, which is reimbursed in full by the summoning party. A specified sum, together with the subpoena, must be tendered to the person accepting the subpoena for each day that the employee is required by the subpoena to remain in attendance. Depending on the amount of the actual expenses, the summoning party will be entitled to a refund or required to make additional payment. (*Govt.C. 68097.2.*)

(5) *Continuance.* If the court continues a proceeding on its own motion, no additional witness fee may be required prior to issuing a subpoena or making an order directing the employee to appear on the new date. (*Govt.C. 68097.2(e).*)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Statutory Listing.* *Govt.C. 68097* was amended in 2003 to add trial court employees to the statutory list.



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I. ATTENDANCE AND COMPENSATION

B. When Witnesses Must Attend.

2. Criminal Cases.

a. Defendant's Constitutional Right.

2 *Witkin Cal. Evid. Witnesses* § 6

[§ 6] Defendant's Constitutional Right.

The defendant has the right to the process of the court to compel the attendance of witnesses on his or her behalf. (Cal. Const., Art. I, §15; P.C. 686(3); see *In re Finn* (1960) 54 C.2d 807, 813, 8 C.R. 741, 356 P.2d 685; *People v. Brinson* (1961) 191 C.A.2d 253, 258, 12 C.R. 625.) (On compulsory process as element of constitutional due process, see *Washington v. Texas* (1967) 388 U.S. 14, 87 S.Ct. 1920, 1925, 18 L.Ed.2d 1019, 1025, 3 Cal. Evidence (4th), *Presentation at Trial*, §5, and *United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 102 S.Ct. 3440, 3446, 73 L.Ed.2d 1193, 1202, 3 Cal. Evidence (4th), *Presentation at Trial*, §5; on constitutionality of affidavit of belief in support of subpoena requesting attendance, see *infra*, §7.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Witnesses k.2(1)



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#### B. When Witnesses Must Attend.

##### 2. Criminal Cases.

#### b. Territorial Limitations on Compulsory Attendance.

*2 Witkin Cal. Evid. Witnesses § 7*

[§ 7] Territorial Limitations on Compulsory Attendance.

(1) *Statutory Rule.* A person may not be compelled to appear before a court located out of the county where he or she resides or is served, unless the distance from the place of residence to the place of trial is less than 150 miles. But on affidavit of the prosecutor or defendant stating a belief that the evidence is material and attendance is necessary, the judge must endorse on the subpoena an order for attendance. The limitations on attendance are inapplicable to a subpoena duces tecum that does not require the witness' personal attendance. (P.C. 1330.)

(2) *Constitutionality of Affidavit of Belief.* The statute's requirement of an affidavit of belief in materiality of the evidence as a condition to the judge's endorsement on the subpoena was upheld against constitutional attack in *Lucas v. Superior Court* (1988) 203 C.A.3d 733, 250 C.R. 76.

(a) Petitioner contended that, because witnesses in civil cases may be compelled to attend anywhere in the state without a showing of materiality (C.C.P. 1989, supra, §§2, 3), P.C. 1330 denies equal protection of the law to criminal defendants. The statute, however, does not distinguish between criminal and civil litigants, but between civil and criminal witnesses; and the difference in treatment is rationally based:

"Civil witnesses are entitled to demand mileage and a one-day fee be paid in advance and may not be compelled to attend (except for certain government employees), unless those costs are paid by the party requesting the subpoena. The witness has no such protection in criminal cases. Further, although witnesses who testify in civil cases are entitled to mileage and fees, those who are improvidently subpoenaed in criminal cases may be denied fees altogether in the discretion of the court, and those whose testimony is not material or who appear and are not permitted to testify may not be paid. ... Thus witnesses in criminal cases face potential economic hardships not confronting civil witnesses if their testimony is deemed immaterial, while being forced under court compulsion to attend the trial without any preliminary ascertainment of materiality. Witnesses in civil cases need not attend court if their demand for advance fees and mileage is not met and, whether they testify or not, merely appearing and presenting the subpoena to the court clerk entitles them to daily fees and return mileage. We believe it significant also that witness fees and mileage in civil cases are direct costs to the litigant, a value factor to be weighed in determining whether the benefit of subpoenaed witnesses' testimony justifies the economics in producing them. No such restraining factor is inherent in the subpoenaing of criminal witnesses who, if paid at all, derive their stipend from the county treasury, a fisc a trial court may be inclined to protect when exercising its discretion to award fees to persons improvidently subpoenaed." (203 C.A.3d 739.)

(b) The endorsement requirement also serves the necessary purpose of preventing abuse of the process of the court

by screening out witnesses who can offer only immaterial and cumulative testimony. (203 C.A.3d 740.) And "[t]here cannot be a denial of due process by preventing the compulsory attendance of witnesses who cannot supply material evidence because they can contribute nothing of evidentiary value." (203 C.A.3d 741.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Witnesses k.6



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#### B. When Witnesses Must Attend.

##### 2. Criminal Cases.

##### c. Undertaking To Appear.

2 Witkin Cal. Evid. Witnesses § 8

[§ 8] Undertaking To Appear.

A court may require a *material witness* for the prosecution or defense to enter into a written undertaking to appear whenever the court finds that the witness would not appear and testify unless security is required. Refusal to comply with such an order may result in the witness being taken into custody until he complies or is legally discharged. An undertaking is forfeited on the witness' failure to appear in the same manner as undertakings of bail. (P.C. 1332.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*In re Francisco M.* (2001) 86 C.A.4th 1061, 103 C.R.2d 794, involved two minors who had been detained under P.C. 1332 for approximately 10 weeks as material witnesses in a murder prosecution. The minors petitioned for habeas corpus. *Held*, petitions denied insofar as they seek the minors' immediate release.

(a) *Constitutionality of Statute.* Cal. Const., Art. I, §10, provides that a witness may not be unreasonably detained. P.C. 1332 does not, on its face, violate this provision. The Government's authority to arrest and imprison material witnesses was a long-established feature of English law at the time the United States became a nation, and material witness statutes similar to California's are common among the states. The United States Supreme Court has accepted their validity under the federal *Constitution*. (86 C.A.4th 1071, citing *Hurtado v. United States* (1973) 410 U.S. 578, 93 S.Ct. 1157, 35 L.Ed.2d 508, text, §17.) "Since section 1332 may be applied fairly, with adequate procedural safeguards, we see no reason to declare the statute unconstitutional on its face." (86 C.A.4th 1072.)

(b) *Explicit Refusal To Appear Not Required.* On a proper showing under oath that the witness will not appear unless security is required, P.C. 1332 empowers the court to: (1) require the witness to submit a written undertaking in which the witness promises to appear and testify, and further promises to forfeit the required security should the witness fail to appear; (2) set a reasonable bail amount as the required security; and (3) detain the witness if he or she refuses to enter such an undertaking. The witness' refusal to comply with an order to enter the undertaking need not follow a formal, on-the-record inquiry from the court. When a person is remanded to custody in lieu of bail, that person is implicitly ordered--if he or she wishes to be released--to submit a written undertaking containing a promise to appear or to forfeit the bail amount that must be posted. The witness' refusal to enter the undertaking, for whatever reason, is implicit from the failure to post bail. (86 C.A.4th 1073.)

(c) *Initial Hearing.* Nevertheless, the right of witnesses not to be "unreasonably detained" requires procedural safeguards allowing their interests to be heard in conjunction with those of the state. The statute clearly contemplates an initial hearing at which the witness is entitled to notice of the basis on which his or her detention is sought. At this

hearing the witness should have counsel, either retained or appointed. Further, the witness is entitled to controvert the allegations seeking his or her detention, and to be heard on all relevant issues, including whether the witness will agree to return if released and whether other alternatives to incarceration in lieu of security are feasible and adequate. "We do not mean to imply that the hearing must take on the formal aspects of a trial, with the calling of witnesses and full cross-examination. The trial court retains discretion to limit the form and manner of proof as appropriate to the individual case." (86 C.A.4th 1076.)

(d) *Factors Providing Foundation for Exercise of Discretion.* In determining whether to order the witness to enter a written undertaking to the effect that he or she will appear and testify or forfeit an amount the court deems proper (P.C. 1332(a)), some or all of the following circumstances are appropriate for consideration: (1) the nature of the charges in the underlying prosecution; (2) the nature of the witness' proposed testimony and its importance; (3) the length of the proposed detention; (4) evidence relevant to whether the witness will or will not appear and testify, including testimony of the witness; (5) the age and maturity of the witness; (6) the harm to the witness and his or her family flowing from incarceration; (7) the witness' financial resources; (8) the circumstances of any continuance of the underlying prosecution that will prolong the incarceration; and (9) whether steps short of incarceration, possibly including a conditional examination under P.C. 1335 and 1336 (see 5 Cal. Crim. Law (3d), *Criminal Trial*, §66), are feasible and adequate to protect the interests of all parties. (86 C.A.4th 1076, 1077, 1078.) "While not exclusive, the foregoing factors provide a foundation for the court's exercise of discretion in determining whether to require the witness to post security to secure his attendance at trial, and if so, the amount of security to be required." (86 C.A.4th 1079.)

(e) *Periodic Reviews.* The statute also provides for a 2-day and a 10-day review. At these reviews, the court should consider any relevant change in circumstances in determining whether to continue the detention, including whether the witness credibly has changed his or her attitude toward appearing at trial, or toward accepting a lesser, feasible alternative to custody. Further, P.C. 1332(d) must be construed to provide a review every 10 days. (86 C.A.4th 1079.)

(f) *Remand Required in This Case.* A review of the entire record in this case indicates that the immediate release of the minors is not warranted. Nevertheless, on remand, the minors should be given the benefit of the procedures and considerations set forth in this opinion. "The appellate court is not the proper forum to resolve all the various factors that must inform the decision whether to continue to detain petitioners in lieu of bail, or whether to reduce or eliminate the requirement of posting bail altogether." (86 C.A.4th 1079.) (See *In re D.W.* (2004) 123 C.A.4th 491, 499, 20 C.R.3d 274 [woman who was ordered incarcerated as uncooperative material witness was illegally deprived of her liberty, where she was denied counsel and proper hearings required by P.C. 1332].)



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## CHAPTER IX - Witnesses

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##### 2. Criminal Cases.

##### d. Out-of-State Witnesses: Uniform Act.

##### 1. Nature of Act.

#### 2 *Witkin Cal. Evid. Witnesses* § 9

#### [§ 9] Nature of Act.

Under the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Cases (P.C. 1334 et seq.; 11 U.L.A. (Master Ed.), p. 1), if a judge of a court of record in this state issues a certificate, a judge in a foreign state will order a material witness to attend a criminal trial. (P.C. 1334.3.) The statute, while doubtless intended chiefly for the use of prosecuting officials, seems clearly available to the defendant as well. (See generally 11 U.L.A. (Master Ed.), p. 2 et seq.; *People v. Cavanaugh* (1968) 69 C.2d 262, 70 C.R. 438, 444 P.2d 110, infra, §11; *Vannier v. Superior Court* (1982) 32 C.3d 163, 169, 171, 185 C.R. 427, 650 P.2d 302, infra, §10 [Act does not violate California Constitution; "the inalienable rights protected by article I, section 1 do not include a right to refuse to be a witness in judicial proceedings within the state"]; *People v. O'Neill* (1959) 359 U.S. 1, 79 S.Ct. 564, 567, 3 L.Ed.2d 585, 587 [Act is constitutional]; *People v. Superior Court (Jans)* (1990) 224 C.A.3d 1405, 1411, 274 C.R. 586 [Act covers the Navajo Nation]; 46 Cal. L. Rev. 625 [*People v. O'Neill*]; 81 Am.Jur.2d (1992 ed.), *Witnesses* §34 et seq.; 44 A.L.R.2d 732 [Uniform Act generally]; 7 A.L.R.4th 836 [availability of subpoena duces tecum under Uniform Act].) (On sufficiency of evidence to support or require finding that out-of-state witness is "material" witness, justifying certificate to secure attendance, see 12 A.L.R.4th 742; on sufficiency of evidence to support or require finding that witness is "material and necessary," justifying issuance of summons directing attendance, see 12 A.L.R.4th 771.)

Indigent defendants are entitled to obtain material witnesses at public expense. (*People v. Cavanaugh, supra*, 69 C.2d 269.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 81 Am.Jur.2d (2004 ed.), *Witnesses* §34 et seq. *Correction:* Page 269, line 13 of section, "*People v. O'Neill*" should be "*New York v. O'Neill*". *West's Key Number Digest*, *Witnesses* k.6



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2. Certificate as Prima Facie Evidence.

2 *Witkin Cal. Evid. Witnesses* § 10

[§ 10] Certificate as Prima Facie Evidence.

In *Vannier v. Superior Court* (1982) 32 C.3d 163, 185 C.R. 427, 650 P.2d 302, petitioners challenged certificates issued in Florida to require their appearance before a county grand jury, as material and necessary witnesses. *Held*, the certificates were valid.

(a) Although the affidavit on which they were based did not indicate the testimony expected, to require such a showing would greatly impair the applicability of the Uniform Act. Florida officials, unaware of the testimony to be obtained, are not in a position to show that they cannot secure similar testimony from other sources. (32 C.3d 173.)

(b) The claim of petitioners that the affidavit was a product of illegal electronic surveillance can and should be raised in the requesting state, where it is far more likely to have occurred; a hearing in the rendering state would often require transportation of witnesses, delaying and rendering ineffective the *Uniform Act*. (32 C.3d 176, 177.)

**SUPPLEMENT:** [This section is current through the latest supplement]





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##### d. Out-of-State Witnesses: Uniform Act.

##### 3. Limitation of Cumulative Evidence.

2 Witkin Cal. Evid. Witnesses § 11

[§ 11] Limitation of Cumulative Evidence.

In *People v. Cavanaugh* (1968) 69 C.2d 262, 70 C.R. 438, 444 P.2d 110, defendant, charged with armed robbery, sought to have 11 alibi witnesses brought from Massachusetts to testify that he was there at the time of the charged offense. His affidavit was vague as to the proposed testimony of some and silent as to the remainder. The trial judge allowed his counsel to take depositions of all on written interrogatories, with the public defender of Boston as commissioner. Seven gave answers, defendant moved that four be brought here, but the judge thought there was considerable overlapping, and allowed only two. At the trial, these two testified, defendant was permitted to read the interrogatories of the absent ones, and the judge fully explained the circumstances to the jury and instructed them not to discount deposition testimony. *Held*, there was no abuse of discretion.

(a) The constitutional right to compulsory process runs only to persons who can be compelled, i.e., persons within the jurisdiction. (69 C.2d 265.)

(b) Under the Uniform Act to Secure the Attendance of Witnesses, the judge of the requesting state must first determine that a proposed witness would be *material*, and then the judge *may* demand; i.e., even bringing a material witness is within the judge's sound discretion. (69 C.2d 262.)

(c) Here, the factor of cost, out of proportion to the benefit of the cumulative testimony, was not given undue weight. Even a wealthy defendant, who might be able to pay for an out-of-state witness' transportation, cannot compel the witness to come; discretion must still be exercised by the judge. And, even if witnesses are willing to come, their testimony may be excluded under the general power to limit cumulative evidence (see 3 Cal. Evidence (4th), *Presentation at Trial*, §67). (69 C.2d 269.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### 4. No Attorneys' Fees for Successful Resistance.

### 2 Witkin Cal. Evid. Witnesses § 12

[§ 12] No Attorneys' Fees for Successful Resistance.

In *M.C.A. v. California* (1982) 128 C.A.3d 225, 181 C.R. 404, an order under P.C. 1334.2 compelling plaintiff to appear before a Florida grand jury was reversed on appeal, with costs to plaintiff. On remand, he made a motion for reimbursement by the state for all expenses and attorneys' fees incurred at both the trial and appellate levels. *Held*, the motion was properly denied. The Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Cases contains no provision for an award of attorneys' fees, and *C.C.P. 1987.2*, a civil discovery statute (see 2 *Cal. Evidence* (4th), *Discovery*, §226), cannot be applied to proceedings under the Act, for a number of reasons:

(a) *C.C.P. 1987.2* authorizes an award against a party litigant who seeks a subpoena without adequate justification; California did not seek to subpoena plaintiff, but merely processed Florida's request. (128 C.A.3d 228.)

(b) The Act mandated the court receiving the certificate to direct the witness to appear at a hearing, and the court merely performed its statutory duty. (128 C.A.3d 228, 229.)

(c) Proceedings under the Act require a hearing before issuance of the subpoena, and a reluctant witness necessarily incurs expenses in resisting its issuance; this inevitable cost reflects the nature of the proceeding, not a court's bad faith. (128 C.A.3d 229.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### B. When Witnesses Must Attend.

##### 3. Prisoners.

2 Witkin Cal. Evid. Witnesses § 13

[§ 13] Prisoners.

In either civil or criminal proceedings, procedures are available to bring in witnesses who are confined in state prison or a county jail. (On appearance of federal prisoners, see *Barber v. Page* (1968) 390 U.S. 719, 88 S.Ct. 1318, 1321, 20 L.Ed.2d 255, 259, 1 Cal. Evidence (4th), Hearsay, §28.)

(1) *Live Testimony or Deposition.* In civil proceedings, the witness may be produced if in the county jail; otherwise his deposition must be taken. (C.C.P. 1995 et seq.; see P.C. 1567 [form of order to bring prisoner before court]; C.E.B., 1 Civil Proc. During Trial 3d, §4.32; on right of indigent prisoner defendant in civil case to appearance by appointed counsel, see *Payne v. Superior Court* (1976) 17 C.3d 908, 132 C.R. 405, 553 P.2d 565, 1 Cal. Proc. (4th), Attorneys, §75.)

In criminal proceedings, if the court does not order personal attendance of the prisoner witness, his or her deposition may be taken. (P.C. 2620 et seq.; see P.C. 1567, supra.)

(2) *Electronic Audiovisual Testimony.* In a preliminary hearing or a criminal or civil trial, the court may order an incarcerated witness to testify by way of two-way electronic audiovisual communication. However, this procedure may be used in criminal trials only with the consent of both parties expressed in open court and on waiver of the defendant's right to compel the witness' physical presence. The waiver may be rescinded on a showing of good cause. No inducement may be given, or penalty imposed, in connection with the defendant's consent to this procedure. (P.C. 2624.)

(4) *Writ of Habeas Corpus Ad Testificandum Superseded.* The statutory procedures above cover the field, superseding the common law writ of habeas corpus ad testificandum. (*In re Bagwell* (1938) 26 C.A.2d 418, 79 P.2d 395.) In the foregoing case, petitioner, an inmate of the state prison, filed a civil suit and sought the common law writ to enable him to appear and testify in his action. *Held*, the writ did not lie, and he was not entitled to relief under the statutes. The court pointed out that, under C.C.P. 1997, the attendance of a prisoner in the county jail may be required; but, here, he was in the state prison, and personal production was in the court's discretion. (26 C.A.2d 419.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER IX - Witnesses

### I. ATTENDANCE AND COMPENSATION

#### C. Protection Against Reprisal.

2 Witkin Cal. Evid. Witnesses § 14

#### [§ 14] Protection Against Reprisal.

The duty of a person properly served to testify (*supra*, §2), and the rule that privileges to refuse are strictly limited to those set forth in express statutes (*infra*, §60), necessarily imply that the witness who performs his duty will receive adequate legal protection. The principal safeguards are as follows:

(1) *Testimonial Privilege*. Testimony is absolutely privileged and cannot be the basis of a tort action for defamation. (See 8 Wigmore (McNaughton Rev.) §§2192, 2195f; 5 *Summary* (9th), *Torts*, §504 et seq.; see also *Briscoe v. LaHue* (1983) 460 U.S. 325, 103 S.Ct. 1108, 75 L.Ed.2d 96, 5 *Summary* (9th), *Torts*, §321 [convicted person may not recover damages under federal Civil Rights Act from police officer witness who allegedly gave perjured testimony at criminal trial].)

A similar protection against improper reprisals was discussed in *Bernstein v. Alameda-Contra Costa Med. Assn.* (1956) 139 C.A.2d 241, 293 P.2d 862. Petitioner was expelled from a county medical association for violation of the American Medical Association Principles of Medical Ethics. One charge was based on a disparaging statement about another physician made by petitioner in a medical report for use in an Industrial Accident Commission proceeding. *Held*, the same policy which gives an absolute privilege for such evidence against a defamation suit "should ban a medical association by-law which holds over each of the members the threat of expulsion if in his testimony (oral or written) before a court or other judicial body he 'disparages, by comment or insinuation,' another physician. ... It is inconceivable that the law could tolerate the holding of such a sword of Damocles over any medical witness in any judicial proceeding." (139 C.A.2d 246.) The court declared that the Canon should be construed as inapplicable to witnesses, observing, "We are loath to read into the Principles of Medical Ethics an intent upon the part of the American Medical Association to interfere with the judicial process." (139 C.A.2d 247.) (See 77 *Harv. L. Rev.* 339.)

(2) *Criminal Penalties and Sanctions*. Both the federal Victim and Witness Protection Act of 1982 (18 U.S.C., §1512 et seq.) and California law (P.C. 136 et seq.; see generally 2 *Cal. Crim. Law* (3d), *Crimes Against Governmental Authority*, §5 et seq.) provide criminal penalties and other sanctions to prevent intimidation of witnesses.

(3) *Witness Protection Programs*. In an official proceeding concerning an organized crime or other serious offense, the federal Witness Security Reform Act of 1984 (18 U.S.C., §3521 et seq.) authorizes the Attorney General to provide for *relocation* or other measures to protect government witnesses against crimes of violence or obstruction of justice. (18 U.S.C., §3521(a)(1).) However, no protection is authorized if the risk of danger to the public outweighs the need for the witness' testimony. (18 U.S.C., §3521(c).) (See 36 *Stanf. L. Rev.* 1017.)

The protective measures that may be taken include furnishing documents to enable the witness to establish a new

identity; providing the witness with housing, transportation for his or her property, and money for basic living expenses; and assisting the witness in obtaining employment. (*18 U.S.C.*, §3521(b)(1).)

California's Witness Protection Act (P.C. 14020 et seq.), enacted in 1997, also provides for the protection and relocation of a witness in a criminal proceeding where credible evidence establishes that there is a substantial danger that the witness may suffer intimidation or retaliatory violence. (See *2 Cal. Crim. Law (3d)*, *Crimes Against Governmental Authority*, §5.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Testimonial Privilege*.

*Cross-Reference:* 5 *Summary* (10th), *Torts*, §561 et seq.

*Briscoe v. LaHue:*

*Cross-Reference:* 5 *Summary* (10th), *Torts*, §184.(2) *Criminal Penalties and Sanctions*. See 185 A.L.R. Fed 1 [construction and application of witness tampering provision of *18 U.S.C.*, §1512].



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## CHAPTER IX - Witnesses

### I. ATTENDANCE AND COMPENSATION

#### D. Compensation of Ordinary Witnesses.

##### 1. In General.

#### 2 Witkin Cal. Evid. Witnesses § 15

[§ 15] In General.

(1) *Right Dependent on Statute.* It is within the state's power to compel witnesses to attend without compensation; thus, the right to compensation is limited by statute. (See *Govt.C. 204*; *Naylor v. Adams* (1911) 15 C.A. 353, 356, 114 P. 997; *Fabricant v. Superior Court* (1980) 104 C.A.3d 905, 908, 163 C.R. 894 [special fees cannot be awarded to attorney witnesses either as witness fees or as sanctions under the inherent powers of the court]; C.J.E.R., Judges Benchbook, Civil Proceedings: Trial §8.19.) Conversely, where the statute gives compensation, the court cannot by a local practice deny it. (*Engel v. Ehret* (1913) 21 C.A. 112, 115, 130 P. 1197 [practice of San Francisco court to deny mileage to witnesses residing in San Francisco].) (On right of witness in custody, see 50 A.L.R.2d 1439; on witness in deposition proceeding, see C.C.P. 1986.5, 2 Cal. Evidence (4th), Discovery, §39.)

Unless he or she is a party or an expert witness, a public employee subpoenaed as a witness is entitled to a leave of absence with pay for the difference between the employee's regular earnings and the amount received for the appearance. (*Govt.C. 1230.1*.)

(2) *Witness Legally Required To Attend.* A witness is entitled to compensation only "when legally required to attend." (*Govt.C. 68093, 68096*.) But if the witness could have been compelled to attend, and attends at the mere request of the party, without subpoena, he or she is entitled to fees. If the opposing party, he or she suffers no injury by the absence of a subpoena; indeed, the opposing party benefits because his or her liability does not include the cost of serving the subpoena. (*Linforth v. San Francisco Gas & Elec. Co.* (1908) 9 C.A. 434, 437, 99 P. 716; see *Downey v. Gonzales* (1968) 262 C.A.2d 563, 569, 69 C.R. 34 [condemnation witness of defendants subpoenaed for 7 days; judge refused to subpoena him for 8th day, but he returned at request of defendants and testified; held that fee for that date also allowable as costs].)

In a civil case, the witness may demand payment of mileage and fees for 1 day in advance, and need not attend until it is paid. (*Govt.C. 68097*; see C.C.P. 1987 [demand may be made at time of service of subpoena].) (On allowance of fees as costs, see 7 Cal. Proc. (4th), Judgment, §128 et seq.; on fees as costs in eminent domain proceeding, see *Downey v. Gonzales*, *supra*.)

(3) *Reimbursement of Public Entity for Compensation of Public Employee Subpoenaed as Witness in Civil Proceeding.* A local agency employee is entitled to compensation if the employee is subpoenaed as a witness at a civil proceeding. The proceeding must involve a matter that the employee perceived or investigated in the course of his or her duties, and must be one in which the local agency is not a party. The employee is entitled to receive his or her normal compensation from the local agency while traveling to and from the proceeding and remaining in attendance,

plus reasonable traveling expenses. The party at whose request the subpoena was issued must reimburse the local agency for the employee's compensation. (*Govt.C. 68096.1.*)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Witness Legally Required To Attend.* *Govt.C. 68096*, regarding witness fees, was repealed in 2002. *West's Key Number Digest*, Witnesses k.24 et seq.



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## CHAPTER IX - Witnesses

### I. ATTENDANCE AND COMPENSATION

#### D. Compensation of Ordinary Witnesses.

#### 2. Statutory Fees and Mileage in Civil Cases.

#### 2 Witkin Cal. Evid. Witnesses § 16

[§ 16] Statutory Fees and Mileage in Civil Cases.

(1) *Fees*. A witness is entitled to a fee of \$ 35 per day regardless of whether the proceeding is in a superior or municipal court. (*Govt.C. 68093*; see *C.E.B.*, 1 Civil Proc. During Trial 3d, §4.41.)

(2) *Mileage*. Witnesses in superior and municipal court proceedings are entitled to mileage actually traveled, both ways, at 20 cents per mile. (*Govt.C. 68093*; see *C.E.B.*, 1 Civil Proc. During Trial 3d, §4.41.) Where a *continuance* is ordered, witnesses may properly be allowed mileage for attendance on both occasions. (*Richards v. Silveria* (1929) 97 C.A. 166, 177, 275 P. 478.)

The witness is entitled to mileage "for each day's actual attendance." (*Govt.C. 68093*.) If there are intervening days of nonattendance during which the witness remains at home, the witness may claim mileage for the new trip to court. In *People v. MacFarlane* (1945) 71 C.A.2d 535, 536, 162 P.2d 937, it was held that, under the plain language of the statute, a witness can also claim the allowance for mileage actually traveled (a relatively small sum, usually), *even where the attendance is on consecutive trial days*.

(3) *Notice of Right*. A witness subpoenaed in any civil or administrative action or proceeding must be given written notice on the subpoena that he may be entitled to receive fees and mileage. The notice must indicate generally the manner in which the request for these should be made. (*C.C.P. 2065*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Fees*. *Govt.C. 68093* was amended in 2002 to delete the reference to municipal courts.

(2) *Mileage*. *Govt.C. 68093* was amended in 2002 to delete the reference to municipal courts.





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### I. ATTENDANCE AND COMPENSATION

#### D. Compensation of Ordinary Witnesses.

##### 3. Fees and Mileage in Criminal Cases.

*2 Witkin Cal. Evid. Witnesses § 17*

[§ 17] Fees and Mileage in Criminal Cases.

(1) *Discretionary*. In criminal cases, fees and expenses are discretionary. (P.C. 1329; see *Govt.C. 72232* [in municipal court, payment must be made in the manner provided in the county or city and county in which the court is situated].)

(2) *Amount*. If the judge decides to award fees and expenses, the judge may (a) prescribe a fee of \$ 12 per day plus a reasonable sum for necessary expenses, or (b) make any allowance provided by *Govt.C. 68070* et seq., with the exception of *Govt.C. 68093* (see *supra*, §16). (P.C. 1329(a).)

The judge also has discretion to authorize payment to a witness who is employed and whose salary is not being paid by his employer during his absence as a witness, "a sum equal to his gross salary for such time," not to exceed \$ 18 per day. (P.C. 1329(b).) But a person compensated under P.C. 1329(b) may not receive the witness' fees provided for in P.C. 1329(a).

(3) *Notice on Subpena*. The subpoena must contain a notice that the witness may be entitled to receive fees and mileage and indicate the manner in which a request or claim should be made. (P.C. 1329.1.)

(4) *Out-of-State Witness*. When an out-of-state witness is subpoenaed under the Uniform Act (see *supra*, §9), the judge of the court in which the witness is ordered to appear must order payment of witness fees and reimbursement for additional reasonable and necessary expenses. (P.C. 1334.3(a).)

However, if the witness is an inmate in a penal facility, he or she must be furnished, in lieu of the statutory per diem tendered to other out-of-state witnesses, food and lodging at a penal facility in the county where he or she will be testifying. (P.C. 1334.3(b).)

(5) *Detained Material Witness*. The duty to disclose knowledge of crime justifies detention of innocent material witnesses, and statutory compensation may reasonably be kept at a minimum. (*Hurtado v. United States* (1973) 410 U.S. 578, 93 S.Ct. 1157, 1164, 35 L.Ed.2d 508, 518 ["The detention of a material witness, in short, is simply not a 'taking' under the Fifth Amendment, and the level of his compensation, therefore, does not, as such, present a constitutional question"].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Discretionary*. *Govt.C. 72232* was repealed in 2002 to reflect the unification of the municipal and superior courts. (See 2 *Cal. Proc. (4th), Courts, Supp.*, §169.)



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I. ATTENDANCE AND COMPENSATION

D. Compensation of Ordinary Witnesses.

4. Grand Jury, Coroner's Jury, and Juvenile Court.

*2 Witkin Cal. Evid. Witnesses § 18*

[§ 18] Grand Jury, Coroner's Jury, and Juvenile Court.

(1) *Grand Jury*. Witnesses before a grand jury may be compensated under either P.C. 1329 (\$ 12 per day and a reasonable sum for necessary expenses; see *supra*, §17), or *Govt.C. 68094* (\$ 12 per day and mileage actually traveled, one way only, at 20 cents per mile). (P.C. 1329(a).) Both statutes make payment discretionary.

(2) *Coroner's Jury*. The fees and mileage for witnesses before a coroner's jury are the same as those prescribed by *Govt.C. 68094* (see *supra*). However, payment is mandatory. (*Govt.C. 68095*.)

(3) *Juvenile Court*. A witness attending a juvenile court hearing on a subpoena issued to the probation officer, district attorney, minor, or parent, guardian, or custodian of the minor may be awarded fees in the discretion of the court, pursuant to *Govt.C. 68093*. (Welf.C. 664; see *supra*, §16.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### D. Compensation of Ordinary Witnesses.

##### 5. Payment of Extra Compensation.

2 Witkin Cal. Evid. Witnesses § 19

[§ 19] Payment of Extra Compensation.

A contract to pay witness fees *contingent* on the outcome of the suit is void for illegality. (*Pelkey v. Hodge* (1931) 112 C.A. 424, 425, 296 P. 908; *Von Kesler v. Baker* (1933) 131 C.A. 654, 657, 21 P.2d 1017; *Van Norden v. Metson* (1946) 75 C.A.2d 595, 599, 171 P.2d 485; see 57 A.L.R.4th 643 [contingent-fee informant testimony in state prosecutions]; 1 Summary (9th), Contracts, §611.)

There is no illegality in an agreement merely to pay *larger sums* than the compensation fixed by the statute. But such payments have been strongly condemned as offering a temptation to color testimony. In *Crutchfield v. Davidson Brick Co.* (1942) 55 C.A.2d 34, 37, 130 P.2d 183, the court said:

"The practice of paying witnesses sums greater than the statutory fees on the theory that they are being compensated for their time or that they are being prevented from suffering financial loss is not to be commended. A deep knowledge of human nature is not necessary in order to draw the conclusion that a witness liberally compensated for his time by the party serving him with a subpoena will be apt to color his testimony, or at least to present it in the light most favorable to the party who compensated him. Witnesses who learn of the practice of paying extra compensation are confronted with the temptation to make terms for their testimony. In such a situation there is opportunity for oppressive and corrupt conduct. ... The practice under consideration has been growing in late years and it is now common knowledge that litigants having considerable business in the courts customarily 'take good care of their witnesses.' Numerous instances have occurred in the trial courts where public employees subpoenaed to disclose information gained in the discharge of their duties have received extra-legal fees for attendance in court, notwithstanding their salaries were being paid in full from the public treasury. If testimony by witnesses who have received extra-legal compensation is to be received, liberal cross-examination should be permitted by the trial court on the subject of the compensation to enable the jury to better pass upon their credibility." (55 C.A.2d 37.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*Cross-Reference:* 1 Summary (10th), Contracts, §636.



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## CHAPTER IX - Witnesses

### I. ATTENDANCE AND COMPENSATION

#### E. Compensation of In-Custody Informants.

#### *2 Witkin Cal. Evid. Witnesses § 20*

[§ 20] Compensation of In-Custody Informants.

P.C. 1127a and 4001.1 provide for compensation of "in-custody informant" witnesses. (See *21 Pacific L. J.* 421.)

(1) *"In-Custody Informant."* The term is defined as "a person, other than a codefendant, percipient witness, accomplice, or coconspirator whose testimony is based upon statements made by the defendant while both the defendant and the informant are held within a correctional institution." (P.C. 1127a(a); see P.C. 4001.1(c) [adopting definition].)

(2) *Limited Permitted Compensation.* Law enforcement and correctional officials may not give, offer, or promise an in-custody informant monetary payment in excess of \$ 50 in return for testimony in a criminal proceeding. However, not prohibited are "payments incidental to the informant's testimony such as expenses incurred for witness or immediate family relocation, lodging, housing, meals, phone calls, travel, or witness fees authorized by law, provided those payments are supported by appropriate documentation demonstrating that the money was used for the purposes for which it was given." (P.C. 4001.1(a).)

(3) *Statement of Consideration.* When the prosecution calls an in-custody informant as a witness in a criminal trial, it must contemporaneously "file with the court a written statement setting out any and all consideration promised to, or received by, the in-custody informant." (P.C. 1127a(c).) "Consideration" is defined as "any plea bargain, bail consideration, reduction or modification of sentence, or any other leniency, benefit, immunity, financial assistance, reward, or amelioration of current or future conditions of incarceration in return for, or in connection with, the informant's testimony in the criminal proceeding in which the prosecutor intends to call him or her as a witness." (P.C. 1127a(d).) (For mandatory cautionary instruction on request, see *3 Cal. Evidence (4th), Presentation at Trial, §109.*)

**SUPPLEMENT:** [This section is current through the latest supplement]



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### I. ATTENDANCE AND COMPENSATION

#### F. Attendance and Compensation of Experts.

1. Right to Reasonable and Customary Compensation.
  - a. Former Rule Denying Extra Compensation.

2 Witkin Cal. Evid. Witnesses § 21

[§ 21] Former Rule Denying Extra Compensation.

It was formerly the California rule that an expert who had knowledge of particular facts or who had already formed particular opinions could be called as a witness and questioned as to those facts or opinions with the same statutory compensation as an ordinary witness. (See *McClenahan v. Keyes* (1922) 188 C. 574, 583, 584, 206 P. 454 ["in the absence of an express contract to pay a physician for his testimony as an expert, he is only entitled to the statutory fee"]; *San Francisco v. Superior Court* (1951) 37 C.2d 227, 234, 231 P.2d 26; *People v. Barnes* (1931) 111 C.A. 605, 609, 295 P. 1045.)

The duty did not, of course, extend to *preparation* for expert testimony on a particular matter, by investigation, examination, or tests. (See *People v. Conte* (1912) 17 C.A. 771, 783, 122 P. 450; *People v. Barnes, supra*; 5 *Hastings L. J.* 51.) And *Ev.C.* 730 provides for compensation of *court-appointed experts* in an amount determined by the judge. (See 1 *Cal. Evidence (4th)*, *Opinion Evidence*, §83.)

The rule denying extra compensation was abrogated in 1968 by the enactment of *Govt.C.* 68092.5. (See *infra*, §§22, 23.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### F. Attendance and Compensation of Experts.

1. Right to Reasonable and Customary Compensation.
  - b. Abrogation of Rule.

#### 2 Witkin Cal. Evid. Witnesses § 22

[§ 22] Abrogation of Rule.

(1) *Witness and Proceeding.* The expert witness fee statute applies to testimony "before any court, tribunal, or arbiter in any civil action or proceeding from any expert witness" (except a party or employee of a party) who is any of the following (*Govt.C. 68092.5(a)*):

(a) An expert described in *C.C.P. 2034(a)(2)*.

(b) A treating physician and surgeon or other treating health care practitioner who is to be asked to express an opinion.

(c) An architect, professional engineer, or licensed land surveyor who was connected with the original project design or survey for which he or she is asked to express an opinion that is both within his or her expertise and relevant to the action or proceeding.

The *deposition* of an expert witness is governed by *C.C.P. 2034* (see *2 Cal. Evidence (4th), Discovery, §188 et seq.*). (*Govt.C. 68092.5(f)*.)

(2) *Compensation.* The expert is entitled to a "reasonable and customary hourly or daily fee" for the actual time consumed by the expert's testimony. The hourly or daily fee may not exceed the fee charged the party who retained the expert, except where the expert donated his or her services to a charitable or other nonprofit organization. A daily fee may only be charged for a full day of attendance at a deposition or where the expert was required by the deposing party to be available for a full day and the expert necessarily had to forgo all business he or she would have otherwise conducted that day. The expert is additionally entitled to reimbursement for preparation and travel expenses. (*Govt.C. 68092.5(a)*.)

(3) *Procedure: Subpena and Tender of Fee.* The party requiring the expert's attendance must either (a) accompany service of the subpoena or notice with tender of the expert's anticipated fee; or (b) tender that fee at the required time of appearance. The fee must be delivered to the attorney for the party designating the expert. If the expert's appearance takes longer than anticipated, the party serving the subpoena or notice must pay the balance of the fee within 5 days after receiving an itemized statement from the expert. (*Govt.C. 68092.5(a)*.)

Service of a proper subpoena or notice and accompanying fee is effective to require the party employing or retaining

the expert to produce the expert. Unless the parties stipulate otherwise, the expert need not appear if the party serving the notice or subpoena fails to tender the required fee. (*Govt.C. 68092.5(b).*)

(4) *Compensation Where Fee Is Unreasonable.* If a party requiring the appearance of another party's expert deems that the expert's fee is unreasonable, the party may move for an order setting the expert's compensation. The motion must be accompanied by a declaration stating facts showing a reasonable, good faith attempt at an informal resolution. Notice must be given to the expert. (*Govt.C. 68092.5(c).*)

*Govt.C. 68092.5(c)* also specifies the information to be provided in an attempted informal resolution, and sets forth the information to be considered in determining whether the fee is reasonable.

(5) *Responsibility for Paying Fee.* The party *requiring* the expert testimony must pay the expert's hourly or daily fee. The party *designating* the expert is responsible for preparation and travel costs, unless otherwise determined by the court. (*Govt.C. 68092.5(a).*) The statute formerly stated that the fees were not allowable costs, but this language was eliminated in 1988.

(6) *Notification of Continuation or Cancellation.* When the proceeding that the expert was asked to attend has been continued or cancelled, the party who called the expert should notify him or her by the quickest and most reliable means available under the circumstances. If not notified, the expert is entitled to compensation even though he or she gives no testimony. (*Govt.C. 68092.5(d).*)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Witness and Proceeding.* *C.C.P. 2034*, on the deposition of expert witnesses, was repealed and replaced by *C.C.P. 2034.010* et seq. in 2004 without substantive change. The experts formerly described in *C.C.P. 2034(a)(2)* are now described in *C.C.P. 2034.210(b)*.

(2) *Compensation.* See 28 *Pepperdine L. Rev. 1* [proposals for guarding against biased testimony where expert witness is testifying in exchange for compensation]. *West's Key Number Digest*, Witnesses k.28(1)



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#### F. Attendance and Compensation of Experts.

##### 2. Right to Agreed Compensation.

*2 Witkin Cal. Evid. Witnesses § 23*

[§ 23] Right to Agreed Compensation.

(1) *Agreement To Compensate for Testimony Requiring Preparation.* Because the expert cannot be compelled to make a scientific investigation or to undertake other special duties in preparation for his or her testimony without special compensation (see *supra*, §22), expert witnesses are usually employed by the parties, appear voluntarily, and are compensated by private contract. Such a contract is of course valid unless the payment is based on the contingency of success. (See *Van Norden v. Metson (1946) 75 C.A.2d 595, 599, 171 P.2d 485* [invalid contingent agreement with civil engineer]; *64 So. Cal. L. Rev. 1363* [Contingent Expert Witness Fees: Access and Legitimacy]; 6 Corbin §1430; *supra*, §19.)

(2) *Agreement To Compensate for Ordinary Testimony.* Our former law was uncertain as to whether an agreement to pay special compensation for the ordinary testimony of an expert, requiring no preparation, was enforceable; some jurisdictions took the position that, because the expert could be compelled to testify for the statutory fee, he or she would be giving no consideration for a promise to pay an additional sum. (See *9 So. Cal. L. Rev. 61.*)

*Govt.C. 68092.5* (*supra*, §22) resolved the uncertainty as follows: An *express contract* relating to compensation between a person and the party requesting or requiring the person to testify is *enforceable* and *prevails* over the provisions of the statute. (*Govt.C. 68092.5(e).*)

Thus, the expert is now assured of an agreed compensation (*supra*) or reasonable and customary compensation (*supra*, §22) whenever he or she is required to give expert testimony.

**SUPPLEMENT:** [This section is current through the latest supplement]





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## CHAPTER IX - Witnesses

### I. ATTENDANCE AND COMPENSATION

#### G. Procedure.

##### 1. Subpena.

##### a. Nature and Form.

#### 2 Witkin Cal. Evid. Witnesses § 24

[§ 24] Nature and Form.

(1) *Nature of Process.* "The *process* by which the attendance of a witness is required is the *subpoena*. It is a *writ or order* directed to a person and requiring his attendance at a particular time and place to testify as a witness." (*C.C.P. 1985(a)*; see *C.C.P. 2064* [witness must attend]; *P.C. 1326 et seq.* [compelling witnesses in criminal proceedings]; *Linforth v. San Francisco Gas & Elec. Co. (1908) 9 C.A. 434, 99 P. 716; 81 Am.Jur.2d (1992 ed.), Witnesses §5; C.E.B., 1 Civil Proc. During Trial 3d, §4.6; C.J.E.R., Judges Benchbook, Civil Proceedings: Trial §8.14 et seq.*)

In a civil case, a subpoena to require attendance "before a court, or at the trial of an issue therein" is issued by the *clerk* of the court (or by the judge or justice if there is no clerk). Issuance is "*as of course*, upon the application of the party desiring it." (*C.C.P. 1986.*)

(2) *Form.* The following Judicial Council forms are mandatory:

(a) Civil Subpena for Personal Appearance at Trial or Hearing. (See Judicial Council Forms, Form No. 982(a)(15).) The form includes provisions expressly required by statute. (See *C.C.P. 1985.2* [advice to contact attorney requesting subpoena; see *10 Pacific L. J. 346*]; *C.C.P. 2065* [notice of entitlement to fees and mileage]; on mandatory Judicial Council forms for civil deposition subpoenas, see *2 Cal. Evidence (4th), Discovery, §220.*)

(b) Subpena (Criminal or Juvenile). (See Judicial Council Forms, Form No. 982(a)(16).) The form incorporates the substance of the one set out in *P.C. 1327*, and complies with *P.C. 1329.1*, requiring notice of entitlement to fees and mileage.

A different time of appearance from that specified in either subpoena may be agreed to by the party and the witness subpoenaed. (*C.C.P. 1985.1; P.C. 1331.5; see infra, §33.*)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Nature of Process.* *C.C.P. 1986* was amended in 2007 to delete as unnecessary language authorizing the judge or justice to issue a subpoena if there is no clerk. (See Law Revision Commission Comment on 2007 amendment of *C.C.P. 1986* [noting that *C.C.P. 167* authorizes judge to perform any act clerk may perform].)

See *81 Am.Jur.2d (2004 ed.), Witnesses §5.*

(2) *Form.*

(a) *Civil Subpena for Personal Appearance at Trial or Hearing:* Judicial Council Form No. 982(a)(15) has been renumbered Judicial Council Form No. SUBP-001.

(b) *Subpena (Criminal or Juvenile):* Judicial Council Form No. 982(a)(16) was revoked in 2006. *West's Key Number Digest*, Witnesses k.8 et seq.



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CHAPTER IX - Witnesses

I. ATTENDANCE AND COMPENSATION

G. Procedure.

1. Subpena.

b. Issuance.

2 *Witkin Cal. Evid. Witnesses* § 25

[§ 25] Issuance.

(1) *Issuance by Attorney in Civil Case.* Because a party is entitled to a subpoena as a matter of right, the customary practice of the clerk was to deliver blank forms, signed and sealed, to the attorney, who thereafter inserted the title of the case, the name of the witness and the date of the trial. (See *Prichard v. Southern Pac. Co.* (1935) 9 C.A.2d 704, 706, 51 P.2d 428.) This practice has been codified; the attorney of record may now sign and issue subpoenas for attendance at trial or deposition, or for production of the matters described in the subpoena. (C.C.P. 1985(c).)

(2) *Issuance in Criminal Case.* In a criminal case, the subpoena may be signed and issued by a magistrate, his clerk, the district attorney and public defender or their investigators, the clerk or judge of the trial court, or the defendant's attorney of record. The clerk must give the defendant as many *blank subpoenas* as the defendant requires. (P.C. 1326.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Issuance in Criminal Case.* On issuance of a subpoena commanding production of business records, see 5 *Cal. Crim. Law* (3d), *Criminal Trial*, Supp., §530.



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### I. ATTENDANCE AND COMPENSATION

#### G. Procedure.

##### 1. Subpena.

##### c. Service.

##### 1. In General.

#### 2 Witkin Cal. Evid. Witnesses § 26

[§ 26] In General.

(1) *Who May Serve*. In civil cases, *any person* may serve the subpena. (C.C.P. 1987(a).) In criminal cases, service may be made by any person except the defendant; but, on request, service *must* be made by a peace officer. (P.C. 1328(a).) Also, in criminal cases, a subpena may be sent by telegraph or teletype, and the officer with the telegraphic copy proceeds in the same manner as if the officer held the original subpena. (P.C. 1328a et seq.)

(2) *Method of Service: Civil Cases*. C.C.P. 1987(a) provides as follows (see C.E.B., 1 Civil Proc. During Trial 3d, §4.15 et seq.):

(a) *Adults*. Service on an adult is made "by delivering a copy, or a ticket containing its substance, to the witness personally."

(b) *Minors*. Service on a minor "shall be made on the minor's *parent, guardian, conservator, or similar fiduciary*, or if one of them cannot be located with reasonable diligence, then service shall be *made on any person having the care or control of the minor or with whom the minor resides or by whom the minor is employed, and on the minor if the minor is 12 years of age or older*."

This language is subject to two possible interpretations: (1) a minor 12 years old or older must *always* be served; or (2) a minor of that age need *not* be served when it is possible to locate and serve the minor's parent, guardian, conservator, or similar fiduciary. In the absence of an amendment or decision clarifying C.C.P. 1987(a), the safer course would be to serve the minor in all cases if he is at least 12 years old.

(3) *Method of Service: Criminal Cases*. P.C. 1328 provides as follows:

(a) *Adults*. Service on an adult is made "by delivering a copy ... to the witness personally." (P.C. 1328(a).)

(b) *Minors*. Service on a minor is accomplished in the same manner as provided under C.C.P. 1987(a), *supra*, but with these additional provisions: Service may not be made on a parent, guardian, conservator, fiduciary, or other specified person if he or she is the defendant. The court may appoint a guardian ad litem to receive service or to produce the child. A wilful failure to produce the minor at the time and place designated is punishable as contempt. And the person served is allowed the fees and expenses provided for subpoenaed witnesses. (P.C. 1328(b).)

(4) *Compensation of Witnesses*. At the time of service, the witness must be given or offered mileage and 1 day's fees, if demanded by him or her. (*C.C.P. 1987(a)*; *Govt.C. 68097*; see *supra*, §15 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Method of Service: Civil Cases*.

(b) *Minors*. *C.C.P. 1987(a)* was amended in 2002. In the portion of the subdivision quoted in the text, "them" was replaced by "those persons," and "then" was deleted. The amended subdivision further provides that if the minor is alleged to come within *Welf.C. 300, 601, or 602* (see 10 *Summary* (10th), *Parent and Child*, §§538, 729 et seq.), and the minor is not in the custody of a parent or guardian, then regardless of the minor's age, "service also shall be made upon the designated agent for service of process at the county child welfare department or the probation department under whose jurisdiction the minor has been placed." (3) *Method of Service: Criminal Cases*.

(b) *Minors*. *P.C. 1328(b)*, as amended in 2002, additionally provides that if the minor is alleged to come within *Welf.C. 300, 601, or 602*, and the minor is not residing with a parent or guardian, then regardless of the minor's age, "service also shall be made upon the designated agent for service of process at the county child welfare department or the probation department under whose jurisdiction the child has been placed."



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## CHAPTER IX - Witnesses

### I. ATTENDANCE AND COMPENSATION

#### G. Procedure.

##### 1. Subpena.

##### c. Service.

##### 2. Special Rules.

2 Witkin Cal. Evid. Witnesses § 27

[§ 27] Special Rules.

(1) *Witness Concealed*. If the witness is *concealed* in a building or vessel, any court or judge may, upon affidavit of such concealment and the materiality of the witness, *order the sheriff* to serve it, breaking in if necessary. (C.C.P. 1988; see *People v. Avila* (1967) 253 C.A.2d 308, 331, 61 C.R. 441 [failure of defendant to make application under statute precludes asserting error in witness not appearing].)

(2) *Service by Mail or Messenger*. This type of service is specifically authorized, and is complete when the witness acknowledges receipt of the subpoena by telephone or mail, or in person, and provides his or her date of birth and driver's license number or Department of Motor Vehicles identification card number. (P.C. 1328d.)

(3) *Service on Peace Officer's Superior*. P.C. 1328 provides as follows:

(a) When a peace officer is required as a witness, the subpoena may be served either on the officer or on his or her immediate superior (or agent designated by the superior). Two copies are served on the superior or agent, who delivers one copy to the peace officer "as soon as possible and in no event later than such time as will enable the peace officer to comply." In those counties where the local agencies have agreed with the marshal's office or sheriff's office to participate, the subpoena may be sent by electronic means to the peace officer's immediate superior, or to an agent designated by the superior to receive service. The superior or agent must acknowledge receipt of the subpoena "by telephone or electronic means to the sender of origin." (P.C. 1328(c).)

(b) If the superior or agent knows he or she will be unable to deliver the copy in time for compliance, the superior or agent may refuse to accept service, and notify the server; if service is tendered less than 5 working days prior to the hearing and the superior or agent is not reasonably certain he or she can complete the service, he or she may likewise refuse acceptance. (P.C. 1328(d), (e).)

(c) If the superior or agent accepts service but subsequently determines that he or she cannot deliver the copy in time for compliance, the superior or agent must notify the server not less than 48 hours prior to the hearing date. The server, so notified, is then responsible for preparing the written return of service and notifying the originator of the subpoena if required. (P.C. 1328(f).)

(d) Notwithstanding P.C. 1328(c) (*supra*), if service is made on the superior or agent of a peace officer employed by

the *California Highway Patrol*, the superior or agent must deliver a copy of the subpoena to the peace officer on the officer's first workday following acceptance of service of process. However, the failure of the superior or agent to deliver the subpoena does not constitute a defect in service. (P.C. 1328(g).)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER IX - Witnesses

### I. ATTENDANCE AND COMPENSATION

#### G. Procedure.

##### 1. Subpena.

#### d. Penalties for Failure To Obey.

##### 1. Contempt.

##### aa. In General.

#### 2 Witkin Cal. Evid. Witnesses § 28

[§ 28] In General.

Disobedience of a subpoena or refusal to answer proper questions (see *infra*, §29) is punishable as a contempt by the court that issued it. (*C.C.P. 1209(a)(9)*, 1991; see also P.C. 1331, 1564; on contempt for refusal to testify at deposition, see 2 *Cal. Evidence (4th)*, *Discovery*, §260 et seq.; on tardiness as contempt, see 7 *Cal. Proc. (4th)*, *Trial*, §§210, 211.)

Failure to comply with a subpoena delivered by mail or messenger (see *supra*, §27) may be punished as a contempt. (P.C. 1328d.) And the same sanction is available where the witness fails to obey a written notice to his attorney pursuant to *C.C.P. 1987* (*infra*, §36), or to comply with an agreement to appear pursuant to *C.C.P. 1985.1* (*infra*, §33).

A parent who fails to comply with a subpoena requiring attendance at a wardship hearing in juvenile court is guilty of contempt, unless the court, for good cause, excuses the parent from attending or finds that there was a satisfactory excuse for not attending. (Welf.C. 664(c)(1); see 10 *Summary (9th)*, *Parent and Child, Supp.*, §542.)

The contempt power is also available to enforce an agreement to appear under P.C. 1331.5. (See *infra*, §33.) But a subpoena that fails to state what the statute mandates, i.e., that the failure to appear is punishable as a contempt, may not be used as the basis for a contempt proceeding. (See *In re Garcia (1974)* 41 *C.A.3d* 997, 998, 116 *C.R.* 503.)

Assisting another to evade service of a subpoena constitutes a violation of P.C. 136.1 (preventing witness from testifying; see *supra*, §14), and is punishable as a contempt under *C.C.P. 1209(a)(8)* (any other "unlawful" interference with court proceedings). (*In re Holmes (1983)* 145 *C.A.3d* 934, 942, 193 *C.R.* 790.)

However, the contempt sanction may not be imposed unless the subpoena was personally served on the witness. (*In re Abrams (1980)* 108 *C.A.3d* 685, 687, 166 *C.R.* 749 [methods of service for summons or order to show cause do not apply].)

**SUPPLEMENT:** [This section is current through the latest supplement]

On contempt for journalist's refusal to answer questions in criminal proceeding, see *C.C.P. 1986.1*, *Supp.*, *infra*, §344.

*Cross-Reference:* 10 *Summary (10th)*, *Parent and Child*, §781. *West's Key Number Digest*, Witnesses k.21





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1. Subpena.

d. Penalties for Failure To Obey.

1. Contempt.

bb. Refusal To Answer Proper Questions.

2 *Witkin Cal. Evid. Witnesses* § 29

[§ 29] Refusal To Answer Proper Questions.

In a contempt proceeding for failure to answer proper questions, the precise questions must be shown. (See *Ransom v. Superior Court* (1968) 262 C.A.2d 271, 276, 68 C.R. 507 [no showing or finding of what questions were asked; contempt order annulled]; *In re Wells* (1946) 29 C.2d 200, 201, 173 P.2d 811 [deposition].)

Multiple punishment may be imposed for *successive refusals*. (See 77 *Harv. L. Rev.* 1330; 94 A.L.R.2d 1246 [separate contempt for successive refusals to respond to same or similar questions].) However, multiple punishment was held improper where the witness refused to answer a series of questions about an incident, after making it clear that he would answer no questions on that subject. (*In re Keller* (1975) 49 C.A.3d 663, 667, 123 C.R. 223; see also *Yates v. United States* (1957) 355 U.S. 66, 78 S.Ct. 128, 132, 2 L.Ed.2d 95, 101 [refusal to answer questions within certain area is only one contempt, despite prosecutor's multiplication of questions].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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G. Procedure.

1. Subpena.

d. Penalties for Failure To Obey.

1. Contempt.

cc. Case No Longer Pending.

2 *Witkin Cal. Evid. Witnesses* § 30

[§ 30] Case No Longer Pending.

If the case in which a subpena was issued is no longer pending in the court, the court has no power to punish for failure to obey. (*Schultz v. Superior Court* (1945) 69 C.A.2d 530, 532, 159 P.2d 417.) And it cannot imprison a contemnor for longer than the duration of the trial. (*In re McKinney* (1968) 70 C.2d 8, 10, footnote 1, 73 C.R. 580, 447 P.2d 972.)

However, even if the litigation has already terminated, a judge has jurisdiction to vindicate the dignity and authority of the court by punishing a witness for criminal contempt that has occurred at an earlier time. (*Morelli v. Superior Court* (1969) 1 C.3d 328, 332, 82 C.R. 375, 461 P.2d 655.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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I. ATTENDANCE AND COMPENSATION

G. Procedure.

1. Subpena.

d. Penalties for Failure To Obey.

2. Arrest.

2 *Witkin Cal. Evid. Witnesses* § 31

[§ 31] Arrest.

Although contempt is the principal remedy of the party aggrieved, the court may make an order for the arrest of the disobedient witness by the sheriff, who then brings the witness in to testify. (*C.C.P. 1993, 1994.*) And if the trial judge determines that the witness is a *material witness*, the judge must issue a bench warrant for his or her arrest, and may commit him or her into custody for up to 10 days. (P.C. 881(b), (d).) (See 14 *Pacific L. J.* 592.)

However, a warrant of arrest or a body attachment may not be issued for a witness who fails to appear in response to a subpoena delivered by mail or messenger (see *supra*, §27). (P.C. 1328d.)

Unlawful detention of a witness is a contempt. (*C.C.P. 1209(a)(7).*)

**SUPPLEMENT:** [This section is current through the latest supplement]



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G. Procedure.

1. Subpena.

d. Penalties for Failure To Obey.

3. Statutory Penalty and Damages.

2 *Witkin Cal. Evid. Witnesses* § 32

[§ 32] Statutory Penalty and Damages.

The disobedient witness is liable to the aggrieved party for a statutory penalty of a prescribed amount, and all *damages* sustained by the failure to attend. These may be recovered in a civil action. (*C.C.P.* 1992; see 61 A.L.R.3d 1297 [tort or statutory liability for failure or refusal of witness to give testimony]; but see P.C. 1331 [providing only for the penalty, and permitting excuse of "good cause" for nonattendance].)

The remedies of penalty and damages are independent, and either or both may be enforced for the same disobedience. (*Church v. Payne* (1939) 35 C.A.2d Supp. 752, 755, 92 P.2d 406.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P.* 1992, as amended in 2005, applies not just to witnesses, but to "persons," and not just to subpoenas but also to court orders.



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CHAPTER IX - Witnesses

I. ATTENDANCE AND COMPENSATION

G. Procedure.

1. Subpena.

e. Special Agreement To Appear.

2 *Witkin Cal. Evid. Witnesses* § 33

[§ 33] Special Agreement To Appear.

(1) *Civil Cases*. A party and the witness subpoenaed may agree to a different time of appearance from that specified in the subpoena, or to appearance "on such notice as may be agreed upon." Failure to appear pursuant to the agreement may be punished as a contempt by the court issuing the subpoena. There is no requirement of a writing, and the facts of agreement and failure to appear may be proved by "an affidavit of any person having personal knowledge of the facts." (*C.C.P.* 1985.1.)

(2) *Criminal Cases*. Equivalent procedures apply in criminal cases. (See P.C. 1331.5.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER IX - Witnesses

### I. ATTENDANCE AND COMPENSATION

#### G. Procedure.

##### 1. Subpena.

##### f. Quashing Subpena.

*2 Witkin Cal. Evid. Witnesses § 34*

[§ 34] Quashing Subpena.

Prior to 1976, there was no statutory authority for quashing subpoenas. However, decisions involving subpoenas *duces tecum* recognized an inherent right to quash under certain circumstances. (See *2 Cal. Evidence (4th), Discovery*, §226.) And in *People v. Rhone* (1968) 267 C.A.2d 652, 657, 73 C.R. 463, it was held that, on a showing that the witness could not offer relevant and competent testimony, an ordinary witness subpoena could be quashed. (See *People v. Superior Court (Long)* (1976) 56 C.A.3d 374, 378, 126 C.R. 465 [trial judge quashed subpoena served on minor who wished, for sake of reconciliation with her mother, to avoid testifying against her stepfather in sexual abuse case; because minor was material witness, mandamus issued to set aside order].)

*C.C.P. 1987.1*, enacted in 1976, permits a court to make an order "quashing the subpoena entirely, modifying it, or directing compliance with it upon such terms or conditions as the court shall declare." (See *8 Pacific L. J. 237*; C.E.B., 1 Civil Proc. During Trial 3d, §4.45; on procedure, see *2 Cal. Evidence (4th), Discovery*, §226.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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G. Procedure.

2. Compelled Testimony Without Subpena.

2 *Witkin Cal. Evid. Witnesses* § 35

[§ 35] Compelled Testimony Without Subpena.

The proper issuance and service of the subpena is necessary to compel *attendance*. But it is not always necessary to compel *testimony*. The witness may attend voluntarily, at the request of the party, or for other reasons, without subpena (see *supra*, §15), and *C.C.P. 1990* provides: "A person *present in court*, or before a judicial officer, may be required to testify in the same manner as if he were in attendance upon a subpena issued by such court or officer." (See *C.E.B.*, 1 Civil Proc. During Trial 3d, §4.33.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER IX - Witnesses

### I. ATTENDANCE AND COMPENSATION

#### G. Procedure.

#### 3. Notice to Attorney for Party Witness.

*2 Witkin Cal. Evid. Witnesses § 36*

[§ 36] Notice to Attorney for Party Witness.

*C.C.P. 1987(b)* dispenses with a subpoena where the witness is a party or agent of a party, and authorizes the alternative process of notice to his or her attorney, as in deposition proceedings (see *2 Cal. Evidence (4th), Discovery, §39*).

(1) *Witness*. The statute applies to the following:

- (a) "A party to the record of any civil action or proceeding."
- (b) A person "for whose immediate benefit" the action or proceeding is prosecuted or defended.
- (c) An officer, director, or managing agent of any such party or person.

(2) *Written Notice*. The notice must be written, and must request the witness to attend before a court, or at a trial of an issue therein, specifying the time and place.

(3) *Service of Notice*. The notice must be served at least 10 days before the time required for attendance, unless the court prescribes a shorter time.

In other respects the procedure is the same as that following service of a subpoena: the witness is entitled to fees and mileage on demand; the notice has the same effect as service of a subpoena; and "the court may make such orders, including the imposition of sanctions, as in the case of a subpoena for attendance before the court."

(4) *Request for Books and Other Items*. *C.C.P. 1987(c)* authorizes use of the notice to accomplish the purposes of a subpoena duces tecum:

(a) The notice must be served at least 20 days before the time required for attendance (unless the court orders a shorter time).

(b) It may include a request that the person bring with him or her "books, documents or other things." The request must state "the exact materials or things desired" and that the person has them in his or her possession or control. (See *Nelson v. Superior Court (1986) 184 C.A.3d 444, 452, 229 C.R. 94* [notice that did not specify documents desired was insufficient to support motion to compel].)



(c) Within 5 days thereafter, or such other period as the court may allow, the person on whom the request is made may serve and file written objections, with a statement of grounds.

(d) Thereafter, the requesting party may file a noticed motion, with a showing of good cause and of "materiality of the items to the issues," for an order to produce the items to which objection was made.

(e) On such motion, the court may order production, unless the objecting person establishes good cause for nonproduction or production under limitations or conditions.

(f) "The procedure of this subdivision is alternative."

Although a request under *C.C.P. 1987(c)* has the same effect as a notice to attend under *C.C.P. 1987(b)*, the geographical reach of *C.C.P. 1987(c)* is limited by *C.C.P. 1989* (see *supra*, §3), which provides that a witness, "including a witness specified in subdivision (b) of Section 1987," is not obliged to attend unless the witness is "a resident within the state at the time of service." (*Amoco Chemical Co. v. Certain Underwriters at Lloyd's of London* (1995) 34 C.A.4th 554, 559, 40 C.R.2d 80 [disagreeing with suggestion to the contrary in *Boal v. Price Waterhouse & Co.* (1985) 165 C.A.3d 806, 212 C.R. 42, 7 Cal. Proc. (4th), Trial, §120; trial judge erred in imposing sanctions for defendant British insurers' failure to comply with notice to appear and produce documents at trial]; on partial, implied repeal of *C.C.P. 1089* by *C.C.P. 2025*, which permits depositions of nonresidents in California, see *supra*, §3.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(3) *Service of Notice.* The portion of *C.C.P. 1987(b)* quoted in the text was amended in 2002 to change "such" to "those".

(4) *Request for Books and Other Items.* *C.C.P. 2025*, permitting depositions of nonresidents in California, was repealed and replaced by *C.C.P. 2025.010 et seq.* in 2004 without substantive change.



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## CHAPTER IX - Witnesses

### II. COMPETENCY OF WITNESSES A. Abolished Grounds of Disqualification. 1. Common Law Grounds. a. General Rule.

2 Witkin Cal. Evid. Witnesses § 37

[§ 37] General Rule.

"Except as otherwise provided by *statute*, every person, irrespective of age, is qualified to be a witness and no person is disqualified to testify to any matter." (*Ev.C. 700*; see P.C. 1321 [rules of competency same as in civil cases unless otherwise specially provided]; Unif. Rule 601; 1 McCormick 5th, §61 et seq.; 2 Wigmore (Chadbourn Rev.) §488; 81 *Am.Jur.2d* (1992 ed.), *Witnesses* §163 et seq.; 1 Jefferson, *California Evidence Benchbook* 3d, Chap. 26; C.J.E.R., *Judges Benchbook*, Civil Proceedings: Trial §8.3 et seq.; 2 Wharton, *Criminal Evidence* (14th ed.), §340 et seq.)

*Ev.C. 700* carries out the policy of the predecessor statute, which abolished most of the common law grounds of incompetency, such as relationship of parties, pecuniary interest in the suit, conviction of a felony, and lack of religious belief. The first three remain only as matters that the jury may consider in determining credibility. (See *Ripperdan v. Weldy* (1906) 149 C. 667, 672, 87 P. 276; *Estate of Reynolds* (1949) 94 C.A.2d 851, 855, 211 P.2d 608 [sole beneficiary under lost holographic will may testify to its provisions subject to challenge of credibility]; *People v. Clark* (1925) 70 C.A. 531, 550, 233 P. 980 [convict]; *People v. Bernfield* (1934) 140 C.A. 613, 614, 35 P.2d 585 [same]; *Langer v. Langer* (1948) 85 C.A.2d 806, 809, 194 P.2d 81 [same; "A degraded character may be a competent witness though not credible"]; *People v. Harris* (1948) 87 C.A.2d 818, 823, 198 P.2d 60 [same; "A person never sinks so low that he cannot speak the truth sometimes"]; *Washington v. Texas* (1967) 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019, 3 *Cal. Evidence* (4th), *Presentation at Trial*, §5 [statute making principals, accomplices, or accessories incompetent as witnesses for each other held violation of Sixth Amendment]; 2 Wigmore (Chadbourn Rev.) §515 et seq.; on procedure for bringing prisoner to testify, see *supra*, §13; on right of party to testify on his or her own behalf, see 3 *Cal. Evidence* (4th), *Presentation at Trial*, §11.)

Religious belief, or lack of it, is not a ground of incompetency. (Cal. Const., Art. I, §4; see *Estate of Malvasi* (1929) 96 C.A. 204, 210, 273 P. 1097 [juror]; Unif. Rules, Rule 610; 2 Wigmore (Chadbourn Rev.) §518; 3 *Cal. Evidence* (4th), *Presentation at Trial*, §260 [no impeachment on this ground].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See Simons, *Cal. Evidence Manual*, §3:1 et seq.; 1 McCormick 6th, §61 et seq.; 39 *U.S.F. L. Rev.* 455 [comparing California and federal rules on competency of witnesses]; 81 *Am.Jur.2d* (2004 ed.), *Witnesses* §160 et seq. *West's Key Number Digest*, *Witnesses* k.35 et seq.



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#### A. Abolished Grounds of Disqualification.

1. Common Law Grounds.
- b. Exceptions and Distinctions.

2 Witkin Cal. Evid. Witnesses § 38

[§ 38] Exceptions and Distinctions.

(1) *Traffic Offenses*. An arresting officer without a distinctive uniform and distinctive car is *incompetent* to testify as a witness. (*Veh.C. 40804*; see *supra*, §37.) (On incompetency of officer whose testimony is based on speed trap evidence, see 2 *Cal. Evidence (4th)*, *Demonstrative, Experimental, and Scientific Evidence*, §883.)

(2) *Fundamental Fairness*. The courts have also occasionally excluded the testimony of a competent witness to assure a fair trial or orderly proceedings. (See *Turner v. Louisiana (1965)* 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424, 6 *Cal. Crim. Law (3d)*, *Criminal Judgment*, §28 [officers in charge of jury testified against defendant; held denial of due process]; *People v. Smith (1970)* 13 C.A.3d 897, 904, 91 C.R. 786, *infra*, §57 [trial attorney competent to testify in client's behalf, but properly barred to assure orderly proceedings].)

(3) *Federal Rules of Evidence*. "Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law." (*F.R. Evid.*, Rule 601; see 3 Mueller & Kirkpatrick, *Federal Evidence* 2d, §232 et seq.; 81 *Am.Jur.2d (1992 ed.)*, *Witnesses* §163.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(3) *Federal Rules of Evidence*. See 81 *Am.Jur.2d (2004 ed.)*, *Witnesses* §160.



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## CHAPTER IX - Witnesses

### II. COMPETENCY OF WITNESSES A. Abolished Grounds of Disqualification. 2. Dead Man Statute. a. Nature of Former Rule.

2 Witkin Cal. Evid. Witnesses § 39

[§ 39] Nature of Former Rule.

The "dead man statute" prevented parties or their assignors from testifying against an executor or administrator, on a claim or demand against the estate of a deceased person, as to any matter occurring before the death of the decedent. It produced a great deal of case law on its scope and exceptions, and a brief summary will be helpful in appreciating the importance of the change.

(1) *Theory of Disqualification.* The dead man statutes were adopted on the assumption that, if the real opponent--the adverse party to the transaction--is dead, there is danger of perjury in permitting the plaintiff to give testimony as to facts which the deceased had no opportunity to contradict. (See *Poulson v. Stanley* (1898) 122 C. 655, 658, 55 P. 605; *Roncelli v. Fugazi* (1919) 44 C.A. 249, 251, 186 P. 373; *Warren v. Nair* (1951) 102 C.A.2d 298, 300, 227 P.2d 515; *Adams v. Herman* (1951) 106 C.A.2d 92, 103, 234 P.2d 695; *Vonchina v. Estate of Turner* (1957) 154 C.A.2d 134, 136, 315 P.2d 723; *Trabin v. Title Ins. & Trust Co.* (1959) 52 C.2d 149, 152, 339 P.2d 136; *Corso v. Security-First Nat. Bank* (1959) 171 C.A.2d 816, 824, 342 P.2d 56; *Hays v. Clark* (1959) 175 C.A.2d 565, 568, 346 P.2d 448; *Simon v. Bank of America* (1962) 209 C.A.2d 21, 25, 25 C.R. 654; 4 U.C.L.A. L. Rev. 175; 33 So. Cal. L. Rev. 339; 81 Am.Jur.2d (1992 ed.), Witnesses §557 et seq.; 1 McCormick 5th, §65; 2 Wigmore (Chadbourn Rev.) §578; 80 A.L.R.2d 1296 [testimony to facts of automobile accident as testimony to "transaction" or "communication" with decedent within dead man statute]; 84 A.L.R.2d 1356 [competency under dead man statute of witness to testify as to payment or nonpayment of obligation owing to decedent].)

(2) *Matter or Fact Occurring Before Death.* The statute was construed to cover events or transactions outside the presence of the decedent as well as those taking place in his or her presence. (See *Stuart v. Lord* (1903) 138 C. 672, 677, 72 P. 142; *Corso v. Security-First Nat. Bank*, *supra*, 171 C.A.2d 827, 828; 33 So. Cal. L. Rev. 339.) It was also applied to prevent the survivor of an automobile accident from testifying against the executor or administrator of a decedent killed in the accident, or dying after its commencement. (See *Miller v. Du Bois* (1957) 153 C.A.2d 310, 312, 314 P.2d 27; 1 McCormick 5th, §65; 77 A.L.R.2d 676 [competency of witness in wrongful death action as affected by dead man statute]; 18 A.L.R.3d 606 [statute excluding testimony of one person because of death of another as applied to testimony about lost or destroyed instrument].)

(3) *Exception: Witness Not Party or Assignor.* The rule excluded only the testimony of parties to the action or their assignors; it did not disqualify parties to a contract or other persons in interest, or a nominal party who asserted no claim against the estate. (See *Arata v. Bank of America* (1963) 223 C.A.2d 199, 202, 35 C.R. 703 [nominal party]; *Hays v. Clark*, *supra* [spouse witness, subject matter was separate property of other spouse]; *Gianotti v. McDonald* (1963) 213

C.A.2d 744, 745, 29 C.R. 275 [claim and proceeds relinquished by witness husband to party wife]; on community property problem, see 4 U.C.L.A. L. Rev. 195; 10 Hastings L. J. 65.)

(4) *Exception: Action Not on Money Claim.* The statutory reference to a "claim, or demand" was construed to mean only money claims. Hence, the rule did not apply to actions to recover specific real property, to establish a trust, or others in which no monetary recovery was sought. (See *Cohn v. Cohn* (1929) 100 C.A. 746, 748, 281 P. 504; *Holland v. Bank of Italy* (1931) 115 C.A. 472, 485, 1 P.2d 1031; *Humes v. Humes* (1942) 56 C.A.2d 126, 132, 133 P.2d 39; *Estate of Sears* (1960) 182 C.A.2d 525, 531, 6 C.R. 148 [statute inapplicable to action by widow claiming that decedent husband's separate property was changed to community property by oral agreement]; *Bernkrant v. Fowler* (1961) 55 C.2d 588, 592, 12 C.R. 266, 360 P.2d 906 [statute inapplicable to action to have it determined that note made to decedent was discharged].)

(5) *Miscellaneous Exceptions.* (See *Panno v. Russo* (1947) 82 C.A.2d 408, 413, 186 P.2d 452 [action against partnership after death of partner]; *Trabin v. Title Ins. & Trust Co.*, *supra* [codefendant without adverse interest].)

(6) *Waiver of Disqualification.* Although classified as a rule of incompetency, the dead man statute was construed to permit the executor or administrator to waive its benefits, thus in effect making it a rule of privilege. (See *Kinley v. Largent* (1921) 187 C. 71, 75, 200 P. 937; *McClenahan v. Keyes* (1922) 188 C. 574, 577, 206 P. 454; *Deacon v. Bryans* (1931) 212 C. 87, 90, 298 P. 30; *Moul v. McVey* (1942) 49 C.A.2d 101, 106, 121 P.2d 83; *Thompson v. Hickman* (1948) 89 C.A.2d 356, 364, 369, 200 P.2d 893; *Hays v. Clark*, *supra*; *Drvol v. Bant* (1960) 183 C.A.2d 351, 358, 7 C.R. 1; *Bruce v. Ullery* (1962) 58 C.2d 702, 709, 25 C.R. 841, 375 P.2d 833; 12 So. Cal. L. Rev. 1, 15; 6 Stanf. L. Rev. 358; 4 U.C.L.A. L. Rev. 196, 199; 15 So. Cal. L. Rev. 523; 26 A.L.R.2d 1009 [introduction of decedent's book accounts by personal representative as waiver]; 33 A.L.R.2d 1440 [examination of one incompetent witness as waiver of incompetency of other witnesses]; 23 A.L.R.3d 389 [deposing or serving interrogatories in civil case as waiver of incompetency of witness].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Theory of Disqualification.* See 81 Am.Jur.2d (2004 ed.), Witnesses §538 et seq.; 1 McCormick 6th, §65.(2) *Matter or Fact Occurring Before Death.* See 1 McCormick 6th, §65.West's Key Number Digest, Witnesses k.125 et seq.



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2 Witkin Cal. Evid. Witnesses § 40

[§ 40] Repeal of Statute.

The dead man statute was strongly criticized by nearly all authorities in the field of evidence, and there was a marked tendency of the courts to construe it narrowly against disqualification. (See *Trabin v. Title Ins. & Trust Co.* (1959) 52 C.2d 149, 152, 339 P.2d 136; *Bruce v. Ullery* (1962) 58 C.2d 702, 710, 25 C.R. 841, 375 P.2d 833, quoting the text; 4 U.C.L.A. L. Rev. 175, 209, 212; 9 So. Cal. L. Rev. 35; 12 So. Cal. L. Rev. 1; 15 So. Cal. L. Rev. 523; 13 Cal. L. Rev. 291; 6 Stanf. L. Rev. 358; 1 McCormick 5th, §65; 2 Wigmore (Chadbourn Rev.) §§578, 578a; 1948 A.S. 882; 1960 A.S. 564.)

The California Law Revision Commission recommended abolition of the rule, and it was not restated in the Evidence Code, for the following reasons:

"The dead man statute operates unsatisfactorily. It prohibits testimony concerning matters of which the decedent had no knowledge and, hence, to which he could not have testified even if he had survived. It operates unevenly since it does not prohibit testimony relating to claims *under*, as distinguished from claims *against*, the decedent's estate even though the effect of such a claim may be to frustrate the decedent's plan for the disposition of his property. ... The dead man statute excludes otherwise relevant and competent evidence--even if it is the only available evidence--and frequently this forces the courts to decide cases with a minimum of information concerning the actual facts." (Law Rev. Com. Comment to *Ev.C. 1261*.)

The Commission's substitute was a new hearsay exception permitting the estate to introduce declarations of the decedent under circumstances affording a guarantee of trustworthiness. (*Ev.C. 1261*; see 1 *Cal. Evidence (4th)*, *Hearsay*, §225.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 1 McCormick 6th, §65.



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### II. COMPETENCY OF WITNESSES B. Remaining Grounds of Disqualification. 1. Capacity To Understand and Express. a. In General.

#### 2 Witkin Cal. Evid. Witnesses § 41

[§ 41] In General.

(1) *Grounds for Disqualification.* Under *Ev.C. 701(a)*, a person is disqualified to be a witness for either of the following reasons:

(a) The witness is incapable of *expressing himself or herself* concerning the matter so as to be understood, either directly or through interpretation by one who can understand the witness. (*Ev.C. 701(a)(1).*)

(b) The witness is incapable of *understanding the duty of a witness to tell the truth.* (*Ev.C. 701(a)(2).*)

(2) *Procedure for Disqualification.* Three procedural rules apply to these grounds for disqualification:

(a) The opponent who challenges a witness' mental capacity to testify, on the ground that the witness is too young or is mentally defective, has the burden of proof on the issue. (Law Rev. Com. Comment to *Ev.C. 405*; *People v. Craig* (1896) 111 C. 460, 469, 44 P. 186; *People v. Tyree* (1913) 21 C.A. 701, 706, 132 P. 784; *People v. Gasser* (1917) 34 C.A. 541, 543, 168 P. 157; *People v. Knox* (1979) 95 C.A.3d 420, 431, 157 C.R. 238, citing the text; *People v. Willard* (1983) 155 C.A.3d 237, 239, 202 C.R. 100; *People v. Hall* (1984) 157 C.A.3d 538, 545, 223 C.R. 267, citing the text [witness gave impression of being "emotionally unstable" and biased against defendant, but "this does not translate into incompetency"]; see generally 81 *Am.Jur.2d* (1992 ed.), *Witnesses* §187 et seq.; 14 A.L.R.4th 802 [capacity of declarant who was asleep or unconscious]; 50 A.L.R.4th 1188 [capacity of deaf-mute as witness].)

(b) The determination is finally made by the trial judge, without resubmission of the issue to the jury. (*Ev.C. 405*; Law Rev. Com. Comment to *Ev.C. 701*; see *People v. Tyree*, *supra*, 21 C.A. 706; *People v. Delaney* (1921) 52 C.A. 765, 769, 771, 199 P. 896; *People v. McCaughan* (1957) 49 C.2d 409, 421, 317 P.2d 974; *People v. Blagg* (1970) 10 C.A.3d 1035, 1039, 89 C.R. 446, citing the text; 3 *Cal. Evidence* (4th), *Presentation at Trial*, §61.)

(c) In any proceeding held outside the presence of the jury, "the court may reserve challenges to the competency of a witness until the conclusion of the direct examination of that witness." (*Ev.C. 701(b).*)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Procedure for Disqualification.*

(a) *Opponent has burden of proof:* See *People v. Lewis* (2001) 26 C.4th 334, 360, 361, 110 C.R.2d 272, 28 P.3d 34

[witness suffered from mental disorders and his testimony was hard to understand, but record did not support claim that he was incapable of expressing himself, and fact that he initially refused to answer defendant's question regarding victim's strangulation did not establish by preponderance of evidence that he did not understand duty to tell truth]; 81 *Am.Jur.2d* (2004 ed.), *Witnesses* §183 et seq. *West's Key Number Digest*, *Witnesses* k.39 et seq.





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B. Remaining Grounds of Disqualification.

1. Capacity To Understand and Express.

b. Children.

1. Former Law: Age 10 Distinction.

2 *Witkin Cal. Evid. Witnesses* § 42

[§ 42] Former Law: Age 10 Distinction.

Former C.C.P. 1880(2) treated children over 10 as competent unless incapacity was shown, and children under 10 as competent if found to possess the necessary capacity. In practice, however, children of very tender years were commonly accepted as witnesses. (See *People v. Walker* (1931) 112 C.A. 146, 147, 296 P. 692 [child of 5]; *People v. Watrous* (1935) 7 C.A.2d 7, 10, 45 P.2d 380 [child of 4]; *Cheeseman v. Cheeseman* (1929) 99 C.A. 290, 292, 278 P. 242 [child of 6 1/2]; *People v. Harrison* (1941) 46 C.A.2d 779, 785, 117 P.2d 19 [child of 9 1/2]; *People v. Ernst* (1953) 121 C.A.2d 287, 290, 263 P.2d 114 [children of 8 and 9]; *People v. Lamb* (1953) 121 C.A.2d 838, 844, 264 P.2d 126 [children ages 6 and 9].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## b. Children.

## 2. Abrogation of Age Distinction.

## 2 Witkin Cal. Evid. Witnesses § 43

[§ 43] Abrogation of Age Distinction.

The reference to children, with its age distinction (see *supra*, §42), was eliminated by the Evidence Code. A child's competency is now determined under the general test of *Ev.C. 701* (*supra*, §41). (See generally 2 Wigmore (Chadbourn Rev.) §505 et seq.; 81 *Am.Jur.2d* (1992 ed.), *Witnesses* §217 et seq.; C.J.E.R., Judges Benchbook, Civil Proceedings: Trial §8.84; 18 *Pacific L. J.* 801, 806 [competency of child witness]; 13 *Pepperdine L. Rev.* 157 [child witnesses in sexual abuse criminal proceedings]; 69 *So. Cal. L. Rev.* 2117 [same]; 28 *Pacific L. J.* 3 [research on children as witnesses]; 28 *Pacific L. J.* 169 [proposed Child Witness Code] 60 A.L.R.4th 369 [child competency statutes]; 35 Proof of Facts 2d 665 [qualifying child witness to testify].) (On instruction regarding child witness, see 3 *Cal. Evidence* (4th), *Presentation at Trial*, §88; on admissibility of child hearsay statements in dependency proceedings where child is determined to be incompetent, see 10 *Summary* (9th), *Parent and Child*, *Supp.*, §§689A, 689B.)

As pointed out in the Law Revision Commission Comment to *Ev.C. 701*, the liberal attitude of our courts on competency of very young children (*supra*, §42) makes this change largely one of method rather than result. (See *Adamson v. Department of Social Services* (1988) 207 C.A.3d 14, 20, 254 C.R. 667, citing the text [child age 5; fact that part of her testimony was unbelievable went to credibility, but did not indicate inability to perceive, recollect, communicate or understand duty to tell truth]; *In re Amy M.* (1991) 232 C.A.3d 849, 857, 283 C.R. 788 [child age 11 who was molestation victim held competent to testify in dependency proceedings despite her hallucinations, including one during cross-examination]; but see *In re Crystal J.* (1990) 218 C.A.3d 596, 601, 267 C.R. 105, citing the text [child age 7 held incompetent where he stated that he did not know difference between truth and lie]).

**SUPPLEMENT:** [This section is current through the latest supplement]

Where a child victim of molestation is called as a witness, the relevant determination is simply whether the victim is competent to testify, i.e., whether the victim has the capacity to understand the oath and to communicate. California does not approve or require a "taint" hearing, in which the court determines whether pretrial events, interviews, or investigations may have been so suggestive as to affect the accuracy of the victim's recollection of facts. (*People v Montoya* (2007) 149 C.A.4th 1139, 1149, 1150, 57 C.R.3d 770.)

See 22 J. Juvenile Law 113 [effect of California's witness competence standard on child molestation cases]; 73 *So. Cal. L. Rev.* 1017 [study of children's oath-taking competence]; 81 *Am.Jur.2d* (2004 ed.), *Witnesses* §208 et seq.

*Cross-Reference:* 10 *Summary* (10th), *Parent and Child*, §619. *West's Key Number Digest*, *Witnesses* k.40(1)



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## b. Children.

## 3. Medical Records of Child Witness.

## 2 Witkin Cal. Evid. Witnesses § 44

[§ 44] Medical Records of Child Witness.

In *People v. Boyette* (1988) 201 C.A.3d 1527, 247 C.R. 795, defendant was convicted of burglary, mainly on the testimony of Justin, a 5-year-old boy, that he saw defendant enter the house, remove a china cabinet, load it on his truck, and drive away. Defendant subpoenaed county medical and psychiatric records and moved for their disclosure before trial, arguing their possible relevance to the minor witness' competency and credibility. County counsel opposed disclosure, arguing that the records were confidential under Welf.C. 5328, and that the judge could determine competency without them. The judge denied the motion. *Held*, this was reversible error.

(a) *People v. Reber* (1986) 177 C.A.3d 523, 223 C.R. 139, held that the psychotherapist-patient privilege may be overridden to the extent necessary to ensure a defendant's right of confrontation, and therefore that the trial judge erred in failing to review subpoenaed psychotherapy records of victim-witnesses to determine what privileged matters were essential to vindicate defendants' rights of confrontation. *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (see 3 Cal. Evidence (4th), Presentation at Trial, §6), took the same position. And, *People v. Caplan* (1987) 193 C.A.3d 543, 238 C.R. 478, held that in the light of *Reber* and *Ritchie*, it was error to uphold a patient's claim of privilege against a defendant's discovery request without reviewing a psychotherapist's records about a victim-witness. (201 C.A.3d 1532, 1533.)

(b) Although these cases dealt with victims of sexual crimes, "their reasoning applies equally to other crimes and other kinds of witnesses." (201 C.A.3d 1533.)

(c) "We emphasize that we are not requiring disclosure of the witness's medical and psychological records. All we hold is that the trial court must review the records in chambers to determine to what extent they were privileged and whether defendant's constitutional rights to a fair trial might overcome any privilege applicable to any particular record." (201 C.A.3d 1534.)

*People v. Hammon* (1997) 15 C.4th 1117, 1123, 65 C.R.2d 1, 938 P.2d 986, *infra*, §235, overruled *Boyette*, *Reber*, and *Caplan* to the extent they held that the Confrontation Clause of the Sixth Amendment required *pretrial* disclosure of privileged information when the defendant's need for the information outweighed the patient's interest in confidentiality.

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### B. Remaining Grounds of Disqualification.

##### 1. Capacity To Understand and Express.

##### c. Insane Persons.

#### 2 Witkin Cal. Evid. Witnesses § 45

[§ 45] Insane Persons.

Our former statute (*C.C.P. 1880(1)*) making persons "of unsound mind" incompetent was superseded by *Ev.C. 701*, stating the general test of incompetency (*supra*, §41). Thus:

(1) A minor degree of mental unsoundness will not necessarily disqualify. (See *People v. Crandall* (1941) 43 C.A.2d 238, 242, 110 P.2d 682; *People v. Tyree* (1913) 21 C.A. 701, 707, 132 P. 784; *People v. Ives* (1941) 17 C.2d 459, 476, 110 P.2d 408; *People v. Blagg* (1970) 10 C.A.3d 1035, 1039, 89 C.R. 446, citing the text [mentally disordered sex offender who suffered from lapses of memory and had fantasies about little girls was competent to testify about attack in jail cell]; 2 Wigmore (Chadbourn Rev.) §492 et seq.; 32 So. Cal. L. Rev. 65.)

(2) The fact that the witness was *formerly committed* for insanity is not conclusive. (*People v. Horowitz* (1945) 70 C.A.2d 675, 696, 161 P.2d 833.)

(3) A *subsequent adjudication* of insanity and confinement to an asylum does not render the prior testimony of the witness incompetent. (*People v. Crandall*, *supra*, 43 C.A.2d 242; *People v. Jackson* (1969) 273 C.A.2d 248, 254, 78 C.R. 20 [no error in reading testimony given by witness at first trial, even though absence at second trial was due to confinement for later developed mental incompetency].)

Although the trial judge determines competency (*supra*, §41), "sound discretion demands the exercise of great caution in qualifying as competent a witness who has a history of insane delusions relating to the very subject of inquiry in a case in which the question is not simply whether or not an act was done but, rather, the manner in which it was done and in which testimony as to details may mean the difference between conviction and acquittal." (*People v. McCaughan* (1957) 49 C.2d 409, 421, 317 P.2d 974; see *Stanchfield v. Hamer Toyota* (1995) 37 C.A.4th 1495, 1506, 1507, 44 C.R.2d 565 [in light of uncontroverted medical evidence concerning witness' organic brain syndrome and dementia, trial judge properly found witness was incompetent].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See CALJIC, No. 2.20.2 [evaluating testimony of person with developmental disability or cognitive, mental, or communication impairment]. *West's Key Number Digest*, Witnesses k.41



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### II. COMPETENCY OF WITNESSES B. Remaining Grounds of Disqualification. 2. Personal Knowledge. a. In General.

2 Witkin Cal. Evid. Witnesses § 46

[§ 46] In General.

(1) *Basic Requirement.* Except where an expert gives an opinion in justifiable reliance on information from others (Ev.C. 801; see 1 Cal. Evidence (4th), *Opinion Evidence*, §31 et seq.), "the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter." (Ev.C. 702(a).) (See *People v. Collins* (1968) 68 C.2d 319, 328, 66 C.R. 497, 438 P.2d 33, citing the text.)

"Personal knowledge" means "a *present recollection of an impression* derived from the exercise of the witness' own senses." (Law Rev. Com. Comment to Ev.C. 702, citing Wigmore.) (See 1 McCormick 5th, §10; 2 Wigmore (Chadbourn Rev.) §§478, 650 et seq.; Unif. Rules, Rule 602; 81 Am.Jur.2d (1992 ed.), *Witnesses* §178.)

The knowledge requirement also applies to a lay witness' opinion testimony; i.e., such an opinion must be "[r]ationally based on the perception of the witness." (Ev.C. 800(a); see 1 Cal. Evidence (4th), *Opinion Evidence*, §4.)

(2) *Redetermination by Jury: Capacity Distinguished.* Formerly the *ability to perceive and recollect* was considered an element of *competency* of the witness, like capacity to communicate. (See *People v. Lamb* (1953) 121 C.A.2d 838, 844, 264 P.2d 126; *People v. McCaughan* (1957) 49 C.2d 409, 420, 317 P.2d 974; *People v. Pike* (1960) 183 C.A.2d 729, 732, 7 C.R. 188.) The Evidence Code treats the ability to perceive and recollect as an element of the *knowledge requirement*: "Because a witness, qualified under Section 701, must have personal knowledge of the facts to which he testifies (Section 702), he must, of course, have the capacity to perceive and recollect those facts." (Law Rev. Com. Comment to Ev.C. 701.)

The effect of this change in theory is that, while capacity of a witness to communicate is finally determined by the trial judge (supra, §41), the ability of a competent witness to perceive and recollect with respect to the particular matter on which the witness testifies is only preliminarily determined by the trial judge, and ultimately redetermined by the jury. (Law Rev. Com. Comment to Ev.C. 701; Ev.C. 403(a)(2), and Law Rev. Com. Comment; see *People v. Blagg* (1970) 10 C.A.3d 1035, 1040, 89 C.R. 446, citing the text; *People v. Dennis* (1998) 17 C.4th 468, 525, 526, 71 C.R.2d 680, 950 P.2d 1035 [in capital murder case, trial judge did not err when, in determining 8-year-old eyewitness' competence to testify, he failed to inquire into her personal knowledge of subject matter of her testimony].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Basic Requirement.* See 81 Am.Jur.2d (2004 ed.), *Witnesses* §174; 1 McCormick 6th, §10.

(2) *Redetermination by Jury: Capacity Distinguished.* See *People v. Anderson* (2001) 25 C.4th 543, 574, 106 C.R.2d 575, 22 P.3d 347 [where there was no claim that witness could not communicate her memories or did not understand duty to testify truthfully, trial judge properly admitted testimony on basis of evidence that, despite suffering from delusions, she was present during robbery and murder and accurately perceived and recollected those events]; *People v. Lewis* (2001) 26 C.4th 334, 357, 110 C.R.2d 272, 28 P.3d 34, citing the text [in capital murder case, trial judge did not err in failing to exclude witness' testimony on basis of lack of personal knowledge; although testimony "may have consisted of inconsistencies, incoherent responses, and possible hallucinations, delusions and confabulations," it presented plausible account of circumstances of murder]; *People v. Zambrano* (2007) 41 C.4th 1082, 1140, 63 C.R.3d 297, 163 P.3d 4 [in prosecution for murder and attempted murder, trial judge did not err in failing to exclude, for lack of personal knowledge, testimony of attempted murder victim who suffered head injuries and had preexisting bipolar disorder; there was ample evidence from which rational jury could conclude that victim perceived and independently recollected charged attacks, and it was for jury to determine whether recollections were accurate]. *West's Key Number Digest*, Witnesses k.37(1) et seq.



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2. Personal Knowledge.  
b. Hearsay Rule Distinguished.

2 Witkin Cal. Evid. Witnesses § 47

[§ 47] Hearsay Rule Distinguished.

Frequently, a witness purports to narrate facts that, it develops, were merely related to the witness by another. This testimony is often regarded as "hearsay" in the guise of fact. Thus, in *Pinto v. Seely* (1913) 22 C.A. 318, 135 P. 43, plaintiff administrator, suing for the value of attorney's services allegedly rendered by decedent P to defendant, testified that she was familiar with some of P's legal business, that she knew P had acted as attorney for defendant, that at the time of his death he was defendant's attorney in a particular case, and that P had told her he had a contract calling for 50% of the recovery. *Held*, all of this testimony was hearsay, because her "knowledge" of P's professional dealings was only of confidences imparted to her by P. (22 C.A. 322.)

Similarly, in *People v. Ware* (1924) 67 C.A. 81, 86, 226 P. 956, a police officer testified to the illegal purposes of an organization, but it appeared that his supposed knowledge was derived entirely from declarations of persons whom he believed to be members. And in *People v. Smith* (1921) 55 C.A. 324, 328, 203 P. 816, a surgeon testified that he performed an autopsy on *defendant's wife*, but then admitted that he did not know her and merely relied on the statement of the undertaker's assistant as to *whose body* it was.

Many other cases are to the same effect. (See *McGowan v. Los Angeles* (1950) 100 C.A.2d 386, 389, 223 P.2d 862, 1 Cal. Evidence (4th), Hearsay, §240; *People v. Gray* (1906) 148 C. 507, 509, 83 P. 707 [opinion testimony of witness as to identity of murderer rejected where based solely on statement of another person]; *Huyck v. Rennie* (1907) 151 C. 411, 415, 90 P. 929 [witness cannot testify to knowledge or belief of another]; *Sneed v. Marysville Gas & Elec. Co.* (1906) 149 C. 704, 707, 87 P. 376 [wrongful death action; mother's testimony that decedent "had no knowledge" of dangers of electricity]; *Harrigan v. Chaperon* (1953) 118 C.A.2d 167, 168, 257 P.2d 716 [testimony of fire inspector as to cause of fire, based on statements received from another member of fire department].)

The result reached in all of these cases is, of course, correct; but, under the modern view, the analysis is incorrect. Hearsay evidence is evidence of a statement made "other than by a witness while testifying at the hearing." (*Ev.C. 1200*; see 1 Cal. Evidence (4th), Hearsay, §4.) In all of these cases, the witnesses were testifying at the hearing, and the hearsay rule was inapplicable. The true basis of exclusion was that they lacked personal knowledge of the matters. (See 2 McCormick 5th, §247; 2 Wigmore (Chadbourn Rev.) §657; 5 Wigmore (Chadbourn Rev.) §1361.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Valencia* (2006) 146 C.A.4th 92, 103, 52 C.R.3d 649 [in sexual molestation prosecution, defense counsel provided ineffective assistance in failing to object to admission of witness' testimony that her daughter had told her that

defendant had been "touching" his sister since she was 4 years of age, where daughter apparently had no personal knowledge of that touching; personal knowledge requirement applies to hearsay declarations]; 2 McCormick 6th, §247.





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## CHAPTER IX - Witnesses

### II. COMPETENCY OF WITNESSES

- B. Remaining Grounds of Disqualification.
- 3. Examination, Determination, and Review.

2 Witkin Cal. Evid. Witnesses § 48

[§ 48] Examination, Determination, and Review.

(1) *Examination.* A witness whose competency or knowledge is challenged may be given a voir dire examination by the judge and counsel to determine the witness' qualifications. (See *People v. Delaney* (1921) 52 C.A. 765, 767, 199 P. 896; *People v. Lamb* (1953) 121 C.A.2d 838, 846, 264 P.2d 126; *People v. Pike* (1960) 183 C.A.2d 729, 731, 7 C.R. 188; *People v. McIntyre* (1967) 256 C.A.2d 894, 898, 64 C.R. 530; *People v. Blagg* (1970) 10 C.A.3d 1035, 1039, 89 C.R. 446, citing the text.) It is not necessary to show that an infant witness has religious beliefs or detailed knowledge of the nature of the oath. "As long as the child understands that some earthly evil will follow if he does not tell the truth, that is all that is required." (*People v. Lamb, supra*, 121 C.A.2d 845.)

(2) *Determination.* A child's capacity to receive just impressions of the facts relates to the time the events occurred, while the capacity to state them truly relates to the later time of trial. Thus, the child may be competent to testify to occurrences remembered, though they happened at a time when he or she lacked capacity to testify. This distinction is illustrated in *Bradburn v. Peacock* (1955) 135 C.A.2d 161, 286 P.2d 972, an action for injuries to a young girl run over by defendant's truck. The victim's brother, familiar with defendant and his truck, saw the accident. He was then 3 years and 3 months old, and at the time of trial was slightly over 5 years. The trial judge, without any voir dire examination, refused to permit him to testify. *Held*, it was reversible error to determine incompetency as a matter of common knowledge or law. "We cannot say that no child of 3 years and 3 months is capable of receiving just impressions of the facts that a man whom he knows in a truck which he knows ran over his little sister. Nor can we say that no child of 3 years and 3 months would remember such facts and be able to relate them truly at the age of 5." (135 C.A.2d 164.)

(3) *Review.* In reviewing the trial judge's determination of ability to recollect and narrate, the appellate court is not limited by the voir dire examination, but may look at subsequent testimony which, if clear, relevant and coherent, may be used to support a ruling upholding qualifications of a child witness. (*People v. Lamb, supra*, 121 C.A.2d 844; *People v. Pike, supra*, 183 C.A.2d 732.)

An unsubstantial challenge does not require a voir dire examination; the granting or denial of a motion to voir dire a witness on competency is within the sound discretion of the trial judge. The judge should deny the motion when it is made "on the basis of nothing more than defense counsel's characterization of the witness' prior statements regarding his fears, or the strangeness or unusualness of the events such as at bench, or when made to inquire into other matters which are the proper subjects of cross examination." (*People v. Willard* (1983) 155 C.A.3d 237, 240, 202 C.R. 100.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Determination.* *People v. Avila* (2006) 38 C.4th 491, 589, 43 C.R.3d 1, 133 P.3d 1076 [in capital murder trial, trial

judge did not err in determining that witness was capable of communicating so as to be understood and that he understood his duty to tell truth; witness' testimony was difficult to comprehend chiefly because his statements were so contradictory, but determination of his credibility was for jury]; See *People v. Augustin* (2003) 112 C.A.4th 444, 448, 5 C.R.3d 171 [in prosecution for assault, trial judge's determination that victim, who suffered from cerebral palsy, was competent witness fell within scope of his discretion; victim may have been more difficult to understand than typical witness, but record reflected that she was intelligent, and defense counsel could have asked her to repeat her answers if he did not understand them].



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## CHAPTER IX - Witnesses

### II. COMPETENCY OF WITNESSES

#### C. Judge Presiding.

#### 1. Disqualification by Objection.

##### a. Nature of Problem.

#### 2 Witkin Cal. Evid. Witnesses § 49

[§ 49] Nature of Problem.

(1) *Testimony in Case Before Another Judge.* Judicial office is not a disqualifying circumstance, and a judge may be freely summoned as a witness in a case before another judge, e.g., to testify concerning a former trial where the judge presided, or as a character witness for a party. (See 1 McCormick 5th, §68; 6 Wigmore (Chadbourn Rev.) §1909.) And when a judge other than the presiding judge is called as a witness in his or her official capacity, the judge is entitled to representation by counsel. (*Govt.C. 68111.*)

However, in *People v. McGhee* (1987) 193 C.A.3d 1333, 239 C.R. 28, where two judges testified for the prosecution as to the bad character of defendant's primary witness, the court offered the following observations:

(a) The commentary to Canon 2 of the Code of Judicial Conduct (see 2 Cal. Proc. (4th), Courts, §54) states: "The testimony of a judge as a character witness injects the prestige of his office into the proceedings and may be misunderstood to be an official testimony." (193 C.A.3d 1348.)

(b) Although no cases restrict judges from testifying as character witnesses in cases other than those on which they have worked (193 C.A.3d 1347, citing the text), when the American Bar Association Code (upon which the California Code of Judicial Conduct is modeled) was being discussed, many were concerned with the problem. "They concluded it was best that judges *not* be *voluntary* character witnesses. ... We suggest that if a judge's testimony is necessary to a case the proper procedure to follow would be to subpoena him." (193 C.A.3d 1348.)

(2) *Testimony in Case Over Which Judge Is Also Presiding.* Another policy problem arises where a judge's testimony is necessary in the very case over which he or she is presiding. The testimony is of course admissible, because the judge is a competent witness. But the propriety of continuing to sit, and of accepting the case if he or she knew of the likelihood of being called as a witness, are seriously doubted: "[E]xamination and cross-examination of a judge-witness may be embarrassing and prejudicial to a party. By testifying as a witness for one party, a judge appears in a partisan attitude before the jury. Objections to questions and to his testimony must be ruled on by the witness himself. The extent of cross-examination and the introduction of impeaching and rebuttal evidence may be limited by the fear of appearing to attack the judge personally." (Law Rev. Com. Comment to Ev.C. 703; see Model C., Rule 302; *People v. Connors* (1926) 77 C.A. 438, 452, 246 P. 1072 [criticizing the practice of testifying to material facts in a criminal case]; 6 Wigmore (Chadbourn Rev.) §1909; 59 Harv. L. Rev. 512.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Testimony in Case Before Another Judge.* See 1 McCormick 6th, §68. *West's Key Number Digest*, Witnesses k.68 et seq.



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CHAPTER IX - Witnesses

II. COMPETENCY OF WITNESSES

C. Judge Presiding.

1. Disqualification by Objection.
- b. Uniform Rule and Evidence Code.

2 *Witkin Cal. Evid. Witnesses* § 50

[§ 50] Uniform Rule and Evidence Code.

Former C.C.P. 1883 authorized the judge, in his or her discretion, to order the trial postponed or suspended, and to take place before another judge.

*Ev.C. 703(b)* adopted the view of the original Uniform Rule of Evidence: "Against the objection of a party, the judge presiding at the trial of an action may not testify in that trial as a witness. Upon such objection, *the judge shall declare a mistrial* and order the action assigned for trial before another judge."

In a criminal case, a mistrial granted against the objection of the defendant will give defendant the defense of double jeopardy in an attempted retrial. If, however, the defendant either moves for or consents to a mistrial, that defense is waived. (See *1 Cal. Crim. Law (3d), Defenses, §120 et seq.*) *Ev.C. 703(c)* takes care of this problem by providing that the defendant's objection to calling of the judge as a witness "shall be deemed a motion for mistrial," and, in consequence, a waiver of the defense.

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER IX - Witnesses

## II. COMPETENCY OF WITNESSES

## C. Judge Presiding.

1. Disqualification by Objection.
- c. Testimony in Subsequent Proceeding.

2 Witkin Cal. Evid. Witnesses § 51

[§ 51] Testimony in Subsequent Proceeding.

In *Merritt v. Reserve Ins. Co.* (1973) 34 C.A.3d 858, 110 C.R. 511, plaintiff truck driver contended that defendant insurance carrier had refused in bad faith to settle plaintiff's earlier personal injury claim against the carrier's insured, as a result of which plaintiff's judgment against the insured largely remained unsatisfied. To show the carrier's alleged bad faith, plaintiff called as an expert witness the judge who had presided over the original action. He testified that a defense witness at the earlier trial was not a persuasive witness, thus inferring that the defense had been unskillfully handled. *Held*, the judge should have been barred from testifying as an expert on matters which took place before him in his judicial capacity. The Evidence Code prohibits him from testifying over objection at the trial of an action over which he presided; "[w]e think it only slightly less prejudicial when a judge expresses his opinion as a witness about events that occurred in an earlier trial over which he had presided." (34 C.A.3d 883.) (See 86 A.L.R.3d 633 [judge as witness in cause not on trial before him].)

The disqualification is now covered by *Ev.C. 703.5*: "No person presiding at any *judicial or quasi-judicial proceeding*, and no arbitrator or mediator, shall be competent to testify, *in any subsequent civil proceeding*, as to any statement, conduct, decision, or ruling occurring at or in conjunction with the prior proceeding, except as to a statement or conduct that could (1) give rise to civil or criminal contempt, (2) constitute a crime, (3) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (4) give rise to disqualification proceedings" against a judge for having personal knowledge or for being biased or prejudiced. (*C.C.P. 170.1(a)(1)*, (a)(6).)

However, *Ev.C. 703.5* is inapplicable to mediators with respect to mediation of visitation or custody issues under *Family C. 3160* et seq. (see *10 Summary (9th)*, *Parent and Child, Supp.*, §231M et seq.). (*Ev.C. 703.5*.) And *Ev.C. 703.5* only limits *who may testify*, not *what testimony may be received*. (*Caro v. Smith* (1997) 59 C.A.4th 725, 733, 734, 69 C.R.2d 306, 6 Cal. Proc. (4th), *Proceedings Without Trial, Supp.*, §521 [where defendant challenged arbitration award on basis that she had not consented to arbitration, *Ev.C. 703.5* did not require exclusion of declarations by plaintiff and her attorney detailing colloquy between defendant and arbitrator, where declarations were not by arbitrator].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Saeta v. Superior Court* (2004) 117 C.A.4th 261, 267, 11 C.R.3d 610 [in wrongful termination action, trial judge did not err in granting motion to compel testimony of retired judge who had acted as member of board that reviewed plaintiff's termination after she exercised hearing right under employment contract; proceeding was neither arbitration nor mediation within meaning of *Ev.C. 703.5*]. *Mediation of visitation or custody issues:*

*Cross-Reference:* 10 *Summary* (10th), *Parent and Child*, §278 et seq. *Correction:* Page 302, first full paragraph, the last line should read: "prejudiced under *C.C.P. 170.1(a)(1), (a)(6).*"



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CHAPTER IX - Witnesses

II. COMPETENCY OF WITNESSES

C. Judge Presiding.

2. Procedure Where No Objection.

2 *Witkin Cal. Evid. Witnesses* § 52

[§ 52] Procedure Where No Objection.

(1) *Disclosure to Parties*. In the absence of objection, the judge is a qualified witness and "may testify." (*Ev.C. 703(d)*.) But, before he or she may be called, the judge must, outside the presence and hearing of the jury, "inform the parties of the information he has concerning any fact or matter about which he will be called to testify." (*Ev.C. 703(a)*.)

(2) *Consent to Mistrial*. Calling the judge "shall be deemed a consent to the granting of a motion for mistrial." (*Ev.C. 703(c)*.) This provision, like the one on objection, is principally designed to preclude the defense of double jeopardy on a retrial. (See *supra*, §50.)

**SUPPLEMENT:** [This section is current through the latest supplement]





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## CHAPTER IX - Witnesses

### II. COMPETENCY OF WITNESSES

#### D. Juror.

2 Witkin Cal. Evid. Witnesses § 53

[§ 53] Juror.

(1) *Nature of Problem.* The problem of a juror testifying in the very case in which he or she is on the jury is similar to that of the judge. "A juror-witness is in an anomalous position. He manifestly cannot weigh his own testimony impartially. A party affected adversely by the juror's testimony is placed in an embarrassing position. He cannot freely cross-examine or impeach the juror for fear of antagonizing the juror--and perhaps his fellow jurors as well. And, if he does not attack the juror's testimony, the other jurors may give his testimony undue weight." (Law Rev. Com. Comment to *Ev.C. 704*; see 1 McCormick 5th, §68; 6 Wigmore (Chadbourn Rev.) §1910; 86 A.L.R.3d 781 [trial jurors as witnesses in same state court or related case]; 81 *Am.Jur.2d* (1992 ed.), *Witnesses* §280.)

(2) *Former Law and Evidence Code.* Former C.C.P. 1883 left it to the judge's discretion to determine whether the matter should be tried before another jury. *Ev.C. 704(b)* takes the same approach as the comparable rule on judge's testimony (*supra*, §49):

"Against the objection of a party, a juror sworn and impaneled in the trial of an action may not testify before the jury in that trial as a witness. Upon such objection, the *court shall declare a mistrial* and order the action assigned for trial before another jury."

*Ev.C. 704* parallels *Ev.C. 703* (*supra*, §49 et seq.) in its implementation:

(a) In the absence of objection, a juror "may be compelled to testify." (*Ev.C. 704(d)*.)

(b) The juror must first, in a proceeding conducted by the judge outside the presence and hearing of the remaining jurors, inform the parties of the information he or she has. (*Ev.C. 704(a)*.)

(c) Calling the juror to testify is deemed a consent to the granting of a mistrial. (*Ev.C. 704(c)*.)

(d) Objection to calling of a juror is deemed a motion for a mistrial. (*Ev.C. 704(c)*.)

(3) *Distinctions.* *Ev.C. 704* deals solely with a juror's testimony before the jury in a trial in which he or she is a juror. Other problems involving jurors are treated elsewhere. (See *Ev.C. 1150*, 7 *Cal. Proc.* (4th), *Trial*, §392 et seq. [evidence to test a verdict]; on voir dire examination of jurors, see 7 *Cal. Proc.* (4th), *Trial*, §150 et seq.; 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §472 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Nature of Problem.* See 81 *Am.Jur.2d* (2004 ed.), *Witnesses* §268; 1 McCormick 6th, §68. *West's Key Number*

*Digest*, Witnesses k.68 et seq.



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## CHAPTER IX - Witnesses

### II. COMPETENCY OF WITNESSES

#### E. Attorney.

##### 1. Civil Cases.

##### a. Attorney as Witness for Client.

2 Witkin Cal. Evid. Witnesses § 54

[§ 54] Attorney as Witness for Client.

An attorney may of course be a competent witness. But if called to testify for *his or her client* (except as to purely formal matters such as attestation of an instrument), the approved practice is to leave the trial to other counsel, to avoid the appearance of being paid a professional fee for favorable testimony. The objection is not one of competency, but of legal ethics. (See *Hotaling v. Hotaling* (1922) 187 C. 695, 709, 203 P. 745; *People v. Smith* (1970) 13 C.A.3d 897, 903, 91 C.R. 786, *infra*, §57, citing the text; *Reynolds v. Superior Court* (1986) 177 C.A.3d 1021, 1024, 223 C.R. 258; *Rules of Professional Conduct*, Rule 5-210 [except in specified circumstances, e.g., where testimony relates to uncontested matter, etc., attorney-witness must obtain client's consent to continued representation]; 6 Wigmore (Chadbourn Rev.) §1911; 81 Am.Jur.2d (1992 ed.), *Witnesses* §225 et seq.; 35 A.L.R.4th 810 [attorney as witness for client in civil proceedings--modern state cases]; 1 Cal. Proc. (4th), *Attorneys*, §§448, 522.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 81 Am.Jur.2d (2004 ed.), *Witnesses* §214 et seq. *West's Key Number Digest*, *Witnesses* k.67



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II. COMPETENCY OF WITNESSES

E. Attorney.

1. Civil Cases.

b. Opposing Attorney Called as Witness.

2 *Witkin Cal. Evid. Witnesses* § 55

[§ 55] Opposing Attorney Called as Witness.

An embarrassing and prejudicial situation can arise where a party calls the other party's attorney to give testimony unfavorable to the attorney's client. This may and should be avoided by a stipulation on the matter involved, preferably made outside the presence of the jury. But where the stipulation is sought and rejected without justification, there is no misconduct in forcing an admission on the stand.

Thus, in *Romeo v. Jumbo Market* (1967) 247 C.A.2d 817, 56 C.R. 26, a personal injury case, Dr. S testified for plaintiff and Dr. N for defendant. Defendant's counsel asked for a stipulation that Dr. S had seen Dr. N's report before testifying. Plaintiff's counsel cited this entirely proper request as misconduct and rashly declared, "I have no knowledge whatsoever about it." He was then called to the stand and admitted that he had sent the report to Dr. S. *Held*, there was no error in this procedure. ( 247 C.A.2d 821.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER IX - Witnesses

### II. COMPETENCY OF WITNESSES

#### E. Attorney.

#### 2. Criminal Cases.

#### a. Prosecutor as Witness.

2 Witkin Cal. Evid. Witnesses § 56

[§ 56] Prosecutor as Witness.

A prosecutor is a competent witness. (See *People v. Stokley* (1968) 266 C.A.2d 930, 936, 72 C.R. 513; *People v. Guerrero* (1975) 47 C.A.3d 441, 444, 120 C.R. 732; 81 Am.Jur.2d (1992 ed.), Witnesses §§229, 230; 54 A.L.R.3d 100.)

However, ethical considerations may be involved where the prosecutor interviews a prospective witness without a third party present.

Thus, in *People v. Guerrero*, *supra*, defendant G and another were convicted of three sex crimes committed upon a 17-year-old girl. On appeal, the sole issue was the trial judge's ruling that the prosecutor, a deputy district attorney, could testify as a witness. The prosecutor had interviewed C, a possible hostile witness, without an investigator present, and C told him that he had disclosed the victim's age to defendant. At the trial, C testified that he had not communicated that information to defendant, and the prosecutor took the stand, without objection, to impeach him. *Held*, any error in this procedure was harmless, for it related solely to the unlawful intercourse charge, the least serious, and the jury also found defendant guilty of forcible rape and oral copulation. (47 C.A.3d 444, 448.) But the court, noting that in a number of out-of-state cases there had been reversals on the ground of testimony by the prosecutor (47 C.A.3d 448, footnote 8), undertook to restate the ethical considerations involved.

(a) Although an attorney is a competent witness, the dual role of witness and advocate--particularly the practice of a prosecuting attorney testifying in a case he or she is prosecuting--should be approved only in extraordinary circumstances. (47 C.A.3d 445.)

(b) The relevant ethical canons, incorporated into Rules of Professional Conduct, former Rule 2-111 (now Rule 5-210; see 1 Cal. Proc. (4th), Attorneys, §522), elaborately cover the subject. (47 C.A.3d 445, 446.) And the A.B.A. Standards for Criminal Justice stress the preventive law approach: The prosecutor should avoid interviewing a prospective witness except in the presence of a third person unless the prosecutor is prepared to forgo impeachment or withdraw from the case in order to present his or her impeaching testimony. (47 C.A.3d 447.)

(c) The problem presented by cases of this kind would have been avoided if this A.B.A. recommendation were followed; and "[w]e urge that district attorneys familiarize themselves and their staffs with the pertinent provisions of the State Bar rules and the American Bar Association canons and standards, as to the latter particularly those applicable to 'the prosecution function.' " (47 C.A.3d 448.) A footnote adds: "We suggest like action by public defenders and private counsel, with emphasis on ABA standards as to 'the defense function.' " (47 C.A.3d 449, footnote 9.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Garcia* (2000) 84 C.A.4th 316, 332, 100 C.R.2d 789 [defendant's request to call prosecutor as percipient witness was properly denied where defendant demonstrated neither extraordinary circumstances nor inability to obtain same information from another source]; 81 Am.Jur.2d (2004 ed.), Witnesses §216.



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## CHAPTER IX - Witnesses

### II. COMPETENCY OF WITNESSES

#### E. Attorney.

#### 2. Criminal Cases.

#### b. Defense Counsel as Witness for Defendant.

2 Witkin Cal. Evid. Witnesses § 57

[§ 57] Defense Counsel as Witness for Defendant.

In *People v. Smith* (1970) 13 C.A.3d 897, 91 C.R. 786, on unusual facts, the reviewing court upheld the trial judge's action in barring the defense attorney from the witness stand during defendant's third trial on the same robbery charges. The following sequence of events led to that result:

*First trial.* Attorney B, a deputy public defender, represented defendant and called J as a witness. After J declined to answer questions on the grounds of self-incrimination, the jury deadlocked and the judge declared a mistrial.

*Second trial.* Attorney T, another deputy public defender, represented defendant and listed both J and attorney B as prospective witnesses, with indications that B had received significant statements from J. When defendant expressed a lack of confidence in T, the judge suggested that defendant should have an attorney completely divorced from the public defender's office. Defendant, however, insisted on once again having B as his attorney. The judge said: "You realize that if he represents you he won't be able to appear on your behalf as a witness." The judge then declared a mistrial and reappointed B.

*Third trial.* After the prosecution rested, B made an offer of proof that J committed the robbery, indicating that J should be called as a witness. If J still claimed his Fifth Amendment privileges, B would testify that J "told me that he committed the crime and that Nova Smith, the defendant, did not commit the crime." The judge rejected this offer. *Held*, the ruling was proper.

(a) B's status as defendant's trial attorney did not disqualify him as a witness. "Evidence Code section 700 declares that 'except as otherwise provided by statute' every person is qualified as a witness. No California statute disqualifies a lawyer from testifying in a trial to which his client is a party. California authorities declare that the inhibition against attorneys' testimony is a problem of professional ethics rather than competence." (13 C.A.3d 903.)

(b) The judge, however, had *inherent power* to control the proceedings by imposing a *pretrial election* on the defense, i.e., withdrawal of the attorney if he chose to testify. "The propriety of this kind of intervention is judgmental. It varies with the circumstances, entailing a balance between the integrity of the fact-finding process and the client's need for continuity of representation. The potential for debasement of the trial was large. Viewed in prospect, the attorney's proposed testimony was important; it would describe the alleged confession of a third party to the crime of which defendant stood accused. The testimony might at least kindle a reasonable doubt in the mind of a reasoning juror. The attorney would attempt to shift between the sworn objectivity of the witness and the duty-bound partisanship of the

advocate. Because of his professional and official role, his sworn testimony would lay silent claim to a heightened degree of credibility. He would thrust upon his opponent a sticky choice between vigorous cross-examination of his professional colleague and abdication of his own professional responsibility. After cross-examination the witness would doff his hat as witness, pick up his hat as advocate and stand before the jury in summation. The synthetic change of hats would hardly interrupt the flow of impressions and influences emanating from him as a unitary human being. In his role as advocate he would assure the jurors of his own veracity as witness. In justice to his client, he could do no less. His opponent would then be driven to attack his credibility as a witness. In justice to *his* client, the opponent too could do no less." (13 C.A.3d 907.)

(c) The circumstances here were *fully foreseeable*. Aside from defendant's subjective preference, there was no compelling need for B to resume his attorney's role in the third case. "The need for the attorney's testimony was discernible in advance of the trial; there was no emergency; the facts of the case were simple, the attorney's professional involvement transitory, the episode to which he would testify of brief duration." (13 C.A.3d 909.) (See *People v. Guerrero* (1975) 47 C.A.3d 441, 449, footnote 9, 120 C.R. 732, supra, §56; 52 A.L.R.3d 887 [defense attorney as witness for client in state criminal case]; 81 Am.Jur.2d (1992 ed.), *Witnesses* §228.)

It is *error* to deny defense counsel's request to withdraw and then refuse to permit counsel to give relevant testimony. In *People v. Goldstein* (1982) 130 C.A.3d 1024, 182 C.R. 207, defendant's counsel was informed on the afternoon of the trial's commencement that a material witness expected to testify for the defense had recanted and indicated that he would testify for the prosecution. Counsel moved to be relieved because he expected to testify to prior inconsistent statements of the witness, and the judge denied the motion. The witness then gave damaging testimony for the prosecution, defendant's counsel asked permission to give the impeaching testimony, and the judge refused. *Held*, this was error of constitutional dimension. The first ruling, denying the motion to be relieved as counsel, was based on speculation, and would have called for a continuance in a trial already long delayed. But the second ruling denied the defendant the fundamental right to call a favorable witness to give relevant evidence on the issue of guilt. (130 C.A.3d 1030.) The error, however, was harmless, for, on cross-examination, the witness admitted the prior inconsistent statements and his own devious behavior. (130 C.A.3d 1032, 1033.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 81 Am.Jur.2d (2004 ed.), *Witnesses* §215.





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## CHAPTER IX - Witnesses

### II. COMPETENCY OF WITNESSES

#### E. Attorney.

#### 2. Criminal Cases.

#### c. Defense Counsel Called by Prosecution.

2 Witkin Cal. Evid. Witnesses § 58

[§ 58] Defense Counsel Called by Prosecution.

It is serious misconduct for the prosecution to call the defendant's attorney as a witness where the facts to be proved could be established in another manner. The effect of such a maneuver is to impair the right of consultation and to subvert the privilege against self-incrimination. (*People v. Lathrom* (1961) 192 C.A.2d 216, 227, 230, 13 C.R. 325, 5 Cal. Crim. Law (3d), *Criminal Trial*, §237; see 108 Harv. L. Rev. 775.)

In *People v. Rodriguez* (1981) 115 C.A.3d 1018, 171 C.R. 798, F, defendant's counsel, at a lineup, was asked by the prosecutor what he thought of it, and he replied: "It's not bad." At the trial F and A, another attorney, represented the defendant, and A extensively cross-examined the identifying witnesses and the police officer who conducted the lineup, in developing the defense of misidentification. The prosecutor then, without warning, called F as a witness. A objected, the judge indicated that he would overrule the objection, no one consulted defendant, and the objection was withdrawn. F then testified to his opinion at the lineup. *Held*, conviction reversed; the conduct of the prosecutor, coupled with the response of the court and defense counsel, deprived defendant of the effective assistance of counsel. "The jury can hardly avoid inferring the defendant's own attorney does not believe in the defense he himself is presenting." (115 C.A.3d 1021.)

**SUPPLEMENT:** [This section is current through the latest supplement]

Cf. *People v. Prince* (2007) 40 C.4th 1179, 1246, 57 C.R.3d 543, 156 P.3d 1015 [in murder prosecution, rule of *People v. Rodriguez* (1981) 115 C.A.3d 1018, 171 C.R. 798, text, p. 308, was not violated where homicide detective who conducted live lineup testified that defense counsel were present at lineup and implied that they had approved composition of lineup and selected defendant's placement in it; defense counsel were not ordered to testify, and their credibility and ability to pursue defense of mistaken identification were not undercut].



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## CHAPTER IX - Witnesses

## III. PRIVILEGE: IN GENERAL

## A. Nature of Rules of Privilege.

2 Witkin Cal. Evid. Witnesses § 59

[§ 59] Nature of Rules of Privilege.

(1) *Incompetency Distinguished.* Incompetency prevents a person from testifying, for reasons which supposedly make the person a bad witness. (See *supra*, §41 et seq.) Privilege exempts the person from testifying, i.e., allows him or her to refrain if he or she chooses, or if someone else who is entitled to the privilege claims it, for reasons of public policy that have nothing to do with competency to testify. The rules of privilege are designed to protect personal relationships or other interests where the protection of confidentiality is considered more important than the need for the evidence. (See Law Rev. Com. Comment to *Ev.C. 910*, *infra*, §65; 1 McCormick 5th, §72 et seq.; 8 Wigmore (McNaughton Rev.) §2285; 98 *Harv. L. Rev.* 1450 [Developments in the Law--Privileged Communications]; 26 *San Diego L. Rev.* 625 [evidentiary privileges and exclusion of derivative evidence]; 81 *Am.Jur.2d* (1992 ed.), *Witnesses* §285 et seq.; C.E.B., Jefferson, 2 California Evidence Benchbook 3d, Chap. 35; C.J.E.R., Judges Benchbook, Civil Proceedings: Discovery §4.1 et seq.; 3 Wharton, Criminal Evidence (14th ed.), §512 et seq.; Hogan, 2 Cal. Civil Discovery, Chap. 12.)

(2) *Types of Privilege.* A privilege may be an exemption from the duty to take the stand and testify (criminal defendant, spouse) or an exemption from the duty to testify as to privileged matters (the usual witness' privilege). A privilege also includes the right of the holder to prevent another from disclosing privileged information. (See *infra*, §66.) (On similar--but distinguishable--protection from disclosure afforded by special privacy statutes, see *infra*, §503 et seq.)

(3) *Right To Claim or Waive Privilege.* A privilege is personal to the holder; thus, it must be claimed and may be waived (see *infra*, §67 et seq.). But the claim is protected from adverse comment or inference. (See *infra*, §95 et seq.)

(4) *Appellate Review.* If the trial judge *sustains the objection* to testimony at the trial, or refuses to order the witness to answer questions on a deposition or to produce records, the ruling or order is of course reviewable on appeal from the final judgment. More commonly, however, mandamus is sought to compel the judge to require the witness to answer or produce records. (See *I.E.S. Corp. v. Superior Court* (1955) 44 *C.2d* 559, 564, 283 *P.2d* 700; 2 *Cal. Evidence* (4th), *Discovery*, §71.) (On the effect of *overruling a claim*, see *infra*, §93, 94.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Incompetency Distinguished.* See Simons, Cal. Evidence Manual, §5:1 et seq.; Hogan, 2 Cal. Civil Discovery 2d, Chap. 12; 81 *Am.Jur.2d* (2004 ed.), *Witnesses* §273 et seq.; 1 McCormick 6th, §72 et seq. *West's Key Number Digest*, *Witnesses* k.184(1)



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## CHAPTER IX - Witnesses

### III. PRIVILEGE: IN GENERAL

#### B. Privileges Statutory.

##### 1. General Rule.

2 Witkin Cal. Evid. Witnesses § 60

[§ 60] General Rule.

(1) *Evidence Code*. Unless otherwise provided by statute, no person has a privilege to do any of the following:

(a) To refuse to be a witness. (*Ev.C. 911(a).*)

(b) To refuse either to disclose a matter or to produce a writing, object, or other thing. (*Ev.C. 911(b).*)

(c) To insist that another *not* be a witness, *not* disclose a matter, or *not* produce a writing, object, or other thing. (*Ev.C. 911(c).*)

*Ev.C. 911* codifies established law. (See *Whitlow v. Superior Court* (1948) 87 C.A.2d 175, 184, 196 P.2d 590, *infra*, §61; *Tatkin v. Superior Court* (1958) 160 C.A.2d 745, 753, 326 P.2d 201; *Chronicle Publishing Co. v. Superior Court* (1960) 54 C.2d 548, 565, 7 C.R. 109, 354 P.2d 637, *infra*, §270, quoting the text; 1 McCormick 5th, §75; 8 Wigmore (McNaughton Rev.) §§2192 et seq., 2286; C.J.E.R., Judges Benchbook, Civil Proceedings: Discovery §4.3.)

Although all of the important privileges are fully stated in the Evidence Code, there is some coverage of the subject in other codes. *Ev.C. 920* assures the continuing force of these other sections by providing that "[n]othing in this division shall be construed to repeal by implication any other statute relating to privileges." (For the newsperson's shield law, see *infra*, §333 et seq.; on privileges that are defenses to tort actions, see 5 *Summary* (9th), *Torts*, §§278 et seq., 498 et seq.; for the distinguishable special privacy statutes, see *infra*, §503 et seq.)

(2) *Construction of Privilege Statutes*. It is sometimes said that, because privileges operate to keep out relevant evidence and thereby impede the correct determination of issues, they should be strictly construed so as to keep them within the narrow limits of the statutes. (See *Dwelly v. McReynolds* (1936) 6 C.2d 128, 131, 56 P.2d 1232; *Samish v. Superior Court* (1938) 28 C.A.2d 685, 695, 83 P.2d 305; *Tanzola v. De Rita* (1955) 45 C.2d 1, 6, 285 P.2d 897; *People v. McGraw* (1983) 141 C.A.3d 618, 622, 190 C.R. 461, quoting McCormick; *People v. Thompson* (1982) 133 C.A.3d 419, 427, 184 C.R. 72; *infra*, §99.) These observations should not, however, be given undue significance. The modern trend of decisions is to fully protect most of the privileges, particularly the privilege against self-incrimination; and the Evidence Code in a number of instances changes our former law in accordance with this policy.

(3) *Federal Rules of Evidence*. "Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common

law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law." (*F.R. Evid.*, Rule 501; see *Trammel v. United States* (1980) 445 U.S. 40, 100 S.Ct. 906, 910, 63 L.Ed.2d 186, 192, 193, *infra*, §170; 2 Mueller & Kirkpatrick, *Federal Evidence* 2d, §169 et seq.; 1 McCormick 5th, §76.1; 81 *Am.Jur.2d* (1992 ed.), *Witnesses* §288; 9 *U.C. Davis L. Rev.* 477; 98 *Harv. L. Rev.* 1463, 1469; 105 *Harv. L. Rev.* 1339 [Making Sense of Rules of Privilege Under the Structural (IL) Logic of the Federal Rules of Evidence]; 1978 A.S. 493.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Evidence Code*. See 1 McCormick 6th, §75. *Privileges stated elsewhere:* See *Ombudsman Services of Northern Calif. v. Superior Court* (2007) 154 C.A.4th 1233, 1243, 65 C.R.3d 456 [although courts may not create new nonstatutory privileges, and there is no general ombudsman statutory privilege in California, Welf.C. 9725 provides privilege for investigatory records and files of office of long-term care ombudsman].

Federal statutes and treaties may supply the basis for a privilege recognized by California courts. (*Union Bank of Calif. v. Superior Court* (2005) 130 C.A.4th 378, 394, 29 C.R.3d 894 [bank that had produced suspicious activity reports when it detected known or suspected violations of federal law or suspicious transactions related to money laundering, was protected by federal "suspicious activity report" privilege from being compelled to disclose supporting documentation generated in producing reports].)

*Privileges that are defenses to tort actions:*

*Cross-Reference:* 5 *Summary* (10th), *Torts*, §§131 et seq., 561 et seq.

(3) *Federal Rules of Evidence*. See 1 McCormick 6th, §76.1; 53 *Hastings L. J.* 769 [suggesting steps toward codification of federal testimonial privileges]; 38 *Loyola L.A. L. Rev.* 515 [symposium on federal privileges in 21st century]; 81 *Am.Jur.2d* (2004 ed.), *Witnesses* §276.



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## CHAPTER IX - Witnesses

## III. PRIVILEGE: IN GENERAL

## B. Privileges Statutory.

## 2. Illustrations.

## a. General Duty To Testify.

2 *Witkin Cal. Evid. Witnesses* § 61

## [§ 61] General Duty To Testify.

The duty to testify in the absence of a statutory privilege, and the fallacy underlying some popular excuses, were considered in *Whitlow v. Superior Court* (1948) 87 C.A.2d 175, 196 P.2d 590. Following settlement of a malpractice suit against Dr. W, Mrs. T wrote the superior judge charging that crucial testimony of a witness had been altered in the reporter's transcript, and demanding an investigation. The judge filed the letter, commenced the investigation by taking testimony of the reporter and other witnesses, and sought to examine Mrs. T and Dr. W. Mrs. T declined to answer certain questions because her attorney was not present; Dr. W claimed his "constitutional right as a citizen" to refuse to testify without advice of his counsel, who was not present, stating that his attorney had so advised him and had also told him "to challenge the jurisdiction of the court." Upon being threatened with contempt, both sought a writ of prohibition. *Held*, writ denied; despite the informality of the accusation, it was the right and duty of the court to inquire into charges of criminal misconduct on the part of its officers. The inquiry was therefore a judicial proceeding in which witnesses (not defendants) could be called and examined, and were required to testify unless incriminating questions were asked. "That a witness may wish his attorney to be present is no excuse. He might name a thousand wishes and name a thousand persons he would like to have present, but he would not for any or all of them be relieved of his duty to give his testimony." (87 C.A.2d 184.)

*Simrin v. Simrin* (1965) 233 C.A.2d 90, 43 C.R. 376, suggests a questionable distinction. A mother, deprived of custody of her children by a divorce decree, moved to modify, and called a rabbi to give evidence of her rehabilitation. He refused to testify on the ground that he had acted as marriage counselor to the parties under an express agreement with the parties that their communications would be confidential and that neither would call him as a witness. The trial judge ruled that he need not relate the confidential communications, and the wife's motion was denied. *Held*, the ruling was not erroneous. There is no statutory privilege for a marriage counselor, and the clergyman privilege, limited to confessions in the course of church discipline, does not cover communications made to a religious advisor acting as a marriage counselor. (233 C.A.2d 94.) However, the agreement, though a contract to suppress evidence, also sought to further the policy of counseling as a means of preserving marriages: "One should not be permitted, under cover of suppression of evidence, to repudiate an agreement so deeply affecting the marriage relationship. For the unwary spouse who speaks freely, repudiation would prove a trap; for the wily, a vehicle for making self-serving declarations." (233 C.A.2d 95.) The court also saw helpful analogies in the rule excluding statements made in an offer to compromise, and in the private proceedings of the conciliation court, designed to encourage the spouses to speak freely in the hope of preserving the marriage. (233 C.A.2d 95.) (See 13 U.C.L.A. L. Rev. 178.)

This reasoning is a persuasive argument to the Legislature for the creation of a marriage counselor's privilege (see 13 *U.C.L.A. L. Rev.* 186), but it cannot be considered a safe precedent:

(a) *Ev.C. 911* permits no such exception.

(b) The conciliation court analogy fails, for its confidentiality is imposed by statute.

(c) The only basis for refusing to compel the rabbi to testify was the agreement of the parties, and this carries the implication that a pseudo-privilege may be created, by such an agreement, for clergymen, social workers, probation officers, arbitrators, schoolteachers, or even family friends. (On the right of an independent expert to refuse to testify as to his expert opinion, see 50 A.L.R.4th 680.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER IX - Witnesses

### III. PRIVILEGE: IN GENERAL

#### B. Privileges Statutory.

##### 2. Illustrations.

#### b. Nonstatutory Privileges Rejected.

2 Witkin Cal. Evid. Witnesses § 62

#### [§ 62] Nonstatutory Privileges Rejected.

In a number of instances, claims of privilege having no foundation in our express statutes have been rejected.

(1) *Communications to Probation Officer*. There is no statutory privilege protecting communications to a probation officer. (See *People v. Carter* (1973) 34 C.A.3d 748, 751, 110 C.R. 324 [distinguishing exclusion of admissions made under implied threat or inducement; see 1 Cal. Evidence (4th), Hearsay, §65 et seq.].) (For exclusion of statements made to probation officers in connection with deferred entry of judgment and pretrial diversion programs, see *infra*, §265.)

(2) *Communications to Social Worker*. Psychiatric social workers not covered by *Ev.C. 1010* (*infra*, §215) have no psychotherapist privilege to keep the Department of Social Welfare from establishing information systems about the people they assist. (*Belmont v. State Personnel Bd.* (1974) 36 C.A.3d 518, 522, 111 C.R. 607.) (For decisions of other states on communications to social worker, see 50 A.L.R.3d 563; 81 *Am.Jur.2d* (1992 ed.), *Witnesses* §541 et seq.)

(3) *Communications to Parent*. A child has no privilege to prevent disclosure of communications made in the course of the parent-child relationship. (*In re Terry W.* (1976) 59 C.A.3d 745, 747, 130 C.R. 913; 100 *Harv. L. Rev.* 910 [reviewing case law and statutes and urging establishment of parent-child testimonial privilege]; 1984 A.S. 363 [family privileges].)

In the *Terry* case, a minor was adjudicated a ward of the juvenile court after his mother, over objection, testified that he confessed a burglary to her. *Held*, the testimony was properly received. A communication from child to parent falls within a privileged area in certain situations; e.g., where the communication to the parent is to further the child's interest in communication with, or is necessary for transmission of information to, a lawyer, a physician, or a psychotherapist. But the self-incrimination privilege is inapplicable to incriminatory statements made to persons unconnected with government, and the right to privacy does not protect all intrafamily communication from compelled disclosure. (59 C.A.3d 748.) (See 16 *San Diego L. Rev.* 811 [approving New York case upholding privilege under federal constitutional right of privacy]; 1983 A.S. 196; 62 A.L.R.5th 629 [confidential communications between relatives other than husband and wife].)

(4) *Nonmarital Relationship*. The husband-wife privilege requires a marriage relationship; there is no privilege for unmarried cohabitants. (*People v. Delph* (1979) 94 C.A.3d 411, 416, 156 C.R. 422, *infra*, §173.)

(5) *Communications to Jailhouse Lawyer*. There is no privilege protecting an inmate's communications to a "jailhouse lawyer." (See *People v. Velasquez* (1987) 192 C.A.3d 319, 237 C.R. 366, *infra*, §101.)

(6) *Academic Peer Review Materials*. *F.R. Evid.*, Rule 501 (*supra*, §60) does not justify creation of a new privilege of a university to refuse to disclose peer review materials relating to tenure of a former faculty member alleging discrimination on the basis of race and sex. (*University of Pennsylvania v. E.E.O.C.* (1990) 493 U.S. 182, 110 S.Ct. 577, 582, 107 L.Ed.2d 571, 582.)

(7) *Self-Critical Analysis Privilege*. The self-critical analysis privilege, recognized by federal courts for analyses conducted by federal contractors pursuant to their equal opportunity obligations, does not exist in California. (*Cloud v. Superior Court* (1996) 50 C.A.4th 1552, 1558, 58 C.R.2d 365 [in action against employer for gender-based discrimination, defendant's self-critical affirmative action analyses were not protected by self-critical analysis privilege, nor did they come within attorney-client, work product, or trade secret privileges]; see 34 *San Diego L. Rev.* 93 [discussing self-critical analysis privilege and arguing it should not apply to drug and medical device industry].)

Suggestions are constantly made to create additional statutory privileges. (See 1 McCormick 5th, §§76.2, 77; 98 *Harv. L. Rev.* 1575, 1588, 1609; 14 *San Diego L. Rev.* 876 [proposed privilege of academic researcher to refuse disclosure of information obtained under pledge of confidentiality]; 69 *Cal. L. Rev.* 1538 [proposed academic freedom privilege]; 15 *U.C. Davis L. Rev.* 473 [proposed extension of federal Privacy Act of 1974 to give confidentiality to personnel files in the private sector]; 45 *U.C.L.A. L. Rev.* 1167 [environmental self-audit privilege]; 33 *A.L.R.*4th 539 [accountant's privilege created in a few states]; 1983 *A.S.* 182 [accountant's work product privilege recognized by federal court].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Communications to Social Worker*. See 81 *Am.Jur.*2d (2004 ed.), *Witnesses* §522. *Suggestions to create additional privileges:* See 1 McCormick 6th, §§76.2, 77.

(8) *(New) Union Representative-Employee Privilege*. Neither California nor federal law recognizes an evidentiary privilege for discussions between a union representative and a union member. (*American Airlines v. Superior Court* (2003) 114 C.A.4th 881, 888, 8 C.R.3d 146, citing the text and distinguishing *Welfare Rights Organization v. Crisan* (1983) 33 C.3d 766, 190 C.R. 919, 661 P.2d 1073, text, §103.)





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## CHAPTER IX - Witnesses

### III. PRIVILEGE: IN GENERAL

#### B. Privileges Statutory.

##### 2. Illustrations.

#### c. Distinction: Consular Privilege Under Treaty.

2 Witkin Cal. Evid. Witnesses § 63

[§ 63] Distinction: Consular Privilege Under Treaty.

In *People v. Corona* (1989) 211 C.A.3d 529, 259 C.R. 524, defendant, charged with first degree murder, met with Rodriguez, the Mexican consul, to discuss defendant's eligibility for a prisoner exchange program between Mexico and the United States. During the meeting Rodriguez asked defendant whether he had committed the crime and defendant replied, "Yes, I did it and I'm a sick man and a sick man cannot be judged as the rest of them." At the trial, Rodriguez testified to the conversation. *Held*, though the communication was privileged, defendant could not raise the error on appeal.

(a) The Vienna Convention on Consular Relations provides that members of a consular post are under no obligation to give evidence concerning matters connected with the exercise of their functions, and that the sending state may waive this privilege only by a written waiver communicated to the receiving state. (211 C.A.3d 538.) In this case, the Mexican Government did not submit a written waiver; but a government official advised the district attorney that the government had no objection to the testimony. And an attorney purporting to represent the government, who appeared informally to advise the judge of the consular privilege, did not assert it. (211 C.A.3d 539.)

(b) The holder of the privilege was the Mexican Government, and Rodriguez had no authority to claim or waive it. But under *Ev.C. 916(a)*, the court on its own motion or on motion of a party must exclude privileged information if the person from whom the information is sought is not authorized to claim it and there is no party so authorized. (211 C.A.3d 539; see *infra*, §92.) This duty of the court extends to the consular privilege: Although that privilege is not specified in the Evidence Code, *Ev.C. 911*, providing that there are no privileges except as provided by statute (see *supra*, §62), must be construed in the light of *Ev.C. 230*, stating that the word "statute" includes treaties. (211 C.A.3d 540.)

(c) It was therefore error for the trial judge to fail to assert the consular privilege on behalf of Mexico; but defendant, who was not the holder, could not raise the error on appeal. (211 C.A.3d 540, citing *Ev.C. 918*, *infra*, §93.) This rule is not unjust as applied to defendant, for the purpose of the privilege is not to benefit individuals but to ensure efficient performance of functions by consuls. And even if a prisoner could raise the claim, the state, as holder of the privilege, could waive it over his objection. (211 C.A.3d 541.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER IX - Witnesses

### III. PRIVILEGE: IN GENERAL

#### B. Privileges Statutory.

#### 3. Nonstatutory Exceptions to Privilege Rejected.

2 Witkin Cal. Evid. Witnesses § 64

[§ 64] Nonstatutory Exceptions to Privilege Rejected.

In *Dickerson v. Superior Court* (1982) 135 C.A.3d 93, 185 C.R. 97, the statutory holder of the privilege was the successor of a corporation which originally retained the attorney. Minority shareholders sued the attorney and Dickerson--president and controlling shareholder of the original corporation--for fraud and breach of fiduciary duty. The shareholders then took the attorney's deposition, and sought to question him about the discussions and transactions involved. The attorney claimed privilege, the trial court ordered him to answer, and he sought relief by extraordinary writ. *Held*, writ granted; the compelled testimony would violate the privilege.

(a) The minority shareholders relied on the 1970 federal Circuit Court of Appeals case of *Garner v. Wolfenbarger*, which held that the privilege is qualified in litigation between a corporation and its own stockholders, and that the stockholders may show that it should not be invoked in the particular instance. But the *Garner* court was acting under *F.R. Evid.*, Rule 501 (see *supra*, §60), which gives federal courts flexibility to develop rules of privilege. (135 C.A.3d 99.) In California, the courts are not free to create new privileges (*Ev.C.* 911); and they are similarly without power to create an exception to an existing privilege because the area "is one of the few instances where the Evidence Code precludes the courts from elaborating upon the statutory scheme." (135 C.A.3d 99, quoting Law Rev. Com. Comment to *Ev.C.* 911.)

(b) The court added that, although the rule of *Garner*, *supra*, might be a desirable means of preventing abuse of the attorney-client privilege by corporate fiduciaries, any exception must be made by statute. (135 C.A.3d 99, 100.) However, on a proper showing, the fraud exception to the privilege might be invoked. (135 C.A.3d 100; see *infra*, §153 et seq.) (See *National Football League Properties v. Superior Court* (1998) 65 C.A.4th 100, 108, 75 C.R.2d 893 [in professional football club's shareholder action against football league and its corporate marketing arm, trial judge erred in ordering corporate defendant to disclose documents protected by attorney-client privilege, where there was no showing club had independent attorney-client relationship with corporate counsel or that services of counsel had been sought for fraudulent purpose]; following *Dickerson*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

In *Wells Fargo Bank v. Superior Court* (2000) 22 C.4th 201, 91 C.R.2d 716, 990 P.2d 591, a bank, cotrustee of a private express trust, petitioned the probate court to settle its accounts and approve its resignation as cotrustee. The trust beneficiaries, claiming misconduct by both cotrustees, filed objections to the bank's accounts and petitioned for removal of the other cotrustee. In response to the beneficiaries' request for documents relating to the trust, the bank produced documents reflecting confidential communications with its attorneys on the subject of trust administration. However, it

asserted the attorney-client privilege as to documents reflecting communications with its attorneys about the beneficiaries' claims of misconduct, and the bank's outside trust administration counsel claimed the protection of the work product doctrine for other documents. The trial judge granted the beneficiaries' motion to compel, but the Court of Appeal reversed, vacating the order compelling production of documents subject to the attorney-client privilege and directing the trial judge to examine in camera the documents as to which outside counsel had claimed protection of the work product doctrine. *Held*, judgment of the Court of Appeal affirmed.

(a) *No statutory exception exists.* *Prob.C. 16060* imposes a duty on trustees to keep the trust beneficiaries reasonably informed, and under *Prob.C. 16064*, a beneficiary may request a report of information about the trust (see 13 *Summary* (10th), *Trusts*, §85). Neither of these statutes necessarily requires a trustee to disclose privileged communications. "If the Legislature had intended to restrict a privilege of this importance, it would likely have declared that intention unmistakably, rather than leaving it to courts to find the restriction by inference and guesswork in the interstices of the Probate Code." (22 *C.4th* 207.)

(b) *Nonstatutory exceptions may not be created.* In some jurisdictions, including the Ninth Circuit, courts have given the trustee's reporting duties precedence over the attorney-client privilege. But California courts do not enjoy the freedom to restrict the attorney-client privilege based on notions of policy or ad hoc justification. (22 *C.4th* 208, 209.) "The privileges set out in the Evidence Code are legislative creations; the courts of this state have no power to expand them or to recognize implied exceptions. ... The [beneficiaries'] argument is nothing more than a plea for an implied exception." (22 *C.4th* 206.) *Moeller v. Superior Court* (1997) 16 *C.4th* 1124, 69 *C.R.2d* 317, 947 *P.2d* 279, text, §107, did not create or recognize any exceptions to the privilege; it simply determined that the privilege was not personal to the trustee but passed from the predecessor trustee to its successor along with the other powers of the office. (22 *C.4th* 209.)

(c) *Privilege was not waived.* The bank had no obligation to disclose any confidential communications on the subject of trust administration. The fact that it did disclose certain of those communications does not mean that it waived the privilege as to other documents not yet disclosed. The bank apparently believed in good faith that its disclosures were required, but the law at the time was uncertain. "An honest mistake of law, where the law is unsettled and debatable, both militates against a finding of waiver ... and offers a possible basis for relief from actions taken in connection with pretrial discovery." (22 *C.4th* 211.)

(d) *No joint client relationship existed.* The beneficiaries could gain access to the documents they seek if they were joint clients of the bank's attorneys. But the law presumes that the attorney for the trustee represents only the trustee, and any joint client relationship would have to be demonstrated based on the facts of the particular case. Here, the record does not provide the evidence needed to support that relationship; a declaration by one of the beneficiaries even contains strong evidence to the contrary. (22 *C.4th* 212, citing *Lasky, Haas, Cohler & Munter v. Superior Court* (1985) 172 *C.A.3d* 264, 218 *C.R.* 205, text, §142.)

(e) *Protection of work product doctrine may have been waived.* Waiver on the basis of nonconfidential disclosure (from outside counsel to the bank) is the only conceivable basis on which the beneficiaries could claim access to outside counsel's work product. The trial judge should examine in camera those documents that were disclosed in order to determine whether they were, in fact, disclosed in confidence. While a court may not require disclosure, even in camera, of information claimed to be privileged (*Ev.C. 915*; see text, §87), that stricture does not apply to the work product doctrine. (22 *C.4th* 214, 215.)

*Ev.C. 915* was amended in 2001 to make the nondisclosure rule applicable to work product claims as well. (See Supp., *infra*, §§87, 88.)



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## CHAPTER IX - Witnesses

### III. PRIVILEGE: IN GENERAL C. Scope and Construction of Division 8.

#### 2 Witkin Cal. Evid. Witnesses § 65

[§ 65] Scope and Construction of Division 8.

(1) *All Proceedings.* "Except as otherwise provided by statute, the provisions of this division apply in all proceedings." (*Ev.C. 910.*) And "proceeding" means "any action, hearing, investigation, inquest, or inquiry (whether conducted by a court, administrative agency, hearing officer, arbitrator, legislative body, or any other person authorized by law) in which, pursuant to law, testimony can be compelled to be given." (*Ev.C. 901.*) The Law Revision Commission Comment to *Ev.C. 910* explains the purpose of this broad application:

(a) "Most rules of evidence are designed for use in courts. Generally, their purpose is to keep unreliable or prejudicial evidence from being presented to the trier of fact. Privileges are granted, however, for reasons of policy unrelated to the reliability of the information involved. A privilege is granted because it is considered more important to keep certain information confidential than it is to require disclosure of all the information relevant to the issues in a pending proceeding. Thus, for example, to protect the attorney-client relationship, it is necessary to prevent disclosure of confidential communications made in the course of that relationship."

(b) "If confidentiality is to be protected effectively by a privilege, the privilege must be recognized in proceedings other than judicial proceedings. The protection afforded by a privilege would be insufficient if a court were the only place where the privilege could be invoked. Every officer with power to issue subpoenas for investigative purposes, every administrative agency, every local governing board, and many more persons could pry into the protected information if the privilege rules were applicable only in judicial proceedings."

(2) *Where Common Law Rules Relaxed.* In administrative hearings and a few other special proceedings, the common law rules of evidence are abandoned or relaxed. (See 1 *Cal. Evidence* (4th), *Introduction*, §36 et seq.) But a privilege is not one of the common law rules, and *Ev.C. 910* adds a clarifying statement to this effect: "The provisions of any statute making rules of evidence inapplicable in particular proceedings, or limiting the applicability of rules of evidence in particular proceedings, do not make this division inapplicable to such proceedings."

(3) *Special Definitions.* Division 8 adds special definitions to the list contained in Division 2 (see 1 *Cal. Evidence* (4th), *Introduction*, §17), to apply solely to privileges (*Ev.C. 900*). Included are the following:

- (a) "Proceeding." (*Ev.C. 901*, supra.)
- (b) "Civil proceeding," which includes nonjudicial proceedings. (*Ev.C. 902.*)
- (c) "Criminal proceeding," which includes accusations against public officers. (*Ev.C. 903.*)

(d) "Presiding officer," who is the person authorized to rule on a claim of privilege, including arbitrators, hearing officers, referees, and similar persons. (*Ev.C. 905*; see *Ev.C. 914* [presiding officer determines claim of privilege in same manner as judge does under *Ev.C. 400* et seq.; see *3 Cal. Evidence (4th), Presentation at Trial, §62*].)

The important concept of "holder of the privilege" is not contained in a single definition, but is separately covered in connection with particular privileges. (See *Ev.C. 953, 993, 1013*.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### D. Eavesdroppers and Other Interceptors.

2 *Witkin Cal. Evid. Witnesses* § 66

[§ 66] Eavesdroppers and Other Interceptors.

It has been the view of many authorities, particularly in connection with the attorney-client and husband-wife privileges, that a privilege is personal, and that the holder must take precautions to safeguard it. If a third person--eavesdropper, finder, or interceptor--overhears or otherwise receives the confidential communication, he has no privilege and may testify to it. (See *People v. Rittenhouse* (1922) 56 C.A. 541, 546, 206 P. 86 [attorney-client; dictum]; *People v. Peak* (1944) 66 C.A.2d 894, 903, 153 P.2d 464 [husband-wife]; *People v. Mitchell* (1923) 61 C.A. 569, 573, 215 P. 117 [husband-wife]; *People v. Morhar* (1926) 78 C.A. 380, 387, 248 P. 975 [husband-wife]; 1 McCormick 5th, §§74, 82; 8 Wigmore (McNaughton Rev.) §2339; 22 *Cal. L. Rev.* 573; 10 *Stanf. L. Rev.* 310; 44 A.L.R.4th 841 [governmental eavesdropping on communications between accused and counsel].)

The original Uniform Rules of Evidence, departing from the Model Code, took a firm position to the contrary. (See 1953 A.S. 792; 1954 A.S. 790.) And the Evidence Code, by identical language in the several privilege sections, repudiated the eavesdropper rule. The person entitled to claim the privilege "has a privilege to refuse to disclose, and to prevent another from disclosing," the confidential communication. (See *Ev.C.* 954 [attorney-client]; *Ev.C.* 980 [husband-wife]; *Ev.C.* 994 [physician-patient]; *Ev.C.* 1014 [psychotherapist-patient]; *Ev.C.* 1033 [penitent]; *Ev.C.* 1040 [official information]; *Ev.C.* 1041 [identity of informer].) (On voluntary disclosure, see *Ev.C.* 912(a), *infra*, §§67, 75, 76; on waiver of privilege by making statement in known presence of unnecessary third party, see *infra*, §74.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 1 McCormick 6th, §§74, 82.



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## CHAPTER IX - Witnesses

### III. PRIVILEGE: IN GENERAL E. Waiver by Disclosure or Consent. 1. What Constitutes Waiver. a. In General.

#### 2 Witkin Cal. Evid. Witnesses § 67

[§ 67] In General.

(1) *Privileges Subject to Waiver Statute.* Except for the privilege against self-incrimination, *Ev.C. 912(a)* comprehensively states the doctrine of waiver for all of the privileges:

- (a) The lawyer-client privilege (*Ev.C. 954*).
- (b) The privilege for confidential marital communications (*Ev.C. 980*).
- (c) The physician-patient privilege (*Ev.C. 994*).
- (d) The psychotherapist-patient privilege (*Ev.C. 1014*).
- (e) The privilege of the penitent (*Ev.C. 1033*).
- (f) The privilege of clergyman (*Ev.C. 1034*).

(g) The sexual assault victim-counselor privilege (*Ev.C. 1035.8*). (On waiver of the privilege against self-incrimination, see *infra*, §§428 et seq., 497 et seq.)

(2) *Scope of Statute.* *Ev.C. 912(a)* further defines the contours of the doctrine as follows: "Except as otherwise provided in this section, the right of any person to claim a privilege ... is waived with respect to a communication protected by such privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to such disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege." (See generally *81 Am.Jur.2d* (1992 ed.), *Witnesses* §§294, 303, 304, 500 et seq.; Unif. Rules, Rule 510; C.J.E.R., Judges Benchbook, Civil Proceedings: Discovery §4.10 et seq.; 9 *U.C. Davis L. Rev.* 477 [waiver principles and policies they promote]; 98 *Harv. L. Rev.* 1629 [same]; 32 *Proof of Facts* 3d 189 [proof of waiver of attorney-client privilege]; 31 *A.L.R.3d* 557 [power of bankruptcy trustee to waive privilege available to bankrupt].)

The principal kinds of conduct amounting to a waiver are as follows:

- (a) Advance waiver by contract. (See *infra*, §§68, 69.)

(b) Failure to claim the privilege. (See *infra*, §70 et seq.)

(c) Making statements in the known presence of unnecessary third parties. (See *infra*, §74.)

(d) Voluntary disclosure of the communication to a third person. (See *infra*, §§75, 76.) (For other illustrations, see *infra*, §80.)

Although sometimes asked to create a nonstatutory waiver in the interests of "fundamental fairness," courts have generally declined to do so. (See *Estate of Kime* (1983) 144 C.A.3d 246, 258, 193 C.R. 718.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Privileges Subject to Waiver Statute.* *Ev.C. 912(a)* was amended in 2002 to add the domestic violence-counselor privilege (*Ev.C. 1037.5*) to the privileges that may be waived.

See *Eisendrath v. Superior Court* (2003) 109 C.A.4th 351, 363, 134 C.R.2d 716, 1 Cal. Evidence (4th), *Circumstantial Evidence, Supp.*, §153 [*Ev.C. 910* et seq. do not apply to mediation confidentiality privilege created by *Ev.C. 111* et seq.].

(2) *Scope of Statute.* *Ev.C. 912(a)* was amended in 2002. The language quoted in the text was changed to substitute "the privilege" for "such privilege" and to delete "such" before "disclosure."

See 81 *Am.Jur.2d* (2004 ed.), *Witnesses* §§282, 291, 292, 480 et seq. *West's Key Number Digest*, *Witnesses* k.219(1) et seq.





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## CHAPTER IX - Witnesses

### III. PRIVILEGE: IN GENERAL

#### E. Waiver by Disclosure or Consent.

1. What Constitutes Waiver.
- b. Advance Waiver by Contract.
  1. Insurance Contracts.

#### 2 Witkin Cal. Evid. Witnesses § 68

[§ 68] Insurance Contracts.

(1) *Consent Clauses.* An express waiver may be made by contract. Typical are insurance policy clauses consenting to disclosure by physicians. (See *Torbensen v. Family Life Ins. Co.* (1958) 163 C.A.2d 401, 404, 329 P.2d 596 [waiver in insurance questionnaire]; Model C., Rule 231; 1 McCormick 5th, §73; 8 Wigmore (McNaughton Rev.) §2388; 81 Am.Jur.2d (1992 ed.), Witnesses §504.)

These provisions have been strictly construed to protect the privilege. Thus, in *Turner v. Redwood Mut. Life Assn.* (1936) 13 C.A.2d 573, 57 P.2d 222, an application for life insurance provided: "I hereby authorize any doctor at any time to give to said association any information he or she may have regarding me." *Held*, the waiver extended only to past communications, and did not cover those made after the date of the policy. (13 C.A.2d 577.) (See *In re De Neef* (1941) 42 C.A.2d 691, 693, 109 P.2d 741 [decedent husband waived the doctor-patient privilege in a policy; held, his widow could still assert the husband-wife privilege as to any communications during the marriage and prior to death]; 25 Cal. L. Rev. 109.)

In *Roberts v. Superior Court* (1973) 9 C.3d 330, 107 C.R. 309, 508 P.2d 309, plaintiff sued for damages for physical injuries allegedly received in an automobile accident. Defendants claimed that she waived her psychotherapist-patient privilege (see *infra*, §211 et seq.) by signing a consent form which defendants' insurance carrier presented to her 6 days after the collision. *Held*, no waiver. A form consent must be strictly construed; and the language would have led plaintiff to believe that the authorization applied only to records concerning *physical injuries* from the accident. (9 C.3d 343.) The court added: "[W]e hesitate to sanction the solicitation of such waivers, which would substantially defeat the privacy afforded by the psychotherapist-patient privilege, and possibly disrupt the confidential relationship sought to be protected in *In re Lifschutz*." (9 C.3d 343.) (For *In re Lifschutz* (1970) 2 C.3d 415, 85 C.R. 829, 467 P.2d 557, see *infra*, §888, 224.)

(2) *Distinction: Cooperation Clauses.* The cooperation clause in a liability insurance policy is not an implied waiver of the lawyer-client privilege as to communications between the insured and its attorney in furtherance of the insured's duty to cooperate in defending a third-party action. (*Rockwell Int. Corp. v. Superior Court* (1994) 26 C.A.4th 1255, 1260, 1262, 32 C.R.2d 153, *infra*, §167.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Consent Clauses.* See 81 Am.Jur.2d (2004 ed.), Witnesses §482; 1 McCormick 6th, §73.



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1. What Constitutes Waiver.
- b. Advance Waiver by Contract.
2. Other Contracts.

#### 2 Witkin Cal. Evid. Witnesses § 69

[§ 69] Other Contracts.

(1) *Collective Bargaining Agreements*. A liberal interpretation was approved in *Crest Catering Co. v. Superior Court* (1965) 62 C.2d 274, 42 C.R. 110, 398 P.2d 150. K, administrator of an employee welfare and retirement fund, sued C Co., the employer, to compel payment of contributions allegedly owed under its union contract. K sought discovery of employment records by interrogatories, and C Co. responded that its books and records had been destroyed by fire. K then requested copies of its employment tax returns, and C Co., being directed by the lower court to produce them for inspection, sought prohibition on the ground of privilege under *Unemp.Ins.C. 1094* and *2111*. *Held*, writ denied:

(a) The statutory privilege was clear (see *infra*, §255), but was waived by the union agreement. This provided that C Co. should "promptly furnish all necessary information upon demand," and that an auditor of the union fund could audit the payrolls to determine the correct amount of contributions owed. Although there was no express reference to the statutes creating the privilege, this language was nevertheless a waiver. (62 C.2d 277.)

(b) The waiver, however, was concerned with the payrolls; how did it cover the tax returns? Because (1) destruction of the payrolls left the tax returns as the only source of the required data (62 C.2d 278), and (2) the payrolls and tax returns contained the same information (62 C.2d 279).

(2) *Immunity Agreements*. In *Maas v. Municipal Court* (1985) 175 C.A.3d 601, 221 C.R. 245, defendant Sully was charged with murder. Codefendant Trina Livingston, also charged with the murder, entered into a plea bargain in which the murder charge against her was dismissed and she was granted immunity from prosecution for certain other offenses. In exchange she agreed to testify "truthfully and completely in all criminal proceedings" involving defendant Sully and others. Defendant's attorney sought to require Livingston's attorneys to produce documents and records, contending that she had waived her attorney-client privilege by agreeing to testify "completely" in exchange for immunity. *Held*, the privilege was not waived.

The court said: "While a written immunity agreement might include an unambiguous waiver of the attorney-client privilege among its terms, clearly the agreement at issue in this case did not. ... Read in its entirety, the plain language of the agreement requires Livingston to testify truthfully and completely about the actions and criminal offenses of the named persons, and about her own involvement in those offenses. It does not mention her own confidential communications with her attorneys and does not require her to provide statements or testify about those communications." (175 C.A.3d 607.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### E. Waiver by Disclosure or Consent.

##### 1. What Constitutes Waiver.

###### c. Failure To Claim.

##### 1. What Constitutes Waiver.

#### 2 *Witkin Cal. Evid. Witnesses* § 70

[§ 70] What Constitutes Waiver.

(1) *In General.* A waiver results from failure of the holder "to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege." (*Ev.C. 912(a)*, *supra*, §67; see *People v. Slocum* (1975) 52 C.A.3d 867, 880, 125 C.R. 442 [failure to object at trial, to move to strike witness' testimony at close of prosecution's case, or to raise issue at new trial motion amounted to waiver on appeal]; 36 A.L.R.3d 1367 [waiver of privilege at trial after exercise of privilege in pretrial discovery proceedings].)

Thus, a client or his or her attorney, called as a witness, may testify to the confidential communications without objection. (See *People v. Riordan* (1926) 79 C.A. 488, 498, 250 P. 190 [criminal prosecution of attorney; client expressly waived objection and testified fully]; *People v. Ottenstorf* (1954) 127 C.A.2d 104, 110, 273 P.2d 289; *Agnew v. Superior Court* (1958) 156 C.A.2d 838, 841, 320 P.2d 158; *Cope v. Cope* (1964) 230 C.A.2d 218, 235, 40 C.R. 917 [affidavits of attorney introduced in hearing on motion without objection]; *People v. Dubrin* (1965) 232 C.A.2d 674, 680, 43 C.R. 60; 1 McCormick 5th, §93; 8 Wigmore (McNaughton Rev.) §2327; 10 *Stanf. L. Rev.* 314; 51 A.L.R.2d 521 [waiver by client].)

Likewise, a patient may testify or allow his or her doctor to testify to the confidential communication. (See *Wheelock v. Godfrey* (1893) 100 C. 578, 587, 35 P. 317; *Hirschberg v. Southern Pac. Co.* (1919) 180 C. 774, 777, 183 P. 141 [decided prior to 1917 amendment making express exception for personal injury actions; reliance on waiver no longer necessary]; *Cope v. Cope*, *supra* [affidavit of doctor introduced without objection]; *People v. Clark* (1993) 5 C.4th 950, 1006, 22 C.R.2d 689, 857 P.2d 1099 [by calling psychiatrist, appointed to assist defense, at pretrial suppression hearing, defendant waived attorney-client privilege as to his communications with psychiatrist]; 1 McCormick 5th, §103; 8 Wigmore (McNaughton Rev.) §§2389, 2390; 20 *Cal. L. Rev.* 307, 310; 5 A.L.R.3d 1244 [waiver as to one doctor, effect as to others]; 25 A.L.R.3d 1401 [waiver by disclosure on discovery].)

In *People v. Dubrin*, *supra*, defendant was charged with grand theft--knowingly keeping a payment mistakenly sent to him. On the issue of fraudulent intent, he attempted to call his then attorney to give evidence of an offer of restitution; but in response to the judge's query he refused to waive the privilege. *Held*, objections to questions asked of attorney were properly sustained. If the attorney was unauthorized by defendant to make the offer of restitution, the evidence would be irrelevant. If the attorney was authorized, the communication made through him to a third party was not privileged. And defendant could not call his attorney to testify to privileged matters and then preclude cross-examination on those matters (e.g., to show lack of authorization, or lack of means to restore, or no intent to

restore until after knowledge that it might prevent prosecution). (232 C.A.2d 680.)

(2) *Equivocal Response*. In *Calvert v. State Bar* (1991) 54 C.3d 765, 1 C.R.2d 684, 819 P.2d 424, a disciplinary proceeding against attorney C for incompetent representation, the complaining client's former attorney F, who had referred the client's case to C, testified. C raised the issue of privilege between F and the client. After consulting with the client, who was present, F said that she was "not sure" whether her testimony had created an attorney-client conflict or jeopardized the client's case. The referee then granted the State Bar's motion to strike F's testimony, over C's objection. *Held*, this was error, because the privilege that was the basis for the ruling had been waived. F's equivocal statement after consultation with the client amounted to a failure to claim the privilege when the opportunity arose, meeting the conditions of *Ev.C. 912(a)*. (54 C.3d 780.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General*. See 1 McCormick 6th, §§93, 103.



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c. Failure To Claim.

2. Conduct Not Amounting to Waiver.

aa. Nonparty Client's Failure To Appear.

2 *Witkin Cal. Evid. Witnesses* § 71

[§ 71] Nonparty Client's Failure To Appear.

In *Glade v. Superior Court* (1978) 76 C.A.3d 738, 143 C.R. 119, plaintiffs, suing for legal malpractice, sought discovery of confidential communications between defendant attorney and certain of his clients. Defendant claimed the privilege, and the judge gave the clients an opportunity to appear at a scheduled hearing to object to discovery. *Held*, their failure to appear was not a waiver of their privilege. "To find a waiver arising from the MacFarlands' failure to appear at a hearing in an action in which they are not parties and have no interest would place the burden of asserting the attorney-client privilege upon the client. This result would run counter to the rule that the attorney-client privilege is retained, even without express assertion thereof, until the holder voluntarily discloses a substantial part of the privileged communication or otherwise unambiguously manifests his consent for disclosure by others." (76 C.A.3d 744.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## 1. What Constitutes Waiver.

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## 2. Conduct Not Amounting to Waiver.

## bb. Disclosure of Subject Matter.

2 *Witkin Cal. Evid. Witnesses* § 72

[§ 72] Disclosure of Subject Matter.

In *Lohman v. Superior Court* (1978) 81 C.A.3d 90, 146 C.R. 171, plaintiff sued her former conservator, who deposed her former attorney. The trial judge ordered questions answered despite the attorney's claim of privilege. *Held*, order vacated; plaintiff's disclosure of communications with her *other* former attorneys did not waive the privilege. "[I]t is *not* the content of the communication but the relationship that must be preserved and enhanced as a societal value. Thus, if the client discloses certain facts to a third person and subsequently advises his attorney of those same facts in the form of a confidential communication, there has been no waiver since, obviously, the client had not disclosed to the third person the confidential communication to the attorney, i.e., *had not disclosed that certain information had been communicated to the attorney.*" (81 C.A.3d 97.) (See 1967 A.S. 122 [opponent's discovery deposition; no waiver by patient's testimony as to nature and extent of injuries]; 25 A.L.R.3d 1401 [opponent's discovery deposition; no waiver by patient's testimony as to nature of injury or treatment]; 25 A.L.R.3d 1405 [patient's testimony relating to privileged matter given at previous trial; no waiver as to subsequent action].)

The *Lohman* holding was approved and followed in *Miller v. Superior Court* (1980) 111 C.A.3d 390, 392, 394, 168 C.R. 589, a malpractice suit by a client against her former attorney; communications between herself and her new attorneys consulted after the alleged malpractice were held privileged. (See also *Schlumberger Ltd. v. Superior Court* (1981) 115 C.A.3d 386, 392, 171 C.R. 413 [following *Lohman* and *Miller*].)

The same result was reached in *People v. Tamborrino* (1989) 215 C.A.3d 575, 263 C.R. 731. Defendant was charged with first degree residential robbery. The victim testified that she had never met defendant; he testified that he had known her for years, and that she had a motive to frame him because he had sold her bogus cocaine. On cross-examination, the trial judge asked defendant, over defense counsel's objection, whether and when he had told this story to his attorney. On a subsequent motion for mistrial, the trial judge ruled that defendant's testimony about the drug deal was a disclosure that waived the attorney-client privilege. *Held*, the privilege had not been waived. "Defendant's testimony concerning facts that might have been previously related by him to his counsel is not equivalent to disclosure by him of the actual content of an attorney-client communication." (215 C.A.3d 582.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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##### 2. Conduct Not Amounting to Waiver.

##### cc. Issuance of Subpena.

2 Witkin Cal. Evid. Witnesses § 73

[§ 73] Issuance of Subpena.

*Lohman v. Superior Court* (1978) 81 C.A.3d 90, 146 C.R. 171, supra, §72, rejected defendant's contention that plaintiff's subpoenas of her former attorneys' records waived the privilege; there could be no waiver before the records' contents were voluntarily disclosed. And, because a subpoena duces tecum is issued without an adversary hearing, waiver does not result from a patient's failure to object to production of medical records when the subpoena is originally served on the doctor. (*Roberts v. Superior Court* (1973) 9 C.3d 330, 342, footnote 5, 107 C.R. 309, 508 P.2d 309 [former C.C.P. 2034(a) (now C.C.P. 2025(o); see 2 Cal. Evidence (4th), Discovery, §70) contemplates hearing on motion filed by proponent of discovery after deponent has refused production].)

**SUPPLEMENT:** [This section is current through the latest supplement]

C.C.P. 2025(o) (procedure for hearing on motion to compel production of documents) was repealed and replaced by C.C.P. 2025.480 in 2004 without substantive change.





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1. What Constitutes Waiver.
- d. Presence of Third Parties.

2 Witkin Cal. Evid. Witnesses § 74

[§ 74] Presence of Third Parties.

Making statements in the known presence of unnecessary third parties who can overhear is considered a manifestation of intent to make a nonconfidential communication. (See *Horowitz v. Sacks* (1928) 89 C.A. 336, 344, 265 P. 281; *People v. Gomez* (1982) 134 C.A.3d 874, 879, 185 C.R. 155; 1 McCormick 5th, §101; on rule that privilege is not lost where statement is overheard by eavesdropper, see *supra*, §66.)

In *People v. Poulin* (1972) 27 C.A.3d 54, 103 C.R. 623, the victim of a bomb blast drew a diagram of the instrument while he was testifying. The bailiff, who was seated next to the jury box, saw defendant, seated next to his attorney, gesture with his hands towards the attorney, indicating size, and heard defendant say, "It was not quite like that" or "It wasn't like that." The bailiff testified to this conversation without objection. *Held*, the testimony was properly admitted. Not only was there a waiver but the privilege does not attach to a statement made in the presence of a third person who is ostensibly present; and there was no indication that the bailiff was eavesdropping. (27 C.A.3d 64, citing the text.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Urbano* (2005) 128 C.A.4th 396, 403, 26 C.R.3d 871 [defendant waived privilege as to comment he made to attorney while they were sitting in jury box when court was not in session, in voice loud enough that it was overheard by witness in last row of seats in room]; 1 McCormick 6th, §101.



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#### E. Waiver by Disclosure or Consent.

##### 1. What Constitutes Waiver.

#### e. Voluntary Disclosure to Third Person.

##### 1. In General.

### 2 Witkin Cal. Evid. Witnesses § 75

[§ 75] In General.

(1) *General Rule of Waiver.* Voluntary disclosure of a significant part of the communication to a third person is a waiver of the privilege. (*Ev.C. 912(a)*, supra, §67; see *People v. Barnett* (1998) 17 C.4th 1044, 1124, 74 C.R.2d 121, 954 P.2d 384 [in murder prosecution, defendant, by testifying about map and directions he gave to defense investigator, and about investigator's failure to find hidden methamphetamine oil, waived attorney-client privilege, and trial judge properly allowed limited questioning of investigator on these subjects]; 1 McCormick 5th, §93; 8 Wigmore (McNaughton Rev.) §2327.)

(2) *Partial Disclosure.* In *Jones v. Superior Court* (1981) 119 C.A.3d 534, 174 C.R. 148, infra, §209, plaintiff sued a number of pharmaceutical firms claiming injury as a result of her mother's ingestion of diethylstilbestrol (DES) while plaintiff was *in utero*. One of the defendants deposed her mother, J, who answered questions about her medical history before and up to the time of plaintiff's birth. She refused to answer any questions about her medical history after that time, asserting the statutory privilege, her constitutional right of privacy, and lack of relevance. On defendant's motion the trial judge ordered J to answer. *Held*, the order was proper.

(a) "By testifying freely that she ingested DES, and as to certain of the circumstances in which she did so, petitioner has disclosed a 'significant part' of her communications with physicians on that subject, and on the inextricably related subject of her pregnancy with plaintiff. Thus, she has waived her statutory privilege as to these matters." (119 C.A.3d 546.)

(b) However, the waiver "does not extend to her lifetime medical history, but only to those matters as to which, based upon her disclosures, it can reasonably be said she no longer retains a privacy interest." (119 C.A.3d 551.)

In *Transamerica Title Ins. Co. v. Superior Court* (1987) 188 C.A.3d 1047, 233 C.R. 825, defendant, sued for bad faith breach of its title insurance contract, cross-complained for declaratory relief. In response to interrogatories, defendant stated that it relied on the defense of advice of counsel to explain the filing of the cross-complaint, and provided plaintiff with a copy of its attorneys' opinion letter. Plaintiff then requested production of all notes, memoranda, etc., relating to any advice defendant had received from its attorneys concerning the action, contending that production of the opinion letter disclosed the significant part of defendant's communication with its attorneys and, hence, was a waiver under *Ev.C. 912(a)*. *Held*, there was no waiver, for there was no disclosure of a significant part of defendant's communications to its lawyers. The documents sought by plaintiff all postdated the filing of the

cross-complaint and pertained to matters concerning the conduct of the litigation. Defendant was relying on the advice of counsel defense only as to the filing of the cross-complaint and not to explain its decision not to pay the claim and to continue to litigate; hence, disclosure would not significantly further plaintiff's case but would impinge on defendant's ability to freely and openly communicate with its attorneys. (188 C.A.3d 1053.)

In *People v. Superior Court (Broderick)* (1991) 231 C.A.3d 584, 282 C.R. 418, a prosecution for the murder of defendant's former husband and his new wife, defendant admitted to the killings but claimed that they were mitigated or excused by her mental state. Defense experts relied in part on the work of doctors who had treated defendant in the past, some of whom had testified or provided material relied on by other experts in a child custody dispute between defendant and her former husband. After a mistrial caused by a hung jury, the prosecution subpoenaed the records of all the mental health professionals relied on by the defense experts. The trial judge made a general finding that defendant had waived her psychotherapist-patient privilege by disclosing her communications to them, either through their testimony in earlier court proceedings, or through their reports that were relied on by other experts. *Held*, the waiver issue was inadequately determined: the judge was required to "determine as to each doctor whether the privilege had been waived and as to what material." (231 C.A.3d 595.)

(a) The subpoenas in question were extremely broad, requesting all records from the doctors over a long period. The asserted waivers occurred with respect to different doctors over a 2-year period. Even if defendant had waived the privilege as to certain communications, it did not necessarily follow that any communications made *after* the waiver were not privileged. (231 C.A.3d 590.)

(b) Also, particularly as to the nontestifying doctors, the disclosure may not have been significant enough to result in a waiver under *Ev.C. 912*. (231 C.A.3d 590.) (See *Travelers Ins. Cos. v. Superior Court* (1983) 143 C.A.3d 436, 444, 445, 191 C.R. 871 [answers to interrogatories not wide enough in scope and deep enough in substance to constitute significant part of communication, hence, no waiver].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *General Rule of Waiver*. See 1 McCormick 6th, §93.



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## 2. Distinctions.

## 2 Witkin Cal. Evid. Witnesses § 76

[§ 76] Distinctions.

(1) *Inadvertent Disclosure*. At least two California cases have held that an inadvertent (i.e., unintentional or accidental) disclosure of a privileged communication, at least in the discovery context, is not voluntary, and therefore does not waive the privilege. (See *O'Mary v. Mitsubishi Electronics America* (1997) 59 C.A.4th 563, 577, 69 C.R.2d 389 [in age discrimination action, defendant employer's inadvertent production, in course of discovery, of termination list prepared at direction of in-house counsel; no waiver of attorney-client privilege]; *State Comp. Ins. Fund v. WPS* (1999) 70 C.A.4th 644, 652, 82 C.R.2d 799, 1 Cal. Proc. (4th), Attorneys, Supp., §602A [in workers' compensation dispute, plaintiff responded to discovery request by sending defense counsel numerous documents that included, inadvertently, claim summary forms clearly marked as privileged; no waiver of attorney-client privilege]; see C.J.E.R., Judges Benchbook, Civil Proceedings: Discovery §4.11; 18 *Pacific L. J.* 59 [discussing inadvertent disclosure cases]; 37 *Santa Clara L. Rev.* 547 [same]; 51 A.L.R.5th 603 [same].)

(2) *Marital Privilege*. The marital privilege belongs to both spouses (see *infra*, §188).

There was formerly authority to the effect that a voluntary disclosure by one spouse would authorize testimony by the third party. (See *Wolfe v. United States* (1934) 291 U.S. 7, 54 S.Ct. 279, 78 L.Ed. 617 [defendant dictated letter to stenographer, addressed to wife; stenographer permitted to testify to contents]; 22 *Cal. L. Rev.* 573.) *Ev.C.* 980, the husband and wife eavesdropper section, changes this rule: The only waiver is as to the spouse who makes the disclosure. (Law Rev. Com. Comment to *Ev.C.* 980.)

(3) *Use of Interpreter by Hearing Impaired Person*. A person who is deaf or hard of hearing does not waive a valid privilege merely by using an interpreter. (*Ev.C.* 754.5; see 3 *Cal. Evidence* (4th), *Presentation at Trial*, §30.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Inadvertent Disclosure*. See 29 West L.A. L. Rev. 229 [inadvertent disclosure of electronic mail]; 159 A.L.R. Fed 153 [federal law on inadvertent disclosure].



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## f. Refreshing Recollection With Communication.

## 2 Witkin Cal. Evid. Witnesses § 77

## [§ 77] Refreshing Recollection With Communication.

In *Kerns Const. Co. v. Superior Court* (1968) 266 C.A.2d 405, 72 C.R. 74, two plaintiffs sued Gas Co. for personal injuries resulting from an explosion. Gas Co. cross-complained against Kerns Co. Kerns Co. took the deposition of R, a Gas Co. employee. He had investigated the accident and written reports on forms labeled "Confidential" and "for the Use of the Company's Attorneys." Under the rules enunciated in *D. I. Chadbourne v. Superior Court* (1964) 60 C.2d 723, 36 C.R. 468, 388 P.2d 700, *infra*, §132, the reports were confidentially transmitted to the attorney, and were protected by the attorney-client privilege. (266 C.A.2d 412.) At the deposition, R testified that he had no independent recollection of the facts involved, and used the reports to refresh his memory, both on direct and cross-examination. The reports were furnished to him by Gas Co.'s attorney, and the latter was present at the deposition and made no objection to R's testimony or to the marking of the reports for identification. But when Kerns Co.'s attorney requested that copies of the reports be made available for inspection, Gas Co.'s attorney objected on the ground of privilege and work product. *Held*, the objection was too late:

"When, with knowledge of their intended use, the privileged records were furnished to the witness, which act was not required to be performed, and the witness gave testimony from them, the privilege was waived. The claim of privilege should have been made at the point when the questions were propounded to the witness which required of the witness a recitation of the material or some of the material contained in the reports. It would be unconscionable to allow a rule of evidence that a witness can testify to material contained in a report, though not verbatim, and then prevent a disclosure of the reports." (266 C.A.2d 414.)

*Kerns* was distinguished in *Sullivan v. Superior Court* (1972) 29 C.A.3d 64, 105 C.R. 241, also a personal injury case. Plaintiff conferred with her attorney about the accident, and used a transcription of the recorded conference to refresh her recollection before giving a deposition to opposing counsel. Defense counsel then sought production of that "memorandum," and the trial court granted the motion. *Held*, prohibition issued.

(a) In reviewing statements made to her attorney in the strictest confidence, the client was in no way consenting to a disclosure of those statements nor "by any statement or other conduct," as specified in *Ev.C.* 912, was she manifesting a consent to disclosure. (29 C.A.3d 68.) In *Kerns*, the witness testified at the deposition, using the reports without objection; in the present case, the witness refreshed her memory prior to the deposition and raised the privilege when demand was made that she produce the transcription. (29 C.A.3d 72.)

(b) The apparent conflict between the attorney-client privilege and the production requirements of *Ev.C.* 771 (see 3

*Cal. Evidence (4th), Presentation at Trial, §177 et seq.*) "may be harmonized" by holding that the word "writing" in *Ev.C. 771* was never intended to mean a transcription of a client's original discussion with her attorney. "Particularly is this so when it is realized that had the client refreshed her memory by listening to a replaying of the tape instead of reading its transcription, no claim could be made that she had waived the confidential relationship between her and her counsel. Nor could such claim be made if her attorney had told her what she had told him originally or even read to her his notes of the interview." (29 *C.A.3d* 73.)

(c) Because the transcription probably also contained the attorney's comments and advice, the opposing parties could not have been entitled to that information. (29 *C.A.3d* 73.) (For a criticism of *Sullivan* court's reasoning, see 6 *Pacific L. J.* 617.)

In *Mize v. Atchison, Topeka & Santa Fe Ry. Co.* (1975) 46 *C.A.3d* 436, 120 *C.R.* 787, defendant's investigator testified under cross-examination that he had refreshed his recollection from his file, which he was then asked to produce. The file contained both privileged and nonprivileged matter. *Held*, the objection of privilege to the entire file was too broad and therefore properly overruled. However, the mere calling of a witness who has refreshed his recollection from communications to his attorney is not a waiver so long as the privilege is claimed at the first opportunity. (46 *C.A.3d* 449, citing *Kerns* and *Sullivan*.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## g. Attorney's Knowledge of Facts.

## 2 Witkin Cal. Evid. Witnesses § 78

[§ 78] Attorney's Knowledge of Facts.

(1) *Use in Prosecuting Action.* In *Merritt v. Superior Court* (1970) 9 C.A.3d 721, 88 C.R. 337, plaintiff had recovered judgment well in excess of insurance policy limits against two defendants who were largely covered by R insurance carrier, the real party in interest. By acquiring whatever claims the original tortious parties had against R for failing to protect their interests, plaintiff brought an action against R and alleged that R had wrongfully refused to settle plaintiff's claim within the policy limits. The basis of plaintiff's contention was that R had prevented plaintiff's personal injury counsel from settling the case by furnishing them with confusing statements about the available insurance coverage. As part of its discovery procedures, R sent interrogatories to plaintiff, requesting the substance of all communications between plaintiff's allegedly confused attorneys and a workers' compensation carrier that had provided plaintiff with substantial benefits. R also sought information on the effect of the workers' compensation coverage and lien on the attorneys' handling of the litigation. Plaintiff claimed the attorney-client and work product privileges, but the trial judge ordered the questions answered. *Held*, this was proper.

The theory of plaintiff's lawsuit placed in issue his former attorneys' conduct and state of mind in failing to propose a settlement. While there could have been no waiver of the attorney-client privilege from the mere fact that plaintiff had initiated the lawsuit, it was obvious from the *issues framed* and the *depositions of* the former attorneys that plaintiff would be relying heavily on the attorneys' evidence; i.e., they would be proving matters which they could have learned only in the course of their employment. "Thus it was not merely the initiation of the lawsuit but rather the *manner of its prosecution* which constituted the waiver." (9 C.A.3d 730.)

(2) *Disclosure for Client's Benefit.* In *Klang v. Shell Oil Co.* (1971) 17 C.A.3d 933, 936, 95 C.R. 265, plaintiff had been injured in an automobile accident and was too ill to speak to the investigating officer. Instead, to avoid a traffic citation, his then attorney provided a statement of facts on plaintiff's behalf. This statement was damaging to plaintiff's trial theory (with a new attorney) as to the cause of the accident, and was admitted in evidence over objections that it was a confidential communication between attorney and client. *Held*, no error. Long before the trial, plaintiff's counsel had voluntarily disclosed to the officer information on how plaintiff's car had come to a stop on the freeway. The disclosure was not in confidence and not dependent on court action. When the attorney disclosed the contents of the privileged communication other than in confidence, the attorney-client privilege was lost. Plaintiff's consent was inferred from the fact that disclosure was for plaintiff's benefit in negotiations to prevent assertion of criminal liability against him. (17 C.A.3d 938.)

(3) *Corporate Counsel.* In *Chicago Title Ins. Co. v. Superior Court* (1985) 174 C.A.3d 1142, 220 C.R. 507, plaintiff

CTI sued defendant bank on causes of action including fraud. The complaint alleged that defendant bank had become aware that R, one of its depositors, and B were using an account at the bank to defraud plaintiff; and that defendant bank, instead of closing the account as recommended by its auditors, had assisted, collaborated and conspired with the perpetrators. Defendant bank sought to depose several of plaintiff's present and former employees including Straw, an attorney who was plaintiff's assistant regional counsel. Claiming attorney-client privilege, plaintiff's attorney instructed the employees not to answer questions concerning communications between Straw and other employees. *Held*, there was an implied waiver of the privilege.

(a) Straw's actions as plaintiff's legal counsel were so intertwined with activities which were wholly business or commercial that a clean distinction between the two roles became impossible to make. "This merging of business and legal activities jeopardizes the assertion of the attorney-client privilege, since the attorney and the client in effect have become indistinguishable." (174 C.A.3d 1154.)

(b) By alleging detrimental reliance in its cause of action for fraud, plaintiff placed its knowledge of the allegedly fraudulent transactions at issue, and Straw in his dual role of business agent and attorney was the person who most thoroughly could attest to the knowledge of the corporate entity. (174 C.A.3d 1154.)

The opinion adds: "This is not to say that solely by bringing an action in fraud the attorney-client privilege disappears; nor are we asserting that the employment of in-house counsel, standing alone, erodes the privilege. We merely find that given the facts of this case, Straw's merger of business and legal functions, coupled with CTI's assertion of detrimental reliance, has resulted in the implied waiver of the attorney-client privilege." (174 C.A.3d 1154.)

**SUPPLEMENT:** [This section is current through the latest supplement]





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## 1. What Constitutes Waiver.

## h. Attorney's Investigation Used as Defense in Discrimination Case.

2 *Witkin Cal. Evid. Witnesses* § 79

[§ 79] Attorney's Investigation Used as Defense in Discrimination Case.

*Wellpoint Health Networks v. Superior Court* (1997) 59 C.A.4th 110, 68 C.R.2d 844, deals with (a) the extent to which documents produced by an attorney engaged by an employer to conduct a prelitigation investigation of an employee's discrimination claims are protected by the attorney-client and work product privileges, and (b) the issue of waiver that arises once the employer raises the adequacy of its investigation as a defense. Plaintiff, a health insurance employee who was laid off after the work of his department was contracted out, brought an action against his former employer alleging that he had been discriminated against because of his race and because he had filed a complaint with the Department of Fair Employment and Housing. The trial judge sustained demurrers to plaintiff's first and second amended complaints. Plaintiff's attorney then sought discovery of (a) records concerning an investigation conducted by defendant prior to plaintiff's layoff and in response to his claims of discriminatory treatment, and (b) plaintiff's "complete personnel file," which was defined to include the investigation documents. Although the investigation had been conducted by the attorney who was now representing defendant, the trial judge concluded that the attorney had been acting in a nonattorney capacity, and therefore the investigation documents were not protected by the attorney-client privilege. The judge ordered the documents to be produced, but also recommended that defendant prepare a privilege log as to any documents that might qualify for work product protection, and these would be inspected in camera. *Held*, writ of mandate issued; the discovery order was improper.

(a) Past cases have recognized that attorneys sometimes engage in nonattorney work, and that documents produced in the course of that work may therefore not qualify for attorney-client or work product protection. (59 C.A.4th 121, 122, citing *Montebello Rose Co. v. Agricultural Lab. Rel. Bd.* (1981) 119 C.A.3d 1, 173 C.R. 856, and *Watt Industries v. Superior Court* (1981) 115 C.A.3d 802, 171 C.R. 503.) However, these cases cannot be read to support a blanket rule excluding attorney investigations of employer discrimination from the protection of the privileges. Even though an attorney is hired to conduct business that does not require a lawyer, the attorney may be called on to give legal advice during the course of that work, and documents related to that advice should be protected notwithstanding the original purpose of the employment. The trial judge should not have given plaintiff "carte blanche access" to defendant's investigative file, but should have based his ruling on the subject matter of each document. (59 C.A.4th 122.)

(b) It is true that a party claiming a privilege has the burden of establishing the preliminary facts necessary to support it, but here there was never a dispute concerning the underlying facts. Plaintiff conceded that defendant's attorney had been given the task of investigating plaintiff's discrimination charges. At this point, the burden shifted to plaintiff to make a prima facie showing that an exception to the privilege applied. He could not meet this burden by

simply asserting, as he did in a supplemental memorandum of points and authorities, that the attorney was engaged in a fact-finding mission. "At a minimum, he needed to present evidence concerning his employer's normal method of dealing with internal employment discrimination complaints and whether they were routinely assigned to outside counsel to investigate and deal with." (59 C.A.4th 124.)

(c) The trial judge additionally ruled that production of the documents was required by *Lab.C. 1198.5*, under which employers must allow employees to inspect those personnel files that are used to determine the employees' qualifications, promotions, raises, and discipline. (See 2 *Summary* (9th), *Agency and Employment*, §313.) But the statute does not express a legislative intention to overthrow the traditional protections afforded attorney-client communications and attorney work product, and it should not be read to establish an implied exception to that effect. (59 C.A.4th 124, 125.)

(d) Having found that the investigation documents were for the most part unprotected, the trial judge never addressed the issue of waiver. However, when an employer injects into a lawsuit an issue concerning the adequacy of its investigation, and the investigation was undertaken by an attorney or law firm, a waiver of the traditional protections must be deemed to have occurred. "If a defendant employer hopes to prevail by showing that it investigated an employee's complaint and took action appropriate to the findings of the investigation, then it will have put the adequacy of the investigation directly at issue, and cannot stand on the attorney-client privilege or work product doctrine to preclude a thorough examination of its adequacy." (59 C.A.4th 128.) If plaintiff is able to file an acceptable complaint, and defendant's answer raises an investigation defense, a finding on the waiver issue will be necessary. Thus, the trial judge's discovery order "must be reversed without prejudice to [plaintiff's] ability to reassert a right to discovery of the file at a later time if defendants interject a defense based on the investigation." (59 C.A.4th 129.)

The *Wellpoint* case was distinguished in *Kaiser Foundation Hosp. v. Superior Court* (1998) 66 C.A.4th 1217, 78 C.R.2d 543, where the employer's investigation was performed by a *nonattorney* human resources specialist. When plaintiffs requested discovery of the employer's investigation files, it produced over 90% of its investigation-related documents, but only after obtaining a written stipulation that this production did not constitute a waiver of the attorney-client privilege. It withheld the remainder of the documents on the basis of that privilege or the work product doctrine. The trial judge granted plaintiffs' motion to compel. *Held*, this was error. "*Wellpoint* did not make a blanket holding that the attorney-client privilege and the work product doctrine are waived in every case that an employer puts the adequacy of its prelitigation investigation at issue. ... Where a defendant has produced its files and disclosed the substance of its internal investigation conducted by nonlawyer employees, and only seeks to protect specified discrete communications which those employees had with their attorneys, disclosure of such privileged communications is simply not essential for a thorough examination of the adequacy of the investigation or a fair adjudication of the action." (66 C.A.4th 1226, 1227.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*Cross-Reference:* 3 *Summary* (10th), *Agency and Employment*, §357.



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##### 1. What Constitutes Waiver.

##### i. Other Illustrations.

2 Witkin Cal. Evid. Witnesses § 80

[§ 80] Other Illustrations.

The following cases, involving miscellaneous conduct, have discussed whether a valid privilege was waived:

*People v. Clark* (1990) 50 C.3d 583, 621, 268 C.R. 399, 789 P.2d 127 [defendant communicated murder threats to therapist, who then advised him that she might reveal them; defendant did not consent to disclosure by expressing satisfaction over pain revelation would cause potential victims].

*Hiott v. Superior Court* (1993) 16 C.A.4th 712, 719, 20 C.R.2d 157 [plaintiff waived privilege as to videotaped conversation with her attorney by informing defendant of existence of tape and indicating that defendant was welcome to a copy].

*People v. Gillard* (1997) 57 C.A.4th 136, 162, 66 C.R.2d 790 [following *People v. Lines* (1975) 13 C.3d 500, 119 C.R. 225, 531 P.2d 793, *infra*, §237; in prosecution for workers' compensation fraud, defendant's placing of physical condition in issue in proceeding giving rise to prosecution did not constitute waiver of attorney-client privilege as to photographs taken of defendant and given to his attorney in connection with prior injury].

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Wells Fargo Bank v. Superior Court* (2000) 22 C.4th 201, 211, 91 C.R.2d 716, 990 P.2d 591, Supp., *supra*, §64 [where law was unsettled and trustee disclosed attorney-client communications regarding trust administration believing in good faith that disclosure was required, privilege was not waived as to other documents not yet disclosed].



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##### 2. Exceptions to Waiver Rule.

##### a. Where Privilege Is Joint.

2 Witkin Cal. Evid. Witnesses § 81

[§ 81] Where Privilege Is Joint.

Where two or more persons are joint holders of the lawyer-client privilege (*Ev.C. 954*), the physician-patient privilege (*Ev.C. 994*), the psychotherapist-patient privilege (*Ev.C. 1014*), or the sexual assault victim-counselor privilege (*Ev.C. 1035.8*), waiver of the right of one joint holder to claim the privilege does not affect the right of another joint holder to do so. Similarly, in the case of the privilege for confidential marital communications (*Ev.C. 980*), waiver of the right of one spouse to claim the privilege does not affect the right of the other spouse to do so. (*Ev.C. 912(b)*.) (See 98 *Harv. L. Rev.* 1648.)

Thus, in *People v. Kor* (1954) 129 C.A.2d 436, 277 P.2d 94, *infra*, §168, where the communication was made to a joint attorney by defendant Kor in the presence of defendant Kaufman, Kaufman testified to Kor's statements without objection. *Held*, this failure to object (for whatever strategic reason) was not a consent to testimony *by the attorney*. "Kaufman could not waive the privilege for Kor." (129 C.A.2d 444.) (See criticism, 2 *U.C.L.A. L. Rev.* 573; 10 *Stanf. L. Rev.* 315.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Ev.C. 912(b)* was amended in 2002 to add the domestic violence-counselor privilege (*Ev.C. 1037.5*) to the jointly held privileges to which the nonwaiver rule applies.



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##### 2. Exceptions to Waiver Rule.

##### b. Where Disclosure Itself Privileged.

*2 Witkin Cal. Evid. Witnesses § 82*

[§ 82] Where Disclosure Itself Privileged.

"A disclosure that is itself privileged is not a waiver of any privilege." (*Ev.C. 912(c).*)

The Law Revision Commission Comment makes this explanation: "A privilege is not waived when a revelation of the privileged matter takes place in another privileged communication. Thus, for example, a person does not waive his lawyer-client privilege by telling his wife in confidence what it was that he told his attorney. Nor does a person waive the marital communication privilege by telling his attorney in confidence in the course of the attorney-client relationship what it was that he told his wife. And a person does not waive the lawyer-client privilege as to a communication by relating it to another attorney in the course of a separate relationship. A privileged communication should not cease to be privileged merely because it has been related in the course of another privileged communication. The theory underlying the concept of waiver is that the holder of the privilege has abandoned the secrecy to which he is entitled under the privilege. Where the revelation of the privileged matter takes place in another privileged communication, there has not been such an abandonment. Of course, this rule does not apply unless the revelation was within the scope of the relationship in which it was made; a client consulting his lawyer on a contract matter who blurts out that he told his doctor that he had a venereal disease has waived the privilege, even though he intended the revelation to be confidential, because the revelation was not necessary to the contract business at hand."

**SUPPLEMENT:** [This section is current through the latest supplement]



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## c. Necessary Confidential Disclosure.

## 1. Nature of Exception.

2 *Witkin Cal. Evid. Witnesses* § 83

## [§ 83] Nature of Exception.

A disclosure in confidence of a communication that is protected by the lawyer-client privilege (*Ev.C. 954*), the physician-patient privilege (*Ev.C. 994*), the psychotherapist-patient privilege (*Ev.C. 1014*), or the sexual assault victim-counselor privilege (*Ev.C. 1035.8*) does not waive the privilege if the disclosure is reasonably necessary to accomplish the purpose for which the lawyer, physician, psychotherapist, or sexual assault counselor was consulted. (*Ev.C. 912(d)*.)

The Law Revision Commission Comment states: "For example, where a confidential communication from a client is related by his attorney to a physician, appraiser, or other expert in order to obtain that person's assistance so that the attorney will better be able to advise his client, the disclosure is not a waiver of the privilege, even though the disclosure is made with the client's knowledge and consent. Nor would a physician's or psychotherapist's keeping of confidential records necessary to diagnose or treat a patient, such as confidential hospital records, be a waiver of the privilege, even though other authorized persons have access to the records. Similarly, the patient's presentation of a physician's prescription to a registered pharmacist would not constitute a waiver of the physician-patient privilege because such disclosure is reasonably necessary for the accomplishment of the purpose for which the physician is consulted. See also *Evidence Code* §992. Communications such as these, when made in confidence, should not operate to destroy the privilege even when they are made with the consent of the client or patient. Here, again, the privilege holder has not evidenced any abandonment of secrecy. Hence, he should be entitled to maintain the confidential nature of his communications to his attorney or physician despite the necessary further disclosure."

In *Green v. Superior Court* (1963) 220 C.A.2d 121, 33 C.R. 604, a divorce case in which the wife placed her fitness in issue by seeking child custody, the husband sought to prove her excessive use of drugs by production of pharmacists' prescription records. The objection, that the pharmacist receives a confidential communication of the nature of the patient's ailment from the prescribing doctor, was rejected. (220 C.A.2d 124.) As the Comment suggests, *Ev.C. 912(d)* changed the rule of this case. (See *Rudnick v. Superior Court* (1974) 11 C.3d 924, 932, 114 C.R. 603, 523 P.2d 643 [*Green* holding "no longer has vitality"].)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Ev.C. 912(d)* was amended in 2002 to add the domestic violence-counselor privilege (*Ev.C. 1037.5*) to the privileges that are not waived when the disclosure is reasonably necessary.

See *STI Outdoor v. Superior Court* (2001) 91 C.A.4th 334, 341, 109 C.R.2d 865 [privilege was not waived as to documents prepared by counsel for two parties contemplating entering into license agreement and circulated between parties during course of negotiations; disclosure was reasonably necessary to further parties' interests in finalizing negotiations]; *Pollock v. Superior Court* (2001) 93 C.A.4th 817, 821, 113 C.R.2d 453 [because insured is required to submit claim to disability insurer as prerequisite to coverage, submission of claim does not constitute waiver of psychotherapist-patient privilege]; 25 California Lawyer 45 (June 2005) [*STI Outdoor v. Superior Court*].

(New) *Disclosure for common interest*: In *OXY Resources Calif. LLC v. Superior Court* (2004) 115 C.A.4th 874, 9 C.R.3d 621, two oil and gas companies entered into negotiations for the exchange of interests in oil and gas producing properties, and before the transaction was consummated, they also entered into a joint defense agreement providing that communications between the parties would be privileged and exempt from discovery. Once the transaction was announced, a third party claiming an interest in one of the properties sued and sought discovery of documents exchanged between the two contractual parties both before and after completion of the transaction. The trial judge, relying on *STI Outdoor*, ruled that the documents exchanged before completion of the transaction were privileged. As to the posttransaction documents, the judge found that their mutual disclosure was not reasonably necessary within the meaning of *Ev.C. 912(d)* and ordered their production. *Held*, writ relief was appropriate.

(a) There is no separate common interest privilege in California, and the claim of a party seeking to avoid disclosure on the basis of a common interest theory, therefore, must be analyzed on the basis of the waiver principles normally applied to attorney-client and work product claims. (115 C.A.4th 889.) First, the party must establish that the communicated information would otherwise be protected from disclosure, i.e., it falls within the attorney-client or work product privilege. Second, the party must establish that the disclosure of the information to someone outside the attorney-client relationship did not result in waiver. (115 C.A.4th 890.) A joint defense agreement such as the one entered into by the contracting parties here can evidence a reasonable expectation that any information exchanged will remain confidential. Such an expectation will not prevent waiver, however, unless the exchange was reasonably necessary for the accomplishment of the purpose for which the lawyer was consulted. (115 C.A.4th 891.)

(b) Joint defense agreements are not void as against public policy, but they cannot be the sole basis for withholding documents from disclosure. Here the trial judge relied on the parties' agreement to deny disclosure as to the pre-transaction documents regardless of whether the documents were protected by privilege and whether their exchange effected a waiver. (115 C.A.4th 893.)

(c) The judge's ruling as to the posttransaction documents was also flawed, as there was an inadequate evidentiary basis for concluding that mutual disclosure of the documents was not reasonably necessary. (115 C.A.4th 900.)

(d) On remand, "the trial court must first establish that the documents are protected by either the attorney-client privilege or the attorney work product doctrine. The trial court must then determine that there was a reasonable expectation the communications would be maintained in confidence and that the disclosures were reasonably necessary for the purpose for which attorneys were consulted. This determination will invariably hinge on the content and context of the communication. In order to assess the claims of common interest and the necessity of disclosure, the trial court may conduct an in camera review of the disputed documents." (115 C.A.4th 902.) While in camera review of documents claimed to be protected by the attorney-client privilege is generally prohibited (*Ev.C. 915(a)*; see text, §87), it is permitted where necessary to determine whether an exception to the privilege applies. (115 C.A.4th 896.) (See *Roush v. Seagate Technology, LLC* (2007) 150 C.A.4th 210, 224, 58 C.R.3d 275 [in action by employee against her employer, employee could not show that information she shared with co-employee who was also suing employer maintained its confidentiality; although they had same attorney, employee and co-employee were not joint clients, and, even if they had overlapping interests, employee did not show that sharing was reasonably necessary to advance her case].)



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## CHAPTER IX - Witnesses

## III. PRIVILEGE: IN GENERAL

## E. Waiver by Disclosure or Consent.

## 2. Exceptions to Waiver Rule.

## c. Necessary Confidential Disclosure.

## 2. Clarifications and Distinctions.

2 Witkin Cal. Evid. Witnesses § 84

[§ 84] Clarifications and Distinctions.

(1) *Cooperation Among Defendants for Nondefense Purpose*. In *Raytheon Co. v. Superior Court* (1989) 208 C.A.3d 683, 256 C.R. 425, plaintiffs sued Raytheon and other defendants on contract and tort claims related to the toxic condition of certain real property. Subsequent to the filing of the suit, the Environmental Protection Agency began an investigation of the contaminated site, and on August 15, 1985, Raytheon and others entered into an administrative consent order that commenced a cooperative administrative investigation. Plaintiffs sought draft reports and related correspondence that were circulated among the defendants during the federal investigation. The trial judge ordered discovery, ruling that, under *Williamson v. Superior Court* (1978) 21 C.3d 829, 148 C.R. 39, 582 P.2d 126, *infra*, §149, circulation of the documents among the "adversarial" codefendants waived claims of attorney-client or work product privilege. *Held*, mandamus issued, directing reconsideration of the matter.

(a) *Williamson* is not controlling; it turned on the narrow public policy ground that a bargain to suppress evidence is disfavored. Here the issue is simply whether a waiver occurs when adversaries voluntarily share otherwise privileged information. (208 C.A.3d 686.)

(b) No California cases have considered whether common cooperation among defendants, for a purpose other than a common defense of the lawsuit, is a purpose "for which" the defense lawyers were "consulted." (*Ev.C. 912(d)*.) However, *Ev.C. 912(d)* requires a court to determine (1) whether the parties had a commonality of interest, and (2) whether mutual disclosures were reasonably necessary to accomplish the purpose for which attorneys were consulted. (208 C.A.3d 686.)

(c) Raytheon argues that the disclosures were reasonably necessary, because it was beneficial for all to cooperate in the governmental investigation. Plaintiffs respond that, because the liability of polluters is assessed in proportion to fault, the parties' interests may well have been adverse rather than joint. Remand is necessary because the trial judge, viewing the *Williamson* decision as controlling, did not give Raytheon the opportunity to meet its burden of showing that the relationship of the defendants when the documents were generated was such that disclosure was reasonably necessary within *Ev.C. 912(d)*. (208 C.A.3d 687, 688, 689.)

(d) There is no statutory provision governing waiver of work product protection; however, language in *Fellows v. Superior Court* (1980) 108 C.A.3d 55, 166 C.R. 274, "strongly suggests that privilege is not waived except by a disclosure wholly inconsistent with the purpose of the privilege, which is to safeguard the attorney's work product and



trial preparation." (208 C.A.3d 689.) Because the trial judge relied exclusively on inapposite authority, no evidence was developed as to whether the work product was disclosed under circumstances inconsistent with the privilege. "There is no detailed description of the nature of the administrative investigation and the various interests each party had at stake during its progress; yet these facts are crucial to determining whether disclosure could reasonably be made with an expectation of confidentiality." (208 C.A.3d 689.)

(2) *Distinction: Where Expert Designated as Witness.* The lawyer-client privilege embraces statements from counsel to an expert that disclose confidential information communicated by the client when disclosure is reasonably necessary to further the attorney's representation of the client's interests. However, the privilege is lost upon designation of the expert as a witness, because the decision to use the expert as a witness manifests the client's consent to disclosure of the information. (*Shadow Traffic Network v. Superior Court* (1994) 24 C.A.4th 1067, 1078, 1079, 29 C.R.2d 693, 1 Cal. Proc. (4th), Attorneys, §174.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1a) (*New*) *Disclosure to Government Investigators.* Ev.C. 912(d) does not prevent waiver where the client hires an attorney to represent it in civil litigation, the attorney conducts interviews and prepares reports in the course of that representation, and then the interviews and reports are shared with a government agency that is conducting a separate investigation, even if the sharing is accomplished pursuant to a confidentiality agreement. Under these circumstances, disclosure is not "reasonably necessary" within the meaning of the statute for the purpose for which the attorney was consulted. (*McKesson HBOC v. Superior Court* (2004) 115 C.A.4th 1229, 1237, 9 C.R.3d 812, distinguishing *Raytheon Co. v. Superior Court* (1989) 208 C.A.3d 683, 256 C.R. 425, text, p. 336, where the sharing was between defendants.)



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## CHAPTER IX - Witnesses

### III. PRIVILEGE: IN GENERAL F. Claim and Determination of Privilege. 1. Presumption of Confidentiality. a. In General.

2 Witkin Cal. Evid. Witnesses § 85

[§ 85] In General.

If the person claiming that a communication was privileged was required initially to establish its confidential character, the purpose of the privilege would frequently be defeated, for the proof would entail the very disclosure that the statute seeks to prevent. It seems appropriate, therefore, to regard communications between persons in the privileged relationships as confidential unless they are proved otherwise.

This view has had judicial approval in connection with the marital privilege. In *Blau v. United States* (1951) 340 U.S. 332, 71 S.Ct. 301, 95 L.Ed. 306, petitioner, questioned by a federal grand jury and district judge, refused to reveal the whereabouts of his wife (apparently secreting herself to evade process). In reversing a judgment of contempt, the Supreme Court pointed out that petitioner obtained his knowledge from her communication, and applied the presumption that marital communications are confidential. It was not necessary for the witness to prove that the information was privately conveyed, but rather the task of the Government to overcome the presumption of confidentiality. (71 S.Ct. 302, 95 L.Ed. 308.) (See 1 McCormick 5th, §80; 8 Wigmore (McNaughton Rev.) §2336; on procedure for judge's *in camera* inspection of public records for which privilege has been claimed, see *infra*, §299; on *in camera* review of claim of confidentiality under newsperson's shield law, see *infra*, §348.)

*Ev.C. 917* adopts this rule for all of the important privileges:

"Whenever a privilege is claimed on the ground that the matter sought to be disclosed is a communication made in confidence in the course of the lawyer-client, physician-patient, psychotherapist-patient, clergyman-penitent, or husband-wife relationship, the communication is presumed to have been made in confidence and the *opponent* of the claim of privilege has the *burden of proof* to establish that the communication was not confidential."

**SUPPLEMENT:** [This section is current through the latest supplement]

*Ev.C. 917* was amended and subdivided in 2002. Under *Ev.C. 917(a)*, the presumption additionally applies to the sexual assault counselor-victim and domestic violence counselor-victim privileges. Under *Ev.C. 917(b)*, a communication made in the course of one of the specified relationships does not lose its privileged character solely because it is made by electronic means or because persons involved in the delivery, facilitation, or storage of electronic communications may have access to the communication's content.

*Ev.C. 917* was further amended in 2004 to change "clergyman-penitent" to "clergy-penitent."

2 Witkin Cal. Evid. Witnesses § 85

See 1 McCormick 6th, §80. *West's Key Number Digest*, Witnesses k.222



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## CHAPTER IX - Witnesses

## III. PRIVILEGE: IN GENERAL

## F. Claim and Determination of Privilege.

1. Presumption of Confidentiality.
- b. Necessity of Preliminary Proof That Privilege Exists.

## 2 Witkin Cal. Evid. Witnesses § 86

[§ 86] Necessity of Preliminary Proof That Privilege Exists.

The burden imposed by *Ev.C. 917* on the opponent of proving that a communication was not confidential (see *supra*, §85) arises only when the claimant first proves the preliminary fact that *a privilege exists*. (*Mahoney v. Superior Court* (1983) 142 C.A.3d 937, 940, 191 C.R. 425 [general objection asserting psychotherapist-patient privilege, without identifying particular psychotherapist and without showing that claimant had consulted him for purposes specified in *Ev.C. 1011* which would make him a patient].)

In *Gonzalez v. Superior Court* (1995) 33 C.A.4th 1539, 39 C.R.2d 896, photographs of a seminude female bearing a striking resemblance to plaintiff, a police radio dispatcher, were placed in the men's locker room at the police station. After the photographs were removed, plaintiff acquired them. When questioned by her superiors, she refused to identify the person who had taken the photographs from a police sergeant's file cabinet and given them to her. This refusal was reflected in a negative performance review, leading plaintiff to quit and file an action for sexual harassment. Defendants served an interrogatory asking for the identity of the person who had given her the photographs. Plaintiff refused to answer, and the trial judge granted defendants' motion to compel. *Held*, the motion was properly granted.

(a) The information is undoubtedly relevant. Among other things, if plaintiff succeeds in establishing sexual harassment, evidence of any misconduct by her (in stealing or encouraging another to steal the photographs) will be admissible to limit the kind and quality of her damages. (33 C.A.4th 1547.)

(b) None of the established constitutional or statutory privileges are obviously applicable. Where a question calls for information that may or may not be privileged, the party asserting the privilege must establish its application before the interrogator is required to show more than basic discovery relevance. Plaintiff offers nothing to support her claims of privilege based on California's policy of protecting whistleblowers and preventing sexual harassment. "[S]he simply argues that, because Defendants took disciplinary action against her, we must assume they will retaliate against her assistant because he helped her by giving her the photographs. She conveniently ignores the fact that she has presented no evidence at all to establish her assistant's status (as noted, we do not know if he is a coworker), nor does she ever say what sort of retaliation she fears. There is not even any evidence that the photographs were given to her in confidence, with the expectation that the assistant's identity would not be disclosed." (33 C.A.4th 1549.)

(c) Plaintiff's reliance on *John Z. v. Superior Court* (1991) 1 C.A.4th 789, 2 C.R.2d 556, is misplaced. There the informant whose identity was protected was a traditional whistleblower (he had informed a public utility that some of its contractors were receiving payment for services not actually performed); there was no hint that he was guilty of any

wrongdoing; and he filed a lengthy declaration detailing threats to his life. Plaintiff simply speculates that her assistant, if identified, will be disciplined. She has not satisfied her burden of proof. (33 C.A.4th 1552, 1553.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER IX - Witnesses

### III. PRIVILEGE: IN GENERAL

#### F. Claim and Determination of Privilege.

##### 2. Disclosure to Court.

##### a. General Rule: No Compelled Disclosure.

2 Witkin Cal. Evid. Witnesses § 87

[§ 87] General Rule: No Compelled Disclosure.

For much the same reason that a communication is presumed to be confidential (*supra*, §85), the claimant of the important privileges, such as attorney-client and husband-wife, may not be compelled to disclose the information to the judge in order that the judge may rule on the claim. (*Ev.C. 915(a)*.)

In *Carlton v. Superior Court* (1968) 261 C.A.2d 282, 67 C.R. 568, plaintiff, a guest in defendant's automobile, was injured when defendant ran the car off the road. Plaintiff sued for personal injuries, alleging defendant's intoxication as the cause, which defendant denied in his answer. Plaintiff then sought inspection of hospital records, other than statements by defendant to his doctor, relating to defendant's treatment for intoxication, and the lower court ordered it. The hospital refused, and the lower court, following issuance of a subpoena duces tecum, proposed to examine the records *in camera* to determine which were subject to inspection. *Held*, prohibition issued to prevent it from acting.

Plaintiff's theory was that the only records he sought to inspect were not privileged, and that the court could separate the privileged material. But the court held that the only exceptions to the nondisclosure rule were those codified in *Ev.C. 915*. (261 C.A.2d 292.) A strong dissenting opinion argues that in a criminal case a blood test is permitted in the public interest, despite strong constitutional challenge, and that the right of recovery of an innocent victim against an intoxicated driver is entitled to just as much protection. Moreover, an intoxicated driver, charged with felony drunk driving, might well plead guilty, and his plea would be admissible against him in a subsequent civil action by the guest: thus, if the driver is prosecuted the privilege is not available, but if he is sued by the victim it is. "It is inconceivable to me that justice can be obstructed by such patently arbitrary, fictitious and unrealistic reasoning and distinction." (261 C.A.2d 295.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Ev.C. 915(a)* was amended in 2001 to add attorney work product to those privileges for which the judge may not order disclosure; however, the work product privilege was also added to the list of privileges for which an exception may be made. (*Ev.C. 915(b)*, as amended in 2001; see *Supp.*, *infra*, §88.)

See *Solin v. O'Melveny & Myers, LLP* (2001) 89 C.A.4th 451, 465, 107 C.R.2d 456, 1 Cal. Proc. (4th), *Attorneys*, *Supp.*, §118 [where clients invoked privilege to prevent their attorney from prosecuting malpractice claim against law firm in which, in order to defend, law firm would need to reveal privileged notes relating to clients, trial judge did not err in failing to order *in camera* inspection of notes to determine whether they could be redacted without prejudice to law firm's defense]; *OXY Resources Calif. LLC v. Superior Court* (2004) 115 C.A.4th 874, 896, 9 C.R.3d 621, *Supp.*,

supra, §83 [rule against in camera review applies where attorney-client privilege is claimed, but review is permitted to determine whether exception to privilege applies].



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## CHAPTER IX - Witnesses

### III. PRIVILEGE: IN GENERAL

#### F. Claim and Determination of Privilege.

##### 2. Disclosure to Court.

#### b. Exceptions: Required Disclosure to Judge.

##### 1. Statutory Basis.

### 2 Witkin Cal. Evid. Witnesses § 88

[§ 88] Statutory Basis.

(1) *Qualified Privilege*. Three types of privilege are recognized in qualified form: they are protected only if the interest in secrecy "out-weighs the necessity for disclosure in the interest of justice." These are the official information privilege (*Ev.C. 1040*, *infra*, §246), the identity of informer privilege (*Ev.C. 1041*, *infra*, §307), and the trade secret privilege (*Ev.C. 1060*, *infra*, §350). To apply this qualification intelligently, the judge may have to know what the confidential information is, and the practice has developed of an in camera inspection for this purpose.

*Ev.C. 915(b)*, following this view, states that if the judge "is unable" to rule on such a claim without disclosure, the judge may "require the person from whom disclosure is sought or the person authorized to claim the privilege, or both," to disclose it to the judge in chambers, out of the presence and hearing of all persons except the person authorized to claim it and such others as the person is willing to have present.

As a further safeguard, "[i]f the judge determines that the information is privileged, neither he nor any other person may ever disclose, without the consent of a person authorized to permit disclosure, what was disclosed in the course of the proceedings in chambers." (See *Lipton v. Superior Court* (1996) 48 C.A.4th 1599, 1619, 56 C.R.2d 341 [in attorney's bad faith action against malpractice insurer, in camera review was proper procedure where plaintiff sought insurer's documents containing both loss reserve and reinsurance information as well as claimed privileged matter].) (On use of same practice to review claim of official information privilege, see *infra*, §249; to review claim under newperson's shield law, see *infra*, §348.)

(2) *Claim of Privilege Against Search Warrant for Documentary Evidence*. A proviso to *Ev.C. 915(a)* makes the *Ev.C. 915(b)* in camera inspection available in a hearing under P.C. 1524(c) to determine a claim of privilege against a search warrant for documentary evidence raised by a lawyer (*Ev.C. 950*), physician (*Ev.C. 990*), psychotherapist (*Ev.C. 1010*), or clergyman (*Ev.C. 1030*), who is not reasonably suspected of criminal activity related to the evidence sought.

(3) *Claim of Other Privilege*. In *re Lifschutz* (1970) 2 C.3d 415, 437, footnote 23, 85 C.R. 829, 467 P.2d 557 (*infra*, §224), contains this dictum: "Although ordinarily a patient cannot be required to disclose privileged information in order to claim the privilege (*Evid. Code*, §915, subd. (a)), because the privileged status of psychotherapeutic communications under the patient-litigant exception depends upon the *content* of the communication, a patient may have to reveal some information about a communication to enable the trial judge to pass on his claim of irrelevancy. Upon such revelation, the trial judge should take necessary precautions to protect the confidentiality of these



communications; for example, he might routinely permit such disclosure to be made *ex parte* in his chambers. (Compare the procedure suggested in *Evid. Code*, §915, subd. (b).)" (For subsequent decisions approving in camera inspection on this theory, see *Lemelle v. Superior Court* (1978) 77 C.A.3d 148, 160, 143 C.R. 450 [dangerous patient exception (*Ev.C. 1024*) to psychotherapist-patient privilege]; *Mavroudis v. Superior Court* (1980) 102 C.A.3d 594, 606, 162 C.R. 724 [same]; *infra*, §229.)

However, the statutory procedure ordinarily is not necessary where the attorney-client privilege is involved. (See *People v. Glen Arms Estate* (1964) 230 C.A.2d 841, 847, footnote 1, 41 C.R. 303.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Qualified Privilege*. *Ev.C. 915(b)* was amended in 2001 to add the work product privilege to those qualified privileges for which the judge may order in camera disclosure if the judge is otherwise unable to rule on the privilege claim. The amendment also rendered the subdivision's language gender-neutral.



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### III. PRIVILEGE: IN GENERAL

#### F. Claim and Determination of Privilege.

##### 2. Disclosure to Court.

#### b. Exceptions: Required Disclosure to Judge.

##### 2. Constitutional Basis.

### 2 Witkin Cal. Evid. Witnesses § 89

[§ 89] Constitutional Basis.

In *Vela v. Superior Court* (1989) 208 C.A.3d 141, 255 C.R. 921, city police officers made statements to members of a special investigation team charged with gathering evidence for use by the city in defending against possible future civil litigation arising out of a shooting incident. Defendants, who were charged with crimes arising out of the same incident, sought to discover the statements. *Held*, the statements were within the city's attorney-client privilege, but an in camera hearing is necessary to determine whether the privilege must give way to pretrial access to protect the defendants' constitutional rights of confrontation and cross-examination.

The court said: "Conceivably, parts of the officer's statement may not be relevant to the underlying criminal action, and the trial court should, in light of all the facts and circumstances, initially decide how much, if any, must remain confidential. Defendant's entitlement to discovery is not absolute. The attorney-client privilege may be overridden only if, and to the extent, necessary to ensure defendant's constitutional rights of confrontation and cross-examination. Thus, the trial court must weigh defendant's constitutionally based need against the statutory privilege claimed by City and determine which privileged matters, if any, are essential to ensure defendant's right of confrontation and access to matters reasonably required to permit a full and fair cross-examination. The trial court must also create a record of the in camera hearing, and the findings made therein, adequate to permit appellate review of its ruling." (208 C.A.3d 151.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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### III. PRIVILEGE: IN GENERAL

#### F. Claim and Determination of Privilege.

##### 2. Disclosure to Court.

#### b. Exceptions: Required Disclosure to Judge.

##### 3. Basis in Federal Common Law.

2 Witkin Cal. Evid. Witnesses § 90

[§ 90] Basis in Federal Common Law.

In *United States v. Zolin* (1989) 491 U.S. 554, 109 S.Ct. 2619, 105 L.Ed.2d 469, the Court held that, under federal common law, a district court may conduct an in camera review of material allegedly protected by the attorney-client privilege to determine the applicability of the crime-fraud exception (infra, §153 et seq.). The court reasoned as follows:

(a) *F.R. Evid., Rule 104(a)* (see 3 *Cal. Evidence* (4th), *Presentation at Trial*, §48) does not categorically prohibit the party opposing the privilege from relying on the results of an in camera hearing. Unlike *Ev.C. 915(a)* (supra, §87), the federal rule does not provide that all materials claimed to be privileged must be excluded from consideration in ruling on the privilege. (109 S.Ct. 2628, 105 L.Ed.2d 487.)

(b) In camera review does not destroy the privileged nature of the contested communications. That being the case, "the costs of imposing an absolute bar to consideration of the communications in camera for the purpose of establishing the crime-fraud exception are intolerably high," creating "too great an impediment to the proper functioning of the adversary process." (109 S.Ct. 2629, 105 L.Ed.2d 489.)

(c) Before the court may engage in an in camera review, the party opposing the privilege must present relevant evidence, lawfully obtained and not adjudicated to be privileged, sufficient to support a reasonable belief that in camera review may yield evidence that establishes the exception's applicability. (109 S.Ct. 2631, 2632, 105 L.Ed.2d 491, 492.) Once the showing is made, the decision to engage in an in camera review is in the court's sound discretion. (109 S.Ct. 2631, 105 L.Ed.2d 491.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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### III. PRIVILEGE: IN GENERAL

#### F. Claim and Determination of Privilege.

##### 2. Disclosure to Court.

##### c. Judge's Discretion To Deny In Camera Hearing.

2 Witkin Cal. Evid. Witnesses § 91

[§ 91] Judge's Discretion To Deny In Camera Hearing.

*Ev.C. 915(b)* (supra, §88) is permissive, and the decision on whether to hold such a hearing is within the trial court's sound discretion. (*In re Muszalski* (1975) 52 C.A.3d 475, 482, 125 C.R. 281.)

In the *Muszalski* case, a prisoner preparing for a parole hearing sought to inspect a probation report which had been submitted to the trial court when he was sentenced and which was filed with the Department of Corrections. The trial judge refused to order an in camera hearing at which a correctional counselor would have testified about the need for confidentiality. *Held*, ordinarily an in camera hearing should have been conducted but, on the facts here, it was properly denied.

(a) A judge's private perusal of allegedly confidential documents may be insufficient to disclose the Department's reasons for its confidential classification. In many cases, the reasons for confidentiality may not spring from the face of the document but may be based on other factors which the custodian of records could explain. Anything less would have the judge act in a vacuum. (52 C.A.3d 482.)

(b) Because the burden of demonstrating the need for confidentiality rests on the Department, it would be an abuse of discretion to refuse a request for an in camera hearing when that hearing is the only means available for the Department to meet its burden of proof without disclosing the very information claimed to be confidential. (52 C.A.3d 483.)

(c) Here, however, the trial court did not abuse its discretion. The disputed probation report was or should have been supplied to defense counsel and to the defendant at the time of sentencing. Because, by statute, the contents had to be disclosed to defendant then, it would be irrational and serve no useful purpose to classify the document as confidential now and deny defendant access to it. (52 C.A.3d 483.) (See *In re Olson* (1974) 37 C.A.3d 783, 112 C.R. 579, 3 Cal. Crim. Law (3d), *Punishment*, §619 [proper balance between state's interest in confidentiality and inmate's interest in obtaining liberty by inspecting prison files]; *People v. Superior Court (Biggs)* (1971) 19 C.A.3d 522, 530, 97 C.R. 118 [*Ev.C. 915(b)* creates erroneous impression that ruling for or against privilege should be made at close of in camera inquiry; better practice is for adversary hearing after preliminary in camera hearing].)

**SUPPLEMENT:** [This section is current through the latest supplement]

An in camera hearing is not proper on a claim of official information privilege (*Ev.C. 1040*; see text, §246) unless the party claiming the privilege explains in open court why the privilege applies or declares that it cannot do so without

betraying the privilege. If that showing is made, and the trial court finds that it is unable to evaluate the claim without disclosure of information that the party asserts is privileged, the court is authorized by *Ev.C. 915(b)* to conduct an in camera hearing to evaluate the existence of the privilege. (*Torres v. Superior Court* (2000) 80 C.A.4th 867, 870, 95 C.R.2d 686 [in probation revocation proceeding in which defendant sought names of those who accompanied detective on probation search, trial judge erred in setting ex parte in camera hearing on prosecution's claim of official information privilege where prosecution asked for hearing but said nothing more].)



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## CHAPTER IX - Witnesses

### III. PRIVILEGE: IN GENERAL F. Claim and Determination of Privilege. 3. Exclusion by Presiding Officer.

2 Witkin Cal. Evid. Witnesses § 92

[§ 92] Exclusion by Presiding Officer.

(1) *Duty of Judge To Exclude.* The fact that the clerk or secretary of an attorney was present when a confidential communication was made does not rob it of its confidential character. (See *infra*, §121.) But it may occasionally happen that the clerk or secretary is called to testify without either the attorney or client present. The clerk or secretary is not the holder of the privilege and is helpless. In such a case, *Ev.C. 916* provides that the judge or other presiding officer must, on his or her own motion or the motion of any party, exclude the privileged information.

The two conditions under which the judge must act are: (a) the witness is not authorized to claim the privilege, and (b) there is no party authorized to do so.

But if an authorized person instructs the judge to permit disclosure, or the proponent shows that there is no authorized claimant in existence, the judge may not exclude. (*Ev.C. 916(b)*.)

The Law Revision Commission Comment makes this distinction:

"Section 916 is designed to protect only privileged information that the holder of the privilege could protect by claiming the privilege at the hearing. It is not designed to protect unprivileged information. For example, if the statement offered in evidence is a declaration against the penal interest of the declarant, Section 916 does not authorize the presiding officer to exclude the evidence on the ground of the declarant's privilege against self-incrimination. If the declarant were present, his self-incrimination privilege would merely preclude his giving self-incriminating testimony at the hearing; it could not be asserted to prevent the disclosure of previously made self-incriminating statements."

(2) *Duty of Judge To Advise Witness of Privilege.* In *People v. Flores* (1977) 71 C.A.3d 559, 139 C.R. 546, defendant contended that it was error for the trial judge to tell a prosecution witness that he could claim privilege as to discussions with his attorney concerning a grant of immunity from prosecution. *Held*, the advice was mandatory. "*Evidence Code* section 916 requires that the trial court exclude on its own motion privileged information when the party from whom the information is sought is not a person authorized to claim the privilege and a party who is authorized to claim the privilege is not a party to the proceeding. Inherent with this mandate is the obligation that the court, when aware that a witness is without advice of counsel and uninformed, inform such witness of his right to assert the privilege. To permit the witness to testify under such known circumstances is error." (71 C.A.3d 564.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER IX - Witnesses

## III. PRIVILEGE: IN GENERAL

## F. Claim and Determination of Privilege.

## 4. Effect of Overruling Claim.

## a. Claim Overruled in Present Proceeding.

2 Witkin Cal. Evid. Witnesses § 93

[§ 93] Claim Overruled in Present Proceeding.

(1) *In Judicial Proceeding.* If a party's claim of privilege is rejected, he or she testifies under compulsion, and if judgment is rendered against him or her, the party may obtain a review of the ruling on appeal from the judgment. (See, e.g., *People v. Kor* (1954) 129 C.A.2d 436, 437, 277 P.2d 94, *infra*, §168.) But there is no good reason why the wrongful invasion of the privilege of a *third person*, which results in the introduction of evidence otherwise admissible, should be a ground for challenge by the party. (See *People v. Mann* (1957) 148 C.A.2d 851, 853, 307 P.2d 684; 1 McCormick 5th, §73.1; 8 Wigmore (McNaughton Rev.) §2196; 2 A.L.R.2d 645 [right of one against whom testimony is offered to invoke privilege of communication between others].) Accordingly, *Ev.C. 918* states: "A party may predicate error on a ruling disallowing a claim of privilege *only if he is the holder* of the privilege, except that a party may predicate error on a ruling disallowing a claim of privilege by his *spouse* under Section 970 or 971."

If the holder of the privilege does not choose to acquiesce in the judge's ruling and test it later on appeal, the party may refuse to answer and, if held in contempt, may review the contempt order by certiorari (or, if imprisoned, by habeas corpus). And other extraordinary writs, such as prohibition and mandamus, have also been employed to protect against invasion of the privilege in discovery proceedings. (See, e.g., *Holm v. Superior Court* (1954) 42 C.2d 500, 505, 267 P.2d 1025 [prohibition]; 2 *Cal. Evidence* (4th), *Discovery*, §242 et seq.)

(2) *In Nonjudicial Proceeding.* Except where a nonjudicial body has constitutional judicial powers (e.g., Public Utilities Commission, and Workers' Compensation Appeals Board), it cannot directly punish for contempt; it must seek a court order to comply with the direction to testify. (See 1 *Cal. Evidence* (4th), *Introduction*, §73.) Thus, a party whose claim of privilege is overruled in an administrative hearing cannot be held in contempt "unless he has failed to comply with an order of a court" that he disclose the information. (*Ev.C. 914(b)*.)

The Legislature and legislative committees, however, have independent power to commit and arrest for contempt. (See *Govt.C. 9405, 9406, 9409*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In Judicial Proceeding.* See 1 McCormick 6th, §73.1.



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## CHAPTER IX - Witnesses

### III. PRIVILEGE: IN GENERAL

#### F. Claim and Determination of Privilege.

##### 4. Effect of Overruling Claim.

##### b. Claim Overruled in Prior Proceeding.

*2 Witkin Cal. Evid. Witnesses § 94*

[§ 94] Claim Overruled in Prior Proceeding.

It sometimes happens that a claim of privilege is erroneously rejected, disclosure is compelled, and thereafter, in a subsequent proceeding, the improperly coerced disclosure is offered in evidence. In principle, it would seem clear that a privilege is not waived by testimony wrongfully compelled, and that to admit the evidence would sanction its violation. Accordingly, *Ev.C. 919(a)* makes the evidence inadmissible against a holder of the privilege for either of these reasons:

- (1) A person authorized to claim the privilege claimed it, but disclosure erroneously occurred.
- (2) The presiding officer failed to exclude the privileged information as required by *Ev.C. 916* (see *supra*, §92).

*Ev.C. 919(b)* adds this caveat: "If a person authorized to claim the privilege claimed it, whether in the same or a prior proceeding, but nevertheless disclosure erroneously was required by the presiding officer to be made, neither the failure to refuse to disclose nor the failure to seek review of the order of the presiding officer requiring disclosure indicates consent to the disclosure or constitutes a waiver and, under these circumstances, the disclosure is one made under coercion." (See *6 Pacific L. J. 433* [pointing out that amendment abrogated principle of *Markwell v. Sykes* (1959) *173 C.A.2d 642, 649, 343 P.2d 769, infra*, §269].)

**SUPPLEMENT:** [This section is current through the latest supplement]





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## CHAPTER IX - Witnesses

### III. PRIVILEGE: IN GENERAL

#### G. No Comment or Inference.

##### 1. Former Law.

#### 2 Witkin Cal. Evid. Witnesses § 95

[§ 95] Former Law.

The Model Code (Rule 233) would have permitted comment on and inference from the exercise of any privilege. The majority view is contra. (See 1 McCormick 5th, §74.1; 8 Wigmore (McNaughton Rev.) §2272.) In California, the state Constitution allowed comment on exercise of the self-incrimination privilege (see *infra*, §432), but the case law took inconsistent positions in criminal and civil cases on the other privileges. The following brief summary of prior law, therefore, will be helpful in understanding the Evidence Code changes (*infra*, §§96, 97):

(1) *Criminal Case: Self-Incrimination Privilege.* California's constitutional provision allowing comment and adverse inference was held unconstitutional by the United States Supreme Court; hence, no comment or inference is permissible. (See *infra*, §433.)

(2) *Criminal Case: Lawyer-Client Privilege.* Adverse comment has been strongly disapproved, as prejudicial misconduct. (See *People v. Lathrom* (1961) 192 C.A.2d 216, 222, 13 C.R. 325, 5 Cal. Crim. Law (3d), *Criminal Trial*, §237.)

(3) *Criminal Case: Husband-Wife Privilege.* Adverse comment has likewise been denounced as misconduct. (See *People v. Klor* (1948) 32 C.2d 658, 663, 197 P.2d 705; *People v. Wilkes* (1955) 44 C.2d 679, 687, 284 P.2d 481 [alibi defense supported by alleged phone call by defendant to his wife; prosecuting attorney asked "why didn't she take the stand and testify for him?"].) The same kind of misconduct is committed by the prosecution calling a defendant's wife as a witness, thus forcing him to object before the jury. (See *People v. Ward* (1958) 50 C.2d 702, 712, 328 P.2d 777 [held not reversible error under the circumstances]; *People v. Solis* (1961) 193 C.A.2d 68, 77, 13 C.R. 813; 76 A.L.R.2d 920.) It is even more serious where the trial judge persistently questions the wife in an attempt to induce her to consent. (See *People v. Wade* (1959) 53 C.2d 322, 332, 1 C.R. 683, 348 P.2d 116.)

(4) *Civil Cases: Self-Incrimination Privilege.* There have been expressions in California's decisions to the following effect:

(a) An adverse inference may be drawn from a claim of the self-incrimination privilege in a civil case. (See *Fross v. Wotton* (1935) 3 C.2d 384, 395, 44 P.2d 350.)

(b) A witness in a civil case may be impeached by proof of his exercise of this privilege in a prior proceeding. (See *Nelson v. Southern Pac. Co.* (1937) 8 C.2d 648, 654, 67 P.2d 682.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 1 McCormick 6th, §74.1.(4) *Civil Cases: Self-Incrimination Privilege*.

(b) *Impeachment*: The rule stated in *Nelson v. Southern Pac. Co.* (1937) 8 C.2d 648, 67 P.2d 682, text, p. 347, was characterized as erroneous in *People v. Holloway* (2004) 33 C.4th 96, 130, 14 C.R.3d 212, 91 P.3d 164, in light of the subsequent enactment of *Ev.C. 913* (text, §96).



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## CHAPTER IX - Witnesses

### III. PRIVILEGE: IN GENERAL

#### G. No Comment or Inference.

##### 2. Evidence Code.

2 Witkin Cal. Evid. Witnesses § 96

[§ 96] Evidence Code.

The nullification of the California constitutional provision allowing comment on the claim of the self-incrimination privilege in a criminal case, and the decisions holding it misconduct in a criminal case to comment on the exercise of other privileges (see *supra*, §95), left civil cases as the only area of permissible comment. No good reason for this difference in treatment exists; if the privilege is entitled to protection its protection should be complete and uniform. Accordingly, *Ev.C. 913* states a comprehensive rule for civil and criminal cases, prohibiting both comment and inference:

(1) "If in the instant proceeding or on a prior occasion a privilege is or was exercised not to testify with respect to any matter, or to refuse to disclose or to prevent another from disclosing any matter, neither the presiding officer nor counsel may comment thereon, no presumption shall arise because of the exercise of the privilege, and the trier of fact may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding." (*Ev.C. 913(a)*.)

(2) "The court, at the request of a party who may be adversely affected because an unfavorable inference may be drawn by the jury because a privilege has been exercised, shall instruct the jury that no presumption arises because of the exercise of the privilege and that the jury may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding." (*Ev.C. 913(b)*.)

An obvious distinction needs to be drawn: where no privilege is involved, the party's failure to explain or deny evidence against him may be the proper subject of comment or adverse inference. (Law Rev. Com. Comment to *Ev.C. 913*; see *Ev.C. 413*, and Law Rev. Com. Comment; BAJI (8th ed.), No. 2.27.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See CACI, No. 215, CACI, No. 216 [exercise of communication privilege or right not to testify].(2) *Inference:* See *People v. Stewart* (2004) 33 C.4th 425, 473, 15 C.R.3d 656, 93 P.3d 271 [in capital murder case in which name of associate of defendant was frequently mentioned but associate was never called as witness, *Ev.C. 913(b)* did not give defendant right to jury instruction stating that no inference should be drawn from associate's exercise of privilege, where jury was never told that associate had exercised privilege].



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## CHAPTER IX - Witnesses

## III. PRIVILEGE: IN GENERAL

## G. No Comment or Inference.

## 3. Illustrations.

2 Witkin Cal. Evid. Witnesses § 97

[§ 97] Illustrations.

(1) *Comment Improper*. In *Buehler v. Sbardellati* (1995) 34 C.A.4th 1527, 1541, 41 C.R.2d 104, plaintiff sued defendant attorney for malpractice in connection with a real estate limited partnership in which plaintiff was to be a limited partner and another client of defendant was the general partner. During pretrial discovery, plaintiff sought to obtain the other client's file, but defendant asserted the attorney-client privilege on behalf of the other client, and refused to produce the file. Thereafter, but prior to trial, the other client waived his privilege, resulting in the production of the file. In closing argument, plaintiff sought to claim that defendant's exercise of the privilege impeached his claim that he viewed his role as attorney only for the limited partnership, and that the privilege prohibited him from ever obtaining plaintiff's informed consent to narrow the scope of his representation of plaintiff, because defendant would have had to reveal the very same confidences he refused to reveal based on the privilege. *Held*, despite this facially appealing argument, *Ev.C. 913(a)* prohibits comment on the fact that a privilege has been exercised, and there are no exceptions to the rule. Moreover, privileged material other than simply that pertaining to the limited partnership was at stake when defendant exercised the privilege. (34 C.A.4th 1541.)

(2) *Comment Permissible*. In *People v. Ford* (1988) 45 C.3d 431, 247 C.R. 121, 754 P.2d 168, the issue was whether *Ev.C. 913(a)* or any other rule prohibits a prosecutor's comment on the defendant's failure to call former defendants as witnesses to support his alibi defense.

Defendant Ford and his alleged accomplices Bridges, Cooper, and Elder were charged with burglary. Before defendant's trial, Cooper and Bridges had been convicted on pleas of guilty, but had not yet been sentenced, and Elder had not yet been tried. Hence, each, if called, could have exercised the privilege against self-incrimination. Defendant's testimony placed him and Cooper and Elder at a location away from the scene of the crime, and the prosecutor, in closing argument, said: "If the testimony is indeed true, why didn't he bring in Mr. Cooper, Mr. Elder?" The trial judge granted a motion for a new trial on the ground of prosecutorial misconduct, but the Court of Appeal reversed, and the Supreme Court affirmed the Court of Appeal.

(a) "The Court of Appeal held that the mere existence of a privilege did not render Cooper and Elder unavailable as witnesses, noting that although they were charged with the same offenses as defendant, they were competent witnesses who could have been called to determine if they would have exercised their privilege against self-incrimination. The Court of Appeal recognized the possibility, on which the trial court relied, that Cooper and Elder would have asserted a valid claim of privilege, but concluded that it was equally possible that having already pled guilty to being an accessory and therefore risking no further liability, Cooper might have been willing to testify to exculpate defendant if defendant had not been involved in the burglary. The court also reasoned that because Elder had not yet pled guilty, he might have

been amenable to giving testimony that confirmed that neither he nor defendant had been involved." (45 C.3d 438.)

(b) Defendant and the dissenters argued that whenever a witness is or was a codefendant who may exercise the privilege he must be deemed unavailable and comment on failure to call him is forbidden. But in order to assert the privilege a witness must be called and sworn; and unless the question clearly calls for an incriminating answer he has the burden of satisfying the court that an answer would have a tendency to incriminate. (45 C.3d 440, citing *Ev.C.* 404, infra, §495.) A determination that the witness may exercise the privilege must therefore be made after the witness has asserted it. (45 C.3d 441.)

(c) Here the evidence that defendant could have been expected to elicit from Cooper and Elder would have established an alibi for both defendant and the witnesses; there is no suggestion that responding to questions designed to corroborate defendant's testimony would have a tendency to incriminate *Cooper or Elder*. (45 C.3d 442.)

(d) A blanket rule forbidding comment would encourage perjury. "The defendant would be assured that no matter how transparently perjured his testimony, there would be no burden on him to call a witness who might be expected to corroborate it without incriminating themselves, and the prosecutor would be prohibited from commenting on his failure to call those logical witnesses." (45 C.3d 443.)

(e) "We recognize that a rule permitting comment on a defendant's failure to call witnesses is subject to criticism if applied when the reason is ambiguous, or if the defendant is simply standing on the right to have the state prove his guilt. Therefore, the trial court must have discretion to determine when the circumstances of the case are such that comment is not permissible. When a defendant has taken the stand, however, and offered an alibi defense in which he identifies other persons who could support his testimony, and those witnesses are available and subject to subpoena, there should be no question but that comment is appropriate and permissible." (45 C.3d 447.)

The majority opinion concludes:

"Neither principle nor precedent supports the rule which defendant and the dissent seek to establish. Their rule would create a judicial presumption that an entire class of potential witnesses is 'unavailable' and comment on their absence would be prohibited solely because the potential witnesses have been charged with the same offense as the defendant. The presumption would apply regardless of whether the testimony that could logically be expected from the 'unavailable' witness would be incriminating to the witness, and regardless of the actual willingness of the witness to testify. We decline the opportunity to engage in such judicial rulemaking." (45 C.3d 449.) (See *People v. Clark* (1993) 5 C.4th 950, 1009, 22 C.R.2d 689, 857 P.2d 1099 [prosecutor's references to meetings between defendant and defense psychiatrist did not violate *Ev.C.* 913; because psychiatrist testified at suppression hearing, there was no longer any privilege with respect to meetings].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Comment Permissible.* See *People v. Champion* (2005) 134 C.A.4th 1440, 1452, 37 C.R.3d 122 [where defendant testified that he had not been allowed to tell whole story and prosecution was then allowed to offer evidence that he had chosen to remain silent in face of police questioning, court's instruction, tailored to fit circumstances, satisfied *Ev.C.* 913(a): jury could consider prosecution's evidence to rebut defendant's claim of no opportunity to tell his side of story but could not otherwise hold refusal to answer questions against him].



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## CHAPTER IX - Witnesses

### IV. LAWYER-CLIENT PRIVILEGE

#### A. General Principles.

##### 1. Nature of Privilege.

#### 2 Witkin Cal. Evid. Witnesses § 98

#### [§ 98] Nature of Privilege.

(1) *Nature and Scope of Statute.* *Ev.C. 954*, the primary statute governing the privilege, provides that a client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between the client and his or her lawyer. The privilege may be claimed only by one of the following:

(a) The holder of the privilege. (*Ev.C. 954(a)*.)

(b) A person authorized by the holder of the privilege to claim it. (*Ev.C. 954(b)*.)

(c) The lawyer at the time of the confidential communication. However, that lawyer may not claim the privilege if there is no holder of the privilege in existence, or if the lawyer is otherwise instructed by a person authorized to permit disclosure. (*Ev.C. 954(c)*.)

The privilege may be waived as provided by *Ev.C. 912* (see *supra*, §67 et seq.), and is subject to more specific provisions governing it (*Ev.C. 951* et seq.). (*Ev.C. 954*.)

To make the privilege applicable, there must be a communication (*infra*, §108 et seq.), in the course of the relationship (*infra*, §113 et seq.), intended to be confidential (*infra*, §119 et seq.).

The privilege belongs to the client (*infra*, §104), and the lawyer, pursuant to his or her professional obligation under *B. & P.C. 6068(e)*, must claim it for the client whenever the lawyer is present and authorized to make the claim under *Ev.C. 954(c)*. (*Ev.C. 955*.)

The privilege survives the client's death, even if protected communications are of substantial importance to criminal litigation. (*Swidler & Berlin v. United States* (1998) 524 U.S. 399, 118 S.Ct. 2081, 2088, 141 L.Ed.2d 379, 388; see 112 Harv. L. Rev. 222 [Swidler]; *infra*, §107.)

(2) *Cases and Commentary.* The background, nature, and scope of the privilege have been the subject of much discussion by courts and commentators. (See generally *Upjohn Co. v. United States* (1981) 449 U.S. 383, 101 S.Ct. 677, 682, 66 L.Ed.2d 584, 592, *infra*, §126; *Welfare Rights Organization v. Crisan* (1983) 33 C.3d 766, 770, 771, 190 C.R. 919, 661 P.2d 1073, *infra*, §103; *Mitchell v. Superior Court* (1984) 37 C.3d 591, 599, 600, 208 C.R. 886, 691 P.2d 642 ["While it is perhaps somewhat of a hyperbole to refer to the attorney-client privilege as 'sacred,' it is clearly one which our judicial system has carefully safeguarded with only a few specific exceptions"]; 1 McCormick 5th, §87 et seq.; 8 Wigmore (McNaughton Rev.) §2290 et seq.; 2 Jefferson, California Evidence Benchbook 3d, Chap. 40; C.J.E.R.,

Judges Benchbook, Civil Proceedings: Discovery §4.21 et seq.; Hogan, 2 Cal. Civil Discovery §12.8 et seq.; 81 *Am.Jur.2d* (1992 ed.), *Witnesses* §337 et seq.; 66 *Cal. L. Rev.* 1061 [historical perspective]; 91 *Harv. L. Rev.* 464 [Fixed Rules, Balancing, and Constitutional Entitlement]; 97 *Harv. L. Rev.* 947 [proposed exception for class actions to promote adequacy of representation]; 98 *Harv. L. Rev.* 1501 [Theories and Recent Developments]; 15 *San Diego L. Rev.* 797 [Securities Lawyer's Dilemma: SEC's Disclosure Policy v. Attorney-Client Privilege]; 16 *California Lawyer* 11 (November 1996), p. 64 [applicability to environmental reports]; 35 *Santa Clara L. Rev.* 611 [applicability to inventor-patent attorney communications]; 9 A.L.R.3d 1420 [communications between attorneys].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Cases and Commentary.* See 81 *Am.Jur.2d* (2004 ed.), *Witnesses* §325 et seq.; 1 McCormick 6th, §87 et seq.; 33 *Lincoln L. Rev.* 75 [applicability of privilege to communications between clients and registered patent agents]; 29 *Western State L. Rev.* 199 [applicability of privilege to Office of White House Counsel]; 26 A.L.R.6th 287 [application of privilege to electronic documents]; 159 A.L.R. Fed 243 [United States Supreme Court's views on attorney-client privilege]. *West's Key Number Digest*, *Witnesses* k.198 et seq.



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## CHAPTER IX - Witnesses

### IV. LAWYER-CLIENT PRIVILEGE

#### A. General Principles.

#### 2. Liberal or Strict Construction.

2 Witkin Cal. Evid. Witnesses § 99

[§ 99] Liberal or Strict Construction.

(1) *Liberal Construction*. The basic policy of the attorney-client privilege is to promote the relationship between attorney and client by safeguarding the confidential disclosures of the client and the advice given by the attorney, and this policy supports a liberal construction in favor of its exercise. (See generally *San Francisco v. Superior Court* (1951) 37 C.2d 227, 234, 231 P.2d 26; *People v. Kor* (1954) 129 C.A.2d 436, 277 P.2d 94, *infra*, §168; *Holm v. Superior Court* (1954) 42 C.2d 500, 506, 267 P.2d 1025, *infra*, §§128, 130; *American Mut. Liab. Ins. Co. v. Superior Court* (1974) 38 C.A.3d 579, 593, 113 C.R. 561, citing the text; *People v. Flores* (1977) 71 C.A.3d 559, 565, 139 C.R. 546; *Lohman v. Superior Court* (1978) 81 C.A.3d 90, 94, 146 C.R. 171, *supra*, §72; *Benge v. Superior Court* (1982) 131 C.A.3d 336, 344, 182 C.R. 275, citing the text; *Shannon v. Superior Court* (1990) 217 C.A.3d 986, 994, 266 C.R. 242; 1 McCormick 5th, §87; 8 Wigmore (McNaughton Rev.) §2291.)

In *San Francisco v. Superior Court*, *supra*, it was pointed out that, although the privilege may result in the suppression of relevant evidence, it is necessary to protect the client in making a full disclosure of the facts to his or her attorney. The court quoted the Model Code as follows: "Unless he makes known to the lawyer all the facts, the advice which follows will be useless, if not misleading; the lawsuit will be conducted along improper lines, the trial will be full of surprises, much useless litigation may result. Thirdly, unless the client knows that his lawyer cannot be compelled to reveal what is told him, the client will suppress what he thinks to be unfavorable facts." (37 C.2d 235.)

Courts sometimes become vehement in defense of this privilege, as in the concurring opinion in *People v. Kor*, *supra*, 129 C.A.2d 447: "The privilege of confidential communication between client and attorney should be regarded as sacred. It is not to be whittled away by means of specious argument that it has been waived. Least of all should the courts seize upon slight and equivocal circumstances as a technical reason for destroying the privilege. ... Defendant's attorney should have chosen to go to jail and take his chances of release by a higher court. This is not intended as a criticism of the action of the attorney. It is, however, a suggestion to any and all attorneys who may have the misfortune to be confronted by the same or a similar problem." (See also *People v. Singh* (1932) 123 C.A. 365, 370, 11 P.2d 73, *infra*, §115.)

(2) *Strict Construction*. Other authorities have expressed the view that the privilege should be strictly construed, "since it suppresses relevant facts that may be necessary for a just decision." (*Paley v. Superior Court* (1955) 137 C.A.2d 450, 462, 290 P.2d 617; see *Wilson v. Superior Court* (1957) 148 C.A.2d 433, 443, 307 P.2d 37, *infra*, §127 [conflicting policies of the privilege and of discovery must be reconciled]; *Agnew v. Superior Court* (1958) 156 C.A.2d 838, 840, 320 P.2d 158; *Brunner v. Superior Court* (1959) 51 C.2d 616, 618, 335 P.2d 484; *Greyhound Corp. v. Superior Court* (1961) 56 C.2d 355, 396, 15 C.R. 90, 364 P.2d 266; *People v. Donovan* (1962) 57 C.2d 346, 355, 19



*C.R. 473, 369 P.2d 1*; 1 McCormick 5th, §87 [observing that benefits are often speculative and suggesting that judge should have discretion to require particular disclosure if necessary in administration of justice]; 8 Wigmore (McNaughton Rev.) §2291.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Liberal Construction*. See 1 McCormick 6th, §87.

(2) *Strict Construction*. See 1 McCormick 6th, §87.



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## CHAPTER IX - Witnesses

### IV. LAWYER-CLIENT PRIVILEGE

#### A. General Principles.

#### 3. Communications by Prisoners.

2 Witkin Cal. Evid. Witnesses § 100

[§ 100] Communications by Prisoners.

(1) *In General.* The protection of confidences and secrets of a prisoner is not just a rule of professional conduct; it also involves public policies of paramount importance. Notwithstanding the legitimate interests of prison authorities in the administration of jails, "a prisoner has a right to consult with his attorney in absolute privacy." (*In re Jordan* (1972) 7 C.3d 930, 941, 103 C.R. 849, 500 P.2d 873; see *In re Jordan* (1974) 12 C.3d 575, 580, footnote 7, 116 C.R. 371, 526 P.2d 523, citing the text [no matter whether general rule is strict or liberal, liberal construction is mandated as to attorney-inmate privilege of P.C. 2601(b)]; *People v. Godlewski* (1993) 17 C.A.4th 940, 945, 21 C.R.2d 796 [jailhouse conversation between defendant and his attorney suggesting that, as matter of trial tactics, defendant would admit being killer, was properly barred as within privilege].)

(2) *Monitoring of Consultations in Prison Conference Room.* In *People v. Jordan* (1990) 217 C.A.3d 640, 266 C.R. 86, defendant asserted that his right to counsel had been violated by electronic monitoring of his conversations with defense counsel in a prison conference room. The trial judge, after an in camera hearing, determined that no monitoring had occurred, and denied defendant's motion to dismiss the indictment. In affirming the judgment of conviction, the court discussed the burden and standard of proof on this issue:

(a) If the defendant makes a prima facie showing of eavesdropping, the burden of proof shifts to the prosecution to prove the legality of its conduct. (217 C.A.3d 644.)

(b) The standard of proof beyond a reasonable doubt is inappropriate where the issue has no necessary connection with guilt. (217 C.A.3d 645.) The standard of preponderance of the evidence is applied in suppression hearings on alleged violations of the Fourth and Fifth Amendments, and in determination of voluntariness of a confession. (217 C.A.3d 645.) There is precedent, however, in the lineup case of *United States v. Wade* (1967) 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149, infra, §392, for the intermediate standard of clear and convincing evidence. (217 C.A.3d 645.)

The present case involves considerations similar to those in *Wade*: "Both cases concern protection of the same constitutional value--the right of an accused to counsel. Both also involve a factual determination in circumstances that inevitably tend to favor the prosecution. Without having been present at a lineup, defense counsel is at a disadvantage in attacking the reliability of the lineup and demonstrating its probable influence on courtroom identification. In eavesdropping cases, the testimony of law enforcement officials may reflect a self-interest in defending the legality of their conduct. Eavesdropping is a felony under California law. By denying participation in eavesdropping, prison officials may be merely shielding themselves from criminal prosecution. Since prison eavesdropping occurs in a complex bureaucratic sphere that is difficult to investigate, defense counsel cannot easily devise effective strategies for

impeachment of suspect testimony, and, as the present case illustrates, faces formidable problems in proving eavesdropping by circumstantial evidence." (217 C.A.3d 646.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER IX - Witnesses

### IV. LAWYER-CLIENT PRIVILEGE B. Lawyer Licensed or Believed Licensed. 1. General Requirement.

#### 2 Witkin Cal. Evid. Witnesses § 101

#### [§ 101] General Requirement.

(1) *Licensed Attorney*. The privilege is intended to protect the relationship of attorney and client (*supra*, §99), and ordinarily applies only where the "lawyer" is "a person ... authorized to practice law." (*Ev.C. 950*; see 1 McCormick 5th, §88; 8 Wigmore (McNaughton Rev.) §2300.)

It is sufficient, however, that the "lawyer" be licensed to practice "in any state or nation." (*Ev.C. 950*.) Thus, even though the lawyer is not admitted in California and may be guilty of unlawful practice (see 1 *Cal. Proc.* (4th), *Attorneys*, §395 et seq.), the privilege applies. And it is immaterial whether the jurisdiction that licensed the attorney recognizes the privilege: "Legal transactions frequently cross state and national boundaries and require consultation with attorneys from many different jurisdictions. When a California resident travels outside the State and has occasion to consult a lawyer during such travel, or when a lawyer from another state or nation participates in a transaction involving a California client, the client should be entitled to assume that his communications will be given as much protection as they would be if he consulted a California lawyer in California. A client should not be forced to inquire about the jurisdictions where the lawyer is authorized to practice and whether such jurisdictions recognize the lawyer-client privilege before he may safely communicate with the lawyer." (Law Rev. Com. Comment to *Ev.C. 950*; see 1956 A.S. 548.)

(2) *Law Corporation*. The 1968 Legislature enacted the Moscone-Knox Professional Corporation Act authorizing the incorporation of persons in certain professions, under which lawyers and medical persons may form corporations to render professional services. (*Corp.C. 13400* et seq.; see 9 *Summary* (9th), *Corporations*, §33.) In conformity with this statute, *Ev.C. 954* was amended to provide that the relationship of attorney and client exists (a) between a law corporation as defined in the statute, and "the persons to whom it renders professional services," and (b) "between such persons and members of the State Bar employed by such corporation to render services to such persons." And the word "persons" includes "partnerships, corporations, limited liability companies, associations and other groups and entities." (*Ev.C. 954*.)

(3) *Distinction: Jailhouse Lawyer*. In *People v. Velasquez* (1987) 192 C.A.3d 319, 237 C.R. 366, defendant was convicted of murder with special circumstances, robbery, and burglary. During the trial, the prosecution introduced the testimony of R, a trustee inmate in the county jail where defendant was held. R, who had read some legal books and pamphlets and prepared seven writs, assisted defendant in preparing a petition to dismiss the public defender. R testified that defendant asked him to research the law on diminished capacity, and, after R told him that to do so he would have to know everything that happened, defendant described the crimes and said that he had fooled the psychiatrists and others by telling them he remembered nothing. Defendant contended that the attorney-client privilege applies to the

communications between "jailhouse lawyers" and their inmate "clients." *Held*, the communications were not privileged.

(a) The Code defines a "lawyer" as "a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation." (*Ev.C. 950.*) No authority has recognized an attorney-client privilege between a "jailhouse lawyer" and his inmate "client," and the federal and state cases that have considered the issue have rejected it. (*192 C.A.3d 326.*)

(b) Privileges are limited to those created by statute (*Ev.C. 911*; see *supra*, §60), and the statutory lawyer-client privilege is to be strictly construed where the issue is whether an attorney-client relationship has been established. (*192 C.A.3d 319*, footnote 4.)

(c) To come within the privilege, defendant would have had to believe that he was talking to a lawyer or a person he reasonably believed to be a lawyer (see *infra*, §102); but he never testified that he believed R was an attorney. (*192 C.A.3d 328.*)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Licensed Attorney*. See 1 McCormick 6th, §88.(2) *Law Corporation*.

*Cross-Reference:* 9 *Summary* (10th), *Corporations*, §26.



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CHAPTER IX - Witnesses

IV. LAWYER-CLIENT PRIVILEGE  
B. Lawyer Licensed or Believed Licensed.  
2. Exception: Client's Reasonable Belief.

*2 Witkin Cal. Evid. Witnesses § 102*

[§ 102] Exception: Client's Reasonable Belief.

The modern trend is to extend the privilege beyond the strict attorney-client relationship in cases where the client is deceived as to the attorney's lack of professional status. Thus, *Ev.C. 950* defines "lawyer" to include a person "reasonably believed by the client" to be authorized to practice law in any state or nation. (See 1 McCormick 5th, §88; 8 Wigmore (McNaughton Rev.) §2302.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See The New Wigmore: Evidentiary Privileges §6.9.2; 1 McCormick 6th, §88.



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## CHAPTER IX - Witnesses

### IV. LAWYER-CLIENT PRIVILEGE

#### B. Lawyer Licensed or Believed Licensed.

#### 3. Exception: Representative in AFDC Hearing.

2 Witkin Cal. Evid. Witnesses § 103

[§ 103] Exception: Representative in AFDC Hearing.

In *Welfare Rights Organization v. Crisan* (1983) 33 C.3d 766, 190 C.R. 919, 661 P.2d 1073, the court created a new privilege, analogous to that of attorney-client, for authorized representatives of welfare claimants and recipients in administrative fair hearings under the Aid to Families With Dependent Children program.

The hearing had been requested by claimants L and G. The county social welfare department obtained a subpoena and subpoena duces tecum directing Beltz, a Welfare Rights Organization worker, to testify and produce documents at the hearing. The information sought consisted of past communications between Beltz and L and G "regarding legal advice" Beltz had given them in connection with an earlier AFDC fair hearing. L and G had authorized him to be their lay representative and had believed and intended their consultation to be confidential. L and G sought injunctive relief in the superior court, but that court gave judgment on demurrer for the county social welfare department. *Held*, reversed.

(1) *Privileges under Evidence Code.* The Code prohibits the creation of nonstatutory privileges for court or administrative hearings (33 C.3d 769; see *supra*, §62). "Thus, unless a privilege is expressly or impliedly based on statute, its existence may be found only if required by constitutional principles, state or federal." (33 C.3d 769.) In the situation presented by this case, "a privilege comparable to the attorney-client is impliedly provided by statute," and the question whether it is also constitutionally required is not reached. (33 C.3d 769.)

(2) *Hearing under federal AFDC regulations.* AFDC is a federal program in which states may participate by submitting a plan that conforms to the Social Security Act and federal regulations. (33 C.3d 769.) The federal regulations provide for hearings which meet the due process standards of *Goldberg v. Kelly* (1970) 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287, including an evidentiary hearing with the right to representation by counsel before benefits are terminated. (33 C.3d 369; see 7 *Summary* (9th), *Constitutional Law*, §544.) Although *Goldberg* spoke only of counsel, the federal regulations provide for lay representation: An applicant or recipient "may be represented by an authorized representative, such as legal counsel, relative, friend or other spokesman, or he may represent himself." (33 C.3d 770.)

(3) *Hearing under California statute.* Consistent with *Goldberg* and federal regulations, Welf.C. 10950 states that an applicant or recipient is entitled to a hearing "in person or through an authorized representative." Thus the Legislature made it clear that claimants have a right to be represented by lay representatives, and the Department's regulations make this explicit. (33 C.3d 770, and footnote 2.)

(4) *Privilege implied in California statute.* The vital importance of the attorney-client privilege has been repeatedly declared (33 C.3d 770, 771); and the considerations which support it are so generally accepted that "the Legislature must have implied its existence as an integral part of the right to representation by lay persons." Otherwise the right would be a trap, inducing confidential communications and then allowing them to be used against the claimant. (33 C.3d 771.) The practice of construing a statute to include matter necessarily implied is well established (33 C.3d 771); and the fact that lay representatives are neither licensed nor subject to regulation does not preclude a finding of legislative intent to accord them a confidentiality privilege, for even the lawyer-client privilege applies to a person "reasonably believed by the client" to be authorized to practice law. (33 C.3d 771, 772; see supra, §102.)

"Accordingly, we construe *Welfare and Institutions Code section 10950* as including a guarantee of confidentiality in its extension of the right of representation to include representation by lay persons as well as by counsel in connection with welfare fair hearings. The absence of a single earlier case on this issue provides substantial support for our conclusion: during the 17 years in which the right of lay representation in welfare hearings has existed in California, the implicit guarantee of confidentiality has apparently gone unquestioned." (33 C.3d 772.)

(5) *Limited nature of holding.* This interpretation is also supported by the rule that courts are to construe statutes in a manner which avoids constitutional difficulties; hence the issues of federal supremacy and due process are not considered. (33 C.3d 772.) The scope of the privilege, in view of the limited function of a lay authorized representative, is also left for the future. And, there are other statutes permitting lay representation before certain tribunals (e.g., *Unemp.Ins.C. 1957, Lab.C. 5700*); but nothing said here with respect to *Welf.C. 10950* demands an identical interpretation of other enactments, "each of which will have to be examined against its own statutory, historical and constitutional background." (33 C.3d 772.) (See 15 *Pacific L. J.* 245; 31 A.L.R.4th 1226 [privilege as to communications between lay representative and client in judicial or administrative proceedings].)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*Cross-Reference:* 7 *Summary* (10th), *Constitutional Law*, §685.





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## CHAPTER IX - Witnesses

### IV. LAWYER-CLIENT PRIVILEGE

#### C. Holder of the Privilege.

##### 1. Client.

##### a. Privilege Belongs to Client.

2 Witkin Cal. Evid. Witnesses § 104

[§ 104] Privilege Belongs to Client.

(1) *General Rule.* The "holder of the privilege," i.e., the person entitled to claim it (*Ev.C. 954(a)*), is the "client" (unless the client has a guardian or conservator). (*Ev.C. 953(a)*.) In other words, the privilege belongs to the client, not the attorney; the client alone may waive it, the attorney in claiming it does so on behalf of the client, and the attorney, unless instructed otherwise, must make the claim. (*Ev.C. 953 et seq.*; see *Abbott v. Superior Court* (1947) 78 C.A.2d 19, 21, 177 P.2d 317, *infra*, §153; *Rigolfi v. Superior Court* (1963) 215 C.A.2d 497, 501, 30 C.R. 317; *People v. Vargas* (1975) 53 C.A.3d 516, 527, 126 C.R. 88, *infra*, §120 [in client's absence, attorney had duty to assert privilege]; *Glade v. Superior Court* (1978) 76 C.A.3d 738, 744, 143 C.R. 119, *supra*, §71 [privilege not waived by nonparty clients' failure to appear at hearing to adjudicate their attorney's claim of privilege]; *In re Navarro* (1979) 93 C.A.3d 325, 330, 155 C.R. 522, *infra*, §108 [at preliminary hearing, attorney representing defendant in another matter had duty to claim privilege]; *Dickerson v. Superior Court* (1982) 135 C.A.3d 93, 98, 185 C.R. 97 [duty of attorney to exercise privilege unless holder instructs him not to do so]; 1 McCormick 5th, §92; 8 Wigmore (McNaughton Rev.) §2291.)

(2) *Distinction: Independent Nonparty Witness.* The privilege does not extend to communications from an independent nonparty witness to counsel. (See *Trade Center Properties v. Superior Court* (1960) 185 C.A.2d 409, 411, 8 C.R. 345; *Greyhound Corp. v. Superior Court* (1961) 56 C.2d 355, 397, 15 C.R. 90, 364 P.2d 266, *infra*, §139.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *General Rule.* See *Mylan Laboratories v. Soon-Shiong* (1999) 76 C.A.4th 71, 80, 90 C.R.2d 111 [holder of attorney-client privilege automatically has standing to assert it, even if he or she is not party, and there is no need to intervene to become party]; *OXY Resources Calif. LLC v. Superior Court* (2004) 115 C.A.4th 874, 901, 9 C.R.3d 621, Supp., *supra*, §83 [as holder of privilege, client has standing to assert it even if privileged material is no longer in client's possession, provided there has been no waiver]; 1 McCormick 6th, §92.



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## CHAPTER IX - Witnesses

### IV. LAWYER-CLIENT PRIVILEGE

#### C. Holder of the Privilege.

##### 1. Client.

##### b. Who Is Client in General.

2 Witkin Cal. Evid. Witnesses § 105

[§ 105] Who Is Client in General.

(1) *Persons*. A "client" is "a *person* who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity." The term includes an incompetent person who consults a lawyer, or whose guardian or conservator does so on his or her behalf. (*Ev.C. 951*; see *36 U.C.L.A. L. Rev.* 997 [availability of privilege to insured persons]; 1 McCormick 5th, §88; 8 Wigmore (McNaughton Rev.) §2292; *81 Am.Jur.2d* (1992 ed.), *Witnesses* §§368, 369; on clients of law corporations, see *supra*, §101.)

"Authorized representative" means a person who is authorized to obtain legal advice on the client's behalf. For example, a corporation president may be authorized to obtain legal advice for the corporation as the corporation's authorized representative. Authority to negotiate contracts is not the same thing as authority to seek legal advice and cannot serve as a basis for piercing the corporate attorney-client privilege. (*National Football League Properties v. Superior Court* (1998) 65 C.A.4th 100, 111, 75 C.R.2d 893 [in professional football club's shareholder action against football league, fact that league commissioner and league employees acted as agents for member clubs in negotiating contracts did not mean that club had attorney-client relationship with league's counsel so as to entitle it to access to privileged documents].)

(2) *Unincorporated Organizations*. Because "person" includes *corporations* and other *associations* (*Ev.C. 175*), "such unincorporated organizations as labor unions, social clubs, and fraternal societies have a lawyer-client privilege when the organization (rather than its individual members) is the client." (Law Rev. Com. Comment to *Ev.C. 951*; see *Benge v. Superior Court* (1982) 131 C.A.3d 336, 345, 182 C.R. 275, citing the text [labor union as client]; on corporations, see *infra*, §106.)

(3) *Public Entities*. A public entity is also a "person" protected by the privilege. (See *Ev.C. 175, 200, 951*; *Holm v. Superior Court* (1954) 42 C.2d 500, 267 P.2d 1025, *infra*, §§128, 130; *Vela v. Superior Court* (1989) 208 C.A.3d 141, 148, 255 C.R. 921, *supra*, §89 [city holds attorney-client privilege as to police officers' statements taken by special investigators charged with protecting city in future civil litigation]; *Roberts v. Palmdale* (1993) 5 C.4th 363, 370, 20 C.R.2d 330, 853 P.2d 496, *infra*, §294, citing the text [following *Vela*].)

The attorney-client relationship between a public entity and its counsel is sometimes complicated by the Ralph M. Brown Act requirement of public meetings of local legislative bodies. (See 9 *Cal. Proc. (4th)*, *Administrative Proceedings*, §15 et seq.) However, the entity is just as much in need of confidential legal advice as a private person,

and the privilege is equally available to it under proper circumstances. An attempt to resolve this apparent conflict was made in *Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors* (1968) 263 C.A.2d 41, 69 C.R. 480, 9 Cal. Proc. (4th), Administrative Proceedings, §21: "Public board members, sworn to uphold the law, may not arbitrarily or unnecessarily inflate confidentiality for the purpose of deflating the spread of the public meeting law. Neither the attorney's presence nor the happenstance of some kind of lawsuit may serve as the pretext for secret consultations whose revelation will not injure the public interest. To attempt a generalization embracing the occasions for genuine confidentiality would be rash." (263 C.A.2d 58.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Persons*. See 81 Am.Jur.2d (2004 ed.), Witnesses §349 et seq.; 1 McCormick 6th, §88.(2) *Unincorporated Organizations*. See *State Comp. Ins. Fund v. Superior Court* (2001) 91 C.A.4th 1080, 1087, 111 C.R.2d 284, 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence*, Supp., §85, quoting the text.



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## CHAPTER IX - Witnesses

### IV. LAWYER-CLIENT PRIVILEGE

#### C. Holder of the Privilege.

##### 1. Client.

##### c. Corporation as Client.

2 Witkin Cal. Evid. Witnesses § 106

[§ 106] Corporation as Client.

The attorney-client privilege may be claimed by a corporation; i.e., both for corporations and individuals, the privilege promotes full and frank communication between attorneys and clients. (See *Upjohn Co. v. United States* (1981) 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584, *infra*, §126; *Commodity Futures Trading Com. v. Weintraub* (1985) 471 U.S. 343, 105 S.Ct. 1986, 1991, 85 L.Ed.2d 372, 378, *infra*, §107; 1 McCormick 5th, §87; 20 U.C.L.A. L. Rev. 288; 50 So. Cal. L. Rev. 303 [privilege in shareholder litigation]; 14 Loyola L.A. L. Rev. 79 [privilege in corporate context]; 98 A.L.R.2d 241 [right of corporation to assert privilege]; 26 A.L.R.5th 628 [determining whether communication is from corporate client]; 28 A.L.R.5th 1 [who may assert or waive privilege]; on who is corporation's authorized representative for purposes of claiming privilege, see *National Football League Properties v. Superior Court* (1998) 65 C.A.4th 100, 111, 75 C.R.2d 893, *supra*, §105.)

There is no statutory exception for closely held corporations. (*Hoiles v. Superior Court* (1984) 157 C.A.3d 1192, 204 C.R. 111.) In *Hoiles*, plaintiff, a minority shareholder and director of FIN, a closely held family corporation, brought an action to dissolve the corporation, alleging breach of fiduciary duty. He took the deposition of S, corporate counsel, and the latter asserted the attorney-client and work product privileges as to discussions during meetings with various family members to plan prelitigation strategy. *Held*, the lower court properly upheld the claim of privilege. (157 C.A.3d 1198.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Smith v. Laguna Sur Villas Community Assn.* (2000) 79 C.A.4th 639, 643, 644, 94 C.R.2d 321 [condominium association, a mutual benefit nonprofit corporation, was holder of attorney-client privilege as to communications with its attorneys in construction defect action, and dissident homeowners were not entitled to disclosure except as allowed by association board; relying on *Wells Fargo Bank v. Superior Court* (2000) 22 C.4th 201, 91 C.R.2d 716, 990 P.2d 591, *Supp.*, *supra*, §64]; *McDermott, Will & Emery v. Superior Court* (2000) 83 C.A.4th 378, 383, 99 C.R.2d 622 [derivative action by shareholders against corporation's outside counsel for malpractice could not proceed; corporation, not shareholders, was holder of privilege, and in absence of waiver by corporation, outside counsel was foreclosed from mounting meaningful defense]; 1 McCormick 6th, §87.



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## CHAPTER IX - Witnesses

### IV. LAWYER-CLIENT PRIVILEGE

#### C. Holder of the Privilege.

#### 2. Representative or Successor.

2 Witkin Cal. Evid. Witnesses § 107

[§ 107] Representative or Successor.

*Ev.C.* 953 filled several gaps in our former law concerning the person entitled to claim the privilege when the client is dead or otherwise incapable of doing so:

(1) *Guardian or Conservator*. The guardian or conservator (see 12 *Summary (9th)*, *Wills and Probate*, §819 et seq.) is the holder of the privilege of his or her ward or conservatee. (*Ev.C.* 953(b); see 67 A.L.R.2d 1277 [waiver by guardian of incompetent].) However, when guardianship or conservatorship terminates, e.g., when a minor client reaches majority, the client becomes the holder. (*Ev.C.* 953(a).)

(2) *Successor of Corporation, Association, or Public Entity*. "A successor, assign, trustee in dissolution, or any similar representative of a firm, association, organization, partnership, business trust, corporation, or public entity that is no longer in existence" is the holder of the privilege of the organization. (*Ev.C.* 953(d); see *Dickerson v. Superior Court* (1982) 135 C.A.3d 93, 98, 185 C.R. 97 [successor of corporation].)

In *Commodity Futures Trading Com. v. Weintraub* (1985) 471 U.S. 343, 105 S.Ct. 1986, 85 L.Ed.2d 372, the issue was whether the trustee of a corporation in bankruptcy could waive the debtor corporation's privilege with respect to communications that took place before the filing of the petition in bankruptcy. In holding that he could, the court pointed out that the trustee's role was analogous to that of a solvent corporation's management, and that new managers, installed as a result of a takeover, merger, loss of confidence by shareholders, or normal succession, may waive the privilege with respect to communications made by former officers and directors. (105 S.Ct. 1991, 1993, 85 L.Ed.2d 381, 382.) (See 1986 A.S. 717 [discussing *Commodity Futures Trading Com.*].)

(3) *Successor Trustee*. In *Moeller v. Superior Court* (1997) 16 C.4th 1124, 69 C.R.2d 317, 947 P.2d 279, the assets of an express trust were depleted by the costs of toxic cleanup required to be carried out on trust property. After the trustee (a bank) resigned, the successor trustee (the son of the original trustees) objected to the bank's accounting and petition and demanded production and inspection of certain documents and records relating to the bank's administration of the trust. The bank asserted the attorney-client privilege as to this material, and the trial judge denied the successor trustee's motion to compel. The Court of Appeal issued a writ of mandamus to compel production. *Held*, judgment of the Court of Appeal affirmed; the attorney-client privilege did not permit the bank to withhold the documents from the successor trustee. When a trustee, acting as trustee, secures the advice of an attorney, it becomes the attorney's client and acquires the right to claim the privilege as to confidences made in the course of the attorney-client relationship. (16 C.4th 1130.) But when a successor trustee takes office, it assumes all of the powers of the trustee, including the power to assert the privilege. (16 C.4th 1131.) A contrary rule, "that the attorney-client privilege is personal to the trustee, so

that whichever person is the trustee when the confidential communication occurs retains the privilege as long as that person exists--would go far to prevent smooth transitions from one trustee to the next, would disrupt orderly administration of trusts, and would be detrimental to the beneficiaries." (16 C.4th 1136, 1137, citing *Commodity Futures Trading Com. v. Weintraub*, *supra*.)

Three justices dissented, pointing out that the only circumstances recognized by the Evidence Code for transfer of the attorney-client privilege are those described in *Ev.C.* 953, none of which applies to transfers of title to trust property to successor trustees. (16 C.4th 1140.)

(4) *Personal Representative of Deceased Client Before Final Distribution*. The privilege survives the death of the client, as against strangers; hence, in controversies between persons claiming under the decedent and others not in privity with the estate, the communications of the decedent to his attorney are protected. (See *Paley v. Superior Court* (1955) 137 C.A.2d 450, 457, 290 P.2d 617; 1 McCormick 5th, §94; 8 Wigmore (McNaughton Rev.) §2323; 8 U.C.L.A. L. Rev. 618; 40 Harv. L. Rev. 115 [discussing exceptions in will cases].)

The holder in such a case is the personal representative--executor or administrator. (*Ev.C.* 953(c).) The personal representative may therefore claim the privilege, and may waive it where it is in the interest of the estate to do so. (See Law Rev. Com. Comment to *Ev.C.* 953; 67 A.L.R.2d 1268 [waiver of attorney-client privilege by personal representative or heir of deceased client or by guardian of incompetent].)

Our former law did not indicate that the privilege ever terminated. Under the Evidence Code, it *ceases to exist* when, *on final distribution*, the personal representative is discharged. When he or she is no longer the personal representative, he or she is no longer the holder of the privilege, and there is no holder left to claim it. (See *Ev.C.* 954(c).) The Law Revision Commission Comment observes that "there is little reason to preserve secrecy at the expense of excluding relevant evidence after the estate is wound up and the representative is discharged."

(5) *Receiver*. In *Shannon v. Superior Court* (1990) 217 C.A.3d 986, 266 C.R. 242, the court held that a receiver appointed under *C.C.P.* 564 may claim the attorney-client privilege with respect to communications between the receiver and his or her special counsel.

(a) A receiver is a fiduciary who, as an officer and representative of the court, occupies a position analogous to that of an executor or trustee in bankruptcy. (217 C.A.3d 992.) An executor has the right to obtain an attorney, and the attorney-client privilege applies to communications between an executor and the attorney. (217 C.A.3d 993.) The same should be true of the relationship between a receiver and his or her counsel. (217 C.A.3d 994.)

(b) The contention was made that the trial judge may order the receiver, as an officer of the court, to disclose information otherwise privileged if such disclosure is in the best interests of the proceeding or the parties. But the statutes make the privilege absolute; and "the Legislature's unqualified protection of the privilege requires it to be preserved, notwithstanding any contrary desire on the part of the court before which the receivership is pending or the parties to the action." (217 C.A.3d 995.)

(c) "This conclusion is no astounding proposition. In point of fact, it probably needs no articulation. To hold a receiver is entitled to claim the privilege is to necessarily decide the court is powerless to compel its waiver, irrespective of whether the disclosure would materially advance the interests of certain parties to the receivership or the efficiency of the proceedings. The decisive fact is that neither the estate, the court, nor the collection of persons who may have a claim to, or an interest in, the custodial property is the 'client' of the attorney for the receiver. Though the conscientious performance of the receiver's obligations will in the ultimate analysis inure to the presumed benefit of all concerned, the result is indirect. Along the way, the receiver may come to disagree with one, or a number, or, as the case apparently is here, all of the claimants to the property." (217 C.A.3d 995.)

(d) "The receiver may also be required to defend against an effort by the parties to remove him or her for claimed deficiencies or wrongdoing on his or her part as the receiver. It is conceivable the receiver may come to take issue with,

and seek review of, a ruling of the court. The receiver's ability to independently carry out his or her fiduciary responsibilities would be seriously undermined, if not wholly destroyed, were he or she unable to 'freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the [receiver] may have adequate advice. ... [T]he absence of the privilege would convert the attorney habitually and inevitably into a mere informer for the benefit of the [receiver's] opponent.' " (217 C.A.3d 995, 996, quoting *Mitchell v. Superior Court* (1984) 37 C.3d 591, 208 C.R. 886, 691 P.2d 642, *infra*, §152, and *San Francisco v. Superior Court* (1951) 37 C.2d 227, 231 P.2d 26, *infra*, §124.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Guardian or Conservator.*

*Cross-Reference:* 14 *Summary* (10th), *Wills and Probate*, §901 et seq.(2) *Successor of Corporation, Association, or Public Entity.* See *Venture Law Group v. Superior Court* (2004) 118 C.A.4th 96, 104, 12 C.R.3d 656 [in action by minority shareholders of merged corporation against former officers and directors who were majority shareholders of corporation, trial judge erred in ordering attorney who had represented merged corporation to answer deposition questions; successor corporation, which now held attorney-client privilege, had not waived it, and individual defendants could not waive it by asserting advice of counsel defense as they no longer held it].(4) *Personal Representative of Deceased Client Before Final Distribution.* *HLC Properties, Ltd. v. Superior Court* (2005) 35 C.4th 54, 24 C.R.3d 199, 105 P.3d 560, involved 59 written communications pertaining to 3 recording contracts executed by Bing Crosby. Many years after Crosby's death, a company that was formed to manage the interests Crosby left sued several record companies, claiming that defendants had been underpaying royalties under the contracts. Defendants propounded a demand for production of documents. Plaintiff withheld the 59 documents at issue on the basis of the attorney-client privilege. The trial judge determined that Crosby was the client and holder of the privilege, and that the privilege terminated with his death. The Court of Appeal granted plaintiff's writ petition, finding that Bing Crosby Enterprises, an unincorporated organization that Crosby had formed to help him manage his business operations, was the initial holder of the privilege, and that plaintiff, as successor to that organization, was the current holder of the privilege. *Held*, judgment of the Court of Appeal reversed.

(a) Even assuming that an unincorporated business organization may consist of an individual and his employees working together to further the individual's business affairs, the Evidence Code makes clear that the privilege belongs only to the client, whether the client is a natural person, an unincorporated organization, or some other entity. The validity of plaintiff's claim, therefore, depends on whether Bing Crosby Enterprises itself, as opposed to Crosby or any other of its supposed individual members, was the original client and privilege holder. The trial judge determined that Crosby was the client who sought the legal advice reflected in the documents at issue, and that determination is supported by substantial evidence. (35 C.4th 64.)

(b) *Ev.C. 953(c)* states, without qualification, that the holder of a deceased client's attorney-client privilege is the client's personal representative. *Ev.C. 954* specifies that, except as otherwise provided by statute, the privilege may be claimed only by the holder of the privilege, by a person whom the holder authorizes to claim the privilege, or by the person who was the attorney at the time of the confidential communication, so long as a privilege holder exists and has not authorized disclosure. Taken together, these two statutes unambiguously provide that only a personal representative may claim the attorney-client privilege in the case of a deceased client. (35 C.4th 65.)

(c) "[W]e do not suggest that entities formed to manage the business affairs of a natural person can never be clients or never hold attorney-client privileges in their own right. Nor do we find that a personal representative's assertion of the privilege categorically forecloses others from claiming it as to the same communications. But the Evidence Code unmistakably provides that the attorney-client privilege belongs only to the client, whether the client is a natural person or a business entity, and the record here amply supports the trial court's determination that Crosby, not [Bing Crosby] Enterprises, was the original client and holder of the privilege with respect to the 59 withheld documents. Under these circumstances, the Evidence Code compels us to find that, when Crosby died, his privilege transferred to the executor of his estate and thereafter ceased to exist upon the executor's discharge." (35 C.4th 68.) (See 11 California Trusts and

Estates Quarterly 17 [discussing uncertainties created by California's personal representative rule and proposing ways of maintaining or reviving attorney-client privilege after client's death].)

See 1 McCormick 6th, §94.





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## CHAPTER IX - Witnesses

### IV. LAWYER-CLIENT PRIVILEGE

#### D. Communication.

#### 1. Information or Advice.

2 Witkin Cal. Evid. Witnesses § 108

[§ 108] Information or Advice.

(1) *In General.* The protected communication may be either "information transmitted between a client and his lawyer" or "advice given by the lawyer." (*Ev.C.* 952; see *San Francisco v. Superior Court* (1951) 37 C.2d 227, 235, 231 P.2d 26; *Holm v. Superior Court* (1954) 42 C.2d 500, 508, 510, 267 P.2d 1025, *infra*, §§128, 130 [photographs of accident prepared for counsel's use in anticipated litigation]; *People v. Lines* (1975) 13 C.3d 500, 507, 119 C.R. 225, 531 P.2d 793, *infra*, §237 [overlapping of attorney-client and psychotherapist-patient privileges]; 55 A.L.R.3d 1322 [applicability of privilege when attorney is asked to testify about unavailable or nonexistent nontestamentary document that he has drafted]; 75 A.L.R.4th 1144 [disclosure of will prior to client's death]; 1 McCormick 5th, §89; 8 Wigmore (McNaughton Rev.) §§2306, 2320; *infra*, §122 et seq.)

As the court said in *San Francisco v. Superior Court*, *supra*, quoting Wigmore: "[A]lmost any act, done by the client in the sight of the attorney and during the consultation, may conceivably be done by the client as the subject of a communication, and the only question will be whether, in the circumstances of the case, it was intended to be done as such. The client, supposedly, may make a specimen of his handwriting for the attorney's information, or may exhibit an identifying scar, or may show a secret token. If any of these acts are done as part of a communication to the attorney, and if further the communication is intended to be confidential ... the privilege comes into play."

(2) *Uncommunicated Legal Opinion.* *Ev.C.* 952 also covers "a legal opinion formed" even though *not communicated to the client*. The Law Revision Commission Comment observes that this language "will preclude a possible construction of this section that would leave the attorney's uncommunicated legal opinion--which includes his impressions and conclusions--unprotected"; and that such a construction "would virtually destroy the privilege."

(3) *Attorney's Display of Public Document to Client.* *In re Navarro* (1979) 93 C.A.3d 325, 155 C.R. 522, arose out of a preliminary hearing of a murder charge. An attorney who was representing defendant in a separate robbery case was held in contempt for refusing to state whether she had shown defendant a robbery arrest report, the contents of which might provide a motive for the murder. *Held*, order discharging contempt order affirmed. *Ev.C.* 952 expanded the privilege to cover "information transmitted between a client and his lawyer," eliminating the former limitation to communications originating with the client. The public nature of the report is not dispositive; the privilege attached to the act of handing the document to the client. (93 C.A.3d 328.) (See *In re Jordan* (1974) 12 C.3d 575, 580, 116 C.R. 371, 526 P.2d 523 [prisoner's statutory right to correspond confidentially with attorney prohibits inspection of enclosures in attorney-inmate mail, in light of *Ev.C.* 952's broad definition of "confidential communication"].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General.* See 1 McCormick 6th, §89. *West's Key Number Digest*, Witnesses k.201 et seq.



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## CHAPTER IX - Witnesses

### IV. LAWYER-CLIENT PRIVILEGE

#### D. Communication.

#### 2. Information Acquired Through Communication.

2 Witkin Cal. Evid. Witnesses § 109

[§ 109] Information Acquired Through Communication.

In *People v. Meredith* (1981) 29 C.3d 682, 175 C.R. 612, 631 P.2d 46, defendant Scott, on trial for conspiracy to commit robbery and murder, told his former attorney that he had taken the victim's wallet, divided the money with the other defendant, attempted to burn the wallet, and finally put it in a trash can behind his home. That attorney sent F, his investigator, to retrieve the wallet. The attorney examined it and then turned it over to the police. At the trial all parties agreed that the wallet was admissible in evidence, and that the conversation between defendant Scott and his former attorney was not. But the prosecution called F to testify to the *location* of the wallet, i.e., that he observed it in the trash can behind Scott's home. *Held*, F's testimony was admissible.

(a) Decisions in other states have recognized that implementation of the policies supporting the attorney-client privilege may require its extension beyond the initial communication to cover any information which the attorney or his investigator may subsequently acquire as a direct result of the communication. (29 C.3d 691, 692, 693.) In some of the cases, defense counsel obtained the evidence from his client or removed it from its original location; in others the attorney did not remove or alter it; but none of the decisions dealt with the effect of such removal or alteration on the privilege as a bar to testimony concerning the original location or condition. (29 C.3d 694.)

(b) When defense counsel alters or removes physical evidence, he deprives the prosecution of the opportunity to observe it in its original condition or location. To bar testimony concerning original condition or location would permit the defense to destroy critical information, and to encourage defense counsel "to race the police to seize critical evidence." (29 C.3d 694.) It is necessary, therefore, to create an exception to the privilege where such removal or alteration has taken place: The prosecution may offer evidence of the original location or condition, in a manner which avoids revealing the content of the communications or the original source of the information. (29 C.3d 695, and footnote 8.) "We thus view the defense decision to remove evidence as a tactical choice. If defense counsel leaves the evidence where he discovers it, his observations derived from privileged communications are insulated from revelation. If, however, counsel chooses to remove evidence to examine or test it, the original location and condition of that evidence loses the protection of the privilege." (29 C.3d 695.) (See *People v. Superior Court (Fairbank)* (1987) 192 C.A.3d 32, 237 C.R. 158, *infra*, §155 [applying *People v. Meredith* to defense counsel's obligation to turn over relevant evidence]; 70 Cal. L. Rev. 1048.)

In *Aerojet-General Corp. v. Transport Indem. Ins.* (1993) 18 C.A.4th 996, 22 C.R.2d 862, a dispute about insurance coverage between two companies and their liability insurers, an attorney for plaintiffs inadvertently received documents originating from defendants' attorneys, including a memorandum revealing the existence of a witness whom he subsequently deposed. Plaintiffs' attorney did not immediately inform opposing counsel of his receipt of the documents.

In response to defendants' motion for sanctions, the trial court ordered plaintiffs' attorney's firm to pay all expenses incurred by defendants in bringing the sanctions motion and in conducting discovery to determine how the disclosure occurred. *Held*, reversed.

(a) "The attorney-client privilege is a shield against deliberate intrusion; it is not an insurer against inadvertent disclosure. Further, not all information that passes privately between attorney and client is entitled to remain confidential in the literal sense. The most obvious example is information that is required to be disclosed in response to discovery, such as the identification of potential witnesses." (18 C.A.4th 1004.)

(b) The privilege protects the disclosure of communications but not the underlying facts. It does not extend to independent witnesses or their discovery, and the identity and location of such persons cannot be concealed under the attorney work product rule of *C.C.P. 2018* (infra, §140). The existence of the witness was not privileged, and plaintiffs' counsel acquired knowledge of the witness' identity through no fault or misconduct of his own. Thus, plaintiffs and their counsel were entitled to use the information, and defendants were not entitled to sanctions in the form of attorneys' fees expended in preventing that use. (18 C.A.4th 1005.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2018* (the attorney work product rule) was repealed and replaced by *C.C.P. 2018.010* et seq. in 2004 without substantive change.



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## CHAPTER IX - Witnesses

### IV. LAWYER-CLIENT PRIVILEGE

#### D. Communication.

#### 3. Distinction: Knowledge Without Communication. a. In General.

2 Witkin Cal. Evid. Witnesses § 110

[§ 110] In General.

There are some facts of which the attorney obtains knowledge without any communication by the client. But unless there is such a communication ("information transmitted"), the knowledge gained is not protected by the privilege. The following are illustrations:

(1) *Impressions of Mental Condition*. An attorney's observation and impressions of the mental condition of his or her client are not privileged. (*Oliver v. Warren* (1911) 16 C.A. 164, 168, 116 P. 312; see 35 So. Cal. L. Rev. 208.)

(2) *Independent Fact Related to Communication*. In *Coy v. Superior Court* (1962) 58 C.2d 210, 23 C.R. 393, 373 P.2d 457, a complaint for abuse of process was based on the theory that defendant W and defendant B, his attorney, conspired to file an improper action against plaintiff. Plaintiff's interrogatory to W asked when he first discussed plaintiff's obligation with B. *Held*, this was permissible. It did not seek to elicit a privileged conversation, but only to set the date at which defendants first conceived the idea of filing the action against plaintiff. This date was a fact, and in no sense a communication by the client to his attorney. Thus, a question is not objectionable, even if it refers to a privileged communication, so long as it does not call for it. (58 C.2d 219, 220.)

To similar effect is *Brown v. Superior Court* (1963) 218 C.A.2d 430, 32 C.R. 527. Plaintiff sued defendant doctor for malpractice. Pursuant to the master plan embodied in the doctor's insurance policy, a committee of members of the local medical society met with the doctor and his attorney to review the evidence and make recommendations to the attorney. Plaintiff sought by interrogatories to discover the recommendations. *Held*, although protected on another ground (see *infra*, §140 et seq.), the privilege did not apply. The doctors were not agents of the client communicating or interpreting his disclosures; they were dealing with open information concerning the case, and their opinions on such discoverable information were not within the attorney-client privilege. (218 C.A.2d 439.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER IX - Witnesses

### IV. LAWYER-CLIENT PRIVILEGE

#### D. Communication.

#### 3. Distinction: Knowledge Without Communication.

##### b. Identity of Client.

2 Witkin Cal. Evid. Witnesses § 111

#### [§ 111] Identity of Client.

(1) *General Rule: No Privilege.* The prevailing view is that identity of the client (or the real party in interest) is not privileged, and the attorney cannot refuse to disclose the client's name. One theory is that the attorney learns the fact before the relationship is established; the other is that whatever communication is involved is not intended to be confidential, because the attorney must openly represent the client in dealings with third persons, and the adverse party is entitled to know who his or her opponent is. (See *Satterlee v. Bliss* (1869) 36 C. 489, 507; *Brunner v. Superior Court* (1959) 51 C.2d 616, 618, 335 P.2d 484; 1 McCormick 5th, §90; 8 Wigmore (McNaughton Rev.) §2313; 98 Harv. L. Rev. 1514; 23 Cal. Western L. Rev. 42 [disclosure of taxpayer client's identity to I.R.S.]; 1965 A.S. 570; 1966 A.S. 407; 1991 A.S. 1047; 16 A.L.R.3d 1047 [disclosure of name, identity, address, occupation, or business of client as violation of attorney-client privilege].)

(2) *Exception: Where Disclosure Would Incriminate Client.* In *Ex parte McDonough* (1915) 170 C. 230, 236, 149 P. 566, though the court recognized this general rule, it held that, under the peculiar circumstances, to divulge identity of the clients would tend to incriminate them. (See *Willis v. Superior Court* (1980) 112 C.A.3d 277, 291, 292, 169 C.R. 301 [holding identity not privileged, but recognizing exception, as in *Ex parte McDonough*, where disclosure might subject client to prosecution in case in which attorney was consulted]; 49 Cal. L. Rev. 283, 388; 1960 A.S. 573.)

(3) *Exception: Where Disclosure Would Reveal Confidential Communication.* In *Rosso, Johnson, Rosso & Ebersold v. Superior Court* (1987) 191 C.A.3d 1514, 237 C.R. 242, defendant law firm had placed an advertisement directed to women who suffered injury from using the Dalkon Shield intrauterine device. Plaintiff, who had responded to the advertisement, sued the firm, alleging that the attorneys were responsible for her having missed the statute of limitations on her claim against the device's manufacturer; and she sought to discover defendants' master list of Dalkon Shield cases. Held, the list was protected by the attorney-client privilege. "As a general rule, the identity of an attorney's clients is not protected by the attorney-client privilege." (191 C.A.3d 1518, citing the text.) However, in this case, which is analogous to doctor-patient privilege cases (see *infra*, §§202, 220, 221), disclosure of the clients' names would reveal the nature of their medical problem, a confidential communication. Thus, "this is one of the exceptional cases where the identity of the client should be protected." (191 C.A.3d 1519.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *General Rule: No Privilege.* See *Hooser v. Superior Court* (2000) 84 C.A.4th 997, 1005, 101 C.R.2d 341 [stating general rule and its exceptions]; *Tien v. Superior Court* (2006) 139 C.A.4th 528, 536, 43 C.R.3d 121 [in class action

lawsuit attorney-client privilege did not preclude disclosure to defendant employer of names of employees who had responded to neutral letter sent to putative class members informing them that they could contact employees' counsel for more information; distinguishing *Rosso, Johnson, Rosso & Ebersold v. Superior Court* (1987) 191 C.A.3d 1514, 237 C.R. 242, text, p. 368]; 1 McCormick 6th, §90; 38 U.C. Davis L. Rev. 141 [discussing whether tax attorney may shield client's identity from I.R.S. under attorney-client privilege].



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## CHAPTER IX - Witnesses

### IV. LAWYER-CLIENT PRIVILEGE

#### D. Communication.

#### 3. Distinction: Knowledge Without Communication.

##### c. Knowledge of Client's Agent.

2 Witkin Cal. Evid. Witnesses § 112

[§ 112] Knowledge of Client's Agent.

In *Grand Lake Drive In v. Superior Court* (1960) 179 C.A.2d 122, 3 C.R. 621, plaintiff, in a personal injury suit, alleged negligence of defendant in maintaining a slippery apron for its drive-in theatre. Defendant's attorney engaged an engineer to inspect and conduct tests on the sidewalk. Plaintiff then took the engineer's deposition, asking direct questions as to the nature of the surface and the results of his inspection and testing; i.e., the inquiry was as to knowledge, not communications. The trial judge ordered the engineer to answer and defendant sought mandamus, contending that the engineer received his knowledge solely as an intermediary in a confidential communication. *Held*, there was no privilege. "The object of Cheek's inspection, and the source of the knowledge as to which plaintiff seeks to question him, is the sidewalk area in front of defendant's drive-in. This area is open to the public. It is as readily visible to anyone approaching the building as is the color of the hat or pattern of the shoe a client wears to his lawyer's office. No act which defendant would not have done in the ordinary course of his business was required to make known to Cheek the characteristics of this sidewalk." (179 C.A.2d 126.) And if the sidewalk were destroyed it could hardly be argued that the engineer could not be called to testify as to its condition at a time shortly after the accident. (179 C.A.2d 127.)

The *Grand Lake* case was followed in *People v. Donovan* (1962) 57 C.2d 346, 19 C.R. 473, 369 P.2d 1, a condemnation suit, in which the court held that the state appraiser's opinion on fair market value of property was not within the privilege merely because it had been communicated to the state's attorney. Thus, when the state did not call him as a witness, he was properly called by the defendant to give his opinion; i.e., defendant was not inquiring as to a disclosure made by the witness (the client's agent), but only as to his knowledge, which was not privileged. (57 C.2d 355.)

*Donovan* was followed in *People v. Cowan* (1969) 1 C.A.3d 1001, 1004, 81 C.R. 713. But C.C.P. 1255.060, enacted in 1975, prohibits use of an appraiser's opinion on value communicated to the condemnor's attorney, and thus nullifies the holding in these cases. (See 66 A.L.R.4th 213 [compelling testimony of opponent's expert]; 8 Summary (9th), *Constitutional Law*, §996.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Cross-Reference:* 8 Summary (10th), *Constitutional Law*, §1212.





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## CHAPTER IX - Witnesses

### IV. LAWYER-CLIENT PRIVILEGE

#### E. In Course of Relationship.

##### 1. Professional Consultation.

##### a. In General.

2 Witkin Cal. Evid. Witnesses § 113

[§ 113] In General.

(1) *Statutory Requirement.* The information must have been transmitted, or the advice given, "in the course of that relationship." (Ev.C. 952; see Unif. Rules, Rule 502(b); 1 McCormick 5th, §88; 8 Wigmore (McNaughton Rev.) §2303; 10 Stanf. L. Rev. 301.)

(2) *Consultation Before Employment.* The rule does not require that the attorney be actually employed and the relationship of attorney and client thereby created. Ev.C. 951 states the prevailing view that a "client" is a person who "consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity."

In other words, a person may safely discuss a problem with an attorney for the purpose of obtaining advice or representation, and the statements made are privileged, even though no actual employment follows. (*Estate of Dupont* (1943) 60 C.A.2d 276, 288, 140 P.2d 866 [attorney, after interview, refused employment]; *People v. Dorrance* (1944) 65 C.A.2d 125, 128, 150 P.2d 10 [attorney declined representation because of conflicting interest of another client]; *People v. Abair* (1951) 102 C.A.2d 765, 771, 228 P.2d 336; *People v. Canfield* (1974) 12 C.3d 699, 705, 117 C.R. 81, 527 P.2d 633, *infra*, §114 ["The lawyer-client privilege is, indeed, so extensive that where a person seeks the assistance of an attorney with a view to employing him professionally, any information acquired by the attorney is privileged whether or not actual employment results"]; see 8 Wigmore (McNaughton Rev.) §2304.)

However, in *People v. Heart* (1905) 1 C.A. 166, 81 P. 1018, defendant's wife consulted an attorney who refused the case. *Held*, the wife's communications were not privileged. (1 C.A. 168; but see criticism of *Heart* in *Estate of Dupont*, *supra*, 60 C.A.2d 289; see also *infra*, §124 [privilege where client communicates through messenger or agent].)

(3) *Undelivered Letter to Public Defender.* In *People v. Gardner* (1980) 106 C.A.3d 882, 165 C.R. 415, defendant, one of three persons arrested for murder, was in jail. He wrote a letter addressed to "P.D.," in which he stated that he had committed the crime and the other two were innocent. He added: "Now where do we go from here? I wouldn't talk to anybody in the police department until I talked to somebody from your office." A police officer, informed by the other two suspects that defendant would clear them, went to the cell and seized the letter, despite defendant's protest that it was confidential and intended for his attorney. *Held*, admission of the letter was reversible error per se. It was written with the reasonable expectation that defendant, having been represented by the county public defender at least seven times previously, would be so represented again; the fact that the communication was in the form of an undelivered letter was immaterial. (106 C.A.3d 887.)

(4) *Labor Union Attorney at Union Meeting.* In *Benge v. Superior Court* (1982) 131 C.A.3d 336, 182 C.R. 275, members of a local union working at a battery plant held a union meeting with their retained attorneys to discuss lead dust conditions and to obtain legal advice on their workers' compensation rights. They also received additional advice on their potential rights against third parties, and subsequently filed actions for damages against the plant owner. The latter, on deposition of union members, sought disclosure of the communications made at the meeting. *Held*, the communications were privileged. The facts (a) that the members did not intend to employ counsel when they went to the meeting, or (b) that the attorneys at the meeting did not represent them, were irrelevant; the discussion was privileged even though no actual employment resulted. (131 C.A.3d 345, 347, citing *People v. Canfield*, *supra*, and the text.)

(5) *Appointed Counsel Replacing Deceased, Disbarred, or Inactive Counsel.* C.R.C., Rule 955 and B. & P.C. 6180 provide for appointment of counsel to replace an attorney who is deceased, disbarred, or inactive. (See 1 Cal. Proc. (4th), *Attorneys*, §111 et seq.) The attorney-client privilege extends to actions taken, and to communications by or to the appointed counsel, to the same extent that it would have applied to communications by or to the replaced attorney. (B. & P.C. 6180.10.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Statutory Requirement.* See 1 McCormick 6th, §88.(5) *Appointed Counsel Replacing Deceased, Disbarred, or Inactive Counsel.* C.R.C., Rule 955 was renumbered C.R.C., Rule 9.20 in 2006. *West's Key Number Digest*, Witnesses k.199 et seq.



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### IV. LAWYER-CLIENT PRIVILEGE

#### E. In Course of Relationship.

##### 1. Professional Consultation.

##### b. Statement of Indigency to Public Defender.

2 Witkin Cal. Evid. Witnesses § 114

[§ 114] Statement of Indigency to Public Defender.

In *People v. Canfield* (1974) 12 C.3d 699, 117 C.R. 81, 527 P.2d 633, defendant was charged with auto theft and receiving stolen property. In a confidential interview in jail, he told a public defender's aide that he could not afford private counsel, and he signed a financial statement under penalty of perjury pursuant to Govt.C. 27707. At the trial, defendant testified that he had paid cash for the car and had won about \$ 75,000 by gambling during the preceding months. On cross-examination, the prosecutor, over objection, impeached him by using the financial statement. *Held*, it was error to permit such use.

(a) The United States Supreme Court, in *United States v. Kahan* (1974) 415 U.S. 239, 94 S.Ct. 1179, 39 L.Ed.2d 297, 5 Cal. Crim. Law (3d), *Criminal Trial*, §170, did allow introduction of evidence that a defendant had falsely stated at his arraignment that he lacked funds to employ an attorney. But there, the defendant made his statements in *open court*, without any expectation of confidentiality, and the statements were *knowingly false*. (12 C.3d 706.)

(b) Here, the prosecutor used the *content* of defendant's apparently *true* statement to impeach him, on the theory that under Govt.C. 27707 the form became a public record. This is unsound: the section does not abrogate the attorney-client privilege as to a financial statement given in confidence to the public defender. (12 C.3d 706.)

(c) Even if the court could require the public defender to turn over to it a defendant's eligibility statement, "the sole use which the court could make of the statement would be to enable it to determine whether the defendant was eligible for the services of the public defender and not, as here, to turn the statement over to the People to use in the prosecution of the case in chief against the defendant." (12 C.3d 707.)

A concurring opinion in *Canfield* sought to narrow its scope: "[I]f the procedures followed in situations like the present one are such that the defendant is made aware of their nature and purpose and understands that he will not be represented by the public defender until he has established his indigency, then any information given by him either orally or in writing for that purpose cannot properly be considered a 'confidential communication' covered by the attorney-client privilege." (12 C.3d 708.) (See *United States v. Kahan*, *supra*, 94 S.Ct. 1181, 39 L.Ed.2d 301 [protective shield against defendant's having to choose between different constitutional protections "is not to be converted into a license for false representations on the issue of indigency free from the risk that the claimant will be held accountable for his falsehood"].)

Govt.C. 27707 and P.C. 987 were amended in 1980 to make the statement of indigency confidential and

inadmissible *in any criminal proceeding* except a prosecution for perjury based on false material contained in the statement. But the statement may be used in a proceeding under P.C. 987.8 to determine *the defendant's present ability to pay* all or part of the costs of the defense. Thus, the amended sections create a new statutory privilege specifically precluding use of the statement for impeachment or otherwise by the prosecution in a criminal case.

**SUPPLEMENT:** [This section is current through the latest supplement]



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### IV. LAWYER-CLIENT PRIVILEGE

#### E. In Course of Relationship.

##### 1. Professional Consultation.

##### c. Termination or Continuation of Relationship.

2 Witkin Cal. Evid. Witnesses § 115

[§ 115] Termination or Continuation of Relationship.

(1) *Effect of Termination of Employment.* In *People v. Singh* (1932) 123 C.A. 365, 11 P.2d 73, an attorney was consulted and appeared for defendants in preliminary proceedings. Later, at the trial, he testified against them, claiming that the employment terminated when they failed to raise his fee. *Held*, admission of the testimony was reversible error. The court said: "Conceding that he had the right, for nonpayment of fees or for any other good reason, to repudiate the employment and be relieved from further obligation, he had no right to violate any confidence reposed in him while acting as counsel." (123 C.A. 369.) (See 21 Cal. L. Rev. 67.)

Similarly, in *Hardy v. Martin* (1907) 150 C. 341, 89 P. 111, plaintiffs sent letters to their attorney containing damaging admissions. Later, plaintiffs made a deed, and subsequently sought to set it aside for fraud and undue influence. *Held*, although the attorney was no longer representing them when the deed was executed, the letters were privileged. "[I]f the relation existed at the time the communications are given, the subsequent cessation of that relation does not make the communication admissible." (150 C. 344.) (On disclosures made after attorney refuses to undertake representation, see *People v. Gionis* (1995) 9 C.4th 1196, 40 C.R.2d 456, 892 P.2d 1199, *infra*, §118.)

(2) *Continuation of Relationship.* In *Littlefield v. Superior Court* (1982) 136 C.A.3d 477, 186 C.R. 368, prosecution witness Bianchi was ordered to testify on cross-examination as to the content of confidential conversations between him and his defense counsel, the public defender. The order was made on behalf of counsel for defendant Buono, who wanted evidence to impeach Bianchi by showing that he obtained critical facts secondhand from his counsel. The order was based on the theory that the attorney-client relationship was "attenuated" because Bianchi had pled guilty to five of the murders charged against Buono and to similar murders in Washington. *Held*, the order was invalid. It was still uncertain where Bianchi would serve his life term; moreover, "unlike the privileges against self-incrimination, the attorney/client privilege continues even after the end of threat of punishment." (136 C.A.3d 482.) "Nothing in the statutes controlling the privilege suggests it is to be limited or diminished in importance as a function of the continuance of the relationship that existed at the time of the confidential communications herein sought." (136 C.A.3d 482.) Thus, the relationship between Bianchi and the public defender "has not, and never can be, 'attenuated' in the sense herein urged on us." (136 C.A.3d 482.)

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## CHAPTER IX - Witnesses

### IV. LAWYER-CLIENT PRIVILEGE

#### E. In Course of Relationship.

#### 2. Nonprofessional Employment or Consultation.

##### a. In General.

2 Witkin Cal. Evid. Witnesses § 116

[§ 116] In General.

The burden is on the claimant of the privilege to establish the condition of professional consultation. (*Collette v. Sarrasin* (1920) 184 C. 283, 288, 193 P. 571; *Carroll v. Sprague* (1881) 59 C. 655, 660.) Thus, where the client merely asked the attorney to witness a business transaction (deposit of funds in a bank), an act which could have been done by any layman, it was held that information as to the name and location of the bank was not a privileged communication. (*McKnew v. Superior Court* (1943) 23 C.2d 58, 64, 142 P.2d 1; see *Solon v. Lichtenstein* (1952) 39 C.2d 75, 80, 244 P.2d 907; *Henshall v. Coburn* (1917) 177 C. 50, 54, 169 P. 1014 [attorney acted as agent to engage another attorney]; *Collette v. Sarrasin*, supra [attorney employed to draw deed, no legal advice given]; *Ferguson v. Ash* (1915) 27 C.A. 375, 377, 150 P. 657 [same]; *Mitchell v. Towne* (1939) 31 C.A.2d 259, 265, 87 P.2d 908 [witness to conversation]; *Watt Industries v. Superior Court* (1981) 115 C.A.3d 802, 804, 171 C.R. 503 [work product privilege inapplicable]; *Chicago Title Ins. Co. v. Superior Court* (1985) 174 C.A.3d 1142, 1151, 220 C.R. 507, supra, §78 [attorney merely acted as negotiator for client, gave business advice, or otherwise acted as business agent]; *Wellpoint Health Networks v. Superior Court* (1997) 59 C.A.4th 110, 122, 68 C.R.2d 844, supra, §79 [documents produced by attorney engaged by employer to conduct prelitigation investigation of employee's discrimination claims might fall within or outside protection of privilege depending on whether he was called on to give legal advice during course of investigation]; 8 Wigmore (McNaughton Rev.) §§2296, 2297; 17 So. Cal. L. Rev. 410; 10 Stanf. L. Rev. 301; 1956 A.S. 548.)

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#### 2. Nonprofessional Employment or Consultation.

##### b. Client's Denial of Consultation.

2 Witkin Cal. Evid. Witnesses § 117

[§ 117] Client's Denial of Consultation.

A "client" cannot both deny the fact of consultation and claim a privilege resulting from it. In *Maier v. Noonan* (1959) 174 C.A.2d 260, 344 P.2d 373, Mrs. M, living with her husband, sued defendant to establish paternity and obtain support for her infant child, and received a verdict and judgment. On motion for new trial, an affidavit of attorney S was filed, stating that he tried a personal injury suit against Mrs. M; that thereafter she phoned and asked whether she could get support for her child from defendant; that in the conversation she stated--contrary to her testimony at the trial--that she had regular intercourse with her husband during all the time in question; that S told her she could not collect, declined employment, and suggested that she get a local attorney. Mrs. M filed a counteraffidavit denying that she had ever discussed this subject with attorney S. The motion for new trial was granted but, on the retrial before a new judge, the counteraffidavit was not called to his attention. Hence, he ruled that the affidavit of S could not be introduced (as an admission or prior inconsistent statement) because of the attorney-client privilege. *Held*, it was reversible error to fail to call the counteraffidavit to the judge's attention:

"It appears to this court that Rosalie [Mrs. M] cannot at the time of the motion for a new trial (after the first trial), deny under oath that she ever talked to Shatford or ever sought or received any advice from him about the matter at hand and then at the third trial claim that the privilege of attorney and client existed between Shatford and herself. The attorney for Rosalie can hardly claim ignorance of the previous proceedings for the file discloses that the affidavit of Rosalie wherein she denied that she ever had even talked to Shatford about this case was prepared on his stationery and he acted as the notary before whom Rosalie swore to the truth of the statements therein contained. Out of fairness to the trial judge the stipulation should have been called to his attention and the matter of whether the relationship of attorney and client existed should have been explored on a *voir dire* examination. There is obviously great doubt and uncertainty as to whether the communication as made by Rosalie to Shatford (if there was such a conversation) is privileged, and under the circumstances in the interests of justice the question should be settled." (174 C.A.2d 265.)

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#### 2. Nonprofessional Employment or Consultation.

##### c. Attorney's Refusal To Represent Client.

*2 Witkin Cal. Evid. Witnesses § 118*

[§ 118] Attorney's Refusal To Represent Client.

In *People v. Gionis* (1995) 9 C.4th 1196, 40 C.R.2d 456, 892 P.2d 1199, a case involving an alleged conspiracy by defendant to assault his former wife, the trial judge allowed an attorney, who was a friend and business associate of defendant's, to testify about an earlier occasion on which defendant, having been served with divorce papers, had told the attorney about possibly hiring someone to attack his wife. The Court of Appeal concluded that these statements were admitted in violation of the attorney-client privilege. *Held*, reversed. At the time the statements were made, the attorney had already told defendant unequivocally that he would not represent him in the dissolution proceeding. A person can have no reasonable expectation of being represented by an attorney after the attorney's explicit refusal to undertake representation. "Moreover, evidence of an attorney's express refusal of representation may give rise to a reasonable inference that, in continuing to speak to the attorney, the person is not thereafter consulting with the attorney for advice 'in his professional capacity.' " (9 C.4th 1211.) Under the circumstances, it is reasonable to infer that the conversation between defendant and the attorney was one between friends, and thus the trial judge's determination that no attorney-client relationship existed is adequately supported by the record. (9 C.4th 1212, 1213.) (See 23 *Pepperdine L. Rev.* 728 [*Gionis*]; 18 *Thomas Jefferson L. Rev.* 97 [same].)

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### IV. LAWYER-CLIENT PRIVILEGE

#### F. Confidential Disclosure.

##### 1. General Requirement.

2 Witkin Cal. Evid. Witnesses § 119

[§ 119] General Requirement.

The communication must have been intended to be confidential. (See *Mission Film Corp. v. Chadwick Pictures Corp.* (1929) 207 C. 386, 390, 278 P. 855; *Mitchell v. Towne* (1939) 31 C.A.2d 259, 265, 87 P.2d 908; *People v. Hall* (1942) 55 C.A.2d 343, 356, 130 P.2d 733; *Solon v. Lichtenstein* (1952) 39 C.2d 75, 80, 244 P.2d 907 [no privilege where communication made to be conveyed to third person]; *Price v. Superior Court* (1958) 161 C.A.2d 650, 652, 327 P.2d 203; *Gonzales v. Municipal Court* (1977) 67 C.A.3d 111, 118, 120, 136 C.R. 475 [statements by arresting officer to police department investigators, made with knowledge that they would be transmitted to city attorney and could be basis for disciplinary proceedings against him]; 1 McCormick 5th, §§89, 91; 8 Wigmore (McNaughton Rev.) §§2306, 2311; 10 Stanf. L. Rev. 307; 1956 A.S. 548.) (On whether privilege extends to *confidential part* of nonconfidential communication, see 32 So. Cal. L. Rev. 212; on problem of confidentiality in meeting of public agency, see *Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors* (1968) 263 C.A.2d 41, 58, 69 C.R. 480, supra, §105; on confidentiality of appointed expert's report, see *Torres v. Municipal Court* (1975) 50 C.A.3d 778, 123 C.R. 553.)

To be a "confidential communication," it must be "in confidence by a means which, so far as the client is aware, <discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted." However, a communication does not lose its confidential character simply because it was transmitted by "facsimile, cellular telephone, or other electronic means between the client and his or her lawyer." (v.C. 952.)>

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Snow* (2003) 30 C.4th 43, 87, 132 C.R.2d 271, 65 P.3d 749, citing the text [admission of evidence that defendant had asked to delay his response to robbery plea bargain offer until after lunch hour was not error; defendant intended statement to be communicated by his attorney to prosecutor and thus it was not privileged]; *People v. Combs* (2004) 34 C.4th 821, 865, 22 C.R.3d 61, 101 P.3d 1007 [in capital murder case, testimony by public defender who had represented defendant in prior check forgery case did not violate attorney-client privilege, where defender did not testify about any confidential communications between defendant and himself, but only authenticated hearing transcript from prior case and testified as to matters within it]; 1 McCormick 6th, §§89, 91. *Correction:* Page 376, continuation of the last line of the section is: "discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted." (Ev.C. 952.) *West's Key Number Digest*, Witnesses k.205



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## CHAPTER IX - Witnesses

### IV. LAWYER-CLIENT PRIVILEGE

#### F. Confidential Disclosure.

##### 2. Requirement Excused.

2 Witkin Cal. Evid. Witnesses § 120

[§ 120] Requirement Excused.

(1) *Attorney's Duty To Protect Client.* In *People v. Vargas* (1975) 53 C.A.3d 516, 126 C.R. 88, defendant was present during jury selection on the first day of his trial for a drug offense but failed to appear when court opened on the next day. Outside the jury's presence, defense counsel informed the trial judge that defendant had been present "a little while ago," when defendant and the attorney disagreed about the likelihood of the complaining witness showing up. Defense counsel added, "Just as soon as she did show up ... he said, 'I want to get my sport coat,' and he took off." *Held*, the attorney breached the attorney-client privilege but the disclosure was excusable.

(a) Defendant's statement concerning his apprehension about the complaining witness' presence arose out of the attorney-client relationship and was a confidential communication, privileged under *Ev.C. 954*. (53 C.A.3d 527.)

(b) Defendant's statement that he was going to get his sport coat was not confidential and the attorney could properly have revealed it. The revelation did indicate that defendant had been present and had left, ostensibly to go to his car and return. But there was nothing confidential about defendant's whereabouts, which were open for all to observe. (53 C.A.3d 527.)

(c) The confidential aspect of the communication was the revelation which indicated defendant's apprehension, i.e., consciousness of guilt. The statement did not show an intent to commit a crime or fraud (which would have excused disclosure) but, at best, was only circumstantial evidence of flight. (53 C.A.3d 527.) The attorney's disclosure nevertheless may be excused as necessary to protect defendant's interest: "It is arguable that in moving for a continuance the attorney was under a duty to reveal to the court all facts within his knowledge concerning the defendant's disappearance, and that even if he were not under such duty, it was no abuse of discretion, and an exemplary tactical choice, to reveal all the facts to the court in the hopes of securing time to communicate with his client and to induce him to return for trial or change of plea." (53 C.A.3d 528.)

(2) *Court's Duty To Control Disclosure.* Under *Ev.C. 912* and *952*, documents containing confidential communications between attorney and client lose the protection of the privilege once they are disclosed. However, when allegedly privileged documents are seized pursuant to a search warrant, the court may itself control disclosure. Based on the court's duty to safeguard disclosure of privileged materials, its power to govern discovery of them, and its power to control its orders so as to make them conform to law and justice, the court has the power to seal such materials and, on a claim of privilege, conduct an in camera review. The owner of the documents may then identify and object to the seizure of those documents believed to be protected and move for the return of those believed to be outside the scope of the warrant under P.C. 1539 (see 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence*, §139). (PSC Geothermal

*Services Co. v. Superior Court* (1994) 25 C.A.4th 1697, 1708, 1712, 31 C.R.2d 213, 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence*, §83.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Court's Duty To Control Disclosure*. See *People v. Superior Court (Pfingst)* (2000) 83 C.A.4th 387, 401, 402, 99 C.R.2d 646 [court's duty, identified in *PSC Geothermal Services Co. v. Superior Court* (1994) 25 C.A.4th 1697, 31 C.R.2d 213, text, p. 377, to safeguard disclosure of privileged materials does not apply where search is directed not at obtaining privileged materials but is limited to ongoing investigation of possible wrongdoing of public prosecutor and is carefully confined to searching for evidence and fruits of alleged criminal activity].



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#### F. Confidential Disclosure.

#### 3. Presence of Third Persons.

2 Witkin Cal. Evid. Witnesses § 121

[§ 121] Presence of Third Persons.

The communication may retain its confidential character even though third persons are present:

(1) *Former Law*. One view, probably California's former law, is that the privilege remains only where such third persons are necessary for the purpose of communication or consultation; e.g., a lawyer's secretary or clerk. The presence of others, though intimately associated with the client, renders the communication nonconfidential. (See *Marshall v. Marshall* (1956) 140 C.A.2d 475, 480, 295 P.2d 131 [communications in presence of plaintiff's son]; *Mitchell v. Towne* (1939) 31 C.A.2d 259, 265, 87 P.2d 908; *Sharon v. Sharon* (1889) 79 C. 633, 677, 22 P. 26; and see generally 1 McCormick 5th, §91; 10 Stanf. L. Rev. 308, 317; 61 Harv. L. Rev. 717; 96 A.L.R.2d 125, 160 [persons other than client or attorney affected by, or included within, attorney-client privilege].)

(2) *Evidence Code*. The Evidence Code states a much broader rule, embracing two kinds of third persons whose presence does not destroy the confidentiality of the communication:

(a) Those "to whom disclosure is reasonably necessary for ... the accomplishment of the purpose for which the lawyer is consulted." (Ev.C. 952, supra, §119.) This would cover not only a secretary or clerk, but an expert consultant present to assist the lawyer in advising the client. (Law Rev. Com. Comment.)

(b) Those "who are present to further the interest of the client in the consultation." (Ev.C. 952.) This would cover a spouse, parent, business associate, joint client, etc., or "another person and his attorney who may meet with the client and his attorney in regard to a matter of joint concern." (Law Rev. Com. Comment.)

In *Insurance Co. of North America v. Superior Court* (1980) 108 C.A.3d 758, 166 C.R. 880, communications were made at a meeting of representatives of a parent company and its wholly owned operating subsidiary. The issue was whether an officer or employee of a holding or affiliated company could receive confidential legal advice from counsel employed by a wholly owned subsidiary or affiliate. *Held*, the communications were privileged.

(a) "[W]e construe section 952 to mean that attorney-client communications in the presence of, or disclosed to, clerks, secretaries, interpreters, physicians, spouses, parents, business associates, or joint clients, when made to further the interest of the client or when reasonably necessary for transmission or accomplishment of the purpose of the consultation, remain privileged." (108 C.A.3d 771.)

(b) "As part of this general rule, we conclude that an officer or employee of a holding or affiliated company can

receive legal advice from counsel employed by a wholly owned subsidiary or affiliate without destroying the confidentiality of the communication." (108 C.A.3d 771.) (See 36 U.C.L.A. L. Rev. 151 [applying attorney-client and work product privileges to allied party exchange of information]; 14 A.L.R.4th 594 [communications made in presence of or solely to or by third person; note on *Insurance Co.* case]; on effect of disclosure to court-appointed psychotherapist, see *infra*, §231 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Former Law.* See 1 McCormick 6th, §91.

(2) *Evidence Code.* See 33 *Pepperdine L. Rev.* 677 [recommending amendment of rules of law student practice and attorney-client privilege to allow presence of law students, under supervision of licensed attorney, during confidential client communications]. *West's Key Number Digest*, Witnesses k.206



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#### F. Confidential Disclosure.

#### 4. Communication to Lawyer's Agent.

##### a. In General.

2 Witkin Cal. Evid. Witnesses § 122

[§ 122] In General.

(1) *General Rule.* A communication by a client retains its confidential character, though made to a third person, if the disclosure to that third person "is reasonably necessary for the transmission of the information" to the attorney. (*Ev.C.* 952, *supra*, §119.) This broad rule covers various kinds of agents and intermediaries, e.g., the attorney's secretary, a doctor engaged by the attorney to interpret the client's communications, an accountant, or other expert. (*Law Rev. Com. Comment to Ev.C.* 952; see *Unif. Rules*, Rule 502(a)(5); *San Francisco v. Superior Court* (1951) 37 C.2d 227, 236, 231 P.2d 26 [doctor as necessary to interpret the client's condition to the attorney]; *In re Ochse* (1951) 38 C.2d 230, 232, 238 P.2d 561 [attorney entitled to have psychiatrist examine client privately to interpret mental condition to him]; *People v. Lines* (1975) 13 C.3d 500, 119 C.R. 225, 531 P.2d 793, *infra*, §237 [attorney-client privilege may exist even though psychotherapist-patient privilege has been waived]; *People v. Clark* (1990) 50 C.3d 583, 621, 268 C.R. 399, 789 P.2d 127 [psychologist appointed by court at defense counsel's request to examine defendant]; *Rodriguez v. Superior Court* (1993) 14 C.A.4th 1260, 1266, 18 C.R.2d 120 [defendant's statement to psychologist retained by defense counsel for purposes of evaluation in preparation of defense]; 1 McCormick 5th, §89; 96 A.L.R.2d 125, 160 [persons other than client or attorney affected by, or included within, attorney-client privilege].)

(2) *Distinctions.* In *Brown v. Superior Court* (1963) 218 C.A.2d 430, 32 C.R. 527, *infra*, §141, a malpractice case against Dr. F, the doctor's statements to a county medical society committee, later delivered to his attorney, were held not privileged. Unlike the lay client in the *San Francisco* case, *supra*, Dr. F did not need an intermediary to communicate his condition to his attorney. (218 C.A.2d 439.)

An obvious distinction was made in *Jorgensen v. Superior Court* (1958) 163 C.A.2d 513, 329 P.2d 550, a malpractice suit. Plaintiff voluntarily submitted to defendant's request for an examination by *defendant's doctor*, and thereafter, defendant refused to give plaintiff a copy of the doctor's report. *Held*, there was no privilege: plaintiff was not communicating to the agent of *his* attorney but to the agent of the *opposing attorney*, and there was neither an attorney-client relationship nor a communication intended to be confidential. (163 C.A.2d 516.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *General Rule.* See *People v. Roldan* (2005) 35 C.4th 646, 724, 27 C.R.3d 360, 110 P.3d 289 [in capital murder case, trial judge erred in permitting psychologist appointed by court to assist defense to describe threats defendant made to him against prosecutor; at time of trial, no express exception to attorney-client privilege existed for threats of future criminal conduct (see text, §154)]; 1 McCormick 6th, §89.



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#### 4. Communication to Lawyer's Agent.

##### b. Guardian Ad Litem as Agent.

2 Witkin Cal. Evid. Witnesses § 123

[§ 123] Guardian Ad Litem as Agent.

In *De Los Santos v. Superior Court* (1980) 27 C.3d 677, 166 C.R. 172, 613 P.2d 233, J, a 9-year-old boy, was injured when his bicycle collided with an automobile. An action was filed on his behalf by Mrs. S, his mother, as guardian ad litem, and on her own behalf to recover the cost of past and future medical care for J. Defendants--driver and owner of the automobile and manufacturer and seller of the bicycle--served interrogatories on J and deposed Mrs. S. In her deposition, she was questioned about statements made by J to her regarding the circumstances of the accident and the condition of the bicycle. She refused to answer on the ground that J's statements were made in response to questions she had asked at the request of his attorney, for the purposes of answering defendants' interrogatories and preparing for trial. The trial judge granted defendants' motion to compel answers. *Held*, mandamus issued to prevent discovery; the information was privileged.

(a) In her capacity as guardian ad litem, Mrs. S was the holder of J's lawyer-client privilege and authorized to assert it on his behalf (*Ev.C. 953(b)*). (27 C.3d 682.) The statements were given in the course of a lawyer-client relationship and were intended to be confidential. (27 C.3d 682.)

(b) The statements retained their confidential character despite their intended use for answering interrogatories, just as statements to an attorney in preparation for testimony at a trial retain confidentiality despite the testimony at the trial. (27 C.3d 682, 683.)

(c) J's privilege was not lost by reason of his disclosure of confidential information to Mrs. S. She, as guardian ad litem, was a third party to whom communication was reasonably necessary for transmission of the information to his attorney (*Ev.C. 952*). The guardian ad litem has broad powers in the conduct of a case, and should be apprised of matters which the minor communicates to his attorney for the purpose of prosecuting or defending the action. Whether the guardian obtains such knowledge by his or her presence at consultations between the attorney and the minor, or by securing the information from the minor for transmission to the attorney, is of no consequence. And the protection extends to minors of any age. (27 C.3d 684.)

(d) Defendants suggested that Mrs. S may not have communicated all of J's statements to his lawyer, and contended that any such unreported statements were not privileged. But no authority supports the theory that, in order to retain confidential status, the statements must be rendered literally by the intermediary; the client's intent to make a confidential communication controls. Hence, the privilege protects the statements made by J to his mother for the purpose of transmission to his lawyer regardless of whether all of his remarks were communicated in full. (27 C.3d

685.)

(e) J answered interrogatories dealing with defects in the bicycle, and *Ev.C. 912* provides that the privilege is waived if the holder discloses or consents to disclosure of a significant part of the communication. But, as already pointed out, the nonconfidential answers to interrogatories are distinct from the confidential conversations on which the answers were based; and neither by testifying nor by answering interrogatories does a client waive the confidentiality of those conversations. (27 *C.3d* 685, 686.) (See 8 *Pepperdine L. Rev.* 604.)

**SUPPLEMENT:** [This section is current through the latest supplement]





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#### 5. Communication by Client's Agent.

##### a. Agent of Natural Person.

2 Witkin Cal. Evid. Witnesses § 124

[§ 124] Agent of Natural Person.

The client's freedom of disclosure requires protection whether the client communicates with his or her attorney directly or indirectly. "This of course includes communications through an *interpreter*, and also communications *through a messenger* or any other *agent of transmission*, as well as communications *originating with the client's agent* and made to the attorney." (*San Francisco v. Superior Court* (1951) 37 C.2d 227, 237, 231 P.2d 26 [quoting Wigmore]; see 8 Wigmore (McNaughton Rev.) §2317; 10 *Stanf. L. Rev.* 304, 316; 66 A.L.R.4th 1227 [who is "representative of the client" under statute privileging communications between attorney and client's representative].)

*Ev.C. 951* (supra, §105) codified this rule by defining "client" as a person who, "directly or through an authorized representative," consults a lawyer. (See Unif. Rules, Rule 502(a)(1) ["person ... who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him"].)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See The New Wigmore: Evidentiary Privileges §6.10.1.



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#### F. Confidential Disclosure.

#### 5. Communication by Client's Agent.

#### b. Employee of Corporation or Public Entity.

#### 1. In General.

2 *Witkin Cal. Evid. Witnesses* § 125

[§ 125] In General.

A corporation has the same privilege as an individual (see *supra*, §106), but the relationship of corporate client and attorney gives rise to a special problem of confidential disclosure. The artificial corporate person must communicate through a natural person--its employee; and the intent to communicate in confidence must be either the actual or imputed intent of that employee. Nearly all the decisions deal with written reports. (See 27 A.L.R.5th 76 [corporate communications entitled to privilege].) In *D. I. Chadbourne v. Superior Court* (1964) 60 C.2d 723, 36 C.R. 468, 388 P.2d 700, the court, in an elaborate opinion reexamining earlier cases, laid down a series of tests to determine when the necessary intent is present. (See *infra*, §132.)

The situation of the public entity (defined in *Ev.C. 200*) is similar, and the *Chadbourne* principles apply to communications by employees of the public entity. (See *People v. Glen Arms Estate* (1964) 230 C.A.2d 841, 858, 41 C.R. 303, *infra*, §133.)

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#### F. Confidential Disclosure.

5. Communication by Client's Agent.
- b. Employee of Corporation or Public Entity.
  2. Control Group Test Repudiated.

2 Witkin Cal. Evid. Witnesses § 126

#### [§ 126] Control Group Test Repudiated.

In applying the privilege to a corporation client, several federal court decisions adopted the "control group test," under which only senior management is regarded as having an identity analogous to the corporation as a whole; i.e., the privilege may be claimed only for communications by employees in a position to control or take a substantial part in a decision--they then personify the corporation. (See *Upjohn Co. v. United States* (1981) 449 U.S. 383, 101 S.Ct. 677, 683, 66 L.Ed.2d 584, 593; 84 Harv. L. Rev. 424.)

This test was repudiated in the *Upjohn* case. Upjohn, a corporation manufacturing pharmaceuticals, had a number of foreign subsidiaries. An audit by independent accountants disclosed illegal payments by a subsidiary to foreign governmental officials to obtain government business. T, Upjohn's vice-president, secretary and general counsel, conducted an investigation, in which questionnaires were sent to all foreign general and area managers, seeking detailed information on such possibly illegal payments. The managers were instructed to treat the investigation as confidential. T also interviewed recipients of the questionnaire and other officers and employees. The corporation made a report to the S.E.C., with a copy to the I.R.S., and the I.R.S. issued a summons demanding production of "[a]ll files relative to the investigation," with the following specification: "The records should include but not be limited to written questionnaires ... and memoranda or notes of the interviews ... with officers and employees." Upjohn refused to produce these specified documents, on the ground that they were protected by the attorney-client privilege and the work product doctrine. *Held*, both privileges applied.

#### (a) Criticism and rejection of control group test.

(1) The privilege protects not only the giving of *professional advice* by the lawyer but also the giving of *information to the lawyer* to enable him to give informed advice. (101 S.Ct. 683, 66 L.Ed.2d 593.)

(2) In the case of the individual client, the provider of information and the person who acts on the lawyer's advice are the same. But in the corporate context employees beyond the control group will possess information needed by the corporation's lawyers. "Middle-level--and indeed lower-level--employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties." (101 S.Ct. 683, 66 L.Ed.2d 592.) The control group test thus frustrates the purpose of the privilege by discouraging the communication of relevant information by employees of the client corporation seeking to

render legal advice to the client, and by making it difficult for the attorney to convey legal advice to the employees who will put into effect the client's policy. (101 S.Ct. 684, 66 L.Ed.2d 593.)

(3) The control group test is also lacking in certainty and difficult to apply in practice; i.e., conflicting views have resulted on which officers play a substantial role in directing a corporation's legal response. (101 S.Ct. 684, 66 L.Ed.2d 593.)

(b) *Attorney-client privilege applies to communications here.* Information not available from upper echelon management was needed to supply a basis for legal advice concerning compliance with securities and tax laws, foreign laws, currency regulation, duties to shareholders, and potential litigation in each of these areas. (101 S.Ct. 685, 66 L.Ed.2d 594.)

(c) *Untenable objection that discovery will be unduly restricted.* The privilege only protects disclosure of communications to the attorney; the employees may be called to testify to facts. Hence, while it might be more convenient for the Government to obtain the results of Upjohn's internal investigation by subpoenaing the questionnaires and notes taken by the attorneys, this consideration does not overcome the policies of the privilege. (101 S.Ct. 686, 66 L.Ed.2d 595.)

(d) *No comprehensive standards or rules declared.* This case is decided on its facts, and "we ... do not undertake to draft a set of rules" to govern challenges to investigatory subpoenas. However, the narrow control group test cannot govern development of the law in this area. (101 S.Ct. 686, 66 L.Ed.2d 595.) (See 95 Harv. L. Rev. 270; 33 Hastings L. J. 518; 19 Cal. Western L. Rev. 141; 67 A.B.A.J. 1142; 1981 A.S. 193; 1982 A.S. 129, 179; 1983 A.S. 175; for holding on work product privilege, see *infra*, §138.)

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#### 5. Communication by Client's Agent.

##### c. Agent Who Is Also Party.

2 Witkin Cal. Evid. Witnesses § 127

[§ 127] Agent Who Is Also Party.

In *Wilson v. Superior Court* (1957) 148 C.A.2d 433, 307 P.2d 37, plaintiffs sued for damages to land caused by alleged negligence in excavating by defendant school district pursuant to the plan and supervision of defendant W, an engineer. On deposition, W refused to answer many relevant questions concerning negligence and causation, relying mainly on the district's claim of attorney-client privilege. The theory of the claim was that, after the slide occurred, defendant district (client) employed W (client's agent) to investigate and provide the district's attorney with a confidential report to use in defense of a potential lawsuit against the district. Concededly such a report was a privileged communication, but the deposition merely sought *information* gained in the investigation, and any *expert opinion* based thereon. The problem was whether *San Francisco v. Superior Court* (1951) 37 C.2d 227, 231 P.2d 26, supra, §124, was so analogous as to compel the conclusion that "the client may submit his property to an examination by the engineering expert without fear that the latter will be compelled to reveal the information disclosed." (148 C.A.2d 442.) Held, W should be required to answer: "Here, the agent whom the client selected to investigate and report to its attorney was himself a potential defendant in the litigation which was imminent, the very person upon whose negligence or nonnegligence the imputed negligence or nonnegligence of the district would seem largely, if not wholly, to depend." (148 C.A.2d 442.)

The court then took note of the authorities holding that the policy of nondisclosure yields when the attorney-client relationship is abused, as where the client seeks advice in contemplation of a crime or fraud. (148 C.A.2d 443; see *infra*, §153 et seq.) Although no corrupt motive was shown here, nevertheless there were, said the court, factors potentially inherent in the situation which made it impolitic to recognize the privilege; in particular, "the inducement, to a defendant who may acquire significant information, to seal his own lips by accepting, perhaps actively seeking, employment as the agent of a codefendant, if the revealing of such knowledge can be controlled by a cooperative principal." (148 C.A.2d 444.) There were, moreover, seven individual defendants in addition to W (his associates and employees), "whom the school district might similarly employ and similarly seal their lips." "How far can this go? Can each of these eight employ each of the others as his agent to aid his attorney in preparing and conducting his defense and thus increase from one to nine the number of client-principals whose consents must be obtained for the release of the knowledge acquired by any of the eight as agents?" (148 C.A.2d 444.) And if so, "it should be permissible for the plaintiffs to do likewise, with similar concealment of information acquired by each plaintiff as agent of a coplaintiff." (148 C.A.2d 444.)

Thus the court reconciled the conflicting policies of the privilege and the duty to testify by holding that (a) in his

capacity as agent of the client, W's *communications* to the attorney and the *advice* received from the attorney were as confidential and as much within the protection of the privilege as if he had been the client; but that (b) in his capacity as a "principal" and an adverse party he was under the usual duty to testify on deposition or at the trial, answering all legal and pertinent questions which called for his *knowledge*, however acquired. (148 C.A.2d 445.) (For criticism of some of this language, see *Grand Lake Drive In v. Superior Court* (1960) 179 C.A.2d 122, 127, 3 C.R. 621, supra, §112.)

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#### 6. Writings Transmitted to Attorney.

##### a. Existing Papers Not Privileged.

2 Witkin Cal. Evid. Witnesses § 128

[§ 128] Existing Papers Not Privileged.

(1) *In General.* Modern discovery proceedings (see 2 Cal. Evidence (4th), Discovery, §2) bring into conflict the policy favoring production of evidence and the policies underlying the several privileges. This conflict occurs in connection with oral testimony on deposition, and it is even more serious where documentary evidence is sought by order of inspection or subpoena duces tecum.

No question arises, of course, as to ordinary confidential communications by letter or other writing between the attorney and client. They are protected from disclosure at the trial and from disclosure in discovery proceedings. (See 1 McCormick 5th, §§89, 96; 8 Wigmore (McNaughton Rev.) §§2307, 2318.)

The practical problem is whether documents which are not just communications to an attorney, but which have some independent character, e.g., contracts or reports, become privileged by *transmission (or "communication") to the attorney*. The answer is now established: if a document has such an independent existence as to be subject to compulsory disclosure while in the client's possession, it remains subject to disclosure despite its physical delivery to the attorney for use in preparing the case. "[A] document, report, or photograph that would otherwise be admissible in evidence does not become privileged merely because the client delivers it to his attorney. Unless a report or photograph is created for the purpose of communicating information to the attorney, it cannot have the character of a privileged communication when it comes into existence and accordingly cannot become privileged if it is later delivered to the attorney." (*Holm v. Superior Court* (1954) 42 C.2d 500, 511, 267 P.2d 1025, *infra*, §130 [concurring and dissenting opinion]; see *San Francisco Unified School Dist. v. Superior Court* (1961) 55 C.2d 451, 457, 11 C.R. 373, 359 P.2d 925; *Greyhound Corp. v. Superior Court* (1961) 56 C.2d 355, 397, 15 C.R. 90, 364 P.2d 266, *infra*, §139; *Fisher v. United States* (1976) 425 U.S. 391, 96 S.Ct. 1569, 48 L.Ed.2d 39, *infra*, §458 [fact that attorney was client's agent did not prevent enforcement of subpoena duces tecum for accountant's tax workpapers prepared for client and then transmitted to attorney]; 1 McCormick 5th, §§89, 96; 8 Wigmore (McNaughton Rev.) §2307; 10 *Stanf. L. Rev.* 302; 82 A.L.R.2d 1162 [*San Francisco Unified School Dist.*].)

(2) *Illustrations.* In *Holm v. Superior Court*, *supra*, after an accident involving a city bus driver, the city's claims investigator obtained a signed statement from the injured party (plaintiff) concerning the facts of the accident, and gave her no copy. *Held*, plaintiff's own statement was in no sense a confidential communication to an attorney, and the document did not become privileged by transmittal to the city's legal staff. (42 C.2d 507.) (For holding that investigator's report and photographs of scene were privileged, see *infra*, §130.)

In *San Francisco Unified School Dist. v. Superior Court*, *supra*, C, a high school student, was injured during athletic events, and sued the school district. He had been operated on and treated by Dr. N, and the district took Dr. N's deposition, at which he answered all questions fully. He had no independent recollection or notes, however, of some five visits; and, when asked for three reports sent to C's attorneys during that period, the attorneys claimed privilege. *Held*, mandamus issued to compel production of the reports. The privilege can be invoked where the client was sent by the attorneys to the doctor for examination, but not where the client was treated by the doctor before the doctor was thus asked to serve as agent. C's theory was that, although Dr. N was not privileged with respect to knowledge of any facts gained, and fully related those facts on deposition, his reports to the attorneys were privileged. But knowledge otherwise not privileged does not become so merely by being communicated to an attorney:

"Here the real parties in interest would have us apply the attorney-agent-client privilege where the witness whose *knowledge of the facts is unprivileged* testifies that he has no record or independent recollection of certain of such facts but has made reports to the client's attorneys which, so far as appears, may set forth the otherwise unrecorded facts. As pointed out by petitioner, such a holding would permit, by the deliberate destruction of records after the rendering of reports to counsel, the sealing up of nonprivileged information by the passage of time and the resultant lapse of memory on the part of the witness. ... We hold that the forwarding to counsel of nonprivileged records, in the guise of reports, will not create a privilege with respect to such records and their contents where none existed theretofore." (55 C.2d 456.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General*. See 1 McCormick 6th, §§89, 96. (2) *Illustrations*. See *Green & Shinee v. Superior Court* (2001) 88 C.A.4th 532, 537, 105 C.R.2d 886 [supplemental reports prepared, in keeping with departmental procedure, by sheriff's deputies concerning off-duty forceful encounter in restaurant were not privileged, even though, after encounter became subject of department investigation, one deputy delivered them to his attorney]; *Doe 2 v. Superior Court* (2005) 132 C.A.4th 1504, 1521, 34 C.R.3d 458 [letter sent by one clergy member to another during sexual abuse controversy was not subject to attorney-client privilege even though clergy member who originally sent it intended that recipient would pass it on to church's attorney]. *West's Key Number Digest*, Witnesses k.204(2)





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##### b. Reports Prepared for Litigation.

##### 1. Nature of Problem.

2 *Witkin Cal. Evid. Witnesses* § 129

[§ 129] Nature of Problem.

Where there is no bald attempt to insulate existing documentary evidence (*supra*, §128), a stronger case is made for the privilege. The typical situation arises after an automobile accident or other negligent act, where the agent or adjuster of the defendant or the defendant's insurance carrier investigates and obtains written statements from witnesses (often including the plaintiff), takes photographs, and makes written reports to the defendant or insurance carrier. To what extent are these reports of agents of the client privileged?

If the report is not a matter of ordinary business routine, but appears to be specially prepared for the use of the client's attorney in connection with anticipated litigation, it is *privileged*. (See *New York Cas. Co. v. Superior Court* (1938) 30 C.A.2d 130, 132, 85 P.2d 965; *Holm v. Superior Court* (1954) 42 C.2d 500, 508, 267 P.2d 1025, *infra*, §130; 1 McCormick 5th, §96; 8 Wigmore (McNaughton Rev.) §§2318, 2319; 1 U.C.L.A. L. Rev. 605; 1942 A.S. 888; 1954 A.S. 791; 55 A.L.R.4th 336 [insured's communication to insurer privileged as transmission to insurer-assigned attorney for defense of claim].)

In many cases, however, an accident report is required by a transportation company or similar party, as a matter of routine business practice, but for a dual purpose: preparation for anticipated litigation, and improvement of service by elimination of careless or incompetent operators and defective equipment. In other words, the report would be made even though no litigation were threatened or commenced; and, so far as privilege is concerned, it might be held to fall within the general rule requiring disclosure of *preexisting* documents. (See *Holm v. Superior Court*, *supra*, 42 C.2d 511 [dissenting opinion]; 1 McCormick 5th, §96.) But the California court took a different view. (See *infra*, §130.)

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See 1 McCormick 6th, §96.



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#### 2. Governing Law: Dominant Purpose Test.

2 Witkin Cal. Evid. Witnesses § 130

[§ 130] Governing Law: Dominant Purpose Test.

(1) *Nature of Test.* In *Holm v. Superior Court* (1954) 42 C.2d 500, 267 P.2d 1025, the court held that, where a report has a dual purpose, it is privileged if its *dominant purpose* is transmittal to the attorney in the course of professional employment. The question is one of fact for the trial judge, but whose determination is subject to review for abuse of discretion. (42 C.2d 507.)

The action in the *Holm* case was against defendant city and G, its bus driver, for personal injuries resulting from alleged negligence in operation of a bus. The judge granted an order of inspection of (a) written reports of G, the driver, made to the city, giving his version of the accident, and (b) photographs taken at the scene of the accident by the city's agents. *Held*, prohibition granted to prevent enforcement of the order; although prepared in the regular course of business, the dominant purpose of collecting these materials was their use in threatened litigation. The court said: "[T]here is no valid basis for a distinction between a communication created for transmittal to an attorney to prepare for threatened litigation following particular accidents, and a communication prepared for an identical purpose under standing rules in the case of all accidents involving personal or property injury. Because the scope of the operations of the defendant city's municipal railway is such as to require communications of this nature as a routine matter, it cannot be said that the attorney-client privilege did not attach." (42 C.2d 508.) (See *Jessup v. Superior Court* (1957) 151 C.A.2d 102, 109, 311 P.2d 177 [routine report of investigation of drowning of boy in municipal swimming pool, delivered to city manager and then to city attorney; dominant purpose held preparation for litigation, and privileged].)

(2) *Abuse of Discretion Standard.* The "discretion" test of the *Holm* case makes the result difficult to predict. In *Union Oil Co. v. Superior Court* (1957) 151 C.A.2d 286, 311 P.2d 640, plaintiffs, heirs of decedents, sued petitioner for wrongful death from poisonous gas. They sought inspection of written statements made by petitioner's employees and other witnesses concerning the accident, averring that the statements were made pursuant to a petroleum safety order required by statute. Petitioner's affidavits averred that the statements were prepared and delivered to counsel in anticipation of litigation. The trial judge ordered inspection. *Held*, affirmed; his determination of the dominant purpose (required report) on conflicting affidavits was binding. (151 C.A.2d 289.) (Cf. *Jessup v. Superior Court*, *supra*, 151 C.A.2d 110, 111 [discretion held abused, order of inspection improper].)

The *Holm* and *Jessup* cases were followed in *Heffron v. Los Angeles Transit Lines* (1959) 170 C.A.2d 709, 339 P.2d 567, a wrongful death action. Defendant's bus driver, pursuant to company rules, made a report which went to its insurance company and was then transmitted to its attorney. An affidavit stated that the primary purpose of such a report

is the preparation of a defense to anticipated litigation. *Held*, this supported the trial judge's implied finding of dominant purpose, and made the report privileged. (170 C.A.2d 717.) (See *Greeneich v. Southern Pac. Co.* (1961) 189 C.A.2d 100, 110, 11 C.R. 235; *Safeway Stores v. Superior Court* (1961) 193 C.A.2d 270, 274, 14 C.R. 243 [reviewing cases and holding dominant purpose not established]; *Greyhound Corp. v. Superior Court* (1961) 56 C.2d 355, 398, 15 C.R. 90, 364 P.2d 266 [statements taken from independent nonparty witnesses; held not confidential and not privileged]; *infra*, §131 et seq.)

(3) *Holm's Photographs Holding Disapproved*. In its holding as to photographs, however, the *Holm* case was disapproved in *Suezaki v. Superior Court* (1962) 58 C.2d 166, 176, 23 C.R. 368, 373 P.2d 432, *infra*, §135.

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3. Report Must Emanate From Client.

2 Witkin Cal. Evid. Witnesses § 131

[§ 131] Report Must Emanate From Client.

In *San Diego Professional Assn. v. Superior Court* (1962) 58 C.2d 194, 23 C.R. 384, 373 P.2d 448, S Assn. hired plaintiff architects to prepare plans and supervise construction of a building. After completion plaintiffs sued for a balance due for services. S Assn., defendant, answered and cross-complained alleging malpractice and breach of contract, and its attorney retained an engineering firm to make a study of all the documents and to analyze the alleged deficiencies. The firm's report was delivered to the attorney. Plaintiffs then sought an order of inspection, which the trial judge granted. *Held*, the order was not an abuse of discretion.

Defendant contended that the report was like that of a doctor retained by an attorney to report on the physical or mental condition of the client, but the court saw no similarity:

"[N]either the client's body, mind, nor private and confidential papers were submitted to the engineers for examination and report. They were handed the 'contract documents.' In other words, their primary duty was not to examine and assess the client's building, but to evaluate and report any errors found in certain architectural designs, building specifications and contracts, all of which were part of the documents which constituted the contract between the parties to the lawsuit. Such documents were not private to the client, but were equally available to both parties, both before and during the pendency of the action." (58 C.2d 201.)

Thus, under the test that privileged matters are only those which emanate in confidence *from the client*, there was no privilege for other information merely because it was reduced to writing and transmitted by a "report" to the attorney. (58 C.2d 202.) (For work product issue, see *infra*, §139; and see 97 A.L.R.2d 770 [pretrial discovery of opponent's engineering reports].)

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#### 4. Where Corporation or Similar Entity Is Client.

##### aa. Chadbourne Criteria.

2 *Witkin Cal. Evid. Witnesses* § 132

[§ 132] Chadbourne Criteria.

In *Gene Compton's Corp. v. Superior Court* (1962) 205 C.A.2d 365, 23 C.R. 250, the court held that statements of employees taken by the adjuster for the employer's insurance carrier and transmitted to the attorney were privileged as a matter of law. This decision was followed by *Atchison, Topeka & Santa Fe Ry. Co. v. Superior Court* (1962) 208 C.A.2d 73, 76, 25 C.R. 54, but both decisions were overruled in *D. I. Chadbourne v. Superior Court* (1964) 60 C.2d 723, 36 C.R. 468, 388 P.2d 700.

In the *Chadbourne* case, Mr. and Mrs. S sued for personal injuries sustained in a fall on a sidewalk, alleging negligence of defendant Chadbourne. Answering plaintiff's interrogatories, defendant admitted that it had obtained the written statement of M, an employee who performed work on the sidewalk. In response to plaintiff's motion for inspection, showing good cause (M had failed to appear for a deposition and was on foreign duty with the armed forces), defendant filed a declaration of the adjuster that M's statement had been taken by the adjuster of defendant's insurance carrier, on direction of the attorneys, as part of the preparation of the defense, and that the statement had been given to the adjuster. The judge ordered inspection and defendant sought mandamus. *Held*, writ denied; the statement was not privileged as a matter of law, and the judge's determination of the factual issue in favor of inspection was binding on the reviewing court. The lengthy opinion proceeds as follows:

(a) *Problem where client is corporation.* The test, whether the client intended the communication to be confidential, gives rise to two alternative questions: (1) whether the corporate employee who made the statement had such intent, or (2) if he had none and was required by the corporation to make the statement, whether its intent made it privileged. (60 C.2d 732, 733.) The problem is accentuated where the communication passes through several hands (here, e.g., the employee communicated the statement to the adjuster who reported to the adjusting company which reported to the insurance company which transmitted it to the attorney). (60 C.2d 735.)

(b) *Governing policy.* The artificial corporate person should have the same opportunity as a natural person to communicate with its attorney in confidence. But it should not have greater privileges merely because it must utilize a natural person in order to speak. (60 C.2d 736.)

(c) *Basic principles.* Pursuant to this policy, the following principles emerge (60 C.2d 736):

(1) "When the employee of a defendant corporation is also a defendant in his own right (or is a person who may be charged with liability), his statement regarding the facts with which he or his employer may be charged, obtained by a representative of the employer and delivered to an attorney who represents (or will represent) either or both of them, is entitled to the attorney-client privilege on the same basis as it would be entitled thereto if the employer-employee relationship did not exist."

(2) "When such an employee is not a codefendant (or person who may be charged with liability), his communication should not be so privileged unless, under all of the circumstances of the case, he is the natural person to be speaking for the corporation; that is to say, that the privilege will not attach in such case unless the communication constitutes information which emanates from the corporation (as distinct from the nonlitigant employee), and the communicating employee is such a person who would ordinarily be utilized for communication to the corporation's attorney."

(3) "When an employee has been a witness to matters which require communication to the corporate employer's attorney, and the employee has no connection with those matters other than as a witness, he is an independent witness; and the fact that the employer requires him to make a statement for transmittal to the latter's attorney does not alter his status or make his statement subject to the attorney-client privilege."

(4) "Where the employee's connection with the matter grows out of his employment to the extent that his report or statement is required in the ordinary course of the corporation's business, the employee is no longer an independent witness, and his statement or report is that of the employer."

(5) "If, in the case of the employee last mentioned, the employer requires (by standing rule or otherwise) that the employee make a report, the privilege of that report is to be determined by the employer's purpose in requiring the same; that is to say, if the employer directs the making of the report for confidential transmittal to its attorney, the communication may be privileged."

(6) "When the corporate employer has more than one purpose in directing such an employee to make such report or statement, the dominant purpose will control, unless the secondary use is such that confidentiality has been waived."

(7) "If otherwise privileged under the rules stated above, a communication does not lose its privilege merely because it was obtained, with the knowledge and consent of the employer, by an agent of the employer acting under such agency."

(8) "For such purpose an insurance company with which the employer carries indemnity insurance, and its duly appointed agents, are agents of the employer corporation; but the extent to which this doctrine may be carried, and the number of hands through which the communication may travel without losing confidentiality must always depend on reason and the particular facts of the case."

(9) "And in all corporate employer-employee situations it must be borne in mind that it is the intent of the person from whom the information emanates that originally governs its confidentiality (and hence its privilege); thus where the employee who has not been expressly directed by his employer to make a statement, does not know that his statement is sought on a confidential basis (or knowing that fact does not intend it to be confidential), the intent of the party receiving and transmitting that statement cannot control the question of privilege."

(10) "Similarly, where the corporate employer directs the employee, at the request of its insurance carrier, to make such a statement, the intent of the employer controls; and unless the insurance carrier (or its agent) has advised the employer that the employee's statement is to be obtained and used in such manner, it cannot be said that the corporation intended the statement to be made as a confidential communication from client to attorney."

(11) "Finally, no greater liberality should be applied to the facts which determine privilege in the case of a corporation than would be applied in the case of a natural person (or association of persons), except as may be necessary

to allow the corporation to speak."

(d) *Application to this case.* The burden of establishing privilege was not met. M, the employee, was not a defendant, and no attempt was made to show that he could be responsible for the accident. No claim was made that his statement contained any information emanating from him as a spokesman of the corporation, or anything that could not have been known to a nonemployee witness. More important, the declaration was made by the adjuster and was limited to his intent; there was no indication of a confidential intention of M or defendant employer. (60 C.2d 738.) (See 12 U.C.L.A. L. Rev. 629.)

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##### bb. Illustrations: Report Privileged.

2 Witkin Cal. Evid. Witnesses § 133

[§ 133] Illustrations: Report Privileged.

In *People v. Glen Arms Estate* (1964) 230 C.A.2d 841, 41 C.R. 303, a condemnation proceeding, the *Chadbourn* principles were applied to an employee of a public entity, and the privilege upheld. N, a state right-of-way agent, made a report to D, the district agent, as a basis for an offer of settlement; the report was then transmitted to the state's attorneys. *Held*: The trial judge was warranted in concluding that the report was prepared for contemplated litigation and thus privileged, although no litigation was as yet instituted.

(a) The client's employee was required to make the report and did so as the speaking agent of the client. (230 C.A.2d 862.)

(b) The dominant purpose of the report was to enable the client (Division of Highways) to communicate its knowledge to its attorneys in preparation for the litigation. (230 C.A.2d 862.)

Later cases are to the same effect. (See *Sierra Vista Hosp. v. Superior Court* (1967) 248 C.A.2d 359, 367, 56 C.R. 387 [after plaintiff patient suffered alleged negligent injury in defendant's hospital, defendant's administrator directed its nursing head to investigate and transmit information to insurer for use of its attorney; report was labeled "confidential," it was not shown to anyone else, and no copies were kept by hospital]; *Payless Drug Stores v. Superior Court* (1976) 54 C.A.3d 988, 991, 127 C.R. 4 ["Evidence to the effect that the report in question was prepared by an employee of the corporate employer on the date of the accident on a preprinted form furnished by the insurance carrier headed 'Public Liability Accident--Report Every Accident Immediately to Harbor Insurance Company' is sufficient to establish the dominant purpose"]; *Alpha Beta Co. v. Superior Court* (1984) 157 C.A.3d 818, 826, 203 C.R. 752, *infra*, §134 [some matters privileged, some matters not privileged]; *Vela v. Superior Court* (1989) 208 C.A.3d 141, 148, 255 C.R. 921, *supra*, §89 [statements obtained by city's special investigators from police officers to protect city from future litigation were privileged]; *Soltani-Rastegar v. Superior Court* (1989) 208 C.A.3d 424, 426, 256 C.R. 255 [statements made to insurance claims representative were privileged, even though litigation had not been commenced and no attorney had been assigned].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Scripps Health v. Superior Court* (2003) 109 C.A.4th 529, 534, 135 C.R.2d 126 [hospital's occurrence reports, prepared by hospital employees under hospital's risk management plan, fell within privilege, as dominant purpose of



reports involved transmittal to attorney in course of professional attorney-client relationship under circumstances in which hospital expected confidentiality].



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#### 6. Writings Transmitted to Attorney.

##### b. Reports Prepared for Litigation.

#### 4. Where Corporation or Similar Entity Is Client.

##### cc. Illustrations: Report Not Privileged.

2 Witkin Cal. Evid. Witnesses § 134

[§ 134] Illustrations: Report Not Privileged.

In *Alpha Beta Co. v. Superior Court* (1984) 157 C.A.3d 818, 203 C.R. 752, plaintiff Sundry was a former employee of defendant Alpha Beta, a corporation. He brought a libel suit against Alpha Beta and its store manager for statements made to a new prospective employer. Kanode, the corporation's vice president and general counsel, engaged attorney Duryea to handle the defense. Duryea prepared an answer denying generally all of the allegations of the complaint and asserting affirmative defenses, and Kanode verified it on information and belief. Plaintiff's counsel then took Kanode's deposition, and Kanode, claiming privilege, refused to answer many questions. Plaintiff contended that the questions did not call for privileged matter, or, if they did, that the privilege was waived by Kanode's verification of the answer. The lower court directed Kanode to answer. *Held*, applying the criteria established in *D. I. Chadbourne v. Superior Court* (1964) 60 C.2d 723, 36 C.R. 468, 388 P.2d 700, *supra*, §132, some matters were privileged and some were not.

#### (a) *Matters privileged.*

(1) Questions relating to Kanode's discussions with Alpha Beta's president were privileged; i.e., the communications were made by the corporation's general counsel to its high ranking officer for the purpose of preparing a defense to litigation. (157 C.A.3d 826.)

(2) Questions relating to Kanode's factual basis for verifying the answer were privileged; i.e., the answer was prepared by attorney Duryea, and the information was based on communications with this privileged source. (157 C.A.3d 827.)

(3) Questions relating to Kanode's discussion with "anyone" concerning whether defendant Evans, the store manager, was advised of certain company policies, in part called for privileged communications; hence, the privilege existed unless plaintiff could establish that the answers sought would come from a nonprivileged source. (157 C.A.3d 827.)

#### (b) *Matters not privileged.*

(1) Questions seeking what Kanode "meant" by certain affirmative defenses in the answer merely called for personal information and not information based on privileged communications. (157 C.A.3d 828.)

(2) Questions relating to whether Alpha Beta had employed investigators for the case did not call for privileged information, and the identity of the investigators would not be privileged information. (157 C.A.3d 828.)

(3) Questions relating to Alpha Beta's policy regarding release of personnel information were preliminary and foundational, and did not call for disclosure of privileged information. (157 C.A.3d 828, 829.)

In *Triple A Machine Shop v. California* (1989) 213 C.A.3d 131, 261 C.R. 493, plaintiff Triple A, lessee of space from the Navy at a San Francisco shipyard, was the subject of investigation by the State Department of Health Services and the district attorney for alleged illegal dumping of hazardous waste. Plaintiff filed the present action for injunctive relief, alleging that defendant State of California and the San Francisco district attorney had contacted plaintiff's high level managerial employees without his notice or consent, in violation of the attorney-client privilege and former Rule 7-102 of the Rules of Professional Conduct. The trial judge issued a preliminary injunction, and defendants appealed. The Court of Appeal first granted supersedeas to stay the civil action pending completion of a criminal case against Triple A, and then reversed the order granting a preliminary injunction.

(a) The scope of the privilege is established by *Chadbourn*. (213 C.A.3d 141, quoting the 11 listed principles.) And not all corporate employees are necessarily within the privilege: "For example, it is possible in any given case that a corporate officer or director covered by rule 2-100 may not be privy to information protected by the attorney-client privilege, while a lower level employee who is not shielded from contact under rule 2-100 may be in possession of substantial privileged information. However, this does not enable corporate counsel to automatically assert the privilege as to every corporate employee and on that basis enjoin opposing counsel from any and all contact with employees not covered by rule 2-100." (213 C.A.3d 143.)

(b) The privilege protects only disclosure of communications between attorney and client, not disclosure of the underlying facts which were communicated; and it does not extend to independent witnesses. (213 C.A.3d 143, citing the text.) Here the information sought by defendants concerned nonprivileged observations by the witnesses, occurring outside any attorney-client relationship. "Respondent's application for injunctive relief is based on little more than the bare assertion that, unless enjoined, appellants may obtain privileged information. The mere possibility that appellants may inadvertently obtain privileged information is an insufficient basis for the present injunction." (213 C.A.3d 143.)

When an employee is no more than a witness to an accident, the employee's statement, made to an attorney for the employer, is not protected from disclosure by the attorney-client privilege even if it was taken in preparation for litigation, because an employer should not be allowed to silence witnesses when a natural person could not. (*Martin v. Workers' Comp. App. Bd.* (1997) 59 C.A.4th 333, 346, 347, 69 C.R.2d 138 [board erred in ruling that statements by employees, elicited at request of employer's counsel during investigation of employee's compensation claim, were privileged; remand was necessary to determine whether each statement was by independent witness (hence not protected) or made in scope of employee's duties (protected)].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Superior Court (Pfingst)* (2000) 83 C.A.4th 387, 399, 99 C.R.2d 646 [deputy district attorney who was being investigated by state Attorney General for possible crimes relating to his employment was not holder of privilege as to items seized from his home that were generated in course of his employment; relying on *D.I. Chadbourne v. Superior Court* (1964) 60 C.2d 723, 36 C.R. 468, 388 P.2d 700, text, §132].



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#### 6. Writings Transmitted to Attorney.

##### c. Distinction: Photograph or Film.

2 Witkin Cal. Evid. Witnesses § 135

[§ 135] Distinction: Photograph or Film.

In *Suezaki v. Superior Court* (1962) 58 C.2d 166, 23 C.R. 368, 373 P.2d 432, Henry and Grace sued C and G Co. for personal injuries. Defendants' attorney hired an investigator to take motion pictures of plaintiff Henry without his knowledge. Henry, by interrogatories, compelled defendants over objections to disclose the existence of the films and the fact that they had been taken by an independent investigator and delivered by him to the attorney. Then plaintiffs moved for production and inspection of the films under C.C.P. 2031. The objection was that the films had been "communicated" to defendants' attorney for confidential use in preparation of the defense. The trial judge, satisfied with the showing of good cause for inspection, nevertheless thought that *Holm v. Superior Court* (1954) 42 C.2d 500, 267 P.2d 1025, supra, §130, and *Grand Lake Drive In v. Superior Court* (1960) 179 C.A.2d 122, 127, 3 C.R. 621, supra, §112, required denial of the motion. *Held*, mandamus granted to compel vacating of the order:

(a) *Grand Lake and Holm cases are distinguishable.*

(1) *Grand Lake*, which did not deal with this type of material, is not in point. (58 C.2d 172.)

(2) The *Holm* case did deal with a photograph, but is distinguishable on its facts, and its supposed rule is no longer acceptable. (a) The "dominant purpose" theory was devised to determine the capacity in which a public employee was acting; it does not apply to a natural person who communicates to an attorney. (58 C.2d 174.) (b) And the photograph was not privileged. "A picture of a public bus on a public street is not a confidential communication. Therefore, insofar as the *Holm* case may be interpreted to hold that any photograph taken for the purpose of litigation and transmitted to an attorney is privileged, per se, it is disapproved." (58 C.2d 176.)

(b) *No privilege in present case.* There is no basis in principle for the privilege.

(1) The intention of the parties that a matter be confidential is immaterial, unless there is a *communication* by the *client* to the attorney. Here, the film was a physical object, not a communication. Even if deemed a communication, it was not one from the *client*. Prior cases in which communications made by a client's agent were held privileged usually involved a physical or mental examination or blood test of the *client* by a specialist, engaged to communicate something from the client which the client would have transmitted himself if able to do so. No such communication occurred here. (58 C.2d 177.)

(2) "The films are not a graphic representation of the defendants, their activities, their mental impressions, anything

within their knowledge, or of anything owned by them. The films are representations of the plaintiff, not of the defendants. If they can be said to be a 'communication' in any sense of the word, they represent an unconscious and unintended 'communication' from plaintiff." And there is no privilege in "a communication from a litigant to his adversary's attorney." (58 C.2d 177.) (See 19 A.L.R.4th 1236 [photographs of civil litigant realized by opponent's surveillance as subject to pretrial discovery]; for work product issue, see *infra*, §139.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2031*, on inspection demands, was repealed and replaced by *C.C.P. 2031.010* et seq. in 2004 without substantive change.



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#### 6. Writings Transmitted to Attorney.

##### d. Distinction: Expert Opinion.

2 Witkin Cal. Evid. Witnesses § 136

[§ 136] Distinction: Expert Opinion.

In *Oceanside Union School Dist. v. Superior Court* (1962) 58 C.2d 180, 23 C.R. 375, 373 P.2d 439, plaintiff brought a proceeding to condemn land of several defendants. Defendants sought by interrogatories to obtain the opinions (not reports) of plaintiff's appraisers as to the market value and severance damages of each parcel. *Held*, the judge's order to answer was correct.

(a) Under the analysis in *Suezaki v. Superior Court* (1962) 58 C.2d 166, 23 C.R. 368, 373 P.2d 432, *supra*, §135, the information required did not emanate from the client but from his adversary, and the determining factor in applying the privilege is not the confidential intent but the source of the information. (58 C.2d 189.)

(b) Nor is there any distinction between factual data gathered by an expert and the opinion he or she forms by studying that data; if the facts are unprivileged because not emanating from the client, the opinion of the expert who gathered them is similarly unprivileged. (58 C.2d 191.) (For work product issue, see *infra*, §139; on confidentiality of a report by a court-appointed expert to assist in preparing a defense, see *Torres v. Municipal Court* (1975) 50 C.A.3d 778, 123 C.R. 553 [medical report to public defender should have been protected by privilege under *Ev.C.* 952]; on overlapping of attorney-client and psychotherapist-patient privileges, where information sought emanated from the client, see *People v. Lines* (1975) 13 C.3d 500, 507, 119 C.R. 225, 531 P.2d 793, *infra*, §237; on waiver of privilege under *C.C.P.* 2032, which deals with mutual discovery about party's physical condition, see *Queen of Angels Hosp. v. Superior Court* (1976) 57 C.A.3d 370, 374, 129 C.R. 282 [construing predecessor statute].)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P.* 2032, on physical and mental examinations, was repealed and replaced by *C.C.P.* 2032.010 et seq. in 2004 without substantive change.



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#### 7. Attorney's Work Product.

##### a. Federal Hickman Rule.

##### 1. Statement of Rule.

2 Witkin Cal. Evid. Witnesses § 137

[§ 137] Statement of Rule.

In *Hickman v. Taylor* (1947) 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451, a wrongful death action arising out of the sinking of a tug, defendant's attorney obtained both oral and written statements from survivors. Plaintiff served interrogatories seeking production of both. In rejecting his claim, the Court reasoned as follows:

(a) *The material was not protected from discovery by the attorney-client privilege.* "[T]he protective cloak of this privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation. Nor does this privilege concern the memoranda, briefs, communications and other writings prepared by counsel for his own use in prosecuting his client's case; and it is equally unrelated to writings which reflect an attorney's mental impressions, conclusions, opinions or legal theories." (67 S.Ct. 392, 91 L. Ed. 461.)

(b) *The work product of a lawyer is not subject to discovery except in cases of necessity* (e.g., where witnesses are no longer readily available; no such showing made here). "Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways--aptly though roughly termed ... the 'Work product of the lawyer.' Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." (67 S.Ct. 393, 91 L. Ed. 462.)

Commentary on the *Hickman* case has been extensive. (See 1 McCormick 5th, §96; Hogan, 2 Cal. Civil Discovery, Chap. 13; 62 Harv. L. Rev. 269; 10 Stanf. L. Rev. 316; 45 Cal. L. Rev. 488; 72 Harv. L. Rev. 560; 74 Harv. L. Rev. 1027; 15 Stanf. L. Rev. 718; 18 Stanf. L. Rev. 783.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See Hogan, 2 Cal. Civil Discovery 2d, Chap. 13; 1 McCormick 6th, §96. *West's Key Number Digest*, Pretrial Procedure k.35



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##### a. Federal Hickman Rule.

##### 2. Scope of Rule.

2 Witkin Cal. Evid. Witnesses § 138

[§ 138] Scope of Rule.

(1) *In General.* The rule applies to criminal as well as civil cases, but it may be waived. (See *United States v. Nobles* (1975) 422 U.S. 225, 95 S.Ct. 2160, 2170, 2171, 45 L.Ed.2d 141, 154.)

It also applies to *tax summons enforcement proceedings*. In *Upjohn Co. v. United States* (1981) 449 U.S. 383, 101 S.Ct. 677, 687, 66 L.Ed.2d 584, 594, 598, *supra*, §126, the Court first held that responses to questionnaires and notes reflecting responses to interview questions were protected by the attorney-client privilege. (See *supra*, §126.) The Court then held that notes and memoranda of interviews going beyond recording responses, to the extent not protected by that privilege, were protected by the work product doctrine. (For other situations, see *Goldberg v. United States* (1976) 425 U.S. 94, 96 S.Ct. 1338, 47 L.Ed.2d 603 [Jencks Act does not contain work product exception for government lawyers]; 6 Southwestern U. L. Rev. 696; 12 U.S.F. L. Rev. 569 [corporate attorney]; 35 A.L.R.3d 412 [development of work product doctrine since *Hickman*].)

(2) *Necessity Exception.* *Upjohn* added some observations on the necessity exception to the work product doctrine, recognized in *Hickman v. Taylor* (1947) 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451, *supra*, §137:

(a) Where production of relevant and nonprivileged facts is essential to the preparation of the case, or witnesses are no longer available or may be reached only with difficulty, discovery may be allowed. (101 S.Ct. 687, 66 L.Ed.2d 594.) But forcing an attorney to disclose notes and memoranda of oral statements of witnesses tends to reveal the attorney's mental processes. *F.R. Civ. P., Rule 26* permits disclosure of documents and tangible things on a showing of substantial need and inability to obtain the equivalent without undue hardship, but states that "the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney." And *Hickman* emphasizes the need for such protection. (101 S.Ct. 688, 66 L.Ed.2d 598.)

(b) Some courts have concluded that no showing of necessity can overcome protection of work product which is based on oral statements of witnesses; however, "[w]e do not decide the issue at this time." The magistrate below applied the "substantial need" and "without undue hardship" standard of *F.R. Civ. P., Rule 26(b)(3)*; that was wrong:

"While we are not prepared at this juncture to say that such material is always protected by the work-product rule, we think a far stronger showing of necessity and unavailability by other means than was made by the Government or applied by the magistrate in this case would be necessary to compel disclosure." (101 S.Ct. 688, 66 L.Ed.2d 599.)



**SUPPLEMENT:** [This section is current through the latest supplement]



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## 7. Attorney's Work Product.

## b. California Cases Before 1963 Statute.

2 Witkin Cal. Evid. Witnesses § 139

[§ 139] California Cases Before 1963 Statute.

*Greyhound Corp. v. Superior Court* (1961) 56 C.2d 355, 15 C.R. 90, 364 P.2d 266, rejected the contention that an attorney's work product was necessarily immune from normal discovery. The court pointed out that even *Hickman v. Taylor* (1947) 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451, (supra, §137), included cautions against too strict an application of its theory, and that the principal purpose of the rule was to prevent an incompetent practitioner from taking undue advantage of an adversary's efforts. The court then approved the approach of *Trade Center Properties v. Superior Court* (1960) 185 C.A.2d 409, 411, 8 C.R. 345, in which the claim is recognized as a good ground for a discretionary protective order (see 2 Cal. Evidence (4th), Discovery, §§59 et seq., 82) rather than as a basis for routine exclusion:

"In its essence, the 'work product rule' is a form of federally created privilege. ... The Legislature expressly refused to extend the concepts of privilege when adopting the discovery procedures. Since privilege is created by statute it should not be extended by judicial fiat. While the *Hickman* case, and any other case from a jurisdiction having a similar discovery statute, may be persuasive, and its reasoning accepted where applicable to California ... , such should not be accepted as creating a privilege where none existed. We are therefore inclined to the view that the work product privilege does not exist in this state. This is not to say that discovery may not be denied, in proper cases, when disclosure of the attorney's efforts, opinions, conclusions or theories would be against public policy (as in the *Trade Center* situation, *supra*), or would be eminently unfair or unjust, or would impose an undue burden. The California Legislature has designed safeguards for such situations. The sanctions which protect against the abuse of discovery give the trial court full discretion to limit or deny when the facts indicate that one litigant is attempting to take advantage of the other. Facts which give rise to the work product privilege in other jurisdictions may, in some circumstances, indicate an abusive attempt to 'ride free' on the opponent's industry. Such facts are not even hinted at herein, and, if they were, the respondent court has resolved them in favor of discovery. Petitioner has not only failed to convince us that 'work product' is equated with privilege in California, it has failed to indicate that the reasons underlying that doctrine would be applicable to this proceeding." (56 C.2d 401; see 9 U.C.L.A. L. Rev. 223; 49 Cal. L. Rev. 994; 14 Stanf. L. Rev. 606; 18 Stanf. L. Rev. 791.)

In *Suezaki v. Superior Court* (1962) 58 C.2d 166, 23 C.R. 368, 373 P.2d 432, defendants' investigator took motion pictures of plaintiff, a personal injury claimant, and delivered them to defendants' attorney for use in the trial. (See supra, §135.) Held, defendants' objection to inspection was unsound. "They urge that undoubtedly the films were the result of the work product of the attorney, which is correct, and contend that for that reason alone they are privileged as

a matter of law, which is incorrect." (58 C.2d 177.)

(a) Under the *Greyhound* case, work product is only a factor which the trial judge may consider and not a complete bar to discoverability. (58 C.2d 177.)

(b) The trial judge, exercising discretion under the discovery statutes to prevent abuse and to rule consistently with equity and justice, can protect those portions of the attorney's files disclosing the attorney's mental processes formed while interviewing witnesses. "Such matters should not be discoverable under the California rule." (58 C.2d 178.)

(c) There is nothing even in the federal work product rule which implies that the film calls for such protection. (58 C.2d 179.)

(d) Inspection in these cases should neither be denied nor ordered as a matter of law. "While it would appear that inspection of the films should be permitted, the discretion granted by the statute is the discretion of the trial court, not of this court. Therefore, the matter should be referred back to the trial court to permit it to exercise its discretion as conferred by statute, and to permit it to decide whether on the showing that has or may be made it should deny, grant, or conditionally grant the order." (58 C.2d 179.) (See 10 U.C.L.A. L. Rev. 575, 593.)

In *San Diego Professional Assn. v. Superior Court* (1962) 58 C.2d 194, 23 C.R. 384, 373 P.2d 448, plaintiffs successfully sought inspection of a report on documents in litigation made by an expert for defendant's attorney. (See supra, §131.) The *Suezaki* approach was employed as follows:

(a) "The report here involved was clearly the work product of petitioner's attorney. For the purpose of preparing for trial, the attorney gathered together the documents on which defendant's case was predicated, took them to the engineers, discussed the same with them, and purchased the evaluation and opinions of such experts regarding the alleged failure of the real party in interest to perform in a professional manner, or in accordance with its contract." (58 C.2d 204.)

(b) The judge determined that the prima facie showing of good cause outweighed the necessity of protecting files from invasion, and that defendant failed to sustain its burden of showing that it would be harmed by the inspection. Hence, the judge's order, with its reasonable limitations on use and provision for sharing costs, was a proper exercise of discretion. (58 C.2d 204, 205.)

Finally, in *Oceanside Union School Dist. v. Superior Court* (1962) 58 C.2d 180, 192, 23 C.R. 375, 373 P.2d 439, see supra, §136, the court pointed out that the trial judge might well have withheld the desired discovery until the parties were in a position to trade appraisals, but held that it was not an abuse of discretion to accept defendants' explanation as to why they had not yet obtained their own appraisals. (See 18 *Stanf. L. Rev.* 793.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### 7. Attorney's Work Product.

#### c. Statutory Work Product Rule.

2 Witkin Cal. Evid. Witnesses § 140

[§ 140] Statutory Work Product Rule.

*Greyhound Corp. v. Superior Court* (1961) 56 C.2d 355, 15 C.R. 90, 364 P.2d 266, and *Suezaki v. Superior Court* (1962) 58 C.2d 166, 23 C.R. 368, 373 P.2d 432, *supra*, §139, rejecting the work product theory of privilege, met with considerable opposition from lawyers. In 1963, the State Bar sponsored statutory changes designed to give more protection to the work product than these decisions offered. (See former C.C.P. 2016(b); 18 *Stanf. L. Rev.* 783.) Effective July 1, 1987, these provisions were restated without substantial change as follows:

(1) *Underlying Policy*. "It is the policy of the state to: (1) preserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of those cases; and (2) to prevent attorneys from taking undue advantage of their adversary's industry and efforts." (C.C.P. 2018(a).) (See 36 *U.C.L.A. L. Rev.* 151 [applying attorney-client and work product privileges to allied party exchange of information]; 39 *Proof of Facts* 3d 1 [proof that materials are or are not subject to protection]; C.J.E.R., *Judges Benchbook, Civil Proceedings: Discovery* §4.28 et seq.; Hogan, 2 *Cal. Civil Discovery* §13.1 et seq.; C.E.B., *Jefferson, 2 California Evidence Benchbook* 3d, Chap. 41; *infra*, §141 et seq.)

(2) *Qualified Protection*. Subject to C.C.P. 2018(c) (*infra*, this section), "the work product of an attorney is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice." (C.C.P. 2018(b); see *American Mut. Liab. Ins. Co. v. Superior Court* (1974) 38 C.A.3d 579, 594, 113 C.R. 561 [construing predecessor statute].)

(3) *Absolute Protection*. "Any writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories shall not be discoverable under any circumstances." (C.C.P. 2018(c); see *American Mut. Liab. Ins. Co. v. Superior Court*, *supra*, 38 C.A.3d 594 [construing predecessor statute].)

(4) *Restatement of Existing Law*. C.C.P. 2018 "is intended to be a restatement of existing law relating to protection of work product. It is not intended to expand or reduce the extent to which work product is discoverable under existing law in any action." (C.C.P. 2018(d).)

(5) *Discovery in Disciplinary Investigations*. "The State Bar may discover the work product of an attorney against whom disciplinary charges are pending when it is relevant to issues of breach of duty by the lawyer, subject to applicable client approval and to a protective order, where requested for good cause, to ensure the confidentiality of work product except for its use by the State Bar in disciplinary investigations and its consideration under seal in State

Bar Court proceedings. For purposes of this section, whenever a client has initiated a complaint against an attorney, the requisite client approval shall be deemed to have been granted." (*C.C.P. 2018(e)*.)

(6) *Action Between Attorney and Client*. "In an action between an attorney and his or her client or former client, no work product privilege under this section exists if the work product is relevant to an issue of breach by the attorney of a duty to the attorney's client arising out of the attorney-client relationship." (*C.C.P. 2018(f)*.)

(7) *Definition of "Client."* "For purposes of this section, 'client' means a client as defined in *Section 951 of the Evidence Code*." (*C.C.P. 2018(f)*; see *supra*, §105.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Underlying Policy*. *C.C.P. 2018(a)* was repealed and replaced by *C.C.P. 2018.020* in 2004 without substantive change.

See *People v. Coddington* (2000) 23 C.4th 529, 606, 97 C.R.2d 528, 2 P.3d 1081 [trial court's decision to permit prosecutor, during cross-examination, to ask mental experts called by defense whether they were aware that other defense experts had examined defendant, and to emphasize in closing argument that experts who testified were engaged months after experts who were not called, violated policy underlying *C.C.P. 2018*]; Hogan, 2 Cal. Civil Discovery 2d, §13.4 et seq.

(2) *Qualified Protection*. *C.C.P. 2018(b)* was repealed and replaced by *C.C.P. 2018.030(b)* in 2004 without substantive change.

(3) *Absolute Protection*. *C.C.P. 2018(c)* was repealed and replaced by *C.C.P. 2018.030(a)* in 2004 without substantive change.

(4) *Restatement of Existing Law*. *C.C.P. 2018(d)* was repealed and replaced by *C.C.P. 2018.040* in 2004 without substantive change.

(5) *Discovery in Disciplinary Investigations*. *C.C.P. 2018(e)* was repealed and replaced by *C.C.P. 2018.070* in 2004 without substantive change.

(6) *Action Between Attorney and Client*. The portion of *C.C.P. 2018(f)* relating to actions between attorney and client was re-pealed and replaced by *C.C.P. 2018.080* in 2004 without substantive change. (7) *Definition of "Client."* The portion of *C.C.P. 2018(f)* defining "client" was repealed and replaced by *C.C.P. 2018.010* in 2004 without substantive change.



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## CHAPTER IX - Witnesses

### IV. LAWYER-CLIENT PRIVILEGE

#### F. Confidential Disclosure.

#### 7. Attorney's Work Product.

#### d. Scope and Application of Rule.

#### 1. In General.

2 Witkin Cal. Evid. Witnesses § 141

[§ 141] In General.

(1) *Burden of Proof.* Counsel must do more than merely state that something is protected by the work product rule: "The burden is upon him to prove the preliminary facts to show that the privilege applies." (*Mize v. Atchison, Topeka & Santa Fe Ry. Co.* (1975) 46 C.A.3d 436, 447, 120 C.R. 787; see *Fellows v. Superior Court* (1980) 108 C.A.3d 55, 66, 166 C.R. 274 [showing of preliminary facts to establish privilege as to documents]; *Mack v. Superior Court* (1968) 259 C.A.2d 7, 10, 66 C.R. 280, *infra*, §145 [affidavit asserting privilege need not be made by attorney; party's declaration on personal knowledge is sufficient].)

(2) *Privilege Continues After Termination of Litigation.* The work product privilege does not cease when the action terminates. The primary purpose of the rule--encouraging full and fair representation of a client and preparation of a case without fear of subsequent scrutiny by opposing parties--calls for extension of the privilege beyond termination of the litigation for which the documents were prepared. (*Popelka, Allard, McCowan & Jones v. Superior Court* (1980) 107 C.A.3d 496, 502, 165 C.R. 748; *Fellows v. Superior Court*, *supra*, 108 C.A.3d 61; see 27 A.L.R.4th 568 [applicability of privilege to material prepared for terminated litigation or for claim that did not result in litigation].)

(3) *Work Product Rule and Privilege Distinguished.* In *Brown v. Superior Court* (1963) 218 C.A.2d 430, 32 C.R. 527, plaintiff sued Dr. F for malpractice. Under the master plan of malpractice insurance covering members of the county medical society, a committee of doctors met to review the evidence and assist the insurer's attorney in evaluating the case for settlement or preparation for trial. Investigation reports and statements were furnished to the committee by the insurer; Dr. F was interrogated and explained his actions; and all information obtained was delivered to the attorney for the purpose of assisting him in defense of the suit. Plaintiff sought discovery (by interrogatories) of what occurred at the meeting. *Held*, the trial judge properly sustained objections; the matter was not privileged (*supra*, §110), but it was protected by the work product rule. The court made this distinction:

(a) Defendant's knowledge, the doctors' opinions and the reasons for their opinions based on open facts were not privileged, so plaintiff could get this information by deposition, requests for admissions and interrogatories, as well as by inspection of documents in defendant's possession. (218 C.A.2d 442.) "This much, under the facts here present, would seem equitably discoverable in order to put the adversaries on even terms in the opportunity to appraise and evaluate the case for settlement purposes and to prepare for trial. This much also will constitute an acquisition of facts by said plaintiff's counsel *through his own industry*. To allow less than this would be to permit the defense through the device of the committee meeting to corral all expert testimony available locally, place a gag on these witnesses and

throw a cloak of privilege over their opinions, thus defeating the purpose of discovery." (218 C.A.2d 442.)

(b) The additional information sought by plaintiff--what the committee members said, what they recommended and how they voted--would be useful for impeachment purposes. But the right to impeach must be weighed against the privilege of work product; and the judge, pursuant to the statutory directive, properly determined that plaintiff would not be unfairly prejudiced by denial of discovery of the discussion at the meeting. The worthy purpose of the committee was to assist in settlement with a minimum of damaging publicity, and the plan "will not be aided if the attorney or anyone else present must disclose everything which occurred at the conference. ... In fact, it may be confidently predicted that should this court announce a rule requiring such disclosure, it would be the last of such meetings in California." (218 C.A.2d 443.) (See 18 *Stanf. L. Rev.* 798.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### F. Confidential Disclosure.

#### 7. Attorney's Work Product.

#### d. Scope and Application of Rule.

#### 2. Attorney Is Holder of Privilege.

2 Witkin Cal. Evid. Witnesses § 142

[§ 142] Attorney Is Holder of Privilege.

(1) *Statement of Rule.* In *Lasky, Haas, Cohler & Munter v. Superior Court* (1985) 172 C.A.3d 264, 218 C.R. 205, trust beneficiaries with future interests petitioned to remove G as trustee, alleging mismanagement of the trust to the prejudice of their interests. They sought discovery from the Lasky firm, representing G, of opinions, theories and other work product not previously communicated to G. Their petition raised a question of first impression: whether trust beneficiaries who are litigation adversaries of their trustee may compel discovery of the uncommunicated work product of the attorney counseling the trustee in administration of the trust. *Held*, the "absolute" work product privilege belongs exclusively to the attorney.

(a) Former C.C.P. 2016 (now C.C.P. 2018; see *supra*, §140) is silent on the question, but the cases have construed its language to provide that the attorney generating the work product is the exclusive holder of the privilege. (172 C.A.3d 271, discussing *Rumac v. Bottomley* (1983) 143 C.A.3d 810, 192 C.R. 104, *infra*, §148, and other cases.)

(b) The beneficiaries contend that these cases deal with attorneys asserting the privilege against third parties with interests adverse to that of the client, and that the privilege cannot be asserted against them because they had a fiduciary relationship with the trustee when the work product was generated. However, the statute does not so limit the privilege: "[T]he attorney for the trustee was encouraged to investigate and analyze fully his client's alternatives, even though some of these alternatives be arguably adverse to the beneficiaries, knowing that the process of full research and candid analysis is absolutely protected against compelled disclosure for use against his client. Unless the beneficiaries are also clients of the attorney in the sense contemplated by the section 2016, subdivision (b) privilege, the principle purpose of the privilege is here served only by upholding its absolute character." (172 C.A.3d 279.) Hence, the attorney may assert the privilege even against his client where adversaries seek discovery for use against the client. (172 C.A.3d 279.)

(c) Under the law of trusts, the trustee has a fiduciary duty of full disclosure to the trust beneficiaries; but the public policy underlying this duty does not overcome the manifested legislative intent to create an absolute privilege for the attorney's work product. (172 C.A.3d 280, 282.)

(d) The trust beneficiaries are not clients of the trustee's attorneys. (172 C.A.3d 282 et seq., distinguishing joint client cases, *infra*, §165 et seq.)

The opinion concludes with the following observation to aid the lower court in its *in camera* determination of what



materials qualify for protection: "[S]ubdivision (b) should be construed to protect all internal, oral communications between petitioners that were eventually reduced to written form by them and were not communicated outside petitioners' law firm." (172 C.A.3d 286.) (See *Metro-Goldwyn-Mayer v. Superior Court* (1994) 25 C.A.4th 242, 247, 30 C.R.2d 371 [discussing *Lasky* and conflicting line of cases, decided under Rules of Professional Conduct, and holding that privilege belongs to client].)

(2) *Distinction: In Pro. Per. Dowden v. Superior Court* (1999) 73 C.A.4th 126, 86 C.R.2d 180, involved an issue of first impression: May a litigant appearing in pro. per. assert the work product privilege? In an action seeking recovery for property damage and breach of contract, plaintiff moved to compel defendant's production of a diary. Defendant was not represented by counsel, and the trial judge found that the attorney work product privilege under C.C.P. 2018 does not apply to an in pro. per. litigant. *Held*, reversed.

(a) C.C.P. 2018 does not define the term "attorney," and because that term has been applied to other statutes without distinguishing between attorneys and unrepresented litigants, the term was ambiguous. (73 C.A.4th 129.) However, a 1963 amendment to the statute, sponsored by the California State Bar, was adopted by the Legislature almost verbatim. The amendment emphasized the need to limit discovery so that a less able or willing practitioner may not take undue advantage of his or her adversary's efforts. This policy is important not only for attorneys, but also for litigants acting in pro. per. (73 C.A.4th 133.)

(b) Relevant case law establishes that the privilege is intended for the protection of litigants, and not just attorneys, and thus supports applying the privilege to an in pro. per. litigant. (73 C.A.4th 133, 134.)

(c) The work product privilege exists to promote the adversary system, and allowing litigants appearing in pro. per. to assert the privilege furthers that purpose. In determining whether a particular matter is privileged as work product, the court should be guided by the policy of promoting diligence in preparing one's own case, rather than depending on an adversary's efforts. Thus, it is necessary to conduct an in camera review of the items sought to be protected, i.e., the diary in the present case, to determine whether it contains matter that is privileged under C.C.P. 2018. (73 C.A.4th 135.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Statement of Rule.* C.C.P. 2018 was repealed and replaced by C.C.P. 2018.010 et seq. in 2004 without substantive change. (2) *Distinction: In Pro. Per.* C.C.P. 2018 was repealed and replaced by C.C.P. 2018.010 et seq. in 2004 without substantive change.



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- F. Confidential Disclosure.
- 7. Attorney's Work Product.
- d. Scope and Application of Rule.
- 3. Crime-Fraud Exception Inapplicable.

2 Witkin Cal. Evid. Witnesses § 143

[§ 143] Crime-Fraud Exception Inapplicable.

In *BP Alaska Exploration v. Superior Court* (1988) 199 C.A.3d 1240, 245 C.R. 682, plaintiff NWEAC, an oil exploration company, brought an action against defendant BPAE, another such company, for damages for breach of contract, unfair competition and other wrongful acts. Plaintiff sought discovery of communications to defendant from its attorneys, contending that the communications had lost their privileged character because they were obtained in furtherance of a fraud. The trial court issued its discovery order and defendant sought prohibition. *Held*, writ granted; the crime-fraud exception (see *infra*, §153 et seq.) does not apply to material protected by the work product privilege. (199 C.A.3d 1246, 1249, 1251.)

The court pointed out that the Federal Rule permits penetration of the attorney's "opinion" work product under exceptional circumstances (see *supra*, §138). However, the California statute provides that an attorney's opinion work product "shall not be discoverable under any circumstances." (199 C.A.3d 1250, quoting former statute [now C.C.P. 2018(c)].) In *Lasky, Haas, Cohler & Munter v. Superior Court* (1985) 172 C.A.3d 264, 218 C.R. 205, *supra*, §142, the court emphasized the absolute language of the statute, the legislative intent is clear, and the plain meaning governs. (199 C.A.3d 1251.) (See *State Farm Fire & Cas. Co. v. Superior Court* (1997) 54 C.A.4th 625, 650, 62 C.R.2d 834, *infra*, §156 [citing *BP Alaska* and *Lasky*].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *State Comp. Ins. Fund v. Superior Court* (2001) 91 C.A.4th 1080, 1091, 111 C.R.2d 284, 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence, Supp.*, §85 [crime-fraud exception to attorney-client privilege could not justify seizure, pursuant to warrant, of documents from State Compensation Insurance Fund to extent those documents were protected by work product privilege; relying on *BP Alaska Exploration v. Superior Court* (1988) 199 C.A.3d 1240, 245 C.R. 682, text, p. 406]; 178 A.L.R. Fed 87 [crime-fraud exception in federal courts].

C.C.P. 2018(c) was repealed and replaced by C.C.P. 2018.030(a) in 2004 without substantive change.

(*New Distinction: Knowing participation in crime or fraud:* When a lawyer is suspected of knowingly participating in a crime or fraud, the statutory work product privilege does not apply in any official investigation by a law enforcement agency, or in a "proceeding or action brought by a public prosecutor in the name of the people of the State of California," if the lawyer's services were sought or obtained to enable or aid anyone to commit or plan to commit a crime or fraud. (C.C.P. 2018.050, originally added as part of C.C.P. 2018(d) in 2002 and renumbered in 2004

without substantive change; see 34 *McGeorge L. Rev.* 327; on attorney's right to request in camera hearing to resolve privilege claim, see Supp., *infra*, §158.)



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#### d. Scope and Application of Rule.

#### 4. Work Product After Delivery to Client.

2 Witkin Cal. Evid. Witnesses § 144

[§ 144] Work Product After Delivery to Client.

In *BP Alaska Exploration v. Superior Court* (1988) 199 C.A.3d 1240, 245 C.R. 682, supra, §143, the dissenting justice maintained that the attorney's absolute work product consists only of writings in the attorney's possession, and that once an opinion writing is delivered to the client the attorney has surrendered his or her privacy rights in the writing. Because the client may choose to publish the contents, there is no further need for work product protection; but the writing--a confidential communication between the attorney and the client--is protected by the attorney-client privilege.

The majority rejected this reasoning:

(a) The statute defines absolute work product as "*any writing*." It does not restrict it to only those writings in the attorney's possession, and it provides that the writing is not discoverable "under *any circumstances*." The Legislature apparently intended to give attorneys broader protection than the federal courts had given under *Hickman v. Taylor* (1947) 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451, supra, §137. "Thus, any restriction on the statute's absolute work product definition of 'any writing' must come from the Legislature and not from the courts." (199 C.A.3d 1254.)

(b) The argument for restriction to writings in the attorney's possession assumes that the Legislature believed the attorney's need for privacy ceases on delivery of the writing, but the statute indicates a contrary intent:

"The Legislature presumably intended to protect the attorney's privacy in the opinion writing after its delivery to the client because this would free the attorney from the fear of a subsequent disclosure of the writing to third parties where the client for some reason did not assert the attorney-client privilege to prevent disclosure." (199 C.A.3d 1255.) This legislative purpose furthers the stated policy of preserving the right of attorneys to investigate not only the favorable but the unfavorable aspects of the cases, and encourages the attorney to deliver his or her opinions in writing for the client's further consideration. (199 C.A.3d 1255.)

(c) A federal case holds that an attorney's opinion writing retains its work product status on delivery to the client, and another federal case holds that the delivery of work product documents to "interested" third parties does not constitute a waiver. (199 C.A.3d 1255.) And several California cases have implicitly held that the writing retains its work product character after delivery to the client. (199 C.A.3d 1256, discussing *Fellows v. Superior Court* (1980) 108 C.A.3d 55, 166 C.R. 274, supra, §141, *Mack v. Superior Court* (1968) 259 C.A.2d 7, 66 C.R. 280, infra, §145, and *Lasky, Haas, Cohler & Munter v. Superior Court* (1985) 172 C.A.3d 264, 218 C.R. 205, supra, §142.)

"We conclude from the cited cases that the attorney's absolute work product protection continues as to the contents of a writing delivered to a client in confidence. The protection precludes third parties not representing the client from discovery of the writing. The fact that the client does not object to disclosure of the contents of the writing does not lessen the attorney's need for privacy. The recognition of an attorney's right to assert a work product protection in the contents of a writing after it is delivered to the client strengthens the attorney-client relationship by enabling the attorney to evaluate his client's case and to communicate his opinions to the client without fear that his opinions and theories will thereafter be exposed to the opposing party or to the public in general for criticism or ridicule." (199 C.A.3d 1260.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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- 5. Opinion of Expert Consultant.

2 Witkin Cal. Evid. Witnesses § 145

[§ 145] Opinion of Expert Consultant.

*Scotsman Mfg. Co. v. Superior Court* (1966) 242 C.A.2d 527, 51 C.R. 511, was an action for injuries resulting from explosion of a butane lamp. Several defendants were sued, including Scotsman, which had installed the lamp, and Roberts, manufacturer of a valve. Scotsman's attorney employed Dr. M to examine the lamp and make a written report to him, and Dr. M did so. Roberts, served much later than the others, was also served with a cross-complaint by Scotsman. Roberts thereupon obtained an order for inspection of Dr. M's report. *Held*, prohibition granted to prevent enforcement of the order.

(a) If the report was a work product it could be subject to inspection only on a showing of prejudice (former C.C.P. 2016(b), now C.C.P. 2018(b)). The showing here, that Roberts was brought in late and had little time to prepare, was insufficient; the remedy for any such inconvenience is a continuance. (242 C.A.2d 530.)

(b) Roberts contended that it was not a work product because it contained information as to which Dr. M would be a prospective witness. But the protection extends to reports of a dual character which contain information subject to discovery and advisory matters which are not. (242 C.A.2d 531.)

(c) Roberts' remedy was to use interrogatories or a deposition to discover Dr. M's status as a witness. (242 C.A.2d 532.)

*Scotsman and Brown v. Superior Court* (1963) 218 C.A.2d 430, 32 C.R. 527 (supra, §141), were followed in *Kenney v. Superior Court* (1967) 255 C.A.2d 106, 63 C.R. 84, a malpractice action. The trial judge correctly required an answer to the interrogatory asking whether defendant doctor had conferred with experts pertaining to plaintiff's case, and which if any would be called; also what experts were known and possibly would be called as witnesses. This would enable plaintiff to investigate their qualifications and prepare for their cross-examination. (255 C.A.2d 112.) But plaintiff was not entitled to information which defendant or defendant's attorney may have imparted to such experts while preparing to defend. (255 C.A.2d 112.) And plaintiff was not entitled to the names of members of the medical committee: the only purpose of this inquiry would be improper--to permit plaintiff's counsel to obtain disclosures which defendant or defendant's attorney made to them under the work product privilege. (255 C.A.2d 113.)

The court took note of possible abuse of the "medical committee" system (particularly in a small community), in cornering by defendant of the supply of "top-drawer" experts, and silencing them as potential plaintiff's witnesses by

placing them in a committee to be consulted in defense of every malpractice claim. But the committee serves a useful purpose, and harassment of members would destroy their efficiency. Moreover, the plaintiff may call any doctor as a witness or obtain information from him or her. (255 C.A.2d 114.) (See *Matchett v. Superior Court* (1974) 40 C.A.3d 623, 629, 115 C.R. 317, *infra*, §§510, 512 [suggesting that Ev.C. 1157 was enacted in response to *Kenney* decision, where court had allowed some access to hospital staff records which might have revealed information bearing on defendant doctor's competence]; *Sanders v. Superior Court* (1973) 34 C.A.3d 270, 278, 109 C.R. 770 [personal injury claimant's medical records protected as attorney's work product; no showing that experts were prospective witnesses rather than advisors for attorney].)

In *Mack v. Superior Court* (1968) 259 C.A.2d 7, 66 C.R. 280, the State Public Works Board sued to condemn defendants' lands, and moved for an order to compel disclosure by answer to interrogatories of a real estate appraisal obtained by defendants' former attorney. Defendants' declaration stated that the information was obtained solely for the purpose of the attorney's preparation of the case, and that they did not plan to call the appraiser as a witness. The judge nevertheless ordered defendants to answer. *Held*, prohibition granted to restrain enforcement of the order.

(a) Information regarding events provable at trial, or identity and location of physical evidence, cannot be brought within the work product privilege simply by transmitting it to the attorney. (259 C.A.2d 10; see *supra*, §128.) And the court can require reciprocal disclosure of appraisals intended to be used in evidence. (259 C.A.2d 11; see 2 *Cal. Evidence* (4th), *Discovery*, §63.)

(b) But material "of a derivative character," such as diagrams prepared for trial, audit reports, appraisals and other expert opinions, developed by initiative of counsel, are protected by the work product rule. The attorney should be allowed to investigate unfavorable as well as favorable aspects of his case, and even clearly relevant evidence--such as an unfavorable opinion of value by an appraiser consulted--may be privileged. (259 C.A.2d 11.)

(c) The privilege must give way on a showing of unfair prejudice, but the State made no such showing here: there is nothing unique about one appraiser's opinion. (259 C.A.2d 11.) (On inadmissibility of appraisal given in connection with deposit or withdrawal of probable amount of compensation, see *C.C.P. 1255.060*, *supra*, §112.)

In *National Steel Products Co. v. Superior Court* (1985) 164 C.A.3d 476, 210 C.R. 535, National was sued in New York for negligence in the manufacture of components of a metal building in New York; National's attorney obtained a report from an expert; the expert was neither deposed nor identified as a witness, and the litigation was settled prior to trial. In the present action by R against National for similar negligence in the manufacture of components of a California metal building, National's attorney obtained the New York expert's report, and also commissioned him to prepare an engineering analysis of the California building, but, although the expert had been identified as an expert witness in the present litigation (former C.C.P. 2037, now C.C.P. 2034; see 2 *Cal. Evidence* (4th), *Discovery*, §178 et seq.), National did not intend to offer the New York report in evidence. R sought discovery of the report and the trial judge so ordered. *Held*, mandamus granted to compel setting aside of the order granting unlimited discovery, and directing an in camera inspection to determine the extent of proper discovery.

(a) *No violation of attorney-client privilege.* By identifying the expert as a witness, National waived the privilege, as held in *Sanders v. Superior Court* (1973) 34 C.A.3d 270, 109 C.R. 770. The prior report was an opinion of the expert respecting the subject matter of his prospective testimony, and that testimony would necessarily disclose a "significant part" of the privileged communication (Ev.C. 912(a)). (164 C.A.3d 485.)

(b) *Work product privilege in part applicable.* "The critical distinction in the rule enunciated by *Scotsman* is that between services rendered in an advisory capacity and services which qualify one as an expert witness. ... [A]n expert's report rendered in an advisory capacity is one designed to assist the attorney in such matters as preparation of pleadings, the manner of presentation of proof, and cross-examination of opposing expert witnesses; matters that are often reflective of the mental processes of the attorney under whose direction the expert works. ... In contrast, we hold that a report which would qualify the author as an expert witness is one containing findings and opinions of the expert that go

to the establishment or denial of a principal fact in issue." (164 C.A.3d 489.) Applying this analysis, it will often be necessary for the trial judge to conduct a three step in camera inspection of the report of an expert identified as a witness in order to rule on the claim of work product privilege:

(1) The judgment should determine whether the report, in whole or in part, reflects an attorney's impressions, conclusions, opinions, or legal research or theories (former C.C.P. 2016(b), now C.C.P. 2018(b)). Any severable part that meets this definition is absolutely privileged. (164 C.A.3d 489.)

(2) The portions of the report that are advisory are conditionally privileged; those that are not are discoverable if easily severable. (164 C.A.3d 490.)

(3) As to the advisory portions--which are not absolutely privileged--the judge should determine whether other good cause for discovery outweighs the principles supporting the conditional work product privilege. (164 C.A.3d 490.) In accordance with the liberal policies underlying the discovery procedures, doubts as to relevance should be resolved in favor of permitting discovery. (164 C.A.3d 493.)

In *Los Angeles v. Superior Court (Hernandez)* (1990) 222 C.A.3d 647, 271 C.R. 698, defendant county removed a pathologist from its designation of expert witnesses, but retained him as a consultant. Plaintiff patient then attempted to add the pathologist to his list of expert witnesses. *Held*, defendant was entitled to a protective order. "We hold that a party may, for tactical reasons, withdraw a previously designated expert witness, not yet deposed. If that expert continues his or her relationship with the party as a consultant, the opposing party is barred from communicating with the expert and from retaining him or her as the opposing party's expert. To conclude otherwise would produce two undesirable results: a designated expert subsequently withdrawn could 'sell' his or her opinions to the highest bidder and be free of concern about whether his or her previous consultation is protected by the work product privilege; and a party would never withdraw a previously designated expert for fear that the attorney's work product (i.e., the consultations with the withdrawn expert) would become available to the opposition." (222 C.A.3d 657.) (See *In re Tabatha G.* (1996) 45 C.A.4th 1159, 1167, 53 C.R.2d 93 [in proceeding to terminate mother's parental rights, even assuming that bonding study, obtained by mother's counsel without knowledge of department of social services or foster parents, came within qualified work product privilege, it was discoverable, as disclosure was in minor's best interests and denial would result in injustice].)

**SUPPLEMENT:** [This section is current through the latest supplement]

C.C.P. 2018(b), on disclosure of work product on a showing of prejudice, was repealed and replaced by C.C.P. 2018.030(b) in 2004 without substantive change.

C.C.P. 2034, on exchange of expert witness information, was repealed and replaced by C.C.P. 2034.010 et seq. in 2004 without substantive change.

See *Armenta v. Superior Court* (2002) 101 C.A.4th 525, 536, 124 C.R.2d 273 [in action by qui tam plaintiff and city power and water department against defendant water distribution parts manufacturers, in which plaintiffs jointly hired expert to test parts acquired by city from defendants, trial judge erred in ordering disclosure of test results to defendants; denial of access would not unfairly prejudice defendants' preparation of their defense in other actions, as they had equivalent opportunity to generate comparable evidence]. *Correction:* Page 411, second full paragraph, first line, "judgment" should be "judge".





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- d. Scope and Application of Rule.
- 6. Identity of Lay Witnesses.
  - aa. Conditional Protection.

2 Witkin Cal. Evid. Witnesses § 146

[§ 146] Conditional Protection.

The identity of nonexpert witnesses is conditionally protected. In *Long Beach v. Superior Court* (1976) 64 C.A.3d 65, 134 C.R. 468, discovery of a list of the witnesses intended to be called at trial was denied for lack of a showing of unfair prejudice or injustice sufficient to overcome the conditional privilege of former C.C.P. 2016(b) (now C.C.P. 2018(b)). Although the identities of persons having knowledge of relevant facts are clearly discoverable, the selection of trial witnesses is the work product of counsel.

The *Long Beach* court also denied discovery of "the nature and extent of the testimony which will be offered" through certain witnesses: "Such an interrogatory clearly calls for production of a writing reflecting the attorney's impressions, conclusions and opinions and thus falls within the absolute work product privilege." (64 C.A.3d 80.)

A similar result was reached in *Nacht & Lewis Architects v. Superior Court* (1996) 47 C.A.4th 214, 54 C.R.2d 575, an action arising from plaintiff's former employment. Defendants objected to and refused to answer interrogatories in which plaintiff sought the identity of, and information regarding (a) individuals interviewed concerning the incident giving rise to the action, and (b) individuals from whom written or recorded statements were obtained concerning the incident. The trial judge granted plaintiff's motion to compel further responses. *Held*, the motion was improperly granted.

(a) As to the first interrogatory, the court's order clearly violated the work product privilege: compelled production of a list of potential witnesses interviewed by counsel would necessarily reveal counsel's evaluation of the case by disclosing which witnesses or other persons counsel deemed important enough to interview. (47 C.A.4th 217.)

(b) As to the second interrogatory, defendants stated not "that their attorney took notes or otherwise recorded his interviews with employees of Nacht & Lewis, but that their attorney collected information from the interviews. Though imprecise, the language is susceptible to the interpretation that defendants' counsel collected from the employees statements the employees had previously written or recorded themselves. ... [A] list of potential witnesses who turned over to counsel their independently prepared statements would have no tendency to reveal counsel's evaluation of the case. Such a list would therefore not constitute qualified work product." (47 C.A.4th 217, 218.) On the other hand, if the interrogatory is directed at witnesses whose interviews counsel "recorded in notes or otherwise," then the list is qualified work product because it would tend to reveal counsel's evaluation of the case by identifying those persons

claiming knowledge of the incident whom counsel deemed it important to interview. "Moreover, any such notes or recorded statements taken by defendants' counsel would be protected by the absolute work product privilege because they would reveal counsel's 'impressions, conclusions, opinions, or legal research or theories' " within the meaning of *C.C.P. 2018(c)*. (47 *C.A.4th* 217.)

(c) Therefore, the trial judge must vacate that portion of his order granting the motion to compel further response to the first interrogatory, and he should compel further response to the second interrogatory only insofar as he determines that defendants' counsel obtained independently written or recorded statements. (47 *C.A.4th* 218, 219.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2018(b)* (conditional work product privilege) was repealed and replaced by *C.C.P. 2018.030(b)* in 2004 without substantive change.

*C.C.P. 2018(c)* (absolute work product privilege) was repealed and replaced by *C.C.P. 2018.030(a)* in 2004 without substantive change.



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#### 7. Attorney's Work Product.

#### d. Scope and Application of Rule.

#### 6. Identity of Lay Witnesses.

#### bb. Distinction: Disclosure of Witness Lists at Pretrial Conference.

2 Witkin Cal. Evid. Witnesses § 147

[§ 147] Distinction: Disclosure of Witness Lists at Pretrial Conference.

*In re Jeanette H.* (1990) 225 C.A.3d 25, 275 C.R. 9, a dependency proceeding, involved an order, applicable to both the present case and appropriate future cases, that, upon motion by the parties, sealed witness lists be submitted to the court 7 to 10 days prior to trial, and then be distributed to the parties at the trial readiness conference. *Held*, the order was proper; compelled disclosure of witness lists *during discovery* violates the work product doctrine, but such disclosure at the pretrial conference is justified under the court's inherent power to manage its calendar.

#### (a) *Discovery issue.*

(1) The motion to disclose witness lists was framed as a discovery motion, and the court, under its power to control discovery in juvenile matters (C.R.C., Rule 1420, *10 Summary (9th)*, *Parent and Child*, §562 et seq.), ordered the exchange as an "exception" to the work product doctrine. (225 C.A.3d 31.) However, the only exceptions to the doctrine identified by *C.C.P. 2018* are prejudice to the party seeking disclosure or resulting injustice if disclosure is not compelled, and there is no authority creating additional exceptions. Although unnecessary delay may cause injustice in juvenile court cases, the record did not reveal how disclosure of witnesses during discovery would prevent injustice. (225 C.A.3d 33.)

(2) The reasoning of *Long Beach v. Superior Court* (1976) 64 C.A.3d 65, 134 C.R. 468 (supra, §146), which held that the exchange of nonexpert witness lists violates the absolute work product privilege, is persuasive and is adopted here. "[That] decision recognizes the exact witnesses an attorney may call at trial depends on what the attorney considers to be important and relevant facts. The decision to call or not to call a witness is made after consideration of the strengths and weaknesses of a case and the legal theory chosen by the attorney. Selection of the witnesses through whom the attorney wishes to present his or her case is an intimate part of the attorney's mental processes." (225 C.A.3d 32.)

(3) Although *Joe Z. v. Superior Court* (1970) 3 C.3d 797, 91 C.R. 594, 478 P.2d 26 (see 1 Cal. Evidence (4th), *Introduction*, §41), recognized that the discovery statutes are not generally applicable to juvenile matters, that decision neither discussed the work product doctrine nor held that discovery rules are never applicable in juvenile cases. Moreover, the work product doctrine is not limited to the discovery statutes, but rather is founded in case law as well. The juvenile court discovery rule acknowledges the application of recognized privileges (C.R.C., Rule 1420(g), 10

*Summary* (9th), *Parent and Child*, §566), and, while favoring disclosure generally, does not specifically permit compelled disclosure of witness lists during discovery. (225 C.A.3d 33.)

(b) *Court's inherent administrative power.*

(1) In addition to formal local rules of procedure, adopted in accordance with C.R.C., Rule 981 (2 *Cal. Proc.* (4th), *Courts*, §202), courts possess inherent power to adopt informal rules that are reasonable and not in conflict with statutes or Judicial Council rules. In determining whether a court policy requiring disclosure of witness lists shortly before trial is reasonable, it must be remembered that, by their very nature, witness lists, unlike other forms of work product, will ultimately be disclosed at trial. (225 C.A.3d 35.) Also, the work product protection for witness lists is qualified, not absolute: *Long Beach* dealt only with a challenge to compelled disclosure *during discovery*; it did not hold that a disclosure at a trial setting conference would violate the privilege. (225 C.A.3d 35, 37.)

(2) The compelled mutual exchange of witness lists at the pretrial conference has been utilized in federal pretrial procedure as a reasonable way to force adequate preparation by counsel and to apprise the court of the complexity involved (225 C.A.3d 35); and C.C.P. 96(a) (2 *Cal. Proc.* (4th), *Courts*, §265) permits the exchange of witness lists in municipal and justice court cases (now "limited civil cases"; see 2 *Cal. Proc.* (4th), *Courts*, Supp., §248A) shortly before trial (225 C.A.3d 36). C.R.C., Rule 212(a), providing for pretrial conferences in some superior court cases (7 *Cal. Proc.* (4th), *Trial*, §54), neither permits nor prohibits disclosure of witness lists, although one commentator has stated that some superior courts have local rules or policies requiring the exchange of witness lists shortly before trial. (225 C.A.3d 36, citing Weil & Brown, California Practice Guide: Civil Procedure Before Trial, §§8:84 et seq., 8:243, 8:244.) And in juvenile court cases, the rules recognize the need for expeditious handling, but they are silent with respect to pretrial disclosure of witness lists. (225 C.A.3d 36.)

(3) The exchange of witness lists in a trial setting conference, as opposed to during discovery, does not frustrate the goals of the work product doctrine of encouraging thorough preparation for trial and preventing one attorney from taking advantage of another's industry and effort. If pretrial disclosure in the municipal court does not violate the doctrine, it will not do so in the juvenile court. (225 C.A.3d 36.)

(4) Hence, the order here does not conflict with any statute, constitutional provision or court rule, and was a reasonable effort by the court to manage its calendar efficiently. Under the court's inherent power, the informal adoption of a policy requiring the mutual exchange of witness lists in appropriate cases is justified even in the absence of a more formal rule, although use of the formal procedure for adopting local rules set forth in C.R.C., Rule 981 is encouraged. (225 C.A.3d 37, and footnote 4.)

The court cautioned that its holding did not cover quasi-criminal juvenile court proceedings under Welf.C. 601 et seq. (see 10 *Summary* (9th), *Parent and Child*, §725 et seq.), because an order to disclose witnesses in such cases might implicate the minor's Fifth Amendment rights and might be affected by P.C. 1054.3, a part of Proposition 115 (see 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §30 et seq.). (225 C.A.3d 37.) (See *Aerojet-General Corp. v. Transport Indem. Ins.* (1993) 18 C.A.4th 996, 1004, 22 C.R.2d 862, supra, §109 [identity of witness disclosed to plaintiffs' attorney when defendants' documents were inadvertently forwarded to him was not protected work product; quoting *Long Beach*].)

**SUPPLEMENT:** [This section is current through the latest supplement]

C.C.P. 2018 was repealed and replaced by C.C.P. 2018.010 et seq. in 2004 without substantive change. The exceptions to the work product rule are now stated in C.C.P. 2018.030. *Power to control discovery*: C.R.C., Rule 1420 was renumbered C.R.C., Rule 5.546 in 2006. C.R.C., Rule 1420(g) became C.R.C., Rule 5.546(g).

*Cross-Reference*: 10 *Summary* (10th), *Parent and Child*, §§612, 860 et seq.

*Application of recognized privileges*:

*Cross-Reference*: 10 *Summary* (10th), *Parent and Child*, §862.

*Adoption of local rules:* C.R.C., Rule 981 was renumbered C.R.C., Rule 10.613 in 2006. C.R.C., Rule 212(a) was relettered C.R.C., Rule 212(b), effective July 1, 2002. As amended, the rule requires a "case management conference" in every case. C.R.C., Rule 212(b) became C.R.C., Rule 3.722 in 2006.

*Quasi-criminal juvenile court proceedings:*

*Cross-Reference:* 10 *Summary* (10th), *Parent and Child*, §729 et seq.



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#### d. Scope and Application of Rule.

#### 7. Writings of Lawyer-Negotiator.

2 Witkin Cal. Evid. Witnesses § 148

[§ 148] Writings of Lawyer-Negotiator.

In *Rumac v. Bottomley* (1983) 143 C.A.3d 810, 192 C.R. 104, defendant attorney obtained a protective order to prevent plaintiff from obtaining certain documents and records prepared by the attorney in the course of lease negotiations on behalf of his client. *Held*, the order was properly issued. "Neither the text of the statute nor the policy underlying the creation of the absolute privilege warrants a class distinction between the lawyer-negotiator and the lawyer-litigator. There is also no valid reason to differentiate between the writings reflecting the private thought processes of a lawyer acting on behalf of a client at the beginning of a business deal and the thoughts of a lawyer when that business deal goes sour with resultant litigation." (143 C.A.3d 812.)

The court declared that protecting the attorney's work product when the attorney acts in a nonlitigation legal capacity "furthers the important goal of reducing the likelihood of litigation." (143 C.A.3d 816.) And counseling need not have a direct connection to litigated matters: "It is the thoughtful and conscientious lawyer carefully examining his or her client's needs in negotiating a transaction who is perhaps best able to avoid or at least reduce the likelihood of litigation. ... The attorney's skill is not only essential to express the terms of the bargain, but the creative lawyer is able to draft appropriate provisions dealing with alternatives to litigation in the event a dispute between the parties does arise." (143 C.A.3d 816.)

*Watt Industries v. Superior Court* (1981) 115 C.A.3d 802, 171 C.R. 503, holding that the privilege does not apply where the attorney acts merely as a business agent for the client, was distinguished: "[T]he privilege extends to the lawyer only when he or she is acting *qua* lawyer. ... Here, the complexity of the transaction and the services which Bottomley was called upon to perform were found by the court to be services requiring Bottomley's professional skill and knowledge. Accordingly, this case does not fall within the narrow holding of *Watt*." (143 C.A.3d 817.) (See *Roberts v. Palmdale* (1993) 5 C.4th 363, 371, 20 C.R.2d 330, 853 P.2d 496, *infra*, §294, citing the text [following *Rumac*].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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##### e. Rule Inapplicable.

2 Witkin Cal. Evid. Witnesses § 149

[§ 149] Rule Inapplicable.

A number of cases have held the work product rule inapplicable in various situations.

(1) *Use of Material at Trial*. In *Mize v. Atchison, Topeka & Santa Fe Ry. Co.* (1975) 46 C.A.3d 436, 120 C.R. 787, an investigator witness had refreshed his recollection from materials which arguably fell within the work product or attorney-client privilege. In approving the trial judge's action making those papers available to opposing counsel, the court said:

"It seems doubtful if the alleged work product privilege can ever be claimed at the time of trial. It is not one of the privileges enumerated in the Evidence Code. Provisions as to work product found in *Code of Civil Procedure section 2016* do not use the word privilege and are in the nature of statutory limitations on pretrial discovery. Also it may well be that even if it be deemed there is in fact a work product privilege concerning a report of an investigator it ceases the moment it is determined to use him as a witness, just as it does with the report of an expert. ... In any event it ceases when the witness uses the report to refresh his recollection and then is called and testifies." (46 C.A.3d 449, citing former work product statute, now C.C.P. 2018.) (See *Brokopp v. Ford Motor Co.* (1977) 71 C.A.3d 841, 856, 139 C.R. 888 [work product privilege does not preclude order requiring production for trial of results of tests coordinated by defendant's prospective expert witness].)

(2) *No Prosecutor's Privilege in Civil Case*. "[W]e have not been directed to, nor have we found, any authority holding that a public prosecutor--having completed his investigation and having announced, after failing to obtain an indictment, that no further action would be taken by him--is entitled to rely upon the work product doctrine when the fruits of his investigation become relevant to civil litigation to which he is not a party. The district attorney is not an 'attorney' who represents a 'client' as such. He is a public officer, under the direct supervision of the Attorney General. ... [T]he extent to which the fruits of his investigations are entitled to confidentiality is governed entirely by provisions governing official information." (*Shepherd v. Superior Court* (1976) 17 C.3d 107, 122, 130 C.R. 257, 550 P.2d 161, *infra*, §250.)

(3) *Facts Forming Basis of Allegations*. In *Southern Pac. Co. v. Superior Court* (1969) 3 C.A.3d 195, 83 C.R. 231, a wrongful death action, plaintiffs alleged that defendant was negligent in various ways but refused to answer interrogatories which sought a detailed statement giving "all facts forming the basis" of these allegations. *Held*, mandamus issued to compel answers. "The interrogatories did not seek derivative material in the attorney's possession such as statements of witnesses, investigative reports or technical data; did not seek the attorney's legal theories,

research or calculations; did not seek information which would not ultimately be disclosed at the trial. Nor did the interrogatories improperly attempt to 'tie down' plaintiffs by calling for all the facts they intend to produce at the trial. ... The facts sought, those presently relied upon by plaintiffs to prove their case, are discoverable no matter how they come into the attorney's possession. ... Plaintiffs will *ultimately disclose* these facts at the trial. Surprise is the only objective of withholding these facts pending the trial. That objective is contrary to the spirit and letter of the discovery statutes." (3 C.A.3d 198.)

The dictum in *Southern Pac. Co.*, *supra*, on statements of witnesses, was approved by the same appellate court in *Kadelbach v. Amaral* (1973) 31 C.A.3d 814, 107 C.R. 720. Plaintiff learned that two witnesses to his accident had given tape-recorded statements to defendants' counsel and sought discovery of their contents. Defendants objected, claiming the work product privilege. The court, emphasizing its prior holding that facts are discoverable no matter how they came into the attorney's possession, rejected the notion that statements of witnesses come within the protection of the work product rule. (31 C.A.3d 823.)

(4) *Opinion of Prospective Expert Witness*. In *Williamson v. Superior Court* (1978) 21 C.3d 829, 148 C.R. 39, 582 P.2d 126, plaintiff sued Firestone, a tire manufacturer, and Big Four, manufacturer of a tire-changing machine, for personal injuries. K, Big Four's expert, concluded that the accident was caused by a defect in the tire, not the machine, and so was designated a prospective witness. Just as plaintiff was about to take K's deposition, Big Four withdrew the designation in exchange for Firestone's agreement to indemnify Big Four against liability to plaintiff. *Held*, discovery of K's report should be allowed. The report was "an expert opinion, developed as a result of the initiative of counsel in preparing for trial," and therefore constituted work product afforded the conditional protection of former C.C.P. 2016(b) (now C.C.P. 2018(b)). (21 C.3d 834.) However, K's designation as a prospective witness constituted good cause for discovery of his report. (21 C.3d 835.) And, though a party may be entitled to withdraw an expert witness, the withdrawal here was pursuant to an attempted illegal agreement to suppress evidence. Therefore, denial of discovery would "result in an injustice" under the statute. (21 C.3d 838.)

In *Shadow Traffic Network v. Superior Court* (1994) 24 C.A.4th 1067, 29 C.R.2d 693, 1 Cal. Proc. (4th), Attorneys, §174, the court held that reports prepared by an expert as a consultant are protected by the work product doctrine until the expert is designated as a witness. Then, the opponent may seek disclosure of the reports upon a showing of good cause, following the procedure set forth in *National Steel Products Co. v. Superior Court* (1985) 164 C.A.3d 476, 210 C.R. 535, *supra*, §145. "However, to the extent that said reports embrace counsel's impressions and conclusions, the work-product doctrine gives absolute protection to that information." (24 C.A.4th 1079, citing *Williamson v. Superior Court*, *supra*, and *Kizer v. Sulnick* (1988) 202 C.A.3d 431, 248 C.R. 712.)

(5) *Use by Nonparty*. In *Kizer v. Sulnick*, *supra*, the Director of the Department of Health Services, as part of his investigation of possible health hazards posed by a waste facility in Casmalia, sought production of a medical study of the health effects on persons living near the facility. The study had been commissioned by an attorney representing a group of Casmalia residents in their civil suit against the facility. Claiming that the study was part of his work product, the attorney refused to produce it. *Held*, the work product rule was inapplicable in this situation.

(a) The director is not a party to the lawsuit and is barred by Govt.C. 11183 from revealing the contents of the study to opposing counsel. Hence, the purposes of the work product rule, i.e., to allow an attorney to prepare his case in privacy and to prevent his adversary from taking undue advantage, are irrelevant in the present context. (202 C.A.3d 441.)

(b) On the other hand, the need for disclosure is significant. The director cannot fulfill his duty to investigate possible health hazards without access to all relevant information, and there was testimony that the Casmalia residents would not participate in a government-sponsored study. (202 C.A.3d 441, footnote 12.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Use of Material at Trial*. C.C.P. 2018, the work product statute, was repealed and replaced by C.C.P. 2018.010 et



seq. in 2004 without substantive change.(2a) (*New*) *No Prosecutor's Privilege in Criminal Case*. Depending on the circumstances, any possible claims of attorney-client privilege, work product privilege, or privacy regarding documents or statements prepared by a deputy district attorney in the course of his or her employment with the district attorney would belong to the district attorney, not the individual deputy. (*People v. Superior Court (Pfingst)* (2000) 83 C.A.4th 387, 399, 400, 99 C.R.2d 646 [deputy district attorney who was being investigated by state Attorney General for possible crimes relating to his employment could not assert work product privilege as to materials seized from his home that were generated in course of his employment; relying on *Shepherd v. Superior Court* (1976) 17 C.3d 107, 130 C.R. 257, 550 P.2d 161, text, p. 417].)(4) *Opinion of Prospective Expert Witness*. C.C.P. 2018(b), conditionally protecting attorney work product, was repealed and replaced by C.C.P. 2018.030(b) in 2004 without substantive change.(6) (*New*) *Factual Investigations by In-House Claims Adjusters*. Where an insured seeks communications between an insurer and its in-house claims adjusters in the course of litigation concerning the insurer's claims handling, and those adjusters happen to be attorneys, the work product privilege is not applicable to material or communications developed by the adjusters in their capacity as claims handlers rather than attorneys. (2,022 *Ranch, L.L.C. v. Superior Court* (2003) 113 C.A.4th 1377, 1401, 7 C.R.3d 197, Supp., infra, §167.)



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#### f. Waiver of Work Product Privilege.

2 Witkin Cal. Evid. Witnesses § 150

#### [§ 150] Waiver of Work Product Privilege.

(1) *Conduct Amounting to Waiver*. The privilege belongs to the attorney (see supra, §142); thus, it may be waived by the attorney without the client's consent. (See *Lohman v. Superior Court* (1978) 81 C.A.3d 90, 100, 146 C.R. 171, supra, §72 [rejecting plaintiff's petition for suppression of her former attorney's deposition answers disclosing work product]; *Raytheon Co. v. Superior Court* (1989) 208 C.A.3d 683, 688, 689, 256 C.R. 425, supra, §84 [waiver by attorney found]; *Metro-Goldwyn-Mayer v. Superior Court* (1994) 25 C.A.4th 242, 249, 30 C.R.2d 371 [action by corporation against its majority shareholders arising from merger transaction; by undertaking representation of shareholders in related case, law firm that represented corporation in merger waived privilege].)

However, a client may, in the absence of the attorney, claim the privilege on his behalf. (*Fellows v. Superior Court* (1980) 108 C.A.3d 55, 63, 166 C.R. 274.)

The privilege may be waived under the mutual discovery provisions of C.C.P. 2032, dealing with a party's physical condition. (See *Queen of Angels Hosp. v. Superior Court* (1976) 57 C.A.3d 370, 374, 129 C.R. 282.) And an attorney's release of the information to a news reporter is also a waiver. (*Los Angeles v. Superior Court* (Friedman) (1985) 170 C.A.3d 744, 754, 216 C.R. 311.)

In *Petterson v. Superior Court* (1974) 39 C.A.3d 267, 273, 114 C.R. 20, the court first observed that "arguably the work product privilege attaches to the *client* upon the attorney's death or resignation from the case." However, if it was waived by the first attorney with the client's approval, the waiver remains.

(2) *Conduct Not Amounting to Waiver*. Where the privilege is properly claimed, a slight delay in furnishing a competent and sufficient specific description of documents substantiating the claim cannot be treated as a waiver of the privilege. (*Motown Record Corp. v. Superior Court* (1984) 155 C.A.3d 482, 492, 202 C.R. 227.) (See *Aronson v. Kinsella* (1997) 58 C.A.4th 254, 269, 68 C.R.2d 305, 5 Summary (9th), *Torts, Supp.*, §505 [in libel action, defendant, by raising litigation privilege, did not waive attorney-client or work product privilege; claim that statements in his letter were protected by litigation privilege put his state of mind at issue but not thoughts, conduct, or work product of his attorneys].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Conduct Amounting to Waiver*. See *Eddy v. Fields* (2004) 121 C.A.4th 1543, 1548, 18 C.R.3d 487 [attorney representing two cotrustees waived work product privilege when he turned over assertedly privileged documents to

attorney representing one of cotrustees, and thus trial judge did not err in ordering second attorney to turn over documents to successor trustee]; 30 *Pepperdine L. Rev.* 445 [waiver of privilege in connection with advice-of-counsel defense in patent infringement case].

*C.C.P.* 2032 (mental and physical examinations) was repealed and replaced by *C.C.P.* 2032.010 et seq. in 2004 without substantive change.(2) *Conduct Not Amounting to Waiver*. See *Armenta v. Superior Court* (2002) 101 C.A.4th 525, 533, 124 C.R.2d 273 [where qui tam plaintiff and plaintiff city power and water department hired expert under joint prosecution agreement in their action against defendant water distribution parts manufacturers, city's waiver of work product privilege as to expert's reports did not result in waiver of qui tam plaintiff's privilege]; *Laguna Beach County Water Dist. v. Superior Court* (2004) 124 C.A.4th 1453, 1459, 22 C.R.3d 387 [by sending letters containing work product to auditors for county water district, in response to auditors' requests for information about pending or threatened litigation against district that might affect its financial condition, district's attorney did not waive right to assert work product protection].

*Cross-Reference:* 5 *Summary* (10th), *Torts*, §571.

(3) *(New) Selective Waiver*. The selective waiver theory, under which a client may disclose a privileged or protected communication to the Government while continuing to assert the privilege or protection against other parties, is accepted by some federal courts, but it is not part of the work product privilege law in California. (*McKesson HBOC v. Superior Court* (2004) 115 C.A.4th 1229, 1239, 9 C.R.3d 812 [by disclosing to government agency information obtained and reports prepared by its attorneys concerning internal accounting improprieties, company could no longer assert work product privilege as to same material in civil actions against it by shareholders].)



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#### 8. Waiver of Attorney-Client Privilege.

##### a. Implied and Express Waiver.

2 Witkin Cal. Evid. Witnesses § 151

[§ 151] Implied and Express Waiver.

In *Southern Calif. Gas Co. v. Public Util. Com.* (1990) 50 C.3d 31, 265 C.R. 801, 784 P.2d 1373, plaintiff SoCalGas applied to defendant Public Utilities Commission for authorization to recover costs incurred in buying out a gas supply contract made with Getty. The Commission questioned the reasonableness of the buyout, and sought discovery of documents regarding early termination of the Getty contract. Plaintiff, invoking the privilege, refused to produce confidential memos written by its attorneys. The Commission concluded that by making its application plaintiff had waived the privilege. In this proceeding for review of the Commission's decision, the Supreme Court held that the attorney-client privilege applies in proceedings before the Commission (see 1 Cal. Evidence (4th), Introduction, §74), and there was no waiver.

#### (a) Nonstatutory implied waiver.

(1) The theory of implied waiver was first recognized in *Merritt v. Superior Court* (1970) 9 C.A.3d 721, 88 C.R. 337, supra, §78, where the plaintiff had specifically put the state of mind of his attorney at issue. (50 C.3d 40.) But in *Mitchell v. Superior Court* (1984) 37 C.3d 591, 208 C.R. 886, 691 P.2d 642, infra, §152, the court concluded that there was no waiver where the substance of the protected communication was not itself tendered in issue. (50 C.3d 40.) And in *Aetna Cas. & Surety Co. v. Superior Court* (1984) 153 C.A.3d 467, 200 C.R. 471, infra, §167, the court held that no waiver occurred because Aetna was not relying on advice of counsel to show that it acted reasonably. (50 C.3d 41.)

(2) In the present case plaintiff did nothing to place in issue its privileged communications. It expressly stated that it did not rely on its attorneys' advice or state of mind to demonstrate that it acted reasonably when it bought out the Getty contract; and it "has represented that it will demonstrate that its buyout was reasonably based on an examination of the contract itself, the economic analysis it relied on to arrive at its decision, and testimony from appropriate witnesses." (50 C.3d 43.)

(3) The commission further argued that the privileged information is essential for its review of the application "because, pursuant to various statutes and in fundamental fairness to ratepayers, it must be able to examine all relevant sources of information that SoCalGas considered before it bought out the Getty contract." But no statute expressly requires access to a utility's privileged sources of information, and the commission's careful effort to determine reasonableness "does not have to come at the unnecessary expense of trampling on SoCalGas's attorney-client privilege." (50 C.3d 44.)

"If we were to uphold the commission's ruling, it would have the right to demand privileged information from a utility whenever a CAM application or any other application to recover costs involved a legal issue, since legal advice might be one source of information the utility considered. The commission's approach would drastically impinge on a utility's efforts to obtain adequate legal advice because a utility would be much less likely to divulge all pertinent information to its attorneys if it knew that the commission would have access to the communications." (50 C.3d 45.)

(b) *Statutory waiver.* A waiver of the privilege occurs under *Ev.C. 912* when the client has disclosed or consented to a disclosure of a significant part of the communication. (50 C.3d 46; see *supra*, §70.) In the present case, plaintiff's notes on phone conference state that "our attorneys had gone over the contract several times." But merely revealing that one has consulted an attorney does not constitute a waiver; there must be a disclosure of a significant part of the communication. (50 C.3d 46, discussing *Travelers Ins. Cos. v. Superior Court* (1983) 143 C.A.3d 436, 191 C.R. 871, *Mitchell v. Superior Court*, *supra*, and *Transamerica Title Ins. Co. v. Superior Court* (1987) 188 C.A.3d 1047, 233 C.R. 825, *supra*, §75.)

"We have considered these authorities and find their reasoning compelling. The attorney-client privilege seeks to protect the conversations and communications between the attorney and client, not merely the conclusions developed by those conversations or the fact that such conversations occurred. Accordingly, we conclude that SoCalGas's disclosure of the fact of its attorneys' review of the Getty agreement and the conclusions arrived at by its attorneys to members of the commission was not an express waiver of the attorney-client privilege." (50 C.3d 49.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 33 *Pepperdine L. Rev.* 723 [weakening of attorney-client and work product privileges by way of selective waiver]. *West's Key Number Digest*, Witnesses k.219(3)



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#### b. Information and Advice From Attorney.

2 Witkin Cal. Evid. Witnesses § 152

[§ 152] Information and Advice From Attorney.

In *Mitchell v. Superior Court* (1984) 37 C.3d 591, 208 C.R. 886, 691 P.2d 642, plaintiffs Gary and Bette Mitchell and 100 others filed actions against defendant manufacturers and distributors of DBCP, an agricultural soil fumigant, alleging contamination of the air and ground water in the vicinity of their homes. The complaint set forth seven causes of action for personal injuries and property damage. In the cause of action for intentional infliction of emotional distress, plaintiffs alleged that the water contamination caused such distress because they were aware that the chemical was highly toxic and carcinogenic.

Defendants propounded interrogatories to Bette seeking the sources of plaintiffs' information, and the nature and content of the warnings which contributed to her emotional distress. A number of these interrogatories dealt with information or documents received from her attorneys, and she invoked the attorney-client privilege. The trial judge ordered her to answer. *Held*, mandamus granted to compel vacation of the order.

(a) *Broad scope of privilege: in general.* "[T]he privilege covers the transmission of documents which are available to the public, and not merely information in the sole possession of the attorney or client. In this regard, it is the actual fact of the transmission which merits protection, since discovery of the transmission of specific public documents might very well reveal the transmitter's intended strategy." (37 C.3d 600.)

(b) *Scope of privilege: confidential communications.* "Each of the questions presuppose a communication between attorney and client, in which the attorney warned the client about the effects of DBCP, and cannot be answered without impliedly affirming that such conversation occurred." (37 C.3d 601.) Thus, the questions clearly involved *information* transmitted between plaintiff and her attorney in the course of their relationship as client and lawyer, as well as *advice* given by her attorney in the course of that relationship. (37 C.3d 601.) The contention that the warnings were not privileged because they involved "factual information" as opposed to "legal advice" is unsound: neither the statutes nor the cases make any such distinction, and the attorney transmitted the information "in the context of investigating, preparing and prosecuting a lawsuit; not simply in an abstract lecture to a friend on the health effects of that particular chemical." (37 C.3d 601.)

(c) *No waiver of privilege by disclosure.* Ev.C. 912 provides that waiver of this and other privileges occurs when the holder of the privilege discloses a significant part of the communication. (See *supra*, §67.) But mere disclosure of the fact that there was a communication between client and attorney does not amount to disclosure of its specific content; here, plaintiff's answers at most affirmed that she had discussed certain warnings with her attorneys, and in no

way revealed a significant part of the substance of the discussions. (37 C.3d 602, 603.)

(d) *No implied waiver: cases distinguished.* Defendants' contention that plaintiff waived the privilege by tendering a cause of action for emotional distress is based on a number of cases holding that "fundamental fairness" requires disclosure of otherwise privileged information or communications "where the plaintiff has placed in issue a communication which goes to the heart of the claim in controversy." (37 C.3d 604.) These cases are distinguishable:

(1) *In re Lifschutz* (1970) 2 C.3d 415, 85 C.R. 829, 467 P.2d 557, *infra*, §224, was based on the specific statutory patient-litigant exception to the psychotherapist-patient privilege (*infra*, §211 et seq.). No such specific statutory exception applies to the attorney-client privilege. (37 C.3d 604.)

(2) *Fremont Indem. Co. v. Superior Court* (1982) 137 C.A.3d 554, 187 C.R. 137, *infra*, §497, involved a claim of the self-incrimination privilege where the testimony sought was "vitally relevant" to an issue necessarily raised by plaintiff's claim. That is not true of the answers sought here. (37 C.3d 605.)

(3) *Merritt v. Superior Court* (1970) 9 C.A.3d 721, 88 C.R. 337, *supra*, §78, involved an action against an insurance company for bad faith refusal to settle. Plaintiff's complaint alleged that counsel for the company had so confused plaintiff's counsel as to disable plaintiff from settling the case within the policy limits. The court upheld disclosure on the ground that plaintiff had placed in issue the mental state of his then attorney, who would be called as a witness to prove the allegation. (37 C.3d 605, citing *Estate of Kime* (1983) 144 C.A.3d 246, 193 C.R. 718, *supra*, §67, for this limited application of *Merritt* holding.) Here, the state of mind of plaintiff's attorneys was not in issue. (37 C.3d 605.)

(e) *No implied waiver: evidence obtainable by other means.*

(1) A number of cases have rejected the claim of waiver where the substance of the protected communication is not itself in issue, but simply represents one of several forms of indirect evidence in the matter. (37 C.3d 606, 607.) Here, plaintiff correctly contends that she will attempt to prove her emotional distress claim without reference to confidential communications with her attorneys, and that the real issues are her knowledge and state of mind, evidence of which may be ascertained directly from her. (37 C.3d 606, 607.)

(2) In *Schlumberger Ltd. v. Superior Court* (1981) 115 C.A.3d 386, 171 C.R. 413, the court pointed out that privileged communications do not become discoverable merely because they are related to issues raised in the litigation. This is an appropriate answer to defendants' suggestion that much of plaintiff's alleged emotional distress resulted from fear induced by the advice and actions of her counsel, for plaintiff did not allege that the information supplied by her counsel caused her emotional distress: the complaint alleged that the contamination of ground water and air rendered the property unfit for human habitation or farming and caused personal injuries and emotional distress. (37 C.3d 607.)

Defendants also contended that plaintiff, by alleging a cause of action for emotional distress, rendered discoverable the source and substance of all information which she received about DBCP in order to determine the "genuineness" of her claim. This is likewise untenable: "[T]he principal measure of reasonableness is whether her fears square with scientifically proven or suspected effects of DBCP, a relatively objective test which can be applied by a trier of fact without delving into all her sources of information or misinformation." (37 C.3d 608.) And even if the communications were potentially relevant to the issue of damages, the privilege would still operate to exclude them: courts and legislatures have recognized that the privilege will at times exclude otherwise relevant evidence, and "[t]his court has no intention of abandoning that principle here." (37 C.3d 608.)

(f) *Public policy considerations.*

(1) Disclosure of the sought after confidential communications may have a significant impact on the attorney's work product doctrine (*supra*, §137 et seq.). Plaintiffs' attorneys have maintained that discovery would reveal much of their investigative efforts and trial strategy. (37 C.3d 609, 610.) "[I]t is logical to expect that in most personal injury cases where emotional distress is alleged by reason of feared future consequences, defense counsel would seek to

discover whether those potential consequences had been discussed between client and counsel and if so, whether that discussion had contributed to plaintiff's distress. Since it is likely that such discussions do in fact occur in most cases, the door would then be open for broad discovery of previously privileged communications. While such discovery would nominally be intended to produce evidence relating to the damages issue, it might well reveal much of plaintiff's investigative efforts and trial strategy. Limitations on the scope of this discovery would be very difficult to fashion." (37 *C.3d* 610.)

(2) The mere knowledge of such potential discovery would make an attorney representing a plaintiff with an emotional distress claim reluctant to even discuss future consequences with a client; and if an attorney cannot freely express opinions and impart knowledge on all issues the value of his or her services is substantially diminished. (37 *C.3d* 610.)

(3) To permit such discovery "would potentially uphold a harassment tactic whereby defendants such as these are able to shift the focus of the case from damages caused by chemical pollutants to damages caused by allegedly inflammatory or false information provided by self-serving attorneys." (37 *C.3d* 610.) (See *People v. Hayes* (1999) 21 *C.4th* 1211, 1265, footnote 14, 91 *C.R.2d* 211, 989 *P.2d* 645 [following *Mitchell* rule that mere disclosure that there was communication between client and attorney does not amount to disclosure of its specific content].)

**SUPPLEMENT:** [This section is current through the latest supplement]





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## CHAPTER IX - Witnesses

## IV. LAWYER-CLIENT PRIVILEGE

## G. Exceptions to the Privilege.

## 1. Contemplated Crime or Fraud.

## a. Scope of Exception.

## 1. Nature of Exception.

2 *Witkin Cal. Evid. Witnesses* § 153

## [§ 153] Nature of Exception.

The privilege is commonly and appropriately claimed where the client has committed a crime or other wrongful act and consults an attorney to defend him or her in a criminal or civil action. But the "shield" cannot be used as a "sword"; i.e., a person cannot so pervert the purpose of the privilege as to make it safe to seek legal assistance *to perpetrate* a crime or fraud. "[C]ommunications between attorney and client having to do with the client's contemplated criminal acts, or in aid or furtherance thereof, are not covered by the cloak of this privilege." (*Abbott v. Superior Court* (1947) 78 C.A.2d 19, 21, 177 P.2d 317; see *Wilson v. Superior Court* (1957) 148 C.A.2d 433, 443, 307 P.2d 37, supra, §127; *Agnew v. Superior Court* (1958) 156 C.A.2d 838, 840, 320 P.2d 158; 1 McCormick 5th, §95; 8 Wigmore (McNaughton Rev.) §§2298, 2299; 45 Cal. L. Rev. 75; 77 Harv. L. Rev. 730; 98 Harv. L. Rev. 1509; 1946 A.S. 1171; 1947 A.S. 1077; 1954 A.S. 790; 1956 A.S. 549; 81 Am.Jur.2d (1992 ed.), *Witnesses* §393 et seq.; 2 A.L.R.3d 861 [communications about contemplated tortious acts]; 64 A.L.R.3d 385 [rights and duties of attorney in criminal prosecution when client states intention to present perjured testimony]; 31 A.L.R.4th 458 [contemplated civil fraud].)

In the *Abbott* case, supra, petitioner, an attorney, sent communications to his client through the latter's employee. Later the client and attorney were both indicted for criminal conspiracy. *Held*, neither could object to introduction of the communications. (a) The privilege belongs to the client and cannot be claimed solely for the incidental purpose of protecting the attorney; hence, the attorney could not object unless the client could object. (b) The client could not, for the communication dealt with his contemplated criminal acts. (78 C.A.2d 21.)

The exception applies only where the crime or fraud is contemplated *by the client*. In *Glade v. Superior Court* (1978) 76 C.A.3d 738, 143 C.R. 119, plaintiffs claimed that their former attorney had defrauded them by using information obtained in his contemporaneous representation of the adverse interests of other clients. *Held*, the exception did not apply to the other clients' privilege. The attorney's misuse of confidential information to defraud others will not invoke the exception of *Ev.C.* 956 (infra, §154) "if the client did not seek legal assistance to further this purpose, and he was unaware of the attorney's contemplated wrongdoing." (76 C.A.3d 746.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 81 Am.Jur.2d (2004 ed.), *Witnesses* §377 et seq.; 1 McCormick 6th, §95; 9 A.L.R.6th 363 [exception to attorney-client privilege for crime contemplated by client]. *West's Key Number Digest*, *Witnesses* k.201(2)



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##### a. Scope of Exception.

##### 2. Evidence Code.

2 Witkin Cal. Evid. Witnesses § 154

[§ 154] Evidence Code.

The original Uniform Rule of Evidence made a significant extension of the exception, using the phrase "crime or a tort." This opened up a large and uncertain area of nullification of the privilege, and presented difficult problems for an attorney consulting with a client. (See Cal. L. Rev. 77, note 15; 77 Harv. L. Rev. 731.)

California retained the conventional rule in *Ev.C. 956*: "There is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud." (See *Nowell v. Superior Court* (1963) 223 C.A.2d 652, 658, 36 C.R. 21, quoting the text; Unif. Rules, Rule 502(d)(1) ["crime or fraud"].)

The exception stated in *Ev.C. 956* does not encompass a mere statement of intent to commit a future crime and to seek legal assistance in planning or perpetrating the crime. (*People v. Clark* (1990) 50 C.3d 583, 622, 268 C.R. 399, 789 P.2d 127 [defendant's statement that he intended to kill his former wife's employer and his therapist's brother was within the privilege].)

*Ev.C. 956.5*, enacted in 1993, expands the scope of the offenses included within the exception: There also is no privilege if the lawyer reasonably believes that disclosure is necessary to prevent the client from committing a criminal act the lawyer believes is likely to result in death or substantial bodily harm. (See 28 U.C. Davis L. Rev. 367; 35 Santa Clara L. Rev. 825 [possibility that *Ev.C. 956.5* will cause extension of liability to attorneys under *Tarasoff v. Regents of Univ. of Calif.* (1976) 17 C.3d 425, 131 C.R. 14, 551 P.2d 334, 6 Summary (9th), Torts, §860].)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Ev.C. 956.5* was amended in 2003 to substitute "to prevent a criminal act" for "to prevent the client from committing a criminal act," and to specify that the lawyer's belief that the act is likely to result in death or substantial bodily harm must be reasonable.

See *People v. Michaels* (2002) 28 C.4th 486, 537, 538, 122 C.R.2d 285, 49 P.3d 1032 [where defendant was tried for murder prior to enactment of *Ev.C. 956.5* (text, p. 427), admission at penalty phase of note written by defendant to attorney during preliminary hearing, to effect that one codefendant might be harmed unless kept separate from defendant and another codefendant, was error, although harmless; *Ev.C. 956* authorized admission if services of attorney were sought to aid in commission of crime, but defendant's communication was intended to prevent crime]; 73

So. Cal. L. Rev. 139 [arguing for amendment of B. & P.C. 6068(e) (attorney's duty of confidentiality; see 1 Cal. Proc. (4th), Attorneys, §118) in order to clarify meaning of Ev.C. 956.5].

In *People v. Dang* (2001) 93 C.A.4th 1293, 113 C.R.2d 763, defendant was charged with residential burglary, false imprisonment, assault with a firearm or deadly weapon, and dissuading a witness by force or threat. After engaging in most of the conduct that formed the basis of the charges, defendant had told his attorney that he was going to try to "pay off" one or more witnesses and that he would "whack" them if he was not successful in bribing them. In a second conversation, defendant repeated these threats and also threatened the attorney. The attorney reported the threats to the district attorney and was relieved as counsel. At trial, the attorney was permitted to testify about the threats, and defendant was found guilty. *Held*, affirmed; the attorney's testimony was properly admitted.

(a) Ev.C. 956.5 provides that the attorney-client privilege is inapplicable where "the lawyer reasonably believes that disclosure of any confidential communication relating to representation of a client is necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm." Defendant's characterization of his threats as reflecting an attempt to pay off witnesses is simply wrong; defendant threatened both the witnesses and the attorney with death, and those threats are clearly within the statutory exception. (93 C.A.4th 1296, 1297.)

(b) There is a possible conflict between Ev.C. 956.5 and B. & P.C. 6068(e) (1 Cal. Proc. (4th), Attorneys, §118), which requires an attorney to maintain confidences inviolate. The issue on appeal, however, is limited to the admissibility of the attorney's testimony, and thus the conflict need not be resolved. Nevertheless, it is worth noting that the State Bar Court has found that the duty of confidentiality under B. & P.C. 6068(e) is modified by the exceptions to the attorney-client privilege codified in the *Evidence Code*. (93 C.A.4th 1298, 1299.)

(c) There is no basis for reversal under Ev.C. 352 (weighing of probative value against prejudicial impact; see 1 Cal. Evidence (4th), Circumstantial Evidence, §17). The evidence was clearly relevant to the claim of witness intimidation. The fact that defendant made the threats to his attorney provides no grounds for exclusion under Ev.C. 352. "If the Legislature had wished to exclude admissibility of an attorney's testimony against a former client in this context, it could have done so by providing ... that the attorney could *report* the threat to authorities, but could *not testify* against the client in a trial. Instead, the Legislature did not qualify the provision." (93 C.A.4th 1299.) Finally, the trial judge told the jury that if it found that defendant made the statements, it could consider them as a circumstance tending to show a consciousness of guilt but that the statements were not sufficient by themselves to prove guilt, and that the weight and significance of the statements were for the jury to decide. There was no abuse of discretion. (93 C.A.4th 1299, 1300.)

Language added to B. & P.C. 6068(e) in 2003 addresses the statutory conflict referred to in *People v. Dang*, *supra*: "[A]n attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual."

*Cross-Reference:* 6 Summary (10th), Torts, §1050.



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  - a. Scope of Exception.
3. Physical Evidence of Completed Crime.

2 Witkin Cal. Evid. Witnesses § 155

[§ 155] Physical Evidence of Completed Crime.

The privilege covers communications dealing with a crime already committed. (See 16 A.L.R.3d 1029; *supra*, §153.) But it does not permit defense counsel to *secrete physical evidence* which his or her client has given to him or her. (*People v. Lee* (1970) 3 C.A.3d 514, 524, 83 C.R. 715; *People v. Superior Court (Fairbank)* (1987) 192 C.A.3d 32, 34, 237 C.R. 158.)

In *People v. Lee, supra*, the victim of a beating was unable to identify her assailant because of brain damage (possibly suffered from being kicked in the head). Defendant, arrested for the crime, asked his father to look for a pair of shoes he had hidden on some neighbors' property. The neighbors discovered the shoes first and gave them to defendant's estranged wife. She, in turn, delivered them to an investigator for the public defender's office, who passed them on to the deputy assigned to represent defendant. Before the preliminary hearing, the deputy was replaced by private counsel. To avoid a charge of suppressing evidence, and to prevent its seizure by the district attorney without a prior determination of its arguably privileged character, the deputy delivered the shoes to a municipal court judge. The judge, the district attorney and the deputy agreed that the judge would retain the shoes as a "private citizen" until a judicial decision had been made. Ultimately, the district attorney obtained the shoes by use of a search warrant and proved they were stained with blood of the victim's type. *Held*, the seizure of evidence did not violate defendant's rights.

(a) It is an abuse of a lawyer's professional responsibility to knowingly take possession of and secrete the instrumentalities of a crime. As a Washington case put it: "The attorney should not be a depository for criminal evidence (such as a knife, other weapons, stolen property, etc.), which in itself has little, if any, material value for the purposes of aiding counsel in the preparation of the defense of his client's case. Such evidence given the attorney during legal consultation for information purposes and used by the attorney in preparing the defense of his client's case, whether or not the case ever goes to trial, could clearly be withheld for a reasonable period of time. It follows that the attorney, after a reasonable period, should, as an officer of the court, on his own motion turn the same over to the prosecution." (3 C.A.3d 526.)

(b) The fact that the client delivered the evidence to his attorney may be privileged, but the physical object does not become privileged merely because it was given to the attorney. (3 C.A.3d 526.)

In *People v. Superior Court (Fairbank), supra*, the prosecution obtained jailhouse letters from defendant, who was charged with murder, stating that he "foolishly told lawyer where weapons were" and that the attorneys "now have

weapons and D.A. doesn't know it yet." The prosecutor moved to compel defense counsel to produce the physical evidence, but the motion was denied after the judge asked defense counsel whether he was "aware" of his duties and received an affirmative response. *Held*, denial of the motion was error.

(a) Defense counsel may not retain physical evidence pertaining to the crime charged against his or her client. (192 C.A.3d 34, citing *Lee*.) And if defense counsel removes or alters evidence, the attorney-client privilege "does not bar revelation of the original location or condition of the evidence." (192 C.A.3d 36, quoting from *People v. Meredith* (1981) 29 C.3d 682, 175 C.R. 612, 631 P.2d 46, *supra*, §109.)

(b) Defense counsel's argument that defense attorneys cannot be compelled to answer questions about or turn over crime-related physical evidence prior to trial is based on the discussion in *Goldsmith v. Superior Court* (1984) 152 C.A.3d 76, 199 C.R. 366, *infra*, §385, of a defendant's right to be free from compelled self-incrimination. But the argument depends entirely on the "false premise" that when defense counsel turns over physical evidence or describes its location before removal he incriminates the defendant. Defense counsel does not necessarily learn the location of evidence from the defendant; and, as explained in *Meredith*, *supra*, the defense may preclude the jury from speculating that the defendant provided the information, by stipulating to a limited explanation of how the evidence was recovered (see *supra*, §109). (192 C.A.3d 38.)

(c) Cases decided before Proposition 115 that prohibited compelled discovery of defense information (see 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §28 et seq.) do not apply where the prosecution seeks only access to physical evidence possessed by defense counsel. "To read those cases as permitting defense counsel to obtain and withhold physical evidence concerning the crime charged against the defendant would directly clash with the principles discussed in *Meredith*." (192 C.A.3d 39.)

(d) Defense counsel's obligations with respect to relevant physical evidence "should be self-executing and no motion by the prosecution or order by the court should be required to enforce them." (192 C.A.3d 39.) "The defense decision to remove or alter evidence is a tactical choice. If counsel or an agent of counsel chooses to remove, possess, or alter physical evidence pertaining to the crime, counsel must immediately inform the court of the action. The court, exercising care to shield privileged communications and defense strategies from prosecution view, must then take appropriate action to ensure that the prosecution has timely access to physical evidence possessed by the defense and timely information about alteration of any evidence." (192 C.A.3d 39, citing *Meredith*.)

(e) The prosecution is not required to show need for the evidence: "The obligation to provide the prosecution with access to physical evidence and information about its alteration is absolute. Defense counsel may not use seizure or alteration of evidence as an excuse to pretry the prosecution's case or test the court's sympathies." (192 C.A.3d 40.)

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##### a. Scope of Exception.

##### 4. Fraud in Defending Insurance Bad Faith Action.

2 Witkin Cal. Evid. Witnesses § 156

[§ 156] Fraud in Defending Insurance Bad Faith Action.

In *State Farm Fire & Cas. Co. v. Superior Court* (1997) 54 C.A.4th 625, 62 C.R.2d 834, an insurer denied plaintiff homeowners' claim for earthquake damage on the ground that plaintiffs' policy did not include earthquake coverage. Plaintiffs then sued the insurer, several of its agents, and several insurance brokers, alleging that defendants had participated in fraudulently misrepresenting that plaintiffs' policy would cover them for earthquake loss. After the trial judge granted the insurer's motion for summary judgment, plaintiffs moved for reconsideration and submitted declarations by a former employee of the insurer, who had worked on plaintiffs' case during the discovery stage. The declarations related to the insurer's litigation strategy and its lack of compliance with discovery requests, and they described conversations with other employees and inside and outside counsel regarding plaintiffs' case. The insurer requested a protective order sealing the declarations and prohibiting plaintiffs' counsel from disseminating any information he had learned from the former employee. The trial judge issued a temporary protective order, but, after hearing argument, he vacated the order and ordered the documents unsealed. *Held*, writ relief denied; unsealing of the documents was proper.

(a) The attorney-client privilege protects disclosures of communications between the attorney and client but does not protect disclosure of underlying facts referenced within a qualifying communication. "Therefore, to the extent that Ms. Zuniga has knowledge about the practices and procedures of State Farm, or the existence of claims manuals and other documents which are normally utilized by State Farm in the operation of its business, the information is not privileged. ... Also, it would not be a violation of the attorney-client privilege for Ms. Zuniga to divulge that such documents exist but were not produced" in connection with this action. (54 C.A.4th 639.) Under this analysis, some of the materials sought at least arguably fall within the privilege, while some clearly do not. (54 C.A.4th 643.)

(b) As to those materials that would otherwise be exempted from disclosure by the attorney-client privilege, plaintiffs have presented sufficient evidence to support the trial judge's implied finding that the crime-fraud exception applies: (1) they have asserted that the insurer's wrongful tactics in defending the litigation constitute a fraud upon the court; (2) the circumstances surrounding the communications at issue show that there is a reasonable relationship between the communications and the alleged fraud; and (3) evidence presented by plaintiffs, including the former employee's declarations, indicates that the insurer may have had a policy of destroying potentially relevant documents to avoid having to produce them in bad faith actions, that certain evidence in this case may have been "manufactured," and that the original insurance application may have been forged. "We conclude the foregoing evidence is more than

sufficient for application of the crime/fraud exception to the privileged materials contained in the Zuniga declarations." (54 C.A.4th 649.) The same conclusion applies to a portion of one of the declarations disclosing the name of a software program that would otherwise qualify for protection under the statutory trade secret privilege: that privilege contains its own fraud exception (see *Ev.C. 1060*, *infra*, §350). (54 C.A.4th 651.)

(c) The crime-fraud exception is inapplicable to the work product privilege. When a work product claim is made, the appropriate inquiry is whether, if disclosure is denied, an injustice might occur or the party opposing disclosure would be unfairly prejudiced. Here, the same analysis used for the crime-fraud exception leads to the conclusion that refusal to disclose the information contained in the declarations would unfairly prejudice plaintiffs and result in an injustice. (54 C.A.4th 650.)

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##### b. Procedure.

##### 1. Foundation.

2 Witkin Cal. Evid. Witnesses § 157

[§ 157] Foundation.

In most cases, the communication itself will show that the client contemplated the wrongful acts. But it would be wholly destructive of the privilege to require disclosure by the attorney in any case on the mere assertion of opposing counsel. Accordingly, evidence should be presented to show that this was the client's purpose, before the communication is received. (See *Clark v. United States* (1933) 289 U.S. 1, 53 S.Ct. 465, 468, 77 L.Ed. 993, 999; *Nowell v. Superior Court* (1963) 223 C.A.2d 652, 657, 36 C.R. 21, quoting the text; Law Rev. Com. Comment to Ev.C. 405 [proponent of proffered evidence has burden of proof on preliminary fact of exception to privilege]; *Travelers Ins. Cos. v. Superior Court* (1983) 143 C.A.3d 436, 446, 447, 191 C.R. 871 [burden not met]; 77 Harv. L. Rev. 736 [discussing "proof dilemma"].)

In *Nowell v. Superior Court*, *supra*, S sued N and others for alleged libel in a city election campaign. S took N's deposition, and asked questions as to whether he solicited legal advice, or discussed with his attorney the legal effect of particular conduct or inaction, and whether he relied on his attorney's advice in publishing certain material. N claimed privilege, and S's motion to compel answers was granted. *Held*, N was entitled to prohibition. Although the questions were innocently phrased so as not to directly call for communications between the attorney and client, the answers would contain implied admissions as to those communications. (223 C.A.2d 656.)

In *BP Alaska Exploration v. Superior Court* (1988) 199 C.A.3d 1240, 245 C.R. 682, *supra*, §143, the court held that the crime-fraud exception was inapplicable to material protected by the absolute work product privilege, but the matter was remanded to the trial court for an in camera hearing to determine which documents contained work product, and which were protected only by the attorney-client privilege, and therefore were subject to the crime-fraud exception. (199 C.A.3d 1261.)

The opinion deals with the nature of the prima facie showing under Ev.C. 956 as follows: the mere assertion of fraud is insufficient; there must be a showing that the fraud has some foundation in fact. (199 C.A.3d 1262, citing *Nowell, supra*.) However, because the statute applies to communications to enable the client to plan to commit a fraud, it is not necessary that the contemplated fraud be successful: "[T]he proponent of the exception need only to prove a false representation of a material fact, knowledge of its falsity, intent to deceive and the right to rely." (199 C.A.3d 1263.) The record contains such a prima facie showing. (199 C.A.3d 1269.)

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2. Where Evidence Seized Pursuant to Warrant.

2 Witkin Cal. Evid. Witnesses § 158

[§ 158] Where Evidence Seized Pursuant to Warrant.

In *People v. Superior Court (Bauman & Rose)* (1995) 37 C.A.4th 1757, 44 C.R.2d 734, documents were seized from the offices of several attorneys suspected of insurance fraud. The attorneys moved for sealing of the documents until an in camera hearing could be held to determine whether the documents were protected by the attorney-client privilege. The trial judge granted the motion. *Held*, this was proper.

(a) The attorneys' right to a hearing did not stem from P.C. 1524, which authorizes an in camera hearing pursuant to a special master procedure for *nonsuspect* privilege holders. (See 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence*, §83 et seq.) The statute does not apply to attorneys suspected of criminal activity. Nevertheless, nothing in the statute or its legislative history purports to abrogate the attorney-client privilege between a suspect attorney and his client, and the attorney is entitled to assert the privilege on behalf of his client. The trial judge retains authority to hold an in camera hearing to determine the validity of the assertion of the attorney-client privilege by an attorney suspected of criminal activity, notwithstanding the inapplicability of P.C. 1524. (37 C.A.4th 1764, 1767.)

(b) The finding of probable cause to issue the warrant did not imply a determination by the issuing magistrate that the attorney-client privilege had been waived by the crime-fraud exception and thus obviate the need for a hearing. It cannot be presumed, simply because a warrant issues, that all the items seized fall within the crime-fraud exception, or that other items outside the scope of the warrant have not been seized, either by mistake or misapprehension. (37 C.A.4th 1768, citing *Geilim v. Superior Court* (1991) 234 C.A.3d 166, 174, 285 C.R. 602.) The trial judge correctly ruled that an in camera hearing was required. (37 C.A.4th 1771.) (See *Brillantes v. Superior Court* (1996) 51 C.A.4th 323, 333, 58 C.R.2d 770, 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence*, §86 [Bauman holding applies only to attorney-client privilege, and, even where applicable, does not establish absolute right to in camera hearing; rather, trial judge has inherent power to protect privilege holder from improper disclosure by fashioning safeguards as required by particular facts].)

**SUPPLEMENT:** [This section is current through the latest supplement]

A superior court has an obligation to determine claims of privilege regarding materials seized from attorneys, whether or not the attorneys are suspected of criminal conduct, and the court may properly conduct a hearing to resolve the privilege claims. Although C.C.P. 639 (see 6 Cal. Proc. (4th), *Proceedings Without Trial*, §60) does not authorize a compulsory reference in a proceeding to determine whether documents seized from a criminal suspect are privileged

(because such a proceeding is not the type of "special proceeding" to which that section applies), the court nevertheless possesses inherent authority to appoint a special master to assist it in examining the seized documents and ruling on the claims of privilege. However, the court lacks either statutory or inherent power to require the parties to bear the cost of a special master's services in this context. (*People v. Superior Court (Laff)* (2001) 25 C.4th 703, 709, 710, 107 C.R.2d 323, 23 P.3d 563, 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence*, Supp., §86; approving *People v. Superior Court (Bauman & Rose)* (1995) 37 C.A.4th 1757, 44 C.R.2d 734, text, p. 431; see P.C. 1524(i), added in 2002 [nothing in P.C. 1524, text, p. 432, is intended to limit ability of attorney to obtain in camera hearing pursuant to holding in *Laff*].)



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1. Contemplated Crime or Fraud.
  - b. Procedure.
3. Federal Common Law.

2 *Witkin Cal. Evid. Witnesses* § 159

[§ 159] Federal Common Law.

Under federal common law, a district court may conduct an in camera review of material allegedly protected by the attorney-client privilege to determine the applicability of the crime-fraud exception, if the party opposing the privilege presents relevant evidence, lawfully obtained and not adjudicated to be privileged, sufficient to support a reasonable belief that an in camera review may yield evidence establishing the exception's applicability. (See *United States v. Zolin* (1989) 491 U.S. 554, 109 S.Ct. 2619, 2628, 2631, 105 L.Ed.2d 469, 487, 491, supra, §90 [contrasting *F.R. Evid.*, Rule 104(a), 3 *Cal. Evidence* (4th), *Presentation at Trial*, §48 with *Ev.C.* 915(a), supra, §87].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### 2. Parties Claiming Through Deceased Client.

2 Witkin Cal. Evid. Witnesses § 160

[§ 160] Parties Claiming Through Deceased Client.

(1) *Nature of Exception.* Privy furnishes another important exception. "[T]he privilege does not survive the testator's death when the matter of his conversations or instructions arises in will contests, petitions to determine heirship, petitions to construe an ambiguous will, or any other type of controversy involving only the heirs or next of kin and the legatees or devisees of the testator." (*Paley v. Superior Court* (1955) 137 C.A.2d 450, 457, 290 P.2d 617; see *Swidler & Berlin v. United States* (1998) 524 U.S. 399, 118 S.Ct. 2081, 2085, 141 L.Ed.2d 379, 385 [existence of testamentary exception does not mean that privilege, in other contexts, does not survive death of client]; *Estate of Dominici* (1907) 151 C. 181, 186, 90 P. 448; 1 McCormick 5th, §94; 8 Wigmore (McNaughton Rev.) §2314; 10 *Stanf. L. Rev.* 313; 40 *Harv. L. Rev.* 115; 8 *U.C.L.A. L. Rev.* 618; 1959 A.S. 635; 1966 A.S. 408; 66 A.L.R.2d 1302 [communications to attorney in connection with drawing of will]; 75 A.L.R.4th 1144 [effect of will being disclosed involuntarily prior to testator's death].)

(2) *Evidence Code.* Ev.C. 957 states the exception in its broadest form: "There is no privilege under this article as to a communication relevant to an issue between parties all of whom claim through a deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction." (See also Unif. Rules, Rule 502(d)(2).)

The exception was formerly limited in California to persons claiming by testate or intestate succession, i.e., heirs or distributees. (See *Paley v. Superior Court*, *supra*, 137 C.A.2d 457.) Ev.C. 957 follows the Uniform Rules of Evidence in extending it to claims based on inter vivos transactions. (See Law Rev. Com. Comment.)

Although Ev.C. 957 does not specify which attorney-client relationship it refers to, the relationship can only be that of the deceased client and his or her attorney. This limitation is implicit in the statute's reference to a "client" who is "deceased." Thus, communications that are subject to disclosure under this exception are those between the decedent and the decedent's attorney. (*Fletcher v. Superior Court* (1996) 44 C.A.4th 773, 778, 779, 52 C.R.2d 65 [in litigation involving trust, exception did not apply to communications between trustee (sister of deceased trustor) and her attorney, and thus trial judge erred in ordering disclosure].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Nature of Exception.* See 1 McCormick 6th, §94. *West's Key Number Digest*, Witnesses k.202



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#### G. Exceptions to the Privilege.

##### 3. Breach of Duty.

##### a. In General.

2 Witkin Cal. Evid. Witnesses § 161

[§ 161] In General.

If, in litigation between an attorney and the attorney's client or between the client and a third person, or in any other proceeding, the attorney's integrity, good faith, authority, or performance of his or her duties is questioned, the attorney should be permitted to meet this issue with testimony as to the attorney's communications with the client. (See *Pacific Tel. & Tel. Co. v. Fink* (1956) 141 C.A.2d 332, 335, 296 P.2d 843; *Fleschler v. Strauss* (1936) 15 C.A.2d 735, 739, 60 P.2d 193; *People v. Morris* (1971) 20 C.A.3d 659, 663, 97 C.R. 817, quoting the text [defendant had alleged false promises by former attorney as inducement for guilty plea; because attorney's good faith, honesty and professional conduct were under attack, attorney was authorized to testify against defendant in perjury prosecution]; *People v. Vargas* (1975) 53 C.A.3d 516, 525, 126 C.R. 88, supra, §120, citing the text [at sentencing hearing 2 1/2 years after trial, defendant said he fled trial on counsel's advice; attorney could properly contradict that statement]; *In re Gray* (1981) 123 C.A.3d 614, 615, 616, 176 C.R. 721, infra, §162, citing the text; 1 McCormick 5th, §91; 81 Am.Jur.2d (1992 ed.), Witnesses §400; 1966 A.S. 408.)

This view was embodied in *Ev.C. 958*: "There is no privilege as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship."

In *Pacific Tel. & Tel. Co. v. Fink*, supra, attorneys for both sides stipulated that judgment should follow the determination of a controlling issue by the Public Utilities Commission in a pending case involving the same parties. The Commission decided in favor of plaintiffs, and judgment was entered against defendants as stipulated. New counsel for defendants then moved to vacate the judgment on the ground of lack of authority of defendants' former attorney to so stipulate, and objected to the attorney's testimony on his authority as a disclosure of confidential communications. *Held*, the objection was untenable where, as here, the professional conduct of the attorney had been attacked. "It would be a sad commentary upon our boasted concept of fairness and the right to defend one's reputation and integrity, were it possible for the accuser to silence the accused by invoking the doctrine of privileged communication." (141 C.A.2d 335.)

*Fleschler v. Strauss*, supra, is similar. Defendant instructed his attorney to arrange for settlement of a claim against him. A settlement was reached, but defendant refused to perform and repudiated the authorization. The claimant sued, and at the trial the attorney was permitted to testify as to the instructions. *Held*, this was proper; to apply the privilege would be unjust to both the attorney and the third party, for the client could authorize the attorney to contract and then nullify the attorney's act by forbidding disclosure of the authorization. (15 C.A.2d 739.)

In *Carlson, Collins, Gordon & Bold v. Banducci* (1967) 257 C.A.2d 212, 64 C.R. 915, plaintiff attorney, suing for the reasonable value of his services, was permitted to testify to various details of questionable conduct of his client, who was a defendant in a will contest. The purposes were to show the obstacles faced by plaintiff's law firm in reaching a settlement with the contesting relatives, and to rebut defendants' claim that plaintiff exercised undue influence or took advantage of defendants in the fee agreement. There was no violation of privilege, for evidence of the communications was necessary to protect the attorney's rights. (257 C.A.2d 228, citing the text.)

Communications between the attorney *and other clients* are distinguishable. In *Glade v. Superior Court* (1978) 76 C.A.3d 738, 143 C.R. 119, supra, §153, plaintiffs, suing for legal malpractice, were properly denied discovery of defendant attorney's communications with other clients not privy to his relationship with plaintiffs. *Ev.C.* 958 does not entitle a litigant claiming breach of duty relating to his own representation "unilaterally to waive the attorney-client privilege held by other clients of the same attorney." (76 C.A.3d 747.)

For a discussion of the "in issue" doctrine (waiver of privilege where client tenders issue involving substance or content of protected communication), and its inapplicability where the client, an insured, sues its liability insurer for failure to defend, see *Rockwell Int. Corp. v. Superior Court* (1994) 26 C.A.4th 1255, 1268, 32 C.R.2d 153, *infra*, §167.

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 81 *Am.Jur.2d* (2004 ed.), *Witnesses* §383; 1 McCormick 6th, §91.1.



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##### 3. Breach of Duty.

#### b. Challenge of Competency of Counsel.

2 Witkin Cal. Evid. Witnesses § 162

[§ 162] Challenge of Competency of Counsel.

*In re Gray* (1981) 123 C.A.3d 614, 176 C.R. 721, involved a habeas corpus petition by a defendant found guilty of first degree murder and conspiracy to commit extortion. She alleged that Gray, her attorney, had failed to act as a reasonably competent attorney in failing to offer potentially meritorious defenses of diminished capacity or insanity. At the hearing, she refused to waive privilege and objected to Gray testifying. *Held*, the privilege was waived. The claim of inadequate representation clearly involves a charge of breach of duty under *Ev.C. 958*: "[I]f the defendant in a criminal action claims that his lawyer did not provide him with an adequate defense, communications between the lawyer and client relevant to that issue are not privileged." (123 C.A.3d 615, quoting Law Rev. Com. Comment.) As noted in *People v. Pope* (1979) 23 C.3d 412, 426, 152 C.R. 732, 590 P.2d 859, 5 Cal. Crim. Law (3d), *Criminal Trial*, §202: "In habeas corpus proceedings, there is an opportunity in an evidentiary hearing to have trial counsel fully describe his or her reasons for acting or failing to act in the manner complained of. ... For example, counsel may explain why certain defenses were or were not presented. Having afforded the trial attorney an opportunity to explain, courts are in a position to intelligently evaluate whether counsel's acts or omissions were within the range of reasonable competence." (123 C.A.3d 616.)

The opinion adds: "[I]f during an evidentiary hearing a defendant discovers that he has opened a real can of worms and that some of the goodies he has imparted to his attorney may come to light, he can protect himself by simply dismissing the petition." (123 C.A.3d 617.)

**SUPPLEMENT:** [This section is current through the latest supplement]

The purpose of the exception provided by *Ev.C. 958* to the attorney-client privilege has been fully met once evidence relating to the attorney's possibly inadequate representation of a defendant at a criminal trial has been presented at a habeas corpus proceeding. Thus, following the proceeding, the exception is no longer applicable, and the privilege continues to apply. To interpret the statute otherwise would raise serious questions as to whether it conflicts with the defendant's constitutional right to counsel, a right that the privilege is intended to promote. (*People v. Ledesma* (2006) 39 C.4th 641, 694, 47 C.R.3d 326, 140 P.3d 657 [defendant's statements to psychiatrist who had assisted defense counsel, although properly admitted at habeas corpus proceeding challenging adequacy of his attorney's representation regarding mental defenses at first trial, did not fall within exception of *Ev.C. 958* for purposes of retrial; however, defendant waived privilege at retrial by presenting testimony of expert witnesses who had reviewed psychiatrist's report and prior testimony].)



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4. Lawyer as Attesting Witness.

2 *Witkin Cal. Evid. Witnesses* § 163

[§ 163] Lawyer as Attesting Witness.

The client contemplates the testimony of an attesting witness, and may therefore be thought of as "waiving" the privilege if the client makes his or her attorney such a witness. (See *In re Mullin* (1895) 110 C. 252, 254, 42 P. 645; *In re Wax* (1895) 106 C. 343, 347, 39 P. 624; 8 Wigmore (McNaughton Rev.) §2315.)

There is no reason, however, to extend the exception beyond the necessity for it. The privilege is waived as to the issues of execution and attestation, i.e., as to those matters on which an attesting witness is called to testify; but communications of the client on other matters should remain within the privilege. California's former law did not recognize this distinction. (See *In re Mullin*, supra, 110 C. 254, allowing proof of declarations of deceased as to the will, on the issue of mental capacity.) But *Ev.C.* 959 makes the limited scope of the exception clear:

"There is no privilege under this article as to a communication relevant to an issue concerning the intention or competence of a client executing an attested document of which the lawyer is an attesting witness, or concerning the execution or attestation of such a document." (See similar Unif. Rules, Rule 502(d)(4).)

**SUPPLEMENT:** [This section is current through the latest supplement]





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5. Deceased Client's Dispositive Instrument.

2 *Witkin Cal. Evid. Witnesses* § 164

[§ 164] Deceased Client's Dispositive Instrument.

The considerations supporting the attorney-attesting witness exception (*Ev.C.* 959, *supra*, §163) are equally applicable to any dispositive instruments attested by others. "A client ordinarily would desire his lawyer to communicate his true intention with regard to a dispositive instrument if the instrument itself leaves the matter in doubt and the client is deceased. Likewise, the client ordinarily would desire his attorney to testify to communications relevant to the validity of such instruments after the client dies." (*Law Rev. Com. Comment to Ev.C.* 960.)

Two sections accordingly extend the exceptions as follows:

(1) *Intention of Client*. There is no privilege as to "a communication relevant to an issue concerning the intention of a client, now deceased, with respect to a deed of conveyance, will, or other writing, executed by the client, purporting to affect an interest in property." (*Ev.C.* 960.)

(2) *Validity of Writing*. There is no privilege as to "a communication relevant to an issue concerning the validity of a deed of conveyance, will, or other writing, executed by a client, now deceased, purporting to affect an interest in property." (*Ev.C.* 961.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Witnesses k.202



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##### 6. Joint Clients.

##### a. General Rule for Civil Proceeding.

2 Witkin Cal. Evid. Witnesses § 165

[§ 165] General Rule for Civil Proceeding.

(1) *Nature of Exception.* Where persons "have mutually employed the same counsel and have discussed freely their problems in the presence of one another and their counsel, the reason for the rule of privilege has been destroyed, for each party by such concerted action thereby has waived the right to place such communications under the shield of privilege." (*Clyne v. Brock* (1947) 82 C.A.2d 958, 965, 188 P.2d 263; see *Croce v. Superior Court* (1937) 21 C.A.2d 18, 19, 68 P.2d 369; *De Olazabal v. Mix* (1937) 24 C.A.2d 258, 262, 74 P.2d 787; *Murphy v. Waterhouse* (1896) 113 C. 467, 470, 45 P. 866; *Petty v. Superior Court* (1953) 116 C.A.2d 20, 29, 253 P.2d 28; 8 Wigmore (McNaughton Rev.) §2312; 10 *Stanf. L. Rev.* 309; 72 *Harv. L. Rev.* 766; 1958 A.S. 658; 4 A.L.R.4th 765 [applicability in subsequent action between parties originally represented contemporaneously by same attorney]; Unif. Rules, Rule 502(d)(5).)

Thus, in the *Croce* case, *supra*, the attorney represented several associates in a business enterprise, defending them in a suit in which they denied that they were partners. A dispute arose thereafter between them, and the attorney then represented one against the others, the complaint alleging that they were partners. *Held*, prior communications were not privileged, and any of the parties could compel him to testify. (For criticism and distinguishing of *Croce*, see *Industrial Indem. Co. v. Great Amer. Ins. Co.* (1977) 73 C.A.3d 529, 536, 140 C.R. 806, 1 Cal. Proc. (4th), Attorneys, §165 ["even if *Croce* is still good law, it does not apply to a situation where the joint representation of two or more clients with *conflicting interests* was undertaken or continued without disclosure and written consent"].)

(2) *Evidence Code.* Ev.C. 962 codifies the exception as follows:

"Where two or more clients have retained or consulted a lawyer upon a matter of common interest, none of them, nor the successor in interest of any of them, may claim a privilege under this article as to a communication made in the course of that relationship when such communication is offered in a civil proceeding between one of such clients (or his successor in interest) and another of such clients (or his successor in interest)." (See *Wortham & Van Liew v. Superior Court* (1987) 188 C.A.3d 927, 931, 233 C.R. 725 [although party and attorney intended communication to be confidential, communication concerned partnership affairs and was not privileged].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Evidence Code.* See *Wells Fargo Bank v. Superior Court* (2000) 22 C.4th 201, 212, 91 C.R.2d 716, 990 P.2d 591, Supp., *supra*, §64.



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6. Joint Clients.

b. Action by Insured Against Insurer.

1. In General.

2 *Witkin Cal. Evid. Witnesses* § 166

[§ 166] In General.

*Glacier General Assur. Co. v. Superior Court* (1979) 95 C.A.3d 836, 157 C.R. 435, involved discovery sought by plaintiffs who had recovered a malpractice judgment against an insured doctor and, as his assignees, were suing his liability insurer for bad faith failure to settle. Over claims of attorney-client and work product privileges, the trial court ordered discovery of the entire litigation file of the attorney who represented both insurer and insured in the malpractice action. *Held*, discovery was proper under the joint client exception. As the insured's assignees, plaintiffs may discover matters in the attorney's file of "common interest" to the insurer and insured (*Ev.C.* 962). (95 C.A.3d 840.) The exception is not limited to an attorney's communications with joint clients in the presence of each other. (95 C.A.3d 841.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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##### 6. Joint Clients.

##### b. Action by Insured Against Insurer.

##### 2. Exception Not Applicable.

2 Witkin Cal. Evid. Witnesses § 167

[§ 167] Exception Not Applicable.

*Glacier General Assur. Co. v. Superior Court* (1979) 95 C.A.3d 836, 157 C.R. 435, *supra*, §166, which upheld the joint client exception in a case involving an attorney who represented both the insurer and the insured in a malpractice action, was distinguished in *Houston General Ins. Co. v. Superior Court* (1980) 108 C.A.3d 958, 166 C.R. 904. In *Houston General Ins. Co.*, the attorney had never been employed by the insurance company to defend its insured. Thus, the court held that "the tripartite relationship which would have imposed on the attorney the dual obligation to the insured and to the insurer never materialized." (108 C.A.3d 967.)

The same distinction was made in *Aetna Cas. & Surety Co. v. Superior Court* (1984) 153 C.A.3d 467, 200 C.R. 471. P, an insured, sought recovery for a casualty loss from Aetna, his insurer. Aetna retained attorney T to investigate the claim, and then brought a declaratory relief suit against P, claiming that his policy did not cover the loss (destruction of a home by a rainstorm causing a mudslide). To avoid a possible conflict of interest, T withdrew as counsel for Aetna prior to filing of the suit. P resisted the suit by a claim of bad faith denial of insurance coverage, and sought, by subpoena duces tecum and deposition, to obtain T's records of the investigation of P's claim. Aetna moved to quash the subpoenas or for a protective order, asserting the attorney-client and work product privileges, but the trial judge denied the motions. *Held*, mandamus issued to compel the reconsideration of the motions.

(a) P's theory was that, under language in *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 C.3d 809, 169 C.R. 691, 620 P.2d 141, 6 Summary (9th), *Torts*, §1354, and *Glacier, supra*, the joint client exception applied. But neither case involved a dispute on the basic issue of coverage or the hiring of counsel with respect to that issue. (153 C.A.3d 467.)

(b) *Houston, supra*, "stands for the proposition that consultations regarding a policy of insurance between an insurance company and its attorney prior to the time the insurance company has accepted its obligations under that policy are protected by the attorney-client privilege vis a vis the person insured by the policy." (153 C.A.3d 474.) This rule is sound: "[A]n insurance company should be free to seek legal advice in cases where coverage is unclear without fearing that the communications necessary to obtain that advice will later become available to an insured who is dissatisfied with a decision to deny coverage." (153 C.A.3d 474.) (See *State Farm Fire & Cas. Co. v. Superior Court* (1988) 206 C.A.3d 1428, 1432, 254 C.R. 543 [following *Houston* and *Aetna*].)

In *Rockwell Int. Corp. v. Superior Court* (1994) 26 C.A.4th 1255, 32 C.R.2d 153, a corporate insured brought an action against its liability insurers for declaratory relief and breach of contract for failure to defend it in environmental

contamination lawsuits. During discovery, plaintiff withheld certain documents and consultants' reports, claiming the lawyer-client and work product privileges. A discovery referee found that the cooperation clause in plaintiff's policies had abrogated the lawyer-client privilege and that the consultants' reports were required to be disclosed despite the work product doctrine. The trial judge approved the referee's recommendations and ordered production of the documents. *Held*, writ of mandamus issued.

(a) The standard cooperation clause in the insurance policies did not waive the lawyer-client privilege.

(1) The clause did not contain even a hint that communications from the insured to its attorney in furtherance of the insured's duty to cooperate in the defense of the underlying action should occur without an expectation of confidentiality. Moreover, defendants conceded that "at the time the standard cooperation clause was drafted, its drafter did not consider or intend that it would operate as a waiver of the attorney-client privilege in this situation or in any situation." (26 C.A.4th 1262, 1263.)

(2) A holding that a cooperation clause abrogates the privilege would conflict with the legislative declaration (C.C. 2860(d); see 6 *Summary* (9th), *Torts*, §1139) that "where, as here, a conflict exists because an insurer has reserved its rights, the insured is entitled to independent counsel and to a relationship with that counsel free from the fear of disclosure of privileged communications." (26 C.A.4th 1263.)

(b) The "joint client" or "common interest" exception (see *supra*, §165) is inapplicable, because counsel for plaintiff, although selected by defendants, were not "retained or consulted" by defendants within the meaning of *Ev.C.* 962; they were retained only to represent plaintiff. (26 C.A.4th 1267.)

(c) The "in issue" doctrine creates an implied waiver of the privilege when the client tenders an issue involving the substance or content of a protected communication, but it does not have this effect when the privileged communication simply represents one of several forms of indirect evidence in a particular case. "There is nothing in the record before us to suggest that Rockwell has tendered any privileged communication or any issue which cannot be proved or disproved by other, more direct evidence." (26 C.A.4th 1268; for discussion of the "in issue" exception in the context in which it most frequently applies, the physician-patient privilege, see *infra*, §204.)

(d) The referee found that the work product doctrine did not bar disclosure of the consultants' reports, but a discovery referee's report is advisory, not determinative, and the record indicates that the trial judge abdicated his judicial responsibility by simply entering an order on the referee's report as if it were a binding decision of the court itself. On remand, the trial judge must consider plaintiff's objections and make an informed decision about whether to accept the referee's recommendations. (26 C.A.4th 1269, 1270.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*Egan v. Mutual of Omaha Ins. Co.:*

*Cross-Reference:* The discussion of the *Egan* case, formerly located in *Torts*, was not carried over to the 10th edition of *Summary.C.C.* 2860(d):

*Cross-Reference:* The discussion of C.C. 2860(d), formerly located in *Torts*, has been transferred to 2 *Summary* (10th), *Insurance*, §291.

(*New*) *Distinction: In-house claims adjusters:* In *2,022 Ranch, L.L.C. v. Superior Court* (2003) 113 C.A.4th 1377, 7 C.R.3d 197, a developer sued a title insurer for breach of contract and bad faith in handling the developer's claim. The title insurer admitted liability but would not agree to the amount of damages sought. The developer then amended the complaint to seek punitive damages based on the insurer's refusal to accept the developer's claim. The developer sought documents from the insurer's claims files and also sought to depose the insurer's in-house claims adjusters, who were attorneys. The insurer resisted this discovery on the ground that the developer was not entitled to confidential communications between its claims adjusters and the insurer. The trial judge denied the developer's motion to compel

documents and its motion to compel answers to the deposition questions. *Held*, this was error. As to the attorney-client privilege, evidence reflecting the factual investigations of the claims adjusters was subject to discovery, and only those communications reflecting the requesting of, or rendering of, legal advice were protected. (113 C.A.4th 1397, 1399, disagreeing with *Aetna Cas. & Surety Co. v. Superior Court* (1984) 153 C.A.3d 467, 200 C.R. 471, text, p. 439, insofar as it can be read to hold that any factual claims investigation work by an in-house attorney claims adjuster is privileged.) As to the work product privilege, only the handlers' legal impressions, conclusions, opinions, and legal research and theories were protected. (113 C.A.4th 1397, 1401.) Remand to the trial court was necessary for application of these standards to each deposition question posed and each document sought. (113 C.A.4th 1401.)



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CHAPTER IX - Witnesses

IV. LAWYER-CLIENT PRIVILEGE

G. Exceptions to the Privilege.

6. Joint Clients.

c. No Waiver in Criminal Case.

2 *Witkin Cal. Evid. Witnesses* § 168

[§ 168] No Waiver in Criminal Case.

A communication by one of several criminal defendants is privileged. In *People v. Kor* (1954) 129 C.A.2d 436, 444, 277 P.2d 94, *supra*, §81, Kor and Kaufman, jailed on a charge of unlawful possession of narcotics, together consulted R, as attorney for both. Kor made incriminating statements to R, and, at the trial, the judge compelled R to testify thereto on the theory that the presence of Kaufman resulted in a waiver of Kor's privilege. *Held*, this was error; the state was a stranger and could not require a joint attorney to disclose information received from either defendant. (See *People v. Abair* (1951) 102 C.A.2d 765, 772, 228 P.2d 336; 2 U.C.L.A. L. Rev. 573.)

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## CHAPTER IX - Witnesses

V. HUSBAND-WIFE PRIVILEGE  
A. Privilege Not To Testify Against Spouse.  
1. In General.

2 Witkin Cal. Evid. Witnesses § 169

[§ 169] In General.

At common law, the husband and wife were incompetent to testify in each other's actions. Although this disqualification has been abandoned or substantially curtailed in most states, privileges of more limited scope remain, chiefly grounded on the theory that compelled testimony of a spouse is disruptive of family harmony. (See generally 1 McCormick 5th, §78 et seq.; 8 Wigmore (McNaughton Rev.) §§2228, 2334; C.E.B., Jefferson, 2 California Evidence Benchbook 3d, §36.1 et seq.; C.J.E.R., Judges Benchbook, Civil Proceedings: Discovery §4.41 et seq.; 19 Cal. L. Rev. 390, 407; 24 Cal. L. Rev. 472; 44 Cal. L. Rev. 945; 10 So. Cal. L. Rev. 94; 9 U.C. Davis L. Rev. 569 [improvements and uncertainties in marital privileges]; 8 Stanf. L. Rev. 420, 433 et seq.; 98 Harv. L. Rev. 1563; 81 Am.Jur.2d (1992 ed.), Witnesses §296 et seq.)

Many authorities consider the theory unsound and the privilege undesirable. "The whole concept of marital privilege, immunity or competency has been the subject of almost violent criticism by Wigmore ... and is also damned by most modern writers. ... The purposes of the privilege, preservation of marital harmony, the repugnance of making one spouse an instrument in the condemnation of the other, the danger of perjury and the encouragement of free communication, have been more and more considered obstructive and sentimental." (*Young v. Superior Court* (1961) 190 C.A.2d 759, 764, 12 C.R. 331.) (See also *Tanzola v. De Rita* (1955) 45 C.2d 1, 6, 285 P.2d 897 [privilege strictly construed, with burden on party seeking to suppress evidence].) (On existence of privilege where marriage was entered into for purpose of barring testimony, see 13 A.L.R.4th 1305.)

The Model Code and the Uniform Rules of Evidence support this view by wholly omitting the privilege against testifying, retaining only the privilege for confidential communications (infra, §187 et seq.). (See Model C., Rule 215, Comment a.) California's former statute contained both privileges, and the Evidence Code retained them. (Ev.C. 970 et seq., 980 et seq.) As to the privilege against testifying or being called, the Law Revision Commission Comment to Ev.C. 970 says: "Society stands to lose more from such disruption than it stands to gain from the testimony which would be available if the privilege did not exist." (On distinction between privilege not to testify and privilege not to reveal confidential communications, see *People v. Bradford* (1969) 70 C.2d 333, 342, 74 C.R. 726, 450 P.2d 46.)

The privilege, of course, is only against testimony in court. Extrajudicial declarations of a spouse that come within an exception to the hearsay rule cannot be excluded. (*First Nat. Bank v. De Moulin* (1922) 56 C.A. 313, 323, 205 P. 92; 8 Stanf. L. Rev. 428.) (On whether privilege should apply to spouse's extrajudicial statement to third party, see 18 Hastings L. J. 222.)

**SUPPLEMENT:** [This section is current through the latest supplement]



See *81 Am.Jur.2d (2004 ed.)*, *Witnesses* §284 et seq.; 1 McCormick 6th, §78 et seq.; on applicability of marital privileges to domestic partners, see C.E.B., *California Domestic Partnerships*, §12.1 et seq. *West's Key Number Digest*, *Witnesses* k.188 et seq.



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### V. HUSBAND-WIFE PRIVILEGE

#### A. Privilege Not To Testify Against Spouse.

##### 2. Federal Rule: Hawkins and Trammel.

2 *Witkin Cal. Evid. Witnesses* § 170

[§ 170] Federal Rule: Hawkins and Trammel.

In *Hawkins v. United States* (1958) 358 U.S. 74, 79 S.Ct. 136, 3 L.Ed.2d 125, petitioner's wife voluntarily testified against him in a Mann Act prosecution, over his objection. The Government made no argument for compulsory testimony of one spouse against the other, but urged that the privilege should be relaxed to allow either to testify against the other if he or she wished to do so. But the court thought that the ill effects of voluntary testimony would be the same as those of compulsory testimony, and restated the policy as follows: "The basic reason the law has refused to pit wife against husband or husband against wife in a trial where life or liberty is at stake was a belief that such a policy is necessary to foster family peace, not only for the benefit of husband, wife and children, but for the benefit of the public as well. Such a belief has never been unreasonable and is not now." (79 S.Ct. 138, 3 L.Ed.2d 128.) The court further observed that, despite modifications of the privilege in America and England, "there is still a widespread belief, grounded on present conditions, that the law should not force or encourage testimony which might alienate husband and wife, or further inflame existing domestic differences." (79 S.Ct. 139, 3 L.Ed.2d 129.)

The *Hawkins* rule was modified in *Trammel v. United States* (1980) 445 U.S. 40, 100 S.Ct. 906, 63 L.Ed.2d 186. Petitioner's conviction was based on his wife's voluntary adverse testimony, given over his objection. *Held*, conviction affirmed. The trend in state law has been against the accused's privilege to bar adverse spousal testimony; and, in light of the independent privilege protecting confidential marital communications, the *Hawkins* rule "seems far more likely to frustrate justice than to foster family peace." (100 S.Ct. 913, 63 L.Ed.2d 196.) Thus, "the witness spouse alone has a *privilege to refuse* to testify adversely; the witness may be neither *compelled* to testify nor *foreclosed* from testifying." (100 S.Ct. 914, 63 L.Ed.2d 196.) (See 1980 A.S. 507; 1981 A.S. 187; 1983 A.S. 187; 98 *Harv. L. Rev.* 1568.)

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## CHAPTER IX - Witnesses

## V. HUSBAND-WIFE PRIVILEGE

## A. Privilege Not To Testify Against Spouse.

## 3. Condition: Valid Marriage.

## a. General Rule on Void Marriage.

2 Witkin Cal. Evid. Witnesses § 171

[§ 171] General Rule on Void Marriage.

The privilege belongs to "a married person" (Ev.C. 970), and may be claimed only if there is a valid marriage in existence at the time the witness is called to testify. Thus, it does not apply where a purported marriage is wholly void. (See *People v. Glab* (1936) 13 C.A.2d 528, 534, 57 P.2d 588 [bigamous]; *People v. Gallego* (1990) 52 C.3d 115, 176, 177, 276 C.R. 679, 802 P.2d 169 [same]; *People v. MacDonald* (1938) 24 C.A.2d 702, 708, 76 P.2d 121 [incestuous]; *People v. McIntyre* (1931) 213 C. 50, 54, 1 P.2d 443 [failure to procure license]; 98 Harv. L. Rev. 1565.) But where the marriage is merely voidable, it is good until annulled, and testimony prior to final judgment of annulment is privileged. (*People v. Livingston* (1928) 88 C.A. 713, 714, 263 P. 1036; see 26 So. Cal. L. Rev. 452.)

Regardless of validity or invalidity, where a marriage is entered into solely for fraudulent purposes, the privilege is inapplicable. (*Lutwak v. United States* (1953) 344 U.S. 604, 73 S.Ct. 481, 487, 97 L.Ed. 593, 601 [sham marriage so spouse could gain illegal entry into country].)

The determination of this issue is made by the trial judge. In *People v. MacDonald*, *supra*, defendant, charged with an incestuous marriage with his daughter, admitted the marriage but denied that the girl was his child. The prosecution introduced considerable evidence of paternity, the daughter was then sworn, and defendant's objection to her testifying was overruled. On appeal, defendant contended that the court thereby ruled that she was his daughter, taking this important fact question from the jury. *Held*, the ruling was proper. A mixed question of law and fact was involved, and the trial judge had to decide preliminarily whether there was paternity; if there was, the marriage would be void and she could testify. (24 C.A.2d 705.) (On finality of judge's determination of admissibility, see Law Rev. Com. Comment to Ev.C. 405(b); 3 Cal. Evidence (4th), Presentation at Trial, §59.)

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(*New*) *Distinction: No longer viable marriage:* There is no exception to the marital privilege for marriages that are no longer viable, and such an exception cannot be created by judicial interpretation. "Only the Legislature could choose to add such an exception to the existing express statutory marital privilege exceptions listed in section 972." (*Jurcoane v. Superior Court* (2001) 93 C.A.4th 886, 889, 113 C.R.2d 483 [in murder prosecution, defendant's wife could not be called to testify against him so long as she continued to exercise privilege and couple remained married, even though charged murders occurred 17 years earlier, defendant immediately fled to Mexico, and defendant and wife had no further contact].) *West's Key Number Digest*, Witnesses k.189



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### V. HUSBAND-WIFE PRIVILEGE

#### A. Privilege Not To Testify Against Spouse.

##### 3. Condition: Valid Marriage.

##### b. Divorce or Annulment.

2 Witkin Cal. Evid. Witnesses § 172

[§ 172] Divorce or Annulment.

The relationship privilege terminates on divorce or annulment; after that, the prior confidential communications remain privileged (infra, §189), but as to other matters, either of the former spouses may testify freely and may be compelled to testify for or against each other without consent. (See *People v. Loper* (1910) 159 C. 6, 12, 112 P. 720 [divorce]; *People v. Godines* (1936) 17 C.A.2d 721, 726, 62 P.2d 787 [annulment]; *People v. Bradford* (1969) 70 C.2d 333, 343, 74 C.R. 726, 450 P.2d 46 [wife received final decree of divorce during course of trial, but prior to her admissible testimony]; *People v. Villarino* (1970) 7 C.A.3d 56, 65, 86 C.R. 338, infra, §175; *People v. Dorsey* (1975) 46 C.A.3d 706, 716, 120 C.R. 508 [privilege may not have existed because wife may have obtained final decree of divorce at some point]; *People v. Delph* (1979) 94 C.A.3d 411, 415, footnote 2, 156 C.R. 422, infra, §173, citing the text.) (On effect of separation or other marital instability short of absolute divorce, see 98 A.L.R.3d 1285.)

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A. Privilege Not To Testify Against Spouse.

3. Condition: Valid Marriage.

c. Nonmarital Relationship.

2 *Witkin Cal. Evid. Witnesses* § 173

[§ 173] Nonmarital Relationship.

In *People v. Delph* (1979) 94 C.A.3d 411, 156 C.R. 422, defendant challenged the trial judge's ruling that the women he lived with must testify, invoking the holding in *Marvin v. Marvin* (1976) 18 C.3d 660, 134 C.R. 815, 557 P.2d 106, on property rights in a nonmarital relationship (see 11 *Summary* (9th), *Community Property*, §233). *Held*, the ruling was correct. The court in *Marvin* did not resurrect common law marriage or elevate meretricious relationships to the level of marriages for all purposes; and whether a privilege should be established for such relationships is a matter for legislation. (94 C.A.3d 416.) (See 4 A.L.R.4th 422 [communication between unmarried couple living together as privileged]; 98 *Harv. L. Rev.* 1566.)

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*Cross-Reference:* 11 *Summary* (10th), *Community Property*, §271.



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### V. HUSBAND-WIFE PRIVILEGE

#### A. Privilege Not To Testify Against Spouse.

##### 4. Scope.

##### a. Witness Spouse Alone Privileged.

2 Witkin Cal. Evid. Witnesses § 174

[§ 174] Witness Spouse Alone Privileged.

(1) *Former Law: Privilege of Party Spouse.* California's former Code of Civil Procedure and Penal Code sections made a confusing distinction between civil and criminal cases:

(a) In civil cases, the privilege belonged to the party spouse; if the party spouse objected, the witness spouse could not testify. (See *Marple v. Jackson* (1920) 184 C. 411, 413, 193 P. 940 [action by wife to enjoin execution sale of land obtained from husband by gift deed; husband could not testify against her].) But if the party spouse consented, the witness spouse had no privilege under the statutory language.

(b) In criminal cases, the privilege belonged to both, and could be claimed by either the defendant spouse or the witness spouse. (See *People v. Langtree* (1883) 64 C. 256, 259, 30 P. 813.)

(2) *Evidence Code: Privilege of Witness Spouse.* Ev.C. 970 eliminates the privilege of the party spouse, and gives it exclusively to the witness spouse: "[A] married person has a privilege not to testify against his spouse in any proceeding." The Law Revision Commission states: "[T]he witness spouse ... is more likely to determine whether to claim the privilege on the basis of the probable effect of his testimony on the marital relationship. Because of his interest in the outcome of the action, a party spouse would be under considerable temptation to claim the privilege even if the marriage were already hopelessly disrupted, whereas a witness spouse probably would not." (Law Rev. Com. Comment to repealed C.C.P. 1881; see *People v. Chavez* (1968) 262 C.A.2d 422, 429, 68 C.R. 759, citing the text; *People v. Dorsey* (1975) 46 C.A.3d 706, 716, 120 C.R. 508.) (For similar federal rule, see *Trammel v. United States* (1980) 445 U.S. 40, 100 S.Ct. 906, 63 L.Ed.2d 186, supra, §170.)

Cases prior to the Evidence Code held the privilege inapplicable where the party spouse was only a nominal party or had no interest in the subject of inquiry. (See *Johnston v. St. Sure* (1920) 50 C.A. 735, 737, 195 P. 947; *Sylvester v. Kirkpatrick* (1947) 79 C.A.2d 443, 451, 180 P.2d 36; *Dean v. Superior Court* (1951) 103 C.A.2d 892, 893, 230 P.2d 362.)

(3) *Spouse of Judgment Debtor.* In a postjudgment debtor proceeding to locate the debtor's assets, the privilege is inapplicable. (C.C.P. 708.130(b).)

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##### 4. Scope.

##### b. Privilege Not To Be Called.

2 Witkin Cal. Evid. Witnesses § 175

[§ 175] Privilege Not To Be Called.

(1) *General Rule.* It has been pointed out that to call a spouse as a witness, and force the witness spouse to claim privilege before the jury, may be highly prejudicial to the party spouse. (See *People v. Wade* (1959) 53 C.2d 322, 1 C.R. 683, 348 P.2d 116, supra, §95.) *Ev.C. 971* prohibits this practice by creating a distinct privilege: "[A] married person whose spouse is a party to a proceeding has a privilege not to be called as a witness by an adverse party ... without the prior express consent of the spouse having the privilege." (See supra, §174.) The section makes an exception where the adverse party calls the spouse "in good faith without knowledge of the marital relationship."

The Law Revision Commission Comment points out that this privilege only applies where the other spouse is a party to the proceeding. A person under investigation by a grand jury is not a party to the grand jury proceeding; hence, the suspect's spouse may be called as a witness. But the witness spouse still has the other privilege, under *Ev.C. 970* (supra, §174), to refuse to answer questions which would constitute testimony against the other spouse, for this privilege applies "in any proceeding."

(2) *Calling Spouse To Prove Marital Relationship.* In *People v. Villarino* (1970) 7 C.A.3d 56, 86 C.R. 338, defendant was charged with forgery. Several of the allegedly forged checks had been cashed by a woman whom the prosecutor suspected was defendant's wife. He accordingly subpoenaed her to appear as a witness at defendant's trial. Out of the jury's presence, defense counsel requested a ruling that the wife need not respond to the subpoena. In opposition, the prosecutor stated he did not intend to have the wife do anything more than produce herself as physical evidence and to state whether she was defendant's wife. The judge ruled that the wife should appear and that the privilege should be asserted *after* she had been sworn. Only on giving sworn testimony that she was defendant's wife was she excused. Based on her appearance, a prosecution witness identified her as the woman for whom he had cashed the check. *Held*, this was proper.

(a) When the prosecutor subpoenaed the wife, he apparently knew that the witness would identify her. The witness could not have testified that the woman was defendant's wife because he had not known her in that capacity. "Her physical presence in the courtroom was the most direct and simple manner of proving, for what it was worth, that defendant's wife was the woman in question. Actually, it was the fact of the close association with defendant that was the ultimate matter to be proved rather than the relationship out of which the association grew." (7 C.A.3d 62.) On the question of whether the means employed were proper to compel the wife to bring herself to court to be observed, no statutory or judicial authority was available, but Wigmore takes the position that for production of a witness' living body, the trial court's discretion--and not a privilege of nondisclosure--determines the necessity and suitable conditions.

(7 C.A.3d 63.) (See 8 Wigmore (McNaughton Rev.) §2216.)

(b) The claim of privilege can be sustained only on *proof of the marital relationship*. It was thus doubtful that "merely asking the witness if she was the wife of defendant violated the privilege." (7 C.A.3d 65.) Because the prosecutor had represented that he wanted only to establish the wife's identity, "it may be that the questioning would have been terminated without its being necessary for defendant to assert the privilege before the jury." (7 C.A.3d 65.)

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4. Scope.  
c. Witness Must Testify for Spouse.

2 *Witkin Cal. Evid. Witnesses* § 176

[§ 176] Witness Must Testify for Spouse.

California's former law allowed a witness spouse to refuse to testify even though the party spouse sought the testimony for his or her own benefit. This aspect of the privilege was abolished by the Code for both civil and criminal actions. *Ev.C. 970* only gives a privilege not to testify "against" the party spouse.

As the Law Revision Commission states: "If a case can be imagined in which a party would wish to avail himself of this privilege [i.e., as to testimony *for* him], he could achieve the same result by simply not calling his spouse to the stand. Nor does it seem desirable to continue the present privilege of the nonparty spouse not to testify *in favor* of the party spouse in a criminal action. It is difficult to imagine a case in which this privilege would be claimed for other than mercenary or spiteful motives, and it precludes access to evidence which might save an innocent person from conviction." (Law Rev. Com. Comment to repealed *C.C.P. 1881*.)

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5. Exceptions to the Privilege.  
a. In General.

2 *Witkin Cal. Evid. Witnesses* § 177

[§ 177] In General.

A number of exceptions to the privilege against testifying were developed at common law and codified in our former statutes. (See 8 *Stanf. L. Rev.* 431.) The Evidence Code retained them, with some revision, to achieve consistency with the exceptions to the communication privilege (*infra*, §193 et seq.). (Law Rev. Com. Comment to *Ev.C.* 972.)

The exceptions fall under four heads:

- (1) Certain civil proceedings. (*Ev.C.* 972(a), (b), (c); see *infra*, §178 et seq.)
- (2) Juvenile court proceedings. (*Ev.C.* 972(d).)
- (3) Certain criminal proceedings. (*Ev.C.* 972(e), *infra*, §§181, 182.)
- (4) Proceedings arising from criminal acts committed prior to marriage. (*Ev.C.* 972(f), *infra*, §183.)

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5. Exceptions to the Privilege.

b. Civil Proceedings.

1. Proceeding Between Spouses.

2 *Witkin Cal. Evid. Witnesses* § 178

[§ 178] Proceeding Between Spouses.

The privilege may not be claimed in a "proceeding brought by or on behalf of one spouse against the other spouse." (*Ev.C.* 972(a); see *Savings Union Bank & Trust Co. v. Crowley* (1917) 176 C. 543, 547, 169 P. 67 [action by husband's executor against surviving wife; wife could testify]; *Estate of Gillett* (1946) 73 C.A.2d 588, 594, 166 P.2d 870 [estate of deceased husband asserted claim against surviving wife]; on divorce cases, see 19 *Cal. L. Rev.* 399; 8 *Stanf. L. Rev.* 432.)

An exception to the spousal privilege is also set forth in the Uniform Interstate Family Support Act (see *Family C.* 4930(h)) and in the Uniform Civil Liability for Support Act (see *Family C.* 3551).

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5. Exceptions to the Privilege.

b. Civil Proceedings.

2. Commitment and Competency Proceedings.

2 *Witkin Cal. Evid. Witnesses* § 179

[§ 179] Commitment and Competency Proceedings.

The privilege may not be claimed in two classes of civil proceedings involving the mental state of a spouse:

(1) *Commitment Proceeding*. "A proceeding to commit or otherwise place his or her spouse or his or her spouse's property, or both, under the control of another because of the spouse's alleged mental or physical condition." (*Ev.C.* 972(b).)

(2) *Competency Proceeding*. "A proceeding brought by or on behalf of a spouse to establish his or her competence." (*Ev.C.* 972(c).)

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b. Civil Proceedings.

3. Proceeding by Former Spouse, Other Parent, or Guardian.

2 Witkin Cal. Evid. Witnesses § 180

[§ 180] Proceeding by Former Spouse, Other Parent, or Guardian.

The privilege is also inapplicable in the following proceedings (*Ev.C. 972(g)*):

(1) "A proceeding brought against the spouse by a former spouse" (a) "so long as the property and debts of the marriage have not been adjudicated," or (b) "in order to establish, modify, or enforce a child, family or spousal support obligation arising from the marriage to the former spouse."

(2) "A proceeding brought against a spouse by the other parent in order to establish, modify, or enforce a child support obligation for a child of a nonmarital relationship of the spouse."

(3) "A proceeding brought against a spouse by the guardian of a child of that spouse in order to establish, modify, or enforce a child support obligation of the spouse."

*Ev.C. 972(g)* removes the privilege of the married person to refuse to give information regarding the "income, expenses, assets, debts, and employment of either spouse." However, he or she may still assert the privilege if other information is requested by the former spouse, guardian, or other parent.

A person who demands information now available under *Ev.C. 972(g)*, and who is also obligated to support the child for whom an order to establish, modify, or enforce is sought waives his or her marital privilege to the same extent as the spouse.

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##### 5. Exceptions to the Privilege.

##### c. Criminal Proceedings.

##### 1. In General.

2 Witkin Cal. Evid. Witnesses § 181

[§ 181] In General.

Criminal proceedings in which "one spouse is charged with" certain crimes are excepted by *Ev.C. 972(e)*. (On whether this class is confined to actual prosecutions for the acts testified to, see discussion, *People v. Mathis* (1965) 63 C.2d 416, 430, 46 C.R. 785, 406 P.2d 65, and dissent, 63 C.2d 434; 1966 A.S. 409.)

*Ev.C. 972* lists the following:

(1) *Crime Against Other Spouse, Child, Parent, Relative, or Cohabitant*. (*Ev.C. 972(e)(1)*, *infra*, §182.)

(2) *Crime Incidentally Committed Against Third Person*. "A crime against the person or property of a third person committed in the course of committing a crime against the person or property of the other spouse, whether committed before or during marriage." (*Ev.C. 972(e)(2)*; see *People v. Pittullo* (1953) 116 C.A.2d 373, 377, 253 P.2d 705; 74 A.L.R.4th 277 [competency of one spouse to testify against other in prosecution for offense against third party as affected by fact that offense against spouse was involved in same transaction].)

Merely *charging* one spouse with such crimes does not render the exception applicable; under *Ev.C. 405* (see 3 *Cal. Evidence* (4th), *Presentation at Trial*, §59), "the prosecution bears the burden of proof on the issue and must, *at the least*, make a *prima facie* showing of violation of the offense or offenses giving rise to the exception." (*Fortes v. Municipal Court* (1980) 113 C.A.3d 704, 711, 170 C.R. 292.)

In *Fortes*, defendant husband entered his wife's home, which he had shared with her until about 3 weeks earlier, and killed a male visitor. When the wife refused to testify against defendant, the prosecution invoked the exception on the theory that defendant had committed the murder in the course of committing burglary against his wife. *Held*, the claim of privilege was good. The prosecution failed to show that defendant could validly be convicted of burglary, i.e., stipulations established that the residence was a family dwelling, and there was no evidence that defendant's right to access was limited; there was no evidence that the residence was the wife's separate property; and a temporary restraining order denying defendant access had expired prior to his entry. (113 C.A.3d 713.)

(3) *Bigamy*. (*Ev.C. 972(e)(3)*.)

(4) *Criminal Nonsupport of Child or Wife*. "A crime defined by *Section 270 or 270a of the Penal Code*." (*Ev.C.*

972(e)(4); see 10 *Summary* (9th), *Parent and Child*, §326; 11 *Summary* (9th), *Husband and Wife*, §18; 2 *Cal. Crim. Law* (3d), *Sex Offenses and Crimes Against Decency*, §143 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Crime Incidentally Committed Against Third Person*. The exception contained in *Ev.C.* 972(e)(2) does not require that an accusatory pleading have been filed charging the defendant with a crime against his or her spouse. Further, it is not inapplicable simply because the crime against the spouse is incidental to the crime against the third party. Rather, the exception applies "whenever the crime against the third person and the crime against the spouse (1) are part of a continuous course of criminal conduct, and (2) bear some logical relationship to each other." (*People v. Sinohui* (2002) 28 *C.4th* 205, 212, 220, 120 *C.R.2d* 783, 47 *P.3d* 629 [in prosecution in which defendant was charged with kidnaping and murdering wife's former boyfriend, trial judge properly compelled wife to testify, where defendant committed uncharged crime of false imprisonment of wife at same time he committed charged kidnaping and murder]).(4) *Criminal Nonsupport of Child or Wife*.

*Cross-References:* 10 *Summary* (10th), *Parent and Child*, §438; 11 *Summary* (10th), *Husband and Wife*, §35 et seq.



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## CHAPTER IX - Witnesses

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##### 5. Exceptions to the Privilege.

##### c. Criminal Proceedings.

#### 2. Crime Against Other Spouse, Child, Parent, Relative, or Cohabitant.

2 Witkin Cal. Evid. Witnesses § 182

[§ 182] Crime Against Other Spouse, Child, Parent, Relative, or Cohabitant.

Ev.C. 972(e)(1) excepts a crime by one spouse, whether committed before or during the marriage, against the person or property of any of the following:

(1) *Other spouse.* (See *In re Kellogg* (1940) 41 C.A.2d 833, 837, 107 P.2d 964 [husband permitted to testify in prosecution of wife for grand theft, based on unauthorized withdrawal of funds from their joint tenancy account]; *People v. Tidwell* (1943) 61 C.A.2d 58, 61, 141 P.2d 969 [prosecution of husband for selling wife for immoral purposes, P.C. 266f]; *People v. Schlette* (1956) 139 C.A.2d 165, 167, 293 P.2d 79 [prosecution of husband for burning house and shop of wife (community property); wife, as an owner, could testify]; *Young v. Superior Court* (1961) 190 C.A.2d 759, 762, 12 C.R. 331 [felonious assault by wife on husband, husband compelled to testify]; 1955 A.S. 640; *Wyatt v. United States* (1960) 362 U.S. 525, 80 S.Ct. 901, 902, 4 L.Ed.2d 931, 932 [Mann Act prosecution; see 74 Harv. L. Rev. 160; 1960 A.S. 572]; 74 A.L.R.4th 223 [modern state cases]; 74 A.L.R.4th 277 [crime against third party that was also against spouse].)

(2) *Child of either spouse.* (See *People v. James* (1935) 9 C.A.2d 162, 164, 48 P.2d 1011 [husband committed lewd act with daughter (P.C. 288); wife competent]; *People v. Kasunic* (1950) 95 C.A.2d 676, 677, 213 P.2d 778 [husband-stepfather committed sexual offenses against children; wife-mother competent]; *People v. Vera* (1955) 131 C.A.2d 669, 673, 281 P.2d 65 [wife-mother committed mayhem on her child; husband-stepfather competent]; *People v. Gibson* (1957) 152 C.A.2d 149, 153, 312 P.2d 705 [husband committed lewd act (P.C. 288a) with wife's daughter]; *Dunn v. Superior Court* (1993) 21 C.A.4th 721, 724, 725, 26 C.R.2d 365 [exception applied to foster child who had only lived in home for 5 months].)

(3) *Parent of either spouse.*

(4) *Relative of either spouse.*

(5) *Cohabitant of either spouse.* The exception applies as long as the cohabitant-victim lives in the same household as the spouse, regardless of the nature of the relationship. (*People v. Siravo* (1993) 17 C.A.4th 555, 562, 21 C.R.2d 350 [assault by defendant on his wife's housemate]; *People v. Bogle* (1995) 41 C.A.4th 770, 782, 783, 48 C.R.2d 739 [following *Siravo*].)



**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Child of either spouse.* (See 119 A.L.R.5th 275 [offense against child of both spouses, or of either or neither].)



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5. Exceptions to the Privilege.

d. Proceedings Arising From Premarital Criminal Acts.

2 Witkin Cal. Evid. Witnesses § 183

[§ 183] Proceedings Arising From Premarital Criminal Acts.

*Ev.C. 972(e)* (see *supra*, §182) creates an exception to the privilege where one spouse is charged with specified crimes *against the other spouse, or the child, parent, relative, or cohabitant of either spouse*. *Ev.C. 972(f)* extends the exception to proceedings resulting from *a criminal act*.

The exception applies under the following conditions: (1) the criminal act must have occurred prior to the spouses' legal marriage; (2) the proceeding must be in regard to knowledge acquired prior to marriage; and (3) prior to the marriage the witness spouse must have been aware that his or her spouse had been arrested for, or formally charged with, the crime about which the spouse is called to testify. (*Ev.C. 972(f)* ;see *15 Pacific L. J. 583.*)

**SUPPLEMENT:** [This section is current through the latest supplement]



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##### 6. Waiver by Testimony or Interest.

##### a. Testimony by Spouse.

2 Witkin Cal. Evid. Witnesses § 184

[§ 184] Testimony by Spouse.

Under *Ev.C. 973(a)*, two kinds of voluntary testimony ("unless erroneously compelled"; see *infra*, this section) result in a waiver of the privilege for "the proceeding in which such testimony is given":

(1) *Proceeding where other spouse is a party.* "[A] married person cannot call his spouse as a witness to give favorable testimony and have that spouse invoke the privilege provided in Section 970 to keep from testifying on cross-examination to unfavorable matters; nor can a married person testify for an adverse party as to particular matters and then invoke the privilege not to testify against his spouse as to other matters." (Law Rev. Com. Comment to *Ev.C. 973*; see *People v. Lucas* (1995) 12 C.4th 415, 490, 48 C.R.2d 525, 907 P.2d 373 [citing the text and *People v. Resendez* (1993) 12 C.A.4th 98, 15 C.R.2d 575].) (On the extent of the waiver under California's former law, see *People v. Odmann* (1958) 160 C.A.2d 693, 696, 325 P.2d 495; *People v. Mathis* (1965) 63 C.2d 416, 426, 46 C.R. 785, 406 P.2d 65.)

(2) *Testimony by a witness spouse against other spouse in any proceeding.* Where the other spouse is not a party, the witness spouse may ordinarily testify without losing the privilege; but the witness spouse waives it "as to all matters if he testifies against his spouse as to any matter." (Law Rev. Com. Comment to *Ev.C. 973*.)

"Proceeding" includes civil and criminal proceedings (*Ev.C. 901*), and the waiver extends to the entire proceeding. "For example, if a civil action involves issues being separately tried, a wife whose husband is a party to the litigation may not testify for her husband at one trial and invoke the privilege in order to avoid testifying against him at a separate trial of a different issue. Nor may a wife testify against her husband at a preliminary hearing of a criminal action and refuse to testify against him at the trial." (Law Rev. Com. Comment to *Ev.C. 973*.) (See *People v. Lankford* (1976) 55 C.A.3d 203, 210, 127 C.R. 408 [if wife's testimony at husband's preliminary hearing was not improperly compelled, under *Ev.C. 973* she waived her privilege for all future proceedings in that action].)

A witness spouse who testifies against the other spouse at that spouse's preliminary hearing waives the privilege, even if the witness spouse was not advised of the privilege and its potential loss. (*People v. Resendez, supra*, 12 C.A.4th 108, 109 [declining opportunity to precisely define "erroneously compelled," but concluding that testimony did not satisfy that definition, even though witness spouse told trial court, "I didn't want to testify. ... But they told m[e] that I had to"].)

**SUPPLEMENT:** [This section is current through the latest supplement]

*West's Key Number Digest*, Witnesses k.219(2)



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##### 6. Waiver by Testimony or Interest.

##### b. Direct Interest in Proceeding.

##### 1. In General.

2 Witkin Cal. Evid. Witnesses § 185

[§ 185] In General.

California's prior case law developed rules of waiver where the husband and wife joined in an action, either as plaintiffs or defendants. Thus:

(1) The privilege was waived where, under California's former rule classifying personal injury damages as community property, the spouses joined in an action for damages for injuries to one of them. (See *In re Strand* (1932) 123 C.A. 170, 171, 11 P.2d 89; 6 So. Cal. L. Rev. 336; 8 Stanf. L. Rev. 430; cf. *Credit Bureau of San Diego v. Smullen* (1952) 114 C.A.2d Supp. 834, 840, 249 P.2d 619 [privilege for confidential communications held waived where plaintiff husband sued alone but relied on contract between himself and his wife and defendant].)

(2) The privilege was waived where a third party joined both spouses as defendants, and by a joint answer they placed in issue the validity of a transaction, or asserted a joint title or interest. (See *Tobias v. Adams* (1927) 201 C. 689, 699, 258 P. 588 [action against spouses to set aside fraudulent conveyance from husband to wife; defense of husband's relinquishment of community property to wife; both could testify]; *Schwartz v. Brandon* (1929) 97 C.A. 30, 35, 275 P. 448 [similar action; defense of deed of community property by defendant husband to wife; both could testify]; *Hagen v. Silva* (1956) 139 C.A.2d 199, 202, 293 P.2d 143; *Rinehart v. First Cupertino Co.* (1957) 154 C.A.2d 842, 844, 317 P.2d 30; 44 Cal. L. Rev. 947.)

In *Hagen*, plaintiff maker of a note sued defendant holders, husband and wife, to quiet title thereto, alleging full payment. Plaintiff's evidence was testimony of defendant wife that payment was made to C as agent of defendants for collection. *Held*, admission of the wife's testimony, over the husband's objection, was proper. "To permit defendants to assert their claim and at the same time to permit the husband to prevent questioning of his wife about that claim, if not 'monstrous' (as was described the possibility of immunity from scrutiny of a transaction by which one spouse took property from another in alleged defraud of creditors, in *Tobias v. Adams* ... ) would at least be incongruous and unfair." (139 C.A.2d 203.)

*Ev.C. 973(b)* codified the underlying principle of these cases by eliminating the privilege "in a civil proceeding brought or defended by a married person for the immediate benefit of his spouse or of himself and his spouse." (On what constitutes immediate benefit, see *infra*, §186.)

However, the mere fact that one spouse acted as agent of another in the transaction or business involved does not

give rise to a waiver. (*Ayres v. Wright* (1930) 103 C.A. 610, 619, 284 P. 1077.)

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##### 6. Waiver by Testimony or Interest.

##### b. Direct Interest in Proceeding.

##### 2. "Immediate Benefit."

2 Witkin Cal. Evid. Witnesses § 186

[§ 186] "Immediate Benefit."

The "immediate benefit" phrase of *Ev.C. 973(b)* was construed in *Duggan v. Superior Court* (1981) 127 C.A.3d 267, 179 C.R. 410. Plaintiff, a partner in a real estate venture, sued defendants to establish a 15% ownership interest in real property acquired on behalf of the partnership and held of record by defendants. Defendants obtained an order compelling the deposition of plaintiff's wife, on the theory that she had an ultimate community property interest in any recovery that plaintiff might obtain. *Held*, prohibition issued; the order violated the marital privilege.

(a) *Ev.C. 973(b)* was based on prior case law; and, though the particular section has not been construed, similar language in other statutes (*Ev.C. 776*, former C.C.P. 2019) has been narrowly interpreted: "These cases appear to limit the application of 'immediate benefit' to persons who are represented by a nominal plaintiff or defendant (as where a corporation serves as the alter ego of its sole shareholder) or who themselves have the right to act or defend against the adverse party on the issues involved." (127 C.A.3d 272.) (See 29 U.C. Davis L. Rev. 1243 [defining immediate benefit in light of current community property law].)

(b) The wife here was not named as a party to the action, or as a signer of the partnership agreement, or as a record holder of any of the real property; and any claim of a community property interest would not be to the property (former Corp.C. 15025(2)(e), partner's right in specific partnership property is not community property), and would be against plaintiff husband and not the other partners. (127 C.A.3d 272.)

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#### B. Privilege for Confidential Marital Communications.

##### 1. Nature and Distinctions.

##### 2 *Witkin Cal. Evid. Witnesses § 187*

[§ 187] Nature and Distinctions.

(1) *In General.* "Subject to Section 912 [waiver] and except as otherwise provided in this article, a spouse (or his guardian or conservator when he has a guardian or conservator), whether or not a party, has a privilege *during the marital relationship and afterwards* to refuse to disclose, and to prevent another from disclosing, a communication if he claims the privilege and the communication was *made in confidence* between him and the other spouse *while they were husband and wife.*" (*Ev.C. 980*; Unif. Rules, Rule 504(b) [privilege limited to criminal proceedings]; see 1 McCormick 5th, §85; 8 Wigmore (McNaughton Rev.) §§2334, 2341; C.E.B., Jefferson, 2 California Evidence Benchbook 3d, §36.15 et seq.; C.J.E.R., Judges Benchbook, Civil Proceedings: Discovery §4.46 et seq.; 81 *Am.Jur.2d* (1992 ed.), *Witnesses* §296 et seq.)

(2) *Relationship Privilege Distinguished.* The relationship privilege is against testifying at all (*supra*, §169), but it may be claimed only during an existing valid marriage (*supra*, §171). The communications privilege applies during the marriage and after it is dissolved, and protects any communication made between the spouses during the marriage. (See *People v. Bradford* (1969) 70 C.2d 333, 342, 74 C.R. 726, 450 P.2d 46; *People v. Dorsey* (1975) 46 C.A.3d 706, 717, 120 C.R. 508.)

The underlying policy of both privileges is the same--promotion of marital harmony. But the somewhat different theory advanced in support of the communications privilege is that it encourages free confidential communication between the spouses. Most of the critics of the other privilege are satisfied that the social considerations which support the communications privilege are substantial and that it should be retained. (See Model C., Rule 215 and Comment; 8 Wigmore (McNaughton Rev.), §2332; but see 1 McCormick 5th, §86 [arguing that judge should have discretion to allow evidence in cases of necessity]; 19 *Cal. L. Rev.* 411 [arguing for abolition of privilege]; 9 *U.C. Davis L. Rev.* 569 [improvements and uncertainties in marital privileges].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General.* See *People v. Catlin* (2001) 26 C.4th 81, 130, 109 C.R.2d 31, 26 P.3d 357, 1 *Cal. Crim. Law* (3d), *Defenses, Supp.*, §188 [prosecution witness was not prevented by *Ev.C. 980* from testifying against defendant in capital murder trial, where she had married defendant before his divorce from previous wife was final; rule rendering privilege inapplicable when marriage is void applies not just to spousal testimonial privilege (see text, §171), but also to marital communications privilege]; The New Wigmore: Evidentiary Privileges §6.2.1; 81 *Am.Jur.2d* (2004 ed.), *Witnesses* §284 et seq.; 1 McCormick 6th, §85.

(2) *Relationship Privilege Distinguished.* See 1 McCormick 6th, §86. *West's Key Number Digest*, *Witnesses* k.188



et seq.



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V. HUSBAND-WIFE PRIVILEGE

B. Privilege for Confidential Marital Communications.

2. Scope.

a. Both Spouses May Claim.

*2 Witkin Cal. Evid. Witnesses § 188*

[§ 188] Both Spouses May Claim.

The somewhat obscure language of California's former statute was replaced by a clear grant of the privilege to both spouses: "A spouse" has the privilege to refuse to disclose and to prevent another from disclosing a confidential communication. (*Ev.C. 980*; see Law Rev. Com. Comment; *People v. Dorsey* (1975) 46 C.A.3d 706, 717, 120 C.R. 508, citing the text; 98 Harv. L. Rev. 1571.)

The guardian or conservator of an incompetent spouse may claim the privilege for him or her. (*Ev.C. 980*.) But a deceased spouse has no privilege, and a claim can only be made on behalf of the surviving spouse. (Law Rev. Com. Comment.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### B. Privilege for Confidential Marital Communications.

##### 2. Scope.

##### b. During Marriage and Afterwards.

*2 Witkin Cal. Evid. Witnesses § 189*

[§ 189] During Marriage and Afterwards.

The Model Code (Rule 215) followed the generally accepted rule that the privilege continues after termination of the marriage. (See *8 U.C.L.A. L. Rev.* 608; 1960 A.S. 573.) The original Uniform Rules of Evidence limited the privilege to the duration of the marriage, but the Evidence Code retained the general rule, recognizing the privilege "during the marital relationship and afterwards." (*Ev.C.* 980.)

In *People v. Godines* (1936) 17 C.A.2d 721, 727, 62 P.2d 787, a marriage was annulled for fraud. Thereafter, in this criminal prosecution of the former wife for perjury, (a) the former husband could testify, because the relationship privilege had ended (*supra*, §172); but (b) it was error to admit a letter written by defendant to him before the annulment decree, because this was a privileged communication "during the marriage." The court proceeded on the theory that, for some purposes at least, a voidable marriage is nevertheless valid until annulled. (See *25 Cal. L. Rev.* 619; *People v. Dorsey* (1975) 46 C.A.3d 706, 717, 120 C.R. 508, citing the text [privilege exists even though marriage has been terminated by divorce]; but see *People v. Badgett* (1995) 10 C.4th 330, 363, 41 C.R.2d 635, 895 P.2d 877, 1 Cal. Evidence (4th), Hearsay, §57 [defendant and witness did not have valid common law marriage under laws of Texas, and therefore privilege was inapplicable]; on effect of separation, see 98 A.L.R.3d 1285.)

Of course, there is no privilege for a communication made *before* the marriage or *after* its dissolution. (*Ev.C.* 980 [made "while they were husband and wife"]; 1 McCormick 5th, §81; 8 Wigmore (McNaughton Rev.) §2335.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 1 McCormick 6th, §81.



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## 2. Scope.

## c. Communication.

2 Witkin Cal. Evid. Witnesses § 190

[§ 190] Communication.

The privilege protects "a communication" (*Ev.C. 980*), and, by the better view, this covers only written or oral statements, or signs which carry a message. (See *Rubio v. Superior Court* (1988) 202 C.A.3d 1343, 1347, 249 C.R. 419, 3 Cal. Evidence (4th), Presentation at Trial, §6 [videotape is "writing" subject to privilege; here, videotape of sexual acts performed by husband and wife in private]; *People v. Bogle* (1995) 41 C.A.4th 770, 784, 48 C.R.2d 739 [in murder prosecution, suicide note written by defendant to wife was never "communicated" and therefore did not come within privilege, where, after writing it, defendant tore it up and threw it in trash].) This sufficiently carries out the policy of encouraging the free exchange of confidences without suppressing other useful evidence. (See 1 McCormick 5th, §79; 8 Wigmore (McNaughton Rev.) §2337; for same principle applied to attorney-client privilege, see *supra*, §110.) Thus, the privilege does not apply in two situations:

(1) *Fact of communication*. Where one spouse testifies not to the content of a conversation or letter, but merely to the fact that the parties conversed at a certain time, or that a letter was sent or received. "[T]he purpose of the inquiry being to show the act of communicating and not the disclosures involved in the communications, the testimony does not come within the inhibition of the statute." (*Estate of Pusey* (1919) 180 C. 368, 374, 181 P. 648; see *Tanzola v. De Rita* (1955) 45 C.2d 1, 7, 285 P.2d 897; *People v. Bradford* (1969) 70 C.2d 333, 342, footnote 2, 74 C.R. 726, 450 P.2d 46; *People v. Saidi-Tabatabai* (1970) 7 C.A.3d 981, 986, 86 C.R. 866.)

In *People v. Saidi-Tabatabai*, defendant's husband was permitted to testify, over objection, that the handwriting which accompanied certain pictures was his wife's. (The relevant fact was whether defendant had those photographs after her brother-in-law was shot to death.) Held, the evidence was properly received. The address on the mailed package was not a confidential communication because various post office employees were expected to read it. (7 C.A.3d 986, footnote 3.) And, "[e]very court that ever analyzed the problem has held that a spouse may identify the handwriting of the other spouse." (7 C.A.3d 986.)

(2) *Acts*. Where the testimony relates to acts that are not communications. On this point, there is a strong conflict of authority, many courts treating nonverbal conduct which is private or confidential as covered by the privilege. (See 1 McCormick 5th, §79; 1949 A.S. 993; 1953 A.S. 779; 1964 A.S. 375; 10 A.L.R.2d 1389.) But California follows Wigmore's view that this evidence is not privileged.

Thus, in *Tanzola v. De Rita*, *supra*, plaintiff lent money to decedent husband, the checks being received and deposited by decedent's wife acting as decedent's business manager. In this action, the wife testified over objection to

the *facts* that the checks were left with her, indorsed and deposited by her. *Held*, the testimony was admissible. No communication from the husband to the wife was involved in his placing the checks on her desk. (See *Pereira v. United States* (1954) 347 U.S. 1, 74 S.Ct. 358, 361, 98 L.Ed. 435, 443; *People v. Bradford*, *supra*, 70 C.2d 342, footnote 2 [wife's testimony admissible to show that she received victim's jewelry from defendant and saw him place sulfuric acid in garage]; *People v. Dorsey* (1975) 46 C.A.3d 706, 717, 120 C.R. 508, citing the text [privilege does not extend to observed physical facts, which are not "communications"]; 1 McCormick 5th, §79; 8 Wigmore (McNaughton Rev.) §2337; 1954 A.S. 792.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 1 McCormick 6th, §79.

(2) *Acts*. See *People v. Cleveland* (2004) 32 C.4th 704, 743, 11 C.R.3d 236, 86 P.3d 302 [in capital murder prosecution, trial judge did not err in allowing witness who was married to defendant at time of charged murders to testify that when defendant returned home after murders, she observed him wearing watch and possessing cocaine; observations were not communications within meaning of privilege]; 1 McCormick 6th, §79; 23 A.L.R.6th 1 [privilege as including knowledge derived from observation by one spouse of acts of other; superseding 10 A.L.R.2d 1389, text, p. 457].



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#### B. Privilege for Confidential Marital Communications.

##### 2. Scope.

##### d. Confidential Disclosure.

##### 1. Statutory Requirement.

2 Witkin Cal. Evid. Witnesses § 191

[§ 191] Statutory Requirement.

(1) *In General*. California's former statute referred to "any communication," giving some support to the view that all communications between husband and wife during the marriage are within the privilege. (See *People v. Mullings* (1890) 83 C. 138, 140, 23 P. 229.) But it is generally held that the protection extends only to those communications which are intended as private or confidential. (See *Wolfe v. United States* (1934) 291 U.S. 7, 54 S.Ct. 279, 280, 78 L.Ed. 617, 620; 1 McCormick 5th, §80; 8 Wigmore (McNaughton Rev.) §2336; 1959 A.S. 634; 8 U.C.L.A. L. Rev. 611; 98 Harv. L. Rev. 1572; and see *Tanzola v. De Rita* (1955) 45 C.2d 1, 6, 7, 285 P.2d 897, supra, §190 [disapproving *Mullings* on burden of proof and intimating approval of the requirement of confidentiality].)

*Ev.C. 980* clarified the law by referring to a communication "*made in confidence* between him and the other spouse." (See *People v. Dorsey* (1975) 46 C.A.3d 706, 718, 120 C.R. 508 [wife properly testified to communications made to third person in her presence].) (On privilege where third person has been eavesdropping as a result of betrayal or connivance of spouse to whom communication was addressed, see 3 A.L.R.4th 1104; on privilege where communication was inadvertently obtained by third person, see 32 A.L.R.4th 1177; on presence of child as destroying confidentiality, see 39 A.L.R.4th 480.)

(2) *Jailhouse Communications*. The privilege extends to jailhouse communications between spouses under circumstances creating an expectation of privacy. (See *North v. Superior Court* (1972) 8 C.3d 301, 308, 104 C.R. 833, 502 P.2d 1305, 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence*, §351 [secretly recorded conversation in arresting officer's office after he left room and closed door was privileged]; *People v. Von Villas* (1992) 11 C.A.4th 175, 221, 15 C.R.2d 112 [loud jailhouse conversation was not privileged].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General*. See 1 McCormick 6th, §80.



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##### 2. Scope.

##### d. Confidential Disclosure.

##### 2. Loss of Confidentiality.

2 Witkin Cal. Evid. Witnesses § 192

[§ 192] Loss of Confidentiality.

In *People v. Johnson* (1991) 233 C.A.3d 425, 284 C.R. 579, a murder case, defendant asserted the privilege for marital communications to prevent his wife, Lenora, from testifying that while inflicting a severe beating on her, he told her that what had happened to the murder victim would happen to her. Lenora had previously so testified at the preliminary hearing, at which time defense counsel made no attempt to assert the privilege, because it does not exist in a criminal proceeding where one spouse is charged with committing a crime against the other (see *infra*, §194). Because the charge resulting from the beating was dismissed before defendant's murder trial, defendant claimed that his statements during that incident should have been afforded the privilege at trial. *Held*, the statements were properly admitted.

(a) "Once disclosed during Lenora's testimony at the preliminary hearing, the statements lost their confidential character. ... The reason for the privilege--to encourage confidences between spouses for the benefit of the marital relationship--ceased to operate when confidentiality was lost." (233 C.A.3d 437.)

(b) "We doubt, too, whether the statements assumed the mantle of confidentiality when they were first made, inasmuch as defendant, in abusing Lenora, abused the relationship on which the privilege is predicated." (233 C.A.3d 438.)

(c) "Our conclusion that defendant's statements to his wife lost their confidentiality in her preliminary hearing testimony makes it unnecessary to address another rationale for admission ... : that the statements were not intended to be confidential when made, due to the presence of Clarice Johnson somewhere in the home at the time when defendant was assaulting Lenora and making the statements. We merely note that although California law recognizes no privilege for marital communications 'in the hands of a third party,' such as an eavesdropper ... we have identified no case holding that a mere possibility that the third party listened to the communication, absent any showing that the spouse is aware that the third party may be able to overhear, suffices to overcome the privilege." (233 C.A.3d 438.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER IX - Witnesses

### V. HUSBAND-WIFE PRIVILEGE

#### B. Privilege for Confidential Marital Communications.

##### 3. Exceptions to the Privilege.

##### a. Civil Proceedings.

2 Witkin Cal. Evid. Witnesses § 193

[§ 193] *Civil Proceedings.*

*Ev.C. 982 et seq.* establish exceptions to the communications privilege similar to those established by *Ev.C. 972* for the relationship privilege (*supra*, §178 et seq.):

(1) *Proceeding Between Spouses.* There is no privilege in:

(a) A proceeding by or on behalf of one spouse against the other. (*Ev.C. 984(a).*)

(b) A proceeding between a surviving spouse and one who claims through the deceased spouse, regardless of whether the claim is by testate or intestate succession or by an inter vivos transaction. (*Ev.C. 984(b)*; see *Estate of Gillett (1946) 73 C.A.2d 588, 594, 166 P.2d 870.*)

(2) *Commitment Proceeding.* There is no privilege in "a proceeding to commit either spouse or otherwise place him or his property, or both, under the control of another because of his alleged mental or physical condition." (*Ev.C. 982.*)

(3) *Competency Proceeding.* There is no privilege in "a proceeding brought by or on behalf of either spouse to establish his competence." (*Ev.C. 983.*)

As to the last two exceptions, the Law Revision Commission Comment to *Ev.C. 982* states: "Commitment and competency proceedings are undertaken for the benefit of the subject person. Frequently, much or all of the evidence bearing on a spouse's competency or lack of competency will consist of communications to the other spouse. It would be undesirable to permit either spouse to invoke a privilege to prevent the presentation of this vital information inasmuch as those proceedings are of such vital importance both to society and to the spouse who is the subject of the proceedings."

**SUPPLEMENT:** [This section is current through the latest supplement]





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## CHAPTER IX - Witnesses

### V. HUSBAND-WIFE PRIVILEGE

#### B. Privilege for Confidential Marital Communications.

##### 3. Exceptions to the Privilege.

##### b. Criminal Proceedings.

2 Witkin Cal. Evid. Witnesses § 194

[§ 194] Criminal Proceedings.

(1) *Statutory List.* The principal exceptions for criminal proceedings are set forth in *Ev.C. 985* (on comparable exception for relationship privilege, see *Ev.C. 972(e)*, supra, §§181, 182). There is no privilege in a criminal proceeding in which one spouse is charged with:

(a) A crime committed at any time against the person or property of the other spouse or of a child of either spouse. (*Ev.C. 985(a)*; see *People v. Johnson* (1991) 233 C.A.3d 425, 437, 284 C.R. 579, supra, §192.)

(b) A crime, committed at any time against the person or property of a third person, that is committed during a crime against the person or property of the other spouse. (*Ev.C. 985(b)*.)

(c) Bigamy. (*Ev.C. 985(c)*.)

(d) A crime defined by P.C. 270 (nonsupport of child) or P.C. 270a (nonsupport of spouse). (*Ev.C. 985(d)*; P.C. 270e.)

The argument that *Ev.C. 985* does not apply to communications made after commission of a crime and institution of criminal proceedings was summarily rejected in *People v. Daniels* (1969) 1 C.A.3d 367, 377, 81 C.R. 675.

(2) *Crime Committed Against Adult Child.* In *People v. McGraw* (1983) 141 C.A.3d 618, 190 C.R. 461, defendant was convicted of the murder of his stepson, aged 22. He contended that the word "child" means a minor, i.e., a person under 18; hence, the trial judge erroneously allowed his wife, mother of the child, to testify to his inculpatory statements made to her after the killing. *Held*, the evidence was not privileged. No light is shed on the meaning of "child" in the Law Revision Commission Report, Model Code, or the Uniform Rules of Evidence; the word was never interpreted in former P.C. 1322; and none of the commentators have discussed its meaning. (141 C.A.3d 621, and footnote 5.) However, statutes must be given a reasonable construction that leads to a wise policy and avoids absurd results. Using this approach: (a) The word "child" connotes a family relationship without any age limitations; the Legislature has used the word "minor" when it meant a minor child. (b) The purpose of the marital communications privilege is to preserve confidence and marital harmony; and such harmony would be nonexistent in criminal actions where a child of either spouse is the victim. "A parent is no less outraged, and marital harmony is no less obliterated because the child who was murdered was past his 18th birthday." (141 C.A.3d 622.)

(3) *Threats Against Third Persons.* In *People v. Carter* (1973) 34 C.A.3d 748, 110 C.R. 324, defendant followed his estranged wife to Chicago, where he assaulted her and demanded to know who had helped her get away from him. On learning that neighbors had provided the help, he said, "I'm going to kill them all." He then returned to Los Angeles and murdered the victim. At his trial, his wife testified about his threat. *Held*, no error. Although Ev.C. 985 does not include this type of statement, the exceptions listed are germane to a consideration of whether the statement was given in confidence. (34 C.A.3d 752.) And the policy considerations (preserving confidence and tranquility of marital relationship) "would not be served by shielding as confidential and privileged threats against third persons made by one spouse in the course of criminally victimizing the other spouse." (34 C.A.3d 753.)

(4) *Defendant's Right To Testify to Communication From Spouse.* The original Uniform Rules of Evidence introduced an innovation, giving the *defendant* in a criminal case the right to testify *on his or her own behalf* to a relevant communication from the defendant's spouse which might aid in the defendant's defense. (See also Model C., Rule 216, Comment; 8 Wigmore (McNaughton Rev.) §2338.)

Ev.C. 987 adopted this exception: There is no privilege where "the communication is offered in evidence by a defendant who is one of the spouses between whom the communication was made." As the Law Revision Commission Comment states, the defendant's spouse or former spouse should not be privileged to withhold evidence material to the defendant's defense.

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### V. HUSBAND-WIFE PRIVILEGE

#### B. Privilege for Confidential Marital Communications.

##### 3. Exceptions to the Privilege.

##### c. Other Exceptions.

2 Witkin Cal. Evid. Witnesses § 195

[§ 195] Other Exceptions.

(1) *Juvenile Court Proceeding*. *Ev.C.* 986 parallels the exception in *Ev.C.* 972(d), *supra*, §177.

(2) *Aiding Crime or Fraud*. *Ev.C.* 981 introduces an exception to the marital communications privilege which is also recognized in somewhat different form in connection with other privileges (see *supra*, §153 et seq.; *infra*, §§207, 223): There is no privilege "if the communication was made, in whole or in part, to enable or aid anyone to commit or plan to commit a crime or a fraud."

The limited nature of this exception is stressed in the Law Revision Commission Comment to *Ev.C.* 981: "It does not permit disclosure of communications that merely reveal a plan to commit a crime or fraud; it permits disclosure only of communications made to *enable* or *aid* anyone to commit or plan to commit a crime or fraud. Thus, unless the communication is for the purpose of obtaining assistance in the commission of the crime or fraud or in furtherance thereof, it is not made admissible by the exception provided in this section." (See *People v. Dorsey* (1975) 46 C.A.3d 706, 718, 120 C.R. 508 [wife could properly testify about communications which defendant husband made to third person, giving instructions during commission or attempted commission of crime, but could not testify about husband's statements to wife alone when they were not made to enable him to commit or plan crime]; *People v. Von Villas* (1992) 11 C.A.4th 175, 222, 15 C.R.2d 112 [jailhouse conversation between defendant and wife was not privileged where defendant's statements could be construed as attempt to obstruct justice]; 62 A.L.R.4th 1134 [communications between spouses as to joint participation in crime].)

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## CHAPTER IX - Witnesses

### VI. PHYSICIAN-PATIENT PRIVILEGE

#### A. General Principles.

##### 1. Nature of Privilege.

2 Witkin Cal. Evid. Witnesses § 196

[§ 196] Nature of Privilege.

(1) *Statutory Basis.* Unlike the typical privileges of husband-wife and attorney-client, the doctor-patient privilege did not exist at common law. It was established by statute in about half of the states, and was made a part of the original Code of Civil Procedure. (See Unif. Rules, Rule 503; *Kramer v. Policy Holders' Life Ins. Assn.* (1935) 5 C.A.2d 380, 384, 42 P.2d 665; 1 McCormick 5th, §98 et seq.; 8 Wigmore (McNaughton Rev.) §2380; C.E.B., Jefferson, 2 California Evidence Benchbook 3d, Chap. 37; C.J.E.R., Judges Benchbook, Civil Proceedings: Discovery §4.53 et seq.; 98 Harv. L. Rev. 1532; 9 So. Cal. L. Rev. 149; 81 Am.Jur.2d (1992 ed.), Witnesses §436; 45 Proof of Facts 2d 595 [establishing privilege])

California's former brief statute (C.C.P. 1881(4)) was replaced by the more detailed Ev.C. 994. That statute provides that a patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between the patient and his or her physician. The privilege may be claimed only by one of the following:

(a) The holder of the privilege. (Ev.C. 994(a).)

(b) A person authorized by the holder of the privilege to claim it. (Ev.C. 994(b).)

(c) The physician at the time of the confidential communication. However, that physician may not claim the privilege if there is no holder of the privilege in existence, or if the physician is otherwise instructed by a person authorized to permit disclosure. (Ev.C. 994(c).)

(2) *Scope of Privilege.* The privilege only arises out of the relationship of physician and patient. Thus, a doctor who performs an autopsy must testify, for the dead man is not a patient. (*Harrison v. Sutter Street Ry. Co.* (1897) 116 C. 156, 166, 47 P. 1019; see 8 Wigmore (McNaughton Rev.) §2382.) (On privilege of medical corporation, see *infra*, §198; on person authorized to claim privilege by holder of privilege, see *Rudnick v. Superior Court* (1974) 11 C.3d 924, 932, 114 C.R. 603, 523 P.2d 643, *infra*, §200; on whether action for damages may be brought by patient against physician who wrongfully discloses privileged information outside courtroom, see 79 Harv. L. Rev. 1723; 1967 A.S. 123; on extension of privilege to alternative health practitioners, see 48 Hastings L. J. 633.)

Like the lawyer-client privilege, this one is protected against eavesdroppers or other interceptors (Ev.C. 994; see *supra*, §66); but it must be claimed by an authorized person (Ev.C. 994), and it may be waived (Ev.C. 912, *supra*, §67). Also, the physician must claim the privilege when present and not instructed otherwise. (Ev.C. 995; see similar Ev.C.

955 [lawyer-client, *supra*, §§98, 104].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Statutory Basis.* See *81 Am.Jur.2d* (2004 ed.), *Witnesses* §416 et seq.; 1 McCormick 6th, §98 et seq.

(2) *Scope of Privilege.* See *Hurvitz v. Hoefflin* (2000) 84 C.A.4th 1232, 1243, 101 C.R.2d 558 [while privilege protects patient from forced disclosure in course of litigation, it cannot be used to justify prior restraint on dissemination of information already made known outside of litigation]; *The New Wigmore: Evidentiary Privileges* §6.2.6. *West's Key Number Digest*, *Witnesses* k.208 et seq.



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## CHAPTER IX - Witnesses

### VI. PHYSICIAN-PATIENT PRIVILEGE

#### A. General Principles.

#### 2. Liberal or Strict Construction.

2 *Witkin Cal. Evid. Witnesses* § 197

[§ 197] Liberal or Strict Construction.

The policy of the physician-patient privilege is similar to that underlying the lawyer-client privilege: to encourage free disclosure by the patient of facts which may aid in the treatment of his or her illness or injury or the maintenance of his or her general health. (See *McRae v. Erickson* (1905) 1 C.A. 326, 331, 82 P. 209; 1 McCormick 5th, §98; 8 Wigmore (McNaughton Rev.) §2380a.) To promote this policy, some cases declare a rule of liberal construction and application. (See *McRae v. Erickson*, *supra*; *Kramer v. Policy Holders' Life Ins. Assn.* (1935) 5 C.A.2d 380, 385, 394, 42 P.2d 665; *Turner v. Redwood Mut. Life Assn.* (1936) 13 C.A.2d 573, 576, 57 P.2d 222; *Carlton v. Superior Court* (1968) 261 C.A.2d 282, 289, 67 C.R. 568; *Marcus v. Superior Court* (1971) 18 C.A.3d 22, 95 C.R. 545, *infra*, §202.)

Other authorities take the opposite position and recommend abolition or drastic restriction of the privilege. (See 1 McCormick 5th, §§98, 105; 8 Wigmore (McNaughton Rev.) §2380a; 47 *Cal. L. Rev.* 783; 2 *Hastings L. J.* 38; 16 *Pacific L. J.* 787; 9 *So. Cal. L. Rev.* 149; 25 *So. Cal. L. Rev.* 238; 8 *U.C.L.A. L. Rev.* 625; 1983 *A.S.* 193.)

Nevertheless, both the Model Code (Rules 220, 221, 223) and the Uniform Rules of Evidence (Rule 503) include the privilege, and the Evidence Code restates it without undue restrictions (*supra*, §196).

**SUPPLEMENT:** [This section is current through the latest supplement]

See The New Wigmore: Evidentiary Privileges §6.2.6; 1 McCormick 6th, §§98, 105.



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## CHAPTER IX - Witnesses

### VI. PHYSICIAN-PATIENT PRIVILEGE B. Physician Licensed or Believed Licensed.

#### 2 Witkin Cal. Evid. Witnesses § 198

[§ 198] Physician Licensed or Believed Licensed.

(1) *In General: Reasonable Belief.* California's former statute referred expressly to a "licensed physician or surgeon," and did not apply to unlicensed persons. (See *Estate of Mossman (1931) 119 C.A. 404, 406, 6 P.2d 576* [Christian Science practitioner]; 1 McCormick 5th, §99; 8 Wigmore (McNaughton Rev.) §2382.)

*Ev.C. 990* makes the same provision for reasonable belief as the Code does for lawyers (*supra*, §102): "Physician" means a person authorized "or reasonably believed by the patient to be authorized, to practice medicine in any state or nation." The Law Revision Commission Comment states: "[I]f this privilege is to be recognized, it should protect the patient from reasonable mistakes as to unlicensed practitioners. The privilege also should be applicable to communications made to a physician authorized to practice in any state or nation. When a California resident travels outside the State and has occasion to visit a physician during such travel, or when a physician from another state or nation participates in the treatment of a person in California, the patient should be entitled to assume that his communications will be given as much protection as they would be if he consulted a California physician in California. A patient should not be forced to inquire about the jurisdictions where the physician is authorized to practice medicine and whether such jurisdictions recognize the physician-patient privilege before he may safely communicate with the physician." (See similar Unif. Rule 503(a)(2).)

(2) *Medical Corporations.* A 1968 amendment to *Ev.C. 994* had the practical effect of expanding the definition of "physician" to include a medical corporation and its physician employees and a 1980 amendment added podiatry corporations. The section now provides as follows:

(a) The "relationship of a physician and patient" (see *Ev.C. 992, infra*, §§202, 203) exists between a medical or podiatry corporation as defined in the Medical Practice Act and the patient to whom it renders professional services, as well as between such patients and the corporation's physician employees.

(b) The "person" entitled to claim the privilege as "physician" (*Ev.C. 994(c)*, *supra*, §196) "includes partnerships, corporations, limited liability companies, associations, and other groups and entities."

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General: Reasonable Belief.* See 1 McCormick 6th, §99.



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## CHAPTER IX - Witnesses

### VI. PHYSICIAN-PATIENT PRIVILEGE

#### C. Holder of the Privilege.

##### 1. Patient, Representative, or Successor.

2 *Witkin Cal. Evid. Witnesses* § 199

[§ 199] Patient, Representative, or Successor.

*Ev.C.* 993, defining "holder of the privilege," states rules similar to those in *Ev.C.* 953 (lawyer-client, *supra*, §104 et seq.):

(1) *Patient*. Normally, the patient is the holder. (*Ev.C.* 993(a).) If the patient, with an opportunity to claim the privilege, does not do so, the physician cannot assert it. (See *San Francisco v. Superior Court* (1951) 37 *C.2d* 227, 233, 231 *P.2d* 26; 1 McCormick 5th, §102; 8 Wigmore (McNaughton Rev.) §2386; 20 *Cal. L. Rev.* 307; 67 *Harv. L. Rev.* 1273; 1955 A.S. 641 [doctor may invoke it for patient confined in mental hospital]; on duty of physician to claim privilege on client's behalf, see *Ev.C.* 995, *supra*, §196.)

(2) *Guardian or Conservator*. The guardian or conservator is the holder where the patient is under guardianship or conservatorship. (*Ev.C.* 993(b).) If the patient has separate guardians of his or her estate and person, either guardian may claim it. (Law Rev. Com. Comment to *Ev.C.* 993.)

(3) *Personal Representative*. The personal representative is the holder if the patient is dead. (*Ev.C.* 993(c); see *Rittenhouse v. Superior Court* (1991) 235 *C.A.3d* 1584, 1588, 1590, 1 *C.R.2d* 595; *Hale v. Superior Court* (1994) 28 *C.A.4th* 1421, 1423, 1424, 34 *C.R.2d* 279 [citing *Rittenhouse*; estate of deceased defendant was holder of privilege and could freely communicate with her doctors, even though when they treated decedent in hospital she could not communicate with them]; 8 *U.C.L.A. L. Rev.* 627, 630; 97 *A.L.R.2d* 393 [who may waive privilege of confidential communication to physician by person since deceased].) The personal representative may waive the privilege in the interest of the estate; and after final distribution and discharge the privilege terminates. (Law Rev. Com. Comment to *Ev.C.* 993.)

(4) *Distinction: Mother's Assertion of Child's Privilege in Dependency Proceeding*. In *re Troy D.* (1989) 215 *C.A.3d* 889, 263 *C.R.* 869, involved a proceeding to declare Troy D. a dependent child of the juvenile court, on the basis that he was born under the influence of harmful drugs. Evidence of the mother's and son's medical records was offered, and the mother contended that this was a violation of the physician-patient privilege. In upholding admissibility, the court took the position that the mother was not entitled to invoke the privilege as to the son's medical records. "Under ordinary circumstances, it would be reasonable for a parent to be able to assert the privilege on behalf of his child. ... But we question the appropriateness of Mother asserting a privilege to prevent the disclosure of Troy's medical records during his dependency hearing when his and her interests are potentially conflicting. ... We see no legitimate public policy being served by allowing Mother to prevent disclosure. ... Troy was represented by counsel at the jurisdictional hearing, and his attorney made no objection to admitting his medical records." (215 *C.A.3d* 900.)



**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Patient*. See *Johnson v. Superior Court* (2000) 80 C.A.4th 1050, 1063, 95 C.R.2d 864 [in action by parents and their child against sperm bank arising from alleged transmission of kidney disease to child from sperm donor, donor could not rely on physician-patient privilege to resist discovery of his personal information; he had visited bank with sole purpose of selling sperm and thus was not patient within meaning of privilege]; 1 McCormick 6th, §102; 31 *Golden Gate L. Rev.* 193 [*Johnson*].



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## CHAPTER IX - Witnesses

## VI. PHYSICIAN-PATIENT PRIVILEGE

## C. Holder of the Privilege.

## 2. Third-Party Recipient of Communication.

2 Witkin Cal. Evid. Witnesses § 200

[§ 200] Third-Party Recipient of Communication.

In *Henard v. Superior Court* (1972) 26 C.A.3d 129, 102 C.R. 721, plaintiff allegedly suffered a cerebral thrombosis as a side effect of using an oral contraceptive tablet manufactured by defendants. Her personal injury complaint alleged that defendants should have anticipated this complication. After obtaining copies of drug reaction reports which defendants had received from doctors (identified only by initials) who previously prescribed the drug, plaintiff requested the doctors' names and addresses. Defendants contended that the reports were based on confidential information acquired by the doctors from their patients (see *infra*, §§202, 203), and that they (defendants) could invoke the privilege on behalf of the doctors. *Held*, mandamus granted to compel defendants to answer plaintiff's interrogatories. "The confidential information has already been disclosed to petitioners and, if anything, it is the patient's identity, not the doctor's identity, that needs protection. However, it is conceivable that petitioners, if permitted to interview the doctors, will obtain information relevant to their lawsuit other than the names of the patients; what, if any, warnings or cautionary instructions the doctors may have received on the propensities of 'Norinyl' to cause blood clots is a good example. It is also conceivable that some patients will not object to the disclosure of their identities; and for patients who wish to remain anonymous, the privilege can be effectively asserted by the doctor if and when he is interviewed." (26 C.A.3d 133.)

In *Rudnick v. Superior Court* (1974) 11 C.3d 924, 114 C.R. 603, 523 P.2d 643, the trial judge, relying on *Henard*, ordered defendants, the manufacturers, producers and marketers of a drug, to produce the names and addresses of doctors who had submitted drug reaction reports to them; but he denied plaintiff's request that the reports be produced in full. *Held*, mandamus issued, with directions to the judge to reconsider his ruling in accordance with guidelines set forth for the "novel question" of whether a third-party recipient of confidential information from a physician may assert the physician-patient privilege.

(a) *Implied authorization by patients.* Because defendants were not expressly authorized to claim the privilege by the patients mentioned in the doctors' reports, the issue is whether the patients impliedly authorized defendants to do so. The contents of the reports were confidential communications between the patients and their physicians at the time the information was communicated to or ascertained by the physicians, and remain confidential unless the patients waive the privilege. "As a result we are concerned solely with the effect of the disclosure of this privileged material by the respective physicians to defendants." (11 C.3d 930.)

(b) *No waiver by physician's disclosure.* Disclosure by a physician does not amount to waiver when done to accomplish a purpose for which the physician was consulted. "Thus, for example, if the physician reported to defendants the adverse effects of the drug on his patient so as to obtain assistance in the use of the drug in treating the

patient, such disclosure even if consented to by the patient would not constitute a waiver of the privilege." (11 C.3d 930.)

(c) *Third person as holder of privilege where necessary to accomplish purpose for which physician was consulted.* "We therefore hold that a disclosure in confidence by a physician, with or without the consent of the patient, of communications protected by the physician-patient privilege to a third person to whom disclosure is reasonably necessary for the accomplishment of the purpose for which the physician is consulted confers upon the third person the right to claim the physician-patient privilege on behalf of the patient. In other words, that third person thereby becomes '[a] person who is authorized to claim the privilege by the holder of the privilege' within the meaning of section 994." (11 C.3d 932; see supra, §196.)

(d) *Where disclosure not necessary to accomplish desired purpose.* But if disclosure is not necessary to accomplish the desired purpose, three situations ensue.

(1) If the patient expressly or impliedly consents to disclosure, the patient has waived the privilege and the communications are subject to discovery. (11 C.3d 932.)

(2) If the patient does not consent by word or deed to disclosure, the patient has not waived the privilege. "Thus if the patient is a party to the court proceeding he may claim the privilege to prevent disclosure in court by such third person of the confidential communications between patient and physician disclosed by the physician without the patient's consent. If the patient is not a party to the court proceedings, the appropriate court, in its discretion and on its own motion, may protect an absentee holder of the privilege who has not waived it." (11 C.3d 932.)

(3) The third party to whom the confidential communication was disclosed, however, may not claim the privilege. "Where the disclosure to the third party is not reasonably necessary to accomplish the purpose for which the physician was consulted, there is nothing in the Evidence Code, its history or interpretation, or in reason, to warrant the conclusion that such unconsented-to disclosure to a third person makes the latter 'a person who is authorized to claim the privilege by the holder of the privilege' within the meaning of section 994. Therefore, the decision to deny admission of confidential information so disclosed in order to protect the absentee holder of the privilege lies within the discretion of the court." (11 C.3d 933.)

Subsequent cases have applied the *Rudnick* test. (See *Blue Cross v. Superior Court* (1976) 61 C.A.3d 798, 801, 132 C.R. 635 [upholding privilege for claim files of prepaid health care plan]; *Board of Med. Quality Assur. v. Gherardini* (1979) 93 C.A.3d 669, 675, 679, 156 C.R. 55 [hospital could assert its patients' privileges against production of its records (citing *Rudnick*); constitutional right of privacy also provided proper basis for denial of investigative subpoenas]; *Pating v. Board of Med. Quality Assur.* (1982) 130 C.A.3d 608, 618, 182 C.R. 20 [*Gherardini* rule, requiring good cause for production of medical records, and further requiring showing that request for records can be granted without violating right of privacy, held nonretroactive].) (For Confidentiality of Medical Information Act (C.C. 56 et seq.), restricting third persons' acquisition and disclosure of information, see *infra*, §518 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER IX - Witnesses

### VI. PHYSICIAN-PATIENT PRIVILEGE

#### D. Confidential Communication.

##### 1. In Course of Relationship.

2 Witkin Cal. Evid. Witnesses § 201

[§ 201] In Course of Relationship.

(1) *Creation of Relationship.* The relationship of doctor and patient is established for the purpose of the privilege when a person "consults" a physician or "submits to an examination" by a physician. (*Ev.C.* 991; see 1 McCormick 5th, §99; 46 Proof of Facts 2d 373 [Existence of Physician and Patient Relationship].) The relationship does not depend on contract, nor is it necessary that the patient either call or pay the doctor. (*Kramer v. Policy Holders' Life Ins. Assn.* (1935) 5 C.A.2d 380, 386, 42 P.2d 665; *Carlton v. Superior Court* (1968) 261 C.A.2d 282, 288, 67 C.R. 568 [established between defendant and physicians at community hospital to which he was taken in an ambulance after accident].)

(2) *Consultation for Treatment or Diagnosis.* California's former statute was interpreted strictly to limit the privilege to consultation for the purpose of "treatment." Thus, where a doctor examined a person for attorneys preparing a lawsuit, with no advice or treatment contemplated or given, the relationship was not created. (*San Francisco v. Superior Court* (1951) 37 C.2d 227, 231, 231 P.2d 26 [communication protected by attorney-client privilege instead]; see generally 8 Wigmore (McNaughton Rev.) §2383; 25 So. Cal. L. Rev. 237.)

*Ev.C.* 991 abandoned this limitation, and covers consultation or examination "for the purpose of securing a diagnosis or preventive, palliative, or curative treatment of his physical or mental or emotional condition." As the Law Revision Commission Comment points out: "Persons do not ordinarily consult physicians from idle curiosity. ... They may seek diagnosis from one physician to check the diagnosis made by another. They may seek diagnosis from one physician in contemplation of seeking treatment from another. Communications made under such circumstances are as deserving of protection as are communications made to a treating physician."

In *Kizer v. Sulnick* (1988) 202 C.A.3d 431, 248 C.R. 712 (supra, §149), the court made the following distinction between participation in a public health study and private consultation with one's physician: "While the exceedingly brief description of the health effects study in the record before us suggests that participation by the Casmalia residents might constitute consultation with a physician, there is no evidence that the purpose of this communication was to obtain a diagnosis of the subjects' condition. It appears more likely that the purpose was to determine whether a statistically significant portion of the residents of Casmalia shared similar medical complaints in order to determine whether the presence of the waste facility was the cause of these symptoms. Participation in such a group study does not invoke the same considerations of confidentiality as an individual's communication with his or her doctor." (202 C.A.3d 439.)

(3) *Reasonable Belief of Patient.* In *Kramer v. Policy Holders' Life Ins. Assn.*, supra, the court held the privilege

applicable where the patient was justified in believing that he was giving information necessary to diagnosis or treatment, even though the doctor was there simply as a scientific observer for a medical foundation to study the effects of a cancer treatment administered by other doctors. (5 C.A.2d 384.) The Evidence Code does not directly deal with this situation, but perhaps *Ev.C. 990*, on reasonable belief that the physician is authorized to practice (*supra*, §198), can be stretched to cover reasonable belief that the particular doctor is acting as a physician.

*Frederick v. Federal Life Ins. Co.* (1936) 13 C.A.2d 585, 590, 57 P.2d 235, held that the privilege did not apply to interns taking the history of a patient for hospital records. (See criticism, 25 Cal. L. Rev. 108; and see 14 So. Cal. L. Rev. 108, 110.) Either under the more liberal *Kramer* holding or the statutory language, such communications ought to be privileged.

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Creation of Relationship*. See 1 McCormick 6th, §99.



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## CHAPTER IX - Witnesses

## VI. PHYSICIAN-PATIENT PRIVILEGE

## D. Confidential Communication.

## 2. Confidential Information.

## a. Information Transmitted or Obtained.

2 Witkin Cal. Evid. Witnesses § 202

[§ 202] Information Transmitted or Obtained.

(1) *In General.* California's prior statute and the Evidence Code cover *information* acquired or obtained as well as *communications* (see *infra*, §203). Thus, *Ev.C.* 992 defines "confidential communication" as "information, including information obtained by an examination of the patient, transmitted between a patient and his physician in the course of that relationship." And it includes "a diagnosis made and the advice given by the physician in the course of that relationship." (See *Torres v. Superior Court* (1990) 221 C.A.3d 181, 185, 270 C.R. 401 [specialist who examined plaintiff's test results could testify for defendants in suit brought 6 years later for negligence during surgery, because information requested was not part of confidential communications with plaintiff]; *Hale v. Superior Court* (1994) 28 C.A.4th 1421, 1424, 34 C.R.2d 279 [deceased defendant's inability to communicate with treating physicians shortly before her death did not defeat exercise of privilege by her estate, because statute protects information obtained by examination of patient].) (On protection of hospital records, see Confidentiality of Medical Information Act (C.C. 56 et seq.), *infra*, §518 et seq.; on observations of patient's mental condition, see 100 A.L.R.2d 648.)

(2) *Names of Other Patients.* In actions against doctors for medical malpractice, or against drug manufacturers, the plaintiffs often seek discovery of the names of other patients who were given similar treatment or who took the same drug. If the disclosure of the patient's name reveals nothing of any confidential communication concerning his or her ailments, there is no violation of the privilege; but if such disclosure does include confidential information concerning the patient's ailments, it is privileged. (See *Marcus v. Superior Court* (1971) 18 C.A.3d 22, 25, 95 C.R. 545 [privileged: "it is not merely the disclosure of the name and address, but the joining of that information with the limitation in the question that these were patients who had received the specified tests"]; *Rudnick v. Superior Court* (1974) 11 C.3d 924, 933, footnote 13, 114 C.R. 603, 523 P.2d 643, *supra*, §200; 67 Harv. L. Rev. 1272; 66 A.L.R.5th 591.)

(3) *Photographs of Patient's Body.* In *Binder v. Superior Court* (1987) 196 C.A.3d 893, 242 C.R. 231, an action for wrongful death based on medical negligence, defendant dermatologist was ordered by the trial judge to produce all photographs in his possession "depicting a lesion suspected or diagnosed as melanoma." Pursuant to his customary practice, defendant had photographs taken of all skin lesions on his more than 25,000 patients. The photographs were "for a general frame of reference," were not intended to be diagnostic, and were not indexed by diagnosis. *Held*, compelling disclosure would violate the physician-patient privilege.

(a) The photographs constitute "confidential communications" within the express meaning of *Ev.C.* 992. They were taken in conjunction with and as part of defendant's examination of his patients, strictly in the course of the physician-patient relationship, and both defendant and the patient understood the photographs would not be disclosed

except as reasonably necessary for the patient's treatment. (196 C.A.3d 897.)

(b) Disclosure of the subject photographs would subvert the objectives of the physician-patient privilege. It would shock and humiliate present and former patients to learn that pictures of their bodies and ailments would be turned over to strangers, whether or not their identities are disclosed. Dictum in *Rudnick v. Superior Court*, *supra*, to the effect that disclosure of ailments without disclosure of the patient's identity is not within the physician-patient privilege is inapplicable to this case. "[I]t is one thing to have a *description* of one's ailment read, but quite another to have that ailment actually *depicted* in a photograph." (196 C.A.3d 899.)

(c) Furthermore, *Rudnik* did not consider the effect of disclosure on the second purpose of the privilege, which is to encourage full disclosure by patients. Many physicians regularly take pictures of their patient's disease processes in order to follow the disease's progress or the effect of treatment. "In our view, a rule compelling disclosure of patient photographs would discourage patients from allowing physicians to photograph their ailments or other conditions." (196 C.A.3d 899.)

(d) Disclosure of the pictures would also violate defendant's patient's right of privacy as guaranteed by Cal. Const., Art. I, §1 (see 7 *Summary* (9th), *Constitutional Law*, §454 et seq.), which defendant as custodian of the pictures has a duty to assert. As medical records, the pictures are protected by this right of privacy. They may be disclosed after a "careful balancing" of the "compelling public need" against this right, but only if they are *directly relevant* to issues in the lawsuit. Plaintiffs have not shown this direct relevance. (196 C.A.3d 899.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General*. See 36 Cal. Western L. Rev. 523 [arguing that litigant should not be able to obtain nonparty medical records; discussing *Marcus v. Superior Court* (1971) 18 C.A.3d 22, 95 C.R. 545, text, p. 470]. (3) *Photographs of Patient's Body*.

*Cross-Reference:* 7 *Summary* (10th), *Constitutional Law*, §575 et seq. *West's Key Number Digest*, Witnesses k.213



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CHAPTER IX - Witnesses

VI. PHYSICIAN-PATIENT PRIVILEGE

D. Confidential Communication.

2. Confidential Information.

b. Confidential Disclosure.

2 *Witkin Cal. Evid. Witnesses* § 203

[§ 203] Confidential Disclosure.

*Ev.C.* 992 further describes the confidentiality requirement in the same terms as *Ev.C.* 952 does for the lawyer-client privilege: The information must be transmitted "in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the physician is consulted." (See *Carlton v. Superior Court* (1968) 261 *C.A.2d* 282, 289, 67 *C.R.* 568 [doctor's notes and records of follow-up examinations, and records of observations and tests, protected].)

**SUPPLEMENT:** [This section is current through the latest supplement]





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## CHAPTER IX - Witnesses

## VI. PHYSICIAN-PATIENT PRIVILEGE

## E. Exceptions to the Privilege.

## 1. Patient-Litigant.

## a. Issue Tendered by Patient.

2 Witkin Cal. Evid. Witnesses § 204

[§ 204] Issue Tendered by Patient.

(1) *Background and Nature of Exception.* California's former statute provided an exception where the patient brought an action for damages for personal injuries. As the court said in *San Francisco v. Superior Court* (1951) 37 C.2d 227, 232, 231 P.2d 26: "The whole purpose of the privilege is to preclude the humiliation of the patient that might follow disclosure of his ailments. When the patient himself discloses those ailments by bringing an action in which they are in issue, there is no longer any reason for the privilege. The patient-litigant exception precludes one who has placed in issue his physical condition from invoking the privilege on the ground that disclosure of his condition would cause him humiliation. He cannot have his cake and eat it too." (See *Kizer v. Sulnick* (1988) 202 C.A.3d 431, 439, 248 C.R. 712, supra, §§149, 201 [following *San Francisco v. Superior Court*]; 1 McCormick 5th, §103; 8 Wigmore (McNaughton Rev.) §2389; 25 So. Cal. L. Rev. 237; 25 A.L.R.2d 1429 [construction and effect of statute removing or modifying, in personal injury action, patient's privilege against disclosure by physician]; Law Rev. Com. Comment to Ev.C. 996.) The same result was reached by judicial decision where an inmate of a state medical facility petitioned for habeas corpus. (See *In re Cathey* (1961) 55 C.2d 679, 691, 12 C.R. 762, 361 P.2d 426.)

(2) *Evidence Code.* Ev.C. 996(a) extends the theory of our former statute and rule into a broad exception applicable to any kind of proceeding in which the patient--whether plaintiff, defendant, petitioner, etc.--tenders the issue of his or her condition: A communication relevant to that issue is not privileged. (See also Ev.C. 1005, infra, §206 [issue of mental competence].)

An action by a patient is a waiver not only for trial, but also for discovery proceedings. (See *In re Lifschutz* (1970) 2 C.3d 415, 85 C.R. 829, 467 P.2d 557, infra, §224 [limited waiver as to psychiatric treatment]; 21 A.L.R.3d 921 [commencing action involving physical condition of plaintiff or decedent as waiving physician-patient privilege as to discovery proceedings]; 50 A.L.R.4th 714 [on whether defense counsel may interview injured plaintiff's treating physician ex parte on theory of waiver of privilege].) But even though a medical privilege (e.g., psychotherapist-patient) has been waived, an attorney-client privilege may remain. (See *People v. Lines* (1975) 13 C.3d 500, 119 C.R. 225, 531 P.2d 793, infra, §237.) And an action by a patient against one physician does not necessarily waive the privilege as to a communication with the defendant's associate. (See *Heller v. Norcal Mut. Ins. Co.* (1994) 8 C.4th 30, 44, footnote 5, 32 C.R.2d 200, 876 P.2d 999, infra, §520.)

Issues are ordinarily tendered by an allegation, e.g., in a complaint. A defendant's *denial* is merely a joinder in issue, and the defendant patient does not lose his or her privilege. (*Carlton v. Superior Court* (1968) 261 C.A.2d 282, 289, 67 C.R. 568; see *Koshman v. Superior Court* (1980) 111 C.A.3d 294, 298, 168 C.R. 558 [father sought

modification of child custody order and served subpoena duces tecum on custodian of mother's medical records; wife, who did not tender her medical condition as an issue, could claim privilege]; *Simek v. Superior Court* (1981) 117 C.A.3d 169, 175, 176, 172 C.R. 564 [*Koshman* followed in case involving visitation rights].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Background and Nature of Exception*. See 1 McCormick 6th, §103. *West's Key Number Digest*, Witnesses k.219(4) et seq.



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#### E. Exceptions to the Privilege.

##### 1. Patient-Litigant.

##### b. Issue Tendered by Others.

2 Witkin Cal. Evid. Witnesses § 205

[§ 205] Issue Tendered by Others.

The theory of the exception is equally applicable in several situations where the issue of the patient's condition is involved, even though the patient is not an actual party to the action. *Ev.C. 996* covers these in three subdivisions, excluding the privilege where the issue has been tendered by any of the following:

(1) A party claiming through or under the patient. (*Ev.C. 996(b)*.)

(2) Any party claiming as a beneficiary of the patient through a contract to which the patient is or was a party. (*Ev.C. 996(c)*.)

(3) The plaintiff in an action brought under *C.C.P. 376* (action by parents of injured child) or *C.C.P. 377.60* et seq. (wrongful death action) for damages for the injury or death of the patient. (*Ev.C. 996(c)*.)

In *Palay v. Superior Court* (1993) 18 C.A.4th 919, 22 C.R.2d 839, plaintiff brought a medical malpractice action as guardian ad litem on behalf of her child, and asserted the physician-patient privilege as to her prenatal medical records. The trial judge ordered production of the records. *Held*, the records were not privileged.

(a) The child himself waived the privilege by filing the action. In view of this waiver and the doctrine of inseparability, under which the prenatal records were shared records belonging to both the child and the mother, the mother could not assert the privilege even though she was not a party to the action but appeared only as the child's guardian ad litem. (18 C.A.4th 927, 928.)

(b) Discovery of the records was not precluded by the constitutional right of privacy (7 Summary (9th), *Constitutional Law*, §454 et seq.). Defendants had an interest in the records, which were material to issues in the case, and they had no other means of obtaining the needed information. Thus, their legitimate interest in preparing their defense outweighed the mother's privacy rights. (18 C.A.4th 933, 934.) (See *Jones v. Superior Court* (1981) 119 C.A.3d 534, 174 C.R. 148, supra, §75 and infra, §209 [*Ev.C. 996(b)*, (c) did not apply to drug liability case based on ingestion of DES by plaintiff's mother during her pregnancy].)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Cross-Reference:* 7 Summary (10th), *Constitutional Law*, §575 et seq.



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### VI. PHYSICIAN-PATIENT PRIVILEGE

#### E. Exceptions to the Privilege.

#### 2. Criminal, Disciplinary, and Competency Proceedings.

2 Witkin Cal. Evid. Witnesses § 206

[§ 206] Criminal, Disciplinary, and Competency Proceedings.

The privilege is excluded in several kinds of proceedings in which its recognition would not serve a justifiable purpose.

(1) *Criminal Proceedings*. There is no privilege in "a criminal proceeding." (*Ev.C.* 998; see *People v. Lane* (1894) 101 C. 513, 516, 36 P. 16; *People v. Combes* (1961) 56 C.2d 135, 149, 14 C.R. 4, 363 P.2d 4; 7 A.L.R.3d 1458 [excepted criminal proceedings in general]; 44 A.L.R.4th 649 [exception for proceedings relating to child abuse or neglect].)

(2) *Disciplinary Proceedings*. There is no privilege in "a proceeding brought by a public entity to determine whether a right, authority, license, or privilege (including the right or privilege to be employed by the public entity or to hold a public office) should be revoked, suspended, terminated, limited, or conditioned." (*Ev.C.* 1007.) This innovation applies to those administrative proceedings which, though classified as civil, are "quasi-criminal" in effect, and are properly subject to the rule governing criminal proceedings. (See Law Rev. Com. Comment to *Ev.C.* 1007.)

(3) *Commitment and Other Proceedings Involving Competency*. Another innovation, derived from the original Uniform Rules of Evidence, eliminates the privilege in "a proceeding to commit the patient or otherwise place him or his property, or both, under the control of another because of his alleged mental or physical condition." (*Ev.C.* 1004.) This covers commitments of persons mentally ill and also appointment of a conservator under *Prob.C.* 1801. As the Law Revision Commission Comment observes, these proceedings are conducted for the benefit of the patient, and "he should not have a privilege to withhold evidence that the court needs in order to act properly for his welfare."

A similar exception applies to a proceeding brought "by or on behalf of the patient" to establish his or her competence. (*Ev.C.* 1005.)

(4) *Medi-Cal Fraud Investigation*. Where a physician is suspected of Medi-Cal fraud and patient files are seized from the physician's office pursuant to a search warrant, "the disclosure and reporting provisions of the Medi-Cal program restrict, and may invalidate, [the physician's] right to assert the privilege on behalf of his patients." (*Brillantes v. Superior Court* (1996) 51 C.A.4th 323, 339, 58 C.R.2d 770, 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence*, §86.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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E. Exceptions to the Privilege.

3. Contemplated or Committed Crime or Tort.

2 *Witkin Cal. Evid. Witnesses* § 207

[§ 207] Contemplated or Committed Crime or Tort.

The same policy which justifies an exception to the lawyer-client privilege (*supra*, §153 et seq.) applies to the physician-patient privilege, and it is stated in *Ev.C.* 997. (See similar Model C., Rule 222, Comment; 8 Wigmore (McNaughton Rev.) §2385; but see Unif. Rules, Rule 503 [no crime or tort exception to physician-patient privilege].)

But the two provisions differ in scope. As pointed out above, there are dangers in nullifying the privilege when a client consults a lawyer on matters which might ultimately involve liability in tort; hence, the lawyer-client exception is phrased in the more limited form of crime "or fraud." (See *supra*, §154.) There is no need, however, to protect such discussions with a physician; thus, *Ev.C.* 997 refers to *any tort*: There is no privilege "if the services of the physician were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a tort or to escape detection or apprehension after the commission of a crime or a tort."

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VI. PHYSICIAN-PATIENT PRIVILEGE

E. Exceptions to the Privilege.

4. Damage Suit: Good Cause for Disclosure.  
a. In General.

2 Witkin Cal. Evid. Witnesses § 208

[§ 208] In General.

*Ev.C. 999* originally introduced a new exception for a civil action to recover damages based on "conduct of the patient which constitutes a crime." The Law Revision Commission gave the following reason for the innovation: If the criminal trial took place first, the evidence in that trial would be admissible in a subsequent civil trial under the former testimony hearsay exception (*Ev.C. 1290 et seq.*; see 1 *Cal. Evidence (4th)*, *Hearsay*, §259), but would not be available if the civil action were tried first. "This exception is provided, therefore, so that the same evidence is available in the civil case without regard to when the criminal case is tried." (Law Rev. Com. Comment to *Ev.C. 999*.)

But the criminal conduct exception proved to be burdensome and difficult to administer, and the section was amended in 1975 to eliminate the specific reference to *criminal conduct* and substitute a *good cause* exception. (See Law Rev. Com. Comment; 7 *Pacific L. J.* 337.) The amended statute reads as follows:

"There is no privilege under this article as to a communication relevant to an issue concerning the condition of the patient in a proceeding to recover damages on account of the conduct of the patient if good cause for disclosure of the communication is shown."

**SUPPLEMENT:** [This section is current through the latest supplement]



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### VI. PHYSICIAN-PATIENT PRIVILEGE

#### E. Exceptions to the Privilege.

#### 4. Damage Suit: Good Cause for Disclosure.

##### b. Illustrations.

2 Witkin Cal. Evid. Witnesses § 209

[§ 209] Illustrations.

(1) *Exception Applicable*. In *Slagle v. Superior Court* (1989) 211 C.A.3d 1309, 260 C.R. 122, plaintiff brought an action for personal injuries alleging that one defendant negligently backed her car out of a parking space and hit his car. Defendants filed an answer alleging contributory negligence and a cross-complaint for equitable contribution and indemnity. They then sought to discover plaintiff's medical records from a doctor and a hospital, asserting that the records were relevant because one defendant had overheard plaintiff tell the doctor at the hospital following the accident that he was blind 6 months prior to the accident. The trial judge ordered production of the records, and plaintiff sought relief by extraordinary writ. *Held*, the records were discoverable. Under the policy of liberal construction in favor of disclosure (see 2 Cal. Evidence (4th), Discovery, §7), and in view of the legislative history of Ev.C. 999 as reflected in the comments of the Law Revision Commission (see supra, §208), "we interpret the section to include within its scope medical records of a plaintiff where the plaintiff's conduct is shown to be relevant to the issue of proximate causation if 'good cause for disclosure' is shown." (211 C.A.3d 1314.)

(2) *Exception Not Applicable*. In *Jones v. Superior Court* (1981) 119 C.A.3d 534, 174 C.R. 148, supra, §75, plaintiff sued for injuries caused by her mother's ingestion of the drug DES during pregnancy, and defendant pharmaceutical firm, invoking the exception of Ev.C. 999, sought disclosure of the mother's medical history subsequent to plaintiff's birth. *Held*, the exception was inapplicable. "Plaintiff in this case sues, not 'on account of the conduct of' her mother, but on account of the conduct of defendants, who are alleged to have acted wrongfully in relation to her." (119 C.A.3d 544.)

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#### E. Exceptions to the Privilege.

##### 5. Other Exceptions.

2 Witkin Cal. Evid. Witnesses § 210

[§ 210] Other Exceptions.

(1) *Parties Claiming Through Deceased Patient*. There is no privilege as to a communication between parties "all of whom claim through a deceased patient, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction." (*Ev.C. 1000*, similar to *Ev.C. 957* on lawyer-client, *supra*, §160.)

(2) *Breach of Duty*. There is no privilege as to a communication "relevant to an issue of breach, by the physician or the patient, of a duty arising out of the physician-patient relationship." (*Ev.C. 1001*, similar to *Ev.C. 958* on lawyer-client, *supra*, §161.)

(3) *Deceased Patient's Dispositive Instrument*. There is no privilege as to a communication "relevant to an issue concerning the *intention* of a patient, now deceased, with respect to a deed of conveyance, will, or other writing, executed by the patient, purporting to affect an interest in property." (*Ev.C. 1002*, similar to *Ev.C. 960* on lawyer-client, *supra*, §164.) Likewise, there is no privilege as to a communication "relevant to an issue concerning the validity of a deed of conveyance, will, or other writing, executed by a patient, now deceased, purporting to affect an interest in property." (*Ev.C. 1003*, similar to *Ev.C. 961* on lawyer-client, *supra*, §164.) Both are based on prior law.

(4) *Required Report*. There is no privilege as to "information that the physician or the patient is required to report to a public employee, or as to information required to be recorded in a public office, if such report or record is open to public inspection." (*Ev.C. 1006*.) As the Law Revision Commission Comment points out, no purpose is served by preventing use of the information when the law requires it to be publicly reported. (See 85 A.L.R.3d 1196 [wound required to be reported to public authority].)

(5) *Coroner's Inquiry into Decedent's Death*. A coroner may enforce a subpoena or subpoena duces tecum for records of confidential communications of a decedent subject to the physician-patient privilege. (*Govt.C. 27491.8*; see *infra*, §236.)

**SUPPLEMENT:** [This section is current through the latest supplement]





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## CHAPTER IX - Witnesses

### VII. PSYCHOTHERAPIST-PATIENT PRIVILEGE

#### A. Nature of Privilege.

##### 1. Former Law and Criticism.

##### 2 *Witkin Cal. Evid. Witnesses § 211*

[§ 211] Former Law and Criticism.

The Psychology Certification Act of 1957, regulating the practice of psychology, created a privilege for patients of *psychologists*, with the scope of the lawyer-client privilege and broader than that of physician-patient. (Former B. & P.C. 2904; see *People v. Spigno* (1957) 156 C.A.2d 279, 289, 319 P.2d 458.) *Psychiatrists* had only the protection of the narrow physician-patient privilege.

Modern law recognizes the psychotherapist-patient privilege. (See Unif. Rule 503; 98 *Harv. L. Rev.* 1539; 49 *Hastings L. J.* 945 [federal common law privilege]; 49 *Hastings L. J.* 969 [same]; 49 *Hastings L. J.* 999 [The Psychotherapist Privilege and the Supreme Court's Misplaced Reliance on State Legislatures]; 81 *Am.Jur.2d* (1992 ed.), *Witnesses* §§445, 452, 484.) The California Law Revision Commission saw no rational basis for the distinction between psychologists and psychiatrists:

"A broad privilege should apply to both psychiatrists and certified psychologists. Psychoanalysis and psychotherapy are dependent upon the fullest revelation of the most intimate and embarrassing details of the patient's life. Research on mental or emotional problems requires similar disclosure. Unless a patient or research subject is assured that such information can and will be held in utmost confidence, he will be reluctant to make the full disclosure upon which diagnosis and treatment or complete and accurate research depends."

"The Law Revision Commission has received several reliable reports that persons in need of treatment sometimes refuse such treatment from psychiatrists because the confidentiality of their communications cannot be assured under existing law. Many of these persons are seriously disturbed and constitute threats to other persons in the community. Accordingly, this article establishes a new privilege that grants to patients of psychiatrists a privilege much broader in scope than the ordinary physician-patient privilege. Although it is recognized that the granting of the privilege may operate in particular cases to withhold relevant information, the interests of society will be better served if psychiatrists are able to assure patients that their confidences will be protected."

"The Commission has also been informed that adequate research cannot be carried on in this field unless persons examined in connection therewith can be guaranteed that their disclosures will be kept confidential." (Law Rev. Com. Comment to *Ev.C.* 1014.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 81 *Am.Jur.2d* (2004 ed.), *Witnesses* §§427, 436, 464.



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VII. PSYCHOTHERAPIST-PATIENT PRIVILEGE

A. Nature of Privilege.

2. Evidence Code Restatement.

a. In General.

2 Witkin Cal. Evid. Witnesses § 212

[§ 212] In General.

*Ev.C. 1014*, setting forth the psychotherapist-patient privilege, applies to all psychotherapists, i.e., psychologists and psychiatrists, unless other statutes governing the privilege provide otherwise. Under the statute, the patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between the patient and the psychotherapist. The privilege may be claimed by any of the following:

(1) The holder of the privilege. (*Ev.C. 1014(a)*.)

(2) A person authorized by the holder of the privilege to claim it. (*Ev.C. 1014(b)*.)

(3) The person who was the psychotherapist at the time of the confidential communication. However, the psychotherapist may not claim the privilege if there is no holder of the privilege in existence or if the psychotherapist is otherwise instructed by a person authorized to permit disclosure. (*Ev.C. 1014(c)*.)

A "psychotherapist" is a person or entity described in *Ev.C. 1010*. (See *infra*, §215.)

The privilege is protected against eavesdroppers and other interceptors (*Ev.C. 1014*; see *supra*, §66), but it must be claimed by an authorized person (*Ev.C. 1014*), and it may be waived (*Ev.C. 912*, *supra*, §67). Also, the psychotherapist (like the lawyer or physician) must claim the privilege when present and not instructed otherwise. (*Ev.C. 1015*.) (See generally C.E.B., Jefferson, 2 California Evidence Benchbook 3d, Chap. 38; C.J.E.R., Judges Benchbook, Civil Proceedings: Discovery §4.58 et seq.; 47 Proof of Facts 2d 721 [establishing privilege].)

**SUPPLEMENT:** [This section is current through the latest supplement]

*West's Key Number Digest*, Witnesses k.214.5



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VII. PSYCHOTHERAPIST-PATIENT PRIVILEGE

- A. Nature of Privilege.
- 2. Evidence Code Restatement.
  - b. Criminal Proceedings.

2 Witkin Cal. Evid. Witnesses § 213

[§ 213] Criminal Proceedings.

Under former Ev.C. 1028, the privilege was available in criminal proceedings only for communications with psychiatrists (or those reasonably believed by the patient to be so) and licensed psychologists. (See *Lemelle v. Superior Court* (1978) 77 C.A.3d 148, 158, 143 C.R. 450.) The 1985 repeal of the statute extended the privilege in criminal proceedings to all persons within the definition of "psychotherapist" (see *infra*, §215).

In *People v. Clark* (1990) 50 C.3d 583, 619, 268 C.R. 399, 789 P.2d 127, defendant's therapist revealed defendant's murder threats to the potential victims. *Held*, defendant could not invoke the privilege to exclude the threats at his penalty trial. The purpose underlying Ev.C. 1014 is not to prevent the use of a defendant's statements against him or her in legal proceedings, but rather to protect the patient's right to privacy and promote the therapeutic relationship. Hence the reasons for the privilege, and the privilege itself, disappear once the communication is no longer confidential. (50 C.3d 620.)

For a decision limiting the *Clark* holding to the situation where a psychotherapist informs a person of a patient's threat against that person, see *Menendez v. Superior Court* (1992) 3 C.4th 435, 11 C.R.2d 92, 834 P.2d 786, *infra*, §228.

**SUPPLEMENT:** [This section is current through the latest supplement]



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VII. PSYCHOTHERAPIST-PATIENT PRIVILEGE

A. Nature of Privilege.

2. Evidence Code Restatement.

c. No Exception for Lanterman-Petris-Short Act Records.

2 Witkin Cal. Evid. Witnesses § 214

[§ 214] No Exception for Lanterman-Petris-Short Act Records.

*In re S. W. (1978) 79 C.A.3d 719, 145 C.R. 143*, was a mother's appeal from an order terminating her custody of her sons. She asserted the privilege against admission of records of her treatment in a public mental health facility. Welf.C. 5328 provides that such records "shall be confidential" and may be disclosed only under certain circumstances, including "[t]o the courts, as necessary to the administration of justice." (Welf.C. 5328(f).) *Held*, the privilege applied. Welf.C. 5328 is a general prohibition against disclosure of information, subject to defined exceptions; but the listing of exceptions does not make admissible records which are inadmissible under the *Evidence Code*. (79 C.A.3d 722.) (See also *Mavroudis v. Superior Court (1980) 102 C.A.3d 594, 602, 162 C.R. 724*, *infra*, §229; *People v. Pack (1988) 201 C.A.3d 679, 685, 248 C.R. 240*.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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### VII. PSYCHOTHERAPIST-PATIENT PRIVILEGE B. Definition of Psychotherapist.

2 Witkin Cal. Evid. Witnesses § 215

[§ 215] Definition of Psychotherapist.

The following persons and entities are considered to be a "psychotherapist" for purposes of the privilege:

(1) *Psychiatrist*. A person authorized, or reasonably believed by the patient to be authorized, to practice medicine in any state or nation who devotes, or is reasonably believed by the patient to devote, a substantial portion of his or her time to the practice of psychiatry. (Ev.C. 1010(a).)

(2) *Psychologist*. A person licensed as a psychologist under B. & P.C. 2900 et seq. (Ev.C. 1010(b)), licensed as an educational psychologist under B. & P.C. 4986 et seq. (Ev.C. 1010.5), or serving as a school psychologist and holding a state issued credential authorizing that service (Ev.C. 1010(d)).

(3) *Clinical Social Worker*. A person licensed as a clinical social worker under B. & P.C. 4996 et seq., when engaged in applied psychotherapy of a nonmedical nature. (Ev.C. 1010(c); see *Luhdorff v. Superior Court* (1985) 166 C.A.3d 485, 488, 212 C.R. 516; 49 *Hastings L. J.* 991 [The Social Worker's Privilege, Victim's Rights, and Contextualized Truth].)

(4) *Marriage, Family, and Child Counselor*. A person licensed as a marriage, family, and child counselor under B. & P.C. 4980 et seq. (Ev.C. 1010(e).)

(5) *Psychological Assistant, Intern, Trainee, Associate, or Doctoral Graduate*. A person registered as an assistant, an intern, a trainee, or an associate of a licensed or certified psychotherapist, as specified, who practices under the supervision of the psychotherapist. (Ev.C. 1010(f), (g), (i), (j).)

Also included within the term is a person exempt from the Psychology Licensing Law because he or she possesses a doctoral degree in psychology and has completed at least 1 year of appropriate professional experience (see B. & P.C. 2909(d)), provided that he or she practices under the supervision of a licensed or certified psychotherapist. (Ev.C. 1010(h).)

(6) *Psychiatric Nurse*. A person licensed as a registered nurse under B. & P.C. 2700 et seq. and who possesses a master's degree in psychiatric mental health nursing. (Ev.C. 1010(k).)

(7) *Provider of Mental Health Services to Minors*. A person rendering mental health treatment or counseling services to minors under Family C. 6924 (see 1 *Summary* (9th), *Contracts, Supp.*, §356J). (Ev.C. 1010(l).)

(8) *Professional Corporation*. A psychological corporation (see B. & P.C. 2995 et seq.), a marriage, family, and

child counseling corporation (see *B. & P.C. 4987.5* et seq.), a licensed clinical social worker corporation (see *B. & P.C. 4998* et seq.), and psychotherapists employed by those corporations. (*Ev.C. 1014*; for similar treatment of legal corporation under attorney-client privilege, see *Ev.C. 954*, supra, §101.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Ev.C. 1010* was amended in 2001 to make the phrase "a person who is, or is reasonably believed by the patient to be" applicable to all the enumerated categories.

(1) *Psychiatrist. Ev.C. 1010(a)* was amended in 2001 to delete the phrase "or reasonably believed by the patient to be authorized."

(2) *Psychologist. B. & P.C. 4986* et seq., relating to educational psychologists, were repealed and replaced by *B. & P.C. 4989.10* et seq. in 2006.

(4) *Marriage, Family, and Child Counselor. Ev.C. 1010(e)* was amended in 2001 to refer to marriage and family therapists licensed under *B. & P.C. 4980* et seq.(7) *Provider of Mental Health Services to Minors.*

*Cross-Reference:* 1 *Summary* (10th), *Contracts*, §45.

(8) *Professional Corporation. Ev.C. 1014* and *B. & P.C. 4987.5* were amended in 2002 to refer to marriage and family therapy corporations, rather than marriage, family, and child counseling corporations.



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### VII. PSYCHOTHERAPIST-PATIENT PRIVILEGE

#### C. Definition of Patient.

2 Witkin Cal. Evid. Witnesses § 216

[§ 216] Definition of Patient.

A patient, for purposes of the privilege, is "a person who consults a psychotherapist or submits to an examination by a psychotherapist for the purpose of securing a diagnosis or preventive, palliative, or curative treatment of his mental or emotional condition or who submits to an examination of his mental or emotional condition for the purpose of scientific research on mental or emotional problems." (*Ev.C. 1011.*)

*In re Tabatha G.* (1996) 45 C.A.4th 1159, 53 C.R.2d 93, involved a proceeding to terminate a mother's parental rights. *Held*, a study of bonding between the minor and her mother and grandmother, obtained by the mother's counsel without knowledge of the social services department or the minor's foster parents, did not fall within the privilege. The minor was not seeking diagnosis or treatment, nor was there any scientific research involved, and thus she was not a patient for purposes of *Ev.C. 1011.* (45 C.A.4th 1168.)

In *People v. Cabral* (1993) 12 C.A.4th 820, 15 C.R.2d 866, a prosecution for sexual offenses, the trial judge admitted a letter defendant had written while in custody to a psychologist at a sex offender treatment program, in which defendant admitted molesting his daughter. Other prisoners had told defendant that if he was admitted to the program, he could receive a lesser sentence, but he would have to admit the sexual molestation allegations. *Held*, the letter was properly admitted. For the privilege to be applicable, the dominant purpose of the confidential communication must have been to obtain treatment. Defendant's asserted purpose was to avoid a prison sentence. Even assuming that part of his purpose was to obtain treatment, it could not be concluded he had met his burden of proving that treatment was his dominant purpose. (12 C.A.4th 828.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Story v. Superior Court* (2003) 109 C.A.4th 1007, 1016, 135 C.R.2d 532 [because goal of defendant's psychotherapy was to treat his emotional problems and thereby aid his rehabilitation, his psychotherapy records were confidential, even if he undertook therapy as condition of probation; disagreeing with "dominant purpose" test of *People v. Cabral* (1993) 12 C.A.4th 820, 15 C.R.2d 866, text, p. 481].



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D. Holder.

2 *Witkin Cal. Evid. Witnesses* § 217

[§ 217] Holder.

The same provisions on the holder of the privilege are made as in the lawyer-client and physician-patient sections: The holder is the patient, his or her guardian or conservator, or his or her personal representative if the patient is dead. (*Ev.C. 1013*; see *supra*, §199; *In re Lifschutz* (1970) 2 C.3d 415, 85 C.R. 829, 467 P.2d 557, *infra*, §224 [privilege belongs to patient, not psychotherapist]; *People v. Caplan* (1987) 193 C.A.3d 543, 556, 238 C.R. 478 [*Ev.C. 1027* (see *infra*, §223) as a "limited removal of the child-patient's privilege and placement with the psychotherapist who treated the child at the time the requirements of the exception were met"]; *In re Daniel C. H.* (1990) 220 C.A.3d 814, 829, 269 C.R. 624, 10 *Summary* (9th), *Parent and Child, Supp.*, §556 [in dependency proceeding under *Welf.C. 300*, privilege belongs to child patient and may be asserted by his or her attorney].)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*Cross-Reference:* 10 *Summary* (10th), *Parent and Child*, §620.





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### VII. PSYCHOTHERAPIST-PATIENT PRIVILEGE

#### E. Confidential Communication.

##### 1. In General.

#### 2 *Witkin Cal. Evid. Witnesses § 218*

[§ 218] In General.

A confidential communication, for purposes of the privilege, is "information, including information obtained by an examination of the patient, transmitted between a patient and his psychotherapist in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation, or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the psychotherapist is consulted, and includes a diagnosis made and the advice given by the psychotherapist in the course of that relationship." (*Ev.C. 1012.*)

In *Luhdorff v. Superior Court* (1985) 166 C.A.3d 485, 489, 212 C.R. 516, a licensed clinical social worker, who was supervised by a licensed psychologist or psychiatrist, diagnosed defendant's emotional problem, determined the appropriate treatment, and treated defendant for 3 months. *Held*, written records relating to conversations between defendant and the clinical social worker were confidential communications under *Ev.C. 1012*. Under the statute, communications made by patients to persons reasonably necessary to assist psychiatrists and psychologists in the treatment of the patient's mental disorder are within the privilege. Although the social worker was not a therapist to whom the privilege attached, he worked under such a person, and defendant's case was ultimately controlled and supervised by persons to whom the privilege attached. These persons approved the treatment plan devised for defendant by the social worker and met with him to review the treatment plan and evaluate his performance. Therefore, the social worker fell within the category of persons reasonably necessary for the transmission of information or the accomplishment of the purpose for which a psychotherapist is consulted. (166 C.A.3d 489.)

In *Farrell L. v. Superior Court* (1988) 203 C.A.3d 521, 250 C.R. 25, petitioner was charged with forcible sex offenses committed on his minor daughter. At the preliminary hearing the magistrate ruled that defense counsel could not cross-examine the prosecutrix regarding persons in her *therapy group* at Napa State Hospital to whom she had revealed details of the offenses committed against her. *Held*, the ruling was correct; the communications came within the psychotherapist-patient privilege. " 'Group therapy' is designed to provide comfort and revelation to the patient who shares similar experiences and or difficulties with other like persons within the group. The presence of each person is for the benefit of the others, including the witness/patient, and is designed to facilitate the patient's treatment. Communications such as these, when made in confidence, should not operate to destroy the privilege." (203 C.A.3d 527.) (For holding that exercise of privilege was not unconstitutional denial of right of confrontation, see *infra*, §235.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *In re Pedro M.* (2000) 81 C.A.4th 550, 554, 555, 96 C.R.2d 839, 10 Summary (10th), *Parent and Child*, §873 [where supplemental petition alleged that minor's suitable placement disposition had been ineffective, privilege did not preclude minor's therapist from testifying about minor's progress under treatment plan; *Ev.C. 1012* allows disclosure where reasonably necessary to accomplish purpose for which therapist was consulted, and under these circumstances this would include disclosure to juvenile court]; *In re Kristine W.* (2001) 94 C.A.4th 521, 527, 114 C.R.2d 369, 10 Summary (10th), *Parent and Child*, §620 [in dependency proceeding stemming from minor's abuse by her father, trial judge did not err in permitting county health and human services agency to receive information from minor's therapist regarding her therapy, notwithstanding her invocation of privilege; relying on *Pedro M.*]; *In re Mark L.* (2001) 94 C.A.4th 573, 584, 114 C.R.2d 499, 10 Summary (10th), *Parent and Child*, §620 [in dependency proceeding, trial judge erred in refusing to allow minor's therapist to testify about recent circumstances that might have made joint therapy and visitation with father appropriate and facilitated reunification; relying on *Pedro M.*]; *In re Christopher M.* (2005) 127 C.A.4th 684, 696, 26 C.R.3d 61, 10 Summary (10th), *Parent and Child*, Supp., §939 [where juvenile court found true allegations that minor committed robbery and that offense constituted hate crime, probation condition that records of minor's treatment be made available on request to court and probation department did not violate *Ev.C. 1012*; relying on *Pedro M.*]; *Roman Catholic Archbishop of Los Angeles v. Superior Court* (2005) 131 C.A.4th 417, 455, 32 C.R.3d 209 [memorandum from staff of archbishop's vicar to troubled priest's psychotherapists, purpose of which was to supply therapeutic team with information about priest's personal history as aid to diagnosis and treatment, came within psychotherapist-patient privilege; relying on *Grosslight v. Superior Court* (1977) 72 C.A.3d 502, 140 C.R. 278, text, §219].



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VII. PSYCHOTHERAPIST-PATIENT PRIVILEGE

E. Confidential Communication.

2. Communication by Parent of Patient.

2 *Witkin Cal. Evid. Witnesses* § 219

[§ 219] Communication by Parent of Patient.

In *Grosslight v. Superior Court* (1977) 72 C.A.3d 502, 140 C.R. 278, plaintiff sued B, a 16-year-old girl, for personal injuries, and joined her parents as defendants on the theory that they had knowledge of her dangerous propensities and failed to exercise adequate control. Plaintiff then sought inspection of the records of a psychiatric hospital where B had been treated, to discover statements given by B's parents to the doctor which might include admissions of the alleged knowledge. *Held*, the statements were privileged. Although the patient is the holder of the privilege, a communication from the parent to the hospital is for the purpose of furthering the child's interest in communicating with the psychotherapist and to facilitate the diagnosis and treatment. (72 C.A.3d 506, 507.) Thus, applying the rule of liberal construction in support of the underlying policy of *Ev.C. 1014* (see Law Rev. Com. Comment, *supra*, §211), "we hold that the privilege established by that section includes all relevant communications to psychotherapists and to psychiatric personnel, by intimate family members of the patient." (72 C.A.3d 508.)

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### VII. PSYCHOTHERAPIST-PATIENT PRIVILEGE

#### E. Confidential Communication.

#### 3. Identity of Patient Privileged.

##### a. In General.

2 Witkin Cal. Evid. Witnesses § 220

[§ 220] In General.

In *Smith v. Superior Court* (1981) 118 C.A.3d 136, 173 C.R. 145, a marital dissolution case, the husband was a licensed psychologist. The wife, asking for spousal support, tried to discover the husband's income by interrogatories seeking names and addresses of his patients and the money received from them during the past year. *Held*, the discovery order was improper. "The patient's purpose would be inhibited and frustrated if his psychotherapist could be compelled to give up his identity without his consent. Public knowledge of treatment by a psychotherapist reveals the existence and, in a general sense, the nature of the malady." (118 C.A.3d 141.) The attorney-client cases (see *supra*, §111) are distinguishable: disclosure of the identity of the client does not reveal the reason for legal counsel or the content of the communication with the attorney. (118 C.A.3d 142.) And the wife had other means of obtaining evidence of the husband's income; e.g., examination of his receptionist or professional associates on the number of patients he ordinarily counsels and his customary fees and gross receipts. (118 C.A.3d 142.)

In *Scull v. Superior Court* (1988) 206 C.A.3d 784, 254 C.R. 24, defendant psychiatrist was charged with sexually molesting a patient. The district attorney moved to have the names, addresses and telephone numbers of defendant's female patients for the prior 10 years released to him for the purpose of contacting them to determine whether they had been molested during treatment. The trial judge ordered a special master to compile the information sought and, to minimize the intrusion on the former patients' privacy, required that a psychiatrist or psychologist be appointed to initiate any contacts. The judge further ordered that the patients be informed that they had the right to make no statements, and that unless they chose to testify, any information would be disclosed only to defendant and his attorney. *Held*, the order violated the psychotherapist-patient privilege.

(a) The evidence sought *did not appear to be crucial*. Use of evidence demonstrating similar acts of misconduct for the purpose of corroboration, even if admissible, would be of marginal value. (206 C.A.3d 792.)

(b) Unlike *Tarasoff v. Regents of Univ. of Calif.* (1976) 17 C.3d 425, 131 C.R. 14, 551 P.2d 334, *infra*, §227, or *Alameda v. Superior Court* (1987) 194 C.A.3d 254, 239 C.R. 400, *infra*, §221, this case did not involve discovery concerning dangerous *patients*. Thus, discovery was unnecessary to protect the public from harm. Defendant was not seeing any of his former patients; any injuries had already taken place; and there was no evidence that injury was likely to occur in the future. (206 C.A.3d 792, 793.)

(c) There was no showing that the potential benefits of contacting former patients would outweigh the harm caused by the intrusion. "Presumably, most of petitioner's former patients consulted him because they were emotionally

distressed. Possibly, a number of these individuals remained so even after therapy had been completed. Considerable harm could be visited upon any one of these emotionally troubled people were she to be contacted by the authorities in the context of a criminal investigation. Those who have been cured could have old wounds reopened. Indeed, the very fact of the authorities' knowledge of the patient's having sought the assistance of a psychiatrist could prove to be embarrassing. Such embarrassment may well nigh be compounded by the caller's innuendo that the former patient was possibly the victim of sexual molestation." (206 C.A.3d 793.)

(d) The evidence sought could be obtained by less intrusive means. Here, the district attorney had had some success contacting former patients by using the media to request assistance from persons having information concerning any offenses defendant committed upon other patients. (206 C.A.3d 794.)

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#### E. Confidential Communication.

#### 3. Identity of Patient Privileged.

#### b. Distinction: Where Need for Disclosure Is Great.

2 Witkin Cal. Evid. Witnesses § 221

[§ 221] Distinction: Where Need for Disclosure Is Great.

The impact of *Smith v. Superior Court* (1981) 118 C.A.3d 136, 173 C.R. 145, supra, §220, was limited in *Alameda v. Superior Court* (1987) 194 C.A.3d 254, 239 C.R. 400. Defendant mental hospital was sued by a patient who alleged that as a result of its negligent supervision she was raped by another patient. Plaintiff obtained an order compelling the hospital to disclose the name, address and telephone number of the male patient discovered with her in a locked men's bathroom. *Held*, disclosure was properly ordered.

(a) "[T]he *Smith* rule declaring the patient's identity to be a privileged communication should not rigidly apply in every case. In extraordinary cases of need for disclosure, a court retains discretion to order the patient's identity revealed. Revelation of the patient's identity raises only the broadest inference of mental or emotional problems. That inference, moreover, remains static from one case to the next. On the other side, a particular litigant's need for disclosure can range from mere desire for corroborating or cumulative proof to, as in this case, facts essential to the cause of action and to the ability to conduct meaningful discovery. Unlike the situation in *Smith*, the information may be crucial and there may be no other way of obtaining it." (194 C.A.3d 261.)

(b) This limitation on *Smith* will have "narrow application," will not undermine its "policy considerations," and is consistent with the Legislature's directive in *Ev.C. 911* that "courts should avoid elaborating upon the statutory scheme wherever possible" (see supra, §§60, 62). (194 C.A.3d 263.)

(c) In this case, the need for disclosure of the alleged rapist's identity is crucial to plaintiff's case: plaintiff "is effectively deprived of her day in court without it, stymied in her efforts at meaningful discovery and perhaps hampered in proving that the assault even took place." (192 C.A.3d 261.) Moreover, the case involves "compelling policy considerations" for it "implicates both her personal constitutional right to pursue and obtain safety ... and public concern for the safety of committed patients in general." (194 C.A.3d 261, discussing *Tarasoff v. Regents of Univ. of Calif.* (1976) 17 C.3d 425, 131 C.R. 14, 551 P.2d 334, infra, §227.)

(d) While the trial judge correctly ordered disclosure of the alleged rapist's name, address and telephone number, it is directed "[i]n the interest of minimizing unnecessary invasion of the man's privacy interests ... to protect the information from disclosure to anyone other than real party in interest." (194 C.A.3d 264.)

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#### E. Confidential Communication.

#### 4. Patient's Constitutional Right of Privacy.

2 Witkin Cal. Evid. Witnesses § 222

[§ 222] Patient's Constitutional Right of Privacy.

In *Cutter v. Brownbridge* (1986) 183 C.A.3d 836, 228 C.R. 545, Cutter's former wife, in a pending legal action, sought to suspend Cutter's right to visit his children. Brownbridge, Cutter's therapist, voluntarily executed a declaration for use by the former wife's attorney, containing details of Cutter's therapy. Plaintiff Cutter then filed the present suit against Brownbridge for damages for emotional distress suffered from this violation of his right of privacy. Defendant Brownbridge, by demurrer, raised the judicial proceeding immunity of former C.C. 47(2) (now C.C. 47(b); see 5 *Summary* (9th), *Torts*, §324), and the demurrer was sustained. *Held*, judgment for defendant on demurrer reversed.

(a) The constitutional right of privacy (Cal. Const., Art. I, §1; see 7 *Summary* (9th), *Constitutional Law*, §454 et seq.) has a broad reach (183 C.A.3d 842); and defendant's impressions and diagnosis, and other details of his professional relationship with plaintiff, fall within the zone of privacy protected (183 C.A.3d 843).

(b) The right is not absolute; and the necessity of ascertaining the truth is sufficiently compelling to justify disclosure when narrowly limited to information directly relevant to the issues, and when good cause and materiality to the action establish that the need for disclosure outweighs the right to privacy. (183 C.A.3d 843.)

(c) C.C. 47(2), denying a remedy in damages when an invasion of privacy occurs in a judicial proceeding, does not call for a blanket immunity for voluntary disclosure of constitutionally protected information. (183 C.A.3d 845.) The psychotherapist-patient privilege statutes (*Ev.C. 1010* et seq.) provide "a comprehensive scheme by which the need for ascertaining the truth in judicial proceedings can be balanced with a patient's right to privacy." (183 C.A.3d 845.) Compliance with this procedure avoids the concerns that access to the courts and the search for truth in judicial proceedings will be chilled by a threat of litigation over actual issues of malice, truth, or other details involved in defamation and other tort actions.

Thus: "[W]hen disclosure of constitutionally protected material is contemplated, compliance with the Evidence Code requirements for claiming the privilege when that disclosure is sought and resort to the protective procedures provided are necessary prerequisites to protection of section 47, subdivision 2, immunity. Thus, a psychotherapist who volunteers information concerning a patient obtained in connection with their relationship, does so at his or her peril." (183 C.A.3d 846.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Cross-References:* 5 *Summary* (10th), *Torts*, §186; 7 *Summary* (10th), *Constitutional Law*, §575 et seq.



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#### F. Exceptions to the Privilege.

##### 1. Those Similar to Physician-Patient Exceptions.

2 Witkin Cal. Evid. Witnesses § 223

[§ 223] Those Similar to Physician-Patient Exceptions.

Most of the exceptions closely parallel those stated in the physician-patient discussion (see supra, §204 et seq.):

(1) *Patient-litigant.* (Ev.C. 1016; see supra, §204; *Grey v. Superior Court* (1976) 62 C.A.3d 698, 703, 133 C.R. 318 [exception held inapplicable; see concurring opinion arguing for narrow construction of Ev.C. 1016]); *Alhambra v. Superior Court* (1980) 110 C.A.3d 513, 519, 168 C.R. 49 [broad patient-litigant exception of Ev.C. 999, supra, §208, not applicable to psychotherapist privilege]; *In re Lifschutz* (1970) 2 C.3d 415, 432, 85 C.R. 829, 467 P.2d 557, infra, §224; *Boling v. Superior Court* (1980) 105 C.A.3d 430, 438, 164 C.R. 432 [commencement of action where plaintiff is living and literally a "patient-litigant" is automatic waiver; but this is not true of action for wrongful death where patient has died (Ev.C. 1016(d))]; *People v. Mickle* (1991) 54 C.3d 140, 190, 284 C.R. 511, 814 P.2d 290 [capital murder defendant waived privilege as to communications in psychiatric hospital records by testifying in penalty phase about his mental problems and his treatment in hospitals; citing *In re Lifschutz*].)

(2) *Proceeding to establish competence.* (Ev.C. 1025; see supra, §206.)

(3) *Contemplated or committed crime or tort.* (Ev.C. 1018; see supra, §207.)

(4) *Parties claiming through deceased patient.* (Ev.C. 1019; see supra, §210.)

(5) *Breach of duty arising out of relationship.* (Ev.C. 1020; see supra, §210.)

(6) *Deceased patient's dispositive instrument.* (Ev.C. 1021, 1022; see supra, §210.)

(7) *Required report.* (Ev.C. 1026; see supra, §210.)

(8) *Where child under age 16 is crime victim.* Ev.C. 1027 states an additional exception: Where (a) the patient is a child under the age of 16; and (b) the psychotherapist has reasonable cause to believe that the patient has been the victim of a crime, and that disclosure of the communications is in the best interest of the child. (See *People v. Caplan* (1987) 193 C.A.3d 543, 556, 238 C.R. 478; *People v. Castro* (1994) 30 C.A.4th 390, 396, 397, 35 C.R.2d 839 [in prosecution for lewd conduct on child, trial judge properly excluded opinion of victim's family's therapist as to truth of victim's claim; exception was inapplicable, because therapist did not believe crime occurred].)

The physician-patient exception for damage actions arising out of the patient's criminal conduct (supra, §208) was not carried over into the psychotherapist-patient privilege, because the latter privilege applies to criminal cases. (Law



Rev. Com. Comment to *Ev.C. 1014*; see *infra*, §225.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Patient-litigant*. See *People v. One Ruger .22-Caliber Pistol (2000) 84 C.A.4th 310, 314, 315, 100 C.R.2d 780* [in proceeding under Welf.C. 8102 for return of firearms to defendant, testimony of psychiatrist who examined defendant under Welf.C. 5150 (mental evaluation of person taken into custody as danger to self or others; see 3 *Cal. Proc. (4th), Actions*, §30) was admissible under *Ev.C. 1016*; policy underlying privilege was required to yield to extent necessary to avert danger to others].



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## CHAPTER IX - Witnesses

### VII. PSYCHOTHERAPIST-PATIENT PRIVILEGE

#### F. Exceptions to the Privilege.

#### 2. Partial Waiver Through Litigation.

2 Witkin Cal. Evid. Witnesses § 224

[§ 224] Partial Waiver Through Litigation.

*In re Lifschutz* (1970) 2 C.3d 415, 85 C.R. 829, 467 P.2d 557, involved a personal injury action by H against A. H alleged that A had caused him "physical injuries, pain, suffering and severe mental and emotional distress." (2 C.3d 420.) On deposition, H said he had received treatment from petitioner, a psychiatrist, over a 6-month period approximately 10 years earlier, but did not describe his treatment or conversations with petitioner. When petitioner was subpoenaed for a deposition, he refused to produce any of his medical records, to answer any questions about his treatment of patients or to disclose whether H had consulted him or been his patient. (H never expressly claimed or waived the psychotherapist-patient privilege.) On the ground that the filing of personal injury litigation waived the privilege, the judge ordered petitioner to answer the deposition questions. Petitioner refused, was ordered jailed, and sought habeas corpus. *Held*, writ denied.

(a) *Protected interests are those of patient.* The concern over compelled disclosure depends on the depth and intimacy of the *patient's* revelations, rather than the psychotherapist's own deep involvement in the treatment. A psychotherapist does not have significant privacy interests independent of the patient's interests. (2 C.3d 424.) Arguments based on economic loss are also unavailing because "the compelled disclosure is reasonable in light of a related and important governmental purpose." (2 C.3d 425.) Even though psychotherapists and clergymen sometimes perform similar functions and serve similar needs, the Legislature has not denied psychotherapists equal protection of the laws by allowing a broader nondisclosure privilege to clergymen. (2 C.3d 429.)

(b) *Waiver effective only as to directly relevant matters.* Because H--the holder of the privilege--disclosed at a deposition that he had consulted petitioner for psychiatric treatment, he waived his privilege. But because he did not disclose "a significant part of the communication" (*Ev.C.* 912), he did not waive the right to later claim the privilege for communications other than the fact that petitioner had treated him. (2 C.3d 430.) "[T]he patient-litigant exception allows only a limited inquiry into the confidences of the psychotherapist-patient relationship, compelling disclosure of only those matters directly relevant to the nature of the specific 'emotional or mental' condition which the patient has voluntarily disclosed and tendered in his pleadings or in answer to discovery inquiries. Furthermore, when confidential information falls within this exception, trial courts, because of the intimate and potentially embarrassing nature of such communications, may utilize the protective measures at their disposal to avoid unwarranted intrusions into the confidences of the relationship." (2 C.3d 431.)

(c) *Zones of privacy protected, but limited by search for truth.* Even though the confidentiality of a psychotherapeutic session falls within a constitutionally protected zone of privacy, *Ev.C.* 1016 has been "carefully tailored to serve the historically important state interest of facilitating the ascertainment of truth in connection with legal

proceedings." (2 C.3d 432.) Because the patient-litigant exception to the privilege compels disclosure only when initiated by the patient's own action, "intrusions" into a patient's privacy remain under his or her control. "As such, we find no constitutional infirmity in it." (2 C.3d 433.)

This exception, however, is not an automatic total waiver whenever a patient institutes a claim for physical or mental injury. *Ev.C. 1016* must be construed as "a limited waiver concomitant with the purposes of the exception." (2 C.3d 435.) Communications not directly relevant to the specific conditions disclosed by the patient-litigant remain privileged. "Disclosure cannot be compelled with respect to other aspects of the patient-litigant's personality even though they may, in some sense, be 'relevant' to the substantive issues of litigation. The patient thus is not obligated to sacrifice all privacy to seek redress for a specific mental or emotional injury; the scope of the inquiry permitted depends upon the nature of the injuries which the patient-litigant himself has brought before the court." (2 C.3d 435.)

(d) *Patient has burden of showing irrelevance of questioning.* Because only the patient knows both the nature of the ailments for which he or she seeks damages and the general content of his or her psychotherapeutic communications, the burden rests on the patient initially "to submit some showing that a given confidential communication is not directly related to the issue he has tendered to the court." (2 C.3d 436.) A patient-litigant may have to limit his or her alleged "mental or emotional distress" or explain, in general terms, the object of the psychotherapy to illustrate that it is not reasonably probable the information sought is directly relevant to the mental condition in issue. In determining whether to require disclosure, courts should then heed the basic privacy interests involved and *liberally construe* the privilege in the patient's favor. (2 C.3d 437.) The patient may have to reveal part of the communication to enable the trial judge to pass on the claim of irrelevancy. But the trial judge should take necessary precautions to protect the confidentiality of these communications; e.g., the judge might routinely permit such disclosure to be made *ex parte* in the judge's chambers. (2 C.3d 437, footnote 23.) At a trial, where the danger of publicity and embarrassment is increased, the careful exercise of judicial discretion should protect the patient's legitimate interests. Without this supervision, "intensive examinations of psychotherapists and patients may often ultimately result in substantially more harm than benefit." (2 C.3d 438.) (See 59 Cal. L. Rev. 30 [praising "highly desirable balance" struck in *Lifschutz* case]; 10 Loyola L.A. L. Rev. 695 [federal case following *Lifschutz*]; 44 A.L.R.3d 24 [privilege, in judicial or quasi-judicial proceedings, arising from relationship between psychiatrist or psychologist and patient].)

The *Lifschutz* principles supporting the privilege were emphasized in *Roberts v. Superior Court* (1973) 9 C.3d 330, 107 C.R. 309, 508 P.2d 309, a personal injury action in which plaintiff sought damages for physical injuries but not for emotional distress or mental suffering. There was thus no reasonable probability that the psychotherapeutic communications sought by defendant were directly relevant to a specific mental condition placed in issue by plaintiff. The court said:

"We must of course recognize that any physical injury is likely to have a 'mental component' in the form of pain suffered by the injured person, at least insofar as he is conscious of the physical injury. Presumably, the perception of pain from a particular injury will vary among individuals. Thus, in every lawsuit involving personal injuries, a mental component may be said to be at issue, in that limited sense at least. However, to allow discovery of past psychiatric treatment merely to ascertain whether the patient's past condition may have decreased his tolerance to pain or whether the patient may have discussed with his psychotherapist complaints similar to those to be litigated, would defeat the purpose of the privilege." (9 C.3d 339.) Therefore, "where there is no specific mental condition of the patient at issue, and discovery of the privileged communications is sought merely upon speculation that there may be a 'connection' between the patient's past psychiatric treatment and some 'mental component' of his present injury, those communications should remain protected by the privilege." (9 C.3d 339.) (See 62 Cal. L. Rev. 604; *People v. Superior Court (Kaufman)* (1974) 12 C.3d 421, 426, 115 C.R. 812, 525 P.2d 716 ["Interpreted broadly, *Lifschutz* recognizes that discretion rests in the trial court to control the scope and use of a deposition where a claim of privilege has been tendered and the limits of an exception to the privilege are at issue"]; *Huelter v. Superior Court* (1978) 87 C.A.3d 544, 547, 151 C.R. 138 [following *Lifschutz* and *Roberts*].)

*In re Edward D.* (1976) 61 C.A.3d 10, 132 C.R. 100, held that the privilege was waived in special circumstances

arising in a juvenile court dependency proceeding involving two boys. The county Department of Public Social Services referred the boys' mother to a psychologist for evaluation, and the judge permitted the psychologist to testify as to his diagnosis despite the mother's claim of privilege. *Held*, the ruling was correct. "Appellant understood that she was to be examined by Dr. Cramer to provide a diagnosis or evaluation which would be considered in determining whether she would be given custody of the minors. She knew that the juvenile court judge was the one who would make that decision. Her voluntary participation can only be interpreted as reflecting her consent that Dr. Cramer's evaluation be communicated both to DPSS and to the court for that purpose. Thus, while the information remained confidential as between appellant and the world generally, the transmission of the information to the juvenile court judge was proper in order to accomplish her purpose." (61 C.A.3d 15.) (See lengthy dissent.)

In *Patterson v. Superior Court* (1983) 147 C.A.3d 927, 193 C.R. 99, plaintiffs' son had been diagnosed as schizophrenic and had made two suicide attempts in a hospital which thereafter transferred him to defendant Cordilleras Center. Defendants, aware of his suicidal tendencies, at first placed him under close observation, but then allowed him more freedom, and he hung himself. Plaintiffs sued for damages for wrongful death, alleging that defendant and the treating physician failed to take proper measures to protect the decedent from his suicidal urges. Defendants moved for production of all medical records pertaining to decedent's prior care or treatment at a number of hospitals. Plaintiffs opposed the motion on the ground that they did not claim that defendants caused or aggravated his condition, that they sought damages only for loss of society, not for loss of prospective financial support, and that the decedent's medical history was not relevant on the issue of defendants' negligence in failing to protect him from himself. *Held*, order granting affirmed. The mere filing of a lawsuit does not trigger application of the patient-litigant exception, but here, the issue of the decedent's psychiatric condition was at the heart of the lawsuit.

(a) The fact that defendants knew of the decedent's suicidal condition did not remove that condition as an issue; it merely suggests that defendants will have a difficult task if they try to prove either that they did not know this or that there was no reason to suspect that he would actually commit suicide. And defendants should not be required to defend this psychiatric malpractice case solely on what they learned about the patient during his short stay at their facility. (147 C.A.3d 931.)

(b) Defendants also were entitled to view records that might reveal negligence attributable to the referring hospital, which could become the basis for a cross-complaint. (147 C.A.3d 931, footnote 1.)

(c) Defendants could further attempt to set up the defense of causation; i.e., that the decedent's suicide was inevitable and could not have been prevented. (147 C.A.3d 931.)

In brief, the nature of the suit called for a full inquiry into the decedent's medical and psychiatric history in order to determine how to defend the action; hence, to deprive the defendants of the opportunity to review the records would require them to defend a psychiatric malpractice case with only partial knowledge of the patient's condition. (147 C.A.3d 931.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(New) *Distinction: Disclosures in prior unrelated proceeding.* "[A]ny waiver of the psychotherapist-patient privilege which has occurred in one proceeding must be carefully limited with respect to its later use in entirely unrelated proceedings. ... Because among other reasons nontestimonial pretrial disclosures of privileged communications are not usually made in a public setting, are not otherwise widely disseminated and in fact may be subject to judicial protection from wide dissemination, a pretrial disclosure of such a communication may not suggest to a patient the possibility that the information disclosed will be available to anyone who, at anytime in the future, believes he needs the information. Of concern here also is the impact the uncontrolled use of information disclosed in one setting might have on a litigant's behavior: in the absence of some limitation as to later use of confidential information psychotherapeutic patients will be unnecessarily discouraged from asserting compensation for emotional injuries for fear that any disclosure needed to obtain compensation will haunt them in perpetuity." (*San Diego Trolley v. Superior Court* (2001) 87 C.A.4th 1083, 1093, 105 C.R.2d 476; citing *In re Lifschutz* (1970) 2 C.3d 415, 85 C.R. 829, 467 P.2d 557, text, p. 489 [in personal

injury action against trolley company in which plaintiff deposed trolley driver, neither driver's testimony, fact that she had made stress-related worker's compensation claim against employer, nor any disclosure she made in that proceeding deprived her of power to prevent disclosure of confidential communications with psychiatrist[.]



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### VII. PSYCHOTHERAPIST-PATIENT PRIVILEGE

#### F. Exceptions to the Privilege.

#### 3. Insanity Defense in Criminal Action.

2 *Witkin Cal. Evid. Witnesses* § 225

[§ 225] Insanity Defense in Criminal Action.

Unlike the physician-patient privilege (*supra*, §206), the psychotherapist privilege is not limited to civil proceedings but applies in criminal proceedings. "This difference in the scope of the two privileges is based on the fact that the Law Revision Commission has been advised that proper psychotherapy often is denied a patient solely because he will not talk freely to a psychotherapist for fear that the latter may be compelled in a criminal proceeding to reveal what he has been told. The Commission has also been advised that research in this field will be unduly hampered unless the privilege is available in criminal proceedings." (Law Rev. Com. Comment to *Ev.C. 1014*.)

If the defendant tenders the issue of his or her mental or emotional condition the privilege is lost. (*Ev.C. 1016*.) Thus, there is no privilege where a criminal defendant raises the issue of present insanity as an objection to trial, or pleads insanity as a defense. (*Ev.C. 1023*.) "In such a proceeding, the trier of fact should have available to it all information that can be obtained in regard to the defendant's mental or emotional condition. That evidence can often be furnished by the psychotherapist who examined or treated the patient-defendant." (Law Rev. Com. Comment to *Ev.C. 1014*.) (See *People v. Superior Court (Broderick)* (1991) 231 C.A.3d 584, 590, 282 C.R. 418, *supra*, §75 [directing trial judge to reconsider extent of murder defendant's waiver of psychotherapist-patient privilege under *Ev.C. 912*, resulting from disclosures in prior murder trial where defenses based on mental state were raised].)

However, a defendant may lose the psychotherapist-patient privilege but nonetheless be protected by the attorney-client privilege. (See *People v. Lines* (1975) 13 C.3d 500, 119 C.R. 225, 531 P.2d 793, *infra*, §237.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### F. Exceptions to the Privilege.

##### 4. Dangerous Patient.

##### a. Nature of Exception.

2 *Witkin Cal. Evid. Witnesses* § 226

[§ 226] Nature of Exception.

The broad exception for commitment and guardianship proceedings in the physician-patient statute (see *supra*, §206) is considerably reduced for patients of psychotherapists: The privilege is denied only "if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger." (*Ev.C.* 1024; see *People v. Henderson* (1981) 117 C.A.3d 740, 748, 172 C.R. 858 [mentally disordered sex offender proceeding; statements made to hospital staff in course of routine therapy sessions not privileged]; *People v. Gomez* (1982) 134 C.A.3d 874, 880, 881, 185 C.R. 155 [rejecting contention that, although threat to kill victim was not privileged when made, it became privileged by time of trial because victim was then dead and disclosure was no longer necessary to prevent danger]; *Luhdorff v. Superior Court* (1985) 166 C.A.3d 485, 494, 212 C.R. 516 [exception inapplicable where no evidence in record indicating that accused who was interviewed was a danger to alleged victim]; *In re Kevin F.* (1989) 213 C.A.3d 178, 182, 261 C.R. 413 [juvenile confessed to arson during mandatory counseling session while committed to residential treatment program; confession revealed threat to residents]; 62 *Cal. L. Rev.* 1025 ["The Patient or His Victim: The Therapist's Dilemma"]; 9 *U.C. Davis L. Rev.* 549 [dangerous patient exception: dangerous precedent?].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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##### 4. Dangerous Patient.

##### b. Balancing Test: Tarasoff Case.

2 Witkin Cal. Evid. Witnesses § 227

[§ 227] Balancing Test: Tarasoff Case.

In *Tarasoff v. Regents of Univ. of Calif.* (1976) 17 C.3d 425, 131 C.R. 14, 551 P.2d 334, the court held that a cause of action could be stated by plaintiff parents of a murder victim against defendant therapists for negligent failure to warn the victim that a psychiatric patient had threatened to kill her. The court made the following observations on the privilege and dangerous-patient exception:

(a) *Legislative balance*. "[T]he public interest in supporting effective treatment of mental illness and in protecting the rights of patients to privacy" must be weighed against "the public interest in safety from violent assault." In *Ev.C. 1014* and *1024* the Legislature undertook the difficult task of balancing these countervailing concerns. (17 C.3d 440.)

(b) *Confidentiality*. "We realize that the open and confidential character of psychotherapeutic dialogue encourages patients to express threats of violence, few of which are ever executed. Certainly a therapist should not be encouraged routinely to reveal such threats; such disclosures could seriously disrupt the patient's relationship with his therapist and with the persons threatened. To the contrary, the therapist's obligations to his patient require that he not disclose a confidence unless such disclosure is necessary to avert danger to others, and even then that he do so discreetly." (17 C.3d 441.)

(c) *Duty to warn endangered party*. "We conclude that the public policy favoring protection of the confidential character of patient-psychotherapist communications must yield to the extent to which disclosure is essential to avert danger to others. ... If the exercise of reasonable care to protect the threatened victim requires the therapist to warn the endangered party or those who can reasonably be expected to notify him, we see no sufficient societal interest that would protect and justify concealment." (17 C.3d 442.) (For an extended discussion of the case, law review comments, and later decisions following or distinguishing it, see 6 *Summary* (9th), *Torts*, §860; and see *Lemelle v. Superior Court* (1978) 77 C.A.3d 148, 159, 143 C.R. 450 [averment in declaration supporting discovery motion insufficient to show that psychotherapist had reasonable cause to believe patient was dangerous and disclosure of communication was necessary].)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*Cross-Reference:* 6 *Summary* (10th), *Torts*, §1050.





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## 4. Dangerous Patient.

## c. Other Illustrations.

2 Witkin Cal. Evid. Witnesses § 228

[§ 228] Other Illustrations.

In *People v. Hopkins* (1975) 44 C.A.3d 669, 119 C.R. 61, an 89-year-old woman was beaten and robbed by two men who broke into her apartment. Later that day, defendant went to a Veterans Administration Hospital, asked to see a psychiatrist and, on meeting one, asked whether everything said would be confidential. When the psychiatrist said yes, defendant described his participation in the crime. The psychiatrist sent him to another branch of the hospital and repeated defendant's story to two nurses, one of whom informed hospital security, which then notified the police. This information led to defendant's arrest and confession. *Held*, defendant's motion to suppress was properly denied. Under *Ev.C. 1024*, the psychotherapist had reasonable cause to believe that defendant was in a mental or emotional condition that made him dangerous to himself or the person or property of another, and that disclosure of the communication was necessary to prevent the threatened danger. Under those circumstances, there is no privilege of confidentiality under *Ev.C. 1014*. (44 C.A.3d 674.)

In *People v. Wharton* (1991) 53 C.3d 522, 280 C.R. 631, 809 P.2d 290, defendant was convicted of first degree murder for the killing of his girlfriend, and was sentenced to death. On appeal, he argued that the trial judge had misconstrued the dangerous patient exception (*Ev.C. 1024*) to the psychotherapist-patient privilege (*Ev.C. 1014*, *supra*, §212 *et seq.*), in permitting the prosecutor to examine defendant's two psychotherapists. More than 2 weeks before the murder, defendant had voluntarily sought mental health counseling. Both doctors who examined him had warned the victim that she was in danger, as they were obligated to do by *Tarasoff v. Regents of Univ. of Calif.* (1976) 17 C.3d 425, 131 C.R. 14, 551 P.2d 334, *supra*, §227. After an in camera hearing at which the doctors testified, the trial judge ruled that the prosecution could examine the doctors as to their conversations with the victim *and* as to the statements by defendant in the course of his therapy that had prompted their warnings. *Held*, judgment affirmed.

(a) Although the psychotherapist-patient privilege is liberally construed in favor of the patient (see *Roberts v. Superior Court* (1973) 9 C.3d 330, 107 C.R. 309, 508 P.2d 309, and *In re Lifschutz* (1970) 2 C.3d 415, 85 C.R. 829, 467 P.2d 557, *supra*, §224), and exceptions to the privilege are narrowly construed (see *People v. Stritzinger* (1983) 34 C.3d 505, 194 C.R. 431, 668 P.2d 738, *infra*, §234), the trial judge complied with these requirements by specifically excluding from disclosure any statements that did not trigger the doctors' warnings to the victim. (53 C.3d 554.)

(b) Defendant's argument that *Ev.C. 1024* should not apply after the victim is dead, because the goal of preventing harm to others has become irrelevant, leads to the absurd result that a dangerous patient could regain the privilege by killing his or her victim. (53 C.3d 554.) The same argument was properly rejected in *People v. Gomez* (1982) 134 C.A.3d 874, 185 C.R. 155, and *Mavroudis v. Superior Court* (1980) 102 C.A.3d 594, 162 C.R. 724, *infra*, §229. Because

defendant made statements leading his doctors to reasonably believe that he posed a threat to the victim, those statements were not privileged under *Ev.C. 1024*. Hence, the doctors were free to communicate them to the victim, and they were admissible at defendant's trial. (53 C.3d 558.)

(c) This interpretation of *Ev.C. 1024* does not violate public policy by discouraging those in need of help from seeking mental health counseling. Instead, it "vindicates the Legislature's careful balance between the need for confidentiality in the psychotherapeutic relationship on the one hand, and public safety concerns on the other." (53 C.3d 558, citing *Tarasoff*.)

(d) The argument that *Ev.C. 1024* does not remove the psychotherapist-patient privilege for communications that were not disclosed to the victim misperceives the nature of the statute. If the therapist believes that disclosure is necessary to prevent the danger posed to the victim by the patient, the statute does not provide that the privilege is waived; it provides that *there is no privilege*. *Ev.C. 1024* does not involve voluntary disclosure and the concept of waiver. (53 C.3d 560.)

(e) Interpreting *Ev.C. 1024* to permit therapists to warn potential victims, but to forbid other uses of the patient's disclosures, is inconsistent with the Legislature's intent. Once a court determines that a case falls within the scope of *Ev.C. 1024*, there simply is no privilege. (53 C.3d 561.) Moreover, once confidential communications are revealed to the potential victim, they lose their confidential status. Here, although defendant's doctors did not reiterate defendant's exact statements when they warned the victim, they did reveal to her his confidential communications. (53 C.3d 562.)

(f) Defendant's right to privacy was not violated by this interpretation of *Ev.C. 1024*. The right to privacy is not absolute, but may yield to compelling state interests. (53 C.3d 563, citing *Stritzinger*, *supra*.) A patient's privacy is preserved to the extent consistent with the purpose of *Ev.C. 1024*, when revelation of confidential communications during therapy that did *not* trigger a *Tarasoff* warning is prohibited. (53 C. 3d 561.)

Three justices dissented, one on the ground that *Ev.C. 1024* applies only while injury to the victim may be averted (53 C.3d 607), and two on the ground that *Ev.C. 1024* applies only to statements that must themselves be disclosed by the therapist in order to prevent danger (53 C.3d 615).

In *Menendez v. Superior Court* (1992) 3 C.4th 435, 11 C.R.2d 92, 834 P.2d 786, petitioners Lyle and Erik--two brothers--were charged with the murder of their parents. Petitioners had a number of sessions with Dr. Oziel, a psychotherapist. The police obtained a search warrant under P.C. 1524 authorizing a search of the offices of Dr. Oziel, and seizure of specified items including audiotape recordings containing information relating to the killings. Dr. Oziel delivered the materials, but claimed the psychotherapist-patient privilege on behalf of petitioners as to the items seized. The superior court rejected the claim, but the Supreme Court, on review, sustained the claim in part. The opinion discusses the effect of *People v. Clark* (1990) 50 C.3d 583, 268 C.R. 399, 789 P.2d 127, *supra*, §213, in the light of the later decision in *People v. Wharton*, *supra*.

(a) "Considered within its context, *Clark* holds only that when a psychotherapist discloses a patient's threat to the patient's intended victim in a so-called 'Tarasoff warning' ... , the disclosed threat is not covered by the privilege." (3 C.4th 447.) "[T]he superior court read *Clark* to hold broadly that the privilege requires the communication to be and remain 'confidential.' " (3 C.4th 447.) This is incorrect: the privilege can cover a communication that was never "confidential" so long as it was made in confidence; it can cover a communication that has lost its "confidential" status; it can bar testimony by anyone; and "outside" third persons are included within the scope of the protection. (3 C.4th 447, 448.) "*Clark* impliedly accepts the patient's control of waiver of the privilege." (3 C.4th 449.)

(b) *Clark* is inapplicable here: "Dr. Oziel did not disclose any threat by Lyle and/or Erik to any intended victim in a *Tarasoff* warning because neither Lyle nor Erik threatened anyone other than Dr. Oziel himself." (3 C.4th 449.)

(c) "*Wharton* is different. Its applicability cannot be doubted. It bears directly on the crucial issue of the 'dangerous patient' exception. As pertinent here, *Wharton* holds in substance that a psychotherapist's *Tarasoff* warning to the

patient's intended victim is not covered by the privilege even if it relates an otherwise protected communication, provided that the conditions of the exception are satisfied, viz., there is reasonable cause for the psychotherapist to believe that (1) the patient is dangerous *and* (2) disclosure of the communication is necessary to prevent any harm." (3 C.4th 449.)

(d) "We emphasize that the 'dangerous patient' exception requires *only* reasonable cause for belief by the psychotherapist in the dangerousness of the patient and the necessity of disclosure. Certainly, it does not demand that the patient must be dangerous to a person *other than* the psychotherapist--although here the patients were. Nor does it demand that the psychotherapist must actually disclose the relevant communication or even issue a warning. Indeed, in *Wharton* we made plain that the exception was 'not keyed to ... disclosure' or warning, but to the 'existence of the specified factual predicate,' viz., reasonable cause for belief in the dangerousness of the patient and the necessity of disclosure." (3 C.4th 451.) This view is also supported by *Tarasoff*. (3 C.4th 451, 452.) (See 20 *Pepperdine L. Rev.* 415 [discussing *Clark*, *Wharton*, and *Menendez*]; 20 *Pepperdine L. Rev.* 1640 [discussing *Menendez*].)

**SUPPLEMENT:** [This section is current through the latest supplement]

In *People v. Martinez* (2001) 88 C.A.4th 465, 105 C.R.2d 841, defendant was committed as a sexually violent predator in a proceeding in which the prosecution's psychological experts relied in part on defendant's psychological records from a prior mentally disordered sex offender proceeding. *Held*, commitment order affirmed; there was no violation of the psychotherapist-patient privilege. The Sexually Violent Predators Act (Welf.C. 6600 et seq.; see 3 *Cal. Crim. Law* (3d), *Punishment*, §193 et seq.) "protects the public from sexual predators by detaining them and providing treatment until the mental condition causing their disorder has abated. The determination that a disorder has abated requires a full assessment of the person's current mental condition, including reference to treatment records and progress in therapy. To this end, we conclude that the psychotherapist-patient privilege did not preclude [the experts] from considering defendant's therapy records because the privilege never attached to his communications" with staff during the prior treatment. (88 C.A.4th 484.) Defendant concedes that one of the reports was not privileged in the prior proceeding, but argues that this "waiver" applied only to that proceeding and not to subsequent ones. This is incorrect: If the preliminary facts making *Ev.C. 1024* applicable are present, the privilege never attaches in the first place and there is nothing to waive. (88 C.A.4th 484, 485.) (See *Story v. Superior Court* (2003) 109 C.A.4th 1007, 1018, 135 C.R.2d 532 [distinguishing *Martinez*; defendant granted probation is not comparable to person committed under Sexually Violent Predators Act, and thus dangerous patient exception is not generally applicable to records of probation-conditioned psychotherapy; however, partial disclosure of those records may be necessary for court to monitor defendant's progress].)



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#### F. Exceptions to the Privilege.

##### 4. Dangerous Patient.

##### d. In Camera Inspection.

2 Witkin Cal. Evid. Witnesses § 229

[§ 229] In Camera Inspection.

In *Mavroudis v. Superior Court* (1980) 102 C.A.3d 594, 162 C.R. 724, plaintiffs' son, a psychiatric patient of defendant hospitals, attacked them, causing physical injuries. They brought an action for damages, alleging that defendants knew or reasonably should have known that he posed the danger, and asked that the records of his treatment be either produced or delivered to their psychiatric expert for examination under a protective order. The trial judge inspected the records in camera and denied the discovery motion on the ground that the records contained no information indicating a serious danger of violence to plaintiffs. *Held*, the motion must be reconsidered under different standards.

(a) Under *Tarasoff v. Regents of Univ. of Calif.* (1976) 17 C.3d 425, 131 C.R. 14, 551 P.2d 334, *supra*, §227, petitioners were entitled to discovery not only on the basis of indication in the records that defendants knew, but also that they reasonably should have known, of the danger. (102 C.A.3d 599.)

(b) A literal reading of *Ev.C. 1024* would limit the dangerous-patient exception to prospective application by requiring that the psychotherapist have reasonable cause to believe disclosure is necessary at the time the privilege is invoked. But the exception also applies if *Ev.C. 1024*'s conditions were satisfied at the time of an earlier disclosure (see *People v. Hopkins* (1975) 44 C.A.3d 669, 119 C.R. 61, *supra*, §228), or when there was a duty to disclose. (102 C.A.3d 603.)

(c) Despite the restriction in *Ev.C. 915* on requiring disclosure of information claimed to be privileged in order to rule on the claim (see *supra*, §87), the court may require disclosure *in camera* when an exception depends on the content of a communication (*In re Lifschutz* (1970) 2 C.3d 415, 437, footnote 23, 85 C.R. 829, 467 P.2d 557, *supra*, §§88, 224). (102 C.A.3d 606.)

(d) In some instances, the trial judge may be competent to determine the applicability of the exception without expert assistance; e.g., where the patient has made an actual threat of violence or the psychotherapist has determined the existence of such danger or, conversely, where the plaintiffs are not readily identifiable as potential victims or the records are devoid of any indication of possible violence. In all other cases, the court must receive expert testimony to establish the standard of care in the profession. Such testimony should be given *in camera* by a court-appointed expert (*Ev.C. 730*; see 1 Cal. Evidence (4th), *Opinion Evidence*, §80) rather than by an expert retained by a party. (102 C.A.3d 605.) (See *Lemelle v. Superior Court* (1978) 77 C.A.3d 148, 160, 143 C.R. 450 [defendant not precluded from presenting motion and seeking in camera inspection]; 15 San Diego L. Rev. 265; *supra*, §88 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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4. Dangerous Patient.

e. Statutory Authority and Duty.

2 Witkin Cal. Evid. Witnesses § 230

[§ 230] Statutory Authority and Duty.

When a patient, in the opinion of his or her psychotherapist (see *Ev.C. 1010*, supra, §215), presents a *serious danger of violence* to a *reasonably foreseeable* victim, specified information or records may be released to that person and to law enforcement agencies as the psychotherapist determines is needed for the protection of that person. (Welf.C. 5328(r).)

The monetary liability of a psychotherapist for failing to warn a victim of a patient's threatened violent behavior is limited to situations "where the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims." (C.C. 43.92(a).) And the psychotherapist's duty to warn is discharged if he or she makes *reasonable efforts* to communicate the threat to the victim *and* a law enforcement agency. (C.C. 43.92(b).)

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### VII. PSYCHOTHERAPIST-PATIENT PRIVILEGE

#### F. Exceptions to the Privilege.

#### 5. Psychotherapist Appointed by Court or Prison Board.

##### a. Applicability of Exception.

2 Witkin Cal. Evid. Witnesses § 231

[§ 231] Applicability of Exception.

(1) *Where Exception Applies.* There is no privilege where the psychotherapist is appointed by the judge to examine the patient. (*Ev.C. 1017(a)*.) The reasons are that (a) the court appointment does not create a sufficiently confidential relationship to warrant the privilege, and (b) the purpose of the appointment is usually to have the psychotherapist testify concerning the patient's condition. (Law Rev. Com. Comment to *Ev.C. 1017*; see 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §674.)

Similarly, the privilege does not apply where the psychotherapist is appointed by the Board of Prison Terms to examine a patient under P.C. 2900 et seq. (disposition of mentally disordered prisoners upon discharge; see 3 *Cal. Crim. Law* (3d), *Punishment*, §638 et seq.).

(2) *Where Exception Does Not Apply.* The exception does not apply to a juvenile court referral of a parent for counseling. The referral is not equivalent to a court-ordered examination within the meaning of *Ev.C. 1017(a)*. (*In re Eduardo A.* (1989) 209 C.A.3d 1038, 1041, 261 C.R. 68.)

And different rules govern a prosecution or defense request in a criminal case for an appointment of a psychotherapist. (See *infra*, §§232, 233.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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5. Psychotherapist Appointed by Court or Prison Board.
  - b. Where Criminal Defendant Requests Appointment.

2 Witkin Cal. Evid. Witnesses § 232

[§ 232] Where Criminal Defendant Requests Appointment.

*Ev.C. 1017(a)* contains a proviso restoring the privilege where the court appointment is on request of the defendant's lawyer for the purpose of providing him or her with information needed to advise on whether to *enter or withdraw* an insanity plea or to present a defense based on mental or emotional condition. The Law Revision Commission says: "If the defendant determines not to tender the issue of his mental or emotional condition, the privilege will protect the confidentiality of the communication between him and his court-appointed psychotherapist. If, however, the defendant determines to tender this issue--by a plea of not guilty by reason of insanity, by presenting a defense based on his mental or emotional condition, or by raising the question of his sanity at the time of the trial--the exceptions provided in Sections 1016 and 1023 make the privilege unavailable to prevent disclosure of the communications between the defendant and the psychotherapist." (See *People v. Haskett* (1990) 52 C.3d 210, 243, 276 C.R. 80, 801 P.2d 323 [privilege under *Ev.C. 1017* was waived for purposes of second death penalty trial, where defense called doctor at first trial and did not object to testimony about admissions by defendant].)

The Comment adds that the words "or withdraw" were added to make it clear that the privilege applies "in a case where the defendant in a criminal proceeding enters a plea based on insanity, submits to an examination by a court-appointed psychotherapist, and later withdraws the plea based on insanity prior to the trial on that issue." In such case, the defendant does not tender the issue of mental or emotional condition and the privilege should remain.

**SUPPLEMENT:** [This section is current through the latest supplement]

*(New) Distinction: Sexually violent predator proceeding:* The rule set forth in *Ev.C. 1017(a)*, that the psychotherapist-patient privilege applies to an expert appointed by the court at the defendant's request, does not apply in a sexually violent predator proceeding. Confidentiality is extended to an expert evaluation in the criminal context because if the defense lawyer decides, based on the evaluation, not to proceed with a plea or defense based on mental condition, the defendant's mental condition is no longer in issue in the proceeding. Conversely, if the defendant proceeds with a mental plea or defense, he tenders the issue of his mental condition and waives any claim of confidentiality, including the psychotherapist-patient privilege. In a sexually violent predator proceeding, by contrast, there is no such thing as an insanity plea or a mental condition defense. The defendant's mental condition is always in issue. A defense evaluation concurring in the prosecution's evaluations would merely be cumulative and therefore would not be excludible. If it disagreed with the prosecution's evaluations, it would benefit the defendant, and there would be no reason for the defense to want to keep it confidential. (*People v. Angulo* (2005) 129 C.A.4th 1349, 1366, 30 C.R.3d 189.)





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#### 5. Psychotherapist Appointed by Court or Prison Board.

##### c. Where Prosecution Requests Appointment.

2 Witkin Cal. Evid. Witnesses § 233

[§ 233] Where Prosecution Requests Appointment.

In *People v. Danis* (1973) 31 C.A.3d 782, 107 C.R. 675, defendant relied solely on diminished capacity as a defense against a charge of auto theft, and obtained court appointment of a psychiatrist who testified that defendant probably lacked specific intent to deprive the vehicle owner of its possession. After this testimony, the prosecution obtained an order for appointment of another psychiatrist to examine defendant. The prosecution psychiatrist was prohibited from testifying about incriminating statements defendant made during the examination, but was permitted to give his evaluation of defendant and to state that in his opinion defendant could have formed the requisite specific intent. *Held*, no error.

(a) Psychiatric testimony is not analogous to real or physical evidence like handwriting exemplars, chemical tests or the trying on of clothing; in California, psychiatric tests are communicative or testimonial in character. (31 C.A.3d 785.) While an order appointing a psychiatrist does not in itself violate the constitutional right against self-incrimination, a defendant can, nevertheless, assert the privilege to remain silent, either by refusing to submit to the examination or to answer questions. (31 C.A.3d 785.) However, by presenting psychiatric testimony in support of his diminished capacity defense, defendant *waived* this privilege, "at least to the extent of foreclosing any objection to the testimony of a court-appointed psychiatrist relating to the diminished capacity issue." (31 C.A.3d 786.)

(b) All three conditions for admissibility of this evidence were met here, i.e., assistance of counsel, placing of mental condition in issue and instructing that defendant's incriminating statements were to be considered only to show the information on which the psychiatrist based his information. (See *In re Spencer* (1965) 63 C.2d 400, 46 C.R. 753, 406 P.2d 33.) "In fact, as to the third condition, the court took a more stringent step than instructing the jury concerning incriminating statements. It specifically precluded Dr. Bramwell from testifying to any of such statements made by defendant during the interview." (31 C.A.3d 786.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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### VII. PSYCHOTHERAPIST-PATIENT PRIVILEGE

#### F. Exceptions to the Privilege.

#### 6. Report of Child Abuse or Neglect.

2 Witkin Cal. Evid. Witnesses § 234

[§ 234] Report of Child Abuse or Neglect.

The Child Abuse and Neglect Reporting Act (P.C. 11164 et seq.; see 5 *Summary (9th)*, *Torts*, §283 et seq.) states that "[n]either the physician-patient privilege nor the psychotherapist-patient privilege applies to information reported pursuant to this article." (P.C. 11171(b).) This exception to the privilege was examined and limited in its application in *People v. Stritzinger* (1983) 34 C.3d 505, 194 C.R. 431, 668 P.2d 738.

Defendant was convicted of child molestation, based on various sexual activities with his stepdaughter Sarah. When Sarah's mother--defendant's wife--learned of these activities she arranged counseling for both her daughter and husband with Dr. W, a licensed clinical psychologist. Dr. W reported his conversation with the child to the authorities. Dr. W then met with defendant, who discussed his sexual relations with Sarah. Deputy B of the sheriff's office then phoned Dr. W to ask about his conversation with defendant and read P.C. 11171(b) to him. Dr. W then recounted the conversation, which was tape-recorded and summarized in a written report. At the trial, Dr. W testified to the conversation over objection. *Held*, admission of the testimony was reversible error.

(a) The psychotherapist-patient privilege is an aspect of the patient's constitutional right to privacy. But the right is not absolute, and a compelling state interest may justify an exception to the privilege. (34 C.3d 511, citing *In re Lifschutz* (1970) 2 C.3d 415, 85 C.R. 829, 467 P.2d 557, *supra*, §224.) The Child Abuse and Neglect Reporting Act creates such an exception: the Act imposes on psychotherapists an affirmative duty to report, explicitly providing an exception to the privilege. And no constitutional challenge to the exception was made here. (34 C.3d 512.)

(b) An exception must, however, be narrowly construed (*In re Lifschutz, supra*); and the exception was erroneously applied in this case. Dr. W had already reported the communications from Sarah (under the exception of *Ev.C. 1027*--patient under 16 and victim of crime), and was under no statutory obligation to make a second report concerning the same activity. Had he learned from defendant of additional incidents of child abuse he would have been required to report these new suspicions, or if he had first learned of the abuse from defendant himself he would have been bound to report that information. But there was no obligation to reiterate his suspicion following his consultation with defendant. He did so only when deputy B misled him into believing that the law required him to do so. (34 C.3d 514.)

(c) The value of psychiatry is based on a confidential relationship, and the doctor can be of assistance only if the patient may freely relate his or her thoughts and actions, fears and fantasies, and strengths and weaknesses. "If the psychiatrist is compelled to go beyond an initial report to authorities regarding a suspected child abuse and must thereafter repeat details given to him by the adult patient in subsequent sessions, candor and integrity would require the doctor to advise the patient at the outset that he will violate his confidence and will inform law enforcement of their

discussions. Under such circumstances it is impossible to conceive of any meaningful therapy. Ironically, in this case medical help was initially what this distraught family sought as a result of these tragic events." (34 C.3d 514.) (See 16 Pacific L. J. 335.)

In *People v. Battaglia* (1984) 156 C.A.3d 1058, 1063, 203 C.R. 370, the court, relying on *Stritzinger*, rejected constitutional challenges to the admission of testimony of the child victim, after a report by a licensed clinical social worker to the police, pursuant to P.C. 11166.

Many other cases have discussed the exception. (See *People v. John B.* (1987) 192 C.A.3d 1073, 1078, 237 C.R. 659 [P.C. 11171(b) suspends psychotherapist-client privilege only as to information actually *reported*; unreported but reportable information is privileged]; *In re Troy D.* (1989) 215 C.A.3d 889, 901, 902, 263 C.R. 869 [child born under influence of illegal drugs; P.C. 11166 applied, notwithstanding that mother's acts took place prior to child's birth]; *Roe v. Superior Court* (1991) 229 C.A.3d 832, 844, 280 C.R. 380, 5 Summary (9th), Torts, Supp., §284A [P.C. 11171(b) applied to permit libel plaintiff to depose defendant's psychotherapist regarding allegedly false information in child abuse report filed by psychotherapist]; and see 44 A.L.R.4th 649 [limitation of physician-patient privilege in proceedings relating to child abuse or neglect].)

**SUPPLEMENT:** [This section is current through the latest supplement]  
P.C. 11171(b) was renumbered P.C. 11171.2(b) in 2002 without substantive change.

*Child Abuse and Neglect Reporting Act:*

*Cross-Reference:* 5 Summary (10th), Torts, §140 et seq. *Roe v. Superior Court:*

*Cross-Reference:* The *Roe* case, formerly discussed in *Torts*, was not carried over to the 10th edition of *Summary*.



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## 7. Criminal Defendant's Confrontation Rights.

2 Witkin Cal. Evid. Witnesses § 235

[§ 235] Criminal Defendant's Confrontation Rights.

In *Farrell L. v. Superior Court* (1988) 203 C.A.3d 521, 250 C.R. 25, supra, §218, communications made by the prosecutrix in a group therapy session were held privileged under *Ev.C. 1012*. The court also rejected defendant's contention that the privilege must give way to his right of confrontation. (a) The identification of persons in the group would only have been relevant in a subsequent attempt to impeach the testimony of the prosecutrix at the trial; hence, prevention of the cross-examination would only affect the weight of the direct evidence, and would not deny the defendant a fair hearing. (b) Defense counsel failed to establish good cause for seeking the privileged information: he gave no indication that he intended to pursue the questioning or to call the identified persons as witnesses. (203 C.A.3d 528.)

In *People v. Hammon* (1997) 15 C.4th 1117, 65 C.R.2d 1, 938 P.2d 986, defendant, who was charged with lewd and lascivious acts on a minor under age 14, served pretrial subpoenas duces tecum on several psychotherapists who had treated the complaining witness. The prosecution moved to quash the subpoenas on the basis of the psychotherapist-patient privilege. Opposing the motion to quash, defense counsel argued that the witness' psychological records were needed to test her credibility, and that they would provide evidence as to whether the alleged molestations actually occurred. The trial judge acknowledged that, on a showing of good cause, *People v. Reber* (1986) 177 C.A.3d 523, 223 C.R. 139, would require the judge to review the records in camera. He declined to conduct such a review, however, and granted the motion to quash, explaining that defense counsel had failed to identify any particular information that would be of benefit to defendant. The Court of Appeal affirmed, agreeing that there had been no showing of good cause. *Held*, affirmed, but for reasons other than those given by the trial judge and the Court of Appeal.

(a) *People v. Reber* and cases following it held that the right of confrontation guaranteed by the Sixth Amendment of the United States Constitution required the pretrial disclosure of privileged information if the defendant's need for it outweighed the patient's interest in confidentiality. These cases relied on *Davis v. Alaska* (1974) 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347, but that case addressed trial rights. In the later case of *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40, 3 Cal. Evidence (4th), Presentation at Trial, §6, seven members of the United States Supreme Court spoke to, but were unable to reach a consensus on, the issue of whether the *Davis* principle extended to pretrial discovery. *Reber* and its progeny incorrectly decided that it did. (15 C.4th 1123, 1124, disapproving *People v. Reber*; *People v. Dancer* (1996) 45 C.A.4th 1677, 53 C.R.2d 282; *People v. Boyette* (1988) 201 C.A.3d 1527, 247 C.R. 795; *People v. Pack* (1988) 201 C.A.3d 679, 248 C.R. 240; and *People v. Caplan* (1987) 193 C.A.3d 543, 238 C.R. 478.)

(b) "We do not ... see an adequate justification for taking such a long step in a direction the United States Supreme Court has not gone. Indeed, a persuasive reason exists not to do so. When a defendant proposes to impeach a critical prosecution witness with questions that call for privileged information, the trial court may be called upon, as in *Davis*, *supra*, to balance the defendant's need for cross-examination and the state policies the privilege is intended to serve. ... Before trial, the court typically will not have sufficient information to conduct this inquiry; hence, if pretrial disclosure is permitted, a serious risk arises that privileged material will be disclosed unnecessarily." (15 C.4th 1127.)

(c) The present case illustrates this point. Defendant's request for the witness' psychological records indicated that they would help determine whether any molestations occurred. Yet at trial, he conceded that he had had sex with her, and the main question for the jury became whether this had occurred before or after her 14th birthday. (15 C.4th 1121, 1127.)

(d) The defense's right to issue subpoenas duces tecum to private persons remains unquestioned. It is implicit in P.C. 1326, 1327 (see *supra*, §24), and has been recognized by the courts for at least two decades. (15 C.4th 1128, citing *Millaud v. Superior Court* (1986) 182 C.A.3d 471, 227 C.R. 222, and *Pacific Lighting Leasing Co. v. Superior Court* (1976) 60 C.A.3d 552, 131 C.R. 559, 5 Cal. Crim. Law (3d), *Criminal Trial*, §69.) "However, this more general right provides no basis for overriding a statutory and constitutional privilege." (15 C.4th 1128.)

Two justices, concurring separately, would have upheld the *Reber* rule, but agreed with the trial judge that a good cause showing for in camera review had not been made. (15 C.4th 1128, 1131.) (See *Nielsen v. Superior Court* (1997) 55 C.A.4th 1150, 1156, 64 C.R.2d 566 [murder defendant's confrontation right did not require codefendant to turn over his psychiatric records to him; any possibility that codefendant would testify was speculative, and codefendant could not be required to indicate his decision as to whether he would testify in order to litigate his motion to quash].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Gurule* (2002) 28 C.4th 557, 593, 123 C.R.2d 345, 51 P.3d 224 [in capital murder prosecution, trial judge did not deny defendant his confrontation rights by refusing to grant him full pretrial access to psychiatric records of his accomplice, who was prosecution's primary witness; in giving defendant access to some records, while withholding others on basis of attorney-client privilege, judge gave defendant more than required by *People v. Hammon* (1997) 15 C.4th 1117, 65 C.R.2d 1, 938 P.2d 986, text, p. 504].



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#### 8. Coroner's Inquiry Into Decedent's Death.

2 Witkin Cal. Evid. Witnesses § 236

[§ 236] Coroner's Inquiry Into Decedent's Death.

*Govt.C. 27491.8* specifies a procedure by which a coroner may enforce a subpoena or subpoena duces tecum for records of confidential communications of a decedent subject to the physician-patient privilege (see *supra*, §196 et seq.) or the psychotherapist-patient privilege, where sought (1) for the purpose of inquiry into, and determination of, the circumstances, manner, and cause of violent, sudden, unusual, or other suspicious deaths (*Govt.C. 27491*; see 4 *Cal. Crim. Law (3d)*, *Introduction to Criminal Procedure*, §43); or (2) for the sole purpose of being introduced as evidence at a coroner's inquest.

(1) *Notice To Deliver Records*. The coroner must provide notice to the decedent's personal representative personally or at his or her last known address not less than 15 days prior to the date the records are to be delivered to the presiding judge of the superior court. The notice must inform the personal representative of the right to make a written objection to disclosure on or before the date for delivery. (*Govt.C. 27491.8(a)*.)

(2) *Delivery by Custodian*. The custodian must deliver the records to the presiding judge in a confidential manner, and the judge must examine them in camera. If there is good cause, the judge must direct the custodian to disclose to the coroner those portions of the records that the judge determines are relevant to the coroner's inquiry or inquest. (*Govt.C. 27491.8(a)*.)

(3) *Confidentiality*. A communication made available to the coroner is confidential except as it is introduced into evidence at a coroner's inquest, and may not be distributed or made available to any other person, agency, firm, or corporation. (*Govt.C. 27491.8(b)*.) Moreover, this communication is not admissible as former testimony (see *Ev.C. 1290* et seq., 1 *Cal. Evidence (4th)*, *Hearsay*, §255 et seq.). (*Govt.C. 27491.8(c)*.) After the investigation or inquest has ended, the court must order the records sealed as necessary to protect the confidentiality of the decedent's medical or mental health information. (*Govt.C. 27491.8(d)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Notice To Deliver Records*. *Govt.C. 27491.8(a)* was amended in 2000 to change the time for providing notice from 15 to 7 days. Under the amended statute, if no personal representative has been appointed by the court, the notice must be given to the person who has the right to control disposition of the decedent's remains, "to the extent known."

(3) *Confidentiality*. *Govt.C. 27491.8(b)* was amended in 2000. Under the amended statute, a communication made available to the coroner is confidential and may not be distributed or made available to any other person, agency, firm, or corporation, except: (a) when introduced into evidence at a coroner's inquest proceeding; (b) when included in a

coroner's official report for the purpose of establishing the cause, manner, and circumstances of death; and (c) when otherwise required by law.

*Govt.C. 27491.8(c)* was amended in 2000 to provide that the communication may not be admitted as former testimony, "unless otherwise admissible by law."

*Govt.C. 27491.8(d)* was amended in 2000 to provide that after the investigation or inquest has terminated, the court must order the records produced to the coroner containing the confidential communication to be sealed or destroyed if necessary to protect the confidentiality of the decedent's medical or mental health information.



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## VII. PSYCHOTHERAPIST-PATIENT PRIVILEGE

## G. Overlapping of Privileges.

2 Witkin Cal. Evid. Witnesses § 237

## [§ 237] Overlapping of Privileges.

The psychotherapist-patient privilege and the attorney-client privilege occasionally overlap. When they do, waiver of the medical privilege may nevertheless leave the examined individual protected by his or her privilege as a client who disclosed confidential information to his or her attorney's agent (see *supra*, §122). (See *People v. Saidi-Tabatabai* (1970) 7 C.A.3d 981, 987, footnote 4, 86 C.R. 866; *People v. Goldbach* (1972) 27 C.A.3d 563, 568, 103 C.R. 800; *Finley v. Superior Court* (1972) 29 C.A.3d 342, 347, 104 C.R. 699; *People v. Lines* (1975) 13 C.3d 500, 507, 119 C.R. 225, 531 P.2d 793.)

The *Lines* case, *supra*, dealt with a defendant who, after pleading not guilty to a murder charge, requested appointment of psychiatrists under *Ev.C. 730* (see 1 *Cal. Evidence* (4th), *Opinion Evidence*, §79 et seq.) and *Ev.C. 1017* (*supra*, §232), to provide defendant with information on whether to enter an insanity plea or present a defense based on an emotional or mental condition. The trial judge appointed Dr. T and Dr. M. Several months later, defendant entered an additional plea of not guilty by reason of insanity. Pursuant to *Ev.C. 730* and P.C. 1026 et seq. (see 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §669 et seq.), the court appointed Dr. B and *reappointed* Dr. T and Dr. M. (Under P.C. 1027, any psychiatrist so appointed to investigate a defendant's sanity may be called as a witness by either party or the court itself.) Soon after the case was called for trial, the court doubted that defendant understood the nature of the proceedings or could cooperate rationally with defense counsel and, accordingly, suspended criminal proceedings. Dr. C was appointed and Dr. M was *reappointed* to examine defendant. By stipulation, the court read the reports of Dr. M, Dr. T and Dr. C, found defendant insane under P.C. 1368, suspended criminal proceedings and committed defendant to a state hospital. Later that year, trial resumed. On his arraignment, defendant again entered pleas of not guilty and not guilty by reason of insanity. Pursuant to *Ev.C. 730* and 1017, Dr. W and Dr. A were appointed to examine defendant and prepare confidential reports. (A total of six psychiatrists had thus been chosen to examine defendant for various purposes.) At the sanity phase of the trial, after defendant was found guilty of second degree murder during the guilt phase, defendant called only one witness, Dr. C (who had been appointed to help determine his capacity to stand trial). The prosecution called four psychiatrists--Dr. A, Dr. M, Dr. W and Dr. T. Defendant objected to the entire testimony of Dr. A on the ground that he would reveal confidential communications protected by the attorney-client privilege, and objected to that part of Dr. M's testimony based on confidential examinations but not that based on the examination to determine defendant's capacity to stand trial. The trial judge admitted the testimony of Dr. A and Dr. M. *Held*, this was error; the disputed testimony violated the attorney-client privilege.

(a) The attorney-client privilege of confidentiality persists despite disclosure of the communications to third persons (including physicians) to whom disclosure is reasonably necessary to accomplish the purpose for which the lawyer was consulted. (13 C.3d 510; see *supra*, §122.) Here, Dr. A and Dr. M were appointed to examine defendant for



his own benefit and to fully inform defense counsel about the nature and extent of defendant's mental condition. Through the doctor as an intermediate agent, defendant communicated information about his mental condition to his attorney. "[A]ll information obtained by the doctors from their examination of defendant and the reports thereof furnished to his attorney constituted confidential communications protected from disclosure by the attorney-client privilege. The fact that the psychiatrists were appointed by the court rather than privately employed by counsel in no way affects the confidentiality of these communications since they were appointed to prepare a confidential report for defendant." (13 C.3d 510.)

(b) Did the privilege end once defendant tendered the issue of his mental condition by pleading not guilty by reason of insanity? Under *Ev.C. 996* and *1018*, the privilege is waived if the patient tenders an issue to which the communication is relevant. *But there is no statutory client-litigant exception to the attorney-client privilege.* "[W]hen communications by a client to his attorney regarding his physical or mental condition require the assistance of a physician to interpret the client's condition to the attorney, the information obtained by the physician as a result remains protected from disclosure even if the client places his physical or mental condition in issue." (13 C.3d 511.)

(c) Generally speaking, there is no psychotherapist-patient privilege when the therapist is appointed by court order, except when the appointment is made at the defendant's request to provide counsel with information to help in the plea and trial process. This exception is no longer applicable when the patient places his or her mental or emotional condition in issue, as by pleading not guilty by reason of insanity. However, the attorney-client privilege remains, for it has no client-litigant exception. (13 C.3d 512.) Thus, "the results of such examination, including any report thereof, and all information and communications relating thereto, are protected from disclosure by the attorney-client privilege notwithstanding the fact that the defendant has theretofore or thereafter tendered in said proceeding the issue of his mental or emotional condition." (13 C.3d 514, disapproving contrary view of *People v. Aikin* (1971) 19 C.A.3d 685, 696, 97 C.R. 251.)

(d) By contrast, when a defendant pleads not guilty by reason of insanity, P.C. 1027 requires appointment of two psychiatrists to examine defendant. "The information gained from these examinations and communicated to the court, either by written medical report or in court testimony of the psychiatrist called as a witness by either party or by the court itself is clearly not protected by the attorney-client privilege. The psychiatrists so appointed are not appointed as agents of the attorney, but of the court; the communications are not made in confidence and are not made to the attorney." (13 C.3d 515.)

(e) Even when an examination under P.C. 1027 follows an examination under *Ev.C. 1017*, the results of the first examination still retain the attorney-client privilege. However: "[W]e can conceive of situations where such information cannot be so precisely compartmentalized and where it may be an impossible task for the psychiatrist to report or testify as to unprivileged information without drawing upon and utilizing that which is privileged. ... [I]n view of the risk of disclosure of privileged information, we seriously question the wisdom of 'reappointing' without appropriate waiver by the defendant a psychiatrist, whose earlier examination is protected by privilege, to make a subsequent examination under circumstances which carry no protection of privilege, and accordingly we disapprove of such practice." (13 C.3d 515; adding that here, no prejudice resulted because the erroneously admitted testimony was essentially the same as that of psychiatrists who testified without defense objection.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER IX - Witnesses

### VIII. CLERGY-PENITENT PRIVILEGE

#### A. Nature of Privilege.

2 *Witkin Cal. Evid. Witnesses* § 238

[§ 238] Nature of Privilege.

The privilege of "confessor and confessant," or "priest and penitent," was not recognized at common law, but is established by statute in a majority of jurisdictions, and is stated in Model C., Rule 219 and Unif. Rules, Rule 505. (See also 8 Wigmore (McNaughton Rev.) §2394 et seq.; C.J.E.R., Judges Benchbook, Civil Proceedings: Discovery §4.81 et seq.; C.E.B., Jefferson, 2 California Evidence Benchbook 3d, §39.1 et seq.; 98 *Harv. L. Rev.* 1555 [history and developments]; 30 *Loyola L.A. L. Rev.* 177 [issues facing clergy, including scope of privilege]; 23 *Santa Clara L. Rev.* 95 [The History and Current Status of the Clergy-Penitent Privilege]; 9 *U.C. Davis L. Rev.* 523 [Catholic sisters, irregularly ordained women and clergy-penitent privilege]; 81 *Am.Jur.2d* (1992 ed.), *Witnesses* §513 et seq.; 49 A.L.R.3d 1205 [who is entitled to clergyman's privilege?]; 71 A.L.R.3d 794 [extent of privilege].)

Former C.C.P. 1881(3) limited the privileged matter to a "confession" made in the course of discipline enjoined by the church. The Evidence Code extends its coverage to other communications and to a wider group of church denominations:

(1) *Penitential communication*. A "penitential communication" is one "made in confidence, in the presence of no third person so far as the penitent is aware, to a clergyman who, in the course of the discipline or practice of his church, denomination, or organization, is authorized or accustomed to hear such communications and, under the discipline or tenets of his church, denomination, or organization, has a duty to keep such communications secret." (*Ev.C. 1032*.)

(2) *Clergyman*. A "clergyman" is a "priest, minister, religious practitioner, or similar functionary of a church or of a religious denomination or religious organization." (*Ev.C. 1030*.)

(3) *Penitent*. A "penitent" is a "person who has made a penitential communication to a clergyman." (*Ev.C. 1031*.)

Both the old and the current statute, however, embody the same requirement of *communication*. (See *Estate of Toomes* (1880) 54 C. 509, 516 [priest's testimony as to mental condition of testatrix, based on his observation prior to determining whether to administer sacraments, held admissible].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 39 *Loyola L.A. L. Rev.* 1339 [arguing for abandonment of clergy-penitent privilege]; 81 *Am.Jur.2d* (2004 ed.), *Witnesses* §§493, 494; 93 A.L.R.5th 327 [subject matter and waiver of privilege], superseding 71 A.L.R.3d 794, text, p. 509; 101 A.L.R.5th 619 [who is entitled to privilege], superseding 49 A.L.R.3d 1205, text, p. 509.

(1) *Penitential communication*. *Ev.C. 1032* was amended in 2002 to substitute "member of the clergy" for

"clergyman," to substitute "those" for "such," and to make the statute gender-neutral.

There is no requirement that a communication have as its purpose the confession of a flawed act to receive religious consolation and guidance in return in order to be privileged. As long as the discipline or practice of a church authorizes a member of the clergy to hear particular communications and imposes a duty of secrecy on the clergy member for those communications, a communication is privileged from disclosure even though it is not a confession. (*Doe 2 v. Superior Court* (2005) 132 C.A.4th 1504, 1518, 1519, 34 C.R.3d 458.)

(2) *Clergyman*. *Ev.C. 1030* was amended in 2002 to substitute "member of the clergy" for "clergyman".

(3) *Penitent*. *Ev.C. 1031* was amended in 2002 to substitute "member of the clergy" for "clergyman". *West's Key Number Digest*, Witnesses k.215



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## CHAPTER IX - Witnesses

### VIII. CLERGY-PENITENT PRIVILEGE

#### B. Privileges of Penitent and Clergyman.

2 Witkin Cal. Evid. Witnesses § 239

[§ 239] Privileges of Penitent and Clergyman.

(1) *Penitent's Privilege*. Subject to the waiver rule (*Ev.C. 912*, supra, §67), "a penitent, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a penitential communication if he claims the privilege." (*Ev.C. 1033*.) This language gives the usual protection against eavesdroppers (see supra, §66).

(2) *Clergyman's Privilege*. Subject to the waiver rule (*Ev.C. 912*, supra, §67), "a clergyman, whether or not a party, has a privilege to refuse to disclose a penitential communication if he claims the privilege." (*Ev.C. 1034*.) Two aspects of this provision are discussed in the Law Revision Commission Comment to the statute:

(a) The clergyman has a separate privilege, which the clergyman may claim even if the penitent waives his or her own. The principal reason is that the law will not compel a clergyman to violate church tenets that require him or her to maintain the secrecy of confidential statements. (See 1 McCormick 5th, §76.2; 8 Wigmore (McNaughton Rev.) §2396.)

(b) Unlike the lawyer or physician, the clergyman is under no duty to claim the privilege on behalf of the penitent. If the penitent is dead, incompetent, absent, or fails to claim his or her privilege, the clergyman might, for good reasons, elect to testify. "The extent to which a clergyman should keep secret or reveal penitential communications is not an appropriate subject for legislation; the matter is better left to the discretion of the individual clergyman involved and the discipline of the religious body of which he is a member."

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Penitent's Privilege*. *Ev.C. 1033* was amended in 2002 to make the statute gender-neutral.

(2) *Clergyman's Privilege*. *Ev.C. 1034* was amended in 2002 to substitute "member of the clergy" for "clergyman" and otherwise make the statute gender-neutral.

(a) *Clergyman's separate privilege*: See 1 McCormick 6th, §76.2.



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## CHAPTER IX - Witnesses

### VIII. CLERGY-PENITENT PRIVILEGE

#### C. Communications Not Privileged.

2 Witkin Cal. Evid. Witnesses § 240

[§ 240] Communications Not Privileged.

*People v. Johnson* (1969) 270 C.A.2d 204, 75 C.R. 605, makes it clear that not every communication to a minister is privileged. Defendant, fleeing from a robbery, entered the church office of P, a minister. Defendant said he was in trouble, and made statements concerning the event. P advised calling the police, they went out together, and P related to the officers the story told by defendant. *Held*, Ev.C. 1032 did not apply.

(a) Defendant was a stranger to P, P had no ministerial vestments on, and both sought the police; thus there was no suggestion of confidentiality. (270 C.A.2d 207.)

(b) No showing was made that P had authority to hear communications or a duty to keep them secret under the discipline or practice of his church. (270 C.A.2d 207.)

In *People v. Thompson* (1982) 133 C.A.3d 419, 184 C.R. 72, defendant confessed a murder to Ward, a member of the Church of Scientology (see 133 C.A.3d 424, footnote 1), who had received some training as an "ethics officer." But he was not ordained as an "auditor" or minister of the church, and was employed solely as a business consultant by defendant's employer, to improve sales. *Held*, Ward did not function as a clergyman when he received the confession. (133 C.A.3d 426, 427.)

In *People v. Edwards* (1988) 203 C.A.3d 1358, 248 C.R. 53, defendant, treasurer of an Episcopal church guild, embezzled its funds over a long period. She sought an urgent meeting with Father R, rector of the church, asking for help in stopping payment on checks she had drawn, to enable her to make restitution. In accordance with his suggestion, she consulted two wardens of the church and disclosed her criminal activities. At her trial for grand theft, the trial judge determined that the privilege did not apply to her confidential statements to Father R. *Held*, the ruling was correct.

(a) Father R testified that he believed defendant's statements to him were in the nature of a secular request seeking counseling and not absolution; and that when he offered to assist her by divulging the substance of their confidential discussion to the wardens, she agreed. (203 C.A.3d 1363.) "He emphasized that the conversation did not even 'remotely resemble' a religious confession; rather, that the mutual encounter involved a 'problem solving' entreaty under a promise of confidence from which defendant ultimately released him." (203 C.A.3d 1364.)

(b) The trial judge, after considering the conflicting evidence, reached a factual determination that the questioned statement "was not a penitential communication within legal contemplation," and therefore no privilege attached. This determination was supported by substantial evidence. (203 C.A.3d 1365.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Roman Catholic Archbishop of Los Angeles v. Superior Court* (2005) 131 C.A.4th 417, 444, 32 C.R.3d 209 [where grand jury subpoenaed communications between two priests and archbishop or his vicar stemming from archbishop's intervention with priests concerning sexual issues, trial judge did not err in ruling that communications were not protected from disclosure by clergy-penitent privilege in that participants in interventions understood that communications were likely to be shared with others].



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## CHAPTER IX - Witnesses

### IX. SEXUAL ASSAULT VICTIM-COUNSELOR PRIVILEGE

#### A. Nature of Privilege.

2 Witkin Cal. Evid. Witnesses § 241

[§ 241] Nature of Privilege.

(1) *In General.* *Ev.C. 1035* et seq. create a privilege for confidential communications between sexual assault victims and trained counselors in rape crisis centers (see *Health & Saf.C. 1598.1*; *P.C. 13837*). (See generally *12 Pacific L. J. 341*; *15 Pacific L. J. 584*; *68 So. Cal. L. Rev. 1335* [admission of rape crisis counselor records in acquaintance rape trials]; *43 A.L.R.4th 395* [constitutionality of statute making communications between sex crime victim and counselor confidential]; *C.J.E.R., Judges Benchbook, Civil Proceedings: Discovery §4.70* et seq.)

A "sexual assault victim" is one who consults the counselor "for the purpose of securing advice or assistance concerning a mental, physical, or emotional condition caused by a sexual assault." (*Ev.C. 1035*.) (For definition of "sexual assault victim counselor," see *Ev.C. 1035.2*; for definition of "sexual assault," see *Ev.C. 1036.2*.)

(2) *Confidential Communication.* This includes "all information regarding the facts and circumstances involving the alleged sexual assault and also includes all information regarding the victim's prior or subsequent sexual conduct, and opinions regarding the victim's sexual conduct or reputation in sexual matters." (*Ev.C. 1035.4*.)

(3) *Claim and Waiver of Privilege.* The privilege protects disclosures reasonably necessary to the purpose of the communication (*Ev.C. 1035.4*), and may be invoked to prevent unauthorized disclosure by others (*Ev.C. 1035.8*). It may be claimed by the "holder," i.e., the victim or the victim's guardian, conservator, or personal representative (*Ev.C. 1035.6*); and it must be claimed by the counselor unless otherwise instructed by an authorized person or no holder exists (*Ev.C. 1035.8(c), 1036*). (See *People v. Gilbert (1992) 5 C.A.4th 1372, 1390, 7 C.R.2d 660* [trial judge erred in ruling that privilege was applicable, but error was harmless].)

The privilege may be waived. (*Ev.C. 912*; see *supra*, §67.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General.* *Ev.C. 1035.2* was amended in 2006 to change "sexual assault victim counselor" to "sexual assault counselor."



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CHAPTER IX - Witnesses

IX. SEXUAL ASSAULT VICTIM-COUNSELOR PRIVILEGE  
B. Procedure for Disclosure.

2 Witkin Cal. Evid. Witnesses § 242

[§ 242] Procedure for Disclosure.

(1) *Balancing Procedure.* The trial judge may compel disclosure of information received by the counselor that constitutes relevant evidence involving the sexual assault that is the subject of a criminal proceeding, on determining that the probative value outweighs the effect of disclosure on the victim. The same balancing procedure may be applied to compel disclosure in proceedings related to child abuse. (*Ev.C. 1035.4*.)

(2) *Disclosure Procedure.* On determining that information is to be disclosed, the court must so order and inform the defendant. (*Ev.C. 1035.4*.)

On finding that there is a reasonable likelihood that information is subject to disclosure under the balancing test, the trial judge must (a) inform the defendant of the nature of the information; (b) order a hearing outside the presence of the jury at which the counselor may be questioned regarding the information; and (c) rule on which items of information, if any, must be disclosed. (*Ev.C. 1035.4*.) Also, the court may issue an order specifying the evidence which the defendant may introduce and the nature of questions to be permitted. (*Ev.C. 1035.4*.)

The defendant may offer evidence pursuant to the court's order, but admission of evidence concerning the sexual conduct of the complaining witness is subject to *Ev.C. 352, 782, and 1103* (see 1 *Cal. Evidence (4th), Circumstantial Evidence*, §§17, 61 et seq.). (*Ev.C. 1035.4*.)

**SUPPLEMENT:** [This section is current through the latest supplement]





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CHAPTER IX - Witnesses

X. DOMESTIC VIOLENCE VICTIM-COUNSELOR PRIVILEGE

A. Nature of Privilege.

2 Witkin Cal. Evid. Witnesses § 243

[§ 243] Nature of Privilege.

(1) *In General.* *Ev.C. 1037* et seq. create a privilege for confidential communications between victims of domestic violence and trained counselors employed by domestic violence centers (see *Welf.C. 18290* et seq., *11 Summary* (9th), *Husband and Wife*, §28). (See generally C.J.E.R., Judges Benchbook, Civil Proceedings: Discovery §4.75 et seq.)

A victim is a person who suffers "domestic violence," as that term is defined in *Family C. 6211* (see *11 Summary* (9th), *Husband and Wife*, Supp., §36A). (*Ev.C. 1037*, *1037.7*.) (For definition of "domestic violence counselor," see *Ev.C. 1037.1*.)

(2) *Confidential Communication.* This includes information transmitted in confidence between the victim and counselor in the course of their relationship "regarding the facts and circumstances involving all incidences of domestic violence, as well as all information about the children of the victim or abuser and the relationship of the victim with the abuser." (*Ev.C. 1037.2*.)

(3) *Claim and Waiver of Privilege.* The privilege protects disclosures reasonably necessary to the purpose of the communication (*Ev.C. 1037.2*), and may be invoked to prevent unauthorized disclosures by others (*Ev.C. 1037.5*). It may be claimed by the "holder," i.e., the victim or the victim's guardian or conservator (*Ev.C. 1037.4*), and it must be claimed by the counselor unless otherwise instructed by an authorized person or no holder exists (*Ev.C. 1037.5(c)*, *1037.6*).

(4) *Obligation To Report Child Abuse.* *Ev.C. 1037* et seq. do not limit the obligation to report child abuse as required by P.C. 11166 (see supra, §234). (*Ev.C. 1037.3*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General.* Govt.C. 1037.8, added in 2002, requires a domestic violence counselor to inform a domestic violence victim of any applicable limitations on the confidentiality of their communications. The information may be given orally.

*Welf.C. 18290* et seq. were repealed in 2006 and replaced by new *Welf.C. 18290* et seq., The Domestic Violence Shelter-Based Programs Act. (See *11 Summary* (10th), *Husband and Wife*, Supp., §371.)

*Cross-Reference:* *11 Summary* (10th), *Husband and Wife*, §371.

*Definition of domestic violence:*

*Cross-Reference:* 11 *Summary* (10th), *Husband and Wife*, §374.

(3) *Claim and Waiver of Privilege.* The domestic violence-counselor privilege is subject to the same waiver rules as the other major privileges. (See *Ev.C. 912*, as amended in 2002, Supp., supra, §67.)

*Ev.C. 1037.4* was amended in 2007 to specify that "holder of the privilege" does not include the victim's guardian or conservator if the guardian or conservator is accused of perpetrating domestic violence against the victim.



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X. DOMESTIC VIOLENCE VICTIM-COUNSELOR PRIVILEGE  
B. Procedure for Disclosure.

2 Witkin Cal. Evid. Witnesses § 244

[§ 244] Procedure for Disclosure.

(1) *Balancing Procedure.* The court may compel disclosure of information received by the counselor that constitutes relevant evidence involving alleged domestic violence that is the subject of a criminal proceeding, on determining that the probative value outweighs the effect of disclosure on the victim, the counseling relationship, and the counseling services. The same balancing procedure may be applied to compel disclosure in proceedings related to child abuse. In addition, disclosure may be compelled where the victim is either dead or not the complaining witness in a criminal action against the perpetrator. (*Ev.C. 1037.2.*)

(2) *Disclosure Procedure.* On determining that information is to be disclosed, the court must so order and inform the defendant. (*Ev.C. 1037.2.*)

On finding that there is a reasonable likelihood that information is subject to disclosure under the balancing test, the procedure specified in *Ev.C. 1035.4* (see *supra*, §242) must be followed. (*Ev.C. 1037.2.*)

**SUPPLEMENT:** [This section is current through the latest supplement]



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CHAPTER IX - Witnesses

XI. PRIVILEGE FOR OFFICIAL INFORMATION

A. Nature and Purpose of Privilege.

1. State Secrets.

2 *Witkin Cal. Evid. Witnesses* § 245

[§ 245] State Secrets.

A common law privilege, well recognized despite the meager case law, protects military, diplomatic, or other state secrets from compulsory disclosure in court. (See *United States v. Reynolds* (1953) 345 U.S. 1, 73 S.Ct. 528, 531, 97 L.Ed. 727, 732, *infra*, §249; *Environmental Protection Agency v. Mink* (1973) 410 U.S. 73, 93 S.Ct. 827, 833, 35 L.Ed.2d 119, 128 [refusal to justify disclosure, under Freedom of Information Act, of recommendations and reports made to President on advisability of conducting nuclear test]; Unif. Rules, Rule 508; 1 McCormick 5th, §107; 8 Wigmore (McNaughton Rev.) §2378; 61 *Harv. L. Rev.* 468; 65 *Harv. L. Rev.* 1445 [on Court of Appeals decision in *Reynolds*]; 70 *Harv. L. Rev.* 935; 83 *Harv. L. Rev.* 928 [applicability of Freedom of Information Act to "top secret" files]; 85 *Harv. L. Rev.* 1189 [national security secrets]; 103 *Harv. L. Rev.* 906 [national security information, the Freedom of Information Act and the courts]; 18 *Hastings Const. L. Q.* 745 [Secret Justice and the Adversary System]; 4 *Pepperdine L. Rev.* 81 [discovery of national defense and foreign policy information prior to and under 1974 amendment to Freedom of Information Act]; 12 *U.C.L.A. L. Rev.* 1044, 1288; 81 *Am.Jur.2d* (1992 ed.), *Witnesses* §524 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 81 *Am.Jur.2d* (2004 ed.), *Witnesses* §505 et seq.; 1 McCormick 6th, 107; 23 A.L.R.6th 521 [invocation and effect of privilege]. *West's Key Number Digest*, *Witnesses* k.216 et seq.



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## CHAPTER IX - Witnesses

### XI. PRIVILEGE FOR OFFICIAL INFORMATION

#### A. Nature and Purpose of Privilege.

##### 2. Official Information.

2 Witkin Cal. Evid. Witnesses § 246

[§ 246] Official Information.

(1) *In General.* Both federal and state statutes create additional privileges to withhold official information when its disclosure would be harmful to the public interest. Some statutes are general in form (e.g., *Ev.C. 1040*), while others deal specifically with a particular kind of governmental record or report to a governmental agency (see *infra*, §255 et seq.). (See generally *People v. Superior Court (Biggs)* (1971) 19 C.A.3d 522, 526, 97 C.R. 118, citing the text; *Department of Trans. v. Superior Court* (1996) 47 C.A.4th 852, 857, 55 C.R.2d 2 [23 U.S.C., §409 preempts state law and protects from disclosure reports or data compiled or collected for purpose of identifying or alleviating roadway hazards, but scope of preemption is narrow and extends only to information collected under federal provisions specified in §409]; *RLI Ins. Co. Group v. Superior Court* (1996) 51 C.A.4th 415, 436, 437, 59 C.R.2d 111 [*Ev.C. 1040* does not, in combination with "deliberative process" privilege recognized by federal courts, provide basis for protecting mental process underlying administrative decision where decision is not undergoing direct judicial review]; 1 McCormick 5th, §112; 8 Wigmore (McNaughton Rev.) §2377; C.J.E.R., Judges Benchbook, Civil Proceedings: Discovery §4.86 et seq.; C.E.B., Jefferson, 2 California Evidence Benchbook 3d, Chap. 42; 22 Cal. L. Rev. 667; 54 Cal. L. Rev. 1650 [access to governmental information in California]; 85 Harv. L. Rev. 861 [disclosure of warnings from Department of Agriculture]; 86 Harv. L. Rev. 1047 [intra-agency memoranda]; 9 Santa Clara Lawyer 301 [interagency information sharing]; 12 U.C.L.A. L. Rev. 1288; 7 U.S.F. L. Rev. 282 [privilege as roadblock to discovery]; 36 A.L.R.2d 1318 [privilege of custodian in civil action not to disclose official police records and reports]; 54 A.L.R.3d 768 [confidentiality of records as to public welfare recipients].)

(2) *Policies Justifying Privilege.* The underlying policies supporting these privileges for minor government secrets appear to be (a) to encourage full disclosure by various private persons to regulatory governmental agencies, and (b) to safeguard necessary confidential disclosures between governmental officials. (See *Runyon v. Board of Prison Terms & Paroles* (1938) 26 C.A.2d 183, 185, 79 P.2d 101, *infra*, §264; *Markwell v. Sykes* (1959) 173 C.A.2d 642, 645, 343 P.2d 769, *infra*, §269, citing the text; *City Council v. Superior Court* (1962) 204 C.A.2d 68, 77, 21 C.R. 896; 47 Cal L. Rev. 3.)

(3) *California Statutes.* Former C.C.P. 1181(5), California's general statute governing the privilege, was superseded by *Ev.C. 1040*; the specific statutes protecting particular kinds of official information (*infra*, §255 et seq.) were untouched by the revision. (See *Ev.C. 920*.)

In *Pitchess v. Superior Court* (1974) 11 C.3d 531, 538, 113 C.R. 897, 522 P.2d 305, 5 Cal. Crim. Law (3d), *Criminal Trial*, §50, the court observed that *Ev.C. 1040* represents the exclusive means by which a public entity may assert a claim of governmental privilege based on the necessity for secrecy. (See also *Shepherd v. Superior Court*

(1976) 17 C.3d 107, 123, 130 C.R. 257, 550 P.2d 161, *infra*, §250; *Register Div. of Freedom Newspapers v. Orange* (1984) 158 C.A.3d 893, 905, 205 C.R. 92; 80 Harv. L. Rev. 912; 1964 A.S. 321.)

"Official information" is defined by California's general statute as "information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made." (*Ev.C. 1040(a)*.) Two kinds of privilege--absolute and conditional--are then stated. (*Ev.C. 1040(b)*; see *infra*, §247.) (On requirement that Employment Development Department disclose certain information to law enforcement agencies where a felony has been charged, see *Ev.C. 1040(c)*.) (On privilege for official information under California Public Records Act, see *infra*, §278 et seq.; under federal Freedom of Information Act, see *infra*, §302.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General*. See *Pierce County, Washington v. Guillen* (2003) 537 U.S. 129, 123 S.Ct. 720, 731, 154 L.Ed.2d 610, 627 [23 U.S.C., §409, protecting from discovery information collected in connection with certain federal highway safety programs, is constitutional]; 1 McCormick 6th, §112; 30 *Lincoln L. Rev.* 25 [*Guillen*]; 181 A.L.R. Fed 147 [construction, application, and validity of 23 U.S.C., §409].

(2) *Policies Justifying Privilege*. See *Fox v. Kramer* (2000) 22 C.4th 531, 542, 93 C.R.2d 497, 994 P.2d 343, Supp., *infra*, §505 [Department of Health Services investigator's report concerning incident that gave rise to medical malpractice action was privileged as official information and was not admissible in that action, where it was based on hospital peer review committee records; policy of encouraging candid evaluations of physicians by their peers outweighed necessity of disclosure in interest of justice]. *West's Key Number Digest*, Witnesses k.216 et seq.



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## CHAPTER IX - Witnesses

### XI. PRIVILEGE FOR OFFICIAL INFORMATION

#### A. Nature and Purpose of Privilege.

#### 3. Absolute and Conditional Privilege.

2 Witkin Cal. Evid. Witnesses § 247

[§ 247] Absolute and Conditional Privilege.

(1) *Absolute Privilege.* *Ev.C. 1040(b)(1)* recognizes an absolute privilege where disclosure is forbidden by "a statute of this state." (See *Richards v. Superior Court* (1968) 258 C.A.2d 635, 65 C.R. 917, *infra*, §263; *Kleitman v. Superior Court* (1999) 74 C.A.4th 324, 335, footnote 9, 87 C.R.2d 813, 9 Cal. Proc. (4th), *Administrative Proceedings*, Supp., §24A [*Ev.C. 1040(b)(1)*] "necessarily includes the Brown Act's prohibition of disclosure of closed session proceedings except as provided by the Act".)

(2) *Conditional Privilege.* *Ev.C. 1040(b)(2)* states a conditional privilege under which the judge must weigh public and private interest and consider the consequences of disclosure and nondisclosure. The privilege may be claimed if the disclosure of the information "is against the public interest because there is a *necessity for preserving the confidentiality* of the information that *outweighs the necessity for disclosure* in the interest of justice." (See *People v. Montgomery* (1988) 205 C.A.3d 1011, 1017, 252 C.R. 779, *infra*, §254, citing the text [discussing balancing test].) But the statute adds two qualifications:

(a) The privilege may not be claimed if a person authorized to do so has consented to the disclosure of the information in the proceeding.

(b) In determining whether disclosure is against the public interest, "the interest of the public entity as a party in the outcome of the proceeding may not be considered."

In *San Diego v. Superior Court (Tri-City Hospital District)* (1986) 176 C.A.3d 1009, 222 C.R. 484, Tri-City Hospital District applied to San Diego County for designation under *Health & Saf.C. 1797* et seq. as a regional trauma center. After it was rejected by the county's Proposal Review Committee in favor of Palomar/Pomerado Hospital, Tri-City petitioned for mandamus against the county and sought to discover documents connected with the review process. The county claimed statutory privilege under *Ev.C. 1040* and *1157.7* (*infra*, §517). *Held*, petitioner was entitled to all the raw data examined by members of the committee, their detailed findings on each proposal, the standard by which each factor was measured, and ratings as to each factor evaluated. However, Tri-City was not entitled to production of transcripts of the committee members' discussions during deliberations or other memoranda of those discussions.

(a) *Ev.C. 1157.7*, which by its terms applies to a committee monitoring, evaluating, and reporting on "a general acute care hospital which has been designated" as qualified to render specialty health care services, is inapplicable to the trauma center designation process; thus the absolute privilege of *Ev.C. 1040(b)(1)* does not apply. (176 C.A.3d 1023.)

(b) In determining whether the conditional privilege of *Ev.C. 1040(b)(2)* prevents disclosure, the necessity for preserving confidentiality must be weighed against the need for disclosure in the interest of justice. The fact that Tri-City submitted an application in accordance with a notice of confidentiality, although not equivalent to a contractual agreement, is relevant to the weighing process. However, the county's interest in the outcome of the lawsuit is not a factor in determining public interest under *Ev.C. 1040(b)(2)*; the public's interest is that the trial court have the ability to intelligently evaluate the legal issues. "This can be accomplished only if the raw data considered is discoverable. We are cited to no strong public interests in keeping this data confidential." (176 C.A.3d 1026.)

(c) Tri-City is not entitled to production of transcripts of the committee members' discussions during deliberations or other memoranda of those discussions. "[T]he public has a substantial interest in insuring that qualified professionals will not be discouraged from serving on trauma care proposal review committees. It is likely the better qualified the professionals composing the committee, the more accurate will be their evaluations of the competing hospitals. It is important to the public that the most qualified hospital be selected to provide this care even where the differences between the competing hospitals may be slight and subtle. Here, the six trauma care experts utilized were not County employees. Each contracted to perform these studies and evaluations with the understanding all deliberations would remain confidential. While knowledge that a professional's informal notes and recorded deliberations may become public knowledge may not deter all qualified persons from participating in the evaluation process, it unquestionably would deter some and, perhaps, most." (176 C.A.3d 1027.) (See *Azusa v. Superior Court* (1987) 191 C.A.3d 693, 696, 236 C.R. 621 [in civil rights and tort action against city and police officers, conditional privilege applied to plaintiff's request for copies of citizen complaints against defendant officers].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Conditional Privilege.* See *Marylander v. Superior Court* (2000) 81 C.A.4th 1119, 1124, 97 C.R.2d 439 [in civil action, trial judge erred in denying plaintiff's motion to compel production of memoranda from state agency to Governor's office on ground they were absolutely privileged under *Govt.C. 6254(l)* and common law deliberative process privilege; only official information privilege was applicable and it required applying balancing test of *Ev.C. 1040(b)(2)*]; *Department of Motor Vehicles v. Superior Court* (2002) 100 C.A.4th 363, 374, 377, 122 C.R.2d 504 [in prosecution for vehicular manslaughter, trial judge properly ordered Department of Motor Vehicles to disclose medical records relating to defendant; *Veh.C. 1808.5* (confidentiality of DMV records) does not forbid disclosure within meaning of *Ev.C. 1040(b)(1)*, and under weighing test of *Ev.C. 1040(b)(2)*, prosecution's and defense's need for documents outweighed DMV's interest in confidentiality]; *White v. Superior Court* (2002) 102 C.A.4th Supp. 1, 6, 7, 126 C.R.2d 207 [in prosecution for assault and battery by public officer, Inspector General was properly ordered to disclose report in separate investigation that allegedly cast doubt on honesty of officer investigating defendant's case; in camera review would allow trial judge to balance defendant's fair trial right against Inspector General's interest in maintaining confidentiality of records]; *Suarez v. Office of Administrative Hearings* (2004) 123 C.A.4th 1191, 1195, 20 C.R.3d 618 [where real estate broker was accused of fraud by Department of Real Estate, with some charges arising out of audit, administrative law judge abused his discretion in granting broker's motion to compel production of department's audit manual; confidentiality would protect department's ability to investigate and would thus advance public interest, while disclosure would not enable broker to determine validity of way in which audit was carried out].





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## CHAPTER IX - Witnesses

### XI. PRIVILEGE FOR OFFICIAL INFORMATION B. Claim and Waiver.

2 Witkin Cal. Evid. Witnesses § 248

[§ 248] Claim and Waiver.

(1) *General Principles.* "The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer. The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect." (*United States v. Reynolds* (1953) 345 U.S. 1, 73 S.Ct. 528, 532, 97 L.Ed. 727, 733, *infra*, §249.) "The privilege is for the benefit of the state ... or its agencies and the cloak of testimonial immunity is thrown only around such public officials. ... Whether there can be any waiver is often a difficult question ... ; when the right of waiver exists it cannot be exercised by a subordinate employee in the exercise of his own discretion. ... In any event the existence of a privilege in the state presents a question for the court ... , not for the head of the department, to determine ... ; on a parity with that question is the further one whether the public interest would suffer by a disclosure." (*Markwell v. Sykes* (1959) 173 C.A.2d 642, 647, 343 P.2d 769.)

(2) *Privilege of Public Entity.* A "public entity" (see broad definition, *Ev.C.* 200, 1 *Cal. Evidence* (4th), *Introduction*, §17) has a privilege "to refuse to disclose official information, and to prevent another from disclosing official information, if the privilege is claimed by a person authorized by the public entity to do so." (*Ev.C.* 1040(b).) Two aspects of this provision are emphasized in the Law Revision Commission Comment to the statute:

(a) The privilege may be claimed by the authorized representative of a public entity, and therefore may be waived by an authorized representative.

(b) The public entity may claim the privilege when its officer or employee is called to testify, and also when anyone else who has official information is about to disclose it.

(3) *Privilege of Private Person.* In some instances, where a specific statute requires a report from a person to a governmental agency and makes the communicated information privileged (see *infra*, §255 et seq.), the privilege may be claimed by either the public entity or the person reporting. But the *knowledge* of the person making the report is not privileged, and the governmental agency cannot prevent the person from testifying to it merely because of the report. (See Law Rev. Com. Comment to *Ev.C.* 1040.)

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## XI. PRIVILEGE FOR OFFICIAL INFORMATION

## C. Determination and Sanction.

## 1. Civil Case: Disclosure to Judge.

## a. General Rule: Showing of Necessity Required.

2 Witkin Cal. Evid. Witnesses § 249

[§ 249] General Rule: Showing of Necessity Required.

A practical problem confronts the courts in dealing with governmental privileges: when the claimant asserts that the information sought is privileged, how can the issue be resolved without requiring disclosure of the very information which must be kept secret? One extreme view would make the governmental officer's claim of privilege conclusive and free from judicial inquiry; another would invariably call for confidential disclosure to the judge to determine whether the matter is a state secret. (See 8 Wigmore (McNaughton Rev.) §2379.) In *United States v. Reynolds* (1953) 345 U.S. 1, 73 S.Ct. 528, 533, 97 L.Ed. 727, 734, both extremes were rejected, and the court, relying mainly on self-incrimination cases (see *infra*, §496), authoritatively declared a *compromise formula*: "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers." (See 70 Harv. L. Rev. 935; 72 Harv. L. Rev. 781 [federal court in camera trial of patent claim despite secrecy order].)

In the *Reynolds* case, an Air Force plane, on a flight testing secret electronic equipment, burned and crashed, killing three civilian observers and all but three of the crew. Suits for death of the civilians were brought under the Federal Tort Claims Act, and plaintiffs sought *inspection* (under *F.R. Civ. P., Rule 34*) of the Air Force official accident investigation report and statements taken from the surviving crew members. The Government claimed privilege but offered to produce without cost the three surviving crew members for examination on all matters except those classified, thus making their testimony available on the negligence and causation issues. Plaintiffs declined the offer; the district judge ordered delivery of the documents to him to determine whether they contained privileged matter; and, on the Government's refusal, the judge imposed the sanction of *F.R. Civ. P., Rule 37(b)(2)(i)*, taking the fact of negligence as established. Judgment for plaintiffs followed. *Held*, reversed. Applying the formula set forth above, the Court said: "In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake. *A fortiori*, where necessity is dubious, a formal claim of privilege, made under the circumstances of this case, will have to prevail. Here, necessity was greatly minimized by

an available alternative, which might have given respondents the evidence to make out their case without forcing a showdown on the claim of privilege. By their failure to pursue that alternative, respondents have posed the privilege question for decision with the formal claim of privilege set against a dubious showing of necessity." (73 S.Ct. 533, 97 L.Ed 735.)

The *Reynolds* theory is incorporated in *Ev.C. 915(b)*, calling for disclosure in chambers where this is necessary. (See *supra*, §88.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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### XI. PRIVILEGE FOR OFFICIAL INFORMATION

#### C. Determination and Sanction.

1. Civil Case: Disclosure to Judge.
  - b. Procedure.

2 *Witkin Cal. Evid. Witnesses* § 250

[§ 250] Procedure.

In *Shepherd v. Superior Court* (1976) 17 C.3d 107, 130 C.R. 257, 550 P.2d 161, a wrongful death case, plaintiff sought to compel the district attorney to disclose certain information which he had developed in the course of an investigation into the fatal shooting of plaintiff's decedent. The district attorney claimed absolute privilege under Govt.C. 6254(f), which forbids disclosure of certain law enforcement investigatory material (see *infra*, §289 et seq.). *Held*, the privilege of nondisclosure was conditional rather than absolute and must be evaluated by the trial judge.

(a) The effect of the Public Records Act (Govt.C. 6250 et seq.) is limited to that act and does not apply to procedures outside the act. (17 C.3d 123.) (See *infra*, §278 et seq.)

(b) The only applicable privilege is the conditional privilege set forth in *Ev.C. 1040(b)(2)* (*supra*, §247). This conditional privilege, like the absolute privilege, applies only to information acquired in confidence. Some of the material sought, e.g., statements by defendant police officers, was not acquired in confidence within the meaning of *Ev.C. 1040(a)* (*supra*, §246). "Manifestly, it cannot be maintained that voluntary statements of a criminal suspect to investigating authorities are 'confidential.'" (17 C.3d 124.)

(c) Even material acquired in confidence by the district attorney may be made available if disclosure is within the public interest, a determination which the trial judge must make before denying discovery. With respect to each item of material found to be discoverable within the provisions of *C.C.P. 1985* (see 2 *Cal. Evidence* (4th), *Discovery*, §218 et seq.), the trial judge must consider whether there is a need to preserve confidentiality which outweighs the need for disclosure in the interest of justice. If the judge decides that question in the affirmative, then disclosure is against the public interest and the particular item is privileged. If the judge decides otherwise, production should be ordered. The weighing procedure will thus entail a separate assessment of the *necessity for disclosure in the interest of justice* and the *necessity for preserving the confidentiality of the information*. (17 C.3d 125.)

(d) Each assessment should include a consideration of the consequences to the litigant of nondisclosure and to the public of disclosure. Considering consequences to the litigant will involve matters similar to those in issue in the determination of materiality and good cause under *C.C.P. 1985*, including *the importance of the material sought to the fair presentation of the litigant's case, the availability of the material to the litigant by other means, and the effectiveness and relative difficulty of such other means*. Considering consequences to the public will involve *the effect of disclosure on the integrity of public processes and procedures*. (17 C.3d 126.)

In summary, the following procedures should be followed: "First, the trial court should undertake to determine, without respect to possible privilege, whether and to what extent the moving papers are in compliance with the requirements of specificity, materiality, and good cause set forth in *section 1985 of the Code of Civil Procedure*. Second, with respect to each of the items sought which meet with those requirements the trial court should determine whether it comprehends 'information acquired in confidence' which may be subject to the privilege for official information set forth in *section 1040 of the Evidence Code*; items which qualify for production under the standards of section 1985 but which do not consist of 'information acquired in confidence' should be ordered to be produced. Third, with respect to items which qualify for production under the standards of section 1985 but which consist of 'information acquired in confidence' within the meaning of *section 1040 of the Evidence Code*, the trial court should proceed to determine whether they qualify for the conditional privilege of subdivision (b)(2) of that section in that their disclosure is against the public interest; all items which do not so qualify should be ordered to be produced." (17 C.3d 127.) (See also *Parnes v. Superior Court* (1978) 81 C.A.3d 831, 834, 836, 146 C.R. 818 [mandamus issued to compel trial court to engage in weighing process under *Shepherd* guidelines]; *Dominguez v. Superior Court* (1980) 101 C.A.3d 6, 11, 161 C.R. 407 [same].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Michael P. v. Superior Court* (2001) 92 C.A.4th 1036, 1046, 113 C.R.2d 11 [where father in juvenile dependency proceeding sought forensic evidence compiled during investigation into death of his girlfriend's daughter, trial judge's blanket denial of disclosure, without first conducting in camera review of each item requested, violated mandates of *Shepherd v. Superior Court* (1976) 17 C.3d 107, 130 C.R. 257, 550 P.2d 161, text, p. 520].



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### XI. PRIVILEGE FOR OFFICIAL INFORMATION

#### C. Determination and Sanction.

1. Civil Case: Disclosure to Judge.
  - c. No Dismissal of Action.

2 Witkin Cal. Evid. Witnesses § 251

[§ 251] No Dismissal of Action.

"This case presents an issue of first impression concerning the power of the trial court to create a nonstatutory, local state secrets privilege that functions as a special defense to bar or abate an action under *Code of Civil Procedure* section 597." (*Rubin v. Los Angeles* (1987) 190 C.A.3d 560, 566, 235 C.R. 516.)

The Jewish Defense League (JDL) and one of its officers claimed that their constitutional rights of privacy, freedom of association and freedom of speech had been violated by an undercover police officer who infiltrated the organization. Plaintiffs alleged that the officer went beyond the scope of legitimate surveillance, incited the organization to violence and took other actions "designed to destroy the group's legitimate First Amendment activities." Defendants, claiming privilege as an affirmative defense, did not admit or deny these allegations, refused to respond to interrogatories, and moved for dismissal of the action. The trial judge combined the bifurcated trial procedure for special defenses (*C.C.P.* 597; see 7 *Cal. Proc.* (4th), *Trial*, §164 et seq.) with the in camera procedure of *Ev.C.* 1040 privilege claims to try the affirmative defense prior to a trial of plaintiff's complaint. Following the in camera hearing, the judge denied plaintiffs' motion to compel answers to their interrogatories and dismissed the action. *Held*, reversed.

(a) *C.C.P.* 597 *inapplicable*. An evidentiary privilege has never been held to constitute a special defense that bars or abates an action. (190 C.A.3d 575.)

(b) *State secrets privilege inapplicable*.

(1) The state secrets privilege, though absolute when successfully invoked (see *supra*, §245), does not require the blanket dismissal of all actions; dismissal is warranted only when no amount of effort and care on the part of the court and the parties will safeguard the privileged material; e.g., when military secrets are so central to the subject matter of the litigation that any attempt to proceed will threaten their disclosure. (190 C.A.3d 578, 579.)

(2) Courts have relied on *Totten v. United States* (1875) 92 U.S. 105, 23 L.Ed. 605, in dismissing complaints where the maintenance of the action would inevitably lead to the disclosure of secret information. In the instant case, however, plaintiffs may be able to prove their allegations that the alleged surveillance exceeded the limits of proper police investigative work, without discovery of any information from defendants. Hence, plaintiffs can proceed without the use of any privileged evidence, particularly because plaintiffs are not challenging the propriety of the infiltration of the JDL. Moreover, plaintiffs do not have any secret information in their possession that they could unwittingly disclose in an attempt to prove a *prima facie* case. Dismissal of the action was therefore improper under federal law. (190 C.A.3d 579.)

(c) *Ev.C. 1040 not a dismissal statute. Ev.C. 1040* " 'represents the exclusive means by which a public entity may assert a claim of governmental privilege based on the necessity for secrecy.' " (190 C.A.3d 583, quoting *Shepherd v. Superior Court* (1976) 17 C.3d 107, 130 C.R. 257, 550 P.2d 161, supra, §250.) "Section 1040, however, does not allow the dismissal of a civil action based on a threatened disclosure of local state secrets. By its terms, section 1040 only allows for the exclusion of the privileged official information; it does not provide for the dismissal of an action brought by a private party." (190 C.A.3d 583.)

(d) *Motion to compel responses to interrogatories improperly denied.* In denying plaintiffs' discovery motion, the trial judge "failed to make the threshold determination of whether the information claimed to be privileged was 'acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made.' " (190 C.A.3d 586; see *Ev.C. 1040(a)* and *Shepherd*.) On remand, in balancing the need for preserving confidentiality with the necessity for disclosure, the trial judge should consider, as one factor, the passage of time since the end of the alleged infiltration. (190 C.A.3d 587.)

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XI. PRIVILEGE FOR OFFICIAL INFORMATION

C. Determination and Sanction.

2. Criminal Case: Dismissal or Adverse Finding.

a. General Rule.

2 *Witkin Cal. Evid. Witnesses* § 252

[§ 252] General Rule.

*United States v. Reynolds* (1953) 345 U.S. 1, 73 S.Ct. 528, 97 L.Ed. 727, supra, §249, recognized and reaffirmed a different principle applicable to a criminal case: "[S]ince the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense." (73 S.Ct. 534, 97 L.Ed. 735.)

*Ev.C. 1042(a)* carries out this principle by providing that if a claim of privilege is sustained, "the presiding officer shall make such order or finding of fact adverse to the public entity bringing the proceeding as is required by law upon any issue in the proceeding to which the privileged information is material."

This section is limited, however, to cases in which the privilege is asserted by the State of California or its public entity. If (1) the disclosure is absolutely forbidden by a federal statute, or (2) the information is withheld by the federal Government or by another state, there is no unconscionable conduct by this state or its agencies, hence, no reason for imposition of the sanctions. (*Ev.C. 1042* and Law Rev. Com. Comment; see *People v. Parham* (1963) 60 C.2d 378, 382, 33 C.R. 497, 384 P.2d 1001.)

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#### 2. Criminal Case: Dismissal or Adverse Finding.

##### b. Illustrations.

2 Witkin Cal. Evid. Witnesses § 253

[§ 253] Illustrations.

In *Hines v. Superior Court* (1988) 203 C.A.3d 1231, 251 C.R. 28, defendant was charged with sale of narcotics. At the preliminary hearing, Officer W testified that he was working on covert surveillance and, watching the corner of Fifth and Grove with binoculars, he observed a number of defendant's narcotics transactions. On cross-examination, Officer W was asked where he and his partner were located when they made their observations, and he claimed the privilege of *Ev.C. 1040(b)* (supra, §247). The magistrate ruled that the privilege applied, and limited the cross-examination to questions regarding any obstructions or limitations on his observations. *Held*, the privilege applied, but the adverse finding required by *Ev.C. 1042(a)* was required.

(a) The adverse finding is required only if the privileged information is material, and the prosecution argued that the location of the surveillance is not material on the question of guilt or innocence. But the purpose of the defense in learning the location was to test the officer's clear and unobstructed view of the scene, and on that issue the privileged information was material. Hence failure of the magistrate to make the finding required reversal. (203 C.A.3d 1235.)

(b) For the guidance of magistrates faced with similar decisions, the Law Revision Commission Comments to *Ev.C. 1042* suggest that, if the privileged information is material to the defendant's guilt or innocence, the consequences of invocation of the privilege should be dismissal; but if the information relates to a narrower issue, such as the legality of a warrantless search, striking of the testimony or some other order might be proper. (203 C.A.3d 1235, 1236.) In the instant case, the appropriate order should have been to strike the testimony, and without it there was insufficient evidence to support the holding order. (203 C.A.3d 1236.) (See *People v. Montgomery* (1988) 205 C.A.3d 1011, 1022, 252 C.R. 779, *infra*, §254 [following *Hines* under nearly identical facts].)

In *People v. Walker* (1991) 230 C.A.3d 230, 282 C.R. 12, defendant was convicted of selling cocaine based on the eyewitness testimony of an officer who had observed the transaction from a location he refused to reveal at trial, asserting the official information privilege (*Ev.C. 1040*). Defendant contended that the officer's location was a material issue, and that he had been deprived of a fair trial by the trial judge's failure to make an adverse finding under *Ev.C. 1042(a)*, striking the officer's testimony after he asserted the privilege. *Held*, conviction affirmed.

(a) An officer's surveillance location is privileged information under *Ev.C. 1040(b)*. (230 C.A.3d 235, citing *Montgomery* and *Hines*.) Here, the privilege was properly sustained under the balancing process required by *Ev.C. 1040(b)(2)*: the officer testified that the transaction took place in a gang area and that reprisals might result from disclosure; and defendant had no support for his claim of need for the information. (230 C.A.3d 236.)

(b) Under *Ev.C. 1042(a)* and *United States v. Reynolds* (1953) 345 U.S. 1, 73 S.Ct. 528, 97 L.Ed. 727, *supra*, §249, official information must be material in order for the government to suffer consequences for its nondisclosure. Contrary to defendant's argument, a surveillance location is *not* always material. (230 C.A.3d 237.)

(c) Unlike the situations in *Montgomery* and *Hines*, where the officer had made observations at a substantial distance under questionable circumstances, here the observation was made only 15 feet away from the transaction, under good lighting conditions. There was no basis for concluding that the officer's exact location would have been material on the issue of guilt. (230 C.A.3d 239.) (See *In re Sergio M.* (1993) 13 C.A.4th 809, 813, 814, 16 C.R.2d 701 [following *Walker*]; *People v. Garza* (1995) 32 C.A.4th 148, 154, 155, 38 C.R.2d 11 [same]; *People v. Haider* (1995) 34 C.A.4th 661, 668, 40 C.R.2d 369 [same; contrary to suggestion in *Garza*, *Walker* court did not hold that materiality is necessarily shown by evidence that at some point within area surveilled officer could not have viewed defendant because of some obstruction].)

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### XI. PRIVILEGE FOR OFFICIAL INFORMATION

#### C. Determination and Sanction.

#### 2. Criminal Case: Dismissal or Adverse Finding. c. Balancing Process.

2 Witkin Cal. Evid. Witnesses § 254

[§ 254] Balancing Process.

*Ev.C. 1040* imposes a balancing process on the courts, implicitly recognizing that some kinds of governmental secrecy "must be locked away from the most necessitous litigant," but not explicitly requiring that the litigant establish the information's materiality, relevance or even admissibility. "In a criminal case the defendant must at least show how the information affects the preparation or presentation of his defense." The trial judge must then consider alternative evidence offered by the state. "An alternative which fulfills the demanding litigant's actual needs minimizes or eliminates necessity for fulfilling the original demand and avoids a showdown on the claim of privilege." (*People v. Superior Court (Biggs)* (1971) 19 C.A.3d 522, 530, 534, 97 C.R. 118.)

In the *Biggs* case, defendant, charged with having sold methedrine to an undercover operator of the Bureau of Narcotics Enforcement, claimed that he was also an active undercover operator for the Bureau and was checking on the activities of a roommate who actually sold the methedrine. Through a subpoena duces tecum, defendant sought production of notebooks and diaries kept by Bureau agents, in hopes of establishing his connection with the Bureau. The Bureau invoked the privilege against harmful disclosure of official information (e.g., contacts with informers) and moved to quash the subpoena. After sustaining the claim of privilege, the trial judge ruled that it would order dismissal of the charges because the information was material and bore on defendant's guilt or innocence. To avoid that result, the prosecution offered to supply defendant with those parts of the notebooks and diaries describing reports made by defendant; other matters would be masked out. Defendant did not accept the offer, the trial judge stood by his ruling and the prosecution applied for a writ of prohibition to prevent entry of an order of dismissal. On receiving a stay order from the reviewing court, the trial judge allowed the trial to continue. Defendant was found guilty but the judge deferred sentencing until disposition of the petition for prohibition. *Held*, petition denied; "the absence of a statutory prosecution appeal expresses a legislative policy against exposing the accused to a possible retrial, even though the policy transmutes an erroneous trial court ruling into an erroneous dismissal." (19 C.A.3d 535.)

(a) Without some probing by a neutral tribunal a government claim of privilege would be impregnable. To surface appearances, *Ev.C. 915(b)* supplies the probing mechanism, "an *in camera* inquiry by the trial judge and the government, culminating in a ruling for or against disclosure." If the judge upholds the privilege, the judge enters the protective order required under *Ev.C. 1042(a)*. (19 C.A.3d 530.)

"Viewed in these literal terms, section 915, subdivision (b), is apt to lure court and counsel into error. The *in camera* hearing is far too constricted to permit an enlightened determination. Shared only by the court and government, it provides no means for assessing the defendant's claim. It is paradoxical to hold a hearing for balancing the conflicting

interests of two sides when only one is represented. Deprived of the three-way communication habitual to an adversary setting, the judge cannot simultaneously perform the tasks of inspecting and identifying the material, measuring the government's claim to withhold it and assessing the defendant's need to get it. The *ex parte* process places too much confidence in judicial prescience and invites error, even unfairness." (19 C.A.3d 530.)

(b) *Ev.C. 915(b)* leads to all-or-nothing rulings when better solutions might be available, and supplies no record on appeal from a conviction. Because the *in camera* hearing is adapted to no more than a preliminary inquiry, the trial court "should continue its inquiry in an adversary setting, probing the information's relevance to the defense, exploring with counsel the availability of other alternatives and, if necessary, hearing testimony *voir dire*. Only at the conclusion of an adversary inquiry is the court in a position to assess the counter-balancing weight of the defendant's need, to appraise the possibility of reasonable alternatives and to determine what cost shall be exacted of the prosecution. Only at the conclusion of an adversary inquiry is the court qualified to rule for or against the government's claim of privilege." (19 C.A.3d 531.)

(c) The *in camera* hearing under *Ev.C. 915(b)* is not exclusive but *permissive*. "A wider inquiry is offered by other Evidence Code provisions, which authorize hearings outside the jury's presence for the purpose of determining preliminary or foundational facts, including the existence or nonexistence of a privilege." (19 C.A.3d 531.)

(d) Here, the prosecution offer (actually a counteroffer) to supply the relevant information, with other entries masked out, included the very information the defense assertedly needed. "Biggs' attorney should have accepted it. He did not. The trial court should have ascertained whether the offer reasonably fulfilled the defendant's needs and, if it did, should have forced the defense to accept the offer on pain of an adverse ruling. The court did not do so. At this point error occurred. It was traceable not to intrinsic error in the court's earlier ruling of nondisclosure, but rather to the ruling's prematurity." (19 C.A.3d 533.) The disclosure ruling should have been withheld pending inquiry into a possible middle ground. "The court should have ruled after and not before the state's counteroffer." (19 C.A.3d 534.)

(e) Despite the fact that the parties and counsel were misled by the draftmanship of *Ev.C. 915(b)*, "which creates the erroneous impression that a ruling for or against privileges should be made at the close of the court's *in camera* inquiry," the reviewing court was without power to grant prohibition because the writ would expose the accused to a possible retrial. (19 C.A.3d 535.) (See *In re Olson* (1974) 37 C.A.3d 783, 112 C.R. 579, 3 Cal. Crim. Law (3d), *Punishment*, §619 [suggesting procedures for establishing privileged nondisclosure of inmate's file or compelling release of information to inmate seeking parole]; *In re Muszalski* (1975) 52 C.A.3d 475, 125 C.R. 281, *supra*, §91 [in camera hearing may properly include testimony to explain significance of document for which privilege is claimed]; *People v. Alexander* (1983) 140 C.A.3d 647, 657, 658, 189 C.R. 906 [discussing *Muszalski* and holding that government had made sufficient showing to support judge's determination that notes of interviews with prison inmates should not be disclosed]; *People v. Marghzar* (1987) 192 C.A.3d 1129, 1134, 239 C.R. 130 [defendant presented no evidence as to how disclosure of "check digit" formula used to detect counterfeit vehicle identification numbers would aid defense; necessity for preserving confidentiality outweighed defendant's interest]; *People v. Walker* (1991) 230 C.A.3d 230, 236, 282 C.R. 12, *supra*, §253.)

*People v. Montgomery* (1988) 205 C.A.3d 1011, 252 C.R. 779, involved Officer W's refusal to disclose his surveillance location, under circumstances nearly identical to those existing in *Hines v. Superior Court* (1988) 203 C.A.3d 1231, 251 C.R. 28 (*supra*, §253). In reversing defendant's convictions for possession and sale of marijuana, the court elaborated on the balancing procedure outlined in the *Biggs* decision as follows:

(a) "The correct procedure in these cases is for the court first to ask the defendant to make a *prima facie* showing for disclosure. ... If defendant does so, the court should then proceed under section 915 and hold an *in camera* hearing attended by the party claiming the privilege. ... The defendant should be given an opportunity to propose questions to be asked at this hearing. The *in camera* hearing is a preliminary inquiry into whether the claim of privilege should be upheld. If the People succeed in camera, the adversary process should be utilized, 'probing the information's relevance to the defense, exploring with counsel the availability of other alternatives, and, if necessary, hearing testimony *voir*

dire.' ... The hearing should conclude with the trial court making findings sufficient to enable the appellate court to review its decision." (205 C.A.3d 1021.)

(b) A full inquiry of this nature did not occur here. (1) The trial judge did not engage in an *Ev.C. 915* hearing to determine the preliminary fact of the nature of the surveillance location. (2) The trial judge did not engage in the required balancing process. Instead, he concluded that, although the surveillance location was material to defendant's case, it was privileged as a matter of law, because Officer W testified that the location was still in use and its disclosure might endanger lives. (3) The trial judge failed to make the adverse finding, under *Ev.C. 1042* (see *supra*, §252), which is required whenever the prosecution withholds information which is unquestionably material. (205 C.A.3d 1022.)

(c) A full-scale hearing should explore any available alternatives. For example, the surveillance location could be revealed to defense counsel, subject to the condition that he not reveal it to anyone else. Or the prosecution could use a videotape of the crime scene, taken from the surveillance location, to establish the unobstructed nature of the view. (205 C.A.3d 1022.)

(d) Because the convictions were based in large part on what was observed from the surveillance location, they cannot stand without a proper resolution of the question of privilege. (205 C.A.3d 1023.)

The opinion concludes by noting that, as in cases involving the identity of an informer (see *infra*, §§325, 326), no adverse finding under *Ev.C. 1042* would be required if Officer W's observations merely formed the basis for a search warrant or for probable cause to make an arrest. (205 C.A.3d 1023, footnote 8.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Jenkins* (2000) 22 C.4th 900, 957, 95 C.R.2d 377, 997 P.2d 1044, 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence*, §65 [in capital murder case, trial judge properly denied defendant's request for disclosure of all cases that victim (a police officer) had investigated or in which he had made arrest in year prior to his death; there is significant interest in preserving confidentiality of individual citizens' arrest records, and defendant's showing of need was based on sheer speculation that someone under investigation by victim had murdered him].



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### XI. PRIVILEGE FOR OFFICIAL INFORMATION

#### D. Privilege for Taxpayer's Statements and Returns.

##### 1. Privileged Matters.

##### a. Original Statements and Returns.

2 *Witkin Cal. Evid. Witnesses* § 255

[§ 255] Original Statements and Returns.

A property owner's statement to the tax assessor is secret. (Rev.C. 451, 833; see *Gallagher v. Boller* (1964) 231 C.A.2d 482, 489, 41 C.R. 880.) The same is true of information furnished by a retailer under the Sales and Use Tax Law. (Rev.C. 7056 [disclosure prohibition]; Rev.C. 7056.5 ["willful unauthorized inspection or unwarranted disclosure or use" of information as misdemeanor]; see *McCabe v. Snyder* (1999) 75 C.A.4th 337, 345, 89 C.R.2d 315 [Rev.C. 7056 prohibited disclosure of names and addresses of those who paid motor vehicle smog impact fee on vehicles registered out of state].)

The federal and state income tax acts normally prohibit disclosure by tax officials of information contained in the taxpayer's return. (Rev.C. 19542 [disclosure prohibition]; Rev.C. 19542.1 ["willful unauthorized inspection or unwarranted disclosure or use of confidential information" as misdemeanor]; see *Franchise Tax Bd. v. Superior Court* (1950) 36 C.2d 538, 547, 225 P.2d 905; *Garner v. United States* (1976) 424 U.S. 648, 96 S.Ct. 1178, 47 L.Ed.2d 370, *infra*, §498 [failure to claim privilege on federal tax return amounts to waiver]; *Fisher v. United States* (1976) 425 U.S. 391, 96 S.Ct. 1569, 48 L.Ed.2d 39, *infra*, §458; 8 Wigmore (McNaughton Rev.) §2377; C.J.E.R., Judges Benchbook, Civil Proceedings: Discovery §4.94 et seq.; 86 *Harv. L. Rev.* 914 [information provided on income tax return not usable in prosecution for nontax offense]; 24 *Hastings L. J.* 959 [same]; 8 *U.S.F. L. Rev.* 55 [immunity of tax records from search and seizure]; 70 A.L.R.2d 246 [discovery and inspection of income tax returns in actions between private individuals]; 1 A.L.R.4th 959 [validity, construction and effect of state laws making income tax returns or information confidential].)

The Unemployment Insurance Code contains similar provisions. (*Unemp.Ins.C.* 1094 [disclosure prohibition]; *Unemp.Ins.C.* 13018 ["willful unauthorized inspection or unwarranted disclosure or use" of information as misdemeanor].)

**SUPPLEMENT:** [This section is current through the latest supplement]

With some exceptions, C.C. 1799.1a, added in 2000, prohibits the disclosure of "information obtained from a federal or state income tax return or any information obtained from a tax schedule submitted with the return by a consumer in connection with a financial or other business-related transaction." (C.C. 1799.1a(a).) "Unrelated use" of the information is also prohibited; a use is "unrelated" if it is not necessary to effect, administer, or enforce the financial or other business-related transaction with the consumer, or is beyond the scope of the stated purpose to which the consumer consented for the use of the return or any other information he or she submitted. (C.C. 1799.1a(b).) Each violation of

the statute constitutes a separate cause of action for which damages are recoverable. (C.C. 1799.1a(e).) (See *Firestone v. Hoffman* (2006) 140 C.A.4th 1408, 1419, 45 C.R.3d 534 [C.C. 1799.1a does not create or codify privilege shielding litigant from discovery of litigant's own tax returns, nor does it apply to foreign tax returns].) *West's Key Number Digest*, Witnesses k.216(2)



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### XI. PRIVILEGE FOR OFFICIAL INFORMATION

#### D. Privilege for Taxpayer's Statements and Returns.

1. Privileged Matters.
- b. Copies of Tax Returns.

2 Witkin Cal. Evid. Witnesses § 256

#### [§ 256] Copies of Tax Returns.

There is considerable authority to the effect that the privilege against disclosure of income tax returns covers only the original returns, and that in ordinary litigation a copy of a return may be demanded and its production required in discovery proceedings. (See 1 McCormick 5th, §112; 31 So. Cal. L. Rev. 212; 70 A.L.R.2d 240 [discovery and inspection of income tax returns in actions between private individuals].)

However, Rev.C. 19542 et seq. prohibit disclosure except in a few special situations (see *infra*, §258 et seq.). Accordingly, *Webb v. Standard Oil Co.* (1957) 49 C.2d 509, 319 P.2d 621, which construed substantively similar predecessor statutes, held that in civil litigation a party cannot be compelled to produce a copy of his or her return:

"The purpose of the amended statutory provisions prohibiting disclosure is to facilitate tax enforcement by encouraging a taxpayer to make full and truthful declarations in his return, without fear that his statements will be revealed or used against him for other purposes. If the information can be secured by forcing the taxpayer to produce a copy of his return, the primary legislative purpose of the secrecy provisions will be defeated. The effect of the statutory prohibition is to render the returns privileged, and the privilege should not be nullified by permitting third parties to obtain the information by adopting the indirect procedure of demanding copies of the tax returns." (49 C.2d 513.) (See 31 So. Cal. L. Rev. 211.)

The *Webb* court also held that, because both the federal and state returns contained substantially the same information on the issue involved, production of the *federal returns* could not be required. "Under the circumstances, forcing disclosure of the information in the federal tax return would be equivalent to forcing disclosure of the state returns and would operate to defeat the purposes of the state statute." (49 C.2d 513.) (See 31 So. Cal. L. Rev. 211.)

Later cases have followed the *Webb* rule. (See *Aday v. Superior Court* (1961) 55 C.2d 789, 796, 13 C.R. 415, 362 P.2d 47; *Sav-On Drugs v. Superior Court* (1975) 15 C.3d 1, 6, 123 C.R. 283, 538 P.2d 739 [if Rev.C. 7056 (confidentiality of sales and use tax information) protects sales tax returns themselves, statute also protects information contained in returns; thus, pretrial discovery about specific sales tax deductions was improper]; *Brown v. Superior Court* (1977) 71 C.A.3d 141, 143, 139 C.R. 327 [privilege covers copies of W-2 forms required to be attached to returns]; *In re Marriage of Brown* (1979) 99 C.A.3d 702, 707, 160 C.R. 524, *infra*, §259; *Sammur v. Sammur* (1980) 103 C.A.3d 557, 163 C.R. 193, *infra*, §259; *Rifkind v. Superior Court* (1981) 123 C.A.3d 1045, 1048, 177 C.R. 82 [wife in marital dissolution proceeding improperly sought extensive discovery of tax returns of husband's law corporation and investment partnerships]; *King v. Mobile Home Rent Review Bd.* (1989) 216 C.A.3d 1532, 1537, 265 C.R. 624 [privilege



applicable in administrative proceeding]; and see 74 *Harv. L. Rev.* 1010.)

More recently, however, the Supreme Court has limited the application of *Webb* by holding that in a marital dissolution proceeding, one spouse may discover corporate tax returns and payroll tax returns of the other spouse. (See *Schnabel v. Superior Court* (1993) 5 C.4th 704, 722, 723, 21 C.R.2d 200, 854 P.2d 1117, *infra*, §259 [disapproving *Rifkind v. Superior Court*, *supra*, insofar as it held that all tax returns are absolutely privileged]; and see 38 A.L.R.4th 145 [spouse's right to discovery of closely held corporation records during divorce proceeding]; 29 *Hastings L. J.* 775 [Case for Abrogation of Taxpayer Privilege in California; urging that *Webb* be overruled].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Deary v. Superior Court* (2001) 87 C.A.4th 1072, 1078, 105 C.R.2d 132 [extending rationale of *Webb v. Standard Oil Co. of Calif.* (1957) 49 C.2d 509, 319 P.2d 621, text, p. 530, to copies of estate tax returns; Rev.C. 14251 renders returns privileged, and privilege should not be nullified by permitting third parties to demand copies]; *Firestone v. Hoffman* (2006) 140 C.A.4th 1408, 1419, 1420, 45 C.R.3d 534 [although *Webb* extended tax return privilege from state to federal returns, there is no reason for further extension to foreign tax returns]; 1 McCormick 6th, §112.



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### XI. PRIVILEGE FOR OFFICIAL INFORMATION

#### D. Privilege for Taxpayer's Statements and Returns.

##### 1. Privileged Matters.

##### c. Information From Tax Consultants.

*2 Witkin Cal. Evid. Witnesses § 257*

[§ 257] Information From Tax Consultants.

Persons who assist taxpayers in the preparation of state or federal income tax returns are prohibited from disclosing any information obtained in the process. Exceptions are allowed when disclosure is: (1) consented to by the taxpayer in a separate document; (2) expressly authorized by state or federal law; (3) necessary to the preparation of the return; or (4) pursuant to court order. (*B. & P.C. 17530.5.*)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Firestone v. Hoffman* (2006) 140 C.A.4th 1408, 1418, 45 C.R.3d 534 [*B. & P.C. 17530.5* does not create or codify privilege shielding litigant from discovery of litigant's own tax returns, nor does it apply to foreign tax returns].

To the extent a communication between a federally authorized tax practitioner and a client would be considered a privileged communication if it were between an attorney and client, the communication is entitled to the same protections enjoyed by attorney-client communications. However, this privilege may be asserted only in noncriminal tax matters before the State Board of Equalization, and it does not apply to any written communication between a federally authorized tax practitioner and a director, shareholder, officer, or employee, agent, or representative of a corporation in connection with promoting "the direct or indirect participation of the corporation in any tax shelter, or in any proceeding to revoke or otherwise discipline any license or right to practice by any governmental agency." (Rev.C. 7099.1(b).) Further, communications made before the effective date of the statute creating this privilege are not protected by it. (Rev.C. 7099.1, added in 2000; see similar provisions regarding Franchise Tax Board (Rev.C. 21028, added in 2000) and Employment Development Department (*Unemp.Ins.C. 13019*, added in 2000).)



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#### D. Privilege for Taxpayer's Statements and Returns.

##### 2. Exceptions.

##### a. In General.

2 Witkin Cal. Evid. Witnesses § 258

[§ 258] In General.

(1) *General Rule of Disclosure*. Most statutes requiring secrecy contain express authorization for disclosure in exceptional situations. The most common examples are as follows:

(a) Rev.C. 408(c), *Govt.C. 15612* [duty of local assessors to disclose records to certain governmental agencies]; see *State Bd. of Equalization v. Watson* (1968) 68 C.2d 307, 311, 66 C.R. 377, 437 P.2d 761.

(b) Rev.C. 7056 [Sales and Use Tax; Governor may order examination by state or federal officers].

(c) Rev.C. 19545 [franchise and personal income tax; disclosure permitted, under specified conditions, in judicial or administrative proceeding pertaining to tax administration].

(d) Rev.C. 19553 [disclosure of welfare applicants' tax returns].

(2) *Welfare Exemption Affidavit*. In *Gallagher v. Boller* (1964) 231 C.A.2d 482, 41 C.R. 880, plaintiff's client, a laundry, complained that a church, tax-exempt under the welfare exemption (see 9 *Summary* (9th), *Taxation*, §150 et seq.), was operating a commercial laundry in competition with it. Plaintiff was refused permission to inspect the church's affidavit and the assessor's ruling thereon. *Held*, mandamus granted. A *compulsory* property statement is secret (see *supra*, §255), but the *voluntary* application for the welfare exemption is not:

"Such contrasting circumstances, i.e., a statutory requirement of confidentiality as to a required property statement and a lack of such statutory requirement as to voluntary application for welfare tax-exemption, indicate a legislative intent that information furnished by a welfare organization in seeking the special privilege or benefit of tax exemption shall not be confidential. Such circumstances also indicate a public policy that a welfare organization, which contemplates applying for such special privilege, must elect whether it will forego the matter of keeping its property affairs confidential in order to be classified as a nontaxpaying owner of property." (231 C.A.2d 491.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *General Rule of Disclosure*.

(e) (*New*) Rev.C. 19556 [disclosure by Franchise Tax Board for use in actions or proceedings affecting personnel rights of employees or former employees].

(2) *Welfare Exemption Affidavit.*

*Cross-Reference:* 9 *Summary* (10th), *Taxation*, §187 et seq.



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#### D. Privilege for Taxpayer's Statements and Returns.

##### 2. Exceptions.

##### b. Family Law Proceedings.

2 Witkin Cal. Evid. Witnesses § 259

[§ 259] Family Law Proceedings.

(1) *Support Proceedings.* In *Miller v. Superior Court* (1977) 71 C.A.3d 145, 149, 139 C.R. 521, the court recognized an implied statutory exception for a *child support* proceeding seeking payment of arrearages. In *re Marriage of Brown* (1979) 99 C.A.3d 702, 709, 160 C.R. 524, distinguishing *Miller*, denied discovery where the purpose was imposition of a new support obligation; and *Sammut v. Sammut* (1980) 103 C.A.3d 557, 562, 163 C.R. 193, denied discovery in an action by a former wife seeking an increase in *spousal support*.

The Legislature solved the problem by the enactment of former C.C. 4700.7, which was repealed and replaced in 1994 by similar *Family C. 3552*:

(a) In a proceeding involving *child, family, or spousal support*, no party may refuse to submit copies of his or her state and federal income tax returns to the court, whether individual or joint. (*Family C. 3552(a).*)

(b) The tax returns may be examined by the opposing party and are discoverable by him or her. A party may also be examined by the opposing party about the contents of a tax return submitted pursuant to the statute. (*Family C. 3552(b).*)

(c) If the judge finds that it is relevant to the case to retain the tax return, the return must be sealed and maintained as a confidential court record. However, if the judge finds that the tax return is not relevant to disposition of the case, all copies of the tax return must be returned to the party who submitted it. (*Family C. 3552(c).*)

(2) *Paternity Actions.* *Family C. 3552* does not apply in a paternity action until the issue of paternity is finally adjudicated; a court's finding of paternity for the limited purpose of making an award of *interim support* is not a finding of paternity for the purposes of the statute. (*Thomas B. v. Superior Court* (1985) 175 C.A.3d 255, 264, 220 C.R. 577 [construing predecessor statute].)

(3) *Marital Dissolution Proceedings.* In *Schnabel v. Superior Court* (1993) 5 C.4th 704, 21 C.R.2d 200, 854 P.2d 1117, the wife in a marital dissolution proceeding sought to discover the business records and corporate and quarterly payroll tax returns of a close corporation in which 30% of the stock was community property. She served a deposition subpoena for production of business records on the custodian of the corporate records, and the trial court denied the corporation's motion to quash the subpoena. *Held*, the wife was entitled to corporate business records and tax returns regarding the husband himself, but not payroll tax information identifying third persons. All tax returns are not

absolutely privileged. The marital community and the corporation were closely related, and the corporation was not a public corporation whose shares had a readily ascertainable market value. "These facts, combined with the legislatively declared public policy in favor of full disclosure in a marital dissolution proceeding, warrant an exception to the privilege in this case limited to those tax returns that are reasonably related to the purpose for which they are sought." (5 C.4th 722.) (See 21 *Pepperdine L. Rev.* 266 [Schnabel].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Support Proceedings*. See *In re Marriage of Sachs* (2002) 95 C.A.4th 1144, 1161, 116 C.R.2d 273, 8 Cal. Proc. (4th), *Enforcement of Judgment*, Supp., §275 [at judgment debtor examination of former husband who had accumulated considerable arrearages of child and spousal support, wife was entitled to copy of husband's tax returns and had right to examine him about their contents to extent allowed by *Family C.* 3552, notwithstanding husband's invocation of self-incrimination privilege; statute strikes appropriate balance between conflicting interests of supported spouse and supporting spouse].



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#### D. Privilege for Taxpayer's Statements and Returns.

##### 2. Exceptions.

##### c. IRS Examination of Accountant's Audit.

2 Witkin Cal. Evid. Witnesses § 260

[§ 260] IRS Examination of Accountant's Audit.

In *United States v. Arthur Young & Co.* (1984) 465 U.S. 805, 104 S.Ct. 1495, 79 L.Ed.2d 826, the Court upheld the statutory power of the Internal Revenue Service to examine tax accrual workpapers prepared by a corporation's independent certified public accountant in the course of a regular financial audit.

(a) The auditor may assess opinions, speculations, and projections of management with regard to unclear, aggressive, or questionable tax positions that may have been taken on prior returns, and the tax accrual workpapers record the process of examination and analysis. "In short, tax accrual workpapers pinpoint the 'soft spots' on a corporation's tax return by highlighting those areas in which the corporate taxpayer has taken a position that may, at some later date, require the payment of additional taxes." (104 S.Ct. 1500, 79 L.Ed.2d 833.)

(b) Although the workpapers may not be relevant in an evidentiary sense, the intent of the federal statute is to allow the IRS to obtain items of potential relevance to an ongoing investigation; records that "illuminate any aspect of the return" are highly relevant to legitimate IRS inquiry. (104 S.Ct. 1501, 1502, 79 L.Ed.2d 833, 834.)

(c) The Court of Appeals "fashioned a work-product immunity doctrine for tax accrual workpapers prepared by independent auditors." (104 S.Ct. 1499, 79 L.Ed.2d 831.) The statutory language does not support such a doctrine, and no accountant-client privilege exists under federal law. (104 S.Ct. 1503, 79 L.Ed.2d 835.) Nor does the attorney work product doctrine of *Hickman v. Taylor* (1947) 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451, supra, §137, provide a persuasive analogy. That doctrine was founded on the private attorney's role as the client's confidential advisor and advocate; the independent certified public accountant performs a different role: "By certifying the public reports that collectively depict a corporation's financial status, the independent auditor assumes a *public* responsibility transcending any employment relationship with the client. The independent public accountant performing this special function owes ultimate allegiance to the corporation's creditors and stockholders, as well as to investing public. This 'public watchdog' function demands that the accountant maintain total independence from the client at all times and requires complete fidelity to the public trust." (104 S.Ct. 1503, 79 L.Ed.2d 836.) (See 98 Harv. L. Rev. 295; on Court of Appeals opinion, see 14 Southwestern U. L. Rev. 356.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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### XI. PRIVILEGE FOR OFFICIAL INFORMATION

#### D. Privilege for Taxpayer's Statements and Returns.

##### 3. Waiver.

2 Witkin Cal. Evid. Witnesses § 261

[§ 261] Waiver.

(1) *General Rule: Privilege May Be Waived.* The privilege against disclosure of confidential tax records may be waived in advance by a contract requiring one party to furnish information to the other. (See *Crest Catering Co. v. Superior Court* (1965) 62 C.2d 274, 42 C.R. 110, 398 P.2d 150, *supra*, §69.)

In *Wilson v. Superior Court* (1976) 63 C.A.3d 825, 134 C.R. 130, a taxpayer sued her accountants for damages suffered from negligent and improper advice on the tax consequences of a sale of real property in 1972. Defendants' motion for discovery of plaintiff's income tax returns from 1965 through 1973 was denied. *Held*, discovery should be allowed; plaintiff waived the privilege when her complaint *placed in issue the existence and content of her tax returns and their tax consequences*. "[E]stablishment of all the essential elements of plaintiff's case will be impossible without proof of statements and computations in her tax returns. To permit plaintiff to produce evidence of the contents of those returns ... while successfully resisting their disclosure on grounds of privilege would be manifestly unfair to defendants. Accordingly, plaintiff can either maintain her lawsuit or the confidentiality of her returns, but not both." (63 C.A.3d 830.)

(2) *Clarifications and Distinctions.* Where joint tax returns are filed the privilege is held by both taxpayers, and a waiver by only one is insufficient to permit disclosure. (*Coate v. Superior Court* (1978) 81 C.A.3d 113, 115, 144 C.R. 350.)

And there is no automatic waiver by a plaintiff suing for loss of income as a result of personal injuries. (See *Brown v. Superior Court* (1977) 71 C.A.3d 141, 144, 139 C.R. 327.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Clarifications and Distinctions.* A taxpayer who submits copies of his or her tax returns to a bank in connection with a loan application should not be considered to have waived the privilege so that a third party suing the taxpayer can obtain a copy simply by subpoenaing it from the bank. "The purpose of the tax-return privilege is to encourage voluntary filing of tax returns and truthful reporting of income, and thus to facilitate tax collection. ... It does this by assuring the taxpayer that such voluntary filing and truthful reporting will not result in a loss of confidentiality. ... Routinely forcing a taxpayer to produce a copy of his or her tax returns in litigation would effectively defeat the legislative purpose. ... Given the well-recognized practice of requiring tax returns as part of a loan application, it follows that forcing a bank to produce those returns routinely in litigation would have the same effect as forcing the taxpayer to produce them directly, and that, too, would effectively defeat the legislative purpose." (*Fortunato v. Superior Court* (2003) 114 C.A.4th 475, 482, 8 C.R.3d 82.)





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### XI. PRIVILEGE FOR OFFICIAL INFORMATION

#### E. Privilege for Confidential Business Information.

##### 1. In General.

2 Witkin Cal. Evid. Witnesses § 262

[§ 262] In General.

(1) *General Rule Prohibiting Disclosure.* A statute may require information from business institutions, to serve some useful public purpose, and may, to facilitate that purpose, validly prohibit disclosure of the information. (See 8 Wigmore (McNaughton Rev.) §2377 [accident reports].) "The courts generally have concluded that the public interest in preserving confidential information outweighs in importance the interest of a private litigant in the absence of considerations involving life or liberty." (*San Francisco v. Superior Court* (1951) 38 C.2d 156, 163, 238 P.2d 581.)

In the foregoing case, the city's salary standardization ordinances provided for schedules of compensation in accord with the generally prevailing rates in private or comparable governmental employment. Certain employees obtained a trial court order of inspection of all documents and data. An employer sought prohibition, showing that the civil service commission had solicited information from private employers by promising that the source would be held in confidence; that without such a pledge it would be impossible to obtain voluntary cooperation of private employers in making the survey; and that disclosure would create unrest in industrial employment relations and interfere with competitive activities of employers in private industry. *Held*, writ granted.

(2) *Exceptions.* The Director of Employment Development must permit the use of information to the extent necessary to enable federal, state, and local departments or agencies to verify or determine *eligibility for public social services* under Welf.C. 10000 et seq. or the aid to families with dependent children program. (*Unemp.Ins.C. 1095(f).*)

Another exception has been enacted to assist a district attorney's *investigation of consumer fraud*: the district attorney must be given access to any complaint against a person subject to regulation by a consumer oriented state agency and any investigation of such a person by the agency. If the district attorney takes no action on the complaint or investigation, the material remains confidential; and where release of the material would jeopardize an investigation or other duties of the agency, it has discretion to delay the release of such information. (*Govt.C. 25509*, listing, without limitation, a large number of boards classified as "consumer oriented" state agencies.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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### XI. PRIVILEGE FOR OFFICIAL INFORMATION

#### E. Privilege for Confidential Business Information.

##### 2. Reporting Party May Not Waive Privilege.

2 Witkin Cal. Evid. Witnesses § 263

[§ 263] Reporting Party May Not Waive Privilege.

With limited exceptions, *Unemp.Ins.C. 2111* and *2714* provide that information and medical records are confidential and not open to public inspection.

In *Richards v. Superior Court (1968)* 258 C.A.2d 635, 65 C.R. 917, plaintiff filed a personal injury action against defendants. After the accident, plaintiff had claimed disability benefits, and the Department of Employment had referred her to Dr. C for a medical examination. Plaintiff gave written consent to defendants' counsel to inspect and copy Dr. C's records, and defendants obtained a subpoena for Dr. C's deposition and production of the records. But the Department moved to quash, claiming privilege. *Held*, the claim was good.

(a) Plaintiff waived her doctor-patient privilege by bringing the action. (258 C.A.2d 638.)

(b) The privilege claimed here, however, was that of the public entity. The legislative intent was to preserve confidentiality of information on the nature and cause of the claimant's disability, so as not to impede a complete and honest report by fear of its use against the claimant in a later lawsuit (258 C.A.2d 638), and defendants' contention that such statutes are for the benefit of the reporting party or claimant was untenable under *Ev.C. 1040(b)(1)*, making the privilege absolute, and leaving no discretion in the judge. (258 C.A.2d 639.)

**SUPPLEMENT:** [This section is current through the latest supplement]

The court in *Department of Motor Vehicles v. Superior Court (2002)* 100 C.A.4th 363, 122 C.R.2d 504, pointed out that the conclusion of *Richards v. Superior Court (1968)* 258 C.A.2d 635, 65 C.R. 917, that *Unemp.Ins.C. 2111* and *2714* created an absolute privilege, was inconsistent with the comment in the same case that a different result might be reached if the subject of the medical records were seeking the records for her own benefit. "We do not agree with *Richards's* conclusion that 'whether a statute prohibits disclosure is a matter of interpretation of that statute *as applied to the case in which disclosure is sought*.' ... In our view, whether disclosure of specified official information is prohibited by statute is a matter of statutory construction, and the weighing of interests is the essence of a conditional, not an absolute, privilege." (100 C.A.4th 376.)



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### XI. PRIVILEGE FOR OFFICIAL INFORMATION

#### F. Privilege for Criminal History Records and Related Matters.

##### 1. In General.

2 *Witkin Cal. Evid. Witnesses* § 264

[§ 264] In General.

(1) *General Rule Prohibiting Disclosure.* The official information privilege (*Ev.C. 1040*, supra, §246 et seq.), and some additional specific statutes, have the general effect of preventing disclosure of reports and records of law enforcement agencies dealing with crime and criminals. In *Runyon v. Board of Prison Terms & Paroles* (1938) 26 C.A.2d 183, 184, 79 P.2d 101, petitioner's demand for inspection of letters and other documents sent by individuals to the state parole board dealing with applications for parole was refused. The court pointed out that public records of this type have consistently been treated as free from inspection, and added: "Included in this class are documents and records kept on file in public institutions, concerning the condition, care and treatment of the inmates thereof, and the files in the offices of those charged with the execution of the laws relating to the apprehension, prosecution and punishment of criminals." (See *People v. Wilkins* (1955) 135 C.A.2d 371, 377, 287 P.2d 555 [prosecution for pandering; defendants sought production of police department records of arrest of individuals for activities connected with prostitution, for use in cross-examination; held properly denied]; *People v. King* (1932) 122 C.A. 50, 56, 10 P.2d 89 [prosecution for auto theft; secret motor number of car known only to manufacturer and National Auto Theft Bureau]; 22 Cal. L. Rev. 672; 36 A.L.R.2d 1318 [privilege of custodian in civil action not to disclose official police records and reports].)

(2) *Exceptions.* In *People v. Curry* (1950) 97 C.A.2d 537, 547, 218 P.2d 153, the prosecution called a juvenile probation officer to testify to a conversation with defendant in the city prison, in which defendant made statements contrary to his testimony at the trial. *Held*, admissible. The statute makes the record of a probation officer's *report* secret except as ordered by the probation officer or judge; it says nothing about *communications* to such an officer. (On similar rule on statements of automobile driver to highway patrolman, see *infra*, §274.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *General Rule Prohibiting Disclosure.* See *Orange v. Superior Court* (2000) 79 C.A.4th 759, 767, 94 C.R.2d 261 [in parents' civil action against county and sheriff's department arising from criminal investigation of their child's murder, trial judge erred in granting parents' discovery request for entire file of investigation; public interest in solving murder and bringing perpetrators to justice outweighed parents' interest in obtaining file, at least at time discovery was sought]; cf. *Michael P. v. Superior Court* (2001) 92 C.A.4th 1036, 1045, 1046, 113 C.R.2d 11 [where father in juvenile dependency proceeding sought forensic evidence compiled during investigation into death of his girlfriend's daughter, trial judge erred in denying disclosure request without first conducting in camera review; father's interest in having custody of his child was weightier than interest of parents in *Orange* case, in prosecuting civil damages action].



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XI. PRIVILEGE FOR OFFICIAL INFORMATION

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2. Statements in Connection With Deferred Entry of Judgment or Pretrial Diversion.

2 Witkin Cal. Evid. Witnesses § 265

[§ 265] Statements in Connection With Deferred Entry of Judgment or Pretrial Diversion.

Defendants charged with certain drug offenses are eligible for *deferred entry of judgment programs* of rehabilitation which, if successfully completed, would cause their arrests to be "deemed to have never occurred" (see P.C. 1000.4). (P.C. 1000 et seq.; see 4 Cal. Crim. Law (3d), *Pretrial Proceedings*, §341 et seq.). A statement made by the defendant to a probation officer or drug treatment worker subsequent to the granting of deferred entry of judgment is not admissible in any action or proceeding, including a sentencing hearing. (P.C. 1000.1(c).)

Similar exclusionary language also appears in legislation governing the following *pretrial diversion programs*:

- (1) Persons charged with misdemeanors. (P.C. 1001.5.)
- (2) Persons charged with writing bad checks. (P.C. 1001.67.)
- (3) Parents and legal guardians charged with contributing to the delinquency of their minor child. (P.C. 1001.72(b).)
- (4) Mentally retarded persons charged with crimes. (P.C. 1001.24 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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3. Minor's Criminal or Juvenile Court Records.

2 *Witkin Cal. Evid. Witnesses* § 266

[§ 266] Minor's Criminal or Juvenile Court Records.

Various statutes have barred disclosure of criminal or juvenile court records of minors. (See P.C. 851.7, 1203.45; Welf.C. 781; *10 Summary* (9th), *Parent and Child*, §502 et seq.)

In 1970, the Legislature relaxed this confidentiality for defamation actions or proceedings where good cause is shown; the judge may order the records unsealed and admitted into evidence. "The records shall be confidential and shall be available for inspection only by the court, jury, parties, counsel for the parties, and any other person who is authorized by the court to inspect them. Upon the judgment in the action or proceeding becoming final, the court shall order the records sealed." (P.C. 851.7(f); see similar language in P.C. 1203.45, and in Welf.C. 781.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Cross-Reference:* *10 Summary* (10th), *Parent and Child*, §492 et seq.



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### XI. PRIVILEGE FOR OFFICIAL INFORMATION

#### F. Privilege for Criminal History Records and Related Matters.

##### 4. Statements to Police About Alleged Rape.

2 Witkin Cal. Evid. Witnesses § 267

[§ 267] Statements to Police About Alleged Rape.

In *Rider v. Superior Court* (1988) 199 C.A.3d 278, 244 C.R. 770, the court held that a plaintiff in a defamation action who claimed that he was wrongfully accused of rape was entitled to the same discovery as a defendant accused of rape in a criminal action.

Plaintiffs, husband and wife employees of defendant F, were discharged, and shortly afterward F publicly accused plaintiff husband of raping F's 14-year-old daughter. Several months later the alleged victim made statements to the police regarding the crime. In this action by plaintiffs for defamation, they sought by subpoena duces tecum served on the police department to produce the investigating officer's notes of the conversations with the daughter. The trial judge, reviewing the record, in camera, denied the motion on the ground that production would violate the daughter's right of privacy. *Held*, mandamus issued to compel production.

(a) The police department, relying on the conditional privilege to refuse to disclose information if disclosure would be "against the public interest" (*Ev.C. 1040(b)(2)*, supra, §247), contended that preserving the confidentiality of the statements was necessary to protect the privacy rights of the alleged rape victim. But the constitutional right of privacy (see 7 *Summary (9th)*, *Constitutional Law*, §454 et seq.) is not absolute; and when it conflicts with the right to a fair trial the court must balance the right of civil litigants to discover relevant facts against the privacy interest. (199 C.A.3d 282.) In a number of cases the courts have held that the litigant's need for discovery prevailed over the competing interest in sexual privacy. (199 C.A.3d 283.)

(b) "We believe discovery available to a criminal defendant accused of rape provides authoritative guidance to discovery available to a *plaintiff* accused of rape who sues for defamation." And "it is clear the defendant in a rape prosecution is entitled to pretrial discovery of statements by the victim to the police and the prosecutor." (199 C.A.3d 283.)

(c) "We discern no difference in relevancy or good cause which would justify making the victim's statements to the police available in a criminal action but not in a defamation action. It is difficult to imagine any material more relevant to a defamation case based on false accusation of rape than the statements by the alleged victim to the police. Review of these statements is reasonably calculated to lead to the discovery of admissible evidence." (199 C.A.3d 284.) Here it appears that truth is the only defense, and plaintiffs must anticipate that the daughter will testify at the trial and prepare for impeachment of her testimony. (199 C.A.3d 285.)

The court added that what would be disclosed is no more than what would have been revealed in open court if the

prosecution had elected to pursue the prosecution the daughter invited by voluntarily making the charges to the police; and the investigating officer's notes showed that he had advised the daughter that she could expect to appear in court, that her appearance would be "newsworthy," and that a court appearance would result in an open discussion of her sexual behavior. (199 C.A.3d 286.)

The order compelling production was qualified by the protective condition that the information "shall not be used or disclosed by plaintiffs or their counsel for any purpose outside the confines of this litigation." (199 C.A.3d 287.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Cross-Reference:* 7 Summary (10th), *Constitutional Law*, §575 et seq.



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#### F. Privilege for Criminal History Records and Related Matters.

##### 5. Surveillance Location Privilege.

2 *Witkin Cal. Evid. Witnesses* § 268

[§ 268] Surveillance Location Privilege.

In *People v. Montgomery* (1988) 205 C.A.3d 1011, 252 C.R. 779 (supra, §254), the court held that one effect of *Ev.C. 1040* (see supra, §246) was to establish, under appropriate circumstances, a surveillance location privilege, even though the officer using the location might have "acquired" the information from himself or herself. (205 C.A.3d 1019.) Like confidential informants (see infra, §306 et seq.), hidden observation posts are often useful law enforcement tools. Disclosure of the location will likely destroy its future value, threaten the safety of the officers using it, and discourage property owners from allowing the police to make such use of their property. In fact, such posts deserve even greater protection than that accorded to confidential informants because, unlike a revealed informant who can hide in California's predominantly urban environment, a person whose address has been revealed has no place to hide. (205 C.A.3d 1019.)

Later cases are to the same effect. (See *Hines v. Superior Court* (1988) 203 C.A.3d 1231, 1234, 251 C.R. 28, supra, §253; *People v. Walker* (1991) 230 C.A.3d 230, 236, 282 C.R. 12, supra, §253; *In re Sergio M.* (1993) 13 C.A.4th 809, 813, 16 C.R.2d 701 [following *Montgomery*]; and see 67 A.L.R.5th 149 [cases discussing police surveillance privilege]; on requirement of finding adverse to prosecution if surveillance location is material to defense, see supra, §252.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 36 *U.S.F. L. Rev.* 1067 [critique of surveillance location privilege].





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G. Confidential Records of Licensing Board.

2 *Witkin Cal. Evid. Witnesses* § 269

[§ 269] Confidential Records of Licensing Board.

Administrative agencies which license and regulate business frequently seek and obtain information from persons who rely upon its confidentiality; and if the informant knew that his or her complaints or disclosures could be published and become the basis of a defamation suit the informant might be inhibited and the statutory purpose would be frustrated. The rule is the same as that applied to criminal law enforcement agencies (*supra*, §264 et seq.), and the privilege of nondisclosure exists.

In *Markwell v. Sykes* (1959) 173 C.A.2d 642, 645, 343 P.2d 769, the court, recognizing the privilege, held that it was waived by compliance with an erroneous order of the judge to testify instead of pursuing writ remedies to challenge the order. But this view was repudiated by a 1974 amendment to *Ev.C. 919*: disclosure under an erroneous but unchallenged order no longer waives the privilege. (See *Ev.C. 919(b)*, *supra*, §94; 6 *Pacific L. J.* 434.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### H. Confidential Records of State Bar.

2 *Witkin Cal. Evid. Witnesses* § 270

[§ 270] Confidential Records of State Bar.

In *Chronicle Publishing Co. v. Superior Court* (1960) 54 C.2d 548, 7 C.R. 109, 354 P.2d 637, C, attorney at law, brought a libel suit against defendant newspaper, for publication of an article injuring him in his professional reputation. He alleged that he enjoyed a good reputation and had never been guilty of professional misconduct. Defendant denied these allegations for lack of information or belief. C served interrogatories and requested admissions concerning any facts on which the denial was based. Defendant then sought to take the deposition of the State Bar and its Secretary, on written interrogatories. The latter moved to limit the examination by excluding inquiry into information contained in the confidential files, and by affidavit showed that the public records revealed no discipline against C. The lower court granted the State Bar's motion. *Held*, mandamus issued to compel modification of the limiting order so as to require disclosure of nonprivileged information.

(a) *Official information privilege applies.* The State Bar, its Board of Governors and its Secretary may claim the privilege of communications made in official confidence when the public interest would suffer by disclosure. (54 C.2d 566.)

(b) *What records are privileged.* The State Bar procedure allows any kind of informal complaint to be made. (See 1 Cal. Proc. (4th), Attorneys, §637.) Most turn out to be unfounded, and to allow their disclosure would tend both to discourage persons from making complaints and to expose attorneys to unwarranted injury to reputation. (54 C.2d 567.) Thus, the report of the National Conference of Bar Examiners on C's admission (given on express assurance of confidentiality), and complaints not resulting in Board action, were privileged. Although the Board had discretion to waive the privilege under State Bar Rules of Procedure, it refused to do so. (54 C.2d 570, 571.)

(c) *What records are not privileged.* Any Board action, even though not amounting to a recommendation of suspension or disbarment or other public discipline, is outside the privilege. Hence, defendant newspaper was entitled to know whether C received a *private reproof*, and, if so, upon what information it was based. "A private reproof is an official act of the board, as much as a public reproof. It means either that some charge brought against the member has been determined to be well founded, or that some conduct warranting reproof has been disclosed. ... An attorney who has so conducted himself as to merit a private reproof must expect that in a proper situation the facts upon which the reproof was based may be brought to light. Persons giving the information must realize that, just as when public disciplinary action follows, their information is subject to release, so it is when private disciplinary action is taken." (54 C.2d 574.)

*Brotsky v. State Bar* (1962) 57 C.2d 287, 302, 19 C.R. 153, 368 P.2d 697, is to the same effect.

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XI. PRIVILEGE FOR OFFICIAL INFORMATION

I. Confidential Records of Social Service and General Assistance Programs.

1. Privileged Matters.

2 *Witkin Cal. Evid. Witnesses* § 271

[§ 271] Privileged Matters.

(1) *Social Service Program Information.* Except for disclosure to specified public agencies for certain official purposes, applications and records made or kept by any public officer or agency in connection with the administration of state public social services funded by the federal government "shall be confidential, and shall not be open to examination for any purpose not directly connected with the administration of that program, or any investigation, prosecution, or criminal or civil proceeding" conducted in connection with that administration. Disclosure of the identities of social service recipients is also prohibited. (Welf.C. 10850(a), (b).)

Welf.C. 10850 was enacted to comply with federal prerequisites to funding (*Jonon v. Superior Court* (1979) 93 C.A.3d 683, 694, 155 C.R. 822, *infra*, §272), and the disclosures that it forbids are within the absolute privilege of *Ev.C. 1040(b)(1)* (*supra*, §247). In *Sinacore v. Superior Court* (1978) 81 C.A.3d 223, 146 C.R. 302, defendants in a wrongful death action sought county welfare records relating to decedent, asserting relevancy to the issue of damages. The trial court granted discovery. *Held*, the records were absolutely privileged under Welf.C. 10850. (81 C.A.3d 225.)

(2) *General Assistance Information.* Subject to specified exceptions, counties must maintain the confidentiality of records relating to the provision of general assistance to indigents. (Welf.C. 17006.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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### XI. PRIVILEGE FOR OFFICIAL INFORMATION

#### I. Confidential Records of Social Service and General Assistance Programs.

##### 2. Clarifications and Distinctions.

2 Witkin Cal. Evid. Witnesses § 272

[§ 272] Clarifications and Distinctions.

(1) *Where Arrest Warrant Issued.* A program applicant's or recipient's name, address or physical whereabouts, telephone number, birthdate, Social Security number, and physical description may be disclosed if a warrant has been issued for the applicant's arrest for a felony or misdemeanor. (Welf.C. 10850.3 [social services programs]; Welf.C. 17006.5 [general assistance program].)

(2) *Information Not Kept in Connection With Administration.* In *Jonon v. Superior Court* (1979) 93 C.A.3d 683, 155 C.R. 822, a county social worker refused to testify on deposition concerning her telephone conversation with a decedent whose death from pesticides was the subject of a wrongful death action. *Held*, plaintiffs were entitled to compel her testimony regarding observations of the decedent's physical mannerisms during the phone call. Records made or kept in the administration of social services "include only the agency's files and the information contained in them" and do not include "observations of physical characteristics." (93 C.A.3d 691.) The statement in Welf.C. 10850(b) forbidding disclosure of "any confidential information pertaining to an applicant or recipient" was "intended to prohibit disclosure of only such information as was otherwise made confidential by other provisions of section 10850." (93 C.A.3d 692.)

(3) *Disclosure in Connection With Administration.* In child custody proceedings, disclosure of records of a public social service agency relating to the best interests of the child is directly connected with the administration of the social service and therefore disclosure is not prohibited by Welf.C. 10850. (See *In re Jeannie Q.* (1973) 32 C.A.3d 288, 305, 107 C.R. 646; *In re Lynna B.* (1979) 92 C.A.3d 682, 703, 155 C.R. 256.)

(4) *Elderly or Disabled Clients in Emergency.* "An authorized employee of a county social services department" may disclose the name and residential address of an elderly or disabled client to police, fire, or other emergency services personnel in the event of a public safety emergency necessitating the possible evacuation of the area in which the client lives. "[P]ublic safety emergencies include, but are not limited to, fires, earthquakes, gas leaks, bomb scares, and other natural or human-made occurrences that jeopardize the immediate physical safety of county residents." (Welf.C. 10850.9(a).) The Director of Social Services must seek any federal approval needed for implementation of this provision (Welf.C. 10850.9(b)), and implementation may take place only if the director executes a declaration stating that federal approval has been obtained (Welf.C. 10850.9(c)).

**SUPPLEMENT:** [This section is current through the latest supplement]



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J. Confidentiality of Compulsory Vehicle Accident Reports.

1. Confidential Matters.

2 *Witkin Cal. Evid. Witnesses* § 273

[§ 273] Confidential Matters.

If a vehicle is involved in an accident resulting in personal injury or death, the driver (or the driver's agent, broker, or legal representative) must make a written report about the accident within 24 hours to the California Highway Patrol (CHP), or to the police department if the accident occurred within a city. (*Veh.C. 20008*.) These reports are for the confidential use of the CHP and the Department of Motor Vehicles (DMV) (*Veh.C. 20012, 20014*), and the reports may not be used as evidence in a civil or criminal trial arising out of the accident (*Veh.C. 20013*).

If a vehicle accident has resulted in property damage of \$ 500 or bodily injury or death, a report also must be made to the Sacramento office of the DMV within 10 days (*Veh.C. 16000(a)*), and the report is subject to similar confidentiality requirements (*Veh.C. 16005*). (See generally 8 Wigmore (McNaughton Rev.) §2377; 84 A.L.R.2d 1261 [right to inspect motor vehicle records].)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Veh.C. 16000(a)* was amended in 2002 to raise the amount of property damage that triggers the reporting requirement to \$ 750.



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#### J. Confidentiality of Compulsory Vehicle Accident Reports.

##### 2. Exceptions and Distinctions.

2 Witkin Cal. Evid. Witnesses § 274

[§ 274] Exceptions and Distinctions.

(1) *Statutory Exceptions.* Veh.C. 20012 (supra, §273) requires designated law enforcement agencies to disclose certain matters to interested persons, as follows:

(a) *Matters To Be Disclosed.* The entire contents of the report must be disclosed, including the names and addresses of persons involved or injured in, or witnesses to, the accident; the registration numbers and descriptions of vehicles involved; the date, time, and location of the accident; all diagrams; statements of the drivers involved, or the occupants injured, in the accident; and statements of all witnesses.

(b) *Persons Entitled To Disclosure.* Disclosure must be made "to any person who may have a proper interest therein." This includes the drivers involved in the accident, the guardian or conservator of a driver, the parent of a minor driver, the authorized representative of a driver, any person injured in the accident, the owner of a vehicle or property damaged in the accident, anyone who may incur civil liability due to the accident (including liability based on breach of warranty), and any attorney who declares under penalty of perjury that he or she represents any of these persons.

Veh.C. 16005 (supra, §273) authorizes similar disclosure of accident reports submitted under the Financial Responsibility Law.

(2) *Officer's Right To Testify.* An officer who made a report is not disqualified from *testifying* to facts covered by it. (See *Dwelly v. McReynolds* (1936) 6 C.2d 128, 131, 56 P.2d 1232; *Stroud v. Hansen* (1941) 48 C.A.2d 556, 560, 120 P.2d 102; *Carroll v. Beavers* (1954) 126 C.A.2d 828, 835, 273 P.2d 56; 46 A.L.R.4th 291 [admissibility of officer's testimony relating to motorist's admissions made in or for required accident report].)

(3) *Contents as Past Recollection Recorded.* In *Sherrell v. Kelso* (1981) 116 C.A.3d Supp. 22, 172 C.R. 667, plaintiff sued for damages sustained in an automobile intersection collision. Plaintiff's witness P, a passenger in plaintiff's vehicle, testified that defendant drove through a red light. Defendant then called a police officer whose report of the accident contained a statement of P inconsistent with her testimony. The report itself was inadmissible under Veh.C. 20013, but defendant laid a foundation for the officer to read portions of it as past recorded recollection, and the trial judge permitted him to do so. *Held*, the ruling was proper.

(a) The history of Veh.C. 20012 and 20013 shows that the sections do not now serve the original purpose of confidentiality. Although the prohibition against the report being used "as evidence" remains, the contents of the report are available "to litigants and their attorneys, and from there to insurance adjusters, witnesses, family and friends." (116

*C.A.3d Supp. 30.*) The only viable purpose of the prohibition is that the report, on a printed form with insignia and title indicating "official" character, might be given undue weight by a jury. Thus, the present legislative purpose of *Veh.C. 20013* is only to exclude the document constituting the report, not its contents. (*116 C.A.3d Supp. 31.*)

(b) Use of the report to refresh the officer's recollection has been approved, and the same should be true of use by the officer as past recollection recorded. In addition to the safeguards provided by the foundation requirements of *Ev.C. 1237* (see *3 Cal. Evidence (4th), Presentation at Trial, §182 et seq.*), there is this one: "Under the doctrine of recollection refreshed, the officer is free to wander far astray from the previously recorded facts he deemed relevant at the time of the accident, while his memory was fresh. For instance, the officer could testify--now that his memory is refreshed--that there was, in fact, a confession of guilt by the driver, but he simply failed to write it down due to the press of other emergency matters. The fact that the officer's brain had subconsciously scrambled the facts of two somewhat similar accidents is difficult, if not impossible, to prove upon cross-examination, even by experienced trial counsel. On the other hand, when evidence is admitted under the doctrine of past recollection recorded, the witness is compelled to stick to the facts in the written document, that is, those facts the officer deemed relevant when his memory was fresh." (*116 C.A.3d Supp. 34.*)

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#### J. Confidentiality of Compulsory Vehicle Accident Reports.

##### 3. Reports and Data Generated.

2 *Witkin Cal. Evid. Witnesses* § 275

[§ 275] Reports and Data Generated.

In *Davies v. Superior Court* (1984) 36 C.3d 291, 204 C.R. 154, 682 P.2d 349, plaintiff suffered injuries in a single vehicle tractor-trailer accident on a state highway, and sued the state on the theory that the highway was in a defective and dangerous condition of which the state had notice. He sought discovery, by interrogatories and request for production of documents, of prior accidents at the location and the details concerning them, particularly those in the Department of Transportation's computerized accident data retrieval system (TASAS). The state, claiming privilege under *Veh.C. 20012* and *20014* (*supra*, §273), refused to answer the interrogatories or produce the documents. *Held*, the data were subject to discovery.

(a) *People v. Superior Court (Clark)* (1976) 60 C.A.3d 352, 131 C.R. 476, *Edgar v. Superior Court* (1978) 84 C.A.3d 430, 148 C.R. 687, and *California v. Superior Court (Thompson)* (1980) 102 C.A.3d 25, 162 C.R. 78, held that accident reports are privileged and that TASAS data based on them were not discoverable. (36 C.3d 297, 298.) These cases are wrong and are disapproved. (36 C.3d 300.) Neither *Veh.C. 20012* nor *20013* creates a *privilege* as the term is used in *Ev.C. 911* et seq. *Veh.C. 20012* and *20014* term accident reports "confidential," and *Veh.C. 20013* prevents their introduction as evidence in a trial; but the exclusion from evidence is narrow, applying only to required reports (by a driver, passenger or witness). "Although termed a 'privilege' in some opinions, the confidentiality created by these statutes does not authorize the reporting party to control release of the reports or information contained therein. The State is authorized to disclose the 'entire contents' of the reports to the persons particularly described in section 20012 and to any other person having a 'proper interest' therein. The State, not the reporting party, determines who those persons may be. The statute does not create a privilege in the reporting party to refuse to be a witness or to disclose information about the accident, and it does not create a privilege to preclude discovery by a person having a 'proper interest' in the contents of the report. The express disclosure authorization of section 20012, and the limited exclusion from evidence created by section 20013, suggest that the information contained in accident reports is more accurately characterized as 'confidential' than as 'privileged.'" (36 C.3d 298.)

(b) "Since highway accidents are public occurrences, and are often the object of press reports, it seems unlikely that the legislative purpose was to keep confidential either the fact of the accident or information about its nature and causation. Nor is there any reason to protect the identity of the investigating officer since that information is also readily available from other sources." (36 C.3d 299.)

(c) The TASAS data, diagrams, and other information derived from accident reports can easily be made available without indication of the confidential matters--identity of the reporting parties and identifying information in the reports. And the statute neither states nor requires extension of that confidentiality to data generated from the reports.

Nor does public policy support denial of access to information which may reveal a defective condition of public property: "Discovery of a highway defect, and of the State's potential liability for damages caused thereby, serves the salutary purpose of encouraging remedial measures." (36 C.3d 300.) (See 84 A.L.R.4th 15 [discovery of traffic accident reports and derivative information].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER IX - Witnesses

### XI. PRIVILEGE FOR OFFICIAL INFORMATION

#### J. Confidentiality of Compulsory Vehicle Accident Reports.

##### 4. Discovery by Criminal Defendant.

2 *Witkin Cal. Evid. Witnesses* § 276

[§ 276] Discovery by Criminal Defendant.

In *People v. Ansbros* (1984) 153 C.A.3d 273, 200 C.R. 210, defendant driver was involved in a collision resulting in the death of a passenger in the other vehicle, and was convicted of vehicular manslaughter and driving under the influence of alcohol. He moved for a new trial on the ground of error in failing to determine admissibility of evidence of four other accidents at the same location, to establish the dangerous condition of the road as the cause of the accident. He had sought, by subpoena, to procure a Department of Public Works map and Highway Patrol reports, but was informed that they were privileged under *Ev.C. 1040(b)(1)* (supra, §247) and *Veh.C. 20012* (supra, §273). *Held*, judgment of conviction reversed.

(a) The reports of accidents made by investigating officers are not privileged. The required reports by drivers and passengers under *Veh.C. 20012* are privileged, but the state's claim of unconditional privilege is untenable: due process protects the defendant's right to present relevant exculpatory evidence, and using the state statute to prevent access to such evidence is a denial of due process. (153 C.A.3d 277.)

(b) The trial judge should examine the reports in camera to determine whether the prior accidents were similar; the judge must also segregate the required reports from the unprivileged accident reports of police agencies; and if the evidence is deemed relevant and the state claims privilege, the judge may then be required to instruct under *Ev.C. 1042(a)* (supra, §252). Accordingly, on a finding that the evidence is relevant, the motion for new trial must be granted. (153 C.A.3d 278.)

In *California v. Superior Court (Hall)* (1985) 37 C.3d 847, 210 C.R. 219, 693 P.2d 804, defendant Hall was charged with murder, vehicular manslaughter and drunk driving as a result of an automobile collision. She served a subpoena duces tecum on the Department of Transportation for accident reports of collisions from 1980 to 1983 at the location of the incident. *Held*, she had a "proper interest" under *Veh.C. 20012* (supra, §274), and was entitled to disclosure.

(a) In *Davies v. Superior Court* (1984) 36 C.3d 291, 204 C.R. 154, 682 P.2d 349, supra, §275, the court did not reach the question whether a civil plaintiff, not a party to an accident, may have a "proper interest" in a report of it. Here, however, the interest is asserted by a person charged with crime, and such a person is entitled to the fullest possible discovery of information concerning the case. (37 C.3d 852, 855.) The evidence of other similar accidents may raise a reasonable doubt on the issue of implied malice, or of conscious indifference to the consequences. (37 C.3d 856.) Thus, she is entitled to the reports with the names and other identifying information deleted. (37 C.3d 851, 857.)

(b) She is also entitled to discovery of investigative reports of law enforcement officials, similarly edited to delete identifying information. Although *Veh.C. 20014* (supra, §273) does not contain a disclosure provision, there is no indication of a legislative intent to provide a greater degree of confidentiality than that given by *Veh.C. 20012*. The case law holds that police reports are not confidential (see *People v. Ansbro, supra*), and the Legislature's failure to amend *Veh.C. 20014* when it amended *Veh.C. 20012* to expand disclosure to properly interested persons does not compel a contrary conclusion. (37 C.3d 857, 858.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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CHAPTER IX - Witnesses

XI. PRIVILEGE FOR OFFICIAL INFORMATION

K. Confidentiality of Administrative Proceeding Against Driver's License.

*2 Witkin Cal. Evid. Witnesses § 277*

[§ 277] Confidentiality of Administrative Proceeding Against Driver's License.

Any record of departmental action against a person's privilege to drive, as well as testimony concerning any administrative hearing held in connection with the action, may not be admitted in evidence. However, that information may be used for impeachment purposes, and the exclusion does not apply in prosecutions for driving without a license or for failing to disclose information at that type of hearing. (*Veh.C. 40807.*)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER IX - Witnesses

### XI. PRIVILEGE FOR OFFICIAL INFORMATION

#### L. California Public Records Act.

##### 1. Nature and Purpose of Act.

2 Witkin Cal. Evid. Witnesses § 278

[§ 278] Nature and Purpose of Act.

(1) *Enactment and Purpose of Act.* The California Public Records Act (Govt.C. 6250 et seq.) supersedes former specific code provisions permitting inspection and copying of public records. "In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (Govt.C. 6250; see *Black Panther Party v. Kehoe* (1974) 42 C.A.3d 645, 654, 117 C.R. 106 [act validly balances right to information and right of privacy]; *American Federation of State, County & Mun. Employees v. Regents of Univ. of Calif.* (1978) 80 C.A.3d 913, 914, 146 C.R. 42 [same]; *Connell v. Superior Court* (1997) 56 C.A.4th 601, 611, 65 C.R.2d 738 [use of phrase "every person in this state" in Govt.C. 6250 evinces intent to include both domestic and foreign corporations among those who may enforce Act]; 4 *Golden Gate L. Rev.* 210 [history of act and analysis of its exemptions].)

(2) *FOIA As Interpretative Aid.* The federal Freedom of Information Act (5 U.S.C., §552; infra, §302) may be used to help interpret the Public Records Act. (*Uribe v. Howie* (1971) 19 C.A.3d 194, 212, 96 C.R. 493 [relying on federal "investigatory files" exception to construe Govt.C. 6254(f), infra, §289 et seq.]; *Braun v. Taft* (1984) 154 C.A.3d 332, 342, 201 C.R. 654; *South Coast Newspapers v. Oceanside* (1984) 160 C.A.3d 261, 267, 206 C.R. 527.)

(3) *Not Applicable in Discovery Proceedings.* The Public Records Act does not affect the rights of litigants in judicial or administrative proceedings under the discovery statutes, including the right to discovery in criminal cases. (Govt.C. 6260.) Thus, information is not immune to discovery simply because it is exempted by Govt.C. 6254 (infra, §288 et seq.) from the disclosure requirements. (*Shepherd v. Superior Court* (1976) 17 C.3d 107, 123, 130 C.R. 257, 550 P.2d 161.)

(4) *Purpose of Request Not Basis for Denial of Access.* The purpose for which a public record is requested is not a proper basis for limiting access to it, if the record is otherwise subject to disclosure. (Govt.C. 6257.5.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Enactment and Purpose of Act.* See 22 California Lawyer 42 (July 2002) [requesting documents under Public Records Act]; 53 U.C.L.A. L. Rev. 909 [role of constitutional law and judicial review in mediating demands for public access to information].

(3) *Not Applicable in Discovery Proceedings.* See *Marylander v. Superior Court* (2000) 81 C.A.4th 1119, 1125, 97 C.R.2d 439 [in civil action in which plaintiff moved to compel production of memoranda from state agency to Governor's office, trial judge erred in analyzing motion under Govt.C. 6254(l) (text, §288) and common law deliberative

process privilege (text, §303 et seq.) rather than official information privilege (*Ev.C. 1040(b)(2)*; see text, §247)].

(4) *Purpose of Request Not Basis for Denial of Access.* A plaintiff who has filed suit against a public agency may, either directly or indirectly through a representative, file a request under the Public Records Act for the purpose of obtaining documents for use in the plaintiff's civil action, and the documents must be produced unless one or more of the Act's statutory exemptions apply. (*Los Angeles v. Superior Court (Axelrad)* (2000) 82 C.A.4th 819, 826, 98 C.R.2d 564 [member of law firm was not precluded from seeking records from county sheriff's department, even though records were to be used in action that firm was prosecuting on behalf of former county jail inmates claiming they were overdetained in county jail].)

(5) *(New) Proposition 59.* Proposition 59, approved by the voters in 2004, amended Cal. Const., Art. I, §3. Under the amended section, "[t]he people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny." (Cal. Const., Art. I, §3(b)(1).) "A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access." (Cal. Const., Art. I, §3(b)(2).) *West's Key Number Digest*, Records k.50 et seq.



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### XI. PRIVILEGE FOR OFFICIAL INFORMATION

#### L. California Public Records Act.

#### 2. Scope: Agencies and Officials Covered.

2 Witkin Cal. Evid. Witnesses § 279

[§ 279] Scope: Agencies and Officials Covered.

(1) *State Agencies*. Every state agency is covered by the Act, except those provided for by Cal. Const., Art. IV (the legislative article, excluding §20, the Fish and Game Commission), and Cal. Const., Art. VI (the judicial article). (*Govt.C. 6252(a)*; see *McClatchy Newspapers v. Superior Court* (1988) 44 C.3d 1162, 1183, 245 C.R. 774, 751 P.2d 1329 [grand jury, as judicial entity, is exempt from Act]; *McGuire v. Superior Court* (1993) 12 C.A.4th 1685, 1687, 16 C.R.2d 726 [probation department files are exempt from inspection under *Govt.C. 6252(a)*, but may be examined under P.C. 1203.10 (see 3 Cal. Crim. Law (3d), *Punishment*, §504)]; 27 A.L.R.4th 742 [what constitutes agency subject to application of state freedom of information act].)

For state agencies governed by Cal. Const., Art. IV, an itemized statement of the agency's total expenditures and disbursement is open for inspection. (*Govt.C. 6261.*) Legislative expenses are to be reported under *Govt.C. 9131*, while other legislative records are subject to the reporting procedures of *Govt.C. 9070* et seq. Reports by the Governor are provided for in *Govt.C. 12022* and *12023*.

(2) *Local Agencies*. The Act covers local public entities and private nonprofit entities that are legislative bodies of local agencies (see *Govt.C. 54952(c), (d)*). (*Govt.C. 6252(b).*)

(3) *Persons*. The Act governs every person, natural or artificial. (*Govt.C. 6252(c).*)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *State Agencies*. *Govt.C. 6252(a)*, specifying which state agencies are covered by the Act, was relettered *Govt.C. 6252(f)* in 2004.

In *California State University, Fresno Assn. v. Superior Court* (2001) 90 C.A.4th 810, 108 C.R.2d 870, the issue was whether a university-affiliated nonprofit auxiliary corporation was a "state agency" that could be required to turn over to plaintiff newspaper a list of donors who had obtained licenses to use luxury suites in a new university arena in exchange for their donations. The trial court ordered disclosure, reasoning that the corporation was under the direct control of the university and was required to advance the university's interests in all its activities. *Held*, the order was improper. "In resolving this uncharted territory of legislative intent, we recognize the extent of the CPRA's coverage is a matter to be developed by the courts on a case-by-case basis." (90 C.A.4th 828.) Former *Govt.C. 6252(a)* (now *Govt.C. 6252(f)*) includes "other state body or agency" within the definition of "state agency." Although there is some ambiguity in this term, "we conclude a nongovernmental auxiliary organization is not a 'state agency' for purposes of the CPRA. The words 'state body' and 'state agency' simply do not include a nongovernmental organization." (90 C.A.4th 829.) "We



are fully cognizant of the fact that our conclusion seems to be in direct conflict with the express purposes of the CPRA--'to safeguard the accountability of government to the public.' ... In many ways, the Association can be characterized as a 'state-controlled' corporation that should be subject to the CPRA. ... However, ... [t]he rewriting of a statute is a legislative, rather than a judicial function, a practice in which we will not engage." (90 C.A.4th 830.)

See *Mack v. State Bar* (2001) 92 C.A.4th 957, 962, 112 C.R.2d 341 [because State Bar is constitutional entity that serves as administrative arm of Supreme Court, Public Records Act "apparently" does not apply to it]; *Orange County Employees Assn. v. Superior Court* (2004) 120 C.A.4th 287, 298, 15 C.R.3d 201 [superior court records relating to reimbursement for travel expenses for judges and management employees of court were not subject to disclosure under Act, even though records were prepared by county; contract between court and county provided that records were court property].(2) *Local Agencies*. Govt.C. 6252(b), defining "local agency," was relettered Govt.C. 6252(a) in 2004.



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### XI. PRIVILEGE FOR OFFICIAL INFORMATION

#### L. California Public Records Act.

##### 3. Scope: Records Covered.

##### a. In General.

2 *Witkin Cal. Evid. Witnesses* § 280

[§ 280] In General.

"Public records" include "any *writing* containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." (*Govt.C. 6252(e)*; see *Cook v. Craig* (1976) 55 C.A.3d 773, 781, 127 C.R. 712 [term should receive broad interpretation]; *Vallejos v. California Highway Patrol* (1979) 89 C.A.3d 781, 785, 152 C.R. 846 [same]; 27 A.L.R.4th 680 [what are "records" of agency which must be made available under state freedom of information act]; but see *Oziel v. Superior Court* (1990) 223 C.A.3d 1284, 1292, 273 C.R. 196 [videotape of execution of search warrant was not public record owned by state agency, because it was owned by court, which is not covered by Act; see *supra*, §279].)

For material in the custody of or maintained by the Governor's office, however, "public record" refers to a writing prepared on or after January 6, 1975. (*Govt.C. 6252(e)*.) On leaving office, the Governor must transfer public records in his or her custody or control to the State Archives. The Governor may restrict public access to specified transferred records for (1) up to 25 or 50 years (depending on the type of record), or (2) during the Governor's lifetime, whichever is longer. (*Govt.C. 6268*.)

"Writing" is defined to cover every "means of recording," including tapes, films, magnetic or punched cards, etc. (*Govt.C. 6252(f)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Coronado Police Officers Assn. v. Carroll* (2003) 106 C.A.4th 1001, 1006, 131 C.R.2d 553 [county public defender's database, which included client files, augmented by public information sources, was not public record; its core function, representation of indigent defendants, was not "public's business" within meaning of *Govt.C. 6252(e)*].

*Govt.C. 6252(f)*, as amended in 2002, defines "writing" as "any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile," and any other means of recording on a tangible thing a communication or representation, "including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored."

*Govt.C. 6252(f)* was relettered *Govt.C. 6252(g)* in 2004.



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### XI. PRIVILEGE FOR OFFICIAL INFORMATION

#### L. California Public Records Act.

##### 3. Scope: Records Covered.

##### b. Court Clerk's Rough Minutes.

2 Witkin Cal. Evid. Witnesses § 281

[§ 281] Court Clerk's Rough Minutes.

In *Copley Press v. Superior Court* (1992) 6 C.A.4th 106, 7 C.R.2d 841, petitioner Copley Press brought an action in the superior court naming the court and six sitting judges as respondents. The petition sought an order providing access to the minute books of the clerks, to determine which attorneys appeared before the judges over a period of time in which news stories in the local press dealt with gifts reported by certain judges from certain attorneys. The issue posed for the Court of Appeal was "whether informal notes prepared by the court clerk as a precursor to creation of the formal minutes of the court are public records to which the press may require access." (6 C.A.4th 110.) The presiding judge had ruled that the minute books were not official court records, hence, were not open to public view. *Held*, order reversed, and mandamus granted to compel the presiding judge to rehear petitioner's motion.

(a) *Court records open to inspection.* The Public Records Act contains a specific exclusion for records of state courts (Govt.C. 6252, *supra*, §279); but the fact that there is no specific statutory requirement for access to court documents does not permit exclusion of the public from the records. *Estate of Hearst* (1977) 67 C.A.3d 777, 136 C.R. 821, 12 Summary (9th), *Wills and Probate*, §335, held that, notwithstanding the statutory exception in the Public Records Act, such records are public records open to inspection. (6 C.A.4th 111, 112.)

(b) *Clerk's rough minutes as court records.* Two classes of documents are prepared in the course of a court's work.

(1) "The first class represents documentation which accurately and officially reflects the work of the court, such as its orders and judgments, its scheduling and administration of cases, its assignment of judicial officers and administrators. Included in such documentation, which we will call Category I documents, would be the official court minutes, all its written orders and dispositions, the official reports of oral proceedings, the master calendar. Also included in Category I of court documents would be the various documents filed in or received by the court, such as the pleadings and motions filed by the parties and the evidence admitted in court proceedings. All of these documents represent and reflect the official work of the court, in which the public and press have a justifiable interest." (6 C.A.4th 113.)

(2) "Before a judgment goes out there is usually a draft prepared and then edited. Jury instructions are written and rewritten. Informal notes are prepared by judges to assist them in conducting voir dire. Most judges keep personal notes of the testimony and argument brought to their court. Court reporters keep original notes, which are corrected and amplified before a final reporter's transcript is issued. If we look to the courts of appeal, we will find enormous quantities of initial drafts, memoranda, critical analyses of others' work, and all kinds of preliminary writings. All of this

material, which we will call Category II writings, is created in the course of judicial work and for the purpose of carrying out judicial duties." (6 C.A.4th 114.)

(3) None of the materials in Category II should be subject to public inspection. Their use would often be detrimental to the user, for they are tentative, often wrong, and sometimes misleading. And, their use would in many cases severely hamper the users, for the judge's personal bench notes are constructed so as to remind the judge, in his or her personal fashion and not in a form digestible by the public, of the aspects of the case the judge thought important. (6 C.A.4th 114.)

(4) Certain kinds of documents, such as the clerk's rough minutes, are on the margin of this classification. "They are clearly not official records of the court in the sense that they constitute court action, or can be relied upon as reflecting court proceedings with complete accuracy. On the other hand, they do not partake of the discretionary and incomplete content that characterizes the judge's bench notes or the first drafts of various court documents." (6 C.A.4th 115.) The clerk is obligated to prepare a record of the events of the court's sessions. "This record, including the clerk's rough notes, involves the exercise of no significant discretion on the part of the clerk. ... The clerk's rough minutes are made not only for his benefit but for the use of the court, and very possibly for the benefit of parties and others interested in the litigation." (6 C.A.4th 115.)

"We therefore conclude that the clerk's initial or 'rough' minutes constitute a court record which should be available for public inspection. This written document is kept regularly by all clerks. It reflects ministerial action by the clerk. It is a useful document because it is the one repository of easy access which provides a continuous chronology of each court's daily activities. Further, unlike many of the writings we have described above, which may contain tentative or erroneous information or conclusions the release of which to the press would be detrimental to the judicial process, the clerk's minute book presumptively contains only accurate, descriptive and non-discretionary information." (6 C.A.4th 115.)

(c) *Authority of presiding judge.* The presiding judge, in denying the request for inspection, declared that he had no authority to direct the production of the minute books of other superior court judges. (6 C.A.4th 116.) However, he was the administrative leader of the court, and had general direction and supervision of the attaches of the court. "While the presiding judge may not (as he ruled) have the authority to require release to the press of the clerk's minutes of other departments of the superior court, he surely has the power to make at least a preliminary ruling as to the nature of records and whether they are subject to press inspection. We would assume that most of the judges of the superior court would honor the presiding judge's determination of press access to the clerk's minutes, even though from a strictly technical perspective they might be free to make a contrary determination as to their own court's minutes. We therefore find that the order rendered in this case is presumptively effective, notwithstanding any potential defect it may have, in terms of precluding press access to the clerk's minutes. The order should therefore be reversed." (6 C.A.4th 116.)

Accordingly, the writ of mandamus issued as follows: "The order of the presiding judge in this case is reversed, and he is directed to rehear the motion of petitioner and to make such ruling pertaining thereto as he conceives appropriate, in fulfilling his administrative duties as presiding judge, and in harmony with this decision. No further order or direction, as might pertain to the six named superior court judges, is at this time appropriate." (6 C.A.4th 117.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*Estate of Hearst:*

*Cross-Reference:* 14 Summary (10th), *Wills and Probate*, §349.



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## CHAPTER IX - Witnesses

### XI. PRIVILEGE FOR OFFICIAL INFORMATION

#### L. California Public Records Act.

##### 3. Scope: Records Covered.

##### c. Records of State Board of Equalization.

2 Witkin Cal. Evid. Witnesses § 282

[§ 282] Records of State Board of Equalization.

In *State Bd. of Equalization v. Superior Court* (1992) 10 C.A.4th 1177, 13 C.R.2d 342, Associated Sales Tax Consultants sought to obtain documents showing the State Board of Equalization's practice in interpreting and applying certain sales and use tax regulations. The board denied the request, and Associated petitioned the superior court for declaratory relief and an order to disclose. The superior court granted the petition, and the board sought review in the court of appeal. *Held*, order affirmed.

(a) The records were public records, which would disclose the board's practices in applying its regulations to the cases coming before it. This is a matter of interest to the public: "The revelation of an agency's working law promotes its accountability to the public and the consistent, predictable and nonarbitrary application and enforcement of the law. ... This working law is found in the application of an agency's regulations to cases coming before it and in the opinions of its counsel and audit staff training materials which guide the Board's employees in the performance of their duties. It is in the application of a rule to the facts of a case that its meaning is frequently disclosed." (10 C.A.4th 1186.)

(b) The records are identifiable; the size of the request is not an objection, if the records can be located with reasonable effort. (10 C.A.4th 1186.)

(c) Confidential taxpayer information is segregable; hence the fact that the records may contain some confidential information does not justify withholding the entire document. (10 C.A.4th 1187, citing *American Civil Liberties Union Foundation v. Deukmejian* (1982) 32 C.3d 440, 186 C.R. 235, 651 P.2d 822.) Exemplars of excised records of similar documents the board has disclosed show that it is likely the excision will not destroy the utility of the documents. (10 C.A.4th 1188.)

(d) The burdens of production are not too onerous:

(1) *Govt.C. 6255* (infra, §§295, 296) states that an agency may justify withholding if on the facts the public interest in not making the record public clearly outweighs the public interest served by disclosure. But the burden of showing that a request is too onerous lies with the board. (10 C.A.4th 1188.)

"Here, the public interest in disclosure is substantial, the manifest public interest in the avoidance of secret law and a correlative interest in the disclosure of an agency's working law. On the other side of the equation, the Board overstates the burden of segregating the exempt from the nonexempt material. As noted, the record contains exemplars

of similar documents the Board has disclosed in the past with confidential information excised. They show that the primary deletions were the names of the taxpayers. Unlike in *American Civil Liberties Union Foundation, supra*, segregation here would not impose a burden on the Board to inquire from numerous outside sources whether information contained on the documents is confidential." (10 C.A.4th 1190.)

(2) The board complains of staff inconvenience and expense; but the trial court found that this burden is sufficiently alleviated by retaining outside counsel with expertise to perform the task at the expense of *Associated*. (10 C.A.4th 1190.)

(3) The board discounts the public interest because *Associated* intends to use the material for commercial purposes. But the Public Records Act does not differentiate among those who seek access to public information: "What is material is the *public* interest in disclosure, not the private interest of a requesting party." (10 C.A.4th 1191.)

(e) The board may be required to prepare a list. "We can conceive circumstances in which an indexing requirement could involve the exercise of policy discretion and improperly be used to manufacture novel policy determinations in the guise of seeking existing documents. That is not this case: The listing called for is ministerial; there is no practical distinction whether it is called a list or an index." (10 C.A.4th 1191.) And list preparation correlates with the requirement that records requests reasonably describe identifiable documents. "The identification requirement may not be used by a government agency as a method of withholding records, e.g., by refusing to provide a requesting party with the means by which he may reasonably describe an identifiable document." (10 C.A.4th 1192.)

The Legislature responded to *State Board of Equalization v. Superior Court, supra*, by enacting Govt.C. 15650 et seq., which require the board to adopt regulations that will facilitate maximum public access to the board's public records.

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER IX - Witnesses

### XI. PRIVILEGE FOR OFFICIAL INFORMATION

#### L. California Public Records Act.

##### 3. Scope: Records Covered.

##### d. Miscellaneous Records.

2 Witkin Cal. Evid. Witnesses § 283

[§ 283] Miscellaneous Records.

(1) *Air Pollution Data*. The following air pollution data are expressly designated as public records:

(a) Information disclosing the air pollution that particular equipment will produce, required to be submitted to a state or local agency prior to its sale, operation or use. (*Govt.C. 6254.7(a).*)

(b) Pollution monitoring data. (*Govt.C. 6254.7(b).*)

(c) "Notwithstanding any other provision of law, all air pollution emission data, including those emission data which constitute trade secrets." (*Govt.C. 6254.7(e).*)

However, trade secrets used to calculate emission data are *not* public records. (*Govt.C. 6254.7(d), (e)*; see *Masonite Corp. v. Mendocino Air Quality Management Dist.* (1996) 42 C.A.4th 436, 446, 49 C.R.2d 639 [emission factors are data used to calculate emission data, and therefore they qualify for protection as trade secrets under *Govt.C. 6254.7(e)* and implementing regulations].) Similarly, emission data used to calculate the costs of obtaining emissions offsets are not public records. (*Govt.C. 6254.7(f).*)

(2) *Notices of Housing Code Violations*. Notices that render a dwelling untenable under C.C. 1941.1 (see 4 *Summary* (9th), *Real Property*, §580), and records of action with respect to these notices, are public records. (*Govt.C. 6254.7(c).*)

(3) *Public Employment Contracts*. Employment contracts between a state or local agency and its officials or employees are public records and are not exempt under *Govt.C. 6254* (infra, §288 et seq.) or *Govt.C. 6255* (infra, §§295, 296). (*Govt.C. 6254.8*; see *Braun v. Taft* (1984) 154 C.A.3d 332, 346, 201 C.R. 654.)

(4) *Disciplinary Records of Securities Broker-Dealers*. Information reported to the North American Securities Administrators Association/National Association of Securities Dealers' Central Registration Depository and compiled as disciplinary records that are made available to the Department of Corporations through a computer system are public records. The department may disclose the information upon request under *Corp.C. 25247*. (*Govt.C. 6254.12.*)

(5) *Distinction: Computer Software*. Computer software (defined to include computer mapping systems, computer programs, and computer graphics systems) developed by a state or local agency is *not itself* a public record. However, the statute does not affect the public record status of information merely because it is stored in a computer. (*Govt.C.*

6254.9; Overly on Electronic Evidence in California, §§4.02, 4.04, Appx. D; see 20 *Pacific L. J.* 714.) (On records expressly exempted from the disclosure requirements, see *infra*, §288 et seq.; on records not governed by the exemptions, and therefore subject to disclosure, see *infra*, §298.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Air Pollution Data*. On confidentiality of trade secret information provided to state regarding potentially hazardous chemicals, notwithstanding Govt.C. 6254.7, see *Health & Saf.C. 57020*, added in 2006.

(2) *Notices of Housing Code Violations*.

*Cross-Reference:* 12 *Summary* (10th), *Real Property*, §621.

(3) *Public Employment Contracts*. See *Teamsters Local 856 v. Priceless, LLC* (2003) 112 C.A.4th 1500, 1519, 5 C.R.3d 847 [public employees who are not parties to employment contracts have no contracts to disclose within meaning of Govt.C. 6254.8, and thus, in any Public Records Act disclosure of employment terms relating to them, Govt.C. 6254.8 would not mandate that salary information be linked to individual names]; cf. *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 C.4th 319, 335, 64 C.R.3d 693, 165 P.3d 488, 5 Cal. Crim. Law (3d), *Criminal Trial*, Supp., §§52, 53 ["precedential value of *Priceless* is slight"]; and see *Versaci v. Superior Court* (2005) 127 C.A.4th 805, 817, 26 C.R.3d 92 [community college district was not required to disclose personal performance goals of its former superintendent, even though superintendent's employment contract referred to goal setting; reference to goal setting did not clearly evidence parties' intent to incorporate as yet undetermined goals into contract; distinguishing *Braun v. Taft* (1984) 154 C.A.3d 332, 201 C.R. 654, text, p. 555].





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### XI. PRIVILEGE FOR OFFICIAL INFORMATION

#### L. California Public Records Act.

#### 4. Right To Inspect and Copy.

##### a. In General.

2 Witkin Cal. Evid. Witnesses § 284

[§ 284] In General.

(1) *Regulations and Guidelines for Inspection.* Public records *must* be "open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record, except as hereafter provided." Any reasonably segregable portion of a record must be made available for inspection to anyone requesting the record after deletion of those portions that are exempted from disclosure by law. (*Govt.C. 6253(a).*)

Every public agency *may* adopt regulations stating the procedures for making its records available, and certain specified agencies *must* establish written guidelines for access to records. The guidelines must be posted conspicuously and free copies must be made available on request. (*Govt.C. 6253.4.*)

(2) *Right To Obtain Copies.* When a state or local agency receives a request for a copy of records and the request reasonably describes the records sought, the agency must "make the records promptly available to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable." An exact copy, if requested, must be provided unless it is impracticable to do so. Computer data must be provided in a form to be determined by the agency. These requirements do not apply to public records that are exempted from disclosure by express provisions of law. (*Govt.C. 6253(b)*); see *Govt.C. 6277* [impracticability of state agency providing electronic copy due to Y2K problem]; *Govt.C. 26831* [county clerk may charge reasonable fee for copies of records]; *Rosenthal v. Hansen (1973) 34 C.A.3d 754, 761, 110 C.R. 257* [construing predecessor statute; public agencies may impose reasonable restrictions on general requests for voluminous classes of documents, e.g., requiring specific request for copies of specific documents]; *North County Parents Organization v. Department of Education (1994) 23 C.A.4th 144, 148, 28 C.R.2d 359* [construing predecessor statute; cost of duplication includes cost of running copy machine and "conceivably" also expense of person operating it, but does not include retrieval, inspection, and handling of file from which copy is extracted]; 86 A.L.R.4th 786 [right to receive information in particular medium or format].)

Within 10 days of receiving a request for a copy, the agency must determine whether the request is for "disclosable public records in the possession of the agency" and notify the person making the request of its determination and the supporting reasons. Under specified "unusual circumstances," the time limit may be extended by not more than 14 days. (*Govt.C. 6253(c).*)

An agency may not "obstruct the inspection or copying of public records" and may adopt requirements for itself that allow for faster, more efficient, or greater access than otherwise required. (*Govt.C. 6253(d), (e).*)

(3) *Inspection of Records by Insurers.* Insurers and their agents, while investigating suspected fraud, are entitled to access to all relevant public records required to be open for inspection under *Govt.C. 6250 et seq. (Ins.C. 1871.1.)*

(4) *Sale or Other Furnishing Interfering With Public Access.* An agency may not sell, exchange, furnish, or otherwise provide a public record subject to disclosure under the Act to a private entity in a manner preventing the agency from providing the record directly pursuant to the Act. However, this prohibition does not require an agency to use the State Printer to print public records, and does not prevent the destruction of records pursuant to law. (*Govt.C. 6270(a)*; for limited exception applicable to contracts entered into by one county, see *Govt.C. 6270(b)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Right To Obtain Copies.* If an agency has information constituting an identifiable public record that is not exempt from disclosure, and the information is in an electronic format, the agency must make the information available in an electronic format to anyone requesting it. However, the agency is not required to release an electronic record in the electronic format in which it is held if doing so would jeopardize or compromise the security or integrity of the original record or of any proprietary software in which it is maintained. (*Govt.C. 6253.9*, added in 2000.) *Notification of determination:* *Govt.C. 6253(c)*, as amended in 2001, additionally provides that if the agency determines that the requested records are disclosable, it must state the estimated date and time when the records will be made available.

(2a) *(New) Assistance in Identifying Records.* Where a request for inspection or for a copy is made, the agency must, "in order to assist the member of the public make a focused and effective request that reasonably describes an identifiable record or records," do all of the following, "to the extent reasonable under the circumstances": (a) assist the member of the public in identifying records and information that are responsive to the request or purpose of the request; (b) describe the information technology and physical location in which the records exist; (c) provide suggestions for overcoming any practical basis for denying access. These requirements are deemed to be satisfied if the agency "is unable to identify the requested information after making a reasonable effort to elicit additional clarifying information from the requester that will help identify the record or records." The requirements are in addition to any action required of the agency under *Govt.C. 6253* (text, p. 556), and they do not apply if the agency (a) makes the requested records available under *Govt.C. 6253*; (b) determines that the request should be denied and bases its determination solely on an exemption listed in *Govt.C. 6254* (text, §288); or (c) makes available an index of its records. (*Govt.C. 6253.1*, added in 2001.)

(2b) *(New) Denial in Writing.* Where a request for inspection or copies of public records is made in writing, and a determination is made to deny the request, in whole or in part, the denial must be in writing. (*Govt.C. 6255(b)*, added in 2000.)

(3a) *(New) Inspection by Public Entities and Public Officials.* In *Los Angeles Unified School Dist. v. Superior Court* (2007) 151 C.A.4th 759, 60 C.R.3d 445, a city and its city attorney sought records from a school district relating to a school construction project. The district refused to produce the documents, and the trial judge issued an order compelling it to do so. *Held*, affirmed; both the city and the city attorney had standing to request the records.

(a) Under traditional rules of statutory construction, government entities must be considered "persons" within the meaning of *Govt.C. 6253* unless to so include them would infringe upon sovereign governmental powers. The district is already required to produce records upon payment of a fee, and any additional indirect costs the district may incur in complying with an inspection request from a municipal corporation cannot be considered a significant infringement on its powers. (151 C.A.4th 770.) The ultimate purpose of the Act is to encourage full disclosure and openness in governmental affairs. Thus, one governmental entity should be willing to provide public records to another governmental entity. "Our conclusion that the City is a 'person' entitled to request documents from another governmental entity is the only rational and reasonable interpretation of the statute." (151 C.A.4th 771.)

(b) As to the city attorney, *Govt.C. 6252.5*, by specifying that an elected member or officer of an agency is entitled to access to records of that agency, might be read to limit the city attorney to access to city records. The next sentence of

the statute, however, makes clear that no such limitation was intended: "Nothing in this section shall limit the ability of elected members or officers to access public records permitted by law in the administration of their duties." Further, "natural persons" are persons who may request records (*Govt.C. 6252(c)*), and the city attorney's official position does not extinguish his status as a natural person. (*151 C.A.4th 774.*)



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L. California Public Records Act.

4. Right To Inspect and Copy.

b. Inspection of Hazardous Waste Records.

*2 Witkin Cal. Evid. Witnesses § 285*

[§ 285] Inspection of Hazardous Waste Records.

In response to a finding that the protection of public health and the environment require that the public's access to records "pertaining to hazardous waste management, information, and cleanup" be facilitated (*Health & Saf.C. 25103*), the 1986 Legislature added *Health & Saf.C. 25152.5*.

The statute (1) prohibits the Department of Health Services from limiting the hours during the normal working day or the number of working days during which public records may be inspected; (2) specifies time limits within which nonexempt records must be made available; (3) provides for payment of duplication and mailing costs by the party requesting the records; and (4) requires, in the event a request is denied, a writing specifying the reasons for the denial and disclosing the identity of each person responsible for the decision.

**SUPPLEMENT:** [This section is current through the latest supplement]



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### XI. PRIVILEGE FOR OFFICIAL INFORMATION

#### L. California Public Records Act.

#### 5. Proceedings To Enforce Rights.

##### a. In General.

2 Witkin Cal. Evid. Witnesses § 286

[§ 286] In General.

(1) *Injunctive, Declaratory, or Mandamus Relief.* Any person may institute proceedings for injunctive, declaratory, or mandamus relief to enforce his or her right to inspect or copy a public record or class of public records, and the matter must be expeditiously heard. (Govt.C. 6258; see *Wilder v. Superior Court* (1998) 66 C.A.4th 77, 82, 84, 77 C.R.2d 629, 8 Cal. Proc. (4th), *Extraordinary Writs*, Supp., §122 [woman struck by city operated trolley was entitled to use mandamus procedure to obtain public records relating to operation of trolley, even though she was potential plaintiff against city].) (On in camera examination of record where exemption claimed, see *infra*, §299; on distinguishable situation where governmental agency seeks declaratory relief to prevent disclosure, see *infra*, §287.)

(2) *Costs and Attorneys' Fees.* If the plaintiff prevails in litigation under this statute, the court must award court costs and reasonable attorneys' fees to the plaintiff. The costs and fees must be paid by the *agency* of which the public official is a member or employee, and do not become the official's personal liability. If the court finds that the plaintiff's case is clearly frivolous, it must award court costs and reasonable attorneys' fees to the public agency. (Govt.C. 6259(d); see *Belth v. Garamendi* (1991) 232 C.A.3d 896, 900, 283 C.R. 829 [Govt.C. 6259(d) is mandatory]; *Braun v. Taft* (1984) 154 C.A.3d 332, 348, 349, 201 C.R. 654 [fees properly denied where plaintiff acted for personal reasons rather than as member of public seeking withheld public information].)

A plaintiff prevails, within the meaning of the costs provision, if the action results in the defendant releasing a copy of a previously withheld document; an action results in the release of a previously withheld document if the lawsuit motivates the defendant to produce the document. (*Rogers v. Superior Court* (1993) 19 C.A.4th 469, 482, 23 C.R.2d 412; see *Motorola Communication & Electronics v. Department of General Services* (1997) 55 C.A.4th 1340, 1350, 1351, 64 C.R.2d 477 [plaintiff was not prevailing party entitled to costs and fees in mandamus proceeding, where there was substantial evidence that defendant made timely efforts to comply with plaintiff's request for documents and that litigation was not cause of defendant's ultimate disclosure]; *Fontana Police Dept. v. Villegas-Banuelos* (1999) 74 C.A.4th 1249, 1252, 88 C.R.2d 641 [prevailing party was entitled to fee, even though he had not initiated disclosure proceeding].)

(3) *Petition by District Attorney.* District attorneys may inspect or copy records not exempted by the Act. (Govt.C. 6263 et seq.; on exemptions, see *infra*, §288 et seq.) If a request to inspect or copy is not honored within 10 working days, the district attorney may petition an appropriate court, which may require permission to inspect or copy "unless the public interest or good cause in withholding such records clearly outweighs the public interest in disclosure." (Govt.C. 6264.) Disclosure to a district attorney under the statute "shall effect no change in the status of the records

under any other provision of law." (*Govt.C.* 6265; see *11 Pacific L. J.* 462.)

(4) *Appeal*. On appeal from a trial court's decision under the Act, the reviewing court must conduct an independent review of the trial court's statutory balancing analysis, upholding its factual findings if based on substantial evidence. (*CBS v. Block* (1986) 42 C.3d 646, 651, 230 C.R. 362, 725 P.2d 470, *infra*, §295.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Injunctive, Declaratory, or Mandamus Relief*. Although any person may enforce the California Public Records Act, *Govt.C.* 6258 contemplates a declaratory relief action commenced only by an individual or entity seeking disclosure of public records. The statute provides neither explicit nor implicit authority for one person to enforce another's inspection rights. (*San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist.* (2006) 139 C.A.4th 1356, 1415, 44 C.R.3d 128.)

See 13 A.L.R.6th 721 [recovery of punitive damages in actions under state freedom of information acts].

(2) *Costs and Attorneys' Fees*. See *Los Angeles Times v. Alameda Corridor Trans. Authority* (2001) 88 C.A.4th 1381, 1391, 107 C.R.2d 29 [newspaper was prevailing plaintiff, entitled to attorneys' fees, even though it obtained only one of two documents it sought from transportation authority, where the document was disclosed only because newspaper filed suit]; *San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist.*, *supra*, 139 C.A.4th 1421 [in action by community organization challenging school district's decision to close two schools, plaintiff's request for attorneys' fees under *Govt.C.* 6259 was properly denied; evidence supported trial judge's implied finding that action did not result in release of previously withheld public records].



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#### L. California Public Records Act.

##### 5. Proceedings To Enforce Rights.

##### b. Distinction: No Action by Governmental Entity.

2 Witkin Cal. Evid. Witnesses § 287

[§ 287] Distinction: No Action by Governmental Entity.

"In this appeal we confront the novel question whether a city may maintain an action for declaratory relief to determine its obligation to disclose the contents of a police report in response to a request by a local newspaper for disclosure under the California Public Records Act." (*Santa Rosa v. Press Democrat* (1986) 187 C.A.3d 1315, 1324, 232 C.R. 445.)

(a) The Act (CPRA) authorizes any person to bring an action *to enforce* the right to inspect or copy, but there is no provision for an action by the governmental agency or for any action *to prevent* disclosure. (187 C.A.3d 1320.)

(b) There is no implied right to bring an action on the theory of the federal "reverse Freedom of Information Act (FOIA)" action. The intricate problems of such actions under the FOIA have no relevance to the issue presented here: "The thrust of the reverse FOIA case, like that of the usual FOIA action, is to obtain judicial review of an agency decision. The parties neither cite nor has our independent search disclosed any case in which a court has agreed to undertake the decision making function in the first instance." (187 C.A.3d 1322.)

(c) "We recognize the dilemma in which the City finds itself. If it refuses to disclose the information, it faces the possibility of defending an action by the Press Democrat to enforce the CPRA. If it fails to justify the nondisclosure, it will be liable for court costs and attorney fees. ... Moreover, if voluntary disclosure results in an unwarranted invasion of privacy, it becomes exposed to a potential civil suit for damages. ... But we cannot agree that the solution to such dilemma is to substitute the court as the initial decision making body." (187 C.A.3d 1322.) To subject a person requesting information to a potential civil suit instituted by the government agency for the purpose of testing the legitimacy of the request would be contrary to the purpose of the CPRA, "and would effectively discourage requests for disclosure by a member of the public or representative surrogate." (187 C.A.3d 1323.)

(d) The declaratory relief procedure (*C.C.P. 1060*) is inappropriate. "[T]he City here claims that it is unable to balance the rights of the various parties and reach a decision whether to disclose. Somewhat inconsistently, it also argues that the verified complaint constitutes its 'determination and the reasons' whether to comply as required by section 6256. Yet, nowhere in the complaint or the briefs do we find any suggestion that The Press Democrat either has sought or intends to bring an action to compel disclosure of the information if its request is denied. The absence of such allegations manifests that no live controversy exists suitable for adjudication under *Code of Civil Procedure* section 1060." (187 C.A.3d 1323, referring to former Govt.C. 6256, now Govt.C. 6253; see *supra*, §284.) The fact that it is the agency itself that asks the court to preview its exercise of discretion does not call for a different conclusion: it would

violate the doctrine of separation of powers if the court, in the guise of giving declaratory relief, made pronouncements in a field reserved to legislative or executive discretion. (187 C.A.3d 1324.)

**SUPPLEMENT:** [This section is current through the latest supplement]

In *Filarsky v. Superior Court* (2002) 28 C.4th 419, 121 C.R.2d 844, 49 P.3d 194, an attorney made a request under the California Public Records Act for disclosure of records relating to the city's hiring of a police captain. The city refused to disclose the records, and, before the attorney could initiate a proceeding under the Act, the city filed its own declaratory relief action under C.C.P. 1060. The trial judge determined that the city did not have to disclose the records. The Court of Appeal affirmed and further determined that the city acted properly in seeking declaratory relief. *Held*, reversed. Under these circumstances, Govt.C. 6258 and 6259 (text, §§286, 299) set forth the exclusive procedure for litigating the issue of a public agency's obligations to disclose records to a member of the public, and those provisions do not authorize an agency in possession of the records to seek a judicial determination regarding its disclosure duty. "Permitting a public agency to circumvent the established special statutory procedure by filing an ordinary declaratory relief action against a person who has not yet initiated litigation would eliminate statutory protections and incentives for members of the public in seeking disclosure of public records, require them to defend civil actions they otherwise might not have commenced, and discourage them from requesting records pursuant to the Act, thus frustrating the Legislature's purpose of furthering the fundamental right of every person in this state to have prompt access to information in the possession of public agencies." (28 C.4th 423.)





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#### L. California Public Records Act.

##### 6. Exemptions.

##### a. In General.

2 Witkin Cal. Evid. Witnesses § 288

[§ 288] In General.

*Govt.C. 6254* is the primary exemption statute, and contains an elaborate list of records not subject to the disclosure requirements:

(1) *Preliminary Records*. Preliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business. However, the public interest in withholding these records must clearly outweigh the public interest in disclosing them. (*Govt.C. 6254(a)*; see *Citizens for a Better Environment v. Department of Food & Agriculture* (1985) 171 C.A.3d 704, 714, 217 C.R. 504 [no showing that writings would be customarily destroyed in ordinary course of business, hence no exemption].)

(2) *Records Pertaining to Pending Litigation*. Records pertaining to pending litigation to which the public agency is a party, or to claims made under the Tort Claims Act (*Govt.C. 810* et seq.; see 5 *Summary* (9th), *Torts*, §129 et seq.). The records are exempt until the pending litigation or claim has been finally adjudicated, or has otherwise been settled. (*Govt.C. 6254(b)*; see *California v. Superior Court (Bourne)* (1974) 43 C.A.3d 778, 783, 117 C.R. 726 [exemption "essentially provides public agencies with the protection of the attorney-client privilege, including work-product," during ongoing litigation]; *Los Angeles v. Superior Court (Axelrad)* (1996) 41 C.A.4th 1083, 1087, 49 C.R.2d 35 [pretrial depositions from actions to which city was party were not exempted, because actions had all been concluded]; *Poway Unified School Dist. v. Superior Court* (1998) 62 C.A.4th 1496, 1503, 73 C.R.2d 777 [claim forms filed by plaintiffs in tort action against school district were subject to disclosure; while language of pending litigation exemption is ambiguous, related statute (*Govt.C. 54956.9(b)(3)(C)*) expressly acknowledges availability for inspection of claims forms filed under Tort Claims Act]; *Fairley v. Superior Court* (1998) 66 C.A.4th 1414, 1422, 78 C.R.2d 648 [following *Hemet v. Superior Court* (1995) 37 C.A.4th 1411, 44 C.R.2d 532, 5 Cal. Crim. Law (3d), *Criminal Trial*, §53; where plaintiff filed claim against city for damages stemming from his arrest, trial judge erred in refusing, on basis of pending litigation exemption, to compel city to produce documents relevant to arrest without first determining whether documents were prepared for purpose of litigation]; for similar exemption, see *Govt.C. 6254.25*, *infra*, §297.)

(3) *Personnel and Medical Records*. Personnel, medical, or similar records, where their disclosure would constitute an "unwarranted invasion of personal privacy." (*Govt.C. 6254(c)*; see *American Federation of State, County & Mun. Employees v. Regents of Univ. of Calif.* (1978) 80 C.A.3d 913, 914, 146 C.R. 42; 26 A.L.R.4th 666 [what constitutes personal matters exempt from disclosure by invasion of privacy exemption under state freedom of information act]; but see *Braun v. Taft* (1984) 154 C.A.3d 332, 342, 345, 201 C.R. 654 [disclosure of face sheet of firefighter's salary card not an invasion of privacy and exemption inapplicable]; *Register Div. of Freedom Newspapers v. Orange* (1984) 158

*C.A.3d 893, 902, 205 C.R. 92* [medical records exemption inapplicable where records voluntarily submitted to substantiate personal injury claim]; *New York Times Co. v. Superior Court* (1997) 52 C.A.4th 97, 103, 104, 60 C.R.2d 410 [distinguishing *Hemet v. Superior Court*, *supra*; names of police officers involved in shooting were not exempt, because they could be provided without disclosing any portion of personnel files, and public interest in disclosure outweighed possible opprobrium or embarrassment].)

(4) *Applications to State Agencies That Regulate Securities or Financial Institutions*. Records in connection with an application filed with a state agency that regulates or supervises (a) the issuance of securities or (b) financial institutions, including, but not limited to, banks, savings and loan associations, industrial loan companies, credit unions, and insurance companies. (Govt.C. 6254(d).)

(5) *Utility Systems Development Data or Market or Crop Reports*. "Geological and geophysical data, plant production data and similar information relating to utility systems development, or market or crop reports, which are obtained in confidence from any person." (Govt.C. 6254(e); see *Uribe v. Howie* (1971) 19 C.A.3d 194, 212, 96 C.R. 493 ["crop reports" refer only to reports specifying the nature, extent, type or magnitude of crops being grown; pesticide spray reports are not exempt].)

(6) *Intelligence Information*. Records of intelligence information. (Govt.C. 6254(f); see *infra*, §289 et seq.)

(7) *Examination Information*. "Test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examination," except as provided for in *Educ.C. 99150 et seq.* (Govt.C. 6254(g).)

(8) *Public Contract Information*. Real estate appraisals or engineering or feasibility estimates and evaluations made for or by the state or local agency relative to the acquisition of property, or to prospective public supply and construction contracts. The exemption ends when all of the property has been acquired or when the entire contract agreement has been obtained. "[T]he law of eminent domain shall not be affected by this provision." (Govt.C. 6254(h).)

(9) *Local Tax Collection Information*. Confidential information required from a taxpayer in connection with the collection of local taxes, if disclosure would result in an unfair competitive disadvantage to the taxpayer. (Govt.C. 6254(i).)

(10) *Library Circulation Records*. Library circulation records kept to identify borrowers, and library and museum materials presented solely for reference or exhibition purposes. However, this exemption does not apply to records of fines imposed on borrowers. (Govt.C. 6254(j); see similar exemption under Govt.C. 6267, *infra*, §297.)

(11) *Records Exempted by Federal or State Law*. Records that are exempt from disclosure under federal or state law, including provisions of the Evidence Code relating to privilege. (Govt.C. 6254(k); see *infra*, §294.)

(12) *Governor's Correspondence*. Correspondence by or to the Governor or his or her employees, provided that public records are not transferred to the Governor's custody to evade the Act's disclosure requirements. (Govt.C. 6254(l); see *California First Amendment Coalition v. Superior Court* (1998) 67 C.A.4th 159, 167, 78 C.R.2d 847 [letters and application forms received by Governor's office from applicants for vacant county supervisor's position were exempt].)

(13) *Legislative Counsel Records*. Records in the custody of or maintained by the Legislative Counsel, except those records in the Legislative Counsel's public database that are described in Govt.C. 10248. (Govt.C. 6254(m).)

(14) *Financial Information of Applicants for Licenses*. Personal financial information filed by an applicant to establish his or her personal qualification for a license, certificate, or permit. (Govt.C. 6254(n); see *San Gabriel Tribune v. Superior Court* (1983) 143 C.A.3d 762, 779, 192 C.R. 415 [financial data to justify rate increase submitted by waste disposal company under contract with city involved no "license," and thus was not exempt].)

(15) *Financial Information of Applicants for Pollution Control Financing*. Financial data in applications for pollution control financing under *Health & Saf.C. 44500* et seq., where a California Pollution Control Financing Authority officer determines that disclosure would be competitively injurious to the applicant. (*Govt.C. 6254(o).*)

(16) *Higher Education Employment Records*. Specified records of state agencies relating to state higher education employer-employee relations. (*Govt.C. 6254(p).*)

(17) *Health Care Records*. Specified records of state agencies relating to nursing facilities' rates, county health care systems, and expanded choice of health care plans for Medi-Cal. (*Govt.C. 6254(q).*)

(18) *Records of Sacred Places of Native Americans*. Records of Native American graves, cemeteries, and other sacred places maintained by the Native American Heritage Commission. (*Govt.C. 6254(r).*)

(19) *Hospital Accreditation Reports*. A final accreditation report of the Joint Commission on Accreditation of Hospitals transmitted to the Department of Health Services under *Health & Saf.C. 1282(b)*. (*Govt.C. 6254(s).*)

(20) *Hospital Insurance Records*. Records of a local hospital district or a municipal hospital, formed under *Health & Saf.C. 32000* et seq. or *Govt.C. 37600* et seq., respectively, and relating to a contract with an insurer or nonprofit hospital service plan for inpatient or outpatient services for alternative rates under *Ins.C. 10133* or *11512*. However, the record may be inspected within 1 year after the contract is fully executed. (*Govt.C. 6254(t).*)

(21) *Information in Firearm Licenses or Applications*. Specified information contained in applications for licenses to carry firearms, or in the licenses themselves. (*Govt.C. 6254(u).*)

(22) *Major Risk Medical Insurance Program Records*. Records of the Major Risk Medical Insurance Program related to activities governed by *Ins.C. 12695* et seq. and *12700* et seq., and which reveal the deliberative processes or other portion of negotiations with health plans, or the opinions, recommendations, research, or strategy of the Major Risk Medical Insurance Board or its staff. (*Govt.C. 6254(v)(1).*)

Similarly, program records related to activities governed by *Ins.C. 10700* et seq., and which reveal the deliberative processes or other portion of negotiations with health plans or the opinions, recommendations, research, or strategy of the Major Risk Medical Insurance Board or its staff. (*Govt.C. 6254(w)(1).*)

(23) *Service Contractor Financial Data*. Financial data contained in applications for registration or renewal as a service contractor filed with the Director of the Department of Consumer Affairs under *B. & P.C. 9800* et seq. for the purpose of establishing the contractor's net worth, or financial data regarding the funded accounts held in escrow for service contracts held in force in this state by a service contractor. (*Govt.C. 6254(x).*)

(24) *Managed Risk Medical Insurance Board Records Relating to Healthy Families Program*. Records of the Managed Risk Medical Insurance Board related to activities governed by *Ins.C. 12693* et seq. and that reveal the deliberative processes or any other portion of negotiations with health plans, or the opinions, recommendations, research or strategy of the Managed Risk Medical Insurance Board or its staff. (*Govt.C. 6254(y).*)

(26) *Telephone Numbers of Law Enforcement and Similar Agencies*. Records of telephone numbers of law enforcement, fire protection, public health, and similar agencies specified in *Pub.Util.C. 2891.1(c)(2)*. (*Govt.C. 6254(z).*)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Records Pertaining to Pending Litigation*. See *Board of Trustees of Calif. State University v. Superior Court* (2005) 132 C.A.4th 889, 901, 34 C.R.3d 82 [where university was being sued by two different employees, both of whose claims arose out of audit of university's athletic department, deposition transcripts taken in employees' actions were not covered by *Govt.C. 6254(b)* because they were available to public, absent objection and protective order, under *C.C.P.*

2025.570 (see 2 Cal. Evidence (4th), Discovery, Supp., §78)].

*Cross-Reference:* 5 Summary (10th), Torts, §216 et seq.

(New) *Exemption not duplicative of Govt.C. 6254(k):* A document is protected from disclosure under the pending litigation exemption only if it was specifically prepared for use in litigation. However, Govt.C. 6254(b) is not duplicative of Govt.C. 6254(k) (text, p. 563), through which former C.C.P. 2018 (now C.C.P. 2018.010 et seq.) applies and protects attorney work product; rather, Govt.C. 6254(b) confers on public agencies a broader exemption from disclosure by protecting the work product generated by a public agency in anticipation of litigation. (*Los Angeles v. Superior Court (Axelrad)* (2000) 82 C.A.4th 819, 830, 831, 98 C.R.2d 564 [remand was required after trial judge found pending litigation exemption inapplicable to law firm's request for records from county sheriff's department, where judge's determination suggested that he believed exemption was duplicative of Govt.C. 6254(k)].)

(New) *Application to correspondence between counsel:* Govt.C. 6254(b) "applies to litigation documents, when sought by persons or entities not party to the litigation, which the parties do not intend to be revealed *outside the litigation*. Thus, even though attorneys may exchange correspondence with each other (or the opposing party), if they desire to have such matters remain confidential as to nonparties pending resolution of the litigation, the correspondence is protected from disclosure to third parties." (*Board of Trustees of Calif. State University v. Superior Court, supra*, 132 C.A.4th 900.)

(3) *Personnel and Medical Records.* See *Copley Press v. Superior Court* (2006) 39 C.4th 1272, 1298, 48 C.R.3d 183, 141 P.3d 288, Supp., infra, §294 [rule of nonconfidentiality of officers' identity set forth in *New York Times Co. v. Superior Court* (1997) 52 C.A.4th 97, 60 C.R.2d 410, text, p. 562, is unsupported by statutory language or legislative history]; *Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 C.4th 278, 299, 64 C.R.3d 661, 165 P.3d 462, 5 Cal. Crim. Law (3d), *Criminal Trial*, Supp., §53 [names, employing departments, and hiring and termination dates of California peace officers were not rendered confidential by P.C. 832.7 and 832.8, and under Govt.C. 6254(c) privacy interests of peace officers were outweighed by public interest in disclosure]; *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 C.4th 319, 336, 64 C.R.3d 693, 165 P.3d 488, 5 Cal. Crim. Law (3d), *Criminal Trial*, Supp., §§52, 53 [names and salaries of city employees earning \$ 100,000 or more were not exempt from disclosure; disagreeing with *Teamsters Local 856 v. Priceless, LLC* (2003) 112 C.A.4th 1500, 5 C.R.3d 847, to extent it found that practice of government entities of refusing to disclose salary information could create privacy interest required to be recognized under Act]; *Bakersfield City School Dist. v. Superior Court* (2004) 118 C.A.4th 1041, 1046, 13 C.R.3d 517 [newspaper's request for access to school district employee's disciplinary records was properly granted, where complaint against employee involving sexual misconduct revealed allegations of substantial nature, and there was reasonable cause to believe complaint was well founded]; *Versaci v. Superior Court* (2005) 127 C.A.4th 805, 818, 26 C.R.3d 92 [personal performance goals of community college district's former superintendent were exempt from disclosure]; *BRV v. Superior Court* (2006) 143 C.A.4th 742, 755, 49 C.R.3d 519 [test for determining whether disclosure is required under Govt.C. 6254(c) is same as under Govt.C. 6255 (text, §295): court must determine whether disclosure would compromise substantial privacy interests, and, if so, whether potential harm to privacy interests outweighs public interest in disclosure]; 45 *Santa Clara L. Rev.* 127 [proposing amendment to Public Records Act in harmony with holding in *Teamsters Local 856*].(4) *Applications to State Agencies That Regulate Securities or Financial Institutions.* See 5 A.L.R.6th 327 [construction of exemption of commercial or financial information, exclusive of trade secrets, under state freedom of information acts]; 8 A.L.R.6th 117 [specific applications of exemption of commercial or financial information, exclusive of trade secrets, under state freedom of information acts].(18) *Records of Sacred Places of Native Americans.* As amended in 2005, Govt.C. 6254(r) applies to records of Native American graves, cemeteries, and sacred places, and records of Native American places, features, and objects described in Pub.Res.C. 5097.9 and 5097.993 maintained or possessed by the Native American Heritage Commission, another state agency, or a local agency.(22) *Major Risk Medical Insurance Program Records.* Govt.C. 6254(v)(1) was amended in 2007 to substitute "Managed Risk Medical Insurance Board" for "Major Risk Medical Insurance Program," and to substitute "entities contracting or seeking to contract with the board" for "health plans."

Govt.C. 6254(w)(1) was amended in 2007 to substitute "Managed Risk Medical Insurance Board" for "Major Risk Medical Insurance Board."

(24) *Managed Risk Medical Insurance Board Records Relating to Healthy Families Program.* Govt.C. 6254(y) was amended in 2003 to extend the scope of the exemption to activities governed by *Ins.C. 12699.50* et seq. (County Health Initiative Matching Fund).

Govt.C. 6254(y) was further amended in 2007 to substitute "entities contracting or seeking to contract with the board" for "health plans."

(27) *(New) Assessment Regarding Terrorist Attack.* A document prepared by a local agency assessing the agency's vulnerability to terrorist attack or other criminal acts intended to disrupt the agency's operations, where the document is prepared for distribution or consideration in a closed session. (Govt.C. 6254(aa), added in 2002.)

(28) *(New) Critical Infrastructure Information.* Critical infrastructure information, as defined in 6 U.S.C., §131(3), that is voluntarily submitted to the California Office of Homeland Security for use by that office, including the identity of the person or entity that submitted the information. (Govt.C. 6254(ab), added in 2005 and relettered in 2007.)

(29) *(New) Advance Health Care Directive Registry Information.* Information provided to the Secretary of State in connection with registration in the Advance Health Care Directive Registry, although that information may be released at the request of a health care provider, public guardian, or the registrant's legal representative. (Govt.C. 6254(ac), added in 2004 and relettered in 2007.)



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## CHAPTER IX - Witnesses

## XI. PRIVILEGE FOR OFFICIAL INFORMATION

## L. California Public Records Act.

## 6. Exemptions.

## b. Records of Intelligence Information.

## 1. General Rule of Nondisclosure.

2 *Witkin Cal. Evid. Witnesses* § 289

[§ 289] General Rule of Nondisclosure.

With specified exceptions (see *infra*, §291 et seq.), the following records need not be disclosed: "[C]omplaints to, or investigations conducted by, or records of intelligence information or security procedures of, the office of the Attorney General and the Department of Justice, and any state or local police agency, or any such investigatory or security files compiled by any other state or local police agency, or any such investigatory or security files compiled by any other state or local agency for correctional, law enforcement or licensing purposes." (*Govt.C.* 6254(f); see *Uribe v. Howie* (1971) 19 C.A.3d 194, 212, 96 C.R. 493 [files are "investigatory" and compiled for "correctional" or "law enforcement" purposes only when the prospect of enforcement proceedings is concrete and definite]; *California v. Superior Court (Bourne)* (1974) 43 C.A.3d 778, 783, 117 C.R. 726 [same]; *Black Panther Party v. Kehoe* (1974) 42 C.A.3d 645, 650, 117 C.R. 106 ["any such investigatory" files compiled by nonpolice agencies for correctional, law enforcement or licensing purposes includes records of *complaints* even in the absence of investigation or enforcement]; *Cook v. Craig* (1976) 55 C.A.3d 773, 783, 127 C.R. 712 [records of police agency's *procedures* for investigation pursuant to citizen complaints are not exempt]; *Los Angeles Police Dept. v. Superior Court* (1977) 65 C.A.3d 661, 135 C.R. 575 [records of complaints to, investigations conducted by, or intelligence information of, a local police agency]; *Northern Calif. Police Practices Project v. Craig* (1979) 90 C.A.3d 116, 121, 153 C.R. 173 [records of police agency's security procedures]; *American Civil Liberties Union Foundation v. Deukmejian* (1982) 32 C.3d 440, 450, 186 C.R. 235, 651 P.2d 822 [California Department of Justice index cards and computer printouts relating to organized crime suspects; "the 'intelligence information' exemption bars disclosure of information that might identify individuals mentioned in the [printout or cards], that might identify confidential sources, or that was supplied in confidence by its original source"]; *Register Div. of Freedom Newspapers v. Orange* (1984) 158 C.A.3d 893, 904, 205 C.R. 92 [sheriff's investigation to determine county's civil liability to inmate assaulted in county jailhouse was not for law enforcement purposes, hence, not exempt]; see also *Govt.C.* 6262 [records of complaints or investigations for *licensing* purposes are not exempt from requests for inspection by *district attorney*; 11 *Pacific L. J.* 462].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### L. California Public Records Act.

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##### 2. Clarifications and Distinctions.

2 Witkin Cal. Evid. Witnesses § 290

[§ 290] Clarifications and Distinctions.

The general rule of nondisclosure is not absolute. In *South Coast Newspapers v. Oceanside* (1984) 160 C.A.3d 261, 206 C.R. 527, a newspaper sought disclosure of a city police report of its investigation of a high school principal for allegedly failing to report an incident of child abuse. The city disclosed the information required by Govt.C. 6254(f)(2), but the newspaper contended that it was entitled to the entire report. The trial judge ruled that the general exemption of Govt.C. 6254(f) was applicable and that the report was thus exempt from disclosure regardless of its contents. *Held*, reversed and remanded for an in camera examination.

(a) Govt.C. 6254(f) must be construed in light of the similar provision in the federal Freedom of Information Act (infra, §302), and the amendments thereto, which permit disclosure under specified circumstances. (160 C.A.3d 268.)

(b) Accordingly, the newspaper is entitled to receive a copy of the report if the trial judge, after an in camera examination, makes the following determinations: "(1) [N]o confidential sources will be revealed as a result of the report's release; (2) disclosure will not interfere with enforcement proceedings; (3) no person will be deprived of a fair trial; (4) release of the report will not constitute an unwarranted invasion of personal privacy; (5) secret police investigative techniques or procedures will not be revealed; or (6) the life or physical safety of law enforcement personnel will not be endangered." (160 C.A.3d 265.)

In *Williams v. Superior Court* (1993) 5 C.4th 337, 19 C.R.2d 882, 852 P.2d 377, a newspaper requested access to a county sheriff's records of disciplinary proceedings against two deputies. Despite the sheriff's objection that the records were exempt from disclosure under Govt.C. 6254(f), the trial judge ordered partial disclosure. The Court of Appeal vacated the trial judge's order, directing further review in camera and articulating two limitations on Govt.C. 6254(f) that do not appear on the face of the statute: (1) the exemption was limited by the criteria set forth in the Freedom of Information Act (5 U.S.C., §552), and (2) records remained exempt only as long as they continued to relate to a "pending" investigation. *Held*, the Court of Appeal correctly vacated the trial judge's order but erred in articulating the scope of the exemption.

(a) In drafting Govt.C. 6254(f), the Legislature expressly imposed several precise limitations on the confidentiality of law enforcement investigatory records. It was capable of articulating additional limitations if it intended to do so. Thus, contrary to the holding in *South Coast Newspapers v. Oceanside*, *supra*, the statute should not be interpreted as if it incorporated the FOIA criteria. (5 C.4th 351, 354.)

(b) While there may be policy reasons supporting a time limitation on the exemption, such a limitation cannot be reconciled with the statutory language and its history. "Once an investigation ... has come into being because there is a concrete and definite prospect of enforcement proceedings at that time, materials that relate to the investigation and, thus, properly belong in the file remain exempt subject to the terms of the statute." (5 C.4th 362.) (See 21 *Pepperdine L. Rev.* 979.)

In *Rivero v. Superior Court* (1997) 54 C.A.4th 1048, 63 C.R.2d 213, the court held that the district attorney's files from a closed investigation into the conduct of a public official were exempt from disclosure under Govt.C. 6254(f). The court noted that the suggestion in the *Williams* case that a time limitation on the exemption might be appropriate has not been followed by the *Legislature*. (54 C.A.4th 1059.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Rackauckas v. Superior Court* (2002) 104 C.A.4th 169, 176, 128 C.R.2d 234 [post-investigative closing report by deputy district attorney, containing investigators' opinions, thoughts, and conclusions regarding potential criminal misconduct, was not subject to disclosure; following *Williams v. Superior Court* (1993) 5 C.4th 337, 19 C.R.2d 882, 852 P.2d 377, text, p. 566].





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3. Exceptions.

aa. Specific Information to Specified Persons.

2 *Witkin Cal. Evid. Witnesses* § 291

[§ 291] Specific Information to Specified Persons.

Certain information must be provided, subject to narrower exceptions (see *infra*, §§292, 293), to the following groups: the victims of an incident; their authorized representatives; insurance carriers against which a claim has been or might be made; and any persons suffering bodily injury or property damage as a result of an incident caused by arson, burglary, fire, explosion, larceny, robbery, vehicle theft, vandalism or specified violent crimes. The state and local law enforcement agencies must disclose the following: the names and addresses of the persons involved in the incident and of the witnesses to the incident (other than confidential informants); a description of any property involved; the date, time and location of the incident; all diagrams; and statements by the parties involved and by the witnesses (other than confidential informants). (*Govt.C.* 6254(f); see *Vallejos v. California Highway Patrol* (1979) 89 C.A.3d 781, 785, 152 C.R. 846 [traffic accident reports, disclosable also under *Veh.C.* 20012, *supra*, §274].)

However, nondisclosure is authorized if disclosure would endanger the safety of a witness or other person involved in the investigation or would endanger the successful completion of the investigation or a related investigation. And papers reflecting the investigating officer's analysis or conclusions need not be disclosed. (*Govt.C.* 6254(f).)

**SUPPLEMENT:** [This section is current through the latest supplement]



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##### 3. Exceptions.

##### bb. Specific Information to All Persons.

2 Witkin Cal. Evid. Witnesses § 292

[§ 292] Specific Information to All Persons.

Unless disclosure would endanger a person involved in an investigation or the successful completion of an investigation (*Govt.C. 6254(f)*), state and local law enforcement agencies must disclose specified information that relates to the following:

(1) *Persons Arrested*. The information on persons arrested includes name, occupation, and physical description; time and date of arrest and booking; factual circumstances surrounding the arrest; amount of bail and time and manner of release or location where the individual is being held; and all charges against the individual. (*Govt.C. 6254(f)(1)*.)

(2) *Complaints or Requests for Assistance Received*. In addition to the time, substance and location of all complaints or requests for assistance, and the response thereto, the information disclosed must include, to the extent it is recorded: the time, date, and location of occurrence; the time and date of the report; the name and age of the victim; the factual circumstances surrounding the crime or incident; and a general description of any injuries, property, or weapons involved. (*Govt.C. 6254(f)(2)*; see *South Coast Newspapers v. Oceanside* (1984) 160 C.A.3d 261, 270, 206 C.R. 527 [*Govt.C. 6254(f)(2)* does not require formal, written complaint by citizen to police department; complaint internally generated within police department is sufficient].)

At the request of a victim of certain specified offenses, or at the request of a minor victim's parent or guardian, the victim's name may be withheld. Where a person is the victim of more than one crime, information disclosing that the person is a victim of a specified crime may be also be withheld by request. And, *Govt.C. 6254(f)(2)* is also subject to P.C. 841.5, prohibiting law enforcement officers from disclosing, to arrested persons or those who may be defendants in a criminal action, the address or telephone number of any victim or witness. (*Govt.C. 6254(f)(2)*.)

(3) *Distinction: Disclosure Restricted to Current Information*. In *Los Angeles v. Superior Court (Kusar)* (1993) 18 C.A.4th 588, 22 C.R.2d 409, a legal secretary sought to compel the county under *Govt.C. 6254(f)(1)* and (f)(2) to generate and disclose recorded information regarding every person arrested for certain offenses by two specifically named deputy sheriffs over a 10-year period. The secretary's employer, an attorney, was representing the plaintiff in a civil action arising from the alleged use of excessive force by the two officers, and had already unsuccessfully sought the information in that action. The trial judge granted the disclosure order. *Held*, the broad disclosure required by the order was not authorized by the statute.

(a) The history of the 1982 legislation that amended *Govt.C. 6254(f)* to read as it does now demonstrates a legislative intent "only to continue the common law tradition of contemporaneous disclosure of individualized arrest information in order to prevent secret arrests and to mandate the continued disclosure of customary and basic law enforcement information to the press." (*18 C.A.4th 598.*)

(b) P.C. 832.5, 832.7, and 832.8 and *Ev.C. 1043* et seq. (see 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §51 et seq.) impose restrictions on the disclosure of information from records of citizen complaints against police officers. Those procedures would be nullified if the same information could be obtained as a matter of right through the Public Records Act. Thus, the records to be disclosed under *Govt.C. 6254(f)(1)* and (f)(2) "are limited to current information and records of the matters described in the statute and which pertain to contemporaneous police activity." (*18 C.A.4th 600, 601.*)

**SUPPLEMENT:** [This section is current through the latest supplement]



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##### 3. Exceptions.

#### cc. Specific Information for Specified Purposes.

2 *Witkin Cal. Evid. Witnesses* § 293

[§ 293] Specific Information for Specified Purposes.

Unless disclosure would endanger a person involved in an investigation or the successful completion of an investigation (*Govt.C. 6254(f)*), state and local law enforcement agencies must disclose an arrestee's or victim's current address if the requester declares under penalty of perjury that the request is made for a "scholarly, journalistic, political, or governmental purpose, or that the request is made for investigation purposes by a licensed private investigator." (*Govt.C. 6254(f)(3)*.) The requester must declare under penalty of perjury that address information will not be used directly or indirectly to sell a product or service. (*Govt.C. 6254(f)(3)*; see *Los Angeles Police Dept. v. United Reporting Publishing Co.* (1999) 528 U.S. \_\_\_, 120 S.Ct. 483, 488, 145 L.Ed.2d 451, 458 [private publishing service not faced with prosecution or cutoff of funds could not facially challenge sales limitations of *Govt.C. 6254(f)(3)*, where statute did not abridge commercial speech, but simply regulated access to information held by police as to arrestees' addresses].)

The address of a victim of certain specified crimes must remain confidential. And, *Govt.C. 6254(f)(3)* is also subject to P.C. 841.5, prohibiting law enforcement officers from disclosing, to arrested persons or those who may be defendants in a criminal action, the address or telephone number of any victim or witness. (*Govt.C. 6254(f)(3)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Govt.C. 6254(f)(3)* was amended in 2004 to additionally provide that the statute is not to be construed to prohibit or limit "a scholarly, journalistic, political, or government use of address information obtained pursuant to this paragraph."

*Citation: Los Angeles Police Dept. v. United Reporting Publishing Corp.* (1999) 528 U.S. 32, 120 S.Ct. 483, 145 L.Ed.2d 451.



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##### c. Records Exempted by Federal or State Law.

2 Witkin Cal. Evid. Witnesses § 294

[§ 294] Records Exempted by Federal or State Law.

(1) *In General.* Records not subject to the Act's disclosure requirements include those that are exempt from disclosure under federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege. (*Govt.C. 6254(k)*; see *San Gabriel Tribune v. Superior Court* (1983) 143 C.A.3d 762, 775, 192 C.R. 415 [financial data utilized by city in granting rate increase to waste disposal company was not privileged *official information* under *Ev.C. 1040*, and thus was not prohibited from disclosure by *Govt.C. 6254(k)*]; *CBS v. Block* (1986) 42 C.3d 646, 651, 230 C.R. 362, 725 P.2d 470, *infra*, §295 [rejection of claim of exemption under *Govt.C. 6255*, on ground that public interest favors disclosure, similarly requires rejection of claims of exemption under *Govt.C. 6254(k)* and *Ev.C. 1040*, *supra*, §246 et seq.]; *Hemet v. Superior Court* (1995) 37 C.A.4th 1411, 1420, 44 C.R.2d 532, 5 Cal. Crim. Law (3d), *Criminal Trial*, §53 [incorporation into this exemption of P.C. 832.7, providing for confidentiality and limited disclosure of peace officer personnel records]; *Los Angeles v. Superior Court (Axelrad)* (1996) 41 C.A.4th 1083, 1088, 1089, 49 C.R.2d 35 [rejection of claim of exemption for depositions generated in previous actions to which city was party; although *Govt.C. 6254.5* (see *infra*, §301) states rule of nonwaiver for disclosures made through legal proceedings, that provision is keyed to pending litigation exemption, which lasts only until action is concluded].

In *Roberts v. Palmdale* (1993) 5 C.4th 363, 20 C.R.2d 330, 853 P.2d 496, plaintiff city taxpayer appealed to the city council concerning a parcel map approved by the planning commission. The city attorney prepared a confidential letter concerning the appeal and distributed copies to members of the council. After the council approved the map, the taxpayer demanded a copy of the letter. The council refused, and the trial judge denied the taxpayer's petition for a writ of administrative mandamus. *Held*, disclosure of the letter was not required.

(a) Although *Govt.C. 6254(b)* exempts from disclosure records pertaining to pending litigation, it does not operate to limit the scope of the attorney-client privilege to matters pertaining to pending litigation. (See *supra*, §288.) *Govt.C. 6254(k)* expressly exempts from disclosure matters privileged under the Evidence Code, and this includes the attorney-client privilege. Thus, a public entity may assert the privilege under the Public Records Act without alleging that the writing is relevant to pending litigation under *Govt.C. 6254(b)*. (5 C.4th 373.)

(b) *Govt.C. 54956.9*, part of the Ralph M. Brown Act (see 9 Cal. Proc. (4th), *Administrative Proceedings*, §15 et seq.), governs closed meetings of governing bodies regarding pending litigation and limits the attorney-client privilege for purposes of conducting closed meetings. However, the transmission of a letter to individual members of the governing body is not a meeting. The Brown Act and the Public Records Act "are readily harmonized if we adopt the usual meaning of the words 'meeting' and 'session': the attorney-client privilege applies to meetings with counsel only as

provided by the Brown Act, while the attorney-client privilege is a rule of general applicability in the case of public records." (5 C.4th 379.) Because the Public Records Act did not require disclosure, and the Brown Act was inapplicable, the city council properly withheld the letter. (5 C.4th 381.) (See 22 *Pepperdine L. Rev.* 328; 25 *Southwestern U. L. Rev.* 265, 285.)

(2) *Statutory List of Exemptions.* The 1998 Legislature enacted *Govt.C.* 6275 et seq. "to assist members of the public and state and local agencies in identifying exemptions to the California Public Records Act. It is the intent of the Legislature that, after January 1, 1999, each addition or amendment to a statute that exempts any information contained in a public record from disclosure pursuant to subdivision (k) of Section 6254 shall be listed and described in this article." (*Govt.C.* 6275.) The extensive statutory list is contained in *Govt.C.* 6276.02 et seq.

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General.* See *State Farm Mut. Auto. Ins. Co. v. Garamendi* (2004) 32 C.4th 1029, 1047, 12 C.R.3d 343, 88 P.3d 71 [*Ins.C.* 1861.07, making community service statement submitted by insurer to insurance commissioner available for public inspection, does not incorporate exemption to disclosure created by *Govt.C.* 6254(k), and thus trade secret information included in statement is not exempt from disclosure].

In *Copley Press v. Superior Court* (2006) 39 C.4th 1272, 48 C.R.3d 183, 141 P.3d 288, plaintiff newspaper publisher sought disclosure of documents relating to a peace officer's administrative appeal of a disciplinary matter. When the county civil service commission denied the request, plaintiff filed a petition for writ of mandamus and a complaint for declaratory and injunctive relief. The trial court found in favor of the commission, but the Court of Appeal ordered release of the requested information, with some redactions. *Held*, judgment of the Court of Appeal reversed.

(a) *Govt.C.* 6254(k) creates an exemption for records that are otherwise protected from disclosure by state or federal law. P.C. 832.7 is one such law, providing that peace officer or custodial officer records "are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery" under *Ev.C.* 1043, 1046. The Court of Appeal relied on *Bradshaw v. Los Angeles* (1990) 221 C.A.3d 908, 270 C.R. 711, 5 Cal. Crim. Law (3d), *Criminal Trial*, §53, which held that P.C. 832.7 applies only to criminal and civil proceedings. *Bradshaw*, however, interpreted the statutory language incorrectly. P.C. 832.7 sets forth a general rule of confidentiality, and then creates a limited exception for criminal and civil proceedings. (39 C.4th 1284, 1285.)

(b) The Court of Appeal also found the protections of P.C. 832.7 inapplicable because the commission records sought by plaintiff are not those of the officer's "employing agency" within the meaning of P.C. 832.8. It is true that the officer in question is not employed by the commission, but for the purpose of these statutes, the commission should be regarded as an arm of the employing agency and its records should be regarded as constituting a file maintained by the employer. (39 C.4th 1288.)

(c) The Court of Appeal specifically addressed the disclosure of the officer's identity, finding that it did not qualify for the confidentiality created by P.C. 832.7. *New York Times Co. v. Superior Court* (1997) 52 C.A.4th 97, 60 C.R.2d 410, did declare a broad rule of nonconfidentiality in this regard, but that rule is unsupported by either the statute's language or its legislative history. (39 C.4th 1298.)

(d) Finally, neither the common law nor constitutional principles support plaintiff's position. Any common law rule of disclosure has been displaced by a specific statute (P.C. 832.7). As to the constitutional arguments, Cal. Const., Art. I, §3(b)(3), specifically provides that the public's right of access does not trump the right of privacy as to "discovery or disclosure of information concerning the official performance or professional qualifications of a peace officer." (39 C.4th 1300.) Further, United States Supreme Court precedent confirms that there is no constitutional right to have access to particular government information. (39 C.4th 1302.) (3) *(New) Termination of State Archives Exemption.* Any provision of law that exempts an item in the State Archives from public disclosure ceases to apply to that item 75 years after the item was created, "irrespective of the origin of the item, the manner in which it was deposited with the State

Archives, or any other condition or circumstance at the time the item was deposited." (*Govt.C. 12237*, added in 2004.)



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## CHAPTER IX - Witnesses

### XI. PRIVILEGE FOR OFFICIAL INFORMATION

#### L. California Public Records Act.

##### 6. Exemptions.

##### d. Public Interest Exemption.

##### 1. In General.

2 Witkin Cal. Evid. Witnesses § 295

[§ 295] In General.

(1) *Statement of Exemption.* An agency unable to establish a specific exemption under *Govt.C. 6254 et seq.* (see *supra*, §288 *et seq.* and *infra*, §297) may nevertheless justify its withholding of the record by demonstrating that "on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record." (*Govt.C. 6255*; see *Govt.C. 6254.8*, *supra*, §283 [public interest exemption does not apply to public employment contracts].)

In *San Jose v. Superior Court (San Jose Mercury News)* (1999) 74 C.A.4th 1008, 88 C.R.2d 552, the public interest exemption applied. A newspaper initiated writ proceedings under the Public Records Act seeking to compel a city to disclose the names, addresses, and telephone numbers of persons who had made complaints to the city about municipal airport noise. The trial judge ordered the city to disclose the information. *Held*, the order was erroneous; applying the *Govt.C. 6255* balancing test, the public interest in the nondisclosure of the complainant's personal information clearly outweighed the public interest in disclosure.

(a) The complainants had a significant privacy interest in their names, addresses, and telephone numbers as well as in the fact that they had made a complaint to their government, and disclosure of this information would have had a chilling effect on future complaints. (74 C.A.4th 1023.)

(b) In contrast, the public interest in disclosure of personal information about airport noise complainants was minimal, because the city made available all the information it had concerning the complaints, except for the names, addresses, and telephone numbers of the complainants. (74 C.A.4th 1024.)

(c) The newspaper also had alternative means of contacting and interviewing the complainants. (74 C.A.4th 1024.)

Other cases have upheld the exemption and prohibited disclosure. (See *Johnson v. Winter* (1982) 127 C.A.3d 435, 439, 179 C.R. 585 [investigation file on applicant for special deputy status; trial judge was correct in prohibiting disclosure of matters given under explicit or implicit assurances of confidentiality, but incorrect in ruling that entire file was privileged]; *Eskaton Monterey Hosp. v. Myers* (1982) 134 C.A.3d 788, 791, 184 C.R. 840 [Medi-Cal audit manual for health care providers, which contains the Department of Health Services' strategy for audits, constitutes law enforcement, rather than administrative, materials and is exempt from disclosure].)



(2) *Exemption Not Applicable*. In *CBS v. Block* (1986) 42 C.3d 646, 230 C.R. 362, 725 P.2d 470, plaintiff CBS sought to inspect and copy applications for authorization to carry a concealed weapon submitted to defendant, County Sheriff of Los Angeles, and licenses issued by him pursuant to P.C. 12050 et seq. Defendant refused to release the records, CBS brought suit, and, after a hearing and an in camera review of the records, the trial judge ordered disclosure of most of the 35 then-existing licenses, with the licensee's home address deleted, but denied access to the applications. *Held*, reversed.

(a) Defendant's concern that release of the information would increase the licensees' vulnerability to attack is "conjectural at best." "A mere assertion of possible endangerment does not 'clearly outweigh' the public interest in access to these records." (42 C.3d 652.)

(b) Any information on the applications or licenses that indicate time and places when the licensee is vulnerable to attack may be deleted pursuant to former Govt.C. 6257 (now Govt.C. 6253), but the fact that some parts of a document may come within the public interest exemption does not justify withholding the entire document. (42 C.3d 652, 653.)

(c) The inchoate fear that some persons will violate the law rather than submit applications that will be disclosed is an insufficient reason to limit the people's right to know. (42 C.3d 653.)

(d) Disclosure of the information will not violate the licensees' constitutional right of privacy. The information sought was voluntarily given to the sheriff, and its disclosure would not inflict an immediate social stigma. It is doubtful that a licensee's desire for anonymity would outweigh the "fundamental and necessary" right of the public to examine the bases upon which such licenses are issued; but, if certain information supplied by individual applicants entails a substantial privacy interest, that information may be deleted. (42 C.3d 655.)

(e) The public interest in disclosure is particularly strong because the sheriff's discretion under the statute is unfettered, and, if the information sought is not disclosed, there is no method by which the people can judge whether the law is being applied fairly and impartially. (42 C.3d 655.)

(f) Further, legislative history undermines the licensees' claimed expectation of privacy. From 1957 to 1968, the licenses were open to public inspection pursuant to P.C. 12053, which was then amended to ensure that the records were subject to the newly enacted Public Records Act. Although it did so for many other type of records, the Legislature did not create an exemption, express or implied, for concealed weapons licenses. (42 C.3d 655.) (See *Los Angeles v. Superior Court (Axelrad)* (1996) 41 C.A.4th 1083, 1090, 1091, 49 C.R.2d 35 [depositions in no longer pending actions against city for excessive force in use of police dogs were properly ordered disclosed, as disclosure could either force city to change policy to comport with law or reassure public that current policy was lawful]; citing *CBS* case.)

Other cases are to the same effect. (See *Black Panther Party v. Kehoe* (1974) 42 C.A.3d 645, 657, 117 C.R. 106, *infra*, §300 [public interest in disclosure of practice of voluntary compliance by collection agencies does not outweigh public interest in encouraging complaints by provisional assurances of confidentiality]; *American Federation of State, County & Mun. Employees v. Regents of Univ. of Calif.* (1978) 80 C.A.3d 913, 914, 146 C.R. 42 [reversing order denying disclosure after balancing interests simultaneously under Govt.C. 6254(c), *supra*, §288, and public interest exemption of Govt.C. 6255]; *San Gabriel Tribune v. Superior Court* (1983) 143 C.A.3d 762, 780, 192 C.R. 415 [financial data to justify rate increase submitted by waste disposal company under its contract with city; public's need to know of contracts regulating services outweighed interests of both city (interest in not chilling information-gathering ability) and company (interest in protecting competitive advantage)]; *Braun v. Taft* (1984) 154 C.A.3d 332, 346, 201 C.R. 654 [disclosure of face sheet of firefighter's salary card not within exemption]; *Register Div. of Freedom Newspapers v. Orange* (1984) 158 C.A.3d 893, 908, 205 C.R. 92 [documents relating to county's settlement procedure in tort claims case not within exemption]; *Connell v. Superior Court* (1997) 56 C.A.4th 601, 612, 65 C.R.2d 738 [public interest in disclosure of warrants issued by State Controller to state vendors that were unpaid outweighed public interest in nondisclosure; security concerns were largely speculative, burden on Controller's office was not undue, and there was strong public interest in verifying that public revenues were managed properly]; *Poway Unified School Dist. v. Superior*

*Court* (1998) 62 C.A.4th 1496, 1505, 1506, 73 C.R.2d 777 [where students filed government tort claims against school district arising out of brutal hazing incident involving sodomy, public interest in disclosure of claims forms outweighed interest served by withholding them from newspaper; one who files tort claim has no reasonable expectation of privacy in it, and newspaper had policy of protecting identity of sex crime victims and juvenile offenders].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Statement of Exemption.* The portion of *Govt.C.* 6255 quoted in the text was amended in 2000 to read: "on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record."

See *Michaelis, Montanari & Johnson v. Superior Court* (2006) 38 C.4th 1065, 1073, 1074, 44 C.R.3d 663, 136 P.3d 194 [proposals submitted in response to city's request for proposals for lease of land at airport were not subject to disclosure under *Govt.C.* 6255 during negotiation process; disclosure after completion of negotiations and before approval of award would give public and interested parties opportunity to scrutinize and protest proposed award, whereas earlier disclosure might impair negotiation and selection process]; *Coronado Police Officers Assn. v. Carroll* (2003) 106 C.A.4th 1001, 1012, 131 C.R.2d 553 [even if county public defender's database, which included client files, augmented by public information sources, could be considered public record, public interest in allowing access to database was outweighed by public interest in preventing undermining of defender's ability to represent clients].(2) *Exemption Not Applicable.* See *California State University, Fresno Assn. v. Superior Court* (2001) 90 C.A.4th 810, 833, 108 C.R.2d 870, Supp., supra, §279 [trial judge properly ordered state university to disclose list of donors who obtained licenses to use luxury suites in new university arena in exchange for their donations; public's interest in determining whether purchase price for suites was fair and reasonable return on its contribution to project outweighed public interest in keeping donor identities private]; *CBS Broadcasting v. Superior Court* (2001) 91 C.A.4th 892, 908, 110 C.R.2d 889 [public interest in disclosure of identity of every individual granted criminal conviction exemption to work in licensed child day-care facility and identity of each facility employing those individuals outweighed public interest in nondisclosure]; *BRV v. Superior Court* (2006) 143 C.A.4th 742, 759, 49 C.R.3d 519 [where school district investigated superintendent for possible misconduct, prepared report, and then reached agreement providing for him to resign in exchange for payment and confidentiality, plaintiff publisher was entitled to disclosure of report, subject to certain redactions; public's interest in knowing why superintendent was exonerated and how district treated accusations outweighed superintendent's interest in keeping allegations confidential].



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## CHAPTER IX - Witnesses

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#### L. California Public Records Act.

##### 6. Exemptions.

##### d. Public Interest Exemption.

#### 2. Executive or Deliberative Process Privilege.

2 Witkin Cal. Evid. Witnesses § 296

[§ 296] Executive or Deliberative Process Privilege.

In *Times Mirror Co. v. Superior Court* (1991) 53 C.3d 1325, 283 C.R. 893, 813 P.2d 240, a newspaper brought suit to obtain disclosure of the Governor's appointment schedules and calendars for the previous 5 years. The trial judge refused to permit disclosure. The Court of Appeal reversed and remanded for an in camera review by the trial judge, in order to segregate information in the records posing a legitimate security risk before disclosure. *Held*, judgment of the Court of Appeal reversed.

(a) The Court of Appeal correctly found that the Governor's appointment records were not exempt from disclosure under *Govt.C. 6254(l)*, protecting "correspondence" to and from the Governor's office (see *supra*, §288). The correspondence exemption is confined to communications by letter. (53 C.3d 1337.) However, the records sought by plaintiff were protected from disclosure by the public interest exemption of *Govt.C. 6255* (see *supra*, §295). (53 C.3d 1347.)

(b) The "deliberative process" or "executive" privilege, which has been explored at length in federal case law, supported the public interest in nondisclosure. "Disclosing the identity of persons with whom the Governor has met and consulted is the functional equivalent of revealing the substance or direction of the Governor's judgment and mental processes; such information would indicate which interests or individuals he deemed to be of significance with respect to critical issues of the moment. The intrusion into the deliberative process is patent." (53 C.3d 1343.) Further, compelled disclosure might discourage some from meeting with the Governor, devaluing or eliminating their viewpoints from consideration. (53 C.3d 1344.)

(c) The public interest of a democratic society in knowing how the Governor performs his or her duties was "clearly outweighed" by the public interest in nondisclosure of the appointment records. "The deliberative process privilege is grounded in the unromantic reality of politics; it rests on the understanding that if the public and the Governor were entitled to precisely the same information, neither would likely receive it. ... To disclose every private meeting or association of the Governor and expect the decision making process to function effectively is to deny human nature and contrary to common sense and experience." (53 C.3d 1345.)

(d) The trial judge's denial of the requested disclosure was further justified by the potential threat to the Governor's physical security. There was evidence that "an individual intent on doing harm to the Governor might be able to reconstruct the Governor's daily habits and patterns using outdated schedules." (53 C.3d 1347.)

More recent cases have followed the *Times Mirror* rule. (See *Rogers v. Superior Court* (1993) 19 C.A.4th 469, 479, 23 C.R.2d 412 [telephone numbers of persons with whom city council members spoke were exempt from disclosure under deliberative process privilege, as they would reveal "judgment and mental processes" of members]; *Wilson v. Superior Court* (1996) 51 C.A.4th 1136, 1143, 59 C.R.2d 537 [applications submitted to Governor for position on county board of supervisors were predecisional documents coming within deliberative process privilege; application forms solicited personal information, which would not be supplied if confidentiality were not respected]; *California First Amendment Coalition v. Superior Court* (1998) 67 C.A.4th 159, 169, 78 C.R.2d 847 [following *Wilson*]; and see 19 *Pepperdine L. Rev.* 736 [discussing *Times Mirror*].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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##### 6. Exemptions.

##### e. Miscellaneous Exemptions.

2 *Witkin Cal. Evid. Witnesses* § 297

[§ 297] Miscellaneous Exemptions.

Various other statutes provide disclosure exemptions for particular records. The following are the principal ones:

- (1) The address of the victim of domestic violence. (*Govt.C. 6205 et seq.*)
- (2) Information about persons paid by the state to provide in-home supportive services under *Welf.C. 12300 et seq.* or personal care services under *Welf.C. 14132.95*. However, the names, addresses, and telephone numbers of these persons may be disclosed to labor organizations or officials seeking to represent them. (*Govt.C. 6253.2.*)
- (3) Addresses contained in Department of Housing and Community Development or Department of Motor Vehicles records, or the results of motor vehicle operation competency tests. (*Govt.C. 6254.1.*)
- (4) Memoranda submitted to a state body or a local agency by legal counsel until pending litigation has been finally adjudicated or settled. (*Govt.C. 6254.25*; see similar *Govt.C. 6254(b)*, *supra*, §288.)
- (5) Home addresses and telephone numbers of state and local public school employees. (*Govt.C. 6254.3.*)
- (6) *Voter information.* (*Govt.C. 6254.4*; see also *Elec.C. 2166, 2166.5*, allowing registrants under certain circumstances to have residence address and telephone number declared confidential.)
- (7) The identity of private employers contained in private industry wage data provided by the federal Bureau of Labor Statistics. (*Govt.C. 6254.6.*)
- (8) State archeological site information. (*Govt.C. 6254.10.*)
- (9) Records of volatile organic compounds or chemical substances received or compiled by an air pollution control officer. (*Govt.C. 6254.11.*)
- (10) Records of private companies relating to retention, location, relocation, or expansion within California. (*Govt.C. 6254.15.*)
- (11) Utility companies' customer records, including customers' names, credit histories, usage data, home addresses, and telephone numbers. (*Govt.C. 6254.16.*)

(12) Internet personal user information electronically collected, received, or compiled (see *Govt.C. 11015.5*) by a state agency. (*Govt.C. 6254.20.*)

(13) The home address or telephone number of an elected or appointed official for purposes of the internet. (*Govt.C. 6254.21.*)

(14) Registration and circulation records of publicly supported libraries. (*Govt.C. 6267*; see similar *Govt.C. 6254(j)*, *supra*, §288.)

However, inspection is allowed as follows: (a) by a person acting within the scope of his or her duties within the administration of the library; (b) by a person receiving written authorization from the one to whom the records pertain; or (c) by superior court order. However, reports of registration and circulation and records of fines collected may not be disclosed. (*Govt.C. 6267.*)

(15) *A criminal defendant's Social Security number.* (*Govt.C. 68107.*)

(16) Hospital and medical facility records relating to health care services payment rates. (*Health & Saf.C. 1457(c).*)

(17) Witness information relating to participants in Witness Protection Program (*P.C. 14020 et seq.*). (*P.C. 14029.*)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Address of domestic violence victim:* *Govt.C. 6205 et seq.* were amended in 2000 to apply to victims of stalking as well as victims of domestic violence, and to apply to names as well as addresses. The statutes were further amended in 2006 to apply to sexual assault victims as well. (5) *Home addresses and telephone numbers of state and local public school employees:* See *Lorig v. Medical Bd. (2000) 78 C.A.4th 462, 467, 468, 92 C.R.2d 862* [medical board's policy of requiring website posting of physicians' addresses of record did not violate *Govt.C. 6254.3*; those physicians who were state employees, did not have business offices, and listed their home addresses with board had option of maintaining post office box].

(6) *Voter information:* *Govt.C. 6254.4* and *Elec.C. 2166, 2166.5* were amended in 2000 to additionally provide for confidentiality of electronic mail addresses. *Govt.C. 6254.4*, as amended in 1996 and 2003, also protects any "unique identifier" used by the state for purposes of voter identification, such as driver's license and Social Security numbers. *Govt.C. 6254.4* was further amended in 2005 to make confidential the voter's signature as shown on the voter registration card.

(11a) *(New) Reproductive health services facility information regarding employees, officers, volunteers, owners, and contractors.* (*Govt.C. 6254.18*, added in 2004.) (See 36 *McGeorge L. Rev.* 797.)

(13a) *(New) Alternative investment records of public investment funds.* (*Govt.C. 6254.26*, added in 2005.)

(15a) *(New) Social Security numbers contained in official records.* *Govt.C. 27300 et seq.*, added in 2007, require county recorders to prepare "public record" versions of "official records." A public record is an electronic-format version of an official record, except that any Social Security number contained in the record is truncated. (*Govt.C. 27300(b).*) The public record version is the one that is released in response to a request for inspection. (*Govt.C. 27303.*) (See also *Govt.C. 6254.27, 6254.28*, added in 2007 [Public Records Act does not require disclosure of official record if public record is available]; *U.C.C. 9526.5*, added in 2007 [creation of "public filing" version of "official filing"].)

(18) *(New) Fishing and hunting licensees' names and addresses.* (*Fish & Game C. 1050.6*, added in 2001.)

(19) *(New) Residential addresses of reproductive health care service providers, employees, volunteers, and patients.* (*Govt.C. 6215 et seq.*, added in 2002.)

(20) *(New) Indian tribal records received by state in connection with sale of tribal-state compact assets or issuance of bonds. (Govt.C. 63048.63(b), added in 2004.)*



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f. Records Not Covered by Exemptions.

2 *Witkin Cal. Evid. Witnesses* § 298

[§ 298] Records Not Covered by Exemptions.

The disclosure exemptions contained in *Govt.C. 6254* et seq. (see *supra*, §288 et seq.) do *not* apply to the following information:

(1) Pesticide safety and efficacy information. (*Govt.C. 6254.2.*)

(2) Air pollution data, housing code violations, and trade secrets. (*Govt.C. 6254, 6254.7*; see *supra*, §283.)

(3) Public employment contracts. (*Govt.C. 6254.8*; see *supra*, §283.)

(4) The release of questions or materials used by the State Department of Education in statewide testing of public school students. (*Govt.C. 6254, 6254.13.*)

(5) Disclosure in proceedings outside the Public Records Act. (*Shepherd v. Superior Court* (1976) 17 C.3d 107, 125, 130 C.R. 257, 550 P.2d 161.)

(6) Parts of a reasonably segregable record that are not exempt from disclosure. (*Northern Calif. Police Practices Project v. Craig* (1979) 90 C.A.3d 116, 123, 153 C.R. 173.) (For other information deemed to be a "public record" subject to disclosure, see *supra*, §280 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]





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#### L. California Public Records Act.

##### 7. In Camera Examination.

2 Witkin Cal. Evid. Witnesses § 299

[§ 299] In Camera Examination.

(1) *Hearing*. If permitted by *Ev.C. 915(b)* (disclosure of privileged information to judge; see *supra*, §88), a court must rule on an exemption claimed by the agency (see *supra*, §288 et seq.) after examining the record in camera, papers filed by the parties, "and such oral argument and additional evidence as the court may allow." (*Govt.C. 6259(a)*.)

Since the in camera proceeding specified by *Ev.C. 915(b)* is permissive, an in camera examination of records under *Govt.C. 6259* is discretionary. (See *Johnson v. Winter* (1982) 127 C.A.3d 435, 440, 179 C.R. 585 [in camera proceeding was required to determine whether employment application record contained nonexempt material]; *Register Div. of Freedom Newspapers v. Orange* (1984) 158 C.A.3d 893, 901, 205 C.R. 92 [with exception of sheriff's crime report and rough notes of risk management staff, documents relating to settlement between county and jailhouse inmate injured in jailhouse assault (medical records, investigation report, etc.) were properly ordered disclosed without in camera examination]; *South Coast Newspapers v. Oceanside* (1984) 160 C.A.3d 261, 270, 206 C.R. 527, *supra*, §290 [remanded for in camera examination of police report even though investigating officer's testimony strongly suggested that conditions for disclosure were satisfied].)

(2) *Order*. If the official's refusal to disclose is not justified, the judge must order the official to make the record public. However, if the refusal is justified, the judge must enter an order supporting the official's decision and return the record to the official without disclosing its content. (*Govt.C. 6259(b)*.) A person who fails to obey an order may be cited for contempt. (*Govt.C. 6259(c)*.)

(3) *Review of Order*. An order either directing disclosure or supporting the official's refusal to disclose is not a final judgment or order from which appeal may be taken, but is "immediately reviewable by petition to the appellate court for the issuance of an extraordinary writ." (*Govt.C. 6259(c)*; see *Powers v. Richmond* (1995) 10 C.4th 85, 89, 112, 115, 40 C.R.2d 839, 893 P.2d 1160, 8 Cal. Proc. (4th), *Extraordinary Writs*, §16 [noting that amended statute overrules *Freedom Newspapers v. Superior Court* (1986) 186 C.A.3d 1102, 231 C.R. 189, insofar as that case held that scope of review of Public Records Act decisions under writ of review was confined to jurisdictional issues]; *Butt v. Richmond* (1996) 44 C.A.4th 925, 931, 52 C.R.2d 232 [after superior court's denial of petition for writ of mandamus to compel government entity to allow inspection of public records, *Govt.C. 6259(c)* does not preclude appeal from portion of judgment ordering payment of attorney fees and imposing sanctions].)

A party must file the petition for review within 20 days after being served with written notice of entry of the order. For good cause, the trial judge may allow additional time to file, not to exceed 20 days. The allowable period is increased by 5 days if the notice is served by mail. A stay of an order or judgment will not be granted unless the party

demonstrates that he or she "will otherwise sustain irreparable damage and probable success on the merits." (*Govt.C. 6259(c).*)

**SUPPLEMENT:** [This section is current through the latest supplement]

(3) *Review of Order.* See *Los Angeles Times v. Alameda Corridor Trans. Authority* (2001) 88 C.A.4th 1381, 1385, 107 C.R.2d 29 [*Govt.C. 6259* does not limit appellate review of attorney fee orders to review by extraordinary writ; following *Butt v. Richmond* (1996) 44 C.A.4th 925, 52 C.R.2d 232, text, p. 578].



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#### L. California Public Records Act.

#### 8. Agency's Voluntary Disclosure.

2 Witkin Cal. Evid. Witnesses § 300

[§ 300] Agency's Voluntary Disclosure.

(1) *Proper Disclosure.* The specific exemptions (supra, §288 et seq.) do not prevent an agency from "opening its records concerning the administration of the agency to public inspection," unless disclosure is otherwise prohibited by law. (*Govt.C. 6254*; see *Younger v. Berkeley City Council* (1975) 45 C.A.3d 825, 833, 119 C.R. 830 [Penal Code sections prohibited city police department's voluntary disclosure of arrest records].)

(2) *Improper Selective Disclosure.* Disclosure of documents to selected persons nullifies the exemption as to the public generally. In *Black Panther Party v. Kehoe* (1974) 42 C.A.3d 645, 117 C.R. 106, plaintiffs sought to inspect letters of complaint which had been sent by individuals to the State Department of Consumer Affairs and the Bureau of Collection and Investigative Services and which charged that licensed collection agencies had committed unethical or abusive practices. (Apparently plaintiffs wished to inform their primarily low-income membership of the collection agency practices.) The trial judge held the consumer complaints exempt from disclosure. *Held*, the judge should reconsider plaintiffs' demand in light of the agencies' existing disclosure practices (and the agencies should be given an opportunity to reappraise those practices).

(a) The consumer complaints are ordinarily exempt under *Govt.C. 6254(f)*. (42 C.A.3d 650; see supra, §289 et seq.)

(b) There is, however, a valid special basis for disclosure--the public agency's policy of routinely disclosing complaints to the affected collection agencies. The trial judge's failure to make an appropriate finding on this issue is significant because "the practice of disclosing complaints to the affected licensees destroys the privilege of confidentiality otherwise permitted by section 6254, subdivision (f)." (42 C.A.3d 656.) While the agency has discretionary authority to override a statutory exemption and open its records to public inspection, it lacks authority to indulge in *selective disclosure*:

"The term *public inspection* necessarily implies general, nonselective disclosure. It implies that public officials may not favor one citizen with disclosures denied to another. When a record loses its exempt status and becomes available for public inspection, section 6253, subdivision (a), endows *every citizen* with a right to inspect it. By force of these provisions, records are completely public or completely confidential. The Public Records Act denies public officials any power to pick and choose the recipients of disclosure. When defendants elect to supply copies of complaints to collection agencies, the complaints become public records available for public inspection." (42 C.A.3d 656.)

(3) *Division of Industrial Safety Records.* *Lab.C. 6322* imposes a misdemeanor penalty for disclosure of the Division's information that is classified as confidential under the Public Records Act. (*Govt.C. 6250* et seq.; see

*California v. Superior Court (Bourne)* (1974) 43 C.A.3d 778, 783, 117 C.R. 726 [rejecting blanket claim of absolute privilege for Division records].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER IX - Witnesses

### XI. PRIVILEGE FOR OFFICIAL INFORMATION

#### L. California Public Records Act.

##### 9. Waiver of Exemptions.

2 Witkin Cal. Evid. Witnesses § 301

[§ 301] Waiver of Exemptions.

"[W]henever a state or local agency discloses a public record which is otherwise exempt from this chapter, to any member of the public," the disclosure constitutes a waiver of the exemptions specified in *Govt.C. 6254* (supra, §288), *Govt.C. 6254.7* (supra, §283), and other similar provisions. (*Govt.C. 6254.5*; see *Masonite Corp. v. Mendocino Air Quality Management Dist.* (1996) 42 C.A.4th 436, 452, 49 C.R.2d 639 [inadvertent release of trade secret information by state environmental health hazard assessment office did not constitute waiver under *Govt.C. 6254.5*, as release by office employee was not within proper scope of employee's duties].)

*Govt.C. 6254.5* does not apply, however, to any of the following:

(1) Disclosures made in discovery proceedings or under the Information Practices Act (C.C. 1798 et seq.; see 7 *Summary* (9th), *Constitutional Law*, §472). (*Govt.C. 6254.5(a)*.)

(2) Disclosures made "through other legal proceedings or as otherwise required by law." (*Govt.C. 6254.5(b)*.)

(3) Disclosures made within the scope of a statute limiting disclosure of specified writings to certain purposes. (*Govt.C. 6254.5(c)*.)

(4) Disclosures not required by law "and prohibited by formal action of an elected legislative body of the local agency which retains the writings." (*Govt.C. 6254.5(d)*.)

(5) Disclosures made to a governmental agency that agrees to treat the disclosed material as confidential. (*Govt.C. 6254.5(e)*.)

(6) Records relating to a financial institution if the disclosure is made to the institution by the state agency responsible for regulating it. (*Govt.C. 6254.5(f)*.)

(7) Records disclosed by the Department of Corrections to a person or corporation for the purpose of corrective action or to the extent necessary to obtain information for an investigation. (*Govt.C. 6254.5(g)*.)

(8) Disclosures made by the Commissioner of Financial Institutions under *Fin.C. 1909, 8009, or 18396*. (*Govt.C. 6254.5(h)*.)

(9) Records relating to persons subject to the jurisdiction of the Department of Managed Care, if the disclosures are

made to the person who is the subject of the records for the purpose of corrective action, or to any other person as necessary to obtain information for an investigation. (*Govt.C. 6254.5(i).*)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Disclosures made in discovery proceedings:*

*Cross-Reference: 7 Summary (10th), Constitutional Law, §604.*

(5) *Disclosures made to governmental agency that agrees to treat disclosed material as confidential:* See *Los Angeles v. Superior Court (Union of Amer. Physicians & Dentists)* (2005) 130 C.A.4th 1099, 1107, 30 C.R.3d 708 [county board of supervisors did not waive exemption where it disclosed closed session minutes to district attorney under agreement that they would be kept confidential].

(9) *Persons subject to jurisdiction of Department of Managed Care:* *Govt.C. 6254.5(i)* was amended in 2000 to refer to the Department of Managed Health Care.



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XI. PRIVILEGE FOR OFFICIAL INFORMATION  
M. Federal Freedom of Information Act.

2 Witkin Cal. Evid. Witnesses § 302

[§ 302] Federal Freedom of Information Act.

(1) *In General.* The federal Freedom of Information Act (5 U.S.C., §552) requires public disclosure by federal agencies of records not expressly exempt, and empowers the federal courts to compel this disclosure. There are separate provisions for compelling disclosure of agency records containing *personal* information to the individuals concerned. (5 U.S.C., §552a; see 150 A.L.R. Fed 521 [agencies subject to Act].)

(2) *Case Law.* The cases discussing the nature of the system of disclosure and the enumerated exemptions are legion. (See *Environmental Protection Agency v. Mink* (1973) 410 U.S. 73, 93 S.Ct. 827, 35 L.Ed.2d 119 [description of statutory background and principal objectives]; *Department of Air Force v. Rose* (1976) 425 U.S. 352, 96 S.Ct. 1592, 48 L.Ed.2d 11 [discussion of statute's legislative history]; *Kissinger v. Reporters Committee for Freedom of the Press* (1980) 445 U.S. 136, 100 S.Ct. 960, 968, 63 L.Ed.2d 267, 281 [order that agency retrieve improperly removed records held in excess of court's jurisdiction to order production of "agency records improperly withheld"]; *Federal Bureau of Investigation v. Abramson* (1982) 456 U.S. 615, 102 S.Ct. 2054, 72 L.Ed.2d 376 [Exemption 7--disclosure of law enforcement records unless agency can demonstrate one of six specific harms]; *United States Dept. of State v. Washington Post Co.* (1982) 456 U.S. 595, 102 S.Ct. 1957, 72 L.Ed.2d 358 [Exemption 6--personnel and medical files whose disclosure would be clear invasion of privacy]; *United States v. Weber Aircraft Corp.* (1984) 465 U.S. 792, 104 S.Ct. 1488, 1492, 79 L.Ed.2d 814, 822 [Exemption 5--interagency or intra-agency memoranda which private party could not discover in litigation with agency]; *CIA v. Sims* (1985) 471 U.S. 159, 105 S.Ct. 1881, 1885, 85 L.Ed.2d 173, 180 [Exemption 3--matters specifically exempted by a statute referring to particular types of matters to be withheld]; *United States Dept. of Justice v. Julian* (1988) 486 U.S. 1, 108 S.Ct. 1606, 100 L.Ed.2d 1; *United States Dept. of Justice v. Reporters Committee for Freedom of Press* (1989) 489 U.S. 749, 109 S.Ct. 1468, 1476, 103 L.Ed.2d 774, 788 [Exemption 7(C) prohibits disclosure of rap sheets compiled by FBI]; *United States Dept. of Justice v. Tax Analysts* (1989) 492 U.S. 136, 109 S.Ct. 2841, 2844, 106 L.Ed.2d 112, 121 [Justice Department must provide copies of district court decisions it receives during tax litigation; decisions were "improperly withheld," notwithstanding public availability]; *John Doe Agency v. John Doe Corp.* (1989) 493 U.S. 146, 110 S.Ct. 471, 107 L.Ed.2d 462 [Exemption 7--records compiled for law enforcement purposes--includes records originally collected for nonlaw enforcement purposes]; *United States Dept. of State v. Ray* (1991) 502 U.S. 164, 112 S.Ct. 541, 116 L.Ed.2d 526 [Exemption 6, providing that disclosure requirements do not apply to personnel and medical files and similar files, where disclosure would be unwarranted invasion of personal privacy]; *United States Dept. of Justice v. Landano* (1993) 508 U.S. 165, 113 S.Ct. 2014, 2021, 124 L.Ed.2d 84, 96 [no presumption that all sources supplying information to FBI in course of criminal investigation are confidential within meaning of Exemption 7(D)]; *Williams v. Superior Court* (1993) 5 C.4th 337, 354, 19 C.R.2d 882, 852 P.2d 377, supra, §290 [disclosure exemption of Govt.C. 6254(f) for law enforcement investigatory records is not limited by criteria set forth in Freedom of Information Act].)

(3) *Commentary.* The Act has also been the subject of extensive commentary. (See 87 *Harv. L. Rev.* 854 [administrative information]; 87 *Harv. L. Rev.* 1505 [rights of public and press]; 88 *Harv. L. Rev.* 470 [confidential exception]; 89 *Harv. L. Rev.* 196 [analysis of cases]; 94 *Harv. L. Rev.* 232 [Kissinger]; 14 *Cal. Western L. Rev.* 183 [*Department of Air Force v. Rose*]; 4 *Golden Gate L. Rev.* 203 [summary of Act]; 13 *Loyola L.A. L. Rev.* 133 [suits to prevent agency's disclosure of plaintiff's trade secrets]; 4 *Pepperdine L. Rev.* 81 [discovery of national defense and foreign policy information prior to and under 1974 amendments]; 16 *Santa Clara L. Rev.* 193; 21 *Santa Clara L. Rev.* 1161 [Kissinger]; 22 *Santa Clara L. Rev.* 513 [disclosure of copyrighted agency records]; 28 *Santa Clara L. Rev.* 29 [IRS Confidentiality vs. Freedom of Information Act]; 31 *Stanf. L. Rev.* 1093 [definition of "agency records"]; 32 *Stanf. L. Rev.* 339 [Economic Proposal for Government Disclosure of Privately Submitted Commercial Information]; 27 *U.C. Davis L. Rev.* 219 [proposal for reducing CIA abuse of Freedom of Information Act]; 1979 A.S. 361 [developments under Act]; 1980 A.S. 755; 1981 A.S. 747; 1983 A.S. 215; 1986 A.S. 609 [Exemption 7(C)--prohibiting disclosure of investigatory records where disclosure would result in "unwarranted invasion of privacy"]; 1986 A.S. 625 [Personal Information in Government Agency Records: Toward an Informational Right to Privacy]; 1990 A.S. 497 [discussing *United States Dept. of Justice v. Reporters Committee for Freedom of Press*, *United States Dept. of Justice v. Tax Analysts*, and *John Doe Agency v. John Doe Corp.*, *supra*]; 1994 A.S. 79 [emergence of new standards making public access more difficult]; Overly on Electronic Evidence in California §§4.03, 4.05, and Appx. B; 100 A.L.R.3d 699 [disclosure of payroll records of individual government employees]; 141 A.L.R. Fed 531 [exemption for matters relating to agency personnel rules and practices]; 153 A.L.R. Fed 571 [agency records that must be made available]; 50 *Am.Jur. Trials* 407.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General.* See 37A *Am.Jur.2d* (2005 ed.), *Freedom of Information Acts* §1 et seq.

(2) *Case Law.* See *Department of Interior v. Klamath Water Users Protective Assn.* (2001) 532 U.S. 1, 121 S.Ct. 1060, 1067, 149 L.Ed.2d 87, 97 [documents passing between department and Indian tribes regarding water allocations were not intraagency memoranda subject to Exemption 5]; *National Archives & Records Administration v. Favish* (2004) 541 U.S. 157, 124 S.Ct. 1570, 1579, 158 L.Ed.2d 319, 334 [Exemption 7(C), protecting records compiled for law enforcement purposes where unwarranted invasion of privacy would result, extended to family's interest in preventing release of graphic photos of body of decedent, who was deputy counsel to President]; 167 A.L.R. Fed 545 [United States Supreme Court cases]. (3) *Commentary.* See 43 *San Diego L. Rev.* 209 [under Act, court should not defer to agency decision to withhold information]; 165 A.L.R. Fed 591 [what constitutes "agency" under Act]; 168 A.L.R. Fed 143 [Exemption 5--intraagency or interagency memoranda or letters]; 169 A.L.R. Fed 495 [national security exemption]; 171 A.L.R. Fed 193 ["confidential source" exemption]; 179 A.L.R. Fed 1 [recovery of attorneys' fees and costs under Act]; 184 A.L.R. Fed 435 [exemption for disclosure that could endanger life or physical safety]; 187 A.L.R. Fed 1 [use of affidavits to substantiate federal agency's claim of exemption]; 189 A.L.R. Fed 1 [exemption for disclosure that could interfere with enforcement proceedings]; 189 A.L.R. Fed 455 [award of damages under 5 U.S.C., §552a]; 4 A.L.R. Fed 2d 337 [expedited processing of requests under Act]; 7 A.L.R. Fed 2d 395 [exemption for operational files of CIA].





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## CHAPTER IX - Witnesses

## XII. PRIVILEGE FOR ELECTED OFFICIALS AND THEIR AIDES

## A. President of United States.

2 Witkin Cal. Evid. Witnesses § 303

[§ 303] President of United States.

"A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for presidential communications. The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution." (*United States v. Nixon* (1974) 418 U.S. 683, 94 S.Ct. 3090, 3107, 41 L.Ed.2d 1039, 1064.)

In *United States v. Nixon*, the President challenged a subpoena which was served on him as a third party and required the production of tape recordings and documents dealing with conversations he had with his aides. He did not assert that military or diplomatic secrets were involved, but claimed an absolute privilege against disclosure of confidential communications. *Held*, the claim was too broad.

(a) "[W]hen the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial." (94 S.Ct. 3110, 41 L.Ed.2d 1066.) And neither the doctrine of separation of powers nor the need for confidentiality of high level communications, without more, can sustain an absolute presidential immunity from judicial process under all circumstances. "The President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of presidential communications is significantly diminished by production of such material for *in camera* inspection with all the protection that a district court will be obliged to provide." (94 S.Ct. 3107, 41 L.Ed.2d 1063.)

(b) The interest in preserving confidentiality is entitled to great respect, but "we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution." (94 S.Ct. 3109, 41 L.Ed.2d 1066.) "Without access to specific facts a criminal prosecution may be totally frustrated. The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases." (94 S.Ct. 3110, 41 L.Ed.2d 1066.) (See 87 Harv. L. Rev. 1557; 88 Harv. L. Rev. 13, 50 [executive privilege]; 88 Harv. L. Rev. 281 [book review]; 98 Harv. L. Rev. 1619; 9 Loyola L.A. L. Rev. 11, 20, 33, 40, 52, 57; 2 Hastings Const. L. Q. 309; 8 Southwestern U. L. Rev. 931; 25 Stanf. L. Rev. 836 [comparison of crown privilege and executive privilege]; 27 Stanf. L. Rev. 489 [book review]; 22 U.C.L.A. L.

Rev. 1 [executive privilege symposium].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Cheney v. United States Dist. Court for Dist. of Columbia* (2004) 542 U.S. 367, 124 S.Ct. 2576, 2588, 159 L.Ed.2d 459, 479 [where public interest groups sued Vice President and other federal officials who were members of task force formed to advise President on national energy policy, district court of appeal could entertain Vice President's separation of powers arguments in resisting plaintiffs' discovery requests without requiring Vice President to first raise specific claims of executive privilege in lower court; distinguishing *United States v. Nixon* (1974) 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039, text, p. 583, which involved need for relevant evidence in criminal proceeding]; 76 So. Cal. L. Rev. 235, 240 [*United States v. Nixon*].



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## CHAPTER IX - Witnesses

### XII. PRIVILEGE FOR ELECTED OFFICIALS AND THEIR AIDES

#### B. Members of Congress and Aides.

2 Witkin Cal. Evid. Witnesses § 304

[§ 304] Members of Congress and Aides.

The Speech or Debate Clause of the federal Constitution (Art. I, §6, Cl. 1) provides that "for any Speech or Debate in either House," senators and representatives "shall not be questioned in any other Place." (See 7 *Summary* (9th), *Constitutional Law*, §117.) In *Gravel v. United States* (1972) 408 U.S. 606, 92 S.Ct. 2614, 33 L.Ed.2d 583, a United States senator intervened in proceedings which arose from a grand jury investigation into the release and publication of classified materials on the Vietnam War (the Pentagon Papers). The senator sought to quash subpoenas on his assistant and on the director of a publishing firm, and also requested that the government specify the questions which would be directed to his assistant. *Held*, the senator, and therefore his aide, had only a limited privilege.

(a) The Speech or Debate Clause protects members against prosecutions that directly impinge upon or threaten the legislative process. Thus the senator is protected from questioning about events at the subcommittee meeting where the Pentagon Papers were introduced into the public record. (92 S.Ct. 2622, 33 L.Ed.2d 597.)

(b) The aides' work is so critical to the members' performance that they must be treated as the elected officials' alter egos. Hence, the things done by aides are privileged if they would be privileged when done by the member personally. (92 S.Ct. 2622, 2623, 33 L.Ed.2d 597.)

(c) But the Clause does not reach many services characteristically performed by aides for members, even though within the scope of their employment. "It likewise provides no protection for criminal conduct threatening the security of the person or property of others, whether performed at the direction of the Senator in preparation for or in execution of a legislative act or done without his knowledge or direction. Neither does it immunize Senator or aide from testifying at trials or grand jury proceedings involving third-party crimes where the questions do not require testimony about or impugn a legislative act." (92 S.Ct. 2625, 33 L.Ed.2d 600.)

(d) The senator's alleged arrangement with a private publisher to publish the Pentagon Papers was not protected by the *Speech or Debate Clause*. (92 S.Ct. 2625, 33 L.Ed.2d 601.) "The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative process by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." (92 S.Ct. 2627, 33 L.Ed.2d 602.) The privilege is extended beyond pure speech or debate only when necessary to prevent indirect impairment of the deliberations. (92 S.Ct. 2627, 33 L.Ed.2d 602.)

(e) The Clause does not confer a general exemption on members of Congress from liability or process in criminal

cases. "Quite the contrary is true. While the Speech or Debate Clause recognizes speech, voting, and other legislative acts as exempt from liability that might otherwise attach, it does not privilege either Senator or aide to violate an otherwise valid criminal law in preparing for or implementing legislative acts. If republication of these classified papers would be a crime under an Act of Congress, it would not be entitled to immunity under the Speech or Debate Clause." (92 S.Ct. 2628, 33 L.Ed.2d 603.) (See 23 U.C.L.A. L. Rev. 57 [congressional papers and judicial subpoenas]; 98 Harv. L. Rev. 1614.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*Cross-Reference:* 7 Summary (10th), *Constitutional Law*, §150.



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XII. PRIVILEGE FOR ELECTED OFFICIALS AND THEIR AIDES  
C. State and Local Officials.

2 Witkin Cal. Evid. Witnesses § 305

[§ 305] State and Local Officials.

Courts may not inquire into the motivation or mental processes of local or state legislators in enacting legislation; the subjective reasoning of individual legislators is privileged. (See *Los Angeles v. Superior Court (Burroughs)* (1975) 13 C.3d 721, 119 C.R. 631, 532 P.2d 495, 7 Summary (9th), *Constitutional Law*, §116; *Times Mirror Co. v. Superior Court* (1991) 53 C.3d 1325, 1347, 283 C.R. 893, 813 P.2d 240, *supra*, §296 [Governor's appointment records protected from disclosure by public interest exemption of *Govt.C.* 6255].)

However, in a *federal prosecution* of a *state legislator*, there is no legislative privilege comparable to that of a member of Congress under the Speech or Debate Clause. (*United States v. Gillock* (1980) 445 U.S. 360, 100 S.Ct. 1185, 1193, 63 L.Ed.2d 454, 460, 461, 462.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*Cross-Reference:* 7 Summary (10th), *Constitutional Law*, §149.



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## CHAPTER IX - Witnesses

### XIII. PRIVILEGE FOR IDENTITY OF INFORMER

#### A. Nature of Privilege.

2 Witkin Cal. Evid. Witnesses § 306

[§ 306] Nature of Privilege.

(1) *Policy Basis*. "It is clear that the public interest would suffer if the disclosure were compelled of the names of those citizens who inform public officers of violation of law and who assist such officers in the performance of their duty to apprehend law violators. A citizen who knows that the fact would be made public that he has disclosed such information to public officers may be loath to cooperate in the administration of justice by exercising his right and duty to make such disclosures because he would justifiably believe himself to be in danger of physical violence from those upon whom he had informed, as well as in danger of actions of slander and malicious prosecution." (*People v. Gonzales* (1955) 136 C.A.2d 437, 441, 288 P.2d 588.) This reasoning underlies the privilege against disclosure of the identity of an "informer" or "informant." (See 1 McCormick 5th, §111; 8 Wigmore (McNaughton Rev.) §2374; Unif. Rules, Rule 509; *People v. McShann* (1958) 50 C.2d 802, 806, 330 P.2d 33; *Priestly v. Superior Court* (1958) 50 C.2d 812, 816, 330 P.2d 39; *McCray v. Illinois* (1967) 386 U.S. 300, 87 S.Ct. 1056, 1059, 18 L.Ed.2d 62, 67; C.J.E.R., Judges Benchbook, Civil Proceedings: Discovery §4.103; 98 Harv. L. Rev. 1596; 46 Cal. L. Rev. 466; 11 Hastings L. J. 54; 17 Hastings L. J. 99; 33 So. Cal. L. Rev. 344; 12 Stanf. L. Rev. 256; 76 A.L.R.2d 262 [accused's right to, and prosecution's privilege against, disclosure of identity of informer]; 86 A.L.R.4th 1024 [existence, nature, and application to medical professional disciplinary board of privilege against disclosure of identity of informer].)

(2) *Former Law and Evidence Code*. In California, the privilege was originally grounded on former C.C.P. 1881(5), the official information privilege (now *Ev.C. 1040*, supra, §246). *Ev.C. 1041* states it as a separate privilege, but sets forth its scope and conditions in language almost identical to that of *Ev.C. 1040*. (See *infra*, §§307, 308.)

As will be seen, however, the privilege has lost most of its vitality under recent decisions requiring disclosure to protect the defendant's right to a fair trial or to test the validity of an arrest or search. (See *infra*, §310 et seq.)

(3) *Constitutionality of Privilege*. Neither due process nor the right of confrontation precludes the use by a state of the informer privilege. (*McCray v. Illinois*, supra, 87 S.Ct. 1063, 18 L.Ed.2d 71.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Policy Basis*. See 1 McCormick 6th, §111. *West's Key Number Digest*, Witnesses k.216(4)



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## CHAPTER IX - Witnesses

### XIII. PRIVILEGE FOR IDENTITY OF INFORMER

#### B. Scope and Conditions.

##### 1. In General.

2 Witkin Cal. Evid. Witnesses § 307

[§ 307] In General.

The privilege is set forth in *Ev.C. 1041* as follows:

(1) *Public Entity's Right To Protect Informer's Identity.* A public entity has a privilege "to refuse to disclose the identity of a person" who has "furnished information" purporting to disclose a violation of federal, state, or local law, and "to prevent another from disclosing such identity." (*Ev.C. 1041(a).*)

(2) *Information Furnished in Confidence.* The privilege applies only "if the information is furnished in confidence" to (a) a law enforcement officer, (b) a representative of an administrative agency charged with administration or enforcement of the law alleged to be violated, or (c) any person for the purpose of transmittal to either of the above. (*Ev.C. 1041(b)*; see *People v. Otte* (1989) 214 C.A.3d 1522, 1530, 263 C.R. 393 [confidentiality requirement refers to informant's identity, not to information communicated, unless it would tend to disclose informant's identity]; *People v. Seibel* (1990) 219 C.A.3d 1279, 1288, 269 C.R. 313 [following *People v. Otte*]; *People v. Hobbs* (1994) 7 C.4th 948, 961, 962, 30 C.R.2d 651, 873 P.2d 1246 [citing "well-established" rule that communication itself comes within privilege if disclosure would tend to disclose identity of informer].)

In *People v. Lanfrey* (1988) 204 C.A.3d 491, 251 C.R. 189, the question was whether the term "informer," as used in *Ev.C. 1041*, applies only to persons who supply information to the police on an ongoing basis for compensation, or whether it also extends to nonparticipating eyewitnesses who gratuitously supply information on a onetime basis. *Held*, such witnesses are "informers," and their identity is protected if they request confidentiality. There is no requirement in *Ev.C. 1041* that the information be furnished as part of an ongoing relationship or in exchange for some benefit. Because the privilege applies only when the information is furnished in confidence, most eyewitnesses who simply supply information upon being interviewed will not be within its scope. And, extending the privilege to cover information supplied in confidence on a onetime basis furthers the policy of aiding law enforcement efforts by encouraging communication from citizens. (204 C.A.3d 498.)

(3) *Absolute and Conditional Privilege.* The privilege is *absolute* if disclosure is forbidden by federal or California law; otherwise, it is *conditional* and calls for a weighing of the public interest in confidentiality against the necessity for disclosure in the interest of justice; but no privilege can be claimed if an authorized person has consented to disclosure in the proceeding. (*Ev.C. 1041(a)(1)*, (a)(2), similar to *Ev.C. 1040(b)(1)*, (b)(2), *supra*, §247; see *infra*, §309.)

(4) *Invocation of Privilege.* The privilege must be *claimed* by a person "authorized by the public entity to do so." (*Ev.C. 1041(a).*)

(5) *Sanctions for Improper Invocation.* The sanctions of *dismissal or adverse finding of fact* against the public entity claiming the privilege are the same as those imposed on the claim of the official information privilege in a criminal case. (*Ev.C. 1042(a)*, *supra*, §252.)

**SUPPLEMENT:** [This section is current through the latest supplement]





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XIII. PRIVILEGE FOR IDENTITY OF INFORMER

B. Scope and Conditions.

2. Official Information Privilege Distinguished.

2 *Witkin Cal. Evid. Witnesses* § 308

[§ 308] Official Information Privilege Distinguished.

The informer privilege differs from the official information privilege in two significant respects:

(1) The public entity may refuse to disclose, and may prevent another from disclosing, the identity of an informer. (*Ev.C. 1041(a)*, supra, §307.) However, "[t]here is no privilege under this section to prevent the informer from disclosing his identity." (*Ev.C. 1041(c)*.)

(2) Under California's former law, which based the informer privilege on the official information statute, the privilege could have been regarded as covering the contents of the communication from the informer. (See *People v. McShann* (1958) 50 C.2d 802, 807, 330 P.2d 33.) The opposing view is that the contents are not covered unless they would reveal the informer's identity. (See Model C., Rule 230; *Roviaro v. United States* (1956) 353 U.S. 53, 77 S.Ct. 623, 627, 1 L.Ed.2d 639, 644; 8 Wigmore (McNaughton Rev.) §2374, p. 765.) The language of *Ev.C. 1041* is clearly limited to identity.

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER IX - Witnesses

### XIII. PRIVILEGE FOR IDENTITY OF INFORMER C. Weighing Public Interest Against Necessity for Disclosure.

2 Witkin Cal. Evid. Witnesses § 309

[§ 309] Weighing Public Interest Against Necessity for Disclosure.

(1) *General Rule.* The Evidence Code did not change the rule of cases holding disclosure necessary for a fair trial. "In such cases, it is clear that the 'balance' is struck in favor of the defendant, and disclosure must be ordered upon pain of dismissal. Any other conclusion would be at variance with due process provisions of the state and federal Constitutions." (*People v. Garcia* (1967) 67 C.2d 830, 842, 64 C.R. 110, 434 P.2d 366, *infra*, §313.)

(2) *Sufficient Showing of Necessity.* The defendant seeking disclosure has the burden of showing that the informer would be a material witness on guilt and that nondisclosure would deprive the defendant of a fair trial. (*People v. Garcia, supra*, 67 C.2d 839; see *Williams v. Superior Court* (1974) 38 C.A.3d 412, 418, 112 C.R. 485 [describing the rule as "a 'two-pronged' test of which the fair trial element is the second prong"].)

However, the burden is met by showing a *reasonable possibility* that the informer could give evidence that might exonerate the defendant. (*People v. Borunda* (1974) 11 C.3d 523, 529, 113 C.R. 825, 522 P.2d 1, *infra*, §313.) The showing usually consists of a theory of defense based on evidence presented at the trial or declarations filed in support of the motion. (*People v. Sewell* (1970) 3 C.A.3d 1035, 1039, 83 C.R. 895; see *People v. Long* (1974) 42 C.A.3d 751, 755, 117 C.R. 200; *People v. Tolliver* (1975) 53 C.A.3d 1036, 1048, 125 C.R. 905 [disclosure order affirmed as supported by the evidence even though defendant failed to articulate a defense theory to the trial court; "specific articulation of a defense is not required"]; *Williams v. Superior Court, supra*, 38 C.A.3d 423 [the required showing is "as to the quality of the vantage point from which the informer viewed either the commission or the immediate antecedents of the alleged crime"].) (See also *Price v. Superior Court* (1970) 1 C.3d 836, 844, 83 C.R. 369, 463 P.2d 721 [requiring disclosure of informer who stated that he heard conversation by persons "known by him" to have been present at the crime]; *People v. Hunt* (1971) 4 C.3d 231, 238, 93 C.R. 197, 481 P.2d 205, *infra*, §313; *Theodor v. Superior Court* (1972) 8 C.3d 77, 87, 104 C.R. 226, 501 P.2d 234 [discrepancies in informer's description of defendant and account of narcotics purchases warranted disclosure]; *People v. Long, supra*, 42 C.A.3d 758 [nondisclosure of informer justified dismissing charge of possessing heroin for sale but not charge of simple possession; informer had described purchase at premises where officer found defendant in possession and under influence; defendant claimed he was customer, not seller]; *People v. Tolliver, supra*, 53 C.A.3d 1044 [police found defendant, codefendant, and narcotics on premises where informer said he had purchased heroin; informer's testimony would be material on whether narcotics were exclusively controlled by someone other than defendant]; 16 *Santa Clara L. Rev.* 674.)

(3) *Insufficient Showing.* The showing "requires more than speculation." (*People v. Sewell, supra*, 3 C.A.3d 1039 ["affidavit states the informer saw marijuana in the apartment 11 days before the search, not that he was a percipient witness to the particular possession of contraband disclosed by the search which resulted in the charge"].) (See also *People v. Thomas* (1970) 12 C.A.3d 1102, 1112, 91 C.R. 867 [magistrate not informed of defense theory; denial of

disclosure sustained]; *People v. Martin* (1969) 2 C.A.3d 121, 127, 82 C.R. 414 [no showing of how cross-examination of informer might have helped defense; disclosure not required]; *People v. Pacheco* (1972) 27 C.A.3d 70, 81, 103 C.R. 583, *infra*, §322; *People v. Acuna* (1973) 35 C.A.3d 987, 989, 111 C.R. 878 [prosecution for heroin sale based entirely on discovery of balloons containing drug in defendant's pants pocket; disclosure not required because informer simply pointed finger of suspicion at defendant]; *People v. Hardeman* (1982) 137 C.A.3d 823, 828, 829, 831, 187 C.R. 296 [informer was nonparticipant, noneyewitness; no reasonable possibility that he could give evidence on issue of guilt]; *People v. Otte* (1989) 214 C.A.3d 1522, 1530, 263 C.R. 393 [no showing that informant, whose information was used to obtain search warrant leading to seizure of marijuana and related sales records, had material information as to guilt]; *People v. Oppel* (1990) 222 C.A.3d 1146, 1153, 272 C.R. 340 [defense counsel's affidavit made on information and belief was not evidence, hence, was insufficient evidentiary basis to support disclosure order]; *In re Benny S.* (1991) 230 C.A.3d 102, 109, 281 C.R. 1, *infra*, §313 [following *Martin*, *Acuna*, and *Hardeman*; informer held not a percipient or material witness to drug possession].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(3) *Insufficient Showing.* See *People v. Luera* (2001) 86 C.A.4th 513, 526, 103 C.R.2d 438 [in prosecution for possession of child pornography, defendant's suggestion that anonymous citizen informant might have been person who downloaded pornography onto defendant's computer amounted to "mere speculation"].



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## CHAPTER IX - Witnesses

### XIII. PRIVILEGE FOR IDENTITY OF INFORMER

#### D. Exceptions Necessary for Fair Trial.

##### 1. General Principles.

2 Witkin Cal. Evid. Witnesses § 310

[§ 310] General Principles.

"Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." (*Roviaro v. United States* (1956) 353 U.S. 53, 77 S.Ct. 623, 628, 1 L.Ed.2d 639, 645.) This approach has been consistently followed in both federal and state courts, and has resulted in a severe curtailment of the privilege. (See generally *People v. Hobbs* (1994) 7 C.4th 948, 958, 959, 30 C.R.2d 651, 873 P.2d 1246 [quoting *Roviaro*]; *People v. Lawrence* (1957) 149 C.A.2d 435, 449, 308 P.2d 821; *People v. Castiel* (1957) 153 C.A.2d 653, 656, 315 P.2d 79; *People v. Tolliver* (1975) 53 C.A.3d 1036, 1043, 125 C.R. 905; 1 McCormick 5th, §111; 8 Wigmore (McNaughton Rev.) §2374; Unif. Rules, Rule 509(c)(2); Model C., Rule 230, Comment; 71 Harv. L. Rev. 111; 17 Hastings L. J. 99; 1955 A.S. 644; 76 A.L.R.2d 262 [accused's right to, and prosecution's privilege against, disclosure of identity of informer]; 33 Proof of Facts 2d 549 [establishing privilege]; *infra*, §311 et seq.) (On disclosure of informer-witness' true name and address, see *Smith v. Illinois* (1968) 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956, 3 Cal. Evidence (4th), Presentation at Trial, §283.)

In *People v. Castiel*, *supra*, the court, citing the *Roviaro*, *Lawrence*, and other federal and state cases on governmental privileges, explained the defendant's right to the testimony of the informer in terms of due process. (153 C.A.2d 657.) And, in rejecting the Attorney General's argument that there was direct testimony sufficient to establish guilt, the court said: "No one knows what the undisclosed informer, if produced, might testify. He might contradict or persuasively explain away the prosecution's evidence. It is the deprivation of the defendants of the opportunity of producing evidence which *might* result in their exoneration which constitutes the error in this case, and we cannot assume because the prosecution evidence may seem strong that the undisclosed evidence might not prove sufficient to overcome it in the minds of the jurors. To do so is to reason that in no case can a defendant suffer prejudice from the suppression of evidence which may be favorable to him if the prosecution has produced what seems to be a strong eyewitness case of the defendant's guilt." (153 C.A.2d 659.) (See also *People v. Alvarez* (1957) 154 C.A.2d 694, 697, 316 P.2d 1006 [following *Roviaro* and *Lawrence* cases]; *People v. Cox* (1957) 156 C.A.2d 472, 477, 319 P.2d 681; *People v. Alvidrez* (1958) 158 C.A.2d 299, 302, 322 P.2d 557.)

In *People v. Tolliver*, *supra*, the court declared that "the most important principle that emerges from the decisional law is that the prosecution cannot successfully invoke the privilege for nondisclosure of an informant's identity if the defendant demonstrates a reasonable *possibility* that the informer *could* give evidence on the issue of guilt that *might* result in defendant's exoneration." (53 C.A.3d 1043.) (See also *People v. Garcia* (1967) 67 C.2d 830, 64 C.R. 110, 434 P.2d 366, *infra*, §313.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 1 McCormick 6th, §111.



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CHAPTER IX - Witnesses

XIII. PRIVILEGE FOR IDENTITY OF INFORMER

D. Exceptions Necessary for Fair Trial.

2. Participating Informer.

2 *Witkin Cal. Evid. Witnesses* § 311

[§ 311] Participating Informer.

"[W]hen an informant participates in the criminal act he is no longer simply an informer. He is a material witness to the criminal act, in fact, he is similar to a feigned accomplice." (*People v. Lawrence* (1957) 149 C.A.2d 435, 450, 308 P.2d 821.) The defendant is accordingly entitled to disclosure of the informant's identity. (See *Roviaro v. United States* (1956) 353 U.S. 53, 77 S.Ct. 623, 628, 1 L.Ed.2d 639, 645; *People v. Lawrence* (1957) 149 C.A.2d 435, 450, 308 P.2d 821; 46 Cal. L. Rev. 467; 11 Hastings L. J. 57; 71 Harv. L. Rev. 111; 33 Proof of Facts 2d 549 [need for disclosure of informant's identity].)

In the *Roviaro* case, *supra*, petitioner was charged with sale of narcotics to Doe, an unidentified informer, and illegal transportation of narcotics. The testimony of narcotics agents and police officers, who, by prearrangement with Doe, followed petitioner and Doe and observed the transaction, was seemingly conclusive of guilt. The conviction was reversed, however, for refusal to compel disclosure of Doe's name and address. On the sale count, the refusal was clearly unjustified because Doe was a participant in the illegal activity charged. On the transportation count, Doe was, apart from petitioner himself, his sole material witness; Doe had helped to set up the criminal occurrence, and his testimony might have disclosed an entrapment or have thrown doubt on petitioner's identity, the identity of the package of narcotics, or petitioner's knowledge of the contents of the package.

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CHAPTER IX - Witnesses

XIII. PRIVILEGE FOR IDENTITY OF INFORMER

D. Exceptions Necessary for Fair Trial.

3. Nonparticipating Material Witness.

a. Who Is Material Witness.

1. In General.

2 *Witkin Cal. Evid. Witnesses* § 312

[§ 312] In General.

The court in *People v. McShann* (1958) 50 C.2d 802, 330 P.2d 33, observed that there is no privilege if disclosure of the identity of a *nonparticipating* informer is essential to a fair determination of the cause:

(a) "Disclosure is not limited to the informer who participates in the crime alleged. The information elicited from an informer may be 'relevant and helpful to the defense of the accused or essential to a fair determination of a cause' even though the informer was not a participant. For example, the testimony of an eyewitness-nonparticipant informer that would vindicate the innocence of the accused or lessen the risk of false testimony would obviously be relevant and helpful to the defense of the accused and essential to a fair determination of the cause." (50 C.2d 808.)

(b) Nor is disclosure limited to an informer *eyewitness*; it is enough that the informer is a *material* witness. A "mere" informer who points the finger, puts the wheels in motion, and plays no part in the criminal act need not be disclosed. "When it appears from the evidence, however, that the informer is also a material witness on the issue of guilt, his identity is relevant and may be helpful to the defendant. Nondisclosure would deprive him of a fair trial." (50 C.2d 808.) (See 12 *Stanf. L. Rev.* 256; 11 *Hastings L. J.* 59.)

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## CHAPTER IX - Witnesses

### XIII. PRIVILEGE FOR IDENTITY OF INFORMER

#### D. Exceptions Necessary for Fair Trial.

##### 3. Nonparticipating Material Witness.

##### a. Who Is Material Witness.

##### 2. Illustrations.

2 Witkin Cal. Evid. Witnesses § 313

[§ 313] Illustrations.

In *People v. Williams* (1958) 51 C.2d 355, 333 P.2d 19, a police officer, working with an informer who introduced him to defendant, bought narcotics on the first occasion, then later bought them again by himself. Defendant claimed mistaken identification. *Held*, it was reversible error to allow the officer on cross-examination to refuse to disclose the identity of the informer. He saw the seller and was instrumental in bringing about the transaction. "As a witness at the trial he might have testified that defendant was not the seller of the narcotics, and such testimony would have been especially important to the defense in view of the fact that the officer was the sole witness for the prosecution and that, so far as appears from the record, he saw the culprit for only a few minutes, three months prior to defendant's indictment and arrest." (51 C.2d 359.)

As to the second sale, although the informer did not witness it, it was consummated in reliance on the prior one; if the informer contradicted the officer's identification of defendant as to the first sale this would be material evidence that he was also mistaken in connecting him with the second. (51 C.2d 360.) (See also *People v. Durazo* (1959) 52 C.2d 354, 356, 340 P.2d 594 [following *Williams*]; *People v. Hammond* (1960) 54 C.2d 846, 851, 9 C.R. 233, 357 P.2d 289, *infra*, §329; *People v. Perez* (1965) 62 C.2d 769, 773, 44 C.R. 326, 401 P.2d 934; 12 *Stanf. L. Rev.* 256; 33 *So. Cal. L. Rev.* 344.)

In *Honore v. Superior Court* (1969) 70 C.2d 162, 74 C.R. 233, 449 P.2d 169, a marijuana case, defendant was first taken into custody on an unrelated charge. Then a reliable informant told the police of defendant's prior dealings in methedrine. The informant later went to defendant's apartment and stated that he had seen methedrine and four persons there. The police obtained a search warrant, broke in and found defendant and others with marijuana in plain sight, but no methedrine. Defendant, charged with possession of marijuana, sought pretrial discovery of the informant. *Held*, mandamus granted to compel disclosure. Defendant was in custody when the informer saw other persons in her apartment, and it is possible that they brought the marijuana. Hence, the informer was a material witness on whom and what he saw in the apartment. (70 C.2d 169.)

In *People v. Borunda* (1974) 11 C.3d 523, 113 C.R. 825, 522 P.2d 1, defendant contended that disclosure of an informer's identity was necessary because the informer could give evidence about his dealings with the arresting officer immediately before the arrest, and thus could affect the conflict of credibility between the officer and defendant's sister on whether any heroin was actually recovered at the time of arrest, and because the informer might show that defendant's possession of the heroin was only momentary and transitory. The trial judge ordered disclosure. When the



prosecution refused to comply, the judge dismissed the case. *Held*, order of dismissal affirmed. Even if defendant was alone in the bathroom, flushing the toilet, when he was apprehended, he could be found guilty only if the substance he was trying to flush away was in fact heroin. Depending on the informer's testimony, the jury might believe that the officer had recovered no heroin at the time of the arrest but, instead, had offered in evidence the heroin the officer had previously received from the informer. (11 C.3d 528.)

An extremely broad concept of material witness was invoked to extend the requirement of disclosure in *People v. Garcia* (1967) 67 C.2d 830, 64 C.R. 110, 434 P.2d 366. A search warrant was issued naming Frank, Joe and Rose, based on an affidavit partly relying on two unidentified informers. The police entered an apartment in which the three were found, and also found defendant, not named in the affidavit or warrant. Defendant, after proper warnings, said the narcotics were his. At the trial he denied everything. Before trial and at trial he sought disclosure of the informers. *Held*, refusal to disclose was reversible error.

(a) The informers were neither *participants* nor *eyewitnesses*, and the prosecution did not use their information as substantive evidence to prove defendant's guilt. But they could give direct evidence supporting defendant's position that he was a mere visitor at the apartment for the first time looking for a fix; e.g., the informers could have information as to the quantity of narcotics kept by *Frank and Joe*. (67 C.2d 839.)

(b) The burden of showing that the informer would be a material witness is met "when defendant demonstrates a reasonable possibility that the anonymous informant whose identity is sought could give evidence on the issue of guilt which might result in defendant's exoneration." (67 C.2d 840.) (See 56 Cal. L. Rev. 1689.)

In *People v. Hunt* (1971) 4 C.3d 231, 93 C.R. 197, 481 P.2d 205, the court relied on *People v. Garcia*, *supra*, in holding that disclosure of the informer's identity was required. "In *Garcia*, the officer's information was at least a day old; here about two hours. In *Garcia*, the informers merely stated that the suspects were selling narcotics from their apartment and did not locate or state that any narcotics were in the apartment; here the informer places the methedrine belonging to codefendant Hall as being in a brown valise, in which it was in fact found." (4 C.3d 240.) Most importantly, "the information given to the officer by the unidentified informer itself tends to *exonerate* defendant. If the informer testified, as he wrote to the officer, that Hall was the owner of the brown valise and owned the merchandise therein, his testimony would tend to exonerate defendant with respect to the claim of constructive ownership." (4 C.3d 240.)

In *re Benny S.* (1991) 230 C.A.3d 102, 281 C.R. 1, involved a minor's motion for disclosure of an informer. The minor was charged with possession of marijuana for sale after the informer told police that drugs were being dealt near two high schools from a specified vehicle. *Held*, the motion was properly denied. As to the *possession* of marijuana with which defendant was charged, the informer was neither a percipient nor a material witness. Had defendant been charged with the *sales* of marijuana witnessed by the informer, disclosure would have been required, because the informer was a percipient and material witness to that conduct. (230 C.A.3d 109.)

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## CHAPTER IX - Witnesses

### XIII. PRIVILEGE FOR IDENTITY OF INFORMER

#### D. Exceptions Necessary for Fair Trial.

##### 3. Nonparticipating Material Witness.

##### b. Disclosure at Trial.

2 Witkin Cal. Evid. Witnesses § 314

[§ 314] Disclosure at Trial.

The defendant may seek disclosure by pretrial discovery (see *Honore v. Superior Court* (1969) 70 C.2d 162, 74 C.R. 233, 449 P.2d 169, supra, §313), or at the trial. (See 33 Proof of Facts 2d 549 [need for disclosure of informant's identity]; supra, §312.)

The requirement of disclosure at the trial may be, in effect, a review and correction of an error in refusing pretrial discovery, and not merely an element of the right of cross-examination of prosecution witnesses. Thus, in *People v. Montano* (1966) 244 C.A.2d 555, 53 C.R. 145, the police, using a search warrant, found marijuana in defendant's home and garage. The warrant had been issued on an affidavit showing reliance on two reliable informers whose identities had not been put in issue as to probable cause for the search (see infra, §§325, 326). But defendant contended that the informers were probably A and R, users who had framed him; and he unsuccessfully sought pretrial disclosure by motion and by writ of prohibition. At the trial, on cross-examination of the officer, objections were sustained to his questions seeking the same disclosure. *Held*, conviction reversed.

The case was governed by the general principle that where disclosure is relevant and helpful to the defense or essential to a fair determination of the cause, the privilege must give way. (244 C.A.2d 561; see supra, §310 et seq.) It was immaterial that the trial judge thought defendant had concocted a false theory; the defendant does not have to show any reason for expecting favorable testimony from the informer. The conclusion that a defendant is entitled to disclosure when relevant, helpful, or essential to a fair trial is supported by those cases permitting disclosure even though the prosecution proved its case without mention of the informer; thus, disclosure of the informer's identity could not be justified as incident to cross-examination of the prosecution's witnesses. (244 C.A.2d 565.)

In *People v. Singletary* (1969) 276 C.A.2d 601, 81 C.R. 79, an informant told police lieutenant S that defendant was the sniper who had shot at a police car. With the consent of defendant's mother, another officer searched defendant's home and found a rifle which might have been used in the crime. Questioned by the searching officer, defendant confessed (but later recanted). At the preliminary examination, S was not a witness and the searching officer was not questioned about the informer's identity. At the trial, however, defendant subpoenaed lieutenant S to learn the informer's identity. In opposition, the prosecution presented an oral motion to quash, with the deputy district attorney stating that S would be unable to give any relevant testimony and that the only purpose of the subpoena was to place him on the stand to obtain the informer's identity. The judge ordered the subpoena quashed, and defendant was convicted. *Held*, reversed.

(a) While a pretrial motion is proper to compel disclosure of the informer's identity (see 5 Cal. Crim. Law (3d),

*Criminal Trial*, §43), it does not supplant trial discovery. Defendant was therefore entitled to use a subpoena at trial *to determine whether the informer would be a material witness*. It was an abuse of discretion to quash the subpoena because of defendant's failure to pursue available *pretrial* discovery. (276 C.A.2d 605.)

(b) The deputy district attorney personally stated that lieutenant S would be unable to give relevant testimony, and defendant made no showing that S would be able to do so. But defendant was not required to show what he wanted to find out through the subpoena. S was a *preliminary witness to a possible material witness*, the informer. "It is not necessary to lay the foundation before examining a foundational witness. Although defendant had the burden of demonstrating the informer would be a material witness on the issue of guilt ... , here he was deprived of even being allowed to begin an attempt to carry that burden. Defendant was prevented from questioning the one known foundational witness who could assist in determining whether the informer was a material witness." (276 C.A.2d 604.)

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CHAPTER IX - Witnesses

XIII. PRIVILEGE FOR IDENTITY OF INFORMER

D. Exceptions Necessary for Fair Trial.

3. Nonparticipating Material Witness.

c. Disclosure at Preliminary Hearing.

2 *Witkin Cal. Evid. Witnesses* § 315

[§ 315] Disclosure at Preliminary Hearing.

In *Mitchell v. Superior Court* (1958) 50 C.2d 827, 330 P.2d 48, the officers gave two informers marked and dusted bills, and escorted them to defendants' apartment where they made the purchase. When they emerged, the officers went in and arrested defendants, finding narcotics, some marked bills and fluorescent powder. At the preliminary hearing, the magistrate sustained objections to questions seeking names of the informers. *Held*, this was error. The same reasons which would have required disclosure at the trial (*supra*, §314) call for disclosure at the preliminary hearing. Defendants there may cross-examine and produce their own witnesses, and the exercise of such rights at a preliminary hearing may enable them to show that there is no reasonable cause to commit them and thus avoid the degradation and expense of a criminal trial. (50 C.2d 829.)

But *prohibition* was denied. There was other competent evidence to support the commitment, and disclosure was sought only to obtain information useful at the trial. Defendants were entitled to it, and, at the trial, could demand a continuance if necessary to enable them to locate and interview the informers. The magistrate might have obviated the delay of this future continuance by ruling correctly, but this was merely a procedural error and not a denial of a constitutional right. (50 C.2d 829.)

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CHAPTER IX - Witnesses

XIII. PRIVILEGE FOR IDENTITY OF INFORMER

D. Exceptions Necessary for Fair Trial.

3. Nonparticipating Material Witness.

d. Disclosure in Probation Revocation Hearing.

2 Witkin Cal. Evid. Witnesses § 316

[§ 316] Disclosure in Probation Revocation Hearing.

There is some uncertainty, in a postconviction hearing on *an application for a grant of probation*, which does not involve the issue of guilt, as to whether the defendant may seek disclosure of the identity of an informer. But *a probation revocation proceeding* "is a guilt-determining process," governed by the standards applicable to termination of parole. These standards call for the right to discover the identity of a material witness informer. (*Goodlow v. Superior Court* (1980) 101 C.A.3d 969, 974, 162 C.R. 121.)

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## CHAPTER IX - Witnesses

### XIII. PRIVILEGE FOR IDENTITY OF INFORMER

#### D. Exceptions Necessary for Fair Trial.

##### 4. Informer Relied on for Arrest.

2 Witkin Cal. Evid. Witnesses § 317

[§ 317] Informer Relied on for Arrest.

An informer whose information is the essential basis of probable cause for an arrest and search (see 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence*, §173 et seq.) must be disclosed. (*Roviaro v. United States* (1956) 353 U.S. 53, 77 S.Ct. 623, 628, 1 L.Ed.2d 639, 645; *Priestly v. Superior Court* (1958) 50 C.2d 812, 819, 330 P.2d 39; see 71 Harv. L. Rev. 111; 47 Cal. L. Rev. 395; 11 Hastings L. J. 63; for exception where accused is *parolee* and search is conducted by parole supervisors, see *People v. Hernandez* (1964) 229 C.A.2d 143, 151, 40 C.R. 100; 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence*, §44; 17 Stanf. L. Rev. 514; on exception for informers who are not material witnesses, see *infra*, §327.)

In *Priestly v. Superior Court*, *supra*, informers told police that defendant had narcotics. The officers went to his apartment, arrested him without a warrant and searched the apartment, finding the drugs. At the preliminary hearing, defendant objected to the officer's testimony, demanded disclosure of the informers' identities and moved to strike the testimony. Thereafter, he moved to set aside the information on the ground that, because the only evidence of guilt was illegally obtained and incompetent, he was held without reasonable or probable cause. The motion was denied. *Held*, prohibition issued to restrain the trial:

"If testimony of communications from a confidential informer is necessary to establish the legality of a search, the defendant must be given a fair opportunity to rebut that testimony. He must therefore be permitted to ascertain the identity of the informer, since the legality of the officer's action depends upon the credibility of the information, not upon facts that he directly witnessed and upon which he could be cross-examined. If an officer were allowed to establish unimpeachably the lawfulness of a search merely by testifying that he received justifying information from a reliable person whose identity cannot be revealed, he would become the sole judge of what is probable cause to make the search. Such a holding would destroy the exclusionary rule. Only by requiring disclosure and giving the defendant an opportunity to present contrary or impeaching evidence as to the truth of the officer's testimony and the reasonableness of his reliance on the informer can the court make a fair determination of the issue." (50 C.2d 818.)

The court discounted the dire consequences predicted by opponents of the rule: "Such a requirement does not unreasonably discourage the free flow of information to law enforcement officers or otherwise impede law enforcement. Actually its effect is to compel independent investigations to verify information given by an informer or to uncover other facts that establish reasonable cause to make an arrest or search." (50 C.2d 818.) (See, somewhat critical of the case, 47 Cal. L. Rev. 395; supporting the case, 11 Hastings L. J. 63; and see, following the case, *People v. Hammond* (1960) 54 C.2d 846, 851, 9 C.R. 233, 357 P.2d 289, *infra*, §329.)

In *People v. Robinson* (1958) 166 C.A.2d 416, 333 P.2d 120, on a voir dire hearing on the issue of probable cause, the officer testified that he had known the informer for 3 years, that the latter had given him reliable information on three other occasions leading to arrests or convictions, and that he made the arrest in reliance on his information. On cross-examination, he refused to disclose the informer's identity or the names of the persons previously arrested. *Held*, conviction reversed. The only information on which the officer acted was that given by the informer; if the arrest was illegal, the subsequent search (without consent) was illegal and the evidence inadmissible. Hence, the theory of the *Priestly* case was applicable:

"The defendant had a right to learn the names of those previously arrested upon information given by the same informant, that he might ascertain if the officer was telling the truth or whether the officer used poor judgment in relying upon this particular informant. Certainly, had defendant, after learning the names, checked official records and found that these three persons had never actually been arrested or, if so, on a charge other than for narcotics offenses, the officer's credibility would have been irreparably shaken. Had a check revealed that the three had been arrested but not one had been held on preliminary hearing; or all or one or more had been released by police or their cases dismissed by the district attorney, this fact would surely have constituted a substantial showing that the officer exercised poor judgment in relying upon further information from the same informant which, of course, would go to the weight of the evidence." (166 C.A.2d 421.)

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## CHAPTER IX - Witnesses

### XIII. PRIVILEGE FOR IDENTITY OF INFORMER

#### D. Exceptions Necessary for Fair Trial.

##### 5. Procedure in Raising and Determining Issue.

##### a. Defendant's Request and Prosecution's Response.

*2 Witkin Cal. Evid. Witnesses § 318*

[§ 318] Defendant's Request and Prosecution's Response.

Three procedural rules have been developed to govern the challenge to the privilege:

(1) The request for disclosure of the informer or the objection to testimony given without such disclosure must be made in the trial court, or it is waived; it cannot be raised for the first time on appeal. (See *Coy v. Superior Court* (1959) 51 C.2d 471, 473, 334 P.2d 569; *People v. Postell* (1959) 170 C.A.2d 31, 33, 338 P.2d 454; *Rugendorf v. United States* (1964) 376 U.S. 528, 84 S.Ct. 825, 829, 11 L.Ed.2d 887, 892 [request made only in support of motion to suppress evidence because of allegedly defective search warrant].)

(2) The prosecution may elect to refuse disclosure and submit to the sanctions under *Ev.C. 1042(a)*, i.e., striking of testimony, adverse finding or dismissal. (See *People v. McShann* (1958) 50 C.2d 802, 808, 330 P.2d 33; *Priestly v. Superior Court* (1958) 50 C.2d 812, 819, 330 P.2d 39; *People v. Viramontes* (1978) 85 C.A.3d 585, 593, 149 C.R. 607.)

(3) The prosecution fully complies with a proper request by disclosing the identity of the informer; it need not produce the informer as a witness so as to make the informer available for cross-examination by the defendant. (See *People v. Render* (1960) 181 C.A.2d 190, 195, 5 C.R. 236; *Eleazer v. Superior Court* (1970) 1 C.3d 847, 853, 83 C.R. 586, 464 P.2d 42, *infra*, §330; *People v. Moran* (1970) 1 C.3d 755, 761, 83 C.R. 411, 463 P.2d 763.)

In *People v. Moran*, *supra*, neither side called the go-between who had introduced defendant to a narcotics agent. *Held*, no error. Defendant knew the informer, knew what evidence would have been available through his testimony and could have called him. The failure to do so "supports an inference that his testimony would not be favorable to defendant." (1 C.3d 760.) As to the prosecution's not putting him on the stand, "[t]he People are not required to call any particular witness so long as the material evidence relating to the charge against defendant is produced in a manner according him a fair trial." (1 C.3d 761.)

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D. Exceptions Necessary for Fair Trial.

5. Procedure in Raising and Determining Issue.

b. Hearing To Determine Issue.

1. Outside Jury's Presence.

2 *Witkin Cal. Evid. Witnesses* § 319

[§ 319] Outside Jury's Presence.

When a party demands disclosure on the ground that the informant is a material witness on guilt, the judge must conduct a hearing at which all parties may present evidence on the issue. This hearing must be conducted outside the presence of the jury. (*Ev.C. 1042(d)*; see C.E.B., Jefferson, 2 California Evidence Benchbook 3d, §43.9 et seq.; 1 *Pacific L. J.* 610, 617; 15 Santa Clara Lawyer 326.) (On requirement of in camera hearing without defendant and defense counsel, see *infra*, §320 et seq.)

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On procedure where defendant seeks to quash warrant on ground that informant was defendant's lawyer and thus attorney-client privilege was breached, see *People v. Navarro* (2006) 138 C.A.4th 146, 41 C.R.3d 164, 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence*, Supp., §108.



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#### 5. Procedure in Raising and Determining Issue.

##### b. Hearing To Determine Issue.

##### 2. In Camera Hearing.

##### aa. In General.

2 *Witkin Cal. Evid. Witnesses* § 320

[§ 320] In General.

If, during the hearing (see *supra*, §319), the privilege is claimed or a person refuses to answer a question on the ground that the answer would tend to disclose the informer's identity, the judge, on request of the prosecuting attorney, may hold an in camera hearing outside the presence of the defendant or defense counsel. At this hearing, the prosecution may offer evidence to aid the judge in determining the issue (see *infra*, §322). A reporter must be present, but the transcript and any physical evidence must be sealed, with access only by a court. (*Ev.C. 1042(d)*; see *People v. Levine (1984) 152 C.A.3d 1058, 1071, 199 C.R. 756* [in camera hearing on judge's own motion was proper where defendant had made motion for disclosure, and prosecution had invoked the privilege]; C.E.B., Jefferson, 2 California Evidence Benchbook 3d, §43.9.)

The provision in *Ev.C. 1042(d)* that the prosecution may offer "evidence" implies that *Ev.C. 710* will be followed (every witness must take an oath or make an affirmation). Hence, an in camera hearing in which the informant testified, without being sworn, was defective. (*People v. Gooch (1983) 139 C.A.3d 342, 345, 188 C.R. 673* [conviction reversed, with direction to trial court to conduct new hearing]; *People v. Lee (1985) 164 C.A.3d 830, 840, 210 C.R. 799* [at second in camera hearing, it was error for judge to consider informant's unsworn testimony from first in camera hearing].)

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#### 5. Procedure in Raising and Determining Issue.

##### b. Hearing To Determine Issue.

##### 2. In Camera Hearing.

##### bb. No Requirement That Informant Testify.

2 Witkin Cal. Evid. Witnesses § 321

[§ 321] No Requirement That Informant Testify.

Generally, there is no requirement that the informant testify at the in camera hearing. (See *People v. Lee* (1985) 164 C.A.3d 830, 840, 210 C.R. 799; *People v. Alderrou* (1987) 191 C.A.3d 1074, 1079, 236 C.R. 740; *People v. Fried* (1989) 214 C.A.3d 1309, 1313, 263 C.R. 237; *People v. Dimitrov* (1995) 33 C.A.4th 18, 29, 30, 39 C.R.2d 257.)

As the court in *People v. Alderrou*, *supra*, observed:

"Neither expressly nor by implication does *Evidence Code* section 1042, subdivision (d) *require* the confidential informant to be present or to testify at the in camera hearing. Instead, that section says at the in camera hearing 'the prosecution *may* offer *evidence* which would tend to disclose or which discloses the identity of the informant.' ... It says nothing about the type of evidence to be offered on these issues. Moreover, the language of this section contemplates the possibility the prosecution will introduce evidence of some kind which will only *tend* to disclose the informant's identity, not disclose it. If the confidential informant was always present and always testified then his identity would always be disclosed to the judge. But the Legislature clearly anticipated there would be situations where the informant's identity was not revealed to the judge but where others would supply information perhaps about his relationship to the defendant or to the criminal transaction or to the premises involved which, if known to the defendant, might only tend to suggest the informant's identity." (191 C.A.3d 1079.)

However, an exception was made in *People v. Ruiz* (1992) 9 C.A.4th 1485, 12 C.R.2d 234. Defendant was convicted of selling methamphetamine, after denial of his motion to disclose the identity of a confidential informant (CI) who had arranged the sale by defendant to deputy sheriff Ramos. The trial judge held an in camera hearing, and denied the motion to disclose. Defendant contended that, because this case was essentially a credibility contest between defendant and Ramos, the CI might be able to give exculpatory testimony. *Held*, judgment of conviction reversed for further in camera proceedings pursuant to *Ev.C. 1042(d)*.

(a) That the CI witnessed the transaction does not necessarily require disclosure of the CI's identity; if the evidence presented at the in camera hearing established no reasonable possibility that the CI could give evidence favorable to defendant, nondisclosure would not deprive defendant of a fair trial. (9 C.A.4th 1488, citing *People v. Lanfrey* (1988) 204 C.A.3d 491, 251 C.R. 189, *infra*, §322, and *People v. Alderrou*, *supra*.)

(b) Here, however, defendant had established that the CI was an eyewitness to the alleged drug transaction, and officer Ramos' testimony was insufficient to demonstrate that the CI could not give material testimony tending to exonerate defendant. "The materiality of the CI's possible testimony cannot be determined by a peace officer's characterization of the eyewitness CI's knowledge of the incident and the CI's reliability and credibility." (9 C.A.4th 1489.)

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#### 5. Procedure in Raising and Determining Issue.

##### b. Hearing To Determine Issue.

##### 3. Test for Judge's Determination.

2 Witkin Cal. Evid. Witnesses § 322

[§ 322] Test for Judge's Determination.

The judge makes the determination on the basis of the evidence presented at both hearings, and must not order disclosure or impose the sanctions of striking testimony or dismissal of the proceeding, unless the judge concludes that "there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial." (*Ev.C. 1042(d)*.)

Earlier cases had indicated that the defendant's showing could deal in speculation on how the informer's testimony could benefit defendant. *Ev.C. 1042(d)* changed the situation: "While the defendant may make out a prima facie case for disclosure ... , the court now has a method of determining whether the nondisclosure of the identity of the informer would deprive the defendant of a fair trial, which section 1042 expressly makes the test to be applied." (*People v. Pacheco* (1972) 27 C.A.3d 70, 80, 103 C.R. 583.) In *Pacheco*, it was clear that the informer's information would be of no help to defendant. And if a "bare possibility" of benefit were the test, and the informer's identity had to be disclosed under these circumstances, "then under no circumstances could an informant's identity be withheld. This would be the end of the informer system, which has been of great help to and regarded as a necessity for law enforcement and which has existed from the very beginning of police work." (27 C.A.3d 81.) The in camera hearing is therefore a constitutional means of protecting the privilege. (27 C.A.3d 81.)

In *People v. McCarthy* (1978) 79 C.A.3d 547, 144 C.R. 822, the informer gave in camera testimony that "was not in any way exculpatory but was very incriminatory." (79 C.A.3d 553.) *Held*, denial of disclosure affirmed. "[W]hen an in camera hearing has been held and the trial court has reasonably concluded, as in the instant case, that the informant does not have knowledge of facts that would tend to exculpate the defendant, disclosure of the identity of the informer is prohibited by *Evidence Code* section 1042, subdivision (d), since the public entity has invoked the privilege pursuant to section 1041." (79 C.A.3d 555.) (To same effect, see *People v. Alderrou* (1987) 191 C.A.3d 1074, 1078, 236 C.R. 740; *People v. Fried* (1989) 214 C.A.3d 1309, 1314, 263 C.R. 237; *People v. Dimitrov* (1995) 33 C.A.4th 18, 31, 39 C.R.2d 257.)

Although *Price v. Superior Court* (1970) 1 C.3d 836, 83 C.R. 369, 463 P.2d 721, and other California Supreme Court decisions contain dicta that an informer who was a nonparticipating eyewitness to the offense is *necessarily* a material witness, none of these decisions involved the in camera hearing required by *Ev.C. 1042(d)* (see *supra*, §320). The evidence adduced at such a hearing may establish that there is no reasonable possibility that even an eyewitness could provide any evidence on the issue of guilt. (See *People v. Lanfrey* (1988) 204 C.A.3d 491, 502, 251 C.R. 189 [no reasonable possibility that eyewitness-informer could support defendant's claim of self-defense].)

However, if the evidence taken in camera fails to eliminate the guesswork involved in speculating on what the informer's testimony would be, the defendant's demonstration of a "reasonable possibility that nondisclosure might deprive the defendant of a fair trial" is sufficient to require disclosure. In other words, *Ev.C. 1042(d)* requires that the pre-1969 "reasonable possibility" test "be applied to the combination of evidence produced in court and *in camera*." (*People v. Coleman* (1977) 72 C.A.3d 287, 298, 139 C.R. 908.)

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#### D. Exceptions Necessary for Fair Trial.

#### 5. Procedure in Raising and Determining Issue.

##### c. Duty of Judge To Hold Hearing.

2 Witkin Cal. Evid. Witnesses § 323

[§ 323] Duty of Judge To Hold Hearing.

(1) *On Request of Prosecutor.* *Ev.C. 1042(d)* forbids refusal of the prosecutor's request for an in camera hearing before the court orders disclosure, striking of testimony, or dismissal based on the claim of privilege. (*People v. Aguilera* (1976) 61 C.A.3d 863, 868, 131 C.R. 603; *People v. Reel* (1979) 100 C.A.3d 415, 419, 161 C.R. 43 [defendant failed to show reasonable possibility that informer could give exculpatory evidence; even if such showing was assumed, denial of prosecutor's request for in camera hearing was reversible error].)

(2) *Effect of Prosecutor's Failure To Make Timely Request.* When no in camera hearing is requested and the case is dismissed for noncompliance with a disclosure order, the dismissal will be sustained if the defendant has made a prima facie showing of necessity for disclosure, even though an in camera hearing might have dispelled that necessity. The court in *People v. Viramontes* (1978) 85 C.A.3d 585, 149 C.R. 607, affirming such a dismissal, said: "The evidence supporting the materiality of the informant's testimony was not strong. The posture of the case in the trial court manifested those 'guessing game' qualities which often attend these determinations" (citing *People v. Aguilera*, *supra*, 61 C.A.3d 868). "However, the People had available to them appropriate procedures to eliminate such a guessing game. They could have requested the court to hold an *in camera* hearing." (85 C.A.3d 593.)

Even if the trial court denies disclosure, the prosecution may not get a second chance to request an in camera hearing if the defendant succeeds in obtaining a pretrial writ overturning the denial order. In *Williams v. Superior Court* (1974) 38 C.A.3d 412, 112 C.R. 485, the prosecutor did not request an in camera hearing when defendant moved to compel disclosure before the trial judge. After the motion was denied, defendant sought relief by mandamus. The prosecution contended that even if disclosure had been denied erroneously, the Court of Appeal should remand the matter to the trial court so that the prosecution could request the in camera hearing. *Held*, the prosecution had lost its opportunity. "Nothing in section 1042, subdivision (d), supports the Attorney General's premise that the People's right to request an *in camera* hearing arises only after the trial court has first found that a prima facie case for disclosure has been made by the defendant. Subdivision (d) expressly provides that the very purpose of the *in camera* hearing is 'to aid the court in its determination whether there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial.' Carried to its logical extreme, the Attorney General's contention would require the appellate court to entertain two successive mandate proceedings to test the denial of disclosure in cases such as this, if, upon remand, the trial court held an in camera hearing and adhered to its prior decision. Such a duplication of effort at both the trial and appellate levels cannot have been within the intent of the Legislature when it enacted subdivision (d)." (38 C.A.3d 425.) (But see *Goodlow v. Superior Court* (1980) 101 C.A.3d 969, 977, 162 C.R. 121, *supra*, §316, holding that the

prosecution should be given further opportunity to request in camera hearing because applicability of the disclosure right in probation revocation proceedings was issue of first impression.)

When *reversal of a conviction* is based on failure to order disclosure, the necessity for which might have been clarified by an in camera hearing that was neither held nor requested, the prosecution will be given an opportunity to request such a hearing on remand. (*People v. Blouin* (1978) 80 C.A.3d 269, 288, 145 C.R. 701; *People v. Ingram* (1978) 87 C.A.3d 832, 151 C.R. 239.) "When the issue is resolved in favor of the People there is no necessity for an *in camera* hearing, and such a hearing could only be a waste of court time. Thus, under the circumstances here, we cannot say the People waived their right to request an *in camera* hearing by failing to make it in the trial court, and deem the Attorney General's request for an *in camera* hearing to be timely because the need therefor did not arise until this court ruled that a prima facie case for disclosure had been shown. To remand the cause for an *in camera* hearing will prevent that duplication of judicial time and effort at both the trial and appellate level condemned in *Williams*." (*People v. Ingram*, *supra*, 87 C.A.3d 842.)

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#### D. Exceptions Necessary for Fair Trial.

#### 5. Procedure in Raising and Determining Issue.

##### d. Change of Circumstances After Denial.

2 Witkin Cal. Evid. Witnesses § 324

[§ 324] Change of Circumstances After Denial.

In *People v. Allen* (1980) 101 C.A.3d 285, 161 C.R. 568, defendant's conviction had been reversed for failure to order disclosure, with directions to give the prosecution an opportunity to request an in camera hearing. After remand, it appeared that the informer had died of gunshot wounds 12 days after the hearing of the disclosure motion and 11 months before the trial. Defendant was retried and convicted. *Held*, conviction reversed with directions to dismiss.

(a) Though the informer could not have been a trial witness, he could have given in camera testimony that might have required disclosure, resulting in either dismissal if the prosecution failed to comply or, if there were compliance, availability of additional evidence to defendant. Accordingly, it cannot be established that a fair trial was possible without disclosure. (101 C.A.3d 291.)

(b) The erroneous denial of disclosure did not preclude the prosecution's subsequently requesting an in camera hearing, but the prosecution, not defendant, bore the risk that changed circumstances would render the right of disclosure a nullity. (101 C.A.3d 292, relying on *Harris v. Superior Court* (1973) 35 C.A.3d 24, 27, 110 C.R. 400, *infra*, §331.) This "regrettable" result "could have been avoided had the prosecutor not urged a contention which clearly was foreclosed by the precedent authorities." (101 C.A.3d 294.)

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### XIII. PRIVILEGE FOR IDENTITY OF INFORMER

#### E. Where Disclosure Not Required.

1. Search Under Search Warrant.
- a. Judicial Rule of Nondisclosure.

2 *Witkin Cal. Evid. Witnesses* § 325

[§ 325] Judicial Rule of Nondisclosure.

A search warrant may issue on information furnished by a reliable informer not named in the affidavit. (See 4 *Cal. Crim. Law* (3d), *Illegally Obtained Evidence*, §102.) The magistrate may, if he or she deems it necessary, inquire further into the matter and even seek to question the informer. But is the petitioner, in a proceeding to quash the warrant, entitled to disclosure? In other words, does the rule of *Priestly v. Superior Court* (1958) 50 C.2d 812, 330 P.2d 39, supra, §317, on search incidental to an arrest apply to search pursuant to a search warrant? In *People v. Keener* (1961) 55 C.2d 714, 12 C.R. 859, 361 P.2d 587, the court held that it did not. The *Priestly* rule was laid down because without disclosure probable cause for an arrest would be based solely on the police officer's determination. But where a search warrant is issued the magistrate makes the determination, and can require disclosure if he or she thinks it necessary:

"The requirement that an affidavit be presented to the magistrate and his control over the issuance of the warrant diminish the danger of illegal action, and it does not appear that there has been frequent abuse of the search warrant procedure. One of the purposes of the adoption of the exclusionary rule was to further the use of warrants, and it obviously is not desirable to place unnecessary burdens upon their use. The additional protection which would result from application of the *Priestly* rule in situations such as the one involved here would not offset the disadvantages of excluding probative evidence of crime and obstructing the flow of information to police. It follows from what we have said that where a search is made pursuant to a warrant valid on its face, the prosecution is not required to reveal the identity of the informer in order to establish the legality of the search and the admissibility of the evidence obtained as a result of it." (55 C.2d 723.) (See *People v. Hobbs* (1994) 7 C.4th 948, 959, 960, 30 C.R.2d 651, 873 P.2d 1246 [citing the text and quoting *Keener*].)

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#### E. Where Disclosure Not Required.

1. Search Under Search Warrant.
- b. Codification of Rule.

2 Witkin Cal. Evid. Witnesses § 326

[§ 326] Codification of Rule.

(1) *In General.* *Ev.C. 1042(b)* codifies the holding of *People v. Keener* (1961) 55 C.2d 714, 12 C.R. 859, 361 P.2d 587, *supra*, §325, and extends it to all official information:

"[W]here a search is made pursuant to a warrant valid on its face, the public entity bringing a criminal proceeding is not required to reveal to the defendant official information or the identity of an informer in order to establish the legality of the search or the admissibility of any evidence obtained as a result of it." (See *People v. Flannery* (1985) 164 C.A.3d 1112, 1116, 1117, 210 C.R. 899; *People v. Greenstreet* (1990) 218 C.A.3d 1516, 1519, 267 C.R. 377 [under *Ev.C. 1042(b)*, trial judge may delete information in affidavit identifying informant, but must base determination of probable cause to issue search warrant on unedited version].)

"Bringing a criminal proceeding," within the meaning of *Ev.C. 1042(b)*, includes prearrest investigation. "Otherwise the prosecution might feel or be pressured to bring charges without adequate investigation, charges which might later be dismissed because there was insufficient evidence. Subjects of such investigations might be alerted and impede the investigation by tampering with or destroying evidence. The public interest is served when charges are brought only when the appropriate cause has been developed and established. The policy behind the privilege protecting confidential informants obtains whether or not charges have been pressed." Thus, although, under P.C. 1534, the documents associated with a search warrant are public documents 10 days after the warrant's execution (see 4 *Cal. Crim. Law* (3d), *Illegally Obtained Evidence*, §122), such information may remain privileged if the search is used to further an ongoing investigation. (*PSC Geothermal Services Co. v. Superior Court* (1994) 25 C.A.4th 1697, 1714, 31 C.R.2d 213.)

(2) *Distinction: Additional Proper Purpose.* The general rule of nondisclosure may not apply if disclosure is sought for an additional proper purpose. In other words, the fact that an informer was relied upon for issuance of a search warrant does not impair the right to disclosure of the informer's identity on a showing of reasonable possibility that the informer could give evidence as to guilt. Disclosure is precluded if sought *merely* to attack the legality of the search. (*Theodor v. Superior Court* (1972) 8 C.3d 77, 88, 104 C.R. 226, 501 P.2d 234; see *Price v. Superior Court* (1970) 1 C.3d 836, 842, 83 C.R. 369, 463 P.2d 721.)

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#### E. Where Disclosure Not Required.

##### 2. Reasonable Cause To Arrest.

2 Witkin Cal. Evid. Witnesses § 327

[§ 327] Reasonable Cause To Arrest.

(1) *Original Statute: Narcotic Offenses.* *Ev.C. 1042(c)* created a special exception for arrests for narcotic offenses: Information from an informer was admissible on the issue of reasonable cause to make an arrest or search, if the judge or magistrate determined that the informer was reliable and that disclosure should not be required. Thus, the *Priestly* requirement of disclosure (*supra*, §317) became a discretionary determination by the judge to order or deny it. (See 17 *Hastings L. J.* 107.)

The constitutionality of this exception was established by the United States Supreme Court in *McCray v. Illinois* (1967) 386 U.S. 300, 87 S.Ct. 1056, 1059, 18 L.Ed.2d 62, 68. (See also *Martin v. Superior Court* (1967) 66 C.2d 257, 259, 57 C.R. 351, 424 P.2d 935 [*McCray* case controlling]; *People v. Sanders* (1967) 250 C.A.2d 123, 131, 58 C.R. 259.)

(2) *Amended Statute: All Offenses.* The 1969 Legislature amended *Ev.C. 1042(c)* to extend the judge's discretion to deny disclosure to *all cases*: "[I]n any preliminary hearing, criminal trial, or other criminal proceeding, any otherwise admissible evidence of information communicated to a peace officer by a confidential informant" is admissible, where the informer is not a material witness on guilt or innocence, without a requirement that his or her name or identity be disclosed, if the judge so rules.

Thus, the judge or magistrate "must either (1) compel disclosure of the informant's identity as required by *Priestly*, or (2) exercise his discretion based on evidence produced in open court that the informant is reliable and that disclosure is not required." (*Parsley v. Superior Court* (1973) 9 C.3d 934, 942, 109 C.R. 563, 513 P.2d 611 [judge failed to order informer's identity disclosed and also failed to exercise proper discretion as to reliability; writ of prohibition issued].)

Full cross-examination of prosecution witnesses on the issue of the informant's reliability is necessary for a proper exercise of the judge's discretion, and it also "appears to be a constitutional prerequisite to invoking the informant privilege." (*Parsley v. Superior Court, supra*, 9 C.3d 942.)

Because a witness to a crime is presumptively reliable in the absence of evidence to the contrary, a finding that an eyewitness-informant is reliable need not be supported by previous demonstration of reliability or subsequent corroboration. (*People v. Lanfrey* (1988) 204 C.A.3d 491, 506, 251 C.R. 189.)

In *People v. Shipstead* (1971) 19 C.A.3d 58, 72, 75, 96 C.R. 513, the court pointed out that the privilege may be asserted under *Ev.C. 1042(c)* where the information is received from "a reliable informant"; nondisclosure is unjustified

where no evidence is offered to establish the informer's reliability.

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#### E. Where Disclosure Not Required.

#### 3. Reasonable Cause Shown Without Informer.

2 *Witkin Cal. Evid. Witnesses* § 328

[§ 328] Reasonable Cause Shown Without Informer.

The requirement of disclosure may sometimes be avoided by using the informer only as a lead to information independently verified. In this situation, reasonable cause may then be shown without using the information, and the informer's identity ceases to be material in a test of validity of the arrest. (See *People v. Williams* (1958) 51 C.2d 355, 359, 333 P.2d 19; *People v. McMurray* (1959) 171 C.A.2d 178, 183, 340 P.2d 335; *People v. Hunt* (1963) 216 C.A.2d 753, 756, 31 C.R. 221; *People v. Martin* (1969) 2 C.A.3d 121, 128, 82 C.R. 414 [informer "simply pointed the finger of suspicion" at defendant, who was arrested 3 days later]; *People v. Lanfrey* (1988) 204 C.A.3d 491, 507, 251 C.R. 189; Law Rev. Com. Comment to *Ev.C. 1042*; 33 Proof of Facts 2d 549 [need for disclosure of informant's identity].)

Thus, in *People v. McMurray*, *supra*, police officers for several years suspected defendant of being a dope peddler, from information given by several informers, by observation of defendant making apparent exchanges with addicts, and by a prior arrest attempt which was dropped when it appeared that the informer would have to be disclosed. On the night in question, an informer telephoned defendant to make arrangements for a buy. A group of officers staked out the area the informer designated, accosted defendant and identified themselves as police. Defendant ran and threw away an object which, being recovered, proved to be heroin. *Held*, the trial judge's refusal to compel disclosure was proper. The informer did not come to the scene; hence, he was not a participant or eyewitness (see *supra*, §§311 et seq.). And the informer's information was not necessary to establish reasonable cause, because the officers had sufficient evidence apart from the information and the telephone call. The court distinguished *People v. McShann* (1958) 50 C.2d 802, 330 P.2d 33, *supra*, §312, where the prosecution introduced the informer's phone call. Here, they did not make that mistake; the informer's phone call was brought out by defendant's cross-examination of a police officer on the stand. (171 C.A.2d 184.)

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## CHAPTER IX - Witnesses

XIII. PRIVILEGE FOR IDENTITY OF INFORMER  
 F. Disclosure Withheld Until Informer Unavailable.

2 Witkin Cal. Evid. Witnesses § 329

[§ 329] Disclosure Withheld Until Informer Unavailable.

The direct or indirect suppression of material evidence by the prosecution may constitute a denial of due process. (See 3 Cal. Evidence (4th), Presentation at Trial, §121.) This principle applies to nondisclosure of the identity of an informer: "Denial by the prosecution of an opportunity for the defendant to seek out the informer and to defend by these means, where the testimony of the informer would be material to the issues, is unfair and oppressive to the defendant, and deprives him of due process of law." (*People v. Kiihoa* (1960) 53 C.2d 748, 752, 3 C.R. 1, 349 P.2d 673.) But three situations must be carefully distinguished:

(1) *Where State Is at Fault.* In *People v. Kiihoa*, *supra*, an officer testified that defendant sold narcotics to him after arrangements were made by S, a confidential informant. Defendant was first arrested 3 months after the act, released, and rearrested 2 months later. A police officer testified that this procedure was adopted in order that S, who feared reprisals, could leave the state, and that the rearrest and trial took place only when S was gone and immune from process. *Held*, conviction reversed: Because defendant denied the facts of the sale, the credibility of the officer's testimony was in issue, S was a material witness, and disclosure was required. (53 C.2d 751.)

The prosecution conceded this by giving his name and last known whereabouts, but contended that it had no further obligation, and that no state action was involved in S's disappearance because the police did not actively procure or arrange his departure. Nevertheless, said the court, "the state sought to circumvent, if not to stultify, the reason for the rule requiring disclosure. The procedure resorted to in the instant case manifestly denied the defendant a fair trial just as effectively as if the informer had never been identified." (53 C.2d 753.)

(2) *Where State Is Not at Fault.* In *People v. Hammond* (1960) 54 C.2d 846, 9 C.R. 233, 357 P.2d 289, a narcotics case based on sales to an informer, defendant was denied the name of the informer at the preliminary hearing. Motions to set aside the informations were, on suggestion of counsel for defendant, continued by mutual consent from time to time, pending determination of leading cases then in the Supreme Court. When these cases were decided, the informations were dismissed, new complaints were filed, and a new preliminary hearing had. Then the prosecution disclosed the name of the informer plus the fact that he had since been killed in an auto accident. Defendant was held to answer, new informations were filed, and he was tried and found guilty. *Held*, affirmed. Proper disclosure was ultimately made; the delay was initiated by the defendant himself, and acquiesced in by him, and the death of the informer was a mere fortuitous incident of the delay. (54 C.2d 852.)

(3) *Delayed Arrests During "Buy" Program.* Where an arrest is delayed, not for the purpose of preventing the defendant from reaching an informer, but merely to preserve the anonymity of an undercover agent working on other cases, no fundamental unfairness to the defendant is involved. (See *People v. Galvan* (1962) 208 C.A.2d 443, 447, 25

*C.R. 128; People v. Castedy (1961) 194 C.A.2d 763, 769, 15 C.R. 413; People v. Gilmore (1965) 239 C.A.2d 125, 128, 48 C.R. 449.)*

The "buy" program is described, and its propriety affirmed, in *People v. Gilmore, supra*. Enforcement officers, working with a particular informer over a period of several months, make a large number of purchases. They then terminate the services of the informer, make the arrests and initiate the prosecutions. The informer, understandably, disappears. The contention has been made, on behalf of defendants, that the disclosure requirement should be implemented by a duty to keep a participating informer in custody or under surveillance for a reasonable time after arrests. The *Gilmore* case rejects this proposal, pointing out that the informer is essential in narcotics cases, and holding that the delayed arrest is a reasonable method of protecting him or her from harm. "The balance of interests requires that potential defendants be subjected to the risk of the informer disappearing, so long as the government does not affirmatively induce that disappearance." (239 C.A.2d 133.)

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## CHAPTER IX - Witnesses

### XIII. PRIVILEGE FOR IDENTITY OF INFORMER

#### G. Duty To Locate Informer.

##### 1. Eleazer Rule of Good Faith.

2 Witkin Cal. Evid. Witnesses § 330

[§ 330] Eleazer Rule of Good Faith.

In *Eleazer v. Superior Court* (1970) 1 C.3d 847, 83 C.R. 586, 464 P.2d 42, the court repudiated suggestions in earlier cases that the prosecution automatically fulfills its obligations when it reveals all it knows, even though the data is inadequate for locating an informer. If the informer is a material witness, the prosecution must demonstrate that it has attempted in good faith to *locate* him or her; the duty to disclose the identity of the informer cannot be evaded by *deliberate failure to acquire information*. (1 C.3d 849, 851; see footnote 5, disapproving a number of cases.)

(a) *Extent of information to be given*. The "identity" of a material witness must be disclosed, "not merely his name, but all pertinent information which might assist the defense's efforts to locate and produce him." (1 C.3d 851.) Although the prosecution need not call the informer as a *witness*, or even produce the informer, it cannot withhold information which might assist the defense in doing so. (1 C.3d 851.)

(b) *Types of effort required*. Once the informer had been shown to be a material witness (as at the preliminary hearing), and while he still remained in police employ, "the police or district attorney should have undertaken a good faith effort at least to obtain his address or to make some arrangement under which he could be successfully subpoenaed for trial; their failure to do so suggests a deliberate evasion of the defendant's right to a fair trial." (1 C.3d 853.) The efforts required will vary with the facts of the case. "If the informer has a regular abode and place of employment, simply obtaining his address and telephone number may suffice; if he is transient, or conceals his address, the law enforcement agency probably should make some arrangement for maintaining close communication with him." (1 C.3d 853, footnote 10.) One possible solution is for police to photograph and fingerprint their informers. (1 C.3d 852, footnote 7.)

(c) *Burden on prosecution*. Prosecution contentions, that a defendant should show that he or she cannot readily obtain the desired information through the defendant's own efforts before the People are required to initiate an investigation, put the cart before the horse. "The police will know whether the informer was a material witness *before* charges have been filed against the defendant; it is at this time that inquiries will probably be most fruitful. If investigation is necessary at a later date it is still better undertaken by the prosecution both because of its greater investigatory resources and its superior knowledge of, and contacts with, the informer." (1 C.3d 854.)

The *Eleazer* rule was applied in many later cases. (See *People v. Goliday* (1973) 8 C.3d 771, 781, 106 C.R. 113, 505 P.2d 537 [duty to furnish information is not limited to informers who were paid or who provided information regularly, but applies to "all material witness informants who served as active agents of the police"]; *People v. Frohner* (1976) 65 C.A.3d 94, 110, 135 C.R. 153 [when key informer, whom prosecution was dilatory about locating, was finally

arrested during jury deliberations, it was prejudicial error to deny defendant's motion to reopen case so that informer could testify]; *People v. Hernandez* (1978) 84 C.A.3d 408, 410, 148 C.R. 567 [prosecution's *Eleazer* duty does not apply to victim-witness who was not informer; arrest here was based on police observation of the robbery]; *People v. Rios* (1977) 74 C.A.3d 833, 837, 141 C.R. 677 [refusal to disclose informer's home address was not error where defense counsel knew informer's name and telephone number and declined opportunities to interview and subpoena him]; *Twiggs v. Superior Court* (1983) 34 C.3d 360, 366, 194 C.R. 152, 667 P.2d 1165 [trial judge's order requiring prosecution to provide informant's last known address failed to satisfy *Eleazer*, where it was likely that informant could not be located on the basis of such information alone; trial judge must inquire into what efforts, if any, prosecution has made to maintain contact with informant].)

In *Miller v. Superior Court* (1979) 99 C.A.3d 381, 159 C.R. 456, an informer testified as key witness at the preliminary hearing, but the judge sustained an objection to the question of his home address. Defendant showed that the address was necessary to test veracity, and the prosecution failed to establish any cause for withholding it, conceding there was not sufficient indication of danger to the witness. *Held*, writ issued requiring dismissal under P.C. 995 for lack of probable cause supporting the information.

(a) Denial of the address impaired defendant's right of cross-examination. (99 C.A.3d 385, citing *Alford v. United States* (1931) 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624, 3 Cal. Evidence (4th), *Presentation at Trial*, §283; *Alford v. Superior Court* (1972) 29 C.A.3d 724, 105 C.R. 713, 4 Cal. Crim. Law (3d), *Pretrial Proceedings*, §144.)

(b) The prosecution is not entitled to a second opportunity to disclose the address. In *Eleazer*, the prosecution was given a second chance to locate the informer only because its duty to do so was previously unclear. (99 C.A.3d 387.) (See *Montez v. Superior Court* (1992) 5 C.A.4th 763, 767, 768, 769, 7 C.R.2d 76 [discussing and distinguishing *Miller* and other cases involving similar facts].)

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CHAPTER IX - Witnesses

XIII. PRIVILEGE FOR IDENTITY OF INFORMER

G. Duty To Locate Informer.

2. Effect of Reversal of Conviction.

2 *Witkin Cal. Evid. Witnesses* § 331

[§ 331] Effect of Reversal of Conviction.

In *Harris v. Superior Court* (1973) 35 C.A.3d 24, 110 C.R. 400, the judge at defendant's first trial refused to order disclosure of an informer's name. Following defendant's conviction for possessing heroin, judgment was reversed on the ground that disclosure should have been made. As defendant's second trial was about to begin, the prosecution identified the informer but had no knowledge of his whereabouts. Defendant sought prohibition. *Held*, writ issued to compel dismissal. The prosecution's original refusal to disclose the informer's name, coupled with circumstances beyond defendant's control, deprived her of information essential to a fair trial. No showing short of actual disclosure of the informer's name and whereabouts could remedy the situation. "If the original trial without this information was unfair, a retrial sans same would be nothing but a replay of a constitutionally defective record. If any party must suffer the consequences of the prosecution's original decision to refuse disclosure of the identity of the informer in this case it must be the People and not the accused." (35 C.A.3d 27.)

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## CHAPTER IX - Witnesses

### XIII. PRIVILEGE FOR IDENTITY OF INFORMER

#### G. Duty To Locate Informer.

#### 3. Distinction: Anonymous Informant.

2 Witkin Cal. Evid. Witnesses § 332

[§ 332] Distinction: Anonymous Informant.

In *People v. Callen* (1987) 194 C.A.3d 558, 239 C.R. 584, defendant was charged with robbery. His arrest came about as a result of an anonymous tip received by police on the Crimestoppers telephone hotline from an apparent percipient witness to the crime. Defendant moved for an order compelling disclosure of the identity of the informant; the police did not know who the informer was and the motion was denied. On appeal from the judgment of conviction, defendant contended that the police have a duty to determine and disclose to a defendant the identity of such an informant, and that they may not operate a program purposely designed to conceal the identity of an informant who was a percipient witness. *Held*, conviction affirmed; there is no such duty.

(a) The identity of an informant known to the police who is a percipient witness must be disclosed. (194 C.A.3d 561; see *supra*, §312.) But "[w]e are unaware of any decision holding the police have an affirmative obligation to determine the identity of an anonymous informant who provides information." (194 C.A.3d 561.) The cases dealing with suppression of evidence impose a duty of preservation of evidence favorable to the accused if the prosecution has gathered such evidence; they do not impose upon law enforcement agencies the requirement that they take any affirmative action to procure such evidence. (194 C.A.3d 561; see 3 Cal. Evidence (4th), *Presentation at Trial*, §132.)

(b) Defendant contended that the Crimestoppers program, which guarantees anonymity by not tracing incoming calls, results in suppression of evidence which might be helpful to the defense. This is unsound:

(1) Answering the telephone does not amount to a seizure of potentially material evidence which must then be preserved for the benefit of the defense. (194 C.A.3d 562.)

(2) "[I]t is sheer speculation that taping or tracing hotline calls will yield anything of benefit to criminal defendants. Informants who are determined to protect their anonymity may disguise their voices, call from public telephones, limit their calls to a duration too brief to trace, or even communicate with law enforcement by means not involving the telephone, for instance, by letter." (194 C.A.3d 562.)

(3) The burden placed on law enforcement would extend beyond simply taping or mechanically attempting to trace telephone calls: the police would have to try to keep the informant on the line, and if they traced the call the caller could still physically elude the police. (194 C.A.3d 562.)

(4) The investigatory burden would destroy programs such as Crimestoppers by removing the guarantee of anonymity. "It is the promise of anonymity which allays the fear of criminal retaliation which otherwise discourages

citizen involvement in reporting crime. In turn, by guaranteeing anonymity Crimestoppers provides law enforcement with information it might never otherwise obtain. We are satisfied the benefits of a Crimestoppers-type program--citizen involvement in reporting crime and criminals--far outweigh any speculative benefits to the defense arising from imposing a duty on law enforcement to gather and preserve evidence of the identity of informants who wish to remain anonymous." (194 C.A.3d 563.)

(5) "The asserted need to tape and trace hotline calls to preserve a balance between prosecution and defense is surely the reddest of herrings." (194 C.A.3d 563.) Anonymous information often is passed to law enforcement officials in a manner that cannot be traced. "Thus, defendant's position must be that law enforcement officials should not be permitted to act upon anonymous information, however that information is received, unless the identity of the informant can somehow be uncovered, a proposition we find palpably unacceptable. There is no question but that anonymous information often provides a substantial part of the initial investigatory data relied upon by law enforcement agencies. A Crimestoppers-type program does no more than institutionalize the method by which anonymous information may be fed into the investigation pipeline." (194 C.A.3d 563.)

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## CHAPTER IX - Witnesses

## XIV. NEWSPERSON'S SHIELD LAW

## A. Origin of Immunity.

2 *Witkin Cal. Evid. Witnesses* § 333

[§ 333] Origin of Immunity.

A California statute enacted in 1935 gave newsmen protection against compulsory disclosure of the sources of their information. This "shield law," established by statute in many states, has no common law background, is unavailable in the federal courts, is not recognized by the Model Code or the Uniform Rules of Evidence, and has been criticized in authoritative quarters. (See generally *In re Howard* (1955) 136 C.A.2d 816, 818, 289 P.2d 537 [privilege upheld against contention of waiver]; 1 McCormick 5th, §76.2; 8 Wigmore (McNaughton Rev.) §2286; 11 *Stanf. L. Rev.* 540; 72 *Harv. L. Rev.* 768; 77 *Harv. L. Rev.* 556; 98 *Harv. L. Rev.* 1600; 1956 A.S. 551; 1959 A.S. 636; 1963 A.S. 306; 81 *Am.Jur.2d* (1992 ed.), *Witnesses* §544 et seq.; 99 A.L.R.3d 37.)

The California Law Revision Commission proposed several limitations. All were rejected, however, and *Ev.C. 1070* restated the provisions of former C.C.P. 1881(6). (See *infra*, §334 et seq.; and see generally *Mitchell v. Superior Court* (1984) 37 C.3d 268, 274, 208 C.R. 152, footnote 2, 690 P.2d 625, *infra*, §346 [approximately half the states have similar laws]; 18 *Hastings Const. L. Q.* 779 [The Case for a Federal Journalist's Testimonial Shield Statute]; 29 *Hastings L. J.* 375 [California law and federal shield law]; 25 *Loyola L.A. L. Rev.* 155 [Promises Not To Be Kept: The Illusory Newsgatherer's Privilege in California]; 4 *Pacific L. J.* 880 [surveying California law]; 8 *San Diego L. Rev.* 110 [discussing legislative intent of statutes]; 26 *Santa Clara L. Rev.* 219 [California and federal shield law and criminal defendant's right to fair trial]; 11 *Santa Clara Lawyer* 56 [illustrating difficulties in interpreting *Ev.C. 1070*]; 15 *Southwestern U. L. Rev.* 527 [The Newsgatherer's Shield--Why Waste Space in the California Constitution?]; 8 *U.S.F. L. Rev.* 664 [discussing shield legislation]; C.J.E.R., *Judges Benchbook*, Civil Proceedings: Discovery §4.104 et seq.)

In 1980, an amendment to Cal. Const., Art. I, §2 was adopted, repeating the language of *Ev.C. 1070*. (See *KSDO v. Superior Court* (1982) 136 C.A.3d 375, 381, 186 C.R. 211, *infra*, §345; *Playboy Enterprises v. Superior Court* (1984) 154 C.A.3d 14, 20, 201 C.R. 207, *infra*, §336; *In re Willon* (1996) 47 C.A.4th 1080, 1090, 1096, 55 C.R.2d 245, *infra*, §344 [effect of elevating protection to constitutional status].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 81 *Am.Jur.2d* (2004 ed.), *Witnesses* §525 et seq.; 1 McCormick 6th, §76.2. *West's Key Number Digest*, *Witnesses* k.196.1



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CHAPTER IX - Witnesses

XIV. NEWSPERSON'S SHIELD LAW

B. Nature and Scope of Immunity.

1. Persons Protected.

2 *Witkin Cal. Evid. Witnesses* § 334

[§ 334] Persons Protected.

The immunity may be claimed by the following persons:

(1) A publisher, editor, reporter, or other person currently or formerly connected with or employed by a newspaper, magazine, or other periodical publication, or by a press association or wire service. (*Ev.C. 1070(a).*)

(2) A radio or television news reporter or other person currently or formerly connected with or employed by a radio or television station. (*Ev.C. 1070(b).*)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *O'Grady v. Superior Court (2006) 139 C.A.4th 1423, 1459, 44 C.R.3d 72* [in action alleging that persons unknown caused wrongful publication, in news-oriented websites, of plaintiff's plans to release new computer device, website operators were "publishers" and websites were "newspapers" or "periodicals" within meaning of shield law, and thus trial judge erred in ordering discovery aimed at identifying their sources].



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## CHAPTER IX - Witnesses

### XIV. NEWSPERSON'S SHIELD LAW

- B. Nature and Scope of Immunity.
  - 2. Matter Procured for Publication.
    - a. Statutory Provisions.

2 Witkin Cal. Evid. Witnesses § 335

[§ 335] Statutory Provisions.

The original statute referred to information that was actually published or used. As amended in 1971, it protects nondisclosure of the following (see 3 *Pacific L. J.* 420):

- (1) The source of information procured for publication in a newspaper, magazine, or other periodical publication (*Ev.C. 1070(a)*), or for news or news commentary purposes on radio or television (*Ev.C. 1070(b)*).
- (2) Unpublished information obtained or prepared in gathering, receiving, or processing information for communication to the public. (*Ev.C. 1070(a), (b)*.)

"Unpublished information" includes "information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated and includes, but is not limited to, all notes, outtakes, photographs, tapes or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published information based upon or related to such material has been disseminated." (*Ev.C. 1070(c)*.) Thus, the disclosures protected against are no longer limited to sources or information leading to sources but encompass all information acquired by news gathering or processing activity. That construction furthers the legislative purpose of maintaining a free flow of information. (*Hammarley v. Superior Court* (1979) 89 C.A.3d 388, 396, 153 C.R. 608; *Playboy Enterprises v. Superior Court* (1984) 154 C.A.3d 14, 22, 201 C.R. 207, *infra*, §336; *Delaney v. Superior Court* (1990) 50 C.3d 785, 268 C.R. 753, 789 P.2d 934, *infra*, §§337, 347.)

The phrase "information for communication to the public" requires that the newsperson invoking the shield law be engaged in legitimate journalistic purposes, or have exercised judgmental discretion in those activities. (*Delaney v. Superior Court*, *supra*, 50 C.3d 798, footnote 8.) Thus, the court in *Rancho Publications v. Superior Court* (1999) 68 C.A.4th 1538, 81 C.R.2d 274, held that a newspaper that ran a series of anonymous advertisements critical of a hospital could not invoke the shield law to avoid disclosing the identity of the authors of those advertisements during discovery in the hospital's defamation suit against third parties. (68 C.A.4th 1542.) The *Rancho* court explained: "As far as we know, the Eagle was indifferent to the informational content of these advertisements and would have accepted them whether they sold used cars, promoted the painless removal of unwanted hair, or communicated absolutely nothing." (68 C.A.4th 1546.) However, the court further held that the nonstatutory, constitutional qualified privilege (*infra*, §345 et seq.) prevented disclosure, because it would chill public discourse on core political speech, and because the advertisements were not directly relevant to the defamation action. (68 C.A.4th 1550; following *Mitchell v. Superior Court* (1984) 37 C.3d 268, 208 C.R. 152, 690 P.2d 625, *infra*, §346, and *Britt v. Superior Court* (1978) 20 C.3d 844,



*143 C.R. 695, 574 P.2d 766, 2 Cal. Evidence (4th), Discovery, §113.)*

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## CHAPTER IX - Witnesses

### XIV. NEWSPERSON'S SHIELD LAW

#### B. Nature and Scope of Immunity.

#### 2. Matter Procured for Publication.

#### b. Undisseminated Source Materials.

2 *Witkin Cal. Evid. Witnesses* § 336

[§ 336] Undisseminated Source Materials.

In *Playboy Enterprises v. Superior Court* (1984) 154 C.A.3d 14, 201 C.R. 207, plaintiffs C & C, a comedy team, sued G & R, their former business manager, for breach of contract and breach of fiduciary duty in persuading them to enter into an unfavorable production contract without disclosing defendant's conflicting interest in the production company. Kelly, a freelance reporter, had interviewed plaintiffs and written an article published in an issue of Playboy magazine. Defendants sought discovery from nonparty Playboy Enterprises of the notes, tapes and records of the interview which were used as source material for the article, and all documents relating to the research, writing or editing of the article. The lower court, on a showing by defendants that they were unable to locate and depose Kelly, granted the requested order for discovery. *Held*, mandamus granted, directing the lower court to vacate its order.

(a) *Ev.C. 1070(c)*, protecting unpublished information (*supra*, §335), provides immunity to petitioner Playboy Enterprises. "The manifested legislative intent is to give broad protection to both information and source material so long as such matter has not been already disseminated by the person from whom disclosure is sought, even if related or derivative information has been disseminated by such publication." (154 C.A.3d 22.) "This broad construction safeguards source materials and facts in memory that were obtained on a 'not for attribution' or 'off the record' basis. It also relieves the trial courts of the tedious and dubiously useful task of sorting through source material to discover facts that have been otherwise disseminated and lifting such facts from the source material out of context." (154 C.A.3d 22.) Hence, the judge's order is not enforceable by contempt except to the extent that petitioner has previously disseminated to the public any of the materials. (154 C.A.3d 22.)

(b) Neither the statute nor the constitutional provision may be construed to make the protection inapplicable where unpublished information or materials could confirm or amplify the published information (here, the Playboy article). The statute provides unqualified protection "whether or not published information based upon or related to" the unpublished material has been disseminated; and published material that could be confirmed, amplified or discredited by undisseminated source material is "related to" or "based upon" the undisseminated material. (154 C.A.3d 23.)

(c) Civil litigants have no constitutional rights which overcome the protection.

(1) A criminal defendant's constitutional right to a fair trial, under the Sixth Amendment and comparable due process guarantees of the California Constitution, includes a right to discovery where there is a reasonable possibility that the evidence sought might exonerate the defendant. (154 C.A.3d 24, 25, citing *Hammarley v. Superior Court* (1979) 89 C.A.3d 388, 153 C.R. 608.)

(2) Defendants in a civil action have no similar right. *KSDO v. Superior Court* (1982) 136 C.A.3d 375, 186 C.R. 211, *infra*, §345, is distinguishable: "First, it involves a newsperson who is a *party* to the civil action wherein the discovery is sought. Second, as a direct consequence of the first distinction, the newsperson there relied only upon the indirect protection of the First Amendment to freedom from restraint in the news gathering process rather than the direct and specific protection from disclosure of confidential information afforded under article I, section 2 of the California Constitution." (154 C.A.3d 27.) The dictum in *KSDO*, that disclosure from a nonparty newsperson might be required, is unsound: "If every civil litigant who postulates that some information material to his case is contained within the undisseminated materials of a newsperson may compel that nonparty newsperson to present his information to the trial court for inspection, balancing of interests, and probable disclosure, the protection afforded newspersons would be greatly reduced, if not wholly vitiated." (154 C.A.3d 27.)

(3) "If the Legislature may overcome the general state interest in full civil discovery by enactment of specific statutory privileges limiting disclosure, it certainly has the authority to enact a statute expressly providing a similar protection against compelled disclosure of information by a newsperson. Accordingly, the force of the protection article I, section 2 affords is of no lesser import than the level of protection the Legislature confers by enactment of the privileges found in the Evidence Code." (154 C.A.3d 28.)

(d) Defendants are, however, entitled to reach and depose Kelly; and, having demonstrated unsuccessful diligent efforts to find him, they are entitled to an order compelling Playboy Enterprises to disclose his current address and telephone number. (154 C.A.3d 29.) (See 15 Southwestern U. L. Rev. 527 [newsgatherer's constitutional privilege].)

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### XIV. NEWSPERSON'S SHIELD LAW

- B. Nature and Scope of Immunity.
- 2. Matter Procured for Publication.
- c. Nonconfidential Information.

2 *Witkin Cal. Evid. Witnesses* § 337

[§ 337] Nonconfidential Information.

In *Delaney v. Superior Court* (1990) 50 C.3d 785, 268 C.R. 753, 789 P.2d 934, the court decided the question whether the term "unpublished information" in the California newspaper's shield law (see *supra*, §335) includes a newspaper's nonconfidential, eyewitness observations of an occurrence in a public place.

(a) The language of Cal. Const., Art. I, §2(b) is clear and unambiguous: it refers to "any" unpublished information, regardless of whether it was obtained in confidence. (50 C.3d 798.) This interpretation is supported by the broad definition of "unpublished information," which contains no limitation to confidential information. (50 C.3d 799.) And Delaney's contention that observations are not "information" is unsound: "information" includes reception of knowledge by observation. (50 C.3d 800.)

(b) The legislative and constitutional history does not provide a basis for a contrary interpretation of the plain language. (50 C.3d 800.) Although the ballot argument repeatedly refers to confidentiality, the reasonable inference is that the proponents chose to emphasize what they perceived as the greatest need, and not to indicate that only confidential matters would be protected. (50 C.3d 802.)

(c) The issue is one of first impression for this court, but the Courts of Appeal have dealt with it in a number of cases, and the growing conflict led to a grant of review in several late cases. (50 C.3d 803.) "We disapprove of those Court of Appeal decisions that hold or suggest the shield law protects only confidential information." (50 C.3d 804.) (See 22 *Pacific L. J.* 1371 [*Delaney*]; 18 *Pepperdine L. Rev.* 655 [same]; 25 *Loyola L.A. L. Rev.* 155 [same]; 60 A.L.R.5th 75 [existence of privilege as to nonconfidential news information]; on *Delaney* court's promulgation of balancing test to determine whether newspaper may be held in contempt for refusing to reveal unpublished information when called as witness in criminal proceeding, see *infra*, §347.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER IX - Witnesses

### XIV. NEWSPERSON'S SHIELD LAW

#### B. Nature and Scope of Immunity.

##### 3. Immunity.

##### a. Protection From Contempt.

2 Witkin Cal. Evid. Witnesses § 338

[§ 338] Protection From Contempt.

(1) *Immunity, Not Privilege.* The protected person (see *supra*, §334) cannot be "*adjudged in contempt* by a judicial, legislative, administrative body, or any other body having the power to issue subpoenas, for refusing to disclose, in any proceeding as defined in Section 901, the source of his information." (*Ev.C. 1070(a)*, (b); see 4 *Pacific L. J.* 387; on proceeding under *Ev.C. 901*, see *supra*, §65.)

Thus, the statute does not create a privilege to refuse to testify to the protected facts, but merely an immunity from being adjudged in contempt. Sanctions other than contempt can be imposed against a newsperson. (*Mitchell v. Superior Court* (1984) 37 C.3d 268, 274, 208 C.R. 152, 690 P.2d 625, *infra*, §346; *Delaney v. Superior Court* (1990) 50 C.3d 785, 797, footnote 6, 268 C.R. 753, 789 P.2d 934, *supra*, §337 and *infra*, §347; see *infra*, §340.)

(2) *Absolute Immunity in Civil Case.* In *New York Times Co. v. Superior Court* (1990) 51 C.3d 453, 273 C.R. 98, 796 P.2d 811, the court held that *Mitchell* (*supra*) and *Delaney* (*supra*) support the conclusion that the shield law provides an absolute, not a qualified immunity, from a contempt order in a civil case. (51 C.3d 462.)

However, the court also observed: "We do not foreclose the possibility that in a future case a civil litigant seeking discovery from a nonparty newsperson might have either a state or federal constitutional right that would have to be weighed against a claim of immunity under the shield law." (51 C.3d 462, footnote 11.) (See 18 *Pepperdine L. Rev.* 675.)

(3) *Absolute Immunity From Demand by Prosecution in Criminal Case.* In *Miller v. Superior Court* (1999) 21 C.4th 883, 89 C.R.2d 834, 986 P.2d 170, *infra*, §347, the court observed that although *Delaney* established that a criminal defendant's federal constitutional right to a fair trial may in some cases overcome a claim of immunity under the shield law (21 C.4th 891), the shield law affords absolute immunity from contempt where the demand for disclosure is made by the prosecution. The absoluteness of the immunity embodied in the shield law yields only to a conflicting federal constitutional right, and the prosecution's entitlement to due process in a criminal trial under Cal. Const., Art. I, §29 is not such a right. (21 C.4th 902.)

(4) *Broad Scope of Immunity.* Labeling the protection an immunity rather than a privilege does not indicate a legislative intent to construe it narrowly. "[W]e believe the Legislature in enacting *Evidence Code* section 1070 recognized the importance of maintaining a free flow of information and intended that the statute be given a broad rather than a narrow construction. Accordingly, absent any constitutional or other limitation on the exercise of the

privilege ... , we believe it extends not only to the identity of the source but to the disclosure of any information, in whatever form, which may tend to reveal the source of the information, and, as in the case of the privilege against self-incrimination, the burden is upon the person claiming the privilege to show that the testimony may tend to lead to that source. Though the burden is on the person claiming the privilege, it is not a heavy one." (*Rosato v. Superior Court* (1975) 51 C.A.3d 190, 217, 124 C.R. 427, *infra*, §343; see 51 C.A.3d 216, footnote 17.)

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## CHAPTER IX - Witnesses

### XIV. NEWSPERSON'S SHIELD LAW

#### B. Nature and Scope of Immunity.

##### 3. Immunity.

##### b. No Writ Review Before Contempt Judgment.

2 Witkin Cal. Evid. Witnesses § 339

[§ 339] No Writ Review Before Contempt Judgment.

In *New York Times Co. v. Superior Court* (1990) 51 C.3d 453, 273 C.R. 98, 796 P.2d 811, the court decided the case on the merits to avoid remanding to the trial court for entry of a contempt judgment. (51 C.3d 461.) But the opinion lays down a positive rule barring a premature petition for a writ.

(a) The shield law provides only an immunity from contempt, not a privilege; hence there is nothing from which to seek relief until a newsperson has been adjudged in contempt. (51 C.3d 458; see *supra*, §338.)

(b) Precontempt relief would also have undesirable practical effects. It would deprive the trial court of the opportunity to decide in the first instance whether the shield law applies; and it would also deprive the reviewing court of adequate factual records for making its determination that there was sufficient evidence to support a contempt adjudication. (51 C.3d 459.) Moreover, it would allow newsmen to avoid the responsibility of choosing between disclosing information or being held in contempt. (51 C.3d 460.)

(c) There is, however, a need to avoid unnecessary confinement of a newsmen who invokes the shield law. Hence a trial court should stay its contempt judgment to allow the newsmen sufficient time to seek writ relief if the trial court believes there is "any colorable argument the newsmen can make against the contempt adjudication." (51 C.3d 460.) And if the trial court declines to issue a stay, a reviewing court should do so pending its decision on the petition for a writ. (51 C.3d 460.)

One justice, concurring and dissenting, argued that review by writ should be available before a contempt adjudication. (51 C.3d 464 et seq.)

Later cases have applied the *New York Times* rule. (See *People v. Sanchez* (1995) 12 C.4th 1, 55, 47 C.R.2d 843, 906 P.2d 1129 [finding of prematurity in *New York Times* case was based on practical concern that precontempt relief would frustrate trial court's ability to determine whether immunity should apply in first instance; this reasoning does not foreclose claim of immunity in trial court by nonparty witness during cross-examination]; *SCI-Sacramento v. Superior Court* (1997) 54 C.A.4th 654, 663, 665, 62 C.R.2d 868 [television station was not entitled to writ review of ruling requiring it to disclose "outtakes" of videotaped interview with murder defendant, where station had not yet been found in contempt]; following *New York Times* and distinguishing *Sanchez*.)

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### XIV. NEWSPERSON'S SHIELD LAW

#### B. Nature and Scope of Immunity.

##### 3. Immunity.

##### c. Sanctions Other Than Contempt.

2 Witkin Cal. Evid. Witnesses § 340

#### [§ 340] Sanctions Other Than Contempt.

(1) *Party to Civil Proceeding.* A newsperson who is a party to a civil proceeding remains subject to all sanctions, other than contempt, that may be imposed for withholding information, including discovery sanctions and entry of judgment against the newsperson. (See Law Rev. Com. Comment to *Ev.C. 1070*; *Mitchell v. Superior Court* (1984) 37 C.3d 268, 274, 208 C.R. 152, 690 P.2d 625, *infra*, §346; *Delaney v. Superior Court* (1990) 50 C.3d 785, 797, footnote 6, 268 C.R. 753, 789 P.2d 934, *supra*, §337 and *infra*, §347 [disapproving suggestions to contrary in *Hammarley v. Superior Court* (1979) 89 C.A.3d 388, 153 C.R. 608]; *KSDO v. Superior Court* (1982) 136 C.A.3d 375, 379, 186 C.R. 211, *infra*, §345; *Playboy Enterprises v. Superior Court* (1984) 154 C.A.3d 14, 26, 201 C.R. 207, *supra*, §336; *Dalitz v. Penthouse Int., Ltd.* (1985) 168 C.A.3d 468, 475, 214 C.R. 254 [defendant publisher's cross-complaint in libel action could be dismissed as sanction for failure of its reporters to disclose their confidential sources].)

(2) *Nonparty to Civil Proceeding.* In *New York Times Co. v. Superior Court* (1990) 51 C.3d 453, 273 C.R. 98, 796 P.2d 811, *supra*, §339, the court pointed out that the shield law does not preclude statutory sanctions other than contempt against a nonparty newsperson. *C.C.P. 1992*, which is the sole discovery sanction against nonparties, provides that a witness disobeying a subpoena is subject to a penalty of \$ 500, plus actual damages recoverable in a civil action by the aggrieved party. The enactment of the shield law did not operate as a repeal of this section by implication in the case of disobedience by a newsperson. (51 C.3d 462, 463.) However, the monetary sanctions under *C.C.P. 1992* are not large enough to make a civil action a practical remedy, and are therefore virtually ineffectual. (51 C.3d 464.) (See 18 *Pepperdine L. Rev.* 675.)

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XIV. NEWSPERSON'S SHIELD LAW

C. Limitations on Immunity.

1. In General.

2 *Witkin Cal. Evid. Witnesses* § 341

[§ 341] In General.

In *Rosato v. Superior Court* (1975) 51 C.A.3d 190, 124 C.R. 427, the court set forth the following limitations on the immunity:

(a) It does not shield the protected persons from testifying about criminal activity in which they have participated or which they have observed. (51 C.A.3d 218.) (See *infra*, §342.)

(b) Despite what the Legislature enacts, the judiciary, as a separate and coequal branch of California's tripartite governmental structure, has an inherent power to control its own proceedings and officers. (51 C.A.3d 219.) (See *infra*, §§343, 344.)

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## CHAPTER IX - Witnesses

### XIV. NEWSPERSON'S SHIELD LAW

#### C. Limitations on Immunity.

##### 2. Refusal To Testify.

2 Witkin Cal. Evid. Witnesses § 342

[§ 342] Refusal To Testify.

The statutory immunity does not justify refusal to testify (see *supra*, §338), and the claim of such a right, based on the First Amendment, was rejected in *Branzburg v. Hayes* (1972) 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626. Several newsmen refused either to appear before a grand jury or to answer questions about news sources or information received in confidence. The Court examined and disposed of the constitutional and policy considerations as follows:

(a) *Drying up of news sources.* The newsmen asserted that to gather news it is often necessary to agree either not to identify the source of information published or to publish only part of the facts, or both, and that if a grand jury forces a newsman to reveal these confidences, the source in question and other confidential sources would be measurably deterred from furnishing publishable information. However, on the present record "we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering which is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial." (92 S.Ct. 2661, 33 L.Ed.2d 645.)

"The preference for anonymity of those confidential informants involved in actual criminal conduct is presumably a product of their desire to escape criminal prosecution, and this preference, while understandable, is hardly deserving of constitutional protection." (92 S.Ct. 2662, 33 L.Ed.2d 645.) As to informants not themselves engaged in criminal conduct but with information about other persons' illegal activity: "There is little before us indicating that informants whose interest in avoiding exposure is that it may threaten job security, personal safety, or peace of mind, would in fact, be in a worse position, or would think they would be, if they risked placing their trust in public officials as well as reporters. We doubt if the informer who prefers anonymity but is sincerely interested in furnishing evidence of crime will always or very often be deterred by the prospect of dealing with those public authorities characteristically charged with the duty to protect the public interest as well as his." (92 S.Ct. 2663, 33 L.Ed.2d 647.)

(b) *Concealment of crime.* Concealment of crime and agreements to do so are looked on with disfavor. "Such conduct deserves no encomium, and we decline now to afford it First Amendment protection by denigrating the duty of a citizen whether reporter or informer, to respond to grand jury subpoena and answer relevant questions put to him." (92 S.Ct. 2664, 33 L.Ed.2d 648.)

(c) *Establishment of private system of informers.* "Neither are we now convinced that a virtually impenetrable constitutional shield, beyond legislative or judicial control, should be forged to protect a private system of informers operated by the press to report on criminal conduct, a system that would be unaccountable to the public, would pose a

threat to the citizen's justifiable expectations of privacy, and would equally protect well-intentioned informants and those who for pay or otherwise betray their trust to their employer or associates." (92 S.Ct. 2665, 33 L.Ed.2d 649.)

(d) *Difficulty of defining "newsperson."* "The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods. ... The informative function asserted by representatives of the organized press in the present cases is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. Almost any author may quite accurately assert that he is contributing to the flow of information to the public, that he relies on confidential sources of information, and that these sources will be silenced if he is forced to make disclosures before a grand jury." (92 S.Ct. 2668, 33 L.Ed.2d 653.)

(e) *No bars to state privileges.* Although Congress may determine privileges on the federal level, state Legislatures are free within First Amendment limits to fashion their own standards and state courts cannot be barred by the United States Supreme Court from construing their own constitutions so as to recognize a newsperson's privilege, either qualified or absolute. (92 S.Ct. 2669, 33 L.Ed.2d 654.)

(f) *Official harassment unjustified.* News gathering does have First Amendment protections. "[G]rand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment. Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification. Grand juries are subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth." (92 S.Ct. 2670, 33 L.Ed.2d 655.)

Four justices dissented. (See 86 Harv. L. Rev. 137; 98 Harv. L. Rev. 1603; 10 Golden Gate L. Rev. 691 [effect of *Herbert v. Lando* (1979) 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115, 5 Summary (9th), Torts, §541]; 1 Hastings Const. L. Q. 39 [congressional power to establish privilege]; 24 Hastings L. J. 915 [analyzing applicability of *Branzburg* to 9th Circuit case]; 29 Hastings L. J. 375 [California law and federal shield law]; 33 Hastings L. J. 623 [Source Disclosure in Public Figure Defamation Actions: Towards Greater First Amendment Protection]; 5 Pepperdine L. Rev. 351 [discussing federal case on First Amendment protection for filmmakers' confidential sources]; 60 So. Cal. L. Rev. 1631 [Disclosure of Confidential Sources in International Reporting]; 24 U.C.L.A. L. Rev. 160 [The Case for a Federal Shield Law]; 1971/72 A.S. 266 [discussing cases prior to Supreme Court decision]; 1980 A.S. 165; 1981 A.S. 205.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Cross-Reference:* 5 Summary (10th), Torts, §610.



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## CHAPTER IX - Witnesses

### XIV. NEWSPERSON'S SHIELD LAW

#### C. Limitations on Immunity.

#### 3. Judicial Control of Court Proceedings.

##### a. Rule Prior to Constitutional Immunity Provision.

2 Witkin Cal. Evid. Witnesses § 343

[§ 343] Rule Prior to Constitutional Immunity Provision.

The newsperson's privilege is subject to the inherent power of the court to control its proceedings (see 2 Cal. Proc. (4th), Courts, §177), and to exercise its contempt power (see 7 Cal. Proc. (4th), Trial, §182). (*Farr v. Superior Court* (1971) 22 C.A.3d 60, 69, 99 C.R. 342; *Rosato v. Superior Court* (1975) 51 C.A.3d 190, 219, 124 C.R. 427.)

In the *Farr* case, supra, the trial judge presiding over a mass murder case prohibited all attorneys, court employees, attaches or witnesses from releasing for public dissemination the content or nature of any testimony that might be given at trial or any evidence the admissibility of which the court would have to determine. Petitioner, a newspaper reporter, obtained copies of a statement by a codefendant in which sensational details were given about the planned murder of several film celebrities. At the time he received the statement, petitioner was aware of the gag order; his sources, whom he identified only by classification, were two attorneys of record and a third person subject to the court order. After relying on *Ev.C. 1070* to refuse to identify his sources by name, petitioner published material from the statement, much of which was later ruled inadmissible in evidence. At a hearing following a guilty verdict in the main case, the trial judge sought to determine whether the defendants' right to a fair trial had been jeopardized by a violation of the order restricting publicity. By this time, petitioner was no longer a newspaper reporter, having become a press secretary for the district attorney, but he refused to identify his sources beyond saying that two were attorneys of record and a third was subject to the order and possibly also an attorney of record. All six attorneys of record testified under oath, denying that they had furnished the statement to petitioner. The trial judge rejected petitioner's claims of privilege under *Ev.C. 1070* and held him in direct contempt, subject to incarceration until he answered the questions. *Held*, the contempt judgment was valid.

Leaving open the question whether the statute covered former newsmen (22 C.A.3d 69), and pointing out that the trial judge had power to inquire into violations of the judge's order even though the case had reached the verdict stage (22 C.A.3d 66), the court declared that to construe the statute as granting immunity to petitioner would countenance an interference by the Legislature with an inherent power of the court.

"If *Evidence Code* section 1070 were to be applied to the matter at bench to immunize petitioner from liability, that application would violate the principle of separation of powers established by our Supreme Court. That application would severely impair the trial court's discharge of a constitutionally compelled duty to control its own officers. The trial court was enjoined by controlling precedent of the United States Supreme Court to take reasonable action to protect the defendants in the Manson case from the effects of prejudicial publicity. ... It performed its duty by issuing the order re publicity. By petitioner's own statement that order was violated by two attorneys of record, a list of six counsel in the

case. Those attorneys were officers of respondent court. By petitioner's own statement the violations occurred because of his solicitation. Respondent court was both bound and empowered to explore the violations of its order by its own officers." (22 C.A.3d 70.)

In the *Rosato* case, *supra*, the court observed that despite what the Legislature enacts, the judiciary, as a separate and coequal branch of California's tripartite governmental structure, has an inherent power to control its own proceedings and officers. (51 C.A.3d 219.) But the necessity of determining which court officer has violated protective and seal orders may not totally emasculate the protection afforded to the press. "Consequently, we view the ... limitation on the otherwise absolute protection afforded by the shield law ... as being applicable only when the questions asked may tend to identify who, if anyone, *among those subject to a court's order*, may have violated it. The shield law still remains as a protection against the revelation of all sources other than court officers, and a reporter cannot be required to divulge information which would tend to reveal any source other than those court officers subject to the orders issued by the court." (51 C.A.3d 224.)

Implementing this balance requires a determination on a question by question basis. "To this end, within the rather narrow constrictions described above and even in the face of denials that court officers were involved, questions may continue to be asked if the answers may reveal that the source of the information was a court officer. *Evidence Code section 1070* would not protect a refusal to answer this type of question. However, should a question be overbroad, i.e., it might tend to reveal that either a court official or a protected source was involved in the newsperson's obtaining of the information, the privilege under *Evidence Code section 1070* would apply. Furthermore, a court is not entitled to ask questions directed toward discovering where the information did *not* come from (other than as they pertain to court officials) in order to narrow the field of inquiry vis-a-vis the protected sources. The court is only entitled to ask questions directed toward affirmatively determining if the information did come from court officers or attaches." (51 C.A.3d 225.)

To aid in the application of its "somewhat abstruse" articulation of the test for determining whether a question is proper, the court in *Rosato* included an Appendix to its opinion, setting forth each disputed question asked of the newsmen and commenting on whether the questions should have been answered. (51 C.A.3d 225, 242.) (See *In re Farr* (1974) 36 C.A.3d 577, 111 C.R. 649 [following *Farr v. Superior Court*, and denying habeas corpus relief sought by newsperson adjudged in contempt]; *Hammarley v. Superior Court* (1979) 89 C.A.3d 388, 400, 153 C.R. 608 [enforcement of subpoena requiring reporter to produce notes and recordings of interviews with important witness in murder prosecution was necessary to protect defendant's constitutional right to a fair trial]; 16 *Santa Clara L. Rev.* 379 [analysis of *Farr* 9th Circuit case]; 29 *Hastings L. J.* 384.)

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## CHAPTER IX - Witnesses

### XIV. NEWSPERSON'S SHIELD LAW

#### C. Limitations on Immunity.

#### 3. Judicial Control of Court Proceedings.

#### b. Effect of Constitutional Immunity Provision.

2 Witkin Cal. Evid. Witnesses § 344

[§ 344] Effect of Constitutional Immunity Provision.

*In re Willon* (1996) 47 C.A.4th 1080, 55 C.R.2d 245, was a writ proceeding by a television news reporter and a television news director arising from a widely publicized capital murder case. The trial judge had closed some of the pretrial hearings and issued a protective order prohibiting court staff, participants, and witnesses from discussing what they observed at those proceedings. Additionally, shortly before jury selection was to begin, the judge issued an order prohibiting court officers, law enforcement officers and other public officials, and prospective witnesses from releasing any evidence that had not yet been ruled admissible, "as well as any comments about the evidence gathered, testimony already heard or expected, and the identity of prospective witnesses." (47 C.A.4th 1085.) On the first day of jury selection, petitioners revealed the following information during their evening news broadcast: (a) that defendant's confession would be used at trial; (b) details of the confession; (c) that there were no witnesses to two stops made by defendant after he kidnapped the murder victim; (d) that, during his confession, defendant was not asked whether he had sexually assaulted the victim; and (e) that the victim's body, when found, was so badly decomposed that it could not be ascertained whether she had been sexually assaulted. Finding that this information was encompassed within the protective order, the trial judge asked petitioners to reveal the source of their information. When they would not, the judge found them to be in direct contempt and ordered them imprisoned until they agreed to answer his questions. *Held*, judgments of contempt annulled; under the circumstances, the newperson's shield law protected petitioners from contempt.

(a) The trial judge's justification for the contempt orders was the need to protect defendant's fair trial right by preventing further prejudicial pretrial publicity. Similar steps were taken in two previous California cases: *Farr v. Superior Court* (1971) 22 C.A.3d 60, 99 C.R. 342, supra, §343, and *Rosato v. Superior Court* (1975) 51 C.A.3d 190, 124 C.R. 427, supra, §343. In each of those cases, the court relied on its duty to control court processes in order to protect a criminal defendant's rights. Both *Farr* and *Rosato*, however, were decided at a time when the shield law privilege resided only in the Evidence Code. Since that time, the voters have elevated the privilege to constitutional status. It can no longer be assumed that a source's violation of protective orders is, by itself, a sufficient basis to compel disclosure of protected information. Rather, a precise standard is needed for determining whether disclosure is necessary to avert an actual threat to the defendant's right to a fair trial. (47 C.A.4th 1096, 1097.)

(b) The appropriate standard is the "substantial probability" test. This test--already used to review judicial restrictions on public access to criminal proceedings--will protect the defendant's fair trial rights while recognizing the importance of the immunity conferred by Cal. Const., Art. I, §2(b). "Accordingly, where a violation of a protective or

'gag' order has already occurred, a court should determine the necessity of disclosure of the newsperson's source by addressing two principal considerations in light of all the relevant circumstances: (1) If the newsperson does not disclose the identity of the source, is there a substantial probability of future violations, or 'leaks,' that will impair the defendant's ability to obtain a fair trial? and (2) Are there reasonable alternatives to disclosure that will protect the interests asserted by both the newsperson and the defendant?" (47 C.A.4th 1099.)

(c) In the present case, there is no need to proceed to the second step of the inquiry, as all of the information at issue was already in the public domain, was of minimal significance, or was remediable by effective voir dire. "Thus, even assuming that petitioners obtained information for the newscasts from their source, we see no substantial or even reasonable probability that the source's violation would have influenced the entire jury pool. Since the record does not indicate that there is additional evidence that the court sought to withhold from the public pending jury selection, we have no basis for finding a substantial likelihood of any future violations of the protective order that would create impermissible juror bias." (47 C.A.4th 1102.)

One judge concurred in the judgment, stating that, in view of the unique facts likely to be involved in any similar cases, it was a mistake to attempt to create a "bright line test" for future application. (47 C.A.4th 1102, 1103.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 1986.1*, added in 2000, clarifies the rights of journalists under Cal. Const., Art. I, §2(b), as follows:

(1) No testimony or other evidence given by a journalist under subpoena in a civil or criminal proceeding is to be construed as a waiver of the constitutional immunity. (*C.C.P. 1986.1(a)*.)

(2) "Because important constitutional rights of a third-party witness are adjudicated" when rights under the constitutional immunity provision are asserted, a journalist who is subpoenaed in a criminal or civil proceeding must, except in exigent circumstances, be given at least 5 days' notice that his or her appearance will be required. (*C.C.P. 1986.1(b)*.)

(3) If, in a criminal proceeding, a journalist is held in contempt despite the constitutional immunity provision, the judge must set forth findings, in writing or on the record, stating why the information will be of material assistance to the party seeking the evidence, and why alternate sources of information are not sufficient to satisfy the defendant's fair trial right. (*C.C.P. 1986.1(c)*.)



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## CHAPTER IX - Witnesses

### XIV. NEWSPERSON'S SHIELD LAW

#### D. Constitutional Qualified Privilege.

##### 1. First Amendment Basis.

##### 2 *Witkin Cal. Evid. Witnesses* § 345

[§ 345] First Amendment Basis.

In *KSDO v. Superior Court* (1982) 136 C.A.3d 375, 186 C.R. 211, defendant Clark, county sheriff, initiated an investigation of the city police department, and published a report that plaintiff police officers were involved in drug trafficking. Defendant KSDO radio and news reporter Brown then broadcast a report of the investigation, and defendant newspaper published the report. Plaintiffs sued for libel and violation of civil rights, and took Brown's deposition. Brown revealed the sources of his information leading to the broadcast, and plaintiffs then sought production of Brown's notes and memoranda of conversations between Brown and certain named persons. Defendants opposed the motion on the ground that the notes and memoranda were privileged under *Ev.C. 1070*, Cal. Const., Art. I, §2, and the federal Constitution (First Amendment). The trial judge granted the motion. *Held*, mandamus issued to compel annulling of the order.

(a) *No privilege under California shield law.* "It does not create a privilege for newspeople, rather it provides an immunity from being adjudged in contempt. This rather basic distinction has been misstated and apparently misunderstood by members of the news media and our courts as well." (136 C.A.3d 379, reviewing the history of the legislation and quoting from the California Law Revision Commission Report and the Assembly Committee on Judiciary.) The constitutional amendment of 1980 (Proposition 5, amending Cal. Const., Art. I, §2) used the exact language of *Ev.C. 1070*. (136 C.A.3d 381.) The Constitution, therefore, did not provide a sweeping privilege against disclosure, but only an immunity from contempt. "Thus, although a judge cannot find a reporter in contempt for concealing sources he may strike whatever defenses the reporter might have offered in a libel action or even award a plaintiff a default judgment. The reporter cannot look to Section 1070 to bail him out of his trouble. All the statute grants is immunity from contempt. It is not a privilege such as is provided in the other 13 states with newsmen statutes." (136 C.A.3d 383, quoting 11 Santa Clara Lawyer 56, 58.)

(b) *Privilege under First Amendment.*

(1) It is generally agreed that unless there is a constitutionally protected right to gather news, the free flow of information to the public (the underlying reason for the free press guarantee) would be inhibited. However, as pointed out in *Branzburg v. Hayes* (1972) 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626, *supra*, §342, and other cases, the claim of privilege should be determined by striking a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. These cases support "a qualified newsmen's privilege to safeguard confidential sources and materials where the privilege furthers the First Amendment interest of the free flow of information." (136 C.A.3d 385.) But in criminal cases the public interest in law enforcement creates a substantial public need for disclosure. (136 C.A.3d 385.)



(2) In civil cases where the public interest in requiring disclosure is less compelling, stronger First Amendment protection would apply. However, if there is probable cause to believe relevant or material evidence is in the possession of a newsperson witness, and there are no alternative sources for getting the information, and there is a compelling need that would otherwise allow a miscarriage of justice to result, the newsperson may be compelled to testify. (*136 C.A.3d 385.*)

(3) In libel suits such as this one, in which a newsperson is a party and may have vital information directly related to the plaintiff's claim, the courts have applied the "heart of the claim" test: "The truth or falsity of the material published is the essential issue in a libel case and therefore production of the reporter's notes for identification of his source can be essential to the plaintiff's successful prosecution. The reliability of the source or the accuracy of the notes is clearly called into focus. Where the plaintiff is a public figure, the need is especially great for the plaintiff there has to prove actual malice." (*136 C.A.3d 386.*)

(4) In the present case, the scales would normally be tipped in favor of required disclosure, but plaintiffs failed to show that the information they sought was unavailable from any other source or that the materials desired actually go to the heart of the claim. Brown revealed his sources, plaintiffs are free to test their reliability from such sources, and there was no showing that Brown's notes were necessary for that purpose. Hence, the First Amendment qualified privilege protects Brown and KSDO from having to reveal *Brown's notes*. (*136 C.A.3d 386.*)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER IX - Witnesses

### XIV. NEWSPERSON'S SHIELD LAW

#### D. Constitutional Qualified Privilege.

##### 2. Balancing Test for Civil Cases.

2 Witkin Cal. Evid. Witnesses § 346

[§ 346] Balancing Test for Civil Cases.

In *Mitchell v. Superior Court* (1984) 37 C.3d 268, 208 C.R. 152, 690 P.2d 625, plaintiff Synanon Church and Charles Dederich brought a libel action against Reader's Digest, David and Cathy Mitchell, David MacDonald, and Richard Ofshe. The Digest article containing alleged defamatory statements was written by staff writer MacDonald, and revealed as its sources the Mitchell newspaper account, Ofshe's research papers and conversations with Ofshe. Plaintiffs sought discovery from the Mitchells of all documents referring to Synanon or Dederich in the possession or control of defendants prior to publication of the article, in order to prove that the Mitchells selectively relied on some documentary evidence and ignored other evidence more favorable to Synanon. The Mitchells objected on the ground of constitutional freedom of the press, but the trial judge ordered production of the documents. *Held*, prohibition granted to prevent enforcement of the order to the extent that it required production of documents revealing confidential sources or information furnished by such sources.

#### (a) Existence of qualified privilege in civil case.

(1) California, by statute and constitutional provision, prohibits contempt proceedings against a newsperson for refusing to disclose the source of his or her information. "Since contempt is generally the only effective remedy against a *nonparty* witness, the California enactments grant such witnesses virtually absolute protection against compelled disclosure." (37 C.3d 274.) A *party* to civil litigation may, however, be subject to a variety of other sanctions, including entry of judgment against him or her. (37 C.3d 274; see *supra*, §340.)

(2) The Mitchells, as defendants in the Synanon suit, seek to avoid these other sanctions by asserting a privilege under the federal and state constitutional free press guarantees. A number of decisions have discussed the considerations favoring the newsperson's privilege and those favoring disclosure: "When called upon to weigh the fundamental values arguing both for and against compelled disclosure, the overwhelming majority of courts have concluded that the question of a reporter's privilege in civil cases must be decided on a case-by-case basis, with the trial court examining and balancing the asserted interests in light of the facts of the case before it. Thus, the courts conclude, there is neither an absolute duty to disclose nor an absolute privilege to withhold, but instead a qualified privilege against compelled disclosure which depends on the facts of each particular case." (37 C.3d 276.) *KSDO v. Superior Court* (1982) 136 C.A.3d 375, 186 C.R. 211 (*supra*, §345), came to the same conclusion.

(3) The courts properly distinguish civil and criminal cases: both the state's interest in law enforcement and the interest of the defendant in discovering exonerating evidence outweigh an interest asserted in ordinary civil litigation. (37 C.3d 278.)

(4) Synanon contends that the trial judge's power to issue protective orders against abuse of discovery makes recognition of a qualified reporter's privilege unnecessary. But discovery of confidential sources is not ordinary discovery, and judicial concern is not limited to cases of harassment or abusive tactics; even a narrowly drawn request "may impinge upon First Amendment considerations." (37 C.3d 279.)

(5) "We conclude that in a civil action a reporter, editor, or publisher has a qualified privilege to withhold disclosure of the identity of confidential sources and of unpublished information supplied by such sources." (37 C.3d 279.)

(b) *Balancing test for civil cases.* The scope of the privilege in each case will depend on weighing of a number of interrelated factors:

(1) *Nature of the litigation and whether the reporter is a party:* Disclosure is ordinarily appropriate in civil cases where the reporter is a party; where the reporter is a nonparty, the newsperson's shield law makes it impracticable to enforce disclosure even when other considerations argue in favor of it. "Thus the present case, a libel suit in which discovery is sought from a party defendant, is of the type suitable for requiring disclosure, depending upon the balancing of other relevant considerations." (37 C.3d 280.)

(2) *The relevance of the information sought:*

(a) "The majority view, which we adopt, is that mere relevance is insufficient to compel discovery; disclosure should be denied unless the information goes 'to the heart of the plaintiff's claim.' " (37 C.3d 280, quoting federal case.)

(b) The dispute here centers on the liability of a reporter who furnishes defamatory material but does not control the content of the ultimate publication. Under the law, an original defamer is liable for republication if the repetition was authorized or intended or was reasonably to be expected. (37 C.3d 281, citing *Rest.2d, Torts* §576; see 5 *Summary (9th), Torts*, §478.) Plaintiffs are suing for defamation in Reader's Digest, not for statements of the Mitchells, but the test is foreseeability, not exact reproduction: "If plaintiffs can show a sufficient causal link between the Mitchells and the Reader's Digest article, they can come within the rationale of the republication rule. The Mitchells would then be responsible for language in the article based on information furnished by them to the Reader's Digest." (37 C.3d 282.)

(c) Discovery of the Mitchells' sources and information derived therefrom may be essential to proving actual malice and thus goes to "the heart" of plaintiffs' claim. But plaintiffs sought much broader discovery: the Digest article contains many other statements critical of plaintiffs, and knowledge of such statements, while arguably relevant to the suit, "is not sufficiently essential to justify overriding the reporter's privilege." (37 C.3d 282.)

(3) *Exhaustion of alternative sources of obtaining the information:* Virtually all cases agree that compulsory disclosure of sources is a "last resort," permissible only when the party seeking disclosure has no other practical means of obtaining the information. (37 C.3d 282.) Here, plaintiffs made no showing of exhaustion of alternative sources, e.g., Ofshe and other persons mentioned in the article. "There may well be an irreducible core of information which cannot be discovered except through the Mitchells, but plaintiffs have not yet reduced their discovery to that core." (37 C.3d 282.)

(4) *The importance of protecting confidentiality:* "The investigation and revelation of hidden criminal or unethical conduct is one of the most important roles of the press in a free society--a role that may depend upon the ability of the press and the courts to protect sources who may justifiably fear exposure and possible retaliation. Thus when the information relates to matters of great public importance, and when the risk of harm to the source is a substantial one, the court may refuse to require disclosure even though the plaintiff has no other way of obtaining essential information." (37 C.3d 283.)

(5) *A prima facie showing that alleged defamatory statements are false:* To grant motions for compulsory disclosure without first inquiring into the substance of a libel allegation would emasculate the fundamental principles of

*New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (see 5 Summary (9th), Torts, §534 et seq.; 7 Summary (9th), Constitutional Law, §302 et seq.). This requirement is closely related to the previous one: "There is a great public interest in the truthful revelation of wrongdoing, and in protecting the 'whistleblower' from retaliation; there is very little public interest in protecting the source of false accusations of wrongdoing. A showing of falsity is not a prerequisite to discovery, but it may be essential to tip the balance in favor of discovery." (37 C.3d 283.) Plaintiffs have not attempted to make such a prima facie showing. (37 C.3d 283.)

The court concludes that "the generality of plaintiffs' requests, the absence of a showing that alternative sources had been exhausted, and the absence of a prima facie showing of falsity strike the balance against discovery of the scope envisioned in the ruling below." (37 C.3d 284.) However, plaintiffs may file a new motion based upon a showing sufficient to overcome the qualified privilege. (37 C.3d 284, footnote 11.) (See *Anti-Defamation League of B'nai B'rith v. Superior Court* (1998) 67 C.A.4th 1072, 1083, 79 C.R.2d 597 [in-depth discussion and application of *Mitchell* factors and qualified privilege in invasion of privacy case brought against multiple journalists]; *Rancho Publications v. Superior Court* (1999) 68 C.A.4th 1538, 1547, 81 C.R.2d 274, supra, §335 [applying *Mitchell* factors and protecting newspaper from disclosing identity of authors of anonymous advertisements critical of plaintiff during discovery in plaintiff's defamation suit against third parties]; 15 Southwestern U. L. Rev. 527 [newsgatherer's constitutional privilege].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *O'Grady v. Superior Court* (2006) 139 C.A.4th 1423, 1468, 1479, 44 C.R.3d 72 [in action alleging that persons unknown caused wrongful publication, in news-oriented websites, of plaintiff's plans to release new computer device, trial judge erred in ordering discovery of websites' sources; balance of factors under *Mitchell v. Superior Court* (1984) 37 C.3d 268, 208 C.R. 152, 690 P.2d 625, text, p. 631, favored nondisclosure, particularly inadequacy of plaintiff's showing that it had exhausted alternative avenues of investigation]. *Liability for republication:*

*Cross-Reference:* 5 Summary (10th), Torts, §537. *New York Times Co. v. Sullivan:*

*Cross-References:* 5 Summary (10th), Torts, §601 et seq.; 7 Summary (10th), Constitutional Law, §426 et seq.



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## CHAPTER IX - Witnesses

## XIV. NEWSPERSON'S SHIELD LAW

## D. Constitutional Qualified Privilege.

## 3. Balancing Test for Criminal Cases.

2 Witkin Cal. Evid. Witnesses § 347

[§ 347] Balancing Test for Criminal Cases.

(1) *Demand for Disclosure Made by Defendant.* In *Delaney v. Superior Court* (1990) 50 C.3d 785, 268 C.R. 753, 789 P.2d 934, supra, §337, police officers of a task force on patrol observed Delaney seated on a bench with a plastic bag protruding from his shirt pocket. Suspecting that it contained narcotics, the officers inquired about its contents and also asked permission to check his jacket for weapons. Delaney allegedly consented to the search, and the officers seized a set of brass knuckles. Delaney was charged with the misdemeanor of possession of these weapons. He moved to suppress the evidence on the ground that he had not consented to the search of his jacket. The Los Angeles Times had published an article about the police task force, based upon the observations of two reporters who had accompanied the officers. At the suppression hearing, the prosecutor called the reporters to testify to the legality of the seizure, and their testimony established that each had been in a position to observe whether Delaney had consented to the search. But they refused to answer any questions relating to whether he had consented. *Held*, the need for the reporters' testimony outweighed their claim of immunity.

(a) *Delaney's constitutional rights.* "The incorporation of the shield law into the California Constitution cannot restrict a criminal defendant's *federal* constitutional right to a fair trial." (50 C.3d 805.) Thus it is necessary to determine the nature of the defendant's showing, and the proper test for accommodating the conflicting rights. (50 C.3d 806, 807.) The balancing test for civil cases set forth in *Mitchell v. Superior Court* (1984) 37 C.3d 268, 208 C.R. 152, 690 P.2d 625, supra, §346, is not entirely appropriate for a criminal case, which calls for consideration of different factors. (50 C.3d 807.)

(b) *Threshold showing for balancing test.*

(1) The reporters argued that Delaney must show that their testimony would go to the "heart of his case." (50 C.3d 808.) This is unsound; to overcome a *prima facie* showing by a newsperson that he or she is entitled to withhold information, the defendant need only show "a *reasonable possibility* the information will materially assist his defense." (50 C.3d 808.) "It would be impractical to require a trial court to attempt to divine whether the evidence sought would cause a jury to exonerate the defendant." (50 C.3d 808.)

(2) "To provide guidance to the trial courts, we believe it helpful to make clear how the threshold requirement must be applied in practice. First, the burden is on the criminal defendant to make the required showing. ... Second, the defendant's showing need not be detailed or specific, but it must rest on more than mere speculation. Third, the defendant need not show a reasonable possibility the information will lead to *his exoneration*. He need show only a reasonable possibility the information will materially *assist his defense*. ... [E]vidence may establish an 'imperfect

defense,' a lesser included offense, a lesser related offense, or a lesser degree of the same crime; impeach the credibility of a prosecution witness; or, as in capital cases, establish mitigating circumstances relevant to the penalty determination." (50 C.3d 809.)

(c) *Balancing test factors.*

(1) *Whether the unpublished information is confidential or sensitive:* If the information is not confidential, the court should consider whether it is nevertheless sensitive, i.e., whether its disclosure would somehow unduly restrict the newsmen's access to future sources and information. (50 C.3d 810.)

(2) *The interests sought to be protected by the shield law:* If, as in this case, the criminal defendant seeking disclosure is the source of the information, it cannot be seriously argued that the source (defendant) will feel that his or her confidence has been breached. (50 C.3d 810.) And other circumstances may mitigate or eliminate the adverse consequences of disclosure. (50 C.3d 811.)

(3) *The importance of the information to the criminal defendant:* If the defendant shows that the evidence goes to "the heart" of his or her case, the balance will weigh more heavily in favor of disclosure than if the defendant simply met the threshold requirement. (50 C.3d 811.)

(4) *Whether there is an alternative source for the unpublished information:* In *Mitchell*, *supra*, the court stated that discovery should be denied unless the party seeking it has exhausted all alternative sources of obtaining the needed information. But the situation in this case is different from that in *Mitchell*: "Two witnesses to an act may--indeed, likely do--see it differently, and even though their perceptions are substantially the same, their recollection of the event may differ. Moreover, even if their testimony is substantively similar, one witness may have more credibility with a jury. Likewise, two witnesses may convince the jury of a fact where one witness by himself would not do so." (50 C.3d 812.)

"For all the foregoing reasons, we conclude that a universal and inflexible alternative-source requirement is inappropriate in a criminal proceeding. In considering whether the requirement is appropriate in a given case, the trial court should consider the type of information being sought (e.g., names of potential witnesses, documents, a reporter's eyewitness observations), the quality of the alternative source, and the practicality of obtaining the information from the alternative source. The trial court must also consider the other balancing factors set forth above: whether the information is confidential or sensitive, the interests sought to be protected by the shield law, and the importance of the information to the criminal defendant. In short, whether an alternative-source requirement applies will depend on the facts of each case." (50 C.3d 813; see footnote 29, disapproving of contrary suggestions in *Hammarley v. Superior Court* (1979) 89 C.A.3d 388, 153 C.R. 608, and *Hallissy v. Superior Court* (1988) 200 C.A.3d 1038, 248 C.R. 635.)

The relative importance of the factors will vary from case to case, and "[w]e decline to hold in the abstract that any factor or combination of factors must be determinative." (50 C.3d 813.)

(d) *Application of balancing test in this case.*

(1) Delaney met and surpassed the threshold showing. "It is an understatement to say, in the words of the test we adopt, that there is a reasonable possibility the reporters' testimony will assist Delaney in his defense. There is a substantial certainty that the reporters' testimony will materially affect the outcome of the criminal proceeding." (50 C.3d 814.)

(2) The balance weighs overwhelmingly in favor of requiring the reporters to testify. (a) The information was not confidential or sensitive. (b) The testimony would not impinge on the interests sought to be protected. (c) The importance of the information is obvious. (d) There was no meaningful alternative source: the only disinterested witnesses were the reporters. (50 C.3d 815.) (See 22 *Pacific L. J.* 1371 [*Delaney*]; 18 *Pepperdine L. Rev.* 655 [same]; 25 *Loyola L.A. L. Rev.* 155 [same].)

One justice filed a lengthy concurring opinion disagreeing with the balancing test, and arguing that if invocation of the constitutional immunity deprives the defendant of information necessary to exercise his or her constitutional rights, the defendant is entitled to the information. (50 C.3d 817.)

Another justice, also concurring, disagreed with the "plain language" holding, arguing that the entire legislative history should be considered, and that the history supported the majority's conclusion. (50 C.3d 822.)

In *People v. Cooper* (1991) 53 C.3d 771, 281 C.R. 90, 809 P.2d 865, the trial judge in a capital murder prosecution granted a newspaper editor's motion to quash a subpoena duces tecum compelling production of an anonymous letter to the newspaper and the envelope it was mailed in, on the ground that they were protected by the California newsperson's shield law. The letter, written on sheriff's department stationery, criticized the murder investigation. A defense investigator had discovered the existence of the letter, which apparently was unpublished, during a telephone conversation with a reporter for the newspaper. *Held*, the motion was properly granted.

(a) "The discovery related merely to an anonymous letter to the editor on a subject about which the defense had full discovery. Even the author of the letter was satisfied that the police had correctly solved the crime. The defense investigator questioned everyone who might have written the letter (assuming it was genuine), and learned nothing." (53 C.3d 820.)

(b) "More significantly, the defense had full opportunity to examine under oath all relevant witnesses. The competency of the investigation, which was only tangentially related to the issue of guilt, was exhaustively explored. The denial of the discovery, even if error, could not have prejudiced defendant." (53 C.3d 820.) (See *People v. Von Villas* (1992) 10 C.A.4th 201, 232, 13 C.R.2d 62 [unpublished information acquired by writer before he entered into publication contract came within protection of shield law]; *People v. Sanchez* (1995) 12 C.4th 1, 56, 57, 47 C.R.2d 843, 906 P.2d 1129 [in murder trial, scope of reporter's testimony was properly limited to information he published concerning interviews with defendant; defendant failed to make threshold showing, required by *Delaney*, *supra*, that it was reasonably possible his unpublished statements were necessary to his defense].)

(2) *Distinction: Demand for Disclosure Made by Prosecution.* In *Miller v. Superior Court* (1999) 21 C.4th 883, 89 C.R.2d 834, 986 P.2d 170, the trial judge ordered a television news director to comply with a prosecution-requested order to produce unpublished parts of a videotaped interview conducted by the television station with a defendant charged with murder, and adjudged the director in contempt for failing to do so. *Held*, reversed; a newsperson's constitutional immunity under the shield law does not yield to the prosecution's constitutional right to due process in a criminal trial guaranteed under Cal. Const., Art. I, §29.

(a) As separate provisions of the state constitution, the shield law and Cal. Const., Art. I, §29 have equal dignity and thus must be harmonized, if possible; or, if there is a conflict, then the conflict must be resolved in some manner. However, the two constitutional provisions are not in conflict. The relationship between a prosecutorial right to obtain relevant evidence and the various evidentiary privileges and immunities of the press was not addressed in Proposition 115, of which Cal. Const., Art. I, §29 was a part. The closely related subject of the relationship between the right to admit relevant evidence and those evidentiary privileges and immunities was treated in an earlier initiative, Proposition 8, of which Cal. Const., Art. I, §28(d), the Truth-in-Evidence provision, was a part. That provision expressly exempted the shield law, as a preexisting constitutional right of the press. Implicit in the conclusion that the prosecution's right to truth in evidence did not affect the preexisting shield law was a determination that the shield law did not deny due process. Similarly, the prosecution's right to due process of law in Cal. Const., Art. I, §29 does not mean a right of access to evidence in contravention of previously existing evidentiary privileges and immunities, which include those given to the press. (21 C.4th 892.)

(b) The prosecution claimed that the main purpose of the shield law is to protect confidential sources, and that when, as in the present case, no confidential sources are involved, the shield law must yield to effective criminal prosecution. However, this claim was without merit. The shield law applies to unpublished information whether

confidential or not. (21 C.4th 897.) We may not "convert an absolute into a qualified immunity merely because it is in accord with a particular conception of the proper balance between journalists' rights and prosecutor's prerogatives. Thus, the absoluteness of the immunity embodied in the shield law only yields to a conflicting federal or, perhaps, state constitutional right. As explained, there is no such conflicting right presented in this case." (21 C.4th 901.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Demand for Disclosure Made by Defendant.* See *People v. Sapp* (2003) 31 C.4th 240, 274, 2 C.R.3d 554, 73 P.3d 433 [on appeal from sentence of death, defendant was precluded from asserting trial court error in failing to apply standard of *Delaney v. Superior Court* (1990) 50 C.3d 785, 268 C.R. 753, 789 P.2d 934, text, p. 634, where, in 7-month interval between *Delaney* decision and beginning of his trial, he failed to renew his previously denied request for discovery of reporter's unpublished notes from interview with him]; *People v. Ramos* (2004) 34 C.4th 494, 527, 21 C.R.3d 575, 101 P.3d 478 [in capital murder case in which reporter who had interviewed defendant in jail was called by prosecution, trial judge did not err in denying defendant's request to require reporter to produce his interview notes; threshold showing under *Delaney* was not made, as defendant did not attempt to show that notes revealed anything different from reporter's testimony]; *People v. Vasco* (2005) 131 C.A.4th 137, 155, 31 C.R.3d 643 [in murder prosecution, defendant's request to cross-examine reporter on unpublished information resulting from interview with defendant in jail was properly denied; defendant never claimed that reporter's account of interview was untruthful or inaccurate, and she failed to explain how additional information would have assisted her defense or differed from other mitigating evidence presented at trial; relying on *Ramos* and *People v. Sanchez* (1995) 12 C.4th 1, 47 C.R.2d 843, 906 P.2d 1129, text, p. 637]; C.C.P. 1986.1(c) (required findings where journalist is held in contempt in criminal proceeding), Supp., supra, §344.(2) *Distinction: Demand for Disclosure Made by Prosecution.* In *Fost v. Superior Court* (2000) 80 C.A.4th 724, 95 C.R.2d 620, a murder prosecution, defendant subpoenaed a journalist who had written news articles quoting a principal eyewitness in the case. The journalist testified for the defense about the published information and general journalistic practices. When, on cross-examination, the prosecution attempted to question him about the circumstances of his interviews with the eyewitness, in order to cast doubt on the accuracy of the statements attributed to her, he declined to answer on the basis of the shield law. The trial judge ordered him to answer, and, when he did not, adjudged him in contempt. *Held*, the contempt order was improper.

(a) *Comparison with situation presented in Miller case.* *Miller v. Superior Court* (1999) 21 C.4th 883, 89 C.R.2d 834, 986 P.2d 170, text, p. 637, determined that the prosecution does not have a due process right to evidence that may, in some circumstances, supersede the reporter's privilege under the shield law. The present case differs from *Miller*, however, because here the person from whom the unpublished information is sought was subpoenaed by defendant, not the prosecution, and the prosecution sought disclosure in the course of cross-examination designed to test the credibility of the journalist's testimony in defendant's favor. Thus, the prosecution is asserting that the right in question is defendant's confrontation right, which includes meaningful cross-examination, and the question is whether the prosecution can compel him to choose between asserting that right and showing that it transcends that of the journalist under the shield law, or forgoing the benefit of the journalist's testimony in his favor. (80 C.A.4th 732.)

(b) *Rule where cross-examination right involved.* "We hold that where, in a criminal trial, a defense witness protected under the shield law resists proper cross-examination on the basis of that law, the testimony of that witness on direct examination, though it did not consist of unpublished information protected by the shield law, may on an appropriate motion by the People be barred or stricken." (80 C.A.4th 732.) However, where the defendant can show that nondisclosure of the unpublished information would result in excluding direct testimony that would materially assist the defense, the defendant should be able to vindicate his federal constitutional right to a fair trial by making showings analogous to those required by *Delaney v. Superior Court* (1990) 50 C.3d 785, 268 C.R. 753, 789 P.2d 934, text, p. 634. "Such showings would oblige the court to compel the disclosure sought from a defense witness by the People, which would permit the defendant to present the favorable testimony of the witness that would otherwise have to be excluded." (80 C.A.4th 737.)

(c) *Application to present case.* Here, because there was never any judicial determination that, on balance,



defendant's federal constitutional right superseded the journalist's state constitutional right, the contempt power could not properly be used to compel the journalist to disclose the unpublished information sought by the prosecution. "The situation was complicated by the fact that, inexplicably, the People failed to move to strike the testimony petitioner gave on direct examination as to [the eyewitness] after he refused to respond to cross-examination relating to her. Defendant, who received the testimony he wanted, therefore had no reason to show that his federal constitutional right to a fair trial transcended petitioner's right under the shield law; nor was petitioner provided any reason or opportunity to show the opposite." (80 C.A.4th 739.) (See *People v. Vasco*, *supra*, 131 C.A.4th 159 [discussing reverse situation, where defendant, rather than prosecutor, moves to exclude or strike reporter's testimony when reporter refuses to answer defendant's cross-examination questions, but declining to resolve question, as any conceivable error was harmless beyond reasonable doubt].)



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CHAPTER IX - Witnesses

XIV. NEWSPERSON'S SHIELD LAW  
E. In Camera Review.

2 *Witkin Cal. Evid. Witnesses* § 348

[§ 348] In Camera Review.

(1) *Requirement in Criminal Case.* Although an in camera hearing is not required in every case, when a criminal defendant seeks confidential or sensitive information, the need for such a hearing is obvious. However, the trial judge has discretion to determine whether the claim of confidentiality or sensitivity is colorable; if the judge decides that it is, the judge must then receive the newsperson's testimony in camera. (*Delaney v. Superior Court* (1990) 50 C.3d 785, 814, 268 C.R. 753, 789 P.2d 934, *supra*, §§337, 347.)

(2) *Effect of Submission of Material for In Camera Review.* Where a party voluntarily submits for in camera review material assertedly protected by the shield law and expressly states that it does so without prejudice to its right, in case of an adverse ruling, to refuse to disclose the material and risk a judgment of contempt, there is no waiver of the law's protection. (*SCI-Sacramento v. Superior Court* (1997) 54 C.A.4th 654, 661, 662, 62 C.R.2d 868 [no waiver by television station as to "outtakes" from videotaped interview with murder defendant, even though station raised no objection to presence of defendant and his counsel during in camera review].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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CHAPTER IX - Witnesses

XV. VOTER'S PRIVILEGE

A. In General.

2 *Witkin Cal. Evid. Witnesses* § 349

[§ 349] In General.

Cal. Const., Art. II, §7 requires that "voting shall be secret." This is the basis for the privilege of a voter to refuse to disclose his or her vote, codified in *Ev.C. 1050*: "If he claims the privilege, a person has a privilege to refuse to disclose the tenor of his vote at a public election where the voting is by secret ballot." (See Unif. Rule 506 [similar]; 8 Wigmore (McNaughton Rev.) §2214; C.J.E.R., Judges Benchbook, Civil Proceedings: Discovery §§4.110, 4.111.)

Two exceptions are stated in *Ev.C. 1050*:

(1) Where the voter voted illegally.

(2) Where the voter "previously made an unprivileged disclosure of the tenor of his vote."

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER IX - Witnesses

### XVI. TRADE SECRET PRIVILEGE

#### A. Nature and Purpose.

2 *Witkin Cal. Evid. Witnesses* § 350

[§ 350] Nature and Purpose.

(1) *In General.* *Ev.C. 1060* states a privilege not contained in California's former statutes, but generally recognized by case law: "[T]he owner of a trade secret has a privilege to refuse to disclose the secret, and to prevent another from disclosing it." (See *Unif. Rule 507* [similar]; *C.C.P. 2025(i)* [protective order in discovery proceeding; see 2 *Cal. Evidence (4th), Discovery*, §59 et seq.].) "This privilege is granted so that secret information essential to the continued operation of a business or industry may be afforded some measure of protection against unnecessary disclosure. Thus, the privilege prevents the use of the witness' duty to testify as the means for injuring an otherwise profitable business where more important interests will not be jeopardized." (*Law Rev. Com. Comment to Ev.C. 1060.*) (See generally 8 *Wigmore (McNaughton Rev.)* §2212; *C.J.E.R., Judges Benchbook, Civil Proceedings: Discovery* §4.112 et seq.; 64 *Harv. L. Rev.* 337; 74 *Harv. L. Rev.* 1015; 17 *A.L.R.2d* 383; 62 *A.L.R.2d* 509 [in camera hearing or other procedure to safeguard against undue disclosure]; 14 *Am.Jur. Trials* 78, 89; for a full discussion of trade secrets, see 11 *Summary (9th), Equity*, §103 et seq.)

What constitutes a trade secret is a question of *law*, not of fact; on appeal, the reviewing court is not bound by the trial court's determination. (See *Uribe v. Howie* (1971) 19 *C.A.3d* 194, 207, 96 *C.R.* 493 [in holding that materials in pest control spray reports were not trade secrets, court relied on *Govt.C. 6254.7(d)*, defining "trade secrets" for limited purpose of excluding certain air pollution control data from scope of "public records" under California Public Records Act, *supra*, §280 et seq.]; 27 *A.L.R.4th* 773.)

(2) *Limitation.* *Ev.C. 1060* qualifies the privilege: It may be claimed if its allowance "will not tend to conceal fraud or otherwise work injustice." This vague limitation leaves a wide area of discretion to the court, but clearly disclosure may be necessary in cases involving the issue of unfair competition or use of dangerous materials. (*Law Rev. Com. Comment to Ev.C. 1060*; see *Unif. Rules, Rule 507* [same]; 8 *Wigmore (McNaughton Rev.)* §2212; *Bridgestone/Firestone v. Superior Court* (1992) 7 *C.A.4th* 1384, 1391, 9 *C.R.2d* 709, *infra*, §351; *State Farm Fire & Cas. Co. v. Superior Court* (1997) 54 *C.A.4th* 625, 650, 651, 62 *C.R.2d* 834, *supra*, §156 [in action by insureds against insurer for fraud and bad faith, software program used by insurer to locate its documents was trade secret but was subject to disclosure under exception for fraud or injustice].)

(3) *Waiver.* The privilege may be waived. (See *Stadish v. Superior Court* (1999) 71 *C.A.4th* 1130, 1140, 1144, 84 *C.R.2d* 350, *infra*, §352 [under former *C.C.P. 2031(k)* (now *C.C.P. 2031(l)*); see 2 *Cal. Evidence (4th), Discovery*, §134], defendant waived privilege by failing to assert it in response to plaintiffs' requests for production of documents, but did not waive right to seek protective order (see *infra*, §352) restricting documents' dissemination].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General. C.C.P. 2025(i)*, on protective orders in deposition proceedings, was repealed and replaced by *C.C.P. 2025.420* in 2004 without substantive change. *Cross-Reference: 13 Summary (10th), Equity, §81 et seq.*

(3) *Waiver. C.C.P. 2031(l)* (failure to serve timely response to inspection demand) was repealed and replaced by *C.C.P. 2031.300* in 2004 without substantive change.

(4) *(New) Effect of Refusal To Waive. See Steiny & Co. v. California Elec. Supply Co. (2000) 79 C.A.4th 285, 292, 93 C.R.2d 920* [where contractor sought indemnity from subcontractor for damages contractor was required to pay aircraft company, and contractor invoked trade secrets privilege, preventing subcontractor from examining basis of contractor's damages claim, contractor's damage evidence was properly excluded; when privileged information goes to heart of claim, fundamental fairness requires that it be disclosed for litigation to proceed]. *West's Key Number Digest, Records k.59*



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## CHAPTER IX - Witnesses

### XVI. TRADE SECRET PRIVILEGE

#### B. Procedure.

##### 1. In General.

2 Witkin Cal. Evid. Witnesses § 351

[§ 351] In General.

*Ev.C. 1061* et seq. set forth the procedure for (1) asserting the privilege in a criminal proceeding (*Ev.C. 1061*, infra, §352); (2) excluding the public from criminal proceedings in which trade secrets might be disclosed (*Ev.C. 1062*, infra, §353); and (3) making requests to seal articles containing trade secrets (*Ev.C. 1063*, infra, §354). (See 22 *Pacific L. J.* 579.)

In *Bridgestone/Firestone v. Superior Court* (1992) 7 C.A.4th 1384, 9 C.R.2d 709, plaintiffs brought a wrongful death action against Bridgestone/Firestone, alleging that decedent was killed in an automobile accident caused by failure of a Firestone tire on the car she was driving. Plaintiffs served defendant with interrogatories seeking manufacturing specifications for the tire. The trial court found that the specifications, which correlate with formulas, constituted a trade secret, but ordered disclosure subject to a protective order. *Held*, mandamus issued to compel setting aside the order directing the company to disclose the secret formulas.

(a) The Law Revision Commission Comment on *Ev.C. 1060* states that "the privilege exists under this section only if its application will not tend to conceal fraud or otherwise work injustice." (7 C.A.4th 1390; see supra, §350.) And allowance of the privilege may not be deemed to "work injustice" simply because it would protect information generally relevant to the subject matter or helpful in preparation of a case. The requesting party must make a clear showing that the documents are relevant to the issues involved in the litigation. (7 C.A.4th 1391.)

(b) "We therefore hold that the party claiming the privilege has the burden of establishing its existence. ... Thereafter, the party seeking discovery must make a prima facie, particularized showing that the information sought is relevant and necessary to the proof of, or defense against, a material element of one or more causes of action presented in the case, and that it is reasonable to conclude that the information sought is essential to a fair resolution of the lawsuit. It is then up to the holder of the privilege to demonstrate any claimed disadvantages of a protective order. Either party may propose or oppose less intrusive alternatives to disclosure of the trade secret, but the burden is upon the trade secret claimant to demonstrate that an alternative to disclosure will not be unduly burdensome to the opposing side and that it will maintain the same fair balance in the litigation that would have been achieved by disclosure." (7 C.A.4th 1393.)

(c) Here the declarations of the parties' experts establish that the formulas would be helpful in the analysis of the case and to the ability of plaintiffs' expert to render opinions. But nothing in the record demonstrates the necessity of the formula information to plaintiffs' ability to carry their burden of proof; hence they failed to make the necessary prima facie showing of need. (7 C.A.4th 1397.) (See *Raymond Handling Concepts Corp. v. Superior Court* (1995) 39 C.A.4th

584, 590, 45 C.R.2d 885, 2 Cal. Evidence (4th), Discovery, §136 [approving protective order allowing disclosure of trade secret information to counsel for litigants in similar pending cases].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER IX - Witnesses

### XVI. TRADE SECRET PRIVILEGE

#### B. Procedure.

#### 2. Protective Order.

2 Witkin Cal. Evid. Witnesses § 352

[§ 352] Protective Order.

(1) *In General.* *Ev.C. 1061* establishes a procedure for obtaining a protective order whenever the owner of a trade secret wishes to assert his or her trade secret privilege (*supra*, §350) *during a criminal proceeding*.

The owner (or the prosecution with the owner's consent) must file a motion for the order (*Ev.C. 1061(b)(1)*) and, by a preponderance of the evidence, establish that issuance is proper (*Ev.C. 1061(b)(3)*). Upon finding that a trade secret may be disclosed during a criminal proceeding in the absence of a protective order and that issuance of such an order would not conceal a fraud or work an injustice, the judge must issue an order limiting the use and dissemination of the trade secret, including any article disclosing the secret. (*Ev.C. 1061(b)(4)*.)

A ruling granting or denying the motion has no effect on any *civil proceeding* and is not to be construed as a determination that the alleged trade secret is or is not a trade secret. (*Ev.C. 1061(c)*.)

Despite this statutory language apparently limiting application of *Ev.C. 1061* to a criminal proceeding, the court in *Stadish v. Superior Court* (1999) 71 C.A.4th 1130, 84 C.R.2d 350, involving issuance of a protective order in a *civil action*, adopted a contrary construction: "Throughout these proceedings, the parties have conducted themselves as though section 1061 applies to this case. We conclude that the procedures called for in section 1061 have utility in a civil action in protecting the trade secret privilege provided in section 1060 and should be followed." (71 C.A.4th 1145.) (See also *State Farm Fire & Cas. Co. v. Superior Court* (1997) 54 C.A.4th 625, 650, 62 C.R.2d 834, *supra*, §156 [applying *Ev.C. 1061* in civil case without discussing its applicability in noncriminal cases].)

(2) *Effect.* A protective order entered by a municipal court judge remains in effect in a superior court unless amended or vacated for good cause. (*Ev.C. 1061(d)*.)

*Ev.C. 1061* has prospective effect only, and hence does not invalidate previously entered protective orders. (*Ev.C. 1061(e)*.)

(3) *Affidavits.* The motion must be accompanied by an affidavit, based on personal knowledge, listing the affiant's qualifications to give an opinion concerning the trade secret at issue, identifying without revealing the alleged trade secret and articles disclosing it, and presenting evidence that the secret qualifies as a trade secret under either C.C. 3426.1(d) (see 11 *Summary* (9th), *Equity*, §109) or P.C. 499c(a)(9) (see 2 *Cal. Crim. Law* (3d), *Crimes Against Property*, §197). (*Ev.C. 1061(b)(1)*; see *Stadish v. Superior Court*, *supra*, 71 C.A.4th 1145 [affidavits that were conclusory in nature were insufficient].)



Any party to the proceeding may oppose the motion by submitting affidavits based on the affiant's personal knowledge. The affidavits must be filed under seal, but given to the owner of the secret and to all parties. Neither the owner nor any party may disclose the affidavit to anyone other than counsel of record without court approval. (*Ev.C. 1061(b)(2).*)

(4) *Hearing.* The judge may rule on the motion without holding an evidentiary hearing. However, the judge has discretion to hold an in camera evidentiary hearing concerning disputed articles with only the owner of the secret, a representative of the prosecution, and the defendant and his or her counsel present. At such a hearing, the parties' examination of witnesses may not be used for discovery, but rather must be directed solely at determining whether the alleged trade secret qualifies for protection. (*Ev.C. 1061(b)(3).*)

In *Stadish v. Superior Court*, *supra*, a civil action, plaintiffs sought production of certain documents from defendant, and the trial judge granted defendant's request for a protective order under *Ev.C. 1061*. *Held*, the judge failed to follow proper procedures in granting the order, because he impermissibly delegated to the parties the responsibility of determining which items of discovery contained trade secrets. (71 *C.A.4th* 1144.) A party seeking the protective order must show by a preponderance of the evidence that its issuance is proper (*Ev.C. 1061(b)(3)*, *supra*). Plaintiffs asserted that the documents were relevant to public health, and when that type of claim is made, the judge is required to determine its validity. If the judge were to decide that the documents sought to be protected were relevant to public health, the judge would be required to consider the public interest in determining whether good cause existed for a protective order. (71 *C.A.4th* 1145.) If the judge determined that the documents both contained trade secrets and were relevant to public health, the judge would then be required to balance the interests of the public, plaintiffs, and defendant, and reach a decision as to whether dissemination of the documents should be restricted. (71 *C.A.4th* 1146.)

(5) *Content.* The order may provide that (a) the trade secret may be disseminated only to the parties' counsel and to law enforcement or clerical officials; (b) the defendant may view the secret only in the presence of defense counsel or at counsel's office; (c) any party seeking to show the secret or any article containing it to a person not designated by the order must first obtain court approval; and (d) no articles disclosing the secret may be filed or otherwise made part of the record available to the public without court approval and prior notice to the owner. (*Ev.C. 1061(b)(4)*; on additional requirements for obtaining approval to show the secret to persons not designated in the order, see *Ev.C. 1061(b)(4)(C)(i)*, *(b)(4)(C)(ii)*, *(b)(4)(C)(iii)*.)

In addition, the judge may issue any other order deemed necessary to protect the integrity of the secret. (*Ev.C. 1061(b)(4)(E).*)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Effect.* *Ev.C. 1061(d)* was deleted in 2002 and *Ev.C. 1061(e)* was relettered *Ev.C. 1061(d)(3) Affidavits*.

*Cross-Reference:* 13 *Summary* (10th), *Equity*, §87.



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## CHAPTER IX - Witnesses

### XVI. TRADE SECRET PRIVILEGE

#### B. Procedure.

#### 3. Exclusion of Public in Criminal Proceeding.

2 Witkin Cal. Evid. Witnesses § 353

[§ 353] Exclusion of Public in Criminal Proceeding.

(a) *In General.* *Ev.C. 1062* permits the owner of a trade secret (or the prosecution with the owner's consent) to move to exclude the public from any portion of a *criminal proceeding* in which a trade secret may be disclosed. (*Ev.C. 1062(a).*) The motion must identify without revealing the trade secret that would be disclosed in the absence of closure. (*Ev.C. 1062(b).*)

The motion must be granted where the proponent of closure demonstrates a *substantial probability* that the secret would otherwise be disclosed during the proceeding, thereby causing serious harm to the owner, and where the judge finds that there is no overriding public interest in an open proceeding. However, no evidence may be excluded if it would conceal a fraud, work an injustice, or deprive the prosecution or the defendant of a fair trial. (*Ev.C. 1062(a).*)

A transcript of any closed proceeding, minus any information qualifying as a trade secret, must be made available to the public as soon as practicable. (*Ev.C. 1062(e).*)

Witnesses who are bound by a protective order entered under *Ev.C. 1061* (supra, §352) may be allowed to remain in the courtroom during the closed portion of the proceedings. (*Ev.C. 1062(f).*)

(2) *Hearing and Ruling.* The showing of substantial probability of harm from disclosure must be made at an in camera hearing attended by only the owner of the secret, a representative of the prosecution, the defendant and defense counsel, and a reporter. Any transcription of the hearing, as well as any article presented therein containing the secret, must be sealed, and access thereto may be permitted only upon a showing of good cause. (*Ev.C. 1062(b).*)

In ruling on the motion, the judge may consider any testimony presented or affidavits filed. (*Ev.C. 1062(b).*) If the judge determines that exclusion of trade secret information from the public is appropriate, the judge must close only that portion of the proceeding necessary to prevent disclosure of the secret. However, before granting the motion, the judge must find and state for the record that the moving party has sustained his or her burden and that closure will deprive neither the prosecution nor the defendant of a fair trial. (*Ev.C. 1062(c).*)

(3) *Extraordinary Relief.* The owner of the secret, the prosecution, or the defendant may seek relief from a ruling granting or denying closure by petitioning for extraordinary relief. (*Ev.C. 1062(d).*)

**SUPPLEMENT:** [This section is current through the latest supplement]



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CHAPTER IX - Witnesses

XVI. TRADE SECRET PRIVILEGE

B. Procedure.

4. Request To Seal Articles.

2 Witkin Cal. Evid. Witnesses § 354

[§ 354] Request To Seal Articles.

(1) *In General.* *Ev.C. 1063* establishes the procedure governing requests to seal articles containing trade secrets that are covered by a protective order (see *supra*, §352). (For definition of "article," see *Ev.C. 1061(a)(2)*; *P.C. 499c(a)(2)*.)

(2) *Articles Reasonably Expected To Be Filed or Admitted into Evidence.* Requests to seal these articles must comply with the following procedure:

(a) Not less than 10 court days before trial, and not less than 5 court days before any other criminal proceeding, the prosecution must file a list of all articles which it reasonably expects to file, or admit into evidence, under seal. This list must be made available to the public. (*Ev.C. 1063(a)(1)*.)

(b) Before allowing the listed articles to be filed, admitted into evidence or in any way made part of the record otherwise open to the public, the judge must hold a hearing to consider any objections to the request to seal. (*Ev.C. 1063(a)(2)*.)

(c) After hearing objections, the judge must conduct an in camera hearing before the owner of the trade secret contained in the articles, a representative of the prosecution, and the defendant and defense counsel to determine whether the prosecution has satisfied the constitutional standards governing public access to articles contained in judicial records. The judge may consider testimony presented or affidavits filed in any proceeding held in the action, as well as affidavits filed by the prosecution, defendant, and owner for consideration at the in camera hearing. The judge need not take testimony, but if the judge does, examination of witnesses may not be used for discovery, but must be directed solely toward determining whether sealing is appropriate. (*Ev.C. 1063(a)(3)*.)

(d) If the judge finds that the constitutional standards have been satisfied, he or she must seal the articles if and when they are filed, admitted into evidence, or in any way made part of the record otherwise open to the public. The articles may not be unsealed without a court order based on a showing of good cause. (*Ev.C. 1063(a)(4)*.)

(3) *Other Articles Made Part of Record.* Requests to seal these articles are governed by the following procedure:

(a) When the articles are filed, admitted into evidence, or in any way made part of the record in such a way as to be otherwise open to the public, the prosecution, defendant or owner may request that the articles be sealed. (*Ev.C. 1063(b)(1)*.)

(b) The request may be made either by noticed motion or orally at the time the articles are made part of the record.

Oral requests must be followed within 24 hours by a written description of the request, including a list of the articles to be sealed. The motions and lists must be made available to the public. (*Ev.C. 1063(b)(2).*)

(c) The judge must promptly conduct such hearings as are required for requests to seal articles expected to be filed, and, pending the hearings, must seal the articles. If the request to seal is made orally, the judge may conduct the hearings when the articles are made part of the record, but must reconsider his or her ruling in light of any additional objections made within 2 court days after the written record of the request is made available to the public. (*Ev.C. 1063(b)(3).*)

(d) Any articles sealed may not be unsealed without a court order based on a showing of good cause. Failure to examine the court file for notice of a request to seal is not good cause to consider objections to sealing. (*Ev.C. 1063(b)(4).*)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER IX - Witnesses

### XVII. PRIVILEGE AGAINST SELF-INCRIMINATION

#### A. General Principles.

##### 1. Constitutional Basis.

##### a. Federal and State Constitutions.

2 Witkin Cal. Evid. Witnesses § 355

[§ 355] Federal and State Constitutions.

(1) *Nature and Purpose of Privilege.* The Fifth Amendment to the Federal Constitution provides that "No person ... shall be compelled in any Criminal Case to be a witness against himself." Cal. Const., Art. I, §15 is practically identical. (For general discussions, see 1 McCormick 5th, §114 et seq.; 8 Wigmore (McNaughton Rev.) §§2251, 2252; *Black v. State Bar* (1972) 7 C.3d 676, 685, 103 C.R. 288, 499 P.2d 968, citing the text; *United States v. Mandujano* (1976) 425 U.S. 564, 96 S.Ct. 1768, 1771, 48 L.Ed.2d 212, 216 [infringement of grand jury witness' privilege does not excuse perjury, citing *Bryson v. United States* (1969) 396 U.S. 64, 90 S.Ct. 355, 24 L.Ed.2d 264, infra, §379]; C.J.E.R., Judges Benchbook, Civil Proceedings: Discovery §4.17 et seq.; 13 Cal. L. Rev. 259; 30 Cal. L. Rev. 547; 43 Cal L. Rev. 886; 53 Cal. L. Rev. 611; 78 Harv. L. Rev. 426; 7 Hastings L. J. 72; 17 Stanf. L. Rev. 327; 12 U.C.L.A. L. Rev. 561; 1964 A.S. 376; 81 Am.Jur.2d (1992 ed.), *Witnesses* §80 et seq.; 21A Am.Jur.2d (1981 ed.), *Criminal Law* §701 et seq.; on privilege of accused serviceman under Uniform Code of Military Justice, see 10 U.S.C., §831(a).)

In its origin at common law, the privilege was aimed at the abuse of arbitrary inquisition without charge, and meant that one should not be compelled to *accuse* oneself. As subsequently developed and almost universally applied today, the privilege protects an *accused*, i.e., a person properly charged, from being required to *testify against himself or herself*, and a *witness* from being required to give *testimony which might subject him or her to criminal liability*. Thus, despite the narrow constitutional language, which did not create but merely confirmed the common law protections, there are two privileges:

(a) *Defendant's (or accused's) privilege.* The defendant in a criminal case need not testify at all. (See infra, §365 et seq.)

(b) *Witness' privilege.* A witness in any proceeding, civil, criminal, or administrative, need not answer any question that would tend to subject the witness to a criminal prosecution. (See infra, §446 et seq.)

(2) *Scope of Privilege.* The scope of the privilege is as follows:

(a) It protects natural persons, not corporations or unincorporated associations. (See infra, §451 et seq.)

(b) It protects against compulsory oral testimony and also against compulsory production of documents or personal property. (See 8 Wigmore (McNaughton Rev.) §2264; *People v. Monreal* (1997) 52 C.A.4th 670, 681, 60 C.R.2d 737 [relying on *Minnesota v. Murphy* (1984) 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed.2d 409], infra, §497 [statements made

by defendant to probation officer after conviction and before sentencing were not compelled and thus could be used to establish nature of prior offense]; *infra*, §§384 et seq., 446 et seq.)

(c) It precludes any comment on or inference from its claim. (See *infra*, §432 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Nature and Purpose of Privilege*. See 81 *Am.Jur.2d* (2004 ed.), *Witnesses* §78 et seq.; 1 *McCormick* 6th, §114 et seq. (2) *Scope of Privilege*.

(b) *Protection against compulsory testimony and compulsory production of documents or personal property*: See *People v. Trujillo* (2006) 40 C.4th 165, 178, 51 C.R.3d 718, 146 P.3d 1259, 3 *Cal. Crim. Law* (3d), *Punishment, Supp.*, §343 [disapproving *People v. Monreal* (1997) 52 C.A.4th 670, 60 C.R.2d 737, text, p. 647; statements appearing in probation report that were made by defendant after plea of guilty was accepted are not part of record of prior conviction, and thus may not be considered in determining nature of conviction]. *West's Key Number Digest*, *Witnesses* k.292 et seq.



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### XVII. PRIVILEGE AGAINST SELF-INCRIMINATION

#### A. General Principles.

##### 1. Constitutional Basis.

##### b. Federal Constitution Applies to States.

2 Witkin Cal. Evid. Witnesses § 356

[§ 356] Federal Constitution Applies to States.

It was formerly held that the privilege was not an element of due process protected against state action by the Fourteenth Amendment. (*Adamson v. California* (1947) 332 U.S. 46, 67 S.Ct. 1672, 91 L.Ed. 1903.) In *Malloy v. Hogan* (1964) 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653, *infra*, §466, the *Adamson* view was abandoned:

"The marked shift to the federal standard in state cases began with *Lisenba v. California* ... where the Court spoke of accused's 'free choice to admit, to deny, or to refuse to answer.' ... The shift reflects recognition that the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay. ... Governments, state and federal, are thus constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth. Since the Fourteenth Amendment prohibits the States from inducing a person to confess through 'sympathy falsely aroused,' ... or other like inducement far short of 'compulsion by torture,' ... it follows *a fortiori* that it also forbids the States to resort to imprisonment, as here, to compel him to answer questions which might incriminate him. The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement--the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty ... for such silence." (84 S.Ct. 1493, 12 L.Ed.2d 659.) (See *Griffin v. California* (1965) 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106, *infra*, §433; 78 Harv. L. Rev. 224, 426; 38 So. Cal. L. Rev. 167; 12 U.C.L.A. L. Rev. 561; 1964 A.S. 339, 376.)

Under *Malloy*, federal standards must be applied in determining the scope of the privilege. (See *Zonver v. Superior Court* (1969) 270 C.A.2d 613, 624, 76 C.R. 10.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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XVII. PRIVILEGE AGAINST SELF-INCRIMINATION

A. General Principles.

1. Constitutional Basis.

c. Evidence Code.

2 *Witkin Cal. Evid. Witnesses* § 357

[§ 357] Evidence Code.

The Evidence Code does not define the privilege or set forth its scope and exceptions; it merely recognizes its constitutional basis, and thus refers to the case law for the governing principles:

(1) *Defendant's (or Accused's) Privilege*. "To the extent that such privilege exists under the Constitution of the United States or the State of California, a defendant in a criminal case has a privilege not to be called as a witness and not to testify." (*Ev.C.* 930.)

(2) *Witness' Privilege*. "To the extent that such privilege exists under the Constitution of the United States or the State of California, a person has a privilege to refuse to disclose any matter that may tend to incriminate him." (*Ev.C.* 940.)

**SUPPLEMENT:** [This section is current through the latest supplement]





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### XVII. PRIVILEGE AGAINST SELF-INCRIMINATION

#### A. General Principles.

#### 2. Policy of the Privileges.

2 Witkin Cal. Evid. Witnesses § 358

[§ 358] Policy of the Privileges.

The Comment to Model Code, Rule 201 expresses the feeling of some critics that the privilege arose out of conditions which no longer exist, and frequently operates to obstruct justice and protect the guilty: "If we assume the continuance of trial by an impartial jury before a competent judge in public, it is difficult to understand how an accused represented by competent counsel can be unfairly treated by being required to testify. He may need protection against police and prosecutor but he can hardly need protection against judge and jury whose action is subject to review by an appellate court." (See 1 McCormick 5th, §§115, 117; 8 Wigmore (McNaughton Rev.) §2251; 13 So. Cal. L. Rev. 157; 7 Stanf. L. Rev. 424.)

But the overwhelming majority of courts and writers take the opposite view, and the decisions emphasize the stronghold which the privilege has established in the American judicial system:

*Ullmann v. United States* (1956) 350 U.S. 422, 76 S.Ct. 497, 500, 100 L.Ed. 511, 518: "Time has not shown that protection from the evils against which this safeguard was directed is needless or unwarranted. This constitutional protection must not be interpreted in a hostile or niggardly spirit. Too many ... view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege. ... No doubt the constitutional privilege may, on occasion, save a guilty man from his just deserts. It was aimed at a more far-reaching evil--a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality. Prevention of the greater evil was deemed of more importance than occurrence of the lesser evil."

*Quinn v. United States* (1955) 349 U.S. 155, 75 S.Ct. 668, 673, 99 L.Ed. 964, 972: "Coequally with our other constitutional guarantees, the Self-Incrimination Clause 'must be accorded liberal construction in favor of the right it was intended to secure.' Such liberal construction is particularly warranted in a prosecution of a witness for a refusal to answer, since the respect normally accorded the privilege is then buttressed by the presumption of innocence accorded a defendant in a criminal trial. To apply the privilege narrowly or begrudgingly--to treat it as an historical relic, at most merely to be tolerated--is to ignore its development and purpose."

*Murphy v. Waterfront Com.* (1964) 378 U.S. 52, 84 S.Ct. 1594, 1596, 12 L.Ed.2d 678, 681, *infra*, §469: "It reflects many of our fundamental values and most noble aspirations; our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to

shoulder the entire load' ... ; our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life,' ... our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.' "

Many other opinions are to the same effect. (See *Hoffman v. United States* (1951) 341 U.S. 479, 71 S.Ct. 814, 818, 95 L.Ed. 1118, 1124; *Grunewald v. United States* (1957) 353 U.S. 391, 77 S.Ct. 963, 982, 1 L.Ed.2d 931, 952; *Malloy v. Hogan* (1964) 378 U.S. 1, 84 S.Ct. 1489, 1493, 12 L.Ed.2d 653, 659, supra, §356; *Griffin v. California* (1965) 380 U.S. 609, 85 S.Ct. 1229, 1231, 14 L.Ed.2d 106, 109, infra, §433; *Tehan v. United States* (1966) 382 U.S. 406, 86 S.Ct. 459, 464, 465, 15 L.Ed.2d 453, 458, 459; *Maness v. Meyers* (1975) 419 U.S. 449, 95 S.Ct. 584, 592, 42 L.Ed.2d 574, 584; *People v. McCormick* (1951) 102 C.A.2d Supp. 954, 228 P.2d 349, infra, §375; *People v. Talle* (1952) 111 C.A.2d 650, 664, 245 P.2d 633, infra, §366; *Killpatrick v. Superior Court* (1957) 153 C.A.2d 146, 314 P.2d 164, infra, §365.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 1 McCormick 6th, §§115, 117.



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## CHAPTER IX - Witnesses

### XVII. PRIVILEGE AGAINST SELF-INCRIMINATION

#### A. General Principles.

#### 3. Remedies for Denial.

2 Witkin Cal. Evid. Witnesses § 359

[§ 359] Remedies for Denial.

(1) *Defendant's Privilege*. The defendant's privilege against taking the stand in a criminal prosecution against him or her is rarely infringed. (But see *infra*, §365.) The most practical current problem is whether compelled evidence other than testimony is covered by the privilege, and the issue is generally reviewed on appeal from a judgment of conviction. (See *infra*, §384 et seq.)

(2) *Witness' Privilege*. The witness' privilege to refuse to answer incriminating questions, or to produce incriminating records, calls for a determination of legal and factual issues (see *infra*, §446 et seq.), and is a frequent source of challenge. If a judge erroneously denies the claim of privilege and orders a witness to *answer* on the stand or at a deposition or in response to interrogatories, or to *produce documents or other things* in answer to a subpoena duces tecum, or to obey an *order of inspection*, several remedies are available:

(a) Submit to an adjudication of contempt and review the contempt judgment by certiorari or habeas corpus.

(b) Review the discovery order on appeal from a final judgment in the action.

(c) Review the contempt order or discovery order by prohibition or mandamus. (For extended discussion of the use of the extraordinary writs in connection with discovery proceedings, in which most of the challenges occur, see 2 *Cal. Evidence* (4th), *Discovery*, §242 et seq.)

(3) *Federal Practice*. In federal court trials, suppression of the evidence and its fruits is an adequate protection of the aggrieved defendant; dismissal of the indictment is unwarranted. (*United States v. Blue* (1966) 384 U.S. 251, 86 S.Ct. 1416, 1419, 16 L.Ed.2d 510, 514; see 80 Harv. L. Rev. 231.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER IX - Witnesses

### XVII. PRIVILEGE AGAINST SELF-INCRIMINATION

#### A. General Principles.

#### 4. Effects of Claim.

##### a. In General.

2 Witkin Cal. Evid. Witnesses § 360

[§ 360] In General.

The adverse evidentiary effects, embodied in the former rule permitting comment and inference, no longer obtain. (See *infra*, §432 et seq.) There remain, however, several possible extra-legal consequences:

(1) Discharge of a private employee (e.g., in the entertainment industry) who, by refusing to answer questions of a legislative committee, violates an agreement to do nothing to bring himself or herself into public disgrace. (See *RKO Radio Pictures v. Jarrico* (1954) 128 C.A.2d 172, 173, 274 P.2d 928; 29 So. Cal. L. Rev. 263.)

(2) Discharge of a public employee for refusing to answer questions concerning his or her employment. (See *infra*, §§361, 362.) However, no public employee may be discharged if, as an alternative to discharge, he or she is required to relinquish a constitutional right, e.g., the immunity given to one who is required to testify after a claim of privilege. (See *infra*, §361.)

(3) Deportation of an alien who, in a proceeding seeking suspension of a deportation order, refuses to answer questions concerning the alien's membership in the Communist Party. (See *Kimm v. Rosenberg* (1960) 363 U.S. 405, 80 S.Ct. 1139, 1441, 4 L.Ed.2d 1299, 1302.)

(4) Denial of recovery under a fire insurance policy for refusal to submit to examination concerning the loss in violation of a policy provision requiring such examination. (See *Hickman v. London Assur. Corp.* (1920) 184 C. 524, 195 P. 45, *infra*, §497.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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### XVII. PRIVILEGE AGAINST SELF-INCRIMINATION

#### A. General Principles.

##### 4. Effects of Claim.

#### b. Claim by Public Officer or Employee.

##### 1. Federal Cases.

2 Witkin Cal. Evid. Witnesses § 361

[§ 361] Federal Cases.

The question whether a public employee can be discharged for refusal to testify in a criminal proceeding or investigation by a grand jury or legislative committee was the subject of exhaustive consideration in a number of Supreme Court decisions.

In *Garrity v. New Jersey* (1967) 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562, a New Jersey statute provided that a public officer who claimed the privilege and refused to testify on matters relating to his or her office, in any criminal proceeding where the public officer was a defendant or prosecution witness, or before a grand jury or other body having the right to inquire as to such matters, etc., should be removed from the office and thereafter be ineligible for public employment in the state. Appellants, police officers of certain boroughs, were called in an investigation of alleged fixing of traffic tickets, conducted by the Attorney General under order of the New Jersey Supreme Court. Each received full warning of his privilege and the effect, under the statute, of exercising it. All answered the questions asked. Then, in a subsequent prosecution for conspiracy to obstruct the administration of the traffic laws, some of their answers were admitted over the objection that they were coerced. *Held*, conviction reversed.

(a) *No free choice*. Appellants were forced to elect between self-incrimination and job forfeiture. This "is the antithesis of free choice to speak out or to remain silent." And, like the interrogation practices condemned in *Miranda v. Arizona* (1966) 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (see 1 Cal. Evidence (4th), Hearsay, §76 et seq.), it is likely to exert such pressure on the individual as to disable him or her from making a free and rational decision. (87 S.Ct. 618, 17 L.Ed.2d 565.)

(b) *Holmes dictum rejected*. Justice Holmes, in the celebrated Massachusetts case of *McAuliffe v. New Bedford*, said: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." This is not, however, the question involved here; the question here is "whether a State, contrary to the requirement of the Fourteenth Amendment, can use the threat of discharge to secure incriminatory evidence against an employee." (87 S.Ct. 620, 17 L.Ed.2d 567.) And "policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights." (87 S.Ct. 620, 17 L.Ed.2d 567.)

(c) *Unconstitutional conditions*. "There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price. ... We now hold the protection of the individual under the Fourteenth Amendment prohibits use in subsequent criminal proceedings of confessions obtained under threat of removal from office, and that it extends

to all, whether they are policemen or other members of our body politic." (87 S.Ct. 620, 17 L.Ed.2d 567.) (On the unconstitutional conditions doctrine, see 8 Summary (9th), *Constitutional Law*, §§702, 703.)

The *Garrity* holding was applied in *Gardner v. Broderick* (1968) 392 U.S. 273, 88 S.Ct. 1913, 20 L.Ed.2d 1082. Gardner, a New York City police officer, was called by the grand jury investigating corruption in the police department. He was advised that the jury proposed to examine him concerning performance of his official duties, and was asked to sign a waiver of immunity. He refused, and was discharged pursuant to a charter provision. In this action for reinstatement, the New York court denied relief. *Held*, reversed.

(a) The *Garrity* case did not involve the issue here; it only held that testimony actually given under compulsion could not be used in a subsequent prosecution. *Spevack v. Klein* (1967) 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574 (infra, §363), was also distinguishable; a lawyer is not an employee, but a policeman is, and therefore is responsible to the state or to no one. Thus, if Gardner had refused to answer questions directly relating to his duties, the self-incrimination privilege would not bar his dismissal. (88 S.Ct. 1915, 20 L.Ed.2d 1086.)

(b) Here, however, the discharge was not for refusal to answer but for refusal to waive a constitutional right--the immunity which he would be entitled to if required to testify after a claim of privilege. (88 S.Ct. 1916, 20 L.Ed.2d 1087.)

*Uniformed Sanitation Men Assn. v. Commissioner of Sanitation* (1968) 392 U.S. 280, 88 S.Ct. 1917, 20 L.Ed.2d 1089, followed *Gardner*. Employees of the New York City Department of Sanitation were under investigation for improper diversion of fees. Some claimed privilege and refused to testify before the Commissioner; others were summoned before the grand jury and refused to sign waivers of immunity. *Held*, their discharge was a violation of constitutional rights. These public employees had the benefit of the privilege against self-incrimination. They would, however, subject themselves to dismissal if they refused to account for performance of a public trust in a proceeding which did not involve coercion to relinquish constitutional rights. (88 S.Ct. 1920, 20 L.Ed.2d 1093.) (For analyses of *Garrity*, *Gardner*, and *Uniformed Sanitation* cases, see 82 Harv. L. Rev. 203.)

The *Garrity*, *Gardner* and *Uniformed Sanitation* trilogy was recognized as controlling in *Lefkowitz v. Turley* (1973) 414 U.S. 70, 94 S.Ct. 316, 324, 38 L.Ed.2d 274, 283, where two architects were summoned to testify before a grand jury investigating conspiracy, bribery and larceny charges. Under a New York statute, public contracts had to provide that if a contractor refused to waive immunity or to answer questions about his or her public contracts, the contractor's existing contracts might be cancelled and he or she would be disqualified from further transactions with the state for 5 years. *Held*, the privilege was applicable even though the issue arose in official inquiries into the job performance of a public contractor. The architects were called as witnesses (94 S.Ct. 322, 38 L.Ed.2d 281) and the waiver sought by the state under threat of a substantial economic sanction was not voluntary. There is no constitutional difference between "the threat of job loss to an employee of the State, and a threat of loss of contracts to a contractor." (94 S.Ct. 325, 38 L.Ed.2d 285.)

The court pointed out that the state may insist on such testimony only if it offers adequate immunity, making the testimony or its fruits inadmissible for use in criminal proceedings. (94 S.Ct. 325, 38 L.Ed.2d 285.)

*Lefkowitz v. Cunningham* (1977) 431 U.S. 801, 97 S.Ct. 2132, 53 L.Ed.2d 1, reaffirmed the conclusions reached in *Gardner v. Broderick* and *Lefkowitz v. Turley*, and applied the principles to a statutory penalty which had no substantial economic impact. Under a New York statute, C, an attorney, was divested of his state political party offices and barred for 5 years from holding any other party or public office. *Held*, "direct economic sanctions and imprisonment are not the only penalties capable of forcing the self-incrimination which the Amendment forbids." (97 S.Ct. 2136, 53 L.Ed.2d 8.) Again the court emphasized the state contempt power to compel testimony by granting proper "use immunity" (see infra, §478), thus retaining the opportunity to prosecute the witness on the basis of evidence derived from other sources. (97 S.Ct. 2137, 53 L.Ed.2d 9.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*Unconstitutional conditions doctrine:*

*Cross-Reference:* 8 *Summary* (10th), *Constitutional Law*, §§812, 813.



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## CHAPTER IX - Witnesses

### XVII. PRIVILEGE AGAINST SELF-INCRIMINATION

#### A. General Principles.

##### 4. Effects of Claim.

#### b. Claim by Public Officer or Employee.

##### 2. California Cases.

2 *Witkin Cal. Evid. Witnesses* § 362

[§ 362] California Cases.

California and federal cases (see *supra*, §361) are in accord on the right to discharge or suspend for refusal to testify before a grand jury or legislative committee: Public employees are under an obligation to provide information concerning their fitness to hold office. (See *Govt.C. 1028.1*; *Christal v. Police Com.* (1939) 33 C.A.2d 564, 568, 92 P.2d 416; *Steinmetz v. California State Bd. of Education* (1955) 44 C.2d 816, 824, 285 P.2d 617; *Board of Education v. Mass* (1956) 47 C.2d 494, 498, 304 P.2d 1015; *Szmciarz v. State Personnel Bd.* (1978) 79 C.A.3d 904, 916, 145 C.R. 396; 28 Cal. L. Rev. 94; 43 Cal. L. Rev. 889; 64 Harv. L. Rev. 987; 1956 A.S. 51; 44 A.L.R.2d 789 [assertion of immunity as ground for removing or discharging public officer or employee].)

Also, a public employee who invokes the privilege, but then testifies under protest, may be disciplined on the basis of the information thereby provided. (*Szmciarz v. State Personnel Bd.*, *supra*, 79 C.A.3d 917 [prison correctional officer suspended for 5 months after admitting under protest that he had possessed marijuana at home and had inadvertently brought three marijuana cigarettes into the prison].)

Holding a disciplinary hearing prior to trial of the criminal charge constituting the ground for dismissal does not violate the employee's privilege (by, in effect, forcing the employee to testify to avoid dismissal), because the employee's testimony at the hearing is inadmissible at the later prosecution. (*Hankla v. Governing Bd. of Roseland School Dist.* (1975) 46 C.A.3d 644, 652, 120 C.R. 827.)

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### XVII. PRIVILEGE AGAINST SELF-INCRIMINATION

#### A. General Principles.

##### 4. Effects of Claim.

##### c. Claim by Attorney.

2 Witkin Cal. Evid. Witnesses § 363

[§ 363] Claim by Attorney.

It was formerly the rule that an attorney who refused to cooperate with an authorized judicial inquiry into unethical practices by claiming the privilege could be disbarred. (See *Cohen v. Hurley* (1961) 366 U.S. 117, 81 S.Ct. 954, 6 L.Ed.2d 156.) This rule was repudiated and the *Cohen* case was overruled by a 5-4 vote in *Spevack v. Klein* (1967) 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574. Petitioner, a member of the New York bar, was summoned in a judicial inquiry, and refused to produce financial records or to testify. *Held*, order of disbarment reversed.

(a) The four signers of the main or "plurality" opinion thought that the *Cohen* principle had been "seriously eroded" by *Malloy v. Hogan* (1964) 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653, *supra*, §356, holding that no penalty can be imposed on a person who exercises the self-incrimination privilege. And "penalty," as pointed out in *Griffin v. California* (1965) 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106, *infra*, §433, means any sanction which makes assertion of the privilege "costly," hence, includes the threat of disbarment. "We conclude that *Cohen v. Hurley* should be overruled, that the Self-Incrimination Clause of the Fifth Amendment has been absorbed in the Fourteenth, that it extends its protection to lawyers as well as to other individuals, and that it should not be watered down by imposing the dishonor of disbarment and the deprivation of a livelihood as a price for asserting it." (87 S.Ct. 627, 17 L.Ed.2d 577.)

(b) The fifth justice, concurring, drew a distinction between discharge of a public employee and disbarment of a lawyer who is not a public employee. (87 S.Ct. 630, 17 L.Ed.2d 580; see *supra*, §361.)

The four dissenters denounced the majority opinion in the strongest language:

(a) "This decision, made in the name of the Constitution, permits a lawyer suspected of professional misconduct to thwart direct official inquiry of him or her without fear of disciplinary action. What is done today will be disheartening and frustrating to courts and bar associations throughout the country in their efforts to maintain high standards at the bar." (87 S.Ct. 631, 17 L.Ed.2d 581.)

(b) The decision also means that such a person must be admitted to the bar or appointed to the bench. And it encourages lawyers "to think of their calling as imposing on them no higher standards of behavior than might be acceptable in the general market-place." (87 S.Ct. 631, 17 L.Ed.2d 581.)

(c) The states have long been held to have broad authority to devise requirements for admission and standards of practice for professions; and the New York rules, aimed at protecting the public from the abuses of malpractice,

appropriately recognize that lawyers are officers of the court, performing a fundamental role in the administration of justice. (87 S.Ct. 633, 17 L.Ed.2d 583.)

(d) The plurality opinion's broad proposition "is entirely without support in the construction hitherto given to the privilege, and is directly inconsistent with a series of cases in which this Court has indicated the principles which are properly applicable here." (87 S.Ct. 633, 17 L.Ed.2d 583.) Thus, "so long as state authorities do not derive any imputation of guilt from a claim of the privilege, they may in the course of a bona fide assessment of an employee's fitness for public employment require that the employee disclose information reasonably related to his fitness, and may order his discharge if he declines." (87 S.Ct. 635, 17 L.Ed.2d 585.)

(e) The plurality opinion "does not pause either to acknowledge the previous handling of these issues or to explain why the privilege must now be supposed to forbid all consequences which may result from privileged silence." It creates "a novel and entirely unnecessary extension of the privilege" exceeding the needs of its purpose and seriously inhibiting the protection of other public interests. (87 S.Ct. 635, 17 L.Ed.2d 585.) (See 81 Harv. L. Rev. 200; 1967 A.S. 546, 555, 561; 30 A.L.R.4th 243 [attorney's privilege in disbarment or other disciplinary proceedings--post-*Spevack* cases]; *Black v. State Bar* (1972) 7 C.3d 676, 686, 103 C.R. 288, 499 P.2d 968, *infra*, §372 [attorney in disciplinary proceeding has only the witness privilege to refuse to answer particular questions].)

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## CHAPTER IX - Witnesses

### XVII. PRIVILEGE AGAINST SELF-INCRIMINATION

#### A. General Principles.

#### 4. Effects of Claim.

#### d. Claim by Corporation Officer.

2 *Witkin Cal. Evid. Witnesses* § 364

[§ 364] Claim by Corporation Officer.

A peculiar problem received equivocal treatment in *George Campbell Painting Corp. v. Reid* (1968) 392 U.S. 286, 88 S.Ct. 1978, 20 L.Ed.2d 1094. A New York statute provided that a person or corporation contracting with the state must agree to cancellation without damages, and that a 5-year disqualification for future contracts will result, on (a) refusal to testify before a grand jury or (b) refusal to waive immunity against subsequent criminal prosecution. Appellant was a closely held family corporation. When an investigation of bid rigging was under way, Campbell, president and director, resigned his offices and divested himself of stock. When called before the grand jury he refused to sign the waiver. Accordingly, appellant's contracts were terminated and it was notified of its disqualification. *Held*, this was proper.

(a) The privilege against self-incrimination is personal, and cannot be claimed by a corporation. (88 S.Ct. 1980, 20 L.Ed.2d 1097; see *infra*, §451.)

(b) Because a corporation cannot avail itself of the privilege, it cannot assert invalidity of the penalty imposed for refusal of the individual (president) to waive. (88 S.Ct. 1980, 20 L.Ed.2d 1097.)

(c) The question of denial of due process rights by imposition of the penalty despite Campbell's resignation was not reached, in view of the New York court's finding that this was done solely to avoid the disqualification and should be disregarded. (88 S.Ct. 1980, 20 L.Ed.2d 1097.)

The dissent likens the statute to a bill of attainder: an individual violates a law, the family (here family corporation) is blacklisted. (88 S.Ct. 1980, 20 L.Ed.2d 1098.) (See 82 Harv. L. Rev. 210.)

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## CHAPTER IX - Witnesses

### XVII. PRIVILEGE AGAINST SELF-INCRIMINATION

#### B. Privilege of Accused (Defendant in Criminal Case).

1. General Principles.
  - a. Nature of Privilege.

2 Witkin Cal. Evid. Witnesses § 365

[§ 365] Nature of Privilege.

The common law *disqualification* of the accused as a witness on his or her own behalf has long been abolished. (See *Ferguson v. Georgia* (1961) 365 U.S. 570, 81 S.Ct. 756, 757, 5 L.Ed.2d 783, 784; 78 Harv. L. Rev. 433.) And former P.C. 1325.5, with its confusing statement that a defendant was a competent witness "at his own request, but not otherwise," was repealed on the adoption of the Evidence Code. But the federal and state Constitutions establish a privilege to refuse to be called or sworn as a witness for the prosecution. (See *supra*, §355 et seq.)

The same strong policy requires the court to make the privilege effective by advising the defendant of its existence whenever this appears to be necessary. Thus, in *Killpatrick v. Superior Court* (1957) 153 C.A.2d 146, 314 P.2d 164, a prosecution for contempt for failure to comply with an order for support of a former wife and children, the prosecutor called petitioner as a witness. The latter, unfamiliar with legal procedure and not represented by counsel, was questioned by both the prosecutor and judge with no advice as to the constitutional privilege to refuse to testify. *Held*, contempt judgment annulled; testimony under such circumstances was not a waiver of the privilege. Quoting from a New York case the court said: "When a defendant goes to trial upon a charge of a criminal nature without the benefit of counsel, it is the duty of the court to be alert to protect the defendant's rights. Good practice requires that any suggestion by the court that the defendant take the stand be coupled with advice as to his privilege against self-incrimination. The defendant may not be called to the stand in a criminal case unless he waives his privilege. He cannot be charged with a waiver of the privilege unless it appears that he was aware of its existence and its surrounding safeguards and voluntarily and intelligently elected to refrain from asserting it." (153 C.A.2d 149.) (See *People v. Hines* (1997) 15 C.4th 997, 1032, 64 C.R.2d 594, 938 P.2d 388 [trial counsel's mention in opening statement that defendant would testify did not deprive defendant of right not to testify, where defendant had previously told counsel of his willingness to testify]; 5 A.L.R.2d 1404 [use in subsequent prosecution of self-incriminating testimony given without invoking privilege].)

Such advice is unnecessary, however, where the defendant is represented by counsel. (See *People v. Thomas* (1974) 43 C.A.3d 862, 867, 118 C.R. 226, *infra*, §429.)

An attorney has standing to assert the privilege on the client's behalf. (See *In re Marcario* (1970) 2 C.3d 329, 330, 85 C.R. 135, 466 P.2d 679 [attorney properly refused to comply with trial judge's discovery order to disclose witnesses in murder trial].) But the privilege is *personal*, and cannot be claimed by others. (See *People v. Jenkins* (1973) 34 C.A.3d 893, 897, 110 C.R. 465 [after having pleaded guilty, codefendant who did not assert privilege was properly compelled to testify against remaining defendants]; 39 *Hastings L. J.* 927 [Erosion of the Fifth Amendment Through the

Use of Defense Counsel as Witness].)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Killpatrick v. Superior Court* (1957) 153 C.A.2d 146, 314 P.2d 164, text, p. 657, was disapproved in *People v. Barnum* (2003) 29 C.4th 1210, 131 C.R.2d 499, 64 P.3d 788, 5 Cal. Crim. Law (3d), *Criminal Trial*, Supp., §259. The general rule is that the trial court is not required to assist or advise a self-represented defendant on matters of law, evidence, or trial practice. There is no reason why the privilege against self-incrimination, alone among all the rights enjoyed by a self-represented defendant, mandates protection by the trial court. (29 C.4th 1222, 1223.) However, "[i]n any given case, the court remains free to provide such an advisement, so long as its words do not stray from neutrality toward favoring any one option over another." (29 C.4th 1226.) *West's Key Number Digest*, Witnesses k.299 et seq.



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#### B. Privilege of Accused (Defendant in Criminal Case).

##### 1. General Principles.

##### b. Improper Procedural Restrictions.

2 Witkin Cal. Evid. Witnesses § 366

[§ 366] Improper Procedural Restrictions.

(1) *Forcing Defendant To Claim Before Jury.* In *People v. Talle* (1952) 111 C.A.2d 650, 245 P.2d 633, the prosecutor, at the opening of the trial, commented on "statements" concerning the "advantage" to the prosecution of being permitted to complete its case before defendant is allowed to offer his defense, and offered to "share that advantage" by calling defendant as "our witness." Defendant's counsel objected, the court advised defendant of his rights and asked if he wanted to take the stand, and defendant said that he did not. *Held*, reversible error. "This was a direct, deliberate and prejudicial impairment of appellant's fundamental and constitutional rights. The only purpose of this maneuver was, at the inception of the trial, to try to impair the presumption of innocence that clothes all accused until proven guilty, and to violate appellant's constitutional guarantee against self-incrimination. This error was aggravated and compounded when the district attorney, on the cross-examination of Talle, after he had taken the stand in his own defense, was permitted to ask Talle time and time again why he had refused to take the stand as the first witness when called, and why he had then insisted on invoking his constitutional rights. Over the vigorous and proper objections of defense counsel, Talle was compelled to answer these questions and was compelled to state that he had refused to then take the stand on the advice of his attorneys. It is a novel, and certainly unsound, principle of law that a defendant must justify and explain why he has taken advantage of his constitutional rights." (111 C.A.2d 662.) (See 1959 A.S. 642.)

(2) *Forcing Defendant To Decide Prematurely.* In *Brooks v. Tennessee* (1972) 406 U.S. 605, 92 S.Ct. 1891, 32 L.Ed.2d 358, defense counsel moved to delay defendant's proposed testimony until after other defense witnesses had testified. The trial judge denied the motion on the basis of a state statute which required a defendant who wished to take the stand to do so before calling other defense witnesses. After declining to testify, defendant was convicted of armed robbery and unlawful possession of a pistol. *Held*, judgment reversed.

(a) The statute was an impermissible restriction on defendant's privilege against self-incrimination, because he might not know at the close of the prosecution case whether his own testimony will be necessary or even helpful to his cause. (92 S.Ct. 1894, 32 L.Ed.2d 362.) "Pressuring the defendant to take the stand, by foreclosing later testimony if he refuses, is not a constitutionally permissible means of ensuring his honesty. It fails to take into account the very real and legitimate concerns that might motivate a defendant to exercise his right of silence. And it may compel even a wholly truthful defendant, who might otherwise decline to testify for legitimate reasons, to subject himself to impeachment and cross-examination at a time when the strength of his other evidence is not yet clear." (92 S.Ct. 1895, 32 L.Ed.2d 363.)

(b) The statute also infringed on defendant's due process rights. "Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right. By requiring the accused and his lawyer to make that choice

without an opportunity to evaluate the actual worth of their evidence, the statute restricts the defense--particularly counsel--in the planning of its case. Furthermore, the penalty for not testifying first is to keep the defendant off the stand entirely, even though as a matter of professional judgment his lawyer might want to call him later in the trial. The accused is thereby deprived of the 'guiding hand of counsel' in the timing of this critical element of his defense." (92 S.Ct. 1895, 32 L.Ed.2d 364.)

The three dissenting justices said: "The only 'burden' cast on the defendant's choice to take the stand by the Tennessee procedure is the burden to make the choice at a given point in time. That the choice might in some cases be easier if made later is hardly a matter of constitutional dimension." (92 S.Ct. 1896, 32 L.Ed.2d 365.) (See 66 Cal. L. Rev. 935 [arguing inconsistency between *Brooks* and *Williams v. Florida* (1970) 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446, 5 Cal. Crim. Law (3d), *Criminal Trial*, §29, upholding notice of alibi rule].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Forcing Defendant To Decide Prematurely*. See *People v. Wiege* (2005) 133 C.A.4th 1342, 1348, 35 C.R.3d 482 [trial judge did not violate rule of *Brooks v. Tennessee* (1972) 406 U.S. 605, 92 S.Ct. 1891, 32 L.Ed.2d 358, text, p. 659, where he initially ruled that defendant must testify first or not at all but later retreated from that directive and defense counsel ultimately chose not to call defendant].



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### XVII. PRIVILEGE AGAINST SELF-INCRIMINATION

#### B. Privilege of Accused (Defendant in Criminal Case).

##### 2. What Is a Criminal Case Against Accused.

##### a. Criminal and Quasi-Criminal Proceedings.

2 Witkin Cal. Evid. Witnesses § 367

[§ 367] Criminal and Quasi-Criminal Proceedings.

The obvious application of the privilege is in the trial on a criminal charge against the accused. (See *People v. Talle* (1952) 111 C.A.2d 650, 662, 245 P.2d 633, supra, §366.) And, under the California practice of separate trials on guilt and sanity, a defendant who pleads "not guilty" and "not guilty by reason of insanity" cannot be compelled to testify in the second trial on the issue of sanity. (*People v. Lamey* (1930) 103 C.A. 66, 67, 283 P. 848; see *People v. Flores* (1976) 55 C.A.3d 118, 122, 127 C.R. 230 [because defendant in sanity phase is protected by self-incrimination clause, comment on defendant's silence is improper].)

But the concept is broader than that. "A criminal case is an action, suit, or cause instituted to punish an infraction of the criminal laws, and, with this object in view, it matters not in what form a statute may clothe it, it is still a criminal case, and the person charged therein is protected from being an enforced witness against himself by the aegis of the constitutions, national and state." (*Thurston v. Clark* (1895) 107 C. 285, 289, 40 P. 435 [proceeding to remove sheriff from office]; see *Ex parte Clarke* (1894) 103 C. 352, 354, 37 P. 230 [assignee in insolvency charged petitioner, adjudicated insolvent, with concealment of assets, and had him cited to appear in court for examination]; *Boyd v. United States* (1886) 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 [forfeiture for violation of revenue law]; *United States v. United States Coin & Currency* (1971) 401 U.S. 715, 91 S.Ct. 1041, 1043, 28 L.Ed.2d 434, 437 [forfeiture proceedings are criminal for Fifth Amendment purposes].)

Although a *contempt proceeding* is generally termed "quasi-criminal," contempt is a misdemeanor (P.C. 166), and the proceeding is a criminal case within the protection of the privilege. It is immaterial that the acts constituting contempt arose out of a civil proceeding. (*Ex parte Gould* (1893) 99 C. 360, 361, 33 P. 1112; *Brophy v. Industrial Acc. Com.* (1941) 46 C.A.2d 278, 283, 115 P.2d 835; *In re Ferguson* (1954) 123 C.A.2d 799, 801, 268 P.2d 71; *Killpatrick v. Superior Court* (1957) 153 C.A.2d 146, 314 P.2d 164, supra, §365; *In re Witherspoon* (1984) 162 C.A.3d 1000, 1002, 209 C.R. 67.)

A mentally disordered offender proceeding has "overwhelming penal attributes," and the privilege against self-incrimination applies. (*People v. Pretzer* (1992) 9 C.A.4th 1078, 1085, 11 C.R.2d 860.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Haynie* (2004) 116 C.A.4th 1224, 1228, 11 C.R.3d 163 [right not to be compelled to testify against oneself applies in proceeding to extend commitment of defendant found not guilty by reason of insanity]. *Mentally disordered offender proceeding*: See *People v. Clark* (2000) 82 C.A.4th 1072, 1081, 1082, 98 C.R.2d 767 [in mentally disordered



offender proceeding, requiring defendant to testify about whether she used force or violence in underlying offense did not violate privilege against self-incrimination; disagreeing with *People v. Pretzer* (1992) 9 C.A.4th 1078, 11 C.R.2d 860, text, p. 661]; *People v. Lopez* (2006) 137 C.A.4th 1099, 1110, 40 C.R.3d 789 [equal protection principles do not require extension of right not to testify to mentally disordered offender proceedings; holding of *Haynie* that right applies in proceeding to extend commitment of defendant found not guilty by reason of insanity is incorrect].



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#### 2. What Is a Criminal Case Against Accused.

##### b. Noncriminal Judicial Proceedings.

##### 1. In General.

2 Witkin Cal. Evid. Witnesses § 368

[§ 368] In General.

Some proceedings that may have adverse effects equal to those of criminal or contempt proceedings, or are indirectly connected with criminal prosecutions, are nevertheless not within the classification of criminal cases. The defendant therefore may be called to the stand and compelled to testify; the defendant's only privilege is that of any witness to refuse to answer incriminating questions (*infra*, §446):

*Levy v. Superior Court* (1895) 105 C. 600, 606, 38 P. 965 [statutory proceeding by administrator to recover assets of estate from defendant; sanctions held remedial rather than penal].

*People v. Whelchel* (1967) 255 C.A.2d 455, 460, 63 C.R. 258 [civil narcotic commitment].

*People v. Superior Court (Kaufman)* (1974) 12 C.3d 421, 429, 115 C.R. 812, 525 P.2d 716, *infra*, §§471, 474 [state suit to recover civil penalties for deceptive advertising].

*Cramer v. Tyars* (1979) 23 C.3d 131, 137, 151 C.R. 653, 588 P.2d 793 [proceeding for civil commitment as mentally retarded]; 14 *Loyola L.A. L. Rev.* 187 [Cramer].

*Allen v. Illinois* (1986) 478 U.S. 364, 106 S.Ct. 2988, 2990, 92 L.Ed.2d 296, 302 [state's civil commitment proceedings for sexually dangerous persons].

*Conservatorship of Bones* (1987) 189 C.A.3d 1010, 1015, 234 C.R. 724 [proceeding for involuntary postcertification treatment as dangerous person under Welf.C. 5000 et seq.].

*People v. Merfeld* (1997) 57 C.A.4th 1440, 1446, 67 C.R.2d 759, 3 *Cal. Crim. Law (3d)*, *Punishment*, §640 [hearing to extend commitment as mentally disordered offender].

In *United States v. Ward* (1980) 448 U.S. 242, 100 S.Ct. 2636, 65 L.Ed.2d 742, a statute required persons in charge of ships or shore installations to report oil spills to the federal government, and provided that the reported information should not be used against such person in any criminal case except a prosecution for perjury or giving a false statement. An owner or operator of the source of a spill was made subject to civil penalties, the proceeds of which were to go into a fund for containing and removing spills. The operator of an oil rig duly reported a spill and was assessed a penalty, which the government sued to collect. The operator contended that use of his required report in imposing the penalty

violated his privilege against self-incrimination. *Held*, use of the report was proper; the penalty was civil, and the proceeding in which it was imposed was not quasi-criminal. (100 S.Ct. 2644, 65 L.Ed.2d 753.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *In re Scott* (2003) 29 C.4th 783, 815, 129 C.R.2d 605, 61 P.3d 402 [habeas corpus proceeding brought by defendant under sentence of death]; *People v. Leonard* (2000) 78 C.A.4th 776, 792, 93 C.R.2d 180 [sexually violent predators proceeding (3 Cal. Crim. Law (3d), Punishment, §193 et seq.); following *Allen v. Illinois* (1986) 478 U.S. 364, 106 S.Ct. 2988, 92 L.Ed.2d 296, text, p. 661]; *People v. Clark* (2000) 82 C.A.4th 1072, 1081, 1082, 98 C.R.2d 767 [proceeding to determine whether defendant was mentally disordered offender].



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##### 2. What Is a Criminal Case Against Accused.

##### b. Noncriminal Judicial Proceedings.

##### 2. Juvenile Court Hearings.

2 Witkin Cal. Evid. Witnesses § 369

[§ 369] Juvenile Court Hearings.

Juvenile court hearings on a charge of crime are not criminal trials, and it was formerly held that the minor could not refuse to testify, although the minor had the usual right to refuse to answer incriminating questions. (See *In re Dargo* (1947) 81 C.A.2d 205, 207, 183 P.2d 282; 13 So. Cal. L. Rev. 157.) But the rule today is that a minor charged with criminal conduct in juvenile court proceedings has the same privilege against self-incrimination as an adult defendant charged with crime. (See 1 Cal. Evidence (4th), Introduction, §39.)

*In re Jessica B.* (1989) 207 C.A.3d 504, 254 C.R. 883, applied the reasoning of *Ramona R. v. Superior Court* (1985) 37 C.3d 802, 210 C.R. 204, 693 P.2d 789, *infra*, §370, to a dependency proceeding in which a finding that the father's return to the home would endanger his child was based on his refusal to admit that he was an abusive parent and to undergo therapy for the problem. The father argued that being required to admit the abuse and seek treatment violated his privilege against self-incrimination. *Held*, there was no violation; any incriminating statements made at the hearing or during therapy would be inadmissible in a subsequent criminal trial.

(a) Former Welf.C. 355.1(d) (now Welf.C. 355.1(f)) makes the testimony of a parent in dependency proceedings inadmissible in any other proceeding. However, this statute does not adequately protect the father in this case, because any incriminating statements he made *during treatment* would not constitute "testimony" within the meaning of the statute. (207 C.A.3d 518.)

(b) Without immunity, the father is forced to choose between incriminating himself or having little chance of reunification with his child. And, as held in *Ramona R.*, such a choice runs counter to the historic aversion to cruelty reflected in the privilege against self-incrimination. (207 C.A.3d 520.) Thus, the California Constitution requires use immunity not only for incriminating testimony given at the dependency proceeding, but also for such statements made during court-ordered therapy. In addition to preserving the privilege against self-incrimination, such immunity will facilitate the goal of protecting the best interests of the child. (207 C.A.3d 521.)

The court cautioned that the immunity would not bar the use of statements made to the therapist if the defendant puts such statements in issue by giving squarely inconsistent testimony at the criminal trial. (207 C.A.3d 521.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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##### b. Noncriminal Judicial Proceedings.

##### 3. Fitness Hearings.

2 Witkin Cal. Evid. Witnesses § 370

[§ 370] Fitness Hearings.

(1) *General Rule: Privilege Available.* The privilege is available in a fitness hearing. In *Ramona R. v. Superior Court* (1985) 37 C.3d 802, 210 C.R. 204, 693 P.2d 789, Ramona R., aged 17, was accused of murder, and the district attorney moved to have her tried as an adult (Welf.C. 707(a); see 10 Summary (9th), Parent and Child, §755 et seq.). At the fitness hearing, she refused to testify unless granted immunity from use at trial of any statements she made, and she was found unfit. *Held*, mandamus granted, directing the lower court to vacate its order and conduct a new fitness hearing.

(a) Before the adoption of Cal. Const., Art. I, §28(d), part of Proposition 8 (see 1 Cal. Evidence (4th), Introduction, §§8, 9), statements made to a probation officer and to a court in a fitness hearing could not be introduced as substantive evidence against the minor at trial. (37 C.3d 806, citing *Bryan v. Superior Court* (1972) 7 C.3d 575, 587, 102 C.R. 831, 498 P.2d 1079, and *Sheila O. v. Superior Court* (1981) 125 C.A.3d 812, 816, 178 C.R. 418, 10 Summary (9th), Parent and Child, §766.)

(b) The constitutional amendment, providing for admission of all relevant evidence, contains an express exception for existing statutory rules of evidence relating to "privilege." *Ev.C. 940* does not determine the scope of the privilege against self-incrimination, which is governed by the federal and state Constitutions. *People v. Coleman* (1975) 13 C.3d 867, 889, 120 C.R. 384, 533 P.2d 1024, *infra*, §380, dealing with the similar problem of a probationer facing a hearing on revocation of probation prior to trial, holds that the privilege may be claimed; and this reasoning applies equally to a juvenile considering his or her options with respect to an interview with a probation officer, a fitness hearing, and a guilt-phase trial. (37 C.3d 807, 810.)

(c) There is a final reason why the California Constitution precludes proof, at a subsequent trial, of the statements to a probation officer or testimony at a fitness hearing: the adverse consequences are significant. (1) The certification of a juvenile offender to an adult court is the worst punishment the juvenile system is empowered to inflict; and here, because Ramona was bound over to the criminal court to face murder charges, she could face the penalty of life imprisonment. (37 C.3d 810.) (2) But even a finding of fitness is not such a "bonanza" for a minor; rehabilitation in the juvenile system may involve confinement for years. "Thus we hold that use immunity applies even when the minor has been found fit for treatment under the juvenile laws." (37 C.3d 811.)

(2) *Distinction: Statements Used To Impeach Minor's Testimony.* The *Ramona R.* case explicitly left open the question whether a minor's statements during a fitness evaluation, while not admissible substantively at a subsequent

criminal trial, may nevertheless be used to impeach a minor who chooses to testify. *People v. Macias* (1997) 16 C.4th 739, 66 C.R.2d 659, 941 P.2d 838, provided the answer. As the result of a high-speed chase ending in a collision and the striking of pedestrians, defendant was charged with six murders and operating a vehicle without a license. The prosecution sought to try him as an adult, and a probation officer interviewed him in the course of preparing a report for the fitness hearing. At the subsequent criminal trial, defendant gave an account of the chase and collision, and other circumstances relevant to the incident, substantially at variance with his account to the probation officer. The prosecution was allowed to impeach this testimony with the contradictory statements defendant had made to the probation officer. *Held*, this was proper.

(a) The rule of the *Ramona R.* case was not based on a belief that a minor's statements in the course of fitness evaluation are legislatively compelled. If it had been so based, the question regarding impeachment use of these statements could not have been left open. Rather, the rationale underlying the rule is that juveniles should be allowed to exercise their right to present mitigating evidence to probation officers without giving prosecutors in subsequent trials the unfair advantage of using their statements as substantive evidence of guilt. This rationale does not preclude the impeachment use of a minor's fitness evaluation statements when the minor voluntarily takes the stand and testifies inconsistently with them. (16 C.4th 752, 753, disagreeing with dictum in *People v. May* (1988) 44 C.3d 309, 243 C.R. 369, 748 P.2d 307, 3 Cal. Evidence (4th), *Presentation at Trial*, §319, giving contrary characterization of *Ramona R.* rationale.)

(b) In *New Jersey v. Portash* (1979) 440 U.S. 450, 99 S.Ct. 1292, 59 L.Ed.2d 501, the United States Supreme Court concluded that statements made before a grand jury under a grant of use immunity--statements which the court characterized as *involuntary*--could not be used in a subsequent criminal trial for any purpose. But this was "a unique and limited case, demonstrating the essence of coerced testimony in the 'classic Fifth Amendment' sense because a witness who had been given use immunity was later ordered to testify or face contempt sanctions." (16 C.4th 739.) Other federal cases have explicitly allowed the limited use for impeachment of otherwise protected statements elicited from defendants in a variety of circumstances, and the California Courts of Appeal have ratified the rule that a criminal defendant's self-incrimination privilege does not shield the defendant from impeachment with prior inconsistent statements when he or she chooses to testify at trial. "Consistent with these cases, our decision to grant substantive use immunity to statements that a juvenile defendant made in preparation for a ... fitness hearing, while allowing the use of inconsistent statements for impeachment, protects the juvenile's constitutional rights but refuses to condone or encourage perjury." (16 C.4th 756.) (See *People v. Humiston* (1993) 20 C.A.4th 460, 476, 24 C.R.2d 515 [statements made by defendant to retained psychologist in course of evaluation for fitness for juvenile treatment were properly admitted for impeachment at subsequent murder trial]; 111 Harv. L. Rev. 837 [*Macias*].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *General Rule: Privilege Available.*

*Cross-Reference:* 10 Summary (10th), *Parent and Child*, §835 et seq.

*Sheila O. v. Superior Court:*

*Cross-Reference:* 10 Summary (10th), *Parent and Child*, §842.



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3. Nonjudicial Proceedings.

a. Grand Jury or Legislative Investigation.

2 *Witkin Cal. Evid. Witnesses* § 371

[§ 371] Grand Jury or Legislative Investigation.

*In re Lemon* (1936) 15 C.A.2d 82, 59 P.2d 213, involved a grand jury investigation of alleged graft in the police department. Petitioner, a police captain, was summoned as a witness. He refused to testify, contending that he was a "prospective defendant." *Held*, he was guilty of contempt. As a witness, he could refuse to answer any incriminating questions that might be asked. But, because the grand jury proceeding is not a criminal prosecution, a witness therein is not a party defendant, and he could not refuse to be sworn or to answer proper, nonincriminating questions. (15 C.A.2d 84.) (See 1 McCormick 5th, §118; 10 So. Cal. L. Rev. 211; 70 Harv. L. Rev. 1455; 1954 A.S. 139; 1959 A.S. 640; 38 A.L.R.2d 225 [privilege against self-incrimination as to testimony before grand jury].)

The same rule applies to hearings by legislative investigating committees. (See *infra*, §502.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 1 McCormick 6th, §118.



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##### 3. Nonjudicial Proceedings.

##### b. Administrative Disciplinary Proceeding.

2 Witkin Cal. Evid. Witnesses § 372

[§ 372] Administrative Disciplinary Proceeding.

An administrative proceeding to revoke or suspend a professional license is not a criminal trial and the licensee cannot refuse to testify. The licensee's only privilege is that of a witness, to decline to answer incriminating questions. (See *In re Vaughan* (1922) 189 C. 491, 495, 209 P. 353 [disbarment]; *West Coast Home Imp. Co. v. Contractors' State License Bd.* (1945) 72 C.A.2d 287, 300, 164 P.2d 811 [contractor's license revocation].)

In *Black v. State Bar* (1972) 7 C.3d 676, 684, 103 C.R. 288, 499 P.2d 968, petitioner contended that the State Bar's calling him as a witness in a disciplinary proceeding violated his privilege against self-incrimination, and that he had the right to an admonition that he did not have to be sworn or testify and that his refusal could not be used against him. The State Bar insisted that petitioner had no privilege to refuse to be sworn but could decline to answer questions on the ground his answers would incriminate him. *Held*, he was properly sworn.

(a) Under the *state* privilege against self-incrimination, an attorney does not have complete immunity from testifying but may refuse to answer questions where the attorney's testimony would tend to incriminate him or her. (7 C.3d 686, citing the text.)

(b) Decisions of the United States Supreme Court (e.g., *Spevack v. Klein* (1967) 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574, *supra*, §363) do not require that an attorney disciplinary proceeding be considered a criminal matter for purposes of the *federal* constitutional privilege against self-incrimination. (7 C.3d 687.)

(c) By testifying without objection, petitioner waived his privilege. And the State Bar has no duty to give admonitions about the privilege to an attorney represented by counsel. (7 C.3d 688.)

**SUPPLEMENT:** [This section is current through the latest supplement]





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#### B. Privilege of Accused (Defendant in Criminal Case).

##### 3. Nonjudicial Proceedings.

##### c. Required Registration.

##### 1. Gambling Activity.

#### 2 *Witkin Cal. Evid. Witnesses* § 373

#### [§ 373] Gambling Activity.

It was formerly held that the federal statute requiring registration of persons engaged in the business of receiving wagers did not compel any confession of past illegal acts, and that the privilege did not apply to future acts that may or may not be committed. (*United States v. Kahriger* (1953) 345 U.S. 22, 73 S.Ct. 510, 97 L.Ed. 754; see 67 Harv. L. Rev. 166; 14 U.C.L.A. L. Rev. 947.) "The fact that he may elect to pay the tax and make the prescribed disclosures required by the Act is a matter of his choice. There is nothing compulsory about it, and, consequently, there is nothing violative of the Fifth Amendment. If he does not pay the occupational tax, proceeds to accept wagers, and is prosecuted therefor, as in this case, he cannot be compelled to testify and may claim his privilege." (*Lewis v. United States* (1955) 348 U.S. 419, 75 S.Ct. 415, 418, 99 L.Ed. 475, 480.) But the *Kahriger* and *Lewis* cases were overruled in *Marchetti v. United States* (1968) 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889.

Petitioner, a gambler, was convicted of violation of the federal wagering tax statutes by wilful failure to pay the occupational tax, and wilful failure to register before engaging in the business. (See 26 U.S.C., §§4411, 4412.) *Held*, reversed.

(a) The fact that the activity is unlawful does not prevent its taxation; the issue is whether the methods used in the wagering tax statutes are consistent with the Fifth Amendment privilege. (88 S.Ct. 700, 19 L.Ed.2d 895.) And, because the information obtained thereby is readily available to assist efforts of state and federal authorities to enforce penalties, the obligation to register and pay the tax creates a real and appreciable hazard of self-incrimination. (88 S.Ct. 702, 19 L.Ed.2d 897.)

(b) The basis of the *Lewis* case was the theory that the gambler merely had the choice of giving up the constitutional privilege to commence wagering activities. This reasoning is no longer persuasive: the question is not whether he has a right to violate state law, but "whether, having done so, he may be compelled to give evidence against himself." (88 S.Ct. 704, 19 L.Ed.2d 899.) In other words, "[t]he constitutional privilege was intended to shield the guilty and imprudent as well as the innocent and foresighted." (88 S.Ct. 704, 19 L.Ed.2d 899.)

(c) Both *Kahriger* and *Lewis* held that the privilege offers protection only to past and present acts; hence, it is unavailable to registration and tax requirements which are *prospective*. This is unsound: substantial hazards of incrimination as to past or present acts may stem from the requirements. "History, to be sure, offers no ready illustrations of the privilege's application to prospective acts, but the occasions on which such claims might

appropriately have been made must necessarily have been very infrequent." (88 S.Ct. 705, 19 L.Ed.2d 901.) The central standard for application of the real privilege is whether the hazard of incrimination is substantial and real; this principle does not permit the rigid chronological distinction. (88 S.Ct. 705, 19 L.Ed.2d 901.)

After expressly overruling the two cases (88 S.Ct. 706, 19 L.Ed.2d 901), the Court restated its conclusions as follows: The taxing statutes are constitutional, but "those who properly assert the constitutional privilege as to these provisions may not be criminally punished for failure to comply with their requirements" (88 S.Ct. 709, 19 L.Ed.2d 905). (See *Grosso v. United States* (1968) 390 U.S. 62, 88 S.Ct. 709, 713, 19 L.Ed.2d 906, 911, 912, [following *Marchetti*]; *Leary v. United States* (1969) 395 U.S. 6, 89 S.Ct. 1532, 1539, 23 L.Ed.2d 57, 76 [following *Marchetti* and holding that the former Marijuana Tax Act violated self-incrimination privilege]; 82 *Harv. L. Rev.* 196; 5 *San Diego L. Rev.* 390; 1968/69 A.S. 130.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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##### 3. Nonjudicial Proceedings.

##### c. Required Registration.

##### 2. Possession of Firearm.

2 Witkin Cal. Evid. Witnesses § 374

[§ 374] Possession of Firearm.

The doctrine of *Marchetti v. United States* (1968) 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889, supra, §373, was applied to the National Firearms Act in *Haynes v. United States* (1968) 390 U.S. 85, 88 S.Ct. 722, 19 L.Ed.2d 923. Petitioner was charged with knowing possession of a firearm, not registered, as required by the National Firearms Act. His claim of Fifth Amendment privilege was rejected, and he pleaded guilty. *Held*, conviction reversed. The requirements are directed toward persons inherently suspect of criminal activities, and registration involves a substantial hazard of prosecution. (But see *Galvan v. Superior Court* (1969) 70 C.2d 851, 866, 76 C.R. 642, 452 P.2d 930, 1 Cal. Crim. Law (3d), *Introduction to Crimes*, §57 [local gun registration ordinance, applicable to all persons, valid].)

Following the *Haynes* decision, supra, Congress revised the National Firearms Act. In *United States v. Freed* (1971) 401 U.S. 601, 91 S.Ct. 1112, 1116, 28 L.Ed.2d 356, 360, the court held the amended act valid.

(a) Unlike the former statute, which taxed only weapons used principally by persons engaged in unlawful activities, the amended act covers *all* possessors of specified firearms (e.g., grenades), except for the federal government itself. Under the former statute, any possessor of an included weapon was compelled to register and disclose the fact of possession, "a provision which we held meant that a possessor must furnish potentially incriminating information which the Federal Government made available to state, local, and other federal officials." But under the amended act, only *possessors who lawfully make, manufacture or import firearms* can and must register them. While it is unlawful for any person to receive or possess an unregistered firearm, *the transferee does not and cannot register*. (91 S.Ct. 1115, 28 L.Ed.2d 359.)

(b) A provision in the former statute allowed the sharing of registration and transfer information with other law enforcement officials. The amended act explicitly states that no information developed through registration or transfer procedures can be used, directly or indirectly, as evidence against the registrant or applicant in a criminal proceeding with respect to "a violation of law occurring prior to or concurrently with" the registration process. (91 S.Ct. 1115, 28 L.Ed.2d 359.) As a matter of practice, no information is disclosed to any law enforcement authority, except when nonregistration is necessary for investigation or prosecution under the act itself. (91 S.Ct. 1116, 28 L.Ed.2d 360.)

(c) The *transferor* does the actual registering, though the application must be supported by the transferee's photograph and fingerprints.

"The transferor--not the transferee--makes any incriminating statements. True, the transferee, if he wants the firearm, must cooperate to the extent of supplying fingerprints and photograph. But the information he supplies makes him the *lawful*, not the unlawful possessor of the firearm." (91 S.Ct. 1116, 28 L.Ed.2d 360.) The claim that these procedures will incriminate the transferee in the *future* improperly "assumes the existence of a periphery of the Self-Incrimination Clause which protects a person against incrimination not only against past or present transgressions but which supplies insulation for a career of crime about to be launched." (91 S.Ct. 1117, 28 L.Ed.2d 361.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Wilmshurst* (2007) 146 C.A.4th 621, 626, 53 C.R.3d 136 [in prosecution for possession of machine gun and illegal assault weapons, inclusion in search warrant affidavit of information from records defendant's federal firearms license required him to keep did not violate self-incrimination privilege; keeping of records was requirement of general applicability that did not inherently subject any particular group to risk of prosecution]; *People v. Sun* (2007) 148 C.A.4th 374, 384, 55 C.R.3d 696, 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence*, Supp., §12 [National Firearms Act's bar against use of information developed through registration or transfer procedures, which was added following *Haynes v. United States* (1968) 390 U.S. 85, 88 S.Ct. 722, 19 L.Ed.2d 923, text, p. 668, applies not just to actual trial evidence but also to information triggering prosecution].



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#### B. Privilege of Accused (Defendant in Criminal Case).

##### 3. Nonjudicial Proceedings.

##### c. Required Registration.

##### 3. Criminal Subversive Activity.

2 Witkin Cal. Evid. Witnesses § 375

[§ 375] Criminal Subversive Activity.

In *People v. McCormick* (1951) 102 C.A.2d Supp. 954, 228 P.2d 349, the court held unconstitutional a county ordinance requiring members of Communist organizations to register as such with the sheriff. Compliance might constitute a virtual confession of violation of the Criminal Syndicalism Act, and would often furnish important facts for a prosecution under that Act. As to the scope of the constitutional guarantee, the court said: "The words ... mean that no person shall be compelled to make any statement, orally or in writing, anywhere or at any time, which may be made use of against him in any criminal prosecution, then pending or which might thereafter be brought against him. With almost complete unanimity the cases find in the words more than is literally there. The protection afforded includes but goes beyond the assurance to a defendant on trial in a criminal case that he will not be compelled to testify against himself. The protection intended applies even before the commencement of a criminal case and secures one who may reasonably be expected to be a defendant from furnishing ammunition to be used against him." (102 C.A.2d Supp. 957.) (See 9 Stanf. L. Rev. 375.)

The United States Supreme Court took the same position in *Albertson v. Subversive Activities Control Bd.* (1965) 382 U.S. 70, 86 S.Ct. 194, 15 L.Ed.2d 165. The Subversive Activities Control Board ordered the Communist Party of the United States to register with the Attorney General as a Communist-action organization. The Party failed, petitioner members failed, and they sought review of the subsequent orders that they register. *Held*, the orders were violative of the Fifth Amendment. The registration form required admission of membership in the Party, which could be used for prosecution under the Smith Act or the Subversive Activities Control Act. And such cases as *Quinn v. United States* (1955) 349 U.S. 155, 75 S.Ct. 668, 99 L.Ed.2d 964, *infra*, §502, holding that mere association with the Party presented a sufficient threat of prosecution to support a claim of the witness' privilege, were controlling: "[I]f the admission cannot be compelled in oral testimony, we do not see how compulsion in writing makes a difference for constitutional purposes." (86 S.Ct. 198, 15 L.Ed.2d 171.) (See 80 Harv. L. Rev. 207; 34 U.C.L.A. L. Rev. 467 ["self-reporting schemes" and the Fifth Amendment since *Albertson*].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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c. Required Registration.

4. Supervised Occupation.

2 Witkin Cal. Evid. Witnesses § 376

[§ 376] Supervised Occupation.

In *People v. Stuller* (1970) 10 C.A.3d 582, 89 C.R. 158, defendant applied for a job as a bartender after he had become a suspect in various sex crimes. Because a local ordinance required bartenders to register with and be fingerprinted by the police, the authorities arranged for defendant to handwrite (rather than print) his application form and to give fingerprint specimens. Both the writing and the prints were compared with evidence found at the crime scenes. When the prints were seen to match, defendant was arrested. *Held*, no error; the job application was in no manner incriminating. "The giving of his name, age, residence, physical description, and last place of employment are the types and kinds of information commonly required by any prospective employer and did not furnish incriminating information relative to the criminal offenses under review, nor was such information used against him in such prosecution." (10 C.A.3d 594.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### B. Privilege of Accused (Defendant in Criminal Case).

##### 3. Nonjudicial Proceedings.

##### d. Required Disclosure of Identity.

##### 1. Driver's Identity and Involvement in Accident.

2 Witkin Cal. Evid. Witnesses § 377

[§ 377] Driver's Identity and Involvement in Accident.

(1) *Duty To Stop and Divulge Identity.* In *Byers v. Justice Court* (1969) 71 C.2d 1039, 80 C.R. 553, 458 P.2d 465, the California Supreme Court interpreted decisions of the United States Supreme Court as requiring, in connection with *Veh.C. 20002(a)*, that the privilege against self-incrimination be made applicable "when a driver of a motor vehicle involved in an accident is confronted with a statutory requirement to *stop and divulge his identity* and reasonably believes that compliance with the statute will result in self-incrimination." (71 C.2d 1039.) Rather than declare the reporting statute unconstitutional, however, the court imposed a *use restriction* on the required information; i.e., prosecuting authorities were forbidden to use the data divulged in compliance with *Veh.C. 20002(a)*. (71 C.2d 1056.) (See 58 Cal. L. Rev. 988.)

In *California v. Byers* (1971) 402 U.S. 424, 91 S.Ct. 1535, 29 L.Ed.2d 9, the United States Supreme Court, by a plurality opinion, vacated the California court's judgment.

(a) Although the Vehicle Code defines some criminal offenses, the statute is essentially *regulatory, not criminal*. *Veh.C. 20002(a)* was intended to promote the satisfaction of *civil* liabilities arising from automobile accidents, and is directed at "*all persons who drive automobiles in California*." In contrast to registration statutes affecting a highly selective group inherently suspected of criminal activities, like gambling, this statute is directed to the public at large. "Driving an automobile, unlike gambling, is a lawful activity. Moreover, it is not a criminal offense under California law to be a driver 'involved in an accident.' An accident may be the fault of others; it may occur without any driver having been at fault. No empirical data is suggested in support of the conclusion that there is a relevant correlation between being a driver and criminal prosecution of drivers. So far as any available information instructs us, most accidents occur without creating criminal liability even if one or both of the drivers are guilty of negligence as a matter of tort law." (91 S.Ct. 1539, 29 L.Ed.2d 18.)

(b) Even if the reporting requirement were considered "incriminating" in the traditional sense, it is not "*testimonial*" in the Fifth Amendment sense. Compliance requires that the driver *stop* at the scene and give his or her *name and address*. "The act of stopping is no more testimonial--indeed less so in some respects--than requiring a person in custody to stand or walk in a police lineup, to speak prescribed words, to give samples of handwriting, fingerprints or blood. ... Disclosure of name and address is an essentially neutral act. Whatever the collateral consequences of disclosing name and address, the statutory purpose is to implement the state police power to regulate use of motor vehicles." (91 S.Ct. 1539, 29 L.Ed.2d 19.) This report of identity satisfies valid state needs, "always subject to the

driver's right to assert a Fifth Amendment privilege concerning *specific inquiries*." (91 S.Ct. 1540, 29 L.Ed.2d 20.)

The concurring justice analyzed the noncriminal governmental purpose in securing the information, the necessity for self-reporting and the limited nature of the required disclosures, and concluded that the Fifth Amendment did not warrant imposition of a use restriction on the statutory information. (91 S.Ct. 1553, 29 L.Ed.2d 35.)

One of the minority justices said: "Apparently the plurality believes that a statute which required all robbers to stop and leave their names and addresses with their victims would not involve the compulsion of 'communicative or testimonial' evidence." (91 S.Ct. 1560, 29 L.Ed.2d 44.) (See 85 Harv. L. Rev. 269; *Garner v. United States* (1976) 424 U.S. 648, 96 S.Ct. 1178, 1186, footnote 16, 47 L.Ed.2d 370, 382 [*California v. Byers* holds "only that requiring certain basic disclosures fundamental to a neutral reporting scheme does not violate the privilege"].)

(2) *Duty To Divulge Involvement in Accident If Not Reasonably Apparent*. In *People v. Kroncke* (1999) 70 C.A.4th 1535, 83 C.R.2d 493, 2 Cal. Crim. Law (3d), *Crimes Against Public Peace and Welfare*, §250, the court interpreted *Veh.C. 20001* and *20003* as requiring a driver to disclose to police officers investigating a vehicular accident that he or she had been involved in the accident if that involvement is not reasonably apparent. (70 C.A.4th 1543.) Relying on *California v. Byers*, *supra*, the court further held that the duty did not implicate the driver's self-incrimination privilege. (70 C.A.4th 1545.)

**SUPPLEMENT:** [This section is current through the latest supplement]





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##### d. Required Disclosure of Identity.

##### 2. Loiterer's Identity.

2 Witkin Cal. Evid. Witnesses § 378

[§ 378] Loiterer's Identity.

If the public safety demands identification, a person loitering without apparent reason must identify himself or herself and account for his or her presence if requested to do so by a peace officer; failure to do so amounts to disorderly conduct. (P.C. 647(e); see 2 Cal. Crim. Law (3d), *Crimes Against Public Peace and Welfare*, §50.) In *People v. Solomon* (1973) 33 C.A.3d 429, 108 C.R. 867, the court held that the identification requirement did not violate the privilege against self-incrimination, but concluded that the "account for one's presence" requirement, in order to avoid impingement on the privilege, was operative only to the extent that it assisted in producing credible and reliable identification. (33 C.A.3d 435.)

In *Kolender v. Lawson* (1983) 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903, 2 Cal. Crim. Law (3d), *Crimes Against Public Peace and Welfare*, §50, the United States Supreme Court, after noting that *People v. Solomon* had construed P.C. 647(e) as requiring "credible and reliable" identification, held that the statute was unconstitutionally vague in failing to sufficiently describe how a suspect could satisfy this requirement. (103 S.Ct. 1856, 75 L.Ed.2d 906.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
P.C. 647(e) was repealed in 2007.

See *Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt County* (2004) 542 U.S. 177, 124 S.Ct. 2451, 2457, 159 L.Ed.2d 292, 302 ["stop and identify" statute was not unconstitutionally vague under *Kolender v. Lawson* (1983) 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903, text, p. 672, where it did not require suspect to give officer driver's license or any other document, and allowed suspect to state name or communicate it by other means].



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##### 3. Nonjudicial Proceedings.

##### e. False Statements in Required Reports.

2 Witkin Cal. Evid. Witnesses § 379

[§ 379] False Statements in Required Reports.

The constitutionality of a registration statute is irrelevant to the validity of a registrant's conviction for making a fraudulent statement to the federal government. (*Bryson v. United States* (1969) 396 U.S. 64, 90 S.Ct. 355, 358, 24 L.Ed.2d 264, 268.)

In the *Bryson* case, defendant had falsely denied affiliation with the Communist Party in an affidavit he filed with the National Labor Relations Board. Ten years after his conviction for doing so, he sought to set it aside by arguing that the government had no right to ask the questions which were falsely answered. *Held*, relief denied; a citizen has no privilege to fraudulently answer a question the government should not have asked. "Our legal system provides methods for challenging the Government's right to ask questions--*lying is not one of them*. A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood." (90 S.Ct. 360, 24 L.Ed.2d 271.) The statutory basis for the agency's request for information provided enough jurisdiction to punish the fraudulent statements. (90 S.Ct. 359, 24 L.Ed.2d 270.)

In *United States v. Knox* (1969) 396 U.S. 77, 90 S.Ct. 363, 24 L.Ed.2d 275, defendant was charged with knowingly and wilfully understating the number of employees who were accepting wagers on his behalf. He contended that the Fifth Amendment barred punishment because the filings were not voluntary but were *compelled* by the Internal Revenue Code. If he had filed truthful and complete forms as required by federal law, he would have incriminated himself under Texas wagering laws; if he had filed no forms, he would have subjected himself to federal prosecution for that failure. He therefore chose to file a fraudulent form. *Held*, the Fifth Amendment gave him no privilege to lie. When defendant communicated false information, this was not *testimonial compulsion*. If under statutory pressure he committed a criminal act, he "may have a defense to this prosecution under the traditional doctrine that a person is not criminally responsible for an act committed under duress." (90 S.Ct. 367, 24 L.Ed.2d 280.) (See *LaChance v. Erickson* (1998) 522 U.S. 262, 118 S.Ct. 753, 756, 139 L.Ed.2d 695, 700 [federal employee being investigated for employment-related misconduct may additionally be punished for making false statements in course of investigation; citing *Bryson*]; 22 Stanf. L. Rev. 783 [suggesting that false statements, given under apparent compulsion, should be subject to privilege].)

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### XVII. PRIVILEGE AGAINST SELF-INCRIMINATION

#### B. Privilege of Accused (Defendant in Criminal Case).

##### 3. Nonjudicial Proceedings.

##### f. Probation Revocation Hearing.

##### 1. Limited Exclusionary Rule.

2 *Witkin Cal. Evid. Witnesses* § 380

[§ 380] Limited Exclusionary Rule.

Formerly, a probationer subject to probation revocation for conduct which also made the probationer liable to criminal prosecution faced a difficult testimonial choice. If the probationer's revocation hearing took place before his or her pending trial on criminal charges, the probationer's opportunity to be heard at the hearing (perhaps to offer mitigating circumstances) was minimized by fear that the testimony could later be used against the probationer in court. But if the probationer failed to testify at the hearing, the lack of explanation for his or her apparently criminal conduct could well lead to a revocation of probation. In *People v. Coleman* (1975) 13 C.3d 867, 120 C.R. 384, 533 P.2d 1024, the Supreme Court in a nonretroactive opinion resolved this dilemma, not on constitutional grounds but in the interests of justice and the exercise of its inherent supervisory powers over the trial courts. The court thought that the compelled election of self-accusation, perjury or injurious silence was unfair and opposed to the underlying policy of the self-incrimination privilege:

"We accordingly declare as a judicial rule of evidence that henceforth upon timely objection the testimony of a probationer at a probation revocation hearing held prior to the disposition of criminal charges arising out of the alleged violation of the conditions of his probation, and any evidence derived from such testimony, is inadmissible against the probationer during subsequent proceedings on the related criminal charges, save for purposes of impeachment or rebuttal where the probationer's revocation hearing testimony or evidence derived therefrom and his testimony on direct examination at the criminal proceeding are so clearly inconsistent as to warrant the trial court's admission of the revocation hearing testimony or its fruits in order to reveal to the trier of fact the probability that the probationer has committed perjury at either the trial or the revocation hearing." (13 C.3d 889.)

In the event that the probationer's testimony at the revocation hearing is offered, the following procedures are appropriate:

(a) *Objections and notice.* The defendant may object at the trial to prosecutorial use of revocation hearing testimony or its fruits. "[I]t is to be hoped that the prosecution will whenever practicable anticipate the probationer's objections, and that the probationer will cooperate in securing pretrial resolution of his objections. At the least, it is incumbent upon the prosecution to give sufficient notice to the probationer before seeking to introduce revocation hearing testimony to allow him to press his objections prior to any prejudicial exposure of the testimony to the jury. Both parties bear responsibility for having such objections resolved with a minimum of interruption to the normal course of trial." (13 C.3d 889.)

(b) *Disguising source of testimony.* The prosecution should present the revocation hearing testimony, if admitted, in a form that "disguises the nature of the legal proceeding in which the testimony was adduced, so that the jury--unless already otherwise so informed--remains unaware of the fact that the accused has previously been convicted of a crime." (13 C.3d 889, footnote 19.)

(c) *Standards of admissibility.* The evidentiary standards to determine admissibility are like those applicable to a claim that evidence has been gained through an illegal search or seizure, a coerced confession or some other illegal or improper official conduct, even though those standards are somewhat vague. (13 C.3d 890, footnote 20.)

(d) *Respective evidentiary burdens.* The probationer must meet the initial burden of producing evidence that the charges against him or her are related to the circumstances in issue at the probation revocation hearing. If this is established, the prosecution must either prove by a preponderance of the evidence that the hearing testimony is not so related, or establish that it is nevertheless admissible for impeachment or rebuttal purposes. When a probationer objects to the admission of evidence which the probationer contends is the fruit of his or her revocation hearing testimony, the probationer must meet the burden of producing evidence not only of a relationship between the probation revocation proceeding and the criminal charges against him or her, but also of a relationship between his or her revocation hearing testimony and the allegedly derivative evidence to which the probationer has objected. "Once these prima facie showings have been made, the objection must be sustained unless the prosecution either (1) proves by a preponderance of the evidence the lack of any relationship between the criminal charges and the issues in the revocation proceeding; (2) proves by a preponderance of the evidence the lack of any impermissible relationship between the testimony at the revocation proceeding and the evidence offered in the criminal proceeding; or (3) establishes that the evidence is nevertheless admissible for the limited purpose of impeachment or rebuttal." (13 C.3d 890.)

(e) *False testimony by probationer.* "At trial, as at his revocation hearing, a probationer who chooses to testify must testify truthfully, if he is to have the benefit of the exclusionary rule announced herein." (13 C.3d 893.) Besides being liable to impeachment if the probationer's testimony on direct examination contradicts his or her testimony at a revocation hearing, a probationer who testifies falsely in either proceeding runs a substantial risk of successful prosecution for perjury. (13 C.3d 893, footnote 21.) However, the mere fact that the probationer takes the stand at his or her trial does not open the door to prosecutorial use of his revocation hearing testimony. "The probationer may well have testified truthfully and incriminatingly at his revocation hearing, and yet testify truthfully and exculpatory at his trial by carefully avoiding contradiction of his revocation hearing testimony. In such an instance, the prosecution cannot seek on cross-examination to go beyond the scope of the probationer's direct testimony by asking him either to admit the truth of or perjurally to deny his admissions at the revocation hearing." (13 C.3d 893.)

(f) *Rule limited to revocation hearing.* The new exclusionary rule applies only to the formal, dispositive probation revocation hearing. (13 C.3d 894.) At a prerevocation hearing or a preliminary hearing on criminal charges which also serves as a prerevocation hearing or at an equivalent hearing, there is no dispositive action taken. Therefore, "neither the pressure on the probationer to make full disclosure of his conduct, nor the interest of the state in having him make such disclosure, is sufficiently compelling to warrant the procedural burden of applying the exclusionary rule to testimony of a probationer adduced at this early stage of the probation revocation process." (13 C.3d 896.)

(g) *Order of proceeding.* The most desirable method for handling problems of concurrent criminal and probation revocation proceedings may well be for revocation proceedings not even to be initiated until after disposition of the related criminal proceedings. But if a probationer desires to obtain a speedy resolution of his or her probation status notwithstanding related criminal liability, the probationer properly may offer to waive the benefit of the exclusionary rule if the court allows the probation revocation hearing to proceed in advance of disposition of the related criminal liability. (13 C.3d 896.) (See 64 Cal. L. Rev. 516; 9 Pacific L. J. 949 ["Catch-22": A Probationer's and Parolee's Choice Between the Right to be Heard and the Privilege Against Self-Incrimination].)

*People v. Coleman* was followed in *People v. Jasper* (1983) 33 C.3d 931, 191 C.R. 648, 663 P.2d 206. Although noting that whether a revocation hearing should be held before trial is within the trial judge's discretion, the court

disapproved any "routine disregard" of *Coleman's* admonition that "the most desirable method" may be to hold revocation hearings after trial (see *supra*). (33 C.3d 935.) (See also *People v. Johnson* (1984) 159 C.A.3d 163, 167, 205 C.R. 427 [following *Jasper* and *Coleman*]; *People v. Carter* (1993) 19 C.A.4th 1236, 1248, 23 C.R.2d 888, *infra*, §445 [*Coleman* as creating constitutionally compelled kind of use immunity].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### B. Privilege of Accused (Defendant in Criminal Case).

3. Nonjudicial Proceedings.
  - f. Probation Revocation Hearing.
2. Rule Survives Proposition 8.

2 Witkin Cal. Evid. Witnesses § 381

[§ 381] Rule Survives Proposition 8.

In *People v. Weaver* (1985) 39 C.3d 654, 217 C.R. 245, 703 P.2d 1139, the court held that the limited exclusionary remedy of *People v. Coleman* (1975) 13 C.3d 867, 120 C.R. 384, 533 P.2d 1024, supra, §380, survived Proposition 8 (see 1 Cal. Evidence (4th), Introduction, §§8, 9).

In 1981, defendant, after pleading guilty to possession of a sawed-off shotgun, was placed on probation. In 1983, he was charged with possession of a weapon and held to answer. The district attorney then began probation revocation proceedings for the same conduct that was the basis for the criminal charge. Defendant moved for a continuance of the revocation hearing until after the trial on the charges, arguing that (a) prior to *Coleman*, a defendant had to choose between testifying at the hearing and jeopardizing the privilege against self-incrimination, or remaining silent and surrendering the due process right to present evidence on one's own behalf; (b) *Coleman* relieved a defendant from that dilemma by holding that his or her testimony at the hearing could not be used against him or her in a subsequent trial on the related charge except under limited circumstances for impeachment or rebuttal; but (c) the *Coleman* use immunity rule was nullified by Proposition 8; hence, (d) the Supreme Court must exercise its supervisory powers to grant probationers the right to continue the revocation hearing until after trial on the charges.

The trial judge denied the motion and revoked probation. *Held*, affirmed. The *Coleman* rule was reaffirmed in *People v. Jasper* (1983) 33 C.3d 931, 191 C.R. 648, 663 P.2d 206, a pre-Proposition 8 case, as affording adequate relief from the dilemma. And *Ramona R. v. Superior Court* (1985) 37 C.3d 802, 210 C.R. 204, 693 P.2d 789, supra, §370, held that the "privilege" exception in Proposition 8 applied to the use immunities derived from *Coleman*. In other words, *Coleman's* exclusionary rule could be deemed a "statutory" rule because the self-incrimination statute itself (Ev.C. 940) "merely adopts existing judicial decisions related to the privilege." (39 C.3d 659.) Because *Coleman* and its limited exclusionary remedy survived the adoption of Proposition 8, defendants would not be deprived of the benefits of that remedy in any future trial of the pending criminal charges, and defendants cannot attack revocation of their probation on that basis. (39 C.3d 660.) Three justices, agreeing that *Coleman* survived Proposition 8, nevertheless thought its remedy inadequate to protect probationers facing pretrial revocation proceedings. (39 C.3d 660.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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##### 3. Nonjudicial Proceedings.

##### g. Psychiatric Examination on Competency.

2 Witkin Cal. Evid. Witnesses § 382

[§ 382] Psychiatric Examination on Competency.

In *Tarantino v. Superior Court* (1975) 48 C.A.3d 465, 122 C.R. 61, the judge, pursuant to P.C. 1367 et seq., appointed two psychiatrists to examine defendant to determine his competency to stand trial. Defendant refused to submit to psychiatric questioning in the absence of his attorney. *Held*, compelling a defendant to submit to such an examination does not violate the self-incrimination privilege.

(a) The purpose of the inquiry is to assure that one who is mentally unable to defend oneself not be tried upon a criminal charge. "This purpose is entirely unrelated to any element of guilt, and there is no indication of any legislative intent that any result of this inquiry into a wholly collateral matter be used in determining the issue of guilt. Moreover, the issue of present competency, once the trial court's doubt has been expressed, must be decided before any trial of the charged offense. Both humanitarian and practical considerations call for a judicially declared immunity." (48 C.A.3d 469.)

(b) Thus, neither the statements to the psychiatrists nor their fruits may be used at the trial, either under the plea of not guilty, or of not guilty by reason of insanity. "This immunity will be extended by the federal courts to use of such testimony or its fruits in any possible federal prosecution." (48 C.A.3d 470.)

(c) "We recognize that this immunity normally will require that the psychiatrists appointed for examination under section 1367 et seq. be other than those appointed for inquiry under section 1026." (48 C.A.3d 470.)

In *People v. Harris* (1987) 192 C.A.3d 943, 237 C.R. 747, the court approved *Tarantino's* view that the statements of the examining psychiatrists cannot be used at the trial: "Accordingly, we have no difficulty in requiring that in the event the prosecution wishes to rebut defense testimony concerning the defendant's mental capacity to commit an offense, the prosecution must conduct a psychiatric examination using psychiatrists or psychologists other than those who examined the defendant for the purposes of determining competency to stand trial." (192 C.A.3d 949.)

In *People v. Haskett* (1990) 52 C.3d 210, 276 C.R. 80, 801 P.2d 323, a capital murder case, the defense requested appointment of a psychiatrist to evaluate possible defenses. At the penalty phase of the trial, defendant called the doctor to testify on his behalf. On cross-examination, the doctor related admissions by defendant, without objection from the defense, and the testimony was repeated at defendant's second penalty trial, over his objection. On appeal, defendant claimed that his admissions should have been excluded because he had not been given *Miranda* warnings. *Held*, there was no violation of defendant's Fifth Amendment rights. Defendant failed to make a *Miranda* objection at either trial.

Further, *Miranda* rules apply only to custodial interrogation, not to questioning by a physician at the defense's request. Here, the doctor had correctly told defendant that nothing he revealed could be used against him without the consent of his attorney. (52 C.3d 243.)

**SUPPLEMENT:** [This section is current through the latest supplement]

"[A]n accused person cannot on the basis of the Fifth Amendment refuse to submit to a mental examination by a prosecution expert when properly ordered to do so in connection with a section 1368 hearing. The Fifth Amendment does not come into play in this situation because a judicially declared rule of immunity provides the necessary assurance that an accused will not be convicted of a crime by use of any information obtained at a court-compelled mental examination or the use of information obtained from that examination, or that his sentencing may be affected by such information or the fruits thereof. By allowing the prosecution to investigate facts crucial to the determination of competency without prejudice to the defendant, the rule of immunity also enhances the search for truth." (*Baqleh v. Superior Court* (2002) 100 C.A.4th 478, 502, 122 C.R.2d 673; on right to counsel in competency proceeding, see 5 Cal. Crim. Law (3d), *Criminal Trial*, §700; on use of defendant's competency hearing statements for impeachment at trial, see *People v. Pokovich* (2006) 39 C.4th 1240, 48 C.R.3d 158, 141 P.3d 267, Supp., *infra*, §428.)





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## CHAPTER IX - Witnesses

### XVII. PRIVILEGE AGAINST SELF-INCRIMINATION

#### B. Privilege of Accused (Defendant in Criminal Case).

##### 3. Nonjudicial Proceedings.

##### h. Psychiatric Examination on Insanity.

2 Witkin Cal. Evid. Witnesses § 383

[§ 383] Psychiatric Examination on Insanity.

In *People v. Williams* (1988) 197 C.A.3d 1320, 243 C.R. 480, defendant pleaded not guilty and not guilty by reason of insanity. Dr. G, a court-appointed psychiatrist, examined him pursuant to P.C. 1027, in order to testify in the sanity phase of a bifurcated trial. At the end of the guilt phase, the prosecutor was allowed to reopen, and Dr. G testified that defendant, in the course of the sanity examination, had confessed to the charged crimes. *Held*, this was reversible error.

(a) *In re Spencer* (1965) 63 C.2d 400, 46 C.R. 753, 406 P.2d 33, *Tarantino v. Superior Court* (1975) 48 C.A.3d 465, 122 C.R. 61, *supra*, §382, and *People v. Arcega* (1982) 32 C.3d 504, 186 C.R. 94, 651 P.2d 338, recognize that statements of a defendant to court-appointed psychiatrists may not be used in the trial of the issue of guilt. *Tarantino* and *Arcega* distinguish between competency and insanity examinations, because the purpose of the competency examination is unrelated to any element of guilt; hence *Tarantino's* immunity is broader than *Spencer's*, which exists only so long as defendant's mental state at the time of the crime is not in issue. In all other respects the rationale of *Tarantino* and *Arcega* applies equally to an insanity examination compelled by P.C. 1027. Because defendant did not put his mental state in issue at the guilt phase, the admission of Dr. G's testimony violated his constitutional privilege against self-incrimination. (197 C.A.3d 1324.)

(b) The judicially created privilege rules of *Spencer* and *Arcega* survived Proposition 8. (197 C.A.3d 1320.) And, as pointed out in *Arcega*, federal constitutional law compels the same result. (197 C.A.3d 1325, discussing *Estelle v. Smith* (1981) 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359, and *Buchanan v. Kentucky* (1987) 483 U.S. 402, 107 S.Ct. 2906, 97 L.Ed.2d 336.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Weaver* (2001) 26 C.4th 876, 961, 111 C.R.2d 2, 29 P.3d 103 [in capital murder trial, it was error to allow two psychiatrists, appointed to examine defendant to determine competency to stand trial, to testify at sanity phase as well; however, error was harmless, as numerous other experts testified at sanity phase, expressing same opinion as two psychiatrists]; *People v. Ledesma* (2006) 39 C.4th 641, 697, 698, 47 C.R.3d 326, 140 P.3d 657 [when court appoints psychiatric expert to examine defendant and report to it, and defendant then puts mental state at issue at trial and expert testifies as to statements made to him or her by defendant, court must give limiting instruction that statements are not to be considered for truth; however, rule does not apply where statements were made to expert appointed to assist defense counsel]; *People v. Jantz* (2006) 137 C.A.4th 1283, 1294, 40 C.R.3d 875 [in sanity phase of murder trial, failure to give limiting instruction stating that psychiatrist's testimony regarding defendant's statements should not be regarded as proof

of those statements was error, but error was harmless in that there was little or no evidence that defendant was insane under applicable legal standard]; *In re Hernandez* (2006) 143 C.A.4th 459, 474, 49 C.R.3d 301 [counsel's failure to object to admission at sanity phase of trial of defendant's statements to doctor appointed by court to evaluate his competency, doctor who interviewed and tested him during his period of incompetency, and doctor who examined him for purposes of sanity proceeding and relied on previous doctors' reports, constituted prejudicial error; distinguishing *Weaver*].



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#### B. Privilege of Accused (Defendant in Criminal Case).

##### 4. Evidence Without Testimony or Compulsion.

2 Witkin Cal. Evid. Witnesses § 384

[§ 384] Evidence Without Testimony or Compulsion.

The privilege protects against *testimonial compulsion*; i.e., the defendant cannot be *compelled to give oral testimony or produce documents or real evidence*. Thus, if nontestimonial evidence is obtained from the defendant voluntarily or without compulsion, there is no violation of the privilege. (See *People v. Trujillo* (1948) 32 C.2d 105, 112, 194 P.2d 681 [quoting Wigmore]; 8 Wigmore (McNaughton Rev.) §2263 et seq.; 28 A.L.R.2d 1115 [admissibility of fingerprints or palm prints]; 45 A.L.R.4th 1178 [admissibility of bare footprint evidence].)

Thus, in *People v. Jones* (1931) 112 C.A. 68, 71, 296 P. 317, where defendant left his fingerprints on a porch railing, their admission was held proper. In *People v. Trujillo*, *supra*, defendant's clothing was tested by an expert to match fibers with those of apparel on the victim's body, and no violation of the privilege was found. In *People v. Salas* (1936) 17 C.A.2d 75, 78, 61 P.2d 771, a trial for possession and transportation of morphine, there was no violation of privilege in permitting testimony of a narcotics inspector as to hypodermic needle scars on defendant's arm, where defendant had voluntarily submitted to a physical examination. (See 28 Cal. L. Rev. 391.) And in *People v. Robarge* (1953) 41 C.2d 628, 632, 262 P.2d 14, there was no violation where defendant, charged with robbery, was identified by a janitor at the police station after police placed dark glasses on him without any objection. (See also *People v. Saldivar* (1967) 249 C.A.2d 670, 672, 57 C.R. 731 [defendant, with needle marks on arm, on request of parole officer gave specimen of urine indicating presence of morphine]; 43 So. Cal. L. Rev. 597 [taking of physical evidence from suspect].)

In *People v. Sanchez* (1994) 24 C.A.4th 1012, 30 C.R.2d 111, a murder case, defendant's sisters found inculpatory writings by defendant. They turned them over to an attorney, who gave them to a public defender investigator, who in turn gave them to defendant's attorney. He placed them in a sealed envelope and delivered them to the court clerk. The prosecution learned of the writings independently, and acquired them when the trial judge granted the prosecution's motion to produce them. *Held*, affirmed. Defendant's privilege against self-incrimination was not violated when the trial judge gave the prosecution his writings. Although the writings were incriminating, personal to defendant, and communicative in nature, they were not obtained by compulsion. When "a defendant, without being compelled to do so, creates inculpatory writings and the government obtains them without compelling the defendant to authenticate or vouch for those writings, the Fifth Amendment is not violated." (24 C.A.4th 1024.)

A dissenting justice thought that the preliminary issue, whether defense counsel had a duty to disclose the writings, was not "cut and dried," and the majority should not have resolved it adversely to defendant without hearing argument from the parties. (24 C.A.4th 1032.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *McKune v. Lile* (2002) 536 U.S. 24, 122 S.Ct. 2017, 2030, 153 L.Ed.2d 47, 64 [offering inmate incentives to participate in sex offender rehabilitation program, first step of which involves taking responsibility for past crimes, does not violate self-incrimination privilege; although refusal to participate results in loss of privileges, this constitutes choice, not compulsion]; 116 Harv. L. Rev. 302 [*McKune*]; 31 Pepperdine L. Rev. 803 [same].



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## CHAPTER IX - Witnesses

### XVII. PRIVILEGE AGAINST SELF-INCRIMINATION

#### B. Privilege of Accused (Defendant in Criminal Case).

##### 5. Compulsion Without Testimony.

##### a. General Rule: Privilege Not Applicable.

2 Witkin Cal. Evid. Witnesses § 385

[§ 385] General Rule: Privilege Not Applicable.

Many authorities, starting from the assumption that the privilege protects only against compelled *testimony*, take the position that there is no violation where the testimonial process is not involved, even though the evidence involves some act or submission by the defendant and some degree of compulsion is employed in obtaining it. (See Model C., Rules 201(2) and Comment, 205; 1 McCormick 5th, §124; 8 Wigmore (McNaughton Rev.) §2265; 1984 A.S. 351; 18 A.L.R.2d 796 [pretrial requirement that accused try on apparel as violating constitutional rights]; 25 A.L.R.2d 1407 [requiring submission to physical examination or test as violation of constitutional rights]; 3 A.L.R.4th 374 [requiring criminal defendant to exhibit self, perform physical act or participate in demonstration during trial].) (On compelled production of child, see *infra*, §386.)

This principle has been approved and applied in many federal and California cases. (See *Doe v. United States* (1988) 487 U.S. 201, 108 S.Ct. 2341, 2347, 101 L.Ed.2d 184, 197 [defendant, under investigation by grand jury for receipt of unreported income, compelled to execute forms authorizing disclosure of foreign bank records]; *Pennsylvania v. Muniz* (1990) 496 U.S. 582, 110 S.Ct. 2638, 2645, 110 L.Ed.2d 528, 545 [videotape of booking of drunk driving suspect, showing slurring of speech and other behavior indicating intoxication, properly admitted into evidence]; *People v. Clark* (1941) 18 C.2d 449, 460, 116 P.2d 56 [defendant compelled to stand and remove visor he was wearing so that identifying witnesses might have unobstructed view of his features]; *People v. Eberhard* (1952) 114 C.A.2d 133, 136, 249 P.2d 590 [defendant, narcotics suspect, taken to physician who examined his upper arm for puncture wounds]; *People v. Haeussler* (1953) 41 C.2d 252, 257, 260 P.2d 8 [citing out of state cases holding no violation in placing defendant's foot in footprint at scene of crime, in taking scrapings from beneath defendant's fingernails, in removing defendant's clothing for comparisons and tests, in taking fingerprints, etc.]; *People v. Smith* (1956) 142 C.A.2d 287, 293, 298 P.2d 540 [burglary suspect compelled to take off clothes while officers photographed scars on his body]; *People v. Duroncelay* (1957) 48 C.2d 766, 770, 312 P.2d 690; *People v. Lopez* (1963) 60 C.2d 223, 244, 32 C.R. 424, 384 P.2d 16 ["The privilege extends only to testimonial compulsion; requiring defendants to assume a certain pose for purposes of identification, or to speak for voice identification, is not within the privilege"]; *People v. Gilbert* (1965) 63 C.2d 690, 709, 47 C.R. 909, 408 P.2d 365; *People v. Ellis* (1966) 65 C.2d 529, 533, 55 C.R. 385, 421 P.2d 393, *infra*, §389; *People v. Williams* (1969) 71 C.2d 614, 625, 79 C.R. 65, 456 P.2d 633 ["A defendant may be forcibly fingerprinted provided the means used do not shock the conscience"]; *People v. Smith* (1970) 13 C.A.3d 897, 910, 91 C.R. 786 [defendant at police station refused to don jacket and cap found at scene of crime; prosecutor could introduce evidence of this refusal as indicating consciousness of guilt]; *People v. Turner* (1971) 22 C.A.3d 174, 180, 99 C.R. 186 [defendant properly asked to dress in scarf and sunglasses similar to those worn by woman photographed cashing

forged check]; *People v. Holt* (1972) 28 C.A.3d 343, 350, 104 C.R. 572 [defendant properly asked to wear hat similar to one worn by armed robber, to stand and hold gun in left hand, and to repeat words uttered by robber]; *People v. Traylor* (1972) 23 C.A.3d 323, 332, 100 C.R. 116 [narcotics expert permitted to examine defendant out of court during prosecution's rebuttal to seek evidence of narcotics from condition of defendant's head, arms, hands and legs]; *People v. Allen* (1974) 41 C.A.3d 196, 202, 115 C.R. 839 ["The taking of a hair sample involves physical evidence rather than testimonial compulsion. The invasion of defendant's privacy is minor"]; *People v. Saldivar* (1967) 249 C.A.2d 670, 672, 57 C.R. 731 [defendant, with needle marks on arm, on request of parole officer gave specimen of urine indicating presence of morphine]; *People v. Thomas* (1986) 180 C.A.3d 47, 52, 225 C.R. 277 [head and pubic hair and saliva samples]; *People v. Superior Court (Fairbank)* (1987) 192 C.A.3d 32, 237 C.R. 158, supra, §155 [compulsion of evidence possessed by defense counsel]; *Prince v. Superior Court* (1992) 8 C.A.4th 1176, 1179, 10 C.R.2d 855.)

In contrast to the above cases, *Goldsmith v. Superior Court* (1984) 152 C.A.3d 76, 85, 199 C.R. 366, following a Massachusetts case, held that the compelled production of a firearm, allegedly used to commit charged offenses, is a testimonial communication protected by the privilege. And, *Pennsylvania v. Muniz*, supra, 110 S.Ct. 2649, 110 L.Ed.2d 550, held that defendant's response that he did not know the date of his sixth birthday was testimonial, because he had to either incriminate himself by admitting that he did not know or state the incorrect date.

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Chavez v. Martinez* (2003) 538 U.S. 760, 123 S.Ct. 1994, 2001, 2004, 155 L.Ed.2d 984, 993, 998 [mere compulsive questioning does not violate privilege against self-incrimination where there is no criminal case in which person being questioned is compelled to be witness against self; in those circumstances, remedy against abusive police tactics resulting in confession must be sought under Due Process Clause]; *Goodwin v. Superior Court* (2001) 90 C.A.4th 215, 220, 108 C.R.2d 553, 4 Cal. Crim. Law (3d), *Pretrial Proceedings, Supp.*, §18 ["[t]here is no Fifth Amendment privilege not to attend a lineup"]; 1 McCormick 6th, §124.



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#### B. Privilege of Accused (Defendant in Criminal Case).

##### 5. Compulsion Without Testimony.

##### b. Compelled Production of Child.

2 Witkin Cal. Evid. Witnesses § 386

[§ 386] Compelled Production of Child.

In *Baltimore City Dept. of Social Services v. Bouknight* (1990) 493 U.S. 549, 110 S.Ct. 900, 107 L.Ed.2d 992, Maurice M., an abused child, was removed by court order from the custody of his mother, respondent Bouknight, and placed in shelter care. Later he was returned to Bouknight by an order containing extensive conditions of supervision. She violated the terms and concealed the child, and was held in civil contempt for failure to comply with an order to produce the child. She then claimed that the contempt order violated the Fifth Amendment guarantee against self-incrimination. *Held*, the privilege did not apply.

(a) Although a person may not claim the Amendment's protections based upon the incrimination that may result from the contents or nature of the thing demanded, Bouknight contended that the act of production would amount to testimony regarding her control over and possession of Maurice. (110 S.Ct. 905, 107 L.Ed.2d 1000.) But assuming that this limited testimonial assertion is sufficiently incriminating and sufficiently testimonial, she may not invoke the privilege to resist the production order because she assumed custodial duties and production is required as part of a noncriminal regulatory regime. (110 S.Ct. 905, 107 L.Ed.2d 1000.)

(b) The Court on several occasions has recognized that the privilege may not be invoked to resist compliance with a regulatory regime constructed to effect the state's public purposes unrelated to the enforcement of its criminal laws. (110 S.Ct. 905, 107 L.Ed.2d 1000, discussing *Shapiro v. United States* (1948) 335 U.S. 1, 68 S.Ct. 1375, 92 L.Ed. 1787, *infra*, §456, and *California v. Byers* (1971) 402 U.S. 424, 91 S.Ct. 1535, 29 L.Ed.2d 9, *supra*, §377.) This principle applies here: "Once Maurice was adjudicated a child in need of assistance, his care and safety became the particular object of the State's regulatory interests." (110 S.Ct. 907, 107 L.Ed.2d 1002.) (See 104 Harv. L. Rev. 178.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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##### 5. Compulsion Without Testimony.

##### c. Handwriting Exemplars.

##### 1. Legally Procured Exemplar.

2 Witkin Cal. Evid. Witnesses § 387

[§ 387] Legally Procured Exemplar.

In *People v. Graves* (1966) 64 C.2d 208, 49 C.R. 386, 411 P.2d 114, defendant was charged with forgery of checks. At a police inspector's request, before the accusatory stage had been reached, he gave handwriting exemplars. After his arrest and while in custody, he gave additional exemplars on request, without warning of his rights. In affirming the conviction, the court expressly refrained from deciding whether defendant could have refused to make the exemplars. (64 C.2d 211.)

The issue thus left open was decided in *Gilbert v. California* (1967) 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178. Although the conviction was reversed for lack of counsel at the lineup (see *infra*, §392), the court held as follows on the exemplars:

(a) There was no violation of the Sixth Amendment right to counsel, for taking an exemplar is not a "critical" stage of the criminal proceedings. An unrepresentative exemplar can be challenged by introduction of proper ones; hence, defendant has an opportunity for meaningful confrontation of the state's case and presentation of his own evidence. (87 S.Ct. 1953, 18 L.Ed.2d 1183.)

(b) There was no violation of the Fifth Amendment privilege against self-incrimination. "One's voice and handwriting are, of course, means of communication. It by no means follows, however, that every compulsion of an accused to use his voice or write compels a communication within the cover of the privilege. A mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside its protection." (87 S.Ct. 1953, 18 L.Ed.2d 1183.)

Other cases are to the same effect. (See *People v. Villarino* (1970) 7 C.A.3d 56, 66, 86 C.R. 338, 2 Cal. Evidence (4th), Documentary Evidence, §16; *People v. Hess* (1970) 10 C.A.3d 1071, 1076, 90 C.R. 268, 2 Cal. Evidence (4th), Documentary Evidence, §16; *People v. Stuller* (1970) 10 C.A.3d 582, 597, 89 C.R. 158 [exemplars obtained by trickery not used until after time police could have required defendant to furnish handwriting samples]; *United States v. Mara* (1973) 410 U.S. 19, 93 S.Ct. 774, 776, 35 L.Ed.2d 99, 103; *United States v. Euge* (1980) 444 U.S. 707, 100 S.Ct. 874, 878, 63 L.Ed.2d 141, 146; *People v. Clark* (1993) 5 C.4th 950, 1003, 22 C.R.2d 689, 857 P.2d 1099 [citing *Gilbert*]; *People v. Tai* (1995) 37 C.A.4th 990, 998, 44 C.R.2d 253 [citing *Clark* and *Gilbert*; admission of opinion evidence of defendant's efforts to disguise handwriting on exemplar does not implicate privilege against self-incrimination]; and see 1 McCormick 5th, §124; 8 Wigmore (McNaughton Rev.) §2264; 43 A.L.R.3d 653 [propriety of requiring accused to



give handwriting exemplar].)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 1 McCormick 6th, §124.



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#### B. Privilege of Accused (Defendant in Criminal Case).

##### 5. Compulsion Without Testimony.

##### c. Handwriting Exemplars.

##### 2. Procurement After Illegal Arrest.

2 Witkin Cal. Evid. Witnesses § 388

[§ 388] Procurement After Illegal Arrest.

In *People v. Sesslin* (1968) 68 C.2d 418, 67 C.R. 409, 439 P.2d 321, an officer, acting pursuant to a constitutionally defective warrant, arrested defendant in his office on a charge of forgery of a check. The officer advised him of his rights, and also told him that he did not have to give handwriting exemplars. The officer then requested one, defendant gave it, and later at the police station wrote out more. He was convicted on evidence of a handwriting expert that the writing on the forged check and the exemplars was by the same person. *Held*, admission of this evidence was reversible error.

(a) The "fruit of the poisonous tree" doctrine (see 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence*, §22 et seq.) is applicable: An illegal arrest immediately preceding the procurement of the evidence renders that evidence inadmissible unless the connection with the illegal arrest has become so attenuated as to dissipate the taint. (68 C.2d 428.)

(b) Attenuation "requires at least an intervening independent act by the defendant or a third party which breaks the causal chain linking the illegality." (68 C.2d 428.) Consent by the defendant may produce the requisite degree of attenuation; but the trial judge made no finding that the prosecution had sustained its burden of showing that the consent was free, and not dictated by the implied assertion of authority. (68 C.2d 429.)

(c) The advice given defendant that he need not furnish exemplars was not required by the self-incrimination privilege (see *Gilbert v. California* (1967) 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178, *supra*, §387); did it, however, negative the inference of exploitation, and establish the factor of intervening free consent? No: the advice may be a factor in showing free will, but "it does not in isolation demonstrate as a matter of law the requisite attenuation." (68 C.2d 430.)

Three dissenting justices found this reasoning wholly unconvincing: "Unquestionably the waiver was knowingly made; the defendant was not a naive victim of police imposition. This case involves a knowledgeable defendant in the familiar, comfortable environment of his own business office." (68 C.2d 434.) And the unnecessary warnings clearly provided the intervening independent act; hence, the time element (shortly after illegal arrest) stressed by the majority is wholly irrelevant. (68 C.2d 435.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### B. Privilege of Accused (Defendant in Criminal Case).

##### 5. Compulsion Without Testimony.

##### d. Voice Identification.

##### 1. No Violation of Privilege.

2 Witkin Cal. Evid. Witnesses § 389

[§ 389] No Violation of Privilege.

In *People v. Ellis* (1966) 65 C.2d 529, 55 C.R. 385, 421 P.2d 393, defendant was charged with assault with intent to commit rape. The victim identified him in a lineup, and said she could identify his voice, but he refused to participate in a test. At the trial, police officers testified to his refusal. *Held*, compulsory voice identification is not a violation of the Fifth Amendment privilege, and comment thereon was permissible.

(a) Voice identification is *real evidence*. "In such a test the speaker is asked, not to communicate ideas or knowledge of facts, but to engage in the physiological processes necessary to produce a series of articulated sounds, the verbal meanings of which are unimportant. The sounds alone are elicited for identification purposes through characteristics such as pitch, tone, intonation, accent, and word stress. The speech patterns of individuals are distinctive physical characteristics that serve to identify them just as do other physical characteristics such as color of eyes, hair, and skin, physical build and fingerprints." (65 C.2d 533.) Voice identification testimony is "the very type of objective factual evidence, independent of information communicated by the accused, that the privilege encourages police to seek." (65 C.2d 534.)

(b) The privilege does not prohibit the state from demanding *any assistance* from the accused. "Criminal proceedings are replete with instances where at least passive cooperation of an accused may be constitutionally required." (65 C.2d 534.) "They include fingerprinting, photographing, or measuring of the subject, taking imprints of portions of a suspect's body, removal of or placing articles of clothing on the subject, and requiring the accused's presence at the trial itself." (65 C.2d 535, footnote 6.)

(c) There is no significant distinction between *active and passive cooperation*. Even "passive" cooperation is affirmative, e.g., in fingerprinting or photographing. (65 C.2d 535, footnote 6.)

(d) There is no invasion of the *right of privacy* by a voice test: No disclosure of thought or information is requested, and the voice itself, constantly exposed to public observation, is merely another identifying physical characteristic. (65 C.2d 535.)

The opinion concludes:

"It thus appears that an extension of the privilege to voice identification would serve none of the purposes of the

privilege. It would only exclude evidence of considerable importance when visual identification is doubtful or impossible. The masked robber, the telephone extortionist, and the attacker in the night may all seek refuge behind an extension of the privilege that would do little to further the welfare of accused persons in general. Denial of access to a pertinent identifying trait can only weaken a system dedicated to the ascertainment of truth." (65 C.2d 535.)

The court further pointed out that the refusal of defendant to "display his voice" was not a testimonial communication, and could be shown, like other admissions, by conduct indicating consciousness of guilt--escape, false alibi, flight, suppression of evidence or failure to respond to accusatory statements when not in police custody. (65 C.2d 536.) (See 55 Cal. L. Rev. 1140.)

In *United States v. Wade* (1967) 388 U.S. 218, 87 S.Ct. 1926, 1930, 18 L.Ed.2d 1149, 1155, *infra*, §392, the defendant was also given a voice test during the lineup. The court, in a brief comment following the reasoning of *Schmerber v. California* (1966) 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908, *infra*, §423, reached the same conclusion as in the *Ellis* case, i.e., that the defendant is required to use his or her voice merely as an identifying physical characteristic, not to utter statements of a testimonial nature. (See 33 *San Diego L. Rev.* 349 [presumption of innocence as limiting compelled voice exemplars]; 24 A.L.R.3d 1261 [propriety of requiring accused to demonstrate voice for purposes of identification].)

*United States v. Dionisio* (1973) 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67, involving a federal grand jury investigation of gambling, similarly held that there is no violation of either the Fourth Amendment or the Fifth Amendment in the use of voice recordings. (93 S.Ct. 768, 770, 35 L.Ed.2d 75, 78.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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##### 5. Compulsion Without Testimony.

##### d. Voice Identification.

##### 2. Warning and Precautions.

2 Witkin Cal. Evid. Witnesses § 390

[§ 390] Warning and Precautions.

(1) *Warning Before Voice Test.* In *People v. Ellis* (1966) 65 C.2d 529, 55 C.R. 385, 421 P.2d 393, supra, §389, the court qualified its holding as to admissibility of voice identification by a new refinement of the duty to advise the defendant of his or her rights. The police warned defendant that he had the right to remain silent. This is insufficient; to a layman, that would imply that defendant could refuse to speak at all, even for voice identification. In order to offer his refusal as an implied admission, they must advise defendant that the right to remain silent does not include the right to refuse to participate in such a test. (65 C.2d 539.)

The dissenting justices thought this was a mistaken notion: a defendant may not reasonably infer that he or she may remain mute for all purposes, for the defendant has to give his or her name, address, attorney's name, plea, etc. And they doubted whether peace officers could devise a comprehensive warning to meet the majority's insistence on the distinction between the kinds of refusal to speak. (See 55 Cal. L. Rev. 1140; 24 A.L.R.3d 1261, 1280 [propriety of requiring accused to demonstrate voice for purposes of identification].) (On defendant's refusal to participate in lineup as implied admission, see *People v. Huston* (1989) 210 C.A.3d 192, 216, 258 C.R. 393 [citing *People v. Ellis*, supra; infra, §395].)

(2) *Precautions To Insure Fairness.* The rule making lineup evidence inadmissible when it is unfair or suggestive (see infra, §398) applies to any pretrial identification procedure, including use of a "voice tape lineup" consisting of a number of voices including that of the defendant. In *People v. Vallez* (1978) 80 C.A.3d 46, 143 C.R. 914, the court found no unfairness, but made this observation: "The dangers inherent in a voice lineup dictate that special precautions be taken to insure fairness to the defendant when such a procedure is used. In creating the voice tape, efforts should be made to use a collection of voices which are similar in tone, pitch, volume and accent. Also, steps should be taken to insure uniform sound quality for all voices on the tape and uniform volume when the tape is played to witnesses. Passage of time seriously affects memory and a voice lineup should be conducted for witnesses as soon as practicable." (80 C.A.3d 55.) (See 55 A.L.R.5th 423 [propriety of voice lineup procedures].)

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### XVII. PRIVILEGE AGAINST SELF-INCRIMINATION

#### B. Privilege of Accused (Defendant in Criminal Case).

##### 5. Compulsion Without Testimony.

##### e. Violation of Miranda Rule.

2 Witkin Cal. Evid. Witnesses § 391

[§ 391] Violation of Miranda Rule.

(1) *Former Exclusionary Rule.* The relationship of the *Miranda* rule (see 5 Cal. Crim. Law (3d), *Criminal Trial*, §89 et seq.) to the privilege against self-incrimination was explored in *People v. Rucker* (1980) 26 C.3d 368, 162 C.R. 13, 605 P.2d 843. Defendant was charged with first degree murder and first degree robbery, based on killing during a robbery. His defense was diminished capacity due to intoxication from alcohol and drugs, making it impossible to form the necessary intent. The prosecution in rebuttal introduced evidence of two interviews with defendant by two police officers and a probation officer, conducted with inadequate *Miranda* warnings. The trial judge instructed the jury that the statements of defendant were not offered for their truth but only to show his mental processes. The jury returned a verdict of guilty. *Held*, reversed; the elements of compulsion and testimonial communications were established.

(a) "[T]he *Miranda* analysis is a refinement primarily of the *compulsion* aspect of the privilege. Where actual compulsion must be established under a traditional privilege analysis, *Miranda* holds that compulsion is assumed to exist in a custodial setting unless specified procedural safeguards are carefully followed." (26 C.3d 379.)

(b) Under the theory of the significant cases governing the issue of testimonial communication, defendant was asked to "communicate ideas or knowledge of facts"; the words were not prescribed for him; the verbal meanings of his utterances were essential to the purpose for which they were elicited; and, although they were not being used to prove the truth of what was said, the contents of the disclosures were relied on to establish their probative value. (26 C.3d 382.)

(2) *Abrogation of Rule by Proposition 8.* In *People v. Hall* (1988) 199 C.A.3d 914, 245 C.R. 458, on a trial involving assault with a deadly weapon, the prosecutor asked the arresting officer whether defendant initially refused to give his name and the officer replied that he did refuse. Defense counsel argued that his testimony was inadmissible under *People v. Rucker*, *supra*. *Held*, Proposition 8 abrogated the *Rucker* exclusionary rule.

(a) *People v. May* (1988) 44 C.3d 309, 243 C.R. 369, 748 P.2d 307, abrogating the rule of *People v. Disbrow* (1976) 16 C.3d 101, 127 C.R. 360, 545 P.2d 272, on use of a defendant's extrajudicial statements to impeach (see 3 Cal. Evidence (4th), *Presentation at Trial*, §319), is persuasive. (199 C.A.3d 920.)

(b) The *Rucker* rule is not federally compelled. (199 C.A.3d 921, discussing *Rhode Island v. Innis* (1980) 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297, 1 Cal. Evidence (4th), *Hearsay*, §79.)

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#### B. Privilege of Accused (Defendant in Criminal Case).

##### 6. Lineup.

##### a. Wade-Gilbert Rule: Counsel's Presence Required.

##### 1. Statement of Rule.

2 Witkin Cal. Evid. Witnesses § 392

[§ 392] Statement of Rule.

(1) *In General.* Identification of a suspected criminal at a police lineup is a result of compulsion without testimony and therefore not a violation of the privilege against self-incrimination. (See *supra*, §385.) But the issue of whether, and to what extent, the suspect is entitled to the presence of counsel, has been the subject of many decisions of the United States Supreme Court and California reviewing courts.

In *United States v. Wade* (1967) 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149, a federally insured Texas bank was robbed by a man with a small strip of tape on each side of his face, who then drove away with an accomplice. Defendant Wade and two others were charged with the crime, and counsel was appointed for Wade on his arrest. Fifteen days later, an F.B.I. agent, without notice to Wade's lawyer, conducted a lineup of Wade and five or six other prisoners, each wearing similar strips of tape, and each uttering words such as "put the money in the bag" (allegedly spoken by the robber). The two bank employees identified Wade as the robber. At the trial, they also identified him in the courtroom. Then Wade's attorney, eliciting the prior lineup identification on cross-examination, unsuccessfully moved to strike the courtroom identification. *Held*, conviction reversed.

(a) *No violation of Fifth Amendment.* "[C]ompelling the accused merely to exhibit his person for observation by a prosecution witness prior to trial involves no compulsion of the accused to give evidence having testimonial significance. It is compulsion of the accused to exhibit his physical characteristics, not compulsion to disclose any knowledge he might have. It is no different from compelling Schmerber to provide a blood sample or Holt to wear the blouse, and, as in those instances, is not within the cover of the privilege." (87 S.Ct. 1930, 18 L.Ed.2d 1154.)

(b) *Sixth Amendment: General principles.* The modern construction of the Bill of Rights takes into account today's law enforcement machinery, involving critical confrontations by the accused at pretrial proceedings; and the Sixth Amendment right to counsel applies to "critical" stages.

"In sum, the principle of *Powell v. Alabama* and succeeding cases requires that we scrutinize *any* pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself. It calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice." (87 S.Ct. 1932, 18 L.Ed.2d 1157.)



The scientific analyses of fingerprints, blood samples or clothing are not critical stages, for knowledge of the techniques is available, and expert evidence and cross-examination of prosecution experts affords all necessary protection. But identification evidence has many dangers of mistake, and a witness who picks an accused out of a lineup is not likely to go back on his or her word at the trial; hence, the identification at lineup determines the issue for practical purposes at this point before the trial. And, as with secret interrogations, there is great difficulty afterwards in the defense determining just what took place at the lineup: improper motives where the victim of a crime is the witness, other improper activities, suggestive procedures in which only the suspect wears distinctive clothing, allowing the witness to see police bringing the accused to the lineup in custody, etc. (87 S.Ct. 1933, 1935, 18 L.Ed.2d 1158, 1160.)

(c) *Sixth Amendment applies here.* Where the conviction rests on "a courtroom identification in fact the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial," the accused is deprived of "that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him." (87 S.Ct. 1936, 18 L.Ed.2d 1162.) There is grave potential for prejudice in the pretrial lineup, and the presence of counsel can often avert it; hence, the lineup is a critical stage of the prosecution at which the defendant is entitled to counsel, and both defendant and defense counsel should be notified of an impending lineup. (87 S.Ct. 1937, 18 L.Ed.2d 1162.) However, legislative or local police department regulations which eliminate the risks of abuse and unintentional suggestion "may also remove the basis for regarding the stage as 'critical.' " (87 S.Ct. 1938, 18 L.Ed.2d 1164.)

*Wade* was followed in *Gilbert v. California* (1967) 388 U.S. 263, 87 S.Ct. 1951, 1956, 18 L.Ed.2d 1178, 1187, reversing *People v. Gilbert* (1965) 63 C.2d 690, 47 C.R. 909, 408 P.2d 365, and remanding for a determination of whether the illegal lineup tainted the court identification, and, if so, whether the error was prejudicial. (See 1967 A.S. 174; 17 U.C.L.A. L. Rev. 339 [analysis of key cases, plus examples of actual police regulations]; 5 U.S.F. L. Rev. 85 [erroneous lineup identification and its cure]; 29 Stanf. L. Rev. 989.)

(2) *Rule Not Retroactive.* The *Wade-Gilbert* rule was held nonretroactive in *Stovall v. Denno* (1967) 388 U.S. 293, 87 S.Ct. 1967, 1971, 1972, 18 L.Ed.2d 1199, 1205, 1206. (See also, to the same effect, *People v. Feggans* (1967) 67 C.2d 444, 448, 62 C.R. 419, 432 P.2d 21; *People v. Caruso* (1968) 68 C.2d 183, 184, 65 C.R. 336, 436 P.2d 336; *People v. Thornton* (1974) 11 C.3d 738, 761, 114 C.R. 467, 523 P.2d 267.)

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*West's Key Number Digest*, Criminal Law k.339.8 et seq.



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##### 6. Lineup.

##### a. Wade-Gilbert Rule: Counsel's Presence Required.

##### 2. Appointed Counsel Sufficient.

2 *Witkin Cal. Evid. Witnesses* § 393

[§ 393] Appointed Counsel Sufficient.

*United States v. Wade* (1967) 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149, supra, §392, left open the question whether the defendant was entitled to counsel of his or her choice, or whether an appointed counsel would suffice. In *People v. Wimberly* (1992) 5 C.A.4th 773, 7 C.R.2d 152, appellant contended that, notwithstanding appointed counsel's presence at the lineup, appellant's constitutional right was violated by the failure of the police to advise him of his right to counsel of his choice. *Held*, appointed counsel's presence and representation of appellant at the lineup satisfied constitutional requirements. (5 C.A.4th 784.) In *People v. Bustamante* (1981) 30 C.3d 88, 177 C.R. 576, 634 P.2d 927, infra, §397, the court pointed out that defense counsel is present merely to silently observe and later recall his or her observations; and, "[g]iven this limited role, and the fact that a lineup may proceed in the absence of counsel under certain exigent circumstances ... , we find appointed counsel's attendance at the lineup on appellant's behalf consistent with constitutional requirements." (5 C.A.4th 786.)

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##### 3. When Counsel Should Be Present.

2 Witkin Cal. Evid. Witnesses § 394

[§ 394] When Counsel Should Be Present.

(1) *General Rule: Moment of Identification.* In *People v. Williams* (1971) 3 C.3d 853, 92 C.R. 6, 478 P.2d 942, defendant's attorney was present during the viewing stage of a lineup but was excluded from a nearby room where the principal witness made his identification choice for sheriff's officers. *Held*, the exclusion was error. The *Wade-Gilbert* rules were adopted "to enable an accused to detect any unfairness in his *confrontation* with the witness, and to insure that he will be aware of any suggestion by law enforcement officers, intentional or unintentional, at the time the witness makes his identification." Therefore, defense counsel cannot be excluded from *the moment of identification* any more than defense counsel can be excluded from the lineup itself. (3 C.3d 856.) (See *People v. Malich* (1971) 15 C.A.3d 253, 261, 93 C.R. 87.)

(2) *Distinctions.* There is no requirement that defense counsel must be present whenever a prosecution witness is interrogated. (*People v. Williams, supra*, 3 C.3d 857.) (See also *People v. McClellan* (1969) 71 C.2d 793, 797, 80 C.R. 31, 457 P.2d 871 [prosecutor and witnesses properly reenacted crime in defendant's absence]; *People v. Adair* (1969) 2 C.A.3d 92, 96, 82 C.R. 460 [witness identified defendant from photographs; "The right to the assistance of counsel does not confer the privilege of insinuating him into the prosecutor's office at all important phases of trial preparation"]; *People v. Carpenter* (1999) 21 C.4th 1016, 1045, 90 C.R.2d 607, 988 P.2d 531 [even if witnesses made actual identifications after lineup and in counsel's absence, no error where interviews with them were tape-recorded].)

And defense counsel is not entitled to be present at a postlineup interview. In *People v. Perkins* (1986) 184 C.A.3d 583, 229 C.R. 219, M, a robbery victim, failed to identify defendant as the perpetrator after viewing him in a lineup. However, after the lineup and after defense counsel had left, M told the deputy who interviewed her that she *recognized* the defendant but was unable to *identify* him without first seeing whether he had a lightning bolt tattoo on his neck. When the deputy informed her that the man she recognized had such a tattoo, M replied that she would testify that the man was the robber. *Held*, the postlineup interview did not violate defendant's right to counsel. Defense counsel had not requested that he be present during any postlineup interviews, and M had already marked her lineup card indicating she was unable to identify defendant. At that point, the identification process had been completed, and defense counsel had no more right to be present at the interview than he would have had at any nonconfrontational identification by a victim. (184 C.A.3d 591, citing *Williams* and *Adair*.) (See *People v. Mitcham* (1992) 1 C.4th 1027, 1066, 5 C.R.2d 230, 824 P.2d 1277 [counsel not entitled to be present at postlineup interview when officer questioned witness as to why she had placed question mark on her lineup card next to defendant's number].)

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##### 4. Waiver and Objection.

##### aa. Waiver of Lineup Right to Counsel.

2 Witkin Cal. Evid. Witnesses § 395

[§ 395] Waiver of Lineup Right to Counsel.

(1) *In General.* Informing the defendant of the right to have counsel present at the lineup is insufficient to support a waiver of that right unless the defendant is also told that an attorney will be *appointed* if the defendant cannot afford one. (*People v. Banks* (1970) 2 C.3d 127, 134, 84 C.R. 367, 465 P.2d 263.) A *Miranda* warning during *interrogation* will not support waiver of *lineup* rights. (*People v. Banks*, *supra*, 2 C.3d 136.) (See *People v. Evans* (1971) 16 C.A.3d 510, 516, 94 C.R. 88 [construing admonition as sufficient under *Banks*].) But a defendant who knowingly waives his or her rights in writing cannot repudiate the waiver on the ground that the defendant was entitled to have advice of counsel as to the significance of executing the waiver. (*People v. Wells* (1971) 14 C.A.3d 348, 354, 92 C.R. 191.)

(2) *In-Court Lineup After Rejecting Out-of-Court Arranged Lineup.* In *People v. Harmon* (1989) 215 C.A.3d 552, 263 C.R. 623, defendant asked for and was provided a carefully arranged lineup, but defendant refused to participate. The prosecutor then arranged to have the alleged victim come to the courtroom, sit down, look at persons in and entering the courtroom, and, if he saw the robber, to so indicate. During 5 to 10 minutes of brief discussions between counsel and the trial judge, the victim sat by himself in the courtroom and saw about 15 people of various races including defendant's race. Then, with defendant's counsel present in the courtroom, the bailiff brought out defendant wearing civilian clothes, and the victim immediately identified him as the robber. *Held*, conviction affirmed. Having spurned the arranged lineup, defendant will not be heard to complain that the in-court lineup was tainted by suggestiveness or that his right to counsel was violated under the rule of *People v. Williams* (1971) 3 C.3d 853, 92 C.R. 6, 478 P.2d 942 (*supra*, §394). Moreover, the in-court lineup appears to have been less suggestive than the alternative of a one-person lineup with the victim in the witness box and defendant in the chair of the accused. (215 C.A.3d 569.)

(3) *Refusal To Participate in Lineup.* In *People v. Johnson* (1992) 3 C.4th 1183, 14 C.R.2d 702, 842 P.2d 1, defendant, who was in custody on suspicion of murder, refused an officer's order to leave his cell to participate in a lineup. In the meantime, the attorney appointed to represent defendant at the lineup was unable to speak to him because of an administrative difficulty in locating him. After a wait of several hours, the attorney was informed that defendant would not speak with her and refused to participate in the lineup. Detective Shipp, after speaking with the attorney regarding defendant's refusal, went to defendant's cell and advised him that he had no right to refuse to participate and that his refusal could be introduced against him at trial. Defendant continued to refuse, and the attorney left the jail without having talked to defendant. *Held*, admission of defendant's refusal to stand in the lineup was proper.

(a) Because appearance in a lineup is not protected by the privilege against self-incrimination, evidence of a defendant's refusal to participate is admissible at the defendant's trial. (3 C.4th 1222.)

(b) Defendant argued that because he had been given and asserted his *Miranda* rights, it was reasonable for him to conclude that he could refuse to participate in the lineup. Hence, his refusal to do so was not a reliable indication of consciousness of guilt and should have been excluded under *Ev.C.* 352. This reasoning is faulty. *Miranda* warnings advise a suspect that anything the suspect says may be used in evidence; they do not contradict an admonition that the suspect has no right to refuse to stand in a lineup. Hence, because defendant was warned of his right to refuse to participate and of the possibility that such a refusal could be used against him at trial, his refusal was not an unreliable indication of his consciousness of guilt. (3 C.4th 1223, footnote 9.)

(c) Defendant's argument that his refusal to participate should have been suppressed because he was denied his right to counsel during a critical stage of the prosecution is without merit. Neither *People v. Bustamante* (1981) 30 C.3d 88, 177 C.R. 576, 634 P.2d 927 (infra, §397), which held that the California Constitution affords a suspect a right to counsel at a preindictment lineup, nor *People v. Houston* (1986) 42 C.3d 595, 230 C.R. 141, 724 P.2d 1166, 5 Cal. Crim. Law (3d), *Criminal Trial*, §141, which held that the California Constitution requires that a suspect in custody be informed promptly of his or her counsel's arrival and be allowed to see the attorney before questioning begins, is applicable here: counsel was appointed for defendant in advance of the lineup, and he was not subjected to questioning. (3 C.4th 1222.) In any event, the exclusionary rules of both *Bustamante* and *Houston* were abrogated by Proposition 8. (3 C.4th 1223.)

(d) Defendant's conversation with detective Shipp, during which he expressed his refusal to stand in the lineup, was not custodial interrogation in violation of *Miranda*. Detective Shipp's statements to defendant were limited to conveying information about the proposed procedure and ascertaining whether defendant would participate. This neither required readvisement of rights nor amounted to interrogation. And the fact that defendant's responses may have inculpated him was merely incidental to his unprivileged refusal to cooperate in a nontestimonial procedure. (3 C.4th 1224.)

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##### 4. Waiver and Objection.

##### bb. Procedure for Objection.

2 Witkin Cal. Evid. Witnesses § 396

[§ 396] Procedure for Objection.

Ordinarily, an in-court identification which has been allegedly tainted by a pretrial viewing should be challenged by a *motion to suppress* or a *timely objection* when the identification is introduced in evidence. (*People v. Martin* (1970) 2 C.3d 822, 832, footnote 11, 87 C.R. 709, 471 P.2d 29, *infra*, §406 [despite lack of motion or objection, defendant's "continuing and vigorous efforts" at trial preserved issue on appeal]; see *People v. Smith* (1969) 273 C.A.2d 547, 552, 78 C.R. 405; *People v. Stuller* (1970) 10 C.A.3d 582, 597, 89 C.R. 158 [no objection by trial counsel, issue waived]; *People v. Williams* (1970) 11 C.A.3d 1156, 1162, 90 C.R. 409; *People v. Keel* (1969) 272 C.A.2d 275, 276, 77 C.R. 298 [lineup not challenged until appeal; issue waived].)

The trial court need not hold a hearing outside the presence of the jury to determine the admissibility of identification evidence. (*Watkins v. Sowders* (1981) 449 U.S. 341, 101 S.Ct. 654, 656, 66 L.Ed.2d 549, 552 [such a hearing may often be advisable but a per se rule (as in confession cases; see 1 Cal. Evidence (4th), Hearsay, §81) is not constitutionally required]; see 22 Santa Clara L. Rev. 537 [Watkins]; 1982 A.S. 161 [same].)

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##### b. Preaccusatory Lineup.

2 Witkin Cal. Evid. Witnesses § 397

[§ 397] Preaccusatory Lineup.

(1) *Federal Constitution: Wade-Gilbert Rule Inapplicable.* In *Kirby v. Illinois* (1972) 406 U.S. 682, 92 S.Ct. 1877, 1883, 32 L.Ed.2d 411, 418, the United States Supreme Court held (in a plurality opinion) that counsel was required only at a "critical stage of the criminal prosecution," and that the "prosecution" does not commence until the initiation of adversary judicial criminal proceedings, "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." (See 86 Harv. L. Rev. 156.)

As the above quotation indicates, the usual phrasing of the issue in terms of "pre-indictment lineup" is inaccurate; the critical stage is not reached until a formal charge or accusation of some kind is made, but that need not be an indictment. Thus, the criminal prosecution commences at a statutory preliminary hearing to determine whether there is probable cause to bind the defendant over to the grand jury. (*Moore v. Illinois* (1977) 434 U.S. 220, 98 S.Ct. 458, 465, 54 L.Ed.2d 424, 432.)

(2) *California Constitution: Abrogation of Wade-Gilbert Rule.* Prior to the *Kirby* decision, *supra*, the California Supreme Court held, in *People v. Fowler* (1969) 1 C.3d 335, 342, 82 C.R. 363, 461 P.2d 643, that the *Wade-Gilbert* rule governed in preindictment lineups. After *Kirby*, a number of Court of Appeal decisions assumed that *Fowler* was no longer controlling, but in *People v. Chojnacky* (1973) 8 C.3d 759, 106 C.R. 106, 505 P.2d 530, a divided court failed to reach a conclusion on this issue.

In *People v. Bustamante* (1981) 30 C.3d 88, 177 C.R. 576, 634 P.2d 927, the court, recognizing *Kirby*'s binding interpretation of the Federal Constitution, held that the right to counsel at a pre-accusatory lineup was included in the California Constitution's guarantee of "the assistance of counsel" (Art. I, §15).

However, the *Bustamante* exclusionary rule was abrogated by the enactment of Proposition 8 (see 1 Cal. Evidence (4th), Introduction, §§8, 9). (See *People v. Johnson* (1992) 3 C.4th 1183, 1223, 14 C.R.2d 702, 842 P.2d 1, *supra*, §395.)

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(1) *Federal Constitution: Wade-Gilbert Rule Inapplicable.* See *People v. Cook* (2007) 40 C.4th 1334, 1352, 58 C.R.3d 340, 157 P.3d 950 [trial judge properly denied defendant's motion to suppress lineup identification for failure to appoint counsel for him, where judge found that at time of lineup criminal complaint had not been filed and law enforcement officers were still investigating case and gathering evidence].





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##### c. Due Process in Lineup.

##### 1. Unfair Lineup.

2 Witkin Cal. Evid. Witnesses § 398

[§ 398] Unfair Lineup.

Even where the requirement of counsel does not apply (see *supra*, §§395, 396), a lineup may be conducted in so unfair a manner as to amount to a denial of due process.

In *People v. Caruso* (1968) 68 C.2d 183, 65 C.R. 336, 436 P.2d 336, an armed robbery was committed. The two victims, a store manager and his employee, observed the profile of the driver of the car for about 5 seconds. Defendant was arrested as the driver; the accomplice with the gun was never found. At a police lineup, the victims identified defendant and he was convicted. *Held*, conviction reversed.

(a) The victims described the driver as big, with dark wavy hair and a dark complexion. In the lineup, defendant was of that description, and none of the other persons were. "We can only conclude that the lineup was 'unnecessarily suggestive and conducive to irreparable mistaken identification' ... , and we hold that its grossly unfair makeup deprived defendant of due process of law." (68 C.2d 187.)

(b) If defendant is retried, to overcome the effect of the taint of lineup on the in-court identification, the prosecution must on voir dire show by clear and convincing proof that the in-court identifications were based on observations at the scene: "They must totally eliminate from recollection all observations at the lineup. ... As suggested in *Wade*, this may be extremely difficult." (68 C.2d 190.) (See 56 Cal. L. Rev. 1699; *People v. Hogan* (1968) 264 C.A.2d 254, 260, 70 C.R. 448 [following *Caruso*; defendant Black lined up with men who were not].)

The *Caruso* case was cited by the United States Supreme Court in *Foster v. California* (1969) 394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed.2d 402. Defendant was convicted of armed robbery, in part on the lineup identification of D, night manager of the office robbed. In the first lineup, defendant, a tall man, was placed with two short men, and was wearing a leather jacket similar to that worn by the robber. This left the victim uncertain, and a one-to-one confrontation of the victim and defendant was arranged, so they could speak. This also left the victim uncertain, and a second lineup was arranged, with five men, defendant being the only one who had appeared in the first. This produced a positive identification. *Held*, conviction reversed: "The pretrial confrontations clearly were so arranged as to make the resulting identifications virtually inevitable." (89 S.Ct. 1128, 22 L.Ed.2d 406.) (See 39 A.L.R.3d 487 [admissibility of evidence of lineup identification as affected by allegedly suggestive lineup procedures]; 24 A.L.R.4th 592 [propriety of requiring accused to alter, or to refrain from altering, physical or bodily appearance].)

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See 53 *Hastings L. J.* 681 [criticizing use of simultaneous lineups and arguing in favor of sequential lineups]; 43 *Santa Clara L. Rev.* 213 [proposing guidelines to minimize risk of faulty identification].



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## CHAPTER IX - Witnesses

### XVII. PRIVILEGE AGAINST SELF-INCRIMINATION

#### B. Privilege of Accused (Defendant in Criminal Case).

##### 6. Lineup.

##### c. Due Process in Lineup.

##### 2. Properly Conducted Lineup.

##### aa. In General.

2 Witkin Cal. Evid. Witnesses § 399

[§ 399] In General.

Most of the cases find the lineup fairly conducted. The following are illustrative:

*People v. Beivelman* (1968) 70 C.2d 60, 77, 73 C.R. 521, 447 P.2d 913 [five-man lineup; defendant only one whose undershirt was not visible at his throat and whose pants were light in color; no unfair focusing].

*People v. Floyd* (1970) 1 C.3d 694, 713, 83 C.R. 608, 464 P.2d 64 ["There was no need for the police to match the outfits of everyone in the lineup anymore than the police were required to match the physical proportions of the other men with scientific exactitude"].

*People v. Smith* (1969) 273 C.A.2d 547, 554, 78 C.R. 405 [reasonable spread of heights and weights, test of fairness was pragmatic].

*People v. Hernandez* (1970) 11 C.A.3d 481, 488, 89 C.R. 766 ["Mere proximity in time between the viewing of photographs and a lineup is not, in itself, evidence that the witness has been improperly primed to make a lineup identification"].

*People v. Lawrence* (1971) 4 C.3d 273, 280, 93 C.R. 204, 481 P.2d 212, *infra*, §410 [participants of comparable age and similar build; defendant only one in gold shirt and sweater, but each participant had distinctive clothing and defendant was not wearing clothing described by witness; no unfairness].

*In re Terry* (1971) 4 C.3d 911, 924, 95 C.R. 31, 484 P.2d 1375 [insufficient allegations about physical description of other men in lineup; no unnecessary suggestiveness shown].

*People v. Malich* (1971) 15 C.A.3d 253, 260, 93 C.R. 87 [five Caucasian women in lineup, none of whom bore facial resemblance to others or had extremely distinctive features; lineup did not place defendant in "a state of comparative physical uniqueness"].

*People v. Tribble* (1971) 4 C.3d 826, 833, 94 C.R. 613, 484 P.2d 589 [defendant contended lineup was unduly suggestive because he was noticeably trembling, but no showing that he was only person in that condition in lineup].

*People v. Meneley* (1972) 29 C.A.3d 41, 57, 105 C.R. 432 ["The advice that a suspect was in the lineup did not suggest to the identifying witness anything more than he would assume, and in no way suggested that defendant was the suspect rather than one of the other 9 members of the lineup"].

*People v. Sequeira* (1981) 126 C.A.3d 1, 16, 179 C.R. 249 [some participants were taller than defendant, but there is no requirement that defendant be surrounded by people nearly identical in appearance; defendant was allowed to pick the participants in the lineup from among jail inmates, to review them, and to select his spot in the lineup].

*People v. Ochoa* (1998) 19 C.4th 353, 411, 79 C.R.2d 408, 966 P.2d 442 [witness shown single photograph of defendant in profile following pretrial photographic lineup of six pictures; police providing further useful information in response to witness' request was not unduly suggestive, and police were not required to show photographs of profiles of other suspects].

In *People v. McDaniels* (1972) 25 C.A.3d 708, 102 C.R. 444, several witnesses told police that a man in a blue shirt had robbed a bar and raped a cocktail waitress. Three days after the crime, defendant, a black man, was placed in a lineup with four other black men who were dressed in civilian clothes. Defendant, however, was the only one wearing a blue shirt, which he had put on at his home when he was arrested. (Although the officer in charge of the lineup knew of the witnesses' statements, he did not so advise defendant.) *Held*, the several victim-witnesses had ample opportunity to observe defendant's facial and other physical characteristics during the commission of the crimes and made in-court identifications based on characteristics other than the blue shirt. The court added: "Under the circumstances, prudence suggests that the officer conducting the lineup should have advised the defendant not to wear a blue shirt. Prudence, however, is not a criterion." (25 C.A.3d 711.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Gonzalez* (2006) 38 C.4th 932, 943, 944, 44 C.R.3d 237, 135 P.3d 649 [in capital murder trial, fact that defendant was only person in lineup who had tattoo on back of head did not render lineup suggestive; neither before nor after lineup did any witness suggest that tattoo might be relevant to identification, and it was only later, when some witnesses repudiated their identifications, that some said tattoo was significant]; *People v. Cook* (2007) 40 C.4th 1334, 1355, 58 C.R.3d 340, 157 P.3d 950 [lineup was not unduly suggestive, even though defendant was shortest of participants, where all participants were adult white males, relatively similar in body build, with no one obviously standing out in terms of height or weight].



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##### 2. Properly Conducted Lineup.

##### bb. Defendant's Suggestive Conduct.

2 *Witkin Cal. Evid. Witnesses* § 400

[§ 400] Defendant's Suggestive Conduct.

In *People v. Boyd* (1990) 222 C.A.3d 541, 271 C.R. 738, a murder prosecution, the lineup participants, except for defendant, filed onto the stage in numerical order. Defendant came out after the others were already in their places and then hung his head, moved it back and forth, and continued to look at the floor for several seconds. He was then identified as one of the assailants. *Held*, there was no error. California decisions have not yet decided whether a defendant may challenge a lineup when the defendant's own conduct has caused the procedure to be suggestive, but courts in other jurisdictions have uniformly answered in the negative, and some California cases contain dicta indicating that it must be *police* conduct which causes the procedure to be suggestive. (222 C.A.3d 572, citing *People v. Williams* (1971) 3 C.3d 853, 92 C.R. 6, 478 P.2d 942, *supra*, §394, and *People v. Peggese* (1980) 102 C.A.3d 415, 162 C.R. 510.) "We agree with these decisions; a defendant may not base his claim of deprivation of due process in a lineup on his own behavior." (222 C.A.3d 575.) (See *People v. Wimberly* (1992) 5 C.A.4th 773, 790, 7 C.R.2d 152 [following *Boyd*].)

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##### 6. Lineup.

##### d. Defendant's Right to Lineup.

##### 1. In General.

2 Witkin Cal. Evid. Witnesses § 401

[§ 401] In General.

(1) *Statement of Rule.* In *Evans v. Superior Court* (1974) 11 C.3d 617, 625, 114 C.R. 121, 522 P.2d 681, the court declared that an accused, in an appropriate case and on timely request, is entitled to a pretrial lineup.

Defendant filed a pretrial motion for a lineup, alleging that he was identified at the robbery scene by witnesses who saw only a limited view of his head and shoulders from the rear while he was sitting in a patrol car. He contended that the identification was faulty, that the witnesses, having committed themselves, would be reluctant to recede from their position even if they were in error, and that they would be inclined to continue identifying him merely because he was the accused, was black, would appear in jail denims and would be positioned at defense counsel's side. The trial judge was inclined to grant the motion, but thought he lacked authority to order the prosecution to conduct a lineup. *Held*, a judge or magistrate has discretion to grant such a motion.

(a) The question is whether, prior to the in-court receipt of evidence of identification, the accused may insist on using procedures to disclose the weakness of that evidence. A properly conducted lineup is a device by which the prosecution can discover which witnesses are able to identify the accused; but it may reveal that other witnesses, able to identify the real perpetrator of the crime, are unable to identify the accused as such criminal. Fairness requires that an accused be given a reciprocal right to discover and utilize evidence contrary to the prosecution's case. (11 C.3d 623.)

(b) Even though the prosecution had not conducted a lineup and had not acquired identification evidence, it cannot escape a responsibility to disclose by failure to acquire precise knowledge unavailable to the accused. Should defendant be denied discovery, the net effect would be the same as if existing evidence were intentionally suppressed (see 3 Cal. Evidence (4th), *Presentation at Trial*, §121 et seq.). (11 C.3d 625.)

(c) Whether eyewitness identification is a material issue and whether fundamental fairness requires a lineup are within the broad discretion of the magistrate or trial judge. "We do not hold, accordingly, that in every case where there has not been a pretrial lineup the accused may, on demand, compel the People to arrange for one. Rather, as in all due process determinations, the resolution here to be made is one which must be arrived at after consideration not only of the benefits to be derived by the accused and the reasonableness of his request but also after considering the burden to be imposed on the prosecution, the police, the court and the witnesses." (11 C.3d 625; see footnote 6, disapproving contrary view of three Court of Appeal cases.)

(d) The motion should normally be made as soon after arrest or arraignment as practicable, and a late motion may be denied unless good cause is shown for the delay. (11 C.3d 626.) (See 12 Cal. Western L. Rev. 614.)

More recent cases have followed the analysis set forth in *Evans*. (See *People v. Baines* (1981) 30 C.3d 143, 147, 177 C.R. 861, 635 P.2d 455 [defendant's motion too late]; *People v. Underwood* (1983) 139 C.A.3d 906, 914, 189 C.R. 105 [dismissal of complaint for failure to comply with order requiring lineup was abuse of discretion, where no consideration was given to burden such lineup would impose on prosecution]; *People v. Williams* (1997) 16 C.4th 153, 235, 66 C.R.2d 123, 940 P.2d 710 [in penalty phase of murder trial, trial judge did not abuse discretion in denying motion for lineup, where there was no reasonable likelihood of mistaken identification and defense counsel conceded that it "might not accomplish much"].)

(2) *Effect of Rejecting Right*. Because appearance in a lineup is not protected by the privilege against self-incrimination, evidence of a defendant's refusal to participate is admissible at the defendant's trial. (*People v. Johnson* (1992) 3 C.4th 1183, 1222, 14 C.R.2d 702, 842 P.2d 1, supra, §395.) And a defendant who refuses to participate in an out-of-court arranged lineup may not complain that an in-court lineup was tainted by suggestiveness or that his or her right to counsel was violated. (*People v. Harmon* (1989) 215 C.A.3d 552, 568, 263 C.R. 623, supra, §395.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Statement of Rule*. See *People v. Sullivan* (2007) 151 C.A.4th 524, 560, 59 C.R.3d 876 [in robbery prosecution, trial judge did not abuse discretion in denying defendant's motion for pretrial lineup, where, in light of numerous witness identifications of defendant either in person or from properly conducted photo lineups, defendant failed to establish that there was reasonable likelihood of mistaken identification]. (2) *Effect of Rejecting Right*. See *People v. Lewis* (2004) 117 C.A.4th 246, 256, 12 C.R.3d 1 [prosecutor's questioning and argument concerning defendant's failure to request lineup did not constitute error under *Griffin v. California* (1965) 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106, text, §433; following *People v. Johnson* (1992) 3 C.4th 1183, 14 C.R.2d 702, 842 P.2d 1, text, p. 700].



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##### d. Defendant's Right to Lineup.

##### 2. Right to Restricted Lineup.

2 Witkin Cal. Evid. Witnesses § 402

[§ 402] Right to Restricted Lineup.

In *Garcia v. Superior Court* (1991) 1 C.A.4th 979, 2 C.R.2d 707, defendant sought a protective order from the magistrate to limit the lineup to a "voice-only" lineup, on the ground that a physical lineup held prior to a voice lineup would be unduly suggestive. The magistrate, believing that such an order was beyond his authority, did not exercise his discretion, but concluded that the lineup should be held "and the Court will not dictate its manner." Defense counsel then advised defendant not to participate in the scheduled physical lineup, and it was not held. Defendant then petitioned for mandamus. *Held*, writ granted.

(a) *Evans v. Superior Court* (1974) 11 C.3d 617, 625, 114 C.R. 121, 522 P.2d 681, *supra*, §401, is determinative of the issue whether a magistrate or trial court may compel a "voice-only" lineup. (1 C.A.4th 984.) "Because the prosecution may compel defendant to participate in a voice lineup or use his refusal to cooperate as evidence against him ... , due process requires the defendant to be extended a reciprocal right to a voice lineup." This conclusion is supported by Proposition 115, adding Cal. Const., Art. I, §30(c), providing that "discovery in criminal cases shall be reciprocal in nature." (1 C.A.4th 986; see 5 Cal. Crim. Law (3d), *Criminal Trial*, §30 et seq.)

(b) Under *Evans*, the defendant's right to compel a lineup arises only where eyewitness identification is shown to be a material issue and there exists a reasonable likelihood of a mistaken identification which a lineup would tend to resolve. Applying *Evans* to the facts of this case, the magistrate's discretion should be informed by consideration of the *Evans* criteria. (1 C.A.4th 988.)

(c) "We do not hold that, should the magistrate decide to compel a voice-only lineup, such a lineup must be conducted prior to any physical lineup conducted by the prosecution. Presumably, defendant's motion for a voice-only lineup contemplates a procedure where the victim would listen to disembodied voices, either reproduced by recording or delivered live by speakers physically concealed from the victim's view. Under this procedure, a physical lineup, whether conducted before or after a voice lineup, could have no impermissibly suggestive effect on any identification made in the voice lineup." (1 C.A.4th 989.)

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d. Defendant's Right to Lineup.

3. Sanctions for Witness' Failure To Attend Lineup.

2 Witkin Cal. Evid. Witnesses § 403

[§ 403] Sanctions for Witness' Failure To Attend Lineup.

In *People v. Fernandez* (1990) 219 C.A.3d 1379, 269 C.R. 116, two witnesses who failed to attend a pretrial lineup due to pregnancy were permitted to make in-court identifications of defendant. The trial judge denied defendant's motion to exclude the in-court identifications, but cautioned the jury that such identifications might be less reliable than if the witnesses had attended the lineup. *Held*, this was proper. Defendant was afforded his due process right to a pretrial lineup, but certain evidence was "lost" when the witnesses failed to attend. Because there was no indication of bad faith by the prosecution, no proof that the lost evidence would have aided defendant, and no need for strong punitive action to deter future police suppression of evidence, the trial judge's caution was an adequate remedy. (219 C.A.3d 1385, relying on *People v. Zamora* (1980) 28 C.3d 88, 167 C.R. 573, 615 P.2d 1361, 5 Cal. Crim. Law (3d), *Criminal Trial*, §62.)

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##### 7. Other Identification Methods.

##### a. In-the-Field Identification.

2 Witkin Cal. Evid. Witnesses § 404

[§ 404] In-the-Field Identification.

(1) *Timely Identification Procedure*. "Through good police work, good fortune, or a combination of the two, a criminal suspect may be apprehended so close in proximity to the time and place of the crime itself, the exigencies of the situation and over-riding public policy make it neither practical nor necessary to afford counsel for an in-the-field identification." Under these circumstances, the *Wade-Gilbert* rule of right to counsel does not apply. (*People v. Colgain* (1969) 276 C.A.2d 118, 125, 80 C.R. 659 [defendant involved in automobile accident while fleeing from liquor store robbery; victim identified him in handcuffs beside police car].)

The court in *People v. Colgain*, *supra*, added this comment:

"Timely in-the-field identification is a procedure which enhances the reliability of the identification. ... Where, as here, a serious crime has been committed, it is important to the public well-being that law enforcement officers know with speed and certainty the culprit has been apprehended. Once that fact has been ascertained, they may cease their efforts to catch the criminal--usually greatest and requiring most manpower immediately following the crime--and devote themselves to their other public duties. The general public in the area, although not directly involved, may have its apprehension put at rest by knowledge the perpetrator of the crime has been arrested and identified. Nor should we lose sight of the public interest in avoiding at this very early stage inconvenience and injustice to an innocent person if the use of the procedure results, as it frequently may, in the witness to the crime stating: 'This is not the man.' " (276 C.A.2d 126.)

Many other cases affirm the propriety of this method of timely identification. (See *People v. Burns* (1969) 270 C.A.2d 238, 244, 75 C.R. 688 [defendant apprehended by Highway Patrol after fleeing from gas station robbery; identified by victim while illuminated by police car headlights and spotlights]; *People v. Anthony* (1970) 7 C.A.3d 751, 763, 86 C.R. 767 [10 minutes after robbery, police brought defendant back to gas station in handcuffs for victim to identify]; *People v. Rodriguez* (1970) 10 C.A.3d 18, 27, 88 C.R. 789 [shortly after robbery, victim identified defendant in back seat of police car]; *People v. Smith* (1970) 13 C.A.3d 897, 909, 91 C.R. 786 [15 minutes after purse snatching, victim viewed defendant in patrol car and also identified discarded cap as worn by robber]; *People v. Odom* (1980) 108 C.A.3d 100, 110, 166 C.R. 283 [eyewitnesses to shooting by truck driver were taken several blocks to scene of his arrest and identified him 45 minutes after the shooting]; *People v. Jones* (1981) 126 C.A.3d 308, 316, 178 C.R. 818; *People v. Dampier* (1984) 159 C.A.3d 709, 713, 205 C.R. 728; *People v. Rodriguez* (1987) 196 C.A.3d 1041, 1049, 242 C.R. 386 [identification made 9 hours after shooting was timely, where it was conducted as soon as officers determined that defendant or his family was involved, located family, and transported witnesses to their location]; *People v. Cowger*

(1988) 202 C.A.3d 1066, 1072, 249 C.R. 240 [attempted rape victim had ample opportunity to observe defendant, described him accurately, and identified him instantaneously less than 2 hours after crime].)

(2) *Right To Transport Suspect for Identification*. There are circumstances under which, without probable cause for an arrest, the police may be justified in transporting a suspect to another location for identification; e.g., where an assault victim is injured and physically unable to be taken promptly to view the suspect, or where it would be less of an intrusion on the suspect's rights to convey the suspect speedily a few blocks away to the crime scene rather than to unduly prolong the field detention. But ordinarily there are less intrusive and more reasonable alternatives (e.g., bringing the witness to the detention scene, or arranging for a subsequent confrontation); and in the absence of any exigency, transporting the suspect to the crime scene may be a violation of his or her constitutional rights. (See *People v. Harris* (1975) 15 C.3d 384, 390, 391, 124 C.R. 536, 540 P.2d 632; *In re Lynette G.* (1976) 54 C.A.3d 1087, 1093, 126 C.R. 898 [*Harris* test met; victim injured and could not be taken to view suspects]; *In re Dung T.* (1984) 160 C.A.3d 697, 712, 206 C.R. 772 [*Harris* test not met; car fitting description of one used in a robbery was stopped and its occupants taken to police station for lineup identification with no attempt to ascertain their identification or to bring victim to scene].)

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##### 7. Other Identification Methods.

##### b. In-Custody Identification.

##### 1. Proper Method.

2 Witkin Cal. Evid. Witnesses § 405

[§ 405] Proper Method.

While the need for prompt in-the-field identification has been recognized as a valid limit on a suspect's rights (see *supra*, §404), the practice of having a "single showup," i.e., a one-to-one confrontation with the victim at a *later* time, presents special problems.

However, there is nothing inherently unfair in a single showup. (See *Stovall v. Denno* (1967) 388 U.S. 293, 87 S.Ct. 1967, 1972, 18 L.Ed.2d 1199, 1206 [seriously injured victim identified defendant while he was handcuffed to police officer in her hospital room; no error]; *Neil v. Biggers* (1972) 409 U.S. 188, 93 S.Ct. 375, 382, 34 L.Ed.2d 401, 411; *Manson v. Brathwaite* (1977) 432 U.S. 98, 97 S.Ct. 2243, 2253, 53 L.Ed.2d 140, 154; *People v. Bauer* (1969) 1 C.3d 368, 374, 82 C.R. 357, 461 P.2d 637 [victims individually chose photographs of defendant, then saw him through one-way glass at police station and identified him in each other's presence; no error]; *People v. Irvin* (1968) 264 C.A.2d 747, 755, 70 C.R. 892 [victim was "candid" about what he originally observed and what characteristics of defendants were similar; no error]; *People v. Floyd* (1970) 1 C.3d 694, 714, 83 C.R. 608, 464 P.2d 64 [sole ground for arrest was that defendant matched witness' description]; *People v. Fortier* (1970) 10 C.A.3d 760, 764, 89 C.R. 210 [defendant was charged with illegal narcotics transaction involving undercover officer; no error in allowing single showup because officer "knew what defendant looked like prior to seeing him in the police station"]; *People v. Smith* (1970) 13 C.A.3d 897, 909, 91 C.R. 786 [victim had made in-the-field identification, then received permission to see defendant again at police station]; *People v. Hunt* (1977) 19 C.3d 888, 893, 140 C.R. 651, 568 P.2d 376; *People v. Martinez* (1989) 207 C.A.3d 1204, 1219, 255 C.R. 691; *People v. Johnson* (1989) 210 C.A.3d 316, 323, 258 C.R. 347 [victim instantly identified defendant when he was brought to police station following arrest]; *People v. Leung* (1992) 5 C.A.4th 482, 497, 500, 7 C.R.2d 290 [court should look at totality of circumstances]; *People v. Nguyen* (1994) 23 C.A.4th 32, 39, 28 C.R.2d 140 [victim taken to apartment occupied by one of two suspects, where she was shown three men and identified both suspects; held not suggestive, as police did not encourage victim to identify suspects]; 39 A.L.R.3d 791 [factors affecting suggestibility].)

In *Neil v. Biggers*, *supra*, the showup occurred at the police station some 7 months after an alleged rape, and consisted of two detectives walking the suspect past the victim. At the victim's request, the police ordered the suspect to say, "[S]hut up or I'll kill you." Although the record was unclear on whether the victim had made her identification before or after the suspect had spoken, the victim testified that she knew him when she first laid eyes on him. *Held*, there was no violation of defendant's rights. Suggestive confrontations are disapproved because they increase the

likelihood of misidentification. (93 S.Ct. 382, 34 L.Ed.2d 411.) The factors to be considered in evaluating the likelihood of misidentification include "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." (93 S.Ct. 382, 34 L.Ed.2d 411.) Here, the victim was no casual observer but rather the victim of a humiliating crime, had opportunity and adequate light to see her assailant, and gave the police a more than ordinarily thorough description of him. The 7-month lapse between the rape and the confrontation would be a "seriously negative" factor in most cases. But the victim made no previous identification at any showup, lineup or photographic showing. "Her record for reliability was thus a good one, as she had previously resisted whatever suggestiveness inheres in a showup." (93 S.Ct. 383, 34 L.Ed.2d 412.) (See 26 *Stanf. L. Rev.* 1097; and see *Manson v. Brathwaite*, *supra*, applying *Biggers* criteria and holding the prosecution evidence admissible.)

Nevertheless, the single showup is a critical stage of the criminal proceedings to which the right of assistance of counsel attaches. (*People v. Martin* (1970) 2 C.3d 822, 830, 87 C.R. 709, 471 P.2d 29, *infra*, §406.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Kennedy* (2005) 36 C.4th 595, 610, 611, 31 C.R.3d 160, 115 P.3d 472 [where witness had good opportunity to view perpetrator at time of crime, including eye-to-eye contact for 30 to 60 seconds, but she failed to note his beard when she described him to police, police's playing, 3 weeks later, of videotape of defendant's arrest, during which witness exclaimed, "Oh, my God, that's him, and I don't know how I missed that beard," was not unduly suggestive; applying analysis of *Neil v. Biggers* (1972) 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401, text, p. 705].



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## 7. Other Identification Methods.

## b. In-Custody Identification.

## 2. Improper Where No Compelling Reason.

2 Witkin Cal. Evid. Witnesses § 406

[§ 406] Improper Where No Compelling Reason.

The likelihood of prejudice in the one-to-one confrontation is so great that the police should not use it without a compelling reason. (*In re Hill* (1969) 71 C.2d 997, 1005, 80 C.R. 537, 458 P.2d 449 ["It would have been no hardship for the police to have assembled a number of prisoners and to have held a lineup in the usual manner, especially since petitioners were then being held in the Los Angeles County jail"]; *People v. Bisogni* (1971) 4 C.3d 582, 586, 94 C.R. 164, 483 P.2d 780 [there was "no emergency present" to require single showup]; *People v. Martin* (1970) 2 C.3d 822, 829, 87 C.R. 709, 471 P.2d 29.)

In *People v. Martin*, *supra*, a police officer's wife was the victim of a purse snatching and the only witness to the crime. Later that evening, she viewed defendant through a one-way mirror at the police station, where defendant was accompanied by a uniformed officer. *Held*, the identification procedure was improper. "Nothing has been shown which would indicate that a formal lineup with full constitutional protections was rendered impractical by the circumstances. Indeed, it appears that at least two persons of defendant's general physical characteristics were available for this purpose." (2 C.3d 829.) The dangers of suggestion were especially great. "Whereas in a lineup situation an identifying witness must at least choose among persons having some physical resemblance to one another, a one-to-one viewing requires only the assent of the witness. Moreover, the possibility of mistaken identification is further increased when, as here, the suspect is displayed to the witness in the company of a uniformed officer--the witness having viewed other subjects accompanied by non-uniformed persons." (2 C.3d 829.)

In *People v. Fairley* (1982) 135 C.A.3d 182, 185 C.R. 109, a robbery witness testified that he was told by the prosecution to come to the courtroom on the first day of trial and, if he saw anyone he recognized, to stand up and leave. The witness did so when defendant entered the courtroom, and in subsequent testimony identified defendant as the robber. Although the conviction was affirmed on other evidence, the court disapproved this procedure: "Showups of the type used by the prosecutor in this case ought to be discouraged, ... for the reason that they cannot be conducted within any reasonable limits of control. Given the fact that the witness knows the purpose for which he is in court, there are an unforeseeable number of circumstances which can arise in any open courtroom which would quickly indicate to any person of reasonable intelligence who the defendant is." (135 C.A.3d 187.)

In *People v. Bisogni*, *supra*, three persons--defendant, B, and Mrs. G--were suspected of having committed an armed robbery 6 months earlier. B had been killed in an unrelated crime, but defendant and Mrs. G were in custody when witnesses were brought to the police station to try identifying the robbers. After a fair lineup procedure in which

they picked out defendant, the witnesses looked through a peephole to observe Mrs. G alone in a room. At least one viewer did not recognize Mrs. G, but the others spoke about her being the woman who had participated in the robbery. Following the identifications, Mrs. G apparently cooperated with the police. At defendant's trial, the witnesses identified Mrs. G, but defendant claimed that he and Mrs. G were together and that neither one was at the scene of the crime. *Held*, Mrs. G's identification was unfair, and defendant had standing to complain.

(a) The viewing of Mrs. G alone very much suggested that she was probably the female robber. There was no emergency requiring a single showup. Because the viewing occurred many months after the robbery, the witnesses' identifications could not have been based on recent memories of the criminals. (4 C.3d 586.)

(b) The reason for excluding evidence based on an unfairly conducted showup (unreliable) is equally applicable to identification of a coparticipant in a crime. "Accordingly, whenever the identity of a confederate is essential to prove the defendant's participation in a crime and when, as here, such evidence *effectively destroys the defense* offered by the defendant, he has standing to challenge the fairness of the identification procedures of the alleged coparticipant." (4 C.3d 586.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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##### 7. Other Identification Methods.

##### c. Independent Origin of In-Court Identification.

2 Witkin Cal. Evid. Witnesses § 407

[§ 407] Independent Origin of In-Court Identification.

Even if a pretrial identification has been tainted, the prosecution should be allowed to establish *by clear and convincing evidence* that the in-court identifications were based on observations of the suspect other than the lineup. Among the factors to be considered are "the *prior opportunity* to observe the alleged criminal act, the existence of any *discrepancy* between any pre-lineup description and the defendant's actual description, any identification prior to lineup of *another person*, the identification by *picture* of the defendant prior to the lineup, *failure to identify* the defendant on a prior occasion, and the *lapse of time* between the alleged act and the lineup identification." (*United States v. Wade* (1967) 388 U.S. 218, 87 S.Ct. 1926, 1940, 18 L.Ed.2d 1149, 1165, *supra*, §392; see *People v. Caruso* (1968) 68 C.2d 183, 190, 65 C.R. 336, 436 P.2d 336, *supra*, §398; *In re Hill* (1969) 71 C.2d 997, 1006, 80 C.R. 537, 458 P.2d 449; *People v. Fowler* (1969) 1 C.3d 335, 350, 82 C.R. 363, 461 P.2d 643; *People v. Banks* (1970) 2 C.3d 127, 139, 84 C.R. 367, 465 P.2d 263; *People v. Martin* (1970) 2 C.3d 822, 833, 87 C.R. 709, 471 P.2d 29, *supra*, §406; *People v. Bisogni* (1971) 4 C.3d 582, 587, 94 C.R. 164, 483 P.2d 780, *supra*, §406; *People v. Smith* (1970) 4 C.A.3d 41, 47, 84 C.R. 229; *People v. Williams* (1973) 9 C.3d 24, 37, 106 C.R. 622, 506 P.2d 998; *People v. Collins* (1971) 20 C.A.3d 601, 604, 97 C.R. 821 [violation of then existing rule on assistance of counsel at preindictment lineup was harmless error; courtroom identifications were not tainted]; *People v. Sanchez* (1982) 131 C.A.3d 718, 731, 182 C.R. 671; *People v. Arias* (1996) 13 C.4th 92, 167, 51 C.R.2d 770, 913 P.2d 980 [at penalty phase of capital trial, in-court identification of defendant by victim of prior crime was sufficiently independent of any flaws in photo lineup procedure following prior crime, and of information volunteered to witness by process server, to go to jury].)

Thus, in *People v. Martin*, *supra*, a purse snatching case, the inquiry about independent identification should have included "(1) the lighting and opportunity for observation at the time of the offense; (2) the clear discrepancy between the description given by the victim after the offense and defendant's actual description; (3) the uncertainty manifested by the victim at the time of the pretrial confrontation and afterwards; and (4) the failure of the victim to identify defendant by photograph." (2 C.3d 833.) (See *People v. Dominick* (1986) 182 C.A.3d 1174, 1196, 227 C.R. 849 [assault victim's failure to positively identify defendant from videotaped lineup did not require exclusion of his in-court identification of defendant].)

In *People v. Malich* (1971) 15 C.A.3d 253, 93 C.R. 87, the court commented on the similarity between "independent source" and "harmless error" inquiries: "Both require a comparison of the various impressions and memories which produce the witness' ability to identify the accused. Both involve a comparative analysis of the witness' observations at the time of the crime, on any interim occasion thereafter and at the time of the illegal confrontation.



There is this difference: In inquiring into independent source, the trial court probes to ascertain whether these sources are so reliable and vivid as to preclude a causal connection between the tainted lineup and the courtroom identification. ... In the harmless error inquiry, the court assumes the tainted connection but asks whether the combination of admissible tokens of identity is so compelling that the tainted courtroom identification itself becomes surplus to the array of influences inducing the verdict." (15 C.A.3d 262.)

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##### 7. Other Identification Methods.

##### d. Pretrial Photographic Identification.

##### 1. General Rule: Substantial Likelihood of Misidentification.

2 Witkin Cal. Evid. Witnesses § 408

[§ 408] General Rule: Substantial Likelihood of Misidentification.

The *Wade-Gilbert* rule (*supra*, §392) does not apply to pretrial photographic identifications of a suspect after his or her arrest. Convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside only if the photographic identification procedure was so impermissibly suggestive as to give rise to a substantial likelihood of misidentification. (*Simmons v. United States* (1968) 390 U.S. 377, 88 S.Ct. 967, 971, 19 L.Ed.2d 1247, 1253; see *People v. Lawrence* (1971) 4 C.3d 273, 275, 93 C.R. 204, 481 P.2d 212; *People v. Adair* (1969) 2 C.A.3d 92, 96, 82 C.R. 460; *People v. Hawkins* (1970) 7 C.A.3d 117, 121, 86 C.R. 428; *People v. Stuller* (1970) 10 C.A.3d 582, 597, 89 C.R. 158; *People v. Dontanville* (1970) 10 C.A.3d 783, 790, 89 C.R. 172; *People v. Wesley* (1970) 10 C.A.3d 902, 910, 89 C.R. 377, citing the text; *People v. Hernandez* (1970) 11 C.A.3d 481, 487, 89 C.R. 766; *People v. Bethea* (1971) 18 C.A.3d 930, 937, 96 C.R. 229; *People v. Holt* (1972) 28 C.A.3d 343, 349, 104 C.R. 572; *People v. Greene* (1973) 34 C.A.3d 622, 646, 110 C.R. 160 [use of single photograph not unduly suggestive]; *United States v. Ash* (1973) 413 U.S. 300, 93 S.Ct. 2568, 2576, 2579, 37 L.Ed.2d 619, 630, 633; *People v. Rist* (1976) 16 C.3d 211, 216, 127 C.R. 454, 545 P.2d 833; *People v. Lewis* (1977) 74 C.A.3d 633, 640, 141 C.R. 614 [same rule applies to videotape]; *People v. Sequeira* (1981) 126 C.A.3d 1, 13, 179 C.R. 249; *People v. Ingle* (1986) 178 C.A.3d 505, 512, 223 C.R. 723, citing the text [permitting witness to view videotape made by surveillance camera did not improperly influence subsequent photo lineup identification]; 39 A.L.R.3d 1000 [admissibility of photographic identification as affected by suggestive identification procedures].)

Where the defendant objects to an in-court identification not yet made, on the basis that it is the result of an impermissible pretrial photographic procedure, the judge should take evidence out of the jury's presence to determine whether the photographic procedure tainted the in-court identification. (*People v. Enos* (1973) 34 C.A.3d 25, 38, 109 C.R. 876; *People v. Vanbuskirk* (1976) 61 C.A.3d 395, 401, 403, 132 C.R. 30.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Criminal Law k.339.10(1) et seq.



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##### 7. Other Identification Methods.

##### d. Pretrial Photographic Identification.

##### 2. Illustrations.

2 Witkin Cal. Evid. Witnesses § 409

[§ 409] Illustrations.

In *People v. Wimberly* (1992) 5 C.A.4th 773, 7 C.R.2d 152, the court rejected several challenges to the pretrial identification procedures.

(a) Defendant first complains that two of the victims identified him in a lineup 3 days after viewing photographs. But the use of photographs for identification prior to a lineup is not impermissibly suggestive. (5 C.A.4th 788, citing *People v. Blair* (1979) 25 C.3d 640, 159 C.R. 818, 602 P.2d 738.)

(b) Defendant next complains that the police included his picture in each of two sets of photographs that they showed one of the victims. But California and federal courts have rejected the argument that identification is impermissibly suggestive if the defendant is the only person appearing in both a display of photographs and a subsequent lineup. (5 C.A.4th 789.)

(c) Defendant next complains that the lineup was conducted only 90 minutes after a "jewelry lineup" during which one victim and the parents of another victim identified property. However, if it is permissible to hold a lineup shortly after a display of photographs, "a fortiori, it is permissible to hold a lineup shortly after a jewelry display, which does not involve the viewing of a defendant." (5 C.A.4th 789.)

(d) Finally, defendant complains that he and other participants in the lineup significantly differed physically. But courts have upheld identifications despite the existence of similar or greater disparities among participants. (5 C.A.4th 790.)

In *People v. Johnson* (1992) 3 C.4th 1183, 14 C.R.2d 702, 842 P.2d 1, a photo lineup was held on July 2, and Angela, although uncertain as to her identification, picked defendant's photograph from a six-photo lineup as the one most resembling the man who had shot her. On July 22, there was a second six-picture lineup, consisting of three of the photographs used in the July 2 lineup, two photographs of men not included in the earlier lineup, and a more recent photograph of defendant wearing prison clothes. As had been done before the earlier lineup, Angela was informed that she was not obligated to pick anyone. This time, Angela's identification of defendant was positive. *Held*, the procedure used was not unduly suggestive.

(a) Because all of the photographs were of black males, generally of the same age, complexion and build, and

generally resembling each other, defendant's photograph did not stand out. Minor differences in both the facial hair of the participants and the background color and image size of the photographs did not make the lineup impermissibly suggestive. And the fact that defendant's photograph was in the bottom of two rows, and was with the other photographs used before, did not create two suggestive "subsets" of photographs. No matter where his or her photograph is placed, a defendant can argue that its position is suggestive. (3 C.4th 1217.)

(b) The use of three photographs from the earlier lineup did not reduce the July 22 lineup to the functional equivalent of a three-person array. Rather, it was a reasonable way to avoid suggesting that defendant was the only suspect. And it was not necessary to use new photographs of the other men, as had been done in defendant's case: Angela testified that she did not recognize the three photographs from the first lineup when they were shown to her during the second lineup. (3 C.4th 1217.)

(c) The fact that defendant was the only person depicted in jail clothing was not unduly suggestive because (1) there was no evidence that Angela knew what jail clothing looked like; (2) she indicated that she did not notice defendant's clothes when she selected his photograph; and (3) there were no identifying marks on defendant's clothing, i.e., he merely appeared to be wearing a gold shirt with a T-shirt underneath. (3 C.4th 1217.)

(d) Prior to the second photo lineup, Angela was told by an officer that a suspect named Willie Johnson (defendant) was in custody. Defendant argued that the procedure was therefore unfair because Angela must have assumed that she had selected Willie Johnson's photograph on July 2 and that he would also be in the July 22 lineup. This contention fails because Angela did not know Willie Johnson and had never seen him before the crime. Also, no names appeared on the photographs, and no one described Willie Johnson to her. Hence, knowing the name "Willie Johnson" and that he was in custody could not have assisted Angela in selecting defendant's photograph. Angela's more positive identification after the second lineup was probably due to the fact that a more recent photograph of defendant was used, rather than to her knowledge that Willie Johnson was in custody. (3 C.4th 1218.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Cunningham* (2001) 25 C.4th 926, 990, 108 C.R.2d 291, 25 P.3d 519 [there was no substantial likelihood of misidentification, where defendant's photo was one of six in lineup, his photo was similar to other five, witness had had ample opportunity to observe defendant during crime, he was instructed that perpetrator was not necessarily included in lineup and that he had no obligation to identify anyone, and he readily identified defendant]; *People v. Yeoman* (2003) 31 C.4th 93, 124, 2 C.R.3d 186, 72 P.3d 1166 [photographic lineup procedures were not unduly suggestive, even though in both lineups defendant's photo occupied fourth position, where lineups were separated by a month and different photo of defendant was used in each]; *People v. Carter* (2005) 36 C.4th 1114, 1163, 32 C.R.3d 759, 117 P.3d 476 [photographic lineup, including defendant's semiglossy photo and five glossy Polaroid photos of police officers, was not unduly suggestive, where each subject was middle-aged or younger male with mustache and dark hair, wearing white or colored shirt; although defendant's shirt was orange, it did not necessarily look like "jail jumpsuit," and difference in quality of photos was less important than difference in appearance of persons depicted]; *People v. Gonzalez* (2006) 38 C.4th 932, 943, 44 C.R.3d 237, 135 P.3d 649 [in capital murder trial, photographic lineup that was basis for pretrial identifications of defendant was not unduly suggestive; nothing in defendant's clothing, his apparently droopy eye, or any discoloration in his photograph would have suggested that he should be selected]; *People v. Carlos* (2006) 138 C.A.4th 907, 912, 41 C.R.3d 873 [photographic lineup was unduly suggestive where array of six photos had defendant's picture located at bottom center, directly above his name and number, no other photos having any such identification].



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##### 7. Other Identification Methods.

##### d. Pretrial Photographic Identification.

##### 3. Simulated Lineup.

2 Witkin Cal. Evid. Witnesses § 410

[§ 410] Simulated Lineup.

In *People v. Lawrence* (1971) 4 C.3d 273, 93 C.R. 204, 481 P.2d 212, defendant was arrested 2 hours after a kidnap victim had described her captor to the police. Defendant told the police that his attorney asked to be notified of any lineup procedures so he could attend them. Instead of a conventional lineup, however, the police set up a simulated five-man lineup which they photographed in the absence of defense counsel and the prospective witnesses. The victim was then shown the color photographs and told only that she should be sure to pick the right man. After looking at the pictures for 2 to 3 seconds, she pointed out defendant. *Held*, the identification was proper.

(a) Better police procedures could well have been employed by use of a true lineup with defense counsel and the witness present, because there was ample time and opportunity to do so. But the failure to take that action was not crucial. There is no distinction between identification from a simulated lineup and those from mug shots or other photographic displays. "Thus, if the police had cut up the photographs and shown the pictures of the participants individually *Wade* and *Gilbert* would have no conceivable application. We find no basis in logic to reach a different conclusion because pictures of five men standing in a line were shown." (4 C.3d 277.)

(b) The key issue is whether a photographic identification represents a confrontation between the accused and the witness. At corporeal exhibitions, where the suspect is exhibited in person, the authorities may require the suspect to move about, perform certain acts, don particular clothing or speak the words used during the commission of the offense. The witness thus observes the suspect in person, from a short distance, performing the very acts the criminal did in perpetrating the crime. "At photographic identification proceedings, however, the accused is not present and the witness observes only static poses of those pictured. When mug shots are used the witness is presented only with a collection of faces. Such a witness does not observe the suspect repeat actions or hear the accused speak. We conclude, therefore, that the showing of photographs of the accused to a witness is not a confrontation or exhibition as those words are used in *Wade* or *Gilbert*." (4 C.3d 278.)

(c) The possibility of unfairness does exist. But if the photographs are preserved and available at trial, defense counsel can use them in cross-examination of prosecution witnesses, or the judge may examine them to determine whether the display was fairly presented. (4 C.3d 278.)

Three justices dissented, contending that the photographs were taken with the conscious purpose of evading the *Wade-Gilbert* requirements.

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##### d. Pretrial Photographic Identification.

##### 4. Individual Photographs.

##### aa. In General.

2 Witkin Cal. Evid. Witnesses § 411

[§ 411] In General.

The use of "mug shots," "rogue's gallery" photographs, identification photographs taken in prison, or other likenesses of a suspect has long been sanctioned as an appropriate means of identification. (See *Simmons v. United States* (1968) 390 U.S. 377, 88 S.Ct. 967, 971, 19 L.Ed.2d 1247, 1253; *People v. Lawrence* (1971) 4 C.3d 273, 279, 93 C.R. 204, 481 P.2d 212; 30 A.L.R.3d 908, *supra*, §410.)

In *People v. Neal* (1969) 271 C.A.2d 826, 77 C.R. 65, defendant robbed a finance company at gunpoint in the presence of employees. The pretrial identification procedure was as follows: (a) Shortly after the robbery, two employees were taken to the police station and shown hundreds of pictures in the file; they identified defendant. (b) The same day, defendant's picture was removed from the file and two other employees looked through it without identifying the robber. Then they were handed a small group of pictures of persons similar to defendant (a black man), and both, sitting separately, picked defendant. *Held*, the procedure was fair: there was no element of suggestion, and each eyewitness made an immediate identification. (271 C.A.2d 833.)

In *People v. Pijal* (1973) 33 C.A.3d 682, 109 C.R. 230, an undercover officer bought a restricted dangerous drug from defendant, whom he identified 1 week later from a series of mug shots. Defendant contended that the arbitrary delay of a week denied him his right to due process. *Held*, the claim is "obviously meritless." While the lapse of time between the alleged act and the identification may be a factor, additional circumstances have equal--or greater--weight, e.g., whether the photographic display was fair or rigged, whether the police made suggestive comments, whether the witness observed the defendant more than once, whether the encounter was a brief glimpse or of longer duration, whether the lighting conditions were adequate, or whether the witness had reason to recall the defendant's face. (33 C.A.3d 689.) "Since Moroschok saw appellant several times, picked him up during daylight hours, bargained with him face to face, and observed him sitting, standing, walking, bending and from every side and angle ... , the probability of mistaken identification should be ruled out as a matter of law." (33 C.A.3d 690.)

Other illustrative cases are *People v. Smith* (1968) 259 C.A.2d 814, 818, 66 C.R. 551; *People v. Dewberry* (1974) 40 C.A.3d 175, 178, 181, 114 C.R. 815 [officer showed about seven photographs to witness, two of which were of defendant; procedure was not unduly suggestive]; *People v. James* (1976) 56 C.A.3d 876, 885, 128 C.R. 733 [no unfairness even though numbers appeared on pictures of defendant and codefendant]; *People v. Adams* (1982) 137 C.A.3d 346, 352, 187 C.R. 505 [use of 3-year-old photograph of suspect showing him bearded with bandage on his

forehead was not unduly suggestive, where all participants in photographic lineup had some type of facial hair and each photograph was presented with piece of paper across the forehead]; *People v. Contreras* (1983) 144 C.A.3d 749, 758, 192 C.R. 810 [50 to 60 photographs of members of particular gang were arranged in alphabetical order and examined by two victims in separate rooms, after being admonished to view photographs in unbiased manner; no unfairness]; *People v. Sanders* (1990) 51 C.3d 471, 508, 273 C.R. 537, 797 P.2d 561 [photo array was somewhat suggestive because only defendant's photo matched witness' description, but totality of circumstances did not show very substantial likelihood of irreparable misidentification]; *People v. Phan* (1993) 14 C.A.4th 1453, 1461, 18 C.R.2d 364 [police obtained five "social" photos of defendant and composed six-person photo lineup; procedure was necessary and not suggestive, and identification was reliable]; *People v. Contreras* (1993) 17 C.A.4th 813, 823, 21 C.R.2d 496 [single photo identification procedure was suggestive but there was no causal connection between it and witness' in-court identification of defendant].

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## 4. Individual Photographs.

## bb. Clarifications and Distinctions.

2 Witkin Cal. Evid. Witnesses § 412

[§ 412] Clarifications and Distinctions.

(1) *Distinction: Inadmissible Criminal History.* In *People v. Cook* (1967) 252 C.A.2d 25, 60 C.R. 133, defendant, charged with robbery and burglary and a prior federal conviction, admitted the prior; hence, under P.C. 1025, it could not be alluded to (3 Cal. Crim. Law (3d), Punishment, §376). However, two eyewitnesses to the crime had picked his picture out of a police mug book, thus identifying him as the perpetrator. At the trial, a police officer testified to the fact of selection of the picture, and the trial judge admitted it in evidence. The picture, a typical mug shot, showed defendant's face and profile, with a printed legend giving the police department, the date, and defendant's name. *Held*, this was error. The "other crimes" rule permits proof of prior convictions for a relevant purpose, despite P.C. 1025, and the photograph, proving an extrajudicial identification, is admissible. (252 C.A.2d 28.) However, the unedited picture brought into evidence an indication of another offense of defendant. This was a declaration of a police photographer not available for cross-examination, hence, inadmissible hearsay. The prosecution should have, in some manner, *deleted the objectionable parts.* (252 C.A.2d 30.)

(2) *Distinction: Rigged Photographs.* In *People v. Pedercine* (1967) 256 C.A.2d 328, 63 C.R. 873, the defendant was adequately identified in the courtroom and by photographs shown to witnesses, and the conviction was affirmed on overwhelming evidence of guilt. But the court took occasion to denounce certain photographs used in an out-of-court identification which were not introduced by the prosecution--they came to light only when defendant's counsel offered them on cross-examination of one of the identifying witnesses. The photographs placed a masculine-appearing mug shot of defendant with extremely feminine women. The court thought this was just as bad as the unfair postindictment lineup condemned in the *Wade-Gilbert* cases (supra, §392 et seq.): "The same rationale prompts our declaration of a rule that a preindictment pretrial identification conducted with obvious unfairness possesses the same unreliability and must be similarly condemned." (256 C.A.2d 336.)

(3) *Availability of Comparison Photographs.* The fairness of a photographic identification procedure has been justified, at least in part, because the photographs used for comparative purposes are assumed to have been available to defense counsel for use in cross-examination. (See *People v. Lawrence* (1971) 4 C.3d 273, 278, 93 C.R. 204, 481 P.2d 212, supra, §410; *People v. Adair* (1969) 2 C.A.3d 92, 96, 82 C.R. 460 ["The photographs, with any shortcomings in their quality, lighting, exposure and the like, are available to examine"]; *People v. Hawkins* (1970) 7 C.A.3d 117, 121, 86 C.R. 428; *People v. Dontanville* (1970) 10 C.A.3d 783, 792, 89 C.R. 172 [suggesting that defendant could have

subpenaed entire photographic file to demonstrate unfairness].)

But even if the comparison photographs are *unavailable* at trial, the identification procedure may be upheld. (See *Simmons v. United States* (1968) 390 U.S. 377, 88 S.Ct. 967, 973, 19 L.Ed.2d 1247, 1255 [preferable procedure would have been for government to label photographs and keep them available, but defense made inadequate pretrial efforts to produce pictures and did not explain their significance at trial]; *People v. Bethea* (1971) 18 C.A.3d 930, 937, 96 C.R. 229; *People v. Dewberry* (1974) 40 C.A.3d 175, 180, 114 C.R. 815.)

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##### 8. Evidence Obtained by Brutality.

##### a. Rochin Rule: Violation of Due Process.

2 Witkin Cal. Evid. Witnesses § 413

[§ 413] Rochin Rule: Violation of Due Process.

The Model Code, Rule 205, took the position that the privilege against self-incrimination does not apply to the "taking of samples of body fluids or substances for analysis." (See 20 So. Cal. L. Rev. 301; 22 So. Cal. L. Rev. 483; supra, §385 and infra, §422 et seq.) But a more fundamental protection against drastic methods was invoked in *Rochin v. California* (1952) 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183. When deputy sheriffs broke into defendant's home, he swallowed morphine capsules. After an unsuccessful attempt to force them from his mouth, the officers took him to a hospital, had his stomach pumped, and recovered them. His conviction of possession of morphine was affirmed in *People v. Rochin* (1950) 101 C.A.2d 140, 225 P.2d 1, but was reversed by the United States Supreme Court on the ground that use of the evidence obtained in this manner was a violation of federal due process: "[W]e are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. It is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents--this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation." (72 S.Ct. 209, 96 L.Ed. 190.)

In further explanation of the holding, the Court said: "To attempt in this case to distinguish what lawyers call 'real evidence' from verbal evidence is to ignore the reasons for excluding coerced confessions. Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently true. Coerced confessions offend the community's sense of fair play and decency. So here, to sanction the brutal conduct which naturally enough was condemned by the court whose judgment is before us, would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society." (72 S.Ct. 210, 96 L.Ed. 190.) (See 1 McCormick 5th, §164; 8 Wigmore (McNaughton Rev.) §2184a; 40 Cal. L. Rev. 311; 66 Harv. L. Rev. 122; 71 Harv. L. Rev. 161; 79 Harv. L. Rev. 970; 5 Hastings L. J. 231; 25 So. Cal. L. Rev. 357; 4 Stanf. L. Rev. 591; 2 U.C.L.A. L. Rev. 565; 1951 A.S. 840; 1953 A.S. 762; 25 A.L.R.2d 1407 [requiring submission to physical examination or test as violation of constitutional rights].)

Introduction of evidence violating the *Rochin* rule is not reversible error per se; as in other cases of illegally obtained evidence (except confessions; see 1 Cal. Evidence (4th), Hearsay, §89), the judgment will be affirmed if no prejudice is found. (*People v. Parham* (1963) 60 C.2d 378, 386, 33 C.R. 497, 384 P.2d 1001; *People v. Cappellia*

(1989) 208 C.A.3d 1331, 1337, 256 C.R. 695, *infra*, §417; see 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence*, §384; 6 Cal. Crim. Law (3d), *Reversible Error*, §26.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 1 McCormick 6th, §164.



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## CHAPTER IX - Witnesses

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#### B. Privilege of Accused (Defendant in Criminal Case).

##### 8. Evidence Obtained by Brutality.

##### b. Brutal Body Examination.

2 Witkin Cal. Evid. Witnesses § 414

#### [§ 414] Brutal Body Examination.

The *Rochin* rule (supra, §413) has been applied to various forms of physical compulsion used to prevent accused narcotic offenders caught red-handed from swallowing the drug and destroying the evidence.

(1) *Choke Hold*. In *People v. Martinez* (1954) 130 C.A.2d 54, 278 P.2d 26, the officer placed a choke hold on defendant, forcing him to spit out the package. In reversing the conviction, the court observed that the question "is not how hard an officer may choke a suspect to obtain evidence but whether he may choke him at all" (130 C.A.2d 56), and declared that the *Rochin* case "should serve as a warning to all those who are tempted to use brutal force for the extraction of evidence from the person of an accused." (130 C.A.2d 58.) (See *People v. Brinson* (1961) 191 C.A.2d 253, 256, 12 C.R. 625 [officer choked defendant for a minute and a half]; *People v. Sevilla* (1961) 192 C.A.2d 570, 573, 13 C.R. 714 [officer testified "I wasn't choking but my arm was around pretty tight"; see vigorous dissent, 192 C.A.2d 578]; *People v. Erikson* (1962) 210 C.A.2d 177, 180, 26 C.R. 546 [officer testified "I was trying to keep his Adam's apple from moving," following which defendant coughed up the narcotic]; *People v. Parham* (1963) 60 C.2d 378, 384, 33 C.R. 497, 384 P.2d 1001 [officers held defendant by cheeks and hit him on back of neck with police club to compel him to spit out paper which he tried to chew up]; *People v. Sanders* (1969) 268 C.A.2d 802, 805, and footnote 1, 74 C.R. 350 [describing serious dangers of choking process, quoting textbook on judo]; *People v. Trevino* (1977) 72 C.A.3d 686, 690, 691, 140 C.R. 243; *People v. Jones* (1989) 209 C.A.3d 725, 730, 257 C.R. 500 [officer placed pressure below defendant's chin and above his throat while pushing on back of his neck]; but see *People v. Lara* (1980) 108 C.A.3d 237, 166 C.R. 475, *infra*, §417 [forcing defendant's head against his chest held proper method of preventing him from swallowing balloon containing heroin].)

(2) *Emetic Solution*. In *Vasquez v. Superior Court* (1962) 199 C.A.2d 61, 18 C.R. 140, police observed defendant swallowing a condom containing a white powder thought to be heroin. Defendant was brought to a hospital, handcuffed, and forcibly restrained by two police officers while a physician injected defendant's arm with apomorphine, allegedly to prevent the potentially fatal absorption of heroin into defendant's system. The injection caused nausea, vomiting, and extreme weakness for about 30 minutes, during which time defendant regurgitated the condom, found to contain five grams of heroin. There was testimony that without the injection, the condom might well have passed through defendant's digestive tract without ill effect. *Held*, the conduct of the police and physician "was brutal and shocking," and violated defendant's constitutional rights. (199 C.A.2d 66.) (See also *People v. Bracamonte* (1975) 15 C.3d 394, 404, 124 C.R. 528, 540 P.2d 624; *People v. Rodriguez* (1977) 71 C.A.3d 547, 550, 551, 557, 139 C.R. 509.)

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##### c. Other Evidence Brutally Obtained.

2 Witkin Cal. Evid. Witnesses § 415

[§ 415] Other Evidence Brutally Obtained.

*People v. Matteson* (1964) 61 C.2d 466, 39 C.R. 1, 393 P.2d 161, makes it clear that the *Rochin* rule (supra, §413) rests on its own due process foundation, and is not limited by the scope of the self-incrimination privilege. Defendant, having presented missing corporation checks with his indorsements, was arrested for forgery. Officer R interrogated him, and testified that defendant admitted the wrongful indorsements, and that Officer E took defendant out of the room and returned with a handwriting exemplar. Defendant testified that he had refused to make the exemplar until beaten and threatened by Officer E. A cellmate corroborated the beating testimony, and Officer E was not available at the trial. *Held*, conviction reversed for error in admitting the exemplar, which, under the uncontradicted evidence, was obtained by brutality. "It is irrelevant that a handwriting exemplar does not fall within the privilege against self-incrimination; the rule of the *Rochin* case is a rule of exclusion, and the fact that the evidence does not fall within other exclusionary rules does not save it." (61 C.2d 469.)

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##### 8. Evidence Obtained by Brutality.

##### d. Proper Procedures.

##### 1. General Rule: Reasonable Body Examination.

*2 Witkin Cal. Evid. Witnesses § 416*

[§ 416] General Rule: Reasonable Body Examination.

Where no brutal or shocking force is used on the person of the accused, there is no violation of due process under the *Rochin* rule (*supra*, §413 et seq.). This leaves the case within the general rule that body examination, or the taking of body fluids or substances for analysis, in a reasonable manner although by compulsion, does not violate the privilege against self-incrimination. (See 4 Cal. Western L. Rev. 355; 9 *Hastings L. J.* 227; 1957 A.S. 561, 568; *supra*, §385 and *infra*, §422 et seq.)

Thus, in *People v. Woods* (1956) 139 C.A.2d 515, 517, 293 P.2d 901, a narcotics suspect was taken to a physician and required, over his protest, to submit to removal of a rubber finger stall of powdered drugs from his rectum. This medically approved method of rectal examination, involving little if any pain, was regarded as similar to a blood test (*infra*, §422 et seq.). (To the same effect, see *People v. West* (1985) 170 C.A.3d 326, 334, 335, 216 C.R. 195, *infra*, §419.)

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##### d. Proper Procedures.

#### 2. Preventing Defendant From Swallowing Evidence.

2 Witkin Cal. Evid. Witnesses § 417

[§ 417] Preventing Defendant From Swallowing Evidence.

The most common situations are those in which the narcotics suspect attempts to conceal the drug in his or her mouth. Forcing the suspect (by choking) to spit it out violates the *Rochin* rule (supra, §413), but successfully inducing or ordering the suspect to do so does not. (*People v. Smith* (1958) 50 C.2d 149, 150, 323 P.2d 435; *People v. Zamora* (1958) 163 C.A.2d 400, 401, 329 P.2d 531; see 64 A.L.R.5th 741 [discussing state cases considering issue].)

*People v. Sanchez* (1961) 189 C.A.2d 720, 726, 11 C.R. 407, goes further, and finds no fault with physical prevention where there is no struggle or brutal force. The officer placed his hand on defendant's throat to keep him from swallowing, ordered him to spit out the narcotic, and defendant did. The court, accepting the trial judge's finding that there was no choking, held that the *Rochin* rule was not violated. (See also, holding that no brutality was shown, *People v. Dickenson* (1962) 210 C.A.2d 127, 137, 26 C.R. 601; *People v. Tahtinen* (1962) 210 C.A.2d 755, 759, 26 C.R. 864; *People v. Cisneras* (1963) 214 C.A.2d 62, 66, 29 C.R. 146; *People v. Mora* (1965) 238 C.A.2d 1, 3, 47 C.R. 338.)

In *People v. Lara* (1980) 108 C.A.3d 237, 166 C.R. 475, defendant repeatedly refused to open his mouth. The officer proceeded to hold defendant in a manner that rendered swallowing difficult without interfering with breathing, and also forced his finger into defendant's mouth with the warning, "if you bite my finger, I'm going to bust your head open." The officer was then able to capture the balloon with his finger. *Held*, the evidence was admissible. There was no excessive force, and the warning "did not require suppression of the evidence which the officers had a legal right and duty to recover, and which defendant neither had the right to possess nor to destroy." (108 C.A.3d 242.)

In *People v. Cappellia* (1989) 208 C.A.3d 1331, 256 C.R. 695, two police officers grabbed defendant by the neck to keep him from swallowing three bindles of heroin that he had been seen putting in his mouth. The three accidentally tumbled to the ground, and defendant, who fell face first, began bleeding from the nose and the mouth. After a violent struggle lasting nearly 2 minutes, during which defendant refused to spit out the bindles and bit an officer who attempted to remove them from his mouth, defendant was handcuffed and complied with a request that he open his mouth. An officer then removed two bindles that he found there. The trial judge denied defendant's motion to suppress, finding that there "was no carotid hold" and the police did not use excessive force in conducting the search. Defendant was convicted of offering to sell heroin. On appeal defendant contended that, although the trial judge found that the police did not choke him, preventing his Adam's apple from moving up and down was dangerous and was akin to the choke hold condemned in *People v. Sanders* (1969) 268 C.A.2d 802, 74 C.R. 350, hence was excessive force. *Held*, conviction affirmed.

(a) While *People v. Dickenson*, *supra*, found it constitutionally permissible to prevent the destruction of evidence by holding a defendant's Adam's apple to prevent swallowing, *People v. Trevino* (1977) 72 C.A.3d 686, 140 C.R. 243, hinted that it may be constitutionally unreasonable for the police to put their hands on a defendant's throat at all. (208 C.A.3d 1337.)

(b) Although courts often review police conduct under the "shock the conscience" standard of *Rochin*, modern United States Supreme Court decisions are grounded on whether the search was "reasonable" under the circumstances. "In determining if the conduct was reasonable, we must consider (1) whether there was probable cause to conduct the search, (2) whether the procedure used 'may threaten the safety or health of the person,' and (3) whether the search would damage the individual's sense of 'personal privacy and bodily integrity.' " (208 C.A.3d 1338.)

(c) Seeing defendant placing the narcotics in his mouth provided probable cause, and a search of the mouth is, like a blood test, a routine part of ordinary life that does not damage a person's sense of personal privacy and security. (208 C.A.3d 1338.)

(d) The procedure used by the police did not threaten defendant's health or safety. "Although defendant suffered a bloody nose during the incident, that fact is not dispositive since it is uncontroverted the injury was an accident which came about largely as a result of defendant's efforts to elude arrest and destroy the evidence. What is important here is that the trial court specifically found the police did not choke defendant. The court also found that the police, in placing their hands around defendant's throat, neither impaired defendant's breathing nor caused him to gasp, choke, or cry out in pain. We agree that the 'application of force to a person's throat is a dangerous and sensitive activity' and that it 'is the type of force that, more than any other, is likely to result in violent resistance' ... , but the application of such force is not, as *Trevino* suggests, per se unreasonable, excessive, or a threat to a defendant's health or safety. It may be difficult for the officer in the field to discern whether too much force is being used in a particular case, but 'it makes little sense to say that the minimal pressure necessary to prevent swallowing is excessive, particularly when it is considered that if the drugs are swallowed the defendant may be harmed by them and may have to submit to an even more disagreeable procedure for his own protection or for retrieval of the evidence.' " (208 C.A.3d 1338.)

(e) Permitting the police to use minimal force around the neck to prevent a defendant from destroying evidence by swallowing is in accord with federal authorities, authorities from other jurisdictions, and is consistent with Proposition 8 (see 3 Cal. Evidence (4th), *Presentation at Trial*, §303 et seq.). (208 C.A.3d 1339.)

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#### 3. Procedure Used To Safeguard Defendant's Health.

*2 Witkin Cal. Evid. Witnesses § 418*

[§ 418] Procedure Used To Safeguard Defendant's Health.

In *People v. Jones* (1971) 20 C.A.3d 201, 97 C.R. 492, a police officer saw defendant swallow a number of red capsules, believed to be sodium secobarbital, immediately after being arrested. Although defendant had not appeared intoxicated at the time of his arrest, he soon developed noticeable symptoms of intoxication, e.g., shallow breathing and difficulty with balance. The officer took defendant to a medical center for examination by a doctor to determine whether he had taken a dangerous overdose of drugs. At the center, without any suggestion or request by the officer, a doctor who was informed of the circumstances decided that defendant's stomach should be pumped. Defendant, handcuffed and strapped to a table, did not object. The fluid taken from the stomach was later shown to contain a significant percentage of barbituric acid derivatives. *Held*, the procedure was proper.

(a) Even though defendant's consent was not required, the doctor regarded his apparent cooperation as an indication of consent. "It is most reasonable to assume that appellant did not wish to commit suicide and that his cooperation was motivated by his desire to live." (20 C.A.3d 209.)

(b) There was substantial evidence that the medical procedure followed was necessary to save defendant's life, or that the doctor reasonably so believed. (20 C.A.3d 210.)

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##### 4. Search of Prison Inmate.

2 Witkin Cal. Evid. Witnesses § 419

[§ 419] Search of Prison Inmate.

In *People v. West* (1985) 170 C.A.3d 326, 216 C.R. 195, officers received information that marijuana was to be brought into the county honor farm. The medical staff conducted a body and cavity search of over 40 inmates returning from work furlough, and Dr. S felt a foreign object in defendant's rectum. Dr. S gave defendant the opportunity to expel it, but defendant refused, and Dr. W, using his fingers and a vaginal speculum, extracted a red balloon containing marijuana cigarettes. *Held*, conviction affirmed; the search was proper.

(a) Body cavity searches are a severe intrusion of a person's right to privacy, but internal security is a compelling governmental interest justifying restrictions on prison inmates' privacy. The United States Supreme Court, in *Bell v. Wolfish* (1979) 441 U.S. 520, 99 S.Ct. 1861, 1884, 60 L.Ed.2d 447, 482, held that such a search of a prisoner, properly conducted, was reasonable. (170 C.A.3d 332.)

(b) Applying the factors of reasonableness set forth in *Bell*, the search here was justifiable. "The actual search took place in a trailer instead of a hospital or a prison clinic; however, the search was performed by a licensed physician using acceptable medical procedures and methods. The rectal search, from evidence of the procedure used, was not unduly harsh or oppressive, nor particularly prolonged." (170 C.A.3d 332.)

(c) In *Hudson v. Palmer* (1984) 468 U.S. 517, 104 S.Ct. 3194, 3199, 82 L.Ed.2d 393, 400, the Court recognized the necessity of random searches in penal institutions. (170 C.A.3d 333.) Here, the inmates of the honor farm are away from the facility and unsupervised for a period of time every day, and whether the information concerns the bringing in of marijuana or a weapon, security risks exist. (170 C.A.3d 333.) "For these reasons, a body cavity search of minimum security prisoners can be justified. In the prison context, the government must show that a legitimate penological need necessitates the search, and that it cannot be satisfied by a more narrow means. ... In light of the information that was obtained, a different type of search not only would have been useless, but would not even have supplied the level of probable cause appellant is urging as necessary to conduct the search." (170 C.A.3d 334.)

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See *People v. Collins* (2004) 115 C.A.4th 137, 153, 155, 8 C.R.3d 731 [body cavity search of prison inmate was justified where prison officials received two notes indicating inmate was selling drugs in prison and one of them stated he had drugs on his person; following *People v. West* (1985) 170 C.A.3d 326, 216 C.R. 195, text, p. 721].



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## 8. Evidence Obtained by Brutality.

## e. Distinction: Surgery To Remove Physical Evidence.

## 1. Operation Performed on Victim.

2 Witkin Cal. Evid. Witnesses § 420

[§ 420] Operation Performed on Victim.

In *People v. Browning* (1980) 108 C.A.3d 117, 166 C.R. 293, defendant was charged with murder and assault. He maintained that he had shot Killen, the assault victim, in self-defense with a .32 caliber pistol, and that Killen had accidentally killed the murder victim with a .22 caliber pistol. To establish that defense, defendant moved that Killen be required to undergo surgery to remove bullets from his body for ballistics examination. *Held*, the motion was properly denied.

(a) The case law has established the rule that an unreasonable body examination of the *defendant* is a violation of *due process*. (108 C.A.3d 122, citing the text.) "[S]imple considerations of common sense and fair play" call for protection of a witness' or victim's *Fourth Amendment* (unreasonable search) rights. (108 C.A.3d 122.) The decisions have usually ignored these rights of the victim: "[T]he practice has developed of ordering such minor unpleasanties as blood tests and vaginal examinations from victims of crime without any particular note having been made of the rights of these people to protest such bodily intrusions." (108 C.A.3d 123.) The proper view is that witnesses should have, "and we hold they do have," the same Fourth Amendment protection against governmental intrusion into their bodies that criminal defendants have. (108 C.A.3d 124.)

(b) This is not a case of prosecution suppression of evidence (see 3 Cal. Evidence (4th), *Presentation at Trial*, §121 et seq.); the bullets are in the possession of Killen, and the district attorney also wants them. Hence, in balancing the victim's Fourth Amendment protection and the defendant's right to a fair trial, the proper solution is not to dismiss the serious criminal charge but to permit the defendant to comment on the witness-victim's refusal to cooperate in the production of the evidence. (108 C.A.3d 125, 126.) (See 41 A.L.R.4th 60 [admissibility in criminal case of physical evidence obtained without consent by surgical removal from person's body].)

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## e. Distinction: Surgery To Remove Physical Evidence.

## 2. Operation Performed on Accused.

2 Witkin Cal. Evid. Witnesses § 421

[§ 421] Operation Performed on Accused.

In *Winston v. Lee* (1985) 470 U.S. 753, 105 S.Ct. 1611, 84 L.Ed.2d 662, defendant was suspected of attempting to commit armed robbery. He was suffering from a gunshot wound in his left chest area, and told the police that he had been shot by two persons attempting to rob him. The actual victim of a robbery committed that same night identified defendant as "the man that shot me." The prosecution moved for an order compelling defendant to undergo surgery to remove the bullet, alleging that the bullet would provide evidence of defendant's guilt or innocence. The trial judge granted the motion, but the federal district court granted an injunction, and the Court of Appeals affirmed. *Held*, affirmed; the search would be unreasonable under the Fourth Amendment.

(a) *Schmerber v. California* (1966) 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908, *infra*, §423, provides the appropriate framework of analysis of such a case: the reasonableness of surgical intrusions beneath the skin calls for weighing the individual's interests in privacy and security against society's interest in conducting the procedure. (105 S.Ct. 1616, 84 L.Ed.2d 669.) Significant factors are (1) the extent to which the procedure may threaten the safety or health of the person; (2) the extent of intrusion of his or her interests in personal privacy and bodily integrity; and (3) the community's interest in fairly and accurately determining guilt or innocence. (105 S.Ct. 1617, 1618, 84 L.Ed.2d 669, 670.)

(b) There was probable cause for the search and defendant had adequate procedural protections, but the controlling issues are (1) the extent of the intrusion, and (2) the state's need for the evidence. There were some risks in the procedure, and the state had other substantial evidence that defendant was the person who accosted the victim on the night of the robbery. (105 S.Ct. 1618, 1619, 84 L.Ed.2d 670, 671.) Thus, the search was unreasonable: "The medical risks of the operation, though apparently not extremely severe, are a subject of considerable dispute; the very uncertainty militates against finding the operation to be 'reasonable.' In addition, the intrusion on respondent's privacy interests entailed by the operation can only be characterized as severe. On the other hand, although the bullet may turn out to be useful to the Commonwealth in prosecuting respondent, the Commonwealth has failed to demonstrate a compelling need for it." (105 S.Ct. 1620, 84 L.Ed.2d 672.) (See 41 A.L.R.4th 60.)

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## 9. Tests for Intoxication: In General.

## a. Blood Test.

## 1. Early Decisions.

2 *Witkin Cal. Evid. Witnesses* § 422

[§ 422] Early Decisions.

In *Breithaupt v. Abram* (1957) 352 U.S. 432, 77 S.Ct. 408, 1 L.Ed.2d 448, a car driven by petitioner struck another car, killing three persons and injuring petitioner. While he was unconscious in a hospital, a blood sample was taken, which showed intoxication. This evidence was admitted at his trial for involuntary manslaughter, and he was convicted. *Held*, there was no violation of due process. The Court stressed the urgent social necessity of curbing the "increasing slaughter on our highways," and declared that the "slight" invasion of personal immunity by a blood test, employed as a matter of course by millions of persons, was justified by its deterrent effect on drunken driving. (77 S.Ct. 412, 1 L.Ed.2d 453.) *Rochin v. California* (1952) 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183, *supra*, §413, was distinguished, and the test restated as follows:

"Basically the distinction rests on the fact that there is nothing 'brutal' or 'offensive' in the taking of a sample of blood when done, as in this case, under the protective eye of a physician. To be sure, the driver here was unconscious when the blood was taken, but the absence of conscious consent, without more, does not necessarily render the taking a violation of a constitutional right; and certainly the test as administered here would not be considered offensive by even the most delicate. Furthermore, due process is not measured by the yardstick of personal reaction or the sphygmogram of the most sensitive person, but by that whole community sense of 'decency and fairness' that has been woven by common experience into the fabric of acceptable conduct. It is on this bedrock that this Court has established the concept of due process." (77 S.Ct. 410, 1 L.Ed.2d 451.) But the court added: "This is not to say that the indiscriminate taking of blood under different conditions, or by those not competent to do so may not amount to such 'brutality' as would come under the *Rochin* rule." (77 S.Ct. 411, 1 L.Ed.2d 452.) (See 71 Harv. L. Rev. 161.)

The same result was reached in California in *People v. Haeussler* (1953) 41 C.2d 252, 257, 260 P.2d 8 (decided before *Breithaupt*), and *People v. Duroncelay* (1957) 48 C.2d 766, 770, 312 P.2d 690 (decided after, and citing, *Breithaupt*). (See 41 Cal. L. Rev. 728; 18 Stanf. L. Rev. 243; 79 Harv. L. Rev. 677; 1952 A.S. 741; 1953 A.S. 759, 762; 1957 A.S. 569; 25 A.L.R.2d 1407 [requiring submission to physical examination or test as violation of constitutional rights].)

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##### 9. Tests for Intoxication: In General.

##### a. Blood Test.

#### 2. Schmerber Test: Medical Procedure Reasonably Performed.

2 Witkin Cal. Evid. Witnesses § 423

[§ 423] Schmerber Test: Medical Procedure Reasonably Performed.

In *Schmerber v. California* (1966) 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908, petitioner was involved in an automobile accident. A police officer who arrived shortly afterwards smelled liquor on petitioner's breath, observed the condition of his eyes, and at the hospital within 2 hours later noticed similar symptoms. He was arrested at the hospital. Then, at the officer's direction, a doctor extracted a blood sample, notwithstanding petitioner's refusal, on advice of counsel, to consent. The blood test, showing intoxication, was admitted at his municipal court trial for misdemeanor drunk driving, and he was convicted. *Held*, affirmed; none of the constitutional challenges was sound.

(a) *No violation of due process.* This was settled in *Breithaupt v. Abram* (1957) 352 U.S. 432, 77 S.Ct. 408, 1 L.Ed.2d 448 (supra, §422): the medically acceptable withdrawal of blood does not violate the *Rochin* rule, whether the accused is unconscious or conscious. (86 S.Ct. 1830, 16 L.Ed.2d 914.)

(b) *No violation of privilege against self-incrimination.* The foundation of the privilege is in the demand that the Government produce evidence against the defendant by its own independent labors, but the privilege has never been given its fullest scope; its protection has been limited to evidence sought to be obtained from the mouth of the accused. (86 S.Ct. 1831, 16 L.Ed.2d 915.) The Court here added a qualification: "[W]e are not to be understood to agree with past applications in all instances." (86 S.Ct. 1832, 16 L.Ed.2d 916.)

(c) *No violation of right to counsel.* Because petitioner had no right to assert the Fifth Amendment privilege, he had no greater right by reason of his counsel's erroneous advice that he could assert it. (86 S.Ct. 1833, 16 L.Ed.2d 917.)

(d) *No unlawful search and seizure.* On this new point, the question was whether the intrusion was unjustified under the circumstances or was made in an improper manner. And the rule authorizing search as an incident to a lawful arrest has little application to search beyond the body's surface; there must be a clear indication that the desired evidence will be found. (86 S.Ct. 1835, 16 L.Ed.2d 919.) The test, however, was met here: (1) The officer could reasonably have believed that there was an emergency threatening destruction of evidence, for alcohol soon disappears from the blood. "Given these special facts," the attempt to secure evidence of blood-alcohol content was an appropriate incident to petitioner's arrest. (2) The test was of a proper type, and the method of performing it was reasonable; there might be a serious question, however, if it were performed by police at the station. (86 S.Ct. 1836, 16 L.Ed.2d 919.)

The court concluded that, on the facts of the present case, the minor intrusion under stringently limited conditions



did not violate petitioner's constitutional rights. (86 S.Ct. 1836, 16 L.Ed.2d 920.) (See 14 U.C.L.A. L. Rev. 680; 2 Cal. Western L. Rev. 1; 60 So. Cal. L. Rev. 1124; 25 Western State L. Rev. 43; *People v. Fite* (1968) 267 C.A.2d 685, 687, 73 C.R. 666 [administrative penalties under Veh.C. 13353 do not preclude taking of blood sample from unwilling driver]; *People v. Ritchie* (1982) 130 C.A.3d 455, 181 C.R. 773 [application of *Schmerber* to taking blood sample to test for drugs; because percentage of both drugs and alcohol in body begins to diminish shortly after consumption, exigent circumstances exist in each case for taking blood without consent]; *Carleton v. Superior Court* (1985) 170 C.A.3d 1182, 1187, 216 C.R. 890 [force used held not unreasonable; see dissent]; 72 A.L.R.3d 325 [blood sample from unconscious driver]; 14 A.L.R.4th 690 [admissibility of test results where blood taken despite defendant's objection or refusal to submit to test].) (On whether admission of *refusal* to take test violates privilege against self-incrimination, see *infra*, §427.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Sugarman* (2002) 96 C.A.4th 210, 214, 116 C.R.2d 689 [compulsory blood test did not violate driver's constitutional rights, where test of *Schmerber v. California* (1966) 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908, text, p. 725, was met: circumstances required prompt testing, officer had reasonable cause to believe driver was intoxicated, and test was performed in medically approved manner]; *People v. Esayian* (2003) 112 C.A.4th 1031, 1040, 5 C.R.3d 542 [in drunk driving prosecution, exclusion of results of blood-alcohol test was not required, even if blood was drawn by phlebotomist who was not qualified to do so under former version of Veh.C. 23158(a), where record established that blood was drawn in medically approved manner]; *People v. McHugh* (2004) 119 C.A.4th 202, 212, 14 C.R.3d 142 [following *Esayian*]; *People v. Mateljan* (2005) 129 C.A.4th 367, 377, 28 C.R.3d 506 [following *Esayian* and *McHugh* and, additionally, finding no equal protection violation]; *Ritschel v. Fountain Valley* (2006) 137 C.A.4th 107, 119, 40 C.R.3d 48 [police officer's mere failure to comply with state's implied consent law in drawing blood from person arrested for drunk driving does not equate with or amount to violation of arrestee's rights under federal Constitution].



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##### 9. Tests for Intoxication: In General.

##### a. Blood Test.

##### 3. Former Requirement of Lawful Arrest.

2 Witkin Cal. Evid. Witnesses § 424

[§ 424] Former Requirement of Lawful Arrest.

(1) *Statement of Rule: Hawkins Case.* In *People v. Superior Court (Hawkins)* (1972) 6 C.3d 757, 100 C.R. 281, 493 P.2d 1145, the California Supreme Court clarified conflicting Court of Appeal decisions by qualifying the rule of *Schmerber v. California* (1966) 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908, *supra*, §423, as follows:

(a) "*Schmerber's* approval of the compulsory seizure of blood is clearly grounded on the premise that it is incidental to a lawful arrest." (6 C.3d 761.)

(b) In enacting *Veh.C. 13353*, "the Legislature took pains to condition its use upon a lawful arrest for driving under the influence of intoxicating liquor and upon the reasonable belief of the peace officer that the arrestee was in fact so driving." (6 C.3d 765.)

(2) *Exceptions.* Two exceptions were carved out of the *Hawkins* rule:

(a) *Arrest impossible.* The lack of a formal arrest incidental to the compulsory taking of blood may be excused due to exigent circumstances, i.e., those that pose a substantial threat to life, health, or property. (*Carrington v. Superior Court* (1973) 31 C.A.3d 635, 638, 107 C.R. 546 [citing illustrations of acts used to preserve life or property]; see 6 Southwestern U. L. Rev. 640.)

(b) *Arrest made on other grounds.* In *People v. Bianco* (1975) 55 C.A.3d Supp. 8, 127 C.R. 92, defendant was placed under citizen's arrest for battery and was taken into police custody. After police noticed an alcoholic odor and found that defendant could not pass a field sobriety test, the officers learned from witnesses that defendant had been driving immediately before the alleged battery. Based on that condition, the officers supposedly further arrested him for driving while under the influence of an intoxicant and required him to take a blood-alcohol test under *Veh.C. 13353*. *Held*, the results of the test were admissible. The drunk driving arrest was for a misdemeanor not committed in the officer's presence and therefore could not have justified the test. But defendant was already validly in custody for battery, and there was no need for a second arrest. (55 C.A.3d Supp. 10.)

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##### a. Blood Test.

#### 4. Abrogation of Lawful Arrest Requirement.

2 Witkin Cal. Evid. Witnesses § 425

[§ 425] Abrogation of Lawful Arrest Requirement.

In *People v. Trotman* (1989) 214 C.A.3d 430, 262 C.R. 640, a blood sample was taken without a warrant from an apparently intoxicated, but conscious, driver without a prior formal arrest. *Held*, an arrest was unnecessary. Although the trial judge correctly ruled that the case fell within the exigent circumstances doctrine of *Carrington v. Superior Court* (1973) 31 C.A.3d 635, 107 C.R. 546, *supra*, §424, the Truth-in-Evidence provision of Proposition 8 (see 1 Cal. Evidence (4th), Introduction, §§8, 9) abrogated the rule of *People v. Superior Court (Hawkins)* (1972) 6 C.3d 757, 100 C.R. 281, 493 P.2d 1145, *supra*, §424, and made reliance on exigent circumstances unnecessary. The *Hawkins* rule is contrary to the principles articulated in *Schmerber v. California* (1966) 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908, *supra*, §423, and *Cupp v. Murphy* (1973) 412 U.S. 291, 93 S.Ct. 2000, 36 L.Ed.2d 900, "which make it clear that probable cause to arrest a defendant is the constitutional equivalent of an actual arrest for the limited purpose of determining alcohol content." (214 C.A.3d 438.) (See *People v. Deltoro* (1989) 214 C.A.3d 1417, 1422, 263 C.R. 305 [Trotman followed].)

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## 9. Tests for Intoxication: In General.

## b. Other Tests.

2 Witkin Cal. Evid. Witnesses § 426

[§ 426] Other Tests.

(1) *Breath Test*. Various devices, e.g., the breathalyzer, intoximeter, drunkometer, and intoxilyzer, measure an individual's alcoholic retention by analyzing his or her breath. (See 2 Cal. Evidence (4th), *Demonstrative, Experimental, and Scientific Evidence*, §865 et seq.) As with a blood test, but to a lesser degree, the arrested person is subjected to some physical or psychological inconvenience.

In *People v. Sudduth* (1966) 65 C.2d 543, 55 C.R. 393, 421 P.2d 401, defendant, stopped by officers, showed obvious signs of intoxication. After full warnings as to silence, the officer explained various intoxication tests on the scene, e.g., the physical test of walking a straight line. Defendant refused to take any. At the police station, after another explanation, he refused to take a breathalyzer test. At the trial, comment was made on his refusal. *Held*, conviction affirmed.

(a) A suspect has no constitutional right to refuse a test designed to produce *physical evidence*. And the physical and psychological disturbance to the individual in the breath test is apt to be significantly less than that involved in extracting a blood sample. "In a day when excessive loss of life and property is caused by inebriated drivers, an imperative need exists for a fair, efficient, and accurate system of detection, enforcement and, hence, prevention." (65 C.2d 546.)

(b) *The comment was permissible*, under *People v. Ellis* (1966) 65 C.2d 529, 55 C.R. 385, 421 P.2d 393, *supra*, §389. "A wrongful refusal to cooperate with law enforcement officers" does not qualify for the protection of the *Griffin* rule (*infra*, §433). "A refusal that might operate to suppress evidence of intoxication, which disappears rapidly with the passage of time ... , should not be encouraged as a device to escape prosecution." (65 C.2d 546.) (See 55 Cal. L. Rev. 1140.)

(2) *Urine Test*. The accused has no constitutional right to refuse to give a urine sample to determine either the alcoholic or drug content of his or her blood. (See *People v. Sarkissian* (1978) 81 C.A.3d 660, 663, 146 C.R. 508 [construing written consent requirement in *Health & Saf.C. 11552* that accused give written consent to being tested applies to tests for addiction, not mere ingestion].)

(3) *Field Sobriety Test*. A field sobriety test consists of various exercises to test coordination and balance (walking heel to toe on a straight line, standing on one foot, etc.) and is usually administered to the suspect at the scene of the incident, after detention but prior to arrest. (See *Whalen v. Municipal Court* (1969) 274 C.A.2d 809, 810, 79 C.R. 523;

*People v. Bennett* (1983) 139 C.A.3d 767, 769, 189 C.R. 77.)

Because such a test is designed to elicit physical rather than testimonial evidence, it does not violate the privilege against self-incrimination. (*Whalen v. Municipal Court, supra*, 274 C.A.2d 812 [following *Schmerber v. California* (1966) 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908, *supra*, §423].) And, because the test bears a reasonable relation to the state's interest in deterring drunk driving, it does not constitute an unreasonable search. (*People v. Bennett, supra*, 139 C.A.3d 771.) Also, as in the case of a chemical sobriety test, there is no violation of the Sixth Amendment in administering a field sobriety test in the absence of counsel. (*Whalen v. Municipal Court, supra*, 274 C.A.2d 812.)

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##### 10. Compulsory Driver's Test (Implied Consent Law).

2 Witkin Cal. Evid. Witnesses § 427

[§ 427] Compulsory Driver's Test (Implied Consent Law).

(1) *Nature of Statute.* The Implied Consent Law (*Veh.C.* 23612 et seq., formerly *Veh.C.* 23157 et seq.) provides that a person who drives a motor vehicle is deemed to have given consent to chemical testing of his or her blood, breath, or urine for the purpose of determining blood alcohol or drug content, if lawfully arrested for any offense allegedly committed in violation of *Veh.C.* 23140, 23152, or 23153. (*Veh.C.* 23612(a)(1); on statutory requirements generally, see 2 *Cal. Crim. Law* (3d), *Crimes Against Public Peace and Welfare*, §226 et seq.; on tests for intoxication, see 2 *Cal. Evidence* (4th), *Demonstrative, Experimental, and Scientific Evidence*, §48 et seq.; on drunk driving offense generally, see 2 *Cal. Crim. Law* (3d), *Crimes Against Public Peace and Welfare*, §205 et seq.)

(2) *Sanctions for Refusal To Take Test.* A person who wilfully refuses to submit to, or fails to complete, a chemical test under *Veh.C.* 23612 is subject to certain sanctions simply by virtue of that refusal or failure to complete. Those sanctions include a fine, mandatory imprisonment, and the suspension or revocation of the person's driver's license. (*Veh.C.* 13353(a); see 2 *Cal. Crim. Law* (3d), *Crimes Against Public Peace and Welfare*, §232 et seq.)

(3) *Validity of Statute.* In *South Dakota v. Neville* (1983) 459 U.S. 553, 103 S.Ct. 916, 74 L.Ed.2d 748, the court addressed a question left open in *Schmerber v. California* (1966) 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908, *supra*, §423: whether the admission of evidence of a refusal to take a chemical sobriety test violates the privilege against self-incrimination. *Held*, because no compulsion is involved, there is no violation of the privilege. Under *Schmerber*, the state can legitimately *compel* the suspect to take the test. "Given, then, that the *offer* of taking a blood-alcohol test is clearly legitimate, the action becomes no less legitimate when the State offers a second option of refusing the test, with the attendant penalties for making that choice. Nor is this a case where the State has subtly coerced respondent into choosing the option it had no right to compel, rather than offering a true choice. To the contrary, the State wants respondent to choose to take the test, for the inference of intoxication arising from a positive blood-alcohol test is far stronger than that arising from a refusal to take the test." (103 S.Ct. 923, 74 L.Ed.2d 759.) (See 1984 A.S. 351; 1985 A.S. 248; 26 A.L.R.4th 1112; 2 *Cal. Crim. Law* (3d), *Crimes Against Public Peace and Welfare*, §227.)

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## B. Privilege of Accused (Defendant in Criminal Case).

## 11. Waiver of Privilege by Testifying.

## a. In General.

2 Witkin Cal. Evid. Witnesses § 428

[§ 428] In General.

(1) *Statement of General Rule.* The defendant may waive the privilege by voluntarily taking the stand and testifying on his or her own behalf. If the defendant does, he or she may be *cross-examined* as to any matters about which he or she was examined in chief, and may be *impeached* by any of the methods, including proof of prior conviction of a felony. (See *People v. Gallagher* (1893) 100 C. 466, 475, 35 P. 80; *People v. Soeder* (1906) 150 C. 12, 20, 87 P. 1016; *People v. Porter* (1932) 123 C.A. 618, 621, 11 P.2d 894; *People v. Withers* (1946) 73 C.A.2d 58, 60, 165 P.2d 945; *People v. De Georgio* (1960) 185 C.A.2d 413, 421, 8 C.R. 295; *People v. Ing* (1967) 65 C.2d 603, 610, 55 C.R. 902, 422 P.2d 590, *infra*, §438; *People v. Kadison* (1966) 243 C.A.2d 162, 167, 52 C.R. 114; *People v. Doebke* (1969) 1 C.A.3d 931, 936, 81 C.R. 391 ["[W]hile a defendant who voluntarily takes the stand to testify is still protected by the Fifth Amendment privilege against self-incrimination, he must nevertheless answer all inquiries asked by the cross-examiner to refute or explain any reasonable or logical inference which may have arisen from his direct testimony"]; *People v. Thomas* (1974) 43 C.A.3d 862, 867, 118 C.R. 226 [restating general rule]; *People v. Thornton* (1974) 11 C.3d 738, 760, 114 C.R. 467, 523 P.2d 267; *People v. James* (1976) 56 C.A.3d 876, 888, 128 C.R. 733 [by taking stand, defendant waives privilege "but only to the extent that he may be cross-examined regarding any matter (1) to which he has testified *expressly* on direct examination, (2) to which he has testified *impliedly* on direct examination, and (3) that is relevant to impeach the defendant's credibility as a witness"]; *People v. Fernandez* (1990) 219 C.A.3d 1379, 1388, 269 C.R. 116 [despite objection of his counsel, defendant was entitled to waive the privilege to testify for his codefendant]; 1 McCormick 5th, §126; 8 Wigmore (McNaughton Rev.) §2276, p. 459; 14 *Stanf. L. Rev.* 811; 81 *Am.Jur.2d* (1992 ed.), *Witnesses* §152 et seq.) (For a criticism of the waiver theory, see 13 *Pacific L. J.* 407; on limitation of cross-examination to scope of direct, see 3 *Cal. Evidence* (4th), *Presentation at Trial*, §233; on disclosure of part of conversation or transaction as waiver for the whole, see 1 *Cal. Evidence* (4th), *Circumstantial Evidence*, §36; on impeachment, see 3 *Cal. Evidence* (4th), *Presentation at Trial*, §258 et seq.)

In the *Kadison* case, *supra*, defendant, charged with possession of marijuana, testified on direct examination that he was wholly unfamiliar with the nature of the cigarette handed to him by his codefendant. On cross-examination, he was asked whether he had smoked marijuana, and, after objection was overruled, said, "I stand on the Fifth Amendment." *Held*, his entire testimony was properly stricken.

The waiver rule was unsuccessfully challenged in *People v. De Georgio*, *supra*, a robbery and kidnaping case. Witnesses testified that defendant had been armed, and when defendant was on the stand he was asked about a prior felony conviction. His counsel contended that an affirmative answer would necessarily admit a violation of P.C. 12021

(possession of firearm by previously convicted felon). *Held*, the statutory rule permitting such impeachment applies despite the fact that it shows commission of another crime. "The defendant becomes just another witness when he takes the stand." (185 C.A.2d 421.) (On rule of exclusion of a prior conviction as unduly prejudicial, see 3 *Cal. Evidence* (4th), *Presentation at Trial*, §303 et seq.)

(2) *Waiver as to Statements Previously Made in Juvenile Court Proceeding*. The privilege against self-incrimination requires that a minor be provided with use immunity for making statements to a probation officer or for testifying at a juvenile court fitness hearing, but "waives the privilege against self-incrimination by testifying at trial inconsistently with statements made in the context of a juvenile court proceeding to the extent those statements are proper impeachment evidence." (*People v. Humiston* (1993) 20 C.A.4th 460, 476, 24 C.R.2d 515.)

(3) *Waiver of Objection to Psychiatric Testimony on Competence*. In *People v. Stanfill* (1986) 184 C.A.3d 577, 229 C.R. 215, defendant, who had been found competent to stand trial, testified that he had no recollection of the events that led to his arrest. In rebuttal, one of the psychiatrists who had examined defendant for the competency hearing was permitted to testify that in his opinion defendant had been aware of what he was doing. *Held*, the psychiatrist's testimony was properly admitted. Statements made by a defendant at a competency hearing are excluded to protect the defendant's privilege against self-incrimination. (See *supra*, §382.) However, by testifying, defendant waived the privilege with respect to his discussions with the psychiatrist regarding the incident. (184 C.A.3d 580.) (For criticism of *Stanfill*, see *People v. Harris* (1987) 192 C.A.3d 943, 949, 237 C.R. 747.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Statement of General Rule*. Cf. *People v. Kiney* (2007) 151 C.A.4th 807, 814, 60 C.R.3d 168 [defendant's statements made during closing argument in course of representing himself could be used against him in retrial; permitting use of statements did not force defendant to choose between conflicting constitutional rights, as he could exercise self-representation right without incriminating himself; distinguishing *Simmons v. United States* (1968) 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247, text, §431]; and see 81 *Am.Jur.2d* (2004 ed.), *Witnesses* §149 et seq.; 1 McCormick 6th, §129.(3) *Waiver of Objection to Psychiatric Testimony on Competence*. In *People v. Pokovich* (2006) 39 C.4th 1240, 48 C.R.3d 158, 141 P.3d 267, the court disapproved *People v. Stanfill* (1986) 184 C.A.3d 577, 229 C.R. 215, text, p. 731, holding that the privilege against self-incrimination prohibits the prosecution from using impeachment statements a defendant has made during a court-ordered mental competency examination. "Having considered and weighed the competing interests, we conclude that the impairment of the mental competency evaluation process if impeachment is permitted outweighs the speculative risk to the truth-seeking function of the criminal trial if impeachment is denied." (39 C.4th 1253.)

(4) *(New) Coerced Waiver*. In *People v. Cuccia* (2002) 97 C.A.4th 785, 118 C.R.2d 668, a prosecution for securities violations and attempted grand theft, defendant's sixth witness was called but could not be located. Defendant had not yet decided whether he would testify and had planned to make that decision after all of his witnesses had testified. However, the trial judge gave defendant a choice: he could testify out of order or rest his case. He chose to testify and was convicted. *Held*, reversed. By testifying, defendant waived his self-incrimination privilege, but, because of the judge's threat, the waiver was coerced. (97 C.A.4th 791.) This error would not, by itself, have been cause for reversal, but the trial judge committed further error in denying defendant's request to testify on surrebuttal, and the cumulative effect of these errors was to deny defendant a fair trial. (97 C.A.4th 795.)*West's Key Number Digest*, *Witnesses* k.305 et seq.





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## 11. Waiver of Privilege by Testifying.

## b. Exceptions.

## 1. Uninformed Waiver.

2 Witkin Cal. Evid. Witnesses § 429

[§ 429] Uninformed Waiver.

No waiver results from testifying in excusable ignorance of the privilege. This qualification of the waiver rule is applied in cases where the defendant undertakes his or her defense in pro. per., and the trial judge fails to advise the defendant of his or her constitutional right not to testify. (See *Killpatrick v. Superior Court* (1957) 153 C.A.2d 146, 149, 314 P.2d 164, supra, §365; *People v. Kramer* (1964) 227 C.A.2d 199, 201, 38 C.R. 487; *People v. Solomos* (1978) 83 C.A.3d 945, 953, 148 C.R. 248; *People v. Cervantes* (1978) 87 C.A.3d 281, 288, 150 C.R. 819; 79 A.L.R.2d 643 [court's duty to inform unrepresented accused of right not to testify]; but see *People v. Glaser* (1965) 238 C.A.2d 819, 830, 48 C.R. 427 [failure of judge to advise defendant held not ground for collateral attack where defendant had knowledge of criminal procedure and no prejudice was shown].)

In *People v. Barker* (1965) 232 C.A.2d 178, 42 C.R. 651, infra, §498, a case dealing with the witness privilege, the court added a dictum on the defendant's privilege: "Where the defendant in a criminal case is about to take the witness stand, it is the duty of the court to make certain that the defendant is fully advised of his privilege." (232 C.A.2d 182.)

The court in *People v. Thomas* (1974) 43 C.A.3d 862, 118 C.R. 226, disagreed. Defendant had the benefit of counsel before voluntarily testifying on his own behalf, and the trial judge asked only whether defendant had discussed with counsel the consequences of taking the stand. This was considered to have not only met, but exceeded, the trial court's obligation. (43 C.A.3d 868.) "We conclude that the *Barker* statement was not intended to be as far reaching as it may appear on its face." (43 C.A.3d 868, footnote 4.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Killpatrick v. Superior Court* (1957) 153 C.A.2d 146, 314 P.2d 164, text, p. 732, and *People v. Kramer* (1964) 227 C.A.2d 199, 38 C.R. 487, text, p. 732, were disapproved in *People v. Barnum* (2003) 29 C.4th 1210, 1223, 131 C.R.2d 499, 64 P.3d 788, 5 Cal. Crim. Law (3d), *Criminal Trial*, Supp., §259 [trial judge is not required to advise self-represented defendant of right to testify or of privilege against self-incrimination].



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b. Exceptions.

2. Testimony in Prior Proceeding.

2 *Witkin Cal. Evid. Witnesses* § 430

[§ 430] Testimony in Prior Proceeding.

A waiver is effective only in the proceeding in which the person testifies. Hence, the defendant does not waive the privilege at the trial by voluntarily testifying at the preliminary examination or before the grand jury. (See *People v. Lopez* (1980) 110 C.A.3d 1010, 1020, 168 C.R. 378, *infra*, §500, citing the text; 1 McCormick 5th, §126; 8 Wigmore (McNaughton Rev.) §2276, p. 470; 8 So. Cal. L. Rev. 51; 5 Hastings L. J. 263; 1953 A.S. 761; 36 A.L.R.2d 1403 [right to claim privilege at criminal trial after testifying to same matter before grand jury].)

The prior testimony, however, may be received as an *admission*. (*People v. Thourwald* (1920) 46 C.A. 261, 267, 189 P. 124.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 1 McCormick 6th, §129.



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##### 11. Waiver of Privilege by Testifying.

##### b. Exceptions.

##### 3. Testimony on Motion To Suppress.

2 Witkin Cal. Evid. Witnesses § 431

[§ 431] Testimony on Motion To Suppress.

In *Simmons v. United States* (1968) 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247, two men robbed a federally insured savings and loan association. On possible consent of Mrs. M to a search of her house, F.B.I. agents found a suitcase belonging to G, containing a gun holster and some coin cards and bill wrappers from the robbery. G made a pretrial motion to suppress, and to establish standing he claimed ownership of the suitcase. The motion was denied. At the trial, G denied ownership of the incriminating suitcase and contents. In rebuttal his testimony at the suppression hearing was admitted against him. *Held*, reversible error.

(a) Under *Jones v. United States* (1960) 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697, 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence*, §34, a defendant may have to testify to establish standing to suppress. The defendant's testimony is thus an integral part of the Fourth Amendment claim. The dilemma faced by defendants is most extreme in possessory crimes (e.g., possession of narcotics), and *Jones* eliminated "that Hobson's choice." The present case raises the new question whether defendants charged with nonpossessory crimes (e.g., robbery) are also entitled to be relieved from this dilemma. (88 S.Ct. 975, 19 L.Ed.2d 1257.)

(b) The answer is the same: G was obliged either to give up his Fourth Amendment claim or waive his Fifth Amendment privilege against self-incrimination; and it is intolerable that one constitutional right must be surrendered to assert another. "We therefore hold that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection." (88 S.Ct. 976, 19 L.Ed.2d 1259.) (See *People v. Drews* (1989) 208 C.A.3d 1317, 1325, 256 C.R. 846 [*Simmons* held applicable to testimony on suppression motion during preliminary hearing]; but see *People v. Clark* (1993) 5 C.4th 950, 1007, 22 C.R.2d 689, 857 P.2d 1099 [*Simmons* not applicable where defendant called defense psychiatrist to testify at suppression hearing but could have called other mental experts instead]; 82 Harv. L. Rev. 214.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### B. Privilege of Accused (Defendant in Criminal Case).

##### 12. No Comment or Inference.

##### a. Former Law Permitting Comment.

2 Witkin Cal. Evid. Witnesses § 432

[§ 432] Former Law Permitting Comment.

(1) *Law Prior to 1934*. Originally, California, like most states, did not allow comment on the exercise of the privilege by the defendant. (See 1 McCormick 5th, §126; 8 Wigmore (McNaughton Rev.) §2272; 4 Hastings L. J. 63.)

(2) *Constitutional Amendment of 1934*. In 1934, former Cal. Const., Art. I, §13 was amended to state that "in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury."

The policy of this provision was endorsed, and its constitutionality was upheld against repeated attacks, in a number of decisions. (See *People v. Albertson* (1944) 23 C.2d 550, 584, 145 P.2d 7 [concurring opinion]; *People v. Adamson* (1946) 27 C.2d 478, 490, 165 P.2d 3; *Adamson v. California* (1947) 332 U.S. 46, 67 S.Ct. 1672, 91 L.Ed. 1903; *People v. Richardson* (1946) 74 C.A.2d 528, 533, 169 P.2d 44; *People v. Greenberg* (1946) 73 C.A.2d 675, 677, 167 P.2d 214; *People v. Neely* (1958) 163 C.A.2d 289, 314, 329 P.2d 357; *People v. Modesto* (1965) 62 C.2d 436, 447, 42 C.R. 417, 398 P.2d 753; *People v. Curtis* (1965) 232 C.A.2d 859, 864, 43 C.R. 286; 34 Cal. L. Rev. 764; 9 So. Cal. L. Rev. 410; 1959 A.S. 641.)

But the United States Supreme Court took a different view (see *infra*, §433), and the provision was repealed in 1974.

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Law Prior to 1934*. See 1 McCormick 6th, §126.



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## 12. No Comment or Inference.

## b. Griffin Rule: Comment Prohibited.

2 Witkin Cal. Evid. Witnesses § 433

[§ 433] Griffin Rule: Comment Prohibited.

In *Griffin v. California* (1965) 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106, petitioner was convicted of murder, and a death sentence was imposed, in a trial in which he did not testify. (*People v. Griffin* (1963) 60 C.2d 182, 32 C.R. 24, 383 P.2d 432.) The jury was instructed in accordance with the constitutional provision (supra, §432) that it could take into consideration his failure to explain the evidence against him, and the prosecutor emphasized this failure in argument. Held, conviction reversed: under *Malloy v. Hogan* (1964) 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653, supra, §356, federal standards govern; and the Fifth Amendment, binding on the states by reason of the Fourteenth Amendment (supra, §356), "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." (85 S.Ct. 1233, 14 L.Ed.2d 110.) The brief opinion described such comment as a remnant of the inquisitorial system of criminal justice: "It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." (85 S.Ct. 1233, 14 L.Ed.2d 109.)

The dissenters observed that the Model Code, Uniform Rules of Evidence and weight of scholarly opinion supported the *California rule*. (85 S.Ct. 1237, 14 L.Ed.2d 114.) (See 79 Harv. L. Rev. 92, 159; 53 Cal. L. Rev. 940; 61 Cal. L. Rev. 1422 [inference from failure to produce witness]; 18 Hastings L. J. 198; 39 So. Cal. L. Rev. 120; 9 U.C. Davis L. Rev. 603 [application of *Griffin* rule].)

If the *Griffin* rule had been applied retroactively to permit collateral attack on convictions long final, it would have had a catastrophic effect, for the California comment and inference practice was common. But both the California Supreme Court and the United States Supreme Court, following the analysis in *Linkletter v. Walker* (1965) 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (on illegally obtained evidence; see 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence*, §32), held *Griffin* violations nonretroactive. (See *In re Gaines* (1965) 63 C.2d 234, 237, 45 C.R. 865, 404 P.2d 473 [pointing out that the error does not so pervade entire trial as to deny due process]; *Tehan v. United States* (1966) 382 U.S. 406, 86 S.Ct. 459, 467, 15 L.Ed.2d 453, 461 ["To require all of those States now to void the conviction of every person who did not testify at his trial would have an impact upon the administration of their criminal law so devastating as to need no elaboration"].)

The rule applies to the sanity phase of a trial as well as to the guilt phase. (*People v. Flores* (1976) 55 C.A.3d 118, 122, 127 C.R. 230.) The rule also applies in sentencing proceedings, after a defendant has pleaded guilty, for purposes of determining the severity of the defendant's punishment. (*Mitchell v. United States* (1999) 526 U.S. 314, 119 S.Ct. 1307, 1314, 143 L.Ed.2d 424, 437.) But it is inapplicable to proceedings before a prison disciplinary board, which involve the correctional process and are not criminal prosecutions. (See *Baxter v. Palmigiano* (1976) 425 U.S. 308, 96

*S.Ct. 1551, 1557, 47 L.Ed.2d 810, 820.)*

**SUPPLEMENT:** [This section is current through the latest supplement]

See 113 *Harv. L. Rev.* 244 [*Mitchell v. United States* (1999) 526 U.S. 314, 119 S.Ct. 1307, 143 L.Ed.2d 424, text, p. 735]; *People v. Wood* (2002) 103 C.A.4th 803, 809, 127 C.R.2d 132, 1 Cal. Evidence (4th), Hearsay, Supp., §106 [analogous rule regarding defendant's invocation of constitutional right to refuse warrantless entry]. *West's Key Number Digest*, Witnesses k.309



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## c. Application of Griffin Rule.

## 1. Prosecutor's Comments.

2 *Witkin Cal. Evid. Witnesses* § 434

## [§ 434] Prosecutor's Comments.

A number of cases have found a violation of the *Griffin* rule in prosecutors' comments that indirectly or inferentially call attention to the failure of the defendant to testify. (See *People v. Crawford* (1967) 253 C.A.2d 524, 534, 61 C.R. 472 [prosecutor, commenting on alibi defense, stressed point that at time defendant was taken into custody he had opportunity to give it and didn't; but error held not prejudicial]; *People v. Giovannianni* (1968) 260 C.A.2d 597, 605, 67 C.R. 303 ["of the several voices that we could hear in this case, one voice has been forever stilled"; and "there would be two people ... who could answer that, and one of them, of course, is dead"]; *People v. Mendoza* (1974) 37 C.A.3d 717, 726, 112 C.R. 565 [prosecutor made thinly veiled comment on defendant's failure to take stand in sex perversion case]; *People v. Jaspal* (1991) 234 C.A.3d 1446, 1453, 1455, 286 C.R. 337.)

In *People v. Northern* (1967) 256 C.A.2d 28, 30, 64 C.R. 15, the comment was: "Looking at this evidence which, incidentally, has not been refuted by the Defendant, there is no controverting evidence." The court held the comment direct and thus found it unnecessary to decide a point asserted by the defense: where the defendant is the only witness who could possibly contradict the prosecution's evidence, the mere statement that the prosecution's case is uncontradicted is an improper comment. (See *People v. Vargas* (1973) 9 C.3d 470, 474, 108 C.R. 15, 509 P.2d 959 [no "denial" from defense, according to prosecutor's argument; this was improper]; *People v. Medina* (1974) 41 C.A.3d 438, 457, 116 C.R. 133 [prosecutor argued that his case was "unrefuted"; this was improper]; 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §575; 14 A.L.R.3d 723 [comment or argument by court or counsel that prosecution evidence is uncontradicted as amounting to improper reference to accused's failure to testify].)

**SUPPLEMENT:** [This section is current through the latest supplement]

Cf. *People v. Harrison* (2005) 35 C.4th 208, 257, 25 C.R.3d 224, 106 P.3d 895 [in penalty phase of capital murder case, prosecutor's argument that defendant "should be on his knees apologizing" was not reference to defendant's failure to testify but rather assertion that he was proud of murders when he ought to be ashamed].



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## c. Application of Griffin Rule.

## 2. Jury Instructions.

2 Witkin Cal. Evid. Witnesses § 435

[§ 435] Jury Instructions.

Jury instructions may also amount to a violation of the *Griffin* rule, especially when combined with improper prosecution comments. (See *People v. Summerfield* (1968) 262 C.A.2d 626, 631, 69 C.R. 10 [former CALJIC instruction, since deleted, on defendant's failure to show that possession of stolen property was honestly acquired]; *People v. Mendoza* (1974) 37 C.A.3d 717, 726, 112 C.R. 565 [judge's instruction inadvertently compounded prosecutor's improper comment by implying that defendant's failure to testify could be considered as evidence to prove essential element of offense]; *People v. Tealer* (1975) 48 C.A.3d 598, 606, 122 C.R. 144, *infra*, §436 [trial judge improperly gave CALJIC (6th ed.), No. 2.62 (*infra*, §440) after defendant gave testimony limited only to his denial of having admitted crime to police; net effect of instruction and improper prosecution comment was that jury could infer guilt from silence].)

In *People v. Diaz* (1989) 208 C.A.3d 338, 255 C.R. 91, defendant was convicted of burglary. At trial, defendant did not testify, and the primary evidence was a videotape of him selling a stolen stereo to an undercover police officer. After defense counsel argued that defendant's taped statements indicated that he was a fence or a middleman rather than the thief, the prosecutor made comments that included the following: "Now, if we are to believe this gentleman is only a fence, we need to say where is it? *Who testified that he was a fence? Who came in and said he was a fence? Who testified or what evidence do we have that says I'm a middleman? That I didn't steal this property and that someone else did.*" (208 C.A.3d 342.) After first giving CALJIC (6th ed.), No. 2.60 (*infra*, §439), the trial judge gave CALJIC (6th ed.), No. 2.61, but reversed its meaning by stating: "In deciding whether or not to testify, the Defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove beyond a reasonable doubt every essential element of the charge against him. *The lack of testimony on the Defendant's part will supply a failure of proof by the People so as to support a finding against him on any such essential element.*" Correctly read, the second sentence of the instruction would have begun, "No lack of testimony." (208 C.A.3d 342.)

In reversing the conviction, the court pointed out that the prosecutor's comments were not tempered by an admonishment, and, while these comments may not have directly suggested that the jury should draw adverse inferences from defendant's failure to testify, the misstated instruction did so. The evidence against defendant was not overwhelming, and his taped statements did not preclude his being a fence or middleman; hence, the *Griffin* errors were not harmless beyond a reasonable doubt. (208 C.A.3d 343.)

One justice dissented, and, on denial of a petition for rehearing, argued that *United States v. Robinson* (1988) 485



*U.S. 25, 108 S.Ct. 864, 99 L.Ed.2d 23* (infra, §441) required a finding that there was no *Griffin error*. (208 C.A.3d 351.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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##### 12. No Comment or Inference.

##### c. Application of Griffin Rule.

#### 3. Violation Following Defendant's Limited Testimony.

2 Witkin Cal. Evid. Witnesses § 436

[§ 436] Violation Following Defendant's Limited Testimony.

*Griffin* error may result from prosecution comments or trial court instructions that a defendant who took the stand for limited testimony failed to deny the facts of the case when the defendant had the opportunity to do so. Thus, in *People v. Tealer* (1975) 48 C.A.3d 598, 122 C.R. 144, defendant testified only to a denial that he had made an incriminating statement to a police officer. Cross-examination was limited to a single question on whether defendant had said anything to the officer. But in argument, the prosecutor commented that defendant had not explained away certain facts and had not denied the facts when he took the stand. The trial judge underscored the prosecutor's position by giving the CALJIC (6th ed.), No. 2.62 instruction (infra, §440) without stating what matters were within the scope of proper cross-examination which defendant had not explained or denied. *Held*, the argument and instructions constituted prejudicial error. A testifying defendant gives up self-incrimination rights only as to matters within the scope of relevant cross-examination. (48 C.A.3d 604; see 3 Cal. Evidence (4th), Presentation at Trial, §233.) Here, defendant's limited testimony was no more of an implied denial of the commission of the crime charged than was his previous not guilty plea. Accordingly, because he did not place in issue the *truth* of the alleged admission, the privilege against self-incrimination continued to prevent the prosecution from questioning him upon the case generally and in effect making him its own witness. (48 C.A.3d 606.)

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##### c. Application of Griffin Rule.

##### 4. Comment by Codefendant's Counsel.

2 *Witkin Cal. Evid. Witnesses* § 437

[§ 437] Comment by Codefendant's Counsel.

In *People v. Haldeen* (1968) 267 C.A.2d 478, 73 C.R. 102, H and D were jointly tried for possession of marijuana found in a car owned and driven by H in which D was a passenger. Defendants moved for separate trials on the ground that one might not testify and the other might comment on it. The motions were denied. D testified, denying possession. H did not testify. Counsel for D, in final argument, commented on H's failure and insinuated that this supported the conclusion that H rather than D was in possession. H's counsel moved for a mistrial; the judge instead admonished the jurors not to draw an inference. H was convicted and D was acquitted. The judge granted H's motion for new trial and the prosecution appealed. *Held*, affirmed; it is the fact of comment rather than its source which violates the privilege. (267 C.A.2d 481.) Answering the prosecution's contention that counsel for defendants deliberately adopted this technique to obtain separate trials, the court declared that the judge can warn counsel in advance of trial and deal with infractions as misconduct. (267 C.A.2d 483.) (See 1 A.L.R.3d 989 [comment on accused's failure to testify by counsel for codefendant]; 1963 A.S. 308; 1964 A.S. 379.)

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##### 12. No Comment or Inference.

##### c. Application of Griffin Rule.

##### 5. Where Privilege Waived.

2 Witkin Cal. Evid. Witnesses § 438

[§ 438] Where Privilege Waived.

(1) *In General*. If the defendant waives the privilege by taking the stand, (a) the defendant may be cross-examined within the scope of his or her direct examination (see 3 Cal. Evidence (4th), *Presentation at Trial*, §§233, 236), and (b) the prosecution may comment, and the judge may instruct, on failure to deny or explain matters which could have been proved on cross-examination. (*People v. Ing* (1967) 65 C.2d 603, 55 C.R. 902, 422 P.2d 590.)

In the *Ing* case, defendant doctor was charged with rape of the prosecutrix by administering an intoxicating drug. He testified on his own behalf, but only as to the particular rape charged. The prosecution then introduced evidence of other similar rapes to show a common scheme or plan. In argument, the prosecution commented on his failure to deny or explain the other offenses, and the judge instructed the jurors on the permissible inferences therefrom. *Held*, under both federal and California authorities, this was not a violation of the constitutional privilege. "Since in the present case defendant on direct examination made a general denial of the offenses charged, cross-examination concerning the other offenses would have been proper." (65 C.2d 611.)

The *Ing* rule was applied to unusual facts in *People v. Perez* (1967) 65 C.2d 615, 55 C.R. 909, 422 P.2d 597. Defendant, charged with four counts of robbery, testified on Counts 1 and 2 but not on 3 and 4. The prosecution commented, and the trial judge instructed, on the adverse inference. *Held*, there was no violation of the *Griffin* rule. Defendant, by testifying, waived the privilege to the extent of permissible cross-examination; and cross-examination as to the robberies in Counts 3 and 4 would have been proper because they disclosed a common plan and would have been relevant to the charges in Counts 1 and 2. The distinguishable fact that these were not collateral offenses but were joined with the other charges was not significant; a contrary rule would mean that a defendant could withdraw from cross-examination before the reliability of his or her testimony had been explored. (65 C.2d 621.) (See *People v. Thornton* (1974) 11 C.3d 738, 760, 114 C.R. 467, 523 P.2d 267 [comment and adverse inference were proper following unsuccessful claim of privilege on cross-examination]; *People v. Saddler* (1979) 24 C.3d 671, 678, 679, 156 C.R. 871, 597 P.2d 130 [approving CALJIC (6th ed.), No. 2.62, *infra*, §440].)

(2) *Waiver by Tender of Mental Condition*. Where a defendant tenders his or her mental condition as an issue in the penalty phase of a murder trial, the defendant waives his or her constitutional rights to the extent necessary to permit proper psychiatric examination of that condition. Therefore, if the defendant refuses to answer questions during the examination, testimony by the examining psychiatrist as to that refusal is not improper. (*People v. Carpenter* (1997) 15 C.4th 312, 412, 63 C.R.2d 1, 935 P.2d 708.)

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##### 12. No Comment or Inference.

##### d. Instructions on Griffin Rule.

##### 1. Defendant Not Testifying.

2 Witkin Cal. Evid. Witnesses § 439

[§ 439] Defendant Not Testifying.

CALJIC (6th ed.), No. 2.60 covers the situation where the defendant does not testify; the defendant is entitled to an instruction that no inference may be drawn from that fact. (See *Carter v. Kentucky* (1981) 450 U.S. 288, 101 S.Ct. 1112, 1119, 67 L.Ed.2d 241, 251; *James v. Kentucky* (1984) 466 U.S. 341, 104 S.Ct. 1830, 1835, 80 L.Ed.2d 346, 351 [request for "admonition" equivalent to request for instruction]; *People v. Evans* (1998) 62 C.A.4th 186, 196, 72 C.R.2d 543 [violation of *Carter* by failing to instruct, at defendant's request, that no inference may be drawn from exercise of right not to testify, is subject to harmless error analysis].) A problem arises, however, where the defendant does not request it.

(1) The judge is not required to give the instruction on his or her own motion. (See *People v. Gardner* (1969) 71 C.2d 843, 854, 79 C.R. 743, 457 P.2d 575; *People v. Du Bose* (1970) 10 C.A.3d 544, 547, 89 C.R. 134.)

(2) If the judge proposes to give the instruction on his or her own motion or on request of the prosecution, and the defendant objects, it is error to give it. (See *People v. Molano* (1967) 253 C.A.2d 841, 847, 61 C.R. 821; 18 A.L.R.3d 1335, 1338 [cases holding that instruction was improper].) (But see *Lakeside v. Oregon* (1978) 435 U.S. 333, 98 S.Ct. 1091, 1095, 55 L.Ed.2d 319, 326 [giving of instruction over objection is not violation of constitutional privilege against self-incrimination].)

(3) If the judge gives the instruction on his or her own motion and the defendant fails to object, may the defendant nevertheless urge error on appeal? The decisions do not furnish a clear rule. (See *People v. Horrigan* (1967) 253 C.A.2d 519, 522, 61 C.R. 403 [dictum that it would be error]; *People v. Mason* (1968) 259 C.A.2d 30, 40, 66 C.R. 601 [dictum that it is error when defendant "impliedly" objects]; *People v. Cooper* (1970) 10 C.A.3d 96, 104, 88 C.R. 919 [review of decisions; if error, harmless]; 18 A.L.R.3d 1335, 1339 [same].)

In *People v. Mendoza* (1987) 192 C.A.3d 667, 238 C.R. 1, the court, after reviewing prior cases including *People v. Young* (1978) 85 C.A.3d 594, 149 C.R. 524, and *Lakeside v. Oregon*, *supra*, found no error:

"In our opinion, *Young* and *Lakeside* are the better reasoned decisions on this question. While it must be acknowledged that the instructions here in issue *may* have the effect of highlighting the very fact they are intended to minimize--a theoretical problem with many salutary judicial admonitions required to be given--we simply are unpersuaded by appellant's argument. ... We find it difficult to believe that these instructions will so emphasize the defendant's silence that they will cause the jury to draw the precise inference they have been instructed to avoid." (192

*C.A.3d* 678.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See CALCRIM, No. 355 [Defendant's Right Not to Testify]; *People v. Anderson* (2007) 152 *C.A.4th* 919, 941, 61 *C.R.3d* 903 [CALCRIM, No. 355 does not mislead jury regarding right not to testify].



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##### d. Instructions on Griffin Rule.

##### 2. Defendant Testifying.

2 Witkin Cal. Evid. Witnesses § 440

[§ 440] Defendant Testifying.

CALJIC (6th ed.), No. 2.62 covers the situation where the defendant testifies; the jury may be instructed on the permissible inference unfavorable to the defendant for failure to explain or deny incriminating evidence that the defendant could reasonably be expected to deny or explain. (See *People v. Saddler* (1979) 24 C.3d 671, 678, 156 C.R. 871, 597 P.2d 130.)

In *People v. Haynes* (1983) 148 C.A.3d 1117, 196 C.R. 450, defendant, charged with rape and other offenses on a 17-year-old schoolgirl, testified that she had consented to the acts, and in other respects, gave a version of the event in contradiction to hers. The trial judge, without objection, gave CALJIC (6th ed.), No. 2.62. On appeal, defendant contended that the giving of the instruction was prejudicial error because there was no prosecution evidence that he had failed to explain or deny. *Held*, conviction affirmed.

(a) In view of criticism of this instruction from commentators, it is unwise to give it without prior inquiry of the parties; and it should not be requested by either side unless there is a specific and significant defense omission that the prosecution wishes to stress or the defense wishes to mitigate. (148 C.A.3d 1119, 1120.)

(b) The prosecution's practice of routinely tendering the instruction permits the defense, by silently acquiescing, to generate a claim of error on appeal; and it forces the appellate court to search the record for instances of failure to deny. (148 C.A.3d 1120.) However, in the present case, the victim's report to the police and her testimony were unequivocal and not inherently improbable, and any theoretical error was harmless. (148 C.A.3d 1122.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Lamer* (2003) 110 C.A.4th 1463, 1470, 2 C.R.3d 875 [in prosecution for lewd and lascivious acts on child under age of 14, giving of CALJIC, No. 2.62 was error, although harmless; because defendant was never questioned on cross-examination about victim's motivation in making allegations, and prosecution presented no evidence regarding victim's motivation that could reasonably be said to be within defendant's knowledge, there could not have been any failure on his part to provide explanation or denial]; CALCRIM, No. 361 [Failure to Explain or Deny Adverse Testimony].





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##### 12. No Comment or Inference.

##### e. Comments Not Violative of Rule.

2 Witkin Cal. Evid. Witnesses § 441

[§ 441] Comments Not Violative of Rule.

Several far-fetched attempts to extend the *Griffin* rule have been rejected.

(1) The *Griffin* rule does not prohibit the prosecution from commenting on the state of the evidence or the defense's failure to introduce material evidence or call logical witnesses. (See *People v. Bradford* (1997) 15 C.4th 1229, 1339, 65 C.R.2d 145, 939 P.2d 259 [no error in murder prosecution; neither prosecutor's general comments as to lack of defense evidence or testimony, nor more particularized comments regarding stained mat found in defendant's vehicle, coroner's opinion, or absence of alibi for particular time period would have required defendant to take stand]; *People v. Grant* (1968) 268 C.A.2d 470, 475, 74 C.R. 111; *People v. Burns* (1969) 270 C.A.2d 238, 247, 75 C.R. 688; *People v. Hardy* (1969) 271 C.A.2d 322, 330, 76 C.R. 557 [reference to failure to produce alibi witness in rebuttal]; *People v. Chandler* (1971) 17 C.A.3d 798, 805, 95 C.R. 146 [rhetorical questions and comments suggesting that if defendant had not been at robbery scene he could have produced alibi evidence]; *People v. Font* (1995) 35 C.A.4th 50, 57, 41 C.R.2d 281 [where defendant's out-of-court statement was admitted as state of mind evidence for codefendants, prosecutor's comment, "We have no evidence with regards to any state of mind of any other defendant," was not improper].)

(2) There is no blanket rule that every direct reference by a prosecutor to the defendant's failure to testify violates *Griffin*. In *United States v. Robinson* (1988) 485 U.S. 25, 108 S.Ct. 864, 99 L.Ed.2d 23, defendant, on trial for mail fraud involving arson-related insurance claims, did not testify. In his closing argument, defense counsel charged that the Government had breached its duty to be "fair" by denying defendant the opportunity to explain his actions. The trial judge allowed the prosecutor to say, in his rebuttal summation, that defendant "could have taken the stand and explained it to you, anything he wanted to." The Court of Appeals concluded that this statement violated the *Griffin* rule. *Held*, reversed:

"The Court of Appeals and respondent apparently take the view that any 'direct' reference by the prosecutor to the failure of the defendant to testify violates the Fifth Amendment as construed in *Griffin*. We decline to give *Griffin* such a broad reading, because we think such a reading would be quite inconsistent with the Fifth Amendment, which protects against compulsory self-incrimination. The *Griffin* court addressed prosecutorial comment which baldly stated to the jury that the defendant must have known what the disputed facts were, but that he had refused to take the stand to deny or explain them. We think there is a considerable difference for the purposes of the privilege against compulsory self-incrimination between the sort of comments involved in *Griffin* and the comments involved in this case." (108 S.Ct. 868, 99 L.Ed.2d 31.)

(3) Disparagement of the defense case is proper. In *People v. Bethea* (1971) 18 C.A.3d 930, 96 C.R. 229, defendant was charged with armed robbery in Los Angeles on February 22nd. His wife testified that they had left California for Chicago on February 14th and that defendant could not have been in this state at the critical time. The prosecution, however, proved that defendant, on February 20th, had appeared in Los Angeles Municipal Court to answer a traffic charge. Defendant did not take the stand. In opening argument, the prosecutor commented, "So, ladies and gentlemen, basically what this case boils down to is that we have the prosecution's positive evidence that the defendant is guilty of robbery in the first degree, and we have the defense which has just been shot out of the water, zero. So you have the prosecution's case against *nothing* for the defense." *Held*, no error. "The remarks made by the prosecution go to the *state of the evidence*, which is entirely proper. ... There is absolutely no reference to the fact that defendant did not take the stand; nor is the remark susceptible of such interpretation by inference or innuendo." (18 C.A.3d 936.) (See also *People v. Meneley* (1972) 29 C.A.3d 41, 60, 105 C.R. 432 [prosecutor commented that evidence failed to establish that defendant did not commit crimes charged]; *People v. Gaulden* (1974) 36 C.A.3d 942, 954, 111 C.R. 803 [prosecutor properly argued that "There is no defense. There has not been one shred of evidence introduced in this trial indicating that Mr. Gaulden didn't commit the crime. Not one"]; *People v. Roberts* (1975) 51 C.A.3d 125, 135, 123 C.R. 893 ["Are there any conflicting witnesses as to what happened? ... I submit that the evidence is consistent in this case and there is no confliction"].)

(4) Reading the *Miranda* warnings in court is proper as part of the proof that they were given to the defendant before the defendant's statements were taken, i.e., the admonition that anything said may be used against the defendant is not by itself a comment on his or her failure to take the stand. (*People v. Johnson* (1969) 271 C.A.2d 616, 624, 76 C.R. 768 [although this preliminary fact proof could have been made out of jury's presence, defendant made no objection on this ground].)

(5) Admonishing the defendant not to interrupt, because the defendant waived the right to testify, is not a prohibited comment. In *People v. Gomez* (1967) 252 C.A.2d 844, 60 C.R. 881, defense counsel objected to the prosecutor's argument, and during the discussion with the judge defendant interrupted, saying, "He is telling lies." The judge then said, "I want to admonish the defendant that his opportunity to talk in this case has expired. He could have taken the stand and testified. He elected not to do so. Therefore, he must remain silent. He can tell his attorney what he wants to tell him." The judge later instructed on defendant's right to remain silent and cautioned against drawing any inference of guilt. *Held*: (a) These remarks to *defendant* did not violate the *Griffin* rule against comment to the *jury*. (b) The statement that defendant "could have taken the stand" might well have been omitted; but, considered in context, it was not a violation of the *Griffin* rule, or, if error, was not prejudicial. (252 C.A.2d 856.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Comment on state of evidence:* See *People v. Stewart* (2004) 33 C.4th 425, 505, 506, 15 C.R.3d 656, 93 P.3d 271 [in capital murder trial, prosecutor's comments, first that defense counsel would fail to provide reasonable explanation of events consistent with defendant's innocence, and later that counsel had failed to do so, constituted permissible argument based on state of evidence]. (6) *(New) Comment on defendant's opportunity to tailor testimony:* The *Griffin* rule does not extend to the situation in which the defendant takes the stand as the last witness and the prosecutor comments on the defendant's opportunity to tailor his or her testimony to that which has already been heard. Once the decision to take the stand has been made, the defendant's credibility may be impeached and his or her testimony assailed like that of any other witness. (*Portuondo v. Agard* (2000) 529 U.S. 61, 120 S.Ct. 1119, 1125, 146 L.Ed.2d 47, 56.)



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## B. Privilege of Accused (Defendant in Criminal Case).

## 12. No Comment or Inference.

## f. Effect of Griffin Error.

## 1. Harmless and Reversible Error.

2 Witkin Cal. Evid. Witnesses § 442

[§ 442] Harmless and Reversible Error.

(1) *Former Law: California Probability Test.* The California Supreme Court originally held that our constitutional provision requiring a showing of prejudice from error applied to *Griffin* error. Thus, violation of the *Griffin* rule was not reversible error per se. (*People v. Bostick* (1965) 62 C.2d 820, 827, 44 C.R. 649, 402 P.2d 529, 6 Cal. Crim. Law (3d), *Reversible Error*, §21; see also *In re Gaines* (1965) 63 C.2d 234, 237, 45 C.R. 865, 404 P.2d 473; *People v. Luckman* (1965) 235 C.A.2d 75, 79, 45 C.R. 41; *People v. Butts* (1965) 236 C.A.2d 817, 832, 46 C.R. 362; *People v. Beghtel* (1966) 239 C.A.2d 692, 694, 49 C.R. 235.) But where prejudice was shown, under the California probability test (see 6 Cal. Crim. Law (3d), *Reversible Error*, §7), the conviction would be reversed. (See *People v. Keller* (1965) 234 C.A.2d 395, 399, 44 C.R. 432; *People v. Steele* (1965) 235 C.A.2d 798, 814, 45 C.R. 601; *People v. Odom* (1965) 236 C.A.2d 876, 881, 46 C.R. 453; *People v. Davenport* (1966) 240 C.A.2d 341, 347, 49 C.R. 575.)

(2) *Chapman Test: Harmless Beyond Reasonable Doubt.* *Griffin* error--like other violations of constitutional right--is now reversible unless the prosecution can prove beyond a reasonable doubt that it was harmless. (See *Chapman v. California* (1967) 386 U.S. 18, 87 S.Ct. 824, 828, 17 L.Ed.2d 705, 711; *People v. Stout* (1967) 66 C.2d 184, 198, 57 C.R. 152, 424 P.2d 704, *infra*, §443; *Anderson v. Nelson* (1968) 390 U.S. 523, 88 S.Ct. 1133, 1134, 20 L.Ed.2d 81, 83; 24 A.L.R.3d 1093, 1104; 6 Cal. Crim. Law (3d), *Reversible Error*, §9 et seq.) (For examples of error held harmless, see *People v. Giovannini* (1968) 260 C.A.2d 597, 606, 67 C.R. 303; *People v. Morse* (1969) 70 C.2d 711, 730, 76 C.R. 391, 452 P.2d 607; *People v. Ham* (1970) 7 C.A.3d 768, 778, 86 C.R. 906; *United States v. Hasting* (1983) 461 U.S. 499, 103 S.Ct. 1974, 1981, 1982, 76 L.Ed.2d 96, 108; *People v. Miller* (1996) 46 C.A.4th 412, 429, 430, 53 C.R.2d 773.)

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##### 12. No Comment or Inference.

##### f. Effect of Griffin Error.

##### 2. Error Invited.

2 Witkin Cal. Evid. Witnesses § 443

[§ 443] Error Invited.

Invited error is not a ground for reversal. (See 6 Cal. Crim. Law (3d), *Reversible Error*, §31 et seq.) In *People v. Hill* (1967) 66 C.2d 536, 58 C.R. 340, 426 P.2d 908, defense counsel made much of the prosecutor's failure to examine codefendant S when he was on the stand for the limited purpose of testifying on voluntariness of a confession. The prosecutor answered by telling the jury that he couldn't ask questions outside the scope of that issue. *Held*, this was not improper, or at most harmless error; there was no suggestion of adverse inferences in violation of the *Griffin* rule. (66 C.2d 562.)

A more obvious justification for the prosecutor's statements in *Hill* would be that any hint at the use of the privilege was invited by the defense. But *People v. Stout* (1967) 66 C.2d 184, 57 C.R. 152, 424 P.2d 704, found violation of the *Griffin* rule reversible error, despite the invitation. Defendants were charged with a number of crimes, including alteration of serial numbers on a firearm. Defense counsel told the jury that he had advised defendants not to testify because the case against them would then only be circumstantial. The prosecutor in response stated that the case was not necessarily dependent on circumstantial evidence, and that certain defenses offered by defense counsel were his claims only, because defendants failed to testify in support of them.

This was clearly a legitimate answer to the defense argument. But the prosecutor went further, stating that by failing to testify defendants were subject to a permissible inference that they removed the identification marks on the gun, for if someone else had done it they could have so testified. *Held*, this was misconduct in violation of the *Griffin* rule, and, under the circumstances, reversible error. (66 C.2d 198.) Because failure to testify was deliberately introduced by the defense, and the doctrine of invited error would normally apply, the decision seems to suggest that prosecutors are not entitled to violate the *Griffin* rule just because defense counsel seeks to take adroit advantage of it. (See 24 A.L.R.3d 1093, 1120.)

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##### 13. No Proof of Prior Claim.

2 Witkin Cal. Evid. Witnesses § 444

[§ 444] No Proof of Prior Claim.

Sometimes a defendant claims the witness' privilege and refuses to testify before a grand jury, or claims the accused's privilege at a prior trial, and thereafter waives the privilege and testifies at the trial. May the defendant's prior claim of privilege be proved as an admission, or as impeachment? The law on this point has gone through several stages:

(1) *Former Rule.* In *People v. Kynette* (1940) 15 C.2d 731, 750, 104 P.2d 794, it was held that pertinent portions of the grand jury transcript could be introduced for the limited purpose of impeachment. This case was followed by several later decisions. (See, e.g., *People v. Wayne* (1953) 41 C.2d 814, 829, 264 P.2d 547; *People v. Walsh* (1956) 47 C.2d 36, 43, 301 P.2d 247.)

A strong contrary position was taken in *Grunewald v. United States* (1957) 353 U.S. 391, 77 S.Ct. 963, 983, 1 L.Ed.2d 931, 953: "[T]he Fifth Amendment claim was made before a grand jury where Halperin was a compelled, and not a voluntary, witness; where he was not represented by counsel; where he could summon no witnesses; and where he had no opportunity to cross-examine witnesses testifying against him. These factors are crucial in weighing whether a plea of the privilege is inconsistent with later exculpatory testimony on the same questions, for the nature of the tribunal which subjects the witness to questioning bears heavily on what inferences can be drawn from a plea of the Fifth Amendment." (See 8 Wigmore (McNaughton Rev.) §2273; 71 Harv. L. Rev. 109; 1957 A.S. 563.)

Where, however, the claim of privilege was made at a prior trial, the United States Supreme Court sustained its use for impeachment purposes. (See *Raffel v. United States* (1926) 271 U.S. 494, 46 S.Ct. 566, 567, 70 L.Ed. 1054, 1057; but see *Stewart v. United States* (1961) 366 U.S. 1, 81 S.Ct. 941, 6 L.Ed.2d 84 [improper where prior testimony was unintelligible and there was nothing to impeach].)

(2) *Current Rule: No Implied Admission.* The California cases on impeachment were reexamined in *People v. Calhoun* (1958) 50 C.2d 137, 146, 323 P.2d 427, and *People v. Snyder* (1958) 50 C.2d 190, 195, 324 P.2d 1. In the first case, the claim was before the grand jury; in the second, it was at a prior trial of an alleged coconspirator; in both, it was held reversible error to use the claim as an implied admission, i.e., as affirmative evidence of guilt. (See 11 Stanf. L. Rev. 559; 32 So. Cal. L. Rev. 307; 1960 A.S. 578.)

(3) *Current Rule: No Impeachment.* In *People v. Sharer* (1964) 61 C.2d 869, 40 C.R. 851, 395 P.2d 899, the prior claim was made before the grand jury, and the prosecutor, cross-examining defendant at the trial, was allowed to show it. Held, this was reversible error. Again reviewing the California decisions at length, the court declared that the *Kynette* and *Walsh* cases were wrongly decided and that their authority had been impaired by the *Calhoun* and *Snyder* cases.

The holding was that the use of the prior claim for impeachment is as improper as its use as an admission. (*61 C.2d 876.*) (For same rule in civil cases, see *supra*, §96.)

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#### 14. Grant of Use Immunity Constitutionally Compelled.

2 Witkin Cal. Evid. Witnesses § 445

[§ 445] Grant of Use Immunity Constitutionally Compelled.

In *People v. Coleman* (1975) 13 C.3d 867, 120 C.R. 384, 533 P.2d 1024, supra, §380, the Supreme Court ruled that the testimony of a probationer at a revocation hearing could not be admitted at a subsequent trial on charges based on the same conduct that prompted revocation. Although this holding was expressed in terms of a judicially devised exclusionary rule, "later cases have treated *Coleman* as creating a limited species of use immunity grounded in California's constitutional guarantee against self-incrimination." (*People v. Carter* (1993) 19 C.A.4th 1236, 1248, 23 C.R.2d 888.) *Coleman* immunity has been extended to a few other situations, most notably to a minor's testimony at a fitness hearing or statements to a probation officer. (*Ramona R. v. Superior Court* (1985) 37 C.3d 802, 807, 810, 210 C.R. 204, 693 P.2d 789, supra, §370; on immunity of witnesses generally, see *infra*, §470 et seq.)

In *People v. Carter*, supra, a murder defendant moved for immunity against use of his testimony regarding the circumstances of an untried murder. In his offer of proof, defendant indicated that, in addition to testimony regarding the circumstances of the charged murder, he would have testified that he was present at the untried murder and that he took the personal property of the victim of that murder. Thus he could not testify without risking self-incrimination in connection with the untried murder. The trial judge refused to grant him immunity. *Held*, this was proper.

(a) The *Coleman* rationale does not support extending immunity to protect a defendant in an ongoing trial who takes the stand to rebut admissible, other crimes evidence, and there is a possibility the testimony may be used against the defendant in a subsequent prosecution. The principal concern of the *Coleman* court was the danger of abuse by the state of its opportunity to coerce self-incriminatory testimony by scheduling the probation revocation hearing in advance of trial. The introduction of other crimes evidence does not provide the same opportunity for abuse. It was "unlikely that the prosecution's decision to proffer evidence of the Baro killing was made even in part on the expectation that defendant would be compelled to take the stand to explain it." (19 C.A.4th 1249.)

(b) Additional reasons militate against requiring immunity. In a criminal trial, the state must prove its case to a jury and establish guilt beyond a reasonable doubt. These procedural protections remove "the incentive to testify that was present in such cases as *Coleman* and *Ramona R.*, in which the defendants faced serious potential consequences if they chose not to explain their actions to the trial judge." Moreover, because the defendant's testimony at the two proceedings in question is not likely to differ, the defendant's decision whether to rebut the other crimes evidence at the first proceeding is "a choice having more to do with a calculation of the likely effect of the testimony than with a dilemma posed by differing defense objectives at the two proceedings." (19 C.A.4th 1250.)

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#### C. Privilege of Witness in Any Proceeding.

##### 1. General Principles.

##### a. Proceeding and Witness.

##### 1. Any Proceeding.

2 Witkin Cal. Evid. Witnesses § 446

[§ 446] Any Proceeding.

The witness' privilege may be claimed in almost any kind of proceeding in which testimony is compelled. (See 1 McCormick 5th, §130 et seq.; 8 Wigmore (McNaughton Rev.) §2252; C.J.E.R., Judges Benchbook, Civil Proceedings: Trial §8.29 et seq.; 81 Am.Jur.2d (1992 ed.), Witnesses §87 et seq.) The following are the principal examples:

(1) The trial of a criminal or civil action or special proceeding. (See *infra*, §462 et seq.)

(2) A hearing on a motion or order to show cause. (See *Coleman v. Galvin* (1947) 78 C.A.2d 313, 319, 177 P.2d 606, *infra*, §465 [examination of judgment debtor under C.C.P. 714 et seq.]; *In re Leavitt* (1959) 174 C.A.2d 535, 537, 345 P.2d 75, *infra*, §467 [same].)

(3) A grand jury hearing. (See *Christal v. Police Com.* (1939) 33 C.A.2d 564, 572, 92 P.2d 416; *Blau v. United States* (1950) 340 U.S. 159, 71 S.Ct. 223, 224, 95 L.Ed. 170, 172; 28 Cal. L. Rev. 94; 38 Cal. L. Rev. 924; 38 A.L.R.2d 225; *supra*, §371.)

(4) An administrative proceeding. (See 1 Cal. Evidence (4th), Introduction, §74.)

(5) A legislative committee hearing. (See *Quinn v. United States* (1955) 349 U.S. 155, 75 S.Ct. 668, 673, 99 L.Ed. 964, 972; *Emspak v. United States* (1955) 349 U.S. 190, 75 S.Ct. 687, 690, 99 L.Ed. 997, 1004; 69 Harv. L. Rev. 131; *infra*, §502.)

(6) A juvenile court proceeding. (See *supra*, §369.)

(7) A proceeding before the Commission on Judicial Qualifications. (See *McComb v. Superior Court* (1977) 68 C.A.3d 89, 98, 137 C.R. 233.)

(8) A deposition. (See *Shepherd v. Superior Court* (1976) 17 C.3d 107, 116, 130 C.R. 257, 550 P.2d 161, citing the text on privilege in civil proceedings; *A & M Records v. Heilman* (1977) 75 C.A.3d 554, 566, 142 C.R. 390; 15 Pacific L. J. 785.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 81 Am.Jur.2d (2004 ed.), Witnesses §85 et seq.; 1 McCormick 6th, §130 et seq. West's Key Number Digest,



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  - a. Proceeding and Witness.
2. Witness Alone Privileged.

2 Witkin Cal. Evid. Witnesses § 447

[§ 447] Witness Alone Privileged.

The privilege belongs to the *witness*, and cannot be claimed by a party not under examination. (See *People v. Gonzales* (1922) 56 C.A. 330, 331, 204 P. 1088; *Robinson v. McAbee* (1923) 64 C.A. 709, 713, 222 P. 871; *People v. Bernal* (1967) 254 C.A.2d 283, 294, 62 C.R. 96; *People v. Chandler* (1971) 17 C.A.3d 798, 803, 95 C.R. 146, *infra*, §448; *People v. Williams* (1970) 11 C.A.3d 1156, 1163, 90 C.R. 409; 1 McCormick 5th, §119; 8 Wigmore (McNaughton Rev.) §2270.) However, if the witness' lawyer is clearly acting under authorization of his or her client, the lawyer may invoke the privilege on the witness' behalf. (See *People v. Apodaca* (1993) 16 C.A.4th 1706, 1715, 21 C.R.2d 14.)

The danger must be of incrimination of the *witness himself or herself*; the witness cannot invoke the privilege and refuse disclosure of facts which would incriminate only a third person. (*Rogers v. United States* (1951) 340 U.S. 367, 71 S.Ct. 438, 441, 95 L.Ed. 344, 348.)

This principle was applied on unusual facts in *People v. Bernal*, *supra*. Defendant Charles Bernal was charged with possession of marijuana found in a blue Thunderbird he owned. He called his brother Alex, who was in the county jail serving a term for sale of marijuana, as his witness. But H, Alex's attorney, appeared to protect Alex's interests. Defense counsel asked Alex if he had ever driven the blue Thunderbird before defendant's arrest, for the obvious purpose of suggesting that Alex, not defendant, possessed the marijuana involved. Alex answered "Yes," whereupon his attorney asked that the answer be stricken and advised the witness that it might tend to incriminate him. The answer was stricken, defense counsel asked it again, and Alex refused to answer on grounds of tendency to incriminate. Thereupon the judge struck all of his testimony and advised the jury to totally disregard it. On appeal, defendant contended that it was error to permit the witness to withdraw his answer and claim the privilege, because this prevented the jury from drawing an inference that the witness, rather than the defendant, was the possessor.

The court's answer was: "First, the defendant, as opposed to the witness, has no right which he may assert superior or even equal to that of the witness who exercises the privilege against self-incrimination; the defendant may call the witness; he cannot compromise the witness' testimonial sanctuary to his own uses by using it as a springboard from which to shift the indication of his own guilt. Second, the claim of privilege having no evidentiary value, it could have no relevance to the question of defendant's guilt or innocence." (254 C.A.2d 294.)

Defendant made an additional and even more novel contention: that the ruling denied him the compulsory process

of witnesses, because the judge could have compelled the testimony of Alex by granting him immunity under P.C. 1324 (infra, §485 et seq.). The court's answer leaves the point in some uncertainty: (a) Defendant has no right to any particular testimony in derogation of a witness' privilege against self-incrimination; and (b) defendant did not request that the district attorney exercise the procedure under P.C. 1324; thus, he was not denied use of immunity power on his behalf. (254 C.A.2d 295.)

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See 1 McCormick 6th, §119.



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##### 3. When Privilege Should Be Claimed.

##### aa. Early Rule: In Jury's Presence.

2 Witkin Cal. Evid. Witnesses § 448

[§ 448] Early Rule: In Jury's Presence.

In *People v. Chandler* (1971) 17 C.A.3d 798, 95 C.R. 146, prospective witness M was a juvenile who had already been made a ward of the court as a result of his participation in the robbery for which defendant was being tried. At defendant's trial, M was brought into the courtroom and identified by the victim. The prosecution then indicated it would call M as a witness, but defense counsel objected, contending that M's Fifth and Sixth Amendment rights had been violated by an investigator from the district attorney's office and that M would refuse to testify if called. The trial judge, however, allowed the prosecutor to call M to the stand. After being sworn, M refused to answer questions, even when granted immunity. *Held*, the procedure in calling and questioning M was proper.

(a) Defendant had no standing to complain of any possible violation of the witness' Fifth and Sixth Amendment rights. (17 C.A.3d 803.) Furthermore, neither the trial court nor the prosecutor was obliged to accept defense counsel's prediction that M would not testify. (17 C.A.3d 803.)

(b) Defendant contended that the prosecution should not be permitted to force a witness to assert the privilege against self-incrimination in the presence of the jury, and implied that some form of pretestimonial hearing must be conducted to determine the witness' intention. But no such requirement is found in the Evidence Code. "To the contrary *Evidence Code* section 913 clearly envisions that the privilege will be claimed in the presence of the jury." (17 C.A.3d 804.) Moreover, it would be unrealistic and unwise to require any examination into a prospective claim of privilege, for witnesses often change their minds in relatively short periods of time. "It is always possible that a witness would, in a pre-testimonial hearing, indicate that he would testify and yet refuse to do so when actually questioned in the presence of the jury. Conversely, a witness might express an intention to claim the privilege and yet when actually questioned on the stand freely answer the questions." (17 C.A.3d 805.)

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##### 3. When Privilege Should Be Claimed.

##### bb. Current Rule: Before Witness Takes Stand.

2 Witkin Cal. Evid. Witnesses § 449

[§ 449] Current Rule: Before Witness Takes Stand.

*People v. Chandler* (1971) 17 C.A.3d 798, 95 C.R. 146, supra, §448, was criticized and distinguished in *People v. Johnson* (1974) 39 C.A.3d 749, 114 C.R. 545, where the defense unsuccessfully sought to ask a witness questions, in the jury's presence, to which he would have invoked his self-incrimination privilege. Defendant was charged with murder for stabbing his victim to death in a parking lot brawl. The knife he used apparently was supplied by B, who initially was willing to testify as a defense witness. The trial judge, however, appointed counsel to safeguard B's interests and, outside the jury's presence, B asserted his privilege against self-incrimination as to receiving or giving the knife. Upholding the privilege, the judge ordered defense counsel to refrain from asking any questions in the jury's presence which would involve B in the possession, giving or receiving of the knife. *Held*, the ruling was proper.

(a) *Chandler* held that no pretestimonial hearing is required. "That holding, however, does not stand for the proposition that such a pretestimonial hearing *may not* be held in order to determine whether or not the witness is entitled to the privilege." (39 C.A.3d 758.)

(b) By dictum, *Chandler* conveyed the idea that the privilege against self-incrimination should be invoked in the jury's presence. However, *Ev.C. 913* (see supra, §96) neither envisions nor specifies that this should be done; the privilege may validly be raised in a pretestimonial hearing before the court without any obligation to renew it before the jury. (39 C.A.3d 758, 759.) And, because the judge must determine whether the answer might incriminate the witness, it is the better practice to require exercise of the privilege outside the jury's presence. (39 C.A.3d 759.)

(c) Even though a witness may change his or her mind in a short time, the probability is almost nil when the pretestimonial hearing is conducted during the trial and is immediately followed by the procedure in front of the jury. To require a renewal of the invocation of the privilege would amount to a meaningless ritual, especially because the jury must not draw any inference from the witness' exercise of the privilege. (39 C.A.3d 760.)

The *Johnson* approach was followed in *People v. Frierson* (1991) 53 C.3d 730, 280 C.R. 440, 808 P.2d 1197. Defendant claimed at the penalty phase of a capital murder prosecution that a witness was the actual perpetrator of a prior murder that served to support a special circumstance allegation. The witness asserted his privilege against self-incrimination outside the presence of the jury. Defendant then requested that the witness be required to assert the privilege in front of the jury. Defendant's request was denied; nevertheless, when the witness testified before the jury, he

asserted his privilege under defense questioning. *Held*, death sentence affirmed.

(a) Defendant's request was properly denied. "Allowing a witness to be put on the stand to have the witness exercise the privilege before the jury would only invite the jury to make an improper inference. ... Therefore, 'it is the better practice for the court to require the exercise of the privilege out of the presence of the jury.' " (53 C.3d 743, quoting *Johnson*.) "We have 'commend[ed]' the approach 'as a means by which to avoid the potentially prejudicial impact of the witness asserting the privilege before the jury.' " (53 C.3d 743, quoting *People v. Ford* (1988) 45 C.3d 431, 247 C.R. 121, 754 P.2d 168, *supra*, §97.)

(b) The trial court did not have a sua sponte duty to instruct the jury that the witness had invoked the privilege, that the court had determined outside the jury's presence that the witness was unable to discuss the prior murder, or that the jury could not draw any inferences from these circumstances. That instruction is required only at the request of a party who may be adversely affected because an unfavorable inference may be drawn by the jury. Here, defendant did not request the instruction. Moreover, "White's invocation of the privilege did not obviously prejudice defendant. Indeed, defense counsel himself caused White to assert the privilege in front of the jury. He undoubtedly hoped the jury *would* draw an impermissible inference--that White had something to hide, namely that he, not defendant, was guilty of shooting Green." (53 C.3d 744.) (See 19 A.L.R.4th 368 [propriety of calling witness involved in crime charged against defendant solely to extract claim of self-incrimination].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Holloway* (2004) 33 C.4th 96, 130, 14 C.R.3d 212, 91 P.3d 164 [in capital murder trial, defendant was not entitled to force witness, who had invoked privilege against self-incrimination outside presence of jury, to do so again in front of jury].



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## CHAPTER IX - Witnesses

### XVII. PRIVILEGE AGAINST SELF-INCRIMINATION

#### C. Privilege of Witness in Any Proceeding.

1. General Principles.
- a. Proceeding and Witness.
4. Claim by Civil Defendant.

2 Witkin Cal. Evid. Witnesses § 450

[§ 450] Claim by Civil Defendant.

In *Alvarez v. Sanchez* (1984) 158 C.A.3d 709, 204 C.R. 864, plaintiff filed a complaint for dissolution of partnership, and defendants filed a verified answer. Thereafter, a criminal complaint was filed against defendants charging them with violation of the securities laws and grand theft involving the same property and transactions as the civil suit. During a recess in the preliminary hearing of the criminal proceedings, the civil case came to trial, plaintiffs called defendants as adverse witnesses, and defendants invoked their Fifth Amendment privilege. The trial judge then granted plaintiffs' motion to strike the portions of the answer denying allegations of the complaint, plaintiffs' witnesses testified with no cross-examination permitted, and judgment was rendered for plaintiffs. *Held*, reversed. The harsh penalty of striking the answer and allowing the case to proceed as a default matter was a denial of defendants' fundamental right to a trial, imposing a civil forfeiture for a proper claim of privilege. (158 C.A.3d 712, 713, 714.)

In *Pacers v. Superior Court* (1984) 162 C.A.3d 686, 208 C.R. 743, Needham and others engaged in a fight with employees of Pacers, and were arrested. They sued Pacers and its employees for assault and battery, and the United States attorney maintained an "open file" for criminal assault and battery charges against these defendants. Plaintiffs took defendants' depositions, and defendants refused to answer questions unless given use and derivative use immunity. The superior court denied the request for immunity because of objection by the United States attorney, and issued an order prohibiting defendants from testifying at the trial on the subject matter of the suit. *Held*, mandamus granted to compel setting aside of the order.

(a) Defendants, facing possible criminal prosecution involving the same facts as the civil action, were entitled to invoke their Fifth Amendment privilege without the penalty imposed. (162 C.A.3d 689, 690.)

(b) The court should weigh the parties' competing interests with a view toward accommodating both, and the proper remedy is that established by federal practice: stay discovery in the civil action until disposition of the criminal matter. (162 C.A.3d 690.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Fuller v. Superior Court* (2001) 87 C.A.4th 299, 309, 104 C.R.2d 525 [in action by plaintiff African-American shoppers alleging they were beaten by defendant security guards, denial of defendants' request to stay their depositions until expiration of applicable criminal statute of limitations was proper; criminal statute would not expire until 3 years from scheduled trial date and only a few months before expiration of 5-year period for bringing civil action to trial].

(New) *Distinction: Where defendant is corporation:* In *Avant! Corp. v. Superior Court* (2000) 79 C.A.4th 876, 94 C.R.2d 505, a civil action against defendant corporation for defamation and related causes of action, the trial judge denied defendant's request to stay the action, or at least stay discovery, until a related criminal action against it was concluded. *Held*, petition for mandamus relief denied. The defendants, claiming the privilege in *Pacers v. Superior Court* (1984) 162 C.A.3d 686, 208 C.R. 743, text, p. 752, were individuals, not a corporation, so the federal practice recommended in that case is inapplicable here. Corporations have no privilege against self-incrimination. (79 C.A.4th 883; see text, §451.) But even where the defendant is an individual, a stay of the proceedings is not constitutionally required; rather, a stay is *permissible*, and the trial judge's determination is subject to review for abuse of discretion. Where the defendant is a corporation, the federal practice is to give some weight to self-incrimination considerations (the effect on the rights of defendant's employees), and to weigh such additional factors as the plaintiff's interest in proceeding expeditiously, the burden placed on the defendant by the proceedings, the convenience of the court in managing its cases and efficiently using judicial resources, the interests of nonparties, and the interest of the public in the pending civil and criminal actions. Here, the factors weigh in favor of the trial judge's decision to deny the stay; there was no abuse of discretion. (79 C.A.4th 887, 888.)





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### XVII. PRIVILEGE AGAINST SELF-INCRIMINATION

#### C. Privilege of Witness in Any Proceeding.

##### 1. General Principles.

##### b. Business Records of Corporation or Association.

##### 1. Corporation.

*2 Witkin Cal. Evid. Witnesses § 451*

[§ 451] Corporation.

Unlike the constitutional guarantee against unlawful search and seizure (see *4 Cal. Crim. Law (3d), Illegally Obtained Evidence*, §29), the self-incrimination privilege does not protect a corporation from compulsory disclosure of corporate records incriminating the corporation. The usual explanation is that the corporation is chartered by the state with special powers, and the state may examine corporate records to discover abuse of the powers. (See *United States v. Bausch & Lomb Optical Co. (1944) 321 U.S. 707, 64 S.Ct. 805, 815, 88 L.Ed. 1024, 1037*; *George Campbell Painting Corp. v. Reid (1968) 392 U.S. 286, 88 S.Ct. 1978, 20 L.Ed.2d 1094*, supra, §364; *United States v. Kordel (1970) 397 U.S. 1, 90 S.Ct. 763, 767, 25 L.Ed.2d 1, 8*, infra, §455; 1 McCormick 5th, §138; 8 Wigmore (McNaughton Rev.) §2259a; 44 Cal. L. Rev. 408; 30 U.C. Davis L. Rev. 247 [supporting restriction of privilege to natural persons].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Avant! Corp. v. Superior Court (2000) 79 C.A.4th 876, 883, 884, 94 C.R.2d 505*, Supp., supra, §450; 1 McCormick 6th, §140. *West's Key Number Digest*, Witnesses k.298



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#### C. Privilege of Witness in Any Proceeding.

##### 1. General Principles.

##### b. Business Records of Corporation or Association.

##### 2. Association or Partnership.

2 Witkin Cal. Evid. Witnesses § 452

[§ 452] Association or Partnership.

(1) *Large Unincorporated Associations*. In *United States v. White* (1944) 322 U.S. 694, 64 S.Ct. 1248, 88 L.Ed. 1542, the Court brought large unincorporated associations within the rule which denies the privilege to corporations. The holding was that an officer of an international labor union could not refuse to produce its records under a claim of the privilege. The test, said the Court, is whether "a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only. If so, the privilege cannot be invoked on behalf of the organization or its representatives in their official capacity." (64 S.Ct. 1251, 88 L.Ed. 1547.) (See 17 So. Cal. L. Rev. 322; 18 So. Cal. L. Rev. 157; 44 Cal. L. Rev. 408.)

(2) *Partnership*. In *Bellis v. United States* (1974) 417 U.S. 85, 94 S.Ct. 2179, 40 L.Ed.2d 678, the court explored the "outer limits" of *United States v. White*, *supra*, and concluded that the *White* rule was properly applied to the records of a *small law partnership*.

(a) "While small, the partnership here did have an established institutional identity independent of its individual partners. This was not an informal association or a temporary arrangement for the undertaking of a few projects of short-lived duration. Rather, the partnership represented a formal institutional arrangement organized for the continuing conduct of the firm's legal practice." (94 S.Ct. 2186, 40 L.Ed.2d 688.)

(b) Equally important, the partner who was attempting to assert his personal privilege against self-incrimination was holding the subpoenaed partnership records in a representative capacity. "The documents which petitioner has been ordered to produce are merely the financial books and records of the partnership. These reflect the receipts and disbursements of the entire firm, including income generated by and salaries paid to the employees of the firm, and the financial transactions of the other partners. Petitioner holds these records subject to the rights granted to the other partners by state partnership law. Petitioner has no direct ownership interest in the records; rather, under state law, they are partnership property, and petitioner's interest in partnership property is a derivative interest subject to significant limitations." (94 S.Ct. 2187, 40 L.Ed.2d 689.)

(c) The *White* opinion contained a suggestion that the test for determining whether the privilege applies depends on whether the organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their

common or group interests only. However, this formulation cannot be reduced to a simple proposition based solely upon the size of the organization. "Every State has now adopted laws permitting incorporation of professional associations, and increasing numbers of lawyers, doctors, and other professionals are choosing to conduct their business affairs in the corporate form rather than the more traditional partnership. Whether corporation or partnership, many of these firms will be independent entities whose financial records are held by a member of the firm in a representative capacity. In these circumstances, the applicability of the privilege should not turn on an insubstantial difference in the form of the business enterprise." (94 S.Ct. 2189, 40 L.Ed.2d 691.) (See 17 A.L.R.4th 1039 [right of partners to assert personal privilege against self-incrimination as to production of partnership books or records].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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##### 1. General Principles.

##### c. Officer of Corporation or Association.

##### 1. Officer in Representative Capacity.

##### aa. General Rule: No Privilege.

2 *Witkin Cal. Evid. Witnesses* § 453

[§ 453] General Rule: No Privilege.

An officer of a corporation or other association must produce records of the organization kept in the officer's representative capacity, even though they might also personally incriminate the officer. (See *Wilson v. United States* (1911) 221 U.S. 361, 31 S.Ct. 538, 544, 55 L.Ed. 771, 779; *Wheeler v. United States* (1913) 226 U.S. 478, 33 S.Ct. 158, 161, 57 L.Ed. 309, 313 [after dissolution of corporation and transfer of books to stockholders, former officers cannot invoke privilege as to records]; *Essgee Co. v. United States* (1923) 262 U.S. 151, 43 S.Ct. 514, 515, 67 L.Ed. 917, 919; *Oklahoma Press Publishing Co. v. Walling* (1946) 327 U.S. 186, 66 S.Ct. 494, 499, 90 L.Ed. 614, 622; *McPhaul v. United States* (1960) 364 U.S. 372, 81 S.Ct. 138, 143, 5 L.Ed.2d 136, 143, infra, §454; *Braswell v. United States* (1988) 487 U.S. 99, 108 S.Ct. 2284, 2288, 101 L.Ed.2d 98, 105, infra, §454; 81 *Am.Jur.2d* (1992 ed.) *Witnesses* §101; 78 *Harv. L. Rev.* 454 [corporation president who is sole stockholder of one-man corporation]; 27 *Santa Clara L. Rev.* 411 [Corporate Record-Keepers and the Right Against Self-Incrimination].)

And the officer may not have a privilege to refuse to *identify* the records produced. (See 1 *McCormick* 5th, §140.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 81 *Am.Jur.2d* (2004 ed.), *Witnesses* §99; 1 *McCormick* 6th, §141.



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##### 1. General Principles.

##### c. Officer of Corporation or Association.

##### 1. Officer in Representative Capacity.

##### bb. Illustrations.

2 *Witkin Cal. Evid. Witnesses* § 454

[§ 454] Illustrations.

In *McPhaul v. United States* (1960) 364 U.S. 372, 81 S.Ct. 138, 5 L.Ed.2d 136, petitioner was convicted of contempt for wilful failure to comply with a subpoena duces tecum of a subcommittee of the House Committee on Un-American Activities. The Committee was investigating the Civil Rights Congress, listed as subversive by the Attorney General, and had reason to believe petitioner was its executive secretary. The subpoena called for records of the organization, and at the opening of the hearings the Chairman publicly stated the purpose of the inquiry--to determine whether there had been Communist activity, and its extent, in a vital defense area. Petitioner refused to answer any question relating to possession of the records, solely on a claim of the Fifth Amendment privilege. At the trial he raised the defense that there was no evidence produced by the Government to show that the records called for were in existence, or in his possession or control. *Held*, conviction affirmed.

The Court recognized that a witness cannot be punished for failure to produce documents which the witness does not have unless he or she is responsible for their unavailability or is impeding justice by not explaining what happened to them. However, petitioner never claimed that the records were not in his possession or control, but only, belatedly, that the Government failed to show that he could have produced them. The Government's proof established a prima facie case of wilful failure, the burden shifted to him to present some evidence to explain or justify, and he elected to present no evidence; hence, there was no factual issue as to their existence or his ability to produce. If he had made some statement of reasons for inability to comply, the subcommittee might have taken other appropriate steps to obtain them. (81 S.Ct. 142, 143, 5 L.Ed.2d 142, 143.)

In *Braswell v. United States* (1988) 487 U.S. 99, 108 S.Ct. 2284, 101 L.Ed.2d 98, the question was "whether the custodian of corporate records may resist a subpoena for such records on the ground that the act of production would incriminate him."

Petitioner Braswell operated a business as the sole shareholder of two corporations. A federal grand jury issued a subpoena to him as president of the corporations, requiring him to produce their books and records. His motion to quash was based on the theory that his act of producing the documents has independent testimonial significance, which would incriminate him individually. The motion was denied. *Held*, affirmed.

(a) If petitioner had conducted his business as a sole proprietorship, he could have shown that his act of production

would entail testimonial self-incrimination. (108 S.Ct. 2288, 101 L.Ed.2d 105, 106, citing *United States v. Doe* (1984) 465 U.S. 605, 104 S.Ct. 1237, 79 L.Ed.2d 552, *infra*, §459.) But a corporation has no Fifth Amendment privilege, and *Wilson v. United States* (1911) 221 U.S. 361, 31 S.Ct. 538, 55 L.Ed. 771, *supra*, §453, held that a corporate officer could not resist a demand for corporate records by invoking his personal privilege. (108 S.Ct. 2288, 2289, 101 L.Ed.2d 106.)

(b) The *collective entity rule*, expounded in these and other decisions, was not rendered obsolete by *Fisher v. United States* (1976) 425 U.S. 391, 96 S.Ct. 1569, 48 L.Ed.2d 39 (*infra*, §458). "The agency rationale undergirding the collective entity decisions, in which custodians asserted that production of entity records would incriminate them personally, survives. From *Wilson* forward, the Court has consistently recognized that the custodian of corporate or entity records holds those documents in a representative rather than a personal capacity. ... Under those circumstances, the custodian's act of production is not deemed a personal act, but rather an act of the corporation. Any claim of Fifth Amendment privilege asserted by the agent would be tantamount to a claim of privilege by the corporation--which of course possesses no such privilege." (108 S.Ct. 2291, 101 L.Ed.2d 109.)

(c) *Curcio v. United States* (1957) 354 U.S. 118, 77 S.Ct. 1145, 1 L.Ed.2d 1225, *infra*, §455, does not support petitioner's contention; the Court in that opinion made clear the line between oral testimony and other forms of incrimination, and pointed out that a custodian could not be compelled to condemn himself or herself by his or her own oral testimony. (108 S.Ct. 2293, 101 L.Ed.2d 112.)

(d) Recognizing a Fifth Amendment privilege on behalf of the custodians of records of collective entities would have a detrimental impact on the Government's efforts to prosecute "white-collar crime." "If custodians could assert a privilege, authorities would be stymied not only in their enforcement efforts against those individuals but also in their prosecutions of organizations." (108 S.Ct. 2294, 101 L.Ed.2d 113.)

(e) Certain consequences flow from the fact that the custodian's act of production is in his or her representative capacity, and is deemed one of the corporation: the Government may not make any evidentiary use of the individual act against the individual. "The Government has the right, however, to use the corporation's act of production against the custodian. The Government may offer testimony for example, from the process server who delivered the subpoena and from the individual who received the records--establishing that the corporation produced the records subpoenaed. The jury may draw from the corporation's act of production the conclusion that the records in question are authentic corporate records, which the corporation possessed, and which it produced in response to the subpoena. And if the defendant held a prominent position within the corporation that produced the records, the jury may, just as it would had someone else produced the documents, reasonably infer that he had possession of the documents or knowledge of their contents. Because the jury is not told that the defendant produced the records, any nexus between the defendant and the documents results solely from the corporation's act of production and other evidence in this case." (108 S.Ct. 2295, 101 L.Ed.2d 114, 115.) (See 16 *Hastings Const. L. Q.* 553 [*Braswell*].)

Four justices joined in a strong dissent. (See 102 *Harv. L. Rev.* 170 [critical of reasoning and result].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### C. Privilege of Witness in Any Proceeding.

##### 1. General Principles.

##### c. Officer of Corporation or Association.

##### 2. Distinction: Officer's Personal Privilege.

*2 Witkin Cal. Evid. Witnesses § 455*

[§ 455] Distinction: Officer's Personal Privilege.

The officer can be compelled to produce books in his or her custody or control (see *supra*, §453), but the officer's personal privilege against oral testimony remains intact, and it is a violation of that privilege to compel the officer *to testify to the location of corporate or association records* which, if produced, might incriminate the officer.

Thus, in *Curcio v. United States* (1957) 354 U.S. 118, 77 S.Ct. 1145, 1 L.Ed.2d 1225, a federal grand jury investigating racketeering in unions summoned petitioner, secretary-treasurer of an alleged "phantom union," to appear and produce the union books. He appeared without the books and refused to answer questions as to their whereabouts. In view of his criminal record and other facts the Government conceded the tendency of the books to incriminate him. *Held*, his refusal was justified. The Government argued that records will be obtained more readily if the custodian is threatened with summary commitment for contempt for failing to testify as to their whereabouts, rather than with prosecution for disobedience of the subpoena to produce the records themselves. But the Court said: "The compulsory production of corporate or association records by their custodian is readily justifiable, even though the custodian protests against it for personal reasons, because he does not own the records and has no legally cognizable interest in them. However, forcing the custodian to testify orally as to the whereabouts of nonproduced records requires him to disclose the contents of his own mind. He might be compelled to convict himself out of his own mouth. That is contrary to the spirit and letter of the Fifth Amendment." (77 S.Ct. 1151, L.Ed.2d 1232.)

In *United States v. Kordel* (1970) 397 U.S. 1, 90 S.Ct. 763, 25 L.Ed.2d 1, the Food and Drug Administration sent out interrogatories during a civil action brought against a corporation for alleged misbranding of its interstate products. Before the interrogatories were answered, the FDA served notice of a contemplated criminal proceeding against the corporation and its officers, based on the same facts as the civil proceeding. In trying to avoid or delay their answers to the interrogatories, defendants relied on the "grave injustice" of allowing the government to proceed in companion criminal and civil cases. They expressly disavowed a self-incrimination privilege for the corporation and raised no such claim on behalf of the officers. When the trial judge rejected this argument and ordered the corporation to file answers, one officer did so over his signature. At the criminal trial which followed, these answers aided in the officers' convictions. *Held*, no error.

(a) The officer who provided the answers need not have done so. "Without question he could have invoked his Fifth Amendment privilege against compulsory self-incrimination." (90 S.Ct. 767, 25 L.Ed.2d 8.) The officer was not barred from asserting *his* privilege simply because the corporation had no privilege of its own. (90 S.Ct. 767, 25 L.Ed.2d 8.)

Service of the interrogatories, however, obliged the corporation to appoint an agent who could, without fear of self-incrimination, provide the requested information. A corporation cannot satisfy its discovery obligations simply by pointing to an agent about to invoke his or her constitutional privilege; that would permit a corporation to assert on its own behalf the personal privilege of its individual agents. (90 S.Ct. 767, 25 L.Ed.2d 8.)

(b) "We do not deal here with a case where the Government has brought a civil action solely to obtain evidence for its criminal prosecution or has failed to advise the defendant in its civil proceeding that it contemplates his criminal prosecution; nor a case where the defendant is without counsel or reasonably fears prejudice from adverse pretrial publicity or other unfair injury; nor with any other special circumstances that might suggest the unconstitutionality or even the impropriety of this criminal prosecution." (90 S.Ct. 769, 25 L.Ed.2d 10.)

The Court in *Bellis v. United States* (1974) 417 U.S. 85, 94 S.Ct. 2179, 40 L.Ed.2d 678, supra, §452, rejecting a law partner's claim of privilege for partnership records, indicated that the partner's privilege might apply if he "had been ordered to produce files containing work which he had personally performed on behalf of his clients" (94 S.Ct. 2188, 40 L.Ed.2d 689, footnote 9), or if the firm were "a small family partnership," or "there were some other pre-existing relationship of confidentiality among the partners" (94 S.Ct. 2189, 40 L.Ed.2d 691).

**SUPPLEMENT:** [This section is current through the latest supplement]





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##### 1. General Principles.

##### d. Required Records and Reports.

##### 1. General Rule: No Privilege.

2 Witkin Cal. Evid. Witnesses § 456

[§ 456] General Rule: No Privilege.

Records and reports that are required by statute or regulation are not within the privilege. (See Model C., Rule 207; 1 McCormick 5th, §139; 8 Wigmore (McNaughton Rev.) §2259c; 68 Harv. L. Rev. 340; 70 Harv. L. Rev. 1461; 9 Stanf. L. Rev. 375.)

The situations may be roughly classified as follows:

(1) *Public Record in Custody of Public Official or Employee.* Official public records are of course subject to compulsory production regardless of their tendency to incriminate an individual. (See 8 Wigmore (McNaughton Rev.) §2259c; 9 Stanf. L. Rev. 377.)

(2) *Required Records and Reports of Dangerous Business or Activity.* Dealers in narcotic drugs or liquor, or pawnbrokers who sometimes receive stolen property, may be required to file regular reports and keep records open to inspection by law enforcement officers. (See Model C., Rule 207, Comment; 1 McCormick 5th, §139; 8 Wigmore (McNaughton Rev.) §2259c.)

Similarly, "hit-and-run" statutes require an automobile driver involved in an accident to report it. (See *People v. Diller* (1914) 24 C.A. 799, 801, 142 P. 797; *California v. Byers* (1971) 402 U.S. 424, 91 S.Ct. 1535, 29 L.Ed.2d 9, supra, §377; Model C., Rule 207, Comment; 1 McCormick 5th, §139.) And a driver may be required to report a traffic accident, as mandated by the Financial Responsibility Law (*Veh.C. 16000 et seq.*). (See *Fahlgren v. Department of Motor Vehicles* (1986) 186 C.A.3d 930, 936, 231 C.R. 229.)

(3) *Required Records and Reports of Nondangerous Regulated Business or Activity.* The nonprivileged required records doctrine appears to be applicable to the almost innumerable statutory regulations requiring the filing or disclosure of records to regulatory agencies. In *Shapiro v. United States* (1948) 335 U.S. 1, 68 S.Ct. 1375, 92 L.Ed. 1787, S was charged with violation of the Emergency Price Control Act. He claimed immunity under the former Compulsory Testimony Act (*infra*, §482) because of the prior production of his books and records under subpoena in an administrative hearing. *Held*, no immunity was gained by the production of these *unprivileged records*. "Congress required records to be kept as a means of enforcing the statute and did not intend to frustrate the use of those records for enforcement action by granting an immunity bonus to individuals compelled to disclose their required records to the Administrator." (68 S.Ct. 1379, 92 L.Ed. 1793.) (See *Craib v. Bulmash* (1989) 49 C.3d 475, 487, 489, 261 C.R. 686, 777

*P.2d 1120* [discussing later federal cases and following *Shapiro*]; 19 *So. Cal. L. Rev.* 423; 22 *So. Cal. L. Rev.* 303; 9 *Stanf. L. Rev.* 379; 1967 A.S. 560 [criticizing theory of *Shapiro*].) (On inspection of bank records, see *infra*, §§460, 461.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 1 McCormick 6th, §139.

(2) *Required Records and Reports of Dangerous Business or Activity.* See 1 McCormick 6th, §139.(3) *Required Records and Reports of Nondangerous Regulated Business or Activity.* See *Machado v. State Water Resources Control Bd.* (2001) 90 C.A.4th 720, 729, 109 C.R.2d 116 [self-incrimination privilege did not insulate dairy from reporting requirements of cleanup and abatement order issued by Regional Water Quality Control Board].



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#### C. Privilege of Witness in Any Proceeding.

##### 1. General Principles.

##### d. Required Records and Reports.

##### 2. Distinction: Gambling Registration.

2 Witkin Cal. Evid. Witnesses § 457

[§ 457] Distinction: Gambling Registration.

The federal wagering tax statutes call for registration and furnishing of information of an incriminating nature. In *Marchetti v. United States* (1968) 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889, the Court held that the criminal sanction for wilful failure to register was violative of the Fifth Amendment privilege. (See supra, §373.) As to the Government's contention that the required records doctrine should apply, the court, distinguishing *Shapiro v. United States* (1948) 335 U.S. 1, 68 S.Ct. 1375, 92 L.Ed. 1787 (supra, §456), found the elements of the doctrine absent (88 S.Ct. 707, 19 L.Ed.2d 902, 903).

(a) Defendant was not required to keep customary records, but rather to provide information unrelated to any records he may have maintained for his wagering activities; and this is not significantly different from compelled oral testimony.

(b) The records in Shapiro had a "public" aspect (kept under Emergency Price Control Act); here, neither the Government's desire to obtain information nor formalizing of the demand in a statute makes the records "public."

(c) In *Shapiro* the records were required in an essentially noncriminal area; here, the requirement applied to a selective group inherently suspect of criminal activities. (See 5 *San Diego L. Rev.* 390; 82 *Harv. L. Rev.* 196; 86 *Harv. L. Rev.* 914 [identification of gambling as principal source of income in filing of income tax returns improperly used in prosecution for violation of gambling laws]; 24 *Hastings L. J.* 959 [same].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER IX - Witnesses

## XVII. PRIVILEGE AGAINST SELF-INCRIMINATION

## C. Privilege of Witness in Any Proceeding.

## 1. General Principles.

## e. Personal Records.

## 1. Tax Records.

2 *Witkin Cal. Evid. Witnesses* § 458

## [§ 458] Tax Records.

Although tax records may be privileged (see *supra*, §255 et seq.), when a taxpayer parts with possession by placing them in the hands of a tax preparer, the taxpayer loses the right to invoke the self-incrimination privilege to block a summons directed against the custodian of the material. The privilege cannot be asserted where there is no legitimate expectation of privacy and no government compulsion against the person of the accused. (*Couch v. United States* (1973) 409 U.S. 322, 93 S.Ct. 611, 616, 619, 34 L.Ed.2d 548, 554, 558.) The opinion adds, however, that "situations may well arise where constructive possession is so clear or the relinquishment of possession is so temporary and insignificant as to leave the personal compulsions upon the accused substantially intact." (93 S.Ct. 618, 34 L.Ed.2d 557.)

*Fisher v. United States* (1976) 425 U.S. 391, 96 S.Ct. 1569, 48 L.Ed.2d 39, involved two separate cases in which Internal Revenue agents interviewed taxpayers as part of an investigation into possible civil or criminal tax liability. Soon after the interviews, the taxpayers obtained from their respective accountants documents relating to the accountants' preparation of their tax returns. The taxpayers then transferred the documents to their respective attorneys, who had been retained to assist the taxpayers in connection with the investigation. On learning of the documents' whereabouts, the Internal Revenue Service served a summons on each attorney, directing production of the accountants' workpapers, retained copies of one taxpayer's tax returns, retained copies of reports and other correspondence between the accountant and the taxpayer, and the accountant's analyses of the taxpayers' income and expenses as copied by the accountant from the taxpayers' cancelled checks and deposit receipts. The attorneys declined to comply, and, when the Government brought enforcement actions, they raised the taxpayer's accountant-client privilege, the attorney-client privilege, and Fourth Amendment and Fifth Amendment rights. *Held*, enforcement orders were proper; the documents were not privileged either in the lawyers' hands or those of their clients.

(a) If a taxpayer would have been excused from turning over the accountant's papers had the taxpayer possessed them, the attorney to whom the papers were delivered for the obtaining of legal advice would also have been immune from subpoena. But it is not the taxpayer's *Fifth Amendment* privilege which would excuse the attorney from production. (96 S.Ct. 1573, 48 L.Ed.2d 47, citing *Couch*.) The taxpayer's privilege under the Fifth Amendment would not be violated here because enforcement against a lawyer would not "*compel*" the taxpayer to do anything--and certainly would not compel the taxpayer to be a "*witness*" against himself or herself. (96 S.Ct. 1573, 48 L.Ed.2d 47.) "This is true whether or not the Amendment would have barred a subpoena directing the taxpayer to produce the documents while they were in his hands." (96 S.Ct. 1574, 48 L.Ed.2d 48.) The fact that the attorneys were agents of the taxpayers does

not change this result, nor was the taxpayer's constructive possession so clear or relinquishment of possession so temporary and insignificant as to leave the personal compulsion on the taxpayer substantially intact. "In this respect we see no difference between the delivery to the attorneys in these cases and delivery to the accountant in the *Couch* case. As was true in *Couch*, the documents sought were obtainable without personal compulsion on the accused." (96 S.Ct. 1574, 48 L.Ed.2d 48.)

(b) The taxpayer misconceives the nature of the Fifth Amendment when the taxpayer argues that the privilege should not be lost solely because he or she gave a document to his or her lawyer to obtain legal advice. "Here, the taxpayers retained any privilege they ever had not to be compelled to testify against themselves and not to be compelled themselves to produce private papers in their possession. This personal privilege was in no way decreased by the transfer. It is simply that by reason of the transfer of the documents to the attorneys, those papers may be subpoenaed without compulsion on the taxpayer. The protection of the Fifth Amendment is therefore not available." (96 S.Ct. 1574, 48 L.Ed.2d 48.)

(c) Not every invasion of privacy violates the self-incrimination privilege. "Within the limits imposed by the language of the Fifth Amendment, which we necessarily observe, the privilege truly serves privacy interests; but the Court has never on any ground, personal privacy included, applied the Fifth Amendment to prevent the otherwise proper acquisition or use of evidence which, in the Court's view, did not involve compelled testimonial self-incrimination of some sort." (96 S.Ct. 1575, 48 L.Ed.2d 49.) The constitutional provision which specifically mentions personal privacy is the *Fourth Amendment*.

(d) The proposition that the Fifth Amendment prevents compulsory production of incriminating documents stems from *Boyd v. United States* (1886) 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746. Even though later decisions have lessened *Boyd's* impact, the pronouncement that one may not be forced to produce one's private papers still appears as dictum in many cases. But to the extent that the pronouncement rests on the prohibition against seizure of "mere evidence," its foundations have been washed away. (See 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence*, §81.) "In consequence, the prohibition against forcing the production of private papers has long been a rule searching for a rationale consistent with the proscriptions of the Fifth Amendment against compelling a person to give 'testimony' that incriminates him." (96 S.Ct. 1580, 48 L.Ed.2d 55.)

(e) A subpoena requiring a taxpayer to produce an accountant's work papers in his or her possession involves substantial compulsion, but it does not compel oral testimony and would not ordinarily compel the taxpayer to repeat or affirm the truth of the contents of the documents. Thus, the Fifth Amendment would not be violated by the mere fact that the papers on their face might incriminate the taxpayer. "The accountants' work papers are not the taxpayer's. They were not prepared by him, and they contain no testimonial declarations by him. Furthermore, as far as this record demonstrates, the preparation of all of the papers sought in these cases was wholly voluntary, and they cannot be said to contain compelled testimonial evidence, either of the taxpayer or of anyone else. The taxpayer cannot avoid compliance with the subpoena merely by asserting that the item of evidence which he is required to produce contains incriminating writing, whether his own or that of someone else." (96 S.Ct. 1580, 48 L.Ed.2d 55.) The fact that a document was written by the person asserting the privilege is insufficient to trigger the privilege. (96 S.Ct. 1580, 48 L.Ed.2d 55, footnote 11.)

(f) Aside from the contents of the papers produced, the act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own. Compliance with the subpoena tacitly concedes the *existence* of the papers demanded, their *possession or control* by the taxpayer, and the taxpayer's belief that the papers are those described in the subpoena. Yet whether these tacit averments are both "testimonial" and "incriminating" are questions not lending themselves to categorical answer. Here, "we are confident that however incriminating the contents of the accountant's work papers might be, the act of producing them--the only thing which the taxpayer is compelled to do--would not itself involve testimonial self-incrimination." (96 S.Ct. 1580, 48 L.Ed.2d 56.) The taxpayer's implicit admission of the existence and possession of the papers does not rise to the level of testimony under the Fifth Amendment, and the taxpayer's response to the subpoena would not authenticate the work papers. (96 S.Ct. 1580, 48 L.Ed.2d 56.) (See 27 U.C.L.A. L. Rev. 343; 90 Harv. L. Rev. 76; 95 Harv. L. Rev. 683; 17 U.S.F. L. Rev. 333; 1984 A.S.

351.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
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##### 1. General Principles.

##### e. Personal Records.

##### 2. Other Records Disclosing Criminal Acts.

2 Witkin Cal. Evid. Witnesses § 459

[§ 459] Other Records Disclosing Criminal Acts.

The approach in *Fisher v. United States* (1976) 425 U.S. 391, 96 S.Ct. 1569, 48 L.Ed.2d 39, supra, §458, was followed in *Andresen v. Maryland* (1976) 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 627, where state investigators, with probable cause to believe that petitioner had committed the crime of false pretenses, obtained search warrants for his office, and seized business records, including his own statements, which were incriminating. *Held*, there was no violation of the privilege. The statements of petitioner had been voluntarily committed to writing; the seizure was by law officers; and the records were authenticated at the trial by a handwriting expert. Thus, he was not required to aid in the discovery, production or authentication of incriminating evidence. (96 S.Ct. 2744, 2745, 49 L.Ed.2d 638, 637.)

In *United States v. Doe* (1984) 465 U.S. 605, 104 S.Ct. 1237, 79 L.Ed.2d 552, the defendant was the owner of several sole proprietorships. In an investigation of corruption in awarding county and municipal contracts, the grand jury served subpoenas on defendant demanding production of telephone records, bank accounts, and other business records of his companies. *Held*:

(a) Under the *Fisher* holding, the contents of the records were not privileged. "Respondent does not contend that he prepared the documents involuntarily or that the subpoena would force him to restate, repeat, or affirm the truth of their contents. The fact that the records are in respondent's possession is irrelevant to the determination of whether the creation of the records was compelled." (104 S.Ct. 1242, 79 L.Ed.2d 559.)

(b) The act of producing the records was, however, compelled, and therefore the privilege applied. "In *Fisher*, the Court explored the effect that the act of production would have on the taxpayer and determined that the act of production would have only minimal testimonial value and would not operate to incriminate the taxpayer. Unlike the Court in *Fisher*, we have the explicit finding of the District Court that the act of producing the documents would involve testimonial self-incrimination." (104 S.Ct. 1242, 79 L.Ed.2d 560.) Hence, the act could not be compelled without a statutory grant of use immunity. (104 S.Ct. 1245, 79 L.Ed.2d 563.)

A concurring justice added a brief statement "to make explicit what is implicit" in the first part of the opinion; i.e., that "the Fifth Amendment provides absolutely no protection for the contents of private papers of any kind." The notion that it did originated in *Boyd v. United States* (1886) 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746, but *Fisher* "sounded the death-knell for *Boyd*." (104 S.Ct. 1245, 79 L.Ed.2d 563.) (See 99 Harv. L. Rev. 640 [organizational papers and privilege against self-incrimination].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *United States v. Hubbell* (2000) 530 U.S. 27, 120 S.Ct. 2037, 2048, 147 L.Ed.2d 24, 47 [where independent counsel's subpoena required defendant to produce several broad categories of general business records, and Government had no prior knowledge of existence or whereabouts of documents ultimately produced, defendant's act of production had testimonial aspect that brought it within constitutional privilege; distinguishing *Fisher v. United States* (1976) 425 U.S. 391, 96 S.Ct. 1569, 48 L.Ed.2d 39, text, §458].





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3. Bank Records.

aa. Federal Bank Secrecy Act.

2 *Witkin Cal. Evid. Witnesses* § 460

[§ 460] Federal Bank Secrecy Act.

The Federal Bank Secrecy Act of 1970, requiring the photocopying of checks, the reporting of financial transactions according to Treasury Department regulations, and other extensive record keeping, is constitutional and within Fourth Amendment bounds. Access to these records is controlled by existing legal processes. (See *California Bankers Assn. v. Shultz* (1974) 416 U.S. 21, 94 S.Ct. 1494, 1510, 39 L.Ed.2d 812, 835; *United States v. Miller* (1976) 425 U.S. 435, 96 S.Ct. 1619, 1621, 48 L.Ed.2d 71, 75; 88 Harv. L. Rev. 188; 1986 A.S. 587; 7 *Summary* (9th), *Constitutional Law*, §471.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Cross-Reference:* 7 *Summary* (10th), *Constitutional Law*, §603.



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## 3. Bank Records.

## bb. California Right to Financial Privacy Act.

2 Witkin Cal. Evid. Witnesses § 461

[§ 461] California Right to Financial Privacy Act.

(1) *Enactment of Statute.* In *Burrows v. Superior Court* (1974) 13 C.3d 238, 246, 118 C.R. 166, 529 P.2d 590, the California Supreme Court held that a bank customer's records were protected by the California constitutional right of privacy in Cal. Const., Art. I, §1. (See also *Valley Bank of Nevada v. Superior Court* (1975) 15 C.3d 652, 656, 125 C.R. 553, 542 P.2d 977.) The 1976 Legislature responded with the California Right to Financial Privacy Act, providing that evidence obtained in violation of the act is inadmissible. (Govt.C. 7460 et seq.; see 7 Summary (9th), *Constitutional Law*, §471.) (For the exception where the institution has reason to suspect that a crime has been or is being committed, see Govt.C. 7470(d) and 7471(c); *People v. Nece* (1984) 160 C.A.3d 285, 290, 291, 206 C.R. 552.)

(2) *Effect of Proposition 8.* In *People v. Gibson* (1987) 195 C.A.3d 841, 241 C.R. 126, a first degree murder case, defendant's bank records were admitted into evidence even though she had not been served with a copy of the subpoena, as required by Govt.C. 7476(a)(1). Defendant contended (a) that the issue of admissibility was decided by Govt.C. 7489, making any evidence obtained in violation of the Act inadmissible; and (b) that Govt.C. 7489, as an "existing statutory rule of evidence relating to privilege," survived Proposition 8 (see 1 Cal. Evidence (4th), *Introduction*, §§8, 9). *Held*, the records were admissible; Govt.C. 7489 was abrogated by Proposition 8, and the case is governed by federal law, which permits admissibility (see *United States v. Miller* (1976) 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed.2d 71).

"Statutory privileges were established to encourage unbridled open communications and disclosures. Based upon these considerations, the holder of such a privilege has an absolute right to refuse to disclose privileged information. The relationship between a bank and its customers, although deemed by *Government Code* section 7461 subdivision (c), to be confidential, is not privileged. Neither the bank nor the customer has an absolute right to prevent disclosure of financial information. Upon a proper showing, the financial institution *must* disclose information. The California right to the Financial Privacy Act establishes a statutory *procedure* for the *disclosure* of financial information. It does not create a statutory privilege." (195 C.A.3d 853, 854.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Enactment of Statute.*

*Cross-Reference:* 7 Summary (10th), *Constitutional Law*, §603.



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2 *Witkin Cal. Evid. Witnesses* § 462

[§ 462] Federal Standards Control.

"The Court thus has rejected the notion that the Fourteenth Amendment applies to the states only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights'." (*Malloy v. Hogan* (1964) 378 U.S. 1, 84 S.Ct. 1489, 1495, 12 L.Ed.2d 653, 661, *infra*, §466 [holding that the self-incrimination privilege is enforceable against states according to the same standards which protect those rights against federal encroachment]; see 78 *Harv. L. Rev.* 223.)

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    - b. Threat of Criminal or Quasi-Criminal Penalty.

2 Witkin Cal. Evid. Witnesses § 463

[§ 463] Threat of Criminal or Quasi-Criminal Penalty.

The answer of a witness will usually be deemed incriminating not only where it creates the danger of *criminal prosecution*, but also where it involves the danger of a *penalty or forfeiture* of a criminal or quasi-criminal nature. (See *In re Leavitt* (1959) 174 C.A.2d 535, 539, 345 P.2d 75, *infra*, §467 [danger of adjudication and punishment for contempt]; 1 McCormick 5th, §120; 8 Wigmore (McNaughton Rev.) §§2256, 2257; 70 Harv. L. Rev. 1464.)

On the other hand, there is no protection against disclosure of facts that might involve merely civil liability, economic loss (e.g., discharge from employment), or public disgrace. (See 8 Wigmore (McNaughton Rev.) §§2223, 2254, 2255; 70 Harv. L. Rev. 1464; as to liability for punitive damages as basis for invoking the privilege, see 17 Stanf. L. Rev. 327; for discretionary exclusion of questions on collateral matters degrading a witness, see 3 Cal. Evidence (4th), *Presentation at Trial*, §348.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 1 McCormick 6th, §120. *West's Key Number Digest*, Witnesses k.295



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  - c. Direct and Indirect Incrimination.

2 Witkin Cal. Evid. Witnesses § 464

[§ 464] Direct and Indirect Incrimination.

(1) *In General*. There are two types of incriminating questions: one which calls for an answer which *directly incriminates*, and one which if answered would form "a link in the chain" of evidence of guilt and thus *indirectly incriminate*. (See *In re Berman* (1930) 105 C.A. 37, 44, 287 P. 125, *infra*, §496; *In re Crow* (1932) 126 C.A. 617, 619, 14 P.2d 918; *In re Sales* (1933) 134 C.A. 54, 60, 24 P.2d 916 [privilege available where admissions would "serve as incriminating facts tending to establish their guilt"]; *People v. McCormick* (1951) 102 C.A.2d Supp. 954, 959, 228 P.2d 349; *People v. Bartges* (1954) 126 C.A.2d 763, 770, 273 P.2d 49; *People v. Lawrence* (1959) 168 C.A.2d 510, 516, 336 P.2d 189 [danger of perjury charge in giving of former testimony]; *Cohen v. Superior Court* (1959) 173 C.A.2d 61, 68, 343 P.2d 286, *infra*, §467; *In re Leavitt* (1959) 174 C.A.2d 535, 538, 345 P.2d 75, *infra*, §467; *Blau v. United States* (1950) 340 U.S. 159, 71 S.Ct. 223, 224, 95 L.Ed. 170, 172; *Hoffman v. United States* (1951) 341 U.S. 479, 71 S.Ct. 814, 818, 95 L.Ed. 1118, 1124, *infra*, §466; 1 McCormick 5th, §133; 8 Wigmore (McNaughton Rev.) §§2260, 2261; 30 Cal. L. Rev. 552; 38 Cal. L. Rev. 924; 70 Harv. L. Rev. 1454; 1958 A.S. 674; 1959 A.S. 641.)

Thus, in *People v. Bartges*, *supra*, defendant and J were jointly indicted for grand theft (larceny by trick), and J obtained a severance. Defendant's counsel summoned J and asked questions concerning his meetings with defendant. *Held*, J's claim of privilege was properly sustained. The answers might show the presence of J with his codefendant when the latter was laying the foundation for his scheme, warranting a possible inference that J aided and abetted defendant in committing the crime. (126 C.A.2d 770.)

(2) *Future Indirect Prosecution*. The self-incrimination privilege may be available to a person concerned about a future indirect prosecution; however, in light of the procedural safeguards applicable where other crimes evidence is sought to be introduced to prove something more than mere criminal disposition to commit the crime charged, a witness' claim that his or her testimony might be used as other crimes evidence in a future prosecution is, without more, insufficient to show that the witness has been asked to incriminate himself or herself. (*Blackburn v. Superior Court* (1993) 21 C.A.4th 414, 429, 430, 27 C.R.2d 204.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General*. See 1 McCormick 6th, §120.



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    - 1. Former Conservative Rule.

2 Witkin Cal. Evid. Witnesses § 465

[§ 465] Former Conservative Rule.

In *Mason v. United States* (1916) 244 U.S. 362, 37 S.Ct. 621, 61 L.Ed. 1198, M and H were questioned by a federal grand jury investigating a charge of gambling against six other men. They refused to answer questions whether they saw poker or other gambling games being played at tables in a place where they were sitting. *Held*, the claim of privilege was properly denied. The court, quoting liberally from a leading English case, declared that "the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things,--not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct." (37 S.Ct. 622, 61 L.Ed. 1200.) (See also *Rogers v. United States* (1951) 340 U.S. 367, 71 S.Ct. 438, 442, 95 L.Ed. 344, 350; *Coleman v. Galvin* (1947) 78 C.A.2d 313, 321, 177 P.2d 606; 1 McCormick 5th, §122.)

In *Coleman v. Galvin*, *supra*, plaintiff had obtained a judgment which was only partially satisfied. On order of examination plaintiff asked the judgment debtor whether he was employed; whether he had a safe deposit box; whether he owned any war bonds; whether anyone owed him money; and whether he owned life insurance, real estate or money. The trial judge sustained objections to every question. *Held*, all questions were proper. The court pointed out that the judgment debtor in the present case was not being charged with having made fraudulent transfers, and that questions concerning his present ownership of property would not tend to indicate previous ownership or fraudulent concealment of property. (78 C.A.2d 321.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 1 McCormick 6th, §120.



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- 2. Modern View: Federal Cases.

2 Witkin Cal. Evid. Witnesses § 466

[§ 466] Modern View: Federal Cases.

The United States Supreme Court has abandoned the test of "real," "substantial," and "probable" danger. The witness need not satisfy the court that criminal prosecution is likely and imminent; indeed, to do so might often disclose the privileged incriminating facts. It is enough that the witness shows a *possible* danger--even a hypothetical one; its improbability will not justify denial of the privilege.

The leading case setting forth this view is *Hoffman v. United States* (1951) 341 U.S. 479, 71 S.Ct. 814, 95 L.Ed. 1118. A federal grand jury, convened to investigate rackets, called petitioner, a known racketeer. He was questioned as to his occupation and his knowledge of the whereabouts of W, another alleged racketeer for whom the prosecutor was looking. *Held*, refusal to answer was privileged; the answers might have established contacts between petitioner and W during the period when W was eluding the grand jury, and thus petitioner could have sensed the peril of federal prosecution for obstruction or conspiracy. "[I]f the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered *might be dangerous* because injurious disclosure *could result*." (71 S.Ct. 818, 95 L.Ed. 1124.) (See 1 McCormick 5th, §133; 70 Harv. L. Rev. 1455; 4 Hastings L. J. 194; 1951 A.S. 845; 1956 A.S. 554; 1957 A.S. 562.) (On incriminating nature of questions concerning employment by, affiliation with, or knowledge of activities of, the Communist Party, see *Blau v. United States* (1950) 340 U.S. 159, 71 S.Ct. 223, 224, 95 L.Ed. 170, 172; 24 So. Cal. L. Rev. 110, 303; 2 Hastings L. J. 73; 38 Cal. L. Rev. 924; 1950 A.S. 809; *infra*, §502.)

In *Malloy v. Hogan* (1964) 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653, petitioner, previously convicted in Connecticut of the misdemeanor of pool selling, was ordered to testify, 16 months later, before a court referee conducting an inquiry into gambling activities in the county. He was asked such questions as (a) for whom he worked at the time of his arrest, who furnished his counsel and bail and paid his fine, and (b) "did he know John Bergoti?" (84 S.Ct. 1496, 12 L.Ed.2d 662.) He was sentenced for contempt for refusal to answer. The Connecticut Supreme Court denied habeas corpus, holding that the double jeopardy and statute of limitations defenses would defeat any prosecution growing out of the first group, and that he had failed to explain how a revelation of his relationship with Bergoti would incriminate him. *Held*, reversed. Under the *Hoffman* test, the judge must be "perfectly clear" that the answer "cannot possibly" have a tendency to incriminate. (84 S.Ct. 1496, 12 L.Ed.2d 662.) Here:

(a) Petitioner might apprehend that if the person for whom he had worked were still engaged in unlawful activity, "disclosure of his name might furnish a link in a chain of evidence sufficient to connect the petitioner with a more recent crime for which he might still be prosecuted." (84 S.Ct. 1496, 12 L.Ed.2d 662.)

(b) The Bergoti question indicated that Bergoti was suspected of involvement in the subject of the investigation, and "[a]n affirmative answer to the question might well have either connected petitioner with a more recent crime, or at least have operated as a waiver of his privilege with reference to this relationship with a possible criminal." (84 S.Ct. 1497, 12 L.Ed.2d 663.) (See 78 Harv. L. Rev. 223.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Ohio v. Reiner* (2001) 532 U.S. 17, 121 S.Ct. 1252, 1255, 149 L.Ed.2d 158, 162, 163 [in prosecution for involuntary manslaughter arising from death of infant, prosecution witness who had babysat victim could assert self-incrimination privilege despite her claim of innocence; because defense theory was that she, not defendant, was responsible for death, it was reasonable for her to fear that answers to possible questions might tend to incriminate her]; 1 McCormick 6th, §132.





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2 Witkin Cal. Evid. Witnesses § 467

[§ 467] Modern View: California Cases.

In *Cohen v. Superior Court* (1959) 173 C.A.2d 61, 343 P.2d 286, the main action was by plaintiff B against defendant C for assault and battery. Seeking exemplary damages, plaintiff's counsel sought to question C as to his ownership of an expensive car and house, his employment of servants, the restaurant he attended, and his air travels, all designed to show wealth--relevant on the issue of exemplary damages (see 1 Cal. Evidence (4th), *Circumstantial Evidence*, §139). C claimed privilege and the trial judge sentenced him for contempt. *Held*, contempt judgment annulled. "The witness does not have to demonstrate conclusively that the answers to the questions will make him subject to prosecution nor need he demonstrate that he likely would be convicted." (173 C.A.2d 68.) Here, C was under investigation by Congressional and state legislative committees and by the Internal Revenue Service, and was widely and publicly known as an ex-convict, racketeer and gangster. Thus, as in *Hoffman v. United States* (1951) 341 U.S. 479, 71 S.Ct. 814, 95 L.Ed. 1118 (supra, §466), "the chase is one with a 'warm enough scent' to make the 'pursuit genuinely perilous' to the petitioner." (173 C.A.2d 69.)

In *re Leavitt* (1959) 174 C.A.2d 535, 538, 345 P.2d 75, involved the same kind of proceeding as in *Coleman v. Galvin* (1947) 78 C.A.2d 313, 177 P.2d 606, supra, §465, but with a distinguishable fact. Petitioner, defendant in a divorce action, was in default in alimony payments. His wife instituted a contempt proceeding and then an order of examination. In the latter proceeding, she sought to question him on his financial status and the source and extent of his income. *Held*, his claim of the privilege was proper. The questions related to the basic issue in the contempt proceeding--his ability to pay--and the answers could incriminate by subjecting him to possible adjudication of contempt.

The rule was restated in *Prudhomme v. Superior Court* (1970) 2 C.3d 320, 85 C.R. 129, 466 P.2d 673, 5 Cal. Crim. Law (3d), *Criminal Trial*, §28, as follows:

"An ordinary witness need not actually prove the existence of an incriminatory hazard as that would surrender the very protection which the privilege against self-incrimination was designed to guarantee. Instead, the privilege forbids compelled disclosures which could serve as a 'link in a chain' of evidence tending to establish guilt of a criminal offense; in ruling upon a claim of privilege, the trial court must find that it clearly appears from a consideration of all the circumstances in the case that an answer to the challenged question cannot possibly have a tendency to incriminate the witness." (2 C.3d 326; see also *Zonver v. Superior Court* (1969) 270 C.A.2d 613, 76 C.R. 10, supra, §356; *People v. Traylor* (1972) 23 C.A.3d 323, 330, 100 C.R. 116, 1 Cal. Evidence (4th), *Hearsay*, §151; *People v. Maxwell* (1979) 94

*C.A.3d 562, 570, 156 C.R. 630; Smith v. Superior Court (1980) 110 C.A.3d 422, 425, 168 C.R. 24; Gonzales v. Superior Court (1980) 117 C.A.3d 57, 63, 178 C.R. 358.)*

In *Warford v. Medeiros (1984) 160 C.A.3d 1035, 207 C.R. 94*, the court reviewed federal and state cases, discussed the *Hoffman* and *Prudhomme* cases (see *supra*), and came to the following conclusions:

(a) "The California and federal case law, which is not at all inconsistent, essentially stands for the proposition that, in situations such as that before us, assertion of the privilege in a civil proceeding cannot be sustained--that is, the court must conclude that an answer to the challenged question or production of a withheld document cannot possibly have a tendency to incriminate the person invoking the privilege--*unless* the person who invokes the privilege demonstrates that his or her fear of incrimination is reasonable and not advanced fancifully or merely imagined." (*160 C.A.3d 1044.*)

(b) The person claiming the privilege must object with specificity to the information sought; only where this is done will the trial court be able to make the particularized inquiry required of it. A blanket refusal to testify is unacceptable. (*160 C.A.3d 1045.*)

(c) An *in camera* hearing is within the trial court's discretion, but in any case, the court must clearly state for the record the basis for the conclusion whether the fear of incrimination is reasonably asserted and valid with respect to each question propounded or document sought to be discovered. (*160 C.A.3d 1048.*) (See *Troy v. Superior Court (1986) 186 C.A.3d 1006, 1012, 231 C.R. 108, 8 Cal. Proc. (4th), Enforcement of Judgment, §275* [judgment debtor proceeding; no criminal prosecution or investigation pending which might lead to prosecution].)

**SUPPLEMENT:** [This section is current through the latest supplement]

*In re Marriage of Sachs (2002) 95 C.A.4th 1144, 1161, 116 C.R.2d 273, 8 Cal. Proc. (4th), Enforcement of Judgment, Supp., §275*, held that a wife at a judgment debtor examination of her former husband, who had accumulated considerable arrearages of child and spousal support, was entitled to a copy of the husband's tax returns and had the right to examine him about their contents to the extent allowed by *Family C. 3552* (text, §259), notwithstanding his invocation of the self-incrimination privilege. The court suggested that *In re Leavitt (1959) 174 C.A.2d 535, 345 P.2d 75*, text, p. 770, would have been decided differently had *Family C. 3552* then existed.



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## CHAPTER IX - Witnesses

### XVII. PRIVILEGE AGAINST SELF-INCRIMINATION

#### C. Privilege of Witness in Any Proceeding.

##### 3. Possibility of Prosecution.

##### a. Prosecution Barred.

2 Witkin Cal. Evid. Witnesses § 468

[§ 468] Prosecution Barred.

The purpose of the privilege is not to prevent compulsory disclosure of criminal conduct but to *protect against punishment*. Thus, if the witness "has become for any reason permanently immune from punishment" for the crime, the answer will not incriminate the witness and the privilege cannot be claimed. (See Model C., Rule 202 and Comment; 1 McCormick 5th, §§142, 143; 8 Wigmore (McNaughton Rev.) §2279; *Ex parte Cohen* (1894) 104 C. 524, 528, 38 P. 364.)

The principal situations are as follows:

(1) *Prior Conviction, Acquittal, or Jeopardy*. (See *In re Critchlow* (1938) 11 C.2d 751, 760, 81 P.2d 966 [acquittal]; *People v. Varnum* (1967) 66 C.2d 808, 813, 59 C.R. 108, 427 P.2d 772 [murder trial, prosecution called H, already convicted as accomplice in crime charged; properly ordered to answer questions]; *Reina v. United States* (1960) 364 U.S. 507, 81 S.Ct. 260, 5 L.Ed.2d 249, *infra*, §477 [suggesting that person already convicted of crime need not be offered immunity from prosecution for it as condition of compelled testimony]; Model C., Rule 202, Comment; 1 McCormick 5th, §§142, 143; 8 Wigmore (McNaughton Rev.) §2279; 9 A.L.R.3d 990 [effect of plea of guilty or conviction].)

Where the prospective witness has *pleaded guilty* but has *not yet been sentenced*, the privilege remains. Thus, in *People v. Kizzee* (1979) 94 C.A.3d 927, 156 C.R. 784, C wrote a note to the trial judge stating that she would like to testify for defendant, but could not do so because she had made a guilty plea to a charge against her under an agreement not to give such testimony. *Held*, she was entitled to claim the privilege.

(a) Some cases have suggested that a guilty plea waives or erases the testimonial privilege; but the federal rule is unclear and California cases are not definitive. (94 C.A.3d 938.)

(b) Applying California's constitutional provision (Cal. Const., Art. I, §15), the reasoning of a New Jersey case is persuasive: an accused who pleads guilty does not lose the privilege until he or she has been sentenced, because until that time the accused may move to withdraw the plea. (94 C.A.3d 938.) "The wisdom of such a rule is particularly evident in a case ... where the plea was pursuant to a bargain which ... left several matters to the trial court's discretion." (94 C.A.3d 939.)

Similarly, a convicted defendant retains the privilege against self-incrimination as to subsequent proceedings

against other defendants at least until the time the defendant no longer retains *the right to file a timely notice of appeal*. (*People v. Fonseca* (1995) 36 C.A.4th 631, 633, 634, 42 C.R.2d 525 [citing *People v. Lopez* (1980) 110 C.A.3d 1010, 168 C.R. 378, *infra*, §500]; *People v. Lopez* (1999) 71 C.A.4th 1550, 1554, 84 C.R.2d 655 [citing *Fonseca*].)

(2) *Prosecution Barred by Statute of Limitations*. (See *Ex parte Cohen*, *supra*, 104 C. 528; *Peck's Liquors v. Superior Court* (1963) 221 C.A.2d 772, 776, 34 C.R. 735 [dictum; 1-year statute had run on misdemeanor charge, but petitioners could still be prosecuted for conspiracy to commit the misdemeanor, a felony, with 3-year statute]; Model C., Rule 202, Comment; 8 Wigmore (McNaughton Rev.) §2279; but see *Blackburn v. Superior Court* (1993) 21 C.A.4th 414, 428, 429, 27 C.R.2d 204 [father, deposed in civil action by daughter claiming he molested her, failed to show he had been asked to incriminate himself; if statute of limitations had run, he could not claim privilege, and counsel's statement that statute might have been tolled was insufficient explanation].)

(3) *Accepted Pardon*. (See 8 Wigmore (McNaughton Rev.) §2280.) However, because a pardon involves an implication of guilt, the witness need not accept it and may still assert the privilege. (*Burdick v. United States* (1915) 236 U.S. 79, 35 S.Ct. 267, 270, 59 L.Ed. 476, 481.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 1 McCormick 6th, §§142, 143.

(1) *Prior Conviction, Acquittal, or Jeopardy*. See 1 McCormick 6th, §§142, 143.



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##### 3. Possibility of Prosecution.

##### b. Liability to Prosecution in Other Jurisdiction.

2 Witkin Cal. Evid. Witnesses § 469

[§ 469] Liability to Prosecution in Other Jurisdiction.

(1) *Prosecution in Another State or Under Federal Law.* It was formerly held that the privilege did not protect a witness against disclosures which might subject the witness to prosecution under the laws of another state. Hence, the claim would be denied in a federal court where the danger was only of prosecution under state law, and in a state court where the danger was only of prosecution in another state or under federal law; and testimony compelled by the state could be introduced in a federal prosecution. The historical and practical reasons for this rule are set forth in *United States v. Murdock* (1931) 284 U.S. 141, 52 S.Ct. 63, 76 L.Ed. 210, *Feldman v. United States* (1944) 322 U.S. 487, 64 S.Ct. 1082, 88 L.Ed. 1408, and *Knapp v. Schweitzer* (1958) 357 U.S. 371, 78 S.Ct. 1302, 2 L.Ed.2d 1393. The court in *Knapp v. Schweitzer*, *supra*, saw this danger in a contrary rule: "If a person may, through immunized self-disclosure before a law-enforcing agency of the State, facilitate to some extent his amenability to federal process, or *vice versa*, this too is a price to be paid for our federalism. Against it must be put what would be a greater price, that of sterilizing the power of both governments by not recognizing the autonomy of each within its proper sphere." (78 S.Ct. 1308, 2 L.Ed.2d 1401.) (For general discussions of rule, its scope, effect, and policy, see 1 McCormick 5th, §123; 8 Wigmore (McNaughton Rev.) §2258; 66 Harv. L. Rev. 186; 68 Harv. L. Rev. 1074; 72 Harv. L. Rev. 179; 4 U.C.L.A. L. Rev. 549; 5 U.C.L.A. L. Rev. 1; 5 U.C.L.A. L. Rev. 557, 563; 6 U.C.L.A. L. Rev. 452; 1954 A.S. 797; 1958 A.S. 671; 1959 A.S. 637.)

The rule was abrogated in *Murphy v. Waterfront Com.* (1964) 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed.2d 678. Petitioners were summoned to testify about a work stoppage in a hearing conducted by the Waterfront Commission of New York Harbor--a bistate body established under a compact between New York and New Jersey. They were granted immunity from prosecution under New York and New Jersey law, but refused to answer on the ground of possible incrimination under federal law. *Held*, judgments of contempt reversed.

(a) *Policy.* The policies underlying the privilege are defeated if a witness "can be whipsawed into incriminating himself" under both state and federal law even through the privilege is applicable to each. "This has become especially true in our age of 'cooperative federalism,' where the federal and state governments are waging a united front against many types of criminal activity." (84 S.Ct. 1597, 12 L.Ed.2d 683.)

(b) *Precedent.* "Our review of the pertinent cases in this Court and of their English antecedents reveals that *Murdock* did not adequately consider the relevant authorities and has been significantly weakened by subsequent decisions of this Court, and, further, that the legal premises underlying *Feldman* and *Knapp* have since been rejected." (84 S.Ct. 1598, 12 L.Ed.2d 683.)

(c) *New rule.* "We hold that the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law." (84 S.Ct. 1609, 12 L.Ed.2d 694.)

(d) *Effect of new rule on existing state immunity laws.* "[W]e hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him. We conclude, moreover, that in order to implement this constitutional rule and accommodate the interests of the State and Federal Governments in investigating and prosecuting crime, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits. This exclusionary rule, while permitting the States to secure information necessary for effective law enforcement, leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity." (84 S.Ct. 1609, 1610, 12 L.Ed.2d 695.)

Thus, because the federal government cannot make use of petitioners' testimony in a federal prosecution, the danger of incrimination no longer exists, and petitioners should now be given an opportunity to answer the questions. (84 S.Ct. 1610, 12 L.Ed.2d 696.) (See 78 Harv. L. Rev. 223; 12 U.C.L.A. L. Rev. 561.)

In *Nelson v. Municipal Court* (1972) 28 C.A.3d 889, 105 C.R. 46, suspected prostitutes refused to answer questions about a criminal defendant's alleged procuring activities. Even after being granted immunity under P.C. 1324 (infra, §489), they refused to testify on the ground that the answers might subject them to prosecution under federal law. *Held*, they were properly judged in contempt. Because the immunity granted was comparable to that given in the *Murphy* case, *supra*, the witnesses could be compelled to testify. (28 C.A.3d 892.) Although the state could not bind the federal government by statute, the United States Supreme Court in *Malloy v. Hogan* (1964) 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653, *supra*, §§356, 466, concluded that the Fourteenth Amendment makes the Fifth Amendment privilege against self-incrimination binding on the states. Under the *Murphy* rule, the federal government is prohibited from making *any use* of the compelled testimony or its fruits in a criminal prosecution against the witness. Therefore, the grant of immunity under P.C. 1324 afforded them sufficient constitutional protection. (28 C.A.3d 894.)

(2) *Prosecution in Foreign Country.* The constitutional privilege against self-incrimination is concerned with prosecution by a sovereign that is itself bound by the privilege, i.e., the United States or one of its states. Thus, where a witness claims the privilege based on a fear of prosecution by a foreign nation, the witness can be compelled to testify. (*United States v. Balsys* (1998) 524 U.S. 666, 118 S.Ct. 2218, 2231, 141 L.Ed.2d 575, 595 [approving reasoning of *Murdock*, in this context, and disagreeing with analysis of historical precedent contained in *Murphy*, to extent it would require different result]; see 112 Harv. L. Rev. 172 [Balsys]; 45 U.C.L.A. L. Rev. 1201 [arguing that fear of foreign prosecution should be sufficient basis for invoking self-incrimination privilege].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Prosecution in Another State or Under Federal Law.* See 1 McCormick 6th, §123. (2) *Prosecution in Foreign Country.* See 29 Southwestern U. L. Rev. 201 [Balsys]. *West's Key Number Digest*, Witnesses k.297(14)



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#### C. Privilege of Witness in Any Proceeding.

##### 4. Immunity of Witness.

##### a. General Principles.

##### 1. Nature of Immunity Statutes.

2 Witkin Cal. Evid. Witnesses § 470

[§ 470] Nature of Immunity Statutes.

To overcome the obstacle of the self-incrimination privilege and make necessary evidence available and compellable, immunity statutes have been widely enacted, giving the witness, in effect, an advance pardon for a crime that might be disclosed by the witness' testimony. If the statute makes prosecution for the crime impossible, the constitutional requirement is satisfied (*supra*, §468) and the witness must testify. (See *In re Critchlow* (1938) 11 C.2d 751, 756, 81 P.2d 966; *Ex parte Cohen* (1894) 104 C. 524, 528, 38 P. 364; *People v. Williams* (1970) 11 C.A.3d 1156, 1164, 90 C.R. 409 ["One of the main purposes of the immunity statutes is to make it possible to reach the leaders of criminal conspiracies by guaranteeing immunity and thereby obtaining the testimony of their underlings and minor helpers"]; *Ullmann v. United States* (1956) 350 U.S. 422, 76 S.Ct. 497, 500, 100 L.Ed. 511, 518; *United States v. Mandujano* (1976) 425 U.S. 564, 96 S.Ct. 1768, 1776, 48 L.Ed.2d 212, 221 [discussion of immunity in perjury context; immunity is government's ultimate tool for securing testimony that otherwise would be protected]; 1 McCormick 5th, §§142, 143; 8 Wigmore (McNaughton Rev.) §§2281, 2284; 43 Cal. L. Rev. 888; 7 Hastings L. J. 75; 70 Harv. L. Rev. 1461; 81 Am.Jur.2d (1992 ed.), Witnesses §131 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 81 Am.Jur.2d (2004 ed.), Witnesses §129 et seq.; 1 McCormick 6th, §§142, 143. West's Key Number Digest, Witnesses k.304 et seq.



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##### 4. Immunity of Witness.

##### a. General Principles.

##### 2. Statutory Authority.

##### aa. In General.

2 Witkin Cal. Evid. Witnesses § 471

[§ 471] In General.

It is generally recognized that immunity may be given only under express statutory (or constitutional) authority. (See *In re Critchlow* (1938) 11 C.2d 751, 756, 81 P.2d 966; *Ex parte Cohen* (1894) 104 C. 524, 528, 38 P. 364; 1 McCormick 5th, §§142, 143; 8 Wigmore (McNaughton Rev.) §§2281, 2282; 7 *Hastings L. J.* 75; 78 *Cal. L. Rev.* 755 [Jailhouse Informants and the Need for Judicial Use Immunity in Habeas Corpus Proceedings]; 4 A.L.R.4th 1221 [prosecutor's power to grant prosecution witness immunity from prosecution].)

The older type of statute usually deals with a specific offense or narrow class of offenses, and gives an automatic immunity to the witness who testifies, which, however, is sometimes constitutionally inadequate. (See *infra*, §477.) The modern type, exemplified by the revised California statute (*infra*, §485) and the Federal Immunity of Witnesses Act of 1970 (*infra*, §483), covers a broader field of crimes and penalties, makes the grant discretionary with the prosecution and court, and gives a constitutionally adequate immunity.

In *People v. Superior Court (Kaufman)* (1974) 12 C.3d 421, 115 C.R. 812, 525 P.2d 716, *infra*, §474, the court limited the holding of *In re Critchlow*, *supra*. "[T]here is nothing in *Critchlow* which requires that the legislative authorization be directed to specific as distinguished from general applications. At best, it stands for the proposition that when the Legislature has directed the limits of a grant of immunity, the courts must adhere to such limitations." (12 C.3d 426, footnote 4.) Earlier cases interpreted statutes which dealt only with specific grants of immunity. "In no instance was it necessary to consider whether a statute, purporting to vest broad general discretion in the trial court to accord immunity in a variety of circumstances, did effectively vest that court with discretion to make valid grants of immunity especially in instances when justice and social policies implicit in legislative enactment compel disclosure." (12 C.3d 427.) (See also *People v. Brunner* (1973) 32 C.A.3d 908, 915, 108 C.R. 501, *infra*, §488 [immunity granted through estoppel despite noncompliance with statute]; *Tarantino v. Superior Court* (1975) 48 C.A.3d 465, 469, 122 C.R. 61 [when defendant's mental competence to stand trial is in issue under P.C. 1367 et seq., immunity is reasonably implied from statute so judge may compel defendant to submit to examination by court-appointed psychiatrists].)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 1 McCormick 6th, §§142, 143.





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## a. General Principles.

## 2. Statutory Authority.

## bb. Judicial Use Immunity.

2 Witkin Cal. Evid. Witnesses § 472

[§ 472] Judicial Use Immunity.

In *People v. Sutter* (1982) 134 C.A.3d 806, 184 C.R. 829, defendant wanted to call as a witness his codefendant, who had pled guilty to a robbery charge. However, the codefendant stated that, if called, he would assert his privilege against self-incrimination because his testimony might implicate him in another robbery. On appeal, defendant argued that the trial judge erred in failing to grant the codefendant *judicial* (not statutory) use immunity under the court's general power to act in the interest of justice. *Held*, there was no error. Fifth Amendment due process does not require prosecutors or courts to obtain evidence protected by lawful privilege. And the Sixth Amendment right to compulsory process does not place on prosecutors or courts an affirmative obligation "to secure testimony from a defense witness by replacing the protection of the self-incrimination privilege with a grant of use immunity." (134 C.A.3d 816.)

In *People v. Hunter* (1989) 49 C.3d 957, 264 C.R. 367, 782 P.2d 608, the court recognized, in dicta, the hypothetical possibility that judicially conferred use immunity might be necessary to vindicate a criminal defendant's rights to compulsory process and fair trial, if the testimony which would be forthcoming would be exculpatory and essential to defendant's case. (49 C.3d 973, 974.) Here, however, the trial judge did not abuse his discretion by denying defendant's request where the testimony sought was at best cumulative. (49 C.3d 975.)

In *People v. Cooke* (1993) 16 C.A.4th 1361, 20 C.R.2d 506, a prosecution for attempted murder, a percipient witness, subpoenaed by the defense, invoked his privilege not to testify, and the district attorney declined to grant the witness transactional immunity. After the court heard in camera what the witness' testimony would be, it refused to grant judicial use immunity, concluding that the witness' testimony would be cumulative of other evidence. *Held*, refusal to grant judicial use immunity was not error.

(a) It is not within the court's power to grant statutory transactional immunity; a grant of immunity under P.C. 1324 (see *infra*, §485 et seq.) is strictly an executive function. (16 C.A.4th 1367; on 1996 amendment to P.C. 1324 authorizing prosecution to request transactional or use immunity, see *infra*, §489.)

(b) Although some courts have granted judicial use immunity to a *defendant*, allowing the defendant to testify on other issues relevant to his or her case and still retain protection against self-incrimination at trial, a grant of immunity to a third-party witness would put the prosecutor in an awkward position. "A district attorney who cross-examines a judicially immunized defense witness must narrow his or her questioning to avoid impeding the witness' prosecution,

and even then will still face difficulties in proving that the evidence used against that witness was not obtained from or derived from earlier testimony." (16 C.A.4th 1370.)

(c) There is no due process requirement that judges order defense witness immunity whenever it seems fair to do so. The Fifth Amendment protects against overreaching by the prosecution, but it does not require the prosecution or courts to obtain evidence that is protected by a lawful privilege. "[N]o California Court of Appeal or Supreme Court case has ever granted such immunity to a defense witness, and we will not do so now. The relief which appellant here requests should be granted, if at all, by our state's high court." (16 C.A.4th 1371.)

A dissenting justice, relying on federal case law and the dicta in *People v. Hunter*, *supra*, argued that judicial use immunity must be granted where the immunity is properly sought in the trial court, the defense witness is available to testify, the proffered testimony is clearly exculpatory, the testimony is essential, and there is no strong countervailing governmental interest. (16 C.A.4th 1374, 1375.) (See *People v. Martin* (1983) 150 C.A.3d 148, 161, 197 C.R. 655 [following *Sutter*]; *People v. Lucas* (1995) 12 C.4th 415, 460, 48 C.R.2d 525, 907 P.2d 373 [characterizing trial judge's inherent authority to grant immunity to witness as "doubtful proposition," and finding defendant's offer of proof inadequate in any case]; 25 *Hastings L. J.* 435 [nonstatutory immunity]; 4 A.L.R.4th 617 [accused's right to have immunity from prosecution granted to defense witness].)

**SUPPLEMENT:** [This section is current through the latest supplement]

In *People v. Stewart* (2004) 33 C.4th 425, 15 C.R.3d 656, 93 P.3d 271, a capital murder case, the Supreme Court took the same approach, and reached the same result, as in *People v. Hunter* (1989) 49 C.3d 957, 264 C.R. 367, 782 P.2d 608, text, p. 777: The court assumed, without deciding, that trial judges have the inherent authority to order immunity for a witness the defendant wishes to call, but it concluded that the trial judge in this case did not abuse his discretion in failing to do so. Under one of the tests described in *Hunter*, the trial judge would have the authority to do so if the proffered testimony was both clearly exculpatory and essential, and there was no strong governmental interest countervailing against an immunity grant. Here, however, the witness in question had given police good reason to believe that he might have been involved in the crimes charged against defendant, and thus there was a strong governmental interest in not immunizing him. (33 C.4th 469.) Under the other *Hunter* test, a grant of immunity would be appropriate where the prosecution's treatment of the witness betrayed a deliberate intention of distorting the fact-finding process. Treatment of this sort can be shown where the prosecution relies heavily on the immunized testimony of a prosecution witness while denying immunity to a defense witness whose testimony would directly contradict that of the prosecution witness. Here, the prosecution consistently declined to grant immunity to defendant's potential witness, and, while it did grant immunity to two of its own witnesses, it did not rely heavily on their testimony. (33 C.4th 470, 471.)



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a. General Principles.

3. Standing To Challenge Grant of Immunity.

2 Witkin Cal. Evid. Witnesses § 473

[§ 473] Standing To Challenge Grant of Immunity.

In *People v. Wisely* (1990) 224 C.A.3d 939, 274 C.R. 291, defendant argued that the trial judge erred in granting witness T use immunity, because prior to 1996, only transactional immunity was authorized in California (infra, §489). *Held*, defendant lacked standing to argue that an immunized witness' testimony is the product of an improper grant of immunity. "The privilege against self-incrimination is personal to the person who invokes it and immunity affects only that person. Unless the immunity amounts to an improper coercion of the witness's testimony or demonstrably affects the nature of that testimony, the defendant has no interest in complaining." Here, there was neither claim nor showing that the grant of immunity adversely affected the veracity of T's testimony. (224 C.A.3d 944.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## 4. Immunity of Witness.

## b. Immunity in Civil Actions.

## 1. In General: Proceeding by People.

2 Witkin Cal. Evid. Witnesses § 474

[§ 474] In General: Proceeding by People.

Although immunity is usually sought in *criminal* proceedings, recent cases have made it clear that *C.C.P. 2025(i)* (see 2 Cal. Evidence (4th), Discovery, §59 et seq.) gives a trial judge power to frame a protective order in *civil* discovery proceedings with the effect of a grant of immunity. (See 9 Hastings Const. L. Q. 351 [evolution of California's judicially created immunities in civil actions].)

In *People v. Superior Court (Kaufman)* (1974) 12 C.3d 421, 115 C.R. 812, 525 P.2d 716, the prosecution brought civil proceedings against multiple defendants, charging them with deceptive advertising and unfair competition. On deposition, all defendants refused to answer questions connecting them with activities germane to the alleged fraud, asserting that responses could lead to the production of evidence tending to incriminate them of criminal conduct and thus would violate their constitutional privileges against self-incrimination. The prosecution moved for a protective order limiting the use of the deposition to the pending civil action, which would have been an effective grant of immunity from criminal liability. The trial judge denied the motion on jurisdictional grounds. *Held*, writ issued, directing the trial court to fashion an adequate protective order and then compel the witness to respond on deposition and trial to all proper inquiries, including those which would tend to incriminate him except for the protective order.

(a) Former C.C.P. 2019(b)(1) (now *C.C.P. 2025(i)*) provides that the trial court may make any order which justice requires to protect a party or witness from annoyance, embarrassment or oppression. The statute has been held to authorize a protective order in civil proceedings to limit use of a deposition where the use might otherwise infringe a confidential privilege. (12 C.3d 426; see *In re Lifschutz* (1970) 2 C.3d 415, 437, 85 C.R. 829, 467 P.2d 557, supra, §224.) And *Byers v. Justice Court* (1969) 71 C.2d 1039, 1049, 80 C.R. 553, 458 P.2d 465 (vacated on other grounds), held that the state may require a person to disclose information otherwise privileged if, in place of the protection conferred by the privilege, other protection (e.g., use immunity), having the same scope and effect as the privilege, is substituted. (12 C.3d 428.) Following the *Byers* rationale, the protective order sought would further the legislative purpose and would not unduly hamper the prosecution of persons who should be subjected to criminal proceedings. (12 C.3d 428.)

(b) Defendant objected that, however broad the prospective effect of the protective order may be, he was still subject to penal sanctions in the present civil proceeding--\$ 2,500 per violation. But the statutory penalties are not criminal in nature; e.g., they do not include the stigma of a criminal conviction or permit the alternative punishment of imprisonment. (12 C.3d 431.) Thus, the award of civil penalties does not expose defendant to criminal sanctions against

which he is protected by the privilege against self-incrimination. (12 C.3d 433.) (See also *People v. Superior Court (Taylor)* (1975) 53 C.A.3d 996, 999, 126 C.R. 297; *Gonzales v. Superior Court* (1980) 117 C.A.3d 57, 69, 178 C.R. 358; 64 Cal. L. Rev. 554.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2025(i)*, on protective orders in deposition proceedings, was repealed and replaced by *C.C.P. 2025.420* in 2004 without substantive change.



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## b. Immunity in Civil Actions.

## 2. Action by Private Litigant.

2 Witkin Cal. Evid. Witnesses § 475

[§ 475] Action by Private Litigant.

In *Daly v. Superior Court* (1977) 19 C.3d 132, 137 C.R. 14, 560 P.2d 1193, a newspaper employees' strike resulted in the beating and murder of Daly, a management employee. Plaintiffs, his widow and children, brought an action against officers and employees of the union, seeking damages for wrongful death, battery and intentional infliction of emotional distress. On deposition, the union officials claimed the self-incrimination privilege, mainly on apprehension that answers would tend to prove guilt of the murder and federal crimes of conspiracy. Plaintiffs' motions for a protective order giving use immunity were denied; instead, the judge granted their alternative motion that two of the officials be precluded from testifying at trial unless they filed timely waivers of their privilege for purposes of discovery. *Held*, plaintiffs were entitled to a protective order, but only under specified conditions.

(a) *Kaufman distinguished*. In *People v. Superior Court (Kaufman)* (1974) 12 C.3d 421, 115 C.R. 812, 525 P.2d 716, *supra*, §§471, 474, the immunity sprang from a prosecutorial decision to implement the People's civil enforcement of the law even at the expense of burdens that the immunity order might impose on subsequent criminal proceedings; and the prosecuting attorneys retained complete control over the scope of immunity through the power to determine what questions would be asked. Here, private litigants ask that immunity be granted without any notice to or expression by any prosecuting agency. (19 C.3d 144, 145.)

(b) *Petitioners entitled to protective order*. A prosecutorial *request* is not a universal prerequisite to a judicial grant of immunity; prosecutorial interests are protected if the general condition of *Kaufman* is met: that the granting of immunity will not unduly hamper subsequent criminal prosecutions. (19 C.3d 146, 147.) If it is met, the legislative policies favoring civil discovery give civil litigants the right to inclusion of immunity in a protective order, under the following conditions:

*First, prosecuting official's failure to object*. A prosecuting attorney may be disinclined to make a request for immunity, but the absence of any unduly detrimental effect on future proceedings can be sufficiently established by that official's failure to object to granting of the order after adequate notice and opportunity to do so. (19 C.3d 148.)

*Second, adequate notice to prosecuting official*. To enable the prosecuting agency to make an informed judgment on whether to object, the notice must state the subject matter of the inquiries, so that the immunity order will provide the witness with a clear guide as to its coverage. (19 C.3d 148.)

*Third, objection and declaration by prosecuting official.* The trial judge may disregard objections that are not accompanied by a declaration that the prosecuting attorney is familiar with the notice and has reasonable grounds to believe that the proposed grant of immunity *might* unduly hamper the prosecution of a criminal proceeding. (19 C.3d 148.) But a proper objection and declaration must be treated as conclusively establishing the grounds of the objection; the prosecutor cannot be required to amplify or justify the declaration, and the judge cannot interfere with the prosecutor's discretion by undertaking to assess the nature or degree of the impact of the immunity grant. (19 C.3d 148.) If the litigant considers the objection unjustified, his or her remedy is to attempt to persuade the prosecutor to withdraw it; and it may also be possible to reframe the scope of the proposed immunity order or to postpone the examination of the witness. (19 C.3d 149.)

*Fourth, notice to prosecuting agencies, state or federal, most likely to be interested.* The criminal prosecutions which an immunity order must not unduly hamper extend beyond those instituted by the local district attorney; and, although it would be impracticable to require notice to every agency which might conceivably have jurisdiction to prosecute, it can be given to those most likely to be interested by giving notice to the district attorney of the county, the California Attorney General, and the United States Attorney for the district. Also, the trial judge has discretion to further require notice to other prosecuting officials, such as a city attorney or a prosecutor in another state. (19 C.3d 149.) (See *Blackburn v. Superior Court* (1993) 21 C.A.4th 414, 428, 429, 27 C.R.2d 204 [father, accused in civil action of molesting daughter, needed to inform district attorney why immunity for deposition testimony was required, because it appeared statute of limitations had run]; 66 Cal. L. Rev. 233.)

The *Daly* opinion's comment on the conclusive effect of a prosecutor's objection (19 C.3d 148) was dictum, for the prosecutor did not object. But in *Philibosian v. Superior Court* (1983) 149 C.A.3d 938, 941, 197 C.R. 208, the court pointed out that the comment was a considered declaration of a unanimous court, and "created a procedure with the intention that it be followed."

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### 3. Improper Grant to Some Defendants.

*2 Witkin Cal. Evid. Witnesses § 476*

[§ 476] Improper Grant to Some Defendants.

In *Rysdale v. Superior Court* (1978) 81 C.A.3d 280, 146 C.R. 633, a city brought an action against petitioners and other defendants to enjoin violation of the one-family residence provision of its zoning ordinance. When the city noticed depositions of three defendants, petitioners asserted their privilege on the ground that the ordinance made the conduct a misdemeanor. The city then obtained an order granting immunity to two of them. *Held*, the order was an abuse of discretion.

(a) If the prosecution by initiating civil proceedings were able to obtain compelled testimony to use in prosecution of any of the defendants, it would have obtained a significant advantage. And failure to condition the order to apply to all defendants would subject the nonwitness defendants to the detriment of having compelled testimony of their codefendants used against them. There would also be serious collateral consequences. The defendants could not present a joint defense with a single attorney; the nonwitness defendants would have to engage counsel free from any attorney relationship with the witnesses. (81 C.A.3d 289, 290.)

(b) Although accommodation of the oppression of defendants and the hampering effect on the prosecution is difficult, by granting a use and derivative use immunity applicable in any prosecution of any defendant, the city will be placed in a substantially more advantageous position than it would be without any immunity order. (81 C.A.3d 290.) Accordingly, if the city attorney requests it, such an order may be made. (81 C.A.3d 291.)

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## c. Immunity Coextensive With Privilege.

## 1. In General: Counselman Rule.

2 Witkin Cal. Evid. Witnesses § 477

[§ 477] In General: Counselman Rule.

(1) *Statement of Rule.* To operate as a removal of the privilege, the immunity statute must be *coextensive with the privilege*; i.e., whatever disclosure would be privileged must be protected by immunity from any prosecution resulting from the disclosure. This fundamental proposition was established in *Counselman v. Hitchcock* (1892) 142 U.S. 547, 12 S.Ct. 195, 35 L.Ed. 1110, where the statute merely provided that *the testimony should not be used against the witness*. The court pointed out that *the information gained from the testimony* might be used to obtain other evidence against the witness, so that the danger of criminal prosecution as a result of his or her testimony still remained. Thus, under the *Counselman* rule, an immunity statute is defective, and testimony cannot be compelled, unless the witness is granted immunity from *prosecution for the offense*. (See *In re Critchlow* (1938) 11 C.2d 751, 756, 81 P.2d 966 [immunity must, "in addition to eradicating the self-incriminating character of the testimony to be adduced, also exonerate the witness from prosecution for the offense thereby disclosed"]; 1 McCormick 5th, §§142, 143; 8 Wigmore (McNaughton Rev.) §2283; 79 Harv. L. Rev. 429; 29 A.L.R.5th 1 [on adequacy of use or transactional immunity under state constitutional provision].)

(2) *Clarifications and Distinctions.* The immunity statute obviously can protect only against penal sanctions. And it is valid, and may be invoked to compel testimony, even though the witness may suffer public disgrace, loss of a job, or other such adverse effects. (*Ullmann v. United States* (1956) 350 U.S. 422, 76 S.Ct. 497, 502, 100 L.Ed. 511, 520; see 70 Harv. L. Rev. 1464.) (See also *Piemonte v. United States* (1961) 367 U.S. 556, 81 S.Ct. 1720, 1722, footnote 2, 6 L.Ed.2d 1028, 1031 [narcotics investigation by federal grand jury; fear of danger to life of witness and family no excuse for refusal to testify].)

Similarly, immunity is not a protection against attorney disciplinary proceedings. In *Segretti v. State Bar* (1976) 15 C.3d 878, 126 C.R. 793, 544 P.2d 929, S, an attorney involved in illegal election activities, testified before a United States Senate committee under court-ordered federal immunity. The testimony he gave was then used against him in State Bar disciplinary proceedings. *Held*, this was proper. "The purpose of disciplinary proceedings against attorneys is not to punish but rather to protect the court and public from the official ministrations of persons unfit to practice. ... Such a proceeding is not a criminal case for purposes of the Fifth Amendment privilege against self incrimination. ... Thus that privilege was not violated by the use at the instant proceedings of testimony given by Segretti under grants of immunity." (15 C.3d 886.) (See 62 A.L.R.3d 1145 [use in disbarment proceeding of immunized testimony given by attorney in criminal proceeding].)

An immunity statute need only protect the witness from future prosecutions. In *Reina v. United States* (1960) 364 U.S. 507, 81 S.Ct. 260, 5 L.Ed.2d 249, the witness was already serving a federal sentence for a narcotics offense and was no longer subject to federal prosecution; the statute gave him immunity from state prosecution; hence, he could not claim the privilege before a federal grand jury questioning him concerning the crime and persons involved with him. The court rejected his bold contention that he should not have been ordered to answer without first receiving a pardon for the unserved portion of his sentence. (81 S.Ct. 262, 5 L.Ed.2d 252.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Statement of Rule.* See 1 McCormick 6th, §§142, 143. *West's Key Number Digest*, Witnesses k.304(3)



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##### c. Immunity Coextensive With Privilege.

##### 2. Use Immunity Sufficient.

2 Witkin Cal. Evid. Witnesses § 478

[§ 478] Use Immunity Sufficient.

"Use" immunity protects a witness only against the actual use of the compelled testimony and its fruits; "transactional" immunity protects against later prosecution related to matters about which the witness testified. In *Kastigar v. United States* (1972) 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212, the court held that a federal statute's explicit proscription of the use in any criminal case of "testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information)" was consonant with Fifth Amendment standards.

(a) "We hold that such immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege. While a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader. Transactional immunity, which accords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege. The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted. Its sole concern is to afford protection against being 'forced to give testimony leading to the infliction of 'penalties affixed to ... criminal acts.' ' Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness." (92 S.Ct. 1661, 32 L.Ed.2d 222.)

(b) Petitioners contended that the statutory scope of immunity was not coextensive with the scope of the privilege, and argued that *Counselman v. Hitchcock* (1892) 142 U.S. 547, 12 S.Ct. 195, 35 L.Ed. 1110, supra, §477, required a minimal grant of full transactional immunity. But the court pointed out that the use immunity legislation of 1970 was drafted to meet the conceptual basis of the *Counselman* decision, "namely, that immunity from the use of compelled testimony and evidence derived therefrom is coextensive with the scope of the privilege." (92 S.Ct. 1661, 32 L.Ed.2d 221.) What was defective with the statute construed by the *Counselman* court was its failure to prohibit the use against the immunized witness of evidence *derived* from the witness' compelled testimony. (92 S.Ct. 1661, 32 L.Ed.2d 222.) "The broad language in *Counselman* relied upon by petitioners was unnecessary to the Court's decision, and cannot be considered binding authority." (92 S.Ct. 1662, 32 L.Ed.2d 223.)

(c) By implication, *Murphy v. Waterfront Com.* (1964) 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed.2d 678, supra, §469,

supports the view that use and derivative use immunity are sufficient to meet constitutional objections. "Since the privilege is fully applicable and its scope is the same whether invoked in a state or in a federal jurisdiction, the *Murphy* conclusion that a prohibition on use and derivative use secures a witness' Fifth Amendment privilege against infringement by the Federal Government demonstrates that immunity from use and derivative use is coextensive with the scope of the privilege." (92 S.Ct. 1664, 32 L.Ed.2d 225.)

(d) Despite arguments that compelled testimony will be used in subtle ways to the witness' disadvantage, the statute provides a sweeping proscription against any use, direct or indirect, of the testimony. This total prohibition provides a comprehensive safeguard which bars investigatory leads and the focusing of an investigation on the witness. (92 S.Ct. 1664, 32 L.Ed.2d 226.) Once a defendant demonstrates that he or she has testified under a grant of immunity, the prosecution must show that its evidence is not tainted and must establish that it had an *independent legitimate* source for the disputed evidence. "This burden of proof, which we reaffirm as appropriate, is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." (92 S.Ct. 1665, 32 L.Ed.2d 226.) "One raising a claim under this statute need only show that he testified under a grant of immunity in order to shift to the government the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources." (92 S.Ct. 1665, 32 L.Ed.2d 227.) This is analogous to cases where a coerced confession is involved. (92 S.Ct. 1665, 32 L.Ed.2d 227.)

Later cases are to the same effect. (See *Zicarelli v. New Jersey State Com. of Investigation* (1972) 406 U.S. 472, 92 S.Ct. 1670, 1674, 32 L.Ed.2d 234, 238 [state statute granting use and derivative use immunity only for "responsive" answers upheld; *Kastigar* controlling]; *People v. Gwillim* (1990) 223 C.A.3d 1254, 1272, 1274, 274 C.R. 415 [record established that district attorney's decision to prosecute police officer for sexual offenses and victim's decision to testify were based on sources independent of officer's immunized statement]; *People v. Cooke* (1993) 16 C.A.4th 1361, 1371, 20 C.R.2d 506, supra, §472 [trial court had no duty to grant judicial use immunity to third-party witness to vindicate defendant's due process rights]; and see 86 Harv. L. Rev. 181; 6 Loyola L.A. L. Rev. 350; 46 So. Cal. L. Rev. 202 [suggesting that "half loaf" of use immunity is not enough constitutional protection]; 48 So. Cal. L. Rev. 92 [immunity in bankruptcy proceedings]; 1971/72 A.S. 59; 1973/74 A.S. 343; 29 A.L.R.5th 1 [use or transactional immunity].) (On 1996 amendment to P.C. 1324 authorizing prosecution to request transactional or use immunity, see *infra*, §489.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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##### 3. Transactional Immunity.

2 Witkin Cal. Evid. Witnesses § 479

[§ 479] Transactional Immunity.

Prior to 1996, P.C. 1324 granted only transactional immunity in California. (On 1996 amendment to P.C. 1324 authorizing prosecution to request transactional *or* use immunity, see *infra*, §489.) In *People v. Lawrence* (1972) 25 C.A.3d 498, 102 C.R. 16, defendant had been granted transactional immunity in the federal court to testify about F's drug smuggling operations. He contended that the immunity extended to the state trial in which he was convicted of conspiracy to murder H, who had double-crossed F in a smuggling venture. *Held*, the prosecution and conviction were proper.

(a) Defendant's testimony in the federal trial was limited to his association with F's organization between January and March 1968, and concerned only smuggling activities. "The conspiracy to murder Hudson was not known to the authorities at that time. No reference was ever made to Hudson's disappearance in the federal action. Defendant requested immunity only as to the killing of one 'Joe Cole,' and his participation in hauling two shipments of marijuana to San Francisco. The conspiracy to kill Hudson was clearly a separate transaction." (25 C.A.3d 509.)

(b) Defendant was compelled in the federal trial to testify that he used the alias "John Prescott." He therefore argued that the state could not ask any witness at his state trial whether he had used that alias. But the claim of use immunity protection also must fail because use immunity covers testimony that is *substantially connected* with the crime or that constitutes *links in the chain of evidence* against a defendant. (25 C.A.3d 509.) Although it was necessary here to establish that defendant used a particular alias during the conspiracy to murder Hudson, this was merely a matter of identification. "It is no more a link in the chain of evidence than if defendant had been asked what his name was. His use of an alias did not concern the crimes of conspiracy or smuggling in any substantial way." (25 C.A.3d 510.) The testimony did not alter the "position" between defendant and the government with respect to the state charge. (25 C.A.3d 510.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Griego v. Superior Court* (2000) 80 C.A.4th 568, 576, 95 C.R.2d 351 [defendant could not be prosecuted for sexual molestation where, in sexually violent predator proceeding, prosecution, in return for defendant's testimony in deposition, promised not to prosecute him for any matters testified to in deposition; promise was equivalent to grant of transactional immunity, and questions at deposition touched on matters that became subject of sexual molestation prosecution; distinguishing *People v. Lawrence* (1972) 25 C.A.3d 498, 102 C.R. 16, text, p. 786].



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##### 4. Immunity Following Guilty Plea.

2 *Witkin Cal. Evid. Witnesses* § 480

[§ 480] Immunity Following Guilty Plea.

In *People v. Stewart* (1969) 1 C.A.3d 339, 81 C.R. 562, defendant pleaded guilty and was then granted immunity to compel him to testify against his codefendant. After he did so, he was sentenced to state prison. *Held*, this was proper; the punishment was not brought about by any evidence he produced at the trial. "Sentence was imposed solely by reason of his prior voluntary plea of guilty to the charge of robbery. Such a plea, of course, removed appellant from the protection against self-incrimination afforded by the Fifth Amendment ... and from the purview of section 1324 of the Penal Code insofar as it related to that particular offense. The plea of guilty was an admission of every element of the offense charged. ... Appellant was not subjected to any additional prosecution or penalty as the record reflects that the remaining three counts charged against him were properly dismissed by the court." (1 C.A.3d 343.) Defense counsel had indicated there was no legal cause why sentence should not have been imposed. "No one including the appellant was misled by the grant of immunity, no promises of any nature had been made, and there is no suggestion that he or his counsel entertained a belief that no punishment would be imposed for the offense of robbery of which appellant had been convicted by plea. The trial court retained jurisdiction to sentence appellant and did so after an appropriate hearing." (1 C.A.3d 343.)

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## 5. Immunity Following Trial on Merits.

2 Witkin Cal. Evid. Witnesses § 481

[§ 481] Immunity Following Trial on Merits.

*In re Tracy L.* (1992) 10 C.A.4th 1454, 13 C.R.2d 593, involved a Welf.C. 602 petition charging Tracy with two counts of forcible rape. After the juvenile court had sustained the petition on both counts and sentenced Tracy to the Youth Authority, Tracy was called to testify at the trial of his two adult coparticipants. Although he had testified at the Welf.C. 602 proceeding, Tracy refused to testify at the coparticipants' trial until he was granted immunity under P.C. 1324. During the pendency of the appeal in the Welf.C. 602 proceeding, Tracy filed a habeas corpus petition, arguing that because he had been given immunity from further prosecution for the offenses which were on appeal, the appeal was moot and the Court of Appeal had jurisdiction only to remand with directions to dismiss the charges. *Held*, petition denied.

(a) P.C. 1324 is based on the federal Compulsory Testimony Act of 1893, which has been construed by the United States Supreme Court as granting immunity only from future prosecution. (10 C.A.4th 1464, citing *Brown v. Walker* (1896) 161 U.S. 591, 16 S.Ct. 644, 40 L.Ed. 819, *Ullmann v. United States* (1956) 350 U.S. 422, 76 S.Ct. 497, 100 L.Ed. 511, and *Katz v. United States* (1967) 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576, 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence*, §333.) Thus, it must be presumed that the Legislature intended to adopt this construction when it enacted P.C. 1324. (10 C.A.4th 1464.)

(b) The conclusion that P.C. 1324 grants immunity only from future prosecution is supported by its language granting immunity "for or on account of" any fact or act concerning which the witness was required to testify or produce evidence. Because "for or on account of" connotes a causal relationship, where no such relationship exists between the compelled testimony and the prosecution, penalty or forfeiture, P.C. 1324 does not apply. No such relationship exists here because Tracy was convicted by evidence adduced at his own trial, not by the testimony he was compelled to give at the coparticipants' trial. (10 C.A.4th 1465; for 1996 amendment of P.C. 1324 changing quoted language, see *infra*, §489.)

(c) *People v. Stewart* (1969) 1 C.A.3d 339, 81 C.R. 562, *supra*, §480, which held that a guilty plea waived the defendant's privilege against self-incrimination and rendered P.C. 1324 inapplicable, is persuasive here even though Tracy's conviction resulted from a trial rather than a guilty plea. In each case, the defendant's guilt was determined prior to the compelled testimony and on the basis of evidence totally independent of that testimony. (10 C.A.4th 1465.) By taking the stand in the Welf.C. 602 proceeding, Tracy waived his privilege against self-incrimination, and hence cannot now be allowed to invoke the P.C. 1324 immunity defense for testifying on the same matter in his coparticipants' trial

for the same crimes. (10 C.A.4th 1465.)

(d) *People v. Lopez* (1980) 110 C.A.3d 1010, 168 C.R. 378, *infra*, §500, which held that a convicted defendant who appealed could not be compelled to testify at a codefendant's trial pending the appeal, is distinguishable. Because that decision never raised or discussed the issue whether the defendant could have been compelled to testify in exchange for P.C. 1324 immunity, it has no application here. (10 C.A.4th 1466.)

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##### d. Federal Statutes.

##### 1. Former Statutes.

2 Witkin Cal. Evid. Witnesses § 482

[§ 482] Former Statutes.

(1) *Early Federal Acts*. The first federal acts were defective in several respects and were several times amended; e.g., to meet the *Counselman* test (*supra*, §477), and to require a claim of privilege as a condition to the grant of immunity (to overcome the decision in *United States v. Monia* (1943) 317 U.S. 424, 63 S.Ct. 409, 87 L.Ed. 376). (See generally *Smith v. United States* (1949) 337 U.S. 137, 69 S.Ct. 1000, 93 L.Ed. 1264; *United States v. Bryan* (1950) 339 U.S. 323, 70 S.Ct. 724, 94 L.Ed. 884; *Brown v. United States* (1959) 359 U.S. 41, 79 S.Ct. 539, 3 L.Ed.2d 609 [Interstate Commerce Act]; *Reina v. United States* (1960) 364 U.S. 507, 81 S.Ct. 260, 5 L.Ed.2d 249 [Narcotic Control Act]; *Piemonte v. United States* (1961) 367 U.S. 556, 81 S.Ct. 1720, 6 L.Ed.2d 1028 [same]; 1 U.C.L.A. L. Rev. 183; 70 Harv. L. Rev. 1461.)

(2) *Compulsory Testimony Act of 1954*. This statute (former 18 U.S.C., §3486) eliminated the defects of the earlier acts and modernized the procedure. (See *Ullmann v. United States* (1956) 350 U.S. 422, 76 S.Ct. 497, 100 L.Ed. 511 [upholding the statute and affirming contempt judgment]; 45 Cal. L. Rev. 109; 70 Harv. L. Rev. 113; 79 Harv. L. Rev. 429; 7 Hastings L. J. 72.)

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##### d. Federal Statutes.

#### 2. Immunity of Witnesses Act.

2 Witkin Cal. Evid. Witnesses § 483

[§ 483] Immunity of Witnesses Act.

The former Compulsory Testimony Act of 1954 (supra, §482) was replaced by a new Immunity of Witnesses Act in 1970. (18 U.S.C., §6001 et seq.) The primary distinction between the two statutes is that the new Act substitutes use immunity for transactional immunity. The Act prohibits the use in any criminal case of compelled "testimony or other information ... (or any information directly or indirectly derived from such testimony or other information)." (18 U.S.C., §6002; see *Kastigar v. United States* (1972) 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212, supra, §478 [holding use immunity coextensive with privilege against self-incrimination]; *Pillsbury Co. v. Conboy* (1983) 459 U.S. 248, 103 S.Ct. 608, 610, 74 L.Ed.2d 430, 435 [civil deposition testimony closely tracking prior immunized grand jury testimony is not, under 18 U.S.C., §6002, "information directly or indirectly derived" from the immunized testimony; hence, it is usable in a criminal case, and the deponent may assert his or her privilege against self-incrimination]; 8 Wigmore (McNaughton Rev.) §2283; 1984 A.S. 367 [*Pillsbury Co. v. Conboy*].) (On refusal of immunized witness to testify as contempt, see *United States v. Wilson* (1975) 421 U.S. 309, 95 S.Ct. 1802, 44 L.Ed.2d 186.)

Other significant features of the Act, most of which closely parallel the former Act, are:

(1) It applies in a "proceeding before or ancillary to" either house of Congress or a Congressional committee, or a court, grand jury or agency of the United States. (18 U.S.C., §6002; see 45 *Stanf. L. Rev.* 229.)

(2) The witness must claim the privilege. (18 U.S.C., §6002; see 70 *Harv. L. Rev.* 113.)

(3) The immunity is given only when the testimony is compelled. (18 U.S.C., §6002; see 70 *Harv. L. Rev.* 114.)

(4) The immunity is not automatic; it is conferred on order of the court or agency after compliance with provisions specifying the parties who may request the order (e.g., United States Attorney, House or committee member), and those who must approve the request (e.g., Attorney General, majority of House, two-thirds of House committee). (18 U.S.C., §6003 et seq.)

(5) Before an order may be requested by a United States Attorney (in court and grand jury proceedings), or issued by an agency (in administrative proceedings), the Attorney or agency must find that the testimony is necessary to the public interest and that the individual has exercised, or is likely to exercise, his or her privilege against self-incrimination. (18 U.S.C., §§6003, 6004.)

(6) The immunized testimony may be used in a "prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." (18 U.S.C., §6002; see *United States v. Apfelbaum* (1980) 445 U.S. 115, 100 S.Ct. 948, 955, 957, 63 L.Ed.2d 250, 260, 263; 10 Cal. Western L. Rev. 428.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER IX - Witnesses

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#### C. Privilege of Witness in Any Proceeding.

##### 4. Immunity of Witness.

##### e. Specific California Statutes.

2 Witkin Cal. Evid. Witnesses § 484

[§ 484] Specific California Statutes.

Some of California's former specific immunity statutes were repealed in 1953 when the general section (P.C. 1324, *infra*, §485) was enacted. (On the former statutes, see *In re Critchlow* (1938) 11 C.2d 751, 756, 81 P.2d 966 [gaming law]; *In re Williams* (1932) 127 C.A. 424, 431, 16 P.2d 172 [same]; *Ex parte Cohen* (1894) 104 C. 524, 530, 38 P. 364 [purity of election law].)

Other specific immunity grants remain. For example, under Govt.C. 9410(a), a witness compelled to testify before the Legislature or a legislative committee cannot be held to answer criminally or be subject to a penalty or forfeiture "for any fact or act touching which he or she is required to testify." (See *McLain v. Superior Court* (1950) 99 C.A.2d 109, 117, 221 P.2d 300 [Senate Interim Committee on Social Welfare, investigating alleged bribery of assemblyman]; *In re Connolly* (1936) 16 C.A.2d 709, 712, 61 P.2d 490.) And immunity may be granted in a hearing before the corporation commissioner. (Corp.C. 25531(e); see *People v. White* (1932) 124 C.A. 548, 555, 12 P.2d 1078.) (On immunity in hearing before State Water Resources Board, see *Water C. 1106*.)

In *People v. King* (1967) 66 C.2d 633, 58 C.R. 571, 427 P.2d 171, the court, applying Ins.C. 12924, a typical specific statute, laid down three rules. K and H were officers of a corporation. The Insurance Commissioner conducted an investigation and was appointed conservator. Purporting to act under Ins.C. 1020, he obtained a court order directing defendants to bring their records and testify before him relating to the corporate affairs. K did not appear, H appeared and claimed privilege, contempt proceedings were instituted, and thereafter both defendants appeared before the commissioner and voluntarily gave testimony. This testimony was the basis of an indictment for conspiracy to commit grand theft. *Held*, order granting motion to set aside indictment affirmed; their testimony rendered them immune.

(a) Mistaken assertion of authority by an administrative officer does not nullify a statutory immunity. The state's position was that defendants were not compelled by subpoena issued under Ins.C. 12924, the immunity statute, but by court order under Ins.C. 1020. But Ins.C. 1020 contains no authority for compelling testimony; the only authority is in Ins.C. 12924. Hence, despite the unusual formal steps, in substance the commissioner exercised an authority given only by Ins.C. 12924, and this carried with it the immunity. (66 C.2d 637.)

(b) There was no need to make an express claim of the privilege. Unless a statute requires a claim, immunity results despite the failure to assert the privilege at the administrative hearing. (66 C.2d 642.) *In re Connolly*, *supra*, was distinguished as involving volunteered testimony, and *People v. Eiseman* (1926) 78 C.A. 223, 250, 248 P. 716, was disapproved on this point. (66 C.2d 643.)

(c) Prior similar testimony did not nullify the immunity. During the contempt proceedings, defendant H testified voluntarily to the same matters which were later testified to before the commissioner. If the commissioner had stopped at this point, no immunity would have resulted. But when the commissioner thereafter proceeded under *Ins.C. 12924*, that statute applied. "[A]nd if in proceeding the commissioner was not successful in obtaining information not already available to him, the immunity nevertheless attached as to all matters concerning which the commissioner did inquire. The grant of immunity does not turn on the *product* but rather the *fact* of the inquiry." (66 C.2d 644.)

The second holding of the *King* case, that there was no need to make an express claim of the privilege (see *supra*), was nullified as to proceedings under *Ins.C. 12924* by a 1969 amendment. The witness may now get immunity only "after validly claiming his privilege against self-incrimination."

*King* was followed in *Escamilla v. Superior Court* (1969) 271 C.A.2d 730, 76 C.R. 704. Mrs. E and her husband worked for a market. Mrs. E was arrested and charged with grand theft from their employer, and Mr. E was then discharged. He applied for unemployment insurance, and the employer objected, asserting that he knew of his wife's thefts. In the hearing before a referee of the Unemployment Insurance Appeals Board, Mrs. E voluntarily appeared without subpoena and with her attorney. The husband's attorney called her to the stand, asked her incriminating questions about the thefts, and her attorney claimed the self-incrimination privilege. The referee, acting under *Unemp.Ins.C. 1955*, ordered her to answer, and she did. Thereafter she sought prohibition to restrain the superior court from proceeding with her criminal trial. *Held*, writ granted; she had received complete immunity from prosecution.

The prosecution contended that where a criminal action is pending in the superior court, a hearing officer for a state agency has no power to grant immunity to the accused, thereby in effect quashing the criminal charge. The court's answer was that the Legislature may delegate such power to a hearing officer to act either before or after filing of criminal charges, and that *Unemp.Ins.C. 1955* does so. (271 C.A.2d 734.)

A strong dissenting opinion attacks the proceeding as a successful attempt to obtain an "immunity bath." The issue of the wife's theft was not involved in the husband's unemployment compensation claim; the two lawyers brought the privilege into play by asking irrelevant questions; Mrs. E was not forced to appear to testify, and the referee did not have the right to compel her to answer--that was for the court (*Unemp.Ins.C. 1954*); also, the district attorney agreed in open court not to use the admissions by Mrs. E at the hearing.

**SUPPLEMENT:** [This section is current through the latest supplement]

*Testimony before Legislature:* The portion of *Govt.C. 9410(a)* quoted in the text was amended in 2003 to read: "for any fact or act touching upon either testimony that he or she was so compelled to provide, or documents or other materials that he or she was so compelled to produce."



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4. Immunity of Witness.

f. General California Statute.

1. Nature and Scope.

*2 Witkin Cal. Evid. Witnesses § 485*

[§ 485] Nature and Scope.

P.C. 1324 establishes a broad power to grant immunity in "any felony proceeding or in any investigation or proceeding before a grand jury for any felony offense." In substance and procedure, the section is similar in many respects to the original federal act, but the revised federal act differs materially from the California statute. (For the federal acts, see *supra*, §§482, 483.) (On court's discretion to grant immunity in a protective order under the discovery statute, see *supra*, §474.)

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##### f. General California Statute.

##### 2. Claim of Privilege.

2 Witkin Cal. Evid. Witnesses § 486

[§ 486] Claim of Privilege.

P.C. 1324 applies "if a person refuses to answer a question or produce evidence of any other kind on the ground that he or she may be incriminated thereby."

There is considerable uncertainty under some statutes as to whether the witness must claim the privilege. (See *People v. White* (1932) 124 C.A. 548, 555, 12 P.2d 1078 [Corp.C. 25354; claim of privilege necessary]; *In re Connolly* (1936) 16 C.A.2d 709, 712, 61 P.2d 490 [witness answered nonincriminatory questions without objection, then voluntarily offered incriminating evidence; no immunity]; *McLain v. Superior Court* (1950) 99 C.A.2d 109, 117, 221 P.2d 300 [under Govt.C. 9410, neither claim of privilege nor of immunity necessary]; 25 Cal. L. Rev. 622; 10 So. Cal. L. Rev. 344; 8 Wigmore (McNaughton Rev.) §2282.) P.C. 1324 makes it clear that the privilege must be claimed so that the prosecutor will have notice and an opportunity to elect. (See *In re Connolly*, *supra*, 16 C.A.2d 717.)

It has also been held that a person who voluntarily testifies for the *defendant* in a criminal trial does not gain immunity from prosecution for disclosures which incriminate himself or herself. (*In re Petraeus* (1939) 12 C.2d 579, 582, 86 P.2d 343; see 13 So. Cal. L. Rev. 160.)

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##### f. General California Statute.

#### 3. Procedure To Compel Testimony.

##### aa. Statutory Authority.

2 Witkin Cal. Evid. Witnesses § 487

[§ 487] Statutory Authority.

(1) *Prosecutor's Request.* The statute is invoked "if the district attorney of the county or any other prosecuting agency in writing requests the court, in and for that county, to order that person to answer the question or produce the evidence." (P.C. 1324; see *In re Weber* (1974) 11 C.3d 703, 719, 114 C.R. 429, 523 P.2d 229 [grant of immunity is properly conditioned on request of prosecutor because immunity is part of charging process, and it is for the prosecutor to decide what, if any, crime is to be charged]; *People v. Traylor* (1972) 23 C.A.3d 323, 332, 100 C.R. 116 [vesting power to request immunity solely in prosecutor does not deprive defendant of equal protection of the laws]; *People v. DeFreitas* (1983) 140 C.A.3d 835, 839, 189 C.R. 814 [applying *Traylor* reasoning to defendant's request for use immunity for his wife]; *People v. Hunter* (1989) 49 C.3d 957, 973, 264 C.R. 367, 782 P.2d 608, supra, §472 [defendant right to request immunity for defense witnesses]; 30 *Stanf. L. Rev.* 1211 [same]; 91 *Harv. L. Rev.* 266 [same]; 9 *Hastings Const. L. Q.* 199 [same]; 4 A.L.R.4th 617 [same]; on prosecutor's power to grant prosecution witness immunity, see 4 A.L.R.4th 1221.)

(2) *Hearing and Determination.* A judge of the court then sets a time for hearing and issues an order to show cause.

"[T]he court shall order the question answered or the evidence produced unless it finds that to do so would be clearly contrary to the public interest, or could subject the witness to a criminal prosecution in another jurisdiction." (P.C. 1324.)

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## 3. Procedure To Compel Testimony.

## bb. Effect of Noncompliance.

2 Witkin Cal. Evid. Witnesses § 488

[§ 488] Effect of Noncompliance.

(1) *Prosecutor Estopped From Arguing Noncompliance.* Even though P.C. 1324 is not followed, the prosecution may be estopped from arguing that noncompliance bars a valid grant of immunity. In *People v. Brunner* (1973) 32 C.A.3d 908, 108 C.R. 501, defendant had been promised immunity for her testimony about a murder, but then gave evasive, inconsistent and contradictory testimony and statements during several related trials. Relying on the fact that the immunity grant did not follow statutory procedure, the prosecutor obtained her indictment for the murder about which she had been testifying. *Held*, the trial judge properly dismissed the indictment. "It would be anomalous to permit the People, represented by the district attorney, to argue that an earlier agreement entered into by the district attorney was void for lack of compliance with a statute of whose existence the district attorney must have been aware." (32 C.A.3d 915.) As to the prosecution claim that defendant had not fulfilled her part of the bargain, and therefore was not entitled to its benefits, the answer is that the prosecution did get the hoped for results through her testimony (some of which was introduced as prior inconsistent statements); "we conclude, albeit somewhat pragmatically, that enough of the bargain was kept to make it operative." (32 C.A.3d 916.)

(2) *Prosecutor's Noncompliance Invalidates Grant of Immunity.* In *People v. Superior Court (Perry)* (1989) 213 C.A.3d 536, 261 C.R. 665, the district attorney wrote attorneys for prospective grand jury witnesses that it had granted them "limited use immunity" in expectation of their forthcoming testimony. The attorney responded that his clients would assert their Fifth Amendment rights notwithstanding the prosecution's grant of immunity, and, at the scheduled grand jury hearing, they did so. The prosecution filed a motion to compel testimony in the superior court. The trial judge denied the motion, ruling that an order to compel testimony must be accompanied by a grant of transactional immunity as then provided in P.C. 1324. (On 1996 amendment authorizing prosecution to request transactional *or* use immunity, see *infra*, §489). *Held*, order affirmed.

(a) Although a district attorney is entitled to offer immunity outside P.C. 1324, such an offer is not enforceable until it has been accepted or relied upon. (213 C.A.3d 538, 540, citing *Brunner*.) The statement in *People v. Superior Court (Crook)* (1978) 83 C.A.3d 335, 147 C.R. 856, that a district attorney has inherent power to grant immunity without complying with P.C. 1324, is based on a misinterpretation of the facts and holding in *People v. Label* (1974) 43 C.A.3d 766, 119 C.R. 522, *infra*, §491. The trial judge in *Label* ordered the immunity, and the court held only that the prosecutor has the inherent authority to *initiate* a request. (213 C.A.3d 539.)

(b) Immunity is a creature of statute and its terms have been defined by the Legislature in P.C. 1324. Hence, the trial judge correctly ruled that an order to compel testimony must be accompanied by a grant of transactional immunity as then provided in P.C. 1324. (213 C.A.3d 540, 541, following *People v. Campbell* (1982) 137 C.A.3d 867, 187 C.R. 340, *infra*, §489.)

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##### f. General California Statute.

##### 4. Transactional or Use Immunity.

2 Witkin Cal. Evid. Witnesses § 489

[§ 489] Transactional or Use Immunity.

(1) *Original Statute.* As originally enacted, P.C. 1324 expressly granted only *transactional* immunity. In *People v. Campbell* (1982) 137 C.A.3d 867, 187 C.R. 340, a defendant charged with three narcotics offenses invoked his Fifth Amendment privilege when called as a witness in a felony assault case. The prosecution invoked P.C. 1324, and the trial judge's grant of immunity specified that defendant's *testimony* (which was related to the narcotics offenses) would not be used against him in any other prosecution. Defendant was later convicted of the narcotics offenses even though his immunized testimony was not used. *Held*, reversed; the version of P.C. 1324 then in effect was a *transactional immunity* statute, and it precludes *prosecution* for any offense related to the immunized testimony.

(a) Although *use* immunity was constitutionally sanctioned in *Kastigar v. United States* (1972) 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212, *supra*, §478, and has been judicially granted in the absence of an express statutory immunity, the present *felony case* was governed by P.C. 1324. Thus, the trial judge had no authority to "*judicially* substitute the constitutionally permissible 'use' immunity for section 1324's *express* grant of transactional immunity." (137 C.A.3d 876.)

(b) "The Legislature has not acted, and need not act, to narrow the grant of immunity to present constitutional limits." (137 C.A.3d 876.) (See *People v. Superior Court (Perry)* (1989) 213 C.A.3d 536, 540, 261 C.R. 665, *supra*, §488.)

(2) *1996 Amendment.* The Legislature ultimately decided to expand the scope of immunity authorized by P.C. 1324 and amended it in 1996 to make either transactional or use immunity available. The amended statute now states that "[a]fter complying, and if, but for this section, he or she would have been privileged to withhold the answer given or the evidence produced by him or her, no testimony or other information compelled under the order or any information directly or indirectly derived from the testimony or other information may be used against the witness in any criminal case." The following language was also added: "Nothing in this section shall prohibit the district attorney or any other prosecuting agency from requesting an order granting use immunity or transactional immunity to a witness compelled to give testimony or produce evidence." (See 28 *Pacific L. J.* 722.)

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## f. General California Statute.

## 5. No Immunity From Perjury or Contempt.

2 Witkin Cal. Evid. Witnesses § 490

[§ 490] No Immunity From Perjury or Contempt.

The witness "may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing or contempt committed in answering, or failing to answer, or in producing, or failing to produce, evidence in accordance with the order." (P.C. 1324.) In *People v. Hathcock* (1971) 17 C.A.3d 646, 95 C.R. 221, defendant was convicted of committing perjury at her ex-husband's second trial for murder. Prior to the first murder trial, defendant received a grant of immunity from prosecution for any offense arising from the murder. She then gave the district attorney a written statement implicating her former husband in the killing and testified as a witness for the prosecution, but that trial ended in a mistrial. At the second murder trial, defendant's testimony again implicated her ex-husband. When the prosecutor, apparently anticipating an attack on her credibility, asked if she had told the husband's attorney that he had not been involved, she answered yes. Questioned about whether she had told defense counsel the truth, she said, "Your Honor, I can't answer that question truthfully. May I--I'll have a perjury charge if I do." Ultimately, however, she testified on cross-examination that she knew her former husband had not committed the homicide. On redirect examination, she stated, "Because he wasn't there." Her perjury conviction was based on this last answer. The pivotal question on her appeal was this: if a witness has testified at a criminal trial after a grant of immunity, may she later assert the privilege against self-incrimination and refuse to answer a relevant question on the ground that the answer might tend to incriminate her for the crime of perjury committed at that very trial? *Held*, no; conviction affirmed:

"It is axiomatic that a person who has been called to testify as a witness at a trial, and who has sworn to tell the truth, is morally and legally bound to do so. It follows, by necessary implication, that a witness who testifies at a trial waives his privilege against self-incrimination as to any question which is thereafter asked to test the credulity of his testimony." (17 C.A.3d 649.) A contrary rule would lead to unconscionable results by interfering with a defendant's rights of confrontation and cross-examination. "Furthermore, a rule which would permit a witness who has been granted immunity under section 1324, and who has testified, to assert the privilege against self-incrimination in order to refuse to answer a question designed to test the credulity of his testimony would invite treachery as well as perjury." (17 C.A.3d 649.)

The court also pointed out that the issue was similar to that presented when a defendant in a criminal trial voluntarily testifies in his or her own defense. Though still protected by the Fifth Amendment, the defendant must nevertheless answer all cross-examination questions to explain, clarify, or refute any reasonable or logical inference arising from his or her testimony. (17 C.A.3d 649.) A witness who has derived the benefits of immunity and who has

testified "must be prepared to answer relevant probative questions." (17 C.A.3d 650.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Ervin* (2000) 22 C.4th 48, 81, 91 C.R.2d 623, 990 P.2d 506 [P.C. 1324 does not bar immunity for *past* acts of perjury].



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## f. General California Statute.

## 6. Limited Grant of Immunity.

2 Witkin Cal. Evid. Witnesses § 491

[§ 491] Limited Grant of Immunity.

In *People v. Label* (1974) 43 C.A.3d 766, 119 C.R. 522, defendant was charged with having committed a drug offense on November 4, 1972. The chief prosecution witness, who had been arrested on November 6th, was given immunity for drug offenses for the period of November 3 to 6, 1972. As a result, she incriminated defendant on the key date but refused, on self-incrimination grounds, to testify about her own drug involvement at times other than the period protected by the immunity. Defendant contended that the limited immunity resulted in limited cross-examination, which deprived him of his full confrontation rights. *Held*, no error. "We are of the opinion that to require a prosecuting attorney to grant blanket immunity for any and all criminal acts as the price of testimony under section 1324 would completely frustrate the purpose of said section. We see no impropriety in limiting the immunity to designated crimes committed within a specified period of time. It follows that the immunized witness may not be compelled to testify as to possible criminal involvement at other times. As to such involvement, any witness stands in the same position as any other witness and a defendant's right to cross-examination is limited by *Evidence Code* section 940 and 787. Neither case authority, constitutional provision or statute cited by appellant supports the proposition that the salutary latitude of cross-examination rights granted to defendants in criminal cases licenses an inquiry into unimmunized crimes or diminishes Fifth Amendment privileges and other statutory protection accorded to all witnesses." (43 C.A.3d 774.) (See *People v. Superior Court (Crook)* (1978) 83 C.A.3d 335, 341, 147 C.R. 856 [grant of limited immunity, though not formalized pursuant to P.C. 1324, was within inherent power of prosecuting authority]; *People v. Thompson* (1983) 145 C.A.3d 918, 923, 924, 193 C.R. 782 [following *Label*]; *People v. Superior Court (Perry)* (1989) 213 C.A.3d 536, 539, 261 C.R. 665, *supra*, §488 [district attorney's immunity offer is not enforceable until accepted or relied upon; *Crook* criticized]; on 1996 amendment of P.C. 1324 ensuring prosecutor's right to request use or transactional immunity, see *supra*, §489.)

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##### f. General California Statute.

##### 7. Conditional Immunity to Accomplice.

2 Witkin Cal. Evid. Witnesses § 492

[§ 492] Conditional Immunity to Accomplice.

In *People v. Medina* (1974) 41 C.A.3d 438, 116 C.R. 133, two teenage girls were murdered following a beach party. Three alleged accomplices of defendants were called as witnesses and ordered under P.C. 1324 to answer questions and produce evidence which was material, competent and relevant. Each order was based on the witness' signed waiver, stating that his or her refusal to testify was based on self-incrimination grounds, that the witness waived a show-cause order and a hearing, and that the witness consented to issuance of the order compelling testimony. The order provided that the witness would not be prosecuted or subject to penalty or forfeiture for anything he or she was required to answer or produce. But the immunity was conditional, i.e., that the witness not materially or substantially change the testimony from the tape-recorded statement already given to law enforcement officers, and not resort to silence, whether or not under order of contempt, and not feign lapse of memory affecting information given in the previously recorded statement. Otherwise, the immunity order was void and of no effect.

At the trial, defendants contended that each witness given conditional immunity was an accomplice liable to prosecution for the murders and that the threat contained in the conditional immunity orders denied defendants any effective cross-examination. Their objections were overruled. *Held*, defendants were deprived of their fundamental right to a fair trial. The immune witnesses were, on the evidence, aiders and abettors, and therefore principals, of any rape committed against the victims in the course of a felony-murder, and thus would have been equally guilty of the homicides. The effect of the conditional immunity was that each witness was placed by the court in a position of dire peril. "If his testimony 'materially or substantially' differed from the prior recorded statement he became liable to prosecution for first degree murder and, having disclosed his participation, stood little chance of escaping conviction." (41 C.A.3d 452.)

Many later cases have discussed the *Medina* decision. (See *People v. Sepeda* (1977) 66 C.A.3d 700, 705, 136 C.R. 119 [disapproving police arrangement to pay narcotics informant only if he testified in accordance with his statements to police, but affirming convictions because informant's testimony was amply corroborated; distinguishing *Medina*]; *People v. Harpool* (1984) 155 C.A.3d 877, 884, 202 C.R. 467 [agreement, unlike that in *Medina*, had only one condition; that witness tell the truth]; *People v. Bittaker* (1989) 48 C.3d 1046, 1094, 259 C.R. 630, 774 P.2d 659 [following *Medina*; disapproving plea bargain language purporting to give district attorney, and not court, discretion to determine whether codefendant testified truthfully, but finding no error and no risk codefendant would be induced to give false testimony]; *People v. St. Joseph* (1990) 226 C.A.3d 289, 299, 276 C.R. 498 [grant of immunity to witness for

accessory charge but not for murder was proper; compulsion to implicate defendant *preexisted* immunity, and due process is violated under *Medina* only where *prosecution or court* compels accomplice witness to testify in predetermined way]; *People v. Morris* (1991) 53 C.3d 152, 191, 279 C.R. 720, 807 P.2d 949 [*Medina* was not violated, where only condition was that accomplice witness testify truthfully]; *People v. Sully* (1991) 53 C.3d 1195, 1215, 283 C.R. 144, 812 P.2d 163, 1 Cal. Evidence (4th), *Circumstantial Evidence*, §92 [plea bargain condition that accomplice-witness pass polygraph examination did not violate due process under *Medina*, where she could testify freely, there was ample corroborating testimony, and defendant could impeach her testimony and argue her credibility to jury]; *People v. Garcia* (1997) 56 C.A.4th 1349, 1358, 1359, 66 C.R.2d 350 [witness was only required to testify fully and truthfully, and he was not accomplice on whose testimony prosecution substantially based its case; distinguishing *Medina*.])

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Gurule* (2002) 28 C.4th 557, 616, 123 C.R.2d 345, 51 P.3d 224 [in capital murder prosecution, accomplice's testimony was not rendered inherently unreliable by plea agreement requiring him to cooperate with law enforcement, even though his immunity under agreement was further conditioned on there being no new evidence showing witness was actual killer]; *People v. Kennedy* (2005) 36 C.4th 595, 613, 31 C.R.3d 160, 115 P.3d 472 [testimony of defendant's companion could not be considered coerced, where she was given what amounted to transactional immunity, and order granting immunity did not require that she conform her trial testimony to any statement given to police]; *People v. Boyer* (2006) 38 C.4th 412, 456, 42 C.R.3d 677, 133 P.3d 581 [immunity agreement was not produced by compulsion within meaning of *People v. Medina* (1974) 41 C.A.3d 438, 116 C.R. 133, text, p. 798, where agreement reflected parties' mutual understanding that prior statements of witness were true, not that witness must testify consistently with them regardless of their truth]; *People v. Avila* (2006) 38 C.4th 491, 593, 43 C.R.3d 1, 133 P.3d 1076 [condition that witness take and pass polygraph examination as part of contract not to prosecute did not invalidate contract; following *People v. Sully* (1991) 53 C.3d 1195, 283 C.R. 144, 812 P.2d 163, text, p. 799].





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## CHAPTER IX - Witnesses

### XVII. PRIVILEGE AGAINST SELF-INCRIMINATION

#### C. Privilege of Witness in Any Proceeding.

##### 4. Immunity of Witness.

##### g. Agreement for Immunity.

##### 1. In General.

2 Witkin Cal. Evid. Witnesses § 493

[§ 493] In General.

In *People v. Brunner* (1973) 32 C.A.3d 908, 108 C.R. 501, supra, §488, the court distinguished two situations:

(a) A witness who is not within the target area of the pending investigation or prosecution but who refuses to testify or to produce evidence on the ground of possible incrimination. In these instances, the grant of immunity follows a relatively straightforward course and may be effected by a relatively simple procedure because "the prosecution is primarily concerned with securing an answer and only secondarily concerned with the nature of the answer, either because only one answer is possible or because the sanction of a perjury prosecution furnishes a sufficient guaranty of the truth of the witness's answer." (32 C.A.3d 912.)

(b) A witness who is within the target area, typically when he or she is a party to a multiparty crime, but who has been less culpable than others who were involved and has evidence believed necessary for prosecution of the witness' fellow wrongdoers. Under these circumstances, the prosecutor may strike a bargain with the lesser offender to exchange immunity for testimony despite the dangers involved. The first danger comes from the treacherous witness who, after receiving immunity, does not testify in the manner the witness said he or she would or refuses to testify beyond a certain point. The other danger is that a witness may be so influenced by hopes and fears that he or she will promise to testify to anything desired by the prosecution to obtain a grant of immunity; by dangling the promised immunity, the prosecutor can put the words he wishes into the witness' mouth. (32 C.A.3d 914.)

"These twin dangers point up the desirability for court approval of immunity bargains with target-area witnesses. Properly used, section 1324 is broad enough to protect the prosecutor against double-dealing and enable him to make an enforceable agreement with the most duplicitous witness. Properly used, the section also protects the witness against prosecution pressure to color existing or create additional testimony in order to obtain previously promised immunity. The statute establishes a procedure under which the bargain between prosecutor and witness, each to perform certain acts in the future, can be made a matter of record so that dishonesty, equivocation, and misunderstanding may be minimized. In our view whenever target-area witnesses have been promised immunity in return for their promise to testify, the prosecutor's request for court approval should set out the terms of the agreement, the subject-matter of the testimony, the proceedings at which it will be given, the representations of the witness (or his counsel) as to the specific content of his testimony, and the promise of the witness to testify fully and truthfully in return for the promised grant of immunity. On court approval of the agreement immunity will be granted the witness *after he has complied with the representations of the agreement*." (32 C.A.3d 914.) The terms of the promise of immunity should appear clearly on the

record and be supported by court order, thus enabling an impartial judicial officer to review the propriety of the bargain. (32 C.A.3d 914.)

The court recognized that promise of immunity in exchange for particular testimony leaves a witness vulnerable to the charge that his or her testimony has been bought. "Yet while these factors bear heavily on the *weight* to be given the witness's testimony, they do not impinge upon the validity of the bargain itself." (32 C.A.3d 915; but see *People v. Medina* (1974) 41 C.A.3d 438, 456, 116 C.R. 133, supra, §492 [statement in *Brunner* as to exchange of immunity for particular testimony was dictum and in no way sanctions condition requiring court testimony to coincide with previously given statements]; and see *People v. Morris* (1991) 53 C.3d 152, 192, 279 C.R. 720, 807 P.2d 949 [fact that attorney who negotiated immunity agreement for accomplice-witness shortly thereafter became District Attorney did not affect agreement's validity, absent evidence that attorney could have unfairly influenced defendant's trial]; 21 *Loyola L.A. L. Rev.* 1 [informal immunity agreements made by prosecutors without going through steps mandated by statute]; 32 A.L.R.4th 990 [enforceability of agreement not to prosecute if accused would help in criminal investigation or would become witness against others].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### C. Privilege of Witness in Any Proceeding.

##### 4. Immunity of Witness.

##### g. Agreement for Immunity.

##### 2. Misdemeanor Proceeding.

2 Witkin Cal. Evid. Witnesses § 494

[§ 494] Misdemeanor Proceeding.

The usual statute, such as P.C. 1324 (*supra*, §485 et seq.), is designed to compel the witness to testify, gives the witness immunity if he or she complies, and subjects the witness to punishment for contempt if he or she refuses.

However, P.C. 1324.1 allows a witness to volunteer testimony in return for immunity as follows:

(1) *Misdemeanor Proceeding*. The section applies "[i]n any misdemeanor proceeding in any court."

(2) *Written Agreement*. After claiming privilege, the witness "may agree in writing" with the district attorney or city prosecutor "to testify voluntarily."

(3) *Court Approval of Agreement*. On written request of the prosecutor, the judge "shall approve" the agreement unless the judge "finds that to do so would be clearly contrary to the public interest."

The scope and limitations of the immunity are stated in terms similar to those in P.C. 1324, but the sanction for noncompliance is limited: Since there is no order compelling the witness to testify, a witness who refuses after agreeing merely loses the immunity; the witness may be prosecuted "in the same manner and to the same extent as he would be ... but for this section."

**SUPPLEMENT:** [This section is current through the latest supplement]



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- C. Privilege of Witness in Any Proceeding.
- 5. Determination of Incriminating Character.
  - a. Burden of Proof.

2 Witkin Cal. Evid. Witnesses § 495

[§ 495] Burden of Proof.

If the question is one which is incriminatory on its face, no difficulty is presented in upholding the privilege. (See *supra*, §464.) But if the question does not clearly call for an incriminating answer, the witness has no unqualified right to assert the danger of incrimination and refuse to answer. The court must determine the danger of incrimination, and rule in favor of or against the privilege. (See Model C., Rule 204, Comment; 1 McCormick 5th, §133; 8 Wigmore (McNaughton Rev.) §2271; *supra*, §466.)

*Ev.C. 404* codifies this rule: "[T]he person claiming the privilege has the burden of showing that the proffered evidence might incriminate him." (See *Cohen v. Superior Court* (1959) 173 C.A.2d 61, 68, 343 P.2d 286; *Rosato v. Superior Court* (1975) 51 C.A.3d 190, 218, 124 C.R. 427, citing the text [comparing newsperson's claim of privilege with privilege against self-incrimination].) (For the test, see *infra*, §496.)

**SUPPLEMENT:** [This section is current through the latest supplement]

In *Fisher v. Gibson* (2001) 90 C.A.4th 275, 109 C.R.2d 145, the Department of Corporations filed an action against a company (PCO) that allegedly conducted a fraudulent investment scheme. A receiver was appointed for PCO, and the receiver sued defendant and his company, alleging that PCO had transferred to defendant funds supplied by the defrauded investors. The receiver moved for summary judgment or summary adjudication on causes of action seeking to set aside various payments to defendant by PCO. In arguing that the motion should be denied, stayed, or continued, defendant claimed that he could not present evidence on issues pertinent to the receiver's causes of action because he was the target of a continuing grand jury investigation and was therefore entitled to the protection of the self-incrimination privilege. In granting summary adjudication, the trial judge ruled that defendant had not demonstrated that he was the target of a criminal investigation, or that "facts essential to justify opposition may exist, but cannot, for reasons stated, then be presented" within the meaning of *C.C.P. 437c(h)* (see 6 Cal. Proc. (4th), *Proceedings Without Trial*, §226). *Held*, affirmed. Defendant did not make a factual showing in opposition to the motion that he faced potential parallel criminal prosecution. Further, even if the threat of criminal prosecution could be assumed from the evidentiary showing made in support of the motion, or other documents in the court's file, that possibility standing alone could not suffice to require that the motion be continued. Under *C.C.P. 437c(h)*, defendant was required to make a showing sufficient to allow the court to conclude that (1) "facts necessary to oppose the motion might exist" but (2) "could not then be presented *because of* the proper assertion of the privilege. Appellant made no evidentiary offer in that regard. Appellant's position, in essence, was that the plaintiff in a civil action could not obtain summary adjudication if the defendant simply asserted the privilege due to a potential parallel criminal proceeding. We find this position to be

without merit." (90 C.A.4th 286, 287.)

See 1 McCormick 6th, §132.



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- C. Privilege of Witness in Any Proceeding.
- 5. Determination of Incriminating Character.
  - b. Test.

2 Witkin Cal. Evid. Witnesses § 496

[§ 496] Test.

The earliest authoritative statement of the function of the judge in determining this issue was by Marshall, C.J., in the celebrated *Burr* case, in 1807, quoted in the California case of *In re Berman* (1930) 105 C.A. 37, 287 P. 125: "When a question is propounded, it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness. If this be decided in the negative, then he may answer it without violating the privilege. ... *If a direct answer may criminate himself, then he must be the sole judge what his answer would be. The court cannot participate with him in this judgment, because they cannot decide on the effect of his answer without knowing what it would be; and a disclosure of that fact to the judges would strip him of the privilege.* ... It follows ... that if the question be of such a description that an answer to it *may or may not criminate* the witness, according to the purport of that answer, *it must rest with himself, who alone can tell what it would be, to answer the question or not.*" (105 C.A. 44.)

Later decisions made it clear that the judge looks to all the surrounding circumstances, and has a measure of discretion, in reaching a conclusion. "[I]n substance it is agreed that the court must be satisfied from all the evidence and circumstances, and 'from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious exposure would result. ... ' If the court is so satisfied, the claim of the privilege will be accepted without requiring further disclosure." (*United States v. Reynolds* (1953) 345 U.S. 1, 73 S.Ct. 528, 533, 97 L.Ed. 727, 734, supra, §249; see *Hoffman v. United States* (1951) 341 U.S. 479, 71 S.Ct. 814, 818, 95 L.Ed. 1118, 1124, supra, §466; *Cohen v. Superior Court* (1959) 173 C.A.2d 61, 68, 343 P.2d 286, supra, §467.)

*Ev.C. 404* states the rule as follows: The evidence is *inadmissible* unless "it *clearly appears* to the court" that it "cannot possibly have a tendency to incriminate." The Law Revision Commission Comment observes that the claimant should present *information* to show the danger of incrimination, but "is not required to produce evidence as such." The judge "must consider the matters disclosed in argument, the implications of the question, the setting in which it is asked, the applicable statute of limitations, and all other relevant factors."

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Seijas* (2005) 36 C.4th 291, 305, 30 C.R.3d 493, 114 P.3d 742 [in murder prosecution, trial judge properly allowed witness to assert privilege against self-incrimination, even though prosecution had indicated it would not prosecute witness; use of incriminating statements must be forbidden, as by grant of immunity, and not merely unlikely, before court may force witness to make them]; *Fuller v. Superior Court* (2001) 87 C.A.4th 299, 308, 104 C.R.2d 525 [in

action by plaintiff African-American shoppers alleging they were beaten by defendant security guards, defendants' request to stay their depositions until expiration of applicable criminal statute of limitations was premature; trial judge was required to consider whether each particular question would elicit answer that could lead to prosecution of defendants, and he could not do so until deposition went forward].



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## C. Privilege of Witness in Any Proceeding.

## 6. Waiver of Privilege.

## a. Waiver Before Trial.

2 Witkin Cal. Evid. Witnesses § 497

## [§ 497] Waiver Before Trial.

The right to assert other privileges may be expressly waived by contract (see *supra*, §§68, 69), and the same is true of the witness privilege against self-incrimination. (See *Hickman v. London Assur. Corp.* (1920) 184 C. 524, 529, 195 P. 45 [fire insurance policy]; *Fremont Indem. Co. v. Superior Court* (1982) 137 C.A.3d 554, 187 C.R. 137 [same]; 1 McCormick 5th, §134; 8 Wigmore (McNaughton Rev.) §2275; 43 Cal. L. Rev. 891; 64 Harv. L. Rev. 988; 65 Harv. L. Rev. 691; 70 Harv. L. Rev. 1460.) (On waiver of statutory immunity, see *Regan v. New York* (1955) 349 U.S. 58, 75 S.Ct. 585, 99 L.Ed. 883 [discussing New York statute, but holding validity of waiver irrelevant under the circumstances]; 43 Cal. L. Rev. 886, 892; 64 Harv. L. Rev. 987.)

In *Fremont Indem. Co. v. Superior Court*, *supra*, plaintiff sought to recover damages under a fire insurance policy, and the insurer, relying on a provision excluding recovery for arson caused losses, refused to pay. The insurer requested plaintiff's deposition but, having been charged with arson, he asserted his Fifth Amendment privilege. The trial judge granted plaintiff's motion for a protective order suspending the taking of the deposition until after the criminal matter had been decided. *Held*, the order was improper. "[T]he plaintiff's filing of an action to recover on fire insurance policy operated to waive his constitutional privilege against self-incrimination with reference to any factual issues, particularly as to the applicability of the arson exclusion, tendered by the complaint." (137 C.A.3d 560.) And, once waived, the privilege cannot be relied on even at the discovery stage of the trial. (137 C.A.3d 559.) (See *Hartbrodt v. Burke* (1996) 42 C.A.4th 168, 174, 175, 49 C.R.2d 562 [by bringing suit, plaintiff waived self-incrimination privilege as to tape recording of relevant conversation between him and defendant; following *Fremont Indem. Co.*].)

The contractual waiver of the privilege is not, however, specifically enforced by compelling testimony, but rather by denying rights under the contract. Thus, in *Hickman v. London Assur. Corp.*, *supra*, plaintiff's fire insurance policy contained the usual assured's agreement to submit to examination under oath and to produce books and papers. After a fire loss, an information charging arson was filed against plaintiff, and he refused to answer questions or produce records unless the criminal charge was dismissed. *Held*, judgment for plaintiff reversed; the breach of condition precluded recovery on the policy.

In *Minnesota v. Murphy* (1984) 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed.2d 409, Murphy, on probation and required to meet regularly with his probation officer, made incriminating admissions in answers to questions put at a meeting. In the subsequent criminal prosecution, Murphy sought to suppress the statements on the ground that the officer should have warned him of his privilege before asking the questions. *Held*, the privilege was waived by voluntary statements without claiming the privilege.



(a) The general obligation to appear and answer questions truthfully did not convert Murphy's voluntary statements into compelled ones; he was in no better position than an ordinary witness at a trial, whose testimony is not compelled unless required to answer after a valid claim of the privilege. (104 S.Ct. 1142, 79 L.Ed.2d 419.) "Witnesses who failed to claim the privilege were once said to have 'waived' it, but we have recently abandoned this 'vague term,' ... and 'made clear that an individual may lose the benefit of the privilege without making a knowing and intelligent waiver.'" (104 S.Ct. 1142, 79 L.Ed.2d 419.)

(b) The contention that revocation of probation was threatened if he was untruthful, and that he was therefore compelled to give up his privilege, is unpersuasive. In the "penalty" cases, the state not only compelled an individual to appear and testify, but sought to induce the individual to forgo the Fifth Amendment privilege by threatening to impose economic or other sanctions. And if the state, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation, these cases would apply. (104 S.Ct. 1146, 79 L.Ed.2d 424.) Here, however, Murphy's probation conditions merely required him to appear and give testimony about matters relevant to his probationary status; the state "did not attempt to take the extra, impermissible step." (104 S.Ct. 1147, 79 L.Ed.2d 425.) Thus, "[i]f Murphy did harbor a belief that his probation might be revoked for exercising the Fifth Amendment privilege, that belief would not have been reasonable." (104 S.Ct. 1148, 79 L.Ed.2d 426.) (See 13 Hastings Const. L. Q. 305 [Minnesota v. Murphy].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 1 McCormick 6th, §133. *Statement to probation officer:* See *People v. Coffman & Marlow* (2004) 34 C.4th 1, 117, 118, 17 C.R.3d 710, 96 P.3d 30 [in penalty phase of capital murder case, trial judge did not err in admitting statement defendant made to probation officer in connection with earlier guilty plea to three counts of robbery; following *Minnesota v. Murphy* (1984) 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed.2d 409, text, p. 804]. *West's Key Number Digest*, Witnesses k.305 et seq.



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#### C. Privilege of Witness in Any Proceeding.

##### 6. Waiver of Privilege.

##### b. Waiver at Trial or Hearing.

##### 1. Testifying Without Objection.

2 Witkin Cal. Evid. Witnesses § 498

[§ 498] Testifying Without Objection.

(1) *General Rule.* A witness may waive the privilege by testifying fully without objection to any questions; i.e., a witness who desires the protection of the privilege must claim it. (*United States v. Murdock* (1931) 284 U.S. 141, 52 S.Ct. 63, 65, 76 L.Ed. 210, 213; *Rogers v. United States* (1951) 340 U.S. 367, 71 S.Ct. 438, 440, 95 L.Ed. 344, 348; *People v. Finch* (1963) 213 C.A.2d 752, 771, 29 C.R. 420; *People v. Barker* (1965) 232 C.A.2d 178, 181, 42 C.R. 651; see 8 Wigmore (McNaughton Rev.) §§2268, 2276; 5 So. Cal. L. Rev. 244.)

(2) *Right To Waive and Advice From Judge.* *People v. Barker*, supra, deals with the novel point of the right to waive. Defendant B and his codefendant S were charged with robbery. When the case was nearly completed, S, represented by separate counsel, changed his plea to guilty. B then called S as a witness and asked whether B had been with him when he committed the robbery. He said "No," but the judge struck the answer, advising him that he could be charged with perjury and telling him to claim privilege. The witness declined to make the claim, and the judge, after urging him again, ruled that he should not testify. *Held*, this was reversible error as to B. The judge's refusal to allow the jury to consider direct testimony from a witness asserting positive knowledge of B's nonparticipation was clearly prejudicial. As to privilege, the court said:

"When it appears that a witness is about to incriminate himself, the court is fully justified in advising the witness of his privilege and of the possible consequences of his testimony." But the authorities do not suggest that it is proper to forbid the witness to answer if he or she is willing to do so. "There is no policy of the law which would prevent a perjurer from recanting his false testimony in time to aid another, even though this course exposes the witness to some risk of further prosecution. It is not inconceivable that a witness who had committed perjury would be willing to confess it and accept the consequences rather than to see an innocent friend convicted of a robbery which he did not commit." (232 C.A.2d 182.)

The duty to advise is reaffirmed in *People v. Warren* (1984) 161 C.A.3d 961, 972, 207 C.R. 912: "[W]hen a trial court has reason to believe that a witness may be charged with a crime arising out of events to which he might testify, it has a duty to insure that the witness is fully advised of his privilege against self-incrimination."

However, the cases holding that the judge has a duty to advise usually involve a defendant not represented by counsel and ignorant of the privilege. "Pretzer has not cited compelling authority requiring the trial judge to admonish a defendant concerning his right not to testify at trial when that defendant is represented by counsel." (*People v. Pretzer*

(1992) 9 C.A.4th 1078, 1085, 11 C.R.2d 860 [adding that "Pretzer eagerly testified and his attorney may have acquiesced to his testifying"].) Other cases have also refused to impose such a duty. (See *People v. Alcocer* (1991) 230 C.A.3d 406, 410, 282 C.R. 5 [grand jury setting is not inherently coercive so as to require on-the-record advisement of self-incrimination privilege; testimony voluntarily given before grand jury was properly admitted in perjury prosecution]; *People v. Berry* (1991) 230 C.A.3d 1449, 1453, 281 C.R. 543 [at family court review hearing on modification of child support, judge was not required to advise father of self-incrimination privilege, because matter had no criminal overtones; father's perjury conviction affirmed].)

(3) *Failure To Claim Privilege on Income Tax Return*. Information revealed in the preparation and filing of a federal income tax return "is, for purposes of Fifth Amendment analysis, the testimony of a 'witness.' " Hence, where the defendant made incriminating disclosures on the return instead of claiming the privilege, he could not invoke the privilege when they were later introduced as evidence against him in a criminal prosecution. (*Garner v. United States* (1976) 424 U.S. 648, 96 S.Ct. 1178, 1183, 1188, 47 L.Ed.2d 370, 384.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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##### b. Waiver at Trial or Hearing.

##### 2. Partial Disclosure.

2 Witkin Cal. Evid. Witnesses § 499

[§ 499] Partial Disclosure.

There may also be an *implied or constructive waiver from partial disclosure of incriminating facts*. By voluntarily answering questions as to some of the facts of a transaction involving criminal conduct, the witness is held to have waived the privilege not only as to those, but as to all other facts connected with that transaction. (See *Rogers v. United States* (1951) 340 U.S. 367, 71 S.Ct. 438, 95 L.Ed. 344; *Brown v. United States* (1958) 356 U.S. 148, 78 S.Ct. 622, 2 L.Ed.2d 589; *People v. Freshour* (1880) 55 C. 375, 376; *Regents of Univ. of Calif. v. Superior Court* (1962) 200 C.A.2d 787, 791, 19 C.R. 568; 1 McCormick 5th, §134; 8 Wigmore (McNaughton Rev.) §2276; 38 Cal. L. Rev. 930; 70 Harv. L. Rev. 1459; 92 Harv. L. Rev. 1752.)

In *Rogers v. United States*, *supra*, petitioner, testifying before a federal grand jury, admitted that she was treasurer of the Communist Party of Denver and formerly had custody of the party records, but then, claiming the privilege, refused to identify the person to whom she had given them. *Held*, the privilege was waived. The court quoted Wigmore ("If the two are related facts, parts of a whole fact forming a single relevant topic, then his waiver as to a part is a waiver as to the remaining parts"), and an early Michigan case: "[W]here a witness has voluntarily answered as to materially incriminating facts ... he cannot then stop short and refuse further explanation, but must disclose fully what he has attempted to relate." (71 S.Ct. 442, 95 L.Ed. 349.) (See 14 Stanf. L. Rev. 819; 51 Cal. L. Rev. 284.)

In *Brown v. United States*, *supra*, a denaturalization proceeding, petitioner, on direct examination in her defense, gave comprehensive testimony denying Communist associations or subversive activities, but on cross-examination, claimed privilege in refusing to answer the question whether she was or had been a Communist Party member. *Held*, contempt judgment affirmed. Petitioner's theory, that voluntary testimony constitutes a waiver only when it is itself incriminating (here, it was all favorable to her) was rejected, and the general rule governing a defendant's waiver in a criminal case was followed: If he elects to testify he is subject to cross-examination "on the matters he has himself put in dispute." (78 S.Ct. 627, 2 L.Ed.2d 597.) (See *People v. Lucas* (1995) 12 C.4th 415, 455, 48 C.R.2d 525, 907 P.2d 373 [trial judge did not err in refusing to require witnesses in murder trial to answer questions about their observation of defendant's activities; their testimony would have called forth cross-examination subjecting them to danger of self-incrimination, and having testified, they would no longer be able to claim privilege; citing *Brown*]; 72 Harv. L. Rev. 176; 48 Cal L. Rev. 123; 72 A.L.R.2d 830 [testifying in civil proceeding as waiver of privilege against self-incrimination].)

In *Newson v. Oakland* (1974) 37 C.A.3d 1050, 112 C.R. 890, plaintiff sought damages, including loss of income, as

a result of injuries allegedly caused by defendant's having caused a dangerous street condition. On cross-examination, defense counsel asked plaintiff whether he had filed federal and state income returns, and his objection was overruled. *Held*, the ruling was proper. On the analogy of the patient-litigant exception (see *supra*, §204), plaintiff could not claim relief while refusing to testify about matters which could prevent his recovery. (37 C.A.3d 1056, quoting 4 A.L.R.3d 545 [dismissing action or striking testimony where party to civil action asserts privilege against self-incrimination as to pertinent question].)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 1 McCormick 6th, §133.



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##### 6. Waiver of Privilege.

##### b. Waiver at Trial or Hearing.

##### 3. Privilege in Later Proceeding.

2 Witkin Cal. Evid. Witnesses § 500

[§ 500] Privilege in Later Proceeding.

A defendant's waiver is only effective for the particular proceeding in which it takes place (*supra*, §430), and the same limited effect is given the waiver by a witness. Hence, a defendant may claim the privilege at a criminal trial after waiving it in the preliminary examination or before the grand jury. (See *Overend v. Superior Court* (1900) 131 C. 280, 284, 63 P. 372 [prior waiver at preliminary examination]; *In re Sales* (1933) 134 C.A. 54, 61, 24 P.2d 916; 1 McCormick 5th, §134; 8 Wigmore (McNaughton Rev.) §2276; 8 So. Cal. L. Rev. 51; 5 Hastings L. J. 263; 1953 A.S. 761; 36 A.L.R.2d 1403 [right of witness to claim privilege against self-incrimination at criminal trial after testifying to same matter before grand jury].)

Waiver on a voir dire examination outside the presence of the jury to determine admissibility of evidence is similarly treated; i.e., it does not preclude a claim of privilege at the trial. (*People v. Lawrence* (1959) 168 C.A.2d 510, 517, 336 P.2d 189.)

The rule that a defendant does not waive the privilege by giving prior testimony is ordinarily applied in subsequent proceedings against the same defendant. In *People v. Lopez* (1980) 110 C.A.3d 1010, 168 C.R. 378, it was applied to a person who was a defendant in the former proceeding and a witness in the subsequent proceeding. T, after testifying on his own behalf, was convicted of murder and other offenses, and appealed. While his appeal was pending, he was called as a witness in the trial of his codefendant L, and he claimed the privilege. *Held*, the privilege was not waived by his prior testimony. If T's appeal resulted in a reversal of his conviction and a retrial, his testimony at L's trial could be introduced against him as an admission, and it is conceivable that such testimony could include evidence which had not been presented at his first trial. Because his testimony at L's trial could tend to incriminate him, he was entitled to assert his privilege. (110 C.A.3d 1021.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 1 McCormick 6th, §129.



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CHAPTER IX - Witnesses

XVII. PRIVILEGE AGAINST SELF-INCRIMINATION

C. Privilege of Witness in Any Proceeding.

6. Waiver of Privilege.

c. Failure To Object to Interrogatories.

2 *Witkin Cal. Evid. Witnesses* § 501

[§ 501] Failure To Object to Interrogatories.

In *Brown v. Superior Court* (1986) 180 C.A.3d 701, 226 C.R. 10, plaintiff Brown sued defendants for assault and battery and conspiracy to murder. One defendant was facing criminal charges of attempted murder arising from the same incident. Plaintiff served written interrogatories, some of which required self-incrimination. Defendants did not answer or object within the 30-day period of *C.C.P. 2030*; sanctions were imposed, an additional 10-day period was granted by the judge, and defendants were again late in responding. *Held*, defendants' conduct was a waiver of the right to raise the privilege, and plaintiff was entitled to judgment by default. "Numerous cases have held that if an objection to interrogatories is not raised within the 30-day period, the objection is waived, absent good cause for relief from default. ... We see no basis for treating the privilege against self-incrimination differently." (180 C.A.3d 709.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2030* was repealed and replaced by *C.C.P. 2030.010* et seq. in 2004. The 30-day period for responding to interrogatories is now stated in *C.C.P. 2030.260*.



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## CHAPTER IX - Witnesses

### XVII. PRIVILEGE AGAINST SELF-INCRIMINATION

#### C. Privilege of Witness in Any Proceeding.

##### 6. Waiver of Privilege.

##### d. Claim and Waiver at Legislative Investigation.

2 Witkin Cal. Evid. Witnesses § 502

[§ 502] Claim and Waiver at Legislative Investigation.

The United States Supreme Court has laid down a liberal rule of claim, and a strict test of waiver, for witnesses appearing before congressional investigating committees.

In *Quinn v. United States* (1955) 349 U.S. 155, 75 S.Ct. 668, 99 L.Ed. 964, petitioner, an officer of a labor union having alleged Communist members, was called before a subcommittee of the House Committee on Un-American Activities. The questions concerned his membership in the Communist Party, and were concededly incriminating. His refusal to answer was on "the First and Fifth Amendments" and also on grounds relied on by another witness. He was convicted of contempt of Congress under the statute (2 U.S.C., §192) making punishable the refusal to answer pertinent questions, the lower court holding that he had not properly raised the claim of privilege. *Held*, reversed. (See also *Emspak v. United States* (1955) 349 U.S. 190, 75 S.Ct. 687, 99 L.Ed. 997, and *Bart v. United States* (1955) 349 U.S. 219, 75 S.Ct. 712, 99 L.Ed. 1016, companion cases reaching same result; *Slagle v. Ohio* (1961) 366 U.S. 259, 81 S.Ct. 1076, 1080, 6 L.Ed.2d 277, 282 [state Un-American Activities Commission; *Quinn* and *Bart* cases followed]; *Raley v. Ohio* (1959) 360 U.S. 423, 79 S.Ct. 1257, 3 L.Ed.2d 1344 [state investigating commission; contempt convictions reversed where petitioners were induced to claim privilege without informing them of immunity statute]; cf. *Hutcheson v. United States* (1962) 369 U.S. 599, 82 S.Ct. 1005, 1010, 8 L.Ed.2d 137, 149 [express waiver upheld]; and see generally 69 Harv. L. Rev. 131; 70 Harv. L. Rev. 727, 1459; 51 Cal. L. Rev. 281; 1955 A.S. 72, 646; 1959 A.S. 643; 51 A.L.R.2d 1178 [sufficiency of claim of privilege].)

Three general rules emerge from these cases:

(1) The claim of privilege need not be formal or by any special combination of words. "If an objection to a question is made in any language that a committee may reasonably be expected to understand as an attempt to invoke the privilege, it must be respected both by the committee and by a court." If the committee deems the apparent claim equivocal, it may ask the witness to particularize his or her objection. (*Quinn v. United States*, *supra*, 75 S.Ct. 673, 99 L.Ed. 972.)

(2) Contempt of Congress under the statute requires criminal intent--a deliberate, intentional refusal to answer. Because the committee may either sustain or overrule the objection of the witness, mere refusal to answer is not contumacious unless the committee overrules the objection and directs the witness to answer. The committee need not use any particular form of words to indicate its ruling, so long as the witness is confronted with a clear-cut choice between answering or refusing on pain of contempt. (*Quinn v. United States*, *supra*, 75 S.Ct. 675, 99 L.Ed. 974; *Bart v.*



*United States, supra*, 75 S.Ct. 714, 715, 99 L.Ed. 1019, 1020; *Slagle v. Ohio, supra*, 81 S.Ct. 1080, 1081, 6 L.Ed.2d 282, 283.)

(3) The privilege will not be deemed waived by a casual and equivocal statement. (*Emspak v. United States, supra*, 75 S.Ct. 691, 99 L.Ed. 1005 [petitioner said he didn't think committee had a right to pry into his associations, and "That is my position"]; see *Smith v. United States (1949)* 337 U.S. 137, 69 S.Ct. 1000, 1007, 93 L.Ed. 1264, 1274.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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CHAPTER IX - Witnesses

XVIII. SPECIAL PRIVACY STATUTES

A. Records of Medical Committees.

1. Medical or Medical-Dental Staff Committee.

2 *Witkin Cal. Evid. Witnesses* § 503

[§ 503] Medical or Medical-Dental Staff Committee.

"In-hospital medical or medical-dental staff committees of a licensed hospital may engage in research and medical or dental study for the purpose of reducing morbidity or mortality, and may make findings and recommendations relating to said purpose." (*Ev.C. 1156*.) The section then lays down two rules governing the use of "the written records of interviews, reports, statements, or memoranda of such in-hospital medical or medical-dental staff committees relating to such medical or dental studies":

(1) They are subject to discovery under *C.C.P. 2016* et seq. (see 2 *Cal. Evidence (4th), Discovery*, §5 et seq.) except that, pursuant to the physician-patient and psychotherapist-patient privileges, the patient's identity cannot be disclosed without his or her consent. (*Ev.C. 1156(a), (b)*.)

(2) They are not admissible as evidence "in any action or before any administrative body, agency, or person." (*Ev.C. 1156(a)*.)

However, admissibility of the original medical or dental records of a patient is not affected (*Ev.C. 1156(c)*), and the statute does not exclude evidence relevant in a criminal action (*Ev.C. 1156(d)*).

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Discovery: Ev.C. 1156(a)* was amended in 2004 to refer to *C.C.P. 2016.010* et seq., which replaced *C.C.P. 2016* et seq. in 2004 without substantive change.



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## CHAPTER IX - Witnesses

### XVIII. SPECIAL PRIVACY STATUTES

#### A. Records of Medical Committees.

#### 2. Medical or Psychiatric Quality Assurance Committee.

*2 Witkin Cal. Evid. Witnesses § 504*

[§ 504] Medical or Psychiatric Quality Assurance Committee.

A medical or psychiatric quality assurance committee established under Welf.C. 4070 and 5624 "may engage in research and medical or psychiatric study for the purpose of reducing morbidity or mortality, and may make findings and recommendations to the county and state relating to such purpose." (Ev.C. 1056.1(a).) The statute, nearly identical to *Ev.C. 1156* governing medical and medical-dental staff committees (see *supra*, §503), also sets forth two rules governing the use of "the written records of interviews, reports, statements, or memoranda of such committees relating to such medical or psychiatric studies":

(1) They are subject to discovery under *C.C.P. 2016* et seq. (see *2 Cal. Evidence (4th), Discovery*, §5 et seq.) except that, pursuant to the physician-patient and psychotherapist-patient privileges, the patient's identity cannot be disclosed without his or her consent. (*Ev.C. 1156.1(a), (b).*)

(2) They are not admissible as evidence "in any action or before any administrative body, agency, or person." (*Ev.C. 1156.1(a).*)

However, admissibility of the original medical or psychiatric records of a patient is not affected (*Ev.C. 1156.1(c)*), and the statute does not exclude evidence relevant in a criminal action (*Ev.C. 1156.1(d)*).

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Discovery: Ev.C. 1156.1(a)* was amended in 2004 to refer to *C.C.P. 2016.010* et seq., which replaced *C.C.P. 2016* et seq. in 2004 without substantive change.



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## CHAPTER IX - Witnesses

### XVIII. SPECIAL PRIVACY STATUTES

#### A. Records of Medical Committees.

#### 3. Medical Evaluation or Review Committee.

##### a. Nature and Scope of Protection.

##### 1. In General.

#### 2 Witkin Cal. Evid. Witnesses § 505

[§ 505] In General.

*Ev.C. 1157* preserves the secrecy of the *proceedings and records* of peer review bodies and of organized committees of hospital or professional associations charged with evaluating and improving the quality of care rendered by specified health care professionals. (*Ev.C. 1157(a)*.) With certain exceptions and distinctions (see *infra*, §509 et seq.), these proceedings and records are not subject to discovery (*Ev.C. 1157(a)*), and no person in attendance at a meeting of such a committee may be required to testify "as to what transpired at that meeting" (*Ev.C. 1157(b)*).

Many cases and commentaries have discussed the scope of the statute. (See *Henry Mayo Newhall Memorial Hosp. v. Superior Court* (1978) 81 C.A.3d 626, 635, 146 C.R. 542 [immunity not waived by providing privileged records in unrelated mandamus proceeding]; *West Covina Hosp. v. Superior Court* (1984) 153 C.A.3d 134, 138, 200 C.R. 162; *Snell v. Superior Court* (1984) 158 C.A.3d 44, 49, 204 C.R. 200; *Mt. Diablo Hosp. Med. Center v. Superior Court* (1984) 158 C.A.3d 344, 347, 204 C.R. 626; *Mt. Diablo Hosp. Dist. v. Superior Court* (1986) 183 C.A.3d 30, 33, 227 C.R. 790 [staff committees evaluating safety and efficacy of drugs prior to authorizing use are within scope of statute]; *Los Angeles v. Superior Court (Martinez)* (1990) 224 C.A.3d 1446, 1454, 274 C.R. 712 [department-wide conferences held weekly to improve patient care were "committees" under *Ev.C. 1157*, despite lack of formal organizational indicia and participation of nonphysician hospital staff]; *Cedars-Sinai Med. Center v. Superior Court* (1993) 12 C.A.4th 579, 588, 16 C.R.2d 253 [identity of committee members is so intimately related to the evaluation itself as to fall within privilege]; C.J.E.R., Judges Benchbook, Civil Proceedings: Discovery §4.65 et seq.; 17 *Pacific L. J.* 499 [proposal that absolute disclosure prohibition be replaced with qualified privilege]; 22 Cal. Western L. Rev. 317 [review of cases applying statute]; 69 A.L.R.5th 559 [scope of protection from disclosure of medical peer review proceedings relating to claim in medical malpractice action]; *infra*, §506 et seq.) (On *Ev.C. 1157* as obstacle to establishing hospital's liability for doctor's negligence under decision in *Elam v. College Park Hosp.* (1982) 132 C.A.3d 332, 183 C.R. 156, 6 *Summary* (9th), *Torts*, §1024, see 18 *U.S.F. L. Rev.* 51; 24 *Santa Clara L. Rev.* 661.)

**SUPPLEMENT:** [This section is current through the latest supplement]

In *Fox v. Kramer* (2000) 22 C.4th 531, 93 C.R.2d 497, 994 P.2d 343, plaintiff filed a malpractice action alleging that her colonoscopy was carried out negligently and against her wishes. Shortly before trial, she subpoenaed a draft preliminary report prepared by an investigator for the Department of Health Services concerning the incident. The investigator's conclusions in that report were based on hospital peer review committee records that he examined in the course of his official duties. The trial court excluded both the investigator's testimony and the report itself. The Court of

Appeal affirmed, relying on the rule against evidence of subsequent remedial measures (*Ev.C. 1151*; see *1 Cal. Evidence (4th), Circumstantial Evidence*, §163). *Held*, affirmed, but not for the reasons given by the Court of Appeal. The committee records were immune from discovery under *Ev.C. 1157(a)*. The investigator could review them only as part of his official, purely investigatory, inquiry. (22 *C.4th* 540, citing *Arnett v. Dal Cielo* (1996) 14 *C.4th* 4, 56 *C.R.2d* 706, 923 *P.2d* 1, text, §514.) Plaintiff could not accomplish indirectly what she was forbidden to do directly, i.e., obtain the equivalent of discovery of the contents of the committee records by subpoenaing the testimony or the report of the investigator who reviewed them. (22 *C.4th* 541.) Furthermore, the investigator's opinions were based on "official information" within the meaning of *Ev.C. 1040* (text, §246), and, under the balancing test of that statute, the necessity of preserving the confidentiality of hospital peer review committee records, "which inures to the benefit of the general public by encouraging candid and uninhibited evaluations of physicians by their peers," greatly outweighs the necessity of disclosure in the interest of justice. (22 *C.4th* 542.) However, the Court of Appeal's determination that the records were *inadmissible* under *Ev.C. 1151*, as well as *nondiscoverable* under *Ev.C. 1157*, is incorrect. The Legislature is aware of the need to protect hospital peer review committee records, and in *Ev.C. 1157* it created a limited privilege. The general rule against admissibility of subsequent remedial measures is inapplicable. (22 *C.4th* 548.)

See *Los Angeles v. Superior Court (Gavira)* (2006) 139 *C.A.4th* 8, 12, 42 *C.R.3d* 390 [peer review committee exemption applied to county jail mental health services division]. *Elam v. College Park Hosp.*:

*Cross-Reference:* 6 *Summary* (10th), *Torts*, §1255.



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## CHAPTER IX - Witnesses

### XVIII. SPECIAL PRIVACY STATUTES

#### A. Records of Medical Committees.

#### 3. Medical Evaluation or Review Committee.

##### a. Nature and Scope of Protection.

##### 2. Hospital Staff Privileges.

2 Witkin Cal. Evid. Witnesses § 506

[§ 506] Hospital Staff Privileges.

*Hinson v. Clairemont Community Hosp.* (1990) 218 C.A.3d 1110, 267 C.R. 503, held that neither an application for staff privileges nor the fact that a doctor's privileges were denied, suspended or terminated prima facie falls within the scope of *Ev.C. 1157*.

(a) "An application for staff privileges is not included within *Evidence Code section 1157* because the application is neither necessarily a 'proceeding' nor a 'record' of a committee; it is a document prepared and completed by an individual physician. As the *Santa Rosa* case explains, the mere fact information is placed in a medical staff committee's files does not render information immune from discovery." (218 C.A.3d 1128, citing *Santa Rosa Memorial Hosp. v. Superior Court* (1985) 174 C.A.3d 711, 220 C.R. 236, *infra*, §507.) This holding is not contrary to *Snell v. Superior Court* (1984) 158 C.A.3d 44, 204 C.R. 200, because there the personnel files in question were exclusively maintained by a peer review committee. (218 C.A.3d 1128.)

(b) "Nor do we believe the *plain fact* (as opposed to the underlying facts of the investigation and evaluation) of denial, suspension or termination of staff privileges is automatically immune from discovery under *Evidence Code section 1157*. It seems probable that the actual decision to deny, suspend or terminate a particular physician's privileges is an act of the hospital administration rather than that of a medical staff committee. ... Indeed, the record here shows the Clairemont Community Hospital Board of Governors approved, disapproved or conditioned staff appointments and reappointments." (218 C.A.3d 1128.)

*Hinson* was disapproved in *Alexander v. Superior Court* (1993) 5 C.4th 1218, 23 C.R.2d 397, 859 P.2d 96, a medical malpractice action in which plaintiffs sought discovery of defendant physicians' applications and reapplications for staff privileges at defendant hospital. The trial judge denied plaintiffs' motion to compel the hospital to disclose the documents. *Held*, the motion was properly denied.

(a) "Given the statutory and regulatory scheme, it is clear that applications for staff privileges are the province of the hospital's medical staff committee. ... Although a hospital's administrative governing body makes the ultimate decision about whether to grant or deny staff privileges, it does so based on the recommendation of its medical staff committee." (5 C.4th 1224.)

(b) Plaintiffs asserted that the privilege was inapplicable because the applications were not actually generated by

the committee. However, "nothing in section 1157(a) limits the privilege to records that are *generated by* a medical staff committee, and nothing in the statute supports the suggestion that materials *submitted to* a committee for review are not protected 'records' of the committee." (5 C.4th 1225.) (See *Joel v. Valley Surgical Center* (1998) 68 C.A.4th 360, 371, 80 C.R.2d 247 [privilege extends to reporting suspension of staff privileges to Medical Board of California and to National Practitioner Data Bank]; 22 *Pepperdine L. Rev.* 263; on exception to statutory disclosure prohibition for person requesting hospital staff privileges, see *Ev.C. 1157(c)*, *infra*, §§509, 510.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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### XVIII. SPECIAL PRIVACY STATUTES

#### A. Records of Medical Committees.

#### 3. Medical Evaluation or Review Committee.

##### a. Nature and Scope of Protection.

#### 3. Multidisciplinary Infection Control Committee.

2 Witkin Cal. Evid. Witnesses § 507

[§ 507] Multidisciplinary Infection Control Committee.

In *Santa Rosa Memorial Hosp. v. Superior Court* (1985) 174 C.A.3d 711, 220 C.R. 236, plaintiff sued defendant hospital to recover for injuries suffered as a result of an infection she acquired while in the hospital, alleging both negligent treatment and negligent staff supervision. Plaintiff sought to compel answers to various questions propounded to V, a nurse epidemiologist and member of the *Infection Control Committee* at the hospital. The trial judge ruled that none of the disputed questions asked for the proceedings or records of the committee or for testimony "as to what transpired" at a meeting of that committee; and, if the questions could be deemed to seek such information, the immunity provided by *Ev.C. 1157* did not apply because the infection control committee is not a "medical staff committee" within the meaning of the statute. *Held*, order vacated and matter remanded for further proceedings.

(a) The statutory language is not limited to medical staff committees composed solely, or primarily, of physicians. (174 C.A.3d 718, 719.) Nor is it limited to protecting only information pertaining to peer reviews by physicians. (174 C.A.3d 720.)

(b) Hospital administrators cannot evade their concurrent duty under *Elam v. College Park Hosp.* (1982) 132 C.A.3d 332, 183 C.R. 156, 6 Summary (9th), *Torts*, §1024, simply by purporting to have delegated that entire responsibility to medical staff committees: "Information developed or obtained by hospital administrators or others which does not derive from an investigation into the quality of care or the evaluation thereof by a medical staff committee, and which does not disclose the investigative and evaluative activities of such a committee, is not rendered immune from discovery under section 1157 merely because it is later placed in the possession of a medical staff committee or made known to committee members; and this may be so even if the information in question may be relevant in a general way to the investigative and evaluative functions of the committee." (174 C.A.3d 724; see *infra*, §512.)

(c) A hospital claiming privilege under *Ev.C. 1157* bears the "burden of demonstrating why the information claimed to be immune should be deemed a record or proceeding of a medical staff committee." (174 C.A.3d 727.) Certain types of information are so clearly within the exclusive sphere of a protected medical staff committee that *Ev.C. 1157* can be found applicable without extensive judicial inquiry. But when the information sought to be discovered relates to a matter that is not obviously within the sole purview of a protected committee, the burden of showing that it is protected cannot be sustained except upon particularized judicial inquiry. The trial judge granted the motion to compel answers without sufficient inquiry, and the record did not provide a factual basis for determining the application



of *Ev.C. 1157*; hence, remand was required. (174 C.A.3d 728.)

(d) The only challenged question that explicitly solicited information regarding activities of the Infection Control Committee asked whether plaintiff's care had been reviewed by that committee. The hospital should be required to disclose whether plaintiff's care was reviewed by the committee, unless it can show that such review would not be undertaken as a matter of course and that disclosure of the fact of review would be prejudicial to an interest protected by *Ev.C. 1157*. "If the committee regularly reviews the care and treatment of all or of randomly selected patients, or if review is otherwise automatically undertaken (as, for example, upon request of the patient or his or her physician), the mere fact of committee review would not constitute a record or proceeding of that committee." (174 C.A.3d 729.)

(e) If the trial judge determines that the fact of review or nonreview of plaintiff's care and treatment by the Infection Control Committee is not immune from discovery and must be disclosed, and if Nurse V discloses that it has not been reviewed, the information sought by the remaining deposition questions would not appear to constitute records and proceedings of that committee and must also be disclosed. But if the fact of committee review is immune from discovery, or if it is disclosed that the committee has reviewed her care and treatment, the additional information is not necessarily immune from discovery; the trial judge must determine the extent to which V's responsibilities as nurse epidemiologist may be independent of her participation in activities of the *Infection Control Committee*. (174 C.A.3d 729.) (See *Willits v. Superior Court* (1993) 20 C.A.4th 90, 100, 101, 24 C.R.2d 348, *infra*, §508 [quoting *Santa Rosa*].)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*Elam v. College Park Hosp.:*

*Cross-Reference:* 6 Summary (10th), *Torts*, §1255.



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## CHAPTER IX - Witnesses

## XVIII. SPECIAL PRIVACY STATUTES

## A. Records of Medical Committees.

## 3. Medical Evaluation or Review Committee.

## a. Nature and Scope of Protection.

## 4. Hospital Employee's Suit for Damages.

2 Witkin Cal. Evid. Witnesses § 508

[§ 508] Hospital Employee's Suit for Damages.

In *Willits v. Superior Court* (1993) 20 C.A.4th 90, 24 C.R.2d 348, a nurse who had suffered a needle stick while withdrawing blood from an AIDS patient and subsequently tested HIV-positive brought an action for damages against, among other defendants, the managing entity of the hospital where she worked. Her complaint asserted causes of action for negligence, products liability, and breach of express and implied warranties. Plaintiff sought discovery of documents relating to the needle stick incident; the AIDS patient; the purchase and use of the medical products involved in the accident; employee training and education regarding needle stick incidents; the occurrence, reporting, prevention, and treatment of such incidents; the employment, training, and supervision of plaintiff; rules, policies, and protocols applicable to plaintiff; and the corporate structure and management of the managing entity and the hospital and the relationship between the two. When defendant refused to produce most of the requested documents, the trial judge granted plaintiff's motion to compel, but stated that *Ev.C. 1157* applied to medical staff committee activities and files, and precluded discovery of employee occupational safety or health reports by a hospital employee. The latter qualification caused plaintiff to seek relief in the Court of Appeal. *Held*, writ of mandamus issued.

(a) A hospital employee's suit for damages is within the ambit of the statute. Just as candor and frankness are essential for effective peer review and effective treatment and product review, so they are essential to the review of health and safety matters by hospital staff committees. "A few hospital employees must be denied discovery in order to protect the health of all health care workers and of the public as a whole." (20 C.A.4th 102, 103.)

(b) Elsewhere, as in former Health & Saf.C. 429.14 and 429.15 (now *Health & Saf.C. 105325* and *105335*), the Legislature has sought to protect health care personnel from occupational injuries and illnesses. "[T]hat goal is more readily achieved if hospital staff committees may candidly assess medical devices, and accidents involving such devices, under the mantle of confidentiality provided by section 1157." (20 C.A.4th 103.)

(c) Nevertheless, the holding in *Santa Rosa Memorial Hosp. v. Superior Court* (1985) 174 C.A.3d 711, 220 C.R. 236, *supra*, §507, precludes defendant from attempting to avoid discovery of materials related to its independent duties, such as those imposed by the Labor Code and the Health and Safety Code, by delegating those duties to committees or by placing relevant documents in committee files. Defendant has refused to produce documents that enjoy statutory protection and others that do not. As the trial judge granted plaintiff's motion without sufficiently inquiring into the relevant considerations, as reflected in its statement qualifying the granting of the motion, plaintiff is entitled to remand for further proceedings "under the helpful guidelines offered by the *Santa Rosa Memorial Hospital* court." (20 C.A.4th

104.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Health & Saf.C. 105335*, which required the preparation of a report on the safety of medical devices, was repealed in 2004 as obsolete.



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### XVIII. SPECIAL PRIVACY STATUTES

#### A. Records of Medical Committees.

#### 3. Medical Evaluation or Review Committee.

##### b. Exceptions.

##### 1. Statutory List.

#### 2 Witkin Cal. Evid. Witnesses § 509

[§ 509] Statutory List.

*Ev.C. 1157* specifies a number of exceptions to its prohibitions of discovery or compelled testimony:

(1) Statements made by a person in attendance "who is a party to an action or proceeding the subject matter of which was reviewed at that meeting." (*Ev.C. 1157(c)*; see *Schulz v. Superior Court* (1977) 66 C.A.3d 440, 445, 136 C.R. 67 [rejecting contention that this exception eliminated the statutory immunity in every case in which a hospital or doctor are defendants in a medical malpractice action]; *University of So. Calif. v. Superior Court* (1996) 45 C.A.4th 1283, 1290, 1291, 53 C.R.2d 260 [exception did not entitle physician-resident who was dismissed from hospital's postgraduate surgical training program to discovery of proceedings and records of resident evaluation committee in her action for wrongful termination].)

(2) A person requesting hospital staff privileges. (*Ev.C. 1157(c)*; see *St. Francis Memorial Hosp. v. Superior Court* (1988) 205 C.A.3d 438, 441, 252 C.R. 380 [exception inapplicable to physician with staff privileges who was challenging hospital's suspension of electroconvulsive treatment]; *California Eye Institute v. Superior Court* (1989) 215 C.A.3d 1477, 1480, 264 C.R. 83 [exception inapplicable to ophthalmologist's action for damages for past restrictions on his staff privileges]; *University of So. Calif. v. Superior Court*, *supra*, 45 C.A.4th 1289, 1290 [physician-resident in surgical training program did not have "staff privileges" within meaning of exception; she was employee and student, not doctor practicing surgery]; on *applications* for staff privileges as being within statute, see *supra*, §506; on effect of exception on hospital's malpractice immunity, see *infra*, §510.)

(3) An action against an insurance carrier alleging bad faith by the carrier in refusing to accept a settlement offer within the policy limits. (*Ev.C. 1157(c)*.)

(4) Committees that exceed 10% of the membership of the society. (*Ev.C. 1157(d)*.)

(5) A committee on which a person serves when his or her own conduct or practice is being reviewed. (*Ev.C. 1157(d)*.)

(6) The 1983, 1985, and 1990 amendments to *Ev.C. 1157*, i.e., references to podiatrists, dieticians, psychological review committees, and peer review bodies, do not exclude the discovery or use of relevant evidence in a criminal action. (*Ev.C. 1157(e)*; see *infra*, §511.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(6) *Amendments:* *Ev.C. 1157(e)* was amended in 2000 to provide that the changes made in *Ev.C. 1157* in 2000 (which brought marriage and family therapist and licensed clinical social worker committees within the scope of the statute) do not have the effect of precluding the discovery or use of relevant evidence in criminal actions.



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### XVIII. SPECIAL PRIVACY STATUTES

#### A. Records of Medical Committees.

#### 3. Medical Evaluation or Review Committee.

##### b. Exceptions.

#### 2. No Effect on Immunity From Disclosure in Malpractice Cases.

2 Witkin Cal. Evid. Witnesses § 510

[§ 510] No Effect on Immunity From Disclosure in Malpractice Cases.

In *Matchett v. Superior Court* (1974) 40 C.A.3d 623, 115 C.R. 317, the court rejected the contention that the exception under *Ev.C. 1157(c)* (person requesting hospital staff privileges; see *supra*, §509) eliminated the immunity in any suit charging a hospital with negligent selection or retention of a person who made such a request. The *statutory immunity* is aimed directly at malpractice actions; the *exception* was designed to set the immunity aside and to permit discovery in *suits by doctors* claiming wrongful or arbitrary exclusion from hospital staff privileges. (40 C.A.3d 629.)

In *Roseville Community Hosp. v. Superior Court* (1977) 70 C.A.3d 809, 139 C.R. 170, the court said: "We anticipated in *Matchett* that situations would arise in which doctors have been subjected to (allegedly) wrongful or arbitrary exclusions from hospital staff privileges. We indicated in *Matchett*, by way of dictum, that the exclusionary language in the statute was to all appearances designed to allow such doctors in such situations to obtain by discovery the necessary information to test the legality of their exclusion in a court action. ... We declare this statement of law is no longer dictum. *Matchett*, therefore, prophesied the exact issue we now face." (70 C.A.3d 814.)

In *Roseville*, plaintiff was a partnership of pathologists who worked under contract as a pathological service unit of the hospital. The hospital medical staff terminated the contract. Plaintiff sued for declaratory relief and damages and sought discovery of the records of the hospital staff committees. *Held*, the records were discoverable. In a technical sense, some of the pathologists may not have been "staff members" and, in a vicarious liability case, might not be considered employees of defendant. But the legislative purpose calls for a broader construction to meet such a need as that involved here: "the need to discover ... what charges were made when the termination of plaintiff was for the vague reason of 'no confidence.'" (70 C.A.3d 815.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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### XVIII. SPECIAL PRIVACY STATUTES

#### A. Records of Medical Committees.

#### 3. Medical Evaluation or Review Committee.

##### b. Exceptions.

#### 3. Applicability to Criminal Proceedings.

2 Witkin Cal. Evid. Witnesses § 511

[§ 511] Applicability to Criminal Proceedings.

*Ev.C. 1157(e)* (supra, §509) was construed in *People v. Superior Court (Memorial Med. Center)* (1991) 234 C.A.3d 363, 286 C.R. 478. After an extended analysis of the ambiguous language and legislative history, the court held that the statutory prohibitions of discovery and compelled testimony under *Ev.C. 1157* did not apply to criminal actions.

(a) "We have found absolutely no evidence in the legislative history of the original bill to support the contention section 1157 was intended to apply to criminal actions. Without evidence, such an implication runs counter to the principle that 'privileges should be narrowly construed since they prevent the admission of relevant and otherwise admissible evidence and may obstruct the attainment of justice.' " (234 C.A.3d 377.)

(b) "We conclude the only likely interpretation of section 1157, subdivision (e) is that it is a statement of assurance by the Legislature that the mentioned amendments do not purport to stray from the original intent of section 1157, thus opening the door to its invalidation. If the amendments were read to exclude records of peer review committees from criminal discovery, the entire section would be susceptible of an attack claiming its unconstitutionality in view of article 1, section 28, subdivision (d), the Victim's Bill of Rights. Because we conclude the Legislature intended section 1157 to provide equal protection to the various medical groups under its umbrella, we hold section 1157 does not confer immunity against criminal discovery." (234 C.A.3d 381.)

(c) Even if the language of subdivision (e) is not facially ambiguous, the 1990 amendments require that the peer review committee records and proceedings be subject to discovery in a criminal action. (234 C.A.3d 382.)

(d) The special proceeding under P.C. 1524, seeking issuance of a search warrant for the records of a hospital peer review committee concerning a physician suspected of criminal negligence, is a "criminal action." (234 C.A.3d 387, 388.)

In *Scripps Memorial Hosp. v. Superior Court* (1995) 37 C.A.4th 1720, 44 C.R.2d 725, a hospital sought a writ of mandamus to prevent disclosure, to the prosecution, of records relating to a psychiatrist who had been called as an expert by a defendant charged with child molestation. The Court of Appeal granted relief, squarely disagreeing with the *Memorial Med. Center* court's holding that the prohibition on discovery is limited to civil actions. The Legislature expanded the classes of caregivers whose records are protected, by means of amendments in 1983 (dietitians and podiatrists), 1985 (psychologists), and 1990 (peer review bodies as defined in *B. & P.C. 805*). *Ev.C. 1157(e)*, in its

present form, provides that the 1983, 1985, and 1990 amendments do not exclude the discovery or use of relevant evidence in a criminal action. "[W]e find no ambiguity in the statute. On its face, subdivision (e) is expressly limited in application to the records of classes of caregivers added by amendment to section 1157 in 1983, 1985 or 1990. In our view, limiting discovery in criminal actions to records of groups added to the statute in 1983, 1985, or 1990 not only comports with the plain meaning of the words used but it is consistent with other provisions in the Evidence Code, the Right to Truth-in-Evidence paragraph and the legislative history." (37 C.A.4th 1727.)

**SUPPLEMENT:** [This section is current through the latest supplement]





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### XVIII. SPECIAL PRIVACY STATUTES

#### A. Records of Medical Committees.

#### 3. Medical Evaluation or Review Committee.

##### c. Distinctions.

##### 1. Hospital Administration Files.

#### 2 Witkin Cal. Evid. Witnesses § 512

[§ 512] Hospital Administration Files.

In *Matchett v. Superior Court* (1974) 40 C.A.3d 623, 115 C.R. 317, supra, §510, plaintiff alleged that while he was a patient in defendant hospital, he suffered injuries from defendant doctor's negligent treatment and from the hospital's negligence in admitting and retaining the doctor on its staff without adequate inquiry into or controls over his competence. Plaintiff sought discovery of the hospital's personnel or staff files and the files of several staff committees. *Held*, denial of discovery of the *proceedings and records of the staff committees* was proper (see supra, §509), but the immunity does not extend to the *files of the hospital administration*. "The trial court should have inquired into the existence of a hospital administration file concerning the doctor and, if such a file existed, should have permitted its inspection, excluding any portions which reflected the proceedings of staff committees conforming to the specifications of the immunity statute." (40 C.A.3d 628.) (See also *Saddleback Community Hosp. v. Superior Court* (1984) 158 C.A.3d 206, 209, 204 C.R. 598 [trial judge should hold *in camera* hearing, reviewing each item of evidence requested]; *Santa Rosa Memorial Hosp. v. Superior Court* (1985) 174 C.A.3d 711, 220 C.R. 236, supra, §507.)

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#### A. Records of Medical Committees.

#### 3. Medical Evaluation or Review Committee.

##### c. Distinctions.

#### 2. Voluntary Testimony.

2 *Witkin Cal. Evid. Witnesses* § 513

[§ 513] Voluntary Testimony.

In *West Covina Hosp. v. Superior Court* (1986) 41 C.3d 846, 226 C.R. 132, 718 P.2d 119, plaintiff brought a malpractice action against a surgeon and defendant hospital which had granted surgical privileges and retained the surgeon on the medical staff. Plaintiff proposed to call Dr. A, a member of the medical staff committee which evaluated the surgeon, to testify about specific details of the evaluation. The trial judge, over defendant hospital's objections, ruled that Dr. A could testify voluntarily to the entire proceeding of the committee provided that patients' names were not disclosed. *Held*, the ruling was proper.

(a) *Ev.C. 1157* is clear and unambiguous. It precludes pretrial discovery, and states that a member of the committee may not be "required" to testify: "A provision that a member of a hospital medical staff committee may not be 'required' to testify is not the same as either providing that he may not testify or that the hospital or committee shall have a privilege to preclude testimony." (41 C.3d 851.) This conclusion is also supported by the principle that privileges should be narrowly construed (see *supra*, §69). (41 C.3d 851.)

(b) The purpose of *Ev.C. 1157* is to improve the quality of medical care by the use of peer review committees; and accomplishment of the purpose requires that doctors be recruited to serve on the committees. If they were subject to the burdens of discovery and involuntary testimony, many doctors might refuse to serve. "On the other hand, when a doctor volunteers to testify, he has concluded that he is willing to bear the time burdens; and the Legislature could properly conclude that exclusion of voluntary testimony was not necessary to encourage participation in the peer review program." (41 C.3d 852.)

(c) As the court pointed out in *Matchett v. Superior Court* (1974) 40 C.A.3d 623, 115 C.R. 317, *supra*, §§510, 512, the Legislature provided a measure of confidentiality so as to promote candor and objectivity, but by providing exceptions from the prohibitions it recognized competing concerns such as the interests of victims of medical malpractice. Extending the prohibition to voluntary testimony would further promote candor and frankness, but such an extension is not essential to accomplishment of the legislative purpose. "The Legislature has recognized in subdivisions (c), (d), and (e) that confidentiality must give way to the need for evidence in the specified circumstances. We have no reason to assume that the Legislature was not carefully balancing the need for confidentiality against the need for evidence in subdivision (b) of the section as well, and there is no justification for courts to strike a different balance." (41 C.3d 854.) (See 61 So. Cal. L. Rev. 183; 60 A.L.R.4th 1273 [right of voluntary disclosure of privileged proceedings of hospital medical review or doctor evaluation processes].)

Three justices joined in a strong dissent, asserting that the majority ignored both the purpose of the statute and the background of decisional law against which it was enacted. (41 C.3d 855.) They also asserted that the holding would have an adverse effect on the trial: C.C.P. 2037 et seq. establish a discovery mechanism for expert witnesses, to remove the element of surprise (see 2 Cal. Evidence (4th), Discovery, §178 et seq.). "Yet the majority's holding which permits the voluntary testimony of a peer review committee member at trial--evidence which they admit is not discoverable pretrial--will bring about the very result which section 2037 et seq. intended to avoid. Ironically, in most cases, the victim of the surprise expert testimony will be the plaintiff." (41 C.3d 860.)

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### XVIII. SPECIAL PRIVACY STATUTES

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#### 3. Medical Evaluation or Review Committee.

##### c. Distinctions.

#### 3. Administrative Subpena.

2 Witkin Cal. Evid. Witnesses § 514

[§ 514] Administrative Subpena.

In *Arnett v. Dal Cielo* (1996) 14 C.4th 4, 56 C.R.2d 706, 923 P.2d 1, the Medical Board of California undertook an investigation of an anesthesiologist after receiving a report by a confidential informant that the doctor was addicted to narcotics, and a board investigator served subpoenas duces tecum on the chief executive officer of the hospital where the doctor practiced. The subpoenas sought information from the doctor's application for staff privileges relating to his history of drug abuse; copies of complaints received by the hospital regarding the doctor; records of the hospital's medical executive committee concerning the doctor's drug use; documentation regarding the doctor's drug-related leave of absence, the terms of the hospital's restrictions on his practice, and his monitoring and re-entry agreement; and copies of the periodic reports required under the practice restrictions and re-entry agreement. The hospital refused to comply with the subpoenas, and the board filed a petition in the superior court for an order to enforce them. The trial judge granted the petition, and the Court of Appeal, using extrinsic aids to interpret *Ev.C. 1157*, affirmed. *Held*, the petition was properly granted.

*Ev.C. 1157* affords the proceedings and records of hospital medical committee staffs and peer review bodies protection from "discovery." Although that term has a number of meanings in lay speech, it has a well-known legal meaning--"a formal exchange of evidentiary information between parties to a pending action." Where the words of a statute have a well established legal meaning, that is the meaning that the courts must apply. It was a mistake, therefore, for the Court of Appeal to resort to extrinsic aids such as legislative history, the purpose to be served, and public policy in determining which of several reasonable interpretations the Legislature intended. Because the legal meaning of discovery does not include a subpoena issued by an administrative agency for purely investigative purposes, *Ev.C. 1157* provides the hospital no basis for resisting the board's subpoenas. (14 C.4th 19, 24.)

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XVIII. SPECIAL PRIVACY STATUTES

- A. Records of Medical Committees.
- 4. Nonprofit Medical Care Foundation.

*2 Witkin Cal. Evid. Witnesses § 515*

[§ 515] Nonprofit Medical Care Foundation.

The prohibitions of *Ev.C. 1157* (supra, §505 et seq.) also apply to the proceedings or records of "an organized committee of any nonprofit medical care foundation or professional standards review organization which is organized in a manner which makes available professional competence to review health care services with respect to medical necessity, quality of care, or economic justification of charges or level of care." However, an exception is made for actions involving a claim of a provider of health care services for payment. (*Ev.C. 1157.5*.)

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XVIII. SPECIAL PRIVACY STATUTES

A. Records of Medical Committees.

5. Mental Health Quality Assurance Committee.

*2 Witkin Cal. Evid. Witnesses § 516*

[§ 516] Mental Health Quality Assurance Committee.

Neither the proceedings nor the records of a committee established under Welf.C. 4070 and former Welf.C. 5624, and having the responsibility of evaluation and improvement of the quality of mental health care rendered in county operated and contracted mental health facilities, are subject to discovery. And, no person in attendance in a meeting of such a committee may be required to testify as to what transpired at the meeting. The prohibition against discovery does not apply to statements made by any person in attendance at such a meeting who is a party to an action or proceeding, the subject matter of which was reviewed at the meeting, or to any person requesting facility staff privileges. (*Ev.C. 1157.6.*)

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XVIII. SPECIAL PRIVACY STATUTES

A. Records of Medical Committees.

6. Committee Reviewing Specialty Health Services.

2 *Witkin Cal. Evid. Witnesses* § 517

[§ 517] Committee Reviewing Specialty Health Services.

The prohibitions of *Ev.C. 1157* (supra, §505 et seq.) apply to the proceedings and records of "any committee established by a local governmental agency to monitor, evaluate, and report on the necessity, quality, and level of specialty health services." Such services include, but are not limited to, trauma care services provided by government approved general acute care hospitals. (*Ev.C. 1157.7*; see *San Diego v. Superior Court (Tri-City Hospital District)* (1986) 176 C.A.3d 1009, 1019, 222 C.R. 484, supra, §247 [statute does not apply to trauma center *designation process*].)

*Ev.C. 1157.7* further provides that the committee records and proceedings are not subject either to the right to inspect public records guaranteed by the California Public Records Act (*Govt.C. 6250* et seq.), or to the requirement that public agency meetings be open, as established by the Ralph M. Brown Act (*Govt.C. 54950* et seq.; see 9 *Cal. Proc. (4th)*, *Administrative Proceedings*, §15 et seq.).

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### XVIII. SPECIAL PRIVACY STATUTES B. Confidentiality of Medical Information Act. 1. Nature and Scope of Act.

#### 2 *Witkin Cal. Evid. Witnesses § 518*

[§ 518] Nature and Scope of Act.

(1) *In General.* The Confidentiality of Medical Information Act (C.C. 56 et seq.) regulates the *disclosure* of identifiable information regarding the medical history, mental or physical condition, or treatment (C.C. 56.05(f)) of a patient (C.C. 56.05(g)) or enrollee or subscriber of a health care service plan by a provider of health care (C.C. 56.05(h), 56.06), a health care service plan (C.C. 56.05(d)), or a related contractor (C.C. 56.05(c)). (C.C. 56.10 et seq.)

The Act also regulates the use or disclosure of that information by an employer (C.C. 56.20 et seq.) or third-party administrator (C.C. 56.26); the use and disclosure by a health care service plan of genetic test results of an enrollee in the plan (C.C. 56.17); the use and disclosure of medical information about whether a patient is infected with or exposed to HIV (C.C. 56.31); and the release of information by a health care provider, health care service plan, or contractor of information specifically relating to a patient's participation in outpatient psychotherapy (C.C. 56.104). (On restriction of dissemination of medical information imposed by the California constitutional right of privacy (Cal. Const., Art. I, §1), see *Board of Med. Quality Assur. v. Gherardini* (1979) 93 C.A.3d 669, 156 C.R. 55, 7 Summary (9th), *Constitutional Law*, §464; on disclosure of medical records to law enforcement agencies, see P.C. 1543 et seq.)

(2) *Authorization To Use or Disclose Information.* With certain exceptions (C.C. 56.10(b), 56.10(c), 56.17(h), 56.20(c), 56.25, 56.26(a), 56.30, 56.31, 56.104(d)), use or disclosure of the medical information of a patient (or employee or plan enrollee) generally requires the patient's authorization. (C.C. 56.10(a), 56.10(d), 56.10(e), 56.17, 56.20(c), 56.20(d), 56.26(a), 56.31, 56.104.) This is accomplished by having the patient execute a detailed statutory form of authorization. (C.C. 56.11, 56.17(g), 56.21, 56.26(b), 56.104(a).) A patient may demand a copy of the authorization (C.C. 56.12, 56.17(g)(8), 56.22, 56.104(b)), and may impose limits and restrictions on the permission granted (C.C. 56.13, 56.14, 56.17(g), 56.23, 56.104(a)). An authorization may be cancelled or modified at any time; the cancellation or modification is effective *upon receipt of notice* by the health care provider (or employer, etc). (C.C. 56.15, 56.24.) And, confidentiality must be preserved when destroying or abandoning medical records. (C.C. 56.101.)

A patient making a demand for settlement or offer to compromise prior to service of a malpractice complaint must submit an authorization for the disclosure of medical information to those insuring, responsible for, or defending the defendant's liability. (C.C. 56.105.)

The Act does not affect disclosure to the patient (C.C. 56.28) or provisions of the Information Practices Act of 1977 (C.C. 1798 et seq.; see 7 Summary (9th), *Constitutional Law*, §472). (C.C. 56.29; for illustrations, see *infra*, §§519, 520.)



(3) *Sanctions for Violations.* Violations of the Act are misdemeanors (C.C. 56.36), and entitle the patient to recover compensatory damages, plus punitive damages up to \$ 3,000, attorneys' fees up to \$ 1,000, and litigation costs (C.C. 56.35). Separate sanctions apply to the improper disclosure of genetic test results by health care service plans. (See C.C. 55.17(b), (c), (d), (e), (f).)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General.* See 87 Proof of Facts 3d 259 [confidentiality of medical and other treatment records].

Under C.C. 56.05(f), as amended in 2002, the Confidentiality of Medical Information Act also applies to medical information in the possession of pharmaceutical companies. (See C.C. 56.05(i), added in 2002 and relettered in 2003, defining "pharmaceutical company"; C.C. 56.102, added in 2002 [with specified exceptions, company may not require patient to waive confidentiality requirements].)

C.C. 56.05(f) was relettered C.C. 56.05(g) in 2003.

C.C. 56.05(g), defining "patient," was relettered C.C. 56.05(h) in 2003.

C.C. 56.05(h), defining "provider of health care," was relettered C.C. 56.05(i) in 2002 without substantive change and C.C. 56.05(j) in 2003. C.C. 56.17 (disclosure of genetic test results) was amended in 2000 to apply to plan applicants, as well as plan enrollees.

C.C. 56.265, added in 2000, prohibits any person or entity (or an affiliate of that person or entity) that "underwrites or sells annuity contracts or contracts insuring, guaranteeing, or indemnifying against loss, harm, damage, illness, disability, or death" from disclosing individually identifiable information about a customer's health or medical or genetic history to "any affiliated or nonaffiliated depository institution, or to any other affiliated or nonaffiliated third party" for use in the granting of credit.

*Board of Med. Quality Assur. v. Gherardini:*

*Cross-Reference:* 7 Summary (10th), *Constitutional Law*, §581.

(2) *Authorization To Use or Disclose Information.* C.C. 56.103, added in 2007, allows a health care provider to disclose medical information to a county social worker, a probation officer, or any other person who is legally authorized to have custody or care of a minor for purposes of coordinating health care services and medical treatment for the minor.

See *Shaddox v. Bertani* (2003) 110 C.A.4th 1406, 1414, 2 C.R.3d 808 [dentist's act of reporting to police officer's superiors his suspicions that officer had prescription drug problem came within exception of C.C. 56.10(c)(14) for disclosures "otherwise specifically authorized by law"; city charter provisions authorized reporting of, and acting upon, complaints of misconduct from public]; *Colleen M. v. Fertility & Surgical Associates of Thousand Oaks* (2005) 132 C.A.4th 1466, 1477, 1478, 34 C.R.3d 439 [where patient used her ex-fiance's credit card at fertility clinic, clinic's disclosure of medical information to ex-fiance' was authorized under C.C. 56.10(c)(2) (disclosure to person or entity responsible for paying for services), and its disclosure to ex-fiance's attorney was compelled under C.C. 56.10(b)(3) because ex-fiance' had brought suit against patient based on her exceeding scope of agreement concerning use of credit card].

*Cross-Reference:* 7 Summary (10th), *Constitutional Law*, §604.

(2a) *(New) Exception for Disclosure to Family Members or Release of General Information.* A health care provider, health care service plan, or contractor may, subject to specified restrictions, disclose to a family member, other relative, domestic partner, or close personal friend of the patient medical information that is directly relevant to that person's involvement in the patient's care or payment related to that care. (C.C. 56.1007, added in 2006.) In the case of

disclosures not addressed by C.C. 56.1007, in the absence of a specific written request by the patient to the contrary, a general acute care hospital may release information concerning the patient's name, address, age, and sex; a general description of the reason for treatment; the general nature of the injury; the general condition of the patient; and any information that does not constitute medical information within the meaning of C.C. 56.05(c). (C.C. 56.16.) C.C. 56.16, which formerly applied to health care providers, and not just acute care hospitals, "represents a pragmatic solution to the problem faced by health care providers surrounded by concerned friends and family of a patient or members of the media when the patient is a public figure. In determining the statute's applicability, the question to be addressed is whether the provider gave out more information than one would expect to be disclosed to concerned friends or relatives inquiring about the condition of a loved one or to members of the media calling to find out the condition of a hospitalized public official or celebrity." (*Garrett v. Young* (2003) 109 C.A.4th 1393, 1407, 1 C.R.3d 134 [doctor did not violate Act by disclosing to patient's employer that patient was suffering from itching and stress and that she was not able to return to work at that time, even if this information may have led employer to believe patient was less ill than represented; although patient orally instructed doctor to give out no information to employer, this did not comply with statute's requirement of written directive].) *Correction:* Page 824, last line of section, "55.17" should be "56.17".



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## CHAPTER IX - Witnesses

### XVIII. SPECIAL PRIVACY STATUTES

#### B. Confidentiality of Medical Information Act.

##### 2. Illustrations.

##### a. Authorization for Disclosure Required.

2 Witkin Cal. Evid. Witnesses § 519

[§ 519] Authorization for Disclosure Required.

In *Pettus v. Cole* (1996) 49 C.A.4th 402, 57 C.R.2d 46, an employee who requested leave from work for stress-related disability was examined by two psychiatrists, who, without the employee's authorization, reported the examination results, including details of the employee's medical history and psychological profile, to the employee's supervisor. As a condition of continued employment, the employee was asked to enter an alcohol treatment program. When he refused, he was fired. He sued the employer and both psychiatrists, claiming violations of C.C. 56 et seq. and invasion of his constitutional right of privacy (Cal. Const., Art. I, §1; see 7 Summary (9th), *Constitutional Law*, §454 et seq.). In a bench trial, the trial judge granted the psychiatrists' motion for judgment at the close of plaintiff's case-in-chief and found for the employer following presentation of its case-in-chief. *Held*, reversed and remanded.

#### (a) Statutory claim against psychiatrists.

(1) Plaintiff was a "patient" within the meaning of C.C. 56 et seq., and the types of disclosure at issue in this case are governed by C.C. 56.10(c)(8)(B), which allows a health care provider to disclose to the employer information resulting from employment-related health care services conducted at the written request and expense of the employer. Disclosure is limited to information describing "functional limitations of the patient that may entitle the patient to leave from work for medical reasons or limit the patient's fitness to perform his or her present employment," and it may not include a "statement of medical cause." Contrary to the conclusion of the trial judge, an employer is not entitled to a full and complete report of the contents of the examination. The disclosures made by the two psychiatrists describing in detail plaintiff's hostility toward his employer and a coworker, his drinking habits and other details about his personal life, went well beyond a description of "functional limitations." (49 C.A.4th 430, 432.)

(2) C.C. 56.10(c)(8)(A) allows disclosure of information that is relevant to a "law suit, arbitration, grievance, or other claim or challenge" in which the employer and employee are parties and in which the employee has placed his or her medical history and mental or physical condition or treatment in issue. An in-house dispute over entitlement to medical leave does not come within this exception. And even if it did, C.C. 56.10(c)(8)(B) is more specific to the present facts than C.C. 56.10(c)(8)(A) and therefore must be deemed the governing provision. (49 C.A.4th 433, 434.)

(3) C.C. 56.10(c)(9) allows disclosure to a "sponsor, insurer, or administrator" of a plan or policy from which the employee is seeking benefits. This provision, too, is inapplicable. The psychiatrists made their disclosures directly to plaintiff's "second-line supervisor," who was not a sponsor, insurer, or administrator or "otherwise an appropriate recipient of the highly personal medical information contained in the psychiatrists' reports." (49 C.A.4th 435, 436.)

(4) The disclosures at issue do not come within the litigation privilege of C.C. 47(b)(2), because the process by which plaintiff requested disability leave was neither a judicial nor a quasi-judicial proceeding. The general privilege for communications between interested parties (C.C. 47(c)) is likewise inapplicable. By enacting C.C. 56.10(c)(8)(B), the Legislature provided a higher level of protection for the type of disclosure at issue, and this more specific provision must be read as a limitation on the general privilege of C.C. 47(c). (49 C.A.4th 436, 437.)

(b) *Constitutional claim against psychiatrists.*

(1) Plaintiff established all three elements of a prima facie showing of a constitutional violation. He had a *legally cognizable interest* in the details of his medical and psychiatric history. (49 C.A.4th 440.) He had a *reasonable expectation of privacy* in the information he conveyed to the psychiatrists. (49 C.A.4th 441.) And the psychiatrists' disclosures, which they must have known could prove highly embarrassing to plaintiff and disruptive of his relationship with his employer, constituted a *serious interference* with plaintiff's privacy rights. (49 C.A.4th 443.)

(2) Neither the employer's expectation that it would receive a full report, nor its "need" for details in order to evaluate plaintiff's request for leave justified the invasion of his privacy interest. The employer's expectation should have been altered by the enactment of C.C. 56.10(c)(8)(B), and its need would have been met by substantially less than was given. (49 C.A.4th 445, 446.) If plaintiff posed a threat to a coworker, as claimed by one defendant, then the warning required by *Tarasoff v. Regents of Univ. of Calif.* (1976) 17 C.3d 425, 131 C.R. 14, 551 P.2d 334, supra, §227, would have been appropriate. Neither of the psychiatrists claims that the reports they submitted constituted a *Tarasoff* warning. (49 C.A.4th 446, 447.)

(3) Some of the evidence presented by the employer after the psychiatrists' motion for judgment was granted, however, may ultimately defeat plaintiff's constitutional claim. In light of statements made by plaintiff to his supervisors before he consulted either psychiatrist, it may be found that, by voluntarily disclosing some of the sensitive information subsequently transmitted by the psychiatrists, he waived his constitutional privacy claim. Because the evidence conflicts on this point, a remand is necessary. (49 C.A.4th 448, 449.)

(c) *Statutory claim against employer.* C.C. 56.20 prohibits an employer from using or communicating medical information about an employee without first obtaining written authorization from the employee. The exception for lawsuits and other claims in which the employer and employee are both parties (C.C. 56.20(c)(2)) fails to benefit defendant employer for the same reasons the analogous exception in C.C. 56.10(c)(8)(A) failed to benefit the psychiatrists. The exception allowing disclosure "only for the purpose of administering and maintaining employee benefits plans ... and for determining eligibility for paid and unpaid leave from work for medical reasons" is also inapplicable, because trying to force an employee into an alcohol treatment program goes far beyond the permitted purposes. (49 C.A.4th 451.)

(d) *Constitutional claim against employer.*

(1) An employer's violation of the fundamental state constitutional right of privacy is actionable in a case such as this, whether or not, under the same facts, an action for wrongful termination in violation of public policy may lie. As in his case against the psychiatrists, plaintiff made a prima facie showing of a constitutional violation by the employer. In addition to a cognizable interest in maintaining the privacy of the detailed medical information he conveyed to the psychiatrists, he had an "autonomy privacy" interest in making "intimate personal decisions about an appropriate course of medical treatment for his disabling stress condition, without undue intrusion or interference from his employer." (49 C.A.4th 457.) Both of these interests were reasonable, and interference with them constituted "an egregious breach of the social norms underlying the privacy right." (49 C.A.4th 460, quoting *Hill v. National Collegiate Athletic Assn.* (1994) 7 C.4th 1, 26 C.R.2d 834, 865 P.2d 633, 7 Summary (9th), *Constitutional Law, Supp.*, §470B.)

(2) The employer failed to identify any countervailing interest sufficient to justify its interference. As to the intrusion into plaintiff's autonomy privacy interest, in particular, the employer's interest would need to be compelling.

However, requiring plaintiff to enroll in an inpatient alcohol treatment program was not only unconvincing, it was unnecessary and inappropriate to address the problems underlying his disability claim. In fact, none of the physicians the employer consulted recommended treatment of this type. Less intrusive alternatives were available, including granting plaintiff three months' disability leave, during which he could pursue appropriate treatment with his own physician, and then evaluating plaintiff again. "Having instead chosen to require Pettus to submit to an unwanted and unnecessary course of medical treatment as a condition of continued employment, ... Du Pont may be held to answer for violation of Pettus's autonomy privacy rights." (49 C.A.4th 461, 462.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Cross-Reference:* 7 Summary (10th), *Constitutional Law*, §575 et seq.*Hill v. National Collegiate Athletic Assn.:*

*Cross-Reference:* 7 Summary (10th), *Constitutional Law*, §576.



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## CHAPTER IX - Witnesses

### XVIII. SPECIAL PRIVACY STATUTES

#### B. Confidentiality of Medical Information Act.

##### 2. Illustrations.

##### b. Authorization for Disclosure Not Required.

2 Witkin Cal. Evid. Witnesses § 520

[§ 520] Authorization for Disclosure Not Required.

In *Heller v. Norcal Mut. Ins. Co.* (1994) 8 C.4th 30, 32 C.R.2d 200, 876 P.2d 999, plaintiff, who had instituted a medical malpractice action, brought a separate action against a physician, the physician's medical services organization, and the physician's insurer. Plaintiff alleged that the physician, who was not a party in the malpractice litigation, had disclosed plaintiff's confidential medical information to the insurer during the course of that litigation. Defendants demurred to plaintiff's cause of action for wrongful disclosure of medical records in violation of C.C. 56 et seq., and the trial judge sustained the demurrer. *Held*, this was proper. The ex parte contact between physician and insurer was contemplated by C.C. 56.10(c)(4), under which a health care provider may disclose medical information without patient authorization to parties that insure or are responsible for defending professional liability. The physician was an associate of the malpractice defendant and was at risk of malpractice exposure, and the insurer insured both physicians. Thus, "as a potential litigant in a malpractice action and a provider who 'may incur' malpractice liability, Yamaguchi was permitted to discuss with Norcal plaintiff's medical condition." (8 C.4th 39.)

Other cases are to the same effect. (See *Inabnit v. Berkson* (1988) 199 C.A.3d 1230, 1235, 245 C.R. 525 [psychiatrist's release of plaintiffs' records pursuant to subpoena duces tecum was proper under C.C. 56.10(b), where notice requirements of C.C.P. 1985.3 were satisfied (see 2 Cal. Evidence (4th), Discovery, §228 et seq.), and plaintiffs made no objection]; *Loder v. Glendale* (1997) 14 C.4th 846, 860, 861, 59 C.R.2d 696, 927 P.2d 1200, 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence*, §323 [provision of city employee drug testing program automatically disqualifying from employment or promotion any employee who refused to sign form authorizing physician to inform city of results of drug test did not violate Act]; and see 25 Southwestern U. L. Rev. 75 [exception for disclosure to patient's spouse].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *California Consumer Health Care Council v. Kaiser Foundation Health Plan* (2006) 142 C.A.4th 21, 33, 47 C.R.3d 593 [health foundation's practice of turning over to its attorneys patient information regarding patients who were suing, or thinking of suing, foundation came within disclosure exception of C.C. 56.10(c)(4), text, p. 828; under these circumstances, patient's history and relationship with medical provider are of sufficient potential relevance to justify disclosure to provider's lawyer and to undermine any claimed expectation of privacy].



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### XVIII. SPECIAL PRIVACY STATUTES

#### C. Insurance Information and Privacy Protection Act.

##### 2 Witkin Cal. Evid. Witnesses § 521

[§ 521] Insurance Information and Privacy Protection Act.

The 1980 Legislature enacted the Insurance Information and Privacy Protection Act (*Ins.C. 791 et seq.*). *Ins.C. 791* states:

"The purpose of this article is to establish standards for the collection, use and disclosure of information gathered in connection with insurance transactions by insurance institutions, agents or insurance-support organizations; to maintain a balance between the need for information by those conducting the business of insurance and the public's need for fairness in insurance information practices, including the need to minimize intrusiveness; to establish a regulatory mechanism to enable natural persons to ascertain what information is being or has been collected about them in connection with insurance transactions and to have access to such information for the purpose of verifying or disputing its accuracy; to limit the disclosure of information collected in connection with insurance transactions; and to enable insurance applicants and policyholders to obtain the reasons for any adverse underwriting decision."

The statute is based on the Insurance Information and Privacy Protection Model Act of the National Association of Insurance Commissioners. Its elaborate provisions prohibit pretext interviews (*Ins.C. 791.02(u), 791.03*), provide for notice to applicants and policyholders in connection with insurance transactions (*Ins.C. 791.04*), prescribe procedures for authorizing disclosure of personal or privileged information (*Ins.C. 791.06, 791.07, 791.08, 791.13*), establish a right on request to obtain a correction of recorded personal information (*Ins.C. 791.09*), require advice to an applicant or policyholder of the reasons for an adverse underwriting decision (*Ins.C. 791.10*), and restrict the bases on which such an adverse decision may rest (*Ins.C. 791.12*).

Extensive investigatory and regulatory powers are given to the insurance commissioner (*Ins.C. 791.14 et seq.*), fines and criminal penalties are specified (*Ins.C. 791.19, 791.22*), and civil actions for equitable relief or damages by persons whose rights are violated are authorized (*Ins.C. 791.20, 791.21*). (For detailed analysis and comment, see *12 Pacific L. J. 495; 13 Pacific L. J. 727; 17 Pacific L. J. 747*.)

In *Griffith v. State Farm Mut. Auto Ins. Co.* (1991) 230 C.A.3d 59, 281 C.R. 165, the court held that insurance policy limits are "personal information" under *Ins.C. 791.13* (supra), and are not discoverable *before the filing of legal proceedings*. (230 C.A.3d 69.) "We are mindful of the realities of personal injury litigation and the fact that many suits can be avoided with the cooperation of all concerned. ... [W]hen a quick exchange of information will settle a dispute, we encourage carriers to seek authorization from insureds which would enable the carrier to release the policy limits. However, until the Legislature specifically authorizes the disclosure of this information, and if the insured refuses to provide authorization for its release, a third party claimant does not have a right to know the policy limits prior to the filing of a formal proceeding." (230 C.A.3d 72.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Connecticut Indem. Co. v. Superior Court* (2000) 23 C.4th 807, 818, 98 C.R.2d 221, 3 P.3d 868 [subpenas issued by city council to obtain information on liability insurance coverage and claims concerning parties believed to be legally responsible for groundwater contamination came within exceptions of *Ins.C. 791.13* permitting disclosure where information is sought by "governmental authority pursuant to law" or where disclosure is otherwise "permitted or required by law"].





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## CHAPTER IX - Witnesses

### XVIII. SPECIAL PRIVACY STATUTES

#### D. Tests and Research on AIDS.

##### 1. Confidentiality Requirements.

##### 2 *Witkin Cal. Evid. Witnesses* § 522

[§ 522] Confidentiality Requirements.

(1) *Nondisclosure of Identity of Test Subjects.* With certain exceptions (see *infra*, §523 et seq.), no person may be compelled in any proceeding to identify, or provide information which would identify, any person "who is the subject of a blood test to detect antibodies to the probable causative agent of AIDS." (*Health & Saf.C. 120975*.) Unauthorized disclosure may result in criminal or civil liability, or the imposition of civil penalties. (*Health & Saf.C. 120980(a)*, (b), (c), (d).) (See 62 *So. Cal. L. Rev.* 1701 [AIDS: A Crisis in Confidentiality].)

In *Irwin Memorial Blood Bank v. Superior Court* (1991) 229 C.A.3d 151, 279 C.R. 911, the superior court issued a discovery order permitting anonymous written depositions of AIDS-infected donors in consolidated transfusion-related AIDS cases against a blood bank. The blood bank sought a writ of prohibition to prevent enforcement of the order. *Held*, writ granted. The order violated the prohibition against compelled disclosure of the identity of AIDS blood-testing subjects provided by former *Health & Saf.C. 199.20* (now *Health & Saf.C. 120975*).

(a) Although the depositions were to be taken behind a screen at the blood bank, the donor would be seen and heard during the deposition by at least the referee and the reporter. (229 C.A.3d 157.)

(b) "More fundamentally, however, the production of the donor for deposition is itself an identification within the meaning of the statute. ... Until the time that the donor appears for deposition, the donor is a number unconnected to a person. Once the person is required to step forth, the connection between the number and the person is made. The donor has been identified. The extent to which that identification is made known to third parties will depend upon the care taken at the deposition but the identification in a civil proceeding has been made. This the statute prohibits." (229 C.A.3d 157.)

(2) *Alternate Testing Sites.* Designated counties may establish alternate testing sites, i.e., sites not involving the donation of blood. (*Health & Saf.C. 120885, 120890*.) The tests must be confidential "through use of a coded system with no linking of individual identity with the test request or results." The county may not ask for any information that could reveal the identity of test subjects. (*Health & Saf.C. 120895(a)*.)

(3) *Confidential Research Records.* Unless authorized by the research subject (*Health & Saf.C. 121080*), research records may not be disclosed, discovered, or compelled to be produced, except in specified situations (see *infra*, §525). (*Health & Saf.C. 121075, 121100*.)

(4) *Confidential Public Health Records.* With certain exceptions (see *infra*, §526), state and local public health

records relating to AIDS that contain "personally identifying information" may not be disclosed, discovered, or compelled to be produced in any proceeding. (*Health & Saf.C. 121025.*)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER IX - Witnesses

### XVIII. SPECIAL PRIVACY STATUTES

#### D. Tests and Research on AIDS.

##### 2. Exceptions.

##### a. Reporting Requirements.

2 Witkin Cal. Evid. Witnesses § 523

[§ 523] Reporting Requirements.

(1) *Disclosure to State or Federal Authorities.* There is no liability or criminal sanction for disclosure of an HIV test (defined in *Health & Saf.C.* 26) in accordance with any reporting requirement for a diagnosed case of AIDS by the State Department of Health Services or the Centers for Disease Control under the United States Public Health Service. (*Health & Saf.C.* 120980(i).)

(2) *Disclosure by Physicians and Hospitals.* Physicians and hospitals must report transfusion-associated AIDS cases and confirmed cases of AIDS carriers to the proper health authorities. (*Health & Saf.C.* 1603.1(c), (d).)

(3) *Donor Deferral Register.* The Department of Health Services must compile and distribute to blood banks and plasma centers a Donor Deferral Register of persons who test reactive for the human immunodeficiency virus (HIV). (*Health & Saf.C.* 1603.1(f).)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Disclosure to State or Federal Authorities.* *Health & Saf.C.* 120980(i) was amended in 2006 to change "case of AIDS" to "case of HIV infection, including AIDS," to change "Centers for Disease Control" to "Centers for Disease Control and Prevention," and to change the definitional reference for HIV test to *Health & Saf.C.* 120775(c).

(2) *Disclosure by Physicians and Hospitals.* *Health & Saf.C.* 1603.1 was extensively revised in 2003. Under new *Health & Saf.C.* 1603.1(c), a physician, hospital, or other health care provider must report all AIDS cases and HIV infections, including transfusion-associated cases or infections, to the local health officer. Under new *Health & Saf.C.* 1603.1(d), the local health officer, upon receiving a report about any transfusion-associated HIV or AIDS cases, must identify which blood bank or plasma center is the source of the infectious blood or blood components and must report this fact to the blood bank or plasma center. The blood bank or plasma center must then undertake an investigation to determine the donor source of the infectious blood or blood components. Under new *Health & Saf.C.* 1603.1(k), the local health officer may disclose to a blood bank or plasma center, on a confidential basis, whether blood or blood components previously transfused may have been donated by a person infected with HIV, "in order to implement the blood bank's or plasma center's program to notify a recipient of blood or blood components that might have transmitted HIV." The blood bank or plasma center may not disclose information that would identify a donor to which *Health & Saf.C.* 1603.1(k) applies and must destroy information communicated to it immediately after reviewing its records as necessary to implement the program.

(3) *Donor Deferral Register*. *Health & Saf.C. 1603.1* was extensively revised in 2003, and the provisions relating to the Donor Deferral Register were deleted.



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XVIII. SPECIAL PRIVACY STATUTES

D. Tests and Research on AIDS.

2. Exceptions.

b. Disclosure to Correctional Facility Personnel.

2 Witkin Cal. Evid. Witnesses § 524

[§ 524] Disclosure to Correctional Facility Personnel.

(1) *Adoption of Proposition 96.* *Health & Saf.C. 121070*, adopted by the voters in 1988 as Proposition 96, provides that medical personnel who serve state or local, adult or juvenile, correctional or detention facilities, and who receive information that an inmate or minor has been exposed to or infected by the AIDS virus, or has an AIDS-related condition or any communicable disease, must communicate that information to the officer in charge of the facility housing the inmate or minor. (*Health & Saf.C. 121070(a)*.)

(2) *Information Subject to Disclosure.* Information subject to disclosure includes laboratory tests, statements by the inmate or minor that he or she has or has been exposed to one of the diseases in question, or the results of a medical examination or test indicating infection or exposure. (*Health & Saf.C. 121070(b)*.) The officer must notify all employees and volunteers serving the facility who have or may have contact with the inmate or minor, or with their bodily fluids. (*Health & Saf.C. 121070(c)*.)

(3) *Confidentiality Requirements.* Personal identifying data must be kept confidential, and wilful, unauthorized disclosure is a misdemeanor. (*Health & Saf.C. 121070(d), (e)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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XVIII. SPECIAL PRIVACY STATUTES

D. Tests and Research on AIDS.

2. Exceptions.

c. Disclosure of Research Records.

2 Witkin Cal. Evid. Witnesses § 525

[§ 525] Disclosure of Research Records.

The following exceptions apply to the prohibition against disclosure of identifying information about AIDS research subjects (see *supra*, §522):

(1) *Permissive Disclosure*. The records *may* be disclosed in the following situations:

(a) Records may be furnished to medical personnel in a bona fide medical emergency of a research subject and to the department to aid in an investigation relating to public health (see *Health & Saf.C. 100325*). (*Health & Saf.C. 121090*.)

(b) Records may be used to substantiate a criminal charge against, or to conduct an investigation of, a research subject upon court findings that there is a reasonable likelihood that the records will disclose material information or substantial evidence and that there is no other practicable way of obtaining such information or evidence. (*Health & Saf.C. 121100(a)*.)

(2) *Mandatory Disclosure*. The records *must* be disclosed to the research subject, to his or her legal representative if the research subject is a minor, or to his or her personal representative if the research subject is deceased. (*Health & Saf.C. 121095*.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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XVIII. SPECIAL PRIVACY STATUTES

D. Tests and Research on AIDS.

2. Exceptions.

d. Disclosure of Public Health Records.

2 Witkin Cal. Evid. Witnesses § 526

[§ 526] Disclosure of Public Health Records.

The prohibition against disclosure of public health records relating to AIDS that contain identifying information (supra, §522) does not apply under certain circumstances:

(1) *Written or Legal Authorization Required.* The records may be disclosed as provided by law for public health purposes or pursuant to written authorization by the person who is the subject of the record or to that person's guardian or conservator. (*Health & Saf.C. 121025(a), (b).*)

(2) *Limited Disclosure.* An authorized disclosure is limited to the information necessary for the purpose of that disclosure, and can be made only upon agreement that the information will not be further disclosed without written authorization. (*Health & Saf.C. 121025(c).*)

(3) *Limited Use.* If the record is disclosed, the *information may not be used to determine employability or insurability.* (*Health & Saf.C. 121025(f).*)

**SUPPLEMENT:** [This section is current through the latest supplement]



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### XVIII. SPECIAL PRIVACY STATUTES

#### D. Tests and Research on AIDS.

##### 2. Exceptions.

##### e. Other Exceptions.

2 Witkin Cal. Evid. Witnesses § 527

#### [§ 527] Other Exceptions.

The Legislature has enacted a number of additional exceptions permitting limited disclosure of information on AIDS cases:

(1) *Test Performed on Cadaver.* There is no civil or criminal liability for disclosing to public health authorities or tissue banks the results of tests performed on cadavers. (*Health & Saf.C. 120980(h).*)

(2) *Disclosure by Physician.* A physician who has ordered a test to detect infection by the probable causative agent of AIDS, and who obtains a positive result, is not civilly or criminally liable for disclosing that fact to the county health officer, or to a person reasonably believed to be the patient's spouse, sexual partner, or one with whom the patient has shared a hypodermic needle. However, the physician must not disclose any identifying information about the person believed to be infected. (*Health & Saf.C. 121015.*)

*Prior to disclosure*, the physician must (a) discuss the test results with the patient, (b) offer counseling, (c) attempt to obtain the patient's voluntary consent for notification of his or her contacts, and (d) inform the patient that the physician intends to notify the contacts. (*Health & Saf.C. 121015(b).*)

*Health & Saf.C. 121015* is permissive on the part of the attending physician, who has no duty to notify anyone of the patient's positive test result. (*Health & Saf.C. 121015(c).*) (See 20 *Pacific L. J.* 652.)

(3) *Disclosure by Blood Bank or Plasma Center.* A blood bank or plasma center is not subject to civil or criminal liability for disclosing to a public health officer that a donor has tested positive for exposure to AIDS, where (a) reasonable efforts by the blood bank or plasma center to locate the donor have failed; and (b) disclosure is necessary to locate and notify the donor. (*Health & Saf.C. 1603.3(g)* [providing that information obtained from blood bank must be expunged by public health officer upon completion of efforts to locate and notify donor].) (On discovery of identity of blood donor, see 56 A.L.R.4th 755.)

(4) *Disclosure by County Health Officer.* The county health officer may alert the following persons concerning their exposure to AIDS: a person reasonably believed to be a spouse, sexual partner, or partner of shared needles of a person who has tested positive on a test to detect infection by the probable causative agent of AIDS. The officer must not disclose any identifying information about the individual believed to be infected, or the physician making the report. The county health officer must keep confidential the identities of the person contacted, as well as the identity and



seropositivity status of the test subject, and must expunge all records regarding the test subject upon completion of his or her efforts to contact the exposed individuals. (*Health & Saf.C. 121015(d)*, (e); see *20 Pacific L. J. 652*.)

(5) *Disclosure by Parent, Guardian, or Conservator.* A parent, guardian, or conservator who has given consent for an AIDS test to be performed on one who is not competent to give consent may (a) receive the results of the test without written authorization; and (b) disclose the test results, or provide written authorization for the disclosure of test results, on behalf of the subject in accordance with *Health & Saf.C. 120975, 120980* (supra, §522). (*Health & Saf.C. 121020*.)

(6) *Disclosure of Blood Test Results.* Disclosure of the results of a blood test to detect antibodies to the probable causative agent of AIDS may be made, without the test subject's written authorization, to the following persons (*Health & Saf.C. 121010*):

(a) The test subject, his or her legal representative, conservator, or any other person authorized to consent to the test.

(b) The test subject's health care provider.

(c) An agent or employee of the test subject's health care provider who provides direct patient care and treatment.

(d) A health care provider who procures, processes, distributes, or uses a human body part donated under the Uniform Anatomical Gift Act (see *4 Summary (9th), Personal Property*, §6 et seq.).

(e) The designated officer of an emergency response employee, and from the designated officer to an emergency response employee.

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Disclosure by Physician.* *Health & Saf.C. 121015* was amended in 2006 to refer to "local health officer" rather than "county health officer," and to make the exception regarding identifying information subject to the requirements of *Health & Saf.C. 121022*. *Health & Saf.C. 121022*, added in 2006, requires health care providers and laboratories to report cases of HIV infection to the local health officer using patient names, in order to "ensure knowledge of current trends in the HIV epidemic and to assure that California remains competitive for federal HIV and AIDS funding." (*Health & Saf.C. 121022(a)*.) However, "reported cases of HIV infection shall not be disclosed, discoverable, or compelled to be produced in any civil, criminal, administrative, or other proceeding." (*Health & Saf.C. 121022(d)*.)

*Health & Saf.C. 121015(c)* was amended to specify that the requirements of *Health & Saf.C. 121022*, supra, must be complied with, notwithstanding that physicians otherwise have no duty to notify.

(3) *Disclosure by Blood Bank or Plasma Center.* *Health & Saf.C. 1603.3(g)* was amended and relettered *Health & Saf.C. 1603.3(f)* in 2003. The amended statute refers to "a local health officer" rather than "a public health officer." (See also *Health & Saf.C. 1603.1(k)*, Supp., supra, §523.)

(4) *Disclosure by County Health Officer.* *Health & Saf.C. 121015(d)* and *121015(e)* were amended in 2006 to refer to "local health officer" instead of "county health officer." (6) *Disclosure of Blood Test Results.*

*Cross-Reference:* 13 *Summary (10th), Personal Property*, §6 et seq.



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### XVIII. SPECIAL PRIVACY STATUTES

#### E. Identity, Address, and Phone Number.

##### 2 *Witkin Cal. Evid. Witnesses* § 528

[§ 528] Identity, Address, and Phone Number.

(1) *Victim of Sex Crime.* The current address and telephone number of specified sex crimes victims may be excluded if the trial judge finds that the probative value of the evidence is outweighed by the creation of a substantial danger to the victim. (*Ev.C. 352.1*; see 3 *Cal. Evidence (4th), Presentation at Trial, §284.*) (For similar provision in California Public Records Act, see *supra*, §291 et seq.; on prohibition, under P.C. 1054.2 (Proposition 115), against attorney disclosing address and telephone number of victim or witness obtained from prosecutor to defendant, see 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §36.)

(2) *Attorneys, Members of Legislature, Peace Officers.* The home address of specified legislators, attorneys, government attorneys and investigators, peace officers, and their spouses and children that appear in any record of the Department of Motor Vehicles is confidential if a protected person requests confidentiality. (*Veh.C. 1808.4(a), 1808.6(a).*) Those home addresses may be disclosed only to a court, law enforcement agency, State Board of Equalization, or governmental agency required by law to be given that information. (*Veh.C. 1808.4(b), 1808.6(b).*) The addresses must be withheld from public inspection for 3 years following termination of office or employment. (*Veh.C. 1808.4(c), 1808.6(c).*) A prohibited disclosure of the home address of a peace officer, an unsworn employee of a city police or county sheriff's office, or the spouse or children of these persons that results in bodily injury to any of them is a felony. (*Veh.C. 1808.4(d).*)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Attorneys, Members of Legislature, Peace Officers.* *Veh.C. 1808.4(b)* was amended in 2001 to add to the list of those to whom a confidential home address may be disclosed "[a]n attorney in a civil or criminal action that demonstrates to a court the need for the home address, if the disclosure is made pursuant to a subpoena."



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## CHAPTER IX - Witnesses

### XVIII. SPECIAL PRIVACY STATUTES F. Miscellaneous Statutes.

#### 2 Witkin Cal. Evid. Witnesses § 529

[§ 529] Miscellaneous Statutes.

Many statutes, covering a variety of situations and types of information, classify certain information as *confidential*, and either *prohibit disclosure* altogether, or *limit disclosure* to specified situations. The following are illustrative:

(1) *Grand Jury Proceeding*. Evidence received, statements made, or votes. (P.C. 924.1 et seq.; see *McClatchy Newspapers v. Superior Court* (1988) 44 C.3d 1162, 1173, 245 C.R. 774, 751 P.2d 1329; *Daily Journal Corp. v. Superior Court* (1999) 20 C.4th 1117, 1124, 86 C.R.2d 623, 979 P.2d 982; 1 McCormick 5th, §113; 8 Wigmore (McNaughton Rev.) §2360; 74 Harv. L. Rev. 1013; 69 A.L.R.4th 298 [discovery of grand jury materials in civil proceedings]; 4 Cal. Crim. Law (3d), *Pretrial Proceedings*, §159.)

(2) *Family Conciliation Court*. Communications between parties and court or officer. (See 2 Cal. Proc. (4th), *Courts*, §38.)

(3) *Lanterman-Petris-Short and Similar Act*. Information and records obtained in course of providing mental health services. (Welf.C. 5328.15.)

(4) *Information Given by Student Age 12 or Older to School Counselor*. Information of a personal nature. (*Educ.C.* 49602, 72621.)

(5) *Financial Information*. Customers' financial records sought by a governmental agency in connection with a civil or criminal investigation. (*Govt.C.* 7460 et seq.; see *supra*, §461.)

(6) *Appointment of Counsel for Indigent Criminal Defendant*. Defendant's financial statement and other information obtained from him or her. (*Govt.C.* 27707; P.C. 987; see *supra*, §114; 5 Cal. Crim. Law (3d), *Criminal Trial*, §170 et seq.)

(7) *Consumer Records Maintained by State or Local Agency*. Personnel, medical, or similar files. (*C.C.P.* 1985.4.)

(8) *Driving Convictions*. Records of specified driving convictions occurring before January 1, 1987. (*Veh.C.* 1807.5.)

(9) *Dismissal of Complaint on Completion of Driving School*. Records pertaining to dismissal to be disclosed only to court. (*Veh.C.* 1808.7.)

(10) *Narcotic Treatment Programs*. Identity of patients or former patients, or records containing identifying

information. (*Health & Saf.C. 11878*.)

(11) *Video Cassette Purchaser or Renter Information*. Personal information or the contents of any record, including sales or rental information, prepared or maintained by the provider of video cassette sales or rental services. (C.C. 1799.3.)

(12) *Carpools and Ridesharing*. Personal information, i.e., address, hours of employment, etc., acquired in course of business to assist private entity in establishing or implementing carpooling or ridesharing program. (P.C. 637.6.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Grand Jury Proceeding*. See *People v. Superior Court (Mouchaourab)* (2000) 78 C.A.4th 403, 436, 92 C.R.2d 829 [in order to prepare P.C. 995 motions to dismiss indictment for lack of probable cause, defendants could discover nontestimonial portions of grand jury proceedings, but not identities of jurors and other persons present, or dates and lengths of sessions]; 1 McCormick 6th, §113.

(5) *Financial Information*. The California Financial Information Privacy Act (*Fin.C. 4050* et seq.), added in 2003, restricts the ability of financial institutions to share personal information regarding consumers. (See 7 *Summary* (10th), *Constitutional Law*, §607.)(6a) *(New) Consumer Credit Information*. Information in consumer's credit file where consumer has placed security alert or security freeze on file. (C.C. 1785.11.1 et seq.; see 4 *Summary* (10th), *Sales*, §297.)

(10) *Narcotic Treatment Programs*. *Health & Saf.C. 11878* was repealed in 2004. *Health & Saf.C. 11845.5*, added in 2004, provides for the confidentiality of the identity and records of patients in narcotic, alcohol, and other drug abuse programs.

(13) *(New) Child Custody and Visitation Proceedings*. Psychological evaluations of a child or recommendations regarding custody and visitation. (*Family C. 3025.5*, added in 2004.)

(14) *(New) Medical Information Obtained From Individuals*. Businesses may not seek medical information directly from individuals and disclose that information for direct marketing purposes without providing specified disclosures and obtaining consent. (C.C. 1798.91, added in 2004.)

(15) *(New) Public Guardian Investigations*. The public guardian may seek, and a court may issue, an order authorizing health care providers and financial institutions and advisors to disclose private information about a person who may be in substantial danger of abuse or neglect and may need a conservator of the person, the estate, or both. The information provided must be kept confidential. (*Prob.C. 2910, 2911*, added in 2007.)



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## CHAPTER X - Discovery

### I. GENERAL PRINCIPLES

#### A. Purpose of Discovery.

#### 2 Witkin Cal. Evid. Discovery § 1

#### [§ 1] Purpose of Discovery.

Discovery procedures are based on the theory that a lawsuit should be a search for the truth, and not a game to be fought and won mainly by strategic moves and surprise tactics. To some extent these procedures, like pretrial conferences, modify the traditional adversary character of litigation. (See *Pillsbury, Madison & Sutro v. Schectman* (1997) 55 C.A.4th 1279, 1288, 64 C.R.2d 698; see generally 1 McCormick 5th, §3; 6 Wigmore (Chadbourn Rev.) §§1845 et seq., 1856 et seq.; 1 Hogan, Cal. Civil Discovery §1.1; Cal. Civil Practice, 2 Procedure, §13:1; DeMeo, §1.02; 18 A.L.R.3d 922 [obtaining material for use in impeaching witnesses]; 23 Am.Jur.2d (1983 ed.), *Depositions and Discovery* §1 et seq.; 15 Am.Jur. Trials 373 [discovery and evaluation of medical records]; 22 Am.Jur. Trials 199 [discovery in product-related burn injury cases].)

The purposes of discovery are: "(1) to give greater assistance to the parties in ascertaining the truth and in checking and preventing perjury; (2) to provide an effective means of detecting and exposing false, fraudulent and sham claims and defenses; (3) to make available, in a simple, convenient and inexpensive way, facts which otherwise could not be proved except with great difficulty; (4) to educate the parties in advance of trial as to the real value of their claims and defenses, thereby encouraging settlements; (5) to expedite litigation; (6) to safeguard against surprise; (7) to prevent delay; (8) to simplify and narrow the issues; and (9) to expedite and facilitate both preparation and trial." (*Greyhound Corp. v. Superior Court* (1961) 56 C.2d 355, 376, 15 C.R. 90, 364 P.2d 266; see *Emerson Elec. Co. v. Superior Court* (1997) 16 C.4th 1101, 1107, 68 C.R.2d 883, 946 P.2d 841 [conclusions in *Greyhound* apply equally to Civil Discovery Act of 1986 (infra, §5)]; *Schreiber v. Estate of Kiser* (1999) 22 C.4th 31, 39, 91 C.R.2d 293, 989 P.2d 720, infra, §183 ["rather than encouraging gamesmanship, the Civil Discovery Act of 1986 places litigants on roughly equal footing"]; *Unger v. Los Angeles Transit Lines* (1960) 180 C.A.2d 172, 178, 4 C.R. 370, 5 C.R. 71 [elimination of "sporting theory" of litigation, which thrives on surprise]; *Buffalo Arms v. Remler Co.* (1960) 179 C.A.2d 700, 703, 4 C.R. 103, 6 Cal. Proc. (4th), *Proceedings Without Trial*, §207 ["discovery statutes should make the summary judgment procedure more useful than it has been heretofore"]; *Burke v. Superior Court* (1969) 71 C.2d 276, 281, 78 C.R. 481, 455 P.2d 409, infra, §105 [testing pleadings by requiring disclosure of evidentiary facts and particular contentions].)

However, in seeking to eliminate surprise and take the "game" element out of trials, the Legislature did not intend to destroy the adversary system of litigation or to minimize the value of skillful advocacy. (*Greyhound Corp. v. Superior Court*, supra, 56 C.2d 376; *Emerson Elec. Co. v. Superior Court*, supra, 16 C.4th 1107.) And the court must supervise the procedures: "Without reasonable judicial control, the instruments of discovery are susceptible to abuse and may be utilized for purposes of delay, annoyance and harassment. If a reasonable control is exercised, the salutary purposes of discovery will be served, abuses will be prevented and undue interference with orderly procedures will be avoided." (*Heffron v. Los Angeles Transit Lines* (1959) 170 C.A.2d 709, 339 P.2d 567.) (On abuse of discovery

procedures, see *infra*, §239 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See Hogan, 1 Cal. Civil Discovery 2d, §1.1; 1 McCormick 6th, §3. *West's Key Number Digest*, Pretrial Procedure k.14 et seq.



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## CHAPTER X - Discovery

### I. GENERAL PRINCIPLES B. Modern Discovery Procedures.

#### 2 *Witkin Cal. Evid. Discovery* § 2

#### [§ 2] Modern Discovery Procedures.

(1) *Adoption of Procedures by Statute.* Various forms of discovery, such as deposition of a party and inspection of papers, have long been recognized in nearly all jurisdictions. The practice was modernized by the Federal Rules of Civil Procedure in 1938, and many states either adopted or adapted these rules to form part of their own procedural law. California joined these states by legislation enacted in 1957. (See former C.C.P. 2016 et seq.; *infra*, §4; for comparisons of California and federal practice prior to 1957 statutes, see 42 *Cal. L. Rev.* 187, 829; 43 *Cal. L. Rev.* 97; 44 *Cal. L. Rev.* 909.) The 1957 discovery statutes were repealed and reenacted in 1986, effective July 1, 1987. (See *infra*, §5; for comparison of federal rules with California's Civil Discovery Act of 1986, see C.E.B., 1 Civil Discovery Practice 3d, §2.125; on "myth" of federal civil discovery abuse, see 46 *Stanf. L. Rev.* 1393; on early disclosure requirements of *F.R. Civ. P.*, Rule 26(a), see 46 *Hastings L. J.* 679; 28 *U.C. Davis L. Rev.* 1123; on "gatekeeping" function of *F.R. Civ. P.*, Rule 11(b)(3), see 43 *U.C.L.A. L. Rev.* 1393 [allowing party to advance allegations that are likely to have evidentiary support after reasonable opportunity for further investigation or discovery]; see generally 68 *Harv. L. Rev.* 673; 74 *Harv. L. Rev.* 940, 942 [evolution of modern discovery]; 21 *U.C.L.A. L. Rev.* 1339 [discovery rules in United States Tax Court]; 23 *Am.Jur.2d* (1983 ed.), *Depositions and Discovery* §2; on interstate discovery, see 74 *Harv. L. Rev.* 1049.)

(2) *Devices.* The purposes of discovery are achieved through a number of devices, each with a distinct procedure, but in some respects, overlapping in function. Under *C.C.P. 2019(a)*, any party may obtain discovery by one or more of the following methods:

- (a) Oral and written depositions. (See *C.C.P. 2025* et seq.; *infra*, §29 et seq.)
- (b) Interrogatories to a party. (See *C.C.P. 2030*; *infra*, §87 et seq.)
- (c) Inspections of documents, things and places. (See *C.C.P. 2031*; *infra*, §118 et seq.)
- (d) Physical and mental examinations. (See *C.C.P. 2032*; *infra*, §140 et seq.)
- (e) Requests for admissions. (See *C.C.P. 2033*; *infra*, §157 et seq.)
- (f) Simultaneous exchanges of expert trial witness information. (See *C.C.P. 2034*; *infra*, §178 et seq.)

In 1994, the California Center for Judicial Education and Research issued a California Judges Benchbook, Civil Proceedings: Discovery. The first of a four volume set treating all aspects of civil procedure from the judge's point of view, the Discovery volume discusses modern discovery procedures, with citations to relevant California statutory and case law. The final chapter (§19.1 et seq.) concerns itself specifically with discovery in the municipal courts. (For listing

of other C.J.E.R. publications, see 2 *Cal. Proc.* (4th), *Courts*, §437.) (On discovery devices generally, see 1 Hogan, *Cal. Civil Discovery*, Chap. 1; 4 Am.Jur. Trials 1 [written interrogatories]; 4 Am.Jur. Trials 119 [oral depositions]; 4 Am.Jur. Trials 185 [requests for admissions]; 4 Am.Jur. Trials 223 [motions for production and inspection]; 51 Am.Jur. Trials 1, §§77-205 [initiating and responding to discovery]; on use of videotape, see *infra*, §67; for forms, see *Cal. Civil Practice*, 2 Procedure, Chap. 13; C.E.B., 2 Civil Lit. Forms, Chaps. 24-33; 8A Am.Jur. P.P. Forms (1996 ed.), *Depositions and Discovery*, Form 2 et seq.)

(3) *Distinctions*. Certain procedures for the production and introduction of evidence should be distinguished: The subpoena duces tecum is not, strictly speaking, a discovery device. A request for inspection is the normal procedure for discovery of the contents of papers and things; a subpoena duces tecum is mainly intended to have produced in court, for use at the trial, the relevant and material papers known or otherwise discovered. (See *infra*, §218.) The same is true of production of papers by a party or witness on the stand, by order of court during the trial. (See 3 *Cal. Evidence* (4th), *Presentation at Trial*, §150.)

The use of depositions at a trial is also to be distinguished: As a discovery device, the deposition may disclose information useful in handling the case although only a part or none of the deposition is introduced in evidence at the trial. And the statutes, while extremely liberal in stating the scope of inquiry on depositions, restrict their introduction at the trial to proper evidentiary purposes. (See 3 *Cal. Evidence* (4th), *Presentation at Trial*, §153 et seq.)

(4) *Self-Help Not Authorized*. Modern discovery presupposes that ownership of documents will remain with whoever holds title, while allowing access to the trier of fact and litigants in specifically delineated proceedings. Self-help is not authorized. "Any litigant or potential litigant who converts, interdicts or otherwise purloins documents in the pursuit of litigation outside the legal process does so without the general protections afforded by the laws of discovery and risks being found to have violated protected rights." (*Pillsbury, Madison & Sutro v. Schectman* (1997) 55 C.A.4th 1279, 1288, 1289, 64 C.R.2d 698 [trial judge properly ordered attorney and law firm representing plaintiff's current and former employees in employment law claims to return documents removed from plaintiff's offices without its consent].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Adoption of Procedures by Statute*. See C.E.B., 1 Civil Discovery Practice 4th, §1.3; 32 *McGeorge L. Rev.* 1051 [suggestions for new approaches and procedures]; 38 *San Diego L. Rev.* 875, 880 [amendment of *F.R. Civ. P.*, Rule 26, relating to early disclosure].

(2) *Devices*. C.C.P. 2019(a), listing the authorized discovery methods, was repealed and replaced by C.C.P. 2019.010 in 2004 without substantive change.

(a) *Depositions*: C.C.P. 2025 et seq. were repealed and replaced by C.C.P. 2025.010 et seq. in 2004 without substantive change. (b) *Interrogatories*: C.C.P. 2030 was repealed and replaced by C.C.P. 2030.010 et seq. in 2004 without substantive change.

(c) *Inspections*: C.C.P. 2031 was repealed and replaced by C.C.P. 2031.010 et seq. in 2004 without substantive change.

(d) *Physical and mental examinations*: C.C.P. 2032 was repealed and replaced by C.C.P. 2032.010 et seq. in 2004 without substantive change.

(e) *Requests for admissions*: C.C.P. 2033 was repealed and replaced by C.C.P. 2033.010 et seq. in 2004 without substantive change.

(f) *Simultaneous exchanges of expert trial witness information*: C.C.P. 2034 was repealed and replaced by C.C.P. 2034.010 et seq. in 2004 without substantive change.



See Hogan, 1 Cal. Civil Discovery 2d, Chap. 1; 8A Am.Jur. P.P. Forms (2004 ed.), Depositions and Discovery, Form 5 et seq.; 38 *Loyola L.A. L. Rev.* 1529 [developments in electronic discovery].



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## CHAPTER X - Discovery

### I. GENERAL PRINCIPLES

#### C. Relation to Pretrial Conference.

#### 2 *Witkin Cal. Evid. Discovery* § 3

#### [§ 3] Relation to Pretrial Conference.

The pretrial conference, introduced in California by Superior Court rules in 1957, was generally regarded as an integral part of discovery. Although originally mandatory, it is now held at the parties' request or when ordered by the court and is called a "case management conference." (See C.R.C., Rule 212(a); 7 *Cal. Proc. (4th), Trial*, §52 et seq.)

An action in which a case management conference is not held may be subject to a trial setting conference. (See C.R.C., Rule 217(a); 7 *Cal. Proc. (4th), Trial*, §62 et seq.) Each party at the trial setting conference must be prepared to inform the court as to what discovery has been completed; what further discovery may be required; and when discovery can be completed. (C.R.C., Rule 219(b).)

Former C.R.C., Rule 210 contemplated completion of discovery before the pretrial conference; time limits on discovery are now keyed to the date set for trial. (See *C.C.P. 2024*, *infra*, §23.)

**SUPPLEMENT:** [This section is current through the latest supplement]

C.R.C., Rule 212(a) was relettered C.R.C., Rule 212(b), effective July 1, 2002, and was renumbered C.R.C., Rule 3.722 in 2006. As amended in 2002, the rule requires a case management conference "[i]n each case."

C.R.C., Rules 217(a) and 219(b) were repealed effective July 1, 2002. C.R.C., Rule 212(e), adopted effective July 1, 2002 and renumbered C.R.C., Rule 3.727 in 2006, covers the subjects that must be considered at a case management conference. It requires the parties to address, and the court to take appropriate action with respect to, whether discovery has been completed and, if not, the date by which it will be completed.

*C.C.P. 2024*, on the time for completion of discovery, was repealed and replaced by *C.C.P. 2024.010* et seq. in 2004 without substantive change.



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## CHAPTER X - Discovery

### I. GENERAL PRINCIPLES

#### D. Overview of California Discovery Statutes.

##### 1. Former Statutes.

#### 2 *Witkin Cal. Evid. Discovery* § 4

[§ 4] Former Statutes.

(1) *Defects of Law Before 1958.* California's prior law was considered defective in the following respects:

(a) The statutory authorization for deposition of a *party* was broad enough to make it a discovery proceeding (see *Ahern v. Superior Court* (1952) 112 C.A.2d 27, 31, 245 P.2d 568), but there were strict limitations on the right to take the deposition of a *witness*. On the other hand, perpetuation proceedings allowing depositions before commencement of an action were relatively unlimited in scope, and were available for discovery purposes without adequate safeguards. (See *MacLeod v. Superior Court* (1952) 115 C.A.2d 180, 185, 251 P.2d 728.)

(b) The motion for inspection was authorized by statute, but the *scope of inspection* was subject to the same limitations as those governing the subpoena duces tecum, and was more restrictive than under the federal practice; its purpose was production of material evidence rather than discovery. (See *Proctor & Gamble Mfg. Co. v. Superior Court* (1954) 124 C.A.2d 157, 161, 268 P.2d 199.)

(c) The defendant's right to a physical examination of the plaintiff in a personal injury case was enforceable under the inherent powers of the court (*Johnston v. Southern Pac. Co.* (1907) 150 C. 535, 540, 89 P. 348), but there was no statutory coverage of the procedure of physical and mental examinations as in the federal rule.

(d) There were no provisions for interrogatories to adverse parties or requests for admissions.

(e) The sanctions for refusal to comply with discovery requests or orders were inadequate.

These defects were the subject of extensive critical comment. (See 1 Hogan, Cal. Civil Discovery §1.3; 42 Cal. L. Rev. 187 [examinations and admissions]; 42 Cal. L. Rev. 829 [production of documents, inspections, subpoena duces tecum]; 43 Cal. L. Rev. 97 [sanctions]; 44 Cal. L. Rev. 909 [depositions and interrogatories].)

(2) *1957 Revision.* The 1957 statutory revision, effective in 1958, was sponsored by the State Bar and the Judicial Council. The revision was designed to provide modern discovery procedures similar to those available under the federal rules. In most instances, the language of the federal rules was used without substantial change. Some provisions, however, were rejected or modified to meet the needs of California practice, and, in some important instances, the California law was left intact. (See generally *Greyhound Corp. v. Superior Court* (1961) 56 C.2d 355, 375, 15 C.R. 90, 364 P.2d 266; 45 Cal. L. Rev. 486.)

The 1957 statutes provided for liberal discovery after commencement of an action, and restricted discovery before

that to cases in which a showing of necessity was made. The statutes included comprehensive provisions for physical and mental examinations, interrogatories to adverse parties, requests for admissions, and service of notices, motions, or orders on the party or the party's attorney. An elaborate set of sanctions to enforce discovery rights and protections against improper discovery were enacted. Most of the statutes governing subpoena duces tecum and ordinary subpoenas were not changed.

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Defects of Law Before 1958.* See Hogan, 1 Cal. Civil Discovery 2d, §1.3.



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## CHAPTER X - Discovery

### I. GENERAL PRINCIPLES

#### D. Overview of California Discovery Statutes.

##### 2. Civil Discovery Act of 1986.

###### a. Enactment.

*2 Witkin Cal. Evid. Discovery § 5*

[§ 5] Enactment.

(1) *Study and Recommendation of Commission.* A joint commission of the State Bar and the Judicial Council conducted an extensive review of California's civil discovery statutes and proposed a comprehensive revision, based in part on changes in the federal discovery rules that occurred since the 1957 statutory revision (*supra*, §4). The Reporter's Notes to the Commission, prepared by Professor James E. Hogan, can be found in 2 Hogan, Cal. Civil Discovery, Appendix C. The statutes proposed by the Commission, with some legislative changes, were enacted as the Civil Discovery Act of 1986 (*C.C.P. 2016 et seq.*), effective July 1, 1987. (See generally 2 Hogan, Cal. Civil Discovery, Appendix A; C.J.E.R., Judges Benchbook, Civil Proceedings: Discovery §1.1 *et seq.*; 18 *Pacific L. J.* 500; 18 *Southwestern U. L. Rev.* 233.)

(2) *Principal Changes.* The 1986 Act clarified and expanded some of the former rules and made some significant changes in the following areas:

- (a) *Scope of discovery.* (See *C.C.P. 2017*, *infra*, §9 *et seq.*; 18 *Pacific L. J.* 502, 503.)
- (b) *Timing of discovery.* (See *C.C.P. 2024*, *infra*, §§23, 24.)
- (c) *Work product doctrine.* (See *C.C.P. 2018*, 2 *Cal. Evidence (4th)*, *Witnesses*, §140; *C.C.P. 2025(m)(1)*, *infra*, §65.)
- (d) *Discovery from nonparty.* (See *C.C.P. 2020*, *infra*, §42 *et seq.*; 18 *Pacific L. J.* 505 *et seq.*)
- (e) *Depositions.* (See *infra*, §§37, 67 *et seq.*; 18 *Pacific L. J.* 507 *et seq.*)
- (f) *Interrogatories.* (See *infra*, §§89, 94; 18 *Pacific L. J.* 514 *et seq.*)
- (g) *Inspection of documents, things and places.* (See *infra*, §128 *et seq.*; 18 *Pacific L. J.* 519, 520.)
- (h) *Physical and mental examinations.* (See *infra*, §143 *et seq.*; 18 *Pacific L. J.* 520 *et seq.*)
- (i) *Requests for admissions.* (See *infra*, §§158, 168, 171, 173 *et seq.*; 18 *Pacific L. J.* 522 *et seq.*)
- (j) *Exchange of expert witness information.* (See *infra*, §§184 *et seq.*, 187 *et seq.*; 18 *Pacific L. J.* 528 *et seq.*)

(k) *Protective orders.* (See *infra*, §§59, 60, 82, 114, 135, 170, 180.)

(l) *Sanctions.* (See *C.C.P. 2023*, *infra*, §249 et seq.)

(m) *Informal resolution of issues in dispute.* (See, e.g., *C.C.P. 2025(n)*, *infra*, §61.)

(n) *Modification of discovery procedures by agreement.* (See *C.C.P. 2021*, *infra*, §§27, 36; *18 Pacific L. J. 531*.)

(o) *Retention and preservation of discovery documents.* (See, e.g., *C.C.P. 2025(s)(1)* [deposition transcript], *infra*, §77; *C.C.P. 2030(j)* [interrogatories and responses], *infra*, §93.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Study and Recommendation of Commission.* *C.C.P. 2016* et seq. were repealed and replaced by *C.C.P. 2016.010* et seq. in 2004 (*infra*, this section).

For the proposed 1986 Act, with reporter's notes, see Hogan, 2 Cal. Civil Discovery 2d, Appendix D.

(2) *Principal Changes.*

(a) *Scope of discovery.* *C.C.P. 2017* was repealed and replaced by *C.C.P. 2017.010* et seq. in 2004 without substantive change.

(b) *Timing of discovery.* *C.C.P. 2024* was repealed and replaced by *C.C.P. 2024.010* et seq. in 2004 without substantive change.

(c) *Work product doctrine.* *C.C.P. 2018* was repealed and replaced by *C.C.P. 2018.010* et seq. in 2004 without substantive change.

(d) *Discovery from nonparty.* *C.C.P. 2020* was repealed and replaced by *C.C.P. 2020.010* et seq. in 2004 without substantive change.

(l) *Sanctions.* *C.C.P. 2023* was repealed and replaced by *C.C.P. 2023.010* et seq. in 2004 without substantive change.

(m) *Informal resolution of issues in dispute.* *C.C.P. 2025(n)*, requiring a meet and confer declaration to accompany a motion for a protective order, was repealed and replaced by *C.C.P. 2025.420* in 2004 without substantive change. (n) *Modification of discovery procedures by agreement.* *C.C.P. 2021* was repealed and replaced by *C.C.P. 2016.030* in 2004 without substantive change.

(o) *Retention and preservation of discovery documents.* *C.C.P. 2025(s)(1)* (deposition transcript) and *C.C.P. 2030(j)* (interrogatories and responses) were repealed and replaced by *C.C.P. 2025.550* and *2030.280* in 2004 without substantive change.

(3) *(New) 2004 Revision.* *C.C.P. 2016* et seq. were repealed and replaced by *C.C.P. 2016.010* et seq. in 2004, effective July 1, 2005. The changes were nonsubstantive (see Stats. 2005, Chap. 182, §61) and, for the most part, involved breaking up each section of the former Act into a series of shorter sections. Under *C.C.P. 2016.010*, the title of the Act became the "Civil Discovery Act." The changes are noted throughout this supplement. The following table, entitled "Disposition of Existing Law," was prepared by the Law Revision Commission to show where each provision of former *C.C.P. 2016* et seq. ended up in the new Civil Discovery Act:

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## CHAPTER X - Discovery

### I. GENERAL PRINCIPLES

#### D. Overview of California Discovery Statutes.

2. Civil Discovery Act of 1986.
  - b. Proceedings Governed by Act.

2 *Witkin Cal. Evid. Discovery* § 6

[§ 6] Proceedings Governed by Act.

(1) *Broad Applicability.* The Civil Discovery Act of 1986 applies to the trial of civil actions and special proceedings of a civil nature (*C.C.P. 2016(b)(1)* ["action" defined]; *C.C.P. 2016(b)(2)* ["court" defined]; *C.C.P. 2016(b)(3)* ["document" and "writing" defined]) with the following restrictions:

(a) The statutes apply to actions in municipal courts only to the extent provided by *C.C.P. 94* and *95*. (See 2 *Cal. Proc.* (4th), *Courts*, §264.)

(b) The statutes apply to discovery in aid of enforcement of a money judgment only to the extent provided by *C.C.P. 708.010* et seq. (interrogatories and inspection demands; 8 *Cal. Proc.* (4th), *Enforcement of Judgment*, §§265, 266). (*C.C.P. 2016(c)*; see *Whitehouse v. Six Corp.* (1995) 40 *C.A.4th* 527, 535, 536, 48 *C.R.2d* 600 [in third-party claim proceeding in which creditor raised defense of fraudulent transfer, third-party claimants were not deprived of due process despite limitation on opportunity for discovery imposed by *C.C.P. 2016(c)*; by choosing inexpensive claim procedure, they waived discovery right].)

The procedure may also be invoked in administrative proceedings (see 1 *Cal. Evidence* (4th), *Introduction*, §75 et seq.), in judicial arbitration proceedings (*C.R.C.*, Rule 1612; see 6 *Cal. Proc.* (4th), *Proceedings Without Trial*, §548), and, to a limited extent, in conventional arbitration proceedings (see *C.C.P. 1283.1*; 6 *Cal. Proc.* (4th), *Proceedings Without Trial*, §530). (See *C.E.B.*, 1 Civil Discovery Practice 3d, §2.6 et seq.; on use in eminent domain proceedings, see *infra*, §200 et seq.; on use in State Bar disciplinary proceedings, see *Brotsky v. State Bar* (1962) 57 *C.2d* 287, 301, 19 *C.R. 153*, 368 *P.2d* 697, 1 *Cal. Evidence* (4th), *Introduction*, §75; on criminal discovery, see 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §27 et seq.)

(2) *Action Must Be Pending.* In *Department of Fair Emp. & Housing v. Superior Court* (1990) 225 *C.A.3d* 728, 275 *C.R. 156*, plaintiff department obtained a final judgment for injunctive relief requiring defendant employer to comply with a settlement agreement entered into in a sex discrimination case. Defendant failed to comply with the judgment, and, in order to determine whether to initiate contempt proceedings, plaintiff made a demand for inspection of documents regarding defendant's financial status. *Held*, discovery was not available. *C.C.P. 2017(a)* (*infra*, §9) permits discovery of any matter relevant to the subject matter of a *pending* action. Hence, "absent the initiation of a contempt proceeding to enforce the judgment, there is no action pending, which is the sine qua non of invoking the relief available under the Civil Discovery Act of 1986." (225 *C.A.3d* 732.)



**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Broad Applicability.* See *Leake v. Superior Court* (2001) 87 C.A.4th 675, 680, 104 C.R.2d 767, 3 Cal. Crim. Law (3d), *Punishment*, Supp., §196A [proceeding under Sexually Violent Predators Act (Welf.C. 6600 et seq.; see 3 Cal. Crim. Law (3d), *Punishment*, §193) is civil in nature, and thus Civil Discovery Act applies]; *People v. Superior Court (Cheek)* (2001) 94 C.A.4th 980, 987, 988, 114 C.R.2d 760, 3 Cal. Crim. Law (3d), *Punishment*, Supp., §196A [same]; cf. *Murillo v. Superior Court* (2006) 143 C.A.4th 730, 740, 49 C.R.3d 511, 3 Cal. Crim. Law (3d), *Punishment*, Supp., §196A [even though Civil Discovery Act applies in sexually violent predator proceedings, requests for admissions are not allowed; using them would violate defendant's due process rights to proof beyond reasonable doubt, jury, and unanimous verdict].

C.C.P. 2016(b)(1), defining "action," C.C.P. 2016(b)(2), defining "court," and C.C.P. 2016(b)(3), defining "document" and "writing," were repealed and replaced by C.C.P. 2016.020(a), (b), and (c), respectively, without substantive change in 2004.

(a) *Municipal courts:* Because of the unification of the trial courts, municipal courts no longer exist, and C.C.P. 94 and 95 now concern discovery in limited civil cases. (See 2 Cal. Proc. (4th), *Courts*, Supp., §262.)

*Administrative and arbitration proceedings:* C.R.C., Rule 1612 was renumbered C.R.C., Rule 3.822 in 2006.

See C.E.B., 1 Civil Discovery Practice 4th, §1.4 et seq.

(1a) *(New) Distinction: Provisions Not Exclusive.* The Civil Discovery Act of 1986 does not provide an exclusive framework for dealing with evidence in a legal action. A party seeking to prevent the destruction of evidence is not precluded from seeking an injunction requiring that the evidence be preserved simply because the Act does not specifically authorize the trial court to issue an injunction of that type. (*Dodge, Warren & Peters Ins. Services v. Riley* (2003) 105 C.A.4th 1414, 1419, 130 C.R.2d 385, 6 Cal. Proc. (4th), *Provisional Remedies*, Supp., §300 [in action for misappropriation of trade secrets, trial judge properly issued injunction prohibiting defendants from destroying or concealing any of their electronic storage media and requiring them to allow access by court-appointed expert].)

(2) *Action Must Be Pending.* C.C.P. 2017(a), permitting discovery of relevant matter, was repealed and replaced by C.C.P. 2017.010 in 2004 without substantive change.



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## CHAPTER X - Discovery

### I. GENERAL PRINCIPLES

#### D. Overview of California Discovery Statutes.

##### 2. Civil Discovery Act of 1986.

##### c. Construction of Statutes.

##### 1. In General.

#### 2 Witkin Cal. Evid. Discovery § 7

#### [§ 7] In General.

(1) *Construction as a Whole*. The various discovery methods are interdependent and the discovery system should be integrated. Thus, the entire Civil Discovery Act of 1986 should be considered in interpreting any particular provision. (*Greyhound Corp. v. Superior Court* (1961) 56 C.2d 355, 375, 15 C.R. 90, 364 P.2d 266; on continuing validity of *Greyhound* decision after enactment of 1986 Act, see Reporter's Notes to C.C.P. 2017, in Hogan, 2 Cal. Civil Discovery, Appendix C; C.J.E.R., Judges Benchbook, Civil Proceedings: Discovery §§1.2, 1.5.)

(2) *Liberal Construction*. A number of decisions have declared a policy of liberal construction of the statutes in favor of discovery. (See *Laddon v. Superior Court* (1959) 167 C.A.2d 391, 395, 334 P.2d 638; *Rolf Homes v. Superior Court* (1960) 186 C.A.2d 876, 882, 9 C.R. 142; *Norton v. Superior Court* (1994) 24 C.A.4th 1750, 1761, 30 C.R.2d 217 ["better that error be made in favor of granting discovery of the undiscoverable rather than denying discovery" of vital information].) "For the guidance of the trial courts the proper rule is declared to be not only one of liberal interpretation, but one that also recognizes that disclosure is a matter of right unless statutory or public policy considerations clearly prohibit it. Even in those instances wherein the statute requires a showing of good cause, that showing must be liberally construed." (*Greyhound Corp. v. Superior Court*, *supra*, 56 C.2d 378; see also *Emerson Elec. Co. v. Superior Court* (1997) 16 C.4th 1101, 1107, 1108, 68 C.R.2d 883, 946 P.2d 841 [conclusions in *Greyhound* apply equally to 1986 Act]; *Hauk v. Superior Court* (1964) 61 C.2d 295, 299, 38 C.R. 345, 391 P.2d 825; *Pacific Tel. & Tel. Co. v. Superior Court* (1970) 2 C.3d 161, 173, 84 C.R. 718, 465 P.2d 854; *California Accounts v. Superior Court* (1975) 50 C.A.3d 483, 487, 123 C.R. 304 [under liberal precedents, time extension provisions of C.C.P. 1013 apply to discovery documents sent by mail]; *Cedars-Sinai Med. Center v. Superior Court* (1993) 12 C.A.4th 579, 584, 16 C.R.2d 253.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Construction as a Whole*. See Reporter's Note to C.C.P. 2017, in Hogan, 2 Cal. Civil Discovery 2d, Appendix D. *West's Key Number Digest*, Pretrial Procedure k.13-



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## CHAPTER X - Discovery

### I. GENERAL PRINCIPLES

#### D. Overview of California Discovery Statutes.

2. Civil Discovery Act of 1986.
  - c. Construction of Statutes.
2. Cases Construing Federal Rules.

2 Witkin Cal. Evid. Discovery § 8

#### [§ 8] Cases Construing Federal Rules.

Federal cases are *persuasive*: The Civil Discovery Act of 1986 was intended to bring California law closer to the discovery provisions of the Federal Rules of Civil Procedure. (*Emerson Elec. Co. v. Superior Court* (1997) 16 C.4th 1101, 1108, 68 C.R.2d 883, 946 P.2d 841.) Because of the similarity of California and federal discovery law, federal decisions have historically been considered persuasive absent contrary California decisions. These decisions should be considered even more persuasive following the 1986 Act. (*Liberty Mut. Ins. Co. v. Superior Court* (1992) 10 C.A.4th 1282, 1288, 13 C.R.2d 363; see C.J.E.R., Judges Benchbook, Civil Proceedings: Discovery §1.6.)

But federal cases are *not controlling*: Despite the practical identity of most of the California discovery statutes with the federal rules, other differing California procedural statutes may require a departure from the federal practice. (See *BP Alaska Exploration v. Superior Court* (1988) 199 C.A.3d 1240, 1249, 245 C.R. 682 [differences in discovery of attorney work product under F.R. Civ. P., Rule 26 and former C.C.P. 2016 (now C.C.P. 2018)]; *Singer v. Superior Court* (1960) 54 C.2d 318, 323, 5 C.R. 697, 353 P.2d 305, *infra*, §106 [California allows interrogatories seeking facts supporting defense].) And some changes of substance were made in the California statutes, which "either extended the situations wherein a particular form of discovery might be used, or extended the persons to whom it might be applied. The importance of those alterations is that almost without exception they were made for the express purpose of creating in California a system of discovery procedures less restrictive than those then employed in the federal courts." (*Greyhound Corp. v. Superior Court* (1961) 56 C.2d 355, 375, 15 C.R. 90, 364 P.2d 266.)

**SUPPLEMENT:** [This section is current through the latest supplement]

C.C.P. 2018 (work product rule) was repealed and replaced by C.C.P. 2018.010 et seq. in 2004 without substantive change.



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## CHAPTER X - Discovery

## I. GENERAL PRINCIPLES

## E. Scope of Discovery.

## 1. Broad Scope.

## a. Relevance to Subject Matter.

2 *Witkin Cal. Evid. Discovery* § 9

[§ 9] Relevance to Subject Matter.

Unless otherwise limited by court order, a party may obtain discovery regarding any matter that is not privileged. The matter must be relevant to the subject matter of the pending action or to determining a motion in the action, and it must either be itself admissible in evidence or appear "reasonably calculated" to lead to the discovery of admissible evidence. Discovery may relate to a claim or defense of any party. (*C.C.P. 2017(a)*.) (See *Pacific Tel. & Tel. Co. v. Superior Court* (1970) 2 C.3d 161, 175, 84 C.R. 718, 465 P.2d 854 [party's concession in pleading of given issue does not necessarily narrow scope of discoverable information]; *Norton v. Superior Court* (1994) 24 C.A.4th 1750, 1760, 1761, 30 C.R.2d 217 [possibility that evidence otherwise admissible might be excluded at trial under *Ev.C.* 352 (see 1 *Cal. Evidence* (4th), *Circumstantial Evidence*, §17 et seq.) or some other evidentiary objection is not relevant consideration for purposes of ruling on discovery motion]; *Lantz v. Superior Court* (1994) 28 C.A.4th 1839, 1853, 1854, 34 C.R.2d 358 [when constitutional right of privacy is involved, party seeking discovery must do more than satisfy relevancy standard of *C.C.P. 2017*; it must demonstrate compelling need outweighing privacy rights when interests are balanced]; *Gonzalez v. Superior Court* (1995) 33 C.A.4th 1539, 1546, 39 C.R.2d 896 [even "fishing expeditions" are permissible in some cases]; *Lipton v. Superior Court* (1996) 48 C.A.4th 1599, 1614, 1617, 56 C.R.2d 341 [in attorney's bad faith action against malpractice insurer, insurer's loss reserves and reinsurance information could be relevant within meaning of *C.C.P. 2017(a)* because it could lead to discovery of admissible evidence, and thus in camera review was warranted]; *Glenfed Dev. Corp. v. Superior Court* (1997) 53 C.A.4th 1113, 1117, 1118, 62 C.R.2d 195 [in coverage dispute between insured and excess insurer, insurer's claims manual was discoverable because it was not privileged and was relevant to showing how insurer understood and intended to apply standard language in insured's policy, and might disclose identity of persons involved in claims handling process]; *C.E.B.*, 1 Civil Discovery Practice 3d, §2.2; *C.J.E.R.*, Judges Benchbook, Civil Proceedings: Discovery §3.1 et seq.; 1 Hogan, *Cal. Civil Discovery*, Chap. 11; 15 A.L.R.3d 1446 [scope of physician's duty to make pretrial disclosures in medical malpractice action]; 20 A.L.R.3d 1430 [right to discover complaints for similar injuries by other users of allegedly defective product].)

"After extensive debate, the majority of the Commission opted to retain the definition of the scope of discovery in terms of relevance to the *subject matter*, instead [of] to the *issues*. ... The Commission ultimately concluded that, despite its alluring logic, a narrowing of the scope of discovery to the issues would generate its own set of abuses. The Commission feared that an 'issue' standard would produce a dramatic increase both in objections on relevance grounds, and in the need for trial court intervention to resolve these objections. The Commission felt that the abuse caused by discovery overbreadth could be better dealt with by spelling out, as it has done in subdivision (c), the trial court's discretion to narrow the initial broad scope of discovery on a case-by-case basis." (Reporter's Note to *C.C.P. 2017(a)*, in

Hogan, 2 Cal. Civil Discovery, Appendix C; on court's discretion to limit scope of discovery, see *C.C.P. 2017(c)*, *infra*, §241.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2017(a)*, on the requirement of relevance, was repealed and replaced by *C.C.P. 2017.010* in 2004 without substantive change.

See *Stewart v. Colonial Western Agency (2001)* 87 C.A.4th 1006, 1013, 1014, 105 C.R.2d 115 [in wrongful termination action, plaintiff's deposition questions to defendant's employee concerning interactions between defendant's chief executive officer and other employees were not objectionable; questions could lead to discovery of evidence useful to plaintiff in challenging defendant's contention that her termination was for good cause]; *Kirkland v. Superior Court (2002)* 95 C.A.4th 92, 97, 115 C.R.2d 279 [in action for fraud and related causes of action arising from defendant's connection with corporation that had fallen behind in royalty payments, trial judge properly ordered defendant to produce copies of documents from Securities and Exchange Commission proceedings in separate investigation of defendant; defendant's state of mind, as reflected in requested material, was relevant to claim that defendant helped improperly enhance corporation's financial appearance]; *King City v. Community Bank of Cen. Calif. (2005)* 131 C.A.4th 913, 934, 32 C.R.3d 384 [in action by city seeking return of funds on deposit in bank, trial judge erred in denying bank's motion for continuance to conduct discovery on ground that there was already sufficient evidence on question of ownership of funds; evidence already obtained showed that funds had passed through city general funds account, but further discovery could shed light on material issue of where funds came from]; *Volkswagen of America v. Superior Court (2006)* 139 C.A.4th 1481, 1490, 43 C.R.3d 732 [in asbestos exposure action against automobile manufacturer, trial judge erred in denying defendant's discovery of documents submitted to bankruptcy trusts by plaintiff's attorney in support of claims for compensation for asbestos-related injuries; even if documents were inadmissible as offers to compromise, they could lead to admissible evidence, and fact that some documents were signed by plaintiff's attorney rather than plaintiff did not affect their relevance]; C.E.B., 1 Civil Discovery Practice 4th, §1.34 et seq.; Hogan, 2 Cal. Civil Discovery 2d, Chap. 11; Reporter's Note to *C.C.P. 2017(a)*, in Hogan, 2 Cal. Civil Discovery 2d, Appendix D.*C.C.P. 2017(c)*, on the trial court's discretion to limit discovery, was repealed and replaced by *C.C.P. 2017.020(a)* in 2004 without substantive change.

(New) Federal rule: *F.R. Civ. P., Rule 26(b)(1)*, which formerly permitted discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action," was narrowed by amendment in 2000. The amended rule permits discovery "regarding any matter, not privileged, that is relevant to the *claim or defense* of any party." However, for good cause shown, "the court may order discovery of any matter relevant to the subject matter involved in the action." (See 38 *San Diego L. Rev.* 875, 883.) *West's Key Number Digest*, Pretrial Procedure k.27 et seq.



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CHAPTER X - Discovery

I. GENERAL PRINCIPLES

E. Scope of Discovery.

1. Broad Scope.

b. Identification of Persons, Things, and Property.

*2 Witkin Cal. Evid. Discovery § 10*

[§ 10] Identification of Persons, Things, and Property.

Under *C.C.P. 2017(a)*, the following items may be discovered:

(1) The identity and location of persons having knowledge of discoverable matter. (See 37 A.L.R.2d 1152 [names and addresses of witnesses to accident or incident].)

(2) The existence, description, nature, custody, condition and location of a document, a tangible thing, land, or other property.

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2017(a)*, specifying what items may be discovered, was repealed and replaced by *C.C.P. 2017.010* in 2004 without substantive change.



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## CHAPTER X - Discovery

### I. GENERAL PRINCIPLES

#### E. Scope of Discovery.

##### 1. Broad Scope.

##### c. Insurance Coverage.

#### 2 Witkin Cal. Evid. Discovery § 11

#### [§ 11] Insurance Coverage.

A party may discover the existence and content of an insurance agreement under which the insurer may be liable to satisfy or reimburse payments made to satisfy any judgment entered in the action. The discovery may include the identity of the insurer, the nature and limits of the coverage, and whether coverage is disputed, but not the nature and substance of the dispute. "Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial." (*C.C.P. 2017(b)*, based on *F.R. Civ. P., Rule 26(a)*.) (See *Irvington-Moore v. Superior Court* (1993) 14 C.A.4th 733, 739, 18 C.R.2d 49; 1 Hogan, Cal. Civil Discovery §11.10.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2017(b)*, concerning discovery of insurance information, was repealed and replaced by *C.C.P. 2017.210* in 2004 without substantive change.

See *Catholic Mut. Relief Soc. v. Superior Court* (2007) 42 C.4th 358, 372, 64 C.R.3d 434, 165 P.3d 154 [in action arising from abuse of children by priests, trial judge, after allowing discovery of defendant archdiocese's insurance policies under *C.C.P. 2017.210*, erred in further ordering production of insurer's reinsurance agreements; nothing in history or language of statute evidences intention to extend scope of limited discovery right beyond primary liability insurance policies to reinsurance agreements]; *Hecht, Solberg, Robinson, Goldberg & Bagley LLP v. Superior Court* (2006) 137 C.A.4th 579, 597, 40 C.R.3d 446, 1 Cal. Proc. (4th), Attorneys, Supp., §338 [in legal malpractice action in which plaintiff alleged that defendant attorneys failed to settle prior malpractice action against law firm for sufficient amount, trial judge properly granted motion to compel discovery of insurance information concerning law firm, in order to show how much money could have been collected from firm]; Hogan, 2 Cal. Civil Discovery 2d, §11.10.



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## CHAPTER X - Discovery

### I. GENERAL PRINCIPLES

#### E. Scope of Discovery.

#### 2. Restrictions on Obtaining Information.

##### a. Privileges.

2 Witkin Cal. Evid. Discovery § 12

#### [§ 12] Privileges.

A formidable barrier to liberal discovery practice is the invocation by the witness or adverse party of basic privileges against disclosure of communications, facts or records. (See generally 74 *Harv. L. Rev.* 1009.) The existence and effect of the privileges are recognized by *C.C.P.* 2017(a), which provides that discovery is available for relevant matter that is "not privileged." (See *C.E.B.*, 1 Civil Discovery Practice 3d, §2.43 et seq., Chap. 3; 2 Hogan, Cal. Civil Discovery, Chaps. 12, 13.)

The privileges have already been fully discussed in relation to both trial and discovery (see 2 *Cal. Evidence* (4th), *Witnesses*, §59 et seq.), and it will be sufficient here to cite significant cases dealing with the privileges most frequently invoked in discovery proceedings:

(1) *Attorney-client*. (See, upholding privilege, *San Francisco v. Superior Court* (1951) 37 C.2d 227, 236, 231 P.2d 26; *Holm v. Superior Court* (1954) 42 C.2d 500, 508, 267 P.2d 1025, 2 Cal. Evidence (4th), *Witnesses*, §§128, 130; *Jessup v. Superior Court* (1957) 151 C.A.2d 102, 107, 311 P.2d 177; *Transamerica Title Ins. Co. v. Superior Court* (1987) 188 C.A.3d 1047, 1052, 233 C.R. 825, 2 Cal. Evidence (4th), *Witnesses*, §75 [no statutory or implied waiver of attorney-client privilege]; on work product rule, see *C.C.P.* 2018(b), 2 Cal. Evidence (4th), *Witnesses*, §140; *Brown v. Superior Court* (1963) 218 C.A.2d 430, 443, 32 C.R. 527, 2 Cal. Evidence (4th), *Witnesses*, §141.)

(2) *Official information*. (See *United States v. Reynolds* (1953) 345 U.S. 1, 73 S.Ct. 528, 531, 97 L.Ed. 727, 732, 2 Cal. Evidence (4th), *Witnesses*, §249; *Franchise Tax Bd. v. Superior Court* (1950) 36 C.2d 538, 545, 225 P.2d 905; *San Francisco v. Superior Court* (1951) 38 C.2d 156, 163, 238 P.2d 581, 2 Cal. Evidence (4th), *Witnesses*, §262; *Jessup v. Superior Court*, *supra*; *Chronicle Publishing Co. v. Superior Court* (1960) 54 C.2d 548, 573, 574, 7 C.R. 109, 354 P.2d 637, 2 Cal. Evidence (4th), *Witnesses*, §270.)

(3) *Self-incrimination*. (See *People v. Superior Court (Kaufman)* (1974) 12 C.3d 421, 433, 115 C.R. 812, 525 P.2d 716, 2 Cal. Evidence (4th), *Witnesses*, §474; *People v. Superior Court (Taylor)* (1975) 53 C.A.3d 996, 999, 126 C.R. 297; *Daly v. Superior Court* (1977) 19 C.3d 132, 143, 137 C.R. 14, 560 P.2d 1193, 2 Cal. Evidence (4th), *Witnesses*, §475; *Smith v. Superior Court* (1980) 110 C.A.3d 422, 425, 168 C.R. 24.)

In *Smith v. Superior Court*, an action was brought against defendant S under the Uniform Reciprocal Enforcement of Support Act. S was served with requests for admissions to establish paternity of the child. The admissions, if made, would give rise to the conclusive presumption of paternity (former Ev.C. 621, now *Family C.* 7540 and 7541), and the



resulting judgment would be admissible as evidence of paternity in a criminal prosecution for wilful nonsupport under P.C. 270. Thus, it would serve as a link in a chain of evidence tending to establish guilt, and, in the absence of an offer of use immunity for past conduct, S could not be required to respond to the request. (110 C.A.3d 425.)

(4) *Physician-patient privilege.* (See *Britt v. Superior Court* (1978) 20 C.3d 844, 862, 143 C.R. 695, 574 P.2d 766 [plaintiffs who sought damages for diminution in property value, personal injuries, and emotional disturbance allegedly caused by operation of airport were not required to make unlimited disclosure of their lifetime medical histories; although plaintiffs could not withhold information about physical or mental conditions that they put in issue, they were entitled to retain confidentiality of all unrelated medical or psychotherapeutic treatment they may have undergone in past]; *Allison v. Work. Comp. App. Bd.* (1999) 72 C.A.4th 654, 659, 84 C.R.2d 915 [relying on *Britt*; employee who sought workers' compensation benefits for injury to wrist could not be compelled to answer deposition questions regarding her lifetime medical history; employee could assert physician-patient privilege with regard to questions going beyond nature of injury that employee brought before tribunal].)

(5) *Constitutional right of privacy.* (See *Valley Bank of Nevada v. Superior Court* (1975) 15 C.3d 652, 656, 125 C.R. 553, 542 P.2d 977; *Britt v. Superior Court* (1978) 20 C.3d 844, 855, 143 C.R. 695, 574 P.2d 766, *infra*, §113; *Fults v. Superior Court* (1979) 88 C.A.3d 899, 903, 152 C.R. 210; *Church of Hakeem v. Superior Court* (1980) 110 C.A.3d 384, 390, 168 C.R. 13; *Board of Trustees of Leland Stanford Junior University v. Superior Court* (1981) 119 C.A.3d 516, 524, 526, 174 C.R. 160; 14 *Loyola L.A. L. Rev.* 385 [Board of Trustees]; *Kahn v. Superior Court* (1987) 188 C.A.3d 752, 233 C.R. 662, 7 *Summary* (9th), *Constitutional Law*, §459; *El Dorado Savings & Loan Assn. v. Superior Court* (1987) 190 C.A.3d 342, 235 C.R. 303, 7 *Summary* (9th), *Constitutional Law*, §460; *Harding Lawson Associates v. Superior Court* (1992) 10 C.A.4th 7, 10, 12 C.R.2d 538; *Sehlmeyer v. Department of General Services* (1993) 17 C.A.4th 1072, 1079, 21 C.R.2d 840; *Estate of Gallio* (1995) 33 C.A.4th 592, 597, 39 C.R.2d 470 [constitutional privacy right and *Family C. 853(a)* (11 *Summary* (9th), *Community Property, Supp.*, §251) preclude discovery of living person's will]; *Tylo v. Superior Court* (1997) 55 C.A.4th 1379, 1388, 64 C.R.2d 731 [in action against television producer by actress who was fired for becoming pregnant, there was insufficient nexus between emotional distress claimed by plaintiff and emotional distress possibly resulting from marital problems to justify deposition questions about her marriage]; for other illustrations of restrictions based on right of privacy, see *infra*, §§13, 14 [party's sexual history], 15 [trade secrets], 16 *et seq.* [financial data], 19 [psychotherapeutic records], 20 [settlement information].)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2017(a)*, providing for discovery of relevant matter that is not privileged, was repealed and replaced by *C.C.P. 2017.010* in 2004 without substantive change.

See C.E.B., 1 Civil Discovery Practice 4th, §§1.61 *et seq.*, 3.1 *et seq.*; Hogan, 2 Cal. Civil Discovery 2d, Chaps. 12, 13.

(1) *Attorney-client.* *C.C.P. 2018(b)*, on discovery of attorney work product, was repealed and replaced by *C.C.P. 2018.030(b)* in 2004 without substantive change.(4a) *(New) Psychotherapist-patient privilege.* (See *Pollock v. Superior Court* (2001) 93 C.A.4th 817, 821, 822, 113 C.R.2d 453 [in action against insurer for bad faith termination of disability policy benefits, trial judge properly denied plaintiff's motion to compel insurer to reveal names and addresses of other claimants whose psychiatric disability claims had been denied; disclosure of identity would necessarily reveal claimants' psychiatric condition; distinguishing *Colonial Life & Acc. Ins. Co. v. Superior Court* (1982) 31 C.3d 785, 183 C.R. 810, 647 P.2d 86, text, §124].)

(5) *Constitutional right of privacy.* In *Save Open Space Santa Monica Mountains v. Superior Court* (2000) 84 C.A.4th 235, 100 C.R.2d 725, an environmental organization, after prevailing in its action challenging two land divisions, sought attorneys' fees under the private attorney general statute (*C.C.P. 1021.5*; see 7 *Cal. Proc.* (4th), *Judgment*, §225). In opposing the fee request, defendant county sought to discover the financial obligations and contributions of residents in the affected area insofar as they related to the organization's employment of attorneys in the

case. The organization sought a protective order, which the trial judge granted in part. *Held*, order set aside.

(a) *Effect of discovery on associational privacy*. "[W]here, as here, the party opposing a section 1021.5 attorney fee award has produced evidence suggesting that a public interest organization is litigating an action primarily for the benefit of nonlitigants, the court should, in order to resolve the issue, allow the opposing party to conduct limited discovery. What kinds of discovery will be permissible is to be decided on a case-by-case basis. We caution, however, that before a trial court orders such discovery it must first determine whether the discovery ordered impermissibly infringes upon important associational privacy rights of third parties." (84 C.A.4th 250.)

(b) *Balancing of privacy interests against state's interest in promoting truth*. Here, the consequences of disclosure of donor information would not be profound. Disclosing, in increments and in camera, information concerning donations and, if necessary, the names of some of the donors, will not have an undue chilling effect on the willingness of concerned citizens to contribute funds to public interest organizations. The privacy interests of the donors and the environmental organization are strong, but the state's interest in promoting truth in litigation is particularly strong, and defendant has demonstrated a need for the discovery that would justify an invasion of the privacy interests involved. (84 C.A.4th 254, citing *Britt v. Superior Court* (1978) 20 C.3d 844, 143 C.R. 695, 574 P.2d 766, text, §113.)

(c) *Intrusiveness of order*. In her order, the trial judge ruled that defendant was entitled to learn the identity of the 10 largest donors and donors who reside in certain areas near the proposed land divisions, as well as the amounts contributed by each of these donors. This information could be disclosed only to persons who need it for the litigation and could be used only for the purpose of this litigation. The judge further ruled, for purposes of certain depositions and deposition subpoenas, that any question must be limited to the raising of funds and financing of the litigation. This order is too intrusive. The trial court should direct the organization to provide documents showing the total amount of money contained in the litigation fund and the amounts donated by each contributor. If the court finds that none of the contributions is significantly large, the inquiry should end. If one or more of the donations are substantial, however, the judge should request information concerning whether any of these large donors own or have an interest in any real property in the area. Only if this proves to be the case should the judge order that further information about the donors be provided, and this should be done with appropriate limitations on the persons who will receive the information and the purposes for which it may be used. (84 C.A.4th 255, 256.)

See *Johnson v. Superior Court* (2000) 80 C.A.4th 1050, 1073, 95 C.R.2d 864 [in action by parents and child against sperm bank arising from alleged transmission of kidney disease to child from sperm donor, balancing of donor's privacy interests against compelling state interests favored allowing plaintiffs to depose donor and inquire into medical history, but his identity was entitled to fullest possible protection]; *Juarez v. Boy Scouts of America* (2000) 81 C.A.4th 377, 391, 392, 97 C.R.2d 12 [in action against national youth organization by former member who was allegedly molested by organization group leader, trial judge properly entered protective order prohibiting discovery of organization's files containing private information about persons found ineligible to be volunteers; plaintiff did not show files were directly relevant to any disputed issue or that there was compelling need outweighing right of privacy]; *Planned Parenthood Golden Gate v. Superior Court* (2000) 83 C.A.4th 347, 366, 369, 99 C.R.2d 627 [in action concerning antiabortion protesters' right to protest outside abortion clinic, trial judge erred in ordering clinic to disclose identities of nonparties affiliated with clinic on "confidential" basis and to disclose their addresses and telephone numbers on "attorneys-eyes only" basis, where judge failed to balance nonparties' constitutional privacy interests against state's interest in compelling disclosure; distinguishing *Alvarado v. Superior Court* (2000) 23 C.4th 1121, 99 C.R.2d 149, 5 P.3d 203, 5 Cal. Crim. Law (3d), *Criminal Trial*, Supp., §79, which was criminal case]; *Hooser v. Superior Court* (2000) 84 C.A.4th 997, 1007, 101 C.R.2d 341 [trial judge erred in ordering judgment debtor, who was attorney, to produce list of his clients for judgment debtor examination proceeding; creditor made insufficient showing of need to outweigh privacy rights of clients]; *TBG Ins. Services Corp. v. Superior Court* (2002) 96 C.A.4th 443, 452, 117 C.R.2d 155 [in wrongful termination action in which defendant corporation alleged that it fired plaintiff for accessing pornographic websites on his work and home computers, which were provided by defendant, trial judge erred in denying defendant's motion to compel production of plaintiff's home computer; plaintiff had signed defendant's policy statement allowing only business use of computers, and this defeated plaintiff's claim of reasonable expectation of privacy]; *Department of Fair*

*Emp. & Housing v. Superior Court* (2002) 99 C.A.4th 896, 905, 121 C.R.2d 615 [in action alleging plaintiff's rental application was wrongfully denied based on race and marital status, trial judge erred in denying plaintiff's motion to compel defendants (property owner and property manager) to produce rental applications and agreements for selected tenants and those whose applications were denied; state's interest in prohibiting discrimination outweighed intrusion on privacy rights of tenants and applicants]; *Experian Information Solutions v. Superior Court* (2006) 138 C.A.4th 122, 133, 41 C.R.3d 219 [in consumer's action concerning credit reporting of collection accounts, after plaintiff's class certification motion was denied, trial judge erred in approving letter intended to be sent by plaintiff to former potential class members; letter invaded those members' privacy right to extent it failed to require written consent to being contacted, but was proper to extent it was reasonably calculated to lead to discovery of admissible evidence on issue of plaintiff's damages]; *Tien v. Superior Court* (2006) 139 C.A.4th 528, 539, 43 C.R.3d 121 [in class action against employer in which neutral letter was sent to class members informing them that they could contact plaintiff employees' counsel for more information, class members' privacy rights outweighed employer's need to know names of those members who responded, and thus trial judge erred in failing to grant plaintiffs' motion for protective order]; *Ombudsman Services of Northern Calif. v. Superior Court* (2007) 154 C.A.4th 1233, 1248, 65 C.R.3d 456 [in elder abuse action, trial judge's order requiring long-term care ombudsman to produce all of its records regarding specific long-term care facility violated constitutional right to privacy insofar as it applied to third-party information; although Welf.C. 9725 allows disclosure of ombudsman records where required by court order, records were protected by strong privacy interest, and party seeking records never established compelling need for disclosure]; 31 *Golden Gate L. Rev.* 193 [Johnson].

(6) *(New) Distinction: Constitutional rights of others.* Generally the target of a discovery request cannot oppose it on the ground that it would infringe the constitutional rights of others. (*Matrixx Initiatives v. Doe* (2006) 138 C.A.4th 872, 879, 42 C.R.3d 79 [in action by pharmaceutical company alleging that anonymous postings on Internet message boards defamed it, two nonparties from whom plaintiff hoped to learn identity of anonymous posters lacked standing to oppose discovery order on ground that posters, who were unrelated to two nonparties, had constitutional right to speak anonymously].)

*Cross-References:* 7 *Summary* (10th), *Constitutional Law*, §§584, 585; 11 *Summary* (10th), *Community Property*, §156. *West's Key Number Digest*, *Pretrial Procedure* k.33 et seq.



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## CHAPTER X - Discovery

### I. GENERAL PRINCIPLES

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#### 2. Restrictions on Obtaining Information.

##### b. Party's Sexual History.

##### 1. Plaintiffs.

#### 2 Witkin Cal. Evid. Discovery § 13

#### [§ 13] Plaintiffs.

In a civil action alleging sexual harassment, sexual assault or sexual battery, a party seeking discovery concerning the plaintiff's sexual conduct with individuals other than the alleged perpetrator is required to show good cause for the discovery, and that the matter sought to be discovered is relevant to the subject matter of the action and reasonably calculated to lead to the discovery of admissible evidence. The showing must be made at a noticed hearing and may not be made or considered *ex parte*. The motion must be accompanied by a declaration stating facts showing a good faith attempt at an informal resolution of each issue presented by the motion. (*C.C.P. 2017(d)*; see *Mendez v. Superior Court* (1988) 206 C.A.3d 557, 564, 565, 568, 573, 253 C.R. 731; *Barrenda L. v. Superior Court* (1998) 65 C.A.4th 794, 802, 76 C.R.2d 727 [in action by minors against county and its employees arising from rape and assault suffered by plaintiffs in foster home, trial judge erred in ordering plaintiffs to answer deposition questions about their other sexual activity; there was no declaration from mental health professional that this evidence would be relevant and necessary to determination of plaintiffs' cause for emotional distress]; *C.J.E.R.*, Judges Benchbook, Civil Proceedings: Discovery §4.133 et seq.)

In *Knoettgen v. Superior Court* (1990) 224 C.A.3d 11, 273 C.R. 636, a sexual harassment case, plaintiff was ordered to answer deposition questions regarding two sexual assaults she suffered as a child. *Held*, the order was improper.

(a) Defendant's contention that the protection afforded by *C.C.P. 2017(d)* does not apply to prior sexual assaults because they are not *consensual* activity conflicts with the legislative purpose of encouraging sexual harassment victims to come forward by ensuring that, absent extraordinary circumstances, they will not be required to disclose their sexual history. (224 C.A.3d 13.)

(b) Defendant's argument that information concerning the prior assaults was necessary to better understand plaintiff's adult perceptions, reactions and attitudes is not a sufficient good cause showing to justify the order to answer. If such a showing established good cause, this type of discovery would be automatically available in every case, and *C.C.P. 2017(d)* would be meaningless. (224 C.A.3d 14.)

(c) Even in the absence of *C.C.P. 2017(d)*, defendant would not be entitled to the discovery sought here, because it is precisely the type that the Legislature has declared to be offensive, harassing, intimidating, unnecessary, and unjustifiable (*infra*, §59). (224 C.A.3d 15.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2017(d)*, on discovery concerning the plaintiff's sexual conduct with other individuals, was repealed and replaced by *C.C.P. 2017.220(a)* in 2004 without substantive change.



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##### b. Party's Sexual History.

##### 2. All Parties.

### 2 Witkin Cal. Evid. Discovery § 14

[§ 14] All Parties.

In *Boler v. Superior Court* (1987) 201 C.A.3d 467, 247 C.R. 185, a workplace sexual harassment suit against a former employer, plaintiff obtained an order requiring defendant to answer deposition questions "relating to the extent and circumstances of his sexual relations, intimacies, flirtations and socializing, if any, with any employees, past or present ... including the identities of said employees." *Held*, order vacated.

(a) *The order violates defendant's right to privacy.*

(1) The constitutional right of sexual privacy, both within and without the marital relationship, is a fundamental liberty arising from both the United States and the California Constitutions. While this sexual privacy right is not absolute, compelled disclosure in court proceedings is only justified to serve the compelling state interest of facilitating truth in legal proceedings. Thus, the party seeking discovery must establish more than a merely rational relationship to some colorable state interest: Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation on the right of privacy. An intrusion upon sexual privacy may only be permitted on the basis of practical necessity, and the compelled disclosure must be narrowly drawn to assure maximum protection of the constitutional interests at stake. (201 C.A.3d 473, 474.)

(2) Plaintiff's request is not justified by practical necessity, for there are less intrusive means by which plaintiff can accomplish her stated objective of being able to contact and interview other alleged victims. Plaintiff's counsel apparently admitted he knew of the women already, and, if so, he has the information from other means and cannot indulge in a sexual privacy intrusion; assuming the names are not known, all plaintiff has to do is obtain a list of all female employees during the pertinent time frame and contact them in person and ask them whether they had ever been sexually harassed by defendant. If they had, they will presumably say so; if they had a totally innocent sexual relationship with him, they may choose to respond in the negative and the parties' sexual privacy will be preserved. (201 C.A.3d 474.)

(3) The decision in *Fults v. Superior Court* (1979) 88 C.A.3d 899, 152 C.R. 210, 7 Summary (9th), *Constitutional Law*, §457, is a model for sexual privacy discovery, and demonstrates that the discovery sought by plaintiff is clearly overbroad and an impermissible intrusion on the rights of defendant and his companions: The order is not limited to the period of time during which plaintiff and defendant worked together, and it encompasses sexual conduct with unknown third parties, which conduct may very well have been voluntary and not instances of workplace harassment. (201

*C.A.3d 474.*) Further, the order is not narrowly tailored: It employs unfortunate, and in some cases anachronistic, terminology which results in an overly intrusive inquiry. "Indeed, the terminology--'flirtations,' 'intimacies,' and 'socializing'--encompasses completely innocent, nonsexual behavior, including simple conversations, casual gatherings, and harmless jocularity." (201 *C.A.3d 474, 475.*)

(b) *A protective order is insufficient to validate the order.* The fact that the trial judge ordered that the information obtained not be disclosed, and be filed under seal as confidential, does not cure the intrusion into the sexual privacy interests at stake. Such a protective order is only available after *valid* discovery has been ordered. The discovery ordered herein is not valid. (201 *C.A.3d 475.*) (On protective orders, see *infra*, §241.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *John B. v. Superior Court* (2006) 38 *C.4th 1177, 1202*, 45 *C.R.3d 316, 137 P.3d 153*, 6 *Summary* (10th), *Torts*, Supp., §912 [in wife's action against husband for negligent transmission of HIV, wife was entitled to discovery of husband's medical records as far back as 6 months preceding date, shortly after marriage, on which he tested negative for HIV, where both parties later tested positive, husband's infection had already progressed to full-blown AIDS, and parties had engaged in unprotected sex both before and after marriage; husband's infection could not have occurred earlier than 6 months prior to negative test].

*Cross-Reference:* 7 *Summary* (10th), *Constitutional Law*, §596.



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##### c. Trade Secrets.

2 Witkin Cal. Evid. Discovery § 15

[§ 15] Trade Secrets.

(1) *General Privilege*. The owner of a trade secret has a privilege to refuse to disclose it, as long as nondisclosure does not conceal fraud or otherwise work injustice. (*Ev.C. 1060*, 2 *Cal. Evidence (4th)*, *Witnesses*, §350; see *Bridgestone/Firestone v. Superior Court* (1992) 7 *C.A.4th* 1384, 1390, 9 *C.R.2d* 709, 2 *Cal. Evidence (4th)*, *Witnesses*, §351 [party seeking discovery must show that information is relevant and necessary to prove or defend material element of case]; *Raymond Handling Concepts Corp. v. Superior Court* (1995) 39 *C.A.4th* 584, 590, 45 *C.R.2d* 885, *infra*, §136 [protective order governing dissemination of defendant's trade secret to counsel in other actions against defendant]; on protective order limiting disclosure of trade secret at deposition, see *C.C.P. 2025(i)(13)*, *infra*, §60.)

(2) *Misappropriation Action*. In an action alleging the appropriation of a trade secret under C.C. 3426 et seq. (Uniform Trade Secrets Act, 11 *Summary (9th)*, *Equity*, §107 et seq.), the trial court must preserve the secrecy of the alleged trade secret by reasonable means, including protective orders issued during discovery. (C.C. 3426.5.) The party alleging the misappropriation must, before commencing discovery relating to the trade secret, identify the secret with reasonable particularity, subject to appropriate orders under C.C. 3426.5. (*C.C.P. 2019(d)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *General Privilege*. *C.C.P. 2025(i)(13)*, on protective orders to protect trade secrets, was repealed and replaced by *C.C.P. 2025.420(b)(13)* in 2004 without substantive change.

(2) *Misappropriation Action*. *C.C.P. 2019(d)*, on the identification of trade secrets in a misappropriation action, was repealed and replaced by *C.C.P. 2019.210* in 2004 without substantive change.

*C.C.P. 2019.210* is not "cause of action" specific. Rather, it refers to any action alleging misappropriation of a trade secret. Thus, where one cause of action is brought under the Uniform Trade Secrets Act, but all causes of action hinge upon the factual allegation that the defendant misappropriated the plaintiff's trade secrets, *C.C.P. 2019.210* applies to the entire action. Furthermore, the "reasonable particularity" required by *C.C.P. 2019.210* "does not mean that the party alleging misappropriation has to define every minute detail of its claimed trade secret at the outset of the litigation. Nor does it require a discovery referee or trial court to conduct a miniature trial on the merits of a misappropriation claim before discovery may commence. Rather, it means that the plaintiff must make some showing that is reasonable, i.e., fair, proper, just and rational ... under all of the circumstances to identify its alleged trade secret in a manner that will allow the trial court to control the scope of subsequent discovery, protect all parties' proprietary information, and allow them a fair opportunity to prepare and present their best case or defense at a trial on the merits. ... The degree of



'particularity' that is 'reasonable' will differ, depending on the alleged trade secrets at issue in each case." (*Advanced Modular Sputtering v. Superior Court* (2005) 132 C.A.4th 826, 835, 836, 33 C.R.3d 901.)

*Cross-Reference:* 13 *Summary* (10th), *Equity*, §86 et seq.



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##### d. Financial Information.

##### 1. In General.

#### 2 Witkin Cal. Evid. Discovery § 16

[§ 16] In General.

A party's financial data is generally discoverable where it is relevant to a claim or defense in the action. (See *C.C.P. 2017(a)*, supra, §9; *Flora Crane Service v. Superior Court* (1965) 234 C.A.2d 767, 779, 45 C.R. 79 [interrogatory asking "Itemize by nature and value all assets and all liabilities" was proper; theory of complaint was that corporation was alter ego, and question sought usual balance sheet information that might show undercapitalization or lack of assets, as grounds for disregard of corporate entity]; *Columbia Broadcasting System v. Superior Court* (1968) 263 C.A.2d 12, 22, 69 C.R. 348 [interrogatory asking for amount of profit realized by defendants from allegedly plagiarized telecast was proper; plaintiff was entitled to discover information directly relevant to damages even though issue of defendants' liability had not been determined and even though it would be difficult to ascertain profits of one episode]; *Fuss v. Superior Court* (1969) 273 C.A.2d 807, 817, footnote 2, 78 C.R. 583, infra, §101 [defendant entitled to detailed answers from his former attorneys to determine how they were supporting claims for compensation for services rendered; "[m]ost or all of that compilation must have been done prior to the filing of the complaint if the litigation was commenced in good faith"]; *Rawnsley v. Superior Court* (1986) 183 C.A.3d 86, 227 C.R. 806, infra, §17 [although C.C. 3295 limits discovery of defendant's financial status, documents fundamental to plaintiff's case are discoverable]; on discovery of party's net worth generally, see C.E.B., 1 Civil Discovery Practice 3d, §2.24 et seq.; 1 Hogan, Cal. Civil Discovery §11.9.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2017(a)*, referring to the discoverability of matters that are relevant to a claim or defense, was repealed and replaced by *C.C.P. 2017.010* in 2004 without substantive change.

See C.E.B., 1 Civil Discovery Practice 4th, §1.40; Hogan, 2 Cal. Civil Discovery 2d, §11.9.



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#### 2. Relevant to Punitive Damages Claim.

2 Witkin Cal. Evid. Discovery § 17

[§ 17] Relevant to Punitive Damages Claim.

(1) *Prima Facie Case of Liability*. The court may, for good cause, grant a defendant a protective order requiring the plaintiff to produce evidence of a prima facie case of liability for punitive damages under C.C. 3294 before introducing evidence of (a) profits the defendant gained by virtue of his or her wrongful course of conduct, or (b) the defendant's financial condition. (See C.C. 3295(a); 11 *Pacific L. J.* 352; 17 California Lawyer 64 (January 1997) [obtaining evidence of defendant's wealth]; 32 A.L.R.4th 432 [necessity of determining or showing liability for punitive damages before discovery or reception of evidence of defendant's wealth].)

(2) *Motion for Discovery*. Pretrial discovery by the plaintiff with respect to the evidence of profits or financial condition of the defendant is prohibited, unless the court enters an order permitting it. The plaintiff must make a motion supported by appropriate affidavits, and a hearing will be held if the court deems it necessary. The court may "at any time" enter the order if it finds, on the basis of supporting and opposing affidavits, that the plaintiff has shown "a substantial probability" that the plaintiff will prevail on the punitive damages claim. The order is not to be considered a determination on the merits of the claim or a defense to it, and must not be given in evidence or referred to at the trial. (C.C. 3295(c); see *Richards v. Superior Court* (1978) 86 C.A.3d 265, 273, 150 C.R. 77 [defendant, on motion, is "presumptively entitled" to protective order that (a) information need be revealed only to counsel for discovering party or counsel's representative, and (b) information may be used only for purposes of action]; *Cobb v. Superior Court* (1979) 99 C.A.3d 543, 550, 551, 160 C.R. 561 [describing factors to be considered in determining scope of protective order]; *Doak v. Superior Court* (1968) 257 C.A.2d 825, 827, 65 C.R. 193 [assets of defendant in wrongful death action were not discoverable in deposition; assets were not relevant to claims or defenses and punitive damages were not available]; *People v. Superior Court (Kardon)* (1973) 35 C.A.3d 710, 712, 713, 111 C.R. 14 [judge has discretion to order answers to interrogatories about defendant's financial worth where defendant faced civil penalties for violations of false advertising and unfair business practices]; *Martin v. Superior Court* (1980) 110 C.A.3d 391, 394, 395, 167 C.R. 811 [order permitting plaintiffs access to financial information was improper; access should be limited to plaintiffs' counsel; following *Richards*]; *GT v. Superior Court* (1984) 151 C.A.3d 748, 755, 198 C.R. 892 ["counsel only" protective order, preventing party from viewing financial information may be necessary to prevent business competitor from obtaining trade secrets or other confidential information]; 54 *So. Cal. L. Rev.* 1141 [Pretrial Discovery of Net Worth in Punitive Damage Cases]; 56 *So. Cal. L. Rev.* 1115 [balancing competing discovery interest in context of attorney-client relationship]; 43 A.L.R.4th 121 [protective orders limiting dissemination of discovered financial information].)

(3) *Exception: Identification of Documents and Witnesses.* The plaintiff may, however, subpoena documents or witnesses to be available *at the trial* to prove profits or financial condition, and the defendant may be required to identify (a) documents in his or her possession that are relevant and admissible for that purpose, and (b) the witnesses employed by or related to the defendant who would be most competent to testify to those facts. (C.C. 3295(c).)

(4) *Exclusion of Financial Information Until After Verdict.* A claim for exemplary damages may not state the amount sought. (C.C. 3295(e).) In addition, upon application of the defendant, the court must preclude the admission of evidence of the defendant's profits or financial condition until after the trier of fact returns a verdict (a) awarding plaintiff actual damages, and (b) finding that defendant is guilty of malice, oppression or fraud in accordance with C.C. 3294. Evidence of profit and financial condition must be presented to the same trier of fact that found defendant guilty. (C.C. 3295(d).) (See *Notrica v. State Comp. Ins. Fund* (1999) 70 C.A.4th 911, 939, 83 C.R.2d 89 [C.C. 3295(d) did not mandate exclusion of evidence of defendant insurance fund's overall financial condition; evidence was relevant on issue of defendant's liability for failure to estimate reasonable claim reserve levels, and defendant had introduced evidence indicating that it was in financial difficulty prior to time that it changed its reserving guideline].)

(5) *Applicability to Arbitration Proceedings.* Unless the court enters an order permitting pretrial discovery under C.C. 3295(c), no party may require the production of evidence specified in C.C. 3295(a) in a judicial arbitration proceeding. (C.C.P. 1141.19.5.)

(6) *Action Against Public Employee.* A public entity may defend a public employee in an action against the employee for an injury arising out of an act or omission within the scope of the employee's employment. (Govt.C. 825, 5 Summary (9th), Torts, §266.) The public entity may, on a finding of certain facts, pay that part of a judgment awarding punitive damages. However, discovery and introduction of evidence of the public entity's assets is not permitted in an action in which it is alleged that a public employee is liable for punitive or exemplary damages. (Govt.C. 825(b).)

(7) *Distinction: Information Related to Liability.* In *Rawnsley v. Superior Court* (1986) 183 C.A.3d 86, 227 C.R. 806, plaintiff brought suit against four limited partnerships to which he belonged and individuals and corporations involved in them. Plaintiff alleged that defendants had siphoned profits from the limited partnerships and received excessive and misstated compensation for managing them. The trial court sustained defendant's objections to certain of plaintiff's requests for production of financial documents, apparently basing its ruling on C.C. 3295. *Held*, the ruling was an abuse of discretion.

C.C. 3295 was designed to protect against a specific type of discovery abuse, i.e., the use of an easily alleged claim for punitive damages to require a defendant to expend time and money compiling "a complex mass of information unrelated to the substantive claim involved in the lawsuit and relevant only to the subject matter of a measure of damages which may never be awarded." (183 C.A.3d 91, citing *Richards v. Superior Court*, *supra*.) Here, the documents sought were "*fundamental*" to plaintiff's ability to prove his allegations, and objections based on C.C. 3295 were without merit. (183 C.A.3d 91, 92.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Motion for Discovery.* Before a court may enter an order permitting discovery of a defendant's financial condition under C.C. 3295(c), it must weigh the evidence submitted in favor of and in opposition to the motion for discovery, and make a finding that it is very likely that the plaintiff will prevail on his or her claim for punitive damages. The statutory term "substantial probability" refers to a strong likelihood and not just a reasonable probability. (*Jabro v. Superior Court* (2002) 95 C.A.4th 754, 758, 115 C.R.2d 843 [in action in which plaintiff alleged that one defendant yelled racial slurs at him and another defendant beat and seriously injured him, trial judge erred in ordering disclosure of defendants' financial condition under C.C. 3295(c) in belief that plaintiff's prima facie showing, which was found sufficient to withstand summary judgment, was also sufficient to justify disclosure]; see *Hilton K. v. Greenbaum* (2006) 144 C.A.4th 1406, 1412, 51 C.R.3d 295 [in action arising from minor's molestation at religious day school, summary judgment for defendants was not precluded by rulings in actions by other children at school granting their motions under C.C.

3295(c) to permit financial condition discovery; statute expressly states that order under it is not to be considered determination on merits and may not be given in evidence or referred to at trial].)(3a) *(New) Order Following Determination of Liability*. A trial court may, in its discretion, order a defendant to produce evidence of its financial condition following a determination of liability for punitive damages, even if the plaintiff has not previously conducted pretrial discovery of the defendant's financial records, subpoenaed documents or witnesses to be available at trial for the purpose of establishing the defendant's financial condition, or formally moved to bifurcate the issues of liability and award. C.C. 3295(c) allows the trial court, at any time, to enter an order permitting discovery of the defendant's profits or financial condition once the plaintiff has established that there is a substantial probability of prevailing on a punitive damages claim. "[T]hat subdivision clearly presupposes that such motion procedure is required where the plaintiff has not actually prevailed on his or her claim at trial. However, once there has been a determination of liability by the trier of fact based on an actual weighing of the credibility of witnesses, this kind of affidavit-and-hearing procedure is patently superfluous. So long as the trial court allows the defendant sufficient time, following a determination of liability, to collect his or her financial records for presentation on the issue of the amount of such damages to be awarded, there is nothing prejudicial or unfair about using such a process to try the issue of the amount of punitive damages. If anything, this method serves the purpose behind section 3295, to wit, to protect against premature disclosure of the defendant's financial condition." (*Mike Davidov Co. v. Issod* (2000) 78 C.A.4th 597, 609, 92 C.R.2d 897.)(6) *Action Against Public Employee*.

*Cross-Reference: 5 Summary (10th), Torts, §375 et seq.*



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- 3. Third Party's Information.

#### 2 Witkin Cal. Evid. Discovery § 18

#### [§ 18] Third Party's Information.

(1) *Discovery Restricted.* In *Harris v. Superior Court* (1992) 3 C.A.4th 661, 4 C.R.2d 564, Mr. Smets entered into a marital settlement agreement with a promise to pay child support. Later, he moved into a house owned by Bonnie Harris. Janice Smets, Mr. Smets' former spouse, moved to increase the amount of child support, believing that her husband's housemate was helping him to pay living expenses, and that under *In re Marriage of Tapia* (1989) 211 C.A.3d 628, 259 C.R. 459 (11 Summary (9th), *Husband and Wife*, §226), the housemate's contributions could be considered in determining ability to pay. Janice Smets then served subpoenas duces tecum on Bonnie Harris, for the production of her wage statements and tax returns. *Held*, the subpoenas should have been quashed.

(a) Personal financial information comes within the zone of privacy protected by the California Constitution; but, on a showing of some compelling public interest, the right of privacy must give way. (3 C.A.4th 664.) A case involving child support necessarily involves the public interest, and the court must balance the right of privacy with the need for discovery. (3 C.A.4th 664, 665.) And the person seeking discovery of constitutionally protected material has the burden of making a threshold showing that the evidence sought is directly relevant to the claim or defense. (3 C.A.4th 665.)

(b) The issue in *Tapia* was not the consideration of the entire income of a nonmarital person, but the nonmarital cohabitant's contribution to Mr. Tapia's expenses; and the case does not hold that it is appropriate to serve a subpoena duces tecum on someone living with an ex-husband who pays child support. (3 C.A.4th 667.)

(c) "Under other facts, some discovery of a third party's financial records may be appropriate. An ex-husband, for example, upon moving in with a third party, is suddenly living in sumptuous surroundings, driving luxury cars and wearing expensive clothes. Depending upon what the discovery of the ex-husband reveals, discovery concerning financial contributions made by a third party to the ex-husband's living expenses may be appropriate." (3 C.A.4th 668.) However, even under these circumstances, the third party is presumptively entitled to a protective order that limits disclosure; i.e., the trial court must limit the scope of inquiry to the extent necessary to a fair resolution of the case. Hence, it must examine the financial information in chambers, and exclude from disclosure any information that does not meet this standard. (3 C.A.4th 668.)

(2) *Discovery Possible Following In Camera Review.* In *Babcock v. Superior Court* (1994) 29 C.A.4th 721, 35 C.R.2d 462, the hypothetical circumstances described in *Harris*, in which some discovery of the third party's financial records might be appropriate, were present. Plaintiff moved to compel production of bank and other financial

documents concerning her former husband's nonmarital cohabitant, and to join the cohabitant in the dissolution proceedings on the ground that the husband had wrongfully diverted community funds to her. The trial judge granted the motion, ordering production of the cohabitant's loan documents and of every check of more than \$ 1,000 deposited during a specified period. *Held*, writ of mandamus issued: an in camera inspection of the requested records should precede any discovery.

(a) The cohabitant did not waive her privacy rights in her personal financial records simply by living in the same house with plaintiff's former husband. Nevertheless, by showing that the cohabitant acquired an interest in a \$ 341,000 home and a \$ 30,000 car despite being unemployed, plaintiff adequately demonstrated a need to inquire into the source of the cohabitant's funds. (29 C.A.4th 726.)

(b) The trial judge declined the cohabitant's request for an in camera inspection because he did not have the time to sort through a confusing array of financial records. But the judge should not have to do this. "Counsel for a deponent wishing to protect the privacy interests of his or her client bears the burden of assisting the court to conduct an in camera hearing. ... We are confident that where there are legitimate privacy concerns about records that have no relevance to the action, conscientious counsel will draft a concise summary for signature by the client, or other relevant declarant, explaining, under penalty of perjury, the source and expenditure of funds. Under these circumstances, the trial court's burden should be relatively light." (29 C.A.4th 727, 728.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Discovery Restricted*. See *Hecht, Solberg, Robinson, Goldberg & Bagley LLP v. Superior Court* (2006) 137 C.A.4th 579, 588, 599, 40 C.R.3d 446, 1 Cal. Proc. (4th), Attorneys, Supp., §338 [in legal malpractice action in which plaintiff alleged that defendant attorneys failed to settle prior malpractice action against law firm for sufficient amount, trial court properly granted motion to compel law firm to provide financial information concerning its assets and net worth, where order was properly limited as to period covered, and where no information was sought concerning law firm's individual partners].

*Cross-Reference:* 11 Summary (10th), *Husband and Wife*, §236.



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## CHAPTER X - Discovery

### I. GENERAL PRINCIPLES

#### E. Scope of Discovery.

#### 2. Restrictions on Obtaining Information.

##### e. Psychotherapeutic Records.

2 *Witkin Cal. Evid. Discovery* § 19

[§ 19] Psychotherapeutic Records.

In *Davis v. Superior Court* (1992) 7 C.A.4th 1008, 9 C.R.2d 331, the court held that "the mere act of filing a personal injury action asking for general damages for pain and suffering does not tender the plaintiff's mental condition so as to make discoverable postinjury psychotherapeutic records." (7 C.A.4th 1011.)

(a) "In determining whether one has waived the right of privacy by bringing suit, our Supreme Court has noted that although there may be an implicit partial waiver, the scope of such waiver must be narrowly, rather than expansively construed, so that plaintiffs will not be unduly deterred from instituting lawsuits by fear of exposure of private activities. ... An implicit waiver of a party's constitutional rights encompasses only discovery *directly relevant* to the plaintiff's claim and essential to the fair resolution of the lawsuit. ... There must be a compelling and opposing state interest justifying the discovery. ... Even when discovery of private information is found directly relevant to the issues of ongoing litigation, it will not be automatically allowed; there must then be a careful balancing of the compelling public need for discovery against the fundamental right of privacy. ... The scope of any disclosure must be narrowly circumscribed, drawn with narrow specificity, and must proceed by the least intrusive manner." (7 C.A.4th 1014.)

(b) Plaintiff filed "a garden-variety motor vehicle personal injury action," alleging general damages, loss of earning capacity, wage loss and other compensatory damages. She made no claim for mental and emotional distress except as to pain and suffering associated with the physical injuries suffered. (7 C.A.4th 1015.) Although no California case has been found presenting the same facts and issues presented here, it has generally been held that the filing of a personal injury action seeking damages for pain and suffering does not, ipso facto, place mental condition in issue. The cases that find direct relevance include specific averments or reasonable interpretations drawn from the pleadings which clearly place mental condition in issue. (7 C.A.4th 1017.)

**SUPPLEMENT:** [This section is current through the latest supplement]





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## CHAPTER X - Discovery

### I. GENERAL PRINCIPLES

#### E. Scope of Discovery.

#### 2. Restrictions on Obtaining Information.

##### f. Settlement Information.

2 Witkin Cal. Evid. Discovery § 20

[§ 20] Settlement Information.

In *Home Ins. Co. v. Superior Court* (1996) 46 C.A.4th 1286, 54 C.R.2d 292, a corporate insured sued its primary and excess insurers for breach of contract and the implied covenant of good faith and fair dealing for failing to cover various environmental claims asserted against the insured. Before trial began, all insurers except one excess insurer and two affiliated reinsurers settled with the insured, and the excess insurer requested information as to the settlement terms and amounts. The insured refused the request, and the trial judge, in response to the insurer's motion to compel, ruled that disclosure was required but only after the insurer's coverage obligation was determined. *Held*, this was error. The insurer had an undoubted right to discover the settlement amounts and to have those amounts allocated. By deferring disclosure, the trial judge elevated the insured's right to confidentiality of its settlements over the insurer's right to present a defense. The insured may have already been fully compensated as to some of the covered sites. (46 C.A.4th 1293.) "Before Home is required to defend itself against each and every claim placed in issue by ARCO, Home is entitled to discover which, if any, of those claims have been satisfied by ARCO's settlements with the other carriers and which of Home's policies are at issue. The trial court can make the determination whether and to what extent that can be done simply and efficiently only after Home has had an opportunity to review the settlement information and been given a chance to make its case for early allocation." (46 C.A.4th 1294.)

In *Hinshaw, Winkler, Draa, Marsh & Still v. Superior Court* (1996) 51 C.A.4th 233, 58 C.R.2d 791, plaintiffs, two doctors, dismissed their claims in a doctors' class action against the purchaser of a hospital. After the remaining class action plaintiffs entered into a confidential settlement agreement, the two doctors brought a malpractice action against the law firm that had represented both them and all the other class action plaintiffs. They sought discovery of information about the class action settlement, claiming that the amount of the settlement was relevant to proving damages in their malpractice action. The trial judge issued an order compelling discovery but directing that names of individual plaintiffs in the class action could be redacted to protect privacy and that documents protected by the attorney-client or work product privileges or subject to the right of privacy need not be produced. *Held*, the order was improper.

A private settlement agreement is entitled to at least as much privacy protection as a bank account or tax information, and therefore plaintiffs had the burden of showing more than the mere possibility that the material at issue could lead to relevant information; they were required to show a compelling and opposing state interest. (51 C.A.4th 239, 241.) Their arguments--that they could not explain how the settlement was germane to their malpractice claim without actually being able to see it, and that there was at least a probable relationship between what the settling doctors

recovered and what plaintiffs lost--did not demonstrate so compelling a need for the information as to entitle them to invade the privacy protection afforded settlement agreements. Further, the redaction of the settling doctors' names would not adequately protect their privacy. "Our decision is influenced by the public policy favoring settlements, the parties' expressed desire for confidentiality, and the speculative nature of measuring plaintiffs' damages by these settlements." (51 C.A.4th 241, 242.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER X - Discovery

### I. GENERAL PRINCIPLES

#### E. Scope of Discovery.

3. Restrictions on Use of Information Obtained.
  - a. No First Amendment Right To Disseminate.

2 Witkin Cal. Evid. Discovery § 21

[§ 21] No First Amendment Right To Disseminate.

In *Seattle Times Co. v. Rhinehart* (1984) 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17, Rhinehart, religious leader of Aquarian Foundation, a group of less than 1,000 members mainly living in the state of Washington, was the subject of a number of derogatory articles in defendant's newspaper, the Seattle Times. Rhinehart brought an action against the Times for damages for defamation and invasion of privacy, and defendant engaged in extensive discovery, seeking, among other matters, financial information on the affairs of Rhinehart, the identity of the foundation donors during the preceding 10 years, and a list of its members during that period. Plaintiff Rhinehart and the foundation moved for a protective order preventing dissemination of any information gained through discovery, asserting that defendant intended to use such information in future articles. The trial court issued the order, and defendant appealed, contending that it impaired their First Amendment rights. *Held*, order affirmed.

(a) "The critical question that this case presents is whether a litigant's freedom comprehends the right to disseminate information that he has obtained pursuant to a court order that both granted him access to that information and placed restraints on the way in which the information might be used." (104 S.Ct. 2207, 81 L.Ed.2d 26.) Because the rules authorizing discovery were adopted by the state Legislature, the processes thereunder are a matter of legislative grace: "A litigant has no First Amendment right of access to information made available only for purposes of trying his suit." (104 S.Ct. 2207, 81 L.Ed.2d 26.) Pretrial depositions and interrogatories are not public components of a civil trial, and much of the information obtained may be unrelated or only tangentially related to the underlying cause of action. (104 S.Ct. 2207, 2208, 81 L.Ed.2d 27.)

(b) A protective order prohibiting dissemination of discovered information "is not the kind of classic prior restraint that requires exacting First Amendment scrutiny." (104 S.Ct. 2208, 81 L.Ed.2d 27.) The party is prevented from disseminating only the information obtained through use of the discovery process; he or she may disseminate the identical information if it is gained through other means. "In sum, judicial limitations on a party's ability to disseminate information discovered in advance of trial implicates the First Amendment rights of the restricted party to a far lesser extent than would restraints on dissemination of information in a different context." (104 S.Ct. 2208, 81 L.Ed.2d 27.)

(c) The rule authorizing protective orders furthers a substantial governmental interest unrelated to the suppression of expression. Liberal pretrial discovery has a significant potential for abuse, not limited to matters of delay and expense; discovery may also seriously implicate privacy interests of litigants and third parties. There is an opportunity, therefore, for litigants to obtain--incidentally or purposefully--information that not only is irrelevant but could be damaging to reputation and privacy. The prevention of this abuse is sufficient justification for protective orders. (104

*S.Ct. 2208, 2209, 81 L.Ed.2d 28.*) And the Supreme Court of Washington, holding that the trial judge properly exercised his discretion, declared that compelled disclosure of membership and sources of financial support might result in "annoyance, embarrassment and even oppression." "We therefore hold that where, as in this case, a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment." (*104 S.Ct. 2209, 81 L.Ed.2d 29.*) (See *In re Marriage of Candiotti* (1995) 34 C.A.4th 718, 724, 40 C.R.2d 299 [protective order restricting ex-wife from disseminating information about ex-husband's new wife was proper as to information acquired by discovery; as to independently acquired information, it was undue prior restraint on speech; following *Seattle Times Co. v. Rhinehart*]; *Millaud v. Superior Court* (1986) 182 C.A.3d 471, 476, 227 C.R. 222, 5 Cal. Crim. Law (3d), Trial, §69 [third party was required to release investigative material to criminal defendant subject to protective order preventing use of material in other proceedings]; 42 *Stanf. L. Rev.* 1577 [dangers of presumptive pretrial public access to depositions under federal rules]; 94 *Harv. L. Rev.* 1085 [Nonparty Access to Discovery Materials in the Federal Courts]; 105 *Harv. L. Rev.* 428 [Confidentiality, Protective Orders, and Public Access to the Courts]; 43 A.L.R.4th 121 [protective orders limiting dissemination of discovered financial information]; 83 A.L.R.4th 987 [propriety of order prohibiting exchange of discovered information among litigants in similar cases].)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Cf. Maggi v. Superior Court* (2004) 119 C.A.4th 1218, 1226, 15 C.R.3d 161 [remedy chosen by trial judge for plaintiffs' violation of stipulated protective order was not appropriate sanction; judge could have imposed monetary sanctions or limited depositions to certain topics, but prohibiting plaintiffs' counsel from speaking to third parties on informal basis or from taking on representation of additional clients, subject to applicable ethical rules, violated free speech rights; distinguishing *Seattle Times Co. v. Rhinehart* (1984) 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17, text, p. 876].



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## CHAPTER X - Discovery

### I. GENERAL PRINCIPLES

#### E. Scope of Discovery.

#### 3. Restrictions on Use of Information Obtained.

##### b. Return of Documents.

2 *Witkin Cal. Evid. Discovery* § 22

[§ 22] Return of Documents.

In *Coalition Against Police Abuse v. Superior Court* (1985) 170 C.A.3d 888, 216 C.R. 614, plaintiffs brought actions challenging the Los Angeles Police Department's use of undercover officers and agents to report on assertedly lawful political activity. In discovery proceedings, plaintiffs obtained huge quantities of documents, a large number of which were subject to protective orders imposing close restraints on copying and use and permitting limited dissemination. The actions ended in a consent decree, under which the rights of private individuals and groups and the law enforcement needs of the city of Los Angeles were accommodated by a statement of standards for proper police investigation and citizen access to nonprivileged information. The agreement, pursuant to which the decree was entered, expressly disclaimed any admission of liability, but provided for payment of \$ 900,000 in settlement of plaintiffs' claims and \$ 900,000 for their attorneys' fees.

Neither the agreement nor the decree made any provision for disposition of the discovered documents, and the city moved for the immediate return of those subject to protective orders. The trial court granted the motion by an order calling for inventory of the documents and placement in the custody of the court until 1991. Plaintiffs petitioned for mandamus, contending that they had constitutional and statutory rights to maintain and disseminate the discovered materials, and that they intended to use them for such purposes as monitoring future compliance with the consent decree, continuing investigations of the police department, and release of the materials to news media, journalists and writers for discussion and debate on the issue of police spying. *Held*, the return order, as modified, was proper.

(a) Under the holding of *Seattle Times Co. v. Rhinehart* (1984) 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17, supra, §21, discovery proceedings are not public components of a civil trial, and restraints placed on discovered information are not violative of First Amendment rights; the government has a substantial interest in preventing abuse of discovery rights. (170 C.A.3d 900, 901.) And the return order does not prohibit the republication of information that has been made public by the terms of the protective orders or by the consent of the parties. (170 C.A.3d 902, 903.)

(b) The return order was a proper exercise of the trial court's discretion. Its purpose was to gather the discovered documents together in "custodia legis" where they will be available to the parties for several years. (170 C.A.3d 904.) "[W]e are not called upon to decide whether, as a general rule, materials discovered pursuant to protective orders must be released, destroyed or returned upon termination of a lawsuit." (170 C.A.3d 905.) The volume of material here made it impracticable to supervise use of the documents if they were to remain in possession of plaintiffs, and the return order protects plaintiffs' access to the materials as needed, as well as the privacy and other interests of the persons named therein. (170 C.A.3d 905.)

(c) The order should be modified to provide that (1) all original documents produced by defendants are to be returned to them; (2) plaintiffs may retain a copy of and disseminate all documents that were disclosed to the public before the date of the return order; (3) plaintiffs may have an observer present during the making of the inventory. (170 C.A.3d 906.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER X - Discovery

### I. GENERAL PRINCIPLES

#### F. Time Limits on Discovery.

##### 1. In General.

#### 2 Witkin Cal. Evid. Discovery § 23

[§ 23] In General.

(1) *30-Day Time Limit.* Most discovery proceedings must be completed on or before the 30th day before the initial trial date and motions must be heard on or before the 15th day before that date. Until those dates, a party is entitled to conduct discovery "as a matter of right." (*C.C.P. 2024(a)*; see *Wagner v. Superior Court* (1993) 12 C.A.4th 1314, 1318, 16 C.R.2d 534 [trial judge's setting of discovery cutoff date when no trial date had been set denied plaintiffs their statutory right to conduct discovery up to 30 days before trial]; C.E.B., 1 Civil Discovery Practice 3d, §2.18.) Discovery is considered completed on the day a response is due or on the day a deposition begins. (*C.C.P. 2024(a)*.) When the last day to perform or complete a discovery act falls on a Saturday, Sunday, or holiday, the time limit is extended until the next business day. (*C.C.P. 2024(g)*.)

(2) *Exceptions.* The 30-day and 15-day time limits of *C.C.P. 2024(a)* are not applicable in the following situations:

(a) Eminent domain proceedings under *C.C.P. 1230.010* et seq. (8 *Summary* (9th), *Constitutional Law*, §954 et seq.). (*C.C.P. 2024(c)(2)*.)

(b) Summary proceedings to obtain possession of real property under *C.C.P. 1159* et seq. (5 *Cal. Proc.* (4th), *Pleading*, §597 et seq.). In these proceedings, discovery must be completed on or before the 5th day before the date set for trial, although the extensions of time provided in *C.C.P. 2024(e)* and *2024(f)* (*infra*, §24) are available. (*C.C.P. 2024(c)(1)*.)

(c) Proceedings for the exchange of information concerning expert witnesses under *C.C.P. 2034* (*infra*, §178 et seq.). These proceedings must be completed on or before the 15th day before the initial trial date, and corresponding motions must be heard on or before the 10th day before that date. (*C.C.P. 2024(d)*.)

(d) Judicial arbitrations under *C.C.P. 1141.10* et seq. (6 *Cal. Proc.* (4th), *Proceedings Without Trial*, §548). (*C.C.P. 2024(b)*.)

(3) *Sequence and Timing of Discovery Methods.* In the absence of a contrary Judicial Council rule, local court rule, or local uniform written policy, the methods of discovery may be used in any sequence. The fact that one party is conducting discovery, whether by deposition or another method, must not delay another party's discovery. "However, on motion and for good cause shown, the court may establish the sequence and timing of discovery for the convenience of parties and witnesses and in the interests of justice." (*C.C.P. 2019(c)*, based on *F.R. Civ. P., Rule 26(d)*.)

"This provision ... aims to eliminate any fixed priority in the sequence of discovery, and to make clear and explicit the court's power to establish priority by an order based on the peculiar needs of a particular case. Most particularly, the Commission aims to end any notion that one who first serves deposition notices thereby acquires the power to delay an adversary's discovery until those depositions are concluded." (Reporter's Note to *C.C.P. 2019(c)*, in 2 Hogan, Cal. Civil Discovery, Appendix C.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *30-Day Time Limit. C.C.P. 2024(a)* was amended in 2000 to provide that when the 15th or 30th day before the initial trial date falls on a Saturday, Sunday, or holiday, the deadline will instead fall on the next successive court day.

*C.C.P. 2024* was repealed and replaced by *C.C.P. 2024.010* et seq. in 2004. The portion of the section setting forth the 30-day and 15-day time limits was transferred to *C.C.P. 2024.020(a)*. The portion of the section relating to holidays and weekends was transferred to *C.C.P. 2016.060*, which provides that when "the last day to perform or complete any act provided for in this title falls on a Saturday, Sunday, or holiday," as specified in *C.C.P. 10*, the time limit is extended until "the next court day closer to the trial date."

See *Fairmont Ins. Co. v. Superior Court* (2000) 22 C.4th 245, 247, 92 C.R.2d 70, 991 P.2d 156 [in case of mistrial, order granting new trial, or remand for new trial after reversal on appeal, discovery is reopened and last date for completing discovery is 15 days before date initially set for new trial]; C.E.B., 1 Civil Discovery Practice 4th, §1.66 et seq.

(2) *Exceptions.(a) Eminent domain: C.C.P. 2024(c)(2)* was repealed and replaced by *C.C.P. 2024.040(b)(2)* in 2004 without substantive change.

*Cross-Reference:* 8 Summary (10th), *Constitutional Law*, §1170 et seq.

(b) *Summary proceedings for possession of real property: C.C.P. 2024(c)(1)* was repealed and replaced by *C.C.P. 2024.040(b)(1)* in 2004 without substantive change.

*C.C.P. 2024(e)* and *2024(f)* were repealed and replaced by *C.C.P. 2024.050* and *2024.060* in 2004 without substantive change.

*C.C.P. 1170.8*, added in 2007, provides that, in any action under *C.C.P. 1159* et seq., a discovery motion may be made at any time upon giving 5 days' notice. The Law Revision Commission Comment states that the section is intended to provide for an expedited hearing on a discovery motion in a forcible entry or forcible or unlawful detainer case.

(c) *Proceedings for exchange of expert witness information: C.C.P. 2024(d)* was repealed and replaced by *C.C.P. 2024.030* in 2004 without substantive change.

*C.C.P. 2034* was repealed and replaced by *C.C.P. 2034.010* et seq. in 2004 without substantive change.

(d) *Judicial arbitrations: C.C.P. 2024(b)* was repealed and replaced by *C.C.P. 2024.040(a)* in 2004 without substantive change.

(3) *Sequence and Timing of Discovery Methods. C.C.P. 2019(c)*, on the sequence and timing of discovery, was repealed and replaced by *C.C.P. 2019.020* in 2004 without substantive change.

See Reporter's Note to *C.C.P. 2019(d)*, in Hogan, 2 Cal. Civil Discovery 2d, Appendix D.





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## CHAPTER X - Discovery

### I. GENERAL PRINCIPLES

#### F. Time Limits on Discovery.

##### 2. Extensions of Time.

#### 2 Witkin Cal. Evid. Discovery § 24

[§ 24] Extensions of Time.

(1) *By Agreement.* With the consent of an affected party, the parties may agree to extend the time for completing discovery or hearing discovery motions, or may agree to reopen discovery after a new trial date has been set. The agreement may be informal, but must be confirmed in a writing specifying the extended date. It may not require the court to grant a continuance or postponement of the trial. (*C.C.P. 2024(f)*; see *Pham v. Nguyen* (1997) 54 C.A.4th 11, 18, 62 C.R.2d 422, 7 Cal. Proc. (4th), Trial, Supp., §8 [trial judge did not abuse discretion in denying continuance request stipulated to in writing by both parties; although parties claimed they had not had time to depose expert witnesses, request was made only 4 days before trial].)

(2) *By Leave of Court.* On motion, accompanied by a declaration showing a reasonable and good faith attempt at an informal resolution of each issue presented, the court may allow discovery proceedings to be completed, or a motion concerning discovery to be heard, closer to the initial trial date, or may reopen discovery after a new trial date has been set. (*C.C.P. 2024(e)*; on *F.R. Civ. P.*, Rule 56(f) [permitting court to extend discovery period for party opposing summary judgment motion], see 45 *Hastings L. J.* 1; on monetary sanctions for failure to attempt informal resolution, see *infra*, §252.) The court may consider any relevant matter in exercising its discretion to grant or deny the motion for extension of time, including the following:

(a) The need for the discovery. (*C.C.P. 2024(e)(1)*.)

(b) The diligence or lack of diligence of the moving party and the reasons that the discovery was not completed or the motion was not heard earlier. (*C.C.P. 2024(e)(2)*.)

(c) The likelihood that granting the motion will delay the trial, interfere with the trial calendar, or result in prejudice to another party. (*C.C.P. 2024(e)(3)*.)

(d) The length of time elapsed between a previous trial date and the present trial date. (*C.C.P. 2024(e)(4)*.)

The court must impose a monetary sanction under *C.C.P. 2023*, *infra*, §252, against a party, person, or attorney who unsuccessfully makes or opposes a motion to extend or reopen discovery. However, the sanction may be avoided if the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make imposing the sanction unjust. (*C.C.P. 2024(e)*.)

Except as provided by *C.C.P. 2024(e)*, a continuance or postponement of the trial date does not operate to reopen

discovery proceedings. (*C.C.P. 2024(a).*)

(3) *Extensions for Mail.* The provisions of *C.C.P. 1013* (relating to extensions of time when service is made by mail) are applicable to any discovery method or motion in *C.C.P. 2016* et seq. (*C.C.P. 2019(e)*; see *California Accounts v. Superior Court* (1975) 50 C.A.3d 483, 487, 123 C.R. 304 [defendant's answers to interrogatories served on plaintiff by mail; time for plaintiff's motion to compel further answers was 30 days plus 5 days]; see also *Karz v. Karl* (1982) 137 C.A.3d 637, 646, 187 C.R. 183 [5-day extension applicable to notice of motion to compel further answers]; on *C.C.P. 1013*, see 6 *Cal. Proc.* (4th), *Proceedings Without Trial*, §28.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *By Agreement.* *C.C.P. 2024(f)*, on agreements to extend or reopen discovery, was repealed and replaced by *C.C.P. 2024.060* in 2004 without substantive change. (2) *By Leave of Court.* *C.C.P. 2024(e)*, on motions to extend or reopen discovery by leave of court, was repealed and replaced by *C.C.P. 2024.050* in 2004 without substantive change. As before, the matters to be taken into consideration include:

(a) *Need for discovery.* (*C.C.P. 2024.050(b)(1).*)

(b) *Diligence.* (*C.C.P. 2024.050(b)(2).*)

(c) *Likelihood of delay, interference, or prejudice.* (*C.C.P. 2024.050(b)(3).*)

(d) *Length of time between previous and present trial date.* (*C.C.P. 2024.050(b)(4).*)

The portion of *C.C.P. 2024(e)* relating to monetary sanctions was repealed and replaced by *C.C.P. 2024.050(c)* in 2004 without substantive change, and the statute generally authorizing monetary sanctions (*C.C.P. 2023*) was replaced by *C.C.P. 2023.010* et seq.

The portion of *C.C.P. 2024(a)* relating to the effect of continuances and postponements was repealed and replaced by *C.C.P. 2024.020(b)* in 2004 without substantive change.

(3) *Extensions for Mail.* *C.C.P. 2019(e)*, on extensions of time where service is by mail, was repealed and replaced by *C.C.P. 2016.050* in 2004. The former statute referred to both "method of discovery" and "motion for discovery." The new statute refers to "method of discovery" and "motion." This change was intended to make clear that the statute applies to motions for protective orders as well as discovery motions. (Law Rev. Com. Comment.)



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## CHAPTER X - Discovery

### I. GENERAL PRINCIPLES

#### G. Court Implementation of Procedures.

##### 1. Discretion of Trial Judge.

#### 2 *Witkin Cal. Evid. Discovery* § 25

[§ 25] Discretion of Trial Judge.

(1) *Areas of Discretion.* Where a particular section requires a showing of "good cause" (e.g., *C.C.P. 2017(d)* regarding sexual history and *C.C.P. 2032(d)* on physical or mental examination), discretion is obviously involved. Moreover, most of the discovery procedures are subject to protective order provisions (*infra*, §241), under which the trial judge may limit discovery for good cause shown. (See *Greyhound Corp. v. Superior Court* (1961) 56 C.2d 355, 379, 15 C.R. 90, 364 P.2d 266; *Asbestos Claims Facility v. Berry & Berry* (1990) 219 C.A.3d 9, 23, 267 C.R. 896, 2 Cal. Proc. (4th), Courts, §245 [trial judges had discretion to designate defense counsel to schedule discovery for defendants in complex litigation].)

(2) *Correct Approach to Discretion.* In exercising their discretion, trial judges should consider the following:

- (a) The purpose of the information sought;
- (b) The effect that disclosure will have on the parties and on the trial;
- (c) The nature of the objections urged by the party resisting disclosure; and

(d) The ability of the court to make an alternative order granting partial disclosure, disclosure in another form, or disclosure only in the event that the party seeking the information undertakes certain specified burdens that appear just under the circumstances. (*Greyhound Corp. v. Superior Court*, *supra*, 56 C.2d 382.)

With these considerations in mind, the judge may grant the request in full, in part, or subject to specified limitations or deny the request in toto. (*Greyhound Corp. v. Superior Court*, *supra*, 56 C.2d 382; see C.J.E.R., Judges Benchbook, Civil Proceedings: Discovery §2.13 et seq.) (On continuing validity of *Greyhound's* discussion of discretion, see C.J.E.R., Judge's Benchbook, Discovery §2.17; for other discussions of discretion, see *Suezaki v. Superior Court* (1962) 58 C.2d 166, 179, 23 C.R. 368, 373 P.2d 432; *Oceanside Union School Dist. v. Superior Court* (1962) 58 C.2d 180, 192, 23 C.R. 375, 373 P.2d 439; *Hauk v. Superior Court* (1964) 61 C.2d 295, 299, 38 C.R. 345, 391 P.2d 825; *Pacific Tel. & Tel. Co. v. Superior Court* (1970) 2 C.3d 161, 171, 84 C.R. 718, 465 P.2d 854 [quoting *Greyhound*]; *Lipton v. Superior Court* (1996) 48 C.A.4th 1599, 1612, 56 C.R.2d 341.)

(3) *Abuse of Discretion.* Disclosure should not be wholly precluded merely because some annoyance or oppression is shown. If the only valid objection is an undue burden, the judge should consider the alternatives of imposing costs or partial approval. (*Greyhound Corp. v. Superior Court*, *supra*, 56 C.2d 380.) And the judge should not sustain the

technical objection that a party has proceeded under the wrong section. (56 C.2d 381.)

(4) *Trial Judge's Opinion*. Rather than entering simple orders granting or denying the right to have information disclosed, trial judges should state the reasons for their decisions. Although the judge need not always make findings as a basis of an order, "a careful trial judge, faced with a questionable request for discovery, will find some way to let the record show the basis of [the judge's] determination." (*Greyhound Corp. v. Superior Court*, *supra*, 56 C.2d 384; see *Steele v. Superior Court* (1961) 56 C.2d 402, 405, footnote 1, 15 C.R. 116, 364 P.2d 292 [trial judge denied discovery, and explained in memorandum opinion that he felt bound by prior appellate decision].)

(5) *Delegation of Discretion*. The trial judge may, on a party's application or the judge's own motion, appoint a referee to hear and determine a discovery motion or dispute. (C.C.P. 639(e); C.R.C., Rule 244.2(e).)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Areas of Discretion*. C.C.P. 2017(d), requiring a showing of good cause for discovery of plaintiff's sexual conduct with others, was repealed and replaced by C.C.P. 2017.220(a) in 2004 without substantive change.

C.C.P. 2032(d), requiring a showing of good cause in support of a motion for a physical or mental examination, was repealed and replaced by C.C.P. 2032.320(a) in 2004 without substantive change.

See *San Diego Unified Port Dist. v. Douglas E. Barnhart* (2002) 95 C.A.4th 1400, 1405, 116 C.R.2d 65 [in action arising from defects in design and construction of airport terminal floor, trial judge abused discretion in ordering all defendants to share costs of destructive testing to be performed on floor, where two defendants did not request testing and did not want it; court's inherent power to exercise reasonable control over discovery does not authorize it to require parties to incur substantial, nonrecoverable costs for unwanted discovery]. (5) *Delegation of Discretion*. C.C.P. 639(e) was relettered C.C.P. 639(a)(5) in 2000.

C.R.C., Rule 244.2(e) was renumbered C.R.C., Rule 3.920(c) in 2006.



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CHAPTER X - Discovery

I. GENERAL PRINCIPLES

G. Court Implementation of Procedures.

2. Limitations on Filing of Papers.

*2 Witkin Cal. Evid. Discovery § 26*

[§ 26] Limitations on Filing of Papers.

C.R.C., Rules 201.5 (superior courts) and 501.5 (municipal courts) curtail the filing of specified papers, including the following:

- (1) Subpena.
- (2) Subpena duces tecum.
- (3) Deposition notice, and response.
- (4) Notice of intention to record testimony by audio or video tape.
- (5) Agreement to set or extend time for deposition, agreement to extend time for response to discovery requests, and notice of these agreements.
- (6) Declaration for additional discovery.
- (7) Agreement for physical and mental examinations.
- (8) Demand for delivery of medical reports, and response.
- (9) Stipulation to enlarge the scope or number of discovery requests from that specified by statute, and notice of the stipulation.
- (10) Notice to produce party, agent, or tangible things before a court, and response.

The specified papers, whether offered separately or as attachments to other documents, "may not be filed unless offered as relevant to the determination of an issue in a law and motion proceeding or other hearing, or are ordered filed for good cause." (C.R.C., Rules 201.5(a), 501.5(a).)

Unless the paper served is a response, the party who serves a specified paper must retain the original with the original proof of service affixed. The original of a response must be served, and it must be retained by the person on whom it is served. All original papers must be retained for 6 months after final disposition of the cause, "unless the court on motion of any party and for good cause shown orders the original papers preserved for a longer period."

(C.R.C., Rules 201.5(b), 501.5(b).)

As used in these rules, "papers" include printed forms furnished by the clerk, but not notices filed and served by the clerk. (C.R.C., Rules 201.5(c), 501.5(c).)

**SUPPLEMENT:** [This section is current through the latest supplement]  
C.R.C., Rule 501.5 was repealed in 2001.

Under C.R.C., Rule 201.5(a), as amended in 2002, the filing restriction applies to:

- (1) Subpena.
- (2) Subpena duces tecum.
- (3) Deposition notice, and response.
- (4) Notice to consumer or employee, and objection.
- (5) Notice of intention to record testimony by audio- or videotape.
- (6) Notice of intention to take an oral deposition by telephone, videoconference, or other remote electronic means.
- (7) Agreement to set or extend time for deposition, agreement to extend time for response to discovery requests, and notice of these agreements.
- (8) Interrogatories, and responses or objections to interrogatories.
- (9) Demand for production or inspection of documents, things, and places, and responses or objections to demand.
- (10) Request for admissions, and responses or objections to request.
- (11) Agreement for physical and mental examinations.
- (12) Demand for delivery of medical reports, and response.
- (13) Demand for exchange of expert witnesses.
- (14) Demand for production of discoverable reports and writings of expert witnesses.
- (15) List of expert witnesses whose opinion a party intends to offer in evidence at trial and declaration.
- (16) Statement that a party does not presently intend to offer the testimony of any expert witness.
- (17) Declaration for additional discovery.
- (18) Stipulation to enlarge the scope of number of discovery requests from that specified by statute, and notice of the stipulation.
- (19) Demand for bill of particulars or an accounting, and response.
- (20) Request for statement of damages, and response, unless it is accompanied by a request to enter default and is the notice of special and general damages.
- (21) Notice of deposit of jury fees.

(22) Notice to produce party, agent, or tangible things before a court, and response.

(23) Offer to compromise, unless accompanied by an original proof of acceptance and a written judgment for the court's signature and entry of judgment.

C.R.C., Rule 201.5 was renumbered C.R.C., Rule 3.250 in 2006. C.R.C., Rule 201.5(a), *supra*, became C.R.C., Rule 3.250(a). C.R.C., Rule 201.5(b) and 201.5(c) became C.R.C., Rule 3.250(b) and 3.250(c), respectively.



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CHAPTER X - Discovery

I. GENERAL PRINCIPLES

G. Court Implementation of Procedures.

3. Modification of Procedures by Agreement.

2 *Witkin Cal. Evid. Discovery* § 27

[§ 27] Modification of Procedures by Agreement.

Unless the court orders otherwise, the parties may, by written stipulation, modify the procedures specified by the Civil Discovery Act of 1986. (*C.C.P. 2021*, based on *F.R. Civ. P., Rule 29*.) Court approval for a stipulation is not required, but the court may prohibit or veto a stipulation that *C.C.P. 2021* would otherwise permit. (Reporter's Note to *C.C.P. 2021*, in 2 Hogan, Cal. Civil Discovery, Appendix C.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*C.C.P. 2021* (written stipulation to modify discovery procedures) was repealed and replaced by *C.C.P. 2016.030* in 2004 without substantive change.

See Reporter's Note to *C.C.P. 2021*, in Hogan, 2 Cal. Civil Discovery 2d, Appendix D.





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## CHAPTER X - Discovery

## I. GENERAL PRINCIPLES

## G. Court Implementation of Procedures.

## 4. Motion To Compel.

## 2 Witkin Cal. Evid. Discovery § 28

## [§ 28] Motion To Compel.

(1) *Use of Motion.* Court involvement with discovery often results from one party making a motion to compel a response to a discovery request or compliance with a demand. (See, e.g., *C.C.P. 2025(o)*, *infra*, §70 [answer to deposition question or production of documents at deposition], 2030(*l*), *infra*, §116 [answers to interrogatories], 2031(m), *infra*, §138 [demands for inspection], 2033(*l*), *infra*, §177 [requests for admissions].)

(2) *Format of Motion.* A motion to compel further responses to interrogatories, inspection demands, or admission requests and a motion to compel answers to questions propounded at a deposition or to compel production of documents or tangible things at a deposition must be accompanied by a separate document which sets forth each interrogatory, item or category of items, request, question, document or tangible thing to which further response, answer, or production is requested, the response given, and the factual and legal reasons for compelling it. Material may not be incorporated by reference, except that the separate document may incorporate identical responses and factual and legal reasons previously stated in the document. No other statements or summaries can be required as part of the motion to compel. (C.R.C., Rule 335(a); see C.E.B., 2 Civil Discovery Practice 3d, §§7.97, 7.98, 8.55, 8.56; 1 Hogan, Cal. Civil Discovery §2.29.)

(3) *Identification of Interrogatories, Demands, or Requests.* A motion concerning interrogatories, inspection demands, or admission requests must identify the interrogatories, demands, or requests by set and number. (C.R.C., Rule 335(b).)

(4) *Reference to Other Responses.* If the response to a particular interrogatory is dependent on the response given to another interrogatory, or if the reasons a further response to a particular interrogatory is deemed necessary are based on the response to another interrogatory, the other interrogatory and its response must be set forth. (C.R.C., Rule 335(c).)

(5) *Reference to Other Documents.* If the pleadings, other documents in the file, or other items of discovery are relevant to the motion, the party relying on them must summarize each relevant document. (C.R.C., Rule 335(d).)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Use of Motion.* *C.C.P. 2025(o)*, on motions to compel answers to depositions or produce documents, was repealed and replaced by *C.C.P. 2025.480* in 2004 without substantive change.

*C.C.P. 2030(l)*, on motions to compel answers to interrogatories, was repealed and replaced by *C.C.P. 2030.300* in 2004 without substantive change.

*C.C.P. 2031(m)*, on motions to compel response to an inspection demand, was repealed and replaced by *C.C.P. 2031.310* in 2004 without substantive change.

*C.C.P. 2033(l)*, on motions to compel further response to a request for admissions, was repealed and replaced by *C.C.P. 2033.290* in 2004 without substantive change.

(2) *Format of Motion*. C.R.C., Rule 335 was amended effective July 1, 2001, and was renumbered C.R.C., Rule 3.1020 in 2006.

Under C.R.C., Rule 3.1020(a), any motion involving the content of a discovery request or the responses to a discovery request must be accompanied by a "separate statement," as defined in C.R.C., Rule 3.1020(c), *infra*, this section. The motions subject to this requirement include: (a) a motion to compel further responses to requests for admission; (b) a motion to compel further responses to interrogatories; (c) a motion to compel further responses to demand for inspection of documents or tangible things; (d) a motion to compel answers at a deposition; (e) a motion to compel or to quash the production of documents or tangible things at a deposition; (f) a motion for a medical examination over objection; and (g) a motion for issue or evidentiary sanctions.

Under C.R.C., Rule 3.1020(b), a separate statement is not required when no response has been provided to the discovery request.

Under C.R.C., Rule 3.1020(c), a separate statement is defined as "a separate document filed and served with the discovery motion that sets forth all the information necessary to understand each discovery request and all the responses to it that are at issue." The statement must be full and complete so that no person need review any other document in order to determine the full request and the full response. Material may not be incorporated into the statement by reference, and the statement must include, for each discovery request to which a further response, answer, or production is requested:

"(1) The text of the request, interrogatory, question, or inspection demand;"

"(2) The text of each response, answer, or objection, and any further responses or answers;"

"(3) A statement of the factual and legal reasons for compelling further responses, answers, or production as to each matter in dispute;"

"(4) If necessary, the text of all definitions, instructions, and other matters required to understand each discovery request and the responses to it;"

"(5) If the response to a particular discovery request is dependent on the response given to another discovery request, or if the reasons a further response to a particular discovery request is deemed necessary are based on the response to some other discovery request, the other request and the response to it must be set forth; and"

"(6) If the pleadings, other documents in the file, or other items of discovery are relevant to the motion, the party relying on them shall summarize each relevant document."

See C.E.B., 2 Civil Discovery Practice 4th, §15.30 et seq.; Hogan, 1 Cal. Civil Discovery 2d, §2.29.(3) *Identification of Interrogatories, Demands, or Requests*. C.R.C., Rule 335(b) was relettered C.R.C., Rule 335(d) without substantive change, effective July 1, 2001, and was renumbered C.R.C., Rule 3.1020(d) in 2006.

(4) *Reference to Other Responses*. C.R.C., Rule 335(c) was repealed effective July 1, 2001, and was replaced by an expanded C.R.C., Rule 335(c), incorporating the requirements of the former subdivision into C.R.C., Rule 335(c)(5). C.R.C., Rule 335(c)(5) was renumbered C.R.C., Rule 3.1020(c)(5) (see *supra*) in 2006.

(5) *Reference to Other Documents*. C.R.C., Rule 335(d) was repealed effective July 1, 2001. The requirements of

the former subdivision were incorporated into C.R.C., Rule 335(c)(6). C.R.C., Rule 335(c)(6) was renumbered C.R.C., Rule 3.1020(c)(6) (see *supra*) in 2006.

(6) *(New) Effect of Failure To Oppose Motion.* Failure to file a written opposition or to appear at a hearing, or the voluntary provision of discovery, does not constitute an admission that the motion was proper or that sanctions should be awarded. (C.R.C., Rule 3.1030(b), adopted effective July 1, 2001, and renumbered in 2006.)



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## CHAPTER X - Discovery

### II. DEPOSITIONS

#### A. In General.

#### 1. Nature of Deposition.

#### 2 Witkin Cal. Evid. Discovery § 29

#### [§ 29] Nature of Deposition.

A deposition is a *written* declaration, made under oath. The adverse party is given notice of the deposition so that the party may attend and cross-examine. (*C.C.P. 2004.*) A deposition is one of the three modes by which testimony may be taken. (*C.C.P. 2002.*) (See *C.J.E.R.*, Judges Benchbook, Civil Proceedings: Discovery, Chaps. 10, 11; *Cal. Civil Practice*, 2 Procedure, §13:19 et seq.; *C.E.B.*, 1 Civil Discovery Practice 3d, Chaps. 4, 5, 6; 1 Hogan, *Cal. Civil Discovery* 3d, Chaps. 2, 3; 2 *C.E.B.*, Civil Lit. Forms, §24.1 et seq.; 23 *Am.Jur.2d* (1983 ed.), *Depositions and Discovery* §108 et seq.; 4 *Am.Jur.* Trials 119; on use of depositions with other discovery tools, see Dunne on Depositions in California, Chap. 1.)

"The term 'deposition' is now confined in meaning to testimony delivered in writing; testimony which in legal contemplation does not exist apart from a writing made or adopted by the witness. In practice the witness usually does not write out the statements but testifies before a commissioner authorized by the court to receive and transmit it and to act as the transcriber of the oral utterance. Since it is an intermediary who makes the writing which becomes the testimony, it is specially necessary to be certain that this writing shall represent precisely the statements for which the witness stands responsible. ... The witness' signature may be regarded either as necessary to constitute the writing his by adoption, or as symbolically equivalent to a knowing assent to its tenor, or as an additional means of identifying the person of the witness." (*Voorheis v. Hawthorne-Michaels Co.* (1957) 151 *C.A.2d* 688, 693, 312 *P.2d* 51; see 3 *Wigmore* (Chadbourn Rev.) §802; on necessity of signature, see *C.C.P. 2025(q)*, *infra*, §§74, 75; 8A *Am.Jur.* P.P. Forms (1996 ed.), *Depositions and Discovery*, Form 56; on recording by videotape, see *infra*, §67 et seq.; on right of defendant in criminal contempt proceeding to obtain information by deposition, see 33 *A.L.R.5th* 761.)

A deposition is said to be a proceeding of the court in which the action is being tried, and under its control. This is so despite the fact that a nonjudicial officer may take the testimony; by giving this authority to such a person, the law makes him or her an *ex officio* officer of the court for the purposes of the deposition. (See *Hays v. Superior Court* (1940) 16 *C.2d* 260, 265, 105 *P.2d* 975.) However, taking a deposition for discovery purposes should be distinguished from its evidentiary use at the trial. (See 3 *Cal. Evidence* (4th), *Presentation at Trial*, §153 et seq.; *BAJI* (8th ed.), No. 2.06 [treatment of testimony read from deposition].)

California recognizes both oral depositions (*infra*, §39 et seq.) and depositions by written questions (*infra*, §80 et seq.) as separate and distinct discovery devices. The general rules set out in *C.C.P. 2025* et seq. (*infra*, §30 et seq.) apply to both types of depositions. (See *C.C.P. 2028(a)*.) However, written depositions have special rules governing matters such as notice of the deposition, service of questions, and procedure for taking the deposition. (See *C.C.P. 2028*, *infra*, §80.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2025* et seq., on depositions generally, were repealed and replaced by *C.C.P. 2025.010* et seq. in 2004 without substantive change. *C.C.P. 2025(q)*, on the signature requirement applicable to written depositions, was replaced by *C.C.P. 2025.520* and *2025.530*.

*C.C.P. 2028*, on depositions by written questions, was repealed and replaced by *C.C.P. 2028.010* et seq. in 2004 without substantive change. *C.C.P. 2028(a)*, making oral deposition procedures applicable, was replaced by *C.C.P. 2028.010*.

See CACI, No. 208 [deposition testimony as evidence]; 25 California Lawyer 34 (January 2005) [deposition ethics]; C.E.B., 1 Civil Discovery Practice 4th, Chaps. 5 and 6; Hogan, 1 Cal. Civil Discovery 2d, Chaps. 2, 3; 87 Am.Jur. Trials 1 [preparing witness for deposition]; 8A Am.Jur. P.P. Forms (2004 ed.), Depositions and Discovery, Form 47. *West's Key Number Digest*, Pretrial Procedure k.91



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## CHAPTER X - Discovery

### II. DEPOSITIONS

#### A. In General.

#### 2. Whose Deposition May Be Taken.

##### a. General Rule.

2 Witkin Cal. Evid. Discovery § 30

[§ 30] General Rule.

(1) *Broad Rule of Discovery.* A party may take the oral deposition of *any person*, including any party to the action. "Person" includes a natural person, a public or private corporation, a partnership, an association, or a government entity. (C.C.P. 2025(a).) A party may also take a deposition using written questions instead of an oral examination. (C.C.P. 2028(a), *infra*, §80.) No showing of good cause is necessary. (*Kramer v. Superior Court* (1965) 237 C.A.2d 753, 755, 47 C.R. 317.) (See C.E.B., 1 Civil Discovery Practice 3d, §4.7 et seq.)

(2) *Illustrations.* The following cases and authorities illustrate the taking of depositions of various parties and witnesses in civil actions.

(a) *Adverse party.* (See *Emerson Elec. Co. v. Superior Court* (1997) 16 C.4th 1101, 68 C.R.2d 883, 946 P.2d 841; *Rifkind v. Superior Court* (1994) 22 C.A.4th 1255, 27 C.R.2d 822.) (On deposition of opposing counsel, see *infra*, §§31, 62.)

(b) *Coparty.* (See *Eades v. Los Angeles Ry. Corp.* (1919) 43 C.A. 259, 260, 184 P. 884 [one defendant took another defendant's deposition, although held objectionable for lack of notice].)

(c) *Ordinary witness.* (See *Ahern v. Superior Court* (1952) 112 C.A.2d 27, 31, 245 P.2d 568; 45 Cal. L. Rev. 486, 499.)

(d) *Law enforcement officers.* (See Govt.C. 68097.6, 2 Cal. Evidence (4th), Witnesses, §4.)

(e) *Unnamed parties in class action.* (See *Southern Calif. Edison Co. v. Superior Court* (1972) 7 C.3d 832, 103 C.R. 709, 500 P.2d 621, *infra*, §64; *Carlson v. Superior Court* (1973) 33 C.A.3d 640, 109 C.R. 240, *infra*, §64; 6 Loyola L.A. L. Rev. 556.)

(f) *Party taking own deposition.* Although the discovery purpose is lacking, a party suing or being sued in another state might wish to introduce his or her testimony by deposition instead of attending trial. California's prior decisions approved the practice without extended discussion. (See *Johnston v. McDuffee* (1890) 83 C. 30, 32, 23 P. 214; *Kay v. Laventhal* (1926) 78 C.A. 293, 297, 248 P. 555; see 13 A.L.R.3d 1312 [use of own testimony given in deposition taken by opponent]; on testimony at trial by deposition, see C.C.P. 2025(u)(3), 3 Cal. Evidence (4th), *Presentation at Trial*, §155.)

(g) *Corporate or association officer or employee.* (See *Chronicle Publishing Co. v. Superior Court* (1960) 54 C.2d 548, 561, 7 C.R. 109, 354 P.2d 637 [deposition of State Bar of California taken]; *Mosier v. Southern Calif. Physicians Ins. Exchange* (1998) 63 C.A.4th 1022, 1030, 74 C.R.2d 550 [defendant's employee's deposition used at trial because employee was ill]; 74 Harv. L. Rev. 940, 1026; 98 A.L.R.2d 622; but see *Liberty Mut. Ins. Co. v. Superior Court* (1992) 10 C.A.4th 1282, 1289, 13 C.R.2d 363, *infra*, §62 [plaintiff could not depose corporate CEO who had no involvement in action].)

(h) *Expert witness.* (See *St. Mary Med. Center v. Superior Court* (1996) 50 C.A.4th 1531, 1537, 58 C.R.2d 182 [deposition of expert used in connection with summary judgment motion]; C.C.P. 2034(i), *infra*, §188; C.E.B., 2 Civil Discovery Practice 3d, §11.43 et seq.)

(i) *Highly placed public officers.* In *State Board of Pharmacy v. Superior Court* (1978) 78 C.A.3d 641, 144 C.R. 320, a consumer organization was successful in an action against the State Board of Pharmacy and was awarded reasonable attorneys' fees to be later determined. The organization attempted to take the deposition of the Attorney General on the ground that he had special knowledge and unique ability to assess the impact of the case and apply the factors relevant to fixing fees; i.e., his services as an expert witness were sought. (78 C.A.3d 643, 644.) The appellate court granted mandamus to quash the subpoena, observing that a highly placed public officer should not be required to give a deposition in his official capacity in the absence of compelling reasons. (78 C.A.3d 644, citing several federal cases supporting this accepted view.) (See *Nagle v. Superior Court* (1994) 28 C.A.4th 1465, 1467, 1468, 34 C.R.2d 281 [action against Employment Development Department and current and former directors; directors entitled to protective order prohibiting their depositions, as plaintiff did not contend that they had personal knowledge of material issue, and plaintiff could obtain information through less intrusive means].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Broad Rule of Discovery.* C.C.P. 2025(a), defining "person," was repealed and replaced by C.C.P. 2025.010 in 2004 without substantive change.

C.C.P. 2028(a) (deposition by written questions) was repealed and replaced by C.C.P. 2028.010 in 2004 without substantive change.

See C.E.B., 1 Civil Discovery Practice 4th, §5.6 et seq.

(2) *Illustrations.*(f) *Party taking own deposition.* C.C.P. 2025(u)(3), on testimony at trial by deposition, was repealed and replaced by C.C.P. 2025.620(c) in 2004 without substantive change.

(h) *Expert witness.* C.C.P. 2034(i), on the deposition of expert witnesses, was repealed and replaced by C.C.P. 2034.410 et seq. in 2004 without substantive change.

(i) *Highly placed public officers.* See *Westly v. Superior Court* (2004) 125 C.A.4th 907, 911, 23 C.R.3d 154 [in action to require state to collect money belonging to state under compacts with Indian tribes and place it in special distribution fund, trial judge abused discretion in denying protection orders preventing deposing of Attorney General and Controller; neither official had personal involvement in action that would preclude application of general rule that agency heads and other top governmental executives should not be subject to deposition absent compelling reasons]. *West's Key Number Digest*, Pretrial Procedure k.96 et seq.



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## CHAPTER X - Discovery

### II. DEPOSITIONS

#### A. In General.

#### 2. Whose Deposition May Be Taken.

##### b. Opposing Counsel.

*2 Witkin Cal. Evid. Discovery § 31*

#### [§ 31] Opposing Counsel.

In some circumstances, a party may wish to depose counsel for the opposing party. For example, when preparing for a hearing to determine the good faith of a sliding scale settlement under *C.C.P. 877.6*, the settling parties may seek to depose counsel for the nonsettling defendants to inquire whether the nonsettling defendants may have been guilty of bad faith or unreasonable conduct that impeded the settlement process and thereby made a lower settlement reasonable. (See *Spectra-Physics v. Superior Court* (1988) 198 C.A.3d 1487, 1490, 244 C.R. 258 [referring to settlement process discussed in *Abbott Ford v. Superior Court* (1987) 43 C.3d 858, 239 C.R. 626, 741 P.2d 124]; on *C.C.P. 877.6* and *Abbott Ford*, see 5 Summary (9th), Torts, §§80, 81.)

*Spectra-Physics* explores the policy considerations involved in the settling party's attempt to depose opposing counsel, and concludes that the order permitting the deposition was not justified.

(a) "In the context of establishing the good faith of a settlement, reliance on advice of counsel is not obviously relevant; the objective reasonableness of the settlement is the matter in issue. ... Hence deposing counsel in this context will have limited usefulness at best. We also consider that deposing counsel during the very proceeding in which he is providing representation is plainly a disruptive process. Further, the likelihood the attorney will assert claims of work product and attorney-client privilege is great, and therefore, as already stated, the usefulness of the procedure is questionable." (198 C.A.3d 1496.)

(b) "The circumstances under which opposing counsel may be deposed are limited to those where (1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and not privileged; (3) the information is crucial to the preparation of the case." (198 C.A.3d 1496.)

(c) In the present case, the settling party had other means to obtain information, and the information was not crucial. Hence, "we conclude that the showing made by [the deposing party] up to now simply does not justify this unpalatable procedure which erodes the adversary system and adds to the already burdensome time and costs of the good faith settlement hearing, which already in *Abbott Ford's* wake threatens to evolve from mini-trial to full dress production approaching in cost and scope the trial to come." (198 C.A.3d 1497.) (See *Trade Center Properties v. Superior Court* (1960) 185 C.A.2d 409, 411, 8 C.R. 345, *infra*, §62 [absent showing of "extremely good cause," plaintiff could not depose defendant's attorney to obtain copy of statement taken by attorney from third party]; *Estate of Ruchi* (1993) 12 C.A.4th 1593, 1601, 16 C.R.2d 151 [in probate proceedings, trial judge properly granted protective order to prevent decedent's son from deposing coexecutors' attorney, where three-part test of *Spectra-Physics* was not satisfied].)



**SUPPLEMENT:** [This section is current through the latest supplement]

See *Carehouse Convalescent Hosp. v. Superior Court* (2006) 143 C.A.4th 1558, 1564, 50 C.R.3d 129 [in action against skilled nursing facility, trial judge erred in granting plaintiffs' motion to compel counsel for defendant to provide, by deposition if necessary, response to request for information compiled by counsel concerning defendant's staffing logs; information was protected by work product doctrine, and plaintiffs failed to show that they had no other means of obtaining information or that it was crucial to case].

*Cross-Reference:* 5 Summary (10th), Torts, §102.



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## CHAPTER X - Discovery

### II. DEPOSITIONS

#### A. In General.

#### 3. Time When Deposition May Be Taken.

##### a. By Plaintiff.

*2 Witkin Cal. Evid. Discovery § 32*

[§ 32] By Plaintiff.

The former federal rule provided a 20-day waiting period for the plaintiff (except by leave of court), to permit the defendant to obtain counsel and prepare for the inquiry. This waiting period was adopted in California. The plaintiff may serve a deposition notice without leave of court 20 or more days after the service of the summons on, or appearance by, *any* defendant. However, on motion with or without notice, the court, for good cause shown, may grant a plaintiff leave to serve a deposition notice on an earlier date. (*C.C.P. 2025(b)(2)*; see C.E.B., 1 Civil Discovery Practice 3d, §4.23 et seq.; 1 Hogan, Cal. Civil Discovery §2.2; on latest time that deposition may be taken, see *supra*, §23; on notice requirements, which affect time of taking, see *infra*, §§39, 42, 49; for detailed discussion of matters to be considered when scheduling depositions, see Dunne on Depositions in California, Chap. 3.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2025(b)(2)*, on the time for service of a deposition notice by the plaintiff, was repealed and replaced by *C.C.P. 2025.210(b)* in 2004 without substantive change.

See C.E.B., 1 Civil Discovery Practice 4th, §5.16 et seq.; Hogan, 1 Cal. Civil Discovery 2d, §2.2. *West's Key Number Digest*, Pretrial Procedure k.122-



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II. DEPOSITIONS

A. In General.

3. Time When Deposition May Be Taken.

b. By Defendant.

2 *Witkin Cal. Evid. Discovery* § 33

[§ 33] By Defendant.

The 20-day waiting period does not apply to the defendant. The defendant may serve a deposition notice without leave of court at any time after he or she has been served or has appeared in the action, whichever occurs first. (*C.C.P.* 2025(b)(1).) Hence, the defendant may ordinarily take depositions before the plaintiff. (On order of taking and priority, see *C.E.B.*, 1 *Civil Discovery Practice* 3d, §4.24; 1 *Hogan*, *Cal. Civil Discovery* §§2.2, 2.3; 74 *Harv. L. Rev.* 940, 954; on sequence and timing of discovery generally, see *supra*, §23.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P.* 2025(b)(1), on the time for service of a deposition notice by the defendant, was repealed and replaced by *C.C.P.* 2025.210(a) in 2004 without substantive change.

See *C.E.B.*, 1 *Civil Discovery Practice* 4th, §5.16; *Hogan*, 1 *Cal. Civil Discovery* 2d, §2.2.



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## CHAPTER X - Discovery

### II. DEPOSITIONS

#### A. In General.

#### 3. Time When Deposition May Be Taken. c. Continuance.

2 Witkin Cal. Evid. Discovery § 34

[§ 34] Continuance.

(1) *Continuance of Main Action or Proceeding.* A continuance may be granted in the action to permit a party to take a deposition or to be present at the taking of a deposition instituted by another. (See *Levin v. Superior Court* (1934) 139 C.A. 693, 696, 34 P.2d 832 [continuance to take]; *Neil v. Gane* (1932) 124 C.A. 51, 54, 12 P.2d 131 [same]; *Bar Assn. v. Superior Court* (1923) 64 C.A. 590, 593, 222 P. 185 [continuance so party could appear]; but see *Pham v. Nguyen* (1997) 54 C.A.4th 11, 17, 62 C.R.2d 422 [court did not abuse its discretion in denying stipulated request for continuance 4 days before trial based on parties' need to depose expert witnesses].)

(2) *Continuance or Stay of Deposition.* On a motion or ex parte application and a showing of good cause, the court may stay the taking of a deposition until the determination of a motion for a protective order (see *infra*, §§59 et seq., 82). (C.C.P. 2025(f); see *Weisman v. Bower* (1987) 193 C.A.3d 1231, 1235, 238 C.R. 756 [deposition stayed pending motion for protective order; order later denied].) A deposition may also be stayed pending determination of a written objection to the procedure specified in the deposition notice. (C.C.P. 2025(g), *infra*, §48; see *Melancon v. Superior Court* (1954) 42 C.2d 698, 707, 268 P.2d 1050 [shareholder's derivative suit; postponement pending compliance with order for deposit of security]; on continuance where party, principal witness or attorney is member of Legislature, see C.C.P. 595, 595.1.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Continuance or Stay of Deposition.* C.C.P. 2025(f), on stays for the purpose of determining a protective order motion, was repealed and replaced by C.C.P. 2025.270(c) in 2004 without substantive change. C.C.P. 2025.270(c) was relettered C.C.P. 2025.270(d) in 2007.

C.C.P. 2025(g), on stays for the purpose of ruling on written objections to procedures specified in the deposition notice, was repealed and replaced by C.C.P. 2025.410(c) in 2004 without substantive change.



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## CHAPTER X - Discovery

### II. DEPOSITIONS

#### A. In General.

#### 4. Before Whom Deposition May Be Taken.

*2 Witkin Cal. Evid. Discovery § 35*

[§ 35] Before Whom Deposition May Be Taken.

(1) *Persons Authorized.* A deposition in California must be taken by an officer authorized to administer oaths, except that the officer for a deposition seeking only discovery of business records for copying (see *infra*, §50 et seq.) must be a professional photocopier (*C.C.P. 2020(d)(3)*). (*C.C.P. 2025(k)*; see *C.E.B.*, 1 Civil Discovery Practice 3d, §4.39; 1 Hogan, Cal. Civil Discovery §2.21; for definition of professional photocopier, see *B. & P.C. 22450*.) Officers authorized to administer oaths include judges, court clerks, justices, notaries public, and certified shorthand reporters. (See *C.C.P. 2093*; see also *C.C.P. 128(a)(7)* [courts]; *C.C.P. 177(4)* [judicial officers], 179(3) [judges]; *C.C.P. 259(d)* [court commissioners]; *Govt.C. 24057* [county officers and their deputies].) (On depositions taken in other states or in federal territories or possessions, see *C.C.P. 2026(c)*, *infra*, §84; on depositions taken in foreign countries, see *C.C.P. 2027(c)*, *infra*, §84.)

Although judges are authorized to take depositions, their usual role consists instead of responding to motions to compel or motions for protective orders, brought when the parties are unable to manage the deposition process without judicial intervention. (See *C.J.E.R.*, Judges' Benchbook, Discovery §10.1.)

(2) *Persons Excluded.* The officer may not be financially interested in the action and may not be a relative or employee of a party or a party's attorney. (*C.C.P. 2025(k)*; see *C.C.P. 2020(d)(3)* [similar provision for professional photocopier serving as deposition officer]; but see *infra*, §36 [deposition by stipulation].)

(3) *Objections.* An objection to a deposition officer's qualifications must be made before the deposition begins or as soon thereafter as the ground for the objection becomes known or could be discovered by reasonable diligence. (*C.C.P. 2025(k)*; see *C.C.P. 2020(d)(3)* [similar provision for professional photocopier serving as deposition officer].)

Taking a deposition before one other than the person named is an inconsequential irregularity. (See *Reimel v. House* (1969) 268 C.A.2d 780, 786, 74 C.R. 345 [administrative proceeding; petition named notary D, actually taken before notary N, equally qualified].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Persons Authorized.* *C.C.P. 179(3)* became *C.C.P. 179(c)* in 2003.

*C.C.P. 259(d)*, authorizing court commissioners to take oaths, was deleted in 2004 as obsolete. Under *C.C.P. 2093(a)*, "every officer or person authorized to take testimony in any action or proceeding, or to decide upon evidence, has the power to administer oaths or affirmations."

*C.C.P. 2020(d)(3)* (professional photocopier requirement) was repealed and replaced by *C.C.P. 2020.420* in 2004 without substantive change.

*C.C.P. 2025(k)* (requirements applicable to deposition officer) was repealed and replaced by *C.C.P. 2025.320* in 2004 without substantive change.

*C.C.P. 2026(c)* (depositions taken in other states) was repealed and replaced by *C.C.P. 2026.010(d)* in 2004 without substantive change.

*C.C.P. 2027(c)* (depositions taken abroad) was repealed and replaced by *C.C.P. 2027.010(d)* in 2004 without substantive change.

See C.E.B., 1 Civil Discovery Practice 4th, §5.72; Hogan, 1 Cal. Civil Discovery 2d, §2.21.(2) *Persons Excluded*. *C.C.P. 2020(d)(3)*, prohibiting a deposition officer who is a professional photocopier from having a financial interest in the action, was repealed and replaced by *C.C.P. 2020.420* in 2004 without substantive change.

*C.C.P. 2025(k)* was subdivided and amended in 2000 to impose additional restrictions relating to the deposition officer's financial interest. The provision cited in the text was redesignated *C.C.P. 2025(k)(1)*. Under *C.C.P. 2025(k)(2)*, any services and products offered by the officer, or by the entity providing the services of the officer, must be offered to all parties or their attorneys attending the deposition. At the request of any party or any party's attorney attending the deposition, a party or party's attorney attending the deposition must enter in the record all services and products made available to the party or party's attorney, or to a third party who is financing all or part of the action, by the officer or by the entity providing the services of the officer. (*C.C.P. 2025(k)(4)*.) The officer or entity providing the services of the officer may not provide any service or product consisting of the officer's notations or comments regarding the demeanor of any witness, attorney, or party present at the deposition to any party, party's attorney, or third party who is financing all or part of the action; the officer or entity providing the officer's services is also prohibited from collecting any personal identifying information about the witness as a service or product to be provided to any party or third party who is financing all or part of the action. (*C.C.P. 2025(k)(3)*.)

*C.C.P. 2025(k)* was repealed and replaced by *C.C.P. 2025.320* in 2004 without substantive change.

Any violation of *C.C.P. 2025.320* is punishable by a civil penalty of up to \$ 5,000. (*C.C.P. 2025.320(f)*, added in 2000 as *C.C.P. 2025(v)* and repealed and replaced in 2004 without substantive change.)

### (3) *Objections.*

The portion of *C.C.P. 2025(k)* relating to objections to a deposition officer's qualifications was designated *C.C.P. 2025(k)(5)* in 2000.

*C.C.P. 2025(k)* was repealed and replaced by *C.C.P. 2025.320* in 2004 without substantive change. The portion of *C.C.P. 2025(k)* relating to objections became *C.C.P. 2025.320(e)*. *West's Key Number Digest*, Pretrial Procedure k.138



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### II. DEPOSITIONS

#### A. In General.

#### 5. Deposition by Stipulation.

2 Witkin Cal. Evid. Discovery § 36

[§ 36] Deposition by Stipulation.

Attorneys often stipulate to the manner of taking the deposition, thereby avoiding compliance with many of the statutory requirements. The stipulation may be (and preferably is) made in written form in advance, but is sometimes made orally at the time of taking. (See *Estate of Short* (1935) 7 C.A.2d 512, 516, 517, 47 P.2d 555; *Lawson v. Steinbeck* (1919) 44 C.A. 685, 689, 186 P. 842; *Consolidated Lumber Co. v. Fidelity & Deposit Co. of Maryland* (1911) 161 C. 397, 401, 119 P. 506; *Housing Authority v. Gomez* (1972) 26 C.A.3d 366, 372, 102 C.R. 657 [defendant's change of residence to Spain furnished no basis for his refusal to appear for deposition on date to which attorney stipulated]; for forms, see C.E.B., 1 Civil Discovery Practice 3d, §§4.43, 4.150; 2 C.E.B., Civil Lit. Forms, §24.5; 8A Am.Jur. P.P. Forms (1996 ed.), Depositions and Discovery §31 et seq.; on stipulations generally, see 1 Cal. Proc. (4th), Attorneys, §289 et seq.)

The practice is recognized by *C.C.P. 2021*: Unless the court orders otherwise, the parties may stipulate in writing that depositions may be taken "before any person, at any time or place, on any notice, and in any manner" and that these depositions may be used like other depositions.

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2021* was repealed and replaced by *C.C.P. 2016.030* in 2004. *C.C.P. 2016.030* provides that the parties may by written stipulation modify the procedures for "any method of discovery" permitted by *C.C.P. 2019.010* (Supp., supra, §2).

See 8A Am.Jur. P.P. Forms (2004 ed.), Depositions and Discovery, Form 5 et seq.; C.E.B., 1 Civil Discovery Practice 4th, §5.50.



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## CHAPTER X - Discovery

### II. DEPOSITIONS

#### A. In General.

#### 6. Multiple Depositions.

2 Witkin Cal. Evid. Discovery § 37

#### [§ 37] Multiple Depositions.

(1) *General Prohibition.* Once a party has taken the deposition of a natural person, including another party, neither the party taking the deposition nor any party who received notice of the deposition may take a subsequent deposition of that deponent. (*C.C.P. 2025(t)*; see *C.E.B.*, 1 Civil Discovery Practice 3d, §4.19; 1 Hogan, Cal. Civil Discovery §2.36.) *C.C.P. 2025(t)* had no counterpart in the former discovery statutes. "It reflects the Commission's decision that in order to minimize the demands that depositions make on the time and energy of the deponent, a person should normally be subjected to the experience only once during the course of a lawsuit." (Reporter's Note to *C.C.P. 2025(t)*, in 2 Hogan, Cal. Civil Discovery, Appendix C.)

(2) *Exceptions.* *C.C.P. 2025(t)* does not preclude one subsequent deposition of a natural person who was previously deposed (a) as an officer, agent or employee of an organization, or (b) pursuant to a court order under *C.C.P. 485.230*, for the limited purpose of discovering under that statute, the identity, location, and value of property in which the deponent has an interest. However, this does not authorize the taking of more than one subsequent deposition for the limited purpose of *C.C.P. 485.230*. (*C.C.P. 2025(t)*; on *C.C.P. 485.230*, see 6 Cal. Proc. (4th), *Provisional Remedies*, §89.)

For good cause, the court may grant leave to take a subsequent deposition. Moreover, the parties, with the consent of a deponent who is not a party, may stipulate that a subsequent deposition be taken. (*C.C.P. 2025(t)*.) Finally, because *C.C.P. 2025(t)* applies to natural persons, multiple depositions of organizations are not prohibited.

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *General Prohibition.* *C.C.P. 2025(t)*, prohibiting subsequent depositions, was repealed and replaced by *C.C.P. 2025.610(a)* in 2004 without substantive change.

See *C.E.B.*, 1 Civil Discovery Practice 4th, §5.15; Hogan, 1 Cal. Civil Discovery 2d, §2.36.

(2) *Exceptions.* The portion of *C.C.P. 2025(t)* stating exceptions to the prohibition of subsequent depositions was repealed and replaced by *C.C.P. 2025.610(b)-(d)* in 2004 without substantive change.





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II. DEPOSITIONS

A. In General.

7. Costs of Deposition.

2 *Witkin Cal. Evid. Discovery* § 38

[§ 38] Costs of Deposition.

The prevailing party in an action may recover the costs of taking, videotaping, and transcribing depositions, including an original and one copy of depositions taken by the claimant and one copy of depositions taken by the party against whom costs are allowed. Travel expenses to attend depositions are also allowable as costs. (*C.C.P. 1033.5(a)(3)*, 7 *Cal. Proc.* (4th), *Judgment*, §125; see 1 Hogan, *Cal. Civil Discovery* §2.43; 74 *Harv. L. Rev.* 940, 972; 76 A.L.R.2d 953.) These deposition costs are allowed even if the deposition is ultimately not used for evidentiary purposes. (*Simpson v. Gillis* (1934) 1 *C.2d* 42, 55, 32 *P.2d* 1071.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See Hogan, 1 *Cal. Civil Discovery* 2d, §2.43.



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### II. DEPOSITIONS

#### B. Oral Depositions.

#### 1. Securing Deponent's Attendance.

##### a. Party Deponent.

##### 1. Notice Requirements.

#### 2 *Witkin Cal. Evid. Discovery* § 39

#### [§ 39] Notice Requirements.

(1) *Statutory Requirement.* A party may depose any party to the action. (See *C.C.P. 2025(a)*, supra, §30.) Before taking the oral deposition of a party, the deposing party must give notice in writing to every party who has appeared in the action. (*C.C.P. 2025(c)*; see Rutter Group, 2 Civil Procedure Before Trial, §8:483 et seq.; C.E.B., 1 Civil Discovery Practice 3d, §4.44; 1 Hogan, Cal. Civil Discovery §2.4 et seq.; 23 *Am.Jur.2d* (1983 ed.), *Depositions and Discovery* §139 et seq.) Because the notice must be given only to parties who have appeared, notice to an adverse party in default is unnecessary.

(2) *No Subpena Required.* The service of a deposition notice alone is effective to require a party or an officer, director, managing agent or employee of a party to attend and testify and to produce any document or tangible thing for inspection and copying. (*C.C.P. 2025(h)(1)*; on motion to compel party's attendance and production, see infra, §57.) *C.C.P. 1986.5* gives a witness who is subpoenaed for a deposition the right to demand mileage and 1 day's fees. Because no subpoena is required for the taking of a party's deposition, the party is not entitled to such compensation. (*Di Napoli v. Superior Court* (1967) 252 *C.A.2d* 202, 204, 60 *C.R.* 394; on subpoena requirements for nonparty deponent, see infra, §42 et seq.; on fees for nonparty deponent, see infra, §46.)

A former provision dispensing with the need for a subpoena for the deposition "of a person for whose immediate benefit an action or proceeding is prosecuted or defended" (former *C.C.P. 2019(a)(4)*) was not continued in the Civil Discovery Act of 1986. The Commission reasoned that "little is achieved by encumbering the Discovery Act with this language permitting such special treatment for an 'immediate beneficiary.' " (Reporter's Note to *C.C.P. 2025(h)*, in 2 Hogan, Cal. Civil Discovery, Appendix C.) With or without the provision, subpoenas are not required for unnamed parties in a class action. (See *Southern Calif. Edison Co. v. Superior Court* (1972) 7 *C.3d* 832, 840, 103 *C.R.* 709, 500 *P.2d* 621, infra, §64 [relying on former provision]; 1 Hogan, Cal. Civil Discovery §2.11 [outcome of *Southern Calif. Edison Co.* was not affected by deletion of provision].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Statutory Requirement.* *C.C.P. 2025(a)*, providing that a party may depose any other party, was repealed and replaced by *C.C.P. 2025.010* in 2004 without substantive change.

*C.C.P. 2025(c)*, requiring notice in writing, was repealed and replaced by *C.C.P. 2025.220* in 2004 without substantive change.

See C.E.B., 1 Civil Discovery Practice 4th, §5.52 et seq.; Hogan, 1 Cal. Civil Discovery 2d, §2.4 et seq.; on notice of oral deposition by telephone, videoconference, or other remote electronic means, see Supp., *infra*, §79A.

(2) *No Subpena Required.* *C.C.P. 2025(h)(1)*, providing that service of a deposition notice is sufficient to require attendance, was repealed and replaced by *C.C.P. 2025.280(a)* in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §2.11; Reporter's Note to *C.C.P. 2025(h)*, in Hogan, 2 Cal. Civil Discovery 2d, Appendix D. *West's Key Number Digest*, Pretrial Procedure k.123 et seq.



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## CHAPTER X - Discovery

### II. DEPOSITIONS

#### B. Oral Depositions.

1. Securing Deponent's Attendance.
  - a. Party Deponent.
2. Contents of Notice.

2 Witkin Cal. Evid. Discovery § 40

[§ 40] Contents of Notice.

(1) *Requirements.* The notice must include the following:

(a) A list of all the parties or attorneys on whom it is served. (*C.C.P. 2025(c)* [list may be included in the accompanying proof of service].)

(b) The date, time and place of the deposition. (*C.C.P. 2025(d)(1), 2025(d)(2).*)

(c) The deponent's name. (*C.C.P. 2025(d)(3).*)

(d) A list of any materials or category of materials to be produced by the deponent, specified "with reasonable particularity." (*C.C.P. 2025(d)(4).*)

(e) Any intention to make an audiotape or videotape record in addition to the general stenographic record or to record the testimony by stenographic method through instant visual display of the testimony (*C.C.P. 2025(d)(5)*), and any intention to reserve the right to use at trial a videotaped deposition of a physician or expert witness (*C.C.P. 2025(d)(6)*). (On audiotaped or videotaped depositions, see *C.C.P. 2025(l)*, *infra*, §67 et seq.; on use at trial of videotaped deposition of physician or expert witness, see *C.C.P. 2025(u)(4)*, 3 *Cal. Evidence (4th)*, *Presentation at Trial*, §154.)

(2) *Private or Public Organization.* If the named deponent is not a natural person, the notice must "describe with reasonable particularity the matters on which examination is requested." The deponent must "designate and produce at the deposition those of its officers, directors, managing agents, employees, or agents who are most qualified to testify on its behalf as to those matters to the extent of any information known or reasonably available to the deponent." (*C.C.P. 2025(d).*)

(3) *Forms.* There are numerous sources for deposition notice forms. (See *Cal. Civil Practice*, 2 *Procedure*, §13:52; 2 *C.E.B.*, *Civil Lit. Forms*, §24.1; 8A *Am.Jur. P.P. Forms* (1996 ed.), *Depositions and Discovery* §251 et seq.; see also *C.J.E.R.*, *Judges Benchbook*, *Discovery* §§10.15, 10.16 [discussing motion to quash defective deposition notice]; *Cal. Civil Practice*, 2 *Procedure*, §13:59 et seq. [objections to deposition notice and motions to quash].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Requirements.*

(a) *List of parties or attorneys:* C.C.P. 2025(c) was repealed and replaced by C.C.P. 2025.240(a) in 2004 without substantive change.

(b) *Date, time, and place:* C.C.P. 2025(d)(1), 2025(d)(2) were repealed and replaced by C.C.P. 2025.220(a)(1), 2025.220(a)(2) in 2004 without substantive change.

(c) *Deponent's name:* C.C.P. 2025(d)(3) was repealed and replaced by C.C.P. 2025.220(a)(3) in 2004 without substantive change.

(d) *List of materials to be produced:* C.C.P. 2025(d)(4) was repealed and replaced by C.C.P. 2025.220(a)(4) in 2004 without substantive change.

(e) *Intention to make audiotape or videotape record:* C.C.P. 2025(d)(5) was amended in 2002 to refer to "audio or video technology," rather than "audiotape or videotape," and C.C.P. 2025(d)(6) was amended to refer to "video recording," rather than "videotape."

C.C.P. 2025(d)(5), 2025(d)(6) were repealed and replaced by C.C.P. 2025.220(a)(5), 2025.220(a)(6) in 2004 without substantive change.

C.C.P. 2025(l), on audiotaped or videotaped depositions, was repealed and replaced by C.C.P. 2025.330, 2025.340 in 2004 without substantive change.

C.C.P. 2025(u)(4), on the use at trial of the videotaped deposition of a physician or expert witness, was repealed and replaced by C.C.P. 2025.620(d) in 2004 without substantive change.

(2) *Private or Public Organization.* C.C.P. 2025(d), on deponents that are not natural persons, was repealed and replaced by C.C.P. 2025.230 in 2004 without substantive change.

See *Maldonado v. Superior Court* (2002) 94 C.A.4th 1390, 1396, 1397, 115 C.R.2d 137 [in employment discrimination action, trial judge erred in denying plaintiffs' motion to compel further responses, after defendant, in response to plaintiffs' deposition notices seeking information about defendant's practices, produced three employees who knew little about practices in question; although defendant was bankrupt and many employees had left, defendant had duty to produce witnesses who had familiarized themselves with information requested].

(3) *Forms.* See 8A Am.Jur. P.P. Forms (2004 ed.), Depositions and Discovery, Form 178 et seq.



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## CHAPTER X - Discovery

### II. DEPOSITIONS

#### B. Oral Depositions.

1. Securing Deponent's Attendance.
  - a. Party Deponent.
3. Party Residing at Distant Place.

#### 2 Witkin Cal. Evid. Discovery § 41

[§ 41] Party Residing at Distant Place.

(1) *Natural Persons*. The deposition of a natural person who is a party must be taken (a) within 75 miles of the deponent's residence, or (b) in the county where the action is pending and within 150 miles of the deponent's residence. The choice between these two options belongs to the party giving notice of the deposition. (*C.C.P. 2025(e)(1)*.)

(2) *Organizations*. The deposition of an organization that is a party must be taken, at the option of the party noticing the deposition, (a) within 75 miles of the organization's principal executive business office in California, or (b) in the county where the action is pending and within 150 miles of that office. If a principal office has not been designated, the deposition may be taken in the county where the action is pending or within 75 miles of any executive or business office in California. (*C.C.P. 2025(e)(2)*.)

(3) *Motion and Order for More Distant Location*. A court order is required for the deposition of a natural person who is a party, or an officer, director, managing agent, or employee of a party, taken at a place that is more distant than that permitted under *C.C.P. 2025(e)(1)*. The motion for the order must be accompanied by a declaration showing a reasonable and good faith attempt at an informal resolution of any issue presented by the motion. (*C.C.P. 2025(e)(3)*); on monetary sanctions for failure to attempt informal resolution, see *infra*, §252.)

When deciding whether to grant the motion, the court must consider whether the interests of justice will be served by allowing the distant deposition. (*C.C.P. 2025(e)(3)*.) The following are among the relevant considerations:

- (a) Whether the moving party selected the forum;
- (b) Whether the deponent will be present to testify at trial;
- (c) The convenience of the deponent;
- (d) The feasibility of conducting a written deposition under *C.C.P. 2028* or using some other discovery method;
- (e) The number of distant depositions being sought;
- (f) The expense to the parties of requiring the deposition to be taken within the distance permitted by *C.C.P. 2025(e)(1)*; and

(g) The deponent's location at the time for which the deposition is scheduled.

The court must impose a monetary sanction under *C.C.P. 2023*, *infra*, §252, against a party, person, or attorney who unsuccessfully makes or opposes a motion to increase travel limits for a party deponent. However, the sanctions may be avoided if the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make imposing the sanction unjust. (*C.C.P. 2025(e)(3)*.)

As a condition for allowing the distant deposition, the court may order the moving party to advance the reasonable expenses and costs that the deponent will incur for travel to the distant location. (*C.C.P. 2025(e)(3)*); see *Glass v. Superior Court* (1988) 204 C.A.3d 1048, 1050, 251 C.R. 690 [*C.C.P. 2025* acts as implied repeal of *C.C.P. 1989, 2 Cal. Evidence (4th)*, *Witnesses*, §3, which provides that only California residents are obliged to attend as witnesses; hence, management of out-of-state corporation suing in California may be required to attend in-state deposition under *C.C.P. 2025(e)(3)*]; see generally C.E.B., 1 Civil Discovery Practice 3d, §4.33 et seq.; 1 Hogan, Cal. Civil Discovery §§2.13, 2.14.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Natural Persons*. *C.C.P. 2025(e)(1)*, on the place where the deposition of a natural person may be taken, was repealed and replaced by *C.C.P. 2025.250(a)* in 2004 without substantive change. (2) *Organizations*. *C.C.P. 2025(e)(2)*, on the place where the deposition of an organization that is a party may be taken, was repealed and replaced by *C.C.P. 2025.250(b)* in 2004 without substantive change.

(3) *Motion and Order for More Distant Location*. *C.C.P. 2025(e)(1)*, on the place where the deposition of a natural person may be taken, was repealed and replaced by *C.C.P. 2025.250(a)* in 2004 without substantive change.

*C.C.P. 2025(e)(3)*, on the procedure for requesting a deposition at a more distant place, was repealed and replaced by *C.C.P. 2025.260* in 2004 without substantive change.

*C.C.P. 2028*, on depositions by written questions, was repealed and replaced by *C.C.P. 2028.010* et seq. in 2004 without substantive change.

*C.C.P. 2023*, on monetary sanctions, was repealed and replaced by *C.C.P. 2023.010* et seq. in 2004 without substantive change.

See C.E.B., 1 Civil Discovery Practice 4th, §5.25 et seq.; Hogan, 1 Cal. Civil Discovery 2d, §2.13.



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## CHAPTER X - Discovery

### II. DEPOSITIONS

#### B. Oral Depositions.

#### 1. Securing Deponent's Attendance.

##### b. Nonparty Deponent.

#### 1. Notice and Subpena Requirements.

#### 2 *Witkin Cal. Evid. Discovery* § 42

[§ 42] Notice and Subpena Requirements.

(1) *Deposition of Nonparty Allowed.* Discovery may be obtained from a person who is not a party by oral deposition, initiated by the service of a deposition subpena. (*C.C.P. 2020(a)*.)

(2) *Notice.* The notice requirement for the deposition of a nonparty witness is the same as that for a party. (*C.C.P. 2025(c)*, supra, §39.) The content of the deposition notice is also the same (see *C.C.P. 2025(c)*), except that the notice must also include the deponent's address and phone number. If the deponent's name is not known, the notice must include a description sufficient to identify the person or class to which the person belongs. (*C.C.P. 2025(d)(3)*, supra, §40.)

(3) *Subpena.* In addition to notice, the appearance and testimony of a nonparty witness requires the service on the deponent of a deposition subpena under *C.C.P. 2020*. (*C.C.P. 2025(h)(2)*, *2020(a)*; see *C.E.B.*, 1 Civil Discovery Practice 3d, §4.46.) The subpena may command (a) only the deponent's attendance and testimony, (b) only the production of business records for copying, or (c) both the deponent's attendance and testimony and the production of business records, other documents and tangible things. (*C.C.P. 2020(a)*; on subpena commanding production of document or tangible things, see *infra*, §49 et seq.; on distinction between deposition subpena and subpena *duces tecum*, see *infra*, §54; on additional, informal efforts that may be taken to ensure deponent's attendance, see *Dunne on Depositions in California* §6:2.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Deposition of Nonparty Allowed.* *C.C.P. 2020(a)*, on deposition of nonparties, was repealed and replaced by *C.C.P. 2020.010* in 2004 without substantive change.

(2) *Notice.* *C.C.P. 2025(c)*, stating the requirement of notice in writing, was repealed and replaced by *C.C.P. 2025.220(a)* in 2004 without substantive change.

*C.C.P. 2025(d)(3)*, specifying the contents of a notice of deposition to a nonparty, was repealed and replaced by *C.C.P. 2025.220* in 2004 without substantive change.

On notice of oral deposition by telephone, videoconference, or other remote electronic means, see *Supp.*, *infra*, §79A.



(3) *Subpena*. *C.C.P. 2020(a)* and *C.C.P. 2025(h)(2)*, on deposition subpoenas, were repealed and replaced by *C.C.P. 2020.010(b)* and *C.C.P. 2025.280(b)* in 2004 without substantive change.

See C.E.B., 1 Civil Discovery Practice 4th, §5.55. *West's Key Number Digest*, Pretrial Procedure k.129



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  - b. Nonparty Deponent.
2. Contents of Subpena.

## 2 Witkin Cal. Evid. Discovery § 43

## [§ 43] Contents of Subpena.

A subpoena that commands only the attendance and testimony of the deponent must specify the time and place of the deposition and summarize (1) the nature of the deposition, (2) the rights and duties of the deponent, and (3) the penalties for disobedience provided by *C.C.P. 2020(h)*. (*C.C.P. 2020(c)*; on penalties, see *infra*, §§58, 258; on subpoenas that command production of documents, records, and tangible things, see *infra*, §49 et seq.) If the deposition will be videotaped (see *infra*, §67 et seq.), the subpoena must so indicate. (*C.C.P. 2020(c)*.)

If the deponent is an organization, the deposition subpoena must (1) "describe with reasonable particularity the matters on which examination is requested," and (2) advise the organization of its duty to designate qualified agents or employees to attend (see *supra*, §40). (*C.C.P. 2020(c)*, 2025(d).)

*C.C.P. 2020(c)* supersedes *C.C.P. 1985*, the general statute for obtaining documentary evidence from a witness, in discovery proceedings. (See Reporter's Note to *C.C.P. 2020(c)*, in 2 Hogan, Cal. Civil Discovery, Appendix C; on *C.C.P. 1985* et seq., see *infra*, §§54, 217 et seq.)

The Judicial Council has adopted a form deposition subpoena, the use of which is mandatory. (See Judicial Council Form No. 982(a)(15.3) [Deposition Subpena for Personal Appearance].)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2020(c)* was amended in 2002 to delete the reference to "videotape" and substitute "using audio or video technology by, or at the direction of, the noticing party." In addition, the amended statute provides that if the deposition testimony is to be conducted using instant visual display, the deposition subpoena must state that it will be conducted in that manner.

*C.C.P. 2020(c)* was repealed and replaced by *C.C.P. 2020.310* in 2004 without substantive change.

*C.C.P. 2025(d)*, requiring a deposition subpoena to a deponent that is an organization to describe with particularity the matters on which examination is requested, was repealed and replaced by *C.C.P. 2025.230* in 2004 without substantive change. The portion of *C.C.P. 2020(c)* stating the same requirement is now found in *C.C.P. 2020.310(e)*.

Judicial Council Form No. 982(a)(15.3) has been renumbered Judicial Council Form No. SUBP-015.

See Reporter's Note to *C.C.P. 2020(c)*, in Hogan, 2 Cal. Civil Discovery 2d, Appendix D.



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## II. DEPOSITIONS

## B. Oral Depositions.

1. Securing Deponent's Attendance.
  - b. Nonparty Deponent.
3. Issuance and Service of Subpena.

## 2 Witkin Cal. Evid. Discovery § 44

[§ 44] Issuance and Service of Subpena.

(1) *Issuance.* Under *C.C.P. 2020(b)*, a deposition subpoena may be issued in two ways:

(a) On request, the clerk of the court in which the action is pending issues the subpoena in blank, but signed and sealed, to a party who fills it in and serves it.

(b) The attorney of record for a party signs and issues an unsealed subpoena. A copy may be served on the nonparty and the attorney may retain the original.

This provision supersedes *C.C.P. 1985* and *1986*, the general statutes for obtaining documentary evidence from a witness, in discovery proceedings. (Reporter's Note to *C.C.P. 2020(b)*, in 2 Hogan, Cal. Civil Discovery, Appendix C; on *C.C.P. 1985* et seq., see *infra*, §§54, 217 et seq.)

(2) *Service.* Service is accomplished by personal delivery. Any person may deliver a copy of the subpoena to the deponent, if the deponent is a natural person, or, if the deponent is an organization, to an officer, director, or custodian of records, or to an agent or employee authorized to accept service. Service must be accomplished sufficiently in advance of the deposition to allow the deponent enough time to locate and produce designated business records, documents, and tangible things, and a reasonable time to travel to the place of deposition. (*C.C.P. 2020(f)*; on timing of notice of deposition generally, see *supra*, §32 et seq.; on production of documents, see *infra*, §49 et seq.)

A copy of the subpoena must be served with the deposition notice to all parties receiving notice (see *supra*, §§39, 42). (*C.C.P. 2025(d)*; see C.E.B., 1 Civil Discovery Practice 3d, §4.50.)

(3) *Effect of Service.* Personal service of a deposition subpoena on a California resident is effective to require (a) personal attendance and testimony, if specified, (b) any specified production, inspection, testing or sampling, and (c) attendance at court to consider any issue "arising out of the deponent's refusal to be sworn, or to answer any question, or to produce specified items, or to permit inspection or photocopying, if the subpoena so specifies, or specified testing and sampling of the items produced." (*C.C.P. 2020(g)*; on subpoena commanding production of documents or items or sampling, see *infra*, §49 et seq.; on consequences of disobeying a deposition subpoena, see *infra*, §58.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Issuance*. *C.C.P. 2020(b)*, on the issuance of deposition subpoenas, was repealed and replaced by *C.C.P. 2020.210* in 2004 without substantive change.

See Reporter's Note to *C.C.P. 2020(b)*, in Hogan, 2 Cal. Civil Discovery 2d, Appendix D.

(2) *Service*. *C.C.P. 2020(f)*, on the service of deposition subpoenas, was repealed and replaced by *C.C.P. 2020.220* in 2004 without substantive change.

*C.C.P. 2025(d)*, requiring a copy of the subpoena to be served on all parties receiving the deposition notice, was repealed and replaced by *C.C.P. 2025.240(c)* in 2004 without substantive change.

See C.E.B., 1 Civil Discovery Practice 4th, §5.69.(3) *Effect of Service*. *C.C.P. 2020(g)*, on the effect of service, was repealed and replaced by *C.C.P. 2020.220(c)* in 2004 without substantive change.



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### II. DEPOSITIONS

#### B. Oral Depositions.

#### 1. Securing Deponent's Attendance.

##### b. Nonparty Deponent.

#### 4. Nonparty Residing at Distant Place.

### 2 Witkin Cal. Evid. Discovery § 45

#### [§ 45] Nonparty Residing at Distant Place.

(1) *Natural Persons*. The deposition location requirements for nonparty witnesses who are natural persons are the same as those for parties who are natural persons (see *supra*, §41): the party giving notice of the deposition may choose a location either within 75 miles of the deponent's residence or within the county in which the action is pending and within 150 miles of the deponent's residence. (*C.C.P. 2025(e)(1)*.) However, there is no provision allowing the court to order the deposition of a nonparty who is a natural person to be taken at a more distant location.

(2) *Organizations*. The deposition of an organization that is not a party must be taken within 75 miles of the organization's principal executive or business office in California, unless the organization consents to a more distant place. If the organization has not designated a principal office, the deposition must be taken, at the option of the party giving notice, either in the county where the action is pending or within 75 miles of any executive or business office of the organization in California. (*C.C.P. 2025(e)(2)*.) There is no provision for a court order allowing an organization's deposition to occur at a more distant location than provided by *C.C.P. 2025(e)(2)*.

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Natural Persons*. *C.C.P. 2025(e)(1)*, on the location of the deposition where the deponent is a natural person, was repealed and replaced by *C.C.P. 2025.250(a)* in 2004 without substantive change.

(2) *Organizations*. *C.C.P. 2025(e)(2)*, on the location of the deposition where the organization is not a party, was repealed and replaced by *C.C.P. 2025.250(c)* in 2004 without substantive change.

*C.C.P. 2025.250(c)* was subdivided in 2005. The provision relating to organizations that have not designated an office in California became *C.C.P. 2025.250(d)*.



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B. Oral Depositions.

1. Securing Deponent's Attendance.

b. Nonparty Deponent.

5. Fees.

2 *Witkin Cal. Evid. Discovery* § 46

[§ 46] Fees.

If the deponent's personal attendance is required, the party noticing the deposition must pay the same witness fee and mileage required by *Govt.C. 68070* et seq. for attendance and testimony before the court in which the action is pending (see 2 *Cal. Evidence (4th), Witnesses*, §15 et seq.). Payment, whether or not demanded by the deponent, must be made, at the option of the party noticing the deposition, either at the time the deposition subpoena is served or the time the deponent appears for the taking of testimony. (*C.C.P. 2020(f)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2020(f)*, on payment of the deponent's fees, was repealed and replaced by *C.C.P. 2020.230(a)* in 2004 without substantive change.



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### II. DEPOSITIONS

#### B. Oral Depositions.

1. Securing Deponent's Attendance.
  - c. Amount of Notice Required.

2 Witkin Cal. Evid. Discovery § 47

[§ 47] Amount of Notice Required.

(1) *Minimum Notice Period.* The deposition notice must be served at least 10 days before an oral deposition. (*C.C.P.* 2025(f); see 1 Hogan, Cal. Civil Discovery §2.7; cf. *F.R. Civ. P., Rule 30(b)* [requiring "reasonable notice"]; on 20-day notice requirement for production of personal consumer records, see *infra*, §52; on timing of service of deposition subpoena, see *supra*, §44.) The deposition must begin at least 30 days before the initial trial date. (See *C.C.P.* 2024(a), *supra*, §23.)

(2) *Unlawful Detainer Action.* An oral deposition in an unlawful detainer action must be scheduled at least 5 days after service of the deposition notice, but not later than 5 days before trial. (*C.C.P.* 2025(f).)

(3) *Shortening or Extending Time.* On the motion or ex parte application of a party or a deponent, and on a showing of good cause, the court may shorten or extend the time for scheduling a deposition, or may stay its taking until the determination of a motion for a protective order under *C.C.P.* 2025(i) (see *infra*, §59). (*C.C.P.* 2025(f).)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Minimum Notice Period.* *C.C.P.* 2025(f) (service of notice required at least 10 days before deposition) was repealed and replaced by *C.C.P.* 2025.270 in 2004 without substantive change.

The portion of *C.C.P.* 2024(a) relating to the time by which a deposition must begin was repealed and replaced by *C.C.P.* 2024.010 and 2024.020 in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §2.7.

(2) *Unlawful Detainer Action.* The portion of *C.C.P.* 2025(f) relating to the scheduling of a deposition in an unlawful detainer action was repealed and replaced by *C.C.P.* 2025.270(b) in 2004 without substantive change. *C.C.P.* 2025.270(b) was amended in 2007 to extend its applicability to other proceedings under *C.C.P.* 1159 et seq. (see 12 *Summary* (10th), *Real Property*, §757).

(3) *Shortening or Extending Time.* The portion of *C.C.P.* 2025(f) relating to shortening or extending the time for the deposition was repealed and replaced by *C.C.P.* 2025.270(c) in 2004 without substantive change. *C.C.P.* 2025.270(c) was relettered *C.C.P.* 2025.270(d) in 2007.



*C.C.P. 2025(i)*, relating to motions for a protective order, was repealed and replaced by *C.C.P. 2025.420* in 2004 without substantive change.



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## CHAPTER X - Discovery

### II. DEPOSITIONS

#### B. Oral Depositions.

##### 1. Securing Deponent's Attendance.

##### d. Objections to Procedure To Secure Deponent's Attendance.

#### 2 Witkin Cal. Evid. Discovery § 48

[§ 48] Objections to Procedure To Secure Deponent's Attendance.

(1) *Written Objection.* A party served with a deposition notice that does not comply with the procedures set forth in *C.C.P. 2025(b)* through *2025(f)* (supra, §39 et seq.) may serve a written objection on the party taking the deposition and on any other attorney or party on whom the notice was served. The objection must be served no less than 3 calendar days before the date scheduled for the deposition and, if made 3 calendar days before the scheduled date, must be personally served on the person noticing the deposition. A deposition taken after the service of the objection may not be used against the objecting party under *C.C.P. 2025(u)*, 3 *Cal. Evidence (4th), Presentation at Trial*, §153, if the party did not attend the deposition and if the court determines that the objection was valid. (*C.C.P. 2025(g)*); on when written objections are most effective, see Dunne on Depositions in California §4:14.)

(2) *Motion To Stay Deposition and Quash Notice.* In addition to serving a written objection, a party may move for an order staying the taking of the deposition and quashing the notice. The deposition is stayed pending the determination of the motion. (*C.C.P. 2025(g)*); see Cal. Civil Practice, 2 Procedure, §13:59 et seq. [objections to deposition notice and motions to quash]; on motion to quash deposition subpoena or subpoena duces tecum, see *infra*, §226; on when use of motion to quash deposition notice is most advantageous, see Dunne on Depositions in California §4:15.)

(3) *Informal Resolution.* The motion must be accompanied by a declaration showing a reasonable and good faith attempt at an informal resolution of the issue presented. (*C.C.P. 2025(g)*); on monetary sanctions for failure to attempt informal resolution, see *infra*, §252.)

(4) *Monetary Sanctions.* The court must impose a monetary sanction under *C.C.P. 2023*, *infra*, §252, against a party, person, or attorney who unsuccessfully makes or opposes a motion to quash a deposition notice. However, the sanctions may be avoided if the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make imposing the sanction unjust. (*C.C.P. 2025(g)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Written Objection.* *C.C.P. 2025(b)-(f)* (requirements relating to deposition notices) were repealed and replaced by *C.C.P. 2025.210* through *C.C.P. 2025.270* in 2004 without substantive change.

*C.C.P. 2025(u)*, relating to the use of the deposition at trial, was repealed and replaced by *C.C.P. 2025.620* in 2004 without substantive change.

*C.C.P. 2025(g)*, relating to objections to the deposition notice, was repealed and replaced by *C.C.P. 2025.410* in 2004 without substantive change.

(2) *Motion To Stay Deposition and Quash Notice*. The portion of *C.C.P. 2025(g)* relating to motions to stay the deposition and quash notice was repealed and replaced by *C.C.P. 2025.410(c)* in 2004 without substantive change.(3) *Informal Resolution*. The portion of *C.C.P. 2025(g)* requiring a meet and confer declaration was repealed and replaced by *C.C.P. 2025.410(c)* in 2004 without substantive change.

(4) *Monetary Sanctions*. *C.C.P. 2023*, on monetary sanctions, was repealed and replaced by *C.C.P. 2023.010* et seq. in 2004 without substantive change.

The portion of *C.C.P. 2025(g)* relating to sanctions was repealed and replaced by *C.C.P. 2025.410(d)* in 2004 without substantive change.



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## II. DEPOSITIONS

## B. Oral Depositions.

## 2. Securing Production of Documents.

## a. Notice Requirements.

## 2 Witkin Cal. Evid. Discovery § 49

## [§ 49] Notice Requirements.

(1) *Party*. Service of a deposition notice under *C.C.P. 2025(c)* (supra, §39) is sufficient to require a deponent who is a party, or an officer, director, managing agent, or employee of a party, to produce documents or tangible things for inspection or copying. (*C.C.P. 2025(h)(1)*.) (On procedures for objecting to inadequate deposition notice, see *C.C.P. 2025(g)*, supra, §48.)

(2) *Nonparty*. A nonparty deponent must be served with a deposition subpoena in order to secure production of documents or tangible things by that deponent. (*C.C.P. 2025(h)(2)*.) The deposition subpoena may command (a) the production of business records for copying, or (b) both the deponent's appearance and testimony, and the production of documents and tangible things. (*C.C.P. 2020(a)*.) When, under *C.C.P. 2020(d)* (infra, §50), only the production by a nonparty of business records for copying is desired, a copy of the deposition subpoena serves as the deposition notice. (*C.C.P. 2025(c)*.) (On production of records alone, see infra, §50 et seq.; on production of records and compelled testimony of deponent, see infra, §53.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Party*. *C.C.P. 2025(c)* (service of deposition notice) was repealed and replaced by *C.C.P. 2025.220* in 2004 without substantive change.

*C.C.P. 2025(h)(1)* (effect of deposition notice on party) was repealed and replaced by *C.C.P. 2025.280(a)* in 2004 without substantive change.

*C.C.P. 2025(g)* (procedures for objecting to inadequate notice) was repealed and replaced by *C.C.P. 2025.410* in 2004 without substantive change.

*(New) Distinction: Party's former employees:* When a deposition notice seeks the person most knowledgeable about a particular subject matter within a corporation, the corporation is not required to produce former employees simply because those employees would be the persons most knowledgeable about the particular subject. "Employee," as used in *C.C.P. 2025(h)(1)* (now *C.C.P. 2025.280(a)*), means "current employee." The corporation's duty is limited to producing the most knowledgeable person currently in its employ and making certain that this person has access to information and documents reasonably available within the corporation. (*Maldonado v. Superior Court* (2002) 94 C.A.4th 1390, 1398, 115 C.R.2d 137.)

(2) *Nonparty*. *C.C.P. 2025(h)(2)*, requiring a nonparty to be served with a deposition subpoena, was repealed and replaced by *C.C.P. 2025.280(b)* in 2004 without substantive change.

*C.C.P. 2020(a)*, specifying what a deposition notice may require, was repealed and replaced by *C.C.P. 2020.020* in 2004 without substantive change.

*C.C.P. 2020(d)*, on deposition subpoenas that command production of business records from a nonparty for copying, was repealed and replaced by *C.C.P. 2020.410(a)* in 2004 without substantive change.

*C.C.P. 2025(c)* (copy of deposition subpoena serves as deposition notice where only production by nonparty of business records for copying is desired) was repealed and replaced by *C.C.P. 2025.220(b)* in 2004 without substantive change. *West's Key Number Digest*, Pretrial Procedure k.130



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## B. Oral Depositions.

## 2. Securing Production of Documents.

## b. Business Records for Copying.

## 1. Contents and Service of Subpena.

2 *Witkin Cal. Evid. Discovery* § 50

## [§ 50] Contents and Service of Subpena.

(1) *Contents.* A subpoena commanding only the production of business records for copying is directed to the custodian of the records or another person qualified to certify the records. It must designate the business records to be produced either by specifically describing each individual item or "by reasonably particularizing each category of item." However, specific information identifiable only to the deponent's records system, such as a policy number or the date the consumer interacted with the witness, must not be required. The deposition subpoena need not be accompanied by an affidavit or declaration showing good cause for the production of the designated business records. (*C.C.P. 2020(d)(1)*; see *Calcor Space Facility v. Superior Court* (1997) 53 C.A.4th 216, 222, 61 C.R.2d 567 [plaintiff failed to meet requirements of specific description and reasonable particularization, where its subpoena asked nonparty to produce all materials relating to gun mounts, failed to identify specific documents and merely described broad categories, and included attachment with three pages each of "definitions" and "instructions"]; *Urban Pac. Equities Corp. v. Superior Court* (1997) 59 C.A.4th 688, 693, 69 C.R.2d 635 ["business records" means item, collection, or grouping of information about business entity, not business' own product; thus, *C.C.P. 2020(d)* cannot be used to obtain reporter's transcript of deposition, which is product of reporter's business, without paying reporter's copying fee].)

The Judicial Council has adopted a form deposition subpoena commanding the production of business records; use of the Judicial Council form is mandatory. (See Judicial Council Form No. 982(a)(15.2) [Deposition Subpena for Production of Business Records].)

(2) *Service.* The deposition subpoena must command compliance no earlier than 20 days after issuance or 15 days after service, whichever is later. (*C.C.P. 2020(d)(1)*.) Subject to that requirement, service must allow "a sufficient time in advance of the deposition to provide the deponent a reasonable opportunity" to locate and produce designated business records, documents and tangible things and, if required, a reasonable time to travel to the deposition place. Service is accomplished by personal delivery. Any person may deliver a copy of the subpoena to the deponent, if the deponent is a natural person, or to "any officer, director, custodian of records" or to any agent or employee authorized to accept service, if the deponent is an organization. (*C.C.P. 2020(f)*; see *California Shellfish v. United Shellfish Co.* (1997) 56 C.A.4th 16, 23, 64 C.R.2d 797 ["deposition hold" of *C.C.P. 2025(b)(2)* (supra, §32) applies to deposition subpoena seeking only business records, and therefore plaintiff may not serve deposition notice under *C.C.P. 2020(d)* until 20 days after service of summons on, or appearance by, any defendant].)

(3) *Fees.* Service of a deposition subpoena that commands only the production of business records for copying must

be accompanied by a payment in cash or by check of the witness fee required by *Ev.C. 1563(b)(6)*, 2 *Cal. Evidence (4th)*, *Documentary Evidence*, §55. (*C.C.P. 2020(f)*; see *C.C.P. 1986.5*.)

(4) *Effect of Service*. Personal service of a deposition subpoena on a California resident is effective to require any specified production and the deponent's attendance at court to consider any issue arising out of the deponent's refusal to produce specified items. (*C.C.P. 2020(g)*; on sanctions for disobeying deposition subpoena, see *C.C.P. 2020(h)*, *infra*, §§58, 258.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Contents*. *C.C.P. 2020(d)(1)*, on the contents of a subpoena commanding production of business records for copying, was repealed and replaced by *C.C.P. 2020.410* in 2004 without substantive change.

Judicial Council Form No. 982(a)(15.2) has been renumbered Judicial Council Form No. SUBP-010.

(2) *Service*. *C.C.P. 2020(d)(1)* (statement regarding time for compliance) was repealed and replaced by *C.C.P. 2020.410(c)* in 2004 without substantive change.

*C.C.P. 2020(f)* (requirements regarding service) was repealed and replaced by *C.C.P. 2020.220* in 2004 without substantive change.

*C.C.P. 2025(b)(2)* (20-day period before plaintiff may serve deposition notice) was repealed and replaced by *C.C.P. 2025.210(b)* in 2004 without substantive change.(3) *Fees*. *C.C.P. 2020(f)* (payment of fees) was repealed and replaced by *C.C.P. 2020.230(b)* in 2004 without substantive change.

(4) *Effect of Service*. *C.C.P. 2020(g)* (effect of service of subpoena) was repealed and replaced by *C.C.P. 2020.220(c)* in 2004 without substantive change.

*C.C.P. 2020(h)* (sanctions for failure to obey) was repealed and replaced by *C.C.P. 2020.240* in 2004 without substantive change.



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## II. DEPOSITIONS

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## b. Business Records for Copying.

## 2. Procedure for Copying.

## 2 Witkin Cal. Evid. Discovery § 51

## [§ 51] Procedure for Copying.

(1) *Delivery by Custodian.* Where a deposition subpoena commands only the production of business records, the custodian of the records or other qualified person must, in person, by messenger, or by mail, deliver only to the deposition officer specified in the deposition subpoena (a) "a true, legible, and durable copy of the records" and (b) an affidavit of compliance with *Ev.C. 1561*, unless the custodian is directed to make the records available for inspection or copying by the subpoenaing party's attorney or the attorney's representative at the witness' business address, as provided in *Ev.C. 1560(e)*. (*C.C.P. 2020(d)(4)*.) The admissibility of the custodian's affidavit is governed by *Ev.C. 1562*. (*C.C.P. 2020(d)(6)*.) (On deposition officer, see *supra*, §35; on *Ev.C. 1560 et seq.*, see 2 *Cal. Evidence (4th)*, *Documentary Evidence*, §51 *et seq.*)

(2) *Form of Delivered Records.* If delivery is made at the deposition officer's office, the records must be enclosed, sealed, and directed as required by *Ev.C. 1560(c)*, 2 *Cal. Evidence (4th)*, *Documentary Evidence*, §51. If delivery is made at the office of the business whose records are subpoenaed, the custodian may permit the deposition officer to copy the original records or may deliver an unsealed copy on receipt of payment of the reasonable costs of preparing the copy, determined under *Ev.C. 1563(b)*, 2 *Cal. Evidence (4th)*, *Documentary Evidence*, §55. (*C.C.P. 2020(d)(4)*.)

(3) *Date of Delivery.* Unless the parties (and the consumer if the records belong to a consumer as defined in *C.C.P. 1985.3* or *1985.6*; see *infra*, §229) stipulate to an earlier date, the custodian may not deliver the requested records to the deposition officer before the date and time specified in the deposition subpoena. The subpoena must contain a statement, in boldface type immediately following the date and time specified for production, that the records are not to be released before that date and time. (*C.C.P. 2020(d)(4)*.)

(4) *Copies Supplied by Deposition Officer.* Promptly on or after the deposition date and after the receipt or copying of the business records, the deposition officer must provide the copy to the party at whose instance the subpoena was served. Any other party to the action may purchase a copy by notifying the deposition officer within 6 months following the settlement of the case. (*C.C.P. 2020(d)(5)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Delivery by Custodian.* *C.C.P. 2020(d)(4)* (delivery requirements) was repealed and replaced by *C.C.P. 2020.430* in 2004 without substantive change.



*C.C.P. 2020(d)(6)* (admissibility of affidavit) was repealed and replaced by *C.C.P. 2020.430(f)* in 2004 without substantive change.

(2) *Form of Delivered Records.* *C.C.P. 2020(d)(4)* (form of records depending on where delivered) was repealed and replaced by *C.C.P. 2020.430(b)* in 2004 without substantive change.

(3) *Date of Delivery.* *C.C.P. 2020(d)(4)* (date and time of delivery) was repealed and replaced by *C.C.P. 2020.430(d)* in 2004 without substantive change. (4) *Copies Supplied by Deposition Officer.* *C.C.P. 2020(d)(5)* (distribution of copies) was repealed and replaced by *C.C.P. 2020.440* in 2004 without substantive change.



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#### 2. Securing Production of Documents.

##### b. Business Records for Copying.

##### 3. Personal Consumer Records.

2 Witkin Cal. Evid. Discovery § 52

[§ 52] Personal Consumer Records.

(1) *Required Notice to Consumer.* If a deposition subpoena seeking the production of business records is directed at a witness and the records described are personal records of a consumer, the subpoena must be accompanied by proof of service of the notice to the consumer required by *C.C.P. 1985.3(e)* (or *C.C.P. 1985.6*, as applicable) or the consumer's written release under *C.C.P. 1985.3(c)* (or *C.C.P. 1985.6(c)(2)*, as applicable). (*C.C.P. 2020(d)(2)*, *2020(e)*; on *C.C.P. 1985.3*, see *infra*, §228 et seq.; on *C.C.P. 1985.6*, see *infra*, §236 et seq.) The consumer must be served with (a) a deposition notice, (b) a copy of the deposition subpoena, and (c) notice of the privacy rights specified in *C.C.P. 1985.3(e)*. (*C.C.P. 2025(c)*.) (On similar notice requirements where employee's employment records are sought, see *C.C.P. 1985.6*, *infra*, §236 et seq.)

(2) *Timing of Deposition.* The deposition of someone who has been commanded to produce personal records of a consumer must be scheduled for a date at least 20 days after issuance of the subpoena. (*C.C.P. 2025(f)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Required Notice to Consumer.* *C.C.P. 2020(d)(2)* and *C.C.P. 2020(e)*, on subpoenas of consumer records, were repealed and replaced by *C.C.P. 2020.410(d)* and *C.C.P. 2020.510(c)* in 2004 without substantive change.

*C.C.P. 2025(c)*, on the requirements for service of a subpoena of consumer records, was repealed and replaced by *C.C.P. 2025.240(b)* in 2004 without substantive change.

(2) *Timing of Deposition.* *C.C.P. 2025(f)*, on scheduling of a deposition of a person who has been commanded to produce consumer records, was repealed and replaced by *C.C.P. 2025.270(c)* in 2004 without substantive change.



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#### 2. Securing Production of Documents.

#### c. Attendance, Testimony, and Production of Documents.

2 Witkin Cal. Evid. Discovery § 53

[§ 53] Attendance, Testimony, and Production of Documents.

(1) *Subpena Requirements.* A subpoena that requires the appearance and testimony of the deponent *and* the production of business records, documents or tangible things must comply with *C.C.P. 2020(c)* (supra, §43) and must (a) "designate the business records, documents, and tangible things to be produced either by specifically describing each individual item or by reasonably particularizing each category of item," and (b) specify any testing or sampling that is being sought. However, the deposition subpoena need not be accompanied by an affidavit or declaration showing good cause for the production of the documents and things designated. (*C.C.P. 2020(e)*.) The Judicial Council has adopted a form subpoena, the use of which is mandatory. (See Judicial Council Form No. 982(a)(15.4) [Deposition Subpoena for Personal Appearance and Production of Documents and Things].) Service of the subpoena is accomplished in the same manner as service of a subpoena that commands only the deponent's appearance and testimony (see *C.C.P. 2020(f)*, supra, §44), and has the same effect (see *C.C.P. 2020(g)*, supra, §44).

(2) *Fees.* The fees to be paid to a nonparty who is commanded to appear and testify at the deposition and to produce records under *C.C.P. 2020(e)* are the same as those to be paid to a nonparty who is commanded merely to appear and testify. (See *C.C.P. 2020(f)*, supra, §46.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Subpena Requirements.* *C.C.P. 2020(c)* (subpena requiring attendance and testimony) was repealed and replaced by *C.C.P. 2020.310* in 2004 without substantive change.

*C.C.P. 2020(e)* (subpena requiring attendance and testimony, as well as production of records, documents or things) was repealed and replaced by *C.C.P. 2020.510* in 2004 without substantive change.

*C.C.P. 2020(f)* (service of subpoena) was repealed and replaced by *C.C.P. 2020.220* in 2004 without substantive change.

*C.C.P. 2020(g)* (effect of service) was repealed and replaced by *C.C.P. 2020.220(c)* in 2004 without substantive change.

Judicial Council Form No. 982(a)(15.4) has been renumbered Judicial Council Form No. SUBP-020.(2) *Fees.* *C.C.P. 2020(e)* (subpena requiring attendance and testimony, as well as production of records, documents, or things) was repealed and replaced by *C.C.P. 2020.510* in 2004 without substantive change.

*C.C.P. 2020(f)* (payment of deposition fees) was repealed and replaced by *C.C.P. 2020.230* in 2004 without substantive change.



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## d. Applicability of Subpena Duces Tecum.

## 2 Witkin Cal. Evid. Discovery § 54

## [§ 54] Applicability of Subpena Duces Tecum.

A subpena duces tecum is the usual means of obtaining documentary evidence from a witness. (See *C.C.P. 1985* et seq., *infra*, §218 et seq.) However, for purposes of depositions, the term *subpena duces tecum* has been abandoned in favor of the term *deposition subpoena*, "language more understandable to the one on whom the subpoena is served." (Reporter's Note to *C.C.P. 2020(a)*, in 2 Hogan, Cal. Civil Discovery, Appendix C.)

Some of the numerous provisions governing deposition subpoenas set forth in *C.C.P. 2020* supersede the similar provisions of *C.C.P. 1985* et seq. on which they were based. For example, *C.C.P. 2020(b)*, which contemplates that all deposition subpoenas will be issued by the court in which the action is pending, supersedes, in discovery proceedings, *C.C.P. 1986(c)*, which requires subpoenas to be issued by the court of the county where the deposition is to be taken. (Reporter's Note to *C.C.P. 2020(b)*, in 2 Hogan, Cal. Civil Discovery, Appendix C.) Similarly, a deposition subpoena for production of business records alone or for production of documents and testimony of a deponent need not be accompanied by an affidavit or declaration showing good cause for the production of the designated business records, documents, or things (see *C.C.P. 2020(d)*, *supra*, §50 and *2020(e)*, *supra*, §53), which contrasts with *C.C.P. 1985(b)* and *C.C.P. 1985.7*. (See Reporter's Notes to *C.C.P. 2020(d)* and *(e)*, in 2 Hogan, Cal. Civil Discovery, Appendix C.)

However, except as modified by *C.C.P. 2020*, *C.C.P. 1985* et seq. continue to apply (*C.C.P. 2020(a)*), and the term *subpena duces tecum* is retained in *C.C.P. 1985* et seq. (See Reporter's Notes to *C.C.P. 2020(d)*, in 2 Hogan, Cal. Civil Discovery, Appendix C [referring to subpoena in *C.C.P. 1985* as *trial subpoena duces tecum*].) The provisions of *Ev.C. 1560* et seq. governing business records (see 2 *Cal. Evidence (4th)*, *Documentary Evidence*, §50 et seq.) also apply to a deposition subpoena, except as modified by *C.C.P. 2020*. (*C.C.P. 2020(a)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2020(b)* (issuance of subpoenas) was repealed and replaced by *C.C.P. 2020.210* in 2004 without substantive change.

*C.C.P. 2020(d)* (subpena requiring production of business records for copying) was repealed and replaced by *C.C.P. 2020.410* in 2004 without substantive change.

*C.C.P. 2020(e)* (subpena requiring attendance and testimony, as well as production of records, documents, or things) was repealed and replaced by *C.C.P. 2020.510* in 2004 without substantive change.

*C.C.P. 2020(a)* (continued applicability of Evidence Code provisions) was repealed and replaced by *C.C.P. 2020.030* in 2004 without substantive change.

See Reporter's Notes to *C.C.P. 2020(d)* and (e), in Hogan, 2 Cal. Civil Discovery 2d, Appendix D.



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#### 3. Deposition Proceedings.

##### a. Attendance of Parties and Witnesses.

##### 1. In General.

#### 2 *Witkin Cal. Evid. Discovery* § 55

[§ 55] In General.

Any party to an action may attend the deposition of a party or other witness. (See *C.C.P. 2025(i)(12)* [party cannot be excluded].) However, in lieu of attendance and participation in the oral examination, a party served with notice may send written questions to the deposition officer to propound to the witness after oral examination has been completed. (*C.C.P. 2025(l)(3)*.) The court, on motion and for good cause shown, may order that designated persons, other than the parties, their officers, or their counsel, are excluded from attending the deposition. (*C.C.P. 2025(i)(12)*; on motion for protective order, see *infra*, §59.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2025(i)(12)*, exclusion of persons other than parties, was repealed and replaced by *C.C.P. 2025.420(b)(12)* in 2004 without substantive change.

*C.C.P. 2025(l)(3)*, on submission of written questions in lieu of personal attendance, was repealed and replaced by *C.C.P. 2025.330(e)* in 2004 without substantive change.

On attendance at oral deposition by telephone, videoconference, or other remote electronic means, see *Supp.*, *infra*, §79A.



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#### 3. Deposition Proceedings.

##### a. Attendance of Parties and Witnesses.

##### 2. Failure To Attend.

##### aa. Deposing Party.

#### 2 Witkin Cal. Evid. Discovery § 56

#### [§ 56] Deposing Party.

If the party giving the deposition notice fails to attend or proceed with a deposition or if the deponent fails to appear because the party giving the notice failed to serve a required deposition subpoena, the court must impose a monetary sanction under *C.C.P. 2023* (see *infra*, §252) in favor of any party attending in person or by attorney, and against the party giving the notice or the attorney for that party. However, the sanction may be avoided if the court finds "that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." (*C.C.P. 2025(j)(1), (j)(2)*; see *Rosen v. Superior Court* (1966) 244 C.A.2d 586, 595, 53 C.R. 347 [person who gives notice of deposition has duty to have witness present at set time so that other party or party's attorney may exercise right of cross-examination, or to give timely notice that deposition will not be taken as noticed]; *Poe v. Diamond* (1987) 191 C.A.3d 1394, 1398, 237 C.R. 80 [defendant's attorney was not a "party," within meaning of former provision on which *C.C.P. 2025(j)* is based (former *C.C.P. 2019(g)(1)*), and payment of monetary sanctions to defendant's attorney was unauthorized].)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2023*, on monetary sanctions, was repealed and replaced by *C.C.P. 2023.010* et seq. in 2004 without substantive change.

*C.C.P. 2025(j)(1), (j)(2)*, on the deposing party's failure to attend, were repealed and replaced by *C.C.P. 2025.430* and *2025.440* in 2004 without substantive change.





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#### 3. Deposition Proceedings.

##### a. Attendance of Parties and Witnesses.

##### 2. Failure To Attend.

##### bb. Party Deponent.

### 2 Witkin Cal. Evid. Discovery § 57

[§ 57] Party Deponent.

(1) *Motion To Compel Party Deponent's Attendance.* If, after service of a deposition notice, a party, or an officer, director, managing agent, employee, or designated deponent of a party, fails to appear, or testify, or produce documents or tangible things for inspection without having served a valid objection under *C.C.P. 2025(g)* (supra, §48), the deposing party may move for an order compelling attendance, testimony, and production. The motion must show good cause to justify the production of the document or tangible thing described in the deposition notice. The motion must be accompanied by a declaration showing a reasonable and good faith attempt to informally resolve each issue presented. Or, when the deponent fails to attend the deposition and produce the requested documents or things, the motion must be accompanied by a declaration stating that the petitioner has contacted the deponent to inquire about the nonappearance. (*C.C.P. 2025(j)(3)*; on monetary sanctions for failure to attempt informal resolution, see *infra*, §252; on format of motion to compel production of documents or tangible things, see *supra*, §28.)

(2) *Sanctions.* If the motion is granted, the court must also impose a monetary sanction under *C.C.P. 2023* "against the deponent or the party with whom the deponent is affiliated, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." The deposing party and any other party who attended at the specified time and place, expecting that the deponent's testimony would be taken, may also move for a monetary sanction under *C.C.P. 2023*. If the deponent fails to obey the order compelling attendance, testimony and production, the court may impose more severe sanctions, including issue, evidence, or terminating sanctions. (*C.C.P. 2025(j)(3)*; see Dunne on Depositions in California §6:3; on monetary sanctions under *C.C.P. 2023*, see *infra*, §252; on severe sanctions for failure to obey order, see *infra*, §255 et seq.)

*C.C.P. 2025(j)(3)* discontinues the former practice of imposing severe sanctions for an initial, wilful failure to appear for a deposition. The Commission believed that that approach needlessly created questions about the meaning of "wilfulness," and that in practice most courts were reluctant to impose severe sanctions for a mere failure to respond. Thus, only a monetary sanction is available in the first instance for a party's failure to appear for a deposition. "However, if the court orders that party to appear, and this order is not obeyed, then it becomes more appropriate to deal with disobedience by one of the severe sanctions." (Reporter's Note to *C.C.P. 2025(j)(3)*, in 2 Hogan, Cal. Civil Discovery, Appendix C.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Motion To Compel Party Deponent's Attendance*. *C.C.P. 2025(g)*, on objection to a deposition notice, was repealed and replaced by *C.C.P. 2025.410* in 2004 without substantive change.

*C.C.P. 2025(j)(3)*, on motions to compel a party deponent to appear, was repealed and replaced by *C.C.P. 2025.450* in 2004 without substantive change.(2) *Sanctions*. *C.C.P. 2023*, on monetary sanctions generally, was repealed and replaced by *C.C.P. 2023.010* et seq. in 2004 without substantive change.

*C.C.P. 2025(j)(3)*, on sanctions for a party's deponent's failure to appear, was repealed and replaced by *C.C.P. 2025.450(c)*, (d) in 2004 without substantive change.

See Reporter's Note to *C.C.P. 2025(j)(3)*, in Hogan, 2 Cal. Civil Discovery 2d, Appendix D.



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#### 3. Deposition Proceedings.

##### a. Attendance of Parties and Witnesses.

##### 2. Failure To Attend.

##### cc. Nonparty Deponent.

### 2 Witkin Cal. Evid. Discovery § 58

#### [§ 58] Nonparty Deponent.

If a deponent on whom a deposition subpoena has been served fails to attend a deposition or refuses to be sworn as a witness, the deponent may be punished for contempt under *C.C.P. 2023* (infra, §260 et seq.), without a prior court order directing compliance by the witness. (*C.C.P. 2025(j)(2)*, *2020(h)*, *1991.1*.)

The deponent is also subject to a civil action by the aggrieved party, under *C.C.P. 1992*, 2 *Cal. Evidence (4th)*, *Witnesses*, §32, to recover \$ 500 and all damages the party sustained because of the deponent's failure to attend or be sworn. (*C.C.P. 2025(j)(2)*; *C.C.P. 2020(h)*.) This remedy seldom has been invoked: the statutory sum (\$ 500) and the damages allowable may be too small to justify the expense of an action. (See Dunne on Depositions in California §6:2.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2020(h)*, *2023*, and *2025(j)(2)*, on punishment by contempt, were repealed and replaced by *C.C.P. 2020.240*, *2023.010* et seq., and *C.C.P. 2025.440(b)*, respectively, in 2004 without substantive change.



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## B. Oral Depositions.

## 3. Deposition Proceedings.

## b. Protective Orders.

## 1. Obtaining Order.

## aa. Procedure.

2 *Witkin Cal. Evid. Discovery* § 59

[§ 59] Procedure.

(1) *In General.* Before, during, or after a deposition, a party, a deponent, or another affected natural person or organization may "promptly" move for a protective order. On a showing of good cause, the court may make any order "that justice requires" to protect against "unwarranted annoyance, embarrassment, or oppression, or undue burden and expense." (*C.C.P. 2025(i)*); see *People v. Superior Court (Kaufman)* (1974) 12 C.3d 421, 425, 115 C.R. 812, 525 P.2d 716, 2 Cal. Evidence (4th), Witnesses, §474 [predecessor to *C.C.P. 2025(i)*, former *C.C.P. 2019(b)*, empowers court to issue protective order that includes grant of immunity from criminal prosecution]; *Allen v. Superior Court* (1984) 151 C.A.3d 447, 198 C.R. 737, 3 Cal. Evidence (4th), Presentation at Trial, §252 [under its authority to protect witness from "annoyance, embarrassment, or oppression," trial court should consider whether plaintiff's object can be accomplished by means less intrusive than overbroad request for production of documents]; C.J.E.R., Judges Benchbook, Civil Proceedings: Discovery §10.4; 1 Hogan, Cal. Civil Discovery §2.15 et seq.; for forms of motion, see Cal. Civil Practice, 2 Procedure, §13:65 et seq.; 8A Am.Jur. P.P. Forms (1996 ed.), Depositions and Discovery §461 et seq.; on when use of motion for protective order is most advantageous, see Dunne on Depositions in California §4:17; on suspension of deposition pending motion for protective order, see *infra*, §61.)

If the motion is denied in whole or in part, the court may order the deponent to permit discovery "on those terms and conditions that are just." (*C.C.P. 2025(i)*); on monetary sanctions for unsuccessfully making or opposing motion, see *infra*, §252.)

(2) *Attempt at Informal Resolution.* The motion must be accompanied by a declaration showing a reasonable and good faith attempt at an informal resolution of each issue presented. (*C.C.P. 2025(i)*.) (On monetary sanctions for failure to attempt informal resolution, see *infra*, §252.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General.* *C.C.P. 2025(i)*, on the procedure for obtaining a protective order, was repealed and replaced by *C.C.P. 2025.420* in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §2.15 et seq.; 8A Am.Jur. P.P. Forms (2004 ed.), Depositions and Discovery, Form 304 et seq. (2) *Attempt at Informal Resolution.* *C.C.P. 2025(i)*, requiring a meet and confer declaration, was repealed and replaced by *C.C.P. 2025.420(a)* in 2004 without substantive change. *West's Key Number Digest*,

Pretrial Procedure k.131 et seq.



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## CHAPTER X - Discovery

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##### b. Protective Orders.

##### 1. Obtaining Order.

##### bb. Permissible Orders.

#### 2 Witkin Cal. Evid. Discovery § 60

[§ 60] Permissible Orders.

Under *C.C.P. 2025(i)*, a protective order may include, but is not limited to, one or more of the following directions:

- (1) That the deposition not be taken at all (see *infra*, §62).
- (2) That the deposition be taken at a different time (on stay of proceedings, see *infra*, §63).
- (3) That a videotaped deposition of a physician or expert witness intended for possible use at trial be postponed until the moving party has had an adequate opportunity to prepare for cross-examination.
- (4) That the deposition be taken at another, authorized place.
- (5) That the deposition be taken only under specified terms and conditions.
- (6) That the deposition be by written examination.
- (7) That written interrogatories be used instead of an oral deposition.
- (8) That a different manner of recording the testimony be used.
- (9) That certain matters not be inquired into.
- (10) That the scope of the examination be limited to certain matters.
- (11) That specified writings or things designated in the notice not be produced, inspected or copied.
- (12) That designated persons, other than the parties, their officers, and their counsel, be excluded. (See *Willoughby v. Superior Court* (1985) 172 C.A.3d 890, 892, 218 C.R. 486 [parties may not be excluded under unambiguous language of former C.C.P. 2019(b)(1)]; *Lowy Dev. Corp. v. Superior Court* (1987) 190 C.A.3d 317, 321, 235 C.R. 401 [construing similar language in former C.C.P. 2019(b)(1); trial court erred in issuing protective order excluding all other corporate officers from attending deposition of fellow corporate officer when corporation was party to action; modified

protective order directed, allowing one officer in addition to deponent to be present at each deposition].)

(13) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only to specified persons or only in a specified way.

(14) That the parties simultaneously file specified documents enclosed in sealed envelopes to be opened as the court directs.

(15) That the deposition be sealed and opened only by court order.

**SUPPLEMENT:** [This section is current through the latest supplement]  
*C.C.P. 2025(i)*, on the contents of a protective order, was repealed and replaced by *C.C.P. 2025.420(b)* in 2004 without substantive change.



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#### 2. Suspension of Deposition.

2 Witkin Cal. Evid. Discovery § 61

[§ 61] Suspension of Deposition.

(1) *Suspension Pending Motion.* There are only two reasons for which a deposition officer may suspend the taking of testimony: (a) when the party conducting the deposition and the deponent stipulate to the suspension, and (b) when a party attending the deposition or the deponent demands a suspension to enable that person to move for a protective order "on the ground that the examination is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses." (*C.C.P. 2025(n)*); on monetary sanctions for unsuccessfully making or opposing motion for protective order, see *infra*, §252.)

(2) *Attempt at Informal Resolution.* The motion for a protective order must be accompanied by a declaration showing a reasonable and good faith attempt at an informal resolution of each issue presented. (*C.C.P. 2025(n)*); on monetary sanctions for failure to attempt informal resolution, see *infra*, §252.)

(3) *Appropriate Court for Motion.* The former provision governing suspension of a deposition pending a motion for a protective order (former *C.C.P. 2019(d)*) allowed the motion to be made either in (a) the court where the action was pending, or (b) the superior court in the county where the deposition was being taken. *C.C.P. 2025(n)* eliminated the power of the latter court to rule on the motion. Because the courts have statewide subpoena power in civil cases, the Commission believed that "it is no longer necessary or appropriate for a court other than the one in which the action is pending to rule on a motion for a protective order terminating or limiting the scope of a deposition." (Reporter's Note to *C.C.P. 2025(n)*, in 2 Hogan, Cal. Civil Discovery, Appendix C.)

(4) *Order of Termination or Limitation.* On a showing of good cause, the court may terminate the examination or limit the scope and manner of taking the deposition as provided in *C.C.P. 2025(i)* (*supra*, §60). If the examination is terminated, it may not be resumed except by court order. (*C.C.P. 2025(n)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Suspension Pending Motion.* *C.C.P. 2025(n)*, as amended in 2002, specifies that the stipulation must be by "all parties present."

*C.C.P. 2025(n)* was repealed and replaced by *C.C.P. 2025.470* in 2004 without substantive change.

(2) *Attempt at Informal Resolution.* The portion of *C.C.P. 2025(n)* requiring a meet and confer declaration was



repealed and replaced by the portion of *C.C.P. 2025.470* making *C.C.P. 2025.420* applicable. (See Supp., supra, §59.)

(3) *Appropriate Court for Motion.* *C.C.P. 2025(n)*, on the procedure for suspending a deposition, was repealed and replaced by *C.C.P. 2025.470* in 2004 without substantive change.

See Reporter's Note to *C.C.P. 2025(n)*, in Hogan, 2 Cal. Civil Discovery 2d, Appendix D.

(4) *Order of Termination or Limitation.* The portion of *C.C.P. 2025(i)* relating to termination or limitation of a deposition was repealed and replaced by *C.C.P. 2025.420* in 2004 without substantive change.

The portion of *C.C.P. 2025(n)* prohibiting the resumption of the examination except by court order was repealed and replaced by *C.C.P. 2025.420(b)(16)* in 2004 without substantive change.



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##### aa. No Deposition Allowed.

#### 2 Witkin Cal. Evid. Discovery § 62

[§ 62] No Deposition Allowed.

(1) *High-Ranking Corporate Official. Liberty Mut. Ins. Co. v. Superior Court* (1992) 10 C.A.4th 1282, 13 C.R.2d 363, involved the following question of first impression: May the head of a corporation be deposed in the absence of any showing of involvement in a lawsuit against the corporation, and prior to the exhaustion of less intrusive means of discovery?

Plaintiff, the wife of an injured employee, sued the employer's workers' compensation carrier and its president for failing to provide the care set forth in the compensation policy. In support of his motion to prohibit the deposition, defendant president submitted his own declaration stating that he had no knowledge of plaintiff's case, and a declaration of his administrative assistant stating that matters such as plaintiff's claim were regularly sent to lower level employees. Plaintiff argued that defendant had constructive knowledge of her claim based on letters from her attorney showing copies to defendant (identifying him by title, but not by name). The trial judge denied the motion for a protective order, and defendant sought mandamus. *Held*, writ granted.

(a) It seems sensible to prevent a plaintiff from leapfrogging to the apex of the corporate hierarchy in the first instance: the head of a large national corporation will generally lack knowledge of a specific incident handled several levels down the corporate pyramid, and allowing such an official to be deposed would raise a tremendous potential for discovery abuse and harassment. (10 C.A.4th 1287.) Based on these concerns, the federal decisions generally do not allow plaintiffs' deposition power to automatically reach the pinnacle of the corporate structure. (10 C.A.4th 1288, citing numerous federal decisions.)

(b) "Consistent with these federal decisions, we hold that when a plaintiff seeks to depose a corporate president or other official at the highest level of corporate management, and that official moves for a protective order to prohibit the deposition, the trial court should first determine whether the plaintiff has shown good cause that the official has unique or superior personal knowledge of discoverable information. If not, as will presumably often be the case in the instance of a large national or international corporation, the trial court should issue the protective order and first require the plaintiff to obtain the necessary discovery through less intrusive methods. These would include interrogatories directed to the high-level official to explore the state of his or her knowledge or involvement in plaintiff's case; the deposition of lower level employees with appropriate knowledge and involvement in the subject matter of the litigation; and the organizational deposition of the corporation itself, which will require the corporation to produce for deposition the most

qualified officer or employee to testify on its behalf as to the specified matters to be raised at the deposition. ... Should these avenues be exhausted, and the plaintiff make a colorable showing of good cause that the high-level official possesses necessary information to the case, the trial court may then lift the protective order and allow the deposition to proceed." (10 C.A.4th 1289.)

(c) Plaintiff's argument that a high level official's protestation of ignorance of a lawsuit is self-serving and automatically suspect is without merit. It is not implausible that such an official would lack knowledge of a specific claim. And in any event, "the procedure outlined above will prevent undue harassment and oppression of high-level officials while still providing a plaintiff with several less intrusive mechanisms to obtain the necessary discovery, and allowing for the possibility of conducting the high-level deposition if warranted." (10 C.A.4th 1290.) (On who may be deposed generally, see *supra*, §30.)

(2) *Opposing Counsel*. In *Trade Center Properties v. Superior Court* (1960) 185 C.A.2d 409, 8 C.R. 345, plaintiff sued defendant for services in procuring a loan from F and Co. Counsel for defendant took a statement from F, president of F and Co. Plaintiff sought to take the deposition of defendant's attorney and to obtain a copy of the statement by subpoena duces tecum in connection with the deposition. The trial judge granted a protective order against taking of the deposition, and plaintiff applied for mandamus to compel the taking. *Held*, writ denied. The written statement by F (not a client) was not privileged, but there are strong policy reasons against taking the deposition of opposing counsel on matters pertaining to the trial: "Whether to protect the work product of that attorney or to restrict the picking of his brains, the court clearly should bar such a proceeding except upon a showing of extremely good cause. No such showing is here made. On the contrary, it is clear that Files has responded freely to interviews by petitioner's counsel, and remains available for further interview, or for deposition if required. Lacking strong elements of good cause, it would seem an abuse of discretion for the trial court to refuse an order that the deposition not be taken." (185 C.A.2d 411.) (See *Greyhound Corp. v. Superior Court* (1961) 56 C.2d 355, 401, 15 C.R. 90, 364 P.2d 266 [dictum approving *Trade Center* approach]; *supra*, §31.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## bb. Stay of Deposition.

## 2 Witkin Cal. Evid. Discovery § 63

## [§ 63] Stay of Deposition.

(1) *Pending Inspection.* In *Rosemont v. Superior Court* (1964) 60 C.2d 709, 36 C.R. 439, 388 P.2d 671, plaintiff sued for breach of contract and inducing breach. The parties agreed that plaintiff's deposition be taken October 1 and defendant T's October 24. Plaintiff, however, had 39 recordings of conversations with defendants and their employees, which defendants wanted to inspect. Accordingly, defendants moved for an order requiring production or, in the alternative, a protective order to stay defendant T's deposition pending application for mandamus to compel inspection. Plaintiff then moved for an order requiring defendants to give their depositions before he produced the recordings. The trial judge stayed T's deposition pending his ruling; then, on December 7, he denied defendants' motion for lack of identifying information, but ordered plaintiff to furnish it. Plaintiff filed a declaration listing the recorded conversations, and the judge then ordered that defendants were entitled to inspect them before plaintiff could take their depositions. *Held*, prohibition denied; the order was proper.

(a) The trial judge has statutory (former C.C.P. 2019(b)(1)) as well as inherent power to stay a deposition pending decision on a motion for a protective order. (60 C.2d 714.)

(b) Plaintiff's argument that he was entitled to the advantage gained by first securing discovery (to take T's deposition before defendants could cure their defective motion) was unacceptable. Parties are entitled to the benefits normally flowing from prompt action, but plaintiff was seeking a one-sided advantage in being able to refresh his recollection before his own deposition while denying this opportunity to defendants. (60 C.2d 714.)

(c) The trial judge could have exercised his discretion in plaintiff's favor, on the ground of defendants' delay in seeking inspection and their inadequate motion; but, in view of plaintiff's own delay in prosecuting the action, he was justified in insisting on the fairness of mutual discovery. (60 C.2d 715.) (See also *Poeschl v. Superior Court* (1964) 229 C.A.2d 383, 386, 40 C.R. 697 [Rosemont followed on similar facts].)

(2) *Pending Exchange of Information.* A protective order requiring exchange of expert appraisals before deposition is frequently made in condemnation cases. "The key element is mutuality"; i.e., one party should not be permitted, by deposition or interrogatories, to explore the reports and opinions of the other party's experts without simultaneously divulging those of his or her own. (*Swartzman v. Superior Court* (1964) 231 C.A.2d 195, 204, 41 C.R. 721.)

In *Swartzman*, defendants refused offers of mutual exchange of data and of simultaneous depositions of all experts; they would not commit themselves on whether they would use an appraiser at the trial, and insisted on the right to depose the state's appraisal expert without any exchange of valuation data. "Clearly, petitioners sought to play their hand with their cards close to the chest while demanding that their opponent play its cards face up from the table. Such one-way discovery, no give and all take, would quickly drive fairness and mutuality out of pretrial investigation." (231 C.A.2d 205.)

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## cc. Class Actions.

2 *Witkin Cal. Evid. Discovery* § 64

## [§ 64] Class Actions.

Conventional discovery procedures are susceptible of abuse during class actions and require a proper allocation of burdens. In *Southern Calif. Edison Co. v. Superior Court* (1972) 7 C.3d 832, 103 C.R. 709, 500 P.2d 621, five named plaintiffs, representing themselves and a class of approximately 1,500 Redondo Beach boat owners, alleged that defendant power company damaged the boats through the wrongful discharge of pollutants from a generating plant. Plaintiffs sought \$ 5 million in compensatory damages, the same amount in exemplary damages and a permanent injunction. After denying the allegations, defendant began discovery proceedings by selecting 20 names at random from a list of members of the boat owners' association, as supplied by plaintiffs. Depositions were noticed for these 20 persons. Without conceding responsibility, plaintiffs tried to produce the requested deponents but were able to bring in only two such persons. Defendant then noticed the depositions of another 20 randomly selected persons and announced its intention of moving to exclude from the class all those who failed to appear. The named plaintiffs obtained a protective order declaring that it was unfair to require plaintiffs' attorney to produce anyone other than the named plaintiffs, that defendant's notices of deposition should be quashed and that defendant could renounce the depositions through issuance of subpoenas. *Held*, the trial court did not abuse its discretion.

(a) The issue posed by the trial judge's order is a practical one, dealing with allocation of the *burden* of securing the unnamed plaintiffs' attendance at depositions. As set forth in *Greyhound Corp. v. Superior Court* (1961) 56 C.2d 355, 383, 15 C.R. 90, 364 P.2d 266 (*supra*, §25), the correct test requires the judge to weigh the relative importance of the information against the hardship its production might entail, as well as considering the parties' abilities to obtain the information. Here, good cause existed for issuance of a protective order, because defendant was as able as the named plaintiffs to compel the attendance of the unnamed plaintiffs, the class was loosely knit, and defendant allegedly was planning to continue noticing depositions and moving to exclude the unnamed plaintiffs who did not appear. (7 C.3d 841.)

"We fear that the notice procedure employed by [defendant] is susceptible of great abuse. In essence, plaintiffs' attorneys will be forced to expend extraordinary time and effort to round up persons of a disorganized class with whom they probably have had no prior contact. ... Prospective deponents who do not heed informal efforts on the part of counsel and do not appear will face potential exclusion. Thus, a defendant can effectively stifle a class action at the discovery stage, either by imposing impossibly expensive burdens on the named plaintiffs or by chipping away at the

size of the class through exclusion of the unnamed plaintiffs. It is especially vital to prevent such 'chilling' of class actions in light of their new importance as a litigation tool." (7 C.3d 842.) However, the proper allocation of discovery burdens "might be different if the class alleged were a closely organized group, where the members generally knew each other and participated together in the planning of the lawsuit." (7 C.3d 841, footnote 7.)

(b) The trial court made a wise decision in finding that good cause for a protective order was shown. But no general rule should be declared for class actions, under which defendants would be required to show good cause for the taking of depositions of unnamed plaintiffs. Discovery should not be conditioned on a showing of good cause, even though class action plaintiffs may have to seek protective orders in many cases. (7 C.3d 842.) (See 61 Cal. L. Rev. 322 [compelling deposition in class action].)

In *Carlson v. Superior Court* (1973) 33 C.A.3d 640, 109 C.R. 240, a follow-up case to *Southern Calif. Edison Co. v. Superior Court*, the trial judge allowed defendant to serve "alternative" deposition subpoenas on unnamed plaintiffs, in which the subpoena was accompanied by a letter informing the prospective deponent of the nature of the case and by a declaration waiving claim, to be executed if he wished to avoid the deposition and waive his rights to recovery as a member of the class. The named plaintiffs sought extraordinary relief to prohibit this procedure. *Held*, mandamus granted. The procedure was just another device by which a defendant could chip away at the size of the class through exclusion of unnamed plaintiffs. The order "did not allow unnamed plaintiffs to freely 'opt out' of the class but, rather, required them to either submit to deposition proceedings or exclude themselves from the class. In effect, unnamed plaintiffs served with deposition subpoenas are required, under the terms of the trial court's order, to take affirmative action in order to remain as members of the class." (33 C.A.3d 649.)

"If defendant is desirous of taking the depositions of unnamed plaintiffs, remedies are available to it to enforce its subpoenas. The sending of notice to unnamed plaintiffs respecting the nature of the action and their option to exclude themselves from the class should they choose to do so is not, in and of itself, improper. Indeed, this is procedure approved under *rule 23, Federal Rules of Civil Procedure*, and *California Civil Code section 1781* for use at an appropriate time. That which we find objectionable is the either/or nature of the notice used here, reinforced as it is by inclusion of the waiver form, which encourages unnamed plaintiffs to 'opt out' of the class at the discovery stage rather than to submit to deposition proceedings." (33 C.A.3d 651.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## c. Method of Conducting Examination.

## 1. In General.

2 *Witkin Cal. Evid. Discovery* § 65

[§ 65] In General.

Unless modified by stipulation (*supra*, §36), deposition procedure is as follows:

(1) *Oath and Reporter*. The deposition officer must put the deponent under oath. The deponent's testimony must be taken stenographically, unless the parties agree or the court orders otherwise. (*C.C.P. 2025(l)(1)*; see *C.E.B.*, 1 Civil Discovery Practice 3d, §§4.38, 4.39, 5.31; 1 Hogan, *Cal. Civil Discovery* §2.22; on use of audiotape or videotape, see *infra*, §67 et seq.) The usual practice is to have a qualified shorthand reporter, who also acts as the deposition officer. (See *C.C.P. 2093(b)*; *supra*, §35.)

(2) *Examination and Cross-Examination*. Examination and cross-examination of a deponent proceeds as permitted at trial under the Evidence Code. (*C.C.P. 2025(l)(1)*; see 3 *Cal. Evidence (4th)*, *Presentation at Trial*, §164 et seq.; *C.E.B.*, 1 Civil Discovery Practice 3d, §5.13 et seq.; 1 Hogan, *Cal. Civil Discovery* §2.28; 4 *Am.Jur. Trials* 119, 161; on strategies for preparing deponents for depositions, see Dunne on Depositions in California, Chap. 5; on procedures and techniques for deposing expert witnesses, see Dunne on Depositions in California, Chap. 8.)

(3) *Objections*. Stated objections are taken stenographically unless the parties agree or the court orders otherwise. (*C.C.P. 2025(l)(1)*.) The deposition proceeds subject to the objection, unless the objecting party demands that the deposition be suspended to permit a motion for a protective order (see *infra*, §61). (*C.C.P. 2025(m)(2)*.) (On strategies for making objections, see Dunne on Depositions in California §7:11; on strategies for dealing with objections to questions, see Dunne on Depositions in California §6:14 et seq.; on procedural defects as basis for objection to introduction of deposition at trial, see 3 *Cal. Evidence (4th)*, *Presentation at Trial*, §161; on inadmissibility as basis for objection, see 3 *Cal. Evidence (4th)*, *Presentation at Trial*, §162; on raising objections to deposition notice, see *C.C.P. 2025(g)*, *supra*, §48.)

(4) *Claim of Privilege or Work Product Protection*. The protection of information from discovery on the ground that it is privileged or protected by the work product doctrine is waived unless a specific and timely objection is made. (*C.C.P. 2025(m)(1)*.) This provision had no counterpart in the former statute. Its absence, together with the general rule that objections based on competency, relevancy or materiality are not waived (*C.C.P. 2025(m)(3)*; 3 *Cal. Evidence (4th)*, *Presentation at Trial*, §162), might have misled an inexperienced attorney into thinking that objections based on privilege or work product are preserved even when not asserted during the deposition. However, under *Ev.C. 912(a)* (2 *Cal. Evidence (4th)*, *Witnesses*, §67), a privilege is waived by failure to make a timely claim. "Since the work product



protection is in many ways analogous to a privilege, failure to invoke it should also result in a waiver." (Reporter's Note to *C.C.P. 2025(m)(1)*, in 2 Hogan, Cal. Civil Discovery, Appendix C; see 1 Hogan, Cal. Civil Discovery §2.27; on strategies for asserting privileges, see Dunne on Depositions in California §7:17 et seq.; on strategies for dealing with assertion of privilege, see Dunne on Depositions in California §6:17 et seq.)

(5) *Failure To Respond*. If the deponent fails to answer a question or fails to produce a document or tangible thing under the deponent's control that is requested in the deposition notice or subpoena, the deposing party "may adjourn the deposition or complete the examination on other matters without waiving the right at a later time to move for an order compelling that answer or production" under *C.C.P. 2025(o)* (infra, §70). (*C.C.P. 2025(m)(4)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Oath and Reporter*. *C.C.P. 2093(b)* was subdivided and amended in 2001. The provision concerning the shorthand reporter's acting as deposition officer is contained in *C.C.P. 2093(b)(1)*, and it applies to depositions taken by telephone or other remote electronic means. (*C.C.P. 2093(b)(2)*; see Supp., supra, §§27A, 55.)

*C.C.P. 2025(l)(1)*, outlining the deposition process, was repealed and replaced by *C.C.P. 2025.330* in 2004 without substantive change.

See C.E.B., 1 Civil Discovery Practice 4th, §5.72; Hogan, 1 Cal. Civil Discovery 2d, §2.22.

(2) *Examination and Cross-Examination*. *C.C.P. 2025(l)(1)*, on the procedure for conducting the examination, was repealed and replaced by *C.C.P. 2025.330(d)* in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §2.28; C.E.B., 1 Civil Discovery Practice 4th, §6.23 et seq.

(3) *Objections*. *C.C.P. 2025(l)(1)*, requiring any objections to be taken stenographically, was repealed and replaced by *C.C.P. 2025.330(b)* in 2004 without substantive change.

*C.C.P. 2025.330(b)* was amended in 2005 to specify that if the testimony or objections are taken stenographically, it must be by a person certified under *B. & P.C. 8020* et seq.

*C.C.P. 2025(m)(2)*, requiring the deposition to proceed absent a demand for suspension, was repealed and replaced by *C.C.P. 2025.460(b)* in 2004 without substantive change.

*C.C.P. 2025(g)*, on objections to the deposition notice, was repealed and replaced by *C.C.P. 2025.410* in 2004 without substantive change.

(4) *Claim of Privilege or Work Product Protection*. *C.C.P. 2025(m)(1)*, on waiver of privilege, was repealed and replaced by *C.C.P. 2025.460(a)* in 2004 without substantive change.

*C.C.P. 2025(m)(3)*, on nonwaiver of competency, relevancy, or materiality objections, was repealed and replaced by *C.C.P. 2025.460(c)* in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §2.27; Reporter's Note to *C.C.P. 2025(m)(1)*, in Hogan, 2 Cal. Civil Discovery 2d, Appendix D.(5) *Failure To Respond*. *C.C.P. 2025(m)(4)*, on the deposing party's options where the deponent fails to respond or produce requested documents, was repealed and replaced by *C.C.P. 2025.460(d)* in 2004 without substantive change.

*C.C.P. 2025(o)*, on motions to compel, was repealed and replaced by *C.C.P. 2025.480* in 2004 without substantive change. *West's Key Number Digest*, Pretrial Procedure k.151 et seq.



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#### c. Method of Conducting Examination.

#### 2. No Legal Contention Questions.

2 *Witkin Cal. Evid. Discovery* § 66

[§ 66] No Legal Contention Questions.

In *Rifkind v. Superior Court* (1994) 22 C.A.4th 1255, 27 C.R.2d 822, one attorney sued another for improperly withdrawing money held in a joint account pending resolution of a fee dispute between them. At a deposition, defendant was asked to state all facts, list all witnesses, and identify all documents that supported the affirmative defenses he had asserted in his answer. Defendant's attorney objected to these questions, but invited plaintiff's attorney to ask the same questions by way of interrogatories. The trial judge granted plaintiff's motions to compel further answers and impose sanctions. *Held*, writ of mandamus issued. "Legal contention" questions of the type asked defendant, while appropriate for interrogatories (see *infra*, §105), are not proper in the deposition of a party who is represented by counsel. (22 C.A.4th 1263.) They are unfair, as they call on the deponent to sort out the factual material in the case according to specific legal contentions, and to do this by memory and on the spot. If the deposing party "wants to know what the adverse party is contending, or how it rationalizes the facts as supporting a contention, it may ask that question in an interrogatory. The party answering the interrogatory may then, with aid of counsel, apply the legal reasoning involved in marshaling the facts relied upon for each of its contentions." (22 C.A.4th 1262.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### 3. Videotape or Audiotape Recording of Deposition.

##### aa. Statutory Authorization.

### 2 *Witkin Cal. Evid. Discovery* § 67

#### [§ 67] Statutory Authorization.

(1) *Former Law.* The use of audiotape or videotape in reporting deposition proceedings has been the frequent subject of commentary. (See 24 *Hastings L. J.* 1, 9; 66 A.L.R.3d 637 [videotape]; 13 A.L.R.4th 775 [audiotape]; see also the Uniform Audio-Visual Deposition Act, 12 U.L.A. (Master Ed.), p. 51; 23 Am.Jur. Trials 95.)

In *Bailey v. Superior Court* (1977) 19 C.3d 970, 140 C.R. 669, 568 P.2d 394, plaintiff B sued defendant manufacturer of a radial arm saw, alleging negligence as the proximate cause of an injury to his hand sustained while he was operating the saw. Defendant denied its negligence and submitted interrogatories asking for a description of the manner in which the accident had occurred. Contending that the responses did not furnish an adequate description, defendant then sought to take an oral deposition of plaintiff, with a direction that he reenact for videotape his version of the accident, and that the videotape and responses be used as part of the deposition. Plaintiff's counsel objected. *Held*, order granting defendant's motion reversed. The statutory definition of deposition and the provisions for reading, correcting, and signing made clear the legislative intention that depositions be stenographically recorded and transcribed into a writing unless the parties otherwise agreed. (19 C.3d 974, 976, 977.) (On present law regarding physical reenactment of accident, see *infra*, §69.)

(2) *Present Law.* The party noticing a deposition may make a videotape or audiotape record if the deposition notice states an intention to record the testimony by either method or all parties agree to either method. Another party, at his or her own expense, may make a videotape or audiotape record if the party "promptly" gives written notice of an intention to do so, not less than 3 calendar days before the scheduled date of the deposition. If the notice is given 3 calendar days before the deposition date, it must be made by personal service under C.C.P. 1011 (6 Cal. Proc. (4th), *Proceedings Without Trial*, §20). The notice must be served on the party or attorney who noticed the deposition, on all other parties or attorneys on whom the deposition notice was served, and on any deponent whose attendance is being compelled by a deposition subpoena. (C.C.P. 2025(l)(1); see *Green v. GTE Calif.* (1994) 29 C.A.4th 407, 410, 34 C.R.2d 517 [sanctions properly imposed against plaintiff's attorney, who attempted to videotape defendant's counsel taking plaintiff's deposition; 3-day statutory notice was not given, and "it is questionable whether the statute applies to videotaping opposing counsel instead of the witness"].) (See C.E.B., 1 Civil Discovery Practice 3d, §5.9 et seq.; 1 Hogan, Cal. Civil Discovery §2.22; 21 Southwestern U. L. Rev. 1199 [federal rule]; 44 Am.Jur. Trials 171; on matters to consider when deciding whether to videotape deposition, see Dunne on Depositions in California §§8:13, 10:1 et seq.; on preparing

witness for videotaped deposition, see Dunne on Depositions in California §10:7 et seq.; on procedure where audio or video record is made, see *infra*, §68; on recovery of costs of videotaping, see *C.C.P. 1033.5(a)(3)*, *supra*, §38.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Present Law.* *C.C.P. 2025(l)(1)*, as amended in 2002, refers to "audio or video technology," rather than "audiotape or videotape."

*C.C.P. 2025(l)(1)* was repealed and replaced by *C.C.P. 2025.330(c)* in 2004 without substantive change.

See C.E.B., 1 Civil Discovery Practice 4th, §5.75 et seq.; Hogan, 1 Cal. Civil Discovery 2d, §2.22; on oral depositions by telephone, videoconference, or other remote electronic means, see *Supp.*, *infra*, §79A.



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##### bb. Procedure.

### 2 Witkin Cal. Evid. Discovery § 68

[§ 68] Procedure.

(1) *Location*. The area used for recording a deposition must be "suitably large, adequately lighted, and reasonably quiet." (*C.C.P. 2025(l)(2)(A)*.)

(2) *Equipment Operator*. The operator of the equipment must be competent to set up, operate, and maintain it (*C.C.P. 2025(l)(2)(B)*) and must not "distort the appearance or the demeanor of participants in the deposition by the use of camera or sound recording techniques" (*C.C.P. 2025(l)(2)(C)*).

Unless the operator is also the deposition officer, he or she may be an employee of the attorney taking the deposition. However, if a videotaped deposition of an expert witness or a treating or consulting physician is to be used at trial or at a hearing, the operator must be a person authorized to administer oaths, may not be financially interested in the action, and may not be a relative or employee of an attorney for a party. (*C.C.P. 2025(l)(2)(B)*, 2025(d)(6); on notice of intent to use deposition at trial, see *C.C.P. 2025(l)(2)(I)*, *infra*, §79.) All parties attending a deposition may agree on the record to waive these restrictions and qualifications. (*C.C.P. 2025(l)(2)(B)*.)

(3) *Content of Record*. The videotape or audiotape record must include:

(a) At the beginning, a statement including (1) the operator's name and business address, (2) the name and business address of the operator's employer, (3) the date, time, and place of the deposition, (4) the caption of the case, (5) the identities of the deponent and the party taking the deposition, and (6) any stipulations. (*C.C.P. 2025(l)(2)(D)*.)

(b) Personal identification of counsel. (*C.C.P. 2025(l)(2)(E)*.)

(c) The administration of the oath. (*C.C.P. 2025(l)(2)(F)*.)

(d) Where more than one unit of tape is required, an announcement of the beginning and end of each unit. (*C.C.P. 2025(l)(2)(G)*.)

(e) A statement of any stipulations concerning custody of the recording and the exhibits or "concerning other pertinent matters." (*C.C.P. 2025(l)(2)(H)*.)

(f) At the conclusion, a statement that the deposition is ended. (*C.C.P. 2025(l)(2)(H).*)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Location.* *C.C.P. 2025(l)(2)(A)*, on the conditions in the deposition location, was repealed and replaced by *C.C.P. 2025.340(a)* in 2004 without substantive change.

(2) *Equipment Operator.* *C.C.P. 2025(l)(2)(B)* was amended in 2000 to add restrictions relating to products and services offered by the deposition officer; these restrictions are substantially the same as those contained in *C.C.P. 2025(k)*. (See Supp., supra, §35.)

*C.C.P. 2025(l)(2)(B)* was repealed and replaced by *C.C.P. 2025.340(b)* in 2004 without substantive change.

*C.C.P. 2025(l)(2)(C)*, prohibiting techniques that produce distortion, was repealed and replaced by *C.C.P. 2025.340(g)* in 2004 without substantive change.

*C.C.P. 2025(d)(6)*, on restrictions on the qualifications of the operator, was repealed and replaced by *C.C.P. 2025.220(a)(6)* in 2004 without substantive change.

*C.C.P. 2025(l)(2)(I)*, on notice of intent to use the deposition at trial, was repealed and replaced by *C.C.P. 2025.340(m)* in 2004 without substantive change.

(3) *Content of Record.* *C.C.P. 2025(l)* was amended in 2002 to refer to "audio or video technology," rather than "audiotape or videotape."

*C.C.P. 2025(l)(2)(D)-(l)(2)(H)*, on the contents of the video or audio record, were repealed and replaced by *C.C.P. 2025.340(h)-(l)* in 2004 without substantive change.

(d) *Announcement of beginning and end:* *C.C.P. 2025(l)(2)(G)*, as amended in 2002, applies not only to each unit of tape but also to each unit of electronic storage.

*C.C.P. 2025(l)(2)(G)* was repealed and replaced by *C.C.P. 2025.340(k)* in 2004 without substantive change.



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##### cc. Physical Reenactment.

### 2 Witkin Cal. Evid. Discovery § 69

#### [§ 69] Physical Reenactment.

In *Emerson Elec. Co. v. Superior Court* (1997) 16 C.4th 1101, 68 C.R.2d 883, 946 P.2d 841, the issue was whether, in the course of a videotaped deposition in a products liability action arising from an accident with a radial arm saw, defendants could require plaintiff to diagram the circumstances of the accident and to reenact it. Concluding that it was bound by the holding in *Stermer v. Superior Court* (1993) 20 C.A.4th 777, 24 C.R.2d 577, that a trial court has no authority to order a deponent to give nonverbal testimony, the trial judge denied defendants' motion for a sanction that would have precluded plaintiff from reenacting the accident at trial. He also denied their alternative motion for an order compelling plaintiff to provide nonverbal testimony, including a reenactment, at the deposition. The Court of Appeal, expressly disagreeing with the *Stermer* case, granted writ relief. *Held*, judgment of Court of Appeal affirmed.

(a) "*Answer*" includes nonverbal response. C.C.P. 2025(o) authorizes a party to enforce the discovery right when a deponent "fails to answer any question." The first question, therefore, is whether "answer" includes nonverbal as well as verbal responses. The language, context, and legislative history of the statute all indicate that nonverbal responses are included. The plain meaning of "answer" encompasses "saying, writing, or *doing* something called for in return." (16 C.4th 1106, 1107.) Adopting this ordinary meaning of "answer" serves to harmonize C.C.P. 2025(o) with C.C.P. 2025(l)(1), which provides that examination and cross-examination of the deponent should proceed as permitted at trial: It is undisputed that evidence at trial may include a nonverbal answer to a question, including a physical demonstration or reenactment. Furthermore, one of the purposes of the Civil Discovery Act of 1986 was to bring California discovery procedures closer to federal practice, which then, as now, provided for videotaped depositions, including reenactments. Prior California case law had determined that videotaped depositions were not permitted without the consent of the parties. The legislative history of C.C.P. 2025 indicates that that case law was intended to be superseded. (16 C.4th 1108, 1109.)

(b) *Discovery procedures protect against abuse.* Construing the statute to require nonverbal responses does not present any dangers that cannot be minimized through the use of already existing discovery procedures. The conditions and techniques of the videorecording are prescribed by statute (C.C.P. 2025(l)(2)), and the deponent may interpose, on the videotaped record, objections to any errors or irregularities (C.C.P. 2025(m)). Moreover, the deponent may seek judicial protection from "unwarranted annoyance, embarrassment, or oppression, or undue burden and expense." (C.C.P. 2025(i).) "In the appropriate case, the court may limit or preclude the request for a reenactment altogether, on

safety, feasibility, or other grounds. ... The need for, and nature of, such a protective order will, of course, depend on the circumstances of the individual case." (16 *C.4th* 1110, 1111.)

(c) *Sanctions*. Because a deponent may be required to perform a demonstration or reenactment at a party's request, the refusal to do so may subject the deponent to any of the usual discovery abuse penalties, including issue, evidence, or terminating sanctions under *C.C.P.* 2023. The trial judge, who denied defendants' motions to compel only reluctantly, must hold a new hearing and reconsider defendants' motions, unconstrained by the erroneous holding in *Stermer*. (16 *C.4th* 1112, 1113.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P.* 2025(o), on enforcement of the discovery right where a deponent fails to answer, was repealed and replaced by *C.C.P.* 2025.480 in 2004 without substantive change.

*C.C.P.* 2025(l)(1), requiring the examination and cross-examination to proceed as at trial, was repealed and replaced by *C.C.P.* 2025.330(d) in 2004 without substantive change.

*C.C.P.* 2025(l)(2), on the conditions and techniques of videorecording, was repealed and replaced by *C.C.P.* 2025.340 in 2004 without substantive change.

*C.C.P.* 2025(m), on objections, was repealed and replaced by *C.C.P.* 2025.460 in 2004 without substantive change.

*C.C.P.* 2025(i), on protection from annoyance, embarrassment, undue burden, or expense, was repealed and replaced by *C.C.P.* 2025.420(b) in 2004 without substantive change.

*C.C.P.* 2023, on discovery sanctions, was repealed and replaced by *C.C.P.* 2023.010 et seq. in 2004 without substantive change.





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##### aa. Motion To Compel Answer or Production.

2 *Witkin Cal. Evid. Discovery* § 70

[§ 70] Motion To Compel Answer or Production.

(1) *Timing of Motion.* If a deponent fails to answer a question or to produce a document or tangible thing under the deponent's control that is specified in the deposition notice or a deposition subpoena, the party seeking discovery may move the court for an order compelling that answer or production. The motion must be made no later than 60 days after completion of the record of the deposition. (*C.C.P. 2025(o)*; on format of motion, see *supra*, §28.)

(2) *Notice of Motion.* Notice of the motion to compel an answer or production must be given to all parties, and to the deponent either orally at the examination, or by subsequent service in writing. If notice of the motion is given orally, the deposition officer must direct the deponent to attend a session of the court at the time specified in the notice. (*C.C.P. 2025(o)*.) (On options for setting hearing, see *Dunne on Depositions* §§6:10 [setting orally at deposition], 6:11 [setting in writing after completion of deposition].)

A nonparty deponent must be personally served with written notice and all moving papers supporting a motion to compel an answer to a deposition question, unless the nonparty deponent agrees to accept service by mail at an address specified on the deposition record. (*C.R.C., Rule 337*.)

(3) *Attempt at Informal Resolution.* The motion must be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion. (*C.C.P. 2025(o)*; on monetary sanctions for failure to attempt informal resolution, see *infra*, §252.)

Although a deposition differs from other discovery mechanisms in that counsel for both parties are present, it is nevertheless subject to the requirement of an attempt at informal resolution prior to any motion to compel. Exchanges between counsel that merely amount to argument, and not an effort at informal negotiation, do not constitute such an attempt. "We do not propose an absolute rule that informal resolution must always await the conclusion of a deposition. Rather, we find that the statute requires that there be a serious effort at negotiation and informal resolution. We leave it to the parties to determine the proper time, manner, and place for such discussion." (*Townsend v. Superior Court* (1998) 61 *C.A.4th* 1431, 1436, 1437, 72 *C.R.2d* 333 [trial judge erred in granting motion and awarding sanctions after plaintiff refused to answer questions; heated debate over appropriateness of objection, interspersed between rounds of further interrogation, did not constitute earnest attempt to resolve impasse].)

(4) *Record at Hearing on Motion.* Not less than 5 days before the hearing on the motion to compel, the moving party must lodge with the court a certified copy of the relevant parts of the deposition transcript, including the transcript from a videotaped or audiotaped deposition. (C.C.P. 2025(o).)

(5) *Monetary Sanctions.* The court must impose a monetary sanction under C.C.P. 2023 (infra, §252) against a party, person, or attorney who unsuccessfully makes or opposes a motion to compel an answer or production, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust. (C.C.P. 2025(o).)

(6) *Order Compelling Answer or Production.* If the court determines that the answer or production sought is subject to discovery, it must order that the answer be given or the production be made when the deposition resumes. If a deponent fails to obey the order, the failure may be considered a contempt of court. In addition, if the disobedient deponent is a party to the action or an officer, director, managing agent, or employee of a party, the court may impose a monetary sanction, an issue sanction, an evidence sanction, or a terminating sanction, or make other just orders, against the disobedient party, or against the party with whom the disobedient deponent is affiliated. (C.C.P. 2025(o); on various types of sanctions, see C.C.P. 2023, infra, §252 et seq.; on commitment order following finding of contempt, see *In re de la Parra* (1986) 184 C.A.3d 139, 228 C.R. 864, infra, §262; see also 38 *Stanf. L. Rev.* 841 [enforcement of discovery where foreign statutes block document production].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Timing of Motion.* The portion of C.C.P. 2025(o) relating to the timing of the motion was repealed and replaced by C.C.P. 2025.480(b) in 2004 without substantive change.

(2) *Notice of Motion.* The portion of C.C.P. 2025(o) relating to notice procedures was repealed and replaced by C.C.P. 2025.480(c) in 2004 without substantive change.

C.R.C., Rule 337 was renumbered C.R.C., Rule 3.1025 in 2006.(3) *Attempt at Informal Resolution.* See *Stewart v. Colonial Western Agency* (2001) 87 C.A.4th 1006, 1016, 1017, 105 C.R.2d 115 [informal resolution attempts of plaintiff's counsel were adequate, even though they did not involve separate in-person or telephonic discussion, where defendant's objections to deposition questions were made at deposition so that counsel had opportunity to discuss matter face-to-face, issue was relatively simple, and there was need for immediate action because of upcoming trial and discovery cutoff dates].

The portion of C.C.P. 2025(o) requiring a meet and confer declaration was repealed and replaced by C.C.P. 2025.480(b) in 2004 without substantive change.

(4) *Record at Hearing on Motion.* The portion of C.C.P. 2025(o) requiring the moving party to lodge a certified copy of the relevant parts of the transcript was repealed and replaced by C.C.P. 2025.480(d) in 2004 without substantive change.

(5) *Monetary Sanctions.* C.C.P. 2023, on monetary sanctions generally, was repealed and replaced by C.C.P. 2023.010 et seq. in 2004 without substantive change.

The portion of C.C.P. 2025(o) specifying when a monetary sanction must be imposed was repealed and replaced by C.C.P. 2025.480(f) in 2004 without substantive change.

(6) *Order Compelling Answer or Production.* C.C.P. 2023, on sanctions authorized for discovery abuses, was repealed and replaced by C.C.P. 2023.010 et seq. in 2004 without substantive change.

The portion of C.C.P. 2025(o) relating to orders requiring an answer or production was repealed and replaced by C.C.P. 2025.480(e) in 2004 without substantive change.

The portion of *C.C.P. 2025(o)* relating to contempt and other sanctions was repealed and replaced by *C.C.P. 2025.480(g)* in 2004 without substantive change. *West's Key Number Digest*, Pretrial Procedure k.221 et seq.



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## bb. Review Following Motion.

## 2 Witkin Cal. Evid. Discovery § 71

## [§ 71] Review Following Motion.

If the trial judge erroneously refuses to order a witness to testify or answer proper questions, this error, like any other, is reviewable on appeal from the final judgment. (See 9 *Cal. Proc.* (4th), *Appeal*, §17; on federal practice, see 74 *Harv. L. Rev.* 992, 993.) This remedy, however, is seldom adequate, and the writ of mandamus is usually employed. (See *Agnew v. Superior Court* (1958) 156 C.A.2d 838, 839, 320 P.2d 158; *Carlson v. Superior Court* (1961) 56 C.2d 431, 435, 15 C.R. 132, 364 P.2d 308; *Chapin v. Superior Court* (1966) 239 C.A.2d 851, 854, 49 C.R. 199; 8 *Cal. Proc.* (4th), *Extraordinary Writs*, §§6, 98 et seq.) Hence, if a witness refuses to testify or answer a proper question, and, after this disobedience is reported, the court fails to order the witness to obey or to punish him or her for refusal, this duty of the court may be enforced by mandamus. (*McClatchy Newspapers v. Superior Court* (1945) 26 C.2d 386, 394, 159 P.2d 944 ["By refusing to compel a witness to answer proper questions, a trial court may effectively deny a litigant the right to take a deposition"]; *I.E.S. Corp. v. Superior Court* (1955) 44 C.2d 559, 564, 283 P.2d 700; *Agnew v. Superior Court* (1958) 156 C.A.2d 838, 839, 320 P.2d 158; *Hauk v. Superior Court* (1964) 61 C.2d 295, 299, 38 C.R. 345, 391 P.2d 825; *Pember v. Superior Court* (1966) 240 C.A.2d 888, 890, 50 C.R. 24; *Morris Stulsaft Foundation v. Superior Court* (1966) 245 C.A.2d 409, 415, 54 C.R. 12; *Jonon v. Superior Court* (1979) 93 C.A.3d 683, 688, 155 C.R. 822 [noting, however, qualification that writ will issue only to review questions of first impression and general importance]; 8 *Cal. Proc.* (4th), *Extraordinary Writs*, §§108, 156.)

If the trial judge has affirmatively acted to deny the right of a party to take a deposition, the erroneous order may be reviewed by mandamus for abuse of discretion, and the trial judge may be ordered to vacate or set it aside. Mandamus used in this manner is similar in effect to *certiorari*, except that the ground is not excess of jurisdiction but mere error (abuse of discretion). (See *Carlson v. Superior Court* (1961) 56 C.2d 431, 435, 15 C.R. 132, 364 P.2d 308 [this is proper method of obtaining relief; review on appeal from final judgment is inadequate remedy]; *Nelson v. Superior Court* (1986) 184 C.A.3d 444, 453, 229 C.R. 94 [mandamus denied; no abuse of discretion]; 95 A.L.R.2d 1229 [availability of mandamus or prohibition to compel discovery]; 8 *Cal. Proc.* (4th), *Extraordinary Writs*, §253.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### d. Procedures Following Examination.

#### 1. Transcription.

#### 2 Witkin Cal. Evid. Discovery § 72

[§ 72] Transcription.

(1) *Requirement.* Unless the parties agree otherwise, the stenographic recording of a deposition must be transcribed. (*C.C.P. 2025(p)*.) The party taking the deposition should make the necessary arrangements with the reporter. But if the deposition does not bring out valuable evidence, or for some other reason is not needed or desired, the attorneys may defer or dispense with transcription. (See 1 Hogan, Cal. Civil Discovery §2.31.)

(2) *Costs.* The party noticing the deposition normally bears the cost of transcription. The court may, however, on motion and for good cause shown, order that the cost be borne or shared by another party. Another party, at that party's expense, may obtain a copy of the transcript. (*C.C.P. 2025(p)*.) The Commission concluded that "the one insisting on the transcription should be required to bear the cost unless the court orders otherwise." (Reporter's Note to *C.C.P. 2025(p)*, in 2 Hogan, Cal. Civil Discovery, Appendix C; on strategies for avoiding costs of transcription and copying, see Dunne on Depositions in California §§2:3, 2:5, 2:6, 2:8, 2:9.)

(3) *Official Version.* If the deposition is recorded both stenographically and by audiotape or videotape, the stenographic transcript is the official record of the deposition testimony for the purposes of the trial, subsequent hearings, or appeal. (*C.C.P. 2025(p)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Requirement.* The portion of *C.C.P. 2025(p)* relating to the transcription requirement was repealed and replaced by *C.C.P. 2025.510(a)* in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §2.31.

(2) *Costs.* *C.C.P. 2025(p)* was amended in 2002 to specify that a copy may be obtained by "any other party or the deponent."

The portion of *C.C.P. 2025(p)* relating to costs was repealed and replaced by *C.C.P. 2025.510(b)* in 2004 without substantive change.

Under *C.C.P. 2025.510(h)*, added in 2007, the "requesting attorney or party appearing in propria persona" must timely pay the deposition officer or entity providing the services of the deposition officer for the transcription or

transcription copy and "any other deposition products or services that are requested either orally or in writing." (*C.C.P. 2025.510(h)(1)*.) However, this requirement is inapplicable if responsibility for payment is otherwise provided by law, or if the deposition officer or entity is notified in writing at the time that services or products are requested that the party or "another identified person" is responsible for payment. (*C.C.P. 2025.510(h)(2)*.) Further, *C.C.P. 2025.510(h)* does not prohibit or supersede an agreement between an attorney and party allocating responsibility for the payment of deposition costs to the party. (*C.C.P. 2025.510(h)(3)*.)

See Reporter's Note to *C.C.P. 2025(p)*, in Hogan, 2 Cal. Civil Discovery 2d, Appendix D.

(3) *Official Version.* *C.C.P. 2025(p)* was amended in 2002 to refer to "audio or video technology," rather than "audiotape or videotape."

The portion of *C.C.P. 2025(p)* making the stenographic transcript the official record was repealed and replaced by *C.C.P. 2025.510(g)* in 2004 without substantive change. *West's Key Number Digest*, Pretrial Procedure k.139



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#### 2. Reading, Hearing, or Viewing.

#### 2 Witkin Cal. Evid. Discovery § 73

[§ 73] Reading, Hearing, or Viewing.

(1) *Transcript*. If the deposition testimony is stenographically recorded, the deposition officer must send written notice to the deponent and to all parties attending the deposition when the original transcript for each deposition session is available for reading, correcting, and signing. However, the deponent and the attending parties may agree on the record to waive reading, correcting, and signing the transcript or to handle these matters after the entire deposition has been concluded or at some other specific date. (*C.C.P. 2025(q)(1)*.)

A deposition officer who receives a request for an original or a copy of a deposition transcript from one party must give immediate notice of the request to the other parties that attended the deposition and, on request, make the original or copy available to all parties at the same time. (*C.C.P. 2025(p)*.)

(2) *Videotape or Audiotape Record*. If there is no stenographic transcript, the deposition officer must send written notice to all the parties attending the deposition when the recording is available for review, unless the deponent and those parties waive review of the tape. (*C.C.P. 2025(q)(2)*.)

On request, a party who records a deposition must promptly allow another party to hear or view the recording and must furnish a copy at reasonable cost. (*C.C.P. 2025(p)*.) Similarly, an operator who retains custody of a tape must, on request, allow the deponent or any party to hear or view the tape and must furnish a copy of it. The operator may first receive compensation for the cost of making a copy or providing facilities for viewing or hearing the tape. (*C.C.P. 2025(s)(2)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Transcript*. *C.C.P. 2025(q)(1)*, on the reading, correcting, and signing of the transcript, was repealed and replaced by *C.C.P. 2025.520(a)* in 2004 without substantive change.

*C.C.P. 2025(p)*, on requests for the original or copies of the transcript, was repealed and replaced by *C.C.P. 2025.510(d)* in 2004 without substantive change. (2) *Videotape or Audiotape Record*. *C.C.P. 2025(p)*, *2025(q)*, and *2025(s)* were amended in 2002 to refer to "audio or video technology," rather than "audiotape or videotape."

The portion of *C.C.P. 2025(p)* regarding the obligations of the party who recorded testimony by video or audio technology was repealed and replaced by *C.C.P. 2025.510(f)* in 2004 without substantive change.

The portion of *C.C.P. 2025(q)(2)* regarding the notice requirement where there was no stenographic transcription was repealed and replaced by *C.C.P. 2025.530(a)* in 2004 without substantive change.

The portion of *C.C.P. 2025(s)(2)* regarding the obligations of an operator who retains custody of the video or audio record was repealed and replaced by *C.C.P. 2025.560* in 2004 without substantive change.





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#### 3. Correction and Signing.

#### aa. Transcript.

### 2 Witkin Cal. Evid. Discovery § 74

[§ 74] Transcript.

(1) *Review Period.* For 30 days following the deposition officer's notice that the transcript is available (see *supra*, §73), the deponent may change the form or the substance of the answer to a question. The deponent may either approve the transcript by signing it or refuse to approve the transcript by not signing it. The deponent and the attending parties may agree on the record or in writing to shorten or lengthen the 30-day period, or the court may shorten the period for good cause. (*C.C.P. 2025(q)(1)*; see 1 Hogan, Cal. Civil Discovery §§2.32, 2.34.)

Alternatively, during the same time period, the deponent may make changes and approve or refuse to approve the transcript by signing and mailing a letter to the deposition officer. The letter must be mailed by certified or registered mail with return receipt requested, and a copy must be sent by first-class mail to all parties attending the deposition. (*C.C.P. 2025(q)(1)*.)

(2) *Notification of Deponent's Action.* The deposition officer must indicate on the original transcript what action the deponent has taken and whether the deponent has approved, failed to approve, or refused to approve the transcript. The officer must also notify the attending parties in writing of any changes that the deponent timely made in person. (*C.C.P. 2025(q)(1)*.)

(3) *Consequences of Failure or Refusal To Approve.* If the deponent fails or refuses to approve the transcript within the allotted period, the deposition will be considered approved, subject to the deponent's timely changes. However, on a "seasonable" motion to suppress the deposition, accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion, the court may determine that the reasons given for the failure or refusal to approve the transcript require rejection of the deposition in whole or in part. (*C.C.P. 2025(q)(1)*; on monetary sanctions for failure to attempt informal resolution, see *infra*, §252.)

The court must impose a monetary sanction under *C.C.P. 2023* (*infra*, §252) against a party, person, or attorney who unsuccessfully makes or opposes a motion to suppress a deposition. However, the sanctions may be avoided if the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make imposing the sanction unjust. (*C.C.P. 2025(q)(1)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Review Period*. The portion of *C.C.P. 2025(q)(1)* regarding the deponent's review period was repealed and replaced by *C.C.P. 2025.520(b)*, (c) in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §§2.32, 2.34.

(2) *Notification of Deponent's Action*. The portion of *C.C.P. 2025(q)(1)* regarding notification as to any action taken by the deponent was repealed and replaced by *C.C.P. 2025.520(e)* in 2004 without substantive change.

(3) *Consequences of Failure or Refusal To Approve*. *C.C.P. 2023*, on monetary sanctions generally, was repealed and replaced by *C.C.P. 2023.010* et seq. in 2004 without substantive change.

The portion of *C.C.P. 2025(q)(1)* regarding the deponent's failure or refusal to approve the transcript was repealed and replaced by *C.C.P. 2025.520(f)*, (g) in 2004 without substantive change.

The portion of *C.C.P. 2025(q)(1)* regarding sanctions was repealed and replaced by *C.C.P. 2025.520(h)* in 2004 without substantive change.



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#### bb. Videotape or Audiotape Recording.

### 2 Witkin Cal. Evid. Discovery § 75

#### [§ 75] Videotape or Audiotape Recording.

(1) *Review Period.* For 30 days following the deposition officer's notice that the recording is available (see *supra*, §73), the deponent, personally or by signed letter, may change the substance of any answer. (*C.C.P. 2025(q)(2).*)

(2) *Notification of Deponent's Action.* In a writing that accompanies the recording, the deposition officer must identify the changes that the deponent has made. The deponent may sign the writing to identify the deposition as his or her own. Otherwise, the officer must state that the deponent failed to sign or to contact the officer within the allotted period. (*C.C.P. 2025(q)(2).*)

(3) *Consequences of Failure or Refusal To Sign.* Where a deponent fails to contact the officer or refuses to sign, the deposition will be given the same effect as though signed. However, on a reasonable motion to suppress the deposition, the court may determine that the reasons given for the refusal to sign require rejection of the deposition in whole or in part. The motion must be accompanied by a declaration showing a reasonable and good faith attempt at an informal resolution of each issue presented. (*C.C.P. 2025(q)(2)*; on monetary sanctions for failure to attempt informal resolution, see *infra*, §252.)

The court must impose a monetary sanction under *C.C.P. 2023* (*infra*, §252) against a party, person, or attorney who unsuccessfully makes or opposes a motion to suppress a deposition. However, the sanctions may be avoided if the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make imposing the sanction unjust. (*C.C.P. 2025(q)(2).*)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Review Period.* *C.C.P. 2025(q)(2)* was amended in 2002 to refer to "audio or video recording," rather than "audiotape or videotape."

The portion of *C.C.P. 2025(q)(2)* regarding the deponent's review period was repealed and replaced by *C.C.P. 2025.530(b)* in 2004 without substantive change.

(2) *Notification of Deponent's Action.* The portion of *C.C.P. 2025(q)(2)* regarding notification as to any action taken by the deponent was repealed and replaced by *C.C.P. 2025.530(c)* in 2004 without substantive change.

(3) *Consequences of Failure or Refusal To Sign*. *C.C.P. 2023*, on monetary sanctions generally, was repealed and replaced by *C.C.P. 2023.010* et seq. in 2004 without substantive change.

The portion of *C.C.P. 2025(q)(2)* regarding the deponent's failure or refusal to approve the transcript was repealed and replaced by *C.C.P. 2025.530(d)*, (e) in 2004 without substantive change.

The portion of *C.C.P. 2025(q)(2)* regarding sanctions was repealed and replaced by *C.C.P. 2025.530(f)* in 2004 without substantive change.



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#### 4. Certification and Sealing.

### 2 Witkin Cal. Evid. Discovery § 76

[§ 76] Certification and Sealing.

(1) *Certification.* The deposition officer must certify on the transcript, or in a writing accompanying an audiotaped or videotaped deposition, that the deponent was duly sworn and that the deposition is a true record of the testimony given. (*C.C.P. 2025(r)(1)*); see 1 Hogan, Cal. Civil Discovery §2.35.) A rough draft transcript may not be certified, or used, cited, or transcribed as the certified transcript, nor may it be used to rebut or contradict the certified transcript. (*C.C.P. 2025(r)(2)*.)

(2) *Sealing and Marking With Name of Witness.* The deposition officer must securely seal the transcript in an envelope or package endorsed with the title of the action and marked "Deposition of (here insert name of deponent)." (*C.C.P. 2025(s)(1)*.)

(3) *Opening Sealed Deposition.* The court, on motion and for good cause shown, may order that a sealed deposition may be opened only by court order. (*C.C.P. 2025(i)(15)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Certification.* *C.C.P. 2025(r)(1)* was amended in 2002 to substitute "audio or video record of deposition testimony" for "audiotaped or videotaped deposition."

*C.C.P. 2025(r)(1)* was repealed and replaced by *C.C.P. 2025.540(a)* in 2004 without substantive change.

*C.C.P. 2025(r)(2)*, regarding rough draft transcripts, was repealed and replaced by *C.C.P. 2025.540(b)* in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §2.35.

(2) *Sealing and Marking With Name of Witness.* *C.C.P. 2025(s)(1)*, regarding the sealing and marking of the transcript, was repealed and replaced by *C.C.P. 2025.550(a)* in 2004 without substantive change.

(3) *Opening Sealed Deposition.* *C.C.P. 2025(i)(15)*, regarding the opening of the sealed deposition by court order, was repealed and replaced by *C.C.P. 2025.420(b)(15)* in 2004 without substantive change.



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#### 5. Disposition and Retention.

2 Witkin Cal. Evid. Discovery § 77

[§ 77] Disposition and Retention.

(1) *Transcript*. The certified transcript of a deposition is not filed with the court. The deposition officer transmits the transcript to the attorney for the party who noticed the deposition. The attorney retains custody of the transcript "under conditions that will protect it against loss, destruction, or tampering" until 6 months after final disposition of the action. At that time, the transcript may be destroyed, unless, on the motion of a party and a showing of good cause, the court orders longer preservation. (*C.C.P. 2025(s)(1)*; see 1 Hogan, Cal. Civil Discovery §2.35.)

(2) *Audiotape or Videotape*. The taped record is not filed with the court, but is retained by the operator "under conditions that will protect it against loss, destruction, or tampering" and preserve as far as practicable the quality and integrity of the tape. An attorney or operator who has custody of a tape must retain it until 6 months after final disposition of the action. At that time, the tape may be destroyed or erased, unless, on the motion of a party and a showing of good cause, the court orders longer preservation. (*C.C.P. 2025(s)(2)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Transcript*. *C.C.P. 2025(s)(1)*, regarding disposition and retention of the transcript, was repealed and replaced by *C.C.P. 2025.550* in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §2.35.

(2) *Audiotape or Videotape*. *C.C.P. 2025(s)(2)* was amended in 2002 to delete references to "tape" and refer instead to "audio or video records."

*C.C.P. 2025(s)(2)* was repealed and replaced by *C.C.P. 2025.560* in 2004 without substantive change.



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#### 6. Public Access to Transcript, Videotape, or Audiotape.

2 *Witkin Cal. Evid. Discovery* § 78

[§ 78] Public Access to Transcript, Videotape, or Audiotape.

Unless the court orders to the contrary, and on payment of a reasonable charge, the deposition officer must make available a copy of the transcript, videotape, or other recording of testimony, if it is still in the officer's possession, to any person requesting it. (*C.C.P. 2025.5(a)*.) On receiving such a request, the officer must (1) notify all parties attending the deposition and the deponent that a request has been made, (2) advise them of the name of the person making the request, and (3) inform them of their right to seek a protective order. If the deposition officer is not served with a protective order within 30 days of mailing this notice, the officer must make the copy available to the person requesting it. (*C.C.P. 2025.5(b)*); on restrictions on dissemination and use of discovered information, see *supra*, §§21, 22.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2025.5(a)* was amended in 2002 to apply to "a copy of the transcript of the deposition testimony made by, or at the direction of, any party, or an audio or video recording of the deposition testimony."

*C.C.P. 2025.5* was repealed and replaced by *C.C.P. 2025.570* in 2004 without substantive change. *C.C.P. 2025.5(a)*, on the officer's duty to make a copy available, became *C.C.P. 2025.570(a)*. *C.C.P. 2025.5(b)*, on the steps to be taken by the officer once a copy is requested, became *C.C.P. 2025.570(b)*, (c).



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#### 7. Intent To Use Videotape or Audiotape at Trial.

2 Witkin Cal. Evid. Discovery § 79

[§ 79] Intent To Use Videotape or Audiotape at Trial.

A party who intends to offer a recorded deposition in evidence under *C.C.P. 2025(u)* (3 *Cal. Evidence* (4th), *Presentation at Trial*, §154) must notify the court and all parties in writing of this intention. The notice must designate the parts of the deposition to be used and must be made "within sufficient time for objections to be made and ruled on by the judge to whom the case is assigned for trial or hearing, and for any editing of the tape." Objections to all or part of the deposition must be made in writing. "The court may permit further designations of testimony and objections as justice may require," and may order that portions of the recording be suppressed or that an edited version be prepared. However, the original audiotape or videotape must be preserved unaltered. If no stenographic record has been made, the party offering the recording as evidence must accompany the offer with a transcript. (*C.C.P. 2025(l)(2)(I)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2025(l)(2)(I)* was amended in 2002 to refer to "audio or video recording," rather than "audiotaped or videotaped recording."

*C.C.P. 2025(l)(2)(I)* was repealed and replaced by *C.C.P. 2025.340(m)* in 2004 without substantive change.

*C.C.P. 2025(u)*, on use of the deposition at trial, was repealed and replaced by *C.C.P. 2025.620(c)* in 2004 without substantive change.





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## CHAPTER X - Discovery

### II. DEPOSITIONS

#### C. Deposition by Written Questions.

##### 1. Procedure.

#### 2 *Witkin Cal. Evid. Discovery* § 80

[§ 80] Procedure.

(1) *Statutory Authorization.* Formerly, written interrogatories could be used in California only for depositions of out-of-state witnesses. *C.C.P. 2028* makes the procedure applicable also to depositions of parties or witnesses within the state. (See C.E.B., 1 Civil Discovery Practice 3d, Chap. 6; C.J.E.R., Judges Benchbook, Civil Proceedings: Discovery, Chap. 11; 1 Hogan, Cal. Civil Discovery, Chap. 3; 23 *Am.Jur.2d* (1983 ed.), *Depositions and Discovery* §168 et seq.; 8A *Am.Jur. P.P. Forms* (1996 ed.), *Depositions and Discovery* §381 et seq.; 4 *Am.Jur. Trials* 1, 88; for practical considerations in use of written depositions, see Dunne on Depositions in California, Chap. 12.) The statute uses the phrase "deposition by written questions" to avoid confusion with discovery by interrogatories to a party under *C.C.P. 2030* (infra, §87 et seq.). (Reporter's Note to *C.C.P. 2028(a)*, in 2 Hogan, Cal. Civil Discovery, Appendix C.)

Except as modified by *C.C.P. 2028*, the procedures for taking oral depositions (see supra, §29 et seq. and infra, §83 et seq.) apply to written depositions. (*C.C.P. 2028(a)*.)

(2) *Notice of Deposition.* The notice of a written deposition is the same as that for an oral deposition (see *C.C.P. 2025(c)*, supra, §39), except that the deposition officer's name or title and address must be stated and the date, time, and place of the deposition may be left to future determination by the officer. (*C.C.P. 2028(b)*.) (For form notices, see 8A *Am.Jur. P.P. Forms* (1996 ed.), *Depositions and Discovery* §384 et seq.)

(3) *Service of Questions.* The questions to be asked on direct examination must accompany the notice. (*C.C.P. 2028(c)*.) The deponent may study the direct questions before examination. (*C.C.P. 2028(e)*.) (See C.E.B., 1 Civil Discovery Practice 3d, §6.17 et seq.; 1 Hogan, Cal. Civil Discovery §§3.3, 3.7; 8A *Am.Jur. P.P. Forms* (1996 ed.), *Depositions and Discovery* §388 et seq. [sample direct questions].)

Cross, redirect, and recross questions must be served on all parties entitled to notice of the deposition. Cross questions must be served within 30 days after direct questions are served, redirect questions must be served within 15 days after cross questions are served, and recross questions must be served within 15 days after redirect questions are served. The court may shorten or extend the periods for good cause. (*C.C.P. 2028(c)*.) The deponent may not preview the form or substance of cross, redirect, or recross questions. (*C.C.P. 2028(e)*.) (See C.E.B., 1 Civil Discovery Practice 3d, §6.30 et seq.; 1 Hogan, Cal. Civil Discovery §3.6; 8A *Am.Jur. P.P. Forms* (1996 ed.), *Depositions and Discovery* §392 et seq. [sample cross questions].)

(4) *Court Participation.* The court may make an appropriate protective order as provided in *C.C.P. 2025(i)*, supra, §§59, 60. (*C.C.P. 2028(f)*.) In addition, it may order that the deponent's testimony be taken by oral, instead of written,

examination (*C.C.P. 2028(f)(1)*) or that a party may attend the deposition in person or by attorney and orally examine the deponent (*C.C.P. 2028(f)(2)*). The court may order that the deposition officer be someone other than the one named in the deposition notice. (*C.C.P. 2028(f)(4)*.) (On court's authority to sustain or overrule objections made under *C.C.P. 2028(d)*, see *infra*, §81.)

(5) *Taking of Deposition.* The party taking the deposition must deliver a copy of the notice and copies of all questions served under *C.C.P. 2028(c)*, *supra*, to the designated officer. The officer must "proceed promptly" to ask the questions and record the deponent's responses. (*C.C.P. 2028(g)*); on asking of questions to which objections have been made, see *infra*, §81.) (See C.E.B., 1 Civil Discovery Practice 3d, §6.47 et seq.; 1 Hogan, Cal. Civil Discovery §3.8.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Statutory Authorization.* *C.C.P. 2028*, on depositions by written questions, was repealed and replaced by *C.C.P. 2028.010* et seq. in 2004 without substantive change. *C.C.P. 2028(a)*, making oral deposition procedure applicable, became *C.C.P. 2028.010*.

*C.C.P. 2030*, on interrogatories, was repealed and replaced by *C.C.P. 2030.010* et seq. in 2004 without substantive change.

See C.E.B., 1 Civil Discovery Practice 4th, §5.161 et seq.; Hogan, 1 Cal. Civil Discovery 2d, Chap. 3; 8A Am.Jur. P.P. Forms (2004 ed.), Depositions and Discovery, Form 258 et seq.(2) *Notice of Deposition.* *C.C.P. 2025(c)*, on notice of an oral deposition, was repealed and replaced by *C.C.P. 2025.240* in 2004 without substantive change.

*C.C.P. 2028(b)*, on notice requirements for written depositions, was repealed and replaced by *C.C.P. 2028.020* in 2004 without substantive change.

(3) *Service of Questions.* *C.C.P. 2028(c)*, on the service of questions with the notice, was repealed and replaced by *C.C.P. 2028.030* in 2004 without substantive change.

*C.C.P. 2028(e)*, allowing the deponent to study the questions prior to the deposition, was repealed and replaced by *C.C.P. 2028.060* in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §§3.3, 3.6.

(4) *Court Participation.* *C.C.P. 2025(i)*, on protective orders, was repealed and replaced by *C.C.P. 2025.420* in 2004 without substantive change.

*C.C.P. 2028(f)*, on orders the court may make regarding the deposition, was repealed and replaced by *C.C.P. 2028.070* in 2004 without substantive change.

*C.C.P. 2028(d)*, on objections to the form of questions, was repealed and replaced by *C.C.P. 2028.040* in 2004 without substantive change.

(5) *Taking of Deposition.* *C.C.P. 2028(c)*, on the service of questions, was repealed and replaced by *C.C.P. 2028.030* in 2004 without substantive change.

*C.C.P. 2028(g)*, on the propounding of questions and recording of testimony, was repealed and replaced by *C.C.P. 2028.080* in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §3.8. *West's Key Number Digest*, Pretrial Procedure k.155



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### II. DEPOSITIONS

#### C. Deposition by Written Questions.

##### 2. Objections.

#### 2 Witkin Cal. Evid. Discovery § 81

[§ 81] Objections.

(1) *Service of Objections.* A party who objects to the form of a question or who objects to a question on the ground that the information is privileged or protected under the work product doctrine must serve a specific objection on all parties entitled to notice of the deposition within 15 days after the question is served, or the objection is waived. (*C.C.P. 2028(d)(1), (d)(2).*)

(2) *Obtaining Court Ruling.* Where the objection is based on *form*, the objecting party must promptly move to sustain the objection. Unless the objection has been sustained, the officer asks the question subject to the objection. (*C.C.P. 2028(d)(1).*) Where the objection is based on *privilege* or the *work product* doctrine, the party asking the question may move to overrule the objection. Unless the objection has been overruled, the officer does not ask the question. (*C.C.P. 2028(d)(2).*) Thus, *C.C.P. 2028(d)* "allocates the burden of obtaining a court ruling on the objection differently depending on the nature of the objection. The objecting party has the burden where the objection is to the form of the question. Failure to obtain that ruling waives the objection. However, the party propounding the question objected to on the ground of privilege or the work product protection must seek a ruling overruling such objection. The question will not be propounded at the deposition unless the party asking obtains such ruling." (Reporter's Note to *C.C.P. 2028(d)*, in 2 Hogan, Cal. Civil Discovery, Appendix C; see *C.C.P. 2028(f)(3)* [court has power to sustain or overrule objection]; see generally 1 Hogan, Cal. Civil Discovery §3.4.)

The party moving to sustain or overrule an objection must provide a supporting declaration showing a reasonable and good faith attempt to resolve informally the issues presented by the motion. (*C.C.P. 2028(d)(1), (d)(2)*; on monetary sanctions for failure to attempt informal resolution, see *infra*, §252.)

(3) *Monetary Sanctions.* The court must impose a monetary sanction under *C.C.P. 2023* (*infra*, §252) against a party, person, or attorney who unsuccessfully makes or opposes a motion to sustain or overrule an objection to a written deposition question. However, the sanctions may be avoided if the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make imposing the sanction unjust. (*C.C.P. 2028(d)(1), (d)(2).*)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Service of Objections.* *C.C.P. 2028(d)(1), (d)(2)*, on service of objections, were repealed and replaced by *C.C.P. 2028.040(a)* and *2028.050(a)* in 2004 without substantive change.

(2) *Obtaining Court Ruling.* *C.C.P. 2028(d)(1), (d)(2)*, on the procedure for obtaining a ruling on objections, were repealed and replaced by *C.C.P. 2028.040(b)* and *2028.050(b)* in 2004 without substantive change.

*C.C.P. 2028(f)(3)*, on the court's power to rule on objections, was repealed and replaced by *C.C.P. 2028.070(c)* in 2004 without substantive change.

See Reporter's Note to *C.C.P. 2028(d)*, in Hogan, 2 Cal. Civil Discovery 2d, Appendix D.

(3) *Monetary Sanctions*. *C.C.P. 2023*, on monetary sanctions generally, was repealed and replaced by *C.C.P. 2023.010* et seq. in 2004 without substantive change.

*C.C.P. 2028(d)(1)*, (d)(2), on sanctions concerning objections to written questions, were repealed and replaced by *C.C.P. 2028.040* and *2028.050* in 2004 without substantive change.



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II. DEPOSITIONS

C. Deposition by Written Questions.

3. Motion for Protective Order.

2 *Witkin Cal. Evid. Discovery* § 82

[§ 82] Motion for Protective Order.

In addition to any appropriate orders listed in *C.C.P. 2025(i)* (supra, §60) for oral depositions, *C.C.P. 2028(f)* authorizes the following protective orders for written depositions:

- (1) That the testimony be taken orally.
- (2) That one or more of the notified parties be permitted to attend and propound questions by oral examination.
- (3) That objections be sustained or overruled.
- (4) That the deposition be taken before an officer other than the one named or described in the notice.

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2025(i)*, on protective orders regarding oral depositions, was repealed and replaced by *C.C.P. 2025.420* in 2004 without substantive change.

*C.C.P. 2028(f)*, on protective orders regarding written depositions, was repealed and replaced by *C.C.P. 2028.070* in 2004 without substantive change.



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### II. DEPOSITIONS

#### D. Depositions Taken Outside California.

##### 1. Statutory Authority.

##### 2 *Witkin Cal. Evid. Discovery* § 83

[§ 83] Statutory Authority.

A party to a California action may take an oral or written deposition in another state, in a federal territory or insular possession subject to the jurisdiction of the United States, or in a foreign nation. (*C.C.P. 2026(a), 2027(a), 2028(a).*) The procedures for taking these depositions are the same as those for taking depositions within California (see *C.C.P. 2025*, supra, §39 et seq.), except as modified by the authorizing statutes. (*C.C.P. 2026(a), 2027(a), 2028(a)*; see C.E.B., 1 Civil Discovery Practice 3d, Chaps. 12, 13; C.J.E.R., Judges Benchbook, Civil Proceedings: Discovery, Chap. 12; 1 Hogan, Cal. Civil Discovery, Chap. 4; Dunne on Depositions in California §11:1 et seq.; 8A Am.Jur. P.P. Forms (1996 ed.), Depositions and Discovery §181 et seq.; on strategies for reducing expenses of out-of-state depositions, see Dunne on Depositions in California §2:18 et seq.)

The same broad scope of discovery is permitted as in local depositions. (See *Beverly Hills Nat. Bank & Trust Co. v. Superior Court* (1961) 195 C.A.2d 861, 867, 16 C.R. 236.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2025*, on taking oral depositions in California, was repealed and replaced by *C.C.P. 2025.010* et seq. in 2004 without substantive change.

*C.C.P. 2026(a)*, on taking oral depositions in another state, was repealed and replaced by *C.C.P. 2026.010(a)* in 2004 without substantive change.

*C.C.P. 2027(a)*, on taking oral depositions abroad, was repealed and replaced by *C.C.P. 2027.010(a)* in 2004 without substantive change.

*C.C.P. 2028(a)*, on written depositions, was repealed and replaced by *C.C.P. 2028.010* in 2004 without substantive change.

See Judicial Council Form No. DISC-030 [Commission To Take Deposition Outside California]; C.E.B., 1 Civil Discovery Practice 4th, §5.29; Hogan, 1 Cal. Civil Discovery 2d, Chap. 4; 8A Am.Jur. P.P. Forms (2004 ed.), Depositions and Discovery, Form 123 et seq. *West's Key Number Digest*, Pretrial Procedure k.154



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## CHAPTER X - Discovery

### II. DEPOSITIONS

#### D. Depositions Taken Outside California.

##### 2. Deposition Officer.

*2 Witkin Cal. Evid. Discovery § 84*

[§ 84] Deposition Officer.

(1) *Within the United States.* An oral deposition in another state or in a federal territory or insular possession may be taken by:

(a) A person who is authorized to administer oaths under federal law or the law of the place where the examination is held, and who is not otherwise disqualified under *C.C.P. 2025(k)* (supra, §35). (*C.C.P. 2026(c)(1)*.)

(b) A person appointed by the court to administer oaths and take testimony. (*C.C.P. 2026(c)(2)*); see 1 Hogan, Cal. Civil Discovery §§4.1, 4.2.)

(2) *In a Foreign Country.* A foreign deposition may be conducted under the supervision of (a) a person authorized to administer oaths or their equivalent under United States or foreign law and not otherwise disqualified under *C.C.P. 2025(k)* (supra, §35), (b) a person or officer appointed by commission or under letters rogatory, or (c) a person agreed to by all the parties. (*C.C.P. 2027(c)*); see *Volkswagenwerk Aktiengesellschaft v. Superior Court* (1973) 33 C.A.3d 503, 508, 109 C.R. 219 [orders appointing commissioner to take deposition of German corporate defendant and allowing inspection of defendant's manufacturing plant would impair Germany's powers to control property and personnel of entity that it created and that has never left its protection; letters rogatory administered by German courts would be appropriate vehicle for discovery]; 1 Hogan, Cal. Civil Discovery §§4.3, 4.4.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Within the United States.* *C.C.P. 2025(k)*, on qualifications of the deposition officer, was repealed and replaced by *C.C.P. 2025.320* in 2004 without substantive change.

*C.C.P. 2026(c)(1)* was amended in 2000 to add *C.C.P. 2025(l)(2)(B)* (text and Supp., §68) to the statutes under which the deposition officer must not otherwise be disqualified.

*C.C.P. 2026(c)* was amended in 2001 to require the clerk, "on request," to issue a commission authorizing the deposition in another state or place. "The commission shall request that process issue in the place where the examination is to be held, requiring attendance and enforcing the obligations of the deponents to produce documents and answer questions."

*C.C.P. 2026* was repealed and replaced by *C.C.P. 2026.010* in 2004 without substantive change. *C.C.P. 2026(c)(1)* became *C.C.P. 2026.010(d)(1)*, and *C.C.P. 2026(c)(2)* became *C.C.P. 2026.010(d)(2)*.

See Hogan, 1 Cal. Civil Discovery 2d, §§4.1, 4.2; on fee for issuing commission to take deposition under *C.C.P.* 2026.010, see *Govt.C.* 70626.

(2) *In a Foreign Country.* *C.C.P.* 2025(k), on qualifications of the deposition officer, was repealed and replaced by *C.C.P.* 2025.320 in 2004 without substantive change.

*C.C.P.* 2027(c)(1) was amended in 2000 to add *C.C.P.* 2025(l)(2)(B) (text and Supp., §68) to the statutes under which the deposition officer must not otherwise be disqualified.

*C.C.P.* 2027(c) was repealed and replaced by *C.C.P.* 2027.010(d) in 2004 without substantive change.

The court in *American Home Assur. Co. v. Socie'te' Commerciale Toute'lectric* (2002) 104 C.A.4th 406, 409, 128 C.R.2d 430, Supp., infra, §85, stated that *Volkswagenwerk Aktiengesellschaft v. Superior Court* (1973) 33 C.A.3d 503, 109 C.R. 219, text, p. 931, has been superseded by *Socie'te' Nationale Industrielle Ae'rospatiale v. United States Dist. Court* (1987) 482 U.S. 522, 107 S.Ct. 2542, 96 L.Ed.2d 461, to the extent *Volkswagenwerk* announced a rule of first resort to the Hague Convention procedures.





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## CHAPTER X - Discovery

### II. DEPOSITIONS

#### D. Depositions Taken Outside California.

#### 3. Securing Deponent's Attendance and Production.

#### 2 Witkin Cal. Evid. Discovery § 85

[§ 85] Securing Deponent's Attendance and Production.

(1) *Party Deponent*. If the deponent is a party or an officer, director, managing agent, or employee of a party, service of the deposition notice is effective to compel the deponent to attend and testify and to produce documents and tangible things for inspection and copying. (C.C.P. 2026(b)(1) [within U.S.]; 2027(b)(1) [outside of U.S.].) (See *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court* (1987) 482 U.S. 522, 107 S.Ct. 2542, 2546, 96 L.Ed.2d 461, 472 [Hague Convention provides optional, but not exclusive or mandatory, discovery procedures for litigants in federal district court]; 22 *Loyola L. Rev.* 217 [*Societe Nationale*]; 71 Am. Jur. Trials 1 [How To Conduct International Discovery; discussing *Societe Nationale*].) For out-of-state depositions, the notice must specify a place for the deposition within 75 miles of the deponent's residence or business office. (C.C.P. 2026(b)(1).)

(2) *Nonparty Deponent*. If the deponent is neither a party nor an officer, director, managing agent, or employee of a party, the party serving the deposition notice may use "any process and procedures required and available" under the law of the place where the deposition is taken to compel the deponent's compliance. (C.C.P. 2026(b)(2), 2027(b)(2).) Applicable procedures may include the Uniform Foreign Deposition Act or the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. (Reporter's Notes to C.C.P. 2026(b) and C.C.P. 2027(b), in 2 Hogan, Cal. Civil Discovery, Appendix C.)

In *International Ins. Co. v. Montrose Chemical Corp.* (1991) 231 C.A.3d 1367, 282 C.R. 783, an insurer and a chemical company were involved in litigation to determine whether various insurance companies were obligated to indemnify the chemical company for hazardous waste pollution problems at several sites in California. The insurer was ordered by a California trial judge to produce documents used by its former claims adjuster to refresh his recollection during a deposition taken in Connecticut. The documents belonged to the insurer and were provided by it to the deponent. The insurer refused to produce the documents on the ground that under C.C.P. 2026(b)(2), the request for the documents had to be made in a Connecticut court in accordance with Connecticut law, which requires a court order as a precondition to production of documents. The judge imposed monetary sanctions against the insurer for its refusal. *Held*, the insurer was required to produce the documents; hence, the sanctions were properly imposed.

(a) The chemical company did not seek documents belonging to or in the possession of the claims adjuster. The documents belonged to the insurer and it could not immunize itself from California's liberal discovery rules by showing the documents to a non-California resident. (231 C.A.3d 1371.)

(b) "[E]xcept as expressly provided otherwise in the Discovery Act, California law governs discovery in California cases, including depositions." (231 C.A.3d 1371, citing C.C.P. 2025(a), *supra*, §30.) "Thus, although section 2026

compelled Montrose to follow Connecticut law in noticing Power's deposition, California law governs Montrose's request to International for the documents used by Power to refresh his recollection. International was not the 'deponent' referred to in section 2026, subdivision (b)(2)." (231 C.A.3d 1371.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Party Deponent*. The rule of first resort to the Hague Convention announced in *Volkswagenwerk Aktiengesellschaft v. Superior Court* (1973) 33 C.A.3d 503, 109 C.R. 219, has been superseded by the balancing test provided in *Socie'te' Nationale Industrielle Ae'rospatiale v. United States Dist. Court* (1987) 482 U.S. 522, 107 S.Ct. 2542, 96 L.Ed.2d 461, text, p. 931. Further, the party proposing discovery under the Convention has the burden of persuasion as to whether considerations of comity favor application of the Convention in a particular case. (*American Home Assur. Co. v. Socie'te' Commerciale Toute'lectric* (2002) 104 C.A.4th 406, 409, 427, 128 C.R.2d 430 [in action by insurer against French corporation, defendant's tactics in responding to discovery were so inconsistent with Convention procedures that trial judge properly found that defendant had waived its right to insist on those procedures].)

C.C.P. 2026(b)(1) (deposition of party in another state) was repealed and replaced by C.C.P. 2026.010(b) in 2004 without substantive change.

C.C.P. 2027(b)(1) (deposition of party abroad) was repealed and replaced by C.C.P. 2027.010(b) in 2004 without substantive change.

(2) *Nonparty Deponent*. C.C.P. 2025(a) (taking of depositions under California law) was repealed and replaced by C.C.P. 2025.010 in 2004 without substantive change.

C.C.P. 2026(b)(2) (deposition of nonparty in another state) was repealed and replaced by C.C.P. 2026.010(c) in 2004 without substantive change.

C.C.P. 2027(b)(2) (deposition of nonparty abroad) was repealed and replaced by C.C.P. 2027.010(c) in 2004 without substantive change.

See Reporter's Note to C.C.P. 2026(b) and C.C.P. 2027(b), in Hogan, 2 Cal. Civil Discovery 2d, Appendix D.



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CHAPTER X - Discovery

II. DEPOSITIONS

E. Deposition of California Witness for Out-of-State Proceeding.

*2 Witkin Cal. Evid. Discovery § 86*

[§ 86] Deposition of California Witness for Out-of-State Proceeding.

When a mandate, writ, letters rogatory, letter of request or commission is issued out of a court in another state, a United States territory, a district of the United States, or a foreign nation, or when, on notice or agreement, the oral or written deposition of a natural person in California is required, the deponent may be compelled to appear and testify, and to produce documents and things, in the same manner, and by the same process as may be employed for taking testimony in actions pending in California. (*C.C.P. 2029*; see 1 Hogan, Cal. Civil Discovery §4.2; Dunne on Depositions in California §11:10 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2029*, on taking depositions in California for an action pending out of state, was repealed and replaced by *C.C.P. 2029.010* in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §4.2.



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## CHAPTER X - Discovery

### III. WRITTEN INTERROGATORIES

#### A. In General.

#### 1. Nature and Purpose.

#### 2 *Witkin Cal. Evid. Discovery* § 87

[§ 87] Nature and Purpose.

(1) *Statutory Authority.* A party may obtain discovery by propounding to another party written interrogatories to be answered under oath. (*C.C.P.* 2030(a); on service and filing, see *infra*, §§92, 93.) This proceeding, based on *F.R. Civ. P.*, Rule 33, with slight changes, was an innovation in California practice. (See generally *Deyo v. Kilbourne* (1978) 84 C.A.3d 771, 779, 149 C.R. 499 [elaborate discussion]; 45 *Cal. L. Rev.* 487, 494; 48 *So. Cal. L. Rev.* 1221 [guide to practical use of interrogatories]; C.E.B., 2 Civil Discovery Practice 3d, Chap. 7; C.J.E.R., Judges Benchbook, Civil Proceedings: Discovery, Chap. 13; 1 Hogan, *Cal. Civil Discovery*, Chap. 5; Overly on Electronic Evidence in California §3.08; *Cal. Civil Practice*, 2 Procedure, §13:78 et seq.; 23 *Am.Jur.2d* (1983 ed.), *Depositions and Discovery* §199 et seq.; 4 *Am.Jur. Trials* 1.)

(2) *Advantages.* The main advantages of interrogatories are:

(a) They sometimes achieve the same purpose as a deposition without the expense of the procedural forms, the officer, the reporter, or transcription. (See 45 *Cal. L. Rev.* 487, 494; 1 Hogan, *Cal. Civil Discovery* §5.1.)

(b) They are particularly convenient where the other party is a corporation with numerous officers and employees. Instead of trying to determine which of these is a witness whose deposition should be taken, the questions are asked of the corporate party, which must give the information obtainable on deposition from any officer or employee. (See 1 Hogan, *Cal. Civil Discovery* §5.4; on selection of answering witness, see *infra*, §92.)

(c) They enable a party to discover from the other party the existence of prospective witnesses whose depositions may then be taken. (See *Bunnell v. Superior Court* (1967) 254 C.A.2d 720, 722, 62 C.R. 458 [persons having knowledge of relevant facts]; *Kenney v. Superior Court* (1967) 255 C.A.2d 106, 112, 63 C.R. 84, 2 *Cal. Evidence* (4th), *Witnesses*, §145 [expert witnesses]; 45 *Cal. L. Rev.* 487, 497; 1 Hogan, *Cal. Civil Discovery* §5.1; *infra*, §88.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Statutory Authority.* *C.C.P.* 2030(a), authorizing written interrogatories, was repealed and replaced by *C.C.P.* 2030.010 in 2004 without substantive change.

See C.E.B., 1 Civil Discovery Practice 4th, §7.1 et seq.; Hogan, 1 *Cal. Civil Discovery* 2d, Chap. 5.

(2) *Advantages.* See Hogan, 1 *Cal. Civil Discovery* 2d, §§5.1, 5.4. *West's Key Number Digest*, Pretrial Procedure k.241 et seq.



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## CHAPTER X - Discovery

## III. WRITTEN INTERROGATORIES

## A. In General.

## 2. Scope of Inquiry.

## 2 Witkin Cal. Evid. Discovery § 88

## [§ 88] Scope of Inquiry.

(1) *Same Scope as Other Devices.* The scope of interrogatories is the same as that provided for other discovery devices by *C.C.P. 2017* (*supra*, §9 et seq.) and is subject to the restrictions of *C.C.P. 2019* (*infra*, §241). (*C.C.P. 2030(a)*; see *Coy v. Superior Court* (1962) 58 C.2d 210, 217, 23 C.R. 393, 373 P.2d 457, *infra*, this section; *Darbee v. Superior Court* (1962) 208 C.A.2d 680, 685, 25 C.R. 520; *Chapin v. Superior Court* (1966) 239 C.A.2d 851, 854, 49 C.R. 199.) The device's purposes are not, however, identical to those of a deposition. (See *Coy v. Superior Court*, *supra*, 58 C.2d 217; *Mowry v. Superior Court* (1962) 202 C.A.2d 229, 233, 20 C.R. 698, *infra*, §92.) And interrogatories are not a complete substitute; depositions allow a greater freedom and flexibility in eliciting information.

(2) *Discovery of Witnesses.* Interrogatories, like depositions, may be used to discover the identity and location of persons who know about discoverable matter (*C.C.P. 2017(a)*), i.e., persons who might be useful as witnesses. (See *West Pico Furniture Co. of Los Angeles v. Superior Court* (1961) 56 C.2d 407, 15 C.R. 119, 364 P.2d 295; *Unger v. Los Angeles Transit Lines* (1960) 180 C.A.2d 172, 179, 4 C.R. 370; *Smith v. Superior Court* (1961) 189 C.A.2d 6, 11, 11 C.R. 165; 19 A.L.R.3d 1114 [discovery of intended witnesses].) However, one party cannot compel the other to list the nonexpert witnesses the party intends to call to testify at trial. (*Long Beach v. Superior Court* (1976) 64 C.A.3d 65, 134 C.R. 468, 2 Cal. Evidence (4th), Witnesses, §146; see 2 Hogan, Cal. Civil Discovery §13.9; cf. *In re Jeanette H.* (1990) 225 C.A.3d 25, 37, 275 C.R. 9, 2 Cal. Evidence (4th), Witnesses, §147 [under inherent power to manage its calendar, juvenile court in dependency proceedings may order exchange of witness lists at trial readiness conference]; on exchange of expert witness list, see *infra*, §178 et seq.)

(3) *Motion Proceedings.* Interrogatories on motion proceedings incidental or collateral to the main case are permissible. Thus, in *1880 Corp. v. Superior Court* (1962) 57 C.2d 840, 22 C.R. 209, 371 P.2d 985, defendant corporation appeared specially to quash summons on the ground that it was not engaged in business in California. Petitioner then served interrogatories designed to ascertain the facts concerning jurisdiction. *Held*, mandamus granted to compel order requiring answers. (57 C.2d 842.)

(4) *Prior Deposition Covering Same Matters.* In *Coy v. Superior Court*, *supra*, the trial judge sustained objections to some of the interrogatories on the ground that they had already been answered on deposition. *Held*, this was an untenable objection. The two procedures differ substantially: (a) A deposition is not final until read, signed, and filed, and until then may be changed; moreover, it is common practice to waive reading and signing until trial, when a party decides whether or not to use it. (b) An interrogatory does two things: It ferrets out relevant information that may lead to other admissible evidence, and it immediately and conclusively binds the answering party to the facts set forth in his or her reply. Hence, even when the same or similar questions are answered, the objection that the question has been

previously answered on deposition will not alone justify a refusal to reply. (58 C.2d 219.) (See *Bunnell v. Superior Court* (1967) 254 C.A.2d 720, 723, 62 C.R. 458 [following *Coy*].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Same Scope as Other Devices*. C.C.P. 2017, on the scope of discovery, was repealed and replaced by C.C.P. 2017.010 in 2004 without substantive change.

C.C.P. 2019, on the methods and sequence of discovery, was repealed and replaced by C.C.P. 2019.010 et seq. in 2004 without substantive change.

C.C.P. 2030(a), on the scope of, and limitations on, interrogatories, was repealed and replaced by C.C.P. 2030.010 in 2004 without substantive change.(2) *Discovery of Witnesses*. C.C.P. 2017(a), on the discovery of the identity and location of persons, was repealed and replaced by C.C.P. 2017.010 in 2004 without substantive change.

See Hogan, 2 Cal. Civil Discovery 2d, §13.9.

(2a) *(New) Discovery of Documents*. Interrogatories may be used to discover the existence of documents in the other party's possession, and the existence of a document is not privileged simply because the document contains privileged information. Thus, if an interrogatory asks the responding party to identify a document, an adequate response must include a description of the document. (*Hernandez v. Superior Court* (2003) 112 C.A.4th 285, 293, 4 C.R.3d 883.)*West's Key Number Digest*, Pretrial Procedure k.271 et seq.



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## CHAPTER X - Discovery

### III. WRITTEN INTERROGATORIES

#### B. Initial Interrogatories.

#### 1. Restrictions on Number of Interrogatories.

2 Witkin Cal. Evid. Discovery § 89

[§ 89] Restrictions on Number of Interrogatories.

(1) *Limit.* A party may propound up to 35 specially prepared interrogatories to another party as a matter of right. (*C.C.P. 2030(c)(1)*; see *Catanese v. Superior Court* (1996) 46 C.A.4th 1159, 1165, 54 C.R.2d 280 ["rule of 35" was violated where, in five interrogatories, plaintiff asked defendant which answers in plaintiff's 8 days of deposition testimony defendant contended were untruthful; this procedure effectively posed 10,000 separate questions]; 1 Hogan, Cal. Civil Discovery §5.6.) The Commission's recommendation of a presumptive limit on interrogatories was a response to concerns about "the abuse created by the reflexive filing of unnecessarily voluminous interrogatories." The Commission noted that because each party may propound 35 interrogatories to *each other party* in the lawsuit, a particular litigant in a multiparty action may propound, and may end up responding to, far more than 35 interrogatories without stipulation or leave of court. (Reporter's Note to *C.C.P. 2030(c)(1)*, in 2 Hogan, Cal. Civil Discovery, Appendix C.)

(2) *Exceptions.* The restriction is subject to the following exceptions:

(a) *Judicial Council form interrogatories.* In addition to the specially prepared interrogatories, a party may propound unlimited official Judicial Council form interrogatories, as described in *C.C.P. 2033.5* (infra, §91), as long as they are relevant to the action's subject matter. (*C.C.P. 2030(c)(1)*.)

(b) *Supplemental interrogatories.* Supplemental interrogatories to elicit later acquired information are authorized by *C.C.P. 2030(c)(8)* (infra, §94). (*C.C.P. 2030(c)(1)*.)

(c) *Declaration for additional discovery.* Subject to the right of the responding party to seek a protective order under *C.C.P. 2030(e)* (infra, §114), a party may propound more than 35 interrogatories if they are warranted by (1) the complexity or quantity of the issues, (2) the financial burden entailed in conducting discovery by oral deposition, or (3) the expedience of using interrogatories to allow the responding party to conduct an investigation or search records to supply information. (*C.C.P. 2030(c)(2)*.) A declaration for additional discovery in substantially the form prescribed by statute must be attached to each set of specially prepared interrogatories exceeding the limit. (*C.C.P. 2030(c)(3)*; for form, see Cal. Civil Practice, 2 Procedure, §13:98.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Limit.* *C.C.P. 2030(c)(1)*, allowing up to 35 interrogatories, was repealed and replaced by *C.C.P. 2030.030(a)(1)* in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §5.6.

(2) *Exceptions.*

(a) *Judicial Council form interrogatories.* C.C.P. 2030(c)(1) and 2033.5, on Judicial Council form interrogatories, were repealed and replaced by C.C.P. 2030.030(a)(2) and 2033.710 et seq. in 2004 without substantive change.

(b) *Supplemental interrogatories.* C.C.P. 2030(c)(1) and 2030(c)(8), on supplemental interrogatories, were repealed and replaced by C.C.P. 2030.030(b) and 2030.070 in 2004 without substantive change.

(c) *Declaration for additional discovery.* C.C.P. 2030(e), on protective orders, was repealed and replaced by C.C.P. 2030.090 in 2004 without substantive change.

C.C.P. 2030(c)(2), (c)(3), on declarations for special interrogatories exceeding the statutory limit, were repealed and replaced by C.C.P. 2030.040 and 2030.050 in 2004 without substantive change. *West's Key Number Digest*, Pretrial Procedure k.248 et seq.





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## CHAPTER X - Discovery

### III. WRITTEN INTERROGATORIES

#### B. Initial Interrogatories.

##### 2. Form.

##### a. Statutory Requirements.

2 Witkin Cal. Evid. Discovery § 90

[§ 90] Statutory Requirements.

(1) *Identification of Set*. Each set of interrogatories must be consecutively numbered and the first paragraph must identify the set number and the asking and responding parties. (*C.C.P. 2030(c)(4)*.)

(2) *Identification and Content of Interrogatory*. Each interrogatory in the set must be separately set forth and identified by number or letter (*C.C.P. 2030(c)(4)*) and must be "full and complete in and of itself" (*C.C.P. 2030(c)(5)*). (See *Catanese v. Superior Court* (1996) 46 C.A.4th 1159, 1164, 54 C.R.2d 280 [requirement of *C.C.P. 2030(c)(5)* that each interrogatory be full and complete in itself was violated where plaintiff propounded five interrogatories asking whether defendant contended that any of plaintiff's deposition answers was untruthful].) Unless approved under *C.C.P. 2033.5* (form interrogatories, *infra*, §91), a set of interrogatories may not include a preface or instruction, and a specially prepared interrogatory may not contain subparts or a compound, conjunctive, or disjunctive question. (*C.C.P. 2030(c)(5)*.) Specially defined terms must appear in all capital letters. (*C.C.P. 2030(c)(5)*.) (See C.E.B., 2 Civil Lit. Forms §§27.2, 27.3; 1 Hogan, Cal. Civil Discovery §5.3; Cal. Civil Practice, 2 Procedure, §13:97 et seq.)

Although the Commission did not believe that boilerplate interrogatories, prefaces, instructions, definitions, or subparts were *per se* abusive, it recognized "the need to control use of these devices lest they become the vehicle for evasion of the 35-question limit." (Reporter's Note to *C.C.P. 2030(c)*, in 2 Hogan, Cal. Civil Discovery, Appendix C.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Identification of Set*. *C.C.P. 2030(c)(4)*, specifying how the sets of interrogatories are to be identified, was repealed and replaced by *C.C.P. 2030.060(a)*, (b) in 2004 without substantive change.

(2) *Identification and Content of Interrogatory*. *C.C.P. 2030(c)(4)*, (c)(5), setting forth the identification and form requirements for individual interrogatories, were repealed and replaced by *C.C.P. 2030.060(c)-(f)* in 2004 without substantive change.

*C.C.P. 2033.5*, on form interrogatories, was repealed and replaced by *C.C.P. 2033.710* et seq. in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §5.3; Reporter's Note to *C.C.P. 2030(c)*, in Hogan, 2 Cal. Civil Discovery 2d, Appendix D. *West's Key Number Digest*, Pretrial Procedure k.248 et seq.



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## CHAPTER X - Discovery

### III. WRITTEN INTERROGATORIES

#### B. Initial Interrogatories.

##### 2. Form.

##### b. Judicial Council Forms.

*2 Witkin Cal. Evid. Discovery § 91*

[§ 91] Judicial Council Forms.

(1) *Statutory Mandate.* In 1980, the Judicial Council was directed to create official form interrogatories and requests for admission for use in civil actions based on personal injury, property damage, wrongful death, unlawful detainer, breach of contract, or fraud. The Council was to consult with a representative advisory committee and to draft the forms in nontechnical language. (Former C.C.P. 2036.5, now C.C.P. 2033.5.) In 1988, the Council was additionally directed to create forms for use in family law actions. (C.C.P. 2033.5.) (On form interrogatories for use by crime victims who have not received complete payment of restitution, see C.C.P. 2033.5(d), (e).)

(2) *Approved Forms.* The Council has approved the following forms:

(a) Form Interrogatories. (See Judicial Council Form No. FI-120.)

(b) Form Interrogatories (Unlawful Detainer). (See Judicial Council Form No. FI-128.)

(c) Form Interrogatories (Economic Litigation). (See Judicial Council Form No. FI-129.)

(d) Form Interrogatories (Family Law). (See Judicial Council Form No. 1292.10.)

(e) Schedule of Assets and Debts (Family Law). (See Judicial Council Form No. 1292.11.)

Use of the approved forms is optional. (C.C.P. 2033.5.) However, by using the Judicial Council's "well-drafted, balanced, and fair" form interrogatories, "a party can at once avoid dispute concerning the wording of a particular interrogatory, and greatly expand the amount of information that would otherwise be obtained via counsel-prepared questions." (Reporter's Note to C.C.P. 2030(c), in 2 Hogan, Cal. Civil Discovery, Appendix C.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Statutory Mandate.* C.C.P. 2033.5, as amended in 2001, additionally authorizes the Judicial Council to develop and approve form interrogatories and requests for admission for "any other civil actions the Judicial Council deems appropriate."

C.C.P. 2033.5 was repealed and replaced by C.C.P. 2033.710 et seq. without substantive change. C.C.P. 2033.5(d), (e), on forms for use by crime victims, became C.C.P. 2033.720.(2) *Approved Forms.*

- (a) Judicial Council Form No. FI-120 was renumbered Judicial Council Form No. DISC-001 in 2006.
- (b) Judicial Council Form No. FI-128 was renumbered Judicial Council Form No. DISC-003/UD-106 in 2006.
- (c) Judicial Council Form No. FI-129 was renamed Form Interrogatories--Limited Civil Cases (Economic Litigation) in 2005, and was renumbered Judicial Council Form No. DISC-004 in 2006.
- (d) Form Interrogatories (Family Law). Judicial Council Form No. 1292.10 was renumbered Judicial Council Form No. FL-145 in 2002.
- (e) Schedule of Assets and Debts (Family Law). Judicial Council Form No. 1292.11 was renumbered Judicial Council Form No. FL-142 in 2002.

See Reporter's Note to *C.C.P. 2030(c)*, in Hogan, 2 Cal. Civil Discovery 2d, Appendix D.



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## CHAPTER X - Discovery

## III. WRITTEN INTERROGATORIES

## B. Initial Interrogatories.

## 3. Service.

## 2 Witkin Cal. Evid. Discovery § 92

[§ 92] Service.

(1) *Timing*. Ten days or more after service of the summons on, or appearance by, another party, the plaintiff may propound interrogatories to that party without leave of court. In an unlawful detainer action, the plaintiff must wait at least 5 days. (*C.C.P. 2030(b)*; cf. similar 20-day waiting period on deposition, *supra*, §32.) On a showing of good cause, the court may grant the plaintiff leave to serve the interrogatories at an earlier time. The defendant may propound interrogatories at any time without the court's leave. (*C.C.P. 2030(b)*.)

If a demurrer is sustained with leave to amend, the plaintiff is still entitled to serve written interrogatories before filing an amended pleading, "even to disclose facts essential to his stating a cause of action." (*Budget Finance Plan v. Superior Court* (1973) 34 C.A.3d 794, 798, 110 C.R. 302; see *Credit Managers Assn. v. Superior Court* (1975) 51 C.A.3d 352, 362, 124 C.R. 242 [plaintiff could properly seek answers to interrogatories to help in amending complaint after demurrer was sustained: "It is not true that a litigant is only entitled to discovery if he does not need it"].)

Because the responding party has 30 days to respond (see *C.C.P. 2030(h)*, *infra*, §97) and because discovery must be completed at least 30 days before the initial trial date (see *C.C.P. 2024(a)*, *supra*, §23), interrogatories should be served at least 60 days before the initial trial date, longer if served by mail. (See *Heffron v. Los Angeles Transit Lines* (1959) 170 C.A.2d 709, 715, 339 P.2d 567 [court has discretion to sustain objection to interrogatories on ground of tardiness]; *Greyhound Corp. v. Superior Court* (1961) 56 C.2d 355, 380, 15 C.R. 90, 364 P.2d 266 [approving exercise of discretion]; see also 1 Hogan, Cal. Civil Discovery §5.2; 74 A.L.R.2d 534 [time for filing and serving interrogatories].)

(2) *Manner*. The party propounding the interrogatories must serve a copy on the party to whom they are directed and on all other parties who have appeared in the action. However, if the court determines that serving all parties would be unduly expensive or burdensome, it may remove this requirement. (*C.C.P. 2030(d)*.)

(3) *Party Served: No Right To Choose Answering Witness*. In *Mowry v. Superior Court* (1962) 202 C.A.2d 229, 20 C.R. 698, a district brought a condemnation suit, and obtained immediate possession on an affidavit of D, an appraiser employed for the purpose. Petitioner, claiming an interest in the lands and seeking an increase in the security deposited, filed 70 interrogatories directed not to the district but to D, calling for a wealth of detail concerning his qualifications and every step in the performance of his task. *Held*, objections were properly sustained.

*First*, interrogatories must be directed to the *party*, and a corporate party may select its own officer or agent to answer them, for it is responsible for, and will be bound by, the answers. (202 C.A.2d 233.)

*Second*, interrogatories must seek objective answers concerning facts available to the party. The subjective questions asked of D could only be answered by him for himself and not the district; by them, petitioner was seeking, as if on deposition, to cross-examine the witness. (202 C.A.2d 233, 236.)

Hence, while ordinarily the trial judge should not deny a petition directed to a particular nonparty witness but should require the party to select an answering agent, no such remedial action was required here, for the questions were not proper interrogatories. (202 C.A.2d 235.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Timing*. C.C.P. 2024(a), on the time for completion of discovery, was repealed and replaced by C.C.P. 2024.020 in 2004 without substantive change.

C.C.P. 2030(b), on the timing of service, was repealed and replaced by C.C.P. 2030.020 in 2004 without substantive change.

C.C.P. 2030(h), on the time for response, was repealed and replaced by C.C.P. 2030.260 in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §5.2.

(New) *Unlawful detainer*: C.C.P. 2030.020(c), added in 2007, provides that in an unlawful detainer action or other proceeding under C.C.P. 1159 et seq. (see 12 *Summary* (10th), *Real Property*, §757), a plaintiff may propound interrogatories to a party without leave of court "at any time that is five days after service of the summons on, or appearance by, that party, whichever occurs first." (2) *Manner*. C.C.P. 2030(d), on the manner of service, was repealed and replaced by C.C.P. 2030.080 in 2004 without substantive change. *West's Key Number Digest*, Pretrial Procedure k.247-



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CHAPTER X - Discovery

III. WRITTEN INTERROGATORIES

B. Initial Interrogatories.

4. Filing and Retention.

2 Witkin Cal. Evid. Discovery § 93

[§ 93] Filing and Retention.

(1) *Filing Not Permitted*. Interrogatories and the responses to them are not to be filed with the court. (*C.C.P. 2030(j)*.)

(2) *Retention of Originals*. The propounding party must retain the original interrogatories, with the original proof of service affixed to them, and the original sworn responses. Six months after final disposition of the action, the originals may be destroyed, unless the court, on a showing of good cause, orders that they be preserved for a longer period. (*C.C.P. 2030(j)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Filing Not Permitted*. The portion of *C.C.P. 2030(j)* specifying that the interrogatories and response are not to be filed with the court was repealed and replaced by *C.C.P. 2030.280(a)* in 2004 without substantive change.

(2) *Retention of Originals*. The portion of *C.C.P. 2030(j)* requiring the retention of the original interrogatories and responses was repealed and replaced by *C.C.P. 2030.280(b)* in 2004 without substantive change.



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## CHAPTER X - Discovery

### III. WRITTEN INTERROGATORIES

#### C. Further Interrogatories.

2 Witkin Cal. Evid. Discovery § 94

[§ 94] Further Interrogatories.

(1) *Subsequent Sets Authorized.* The number of original interrogatories is restricted to 35. (See *supra*, §89.) If the initial set of interrogatories does not exhaust the limit, the balance may be served in subsequent sets. (C.C.P. 2030(c)(1).)

(2) *Supplemental Interrogatories Authorized.* A party may propound a supplemental interrogatory "to elicit any later acquired information bearing on all answers previously made by any party in response to interrogatories." Supplemental interrogatories are authorized twice before the initial setting of a trial date and, subject to the time limits on discovery proceedings and motions provided by C.C.P. 2024 (*supra*, §§23, 24), once after the initial setting of a trial date. On motion and a showing of good cause, however, the court may authorize additional supplemental interrogatories. (C.C.P. 2030(c)(8).) (See 1 Hogan, Cal. Civil Discovery §5.7.)

(3) *Format.* In each set of supplemental interrogatories, the first paragraph immediately below the title of the case must identify: (a) the propounding party, (b) the responding party, (c) the set number being propounded, and (d) the nature of the paper. (C.R.C., Rule 331(a).) (On format of supplemental response or amended answer, see *infra*, §100.)

(4) *Continuing Interrogatories Prohibited.* An interrogatory may not impose a duty on the responding party to supplement an initially correct and complete answer with later acquired information. (C.C.P. 2030(c)(7).) The Commission feared that imposing a duty to supplement on the responding party created the possibility of evidentiary hearings, both before and during the trial, to determine just when an opponent came to possess new information. Moreover, the Commission considered requiring the responding party periodically to review its previous answers to be burdensome. The prohibition against continuing interrogatories is tempered by C.C.P. 2030(c)(8), *supra*, authorizing supplemental interrogatories to update previous answers. (Reporter's Note to C.C.P. 2030(c), in 2 Hogan, Cal. Civil Discovery, Appendix C.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Subsequent Sets Authorized.* C.C.P. 2030(c)(1), allowing subsequent sets of interrogatories, was repealed and replaced by C.C.P. 2030.030(b) in 2004 without substantive change.

(2) *Supplemental Interrogatories Authorized.* C.C.P. 2024, on the time limits for discovery proceedings and motions, was repealed and replaced by C.C.P. 2024.010 et seq. in 2004 without substantive change.

C.C.P. 2030(c)(8), on supplemental interrogatories to elicit later acquired information, was repealed and replaced by C.C.P. 2030.070 in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §5.7.

(3) *Format*. C.R.C., Rule 331(a) was renumbered C.R.C., Rule 3.1000(a) in 2006.

(4) *Continuing Interrogatories Prohibited*. C.C.P. 2030(c)(7), prohibiting the imposition of a duty to supplement an original answer with later acquired information, was repealed and replaced by C.C.P. 2030.060(g) in 2004 without substantive change.

C.C.P. 2030(c)(8), authorizing supplemental interrogatories, was repealed and replaced by C.C.P. 2030.070 in 2004 without substantive change.

See Reporter's Note to C.C.P. 2030(c), in Hogan, 2 Cal. Civil Discovery 2d, Appendix D. *West's Key Number Digest*, Pretrial Procedure k.254





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## CHAPTER X - Discovery

### III. WRITTEN INTERROGATORIES

#### D. Responses.

##### 1. In General.

##### a. Options.

2 *Witkin Cal. Evid. Discovery* § 95

[§ 95] Options.

A party served with interrogatories must respond in writing under oath. The party must submit a separate response to each interrogatory. Each response may take one of the following forms: an answer containing the information sought (see *infra*, §99 et seq.), an objection (see *infra*, §103 et seq.), or the production of writings (see *infra*, §101). (*C.C.P. 2030(f)*; see *Cal. Civil Practice*, 2 Procedure, §13:103 [form]; *C.E.B.*, 2 Civil Discovery Practice 3d, §7.66 et seq. [drafting tips]; 23 *Am.Jur.2d* (1983 ed.), *Depositions and Discovery* §211 et seq.; 4 *Am.Jur.* Trials 1, 89.)

Unless a declaration, as described in *C.C.P. 2030(c)(3)* (*supra*, §89), has been made, a party need only respond to the first 35 specially prepared interrogatories served, if the party states a specific objection to the balance, in accordance with *C.C.P. 2030(f)(3)* (*infra*, §103), on the ground that the limit has been exceeded. (*C.C.P. 2030(c)(1)*.)

A responding party also has the option of moving for a protective order. (See *infra*, §114.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2030(f)*, on responses, was repealed and replaced by *C.C.P. 2030.210* et seq. in 2004 without substantive change. *C.C.P. 2030(f)(3)*, on objections, became *C.C.P. 2030.240*.

*C.C.P. 2030(c)(1)*, authorizing an objection on the ground that the statutory limit has been exceeded, was repealed and replaced by *C.C.P. 2030.030(c)* in 2004 without substantive change.

*C.C.P. 2030(c)(3)*, on declarations for additional discovery, was repealed and replaced by *C.C.P. 2030.050* in 2004 without substantive change.

See *C.E.B.*, 1 Civil Discovery Practice 4th, §7.55 et seq. *West's Key Number Digest*, Pretrial Procedure k.301 et seq.



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## CHAPTER X - Discovery

### III. WRITTEN INTERROGATORIES

#### D. Responses.

##### 1. In General.

##### b. Format.

#### 2 *Witkin Cal. Evid. Discovery* § 96

[§ 96] Format.

(1) *Identification of Responses.* Responses must use the same identifying number or letter and be in the same sequence as the corresponding interrogatory, but the text of the interrogatory need not be repeated. The identity of the parties and the set number must appear in the first paragraph of the response, immediately below the title of the case. (*C.C.P. 2030(f)*.) (On format generally, see 1 Hogan, *Cal. Civil Discovery* §5.15.)

(2) *Required Signatures.* A response to interrogatories must be signed under oath, unless the response contains only objections. The responding party's attorney must sign any response that contains an objection. If the responding party is a corporation, partnership, association, or governmental agency, one of its officers or agents must sign on the party's behalf. If the officer or agent is an attorney acting in that capacity for the party, "that party waives any lawyer-client privilege and any protection for work product under *C.C.P. 2018* (2 *Cal. Evidence* (4th), *Witnesses*, §140) during any subsequent discovery from that attorney concerning the identity of the sources of the information contained in the response." (*C.C.P. 2030(g)*); see *Regency Health Services v. Superior Court* (1998) 64 *C.A.4th* 1496, 1501, 76 *C.R.2d* 95 [trial judge erred in ruling that only plaintiff, not her guardian ad litem, could sign interrogatory responses and that, because she was incompetent, she was exempt from responding; for purposes of signature requirement, "party" includes guardian ad litem].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Identification of Responses.* *C.C.P. 2030(f)*, on identification and format of the responses, was repealed and replaced by *C.C.P. 2030.210(b)*, (c) in 2004 without substantive change.

See Hogan, 1 *Cal. Civil Discovery* 2d, §5.15.

(2) *Required Signatures.* *C.C.P. 2018* (work product rule) was repealed and replaced by *C.C.P. 2018.010* et seq. in 2004 without substantive change.

*C.C.P. 2030(g)*, on signature requirements, was repealed and replaced by *C.C.P. 2030.250* in 2004 without substantive change.



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## CHAPTER X - Discovery

## III. WRITTEN INTERROGATORIES

## D. Responses.

## 1. In General.

## c. Timing of Response.

2 *Witkin Cal. Evid. Discovery* § 97

## [§ 97] Timing of Response.

(1) *General Rule.* The responding party must serve the original response on the asking party within 30 days of service of the interrogatories. In unlawful detainer actions, the responding party has 5 days from the date of service to respond. (*C.C.P. 2030(h)*.) If the interrogatories were served on the responding party by mail, the response time is increased by at least 5 days. (See *C.C.P. 1013(a), 2019(e)*.)

The responding party must also serve a copy of the response on all other parties who have appeared, unless the court relieves the party of the requirement on the grounds that it would be unduly expensive or burdensome. (*C.C.P. 2030(h)*.)

(2) *Extension of Time.* The court, on motion by the propounding party, may shorten the time for response; on the responding party's motion, it may extend the time. (*C.C.P. 2030(h)*.)

Moreover, the parties may agree to extend the time for responding to part or all of a set of interrogatories. The agreement must be confirmed in a writing that specifies the extended date. Unless it expressly provides otherwise, the agreement allows the responding party to respond by answer, objection, or the production of writings. (*C.C.P. 2030(i)*.) A letter from the responding party to the propounding party, with copies to other parties who have appeared, is a sufficient written confirmation. (Reporter's Note to *C.C.P. 2030(i)*, in 2 Hogan, Cal. Civil Discovery, Appendix C.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *General Rule.* *C.C.P. 2019(e)*, on extensions where service is by mail, was repealed and replaced by *C.C.P. 2016.050* in 2004 without substantive change.

*C.C.P. 2030(h)*, stating the general rule on the time for response, was repealed and replaced by *C.C.P. 2030.260* in 2004 without substantive change.

(2) *Extension of Time.* *C.C.P. 2030(h)*, allowing a shortening or extension of the time for response, was repealed and replaced by *C.C.P. 2030.260* in 2004 without substantive change.

Under *C.C.P. 2030.260(b)*, added in 2007, in an unlawful detainer action or other proceeding under *C.C.P. 1159* et seq. (12 *Summary* (10th), *Real Property*, §757), the party to whom the interrogatories are propounded has 5 days from the date of service to respond, unless, on motion of the propounding party, the court has shortened the time for response,

or, on motion of the responding party, the court has extended the time for response.

*C.C.P. 2030(i)*, on agreements to extend the time for response, was repealed and replaced by *C.C.P. 2030.270* in 2004 without substantive change.

See Reporter's Note to *C.C.P. 2030(i)*, in Hogan, 2 Cal. Civil Discovery 2d, Appendix D.



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## CHAPTER X - Discovery

### III. WRITTEN INTERROGATORIES

#### D. Responses.

##### 1. In General.

##### d. Effect of Failure To Respond.

2 Witkin Cal. Evid. Discovery § 98

[§ 98] Effect of Failure To Respond.

Failure to serve a timely response constitutes waiver of (1) any right to answer by producing writings under *C.C.P. 2030(f)*, and (2) any objection, including one based on privilege or the work product doctrine. A party may be relieved of the waiver, on motion, if the court determines that (1) a response in substantial compliance with *C.C.P. 2030(f)* has been subsequently served, and (2) failure to serve a timely response was the result of "mistake, inadvertence, or excusable neglect." (*C.C.P. 2030(k)*.) This provision authorizes relief from waiver "on much the same basis that is presently required for relief from a default under *C.C.P. 473*, which this subdivision is intended to supersede in this situation." (Reporter's Note to *C.C.P. 2030(k)*, in 2 Hogan, Cal. Civil Discovery, Appendix C; see 1 Hogan, Cal. Civil Discovery §5.19.) (On motion to compel response, see *infra*, §115.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2030(f)*, on the right to answer by producing writings, was repealed and replaced by *C.C.P. 2030.210* in 2004 without substantive change.

*C.C.P. 2030(k)*, on failure to serve a timely response, was repealed and replaced by *C.C.P. 2030.290* in 2004 without substantive change.

See *Hernandez v. Superior Court* (2003) 112 C.A.4th 285, 294, 4 C.R.3d 883 [where, in case management order, trial judge required plaintiffs to accompany their privilege objections to defendants' interrogatories with "privilege log," and plaintiffs were tardy in supplying log, trial judge erred in deeming plaintiffs' privileges, other than marital privilege, waived; forced waiver of attorney-client privilege is not appropriate sanction for tardy privilege log]; *Best Products v. Superior Court* (2004) 119 C.A.4th 1181, 1189, 15 C.R.3d 154 [failure to file privilege log in response to plaintiff's interrogatories was inadequate basis for finding that defendant waived its attorney-client and work product privileges; relying on *Hernandez*]; Reporter's Note to *C.C.P. 2030(k)*, in Hogan, 2 Cal. Civil Discovery 2d, Appendix D; Hogan, 1 Cal. Civil Discovery 2d, §5.19.



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## CHAPTER X - Discovery

### III. WRITTEN INTERROGATORIES

#### D. Responses.

##### 2. Answers.

##### a. Required Information.

*2 Witkin Cal. Evid. Discovery § 99*

[§ 99] Required Information.

Each answer must be as complete and straightforward as available information permits. If an interrogatory cannot be answered completely, it must be answered "to the extent possible." The responding party must make a "reasonable and good faith effort" to obtain information that is not personally known, unless that information is equally available to the asking party. (*C.C.P. 2030(f)(1)*.) This provision codifies the duty recognized in several cases. (Reporter's Note to *C.C.P. 2030(f)(1)*, in 2 Hogan, Cal. Civil Discovery, Appendix C; see *Sigerseth v. Superior Court* (1972) 23 C.A.3d 427, 433, 100 C.R. 185 [defendant was required to supply information about qualifications of expert witness].)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2030(f)(1)*, on the contents of the answer, was repealed and replaced by *C.C.P. 2030.220* in 2004 without substantive change.

See *Biles v. Exxon Mobil Corp.* (2004) 124 C.A.4th 1315, 1328, 1329, 22 C.R.3d 282 [in personal injury action against property owner, to extent that trial judge excluded declaration of one of plaintiff employee's coworkers on ground that coworker had not been identified in answer to previous interrogatory and interrogatory had not been supplemented to include coworker's name, exclusion was improper; plaintiff had no statutory duty to update or amend his interrogatory responses, and right to amend, as specified in *C.C.P. 2030.310* (Supp., infra, §100), is not commitment to do so]; Reporter's Note to *C.C.P. 2030(f)(1)*, in Hogan, 2 Cal. Civil Discovery 2d, Appendix D.



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## CHAPTER X - Discovery

### III. WRITTEN INTERROGATORIES

#### D. Responses.

##### 2. Answers.

##### b. Amendment.

2 Witkin Cal. Evid. Discovery § 100

[§ 100] Amendment.

(1) *Right To Amend*. Without leave of court, a party may serve an amended answer containing information subsequently discovered, inadvertently omitted, or mistakenly stated. (*C.C.P. 2030(m)*.)

(2) *Format*. In each set of amended answers to interrogatories, the first paragraph immediately below the title of the case must identify: (a) the propounding, demanding, or requesting party, (b) the responding party, (c) the set number being propounded or responded to, and (d) the nature of the paper. (C.R.C., Rule 331(a).) Each amended answer must be identified by the same number or letter and must be in the same sequence as the corresponding interrogatory, but the text need not be repeated. (C.R.C., Rule 331(b).)

(3) *Binding Effect of Initial Answer*. The asking party may move for an order that the initial answer be deemed binding on the responding party. The motion must be accompanied by a declaration showing a reasonable and good faith attempt at resolution of each issue presented. The motion must be granted if the court determines that (a) the asking party has been substantially prejudiced by the initial failure to respond correctly, (b) the responding party has failed to show substantial justification for the initial answer, and (c) prejudice to the asking party cannot be cured either by a continuance or use of the initial answer at the trial or other hearing. (*C.C.P. 2030(m)*; on use of amended answer at trial, see *infra*, §102; on monetary sanctions for failure to attempt informal resolution, see *infra*, §252.)

The court must impose a monetary sanction under *C.C.P. 2023* (*infra*, §252) against a party, person, or attorney who unsuccessfully makes or opposes a motion to deem binding an initial answer to an interrogatory, unless the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make imposing the sanction unjust. (*C.C.P. 2030(m)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Right To Amend*. *C.C.P. 2030(m)*, on the answering party's right to amend the response, was repealed and replaced by *C.C.P. 2030.310* in 2004 without substantive change.

(2) *Format*. C.R.C., Rule 331(a) and 331(b) were renumbered C.R.C., Rule 3.1000(a) and 3.1000(b), respectively, in 2006.

(3) *Binding Effect of Initial Answer*. *C.C.P. 2023*, on monetary sanctions, was repealed and replaced by *C.C.P. 2023.010 et seq.* in 2004 without substantive change.

*C.C.P. 2030(m)*, on motions to deem an initial answer binding, was repealed and replaced by *C.C.P. 2030.310* in 2004 without substantive change. *West's Key Number Digest*, Pretrial Procedure k.304





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## CHAPTER X - Discovery

### III. WRITTEN INTERROGATORIES

#### D. Responses.

##### 2. Answers.

#### c. Answer Derived From Writings.

2 Witkin Cal. Evid. Discovery § 101

[§ 101] Answer Derived From Writings.

(1) *General Rule.* If an answer requires the preparation of a compilation, abstract, audit, or summary of the responding party's documents and the burden or expense of preparation would be substantially the same for the asking party, it is sufficient to specify in detail the writings from which the answer may be ascertained and to afford the asking party an opportunity to inspect and copy the writings. (C.C.P. 2030(f)(2).) A response in this manner must refer to C.C.P. 2030(f)(2).

(2) *Inadequate Answer.* In *Fuss v. Superior Court* (1969) 273 C.A.2d 807, 78 C.R. 583, defendant motion picture producer served written interrogatories on plaintiffs, his former attorneys, asking detailed questions about each alleged service for which plaintiffs were demanding compensation. (Defendant sought information on the dates the services were performed, the time spent, the persons involved, etc.) The attorneys responded that the answer would require "a compilation, abstract, audit or summary of business records" which was not available but could be compiled by defendant from relevant parts of Services Performed Sheets, Services Performed Code, Attorneys' Appointment Books, Telephone and Appointment Call Sheets, Legal Files, Employee Codes, Time Records, and recollections of persons who performed the work. The "pertinent and proper portions" of the written materials were offered for inspection at reasonable times on reasonable notice. *Held*, the interrogatories should have been answered.

(a) The response on its face belied its use as a complete answer because one source mentioned was the *recollections* of persons who performed the work in dispute. These recollections are not *records* from which the answer can be derived. (273 C.A.2d 815.)

(b) The response failed to afford reasonable opportunity for defendant to examine, audit and inspect the records, because the offer provided access only to "pertinent and proper portions" of the files. "An opportunity to examine records and files which the opposing party to the litigation deems pertinent and proper is no opportunity at all for the purpose of civil discovery." (273 C.A.2d 815.)

(c) Reference to an exhibit as a "substantially accurate summation" did not remedy the deficiencies because it contained a disclaimer that "there may be some duplication or omission." The summary therefore did not represent plaintiffs' "present best and complete answer," and was valueless for impeachment or use in evaluating the claim or preparing a defense. (273 C.A.2d 816.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *General Rule.* *C.C.P. 2030(f)(2)*, on the answering party's right to specify writings from which the answer may be ascertained, was repealed and replaced by *C.C.P. 2030.230* in 2004 without substantive change.



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## CHAPTER X - Discovery

## III. WRITTEN INTERROGATORIES

- D. Responses.
  - 2. Answers.
    - d. Use at Trial.

2 Witkin Cal. Evid. Discovery § 102

[§ 102] Use at Trial.

At the trial or a hearing, a party other than the responding party may use answers to interrogatories, to the extent admissible under the rules of evidence, only against the responding party. The fact that the responding party is available to testify, has testified, or will testify is not a valid objection to the use of an answer. (*C.C.P. 2030(n)*; see *Associates Discount Corp. v. Tobb Co.* (1966) 241 C.A.2d 541, 552, 50 C.R. 738 [provision requiring service of copies on all parties (former C.C.P. 2030(a), now C.C.P. 2030(d), supra, §92), did not impose obligation on other parties, nor give them right to participate in proceeding; hence, answers to interrogatories were not admissible in evidence against them]; *Castaline v. Los Angeles* (1975) 47 C.A.3d 580, 589, 121 C.R. 786 [same; answers to interrogatories are admissible only against answering party]; see also BAJI (8th ed.), No. 2.07 [definition of interrogatory and consideration by jury].) (On effect of answers as limiting answering party's proof at trial, see 86 A.L.R.3d 1089; on inadmissibility of party's own self-serving answers to opponent's interrogatories, see *Estate of Horman* (1968) 265 C.A.2d 796, 805, 71 C.R. 780, 3 Cal. Evidence (4th), Presentation at Trial, §163.)

At trial, any party may use a responding party's initial answer against the responding party; the responding party may then use his or her amended answer. (*C.C.P. 2030(m)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2030(n)*, on use of the answers at trial, was repealed and replaced by *C.C.P. 2030.410* in 2004 without substantive change.

*C.C.P. 2030(d)*, requiring the propounding party to serve copies on all parties, was repealed and replaced by *C.C.P. 2030.080* in 2004 without substantive change.

*C.C.P. 2030(m)*, on use of the initial and amended answers at trial, was repealed and replaced by *C.C.P. 2030.310(a)* in 2004 without substantive change.

See CACI, No. 209 [use of interrogatories at trial]. *West's Key Number Digest*, Pretrial Procedure k.306 et seq.



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CHAPTER X - Discovery

III. WRITTEN INTERROGATORIES

D. Responses.

3. Objections.

a. In General.

2 *Witkin Cal. Evid. Discovery* § 103

[§ 103] In General.

A party may respond to an interrogatory with an objection (*C.C.P. 2030(f)*; *supra*, §95), but if only part of an interrogatory is objectionable, the remainder must be answered (*C.C.P. 2030(f)(3)*). The specific ground for the objection must be set forth clearly. If an objection is based on a claim of privilege, the particular privilege invoked must be clearly stated. If an objection is based on the work product doctrine, the claim must be expressly asserted. (*C.C.P. 2030(f)(3)*; see *C.E.B.*, 2 *Civil Discovery Practice* 3d, §7.73 et seq.; 1 *Hogan*, *Cal. Civil Discovery* §5.18.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2030(f)*, on objections generally, was repealed and replaced by *C.C.P. 2030.210* in 2004 without substantive change.

*C.C.P. 2030(f)(3)*, on the statement of objections, was repealed and replaced by *C.C.P. 2030.240* in 2004 without substantive change.

See *C.E.B.*, 1 *Civil Discovery Practice* 4th, §7.84 et seq.; *Hogan*, 1 *Cal. Civil Discovery* 2d, §5.18. *West's Key Number Digest*, *Pretrial Procedure* k.251 et seq.



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## 3. Objections.

## b. To Form and Competency.

2 Witkin Cal. Evid. Discovery § 104

[§ 104] To Form and Competency.

(1) *In General.* Objections to form are allowed on depositions to protect a witness being orally examined. (See *supra*, §65.) But a witness answering interrogatories in writing after consultation with counsel needs no such protection. Accordingly, technical objections, e.g., that interrogatories "assume facts not in evidence" or are "compound," should not be sustained. (*West Pico Furniture Co. of Los Angeles v. Superior Court* (1961) 56 C.2d 407, 421, 15 C.R. 119, 364 P.2d 295; *Smith v. Superior Court* (1961) 189 C.A.2d 6, 13, 11 C.R. 165.) Moreover, because the test is relevancy and not competency (*supra*, §9), an objection that the answer calls for hearsay is improper. (*Durst v. Superior Court* (1963) 218 C.A.2d 460, 465, 32 C.R. 627.)

In *Flora Crane Service v. Superior Court* (1965) 234 C.A.2d 767, 778, 45 C.R. 79, the interrogatory to defendant corporation was "Describe fully all books and records" and their present custodian. *Held*, the question was proper; it called for a description by appropriate categories with reasonable particularity, and it served a proper discovery purpose--to give the interrogator sufficient information to make a proper description for inspection or subpoena duces tecum.

On the other hand, the use of "boilerplate" interrogatories (standard printed forms), containing some questions unrelated to any issue in the case, has been condemned as "an imposition upon the witness ... and upon opposing counsel," as well as a trespass on the court's time. (See *Wooldridge v. Mounts* (1962) 199 C.A.2d 620, 626, 627, 18 C.R. 806.)

(2) *Question Calling for Conclusion.* A question calling for a "conclusion" or "opinion" is not necessarily bad, where it serves a valid discovery purpose. (See *Singer v. Superior Court* (1960) 54 C.2d 318, 326, 5 C.R. 697, 353 P.2d 305.) But where the proponent baldly asks for the adverse party's legal contentions or arguments, an objection will be sustained. (See *Flora Crane Service v. Superior Court*, *supra*, 234 C.A.2d 781 [interrogatory to defendant, to state "all contentions" forming basis of its affirmative defenses, and to explain how complaint is defective]; *infra*, §105.)

(3) *Argumentative Interrogatories.* In *Sheets v. Superior Court* (1967) 257 C.A.2d 1, 64 C.R. 753, H was a certified public accountant employed by S to audit books. M obtained the audit for inspection, and then submitted an interrogatory with photocopies and the question whether S contended that anything contained in these documents tended to support his allegation of diversion of partnership funds. *Held*, it was an abuse of discretion to compel an answer. The interrogatory was argumentative, calling on S's counsel to state how he interpreted the report, insofar as it might be helpful to him in presenting his client's case. (257 C.A.2d 13.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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- c. To Content.
- 1. Legal Contentions.

## 2 Witkin Cal. Evid. Discovery § 105

## [§ 105] Legal Contentions.

(1) *General Rule.* "An interrogatory may relate to whether another party is making a certain contention, or to the facts, witnesses, and writings on which a contention is based. An interrogatory is not objectionable because an answer to it involves an opinion or contention that relates to fact or the application of law to fact, or would be based on information obtained or legal theories developed in anticipation of litigation or in preparation for trial." (*C.C.P.* 2030(c)(6).) This provision codifies the case law stated in *Universal Underwriters Ins. Co. v. Superior Court* (1967) 250 C.A.2d 722, 58 C.R. 870, *infra*, this section, *Burke v. Superior Court* (1969) 71 C.2d 276, 78 C.R. 481, 455 P.2d 409, *infra*, this section, and *Singer v. Superior Court* (1960) 54 C.2d 318, 5 C.R. 697, 353 P.2d 305, *infra*, §106. (Reporter's Note to *C.C.P.* 2030, in 2 Hogan, Cal. Civil Discovery, Appendix C.) A contrary rule applies to requests for admissions. (See *infra*, §157.)

(2) *Illustrations.* In *Universal Underwriters Ins. Co. v. Superior Court* (1967) 250 C.A.2d 722, 58 C.R. 870, P insurance company sued U insurance company for declaratory relief, to determine which had the duty under automobile liability policies to defend an action. U's position was that it had sent an endorsement to its insured, limiting its liability. P submitted interrogatories asking (a) whether there was legal consideration for the endorsement, and (b) if it was contended that none was necessary. U answered no to (a) and yes to (b). *Held*, the interrogatories were proper, and the lower court did not abuse its discretion in refusing to permit a belated attack on the pretrial order based thereon. The court thought that, under the *Singer* approach (*infra*, §106), "an interrogatory calling on one's adversary to state whether or not he makes a particular contention, either as to the facts or as to the possible issues in the case, is not only proper but desirable." (250 C.A.2d 728.) And this was a simple inquiry to determine whether an issue was raised and would have to be met by proof; it was not an improper attempt to preclude the adverse party from producing subsequently discovered facts. (250 C.A.2d 729.)

The same approach was taken in *Burke v. Superior Court* (1969) 71 C.2d 276, 78 C.R. 481, 455 P.2d 409. R sued W for \$ 95,000 on a promissory note, and levied attachment on W's land. W had judgment in the action. W (and his receiver B) then sued defendant F Co., surety on the attachment bond, for damages for wrongful attachment. They alleged that, because the attachment was valid and regular on its face, they had made no motion to discharge or dissolve it, and were forced to defend the main action on the merits, hence sought the expenses of defending the main action as damages. F Co. filed an unverified general denial of the allegations. Petitioners, alleging that they knew of no facts supporting F Co.'s denial of the essential allegation of the complaint, instituted discovery proceedings to discover the

company's "contentions on the issues and the facts allegedly supporting such contentions." They made requests for admissions and propounded interrogatories, to which the trial judge sustained objections. *Held*, mandamus issued to compel respondent court to vacate its orders, reconsider the objections, and make orders for discovery.

(a) One of the purposes of discovery is to test the pleadings (see *supra*, §1). Accordingly, a defendant may be required to disclose not only evidentiary facts underlying his affirmative defenses or denials, but also "whether or not he makes a particular contention, either as to the facts or as to the possible issues in the case." (71 C.2d 281.) The plaintiff is under a similar duty to disclose. (71 C.2d 282.)

(b) The right to determine an opponent's contentions is particularly important where the answer is an indiscriminate general denial of virtually indisputable matters. (71 C.2d 282.)

(c) The form "Do you contend that?" is not objectionable as calling for a legal opinion. (71 C.2d 283.) (See also *Sav-On Drugs v. Superior Court* (1975) 15 C.3d 1, 5, 123 C.R. 283, 538 P.2d 739 ["A party's contention may be the subject of discovery, but not the legal reasoning or theory behind the contention"].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *General Rule.* C.C.P. 2030(c)(6), on contentions and opinions, was repealed and replaced by C.C.P. 2030.010(b) in 2004 without substantive change.

See Reporter's Note to C.C.P. 2030, in Hogan, 2 Cal. Civil Discovery 2d, Appendix D.





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c. To Content.

2. Facts Supporting Defenses.

2 *Witkin Cal. Evid. Discovery* § 106

[§ 106] Facts Supporting Defenses.

In *Singer v. Superior Court* (1960) 54 C.2d 318, 5 C.R. 697, 353 P.2d 305, plaintiff seaman filed a Jones Act suit for personal injuries, and defendant pleaded contributory negligence and assumption of risk in general terms. Plaintiff served interrogatories seeking the facts forming the bases of these defenses, and the trial judge sustained objections. *Held*, mandamus granted to compel the answers.

(a) The first objection, assertedly based on federal practice, was that the questions pertained only to the pleadings. The federal rules provide for motions that can produce this information, but in California contributory negligence can be pleaded in general terms without being subject to demurrer. "It follows that, in California, discovery proceedings provide a most important method of obtaining knowledge of such facts as may exist and on which the protagonist relies. Since this is not necessarily true under the federal system, authorities from such jurisdictions may be helpful, but cannot be considered as binding. Moreover, even under the federal practice, the later federal cases hold that questions relating to the facts underlying the contentions of the parties are proper and should be answered. ... These later cases state the better rule, and certainly state the rule that should be followed in California under our rules of procedure and pleading." (54 C.2d 324.)

(b) The second objection, that a plaintiff is in a better position than a defendant to know these answers, is untenable: The plaintiff may have more knowledge of the facts of the accident, but not necessarily of the facts on which the defendant bases its defenses. "Moreover, no rule or authority is cited which authorizes refusal to answer an interrogatory simply upon the ground that the answer is known to the party seeking the information." (54 C.2d 324.)

(c) The third and main objection, that the defendant was being forced to limit itself at the trial by stating all facts on which it might subsequently rely, is likewise untenable: "The three questioned interrogatories merely call for the facts this defendant now knows that support its pleaded defenses. The answers will not constitute an unfair limitation on defendant. They will not prevent it at the trial, from presenting subsequently discovered facts, or even from presenting facts now known to it but overlooked by it, if it can show such oversight was in good faith. The plaintiff is entitled to the information. Requiring the defendant to answer is not oppressive." (54 C.2d 326.) (See *Pember v. Superior Court* (1966) 240 C.A.2d 888, 890, 50 C.R. 24 [following *Singer*]; 48 Cal. L. Rev. 864 [discussing *Singer*]; 86 A.L.R.3d 1089 [answers to interrogatories as limiting answering party's proof at trial]; for discussion of issue whether party being orally deposed may be asked to state facts supporting contentions in pleadings, see *Rifkind v. Superior Court* (1994) 22 C.A.4th 1255, 27 C.R.2d 822, *supra*, §66.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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c. To Content.

3. Facts Supporting Cause of Action.

2 *Witkin Cal. Evid. Discovery* § 107

[§ 107] Facts Supporting Cause of Action.

In *Los Angeles v. Superior Court (Ferguson)* (1973) 33 C.A.3d 778, 109 C.R. 365, plaintiff brought an action for battery against M, a police officer, and against the city of Los Angeles, his employer. Through written interrogatories she sought to learn whether and under what circumstances M had been suspended from duty and whether other persons had made complaints about M's conduct. The trial judge ordered the interrogatories answered. *Held*, the order was proper only in part.

(a) Relevancy to the subject matter is a broader concept than relevancy to the issues under former C.C.P. 2016(b) (now C.C.P. 2017(a)) "in that relevancy to subject matter is determinable by potential, not actual, issues in the case." (33 C.A.3d 782.)

(b) The interrogatories on suspensions sought discovery of facts that might show that the city had been put on reasonable notice that M was unfit to be a police officer. If this possibility were shown, plaintiff could amend her complaint to add other causes of action. Therefore, the information is relevant to the subject matter of the action and might become relevant to the issues in an amended complaint. Defendant was properly required to answer the interrogatories (although any suspension resulting from the sued-upon incident would not be discoverable, because remedial measures taken after an event cannot be used to prove negligence or culpability). (33 C.A.3d 783.)

(c) Some interrogatories sought to discover whether other persons had complained to the police department "concerning the conduct" of M. "These obtuse interrogatories cover a field of interrogation so broad that they could require the production of information wholly alien to the subject matter of this action. Conduct that provoked complaint might extend, for example, to the manner in which the officer drove a patrol car, wore his uniform, responded to an emergency situation, selected his language, modulated his voice, or employed gesture in the performance of his duties. ... Yet even were we to narrow these interrogatories to complaints by members of the public of assault and battery, evidence of such conduct would be of dubious value ... , for the character or reputation of a defendant is not an issue in a civil action for assault, and evidence of other specific instances of misconduct is not admissible to prove misconduct on the particular occasion." (33 C.A.3d 783.) The lower court should have sustained defendant's objections to these interrogatories as not being relevant to the subject matter of the action.

In *Holguin v. Superior Court* (1972) 22 C.A.3d 812, 99 C.R. 653, a wrongful death action, plaintiffs directed interrogatories at defendant physicians, asking for facts relating to the autopsy on the decedent. Defendants answered, in

effect, that they could not answer because they were not present. One interrogatory asked whether the decedent, during childbirth, had received anesthesia at the level of the first lumbar vertebra; defendants answered that they were not certain (although each had been in attendance). *Held*, plaintiffs had no right to different answers. Plaintiffs "seem to take the position that the propounding of the interrogatories created a duty in defendants to start an investigation with the various persons in the coroner's office who participated in the autopsy and then to answer in accordance with the information thus gathered, even if the facts learned were antagonistic to their trial posture. We know of no principle of discovery law which thus compels a party not only to prepare his opponent's case, but also to stipulate away his own." (22 C.A.3d 821.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2017(a)*, on the discovery of relevant matter, was repealed and replaced by *C.C.P. 2017.010* in 2004 without substantive change.



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4. In Class Action.

aa. Interrogatories to Plaintiff and Class Members.

2 *Witkin Cal. Evid. Discovery* § 108

[§ 108] Interrogatories to Plaintiff and Class Members.

(1) *Plaintiff*. In *Alpine Mut. Water Co. v. Superior Court* (1968) 259 C.A.2d 45, 66 C.R. 250, plaintiff mutual water companies and others brought a class suit for several kinds of relief, including damages for slander of title. Defendants served interrogatories relating to ownership of the properties and damages allegedly suffered by individual members of the class. Holding some good and some bad, the court in this case of first impression made some general observations about the extent to which discovery is available against a plaintiff who files a class action.

(a) Insofar as the plaintiff represents himself or herself, the scope of discovery is the same as in any ordinary action. (259 C.A.2d 53.)

(b) The difficult question is whether the plaintiff may be required to answer interrogatories about other members. It would be unfair to hold that he or she need not answer any, and equally unfair to hold that he or she must answer detailed questions about each class member--thereby dissipating most of the benefits of the class action. Hence: "We chart a middle course. Absent some specific showing by the objecting party to justify a contrary ruling, such as privilege, a representative plaintiff can be compelled to supply his adversary with the information about his class which is in his possession or readily available to him and which is not equally available to an adversary. A representative plaintiff cannot be compelled to supply information concerning members of his class or their interests in the action which is neither in his possession nor control, unless the interrogatory is directly related to his own standing to maintain the action, to the existence of an ascertainable class, or to the existence of that community of interest which is required to sustain a class action. ... A representative cannot be compelled to respond to interrogatories about any class member's separate claim as distinguished from the common claim of the class which may be tried with or as part of the class action." (259 C.A.2d 54.)

(2) *Unnamed Class Members*. Interrogatories may be propounded to unnamed class members. (*Danzig v. Superior Court* (1978) 87 C.A.3d 604, 611, 151 C.R. 185; *Spoon v. Superior Court* (1982) 130 C.A.3d 735, 745, 746, 182 C.R. 44; see C.E.B., 2 Civil Discovery Practice 3d, §7.13; 1 Hogan, Cal. Civil Discovery §5.5; 4 Cal. Proc. (4th), Pleading, §288.) They must not, however, be directed to the identity of class members or the amount of each claim, and they must not have the purpose or effect of unduly harassing absent members or decreasing the class size. (*Danzig v. Superior Court*, *supra*, 87 C.A.3d 612, 613.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Unnamed Class Members*. See C.E.B., 1 Civil Discovery Practice 4th, §7.23; Hogan, 1 Cal. Civil Discovery 2d, §5.5.



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4. In Class Action.

bb. Interrogatories to Defendant.

2 *Witkin Cal. Evid. Discovery* § 109

[§ 109] Interrogatories to Defendant.

In *Budget Finance Plan v. Superior Court* (1973) 34 C.A.3d 794, 798, 110 C.R. 302, plaintiff consumers, on behalf of an allegedly defrauded class, sought rescission, damages and other relief against a seller and several lending institutions, and filed interrogatories asking defendants to identify other local residents who were taken in by the same sales scheme. *Held*, the interrogatories were proper. Plaintiffs "are entitled to have discovery directed towards appropriate parties in order to learn the names of other proper plaintiffs who may be of assistance in the presentation of the case and who may share the burdens of its prosecution." (34 C.A.3d 799.) The lenders' support of the allegedly fraudulent enterprise, though done impersonally, has obliged them to reveal the identities of purchasers whose contracts were assigned, so that an effective class action may be brought. "If it were not so, righting of wrongs could be prevented by assignment by a larcenous purveyor to many financing agencies." (34 C.A.3d 800.)

In *Union Mut. Life Ins. Co. v. Superior Court* (1978) 80 C.A.3d 1, 145 C.R. 316, plaintiff brought a class action against defendant insurer for wrongful reduction of disability benefits under a group disability policy. He sought discovery of names, addresses and other data for every person who suffered such reductions under similar policies, including those residing outside California. Defendant objected that, as to nonresidents, the interrogatories were irrelevant because plaintiff could not maintain a national class action. *Held*, the interrogatories (with some modifications to avoid undue expense) were relevant and proper. Plaintiff was entitled to obtain information which would permit amendment of his complaint to cover nonresidents in the class; determination of the validity of such a class action should be made in special pretrial proceedings for certification (see 4 *Cal. Proc.* (4th), *Pleading*, §279), not on the challenge of a discovery order. (80 C.A.3d 11, 12.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### d. To Oppressive or Burdensome Requests.

##### 1. Grounds for Protective Order.

*2 Witkin Cal. Evid. Discovery § 110*

[§ 110] Grounds for Protective Order.

The party on whom interrogatories are served is entitled to protection, when justice requires, from "unwarranted annoyance, embarrassment, or oppression, or undue burden and expense." (*C.C.P. 2030(e)*, *infra*, §114; see *Ryan v. Superior Court* (1960) 186 C.A.2d 813, 817, 9 C.R. 147 [burden and expense]; *Columbia Broadcasting System v. Superior Court* (1968) 263 C.A.2d 12, 19, 69 C.R. 348 [following *Ryan*]; *Pantzas v. Superior Court* (1969) 272 C.A.2d 499, 504, 77 C.R. 354 [not unreasonable burden to require insurer to research whether its agent, the insured's employer, had delivered individual certificate to insured]; cf. *Singer v. Superior Court* (1960) 54 C.2d 318, 327, 5 C.R. 697, 353 P.2d 305, *supra*, §106 [where no oppression, no room for judicial discretion]; C.E.B., 2 Civil Discovery Practice 3d, §7.75 et seq.; 1 Hogan, Cal. Civil Discovery §5.14; on judge's discretion generally, see *supra*, §25.)

Because the remedy of a protective order (*infra*, §114) is ordinarily adequate, the claim of oppression should be raised in the trial court. (See *Durst v. Superior Court* (1963) 218 C.A.2d 460, 467, 32 C.R. 627.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2030(e)*, on protective orders, was repealed and replaced by *C.C.P. 2030.090* in 2004 without substantive change.

See C.E.B., 1 Civil Discovery Practice 4th, §7.122; Hogan, 1 Cal. Civil Discovery 2d, §5.14.





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#### d. To Oppressive or Burdensome Requests.

#### 2. Partial Discovery Where Answers Would Be Burdensome.

#### *2 Witkin Cal. Evid. Discovery § 111*

[§ 111] Partial Discovery Where Answers Would Be Burdensome.

In *Borse v. Superior Court* (1970) 7 C.A.3d 286, 86 C.R. 559, plaintiff sought to prove that his signature on a personal injury release was induced by the false representations of defendant's claims adjuster. He wished to find other claimants who were similarly misled, and submitted extensive interrogatories about the conduct of defendant's personal injury negotiations for a 6-year period. Although the judge held that the information sought was neither privileged nor within the work product, he sustained defendant's objection that the questioning was burdensome and oppressive. *Held*, mandamus issued for partial discovery.

(a) Plaintiff's request was excessive, burdensome and oppressive, but unless he received some such information for a shorter time span he might be deprived of all reasonable opportunity to corroborate his claim. (7 C.A.3d 289.)

(b) Because the information, within reasonable limits, was reasonably calculated to lead to the discovery of admissible evidence, the trial court's complete denial of plaintiff's request failed to comply with California's liberal discovery policies. The principle set forth in *Greyhound Corp. v. Superior Court* (1961) 56 C.2d 355, 15 C.R. 90, 364 P.2d 266 (supra, §25) demands partial limitation on discovery rather than its outright denial, and directs courts to weigh the relative importance of the information against the hardship entailed by its production. (7 C.A.3d 289.)

(c) The reviewing court was too far removed from the matter in question to specify appropriate limits. The trial judge should make that determination in consultation with the attorneys and with the aid of additional factual inquiries if necessary. (7 C.A.3d 289.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### 3. Information Available to Both Parties.

2 *Witkin Cal. Evid. Discovery* § 112

[§ 112] Information Available to Both Parties.

An interrogatory is improper when it seeks information readily available in recorded public documents. (See *Alpine Mut. Water Co. v. Superior Court* (1968) 259 C.A.2d 45, 53, 66 C.R. 250, supra, §108; *Sav-On Drugs v. Superior Court* (1975) 15 C.3d 1, 5, 123 C.R. 283, 538 P.2d 739 [plaintiffs improperly sought by discovery to require that defendants disclose specific statutes and administrative regulations supporting disputed tax deductions: "Both the California Revenue and Taxation Code and the California Administrative Code are as readily available to real party in interest as to petitioner and no purpose of discovery is served by compelling the latter to perform legal research for the former"].)

In *Bunnell v. Superior Court* (1967) 254 C.A.2d 720, 62 C.R. 458, plaintiff sued defendant for defamation. The first trial ended in a verdict for plaintiff, and a new trial was granted; the second ended in a mistrial for failure of the jury to agree on a verdict. Prior to the third trial, defendant submitted interrogatories requesting the names and addresses of all witnesses who had any relevant knowledge of the case, in order to lay a foundation for exclusion of any unspecified witnesses at the trial. Plaintiff's answer was that he knew of no witnesses other than those mentioned in the prior trials and depositions. The trial judge made an order requiring further answer, imposing a sanction of \$ 250 attorneys' fees and the further sanction that, if answers were not filed within 5 days, plaintiff could not present any witnesses at the trial. *Held*, prohibition granted to prevent enforcement of the order. There was nothing to discover; the issue was simply who should have the burden of researching the transcripts for the names of witnesses to lay a foundation for defendant's proceeding to exclude undisclosed persons. And, "[w]hen the material to be 'discovered' consists, as here, solely of information available to both parties, it defeats the purpose of the Discovery Act to compel one party to perform another party's research, whether such be laborious or not." (254 C.A.2d 723.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### 4. Invasion of Constitutional Right.

2 Witkin Cal. Evid. Discovery § 113

[§ 113] Invasion of Constitutional Right.

In *Britt v. Superior Court* (1978) 20 C.3d 844, 143 C.R. 695, 574 P.2d 766, plaintiffs, owners and residents of homes near the San Diego airport, sued the district for damage caused by the operation. Defendant district sought extensive discovery of plaintiffs' local political activities. *Held*, nondisclosure of lawful associational activity is a constitutional right, and defendant failed to meet the burden of demonstrating justification for compelled discovery by showing a sufficient state purpose and a narrowly circumscribed disclosure. (For full discussion of *Britt*, see 7 *Summary* (9th), *Constitutional Law*, §273; 67 *Cal. L. Rev.* 662; 11 *Southwestern U. L. Rev.* 735; see also *Church of Hakeem v. Superior Court* (1980) 110 C.A.3d 384, 389, 168 C.R. 13 [following *Britt*; dissident members of church, seeking list of members for class suit, can reach members in other ways]; *Morales v. Superior Court* (1979) 99 C.A.3d 283, 290, 160 C.R. 194 [compelling interest found in unfairness to defendant if he were denied information leading to potentially admissible evidence]; *Bodenheimer v. Superior Court* (1980) 108 C.A.3d 885, 889, 167 C.R. 26 [*Britt* distinguished; defamation action alleging that petitioner had conspired with other defendants including the association; questions were closely related to issues of suit]; *United Farm Workers v. Superior Court* (1985) 170 C.A.3d 391, 395, 216 C.R. 469 [*Britt* test applied, and mandamus granted to compel protective order to provide for in camera review to determine relevancy of requested union records].)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Cross-Reference:* 7 *Summary* (10th), *Constitutional Law*, §382.



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## CHAPTER X - Discovery

### III. WRITTEN INTERROGATORIES

#### D. Responses.

#### 4. Motion for Protective Order.

2 Witkin Cal. Evid. Discovery § 114

[§ 114] Motion for Protective Order.

(1) *In General.* When interrogatories have been propounded, the responding party, and any other party or affected person or organization, may promptly move for a protective order. On a showing of good cause, the court may make "any order that justice requires" to protect a party, person, or organization from "unwarranted annoyance, embarrassment, or oppression, or undue burden and expense." If the court denies the motion for a protective order in whole or in part, it may order that "the party provide or permit the discovery against which protection was sought on terms and conditions that are just." (*C.C.P. 2030(e)*; see *C.C.P. 2019(b)*, *infra*, §241 [court may restrict frequency or extent of use of discovery methods]; *Southern Pac. Co. v. Oppenheimer* (1960) 54 C.2d 784, 785, 8 C.R. 657, 356 P.2d 441 [numerous interrogatories stricken and attorneys' fee of \$ 100 imposed]; *Day v. Rosenthal* (1985) 170 C.A.3d 1125, 1171, 217 C.R. 89 [voluminous "boiler plate" interrogatories in "11th hour" of lawsuit]; 1 Hogan, Cal. Civil Discovery §5.14; 4 Am.Jur. Trials 1, 81; for forms, see Cal. Civil Practice, 2 Procedure, §13:100 et seq.; on monetary sanctions for unsuccessfully making or opposing motion for protective order, see *infra*, §252.)

(2) *Attempt at Informal Resolution.* The motion for a protective order must be accompanied by a declaration showing a reasonable and good faith attempt at an informal resolution of each issue presented. (*C.C.P. 2030(e)*.) (On monetary sanctions for failure to attempt informal resolution, see *infra*, §252.)

(3) *Permissible Orders.* Under *C.C.P. 2030(e)*, a protective order may include, but is not limited to, one or more of the following directions:

- (a) That particular interrogatories or a set of interrogatories need not be answered.
- (b) That, contrary to the representations made in a declaration submitted under *C.C.P. 2030(c)(3)* (*supra*, §89), the number of specially prepared interrogatories is unwarranted.
- (c) That the time to respond to particular interrogatories or a set of interrogatories be extended.
- (d) That a response be made only upon specified terms and conditions.
- (e) That an oral deposition be used instead of interrogatories.
- (f) That a trade secret or confidential information not be disclosed or be disclosed only in a certain way.
- (g) That some or all of the answers to interrogatories be sealed and opened only by court order.

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General. C.C.P. 2019(b)* (court-imposed restrictions on discovery) was repealed and replaced by *C.C.P. 2019.030* in 2004 without substantive change.

*C.C.P. 2030(e)*, on rulings on motions for protective orders, was repealed and replaced by *C.C.P. 2030.090* in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §5.14.(2) *Attempt at Informal Resolution. C.C.P. 2030(e)*, requiring a meet and confer declaration, was repealed and replaced by *C.C.P. 2030.090(a)* in 2004 without substantive change.

(3) *Permissible Orders. C.C.P. 2030(e)*, setting forth a nonexclusive list of the directions a protective order may include, was repealed and replaced by *C.C.P. 2030.090(b)* in 2004 without substantive change.

*C.C.P. 2030(c)(3)*, on declarations supporting a request for more interrogatories, was repealed and replaced by *C.C.P. 2030.050* in 2004 without substantive change. *West's Key Number Digest*, Pretrial Procedure k.255



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## CHAPTER X - Discovery

## III. WRITTEN INTERROGATORIES

## E. Motion To Compel Response.

## 1. No Response Given.

2 *Witkin Cal. Evid. Discovery* § 115

[§ 115] No Response Given.

If a party who has been served with interrogatories fails to respond at all during the prescribed time limits, the propounding party may move for an order compelling a response. The court must impose a monetary sanction under *C.C.P. 2023* (infra, §252) against a party, person, or attorney who unsuccessfully makes or opposes a motion to compel a response to interrogatories. However, the sanctions may be avoided if the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make imposing the sanction unjust. (*C.C.P. 2030(k)*.)

If the court orders a response to be made, and the responding party fails to obey that order, the court may impose monetary, issue, evidence, or terminating sanctions, or may make other just orders. (*C.C.P. 2030(k)*); see C.E.B., 1 Civil Discovery Practice 3d, §8.91 et seq.; 1 Hogan, Cal. Civil Discovery §5.19; 2 Hogan, Cal. Civil Discovery §15.2; on types of sanctions, see *C.C.P. 2023*, infra, §252 et seq.)

The Reporter's Note to *C.C.P. 2030(k)* states: "[T]he subdivision takes away the existing power of the trial court to impose severe sanctions for a failure to answer interrogatories, if it finds that the failure was a 'wilful' one. The Commission believes that the present approach needlessly creates issues as to what constitutes 'wilfulness,' and that in practice most courts are reluctant to impose such a severe sanction for a mere failure to respond. ... The Commission recommends that only a monetary sanction be available in the first instance for a failure to respond to interrogatories. However, if the court orders that a response be filed, and this order is not complied with, then it becomes more appropriate to deal with disobedience by one of the severe sanctions." (2 Hogan, Cal. Civil Discovery, Appendix C.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2023*, on sanctions for discovery abuses, was repealed and replaced by *C.C.P. 2023.010* et seq. in 2004 without substantive change.

*C.C.P. 2030(k)*, on failure to respond, was repealed and replaced by *C.C.P. 2030.290* in 2004 without substantive change.

See C.E.B., 1 Civil Discovery Practice 4th, §7.107; Hogan, 1 Cal. Civil Discovery 2d, §5.19; Hogan, 2 Cal. Civil Discovery 2d, §15.2; Reporter's Note to *C.C.P. 2030(k)*, in Hogan, 2 Cal. Civil Discovery 2d, Appendix D. *West's Key Number Digest*, Pretrial Procedure k.310



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## CHAPTER X - Discovery

## III. WRITTEN INTERROGATORIES

## E. Motion To Compel Response.

## 2. Inadequate Response Given.

2 *Witkin Cal. Evid. Discovery* § 116

[§ 116] Inadequate Response Given.

(1) *Grounds for Motion.* The asking party may move for an order compelling a further response if (a) an answer is evasive or incomplete, (b) the production of documents under *C.C.P. 2030(f)(2)* (*supra*, §101) is unwarranted or the specification is inadequate, or (c) an objection is without merit or too general. (*C.C.P. 2030(l)*.) (See *C.E.B.*, 2 Civil Discovery Practice 3d, §7.93 et seq.; 1 Hogan, *Cal. Civil Discovery* §5.20; *Cal. Civil Practice*, 2 Procedure, §13:104 et seq. [forms]; on format of motion, see *supra*, §28.)

(2) *Time Limit.* The right to compel a further response is waived unless notice of the motion is given within 45 days of service of the response, or a supplemental response, or on or before a specific later date agreed to by the parties in writing. (*C.C.P. 2030(l)*.)

In *Professional Career Colleges, Magna Institute v. Superior Court* (1989) 207 C.A.3d 490, 255 C.R. 5, plaintiff, a former student dissatisfied with the training and courses provided in defendant college's "private security" program, sued for fraud and breach of contract. Plaintiff's first set of interrogatories included a demand that defendant state the addresses of students enrolled in the program during a specified time period. Defendant objected, and plaintiff made no motion to compel a further response. After expiration of the time for compelling a further response, plaintiff served a second set of interrogatories that included a demand for essentially the same information concerning other students, the only difference being that plaintiff specifically sought the names of the students as well as their addresses. When defendant again objected, plaintiff made a timely motion to compel further answers under *C.C.P. 2030(l)*. *Held*, mandamus issued directing entry of an order denying plaintiff's motion. The 1986 Civil Discovery Act "clearly evinces the legislative intent that discovery proceed not only smoothly, but swiftly as well. ... In the context of this case it would be an absurdity to say that a party who fails to meet the time limits of section 2030 may avoid the consequences of his delay and lack of diligence by propounding the same question again. Such a construction of the statute would obviously encourage delay and provide no incentive to attempt to resolve any dispute with the opposing party. The Legislature has explicitly stated that unless a party moves to compel further response within 45 days of the unsatisfactory response, he waives *any* right to compel a further response. We hold that this means what it says; plaintiff's motion was therefore untimely." (207 C.A.3d 493, 494.)

(3) *Informal Resolution.* The motion to compel a further response must be accompanied by a declaration showing a reasonable and good faith attempt at resolution of each issue presented. (*C.C.P. 2030(l)*); see *Obregon v. Superior Court* (1998) 67 C.A.4th 424, 428, 432, 79 C.R.2d 62 [plaintiff's attempts at informal resolution were inadequate, where plaintiff propounded "grossly overbroad" interrogatories, and then, after receiving expectable objections, simply sent single brief letter, late in relevant time period]; on monetary sanctions for failure to attempt informal resolution, see

infra, §252.)

After finding that a party has failed to attempt an informal resolution, the trial court must consider the appropriate remedy, which may be a complete denial of the requested discovery, or some lesser sanction, such as specifying additional efforts that must be made before the court will turn to the merits of the discovery dispute. (*Obregon v. Superior Court*, *supra*, 67 C.A.4th 434, 435 [listing factors that trial court should consider on remand].)

(4) *Monetary Sanctions*. The court must impose a monetary sanction under C.C.P. 2023, *infra*, §252, against a party, person, or attorney who unsuccessfully makes or opposes a motion to compel a further response to interrogatories. However, the sanctions may be avoided if the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make imposing the sanction unjust. (C.C.P. 2030(l).)

(5) *Failure To Obey Order*. If a party fails to obey an order compelling further responses, the court may make "those orders that are just," and may impose the monetary and more severe sanctions authorized by C.C.P. 2023 (*infra*, §255 et seq.). (C.C.P. 2030(l).)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Grounds for Motion*. C.C.P. 2030(f)(2), on the production of documents, was repealed and replaced by C.C.P. 2030.230 in 2004 without substantive change.

C.C.P. 2030(l), on the grounds for a motion to compel further response, was repealed and replaced by C.C.P. 2030.300 in 2004 without substantive change.

See C.E.B., 1 Civil Discovery Practice 4th, §7.110; Hogan, 1 Cal. Civil Discovery 2d, §5.20.

(2) *Time Limit*. C.C.P. 2030(l), on the time for serving notice of a motion to compel further response, was repealed and replaced by C.C.P. 2030.300(c) in 2004 without substantive change. (3) *Informal Resolution*. C.C.P. 2030(l), on the requirement of a meet and confer declaration, was repealed and replaced by C.C.P. 2030.300(b) in 2004 without substantive change.

(4) *Monetary Sanctions*. C.C.P. 2023, on monetary sanctions generally, was repealed and replaced by C.C.P. 2023.010 et seq. in 2004 without substantive change.

C.C.P. 2030(l), on monetary sanctions in connection with a motion to compel further response, was repealed and replaced by C.C.P. 2030.300(d) in 2004 without substantive change.

See *Parker v. Wolters Kluwer United States* (2007) 149 C.A.4th 285, 294, 57 C.R.3d 18 [in action by employee against employer, trial judge did not err in imposing monetary sanctions against employee under C.C.P. 2030.300(d) based on employee's unsuccessful opposition to motion to compel further responses to interrogatories, even though he had not refused to obey any previous order, and judge was not required to make explicit finding that employee's failure to respond was without substantial justification].

(5) *Failure To Obey Order*. C.C.P. 2023, on sanctions authorized for discovery abuses, was repealed and replaced by C.C.P. 2023.010 et seq. in 2004 without substantive change.

C.C.P. 2030(l), on failure to obey an order compelling further response, was repealed and replaced by C.C.P. 2030.300(e) in 2004 without substantive change.





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#### E. Motion To Compel Response.

#### 3. Review Following Motion To Compel.

*2 Witkin Cal. Evid. Discovery § 117*

[§ 117] Review Following Motion To Compel.

As with depositions (*supra*, §71), the appellate remedy is usually deemed inadequate, and mandamus is regularly invoked by the party seeking to compel answers to interrogatories. (See *Pettie v. Superior Court* (1960) 178 C.A.2d 680, 683, 3 C.R. 267 [trial judge compelled to set aside order sustaining objections to interrogatories and to make order overruling them]; *Singer v. Superior Court* (1960) 54 C.2d 318, 5 C.R. 697, 353 P.2d 305, *supra*, §106 [trial judge compelled to set aside order sustaining refusal to answer and to enter order requiring answer]; *Chapin v. Superior Court* (1966) 239 C.A.2d 851, 854, 49 C.R. 199; *People v. Superior Court (Witzerman)* (1967) 248 C.A.2d 276, 279, 56 C.R. 393; *Burke v. Superior Court* (1969) 71 C.2d 276, 277, footnote 1, 78 C.R. 481, 455 P.2d 409.)

The rule announced in *Oceanside Union School Dist. v. Superior Court* (1962) 58 C.2d 180, 185, footnote 4, 23 C.R. 375, 373 P.2d 439, *infra*, §247, that writs will be granted only where necessary to lay down guidelines for future cases, applies generally to review of orders in discovery proceedings; i.e., the test must be met not only for writs to prevent improper orders, but also for writs seeking to enforce proper orders. (*Burke v. Superior Court*, *supra*, 71 C.2d 278, footnote 2 [test met, and mandamus granted].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER X - Discovery

### IV. INSPECTION OF DOCUMENTS, TANGIBLE THINGS, AND PLACES

#### A. Statutory Authorization.

2 *Witkin Cal. Evid. Discovery* § 118

[§ 118] Statutory Authorization.

(1) *Former Law.* The right of a party on motion and court order to inspect the adverse party's papers was recognized by California's former statutes, but it was defective in two main respects: (a) the test was of admissibility of the papers in evidence, which limited the use of the inspection right for discovery; (b) the inspection was limited to papers, while modern discovery practice allows inspection of other things. (See, on former law, *Union Trust Co. of San Diego v. Superior Court* (1938) 11 C.2d 449, 462, 81 P.2d 150; *Milton Kauffman v. Superior Court* (1949) 94 C.A.2d 8, 15, 210 P.2d 88; *Holm v. Superior Court* (1954) 42 C.2d 500, 505, 267 P.2d 1025; *American Federation of Musicians v. Superior Court* (1957) 150 C.A.2d 165, 170, 309 P.2d 874.)

(2) *Present Law.* C.C.P. 2031, based on F.R. Civ. P., Rule 34, cures both defects of the former law. It allows discovery through the inspection of documents, tangible things, and land or other property that are in the possession, custody, or control of another party to the action. (C.C.P. 2031(a); see generally C.E.B., 2 Civil Lit. Forms, §28.1 et seq.; C.E.B., 2 Civil Discovery Practice 3d, Chap. 8; C.J.E.R., Judges Benchbook, Civil Proceedings: Discovery, Chap. 15.1; 1 Hogan, Cal. Civil Discovery, Chap. 6; Overly on Electronic Evidence in California §3:04 et seq.; Cal. Civil Practice, 2 Procedure, §13:143 et seq.; 23 Am.Jur.2d (1983 ed.), *Depositions and Discovery* §244 et seq.; 4 Am.Jur. Trials 223; 8A Am.Jur. P.P. Forms (1996 ed.), *Depositions and Discovery* §581 et seq.; 73 A.L.R.2d 12 [pretrial inspection of statements of parties or witnesses].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Present Law.* C.C.P. 2031, on inspection of documents, things, and places, was repealed and replaced by C.C.P. 2031.010 et seq. in 2004 without substantive change. C.C.P. 2031(a), authorizing inspections of this type, became C.C.P. 2031.010.

See C.E.B., 1 Civil Discovery Practice 4th, Chap. 8; Hogan, 1 Cal. Civil Discovery 2d, Chap. 6; 8A Am.Jur. P.P. Forms (2004 ed.), *Depositions and Discovery*, Form 437 et seq. *West's Key Number Digest*, Pretrial Procedure k.331 et seq.



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## CHAPTER X - Discovery

### IV. INSPECTION OF DOCUMENTS, TANGIBLE THINGS, AND PLACES

#### B. Distinctions.

#### 1. Patient's Discovery of Medical Records.

##### a. Pending Action.

2 Witkin Cal. Evid. Discovery § 119

[§ 119] Pending Action.

(1) *Procedure for Exercising Rights.* *Ev.C. 1158* establishes early discovery rights to a patient's own medical records. Either before an action is filed or before a defendant makes an appearance, an attorney at law, or the attorney's representative, may exercise the patient's rights through the following procedure:

(a) The attorney or the representative presents a written authorization (or a copy), signed by an adult patient, by the guardian or conservator of a patient's person or estate, or by the personal representative or heir of a deceased patient. If the patient is a minor, the authorization is signed by the patient's parent or guardian.

(b) The authorization may be presented to a licensed hospital or pharmacy, or to the following licensed persons: physician, surgeon, dentist, registered nurse, dispensing optician, registered physical therapist, podiatrist, psychologist, osteopath, chiropractor, clinical laboratory bioanalyst, clinical laboratory technologist, and pharmacist. All the patient's records in the custodian's control may be obtained.

(c) "Promptly" on the presentation of the written authorization, the records must be made available for the attorney or the representative to inspect and copy. No copying may be performed by any of the enumerated medical providers or employers, or their agents, if the attorney has employed a photocopier as his or her representative to obtain or review the records.

(d) A failure to make the records available during business hours within 5 days after the presentation of the written authorization may subject the custodian to liability for all reasonable expenses, including attorneys' fees, incurred in a proceeding to enforce *Ev.C. 1158*.

(e) All "reasonable costs" incurred by the enumerated licensed persons or entities may be charged against the person whose written authorization required the availability of the records. Reasonable costs include (1) 10 cents per page for standard reproduction of documents 8 1/2 by 14 inches or less; (2) 20 cents per page for copying documents from microfilm; (3) the actual cost of reproducing oversize documents or documents requiring special processing; (4) "reasonable clerical costs" incurred in locating and making records available, to be billed at a maximum rate of \$ 16 per hour per person, computed on the basis of \$ 4 per quarter hour or fraction thereof; (5) actual postage charges; and (6) actual costs, if any, charged by a third person for retrieval and return of records.

(f) Where the records are delivered to the attorney or the attorney's representative for inspection or photocopying at

the custodian's place of business, the fee for complying with the authorization must not exceed \$ 15, plus actual costs charged to the custodian by a third person for retrieval and return of records held offsite by the third person. (See 12 A.L.R.5th 577 [pre-action production or inspection of documents, persons, or other evidence, including medical records].)

(2) *Broad Applicability.* *Ev.C. 1158* applies in a labor controversy despite the existence of a collective bargaining agreement that does not specifically authorize discovery; i.e., the California policy supporting a patient's right to inspect his or her medical records outweighs the burdens on administration of federal labor law. (*National Football League Management Council v. Superior Court* (1983) 138 C.A.3d 895, 899, 903, 188 C.R. 337.)

(3) *Order To Show Cause.* When a medical provider fails to comply with *Ev.C. 1158*, the demanding party, in addition to any other available remedy, may apply to the court for an order to show cause. If the court issues an order to show cause, it must be served on the respondent in the same manner as a summons and is returnable no sooner than 20 days after issuance "unless ordered otherwise upon a showing of substantial hardship." The court must impose monetary sanctions under *Ev.C. 1158* unless it finds that the person to be sanctioned acted with substantial justification or that other circumstances make imposition of sanctions unjust. (*C.C.P. 1985.7*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Procedure for Exercising Rights.* See *Thornburg v. Superior Court* (2006) 138 C.A.4th 43, 53, 41 C.R.3d 156 [in action by patient against hospital's agent for overcharges for copying costs in violation of *Ev.C. 1158*, trial judge erred in sustaining agent's demurrer; because, under terms of agreement between hospital and agent, agent assumed hospital's obligation of responding to requests under *Ev.C. 1158* and, in doing so, was pursuing its own financial interests, it was subject to statute's limitations]; *Thornburg v. El Centro Regional Med. Center* (2006) 143 C.A.4th 198, 204, 48 C.R.3d 840 [cost limitation provisions of *Ev.C. 1158* may be enforced directly by patients]; 78 Am.Jur. Trials 559 [obtaining and evaluating medical records].



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### IV. INSPECTION OF DOCUMENTS, TANGIBLE THINGS, AND PLACES

#### B. Distinctions.

1. Patient's Discovery of Medical Records.
  - b. Action Not Pending.

2 Witkin Cal. Evid. Discovery § 120

[§ 120] Action Not Pending.

(1) *Right to Records.* An adult patient, a minor patient legally authorized to consent to medical treatment, and any patient representative may gain direct access to patient records from a health care provider, even where there is no pending litigation or court action. (*Health & Saf.C. 123110(a)*; on definition of patient records, see *Health & Saf.C. 123105(d)*; on definition of health care provider, see *Health & Saf.C. 123105(a)*; see also 14 *Pacific L. J.* 521; 30 *U.C.L.A. L. Rev.* 1349, 1368 [proposal for model patient access and information practices statute]; cf. 26 A.L.R.4th 701 [patient's right to disclosure of medical records under state freedom of information act].)

(2) *Procedures.* Specific procedures govern a patient's inspection of his or her records (see *Health & Saf.C. 123110(a)*), or the health care provider's furnishing of copies of the records to the patient on request and payment of costs (see *Health & Saf.C. 123110(b)*). The health care provider is exempt from liability for any consequences resulting from disclosure of the patient's records in accordance with *Health & Saf.C. 123100* et seq. (*Health & Saf.C. 123110(e)*.) In furnishing patient records to other providers, a provider may not discriminate against classes of providers. (*Health & Saf.C. 123110(e)*.)

(3) *Reasons for Denial of Access Rights.* Direct access to the records may be denied to a minor patient's parent or guardian if (a) the minor is legally authorized to consent to the treatment described in the records, or (b) it is determined in good faith that the granting of access would have an adverse effect on the provider's professional relationship with the minor or the minor's physical safety or psychological well-being. (*Health & Saf.C. 123115(a)*.) The provider may also refuse a patient access to mental health records when it determines that there is a substantial risk that disclosure would result in detrimental consequences to the patient. (*Health & Saf.C. 123115(b)*.)

A provider cannot withhold patient records because of an unpaid bill for health care services. (*Health & Saf.C. 123110(g)*; see *Person v. Farmers Ins. Group of Cos.* (1997) 52 C.A.4th 813, 816, 61 C.R.2d 30 [where patient entered into arbitration with insurer over reimbursement for chiropractic expenses, chiropractor had no right to condition his providing patient with medical records and billing statements on patient's signing lien for chiropractic fees].)

(4) *Remedies for Violation of Access Rights.* A patient or representative is permitted to pursue any remedy available for violation of the access provisions and to bring an action against the health care provider for enforcement of the provisions. The prevailing party may recover costs and attorneys' fees. (*Health & Saf.C. 123120*.) A wilful violation is punishable by a fine of not more than \$ 100, and may result in disciplinary action by an appropriate licensing authority. (*Health & Saf.C. 123110(f)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Right to Records*. In addition to the right to inspect his or her records, an adult patient has the right to provide an addendum to the records regarding anything the patient believes is incomplete or incorrect. The health care provider must attach the addendum to the records and include the addendum whenever it discloses that portion of the patient's records to which the addendum pertains. (*Health & Saf.C. 123111*, added in 2000.)

*Health & Saf.C. 123111(d)*, (e), and (f) were added in 2001 to require a health care provider, within 30 days of receiving a written request from a patient or former patient, to provide a copy of the relevant portion of the patient's records to support an appeal regarding eligibility for a public benefit program. The requirement does not apply where the patient is represented by a private attorney who is paying the patient's appeal costs pending the outcome of the appeal.



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### IV. INSPECTION OF DOCUMENTS, TANGIBLE THINGS, AND PLACES

#### B. Distinctions.

#### 2. Other Procedures.

2 Witkin Cal. Evid. Discovery § 121

[§ 121] Other Procedures.

(1) *Party, Not Witness*. Unlike a deposition, the inspection procedure of *C.C.P. 2031* is not available against a nonparty witness. Like interrogatories (*supra*, §87) and requests for admissions (*infra*, §157), it is available only to inspect things "that are in the possession, custody, or control" of another party. (*C.C.P. 2031(a)*; see 19 A.L.R.3d 1134 [inspection of matter held by nonparty affiliated or subsidiary corporation as dependent on "control" by party].) Documents or things in the possession of a nonparty witness must therefore be sought by subpoena duces tecum or deposition subpoena. (See *infra*, §218 and *supra*, §42 et seq.)

(2) *Inspection, Not Production in Court*. *C.C.P. 2031* contemplates inspection, copying, photographing, testing, sampling, measuring, and surveying, to gain information; i.e., it is a discovery proceeding. If the party wishes to introduce documents or other things in evidence, the party must obtain them by the ordinary procedures of subpoena duces tecum and deposition subpoena. (See *infra*, §218 and *supra*, §42 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Party, Not Witness*. *C.C.P. 2031(a)*, limiting the inspection right to items in possession of a party, was repealed and replaced by *C.C.P. 2031.010* in 2004 without substantive change.

(2) *Inspection, Not Production in Court*. *C.C.P. 2031*, authorizing inspections, was repealed and replaced by *C.C.P. 2031.010* et seq. in 2004 without substantive change.



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IV. INSPECTION OF DOCUMENTS, TANGIBLE THINGS, AND PLACES

C. Scope of Inspection.

1. In General.

2 *Witkin Cal. Evid. Discovery* § 122

[§ 122] In General.

Inspection is subject to the same scope and restrictions generally applicable to discovery. (*C.C.P. 2031(a)*; on scope of discovery, see *C.C.P. 2017*, *supra*, §9; 1 Hogan, Cal. Civil Discovery §11.1 et seq.; on restrictions, see *C.C.P. 2019*, *infra*, §241; see generally C.E.B., 2 Civil Discovery Practice 3d, §8.12 et seq.; 23 *Am.Jur.2d* (1983 ed.), *Depositions and Discovery* §253 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2017*, on the scope of discovery, was repealed and replaced by *C.C.P. 2017.010* in 2004 without substantive change.

*C.C.P. 2019*, on restrictions on discovery, was repealed and replaced by *C.C.P. 2019.030* in 2004 without substantive change.

*C.C.P. 2031(a)*, setting forth the scope of, and restrictions applicable to, inspections, was repealed and replaced by *C.C.P. 2031.010* in 2004 without substantive change.

See C.E.B., 1 Civil Discovery Practice 4th, §8.7 et seq.; Hogan, 2 Cal. Civil Discovery 2d, §11.1 et seq. *West's Key Number Digest*, Pretrial Procedure k.351 et seq.





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## CHAPTER X - Discovery

## IV. INSPECTION OF DOCUMENTS, TANGIBLE THINGS, AND PLACES

## C. Scope of Inspection.

## 2. Documents.

## a. Production Required.

2 Witkin Cal. Evid. Discovery § 123

[§ 123] Production Required.

(1) *Documents in General*. One party may demand that another party produce a document that is in the party's possession, custody, or control. The demanding party, or someone acting on its behalf, may then inspect and copy the document. (*C.C.P. 2031(a)(1)*; 1 Hogan, Cal. Civil Discovery §6.7; 74 A.L.R.2d 876 [discovery of private records regarding previous accidents or incidents involving same place or premises]; 97 A.L.R.2d 770 [engineering reports]; 23 *Am.Jur.2d* (1983 ed.), *Depositions and Discovery* §260 et seq.)

(2) *Boundary Disputes Involving Patented Land*. In an action involving a dispute over the boundary of land patented or granted by the state, or over the validity of a state patent or grant dated before 1950, all parties have a duty to disclose all nonprivileged relevant written evidence, including evidence against interest. Evidence meeting this description must be disclosed within 120 days after proof of service on all named defendants has been filed, and the parties have a continuing duty to disclose any evidence of this type that comes to light after that date. (*C.C.P. 2031.5*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Documents in General*. *C.C.P. 2031(a)(1)*, on the demand for inspection of documents, was repealed and replaced by *C.C.P. 2031.010(b)* in 2004 without substantive change.

See *People v. Superior Court (Cole Nat. Corp.)* (2004) 122 C.A.4th 1060, 1076, 1079, 19 C.R.3d 324 [in civil action by state of California against optical retailer and related entities, defendants could not obtain documents in possession of nonparty state agencies by means of request for documents served on plaintiff; because of their separate organization, duties, and powers, *C.C.P. 2031* does not envision nonparty state agencies' documents as being in possession of plaintiff]; Hogan, 1 Cal. Civil Discovery 2d, §6.7.

(2) *Boundary Disputes Involving Patented Land*. *C.C.P. 2031.5*, on the disclosure of evidence in actions involving a dispute over the boundary of patented land, was repealed and replaced by *C.C.P. 2031.510* in 2004 without substantive change. *West's Key Number Digest*, Pretrial Procedure k.371



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#### C. Scope of Inspection.

##### 2. Documents.

##### b. Illustrations of Discoverable Documents.

2 Witkin Cal. Evid. Discovery § 124

[§ 124] Illustrations of Discoverable Documents.

In *Greyhound Corp. v. Superior Court* (1961) 56 C.2d 355, 15 C.R. 90, 364 P.2d 266, plaintiffs were injured in a collision with defendant's bus carrying some interstate passengers. While plaintiffs were awaiting removal to a hospital, an unidentified witness gave them information indicating defendant's liability, and defendant's investigators took written statements of various witnesses. Plaintiffs' attorney was unsuccessful in locating the witnesses, and moved for an order of inspection of all of their written statements. Defendant furnished their names and addresses (many were nonresidents located far away) but refused to supply the statements. The trial judge ordered inspection and defendant sought prohibition. *Held*, writ denied:

(a) It is unnecessary to show relevancy to the issues; it is enough that the matter sought be relevant to the subject matter, and the statements of eyewitnesses meet the test. (56 C.2d 390.)

(b) The matter sought need not be admissible evidence. Assuming that some of it was not admissible, such cases as *Twin Lock v. Superior Court* (1959) 171 C.A.2d 236, 340 P.2d 748, "are wrong and should be disapproved insofar as they hold that the material sought (be it by deposition, interrogatory, demand for admission or examination) is not subject to the discovery statutes because the same material would be inadmissible at the trial of the action." (56 C.2d 391.)

(c) Inadmissibility is, however, a factor to be considered by the trial judge in exercising his discretion in ruling on an objection of undue burden. (56 C.2d 392.)

In *Steele v. Superior Court* (1961) 56 C.2d 402, 15 C.R. 116, 364 P.2d 292, J sued T and A for dissolution of partnership and other relief, and Steele sued the three partners for fraud and breach of contract in the original transaction of formation of the partnership. In J's action, depositions were taken of the three partners, and they were transcribed but never corrected or signed. The attorneys took possession of both the transcriptions and the reporters' shorthand notes, and J dismissed his action. Thereafter, Steele sought inspection of the depositions, but the trial judge denied his motion on the ground that the unsigned writings were not depositions and hence not admissible in evidence. *Held*, under the *Greyhound* rule, *supra*, the objection was untenable. Mandamus was accordingly granted to compel reconsideration of the motion. (56 C.2d 406.) (See also *Colonial Life & Acc. Ins. Co. v. Superior Court* (1982) 31 C.3d 785, 790, 183 C.R. 810, 647 P.2d 86 [plaintiff who alleged unfair claim settlement practices by insured was entitled to discover names, addresses, and records of other insureds whose claims were negotiated by same claims adjuster]; *Irvington-Moore v. Superior Court* (1993) 14 C.A.4th 733, 739, 18 C.R.2d 49 [defendant in personal injury action was required to produce

all insurance policies that it had identified in responses to interrogatories; *C.C.P. 2017(b)* expressly provides for discovery of insurance information (see *supra*, §11) and choice of method of discovery is left to party seeking discovery]; *Norton v. Superior Court* (1994) 24 *C.A.4th* 1750, 1761, 1762, 30 *C.R.2d* 217 [in legal malpractice action, defendant was not precluded from discovering terms and conditions of plaintiffs' settlement agreement with insurer, despite collateral source rule (see 6 *Summary* (9th), *Torts*, §1388), because information could be or lead to admissible evidence].)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2017(b)*, on the discovery of insurance information, was repealed and replaced by *C.C.P. 2017.210* in 2004 without substantive change. *Collateral source rule*:

*Cross-Reference:* 6 *Summary* (10th), *Torts*, §1631.



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#### C. Scope of Inspection.

##### 2. Documents.

##### c. Illustrations of Nondiscoverable Documents.

2 Witkin Cal. Evid. Discovery § 125

[§ 125] Illustrations of Nondiscoverable Documents.

In *Hoffman Corp. v. Superior Court* (1985) 172 C.A.3d 357, 218 C.R. 355, a products liability action, plaintiff sought production of defendant's customer list so that plaintiff could send each customer a letter, asking whether the customer knew of any accidents involving the product. Plaintiff contended that the information sought was needed to show that a defect caused plaintiff's accident and to establish a basis for punitive damages. Defendant, which had provided information about other accidents, litigation, and complaints, objected. On plaintiff's motion to compel production, the trial court ordered production of the list, and subsequently approved a letter to be sent to the customers. *Held*, this was an abuse of discretion.

(a) Where the disclosure sought is of "sensitive information which people may wish to keep confidential," the court must weigh and balance the competing factors. (172 C.A.3d 362.) The customer list "is clearly information falling within this sensitive category as evidenced by the fact that a confidential customer list is protected by the courts in the context of a trade secret." (172 C.A.3d 363.)

(b) Plaintiff's showing of need for the list was inadequate. Only accidents known to defendant would be relevant to the issue of punitive damages, and that information has already been provided. While the list was concededly relevant as providing information as to similar accidents, plaintiff had other means of obtaining that material. (172 C.A.3d 363.)

(c) Balanced against plaintiff's showing is the damage to defendant and the overbreadth of the discovery ordered. Plaintiff's letter apparently was to go not only to customers who purchased the product similar to that at issue, but also to customers who purchased a later model not containing the alleged defect. The extent of damage to defendant from having all of its customers informed that the safety of its product has been questioned "is necessarily speculative but the potential for grave damage is abundantly clear." (172 C.A.3d 364, 365.)

In *Mead Reinsurance Co. v. Superior Court* (1986) 188 C.A.3d 313, 232 C.R. 752, a "bad-faith" action by a city against an insurer and the insurer's corporate claims adjuster, the trial court granted the city's motion to compel the insurer to produce claim files relating to every similar claim for a period of 61/2 years, involving the manual evaluation of over 13,000 claim files currently open and an undetermined number in existence since the initial date of the discovery period, at an expense of over 1,000 personnel-hours and thousands of dollars to the claims adjuster. *Held*, writ issued; the order was oppressive, in view of the massive extent of the burden that the request entailed and the absence of any provision in the order to mitigate that burden. (188 C.A.3d 321.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## IV. INSPECTION OF DOCUMENTS, TANGIBLE THINGS, AND PLACES

## C. Scope of Inspection.

## 3. Tangible Things.

2 Witkin Cal. Evid. Discovery § 126

[§ 126] Tangible Things.

(1) *General Rule*. One party may demand that another party produce any tangible things that are in the party's possession, custody, or control. The demanding party, or someone acting on its behalf, may then inspect and photograph, test, or sample the things. (*C.C.P. 2031(a)(2)*; see 1 Hogan, Cal. Civil Discovery §6.8; 13 A.L.R.2d 657 [inspection of article alleged to have caused personal injury or death]; 95 A.L.R.2d 1061 [photographs]; 4 A.L.R.3d 762 [inspection of article alleged to have caused injury other than personal injury or death]; 11 A.L.R.4th 1245 [permissibility of "destructive testing" of chattel in civil case]; 4 Am.Jur. Trials 223, 238.)

(2) *No Photographic Reenactments*. "Tangible things" include the photographing of a person's face and body to facilitate identification. (*Shepherd v. Superior Court* (1976) 17 C.3d 107, 118, 130 C.R. 257, 550 P.2d 161; see 19 A.L.R.4th 1236 [pictures of litigant].)

However, in *Bailey v. Superior Court* (1977) 19 C.3d 970, 140 C.R. 669, 568 P.2d 394, the Supreme Court held that, in the absence of a stipulation, the use of a videotape to reenact the circumstances of an accident in proceedings on deposition was unauthorized. (See *supra*, §67.) In *Bailey v. Superior Court* (1978) 79 C.A.3d 444, 144 C.R. 875, defendant attempted to gain the same objective by invoking the inspection statute (former C.C.P. 2031): Its motion sought an order requiring plaintiff to appear and reenact the accident for movie cameras. *Held*, the order was improperly granted. While it purported to be based on the court's authority to photograph objects or things, in fact it required a nonverbal statement, visually recorded. In *Shepherd v. Superior Court*, *supra*, the order called for nontestimonial evidence; here, it required testimonial compliance. "[S]ection 2031 does not authorize the compelled reenactment of an event whatever the proposed means of visual recordation--motion pictures, still photographs, drawings, videotape, or other. It is the testimonial nature of the proposed discovery, not the means of recordation, which causes the instant case to fall outside the scope of section 2031." (79 C.A.3d 447.) (See 1 Hogan, Cal. Civil Discovery §6.8; for subsequent statutory authorization of deposition by videotape, see *supra*, §67.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *General Rule*. *C.C.P. 2031(a)(2)*, on the demand for inspection of tangible things, was repealed and replaced by *C.C.P. 2031.010(c)* in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §6.8.

(2) *No Photographic Reenactments*. *C.C.P. 2031*, authorizing inspection demands, was repealed and replaced by *C.C.P. 2031.010* et seq. in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §6.8. *West's Key Number Digest*, Pretrial Procedure k.390



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#### C. Scope of Inspection.

#### 4. Land or Other Property.

2 Witkin Cal. Evid. Discovery § 127

[§ 127] Land or Other Property.

A party may demand entry onto land or other property that is in the possession, custody, or control of another party. The party making the demand may then inspect, measure, survey, photograph, test, or sample the land or other property, or any designated object or operation on it. (*C.C.P. 2031(a)(3)*; see 1 Hogan, Cal. Civil Discovery §6.9; 13 A.L.R.2d 657 [inspection of premises alleged to have caused personal injury or death]; 4 A.L.R.3d 762 [inspection of premises alleged to have caused injury other than personal injury or death].)

A condemnor may enter on land to obtain information reasonably related to acquisition of the property. (See *C.C.P. 1245.010* et seq.; 8 Summary (9th), *Constitutional Law*, §982.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*C.C.P. 2031(a)(3)*, on the demand for inspection of land or other property, was repealed and replaced by *C.C.P. 2031.010(d)* in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §6.9.

*Cross-Reference:* 8 Summary (10th), *Constitutional Law*, §1196.

(*New*) *Distinction: Statutory procedure not exclusive:* Property that is open to the public can be examined without recourse to the inspection provisions of *C.C.P. 2031(a)(3)* (now *C.C.P. 2031.010(d)*), provided that the examination can be conducted in a lawful fashion. "[E]vidence is not made inadmissible by the simple fact that it is obtained by investigation rather than by way of formal discovery." (*Pullin v. Superior Court* (2000) 81 C.A.4th 1161, 1165, 97 C.R.2d 447 [in personal injury action arising from slip and fall in supermarket, trial judge erred in excluding evidence of test performed by forensic safety engineer on plaintiff's behalf without resort to any statutory discovery device].) *West's Key Number Digest*, Pretrial Procedure k.390





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#### D. Procedure for Demanding Inspection.

##### 1. Form of Demand.

2 Witkin Cal. Evid. Discovery § 128

[§ 128] Form of Demand.

(1) *Numbering and Identification.* A party demanding an inspection must number each set of demands consecutively. The identity of the demanding and responding parties and the set number must appear in the first paragraph immediately below the title of the case. Each demand in a set must be separately set forth and identified by number or letter. (*C.C.P. 2031(c)*, based on *F.R. Civ. P.*, *Rule 34(b)*.)

(2) *Contents.* The inspection demand must designate the documents, tangible things, or land or other property to be inspected either by specifically describing each individual item or by "reasonably particularizing" each category of items. (*C.C.P. 2031(c)(1)*.) It must specify a reasonable time and place for inspection. (*C.C.P. 2031(c)(2)*, (c)(3); on timing of inspection, see *infra*, §129.) The demand must specify any related activity demanded in addition to inspection and copying, the manner in which the activity will be performed, and whether the activity will permanently alter or destroy the item involved. (*C.C.P. 2031(c)(4)*.) (See *C.E.B.*, 2 *Civil Discovery Practice* 3d, §§8.36, 8.37; 1 *Hogan, Cal. Civil Discovery* §§6.3, 6.4; 23 *Am.Jur.2d* (1983 ed.), *Depositions and Discovery* §§273, 274; for forms, see *Cal. Civil Practice*, 2 *Procedure*, §13:157 et seq. [documents or tangible things]; 8A *Am.Jur. P.P. Forms* (1996 ed.), *Depositions and Discovery* §584 et seq. [documents], §641 et seq. [premises]; *Cal. Civil Practice*, 1 *Torts*, §16:47 [premises].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Numbering and Identification.* *C.C.P. 2031(c)*, on the numbering and identification of inspection demands, was repealed and replaced by *C.C.P. 2031.030* in 2004 without substantive change. (2) *Contents.* *C.C.P. 2031(c)(1)*, requiring the specific description of each item or reasonable particularization of each category of item, was repealed and replaced by *C.C.P. 2031.030(c)(1)* in 2004 without substantive change.

*C.C.P. 2031(c)(2)*, on setting the time for the inspection, was repealed and replaced by *C.C.P. 2031.030(c)(2)* in 2004 without substantive change.

*C.C.P. 2031(c)(3)*, on specification of the place for the inspection, was repealed and replaced by *C.C.P. 2031.030(c)(3)* in 2004 without substantive change.

*C.C.P. 2031(c)(4)*, on specification of any related activities that are being demanded, was repealed and replaced by *C.C.P. 2031.030(c)(4)* in 2004 without substantive change.

See *C.E.B.*, 1 *Civil Discovery Practice* 4th, §8.47 et seq.; *Hogan*, 1 *Cal. Civil Discovery* 2d, §§6.3, 6.4; 8A *Am.Jur. P.P. Forms* (2004 ed.), *Depositions and Discovery*, Form 437 et seq.



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#### D. Procedure for Demanding Inspection.

##### 2. Timing.

2 Witkin Cal. Evid. Discovery § 129

[§ 129] Timing.

(1) *Timing of Demand.* The defendant may demand inspection without leave of court at any time. Before demanding inspection without leave of court, the plaintiff must wait 10 days after service of the summons on, or appearance by, the responding party, whichever is earlier. In unlawful detainer actions, the plaintiff must wait 5 days. On motion with or without notice, the court, for good cause shown, may allow a plaintiff to make an inspection demand at an earlier time. (*C.C.P. 2031(b)*.)

(2) *Timing of Inspection.* Unless the court has granted leave to specify an earlier date, the time for inspection must be at least 30 days, or 5 days in unlawful detainer actions, after service of the demand. (*C.C.P. 2031(c)(2)*.) Thus, because discovery must be completed at least 30 days before the initial trial date (see *C.C.P. 2024(a)*, supra, §23), the inspection demand should be served at least 60 days before the initial trial date, earlier if served by mail, and even earlier to allow time for a subsequent motion to compel (see *infra*, §137 et seq.), if necessary. (See *C.E.B.*, Civil Discovery Practice 3d, §8.38.)

(3) *Supplemental Demand.* In addition to the inspection demands permitted by *C.C.P. 2031*, a party may propound a supplemental demand to inspect later acquired or discovered documents, tangible things or land or other property that are in the possession, custody, or control of the party on whom the demand is made. The demanding party must have previously served a demand for inspection (a) twice before the initial setting of a trial date, and (b) subject to the time limits in *C.C.P. 2024*, supra, §23, once after the initial setting of a trial date. However, on motion, for good cause shown, the court may allow a party to propound an additional number of supplemental demands for inspection. (*C.C.P. 2031(e)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Timing of Demand.* *C.C.P. 2031(b)*, on the timing of the demand for inspection, was repealed and replaced by *C.C.P. 2031.020* in 2004 without substantive change.

Under *C.C.P. 2031.020(c)*, added in 2007, in an unlawful detainer action or other proceeding under *C.C.P. 1159* et seq. (see 12 *Summary* (10th), *Real Property*, §757), a plaintiff may make a demand for inspection without leave of court "at any time that is five days after service of the summons on, or appearance by, the party to whom the demand is directed, whichever occurs first."

(2) *Timing of Inspection.* *C.C.P. 2024(a)*, on the time for completion of discovery, was repealed and replaced by *C.C.P. 2024.020* in 2004 without substantive change.

*C.C.P. 2031(c)(2)*, on the timing of the inspection, was repealed and replaced by *C.C.P. 2031.030(c)(2)* in 2004 without substantive change. *C.C.P. 2031.030(c)(2)* was amended in 2007 to provide that the demand must specify a reasonable time for the inspection that is at least 30 days after service of the demand, unless the court for good cause has granted leave to specify an earlier date. However, in an unlawful detainer action or other proceeding under *C.C.P. 1159* et seq. (see 12 *Summary* (10th), *Real Property*, §757), the demand must specify a reasonable time that is at least five days after service of the demand, unless the court, for good cause, has granted leave to specify an earlier date.

See C.E.B., 1 Civil Discovery Practice 4th, §8.52 et seq.

(3) *Supplemental Demand*. In addition to the inspection demands permitted by *C.C.P. 2031*, a party may propound a supplemental demand to inspect later acquired or discovered documents, tangible things, or land or other property that is in the possession, custody, or control of the party on whom the demand is made. Such a demand may be made (a) twice prior to the initial setting of a trial date, and (b) subject to the time limits in *C.C.P. 2024*, text, §23, once after the initial setting of a trial date. However, on motion and for good cause shown, the court may allow a party to propound an additional number of supplemental demands for inspection. (*C.C.P. 2031(e)*, as amended in 2000.)

*C.C.P. 2031*, authorizing inspection demands, was repealed and replaced by *C.C.P. 2031.010* et seq. in 2004 without substantive change. *C.C.P. 2031(e)*, on supplemental demands, became *C.C.P. 2031.050*.

*C.C.P. 2024*, setting discovery time limits, was repealed and replaced by *C.C.P. 2024.010* et seq. in 2004 without substantive change. *West's Key Number Digest*, Pretrial Procedure k.402



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D. Procedure for Demanding Inspection.

3. Service and Filing.

2 *Witkin Cal. Evid. Discovery* § 130

[§ 130] Service and Filing.

Copies of an inspection demand are served on the responding party and on all other parties who have appeared. (*C.C.P. 2031(d)*.) The original demand is not filed. Instead, it is retained, with proof of service affixed, by the demanding party for 6 months after final disposition of the action. It may then be destroyed unless the court, on motion of any party, extends the preservation period. (*C.C.P. 2031(k)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2031(d)*, on service of the inspection demand, was repealed and replaced by *C.C.P. 2031.040* in 2004 without substantive change.

*C.C.P. 2031(k)*, on retention of the original demand, was repealed and replaced by *C.C.P. 2031.290(b)* in 2004 without substantive change.



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#### E. Procedure for Responding to Demand.

##### 1. Form of Response.

2 Witkin Cal. Evid. Discovery § 131

[§ 131] Form of Response.

(1) *Identification of Response.* The responding party must respond separately to each item or category of item in the demand using the same sequence and numbering, but the text of the item or category need not be repeated. The identity of the responding and demanding parties and the set number must appear in the first paragraph of the response immediately below the title of the case. (*C.C.P. 2031(g).*)

(2) *Contents.* The following responses are authorized:

(a) A *statement of compliance* providing that the activity demanded will be allowed in whole or in part and that all documents and things demanded that are in the possession, custody, or control of the responding party and to which no objection is being made will be produced. Demanded documents must be produced "as they are kept in the usual course of business" or organized and labeled to correspond to the demand. If necessary, the responding party must convert any data compilations into reasonably usable form, at the reasonable expense of the demanding party. (*C.C.P. 2031(g)(1).*)

(b) A *statement of inability to comply* affirming that the responding party has attempted to comply by a diligent search and a reasonable inquiry. The statement must specify whether inability to comply occurs because the item demanded (1) has never existed, (2) has been destroyed, (3) has been lost, misplaced or stolen, or (4) has never been or is no longer in the possession, custody, or control of the responding party. The statement must also include the name and address of any person or organization known or believed to have possession, custody, or control of the item. (*C.C.P. 2031(g)(2).*)

(c) A *statement of objection* identifying "with particularity" any document, tangible thing or land to which objection is made and clearly setting forth the extent of the objection and the ground on which it is based. A claim based on the work product doctrine must be expressly asserted and a claim of privilege must identify the particular privilege invoked. If only a part of an item or category is objectionable, a statement of compliance or of inability to comply is required for the remainder. (*C.C.P. 2031(g)(3)*; for forms, see Cal. Civil Practice, 1 Torts, §16:48; Cal. Civil Practice, 2 Procedure, §13:136; 8A Am.Jur. P.P. Forms (1996 ed.), Depositions and Discovery §596.)

(3) *Motion for Protective Order.* The responding party also has the option of seeking a protective order. (See *infra*, §135.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Identification of Response.* *C.C.P. 2031(g)*, on identification of the response, was repealed and replaced by *C.C.P.*

2031.210 in 2004 without substantive change.

(2) *Contents.*

(a) *Statement of compliance:* C.C.P. 2031(g)(1), on statements of compliance, was repealed and replaced by C.C.P. 2031.220 in 2004 without substantive change.

C.C.P. 2031.210 was amended in 2007 to provide that the statement of compliance must indicate that compliance will be by the date set for inspection under C.C.P. 2031.030(c)(2) (Supp., supra, §129). (C.C.P. 2031.210(a)(1).)

See *Toshiba America Electronics Components v. Superior Court* (2004) 124 C.A.4th 762, 772, 21 C.R.3d 532 [in action for trade secret misappropriation in which plaintiff served defendant with request for production of documents, trial judge erred in ordering defendant to bear expense of manipulating computer backup tapes in order to produce usable information in response to plaintiff's document demand, without first determining whether former C.C.P. 2031(g)(1) (now C.C.P. 2031.280) was applicable; where it is applicable, it is mandatory and shifts expense to demanding party]; 26 California Lawyer 43 (May 2006) [*Toshiba* and other cases concerning sharing of costs of electronic discovery].

(b) *Statement of inability to comply:* C.C.P. 2031(g)(2), on statements of inability to comply, was repealed and replaced by C.C.P. 2031.230 in 2004 without substantive change. (c) *Statement of objection:* C.C.P. 2031(g)(3), on statements of objection, was repealed and replaced by C.C.P. 2031.240 in 2004 without substantive change.

See 8A Am.Jur. P.P. Forms (2004 ed.), Depositions and Discovery, Form 457 et seq. *West's Key Number Digest*, Pretrial Procedure k.403



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## CHAPTER X - Discovery

### IV. INSPECTION OF DOCUMENTS, TANGIBLE THINGS, AND PLACES

#### E. Procedure for Responding to Demand.

##### 2. Oath Requirement.

2 *Witkin Cal. Evid. Discovery* § 132

[§ 132] Oath Requirement.

The party to whom the demand is directed must sign the response under oath, unless the response contains only objections. If the party is a corporation, partnership, association, or governmental agency, one of its officers or agents must sign the response under oath. (*C.C.P. 2031(h)*; see *Blue Ridge Ins. Co. v. Superior Court* (1988) 202 C.A.3d 339, 344, 345, 248 C.R. 346 [response contained hybrid of objections and other statements; objections effective although response was unverified]; *Food 4 Less Supermarkets v. Superior Court* (1995) 40 C.A.4th 651, 657, 658, 46 C.R.2d 925 [following *Blue Ridge*; omission of verification in portion of response containing fact-specific responses merely renders that portion untimely and creates right to move for orders and sanctions only as to those responses].)

The attorney for the responding party must sign any responses that contain an objection. If an officer or agent signing on behalf of a party is an attorney, acting in that capacity for the party, the party waives any lawyer-client privilege and any protection of the work product doctrine in later discovery concerning the identity of the sources of the information contained in the response. (*C.C.P. 2031(h)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2031(h)*, requiring a signature under oath on the response, was repealed and replaced by *C.C.P. 2031.250* in 2004 without substantive change.



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#### E. Procedure for Responding to Demand.

#### 3. Service and Filing.

2 Witkin Cal. Evid. Discovery § 133

[§ 133] Service and Filing.

(1) *Timing of Service.* The responding party must serve a written response on the demanding party and copies on all other parties who have appeared, within 30 days, or 5 days in unlawful detainer actions, after service of the demand. The period may be shortened or extended by the court on motion. In unlawful detainer actions, the responding party has at least 5 days from the date of service of the demand to respond, unless on motion of the demanding party the court has shortened the time. (*C.C.P. 2031(i)*.)

The parties may agree to extend the time for response to a demand or to particular items in a demand. The agreement must be confirmed by a writing that specifies the extended date. Unless the agreement expressly provides otherwise, the responding party may respond in any manner authorized by *C.C.P. 2031(g)* (*supra*, §131). (*C.C.P. 2031(j)*.) A letter from the responding party to the demanding party, with copies to other parties who have appeared, is a sufficient written confirmation. (Reporter's Note to *C.C.P. 2031(j)* (formerly (i)), in 2 Hogan, Cal. Civil Discovery, Appendix C.)

(2) *No Filing.* The original response is not filed with the court. It is retained by the demanding party for 6 months after final disposition of the action. It may then be destroyed unless the court, on motion of any party and for good cause shown, extends the preservation period. (*C.C.P. 2031(k)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Timing of Service.* *C.C.P. 2031(i)*, on the timing of service, was repealed and replaced by *C.C.P. 2031.260* in 2004 without substantive change. *C.C.P. 2031.260* was amended in 2007 to provide that, in an unlawful detainer action or other proceeding under *C.C.P. 1159 et seq.* (12 *Summary* (10th), *Real Property*, §757), the party to whom an inspection demand is directed has at least 5 days from the date of service to respond, unless, on motion of the party making the demand, the court has shortened the time for response, or, on motion of the party to whom the demand is directed, the court has extended the time for response.

*C.C.P. 2031(g)*, on authorized methods of responding, was repealed and replaced by *C.C.P. 2031.210* in 2004 without substantive change.

*C.C.P. 2031(j)*, on agreements to extend the time for response, was repealed and replaced by *C.C.P. 2031.270* in 2004 without substantive change.

*C.C.P. 2031.270* was amended in 2007. The demanding and responding parties may agree to extend the date for



inspection or the time for service of a response to a set of inspection demands, or to particular items or categories of items, to a date or dates beyond those provided in *C.C.P. 2031.030, 2031.210, 2031.260, and 2031.280*. (*C.C.P. 2031.270(a)*.) The agreement may be informal, but it must be confirmed in a writing that specifies the extended date. (*C.C.P. 2031.270(b)*.) Unless the agreement expressly states otherwise, it preserves to the responding party the right to respond to any item or category of item in the demand to which the agreement applies in any manner specified in *C.C.P. 2031.210, 2031.220, 2031.230, 2031.240, and 2031.280*. (*C.C.P. 2031.270(c)*.)

Under *C.C.P. 2031.280(b)*, added in 2007, production of documents in response to an inspection demand must take place on the date specified in the demand under *C.C.P. 2031.030(c)(2)*, unless an objection to that date has been made. If the date for inspection has been extended under *C.C.P. 2031.270*, the documents must be produced by the date agreed to under that section.

See Reporter's Note to former *C.C.P. 2031(i)*, in Hogan, 2 Cal. Civil Discovery 2d, Appendix D.(2) *No Filing*. *C.C.P. 2031(k)*, specifying that the response is not to be filed with the court, was repealed and replaced by *C.C.P. 2031.290* in 2004 without substantive change.



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## E. Procedure for Responding to Demand.

## 4. Effect of Failure To Respond.

2 Witkin Cal. Evid. Discovery § 134

## [§ 134] Effect of Failure To Respond.

A party who fails to file a timely response to an inspection demand waives any objection to the demand, including an objection based on privilege or the work product doctrine. On motion, the court may relieve a party from its waiver if it determines that the party subsequently served a response "in substantial compliance with" *C.C.P. 2031(g)*, supra, §131, and that "failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect." (*C.C.P. 2031(l)*.) The court's ability to relieve a party from waiver comes from *C.C.P. 473*, and the Commission intended that *C.C.P. 2031(l)* (formerly (k)), and not *C.C.P. 473*, applies to this form of discovery default. (Reporter's Note to *C.C.P. 2031(l)* (formerly (k)), 2 Hogan, Cal. Civil Discovery, Appendix C; on *C.C.P. 473*, see 8 Cal. Proc. (4th), *Attack on Judgment in Trial Court*, §152 et seq.) (See *Fresno v. Superior Court* (1988) 205 C.A.3d 1459, 1466, 253 C.R. 296 [Legislature intended to employ same standard as *C.C.P. 473* in determining "mistake, inadvertence, or excusable neglect"; counsel's mistake of law on "relatively simple and undebatable matter" not valid ground]; *Food 4 Less Supermarkets v. Superior Court* (1995) 40 C.A.4th 651, 657, 658, 46 C.R.2d 925 [where response is filed within statutory period and contains both objections and unverified fact-specific responses, only unverified responses are considered untimely; objections are not waived]; *Korea Data Systems Co. Ltd. v. Superior Court* (1997) 51 C.A.4th 1513, 1516, 59 C.R.2d 925 [plaintiff did not waive attorney-client privilege by filing objections to defendants' inspection requests that were less specific than required by statute and by filing untimely privilege log; *C.C.P. 2031(k)* (now 2031(l)) does not authorize waiver of privilege for untimely filing of log, and other sanctions were appropriate for nonspecific objections].)

The filing of a timely response does not preserve an objection based on the attorney-client privilege unless a specific objection on that ground is contained in the response. Any other interpretation of *C.C.P. 2031(l)* "would allow piecemeal and seriatim doling out of objections to legitimate discovery requests whenever a timely response, no matter how insubstantial, is served. It is clear from the [Civil Discovery] Act that the Legislature intended that any and all objections are to be made at the earliest timely response." (*Scottsdale Ins. Co. v. Superior Court* (1997) 59 C.A.4th 263, 273, 275, 69 C.R.2d 112 [in insurer's declaratory relief action, insured homeowners' association sought all documents relating to specific claim and insurer's timely response failed to raise specific objection in expectation that separate motion for protective order would be granted; tactical choices of insurer's counsel did not constitute mistake of law that justified relief from waiver].)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2031(g)*, on authorized methods of responding, was repealed and replaced by *C.C.P. 2031.210* in 2004 without substantive change.

*C.C.P. 2031(l)*, on the effects of failing to respond, was repealed and replaced by *C.C.P. 2031.300* in 2004 without substantive change.

See *Deary v. Superior Court* (2001) 87 C.A.4th 1072, 1079, 105 C.R.2d 132 [in action against estate, defendant's claim that copies of estate tax returns sought by plaintiff were privileged was not waived, notwithstanding that defendant failed to raise claim in its initial response to notice of deposition and request for production of documents; defendant's doubt that returns were included in request was reasonable]; *Best Products v. Superior Court* (2004) 119 C.A.4th 1181, 1188, 15 C.R.3d 154 [trial judge erred in finding that defendant waived its attorney-client and work product privileges by failing to file privilege log in response to plaintiff's request to inspect and produce; waiver could be found only under *Ev.C. 912* (see 2 Cal. Evidence (4th), Witnesses, §67) or *C.C.P. 2031(l)*, and latter section was not violated, as defendant timely asserted privileges, albeit in boilerplate fashion]; *People v. Superior Court (Cole Nat. Corp.)* (2004) 122 C.A.4th 1060, 1074, 19 C.R.3d 324 [where plaintiff's original response to defendants' request for production of documents and deposition notices was timely and contained objections, and plaintiff thereafter produced privilege log, trial judge erred in finding that plaintiff had waived its privilege because its objections, in its response or privilege log, were insufficiently detailed; relying on *Best Products*, *supra*, and *Korea Data Systems Co. Ltd. v. Superior Court* (1997) 51 C.A.4th 1513, 59 C.R.2d 925, text, p. 970]; Reporter's Note to former *C.C.P. 2031(k)*, in Hogan, 2 Cal. Civil Discovery 2d, Appendix D.



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## CHAPTER X - Discovery

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#### E. Procedure for Responding to Demand.

#### 5. Motion for Protective Order.

##### a. Authorization.

2 Witkin Cal. Evid. Discovery § 135

[§ 135] Authorization.

(1) *In General.* When an inspection of documents, tangible things, or places has been demanded, the party to whom the demand has been directed, and any other party or affected person or organization, may promptly move for a protective order. On a showing of good cause, the court may make "any order that justice requires" to protect a party, person, or organization from "unwarranted annoyance, embarrassment, or oppression, or undue burden and expense." If the court denies the motion for a protective order in whole or in part, it may order that "the party to whom the demand was directed provide or permit the discovery against which protection was sought on terms and conditions that are just." (*C.C.P. 2031(f)*; see Cal. Civil Practice, 2 Procedure, §13:160 et seq. [forms]; Cal. Civil Practice, 1 Torts, §§16:49, 16:50; 1 Hogan, Cal. Civil Discovery §6.11; on monetary sanctions for unsuccessfully making or opposing motion for protective order, see *infra*, §252.)

(2) *Attempt at Informal Resolution.* The motion for a protective order must be accompanied by a declaration showing a reasonable and good faith attempt at an informal resolution of each issue presented. (*C.C.P. 2031(f)*.) (On monetary sanctions for failure to attempt informal resolution, see *infra*, §252.)

(3) *Permissible Orders.* Under *C.C.P. 2031(f)*, a protective order may include, but is not limited to, one or more of the following directions:

- (a) That some or all of the items demanded for inspection not be produced or made available.
- (b) That the time to respond to a particular demand or a set of demands be extended.
- (c) That the place of production be other than that specified in the demand.
- (d) That the inspection be made only on specified terms and conditions.
- (e) That a trade secret or confidential information not be disclosed or be disclosed only to specified persons or in a specified way.
- (f) That items produced be sealed and opened only by court order.

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General.* *C.C.P. 2031(f)*, authorizing motions for a protective order, was repealed and replaced by *C.C.P.*

2031.060 in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §6.11.

(2) *Attempt at Informal Resolution*. The portion of *C.C.P. 2031(f)* requiring a meet and confer declaration was repealed and replaced by *C.C.P. 2031.060(a)* in 2004 without substantive change.(3) *Permissible Orders*. The portion of *C.C.P. 2031(f)* specifying what directions a protective order may include was repealed and replaced by *C.C.P. 2031.060(b)* in 2004 without substantive change.*West's Key Number Digest*, Pretrial Procedure k.413 et seq.



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## E. Procedure for Responding to Demand.

## 5. Motion for Protective Order.

## b. Illustrations.

2 Witkin Cal. Evid. Discovery § 136

[§ 136] Illustrations.

In *Fireman's Fund Ins. Co. v. Superior Court* (1991) 233 C.A.3d 1138, 286 C.R. 50, an insured sued its insurer for breach of contract and bad faith failure to contribute to a settlement. The trial judge ordered the insurer to produce reinsurance agreements and documents containing communications between the insurer and any reinsurers who might be liable to satisfy a judgment against the insurer. The insured asserted that the reinsurer had attempted to influence or pressure the insurer either to settle or not to settle the insured's claim, and that the communications documents therefore were relevant to bad faith. The insured further contended that disclosure of the reinsurance agreements was necessary to provide the context for the communications documents. *Held*, mandamus issued to compel vacation of order.

(a) Although the communications documents *might* have been relevant to the bad faith claim, they might also have been irrelevant or entirely innocuous, and might have contained sensitive commercial information. Thus, the judge should have first conducted an in camera review under *C.C.P. 2031(e)* (now 2031(f)) to determine whether they were of value to the insured's case, and whether any sensitive matters should be excised before disclosure. (233 C.A.3d 1141.)

(b) The judge also erred in ordering production of the reinsurance agreements. The insured's desire to review them for "context" was an insufficient ground to justify the production of highly sensitive commercial information. (233 C.A.3d 1141.) (See *Lipton v. Superior Court* (1996) 48 C.A.4th 1599, 1618, 1619, 56 C.R.2d 341 [holding, on facts similar to those in *Fireman's Fund Ins. Co.*, that in camera review was proper procedure to resolve relevancy of reinsurance and loss reserves information, but disagreeing with that court's seeming extension of qualified privilege of *C.C.P. 2031(e)* (now 2031(f)) for "confidential information" to "sensitive matter"].)

In *Raymond Handling Concepts Corp. v. Superior Court* (1995) 39 C.A.4th 584, 45 C.R.2d 885, plaintiff was injured while operating a forklift and sued the forklift manufacturer. Defendant produced certain confidential documents under an interim discovery agreement with plaintiff, but moved for a protective order to prevent plaintiff from sharing the documents with counsel in similar pending litigation. The trial judge issued a protective order directing that the documents not be disclosed to the general public but allowing plaintiff's counsel to share the documents with attorneys in similar cases, provided those attorneys executed a stipulation agreeing to be bound by the protective order. Whenever disclosure of this type was made, notice to defendant's counsel was required. *Held*, this was proper.

(a) The broad language of *C.C.P. 2031(e)* (now 2031(f)) indicates that the issuance and formulation of protective orders are to a large extent discretionary. Here, the trial judge "drafted a protective order ... which accommodated the public interest in allowing the sharing of information to litigants in similar cases and the interest of petitioners in

protecting confidential information and trade secrets from disclosure to their competitors." (39 C.A.4th 590.)

(b) The order did not violate the principles and procedures of *Bridgestone/Firestone v. Superior Court* (1992) 7 C.A.4th 1384, 9 C.R.2d 709, 2 Cal. Evidence (4th), Witnesses, §351, which, in order to protect the trade secret privilege of Ev.C. 1060, articulated a three-step process that must be followed in ordering disclosure subject to a protective order: (1) the privilege holder's showing of the existence of a trade secret, (2) the opposing party's showing of a need for the material, and (3) the privilege holder's demonstration of any disadvantages of a protective order. Here, by disclosing the information to plaintiff and seeking a protective order, defendant in effect conceded that the material was discoverable and thus rendered the first two steps in the process unnecessary. (39 C.A.4th 590.)

**SUPPLEMENT:** [This section is current through the latest supplement]

C.C.P. 2031(f), authorizing motions for a protective order, was repealed and replaced by C.C.P. 2031.060 in 2004 without substantive change.



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#### F. Compelling Inspections.

##### 1. Order Compelling Response.

##### a. No Response Given.

2 *Witkin Cal. Evid. Discovery* § 137

[§ 137] No Response Given.

If a timely response is not served, the demanding party may move for an order compelling a response. The court must impose a monetary sanction under *C.C.P. 2023* (infra, §252) against someone who unsuccessfully makes or resists a motion to compel a response, unless it finds that the person acted with substantial justification or that other circumstances make imposing the sanction unjust. If a party fails to obey an order compelling a response, the court may enforce the order through the monetary and more severe sanctions available under *C.C.P. 2023* (infra, §252 et seq.). (*C.C.P. 2031(l)*; see *Vallbona v. Springer* (1996) 43 *C.A.4th* 1525, 1545, 1546, 51 *C.R.2d* 311 [notwithstanding language of *C.C.P. 2031(k)* (now 2031(*l*)), evidence sanction may be imposed without prior order to compel compliance with discovery, where order would be futile]; C.E.B., *Civil Discovery Practice* 3d, §8.54; Hogan, 1 *Cal. Civil Discovery* §6.14.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2023*, on sanctions authorized for discovery abuses, was repealed and replaced by *C.C.P. 2023.010* et seq. in 2004 without substantive change.

*C.C.P. 2031(l)*, on failure to serve a timely response, was repealed and replaced by *C.C.P. 2031.300* in 2004 without substantive change.

See C.E.B., 1 *Civil Discovery Practice* 4th, §8.92; Hogan, 1 *Cal. Civil Discovery* 2d, §6.14.





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## IV. INSPECTION OF DOCUMENTS, TANGIBLE THINGS, AND PLACES

## F. Compelling Inspections.

1. Order Compelling Response.
- b. Inadequate Response Given.

2 Witkin Cal. Evid. Discovery § 138

[§ 138] Inadequate Response Given.

(1) *Motion for Order*. The demanding party may move for an order compelling further response if it determines that (a) a statement of compliance is incomplete, (b) a statement of inability to comply is inadequate, incomplete or evasive, or (c) an objection is without merit or too general. The right to compel a further response is waived unless notice of the motion is given within 45 days of service of the response, or any supplemental response, or on or before any specific later date to which the parties have agreed in writing. The motion must specify facts showing good cause for the discovery being sought. It must be accompanied by a declaration showing a reasonable and good faith attempt at informal resolution of the issues presented. (*C.C.P.* 2031(m); see *Standon Co. v. Superior Court* (1990) 225 C.A.3d 898, 903, 275 C.R. 833 [rejecting contention that 45-day period prescribed by *C.C.P.* 2031(l) (now 2031(m)) runs from date set for production or inspection, rather than from date of service of response]; *Sexton v. Superior Court* (1997) 58 C.A.4th 1403, 1404, 68 C.R.2d 708 [where party's motion to compel production of documents under *C.C.P.* 2031(l) (now 2031(m)) is untimely and responding party fails to raise that objection in written opposition but does so orally at hearing on motion, court is required to deny motion]; C.E.B., Civil Discovery Practice 3d, §8.54; Hogan, 1 Cal. Civil Discovery §6.14; on format of motion to compel further response, see *supra*, §28; on monetary sanctions for failure to attempt informal resolution, see *infra*, §252.)

In *Carter v. Superior Court* (1990) 218 C.A.3d 994, 267 C.R. 290, a bad faith action against an insurer, plaintiffs' motion to compel further responses to a demand for inspection of documents was filed after expiration of the 45-day limit set by *C.C.P.* 2031(l) (now 2031(m)), *supra*, and hence was denied. When plaintiffs sought to depose defendant's custodian of records under *C.C.P.* 2025 and requested that he bring the previously withheld documents to the deposition, the trial judge issued a protective order, relying on *Professional Career Colleges, Magna Institute v. Superior Court* (1989) 207 C.A.3d 490, 255 C.R. 5 (*supra*, §116) for the proposition that a party may not obtain by a second discovery request what was lost by untimely prosecution of a first request. *Held*, this was error.

(a) *Professional Career Colleges* is distinguishable: It involved two discovery requests made under the same section, rather than attempted discovery under two separately authorized procedures, as in this case. "Section 2031, subdivision (l) (now 2031(m)) prescribes a waiver of 'any right to compel a further response to the inspection demand.' ... It does not prescribe a waiver of the party's right to use other discovery methods for obtaining the same documents or information." (218 C.A.3d 997.) Defendant's argument that plaintiffs employed only one discovery "method," which happened to be available under two separate statutes, lacks merit because the inspection of documents procedure differs substantially from a deposition at which a party is required to bring documents, and neither statute suggests that a

request for documents under one procedure bars a request under the other for the same documents. (218 C.A.3d 997.)

(b) The silence of both statutes on the question at issue is explainable by the presence elsewhere of general restrictions on abusive discovery, e.g., *C.C.P. 2019(b)* (infra, §241) and *C.C.P. 2025(i)* (supra, §59). (218 C.A.3d 998.)

(2) *Sanctions*. The court must impose a monetary sanction under *C.C.P. 2023* (infra, §252) against someone who unsuccessfully makes or resists a motion to compel further response, unless it finds that the person acted with substantial justification or that other circumstances make imposing the sanction unjust. If a party fails to obey an order compelling further response, the court may enforce the order through the monetary and more severe sanctions available under *C.C.P. 2023* (infra, §252 et seq.). (*C.C.P. 2031(m)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Motion for Order*. *C.C.P. 2031(m)*, on motions to compel further response, was repealed and replaced by *C.C.P. 2031.310* in 2004 without substantive change.

*C.C.P. 2019(b)*, on restrictions on discovery, was repealed and replaced by *C.C.P. 2019.030* in 2004 without substantive change.

*C.C.P. 2025*, on depositions generally, was repealed and replaced by *C.C.P. 2025.010* et seq. in 2004 without substantive change. *C.C.P. 2025(i)*, on protective orders, became *C.C.P. 2025.420*.

See C.E.B., 1 Civil Discovery Practice 4th, §8.93 et seq.; Hogan, 1 Cal. Civil Discovery 2d, §6.14.(2) *Sanctions*. *C.C.P. 2023*, on sanctions authorized for discovery abuses, was repealed and replaced by *C.C.P. 2023.010* et seq. in 2004 without substantive change.

*C.C.P. 2031(m)*, authorizing sanctions in connection with motions to compel further response, was repealed and replaced by *C.C.P. 2031.310(d)*, (e) in 2004 without substantive change.



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#### F. Compelling Inspections.

#### 2. Order Compelling Compliance.

2 *Witkin Cal. Evid. Discovery* § 139

[§ 139] Order Compelling Compliance.

If the responding party fails to permit inspection under the terms of its statement of compliance, the demanding party may move for an order compelling compliance. Monetary sanctions under *C.C.P. 2023* (infra, §252) may be imposed against anyone who unsuccessfully moves for or opposes such an order, and further sanctions under *C.C.P. 2023* (infra, §255 et seq.) are available against a party who fails to obey the order. (*C.C.P. 2031(n)*; see *Crippen v. Superior Court* (1984) 159 *C.A.3d* 254, 259, 205 *C.R.* 477 [timeliness of motion for order compelling compliance under former version of statute]; *C.E.B.*, 2 Civil Discovery Practice 3d, §8.56; 1 Hogan, *Cal. Civil Discovery* §6.15; 38 *Stanf. L. Rev.* 841 [enforcement of discovery where foreign statutes block document production].)

If the trial court abuses its discretion in erroneously denying a motion for inspection, the remedy of review on appeal from the final judgment is inadequate, and mandamus lies to compel the judge to set aside the order of denial and grant the order compelling compliance. (See *Dowell v. Superior Court* (1956) 47 *C.2d* 483, 486, 304 *P.2d* 1009; *Suezaki v. Superior Court* (1962) 58 *C.2d* 166, 179, 23 *C.R.* 368, 373 *P.2d* 432; *Poeschl v. Superior Court* (1964) 229 *C.A.2d* 383, 385, 40 *C.R.* 697; on rule of *Oceanside Union School Dist. v. Superior Court* (1962) 58 *C.2d* 180, 185, footnote 4, 23 *C.R.* 375, 373 *P.2d* 439 [writs will be granted only where necessary to lay down guidelines for future cases], see infra, §247; see also 8 *Cal. Proc.* (4th), *Extraordinary Writs*, §157.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2023*, on sanctions authorized for discovery abuses, was repealed and replaced by *C.C.P. 2023.010* et seq. in 2004 without substantive change.

*C.C.P. 2031(n)*, on failure to permit inspection under the terms of a statement of compliance, was repealed and replaced by *C.C.P. 2031.320* in 2004 without substantive change.

See *C.E.B.*, 1 Civil Discovery Practice 4th, §8.96; Hogan, 1 *Cal. Civil Discovery* 2d, §6.15.



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## CHAPTER X - Discovery

## V. PHYSICAL OR MENTAL EXAMINATION

## A. Scope of Statute.

## 1. Examinee's Condition in Controversy.

2 *Witkin Cal. Evid. Discovery* § 140

[§ 140] Examinee's Condition in Controversy.

(1) *Evolution of Discovery Method.* At an early date, California recognized the inherent power of the court to order a physical examination of the plaintiff in a personal injury case. (See *Johnston v. Southern Pac. Co.* (1907) 150 C. 535, 540, 89 P. 348; *Dodge v. San Diego Elec. Ry. Co.* (1949) 92 C.A.2d 759, 769, 208 P.2d 37; *Sharff v. Superior Court* (1955) 44 C.2d 508, 510, 282 P.2d 896.) C.C.P. 2032, enacted as part of the 1957 Act and continued in the 1986 Act, was based on *F.R. Civ. P., Rule 35*. It was designed to confirm the court's authority, enlarge the scope of examinations, and establish a uniform procedure. (On federal rule, see 42 *Cal. L. Rev.* 188; 36 A.L.R.2d 946; 20 Proof of Facts 411 [examination of commercial vehicle driver under *F.R. Civ. P., Rule 35* or state counterpart].)

(2) *Controversy Requirement.* A party may obtain discovery by means of physical or mental examination in an action in which the mental or physical condition (including the blood group) of the person to be examined is in controversy. (C.C.P. 2032(a); see *Vinson v. Superior Court* (1987) 43 C.3d 833, 839, 239 C.R. 292, 740 P.2d 404, *infra*, §153 [plaintiff's claim of emotional distress in sexual harassment action placed her mental condition in controversy]; *Doyle v. Superior Court* (1996) 50 C.A.4th 1878, 1885, 58 C.R.2d 476 [distinguishing *Vinson*; where employee claimed her supervisor sexually harassed her, resulting in past emotional distress, employee's current mental condition was not "in controversy," and mental examination could not be compelled]; *Barrenda L. v. Superior Court* (1998) 65 C.A.4th 794, 803, 76 C.R.2d 727 [in action by minors against county and its employees for emotional distress arising from rape and assault suffered by plaintiffs in foster home, trial judge erred in ordering plaintiffs to undergo psychological examination without any limitation as to inquiry into plaintiffs' other sexual activity; there was no declaration from mental health professional establishing relevance of other sexual conduct]; see also C.E.B., 2 Civil Discovery Practice 3d, Chap. 10; C.J.E.R., Judges Benchbook, Civil Proceedings: Discovery, Chap. 16; 1 Hogan, Cal. Civil Discovery, Chap. 8; Cal. Civil Practice, 2 Procedure, §13:170 et seq.; 8A Am.Jur. P.P. Forms (1996 ed.), Depositions and Discovery §701 et seq.; 23 Am.Jur.2d (1983 ed.), *Depositions and Discovery* §282 et seq.)

The limitation of the discovery device to situations where the examinee's medical condition is actually "in controversy" continued prior law. "This rather drastic and intrusive form of discovery has never been permitted simply by a showing that someone's medical condition is 'relevant to the subject matter.' Hence, this introductory provision [to C.C.P. 2032] differs from its counterpart in each of the other discovery tools in that it does not" refer to the scope of discovery set forth in C.C.P. 2017 (*supra*, §9). (Reporter's Note to C.C.P. 2032(a), in 2 Hogan, Cal. Civil Discovery, Appendix C.)

(3) *Blood Examinations.* The blood group of the person to be examined is among the physical conditions subject to examination, as long as it is in controversy. Nothing in C.C.P. 2032 affects tests under the Uniform Act on Blood Tests

To Determine Paternity (*Family C. 7550 et seq.*, 2 *Cal. Evidence (4th), Demonstrative, Experimental, and Scientific Evidence*, §69). (*C.C.P. 2032(a)*; see 1 Hogan, *Cal. Civil Discovery* §8.4; 8A *Am.Jur. P.P. Forms* (1996 ed.), *Depositions and Discovery* §751 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Evolution of Discovery Method*. See 34 *U.S.F. L. Rev.* 295 [implications of court-ordered genetic testing under *F.R. Civ. P., Rule 35*].

(2) *Controversy Requirement*. *C.C.P. 2017*, on the scope of discovery, was repealed and replaced by *C.C.P. 2017.010* in 2004 without substantive change.

The portion of *C.C.P. 2032(a)* authorizing mental and physical examinations was repealed and replaced by *C.C.P. 2032.020(a)* in 2004 without substantive change.

See C.E.B., 2 *Civil Discovery Practice* 4th, Chap. 10; Hogan, 1 *Cal. Civil Discovery* 2d, Chap. 8; Reporter's Note to *C.C.P. 2032(a)*, in Hogan, 2 *Cal. Civil Discovery* 2d, Appendix D.(3) *Blood Examinations*. The portion of *C.C.P. 2032(a)* providing that tests under the Uniform Act on Blood Tests To Determine Paternity are unaffected was repealed and replaced by *C.C.P. 2032.010(a)* in 2004 without substantive change.

See Hogan, 1 *Cal. Civil Discovery* 2d, §8.4; 8A *Am.Jur. P.P. Forms* (2004 ed.), *Depositions and Discovery*, Form 576 et seq. *West's Key Number Digest*, *Pretrial Procedure* k.451 et seq.



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## CHAPTER X - Discovery

### V. PHYSICAL OR MENTAL EXAMINATION

#### A. Scope of Statute.

#### 2. Potential Examinees.

2 Witkin Cal. Evid. Discovery § 141

[§ 141] Potential Examinees.

California's prior case law only went so far as to recognize the right of compulsory examination of a *party*, and the former federal rule was likewise limited. The discovery statutes expanded the list of potential examinees: a party, the agent of a party, or a natural person in the custody or legal control of a party may be examined under *C.C.P. 2032*. (*C.C.P. 2032(a)*.) (See *Schlagenhauf v. Holder* (1964) 379 U.S. 104, 85 S.Ct. 234, 240, 13 L.Ed.2d 152, 161 [examination of defendant]; *Harabedian v. Superior Court* (1961) 195 C.A.2d 26, 31, 15 C.R. 420 [same]; but see *William M. v. Superior Court* (1990) 225 C.A.3d 447, 451, 275 C.R. 103 [order compelling putative paternal grandparents to submit to blood test in paternity action was improper; their blood group was not in dispute, and they were not proper parties to action]; 1 Hogan, Cal. Civil Discovery §8.2.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2032(a)*, specifying who may be examined, was repealed and replaced by *C.C.P. 2032.020(a)* in 2004 without substantive change.

See *Cruz v. Superior Court* (2004) 121 C.A.4th 646, 650, 17 C.R.3d 368 [in action by child against medical group alleging that group's care of mother during pregnancy and delivery led to child's brain damage, order requiring mother to undergo blood testing was proper; mother was both "other person" whose physical condition was in controversy and child's agent within meaning of *C.C.P. 2032(a)* (now *C.C.P. 2032.020(a)*)]; Hogan, 1 Cal. Civil Discovery 2d, §8.2.



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## CHAPTER X - Discovery

### V. PHYSICAL OR MENTAL EXAMINATION

#### A. Scope of Statute.

#### 3. No Right to Autopsy.

2 Witkin Cal. Evid. Discovery § 142

[§ 142] No Right to Autopsy.

In *Holm v. Superior Court* (1986) 187 C.A.3d 1241, 232 C.R. 432, disinherited grandchildren of a testator filed a petition to revoke probate, contesting the will on the grounds of lack of testamentary capacity. They then applied for "an order allowing partial autopsy and analysis," treated by the parties and probate court as a discovery matter. The application sought leave to exhume the corpse, so that medical examiners retained by the applicants could perform an autopsy on the brain to determine whether the decedent had suffered from "Alzheimer's Disease" or some other organic brain disorder. They offered declarations, documentary evidence and testimony from both lay and expert medical witnesses, which showed that the death certificate listed "dementia" as one of the causes of death; that the decedent's behavior over a period of years cast doubt on his mental faculties; and that pathologists were of the opinion that it might be possible to determine whether decedent was suffering at the time of death from a condition that would affect his cognitive abilities. The probate court issued the requested order, and the executors sought mandamus. *Held*, writ granted.

(a) Statements in a few criminal cases imply that defendants may have a right to conduct an independent examination of a body. But criminal discovery in California is a product of the common law, while civil discovery since 1957 has been statutory; and no statute authorizes a trial court in a civil proceeding to direct the disinterment or autopsy of human remains for the purpose of discovery. (187 C.A.3d 1245.)

(b) The "inherent" authority to order discovery (see *Johnston v. Southern Pac. Co.* (1907) 150 C. 535, 89 P. 348, supra, §140) was recognized before the 1957 adoption of the discovery statutes. Recent cases make it clear that, in the area of civil discovery, the judiciary has no power to create or sanction types or methods of discovery not based on a reasonable interpretation of statutory provisions. (187 C.A.3d 1247.)

(c) C.C.P. 2032, permitting the trial court to compel a party or a "person" under the legal control of a party to submit to a physical or mental examination, is inapplicable. The words "party" or "person" cannot be construed to include the remains of a deceased person. (187 C.A.3d 1248.)

(d) Decisions from other jurisdictions cited as authority for a court-ordered autopsy are either criminal cases or cases relying on a common law or inherent power of courts in civil proceedings, and are not persuasive. (187 C.A.3d 1248.) (See *Walsh v. Caidin* (1991) 232 C.A.3d 159, 162, 283 C.R. 326 [no right to autopsy for purposes of discovery in civil action; citing *Holm v. Superior Court*].)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2032*, providing that a party or person may be examined, was repealed and replaced by *C.C.P. 2032.020(a)* in 2004 without substantive change.





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## CHAPTER X - Discovery

### V. PHYSICAL OR MENTAL EXAMINATION

#### B. Physical Examination of Personal Injury Plaintiff.

##### 1. Leave of Court Not Required.

##### 2 *Witkin Cal. Evid. Discovery* § 143

[§ 143] Leave of Court Not Required.

(1) *General Rule.* When a plaintiff or cross-complainant seeks recovery for personal injuries, the defendant or cross-defendant may demand, without leave of court, one physical examination of the plaintiff. However, the examination must not include a diagnostic test or procedure that is painful, protracted, or intrusive, and it must be conducted within 75 miles of the examinee's residence. (*C.C.P. 2032(c)(1), 2032(c)(2)*; see *C.E.B., Civil Discovery Practice* 3d, §10.28 et seq.; 1 Hogan, *Cal. Civil Discovery* §8.3.)

(2) *Rationale.* *C.C.P. 2032(c)* had no counterpart in former *C.C.P. 2032*, which required *all* forms of discovery by medical examination to be conducted under a court order, unless otherwise stipulated. "In practice this discovery method is most frequently employed to obtain a form of medical examination that a court would authorize almost as a matter of course, namely, an (1) initial (2) routine (3) physical examination of a (4) personal injury plaintiff (5) at a site near the examinee's home. Indeed, it is likely that the vast majority of such examinations are arranged by stipulation. By permitting initiation by demand instead of motion in the situation where this discovery device would most often be utilized, this provision makes this method partially self-executing, in that the burden of seeking intervention is shifted from the one desiring such an examination to the one resisting it." (Reporter's Note to *C.C.P. 2032(c)*, in 2 Hogan, *Cal. Civil Discovery*, Appendix C.)

(3) *Permissible Examination.* The phrase "painful, protracted, or intrusive" was construed in *Abex Corp. v. Superior Court* (1989) 209 *C.A.3d* 755, 257 *C.R.* 498. Plaintiff sought recovery for injuries allegedly caused by asbestos-containing products produced by defendants. Plaintiff's medical expert concluded that several small "corns" scattered over the palmar surfaces of plaintiff's hands indicated the presence of asbestos skin disease. Plaintiff was subsequently examined by defendants' expert, a dermatologist, who stated that the lesions appeared to be ordinary viral warts, and that plaintiff told him that he "scrapes them off with a pocket knife" when they get particularly thickened. Plaintiff refused to permit a biopsy of the lesions, however, which would have permitted a definitive diagnosis, on the grounds that the procedure would be painful and intrusive. *Held*, plaintiff must submit to the biopsy. "The uncontradicted medical evidence is that the procedure will involve little pain or danger. Any procedure involving a local anesthetic arguably will produce some discomfort but given the fact that real party scrapes the warts off himself with a pocket knife, it strains credulity past the breaking point to believe this procedure qualifies as one that is 'painful, protracted, or intrusive' within the meaning of the discovery legislation." (209 *C.A.3d* 758.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *General Rule.* *C.C.P. 2032(c)(1), 2032(c)(2)*, allowing a defendant or cross-defendant to demand one physical

examination without leave of court, were repealed and replaced by *C.C.P. 2032.220(a)* in 2004 without substantive change.

See C.E.B., 2 Civil Discovery Practice 4th, §10.30 et seq.; Hogan, 1 Cal. Civil Discovery 2d, §8.3.

(2) *Rationale.* *C.C.P. 2032(c)*, authorizing physical examinations, was repealed and replaced by *C.C.P. 2032.220* in 2004 without substantive change.

See Reporter's Note to *C.C.P. 2032(c)*, in Hogan, 2 Cal. Civil Discovery 2d, Appendix D.



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## CHAPTER X - Discovery

### V. PHYSICAL OR MENTAL EXAMINATION B. Physical Examination of Personal Injury Plaintiff. 2. Procedure for Obtaining Examination.

*2 Witkin Cal. Evid. Discovery § 144*

[§ 144] Procedure for Obtaining Examination.

(1) *Demand.* The demand is without leave of court and may be made after the defendant making the demand has been served or has appeared, whichever occurs first. The demand must specify the time, place, manner, conditions, scope, and nature of the examination and the identity and any specialty of the examiner. (*C.C.P. 2032(c)(2)*; see Cal. Civil Practice, 2 Procedure, §13:183; on conduct of examination, see *infra*, §148 et seq.) Copies of the demand are served on the plaintiff and all parties who have appeared. (*C.C.P. 2032(c)(4)*.) The original is not filed with the court, but is retained by the defendant for 6 months after final disposition of the action. It may then be destroyed unless the court, on motion and for good cause, orders preservation for a longer period. (*C.C.P. 2032(c)(8)*.)

(2) *Response.* The plaintiff must respond in writing, stating that he or she will (a) comply as demanded, (b) comply according to specified modifications, or (c) refuse to comply for specified reasons. Unless the court, on motion, has shortened or extended the time to respond, the plaintiff must serve the original response on the demanding party and copies on all other parties who have appeared within 20 days after service of the demand. (*C.C.P. 2032(c)(5)*; see Cal. Civil Practice, 2 Procedure, §13:184.)

(3) *Failure To Respond to Demand.* If a plaintiff to whom a demand for a physical examination has been directed fails to serve a timely response to it, the plaintiff waives any objection to the demand. However, on motion, the court may relieve the plaintiff from this waiver if the court determines that the plaintiff has subsequently served a response "in substantial compliance with" *C.C.P. 2032(c)(5)*, *supra*, and that "failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect." (*C.C.P. 2032(c)(6)*.)

The defendant may move for an order compelling response and compliance with the demand for physical examination. The court must impose a monetary sanction under *C.C.P. 2023* (*infra*, §252) against a party, person, or attorney who unsuccessfully makes or opposes the motion. However, the sanctions may be avoided if the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make imposing the sanction unjust. If the plaintiff fails to obey an order compelling a response and compliance, the court may enforce the order through the monetary and more severe sanctions available under *C.C.P. 2023* (*infra*, §252 et seq.). (*C.C.P. 2032(c)(6)*.)

(4) *Modification or Refusal To Comply With Demand.* If the plaintiff responds by stating that he or she refuses to comply with the demand, or that compliance will be in accordance with certain modifications, the defendant may deem the modified consent or refusal unwarranted and may move for an order compelling compliance with the demand. The motion must be accompanied by a declaration showing a reasonable and good faith attempt at an informal resolution of

each issue presented. (*C.C.P. 2032(c)(7)*; on monetary sanctions for failure to attempt informal resolution, see *infra*, §252.)

The court must impose a monetary sanction under *C.C.P. 2023* (*infra*, §252) against a party, person, or attorney who unsuccessfully makes or opposes the motion. However, the sanctions may be avoided if the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make imposing the sanction unjust. (*C.C.P. 2032(c)(7)*.) If the court grants the motion and the plaintiff then fails to submit to the examination, the court may impose monetary, issue, evidence, or terminating sanctions under *C.C.P. 2023*. (*C.C.P. 2032(f)*; on various sanctions, see *infra*, §252 et seq.)

(5) *Substitution of Other Procedures*. The physical examination of a personal injury plaintiff may be arranged and carried out under a written agreement of the parties, in lieu of the procedures and restrictions specified in *C.C.P. 2032(c)*. (*C.C.P. 2032(e)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Demand*. *C.C.P. 2032(c)(2)*, specifying when the demand may be made and what it must include, was repealed and replaced by *C.C.P. 2032.220(b)*, (c) in 2004 without substantive change.

*C.C.P. 2032(c)(4)*, on service of copies of the demand, was repealed and replaced by *C.C.P. 2032.220(e)* in 2004 without substantive change.

*C.C.P. 2032(c)(8)*, on retention of the original demand, was repealed and replaced by *C.C.P. 2032.260* in 2004 without substantive change.

(2) *Response*. *C.C.P. 2032(c)(5)*, on the contents and service of the response, was repealed and replaced by *C.C.P. 2032.230* in 2004 without substantive change.

(3) *Failure To Respond to Demand*. *C.C.P. 2023*, on sanctions authorized for discovery abuses, was repealed and replaced by *C.C.P. 2023.010* et seq. in 2004 without substantive change.

*C.C.P. 2032(c)(5)*, on requirements regarding the response, was repealed and replaced by *C.C.P. 2032.230* in 2004 without substantive change.

*C.C.P. 2032(c)(6)*, on failure to serve a timely response, was repealed and replaced by *C.C.P. 2032.240* in 2004 without substantive change. (4) *Modification or Refusal To Comply With Demand*. *C.C.P. 2023*, on sanctions authorized for discovery abuses, was repealed and replaced by *C.C.P. 2023.010* et seq. in 2004 without substantive change.

*C.C.P. 2032(c)(7)*, on the plaintiff's refusal to comply or request for modification, was repealed and replaced by *C.C.P. 2032.250* in 2004 without substantive change.

(5) *Substitution of Other Procedures*. *C.C.P. 2032(c)*, on the procedures and restrictions applicable to physical examinations, was repealed and replaced by *C.C.P. 2032.210* et seq. in 2004 without substantive change.

*C.C.P. 2032(e)*, on agreement of the parties to vary the applicable procedures, was repealed in 2004. *C.C.P. 2016.030*, added in 2004, allows the parties to modify, by written stipulation, any of the procedures applicable to any of the permissible methods of discovery. (See Supp., *supra*, §27.)



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## CHAPTER X - Discovery

## V. PHYSICAL OR MENTAL EXAMINATION

## C. Other Physical or Mental Examinations.

## 1. Agreement or Leave of Court Required.

2 *Witkin Cal. Evid. Discovery* § 145

[§ 145] Agreement or Leave of Court Required.

(1) *Leave of Court*. If a party wants to obtain discovery by a physical examination other than the type described in *C.C.P. 2032(c)* (supra, §143), or by a mental examination, the party must obtain leave of court. The motion for the examination must specify the time, place, manner, conditions, scope, and nature of the examination and the identity and any specialty of the examiner. It must be accompanied by a declaration showing a reasonable and good faith attempt to arrange an examination by agreement under *C.C.P. 2032(e)* (infra, this section). Notice of the motion must be served on the person to be examined and on all parties who have appeared in the action. (*C.C.P. 2032(d)*; see C.E.B., 2 Civil Discovery Practice 3d, §10.38 et seq.; Cal. Civil Practice, 2 Procedure, §13:185 et seq.; 1 Hogan, Cal. Civil Discovery §8.3; 8A Am.Jur. P.P. Forms (1996 ed.), Depositions and Discovery §707 et seq.)

(2) *Agreement of Parties*. A physical or mental examination may be arranged and carried out under a written agreement of the parties, in lieu of the procedures and restrictions specified in *C.C.P. 2032(d)*, supra. (*C.C.P. 2032(e)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Leave of Court*. *C.C.P. 2032(c)*, on types of physical examination for which leave is not required, was repealed and replaced by *C.C.P. 2032.210* et seq. in 2004 without substantive change.

*C.C.P. 2032(d)*, on the motion procedure where leave of the court is required, was repealed and replaced by *C.C.P. 2032.310* et seq. in 2004 without substantive change.

See 99 A.L.R.3d 268 [right to require psychiatric or mental examination for party seeking to obtain or retain child custody]; C.E.B., 2 Civil Discovery Practice 4th, §10.40 et seq.; Hogan, 1 Cal. Civil Discovery 2d, §8.3; 8A Am.Jur. P.P. Forms (2004 ed.), Depositions and Discovery, Form 552.

(2) *Agreement of Parties*. *C.C.P. 2032(e)*, on agreements of the parties to vary the applicable procedures, was repealed in 2004. *C.C.P. 2016.030*, added in 2004, allows the parties to modify, by written stipulation, any of the procedures applicable to any of the permissible methods of discovery. (See Supp., supra, §27.)



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### V. PHYSICAL OR MENTAL EXAMINATION

#### C. Other Physical or Mental Examinations.

##### 2. Required Showing.

2 Witkin Cal. Evid. Discovery § 146

#### [§ 146] Required Showing.

(1) *Showing of Good Cause.* A motion for a physical or mental examination may be granted only for good cause shown. (*C.C.P. 2032(d)*; see *Vinson v. Superior Court* (1987) 43 C.3d 833, 840, 239 C.R. 292, 740 P.2d 404, *infra*, §153 [good cause shown in sexual harassment action where plaintiff alleged that she suffered diminished self-esteem, reduced motivation, sleeplessness, loss of appetite, fear, lessened ability to help others, loss of social contacts, anxiety, mental anguish, loss of reputation, and severe emotional distress].)

(2) *Showing of Exceptional Circumstances.* A mental examination of a person who is seeking recovery for personal injuries requires a showing of exceptional circumstances, if the person seeking recovery stipulates that (a) he or she is not claiming mental and emotional distress over and above that usually associated with the physical injuries claimed and (b) no expert testimony regarding this usual mental and emotional distress will be presented at trial to support the damages claim. (*C.C.P. 2032(d)*.) "[T]his provision prevents a defendant from using a claim for the normal mental distress connected with a party's physical injury as the springboard for the wide-ranging invasion of privacy that a mental examination usually entails." (Reporter's Note to *C.C.P. 2032(d)*, in 2 Hogan, Cal. Civil Discovery, Appendix C.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Showing of Good Cause.* The portion of *C.C.P. 2032(d)* requiring a motion for a physical or mental examination to be supported by a showing of good cause was repealed and replaced by *C.C.P. 2032.320(a)* in 2004 without substantive change.

See *Sporich v. Superior Court* (2000) 77 C.A.4th 422, 428, 91 C.R.2d 752, 3 Cal. Crim. Law (3d), *Punishment, Supp.*, §198 [in proceeding under Sexually Violent Predators Act (Welf.C. 6600 et seq.; see 3 Cal. Crim. Law (3d), *Punishment*, §193 et seq.), order requiring defendant to undergo psychiatric examination was not supported by good cause, even assuming that civil discovery procedures apply to such proceedings; defendant had undergone two previous examinations, there was no showing his mental status had changed, and mere passage of time does not by itself translate into good cause for further examinations]; *Albertson v. Superior Court* (2001) 25 C.4th 796, 803, 805, 107 C.R.2d 381, 23 P.3d 611, 3 Cal. Crim. Law (3d), *Punishment, Supp.*, §195 [under Welf.C. 6603(c), enacted in response to *Sporich*, district attorney was entitled to new evaluation of alleged sexually violent predator and to obtain access to his treatment records].

(2) *Showing of Exceptional Circumstances.* The portion of *C.C.P. 2032(d)* requiring a showing of exceptional circumstances for a mental examination of a person seeking personal injury damages was repealed and replaced by

*C.C.P. 2032.320(b)* in 2004 without substantive change.

See Reporter's Note to *C.C.P. 2032(d)*, in Hogan, 2 Cal. Civil Discovery 2d, Appendix D.



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V. PHYSICAL OR MENTAL EXAMINATION

C. Other Physical or Mental Examinations.

3. Compelling Examination.

2 *Witkin Cal. Evid. Discovery* § 147

[§ 147] Compelling Examination.

If a party fails to submit to a required physical or mental examination or fails to produce another for an examination, the court "may make those orders that are just," including the imposition of an issue sanction, an evidence sanction, a terminating sanction, or a monetary sanction under *C.C.P. 2023* (infra, §252 et seq.). (*C.C.P. 2032(f)*; see *Ghanooni v. Super Shuttle* (1993) 20 *C.A.4th* 256, 261, 262, 24 *C.R.2d* 501, infra, §253 [refusal to submit to X-rays].)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2023*, on sanctions authorized for discovery abuses, was repealed and replaced by *C.C.P. 2023.010* in 2004 without substantive change.

*C.C.P. 2032(f)*, on failure to submit to a physical or mental examination, was repealed and replaced by *C.C.P. 2032.410* in 2004 without substantive change.





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## CHAPTER X - Discovery

### V. PHYSICAL OR MENTAL EXAMINATION

#### D. Conduct of Examination.

##### 1. Potential Examiners.

2 Witkin Cal. Evid. Discovery § 148

[§ 148] Potential Examiners.

(1) *Physical Examination*. Only a licensed physician or other appropriate licensed health care practitioner may perform a physical examination. (*C.C.P. 2032(b)*.)

(2) *Mental Examination*. Only a licensed physician, or a licensed clinical psychologist who holds a doctoral degree in psychology and has had at least 5 years of postgraduate experience in the diagnosis of emotional and mental disorders, may perform a mental examination. (*C.C.P. 2032(b)*.) (See 1 Hogan, Cal. Civil Discovery §8.9.)

(3) *Selection of Examiner by Party*. The defendant selects the physician or other health care practitioner who will conduct the physical examination of a personal injury plaintiff under *C.C.P. 2032(c)*, and specifies the physician's identity and specialty, if any, in the demand (see *supra*, §144). (*C.C.P. 2032(c)(2)*.) Similarly, a party who moves for a physical or mental examination under *C.C.P. 2032(d)* (*supra*, §145) specifies the identity and specialty of the person who will perform the examination in the motion, and the court does the same in its order granting the motion. (*C.C.P. 2032(d)*; see *Mercury Cas. Co. v. Superior Court* (1986) 179 C.A.3d 1027, 1033, 225 C.R. 100 [personal injury case subject to former C.C.P. 2032; "although the court may appoint any physician it chooses to conduct the examination, as a practical matter the court almost always will appoint the physician requested by the moving party"]; 1 Hogan, Cal. Civil Discovery §8.10.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Physical Examination*. The portion of *C.C.P. 2032(b)* regarding who may perform a physical examination was repealed and replaced by *C.C.P. 2032.020(b)* in 2004 without substantive change.

(2) *Mental Examination*. The portion of *C.C.P. 2032(b)* regarding who may perform a mental examination was repealed and replaced by *C.C.P. 2032.020(c)* in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §8.9.

(3) *Selection of Examiner by Party*. *C.C.P. 2032(c)*, on the physical examination of personal injury plaintiffs, was repealed and replaced by *C.C.P. 2032.210* et seq. in 2004 without substantive change. *C.C.P. 2032(c)(2)*, on specification of the physician's identity and specialty, became *C.C.P. 2032.220(c)*.

*C.C.P. 2032(d)*, on examinations other than physical examinations of personal injury plaintiffs, was repealed and replaced by *C.C.P. 2032.310* et seq. in 2004 without substantive change. The portion of *C.C.P. 2032(c)(2)* requiring

specification of the examiner's identity and specialty became *C.C.P. 2032.310(b)*.

See Hogan, 1 Cal. Civil Discovery 2d, §8.10. *West's Key Number Digest*, Pretrial Procedure k.455



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## CHAPTER X - Discovery

### V. PHYSICAL OR MENTAL EXAMINATION

#### D. Conduct of Examination.

#### 2. Time and Place of Examination.

2 Witkin Cal. Evid. Discovery § 149

[§ 149] Time and Place of Examination.

(1) *Personal Injury Plaintiff*. The physical examination of a personal injury plaintiff under *C.C.P. 2032(c)* (*supra*, §143) must be conducted within 75 miles of the plaintiff's residence. (*C.C.P. 2032(c)(2)*.) Unless the court shortens the time on motion of the demanding party, the examination may not take place until at least 30 days after service of the demand. (*C.C.P. 2032(c)(3)*.)

(2) *Other Physical and Mental Examinations*. The motion for an examination under *C.C.P. 2032(d)* must specify the time and place of the examination. If the place of examination is more than 75 miles from the residence of the examined person, the court must determine that there is good cause for the travel involved and the moving party must advance reasonable travel expenses. (*C.C.P. 2032(d)*; 1 Hogan, Cal. Civil Discovery §§8.11, 8.12.) *C.C.P. 2032(d)* does not address the timing of the court-ordered examination, but such examinations are subject to the discovery deadline set forth in *C.C.P. 2024* (*supra*, §23).

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Personal Injury Plaintiff*. *C.C.P. 2032(c)*, on the physical examination of personal injury plaintiffs, was repealed and replaced by *C.C.P. 2032.210* et seq. in 2004 without substantive change. *C.C.P. 2032(c)(2)*, requiring the examination to take place at a location within 75 miles of the examinee's residence, became *C.C.P. 2032.220(a)(2)*. *C.C.P. 2032(c)(3)*, on the scheduling of the examination, became *C.C.P. 2032.220(d)*.

(2) *Other Physical and Mental Examinations*. *C.C.P. 2024*, setting discovery time limits, was repealed and replaced by *C.C.P. 2024.010* et seq. in 2004 without substantive change.

*C.C.P. 2032(d)*, on examinations other than physical examinations of personal injury plaintiffs, was repealed and replaced by *C.C.P. 2032.310* et seq. in 2004 without substantive change. The portion of *C.C.P. 2032(d)* regarding permission to hold the examination more than 75 miles from the examinee's residence became *C.C.P. 2032.320(e)*.

See Hogan, 1 Cal. Civil Discovery 2d, §§8.11, 8.12.



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## CHAPTER X - Discovery

### V. PHYSICAL OR MENTAL EXAMINATION

#### D. Conduct of Examination.

#### 3. Who May Attend Examination.

##### a. Physical Examination.

2 *Witkin Cal. Evid. Discovery* § 150

[§ 150] Physical Examination.

(1) *Attorney or Representative.* The attorney for the examinee or for a party producing the examinee, or that attorney's representative, may attend and observe a physical examination conducted for discovery purposes. If an attorney's representative is used as the observer, the representative must be authorized to act by a writing subscribed by the attorney and identifying the representative. (*C.C.P. 2032(g)(1)* [codifying *Sharff v. Superior Court* (1955) 44 C.2d 508, 282 P.2d 896, and *Ebel v. Superior Court* (1974) 39 C.A.3d 934, 114 C.R. 722]; see *Long v. Hauser* (1975) 52 C.A.3d 490, 493, 125 C.R. 125 [*Sharff* made no mention of doctors and does not support right of personal injury plaintiff to have his or her own doctor present at physical examination by defendant's doctor]; 84 A.L.R.4th 558 [right to have attorney or physician present at examination by demand]; 7 A.L.R.3d 881 [right to have attorney or physician present at court-ordered examination]; 1 Hogan, Cal. Civil Discovery §8.14.)

(2) *Level of Participation.* The observer may monitor the examination but may not participate in or disrupt it. If the observer participates in or disrupts the examination, the examiner may suspend the examination in order to allow the party at whose instance it is being conducted to move for a protective order (*infra*, §241). (*C.C.P. 2032(g)(1)*.) (On monetary sanctions for unsuccessfully making or opposing motion for protective order, see *infra*, §252.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Attorney or Representative.* *C.C.P. 2032(g)(1)*, on who may be present at a physical examination, was repealed and replaced by *C.C.P. 2032.510* in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §8.14.

(2) *Level of Participation.* The portion of *C.C.P. 2032(g)(1)* regarding the observer's level of participation was repealed and replaced by *C.C.P. 2032.510(b), (e)* in 2004 without substantive change.



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## CHAPTER X - Discovery

### V. PHYSICAL OR MENTAL EXAMINATION

#### D. Conduct of Examination.

#### 3. Who May Attend Examination.

##### b. Mental Examination.

2 Witkin Cal. Evid. Discovery § 151

[§ 151] Mental Examination.

(1) *Cases Prohibiting Observers.* In *Durst v. Superior Court* (1963) 222 C.A.2d 447, 35 C.R. 143, the court held that a psychiatric examination should be free from the distraction of other persons present. (222 C.A.2d 452.)

The *Durst* holding was further extended in *Whitfield v. Superior Court* (1966) 246 C.A.2d 81, 54 C.R. 505. Plaintiff, suing for personal injuries sustained in a fall of a building, was under psychiatric treatment for trauma occasioned by the accident. Defendants moved for an examination by their psychiatrist. The judge granted the motion and denied plaintiff's request for presence of her attorney and a reporter. *Held*, no abuse of discretion. The fact that, unlike *Durst*, the doctor was not court-appointed, was not significant; the important factor, as *Durst* pointed out, is an atmosphere conducive to freedom of expression. And it should be assumed that the psychiatrist selected by defendants would make an examination "which is at least unbiased and objective in order that his testimony, if offered, will convince the jury of petitioner's actual mental condition." (246 C.A.2d 86.)

*Whitfield* was followed in *Edwards v. Superior Court* (1976) 16 C.3d 905, 130 C.R. 14, 549 P.2d 846.

(a) Counsel's presence is unnecessary to protect the examinee from "improper" questions. "The analyst in a psychiatric examination seeks by careful direction of areas of inquiry to probe, possibly very deeply, into the psyche, measuring stress, seeking origins, tracing aberrations, and attempting to form a professional judgment or interpretation of the examinee's mental condition. Given such techniques and purposes we do not think that an attorney, no matter how well intentioned, can fairly and objectively monitor such an examination. Psychiatry is a discipline requiring highly specialized skills. Further, while properly objecting to a question on legal grounds, counsel does not necessarily possess the ability to define the psychiatric relevance of elicited answers. Many questions which would be legally objectionable, if posed in a courtroom, might be very relevant in the formulation of a sound psychiatric judgment. Rather than encourage a procedure which would permit counsel to interject his own arguments and objections into the examination, we believe other procedural safeguards adequately protect plaintiff's legitimate interests." (16 C.3d 911.)

(b) Permitting other persons to be present at a psychiatric examination to give the examinee comfort, assurance, and emotional support creates difficult questions of limitations, because the larger the number of persons in attendance, the less the prospect of necessary rapport between the psychiatrist and the subject. "We do not suggest that trial courts lack discretion to issue protective orders where necessary to safeguard the physical or mental condition of the examinee. However, we are satisfied that to require the addition of other persons in the examining room would be distracting." (16 C.3d 911.)

(c) Counsel's presence is not required to assure accuracy in reporting the examination. "[A] trial court might reasonably conclude that if the examinee knows his statements are being recorded verbatim, he will react defensively, thereby preventing the free, open and objective communication essential to an effective psychiatric examination. Conflicts regarding the questions and answers elicited at the examination can be resolved through existing procedural methods." (16 C.3d 912.)

(d) Many procedural devices are available to protect a plaintiff. "Examinee's counsel, by way of pretrial discovery, has complete access to all of the notes and records of the examiner. The examiner may be deposed. Counsel may exhaustively test and challenge the examiner's conclusions, carefully exploring the reasons therefor, including the specific questions and answers exchanged between examiner and examinee. During the deposition counsel may have the benefit of his own psychiatric expert at his side to prompt him into every conceivable area of legitimate inquiry. At trial, counsel may by appropriate *voir dire* and motions exclude or limit statements made by his client. He may introduce contrary expert evidence. By cross-examination he may subject the examiner to a searching and probing inquiry, again with the help of counsel's professional advisor. Plaintiff neither lacks, nor should lack, procedural safeguards. However, at the sensitive point of the psychiatric examination itself, given the need for a special and private rapport between examiner and examinee, we think the purposes of the examination are best served by its conduct on a one-to-one basis." (16 C.3d 912.)

(e) Because plaintiff's own psychiatrist had months, if not years, to analyze and treat plaintiff, fundamental fairness requires a similar unrestricted professional exposure, for a brief period, to the other side. (16 C.3d 912.)

(f) The trial court had broad discretion to determine whether good cause existed for refusing to accept the examining party's choice of a psychiatrist. Plaintiff's general objections about her negative reaction to the defense psychiatrist were insufficient to disqualify him as a matter of law, and the trial court acted within its discretion in refusing to prohibit the designated psychiatrist from examining her. (16 C.3d 913.) (See 65 Cal. L. Rev. 267 [Edwards]; 17 Santa Clara L. Rev. 224 [same].)

In *Vinson v. Superior Court* (1987) 43 C.3d 833, 239 C.R. 292, 740 P.2d 404, *infra*, §153, a sexual harassment case, the court approved *Edwards*, but noted that "trial courts retain the power to permit the presence of counsel or to take other prophylactic measures when needed." (43 C.3d 846.)

(2) *Statute Retains Case Law*. Nothing in the Civil Discovery Act of 1986 alters, amends, or affects existing case law with respect to the presence of the examinee's attorney or other persons during a mental examination. The statute does, however, permit the examination to be audiotaped. (C.C.P. 2032(g)(2); see 1 Hogan, Cal. Civil Discovery §8.16; on recording, see *infra*, §154.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Cases Prohibiting Observers*. See *Golfand Entertainment Centers v. Superior Court* (2003) 108 C.A.4th 739, 748, 133 C.R.2d 828 [in personal injury action by boy who suffered brain damage from near-drowning incident, and by boy's mother, trial judge, in ordering boy to submit to mental examination, erred in permitting presence of plaintiffs' counsel; there was no evidence that counsel's presence was necessary to protect plaintiffs' rights and thus no justification for exception to standard rule barring counsel]. (2) *Statute Retains Case Law*. C.C.P. 2032(g)(2), on audiotaping of the examination, was repealed and replaced by C.C.P. 2032.530 in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §8.16. *West's Key Number Digest*, Pretrial Procedure k.453



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## CHAPTER X - Discovery

### V. PHYSICAL OR MENTAL EXAMINATION

#### D. Conduct of Examination.

##### 4. Scope of Examination.

##### a. In General.

2 Witkin Cal. Evid. Discovery § 152

[§ 152] In General.

(1) *Examination of Personal Injury Plaintiff.* The physical examination of a personal injury plaintiff under *C.C.P. 2032(c)* cannot include any diagnostic test or procedure that is painful, protracted, or intrusive (see *supra*, §143). With that limitation, the defendant's demand for an examination specifies the manner, conditions, scope, and nature of the examination. (*C.C.P. 2032(c)(2)*.)

(2) *Other Physical or Mental Examinations.* The court's order under *C.C.P. 2032(d)* must specify the manner, diagnostic tests and procedures, conditions, scope, and nature of the examination. (*C.C.P. 2032(d)*.)

(3) *Suspension of Examination.* The observer of a physical examination conducted under *C.C.P. 2032* may suspend the examination if, in the observer's judgment, the examiner becomes abusive to the examinee or undertakes to engage in unauthorized diagnostic tests and procedures. The party being examined or producing the examinee may then move for a protective order (see *infra*, §241). (*C.C.P. 2032(g)(1)*.) (On monetary sanctions for unsuccessfully making or opposing motion for protective order, see *infra*, §252.)

(4) *Prohibition Against Additional X-rays.* If the person being examined submits or authorizes access to X-rays of an area of the body for the examiner's inspection, the examiner may not take additional X-rays of that area without consent or a court order for good cause. (*C.C.P. 2032(g)(1)*.) (See 8A Am.Jur. P.P. Forms (1996 ed.), Depositions and Discovery §731 et seq.)

(5) *Number of Mental Examinations.* Despite references to "a" mental examination, *C.C.P. 2032* places no limit on the number of examinations that may, on a showing of good cause, be ordered. (*Shapira v. Superior Court* (1990) 224 C.A.3d 1249, 1254, 274 C.R. 516 [limiting defendant to one examination of plaintiff was error, where neurologist and neuropsychologist testified that additional psychiatric examination was needed].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Examination of Personal Injury Plaintiff.* *C.C.P. 2032(c)*, on the physical examination of personal injury plaintiffs, was repealed and replaced by *C.C.P. 2032.210* et seq. in 2004 without substantive change. *C.C.P. 2032(c)(2)*, requiring specification of the time, place, manner, conditions, scope, and nature of the examination, became *C.C.P. 2032.220(c)*.

(2) *Other Physical or Mental Examinations.* *C.C.P. 2032(d)*, requiring specification of the time, place, manner, conditions, scope, and nature of an examination other than a physical examination of a personal injury plaintiff, was

repealed and replaced by *C.C.P. 2032.320(d)* in 2004 without substantive change.

See *Golfland Entertainment Centers v. Superior Court* (2003) 108 C.A.4th 739, 745, 133 C.R.2d 828 [in personal injury action arising from incident in which boy nearly drowned and suffered brain damage, trial judge, in ordering boy to submit to mental examination, erred in prohibiting doctor from eliciting narrative responses; although judge wished to avoid compelling boy to give repetitive responses to questions that had already been asked, order would preclude questions that were necessary to formation of opinion about boy's condition]; *Carpenter v. Superior Court* (2006) 141 C.A.4th 249, 259, 271, 45 C.R.3d 821 [in personal injury action alleging brain damage, trial judge's order requiring plaintiff to submit to "standardized written psychological tests" violated requirement of *C.C.P. 2032.320(d)* that order specify diagnostic tests and procedures to be used; trial judge further erred in ruling that it would violate copyright laws to allow plaintiff to obtain copy of testing materials and his written answers].

(3) *Suspension of Examination*. The portion of *C.C.P. 2032(g)(1)* providing for suspension of the examination was repealed and replaced by *C.C.P. 2032.510(d)* in 2004 without substantive change.

(4) *Prohibition Against Additional X-rays*. The portion of *C.C.P. 2032(g)(1)* prohibiting additional X-rays without consent of the examinee or a court order was repealed and replaced by *C.C.P. 2032.520* in 2004 without substantive change.

(5) *Number of Mental Examinations*. *C.C.P. 2032*, authorizing mental and physical examinations, was repealed and replaced by *C.C.P. 2032.010* et seq. in 2004 without substantive change.





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## CHAPTER X - Discovery

## V. PHYSICAL OR MENTAL EXAMINATION

## D. Conduct of Examination.

## 4. Scope of Examination.

## b. Privacy Limitations.

2 Witkin Cal. Evid. Discovery § 153

## [§ 153] Privacy Limitations.

In *Vinson v. Superior Court* (1987) 43 C.3d 833, 239 C.R. 292, 740 P.2d 404, plaintiff, a 59-year-old widow, sued defendant district and G, its employment director, for sexual harassment and intentional infliction of emotional distress. The complaint alleged that G had suggested sexual relations as a condition of favorable consideration of her employment application; that she refused G's advances; that she was later hired by another department of the district's program; and that, upon learning of her employment, G had her transferred and then terminated. Defendants moved for an order compelling a psychiatric examination to test the true extent of her injuries and to measure her ability to function in the workplace. Plaintiff opposed the motion as a violation of her right of privacy and, in the alternative, requested a protective order prohibiting any probing by the examiner into her sexual history and allowing her attorney to attend the examination to assure compliance with the order. The trial court granted defendant's motion without conditions, and the Court of Appeal denied plaintiff's petition for a writ. *Held*, reversed.

(a) Plaintiff urged that, if an examination is ordered, probing into her sexual history, habits or practices would intrude upon her constitutional right of privacy, and would tend to contravene the state's strong interest in eradicating sexual harassment by means of private suits for damages. Defendants answered that plaintiff waived her right to privacy for purposes of the present suit because she claimed emotional and mental damages. But the mere initiation of a sexual harassment suit, even with the extreme emotional damage alleged here, does not constitute a waiver of all privacy interests. As pointed out in *Britt v. Superior Court* (1978) 20 C.3d 844, 143 C.R. 695, 574 P.2d 766, *supra*, §113, an implicit waiver of a party's constitutional rights encompasses only discovery directly relevant to the plaintiff's claim and essential to the fair resolution of the lawsuit. (43 C.3d 842.)

(b) "Plaintiff's present mental and emotional condition is directly relevant to her claim and essential to a fair resolution of her suit; she has waived her right to privacy in this respect by alleging continuing mental ailments. But she has not, merely by initiating this suit for sexual harassment and emotional distress, impliedly waived her right to privacy in respect to her sexual history and practices. Defendants fail to explain why probing into this area is directly relevant to her claim and essential to its fair resolution. Plaintiff does not contend the alleged acts were detrimental to her present sexuality. Her sexual history is even less relevant to her claim. We conclude that she has not waived her right to sexual privacy." (43 C.3d 842.)

(c) Former C.C.P. 2036.1, substantially the same as C.C.P. 2017(d) (see *supra*, §13), required a showing of good cause which called for a balancing of interests; and the Legislature in enacting the measure pointed to the danger of discouraging complaints by subjecting the complainants to the risk of further intrusions into their personal lives in

discovery or at trial. (43 C.3d 843.) Defendants here have not established specific facts justifying inquiry into plaintiff's zone of sexual privacy; they have merely made sweeping assertions regarding the need for wide latitude in the examination, and these are not sufficient to establish good cause. (43 C.3d 843.)

"We anticipate that in the majority of sexual harassment suits, a separate weighing of privacy against discovery will not be necessary. It should normally suffice for the court, in ruling on whether good cause exists for probing into the intimate life of a victim of sexual harassment, sexual battery, or sexual assault, to evaluate the showing of good cause in light of legislative purpose in enacting [former C.C.P. 2036.1, now C.C.P. 2017(d)] and the plaintiff's constitutional right to privacy." (43 C.3d 844.)

**SUPPLEMENT:** [This section is current through the latest supplement]

C.C.P. 2017(d), on the discovery of plaintiff's sexual history, was repealed and replaced by C.C.P. 2017.220 in 2004 without substantive change.



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## CHAPTER X - Discovery

### V. PHYSICAL OR MENTAL EXAMINATION

#### D. Conduct of Examination.

##### 5. Recording.

2 Witkin Cal. Evid. Discovery § 154

[§ 154] Recording.

(1) *Physical Examinations*. The attorney or representative who attends and observes a physical examination may record stenographically or by audiotape any words spoken to or by the examinee during the examination. (*C.C.P.* 2032(g)(1); see *Ramirez v. MacAdam* (1993) 13 C.A.4th 1638, 1641, 16 C.R.2d 911 [videotaping of examinations is not authorized]; *C.E.B.*, 2 Civil Discovery Practice, §10.17; 1 Hogan, Cal. Civil Discovery §8.15.)

(2) *Mental Examinations*. Either the examiner or the examinee may insist that a mental examination be recorded on audiotape. (*C.C.P.* 2032(g)(2); *C.E.B.*, 2 Civil Discovery Practice, §10.20; 1 Hogan, Cal. Civil Discovery §8.17; on permissibility of observers at mental examination, see *supra*, §151.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Physical Examinations*. *C.C.P.* 2032(g)(1), on the recording of words spoken at a physical examination, was repealed and replaced by *C.C.P.* 2032.510(a) in 2004 without substantive change.

See *C.E.B.*, 2 Civil Discovery Practice 4th, §10.26; Hogan, 1 Cal. Civil Discovery 2d, §8.15.

(2) *Mental Examinations*. *C.C.P.* 2032(g)(2), on the recording of mental examinations, was repealed and replaced by *C.C.P.* 2032.530 in 2004 without substantive change.

See *Golfland Entertainment Centers v. Superior Court* (2003) 108 C.A.4th 739, 750, 133 C.R.2d 828 [in personal injury action arising from incident in which boy nearly drowned and suffered brain damage, trial judge erred in ordering that court reporter be present at boy's mental examination and that only boy's responses be recorded; *C.C.P.* 2032(g)(2) (now *C.C.P.* 2032.530) creates right to have entire examination recorded on audiotape and suggests legislative intent that reporters not be present]; *C.E.B.*, 2 Civil Discovery Practice 4th, §10.29; Hogan, 1 Cal. Civil Discovery 2d, §8.17.



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## CHAPTER X - Discovery

### V. PHYSICAL OR MENTAL EXAMINATION

#### E. Reports of Examination.

##### 1. In General.

2 Witkin Cal. Evid. Discovery § 155

[§ 155] In General.

(1) *Reports of Examining Party.* A party who submits to an examination or produces another for examination may demand in writing (a) "a detailed written report setting out the history, examinations, findings, including the results of all tests made, diagnoses, prognoses, and conclusions of the examiner," and (b) reports of earlier examinations of the same condition of the same person being examined by that or another examiner. The reports must be delivered within the earlier of (a) 15 days of trial, or (b) 30 days after service of the demand. (*C.C.P. 2032(h)*; see *Kennedy v. Superior Court* (1998) 64 C.A.4th 674, 678, 75 C.R.2d 373 [examined party is entitled, on request, to detailed report containing specified information, even if examining physician did not prepare one]; Cal. Civil Practice, 2 Procedure, §13:191; 1 Hogan, Cal. Civil Discovery §8.18.)

(2) *Reports of Examined Party and Identity of Examiners.* The party receiving a demand for reports is entitled to receive in exchange "any existing written report of any examination of the same condition by any other physician, psychologist, or licensed health care practitioner." The party is also entitled to "receive promptly any later report of any previous or subsequent examination of the same condition, by any physician, psychologist, or licensed health care practitioner." (*C.C.P. 2032(j)*; see 1 Hogan, Cal. Civil Discovery §8.19.)

(3) *Failure To Comply.* If the reports of the examining party are not timely delivered, the demanding party may move to compel delivery. The motion must be accompanied by a declaration showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion. (*C.C.P. 2032(h)*; on monetary sanctions for failure to attempt informal resolution, see *infra*, §252.) Similar provisions apply where the examined party fails to supply reports. (*C.C.P. 2032(j)*; see 1 Hogan, Cal. Civil Discovery §§8.18, 8.20.)

The court must impose a monetary sanction under *C.C.P. 2032* (*infra*, §252) against a party, person, or attorney who unsuccessfully makes or opposes a motion to compel delivery of medical reports. However, the sanctions may be avoided if the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make imposing the sanction unjust. (*C.C.P. 2032(h), (j)*.)

Monetary or more severe sanctions may be imposed for failure to comply with an order to deliver demanded medical reports under *C.C.P. 2032(h)* or to deliver additional medical reports under *C.C.P. 2032(j)*. The court must exclude at trial the testimony of (a) an examiner who fails to submit an examination report after having been ordered to do so under *C.C.P. 2032(h)*, and (b) a health care practitioner whose report has not been provided as required by *C.C.P. 2032(j)*. (*C.C.P. 2032(h), (j)*.)

(4) *No Disclosure of Certification Expert*. Nothing in *C.C.P. 2032* requires the disclosure of the identity of an expert consulted by an attorney in order to make the certification required in an action for professional negligence under *C.C.P. 411.30* and *411.35* (3 *Cal. Proc. (4th), Actions, §204*). (*C.C.P. 2032(k)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Reports of Examining Party*. *C.C.P. 2032(h)*, on the examined party's demand for reports, was repealed and replaced by *C.C.P. 2032.610* in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §8.18.(2) *Reports of Examined Party and Identity of Examiners*. *C.C.P. 2032(j)*, on the right of a party receiving a demand for reports to receive reports from the demanding party in exchange, was repealed and replaced by *C.C.P. 2032.640* in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §8.19.

(3) *Failure To Comply*. *C.C.P. 2023*, on sanctions authorized for discovery abuses, was repealed and replaced by *C.C.P. 2023.010* et seq. in 2004 without substantive change.

Those portions of *C.C.P. 2032(h)*, (j) authorizing sanctions in connection with demands for reports were repealed and replaced by *C.C.P. 2032.620* and *2032.650* in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §§8.18, 8.20.

(4) *No Disclosure of Certification Expert*. *C.C.P. 2032(k)*, on identity of the expert consulted by an attorney for purposes of the certification required in an action for professional negligence against an architect, engineer, or land surveyor, was repealed and replaced by *C.C.P. 2032.010(b)* in 2004 without substantive change.



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## CHAPTER X - Discovery

### V. PHYSICAL OR MENTAL EXAMINATION

#### E. Reports of Examination.

##### 2. Waiver of Privileges.

2 *Witkin Cal. Evid. Discovery* § 156

[§ 156] Waiver of Privileges.

By demanding and obtaining the report of an examination under *C.C.P. 2032(h)* (*supra*, §155), or by taking the deposition of the examiner, other than under *C.C.P. 2034(i)* (*infra*, §188), the examinee or the party who produces the examinee waives the examinee's privilege, if any, "regarding reports and writings, as well as the testimony of every other physician, psychologist, or licensed health care practitioner who has examined or may thereafter examine the party or other examinee in respect of the same physical or mental condition." The waiver applies to the pending action and to another action involving the same controversy. The waiver also applies to any protection afforded by the work product doctrine. (*C.C.P. 2032(i)*; see *Queen of Angels Hosp. v. Superior Court* (1976) 57 C.A.3d 370, 374, 375, 129 C.R. 282 [plaintiff, who had received examination report of defendant's physician and had deposed him, waived work product privilege with regard to report of plaintiff's consulting expert]; *Kennedy v. Superior Court* (1998) 64 C.A.4th 674, 678, 679, 75 C.R.2d 373 [examining physician may be deposed even if physician has been withdrawn as expert and redesignated "consultant"; ordinarily party may "hide" expert from deposition by this means, but when expert is also examining physician under *C.C.P. 2032*, specific terms of that statute, including waiver of work product protections, control]; 1 Hogan, Cal. Civil Discovery §8.19.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2032(h)*, on demands for examination records, was repealed and replaced by *C.C.P. 2032.610* in 2004 without substantive change.

*C.C.P. 2032(i)*, on the waiver of privileges effected by a demand for examination records, was repealed and replaced by *C.C.P. 2032.630* in 2004 without substantive change.

*C.C.P. 2034(i)*, on the deposition of expert witnesses, was repealed and replaced by *C.C.P. 2034.410* et seq. in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §8.19.



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## CHAPTER X - Discovery

## VI. REQUESTS FOR ADMISSION

## A. Statutory Authority.

2 *Witkin Cal. Evid. Discovery* § 157

[§ 157] Statutory Authority.

(1) *General Rule.* A party may obtain discovery by a written request that another party admit the genuineness of specified documents or the truth of specified matters of fact, opinion relating to fact, or application of law to fact. (*C.C.P. 2033(a)*.) (See *C.E.B.*, 2 Civil Discovery Practice 3d, Chap. 9; 1 Hogan, *Cal. Civil Discovery*, Chap. 9; *BAJI* (8th ed.), No. 2.08; *C.J.E.R.*, Judges Benchbook, Civil Proceedings: Discovery, Chap. 14; *Overly on Electronic Evidence in California* §3:09; *Cal. Civil Practice*, 2 Procedure, §13:110 et seq.; 23 *Am.Jur.2d* (1983 ed.), *Depositions and Discovery* §314 et seq.; 8A *Am.Jur. P.P. Forms* (1996 ed.), *Depositions and Discovery* §791 et seq.; 4 *Am.Jur. Trials* 185 [plaintiff's requests], 215 [defendant's requests]; on permissible scope of requests under modern state rules, see 42 *A.L.R.4th* 489.)

*C.C.P. 2033(a)* expressly authorizes a request for admission "embracing a matter that is clearly in controversy between the litigants. A request of this type is usually made with little or no expectation that an admission will be made; rather its purpose is to set the stage for the cost-of-proof sanction that is a unique feature of this discovery tool" (see *C.C.P. 2033(o)*, *infra*, §172). (Reporter's Note to *C.C.P. 2033(a)*, in 2 Hogan, *Cal. Civil Discovery*, Appendix C.)

(2) *Consideration as "Discovery Device."* Before the Civil Discovery Act of 1986, numerous courts were reluctant to label a request for admissions as a discovery device. (See *Fredericks v. Kontos Industries* (1987) 189 *C.A.3d* 272, 276, 234 *C.R.* 395, quoting earlier version of this text ["Although the request for admissions is placed in the discovery statute, it is *not a discovery device*. Its objective is the same as that of the pretrial conference: To obtain admissions of uncontroverted facts learned through other discovery methods, and thereby to narrow the issues and save the time and expense of preparing for unnecessary proof"]; see also *Lieb v. Superior Court* (1962) 199 *C.A.2d* 364, 367, 18 *C.R.* 705 [distinguished from interrogatories]; *Hillman v. Stults* (1968) 263 *C.A.2d* 848, 885, 70 *C.R.* 295 ["the admission sections ... were enacted to eliminate the necessity of putting on formal proof of essentially uncontroverted facts"]; *Able v. Van Der Zee* (1967) 256 *C.A.2d* 728, 64 *C.R.* 481 [demurrer held properly sustained because of inconsistencies between allegations in complaint and admitted facts]; *International Harvester Co. v. Superior Court* (1969) 273 *C.A.2d* 652, 655, 78 *C.R.* 515 [not a discovery device]; on pretrial conference, see 7 *Cal. Proc.* (4th), *Trial*, §52.)

The 1986 Act, however, refers to requests for admissions as a way to "obtain discovery" (see *C.C.P. 2033(a)*, *supra*) and lists them among the discovery methods (see *C.C.P. 2019(a)(5)*, *supra*, §2). This new classification does not, however, "work any change in the fundamental nature of the admission device." (1 Hogan, *Cal. Civil Discovery* §9.1.)

(3) *Nonrequesting Party's Reliance on Admissions.* Admissions may be relied on by all parties to the action. (See *Swedburg v. Christiana Community Builders* (1985) 175 *C.A.3d* 138, 143, 220 *C.R.* 544 [defendant entitled to rely on deemed admissions (see *infra*, §174) that resulted from codefendant's requests to plaintiff].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *General Rule. C.C.P. 2033(a)*, authorizing requests for admissions, was repealed and replaced by *C.C.P. 2033.010* in 2004 without substantive change.

*C.C.P. 2033(o)*, on the failure to admit the genuineness of a document or truth of any matter, was repealed and replaced by *C.C.P. 2033.420* in 2004 without substantive change.

See CACI, No. 210 [effect of answers to requests for admissions]; C.E.B., 2 Civil Discovery Practice 4th, Chap. 9; Hogan, 1 Cal. Civil Discovery 2d, Chap. 9; Reporter's Note to *C.C.P. 2033(a)*, in Hogan, 2 Cal. Civil Discovery 2d, Appendix D; 8A Am.Jur. P.P. Forms (2004 ed.), Depositions and Discovery, Form 595.(2) *Consideration as "Discovery Device."* See *Burch v. Gombos* (2000) 82 C.A.4th 352, 358, 359, 98 C.R.2d 119, citing the text.

*C.C.P. 2019(a)(5)*, authorizing requests for admissions, was repealed and replaced by *C.C.P. 2019.010(e)* in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §9.1. *West's Key Number Digest*, Pretrial Procedure k.471 et seq.





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### VI. REQUESTS FOR ADMISSION

#### B. Making Requests.

#### 1. Restrictions on Number of Requests.

2 Witkin Cal. Evid. Discovery § 158

[§ 158] Restrictions on Number of Requests.

(1) *Limited to 35*. As a general rule, a party has no right to request more than 35 admissions. If the initial set of admission requests does not exhaust the limit, the balance may be requested in subsequent sets. (*C.C.P. 2033(c)(1)*; see 1 Hogan, Cal. Civil Discovery §9.4.)

(2) *Exceptions*. The 35 requests limitation is subject to the following exceptions:

(a) *Genuineness of documents*: The number of requests for admission of the genuineness of documents is not limited "except as justice requires to protect the responding party from unwarranted annoyance, embarrassment, oppression, or undue burden and expense." (*C.C.P. 2033(c)(1)*.)

(b) *Declaration for additional discovery*: Subject to the right of the responding party to seek a protective order (*infra*, §170), the number of requests may be increased if warranted by the complexity or quantity of the issues. If the responding party seeks a protective order on the ground that the number of requests for admission is unwarranted, the propounding party has the burden of justifying the number of requests. (*C.C.P. 2033(c)(2)*.) A declaration for additional discovery in substantially the form set forth in *C.C.P. 2033(c)(3)* must be attached to each set of requests exceeding the limit. (*C.C.P. 2033(c)(3)*; see Cal. Civil Practice, 2 Procedure, §13:130.) Unless a declaration has been made, a party need only respond to the first 35 admission requests served that do not relate to the genuineness of documents, if that party states an objection to the balance under *C.C.P. 2033(f)(2)* on the ground that the limit has been exceeded. (*C.C.P. 2033(c)(1)*; on objections, see *infra*, §169.)

(3) *Purpose of Limit*. The Commission concluded that the making of voluminous requests for admission had become so widespread as to constitute a discovery abuse in many cases. By imposing the presumptive limit on the number of requests, the Commission sought to "encourage attorneys to be more thoughtful, restrained, and focused in their employment of this discovery device." (Reporter's Note to *C.C.P. 2033(c)(1)*, in 2 Hogan, Cal. Civil Discovery, Appendix C.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Limited to 35*. *C.C.P. 2033(c)(1)*, on the number of requests permitted, was repealed and replaced by *C.C.P. 2033.030* in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §9.4.(2) *Exceptions*.

(a) *Genuineness of documents*: The portion of *C.C.P. 2033(c)(1)* relating to the exception applicable to requests for admission of the genuineness of documents was repealed and replaced by *C.C.P. 2033.030(c)* in 2004 without substantive change.

(b) *Declaration for additional discovery*: *C.C.P. 2033(c)(2)*, providing for a declaration for additional discovery, was repealed and replaced by *C.C.P. 2033.040(a)* in 2004 without substantive change.

*C.C.P. 2033(c)(3)*, setting forth the form of a declaration for additional discovery, was repealed and replaced by *C.C.P. 2033.050* in 2004 without substantive change.

*C.C.P. 2033(f)(2)*, on objections to requested admissions, was repealed and replaced by *C.C.P. 2033.230* in 2004 without substantive change.

*C.C.P. 2033(c)(1)*, providing that a party need only respond to the first 35 admission requests that do not relate to the genuineness of documents, was repealed and replaced by *C.C.P. 2033.030(b)* in 2004 without substantive change.

(3) *Purpose of Limit*. See Reporter's Note to *C.C.P. 2033(c)(1)*, in Hogan, 2 Cal. Civil Discovery 2d, Appendix D.



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## B. Making Requests.

## 2. Timing.

2 *Witkin Cal. Evid. Discovery* § 159

[§ 159] Timing.

A defendant may make requests without leave of court at any time. A plaintiff may make requests without leave of court at any time that is 10 days (5 days in unlawful detainer actions) after service of the summons on the responding party or the appearance of that party, whichever occurs first. On motion for good cause, the court may allow a plaintiff to make requests at an earlier time. (*C.C.P. 2033(b)*.) The responding party usually has 30 days to respond. (See *C.C.P. 2033(h)*, *infra*, §165.) Thus, because discovery must be completed at least 30 days before the initial trial date (see *C.C.P. 2024(a)*, *supra*, §23), the request should be served at least 60 days before the initial trial date, earlier if served by mail, and even earlier to allow time for a subsequent motion to compel (see *infra*, §177), if necessary. (For discussion of tactical considerations for timing of service, see *C.E.B., Civil Discovery Practice* 3d, §9.31.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2024(a)*, setting the deadline for completion of discovery, was repealed and replaced by *C.C.P. 2024.020* in 2004 without substantive change.

The portion of *C.C.P. 2033(b)* allowing a request to be made by a defendant without leave of court at any time was repealed and replaced by *C.C.P. 2033.020(a)* in 2004 without substantive change. Under *C.C.P. 2033.020(b)*, as amended in 2007, a plaintiff may make requests for admission by a party without leave of court at any time that is 10 days after service of summons on, or appearance by, that party, whichever occurs first. *C.C.P. 2033.020(c)*, added in 2007, provides that, in an unlawful detainer action or other proceeding under *C.C.P. 1159 et seq.* (see 12 *Summary* (10th), *Real Property*, §757), a plaintiff may make requests for admission by a party without leave of court at any time that is 5 days after service of the summons on, or appearance by, that party, whichever occurs first.

*C.C.P. 2033(h)*, on the time for response, was repealed and replaced by *C.C.P. 2033.250* in 2004 without substantive change.

See *C.E.B., 2 Civil Discovery Practice* 4th, §9.12.



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### VI. REQUESTS FOR ADMISSION

#### B. Making Requests.

#### 3. Form and Content.

2 *Witkin Cal. Evid. Discovery* § 160

[§ 160] Form and Content.

(1) *Requirements.* Each set of requests must be consecutively numbered and the first paragraph must identify the set number and the requesting and responding parties. (*C.C.P. 2033(c)(4)*.) Each request in the set must be separately set forth and identified by letter or number (*C.C.P. 2033(c)(4)*), and must be "full and complete in and of itself" (*C.C.P. 2033(c)(5)*). Unless approved by the Judicial Council (infra, this section), a set of requests may not include a preface or instruction and a separate request may not contain subparts or a compound, conjunctive, or disjunctive request. (*C.C.P. 2033(c)(5)*.) A specially defined term must appear in all capital letters. (*C.C.P. 2033(c)(5)*.)

A request for admissions may not be combined with another discovery method in a single document. (*C.C.P. 2033(c)(7)*.) If a party requests the admission of the genuineness of a document, a copy of the document must be attached and the original must be made available for inspection by the responding party. (*C.C.P. 2033(c)(6)*); see 1 Hogan, Cal. Civil Discovery §9.3; for form, see Cal. Civil Practice, 2 Procedure, §13:129.)

(2) *Judicial Council Form.* In accordance with *C.C.P. 2033.5* (see supra, §91), the Judicial Council has approved an official request for admission form for use in civil actions based on personal injury, property damage, wrongful death, unlawful detainer, breach of contract, fraud, or family law. (See Judicial Council Form No. FI-100.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Requirements.* *C.C.P. 2033(c)(4)*, on the numbering and identification of requests, was repealed and replaced by *C.C.P. 2033.060(a)-(c)* in 2004 without substantive change.

*C.C.P. 2033(c)(5)*, on the format of requests, was repealed and replaced by *C.C.P. 2033.060(d)-(f)* in 2004 without substantive change.

*C.C.P. 2033(c)(7)*, prohibiting the combination of discovery methods, was repealed and replaced by *C.C.P. 2033.060(h)* in 2004 without substantive change.

*C.C.P. 2033(c)(6)*, requiring the attachment of the relevant document, was repealed and replaced by *C.C.P. 2033.060(g)* in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §9.3.

(2) *Judicial Council Form.* *C.C.P. 2033.5*, on Judicial Council form interrogatories and requests for admissions,

was repealed and replaced by *C.C.P. 2033.710* et seq. in 2004 without substantive change.

Judicial Council Form No. FI-100 was renumbered Judicial Council Form No. DISC-020 in 2006.



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B. Making Requests.

4. Service and Retention.

2 *Witkin Cal. Evid. Discovery* § 161

[§ 161] Service and Retention.

(1) *Service of Copies*. Copies of the request are served on the responding party and on all parties who have appeared in the action. (*C.C.P. 2033(d)*.)

(2) *Preservation of Original*. The request is not filed with the court. The requesting party retains the original request, with proof of service affixed, for 6 months after final disposition of the action. The original may then be destroyed unless the court, on motion of any party for good cause, orders preservation for a longer period. (*C.C.P. 2033(j)*.) (See 1 Hogan, Cal. Civil Discovery §9.3.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Service of Copies*. *C.C.P. 2033(d)*, on service of copies of the request, was repealed and replaced by *C.C.P. 2033.070* in 2004 without substantive change.

(2) *Preservation of Original*. *C.C.P. 2033(j)*, on retention of the original request, along with proof of service, was repealed and replaced by *C.C.P. 2033.270* in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §9.3.



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### VI. REQUESTS FOR ADMISSION

#### B. Making Requests.

#### 5. No Warning Requirement.

2 Witkin Cal. Evid. Discovery § 162

[§ 162] No Warning Requirement.

(1) *Former Law.* Former C.C.P. 2033(a) required a warning to be placed at the end of a request for admissions advising the responding party that failure to comply with C.C.P. 2033 would cause "each of the matters of which an admission is requested" to be deemed admitted. The placement of this admonition was the subject of a number of decisions. (See *Billings v. Edwards* (1981) 120 C.A.3d 238, 246, 174 C.R. 722; *Hernandez v. Temple* (1983) 142 C.A.3d 286, 290, 190 C.R. 853; *Hansen v. Superior Court* (1983) 149 C.A.3d 823, 829, 197 C.R. 175; *Barnett v. American-Calif. Med. Services* (1984) 156 C.A.3d 260, 264, 202 C.R. 735; *Lopez v. Superior Court* (1986) 178 C.A.3d 925, 929, 223 C.R. 798; *Steele v. Totah* (1986) 180 C.A.3d 545, 551, 552, 225 C.R. 635; *Thomas v. Makita, U.S.A.* (1986) 181 C.A.3d 989, 993, 994, 995, 226 C.R. 413; *Midwest Television v. Scott, Lancaster, Mills & Atha* (1988) 205 C.A.3d 442, 454, 252 C.R. 573.)

(2) *Present Law.* No comparable provision regarding warnings was included in the 1986 Act. All requests for admission must now be answered (C.C.P. 2033(f), *infra*, §163) and "deemed admissions" now require a court order (C.C.P. 2033(k), *infra*, §174).

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Present Law.* C.C.P. 2033(f), requiring that all requests for admissions be answered, was repealed and replaced by C.C.P. 2033.210 in 2004 without substantive change.

C.C.P. 2033(k), requiring a court order for "deemed admissions," was repealed and replaced by C.C.P. 2033.280 in 2004 without substantive change.



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### VI. REQUESTS FOR ADMISSION

#### C. Responses.

##### 1. In General.

##### a. Content.

2 *Witkin Cal. Evid. Discovery* § 163

[§ 163] Content.

(1) *Options*. The responding party must respond separately to each request in writing, by answering the substance of the request (see *infra*, §167) or setting forth an objection (see *infra*, §169). (*C.C.P.* 2033(f).) The responding party also has the option of seeking a protective order. (See *infra*, §170.)

(2) *Form of Response*. The identity of the responding and requesting parties and the set number must appear in the first paragraph of the response, immediately below the title of the case. Each answer or objection in the response must bear the same identifying number or letter and be in the same sequence as the corresponding request, but the text of the request need not be repeated. (*C.C.P.* 2033(f); see 1 Hogan, *Cal. Civil Discovery* §9.9; *Cal. Civil Practice*, 2 Procedure, §13:132; 8A *Am.Jur. P.P. Forms* (1996 ed.), *Depositions and Discovery* §801 et seq.; on similar format of further responses to admission requests, see *C.R.C.*, Rule 331; for permissibility of amended responses, see *infra*, §168.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Options*. The portion of *C.C.P.* 2033(f) requiring a response to each request for admissions was repealed and replaced by *C.C.P.* 2033.210 in 2004 without substantive change.

(2) *Form of Response*. The portion of *C.C.P.* 2033(f) governing the form of the response was repealed and replaced by *C.C.P.* 2033.210(c), (d) in 2004 without substantive change.

*C.R.C.*, Rule 331 was renumbered *C.R.C.*, Rule 3.1000 in 2006.

See Hogan, 1 *Cal. Civil Discovery* 2d, §9.9; 8A *Am.Jur. P.P. Forms* (2004 ed.), *Depositions and Discovery*, Form 604. *West's Key Number Digest*, *Pretrial Procedure* k.477 et seq.





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#### C. Responses.

##### 1. In General.

##### b. Signature and Oath.

2 Witkin Cal. Evid. Discovery § 164

[§ 164] Signature and Oath.

The response must be signed under oath, unless it contains only objections. The attorney for the responding party must sign any response that contains an objection. If an officer or agent signing on behalf of a corporation, partnership, association, or government agency is an attorney acting in that capacity for the party, "that party waives any lawyer-client privilege and any protection for work product ... during any subsequent discovery from that attorney concerning the identity of the sources of the information contained in the response." (*C.C.P.* 2033(g).) (See *Brigante v. Huang* (1993) 20 C.A.4th 1569, 1583, 25 C.R.2d 354, *infra*, §175 [in personal injury action in which defendant could not be located, trial judge had discretion to fashion remedy other than granting plaintiff's motion to have requests deemed admitted, despite lack of defendant's verification of responses made by counsel provided by her insurer]; *Allen-Pac., Ltd. v. Superior Court* (1997) 57 C.A.4th 1546, 1556, 67 C.R.2d 804, *infra*, §175 [distinguishing *Brigante*; where defendant submitted unverified response and neither filed proper response before hearing on motion to deem matters admitted nor sought protective order, judge had no discretion to deny motion]; but see *Wilcox v. Birtwhistle* (1999) 21 C.4th 973, 977, 983, footnote 12, 90 C.R.2d 260, 987 P.2d 727, *infra*, §176 [judge had discretion to allow amendment or withdrawal of deemed admissions ordered after plaintiff's failure to file *verified* responses; disapproving *Brigante* and *Allen-Pac., Ltd.* to extent they conflict with decision in *Wilcox*].)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P.* 2033(g), on the required signature and oath, was repealed and replaced by *C.C.P.* 2033.240 in 2004 without substantive change.



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### VI. REQUESTS FOR ADMISSION

#### C. Responses.

##### 1. In General.

##### c. Timing.

2 Witkin Cal. Evid. Discovery § 165

[§ 165] Timing.

(1) *Time To Respond*. Unless the court, on motion, extends or shortens the time for response, a response is required within 30 days, or within 5 days in unlawful detainer actions, after the request is served. In unlawful detainer actions, the responding party has at least 5 days from the date of service to respond, unless on motion of the requesting party the court has shortened the time. (*C.C.P. 2033(h)*); on extension of time for service by mail, see *C.C.P. 2019(e)*; on time to respond under former statute, see *Gribin Von Dyl & Associates v. Kovalsky (1986) 185 C.A.3d 653, 658, 230 C.R. 50.*)

(2) *Agreement To Extend Time*. The parties may agree to extend the time for responding to part or all of a set of admission requests. The agreement must be confirmed in a writing that specifies the extended date. Unless it expressly provides otherwise, the agreement allows the responding party to respond by answer or objection. The responding party must give notice of the agreement to all other parties who were served with a copy of the request. (*C.C.P. 2033(i)*.) A letter from the responding party to the demanding party, with copies to other parties who have appeared, is a sufficient written confirmation. (Reporter's Note to *C.C.P. 2033(i)*, in 2 Hogan, Cal. Civil Discovery, Appendix C.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Time To Respond*. *C.C.P. 2019(e)*, on extension of time where service is by mail, was repealed and replaced by *C.C.P. 2016.050* in 2004 without substantive change.

*C.C.P. 2033(h)*, on the time for response to a request for admissions, was repealed and replaced by *C.C.P. 2033.250* in 2004 without substantive change.

Under *C.C.P. 2033.250(b)*, added in 2007, in an unlawful detainer action or other proceeding under *C.C.P. 1159* et seq. (12 *Summary* (10th), *Real Property*, §757), the party to whom the request is directed has at least 5 days from the date of service to respond, unless, on motion of the requesting party, the court has shortened the time for response, or, on motion of the responding party, the court has extended the time for response.

(2) *Agreement To Extend Time*. *C.C.P. 2033(i)*, on agreements to extend time for the response, was repealed and replaced by *C.C.P. 2033.260* in 2004 without substantive change.

See Reporter's Note to *C.C.P. 2033(i)*, in Hogan, 2 Cal. Civil Discovery 2d, Appendix D.



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C. Responses.

1. In General.

d. Service and Retention.

2 *Witkin Cal. Evid. Discovery* § 166

[§ 166] Service and Retention.

(1) *Service of Response*. The original response is served on the requesting party and copies are served on all other parties who have appeared. (*C.C.P. 2033(h)*.)

(2) *Preservation of Original*. The response is not filed with the court. The requesting party retains the original for 6 months after final disposition of the action. The original may then be destroyed unless the court on motion of any party for good cause orders preservation for a longer period. (*C.C.P. 2033(j)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Service of Response*. *C.C.P. 2033(h)*, on service of the response, was repealed and replaced by *C.C.P. 2033.250* in 2004 without substantive change.

(2) *Preservation of Original*. *C.C.P. 2033(j)*, on retention of the original response, was repealed and replaced by *C.C.P. 2033.270* in 2004 without substantive change.



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### VI. REQUESTS FOR ADMISSION

#### C. Responses.

##### 2. Answers.

##### a. Options.

2 Witkin Cal. Evid. Discovery § 167

[§ 167] Options.

(1) *Complete Answer Required.* Each answer must "be as complete and straightforward as the information reasonably available to the responding party permits." (C.C.P. 2033(f)(1).)

(2) *Admission, Denial, or Lack of Information.* An answer must admit as much of the matter as is true, "either as expressed in the request itself or as reasonably and clearly qualified by the responding party," and deny as much of the matter as is untrue. (C.C.P. 2033(f)(1); see *Holguin v. Superior Court* (1972) 22 C.A.3d 812, 820, 99 C.R. 653 [wrongful death action defendants who clearly denied requests for admission could not be forced to admit any particular facts, despite plaintiffs' contention that certain matters were so unquestionably true that denials were improper].) An answer must specify as much of the matter "as to the truth of which the responding party lacks sufficient information or knowledge." Such an answer must also state that the responding party has made a reasonable inquiry concerning the matter and that "information known or readily obtainable is insufficient to enable that party to admit the matter." (C.C.P. 2033(f)(1); see 1 Hogan, Cal. Civil Discovery §9.10 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Complete Answer Required.* The portion of C.C.P. 2033(f)(1) requiring a complete answer was repealed and replaced by C.C.P. 2033.220(a) in 2004 without substantive change.

(2) *Admission, Denial, or Lack of Information.* The portion of C.C.P. 2033(f)(1), on the contents of the answer, was repealed and replaced by C.C.P. 2033.220(b), (c) in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §9.10 et seq.



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## C. Responses.

## 2. Answers.

## b. Amendment or Withdrawal.

2 Witkin Cal. Evid. Discovery § 168

[§ 168] Amendment or Withdrawal.

(1) *General Rule.* A party may withdraw or amend an admission on leave of court granted after notice to all parties. Withdrawal or amendment is authorized only if the court finds that the admission was the result of mistake, inadvertence or excusable neglect and that the party requesting the admission will not be substantially prejudiced. The order may impose "just" conditions, including an order that the requesting party be permitted to pursue additional discovery on the matter and that the costs of additional discovery be borne in whole or in part by the responding party. (*C.C.P. 2033(m)*, based on *F.R. Civ. P., Rule 36* and codifying result in *Jahn v. Brickey* (1985) 168 C.A.3d 399, 404, 214 C.R. 119; see 1 Hogan, Cal. Civil Discovery §9.18; Cal. Civil Practice, 2 Procedure, §13:139 et seq. [forms]; on relationship to provision allowing relief from waiver of objections following failure to respond, see *St. Paul Fire & Marine Ins. Co. v. Superior Court* (1992) 2 C.A.4th 843, 3 C.R.2d 412, *infra*, §173 [*C.C.P. 2033(m)* does not control relief from consequences of total failure to respond].)

(2) *Applicability to Deemed Admissions.* *C.C.P. 2033(m)* applies to all admissions, including deemed admissions ordered under *C.C.P. 2033(k)* (*infra*, §174). (*Wilcox v. Birtwhistle* (1999) 21 C.4th 973, 977, 90 C.R.2d 260, 987 P.2d 727, *infra*, §176.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *General Rule.* *C.C.P. 2033(m)*, on withdrawal or amendment of an admission, was repealed and replaced by *C.C.P. 2033.300* in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §9.18.(2) *Applicability to Deemed Admissions.* *C.C.P. 2033(m)*, on withdrawal or amendment of an admission, was repealed and replaced by *C.C.P. 2033.300* in 2004 without substantive change.

*C.C.P. 2033(k)*, on deemed admissions, was repealed and replaced by *C.C.P. 2033.280* in 2004 without substantive change.

(3) *(New) No Duty To Update Response.* Nothing in the text of *C.C.P. 2033* (now *C.C.P. 2033.010* et seq.) creates any ongoing duty to update responses. Indeed, the statute authorizes amending or withdrawing a response only where the court finds that the original admission was the result of mistake, inadvertence, or excusable neglect. (*Burch v. Gombos* (2000) 82 C.A.4th 352, 359, 98 C.R.2d 119 [plaintiff property owners requested admission that defendant logging company had no evidence of recreational use of road across plaintiffs' property, and defendant responded with

unqualified admission that it did not; it had no duty to notify plaintiffs when later, before trial, it acquired evidence of recreational use].)



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## CHAPTER X - Discovery

### VI. REQUESTS FOR ADMISSION

#### C. Responses.

#### 3. Objections.

2 Witkin Cal. Evid. Discovery § 169

[§ 169] Objections.

(1) *Form*. The specific ground for an objection must be set forth clearly in the response. If an objection is based on a claim of privilege, the particular privilege invoked must be clearly stated. If an objection is based on the work product doctrine, the claim must be expressly asserted. If only part of a request is objectionable, the remainder must be answered. (*C.C.P. 2033(f)(2)*; see 1 Hogan, Cal. Civil Discovery §9.14; Cal. Civil Practice, 2 Procedure, §13:132.)

(2) *Grounds*. Possible grounds for objection include the following:

(a) *Excessive number of requests*. If the requesting party serves more than 35 requests for admission, the responding party may respond to the first 35 and then object to the balance. (See *C.C.P. 2033(c)*, supra, §158.)

(b) *Relevancy*. This objection is available, although limited. Under *C.C.P. 2033(a)*, the scope of discovery fixed by *C.C.P. 2017* (supra, §9) is applicable to requests for admissions. This provision, codifying the rule in *Cembrook v. Superior Court* (1961) 56 C.2d 423, 429, 15 C.R. 127, 364 P.2d 303, makes it clear that "relevance to the subject matter, and not to the issues, is the criterion." (Reporter's Note to *C.C.P. 2033(a)*, in 2 Hogan, Cal. Civil Discovery, Appendix C.)

(c) *Conclusions or opinions*. Requests for admission may embrace "opinions related to fact," the "application of law to fact," and matters in controversy. (*C.C.P. 2033(a)*, supra, §157; see *Cembrook v. Superior Court*, supra, 56 C.2d 429 [interpreting predecessor statute; because requests for admission seek to eliminate need to try issues, request that calls for opinion is not necessarily objectionable; if litigant is able to make admission, he or she should do so during discovery and not during trial].) Thus, an objection to a request on the ground that it calls for an opinion is unlikely to be successful. (See 1 Hogan, Cal. Civil Discovery §9.13.)

(d) *Privilege or work product*. Objections on these grounds must be clearly asserted. (See supra.)

(3) *Review of Order Sustaining Objections*. If the lower court erroneously sustains objections to a request for admissions (see infra, §248), mandamus will lie to compel setting aside the order. (See *Lieb v. Superior Court* (1962) 199 C.A.2d 364, 369, 18 C.R. 705.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Form*. *C.C.P. 2033(f)(2)*, on the form of objections, was repealed and replaced by *C.C.P. 2033.230* in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §9.14.

(2) *Grounds.*

(a) *Excessive number of requests.* *C.C.P. 2033(c)*, on objection to requests exceeding the limit of 35, was repealed and replaced by *C.C.P. 2033.030* in 2004 without substantive change.

(b) *Relevancy.* *C.C.P. 2017*, on the scope of discovery, was repealed and replaced by *C.C.P. 2017.010* in 2004 without substantive change.

*C.C.P. 2033(a)*, imposing scope of discovery requirements on requests for admissions, was repealed and replaced by *C.C.P. 2033.010* in 2004 without substantive change.

See Reporter's Note to *C.C.P. 2033(a)*, in Hogan, 2 Cal. Civil Discovery 2d, Appendix D.

(c) *Conclusions or opinions.* *C.C.P. 2033(a)*, on conclusions and opinions, was repealed and replaced by *C.C.P. 2033.010* in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §9.13.





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#### C. Responses.

#### 4. Motion for Protective Order.

2 Witkin Cal. Evid. Discovery § 170

[§ 170] Motion for Protective Order.

(1) *In General.* When requests for admission have been made, the responding party may promptly move for a protective order. On a showing of good cause, the court may make "any order that justice requires" to protect a party, person, or organization from "unwarranted annoyance, embarrassment, or oppression, or undue burden and expense." If the court denies the motion for a protective order in whole or in part, it may order that "the responding party provide or permit the discovery against which protection was sought on terms and conditions that are just." (*C.C.P. 2033(e)*; see Cal. Civil Practice, 2 Procedure, §13:131 [form]; 1 Hogan, Cal. Civil Discovery §9.8; on monetary sanctions for unsuccessfully making or opposing motion for protective order, see *infra*, §252.)

(2) *Attempt at Informal Resolution.* The motion for a protective order must be accompanied by a declaration showing a reasonable and good faith attempt at an informal resolution of each issue presented. (*C.C.P. 2033(e)*.) (On monetary sanctions for failure to attempt informal resolution, see *infra*, §252.)

(3) *Permissible Orders.* Under *C.C.P. 2033(e)*, a protective order may include, but is not limited to, one or more of the following directions:

(a) That a particular request or set of requests not be answered.

(b) That, contrary to the representations made in a declaration submitted under *C.C.P. 2033(c)(3)* (*supra*, §158), the number of admission requests is unwarranted.

(c) That the time to respond to a particular request or set of requests be extended.

(d) That a trade secret or confidential information not be admitted or be admitted only in a certain way.

(e) That some or all of the answers to requests be sealed and opened only by court order.

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General.* *C.C.P. 2033(e)*, relating to motions for protective orders, was repealed and replaced by *C.C.P. 2033.080* in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §9.8.

(2) *Attempt at Informal Resolution.* The portion of *C.C.P. 2033(e)* requiring a meet and confer declaration was

repealed and replaced by *C.C.P. 2033.080(a)* in 2004 without substantive change.

(3) *Permissible Orders*. The portion of *C.C.P. 2033(e)* specifying what a protective order may include was repealed and replaced by *C.C.P. 2033.080(b)* in 2004 without substantive change.

*C.C.P. 2033(c)(3)*, on declarations for additional discovery, was repealed and replaced by *C.C.P. 2033.050* in 2004 without substantive change.



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## 5. Effect of Response.

## a. Admission.

2 Witkin Cal. Evid. Discovery § 171

[§ 171] Admission.

(1) *Limited Effect*. An admitted matter is conclusively established against the party making the admission in the pending action, unless the court has authorized amendment or withdrawal of the admission under *C.C.P.* 2033(m) (supra, §168). The admission is binding only on the party making the admission and applies to the pending action only. It is not an admission by that party for any other purpose, and it must not be used in any manner against that party in another proceeding. (*C.C.P.* 2033(n), based on *F.R. Civ. P.*, Rule 36(b).)

(2) *Court's Discretion To Determine Scope and Effect*. In *Fredericks v. Kontos Industries* (1987) 189 C.A.3d 272, 234 C.R. 395, the court said: "Although admissions are dispositive in most cases, a trial court retains discretion to determine their scope and effect. An admission of a fact may be misleading. In those cases in which the court determines that an admission may be susceptible of different meanings, the court must use its discretion to determine the scope and effect of the admission so that it accurately reflects what facts are admitted in the light of other evidence." (189 C.A.3d 277.) And "[t]he court must have discretion to admit evidence to elucidate and explain an admission, because the admission of a fact does not always reflect the party's reasonable understanding of that fact." (189 C.A.3d 278.) The opinion adds that *C.C.P.* 2033(n) codifies this rule. (189 C.A.3d 278, footnote 2.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Limited Effect*. *C.C.P.* 2033(n), on the effect of an admitted matter, was repealed and replaced by *C.C.P.* 2033.410 in 2004 without substantive change.

See *Amex Assur. Co. v. Allstate Ins. Co.* (2003) 112 C.A.4th 1246, 1252, 1253, 5 C.R.3d 744 [where plumber defaulted in action against him by homeowner's insurer alleging negligent installation of water heater, and insurer then obtained assignment of plumber's rights and sued plumber's insurer for breach of contract and bad faith, plumber's admissions in first action were binding against homeowner's insurer; because homeowner's insurer was pursuing plumber's cause of action, it was not party separate from plumber within meaning of *C.C.P.* 2033(n) (now *C.C.P.* 2033.410)].

(2) *Court's Discretion To Determine Scope and Effect*. *C.C.P.* 2033(n), on the effect of an admitted matter, was repealed and replaced by *C.C.P.* 2033.410 in 2004 without substantive change.

See *Valerio v. Andrew Youngquist Const.* (2002) 103 C.A.4th 1264, 1273, 127 C.R.2d 436 [in action by subcontractor against general contractor, trial judge erred in allowing quantum meruit recovery for plaintiff based on

finding that no contract existed; plaintiff admitted, in response to requests for admissions, that contract existed, and his admission was unambiguous, leaving no room for interpretation; distinguishing *Fredericks v. Kontos Industries* (1987) 189 C.A.3d 272, 234 C.R. 395, text, p. 1000]. *West's Key Number Digest*, Pretrial Procedure k.481



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#### C. Responses.

#### 5. Effect of Response.

#### b. Failure To Admit.

2 Witkin Cal. Evid. Discovery § 172

[§ 172] Failure To Admit.

(1) *Recovery of Fees and Expenses.* If a party fails to admit the genuineness of a document or the truth of a matter when requested to do so, and the requesting party later proves the document's genuineness or the matter's truth, the requesting party may obtain an order requiring the responding party to pay the reasonable expenses incurred in making that proof, including reasonable attorneys' fees. (*C.C.P. 2033(o)*; 23 Am.Jur.2d (1983 ed.), Depositions and Discovery §396 et seq.) The court must make the order unless it finds one of the following:

(a) An objection to the request was sustained or a response to it was waived under *C.C.P. 2033(l)*, infra, §177 (*C.C.P. 2033(o)(1)*);

(b) The admission sought was of no substantial importance (*C.C.P. 2033(o)(2)*);

(c) The party failing to make the admission had reasonable ground to believe that that party would prevail on the matter (*C.C.P. 2033(o)(3)*); or-

(d) There was other good reason for the failure to admit (*C.C.P. 2033(o)(4)*).

(2) *Factors Considered in Awarding Expenses.* In *Brooks v. American Broadcasting Co.* (1986) 179 C.A.3d 500, 224 C.R. 838, the court, upholding an award of sanctions under former C.C.P. 2034(c), the predecessor to *C.C.P. 2033(o)*, made the following observations on the application of the statute, which concerned a "denial," rather than a failure to admit:

(a) The determination of whether there are good reasons for the denial, whether the requested admission was of substantial importance, and the amount of the expenses, if any, are all within the discretion of the trial court. (179 C.A.3d 508.)

(b) The basis for imposing sanctions is directly related to the purpose of requests for admissions, i.e., expediting trial by putting issues to rest. The statute is not a penalty; it is designed to reimburse reasonable expenses incurred in proving a matter encompassed in a request for admission where the admission was of substantial importance "such that trial would have been expedited or shortened if the request had been deemed admitted." (179 C.A.3d 509.)

(c) To be of *substantial importance*, "as a general rule a request for admission should have at least some direct relationship to one of the central issues in the case, i.e., an issue which, if not proven, would have altered the results in

the case." (179 C.A.3d 509.)

(d) In determining whether a party had no good reasons for the denial of a matter of substantial importance, the court should consider a variety of factors, including the following: (1) "whether *at the time the request was denied* it was reasonably possible for the party making the denial to have appreciated that the requested admission involved a central issue"; (2) whether the party denying the request had personal knowledge, or had available sources of information and failed to make a reasonable investigation to ascertain the facts; (3) the "degree to which the party making the denial has attempted in good faith to reach a reasonable resolution of the matters involved"; (4) whether, if the party subsequent to the refusal to admit learns facts that would have called for an admission, the party advises the requesting party that the denial was in error or should be modified; and (5) "whether at the time the denial was made the party making the denial held a reasonably entertained good faith belief that the party would prevail on the issue at trial." (179 C.A.3d 510, 511.)

Other illustrations of the application of C.C.P. 2033(o) include the following:

*Smith v. Circle P Ranch Co.* (1978) 87 C.A.3d 267, 275, 150 C.R. 828 [factors under former statute; one need not be prevailing party to be entitled to sanctions].

*Wagy v. Brown* (1994) 24 C.A.4th 1, 6, 29 C.R.2d 48 [award of attorney fees improper; although defendants denied request for admission that they were negligent, they later admitted it for purposes of arbitration, and thus plaintiff did not have to prove it].

*Garcia v. Hyster Co.* (1994) 28 C.A.4th 724, 735, 736, 34 C.R.2d 283 [personal injury action against manufacturer of "order picker" machine in which insurer of plaintiff's employer intervened; trial judge could award costs and fees to defendant based on insurer's flat denial of request for admission that employer was negligent, but award should not have covered period preceding denial].

*Wimberly v. Derby Cycle Corp.* (1997) 56 C.A.4th 618, 634, 638, 65 C.R.2d 532, 5 Summary (9th), Torts, Supp., §51B [in products liability action, sanctions against defendant producer and distributor of bicycle fork assemblies were proper for denying request for admissions on issues of causation and defect; these were issues of substantial importance and defendant had no reasonable belief it could prevail on them].

*Rosales v. Thermex-Thermatron* (1998) 67 C.A.4th 187, 198, 78 C.R.2d 861 [sanctions against defendant, successor corporation to manufacturer of machine that injured plaintiff, were proper; some of defendant's responses to numerous requests that directly related to successor liability were obviously false and defendant's officer denied knowledge of predecessor even though he had worked for it and its subsidiary].

(3) *Amount of Fee*. The fee set for the entire case is not necessarily the fee imposed for expenses reasonably required to prove facts improperly denied. (See *Hillman v. Stults* (1968) 263 C.A.2d 848, 890, 70 C.R. 295 [award of fee set for entire litigation was excessive where certain phases might have been subject to reasonable dispute].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Recovery of Fees and Expenses*. C.C.P. 2033(o), on failure to admit the genuineness of a document or the truth of a matter, was repealed and replaced by C.C.P. 2033.420 in 2004 without substantive change. C.C.P. 2033(o)(1)-(o)(4), on the grounds for denying a request for fees and expenses, became C.C.P. 2033.420(b)(1)-(b)(4).

See *Barnett v. Penske Truck Leasing Co., L.P.* (2001) 90 C.A.4th 494, 497, 498, 108 C.R.2d 821, citing the text [sanctions under C.C.P. 2033(o) (now C.C.P. 2033.420) may be awarded to party prevailing on summary judgment; statute requires that matter be proved but not necessarily at trial]; *American Federation of State, County & Mun. Employees, Local 1902, AFL-CIO v. Metro-politan Water Dist. of Southern Calif.* (2005) 126 C.A.4th 247, 268, 24 C.R.3d 285 [recovery of cost-of-proof attorneys' fees was not foreclosed by former C.C.P. 2033(l) (now C.C.P. 2033.290), even though plaintiff union raised objections to some of defendant employer's requests and employer did not

move to compel responses, where union, after posing its objections to each request at issue, admitted in part and/or denied entire request, thus leaving nothing to address in motion to compel].(2) *Factors Considered in Awarding Expenses*. C.C.P. 2033(o), on failure to admit the genuineness of a document or the truth of a matter, was repealed and replaced by C.C.P. 2033.420 in 2004 without substantive change.

See *Denver D. Darling v. Controlled Environments Const.* (2001) 89 C.A.4th 1221, 1239, 108 C.R.2d 213 [although subcontractor refused to admit that dock floor was not completed in accordance with contract specifications, trial judge properly denied contractor's motion for expenses, finding that each party had different interpretation of contract and that subcontractor's position was reasonable]; *Stull v. Sparrow* (2001) 92 C.A.4th 860, 865, 112 C.R.2d 239 [award of expenses under C.C.P. 2033(o) (now C.C.P. 2033.420) was properly denied, where, even though defendants refused to admit liability in response to request for admissions, they did so just before trial; following *Wagy v. Brown* (1994) 24 C.A.4th 1, 29 C.R.2d 48, text, p. 1002]. *Wimberly v. Derby Cycle Corp.*:

*Cross-Reference:* 5 *Summary* (10th), *Torts*, §64.



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#### C. Responses.

#### 5. Effect of Response.

##### c. No Response.

#### 1. Waiver of Objection.

### 2 Witkin Cal. Evid. Discovery § 173

#### [§ 173] Waiver of Objection.

(1) *Waiver and Relief From Waiver.* Failure to serve a timely response constitutes waiver of any objection, including one based on privilege or the work product doctrine. However, the court, on motion, may relieve the party from this waiver if it determines that (a) the party has subsequently served a response that is in "substantial compliance" with *C.C.P. 2033(f)*, and (b) the party's failure to serve a timely response was the result of "mistake, inadvertence, or excusable neglect." (*C.C.P. 2033(k)*.)

(2) *Relationship to Amendment and Withdrawal Provision.* In *St. Paul Fire & Marine Ins. Co. v. Superior Court* (1992) 2 C.A.4th 843, 3 C.R.2d 412, the court rejected the argument that the provision allowing amendment and withdrawal (*C.C.P. 2033(m)*, *supra*, §168) could be invoked to avoid waiver. "One subdivision, subdivision (k), controls relief when there is failure to serve a timely response, and in that instance allows default relief for excusable neglect after service of a complying response. ... The other subdivision, subdivision (m), controls relief for the purpose of allowing withdrawal or amendment of 'an admission made in response to a request for admission. ...' Plainly, subdivision (k) is intended to control default relief for total failure to respond, and subdivision (m) is intended to control default relief for erroneous or mistaken responses which the responder wishes to correct." (2 C.A.4th 851.)

*Wilcox v. Birtwhistle* (1999) 21 C.4th 973, 90 C.R.2d 260, 987 P.2d 727, *infra*, §176, holds that *C.C.P. 2033(m)* does provide relief from deemed admissions, ordered under *C.C.P. 2033(k)* following a failure to respond. (21 C.4th 977.) *Wilcox* disapproves *St. Paul* to the extent that it conflicts with that decision. (21 C.4th 983, footnote 12.) However, the answering party in *Wilcox* was seeking relief from deemed admissions, not from a waiver of objections. *Wilcox* makes clear that the initial penalty for failure to respond remains the waiver of all objections under *C.C.P. 2033(k)*, and that relief under *C.C.P. 2033(m)* is available following the entry of a deemed admitted order. (21 C.4th 982.)

#### **SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Waiver and Relief From Waiver.* *C.C.P. 2033(f)*, on the response to a request for admissions, was repealed and replaced by *C.C.P. 2033.210* in 2004 without substantive change.

*C.C.P. 2033(k)*, on failure to serve a timely response, was repealed and replaced by *C.C.P. 2033.280* in 2004 without substantive change.

(2) *Relationship to Amendment and Withdrawal Provision.* *C.C.P. 2033(k)*, on failure to serve a timely response,



was repealed and replaced by *C.C.P. 2033.280* in 2004 without substantive change.

*C.C.P. 2033(m)*, on amendment and withdrawal of a response, was repealed and replaced by *C.C.P. 2033.300* in 2004 without substantive change.



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## C. Responses.

## 5. Effect of Response.

## c. No Response.

## 2. Deemed Admission.

## aa. General Rule.

2 *Witkin Cal. Evid. Discovery* § 174

## [§ 174] General Rule.

(1) *Former Law.* Under the former version of *C.C.P. 2033*, if a party failed to respond in a timely manner to a request for admissions, the requesting party could notify the responding party that the genuineness of the documents or the truth of the matters included in the request had been deemed admitted. The Commission was troubled by aspects of this result: "The Commission is sensitive to the need of the party propounding requests for admission to learn promptly and enduringly whether the admission is being made. It also does not want to encourage the recipient of admission requests to treat cavalierly the discovery obligations they impose. However, the Commission is convinced that the present system is imposing a sanction for nonresponse or tardy response that is out of all proportion to the abuse of discovery that such conduct undoubtedly creates. It has concluded that much of the prevailing unsatisfactory situation arises from the fact that under the present law no response is necessary where the recipient is willing to make the admission. Thus, the resulting silence is ambiguous. Does it signify a willingness to make the admission, or, as is more likely, is it simply attributable to oversight or sloth on the part of the attorney for the other side? The Commission proposes that a response always be required." (Reporter's Note to *C.C.P. 2033(f)(1)*, in 2 Hogan, Cal. Civil Discovery, Appendix C; for discussion of "gamesmanship" under former law, see 1 Hogan, Cal. Civil Discovery §9.15.)

(2) *Present Law.* A response to each request for admission is now required. (*C.C.P. 2033(f)*, supra, §163.) A notice from the requesting party is no longer sufficient for a deemed admission; a court order is required. The requesting party may move for an order that the genuineness of a document or the truth of a matter specified in the requests be deemed admitted. The motion must be granted unless the responding party has served, before the hearing on the motion, a proposed response in substantial compliance with *C.C.P. 2033(f)(1)* (supra, §167). (*C.C.P. 2033(k)*; see *Courtesy Claims Service v. Superior Court* (1990) 219 C.A.3d 52, 55, 268 C.R. 30 [denying motion "in interest of justice" and giving plaintiffs more time to respond was error; under *C.C.P. 2033(k)*, absence of timely response requires order that matters raised by requests be deemed admitted]; *Demyer v. Costa Mesa Mobile Home Estates* (1995) 36 C.A.4th 393, 399, 42 C.R.2d 260 [motion to deem matters admitted was improperly granted where plaintiffs submitted responses by time hearing normally would have been held but discovery referee had shortened time for hearing; "before the hearing on the motion" does not mean before hearing on shortened notice]; see also 1 Hogan, Cal. Civil Discovery §9.16; Cal. Civil Practice, 2 Procedure, §13:133 et seq.; on relief from deemed admissions order under *C.C.P. 2033(m)* (supra, §168), see *Wilcox v. Birtwhistle* (1999) 21 C.4th 973, 977, 90 C.R.2d 260, 987 P.2d 727, infra, §176; on deemed admissions following party's failure to obey order compelling further response, see infra, §177.)

The court must impose a monetary sanction under *C.C.P. 2023* (infra, §252) on the party whose failure to respond necessitated the motion. (*C.C.P. 2033(k)*; see *Appleton v. Superior Court* (1988) 206 C.A.3d 632, 635, 636, 253 C.R. 762 [monetary sanction was mandatory; *unverified*, single response to three requests for admission was tantamount to no response, necessitating motion to have requests deemed admitted].)

*C.C.P. 2033(k)* makes a major change by abolishing the automatic deemed admission and requiring a court order before an unanswered request is deemed admitted. The Commission recognized that its proposal shifted to the party seeking discovery the task of applying to the court to enforce a response to which the party was already entitled. However, it believed that the former practice was "draconian," and that "the prospect of a mandatory monetary sanction will in most instances provide sufficient incentive for the party to whom the request is directed to comply with the requirements of this discovery method." (Reporter's Note to *C.C.P. 2033(k)*, in 2 Hogan, Cal. Civil Discovery, Appendix C.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Former Law.* See Reporter's Note to *C.C.P. 2033(f)(1)*, in Hogan, 2 Cal. Civil Discovery 2d, Appendix D; Hogan, 1 Cal. Civil Discovery 2d, §9.15.(2) *Present Law.* *C.C.P. 2023*, on monetary sanctions, was repealed and replaced by *C.C.P. 2023.010* et seq. in 2004 without substantive change.

*C.C.P. 2033(f)*, requiring a response to each request for admission, was repealed and replaced by *C.C.P. 2033.210* in 2004 without substantive change.

*C.C.P. 2033(f)(1)*, on requirements for the response, was repealed and replaced by *C.C.P. 2033.220* in 2004 without substantive change.

*C.C.P. 2033(k)*, on motions for an order to deem matters admitted, was repealed and replaced by *C.C.P. 2033.280* in 2004 without substantive change.

*C.C.P. 2033(m)*, on withdrawal or amendment of an admission, was repealed and replaced by *C.C.P. 2033.300* in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §9.16; Reporter's Note to *C.C.P. 2033(k)*, in Hogan, 2 Cal. Civil Discovery 2d, Appendix D.



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## CHAPTER X - Discovery

## VI. REQUESTS FOR ADMISSION

## C. Responses.

## 5. Effect of Response.

## c. No Response.

## 2. Deemed Admission.

## bb. Court's Discretion To Deny Motion for Deemed Admission.

2 *Witkin Cal. Evid. Discovery* § 175

[§ 175] Court's Discretion To Deny Motion for Deemed Admission.

(1) *Substantial Compliance and Service Requirements Met.* In *Tobin v. Oris* (1992) 3 C.A.4th 814, 4 C.R.2d 736, the trial court granted summary judgment for plaintiff based solely on facts deemed admitted pursuant to a request for admissions under C.C.P. 2033(k). Counsel for defendants had in fact served sufficient responses to all of the requests, before the hearing on plaintiff's motion to have the requests deemed admitted. However, the responses were served by mail 20 days after they were due and 9 days after plaintiff's motion. The trial court, following a recommendation by a referee, ruled in favor of plaintiff, relying on the provision in C.C.P. 1013a(3) (see 6 Cal. Proc. (4th), *Proceedings Without Trial*, §24) that "[s]ervice made pursuant to this paragraph, upon motion of a party served, shall be presumed invalid if the postal cancellation date or postage meter date on the envelope is more than one day after the date of deposit for mailing contained in the affidavit." *Held*, reversed.

(a) "What both the trial court and *Tobin* have overlooked, however, is the precise language and the obvious function of this statutory provision. Subdivision (3) of section 1013a relates to the manner in which a party will prove that service by mail was accomplished where the person signing the affidavit does not have *personal knowledge*, but can testify as to the business 'practice for collection and processing of correspondence for mailing' of the sender (i.e., the party seeking to establish that a *service by mail* was accomplished). It is only when a party seeks to prove that service by mail has occurred under these specific and limited circumstances that the paragraph would have any application. Further it would *only* be a consideration where an issue exists as to the service of a particular document; that is, where *proof* of the fact of such service is required. It logically would have no application where, as in this case, service has been admitted." (3 C.A.4th 825.)

(b) "The actual receipt of responses prior to the hearing on *Tobin*'s admissions motion, and the absence of any finding as to a lack of substantial compliance with section 2033, subdivision (f)(1), is sufficient, as a matter of law, to defeat it. The *Orises* were not required to show anything else. Certainly, no showing of 'mistake, inadvertence or excusable neglect' by them was required. Such matters play no part in the resolution of a 'deemed admitted' motion. Such factors are only relevant under section 2033, subdivision (k), to a party's effort to obtain relief from a waiver of the right to object to requests. That is not the issue presented here." (3 C.A.4th 827.) (On showing of mistake, inadvertence, or excusable neglect after deemed admitted motion is granted, see *Wilcox v. Birtwhistle* (1999) 21 C.4th 973, 90 C.R.2d 260, 987 P.2d 727, *infra*, §176 [disapproving *Tobin* to extent it conflicts with decision in *Wilcox*].)

(c) "Until we read the record and the briefs in this case, we would not have thought it necessary for a court to have to make explicit what the Legislature so clearly mandated. Under section 2033, subdivision (k), the court is *required* to grant a deemed admission unless a proposed response is served before the hearing on that motion. ... What the statute does not say, but obviously implies, is that where a proposed response is served prior to the hearing (and there is no finding that the 'substantial compliance' requirement has not been met), then the motion may *not* be granted." (3 C.A.4th 828.)

(2) *Effect of Legally Deficient Response.* In *Brigante v. Huang* (1993) 20 C.A.4th 1569, 25 C.R.2d 354, a personal injury action arising from a traffic accident, defendant could not be located and was served by publication. Her insurer retained a law firm to represent her. Plaintiff served requests for admissions that tracked the complaint and asked defendant to admit or deny each allegation and also asked for admissions that plaintiff had suffered at least \$ 500,000 in damages and that defendant had violated two Vehicle Code provisions. Defense counsel responded to the request and verified the responses in defendant's absence. Because C.C.P. 2033 requires verification by the party (see *supra*, §164), plaintiff moved to have the requests deemed admitted. The trial judge granted this motion, and, then, on the basis of the matters deemed admitted, granted plaintiff's motion for summary judgment. *Held*, reversed.

(a) A trial judge may grant appropriate relief, on the basis of oppression, from requests for admissions when it is satisfied that the defendant is not evading the lawsuit or the discovery demanded and is unaware of their pendency, and that reasonable efforts have been made and are ongoing to find the defendant. (20 C.A.4th 1583.)

(b) Some of the remedies the trial judge may adopt, other than ordering the entire set of requests admitted or relieving the responding party from answering at all are: (1) order that only some matters be deemed admitted; (2) relieve the defense from admitting or denying the requests on condition that it demonstrate a continuing and vigorous effort to locate the defendant; (3) grant a specific extension of time within which to find the defendant. (20 C.A.4th 1583.) (On relief on grounds of mistake, inadvertence, or excusable neglect after deemed admitted motion is granted, see *Wilcox v. Birtwhistle* (1999) 21 C.4th 973, 90 C.R.2d 260, 987 P.2d 727, *infra*, §176 [disapproving *Brigante* to extent it conflicts with decision in *Wilcox*].)

(c) As the trial judge did not exercise a discretion he possessed, reversal and remand are required. Nevertheless, plaintiff's use of the requests, while predatory, was entirely within the statute. "The use of sweeping RFA's in a case where the defendant is, and is known to be, absent and cannot be found, is a far cry from the original purpose of the device: to weed out matters that are not the basis of legitimate dispute, so that the trial may proceed more rapidly, with less consumption of the time of court and counsel, and less expense to the parties." (20 C.A.4th 1588.) The Legislature should reexamine the statute. Perhaps an attorney verification should be allowed in a case such as this, perhaps the scope of the requests should be limited, possibly to exclude the amount of unliquidated damages or other specified issues, and perhaps this discovery method should not be allowed in this kind of case, where other means to discover information are readily available. (20 C.A.4th 1589.)

The *Brigante* case was distinguished in *Allen-Pac., Ltd. v. Superior Court* (1997) 57 C.A.4th 1546, 67 C.R.2d 804, an action for fraud and conversion in which defendant's response to plaintiff's request for admissions failed to comply with C.C.P. 2033(g) (*supra*, §164) because it was not signed by defendant under oath. Although plaintiff moved to deem the matters specified in the request admitted and for monetary sanctions, defendant submitted no other response prior to the hearing on the motion, and did not seek a protective order under C.C.P. 2033(e). At the hearing, the trial judge ruled that she did not lack discretion to deny the motion, and she directed defendant to file a verified response. After defendant did so, the judge denied plaintiff's motion. *Held*, denial of the motion was in excess of the judge's authority. When a party fails to respond to a request for admissions, or, as here, files a legally deficient response, C.C.P. 2033 provides only two forms of relief: (a) Before the hearing on the motion, the party may file a belated but proper response as permitted by C.C.P. 2033(k); or (b) the party may seek a protective order under C.C.P. 2033(e). Where, as here, neither form of relief is sought, the party propounding the unanswered request for admissions is entitled to the relief specified in C.C.P. 2033(k) regardless of prejudice. The failure to file a timely response is deemed prejudicial by the statute; there is ordinarily no judicial authority to gainsay that presumption, which can be rebutted, if at all, only by

a very unusual situation such as that in *Brigante, supra*, where response was impossible and the party propounding the request knew it. (57 C.A.4th 1556.) (On relief on grounds of mistake, inadvertence, or excusable neglect after deemed admitted motion is granted, see *Wilcox v. Birtwhistle* (1999) 21 C.4th 973, 90 C.R.2d 260, 987 P.2d 727, *infra*, §176 [disapproving *Allen-Pac., Ltd.* to extent it conflicts with decision in *Wilcox*].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Substantial Compliance and Service Requirements Met.* C.C.P. 2033(k), on matters deemed admitted, was repealed and replaced by C.C.P. 2033.280 in 2004 without substantive change.

C.C.P. 2033(f)(1), on requirements for the answer, was repealed and replaced by C.C.P. 2033.220 in 2004 without substantive change.(2) *Effect of Legally Deficient Response.* C.C.P. 2033(g), on the requirement of a signature under oath, was repealed and replaced by C.C.P. 2033.240 in 2004 without substantive change.

C.C.P. 2033(e), on protective orders, was repealed and replaced by C.C.P. 2033.080 in 2004 without substantive change.

C.C.P. 2033(k), on belated service of a response, was repealed and replaced by C.C.P. 2033.280 in 2004 without substantive change.



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## CHAPTER X - Discovery

## VI. REQUESTS FOR ADMISSION

## C. Responses.

## 5. Effect of Response.

## c. No Response.

## 2. Deemed Admission.

## cc. Relief From Deemed Admission Order.

2 *Witkin Cal. Evid. Discovery* § 176

[§ 176] Relief From Deemed Admission Order.

In *Wilcox v. Birtwhistle* (1999) 21 C.4th 973, 90 C.R.2d 260, 987 P.2d 727, plaintiff sued defendant, a physician, for medical malpractice. Defendant served plaintiff with a request for admissions, asking plaintiff to admit, among other things, that defendant was not negligent in any manner in which he provided medical care to plaintiff and that plaintiff had not suffered any personal injury as a result of the medical care. When plaintiff failed to respond to the request for admissions, defendant moved to have the matters deemed admitted under C.C.P. 2033(k). Before the hearing on the motion, plaintiff served responses to the request for admission, but he failed to verify the responses. The trial court granted the motion and ordered the matters to be deemed admitted. Using new counsel, plaintiff then served verified responses and moved for relief from the deemed admission order. Plaintiff included a declaration from his former counsel explaining that the failure to serve timely responses occurred because of that counsel's own mistake or negligence. The trial judge felt compelled, under *St. Paul Fire & Marine Ins. Co. v. Superior Court* (1992) 2 C.A.4th 843, 3 C.R.2d 412, supra, §173, to deny the motion, and ultimately granted summary judgment for defendant based solely on the deemed admissions. The Court of Appeal reversed. *Held*, judgment of Court of Appeal affirmed; C.C.P. 2033(m), supra, §168, permits the withdrawal or amendment of admissions deemed admitted for failure to respond.

(a) The statutory language of C.C.P. 2033(m) provides little guidance in determining whether it applies to deemed admissions. Whereas the second sentence of (m) refers to "withdrawal or amendment of *an admission*" and thus appears to place no restrictions on the scope of the subdivision, the first sentence refers to "*an admission made in response to a request*" and thus appears to exclude deemed admissions from those subject to withdrawal or amendment. Hence, C.C.P. 2033(m) must be read in light of two other subdivisions in C.C.P. 2033, (k) and (n), and in light of its legislative history. (21 C.4th 978.)

(1) C.C.P. 2033(n), supra, §171, which codified existing case law, establishes that matters admitted in an actual response or those deemed admitted for failure to respond under C.C.P. 2033(k) constitute binding judicial admissions. Thus, "a deemed admitted order establishes, by judicial fiat, that a nonresponding party has responded to the requests by admitting the truth of all matters contained" in the request. This harmonization of the language of C.C.P. 2033 "compels the conclusion that subdivision (m) provides relief from deemed admissions. Like subdivision (n), subdivision (m) refers to admissions "made in response to a request for admission." Because words or phrases given a particular meaning in one part of a statute must be given the same meaning in other parts of the statute, this reference in

subdivision (m)--like the analogous language in subdivision (n)--must encompass deemed admissions." (21 C.4th 979.)

(2) The legislative history further supports this interpretation of *C.C.P. 2033(m)*. Prior law had provided the answering party with 30 days to seek relief under *C.C.P. 473* after receiving notice from the propounding party that a deemed admission, which occurred automatically without court order, had occurred. This practice was considered "draconian" and removed any incentive for a party that was willing to make the admissions to serve an actual response. (21 C.4th 979.) "Construing subdivision (m) to permit the withdrawal or amendment of deemed admissions is consistent with the Legislature's intention to remedy these problems." (21 C.4th 980.) Subdivision (m) eliminates the time limits on obtaining relief and also allows the trial court to tailor the sanction to the severity of the discovery abuse. Moreover, the sanctions available under both subdivisions (k) and (m) should supply the incentive necessary to ensure a response. "Precluding the withdrawal or amendment of deemed admissions, therefore, amounts to overkill." (21 C.4th 980.)

(3) Finally, the Reporter's Notes to *C.C.P. 2033(m)* suggest that the subdivision is based on *F.R. Civ. P., Rule 36(b)*, which, when subdivision (m) was enacted, permitted relief from matters deemed admitted for failure to respond. (21 C.4th 980, 981.)

(b) Although "virtually all" Court of Appeal decisions have reached the opposite conclusion, "our interpretation of subdivision (m) is more consistent with the statutory language and legislative history" of *C.C.P. 2033*, and "the reasoning of these Court of Appeal decisions does not support a contrary result." (21 C.4th 981.)

(1) The conclusion in those cases that *C.C.P. 2033(k)* controls relief when there is a failure to serve a timely response and *C.C.P. 2033(m)* controls relief when there is an actual admission is not supported by the statutory language or legislative history. "Indeed, the scheme of section 2033 equally supports the conclusion that subdivision (k) controls when the failure to respond results in a binding judicial admission and subdivision (m) controls when a party may obtain relief from an admission, deemed or otherwise." (21 C.4th 982.)

(2) Interpreting *C.C.P. 2033(m)* to cover deemed admissions will not render *C.C.P. 2033(k)* useless or duplicative. Instead, this interpretation complements the enforcement scheme created by subdivision (k), and establishes the following graduated system of enforcement: (1) The initial penalty for failure to respond is the waiver of all objections. (2) Once the propounding party files a motion for a deemed admitted order, the nonresponding party then faces an additional penalty--mandatory monetary sanctions. (3) Failing to respond before the hearing on the motion results in entry of a deemed admitted order. (4) The nonresponding party can only escape a binding admission by establishing "mistake, inadvertence, or excusable neglect" and no substantial prejudice to the propounding party. (5) The nonresponding party also faces the likely imposition of more sanctions at the discretion of the trial court. (21 C.4th 982.)

(3) Permitting relief under *C.C.P. 2033(m)* eliminates the undeserved windfalls that occur when the propounding party "gets lucky" and receives no response. It also eliminates the resulting subversion of the policy favoring the resolution of lawsuits on the merits. (21 C.4th 983.)

(4) The following cases are disapproved "to the extent they conflict with our decision here": *Courtesy Claims Service v. Superior Court* (1990) 219 C.A.3d 52, 268 C.R. 30, supra, §174; *St. Paul Fire & Marine Ins. Co. v. Superior Court* (1992) 2 C.A.4th 843, 3 C.R.2d 412, supra, §173, and *Tobin v. Oris* (1992) 3 C.A.4th 814, 4 C.R.2d 736, supra, §175; *Brigante v. Huang* (1993) 20 C.A.4th 1569, 25 C.R.2d 354, supra, §175; *Demyer v. Costa Mesa Mobile Home Estates* (1995) 36 C.A.4th 393, 42 C.R.2d 260, supra, §174; *Allen-Pac., Ltd. v. Superior Court* (1997) 57 C.A.4th 1546, 67 C.R.2d 804, supra, §175. (21 C.4th 983, footnote 12.) Although the Legislature has never objected to *Courtesy Claims*, *St. Paul*, or their progeny, neither has it adopted their judicial interpretations by repeated enactments. (21 C.4th 983.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2033(k)*, on matters deemed admitted, was repealed and replaced by *C.C.P. 2033.280* in 2004 without



substantive change.

*C.C.P. 2033(m)*, on withdrawal or amendment of an admission, was repealed and replaced by *C.C.P. 2033.300* in 2004 without substantive change.

*C.C.P. 2033(n)*, on the effect of an admitted matter, was repealed and replaced by *C.C.P. 2033.410* in 2004 without substantive change.



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## CHAPTER X - Discovery

## VI. REQUESTS FOR ADMISSION

## C. Responses.

## 5. Effect of Response.

## d. Inadequate Response.

2 Witkin Cal. Evid. Discovery § 177

[§ 177] Inadequate Response.

(1) *Motion To Compel Further Response.* If a response is evasive or incomplete or an objection is without merit or too general, the requesting party may move for an order to compel a further response. Notice of the motion must be given within 45 days of service of the response, or any supplemental response, or within a longer period agreed to in writing by the parties. Failure to give timely notice waives any right to compel a further response. (*C.C.P. 2033(l)*; see Cal. Civil Practice, 2 Procedure, §13:138; 1 Hogan, Cal. Civil Discovery §9.17; on format of motion, see *supra*, §28.)

(2) *Attempt at Informal Resolution.* The motion must be accompanied by a declaration showing a reasonable and good faith attempt at an informal resolution of each issue presented. (*C.C.P. 2033(l)*; on monetary sanctions for failure to attempt informal resolution, see *infra*, §252.)

(3) *Monetary Sanctions for Making or Opposing Motion.* The court must impose monetary sanctions under *C.C.P. 2023* (*infra*, §252) against a party, person, or attorney who unsuccessfully makes or opposes a motion to compel further response. The sanction may be avoided if the court finds that the person acted with substantial justification or that other circumstances make imposing the sanction unjust. (*C.C.P. 2033(l)*.)

(4) *Sanctions for Failure To Obey Order.* If a party fails to obey an order compelling further response to a request for admission, "the court may order that the matters involved in the requests be deemed admitted." Instead of or in addition to the order, the court may order a monetary sanction under *C.C.P. 2023* (*infra*, §252). (*C.C.P. 2033(l)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Motion To Compel Further Response.* *C.C.P. 2033(l)*, on motions to compel further response, was repealed and replaced by *C.C.P. 2033.290* in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §9.17.(2) *Attempt at Informal Resolution.* The portion of *C.C.P. 2033(l)* requiring a meet and confer declaration was repealed and replaced by *C.C.P. 2033.290(b)* in 2004 without substantive change.

(3) *Monetary Sanctions for Making or Opposing Motion.* *C.C.P. 2023*, on monetary sanctions generally, was repealed and replaced by *C.C.P. 2023.010* et seq. in 2004 without substantive change.

The portion of *C.C.P. 2033(l)* providing for monetary sanctions in connection with motions to compel further

response was repealed and replaced by *C.C.P. 2033.290(d)* in 2004 without substantive change.

(4) *Sanctions for Failure To Obey Order.* *C.C.P. 2023*, on monetary sanctions, was repealed and replaced by *C.C.P. 2023.010* et seq. in 2004 without substantive change.

The portion of *C.C.P. 2033(l)* providing for sanctions for failure to obey an order compelling further response was repealed and replaced by *C.C.P. 2033.290(e)* in 2004 without substantive change.



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## CHAPTER X - Discovery

### VII. EXCHANGE OF EXPERT WITNESS INFORMATION

#### A. Statutory Authority.

2 *Witkin Cal. Evid. Discovery* § 178

[§ 178] Statutory Authority.

(1) *Exchange of Names and Reports.* A party may demand a mutual and simultaneous exchange by all parties of the names and addresses of natural persons whose expert testimony the parties expect to offer in evidence at trial. (*C.C.P. 2034(a)(1)*.) A party may also demand the mutual and simultaneous production for inspection and copying of all discoverable reports and writings made by experts who are employees of the designating party or who have been retained "for the purpose of forming and expressing an opinion in anticipation of the litigation or in preparation for the trial of the action." (*C.C.P. 2034(a)(2)*, (a)(3); see *South Tahoe Public Util. Dist. v. Superior Court* (1979) 90 C.A.3d 135, 138, 154 C.R. 1 [construing predecessor to *C.C.P. 2034*; demand for disclosure of witnesses who *might* be called, as opposed to those who were *expected* to be called as of date close to trial, was premature; release of names before preparation for trial would discourage full investigation of facts and could enable party to determine trial strategy without independent efforts, based solely on other party's selection of experts]; *Overly on Electronic Evidence in California* §3:11; 37 *Hastings L. J.* 201 [discovery of nontestifying expert witness' identity under Federal Rules of Civil Procedure]; C.E.B., 2 Civil Discovery Practice 3d, Chap. 11; C.J.E.R., Judges Benchbook, Civil Proceedings: Discovery, Chap. 17; Cal. Civil Practice, 2 Procedure, §13:192 et seq.; 1 Hogan, Cal. Civil Discovery, Chap. 10.)

(2) *Exceptions.* *C.C.P. 2034* does not apply to exchanges of lists of experts and valuation data in eminent domain proceedings under *C.C.P. 1258.010* et seq. (*infra*, §200). (*C.C.P. 2034(a)*.) Moreover, requests for disclosure of the names and addresses of witnesses of any type in economic litigation cases are governed by *C.C.P. 93* and *96*. (See 2 *Cal. Proc.* (4th), *Courts*, §§263, 265.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Exchange of Names and Reports.* *C.C.P. 2034(a)(1)*, on the demand for the exchange of the names and addresses of expert witnesses, was repealed and replaced by *C.C.P. 2034.210(a)* in 2004 without substantive change.

*C.C.P. 2034(a)(2)* and *2034(a)(3)* were repealed and replaced by *C.C.P. 2034.210(b)*, (c) in 2004 without substantive change. *C.C.P. 2034(a)(3)*, on the demand for the exchange of discoverable reports and writings by experts, became *C.C.P. 2034.210(c)*.

See C.E.B., 2 Civil Discovery Practice 4th, Chap. 11; Hogan, 1 Cal. Civil Discovery 2d, Chap. 10.(2) *Exceptions.* The portion of *C.C.P. 2034(a)* stating an exception for eminent domain proceedings was repealed and replaced by *C.C.P. 2034.010* in 2004 without substantive change. *West's Key Number Digest*, Pretrial Procedure k.39, 40



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## CHAPTER X - Discovery

### VII. EXCHANGE OF EXPERT WITNESS INFORMATION

#### B. Procedure.

##### 1. Demand.

2 Witkin Cal. Evid. Discovery § 179

[§ 179] Demand.

(1) *Timing and Service.* A demand to exchange information about expert trial witnesses may be made without leave of court (*C.C.P. 2034(b)*) after the initial trial date is set (*C.C.P. 2034(a)*). The demand must be made "no later than the 10th day after the initial trial date has been set, or 70 days before that trial date, whichever is closer to the trial date." (*C.C.P. 2034(b)*.) A copy of the demand must be served on all parties who have appeared. (*C.C.P. 2034(d)*.)

In *Beverly Hosp. v. Superior Court* (1993) 19 C.A.4th 1289, 24 C.R.2d 238, a medical malpractice action, the parties engaged in a timely exchange of expert witness information. The case was tried before a jury, the jury was unable to reach a verdict, and the judge declared a mistrial. After a new trial date was set, plaintiff served a new demand for an exchange of expert witness information. Defendant moved for a protective order, arguing that the timeliness of plaintiff's demand was to be calculated with reference to the original trial date and that, so calculated, the demand was late. The trial judge denied the motion. *Held*, this was proper. In *C.C.P. 2034(d)*, the phrase "initial trial date" was intended to prevent a postponement or continuance of a trial from automatically reopening discovery, but it was not intended to prohibit additional discovery following a mistrial, order granting a new trial, or reversal on appeal. (19 C.A.4th 1295.)

(2) *Form and Content.* The demand must be in writing, state that it is made under *C.C.P. 2034*, identify the demanding party, and specify the date of the exchange (*infra*, §180). (*C.C.P. 2034(c)*; see 1 Hogan, Cal. Civil Discovery §§10.1, 10.3; Cal. Civil Practice, 2 Procedure, §13:201.)

(3) *Preservation of Original Demand.* The demand for an exchange, with proof of service affixed, is not filed with the court, but is retained by the demanding party. It may be destroyed 6 months after final disposition of the action unless the court, on motion and for good cause, orders preservation for a longer period. (*C.C.P. 2034(n)*.) However, a demand is "lodged with the court" when its contents become relevant to an issue pending in the action. (*C.C.P. 2034(k)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Timing and Service.* *C.C.P. 2034(a)*, (b), on the timing of the demand, were repealed and replaced by *C.C.P. 2034.220* in 2004 without substantive change.

*C.C.P. 2034(d)*, on the service of the demand, was repealed and replaced by *C.C.P. 2034.240* in 2004 without substantive change.

See *Fairmont Ins. Co. v. Superior Court* (2000) 22 C.4th 245, 250, 251, 92 C.R.2d 70, 991 P.2d 156 [approving construction of C.C.P. 2034 set forth in *Beverly Hosp. v. Superior Court* (1993) 19 C.A.4th 1289, 24 C.R.2d 238, text, p. 1012].(2) *Form and Content*. C.C.P. 2034(c), on the form and content of the demand, was repealed and replaced by C.C.P. 2034.230 in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §§10.1, 10.3.

(3) *Preservation of Original Demand*. C.C.P. 2034(n), on retention of the original demand, was repealed and replaced by C.C.P. 2034.290(a), (b) in 2004 without substantive change.

C.C.P. 2034(k), specifying when a demand must be lodged with the court, was repealed and replaced by C.C.P. 2034.290(c) in 2004 without substantive change.



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## CHAPTER X - Discovery

### VII. EXCHANGE OF EXPERT WITNESS INFORMATION

#### B. Procedure.

#### 2. Exchange.

2 Witkin Cal. Evid. Discovery § 180

[§ 180] Exchange.

(1) *Date*. The date of exchange must be 50 days before the initial trial date, or 20 days after service of the demand, whichever is closer to the trial date. The court, on motion and a showing of good cause, may order an earlier or later date of exchange. (*C.C.P. 2034(c)*.)

(2) *Means*. The parties who have appeared in the action must exchange witness information in writing on or before the date of exchange specified in the demand, either at a meeting of their attorneys or by mail. (*C.C.P. 2034(f)*.) If the demand includes a demand for production of reports and writings, the parties must produce and exchange, at the specified place and on the specified date, all discoverable reports and writings made by the designated experts. (*C.C.P. 2034(g)*); see *C.E.B.*, 2 Civil Discovery Practice 3d, §11.17; 1 Hogan, Cal. Civil Discovery §10.5; Cal. Civil Practice, 2 Procedure, §13:196; on avoiding compliance by obtaining protective order, see *C.C.P. 2034(e)*, *infra*, §181.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Date*. *C.C.P. 2034(c)*, on the date of the exchange, was repealed and replaced by *C.C.P. 2034.230(b)* in 2004 without substantive change.

See *Hernandez v. Superior Court* (2003) 112 C.A.4th 285, 294, 295, 4 C.R.3d 883 [in wrongful death action involving multiple plaintiffs and defendants, trial judge erred, in case management order, in requiring unilateral early disclosure of plaintiffs' experts and their opinions; although trial court may order mutual exchange on date earlier or later than specified in *C.C.P. 2034*, statute does not permit early unilateral exchange, notwithstanding court's broad discretion to fashion suitable procedures to manage complex litigation]; *Fairfax v. Lords* (2006) 138 C.A.4th 1019, 1025, 41 C.R.3d 850 [trial judge erred in allowing, on date plaintiff served his expert witness designation, defendant to serve "First Designation of Expert Witnesses" naming no retained witnesses, and then later to serve "Second Designation of Expert Witnesses" in which defendant named two retained experts; former *C.C.P. 2034(a)(1)* (now *C.C.P. 2034.210*) required simultaneous exchange of information].

(2) *Means*. *C.C.P. 2034(f)*, on the method of exchange, was repealed and replaced by *C.C.P. 2034.260* in 2004 without substantive change.

*C.C.P. 2034(g)*, on the production of reports and writings, was repealed and replaced by *C.C.P. 2034.270* in 2004 without substantive change.

*C.C.P. 2034(e)*, on protective orders, was repealed and replaced by *C.C.P. 2034.250* in 2004 without substantive

change.

See C.E.B., 2 Civil Discovery Practice 4th, §11.15 et seq.; Hogan, 1 Cal. Civil Discovery 2d, §10.5.





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## CHAPTER X - Discovery

### VII. EXCHANGE OF EXPERT WITNESS INFORMATION

#### B. Procedure.

#### 3. Motion for Protective Order.

*2 Witkin Cal. Evid. Discovery § 181*

[§ 181] Motion for Protective Order.

(1) *In General.* A party who has been served with a demand to exchange information concerning expert trial witnesses may promptly move for a protective order. On a showing of good cause, the court may make "any order that justice requires" to protect a party, person, or organization from "unwarranted annoyance, embarrassment, or oppression, or undue burden and expense." If the court denies the motion for a protective order in whole or in part, it may order that "the responding party provide or permit the discovery against which protection was sought on terms and conditions that are just." (*C.C.P. 2034(e)*; see 1 Hogan, Cal. Civil Discovery §10.4; on monetary sanctions for unsuccessfully making or opposing motion for protective order, see *infra*, §252.)

(2) *Attempt at Informal Resolution.* The motion for a protective order must be accompanied by a declaration showing a reasonable and good faith attempt at an informal resolution of each issue presented. (*C.C.P. 2034(e)*.) (On monetary sanctions for failure to attempt informal resolution, see *supra*, §252.)

(3) *Permissible Orders.* Under *C.C.P. 2034(e)*, a protective order may include, but is not limited to, one or more of the following directions:

- (a) That an untimely demand be quashed.
- (b) That the date of exchange be other than that specified in the demand.
- (c) That the exchange be made only on specified terms and conditions.
- (d) That the production and exchange of experts' reports and writings be made at a different place or time than specified in the demand.
- (e) That some or all of the parties be divided into sides on the basis of their identity of interest in the issues in the action, and that the designation of experts under *C.C.P. 2034(a)(2)* (*supra*, §178) be made by these created sides.
- (f) That a party or side reduce its list of designated employed or retained experts.

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General.* *C.C.P. 2034(e)*, on protective orders, was repealed and replaced by *C.C.P. 2034.250* in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §10.4.(2) *Attempt at Informal Resolution*. The portion of *C.C.P. 2034(e)* requiring a meet and confer declaration was repealed and replaced by *C.C.P. 2034.250(a)* in 2004 without substantive change.

(3) *Permissible Orders*. The portion of *C.C.P. 2034(e)* specifying what protective orders are permissible was repealed and replaced by *C.C.P. 2034.250(b)* in 2004 without substantive change.

*C.C.P. 2034(a)(2)*, on the designation of experts, was repealed and replaced by *C.C.P. 2034.210(a)* in 2004 without substantive change.



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VII. EXCHANGE OF EXPERT WITNESS INFORMATION

C. Witness Lists and Declarations.

1. Contents of Witness List.

*2 Witkin Cal. Evid. Discovery § 182*

[§ 182] Contents of Witness List.

The exchange must either include a statement that the party does not presently intend to offer the testimony of an expert witness at trial or list the names and addresses of the experts whose testimony the party intends to offer. (*C.C.P. 2034(f)(1)*; 1 Hogan, Cal. Civil Discovery §10.6.) In many cases, the list must be accompanied by an expert witness declaration. (See *C.C.P. 2034(f)(2)*, *infra*, §§182, 183.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2034(f)(1)*, on the contents of the list, was repealed and replaced by *C.C.P. 2034.260(b)* in 2004 without substantive change.

*C.C.P. 2034(f)(2)*, on the need for an expert witness declaration, was repealed and replaced by *C.C.P. 2034.260(c)* in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §10.6.



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### VII. EXCHANGE OF EXPERT WITNESS INFORMATION

#### C. Witness Lists and Declarations.

##### 2. Expert Witness Declarations.

##### a. For Whom Necessary.

2 Witkin Cal. Evid. Discovery § 183

[§ 183] For Whom Necessary.

(1) *Party or Party's Retained Expert.* If an expert is a party or a party's employee, or is retained for the purpose of "forming and expressing an opinion in anticipation of the litigation or in preparation for the trial," the exchange must include an expert witness declaration. (*C.C.P. 2034(a)(2), 2034(f)(2)*; on content of declaration, see *infra*, §184.)

(2) *Treating Physician as Expert Witness.* A treating doctor is not a retained expert for purposes of *C.C.P. 2034*. Thus, a party in a personal injury action who intends to have his or her treating doctor testify as to the party's injuries, treatment, and prognosis need not provide opposing counsel the expert witness declaration required by *C.C.P. 2034(f)(2)*. (*Huntley v. Foster (1995) 35 C.A.4th 753, 754, 756, 41 C.R.2d 358*.) Even when the treating physician offers expert opinion on standard of care or causation, he or she is not considered an expert for whom a declaration must be exchanged. (*Schreiber v. Estate of Kiser (1999) 22 C.4th 31, 33, 91 C.R.2d 293, 989 P.2d 720*.)

In *Schreiber*, plaintiff sued for damages she sustained in an automobile accident. She designated seven treating physicians as expert witnesses, but did not submit expert witness declarations for them. In response to a motion in limine, the trial judge ruled that the physicians could testify "as percipient witnesses, but not as experts." Plaintiff called two of the physicians as expert witnesses, but they were precluded from giving their opinion that plaintiff's injuries had been caused by the accident. The jury subsequently found that defendant's negligence did not cause plaintiff's damages and returned a verdict for defendant. *Held*, reversed. A treating physician does not become a "retained" expert within the meaning of *C.C.P. 2034(a)(2)* whenever the physician gives opinion testimony.

(a) The declaration requirement applies only to "certain" expert witnesses: those who are parties or employees of parties, or are retained by a party for the purpose of forming and expressing an opinion in anticipation of the litigation or in preparation for the trial. A treating physician generally falls into none of these categories. (*22 C.4th 35*.) The legislative history of *C.C.P. 2034* clarifies that what distinguishes a treating physician from a retained expert is not the content of the physician's testimony, but the context in which the physician became familiar with the plaintiff's injuries that are ultimately the subject of litigation and that form the factual basis for the medical opinion. (*22 C.4th 35, 36*.) A treating physician is not consulted for litigation purposes, but instead learns of the plaintiff's injuries and medical history because of the underlying physician-patient relationship. (*22 C.4th 36*.)

(b) The conclusion that treating physicians generally are not experts "retained" within the meaning of *C.C.P. 2034(a)(2)* is supported by *C.C.P. 2034(i)(2)* (*infra*, §190 et seq.), and similar language in *Govt.C. 68092.5(a) (2 Cal. Evidence (4th), Witnesses, §22)*. These provisions clearly differentiate between the retained expert described in *C.C.P.*

2034(a)(2), for whom an expert witness declaration is required, and a treating physician expert witness. (22 C.4th 36.) It would be difficult to interpret C.C.P. 2034(a)(2) in a contrary fashion without rendering C.C.P. 2034(i)(2) superfluous. (22 C.4th 37.)

(c) The conclusion that treating physicians are not retained experts is also consistent with the discovery statutes as a whole. The identity and opinions of a party's retained experts are generally privileged unless the experts are going to testify at trial, allowing a party to "bury" an expert who does not support the party's position. Moreover, the party need not reveal whether a retained expert will testify until shortly before trial. (22 C.4th 37.) "It makes sense in this situation that the Legislature would require the person presenting the expert to submit an expert witness declaration" (22 C.4th 37), which allows the parties to assess within a short time frame whether to take the expert's deposition and to select an expert who can respond with a competing opinion on the deposed expert's subject area (22 C.4th 38). By contrast, the identity and opinions of treating physicians are not privileged and are subject to no special discovery restrictions. They can be identified early in the litigation through interrogatories, production of the plaintiff's medical records, and completion of case questionnaires. "Accordingly, the Legislature has apparently determined that by the time of the exchange of expert witness information, the information required by the expert witness declaration is unnecessary for treating physicians who remain in their traditional role." (22 C.4th 38.)

(d) "Our interpretation avoids assigning trial judges the near impossible task of determining whether an expert witness treating physician is providing percipient or opinion testimony." (22 C.4th 39.) A physician may testify as to any opinions formed on the basis of facts independently acquired and informed by his or her training, skill, and experience, including opinions regarding causation and standard of care, because such issues are inherent in a physician's work. (22 C.4th 39, disapproving, to extent it is inconsistent with this opinion, *Plunkett v. Spaulding* (1997) 52 C.A.4th 114, 60 C.R.2d 377.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Party or Party's Retained Expert.* C.C.P. 2034(a)(2) and 2034(f)(2), on expert witness declarations, were repealed and replaced by C.C.P. 2034.210 and 2034.260 in 2004 without substantive change. (2) *Treating Physician as Expert Witness.* C.C.P. 2034(a)(2) and 2034(f)(2), on expert witness declarations, were repealed and replaced by C.C.P. 2034.210 and 2034.260 in 2004 without substantive change.

C.C.P. 2034(i)(2), on the payment of fees to an expert witness who is deposed, was repealed and replaced by C.C.P. 2034.430 in 2004 without substantive change.

See *Fatica v. Superior Court* (2002) 99 C.A.4th 350, 353, 120 C.R.2d 904 [treating physician's testimony is not limited to personal observations; following *Schreiber v. Estate of Kiser* (1999) 22 C.4th 31, 91 C.R.2d 293, 989 P.2d 720, text, p. 1015].

(New) *Distinction: Unnamed treating physician:* Although a designation of retained experts must be accompanied by an expert witness declaration, no such declaration is required for a treating physician who will be called to testify at trial as an expert witness. "But the transformation from treating physician to expert does not occur unless the treating physician is identified by name and address in the proponent's designation, and it is not enough that a plaintiff has 'designated' as experts 'all past or present examining and/or treating physicians.' " (*Kalaba v. Gray* (2002) 95 C.A.4th 1416, 1418, 116 C.R.2d 570 [in medical malpractice action, trial judge properly precluded plaintiff's treating physicians from testifying as to standard of care, where her expert witness declaration mentioned all past or present treating physicians but did not name them].)



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## CHAPTER X - Discovery

### VII. EXCHANGE OF EXPERT WITNESS INFORMATION

#### C. Witness Lists and Declarations.

##### 2. Expert Witness Declarations.

##### b. Contents.

2 Witkin Cal. Evid. Discovery § 184

[§ 184] Contents.

The expert witness declaration is made under penalty of perjury, and must be signed by the attorney for the party designating the expert, or by that party if he or she has no attorney. (*C.C.P. 2034(f)(2)*.) (See *C.E.B.*, 2 Civil Discovery Practice 3d, §11.20; 1 Hogan, Cal. Civil Discovery §10.7.) It must contain the following:

(1) A brief narrative of the expert's qualifications and the substance of his or her testimony. (*C.C.P. 2034(f)(2)(A)*, (f)(2)(B).) (See *Castaneda v. Bornstein* (1995) 36 C.A.4th 1818, 1828, 43 C.R.2d 10 [plaintiff's declaration stating that expert witness would testify as to negligence "leading to" plaintiff's injury sufficiently informed defendants that he would testify as to causation].)

(2) A representation that the expert has agreed to testify at trial. (*C.C.P. 2034(f)(2)(C)*.)

(3) A representation that the expert will be sufficiently familiar with the pending action to submit to a meaningful oral deposition concerning the expert's expected trial testimony, including the expert's opinion and its basis. (*C.C.P. 2034(f)(2)(D)*.)

(4) A statement of the expert's hourly and daily fee for providing deposition testimony and for consulting with the retaining attorney. (*C.C.P. 2034(f)(2)(E)*.) (See Cal. Civil Practice, 2 Procedure, §202.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2034(f)(2)(A)-(f)(2)(E)*, on the contents of the expert witness declaration, were repealed and replaced by *C.C.P. 2034.260(c)(1)-(c)(5)* in 2004 without substantive change.

See *C.E.B.*, 2 Civil Discovery Practice 4th, §11.18; Hogan, 1 Cal. Civil Discovery 2d, §10.7.



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VII. EXCHANGE OF EXPERT WITNESS INFORMATION

C. Witness Lists and Declarations.

3. Preservation of Lists and Declarations.

*2 Witkin Cal. Evid. Discovery § 185*

[§ 185] Preservation of Lists and Declarations.

Witness lists and accompanying declarations are not filed with the court, but are retained by the demanding party. They may be destroyed 6 months after final disposition of the action unless the court, on motion and for good cause, orders preservation for a longer period. (*C.C.P. 2034(n)*.) However, lists and declarations are "lodged" with the court when their contents become relevant to a pending issue in the action. (*C.C.P. 2034(k)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2034(n)*, on the retention of lists and declarations, was repealed and replaced by *C.C.P. 2034.290(b)* in 2004 without substantive change.

*C.C.P. 2034(k)*, specifying when lists and declarations are lodged with the court, was repealed and replaced by *C.C.P. 2034.290(c)* in 2004 without substantive change.



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### VII. EXCHANGE OF EXPERT WITNESS INFORMATION

#### C. Witness Lists and Declarations.

##### 4. Additions to Lists.

##### a. Supplemental List.

2 *Witkin Cal. Evid. Discovery* § 186

[§ 186] Supplemental List.

Within 20 days after an exchange, a party to the exchange may, without leave of court, submit a supplemental list of experts who will express opinions on subjects to be covered by the experts whom adverse parties have designated, unless the party supplementing a list has already retained an expert to testify on the subject. This supplemental list must be accompanied by a declaration under *C.C.P. 2034(f)(2)* (supra, §183) for the additional experts and by any discoverable reports and writings made by the experts. The additional experts must be made immediately available for a deposition under *C.C.P. 2034(i)* (infra, §188), and the deposition may be taken even though the time limit for discovery under *C.C.P. 2024* (supra, §23) has expired. (*C.C.P. 2034(h)*.) (See *Basham v. Babcock* (1996) 44 C.A.4th 1717, 1723, 52 C.R.2d 456 [in personal injury action, trial judge erred in allowing expert on defendant's supplemental list to testify as to cause of plaintiff's injury, instead of expert previously designated for that purpose; party who has designated expert to testify on particular subject may not use supplemental list to substitute experts]; 1 Hogan, Cal. Civil Discovery §10.11.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2034(f)(2)*, on expert witness declarations, was repealed and replaced by *C.C.P. 2034.260(c)* in 2004 without substantive change.

*C.C.P. 2034(i)*, on the deposition of expert witnesses, was repealed and replaced by *C.C.P. 2034.410* et seq. in 2004 without substantive change.

*C.C.P. 2034(h)*, on supplemental expert witness lists, was repealed and replaced by *C.C.P. 2034.280* in 2004 without substantive change.

*C.C.P. 2024*, setting discovery time limits, was repealed and replaced by *C.C.P. 2024.010* et seq. in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §10.11.





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### VII. EXCHANGE OF EXPERT WITNESS INFORMATION

#### C. Witness Lists and Declarations.

##### 4. Additions to Lists.

##### b. Augmented List.

2 Witkin Cal. Evid. Discovery § 187

[§ 187] Augmented List.

(1) *Former Law.* Former C.C.P. 2037.4 permitted a party to augment its expert witness list simply by diligently giving notice of its intent to call an unlisted witness and by making the witness available for deposition. The Commission concluded that this law was "too liberal" and provided "a disincentive to submit a complete list in the first place." (Reporter's Note to C.C.P. 2034, in 2 Hogan, Cal. Civil Discovery, Appendix C.)

(2) *Present Law.* Expert witness information may now be augmented or amended as follows:

(a) *Motion by party in compliance:* A party who has engaged in a timely exchange of expert witness information may move to add the name and address of a subsequently retained witness or to amend the statement of the testimony a previously designated expert is expected to give. The motion must be accompanied by a declaration showing a reasonable and good faith attempt at an informal resolution of each issue presented. (C.C.P. 2034(k); Cal. Civil Practice, 2 Procedure, §13:203 et seq. [forms]; on monetary sanctions for failure to attempt informal resolution, see *infra*, §252.)

(b) *Basis for order:* The court may grant the motion, "after taking into account the extent to which the opposing party has relied on the list of expert witnesses," *only* if it determines that the opposing party will not be prejudiced, and that the moving party:

(1) Either (a) would not in the exercise of reasonable diligence have decided to call that expert witness or to offer the witness' different or additional testimony, or (b) failed to decide to call the witness, or to offer the witness' different or additional testimony, as a result of mistake, inadvertence, surprise, or excusable neglect;

(2) Made the motion promptly; and

(3) Promptly served on all other parties a copy of witness lists and declarations described in C.C.P. 2034(f) (*supra*, §182 et seq.). (C.C.P. 2034(k); see *Dickison v. Howen* (1990) 220 C.A.3d 1471, 1478, 270 C.R. 188 [doctor's change of testimony on cross-examination during deposition from that given to defendant's counsel during preparation was sufficient "surprise" to allow defendant to add new expert]; *Martinez v. Poway* (1993) 12 C.A.4th 425, 432, 15 C.R.2d 644, *infra*, §198 [motion to augment expert witness declaration was properly denied; plaintiff had known of need to augment for several weeks before serving motion, and when motion was heard, trial was to start within 2 weeks]; *Guzman v. Superior Court* (1993) 19 C.A.4th 705, 707, 708, 23 C.R.2d 585, 8 Cal. Proc. (4th), *Attack on Judgment in Trial Court*, §136 [after granting motion for new trial, trial judge abused discretion in denying plaintiff's motion to

designate new expert witnesses, where motion was made well before new trial was to commence]; *Beverly Hosp. v. Superior Court* (1993) 19 C.A.4th 1289, 1295, 24 C.R.2d 238, supra, §179 [new demand for exchange of expert witness information properly allowed after mistrial and scheduling of new trial date]; 1 Hogan, Cal. Civil Discovery §10.12.)

(c) *Conditions*: The order must be conditioned on the moving party making the expert available immediately for a deposition under C.C.P. 2034(i) (infra, §188), "and on such other terms as may be just." For example, the order may allow a party opposing the motion to designate additional expert witnesses or to elicit additional opinions from those previously designated, may continue the trial for a reasonable period of time, or may award costs and litigation expenses to a party who opposes the motion. (C.C.P. 2034(k).)

(d) *Monetary sanctions*: The court must impose monetary sanctions under C.C.P. 2023 (see infra, §252) against someone who unsuccessfully makes or opposes a motion to augment, unless it finds the one subject to sanctions acted with substantial justification or that other circumstances make imposing sanctions unjust. (C.C.P. 2034(k).)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Former Law*. See Reporter's Note to C.C.P. 2034, in Hogan, 2 Cal. Civil Discovery 2d, Appendix D.

(2) *Present Law*.

(a) *Motion by party in compliance*: The portion of C.C.P. 2034(k) relating to motions to augment or amend an expert witness list was repealed and replaced by C.C.P. 2034.610 in 2004 without substantive change.

(b) *Basis for order*: The portion of C.C.P. 2034(k) relating to the basis for the order to augment or amend was repealed and replaced by C.C.P. 2034.620 in 2004 without substantive change.

C.C.P. 2034(f), on the information that must be exchanged, was repealed and replaced by C.C.P. 2034.260 in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §10.12.(c) *Conditions*: The portion of C.C.P. 2034(k) relating to conditions on which the order must be based was repealed and replaced by C.C.P. 2034.620(d) in 2004 without substantive change.

C.C.P. 2034(i), on the deposition of expert witnesses, was repealed and replaced by C.C.P. 2034.410 et seq. in 2004 without substantive change.

(d) *Monetary sanctions*: The portion of C.C.P. 2034(k) relating to the award of sanctions in connection with motions to augment or amend expert witness information was repealed and replaced by C.C.P. 2034.630 in 2004 without substantive change.

C.C.P. 2023, on monetary sanctions generally, was repealed and replaced by C.C.P. 2023.010 et seq. in 2004 without substantive change.



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### VII. EXCHANGE OF EXPERT WITNESS INFORMATION

#### D. Deposition of Other Party's Expert.

##### 1. Applicable Law.

*2 Witkin Cal. Evid. Discovery § 188*

[§ 188] Applicable Law.

(1) *Deposition Authorized.* A party may take the oral or written deposition of any witness on another party's expert witness list. (*C.C.P. 2034(i)*; see *Los Angeles v. Superior Court (Martinez)* (1990) 224 C.A.3d 1446, 1457, 274 C.R. 712 [defendant physicians, who had not been designated as experts, were improperly ordered to be deposed concerning their present opinion of propriety of their acts].)

(2) *Applicable Procedures.* The procedures set forth in *C.C.P. 2025* et seq. (*supra*, §29 et seq.) apply to depositions of expert witnesses, except as otherwise provided in *C.C.P. 2034(i)*. (*C.C.P. 2034(i)*.) The procedures that differ under *C.C.P. 2034(i)* include those governing the means of securing the deponent's attendance at the deposition (see *infra*, §195), the place of deposition (see *infra*, §189), and the fees for an expert's deposition appearance (see *infra*, §190 et seq.).

(3) *Deposition During Summary Judgment Proceedings.* *C.C.P. 2034* does not preclude depositions of experts who are used in connection with summary judgment or summary adjudication proceedings even when there has not yet been an exchange of experts under that section. Where a party presents evidence that raises a significant question relating to the foundation of an expert's opinion filed in support of or in opposition to a motion for summary judgment or summary adjudication, a deposition limited to that subject should be allowed. However, "the process should not be utilized to turn summary proceedings into mini-trials. Whether to grant discovery in a given case falls within the sound discretion of the trial court based upon all of the facts presented. There must be objective facts presented which create a significant question regarding the validity of the affidavit or declaration which, if successfully pursued, will impeach the foundational basis of the affidavit or declaration in question." (*St. Mary Med. Center v. Superior Court* (1996) 50 C.A.4th 1531, 1540, 58 C.R.2d 182 [distinguishing *Los Angeles v. Superior Court*, *supra*, where no summary judgment was pending].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Deposition Authorized.* The portion of *C.C.P. 2034(i)* authorizing the deposition of expert witnesses was repealed and replaced by *C.C.P. 2034.410* in 2004 without substantive change.

(2) *Applicable Procedures.* *C.C.P. 2025* et seq., on depositions generally, were repealed and replaced by *C.C.P. 2025.010* et seq. in 2004 without substantive change.

The portion of *C.C.P. 2034(i)* relating to deposition procedures was repealed and replaced by *C.C.P. 2034.410* et seq. in 2004 without substantive change.(3) *Deposition During Summary Judgment Proceedings.* *C.C.P. 2034*, on the

exchange of expert witness information, was repealed and replaced by *C.C.P. 2034.010* et seq. in 2004 without substantive change. *West's Key Number Digest*, Pretrial Procedure k.97



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D. Deposition of Other Party's Expert.

2. Where Taken.

2 *Witkin Cal. Evid. Discovery* § 189

[§ 189] Where Taken.

The deposition of a party or a party's retained expert, described in *C.C.P. 2034(a)(2)* (supra, §183), must be taken within 75 miles of the courthouse where the action is pending. "However, on motion for a protective order by the party designating an expert witness, and on a showing of *exceptional hardship*, the court may order that the deposition be taken at a more distant place from the courthouse." (*C.C.P. 2034(i)(1)*; on protective orders generally, see supra, §181.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2034(a)(2)*, on retained experts, was repealed and replaced by *C.C.P. 2034.210(b)* in 2004 without substantive change.

*C.C.P. 2034(i)(1)*, on the place where the deposition may be taken, was repealed and replaced by *C.C.P. 2034.420* in 2004 without substantive change.



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### VII. EXCHANGE OF EXPERT WITNESS INFORMATION

#### D. Deposition of Other Party's Expert.

##### 3. Fees.

##### a. To Whom Owed.

2 *Witkin Cal. Evid. Discovery* § 190

[§ 190] To Whom Owed.

(1) *Retained Expert*. The deposing party pays the fee for any expert, other than a party or employee of a party, who is a retained expert described in *C.C.P. 2034(a)(2)* (supra, §183). (*C.C.P. 2034(i)(2)(A)*); on experts' deposition fees generally, see 1 Hogan, Cal. Civil Discovery §10.10.)

(2) *Treating Physician*. The deposing party pays the fee for a treating physician and surgeon or other treating health care practitioner, other than a party or employee of a party, who is to be asked during the deposition to express opinion testimony, "including opinion or factual testimony regarding the past or present diagnosis or prognosis made by the practitioner or the reasons for a particular treatment decision made by the practitioner, but not including testimony requiring only the reading of words and symbols contained in the relevant medical record or, if those words and symbols are not legible to the deponent, the approximation by the deponent of what those words or symbols are." (*C.C.P. 2034(i)(2)(B)*.)

This is a change from prior law (former *C.C.P. 2037.7(a)*), which required payment of the expert's fee only when the deposition was taken "solely for the purpose of obtaining any expert opinion which the deponent [held] upon the basis of his or her special knowledge, skill, experience, training, or education." (See Reporter's Note to *C.C.P. 2034*, in 2 Hogan, Cal. Civil Discovery, Appendix C.)

In *Brun v. Bailey* (1994) 27 *C.A.4th* 641, 32 *C.R.2d* 624, a personal injury action arising from an automobile accident, defendant sought to depose a chiropractor who had treated plaintiff. The chiropractor refused to appear unless he was paid expert witness fees. The trial judge granted defendant's motion to compel the chiropractor to appear but limited defendant's questioning to factual matters. After the deposition, the chiropractor moved for a protective order directing defendant to pay him expert witness fees. The trial judge denied the motion. *Held*, this was proper.

(a) *C.C.P. 2034(i)(2)* recognizes that a treating physician or health care practitioner may or may not be asked to express an opinion during a deposition; if he is not asked for his expert opinion, he is not entitled to an expert witness fee. (27 *C.A.4th* 654, 655.)

(b) The statutory entitlement to fees applies even if, as here, the deposition occurs prior to the exchange of expert witness information and therefore the practitioner's name has not been placed on an expert witness list. (27 *C.A.4th* 656.)

(c) Nevertheless, the chiropractor was not entitled to expert witness fees. Only two questions arguably called for an opinion. The chiropractor had the advice of counsel during the deposition, and counsel frequently objected to questions as calling for an opinion rather than fact. However, counsel did not object to the two questions that might be characterized as calling for an opinion. Furthermore, in the context of a deposition comprising 92 pages of transcript, the two questions were de minimis. (27 C.A.4th 658.)

(3) *Design or Survey Professional*. The deposing party must pay the fee for an architect, professional engineer, or licensed land surveyor, other than a party or a party's employee, who was involved with the original project design or survey for which the professional is asked to express an opinion that is within his or her expertise and relevant to the action or proceeding. (C.C.P. 2034(i)(2)(C).)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Retained Expert*. C.C.P. 2034(a)(2), on the designation of retained experts, was repealed and replaced by C.C.P. 2034.210(b) in 2004 without substantive change.

C.C.P. 2034(i)(2)(A), on the fee for retained experts, was repealed and replaced by C.C.P. 2034.430(a)(1) in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §10.10.

(2) *Treating Physician*. C.C.P. 2034(i)(2)(B), on the fee for treating physicians, was repealed and replaced by C.C.P. 2034.430(a)(2) in 2004 without substantive change.

C.C.P. 2034(i)(2) (now C.C.P. 2034.430(a)) requires the person taking the treating physician's deposition to pay the physician's reasonable and customary hourly or daily fee. However, it does not convert that fee into a recoverable cost. Under C.C.P. 1033.5(b)(1) (7 Cal. Proc. (4th), *Judgment*, §129), fees of experts not ordered by the court are not recoverable in the absence of a specific authorizing statute. C.C.P. 2034(i)(2) "is not such a statute." (*Baker-Hoey v. Lockheed Martin Corp.* (2003) 111 C.A.4th 592, 600, 3 C.R.3d 593 [after defendant obtained summary judgment against several plaintiffs in class action, trial judge properly denied defendant's request for costs of taking deposition of treating physicians for each of those plaintiffs, where physicians were not experts ordered by court].)

See Reporter's Note to C.C.P. 2034, in Hogan, 2 Cal. Civil Discovery 2d, Appendix D.(3) *Design or Survey Professional*. C.C.P. 2034(i)(2)(C), on the fee for design or survey professionals, was repealed and replaced by C.C.P. 2034.430(a)(3) in 2004 without substantive change.



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### VII. EXCHANGE OF EXPERT WITNESS INFORMATION

#### D. Deposition of Other Party's Expert.

##### 3. Fees.

##### b. Amount.

2 Witkin Cal. Evid. Discovery § 191

[§ 191] Amount.

(1) *Time Spent at Deposition.* The amount of the fee is the expert's reasonable and customary hourly or daily fee for any time spent at the deposition from the time noticed in the deposition subpoena, or from the time of the arrival of the expert witness should that time be later than the time noticed in the deposition subpoena, until the time the expert witness is dismissed from the deposition, whether or not the expert is actually deposed by a party attending the deposition. The fee may not exceed the fee charged the party retaining the expert, unless the expert donated his or her services to a charitable or other nonprofit organization. (*C.C.P. 2034(i)(2)*; on variable fee schedules, see *infra*, §192.)

In *Marsh v. Mountain Zephyr* (1996) 43 C.A.4th 289, 50 C.R.2d 493, the issue was whether the trial judge erred in ordering defendant to pay plaintiff's expert witness, an architect, at the rate of \$ 250 per hour, rather than his customary rate of \$ 360 per hour, for his deposition testimony. *Held*, affirmed.

(a) *C.C.P. 2034(i)(2)* requires the deposing party to pay the "reasonable and customary" hourly or daily fee of the other party's expert for deposition testimony. When the deposing party believes the expert's fee is unreasonable, he may move under *C.C.P. 2034(i)(4)* (*infra*, §193) for an order setting the expert's compensation. That provision allows the court to consider the fees usually charged by similar experts for testimonial services and any other factors the court deems appropriate in establishing the "reasonable" fee. The expert is not precluded from charging more than what the court deems reasonable. *C.C.P. 2034(i)(2)* simply transfers the fee obligation to the deposing party to the extent that the fee is reasonable. "Any fees charged by the expert in excess of the 'reasonable' fee determined by the court remain a matter of negotiation and agreement between the expert witness and the party that designated the expert witness." (43 C.A.4th 300.)

(b) Plaintiff's expert asserts that the trial judge violated his constitutional rights by taking into account a local superior court rule stating that in the collective experience of the court, a fee of \$ 200 per hour is representative of the ordinary and customary fees charged for expert testimony by architects in the community. Plaintiff's argument assumes that the rule determines what compensation a private person may charge and receive for his services. But the rule is not a limit on what an expert may be paid. Rather, it simply provides one factor that a trial judge may consider in determining what fee is reasonable under *C.C.P. 2034(i)(4)*. (43 C.A.4th 302.)

(c) The expert also asserts that substantial evidence does not support the trial judge's determination of reasonableness. The substantial evidence rule, however, is inapplicable: It is clearly within the trial judge's discretion to determine what factors he will consider, and it follows that the fee determination itself must be within the judge's



discretion. Here, the expert has failed to show that the trial judge abused his discretion. (43 C.A.4th 303, 304.)

(2) *Travel and Preparation*. The *designating party* is responsible for the expert's travel expenses and any fee for preparing for the deposition. (C.C.P. 2034(i)(2).) This is a change from previous law, which required the party taking the deposition to reimburse the expert for the cost of travel to the deposition site. (Reporter's Note to C.C.P. 2034, in 2 Hogan, Cal. Civil Discovery, Appendix C.)

(3) *Applicability to Workers' Compensation Action*. The fee is payable in a workers' compensation case in which a party desires to depose any expert on another party's expert witness list. (C.C.P. 2034(i)(2).)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Time Spent at Deposition*. The portion of C.C.P. 2034(i)(2) relating to calculation of the amount of the fee was repealed and replaced by C.C.P. 2034.430(b) in 2004 without substantive change.

C.C.P. 2034(i)(4), on motions for an order setting the compensation of an expert, was repealed and replaced by C.C.P. 2034.470 in 2004 without substantive change. (2) *Travel and Preparation*. The portion of C.C.P. 2034(i)(2) relating to reimbursement for travel and preparation expenses was repealed and replaced by C.C.P. 2034.440 in 2004 without substantive change.

See Reporter's Note to C.C.P. 2034, in Hogan, 2 Cal. Civil Discovery 2d, Appendix D.

(3) *Applicability to Workers' Compensation Action*. The portion of C.C.P. 2034(i)(2) making the statute applicable to workers' compensation proceedings was repealed and replaced by C.C.P. 2034.430(f) in 2004 without substantive change.



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#### D. Deposition of Other Party's Expert.

##### 3. Fees.

##### c. Variable Fee Schedule.

*2 Witkin Cal. Evid. Discovery § 192*

[§ 192] Variable Fee Schedule.

In *Rancho Bernardo Dev. Co. v. Superior Court* (1992) 2 C.A.4th 358, 2 C.R.2d 878, the court construed C.C.P. 2034(i)(2) (supra, §190) in its application to the following situation: One of plaintiff's experts, architect S, devoted a considerable portion of his practice to expert investigation. He adopted a standard fee schedule, charging \$ 200 per hour for ordinary services and consultation, and \$ 250 per hour for depositions and court appearances. Plaintiff and S contended that he was entitled to charge the \$ 250 fee for testimony at petitioner's discovery deposition. *Held*, the contention was sound; such variations in fee charges are appropriate.

(a) "In reaching this decision we make two subsidiary determinations. The first is that it is not only customary and usual but also reasonable for an expert to demand higher fees for testimonial service than for other service. The process of giving formal testimony under oath, whether it be in court or by deposition, is an obviously more stressful and tense activity than consulting with your client in his office. The fact that the testimony is sworn, and is designed to be preserved for future precise reference, in and of itself makes the service more valuable than other activities of an expert. The existence of several-tier fee schedules, in use by virtually all experts, while perhaps not the ultimate justification for same, at least testifies to the industry consensus in their acceptance." (2 C.A.4th 362.)

(b) "The second determination is that the statute does not preclude the use of variable fee schedules, nor does it limit the fee for deposition services to whatever lower fee might be charged for investigative services." (2 C.A.4th 362.)

(c) "More important, perhaps, is that we follow the basic maxim that words of a statute are, when unambiguous, to be interpreted literally, and given their common and ordinary meaning. ... The entire focus of section 2034(i)(2) is upon the taking of the deposition of an opposing party's expert. The payment required of the opposing party is 'the expert's reasonable and customary hourly or daily fee for the actual time consumed in the examination of that expert. ...' Literally, therefore, the statute specifies that the payment shall be at the rate charged by the expert for deposition testimony. The limit imposed by subsequent language of the subdivision is that this shall not exceed the fee charged the party who retained the expert. Knowing, as we do (and presumably as the all-knowing Legislature also knew) that experts customarily charge more for depositions than for other work, it would be nonsensical to limit the testimonial charge to the amount charged for nontestimonial work. The first measure of compensation (the reasonable fee) would always be then reduced by the second measure (the lower rate charged for ordinary services), thus making the first and presumably principal fee definition inoperative." (2 C.A.4th 363.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2034(i)(2)*, on expert witness fees, was repealed and replaced by *C.C.P. 2034.430* in 2004 without substantive change.



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### VII. EXCHANGE OF EXPERT WITNESS INFORMATION

#### D. Deposition of Other Party's Expert.

##### 3. Fees.

##### d. Order Setting Compensation.

2 Witkin Cal. Evid. Discovery § 193

[§ 193] Order Setting Compensation.

(1) *Motion for Order.* A party who deems the expert's hourly or daily fee unreasonable may move for an order setting the expert's compensation. Notice of the motion must be given to the expert. The motion must be accompanied by a declaration showing a reasonable and good faith attempt at an informal resolution of each issue presented. The attempt at informal resolution must have included either the party or the expert providing the other with proof of the ordinary and customary fee that the expert has actually charged and received for similar services, the total number of times that the expert has charged and received the presently demanded fee, and the frequency and regularity with which the expert has charged and received that fee over the last 2 years. (*C.C.P. 2034(i)(4)*); on monetary sanctions for failure to attempt informal resolution, see *infra*, §252.)

(2) *Court's Determination.* These same items of proof should be provided to the court to aid in its determination about the reasonableness of the fee. The court may also consider the ordinary and customary fees charged by similar experts for similar services within the relevant community, along with any other necessary or appropriate factors. If the court decides that the expert's demanded fee is unreasonable, it will set the fee. (*C.C.P. 2034(i)(4)*.)

(3) *Monetary Sanctions.* The court must impose monetary sanctions under *C.C.P. 2023* (see *infra*, §252) against someone who unsuccessfully makes or opposes a motion to set the expert witness fee, unless it finds the one subject to sanctions acted with substantial justification or that other circumstances make imposing sanctions unjust. (*C.C.P. 2034(i)(4)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Motion for Order.* *C.C.P. 2034(i)(4)*, relating to motions for an order setting compensation, was repealed and replaced by *C.C.P. 2034.470* in 2004 without substantive change.

See 20 California Lawyer 70 (May 2000) [how to evaluate reasonableness of, and challenge, expert witness fee].

(2) *Court's Determination.* The portion of *C.C.P. 2034(i)(4)* relating to the determination of a motion for an order setting compensation was repealed and replaced by *C.C.P. 2034.470(c)-(e)* in 2004 without substantive change.(3) *Monetary Sanctions.* *C.C.P. 2023*, on monetary sanctions generally, was repealed and replaced by *C.C.P. 2023.010* et seq. in 2004 without substantive change.

The portion of *C.C.P. 2034(i)(4)* relating to the imposition of sanctions in connection with a motion for an order

setting an expert witness fee was repealed and replaced by *C.C.P. 2034.470(g)* in 2004 without substantive change.



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VII. EXCHANGE OF EXPERT WITNESS INFORMATION

D. Deposition of Other Party's Expert.

3. Fees.

e. Tender of Fee.

*2 Witkin Cal. Evid. Discovery § 194*

[§ 194] Tender of Fee.

A fee based on the anticipated length of the deposition must be tendered either with service of the deposition notice or at the commencement of the deposition. It must be delivered to the attorney for the designating party. If the deposition takes longer than anticipated, the balance of the fee must be paid within 5 days of receipt of an itemized statement from the expert. (*C.C.P. 2034(i)(2)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2034(i)(2)*, on tender of the expert witness fee, was repealed and replaced by *C.C.P. 2034.450* in 2004 without substantive change.



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### VII. EXCHANGE OF EXPERT WITNESS INFORMATION

#### D. Deposition of Other Party's Expert.

#### 4. Party's Obligation To Produce Expert.

2 Witkin Cal. Evid. Discovery § 195

[§ 195] Party's Obligation To Produce Expert.

(1) *Retained Experts*. Service of a proper deposition notice accompanied by tender of the fee described in *C.C.P. 2034(i)(2)* (supra, §190 et seq.) "is effective to require the party employing or retaining the expert to produce the expert for the deposition." (*C.C.P. 2034(i)(3)*.) Thus, a deposition subpoena (see supra, §42 et seq.) is not required to secure the attendance of the retained "opinion" experts described in *C.C.P. 2034(a)(2)* (supra, §183). (See Reporter's Note to *C.C.P. 2034*, in 2 Hogan, Cal. Civil Discovery, Appendix C [stating that statute codifies holding to that effect in *Tahoe Forest Inn v. Superior Court* (1979) 99 C.A.3d 509, 160 C.R. 314]; see also C.E.B., 2 Civil Discovery Practice 3d, §11.44; 1 Hogan, Cal. Civil Discovery §10.9; on law that deposition subpoena is not needed for party or party's employee, see supra, §39.)

If the party noticing the deposition fails to tender the expert's fee, the expert may not be deposed at that time unless the parties stipulate otherwise. (*C.C.P. 2034(i)(3)*.)

(2) *Other Experts*. In *Hurtado v. Western Med. Center* (1990) 222 C.A.3d 1198, 272 C.R. 324, a medical malpractice action, plaintiff responded to defendants' demand for an exchange of expert witness information by designating three doctors as her treating physicians. After defendants served notice of deposition of the three doctors, the parties were unable to agree on a date, and a conflict developed concerning which party had the burden to produce the experts for deposition. The trial judge ruled that the burden was on plaintiff, because she had designated the doctors as experts, and thus, the trial judge imposed sanctions when the doctors failed to attend. *Held*, this was error. *C.C.P. 2034* distinguishes between percipient witnesses, i.e., those acquiring information by personal observation, and retained experts, and places the burden of producing an expert witness for deposition on the designating party only if the witness is a retained expert and the noticing party has tendered the expert witness fees. Here, the witnesses were not retained for the purpose of forming an opinion, but rather were designated as experts because, as the treating physicians, they might be required to give an expert opinion. (222 C.A.3d 1203.) (See C.E.B., 2 Civil Discovery Practice 3d, §11.45; 1 Hogan, Cal. Civil Discovery §10.9.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Retained Experts*. *C.C.P. 2034(i)(2)*, on expert witness fees, was repealed and replaced by *C.C.P. 2034.430* et seq. in 2004 without substantive change.

*C.C.P. 2034(i)(3)*, on the effect of service of a deposition notice along with the required fee, was repealed and replaced by *C.C.P. 2034.460* in 2004 without substantive change.

*C.C.P. 2034(a)(2)*, on retained experts, was repealed and replaced by *C.C.P. 2034.210(b)* in 2004 without substantive change.

See *True v. Shank* (2000) 81 C.A.4th 1250, 1256, 97 C.R.2d 462 [although *C.C.P. 2034(i)(3)* (now *C.C.P. 2034.460*) states that expert need not be produced for deposition if notice is not accompanied by tender of witness fee, when that subdivision is read together with *C.C.P. 2034(i)(2)* (now *C.C.P. 2034.450*), it is clear that fee may be tendered either with notice or at commencement of deposition]; Reporter's Note to *C.C.P. 2034*, in Hogan, 2 Cal. Civil Discovery 2d, Appendix D; C.E.B., 2 Civil Discovery Practice 4th, §11.31 et seq.; Hogan, 1 Cal. Civil Discovery 2d, §10.9.

(2) *Other Experts.* *C.C.P. 2034*, on the exchange of expert witness information, was repealed and replaced by *C.C.P. 2034.010* et seq. in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §10.9.





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VII. EXCHANGE OF EXPERT WITNESS INFORMATION

E. Failure To Comply.

1. Exclusion of Testimony.

a. Rule.

2 *Witkin Cal. Evid. Discovery* § 196

[§ 196] Rule.

Under *C.C.P. 2034(j)*, on objection of a party who has timely complied with the exchange requirements of *C.C.P. 2034(f)* (*supra*, §180), the court must exclude the expert testimony of any witness who is offered by a party who has unreasonably failed to do any of the following:

- (1) Timely list that witness as an expert.
- (2) Submit an expert witness declaration.
- (3) Timely produce reports and writings.
- (4) Make that expert available for a deposition.

*C.C.P. 2034(j)* applies except as provided in *C.C.P. 2034(k)* (augmentation of list; *supra*, §187), *C.C.P. 2034(l)* (motion for late exchange; *infra*, §199) and *C.C.P. 2034(m)* (impeachment exception; *infra*, §197). (*C.C.P. 2034(j)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2034(j)*, on the exclusion of expert testimony, was repealed and replaced by *C.C.P. 2034.300* in 2004 without substantive change.

*C.C.P. 2034(f)*, on the exchange requirements, was repealed and replaced by *C.C.P. 2034.260* in 2004 without substantive change.

*C.C.P. 2034(k)*, on augmentation of the expert witness list, was repealed and replaced by *C.C.P. 2034.610* et seq. in 2004 without substantive change.

*C.C.P. 2034(l)*, on motions for late exchange, was repealed and replaced by *C.C.P. 2034.710* et seq. in 2004 without substantive change.

*C.C.P. 2034(m)*, on the exception applicable to impeachment witnesses, was repealed and replaced by *C.C.P. 2034.310* in 2004 without substantive change.



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### VII. EXCHANGE OF EXPERT WITNESS INFORMATION

#### E. Failure To Comply.

1. Exclusion of Testimony.
  - b. Exceptions.

2 Witkin Cal. Evid. Discovery § 197

[§ 197] Exceptions.

(1) *Pretrial Proceedings*. In *Kennedy v. Modesto City Hosp.* (1990) 221 C.A.3d 575, 270 C.R. 544, the court held that noncompliance with C.C.P. 2034 does not render expert testimony inadmissible in a pretrial summary judgment proceeding. From the use throughout C.C.P. 2034 of such terms as "trial date," "trial witnesses," "evidence at the trial," "testify at trial," etc., and from the express language of the exclusionary provision (C.C.P. 2034(j); see *supra*, §196), it appears that the Legislature "had in mind the exclusion of expert testimony offered by noncomplying parties at trial, not at a pretrial proceeding." (221 C.A.3d 582.)

(2) *Impeachment*. A party may call an expert he or she has not designated as a rebuttal witness to impeach the testimony of another party's expert witness. The expert may testify to the falsity or nonexistence of a fact used as the foundation for any opinion by an expert witness called by another party, but an undesignated expert witness may not contradict the opinion itself. (C.C.P. 2034(m).) The Commission noted that the word "impeachment" is "broad enough in its meaning under the Evidence Code to permit the argument that any unlisted expert may be called simply to contradict an opinion expressed at trial by another party's expert." (Reporter's Note to C.C.P. 2034, in 2 Hogan, Cal. Civil Discovery, Appendix C.) *Kennemur v. California* (1982) 133 C.A.3d 907, 184 C.R. 393, recognized that if "impeachment" is given such a broad meaning, the purposes behind expert witness exchanges would be substantially undermined. Accordingly, C.C.P. 2034(m) represents the Commission's attempt to prevent the mere contradiction of a designated expert's *opinion* by an unlisted expert. (Reporter's Note to C.C.P. 2034, in 2 Hogan, Cal. Civil Discovery, Appendix C.) (See *Fish v. Guevara* (1993) 12 C.A.4th 142, 146, 15 C.R.2d 329 [following *Kennemur*]; *Howard Contracting v. G. A. MacDonald Const. Co.* (1998) 71 C.A.4th 38, 54, 83 C.R.2d 590 [following *Kennemur*; testimony contradicting opinion expressed by other party's expert about accepted accounting practices for calculating overhead and costs is "explicitly proscribed" by C.C.P. 2034(m)]; C.E.B., 2 Civil Discovery Practice 3d, §11.62; 1 Hogan, Cal. Civil Discovery §10.14.)

(3) *Other Party's Deposed Experts*. A party may call the expert of another party if that expert has been deposed under C.C.P. 2034(i) (*supra*, §188). (C.C.P. 2034(m); see *Powell v. Superior Court* (1989) 211 C.A.3d 441, 443, 259 C.R. 390.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Pretrial Proceedings*. C.C.P. 2034(j), on the exclusion of expert testimony, was repealed and replaced by C.C.P. 2034.300 in 2004 without substantive change.

(2) *Impeachment*. The portion of *C.C.P. 2034(m)* relating to the calling of nondesignated impeachment witnesses was repealed and replaced by *C.C.P. 2034.310(b)* in 2004 without substantive change.

See *Mizel v. Santa Monica* (2001) 93 C.A.4th 1059, 1068, 113 C.R.2d 649 [in personal injury action in which emergency room doctor testified that alcohol he smelled on plaintiff's breath did not necessarily mean plaintiff was drunk, trial judge properly excluded testimony of defendant's undisclosed expert witness intended to impeach doctor's testimony; witness' testimony would not have challenged foundational facts of doctor's testimony but would have merely rendered contrary opinion]; Reporter's Note to *C.C.P. 2034*, in Hogan, 2 Cal. Civil Discovery 2d, Appendix D; C.E.B., 2 Civil Discovery Practice 4th, §11.66; Hogan, 1 Cal. Civil Discovery 2d, §10.14.(3) *Other Party's Deposed Experts*. The portion of *C.C.P. 2034(m)* relating to the calling of the other party's deposed expert was repealed and replaced by *C.C.P. 2034.310(a)* in 2004 without substantive change.

*C.C.P. 2034(i)*, on the deposition of expert witnesses, was repealed and replaced by *C.C.P. 2034.410* et seq. in 2004 without substantive change.



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### VII. EXCHANGE OF EXPERT WITNESS INFORMATION

#### E. Failure To Comply.

#### 1. Exclusion of Testimony.

##### c. Illustrations.

2 Witkin Cal. Evid. Discovery § 198

[§ 198] Illustrations.

(1) *Testimony Not Permitted.* In *Bonds v. Roy* (1999) 20 C.4th 140, 83 C.R.2d 289, 973 P.2d 66, plaintiff sued defendant for medical malpractice, contending that defendant had negligently severed a nerve in plaintiff's arm during surgery. Defendant designated an orthopedic surgeon as an expert and submitted an expert witness declaration describing the expert's expected testimony as relating to damages. At his deposition, the expert testified that he had been retained "to evaluate the disability of plaintiff at the time I saw him" and "to evaluate how much disability he was [having] prior to the surgery, based on the records." The expert specifically confirmed that he did not expect "to be giving any testimony or any opinion concerning the standard of care issues that might be involved in this case." Nevertheless, at trial, defendant's counsel sought permission to expand the scope of the expert's testimony to include whether plaintiff's injury was consistent with a cut nerve or merely a stretched nerve, and the standard of care as to immediate reoperation and consultation with a neurologist. The trial court declined the request. The jury returned a verdict for plaintiff. *Held*, judgment affirmed.

(a) *A trial court may preclude an expert witness from testifying at trial on a subject whose general substance was not previously described in an expert witness declaration.*

(1) The phrase "expert witness declaration" in C.C.P. 2034(f)(2) (supra, §184) is a term of art, referring to a declaration that meets each of five separate content requirements (20 C.4th 146), including the requirement that the declaration contain a brief narrative statement of the general substance of the testimony that the expert is expected to give (20 C.4th 145). Hence, a party submits an expert witness declaration under C.C.P. 2034(j)(2) (supra, §196) when it submits a declaration that complies with all these requirements. (20 C.4th 146.)

(2) The elaborate amendment provisions of C.C.P. 2034(k) (supra, §187), which are expressly cross-referenced in C.C.P. 2034(j), would be meaningless if the exclusion sanction of C.C.P. 2034(j) could be invoked only when a party failed to submit an expert witness declaration altogether. C.C.P. 2034(k) requires a party to move to amend the declaration if there are deviations in "the general substance of the testimony that an expert previously designated is expected to give." If the motion is denied, the denial will have no practical effect unless the testimony is excluded. (20 C.4th 146.)

(3) The purpose of C.C.P. 2034 is to give fair notice of what an expert will say at trial (20 C.4th 146), which allows the parties to assess whether to take the expert's deposition, to explore fully the relevant subject area at a deposition, and to select an expert who can respond with a competing opinion on that subject area (20 C.4th 147). When an expert is

permitted to testify at trial on a previously undisclosed subject area, opposing parties lack a fair opportunity to prepare for cross-examination or rebuttal. "It makes little practical difference whether the party proffering the expert testimony failed to submit an expert witness declaration or submitted an inaccurate one." (20 C.4th 147.)

(4) The opinions of the Courts of Appeal in *Martinez v. Poway* (1993) 12 C.A.4th 425, 15 C.R.2d 644, and *Castaneda v. Bornstein* (1995) 36 C.A.4th 1818, 43 C.R.2d 10, are disapproved to the extent they reach a result contrary to the one here. (20 C.4th 149, footnote 4.) Those courts incorrectly construed an amendment to C.C.P. 2034(j). The subdivision's exclusion sanction originally applied to a party that failed to "state in an expert witness declaration the general substance of the testimony of that expert," but was amended to apply to a party that unreasonably fails to "submit an expert witness declaration." Contrary to the suggestion in *Castaneda* and *Martinez*, the amendment, considered in the context of the statute as a whole, is best viewed as an extension of the exclusion sanction to cover any unreasonable failure to comply with the expert witness declaration requirements of C.C.P. 2034(f)(2). (20 C.4th 148.)

(5) Moreover, the suggestion in *Castaneda* that "remedies short of evidence exclusion" are available when a party fails to comply with the requirement to disclose the general substance of that testimony is not persuasive. The suggested remedies, such as requiring the party to submit a detailed declaration as to the expert's expected testimony, making the expert available for deposition at the designating party's expense, and allowing the opposing party to designate additional experts, are nearly all already required by C.C.P. 2034(f)(2) and (k). (20 C.4th 148.)

(b) *If a party wishes to expand the scope of an expert's testimony beyond what is stated in the declaration, it must successfully move for leave to amend the declaration.* Defendant concedes that he never moved under C.C.P. 2034(k) to amend the expert witness declaration to include the subject matter of standard of care. Even if defendant's counsel's request to expand the scope of the expert's testimony were considered an implicit motion, the trial court acted well within its discretion in denying it. The expert was the last defense witness, testifying in the afternoon of the last day of testimony. Defendant did not even attempt to expand the scope of the expert's testimony until just before the expert took the stand, and defendant's trial counsel offered no excuse for his failure to do so earlier. Thus, there was no practical opportunity for plaintiff to depose the expert or for plaintiff's own experts to rebut the expert's testimony. (20 C.4th 149.)

Other cases in which the expert's testimony was excluded include:

*Richaud v. Jennings* (1993) 16 C.A.4th 81, 90, 91, 19 C.R.2d 790 [trial judge properly excluded testimony of plaintiff's new expert witness where plaintiff failed to move under C.C.P. 2034(k) (amendment and augmentation of list; supra, §187) to substitute expert for one already designated].

*Province v. Center for Women's Health & Family Birth* (1993) 20 C.A.4th 1673, 1683, 1684, 25 C.R.2d 667 [in negligence action against medical center arising from birth complications, trial judge committed reversible error in allowing doctor, called by defendant as percipient witness and not named as expert witness, to give opinion as to when knot in plaintiff's umbilical cord occurred].

(2) *Testimony Permitted.* Examples of cases in which C.C.P. 2034(j) did not require exclusion of expert testimony include:

*Stanchfield v. Hamer Toyota* (1995) 37 C.A.4th 1495, 1504, 44 C.R.2d 565 [although defendant's expert was not ready at scheduled deposition, plaintiff acted unreasonably in waiting until expert was scheduled to take stand at trial to voice first objection; motion to exclude testimony was properly denied].

*Plunkett v. Spaulding* (1997) 52 C.A.4th 114, 60 C.R.2d 377 [instead of excluding testimony under C.C.P. 2034(j), trial court should have allowed plaintiff to submit tardy expert witness declaration under C.C.P. 2034(l), infra, §199].

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Testimony Not Permitted.* C.C.P. 2034(f)(2), on expert witness declarations, was repealed and replaced by C.C.P.

2034.260(c) in 2004 without substantive change.

*C.C.P. 2034(j)*, on the exclusion of expert testimony, was repealed and replaced by *C.C.P. 2034.300* in 2004 without substantive change. *C.C.P. 2034(j)(2)*, on exclusion for failure to submit an expert witness declaration, became *C.C.P. 2034.300(b)*.

*C.C.P. 2034(k)*, on augmentation or amendment of the expert witness list, was repealed and replaced by *C.C.P. 2034.610 et seq.* in 2004 without substantive change.

See *Jones v. Moore* (2000) 80 C.A.4th 557, 564, 565, 95 C.R.2d 216 [where plaintiff's expert testified in deposition as to certain opinions, and said that those were his only opinions and that he would notify defense if he had others, trial judge properly prevented plaintiff from questioning him at trial on other opinions as to which he had not provided notice; plaintiff's conduct in this regard was similar to unreasonably failing to make expert available for deposition within meaning of *C.C.P. 2034(j)* (now *C.C.P. 2034.300*)]. (2) *Testimony Permitted*. *C.C.P. 2034(j)*, on the exclusion of expert testimony, was repealed and replaced by *C.C.P. 2034.300* in 2004 without substantive change.

*C.C.P. 2034(l)*, on motions for late exchange, was repealed and replaced by *C.C.P. 2034.710 et seq.* in 2004 without substantive change.

See *Jones v. Moore*, *supra*, 80 C.A.4th 566 [in legal malpractice action, ambit of defendant's expert witness declaration, which stated that expert would testify as family law expert, was sufficiently broad to permit expert to opine that defendant did not fall below standard of care in underlying marital dissolution by failing to join husband's pension plan as party or use plan as security for equalizing promissory note]; *DePalma v. Rodriguez* (2007) 151 C.A.4th 159, 165, 59 C.R.3d 479 [testimony of defendant's biomechanic expert was properly admitted where it constituted merely expanded description and interpretation of conclusions stated in his deposition testimony; distinguishing *Bonds v. Roy* (1999) 20 C.4th 140, 83 C.R.2d 289, 973 P.2d 66, text, p. 1027, which involved scope of expert witness declaration, and *Jones v. Moore*, *supra*, 80 C.A.4th 564, 565, where expert, after giving opinions in deposition, stated that they were only opinions he would offer at trial].



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## CHAPTER X - Discovery

### VII. EXCHANGE OF EXPERT WITNESS INFORMATION

#### E. Failure To Comply.

#### 2. Permission To Submit Tardy Information.

*2 Witkin Cal. Evid. Discovery § 199*

[§ 199] Permission To Submit Tardy Information.

(1) *Motion for Late Exchange.* A party who fails to provide expert witness information by the date of exchange may move to submit the information at a later date. The motion must be made a sufficient time in advance of the time limit for the completion of discovery under *C.C.P. 2024* (supra, §23) "to permit the deposition of any expert to whom the motion relates to be taken within that time limit. However, under exceptional circumstances, the court may permit the motion to be made at a later time." The motion must be accompanied by a declaration showing a reasonable and good faith attempt at an informal resolution of each issue presented. (*C.C.P. 2034(l)*; see *C.E.B.*, 2 Civil Discovery Practice 3d, §11.39 et seq.; 1 Hogan, Cal. Civil Discovery §10.13; on monetary sanctions for failure to attempt informal resolution, see *infra*, §252.)

(2) *Basis for Order.* The motion must be granted only if the court, "after taking into account the extent to which the opposing party has relied on the absence of a list of expert witnesses," determines that the opposing party will not be prejudiced and that the moving party (a) failed to submit information "as the result of mistake, inadvertence, surprise, or excusable neglect," (b) made the motion promptly, and (c) promptly served on all other parties a copy of the proposed witness lists and declarations described in *C.C.P. 2034(f)* (supra, §182 et seq.). (*C.C.P. 2034(l)*.) This provision is intended to provide relief from default similar to that provided by *C.C.P. 473* and is meant to supersede *C.C.P. 473* with respect to this discovery device. (Reporter's Note to *C.C.P. 2034*, in 2 Hogan, Cal. Civil Discovery, Appendix C.) (See *Plunkett v. Spaulding* (1997) 52 C.A.4th 114, 136, 137, 60 C.R.2d 377 [refusal to grant motion to submit tardy expert witness declaration was error, where initial failure to file declaration was due to honest mistake of law, plaintiff's counsel acted promptly to attempt to rectify mistake, and defendant's counsel made no specific showing of prejudice]; *Williams v. Volkswagenwerk Aktiengesellschaft* (1986) 180 C.A.3d 1244, 1256, 226 C.R. 306 [permitting testimony under predecessor to *C.C.P. 2034(j)* (former *C.C.P. 2037.6*)]; 58 A.L.R.4th 653 [propriety of allowing testimony of expert witness whose name or address was not disclosed during pretrial discovery proceedings].)

(3) *Conditions.* The order must be conditioned on the moving party making the expert available immediately for a deposition under *C.C.P. 2034(i)* (supra, §188), "and on such other terms as may be just." For example, the court may allow a party opposing the motion to designate additional expert witnesses or to elicit additional opinions from those previously designated, continue the trial for a reasonable period of time, or award costs and litigation expenses to a party opposing the motion. (*C.C.P. 2034(l)*.)

(4) *Monetary Sanctions.* The court must impose monetary sanctions under *C.C.P. 2023* (see *infra*, §252) against someone who unsuccessfully makes or opposes a motion to submit tardy expert witness information, unless it finds the one subject to sanctions acted with substantial justification or that other circumstances make imposing sanctions unjust.

(*C.C.P. 2034(l)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Motion for Late Exchange. C.C.P. 2024*, on discovery time limits, was repealed and replaced by *C.C.P. 2024.010* et seq. in 2004 without substantive change.

The portion of *C.C.P. 2034(l)* setting forth the procedure for moving for late exchange was repealed and replaced by *C.C.P. 2034.710* in 2004 without substantive change.

See C.E.B., 2 Civil Discovery Practice 4th, §11.57 et seq.; Hogan, 1 Cal. Civil Discovery 2d, §10.13.

(2) *Basis for Order. C.C.P. 2034(f)*, on the methods of exchanging expert witness lists and declarations, was repealed and replaced by *C.C.P. 2034.260* in 2004 without substantive change.

The portion of *C.C.P. 2034(l)* specifying the basis for the order was repealed and replaced by *C.C.P. 2034.720* in 2004 without substantive change.

*C.C.P. 2034(j)*, on the exclusion of expert testimony, was repealed and replaced by *C.C.P. 2034.300* in 2004 without substantive change.

See Reporter's Note to *C.C.P. 2034*, in Hogan, 2 Cal. Civil Discovery 2d, Appendix D.(3) *Conditions. C.C.P. 2034(i)*, on the deposition of expert witnesses, was repealed and replaced by *C.C.P. 2034.410* et seq. in 2004 without substantive change.

The portion of *C.C.P. 2034(l)* specifying conditions for the order was repealed and replaced by *C.C.P. 2034.720(d)* in 2004 without substantive change.

(4) *Monetary Sanctions. C.C.P. 2023*, on monetary sanctions generally, was repealed and replaced by *C.C.P. 2023.010* et seq. in 2004 without substantive change.

The portion of *C.C.P. 2034(l)* authorizing sanctions in connection with motions to submit tardy expert witness information was repealed and replaced by *C.C.P. 2034.730* in 2004 without substantive change.





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## CHAPTER X - Discovery

### VIII. EXCHANGE OF INFORMATION IN CONDEMNATION

#### A. Statutory Authorization.

2 *Witkin Cal. Evid. Discovery* § 200

[§ 200] Statutory Authorization.

(1) *Former Law.* The 1967 Legislature enacted a chapter entitled "Exchange of Information in Eminent Domain Proceedings" (former C.C.P. 1272.01 et seq.), based on experience primarily gained in the Los Angeles Superior Court. (See *Swartzman v. Superior Court* (1964) 231 C.A.2d 195, 41 C.R. 721, supra, §63; *Mack v. Superior Court* (1968) 259 C.A.2d 7, 11, 66 C.R. 280, 2 Cal. Evidence (4th), Witnesses, §145 [work product protected]; *Nestle v. Santa Monica* (1972) 6 C.3d 920, 929, 101 C.R. 568, 496 P.2d 480 [usefulness of exchanging appraisal reports]; 20 *Hastings L. J.* 650 [comparison of state and federal practices]; 6 *Loyola L.A. L. Rev.* 447 [mutuality of discovery in California eminent domain].)

(2) *Present Law.* In 1975, the Legislature repealed former C.C.P. 1272.01 et seq., enacting a new Eminent Domain Law, C.C.P. 1230.010 et seq. (See 8 *Summary* (9th), *Constitutional Law*, §953 et seq.) The discovery provisions are in C.C.P. 1258.010 et seq. (See C.E.B., 1 Condemnation Practice 2d, §9.6 et seq.; Cal. Civil Practice, 2 Real Property Litigation, §15.64 et seq.; C.J.E.R., Judges Benchbook, Civil Proceedings: Discovery §18.25 et seq.)

The provisions of C.C.P. 1258.010 et seq. supplement, but do not replace, restrict, or prevent the use of discovery procedures or limit the matters that are discoverable in eminent domain proceedings. (C.C.P. 1258.010.) And nothing in the provisions makes evidence admissible that is not otherwise admissible or permits a witness to base an opinion on a matter that is not a proper basis for the opinion. (C.C.P. 1258.030.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Present Law.*

*Cross-Reference:* 8 *Summary* (10th), *Constitutional Law*, §1170 et seq.



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VIII. EXCHANGE OF INFORMATION IN CONDEMNATION

B. Procedure.

1. Demand.

*2 Witkin Cal. Evid. Discovery § 201*

[§ 201] Demand.

A party may file and serve on another party a demand to exchange lists of expert witnesses and statements of valuation data. This must be done not later than the 10th day after the trial date is selected. On noticed motion and a showing of good cause, the court may permit a party to serve the demand on another party at a later time. (*C.C.P. 1258.210(a)*.)

The demand must describe the property to which it relates, although the description may be by reference to the complaint, and must include a statement in substantially the following form:

"You are required to serve and deposit with the clerk of court a list of expert witnesses and statements of valuation data in compliance with Article 2 ... [*C.C.P. 1258.210 et seq.*] not later than the date of exchange to be set in accordance with that article. Except as otherwise provided in that article, your failure to do so will constitute a waiver of your right to call unlisted expert witnesses during your case in chief and of your right to introduce on direct examination during your case in chief any matter that is required to be, but is not, set forth in your statements of valuation data." (*C.C.P. 1258.210(b)*; see *C.E.B.*, 1 Condemnation Practice 2d, §9.8; *Cal. Civil Practice*, 2 Real Property Litigation, §§15.65, 15.71.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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VIII. EXCHANGE OF INFORMATION IN CONDEMNATION

B. Procedure.

2. Date of Exchange.

*2 Witkin Cal. Evid. Discovery § 202*

[§ 202] Date of Exchange.

The date of exchange is the date to which the party who served a demand and the served party agree for the exchange of their lists of expert witnesses and statements of valuation data. But if no agreement is reached, the date is 60 days before trial commences on the issue of compensation or the date set by the court on noticed motion of either party, for good cause. (*C.C.P. 1258.220.*)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 1258.220* was amended in 2001 to change the date of exchange from 60 to 90 days before commencement of the trial. The amended statute additionally provides that, unless otherwise agreed by the parties, the date of exchange may not be earlier than 9 months after the date of commencement of the proceeding.



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B. Procedure.

3. Witness Lists and Valuation Statements.  
a. Exchange and Deposit.

2 Witkin Cal. Evid. Discovery § 203

[§ 203] Exchange and Deposit.

(1) *Duties of Parties.* Not later than the date of exchange, the parties must take the following actions:

(a) Each party who served a demand and each party on whom a demand was served must deposit with the court clerk a list of expert witnesses and statements of valuation data. (*C.C.P. 1258.230(a)(1).*)

(b) A demanding party must serve its list and statements on each party on whom it served a demand. (*C.C.P. 1258.230(a)(2).*)

(c) Each party on whom a demand was served must serve a list and statements on the party who served the demand. (*C.C.P. 1258.230(a)(3).*)

(2) *Duties of Clerk.* For each list of expert witnesses and statement of valuation data deposited, the court clerk must make an entry in the register of actions. The lists and statements are not filed, but are available to the trial judge at the beginning of trial for the limited purpose of enabling the judge to apply the statutory provisions. At the trial's end, unless the judge orders otherwise, the clerk must return all lists and statements to the attorneys for the parties who deposited them. Lists or statements retained under court order may later be destroyed or otherwise disposed of like exhibits introduced at the trial. (*C.C.P. 1258.230(b)*; on destruction of exhibits, see *C.C.P. 1952 et seq.*, 2 *Cal. Proc.* (4th), *Courts*, §382.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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B. Procedure.

3. Witness Lists and Valuation Statements.

b. Witnesses for Whom Valuation Statement Is Required.

2 Witkin Cal. Evid. Discovery § 204

[§ 204] Witnesses for Whom Valuation Statement Is Required.

The number of statements of valuation data will vary according to the number of relevant witnesses. A statement must be exchanged for each person the party intends to call to testify on any of the following matters:

- (1) The *value* of the property being taken (*C.C.P. 1258.250(a)*);
- (2) The amount of *damage*, if any, to the remainder of the larger parcel from which the property is taken (*C.C.P. 1258.250(b)*);
- (3) The amount of *benefit*, if any, to the remainder of the larger parcel from which the property is taken (*C.C.P. 1258.250(c)*); or
- (4) The amount of other *compensation* that should be paid (*C.C.P. 1258.250(d)*). (See *Padre Dam Mun. Water Dist. v. Burkhardt* (1995) 38 C.A.4th 988, 993, 45 C.R.2d 506 [although property coowner had right to testify as to value of property, it was reversible error to admit his testimony in absence of compliance with exchange requirements].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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### VIII. EXCHANGE OF INFORMATION IN CONDEMNATION

#### B. Procedure.

#### 3. Witness Lists and Valuation Statements.

##### c. Contents.

2 *Witkin Cal. Evid. Discovery* § 205

[§ 205] Contents.

(1) *Expert Witness List*. The list of expert witnesses must include the name, business or residence address, and business occupation or profession of each person the party intends to call as an expert, together with a statement of the subject matter to which the expert's testimony relates. (*C.C.P. 1258.240*; see *C.E.B.*, 1 Condemnation Practice 2d, §9.9; *Cal. Civil Practice*, 2 Real Property Litigation, §15.67.)

(2) *Statement of Valuation Data*. The required statement of valuation data is lengthy and specific. Each statement must give the name and business or residence address of the witness, must state whether the witness will testify about a matter listed in *C.C.P. 1258.250* (*supra*, §204), must reveal what the witness' opinion is, and must show specified data (e.g., the highest and best use of the property, zoning, cost of reproducing or replacing improvements on the property) on which the opinion is based. (*C.C.P. 1258.260*; see *C.E.B.*, 1 Condemnation Practice 2d, §9.10; *Cal. Civil Practice*, 2 Real Property Litigation, §15.67.)

Although *C.C.P. 1258.260* does not explicitly address business goodwill valuation problems, its intent is to expose the expert's opinion on that subject when it is in issue. And the section "should be liberally construed to provide for a general statement of the expert's proposed testimony, with specifics covering the listed factors and any other supporting factors upon which the expert relies." (*Fresno v. Harrison* (1984) 154 *C.A.3d* 296, 303, 201 *C.R.* 219.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Statement of Valuation Data*. *C.C.P. 1258.260* was amended in 2001 to provide that if the items on which the witness will give an opinion include loss of goodwill, the valuation statement must include the method used by the expert to determine that loss and a summary of the data supporting the opinion. The amendment codifies the rule of *Fresno v. Harrison* (1984) 154 *C.A.3d* 296, 201 *C.R.* 219, text, p. 1034. (*Law Rev. Com. Comment.*)



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B. Procedure.

3. Witness Lists and Valuation Statements.

d. Additions.

2 *Witkin Cal. Evid. Discovery* § 206

[§ 206] Additions.

(1) *Duty To Notify*. A party who has served a list of expert witnesses and statements of valuation data must "diligently" give notice to the parties served under any of the following circumstances:

(a) If the party decides to call an expert witness not included in the list to testify on direct examination during the party's case in chief.

(b) If the party decides to call a witness to testify on direct examination during the party's case in chief on an opinion or data that should have been listed in the statement of valuation data for that witness but was omitted.

(c) If the party discovers data that should have been listed in a statement of valuation data but was not. (*C.C.P.* 1258.270; see *Cal. Civil Practice*, 2 Real Property Litigation, §15.69; on effect of diligent notification, see *infra*, §207.)

(2) *Contents of Notice*. The required notice must include the specified information about expert witnesses (*C.C.P.* 1258.240, *supra*, §205) and valuation data (*C.C.P.* 1258.260, *supra*, §205). The notice must be in writing, unless it is given after trial has begun. (*C.C.P.* 1258.270.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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### VIII. EXCHANGE OF INFORMATION IN CONDEMNATION

#### B. Procedure.

#### 4. Failure To Comply.

##### a. Excusable.

2 Witkin Cal. Evid. Discovery § 207

[§ 207] Excusable.

If a party should have included a witness, an opinion, or other data in a list of expert witnesses or statements of valuation data, but did not do so, the trial court may nonetheless allow the party to call the witness or permit a witness to testify to that opinion or data on direct examination during the party's case in chief. (*C.C.P. 1258.290(a)*.) The court may do so after making the following findings:

(1) The party made a good faith effort to comply with the statute (*C.C.P. 1258.210 et seq.*).

(2) The party gave notice in accordance with *C.C.P. 1258.270* (*supra*, §206).

(3) By the date of exchange, the party (a) would not in the exercise of reasonable diligence have determined to call the witness or discovered or listed the opinion or data or (b) failed to determine to call the witness or to discover or list the opinion or data through mistake, inadvertence, surprise, or excusable neglect. (*C.C.P. 1258.290(a)*.)

The trial court should grant permission "on terms that may be just," including, but not limited to, continuing the trial for a reasonable time and awarding costs and litigation expenses. (*C.C.P. 1258.290(a)*.)

In making its determination, the trial court must take into account the extent to which the opposing party relied on the list of expert witnesses and statements of valuation data, and consider whether the opposing party would be prejudiced if the witness is called or the testimony given. (*C.C.P. 1258.290(b)*); for decisions under former law, which was substantially similar to *C.C.P. 1258.290*, see *People v. Douglas* (1971) 15 C.A.3d 814, 820, 93 C.R. 644 [lengthy oral argument was adequate notice of intention to use unlisted expert as witness]; *Nestle v. Santa Monica* (1972) 6 C.3d 920, 929, 101 C.R. 568, 496 P.2d 480 [defendant failed to comply, but plaintiff did not object or request continuance; defendant's failure not ground for reversal]; 6 *Loyola L.A. L. Rev.* 447, 465 [criticizing *Nestle*].)

**SUPPLEMENT:** [This section is current through the latest supplement]





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### VIII. EXCHANGE OF INFORMATION IN CONDEMNATION

#### B. Procedure.

#### 4. Failure To Comply.

##### b. Inexcusable.

2 Witkin Cal. Evid. Discovery § 208

[§ 208] Inexcusable.

(1) *Sanctions*. Unless the failure to provide required data is excused (see *supra*, §207), a party who has complied with the statute may make an objection to protect itself from the other party's default. (*C.C.P. 1258.280*.) The following sanctions must then be imposed:

(a) No party required to serve a list of expert witnesses on the objecting party may call an expert witness to testify on direct examination during the party's case-in-chief unless the information required by *C.C.P. 1258.240* (*supra*, §205) was included on the list served. (*C.C.P. 1258.280(a)*.)

(b) No party required to serve statements of valuation data on the objecting party may call a witness to give an opinion on direct examination during the case in chief about a matter listed in *C.C.P. 1258.250* (*supra*, §204), unless a statement of valuation data for the witness was served. (*C.C.P. 1258.280(b)*.)

(c) During the case in chief of a party required to serve statements of valuation data on an objecting party, no witness called by the obligated party may testify on direct examination to an opinion or data that should have been, but was not, listed in the statement of valuation data. However, testimony that merely explains or elaborates on the listed data is not inadmissible. (*C.C.P. 1258.280(c)*.) (For decisions under former law, which was substantially similar to *C.C.P. 1258.280*, see *Regents of Univ. of Calif. v. Morris* (1968) 266 C.A.2d 616, 629, 72 C.R. 406 [plaintiff's counsel provided only "barebones" information; failure to strike held prejudicial error]; 6 *Loyola L.A. L. Rev.* 460 [discussing *Morris*]; *People v. Los Angeles* (1969) 273 C.A.2d 46, 53, 77 C.R. 875 [pretrial order required designation of *any* expert witness, not just appraisers; proposed testimony by unlisted experts about future zoning changes properly excluded]; *People v. Younger* (1970) 5 C.A.3d 575, 580, 86 C.R. 237 [pretrial order required exchange of appraisers' reports; subpena for unlisted appraiser properly quashed].)

(2) *Other Means of Presenting Excluded Evidence*. The Law Revision Commission Comment points out that *C.C.P. 1258.280* limits only the presentation of evidence during the case-in-chief; it does not preclude a party from calling a witness in rebuttal or having a witness give proper rebuttal testimony, and it places no limits on proper redirect examination to meet matters brought out on cross-examination of the party's witness. However, a party will not be allowed to defeat the purpose of the rule by reserving witnesses and valuation data for use in rebuttal where the witnesses should have been called and the valuation data presented on direct examination during the case in chief. (See *Monterey v. W. W. Leasing Unlimited* (1980) 109 C.A.3d 636, 644, 167 C.R. 12.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Sanctions*. See *Santa Clarita v. NTS Technical Systems* (2006) 137 C.A.4th 264, 276, 40 C.R.3d 244 [in eminent domain action, testimony of defendants' expert witness was properly excluded, where appraisal relied on by expert did not comply with date agreed on for exchange of expert witness lists and valuation data, and was not served on date 90 days prior to commencement of trial or date set by court based on good cause; trial judge's findings of lack of good faith, absence of requisite notice, and inexcusable delay were supported by ample evidence].



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VIII. EXCHANGE OF INFORMATION IN CONDEMNATION  
C. Related Discovery Procedures.

2 Witkin Cal. Evid. Discovery § 209

[§ 209] Related Discovery Procedures.

(1) *Alternatives to C.C.P. 1258.010 et seq.* The procedures established by *C.C.P. 1258.010* are subject to local variation. By court rule, a superior court may provide a procedure for the exchange of valuation data that can be used in lieu of the statutory procedure if the Judicial Council finds that the local procedure "serves the same purpose and is an adequate substitute" for the statutory procedure. (*C.C.P. 1258.300.*)

(2) *Procedures in Addition to C.C.P. 1258.010 et seq.* A party to an exchange of lists of expert witnesses and statements of valuation data, as provided in *C.C.P. 1258.210 et seq.* or pursuant to local court rule under *C.C.P. 1258.300*, may obtain discovery after the time of the exchange from the other party to the exchange and from any person the other party listed as an expert witness. (*C.C.P. 1258.020(b).*)

Proceedings under *C.C.P. 1258.020(b)* may be carried out without a court order and may proceed until not later than 20 days before the trial date on the issue of compensation. This is so notwithstanding any other statute or any court rule relating to discovery. (*C.C.P. 1258.020(a)*; C.E.B., 1 Condemnation Practice 2d, §9.5; Cal. Civil Practice, 2 Real Property Litigation, §15.68.)

On noticed motion by a person subjected to discovery under *C.C.P. 1258.020(b)*, the court may make an order that justice requires to protect the person from annoyance, embarrassment or oppression. (*C.C.P. 1258.020(c).*)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER X - Discovery

### IX. PERPETUATION AND PRESERVATION OF EVIDENCE

#### A. Nature of Proceeding.

2 *Witkin Cal. Evid. Discovery* § 210

[§ 210] Nature of Proceeding.

(1) *Former Law.* Statutes predating the 1957 Act recognized the equitable proceeding to perpetuate testimony by taking of depositions in anticipation of litigation, where there was danger that the witness might become unavailable. Because of the restrictions on depositions, the perpetuation statute was frequently employed not to preserve testimony in danger of being lost, but for discovery purposes. (See *Demaree v. Superior Court* (1937) 10 C.2d 99, 103, 73 P.2d 605; *Superior Ins. Co. v. Superior Court* (1951) 37 C.2d 749, 753, 235 P.2d 833; *Block v. Superior Court* (1963) 219 C.A.2d 469, 475, 33 C.R. 205, quoting the text; 45 Cal. L. Rev. 492; 3 Stanf. L. Rev. 530.)

Former C.C.P. 2017, added in 1957 and based on F.R. Civ. P., Rule 27, authorized a person "to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any Court of this State." But the section tightened up the conditions of the proceeding so as to restrict it to perpetuation and to eliminate its use for the discovery purposes adequately covered by other statutes. (See *Block v. Superior Court*, *supra*, 219 C.A.2d 478; *Hunt-Wesson Foods v. Stanislaus* (1969) 273 C.A.2d 92, 94, 77 C.R. 832; 23 Am.Jur.2d (1983 ed.), *Depositions and Discovery* §118 et seq.)

(2) *Present Statute.* One who expects to be a party in a California action may obtain discovery to perpetuate testimony or preserve evidence in the event an action is subsequently filed. The testimony may be the party's own or that of another natural person or organization. However, the discovery may not be used to ascertain the possible existence of a cause of action or defense, or to identify potential parties to an as yet unfiled action. (C.C.P. 2035(a); see C.E.B., 1 Civil Discovery Practice 3d, §4.128 et seq.; 2 Hogan, Cal. Civil Discovery, Chap. 14; 12 A.L.R.5th 577 [state court's grant or denial of application for preaction production of evidence].) This provision codifies the narrow interpretation of the term "perpetuation" in *Block v. Superior Court*, *supra*, and "makes it clear that this type of discovery is not to be used primarily for investigative purposes." (Reporter's Note to C.C.P. 2035(a), in 2 Hogan, Cal. Civil Discovery, Appendix C.)

(3) *Methods.* Testimony may be perpetuated and evidence may be preserved by the following methods: (a) oral and written depositions (see *supra*, §§39 et seq., 80 et seq.); (b) inspections of documents, things and places (see *supra*, §118 et seq.); and (c) physical and mental examinations (see *supra*, §140 et seq.). (C.C.P. 2035(b), codifying result in *Block v. Superior Court*, *supra*.)

(4) *Use of Deposition.* A perpetuation deposition taken under C.C.P. 2035 (or under comparable provisions of another jurisdiction) may be used in a California action subsequently brought involving the same subject matter. The deposition may be used in accordance with C.C.P. 2025(u) against a party or its successor in interest named in the petition as an expected adverse party. (C.C.P. 2035(g); see 3 Cal. Evidence (4th), *Presentation at Trial*, §157.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Present Statute.* *C.C.P. 2035(a)*, authorizing discovery to perpetuate testimony or preserve evidence, was repealed and replaced by *C.C.P. 2035.010* in 2004 without substantive change.

*C.C.P. 2035.010* was amended in 2005 to additionally allow one who expects a successor in interest to be a party to obtain discovery to perpetuate testimony or preserve evidence.

See C.E.B., 1 Civil Discovery Practice 4th, §5.147 et seq.; Hogan, 2 Cal. Civil Discovery 2d, Chap. 14; Reporter's Note to *C.C.P. 2035*, in Hogan, 2 Cal. Civil Discovery 2d, Appendix D.

(3) *Methods.* *C.C.P. 2035(b)*, on the methods of perpetuating testimony and preserving evidence, was repealed and replaced by *C.C.P. 2035.020* in 2004 without substantive change.

(4) *Use of Deposition.* *C.C.P. 2035*, on discovery for the purpose of perpetuating testimony or preserving evidence, was repealed and replaced by *C.C.P. 2035.010* et seq. in 2004 without substantive change. *C.C.P. 2035(g)*, on the use of perpetuation depositions, became *C.C.P. 2035.060*. *West's Key Number Digest*, Pretrial Procedure k.61



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IX. PERPETUATION AND PRESERVATION OF EVIDENCE

B. Procedure.

1. Petition.

a. Filing Required.

*2 Witkin Cal. Evid. Discovery § 211*

[§ 211] Filing Required.

One desiring to perpetuate testimony or preserve evidence files a verified petition titled in his or her own name in the superior court of the county of residence of one of the expected adverse parties, or, if no expected adverse party is a resident of California, in a county where the action may be filed, requesting a court order authorizing the discovery. (*C.C.P. 2035(c)*, (d); see C.E.B., 1 Civil Discovery Practice 3d, §4.132; 2 Hogan, Cal. Civil Discovery §14.2; C.E.B., 2 Civil Lit. Forms, §24.15.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2035(c)*, (d), requiring the filing of a verified petition, were repealed and replaced by *C.C.P. 2035.030* in 2004 without substantive change.

See C.E.B., 1 Civil Discovery Practice 4th, §5.149 et seq.; Hogan, 2 Cal. Civil Discovery 2d, §14.2.



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IX. PERPETUATION AND PRESERVATION OF EVIDENCE

B. Procedure.

1. Petition.

b. Form and Content.

2 *Witkin Cal. Evid. Discovery* § 212

[§ 212] Form and Content.

The petition must set forth all of the following:

- (1) The expectation that the petitioner will be a party to an action cognizable in a California court. (*C.C.P. 2035(d)(1).*)
- (2) The petitioner's present inability either to bring that action or to cause it to be brought. (*C.C.P. 2035(d)(2).*)
- (3) The subject matter of the expected action and the petitioner's involvement. (*C.C.P. 2035(d)(3).*)
- (4) The particular discovery methods that the petitioner desires to employ. (*C.C.P. 2035(d)(4)*; on available methods, see *supra*, §210.)
- (5) The facts that the petitioner desires to establish by the proposed discovery. (*C.C.P. 2035(d)(5).*)
- (6) The reasons for perpetuating or preserving these facts before an action has been filed. (*C.C.P. 2035(d)(6).*)
- (7) The name or a description of those whom the petitioner expects to be adverse parties so far as known. (*C.C.P. 2035(d)(7).*)
- (8) The names and addresses of those from whom the discovery is to be sought. (*C.C.P. 2035(d)(8).*)
- (9) The substance of the information expected to be elicited from those from whom discovery is being sought. (*C.C.P. 2035(d)(9).*) (See C.E.B., 1 Civil Discovery Practice 3d, §4.131; for form of petition, see C.E.B., 2 Civil Lit. Forms, §24.15.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2035(d)(1)-(d)(9)*, on the form and content of the petition, were repealed and replaced by *C.C.P. 2035.030(b)(1)-(b)(9)* in 2004 without substantive change.

(1) *Expectation that petitioner will be party: C.C.P. 2035.030(b)(1)*, as amended in 2005, also applies to the petitioner's successor in interest.

(2) *Petitioner's inability to bring action:* C.C.P. 2035.030(b)(2), as amended in 2005, also applies to the petitioner's successor in interest. "[I]f a person seeks presuit discovery on behalf of a successor in interest, a court may authorize such discovery only if both the petitioner and the petitioner's successor in interest are unable to bring suit." (Law Rev. Com. Comment to 2005 amendment.)

(3) *Subject matter of action and petitioner's involvement:* C.C.P. 2035.030(b)(3), as amended in 2005, additionally specifies that a copy of any written instrument the validity or construction of which may be called into question, or which is connected with the subject matter of the proposed discovery, must be attached to the petition.

See C.E.B., 1 Civil Discovery Practice 4th, §5.150.





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### IX. PERPETUATION AND PRESERVATION OF EVIDENCE

#### B. Procedure.

##### 1. Petition.

##### c. Notice and Service.

#### 2 *Witkin Cal. Evid. Discovery* § 213

[§ 213] Notice and Service.

(1) *Personal Service of Notice*. The petitioner must serve notice of the petition, along with a copy of the petition, on each natural person or organization named as an expected adverse party. The notice must state that the petitioner will apply for the perpetuation or preservation order at a specified hearing time and place. Service, accomplished in the same manner as service of a summons, must occur at least 20 days before the specified hearing date. (*C.C.P. 2035(e)*; 2 Hogan, Cal. Civil Discovery §14.3; for form of notice, see C.E.B., 2 Civil Lit. Forms, §24.14.)

(2) *Service by Publication*. If a petitioner, despite exercising due diligence, is unable to serve an expected adverse party, the court must order service by publication. If an expected adverse party who has been served by publication fails to appear at the hearing, the court must appoint an attorney to represent that party for all purposes, including the cross-examination of anyone whose testimony is taken by deposition. The petitioner must pay the appointed attorney's reasonable fees and expenses. (*C.C.P. 2035(e)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Personal Service of Notice*. The portion of *C.C.P. 2035(e)* providing for personal service of the notice was repealed and replaced by *C.C.P. 2035.040(a)-(c)* in 2004 without substantive change.

See Hogan, 2 Cal. Civil Discovery 2d, §14.3.

(2) *Service by Publication*. The portion of *C.C.P. 2035(e)* providing for service by publication was repealed and replaced by *C.C.P. 2035.040(d), (e)* in 2004 without substantive change.



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IX. PERPETUATION AND PRESERVATION OF EVIDENCE

B. Procedure.

2. Order.

2 *Witkin Cal. Evid. Discovery* § 214

[§ 214] Order.

If the court determines that all or part of the requested discovery may prevent a failure or delay of justice, it must authorize the discovery. The order must identify (1) witnesses whose depositions may be taken, (2) documents, things, or places that may be inspected, and (3) persons whose physical or mental conditions may be examined. The usual procedures for depositions, inspections, and examinations in pending actions are then followed. (*C.C.P. 2035(f)*; 2 Hogan, Cal. Civil Discovery §14.4; on oral and written depositions, see *supra*, §§39 et seq., 80 et seq.; on inspections of documents, things, and places, see *supra*, §118 et seq.; on physical and mental examinations, see *supra*, §140 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2035(f)*, on the order authorizing the requested discovery, was repealed and replaced by *C.C.P. 2035.050* in 2004 without substantive change.

*C.C.P. 2035.050*, as amended in 2005, further specifies that, in determining whether to authorize discovery by a petitioner who expects a successor in interest to be a party, the court must consider, in addition to other appropriate factors, whether the requested discovery could be conducted by the successor in interest instead of by the petitioner. "This factor is significant but not necessarily determinative." (Law Rev. Com. Comment to 2005 amendment.) *West's Key Number Digest*, Pretrial Procedure k.66



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## CHAPTER X - Discovery

### IX. PERPETUATION AND PRESERVATION OF EVIDENCE

#### C. Pending Appeal.

##### 1. Statutory Authority.

#### 2 *Witkin Cal. Evid. Discovery* § 215

[§ 215] Statutory Authority.

(1) *When Available*. If an appeal has been taken from a judgment entered by a California court, or if the time for taking an appeal has not expired, a party may obtain discovery for the purpose of perpetuating testimony or preserving information for use in possible further proceedings in that court. (*C.C.P. 2036(a)*; see 2 Hogan, Cal. Civil Discovery §14.5.)

(2) *Scope of Discovery*. The scope of the discovery allowed under *C.C.P. 2036(a)* is governed by *C.C.P. 2017* (supra, §9 et seq.) and *C.C.P. 2019* (infra, §241). (*C.C.P. 2036(a)*.) It may be accomplished by (a) oral and written depositions (see supra, §§39 et seq., 80 et seq.); (b) inspections of documents, things, and places (see supra, §118 et seq.); and (c) physical and mental examinations (see supra, §140 et seq.). (*C.C.P. 2036(b)*.)

(3) *Later Use of Deposition*. A deposition to perpetuate testimony taken under *C.C.P. 2036* may be used in a later proceeding in accordance with *C.C.P. 2025(u)* (3 *Cal. Evidence (4th)*, *Presentation at Trial*, §§153, 155). (*C.C.P. 2036(f)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *When Available*. *C.C.P. 2036(a)*, authorizing discovery for the purpose of perpetuating testimony or preserving evidence pending appeal, was repealed and replaced by *C.C.P. 2036.010* in 2004 without substantive change.

See Hogan, 2 Cal. Civil Discovery 2d, §14.5.

(2) *Scope of Discovery*. *C.C.P. 2017* and *2019*, on the scope of discovery, were repealed and replaced by *C.C.P. 2017.010* et seq. and *C.C.P. 2019.010* et seq. in 2004 without substantive change.

*C.C.P. 2036(a)*, referring to the statutes governing the scope of discovery, was repealed and replaced by *C.C.P. 2036.010* in 2004 without substantive change.

*C.C.P. 2036(b)*, specifying the methods of discovery, was repealed and replaced by *C.C.P. 2036.020* in 2004 without substantive change.

(3) *Later Use of Deposition*. *C.C.P. 2025(u)*, on the use of depositions at trial, was repealed and replaced by *C.C.P. 2025.620* in 2004 without substantive change.

*C.C.P. 2036*, authorizing discovery for the purpose of perpetuating testimony or preserving evidence pending

appeal, was repealed and replaced by *C.C.P. 2036.010* et seq. in 2004 without substantive change. *C.C.P. 2036(f)*, on use of a deposition to perpetuate testimony in a later proceeding, became *C.C.P. 2036.050*.



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IX. PERPETUATION AND PRESERVATION OF EVIDENCE

C. Pending Appeal.

2. Procedure.

a. Motion.

2 *Witkin Cal. Evid. Discovery* § 216

[§ 216] Motion.

(1) *Where and How Made.* A party seeking discovery pending appeal must obtain permission from the court that entered the judgment. The notice and service requirements for the motion for leave to conduct discovery pending appeal are the same as those for discovery sought in an action pending in that court. (*C.C.P. 2036(c).*)

(2) *Content of Motion.* The motion must set forth (a) the names and addresses of the natural persons or organizations from whom the discovery is being sought, (b) the particular discovery methods for which authorization is being sought (see *supra*, §215), and (c) the reasons for perpetuating discovery or preserving evidence. (*C.C.P. 2036(d).*)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Where and How Made.* *C.C.P. 2036(c)*, on the procedures for making the motion, was repealed and replaced by *C.C.P. 2036.030(a)* in 2004 without substantive change. (2) *Content of Motion.* *C.C.P. 2036(d)*, on the content of the motion, was repealed and replaced by *C.C.P. 2036.030(b)* in 2004 without substantive change.



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IX. PERPETUATION AND PRESERVATION OF EVIDENCE

C. Pending Appeal.

2. Procedure.

b. Order.

2 *Witkin Cal. Evid. Discovery* § 217

[§ 217] Order.

If the court determines that all or part of the requested discovery may prevent a failure or delay of justice in the event of further proceedings in the action in that court, the court must authorize the discovery. The order must identify (1) witnesses whose depositions may be taken, (2) documents, things, or places that may be inspected, and (3) persons whose physical or mental conditions may be examined. The usual procedures for depositions, inspections, and examinations in pending actions are then followed. (*C.C.P. 2036(e)*; on oral and written depositions, see *supra*, §§39 et seq., 80 et seq.; on inspections of documents, things, and places, see *supra*, §118 et seq.; on physical and mental examinations, see *supra*, §140 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2036(e)*, on determination of the motion and the contents of the order, was repealed and replaced by *C.C.P. 2036.040* in 2004 without substantive change.



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## CHAPTER X - Discovery

### X. SUBPENA DUCES TECUM

#### A. Nature and Use.

2 Witkin Cal. Evid. Discovery § 218

[§ 218] Nature and Use.

(1) *Definition.* The subpoena duces tecum is a subpoena that requires a witness to bring books, documents, or other things under the witness' control that the witness is legally bound to produce in evidence. (See *C.C.P. 1985(a)*; see also *P.C. 1327*; *F.R. Civ. P., Rule 45(a)*; *81 Am.Jur.2d (1992 ed.)*, *Witnesses* §18 et seq.; on production from witness on stand without subpoena duces tecum, see *3 Cal. Evidence (4th)*, *Presentation at Trial*, §150; on subpoena of personal records of consumers, see *infra*, §228 et seq.; on subpoena of employment records, see *infra*, §236 et seq.)

(2) *Relationship to Other Procedures.* The 1986 Civil Discovery Act did not amend *C.C.P. 1985* et seq., and those provisions are still applicable to subpoenas and subpoenas duces tecum generally. However, for purposes of depositions and the production of business records and things, the term *subpoena duces tecum* has been abandoned in favor of the term *deposition subpoena*. (On relationship between deposition subpoena and subpoena duces tecum, see *supra*, §54.)

Thus, the following methods to obtain tangible evidence from witnesses are available:

(a) A deposition subpoena (*C.C.P. 2020(a)*) is used to obtain documentary or other tangible evidence from a *nonparty* during *discovery*. *C.C.P. 1985* et seq. remain applicable to deposition subpoenas, except as modified by *C.C.P. 2020*. (*C.C.P. 2020(a)*, *supra*, §42.)

(b) A deposition notice (*C.C.P. 2025(h)(1)*; *supra*, §39 et seq.) or a demand for inspection of documents or things (*C.C.P. 2031(a)*, *supra*, §118) is used to obtain documentary or other tangible evidence from a *party* during *discovery*.

(c) A notice to produce (*C.C.P. 1987(c)*, *2 Cal. Evidence (4th)*, *Witnesses*, §36) is the simplest means of requiring a *party* witness to produce documentary evidence at *trial*, although a subpoena duces tecum may be used. (See Rutter Group, 1 Civil Trials and Evidence §1:110 et seq.; *C.E.B.*, 1 Civil Procedure During Trial 3d, §4.36 et seq.)

(d) A subpoena duces tecum (*C.C.P. 1985*) provides the only means of compelling a *nonparty* witness to produce tangible evidence at *trial*. (See Rutter Group, 1 Civil Trials and Evidence §1:122 et seq.; *C.E.B.*, 1 Civil Procedure During Trial 3d, §4.6 et seq.)

(3) *Applicability to Nonresidents.* Ordinarily, a witness may not be compelled to attend a hearing unless he or she is a resident within the state at the time of service. (*C.C.P. 1989*.) (See *2 Cal. Evidence (4th)*, *Witnesses*, §3.) This limitation does not apply when a custodian of records or other qualified witness is served with a subpoena duces tecum as provided in *Ev.C. 1560* et seq. (*2 Cal. Evidence (4th)*, *Documentary Evidence*, §50 et seq.) and the witness' personal appearance is not required. (*C.C.P. 1987.3*; *P.C. 1330*; see *82 A.L.R.2d 1403* [production of items held by foreign

custodian in another country].)

Personal jurisdiction over a party does not give the court power to compel production of out-of-state records that the party has in its custody only in a representative capacity. Thus, in *Coopman v. Superior Court* (1965) 237 C.A.2d 656, 47 C.R. 131, plaintiff wife in a California divorce action took the deposition of petitioner, an apparent relative of defendant husband, and by subpoena duces tecum sought to require production of books of a Nevada corporation of which petitioner was president. Petitioner was a California resident, but was not in the state for the purpose of transacting corporate business, the corporation never having done business here. *Held*, prohibition granted; plaintiff's remedy was to seek the aid of the Nevada courts in taking a deposition out of the state (C.C.P. 2026, supra, §85). (237 C.A.2d 662.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Definition.* See 81 Am.Jur.2d (2004 ed.), *Witnesses* §18 et seq.

(2) *Relationship to Other Procedures.*(a) *Deposition subpoena:* C.C.P. 2020(a) was repealed and replaced by C.C.P. 2020.010 in 2004 without substantive change.

(b) *Deposition notice or demand for inspection:* C.C.P. 2025(h)(1), authorizing deposition notices, was repealed and replaced by C.C.P. 2025.280(a) in 2004 without substantive change.

C.C.P. 2031(a), authorizing demands for inspection, was repealed and replaced by C.C.P. 2031.010 in 2004 without substantive change.

(3) *Applicability to Nonresidents.* C.C.P. 2026, on depositions taken in another state, was repealed and replaced by C.C.P. 2026.010 in 2004 without substantive change. *West's Key Number Digest*, *Witnesses* k.16





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X. SUBPENA DUCES TECUM

B. Procedure.

1. Issuance of Subpena.

2 *Witkin Cal. Evid. Discovery* § 219

[§ 219] Issuance of Subpena.

(a) *Issuance by Clerk or Judge.* The clerk, or a judge, must issue a subpoena duces tecum to a party requesting it. The subpoena duces tecum is issued signed and sealed but otherwise in blank, and the party requesting it fills it in before service. (*C.C.P. 1985(c).*)

(b) *Issuance by Attorney.* The attorney of record in an action or proceeding may sign and issue a subpoena duces tecum to require production of the matters or things described in the subpoena. (*C.C.P. 1985(c).*)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER X - Discovery

### X. SUBPENA DUCES TECUM

#### B. Procedure.

#### 2. Form of Subpena.

2 Witkin Cal. Evid. Discovery § 220

[§ 220] Form of Subpena.

(1) *In General.* The Judicial Council has adopted a form subpoena duces tecum, the use of which is mandatory. (See Judicial Council Form No. 982(a)(15.1) [Civil Subpena (Duces Tecum) for Personal Appearance and Production of Documents and Things at Trial or Hearing and Declaration].) A copy of an affidavit that complies with *C.C.P. 1985(b)* must be served with the subpoena duces tecum. (*C.C.P. 1985(b)*, 1987.5; on exception for deposition subpoena, see *infra*, §223.) The affidavit describes the matters or things to be produced. Judicial Council Form No. 982(a)(15.1) incorporates a form declaration that may be used instead of an attached affidavit or declaration.

(2) *Subpena Directed to Corporation or Partnership.* A subpoena may be directed to a corporation or partnership without naming a particular officer; the command to the corporation or partnership is in effect directed to those officially responsible for the conduct of its affairs. (See *Fielder v. Berkeley Properties Co.* (1972) 23 C.A.3d 30, 42, 99 C.R. 791 [administrative subpoena in aid of investigation]; 47 A.L.R.3d 676 [who has possession of corporate papers for purposes of order to produce].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General.* Judicial Council Form No. 982(a)(15.1) has been renumbered Judicial Council Form No. SUBP-002.



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### X. SUBPENA DUCES TECUM

#### B. Procedure.

#### 3. Service.

2 Witkin Cal. Evid. Discovery § 221

[§ 221] Service.

(1) *In General.* The subpoena duces tecum is personally served in the same manner as an ordinary subpoena (C.C.P. 1987; 2 Cal. Evidence (4th), Witnesses, §§26, 27), except that a copy of the affidavit on which the subpoena is based (C.C.P. 1985(b), infra, §222) must also be served. (C.C.P. 1987.5; on exception for deposition subpoena, see infra, §223.) (On penalty for disobedience of subpoena, see infra, §227; on protection against improper subpoena, see infra, §226; on payment of fees, where personal attendance is required, see Ev.C. 1563, 2 Cal. Evidence (4th), Documentary Evidence, §55.)

In *Chapman v. Superior Court* (1968) 261 C.A.2d 194, 67 C.R. 842, a personal injury case, attorneys procured a subpoena duces tecum for records of Dr. Ronne, who had treated plaintiff. The subpoena was directed to "Custodian of Records of Robert A. Ronne." The process server came to the doctor's office and served it on "Ruth Chapman," his bookkeeper-receptionist. She told Dr. Ronne, who accepted a check for \$ 7 witness fees payable to his order. The doctor later sent the records by messenger. But the judge held Ruth Chapman in contempt for failing to make a personal appearance with the records as directed by the subpoena on the date stated. *Held*, annulled. She was not the custodian of the records, and was not served in such capacity, but only as an individual. Hence, she was not "duly served" (C.C.P. 1987) and could not be punished for contempt. (261 C.A.2d 198.)

(2) *Special Provisions on Service.* There are various special provisions pertaining to service of subpoenas duces tecum in particular circumstances, including the following:

(a) *Production of county officer's books:* A subpoena for the production of a county officer's books, papers, or documents relating to county affairs or interests must be served by the county sheriff reading it to the person named in the subpoena, and the sheriff must simultaneously deliver to that person a copy of the subpoena. (Govt.C. 25172.)

(b) *Production of medical records in workers' compensation proceeding:* The subpoena of medical records in workers' compensation proceedings is governed by Lab.C. 4055.2, which requires that a copy of the subpoena be sent to all parties of record at the same time service is made on the custodian of records.

(c) *Production of Department of Motor Vehicles records:* Subpoenas for the production of the Department's records must be served on the director or his or her appointed representatives at the Department's headquarters. (Veh.C. 24.5.)

(d) *Production of personal consumer or employment records:* Subpoenas for the production of personal records of a consumer or employment records are subject to special notice requirements. (See infra, §228 et seq.)

(3) *Responses to Service of Subpena*. A party, or a witness served with a subpoena duces tecum, may move for an order quashing or modifying the subpoena, or for a protective order. A court may also make the order on its own motion. (*C.C.P. 1987.1*, *infra*, §226.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(3) *Responses to Service of Subpena*. *C.C.P. 1987.1* was amended in 2007 to provide that the motion to quash may also be made by an employee described in *C.C.P. 1985.6* (text, §236).



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## CHAPTER X - Discovery

### X. SUBPENA DUCES TECUM

#### B. Procedure.

#### 4. Affidavit Requirement.

##### a. In General.

2 *Witkin Cal. Evid. Discovery* § 222

[§ 222] In General.

(1) *Content.* A copy of an affidavit must be served with a subpoena duces tecum issued before trial (a) showing good cause for the production of the matters and things described in the subpoena (infra, §225), (b) specifying the exact matters or things desired to be produced (infra, §224), (c) setting forth in full detail the materiality of those matters or things to the issues involved in the case, and (d) stating that the witness has the matters or things in his or her possession or under his or her control. (*C.C.P. 1985(b), 1987.5.*) A declaration under penalty of perjury may substitute for the affidavit. (*C.C.P. 2015.5*; see Rutter Group, 1 Civil Trials and Evidence, Form 1:E; C.E.B., 1 Civil Procedure During Trial 3d, §4.56.)

(2) *Affidavit on Information and Belief.* An affidavit in which these matters are set forth on information and belief, without supporting facts to indicate the basis of the information and belief, is generally insufficient. (See *Smith-Golden v. Superior Court* (1940) 41 C.A.2d 512, 515, 107 P.2d 299; *Lewis v. Superior Court* (1953) 118 C.A.2d 770, 773, 258 P.2d 1084; *Pacific Auto. Ins. Co. v. Superior Court* (1969) 273 C.A.2d 61, 77 C.R. 836, infra, §225 [declaration on information and belief devoid of factual data; subpoena duces tecum quashed]; 3 *Stanf. L. Rev.* 532; but see *Kenney v. Superior Court* (1967) 255 C.A.2d 106, 110, 63 C.R. 84 [affidavit on information and belief was sufficient to support subpoena duces tecum in medical malpractice action; order confined to disciplinary records and staff records from hospital].)

(3) *Filing Original Affidavit.* The original must be retained until final judgment, but is not filed unless requested by an affected party or witness. (*C.C.P. 1987.5.*)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Content.* See *M. B. v. Superior Court* (2002) 103 C.A.4th 1384, 1394, 127 C.R.2d 454, 4 Cal. Crim. Law (3d), *Pretrial Proceedings*, Supp., §161A [affidavit requirement of *C.C.P. 1985(b)* does not apply to either criminal trials or criminal grand jury proceedings].



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## CHAPTER X - Discovery

### X. SUBPENA DUCES TECUM

#### B. Procedure.

#### 4. Affidavit Requirement.

#### b. Conflict With Provisions Governing Deposition Subpenas.

2 Witkin Cal. Evid. Discovery § 223

[§ 223] Conflict With Provisions Governing Deposition Subpenas.

A deposition subpoena for production of business records for copying or for production of business records, documents, tangible things, and testimony of a deponent need not be accompanied by an affidavit showing good cause for the production of the designated business records, documents, or things. (See *C.C.P. 2020(d)*, supra, §50, and *C.C.P. 2020(e)*, supra, §53.) Although the last sentence of *C.C.P. 1987.5* (supra, §222) acknowledges the section's inapplicability to deposition subpoenas commanding only the production of business records for copying under *C.C.P. 2020(d)*, it fails to do so for deposition subpoenas under *C.C.P. 2020(e)*. Thus, the affidavit requirement set forth in *C.C.P. 1985(b)* and *1987.5* is an example of a conflict between *C.C.P. 2020* and *C.C.P. 1985* et seq. In the event of such a conflict, *C.C.P. 2020* governs deposition subpoenas. (*C.C.P. 2020(a)*; see Reporter's Notes to *C.C.P. 2020(d)* and *2020(e)*, in 2 Hogan, Cal. Civil Discovery, Appendix C; but see 1 Hogan, Cal. Civil Discovery §7.2 [last sentence of *C.C.P. 1987.5*, added in 1993, has "muddied" situation; sentence could be interpreted as implied repeal of provision in *C.C.P. 2020(e)* that eliminates affidavit requirement for subpoenas under that subdivision].)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2020(d)* (deposition subpoena for production of business records for copying) was repealed and replaced by *C.C.P. 2020.410* in 2004 without substantive change.

*C.C.P. 2020(e)* (deposition subpoena for production of business records, documents, or things, as well as attendance and testimony of deponent) was repealed and replaced by *C.C.P. 2020.510* in 2004 without substantive change.

*C.C.P. 2020(a)* (deposition subpoena provisions prevail) was repealed and replaced by *C.C.P. 2020.010* in 2004 without substantive change.

See Reporter's Notes to *C.C.P. 2020(d)* and *2020(e)*, in Hogan, 2 Cal. Civil Discovery 2d, Appendix D; Hogan, 1 Cal. Civil Discovery 2d, §7.1.



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### X. SUBPENA DUCES TECUM

#### B. Procedure.

#### 4. Affidavit Requirement.

##### c. Specificity.

2 Witkin Cal. Evid. Discovery § 224

[§ 224] Specificity.

The affidavit must specify "the exact matters or things desired to be produced." (*C.C.P. 1985(b)*.) The test is not so strict as the statutory language ("exact matters") would indicate: A reasonably accurate designation that is as specific as the circumstances permit will normally be upheld. (See, for examples of sufficient designation, *Pacific Solvents Co. v. Superior Court* (1948) 88 C.A.2d 953, 955, 199 P.2d 740; 23 A.L.R.2d 862; for examples of insufficient specification, see *Pacific Auto. Ins. Co. v. Superior Court* (1969) 273 C.A.2d 61, 68, 77 C.R. 836, *infra*, §225 [moving party specified no particular documents, records or contents; attempt to obtain *all* papers in investigative file was too broad]; *Grannis v. Board of Med. Examiners* (1971) 19 C.A.3d 551, 564, 96 C.R. 863 [quashing subpoena that requested blanket search of board's records].)

A party lacking information for a sufficient specification may get it by first taking the deposition of the person whose papers are sought, or by serving interrogatories. (See *McClatchy Newspapers v. Superior Court* (1945) 26 C.2d 386, 398, 159 P.2d 944; *Union Oil Co. v. Superior Court* (1957) 151 C.A.2d 286, 293, 311 P.2d 640; *Flora Crane Service v. Superior Court* (1965) 234 C.A.2d 767, 789, 790, 45 C.R. 79.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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### X. SUBPENA DUCES TECUM

#### B. Procedure.

#### 4. Affidavit Requirement.

##### d. Good Cause.

2 Witkin Cal. Evid. Discovery § 225

[§ 225] Good Cause.

(1) *General Requirement.* C.C.P. 1985(b) requires a showing of "good cause for the production of the matters and things described." The showing may be made by affidavits or even by the pleadings. But where the pleadings do not contain such "specific facts," and none are set forth in the affidavit, mere incorporation of the pleadings by reference will not suffice. (*Flora Crane Service v. Superior Court* (1965) 234 C.A.2d 767, 792, 45 C.R. 79.)

(2) *Good Cause Not Shown.* In *Pacific Auto. Ins. Co. v. Superior Court* (1969) 273 C.A.2d 61, 77 C.R. 836, plaintiff Santa Barbara County provided medical services for an indigent pedestrian who had been run down by defendant's insured driver. Despite an alleged oral agreement between the county and the injured person, to the effect that the driver would not be released unless the county consented, defendant insurer settled the claim and obtained the indigent's release without the county's approval. Contending that the insurer had intentionally interfered with the release agreement, the county sued for recovery of money spent in providing the indigent with services. The county then served the insurer with a subpoena duces tecum demanding production of the *entire investigative file* of the accident. After the trial judge denied defendant's motion for relief, *held*, mandamus granted to quash the subpoena.

Plaintiff failed to show good cause. In the supporting declaration by a deputy county counsel, the statement that the insurer's investigator had the material in his possession or under his control was based only on information and belief, *without supporting facts*. The allegations of subject matter relevancy were legal conclusions, stated in general terms, and the declaration was devoid of factual data necessary to allow the judge to make an informed ruling. The need for the entire file was not shown, and there were no affirmative facts to indicate that the documents would aid the county in its case. (273 C.A.2d 66.) (See also *Johnson v. Superior Court* (1968) 258 C.A.2d 829, 837, 66 C.R. 134; *People v. Younger* (1970) 5 C.A.3d 575, 579, 86 C.R. 237 [moving party claimed that independent appraiser had sought-after appraisal report with information available nowhere else, but property in question was open to anyone to inspect and appraise]; on showing necessary to overcome claim of official privilege, see *Shepherd v. Superior Court* (1976) 17 C.3d 107, 125, 130 C.R. 257, 550 P.2d 161, 2 Cal. Evidence (4th), Witnesses, §250.)

**SUPPLEMENT:** [This section is current through the latest supplement]





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## CHAPTER X - Discovery

### X. SUBPENA DUCES TECUM

#### B. Procedure.

#### 5. Resisting Subpena.

2 Witkin Cal. Evid. Discovery § 226

[§ 226] Resisting Subpena.

The remedy against a defective deposition subpoena, or a subpoena duces tecum that calls for privileged matter or constitutes an unreasonable search and seizure, is a motion, variously termed motion to quash, vacate, recall, or modify the subpoena. This practice formerly had no statutory basis in California, but was approved in deposition cases and in cases applying the requirements for subpoenas duces tecum. (See *Wemyss v. Superior Court* (1952) 38 C.2d 616, 618, 241 P.2d 525; *Pelton Motors v. Superior Court* (1953) 120 C.A.2d 565, 569, 261 P.2d 275; *Flora Crane Service v. Superior Court* (1965) 234 C.A.2d 767, 775, 45 C.R. 79; *People v. Younger* (1970) 5 C.A.3d 575, 579, 86 C.R. 237 [motion appropriate method of testing validity of subpoena duces tecum].)

There is now a statutory basis for attacking a subpoena or subpoena duces tecum. When a subpoena requires the attendance of a witness or the production of books, documents or other things before a court, at the trial of an issue or at the taking of a deposition, the court--on motion by a party, a witness, or a consumer described in C.C.P. 1985.3 (infra, §229), or on its own motion after notice and opportunity to be heard--may make an order quashing the subpoena entirely, modifying it, or directing compliance on terms or conditions, including protective orders. The court may also make any appropriate order to protect the parties, the witness, or the consumer from unreasonable or oppressive demands. (C.C.P. 1987.1; see 8 Pacific L. J. 237; on when use of motion to quash deposition subpoena is most advantageous, see Dunne on Depositions in California §4:16; on motion to quash deposition notice and to stay deposition, see supra, §48.)

The court may award the amount of reasonable expenses incurred in making or opposing the motion, including reasonable attorneys' fees, if the motion was made or opposed in bad faith or without substantial justification or if one or more of the subpoena requirements was oppressive. (C.C.P. 1987.2; see *First City Properties v. MacAdam* (1996) 49 C.A.4th 507, 515, 56 C.R.2d 680 [fairness and effective appellate review require that where court exercises its discretion under C.C.P. 1987.2 to issue sanctions, it must delineate specific acts on which sanctions are based].)

Under general practice, an order inadvertently made or void may be attacked by a motion to vacate. (See 8 Cal. Proc. (4th), *Attack on Judgment in Trial Court*, §§152 et seq., 201 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

C.C.P. 1987.1 was amended in 2007 to provide that the motion to quash may also be made by an employee described in C.C.P. 1985.6 (text, §236).

In *Monarch Healthcare v. Superior Court* (2000) 78 C.A.4th 1282, 93 C.R.2d 619, the head of an obstetrical medical practice group sued several doctors for unfairly competing to obtain a managed care contract from a health care

provider. Plaintiff, under former C.C.P. 2020(d) (now *C.C.P. 2020.410*), served a deposition subpoena on the provider's custodian of records as a nonparty witness. The provider produced some of the requested documents but raised trade secret and privacy objections as to others. Discovery was temporarily put on hold while a dispute regarding arbitration was resolved. After the provider was named as an additional defendant, plaintiff moved to compel production. The trial judge ruled that the provider, as a nonparty at the time of the discovery request, could only object by means of a motion to quash; having failed to do so, it waived any objections. *Held*, the ruling was in error. *C.C.P. 1987.1* permits the filing of a motion to quash, but does not require it. Under *C.C.P. 2025(m)* (repealed and replaced by *C.C.P. 2025.460* in 2004), waiver occurs by failure to raise a specific objection during the deposition, and that subdivision is applicable to deposition subpoenas under *C.C.P. 2020(d)*. (78 *C.A.4th* 1287, 1288.) A nonparty should not be held to more onerous requirements than a party. Further, a contrary rule would run afoul of a central principle of discovery: privileges are preserved unless the holder fails to object in a proceeding in which it has standing and an opportunity to claim them. (78 *C.A.4th* 1289, 1290.) (New) *Timeliness of motion*: In *Lee v. Swansboro Country Property Owners Assn.* (2007) 151 *C.A.4th* 575, 59 *C.R.3d* 924, a debtor's examination was scheduled, and the judgment creditor obtained a subpoena duces tecum ordering the debtor to bring specified documents to the examination. One week before the examination date, the debtor filed a motion to quash the subpoena. Based on the requirement of *C.C.P. 1987.1* that the motion be "reasonably made," the trial judge deemed the motion untimely. *Held*, reversed. A debtor's examination can be scheduled as soon as 10 days after the date the debtor is served with the order for examination. "If a hearing can be held 10 days after a debtor is served, a motion to quash filed seven days before that hearing must necessarily be deemed timely." (151 *C.A.4th* 583.) The creditor had ample time to respond to the motion and, in fact, it filed written opposition. The motion was reasonably made within the meaning of the statute. (151 *C.A.4th* 583.)

(New) *Requirement of hearing*: Where a party resisting a subpoena makes a prima facie claim of attorney-client privilege, the trial judge must accord a full hearing, with oral argument, before ordering the revelation of client confidences to the other side and, in effect, compelling attorney testimony against a client. The Legislature's use of the term "motion" in *C.C.P. 1987.1* means that the notice and hearing requirements generally applicable to motions apply to motions to quash made under that statute. (*Titmas v. Superior Court* (2001) 87 *C.A.4th* 738, 740, 743, 104 *C.R.2d* 803 [where defendant in shareholders' derivative action moved to quash subpoena on ground of attorney-client and work product privileges, trial judge erred in denying motion without first holding hearing].)



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CHAPTER X - Discovery

X. SUBPENA DUCES TECUM

B. Procedure.

6. Enforcing Subpena.

2 *Witkin Cal. Evid. Discovery* § 227

[§ 227] Enforcing Subpena.

(1) *Trial Court Remedies.* In the trial court, the usual remedy of contempt is available for refusal to obey a subpoena. (See *C.C.P.* 1991; 43 *Cal. L. Rev.* 102, 106.) The aggrieved party may bring a civil action for a \$ 500 statutory penalty and damages the party sustained because of the witness' failure to attend as ordered in the subpoena. (*C.C.P.* 1992; *supra*, §58.)

(2) *Appellate Court Remedies.* If the witness obtains an erroneous order of the trial court quashing the subpoena duces tecum (see *supra*, §226), the aggrieved party may review the abuse of discretion by mandamus, and the writ may issue to compel the lower court to vacate the order, thus restoring the subpoena duces tecum to full force and effect. (See *Strauss v. Superior Court* (1950) 36 *C.2d* 396, 397, 224 *P.2d* 726; *Flora Crane Service v. Superior Court* (1965) 234 *C.A.2d* 767, 775, 45 *C.R.* 79, citing the text; 8 *Cal. Proc.* (4th), *Extraordinary Writs*, §108.) (For similar use of mandamus in discovery proceedings, see *supra*, §§71, 117, 139.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER X - Discovery

### X. SUBPENA DUCES TECUM

#### C. Special Notice Requirements.

##### 1. Personal Records of Consumer.

###### a. Notice Requirement.

###### 1. In General.

*2 Witkin Cal. Evid. Discovery § 228*

[§ 228] In General.

(1) *Statutory Rule.* A party who is seeking the personal records of a consumer from specified witnesses must notify the consumer that the records are being sought and alert the consumer to his or her options for preventing production of the records. (*C.C.P. 1985.3(b)*, (e); for definitions limiting applicability of requirement, see *infra*, §229; for form of notice, see *infra*, §231.)

The notice requirements of *C.C.P. 1985.3* also apply to subpoena duces tecum for records containing "personal information," as defined in *C.C. 1798.3*, that are otherwise exempt from public disclosure under *Govt.C. 6254* and that are maintained by a state or local agency as defined in *Govt.C. 6252*. (*C.C.P. 1985.4*.)

(2) *Purpose.* The purpose of *C.C.P. 1985.3* is to protect a consumer's right to privacy in the records, but it does not create a special privilege: It merely provides a procedure under which the consumer will be informed that a litigant is seeking discovery of his or her personal records, so that the consumer has an opportunity to move to quash the proposed subpoena. (*Sasson v. Katash* (1983) 146 C.A.3d 119, 124, 194 C.R. 46.)

(3) *Effect of Noncompliance.* The effect of failure to comply with the notice requirement is that the witness may refuse to produce the original records sought by the subpoena duces tecum. (*C.C.P. 1985.3(k)*.)

(4) *Additional Requirement for Release of Phone Records.* A subpoena duces tecum for personal records maintained by a telephone company that is a public utility, as defined in *Pub.Util.C. 216*, is not valid or effective unless it includes a consent to release, signed by the consumer whose records are requested, as required by *Pub.Util.C. 2891*. (*C.C.P. 1985.3(f)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### C. Special Notice Requirements.

##### 1. Personal Records of Consumer.

###### a. Notice Requirement.

###### 2. Definitions.

2 Witkin Cal. Evid. Discovery § 229

[§ 229] Definitions.

(1) *Personal Records*. Personal records are the original or a copy of books, documents, other writings, or electronic data pertaining to a consumer. (*C.C.P. 1985.3(a)(1)*; see *Sasson v. Katash* (1983) 146 C.A.3d 119, 124, 194 C.R. 46 [term is "broadly inclusive," covering records maintained in course of business relationship].)

(2) *Witnesses*. Only records maintained by the following witnesses are considered personal records: a physician, dentist, ophthalmologist, optometrist, chiropractor, physical therapist, acupuncturist, podiatrist, veterinarian, veterinary hospital, veterinary clinic, pharmacist, pharmacy, hospital, medical center, clinic, radiology or MRI center, clinical or diagnostic laboratory, state or national bank, state or federal association (as defined in *Fin.C. 5102*), state or federal credit union, trust company, anyone authorized by California to make or arrange loans that are secured by real property, security brokerage firm, insurance company, title insurance company, underwritten title company, escrow agent licensed pursuant to *Fin.C. 17000* et seq. or exempt from licensure under *Fin.C. 17006*, attorney, accountant, institution of the Farm Credit System, as specified in 12 U.S.C., §2002, telephone corporation that is a public utility, as defined in *Pub.Util.C. 216*, psychotherapist, as defined in *Ev.C. 1010*, or a private or public preschool, elementary school, secondary school, or postsecondary school as described in *Educ.C. 76244*. (*C.C.P. 1985.3(a)(1)*.)

(3) *Consumer*. A consumer is an individual, partnership of five or fewer persons, association, or trust that has transacted business with or has used the services of a witness specified in *C.C.P. 1985.3(a)(1)* or for whom the witness has acted as agent or fiduciary. (*C.C.P. 1985.3(a)(2)*.)

(4) *Subpenaing Party*. The party responsible for giving the notice is the person causing a subpoena duces tecum to be issued in a civil action or proceeding commenced under the Code of Civil Procedure. "Subpenaing party," for the purposes of *C.C.P. 1985.3*, does not include the state or local agencies described in *Govt.C. 7465* or an entity provided for under Cal. Const., Art VI. (*C.C.P. 1985.3(a)(3)*; see *Lantz v. Superior Court* (1994) 28 C.A.4th 1839, 1841, 1842, 34 C.R.2d 358 [county defendant in sexual harassment action that seeks to subpoena medical records of plaintiff-consumer is "subpenaing party" under *C.C.P. 1985.3(a)(3)* and must therefore give notice to consumer in manner prescribed by statute].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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X. SUBPENA DUCES TECUM

C. Special Notice Requirements.

1. Personal Records of Consumer.

a. Notice Requirement.

3. Exceptions.

2 *Witkin Cal. Evid. Discovery* § 230

[§ 230] Exceptions.

Three exceptions to the notice requirement are stated in *C.C.P. 1985.3*:

(1) By showing good cause and due diligence, a subpoenaing party may obtain an order waiving the requirements of *C.C.P. 1985.3(b)*, as long as the rights of witnesses and consumers are preserved. (*C.C.P. 1985.3(h)*.)

(2) *C.C.P. 1985.3* does not apply to a subpoena duces tecum that does not request the records of a particular consumer or consumers and that requires a custodian of records to delete all information that would identify a consumer whose records are to be produced. (*C.C.P. 1985.3(i)*.)

(3) *C.C.P. 1985.3* does not apply to proceedings involving either workers' compensation and insurance (*Lab.C. 3200 et seq.*; *6100 et seq.*) or retraining and rehabilitation of public employees (*Lab.C. 6200 et seq.*). (*C.C.P. 1985.3(j)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 1985.3(l)* was amended in 2005 to state an additional exception:(4) (*New*) If the subpoenaing party is the consumer, and the consumer is the only subject of the subpoenaed records, notice to the consumer, and delivery of the other documents specified in *C.C.P. 1985.3(b)* to the consumer, are not required. (*C.C.P. 1985.3(l)*.)



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### X. SUBPENA DUCES TECUM

#### C. Special Notice Requirements.

##### 1. Personal Records of Consumer.

##### b. Procedure.

##### 1. Form of Notice.

*2 Witkin Cal. Evid. Discovery § 231*

[§ 231] Form of Notice.

The notice must be in a typeface designed to call attention to it. It must indicate that (1) the records are being sought from the witness named on the subpoena; (2) if the consumer objects to furnishing of the records, the consumer must file papers with the court or serve a written objection under *C.C.P. 1985.3(g)* before the date for production specified on the subpoena; and (3) if the party seeking the records will not agree in writing to cancel or limit the subpoena, an attorney should be consulted about the consumer's interest in protecting the right of privacy. Furthermore, if a deposition notice (see *supra*, §39 et seq.) is also served, it may be set forth in a single document with the notice required by *C.C.P. 1985.3(e)*. (*C.C.P. 1985.3(e)*; see *C.E.B.*, 1 Civil Procedure During Trial 3d, §4.59.)

The Judicial Council has adopted a form notice, the use of which is mandatory. (See Judicial Council Form No. 982(a)(15.5) [Notice to Consumer or Employee and Objection].)

**SUPPLEMENT:** [This section is current through the latest supplement]

Judicial Council Form No. 982(a)(15.5) has been renumbered Judicial Council Form No. SUBP-025.



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## CHAPTER X - Discovery

### X. SUBPENA DUCES TECUM

#### C. Special Notice Requirements.

##### 1. Personal Records of Consumer.

###### b. Procedure.

##### 2. Service of Notice.

2 Witkin Cal. Evid. Discovery § 232

[§ 232] Service of Notice.

(1) *Manner of Service on Adults.* Before the date of production called for in the subpoena, the subpoenaing party must serve on the consumer whose records are being sought a copy of the subpoena, the supporting affidavit, if any, the notice described in *C.C.P. 1985.3(e)* (supra, §231), and proof of service as indicated in *C.C.P. 1985.3(c)(1)* (infra, §234). (*C.C.P. 1985.3(b).*) Service must be made: (a) to the consumer personally; (b) to the consumer's last known address; (c) in accordance with *C.C.P. 1010* et seq.; or (d) if the consumer is a party, to his or her attorney of record. (*C.C.P. 1985.3(b)(1).*)

(2) *Manner of Service on Minor.* Service of the notice on a minor consumer must be made on the minor's parent, guardian, conservator, or similar fiduciary, or if one of them cannot be located with reasonable diligence, then service must be made on a person having the care or control of the minor, with whom the minor resides, or by whom the minor is employed, and on the minor if the minor is at least 12 years of age. (*C.C.P. 1985.3(b)(1).*) This language is subject to two interpretations: (a) a minor 12 years old or older must *always* be served; or (b) a minor of that age need not be served when it is possible to locate and serve the minor's parent, guardian, conservator, or similar fiduciary. In the absence of an amendment or decision clarifying *C.C.P. 1985.3(b)(1)*, the safer course is to serve the minor in all cases if he or she is at least 12 years old. (See 2 DeMeo, §53.51[2][b] [always serve minor].)

(3) *Timing.* Service on the consumer must be made not less than 10 days before the production date specified in the subpoena. (*C.C.P. 1985.3(b)(2).*) The consumer must be served at least 5 days before the custodian of the records is served. (*C.C.P. 1985.3(b)(3).*) The time provided by *C.C.P. 1013* must be added to both of these time periods, if service is by mail. (*C.C.P. 1985.3(b)(2), (b)(3).*)

**SUPPLEMENT:** [This section is current through the latest supplement]





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C. Special Notice Requirements.

1. Personal Records of Consumer.

b. Procedure.

3. Service of Subpena.

2 *Witkin Cal. Evid. Discovery* § 233

[§ 233] Service of Subpena.

The subpoena duces tecum itself (which is served on the witness from whom the records are sought) must be served in sufficient time to allow the witness a reasonable time, as provided in *C.C.P. 2020(d)(1)* (supra, §50), to locate and produce the records or copies of them. (*C.C.P. 1985.3(d)*.) The court may shorten the time for service of a subpoena duces tecum on a showing of due diligence by the subpoenaing party and good cause, as long as the rights of witnesses and consumers are preserved. (*C.C.P. 1985.3(h)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 1985.3(d)*, as amended in 2004, refers to *C.C.P. 2020.410* rather than *C.C.P. 2020(d)(1)*.



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CHAPTER X - Discovery

X. SUBPENA DUCES TECUM

C. Special Notice Requirements.

1. Personal Records of Consumer.

b. Procedure.

4. Authorization or Certificate of Compliance.

*2 Witkin Cal. Evid. Discovery § 234*

[§ 234] Authorization or Certificate of Compliance.

Before the production of records, the subpoenaing party must either (1) serve the witness with proof of personal service or service by mail, attesting to compliance with the notice provisions (*C.C.P. 1985.3(c)(1)*), or (2) furnish the witness with a written authorization to release the records signed by the consumer or the consumer's attorney of record (*C.C.P. 1985.3(c)(2)*). The witness may presume that an attorney purporting to sign the authorization on behalf of the consumer acted with the consumer's consent and that any objection to release of the records is waived. (*C.C.P. 1985.3(c)(2)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER X - Discovery

### X. SUBPENA DUCES TECUM

#### C. Special Notice Requirements.

##### 1. Personal Records of Consumer.

###### b. Procedure.

##### 5. Consumer's Responses.

2 Witkin Cal. Evid. Discovery § 235

[§ 235] Consumer's Responses.

(1) *Party Consumer's Motion To Quash or Modify.* If the consumer whose records are sought is a party to the civil action in which the subpoena duces tecum is served, he or she may bring a motion under *C.C.P. 1987.1* (supra, §226) to quash or modify the subpoena. Notice of the motion must be given to the witness and deposition officer at least 5 days before the date for production. The failure to provide notice to the deposition officer does not invalidate the motion, but the officer may raise it as an affirmative defense in an action for liability for improper release of records. No witness or deposition officer is required to produce personal records after receipt of notice of a motion to quash or modify the subpoena, except on order of the court or by agreement of the parties, witnesses, and consumers affected. (*C.C.P. 1985.3(g)*); on definition of deposition officer, see *C.C.P. 1985.3(a)(4)*; see *Slagle v. Superior Court* (1989) 211 C.A.3d 1309, 1312, 260 C.R. 122, 2 Cal. Evidence (4th), Witnesses, §209 [*C.C.P. 1985.3(g)*], providing that consumer may bring motion to quash before date for production, does not bar court from considering motion to quash brought after that date].)

(2) *Nonparty Consumer's Objection.* A nonparty consumer whose records are sought may, before the date for production, serve on the subpoenaing party, the witness from whom the records are sought, and the deposition officer, a written objection specifying the grounds on which production of the records should be prohibited. (*C.C.P. 1985.3(g)*.) The Judicial Council has adopted a form objection, the use of which is mandatory. (See Judicial Council Form No. 982(a)(15.5) [Notice to Consumer or Employee and Objection].)

No witness or deposition officer is required to produce personal records after service of a written objection by a nonparty consumer, except on order of the court or by agreement of the parties, witnesses, and consumers affected. A party requesting a consumer's personal records may bring a motion under *C.C.P. 1987.1* to enforce the subpoena within 20 days of service of the written objection. The motion must be accompanied by a declaration showing a reasonable and good faith attempt at informal resolution of the dispute. (*C.C.P. 1985.3(g)*.)

(3) *Consumer's Protective Order.* Any consumer may, without moving to quash or modify, seek an order protecting him or her "from unreasonable or oppressive demands" including unreasonable violations of the consumer's right of privacy. (*C.C.P. 1987.1*; see supra, §226.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Nonparty Consumer's Objection.* Judicial Council Form No. 982(a)(15.5) has been renumbered Judicial Council

Form No. SUBP-025.

(4) *(New) Distinction: Post-Production Civil Suit Barred. C.C.P. 1985.3* is a discovery statute designed to establish a method by which consumers are informed of and afforded the opportunity to prospectively challenge a subpoena seeking their confidential information from specified sources. The statute neither contemplates nor provides recourse for a consumer against a custodian of records based on the claim that the custodian released records beyond the scope of the subpoena. (*Foothill Fed. Credit Union v. Superior Court* (2007) 155 C.A.4th 632, 641, 642, 66 C.R.3d 249 [action by consumers for invasion of privacy and intentional infliction of emotional distress, alleging that defendant credit union produced consumer records beyond scope of subpoena as narrowed by agreement of parties in underlying action, was barred by litigation privilege of C.C. 47(b) (5 *Summary* (10th), *Torts*, §563 et seq.)].)



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## CHAPTER X - Discovery

### X. SUBPENA DUCES TECUM

#### C. Special Notice Requirements.

##### 2. Employment Records.

##### a. Notice Requirement.

2 Witkin Cal. Evid. Discovery § 236

[§ 236] Notice Requirement.

(1) *Nature of Requirement.* Before the date specified in the subpoena for production, a party seeking specified employment records must serve the employee whose records are being sought with a copy of (a) the subpoena duces tecum, (b) the affidavit supporting issuance of the subpoena, if any, (c) the notice required by *C.C.P. 1985.6(e)*, and proof of service as provided in *C.C.P. 1985.6(c)(1)* (*infra*, §237). (*C.C.P. 1985.6(b)*.)

The notice must be in a typeface designed to attract attention. It must indicate that (a) employment records about the employee are being sought from the witness named on the subpoena, (b) the records may be protected by a right of privacy, (c) if the employee objects, he or she must file papers with the court before the date specified for production, and (d) if the subpoenaing party does not agree in writing to cancel or limit the subpoena, an attorney should be consulted about the employee's interest in protecting his or her right of privacy. If a deposition notice (*supra*, §39) is also served, the two notices may be set forth in a single document. (*C.C.P. 1985.6(e)*.)

The Judicial Council has adopted a form notice, the use of which is mandatory. (See Judicial Council Form No. 982(a)(15.5) [Notice to Consumer or Employee and Objection].)

(2) *Exceptions.* Like *C.C.P. 1985.3* (*supra*, §230), *C.C.P. 1985.6* is inapplicable where the records of a particular individual are not sought and the subpoena requires the records custodian to delete all information that would identify a particular individual whose records are to be produced. (*C.C.P. 1985.6(h)*.) It is also inapplicable to proceedings involving workers' compensation or insurance (*Lab.C. 3200 et seq.*, *6100 et seq.*) or the retraining and rehabilitation of public employees (*Lab.C. 6200 et seq.*). (*C.C.P. 1985.6(i)*.) Moreover, the court may waive the notice requirements for good cause if the subpoenaing party has shown due diligence and if the rights of witnesses and employees are preserved. (*C.C.P. 1985.6(g)*.)

(3) *Definitions.* The applicability of the notice requirement is limited by the following definitions:

(a) "Employment records" are the original or copies of books, documents, other writings, or electronic data that pertain to the employment of an employee and are kept by the employee's current or former employer. (*C.C.P. 1985.6(a)(1)*.)

(b) An "employee" is any individual who is or has been employed by a witness subject to a subpoena duces tecum. (*C.C.P. 1985.6(a)(2)*.)

(c) A "subpenaing party" is a person causing a subpoena duces tecum to be issued or served in connection with any civil action or proceeding. It does not include: (1) the state or local agencies described in *Govt.C. 7465*, or (2) any entity provided for under Cal. Const., Art. VI, in any proceeding maintained before an adjudicative body of that entity under *B. & P.C. 6000* et seq. (*C.C.P. 1985.6(a)(3)*.)

(4) *Effect of Failure To Comply*. If the subpenaing party fails to comply with *C.C.P. 1985.6*, the witness may refuse to produce the employment records. (*C.C.P. 1985.6(j)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Nature of Requirement*. Judicial Council Form No. 982(a)(15.5) has been renumbered Judicial Council Form No. SUBP-025.(2) *Exceptions*. *C.C.P. 1985.6(k)*, added in 2005, provides that if the subpenaing party is the employee, and the employee is the only subject of the subpoenaed records, notice to the employee, and delivery of the other documents specified in *C.C.P. 1985.6(b)* to the employee, are not required.

(3) *Definitions*.

(a) *Employment records*: *C.C.P. 1985.6(a)(1)* was amended and relettered *C.C.P. 1985.6(a)(3)* in 2004. The amendment expanded the scope of the subsection to include records maintained by a labor organization that has represented or currently represents the employee.

(b) *Employee*: *C.C.P. 1985.6(a)(2)* was amended in 2004 to expand the definition of employee to include "any individual who is or has been represented by a labor organization that is a witness subject to a subpoena duces tecum."

(c) *Subpenaing party*: *C.C.P. 1985.6(a)(3)* was relettered *C.C.P. 1985.6(a)(5)* in 2004. *West's Key Number Digest*, Pretrial Procedure k.378



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## X. SUBPENA DUCES TECUM

## C. Special Notice Requirements.

## 2. Employment Records.

## b. Procedure.

## 1. Service of Notice and Subpena.

2 *Witkin Cal. Evid. Discovery* § 237

## [§ 237] Service of Notice and Subpena.

(1) *Manner of Service of Notice.* The notice may be served on the employee personally, or at the employee's last known address, or in accordance with *C.C.P. 1010* et seq., or, if the employee is a party, to his or her attorney of record. If the employee is a minor, service must be made on the minor's parent, guardian, conservator, or similar fiduciary, or if one of them cannot be located with reasonable diligence, service must be made on a person having care or control of the minor, or a person with whom the minor resides, and on the minor if the minor is at least 12 years of age. (*C.C.P. 1985.6(b)(1)*.) This language, like the nearly identical language of *C.C.P. 1985.3(b)(1)* (supra, §232), could be interpreted to require service on a minor who is 12 or older, regardless of whether the minor's parent, guardian, conservator, or fiduciary has been located. In the absence of clearer guidance, such service should be made.

(2) *Time of Service of Notice.* The documents must be served on the employee not less than 10 days before the date specified in the subpoena for production of the employment records and at least 5 days before service on the custodian of the records, plus the additional time provided by *C.C.P. 1013* if the service is by mail. (*C.C.P. 1985.6(b)(2)*, (b)(3).)

(3) *Time of Service of Subpena.* The subpoena duces tecum must be served in sufficient time to allow the witness a reasonable time, as provided in *C.C.P. 2020(d)(1)* (supra, §50), to locate and produce the records or copies. (*C.C.P. 1985.6(d)*.) The court may shorten the time for service of a subpoena duces tecum on a showing of due diligence by the subpoenaing party and good cause, as long as the rights of witnesses and employees are preserved. (*C.C.P. 1985.6(g)*.)

(4) *Proof of Service or Written Authorization.* Before the production of the records, the subpoenaing party must serve the witness with proof of personal service or service by mail, attesting to compliance with the notice requirements of *C.C.P. 1985.6(b)*. (*C.C.P. 1985.6(c)(1)*.) Alternatively, the subpoenaing party may furnish the witness with a written authorization to release the records. The authorization must be signed by the employee or the employee's attorney of record. The witness may presume that the attorney purporting to sign the authorization on behalf of the employee acted with the employee's consent, and that any objection to release of records is waived. (*C.C.P. 1985.6(c)(2)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(3) *Time of Service of Subpena.* *C.C.P. 2020(d)(1)*, on the time for a witness to locate and produce records, was repealed and replaced by *C.C.P. 2020.410(c)* in 2004 without substantive change.

*C.C.P. 1985.6(d)* was amended in 2005 to reflect the replacement of *C.C.P. 2020(d)(1)* by *C.C.P. 2020.410*.



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## CHAPTER X - Discovery

### X. SUBPENA DUCES TECUM

#### C. Special Notice Requirements.

##### 2. Employment Records.

##### b. Procedure.

##### 2. Employee's Responses.

*2 Witkin Cal. Evid. Discovery § 238*

[§ 238] Employee's Responses.

(1) *Motion To Quash or Modify.* Before the date for production, an employee whose records are being sought may bring a motion under *C.C.P. 1987.1* (supra, §226) to quash or modify the subpoena. Notice of the motion must be given to the witness and the deposition officer at least 5 days before production. The failure to provide notice to the deposition officer does not invalidate the motion, but the officer may raise it as an affirmative defense in an action for liability for improper release of records. Neither the witness nor the deposition officer is required to produce the records once he or she has received notice of a motion to quash or modify, except on order of the court or by agreement of the parties, witnesses, and employees affected. (*C.C.P. 1985.6(f)*.)

(2) *Written Objection.* A nonparty employee whose records are sought may, before the date for production, serve on the subpoenaing party, the deposition officer, and the witness a written objection specifying the grounds on which production should be prohibited. (*C.C.P. 1985.6(f)*.) The Judicial Council has adopted a form objection, the use of which is mandatory. (See Judicial Council Form No. 982(a)(15.5) [Notice to Consumer or Employee and Objection].)

Neither the witness nor the deposition officer is required to produce the records once he or she has been served with a written objection by a nonparty employee, except on order of the court or by agreement of the parties, witnesses, and employees affected. (*C.C.P. 1985.6(f)*.)

A party requesting an employee's employment records may bring a motion under *C.C.P. 1987(c)* (see *2 Cal. Evidence (4th), Witnesses, §36*) to enforce the subpoena within 20 days of service of the written objection. The motion must be accompanied by a declaration showing a reasonable and good faith attempt at informal resolution of the dispute. (*C.C.P. 1985.6(f)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Written Objection.* Judicial Council Form No. 982(a)(15.5) has been renumbered Judicial Council Form No. SUBP-025.





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## CHAPTER X - Discovery

### XI. MISUSE OF DISCOVERY PROCEDURES

#### A. In General.

2 Witkin Cal. Evid. Discovery § 239

[§ 239] In General.

(1) *Criticism of Discovery Abuse.* Courts and commentators have criticized excesses and improper objectives in use of discovery procedures. (See articles cited in *Richards v. Superior Court* (1978) 86 C.A.3d 265, 271, 150 C.R. 77.) The following comments are illustrative:

"In this era when calendar congestion afflicts the California court system, attorneys could avoid squabbles such as this by recognizing the difference between legitimate and illegitimate discovery and by a modicum of cooperative observance of the spirit of the discovery statutes. Had plaintiff's attorneys utilized discovery as a tool rather than a bludgeon, they would have narrowed their excessive, oppressive and strategically motivated interrogatories. These interrogatories went far beyond plaintiff's legitimate needs and constituted a massive invasion of defendant's business affairs. Had defendant's counsel not felt put upon, they could have recognized plaintiff's legitimate need for a restricted area of discovery. As it was, plaintiff's demand was far too broad and defendant's outright rejection understandably narrow. Recourse to a reviewing court was a sequence of the trial court's failure to recognize a middle ground." (*Borse v. Superior Court* (1970) 7 C.A.3d 286, 288, 86 C.R. 559, supra, §111.)

"While interrogatories serve useful purposes, they often are abused. Lengthy interrogatories suitable to major litigation, are often needlessly used in small cases. Questions are often repetitious or wholly irrelevant. While our discovery laws were designed to prevent trial by ambush, the most common cry from lawyers is that they are being 'papered to death.' The costs of storage alone are enormous. Indeed, while interrogatories facilitate the search for truth, the enormous expense of discovery tends to deter litigation by persons of moderate means." (*Deyo v. Kilbourne* (1978) 84 C.A.3d 771, 780, 149 C.R. 499; see 84 C.A.3d 781, footnote 5, citing horrible examples.) (On abuses in class actions see supra, §64; see also 69 Cal. L. Rev. 806 [criticism of Federal Rules of Civil Procedure amendments of 1980 for failure to deal effectively with discovery abuse].)

(2) *Legislative Response.* The Civil Discovery Act of 1986 specifies activities constituting abuses of the discovery process (infra, §249) and provides for sanctions (infra, §252 et seq.) and protective orders (infra, §241). (On countering discovery abuse, see 26 U.S.F. L. Rev. 189 [specific proposals to amend Federal Rules of Civil Procedure]; 105 Harv. L. Rev. 428 [importance of judges' discretion to issue protective orders]; for statutory reforms resulting from Judicial Council's Economic Litigation Project for municipal courts, see 2 Cal. Proc. (4th), Courts, §§261, 264, 265.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER X - Discovery

### XI. MISUSE OF DISCOVERY PROCEDURES

#### B. Trial Court Remedies.

##### 1. In General.

*2 Witkin Cal. Evid. Discovery § 240*

[§ 240] In General.

Several remedies are available in the trial court to challenge unauthorized or improper discovery requests or orders:

(1) *Motion to quash or vacate* (supra, §226).

(2) *Objection to evidence*. "Though initially a party may move to quash a defective subpoena duces tecum, he may also comply with it, and, when the evidence is produced in court, object to its admissibility." (*Spencer v. Hibernia Bank* (1960) 186 C.A.2d 702, 717, 9 C.R. 867; see 1 Hogan, Cal. Civil Discovery §§2.24 et seq., 3.5; on objections, see 3 Cal. Evidence (4th), Presentation at Trial, §367 et seq.)

(3) *Contempt*. Instead of complying or moving to vacate, a party may await contempt proceedings and raise its defenses in the hearing. Then, if the ruling is against it, the party may purge itself of contempt by compliance at that time, or seek a review in the appellate court. (See infra, §244.)

(4) *Protective order*. (See infra, §241.)

(5) *Sanctions*. (See infra, §249 et seq.)

(6) *Tort action*. There is some authority supporting a tort action for abuse of process based on misuse of discovery procedures. (See *Thornton v. Rhoden* (1966) 245 C.A.2d 80, 95, 53 C.R. 706 [assuming, without deciding, that taking of deposition for improper purpose is abuse of process]; 33 A.L.R.4th 650 [misuse of discovery or deposition procedures without seizure of person or property]; 5 Summary (9th), Torts, §461.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Objection to evidence*.

See Hogan, 1 Cal. Civil Discovery 2d, §§2.24 et seq., 3.5.

(6) *Tort action*.

*Cross-Reference:* 5 Summary (10th), Torts, §519.



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### XI. MISUSE OF DISCOVERY PROCEDURES

#### B. Trial Court Remedies.

##### 2. Protective Orders.

2 Witkin Cal. Evid. Discovery § 241

[§ 241] Protective Orders.

(1) *Statutory Authorization.* Protective orders are specifically authorized for the following discovery devices:

(a) *Depositions:* C.C.P. 2025(i) (supra, §§59, 60, 82).

(b) *Interrogatories:* C.C.P. 2030(e) (supra, §114).

(c) *Inspections of documents and things:* C.C.P. 2031(f) (supra, §135).

(d) *Requests for admissions:* C.C.P. 2033(e) (supra, §170).

(e) *Exchanges of expert witness information:* C.C.P. 2034(e) (supra, §181).

(f) *Physical examinations:* C.C.P. 2032(g)(1) (supra, §152). (On protective orders generally, see C.E.B., 1 Civil Discovery Practice 3d, §2.63 et seq.; 23 *Am.Jur.2d* (1983 ed.), *Depositions and Discovery* §84 et seq.; 70 A.L.R.2d 685 [preventing, limiting, or terminating taking of depositions]; on protective orders under *F.R. Civ. P.*, Rule 26, see *Westinghouse Elec. Corp. v. Newman & Holtzinger* (1995) 39 C.A.4th 1194, 1204, 1205, 46 C.R.2d 151 [on violation of trade secret agreement incorporated in protective order, injured party may seek sanctions under *F.R. Civ. P.*, Rule 37, but may not bring separate action for breach of order or superseded agreement]; *Seattle Times Co. v. Rhinehart* (1984) 467 U.S. 20, 104 S.Ct. 2199, 2209, 81 L.Ed.2d 17, 29 [state counterpart of *F.R. Civ. P.*, Rule 26(c); order on good cause held not to offend First Amendment]; 1994 A.S. 245; 26 *Golden Gate L. Rev.* 183 [determining whether grand jury subpoena prevails over *F.R. Civ. P.*, Rule 26 protective order]; on protective orders where interrogatories seek discovery of financial condition of defendant against whom punitive damages are sought, see supra, §17.)

(2) *Showing of Good Cause Necessary.* Each of the statutory protective order provisions, supra, requires the party seeking a protective order to make a showing of good cause. (See *People v. Superior Court (Witzerman)* (1967) 248 C.A.2d 276, 281, 56 C.R. 393 [declaration containing mere conclusions insufficient]; *Department of Health Services v. Superior Court* (1980) 104 C.A.3d 80, 84, 163 C.R. 414.) And a protective order, like an injunction, is subject to the statutory prohibition against prevention of performance of acts by a public officer under a valid statute (former C.C.P. 526(4), now C.C.P. 526(b)(4); C.C. 3423). (*People v. Superior Court (Witzerman)*, supra, 248 C.A.2d 282.)

(3) *Limiting Scope of Discovery.* If the court determines on a motion for a protective order by an affected person "that the burden, expense, or intrusiveness of ... discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence," it must limit the scope of discovery. The motion must be

accompanied by a declaration stating facts showing a good faith attempt at an informal resolution of each issue presented by the motion. (*C.C.P. 2017(c), 2019(b)*; see *In re Lifschutz* (1970) 2 C.3d 415, 437, 85 C.R. 829, 467 P.2d 557, supra, §224 [suggesting that when inquiry into confidential relationship takes place during pretrial discovery, "the patient or the psychotherapist may apply to the trial court for a protective order to *limit the scope* of the inquiry or to regulate the procedure of the inquiry so as to best preserve the rights of the patient"]; on protective order in response to request for discovery of electronic evidence, see *Overly on Electronic Evidence in California* §3:12.)

(4) *Limiting Frequency or Extent of Discovery*. Under *C.C.P. 2019(b)*, the court must also restrict the frequency or extent of discovery if it determines either of the following:

(a) "The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive."

(b) "The selected method of discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, and the importance of the issues at stake in the litigation."

*C.C.P. 2019(b)* "aims to eliminate or at least significantly reduce the incidence of discovery that is either cumulative or disproportionate. It is the expectation of the Commission that by its articulation and underscoring of the power of trial courts to limit the quantity and methodology of discovery for the reasons set forth in the subdivision, these courts will be encouraged to be more active in identifying and curbing repetitive, inappropriate, and unduly protracted use of the methods of discovery." (Reporter's Note to *C.C.P. 2019(b)*, in 2 Hogan, Cal. Civil Discovery, Appendix C.) (On monetary sanctions for unsuccessfully making or opposing motion for protective order, see *infra*, §252.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Statutory Authorization*. *C.C.P. 2031.1, 2031.2*, added in 2003, limit the enforceability of stipulated protective orders in civil actions involving elder or dependent adult abuse.

*C.C.P. 2031.1, 2031.2* were repealed and replaced by *C.C.P. 2017.310* and *2017.320* in 2004 without substantive change. (See 5 *Summary* (10th), *Torts*, §149.)

(a) *Depositions*: *C.C.P. 2025(i)* was repealed and replaced by *C.C.P. 2025.420* in 2004 without substantive change.

(b) *Interrogatories*: *C.C.P. 2030(e)* was repealed and replaced by *C.C.P. 2030.090* in 2004 without substantive change.

(c) *Inspections of documents and things*: *C.C.P. 2031(f)* was repealed and replaced by *C.C.P. 2031.060* in 2004 without substantive change.

(d) *Requests for admissions*: *C.C.P. 2033(e)* was repealed and replaced by *C.C.P. 2033.080* in 2004 without substantive change.

(e) *Exchanges of expert witness information*: *C.C.P. 2034(e)* was repealed and replaced by *C.C.P. 2034.250* in 2004 without substantive change.

(f) *Physical examinations*: *C.C.P. 2032(g)(1)* was repealed and replaced by *C.C.P. 2032.510* in 2004 without substantive change.

See C.E.B., 2 Civil Discovery Practice 4th, §15.59 et seq. (3) *Limiting Scope of Discovery*. *C.C.P. 2017(c)* and *2019(b)*, on limitations on the scope of discovery, were repealed and replaced by *C.C.P. 2017.020* and *2019.030* in 2004 without substantive change.

See *Perez v. Santa Clara* (2003) 111 C.A.4th 671, 678, 3 C.R.3d 867 [in nurse's employment discrimination action, trial judge, in granting county employer's motion for protective order in response to nurse's request for personnel records of employer's other nurses, did not abuse his discretion in impliedly finding that proper balance between nurses' privacy interests and plaintiff's need for information was reached by county's provision of interrogatory answers listing disciplinary actions regarding nurses identified by race but not by name].

(4) *Limiting Frequency or Extent of Discovery*. C.C.P. 2019(b), on court-imposed restrictions on discovery, was repealed and replaced by C.C.P. 2019.030 in 2004 without substantive change.

See Reporter's Note to C.C.P. 2019(b), in Hogan, 2 Cal. Civil Discovery 2d, Appendix D. *West's Key Number Digest*, Pretrial Procedure k.41



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## CHAPTER X - Discovery

### XI. MISUSE OF DISCOVERY PROCEDURES

#### C. Remedies in Reviewing Court.

##### 1. In General.

2 *Witkin Cal. Evid. Discovery* § 242

[§ 242] In General.

An order granting or enforcing a discovery remedy is not directly appealable. (See *Collins v. Corse* (1936) 8 C.2d 123, 124, 64 P.2d 137; *Gue v. Dennis* (1946) 28 C.2d 616, 617, 170 P.2d 887; *Holm v. Superior Court* (1954) 42 C.2d 500, 505, 267 P.2d 1025; *Freidberg v. Freidberg* (1970) 9 C.A.3d 754, 763, 88 C.R. 451 ["The extraordinary writs of mandamus and prohibition are the proper remedies to review discovery procedure"]; 9 *Cal. Proc.* (4th), *Appeal*, §117; 37 A.L.R.2d 586 [appealability of orders pertaining to pretrial examinations, discovery, interrogatories, production of books or papers].)

The order may, of course, be reviewed on appeal from a final judgment in the action, but, as in cases involving denial of discovery (*supra*, §71), this is usually considered an inadequate remedy, and various extraordinary writs have been used to deal with different steps in the proceedings. (See *infra*, §243 et seq.; on federal practice, see 74 *Harv. L. Rev.* 940, 992.)

Before seeking extraordinary relief from the appellate courts, a party should exhaust his or her procedural remedies in the trial court. (See *Pacific Tel. & Tel. Co. v. Superior Court* (1970) 2 C.3d 161, 169, footnote 9, 84 C.R. 718, 465 P.2d 854.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER X - Discovery

## XI. MISUSE OF DISCOVERY PROCEDURES

## C. Remedies in Reviewing Court.

## 2. Certiorari and Habeas Corpus.

2 *Witkin Cal. Evid. Discovery* § 243

[§ 243] Certiorari and Habeas Corpus.

(a) *Review of Contempt Order.* If a subpoena or subpoena duces tecum is improper, its issuance is in a broad sense beyond the "jurisdiction" of the trial court. The early cases held that the proper remedy for the person served is to refuse to comply, submit to proceedings for contempt, and raise the objection in the contempt hearing. If found guilty, the person may seek release on habeas corpus or seek annulment of the order by certiorari. Thus, the person may be imprisoned for contempt but may secure a prompt release on habeas corpus; or the person may be fined but not imprisoned, and may review the order by certiorari; and no doubt the person may choose to remain in prison under the contempt order and seek certiorari. (See *Dreher v. Superior Court* (1932) 124 C.A. 469, 474, 12 P.2d 671 [contempt order annulled on certiorari]; *Nelson v. Superior Court* (1955) 135 C.A.2d 531, 532, 287 P.2d 535 [same]; *C. S. Smith Metropolitan Market Co. v. Superior Court* (1940) 16 C.2d 226, 229, 105 P.2d 587 [either remedy]; *Schultz v. Superior Court* (1945) 69 C.A.2d 530, 532, 159 P.2d 417 [same]; *Ex parte Jaynes* (1886) 70 C. 638, 12 P. 117 [habeas corpus]; cf. *Ex parte Clarke* (1899) 126 C. 235, 239, 58 P. 546 [order to produce papers on stand; petitioner released on habeas corpus].)

(b) *Review of Discovery Order by Certiorari.* Some of the cases took the position that the remedy of certiorari is available only when the proceedings have reached the second stage of actual commitment for contempt; i.e., the preliminary order by the trial court directing the witness to obey is not reviewable. (See *Howe v. Superior Court* (1929) 96 C.A. 769, 772, 274 P. 992; *St. Clair Estate Co. v. Superior Court* (1940) 41 C.A.2d 389, 393, 107 P.2d 45.) Others, dealing with perpetuation of testimony, authorized the use of certiorari in the first stage, to annul the discovery order. (See *Kutner-Goldstein Co. v. Superior Court* (1931) 212 C. 341, 345, 298 P. 1001; *Malone v. Superior Court* (1953) 40 C.2d 546, 551, 254 P.2d 517 [orders for perpetuation of testimony and subpoena duces tecum annulled]; and see *infra*, §244 et seq., for same type of review by prohibition or mandamus.)

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### XI. MISUSE OF DISCOVERY PROCEDURES

#### C. Remedies in Reviewing Court.

##### 3. Prohibition.

##### a. Preventing Contempt Adjudication.

2 *Witkin Cal. Evid. Discovery* § 244

[§ 244] Preventing Contempt Adjudication.

If the aggrieved party elects to challenge the proceedings by inviting contempt proceedings for failure to comply with an order or subpoena duces tecum, the party need not wait until an adjudication of contempt (with review by certiorari or habeas corpus, *supra*, §243). The party may use prohibition to prevent an adjudication of or punishment for contempt. (See *Kullman, Salz & Co. v. Superior Court* (1911) 15 C.A. 276, 280, 114 P. 589 [witness on stand refused to produce books; prohibition to restrain enforcement of contempt order]; *Funkenstein v. Superior Court* (1914) 23 C.A. 663, 665, 139 P. 101 [order of inspection; prohibition to restrain contempt proceeding]; *Pyper v. Jennings* (1920) 47 C.A. 623, 631, 191 P. 565 [order to produce books; prohibition to restrain enforcement of contempt order]; *Commercial Bank of Spanish America, Ltd. v. Superior Court* (1923) 192 C. 395, 397, 220 P. 422 [refusal to produce papers at deposition; prohibition to prevent trial for contempt]; *Nelson v. Superior Court* (1937) 9 C.2d 729, 732, 73 P.2d 232 [subpena to take deposition; prohibition to prevent sentencing for contempt]; *Blache v. Superior Court* (1939) 35 C.A.2d 740, 741, 96 P.2d 970 [subpena to take deposition; prohibition to prevent punishment for contempt]; *Franchise Tax Bd. v. Superior Court* (1950) 36 C.2d 538, 545, 225 P.2d 905 [order of inspection of privileged documents; prohibition to restrain contempt proceeding]; *Jessup v. Superior Court* (1957) 151 C.A.2d 102, 107, 311 P.2d 177 [inspection of privileged documents; prohibition to prevent sentence]; 8 *Cal. Proc.* (4th), *Extraordinary Writs*, §70.)

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## CHAPTER X - Discovery

### XI. MISUSE OF DISCOVERY PROCEDURES

#### C. Remedies in Reviewing Court.

##### 3. Prohibition.

##### b. Preventing Discovery Order.

##### 1. Availability of Remedy.

#### 2 Witkin Cal. Evid. Discovery § 245

[§ 245] Availability of Remedy.

(1) *Former Law.* In view of the presumably adequate remedies of contempt hearing followed by certiorari or habeas corpus or prohibition (*supra*, §§242, 243), early cases held that the aggrieved party could not use prohibition to directly attack the proceedings in the first stage, i.e., to prevent issuance or enforcement of the subpoena or discovery order. (See *C. S. Smith Metropolitan Market Co. v. Superior Court* (1940) 16 C.2d 226, 229, 105 P.2d 587; *Rose v. Superior Court* (1941) 44 C.A.2d 599, 600, 112 P.2d 713; *Lockheed Aircraft Corp. v. Superior Court* (1946) 28 C.2d 481, 487, 171 P.2d 21 [prohibition will not issue to prevent enforcement of subpoena]; *Los Angeles Transit Lines v. Superior Court* (1953) 119 C.A.2d 465, 468, 259 P.2d 1004 [same; order of inspection].)

(2) *Present Law.* The theory of the above cases has been repudiated, and prohibition is now available to prevent enforcement of an invalid discovery order or subpoena duces tecum, without going through the steps of disobedience, contempt hearing, and adjudication of contempt. (See *Seven Up Bottling Co. v. Superior Court* (1951) 107 C.A.2d 75, 76, 236 P.2d 623 [subpoena duces tecum; denial of motion to quash reviewed and prohibition issued to prevent taking of deposition]; *Holm v. Superior Court* (1954) 42 C.2d 500, 507, 267 P.2d 1025 [prohibition to restrain enforcement of order of inspection of privileged documents]; *Carroll v. Superior Court* (1954) 42 C.2d 874, 875, 267 P.2d 1073 [same; privileged photographs]; *Kaynar Mfg. Co. v. Superior Court* (1956) 141 C.A.2d 547, 552, 297 P.2d 502 [same; insufficient designation and showing]; *Union Oil Co. v. Superior Court* (1957) 151 C.A.2d 286, 290, 311 P.2d 640 [same; privileged documents]; *Twin Lock v. Superior Court* (1959) 52 C.2d 754, 758, 344 P.2d 788 [prohibition to prevent imposition of sanctions against witnesses who refused to attend deposition outside jurisdictional limits]; *City Council v. Superior Court* (1962) 204 C.A.2d 68, 71, 21 C.R. 896 [official privilege]; *Peck's Liquors v. Superior Court* (1963) 221 C.A.2d 772, 775, 34 C.R. 735 [review of order compelling testimony on deposition in violation of self-incrimination privilege]; *Lund v. Superior Court* (1964) 61 C.2d 698, 712, 39 C.R. 891, 394 P.2d 707 [prohibition to prevent imposition of sanctions against nonparty witnesses who failed to appear for deposition, but over whom court had no personal jurisdiction]; *O'Brien v. Superior Court* (1965) 233 C.A.2d 388, 391, 43 C.R. 815 [review of order for further interrogatories where motion made too late]; *Sav-On Drugs v. Superior Court* (1975) 15 C.3d 1, 5, 123 C.R. 283, 538 P.2d 739 ["[W]e may properly entertain a petition for extraordinary relief when the petitioning party asserts ... that to compel an answer would violate a privilege"]; 8 Cal. Proc. (4th), *Extraordinary Writs*, §245; 95 A.L.R.2d 1229 [availability of mandamus or prohibition to prevent discovery].)

(3) *Protection of Third Party's Rights.* In *Irwin Memorial Blood Bank v. Superior Court* (1991) 229 C.A.3d 151,

279 C.R. 911, plaintiffs in consolidated transfusion-related AIDS cases against a blood bank obtained a general order permitting anonymous written depositions of AIDS-infected donors. Ten months later, after deposition orders were issued for certain donors, defendant sought a writ of prohibition, claiming that the general order violated donors' privacy rights under former Health & Saf.C. 199.20 (now *Health & Saf.C. 120975*; see 2 *Cal. Evidence (4th)*, *Witnesses*, §522). Plaintiffs contended that the petition was barred by laches. *Held*, the blood bank was guilty of laches, but the doctrine would not be applied to defeat the privacy rights of third parties on whose behalf the blood bank was acting. "No order directly affecting the individual donors was issued until the orders setting the depositions. Unless this court acts now, the privacy right of the donors under section 199.20 will be lost. We, therefore, exercise our discretion in favor of resolving the issue on its merits." (229 C.A.3d 156.)

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### XI. MISUSE OF DISCOVERY PROCEDURES

#### C. Remedies in Reviewing Court.

##### 3. Prohibition.

##### b. Preventing Discovery Order.

##### 2. Grounds: Abuse of Discretion.

*2 Witkin Cal. Evid. Discovery § 246*

[§ 246] Grounds: Abuse of Discretion.

Although prohibition is in theory a jurisdictional view (see 8 *Cal. Proc.* (4th), *Extraordinary Writs*, §§5, 50), the alternative use of mandamus (infra, §248) has had the effect of changing the test from excess of jurisdiction to abuse of discretion. Hence, the discovery order may be prohibited not only where it is wholly invalid, but also where, under the circumstances, it constitutes an abuse of the lower court's discretion. (See *O'Brien v. Superior Court* (1965) 233 C.A.2d 388, 391, 43 C.R. 815; *Bunnell v. Superior Court* (1967) 254 C.A.2d 720, 721, footnote 1, 62 C.R. 458; *Volkswagenwerk Aktiengesellschaft v. Superior Court* (1973) 33 C.A.3d 503, 508, 109 C.R. 219; *American Mut. Liab. Ins. Co. v. Superior Court* (1974) 38 C.A.3d 579, 589, 113 C.R. 561, quoting the text; *Dickerson v. Superior Court* (1982) 135 C.A.3d 93, 98, 185 C.R. 97 [quoting *American Mut.*].)

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#### C. Remedies in Reviewing Court.

##### 3. Prohibition.

##### b. Preventing Discovery Order.

##### 3. Necessity of Important Question.

2 Witkin Cal. Evid. Discovery § 247

[§ 247] Necessity of Important Question.

Extraordinary writs were being issued so frequently with regard to discovery orders that the Supreme Court, in *Oceanside Union School Dist. v. Superior Court* (1962) 58 C.2d 180, 23 C.R. 375, 373 P.2d 439, found it necessary to sound a note of caution:

"The prerogative writs have been used frequently to review interim orders in discovery cases. ... But this does not mean that these discretionary writs will or should issue as of course in all cases where this court may be of the opinion that the interim order of the trial court was erroneous. In most such cases, as is true of most other interim orders, the parties must be relegated to a review of the order on appeal from the final judgment. As inadequate as such review may be in some cases, the prerogative writs should only be used in discovery matters to review questions of first impression that are of general importance to the trial courts and to the profession, and where general guidelines can be laid down for future cases. The present case falls within this category. ... Therefore, it is a proper case for the use of the writ." (58 C.2d 185, footnote 4; see also *Rosemont v. Superior Court* (1964) 60 C.2d 709, 712, 36 C.R. 439, 388 P.2d 671, supra, §63 ["The lengthy history of this litigation ... demonstrates the need for caution ... lest the basic purpose of pretrial discovery to expedite litigation be thwarted"].)

The *Oceanside* doctrine of restraint and its major exceptions--violation of privilege and question of first impression--have been the subject of frequent discussion in later cases and by commentators. (See *Pacific Tel. & Tel. Co. v. Superior Court* (1970) 2 C.3d 161, 169, 84 C.R. 718, 465 P.2d 854; *Catanese v. Superior Court* (1996) 46 C.A.4th 1159, 1161, 1162, 54 C.R.2d 280 [*Oceanside* exception allowing writ review for important questions of first impression was applicable where issue was whether, by propounding five interrogatories asking which of plaintiff's deposition answers defendant contended were untruthful, plaintiff could force defendant to review eight volumes of deposition testimony]; 8 Cal. Proc. (4th), *Extraordinary Writs*, §§156, 157.)

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### XI. MISUSE OF DISCOVERY PROCEDURES

#### C. Remedies in Reviewing Court.

##### 4. Mandamus.

2 *Witkin Cal. Evid. Discovery* § 248

[§ 248] Mandamus.

The tendency in California is to disregard functional distinctions between the extraordinary writs, and particularly to use mandamus to accomplish the effect of prohibition or certiorari. In this manner, a nonappealable order may be reviewed and annulled for abuse of discretion, without the necessity of showing excess of jurisdiction. (See 8 *Cal. Proc.* (4th), *Extraordinary Writs*, §§248 et seq., 254.)

Thus, in addition to prohibition (*supra*, §245 et seq.), mandamus may be used to review an improper discovery order and to compel the trial court to vacate or set it aside.

The following are illustrations:

(1) *Subpena or Subpena Duces Tecum*. After the remedy in the lower court by motion to quash has been exhausted (*supra*, §226), mandamus will lie to compel the lower court to quash the subpoena. (See *Smith-Golden v. Superior Court* (1940) 41 C.A.2d 512, 515, 107 P.2d 299 [subpena duces tecum]; *Lewis v. Superior Court* (1953) 118 C.A.2d 770, 773, 258 P.2d 1084 [same]; *Pelton Motors v. Superior Court* (1953) 120 C.A.2d 565, 570, 261 P.2d 275 [same]; *Wemyss v. Superior Court* (1952) 38 C.2d 616, 617, 241 P.2d 525 [deposition subpoena].)

(2) *Order of Inspection*. Mandamus may issue to prevent enforcement of the order. (See *Los Angeles Transit Lines v. Superior Court* (1953) 119 C.A.2d 465, 468, 259 P.2d 1004 [petition for prohibition treated as petition for mandamus and writ issued]; *Proctor & Gamble Mfg. Co. v. Superior Court* (1954) 124 C.A.2d 157, 162, 268 P.2d 199 [same]; *Volkswagenwerk Aktiengesellschaft v. Superior Court* (1981) 123 C.A.3d 840, 855, 858, 176 C.R. 874 [writ granted where discovery orders authorized inspection of petitioner's manufacturing facilities in West Germany, in violation of the country's sovereignty; proper procedure is under Hague Convention]; *Hoffman Corp. v. Superior Court* (1985) 172 C.A.3d 357, 362, 218 C.R. 355, *supra*, §125 [writ issued where trial court abused discretion by ordering discovery of defendant's customer list].)

(3) *Deposition*. (See *Grand Lake Drive In v. Superior Court* (1960) 179 C.A.2d 122, 132, 3 C.R. 621 [writ issued to compel vacation of order requiring witness to answer questions protected by lawyer-client privilege].)

(4) *Interrogatories*. (See *O'Brien v. Superior Court* (1965) 233 C.A.2d 388, 391, 43 C.R. 815 [writ issued to compel vacation of order, along with prohibition to prevent further proceedings]; *South Tahoe Public Util. Dist. v. Superior Court* (1979) 90 C.A.3d 135, 137, 139, 154 C.R. 1 [writ issued to compel vacation of order requiring disclosure of expert witnesses who might or might not be called at a then unscheduled trial].)

(5) *Physical Examination*. (See *Sharff v. Superior Court* (1955) 44 C.2d 508, 511, 282 P.2d 896, supra, §150 [writ issued to compel lower court to allow action to be tried without compliance with improper order]; *Reuter v. Superior Court* (1979) 93 C.A.3d 332, 336, 155 C.R. 525; *Browne v. Superior Court* (1979) 98 C.A.3d 610, 613, 159 C.R. 669.)

In *Harabedian v. Superior Court* (1961) 195 C.A.2d 26, 30, 15 C.R. 420, the court granted a writ of mandamus to prevent a requested ophthalmological examination of defendant, but for all practical purposes nullified its writ by instructing the trial judge to enter a more specific order compelling defendant to submit to that examination.

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## CHAPTER X - Discovery

## XII. SANCTIONS

## A. In General.

## 1. Availability of Sanctions.

2 *Witkin Cal. Evid. Discovery* § 249

## [§ 249] Availability of Sanctions.

(1) *Statutory Authorization for Imposing Sanctions.* The Civil Discovery Act of 1986 provides for sanctions not only for failure to comply with discovery orders, but for other abuses of the discovery process as well. Unlike the former law, which listed sanctions for noncompliance in one place (former C.C.P. 2034), the 1986 Act sets forth the sanctions available for noncompliance with each particular discovery method as part of the provisions governing that method. (See, e.g., *C.C.P. 2020(h), 2025(j), 2025(o)* [depositions]; 2030(k), 2030(l) [interrogatories]; 2031(l), 2031(m), 2031(n) [demands for inspection]; 2032(c), 2032(f) [demands for physical and mental examinations]; 2032(h), 2032(j) [delivery of examination reports]; 2033(k), 2032(l) [requests for admissions]; on advantages of present statutory structure, see 2 Hogan, *Cal. Civil Discovery* §15.2; on sanctions available under federal rules, see *F.R. Civ. P., Rule 37*; 156 A.L.R.Fed 601 [sanctions available under *F.R. Civ. P., Rule 37* for failure to obey discovery order not related to expert witness].)

To the extent authorized by the provisions governing a particular discovery method, or another provision of the 1986 Act, a court, after proper notice and opportunity for hearing, may impose sanctions against anyone who engages in conduct that is a misuse of the discovery process. The types of sanctions available are: monetary, issue, evidence, terminating, and contempt sanctions. (*C.C.P. 2023(b)*; on particular types of sanctions, see *infra*, §252 et seq.; on persons against whom sanctions may be imposed, see *infra*, §250.) (See also C.E.B., 1 *Civil Discovery Practice* 3d, §2.93 et seq.; C.J.E.R., *Judges Benchbook, Civil Proceedings: Discovery*, Chap. 6; 23 *Am.Jur.2d* (1983 ed.), *Depositions and Discovery* §357 et seq.; 15 *Pepperdine L. Rev.* 401 [sanctions provisions of 1986 Act]; on sanctions for failure to disclose witnesses or evidence when request for disclosure has been properly made in economic litigation case, see *C.C.P. 97, 2 Cal. Proc. (4th), Courts*, §265.)

(2) *List of Discovery Abuses.* In addition to providing for discovery sanctions throughout the statute, the 1986 Act contains the following list of discovery misuses:

(a) "Persisting, over objection and without substantial justification, in an attempt to obtain information or materials that are outside the scope of permissible discovery." (*C.C.P. 2023(a)(1)*; on scope of permissible discovery, see *supra*, §9.)

(b) "Using a discovery method in a manner that does not comply with its specified procedures." (*C.C.P. 2023(a)(2)*.)

(c) "Employing a discovery method in a manner or to an extent that causes unwarranted annoyance, embarrassment, or oppression, or undue burden and expense." (*C.C.P. 2023(a)(3)*.)

- (d) "Failing to respond or to submit to an authorized method of discovery." (*C.C.P. 2023(a)(4)*.)
- (e) "Making, without substantial justification, an unmeritorious objection to discovery." (*C.C.P. 2023(a)(5)*.)
- (f) "Making an evasive response to discovery." (*C.C.P. 2023(a)(6)*.)
- (g) "Disobeying a court order to provide discovery." (*C.C.P. 2023(a)(7)*.)
- (h) "Making or opposing, unsuccessfully and without substantial justification, a motion to compel or to limit discovery." (*C.C.P. 2023(a)(8)*.)
- (i) Failing to confer with an opposing party or attorney "in a reasonable and good faith attempt to resolve informally any dispute concerning discovery," as required by a statutory discovery provision. (*C.C.P. 2023(a)(9)*, *infra*, §252; see 15 *Pepperdine L. Rev.* 401, 405.)

The above list of abuses is illustrative, not exhaustive. "It is arguable that, in view of the detailed regulations of the discovery process in the various sections governing the individual methods of discovery, *C.C.P. 2023(a)* is unnecessary." However, the Commission felt that the subdivision "underscored the importance of conducting discovery in a manner that does not abuse the methods provided to achieve its goals." (Reporter's Note to *C.C.P. 2023(a)*, in 2 Hogan, Cal. Civil Discovery, Appendix C; see 15 *Pepperdine L. Rev.* 401, 404.)

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(1) *Statutory Authorization for Imposing Sanctions.* *C.C.P. 2020(h)*, on the punishment for failure to obey a deposition subpoena, was repealed and replaced by *C.C.P. 2020.240* in 2004 without substantive change.

The portion of *C.C.P. 2023(b)* providing that the court may impose sanctions "[t]o the extent authorized by the section governing any particular discovery method" does not mean that the procedural requirements of the applicable discovery method statute must be applied, but rather simply that the particular discovery method statute dictates which sanctions may be imposed. Thus, where a party moves for an order to compel further response to an inspection demand, its request for monetary sanctions need not be made within the 45-day period specified in *C.C.P. 2031(m)* for moving to compel further response to an inspection demand but may be made later. Whether the sanctions motion is timely is subject to the trial judge's discretion. (*London v. Dri-Honing Corp.* (2004) 117 C.A.4th 999, 1006, 1009, 12 C.R.3d 240, citing the text.)

*C.C.P. 2023(b)* was repealed and replaced by *C.C.P. 2023.030* in 2004 without substantive change.

*C.C.P. 2025(j)* and *2025(o)*, on sanctions for noncompliance with the deposition provisions, were repealed and replaced by *C.C.P. 2025.430 et seq.* and *2025.480* in 2004 without substantive change.

*C.C.P. 2030(k)* and *2030(l)*, on sanctions for noncompliance with the interrogatory provisions, were repealed and replaced by *C.C.P. 2030.290* and *2030.300* in 2004 without substantive change.

*C.C.P. 2031(l)-(n)*, on sanctions in connection with demands for inspection, were repealed and replaced by *C.C.P. 2031.300 et seq.* in 2004 without substantive change.

*C.C.P. 2032(c)*, (f), on sanctions in connection with demands for mental and physical examinations, were repealed and replaced by *C.C.P. 2032.240*, *2032.250*, *2032.410*, and *2032.420* in 2004 without substantive change.

*C.C.P. 2032(h)*, (j), on sanctions in connection with delivery of examination reports, were repealed and replaced by *C.C.P. 2032.620* and *2032.650* in 2004 without substantive change.

*C.C.P. 2033(k)* and *2033(l)* (incorrectly cited in the text as *2032(l)*), on sanctions in connection with requests for admissions, were repealed and replaced by *C.C.P. 2033.280* and *2033.290* in 2004 without substantive change.



See C.E.B., 2 Civil Discovery Practice 4th, §15.85 et seq.; Hogan, 2 Cal. Civil Discovery 2d, §15.2.(2) *List of Discovery Abuses*.

(a) *Attempt to obtain information outside scope of discovery*: C.C.P. 2023(a)(1) was repealed and replaced by C.C.P. 2023.010(a) in 2004 without substantive change.

(b) *Failure to comply with specified procedures*: C.C.P. 2023(a)(2) was repealed and replaced by C.C.P. 2023.010(b) in 2004 without substantive change.

(c) *Causing annoyance, embarrassment, oppression, or undue burden*: C.C.P. 2023(a)(3) was repealed and replaced by C.C.P. 2023.010(c) in 2004 without substantive change.

(d) *Failure to respond or submit to authorized discovery method*: C.C.P. 2023(a)(4) was repealed and replaced by C.C.P. 2023.010(d) in 2004 without substantive change.

(e) *Making unmeritorious objection*: C.C.P. 2023(a)(5) was repealed and replaced by C.C.P. 2023.010(e) in 2004 without substantive change.

(f) *Making evasive response*: C.C.P. 2023(a)(6) was repealed and replaced by C.C.P. 2023.010(f) in 2004 without substantive change.

(g) *Disobeying court order*: C.C.P. 2023(a)(7) was repealed and replaced by C.C.P. 2023.010(g) in 2004 without substantive change.

(h) *Making or opposing, unsuccessfully and without justification, motion to compel or limit discovery*: C.C.P. 2023(a)(8) was repealed and replaced by C.C.P. 2023.010(h) in 2004 without substantive change.

(i) *Failure to attempt informal resolution*: C.C.P. 2023(a)(9) was repealed and replaced by C.C.P. 2023.010(i) in 2004 without substantive change.

See *Palm Valley Homeowners Assn. v. Design MTC* (2000) 85 C.A.4th 553, 563, 564, 102 C.R.2d 350, 9 Summary (10th), *Corporations*, §75 [list of abuses in C.C.P. 2023 (now C.C.P. 2023.010) is not exclusive; law firm's participation in discovery on behalf of suspended corporation, knowing corporation was suspended, and having reason to know or suspect suspension disabled corporation from participating in litigation, qualified as conduct abusive of discovery process]; Reporter's Note to C.C.P. 2023(a), in Hogan, 2 Cal. Civil Discovery 2d, Appendix D.(3) *(New) Effect of Lack of Opposition*. Under the Act, sanctions may be awarded in favor of a party who files a motion to compel, even though no opposition to the motion was filed, or opposition to the motion was withdrawn, or the requested discovery was provided after the motion was filed. (C.R.C., Rule 3.1030(a), adopted effective July 1, 2001, and renumbered in 2006.) *West's Key Number Digest*, Pretrial Procedure k.44 et seq.



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## CHAPTER X - Discovery

## XII. SANCTIONS

## A. In General.

## 2. Persons Subject to Sanctions.

2 Witkin Cal. Evid. Discovery § 250

[§ 250] Persons Subject to Sanctions.

(1) *Former Law.* The former statutes authorized various sanctions against a *party*. But where a *nonparty witness* disobeyed an order, the court, lacking personal jurisdiction over the witness, could only proceed in contempt. (*Lund v. Superior Court* (1964) 61 C.2d 698, 713, 39 C.R. 891, 394 P.2d 707 [order that nonparty witness make payments to opposing attorneys for failure to appear at deposition was void].) Former C.C.P. 2034(d) did allow sanctions against a party's attorney whose conduct interfered with proper discovery procedures (see *Weinkauff v. Superior Court* (1966) 64 C.2d 662, 665, 51 C.R. 100, 414 P.2d 36), as long as the sanctions were imposed in conformity with due process (*Blumenthal v. Superior Court* (1980) 103 C.A.3d 317, 320, 163 C.R. 39). (See *In re Marriage of Fuller* (1985) 163 C.A.3d 1070, 1077, 210 C.R. 73 ["notice prior to imposition of sanctions is mandated not only by statute but also by the due process clauses of both state and federal Constitutions"; following *Blumenthal*]; *In re Bongfeldt* (1971) 22 C.A.3d 465, 476, 99 C.R. 428, *infra*, §262; see also 8 A.L.R.4th 1181 [attorney's conduct in delaying or obstructing discovery as contempt].)

(2) *Present Law.* The court may impose the various sanctions listed in C.C.P. 2023(b) against "anyone engaging in conduct that is a misuse of the discovery process." (C.C.P. 2023(b).) Sanctions against an attorney are specifically authorized. (See C.C.P. 2023(b), (c).) Notice and an opportunity for hearing must be given to "any affected party, person, or attorney." (C.C.P. 2023(b).)

In addition to the general authorization provided in C.C.P. 2023(b), there are examples throughout the Civil Discovery Act of 1986 of circumstances in which sanctions for specific discovery violations are authorized against parties, their attorneys, or other persons. (See, e.g., C.C.P. 2025(j)(1) [party giving notice of deposition, or party's attorney, can be sanctioned for failure to attend deposition]; C.C.P. 2025(j)(2) [party giving notice, or party's attorney, can be sanctioned for failure to serve required deposition subpoena]; C.C.P. 2020(h) [contempt sanction may be imposed against "a deponent" who disobeys deposition subpoena]; see also *Corns v. Miller* (1986) 181 C.A.3d 195, 226 C.R. 247, *infra*, §254 [sanctions against attorney]; *Slemaker v. Woolley* (1989) 207 C.A.3d 1377, 1382, 255 C.R. 532 [sanctions imposed on attorney who improperly suspended deposition of client under C.C.P. 2025(n), *supra*, §61; sanction order was not separately appealable final order]; *Ghanooni v. Super Shuttle* (1993) 20 C.A.4th 256, 261, 24 C.R.2d 501, *infra*, §253 [monetary sanctions may be imposed against party's attorney who advised conduct at issue; because un rebutted declarations of plaintiff's counsel established that plaintiff's refusal to submit to X-rays was not based on her attorney's advice, sanctions imposed against attorney were not authorized; citing *Corns v. Miller*]; *Brun v. Bailey* (1994) 27 C.A.4th 641, 658, 659, 32 C.R.2d 624 [trial judge had jurisdiction to impose monetary sanctions against witness deposed by defendant, even though he was not party; C.C.P. 2025(i) authorizes sanctions under C.C.P. 2023 against any

"person"]; 26 Southwestern U. L. Rev. 1125 [attorney's liability where client refuses to produce relevant, nonprivileged document]; for list of numerous violations for which monetary sanctions may be imposed against "any party, person, or attorney," see *infra*, §252.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Present Law. C.C.P. 2020(h)*, on the punishment for failure to obey a deposition subpoena, was repealed and replaced by *C.C.P. 2020.240* in 2004 without substantive change.

*C.C.P. 2023(b)*, specifying who may be sanctioned and requiring notice and a hearing, was repealed and replaced by *C.C.P. 2023.030* in 2004 without substantive change.

*C.C.P. 2023(c)*, referring to attorneys as persons who may be sanctioned, was repealed and replaced by *C.C.P. 2023.040* in 2004 without substantive change.

*C.C.P. 2025(j)(1)* (failure to attend by party giving notice of deposition) was repealed and replaced by *C.C.P. 2025.430* in 2004 without substantive change.

*C.C.P. 2025(j)(2)* (failure to serve deposition subpoena) was repealed and replaced by *C.C.P. 2025.440(a)* in 2004 without substantive change.

*C.C.P. 2025(i)* (sanctions against any "person") was repealed and replaced by *C.C.P. 2025.420(d)* in 2004 without substantive change.



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## CHAPTER X - Discovery

### XII. SANCTIONS

#### A. In General.

#### 3. Limitations on Court's Power To Impose Sanctions.

2 Witkin Cal. Evid. Discovery § 251

[§ 251] Limitations on Court's Power To Impose Sanctions.

(1) *No Punishment for Past Violations.* Sanctions cannot be invoked as a punishment for past violations or other contemptuous conduct, but only for the purpose of securing compliance with the orders of the court. (See *Crummer v. Beeler* (1960) 185 C.A.2d 851, 860, 8 C.R. 698; *Caryl Richards v. Superior Court* (1961) 188 C.A.2d 300, 303, 305, 10 C.R. 377, *infra*, §259; *Fairfield v. Superior Court* (1966) 246 C.A.2d 113, 120, 54 C.R. 721 [failure to answer interrogatories; sanctions imposed 5 days after final denial of appellate relief from original order, leaving insufficient time to comply]; *Welgoss v. End* (1967) 252 C.A.2d 982, 991, 61 C.R. 52; *Midwife v. Bernal* (1988) 203 C.A.3d 57, 64, 65, 249 C.R. 708 [dismissal for refusal to pay monetary sanctions that had been imposed for earlier failures to attend depositions was purely punitive and abuse of discretion]; *Sauer v. Superior Court* (1987) 195 C.A.3d 213, 228, 240 C.R. 489 [sanction upheld]; *Newland v. Superior Court* (1995) 40 C.A.4th 608, 614, 615, 47 C.R.2d 24 [although *Midwife* case was decided under former C.C.P. 2034, its principle that terminating sanction may not be imposed for failure to pay monetary sanction remains valid under current C.C.P. 2023(b)(4), *infra*, §257].)

(2) *Least Drastic Sanction Preferred.* The trial judge does not have unrestricted power to select any of the statutory sanctions, and cannot invoke the penalty of striking out a pleading and entering a default judgment if a less drastic remedy is adequate. A sanction order "cannot go further than is necessary to accomplish the purpose of discovery." (*Newland v. Superior Court*, *supra*, 40 C.A.4th 613; see *Crummer v. Beeler*, *supra*, 185 C.A.2d 860; *Caryl Richards v. Superior Court*, *supra*, 188 C.A.2d 305; *Thomas v. Luong* (1986) 187 C.A.3d 76, 82, 231 C.R. 631, *infra*, §259 [default judgment reversed; lesser sanction of stipulating to liability was available]; but see *Do It Urself Moving & Storage v. Brown, Leifer, Slatkin & Berns* (1992) 7 C.A.4th 27, 36, 37, 9 C.R.2d 396 [trial court did not abuse discretion by not imposing lesser sanction; sanction imposed was properly tailored to particular abuse]; *Collisson & Kaplan v. Hartunian* (1994) 21 C.A.4th 1611, 1620, 26 C.R.2d 786, *infra*, §258 [same]; 2 Hogan, Cal. Civil Discovery §15.5.) (See also *MacDonald v. Superior Court* (1977) 75 C.A.3d 692, 696, 141 C.R. 667 [trial court's order, on failure of defendants to answer interrogatories, that defendants be barred from prosecuting their appeal was beyond its jurisdiction].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *No Punishment for Past Violations.* C.C.P. 2023(b)(4), on terminating sanctions, was repealed and replaced by C.C.P. 2023.030(d) in 2004 without substantive change.

(2) *Least Drastic Sanction Preferred.* "Some courts have held that the more serious sanctions may be imposed under *Code of Civil Procedure* section 2023 even where no specific order has been violated, but those cases have involved repeated and willful refusals to permit discovery or produce documents over a lengthy period of time which

resulted in evidence becoming unavailable." (*Maldonado v. Superior Court* (2002) 94 C.A.4th 1390, 1399, 115 C.R.2d 137 [in employment discrimination action, defendant corporation, in response to plaintiffs' deposition notices seeking to depose persons most knowledgeable about defendant's practices, produced three current employees who knew very little; given that defendant was bankrupt and many of those most knowledgeable had left, and that there was no evidence of egregious conduct, issue-preclusion sanction was not warranted].)(3) (*New*) *Ex Parte Awards Prohibited*. Discovery sanctions cannot be awarded ex parte, and a sanctions order so issued is void. C.C.P. 2023.030 (text and Supp., §249) requires notice and the opportunity for a hearing. (*Parker v. Wolters Kluwer United States* (2007) 149 C.A.4th 285, 296, 57 C.R.3d 18.)

See Hogan, 2 Cal. Civil Discovery 2d, §15.5.



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## CHAPTER X - Discovery

### XII. SANCTIONS

#### B. Types of Sanctions.

##### 1. Monetary Sanction.

##### a. Statutory Authority.

2 *Witkin Cal. Evid. Discovery* § 252

[§ 252] Statutory Authority.

(1) *General Authorization.* The court may order that someone who misuses the discovery process, an attorney who advises that conduct, or both, pay the reasonable expenses, including attorneys' fees, anyone incurs as a result of that conduct. The sanction may also be imposed on someone who unsuccessfully asserts that another person misused the discovery process, on an attorney who advised that assertion, or on both. (*C.C.P. 2023(b)(1)*; see *C.E.B.*, 1 Civil Discovery Practice 3d, §2.102; 23 Am.Jur.2d (1983 ed.), Depositions and Discovery §396 et seq.; 15 *Pepperdine L. Rev.* 401, 409; *C.J.E.R.*, Judges Benchbook, Civil Proceedings: Discovery §6.6 et seq.; on appealability of monetary sanctions order, see 9 *Cal. Proc.* (4th), *Appeal*, §65.)

(2) *Specific Authorizations Within Act.* If a monetary sanction is authorized by a provision of the Civil Discovery Act of 1986, the sanction must be imposed unless the court "finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust." (*C.C.P. 2023(b)(1)*.) In particular, monetary sanctions are authorized against a party, person, or attorney who unsuccessfully makes or opposes one of the following motions:

(a) For a protective order (*C.C.P. 2017(c), 2019(b), 2025(i), 2025(n), 2030(e), 2031(f), 2032(g)(1), 2033(e), 2034(e)*; *supra*, §241);

(b) For discovery in sexual tort cases (*C.C.P. 2017(d)*, *supra*, §13);

(c) To extend or to reopen discovery (*C.C.P. 2024(e)*, *supra*, §24);

(d) To increase travel limits for a party deponent (*C.C.P. 2025(e)*, *supra*, §41);

(e) To quash a deposition notice (*C.C.P. 2025(g)*, *supra*, §48);

(f) To compel a deposition answer or production (*C.C.P. 2025(o)*, *supra*, §70);

(g) To suppress a deposition (*C.C.P. 2025(q)(1), (q)(2)*, *supra*, §§74, 75);

(h) To sustain or overrule an objection to a question on the grounds of form, privilege or the work product doctrine (*C.C.P. 2028(d)(1), (d)(2)*, *supra*, §81);

- (i) To compel a response or a further response to interrogatories (*C.C.P. 2030(k), (l)*, supra, §§115, 116);
- (j) To deem binding an initial answer to an interrogatory (*C.C.P. 2030(m)*, supra, §100);
- (k) To compel a response or further response to an inspection demand (*C.C.P. 2031(l), (m)*, supra, §§137, 138);
- (l) To compel compliance with an inspection demand (*C.C.P. 2031(n)*, supra, §139);
- (m) For an order compelling response and compliance with a demand for a physical examination (*C.C.P. 2032(c)(6), (c)(7)*, supra, §144);
- (n) To compel delivery of medical reports (*C.C.P. 2032(h), (j)*, supra, §155);
- (o) To compel further response to a request for admission (*C.C.P. 2033(l)*, supra, §177);
- (p) To set expert witness fees (*C.C.P. 2034(i)(4)*, supra, §193);
- (q) To augment or amend expert witness information (*C.C.P. 2034(k)*, supra, §187); or
- (r) To submit tardy expert witness information (*C.C.P. 2034(l)*, supra, §199).

(3) *Informal Conference Requirement.* Numerous provisions throughout the 1986 Act require a party to make a reasonable and good faith attempt to resolve a discovery dispute informally before moving the court for an order. (See, e.g., *C.C.P. 2025(g)* [motion to stay deposition and quash deposition notice]; 2032(c)(7) [motion to compel compliance with demand for physical examination of personal injury plaintiff]; 2033(l) [motion to compel further response to request for admission].) When an attempt at informal resolution is required, the party or the party's attorney must confer in person, by telephone, or by letter with the opposing party or attorney. Regardless of the outcome of the particular discovery motion, the court must impose a monetary sanction under *C.C.P. 2023(b)(1)* against a party or attorney who fails to confer as required. (*C.C.P. 2023(a)(9)*; see *15 Pepperdine L. Rev. 401, 405.*)

(4) *Timing of Request for Sanctions.* Neither *C.C.P. 2023* nor any case law mandates that discovery sanctions be imposed before the verdict is rendered. "[C]ommon sense dictates sanctions cannot be pursued before the affected party finds out about the alleged discovery dereliction of his or her opponent. The true facts may not emerge until the end of the trial." (*Sherman v. Kinetic Concepts (1998)* 67 *C.A.4th* 1152, 1163, 79 *C.R.2d* 641 [trial court erred in denying plaintiffs' motion for sanctions on ground that it could not grant relief after conclusion of trial; defendants had intentionally concealed material information from plaintiffs and had lied throughout trial, and plaintiffs could not have moved to compel production of documents that they did not know existed until after trial was over].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *General Authorization.*

*C.C.P. 2023(b)(1)*, authorizing monetary sanctions, was repealed and replaced by *C.C.P. 2023.030(a)* in 2004 without substantive change.

See C.E.B., 2 Civil Discovery Practice 4th, §15.93.

(2) *Specific Authorizations Within Act.*

*C.C.P. 2023(b)(1)*, requiring the imposition of an authorized monetary sanction unless injustice would result, was repealed and replaced by *C.C.P. 2023.030(a)* in 2004 without substantive change.

(a) *Protective order:* *C.C.P. 2017(c), 2019(b), 2025(i), 2025(n), 2030(e), 2031(f), 2032(g)(1), 2033(e)*, and *2034(e)*, on protective orders, were repealed and replaced by *C.C.P. 2017.020, 2019.030(c), 2025.420, 2025.470, 2030.090*,

2031.060, 2032.510, 2033.080, and 2034.250, respectively, in 2004 without substantive change.

(b) *Discovery in sexual tort cases: C.C.P. 2017(d)*, on discovery of plaintiff's sexual history, was repealed and replaced by *C.C.P. 2017.220* in 2004 without substantive change. (c) *Extension or reopening of discovery: C.C.P. 2024(e)*, on motions to extend or reopen discovery, was repealed and replaced by *C.C.P. 2024.050* in 2004 without substantive change.

(d) *To increase travel limits for a party deponent: C.C.P. 2025(e)*, on motions to increase the travel limits for a party deponent, was repealed and replaced by *C.C.P. 2025.260* in 2004 without substantive change.

(e) *To quash a deposition notice: C.C.P. 2025(g)*, on motions to quash a deposition notice, was repealed and replaced by *C.C.P. 2025.410* in 2004 without substantive change.

(f) *To compel a deposition answer or production: C.C.P. 2025(o)*, on motions to compel a deposition answer or produce documents or items, was repealed and replaced by *C.C.P. 2025.480* in 2004 without substantive change.

(g) *To suppress deposition: C.C.P. 2025(q)(1), (q)(2)*, on motions to suppress a deposition, were repealed and replaced by *C.C.P. 2025.520* and *2025.530* in 2004 without substantive change.

(h) *To sustain or overrule objection: C.C.P. 2028(d)(1), (d)(2)*, on rulings on objections, were repealed and replaced by *C.C.P. 2028.040* and *2028.050* in 2004 without substantive change.

(i) *To compel response to interrogatories: C.C.P. 2030(k), (l)*, on motions to compel a response or further response to interrogatories, were repealed and replaced by *C.C.P. 2030.290* and *2030.300* in 2004 without substantive change. (See *Sinaiko Healthcare Consulting v. Pacific Healthcare Consultants* (2007) 148 C.A.4th 390, 405, 55 C.R.3d 751 [trial judge was not divested of authority to hear plaintiff's motion to compel responses under *C.C.P. 2030.290(b)*, which served as basis for imposing monetary sanction under *C.C.P. 2030.290(c)*, where defendants failed to file response to interrogatories within required time but, after motion to compel was served, filed untimely response that plaintiff deemed inadequate].)

(j) *To deem initial interrogatory answer binding: C.C.P. 2030(m)*, on motions to deem an initial interrogatory answer binding, was repealed and replaced by *C.C.P. 2030.310* in 2004 without substantive change.

(k) *To compel response to inspection demand: C.C.P. 2031(l), (m)*, on motions to compel a response or further response to an inspection demand, were repealed and replaced by *C.C.P. 2031.300* and *2031.310* in 2004 without substantive change.

(l) *To compel compliance with inspection demand: C.C.P. 2031(n)*, on motions to compel compliance with an inspection demand, was repealed and replaced by *C.C.P. 2031.320* in 2004 without substantive change.

(m) *To compel response and compliance with demand for physical examination: C.C.P. 2032(c)(6), (c)(7)*, on motions to compel a response and compliance with a demand for physical examination, were repealed and replaced by *C.C.P. 2032.240* and *2032.250* in 2004 without substantive change.

(n) *To compel delivery of medical reports: C.C.P. 2032(h), (j)*, on motions to compel delivery of medical reports, were repealed and replaced by *C.C.P. 2032.620* and *2032.650* in 2004 without substantive change.

(o) *To compel further response to request for admission: C.C.P. 2033(l)*, on motions to compel further response to a request for admission, was repealed and replaced by *C.C.P. 2033.290* in 2004 without substantive change.

(p) *To set expert witness fees: C.C.P. 2034(i)(4)*, on motions to set expert witness fees, was repealed and replaced by *C.C.P. 2034.470* in 2004 without substantive change.



(q) *To augment or amend expert witness information: C.C.P. 2034(k)*, on motions to augment or amend expert witness information, was repealed and replaced by *C.C.P. 2034.630* in 2004 without substantive change.

(r) *To submit tardy expert witness information: C.C.P. 2034(l)*, on motions to submit tardy expert witness information, was repealed and replaced by *C.C.P. 2034.730* in 2004 without substantive change.

(3) *Informal Conference Requirement. C.C.P. 2023(b)(1)*, authorizing monetary sanctions, was repealed and replaced by *C.C.P. 2023.030(a)* in 2004 without substantive change.

*C.C.P. 2025(g)*, on motions to stay a deposition and quash a deposition notice, was repealed and replaced by *C.C.P. 2025.410* in 2004 without substantive change.

*C.C.P. 2032(c)(7)*, on motions to compel compliance with a demand for physical examination, was repealed and replaced by *C.C.P. 2032.250* in 2004 without substantive change.

*C.C.P. 2033(l)*, on motions to compel further response to a request for admission, was repealed and replaced by *C.C.P. 2033.290* in 2004 without substantive change.

See *Leko v. Cornerstone Bldg. Inspection Service (2001) 86 C.A.4th 1109, 1123, 1124, 103 C.R.2d 858* [monetary sanctions were properly imposed against cross-defendants' attorney who, on learning that, through oversight, cross-complainants' counsel and her clients would not be available for scheduled deposition, refused to discuss rescheduling and filed motion to compel].(4) *Timing of Request for Sanctions. C.C.P. 2023*, the statute authorizing discovery sanctions, was repealed and replaced by *C.C.P. 2023.010 et seq.* in 2004 without substantive change.



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## CHAPTER X - Discovery

## XII. SANCTIONS

## B. Types of Sanctions.

## 1. Monetary Sanction.

## b. Recovery of Reasonable Expenses.

2 *Witkin Cal. Evid. Discovery* § 253

[§ 253] Recovery of Reasonable Expenses.

(1) *Reasonable Expenses Defined.* In *Ghanooni v. Super Shuttle* (1993) 20 C.A.4th 256, 24 C.R.2d 501, the court clarified two issues concerning the application of C.C.P. 2023(b)(1) (supra, §252). Plaintiff was injured while on board a passenger shuttle van and brought a personal injury action against the van company. Defendant demanded that plaintiff submit to a medical examination, but when she appeared for the examination, she refused, without substantial justification, to undergo X-rays. The trial judge imposed monetary sanctions against both plaintiff and her attorney. *Held*, the award against the attorney was improper, and the award against plaintiff was improper as to amount.

The statutory phrase "pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct," contemplates the recovery of the costs of compelling the opposing party to submit to proper discovery. Because \$ 1,000 of the monetary sanctions imposed against plaintiff was simply an arbitrary amount intended to punish her, the sanctions were required to be reduced by that amount. (20 C.A.4th 262, 263; on award against attorney, see supra, §250.)

(2) *Reasonable Expenses "Incurred."* In *Argaman v. Ratan* (1999) 73 C.A.4th 1173, 86 C.R.2d 917, plaintiff attorney, in propria persona, reached a settlement with defendant and proceeded to enforce the resulting stipulated judgment. Plaintiff filed a motion to compel defendant to provide further answers to special interrogatories and for sanctions and attorneys' fees. The trial judge granted the motion to compel in part and ordered defendant and his attorney to pay sanctions of \$ 500 under C.C.P. 2030(l) and 2023(b)(1), part of which represented compensation for plaintiff's time expended in connection with the motion. *Held*, sanctions award must be reduced to \$ 24, the amount of expenses plaintiff incurred for filing the motion and duplication.

A monetary sanction for misuse of the discovery process cannot include compensation for time spent by an attorney litigant in propria persona. (73 C.A.4th 1177.) In *Trope v. Katz* (1995) 11 C.4th 274, 45 C.R.2d 241, 902 P.2d 259, 7 Cal. Proc. (4th), *Judgment*, §154, the Supreme Court held that an attorney litigating in propria persona may not recover reasonable attorneys' fees under C.C. 1717 as compensation for time and effort expended and the professional business opportunities lost as a result. (73 C.A.4th 1175.) The court in *Trope* reasoned that such an attorney does not incur attorneys' fees because the attorney litigant is not liable to pay consideration for the legal representation. This same rationale applies to an award of monetary sanctions based on attorneys' fees incurred. (73 C.A.4th 1179, 1180 [disagreeing with *Abandonato v. Coldren* (1995) 41 C.A.4th 264, 48 C.R.2d 429, 7 Cal. Proc. (4th), *Trial*, Supp., §241, which approved monetary sanctions for attorney pro se litigants under C.C.P. 128.5].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Reasonable Expenses Defined.* *C.C.P. 2023(b)(1)*, authorizing monetary sanctions, was repealed and replaced by *C.C.P. 2023.030(a)* in 2004 without substantive change.

(2) *Reasonable Expenses "Incurred."* A pro se litigant cannot be awarded attorneys' fees as a discovery sanction, but the litigant can recover the reasonable expenses he or she has incurred, including photocopying, computer-assisted legal research, and other identifiable and allocable costs. "[W]e think that some of the costs that pro se litigants incur, if reasonably identifiable and allocable, are recoverable as sanctions--even though those costs are ones that lawyers ordinarily include in their hourly rates or other fee structures." (*Kravitz v. Superior Court* (2001) 91 C.A.4th 1015, 1020, 111 C.R.2d 385 [agreeing with *Argaman v. Ratan* (1999) 73 C.A.4th 1173, 86 C.R.2d 917, text, p. 1072, that pro se lawyer cannot recover attorneys' fees as discovery sanction].) (Cf. *Do v. Superior Court* (2003) 109 C.A.4th 1210, 1217, 1218, 135 C.R.2d 855 [noting split of authority represented by *Kravitz* and *Abandonato v. Coldren* (1995) 41 C.A.4th 264, 48 C.R.2d 429, text, p. 1073, as to whether pro se litigant who is attorney may recover sanctions, but holding, in action for breach of loan agreement, that indigent defendant who was represented on pro bono basis could recover monetary sanctions, where there was no finding that plaintiff's failure to appear was with substantial justification or that other circumstances made sanctions unjust].)

*C.C.P. 2023(b)(1)*, authorizing monetary sanctions, was repealed and replaced by *C.C.P. 2023.030(a)* in 2004 without substantive change.

*C.C.P. 2030(l)*, on sanctions in connection with a motion to compel further response to interrogatories, was repealed and replaced by *C.C.P. 2030.300* in 2004 without substantive change.



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## CHAPTER X - Discovery

### XII. SANCTIONS

#### B. Types of Sanctions.

##### 1. Monetary Sanction.

##### c. Illustrations.

2 Witkin Cal. Evid. Discovery § 254

[§ 254] Illustrations.

(1) *Sanctions Proper*. Examples of cases in which monetary sanctions were awarded and upheld include:

*Corns v. Miller* (1986) 181 C.A.3d 195, 200, 226 C.R. 247 [monetary sanction against attorney; responding attorney had burden of proving that he did not counsel disobedience].

*Appleton v. Superior Court* (1988) 206 C.A.3d 632, 635, 636, 253 C.R. 762 [monetary sanction was mandatory; inadequate response to requests for admission necessitated motion to have requests deemed admitted].

*Mattco Forge v. Arthur Young & Co.* (1990) 223 C.A.3d 1429, 273 C.R. 262, *infra*, §265 [defendant violated meet and confer requirements and made unmeritorious, blanket objections to demand for inspection of documents; further sanctions were properly imposed after defendant's unsuccessful motion for reconsideration of first sanction award].

*Kohan v. Cohan* (1991) 229 C.A.3d 967, 971, 280 C.R. 474 [misuse of discovery process need not be wilful to justify imposition of monetary sanctions under C.C.P. 2023(b)(1)].

*International Ins. Co. v. Montrose Chemical Corp.* (1991) 231 C.A.3d 1367, 1373, 1374, 282 C.R. 783, *supra*, §85 [sanction of \$ 7,500 was reasonable portion to attribute to production request, where opposing party sought \$ 19,695 for preparing production motion, supporting declarations, and reply papers].

*Green v. GTE Calif.* (1994) 29 C.A.4th 407, 410, 34 C.R.2d 517 [monetary sanction was proper against plaintiff's counsel for attempting to videotape defendant's counsel taking plaintiff's deposition without complying with C.C.P. 2025].

*California Shellfish v. United Shellfish Co.* (1997) 56 C.A.4th 16, 25, 26, 64 C.R.2d 797 [in imposing monetary sanction under C.C.P. 2023(b), 2025(g) (*supra*, §48), trial judge did not err in failing to make express finding that plaintiff acted without substantial justification in opposing motion to quash deposition subpoena; finding was required only if judge refused to impose sanction because plaintiff acted with substantial justification].

(2) *Sanctions Not Proper*. Examples of cases in which monetary sanctions were not awarded, or were improperly awarded, include:

*In re Marriage of Niklas* (1989) 211 C.A.3d 28, 38, 258 C.R. 921 [ordering reconsideration of sanctions of \$ 45,000

imposed on attorney and client for refusing to answer questions at deposition; no showing that sanctions reflected reasonable fees and costs incurred by examining party].

*Standon Co. v. Superior Court* (1990) 225 C.A.3d 898, 904, 275 C.R. 833 [sanction vacated where trial judge failed to consider whether party making unsuccessful motion to compel further response to demand for inspection (C.C.P. 2031(m)) acted with substantial justification or whether other facts made sanction unjust].

*Babcock v. Superior Court* (1994) 29 C.A.4th 721, 729, 35 C.R.2d 462, supra, §18 [in dissolution proceeding in which wife subpoenaed financial records of husband's nonmarital cohabitant, imposition of sanctions against cohabitant for resisting subpoena was unjust, because there was legitimate difference of opinion between counsel as to whether case law authorized discovery].

*Foothill Properties v. Lyon/Copley Corona Associates* (1996) 46 C.A.4th 1542, 1558, 54 C.R.2d 488 [in light of defendant's valid claim to protective order regarding documents it had not yet produced, it had substantial justification for withholding them until motion for protective order was determined, and thus defendant was improperly sanctioned for opposing motion to compel].

*Townsend v. Superior Court* (1998) 61 C.A.4th 1431, 1438, 72 C.R.2d 333 [where counsel for two defendants took plaintiff's deposition in presence of counsel for other defendants, plaintiff refused to answer questions, and motion to compel was granted, trial judge erred in awarding sanctions to nonpropounding, as well as propounding, defendants; parties who are not discovery proponents but simply join in motion requesting sanctions are not entitled to award].

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Sanctions Proper*. C.C.P. 2023(b), authorizing monetary sanctions, was repealed and replaced by C.C.P. 2023.030(a) in 2004 without substantive change.

C.C.P. 2025, on depositions, was repealed and replaced by C.C.P. 2025.010 et seq. in 2004 without substantive change.

See *Espinoza v. Classic Pizza* (2003) 114 C.A.4th 968, 975, 8 C.R.3d 381 [monetary sanctions against plaintiff and his attorney were proper where, after trial judge denied application for order compelling discovery of defendants' checking account records, attorney served defendants' bank with subpoena duces tecum for records, defendants moved for order to quash subpoena, judge granted order, and attorney served second subpoena for same records]; *Sears, Roebuck & Co. v. National Union Fire Ins. Co. of Pittsburgh* (2005) 131 C.A.4th 1342, 1350, 32 C.R.3d 717 [monetary sanctions against attorney for nonparty witnesses were proper, where attorney first contended he complied with plaintiff's document production subpoenas by producing documents to himself in accordance with mistake in subpoenas identifying him as deposition officer to whom he must produce them, and where, through false assurances, he misled plaintiff into waiting until after discovery cutoff date to bring its discovery motion]. (2) *Sanctions Not Proper*. C.C.P. 2031(m), on motions to compel further response to an inspection demand, was repealed and replaced by C.C.P. 2031.310 in 2004 without substantive change.



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## CHAPTER X - Discovery

### XII. SANCTIONS

#### B. Types of Sanctions.

##### 2. Issue Sanction.

2 Witkin Cal. Evid. Discovery § 255

[§ 255] Issue Sanction.

(1) *Authorization*. The court may impose an issue sanction, ordering that designated facts will be "taken as established in the action in accordance with the claim of the party adversely affected by the misuse of the discovery process." An issue sanction may also prohibit a party who misuses the discovery process from supporting or opposing designated claims or defenses. (*C.C.P.* 2023(b)(2); see 15 *Pepperdine L. Rev.* 401, 413; C.E.B., 1 Civil Discovery Practice 3d, §2.103; C.J.E.R., Judges Benchbook, Civil Proceedings: Discovery §6.15.)

In addition to general authorization in *C.C.P.* 2023(b)(2), numerous provisions throughout the Civil Discovery Act of 1986 permit the imposition of issue sanctions. (See, e.g., *C.C.P.* 2025(j)(3), 2025(o) [deponent's failure to obey order compelling attendance, testimony, or production of documents]; 2030(k), 2030(l) [failure to obey order compelling response or further response to interrogatories]; 2031(l), 2031(m), 2031(n) [failure to obey order compelling response or further response to demands for inspection or order compelling inspection]; 2032(f) [failure to submit to, or to produce another for, physical or mental examination]; 2032(h), 2032(j) [failure to obey order compelling delivery of medical reports]; see also *C.C.P.* 2033(k), 2033(l), *supra*, §§174, 176 [deemed admission following failure to obey order compelling response to request for admission].)

(2) *Illustrations*. An issue sanction was imposed in the following actions:

*Young v. Rosenthal* (1989) 212 C.A.3d 96, 119, 260 C.R. 369 [facts solicited by interrogatories were properly deemed established against party who had wilfully and repeatedly failed to answer].

*In re Marriage of Economou* (1990) 224 C.A.3d 1466, 1476, 274 C.R. 473 [order precluding husband from presenting evidence on issues other than dissolution, custody and visitation was proper in view of his wilful failure to comply with numerous discovery orders].

*Kuhns v. California* (1992) 8 C.A.4th 982, 988, 989, 10 C.R.2d 773 [issue sanction for failure to comply with demand for inspection].

*Johnson v. Pratt & Whitney Canada* (1994) 28 C.A.4th 613, 625, 626, 34 C.R.2d 26 [sanction imposed for defendant's failure to produce documents; order, which precluded defendant from litigating its liability, but not damages, properly deprived it of opportunity to prove comparative fault of others].

*Estate of Ivy* (1994) 22 C.A.4th 873, 878, 879, 28 C.R.2d 16 [finding that beneficiary's objections to trustee's

account were frivolous was proper; her refusal to produce documents prevented determination whether extrinsic fraud excused her from timely raising claim that trustee should have opposed petition by conservator of decedent's widow].

*Vallbona v. Springer* (1996) 43 C.A.4th 1525, 1547, 1548, 51 C.R.2d 311 [in light of defendants' failure to produce requested documents, their subsequent claim that documents were stolen, and factual admissions by one defendant, trial judge properly instructed jury that defendants never applied for approval of their laser procedure for treatment of cellulite and had no data supporting claim that 20,000 people had undergone treatment in Europe].

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Authorization*. C.C.P. 2023(b)(2), authorizing issue sanctions, was repealed and replaced by C.C.P. 2023.030(b) in 2004 without substantive change.

C.C.P. 2025(j)(3) and 2025(o), on failure by the deponent to obey an order compelling attendance, testimony, or production of documents, were repealed and replaced by C.C.P. 2025.450 and 2025.480 in 2004 without substantive change.

C.C.P. 2030(k), (l), on failure to obey an order compelling a response or further response to interrogatories, were repealed and replaced by C.C.P. 2030.290 and 2030.300 in 2004 without substantive change.

C.C.P. 2031(l)-(n), on failure to obey an order compelling response or further response to a demand for inspection or order compelling inspection, were repealed and replaced by C.C.P. 2031.300 et seq. in 2004 without substantive change.

C.C.P. 2032(f), on failure to submit to, or produce another for, physical or mental examination, was repealed and replaced by C.C.P. 2032.410 in 2004 without substantive change.

C.C.P. 2032(h), (j), on failure to obey an order compelling delivery of medical reports, were repealed and replaced by C.C.P. 2032.620 and 2032.650 in 2004 without substantive change.

C.C.P. 2033(k), (l), on deemed admissions following failure to obey an order compelling response to a request for admissions, were repealed and replaced by C.C.P. 2033.280 and 2033.290 in 2004 without substantive change.

See C.E.B., 2 Civil Discovery Practice 4th, §15.97.

(2) *Illustrations*. See *In re Marriage of Chakko* (2004) 115 C.A.4th 104, 108, 8 C.R.3d 699 [in custody proceeding in which district attorney intervened, requested that father be ordered to provide guideline child support, and introduced father's loan application indicating that his monthly income was \$ 40,000, trial judge did not err in declaring, as issue sanction, that \$ 40,000 figure was established; father failed to comply with any requests for discovery of his financial records, even after judge granted district attorney's motion to compel]; *In re Marriage of Michaely* (2007) 150 C.A.4th 802, 810, 59 C.R.3d 56 [sanctions in form of established facts were properly imposed against husband in marital dissolution proceeding based on his abuse of discovery process, both in document production and in his answers to questions]. *Correction:* Page 1076, line 1 of second paragraph, "*Estate of Ivy*" should be "*Estate of Ivey*". *West's Key Number Digest*, Pretrial Procedure k.45



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## CHAPTER X - Discovery

### XII. SANCTIONS

#### B. Types of Sanctions.

##### 3. Evidence Sanction.

2 Witkin Cal. Evid. Discovery § 256

[§ 256] Evidence Sanction.

(1) *Statutory Authority.* The court may impose an evidence sanction, prohibiting a party who misuses the discovery process from introducing designated matters in evidence. (*C.C.P. 2023(b)(3)*; see 15 *Pepperdine L. Rev.* 401, 414; C.E.B., 1 Civil Discovery Practice 3d, §2.103; C.J.E.R., Judges Benchbook, Civil Proceedings: Discovery §6.16; 63 A.L.R.4th 712 [propriety of allowing testimony from nonexpert witness who was not disclosed during pretrial discovery]; 151 A.L.R.Fed 561 [use of *F.R. Civ. P.*, *Rule 37* to exclude expert testimony as sanction for violation of discovery order].)

In addition to the general authorization in *C.C.P. 2023(b)(3)*, numerous provisions throughout the Civil Discovery Act of 1986 permit the imposition of evidence sanctions. (See, e.g., *C.C.P. 2025(j)(3)*, 2025(o) [deponent's failure to obey order compelling attendance, testimony, or production of documents]; 2030(k), 2030(l) [failure to obey order compelling response or further response to interrogatories]; 2031(l), 2031(m), 2031(n) [failure to obey order compelling response or further response to demands for inspection or order compelling inspection]; 2032(f) [failure to submit to, or to produce another for, physical or mental examination]; 2032(h), 2032(j) [failure to obey order compelling delivery of medical reports]; see also *C.C.P. 2034(j)*, 2034(l), *supra*, §§195, 198 [exclusion of expert testimony where party has failed to comply with expert witness information exchange provisions].)

(2) *Sanction Properly Imposed.* An evidence sanction was properly imposed in the following actions:

*Thoren v. Johnston & Washer* (1972) 29 C.A.3d 270, 274, 105 C.R. 276 [trial court properly excluded plaintiff's witness' proposed testimony on ground that plaintiff had wilfully omitted witness' name in answers to interrogatories].

*Crumpton v. Dickstein* (1978) 82 C.A.3d 166, 170, 146 C.R. 840 [quoting and following *Thoren*].

*A & M Records v. Heilman* (1977) 75 C.A.3d 554, 565, 566, 142 C.R. 390 [conditional order, under former statute, preventing defendant from introducing documents at trial if he persisted in refusing to comply with order to produce them one week before trial; defendant also precluded from testifying at trial on matters covered by deposition questions that defendant had refused to answer on ground that his answers might incriminate him].

*Puritan Ins. Co. v. Superior Court* (1985) 171 C.A.3d 877, 882, 886, 217 C.R. 602 [plaintiff's expert inadvertently lost equipment that defendant had allegedly defectively repaired before defendant's experts could inspect or test equipment; order prohibiting plaintiff from introducing equipment and expert testimony derived from examining it was proper].



*Dwyer v. Crocker Nat. Bank* (1987) 194 C.A.3d 1418, 1431, 240 C.R. 297 [order, under former statute, limiting plaintiff's testimony at trial following plaintiff's invocation of his privilege against self-incrimination at his deposition and his failure to produce documents, was not abuse of discretion].

*Young v. Rosenthal* (1989) 212 C.A.3d 96, 119, 260 C.R. 369 [prohibiting party from testifying was proper sanction for wilful, repeated refusal to allow his deposition to go forward; prohibiting use of requested documents was proper sanction for wilful, repeated refusal to identify and produce them for inspection].

*Waicis v. Superior Court* (1990) 226 C.A.3d 283, 287, 276 C.R. 45 [disqualifying expert from testifying was proper, where he was repeatedly uncooperative in allowing his deposition to be taken, including leaving deposition early].

*Do It Urself Moving & Storage v. Brown, Leifer, Slatkin & Berns* (1992) 7 C.A.4th 27, 34, 36, 9 C.R.2d 396 [after plaintiffs failed to produce promised audit report and supporting documentation, trial court properly precluded plaintiffs from introducing accounting evidence].

*Vallbona v. Springer* (1996) 43 C.A.4th 1525, 1545, 51 C.R.2d 311 [evidence sanction was proper where defendants initially failed to respond to request for documents pertaining to whether they had sought independent review board approval for their laser procedure for treatment of cellulite, then claimed documents were stolen, and then brought some of them to trial].

*Pate v. Channel Lumber Co.* (1997) 51 C.A.4th 1447, 1454, 59 C.R.2d 919 [where, in dispute between commercial tenants and landlord over billings to tenants for common area expenses, landlord assured tenants that it had given them all relevant documents in response to discovery request, and where at trial landlord's manager referred to documents that had never been provided, sanction precluding introduction of these documents was proper].

(3) *Sanction Not Warranted*. An evidence sanction was not proper in the following cases:

*Rangel v. Graybar Elec. Co.* (1977) 70 C.A.3d 943, 949, 139 C.R. 191 [where plaintiff's new expert witness was hired only during trial to rebut testimony of defendant's expert, and plaintiff's counsel advised defendant's counsel of intention to call new witness before defense had rested its case, exclusion of rebuttal testimony was reversible error; distinguishing *Thoren v. Johnston & Washer*].

*Grimshaw v. Ford Motor Co.* (1981) 119 C.A.3d 757, 782, 174 C.R. 348 [no error in refusing to bar expert where no wilful delay in disclosure; following *Rangel*].

*Puritan Ins. Co. v. Superior Court*, *supra*, 171 C.A.3d 886 [plaintiff's expert inadvertently lost equipment that defendant had allegedly defectively repaired before defendant's experts could inspect or test equipment; order prohibiting plaintiff from introducing photographs of equipment and expert testimony derived from examination of photographs was not required to protect defendant's interests and exceeded what was "appropriate to the dereliction"].

*McGinty v. Superior Court* (1994) 26 C.A.4th 204, 212, 213, 31 C.R.2d 292 [where attorney for plaintiff inadvertently received information in violation of protective order entered in another action, order imposing preclusive witness and evidence sanction was too severe; quoting *People v. Edwards* (1993) 17 C.A.4th 1248, 1264, 22 C.R.2d 3, 5 Cal. Crim. Law (3d), *Criminal Trial*, §85].

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Statutory Authority*. C.C.P. 2023(b)(3), authorizing evidence sanctions, was repealed and replaced by C.C.P. 2023.030(c) in 2004 without substantive change.

C.C.P. 2025(j)(3) and 2025(o), on failure by the deponent to obey an order compelling attendance, testimony, or production of documents, were repealed and replaced by C.C.P. 2025.450 and 2025.480 in 2004 without substantive

change.

*C.C.P. 2030(k), (l)*, on failure to obey an order compelling a response or further response to interrogatories, were repealed and replaced by *C.C.P. 2030.290* and *2030.300* in 2004 without substantive change.

*C.C.P. 2031(l)-(n)*, on failure to obey an order compelling response or further response to a demand for inspection or order compelling inspection, were repealed and replaced by *C.C.P. 2031.300* et seq. in 2004 without substantive change.

*C.C.P. 2032(f)*, on failure to submit to, or produce another for, physical or mental examination, was repealed and replaced by *C.C.P. 2032.410* in 2004 without substantive change.

*C.C.P. 2032(h), (j)*, on failure to obey an order compelling delivery of medical reports, were repealed and replaced by *C.C.P. 2032.620* and *2032.650* in 2004 without substantive change.

*C.C.P. 2034(j), (l)* were repealed and replaced by *C.C.P. 2034.300* and *2034.710* et seq. in 2004 without substantive change. *C.C.P. 2034(j)*, on exclusion of expert testimony for failure to comply with expert witness information exchange provisions, became *C.C.P. 2034.300*.

See C.E.B., 2 Civil Discovery Practice 4th, §15.98.(2) *Sanction Properly Imposed*. See *Juarez v. Boy Scouts of America* (2000) 81 C.A.4th 377, 390, 97 C.R.2d 12 [in action against national youth organization and church by former organization member who was allegedly molested by organization group leader, trial judge properly imposed evidence sanction, where plaintiff's responses to defendants' repeated requests to identify information he had concerning defendants' knowledge about leader's propensities and background were evasive and uncooperative]; *Karlsson v. Ford Motor Co.* (2006) 140 C.A.4th 1202, 1219, 45 C.R.3d 265 [in products liability action alleging that defendant minivan manufacturer failed to provide harness for center seat of third row and failed to warn that lap belt was dangerous condition, evidence sanctions against defendant were proper based on pattern of discovery abuse, including failure to produce "person most knowledgeable" on warnings issue, leading to instruction to effect that no warnings were provided; even if owner's manual included warnings, defendant's conduct prevented effective discovery on issue].(3) *(New) Sanction Not Warranted*. See *Biles v. Exxon Mobil Corp.* (2004) 124 C.A.4th 1315, 1325, 22 C.R.3d 282 [in personal injury action in which defendant property owner moved for summary judgment, trial judge erred in excluding declaration of one of plaintiff employee's coworkers on ground that coworker had not been identified in answer to previous interrogatory and interrogatory had not been supplemented to include coworker's name; relying on *Rangel v. Graybar Elec. Co.* (1977) 70 C.A.3d 943, 139 C.R. 191, text, p. 1078]; *R & B Auto Center v. Farmers Group* (2006) 140 C.A.4th 327, 356, 44 C.R.3d 426 [although three of plaintiff's witnesses had not been identified during discovery process, trial judge erred in excluding their testimony; plaintiff did not discover them until after discovery cut-off date, there was no deliberate concealment of their identity, and exclusion resulted in plaintiff's unfair competition cause of action being dismissed; distinguishing *Thoren v. Johnston & Washer* (1972) 29 C.A.3d 270, 105 C.R. 276, text, p. 1077].*West's Key Number Digest*, Pretrial Procedure k.45



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## CHAPTER X - Discovery

### XII. SANCTIONS

#### B. Types of Sanctions.

#### 4. Terminating Sanction.

##### a. Authorization.

2 Witkin Cal. Evid. Discovery § 257

[§ 257] Authorization.

The court may impose a terminating sanction by making one of the following orders against a party engaging in the misuse of the discovery process:

- (1) Striking out all or part of a pleading. (*C.C.P. 2023(b)(4)(A).*)
- (2) Staying further proceedings until a discovery order is obeyed. (*C.C.P. 2023(b)(4)(B).*)
- (3) Dismissing all or part of the action. (*C.C.P. 2023(b)(4)(C).*)

(4) Rendering a default judgment. (*C.C.P. 2023(b)(4)(D).*) (See *Greenup v. Rodman* (1986) 42 C.3d 822, 231 C.R. 220, 726 P.2d 1295, 6 Cal. Proc. (4th), *Proceedings Without Trial*, §126 [procedure for default judgment as discovery sanction]; C.E.B., 1 Civil Discovery Practice 3d, §2.104 et seq.; C.J.E.R., Judges Benchbook, Civil Proceedings: Discovery §6.17 et seq.; 8A Am.Jur. P.P. Forms (1996 ed.), Depositions and Discovery §892 [motion for terminating sanction]; 15 *Pepperdine L. Rev.* 401, 414; 56 A.L.R.3d 1109 [dismissal of action for plaintiff's failure or refusal to answer written interrogatories]; 26 A.L.R.4th 849 [judgment in favor of plaintiff for failure to obey request or order for production of documents or other objects]; 27 A.L.R.4th 61 [dismissal of action for failure or refusal of plaintiff to obey order for production of documents or other objects]; 30 A.L.R.4th 9 [judgment for plaintiff following defendant's failure to obey request or order to answer interrogatories or other discovery sanctions]; 32 A.L.R.4th 212 [dismissal of action for failure or refusal of plaintiff to appear or answer questions].)

In addition to general authorization in *C.C.P. 2023(b)(4)*, numerous provisions throughout the 1986 Act permit the imposition of terminating sanctions. (See, e.g., *C.C.P. 2025(j)(3)*, *2025(o)* [deponent's failure to obey order compelling attendance, testimony, or production of documents]; *2030(k)*, *2030(l)* [failure to obey order compelling response or further response to interrogatories]; *2031(l)*, *2031(m)*, *2031(n)* [failure to obey order compelling response or further response to demands for inspection or order compelling inspection]; *2032(f)* [failure to submit to, or to produce another for, physical or mental examination]; *2032(h)*, *2032(j)* [failure to obey order compelling delivery of medical reports].)

The statutory limit on damages in a default judgment (*C.C.P. 580*; see 6 Cal Proc. (4th), *Proceedings Without Trial*, §124) applies to a default judgment entered as a discovery sanction. (*Greenup v. Rodman*, *supra*, 42 C.3d 827, 828.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Striking pleading*: *C.C.P. 2023(b)(4)(A)*, authorizing the striking of all or part of a pleading, was repealed and replaced by *C.C.P. 2023.030(d)(1)* in 2004 without substantive change.

(2) *Staying proceedings*: *C.C.P. 2023(b)(4)(B)*, authorizing the staying of proceedings, was repealed and replaced by *C.C.P. 2023.030(d)(2)* in 2004 without substantive change.

(3) *Dismissing all or part of action*: *C.C.P. 2023(b)(4)(C)*, authorizing a dismissal of all or part of the action, was repealed and replaced by *C.C.P. 2023.030(d)(3)* in 2004 without substantive change.

See *Rail Services of America v. State Comp. Ins. Fund* (2003) 110 C.A.4th 323, 332, 1 C.R.3d 700 [where plaintiffs' refusal to comply with discovery was straightforward and unambiguous, dismissal of only remaining cause of action was proper; however, to extent judgment could be construed as dismissing all causes of action, including those on which summary adjudication for defendant had previously been granted, it required modification to state that judgment on those causes of action was in favor of defendant].

(4) *Rendering default judgment*: *C.C.P. 2023(b)(4)(D)*, authorizing an order rendering a default judgment, was repealed and replaced by *C.C.P. 2023.030(d)(4)* in 2004 without substantive change.

*C.C.P. 2025(j)(3)* and *2025(o)*, on failure by the deponent to obey an order compelling attendance, testimony, or production of documents, were repealed and replaced by *C.C.P. 2025.450* and *2025.480* in 2004 without substantive change.

*C.C.P. 2030(k), (l)*, on failure to obey an order compelling a response or further response to interrogatories, were repealed and replaced by *C.C.P. 2030.290* and *2030.300* in 2004 without substantive change.

*C.C.P. 2031(l)-(n)*, on failure to obey an order compelling a response or further response to a demand for inspection or order compelling inspection, were repealed and replaced by *C.C.P. 2031.300* et seq. in 2004 without substantive change.

*C.C.P. 2032(f)*, on failure to submit to, or produce another for, physical or mental examination, was repealed and replaced by *C.C.P. 2032.410* in 2004 without substantive change.

*C.C.P. 2032(h), (j)*, on failure to obey an order compelling delivery of medical reports, were repealed and replaced by *C.C.P. 2032.620* and *2032.650* in 2004 without substantive change.

See C.E.B., 2 Civil Discovery Practice 4th, §15.99 et seq.; 8A Am.Jur. P.P. Forms (2004 ed.), Depositions and Discovery, Form 675. *West's Key Number Digest*, Pretrial Procedure k.46



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## CHAPTER X - Discovery

## XII. SANCTIONS

## B. Types of Sanctions.

## 4. Terminating Sanction.

## b. Illustrations.

## 1. Sanction Upheld.

2 Witkin Cal. Evid. Discovery § 258

[§ 258] Sanction Upheld.

(1) *Spoliation of Evidence*. In *R.S. Creative v. Creative Cotton, Ltd.* (1999) 75 C.A.4th 486, 89 C.R.2d 353, plaintiffs, a corporation and its sole officer and director, sued defendants for breach of contract. Plaintiffs attached a purported contract as an exhibit to the complaint, but in the course of discovery, that contract was proved to be a forgery. During her deposition, the individual plaintiff stipulated that her desktop or laptop computers would not be operated until defendants' computer expert had an opportunity to examine them for evidence of the forgery. However, the eventual examination revealed that they had been operated and that files had been deleted. The individual plaintiff then repeatedly failed to complete her deposition. Eventually, she filed an amended complaint, removing herself as a plaintiff, and refused to appear for her deposition on the ground that she was no longer a party. The trial judge granted defendants' motion for terminating sanctions. *Held*, affirmed.

(a) *Cedars-Sinai Med. Center v. Superior Court* (1998) 18 C.4th 1, 74 C.R.2d 248, 954 P.2d 511, 3 Cal. Evidence (4th), *Presentation at Trial*, §117, which held that there is no tort cause of action for spoliation of evidence against a party to the litigation, emphasized the availability of terminating sanctions for such conduct under C.C.P. 2023. (75 C.A.4th 495.) Although terminating sanctions are to be used sparingly, the record here demonstrates repeated violations of stipulations and court orders, a forged document offered as true, and deliberate destruction of evidence pertaining to exposing that fact. The individual plaintiff acted for the corporate plaintiff and the two plaintiffs were "one and the same." Thus, there is no merit in the corporate plaintiff's argument that dismissal based on the individual plaintiff's conduct was improper. (75 C.A.4th 496.)

(b) Dismissal of plaintiffs' case did not violate due process. Both plaintiffs had ample opportunities to comply with discovery orders, but failed to do so. C.C.P. 2023 authorizes terminating sanctions in the first instance in egregious cases such as this one. (75 C.A.4th 497.)

(2) *Persistent Noncompliance*. In *Collisson & Kaplan v. Hartunian* (1994) 21 C.A.4th 1611, 26 C.R.2d 786, an action by a law firm for unpaid legal fees, plaintiff served defendants with form and special interrogatories. Defendants filed verified responses to the form interrogatories, but, in violation of C.C.P. 2030(g), did not verify their responses to the special interrogatories, and as to each interrogatory concerning the facts underlying defendants' general denial and affirmative defenses, defendants repeatedly invoked a stock phrase indicating that they were compiling the information requested. Defendants failed to respond to plaintiff's requests for production of documents. They also objected to all but one of plaintiff's requests for admissions and failed to respond to that one request. Plaintiff moved to compel production

of documents and further responses. The trial judge granted the motion and imposed monetary sanctions. After defendants continued to fail to comply with discovery and responded to some interrogatories and requests for admissions from the perspective of an entity that was not even a named defendant, the trial judge struck defendants' answer as a discovery sanction and plaintiff obtained a default judgment. *Held*, the terminating sanction was proper.

(a) In the face of defendants' persistent refusal to share with plaintiff the facts underlying their denial of liability and their purported affirmative defenses, and an approaching trial date scheduled for less than 2 months after the sanction hearing, the trial judge properly tailored the sanction to the harm caused by the withheld discovery. (21 C.A.4th 1619.)

(b) Defendants asserted that there was a discrepancy between the grounds stated in plaintiff's moving papers and the grounds specified by the trial judge for imposing the sanction. The overriding ground for imposing the sanction, however, was that defendants' further responses did not comply with the trial judge's earlier order compelling discovery. The making of further discovery responses from the perspective of an unnamed party (the ground specified in plaintiff's moving papers) and defendants' failure to verify their responses (mentioned by the trial judge in his ruling) were simply two examples of defendants' general noncompliance. (21 C.A.4th 1619.)

(c) Imposing a lesser sanction would have permitted defendants to continue their stalling tactics. The trial judge did not abuse his discretion in choosing the sanction he did. (21 C.A.4th 1620, quoting *Do It Urself Moving & Storage v. Brown, Leifer, Slatkin & Berns* (1992) 7 C.A.4th 27, 9 C.R.2d 396, *supra*, §256.)

In *Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 C.A.3d 481, 282 C.R. 530, the trial judge dismissed an action brought under the "fast-track" program (*Govt.C. 68600 et seq.*; see 2 *Cal. Proc.* (4th), *Courts*, §438) on the ground that plaintiffs had abused the discovery process. Plaintiffs ignored defendant's interrogatories and other discovery requests, defied a subsequent court order to provide interrogatory responses or produce documents, repeatedly failed to provide discovery by deadlines extended by defendant pursuant to stipulation, did not verify the interrogatory responses they finally did provide, and failed to file any opposition to defendant's motion to dismiss. *Held*, dismissal was not an abuse of discretion.

(a) Plaintiffs contended that the judge abused his discretion in dismissing the action because the dismissal was under the fast track program. However, the action was not dismissed for failure to comply with the rules of the program, but for wilful misuse of the discovery process. Moreover, no statute or case law proscribes the appropriate use of dismissal as a sanction by a trial judge in the program. (231 C.A.3d 490.)

(b) The judge was not required to substitute a monetary or issue preclusion sanction. "[T]he issue before us is not what sanction we would have imposed, but whether the trial court abused its discretion in ordering dismissal as a sanction. Substantial evidence supports the trial court's conclusion that appellants wilfully obstructed discovery, failed to honor their stipulation with counsel that they would comply with discovery, and defied the court's order to answer all interrogatories and produce all documents." (231 C.A.3d 491.) (See *Garcia v. McCutchen* (1997) 16 C.4th 469, 478, 66 C.R.2d 319, 940 P.2d 906, 2 *Cal. Proc.* (4th), *Courts*, Supp., §447 [disapproving *Laguna Auto Body* to extent it contains dictum inconsistent with conclusion that power of judge to impose sanctions for noncompliance with fast track rules is limited by *C.C.P. 575.2(b)*, which prohibits dismissal as sanction where noncompliance with local rules is fault of counsel, not of litigant].)

(3) *Other Examples.* Other examples of actions in which a terminating sanction was properly imposed include the following:

*Unger v. Los Angeles Transit Lines* (1960) 180 C.A.2d 172, 180, 4 C.R. 370, 5 C.R. 71 [information sought by plaintiff's interrogatories was not privileged, as defendant had claimed, and record disclosed persistent course of refusal by defendant to obey judge's valid order].

*MacDonald v. Joslyn* (1969) 275 C.A.2d 282, 290, 79 C.R. 707 [defendant wilfully refused to appear for deposition;

answer properly stricken and default entered].

*Scherrer v. Plaza Marina Commercial Corp.* (1971) 16 C.A.3d 520, 524, 94 C.R. 85 [default judgment proper after "amazing disregard for the judicial process" in repeated failures to appear for deposition or hearings].

*Housing Authority v. Gomez* (1972) 26 C.A.3d 366, 371, 102 C.R. 657 [defendant's repeated refusals to appear at deposition made striking his answer and cross-complaint and entry of default proper].

*Stein v. Hassen* (1973) 34 C.A.3d 294, 302, 109 C.R. 321 [defendant's purported answers to interrogatories reflected "his evasiveness and lack of good faith, arrogant insolent attitude toward the judicial process, dilatory tactics and attempt to play 'fast and loose' with the court"].

*Williams v. Travelers Ins. Co.* (1975) 49 C.A.3d 805, 810, 123 C.R. 83 [plaintiff's equivocal and incomplete responses to defendant's requests for discovery were attempts to frustrate discovery goals; refusal to answer interrogatories that went to heart of plaintiff's claim].

*Kaplan v. Eldorado Ins. Co.* (1976) 55 C.A.3d 587, 592, 127 C.R. 699 [arbitration proceeding properly dismissed].

*Calvert Fire Ins. Co. v. Cropper* (1983) 141 C.A.3d 901, 905, 190 C.R. 593 [dismissal of plaintiff's action for failure to comply with discovery order was proper even though dismissal benefited party defendant who did not initiate discovery].

*Alliance Bank v. Murray* (1984) 161 C.A.3d 1, 9, 207 C.R. 233 [defendant's wilful failure to attend two properly noticed depositions justified default judgment].

*Dalitz v. Penthouse Int. Ltd.* (1985) 168 C.A.3d 468, 214 C.R. 254 [dismissal of action for claim of newsman's privilege which prevented discovery of facts necessary for defense].

*Hartbrodt v. Burke* (1996) 42 C.A.4th 168, 173, 175, 49 C.R.2d 562 [complaint properly dismissed with prejudice where plaintiff, relying on self-incrimination privilege, refused to produce tape recording of relevant conversation between him and defendant; plaintiff could not avoid involuntary dismissal by seeking voluntary dismissal without prejudice].

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Spoliation of Evidence*. C.C.P. 2023, authorizing terminating sanctions, was repealed and replaced by C.C.P. 2023.030 in 2004 without substantive change. (2) *Persistent Noncompliance*. C.C.P. 2030(g), on the requirement that interrogatory responses be signed under oath, was repealed and replaced by C.C.P. 2030.250 in 2004 without substantive change.

See *Lang v. Hochman* (2000) 77 C.A.4th 1225, 1247, 92 C.R.2d 322 [sanctions striking defendant's answer and dismissing his cross-complaint were proper, where both discovery referee and trial court found that defendant's lack of diligence in complying with discovery orders was wilful, tactical, egregious, and inexcusable, and lesser sanctions had not produced requested documents]; *American Home Assur. Co. v. Societe' Commerciale Toute'lectric* (2002) 104 C.A.4th 406, 436, 128 C.R.2d 430 [in action by insurer against French corporation, defendant's conduct in resisting discovery and then attempting to stand on its rights under Hague Convention at late stage of discovery proceedings constituted wilful obstructive behavior that supported imposition of terminating sanction]; *Mileikowsky v. Tenet Healthsystem* (2005) 128 C.A.4th 262, 278, 26 C.R.3d 831 [in physician's action against health care providers for breach of contract, terminating sanctions were proper for plaintiff's repeated failures to answer discovery requests; although there was no intervening court order, as ordinarily required for terminating sanction, parties' stipulation essentially waiving plaintiff's right to insist on formal order compelling responses as precursor to issuance of sanctions was tantamount to court order]; *Jerry's Shell v. Equilon Enterprises, LLC* (2005) 134 C.A.4th 1058, 1069, 36 C.R.3d 637 [in action by franchisees against their franchisor, imposition of terminating sanctions was justified based on plaintiffs'

repeated failure to respond to discovery and to comply with court orders; plaintiffs did not respond to discovery requests until more than 10 months later, disregarded two court orders in interim, and also ignored attempts by defense counsel to discuss discovery deficiencies]; *Electronic Funds Solutions, LLC v. Murphy* (2005) 134 C.A.4th 1161, 1183, 36 C.R.3d 663 [in trade secret misappropriation action, trial judge did not abuse discretion in striking defendants' answer and entering default judgment based on defendants' persistent failure to comply with discovery orders, including their attempt to erase e-mails responsive to previous document request]; *Reedy v. Bussell* (2007) 148 C.A.4th 1272, 1292, 56 C.R.3d 216 [in probate proceeding, trial judge did not abuse discretion in imposing terminating sanctions based on defendants' wilful and repeated obstruction of discovery; in light of ample opportunities defendants were given to comply with obligations, it was reasonable to assume that lesser sanctions would be insufficient to curb their continued abuses].(3) *Other Examples*. See *Miranda v. 21st Century Ins. Co.* (2004) 117 C.A.4th 913, 928, 12 C.R.3d 159 [trial judge properly dismissed uninsured motorist arbitration where plaintiff resisted insurer's attempts to obtain plaintiff's medical records, judge ordered her to sign authorizations for release of records, she failed to obey order, and she later announced that she would not sign them]; *Steven M. Garber & Associates v. Eskandarian* (2007) 150 C.A.4th 813, 820, 59 C.R.3d 1 [terminating sanctions were properly imposed where defendants failed to comply with order to respond to interrogatories and production demands, failed to pay monetary sanctions, and, at time terminating sanctions were sought, had disappeared].





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## CHAPTER X - Discovery

## XII. SANCTIONS

## B. Types of Sanctions.

## 4. Terminating Sanction.

## b. Illustrations.

## 2. Discretion Abused.

2 *Witkin Cal. Evid. Discovery* § 259

[§ 259] Discretion Abused.

In *Brown v. Presley of Southern Calif.* (1989) 213 C.A.3d 612, 261 C.R. 779, plaintiff homeowner's action against defendant homebuilder was dismissed when her attorney was late for a hearing on a motion to strike brought by one of defendant's subcontractors. The subcontractor had been brought into the case by way of cross-complaints for indemnity. Plaintiff had earlier failed to appear at a deposition demanded by the subcontractor, who obtained an order requiring compliance and awarding attorneys' fees. When plaintiff's attorney informed the subcontractor that he would be unable to attend the ordered deposition, the subcontractor cancelled the deposition and moved to have plaintiff's complaint against *defendant* dismissed as a sanction. Plaintiff's attorney then informed the subcontractor that plaintiff would in fact pay the attorneys' fees and appear at the deposition, but the subcontractor refused to withdraw the motion to strike. Plaintiff's attorney then informed the subcontractor's attorney that he would be late, and requested that the hearing be rescheduled from 9 a.m. to 9:45 a.m. The hearing was not rescheduled, and the only party who appeared was defendant's attorney, who moved for dismissal. *Held*, dismissal reversed. "It is manifest that the court's use of the ultimate sanction of dismissal was excessive. That is to say, if plaintiff's attorney had appeared at 9 a.m. on May 20 expressing a willingness to produce his client for a deposition and to pay the sanctions imposed pursuant to the court's earlier order, it would unquestionably have been an abuse of discretion to strike appellant's complaint and dismiss the action. That he arrived after the order had already been made because [defendant's] attorney had neglected, inadvertently or otherwise, to inform the court [that plaintiff's attorney] would be 45 minutes late, cannot alter this fact." (213 C.A.3d 620.)

In *Caryl Richards v. Superior Court* (1961) 188 C.A.2d 300, 10 C.R. 377, plaintiff K brought an action against defendant company for damages for injuries to her eye allegedly received from a hair spray manufactured by defendant. One of plaintiff's interrogatories sought the chemical formula of the spray. Defendant, claiming that it was a trade secret, refused to state the exact proportions. On plaintiff's motion, Judge R imposed the sanction of establishing the fact that the product was harmful, together with \$ 150 costs and attorneys' fees. On a subsequent motion, Judge M struck defendant's answer and ordered its default to be entered. *Held*, mandamus granted to compel the lower court to vacate the default and reinstate the answer.

The case involved a number of issues of fact as to whether the spray was actually supplied by defendant to the beauty salon and applied to plaintiff, whether it caused an injury, whether she was guilty of contributory negligence, etc. The particular interrogatory related to only one issue, and a full compliance by defendant with the court's order would at

most have established the fact that the spray was injurious. Plaintiff would still have the burden of proving all other issues of fact, and defendant would still be free to establish contributory negligence. Thus the order the court made was not one designed to accomplish the purposes of discovery but to punish defendant for its failure to disclose its secret process. Hence, it was not only an abuse of discretion but a denial of due process. The proper sanction, the court observed, would have been to presume the fact against defendant, as in *Judge R's order*. (188 C.A.2d 304.)

Other examples of actions in which the trial court abused its discretion in imposing a terminating sanction include the following:

*Deyo v. Kilbourne* (1978) 84 C.A.3d 771, 797, 149 C.R. 499 [answers to interrogatories not wholly responsive, and court could order filing of further answers, but order striking answer and entering default was unwarranted].

*Morgan v. Ransom* (1979) 95 C.A.3d 664, 669, 157 C.R. 212 [plaintiff inmate's handwritten answers to defendant's interrogatories were rejected by clerk as not timely and not in proper form, and judge dismissed action without seeing any of plaintiff's papers; judge abused discretion by never considering whether answers were adequate; also, there was no showing of prejudice to defendant, or of relevancy of interrogatories].

*Duggan v. Moss* (1979) 98 C.A.3d 735, 744, 159 C.R. 425 [trial judge should not have dismissed plaintiff's complaint following plaintiff's failure to answer interrogatories without considering voluminous nature of interrogatories, that parties had at one point apparently agreed to settle case, that plaintiff had to some extent cooperated with earlier discovery requests, that defendant had himself delayed several months in answering plaintiff's interrogatories, and that plaintiff's counsel had requested a continuance and had indicated that he was working on answers].

*Lovato v. Santa Fe Int. Corp.* (1984) 151 C.A.3d 549, 553, 198 C.R. 838 [trial court denied defendant's due process by entering default judgment with defendant unaware of interrogatories that defendant's suspended attorney had failed to respond to].

*Jones v. Otero* (1984) 156 C.A.3d 754, 757, 758, 759, 203 C.R. 90 [timely written notice of defendants' motion to dismiss should have been given to plaintiffs, pursuant to statute and in accordance with fundamental principles of due process; prior order directing *plaintiffs' attorney* to pay sanctions was not directed to *plaintiffs*, and dismissal on failure of either to pay sanction was an act in excess of jurisdiction; "dismissal can never be an appropriate remedy for an *attorney's* noncompliance with an order imposing monetary sanctions"].

*Trail v. Cornwell* (1984) 161 C.A.3d 477, 488, 207 C.R. 679 [dismissal of plaintiff's complaint on grounds of wilful refusal to appear for deposition and to serve answers to interrogatories; cause remanded for consideration of other appropriate sanctions].

*Wilson v. Jefferson* (1985) 163 C.A.3d 952, 958, 210 C.R. 464 [default judgment was excessive; defendant's discovery misconduct related only to his specious affirmative defense and was not dispositive of other issues that were manifestly part of default judgment].

*Thomas v. Luong* (1986) 187 C.A.3d 76, 80, 231 C.R. 631 [default judgment entered against defendant who had failed to appear for deposition and to answer form interrogatories; trial court abused its discretion in imposing ultimate sanction where adequate lesser sanctions were available, including accepting defendant's offer to stipulate to liability or striking defendant's pleadings insofar as they contested liability or causation].

*Morgan v. Southern Calif. Rapid Transit Dist.* (1987) 192 C.A.3d 976, 981, 984, 237 C.R. 756 [although order striking defendant's answer was proper discovery sanction, granting plaintiff default judgment was reversible error where plaintiff failed to serve defendant with notice of amount of damages sought, as required by C.C.P. 425.11 (4 Cal. Proc. (4th), Pleading, §473)].

*McArthur v. Bockman* (1989) 208 C.A.3d 1076, 1081, 256 C.R. 522 [default judgment against defendants for failing to appear at deposition that was limited to inquiry as to their wealth for punitive damages purposes was abuse of discretion; more limited sanction was appropriate].

*Ruvalcaba v. Government Employees Ins. Co.* (1990) 222 C.A.3d 1579, 1583, 272 C.R. 541 [dismissal for plaintiff's failure to respond to demand for inspection was improper in absence of prior order directing him to respond].

*Newland v. Superior Court* (1995) 40 C.A.4th 608, 614, 615, 47 C.R.2d 24 [terminating sanction may not be imposed for failure to pay monetary discovery sanction].

**SUPPLEMENT:** [This section is current through the latest supplement]

*Other examples of abuse of discretion in imposing terminating sanction:*

*Sole Energy Co. v. Hodges* (2005) 128 C.A.4th 199, 208, 26 C.R.3d 823 [entry of default against four defendants as discovery sanction violated due process, where two defendants, although they received notice for order shortening time on motion to compel attendance and for monetary and other unspecified sanctions, never received any notice that terminating sanction might be imposed, one defendant was not even named in any motion to compel or any discovery order, and order requiring fourth defendant to appear did not refer to sanctions of any type].

*Parker v. Wolters Kluwer United States* (2007) 149 C.A.4th 285, 296, 57 C.R.3d 18 [in action by employee against former employer and three of its employees, trial judge abused discretion in imposing terminating sanctions in favor of defendants who did not propound discovery themselves or show how they were prejudiced by plaintiff's failure to comply with discovery requests propounded by others; relying on *Townsend v. Superior Court* (1998) 61 C.A.4th 1431, 72 C.R.2d 333, text, §254].

*Lee v. Blue Shield of Calif.* (2007) 154 C.A.4th 1369, 1376, 65 C.R.3d 612 [health insurer violated B. & P.C. 809 (peer review hearing process) by terminating doctor's provider contract on ground that he was not cooperating with discovery requests; in face of repeated discovery misconduct, peer review process may be terminated, but this must be in course of hearing itself after affording doctor notice and opportunity to be heard; distinguishing *Mileikowsky v. Tenet Healthsystem* (2005) 128 C.A.4th 262, 26 C.R.3d 831, Supp., supra, §258].



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## CHAPTER X - Discovery

### XII. SANCTIONS

#### B. Types of Sanctions.

#### 5. Contempt Sanction.

##### a. Authorization.

2 Witkin Cal. Evid. Discovery § 260

[§ 260] Authorization.

The court may make an order treating the misuse of the discovery process as a contempt. (*C.C.P. 2023(b)(5)*; see 15 *Pepperdine L. Rev.* 401, 416; C.J.E.R., Judges Benchbook, Civil Proceedings: Discovery §6.22 et seq.; C.E.B., 1 Civil Discovery Practice 3d, §2.107.)

The following acts, in particular, are punishable as contempt:

(1) Disobeying a deposition subpoena in any manner described in *C.C.P. 2020(g)* (supra, §§44, 50). (*C.C.P. 2020(h)*, supra, §58; see also *C.C.P. 2025(j)(2)* and *C.C.P. 1991.1*, supra, §58.)

(2) Refusing to obey an order compelling a deposition answer or the production of writings or things. (*C.C.P. 2025(o)*, supra, §70.)

A party guilty of both deliberate refusal to appear for a deposition and failure to appear at an order to show cause hearing may be punished by imprisonment for criminal contempt, even though the civil action itself is no longer pending. (*Morelli v. Superior Court* (1969) 1 C.3d 328, 332, 82 C.R. 375, 461 P.2d 655.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2023(b)(5)*, authorizing contempt sanctions, was repealed and replaced by *C.C.P. 2023.030(e)* in 2004 without substantive change.

See C.E.B., 2 Civil Discovery Practice 4th, §15.102.

(1) *Disobeying deposition subpoena*: *C.C.P. 2020(h)* was repealed and replaced by *C.C.P. 2020.240* in 2004 without substantive change.

*C.C.P. 2025(j)(2)*, on the deponent's failure to attend, was repealed and replaced by *C.C.P. 2025.440* in 2004 without substantive change.

(2) *Disobeying order compelling answer or production*: *C.C.P. 2025(o)*, on failure to obey an order compelling an answer or to produce documents, was repealed and replaced by *C.C.P. 2025.480* in 2004 without substantive change.



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## CHAPTER X - Discovery

### XII. SANCTIONS

#### B. Types of Sanctions.

##### 5. Contempt Sanction.

###### b. Procedure.

2 Witkin Cal. Evid. Discovery § 261

[§ 261] Procedure.

*In re Morelli* (1970) 11 C.A.3d 819, 91 C.R. 72, was a habeas corpus proceeding on behalf of an expert witness for the defense who refused to appear at a deposition even though he had acquired knowledge about an alleged mechanical failure which purportedly caused a fatal accident. In upholding a 5-day jail sentence and \$ 500 fine, the court rejected a number of technical attacks on the procedure.

(a) *Adequacy of supporting papers.* The order to show cause for the contempt hearing was properly supported by a combination of documents. The deposition reporter certified that she appeared at the proper time and place to administer the oath and transcribe the testimony, that opposing counsel were present, and that plaintiffs' attorney made an unsworn statement about the expert's having been served and paid the witness fees he had demanded. At 15 minutes past the scheduled time, the attorney stated that the expert apparently was not going to attend. The attorney therefore asked the reporter to file a transcript with the superior court. Under penalty of perjury, the attorney also executed a declaration indicating that the expert had relevant information. Taken together, these papers met statutory requirements. The reporter's certification under her official seal properly reported the expert's disobedience to the subpoena and satisfied former C.C.P. 1191. (11 C.A.3d 829.) Because the reporter was to officiate at the deposition proceeding, she was a "judicial officer" authorized by C.C.P. 1211 to make a statement of the facts that constituted the contempt. (11 C.A.3d 829.) The declaration by plaintiffs' attorney was under penalty of perjury and therefore a substitute for the affidavit required by C.C.P. 1211. (11 C.A.3d 830.) And the attorney's statements, as transcribed in the deposition record, were made as an officer of the court by reason of his status as an attorney. (11 C.A.3d 830.)

(b) *Forfeiture of bail.* The expert had been arrested on a bench warrant, posted \$ 500 bail and suffered a forfeiture when he refused to appear for an order to show cause hearing. In seeking to vacate a later order for his arrest, he argued that the bail forfeiture, which equaled the maximum fine for contempt, should have discharged him. The court disagreed. "Such a position was tantamount to a confession of the offense (nonappearance by a properly served resident) or at least a concession that the offense had been properly charged, including the element of residence." (11 C.A.3d 834, footnote 8.)

(c) *Personal service.* The expert contended that he should have been personally served with the order to show cause as to his alleged contempt for disobeying the subpoena. This position would have been valid if the expert had never appeared, because in those circumstances the order serves not only as notice but also as a summons giving personal jurisdiction over the individual. (11 C.A.3d 838.) (See 3 Cal. Proc. (4th), Actions, §874 et seq.) But once personal jurisdiction has been obtained, the order to show cause serves chiefly as a notice. (11 C.A.3d 838.) (See 6 Cal. Proc.

(4th), *Proceedings Without Trial*, §55 et seq.) It is "sometimes considered the equivalent of a citation, not in the sense of a personal subpoena, but as a direction for an appearance (normally by counsel) to answer the motion being put to the court. Service on the attorney is therefore appropriate." (11 C.A.3d 838.) The attorney, of course, has the duty to apprise his client of the matter, and the expert's attorney did so here. (11 C.A.3d 838.)

"Since the response to the order to show cause (even initially) may be by counsel ... , personal service on the party is not significant. The main thing is that there be an accurate appraisal of the time of the hearing and a fair appraisal of what must be met." (11 C.A.3d 839.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER X - Discovery

## XII. SANCTIONS

## B. Types of Sanctions.

## 5. Contempt Sanction.

## c. Illustrations.

2 *Witkin Cal. Evid. Discovery* § 262

[§ 262] Illustrations.

(1) *Order Upheld. In re Bongfeldt* (1971) 22 C.A.3d 465, 99 C.R. 428, had its origin in the accidental death of plaintiff's wife, who was struck and killed by a negligent uninsured motorist. Even though liability was admitted, Allstate, the insurance carrier, with whom plaintiff had uninsured motorist coverage, refused to settle for the \$ 15,000 policy limit; only after a contested arbitration did plaintiff receive the full amount. Plaintiff then sued Allstate on the ground that the insurer had fraudulently failed to disclose its intention to pay a sum less than the policy limit in settlement of a claim, even though the insured was entitled to full recovery. To show that Allstate lacked good faith, plaintiff deposed B, its claims evaluator. The key inquiry was whether B could make an evaluation of the wrongful death claim under the policy. B refused to answer. After a court order directing him to answer, B still said he could not do so without a review of the entire file. When plaintiff's counsel suggested a recess to allow B to read the file, which was in defense counsel's possession, the latter refused to allow that procedure. *Held*, B was properly adjudged in contempt. He was an officer or high level employee of Allstate, and he and Allstate's attorney were engaged in a "high-handed oppressive effort" to defy the order and deny plaintiff the discovery to which he was entitled. (22 C.A.3d 476.)

The opinion adds: "The trial court found Bongfeldt alone to be in contempt. In our view, were the contempt of each to be weighed, that of the attorney would be the greater. In such cases courts should not hesitate also to impose contempt sanctions upon the errant attorney." (22 C.A.3d 476.)

(2) *Order Annulled. In Little v. Superior Court* (1968) 260 C.A.2d 311, 67 C.R. 77, plaintiff wife sued for divorce, and defendant husband cross-complained seeking custody of a child. He thereby put his fitness in issue, and plaintiff sought to take depositions of a psychoanalyst and psychotherapist whom the husband had consulted. On claim of privilege by defendant's attorney, they refused to testify. The court then made an order that the privilege did not apply (Ev.C. 996(a) and 1016, 2 *Cal. Evidence* (4th), *Witnesses*, §§204, 223), and that if defendant refused to execute a written consent to their answering questions, the county clerk was appointed commissioner to execute the consent. On being notified, defendant's attorney informed plaintiff's attorney that defendant "has elected not to sign a consent." The clerk, as ordered, executed the consent. The deposition of the psychoanalyst was then taken without difficulty, but the psychotherapist, not informed of the clerk's consent, still refused. Thereafter, defendant was held in contempt. *Held*, annulled. There was no order specifically directing him to perform any act, and no substantial evidence of wilful disobedience. The court's ambiguous order (granting plaintiff's motion to compel consent, but actually ordering alternatives) had to be resolved in favor of the accused, as giving defendant a choice of signing or letting the clerk sign

in his behalf. (260 C.A.2d 318, 319.)

*In re de la Parra* (1986) 184 C.A.3d 139, 228 C.R. 864, involved a defendant who contended that he was constrained by Mexican law to refuse to answer certain interrogatories. The trial court issued a brief commitment order stating that defendant "is found in contempt of Court for failure to comply with court order. Court orders 15 days in custody." *Held*, order annulled.

(a) The requirements of *C.C.P. 1211* et seq. (8 Cal. Proc. (4th), *Enforcement of Judgment*, §335) apply to discovery sanctions matters. The contempt citation fails to demonstrate on its face that defendant is guilty of contempt, fails to recite the specific facts giving rise to the contempt, and fails to recite a finding of a present ability to perform. Moreover, the commitment order "falls short even of the requirements for imposing less egregious discovery sanctions, which at a minimum call for a statement of explicit reasons for the sanctions." (184 C.A.3d 144.)

(b) "The trial court here had available many alternative solutions other than adding to the already overcrowded jail population. ... Imposition of a jail sentence to enforce civil discovery against a party to the lawsuit strikes us as unnecessary and overbearing. Use of this most extreme sanction should be reserved for situations where the court's dignity is truly compromised and no other suitable penalty can be found." (184 C.A.3d 144, 145.)

**SUPPLEMENT:** [This section is current through the latest supplement]





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## CHAPTER X - Discovery

### XII. SANCTIONS

#### C. Procedure.

#### 1. Contents of Motion for Sanctions.

*2 Witkin Cal. Evid. Discovery § 263*

[§ 263] Contents of Motion for Sanctions.

The notice of motion for a sanction must identify every person, party, and attorney against whom the sanction is sought, and specify the type of sanction sought. The notice of motion must be supported by a memorandum of points and authorities, and accompanied by a declaration setting forth facts supporting the amount of any monetary sanction sought. (*C.C.P. 2023(c)*; see *15 Pepperdine L. Rev. 401, 420*; for forms, see Rutter Group, 2 Civil Procedure Before Trial, Forms 8:M [motion to compel answers to deposition questions and for award of sanctions], 8:W [interrogatories], 8:FF.2 [production of documents]; C.E.B., 2 Civil Litigation Forms Manual, §§24.20 et seq. [motion to compel answers to deposition questions and production of documents], 27.10 et seq. [interrogatories], 28.6 et seq. [demand for inspection].)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2023(c)*, on motions for sanctions, was repealed and replaced by *C.C.P. 2023.040* in 2004 without substantive change.

Under *C.C.P. 2023.040*, a motion seeking sanctions for misuse of discovery requires only the support of a memorandum of points and authorities and an accompanying declaration setting forth facts justifying the amount of monetary sanctions sought. The motion is not subject to the 45-day time limit that applies to motions to compel further responses to interrogatories (*C.C.P. 2030.300(c)*), and there is no meet and confer requirement such as applies to motions to compel further responses to interrogatories (*C.C.P. 2030.300(b)*) and inspection demands (*C.C.P. 2031.310(b)(2)*). The 45-day time limit and the meet and confer requirement are also inapplicable under *C.C.P. 2030.290* (motion to compel answers to interrogatories; see text and Supp., §115). (*Sinaiko Healthcare Consulting v. Pacific Healthcare Consultants (2007) 148 C.A.4th 390, 411, 55 C.R.3d 751.*)



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## CHAPTER X - Discovery

### XII. SANCTIONS

#### C. Procedure.

#### 2. Order Compelling Compliance as Prerequisite to Imposition of Sanctions.

*2 Witkin Cal. Evid. Discovery § 264*

[§ 264] Order Compelling Compliance as Prerequisite to Imposition of Sanctions.

Cases and treatises have interpreted the Civil Discovery Act of 1986 and its predecessors to require that, before being subjected to sanctions harsher than monetary sanctions, a party must have disobeyed a court order compelling discovery. (See, e.g., *Deyo v. Kilbourne* (1978) 84 C.A.3d 771, 789, 149 C.R. 499; *Young v. Rosenthal* (1989) 212 C.A.3d 96, 114, 260 C.R. 369; *Ruvalcaba v. Government Employees Ins. Co.* (1990) 222 C.A.3d 1579, 1583, 272 C.R. 541 [dismissal for plaintiff's failure to respond to demand for inspection was improper in absence of prior order directing him to respond]; *Rutter Group*, 2 Civil Procedure Before Trial §§8:10, 8:1184 et seq.)

This interpretation has been rejected, however, where obtaining a prior order compelling discovery would be futile. In *Do It Urself Moving & Storage v. Brown, Leifer, Slatkin & Berns* (1992) 7 C.A.4th 27, 9 C.R.2d 396, an action for breach of contract, negligence, breach of fiduciary duty, and accounting, plaintiffs promised, but failed, to produce an audit report and supporting documentation. On defendant's motion, the trial court precluded plaintiffs from introducing accounting evidence. *Held*, sanction was properly imposed. Even though the motion for sanctions was the first motion to deal with discovery issues, plaintiffs had conceded that they were unable to provide the promised items of discovery. Accordingly, a formal order to comply would have been futile. (7 C.A.4th 36, 37.) (See *Vallbona v. Springer* (1996) 43 C.A.4th 1525, 1546, 51 C.R.2d 311 [requiring plaintiffs to seek formal order to compel defendants to comply with discovery would have been futile because defendants had claimed requested documents were stolen; following *Do It Urself Moving & Storage*].)

**SUPPLEMENT:** [This section is current through the latest supplement]

Cf. *Karlsson v. Ford Motor Co.* (2006) 140 C.A.4th 1202, 1214, 45 C.R.3d 265 [in products liability action against automobile manufacturer, imposition of evidence and issue sanctions was justified, even in absence of discovery order, where sanctions were based not just on defendant's failure to produce "person most knowledgeable" for deposition on warnings issue, as promised, but on entire pattern of discovery abuse].



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## CHAPTER X - Discovery

## XII. SANCTIONS

## C. Procedure.

## 3. Motion for Reconsideration of Sanctions Order.

2 Witkin Cal. Evid. Discovery § 265

[§ 265] Motion for Reconsideration of Sanctions Order.

In *Mattco Forge v. Arthur Young & Co.* (1990) 223 C.A.3d 1429, 273 C.R. 262, defendant responded to plaintiff's demand for inspection of documents with blanket objections, and refused to meet and confer with plaintiff on the ground that to do so was premature because its demurrer was pending. Plaintiff's second request to meet and confer, filed after the trial judge had sustained the demurrer with leave to amend, was also rejected by defendant because the pleading issues were still pending. Plaintiff then filed a motion for an order to compel production and for sanctions under C.C.P. 2031 and 2023, the request for sanctions being based on defendant's refusal to meet and confer and the unmeritorious nature of its objections. After the trial judge granted four-fifths of the motion to compel (8 out of 10 requests were granted) and one-fourth of the request for sanctions (\$ 750 awarded instead of the \$ 3,062.50 requested), defendant filed a motion for reconsideration of the sanction, and plaintiff filed a written opposition and requested additional sanctions under C.C.P. 128.5 and 2023. The trial judge denied the motion for reconsideration on the ground that it was frivolous, and ordered defendant to pay an additional \$ 800 sanction. Defendant challenged the first sanction order by mandamus and the second by appeal. *Held*, mandamus denied; second order affirmed.

(a) *First sanction award was fair and legally correct.*

(1) Defendant contended that this award, which was based on the inadequacy of defendant's discovery responses, was erroneous, because plaintiff's notice of request for sanctions referred only to defendant's refusals to meet and confer. However, plaintiff made specific references, in both the title and body of the notice, to C.C.P. 2031 and to defendant's frivolous objections, and defendant clearly was not misled, because its opposition to the motion included an attempt to justify its blanket objections. (223 C.A.3d 1435.)

(2) Under C.C.P. 2031(l) (now 2031(m)), the trial judge was required to impose sanctions in the absence of a finding that defendant acted with substantial justification. Defendant offered nothing to support its claim that the objections to the eight document requests were justified. Instead, it focused solely on the two requests where the objections were found to be legitimate and ignored the fact that the sanction was reduced because the motion was not granted in its entirety. (223 C.A.3d 1436.)

(3) The fact that defendant was given 30 days to comply with the order to produce the requested documents (a date beyond the next scheduled hearing on the still pending demurrer) did not establish the trial judge's agreement with defendant's claim of prematurity. The timing showed only the judge's concern that, at that stage of the proceedings, the demurrer be resolved first; it did not come close to establishing that defendant's refusal to produce the documents in the first place was justified. (223 C.A.3d 1436.)

(b) *Second sanction award was proper under the Civil Discovery Act of 1986.*

(1) Defendant's contention that this award was insufficient because the trial judge failed to make the findings required by *C.C.P. 128.5(c)* (7 *Cal. Proc.* (4th), *Trial*, §248) ignores the fact that the request for sanctions, which was made in opposition to defendant's motion for reconsideration of the first award, was also based on *C.C.P. 2023*. Because reconsideration, in a discovery dispute as in most other contexts, is simply a continuation of the hearing in which the reconsidered order was rendered, it follows that defendant's motion for reconsideration was part and parcel of the underlying discovery dispute, i.e., a continuation of its opposition to plaintiff's motion to compel production and original request for sanctions. (223 *C.A.3d* 1437, citing *Buchanan v. Buchanan* (1979) 99 *C.A.3d* 587, 595, 160 *C.R.* 577.) Hence, the trial judge properly awarded *discovery* sanctions (not *C.C.P. 128.5* sanctions) and was not required to make written findings explaining its order. (223 *C.A.3d* 1438.)

(2) The fact that the trial judge found that the motion for reconsideration was frivolous does not establish that he was applying *C.C.P. 128.5* (the wrong statute); an order or judgment that is correct on any theory will be affirmed on appeal. (223 *C.A.3d* 1440; see 9 *Cal. Proc.* (4th), *Appeal*, §340.) The use of the word "frivolous" was "factually accurate and legally irrelevant." (223 *C.A.3d* 1440.)

(3) Defendant's contention that the second award cannot stand under the Discovery Act because *C.C.P. 2023* does not include a motion for reconsideration in its list of discovery abuses (*supra*, §249) lacks merit for two reasons: (a) Under *C.C.P. 2023(a)(5)*, the making of unmeritorious objections to discovery is a misuse of the discovery process. Defendant's motion for reconsideration was a continuation of plaintiff's motion to compel production and the original request for sanctions, which, in turn, was based on defendant's unmeritorious objections. (223 *C.A.3d* 1440.) (b) Under *C.C.P. 2023(a)*, the misuses of the discovery process "include, but are not limited to," the nine listed abuses. There is no reason why a motion for reconsideration of a sanction award, made without substantial justification and in the absence of other circumstances making the award unjust, should not be viewed as an abuse of the discovery process under *C.C.P. 2023(a)*. (223 *C.A.3d* 1441.)

(4) To disallow sanctions for unjustified motions for reconsideration of discovery sanction awards would allow such motions to be used to deprive the prevailing party of the costs it had already recovered for making a motion made necessary in the first place only because of the other party's failure to comply with the Discovery Act. "If the sanction provisions of the Discovery Act are to be a credible deterrent to discovery abuses, they must be applied to prevent a losing party from accomplishing indirectly that which it is expressly prohibited from doing directly--forcing a party who deals fairly to pay for the abusive tactics of one who does not." (223 *C.A.3d* 1441.)

(c) *Defendant not subject to additional sanctions for pursuing frivolous appeal.* As noted, the second sanction award cannot be salvaged under *C.C.P. 128.5*. Hence, reliance on that statute would require reversal and remand with instructions to make the appropriate findings or vacate the award. In such event, defendant, as the *prevailing party*, could hardly be accused of making a frivolous appeal. And the basis for affirming the sanction order, i.e., as a discovery sanction not requiring specific findings, is not one that defendant should indisputably have anticipated. (223 *C.A.3d* 1442.) (See *C.E.B.*, 1 Civil Discovery Practice 3d, §2.112.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2023*, authorizing sanctions for discovery abuses, was repealed and replaced by *C.C.P. 2023.010* et seq. in 2004 without substantive change. *C.C.P. 2023(a)*, listing discovery abuses, became *C.C.P. 2023.010*, and *C.C.P. 2023(a)(5)*, specifying that the making of an unmeritorious objection to discovery is an abuse, became *C.C.P. 2023.010(e)*.

*C.C.P. 2031*, on inspection demands, was repealed and replaced by *C.C.P. 2031.010* et seq. in 2004 without substantive change. *C.C.P. 2031(m)*, authorizing sanctions in connection with a motion to compel further response, became *C.C.P. 2031.310*.

Cf. *C.E.B.*, 2 Civil Discovery Practice 4th, §15.111.



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## CHAPTER XI - Presentation At Trial

### I. PREPARATION FOR TRIAL A. Manuals and Other Practice Works.

#### *3 Witkin Cal. Evid. Presentation § 1*

#### [§ 1] Manuals and Other Practice Works.

The steps that occur before counsel arrives at the courtroom, and the many problems faced in preparing a case for trial, are explored from different points of view in a number of books and articles on trial practice. The purpose of this section is to list modern practice manuals, handbooks, and encyclopedic articles that are useful in dealing with problems of trial practice and advocacy.

(1) *General Works*. American Jurisprudence Trials (cited as Am.Jur. Trials) covers all phases of trial practice (Volumes 1-6) and most kinds of trials (Volumes 7 et seq.). American Jurisprudence Proof of Facts (cited as Proof of Facts) presents sample questions and answers, with interspersed practice pointers, for establishing various specific facts or causes of action.

Other works of a general nature include Cotchett and Elkind, Federal Courtroom Evidence 3d; Danner, Expert Witness Checklists 2d; Hunter, Federal Trial Handbook 3d; Lane, Medical Litigation Guide; McCormick, McCormick on Evidence 5th; Schweitzer, Cyclopedia of Trial Practice 2d; Wharton's Criminal Evidence, 14th and 15th eds.

(2) *California Works*. The following works cover various aspects of trial practice in the California courts: California Trial Handbook 3d; C.E.B., California Civil Litigation Forms Manual; C.E.B., California Trial Practice: Civil Procedure During Trial 3d; C.E.B., California Expert Witness Guide 2d; C.E.B., California Trial Objections 5th; C.E.B., Condemnation Practice in California 2d; C.E.B., Effective Direct and Cross-Examination; C.E.B., Effective Introduction of Evidence in California 2d; C.E.B., Trial Attorney's Evidence Code Notebook 3d; C.E.B., Jefferson's California Evidence Benchbook 3d; C.J.E.R., Judges Benchbook, Civil Proceedings: Trial; Haight and Cotchett, California Courtroom Evidence 4th; Jefferson, Synopsis of California Evidence Law; Rutter Group, Civil Trials and Evidence; West's California Judicial Council Forms.

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER XI - Presentation At Trial

### I. PREPARATION FOR TRIAL B. Particular Steps.

#### 3 Witkin Cal. Evid. Presentation § 2

[§ 2] Particular Steps.

This section outlines the principal steps in preparation for trial, with references to discussions in the practice works cited in the preceding section (*supra*, §1).

(1) *Preparation in General.* (See C.E.B., 1 Civ. Proc. During Trial 3d, Chap. 2 [completing pretrial procedure], Chap. 3 [organizing trial materials]; C.E.B., Effective Introduction of Evidence in California 2d, Chap. 2 [planning case; securing witnesses and evidence; witness preparation; trial notebook]; Rutter Group, 1 Civil Trials and Evidence, Chap. 1; Rutter Group, 2 Personal Injury, Chap. 8; 1 McCormick 5th, Chap. 1.)

(2) *The Client: Interviews and Discussions.* (See C.E.B., 1 Civ. Proc. During Trial 3d, §5.48 et seq.; Rutter Group, 1 Civil Trials and Evidence §1:265 et seq.)

(3) *The Ordinary Witness: Interviews and Discussions.* (See C.E.B., 1 Civ. Proc. During Trial 3d, §5.22 et seq.; Rutter Group, 1 Civil Trials and Evidence §§1:265 et seq., 1:297 et seq.; 1 McCormick 5th, Chaps. 2, 3.)

(4) *The Expert Witness: Selection, Interviews and Discussions.* (See C.E.B., Expert Witness Guide 2d, Chaps. 7, 8, 12; C.E.B., 1 Civ. Proc. During Trial 3d, §5.70 et seq.; Rutter Group, 1 Civil Trials and Evidence §§1:281 et seq., 1:297 et seq.; see also 1 Cal. Evidence (4th), Opinion Evidence, §38 et seq.)

(5) *Study of the Scene.* (See C.E.B., Expert Witness Guide 2d, §9.2 et seq.; see also 2 Cal. Evidence (4th), Demonstrative, Experimental, and Scientific Evidence, §25.)

(6) *Preparation of Demonstrative Evidence.* (See C.E.B., Expert Witness Guide 2d, Chap. 9; C.E.B., 2 Civ. Proc. During Trial 3d, Chap. 13; 2 McCormick 5th, Chap. 21; Rutter Group, 1 Civil Trials and Evidence §1:227 et seq.; see 2 Cal. Evidence (4th), Demonstrative, Experimental, and Scientific Evidence, §1.)

(7) *Preparation of Documentary Evidence.* (See C.E.B., 2 Civ. Proc. During Trial 3d, Chap. 13; 2 McCormick 5th, Chaps. 22, 23; Rutter Group, 1 Civil Trials and Evidence §1:110 et seq.; on documentary evidence, see 2 Cal. Evidence (4th), Documentary Evidence, §1 et seq.)

(8) *Planning Order of Proof.* (See C.E.B., 1 Civ. Proc. During Trial 3d, §1.11 et seq.; 1 Jefferson, California Evidence Benchbook 3d, Chap. 5; 1 McCormick 5th, §4; Rutter Group, 1 Civil Trials and Evidence §1:247 et seq.; on order of proof, see *infra*, §§44 et seq., 76.)

(9) *Preparation for Cross-Examination.* (See C.E.B., 1 Civ. Proc. During Trial 3d, §11.82 et seq.; 1 McCormick

5th, Chap. 4.)

(10) *Preparation for Discovery and Pretrial Conference.* (See C.E.B., 1 Civ. Proc. During Trial 3d, §3.15 [deposition databases], Chap. 6; C.E.B., 2 Civ. Proc. Before Trial 3d, Chap. 12; Rutter Group, 1 Civil Trials and Evidence, Chap. 4 [final chamber conference]; on discovery, see 2 *Cal. Evidence (4th)*, *Discovery*, §1 et seq.; on pretrial conference, see 7 *Cal. Proc. (4th)*, *Trial*, §52 et seq.)

(11) *Preparation for Selection of Jury.* (See C.E.B., 1 Civ. Proc. During Trial 3d, Chap. 8; Rutter Group, 1 Civil Trials and Evidence §5:112 et seq.; on selection of jury, see 7 *Cal. Proc. (4th)*, *Trial*, §137 et seq.; on preparation of jury instructions, see 7 *Cal. Proc. (4th)*, *Trial*, §268 et seq.)

(12) *Preparation for Particular Actions.* (See Am.Jur. Trials, Vol. 7 et seq.; Am.Jur. Proof of Facts, covering many types of actions; C.E.B., Condemnation Practice 2d; for full discussion of all aspects of plaintiff's negligence case, see Rutter Group, 1 Personal Injury, Chaps. 1-3; for discussion of all important actions under an alphabetical classification, see Schweitzer 2d, Vols. 3 and 4; and see also 1 Schweitzer 2d, §9 et seq. [admiralty, FELA cases]; 1 Schweitzer 2d, §25 et seq. [ascertaining damages]; 1 Schweitzer 2d, §58 et seq. [negligence cases]; 1 Schweitzer 2d, §107 et seq. [death actions]; for anatomical guide, see 4 Lane, Medical Litigation Guide, Table of Anatomical Drawings; for medical glossary, see 4 Lane, Medical Litigation Guide, Glossary; for damage verdicts, see 5 and 5A Schweitzer, Dollar Verdicts (Rev.); on ascertaining local rules and practices, see Rutter Group, 1 Civil Trials and Evidence §1:3 et seq. and 2 Personal Injury §8:2 et seq.)

(13) *Trial Briefs and Memoranda on Pleadings, Facts and Law.* (See C.E.B., 1 Civ. Proc. During Trial 3d, §3.49 et seq.; Rutter Group, 1 Civil Trials and Evidence §1:331 et seq.; 1 Am.Jur. Trials 269; 5 Am.Jur. Trials 89; 1 Schweitzer 2d, §123.)

(14) *Trial File.* (See C.E.B., 1 Civ. Proc. During Trial 3d, Chap. 3; Rutter Group, 1 Civil Trials and Evidence §1:305 et seq.; 1 Schweitzer 2d, §124 et seq.)

(15) *Settlement of Cases.* (See 4 Am.Jur. Trials 289, 379, 411; Cal. Civil Practice, 3 Procedure, Chap. 27.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Preparation in General.* See 1 McCormick 6th, Chap. 1.(3) *The Ordinary Witness: Interviews and Discussions.* See 1 McCormick 6th, Chaps. 2, 3.

(6) *Preparation of Demonstrative Evidence.* See 2 McCormick 6th, Chap. 21.

(7) *Preparation of Documentary Evidence.* See 2 McCormick 6th, Chaps. 22, 23.

(8) *Planning Order of Proof.* See 1 McCormick 6th, §4.

(9) *Preparation for Cross-Examination.* See 1 McCormick 6th, Chap. 4.(15) *Settlement of Cases.* See Cal. Civil Practice, 4 Procedure, Chap. 27.



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## CHAPTER XI - Presentation At Trial

### II. BASIC EVIDENTIARY RIGHTS

#### A. Party's Right To Present Evidence.

##### 1. Civil Cases.

#### 3 Witkin Cal. Evid. Presentation § 3

#### [§ 3] Civil Cases.

(1) *General Rule.* One of the elements of a fair trial is the right to offer relevant and competent evidence on a material issue. Subject to such obvious qualifications as the court's power to restrict cumulative and rebuttal evidence (*infra*, §67 et seq.), and to exclude unduly prejudicial matter (1 *Cal. Evidence* (4th), *Circumstantial Evidence*, §132 et seq.), denial of this fundamental right is almost always considered reversible error. (See *Guardianship of Waite* (1939) 14 C.2d 727, 730, 97 P.2d 238 ["the right of a party to testify in his own behalf is fundamental"]; *Kelly v. New West Fed. Savings* (1996) 49 C.A.4th 659, 677, 56 C.R.2d 803 [exclusion of all testimony from plaintiffs' expert witness, which precluded plaintiffs from offering testimony to prove their case, was reversible per se]; 2 *Cal. Proc.* (4th), *Jurisdiction*, §299; 9 *Cal. Proc.* (4th), *Appeal*, §§439, 449.) (On right of prisoner, who is defendant in civil case, to appear and testify where his or her testimony is necessary for due process, see *Payne v. Superior Court* (1976) 17 C.3d 908, 925, 132 C.R. 405, 553 P.2d 565, 1 *Cal. Proc.* (4th), *Attorneys*, §75.)

In *Caldwell v. Caldwell* (1962) 204 C.A.2d 819, 22 C.R. 854, plaintiff wife, with custody of children under a divorce decree, made a motion to increase the support award for a change in schools, and her counsel called her as a witness to testify to the child's needs. The judge said, "I understand she is just going to testify as to cause for more money," refused to hear her, and denied the motion. *Held*, this was reversible error per se. (204 C.A.2d 821; see 9 *Cal. Proc.* (4th), *Appeal*, §449.)

In *Bates v. Stoehr* (1964) 229 C.A.2d 628, 40 C.R. 432, plaintiff recovered judgment against defendant guarantor, after the trial judge had excluded evidence in support of defendant's cross-complaint alleging fraud in inducing the guaranty. The judge's explanation was that in the Joint Pretrial Statement of "Issues," fraud was not mentioned, and that the listing of it under "Contentions" of the parties did not make it an issue. *Held*, reversible error per se. The Pretrial Order included all of the documents, including those labeled "Contentions of Defendants and Cross-Complainants," to be filed under separate cover. Hence, defendant was entitled to introduce evidence on this issue. And, because the judge made an express finding of no fraud, "such error was inherently prejudicial." (229 C.A.2d 633.)

(2) *No Exception for Unpleasant Subject Matter.* Reasons of delicacy or expediency cannot justify denial or unwarranted curtailment of the right. Thus, in *Del Ruth v. Del Ruth* (1946) 75 C.A.2d 638, 171 P.2d 34, involving the former divorce law in which fault was material, plaintiff sued for separate maintenance and defendant cross-complained for divorce. Each desired to show numerous instances of cruelty during more than 10 years before the suit, but the trial judge restricted them to certain specifications selected by him, of acts occurring within 3 1/2 years before the separation. Plaintiff was denied a decree, and appealed. *Held*, the ruling was reversible error. "However distressing and regrettable it may be to have to take evidence as to charges of infidelity, disloyalty, acts of physical violence, name calling, and the



use of profane, obscene and disgusting language, it is not within the discretion of the court to arbitrarily refuse to receive competent, relevant and material evidence." (75 C.A.2d 646.)

Similarly, in *Bole v. Bole* (1946) 76 C.A.2d 344, 172 P.2d 936, also involving the former divorce law, plaintiff wife obtained a divorce on the ground of mental cruelty. (a) Defendant husband subpoenaed his 9-year-old son to testify in rebuttal, but the wife, who had custody, would not produce him, and the court refused to order her to do so. (b) As evidence of cruelty, the wife testified that defendant excluded her mother from their home; defendant's offer of evidence that the mother was immoral and unfit to associate with children was rejected. *Held*, both rulings were erroneous and constituted reversible error. (76 C.A.2d 345.)

(3) *Only Opportunity To Testify is Protected.* *Goldstein v. Goldstein* (1963) 220 C.A.2d 369, 33 C.R. 857, 7 Cal. Proc. (4th), Trial, §172, makes a distinction: The fact that a party is mentally ill and unable to testify on his or her own behalf does not call for a mandatory continuance; in other words, due process protects the opportunity to testify, but does not make a party's capacity to testify a condition to completion of the trial. (220 C.A.2d 371.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *General Rule.* See *Elkins v. Superior Court* (2007) 41 C.4th 1337, 1357, 1359, 63 C.R.3d 483, 163 P.3d 160, citing the text [local court rule requiring parties in marital dissolution matters to present case by written declarations was inconsistent with traditional concept of trial as reflected in Evidence Code and Code of Civil Procedure; parties' right to testify in their own behalf, call witnesses, and proffer admissible evidence is central to their having day in court].



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## CHAPTER XI - Presentation At Trial

### II. BASIC EVIDENTIARY RIGHTS

#### A. Party's Right To Present Evidence.

##### 2. Criminal Cases.

##### a. General Rule.

#### 3 Witkin Cal. Evid. Presentation § 4

#### [§ 4] General Rule.

Denial of the right to present evidence is even more serious in criminal trials, and is almost invariably regarded as reversible error. (See *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 107 S.Ct. 989, 1000, 94 L.Ed.2d 40, 56, *infra*, §6 [criminal defendant has "right to put before a jury evidence that might influence the determination of guilt"]; *People v. Carter* (1957) 48 C.2d 737, 740, 312 P.2d 665, *infra*, §68; *People v. Torres* (1964) 61 C.2d 264, 267, 37 C.R. 889, 391 P.2d 161, 1 Cal. Evidence (4th), *Circumstantial Evidence*, §28; *People v. Schunke* (1934) 140 C.A. 544, 549, 35 P.2d 388 [reversible error to exclude testimony explaining why important alibi witnesses could not conveniently be produced]; cf. *People v. Jones* (1998) 17 C.4th 279, 305, 70 C.R.2d 793, 949 P.2d 890 [by excluding evidence from three witnesses concerning past statements and criminal activity by defendant's accomplice, trial judge did not deprive defendant of his right to present witnesses but simply precluded him from attempting to prove third-party culpability with time-consuming hearsay and not particularly probative character evidence].) (On right to compulsory process, see *infra*, §5 et seq.; on defendant's right to testify, see *infra*, §11; on defendant's right to have favorable evidence produced before a grand jury, see 1 Cal. Evidence (4th), *Introduction*, §25; on intimidation causing defense witness to claim privilege, see *infra*, §§9, 10.)

Incidental to the right to present evidence is the right to have it considered. In *People v. Mizer* (1961) 195 C.A.2d 261, 15 C.R. 272, defendant was charged with several sex offenses with a 16-year-old boy. Before trial, defendant's motion to take interrogatories in Texas was granted, and the answers showed that the prosecuting witness had been a troublemaker with a bad reputation for honesty. The parties stipulated to a trial on the preliminary hearing transcript and the interrogatories. However, when the case came to trial, the judge said that he didn't remember the interrogatories, denied a motion to make them part of the trial record, and convicted defendant of the included offense of molesting a child (P.C. 647a, now P.C. 647.6). Thus, by finding defendant not guilty of the more serious charges, the judge indicated that he did not believe the testimony of the prosecuting witness, and, if he had read the omitted matter--which thoroughly impeached the witness--he might well have acquitted the defendant. Describing the result as a "travesty of justice," the court said: "We believe that it is fundamental in our system of jurisprudence that all of a defendant's pertinent evidence should be considered by the trier of fact." (195 C.A.2d 269.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Cornwell* (2005) 37 C.4th 50, 81, 82, 33 C.R.3d 1, 117 P.3d 622 [in capital murder case, trial judge's exclusion of defense expert's testimony on unconscious transference (witness might have seen defendant in area of crime scene at some earlier time, and identified him on that basis) under Ev.C. 352 as more prejudicial or confusing

than probative did not violate defendant's constitutional right to present defense; application of ordinary rules of evidence does not ordinarily infringe this right]; *People v. Thornton* (2007) 41 C.4th 391, 443, 61 C.R.3d 461, 161 P.3d 3 [in penalty phase of capital murder case, exclusion of videotape showing lecture concerning problems of teaching students with learning disabilities did not deny defendant his right to present defense; tape was hearsay not subject to any exception, and ruling did not prevent defendant from presenting evidence consistent with normal rules of evidence through live witnesses who were subject to cross-examination]; *People v. Garcia* (2005) 134 C.A.4th 521, 539, 36 C.R.3d 181 [defendant did not have due process right to present exculpatory hearsay evidence (unidentified bar patron told retired police officer, now deceased, that patron was perpetrator of crimes charged against defendant, and police officer repeated statement to investigating officer) that did not fit any recognized hearsay exception]; *People v. Dixon* (2007) 153 C.A.4th 985, 996, 63 C.R.3d 637 [in robbery prosecution, trial judge did not violate defendant's due process rights in excluding, as unreliable hearsay, statement by codefendant exonerating defendant; "he didn't do it" statement is not inherently reliable in same way "I did it" statement is; relying on *Garcia* and distinguishing *Green v. Georgia* (1979) 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738, 1 Cal. Evidence (4th), Introduction, §27].



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## CHAPTER XI - Presentation At Trial

### II. BASIC EVIDENTIARY RIGHTS

#### A. Party's Right To Present Evidence.

##### 2. Criminal Cases.

##### b. Right to Compulsory Process.

##### 1. Nature of Right.

#### 3 Witkin Cal. Evid. Presentation § 5

#### [§ 5] Nature of Right.

(1) *Due Process Requirement.* The right to compulsory process and the right to present evidence are interconnected elements of due process. This appears from the United States Supreme Court's invalidation of a state statute in *Washington v. Texas* (1967) 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019. The statute provided that persons charged as principals, accomplices, or accessories in the same crime cannot be offered as witnesses for each other, but can be called by the prosecution, and are no longer disqualified if previously tried and acquitted. Defendant W, jealous of his girlfriend's new date, went to her home with F who had a shotgun. Either W or F fired the gun and killed the other boy. F was first tried, convicted and sentenced to 50 years in prison. Then W was tried, and sought to produce F to testify that W tried to prevent him but that F fired the fatal shot. This testimony was excluded and W was convicted. *Held*, reversed.

(a) The Sixth Amendment gives the accused the right "to have compulsory process for obtaining witnesses in his favor." Due process requires counsel, confrontation, speedy and public trial; and compulsory process stands on "no lesser footing." "Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." (87 S.Ct. 1923, 18 L.Ed.2d 1023.)

(b) Although the statute did not deny the right to compel attendance, it made the evidence of certain witnesses inadmissible, under arbitrary categories, permitting testimony where there was a great incentive to perjury (for the prosecution, or for the defendant after acquittal). This was the equivalent of a denial of the right to compulsory process: "The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use." (87 S.Ct. 1925, 18 L.Ed.2d 1025.) (On relationship of Compulsory Process Clause and Due Process Clause, see *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40, *infra*, §6.)

(2) *Testimony Must Be Material and Favorable.* The *Washington* court found a violation of the Sixth Amendment where the testimony excluded was relevant and vital to the defense. (87 S.Ct. 1922, 18 L.Ed.2d 1023.) This circumstance was treated as a requirement for establishing a violation of the constitutional right in *United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 102 S.Ct. 3440, 3446, 73 L.Ed.2d 1193, 1202. The government had deported two illegal aliens, and defendant contended that this act deprived him of the opportunity to interview them as possible witnesses for him at the trial. But he made no showing of what material and favorable evidence they would have given.

*Held*, his constitutional challenge to the indictment was properly denied.

The court said: "Sanctions may be imposed on the Government for deporting witnesses only if the criminal defendant makes a plausible showing that the testimony of the deported witnesses would have been material and favorable to his defense, in ways not merely cumulative to the testimony of available witnesses. In some cases such a showing may be based upon agreed facts, and will be in the nature of a legal argument rather than a submission of additional facts. In other cases the criminal defendant may advance additional facts, either consistent with facts already known to the court or accompanied by a reasonable explanation for their inconsistency with such facts, with a view to persuading the court that the testimony of a deported witness would have been material and favorable to his defense. Because in the latter situation the explanation of materiality is testimonial in nature, and constitutes evidence of the prejudice incurred as a result of the deportation, it should be verified by oath or affirmation of either the defendant or his attorney." (102 S.Ct. 3449, 73 L.Ed.2d 1206.)

Similarly, there are limits on the right to subpoena witnesses. The Constitution "does not authorize the indiscriminate use of the process of the court to call witnesses whose testimony could not possibly be received or which is grossly cumulative." (*People v. Fernandez* (1963) 222 C.A.2d 760, 768, 35 C.R. 370.) In *Fernandez*, defendant attacked the judge's refusal to call 33 witnesses from the county hospital where he had been treated, making no showing as to what testimony he expected. The court said: "Anyone who has had anything to do with the administration of criminal law knows that defendants occasionally express a wish to call many witnesses from all parts of the state who cannot possibly add a single relevant fact to the complex of factors applying to the crime charged; the courts do have inherent power to control the issuance of their own process and they should not permit an abuse of the constitutional right to subpoena witnesses." (222 C.A.2d 769.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Testimony Must Be Material and Favorable.* See *People v. Harris* (2005) 37 C.4th 310, 344, 33 C.R.3d 509, 118 P.3d 545 [in capital murder case, prosecution, by contacting three potential witnesses in another state, did not unconstitutionally interfere with defendant's right to compulsory process; defendant's inability to have witnesses testify was ultimately result of trial judge's exclusion of this evidence, and, in any case, defendant failed to establish that it would have been both material and favorable to him]; *People v. Woods* (2004) 120 C.A.4th 929, 938, 16 C.R.3d 174 [in murder prosecution, defendant was not denied compulsory process right by prosecutor's refusal to complete plea agreement with witness until after defendant's trial, thereby causing witness to rely on privilege against self-incrimination in refusing to testify; as witness thereby became unavailable, his out-of-court statements were admitted, and thus defendant had opportunity to present his version of facts]. *West's Key Number Digest*, Witnesses k.2 et seq.



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#### A. Party's Right To Present Evidence.

##### 2. Criminal Cases.

##### b. Right to Compulsory Process.

#### 2. Right To Discover Privileged or Protected Material.

##### aa. In Camera Review.

### 3 *Witkin Cal. Evid. Presentation § 6*

#### [§ 6] In Camera Review.

(1) *Confidential Records*. In *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40, defendant was charged with committing various sexual offenses against his 13-year-old daughter. He sought to discover records concerning his daughter kept by CYS, a state protective service agency charged with investigating cases of suspected mistreatment and neglect. The statute made the records confidential, with specified exceptions including disclosure pursuant to court order. The trial judge, without reviewing the entire agency record, denied defendant's request, and he was convicted. *Held*, reversed.

(a) "This Court has had little occasion to discuss the contours of the Compulsory Process Clause." However: "Our cases establish, at a minimum, that criminal defendants have the right to the Government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt." (107 S.Ct. 1000, 94 L.Ed.2d 56.)

(b) "This Court has never squarely held that the Compulsory Process Clause guarantees the right to discover the identity of witnesses, or to require the Government to produce exculpatory evidence. ... Instead, the Court traditionally has evaluated claims such as those raised by *Ritchie* under the broader protections of the Due Process Clause of the Fourteenth Amendment. ... Although we conclude that compulsory process provides no *greater* protections in this area than those afforded by due process, we need not decide today whether and how the guarantees of the Compulsory Process Clause differ from those of the Fourteenth Amendment. It is enough to conclude that on these facts, *Ritchie's* claims more properly are considered by reference to due process." (107 S.Ct. 1001, 94 L.Ed.2d 57.)

(c) The government has the obligation to turn over evidence in its possession that is both favorable to the defendant and material to guilt or punishment. And, although the public interest in protecting the type of sensitive information in these records is strong, disclosure of information therein that is determined by a court to be material to defendant's defense is neither precluded by the statute nor opposed to any apparent state policy. Hence, defendant is entitled to have the CYS file reviewed by the trial judge to determine whether it contains information that probably would have changed the outcome of his trial. If it does, he must be given a new trial. If the records contain no such information, or if nondisclosure was harmless beyond a reasonable doubt, the lower court will be free to reinstate the prior conviction. (107 S.Ct. 1001, 94 L.Ed.2d 55.)

(d) Defendant may not require the trial judge to search through the files without first making some plausible showing that they contain material evidence. Although the obligation to disclose exculpatory material does not depend on the presence of a specific request, the degree of specificity of defendant's request may have a bearing on the trial judge's assessment on remand of the materiality of the nondisclosure. (107 S.Ct. 1002, 94 L.Ed.2d 58, footnote 15.)

(e) A defendant's right to discover exculpatory evidence does not include the unsupervised authority to search through the files, and defense counsel has no constitutional right to conduct his own search of the files to argue relevance. Defendant's interest, as well as that of the state, can be protected fully by requiring that the files be submitted only to the trial court for in camera review. Although this denies defendant the benefits of an "advocate's eye," the trial judge's discretion is not unbounded. If a defendant is aware of specific information contained in the file, he may request it directly from the judge, and argue in favor of its materiality. Moreover, the trial judge has an ongoing duty; information that is deemed immaterial upon original examination must be released if the judge subsequently determines it to be material to the fairness of the trial. (107 S.Ct. 1002, 94 L.Ed.2d 58.) (See 101 Harv. L. Rev. 128.)

(2) *Privileged Material*. In *Rubio v. Superior Court* (1988) 202 C.A.3d 1343, 249 C.R. 419, defendant was charged with sexual molestation of 7-year-old Brandie S., while living in her home with his mother, the housekeeper. When arrested, defendant told the police about a videotape which depicted Mr. and Mrs. S. engaging in sexual acts. Brandie later told the police that she had seen her father and stepmother in the tape, doing what defendant did to her. Defendant, by subpoena duces tecum, sought production of the videotape at his preliminary hearing. Mr. and Mrs. S. asserted their marital privilege, and the judge granted a motion to quash; he also granted a similar motion after defendant was held to answer. However, at the preliminary hearing Brandie was cross-examined about what she saw on the tape, without objection. The judge's view was that there was no need for discovery of the privileged tape because of the opportunity to cross-examine Brandie at the trial. *Held*, writ granted to compel production of the tape for in camera review by the judge.

(a) The marital privilege extends to written as well as oral communications, and a videotape is a writing within the meaning of *Ev.C. 250*. Hence, although the performance of sex acts was not a privileged communication, the videotape of those acts was. (202 C.A.3d 1347, 1348.) And the parties did not waive the privilege by failing to take more effective steps to secure the tape from other members of the household; they took reasonable steps by secreting it in a closet. (202 C.A.3d 1348.)

(b) *Davis v. Alaska* (1974) 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347, balanced the defendant's constitutional rights of confrontation and cross-examination against the state's interest in protecting the anonymity of juvenile offenders, and found the defendant's rights paramount. And *People v. Reber* (1986) 177 C.A.3d 523, 223 C.R. 139, and *People v. Caplan* (1987) 193 C.A.3d 543, 238 C.R. 478, 2 Cal. Evidence (4th), Witnesses, §235, followed the *Davis* approach. But the present case involves a different situation: Here Mr. and Mrs. S. asserted their constitutional right of privacy in sexual relations between married persons, in addition to their statutory marital privilege. Thus, instead of balancing a defendant's constitutional rights against a statutory privilege, this court must balance two competing federal constitutional rights, both of which are also "inalienable" state constitutional rights. (202 C.A.3d 1349.)

(c) *People v. Boyette* (1988) 201 C.A.3d 1527, 247 C.R. 795, 2 Cal. Evidence (4th), Witnesses, §44, adopting the analysis of *Pennsylvania v. Ritchie*, *supra*, held that an in camera review was necessary; and these cases indicate that a pretrial in camera review of the videotape should be ordered. "There is no way to balance those competing rights without viewing the tape itself." (202 C.A.3d 1350.)

(d) As a practical matter, the judge might consider the appointment of a medical doctor to review the tape, provide a written report to the parties, and be available to give expert testimony. "But any such remedy should be considered only after the trial court has made a preliminary determination, after in camera review, that some disclosure is required." (202 C.A.3d 1351.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Confidential Records*. *Ev.C. 1045(b)(1)* (5 *Cal. Crim. Law* (3d), *Criminal Trial*, §59), which precludes a criminal defendant's discovery of citizen complaints that were filed more than 5 years before the defendant's criminal act, is not unconstitutional on its face, but it is not an absolute bar to disclosure. A trial judge who, after in camera review, finds such a complaint to be exculpatory may order its disclosure notwithstanding the statutory limitation. (*Los Angeles v. Superior Court (Brandon)* (2002) 29 *C.4th* 1, 12, 14, 124 *C.R.2d* 202, 52 *P.3d* 129, 5 *Cal. Crim. Law* (3d), *Criminal Trial*, Supp., §59, relying on *Pennsylvania v. Ritchie* (1987) 480 *U.S.* 39, 107 *S.Ct.* 989, 94 *L.Ed.2d* 40, text, p. 33.) *West's Key Number Digest*, Criminal Law k.662.4 et seq.





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#### 2. Right To Discover Privileged or Protected Material.

##### bb. Limitations on Right.

### 3 Witkin Cal. Evid. Presentation § 7

[§ 7] Limitations on Right.

In *People v. Hammon* (1997) 15 C.4th 1117, 1123, 65 C.R.2d 1, 938 P.2d 986, 2 Cal. Evidence (4th), Witnesses, §235, the California Supreme Court disapproved *People v. Reber* (1986) 177 C.A.3d 523, 223 C.R. 139, *People v. Caplan* (1987) 193 C.A.3d 543, 238 C.R. 478, and *People v. Boyette* (1988) 201 C.A.3d 1527, 247 C.R. 795, supra, §6, to the extent they held that the constitutional right of confrontation required *pretrial* disclosure of information protected by the psychotherapist-patient privilege when the defendant's need for the information outweighed the patient's interest in confidentiality.

Other cases involving limitations on the defendant's right to compel production of privileged material include:

*People v. Webb* (1993) 6 C.4th 494, 517, 24 C.R.2d 779, 862 P.2d 779 [limitation of defendant's discovery of psychiatric records of prosecution witness to sanitized excerpt did not undermine his right to cross-examine witness effectively at trial; citing *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40, supra, §6].

*People v. Marshall* (1996) 13 C.4th 799, 841, 842, 55 C.R.2d 347, 919 P.2d 1280 [any error in denying defendant's request for Department of Corrections psychiatric evaluations of witness who testified defendant had admitted his guilt to him was harmless; witness' drug-induced "fantasy" state occurred several years before defendant's alleged confession, witness himself admitted mental problems, and his credibility was extensively impeached].

*Nielsen v. Superior Court* (1997) 55 C.A.4th 1150, 1156, 64 C.R.2d 566 [murder defendant's confrontation right did not require codefendant to turn his psychiatric records over to defendant; codefendant was not prosecution witness, and possibility that codefendant would even testify was speculative at this point].

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Gurule* (2002) 28 C.4th 557, 593, 123 C.R.2d 345, 51 P.3d 224 [following *People v. Hammon* (1997) 15 C.4th 1117, 65 C.R.2d 1, 938 P.2d 986, text, p. 36].



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#### 3. Validity of Precluding Testimony as Discovery Sanction.

#### 3 *Witkin Cal. Evid. Presentation § 8*

#### [§ 8] Validity of Precluding Testimony as Discovery Sanction.

(1) *Preclusion of Surprise Witness' Testimony.* In *Taylor v. Illinois* (1988) 484 U.S. 400, 108 S.Ct. 646, 98 L.Ed.2d 798, defendant was charged in an Illinois court with attempted murder, and the prosecutor filed a discovery motion requesting a list of defense witnesses. Defense counsel identified some, but on the second day of trial, after the prosecution's two principal witnesses had completed their testimony, counsel made an oral motion to include Wormley, on a representation that he was a witness to the incident. Counsel acknowledged that defendant had told him about Wormley at an earlier time but said he had been unable to locate him. Wormley was produced, and in response to the judge's questions it appeared that he had not been a witness but had first met the defendant over 2 years after the incident. Because this testimony directly contradicted defense counsel's representations, the court concluded that the appropriate sanction for the discovery violation was to exclude his testimony. *Held*, the sanction was proper.

(a) The state's contention that the Compulsory Process Clause is not implicated by preclusion as a discovery sanction is untenable: "The right to compel a witness' presence in the courtroom could not protect the integrity of the adversary process if it did not embrace the right to have the witness' testimony heard by the trier of fact." (108 S.Ct. 652, 98 L.Ed.2d 810.)

(b) Defendant's claim that the Clause creates an absolute bar to preclusion of the testimony of a surprise witness is equally untenable: "The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence. The Compulsory Process Clause provides him with an effective weapon, but it is a weapon that cannot be used irresponsibly." (108 S.Ct. 653, 98 L.Ed.2d 811.) And the principle that undergirds the defendant's right to present exculpatory evidence is also the source of essential limitations on the right, such as a rule providing for pretrial discovery of witnesses. (108 S.Ct. 653, 98 L.Ed.2d 811.)

(c) Defendant also contended that the sanction of preclusion of the testimony of a previously undisclosed witness is so drastic that it should never be imposed. But there are instances in which alternative sanctions would be inadequate: "If a pattern of discovery violations is explicable only on the assumption that the violations were designed to conceal a plan to present fabricated testimony, it would be entirely appropriate to exclude the tainted evidence regardless of whether other sanctions would also be merited." (108 S.Ct. 655, 98 L.Ed.2d 814.)

(d) Defendant's argument that the judge's voir dire examination of Wormley adequately protected the prosecution from any possible prejudice is not persuasive: "Regardless of whether prejudice to the prosecution could have been

avoided in this particular case, it is plain that the case fits into the category of willful misconduct in which the severest sanction is appropriate. After all, the court, as well as the prosecutor, has a vital interest in protecting the trial process from the pollution of perjured testimony." (108 S.Ct. 656, 98 L.Ed.2d 815.)

(e) The final argument, that defendant should not be held responsible for his lawyer's misconduct, "strikes at the heart of the attorney-client relationship." "[G]iven the protections afforded by the attorney-client privilege and the fact that extreme cases may involve unscrupulous conduct by both the client and the lawyer, it would be highly impracticable to require an investigation into their relative responsibilities before applying the sanction of preclusion. In responding to discovery, the client has a duty to be candid and forthcoming with the lawyer, and when the lawyer responds, he or she speaks for the client. Putting to one side the exceptional cases in which counsel is ineffective, the client must accept the consequences of the lawyer's decision to forego cross-examination, to decide not to put certain witnesses on the stand, or to decide not to disclose the identity of certain witnesses in advance of trial. In this case petitioner has no greater right to disavow his lawyer's decision to conceal Wormley's identity until after the trial commenced than he has to disavow the decision to refrain from adducing testimony from the eyewitnesses who were identified in the Answer to Discovery. Whenever a lawyer makes use of the sword provided by the Compulsory Process Clause, there is some risk that he may wound his own client." (108 S.Ct. 657, 98 L.Ed.2d 816.)

Three justices dissented. (See 102 Harv. L. Rev. 143; 25 San Diego L. Rev. 1113.)

(2) *Preclusion of Evidence After Failure To Comply With Notice Requirements.* The view that the Sixth Amendment does not prohibit the preclusion of evidence as a sanction for a discovery violation was reaffirmed in *Michigan v. Lucas* (1991) 500 U.S. 145, 111 S.Ct. 1743, 114 L.Ed.2d 205. In a prosecution for criminal sexual conduct, defendant failed to give advance notice of his intention to present evidence of the victim's past sexual conduct, as required by Michigan's rape-shield statute. The statute provided that in order to introduce such evidence a defendant must file a written motion and offer of proof within 10 days of his arraignment. The trial court denied a defense motion at the start of trial for permission to introduce evidence of the past sexual relationship between the victim and defendant. Defendant was convicted, but the Michigan Court of Appeals reversed on the ground the statutory notice-and-hearing requirement violated the Sixth Amendment when used to preclude evidence of past sexual conduct between a rape victim and a criminal defendant. *Held*, the Sixth Amendment is not so rigid.

(a) In *Taylor v. Illinois*, *supra*, the argument that preclusion as a discovery sanction violates the Compulsory Process Clause of the Sixth Amendment was rejected, and it was explicitly stated that there are circumstances in which preclusion is justified, although alternative sanctions are adequate and appropriate in most cases. (111 S.Ct. 1748, 114 L.Ed.2d 214.)

(b) The Michigan court erred in adopting a *per se* rule against preclusion of evidence of past sexual conduct between a rape victim and a defendant. Michigan's statutory notice-and-hearing requirement served legitimate state interests in protecting against surprise, harassment, and undue delay, and failure to comply with it might in some cases justify the severe sanction of preclusion. The propriety of the preclusion in this case was for the state court to consider on remand. (111 S.Ct. 1748, 114 L.Ed.2d 214.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### c. Impermissible Intimidation of Defense Witness.

##### 1. Causing Witness To Claim Privilege.

### 3 Witkin Cal. Evid. Presentation § 9

#### [§ 9] Causing Witness To Claim Privilege.

(1) *Threat by Judge.* In *Webb v. Texas* (1972) 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330, the trial judge, during a recess, warned a prospective defense witness, already serving a prison sentence, of the dangers of perjury and of the judge's intention to see that he would be indicted and probably convicted if he lied. He also added that the witness owed no duty to testify. *Held*, the threatening remarks "could well have exerted such duress on the witness' mind as to preclude him from making a free and voluntary choice whether or not to testify." (93 S.Ct. 353, 34 L.Ed.2d 333.) (See 88 A.L.R.4th 388 [judge's admonitions to potential defense witness against perjury, inducing refusal to testify, as prejudicial error].)

(2) *Threat by Prosecutor.* California courts have made similar holdings on threats by prosecutors. (See 88 A.L.R.4th 388 [threats to prosecute potential defense witness, inducing refusal to testify, as prejudicial error].) *In re Martin* (1987) 44 C.3d 1, 241 C.R. 263, 744 P.2d 374, holds that defendant, convicted of second degree murder on testimony of the actual killer, was entitled to vacation of the judgment where the prosecution interfered with his right to present testimony.

(a) *Right to compulsory process.* The right to compulsory process is a fundamental element of constitutional due process of law. (44 C.3d 29, quoting *Washington v. Texas* (1967) 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019, *supra*, §5.) The forms of prosecutorial misconduct that violate the right are many and varied, including statements to defense witnesses to the effect that they would be prosecuted for any crimes they reveal or commit in the course of their testimony, statements warning that they would suffer untoward consequences in other cases if they were to testify for the defense, and arresting a defense witness before he or other defense witnesses have given their testimony. (44 C.3d 30, citing *People v. Bryant* (1984) 157 C.A.3d 582, 203 C.R. 733, *infra*, §10, *People v. Warren* (1984) 161 C.A.3d 961, 207 C.R. 912, *infra*, §10, and federal cases.)

#### (b) *Showing necessary to establish violation.*

(1) The defendant is not required to show that the government acted in bad faith or with improper motives; he need only show that the agent "engaged in activity that was wholly unnecessary to the proper performance of his duties and of such a character as 'to transform [a defense witness] from a willing witness to one who would refuse to testify.' " (44 C.3d 31.)

(2) The defendant must also demonstrate interference, i.e., a causal link between the misconduct and his inability to present witnesses on his own behalf. It is enough, however, to show that the conduct was a substantial cause; and it may be deemed a substantial cause if it carries significant coercive force and is soon followed by the witness' refusal to testify. (44 C.3d 31.)

(c) *Demonstration of materiality*. "Under California law he must show at least a reasonable possibility that the witness could have given testimony that would have been both material and favorable." (44 C.3d 32.)

The court, on an elaborate independent review of the findings of its appointed referee, concluded that the defendant carried his burden of showing a violation of his constitutional right. (44 C.3d 32, 51.) (See *People v. Lucas* (1995) 12 C.4th 415, 457, 458, 48 C.R.2d 525, 907 P.2d 373 [trial judge initiated inquiry into witnesses' possible exercise of privilege; prosecutor merely supplied information regarding offenses in which witnesses might be implicated; distinguishing *Martin*].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Threat by Prosecutor*. See *People v. Kennedy* (2005) 36 C.4th 595, 632, 31 C.R.3d 160, 115 P.3d 472 [in penalty phase of capital murder case, prosecutor did not violate defendant's right to compulsory process by arresting potential defense witness, thereby causing him to assert privilege against self-incrimination, where defendant could not show that witness' testimony would have been both material and favorable].



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#### c. Impermissible Intimidation of Defense Witness.

##### 2. Harmless or Reversible Error.

### 3 Witkin Cal. Evid. Presentation § 10

#### [§ 10] Harmless or Reversible Error.

(1) *Harmless Error*. In *People v. Robinson* (1983) 144 C.A.3d 962, 193 C.R. 92, defense counsel called his witness and, out of the presence of the jury, advised her of her privilege against self-incrimination, and of the possibility that her testimony might be used against her. The prosecutor, however, in cross-examination, added the following: "As a representative of the District Attorney's Office, I need to advise you that charges ... will be filed, should you take the stand." The court then suggested that she consult the public defender, and, after she had done so, she refused to give further testimony. *Held*, the prosecutor's warning was an improper threat that resulted in depriving the defendant of the testimony of this witness; but, under the circumstances (identical testimony given by another witness), the error was harmless beyond a reasonable doubt. (144 C.A.3d 970, 972.)

(2) *Reversible Error*. In *People v. Bryant* (1984) 157 C.A.3d 582, 203 C.R. 733, during a probation revocation hearing, defense witness Harris was called to the stand, and the prosecutor said: "I am personally prosecuting Mr. Harris for perjury when he, in my opinion, lied at the preliminary hearing" about the same facts. Harris was sworn, and the prosecutor stated that if he testified in the same way again, he would be facing another count of perjury. *Held*, the prosecutor's statements were intimidating and effectively deprived defendant of the witness' testimony. Differing with *Robinson, supra*, the court declared that the loss of Harris' testimony was a violation of due process and could not be treated as harmless error. (157 C.A.3d 593, 594.)

*People v. Warren* (1984) 161 C.A.3d 961, 207 C.R. 912, reviews the leading cases and principles and strongly supports the view that the error is subject to the *Chapman* test of reversible error (see 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence*, §384). Defendant, charged with unlawful taking of a vehicle, intended to call Gamer as his key witness, to testify that he, not defendant, had stolen the vehicle. At the outset of the defense, the judge conducted a voir dire examination of Gamer, advising him at length of his self-incrimination privilege, and his right to be represented by an attorney. The prosecutor then examined Gamer, pointing out that he was in the custody of the Youth Authority, and that the authorities had taken his fingerprints from the stolen vehicles, and that if he admitted the crime, the district attorney would be likely to prosecute him. The prosecutor then summed up: "You can testify or not. If you take the 5th right now, you go back to Y.A. and God bless you. If you start testifying, he asks you questions about this crime, I ask you questions about the crime, and we are going to use everything against you we have got." The witness replied: "I am taking the 5th right now then." *Held*, this conduct amounted to impermissible intimidation.

(a) *Proper admonition by trial judge*. When a trial court has reason to believe that a witness may be charged with a

crime arising out of events to which he might testify, the court has a duty to insure that the witness is fully advised of his privilege against self-incrimination (see 2 *Cal. Evidence (4th)*, *Witnesses*, §498). If the court elects to discharge this duty itself rather than to appoint an attorney to do so, "the court must walk the fine line between, on the one hand, fully advising the witness of the danger of self-incrimination and the right not to testify, and, on the other hand, threatening the witness to an extent which materially impairs the defendant's due process right to present witnesses in his defense." (161 *C.A.3d* 972.) Here, the witness was confused about his obligation to testify and his right to remain silent, and the judge, with no coercion or mention of perjury penalties, adequately advised him of his rights. (161 *C.A.3d* 972.)

(b) *Improper intimidation by prosecutor*. The threats were similar to those condemned in *People v. Robinson, supra*, and this case "illustrates the almost inherently coercive effect of a prosecutor's advising a defense witness of the privilege." "The only respect in which a prosecutor may arguably be better situated than others to provide such advice is that his office actually makes the decision to prosecute. But it is this very power that infects a prosecutorial admonition of the right of a defense witness not to testify with a perilous potential for improper intimidation; and this is so regardless of the propriety in fact of the prosecutor's motives. ... Accordingly, we hold that, in this situation, a trial judge should recommend that the witness seek advice from separate counsel or, if appropriate, appoint counsel to render such advice. Often, the public defender or regularly appointed private counsel is readily available to undertake such an assignment so that the trial would not be unnecessarily delayed by such a procedure." (161 *C.A.3d* 974.)

(c) *Reversible error*. The *Bryant* view of reversible error is preferable to that of *Robinson*, but it is not necessary to determine whether the error is reversible per se; it is clearly reversible under the *Chapman* test (cannot conclude that it was harmless beyond reasonable doubt). Although another witness did testify to what Gamer had told her, and the prosecution had waived the hearsay objection to such testimony, Gamer's testimony against his own interest would have carried far more weight. (161 *C.A.3d* 974, 975.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Harmless Error*. See *People v. DePriest* (2007) 42 *C.4th* 1, 55, 63 *C.R.3d* 896, 163 *P.3d* 896 [even if detective manipulated and antagonized defendant's mother and cousin while interviewing them, defendant could not establish that he was deprived of material beneficial evidence; mother testified in his favor, and cousin, who did not testify, appeared disgusted about defendant's crimes and reluctant to help him]. (2) *Reversible Error*. See *People v. Woods* (2006) 146 *C.A.4th* 106, 120, 53 *C.R.3d* 7 [in prosecution for cocaine-related offenses, prosecutor violated defendant's right to compulsory process, where she conditioned potential defense witness' plea agreement on his promise not to testify for defendant, and then threatened to make her best effort to withdraw agreement and proceed to trial against him if he did so].



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## CHAPTER XI - Presentation At Trial

### II. BASIC EVIDENTIARY RIGHTS

#### A. Party's Right To Present Evidence.

##### 2. Criminal Cases.

##### d. Defendant's Right To Testify.

#### 3 *Witkin Cal. Evid. Presentation § 11*

#### [§ 11] Defendant's Right To Testify.

A defendant's right to silence at his or her trial has long been established. (See 2 *Cal. Evidence (4th)*, *Witnesses*, §355 et seq.; 5 *Cal. Crim. Law (3d)*, *Criminal Trial*, §658.) The defendant's right to testify in his or her own behalf, however, has received less attention.

In *People v. Mosqueda (1970) 5 C.A.3d 540, 545, 85 C.R. 346*, the court said that a defendant's right to testify is merely one of many rights guaranteed by the Fourteenth Amendment to insure a fair trial: "Like the right to produce evidence and to confront and cross-examine adverse witnesses, it must be exercised with caution and good judgment, and with the advice and under the direction of competent trial counsel. It necessarily follows that a trial judge may safely assume that a defendant, who is ably represented and who does not testify is merely exercising his Fifth Amendment privilege against self-incrimination and is abiding by his counsel's trial strategy; otherwise, the judge would have to conduct a law seminar prior to every criminal trial." Accordingly, no express waiver was necessary to show that defendant had given up his right to testify; the question, "if anything, involves the issue of adequate representation by counsel." (5 *C.A.3d* 545.)

*People v. Robles (1970) 2 C.3d 205, 214, 85 C.R. 166, 466 P.2d 710*, dealt with a different aspect of the problem. Counsel, on appeal, contended that the trial judge erred in allowing defendant to testify over his own trial attorneys' objections. *Held*, no error; the attorney's power to control court proceedings may not be exercised to deprive a defendant of fundamental rights: "[T]he right to testify in one's own behalf is of such fundamental importance that a defendant who timely demands to take the stand contrary to the advice given by his counsel has the right to give an exposition of his defense before a jury. ... The defendant's insistence upon testifying may in the final analysis be harmful to his case, but the right is of such importance that every defendant should have it in a criminal case. Although normally the decision whether a defendant should testify is within the competence of the trial attorney ... , where, as here, a defendant insists that he wants to testify, he cannot be deprived of that opportunity." (2 *C.3d* 214.) (See also *People v. Blye (1965) 233 C.A.2d 143, 149, 43 C.R. 231, 5 Cal. Crim. Law (3d)*, *Criminal Trial*, §246 [on timely demand to take stand contrary to his attorney's advice, defendant has right to give exposition of his defense before jury]; 3 *Hastings Const. L. Q.* 517 [defense counsel's unilateral waiver of defendant's right to testify].) (On striking defendant's testimony when he claims privilege on cross-examination, see *People v. Reynolds (1984) 152 C.A.3d 42, 199 C.R. 379, infra*, §228.) (See 90 *A.L.R.4th* 586 [necessity that waiver of right to testify be on record].)

A state statute that requires a defendant who wishes to take the stand to do so before calling other defense witnesses is an impermissible restriction on the defendant's rights against self-incrimination and an infringement on his or her due



process rights. (See *Brooks v. Tennessee* (1972) 406 U.S. 605, 92 S.Ct. 1891, 32 L.Ed.2d 358, 2 Cal. Evidence (4th), Witnesses, §366.)

In *People v. Vargas* (1987) 195 C.A.3d 1385, 241 C.R. 360, defendant's counsel wanted to call him to the stand at the preliminary hearing, but his client was reluctant, and counsel said: "I don't know whether I have the right to force him to testify as counsel or whether I have to respect his wishes not to put him on the stand." The magistrate then engaged in a lengthy colloquy with defendant which produced vague, equivocal and inconsistent answers, and the magistrate finally declared: "I'm not going to permit you to testify in this case. It seems to me you have not unconditionally waived your right not to incriminate yourself." Defendant was committed, and brought a P.C. 995 motion, contending that he had been denied the right to present an affirmative defense. The superior court granted the motion. *Held*, reversed.

The court said: "Absent a clear waiver of the right to testify and the right against self-incrimination, the magistrate correctly balanced the defendant's rights not to take the stand, not to testify, and not to incriminate himself over his right to an affirmative defense at the preliminary hearing. This is especially true where, as here, the defendant does not show any desire to testify. It was defense counsel, not the defendant, who wanted to present an affirmative defense. Defense counsel could not waive the defendant's rights not to testify and not to incriminate himself." (195 C.A.3d 1395.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Nakahara* (2003) 30 C.4th 705, 717, 134 C.R.2d 223, 68 P.3d 1190 [at penalty phase of capital murder trial, defendant had fundamental right to testify despite counsel's opposition, and trial judge did not err in failing to give him as full an array of advisements regarding self-representation before he testified in narrative form as he would have, had defendant sought to conduct his entire defense]; *People v. Lancaster* (2007) 41 C.4th 50, 100, 58 C.R.3d 608, 158 P.3d 157 [after defendant decided to exercise his right to testify at penalty phase of murder trial, and trial judge urged him to consider his attorney's contrary view, judge was not further required to (a) admonish him about risks of testifying, (b) revisit matter immediately before defendant took stand, (c) hold hearing to explore defendant's disagreement with counsel, or (d) warn him that scope of testimony would be limited].



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## CHAPTER XI - Presentation At Trial

### II. BASIC EVIDENTIARY RIGHTS

#### B. Party's Right to Confrontation.

##### 1. Civil Cases.

##### a. General Rule: Witness Examined in Party's Presence.

#### 3 Witkin Cal. Evid. Presentation § 12

[§ 12] General Rule: Witness Examined in Party's Presence.

"At the trial of an action, a witness can be heard only in the presence and subject to the examination of all the parties to the action if they choose to attend and examine." (*Ev.C. 711.*) (See 85 A.L.R.4th 475 [permissibility of testimony by telephone].)

The principal application of this rule is in criminal cases. (See *infra*, §14 et seq.) Sometimes, however, the problem arises in a civil case, e.g., when the judge in a custody proceeding talks privately with a child in chambers. If this is done with consent of counsel, there is no impropriety, and the information received may be considered in support of the order. (*In re Marriage of S. (1985) 171 C.A.3d 738, 745, 217 C.R. 561* [no denial of right to cross-examine; wife agreed to judge's private interview with child, and judge stated essential contents of interview in memorandum of decision]; *Smith v. Smith (1955) 135 C.A.2d 100, 105, 286 P.2d 1009*; see *In re Mary S. (1986) 186 C.A.3d 414, 420, 230 C.R. 726* [limitation on parent's right of confrontation in dependency proceeding].) Even where there is consent, however, "it would be the part of wisdom for the court to make a record of such interviews ... in order to protect itself against any suspicion of unfairness." (*Morris v. Morris (1953) 121 C.A.2d 707, 709, 264 P.2d 106.*)

Where the private interview with the child is conducted over a party's objection, it is highly improper. (*Jenkins v. Jenkins (1954) 125 C.A.2d 109, 113, 269 P.2d 908.*) In *Jenkins*, however, despite its condemnation of the procedure, the appellate court found no prejudice because the findings contained a recital that the judge made them "solely on the basis of the evidence introduced in open Court." (*125 C.A.2d 113.*)

A conference on legal issues is distinguishable. Thus, in *People v. House (1970) 12 C.A.3d 756, 766, 90 C.R. 831*, defendant complained that he was not personally present during arguments in chambers on admissibility of evidence, including his prior felony convictions. *Held*, chambers conferences where issues of law are discussed by counsel do not require the defendant's personal presence unless he can show that his absence thwarted a fair and just hearing. (*12 C.A.3d 767.*)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Trial k.38



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## CHAPTER XI - Presentation At Trial

### II. BASIC EVIDENTIARY RIGHTS

#### B. Party's Right to Confrontation.

##### 1. Civil Cases.

#### b. Exception: Exclusion of Testimony of Child Witness From Dependency Hearing.

#### 3 Witkin Cal. Evid. Presentation § 13

[§ 13] Exception: Exclusion of Testimony of Child Witness From Dependency Hearing.

*In re Jennifer J.* (1992) 8 C.A.4th 1080, 10 C.R.2d 813, was a juvenile court proceeding to terminate parental rights over two young children. The mother's request for testimony and examination of Jennifer, aged 7, was denied, and the trial judge ordered termination of the rights. (See 10 Summary (9th), *Parent and Child*, §717 et seq.) *Held*, affirmed.

(a) A court may find a child too young to have the capacity to testify (8 C.A.4th 1085, 2 Cal. Evidence (4th), *Witnesses*, §48), or a child can be found "unavailable to testify" if the testimonial process would cause substantial emotional trauma (Ev.C. 240(c)). (8 C.A.4th 1085.) Here, however, there was no suggestion that Jennifer was either too young to give reliable testimony or that she could be determined "unavailable." The judge's refusal was based on his conclusion that requiring her testimony would cause psychological stress and injury, and that the possible benefit derivable from her testimony would not warrant the injury it would cause. (8 C.A.4th 1086.)

(b) The mother relied on *In re Amy M.* (1991) 232 C.A.3d 849, 863, 283 C.R. 788, 10 Summary (9th), *Parent and Child*, Supp., §662, in which an 11-year-old molested child was held competent to testify in a dependency proceeding. (8 C.A.4th 1086; see 2 Cal. Evidence (4th), *Witnesses*, §43.) But the *Amy M.* holding is not controlling: there, the minor's testimony could have assisted in resolving a disputed issue; here the pivotal factual decision was a matter about which the minor had no knowledge, and the resolution of which would not have been aided by her testimony. (8 C.A.4th 1087, 1088.)

(c) "In order to sustain the court's ruling we must conclude that it is within the juvenile court's discretion to exclude the testimony of a child in order to avoid psychological harm to the child, even though that testimony is relevant, the child is competent to testify, and the child is both practically and legally 'available' to testify. We do so conclude." (8 C.A.4th 1088.)

"[W]e are convinced that the juvenile court judge in a proper case may refuse to require the attendance and testimony of the child who is the subject of the litigation. This power derives, we believe, from a recognition of the overriding objective of the dependency hearing--to preserve and promote the best interests of the child. It would be a perversion of the procedure to impose upon it a requirement that the child's testimony *always* be presented, regardless of the trauma resulting to the child therefrom, and regardless of the necessity of such testimony in the resolution of the issues before the court. The refusal of the court to issue process requiring the attendance and testimony of the child should, assuredly, be a decision made only after a careful weighing of the interests involved. ... Where, however, the child's desires and wishes can be directly presented without live testimony, where the issues to be resolved would not be

materially affected by the child's testimony, and where it is shown that the child would be psychologically damaged by being required to testify, we hold the juvenile court judge has the power to exclude such testimony." (8 C.A.4th 1089.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Cross-Reference:* 10 Summary (10th), *Parent and Child*, §680 et seq.

*In re Amy M.:*

*Cross-Reference:* 10 Summary (10th), *Parent and Child*, §578.



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## CHAPTER XI - Presentation At Trial

## II. BASIC EVIDENTIARY RIGHTS

## B. Party's Right to Confrontation.

## 2. Criminal Cases.

## a. General Right to Confrontation.

## 3 Witkin Cal. Evid. Presentation § 14

## [§ 14] General Right to Confrontation.

(1) *Federal Constitution*. The Sixth Amendment guarantees the accused in all criminal prosecutions the right to be confronted with the witnesses against him or her. This guarantee is binding on the states under the Fourteenth Amendment. (See *Pointer v. Texas* (1965) 380 U.S. 400, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923, 926, 5 Cal. Crim. Law (3d), Criminal Trial, §531; *Douglas v. Alabama* (1965) 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934, 5 Cal. Crim. Law (3d), Criminal Trial, §532; *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40, supra, §6; *Coy v. Iowa* (1988) 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857, infra, §16; *Idaho v. Wright* (1990) 497 U.S. 805, 110 S.Ct. 3139, 3152, 111 L.Ed.2d 638, 659; *Maryland v. Craig* (1990) 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666, infra, §17; *Michigan v. Lucas* (1991) 500 U.S. 145, 111 S.Ct. 1743, 114 L.Ed.2d 205, supra, §8; 17 *Hastings Const. L. Q.* 383 [The Supreme Court's Bifurcated Interpretation of the Confrontation Clause]; 35 *U.C.L.A. L. Rev.* 557; 1987 A.S. 829.)

The Confrontation Clause has two purposes: to ensure that the defendant may personally examine or cross-examine the witnesses and to compel the witnesses to stand before the jury so that the jurors have an adequate opportunity to assess their credibility. (*People v. Louis* (1986) 42 C.3d 969, 982, 232 C.R. 110, 728 P.2d 180.)

(2) *California Constitution*. Former Cal. Const., Art. I, §13, which provided safeguards for criminal prosecutions, made no express mention of a right to confrontation. Cal. Const., Art. I, §15, which was adopted in 1974 as the new organic provision for those safeguards, specifically states that a defendant in a criminal cause has the right "to be confronted with the witnesses against the defendant." (See *People v. Louis* (1986) 42 C.3d 969, 982, 232 C.R. 110, 728 P.2d 180.) In *People v. Contreras* (1976) 57 C.A.3d 816, 129 C.R. 397, defendant contended that the 1974 amendment restricted the scope of Ev.C. 1291(a)(2) (see 1 *Cal. Evidence* (4th), Hearsay, §265) in criminal proceedings. *Held*, the 1974 amendment was declaratory of a prior California constitutional right previously incorporated in the due process guarantee of former Cal. Const., Art. I, §13, and of a statutory right from P.C. 686(3) (see 5 *Cal. Crim. Law* (3d), Criminal Trial, §531 et seq.). Decisional law antedating the 1974 amendment is therefore still applicable. (57 C.A.3d 818.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Criminal Law k.662 et seq.



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## CHAPTER XI - Presentation At Trial

### II. BASIC EVIDENTIARY RIGHTS

#### B. Party's Right to Confrontation.

##### 2. Criminal Cases.

#### b. Private Consultation by Judge Prohibited.

##### *3 Witkin Cal. Evid. Presentation § 15*

[§ 15] Private Consultation by Judge Prohibited.

In *People v. Archerd* (1970) 3 C.3d 615, 637, 91 C.R. 397, 477 P.2d 421, defendant was accused of killing three people by insulin injections. The medical data were voluminous, and the trial judge appointed two attorneys to represent defendant. After defendant was convicted and sentenced to death, the judge sought to have the record reflect the necessity of appointment of cocounsel. He stated that he had recently been at a dinner with many medical men and was amazed at the number of people who had been consulted about insulin. The judge discovered this, he explained, "because I, too, had been making inquiries, but I came against a stone wall. Each of them told me, 'I have been consulted by one side or the other and I can't talk to you.' " A defense attorney responded that at another affair, a doctor said the judge had already consulted him. The judge replied, "I wanted to learn something about insulin ... " *Held*, the judge's consultations were error, though harmless in view of the extensive evidence presented on the subject. It would have been proper for the judge to consult textbooks on insulin, because he may take judicial notice of the expertise of the doctors testifying at the trial. However: "[W]e disapprove the action of the trial judge in consulting experts outside of court. While in this instance the facts of the case were not involved, the extrajudicial inquiry by the judge gave no opportunity to counsel to examine or cross-examine the experts with whom he spoke. However lofty the motivation of the judge in his desire to be informed, the interviewing of potential witnesses anywhere but on the witness stand should be avoided." (3 C.3d 638.) (See *People v. Farmer* (1989) 47 C.3d 888, 923, 254 C.R. 508, 765 P.2d 940 [judge may not generally consult experts outside of court, but may ask opinion of colleagues on abstract principles of law].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER XI - Presentation At Trial

### II. BASIC EVIDENTIARY RIGHTS

#### B. Party's Right to Confrontation.

##### 2. Criminal Cases.

#### c. Extent of Right to Face-to-Face Confrontation.

##### 1. When Required.

### 3 Witkin Cal. Evid. Presentation § 16

#### [§ 16] When Required.

(1) *Defendant's Right To See Accusing Witness.* In *Herbert v. Superior Court* (1981) 117 C.A.3d 661, 172 C.R. 850, defendant was charged with sexual crimes against a 5-year-old girl. At the preliminary examination, the child was initially reluctant to testify, and the judge devised a seating arrangement in which defendant was able to hear but not see the child witness. *Held*, this was a denial of his constitutional right of confrontation. The child was the only inculpatory witness presented, and defendant was entitled to see as well as hear her: "The historical concept of the right of confrontation has included the right to see one's accusers face-to-face. ... A witness' reluctance to face the accused may be the product of fabrication rather than fear or embarrassment." (117 C.A.3d 671.) (On propriety of examination of absent witness over closed-circuit television, see 80 A.L.R.3d 1212; on permissible use of closed-circuit television in examination of child sex offense victim, see *infra*, §217 et seq.; on judge's power to relocate persons in courtroom to provide more comfortable setting for child sex offense victim, see *infra*, §212.)

(2) *Defendant's Right To Be Seen by Accusing Witness.* In *Coy v. Iowa* (1988) 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857, an Iowa statute permitted child witnesses in sexual abuse cases to testify either by closed-circuit television or behind a screen placed between the defendant and the witness, which would enable the defendant to perceive the witnesses without the witnesses seeing the defendant. (For similar California statute, see *infra*, §217.) Defendant, convicted of lewd acts with two young girls, contended that use of the screen violated his confrontation right. *Held*, conviction reversed.

(a) Although most of the decisions have involved either admissibility of out-of-court statements or restrictions on cross-examination, the Clause basically guarantees a face-to-face meeting with witnesses appearing before the trier of fact. (108 S.Ct. 2800, 2801, 101 L.Ed.2d 864.) "That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs." (108 S.Ct. 2802, 101 L.Ed.2d 866.)

(b) The right was clearly violated in this case: "The screen at issue was specifically designed to enable the complaining witnesses to avoid viewing appellant as they gave their testimony, and the record indicates that it was successful in this objective. ... It is difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter." (108 S.Ct. 2803, 101 L.Ed.2d 866.)

(c) The state's contention that the confrontation interests are outweighed by the necessity of protecting victims of

sexual abuse is unacceptable.

(1) Past decisions have indicated that rights protected by the Clause are not absolute; but the rights involved in those cases were those *implicit* in the Clause--right to cross-examine, right to exclude out-of-court statements, and right to face-to-face confrontation at some point other than the trial. (108 S.Ct. 2802, 101 L.Ed.2d 866.) The present case involves "the irreducible literal meaning" of the Clause--the right "to meet face to face all those who appear and give evidence at trial." (108 S.Ct. 2803, 101 L.Ed.2d 867, quoting *California v. Green* (1970) 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489, 1 Cal. Evidence (4th), Hearsay, §157.)

(2) "We leave for another day, however, the question whether any exceptions exist. Whatever they may be, they would surely be allowed only when necessary to further an important public policy." (108 S.Ct. 2803, 101 L.Ed.2d 867.) The cases suggest that, even as to exceptions from the normal implications of the Clause, something more than a generalized finding is needed; and the Iowa statute contains "no individualized findings that these particular witnesses needed special protection." (108 S.Ct. 2803, 101 L.Ed.2d 867.)

Two justices dissented, disagreeing with the characterization of "the irreducible literal meaning of the clause," and quoting Wigmore at length to the contrary. (See 102 Harv. L. Rev. 151; 40 Hastings L. J. 437; 23 Loyola L.A. L. Rev. 415; 16 Pepperdine L. Rev. 709; 1988 A.S. 969.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
West's Key Number Digest, Criminal Law k.662.3





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## CHAPTER XI - Presentation At Trial

### II. BASIC EVIDENTIARY RIGHTS

#### B. Party's Right to Confrontation.

##### 2. Criminal Cases.

##### c. Extent of Right to Face-to-Face Confrontation.

#### 2. Exception: Denial of Right Necessary To Further Important Public Policy.

##### 3 *Witkin Cal. Evid. Presentation § 17*

[§ 17] Exception: Denial of Right Necessary To Further Important Public Policy.

The question left unanswered in *Coy v. Iowa* (1988) 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857, supra, §16, i.e., whether there are any exceptions to the requirement of face-to-face confrontation, was answered in the affirmative in *Maryland v. Craig* (1990) 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666. A Maryland statute permitted child witnesses in sexual abuse cases to testify by one-way closed-circuit television. After the trial judge made a preliminary determination, as required by the statute, that courtroom testimony would result in the child's suffering such serious emotional distress that the child could not reasonably communicate, the child, the prosecutor, and defense counsel withdrew to a separate room, where the child was examined and cross-examined while a video monitor displayed his testimony to those in the courtroom. The defendant remained in electronic communication with defense counsel, and objections could be made and ruled on as if the witness were testifying in the courtroom. *Held*, this procedure did not violate the Confrontation Clause.

(a) Decisions upholding exceptions to the hearsay rule have established that the right to face-to-face confrontation, although forming the core of the values furthered by the Confrontation Clause, is not absolute. (110 S.Ct. 3165, 111 L.Ed.2d 681.) However, as suggested in *Coy*, the right to confrontation may be satisfied without face-to-face confrontation only where (1) the denial of such confrontation is necessary to further an important public policy, and (2) the reliability of the testimony is otherwise assured. (110 S.Ct. 3166, 111 L.Ed.2d 682.)

(b) Both requirements were satisfied here. As evidenced by the significant majority of states which have enacted statutes to protect child witnesses from the trauma of giving testimony in child abuse cases, a state's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh a defendant's right to face-to-face confrontation. (110 S.Ct. 3167, 111 L.Ed.2d 683.) Moreover, the Maryland statute preserved all of the other elements of the confrontation right, i.e., competency and testimony under oath, contemporaneous cross-examination, and observation of demeanor by the defendant and the trier of fact. (110 S.Ct. 3166, 111 L.Ed.2d 682.) "We are therefore confident that use of the one-way closed-circuit television procedure, where *necessary* to further an important state interest, does not impinge upon the truth seeking or symbolic purposes of the Confrontation Clause." (110 S.Ct. 3167, 111 L.Ed.2d 682.)

(c) The finding of necessity must be a case-specific one. In each case the trial judge must do the following: (1) hear evidence and determine whether the use of the one-way closed-circuit television procedure is necessary to protect the welfare of the *particular* child involved; (2) find that the child would be traumatized, not by the courtroom generally,

but by the presence of the defendant; and (3) find that the emotional distress suffered by the child in the defendant's presence would be more than de minimis, i.e., more than mere nervousness or excitement or some reluctance to testify. However, it is not necessary to determine the minimum showing of emotional trauma required, because the Maryland statute's requirement of "serious emotional distress such that the child cannot reasonably communicate" clearly meets constitutional standards. (110 S.Ct. 3169, 111 L.Ed.2d 685.)

(d) In reversing defendant's conviction, the Maryland court of appeals held that, under *Coy*, the Maryland statutory procedure could not be utilized until the child had first been questioned *in the defendant's presence* and the trial judge had determined whether the child would be traumatized by testifying via two-way closed-circuit television. Although such requirements could strengthen the grounds for use of protective measures, it is not necessary, as a matter of federal constitutional law, to establish any such categorical evidentiary prerequisites for the use of the one-way television procedure. All that is required is that the trial judge make a case-specific finding of necessity, as was done here on the basis of expert testimony suggesting that the child witnesses, all of whom had attended defendant's kindergarten and pre-kindergarten center, would have considerable difficulty testifying in defendant's presence. (110 S.Ct. 3171, 111 L.Ed.2d 688.)

Four justices dissented on the ground that face-to-face confrontation, being explicitly guaranteed by the Confrontation Clause, could not be lost through an "interest-balancing" analysis. (110 S.Ct. 3171, 111 L.Ed.2d 688.) (See *People v. Sharp* (1994) 29 C.A.4th 1772, 1782, 1783, 36 C.R.2d 117 [prosecutor's questioning of child victim, with child looking away from defense table, did not deprive defendant of confrontation right; following *Maryland v. Craig* and distinguishing and criticizing *Herbert v. Superior Court* (1981) 117 C.A.3d 661, 172 C.R. 850, supra, §16]; 43 *Hastings L. J.* 1259 [*Maryland v. Craig*]; 65 *So. Cal. L. Rev.* 1993 [same]; 16 *J. Juvenile Law* 150 [same].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Williams* (2002) 102 C.A.4th 995, 1006, 125 C.R.2d 884 [in assault prosecution, trial judge did not err in admitting videotape recording of testimony of adult victim on ground that she suffered from physical and mental disabilities and would be traumatized by having to face defendant; relying on *Maryland v. Craig* (1990) 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666, text, p. 50].

(New) *Distinction: Adult victim:* In *People v. Murphy* (2003) 107 C.A.4th 1150, 132 C.R.2d 688, defendant was convicted of oral copulation by force or fear and felony false imprisonment in a trial in which the victim, an adult, was permitted to testify behind a one-way glass. (The jury and defendant could observe the victim, but she could not see them.) *Held*, reversed; use of the one-way glass violated defendant's constitutional right of confrontation. No authority recognizes a compelling state interest in protecting adult victims of sex crimes from further psychological trauma that might result from testifying face-to-face. (107 C.A.4th 1157, distinguishing *Maryland v. Craig*.) Moreover, the trial judge was not relying on the state's interest in protecting adult victims but instead predicated the ruling on the state's interest in ascertaining the truth. The governmental interest in ascertaining the truth "historically and traditionally cuts the other way." (107 C.A.4th 1157.) "In any event, the court in this case consented to the prosecution's request to use the one-way glass without holding an evidentiary hearing to determine whether, and to what degree, the testifying victim's apparent anxiety was due to the defendant's presence rather than, for instance, the witness' general emotional fragility or the trauma of testifying in court or revisiting a past experience the witness would rather not recall. Even assuming that, in an appropriate case, the court might allow a testifying adult victim, who would otherwise be traumatized, to use a one-way screen to avoid seeing a defendant without violating the right of confrontation, we do not think a court may do so without making the necessary factual findings based upon evidence." (107 C.A.4th 1157.)



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## CHAPTER XI - Presentation At Trial

### II. BASIC EVIDENTIARY RIGHTS

#### B. Party's Right to Confrontation.

##### 2. Criminal Cases.

##### c. Extent of Right to Face-to-Face Confrontation.

##### 3. Exception: No Interference With Effective Cross-Examination.

#### 3 Witkin Cal. Evid. Presentation § 18

[§ 18] Exception: No Interference With Effective Cross-Examination.

(1) *Exclusion of Defendant From Witnesses' Competency Hearing.* In *Kentucky v. Stincer* (1987) 482 U.S. 730, 107 S.Ct. 2658, 96 L.Ed.2d 631, defendant was charged with sexually assaulting two young girls. After a jury was sworn, but before presentation of evidence, the court conducted an in-chambers hearing to determine competency of the girls to testify. Defendant was excluded from this hearing. After examination by counsel and the judge concerning the girls' ability to remember basic facts and to distinguish between the truth and a lie, the trial judge found them competent. At trial, the girls were asked the same and similar questions during direct and cross-examination, but defense counsel did not ask the judge to reconsider his finding of competence. *Held*, there was no violation of the Confrontation Clause.

(a) The right to cross-examination, a primary interest secured by the Confrontation Clause, is essentially a "functional" right designed to promote reliability in the truth-finding functions of a criminal trial. The decisions fall into two broad, albeit not exclusive, categories: cases involving the admission of out-of-court statements, e.g., *Ohio v. Roberts* (1980) 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (infra, §21), and cases involving restrictions imposed by law or by the trial court on the scope of cross-examination, e.g., *Davis v. Alaska* (1974) 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (infra, §269). (107 S.Ct. 2662, 96 L.Ed.2d 641.)

(b) Rather than characterizing the competency hearing as a trial or pretrial proceeding, "it is more useful to consider whether excluding the defendant from the hearing interferes with his opportunity for effective cross-examination." (107 S.Ct. 2664, 96 L.Ed.2d 644.) Defendant's exclusion caused no such interference: The two girls appeared in court, testified and were subjected to full and complete cross-examination in defendant's presence. Defense counsel asked questions concerning competence on cross-examination and could have moved the court to reconsider its ruling on competence. (107 S.Ct. 2666, 96 L.Ed.2d 646.)

(2) *Out-of-Court Identification.* In *United States v. Owens* (1988) 484 U.S. 554, 108 S.Ct. 838, 98 L.Ed.2d 951, the Court held that the Confrontation Clause is not violated by the admission of a prior out-of-court identification statement of a witness who is unable, because of memory loss, to explain the basis for the identification.

(a) When a witness *testifies* to his current belief but is unable to recollect the reason for that belief, it is sufficient that the defendant has the opportunity to bring up such matters as bias, lack of care and attentiveness, poor eyesight, and often the very fact of bad memory. "If the ability to inquire into these matters suffices to establish the constitutionally requisite opportunity for cross-examination when a witness testifies as to his current belief, the basis for which he

cannot recall, we see no reason why it should not suffice when the witness's past belief is introduced and he is unable to recollect the reason for that past belief." (108 S.Ct. 842, 98 L.Ed.2d 958.)

(b) The fact that an out-of-court identification would traditionally be categorized as hearsay (see 1 Cal. Evidence (4th), Hearsay, §163) does not call for a different conclusion when, as here, a hearsay declarant is present at trial and subject to unrestricted cross-examination: "We do not think that a constitutional line drawn by the Confrontation Clause falls between a forgetful witness's live testimony that he once believed this defendant to be the perpetrator of the crime, and the introduction of the witness's earlier statement to that effect." (108 S.Ct. 843, 98 L.Ed.2d 959.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Exclusion of Defendant From Witnesses' Competency Hearing.* *Ohio v. Roberts* (1980) 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597, text, p. 52, was overruled in *Crawford v. Washington* (2004) 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177, Supp., infra, §21.(2) *Out-of-Court Identification.* See *People v. Perez* (2000) 82 C.A.4th 760, 765, 766, 98 C.R.2d 522 [applying rule of *United States v. Owens* (1988) 484 U.S. 554, 108 S.Ct. 838, 98 L.Ed.2d 951, text, p. 52, to situation where witness professed complete failure to recollect alleged crime and any previous statements she made, and prosecution then introduced her prior statements describing crime and identifying perpetrators as prior inconsistent statements under *Ev.C. 1235*, text, §338].



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II. BASIC EVIDENTIARY RIGHTS

B. Party's Right to Confrontation.

2. Criminal Cases.

d. Limited Communication by Witness.

3 *Witkin Cal. Evid. Presentation* § 19

[§ 19] Limited Communication by Witness.

In *People v. Tran* (1996) 47 C.A.4th 759, 54 C.R.2d 905, an attempted murder case, one of the victims was rendered quadriplegic and unable to speak by defendant's alleged attack. The victim was found competent to testify, and, over defendant's objections, he did so by tapping once for "yes" and twice for "no." *Held*, affirmed; defendant's right to confront the witnesses against him was not violated by this procedure. Although defense counsel was limited in the type of questions he could pose during cross-examination, the confrontation clause does not guarantee that a defendant "has a constitutional right to ask a particular form of question." (47 C.A.4th 769, 770 [distinguishing *People v. Brock* (1985) 38 C.3d 180, 211 C.R. 122, 695 P.2d 209, 1 Cal. Evidence (4th), Hearsay, §260, where prosecution witness' preliminary hearing testimony, taken while she was terminally ill and under influence of opiates, was held inadmissible].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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CHAPTER XI - Presentation At Trial

II. BASIC EVIDENTIARY RIGHTS

B. Party's Right to Confrontation.

2. Criminal Cases.

e. No Confrontation Right for Discovery.

3 *Witkin Cal. Evid. Presentation § 20*

[§ 20] No Confrontation Right for Discovery.

In *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40, supra, §6, the Court held that denying the defendant's request for discovery of confidential records of a state agency did not violate his constitutional right of confrontation. "[T]he right of confrontation is a *trial* right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination. ... The ability to question adverse witnesses, however, does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony. Normally the right to confront one's accusers is satisfied if defense counsel receives wide latitude at trial to question witnesses. ... In short, the Confrontation Clause only guarantees 'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' " (107 S.Ct. 999, 94 L.Ed.2d 54.) (For holding on Compulsory Process Clause and due process, see supra, §6.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER XI - Presentation At Trial

### II. BASIC EVIDENTIARY RIGHTS

#### B. Party's Right to Confrontation.

##### 2. Criminal Cases.

##### f. Hearsay Rule Distinguished.

#### 3 Witkin Cal. Evid. Presentation § 21

#### [§ 21] Hearsay Rule Distinguished.

The Sixth Amendment right to confrontation must be distinguished from evidentiary restrictions on the use of hearsay evidence. (See *Dutton v. Evans* (1970) 400 U.S. 74, 91 S.Ct. 210, 215, 218, 219, 27 L.Ed.2d 213, 222, 226; *California v. Green* (1970) 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489, 1 Cal. Evidence (4th), Hearsay, §157; *Ohio v. Roberts* (1980) 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597; 85 Harv. L. Rev. 188 [*Dutton v. Evans*]; 85 Harv. L. Rev. 1378 [*Dutton v. Evans* and *California v. Green*]; 45 So. Cal. L. Rev. 1 [same].)

In *Ohio v. Roberts*, the preliminary hearing testimony of an absent witness was introduced at defendant's trial, and he was convicted. On certiorari, the Court made a detailed examination of the relationship between the Confrontation Clause and the hearsay rule, and determined that the introduction of the testimony was constitutionally permissible.

(a) The Confrontation Clause reflects a preference for face-to-face confrontation at trial, with the right of cross-examination, and was intended to exclude some hearsay. (100 S.Ct. 2537, 65 L.Ed.2d 606.) But the competing interests in effective law enforcement and development of precise rules of evidence for criminal proceedings may warrant dispensing with confrontation at trial. (100 S.Ct. 2538, 65 L.Ed.2d 606.)

(b) The Confrontation Clause restricts the range of admissible hearsay by (1) the requirement of proof of the unavailability of the declarant, and (2) the requirement of trustworthiness of the hearsay admitted. The latter requirement calls for adequate "indicia of reliability"; this can be inferred where the evidence falls within an established hearsay exception, but in other cases must be shown. (100 S.Ct. 2539, 65 L.Ed.2d 607, 608.)

(c) The evidence of unavailability--a good-faith effort by the prosecution to obtain the presence of the witness at the trial--was sufficient. (100 S.Ct. 2543, 2544, 65 L.Ed.2d 613.)

(d) The prior testimony at the preliminary hearing bore sufficient "indicia of reliability" under the test of *California v. Green*, *supra*. The *Green* opinion suggests that the opportunity to cross-examine satisfies the *Confrontation Clause*. (100 S.Ct. 2541, 65 L.Ed.2d 610.) In this case, however, there was actual, effective cross-examination. (100 S.Ct. 2541, 2542, 65 L.Ed.2d 611.) "[R]espondent in effect asks us to disassociate preliminary hearing testimony previously subjected to cross-examination from previously cross-examined prior trial testimony, which the Court has deemed generally immune from subsequent confrontation attack. Precedent requires us to decline this invitation." (100 S.Ct. 2542, 65 L.Ed.2d 611.) (See 14 *Hastings Const. L. Q.* 839 [difficulties in applying Confrontation Clause analysis of *Ohio v. Roberts*]; 35 *U.C.L.A. L. Rev.* 557 ["Restoring the Confrontation Clause"; discussing *Roberts* and *United States*]

v. *Inadi* (1986) 475 U.S. 387, 106 S.Ct. 1121, 89 L.Ed.2d 390, infra, this section].)

Numerous cases have discussed the Confrontation Clause and the hearsay rule:

*United States v. Inadi* (1986) 475 U.S. 387, 106 S.Ct. 1121, 1124, 89 L.Ed.2d 390, 396 [prosecution may introduce nontestifying coconspirator's statements without showing of declarant's unavailability; discussing *Ohio v. Roberts*]. (See 21 *Loyola L.A. L. Rev.* 543; 1987 A.S. 829.)

*Idaho v. Wright* (1990) 497 U.S. 805, 110 S.Ct. 3139, 3152, 111 L.Ed.2d 638, 659 [admission under state residual hearsay exception of 3-year-old sexual abuse victim's statements to examining doctor violated Confrontation Clause; applying *Ohio v. Roberts*]. (See 104 *Harv. L. Rev.* 129.)

*Lilly v. Virginia* (1999) 527 U.S. 116, 119 S.Ct. 1887, 1901, 144 L.Ed.2d 117, 136, 1 *Cal. Evidence* (4th), Hearsay, §62 [admission of nontestifying accomplice's entire confession, which contained some statements against accomplice's penal interest and others that inculpated accused, violated accused's right to confrontation].

*People v. Chavez* (1980) 26 C.3d 334, 161 C.R. 762, 605 P.2d 401.

*People v. Mayfield* (1997) 14 C.4th 668, 742, 60 C.R.2d 1, 928 P.2d 485 [admission of shooting victim's preliminary hearing testimony, under hearsay exception for former testimony, did not violate defendant's confrontation rights, even though victim had suffered some memory lapses at hearing; citing *United States v. Owens* (1988) 484 U.S. 554, 108 S.Ct. 838, 98 L.Ed.2d 951, supra, §18].

*People v. Hughey* (1987) 194 C.A.3d 1383, 1389, 240 C.R. 269, 1 *Cal. Evidence* (4th), Hearsay, §176 [prosecution may introduce spontaneous statements without showing declarant's unavailability as witness; discussing *Inadi*].

*People v. Greenberger* (1997) 58 C.A.4th 298, 330, 331, 68 C.R.2d 61, 1 *Cal. Evidence* (4th), Hearsay, §149 [admission of statement with sufficient indicia of reliability to fall within hearsay exception for declaration against penal interest does not violate Confrontation Clause].

*People v. Fuentes* (1998) 61 C.A.4th 956, 967, 72 C.R.2d 237 [following *Greenberger*].

*People v. Duke* (1999) 74 C.A.4th 23, 30, 87 C.R.2d 547 [statements made by nontestifying codefendant to friend, which inculpated defendant and codefendant, were properly admitted; codefendant made statements spontaneously and voluntarily shortly after committing crime and before he was even a suspect, had no apparent motive to lie, and did not attempt to shift blame; distinguishing *Lilly v. Virginia*].

**SUPPLEMENT:** [This section is current through the latest supplement]

In *People v. Sandoval* (2001) 87 C.A.4th 1425, 105 C.R.2d 504, a prosecution of two defendants for murder, attempted robbery, and other crimes, the trial judge admitted the preliminary hearing testimony of a prosecution witness who was now in Mexico. A prosecution investigator had contacted the witness, and the witness had expressed his willingness to attend the trial if he had financial assistance and the prosecution's help in securing a passport and visa. The prosecution made no such efforts, and the trial judge ruled the witness unavailable simply on the basis that he was in another country. Defendants were convicted. *Held*, reversed. Under the present circumstances, *Ohio v. Roberts* (1980) 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597, text, p. 54, imposes two requirements for satisfaction of Confrontation Clause concerns: unavailability and trustworthiness. The issue in this case is unavailability. By a treaty that became effective in 1991, the United States and Mexico have agreed to cooperate in criminal matters, including the prosecution of crimes. (87 C.A.4th 1440.) In light of this and other recent developments, "the prosecution had several reasonable alternatives it could have pursued to obtain Zavala's live testimony at trial. Instead of making a good faith effort to obtain any category of contemporary, live testimony, the prosecution threw up its hands and asserted Zavala was unavailable simply because he was a foreign citizen residing outside of the United States. The confrontation clause ... calls for more. In the context of the opinions of the United States Supreme Court ... the alternatives for obtaining constitutionally



appropriate testimony have expanded and, therefore, the situations in which the confrontation requirement can be avoided have contracted." (87 C.A.4th 1443.) Because of credibility problems with the testimony of other witnesses at the trial, the preliminary hearing testimony of the Mexican witness was crucial, and the denial of defendants' right to confront him cannot be held harmless beyond a reasonable doubt. (87 C.A.4th 1445.) (On overruling of *Roberts*, see *Crawford v. Washington* (2004) 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177.)

The plurality decision in *Lilly v. Virginia* (1999) 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117, text, p. 55, casts doubt on the validity of the holding in *People v. Greenberger* (1997) 58 C.A.4th 298, 68 C.R.2d 61, text, p. 55, that a statement falling within the hearsay exception for declarations against penal interest bears sufficient indicia of trustworthiness to satisfy Confrontation Clause concerns. Commentators have interpreted the *Lilly* opinion in different ways. However, California courts after *Lilly* have continued to assume that a declarant's statement not coming within an exception to the hearsay rule may nevertheless be admissible if it contains particularized guarantees of trustworthiness. (*People v. Schmaus* (2003) 109 C.A.4th 846, 856, 859, 135 C.R.2d 521 [in murder prosecution of three defendants, trial judge erred in admitting tape recording of cellmate of one defendant, in which cellmate stated that defendant told him that he, another defendant, and "another guy" had committed charged murder; regardless of trustworthiness of defendant's alleged statement, there were numerous reasons not to trust cellmate's account of it].)

See *People v. Otto* (2001) 26 C.4th 200, 211, 109 C.R.2d 327, 26 P.3d 1061, 3 Cal. Crim. Law (3d), Punishment, Supp., §200 [Welf.C. 6600(a)(3) (in sexually violent predator proceeding, details of predicate offenses may be proved by multiple hearsay in form of victims' statements contained in presentence report) is constitutional; victims' statements possess sufficient indicia of reliability to satisfy due process right of confrontation]; *Correa v. Superior Court* (2002) 27 C.4th 444, 465, 117 C.R.2d 27, 40 P.3d 739, 1 Cal. Evidence (4th), Hearsay, Supp., §125 [at preliminary hearing in assault case, admission of investigating officers' testimony as to out-of-court statements by victim and witness did not violate defendant's right of cross-examination, even though statements, made in Spanish, had been translated to officers by lay interpreters]; *People v. Eccleston* (2001) 89 C.A.4th 436, 446, 449, 107 C.R.2d 440 [in prosecution for sexual molestation of child under 14 years of age, admission of videotape of statements made by victim under Ev.C. 1360 (1 Cal. Evidence (4th), Hearsay, §171) did not violate defendant's rights of confrontation and cross-examination]; *People v. Roberto V.* (2001) 93 C.A.4th 1350, 1374, 1375, 113 C.R.2d 804, 1 Cal. Evidence (4th), Hearsay, Supp., §171 [in prosecution for sexual molestation of 3-year-old child, admission of victim's out-of-court statements by way of her mother's testimony pursuant to Ev.C. 1360 violated defendant's confrontation right; distinguishing *Eccleston*]; *People v. Duran* (2001) 94 C.A.4th 923, 935, 114 C.R.2d 595 [in prosecution for conspiring to manufacture methamphetamine, codefendant's false statements, which were made when he was apprehended and were intended to conceal his involvement and existence of lab, were made in furtherance of conspiracy, and thus their admission did not violate defendant's confrontation right; following *United States v. Inadi* (1986) 475 U.S. 387, 106 S.Ct. 1121, 89 L.Ed.2d 390, text, p. 55]; *People v. Wheeler* (2003) 105 C.A.4th 1423, 1430, 129 C.R.2d 916 [hearsay exception allowing admission of statements against social interest is firmly enough rooted to satisfy Confrontation Clause concerns]; *People v. Koss* (2003) 108 C.A.4th 514, 523, 524, 133 C.R.2d 520 [in prosecution for attempted murder and assault with firearm, victim's statement, made 1 or 2 days after shooting, identifying defendant as shooter, was improperly admitted under Ev.C. 1370 (statement concerning injury to declarant; see 1 Cal. Evidence (4th), Hearsay, §220); Ev.C. 1370 is not firmly rooted hearsay exception for Confrontation Clause purposes, and particularized guarantees of trustworthiness were lacking].

(New) *Ohio v. Roberts* disapproved: In *Crawford v. Washington*, *supra*, defendant was convicted of assault and attempted murder. Before trial, defendant and his wife had separately given statements to the police. Their accounts were similar; both indicated that the victim might have been reaching for a weapon, but the wife's statements were more ambiguous on this point than defendant's. The trial judge determined that the wife was an unavailable witness because of the state's marital privilege, and he admitted her statements after finding them to be trustworthy under *Ohio v. Roberts*. The conviction was overturned by a state appellate court and then reinstated by the state supreme court. Both courts applied the *Roberts* analysis but reached different conclusions regarding the statements' trustworthiness. *Held*, reversed; admission of the wife's statements violated defendant's confrontation rights.

(a) *Meaning of Confrontation Clause.* The text of the Confrontation Clause does not resolve the scope of its protections. It could be read to apply only to witnesses who actually testify at trial, or only to statements offered at trial, or its meaning could lie somewhere in between. However, the history of the common law, trial practices in the Colonies before the American Revolution, and early court decisions support two inferences about its meaning. First, the Clause was directed primarily at the civil law mode of criminal procedure and particularly at its use of ex parte examinations as evidence against the accused. This leads to the conclusion that the Clause applies to out-of-court statements that the witness might reasonably believe would be available at a later trial. Interrogations by law enforcement officers fall squarely within this class. (124 S.Ct. 1364, 1365, 158 L.Ed.2d 194.) Second, "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify and the defendant had had a prior opportunity for cross-examination." (124 S.Ct. 1365, 158 L.Ed.2d 194.)

(b) *Inadequacy of Roberts test.* The test of *Ohio v. Roberts* leaves the Clause's protections to "the vagaries of the rules of evidence" and "amorphous notions of reliability." (124 S.Ct. 1370, 158 L.Ed.2d 199.) Its biggest vice, however, is that it allows the admission of testimonial statements that the Clause was clearly meant to exclude. Thus, accomplice confessions implicating the accused are routinely admitted, as are other sorts of plainly testimonial statements despite the absence of any opportunity to cross-examine. "The Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we, no less than the state courts, lack authority to replace it with one of our own devising." (124 S.Ct. 1373, 158 L.Ed.2d 202.)

(c) *Error in this case.* The courts below came to conflicting conclusions about the reliability of the statements made by defendant's wife. The state supreme court gave dispositive weight to the "interlocking" nature of defendant's and his wife's statements. It found that they were both ambiguous as to when and whether the victim had a weapon. The prosecutor obviously did not share this view, as he called the wife's statements "damning evidence" that completely refuted defendant's claim of self-defense. Thus, "[f]ar from obviating the need for cross-examination, the 'interlocking' ambiguity of the two statements made it all the more imperative that they be tested to tease out the truth." (124 S.Ct. 1373, 158 L.Ed.2d 202.) The fact that defendant had no opportunity to cross-examine his wife is alone sufficient to make out a Sixth Amendment violation. (124 S.Ct. 1374, 158 L.Ed.2d 203.)

(d) *Scope of constitutional protection.* "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law--as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of 'testimonial.' Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." (124 S.Ct. 1374, 158 L.Ed.2d 203.)

Two justices concurred in the judgment, arguing that *Roberts* should not have been overruled, and that the majority opinion will leave "thousands of federal prosecutors and ... tens of thousands of state prosecutors" in need of answers as to what kinds of testimony are covered by the new rule. (124 S.Ct. 1378, 158 L.Ed.2d 203, 207.)

The holding in *Crawford* has been the basis for numerous appeals and has engendered considerable commentary:

(1) *United States Supreme Court cases:* See *Davis v. Washington* (2006) 547 U.S. 813, 126 S.Ct. 2266, 2277, 2278, 165 L.Ed.2d 224, 241, 242, 5 Cal. Crim. Law (3d), *Criminal Trial*, Supp., §538 [two cases: (a) victim's statements in response to 911 operator's questions were not testimonial; (b) victim's statements made to police, who arrived at scene after crime was complete, were taken in course of investigation and hence were testimonial]; *Whorton v. Bockting* (2007) 549 U.S. \_\_\_, 127 S.Ct. 1173, 1181, 167 L.Ed.2d 1, 11 [*Crawford* does not apply retroactively to cases already final on direct review].

(2) *California Supreme Court cases:* See *People v. Monterroso* (2004) 34 C.4th 743, 765, 22 C.R.3d 1, 101 P.3d

956 [in capital murder case, admission of victim's statement, made to police shortly after he had been robbed and shot, did not violate *Crawford*; "the common law pedigree of the exception for dying declarations poses no conflict with the Sixth Amendment"]; *People v. Combs* (2004) 34 C.4th 821, 842, 843, 22 C.R.3d 61, 101 P.3d 1007 [admission of accomplice's statements to police, in which she incriminated defendant, did not violate *Crawford*, as they were admitted as, and jury found that they constituted, defendant's adoptive admissions; because they were deemed defendant's own admissions, veracity or credibility of out-of-court declarant was no longer at issue]; *People v. Wilson* (2005) 36 C.4th 309, 343, 30 C.R.3d 513, 114 P.3d 758 [in retrial of capital murder case, prosecution witness' testimony from previous trial was not rendered inadmissible by *Crawford*, as there had been opportunity for cross-examination of witness in previous trial; even if information had since come to light indicating that witness' testimony may have been unreliable, reliability is not part of admissibility inquiry under *Crawford*]; *People v. Giles* (2007) 40 C.4th 833, 841, 55 C.R.3d 133, 152 P.3d 433, 5 Cal. Crim. Law (3d), *Criminal Trial*, Supp., §538A [murder victim's statements, made to police in regard to domestic violence incident several weeks before murder, were testimonial, but were admissible under forfeiture by wrong-doing doctrine, which applied even though wrongdoing was charged murder itself and murder was carried out for reasons other than preventing testimony]; *People v. Cage* (2007) 40 C.4th 965, 991, 56 C.R.3d 789, 155 P.3d 205 [statement made by assault victim to emergency room physician was not testimonial as it was made in course of medical evaluation, but statements to deputy sheriff in emergency room and later at sheriff's station were testimonial and should not have been admitted, as they were made in response to focused questioning aimed at determining circumstances of crime]; *People v. Stevens* (2007) 41 C.4th 182, 199, 59 C.R.3d 196, 158 P.3d 763 [admission of codefendant's statement could not violate defendant's rights under *Crawford*, as it was redacted to remove any reference to defendant]; *People v. Geier* (2007) 41 C.4th 555, 605, 61 C.R.3d 580, 161 P.3d 104 [in murder prosecution, testimony by prosecution expert concerning match between defendant's DNA and DNA extracted from vaginal swabs taken from victim was not subject to requirements of *Crawford*; statements contained in DNA report on which expert relied were not testimonial because they constituted contemporaneous recordation of observable events rather than documentation of past events].

(3) *California Court of Appeal cases*: See *People v. Cervantes* (2004) 118 C.A.4th 162, 173, 175, 12 C.R.3d 774 [in murder prosecution of three defendants, out-of-court statement by one defendant to neighbor was properly admitted against other two defendants as declaration against interest; statement was not testimonial under *Crawford* and it satisfied reliability requirements of *People v. Greenberger* (1997) 58 C.A.4th 298, 68 C.R.2d 61, 1 Cal. Evidence (4th), *Hearsay*, §149]; *People v. Sisavath* (2004) 118 C.A.4th 1396, 1401, 13 C.R.3d 753 [in prosecution for molestation of minor, trial judge erred in admitting out-of-court statements made by victim to police officer and to trained interviewer, after determining that victim was not qualified to testify at trial; both statements were testimonial within meaning of *Crawford*]; *People v. Pirwani* (2004) 119 C.A.4th 770, 786, 14 C.R.3d 673, 1 Cal. Evidence (4th), *Hearsay*, Supp., §26 [under *Crawford*, Ev.C. 1380, allowing admission of videotaped statement by elder or dependent adult who is unavailable at trial, is unconstitutional]; *People v. Price* (2004) 120 C.A.4th 224, 239, 15 C.R.3d 229 [in prosecution for domestic violence in which defendant's wife refused to testify against defendant, admission of statements made by wife to police officer when he arrived at crime scene was proper under *Crawford*; defendant had opportunity to cross-examine wife as to those statements at preliminary hearing]; *People v. Johnson* (2004) 121 C.A.4th 1409, 1413, 18 C.R.3d 230 [in probation revocation hearing, use of laboratory report analyzing rock cocaine that defendant was caught selling was not subject to requirements of *Crawford*; report was routine documentary evidence and was not substitute for live testimony]; *People v. Corella* (2004) 122 C.A.4th 461, 468, 18 C.R.3d 770 [in prosecution for corporal injury to spouse, spontaneous statements of defendant's wife to 911 operator and to police who responded to call were not testimonial within meaning of *Crawford* as they were not made in response to interrogation]; *People v. Song* (2004) 124 C.A.4th 973, 984, 22 C.R.3d 118 [in prosecution of three defendants stemming from incident in which victim was forcibly taken from her home, placed in car, driven from place to place, and sexually molested, admission of statements to police by two defendants, who were ultimately acquitted, violated confrontation rights of third defendant, who was convicted; because one statement directly incriminated third defendant, trial judge's limiting instruction could not have eliminated error under *Crawford*]; *People v. Morgan* (2005) 125 C.A.4th 935, 946, 23 C.R.3d 224 [in prosecution for possession of methamphetamine for sale, admission of evidence that officer who was executing search warrant at defendants' residence answered telephone and caller asked to buy drugs did not violate defendants'

confrontation rights; callers' statements were not testimonial in nature]; *People v. Martinez* (2005) 125 C.A.4th 1035, 1050, 23 C.R.3d 508 [in prosecution for torture and assault, *Crawford* was not violated where victim's preliminary hearing testimony and statements to police officers were admitted but she also testified and submitted to cross-examination at trial]; *People v. Butler* (2005) 127 C.A.4th 49, 58, 59, 25 C.R.3d 154 [in murder prosecution, out-of-court statements by two witnesses who, at trial, denied having made them, were properly admitted; statements were not testimonial, as they were made spontaneously to coworkers and not in presence of government workers, and thus they were not subject to *Crawford*]; *People v. Saffold* (2005) 127 C.A.4th 979, 984, 26 C.R.3d 190 [in prosecution for disobeying domestic relations order, evidence of proof of service of order on defendant (offered in order to satisfy requirement of P.C. 273.6(a) that violation be intentional and knowing) was not subject to *Crawford*; by serving order and completing proof of service, deputy was not giving testimony against defendant, but was merely performing his routine duties]; *People v. Rincon* (2005) 129 C.A.4th 738, 757, 28 C.R.3d 844 [attempted murder victim's statement, made to civilian shortly after he was shot in ankle, was not testimonial within meaning of *Crawford* and was properly admitted under spontaneous statement exception to hearsay rule]; *People v. Castille* (2005) 129 C.A.4th 863, 878, 29 C.R.3d 71, 5 Cal. Crim. Law (3d), *Criminal Trial*, Supp., §538 [codefendants' adoptive admissions, made in joint interview with police, were not subject to *Crawford*; following *Combs, supra*]; *People v. Taulton* (2005) 129 C.A.4th 1218, 1222, 29 C.R.3d 203, 5 Cal. Crim. Law (3d), *Criminal Trial*, Supp., §538 [records introduced under P.C. 969b (3 Cal. Crim. Law (3d), *Punishment*, §378) to establish prima facie evidence of prior convictions are not testimonial in nature and therefore are not subject to *Crawford* rule]; *People v. Angulo* (2005) 129 C.A.4th 1349, 1368, 30 C.R.3d 189 [in sexually violent predator proceeding, defendant's confrontation right was not violated by admission of police reports of defendant's out-of-state molestations; *Crawford* does not apply to civil commitment proceedings]; *People v. Thomas* (2005) 130 C.A.4th 1202, 1210, 30 C.R.3d 582 [notwithstanding *Crawford*, expert witnesses may continue to testify to information and sources on which they relied in forming their opinions, which may include hearsay]; *In re April C.* (2005) 131 C.A.4th 599, 610, 31 C.R.3d 804 [*Crawford* does not apply to juvenile dependency proceedings; minor's hearsay statements claiming that mother's boyfriend sexually abused her were properly admitted]; *People v. Gonzales* (2005) 131 C.A.4th 767, 774, 32 C.R.3d 172 [admission of preliminary hearing transcript to prove that defendant's prior conviction qualified as strike did not violate *Crawford*, as defendant had had opportunity at hearing to cross-examine witness whose testimony was used to show that he had used firearm]; *People v. Smith* (2005) 135 C.A.4th 914, 924, 38 C.R.3d 1 [in murder trial, admission of one defendant's out-of-court statements, made to his girlfriend in motel room, against other defendant under spontaneous statement exception did not violate *Crawford*; for "nontestimonial statements like those at issue here, *Crawford* left undisturbed the standard previously set forth in *Ohio v. Roberts*";]; *People v. Fulcher* (2006) 136 C.A.4th 41, 55, 38 C.R.3d 702 [*Crawford* did not extend Sixth Amendment right of confrontation to sexually violent predator proceedings, and, although due process right to confrontation does apply to those proceedings, it is not violated by admission of experts' testimony, based on hearsay, about defendant's past conduct]; *People v. Mayo* (2006) 140 C.A.4th 535, 554, 44 C.R.3d 497 [victim's statements, whether testimonial or not, were properly admitted under dying declarations exception to hearsay rule; following *Monterroso, supra*]; *People v. Pedroza* (2007) 147 C.A.4th 784, 791, 54 C.R.3d 636 [in prosecution for murder and arson arising from incident in which defendant threw gasoline on his wife and burnt her, victim's statements to police, made in response to prolonged questioning moments after she was burned and while she was suffering from intense pain, were nontestimonial within meaning of *Davis v. Washington, supra*]; *People v. Cooper* (2007) 148 C.A.4th 731, 742, 56 C.R.3d 6 [trial judge erred in excluding two videotaped interviews on ground that any statement to police is testimonial; one interview was nontestimonial in that its primary purpose was to assess victim's condition and deal with her critical need for assistance, while other interview contained some statements not offered for truth and therefore not subject to *Crawford*]; *People v. Romero* (2007) 149 C.A.4th 29, 37, 40, 56 C.R.3d 678 [where defendant admitted killing victim but attempted to use victim's own prior statements to establish his claim of self-defense, he forfeited right to raise Confrontation Clause objection to victim's statement to witness regarding defendant's threats]; *People v. Johnson* (2007) 150 C.A.4th 1467, 1479, 59 C.R.3d 405 [in prosecution for assault and corporal injury to cohabitant, statement by prior victim of defendant to public safety officer ("He punched me in the face, look at my nose") was not testimonial within meaning of *Crawford*; circumstances objectively indicated that there was ongoing emergency when victim made statement]; *People v. Brenn* (2007) 152 C.A.4th 166, 174, 60 C.R.3d 830 [in prosecution for attempted murder, victim's statements to 911 operator and to first police officer on scene were nontestimonial within meaning of *Davis v. Washington*]; *People v. Saracoglu* (2007) 152

*C.A.4th 1584, 1596, 62 C.R.3d 418* [in prosecution for corporal injury to spouse, victim's statements, made at police station about 30 minutes after physical assault occurred, were nontestimonial; victim's primary purpose for making statements was to gain police protection, and purpose of any questioning was to deal with emergency]; *People v. Ramirez* (2007) 153 *C.A.4th* 1422, 1426, 64 *C.R.3d* 96 [hearsay relied on by gang expert was not testimonial within meaning of *Crawford*; relying on *People v. Thomas*, *supra*].

(4) *Commentary*: See 118 *Harv. L. Rev.* 316 [*Crawford*]; 33 *Hastings Const. L. Q.* 361 [status of child abuse victims' statements following *Crawford*]; 55 *Hastings L. J.* 1539 [impact of *Crawford* on expert opinion relying on testimonial hearsay]; 38 *Loyola L.A. L. Rev.* 1835 [determination of which statements are testimonial under *Crawford*]; 32 *Pepperdine L. Rev.* 315 [impact of *Crawford* on admissibility of accomplice confessions]; 42 *San Diego L. Rev.* 1185 [application of forfeiture by wrongdoing exception under *Crawford*]; 46 *Santa Clara L. Rev.* 707 [admissibility of 911 calls under *Crawford* standard]; 79 *So. Cal. L. Rev.* 213 [effect of *Crawford* on prosecution of domestic violence cases]; 35 *Southwestern U. L. Rev.* 137 [effect of *Crawford* on child victims of sexual assault]; 57 *Stanf. L. Rev.* 569 [efficacy of *Crawford* in guaranteeing defendants right to test reliability of prosecution witnesses' testimony through cross-examination under oath]. *West's Key Number Digest*, Criminal Law k.662.8



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## CHAPTER XI - Presentation At Trial

### III. PROCEDURE AT TRIAL

#### A. In General.

#### 3 Witkin Cal. Evid. Presentation § 22

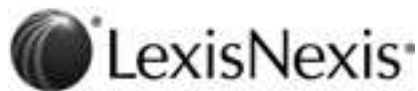
[§ 22] In General.

(1) *Sequence of Steps*. The procedural steps in civil cases are set forth in *C.C.P. 607*. (See 7 *Cal. Proc.* (4th), *Trial*, §161; *C.C.P. 631.7* [trial by court without jury; order specified in *C.C.P. 607* "unless the court otherwise directs"]; see also *C.E.B.*, 1 *Civ. Proc. During Trial* 3d, §1.11 [changing normal order of proof]; *C.E.B.*, 3 *Civ. Proc. During Trial* 3d, §24.7 [order of proof in bench trial]; *C.E.B.*, *Effective Introduction of Evidence in California* 2d, Chap. 5 [order of witnesses and of examination]; 1 *McCormick* 5th, §4; 6 *Wigmore* (Chadbourn Rev.) §§1866, 1869 et seq.) Criminal cases are governed by *P.C. 1093*. (See 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §514.)

(2) *Right To Open and Close*. Ordinarily, the plaintiff, upon whom rests the burden of proof, opens the case and has the closing argument, unless the court "for special reasons" rules otherwise. (*C.C.P. 607*; see *Ferguson v. Dam* (1934) 140 *C.A.* 701, 703, 35 *P.2d* 1072; *McCullough v. Langer* (1937) 23 *C.A.2d* 510, 523, 73 *P.2d* 649; *Orient Handel v. United States Fidelity & Guaranty Co.* (1987) 192 *C.A.3d* 684, 701, 237 *C.R.* 667.) In *Coogan Finance Corp. v. Beatcher* (1932) 120 *C.A.* 278, 7 *P.2d* 695, plaintiff sued on a note, and defendant admitted execution and consideration, but set up an affirmative defense and counterclaim for salary. Plaintiff merely made formal proof of his allegations, and then defendant presented his opening statement and case. *Held*, the court had discretion to permit defendant to open and close. (120 *C.A.* 283.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Sequence of Steps*. See 1 *McCormick* 6th, §4. *West's Key Number Digest*, Criminal Law k.645; Trial k.25 et seq.



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III. PROCEDURE AT TRIAL

B. Opening Statements.

1. Civil Cases.

*3 Witkin Cal. Evid. Presentation § 23*

[§ 23] Civil Cases.

The opening statement of counsel is a preliminary address to the jury or court, outlining the facts to be proved. Its principal purpose is to acquaint the jury with the nature and theory of the case, thus furnishing the basis for an intelligent and favorable consideration of the evidence. It is not required, but is commonly made by both plaintiff and defendant in civil cases. Statutes seldom cover the method or scope of the statement, but the decisions and practice works offer many suggestions and illustrations. (See Rutter Group, 1 Civil Trials and Evidence, Chap. 6; C.E.B., 1 Civ. Proc. During Trial 3d, Chap. 9; 1 Schweitzer 2d, §171 et seq.; 5 Am.Jur. Trials 285, 305; on prejudicial effect of appeals to sympathy, see 68 A.L.R.2d 990, 995; on nonsuit or directed verdict on opening statement (disfavored), see *Rodin v. American Can Co.* (1955) 133 C.A.2d 524, 534, 284 P.2d 530 [granting reversed]; *Baber v. Napa State Hosp.* (1989) 209 C.A.3d 213, 217, 257 C.R. 55; 5 A.L.R.3d 1405; 7 Cal. Proc. (4th), Trial, §§424, 434.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## III. PROCEDURE AT TRIAL

## B. Opening Statements.

## 2. Criminal Cases.

3 *Witkin Cal. Evid. Presentation* § 24

[§ 24] Criminal Cases.

The prosecution usually makes an opening statement. It should be confined to an outline of the facts to be proved, without deliberate reference to inadmissible matter or argumentative statements. However, prosecutorial misconduct in an opening statement is not grounds for reversal of a judgment unless the misconduct was prejudicial or so egregious as to deny the defendant a fair trial. (See *People v. Harris* (1989) 47 C.3d 1047, 1080, 255 C.R. 352, 767 P.2d 619; *People v. Dennis* (1998) 17 C.4th 468, 518, 71 C.R.2d 680, 950 P.2d 1035 [reference to murder victim's young daughter was not prejudicial]; cf. *People v. Aragon* (1957) 154 C.A.2d 646, 653, 316 P.2d 370 [improper reference to lie detector test was prejudicial error]; 16 A.L.R.4th 810 [prosecutor's reference in opening statement to matters that are not provable or that prosecutor does not attempt to prove]; 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §517 et seq.; see also *People v. Stoll* (1904) 143 C. 689, 693, 77 P. 818, 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §517 [trial judge had no authority to direct acquittal under former P.C. 1118 on prosecution's opening statement]; 75 A.L.R.3d 649.)

The defendant may also make an opening statement, but frequently waives it to avoid informing the prosecution of the facts on which the defense will be based. (See *People v. Hayes* (1971) 19 C.A.3d 459, 472, 96 C.R. 879; *People v. Pangelina* (1984) 153 C.A.3d 1, 6, 199 C.R. 916.) The defendant's statement usually should not be made until completion of the prosecution's case. (See *People v. Cryder* (1949) 90 C.A.2d 194, 204, 202 P.2d 765; *People v. Corona* (1978) 80 C.A.3d 684, 725, 145 C.R. 894 [defense counsel is "ill-advised" to give statement after prosecution's opening statement]; see also *People v. Mitcham* (1992) 1 C.4th 1027, 1059, 5 C.R.2d 230, 824 P.2d 1277 ["reasonably competent counsel" may wait to hear prosecution's case before deciding whether to present defense]; 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §520.)

**SUPPLEMENT:** [This section is current through the latest supplement]





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### III. PROCEDURE AT TRIAL

#### C. Oath of Witness.

#### 3 Witkin Cal. Evid. Presentation § 25

#### [§ 25] Oath of Witness.

(1) *General Requirement of Oath.* Before testifying, a witness must take an oath or make an affirmation or declaration "in the form provided by law." (*Ev.C. 710*; cf. *Unif. Rule 603* ["In a form calculated to awaken his conscience and impress his mind with his duty to do so"].) In other words, the oath is traditional and usual; but, if the witness prefers, an affirmation or declaration is sufficient. (See *C.C.P. 2094* [form]; *C.C.P. 2097* [optional form of affirmation or declaration]; *C.C.P. 2095, 2096* [other permissible forms]; 18 *Am.Jur. P.P. Forms* (Rev. ed.), Oath and Affirmation, Form 1 et seq.; 81 *Am.Jur.2d* (1992 ed.), *Witnesses* §708.)

(2) *Exception: Child Witness.* A child under the age of 10, in the court's discretion, may be required only to promise to tell the truth. (*Ev.C. 710*.)

(3) *Consequences of Failure To Take Oath.* No constitutional provision is violated if unsworn testimony is received, and thus, a party waives its objection to unsworn testimony by failing to object to it at trial. (*In re Katrina L.* (1988) 200 C.A.3d 1288, 1299, 247 C.R. 754.) Failure to administer the oath is unlikely to constitute prejudicial error. In *Estate of Da Roza* (1947) 82 C.A.2d 550, 555, 186 P.2d 725, the point was raised on appeal that the record did not show that two witnesses had been sworn. *Held*, (a) it would be presumed that the officer performed his duty and did swear them; and (b) any error was waived by failure to object to the testimony on that ground. (See *Estate of Wilson* (1953) 116 C.A.2d 523, 526, 253 P.2d 1011 [hearing on petition to compromise claim against estate; administrator and counsel for both parties presented matters involved without being sworn as witnesses; error waived]; *People v. Martinez* (1985) 171 C.A.3d 727, 733, 217 C.R. 546.)

In the absence of a waiver, such as a failure to object or a stipulation, unsworn testimony is legally inadmissible. (*In re Heather H.* (1988) 200 C.A.3d 91, 96, 246 C.R. 38 [testimony of 4-year-old minor on sexual molestation by her father, taken in chambers; case decided before *Ev.C. 710* was amended to allow children under 10 to simply "promise to tell the truth"]; *People v. Lee* (1985) 164 C.A.3d 830, 841, 210 C.R. 799.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *General Requirement of Oath.* *C.C.P. 2094* was amended in 2000 to provide alternative forms of oath, affirmation, and declaration, and *C.C.P. 2095, 2096, and 2097* were repealed.

See 81 *Am.Jur.2d* (2004 ed.), *Witnesses* §681; 18B *Am.Jur. P.P. Forms* (1997 ed.), Oath and Affirmation, Form 1 seq.

(2a) *(New) Exception: Dependent Person With Cognitive Impairment.* In the discretion of the court, a dependent

person with a cognitive impairment may be required only to promise to tell the truth. (*Ev.C. 710*, as amended in 2004; on definition of dependent person, see 1 *Cal. Evidence* (4th), *Introduction*, Supp., §17.)*West's Key Number Digest*, Witnesses k.227



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## CHAPTER XI - Presentation At Trial

## III. PROCEDURE AT TRIAL

## D. Interpreters and Translators.

## 1. In General.

## a. Interpreters.

## 3 Witkin Cal. Evid. Presentation § 26

## [§ 26] Interpreters.

Interpreters must be appointed for witnesses who are unable to understand English or express themselves in English (*Ev.C. 752(a)*; see *infra*, §29), for a deaf person in a civil or criminal action, incompetency proceeding or administrative hearing (*Ev.C. 754*; see *infra*, §30), for the defendant in a criminal case who does not understand English (see *infra*, §31), or for an indigent litigant in the small claims court who does not understand English (see *Gardiana v. Small Claims Court* (1976) 59 C.A.3d 412, 421, 130 C.R. 675, and C.C.P. 116.550(b), 2 Cal. Proc. (4th), Courts, §305; cf. *Jara v. Municipal Court* (1978) 21 C.3d 181, 185, 145 C.R. 847, 578 P.2d 94 [municipal court properly refused to appoint interpreter at public expense for indigent civil defendant]; distinguishing *Gardiana*). (See C.J.E.R., Judges Benchbook, Civil Proceedings: Trial §8.92 et seq.; C.E.B., 1 Civ. Proc. During Trial 3d, §11.28 et seq.; Rutter Group, 2 Civil Trials and Evidence §9:217 et seq.; 2 Schweitzer 2d, §391.) *Govt.C. 11435.05* et seq. provide for language assistance in adjudicative hearings.

The appointment and compensation of an interpreter are governed by *Ev.C. 730* et seq., the statutes applicable to expert witnesses. (*Ev.C. 752(b)*.) (See *Govt.C. 68562* [Judicial Council must adopt rules governing certification and competency of interpreters]; C.R.C., Rule 984 [trial court must establish procedures for periodic review of interpreter skills and removal of interpreters who fail to meet standards of professional conduct]; Standards of Judicial Administration, §18 et seq. [standards for determining need for interpreter and ensuring interpreter's familiarity with technical terminology and procedures; standards of professional conduct for interpreters].)

The Law Revision Commission Comment to *Ev.C. 752* states that interpreters are treated as expert witnesses and are subject to the same rules of competency and examination. The competence of an interpreter is ordinarily for the trial court to determine. (*People v. Roberts* (1984) 162 C.A.3d 350, 355, 208 C.R. 461.) Hence, the fact that an interpreter was not on the recommended list under *Govt.C. 68562* did not mean that he was unqualified; the statute is mandatory "unless good cause is found by the judge" for appointment of an interpreter not on the list. (162 C.A.3d 355, footnote 4.) (See *People v. Estrada* (1986) 176 C.A.3d 410, 415, 221 C.R. 922 [competence, not certification, is required; decision to use noncertified interpreter is for trial judge].)

**SUPPLEMENT:** [This section is current through the latest supplement]  
C.R.C., Rule 984 was renumbered C.R.C., Rule 2.891 in 2006.

See Judicial Council Form No. INT-110 [Qualifications of a Noncertified Interpreter]. *West's Key Number Digest*, Criminal Law k.642; Trial k.22



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D. Interpreters and Translators.

1. In General.

b. Translator of Writings.

3 *Witkin Cal. Evid. Presentation* § 27

[§ 27] Translator of Writings.

When it is impossible to decipher or directly understand the written characters in a writing offered in evidence, a translator who can decipher the characters or understand the language must be sworn to decipher or translate the writing. (*Ev.C. 753(a)*; see 6 Proof of Facts 439.)

Appointment and compensation are governed by *Ev.C. 730* et seq. (see *supra*, §26). (*Ev.C. 753(b)*.) (See C.E.B., 1 Civ. Proc. During Trial 3d, §11.28.)

In *People v. Torres* (1985) 164 C.A.3d 266, 210 C.R. 375, defendant was charged with sale of heroin, and the trial judge admitted in evidence a translated transcript of tape recordings of conversations setting up the sale. *Held*, admission of this evidence was error, although harmless under the *Chapman* test (see 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence*, §384). Failure to call the original translator to the stand denied the defendant an opportunity to cross-examine him as to his qualifications and the accuracy of the translations. But no prejudice resulted, for a police officer, fluent in Spanish, testified to their accuracy, and defense counsel had the opportunity to challenge the officer's testimony, or to obtain his own expert, but did not do so. (164 C.A.3d 269, 270.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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### III. PROCEDURE AT TRIAL

#### D. Interpreters and Translators.

##### 1. In General.

##### c. Procedure.

3 *Witkin Cal. Evid. Presentation* § 28

[§ 28] Procedure.

Interpreters and translators take an oath that they will truly interpret or translate. (*Ev.C. 751*.) They are subject to "all the rules of law relating to witnesses." (*Ev.C. 750*; see *People v. Mora (1984) 153 C.A.3d 18, 22, 199 C.R. 904* [because interpreter was subject to rules of law relating to witnesses, any impropriety in his failure to take oath was waived by defendant's failure to timely object]; *C.E.B., 1 Civ. Proc. During Trial 3d, §11.34 et seq.*; *8 U.C. Davis L. Rev. 471* [attorney's guide to use of court interpreters, with English and Spanish glossary of criminal law terms].) (On disqualification of interpreter for bias, see *6 A.L.R.4th 158*.) When a deaf or hard-of-hearing person is testifying under oath, an interpreter certified as competent by an organization approved by the Judicial Council (*Ev.C. 754(f)*, *infra*, §30) must advise the court whenever the interpreter is unable to comply with the oath to truly interpret or translate. (*Ev.C. 751(b)*.)

An interpreter regularly employed by the court and certified or registered under *Govt.C. 68560 et seq.*, or a translator regularly employed by the court, may file the required oath with the clerk. Until revoked, this oath is good in all subsequent court proceedings. (*Ev.C. 751(d)*.)

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### III. PROCEDURE AT TRIAL

#### D. Interpreters and Translators.

##### 2. Interpreter for Witness.

#### 3 *Witkin Cal. Evid. Presentation* § 29

[§ 29] Interpreter for Witness.

When a witness cannot understand or express himself or herself in English so as to be understood directly by counsel, the court, and the jury, an interpreter whom the witness can understand and who can understand the witness must be sworn to interpret for him or her. (*Ev.C. 752(a)*.)

This statute covers both physical disability and lack of understanding of the language. (*Ev.C. 752*, Comment; see *People v. Brown* (1980) 110 C.A.3d 24, 35, 167 C.R. 557 [judge properly allowed victim's testimony to be presented through interpreter; judge was in position to determine whether interpreter was necessary based on reading of preliminary hearing transcript]; *People v. Holtzclaw* (1926) 76 C.A. 168, 176, 243 P. 894 [judge properly denied defendant's demand for interpreter for prosecution witness; testimony showed adequate understanding of language]; 3 Wigmore (Chadbourn Rev.) §811; 6 Proof of Facts 439; 65 Am.Jur. Trials 11 [use of interpreter in litigating case for non-English speaking client]; cf. *People v. Walker* (1924) 69 C.A. 475, 486, 231 P. 572 [error to allow wife of prosecution witness to "interpret" when he was physically unable to speak at all].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Augustin* (2003) 112 C.A.4th 444, 450, 5 C.R.3d 171 [in prosecution for assault, trial judge did not err in failing to appoint interpreter for prosecution witness who suffered from cerebral palsy; her recorded testimony, taken as a whole, demonstrated adequate ability to communicate her perceptions in English so as to be understood without interpretation].



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## CHAPTER XI - Presentation At Trial

### III. PROCEDURE AT TRIAL

#### D. Interpreters and Translators.

#### 3. Interpreter for Deaf or Hearing Impaired Person.

#### *3 Witkin Cal. Evid. Presentation § 30*

[§ 30] Interpreter for Deaf or Hearing Impaired Person.

(1) *General Requirement.* If a present and participating party or witness is deaf or hearing impaired, an interpreter must be appointed. (*Ev.C. 754(b).*) A "deaf or hearing impaired person" is one "with a hearing loss so great as to prevent his or her understanding language spoken in a normal tone." It does not include an individual "provided with, and able to fully participate in the proceedings through the use of, an assistive listening system or computer-aided transcription equipment" provided under C.C. 54.8 (see *infra*, §40). (*Ev.C. 754(a)*; see 9 *Pacific L. J.* 485.)

(2) *Proceedings.* The requirement of an interpreter applies in (a) any civil or criminal action, including an action involving a traffic or other infraction, a juvenile court proceeding, a small claims court proceeding, a family court proceeding or service, or a proceeding to determine mental competency; (b) a court-ordered or court-provided alternative dispute resolution, including mediation and arbitration; and (c) an administrative hearing. (*Ev.C. 754(b).*)

(3) *Qualified Interpreter.* An "interpreter" includes an "oral interpreter, a sign language interpreter, or a deaf-blind interpreter, depending upon the needs of the individual who is deaf or hearing impaired." (*Ev.C. 754(d).*) The interpreter must be "qualified" (*Ev.C. 754(b)*), which means "certified as competent to interpret court proceedings by a testing organization, agency, or educational institution approved by the Judicial Council as qualified to administer tests to court interpreters for individuals who are deaf or hearing-impaired." (*Ev.C. 754(f).*) Certifying organizations, agencies, and educational institutions must comply with Judicial Council guidelines and must hold a valid, current approval by the Judicial Council to administer the tests. (C.R.C., Rule 984.1.) Each superior court must maintain a current roster of qualified interpreters. (*Ev.C. 754(o).*)

"Evidence Code section 754 does not require complete or total comprehension by the deaf person. Such a rule would be difficult if not impossible to satisfy and easily manipulated by a person intent on frustrating the judicial process." (*In re Bryon S.* (1986) 176 C.A.3d 822, 829, 223 C.R. 319 [deaf person who did not "sign," did not read well and relied on lipreading, admitted that no satisfactory interpreter could be found; court provided one of two certified lipreaders with legal experience, and no prejudice resulted].)

(4) *Intermediary Interpreter.* When the interpreter is unfamiliar with the deaf or hearing impaired individual's use of particular signs or a particular variant of sign language, the court or other appointing authority must, in consultation with the deaf or hearing impaired individual, appoint an intermediary interpreter. (*Ev.C. 754(g)*; for definitions of "appointing authority" and "intermediary interpreter," see *Ev.C. 754(c)* and (e), respectively.)

(5) *Limitation on Admissibility of Deaf Person's Statement to Officer.* A written or oral statement by a deaf or

hearing impaired person in reply to a question of a peace officer or other law enforcement or prosecutorial individuals may not be used against the person unless (a) the question was accurately interpreted, and (b) the statement was made knowingly, voluntarily, and intelligently, and was accurately interpreted. Otherwise, the court must make special findings that (a) either the individual could not have used an interpreter or an interpreter was not otherwise required by Title II of the Americans with Disabilities Act of 1990 (42 U.S.C., §12131 et seq.), and (b) the statement was made knowingly, voluntarily, and intelligently. (*Ev.C. 754(k)*.)

Peace officers or other persons having a law enforcement or prosecutorial function must make a good faith effort to obtain an interpreter, without unnecessary delay, when questioning a victim or witness who demonstrates or alleges deafness or hearing impairment. However, no interpreter is required if (a) the individual affirmatively indicates that he or she does not need or cannot use an interpreter; or (b) an interpreter is not otherwise required by Title II of the Americans with Disabilities Act of 1990 (42 U.S.C., §12131 et seq.). (*Ev.C. 754(j)*.)

In obtaining the services of an interpreter for purposes of *Ev.C. 754(j)* or (k), priority must be given to obtaining a qualified interpreter. (*Ev.C. 754(l)*.) Moreover, nothing in *Ev.C. 754(j)* or (k) supersedes the requirement of *Ev.C. 754(b)* that qualified interpreters be used for deaf or hearing impaired individuals participating as parties or witnesses in a trial or hearing. (*Ev.C. 754(m)*.)

(6) *Seating of Interpreter at Hearing.* Interpreters must be in full view of and spatially situated to ensure proper communication with the persons for whom they are interpreting. (*Ev.C. 754(n)*.)

(7) *No Waiver of Privilege.* If an otherwise valid privilege exists between a deaf or hearing impaired individual and another person, the privilege is not waived merely because an interpreter was used to facilitate communication. (*Ev.C. 754.5*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *General Requirement.* See CALJIC, No. 1.08 [presence of sign language interpreter or computer-aided real-time translation reporter in jury room].

(3) *Qualified Interpreter.* C.R.C., Rule 984.1 was renumbered C.R.C., Rule 2.892 in 2006.





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### III. PROCEDURE AT TRIAL

#### D. Interpreters and Translators.

#### 4. Interpreter for Defendant in Criminal Case. a. In General.

#### 3 Witkin Cal. Evid. Presentation § 31

[§ 31] In General.

(1) *Constitutional Right*. Although earlier decisions granting an interpreter to a criminal defendant were based on due process (see *People v. Estany* (1962) 210 C.A.2d 609, 611, 26 C.R. 757; *People v. Annett* (1967) 251 C.A.2d 858, 861, 59 C.R. 888), Article I, §14 of the California Constitution was amended in 1974 to declare a specific constitutional right: "A person unable to understand English who is charged with a crime has a right to an interpreter throughout the proceedings." (See *People v. Menchaca* (1983) 146 C.A.3d 1019, 1023, 194 C.R. 691, *infra*, §32; *People v. Carreon* (1984) 151 C.A.3d 559, 566, 198 C.R. 843, *infra*, §32.) "Proceedings" does not include an interview with a probation officer preparing a presentence report. (*People v. Gutierrez* (1986) 177 C.A.3d 92, 98, 222 C.R. 699.)

"In the past, trial courts had been afforded broad discretion in determining whether a defendant's comprehension of English was minimal enough to render interpreter services 'necessary.' ... Nothing in the new constitutional provision changes this well established requirement of a finding of necessity by the trial court. Indeed, the provision specifically states that the right to an interpreter is contingent upon a person's being 'unable to understand English.' " (*People v. Carreon*, *supra*, 151 C.A.3d 567; see *People v. Alvarez* (1996) 14 C.4th 155, 209, 58 C.R.2d 385, 926 P.2d 365 [defendant, a native Spanish speaker who chose to testify in English, was not denied right to assistance of interpreter, where judge, although impliedly prohibiting simultaneous translation during defendant's testimony, expressly allowed sequential translation]; 32 A.L.R.5th 149.)

The constitutional right is not satisfied where the defendant's attorney also acts as his interpreter. (*People v. Chavez* (1981) 124 C.A.3d 215, 227, 177 C.R. 306.)

(2) *English-speaking Defendant and Non-English-speaking Witness*. In *People v. Aranda* (1986) 186 C.A.3d 230, 230 C.R. 498, defendant spoke English and did not need an interpreter; but he contended that, when the prosecution uses non-English-speaking witnesses who testify through an interpreter, the defendant has a constitutional right to his own interpreter and that this right cannot be waived by counsel. In rejecting the contention, the court said: "[A]n English-speaking defendant, who is forced to await the 'witness interpreter's' translation, stands in exactly the same position as the prosecutor, defense counsel, the judge and jury. Rather than such a defendant being effectively absent from his own trial, the trial is, in effect, in a state of suspension until the translation is made. The reason article I, section 14 is limited, by its terms, to non-English-speaking defendants is because only they are in need of its protection." (186 C.A.3d 237.)

(3) *Functions of Interpreter*. "Interpreters may play three different roles in criminal proceedings: (1) They make the

questioning of a non-English-speaking witness possible; (2) they facilitate the non-English-speaking defendant's understanding of the colloquy between the attorneys, the witness, and the judge; and (3) they enable the non-English-speaking defendant and his English-speaking attorney to communicate." (*People v. Carreon, supra*, 151 C.A.3d 565, footnote 1, quoting 63 Cal. L. Rev. 801, 802.)

(4) *Standard of Judicial Administration*. The Judicial Council's Standard of Judicial Administration (§18(a)), adopted in 1979, states: "An interpreter is needed if upon examination by the court a party or witness is unable to speak English so as to be understood directly by counsel, court, and jury, or if a party is unable to understand and speak English sufficiently to comprehend the proceedings and to assist counsel in the conduct of the case. Separate interpreters may be needed for each non-English speaking party. An additional interpreter may be needed to interpret witness testimony for the court."

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Constitutional Right*. See *People v. Superior Court (Almaraz)* (2001) 89 C.A.4th 1353, 1360, 107 C.R.2d 903 [failure to follow former C.R.C., Rule 984.2 (now C.R.C., Rule 2.893), which specifies when noncertified interpreter may be used in criminal proceeding (see 2 Cal. Proc. (4th), Courts, §397), does not, alone, give rise to constitutional violation]. (4) *Standard of Judicial Administration*. Standards of Judicial Administration, Section 18(a) was amended and renumbered Standards of Judicial Administration, Section 2.10(a) in 2006. As amended, the subdivision reads: "An interpreter is needed if, after an examination of a party or witness, the court concludes that:"

"(1) The party cannot understand and speak English well enough to participate fully in the proceedings and to assist counsel; or"

"(2) The witness cannot speak English so as to be understood directly by counsel, court, and jury." *West's Key Number Digest*, Criminal Law k.642



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#### D. Interpreters and Translators.

#### 4. Interpreter for Defendant in Criminal Case.

##### b. Right to Separate Interpreter.

##### 1. Improper Borrowing.

3 Witkin Cal. Evid. Presentation § 32

[§ 32] Improper Borrowing.

In *People v. Menchaca* (1983) 146 C.A.3d 1019, 194 C.R. 691, the interpreter for witnesses was the only sworn interpreter for defendant at the preliminary hearing and during much of the trial. *Held*, this did not comply with the California constitutional mandate and was also a denial of due process.

(a) "We take judicial notice that when a witness interpreter is utilized, the interpreter and witness are speaking to each other at relatively close range, after which the interpreter translates for the benefit of counsel and the trial court. Under such circumstances, it cannot be assumed a defendant clearly hears and understands the question and answer exchange in Spanish." (146 C.A.3d 1024.)

(b) Even if defendant could hear and understand the answers given in Spanish, it does not follow that he understood the testimony. In the usual case, there are many monosyllabic answers; and, without a clear understanding of the questions, the testimony is meaningless. "Accordingly, we conclude that a third party witness interpreter cannot effectively discharge the translating responsibilities owed to a defendant." (146 C.A.3d 1024.)

(c) "Moreover, a defendant's 'presence,' his sensibility and comprehension of the criminal trial process, is impaired in other ways by sole reliance on a witness interpreter. When acting in that capacity, an interpreter does not provide the defendant with translations of the court's rulings or of open-court colloquy between the bench and counsel. These are integral parts of 'the proceedings.' " (146 C.A.3d 1025.)

(d) The judge's willingness to permit defense counsel to interrupt the proceedings to communicate with defendant was insufficient compliance with the constitutional mandate: "It is the defendant's ability to instantaneously communicate with counsel upon a spontaneous understanding of the testimony and the proceedings which must be protected." (146 C.A.3d 1025.)

The *Menchaca* reasoning was approved in *People v. Aguilar* (1984) 35 C.3d 785, 200 C.R. 908, 677 P.2d 1198, where, without defendant's knowledge, his attorney allowed the court to borrow the interpreter to translate for two prosecution witnesses. The court added:

"In the ethnic richness of California, a multiplicity of languages has been nurtured. Historically, many peoples speaking diverse tongues have formed large portions of our population. The people of this state, through the clear and

express terms of their Constitution, required that all persons tried in a California court understand what is happening about them, for them, and against them. Who would have it otherwise?" (35 C.3d 795.)

The same conclusion was reached in *People v. Carreon* (1984) 151 C.A.3d 559, 198 C.R. 843. Defendant was convicted of robbery and kidnaping. His first language was Spanish and his grasp of English was limited. At the preliminary hearing, the judge borrowed the interpreter who had been provided for the chief prosecution witness--the victim. At the trial, the victim was unavailable, and his preliminary hearing testimony was read into the record in the presence of the jury. *Held*, this was reversible error.

(a) Courts and commentators have noted that denial of interpreter services impairs defendant's due process right, his right to confront adverse witnesses, his right to effective assistance of counsel, and his right to presence at his trial. (151 C.A.3d 567.)

(b) It is not only constitutionally essential but also eminently reasonable to require a separate interpreter. In this case, when the victim was testifying, the interpreter was chiefly concerned with translating the testimony for the court, and was not readily available to facilitate consultation between defendant and his counsel. The opportunity to interrupt the proceedings was not a satisfactory solution to the problem: "[I]t would require the defendant, in order to accomplish the otherwise simple task of consulting his counsel, to somehow make his intention known to the court and call the interpreter back to the counsel table. During the attorney-client conversation, attention would undoubtedly focus upon the scene at the counsel table, as occurs when counsel approach the bench for a private consultation with the court." (151 C.A.3d 571.) And "the risk of alienating or antagonizing the jury or bench would infuse the mere act of speaking to his client with considerations of strategy and tactics, in contrast to the English-speaking defendant whose consultation would be unobtrusive and likely to go unnoticed." (151 C.A.3d 571.)

(c) "Additionally, the defense interpreter is party to privileged communications in nonstructured conditions which may require something more than mere translation. At times, the interpreter may have to accede to the desires of defense counsel whose work in the courtroom and in private conferences with the defendant may require the interpreter to vary the more routine services he would perform as a witness interpreter. His presence may assist defense counsel in assuring that testimony is being accurately translated." (151 C.A.3d 572.) (See *People v. Baez* (1987) 195 C.A.3d 1431, 1436, 241 C.R. 435 [to hear borrowed interpreter, defendant moved away from his attorney; witnesses for whom interpreter was borrowed gave significant testimony; conviction reversed].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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4. Interpreter for Defendant in Criminal Case.
  - b. Right to Separate Interpreter.
2. Single Interpreter for Several Defendants.

#### 3 *Witkin Cal. Evid. Presentation* § 33

[§ 33] Single Interpreter for Several Defendants.

In *People v. Rioz* (1984) 161 C.A.3d 905, 207 C.R. 903, one interpreter was employed for all four Spanish-speaking defendants, and each defendant was equipped with an earphone/headset. When defendant Rioz took the stand as a witness, the single interpreter was used to interpret for him as a witness. *Held*, the borrowing at this time, without their consent, was a violation of the constitutional rights of the other three defendants. (161 C.A.3d 912.)

The court observed that it was not holding that there must always be individual interpreters for each of several defendants jointly charged; for example, where the involvement of defendants is serial rather than simultaneous, a single interpreter might reasonably act as defense interpreter and proceedings interpreter. But when witnesses are called and testimony is taken, the fundamental rights of a defendant to understand the proceedings and to immediately communicate with counsel call for an individual interpreter. (161 C.A.3d 913.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### 4. Interpreter for Defendant in Criminal Case.

##### b. Right to Separate Interpreter.

##### 3. Waiver of Right.

3 *Witkin Cal. Evid. Presentation* § 34

[§ 34] Waiver of Right.

In *People v. Aguilar* (1984) 35 C.3d 785, 200 C.R. 908, 677 P.2d 1198, *supra*, §32, defendant's interpreter was borrowed for prosecution witnesses with the consent of defendant's counsel, but without any knowledge or approval by defendant. "An exchange took place--entirely in English--between the court, the prosecutor, the interpreter, and defense counsel. The defendant was excluded." (35 C.3d 795.) *Held*, this was not a valid waiver. "Although prior to 1974, appointment of an interpreter could be waived by failure to request one, this is no longer the case. The right to an interpreter having since been guaranteed in the Constitution, it may not validly be waived without an 'affirmative showing,' on the record, of waiver which was 'intelligent and voluntary' on the part of the affected defendant." (35 C.3d 794, quoting *People v. Chavez* (1981) 124 C.A.3d 215, 227, 177 C.R. 306; see *People v. Nieblas* (1984) 161 C.A.3d 527, 530, 207 C.R. 695; cf. *People v. Estrada* (1986) 176 C.A.3d 410, 416, 221 C.R. 922 [defendant waived right to have personal interpreter interpret all proceedings verbatim].)

In *People v. Resendes* (1985) 164 C.A.3d 812, 210 C.R. 609, a prosecution of defendant R and his codefendant, the judge, with consent of counsel, appointed one interpreter for both, and advised the defendants that they could raise their hands and stop the proceedings for the purpose of communicating with their attorneys. *Held*, the procedure was error. (a) As in *Aguilar*, *supra*, acquiescence of counsel was not enough for a waiver; personal consent of the defendant is necessary. The judge did not inform defendants of their right to an individual interpreter, but merely asked whether they understood the procedure being used. (164 C.A.3d 816.) (b) The interruption procedure was not a satisfactory substitute for a single interpreter. (164 C.A.3d 817, 818.)

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#### D. Interpreters and Translators.

#### 4. Interpreter for Defendant in Criminal Case. c. Reversible Error.

#### 3 Witkin Cal. Evid. Presentation § 35

#### [§ 35] Reversible Error.

(1) *Conflict in Former Law.* There was previously disagreement as to whether an error in denying or impairing a criminal defendant's right to an interpreter was reversible per se (see *People v. Aguilar* (1984) 35 C.3d 785, 792, 794, 200 C.R. 908, 677 P.2d 1198, supra, §§32, 34 ["constitutional error" in "borrowing" interpreter; absent waiver, reversal is required]; *People v. Menchaca* (1983) 146 C.A.3d 1019, 1025, 194 C.R. 691, supra, §32 [court characterized error as denial of due process]; *In re Dung T.* (1984) 160 C.A.3d 697, 711, 206 C.R. 772) or could be harmless (see *People v. Carreon* (1984) 151 C.A.3d 559, 198 C.R. 843, supra, §32; *People v. Rioz* (1984) 161 C.A.3d 905, 913, 207 C.R. 903, supra, §33).

(2) *Chapman Standard Governs.* In *People v. Rodriguez* (1986) 42 C.3d 1005, 232 C.R. 132, 728 P.2d 202, two interpreters were provided for two defendants, but one of them also interpreted for witnesses. In reaching the conclusion that there was no reversible error, the court reviewed the case law and *rejected the reversible error per se standard.*

(a) "Application of the per se standard requiring automatic reversal for a violation of a constitutional right normally is dependent upon the fundamental character of the right invaded or the impossibility of assessing prejudice. ... This test has not been applied to all deprivations of constitutional rights, even federal constitutional rights ... , and we believe that it similarly is unnecessary here. In so concluding, we do not intend to diminish the importance of the right to an interpreter where required. However, our consideration of the panoply of constitutional rights implicated in the use of or denial of an interpreter, and the fact that the violation of these rights does not automatically lead to substantial prejudice, leads us to believe that a different standard is appropriate. Moreover, if a defendant can demonstrate, either on the record or through habeas corpus, that a fundamental right has been infringed, the denial of which as a general rule would lead to automatic reversal, then he may still obtain such relief on that basis." (42 C.3d 1010.)

(b) Several constitutional interests may be implicated in the right to an interpreter, including due process, confrontation, assistance of counsel, and presence at trial. But violation of these rights does not necessarily require automatic reversal; e.g., the burden is on the defendant to demonstrate that his absence prejudiced his case or denied him a fair and impartial trial, and violation of the right to counsel requires reversal only where the breach has had a material effect on the regularity of the trial. (42 C.3d 1011.)

(c) Where violations of *state constitutional rights* are involved, the *Watson* probability test is usually applied (whether it is "reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error"). Here, *federal constitutional rights* may be affected, and "we therefore adopt a *Chapman*

approach under which a federal constitutional error may be deemed harmless only if the appellate court 'is able to declare a belief that it was harmless beyond a reasonable doubt.' " (42 C.3d 1012; see 6 Cal. Crim. Law (3d), *Reversible Error*, §10.) The United States Supreme Court, in recent decisions involving denial of a defendant's right to be present, failure to permit cross-examination, and other errors of constitutional dimension, has similarly rejected the reversible error per se doctrine and followed the *Chapman* approach. (42 C.3d 1012.)

(d) The Judicial Council's Standard (see *supra*, §31) "did not mandate separate interpreters for each party but rather commented that such a service 'may' be necessary." But problems have arisen, and to avoid speculation regarding possible adverse consequences, "[w]e believe that the best and preferred means of avoiding further confusion is to require that each defendant have assigned to him an interpreter who remains at his side throughout the proceedings, unless such assistance has been waived." (42 C.3d 1013.)

(e) In the present case, while both defendants were technically deprived at times of the assistance of separate interpreters, nothing in the record shows that at any point either defendant's ability to communicate or comprehend was impeded. (42 C.3d 1014.) The situation in *Aguilar*, *supra*, is distinguishable: There, the use of defendant's interpreter to translate for a witness left the defendant isolated and unable to consult his attorney. (42 C.3d 1014.) And in *Menchaca*, *supra*, the court pointed out that defense counsel had objected to the borrowing of the interpreter. (42 C.3d 1015.)

"Thus, among possible indications of actual interference with defendant's rights which may appear on the record are remarks by counsel, the court, or defendants themselves. In other instances, the fact that a defendant who does not speak English has been left without means of communication or comprehension will be equally obvious without reference to express remarks made during the proceedings. Nonetheless, in some cases, even where some deprivation is shown, the absence of a personal interpreter may be found harmless because the proceedings which took place while the interpreter was absent may be insubstantial or concern matters which are not possibly prejudicial to the defendant, or because there is no allegation that the deprivation actually affected any of the defendant's rights." (42 C.3d 1015.)

The opinion concludes: "We hold that the proper standard of review to be utilized where the state constitutional right to an interpreter has been violated is that described in *Chapman*. Nothing will prevent defendants from raising any additional constitutional claims should they be appropriate. In some instances, where the record does not reveal error or does not reveal any likely material effect caused by an apparent violation, the defendant may wish to proceed via habeas corpus proceedings." (42 C.3d 1019.) (See *People v. Baez* (1987) 195 C.A.3d 1431, 1435, 241 C.R. 435, *supra*, §32 [applying *Chapman* standard and reversing conviction].)

**SUPPLEMENT:** [This section is current through the latest supplement]





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#### D. Interpreters and Translators.

#### 4. Interpreter for Defendant in Criminal Case. d. Failure To Administer Oath.

3 Witkin Cal. Evid. Presentation § 36

#### [§ 36] Failure To Administer Oath.

In *People v. Menchaca* (1983) 146 C.A.3d 1019, 194 C.R. 691, supra, §32, the court also declared that the failure to administer the oath required by *Ev.C. 750* and *Ev.C. 751* (supra, §28) "is fatal to the constitutional effectiveness of an interpreter." (146 C.A.3d 1025.)

The court in *People v. Carreon* (1984) 151 C.A.3d 559, 198 C.R. 843, disagreed. The only oath disclosed by the record was that given to a witness interpreter; there was no record of any defense interpreter being sworn. Defendant contended that the same oath requirements for witness interpreters (*Ev.C. 751, 752*, supra, §§28, 29) apply to defense interpreters; that in the absence of record proof that an interpreter was sworn, the presumption arises that no oath was given; and that, under the holding in *Menchaca*, the failure to administer the oath was reversible error. *Held*, these contentions were unsound.

(a) Properly construed, the Code sections do not require an oath. *Ev.C. 751* and *Ev.C. 752* refer only to witness interpreters, and *Ev.C. 750* provides that an interpreter is subject to all the rules of law relating to witnesses. Superficially, *Ev.C. 750* might cover defense interpreters, but this is not the proper interpretation.

(1) In view of the special role of the defense interpreter, the oath may not be required except for the purposes of appearance and solemnity; and the statutory oath for witness interpreters is obviously unsuitable. (151 C.A.3d 578.)

(2) The defense interpreter functions in court and elsewhere during conferences between defense counsel and the defendant; if an oath were required, it would have to be given at the earliest opportunity in order to provide for private conferences. (151 C.A.3d 578.)

(3) The Law Revision Commission Comment to *Ev.C. 750* discusses only the witness interpreter; without that section as a basis, no oath requirement for defense interpreters exists. (151 C.A.3d 578.)

(4) A defendant is provided a defense interpreter much as he or she is assigned a private investigator or psychiatrist, and professional licensing by the state may constitute the only requisite to service. (151 C.A.3d 578.)

(5) The work of the defense interpreter, unlike that of the witness interpreter, does not become a part of the record. (151 C.A.3d 578.)

(b) Assuming that an oath is required, it was waived.

(1) Cases dealing with the oath required of a witness are, under *Ev.C. 750*, applicable to an interpreter. And these cases hold that, where the record does not show whether the witness has been sworn, the presumption is that the duty was performed, and the burden is on the appellant to overcome the presumption. (*151 C.A.3d 578, 579.*)

(2) Apart from the presumption, failure to swear an interpreter, like failure to swear a witness, is not reversible error. (*151 C.A.3d 579*; see *supra*, §25.)

(3) Likewise, as in the case of failure to swear a witness, the error may be waived. (*151 C.A.3d 580, 581*; see *supra*, §25.) And here, defendant's counsel, aware of the fact that an interpreter was not sworn, made no timely request or objection. (*151 C.A.3d 581, 582.*) (See *People v. Martinez (1985) 171 C.A.3d 727, 733, 217 C.R. 546* [record silent on swearing, no objection, no improper translation and no unfairness shown; no reversible error; following *Carreon*]; *In re Bryon S. (1986) 176 C.A.3d 822, 830, 223 C.R. 319* [in juvenile court proceeding, failure to administer oath to interpreter for youth's father until after hearing on interpreter's competence, but prior to receipt of evidence against youth, did not materially affect hearing or adjudication and was not reversible error].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### D. Interpreters and Translators.

4. Interpreter for Defendant in Criminal Case.
- e. Challenge to Accuracy of Information.

3 Witkin Cal. Evid. Presentation § 37

[§ 37] Challenge to Accuracy of Information.

In *People v. Johnson* (1975) 46 C.A.3d 701, 120 C.R. 372, witness R testified in Spanish through an interpreter at the preliminary examination. At the trial, R was unavailable, and the prosecution sought to use his preliminary examination testimony. Defendants moved to exclude R's testimony, arguing that deficiencies in the translation denied defendants the reasonable opportunity to cross-examine him. To support this contention, defendants proposed to introduce testimony by a person fluent in Spanish and English who was present throughout the preliminary hearing as the investigating officer and who would show significant errors in the translation. The judge refused to hear the proffered evidence and permitted R's testimony to go to the jury. *Held*, this was error.

(a) If the interpreter was improperly interpreting questions to R and answers from R, defense counsel had no meaningful opportunity to cross-examine R. The evidence proffered by defendants was thus relevant to an issue vital to the preliminary facts which the prosecution had to establish before R's testimony could be received at trial. (46 C.A.3d 704.)

(b) The trial judge was required to receive the proffered evidence unless some special rule precluded it. No such rule applied here. Under *Ev.C. 750*, interpreters are subject to all rules relating to witnesses. "The most fundamental of laws relating to witnesses generally is that their testimony may be impeached or countered by that of other witnesses." (46 C.A.3d 704.)

(c) The trial judge was not called on to review the preliminary hearing proceedings as on a P.C. 995 motion to dismiss. The proffered evidence was put forward in relation to the prosecution's offer to use R's earlier testimony as original evidence at trial. "The excluded evidence went to a fact of constitutional dimension going to the admissibility of the evidence. It was thus timely when offered, i.e., at the earliest opportunity in rebuttal of the prosecution's effort to carry its burden of establishing that appellants had been afforded a meaningful right of cross-examination at the preliminary hearing." (46 C.A.3d 705.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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### III. PROCEDURE AT TRIAL

#### D. Interpreters and Translators.

#### 5. Interpreter for Party in Civil Case.

*3 Witkin Cal. Evid. Presentation § 38*

[§ 38] Interpreter for Party in Civil Case.

(1) *No Interpreter Required.* *Ev.C. 755* was added in 1991 to provide for the appointment of an interpreter for any party in a civil action who "does not proficiently speak or understand the English language." (*Ev.C. 755(a), (b).*) The statute was to remain in effect until January 1, 1993, unless the Legislature acted to extend that date. (*Ev.C. 755(f).*) *Ev.C. 755* was not extended, and thus it was repealed by its own terms, effective January 1, 1993. (On *Ev.C. 755*, added in 1995, concerning interpreters where domestic violence protective order has been granted or is sought, see *infra*, §39.)

(2) *Exception: Medical Examination.* An interpreter must be appointed for any party to a civil action who lacks proficiency in the English language and who is subject to a medical examination (a) that is requested by an insurer or by the defendant, and (b) that is conducted for the purpose of determining damages. (*Ev.C. 755.5(a).*) The interpreter's fee must be paid by the insurer or the defendant requesting the examination. (*Ev.C. 755.5(b).*)

If a medical examination is conducted without complying with *Ev.C. 755.5(a)*, the record or testimony concerning the examination is inadmissible in the civil action for which it was conducted or in any other civil action. (*Ev.C. 755.5(c).*)

The interpreter must be certified under *Govt.C. 11435.05 et seq.* (*Ev.C. 755.5(a).*) However, if a certified interpreter is unavailable, the person requesting the interpreter may, on stipulation of the parties, provisionally qualify and utilize other interpreters. (*Ev.C. 755.5(e).*)

*Ev.C. 755.5* does not prohibit the presence of any other person to assist a party. (*Ev.C. 755.5(d).*)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Trial k.22



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### III. PROCEDURE AT TRIAL

#### D. Interpreters and Translators.

#### 6. Interpreter Where Protective Order Granted or Sought.

#### 3 Witkin Cal. Evid. Presentation § 39

[§ 39] Interpreter Where Protective Order Granted or Sought.

(1) *In General.* An interpreter must be provided for a party who does not proficiently speak or understand English, if a protective order has been granted or is sought under *Family C. 6221* and the action or proceeding is (1) brought under *Family C. 6200* et seq. (domestic violence) or the Uniform Parentage Act (*Family C. 7600* et seq.), or (2) for dissolution or nullity of marriage or legal separation. The requirement applies whenever the party is present. The interpreter must be certified under *Govt.C. 68560* et seq. (see 2 *Cal. Proc.* (4th), *Courts*, §397), unless the court, in its discretion, appoints an uncertified interpreter. (*Ev.C. 755(a).*)

(2) *Exception for Ex Parte Orders.* The court may order an ex parte protective or restraining order under *Family C. 2045* (11 *Summary* (9th), *Husband and Wife, Supp.*, §171F), *Family C. 6320* et seq. (11 *Summary* (9th), *Husband and Wife, Supp.*, §36G), or *Family C. 7710* (10 *Summary* (9th), *Parent and Child, Supp.*, §448L) without an interpreter being present. (*Ev.C. 755(a).*)

(3) *Fees.* The interpreter's fees are to be paid as provided in *Govt.C. 68092(b)*, but they must be waived if the party who needs the interpreter is appearing in forma pauperis under *Govt.C. 68511.3*. (*Ev.C. 755(b).*)

(4) *Action Permissible Where Interpreter Not Present.* The proceedings may not commence until the interpreter is present and situated near the party and the party's attorney, but this requirement does not prevent the court from (a) issuing an order when the necessity for the order outweighs the necessity for an interpreter, (b) extending a previously issued temporary order if the interpreter is not readily available, or (c) issuing a permanent order where the party requiring the interpreter has failed to make appropriate arrangements for an interpreter after receiving proper notice of the hearing with information about obtaining an interpreter. (*Ev.C. 755(c).*)

(5) *Funding.* Local public entities may, and the Judicial Council must, apply to the appropriate state agency for federal or other funds to implement *Ev.C. 755*, and they need comply with the statute only to the extent those funds are made available. (*Ev.C. 755(e).*)

(6) *Presence of Other Persons.* The statute is not intended to prohibit the presence of any other person to assist a party. (*Ev.C. 755(d).*)

(7) *Rules and Forms.* To implement the statute, the Judicial Council must draft rules and modify forms, including the petition for a temporary restraining order and related forms, to inform both parties of their right to an interpreter. (*Ev.C. 755(f).*)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Exception for Ex Parte Orders.*

*Cross-References:* 11 *Summary* (10th), *Husband and Wife*, §§89, 382; 10 *Summary* (10th), *Parent and Child*, §51.



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## CHAPTER XI - Presentation At Trial

### III. PROCEDURE AT TRIAL E. Assistance for Hearing Impaired.

*3 Witkin Cal. Evid. Presentation § 40*

[§ 40] Assistance for Hearing Impaired.

(1) *In General.* In designated proceedings and hearings (see *infra*, this section), a party, witness, attorney, judicial employee, judge, juror, or other participant who is hearing impaired must, upon request, be provided with a functioning assistive listening system or a computer-aided transcription system. An individual requiring a system must give advance notice to the appropriate court or agency either at the time the hearing is set or not later than 5 days before the hearing. (C.C. 54.8(a).) The proceeding or hearing may not commence until the system is in place and functioning. (C.C. 54.8(i).)

An "individual who is hearing impaired" means "an individual with a hearing loss, who, with sufficient amplification or a computer-aided transcription system, is able to fully participate in the proceeding." (C.C. 54.8(j).)

(2) *Proceedings or Hearings Covered.* The requirement of providing an assistive listening system or a computer-aided transcription system applies in any (a) civil or criminal proceeding, including traffic, small claims court, family court proceedings and services, and juvenile court proceedings; (b) court-ordered or court-provided alternative dispute resolution, including mediation and arbitration; and (c) administrative hearing of a public agency. (C.C. 54.8(a).)

(3) *Compliance With Federal Standards.* C.C. 54.8 may not be construed as prescribing a lesser standard of accessibility or usability than that provided by Title II of the Americans with Disabilities Act of 1990 (42 U.S.C., §12131 et seq.) and implementing federal regulations. (C.C. 54.8(k).)

(4) *Types of Assistance.* "Assistive listening systems" include "special devices which transmit amplified speech by means of audio-induction loops, radio frequency systems (AM or FM), or infrared transmission." Personal receivers, headphones, and neckloops must be available upon request by hearing impaired individuals. (C.C. 54.8(b).)

If a computer-aided transcription system is used, sufficient display terminals must be provided to allow the hearing impaired individual to read the real time transcript of the proceeding without difficulty. (C.C. 54.8(c).)

Each county must have at least one portable assistive listening system for use by any court in the county. The location of the system must be jointly determined by the board of supervisors and the judges. (C.C. 54.8(e).)

(5) *Hearing Impaired Juror.* If a juror is hearing impaired, the jury deliberation room must, at the juror's request, be equipped with an assistive listening system or a computer-aided transcription system. (C.C. 54.8(g).)

A court reporter may be present in the jury deliberation room during deliberation if a hearing impaired juror

requires the reporter's assistance in operating a computer-aided transcription system. (C.C. 54.8(h).)

(6) *Notice and Records.* A sign must be posted in a prominent place indicating the availability of, and the means of requesting, an assistive listening system or a computer-aided transcription system. Notice of the availability of the systems must be posted with notice of trials. (C.C. 54.8(d).)

The Judicial Council must develop and approve official forms for notifying persons of the availability of assistive listening systems and computer-aided transcription systems. The council must also develop and maintain records showing the utilization of these systems by the courts. (C.C. 54.8(f).)

**SUPPLEMENT:** [This section is current through the latest supplement]

(4) *Types of Assistance.* C.C. 54.8(e), as amended in 2001, provides that each superior court must have at least one portable assistive listening system for use in any court facility in the county. When the system is not in use, it must be stored in a location determined by the court.





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### III. PROCEDURE AT TRIAL

#### F. Kinds of Examination.

#### 3 Witkin Cal. Evid. Presentation § 41

[§ 41] Kinds of Examination.

The Evidence Code defines each of the established methods of examining witnesses:

(1) *Direct Examination*. This is "the first examination of a witness upon a matter that is not within the scope of a previous examination of the witness." (*Ev.C. 760*; see *infra*, §164 et seq.; Rutter Group, 2 Civil Trials and Evidence, Chap. 9.) Normally, it is the examination by the party who calls the witness; but, under the above definition and standard practice, if the other party thereafter seeks to question the witness on a matter not within the scope of his or her testimony, the rules of direct examination apply. (*Ev.C. 760*, Comment; see *infra*, §231.)

(2) *Cross-Examination*. This is "the examination of a witness by a party other than the direct examiner upon a matter that is within the scope of the direct examination of the witness." (*Ev.C. 761*; see *infra*, §224 et seq.; Rutter Group, 2 Civil Trials and Evidence, Chap. 10.) The definition retains the established rule limiting the scope of cross-examination. (See *infra*, §231.)

(3) *Redirect Examination*. This is "an examination of a witness by the direct examiner subsequent to the cross-examination of the witness." (*Ev.C. 762*; see *infra*, §256; Rutter Group, 2 Civil Trials and Evidence §9:227 et seq.) The definition covers not only redirect immediately following cross-examination, but any subsequent reexamination by the direct examiner. (*Ev.C. 762*, Comment.)

(4) *Recross-Examination*. This is "an examination of a witness by a cross-examiner subsequent to a redirect examination of the witness." (*Ev.C. 763*; see *infra*, §257; Rutter Group, 2 Civil Trials and Evidence §10:219 et seq.) This, too, includes any subsequent reexamination by a cross-examiner. (*Ev.C. 763*, Comment.)

(5) *Voir Dire Examination*. The term "voir dire examination," not defined in the Evidence Code, refers to the preliminary questioning of a prospective witness (or juror) to determine the person's qualifications. (See 2 *Cal. Evidence* (4th), *Witnesses*, §48; *infra*, §189; on voir dire examination of jurors, see 7 *Cal. Proc.* (4th), *Trial*, §150 et seq.; 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §472 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, *Witnesses* k.224 et seq.



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III. PROCEDURE AT TRIAL

G. Practice Suggestions.

*3 Witkin Cal. Evid. Presentation § 42*

[§ 42] Practice Suggestions.

The following practice books furnish many valuable suggestions on various phases of oral examination:

(1) *In General*. (See C.E.B., 1 Civ. Proc. During Trial 3d, Chap. 11; 1 Jefferson, California Evidence Benchbook 3d, Chap. 27; Rutter Group, 2 Civil Trials and Evidence, Chaps. 9, 10, 11; 2 Wharton's Criminal Evidence 14th, Chap. 8; 1 McCormick 5th, §5 et seq.; 3 Wigmore (Chadbourn Rev.) §766 et seq.; 6 Wigmore (Chadbourn Rev.) §1869 et seq.; 1 Schweitzer 2d, §189 et seq.; Carlson, Successful Techniques for Civil Trials 2d, §4.6 et seq.; Danner, Trial Practice Checklists, §§8:90 [direct], 8:180 et seq. [cross].)

(2) *Courtroom Manner, Speech and Deportment*. (See C.E.B., 2 Civ. Proc. During Trial 3d, §16.8 et seq.; C.E.B., Effective Cross and Direct Examination, §1.4; C.E.B., Effective Introduction of Evidence in California 2d, Chap. 1 [how to ask questions]; 5 Am.Jur. Trials 695.)

(3) *Conduct Toward Opposing Counsel*. (See C.E.B., 2 Civ. Proc. During Trial 3d, §16.31; 1 Cal. Proc. (4th), Attorneys, §599 et seq.)

(4) *Conduct Toward Trial Judge*. (See C.E.B., 2 Civ. Proc. During Trial 3d, §16.20 et seq.; 1 Cal. Proc. (4th), Attorneys, §555 et seq.)

(5) *Rebuttal*. (See C.E.B., 1 Civ. Proc. During Trial 3d, §11.126 et seq.; Rutter Group, 2 Civil Trials and Evidence §9:240 et seq.; 1 Schweitzer 2d, §263 et seq.; *infra*, §70 et seq.)

(6) *Argument or Summation*. (See C.E.B., 2 Civ. Proc. During Trial 3d, Chap. 13; Rutter Group, 3 Civil Trials and Evidence, Chap. 13; 6 Am.Jur. Trials 641, 731, 777, 807, 873; 1 Schweitzer 2d, §271 et seq.; 5 Cal. Crim. Law (3d), Criminal Trial, §566 et seq.; 7 Cal. Proc. (4th), Trial, §176 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General*. See 1 McCormick 6th, §5 et seq.



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## CHAPTER XI - Presentation At Trial

### IV. POWERS AND FUNCTIONS OF TRIAL JUDGE

#### A. In General.

#### 3 Witkin Cal. Evid. Presentation § 43

[§ 43] In General.

The judge's broad authority over the admission and exclusion of evidence is generally recognized by statutes and cases. (See *Ev.C.* 320 [order of proof]; *Ev.C.* 352, 1 *Cal. Evidence* (4th), *Circumstantial Evidence*, §132 et seq. [exclusion of relevant, but prejudicial, evidence]; *Engineering Service Corp. v. Longridge Inv. Co.* (1957) 153 C.A.2d 404, 417, 314 P.2d 563; *Peat, Marwick, Mitchell & Co. v. Superior Court* (1988) 200 C.A.3d 272, 288, 245 C.R. 873; *Cottle v. Superior Court* (1992) 3 C.A.4th 1367, 1379, 5 C.R.2d 882; *Continental Ins. Co. v. Superior Court* (1995) 32 C.A.4th 94, 107, 108, 37 C.R.2d 843; 63 So. Cal. L. Rev. 937 [judicial discretion, power, and responsibility in evidence law]; C.J.E.R., Judges Benchbook, Civil Proceedings: Trial, §5.43 et seq.; 81 *Am.Jur.2d* (1992 ed.), *Witnesses* §§717, 718; 9 Wigmore (Chadbourne Rev.) §2549.)

Particular aspects of this power, considered in subsequent sections, are: order of proof (*infra*, §44 et seq.); determination of preliminary facts (*infra*, §48 et seq.); restriction of cumulative evidence (*infra*, §§67, 68); limiting number of experts (*infra*, §69); restriction of rebuttal evidence (*infra*, §70 et seq.); exclusion of witnesses from courtroom (*infra*, §73 et seq.); examination of witnesses (*infra*, §76 et seq.); instructions to jury on evidence and witnesses (*infra*, §87); exclusion of testimony on own motion (*infra*, §392).

Other aspects already considered are discretion to exclude unduly prejudicial matter (1 *Cal. Evidence* (4th), *Circumstantial Evidence*, §132 et seq.) and discretion to order a view of the scene (2 *Cal. Evidence* (4th), *Demonstrative, Experimental, and Scientific Evidence*, §25).

Some phases of this subject are considered in other works: on power to reopen case after submission, see 7 *Cal. Proc.* (4th), *Trial*, §180; on power to punish for contempt in trial, see 7 *Cal. Proc.* (4th), *Trial*, §182 et seq.; on misconduct of judge preventing a fair trial, see 7 *Cal. Proc.* (4th), *Trial*, §254 et seq.; 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §557; on power of pretrial judge to limit issues by pretrial order, see 7 *Cal. Proc.* (4th), *Trial*, §55; on appellate review of rulings admitting or excluding evidence, see 9 *Cal. Proc.* (4th), *Appeal*, §§341, 422, 423, 434, 439; 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §§548, 549.

**SUPPLEMENT:** [This section is current through the latest supplement]

See CACI, No. 5016 [Judge's Commenting on Evidence]; 37 *U.S.F. L. Rev.* 1003 [comparison of California Evidence Code with Federal Rules in allocation of functions between judge and jury]; 81 *Am.Jur.2d* (2004 ed.), *Witnesses* §§689, 690. *West's Key Number Digest*, Criminal Law k.731



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CHAPTER XI - Presentation At Trial

IV. POWERS AND FUNCTIONS OF TRIAL JUDGE

B. Order of Proof.

1. Civil Cases.

a. In General.

*3 Witkin Cal. Evid. Presentation § 44*

[§ 44] In General.

The sequence of procedural steps in the trial is set forth in *C.C.P. 607*. (See *supra*, §22.) As to presentation of evidence, the court in its discretion regulates the order of proof, except as otherwise provided by law. (*Ev.C. 320*.) However, the order in which each party presents its own evidence and calls its own witnesses is largely a matter of trial strategy, and counsel are usually allowed relatively complete control. (For practice suggestions, see *C.J.E.R.*, Judges Benchbook, Civil Proceedings: Trial §5.8 et seq.; *C.E.B.*, 3 Civ. Proc. During Trial 3d, §24.7; *C.E.B.*, Effective Introduction of Evidence in California 2d, Chap. 5; Rutter Group, 1 Civil Trials and Evidence §1:428 et seq.; for special rules governing particular situations, see *infra*, §45.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Trial k.59 et seq.



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### IV. POWERS AND FUNCTIONS OF TRIAL JUDGE

#### B. Order of Proof.

##### 1. Civil Cases.

##### b. Special Rules of Practice.

3 Witkin Cal. Evid. Presentation § 45

[§ 45] Special Rules of Practice.

Rules governing the order of proof have been developed in the following situations:

(1) *Prior Trial of Special Defenses*. Defenses not involving the merits, such as statute of limitations, res judicata, another action pending or other plea in abatement, may, on motion, be separately tried at the outset. (C.C.P. 597; see 7 Cal. Proc. (4th), Trial, §164 et seq.)

(2) *Prior Trial of Equitable Issues*. When a proceeding involves both legal and equitable issues, the normal practice is to try the equitable issues first. The court's resolution of the equitable issues may also resolve the legal issues. (Raedeke v. Gibraltar Savings & Loan Assn. (1974) 10 C.3d 665, 671, 111 C.R. 693, 517 P.2d 1157; Dills v. Delira Corp. (1956) 145 C.A.2d 124, 129, 302 P.2d 397; A-C Co. v. Security Pac. Nat. Bank (1985) 173 C.A.3d 462, 473, 219 C.R. 62; Walton v. Walton (1995) 31 C.A.4th 277, 293, 36 C.R.2d 901.)

(3) *Prior Trial of Issues of Law*. In actions triable by jury for the recovery of specific real or personal property, or for money claimed under a contract or as damages for breach, or for injuries, when there are issues of law and fact, the legal issues are tried first. (C.C.P. 592.)

(4) *Prior Trial of Basic Issue*. A foundational or basic issue should be tried first, where other proof is dependent on it. (See Smeland v. Renwick (1920) 50 C.A. 565, 574, 196 P. 283 [action against corporation for fraud, proof of representations by officer and falsity before evidence of damage]; Estate of Marshall (1953) 120 C.A.2d 747, 752, 262 P.2d 42 [heirship proceeding by daughter claiming as legitimate pretermitted heir; proof first of cohabitation, which, if established, would lead to conclusive presumption of legitimacy].)

(5) *Judge's Discretion To Vary Order*. The foregoing rules are not restrictive; the discretion of the judge to permit the introduction of evidence out of its logical or conventional order is exceedingly broad. Thus, under the doctrine of limited admissibility (1 Cal. Evidence (4th), Circumstantial Evidence, §30), evidence that may be irrelevant or incompetent unless connected up with other evidence may be admitted on counsel's assurance that the other evidence will be produced. (Ev.C. 403(b), infra, §52.) If it is not, the court should thereafter strike out the unconnected evidence. (See Avery v. Wiltsee (1918) 177 C. 484, 486, 171 P. 95; Jacobson v. Lamb (1928) 91 C.A. 405, 417, 267 P. 114 [declarations of partner before proof of authority to bind partnership]; Brea v. McGlashan (1934) 3 C.A.2d 454, 466, 39 P.2d 877 [declarations of agent admitted prior to proof of agency]; Salyer Grain & Milling Co. v. Henson (1970) 13 C.A.3d 493, 499, 500, 91 C.R. 847 [court may admit evidence conditionally by either reserving its ruling on objection or

by admitting evidence subject to motion to strike]; 1 McCormick 5th, §58; 6 Wigmore (Chadbourn Rev.) §1871; on motion to strike, see *infra*, §383.) (For other illustrations of court's discretion, see *Estate of Smith* (1917) 176 C. 729, 730, 171 P. 289 [will contest; proponents required to offer evidence of execution of will before contestant required to prove interest in estate]; *Laguna Salada Union Elementary School Dist. v. Pacific Dev. Co.* (1953) 119 C.A.2d 470, 474, 259 P.2d 498 [condemnation suit; jury determination of value before court determination of necessity]; *Alton v. Rogers* (1954) 127 C.A.2d 667, 676, 274 P.2d 487 [departure from practice of trying equitable issues first; jury carefully instructed that equitable issues were for court].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(5) *Judge's Discretion To Vary Order*. See 1 McCormick 6th, §58.



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## CHAPTER XI - Presentation At Trial

## IV. POWERS AND FUNCTIONS OF TRIAL JUDGE

## B. Order of Proof.

## 2. Criminal Cases.

3 *Witkin Cal. Evid. Presentation* § 46

[§ 46] Criminal Cases.

(1) *General Rule of Discretion.* The sequence of procedural steps in a criminal trial is stated in P.C. 1093. (See *supra*, §22.) But P.C. 1094 authorizes the court, in its discretion, to depart from this sequence, and the power of the court to vary the normal order of proof of issues is also well recognized. (See *Ev.C.* 320; *People v. McDermand* (1984) 162 C.A.3d 770, 792, 211 C.R. 773.)

Thus, evidence of acts or declarations of a coconspirator are inadmissible against a defendant unless the conspiracy and the defendant's membership therein are independently shown. (See 1 *Cal. Evidence* (4th), *Hearsay*, §133.) But the court may, where it appears necessary or desirable, permit the evidence to be provisionally introduced, subject to later striking if the conspiracy is not proved. (See *People v. Sica* (1952) 112 C.A.2d 574, 584, 247 P.2d 72; *People v. Fratianno* (1955) 132 C.A.2d 610, 625, 282 P.2d 1002; *In re David B.* (1978) 81 C.A.3d 806, 809, 146 C.R. 815.)

Similarly, a defendant's incriminating admission or confession is not admissible unless the corpus delicti has been proved by independent evidence (see 1 *Cal. Crim. Law* (3d), *Elements*, §46), but the court may vary the order for good reason. (See *People v. Griffin* (1950) 98 C.A.2d 1, 47, 219 P.2d 519; *People v. Lara* (1994) 30 C.A.4th 658, 675, 35 C.R.2d 886; cf. 45 A.L.R.2d 1316, 1338.)

(2) *Illustrations.* In *People v. McDermand*, *supra*, a murder trial, the prosecutor moved to defer cross-examination of defendant until after the defense psychiatrist had finished his testimony. *Held*, granting of the motion over objection was error, although harmless. The prosecutor's purpose--to make his cross-examination more effective--was not a proper reason for compelling premature revelation of the nature of the defense. (162 C.A.3d 792.) However, the ruling did not prejudice defendant: (a) The defense was diminished capacity, and defense counsel would have called the psychiatrist in any event. (b) The scope of the cross-examination was not broadened, for the court properly confined it to the scope of the direct examination. (c) It is within the trial court's discretion to permit the prosecutor to recall a defendant for further cross-examination even after the defense has rested; hence, there was no prejudice in the court's ruling permitting all of his cross-examination, rather than some of it, to take place at the later time. (162 C.A.3d 794.) (See *People v. Marshall* (1996) 13 C.4th 799, 835, 836, 55 C.R.2d 347, 919 P.2d 1280 [judge in murder trial, after allowing defense counsel to reopen to present two witnesses after both sides had rested and prosecution had begun guilt phase summation, did not err in refusing to allow defense to present third witness; witness' testimony had slight probative value and would have increased disruption already caused by reopening].)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Criminal Law k.680 et seq.



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## CHAPTER XI - Presentation At Trial

### IV. POWERS AND FUNCTIONS OF TRIAL JUDGE

#### C. Determination of Questions of Law.

3 Witkin Cal. Evid. Presentation § 47

[§ 47] Determination of Questions of Law.

The court must decide all questions of law. These include questions concerning the construction of statutes and other writings, the admissibility of evidence, and other rules of evidence. (*Ev.C. 310(a)*; on construction of statutes and Constitution, see generally 7 *Summary (9th)*, *Constitutional Law*, §92 et seq.; 1 *Cal. Crim. Law (3d)*, *Introduction to Crimes*, §17 et seq.; on construction of contracts, see 1 *Summary (9th)*, *Contracts*, §681 et seq.; on construction of deeds, see 4 *Summary (9th)*, *Real Property*, §235 et seq.; on construction of wills, see 12 *Summary (9th)*, *Wills and Probate*, §244 et seq.; on review of questions of law, see 9 *Cal. Proc. (4th)*, *Appeal*, §316 et seq.)

Foreign law, formerly considered a question of fact, is a question of law, determined by judicial notice under the procedure prescribed by *Ev.C. 450* et seq. (*Ev.C. 310(b)*; see 1 *Cal. Evidence (4th)*, *Judicial Notice*, §27.) Whether a writing constitutes an integration subject to the parol evidence rule is also a question of law (see 2 *Cal. Evidence (4th)*, *Documentary Evidence*, §68), and the same is true of illegality in obtaining evidence as a ground of exclusion (see 4 *Cal. Crim. Law (3d)*, *Illegally Obtained Evidence*, §354 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*Construction of statutes and Constitution:*

*Cross-Reference:* 7 *Summary (10th)*, *Constitutional Law*, §112 et seq.

*Construction of contracts:*

*Cross-Reference:* 1 *Summary (10th)*, *Contracts*, §741 et seq. *Construction of deeds:*

*Cross-Reference:* 12 *Summary (10th)*, *Real Property*, §13 et seq.

*Construction of wills:*

*Cross-Reference:* 14 *Summary (10th)*, *Wills and Probate*, §184 et seq. *West's Key Number Digest*, Criminal Law k.733 et seq.; Trial k.136 et seq.





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## CHAPTER XI - Presentation At Trial

### IV. POWERS AND FUNCTIONS OF TRIAL JUDGE

#### D. Determination of Preliminary Facts.

##### 1. In General.

##### a. Nature of Problem and Code Solution.

*3 Witkin Cal. Evid. Presentation § 48*

[§ 48] Nature of Problem and Code Solution.

(1) *Preliminary Determination by Judge.* In many situations, the qualification of a witness to testify or to refuse to testify, or the admissibility of a particular item of evidence, is conditional on the showing of preliminary facts as a foundation. Although fact questions are ordinarily for the jury (see *infra*, §88), this preliminary issue of admissibility is decided by the trial judge. (See *Ev.C. 310* [court determines issues of fact preliminary to admission of evidence as provided in *Ev.C. 400* et seq., *infra*, §49 et seq.]; *People v. Superior Court (Blakely)* (1997) 60 C.A.4th 202, 209, footnote 6, 70 C.R.2d 388, citing the text; Rutter Group, 2 Civil Trials and Evidence §8:3375 et seq.; 1 McCormick 5th, §53; 9 Wigmore (Chadbourn Rev.) §2550; 20 Southwestern U. L. Rev. 453 [Preliminary Question of Fact for the Judge: The Standard of Proof for Pretrial Admissibility Problems].)

(2) *Redetermination by Jury.* In applying this basic rule, an important procedural question arises: When is the judge's determination of the sufficiency of the foundation final and when does the jury redetermine the issue in considering the evidence? Former California statutes were silent on the point, and the case law was meager and confused. One theory distinguished between questions of competency (exclusively for the judge) and relevancy (redetermined by the jury). The Commission chose the more practical solution of classifying all of the types of preliminary questions under one or the other head. (*Ev.C. 402, 403*, and Comments.) Thus, though a particular classification may be challenged and perhaps eventually changed, a reliable rule is provided for each situation.

(3) *Summary of Code Provisions.* The Code provisions establishing this procedure are as follows:

*Ev.C. 400* and *Ev.C. 401* define the terms (*infra*, §49).

*Ev.C. 402(a)* states that preliminary facts are determined as provided in *Ev.C. 400* et seq.

*Ev.C. 402(b)* and *Ev.C. 402(c)* set forth the procedure of hearing and determination (*infra*, §§50, 51).

*Ev.C. 403* lists the preliminary fact questions to be redetermined by the jury (*infra*, §52 et seq.).

*Ev.C. 405* lists those finally determined by the judge (*infra*, §59 et seq.).

*Ev.C. 404* deals specially with determination of the preliminary fact of tendency to incriminate, where the witness claims the self-incrimination privilege. (See 2 *Cal. Evidence (4th)*, *Witnesses*, §495.)

*Ev.C. 403(a)* and *Ev.C. 405(a)* allocate the burden of producing evidence and the burden of proof. (See 1 *Cal. Evidence* (4th), *Burden of Proof and Presumptions*, §33; *infra*, §§52, 59, 62; and see generally *People v. MacIntosh* (1968) 264 C.A.2d 701, 707, 70 C.R. 667; *People v. Citrino* (1970) 11 C.A.3d 778, 783, 90 C.R. 80; *People v. Hallman* (1989) 215 C.A.3d 1330, 1340, 264 C.R. 215.)

(4) *No Need for Formal Findings.* *Ev.C. 402(c)* codifies the established rule that no formal findings are required in ordinary determinations of preliminary facts, and that a ruling on admissibility "implies whatever finding of fact is prerequisite thereto." (*People v. Williams* (1997) 16 C.4th 153, 196, 66 C.R.2d 123, 940 P.2d 710.) Thus, if the record contains any facts supporting the ruling, it will be upheld on appeal despite the judge's erroneous theory. (See *Davey v. Southern Pac. Co.* (1897) 116 C. 325, 329, 48 P. 117; *D'Amico v. Board of Med. Examiners* (1974) 11 C.3d 1, 19, 112 C.R. 786, 520 P.2d 10; *J.B. Aguerre v. American Guarantee & Liab. Ins. Co.* (1997) 59 C.A.4th 6, 15, 16, 68 C.R.2d 837; 9 *Cal. Proc.* (4th), *Appeal*, §340 et seq.) (On abolition of findings and substitution of statement of decision, see 7 *Cal. Proc.* (4th), *Trial*, §399.)

(5) *Federal Rules of Evidence.* The court must determine preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence. In making its determination, the court is not bound by the rules of evidence except those concerning privileges. (*F.R. Evid.*, *Rule 104(a)*.) When the relevancy of evidence depends on the fulfillment of a condition of fact, the court must admit the evidence subject to the introduction of evidence that fulfills the condition. (*F.R. Evid.*, *Rule 104(b)*); see 1 *Mueller & Kirkpatrick*, *Federal Evidence* 2d, §24 et seq.; 29 *Am.Jur.2d* (1994 ed.), *Evidence* §417; 23 *U.C. Davis L. Rev.* 77 [suggestions for revision of *F.R. Evid.*, *Rule 104*]; 45 *Am.Jur.* *Trials* 1.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Preliminary Determination by Judge.* See 1 *McCormick* 6th, §53. *West's Key Number Digest*, Criminal Law k.736 et seq.; *Trial* k.138



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D. Determination of Preliminary Facts.

1. In General.

b. Preliminary Fact and Proffered Evidence.

3 Witkin Cal. Evid. Presentation § 49

[§ 49] Preliminary Fact and Proffered Evidence.

The Evidence Code provides a vocabulary for what is generally called "laying the foundation" for admissibility of particular evidence.

(1) *Preliminary Fact*. When the admissibility of evidence, including whether a person is qualified to be a witness and whether a privilege exists, depends on the existence of a fact, that fact is a "preliminary fact." (*Ev.C. 400*.)

(2) *Proffered Evidence*. When the admissibility of evidence depends on the existence of a preliminary fact, the evidence is proffered evidence. (*Ev.C. 401*.) This includes "the testimony to be elicited from a witness who is claimed to be disqualified, testimony or tangible evidence claimed to be privileged, and any other evidence to which objection is made." (*Ev.C. 401*, Comment.)

(3) *Examples*. In a search and seizure case, the validity of which rests on consent, the fruits of the search--the narcotics found--are the "proffered evidence"; consent to the search is the "preliminary fact." (*People v. MacIntosh* (1968) 264 C.A.2d 701, 708, 70 C.R. 667; see *People v. Marshall* (1996) 13 C.4th 799, 833, 55 C.R.2d 347, 919 P.2d 1280 [proffered evidence was photographs of reconstruction of homicide scene; finding that conditions represented in photographs were substantially similar to those prevailing at time of offense was preliminary fact].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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### IV. POWERS AND FUNCTIONS OF TRIAL JUDGE

#### D. Determination of Preliminary Facts.

##### 1. In General.

##### c. Hearing Outside Jury's Presence.

##### 1. Ordinary Cases: Judge's Discretion.

*3 Witkin Cal. Evid. Presentation § 50*

[§ 50] Ordinary Cases: Judge's Discretion.

(1) *General Rule.* Some types of preliminary facts should be determined outside the presence of the jury, to avoid the prejudicial effects of jurors actually hearing evidence ultimately excluded, or becoming aware of debatable grounds of admissibility. In other situations, the danger of prejudice is slight, and there is little need for this precaution. Accordingly, the prevailing practice, confirmed by the Code, places the matter within the judge's discretion. (*Ev.C. 402(b)* [court "may" hear matter outside presence of jury]; *People v. Williams* (1997) 16 C.4th 153, 196, 197, 66 C.R.2d 123, 940 P.2d 710; *People v. Glen Arms Estate* (1964) 230 C.A.2d 841, 864, 41 C.R. 303, citing the text; *People v. Scherr* (1969) 272 C.A.2d 165, 169, 77 C.R. 35, quoting the text [statements of defendant to psychiatrists, bearing on his mental condition--not a confession]; *Mize v. Atchison, Topeka & Santa Fe Ry. Co.* (1975) 46 C.A.3d 436, 120 C.R. 787.)

In *Mize*, *supra*, defendants claimed that they were foreclosed from making a necessary proof of privilege as a preliminary fact because the trial judge refused to allow counsel to approach the bench. *Held*: "Not so. Not only did counsel not indicate to the trial judge why he wished to approach the bench nor ask to present a preliminary matter in the absence of the jury but also he could have presented this evidence in the presence of the jury. Except in certain cases not here involved, *Evidence Code* section 402 authorizes the trial court to determine preliminary facts governing the admissibility of evidence either in or out of the presence of the jury." (46 C.A.3d 448, citing the text.)

(2) *Exceptions.* In a few instances, such as determining admissibility of a confession, the hearing *must* be out of the presence of the jury. (*Ev.C. 402(b)*, *infra*, §51.) This exception also appears in the Federal Rules of Evidence: Hearings on the admissibility of confessions must be conducted out of the hearing of the jury, as must hearings on other preliminary matters when the interests of justice require, or when an accused is a witness and so requests. (*F.R. Evid., Rule 104(c)*; see 1 Mueller & Kirkpatrick, *Federal Evidence* 2d, §32.)

In a criminal trial, if the judge ultimately determines that the evidence should be excluded, a jury hearing can be highly prejudicial. But where the judge decides that it is admissible, the fact that the jury heard proof of the preliminary fact cannot be prejudicial. (*People v. Scherr*, *supra*, 272 C.A.2d 170.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *General Rule.* Where the defendant relies on a defense that is novel and there is a question as to whether there is sufficient evidence to support each element of the defense, a hearing under *Ev.C. 402* is justified so that otherwise

irrelevant and confusing matter is not placed before the jury. Necessity defenses, which are often novel, particularly risk the presentation of otherwise irrelevant and confusing evidence to the jury if the defense cannot be established. (*People v. Galambos* (2002) 104 C.A.4th 1147, 1158, 1159, 128 C.R.2d 844 [in prosecution for marijuana cultivation, trial judge did not abuse discretion in holding Ev.C. 402 hearing, where judge, prosecutor, and defense counsel all agreed that application of defendant's defenses (common law necessity and Proposition 215; see 2 Cal. Crim. Law (3d), Crimes Against Public Peace and Welfare, §70) to a supplier of marijuana to a buyer's club was novel].)

See *People v. Hoyos* (2007) 41 C.4th 872, 897, 63 C.R.3d 1, 162 P.3d 528 [neither Ev.C. 402 nor federal due process required trial judge to hold hearing to determine admissibility of testimony by jailhouse informant; defendant's challenge to reliability of jailhouse informants generally went to weight of their testimony, not its admissibility]. *West's Key Number Digest*, Trial k.50



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##### 1. In General.

##### c. Hearing Outside Jury's Presence.

##### 2. Mandatory Hearing Outside Jury's Presence.

#### 3 *Witkin Cal. Evid. Presentation* § 51

[§ 51] Mandatory Hearing Outside Jury's Presence.

(1) *Criminal Defendant's Confession.* In a criminal trial, the prejudicial effect of the jury listening to evidence on the voluntariness of a confession or incriminating admission that is ultimately excluded is obvious. Early California cases indicated that the usual discretion of the judge could be exercised. (See *People v. Gonzales* (1944) 24 C.2d 870, 875, 151 P.2d 251.) *Ev.C. 402(b)* repudiates this view: the court must hear and determine the question of the admissibility of a defendant's confession or admission out of the jury's presence if any party so requests. (See *People v. Carroll* (1970) 4 C.A.3d 52, 58, 84 C.R. 60, 1 Cal. Evidence (4th), Hearsay, §83; *People v. Gutierrez* (1993) 14 C.A.4th 1425, 1437, 18 C.R.2d 371 [harmless error]; *F.R. Evid., Rule 104(c)*, supra, §50; 1 Wigmore (Tillers Rev.) §17.) The defendant may, however, in attacking the credibility of a confession found voluntary and admissible, offer to the jury any relevant evidence including matters presented to the judge in the preliminary hearing. (*Ev.C. 406*; see *Ev.C. 402*, Comment.)

(2) *Other Circumstances.* *Ev.C. 1042(d)* provides for a hearing outside the presence of the jury in determining whether to require disclosure of the identity of an informer. (See 2 Cal. Evidence (4th), Witnesses, §319.) Moreover, such a hearing must be held on the validity of a prior conviction. (*People v. Coffey* (1967) 67 C.2d 204, 217, 60 C.R. 457, 430 P.2d 15; *People v. Curtis* (1969) 70 C.2d 347, 360, 74 C.R. 713, 450 P.2d 33, infra, §64; *People v. Sumstine* (1984) 36 C.3d 909, 923, 206 C.R. 707, 687 P.2d 904 [hearing must be held "in the fashion set forth in *Coffey*".])

**SUPPLEMENT:** [This section is current through the latest supplement]



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### IV. POWERS AND FUNCTIONS OF TRIAL JUDGE

#### D. Determination of Preliminary Facts.

##### 2. Facts Redetermined by Jury.

###### a. In General.

##### 1. Rule, Theory, and Procedure.

#### 3 Witkin Cal. Evid. Presentation § 52

[§ 52] Rule, Theory, and Procedure.

(1) *Rule and Theory.* In determining admissibility in cases in which the jury ultimately determines a preliminary fact (infra, §54 et seq.), the judge must admit the proffered evidence if any showing of preliminary facts is made "sufficient to sustain a finding" of their existence. (*Ev.C. 403(a)*.) The judge cannot weigh the opponent's evidence and resolve the conflict against admissibility; this is the jury's function. The judge can only exclude the proffered evidence if the showing of preliminary facts is too weak to support a favorable determination by the jury. (*Ev.C. 402*, Comment; *Ev.C. 403*, Comment; on application of rule to prior act evidence, see *People v. Simon* (1986) 184 C.A.3d 125, 228 C.R. 855, infra, §55.)

The preliminary fact questions in this class of cases are those which have been "traditionally regarded as jury questions." They involve "the credibility of testimony or the probative value of evidence that is admitted on the ultimate issues. It is the jury's function to determine the effect and value of the evidence addressed to it. ... If the judge finally determined the existence or nonexistence of the preliminary fact, he would deprive a party of a jury decision on a question that the party has a right to have decided by the jury." (*Ev.C. 403*, Comment.) (See *Granville v. Parsons* (1968) 259 C.A.2d 298, 304, 66 C.R. 149, infra, §272; *LeGrand v. Yellow Cab Co.* (1970) 8 C.A.3d 125, 132, 87 C.R. 292.)

(2) *Burden on Proponent.* The proponent has "the burden of producing evidence as to the existence of the preliminary fact," which is accomplished by a showing sufficient to sustain a finding. (*Ev.C. 403(a)*; see *People v. Sanders* (1995) 11 C.4th 475, 514, 46 C.R.2d 751, 905 P.2d 420 [trial judge properly required defendant to establish foundation regarding alleged collaboration between prison inmate and prosecution witness who identified defendant, before allowing cross-examination of witness on collateral issue of fabrication by witness and inmate of evidence about codefendant].)

(3) *Conditional Admissibility.* Except for the basic requirement of personal knowledge, which must be shown before testimony may be admitted over objection (*Ev.C. 702*, infra, §56), the judge may admit the proffered evidence conditionally, "subject to evidence of the preliminary fact being supplied later in the course of the trial." (*Ev.C. 403(b)*; *F.R. Evid.*, Rule 104(b), supra, §48.)

Interpretation of a written contract illustrates this rule. Extrinsic evidence may be offered to prove a meaning of which the language is reasonably susceptible. When objection is made to any item, the judge may not yet be in a position to determine whether, in the light of all of the evidence, that item will be admissible, or should be excluded as

tending to prove a meaning of which the language is not reasonably susceptible. In such case, the judge may admit the item conditionally, either by reserving the ruling on the objection or admitting the item subject to a motion to strike.

(*Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.* (1968) 69 C.2d 33, 40, footnote 7, 69 C.R. 561, 442 P.2d 641; *Gribaldo, Jacobs, Jones & Associates v. Agrippina Versicherungen A.G.* (1970) 3 C.3d 434, 443, footnote 6, 91 C.R. 6, 476 P.2d 406.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Rule and Theory.* See *People v. Hinton* (2006) 37 C.4th 839, 891, 38 C.R.3d 149, 126 P.3d 981 [trial judge properly found that adequate foundation had been laid for admission of statements, made by "E Money" to defendant's aunt over phone, that he had committed charged crimes; relevance of statements depended on preliminary fact that defendant was E Money, and there was sufficient evidence that this was true, notwithstanding that aunt denied it at trial]; *People v. Guerra* (2006) 37 C.4th 1067, 1119, 40 C.R.3d 118, 129 P.3d 321 [in capital murder prosecution, admission of substitute hamper for purposes of crime scene recreation was proper under *Ev.C. 403(a)*; there was ample evidence from which jury could determine that substitute resembled original hamper under conditions substantially similar to those prevailing at time of murder]; *People v. Herrera* (2000) 83 C.A.4th 46, 62, 65, 98 C.R.2d 911 [trial judge properly admitted statement under coconspirator exception to hearsay rule (1 *Cal. Evidence* (4th), *Hearsay*, §132 et seq.), where there was sufficient independent evidence to sustain jury finding that conspiracy existed at time statement was made]; *People v. Jones* (2003) 112 C.A.4th 341, 350, 4 C.R.3d 916 [where Compassionate Use Act defense is relied on (see 2 *Cal. Crim. Law* (3d), *Crimes Against Public Peace and Welfare*, §70), if defendant produces sufficient evidence at *Ev.C. 402* hearing to raise reasonable doubt as to whether defendant had physician's approval to use marijuana, then gate-keeping function of hearing is satisfied and defense should go to jury]; *Islas v. D & G Mfg. Co.* (2004) 120 C.A.4th 571, 578, 15 C.R.3d 559, quoting the text [in action by employee alleging that his employer's failure to provide operation guards on cutting machine caused him to lose two fingers, trial judge erred in determining under *Ev.C. 405* (text, §59) that machine was not power press and that exception of *Lab.C. 4558* to exclusive remedy rule of Workers' Compensation Act therefore was inapplicable; issue did not implicate evidentiary rule concerning unreliable evidence or matters of public policy and thus was factual question for jury].





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#### D. Determination of Preliminary Facts.

##### 2. Facts Redetermined by Jury.

###### a. In General.

##### 2. Instructing Jury.

#### 3 *Witkin Cal. Evid. Presentation* § 53

[§ 53] Instructing Jury.

The proffered evidence is admitted on the judge's determination that a sufficient showing has been made to let it go to the jury; the jury must then make the final determination, and, if it finds, from a consideration of the showing by both parties, that the preliminary fact has not been established, it should disregard the proffered evidence. Must the jury be so instructed in all cases?

In some situations, the matter is so clear as to make an instruction superfluous: "For example, if the disputed preliminary fact is the authenticity of a deed, it hardly seems necessary to instruct the jury to disregard the deed if it should find that the deed is not genuine. No rational jury could find the deed to be spurious and, yet, to be still effective to transfer title from the purported grantor." (*Ev.C. 403*, Comment.)

In other situations, it is not quite so clear: "For example, the theory upon which agent's and co-conspirator's statements are admissible is that the party is vicariously responsible for the acts and statements of agents and co-conspirators within the scope of the agency or conspiracy. Yet, it is not always clear that statements made by a purported agent or co-conspirator should be disregarded if not made in furtherance of the agency or conspiracy. Hence, the jury should be instructed to disregard such statements unless it is persuaded that the statements were made within the scope of the agency or conspiracy." (*Ev.C. 403*, Comment.)

Hence, the judge may instruct the jury on its proper function: "to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds that the preliminary fact does exist." The instruction is mandatory on request of a party. (*Ev.C. 403(c)(1)*.) If the judge subsequently determines that a jury could not reasonably find that the preliminary fact exists, he or she must instruct the jury to disregard the proffered evidence. (*Ev.C. 403(c)(2)*.) (See *People v. Simon* (1986) 184 C.A.3d 125, 129, 228 C.R. 855, *infra*, §55.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Lewis* (2001) 26 C.4th 334, 362, 110 C.R.2d 272, 28 P.3d 34 [in capital murder case in which defendant made no request to instruct jury that they must find witness had capacity to perceive and recollect before it could consider his testimony, trial judge had no sua sponte duty to do so; instruction would simply have told jury the obvious].



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#### D. Determination of Preliminary Facts.

##### 2. Facts Redetermined by Jury.

##### b. Relevancy.

#### 3 Witkin Cal. Evid. Presentation § 54

[§ 54] Relevancy.

(1) *Rule.* The first classification of preliminary fact questions ultimately determined by the jury deals with those situations in which the proffered evidence's relevance depends on the existence of the preliminary fact. (*Ev.C. 403(a)(1).*) If the judge admits the evidence, the jury must still consider its relevancy; but the judge will exclude it after finding the showing to be unsubstantial.

(2) *Illustrations.* In *Alvarado v. Anderson* (1959) 175 C.A.2d 166, 346 P.2d 73, a 15-year-old boy sued for injuries received in diving off the handrails of a highdiving platform from which the board had been removed for repairs. To support the defense of assumption of risk or contributory negligence (voluntary exposure to known danger), defendant offered to prove that a young girl would testify that another boy had yelled to plaintiff, "Tim, don't do that, you will never make it." The trial judge refused to permit the testimony, on a showing that there were many people present, and a great deal of noise, and it did not appear that plaintiff heard anyone yell. *Held*, there was no error in the ruling. The testimony was not material (relevant) unless the jury could have determined that plaintiff must have heard the yell; and whether the foundation evidence was sufficiently substantial was a matter within the judge's discretion. (175 C.A.2d 178.)

In *People v. Lucas* (1995) 12 C.4th 415, 48 C.R.2d 525, 907 P.2d 373, citing the text, the trial judge properly allowed inquiry into whether the defendant had his car cleaned after the alleged murder because this was a preliminary fact to showing guilty knowledge. However, because the defendant denied doing so and there was no other evidence to establish this preliminary fact, the judge should have instructed the jury to disregard the proffered evidence. (12 C.4th 467.)

In *People v. Marshall* (1996) 13 C.4th 799, 55 C.R.2d 347, 919 P.2d 1280, a murder trial, the judge applied the proper standard under *Ev.C. 403(a)(1)* in deciding to admit photographs of a reconstructed waterbed. The judge determined that the evidence was sufficient to permit the jury to find the preliminary fact (that the waterbed was set up as it had been at the time of the murder) true by a preponderance of the evidence. (13 C.4th 832.)

Other illustrations are:

(a) Statements of an alleged agent are admissible against the principal only if the preliminary fact of agency is shown. (See 1 Cal. Evidence (4th), Hearsay, §120; *Brea v. McGlashan* (1934) 3 C.A.2d 454, 466, 39 P.2d 877 [order of proof may be varied; *supra*, §45].)

(b) Statements of an alleged coconspirator are admissible against other members only if the preliminary fact of conspiracy is shown. (See *1 Cal. Evidence (4th)*, *Hearsay*, §132; *People v. Steccone (1950)* 36 C.2d 234, 238, 223 P.2d 17.)

(c) Impeachment of a witness by evidence of conviction of a felony depends on proof of the preliminary fact that the witness was the person so convicted. (*Ev.C. 403*, Comment; see *infra*, §296 et seq.)

(d) Introduction of prior act evidence may depend on establishing the actor's motive. (See *People v. Simon (1986)* 184 C.A.3d 125, 129, 228 C.R. 855, *infra*, §55.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Illustrations.* See *People v. Tafoya (2007)* 42 C.4th 147, 165, 64 C.R.3d 163, 164 P.3d 590 [in capital murder case, trial judge did not err in ruling that defendant could not introduce evidence of prosecution witness' reputation for dangerousness; witness' reputation was relevant to defendant's claim of self-defense only if defendant knew of that reputation and was afraid of him, but defendant presented no evidence of that preliminary fact]; *People v. Pizarro (2003)* 110 C.A.4th 530, 546, 3 C.R.3d 21 [in murder case, prosecution provided insufficient foundation to establish relevancy of DNA evidence under *Ev.C. 403(a)*; relevance depended on perpetrator's genetic profile and perpetrator's population, but reliance on defendant's personal traits added unproved traits to perpetrator's profile and rendered foundation illegitimate].



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#### D. Determination of Preliminary Facts.

##### 2. Facts Redetermined by Jury.

##### c. Prior Acts.

#### 3 Witkin Cal. Evid. Presentation § 55

[§ 55] Prior Acts.

In *People v. Simon* (1986) 184 C.A.3d 125, 228 C.R. 855, defendant was charged with second degree murder of a man he found in his girlfriend's apartment. The trial judge permitted the prosecution to refute defendant's claim of self-defense by introducing evidence of a prior incident in which defendant had pulled a gun on A, another man defendant found in the girlfriend's apartment. *Held*, conviction reversed.

(a) Evidence of a defendant's uncharged act is not admissible to show he had the criminal disposition or propensity to commit the crime charged (*Ev.C. 1101(a)*), but it is admissible under *Ev.C. 1101(b)* if it has a tendency to prove or disprove a disputed material fact, is not merely cumulative, and the trial judge determines that its probative value outweighs its prejudicial effect. (184 C.A.3d 129; see 1 Cal. Evidence (4th), *Circumstantial Evidence*, §74 et seq.) *Ev.C. 1101(b)* has been interpreted to allow the admission of "other act" evidence that tends to negate a defendant's claim of self-defense. (184 C.A.3d 129, citing *People v. Wells* (1949) 33 C.2d 330, 341, 342, 202 P.2d 53, and *People v. Sam* (1969) 71 C.2d 194, 206, 77 C.R. 804, 454 P.2d 700, 1 Cal. Evidence (4th), *Circumstantial Evidence*, §86.)

(b) Defendant's motive in assaulting A is a critical preliminary factual issue which must be resolved before proof of the incident can be deemed admissible. If, as defendant contends, his assault on A was motivated by the desire to keep his girlfriend away from a drug dealer, the incident is not relevant to probe any disputed factual issue in the case. However, if the assault on A was motivated by jealousy, the two incidents are sufficiently similar to suggest that defendant was the aggressor, thereby negating his self-defense claim. (184 C.A.3d 130; see *supra*, §54.)

(c) *Ev.C. 403(a)(4)* provides that, when the proffered evidence is of the conduct of a particular person and the preliminary fact is whether that person so conducted himself, (1) the proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and (2) the proffered evidence is inadmissible unless the trial judge finds there is evidence sufficient to sustain a finding of the existence of the preliminary fact. *Ev.C. 403(c)(1)* goes on to state that if the trial judge admits the proffered evidence he may, and on request must, instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds that the preliminary fact does exist (see *supra*, §53). (184 C.A.3d 131.)

(d) The prejudice to defendant from the failure of the judge to give the *Ev.C. 403(c)(1)* instruction was compounded by the misleading nature of its CALJIC, No. 2.50 instruction telling the jury that evidence of the incident was admitted for the limited purpose of demonstrating defendant's intent and motive. (See 1 Cal. Evidence (4th), *Circumstantial Evidence*, §75.) This "limiting" instruction could only confuse the jury because it failed to acknowledge the disputed

factual issue, thereby suggesting that evidence of the incident was probative of defendant's intent and motive regardless of which version of the facts the jury decided to accept. The instruction is doubly confusing because, even if the prosecution's version is accepted, the incident does not demonstrate defendant's intent or motive but merely tends to negate one proffered motivation, i.e., defendant's claim of self-defense. (184 C.A.3d 131.)

(e) On retrial, the standard of proof to be utilized by both the trial judge and the jury in making their respective preliminary fact evaluations is the preponderance of evidence. (184 C.A.3d 132; see 1 Cal. Evidence (4th), *Circumstantial Evidence*, §80.) Accordingly, the trial judge should first determine whether the evidence of the incident with A is sufficient to allow the jury to determine by a preponderance standard that defendant's assault was motivated by jealousy. If so, the judge may, and if requested must, instruct the jury that unless it determines by a preponderance of the evidence that defendant's motivation was jealousy, it must disregard the evidence of the incident. (184 C.A.3d 134.)

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#### 2. Facts Redetermined by Jury.

#### d. Knowledge of Witness.

3 *Witkin Cal. Evid. Presentation* § 56

[§ 56] Knowledge of Witness.

Another classification of ultimate jury questions deals with the preliminary fact of a witness' personal knowledge concerning the subject matter of his or her testimony. (*Ev.C. 403(a)(2)*; see 2 *Cal. Evidence (4th)*, *Witnesses*, §46.) This includes the requirement of personal perception of a lay witness giving a permissible opinion. (*Ev.C. 800(a)*, 1 *Cal. Evidence (4th)*, *Opinion Evidence*, §4.)

Personal knowledge may be shown by any competent evidence, and it is ordinarily sufficient for the witness to testify to his or her observation of the facts. (See *Ev.C. 702(b)*, and Comment [witness' own testimony may show personal knowledge].) But the requirement is an exception to the rule that the proffered evidence may be received conditionally, subject to later proof of the preliminary fact (*supra*, §52): "Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter." (*Ev.C. 702(a)*; see *People v. Rodriguez (1999) 20 C.4th 1, 10, 82 C.R.2d 413, 971 P.2d 618*, *infra*, §340 [proffered impeachment testimony did not demonstrate impeaching witness' personal knowledge about whether witness to be impeached had done what he claimed to have done; impeachment testimony was properly excluded].)

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e. Authenticity of Writing.

3 *Witkin Cal. Evid. Presentation* § 57

[§ 57] Authenticity of Writing.

Another classification of ultimate jury questions covers the preliminary fact of "authenticity of a writing." (*Ev.C. 403(a)(3)*; on distinguishable exemplar cases, see *infra*, §65.) Whatever method of authentication is used (see 2 *Cal. Evidence (4th)*, *Documentary Evidence*, §7 et seq.), the judge must make the preliminary, but not the final, determination of authenticity; i.e., the judge cannot exclude the writing if there is any sufficient evidence to support its authenticity:

"For example, if the question of A's title to land is in issue, A may seek to prove his title by a deed from former owner O. Section 1401 requires that the deed be authenticated, and the judge, under Section 403, must rule on the question of authentication. If A introduces evidence sufficient to sustain a finding of the genuineness of the deed, the judge is required to admit it. If the rule were otherwise and the judge, on the basis of the adverse party's evidence, were permitted to decide that the deed was spurious and not admissible, the judge would be resolving the basic factual issue in the case and A would be deprived of a jury finding on the issue, even though he is entitled to a jury decision and even though he has introduced evidence sufficient to warrant a jury finding in his favor." (*Ev.C. 403*, Comment.) (On authentication of tape recording, see *infra*, §148.)

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##### 2. Facts Redetermined by Jury.

##### f. Identity of Hearsay Declarant.

*3 Witkin Cal. Evid. Presentation § 58*

[§ 58] Identity of Hearsay Declarant.

The final classification of ultimate jury questions deals with proffered evidence of a hearsay statement or other conduct of a particular person. The preliminary fact is "whether that person made the statement or so conducted himself." (*Ev.C. 403(a)(4)*.) This provision involves a subtle distinction, explained by the Commission as follows:

The various conditions for admissibility of hearsay under an exception, imposed to exclude untrustworthy statements, deal with competency of evidence, and determination of existence of these conditions is made by the judge alone. (See *infra*, §63.) But competency is not the sole issue: It is necessary to determine whether the declarant actually made the statement (its "authenticity"), for if not, the proffered evidence is irrelevant. In the case of some hearsay exceptions, for example, admissions of a party in a civil case (*1 Cal. Evidence (4th), Hearsay, §90 et seq.*) and inconsistent statements of a witness (*1 Cal. Evidence (4th), Hearsay, §156*), the only controversial issue is whether the party or witness made the statement; i.e., the preliminary fact to be determined is the identity of the hearsay declarant. Hence, competency questions (conditions of a hearsay exception) are exclusively for the judge under *Ev.C. 405*, but the relevancy question of identity of the declarant is to be ultimately resolved by the jury. (*Ev.C. 403, Comment; Ev.C. 405, Comment.*)

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#### D. Determination of Preliminary Facts.

#### 3. Facts Finally Determined by Judge.

##### a. In General.

##### 1. Rule, Theory, and Procedure.

#### 3 Witkin Cal. Evid. Presentation § 59

[§ 59] Rule, Theory, and Procedure.

(1) *Rule and Theory*. If the purpose of an exclusionary rule is to keep evidence from the jury "because it is too unreliable to be evaluated properly or because public policy requires its exclusion" (*Ev.C. 405*, Comment), the judge finally determines the preliminary facts by considering the evidence of both the proponent and the opponent; the jury is not permitted to redetermine the issue. (*Ev.C. 405*.)

The Evidence Code refers to this large group of situations in general terms: "preliminary fact determinations not governed by Section 403 or 404" (*Ev.C. 405*), but the Comment to *Ev.C. 405* contains a specific listing of the important ones (see *infra*, §61 et seq.).

(2) *Burden of Producing Evidence and Burden of Proof*. When the existence of a preliminary fact is disputed, the court must indicate which party has the burden of producing evidence and the burden of proof on the issue. Who has the burden depends on established case law governing particular exclusionary rules. (*Ev.C. 405(a)*.) The Comment to *Ev.C. 405* gives two common instances:

(a) *Ev.C. 1200* indicates that the burden of proof is usually on the proponent of the evidence to show that the proffered evidence is within a hearsay exception. Thus, if the disputed preliminary fact is whether the proffered statement was spontaneous, as required by *Ev.C. 1240*, the proponent would have the burden of persuading the judge that the statement was spontaneous.

(b) The privilege rules usually place the burden of proof on the objecting party to show that a privilege is applicable. Thus, if the disputed preliminary fact is whether a person is married to a party, hence, whether their confidential communications are privileged under *Ev.C. 980*, the party asserting the privilege has the burden of persuading the judge that the marriage existed.

(3) *Final Determination by Judge*. The court must determine the existence or nonexistence of the preliminary fact and must admit or exclude the proffered evidence as required by the rule of law under which the question arises. (*Ev.C. 405(a)*.) In other words, if the judge is persuaded by the party with the burden of proof, he or she finds in favor of that party in regard to the preliminary fact and either admits or excludes the proffered evidence as required by the rule of law under which the question arises. Otherwise, the judge finds against that party on the preliminary fact and either admits or excludes the proffered evidence as required. (*Ev.C. 405*, Comment.) (See also *F.R. Evid.*, Rule 104(a), *supra*, §48.)

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#### 3. Facts Finally Determined by Judge.

##### a. In General.

#### 2. Preliminary Fact Also in Issue.

#### *3 Witkin Cal. Evid. Presentation § 60*

[§ 60] Preliminary Fact Also in Issue.

If the factual issue that the judge decides to determine admissibility of proffered evidence is the same one that the jury considers in determining the merits of the action, it would be seriously prejudicial for the jury to learn how the judge decided that issue. The Code therefore prohibits the judge from informing the jury of this determination "as to the existence or nonexistence of the preliminary fact." (*Ev.C. 405(b)(1).*)

The coinciding of preliminary fact and fact in issue in no way changes the rule of finality of the judge's determination of preliminary fact. Thus, where the proffered evidence is admitted, the jury must not be given the instruction to disregard it if they reach a different determination. (*Ev.C. 405(b)(2).*) As the Commission says: "The rules of admissibility being applied by the judge under Section 405 are designed to withhold evidence from the jury because it is too unreliable to be evaluated properly or because public policy requires its exclusion. The policies underlying these rules are served only by the exclusion of the evidence. No valid public or evidentiary purpose is served by submitting the admissibility question again to the jury. For example, the interspousal testimonial privilege ... exists to preclude a spouse from being involuntarily compelled to testify against the other spouse. The privilege serves its purpose only if the spouse does not testify. The harm the privilege is designed to prevent has occurred if the spouse testifies." (*Ev.C. 405, Comment.*)

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b. Competency of Witness.

*3 Witkin Cal. Evid. Presentation § 61*

[§ 61] Competency of Witness.

Although credibility of a witness is a jury question (see *infra*, §88), the witness' competency to testify is determined exclusively by the judge. Thus, the judge finally determines the preliminary facts of capacity of an ordinary witness to understand the oath and to communicate (*Ev.C. 701*, Comment; see *2 Cal. Evidence (4th)*, *Witnesses*, §41), and the qualifications of an expert witness to testify as an expert on the particular subject (*Ev.C. 720*, Comment; see *infra*, §190).

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c. Privilege of Witness.

3 *Witkin Cal. Evid. Presentation* § 62

[§ 62] Privilege of Witness.

Whether a witness may claim a privilege to refuse to testify is determined solely by the trial judge. (*Ev.C. 405*, Comment.)

Two different burdens of proof may be involved: First, the burden is on the party claiming the privilege to prove the preliminary facts of its existence. (See *Ev.C. 405*, Comment; *Tanzola v. De Rita* (1955) 45 C.2d 1, 6, 285 P.2d 897; *People v. Velasquez* (1987) 192 C.A.3d 319, 328, 237 C.R. 366.) Second, if the privilege is conceded or proved, but the proponent of the proffered evidence claims that one of the numerous exceptions applies, the burden is on the proponent to show the exception. (See *Ev.C. 405*, Comment; *Wellpoint Health Networks v. Superior Court* (1997) 59 C.A.4th 110, 123, 124, 68 C.R.2d 844.)

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#### 3. Facts Finally Determined by Judge.

#### d. Hearsay.

3 Witkin Cal. Evid. Presentation § 63

[§ 63] Hearsay.

(1) *General Principle.* The identity of the hearsay declarant ("authenticity" of the statement) is governed by *Ev.C.* 403; in other words, the judge's preliminary determination is subject to redetermination by the jury. (See *supra*, §58.) But the conditions of admissibility, designed to exclude untrustworthy hearsay, are determined finally by the judge, and the proponent has the burden of proving them. (*Ev.C.* 405, Comment; on hearsay exceptions, see 1 *Cal. Evidence (4th)*, *Hearsay*, §51 et seq.)

(2) *Confessions, Criminal Admissions, Dying Declarations and Spontaneous Exclamations.* Former California cases established the policy of redetermination of the conditions of admissibility by the jury of such issues as the voluntariness of a confession or admission by a defendant accused of crime, the sense of impending death of the victim who made a dying declaration, and the conditions of excitement and timeliness which justified proof of a spontaneous exclamation. *Ev.C.* 405 thus works a substantial change in the law. (See 1 *Cal. Evidence (4th)*, *Hearsay*, §§83, 173 et seq., 186 et seq.; *People v. Stroud* (1969) 273 C.A.2d 670, 674, 78 C.R. 270; *People v. Carroll* (1970) 4 C.A.3d 52, 58, 84 C.R. 60, 1 *Cal. Evidence (4th)*, *Hearsay*, §83; *People v. Chapman* (1975) 50 C.A.3d 872, 879, 123 C.R. 862 [type of preliminary factual question to be decided by trial judge under *Ev.C.* 405 includes trustworthiness of admission against penal interest; judge may consider circumstances under which declaration was uttered and may analyze declarant's possible motivation and relationship to defendant]; *Vorse v. Sarasy* (1997) 53 C.A.4th 998, 1011, 1012, 62 C.R.2d 164 [disagreeing with *People v. Chapman*, to extent it suggests that, in weighing probative value under *Ev.C.* 352, trial judge necessarily considers credibility of witness who testifies to proffered evidence].)

The Comment to *Ev.C.* 405 makes this distinction:

"Of course, Section 405 does not prevent the presentation of any evidence to the jury that is relevant to the reliability of the hearsay statement. ... Thus, a party may present evidence of the circumstances under which a confession, dying declaration, or spontaneous statement was made where such evidence is relevant to the credibility of the statement, even though such evidence may duplicate to some degree the evidence presented to the court on the issue of admissibility. But the jury's sole concern is the truth or falsity of the facts stated, not the admissibility of the statement."

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## e. Validity of Prior Conviction.

3 Witkin Cal. Evid. Presentation § 64

[§ 64] Validity of Prior Conviction.

The validity of a prior conviction charged against a defendant may be challenged on constitutional grounds, usually denial of the right to counsel in the prior trial. (See *infra*, §300.) The objection is as fundamental as that made to an involuntary confession, and, as in the case of the challenge to a confession (*supra*, §63), the issue should be determined by the judge, in a pretrial hearing outside the presence of the jury. (*People v. Coffey* (1967) 67 C.2d 204, 217, 60 C.R. 457, 430 P.2d 15, *infra*, §300 [specifying procedure in the hearing]; *People v. Curtis* (1969) 70 C.2d 347, 360, 74 C.R. 713, 450 P.2d 33; *People v. Sumstine* (1984) 36 C.3d 909, 923, 206 C.R. 707, 687 P.2d 904 [hearing must be held "in the fashion set forth in *Coffey*"]; *People v. Nugent* (1971) 18 C.A.3d 911, 914, 96 C.R. 209.)

In *People v. Curtis*, *supra*, defendant did not raise the question before trial, hence, there was no pretrial hearing. Instead, he objected, during his direct examination, when the prior was offered for impeachment. But the same rule governs: "California policy clearly requires the question of the constitutionality of a prior conviction to be determined by the court and not by the jury. That the issue arises during and not before trial, so long as the objection is asserted before the case is submitted to the jury, appears to be without significance. Thus if defendant attacks the constitutionality of the first prior on retrial, a hearing outside the presence of the jury as outlined in *Coffey* will be the appropriate means of determination." (70 C.2d 360.)

In *People v. Nugent*, *supra*, the trial judge held a hearing to determine whether three prior felony convictions alleged against defendant were constitutionally valid. After the prosecutor produced records that made a *prima facie* showing that defendant had been given the assistance of counsel, defendant testified that he had received only perfunctory representation. His testimony was uncontradicted and the prosecutor introduced no further evidence. The judge then ruled that there was no constitutional impairment as to the priors. *Held*, no error. Neither *Ev.C. 550* nor its accompanying Law Revision Commission Comment on the burden of producing evidence (see 1 *Cal. Evidence* (4th), *Burden of Proof and Presumptions*, §§2, 4) required the prosecutor to offer evidence in reply to defendant's testimony. When the prosecutor decided not to present further proof, he risked an adverse decision if the trial judge had given credence to the evidence defendant presented. But if the judge disbelieved defendant's evidence, the prosecutor's *prima facie* showing was sufficient. The conflicting evidence created a factual issue that the judge resolved. (18 C.A.3d 915.)

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#### 3. Facts Finally Determined by Judge.

##### f. Other Situations.

3 Witkin Cal. Evid. Presentation § 65

[§ 65] Other Situations.

(1) *Opinion on Sanity or Handwriting.* A lay witness' opinion on a person's sanity is admissible on proof of the preliminary fact of the witness' intimate acquaintance or other qualification. (*Ev.C. 870, 1 Cal. Evidence (4th), Opinion Evidence, §7.*) Similarly, a lay witness may give an opinion on a person's handwriting after proof of the preliminary fact of personal knowledge of the writing. (*Ev.C. 1416, 2 Cal. Evidence (4th), Documentary Evidence, §11.*) In either case, "the expertise of the witness on that limited subject" is involved, and it is determined in the same manner as the qualification of an expert, by the judge alone. (*Ev.C. 405, Comment.*)

(2) *Comparison of Handwriting.* Where an exemplar is used to compare with disputed handwriting, the preliminary fact of genuineness of the exemplar is determined by the judge alone. (*Ev.C. 1417, 2 Cal. Evidence (4th), Documentary Evidence, §15; Ev.C. 405, Comment.*)

(3) *Admissions During Compromise Negotiations.* These, formerly admissible in California, are now excluded (see *1 Cal. Evidence (4th), Circumstantial Evidence, §143*). The burden, however, is on the objecting party to prove the preliminary fact that an admission--otherwise good evidence--occurred during the negotiations. (*Ev.C. 405, Comment.*)

(4) *Negating Felony Conviction Used To Impeach.* Proof of the fact of conviction, i.e., the identity of the witness as the convicted person, is ultimately a jury issue (see *supra*, §54), but proof of a pardon or dismissal, negating the effect of the conviction (see *infra*, §293), is a matter for the judge. (*Ev.C. 405, Comment.*)

(5) *Best Evidence Rule.* The burden was on the proponent offering secondary evidence to prove the preliminary fact necessary for an exception to the former best evidence rule, e.g., writing lost or destroyed, or under control of the opponent (former *Ev.C. 1501 et seq., 2 Cal. Evidence (4th), Documentary Evidence, §27 et seq.*). The issue was determined by the judge alone. (*Ev.C. 405, Comment* [same is true of proof of photographic copy of writing under *Ev.C. 1550, 1551*]; see *Cotton v. Hudson (1941) 42 C.A.2d 812, 815, 110 P.2d 70*; *Osswald v. Anderson (1996) 49 C.A.4th 812, 819, 820, 57 C.R.2d 23*.) Former *Ev.C. 1501 et seq.* were repealed and replaced in 1998 by *Ev.C. 1520 et seq.*, which create a "secondary evidence rule." (See *2 Cal. Evidence (4th), Documentary Evidence, §31 et seq.*) Instead of determining the applicability of an exception to the best evidence rule, the judge now must determine whether grounds for the exclusion of secondary evidence exist. (See *Ev.C. 1521(a), 1522(a).*)

*F.R. Evid., Rule 1008*, reads as follows: "When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether



the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact." (See 5 Mueller & Kirkpatrick, Federal Evidence 2d, §588 et seq.; 29A Am.Jur.2d (1994 ed.), Evidence §1058.)

(6) *Integration of Contract*. The question whether a contract is integrated, and therefore within the parol evidence rule, is for the judge to decide. (*Brawthen v. H & R Block* (1975) 52 C.A.3d 139, 146, 124 C.R. 845; *Esbensen v. Userware Int.* (1992) 11 C.A.4th 631, 638, footnote 4, 14 C.R.2d 93.)

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#### E. Inherent Power To Preclude Evidence.

*3 Witkin Cal. Evid. Presentation § 66*

[§ 66] Inherent Power To Preclude Evidence.

In *Peat, Marwick, Mitchell & Co. v. Superior Court* (1988) 200 C.A.3d 272, 245 C.R. 873, the Corporation Commissioner brought a professional malpractice action in the name of the People against an accounting firm. After complicated proceedings, the trial judge made an order precluding defendant from controverting certain evidence, observing that the history of the case disclosed breach of an attorney-client relationship and placed "a cloud of suspicion over the litigation process." (200 C.A.3d 283.) *Held*, the order was not an abuse of discretion.

(a) The contention that the preclusion order was tantamount to a dismissal is incorrect; although onerous, it does not amount to a summary adjudication of the issues, and the People must still present evidence on these issues to satisfy their burden of proof. (200 C.A.3d 286.)

(b) "The real question in this case is whether a California trial court has the inherent power to preclude evidence to cure abuses or overreaching involving confidential information, such as the merger with one's opponents' expert. We conclude the trial courts do indeed have such inherent power and do not need a specific statutory authorization to prevent injustice by excluding certain evidence." (200 C.A.3d 286.)

(1) The inherent powers of the court, independent of statute, to control and prevent abuses in the use of their process, have been recognized in many cases. (200 C.A.3d 287; see 2 Cal. Proc. (4th), Courts, §177.)

(2) This power extends to the preclusion of evidence; and even without such abuses the trial court has broad authority over the admission and exclusion of evidence. In exercising the power to preclude evidence, the courts generally employ a motion in limine. (200 C.A.3d 288, quoting the text.)

(3) The power to preclude has been exercised in cases involving destruction of evidence, but it is not limited to such cases: "Peat Marwick's conduct in this case, as the trial court found, has seriously damaged the People's case. Faced with this sort of abuse of the litigation process, the trial court may act to prevent the taking of an unfair advantage and to preserve the integrity of the judicial system. The court may invoke its inherent power to preclude a party's evidence on those aspects of its opponent's case which would have been presented in court by the non-compromised expert witness." (200 C.A.3d 289.)

(4) This conclusion finds support in numerous cases disqualifying law firms to prevent an unfair advantage or to avoid the appearance of impropriety, or disqualifying or enjoining the use of parties' experts for similar reasons. (200 C.A.3d 289.)

(c) A preclusion order does not infringe on a litigant's right to due process: "We cannot accept the notion that due process of law entitles a litigant to present certain evidence after it has compromised its opponent's ability to counter that evidence with the sort of litigation abuse found in this case." (200 C.A.3d 290.) Such orders have also been upheld in the "higher-stakes context of a criminal trial." (200 C.A.3d 290, citing *Washington v. Texas* (1967) 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019, supra, §5, *United States v. Nobles* (1975) 422 U.S. 225, 95 S.Ct. 2160, 45 L.Ed.2d 141, and *Taylor v. Illinois* (1988) 484 U.S. 400, 108 S.Ct. 646, 98 L.Ed.2d 798, supra, §8.)

(d) The contention, based on discovery cases, that preclusion is a "drastic" sanction that cannot be imposed unless lesser sanctions have failed, is unsound: The evidence preclusion order was not a discovery sanction. (200 C.A.3d 291.) "The court's action is thoughtful, well tailored to the evidence and eminently sound. Of course, we only hold the order was not an abuse of discretion in this case, and do not purport to establish criteria for the entry of preclusion orders in different factual contexts." (200 C.A.3d 292.) (Cf. *Continental Ins. Co. v. Superior Court* (1995) 32 C.A.4th 94, 108, 37 C.R.2d 843 [in denying defendants' motion to disqualify plaintiffs' counsel, trial judge abused his discretion in attaching condition that plaintiffs not call witness that counsel had contacted; even if witness (a former employee of one defendant) thought counsel was representing defendant, there was no evidence counsel knowingly made false statements to him].)

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See *Mylan Laboratories v. Soon-Shiong* (1999) 76 C.A.4th 71, 81, 82, 90 C.R.2d 111 [where nonparty moved to intervene and requested preclusive order requiring sealing and return of document it alleged had been stolen by party, trial judge properly denied request for preclusive order after denying motion to intervene; preclusive order may only be sought by party; distinguishing *Peat, Marwick, Mitchell & Co. v. Superior Court* (1988) 200 C.A.3d 272, 245 C.R. 873, text, p. 97]. *West's Key Number Digest*, Criminal Law k.674, 690 et seq.; Trial k.55



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## F. Restriction of Cumulative Evidence.

## 1. Nature of Power.

3 *Witkin Cal. Evid. Presentation* § 67

[§ 67] Nature of Power.

The trial judge may exclude relevant evidence if its probative value is substantially outweighed by the probability that it will consume too much time or confuse the issues. (*Ev.C. 352, 1 Cal. Evidence (4th), Circumstantial Evidence, §17 et seq.*) This recognizes an inherent power of the court to limit the introduction of cumulative evidence or repetitive questioning of witnesses. (See *Estate of Wineteer* (1917) 176 C. 28, 30, 167 P. 516 [refusal to allow more than four or five depositions of nonexpert witnesses on sanity of deceased]; *People v. Mincey* (1992) 2 C.4th 408, 439, 6 C.R.2d 822, 827 P.2d 388 [trial court properly excluded cumulative evidence of child abuse inflicted by defendant's girlfriend]; *Phenegar v. Paolini* (1915) 27 C.A. 381, 391, 149 P. 1008 [further examination properly stopped where exhaustive examination disclosed witness had no definite recollection of contents of letter]; *Weller v. Chavarria* (1965) 233 C.A.2d 234, 247, 43 C.R. 364, citing the text; *People v. Vaughn* (1968) 262 C.A.2d 42, 48, 68 C.R. 366, citing the text; *Vossler v. Richards Mfg. Co.* (1983) 143 C.A.3d 952, 960, 192 C.R. 219 [long trial, proper limitation of cross-examination of plaintiff's witness on subject already well covered by defendant]; 6 Wigmore (Chadbourn Rev.) §§1865, 1907, 1908; 5 A.L.R.3d 169 [limiting number of witnesses in civil case]; 5 A.L.R.3d 238 [same, criminal case]; 17 A.L.R.3d 327 [limiting number of character or reputation witnesses]; cf. *People v. Filson* (1994) 22 C.A.4th 1841, 1850, 28 C.R.2d 335, *infra*, §122 [defendant's tape-recorded statement made shortly after arrest could not be excluded as cumulative; at time of exclusion, arresting officer had not yet testified, so there was no evidence to which the recording could be cumulative]; on problem presented by voluminous unorganized exhibits in "big" cases, see 64 *Harv. L. Rev.* 497.)

The exclusion of cumulative relevant evidence in the trial judge's discretion, to avoid wasting time, should be sharply distinguished from the exclusion of evidence on an uncontested issue. Such evidence is irrelevant, and must be excluded; the judge has no discretion to admit it. (*Fuentes v. Tucker* (1947) 31 C.2d 1, 7, 187 P.2d 752, 1 *Cal. Evidence (4th), Circumstantial Evidence, §10*; *People v. Hall* (1980) 28 C.3d 143, 152, 167 C.R. 844, 616 P.2d 826.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Criminal Law k.675; Trial k.56



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## CHAPTER XI - Presentation At Trial

### IV. POWERS AND FUNCTIONS OF TRIAL JUDGE

#### F. Restriction of Cumulative Evidence.

##### 2. Limitations on Power.

##### 3 *Witkin Cal. Evid. Presentation* § 68

[§ 68] Limitations on Power.

(1) *Designation of Issues at Pretrial Conference.* The older cases speak of the power of the trial judge in civil cases to designate the issues of fact raised by the pleadings. (See *Pastene v. Pardini* (1902) 135 C. 431, 433, 67 P. 681 [party can urge error in limitation without further attempt to offer evidence on excluded issue].) Today, the elimination of noncontroversial matters usually takes place in the pretrial conference culminating in a pretrial order. Thus, designation of issues will be mainly the work of the pretrial judge, who may not be the trial judge. (See 7 *Cal. Proc.* (4th), *Trial*, §§52, 55; 22 A.L.R.2d 599.) Hence, the trial judge's power should be exercised to reduce cumulative evidence on those issues, and not, ordinarily, to restrict the issues.

(2) *Improper Restriction for Reasons of Delicacy or Expedition.* The power must be exercised within the scope of its purpose, namely, the speedy and efficient conduct of a fair trial; the judge cannot exclude a substantial part of the relevant evidence (e.g., under the former divorce law in which fault was material) for reasons of delicacy or expedition. (See *supra*, §3.)

(3) *Improper Exclusion of More Probative Evidence.* In *People v. Carter* (1957) 48 C.2d 737, 312 P.2d 665, a murder trial, the prosecution showed that when officers came to question defendant, he attempted suicide (inference of guilty mind). He had written a suicide note before the murder, with no reason given; later, he made a statement to the district attorney and testified at the trial, giving as his reason the fear of imprisonment as a parole violator, for passing bad checks. In this background, he sought to introduce testimony of Dr. L., attending him when he made the attempt, that he had spoken of this fear and made no mention of the murder or the victim. *Held*, the doctor's testimony was erroneously excluded. "Although cumulative in the sense that it was identical in subject matter with this other evidence, the testimony was not cumulative in respect to its evidentiary weight. The jury would be more inclined to believe an explanation given immediately after the attempted suicide, when defendant thought he was going to die, than the same explanation given at a time when hope of life had returned and the opportunity for fabrication intervened. Defendant's suicide note to his uncle before the attack on [the victim] was some evidence of motivation for his attempted suicide other than guilty knowledge of the attack. Since the note was written before the attack, however, it could not be so persuasive evidence as the statement to [the doctor]. The note made no mention of the bad checks or any other particular reason for suicide. The reason for the exclusion of merely cumulative evidence, that its slight probative value is outweighed by the disadvantages of confusing the jury and obscuring the fundamental issues ... fails in the present case because the probative value of the excluded testimony was greater than that of the other evidence introduced on the same issue." (48 C.2d 749.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER XI - Presentation At Trial

### IV. POWERS AND FUNCTIONS OF TRIAL JUDGE

#### G. Limitations on Number of Experts.

*3 Witkin Cal. Evid. Presentation § 69*

[§ 69] Limitations on Number of Experts.

The court may, at any time before or during the trial, limit the number of expert witnesses to be called by any party. (*Ev.C.* 723; see 5 A.L.R.3d 169, 224.)

In *Horn v. General Motors Corp.* (1976) 17 C.3d 359, 131 C.R. 78, 551 P.2d 398, a personal injury case, defendants called four experts who gave their opinions on the movements plaintiff's body must have made on impact and uniformly concluded that she could not have struck the center area of the automobile steering wheel as she claimed. The trial court then refused to allow defendants to introduce the same expert opinion evidence by a fifth expert who was an employee of defendant manufacturer. *Held*, no error. The testimony was cumulative and the trial court has discretion to refuse to admit cumulative evidence, as well as to limit the number of expert witnesses. (17 C.3d 371, citing the text.) (See *Scalere v. Stenson* (1989) 211 C.A.3d 1446, 1454, 260 C.R. 152 [trial court properly exercised its discretion in limiting plaintiff's second medical expert witness to any "area that hasn't been gone into"].)

This power was given a questionable application in *Clyne v. Brock* (1947) 82 C.A.2d 958, 188 P.2d 263. Counsel for both parties, at the judge's suggestion, allowed the judge to choose a handwriting expert. The expert's testimony was completely adverse to appellants. Appellants then asked permission to call another expert of their own selection, which was refused. The refusal was upheld on the ground that appellants had acquiesced in the court's choice, "gambled on his testimony and lost." (82 C.A.2d 963.) It would seem, however, that appellants had a right to call their own expert in addition to the one appointed. (See *F.R. Evid.*, Rule 706(d) [nothing in Rule 706, which provides for court-appointed experts, limits the parties in calling expert witnesses of their own selection].)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Criminal Law k.676; Trial k.57



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## CHAPTER XI - Presentation At Trial

### IV. POWERS AND FUNCTIONS OF TRIAL JUDGE

#### H. Restriction of Rebuttal Evidence.

##### 1. Civil Cases.

*3 Witkin Cal. Evid. Presentation § 70*

[§ 70] Civil Cases.

After the plaintiff and defendant have presented their cases in chief, they may offer rebutting evidence only. The court may, however, "for good reason, in furtherance of justice," permit them to offer evidence on their original case. (*C.C.P.* 607(6).)

Thus, although the court has great discretion to allow cumulative evidence in rebuttal, the normal practice is to exclude it. (See *Pontecorvo v. Clark* (1928) 95 C.A. 162, 179, 272 P. 591 [ordinarily "it is improper to allow witnesses to reiterate the testimony previously given by them in the original case under the guise of rebuttal"]; *Malone v. Los Angeles Ry. Corp.* (1925) 72 C.A. 736, 739, 238 P. 110 [plaintiff, having anticipated a defense in his case in chief, was properly precluded from covering same ground in rebuttal]; *Lipman v. Ashburn* (1951) 106 C.A.2d 616, 620, 235 P.2d 627 ["a party who has the affirmative may not reserve a portion of his evidence until the opposite party has exhausted his to negative that offered in the first instance"]; *People v. Donovan* (1962) 57 C.2d 346, 357, 19 C.R. 473, 369 P.2d 1 [condemnation suit]; *Diamond Springs Lime Co. v. American River Constructors* (1971) 16 C.A.3d 581, 604, 94 C.R. 200 [leave to reopen case to present rebuttal evidence properly denied; "new theory" claim not tenable]; 6 Wigmore (Chadbourn Rev.) §1873; on practice in offering rebuttal evidence, see *supra*, §42.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Trial k.62 et seq.





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## CHAPTER XI - Presentation At Trial

## IV. POWERS AND FUNCTIONS OF TRIAL JUDGE

## H. Restriction of Rebuttal Evidence.

## 2. Criminal Cases.

## a. Improper Rebuttal by Prosecution.

3 *Witkin Cal. Evid. Presentation* § 71

## [§ 71] Improper Rebuttal by Prosecution.

P.C. 1093(d) states the same rule as *C.C.P. 607(6)*, *supra*, §70: Only rebuttal evidence is allowed after the parties have presented their cases in chief, unless the trial court allows otherwise for good reason.

In *People v. Carter* (1957) 48 C.2d 737, 312 P.2d 665, a murder case, the prosecution theory was that defendant had killed the victim with a wrench, and had left the wrench, the victim's wallet and his own red cap in a certain slough. Defendant denied that he had been to the slough or had left anything there. The prosecution, in rebuttal, introduced the red cap, giving no reason for failure to offer it in the case in chief. In reversing the judgment on other grounds, the court expressed disapproval of this tactic and gave the following explanation of the rule:

"In a sense all evidence that tends to establish the defendant's guilt over his protestations of innocence rebuts the defendant's case, but it is not all rebuttal evidence. ... The purpose of the restriction ... is to assure an orderly presentation of evidence so that the trier of fact will not be confused; to prevent a party from unduly magnifying certain evidence by dramatically introducing it late in the trial; and to avoid any unfair surprise that may result when a party who thinks he has met his opponent's case is suddenly confronted at the end of trial with an additional piece of crucial evidence. Thus proper rebuttal evidence does not include a material part of the case in the prosecution's possession that tends to establish the defendant's commission of the crime. It is restricted to evidence made necessary by the defendant's case in the sense that he has introduced new evidence or made assertions that were not implicit in his denial of guilt. ... A defendant's reiterated denial of guilt and the principal facts that purportedly establish it does not justify the prosecution's introduction of new evidence to establish that which defendant would clearly have denied from the start." (48 C.2d 753.) (See *People v. Daniels* (1991) 52 C.3d 815, 859, 860, 277 C.R. 122, 802 P.2d 906 [quoting from *People v. Carter*; rebuttal testimony relating statements by defendant that amounted to admission of guilt should have been raised in prosecution's case in chief, hence, were improper].)

In *People v. Castro* (1960) 182 C.A.2d 255, 5 C.R. 906, defendant, in 1956, was charged with murder and a prior conviction of burglary in Montana in 1955. Several successive judges found doubt as to his present sanity, and he was committed to the state hospital and returned several times. When finally tried, he admitted the prior conviction and was found guilty of voluntary manslaughter. On the subsequent trial of the issue of sanity, the prosecution called an expert to prove by a photograph and fingerprint comparison that defendant had been found guilty of burglary in Montana in 1955, and then recalled its medical witness to testify again to his opinion of sanity. This was done assertedly to rebut defendant's evidence that his mental illness was of long standing. *Held*, this was error. The prior conviction was charged, the state's medical witness had already testified concerning it in the case in chief, and the only purpose of the

deliberately withheld production of the photograph and record of prior conviction was to prejudice the jury against defendant. "The People ... were permitted to dramatically magnify defendant's prior conviction as the closing evidence." (182 C.A.2d 264.) The court added: "The procedure adopted by the district attorney and permitted by the court has become altogether too prevalent. It is unfair and cannot be condoned." (182 C.A.2d 264.) (See also *People v. Katz* (1962) 207 C.A.2d 739, 750, 24 C.R. 644 [evidence purposely held back, reversible error].)

However, impropriety in the introduction of otherwise admissible evidence as rebuttal is waived by failure to object. (See *People v. Alvarez* (1963) 212 C.A.2d 406, 409, 28 C.R. 141.) It is not reversible error unless prejudice is shown. (See *People v. Fitzgerald* (1961) 56 C.2d 855, 861, 17 C.R. 129, 366 P.2d 481; *People v. Pike* (1962) 58 C.2d 70, 92, 93, 22 C.R. 664, 372 P.2d 656; *People v. Dickerson* (1972) 23 C.A.3d 721, 725, 726, 100 C.R. 533.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Criminal Law k.683 et seq.



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## IV. POWERS AND FUNCTIONS OF TRIAL JUDGE

## H. Restriction of Rebuttal Evidence.

## 2. Criminal Cases.

## b. Proper Rebuttal by Prosecution.

3 *Witkin Cal. Evid. Presentation* § 72

[§ 72] Proper Rebuttal by Prosecution.

(1) *In General*. "The issue of the introduction of proof on rebuttal alleged to be in improper order recalls the requirements for rigid procedure of a past era in American legal history. In the frontier community where opportunities for amusement were limited, the courthouse often took the role of the playhouse. Spectators demanded that the performance of the opponents conform to fixed and known rule. A party could not take advantage of his adversary by introducing in act three, which was reserved for rebuttal, that which should have come in during act one, which served for the presentation of the case in chief. Courts of today are concerned less with the drama of a contest than with the objective of adjudicating the issue in an orderly fashion, in protecting each party against surprise maneuver of the other, and in realistically preserving the opportunity for full and fair presentation." (*People v. Marino* (1959) 176 C.A.2d 163, 166, 1 C.R. 302.)

Thus, in *People v. Contreras* (1964) 226 C.A.2d 700, 702, 38 C.R. 338, the rule against withholding a vital part of the case (*supra*, §71) was held inapplicable where the part was not purposefully withheld, but came in on the prosecution's cross-examination of a witness called by the defense.

Other cases illustrating proper rebuttal by the prosecution include the following:

*People v. Wilson* (1967) 254 C.A.2d 489, 494, 62 C.R. 240 [court rejected defendant's contention that prosecution improperly saved evidence until second round of rebuttal witnesses for dramatic effect; more likely, this was merely usual courtesy extended by counsel on both sides (e.g., defendant's witness was allowed to testify to matters not proper rebuttal)].

*People v. Demond* (1976) 59 C.A.3d 574, 587, 130 C.R. 590 ["Defense counsel was not without resources with respect to this rebuttal evidence; he had every opportunity to introduce additional evidence to contradict this testimony and to cross-examine these witnesses, but he did neither"].

*People v. Graham* (1978) 83 C.A.3d 736, 741, 149 C.R. 6 [cumulative evidence proper where it repeats or fortifies part of prosecution's case in chief after attack by defense evidence].)

*People v. Mendibles* (1988) 199 C.A.3d 1277, 1302, 245 C.R. 553 [impeachment to meet evidence on specific facts in defense testimony].

*People v. Muniz* (1989) 213 C.A.3d 1508, 1514, 262 C.R. 743 [rebuttal evidence that defendant had stated that he was "going to get that girl" was allowable on issue put into dispute by defendant's testimony].

*People v. Daniels* (1991) 52 C.3d 815, 859, 277 C.R. 122, 802 P.2d 906 [prosecution for murder by firearm; rebuttal testimony from medical personnel describing condition and use of defendant's hand was proper, where defendant claimed that bullet wound in hand prevented him from shooting gun].

*People v. Mayfield* (1997) 14 C.4th 668, 762, 60 C.R.2d 1, 928 P.2d 485 [trial judge did not abuse discretion in allowing prosecution to introduce, in rebuttal, statement of defendant's father recounting defendant's description of shooting; even though prosecution knew of statement before trial, it became clearly useful for impeachment only after defendant's testimony that gun discharged accidentally when he tried to take it from victim].

(2) *Refutation of Alibi Defense*. Even though proof of the defendant's presence at the place of the crime is an element of the principal case, additional evidence on this issue may also become proper to rebut an alibi defense. Thus, in *People v. Marino, supra*, defendant, a convict, was charged with stabbing another inmate of the prison in the TV room. Two prosecution witnesses placed him in that room, but their testimony was not strong. Then the defense produced two witnesses who testified that he was not in the room. *Held*, the prosecution in rebuttal properly produced another inmate who saw defendant enter the room and walk out hurriedly. (176 C.A.2d 166; see *People v. Williams* (1958) 164 C.A.2d 285, 291, 330 P.2d 942; *People v. Jeffrey* (1965) 233 C.A.2d 279, 43 C.R. 524 [officer placed defendant at scene of crime; defendant testified, placing himself elsewhere; witness called by prosecution to contradict him].)

In *People v. Porterfield* (1960) 186 C.A.2d 149, 8 C.R. 897, defendant was charged with grand theft of an automobile from M on or about July 27. M had testified before the grand jury that this was the day he missed the car, but at the trial, was not directly asked about the date. Defendant produced an alibi witness for July 27. Then the prosecution: (a) In rebuttal, called a police officer to testify from the police report that the car was actually stolen on July 26. (b) On the granting of its motion to reopen the case, brought in M to testify that he had refreshed his recollection by looking at the report and talking with his wife and insurance agent, and that the theft occurred on July 26. Defendant was fully advised of these steps and the judge's intended rulings, and rejected an offer of a continuance. *Held*, the rebuttal evidence was appropriate. (186 C.A.2d 158.)

In *People v. Kaurish* (1990) 52 C.3d 648, 276 C.R. 788, 802 P.2d 278, photographs of abrasions on defendant's legs linked him to murder and sex offenses. A defense medical expert testified that the abrasions had occurred prior to the offenses. The prosecution then played tape-recorded, extrajudicial statements of defendant claiming that he had sustained abrasions when he fell at a friend's home on the night of the offenses. *Held*, no error was committed. The evidence was sufficiently related to the main thrust of the rebuttal evidence (discrediting the medical expert's testimony) to be permitted on rebuttal. (52 C.3d 682.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General*. See *People v. Young* (2005) 34 C.4th 1149, 1199, 24 C.R.3d 112, 105 P.3d 487 [in capital murder case, trial judge did not err in allowing prosecution to introduce rebuttal evidence to rehabilitate its own witness after defense had impeached him].



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## CHAPTER XI - Presentation At Trial

## IV. POWERS AND FUNCTIONS OF TRIAL JUDGE

## I. Exclusion of Witnesses.

## 1. Discretion To Exclude.

## 3 Witkin Cal. Evid. Presentation § 73

[§ 73] Discretion To Exclude.

(1) *General Rule.* The trial judge has broad discretion to separate witnesses during testimony. The court may exclude from the courtroom any witness not presently under examination so that the witness cannot hear the testimony of other witnesses. (*Ev.C. 777(a)*; see *People v. Garbutt* (1925) 197 C. 200, 205, 239 P. 1080; *People v. Young* (1985) 175 C.A.3d 537, 541, 542, 221 C.R. 32; 6 Wigmore (Chadbourn Rev.) §1837 et seq.; C.E.B., 1 Civ. Proc. During Trial 3d, §§9.13, 11.27; 1 Jefferson, California Evidence Benchbook 3d, §27.151 et seq.; 74 A.L.R.4th 705 [prejudicial effect of improper failure to exclude witnesses in criminal cases]; on magistrate's power in preliminary examination, see P.C. 867; on exclusion of expert during taking of testimony in civil case, see 85 A.L.R.2d 478.)

(2) *Limitations on Power To Exclude.* The statute also states two established limitations on the court's power to exclude witnesses.

(a) A party to the action cannot be excluded. (*Ev.C. 777(b)*; see *Chester v. Bower* (1880) 55 C. 46, 48; *Pedrow v. Federoff* (1926) 77 C.A. 164, 174, 247 P. 212.)

(b) If a party is "other than a natural person," an officer or employee designated by its attorney is entitled to be present. (*Ev.C. 777(c)*.) This right may be claimed on behalf of a corporation or other artificial entity. (*Ev.C. 777, Comment.*)

In *People v. Peters* (1983) 143 C.A.3d 597, 192 C.R. 70, a county district attorney brought a civil action in the name of the People and State of California against a member of the county planning commission, to enforce the financial disclosure and reporting requirements of the Political Reform Act of 1974 (*Govt.C. 81000* et seq.; see 7 *Summary* (9th), *Constitutional Law*, §201 et seq.). On defendant's motion, the trial judge excluded the district attorney's principal investigator from the courtroom. *Held*, this was error. (a) The plaintiff was the State of California, not the prosecuting official. (143 C.A.3d 601.) (b) The state is a public entity entitled under *Ev.C. 777(c)* to be present through its officer, here, the investigator. (143 C.A.3d 602.) (c) This right is applicable to civil, as well as criminal, actions. (143 C.A.3d 602.) (d) The error was prejudicial. Because the investigator had supervised the extensive pretrial investigation, it could not be said that his inability to render assistance during the long and complicated trial was not a miscarriage of justice. (143 C.A.3d 602.) (Cf. *Watson v. Department of Rehabilitation* (1989) 212 C.A.3d 1271, 1288, 261 C.R. 204 [employment discrimination action against state agency; no error in failing to permit agency to have its district administrator present throughout trial, even though administrator was most knowledgeable about case, where administrator had retired months before trial's commencement].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Limitations on Power To Exclude.*

(b) *Party is other than natural person:* See *People v. Gonzalez (2006) 38 C.4th 932, 950, 44 C.R.3d 237, 135 P.3d 649* [in capital murder trial, once deputy district attorney designated detective as his investigating officer, detective could not be excluded, even though detective had previously interviewed witness who was about to testify].

*Cross-Reference:* 7 *Summary* (10th), *Constitutional Law*, §271 et seq. *West's Key Number Digest*, Criminal Law k.665 et seq.; Trial k.41 et seq.



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## CHAPTER XI - Presentation At Trial

## IV. POWERS AND FUNCTIONS OF TRIAL JUDGE

## I. Exclusion of Witnesses.

## 2. Sanctions for Disobeying Exclusion Order.

3 *Witkin Cal. Evid. Presentation* § 74

[§ 74] Sanctions for Disobeying Exclusion Order.

(1) *General Reluctance To Disqualify Witness.* Despite considerable authority for disqualifying a witness who wilfully disobeys the court's order, particularly if the party connives with the witness (see 6 Wigmore (Chadbourn Rev.) §1842; 14 A.L.R.3d 16), California courts have been reluctant to take this step. Although such disobedience may be punished as a contempt, and may affect the witness' credibility, it has been held not to be a ground for rejection of the witness' testimony. (*Mintzer v. Wilson* (1937) 21 C.A.2d 85, 91, 68 P.2d 370; *People v. Tanner* (1946) 77 C.A.2d 181, 187, 175 P.2d 26; *People v. Ortega* (1969) 2 C.A.3d 884, 893, 83 C.R. 260 [victim's wife sat in court while witnesses were excluded; no error in allowing her to testify as unplanned rebuttal witness for prosecution]; *People v. Redondo* (1988) 203 C.A.3d 647, 654, 250 C.R. 46 [violation of witness exclusion order does not render witness incompetent to testify, and does not furnish grounds to refuse permission to testify, at least where party who seeks to offer testimony was not at fault in causing violation]; *People v. Adams* (1993) 19 C.A.4th 412, 436, 23 C.R.2d 512.)

(2) *Disqualification Allowed.* Nevertheless, disqualification remains a possible sanction. In *People v. Valdez* (1986) 177 C.A.3d 680, 223 C.R. 149, the court stated the facts giving rise to the problem as follows: Defendant had only one expert and wanted to use him for two purposes. "First, he wanted his expert to sit by his counsel's side to assist in the cross-examination of the prosecution expert. Then he wanted his expert to testify as a defense expert witness. However, as the prosecutor prepared to call her expert, the last case-in-chief witness, she moved to exclude witnesses from the courtroom. The appearance of appellant's expert seated with his counsel motivated the prosecution's motion. Although the court granted the motion to exclude, it permitted appellant's expert to remain and assist counsel in cross-examining the prosecution's expert witness. Defense counsel did not later call his expert as a witness." (177 C.A.3d 686.)

Defendant contended that the denial of his right to call any witness infringed on his Sixth Amendment right to present a defense; that the order forced him to the Hobson's choice of having his expert to assist during cross-examination or to testify as part of the defense case; and that the court cannot enforce its exclusion order by depriving the defendant of the testimony of an important witness who remains in court after the order is made. *Held*, conviction affirmed; the order of exclusion may be enforced by disqualification of the witness.

(a) Exclusion of witnesses from the courtroom is a matter within the trial judge's discretion. (177 C.A.3d 687, citing the text.) Some jurisdictions exempt an expert witness from sequestration when it is made clear that he is required for the management of the case. (177 C.A.3d 687, 688.) Defense counsel's reason was a different one: He wanted his expert by his side to help him understand the testimony of the prosecution's expert and to cross-examine that expert; but there is no rule that an "elbow expert" is a matter of right for cross-examination purposes. (177 C.A.3d 688.)

(b) "Undeniably, trial counsel would feel more comfortable with an elbow expert. Also, there may be some psychological advantage in having one expert facing the other during testimony. Nevertheless, defense counsel failed to show the trial court good cause for his expert's presence during the prosecution's expert testimony. ... [W]e assume defense counsel consulted with his expert and had sufficient knowledge of the subject to present his expert as a witness. Presumably such an attorney should be equally competent to cross-examine the opposition's expert. Competent trial attorneys routinely engage in litigation involving technical information such as forensic medicine, pathology, laboratory testing, prints and mental competence." (177 C.A.3d 688.)

(c) The trial judge simply permitted defense counsel to obtain assistance from his expert during cross-examination; he did not make a general order excluding witnesses and then "except" the expert. And counsel made no attempt to call the witness or obtain relief from the exclusion order. "We must presume if defense counsel later thought it important to call his expert as a witness, that defense counsel would have so moved and the trial court would have listened carefully to defense counsel's offer of proof and explanation as to the importance of the expert's testimony. If this had been done, we also presume the trial court would have carefully reconsidered its prior order." (177 C.A.3d 690.) The record, however, showed that counsel was able to obtain the evidence sought through cross-examination of the prosecution's expert, and therefore had no need for the testimony of his own expert. (177 C.A.3d 691.)

(d) The supposed rule that disobedience of an order of exclusion cannot be enforced by disqualification of the witness "appears to be a dangerous overstatement of California law." (177 C.A.3d 691.) This may be illustrated by the following hypothetical situation: The judge orders all witnesses excluded; defense counsel brings the expert into the courtroom where he remains; during recess, the expert gives defense counsel advice; later, defendant calls the expert as his witness, thus violating the order. What may the judge do?

(1) The judge could reconsider his exclusion order, but may not want to do so because of the flagrant challenge to his authority. (177 C.A.3d 691.)

(2) The judge could refuse to permit the witness to testify. The statement that the remedy for violation of an exclusion order is contempt, not disqualification of the witness, appears frequently in the opinions; but in the early case of *People v. Boscovitch* (1862) 20 C. 436, the court limited the rule to cases where the defendant was "without fault." And none of the later cases suggest that counsel may defy the exclusion order and assert a constitutional right to the witness' testimony in the absence of good cause. "A party who recognizes the court's authority and chooses to keep a potential witness present presumably does so knowing that except on good cause the witness will no longer be available for testimonial purposes. Later, if the party seeks to call the witness who remained in the courtroom, the prior knowledge of the court order and apparent election to keep the witness present will be deemed 'fault' as in 'you were responsible for keeping the witness present.' " (177 C.A.3d 692.)

(3) "We agree that the rule stated in *Boscovitch* is a rational one of permitting the testimony when the violation of the order has not been chargeable to the party who wishes to call the witness." (177 C.A.3d 693.) Wigmore, examining the problem and the conflicting views of the courts, stresses the difficulty in proving fault as a justification of the absolute power of the judge to enforce his order (177 C.A.3d 694), but California precedents, in accordance with *Boscovitch*, call for the "without fault" qualification. (177 C.A.3d 694, 695.)

The opinion concludes: "The *Boscovitch* conditional enforcement rule does not go so far as Professor Wigmore might have preferred. Nevertheless, under *Boscovitch*, the trial court may consider the circumstances of the violation of the order, and if warranted, exercise discretion to relieve the party of any penalty. However, an absolute rule limiting the penalty to contempt sanctions could work unfairly to the disadvantage of the party who observes the order. Even-handed justice demands a rule which permits the disqualification of a witness when fault is shared by counsel or the party. Whether counsel recognizes the authority of the court to enforce its order and knowingly keeps the witness present, as in this case, or deviously participates in violating the order, the law will deem a waiver of any previously applicable right to present the witness to have occurred. Only in the 'without fault' case is contempt the sole sanction." (177 C.A.3d 695.)



A strong dissenting opinion argues that the defendant, although permitted to keep his expert in the courtroom to assist in cross-examination, still had a constitutional right to call the expert as a defense witness. (*177 C.A.3d 699, 701.*) The dissent disagrees with the majority's view that defense counsel was at fault (*177 C.A.3d 700*), and likewise rejects the majority's suggestion that counsel waived the right to use his expert as part of the defense case because he did not actually try to call him at that time: "Once the trial court had implicitly ruled that by keeping the defense expert in the courtroom, appellant was foreclosed from later calling the expert as a witness, defense counsel was relieved of any further obligation to 'make a record' by calling the witness." (*177 C.A.3d 702.*) (For majority's answer to dissent, see *177 C.A.3d 690*, footnote 5.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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CHAPTER XI - Presentation At Trial

IV. POWERS AND FUNCTIONS OF TRIAL JUDGE

I. Exclusion of Witnesses.

3. Discretion To Allow Witness To Remain.

*3 Witkin Cal. Evid. Presentation § 75*

[§ 75] Discretion To Allow Witness To Remain.

In *People v. Boyden* (1953) 116 C.A.2d 278, 253 P.2d 773, defendant, charged with burglary and receiving stolen property, obtained an order excluding witnesses, but the judge permitted the investigating police officer to remain. Upholding this as a proper exercise of discretion, the court said: "It has long been the general practice to permit some officer, active in the prosecution of the case, to remain for the purpose of advising the district attorney as to the facts, the interest and character of the witnesses, etc. Such a practice is proper and charges that such officer or witness has abused his privilege should be first brought to the knowledge of the trial court, that they may be corrected, if there be any ground for the charge." (116 C.A.2d 283; see *People v. Persky* (1959) 167 C.A.2d 134, 139, 334 P.2d 219, citing the text [charge of theft by business manager; no abuse of discretion in allowing owner and his accountant to remain].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER XI - Presentation At Trial

### IV. POWERS AND FUNCTIONS OF TRIAL JUDGE

#### J. Examination of Witnesses.

1. Judge's Control Over Counsel's Examination.
  - a. Order of Examination.

*3 Witkin Cal. Evid. Presentation § 76*

[§ 76] Order of Examination.

(1) *Judge's Control.* The judge has considerable control over the content of the evidence offered; i.e., the judge determines competency (applying the exclusionary rules), and also may exclude some evidence which is both relevant and competent. (See *1 Cal. Evidence (4th), Circumstantial Evidence, §§7, 8 et seq.*) The judge has a similar power over the method of presentation, including the order of proof (see *supra*, §44 et seq.), the sequence of examinations (*Ev.C. 772, 774*; *infra*, this section, and *infra*, §78), and the mode of interrogation (*Ev.C. 765, infra*, §77). (See C.J.E.R., Judges Benchbook, Civil Proceedings: Trial §5.43 et seq.)

(2) *Phases of Examination.* The examination of a witness must proceed in the following phases: direct examination, cross-examination, redirect examination, and recross-examination. It continues thereafter by redirect and recross-examination. (*Ev.C. 772(a)*.) Each phase of the examination of a witness must be concluded before the succeeding phase begins, unless the court directs otherwise for good cause. (*Ev.C. 772(b)*.)

Except in criminal cases (*infra*, §233), a party may, in the court's discretion, interrupt its cross-examination, redirect examination, or recross-examination of a witness, in order to examine the witness on a matter not within the scope of a previous examination of the witness. (*Ev.C. 772(c)*.) This extended examination is ordinarily governed by the rules of direct examination. (*Ev.C. 760*; see *infra*, §§231, 256.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest, Witnesses k.224*



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## CHAPTER XI - Presentation At Trial

### IV. POWERS AND FUNCTIONS OF TRIAL JUDGE

#### J. Examination of Witnesses.

1. Judge's Control Over Counsel's Examination.
  - b. Mode of Interrogation.

3 Witkin Cal. Evid. Presentation § 77

[§ 77] Mode of Interrogation.

(1) *Generally.* The court must exercise reasonable control over the mode of interrogation of a witness to make the interrogation as rapid, distinct, and effective for ascertaining the truth as possible, and to protect the witness from undue harassment or embarrassment. (*Ev.C. 765(a)*; see *infra*, §164 et seq.; on questions degrading witness' character, see *infra*, §348 et seq.; on power of judge to protect modesty of witness called to testify to obscene language, see *18 Stanf. L. Rev.* 945.)

(2) *Protection of Child Witness.* If a witness is under the age of 14, the court must take special care to protect him or her from undue harassment or embarrassment, and to restrict the unnecessary repetition of questions. The court must take special care to ensure that questions are stated in a form appropriate to the age of the witness. In the interests of justice and on objection by a party, the court may forbid the asking of a question in a form not reasonably likely to be understood by a person of the witness' age. (*Ev.C. 765(b).*)

*In re Marriage of Okum* (1987) 195 C.A.3d 176, 240 C.R. 458, applies *Ev.C. 765(b)* to a child support proceeding in which the parents had made allegations of physical assaults and verbal abuse. When the father called the children to testify, the judge interviewed them in chambers with only a court reporter and the parents' attorneys present, and refused to allow either attorney to propound any questions to the children. *Held*, this was not an abuse of discretion. "The court was obviously concerned that certain testimony by the children in this highly charged proceeding might later affect their relationship with their parents." (195 C.A.3d 183.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2a) *(New) Protection of Dependent Person With Cognitive Impairment.* *Ev.C. 765(b)* was amended in 2004 to make the protections applicable to child witnesses (see text, p. 111) also applicable to dependent persons with substantial cognitive impairment. (On definition of dependent person, see 1 *Cal. Evidence* (4th), *Introduction*, Supp., §17.) *West's Key Number Digest*, Witnesses k.228



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## CHAPTER XI - Presentation At Trial

### IV. POWERS AND FUNCTIONS OF TRIAL JUDGE

#### J. Examination of Witnesses.

1. Judge's Control Over Counsel's Examination.
  - c. Reexamination and Recall.

#### 3 Witkin Cal. Evid. Presentation § 78

#### [§ 78] Reexamination and Recall.

(1) *Reexamination*. A witness who has been examined cannot be reexamined about the same matter without leave of the court. The witness may, however, be reexamined as to any new matter on which he or she has been examined by another party to the action. Leave may be granted or withheld in the court's discretion. (*Ev.C.* 774.)

(2) *Recall of Witness*. A witness, while on the stand, may be subjected successively to direct, cross, redirect and recross-examination as a matter of course. But once the witness has left the stand, after either direct or cross-examination, to recall him or her for further examination is a different matter, particularly after each party has presented its entire case in chief. Hence, after a witness has been excused from giving further testimony in the action, the witness cannot be recalled without leave of the court. Leave may be granted or withheld in the court's discretion. (*Ev.C.* 778; see *People v. Thomas* (1992) 2 C.4th 489, 542, 7 C.R.2d 199, 828 P.2d 101; *Litt v. Litt* (1946) 75 C.A.2d 242, 244, 170 P.2d 684; *People v. Cooks* (1983) 141 C.A.3d 224, 327, 190 C.R. 211; 6 Wigmore (Chadbourn Rev.) §§1898, 1899.)

Nevertheless, refusal to allow recall has sometimes been held an abuse of discretion. (See *Belm v. Patrick* (1930) 109 C.A. 599, 605, 293 P. 847 [recall of defendant requested by his counsel before resting his case]; *People v. Manchetti* (1946) 29 C.2d 452, 460, 175 P.2d 533, *infra*, §229; *People v. Raven* (1955) 44 C.2d 523, 526, 282 P.2d 866 [trial court erroneously believed it had no power to recall witness].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Reexamination*. See *People v. Tafoya* (2007) 42 C.4th 147, 174, 64 C.R.3d 163, 164 P.3d 590 [in capital murder case, trial judge did not err in allowing prosecution to reopen its cross-examination of defendant, where on initial cross-examination prosecution did not ask defendant about his interview with police, and where counsel for codefendant then did so, leading defendant to state that he lied to police but only because he was confused; defendant's responses to counsel for codefendant raised new issues about his credibility]. *West's Key Number Digest*, Witnesses k.261 et seq.



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## CHAPTER XI - Presentation At Trial

## IV. POWERS AND FUNCTIONS OF TRIAL JUDGE

## J. Examination of Witnesses.

1. Judge's Control Over Counsel's Examination.
  - d. Attorney's Consultation With Defendant.

3 Witkin Cal. Evid. Presentation § 79

[§ 79] Attorney's Consultation With Defendant.

A judge's order forbidding defense counsel to consult with his testifying client during the trial may violate the Sixth Amendment right to counsel. Thus, in *Geders v. United States* (1976) 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592, defense counsel finished his direct examination of defendant at 4:55 p.m. on a Tuesday. After the jury left, the prosecutor asked the judge for the same order that was directed at every previous witness who had testified, i.e., that the witness not discuss the case overnight with anyone. Defense counsel objected, explaining that he had a right to confer with his client about matters other than the imminent cross-examination. The judge replied that defendant might not be able to confine himself to nontestimonial matters, and added: "I just think it is better that he not talk to you about anything." *Held*, this was error.

(a) The judge sequestered all witnesses for both prosecution and defense, and before each recess, instructed the testifying witness not to discuss his testimony with anyone. Applied to nonparty witnesses, the orders were within sound judicial discretion. But a defendant is not simply a witness. "A sequestration order affects a defendant in quite a different way from the way it affects a nonparty witness who presumably has no stake in the outcome of the trial. A nonparty witness ordinarily has little, other than his own testimony, to discuss with trial counsel; a defendant in a criminal case must often consult with his attorney during the trial. Moreover, 'the rule' accomplishes less when it is applied to the defendant rather than a nonparty witness, because the defendant as a matter of right can be and usually is present for all testimony and has the opportunity to discuss his testimony with his attorney up to the time he takes the witness stand." (96 S.Ct. 1335, 47 L.Ed.2d 599.)

(b) This is not the case of an embargo order preventing a defendant from consulting his attorney during a brief routine recess in the trial day. (96 S.Ct. 1336, 47 L.Ed.2d 600, footnote 2.) The recess here was overnight, and 17 hours long. During such recesses, a defendant and his counsel commonly discuss trial events, doing intensive work, with tactical decisions to be made and strategies to be reviewed. The lawyer may need to obtain from the defendant information made relevant by the day's testimony or pursue inquiry along undeveloped lines. "At the very least, the overnight recess during trial gives the defendant a chance to discuss with counsel the significance of the day's events. Our cases recognize that the role of counsel is important precisely because ordinarily a defendant is ill equipped to understand and deal with the trial process without a lawyer's guidance." (96 S.Ct. 1335, 47 L.Ed.2d 599.)

(c) Short of putting a barrier between defendant and counsel for 17 hours to prevent possible improper influence or coaching, there are other weapons available to opposing counsel. A prosecutor may cross-examine defendant about the extent of coaching and may develop a record to use in closing argument to raise questions as to defendant's credibility.

"In addition the trial judge, if he doubts that defense counsel will observe the ethical limits on guiding witnesses, may direct that the examination of the witness continue without interruption until completed. If the judge considers the risk high he may arrange the sequence of testimony so that direct and cross-examination of a witness will be completed without interruption. That this would not be feasible in some cases due to the length of direct and cross-examination does not alter the availability, in most cases, of a solution that does not cut off communication for so long a period as presented by this record. Inconvenience to the parties, witnesses, counsel and court personnel may occasionally result if a luncheon or other recess is postponed or if a court continues in session several hours beyond the normal adjournment hour. In this day of crowded dockets, courts must frequently sit through and beyond normal recess; convenience occasionally must yield to concern for the integrity of the trial itself." (96 S.Ct. 1336, 47 L.Ed.2d 600.)

(d) To the extent that conflict remains between the defendant's right to consult with his attorney "about anything" during a long overnight recess in the trial and the prosecutor's desire to cross-examine without counsel's intervention, the conflict must be resolved in favor of the Sixth Amendment right to the assistance and guidance of counsel. (96 S.Ct. 1337, 47 L.Ed.2d 601.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER XI - Presentation At Trial

## IV. POWERS AND FUNCTIONS OF TRIAL JUDGE

## J. Examination of Witnesses.

## 2. Examination by Judge.

## a. In General.

3 *Witkin Cal. Evid. Presentation* § 80

[§ 80] In General.

The judge in a civil or criminal trial has power to examine witnesses, and consent of the parties is not required. Many decisions deal with the typical situation, where the judge intervenes and interrogates a witness already called to the stand by a party, to bring out new facts or to clarify matters left obscure or uncertain. (See generally 1 McCormick 5th, §8; 3 Wigmore (Chadbourn Rev.) §784; 81 *Am.Jur.2d* (1992 ed.), *Witnesses* §724 et seq.; 6 A.L.R.4th 951 [civil cases]; on power of judge in trial of traffic infraction, see *infra*, §84.)

The judge may examine a witness at some length, even though the same testimony would probably have been elicited by counsel. (See *People v. Pierce* (1970) 11 C.A.3d 313, 321, 89 C.R. 751 [no objection made when questioning occurred]; *People v. Rodriguez* (1970) 10 C.A.3d 18, 32, 88 C.R. 789 [trial judge properly questioned witness outside jury's presence on pretrial identification of defendant].)

There is no limitation on the time when the judge may exercise the power to question witnesses or call new witnesses (*infra*, §83). It has been suggested, however, that interruptions are bad practice, and that it is preferable to permit counsel to conclude before the judge begins: "[F]or the court to repeatedly take the defendant as a witness out of the hands of his counsel who, as the record before us shows, was apparently competent, conscientious, and expeditious in his conduct of the case, and proceed along an independent and extensive line of examination and cross-examination is not only not commendable but highly irregular. ... Ordinarily the proper course, and the one generally pursued, is to allow the examination by counsel--direct, cross, redirect and recross--to conclude, and then if anything in the judgment of the trial court remains obscure, which may be material for the jury to know ... the trial court may ... intervene." (*People v. Boggess* (1924) 194 C. 212, 241, 228 P. 448; see *Karwoski v. Grant* (1938) 30 C.A.2d 171, 178, 85 P.2d 944; *People v. Gates* (1979) 97 C.A.3d Supp. 10, 13, 158 C.R. 759; 7 *Cal. Proc.* (4th), *Trial*, §261.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 81 *Am.Jur.2d* (2004 ed.), *Witnesses* §697 et seq.; 1 McCormick 6th, §8. *West's Key Number Digest*, *Witnesses* k.246 et seq.





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#### J. Examination of Witnesses.

#### 2. Examination by Judge.

#### b. Illustrations.

#### 3 Witkin Cal. Evid. Presentation § 81

[§ 81] Illustrations.

The following cases illustrate the use of the power (supra, §80) in civil and criminal trials.

(1) *Civil Trials*. (See *Bell v. Moloney* (1917) 175 C. 366, 369, 370, 165 P. 917 ["It is the right and the bounden duty of a judge of a trial court to take part in the examination of a witness whenever he believes that he may aid in bringing out the truth or in preventing a misunderstanding"]; *Gerson v. Kelsey* (1935) 4 C.A.2d 158, 163, 40 P.2d 543 ["This is especially true when a judge is sitting in a trial without a jury"]; *Grover v. Morrison* (1920) 47 C.A. 521, 528, 190 P. 1078; *Atchison v. Hulse* (1930) 107 C.A. 640, 645, 290 P. 916; *Hart v. Farris* (1933) 218 C. 69, 75, 21 P.2d 432; *Hughes v. Quackenbush* (1934) 1 C.A.2d 349, 359, 37 P.2d 99; *Karwoski v. Grant* (1938) 30 C.A.2d 171, 175, 85 P.2d 944.)

(2) *Criminal Trials*. (See *People v. Mendez* (1924) 193 C. 39, 46, 223 P. 65 [judge interrupted examination to help child witness]; *People v. Golsh* (1923) 63 C.A. 609, 614, 219 P. 456; *People v. Buratti* (1950) 96 C.A.2d 417, 420, 215 P.2d 500 [judge, after defendant, on cross-examination, admitted lies, interrogated him as to reasons, giving him opportunity to explain]; *People v. Corrigan* (1957) 48 C.2d 551, 560, 310 P.2d 953, *infra*, §82; *People v. Rigney* (1961) 55 C.2d 236, 241, 10 C.R. 625, 359 P.2d 23, *infra*, §82; *People v. Bowman* (1966) 240 C.A.2d 358, 382, 49 C.R. 772; *People v. Handcock* (1983) 145 C.A.3d Supp. 25, 29, 193 C.R. 397, and footnote 2; *People v. Tamborrino* (1989) 215 C.A.3d 575, 581, 263 C.R. 731, 2 Cal. Evidence (4th), Witnesses, §72; *People v. Camacho* (1993) 19 C.A.4th 1737, 1744, 1745, 24 C.R.2d 286, citing the text [defendants failed to timely object to examination by judge by waiting until after judge concluded questioning and prosecutor concluded recross-examination; in any event, questions were not adversarial or designed to make jury disbelieve defendant]; *People v. Hawkins* (1995) 10 C.4th 920, 948, 42 C.R.2d 636, 897 P.2d 574 [whether judge's questioning of prosecution expert constituted interrogation of witness, or comment on evidence as permitted by Cal. Const., Art. VI, §10, or combination of both, it was part of his legitimate role of clarifying testimony and assisting jury's understanding of evidence].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## IV. POWERS AND FUNCTIONS OF TRIAL JUDGE

## J. Examination of Witnesses.

## 2. Examination by Judge.

## c. Improper Suggestion of Partisanship.

3 *Witkin Cal. Evid. Presentation* § 82

## [§ 82] Improper Suggestion of Partisanship.

The judge should intervene only for such purposes as to clear up misunderstandings or to develop important evidence. The examination should relate to material matters and be conducted impartially, so that the jury will not receive improper inferences as to the judge's opinions on the case. (See *Flinn v. Ferry* (1900) 127 C. 648, 655, 60 P. 434; *People v. Corrigan* (1957) 48 C.2d 551, 560, 310 P.2d 953 [dissent]; *People v. Carlucci* (1979) 23 C.3d 249, 258, 152 C.R. 439, 590 P.2d 15, *infra*, §84; 1 McCormick 5th, §8; 7 *Cal. Proc.* (4th), *Trial*, §257.)

*People v. Corrigan*, *supra*, appears to be a borderline case. In a robbery prosecution, the trial judge examined defendant's alibi witnesses critically and at length; e.g., one was persistently questioned as to why she had not previously gone to the authorities with her story; another was warned, "Don't forget I want you to tell me the truth." The majority justices saw nothing wrong in the questions, although they emphasized the lack of any objection by defense counsel. (48 C.2d 559.) Two dissenters agreed with the Court of Appeal that the judge had taken a partisan position. (48 C.2d 560.)

*People v. Rigney* (1961) 55 C.2d 236, 10 C.R. 625, 359 P.2d 23, seems also on the borderline. Defendant, a hospital corpsman in the Navy, was convicted of assault with a deadly weapon and assault with a deadly weapon with intent to commit murder. He relied mainly on the defense of lack of memory of the events at the time of the shooting to negative the specific intent to commit murder. He testified himself and also called a naval psychiatrist. The trial judge, over objection, examined defendant extensively as to the events preceding the shooting, interrupting the deputy district attorney's cross-examination to do so, questioning him closely as to inconsistencies between his testimony on the stand and prior statements, and recalling him after he had been excused. The judge also examined the psychiatrist at length on defendant's alleged retrograde amnesia. *Held*, conviction affirmed. Although the better practice is for the judge to allow counsel to develop the case, the questioning was not improper, for the questions asked were designed to get the truth, and fairly and impartially brought out relevant and material testimony; and the jury was properly instructed that it was the exclusive judge of the effect and value of the evidence. (55 C.2d 243.)

A vigorous dissent asserts that the judge assumed the role of prosecutor, clearly indicated to the jury his disbelief in the main defense, interrupted the two witnesses constantly and exhaustively and argumentatively examined them to the almost complete exclusion of the district attorney, was sarcastic and unfair to the psychiatrist, and, when the defense undertook, on redirect examination, to repair the damage, broke in to ridicule the presentation. (See *People v. Williams* (1962) 200 C.A.2d 838, 846, 19 C.R. 743 [close question, but held that judge did not overstep bounds of propriety].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Perkins* (2003) 109 C.A.4th 1562, 1567, 1573, 1 C.R.3d 271 [in burglary and arson prosecution, trial judge committed reversible error in his examination of defendant; judge's questions and comments interfered with presentation of alibi defense and implied that he sided with prosecution, and no admonition or instruction was given to cure this misconduct]; 1 McCormick 6th, §8.



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## CHAPTER XI - Presentation At Trial

## IV. POWERS AND FUNCTIONS OF TRIAL JUDGE

## J. Examination of Witnesses.

## 3. Judge's Power To Call New Witnesses.

## 3 Witkin Cal. Evid. Presentation § 83

[§ 83] Judge's Power To Call New Witnesses.

(1) *Expert Witnesses*. The power of the judge to appoint and call expert witnesses is recognized by several statutes. (See *Ev.C. 730 et seq.*, 1 *Cal. Evidence (4th)*, *Opinion Evidence*, §80 et seq.; *Family C. 7552*, 2 *Cal. Evidence (4th)*, *Demonstrative, Experimental, and Scientific Evidence*, §77 [blood test to determine nonpaternity]; *P.C. 1027*, 5 *Cal. Crim. Law (3d)*, *Criminal Trial*, §674 [trial of insanity issue]; *Marin Water & Power Co. v. Railroad Com. of Calif.* (1916) 171 C. 706, 714, 154 P. 864 [approving Commission's calling of expert in condemnation suit]; *Citizens State Bank of Santa Monica v. Castro* (1930) 105 C.A. 284, 285, 287 P. 559 [handwriting expert]; 1 McCormick 5th, §8.)

(2) *Ordinary Witnesses*. The power to call ordinary witnesses formerly had no statutory basis in California, and its exercise in civil cases was apparently quite rare. In *Travis v. Southern Pac. Co.* (1962) 210 C.A.2d 410, 26 C.R. 700, an action for personal injuries resulting from an intersection collision of plaintiff's automobile and defendant's train, S had stopped at the same intersection, and was therefore an important eyewitness. He gave conflicting statements to the investigator and police officer, and, although plaintiff subpoenaed him, neither party wanted to make him its witness. However, on request of defendant and over plaintiff's objection, the judge allowed defendant to call S with the understanding that either party could cross-examine--the equivalent of the court calling him. *Held*, this was not improper, although it would have been better for the judge to have directly called him: "[W]e have been cited to no case, nor has our independent research disclosed any case, dealing with a civil action in which a witness has been called to the stand by the court, over objection of a party. However, we can see no difference in this respect between a civil and a criminal case. In both, the endeavor of the court and the parties should be to get at the truth of the matter in contest. Fundamentally, there is no reason why the court in the interests of justice should not call to the stand anyone who appears to have relevant, competent and material information." (210 C.A.2d 425.)

The broad power to call witnesses is now statutory. The court, on its own motion or on the motion of any party, may call witnesses and interrogate them as if they had been produced by a party. The parties may object to the questions asked and the evidence adduced as if the witnesses were called and examined by an adverse party. The witnesses may be cross-examined by all parties to the action in the order that the court directs. (*Ev.C. 775*; see *People v. Murray* (1970) 11 C.A.3d 880, 884, 90 C.R. 84 [when alibi witness apparently resisted subpoena, trial judge properly called him to insure defendant benefit of that defense, even though testimony may have hurt defendant]; 16 A.L.R.4th 352 [court's witnesses (other than expert) in state criminal prosecution].) (On time of calling witnesses, see *People v. Gates* (1979) 97 C.A.3d Supp. 10, 13, 158 C.R. 759, *infra*, §85; on power of judge in trial of traffic infraction, see *infra*, §84.)

(3) *Abuse of Power*. A gross abuse of the power was condemned in *People v. Handcock* (1983) 145 C.A.3d Supp. 25, 193 C.R. 397, a prosecution for hit-and-run driving. The trial judge, during recess, undertook his own investigation

of the accident; he then called his own witness to offer evidence derived from the investigation, without notice to either counsel, and interrupted defendant's testimony to examine the new witness. *Held*, this was reversible error: "[T]he cumulative effect of the court's actions in the manner of presenting the results of its investigation was to telegraph to the jury a message that the defendant's testimony was to be disbelieved and that the court had evidence to prove the defendant's guilt." (145 C.A.3d Supp. 33.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Expert Witnesses*. See 1 McCormick 6th, §8.

(2) *Ordinary Witnesses*. See *Conservatorship of Pamela J.* (2005) 133 C.A.4th 807, 827, 35 C.R.3d 228 [in hearing to determine capacity of patient under Lanterman-Petris-Short Act to give or refuse written informed consent to electroconvulsive treatment, trial judge's decision to call and question patient's counsel and her treating physician was authorized under Ev.C. 775].



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### IV. POWERS AND FUNCTIONS OF TRIAL JUDGE

#### J. Examination of Witnesses.

#### 4. Court Trial of Infraction.

#### 3 *Witkin Cal. Evid. Presentation* § 84

[§ 84] Court Trial of Infraction.

In *People v. Carlucci* (1979) 23 C.3d 249, 152 C.R. 439, 590 P.2d 15, defendants were brought to trial for traffic infractions. The prosecuting attorney was unable to be present, and the judge called the prosecution witnesses (peace officers who had issued the citations) and the defendants to the stand. Each was allowed to give a narrative description of the events, each was questioned by the judge, and each defendant cross-examined the officer witnesses. *Held*, the procedure did not deprive the defendants of due process.

(a) *Ev.C.* 775 (supra, §83) codifies traditional case law. (23 C.3d 255.) And the judge's power to question witnesses applies to court trials as well as jury trials. He is not a mere umpire presiding over a contest between professional witnesses, but a judicial officer entrusted with the task of determining where justice lies under the law and facts. (23 C.3d 256.)

(b) Public policy considerations support the conclusion that a trial judge at a traffic infraction hearing may call and question witnesses in the absence of a prosecutor.

(1) Such cases ordinarily entail the imposition of small fines, and it is neither economically feasible nor warranted by the relatively limited monetary exposure of the defendant for counsel to be employed or multiple appearances to be made for arraignment and trial. (23 C.3d 257.) Even though there are incidental penalties where the defendant is found guilty (loss of driving privilege, difficulty in obtaining insurance), the courts and the Legislature have repeatedly evidenced their determination to keep these cases free from procedural intricacies. (23 C.3d 257.)

(2) Because counsel will not be appointed for defendants (P.C. 19.6), a requirement that a prosecutor be present would place an unrepresented defendant at a disadvantage; and, because the cost of private counsel would almost invariably be more than the financial penalty, most defendants would not hire counsel. (23 C.3d 258.)

(c) The practice fully protects the defendant's rights. "[T]he citing officer routinely takes the stand and gives a narrative description of the events leading to the issuance of the citation. The defendant will then have full opportunity to cross-examine the officer and then may himself testify, and present such other evidence as may be probative and relevant. Under these circumstances we are satisfied that a trial judge should, within proper limits, be permitted to ask questions for the purpose of clarifying ambiguities and to insure that justice is done both to the accused and to the People, all this without jeopardizing the court's ability to act in a judicious, independent, detached, and neutral manner." (23 C.3d 258.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER XI - Presentation At Trial

### IV. POWERS AND FUNCTIONS OF TRIAL JUDGE

#### J. Examination of Witnesses.

##### 5. Questioning by Jurors.

##### a. Questions Submitted by Jurors.

*3 Witkin Cal. Evid. Presentation § 85*

[§ 85] Questions Submitted by Jurors.

In *People v. Gates* (1979) 97 C.A.3d Supp. 10, 158 C.R. 759, a prosecution for petty theft committed in a supermarket, defendant concluded his testimony, and a juror then asked whether the jury could have a point clarified. The judge replied that questions could be submitted in writing, and when two were received, asked counsel if they had any objection to the questions or wished to ask the questions themselves. Defense counsel objected only to the timing, and the judge called the security guard (a prosecution witness) and asked the two questions. *Held*, the procedure was proper. Although the point was new for California, Arizona and Michigan courts have approved jurors' questions under appropriate supervision. Unrestricted and uncontrolled questioning can be disruptive and prejudicial; but jurors should be afforded the opportunity to direct any questions they may have to the trial judge, and the judge may properly ask the questions after giving counsel the opportunity to do so or object. (97 C.A.3d Supp. 14.) (See *People v. McAlister* (1985) 167 C.A.3d 633, 644, 213 C.R. 271, *infra*, §86.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See C.R.C., Rule 2.1033, adopted in 2007 [jurors must be allowed to submit written questions to witnesses, and counsel must have opportunity to object out of presence of jury]. *West's Key Number Digest*, Witnesses k.246 et seq.





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## CHAPTER XI - Presentation At Trial

### IV. POWERS AND FUNCTIONS OF TRIAL JUDGE

#### J. Examination of Witnesses.

##### 5. Questioning by Jurors.

##### b. Direct Questioning Improper.

3 Witkin Cal. Evid. Presentation § 86

[§ 86] Direct Questioning Improper.

In *People v. McAlister* (1985) 167 C.A.3d 633, 213 C.R. 271, defendant was charged with vehicular manslaughter and drunken driving. During presentation of the evidence, the judge invited the jurors to submit questions, explaining that he would ask those that he deemed proper. Later, however, a juror was allowed to question a witness directly, and thereafter a number of jurors were permitted to engage in direct questioning. Prior to defendant's taking the stand, the district attorney and defense counsel conferred with the judge in chambers. The district attorney expressed some concern about the procedure, and defense counsel moved for a mistrial. The judge observed that the questions appeared to be relevant, and that he found it "refreshing" to see the jurors' "intensity." However, on returning to the courtroom, he admonished the jurors not to become advocates and encouraged them to write out their questions, and this procedure was then followed. *Held*, allowing direct questions was error, but not prejudicial.

(a) "In a proper case there may be a real benefit from allowing jurors to submit questions under proper control by the court. However, in order to permit the court to exercise its discretion and maintain control of the trial, the correct procedure is to have the juror write the questions for consideration by the court and counsel prior to their submission to the witness." (167 C.A.3d 644.)

(b) "We hold that at least in a criminal case it is unnecessary for counsel to make an objection to the improper nature of the questions propounded by a juror in order to preserve the right to raise the error on appeal. We agree with the courts from other jurisdictions that have held that the risk of prejudice is too great to require counsel to be put to the choice of offending a juror by an objection or of letting improper or prejudicial testimony go in without the right to later review." (167 C.A.3d 644.) It is the duty of the court to see to it that no improper questions are asked. (167 C.A.3d 644.)

(c) Some courts have permitted direct juror questioning, usually for the purpose of clarifying a statement made by a witness; but even where the practice has been encouraged, the cases make it clear that it must be exercised with extreme caution and under strict admonitions from the judge. Other courts have discouraged the practice. (167 C.A.3d 644.)

(d) "Although we hold the view that the practice is inherently dangerous and should be discouraged, we agree that as a reviewing court we are limited to a determination of whether prejudice resulted in this case." (167 C.A.3d 645.) And an examination of the hazards of the procedure is helpful in determining the question of prejudice:

"1. As already noted, counsel is placed in the intolerable position of either offending the juror by objecting or permitting improper and possibly prejudicial testimony to come in without objection."

"2. The involvement of the juror in the process of interrogation may lessen his or her objectivity and cause a premature judgment on some issue in the case."

"3. Personal interaction between juror and witness may produce tension or actual antagonism in the juror." (167 C.A.3d 645.)

The court concluded that there was only one instance in which an objection to a question would have been appropriate, and that the error was not prejudicial. (167 C.A.3d 646.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 28 *Pepperdine L. Rev.* 437 [examining views of state and federal courts as to propriety of jury questioning].



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## CHAPTER XI - Presentation At Trial

### IV. POWERS AND FUNCTIONS OF TRIAL JUDGE

#### K. Instructions to Jury.

#### 3 *Witkin Cal. Evid. Presentation* § 87

[§ 87] Instructions to Jury.

(1) *Former Law.* Former C.C.P. 2061 set forth a number of cautionary instructions on evidence and witnesses. The statute merely confirmed a recognized common law power, and did not cover all instructions that a judge might or should give on these subjects. (See *People v. Sutton* (1964) 231 C.A.2d 511, 515, 41 C.R. 912; 7 Cal. Proc. (4th), Trial, §300; 5 Cal. Crim. Law (3d), Criminal Trial, §606 et seq.) The Legislature, following the Commission's recommendation, repealed the section. The appropriate instructions are, as before, given pursuant to such power or duty of the judge as the case law determines. (See Comment on repealed C.C.P. 2061.)

(2) *Optional Instructions.* In addition to the cautionary instructions formerly contained in C.C.P. 2061, there are a number of others that a judge may give the jury to aid them in considering evidence and witnesses. All will be found in BAJI and CALJIC, and are discussed elsewhere. (See 7 Cal. Proc. (4th), Trial, §§283 et seq., 300 et seq.; 5 Cal. Crim. Law (3d), Criminal Trial, §§626 et seq., 636 et seq.) Those based on rules in the Evidence Code are also briefly noted in this work. (See *infra*, §108 et seq.) (See *People v. Smith* (1989) 214 C.A.3d 904, 912, 263 C.R. 155, 1 Cal. Evidence (4th), Hearsay, §188 [disapproving instruction emphasizing trustworthiness of dying declaration].)

(3) *Required Instructions.* In a few instances, the Evidence Code directly calls for instructions: (a) Burden of proof. (Ev.C. 502; see 1 Cal. Evidence (4th), Burden of Proof and Presumptions, §§3, 6 et seq.) (b) Burden of producing evidence and burden of proof of preliminary facts. (Ev.C. 403, 405, 1 Cal. Evidence (4th), Burden of Proof and Presumptions, §33.) (c) Preponderance of evidence and reasonable doubt. (Ev.C. 502; see 1 Cal. Evidence (4th), Burden of Proof and Presumptions, §34.) (d) Judicial notice. (Ev.C. 457, 1 Cal. Evidence (4th), Judicial Notice, §42.) (e) No unfavorable presumption or inference from claim of privilege. (Ev.C. 913(b), 2 Cal. Evidence (4th), Witnesses, §96.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Criminal Law k.769 et seq.; Trial k.182 et seq.



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## CHAPTER XI - Presentation At Trial

### V. DETERMINATION OF CREDIBILITY AND WEIGHT

#### A. Role of Jury.

#### 3 Witkin Cal. Evid. Presentation § 88

[§ 88] Role of Jury.

(1) *Jury Determines Facts.* Except as otherwise provided by law, the jury decides all questions of fact. (*Ev.C. 312(a)*.) Subject to the court's control, the jury determines the effect and value of the evidence addressed to it, including the credibility of witnesses and hearsay declarants. (*Ev.C. 312(b)*); see *Morey v. Vannucci* (1998) 64 C.A.4th 904, 914, 75 C.R.2d 573 [resolution of meaning of contract terms was properly submitted to jury, because it turned entirely on assessment of credibility of opposing witnesses].)

A party may introduce various types of evidence either impeaching or supporting a witness' credibility (*Ev.C. 780, 785, infra*, §§259, 356, 360), or evidence relevant to weight and credibility (*Ev.C. 406*). If the jury is satisfied with the veracity of a witness or the probative value of other evidence, this determination will almost invariably be accepted on appeal. (See *Davis v. Sacramento* (1994) 24 C.A.4th 393, 405, 29 C.R.2d 232 [finding of negligence]; *People v. Salazar* (1995) 33 C.A.4th 341, 346, 39 C.R.2d 337 [finding of asportation]; 9 *Cal. Proc.* (4th), *Appeal*, §359; 29A Am.Jur.2d (1994 ed.), Evidence §1430 et seq.; 75A Am.Jur.2d (1991 ed.), *Trial* §714 et seq.; 81 Am.Jur.2d (1992 ed.), Witnesses §1027; *F.R. Evid.*, Rule 104(e) [Rule 104, *supra*, §48, "does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility"]; 1 Mueller & Kirkpatrick, *Federal Evidence* 2d, §24 et seq.; see also BAJI (8th ed.), No. 2.06 [depositions].)

(2) *Standard Instructions to Jury.* The jury's exercise of its important function is guided by a number of standard instructions on the weight and sufficiency of evidence and the credibility of witnesses. (See *infra*, §89 et seq.; 7 *Cal. Proc.* (4th), *Trial*, §300 et seq.; 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §636 et seq.; see also *People v. Echevarria* (1992) 11 C.A.4th 444, 450, 13 C.R.2d 840 [court was not required to give requested instruction on viewing immunized witness' testimony with distrust where court added that factor to standard credibility instruction (CALJIC, No. 2.20)]; *People v. Hampton* (1999) 73 C.A.4th 710, 721, 86 C.R.2d 665 [same].) The most basic are the following general admonitions:

(a) That the jury's duty is to follow the law, determine the effect and value of the evidence, and decide all questions of fact. (See BAJI (8th ed.), No. 1.00.)

(b) That the jurors are not bound to decide in conformity with the testimony of a number of witnesses against a lesser number with more convincing force. (See BAJI (8th ed.), No. 2.01; CALJIC (6th ed.), No. 2.22; 7 *Cal. Proc.* (4th), *Trial*, §311; 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §649.)

(3) *Instruction Regarding Child Witness.* In a criminal proceeding in which a child 10 years old or younger testifies, P.C. 1127f requires the court, on a party's request, to instruct the jury as follows:

"In evaluating the testimony of a child you should consider all of the factors surrounding the child's testimony, including the age of the child and any evidence regarding the child's level of cognitive development. Although, because of age and level of cognitive development, a child may perform differently as a witness from an adult, that does not mean that a child is any more or less credible a witness than an adult. You should not discount or distrust the testimony of a child solely because he or she is a child."

This instruction has been incorporated into CALJIC (6th ed.), No. 2.20.1. (See *People v. Jones* (1990) 51 C.3d 294, 315, 270 C.R. 611, 792 P.2d 643; *People v. Gilbert* (1992) 5 C.A.4th 1372, 1393, 7 C.R.2d 660; 32 A.L.R.4th 1196 [jury instructions regarding credibility of child's testimony in criminal case]; for disapproval of requested argumentative instructions that generally discredited minor witnesses, see *People v. Boyette* (1988) 201 C.A.3d 1527, 1536, 247 C.R. 795.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Jury Determines Facts*. See 75A Am.Jur.2d (2007 ed.), Trial §596 et seq.; 81 Am.Jur.2d (2004 ed.), Witnesses §995 et seq.; CACI, No. 208 [deposition testimony]; 39 U.S.F. L. Rev. 455 [comparison of California and federal rules on determination of witness credibility].

(2) *Standard Instructions to Jury*. See CACI, No. 5003 [number of witnesses on one side not determinative]; CALCRIM, No. 226 [Witnesses]; CALCRIM, No. 302 [Evaluating Conflicting Evidence].

Following *People v. Hampton* (1999) 73 C.A.4th 710, 86 C.R.2d 665, text, p. 123, CALJIC, No. 2.20 was modified to add the factor of witness immunity to the factors a jury may consider in determining credibility.

See *People v. Long* (2005) 126 C.A.4th 865, 870, 24 C.R.3d 654 [in prosecution for inflicting corporal injury on cohabitant, trial judge did not err in refusing to include within CALJIC, No. 2.20 instruction that jury could consider character of witness for honesty or truthfulness or their opposites in judging believability of witness, notwithstanding that expert had testified that victim suffered from borderline personality disorder that could cause her to fabricate information during stressful times; expert's testimony was not evidence of victim's character]; *People v. Anderson* (2007) 152 C.A.4th 919, 934, 938, 61 C.R.3d 903 [CALCRIM, Nos. 226 and 302 are proper instructions].

Under C.R.C., Rule 2.1050, adopted in 2003, amended in 2005, and renumbered in 2006, use of the Judicial Council's jury instructions "is strongly encouraged." These include Judicial Council of California, Civil Jury Instructions, known as "CACI" (see 7 Cal. Proc. (4th), Trial, Supp., §287B), and Judicial Council of California, Criminal Jury Instructions, known as "CALCRIM" (see 5 Cal. Crim. Law (3d), Criminal Trial, Supp., §628B).(3) *Instruction Regarding Child Witness*. See *People v. McCoy* (2005) 133 C.A.4th 974, 980, 35 C.R.3d 366 [CALJIC, No. 2.20.1 is constitutional]; CALCRIM, No. 330 [Testimony of Child 10 Years of Age or Younger]. *West's Key Number Digest*, Criminal Law k.741 et seq.; Trial k.139.1 et seq.



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## CHAPTER XI - Presentation At Trial

## V. DETERMINATION OF CREDIBILITY AND WEIGHT

## B. Sufficiency of One Witness.

## 1. General Rule and Illustrations.

3 Witkin Cal. Evid. Presentation § 89

[§ 89] General Rule and Illustrations.

(1) *General Rule.* Unless a statute requires additional evidence, the direct evidence of one witness who is entitled to full credit is sufficient to prove any fact. (*Ev.C. 411.*) In other words, the testimony of a witness normally cannot be disregarded. Unless impeached or contradicted by other testimony or by an inference deducible from the facts proved, or unless it is inherently improbable, the court must accept it as true. (See *Sweeney v. Metropolitan Life Ins. Co. (1937) 30 C.A.2d Supp. 767, 771, 92 P.2d 1043* [where witnesses to accident not contradicted or impeached, "neither the jury nor the court had the privilege of arbitrarily disregarding the positive evidence of actual occurrences"]; *Evje v. City Title Ins. Co. (1953) 120 C.A.2d 488, 492, 261 P.2d 279*; *People v. Allen (1985) 165 C.A.3d 616, 623, 211 C.R. 837* ["absent physical impossibility or inherent improbability, the testimony of a single eyewitness is sufficient to sustain a criminal conviction"]; *People v. Leigh (1985) 168 C.A.3d 217, 221, 214 C.R. 61*; *People v. Vega (1995) 33 C.A.4th 706, 711, 39 C.R.2d 479*; 7 Wigmore (Chadbourn Rev.) §2034; 2 McCormick 5th, §338; 81 Am.Jur.2d (1992 ed.), Witnesses §§1033, 1036; 62 A.L.R.2d 1191; BAJI (8th ed.), No. 2.01; CALJIC (6th ed.), No. 2.27.)

The same rule applies to the testimony of expert witnesses. (See *Wirz v. Wirz (1950) 96 C.A.2d 171, 176, 214 P.2d 839*; *Krause v. Apodaca (1960) 186 C.A.2d 413, 417, 9 C.R. 10*, citing the text [same]; *People v. Smith (1995) 31 C.A.4th 1185, 1190, 37 C.R.2d 524* [sign language expert].)

(2) *Illustrations.* In *Dobson v. Dobson (1948) 86 C.A.2d 13, 193 P.2d 794*, plaintiff sought annulment of his marriage, testifying, with one corroborating witness, that he had been intoxicated and unable to understand what had taken place. There was no contradictory evidence, but the trial judge denied relief, saying: "I am satisfied that there isn't any minister in the City of Las Vegas or anywhere else that is ordained, that will marry a drunken person that is drunk to that extent." *Held*, judgment reversed. The uncontradicted and unimpeached testimony was not inherently improbable, for it is common knowledge that occasionally people submit to the marriage ceremony under such circumstances. (*86 C.A.2d 15.*)

In *Kircher v. Atchison, Topeka & Santa Fe Ry. Co. (1948) 32 C.2d 176, 195 P.2d 427*, plaintiff, seeking damages for personal injuries caused by stumbling against a train, gave uncorroborated and not entirely consistent testimony that was attacked as incredible in the light of the physical facts. Upholding the verdict for plaintiff, the court, conceding that his version was "most extraordinary," nevertheless observed that strange and astonishing things sometimes happen in the world of physical phenomena, and that a person injured and rendered unconscious by an accident cannot be expected to give a correct account of all that happened. (*32 C.2d 184.*) (See *Peterson v. Peterson (1946) 74 C.A.2d 312, 318, 168 P.2d 474* [circumstances merely unusual, or some inconsistencies in testimony, not ground for disregarding evidence as inherently incredible; rule that conflicts in testimony are to be resolved by trier of fact applies also to

conflicts and inconsistencies in testimony of individual witness]; *Siege v. York* (1948) 84 C.A.2d 383, 388, 191 P.2d 50 [quoting from earlier case: "an appellate court must be careful not to give to dogmatic and undemonstrated conclusions respecting natural laws precedence over the testimony of apparently credible witnesses"]; *People v. Gunn* (1959) 170 C.A.2d 234, 238, 338 P.2d 592; *Teich v. General Mills* (1959) 170 C.A.2d 791, 798, 339 P.2d 627; *People v. Harlan* (1990) 222 C.A.3d 439, 454, 271 C.R. 653 [rejecting contention that California law requires corroboration of testimony of child sexual abuse victims]; *DeMiglio v. Mashore* (1992) 4 C.A.4th 1260, 1270, 6 C.R.2d 267 [trial court erroneously annulled election based on its rejection of candidate's testimony as to his intent to remain in city after moving there in election year].)

(3) *Exceptions*. Ev.C. 411 qualifies the general rule to except situations "where additional evidence is required by statute." This refers to the statutory requirements of corroboration of an accomplice (infra, §96), and in cases of treason, solicitation, perjury, and false pretenses (infra, §107).

Several former corroboration requirements have been eliminated by statutory repeal:

- (a) *Lost will*: former Prob.C. 350, repealed in 1984.
- (b) *Destruction of will under testator's direction by another person*: former Prob.C. 74(2), repealed in 1984.
- (c) *Nuncupative will*: former Prob.C. 54, repealed in 1982.
- (d) *Divorce*: former C.C. 130, repealed by statutes on dissolution of marriage.

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *General Rule*. See 81 Am.Jur.2d (2004 ed.), *Witnesses* §§999, 1002; 2 McCormick 6th, §338; CACI, No. 5003 [sufficiency of testimony of one witness]. West's Key Number Digest, Criminal Law k.744; Trial k.141-



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## CHAPTER XI - Presentation At Trial

### V. DETERMINATION OF CREDIBILITY AND WEIGHT

#### B. Sufficiency of One Witness.

#### 2. When Testimony May Be Disregarded.

##### a. In General.

#### 3 *Witkin Cal. Evid. Presentation* § 90

[§ 90] In General.

The principal exceptions to the uncontradicted witness rule (*supra*, §89) were listed in *Davis v. Judson* (1910) 159 C. 121, 113 P. 147, as follows: "The most positive testimony of a witness may be contradicted by inherent improbabilities as to its accuracy contained in the witness' own statement of the transaction; or there may be circumstances in evidence in connection with the matter, which satisfy the court of its falsity; the manner of the witness in testifying may impress the court with a doubt as to the accuracy of his statement and influence it to disregard his positive testimony as to a particular fact." (159 C. 128.)

A more concrete statement appears in *La Jolla Casa de Manana v. Hopkins* (1950) 98 C.A.2d 339, 219 P.2d 871: "[A] trial judge has an inherent right to disregard the testimony of any witness, or the effect of any *prima facie* showing based thereon, when he is satisfied that the witness is not telling the truth or his testimony is inherently improbable due to its inaccuracy, due to uncertainty, lapse of time, or interest or bias of the witness. All of these things may be properly considered in determining the weight to be given the testimony of a witness although there be no adverse testimony adduced. The trial judge is the arbiter of the credibility of the witnesses. A witness may be contradicted by the facts he states as completely as by direct adverse testimony, and there may be so many omissions in his account of particular transactions or of his own conduct as to discredit his whole story. His manner of testifying may give rise to doubts of his sincerity and create the impression that he is giving a wrong coloring to material facts." (98 C.A.2d 346.) (See *Boies v. Wylie* (1952) 113 C.A.2d 243, 251, 248 P.2d 76; *Kurtz v. Kurtz* (1961) 189 C.A.2d 320, 323, 11 C.R. 230, *infra*, §93, citing the text; *Camp v. Ortega* (1962) 209 C.A.2d 275, 282, 25 C.R. 873; on specific reasons for disregarding testimony, see *infra*, §91 et seq.; on evidence viewed with distrust, see *infra*, §108 et seq.; on evidence wilfully suppressed, see *infra*, §115 et seq.; on impeachment of witnesses, see *infra*, §258 et seq.)

The superior position of the trier of fact in observing the witness over that of the appellate court in examining the "cold record" is stressed in *Riddle v. Fiano* (1961) 194 C.A.2d 684, 15 C.R. 248, quoting from a federal case: "For the demeanor of an orally-testifying witness is 'always assumed to be in evidence.' It is 'wordless language.' The liar's story may seem uncontradicted to one who merely reads it, yet it may be 'contradicted' in the trial court by his manner, his intonations, his grimaces, his gestures, and the like--all matters which 'cold print does not preserve' and which constitute 'lost evidence' so far as an upper court is concerned. For such a court, it has been said, even if it were called a 'rehearing court,' is not a 'reseeing court.' Only were we to have 'talking movies' of trials could it be otherwise." (194 C.A.2d 693.) (See *Meiner v. Ford Motor Co.* (1971) 17 C.A.3d 127, 140, 94 C.R. 702.)



**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER XI - Presentation At Trial

## V. DETERMINATION OF CREDIBILITY AND WEIGHT

## B. Sufficiency of One Witness.

## 2. When Testimony May Be Disregarded.

## b. Inherent Improbability.

3 *Witkin Cal. Evid. Presentation* § 91

## [§ 91] Inherent Improbability.

In rare cases, inherent improbability alone appears as the reason for disregarding uncontradicted testimony. (See, e.g., *People v. Headlee* (1941) 18 C.2d 266, 267, 115 P.2d 427 [rape; circumstances related by prosecutrix]; *Sanan v. Schoenborn* (1941) 47 C.A.2d 366, 368, 117 P.2d 731 ["The trial judge may take into account the inherent improbability of a witness' testimony and reject it in its entirety; indeed fantastic tales are frequently so treated"]; *People v. Carvalho* (1952) 112 C.A.2d 482, 489, 493, 246 P.2d 950, 6 Cal. Crim. Law (3d), Criminal Appeal, §151; *Estate of Goldberg* (1962) 203 C.A.2d 402, 409, 21 C.R. 626; cf. *Vorse v. Sarasy* (1997) 53 C.A.4th 998, 1012, 1013, 62 C.R.2d 164 [in balancing probative value against prejudicial impact under Ev.C. 352, judge may exclude live testimony of witness whom judge disbelieves only in rare instance of demonstrable falsity].)

More commonly, this characterization is made of testimony also challenged on the basis of interest or contradictory circumstances. (See, e.g., *Barham v. Khoury* (1947) 78 C.A.2d 204, 215, 177 P.2d 579, *infra*, §93; *DeMartini v. Industrial Acc. Com.* (1949) 90 C.A.2d 139, 146, 202 P.2d 828; *Snell v. Telehala* (1969) 274 C.A.2d 61, 67, 78 C.R. 780 [alleged oral agreement by joint tenant husband to give wife sole ownership of property was improbable fabrication designed to defeat creditor of husband; inconsistent testimony and subsequent acts properly considered].)

Two practical limitations on the power to disregard improbable testimony should be borne in mind:

(1) Although the story of a party or other witness may be so unworthy of belief that the trial judge may disregard the testimony, the judge cannot reject it out-of-hand and reach a decision without a fair hearing of the evidence. (*Ponce v. Marr* (1956) 47 C.2d 159, 163, 301 P.2d 837; *supra*, §3; see *People v. Mayfield* (1997) 14 C.4th 668, 735, 60 C.R.2d 1, 928 P.2d 485 [although testimony that is inherently incredible may be insufficient to support conviction, there is no authority for excluding it on that ground].)

(2) The inherent improbability rule, like the clear and convincing evidence rule (1 *Cal. Evidence* (4th), *Burden of Proof and Presumptions*, §38), is a statement of the power of the trial judge; it is not a doctrine of appellate review. The appellate court will not substitute its evaluation of the credibility of witnesses even though to some triers of fact the evidence "would have seemed so improbable, impossible and unbelievable" as to compel a contrary judgment. (*Evje v. City Title Ins. Co.* (1953) 120 C.A.2d 488, 492, 261 P.2d 279; *People v. Gunn* (1959) 170 C.A.2d 234, 240, 338 P.2d 592 ["Unusual circumstances are not necessarily inherently improbable"]; *People v. Wilburn* (1961) 195 C.A.2d 702, 706, 16 C.R. 97; *People v. Swanson* (1962) 204 C.A.2d 169, 172, 22 C.R. 178, citing the text; *People v. Mayberry* (1975) 15 C.3d 143, 149, 125 C.R. 745, 542 P.2d 1337; *People v. Cantrell* (1992) 7 C.A.4th 523, 538, 9 C.R.2d 188;

*Beck Dev. Co. v. Southern Pac. Trans. Co. (1996) 44 C.A.4th 1160, 1204, 52 C.R.2d 518.)*

**SUPPLEMENT:** [This section is current through the latest supplement]

*West's Key Number Digest*, Trial k.139.1(18)



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## CHAPTER XI - Presentation At Trial

### V. DETERMINATION OF CREDIBILITY AND WEIGHT

#### B. Sufficiency of One Witness.

#### 2. When Testimony May Be Disregarded.

##### c. Interest of Witness.

#### 3 *Witkin Cal. Evid. Presentation* § 92

#### [§ 92] Interest of Witness.

Interest of the witness is an obvious reason for challenging uncontradicted testimony, but the attack is usually aided by evidence of other circumstances.

Thus, in *Klinker v. Klinker* (1951) 108 C.A.2d 122, 238 P.2d 119, plaintiff husband and defendant wife took property in joint tenancy in 1940, and in 1941, defendant was adjudged incompetent. Over 8 years later, plaintiff sued to quiet title, testifying that defendant threatened him with divorce, slander and assault if he did not include her name in the deed. The trial judge's finding against plaintiff was affirmed. It was the duty of the court, in view of the interest of plaintiff, to scrutinize the testimony carefully; the statements attributed to the wife, like those attributed to a dead person, were the weakest and most unsatisfactory kind of evidence; the deed was regular on its face, and plaintiff acquiesced for years before questioning it. (108 C.A.2d 124.) (See *Bard v. Kent* (1939) 35 C.A.2d 434, 437, 95 P.2d 957 [trial court may disbelieve uncontradicted testimony of defendant that decedent made an oral gift of his interest in certain property]; *Barham v. Khoury* (1947) 78 C.A.2d 204, 177 P.2d 579, *infra*, §93; *La Jolla Casa de Manana v. Hopkins* (1950) 98 C.A.2d 339, 346, 219 P.2d 871 [defendant contended for unusual meaning of contract term on basis of purported conversation with plaintiff's representative]; *Ortzman v. Van Der Waal* (1952) 114 C.A.2d 167, 170, 249 P.2d 846 [testimony of plaintiff in automobile collision case as to her injuries]; *Leonard v. Watsonville Community Hosp.* (1956) 47 C.2d 509, 518, 305 P.2d 36 [superintendent of defendant hospital, interested in maintaining favorable relationship and possibly liable for negligence of nurse]; *Tidlund v. Seven Up Bottling Co.* (1957) 154 C.A.2d 663, 666, 316 P.2d 656 [plaintiff's testimony that beverage bottle contained foreign matter]; *Kurtz v. Kurtz* (1961) 189 C.A.2d 320, 325, 11 C.R. 230 [wife's testimony in divorce case]; *Riddle v. Fiano* (1961) 194 C.A.2d 684, 692, 15 C.R. 248; *Braewood Convalescent Hosp. v. Work. Comp. App. Bd.* (1983) 34 C.3d 159, 167, 193 C.R. 157, 666 P.2d 14 [acknowledging that interest of witness may be factor warranting rejection of even uncontradicted evidence, although it does not automatically render testimony questionable]; *Day v. Rosenthal* (1985) 170 C.A.3d 1125, 1158, 217 C.R. 89 [witness' "enormous financial interest" in outcome of litigation was sufficiently great to cast doubt on veracity of his testimony]; 81 Am.Jur.2d (1992 ed.), Witnesses §1039; 13 A.L.R.3d 404 [competence of interested witness on handwriting of deceased].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 81 Am.Jur.2d (2004 ed.), Witnesses §1004. West's Key Number Digest, Trial k.140(2)



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#### d. Other Circumstances.

#### 3 *Witkin Cal. Evid. Presentation* § 93

[§ 93] Other Circumstances.

In *Belser v. American Trust Co.* (1932) 125 C.A. 344, 13 P.2d 951, a deed to plaintiff was found in the grantor's papers at his death. Though plaintiff's testimony of delivery to him was uncontradicted, the court nevertheless found against it because of decedent grantor's acts and declarations indicating ownership after the date of the alleged delivery. (125 C.A. 351.)

In *Barham v. Khoury* (1947) 78 C.A.2d 204, 177 P.2d 579, a physician, the confidential attendant of an elderly woman, gave uncontradicted testimony that prior to her death, she made a gift to him of valuable jewels. *Held*, such circumstances as the confidential relationship, the donor's weakened condition, the donee's long concealment of his claim and his prior inconsistent position, warranted the lower court's discrediting his testimony and finding that no gift had been made. (78 C.A.2d 211.)

In *Kurtz v. Kurtz* (1961) 189 C.A.2d 320, 11 C.R. 230, the wife, in a divorce case, testified to a disabling ailment rendering her incapable of working. But she did not produce her doctor or offer an excuse for failure to do so, and the evidence showed that, despite this long continued condition, she worked steadily for many years in the course of six marriages. (189 C.A.2d 323.) (See *Davis v. Judson* (1910) 159 C. 121, 128, 113 P. 147 [conduct inconsistent with facts asserted in testimony]; *Hinshaw v. Hopkins* (1940) 37 C.A.2d 230, 239, 99 P.2d 283 [same]; *La Jolla Casa de Manana v. Hopkins* (1950) 98 C.A.2d 339, 348, 219 P.2d 871 [great lapse of time between purported conversation related by witness and trial, and unreasonable meaning urged for term in contract prepared by the witness]; *Ortzman v. Van Der Waal* (1952) 114 C.A.2d 167, 172, 249 P.2d 846 [circumstances of accident testified to by all witnesses, plaintiff's conduct at the time (stating that she had not been hurt), her previous extensive medical history]; *Spaulding v. Jones* (1953) 117 C.A.2d 541, 548, 256 P.2d 637; *Condencia v. Nelson* (1960) 187 C.A.2d 300, 303, 9 C.R. 759, citing the text; *Montijo v. Western Greyhound Lines* (1963) 219 C.A.2d 342, 347, 33 C.R. 184.)

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##### e. Manner of Testifying.

3 Witkin Cal. Evid. Presentation § 94

[§ 94] Manner of Testifying.

The witness' demeanor while testifying and the manner in which the witness testifies (see *Ev.C. 780(a)*) "may impress the court with a doubt as to the accuracy of his statement and influence it to disregard his positive testimony as to a particular fact." (*Davis v. Judson* (1910) 159 C. 121, 128, 113 P. 147; see *People v. Adams* (1993) 19 C.A.4th 412, 438, 23 C.R.2d 512 [demeanor is "part of the evidence" and is "of considerable legal consequence"].)

The following are examples: *May v. Farrell* (1928) 94 C.A. 703, 715, 271 P. 789 [unfriendly, reluctant witness]; *Dozier v. Hillman* (1930) 105 C.A. 127, 131, 287 P. 116 [evasive, contradictory testimony and conviction of felony]; *Estate of Vetter* (1930) 110 C.A. 597, 601, 294 P. 438 [close agreement and extreme accuracy of memory of witnesses as to facts occurring years before trial]; *Bohn v. Gruver* (1931) 111 C.A. 386, 393, 295 P. 891 [evasive testimony and long delay in disclosing facts, considered in rejecting story of gift by decedent]; *Hanlon v. Western Loan & Bldg. Co.* (1941) 46 C.A.2d 580, 594, 116 P.2d 465 [testimony full of evasions, equivocations and contradictions]; *People v. Casillas* (1943) 60 C.A.2d 785, 792, 141 P.2d 768 [rape and incest; uncorroborated prosecutrix gave three contradictory versions of what occurred and who committed the act]; *La Jolla Casa de Manana v. Hopkins* (1950) 98 C.A.2d 339, 347, 219 P.2d 871 [conflicts in testimony of defendant and her corroborating witness to purported conversation]; *Nelson v. Black* (1954) 43 C.2d 612, 613, 275 P.2d 473 [plaintiff's testimony as to nature of medical treatment, duration of asserted disability, and physical condition prior to accident, conflicting in itself and with other evidence]; *Conservatorship of Jones* (1986) 188 C.A.3d 306, 311, 232 C.R. 600 [trial court properly disregarded witness' "rambling and incoherent" denial that he had been personally served; citing *Davis v. Judson*, supra].

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## f. Opinion Unsupported by Facts.

3 *Witkin Cal. Evid. Presentation* § 95

## [§ 95] Opinion Unsupported by Facts.

An opinion, expert or nonexpert, will be rejected or held insufficient to sustain a verdict or finding if unsupported by the facts from which it is derived. (See *Estate of Powers* (1947) 81 C.A.2d 480, 485, 184 P.2d 319 [assumed facts contrary to record]; *Coast Counties Gas & Elec. Co. v. Miller & Lux* (1931) 118 C.A. 140, 143, 5 P.2d 34 [witness on land value, no experience with sales or particular use]; *Gazzera v. San Francisco* (1945) 70 C.A.2d 833, 838, 161 P.2d 806 [expert gave no reasons for opinion]; *Paxton v. Alameda* (1953) 119 C.A.2d 393, 405, 259 P.2d 934 [negligent construction; architect witness failed to make usual computation]; *Lucientes v. Bliss* (1958) 157 C.A.2d 565, 570, 321 P.2d 526 [specific performance; real estate agent, offered as expert on value, showed inadequate knowledge of property]; *Behr v. Santa Cruz* (1959) 172 C.A.2d 697, 709, 342 P.2d 987; *Sears, Roebuck & Co. v. Walls* (1960) 178 C.A.2d 284, 289, 2 C.R. 847, citing the text [doctor's opinion on disability based on incorrect assumption of facts]; *Taliaferro v. Taliaferro* (1962) 203 C.A.2d 649, 651, 21 C.R. 868, citing the text; *Griffith v. Los Angeles* (1968) 267 C.A.2d 837, 847, 73 C.R. 773 [expert opinion not based on facts proved]; *Hardy v. Stumpf* (1974) 37 C.A.3d 958, 965, 112 C.R. 739 [personnel director's opinion that substantially all persons under 5 feet 7 inches would be unable to perform patrolman duties was unsupported by any facts and was no more than stereotyped generalization evidence]; 1 *Cal. Evidence* (4th), *Opinion Evidence*, §31 et seq.; *infra*, §201.)

In *Guardianship of Waite* (1939) 14 C.2d 727, 97 P.2d 238, appellant, an elderly woman, was adjudged mentally incompetent. The probate judge relied on the opinions of two doctors that she was "'over credulous" and lacked judgment, and refused to hear her own testimony. *Held*, this was reversible error. Appellant's testimony on the issue of mental capacity could not be excluded (see *supra*, §3), and the recital of instances of bad business judgment did not support the conclusion of mental incompetency. (14 C.2d 731.)

In *Bowers v. Olch* (1953) 120 C.A.2d 108, 260 P.2d 997, a needle was left in plaintiff's body after a stomach operation. In this malpractice suit, defendant doctor was allowed to offer his opinion that he did not leave the needle there, and that it might have gotten in by having been stuck to a surgical pad. *Held*, this was prejudicial error. The witness did not state any fact as a foundation for his opinion, and there was no basis for assuming a hypothetical state of facts. If this type of evidence were admissible, plaintiff could call a witness to say that it was perfectly possible for defendant to have dropped the needle in. "Also if such opinion evidence were proper, it would seem that the best witness, in a case similar to this, would be one with the best imagination as to the various combinations of events that could or might 'possibly' cause a needle to be left in a body. The opinion herein of Dr. Olch was merely his conjecture." (120 C.A.2d 114.)

**SUPPLEMENT:** [This section is current through the latest supplement]





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#### 3. Statutory Requirements of Corroboration.

##### a. Testimony of Accomplice.

##### 1. Statutory Rule.

3 Witkin Cal. Evid. Presentation § 96

[§ 96] Statutory Rule.

A conviction cannot be "had" on the testimony of an accomplice unless that testimony is corroborated by other evidence that tends to connect the defendant with the commission of the offense. The corroboration is not sufficient if it merely shows the commission of the offense or the circumstances of that commission. (P.C. 1111; see CALJIC (6th ed.), No. 3.11; 7 Wigmore (Chadbourn Rev.) §2056 et seq.; 29A Am.Jur.2d (1994 ed.), Evidence §1485 et seq.; infra, §97 et seq.) (See *People v. Barillas* (1996) 49 C.A.4th 1012, 1023, 1031, 57 C.R.2d 166 [lengthy concurring opinion citing the text, reviewing the law of accomplices, and arguing for repeal of P.C. 1111].)

P.C. 1111 applies in a criminal trial. It does not apply in:

(1) A preliminary examination, i.e., a magistrate may hold a defendant to answer on the basis of the accomplice's uncorroborated testimony. (*People v. McRae* (1947) 31 C.2d 184, 186, 187 P.2d 741, 1 Cal. Evidence (4th), Introduction, §21; *In re Golia* (1971) 16 C.A.3d 775, 780, footnote 2, 94 C.R. 323; see *People v. Cooks* (1983) 141 C.A.3d 224, 291, 190 C.R. 211 [motion to set aside indictment properly denied; uncorroborated testimony of accomplice may be sufficient to hold defendant to answer].)

(2) A juvenile court proceeding. (See *In re Mitchell P.* (1978) 22 C.3d 946, 151 C.R. 330, 587 P.2d 1144; 1 Cal. Evidence (4th), Introduction, §38; *In re E.L.B.* (1985) 172 C.A.3d 780, 783, 218 C.R. 429 [*In re Mitchell P.* followed, but continued validity of its rationale questioned in view of narrowing gap between criminal and juvenile courts].)

P.C. 1111 applies by its terms to *conviction of an offense*. Hence, accomplice corroboration is not required to prove a gun use enhancement. (*People v. Maldonado* (1999) 72 C.A.4th 588, 597, 84 C.R.2d 898.) "Unless the defendant has been properly convicted of the underlying offense under corroborated accomplice testimony, the question of personal use of a firearm for enhancement purposes never arises. But when a defendant has already been found guilty of the underlying offense, the accomplice's credibility as to additional details of the crime, such as which participant used a gun, has at that point been supported by independent corroboration connecting the defendant to the commission of the crime. There is no reason why the trier of fact should not then believe the accomplice's evidence as to the detail of gun use without requiring further specific independent corroboration on that point." (72 C.A.4th 598.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See CALCRIM, No. 335 [Accomplice Testimony: No Dispute Whether Witness Is Accomplice]; CALCRIM, No. 708

[Special Circumstances: Accomplice Testimony Must Be Corroborated--No Dispute Whether Witness Is Accomplice (*Pen. Code, § 1111*)]. *West's Key Number Digest*, Criminal Law k.510 et seq., 741(5)



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##### a. Testimony of Accomplice.

##### 2. Who Are Accomplices.

##### aa. In General.

#### 3 Witkin Cal. Evid. Presentation § 97

[§ 97] In General.

(1) *Statutory Rules.* An accomplice is "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (P.C. 1111; see *People v. Barclay* (1953) 40 C.2d 146, 152, 252 P.2d 321 [disconnected offense]; *People v. Gordon* (1973) 10 C.3d 460, 468, 110 C.R. 906, 516 P.2d 298; *People v. Rodriguez* (1986) 42 C.3d 730, 759, 230 C.R. 667, 726 P.2d 113; *People v. James* (1987) 196 C.A.3d 272, 284, 241 C.R. 691; *People v. Burns* (1987) 196 C.A.3d 1440, 1449, 242 C.R. 573 [as former CALJIC, No. 3.10 states, to be accomplice, aider and abettor must have criminal intent]; CALJIC (6th ed.), No. 3.14.)

Two additional statutory provisions deal with special situations.

(a) *Abortees:* P.C. 1108 is a special section requiring corroboration of the woman abortee in abortion cases. Its effect is similar to P.C. 1111 on accomplices generally (see *supra*, §96), and both statutes may be involved in an abortion case. (See *People v. Clapp* (1944) 24 C.2d 835, 839, 151 P.2d 237; *People v. Buffum* (1953) 40 C.2d 709, 723, 256 P.2d 317; *People v. Gallardo* (1953) 41 C.2d 57, 62, 257 P.2d 29; 34 A.L.R.3d 858.)

(b) *Woman seduced for purposes of prostitution:* The crime of "inveigling, enticing, or taking away an unmarried female of previous chaste character" under 18, cannot be proved by the uncorroborated testimony of the woman. (P.C. 1108.)

(2) *Illustrations.* The seemingly clear statement in P.C. 1111 is of little aid in solving the complex problems presented by the cases. *People v. Wallin* (1948) 32 C.2d 803, 197 P.2d 734, illustrates the elasticity of the definition. A mother killed her child and was convicted of murder. Thereafter, defendant was tried and convicted as an accessory, on the mother's testimony that he helped her dispose of the body. *Held*, judgment reversed for refusal to instruct that the mother was an accomplice and that her testimony required corroboration.

(a) From the facts that the mother invited defendant's assistance and that they disposed of the body together, it was clear that each was guilty of the identical crime of accessory to murder, under P.C. 32. This conclusion could not be overcome by the unusual circumstance that the mother had already been convicted of the murder when she testified; the test is whether she was liable for the same offense at the time of commission of the act (disposal of the body). (32 C.2d 808.)

(b) Nor was the conclusion overcome by the peculiar fact that the mother, if she had acted alone, could not have been separately charged with being an accessory after the fact to the murder she had already committed. By acting with defendant, she did become separately liable, although there was little likelihood of her being charged as accessory after the fact instead of as principal. The court referred to other situations in which a person might be criminally liable for cooperating with another, though personally incapable of committing the offense (woman: pimping; woman: rape). (32 C.2d 807.)

In *People v. James*, *supra*, defendant was charged with wilful cruelty toward a child (P.C. 273a(1), now 273a(a)) and her murder by torture (P.C. 187, 189). Defendant contended that the trial judge erred in failing to give accomplice instructions with respect to his wife, the child's mother. *Held*, this was error--though harmless in light of the evidence. As to the P.C. 273a(1) count, disregarding occasions when she hit the child, the wife would still be liable because there was sufficient evidence that she failed to protect the child knowing that defendant was abusing her (see 2 Cal. Crim. Law (3d), *Sex Offenses and Crimes Against Decency*, §159 et seq.). Similar reasoning would also support a finding of implied malice, thus making her an accomplice to the murder charge as well (see 1 Cal. Crim. Law (3d), *Crimes Against the Person*, §§166 et seq., 199). (196 C.A.3d 285.) (See also *People v. Wayne* (1953) 41 C.2d 814, 826, 264 P.2d 547 [solicitation of bribery; M solicited W, then W solicited M; held M could be accomplice because he actively abetted W to solicit him]; *People v. Gullick* (1961) 55 C.2d 540, 542, 11 C.R. 566, 360 P.2d 62 [conspirator and aider and abettor in burglary].)

(3) *Claim of Duress by Accomplice*. The effect of alleged duress on a witness' status as an accomplice under P.C. 1111 was considered in *People v. Jacobs* (1991) 230 C.A.3d 1337, 281 C.R. 733, a prosecution for being an accessory after a felony. The only evidence supporting defendant's conviction came from a witness who had lied to police officers about the circumstances of the felony underlying the accessory charge when she was questioned in defendant's home. The witness testified that she told the police what defendant had told her to say, and that she had feared for the safety of her daughter, who was with defendant in the house (along with at least six police officers). The defense moved for acquittal, arguing that the accomplice witness' uncorroborated testimony was insufficient for a conviction. The trial judge denied the motion, and submitted to the jury the question of whether the witness was an accomplice, instructing it that an honest but unreasonable belief of duress by the witness could negate the requisite specific intent. *Held*, the instruction on duress was reversible error. The honest but unreasonable belief doctrine stated in *People v. Flannel* (1979) 25 C.3d 668, 160 C.R. 84, 603 P.2d 1 (see 1 Cal. Crim. Law (3d), *Defenses*, §77), applies to the negation of malice in homicide cases, not to the negation of specific intent. The witness here "could not be exonerated from responsibility as an accomplice with an honest but unreasonable belief that her actions were required." (230 C.A.3d 1345.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Statutory Rules*. See *People v. Garcia* (2000) 84 C.A.4th 316, 325, 100 C.R.2d 789 [conviction cannot be sustained on uncorroborated accomplice testimony, and coconspirator is accomplice for this purpose]; CALCRIM, No. 334 [Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice]. (2) *Illustrations*. See *People v. Verlinde* (2002) 100 C.A.4th 1146, 1160, 1161, 123 C.R.2d 322 [in prosecution for vehicular manslaughter and felony drunk driving, failure to instruct that witness was accomplice as matter of law was not error, where, although there was evidence that witness steered while defendant operated pedals for part of trip, evidence was conflicting as to whether witness was awake at time of collision; accomplice status on basis of aiding and abetting was also uncertain in that evidence conflicted as to whether witness had requisite knowledge or intent]; *People v. Felton* (2004) 122 C.A.4th 260, 269, 18 C.R.3d 626 [in prosecution for felony child endangerment, trial judge erred in ruling that child's mother, who was defendant's girlfriend, was not accomplice because she did not have specific intent necessary to be aider and abettor; there was evidence that she was coperpetrator because of her criminal negligence in leaving child with defendant, and this was sufficient to make her accomplice]. *West's Key Number Digest*, Criminal Law k.507 et seq.



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##### bb. Wrongdoers Who Are Not Accomplices.

#### 3 Witkin Cal. Evid. Presentation § 98

[§ 98] Wrongdoers Who Are Not Accomplices.

(1) *Suborned Person*. In a prosecution for subornation of perjury, the person suborned (induced to testify falsely) is not deemed an accomplice of the suborner. (*People v. Nickell* (1937) 22 C.A.2d 117, 124, 70 P.2d 659; *People v. Jones* (1967) 254 C.A.2d 200, 216, 62 C.R. 304.)

(2) *Thief*. Ordinarily, the thief and the receiver of stolen goods are not accomplices; the receiver usually takes no part in the theft itself, and the thief cannot receive from himself or herself. Hence, the testimony of the thief may be received without an instruction on the rule of corroboration. (*People v. Layman* (1931) 117 C.A. 476, 479, 4 P.2d 244; *People v. Williams* (1935) 7 C.A.2d 600, 603, 46 P.2d 796; *People v. Burness* (1942) 53 C.A.2d 214, 218, 127 P.2d 623; *People v. Polsalski* (1960) 181 C.A.2d 795, 798, 5 C.R. 762, citing the text; *People v. Smith* (1972) 26 C.A.3d 404, 408, 102 C.R. 625; *People v. McKunes* (1975) 51 C.A.3d 487, 493, 124 C.R. 126.)

An exception is recognized, however, where the two conspire, and pursuant to the plan, the thief steals property and delivers it to the receiver. (See *People v. Jaramillo* (1976) 16 C.3d 752, 759, 129 C.R. 306, 548 P.2d 706; *People v. Hinks* (1997) 58 C.A.4th 1157, 1161, 68 C.R.2d 440.) In such a case, they are accomplices, and corroboration of the testimony of the thief is necessary. (*People v. Lima* (1944) 25 C.2d 573, 577, 154 P.2d 698; cf. *People v. Coakley* (1951) 108 C.A.2d 223, 227, 238 P.2d 633 [error to refuse instruction but no prejudice where corroboration ample].) (See 53 A.L.R.2d 817; 74 A.L.R.3d 560.)

(3) *Parties to Bribery*. Giving and receiving bribes are distinct and separate offenses. (See P.C. 67 [giving], P.C. 68 [receiving].) Hence, neither party is an accomplice of the other. (*People v. Wolden* (1967) 255 C.A.2d 798, 803, 63 C.R. 467.)

(4) *Buyer and User of Narcotics*. The buyer of narcotics cannot be prosecuted for selling them to himself or herself, hence, is not an accomplice of the seller. (*People v. Hernandez* (1968) 263 C.A.2d 242, 247, 69 C.R. 448.) Similarly, a user of narcotics cannot be charged with administering them, hence, is not an accomplice to the crime of unlawful administration. (*People v. Label* (1974) 43 C.A.3d 766, 770, 119 C.R. 522.) (See *People v. Chrisman* (1967) 256 C.A.2d 425, 435, 64 C.R. 733 [defendant charged with furnishing narcotics and witness to whom they were furnished were not accomplices].)

(5) *Accessory After the Fact and Aider and Abettor*. "In order to be an accomplice, the witness must be chargeable with the crime as a principal ... and not merely as an accessory after the fact. ... An aider and abettor is chargeable as a principal, but his liability as such depends on whether he promotes, encourages, or assists the perpetrator and *shares* the perpetrator's criminal purpose. ... It is not sufficient that he merely gives assistance with knowledge of the perpetrator's criminal purpose." (*People v. Sully* (1991) 53 C.3d 1195, 1227, 1228, 283 C.R. 144, 812 P.2d 163, 1 Cal. Evidence (4th), *Circumstantial Evidence*, §92 [witness who was merely present at crime scene (see *infra*, §100) and drove victim there was not accomplice]; see *People v. Horton* (1995) 11 C.4th 1068, 1115, 1116, 47 C.R.2d 516, 906 P.2d 478 [readiness of defendant's companion to drive him to drug dealer's apartment to commit robbery did not make him accomplice, where he never did so; his conduct subsequent to robbery might make him accessory but did not subject him to accomplice liability].)

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##### 2. Who Are Accomplices.

##### cc. Minor Victims.

#### 3 Witkin Cal. Evid. Presentation § 99

#### [§ 99] Minor Victims.

Some of the most difficult problems of statutory interpretation arise in connection with apparent accomplices who are, in a sense, victims of another's wrong. (See generally 7 Wigmore (Chadbourn Rev.) §2060; 31 A.L.R.4th 120 [necessity for corroboration of victim's testimony in prosecution of sexual offenses].)

Children are generally not deemed accomplices to the commission of sexual offenses against them, and they may testify without corroboration. (See *People v. Becker* (1934) 140 C.A. 162, 165, 35 P.2d 196; *People v. Westek* (1948) 31 C.2d 469, 473, 190 P.2d 9 [boys admitted knowing acts were wrongful, but testified that they were afraid of defendant and did not willingly participate; held not accomplices to violation of P.C. 286 (sodomy)]; *People v. Anderson* (1968) 264 C.A.2d 271, 274, 70 C.R. 231 [16-year-old boy, victim of sodomy, threatened with bodily harm by adult with whom he lived]; see also *People v. Perez* (1973) 9 C.3d 651, 657, 108 C.R. 474, 510 P.2d 1026 [18-year-old victim of sodomy was not accomplice and his testimony was sufficient to find defendant guilty]; *People v. Yarber* (1979) 90 C.A.3d 895, 908, 153 C.R. 875 [female minor could not commit oral copulation as defined by P.C. 288a and thus could not be accomplice]; 41 Cal. L. Rev. 744.)

But children over age 14 have been considered accomplices. (See *People v. McRae* (1947) 31 C.2d 184, 186, 187 P.2d 741 [boy of 15, knowing act was wrongful, held accomplice to violation of P.C. 288a (oral copulation), before that statute limited offense to adults who engage in oral copulation with minors or to persons who compel participation of others]; *People v. Dobkin* (1946) 74 C.A.2d 269, 273, 168 P.2d 729 [boy of 16, held accomplice to act of violation of P.C. 286 (sodomy)]; *People v. Hurd* (1970) 5 C.A.3d 865, 875, 85 C.R. 718 [leaving open question whether defendant's minor daughter was accomplice as matter of law in sex crimes charged against defendant].)

The victim in a statutory rape case is not considered an accomplice because the statute is designed for his or her protection. (See *People v. Murray* (1949) 91 C.A.2d 253, 256, 204 P.2d 624; *In re Meagan R.* (1996) 42 C.A.4th 17, 25, 49 C.R.2d 325; 7 Wigmore (Chadbourn Rev.) §2060.) The same is true of a prosecution under *Health & Saf.C. 11361* for using a minor to transport narcotics. Because the use of the minor for this purpose necessarily contributes to the minor's delinquency, he or she is a victim and not an accomplice. (*People v. De Paula* (1954) 43 C.2d 643, 647, 276 P.2d 600.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Tobias* (2001) 25 C.4th 327, 335, 337, 106 C.R.2d 80, 21 P.3d 758 [even child who consents to sex with parent is victim of incest and thus cannot be accomplice for purpose of accomplice corroboration requirement; inconsistent holding of *People v. McRae* (1947) 31 C.2d 184, 187 P.2d 741, text, p. 136, was "highly questionable" even before it was abrogated by statute].





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##### dd. Distinction: Mere Presence at Scene.

#### 3 *Witkin Cal. Evid. Presentation* § 100

[§ 100] Distinction: Mere Presence at Scene.

Mere presence at the scene of a crime, knowledge of the crime, or failure to attempt to prevent it is not enough to make one an accomplice. (*People v. Moran* (1974) 39 C.A.3d 398, 413, 114 C.R. 413; see *People v. Marshall* (1969) 273 C.A.2d 423, 427, 78 C.R. 16 [merely accompanying abortion victim to defendant's residence or place of business, although with realization of victim's purpose, does not necessarily make someone an accomplice]; *People v. Hoover* (1974) 12 C.3d 875, 883, 117 C.R. 672, 528 P.2d 760 [trial court properly concluded as matter of law that witness was not accomplice when his only connection to crime was presence at scene and conduct consistent with general undercover police purposes]; *People v. Matta* (1976) 57 C.A.3d 472, 486, 129 C.R. 205 [presence at crime scene not enough]; *People v. Harris* (1985) 175 C.A.3d 944, 953, 221 C.R. 321; *People v. Stankewitz* (1990) 51 C.3d 72, 91, 270 C.R. 817, 793 P.2d 23; *People v. Sully* (1991) 53 C.3d 1195, 1227, 1228, 283 C.R. 144, 812 P.2d 163, 1 *Cal. Evidence* (4th), *Circumstantial Evidence*, §92.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## ee. Distinction: Feigned Accomplice.

## 3 Witkin Cal. Evid. Presentation § 101

[§ 101] Distinction: Feigned Accomplice.

(1) *Not an Accomplice.* A person who, under direction of police officers, feigns complicity to aid in detection of the perpetrator of a crime, is not an accomplice. "[T]hose who originate and propose a criminal design may not escape conviction merely by reason of the fact that a trap was laid for them or that they were facilitated in the execution of their unlawful enterprises by an officer of the law who acted for the purpose of detecting them." (*People v. Griffin* (1950) 98 C.A.2d 1, 22, 219 P.2d 519; see *People v. Hensling* (1962) 205 C.A.2d 34, 40, 22 C.R. 702; *People v. Hoover* (1974) 12 C.3d 875, 881, 117 C.R. 672, 528 P.2d 760 [where trial judge determines that undercover agent was not accomplice of any kind, issue of whether his complicity with defendant was feigned need not be submitted to jury]; *People v. Escamilla* (1976) 65 C.A.3d 558, 561, 135 C.R. 446 [addict police operative]; *People v. Flores* (1982) 128 C.A.3d 512, 523, 180 C.R. 368.)

(2) *Where Police Officer Is Actual Accomplice.* In *People v. Brocklehurst* (1971) 14 C.A.3d 473, 92 C.R. 340, a police officer and defendant participated in acts that allegedly violated P.C. 288a (oral copulation). The only competent evidence to convict defendant was the officer's testimony, offered as coming from a feigned accomplice. *Held*, conviction reversed; the officer was an actual accomplice whose uncorroborated evidence was insufficient to convict.

(a) In specific intent offenses, the state of mind is significant; "a police officer's testimony, if believed, that he did not have the required intent, but feigned participation in order to obtain evidence against the others, would exonerate him from being an accomplice." (14 C.A.3d 478.)

(b) In crimes not requiring specific intent, such as a violation of P.C. 288a (see 2 Cal. Crim. Law (3d), *Sex Offenses and Crimes Against Decency*, §31 et seq.), intentionally committing the forbidden act is sufficient:

"In the absence of a statute granting immunity, a person of competent age who voluntarily participates in an act which without his participation could not be accomplished, which can be committed only by two persons, which is denounced as a crime by a law that declares both participants to be equally guilty without requiring specific intent, is as to that particular act an accomplice." (14 C.A.3d 480.) (Cf. *People v. Bohmer* (1975) 46 C.A.3d 185, 192, 120 C.R. 136 [observing that *Brocklehurst* does not hold that there can be feigned accomplice only in crime requiring specific intent, and citing cases of feigned accomplices in general intent crimes].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### 3. Procedure in Determining Issue.

### 3 Witkin Cal. Evid. Presentation § 102

[§ 102] Procedure in Determining Issue.

(1) *Burden of Proof*. The defendant has the burden of proof to establish that a witness is an accomplice. (*People v. Tewksbury* (1976) 15 C.3d 953, 962, 127 C.R. 135, 544 P.2d 1335, 1 Cal. Evidence (4th), *Burden of Proof and Presumptions*, §44 [preponderance of evidence is applicable standard]; *People v. Belton* (1979) 23 C.3d 516, 523, 524, 153 C.R. 195, 591 P.2d 485; *People v. Williams* (1997) 16 C.4th 153, 247, 66 C.R. 2d 123, 940 P.2d 710; *People v. Jacobs* (1991) 230 C.A.3d 1337, 1342, 281 C.R. 733, citing the text; CALJIC (6th ed.), No. 3.19.) However, when the prosecution introduces evidence during its case in chief that establishes the accomplice status by a preponderance of the evidence, the defendant's burden is satisfied. (*People v. Belton*, *supra*; *People v. Martinez* (1982) 132 C.A.3d 119, 130, 183 C.R. 256.)

(2) *Roles of Judge and Jury*. The phrase "liable to prosecution" (P.C. 1111, *supra*, §97) means, in effect, "properly liable." "Any issues of fact determinative of the witness' factual guilt of the offense must be submitted to the jury. Only when such facts are clear and undisputed may the court determine that the witness is or is not an accomplice as a matter of law." (*People v. Rodriguez* (1986) 42 C.3d 730, 759, 230 C.R. 667, 726 P.2d 113.)

(a) If the evidence shows that the witness is not an accomplice as a matter of law, the trial judge need not submit the issue to the jury. (See *People v. Mayberry* (1975) 15 C.3d 143, 159, 125 C.R. 745, 542 P.2d 1337; *People v. Gibson* (1976) 56 C.A.3d 119, 132, 128 C.R. 302; *People v. Horton* (1995) 11 C.4th 1068, 1114, 47 C.R.2d 516, 906 P.2d 478.)

(b) If the evidence shows that the witness is an accomplice as a matter of law, the issue should not be submitted to the jury. (*People v. Robinson* (1964) 61 C.2d 373, 394, 38 C.R. 890, 392 P.2d 970, *infra*, §103; see *People v. Zapien* (1993) 4 C.4th 929, 982, 17 C.R.2d 122, 846 P.2d 704 [citing *Robinson*].)

(c) If the facts are disputed or susceptible of different inferences, the question is one for the jury, the defendant is entitled to an instruction on corroboration, and failure to instruct may be reversible error. (See *People v. Jones* (1964) 228 C.A.2d 74, 95, 39 C.R. 302; *People v. Stankewitz* (1990) 51 C.3d 72, 90, 270 C.R. 817, 793 P.2d 23; *People v. DeJesus* (1995) 38 C.A.4th 1, 25, 44 C.R.2d 796 [refusal to give accomplice instruction was improper, because jury could have decided witness' testimony indicated he acted with knowledge of criminal purpose of perpetrator and with intent or purpose of committing, encouraging or facilitating offense; however, under circumstances, error was harmless]; 5 Cal. Crim. Law (3d), *Criminal Trial*, §654.)

(3) *Codefendant Accomplice*. Where the accomplice is a codefendant who makes a judicial confession on the stand, the instruction need not be given; it could be construed by the jurors as imputing the confessing codefendant's foregone guilt to the others. (*People v. Hill* (1967) 66 C.2d 536, 555, 58 C.R. 340, 426 P.2d 908.)

A "unique, but not unprecedented" situation arose in *People v. Valerio* (1970) 13 C.A.3d 912, 92 C.R. 82, as the result of contradictory testimony by two codefendants. Codefendant S testified that defendant V bought two bags of marijuana and then, as police signalled their automobile, asked her to throw away a marijuana cigarette and hide the bags. V testified that S herself had produced the cigarette and threw it away before he could speak about it, and that he had not bought marijuana. The trial judge refused V's request for an instruction that S was an accomplice as a matter of law. *Held*, no error. "If the trial court instructed the jury that the codefendant was an accomplice as a matter of law, he would, in effect, be instructing the jury that the codefendant was guilty of the offenses charged, thereby invading the province of the jury with respect to the determination of her guilt or innocence. Under the circumstances, the trial judge was compelled to leave the matter to the jury." (13 C.A.3d 924.) The judge did give proper aider and abettor instructions. (13 C.A.3d 925.) (See *People v. Benjamin* (1974) 40 C.A.3d 1035, 1043, 115 C.R. 668 [trial court's failure to give accomplice instructions on its own motion was harmless for two defendants whose participation in burglary was videotaped, but was prejudicial for two other defendants implicated by alleged accomplice].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Roles of Judge and Jury*. See *People v. Brown* (2003) 31 C.4th 518, 557, 3 C.R.3d 145, 73 P.3d 1137 [in capital murder case, trial judge did not err in refusing to instruct jury that prosecution witness was accomplice as matter of law, where witness testified that he got into car with defendant and third person, found out that they intended to commit theft that ultimately led to murder only after he got in, and did not agree to it]; *People v. Hinton* (2006) 37 C.4th 839, 880, 38 C.R.3d 149, 126 P.3d 981 [assuming failure of trial judge to instruct, with respect to prosecution witness, that accomplice testimony must be corroborated was error, it was harmless, as witness' testimony was sufficiently corroborated by forensic evidence and by testimony of other witnesses, including defendant himself]; *People v. Avila* (2006) 38 C.4th 491, 565, 43 C.R.3d 1, 133 P.3d 1076 [trial judge properly submitted to jury question whether two witnesses were accomplices; as to one witness, accomplice issue turned on whether, as conspirator or aider or abettor, he was aware that two victims might be killed or was engaged in any other crime that would foreseeably result in murder, and as to second witness, circumstantial evidence did not compel conclusion he was accomplice in light of his denial of involvement in charged crimes].

(3) *Codefendant Accomplice*. In *People v. Avila*, *supra*, a capital murder trial, the court pointed out that the rule regarding the need for accomplice testimony instructions where a codefendant's testimony incriminates the defendant has changed: where such testimony is given, the jury should be instructed that the testimony is to be viewed with care and caution and is subject to the corroboration requirement. (38 C.4th 562; see text and Supp., §108.) The defendant in *Avila* was tried at a time when it was within the trial court's discretion not to give an instruction of this type, and the trial judge chose not to do so. However, there was no need to decide whether the failure to give the instruction was error because, even if it was, it was harmless. The testimony was sufficiently corroborated by independent evidence, including defendant's initial attempt to conceal from police his involvement in the activities culminating in the murders, which implied consciousness of guilt. (38 C.4th 563.)



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#### 4. Nature of Corroboration Required.

##### aa. In General.

### 3 Witkin Cal. Evid. Presentation § 103

#### [§ 103] In General.

(1) *Insufficient Corroboration.* The corroboration must, in some way, tend to connect the defendant with the commission of the crime. If it merely raises a suspicion of guilt, however grave, it is insufficient. (See *People v. Robinson* (1964) 61 C.2d 373, 399, 38 C.R. 890, 392 P.2d 970; *People v. Valardi* (1966) 240 C.A.2d 98, 99, 49 C.R. 339; *People v. Martinez* (1982) 132 C.A.3d 119, 132, 183 C.R. 256; *People v. Falconer* (1988) 201 C.A.3d 1540, 1543, 248 C.R. 60.)

Thus, in *People v. Robinson*, *supra*, two items of evidence were introduced: (a) Fingerprints of defendant found on codefendant's escape car. But the expert could not fix their date, and defendant's association with the car owner made the inference of innocent placement equally permissible; hence, the fingerprints, at most, indicated connection with the codefendant, not with the crime itself. (b) Inconsistent statements by defendant to police concerning his weekend movements. But these merely indicated that he had something to hide from the police, i.e., a guilty frame of mind; they did not afford a reasonable inference of concealing a connection with the particular crime. (61 C.2d 398.)

(2) *Instructions.* "The corroborating evidence is sufficient if it tends to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the witness who must be corroborated is telling the truth." (*People v. MacEwing* (1955) 45 C.2d 218, 224, 288 P.2d 257 [reversible error to give instruction in alternative form: evidence connects defendant with crime or satisfies jury that witness is telling the truth].) (For proper instructions, see CALJIC (6th ed.), No. 3.10 et seq.; on problem presented where jury is instructed both on CALJIC, No. 2.27 (testimony of single witness sufficient, *supra*, §89), and CALJIC, No. 3.11 (accomplice testimony must be corroborated, *supra*, §96), see *People v. Noguera* (1992) 4 C.4th 599, 630, 631, 15 C.R.2d 400, 842 P.2d 1160 [rejecting defendant's claim that instructions are contradictory].)

In *People v. Rodriguez* (1994) 8 C.4th 1060, 36 C.R.2d 235, 885 P.2d 1, a murder prosecution, the trial judge gave CALJIC, No. 3.11 (the standard instruction on corroboration of accomplice testimony) but did not give CALJIC, No. 3.13 (one accomplice may not corroborate another). *Held*, this was proper. One accomplice had testified that defendant and a second accomplice intended to rob the two victims. The surviving victim testified that the second accomplice had asked at the murder scene, "Where do you have it?" Although this question, implying that robbery was defendant's objective, originated with an accomplice, it fell outside the ambit of P.C. 1111. It was not a statement made to law enforcement officials in the hope of leniency or immunity, and it implicated none of the dangers the statute was

intended to address. Thus, giving CALJIC, No. 3.13 would have been inappropriate and unnecessary. (8 C.4th 1133.)

(3) *Function of Reviewing Court.* It is not the duty of the reviewing court in accomplice cases to weigh the corroborative evidence to determine whether it meets the requirements of the statute. An appellate court does not determine "whether the corroborating evidence, by itself, is as compatible with innocence as it is with guilt. That is a question for the trier of fact. All that the appellate court does is to determine whether there is any substantial corroborative evidence, and whether, when error is found, the error committed has led to the verdict reached." (*People v. Malone* (1947) 82 C.A.2d 54, 60, 185 P.2d 870; see *People v. Gallardo* (1953) 41 C.2d 57, 63, 257 P.2d 29 [whether corroboration is as compatible with innocence as with guilt is question for trier of fact]; *People v. Ruscoe* (1976) 54 C.A.3d 1005, 1012, 127 C.R. 6.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Criminal Law k.511.1(4)



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- 4. Nature of Corroboration Required.
  - bb. Sufficient Corroboration.

3 Witkin Cal. Evid. Presentation § 104

#### [§ 104] Sufficient Corroboration.

The great majority of the cases find the corroboration adequate. *People v. Griffin* (1950) 98 C.A.2d 1, 219 P.2d 519, elaborately reviews the authorities and summarizes the rules as follows: The entire conduct of the parties, their relationship, acts, and conduct during and after the crime, may be considered. The corroboration need not extend to all elements of the offense, nor to every detail in the testimony of the accomplice. It need not be strong; it is sufficient if it tends, in some slight degree, to implicate the defendant. It need not be direct; circumstantial evidence is sufficient if the connection of the defendant with the crime may be reasonably inferred therefrom. In brief, the corroborating evidence is sufficient if it connects the defendant with the commission of the crime in such a way as reasonably to satisfy the fact-finder that the accomplice is telling the truth. (98 C.A.2d 25.)

Illustrations are numerous. (See *People v. Barclay* (1953) 40 C.2d 146, 156, 252 P.2d 321; *People v. Gallardo* (1953) 41 C.2d 57, 62, 257 P.2d 29; *People v. Lyons* (1958) 50 C.2d 245, 257, 324 P.2d 556; *People v. Emory* (1961) 192 C.A.2d 814, 821, 13 C.R. 889, citing the text; *People v. Singer* (1963) 217 C.A.2d 743, 753, 32 C.R. 701, quoting the text; *People v. Reinard* (1963) 220 C.A.2d 720, 728, 33 C.R. 908, quoting the text; *People v. Holford* (1965) 63 C.2d 74, 82, 45 C.R. 167, 403 P.2d 423, citing the text; *People v. Luker* (1965) 63 C.2d 464, 470, 47 C.R. 209, 407 P.2d 9, citing the text; *People v. Hathcock* (1973) 8 C.3d 599, 616, 105 C.R. 540, 504 P.2d 476; *People v. Manson* (1977) 71 C.A.3d 1, 36, 139 C.R. 275; *People v. Szeto* (1981) 29 C.3d 20, 29, 171 C.R. 652, 623 P.2d 213; *People v. Lowery* (1988) 200 C.A.3d 1207, 1218, 246 C.R. 443; *People v. Bunyard* (1988) 45 C.3d 1189, 1206, 249 C.R. 71, 756 P.2d 795; *People v. Douglas* (1990) 50 C.3d 468, 507, 268 C.R. 126, 788 P.2d 640; *People v. Rippberger* (1991) 231 C.A.3d 1667, 1685, 283 C.R. 111, citing the text; *People v. Rodrigues* (1994) 8 C.4th 1060, 1128, 1129, 36 C.R.2d 235, 885 P.2d 1; *People v. Barillas* (1996) 49 C.A.4th 1012, 1020, 1021, 57 C.R.2d 166.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Gurule* (2002) 28 C.4th 557, 628, 123 C.R.2d 345, 51 P.3d 224 [in capital murder prosecution, accomplice's testimony satisfied "slight" corroboration requirement mentioned in *People v. Griffin* (1950) 98 C.A.2d 1, 219 P.2d 519, text, p. 141, where it was corroborated by defendant's own extrajudicial statements, identification of defendant by percipient witness, defendant's distinctive tattoo, and fact that victim's fatal wounds matched accomplice's description of how victim was killed]; *People v. Abilez* (2007) 41 C.4th 472, 506, 61 C.R.3d 526, 161 P.3d 58 [in prosecution for murder and sodomy, codefendant's testimony, including that he saw defendant straddling victim, with



white cloth around victim's neck, and that defendant had earlier expressed desire to kill victim, was sufficiently corroborated; police found victim's body with white sock around her neck, and other witnesses testified that defendant stated he wished to kill victim]; *People v. Narvaez* (2002) 104 C.A.4th 1295, 1303, 128 C.R.2d 899 [in prosecution of three defendants for robbery of cash and jewelry, testimony of accomplice, driver of getaway car, was sufficiently corroborated, where there was direct physical evidence of defendants' possession of stolen jewelry]; *People v. Vu* (2006) 143 C.A.4th 1009, 1021, 49 C.R.3d 765 [in murder conspiracy case arising from incident in which victim was killed in mistaken belief he was member of rival gang, testimony of defendant's two accomplices was sufficiently corroborated, where witness' testimony placed defendant at home of fellow gang member, along with other gang members, on night of killing, thus discrediting defendant's alibi placing him elsewhere, and where records of accomplice's cell phone indicated accomplice was not at location where defendant claimed he and accomplice were]. *West's Key Number Digest*, Criminal Law k.511 et seq.



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  - cc. Use of Accomplice's Testimony.

3 Witkin Cal. Evid. Presentation § 105

[§ 105] Use of Accomplice's Testimony.

In *People v. Morton* (1903) 139 C. 719, 724, 73 P. 609, it was suggested that, for the purpose of evaluating the corroborating evidence, the testimony of the accomplice should be wholly eliminated. This view was followed in *People v. Reingold* (1948) 87 C.A.2d 382, 393, 197 P.2d 175, where the court laid down the following strict tests: (a) The corroboration "is not sufficient if it requires interpretation and direction to be furnished by the accomplice's testimony to give it value." (b) The evidence "to be sufficient and of the required substantial value must tend directly and immediately to connect the defendant with the offense charged against him." It must connect the defendant with the crime, and not merely with the persons who perpetrated it. (See *People v. Rios* (1985) 163 C.A.3d 852, 870, 210 C.R. 271, quoting *People v. Szeto* (1981) 29 C.3d 20, 27, 171 C.R. 652, 623 P.2d 213 [evidence is sufficient "if it does not require interpretation and direction from the testimony of the accomplice"].)

Other decisions suggest that the testimony of the accomplice need not be eliminated and that the corroborative evidence need not independently prove guilt. (See *People v. Griffin* (1950) 98 C.A.2d 1, 27, 219 P.2d 519, *supra*, §104; *People v. Allen* (1951) 104 C.A.2d 402, 413, 231 P.2d 896; *People v. Hooker* (1954) 126 C.A.2d 394, 399, 272 P.2d 839.) As the court pointed out in *People v. Griffin*, *supra*, "if it were required that a complete case for the prosecution be established without reference to the testimony of the accomplice, there would then be no occasion to offer the accomplice as a witness." (98 C.A.2d 25.) (Cf. *People v. Goldstein* (1955) 136 C.A.2d 778, 787, 289 P.2d 581 [criticizing *Griffin* view as contrary to expressions in Supreme Court decisions].)

In *People v. Bowley* (1963) 59 C.2d 855, 31 C.R. 471, 382 P.2d 591, defendant was charged with sex perversion. The only prosecution witness was Joan, who testified that she engaged in the acts with defendant in making a motion picture. The only other evidence was the film, which Joan authenticated as an accurate representation of the events. *Held*, judgment reversed for lack of corroboration of Joan's testimony.

The court first held that the film itself could be independent evidence (2 Cal. Evidence (4th), *Demonstrative, Experimental, and Scientific Evidence*, §17), and that Joan, the accomplice, could authenticate it, because the testimony of an accomplice is competent. (59 C.2d 858.) These two propositions appeared to point to the conclusion that the testimony of the accomplice was corroborated by the independent evidence of the film, but they did not, for P.C. 1111 requires corroboration without the aid of any testimony of the accomplice whose testimony is to be corroborated. Hence, (a) the accomplice could authenticate and make the film admissible, but (b) the record could not sustain a

conviction, for lack of corroboration apart from any testimony of the accomplice. "To hold otherwise would allow the prosecution to pull itself up by its own bootstraps." (59 C.2d 863.) (See 96 A.L.R.2d 1185 [corroboration of accomplice witness by objective evidence authenticated by same accomplice].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### 5. Extrajudicial Statement as Testimony.

#### 3 Witkin Cal. Evid. Presentation § 106

[§ 106] Extrajudicial Statement as Testimony.

(1) *Statement Requires Corroboration.* In *People v. Belton* (1979) 23 C.3d 516, 153 C.R. 195, 591 P.2d 485, defendant was charged with violation of P.C. 246 (discharging firearm at inhabited dwelling house). In a trial by the court, the prosecution called F, defendant's stepson, as its witness; but F testified that neither he nor his stepfather had anything to do with the shooting. To contradict this exculpatory testimony, the prosecution called deputy sheriff L to testify to F's prior inconsistent statement--that his stepfather drove him by the house and he (F) fired the weapon. L's testimony as to F's prior statement was the only evidence presented by the prosecution in its case in chief. Defendant moved for an acquittal under P.C. 1118, the motion was denied, and defendant was found guilty. *Held*, reversed.

(a) The extrajudicial statement of F was sufficient to establish his status as an accomplice, but the difficult question was whether that statement was "testimony of an accomplice" calling for corroboration. "Testimony" is generally defined as oral evidence given by witnesses under oath. (23 C.3d 524; see *supra*, §25.) Hence, F's statement did not come within the literal terms of P.C. 1111.

(b) But the cases dealing with the statute have focused on the source of the statements rather than their evidentiary form in articulating the legislative intent. (23 C.3d 525.) And the fact that accomplice F's incriminating out-of-court statement was not part of his testimony at the trial does not lessen the danger that it comes from a tainted source. (23 C.3d 525.)

(c) At the time P.C. 1111 was adopted (1872), a prior inconsistent statement could be used only to impeach; it was not until 1967 that *Ev.C. 1235* made it substantive evidence (see 1 *Cal. Evidence* (4th), *Hearsay*, §156). When the Legislature gave this enlarged effect to the statement, "it neglected, through apparent oversight, to substitute a more inclusive word for the term 'testimony' so that section 1111 might clearly be applicable to this new form of accomplice evidence." (23 C.3d 526.)

(d) The legislative intent was to eliminate the danger of a defendant being convicted solely upon the suspect, untrustworthy and unreliable evidence coming from an accomplice. The language of the section must be given a construction which, though departing from the literal language, carries out that intent. Hence, "this court concludes that Fouse's prior inconsistent statement constituted 'testimony,' as the term is used in section 1111." (23 C.3d 526.) Because the prosecution produced no corroboration during its case in chief, the motion to acquit should have been granted. (23 C.3d 526.) (See concurring opinion, suggesting a different theory: The conviction was obtained upon the testimony of F

because it was that testimony that made the prior inconsistent statement admissible.) (See *People v. Andrews* (1989) 49 C.3d 200, 214, 260 C.R. 583, 776 P.2d 285 ["Section 1111 applies to an accomplice's out-of-court statements when such statements are used as substantive evidence of guilt"; discussing *Belton*].)

(2) *Distinction: Out-of-Court Statement Not Made Under Suspect Circumstances.* "Testimony" within the meaning of P.C. 1111 includes all oral statements made by an accomplice or coconspirator under oath in a court proceeding and all out-of-court statements of accomplices and coconspirators used as substantive evidence of guilt that are made under suspect circumstances. The most obvious suspect circumstances occur when the accomplice has been arrested or is questioned by the police. When out-of-court statements are not given under suspect circumstances, they do not qualify as "testimony," hence, do not need to be corroborated under P.C. 1111. (*People v. Jeffery* (1995) 37 C.A.4th 209, 218, 43 C.R.2d 526 [distinguishing *Belton* and *Andrews*, *supra*; accomplice's statements to undercover officer in course of drug sales and without knowledge of officer's true identity were neither suspect, untrustworthy, nor unreliable, hence, required no corroboration].)

(3) *Distinction: Statements Admissible Under Hearsay Exception.* In *People v. Sully* (1991) 53 C.3d 1195, 283 C.R. 144, 812 P.2d 163, 1 Cal. Evidence (4th), *Circumstantial Evidence*, §92, the court held that the corroboration requirement of P.C. 1111 did *not* apply to an accomplice's extrajudicial statement that was admissible as an excited utterance. "The usual problem with accomplice testimony--that it is consciously self-interested and calculated--is not present in an out-of-court statement that is itself sufficiently reliable to be allowed in evidence." (53 C.3d 1230.) (See *People v. Williams* (1997) 16 C.4th 153, 245, 246, 66 C.R.2d 123, 940 P.2d 710 [statements of accomplice, admitted under prior inconsistent statement exception to hearsay rule, were not given under suspect circumstances and thus did not require corroboration; following *Sully* and approving analysis of *Jeffery*].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(3) *Distinction: Statements Admissible Under Hearsay Exception.* See *People v. Brown* (2003) 31 C.4th 518, 555, 3 C.R.3d 145, 73 P.3d 1137 [in capital murder case, trial judge's failure to instruct jury on accomplice testimony did not constitute error, where accomplice's statements were admitted under hearsay exception for declarations against penal interests].



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### V. DETERMINATION OF CREDIBILITY AND WEIGHT

#### B. Sufficiency of One Witness.

#### 3. Statutory Requirements of Corroboration.

#### b. Treason, Solicitation, False Pretenses, and Perjury.

*3 Witkin Cal. Evid. Presentation § 107*

[§ 107] Treason, Solicitation, False Pretenses, and Perjury.

(1) *Treason*. Evidence of two witnesses is required. (P.C. 37(b); see 7 Wigmore (Chadbourn Rev.) §2036 et seq.)

(2) *Solicitation*. Solicitation generally must be proven by the testimony of two witnesses or one witness and corroborating circumstances. The testimony of one witness and corroborating circumstances is required to prove a violation of P.C. 653f(d) (solicitation of another to violate *Health & Saf.C. 11352, 11379, 11379.5, 11379.6, or 11391* [unlawful manufacture, transportation, sale, distribution, or administration of various controlled substances]) or of P.C. 653f(e) (solicitation of another to violate Welf.C. 14014 [false declaration as to eligibility for health care]). (P.C. 653f(f); see 1 *Cal. Crim. Law* (3d), *Elements*, §32; *People v. Hinman* (1967) 253 C.A.2d 896, 900, 61 C.R. 609 [corroboration of solicitee was series of tape recordings of conversations with defendant; sufficient].)

(3) *Defrauding by False Pretenses*. The testimony of two witnesses or one witness and corroborating circumstances is required. (P.C. 532(b); see 2 *Cal. Crim. Law* (3d), *Crimes Against Property*, §44; *People v. Curran* (1938) 24 C.A.2d 673, 676, 75 P.2d 1090 [failure to give instruction on corroboration in false pretenses case held reversible error, though defendant had not specifically requested it]; *People v. Fujita* (1974) 43 C.A.3d 454, 470, 117 C.R. 757 [corroboration sufficient].)

(4) *Perjury*. Prior to 1969, perjury had to be proved by two witnesses or one witness and corroborating circumstances. (See former P.C. 1103a; *People v. McRae* (1967) 256 C.A.2d 95, 110, 63 C.R. 854 [sufficient]; 1 *Cal. Crim. Law* (3d), *Crimes Against Governmental Authority*, §75 et seq.; 7 Wigmore (Chadbourn Rev.) §2040 et seq.) Now conviction of perjury is precluded "where proof of falsity rests solely upon contradiction by testimony of a single person other than the defendant." (P.C. 118(b).)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Criminal Law k.507(9)



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#### C. Evidence Viewed With Distrust.

##### 1. Testimony of Accomplice.

3 Witkin Cal. Evid. Presentation § 108

[§ 108] Testimony of Accomplice.

(1) *Right to Instruction.* Where the evidence would support an inference that a prosecution witness was an accomplice, the defendant is entitled to an instruction that the testimony of an accomplice should be viewed with distrust. (See *People v. Barclay* (1953) 40 C.2d 146, 153, 252 P.2d 321; *People v. Williams* (1997) 16 C.4th 635, 679, 680, 66 C.R.2d 573, 941 P.2d 752 [in instructing on accomplice testimony, trial judge did not err in refusing defendant's proposed instruction that two witnesses were accomplices as matter of law; instruction of this type may be given only where facts regarding witness' criminal culpability are clear and undisputed]; *People v. Guiuan* (1998) 18 C.4th 558, 76 C.R.2d 239, 957 P.2d 928, *infra*, this section [instruction should be given whenever witness who might be determined by jury to be accomplice testifies]; *People v. Jones* (1964) 228 C.A.2d 74, 94, 39 C.R. 302; *People v. Hill* (1993) 12 C.A.4th 798, 808, 15 C.R.2d 806 [failure to give instruction as to accomplice's taped statement to police was error, even though accomplice gave contradictory in-court testimony exculpating defendant and court gave wilfully false witness instruction]; CALJIC (6th ed.), No. 3.18; 5 Cal. Crim. Law (3d), *Criminal Trial*, §655; cf. 4 A.L.R.3d 351 [propriety of instruction that accomplice's credibility is to be judged in same manner as for any other witness].) (On failure to give instruction as harmless error, see *People v. Gordon* (1973) 10 C.3d 460, 472, 110 C.R. 906, 516 P.2d 298 [prosecutor himself advised jury to distrust testimony of his star witness]; *People v. Salazar* (1977) 74 C.A.3d 875, 881, 141 C.R. 753 [other evidence sufficient]; on requirement that accomplice testimony be corroborated, see *supra*, §96.)

(2) *Former Distinction: Where Accomplice Testifies for Defendant.* The instruction was developed in order to make the admission of accomplice testimony against the defendant fair; thus, it was formerly held that where the accomplice gives testimony favorable to the defendant, there is no reason to suspect that the accomplice is attempting to earn clemency or leniency, and the instruction should not be given. This was so whether the accomplice was called by the defendant or by the prosecution. (*People v. Graham* (1978) 83 C.A.3d 736, 744, 149 C.R. 6; *People v. Provencio* (1989) 210 C.A.3d 290, 309, 258 C.R. 330 [instruction would have raised inference that accomplice's testimony in favor of defendant was suspect]; cf. *People v. Flanders* (1979) 89 C.A.3d 634, 638, 152 C.R. 696 [accomplice's testimony only partially favorable to defendant, and judge limited instruction to incriminating aspects; no error]; *People v. Franco* (1994) 24 C.A.4th 1528, 1537, 1538, 30 C.R.2d 478 [trial judge gave unmodified CALJIC, No. 3.18 even though accomplice testimony was partly favorable and partly unfavorable; defendant who did not object at trial could not claim error on appeal; distinguishing *Flanders* and *Graham*].)

In *People v. Guiuan* (1998) 18 C.4th 558, 76 C.R.2d 239, 957 P.2d 928, the distinction between favorable and unfavorable accomplice testimony was criticized and the rule regarding accomplice testimony was simplified: "[T]he trial court should not be required to parse the testimony of an accomplice to determine whether it may be construed as

'favorable' or 'unfavorable' to the defendant. ... [T]he jury should be instructed to the following effect whenever an accomplice, or a witness who might be determined by the jury to be an accomplice, testifies: 'To the extent an accomplice gives testimony that tends to incriminate the defendant, it should be viewed with caution. This does not mean, however, that you may arbitrarily disregard that testimony. You should give that testimony the weight you think it deserves after examining it with care and caution and in the light of all the evidence in the case.' Such a pretailored instruction is applicable regardless which party called the accomplice. ... [T]he trial court is ... required to give the instruction *sua sponte*. ... It has long been one of the instructions on the 'general principles of law' that trial courts must give on their own initiative." (18 C.4th 569, disapproving *People v. Graham* to extent it would require trial judge to determine whether testimony in question is favorable or unfavorable to defendant.) (See CALJIC (6th ed.), No. 3.18, as revised in 1999 to incorporate language suggested in *Guian*.)

(3) *Distinction: Where Each Accomplice-Defendant Incriminates the Other*. In *People v. Alvarez* (1996) 14 C.4th 155, 58 C.R.2d 385, 926 P.2d 365, a capital murder case, each of the two codefendants testified on his own behalf and, at least to some extent, incriminated the other. The trial judge gave a modified version of CALJIC, No. 3.18. *Held*, this was proper. "[W]hen, as here, a defendant testifies on his own behalf, denies guilt, and incriminates his codefendant, a trial court has authority to instruct the jury that this testimony should be viewed with distrust as that of an accomplice. ... The superior court delivered such an instruction: the testimony of an accomplice-defendant that tends to incriminate his codefendant should be viewed with distrust. Its limitation--the accomplice-defendant's testimony should be viewed with distrust *to the extent that it tends to incriminate his codefendant*--was altogether proper." (14 C.4th 218.) Defendant understandably did not complain about the instruction to the extent it *benefitted* him as the *incriminated* defendant; he complained only insofar as it *burdened* him as the *incriminating* accomplice-defendant. But if "an accomplice who testifies against a defendant deserves 'close scrutiny'--and he does--he deserves such scrutiny even if he is himself a defendant. Like any other accomplice, an accomplice-defendant has the motive, opportunity, and means to try to help himself at the other's expense." (14 C.4th 219.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Right to Instruction*. See *People v. Slaughter* (2002) 27 C.4th 1187, 1202, 120 C.R.2d 477, 47 P.3d 262 [refusal to give instruction was proper, where person asserted by defendant to be accomplice was victim of defendant's murder attempt and was not liable to prosecution for same offenses as defendant]; *People v. Hernandez* (2003) 30 C.4th 835, 874, 134 C.R.2d 602, 69 P.3d 446 [in penalty phase of capital murder trial in which prosecution witness, defendant's brother-in-law, testified regarding uncharged murder involving defendant, trial judge erred in failing to give accomplice instruction; evidence was insufficient to show that witness was accomplice in uncharged murder as matter of law, but jury could have concluded by preponderance of evidence that he was]. (3) *Distinction: Where Each Accomplice-Defendant Incriminates the Other*. See *People v. Coffman & Marlow* (2004) 34 C.4th 1, 105, 17 C.R.3d 710, 96 P.3d 30, following *People v. Alvarez* (1996) 14 C.4th 155, 58 C.R.2d 385, 926 P.2d 365, text, p. 147. *West's Key Number Digest*, Criminal Law k.508(9), 780 et seq.





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C. Evidence Viewed With Distrust.

2. Testimony of In-Custody Informant.

3 *Witkin Cal. Evid. Presentation* § 109

[§ 109] Testimony of In-Custody Informant.

In any criminal trial or proceeding in which an in-custody informant testifies as a witness, the trial judge, on request, must instruct the jury as follows:

"The testimony of an in-custody informant should be viewed with caution and close scrutiny. In evaluating such testimony, you should consider the extent to which it may have been influenced by the receipt of, or expectation of, any benefits from the party calling that witness. This does not mean that you may arbitrarily disregard such testimony, but you should give it the weight to which you find it to be entitled in the light of all the evidence in the case." (P.C. 1127a(b); see P.C. 1127a(a) [in-custody informant defined]; on permitted consideration, see 2 *Cal. Evidence* (4th), *Witnesses*, §20.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Criminal Law k.785(4)



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#### C. Evidence Viewed With Distrust.

##### 3. Witness False in Part.

##### a. Nature of Instruction.

#### 3 Witkin Cal. Evid. Presentation § 110

#### [§ 110] Nature of Instruction.

(1) *General Rule.* An instruction that a witness "false in one part of his or her testimony is to be distrusted in others" is given under the general power of the judge. (BAJI (8th ed.), No. 2.22; see CALJIC (6th ed.), No. 2.21.2 ["willfully false in one material part" of testimony]; *People v. Kennedy* (1937) 21 C.A.2d 185, 201, 69 P.2d 224; *Flemmer v. Monckton* (1946) 73 C.A.2d 271, 276, 166 P.2d 380 ["it was not merely the privilege of said court, but indeed his duty, to view with suspicion the testimony of said witness" on the main issue]; *Nelson v. Black* (1954) 43 C.2d 612, 613, 275 P.2d 473; *Ganahl v. Certain Individuals* (1962) 204 C.A.2d 571, 581, 22 C.R. 520; *People v. Blassingill* (1988) 199 C.A.3d 1413, 1418, 245 C.R. 599 [CALJIC, No. 2.21 (now CALJIC (6th ed.), No. 2.21.2) properly given]; *People v. Hill* (1993) 12 C.A.4th 798, 810, 15 C.R.2d 806 [same]; *People v. Savedra* (1993) 15 C.A.4th 738, 746, 19 C.R.2d 115 [instruction did not constitute impermissible, argumentative, "pinpoint" instruction]; *People v. Murillo* (1996) 47 C.A.4th 1104, 1107, 1108, 55 C.R.2d 21 [failure to give instruction was harmless error, because instruction embodies common sense principle that defense counsel could still argue to jury]; *Gargir v. B'Nei Akiva* (1998) 66 C.A.4th 1269, 1275, 78 C.R.2d 557 [same]; and see generally 3A Wigmore (Chadbourn Rev.) §1008 et seq.; 7 Cal. Proc. (4th), Trial, §312; 81 Am.Jur.2d (1992 ed.), Witnesses §1045; 4 A.L.R.2d 1077.)

(2) *Accepting Other Testimony.* The jury may reject the witness' whole testimony unless, from all the evidence, the jury believes "the probability of truth favors [the witness'] testimony in other particulars." (CALJIC, No. 2.21.2; BAJI, No. 2.22; see *infra*, §111.)

In *People v. Rivers* (1993) 20 C.A.4th 1040, 25 C.R.2d 602, the Court of Appeal expressed concern about giving CALJIC, No. 2.21.2 in a robbery trial in which, on cross-examination, the victim admitted he had not told police officers that the robbery had originated in an arranged drug sale. Because the victim's testimony was crucial to the prosecution's case, the term "probability of truth" in the instruction could have been construed as reducing the prosecution's burden of proving defendant guilty beyond a reasonable doubt. Any error was harmless, however: The only material fact the jury might have found false was the victim's testimony that defendant had jumped him and taken his money by force, before any drug sale took place. If the jury had found this testimony false, it would have acquitted defendant. (20 C.A.4th 1047.) (See *People v. Foster* (1995) 34 C.A.4th 766, 775, 776, 40 C.R.2d 633 [addressing concerns of *Rivers* court; "in the context of all the instructions, no reasonable juror would have interpreted CALJIC, No. 2.21.2 to permit a criminal conviction where the evidence showed the prosecution's evidence was 'probably' truthful, hence the defendant was 'probably' guilty, yet not guilty beyond a reasonable doubt"]; *People v. Wade* (1995) 39 C.A.4th 1487, 1494, 1495, 46 C.R.2d 645 [following *Foster* as to probability issue and further holding that "material" in

CALJIC, No. 2.21.2 need not be defined, as it is used in its common and ordinary sense].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *General Rule.* See *81 Am.Jur.2d (2004)*, *Witnesses §1008*; CACI, Nos. 107, 5003 [witness wilfully false in material part]. *West's Key Number Digest*, Criminal Law k.785(16), 786(7); Trial k.210(2)



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#### C. Evidence Viewed With Distrust.

##### 3. Witness False in Part.

##### b. Testimony of Single Witness.

*3 Witkin Cal. Evid. Presentation § 111*

#### [§ 111] Testimony of Single Witness.

The general rule of sufficiency of a single witness (*supra*, §89) may apply even though the witness has been partly impeached by showing of contradictions or inconsistencies or even false testimony in part. Such inconsistencies are not regarded as judicial admissions (see *1 Cal. Evidence (4th)*, *Hearsay*, §117), and the jury may still give credence to the witness. (See discussion in *People v. Kennedy (1937)* 21 C.A.2d 185, 201, 69 P.2d 224; *People v. Bodkin (1961)* 196 C.A.2d 412, 415, 16 C.R. 506; *People v. Swanson (1962)* 204 C.A.2d 169, 173, 22 C.R. 178, citing the text; *People v. Maxwell (1979)* 94 C.A.3d 562, 575, 156 C.R. 630; *People v. Leigh (1985)* 168 C.A.3d 217, 221, 214 C.R. 61.) Consequently, the contradictions will not be a ground for reversal on appeal except in the rare situation in which the testimony appears to be inherently improbable. (*People v. Holman (1945)* 72 C.A.2d 75, 89, 164 P.2d 297; see *supra*, §91.)

In *People v. Bodkin, supra*, a court trial for sale of narcotics, the sole witness testified to the facts of the offense in the morning; in the afternoon, he was called by the defense and recanted. *Held*, it was for the trial judge to determine which testimony was the truth and which the perjury; and the lack of any credible explanation for the sudden change, coupled with circumstantial evidence supporting the first version, amply justified the conclusion that it was the truth. (196 C.A.2d 414.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See CALCRIM, No. 301 [Single Witness's Testimony].



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#### C. Evidence Viewed With Distrust.

##### 3. Witness False in Part.

##### c. Rejection Not Substitute for Affirmative Evidence.

*3 Witkin Cal. Evid. Presentation § 112*

[§ 112] Rejection Not Substitute for Affirmative Evidence.

In *Estate of Bould* (1955) 135 C.A.2d 260, 287 P.2d 8, a will contest on the ground of undue influence, the proponent was evasive and untruthful. The trial judge declared that he placed no reliance on her testimony, and denied probate. But the other testimony and circumstantial evidence fell short of a showing of undue influence. *Held*, judgment reversed, for "[d]isbelief does not create affirmative evidence to the contrary of that which is discarded." (135 C.A.2d 264.) Where testimony is false or evidence is concealed, an inference arises of concealment of the truth, "but it does not reveal the truth itself or warrant an inference that the truth is the direct converse of the rejected testimony." (135 C.A.2d 265.) (See *Edwards v. Freeman* (1949) 34 C.2d 589, 593, 212 P.2d 883; *Oldenburg v. Sears, Roebuck & Co.* (1957) 152 C.A.2d 733, 742, 314 P.2d 33; *People v. Blakeslee* (1969) 2 C.A.3d 831, 82 C.R. 839, *infra*, §146; *Edmondson v. State Bar* (1981) 29 C.3d 339, 343, 172 C.R. 899, 625 P.2d 812; *Estate of Mann* (1986) 184 C.A.3d 593, 604, 229 C.R. 225.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### C. Evidence Viewed With Distrust.

##### 4. Oral Admissions.

3 Witkin Cal. Evid. Presentation § 113

[§ 113] Oral Admissions.

(1) *General Rule.* Evidence of the "oral admissions" of a party "ought to be viewed with caution." This instruction must be given in a criminal case on the court's own motion. (*People v. Carpenter* (1997) 15 C.4th 312, 392, 63 C.R.2d 1, 935 P.2d 708; see *People v. Carswell* (1959) 51 C.2d 602, 608, 335 P.2d 99; 5 Cal. Crim. Law (3d), *Criminal Trial*, §650; 7 Cal. Proc. (4th), *Trial*, §314; BAJI (8th ed.), No. 2.25; CALJIC (6th ed.), No. 2.70.)

(2) *Rationale.* The reason for the warning, and its importance, are obvious: "[N]o class of evidence is more subject to error or abuse. Witnesses having the best motives are generally unable to state the exact language of an admission, and are liable, by the omission or the changing of words, to convey a false impression of the language used. No other class of testimony affords such temptations or opportunities for unscrupulous witnesses to torture the facts or commit open perjury, as it is often impossible to contradict their testimony at law, or at least by any other witness than the party himself." (*People v. Bemis* (1949) 33 C.2d 395, 399, 202 P.2d 82; *People v. Livaditis* (1992) 2 C.4th 759, 788, 9 C.R.2d 72, 831 P.2d 297 [concurring opinion]; see *Crawford v. Alioto* (1951) 105 C.A.2d 45, 50, 233 P.2d 148.)

(3) *Reversible Error.* The circumstances of each case determine whether failure to give cautionary instructions on the court's own motion constitutes reversible error. (See *People v. Blankenship* (1970) 7 C.A.3d 305, 310, 86 C.R. 651 [error, if any, in failing to give instruction was harmless because ample circumstantial evidence independently connected defendant with crimes]; *People v. Matta* (1976) 57 C.A.3d 472, 484, 129 C.R. 205 [failure to give instruction, though error, was harmless where corpus delicti was convincingly established independently of extrajudicial admissions, and admissions showing intent to commit assault were mere surplusage]; *People v. Padilla* (1995) 11 C.4th 891, 921, 922, 47 C.R.2d 426, 906 P.2d 388 [failure to give instruction was harmless; there was no dispute that defendant told jailmate that sawed-off shotgun was recovered from home of girlfriend's daughter, and any purported inaccuracies in testimony went to immaterial details]; *People v. Carpenter* (1997) 15 C.4th 312, 392, 63 C.R.2d 1, 935 P.2d 708 [error was not reversible where witness' testimony was uncontradicted, defendant's alleged statement consisted of five simple words, spoken when defendant had witness' full attention, and there was no evidence that statement was not made, was fabricated, or was inaccurately remembered or reported].)

(4) *Distinctions.* The following distinctions should be noted:

(a) Although viewed with caution, an oral admission is nevertheless sufficient to sustain a finding or judgment. (See *People v. Kelly* (1946) 77 C.A.2d 23, 26, 174 P.2d 342.)

(b) The requirement does not apply where the oral statement is proved not by the recollection of a witness who

heard it, but by the reliable means of a tape recording. (See *People v. Gardner* (1961) 195 C.A.2d 829, 832, 16 C.R. 256 [dictum]; *People v. Hines* (1964) 61 C.2d 164, 173, 37 C.R. 622, 390 P.2d 398 [no error in failing to instruct; *Gardner* cited]; *People v. Mayfield* (1997) 14 C.4th 668, 775, 60 C.R.2d 1, 928 P.2d 485.)

(c) It is error to give any instruction as to the weight of an admission when in fact there has been no testimony regarding an admission. Thus, although the court may instruct that the testimony of a witness which purported to relate an oral admission of the defendant should be viewed with distrust, the court should not instruct, on its own motion, without such testimony from a witness, that an admission or statement "by the defendant" ought to be viewed with distrust. The jury may think that the defendant's testimony, if any, must be mistrusted, or that the defendant had in fact made an admission. (*People v. Wheelwright* (1968) 262 C.A.2d 63, 69, 70, 68 C.R. 356 [pointing out that there was no easily recognizable admission in record, but holding error not prejudicial in light of strong evidence of guilt].)

(d) There is no sua sponte duty to give the instruction at the *penalty* phase of a criminal trial (*People v. Payton* (1992) 3 C.4th 1050, 1064, 13 C.R.2d 526, 839 P.2d 1035); the judge must do so only on defense request (*People v. Livaditis* (1992) 2 C.4th 759, 783, 9 C.R.2d 72, 831 P.2d 297).

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *General Rule.* See CACI, No. 212 [party admissions]; CALCRIM, No. 358 [Evidence of Defendant's Statements].



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C. Evidence Viewed With Distrust.

5. Weaker Evidence Offered.

3 *Witkin Cal. Evid. Presentation* § 114

[§ 114] Weaker Evidence Offered.

If a party offers weaker and less satisfactory evidence when it could have produced stronger and more satisfactory evidence, the evidence offered should be viewed with distrust (*Ev.C. 412*), and the jury may be so instructed (see *BAJI* (8th ed.), No. 2.02; 7 *Cal. Proc.* (4th), *Trial*, §313; 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §649; cf. *Hansen v. Warco Steel Corp.* (1965) 237 *C.A.2d* 870, 876, 47 *C.R.* 428 [error to instruct where evidence not weaker]).

No such instruction may be given, however, against a criminal defendant relying on the privilege against testifying. (See *Griffin v. California* (1965) 380 *U.S.* 609, 85 *S.Ct.* 1229, 14 *L.Ed.2d* 106, 2 *Cal. Evidence* (4th), *Witnesses*, §433.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *CACI*, No. 203 [effect of offering weaker evidence where stronger evidence could have been produced]. *West's Key Number Digest*, Criminal Law k.788; Trial k.211





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## CHAPTER XI - Presentation At Trial

### V. DETERMINATION OF CREDIBILITY AND WEIGHT

#### D. Evidence Suppressed in Civil Cases.

##### 1. Adverse Inference Permissible.

#### 3 Witkin Cal. Evid. Presentation § 115

[§ 115] Adverse Inference Permissible.

(1) *Former Law.* Former C.C.P. 1963 contained a presumption that "evidence wilfully suppressed would be adverse if produced." This was discontinued as a mandatory presumption, and retained as a permissible inference that the trier of fact may draw and on which the jury may be instructed. (See *Ev.C. 412*, Comment; *Ev.C. 600*, Comment.)

(2) *Current Rule.* In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, (a) the party's failure to explain or to deny the evidence or facts in the case against him or her, or (b) the party's wilful suppression of evidence relating to the facts or evidence, if any. (*Ev.C. 413*; see *BAJI* (8th ed.), Nos. 2.03 [wilful suppression], 2.04 [failure to deny or explain]; *Neumann v. Bishop* (1976) 59 C.A.3d 451, 480, 130 C.R. 786 [court properly instructed jury: "In determining what inferences to draw from the evidence or facts in the case against the party, you may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts"]; *Willard v. Caterpillar* (1995) 40 C.A.4th 892, 907, 48 C.R.2d 607 ["traditional remedies for spoliation of evidence include a discretionary jury inference against the spoliator"; citing *Ev.C. 413*]; 26 Southwestern U. L. Rev. 1051 [inference in product liability case when product at issue is lost or altered])

It is also permissible for counsel to comment on failure to produce a witness (see *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 C.A.3d 1220, 1246, 1 C.R.2d 301), although too much repetition and emphasis, or unfair comment, may constitute misconduct. (See *Keena v. United R. of San Francisco* (1925) 197 C. 148, 158, 239 P. 1061; *Winkie v. Turlock Irr. Dist.* (1937) 24 C.A.2d 1, 7, 74 P.2d 302; *Boyd v. Theetgee* (1947) 78 C.A.2d 346, 351, 177 P.2d 637; see also 7 Cal. Proc. (4th), Trial, §227; cf. *Freitas v. Peerless Stages* (1952) 108 C.A.2d 749, 761, 239 P.2d 671 [comment held proper].)

(3) *Theory Behind Rule.* The theory is explained in *Shapiro v. Equitable Life Assur. Soc.* (1946) 76 C.A.2d 75, 172 P.2d 725, quoting Wigmore as follows: "The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted. The nonproduction of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its tenor is unfavorable to the party's cause." (76 C.A.2d 93.)

Many other opinions contain similar statements. (See *Breland v. Traylor Engineering & Mfg. Co.* (1942) 52 C.A.2d 415, 426, 126 P.2d 455 ["A defendant is not under a duty to produce testimony adverse to himself, but if he fails to produce evidence that would naturally have been produced he must take the risk that the trier of the fact will infer, and properly so, that the evidence, had it been produced, would have been adverse"]; *Talbert v. Ostergaard* (1954) 129 C.A.2d 222, 230, 276 P.2d 880 ["A trial is not to be perverted into a game which allows a defendant to refrain, with impunity, from producing evidence of a fact which is uniquely within his knowledge, or that of his agent, when the burden of explanation rests with such defendant"]; *Thor v. Boska* (1974) 38 C.A.3d 558, 567, 113 C.R. 296 [discussing views of Wigmore and McCormick on spoliation of evidence]; *Lumpkin v. Friedman* (1982) 131 C.A.3d 450, 456, 182 C.R. 378 ["well-recognized rule permitting an inference, where a party fails to produce evidence which he might reasonably be expected to produce, that the evidence would be unfavorable to that party"]; 2 McCormick 5th, §264; 2 Wigmore (Chadbourn Rev.) §285 et seq.; 29 Am.Jur.2d (1994 ed.), Evidence §244 et seq.)

(4) *Distinctions*. Several distinctions should be noted:

(a) Where the failure to explain or deny is the result of a claim of privilege, neither comment nor inference is permissible. (Ev.C. 913, 2 Cal. Evidence (4th), Witnesses, §96.) But this section merely prohibits comment on the claim of privilege as such; it does not prevent the drawing of inferences from the evidence (or lack of it). (See Ev.C. 412, Comment.) (On impropriety of either comment or inference against criminal defendant (rule of *Griffin v. California* (1965) 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106), see 2 Cal. Evidence (4th), Witnesses, §433.)

(b) Although the presumption is eliminated from the trial, something closely akin to it and much stronger is authorized in discovery proceedings in a civil case: Refusal to comply with a discovery order may result in having the facts taken as established in accordance with the claim of the party seeking discovery. (C.C.P. 2025(o), 2 Cal. Evidence (4th), Discovery, §§70, 255; C.C.P. 2023(b)(2).)

(c) Suppression does not warrant the drastic remedy of dismissal of an action. (See 24 Am.Jur.2d (1983 ed.), Dismissal, Discontinuance, and Nonsuit §41 et seq.; 11 A.L.R.3d 1153.) (On tort action for spoliation of evidence, see infra, §117 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Current Rule*. See CACI, Nos. 204, 205 [wilful suppression of evidence, and failure to explain or deny evidence].

(3) *Theory Behind Rule*. See 2 McCormick 6th, §264.(4) *Distinctions*.

(b) *Facts taken as established*: C.C.P. 2023(b)(2) and 2025(o), on issue sanctions ordering that facts be taken as established, were repealed and replaced by C.C.P. 2023.030(b) and 2025.480(g) in 2004 without substantive change. *West's Key Number Digest*, Evidence k.78



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## 2. Illustrations of Proper Inference.

## 3 Witkin Cal. Evid. Presentation § 116

[§ 116] Illustrations of Proper Inference.

(1) *Early Cases.* The opinions in many cases antedating the Evidence Code illustrate the effect of suppression or failure to explain:

In *Dierman v. Providence Hosp.* (1947) 31 C.2d 290, 188 P.2d 12, the presumption of *res ipsa loquitur* (1 Cal. Evidence (4th), *Burden of Proof and Presumptions*, §114 et seq.) was given added strength by coupling it with the rule permitting an adverse inference. Plaintiff, undergoing an operation for the removal of a wart from her nose, was given nitrous oxide by defendant T, the anesthetist. Defendant L, the surgeon, removed the wart. When he was cauterizing with an electric needle, an explosion occurred (apparently from contamination of the nitrous oxide), injuring the unconscious plaintiff. In this action, plaintiff relied on *res ipsa loquitur* and defendants relied on their testimony that they used due care. But defendants did not produce the nitrous oxide tank, nor did they explain why they failed to produce it, and made no showing of any chemical analysis of its contents after the accident. Also, they offered no testimony on how these tanks were kept in the hospital after receipt from the manufacturer. The jury's verdict was for defendants, and the resulting judgment was reversed: "We are constrained to the conclusion that in a *res ipsa loquitur* case where, in addition to the *prima facie* showing of negligence, it is admitted or appears without dispute that the defendant has it in his power to produce substantial evidence material to the issue of negligence but fails to do so, it must be presumed that such evidence, if produced, would have been adverse to defendant, and under such circumstances the evidence is insufficient to support a verdict for the defendant and plaintiff is entitled to a directed verdict." (31 C.2d 295; see dissenting opinion, arguing that majority changed burden of proof and imposed something close to absolute liability on members of hospital staffs; and see 22 So. Cal. L. Rev. 84, to same effect.) (See *Lewis v. Constitution Life Co. of America* (1950) 96 C.A.2d 191, 195, 215 P.2d 55; *Hays v. Viscome* (1953) 122 C.A.2d 135, 138, 264 P.2d 173; *Hagy v. Allied Chemical & Dye Corp.* (1953) 122 C.A.2d 361, 372, 265 P.2d 86; *Talbert v. Ostergaard* (1954) 129 C.A.2d 222, 231, 276 P.2d 880; *Burr v. Crellin* (1958) 159 C.A.2d 275, 279, 323 P.2d 830.)

(2) *Later Cases.* Later cases reach similar results. In *Bihun v. AT&T Information Systems* (1993) 13 C.A.4th 976, 992, 16 C.R.2d 787, an employee's action alleging sexual harassment by a senior official of her employer, the trial court instructed the jury that "If you find that defendant ... wilfully suppressed the personnel file of [the senior official], you may draw an inference that there was something damaging to defendant's case contained in that personnel file. Such an inference may be regarded by you as reflecting defendant's recognition of the strength of plaintiff's case generally and/or the weakness of its own case. The weight to be given such circumstance is a matter for your determination." *Held*, judgment for employee affirmed. Although the instruction the trial court gave goes beyond the language of BAJI, No. 2.03 and Ev.C. 413, it is a correct statement of the law. Former C.C.P. 1963(5) permitted the jury to infer that

evidence wilfully suppressed would be adverse if produced. (See *supra*, §115.) *Ev.C. 413* was not intended as a change in the law. Rather, *Ev.C. 413*, taken together with *Ev.C. 412* (*supra*, §114), restates in substance the meaning that had been given to the presumptions of former C.C.P. 1963(5). (*13 C.A.4th* 994.)

Other examples include: *Albers v. Greyhound Corp.* (1970) 4 C.A.3d 463, 475, 84 C.R. 846 [failure to preserve collapsed box that caused injury to plaintiff]; *Westinghouse Credit Corp. v. Wolfer* (1970) 10 C.A.3d 63, 69, 88 C.R. 654, citing the text [court was justified in denying defendant's motion to vacate her default on ground that her attorney totally failed to represent her; her declaration was completely silent regarding what actually occurred between her and her attorney following her rejection of settlement]; *Thor v. Boska* (1974) 38 C.A.3d 558, 565, 113 C.R. 296 [fact that defendant doctor was unable to produce original clinical record showing his treatment of plaintiff created inference of consciousness of guilt on his part; exclusion of evidence as to original records and their unavailability, based on defendant's misleading admission of negligence, was miscarriage of justice]; *Walsh v. Caidin* (1991) 232 C.A.3d 159, 165, 283 C.R. 326 [defendants in wrongful death action can ask jury to draw adverse inferences from surviving spouse's conduct in cremating decedent]; *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 C.A.3d 1220, 1246, 1 C.R.2d 301 [in action by buyers of shopping center, alleging fraud by sellers in their promise to guarantee certain leases without intention to honor guaranties, buyers' counsel could properly comment on why sellers suddenly attempted to suppress testimony of scheduled witness].

(3) *Annotations*. The following annotations collect cases discussing the presumption or inference arising from the failure to produce specified kinds of evidence or witnesses: 69 A.L.R.4th 906 [relevant medical records]; 77 A.L.R.4th 463 [examining doctor]; 78 A.L.R.4th 571 [party's attorney]; 78 A.L.R.4th 616 [occupant of vehicle involved in accident]; 79 A.L.R.4th 694 [spouse]; 79 A.L.R.4th 779 [friend]; 80 A.L.R.4th 337 [family member other than spouse]; 80 A.L.R.4th 405 [witness with employment relationship to party]; 81 A.L.R.4th 872 [law enforcement personnel]; 81 A.L.R.4th 939 [transferor, transferee, broker or other person involved in transaction at issue].

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Later Cases*. See *Karlsson v. Ford Motor Co.* (2006) 140 C.A.4th 1202, 1219, 45 C.R.3d 265 [in products liability action alleging that defendant minivan manufacturer failed to provide harness for center seat of third row, trial judge properly instructed jurors that defendant had attempted to conceal evidence and that it could consider that fact in determining what inferences to draw from evidence on technical feasibility of harness system; sanctions order did not specify what evidence defendant had concealed, but defendant's own conduct was reason for order's imprecision]. (3) *Annotations*. See 102 A.L.R.5th 99 [appropriate sanction for spoliation in products liability case]; 121 A.L.R.5th 157 [sanctions for spoliation in tort actions other than products liability cases].



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#### 3. Tort Action for Spoliation of Evidence.

##### a. Intentional.

##### 1. Spoliation by Party to Action.

#### 3 Witkin Cal. Evid. Presentation § 117

[§ 117] Spoliation by Party to Action.

(1) *Recognition of Tort in Court of Appeal.* The Court of Appeal in *Smith v. Superior Court* (1984) 151 C.A.3d 491, 496, 198 C.R. 829, recognized a new tort of intentional spoliation of evidence, holding that plaintiffs stated a cause of action against a car dealer that allegedly destroyed or lost physical evidence (automotive parts) that plaintiffs would need in a personal injury action against the dealer and others. (See *Willard v. Caterpillar* (1995) 40 C.A.4th 892, 907, 48 C.R.2d 607 [recognizing tort, but holding that it was error to submit cause of action to jury here].)

(2) *Rejection of Tort by Supreme Court.* In *Cedars-Sinai Med. Center v. Superior Court* (1998) 18 C.4th 1, 74 C.R.2d 248, 954 P.2d 511, the California Supreme Court, which had not previously heard a case concerning intentional spoliation of evidence, determined that the tort does not exist and disapproved *Smith v. Superior Court*, *supra*, and *Willard v. Caterpillar*, *supra*. Plaintiff, a child injured during birth, sued a hospital for medical malpractice. When, during the course of pretrial discovery, defendant was unable to produce certain records, including fetal monitoring strips recording plaintiff's heartbeat during labor, plaintiff amended his complaint to include a cause of action for intentional spoliation of evidence. Because a medical malpractice plaintiff may not file a complaint seeking punitive damages without a court order under C.C.P. 425.13 (see 6 *Summary* (9th), *Torts*, §1368), plaintiff then moved for leave to file a further amended complaint seeking punitive damages based on the spoliation tort. The trial judge granted the motion, and the Court of Appeal denied defendant's petition for writ relief, ruling that C.C.P. 425.13 does not apply to a claim for intentional spoliation of evidence. *Held*, a decision on the applicability of C.C.P. 425.13 would be academic and hypothetical, because the tort of intentional spoliation of evidence does not exist. (18 C.4th 7.)

(a) *Policy against creating tort remedies for litigation-related misconduct.* Recognition of the spoliation tort would conflict with the general policy against creating tort remedies for litigation-related misconduct. Underlying this policy is the need for finality of adjudication. For example, damages may not be recovered against a witness who commits perjury when testifying; a rule to the contrary would lead to unending litigation. For the same reason, there is no civil remedy for the presentation of false documentary evidence, and a final judgment may not be attacked, either directly or collaterally, on the ground that evidence has been suppressed, concealed, or falsified. " 'Endless litigation, in which nothing was ever finally determined, would be worse than occasional miscarriages of justice.' " (18 C.4th 11, quoting *Pico v. Cohn* (1891) 91 C. 129, 133, 134, 25 P. 970, 27 P. 537, 8 Cal. Proc. (4th), *Attack on Judgment in Trial Court*, §242.)

(b) *Availability of nontort remedies.* There are already numerous nontort remedies that seek to punish and deter

intentional spoliation of evidence. Chief among these is the inference that *Ev.C. 413* (see *supra*, §115) allows to be drawn against a party because of the party's wilful suppression of evidence. There are also the numerous discovery sanctions allowed by *C.C.P. 2023* (see 2 *Cal. Evidence (4th), Discovery*, §249 et seq.), as well as State Bar disciplinary sanctions that can be imposed against an attorney who participates in the spoliation of evidence. Indeed, the risk that a client's act of spoliation may suggest that his or her attorney was somehow involved encourages attorneys to take steps to ensure against spoliation. Finally, criminal penalties are available under P.C. 135 (see 2 *Cal. Crim. Law (3d), Crimes Against Governmental Authority*, §4). (18 *C.4th* 13.)

(c) *Uncertainty of harm*. A third reason why the tort should not be allowed is that the fact of harm itself is too uncertain. "[E]ven if the jury infers from the act of spoliation that the spoliated evidence was somehow unfavorable to the spoliator, there will typically be no way of telling what precisely the evidence would have shown and how much it would have weighed in the spoliation victim's favor. Without knowing the content and weight of the spoliated evidence, it would be impossible for the jury to meaningfully assess what role the missing evidence would have played in the determination of the underlying action." (18 *C.4th* 14.)

(d) *Unjustified costs of creating tort remedy*. The costs of creating a tort remedy would also be greater than can be justified. Because of the uncertainty of the fact of harm, there would be an unusually large risk of erroneous determinations. This risk, combined with the availability of punitive damages, would lead persons and entities to take extraordinary measures to preserve documents and things of no apparent value, simply because those items might turn out to have some potential relevance to future litigation. Further, if the spoliation tort were tried in a separate proceeding, there would necessarily be a duplication of effort and the risk of inconsistent results, as the jury reconsidered the evidence from the underlying action in trying to determine what effect the spoliated evidence would have had. On the other hand, if the spoliation tort were tried in the same proceeding, jury confusion would be inevitable. The spoliated evidence would play a part in jury consideration of the underlying claim, by way of the inference available under *Ev.C. 413*; but the jury's initial assessment as to whether spoliation occurred would necessarily be revisited when the spoliation claim was dealt with. (18 *C.4th* 15.)

The opinion concludes: "[W]e hold that there is no tort remedy for the intentional spoliation of evidence by a party to the cause of action to which the spoliated evidence is relevant, in cases in which, as here, the spoliation victim knows or should have known of the alleged spoliation before the trial or other decision on the merits of the underlying action. ... We do not decide here whether a tort cause of action for spoliation should be recognized in cases of 'third party' spoliation (spoliation by a nonparty to any cause of action to which the evidence is relevant) or in cases of first party spoliation in which the spoliation victim neither knows nor should have known of the spoliation until after a decision on the merits of the underlying action." (18 *C.4th* 17, 18, and footnote 4.)

One justice concurred in the judgment, arguing that because the only issue raised in the Court of Appeal related to the applicability of *C.C.P. 425.13*, the issue of the viability of a tort claim for intentional spoliation of evidence was not properly before the *Supreme Court*. (18 *C.4th* 18.) (On spoliation of electronic evidence, see *Overly on Electronic Evidence in California*, Chap. 6.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Recognition of Tort in Court of Appeal*. See 70 A.L.R.4th 984 [intentional spoliation interfering with prospective civil action]; 3 A.L.R.6th 13 [Electronic Spoliation of Evidence].

(2) *Rejection of Tort by Supreme Court*. *C.C.P. 2023*, authorizing discovery sanctions, was repealed and replaced by *C.C.P. 2023.010* et seq. in 2004 without substantive change.

See *Penn v. Prestige Stations (2000)* 83 C.A.4th 336, 342, 99 C.R.2d 602 [*Cedars-Sinai Med. Center v. Superior Court (1998)* 18 C.4th 1, 74 C.R.2d 248, 954 P.2d 511, text, p. 157, applies retroactively; "no litigant could fairly claim that the Supreme Court's unwillingness to recognize the tort was in any sense an extraordinary or unexpected departure from well-established precedent"]; *Hassoldt v. Patrick Media Group (2000)* 84 C.A.4th 153, 161, 100 C.R.2d 662

[same].

*Cross-Reference:* 6 *Summary* (10th), *Torts*, §1600. *West's Key Number Digest*, *Torts* k.13



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## 3. Tort Action for Spoliation of Evidence.

## a. Intentional.

## 2. Spoliation by Third Party.

3 *Witkin Cal. Evid. Presentation § 118*

## [§ 118] Spoliation by Third Party.

In *Temple Community Hosp. v. Superior Court* (1999) 20 C.4th 464, 84 C.R.2d 852, 976 P.2d 223, a hospital patient whose face was burned by an electrocautery tool during the course of a medical procedure brought a tort action against the hospital, two physicians, various manufacturers and distributors of medical equipment, and entities responsible for inspecting and maintaining the equipment. She also alleged that the hospital caused the loss of evidence relevant to all of her claims. The hospital moved to strike her prayer for punitive damages in connection with the spoliation claim on the ground that she had failed to comply with C.C.P. 425.13, which allows a claim for punitive damages to proceed in a medical malpractice case only after the court determines that there is a substantial probability that the plaintiff will prevail on the claim. (See 6 *Summary* (9th), *Torts*, §1368.) The trial judge denied the motion, finding C.C.P. 425.13 inapplicable to the spoliation cause of action. The Court of Appeal denied writ relief, agreeing with the trial judge that C.C.P. 425.13 did not apply. *Held*, judgment of the Court of Appeal reversed; for reasons unrelated to C.C.P. 425.13, the spoliation claim may not go forward.

(a) *Intentional spoliation tort does not exist. Cedars-Sinai Med. Center v. Superior Court* (1998) 18 C.4th 1, 74 C.R.2d 248, 954 P.2d 511, *supra*, §117, determined that the tort of intentional spoliation of evidence by a party does not exist. Therefore, the only potentially viable part of plaintiff's spoliation claim is the spoliation allegedly committed by the hospital, insofar as it may have affected her causes of action against the other defendants. (20 C.4th 469.) But for many of the same reasons outlined in the *Cedars-Sinai* case, creation of a third-party spoliation tort is not warranted. (20 C.4th 471.)

(1) *Policy against expanding tort liability for litigation-related misconduct.* Past decisions of the court have stressed the importance of encouraging parties to make their best effort to investigate and litigate their claims in a single proceeding. This goal would be undermined if a party who was disappointed in a verdict were permitted to bring a new lawsuit against a new party, claiming that the first suit would have been won but for the new party's destruction or suppression of evidence. (20 C.4th 471.)

(2) *Policy of avoiding spiralling lawsuits.* Spoliation is analogous to perjury, for which there is no tort remedy. In both cases, a party may be deprived of critical evidence or a defense, or remain uncompensated for an injury. "This potential injustice cannot be avoided, however, if we are to escape what we have identified as the greater harm of subjecting parties, witnesses, and the courts to unending litigation over the conduct and outcome of a lawsuit." (20 C.4th 473.)



(3) *Even without a tort remedy, spoliation may be exposed.* Often the spoliation will come to light in the course of the lawsuit. The third-party spoliator may not be a true stranger to the litigation. As in the present case, the spoliator's actions as a first party may be subject to exposure, so that the plaintiff will end up with the compensation to which he or she is entitled. (20 C.4th 473.) Alternatively, the spoliator may be acting at the behest of a party, in which case a negative inference may be drawn against that party, and the full panoply of discovery sanctions may become applicable. Even if the spoliator is a true stranger, the plaintiff may be able to bring the evidence of spoliation before the jury in order to rebut any contention that the plaintiff's failure to produce the evidence should result in an inference adverse to his or her cause of action. (20 C.4th 474.)

(4) *Uncertain damage.* As with first-party spoliation, both the fact of injury and the element of causation might be very difficult to prove. (20 C.4th 474.) In some cases, it could even be difficult to determine which party was damaged most by the spoliation. (20 C.4th 474, 475.)

(5) *Burdens and costs of recognizing a tort remedy.* Recognizing the tort of third-party spoliation would entail the same disadvantages and dangers identified in the *Cedars-Sinai* case: jury confusion, the potential for abuse in bringing the action, inaccurate and arbitrary verdicts, and the obvious burden on the judicial system, litigants, and witnesses. Further, the class of potential plaintiffs and defendants would be greatly expanded: either party could become a third-party spoliation victim, and the number of potential defendants would not be limited to the number of parties. "We believe the broad threat of potential liability, including that for punitive damages, might well cause numerous persons and enterprises to undertake wasteful and unnecessary record and retention practices." (20 C.4th 476.)

(b) *Third-party spoliation victim has other remedies.* Although the negative inference of *Ev.C. 413* (see supra, §115) is not applicable where the spoliation is not by a party, the third-party spoliation victim is not entirely helpless. "Some discovery sanctions are available to punish third party spoliation, including monetary and contempt sanctions against persons who flout the discovery process by suppressing or destroying evidence. ... A criminal sanction remains available under *Penal Code section 135*, as are disciplinary sanctions against attorneys who may be involved in spoliation. As we have pointed out, the victim of third party spoliation may deflect the impact of the spoliation on his or her case by demonstrating why the spoliated evidence is missing. ... It also may be possible to establish a connection between the spoliator and a party to the litigation sufficient to invoke the sanctions applicable to spoliation by a party. ... We do not believe that the distinction between sanctions available to victims of first party and third party spoliation should lead us to employ the burdensome and inaccurate instrument of derivative tort litigation in the case of third party spoliation." (20 C.4th 476, 477.)

One justice concurred, pointing out, as he did in the *Cedars-Sinai* case, that the question whether the tort exists was raised for the first time in the petition for review and thus should not have been reached. But: "I recognize that this argument was rejected by a majority of the court in *Cedars-Sinai* for reasons which, if persuasive there, apply with equal force here. To withhold my vote on the merits in the present case would thus serve little purpose." (20 C.4th 480.)

Three justices dissented, arguing in favor of a narrowly drawn tort remedy because "[t]here are no strong and effective nontort remedies that would significantly deter third party spoliation, or that would compensate the victim for the loss caused by the spoliation." (20 C.4th 489.) (See 46 U.C.L.A. L. Rev. 631 [argument for recognizing tort liability for spoliation only in "rare case" of intentional spoliation by third party].)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*Cross-Reference:* 6 Summary (10th), Torts, §1600.



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- 3. Tort Action for Spoliation of Evidence.
  - b. Negligent.

3 Witkin Cal. Evid. Presentation § 119

[§ 119] Negligent.

(1) *Before Cedars-Sinai Case.* Before the California Supreme Court in *Cedars-Sinai Med. Center v. Superior Court* (1998) 18 C.4th 1, 74 C.R.2d 248, 954 P.2d 511, disapproved *Smith v. Superior Court* (1984) 151 C.A.3d 491, 198 C.R. 829 (see supra, §117), the reasoning in *Smith* was applied to hold that a cause of action may be stated for negligent destruction of evidence. In *Velasco v. Commercial Bldg. Maintenance Co.* (1985) 169 C.A.3d 874, 877, 215 C.R. 504, the tort was recognized, but the pleading was held insufficient. Plaintiffs were injured by an exploding bottle. They alleged that they took the fragments of the bottle to an attorney, who put them in a paper bag which he left on top of his desk; and that employees of defendant maintenance company negligently disposed of them while cleaning the attorney's office. However, the complaint did not allege that the bag was marked to designate its contents, and this was a fatal defect:

"A reasonably thoughtful maintenance employee should not be expected to believe that he or she would destroy valuable evidence which might decrease a client's chance of recovery in a product liability action when that employee sees on an attorney's desk an unlabeled bag containing a broken bottle. On the contrary, a reasonably thoughtful janitor is entitled to assume that, if an item that seemed to be garbage were actually evidence, its container would be appropriately marked and, quite likely, not left lying about. Absent such a designation, it is reasonable for a maintenance person who sees a bag containing a broken bottle in the course of cleaning an office to remove it in much the same way as he or she would throw away the remains of a mid-morning coffee break. No important policy would be furthered by a holding that maintenance workers have a duty not to throw away what appears to be trash simply because such objects are located in an attorney's office. If loss of evidence dealt with in the manner herein described should have been foreseeable, that loss should have been foreseen by the attorney, not by respondent." (169 C.A.3d 878.) (See *Augusta v. United Service Auto. Assn.* (1993) 13 C.A.4th 4, 10, 16 C.R.2d 400 [2-year limitations period for obligation or liability not founded on written instrument (C.C.P. 339(1)) is applicable]; *Gomez v. Acquistapace* (1996) 50 C.A.4th 740, 748, 57 C.R.2d 821 [widow's claim for negligent spoliation against employer of her deceased husband was not barred by exclusive remedy rule of worker's compensation scheme]; *Dunham v. Condor Ins. Co.* (1997) 57 C.A.4th 24, 27, 66 C.R.2d 747 [where insureds were sued for injuries arising from automobile accident, their insurer had no duty to preserve for plaintiff's use evidence that was in insured's possession, absent specific request from plaintiffs to do so]; 41 *Hastings L. J.* 1077 [tort of negligent spoliation of evidence as means of avoiding "suit within a suit" requirement of legal malpractice actions].)

(2) *After Cedars-Sinai Case.* The California Supreme Court in *Cedars-Sinai* did not address whether negligent

spoliation of evidence remains a viable cause of action. After *Cedars-Sinai*, the Court of Appeal, in *Johnson v. United Services Auto. Assn.* (1998) 67 C.A.4th 626, 79 C.R.2d 234, chose to "adhere to prior precedent and confirm there is a limited cause of action for negligent spoliation of evidence by a third party spoliator." (67 C.A.4th 629.)

In *Johnson*, plaintiff, a passenger in the family car, was ejected from the car during an accident and sustained brain damage. Adjusters for defendant insurer noted shortly after the accident that "[t]he shoulder strap of the front passenger seat was torn from its housing, which explains why [plaintiff] was ejected from the insureds' vehicle." Also around that time, a police report received by defendant and a statement from plaintiff's father apparently identified a malfunction in the seat belt. Defendant's adjuster also noted that plaintiff had an attorney, wanted to sue the car's manufacturer, and wanted to look at the car. Plaintiff's counsel then had the car inspected by an accident reconstruction expert who removed a portion of the seat belt to preserve it as evidence. Defendant subsequently transferred title of the car to salvage, and the car was sold. Thus, the car was unavailable as evidence when plaintiff later sued the car manufacturer for product liability. After the manufacturer and plaintiff settled the product liability action for \$ 500,000, plaintiff sued defendant for negligent spoliation of evidence, claiming that had the car been preserved, plaintiff's product liability claim against the manufacturer would have been worth more. The trial judge instructed the jury that plaintiff could not prevail on his claim unless the jury found either that defendant agreed to preserve plaintiff's car, that plaintiff specifically requested defendant to preserve the car, or that defendant undertook responsibility for preserving the car and plaintiff relied to his detriment on that undertaking. The jury found for defendant. *Held*, judgment affirmed.

(a) *Cedars-Sinai* does not foreclose a cause of action for third party negligent spoliation. Three concerns prompted the conclusion in *Cedars-Sinai*: (1) a tort remedy for first-party intentional spoliation would run counter to the policy against creating derivative, litigation-engendering tort remedies for litigation-related misconduct; (2) there are sufficient existing nontort remedies for first-party spoliation, particularly within the underlying litigation itself (for example, sanctions or evidentiary inferences against the first-party spoliator); and (3) the fact of harm in spoliation cases is uncertain, and the costs related to those cases are significant, such as inaccuracy, confusion, and duplication in the judicial process, as well as the costs of preservation. (67 C.A.4th 631.) "Of these three concerns, the first two basically are not implicated in the third party spoliation context. The third concern is implicated in that context, however. A similar uncertainty of the fact of harm, though, has been addressed in the prospective economic advantage arena ... and the costs of preservation can be placed on the person seeking preservation." (67 C.A.4th 632.)

(b) The trial judge's instruction correctly indicated the three situations in which a duty can be created in a third-party negligent spoliation of evidence case. In addition, a duty may also be based on some other contractual foundation, or on a statute, a regulation, or some analogous special relationship. Constructive notice of a need to preserve, however, is not enough to create a duty to preserve in this context. (67 C.A.4th 635.) Consequently, the fact that defendant knew (or should have known) that there was a seat belt malfunction, coupled with the notice to defendant that the plaintiff had an attorney, that plaintiff wanted to sue the seat belt manufacturer, and that he wanted his attorney or representative to look at the car, did not create a duty to preserve the car. (67 C.A.4th 636.)

(c) The "specific request" duty basis requires that such a request be accompanied by an offer to pay the cost or otherwise bear the burden of preserving. "We do not think a tort duty to preserve should be created simply by someone specifically requesting a third party to preserve something. Preservation may entail significant burdens. ... Formally adding this condition to the 'specific request' duty basis gives the alleged third party spoliator 'some say' and control in the matter, similar to what the spoliator has in the 'agreement' and the 'undertaking' duty contexts. This condition also places the burden of preservation rightfully where it belongs--on the person or entity requesting preservation." Defendant here had no duty to preserve plaintiff's car. (67 C.A.4th 638.)

The California Supreme Court in *Temple Community Hosp. v. Superior Court* (1999) 20 C.4th 464, 471, footnote 3, 84 C.R.2d 852, 976 P.2d 223, *supra*, §118, declined to determine whether the tort of negligent spoliation still exists or to discuss *Johnson*, *supra*.

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *After Cedars-Sinai Case.* The same policy considerations that led the California Supreme Court in *Cedars-Sinai Med. Center v. Superior Court* (1998) 18 C.4th 1, 74 C.R.2d 248, 954 P.2d 511, text, §117, and *Temple Community Hosp. v. Superior Court* (1999) 20 C.4th 464, 84 C.R.2d 852, 976 P.2d 223, text, §118, to determine that the tort of intentional spoliation of evidence should not be recognized apply with equal force to negligent spoliation. "Moreover, it would be anomalous to impose liability for negligence with respect to conduct that would not give rise to liability if committed intentionally." (*Coprish v. Superior Court* (2000) 80 C.A.4th 1081, 1088, 1089, 1091, 95 C.R.2d 884 [conclusions of *Johnson v. United Services Auto. Assn.* (1998) 67 C.A.4th 626, 79 C.R.2d 234, text, p. 163, which was decided prior to *Temple Community Hosp.*, run contrary to Supreme Court's reasoning in that case]; see *Farmers Ins. Exchange v. Superior Court* (2000) 79 C.A.4th 1400, 1406, 1407, 95 C.R.2d 51 [no negligent spoliation tort exists]; *Lueter v. California* (2002) 94 C.A.4th 1285, 1295, 115 C.R.2d 68 [same].)



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## CHAPTER XI - Presentation At Trial

## V. DETERMINATION OF CREDIBILITY AND WEIGHT

## D. Evidence Suppressed in Civil Cases.

## 4. Justifiable Failure To Produce.

3 *Witkin Cal. Evid. Presentation* § 120

[§ 120] Justifiable Failure To Produce.

The mere failure to produce all potential witnesses is not equivalent to a suppression of evidence. There is no general obligation to call every person with knowledge of the facts in controversy, and experienced counsel exercise care in their selection. Where the witness is deemed unreliable, or his or her testimony would be merely cumulative, or if he or she is available to either side, no unfavorable inference should be drawn from failure to call the witness. (See *Davis v. Franson* (1956) 141 C.A.2d 263, 270, 296 P.2d 600; *Provencio v. Merrick* (1970) 5 C.A.3d 39, 41, 42, 84 C.R. 882 [personal injury action; police officer did not observe accident but merely investigated it, and was as available to plaintiff as to defendants]; *Neumann v. Bishop* (1976) 59 C.A.3d 451, 481, 130 C.R. 786 [no showing that persons not called were prepared and qualified to testify to any fact in issue]; 2 Wigmore (Chadbourn Rev.) §287.)

In *Davis v. Franson*, *supra*, a personal injury action, defendant testified to no recollection of the circumstances and relied on the former presumption of due care (1 *Cal. Evidence* (4th), *Burden of Proof and Presumptions*, §15). *Held*, judgment for defendant affirmed despite his failure to call his guest to the stand. The latter being available to either side, there was no wilful suppression. "Counsel for a party to a civil action has not only the right but the duty to exercise discrimination in selecting the witnesses for whom his client vouches. Assuming, of course, his honesty and good faith, an attorney may not believe the account of such a potential witness, or may think that he is inaccurate or prejudiced or otherwise disqualified to testify." (141 C.A.2d 270.)

Obviously, a plaintiff cannot claim suppression by a defendant or recover judgment based on the defendant's failure to produce evidence unless the plaintiff meets the burden of proving a prima facie case. (See *Vaughn v. Coccimiglio* (1966) 241 C.A.2d 676, 678, 50 C.R. 876.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER XI - Presentation At Trial

### V. DETERMINATION OF CREDIBILITY AND WEIGHT

#### E. Evidence Suppressed in Criminal Cases.

##### 1. Suppression by Prosecution.

##### a. General Duty To Disclose.

3 Witkin Cal. Evid. Presentation § 121

[§ 121] General Duty To Disclose.

(1) *General Rule.* Where the prosecution suppresses evidence favorable to an accused, much more than an inference is involved: Intentional suppression of material evidence is a denial of due process. (See *Brady v. Maryland* (1963) 373 U.S. 83, 83 S.Ct. 1194, 1196, 10 L.Ed.2d 215, 218.) Moreover, even the negligent or inadvertent suppression of material evidence may result in denial of a fair trial and constitute reversible error. (*People v. Westmoreland* (1976) 58 C.A.3d 32, 45, 129 C.R. 554; see *Giglio v. United States* (1972) 405 U.S. 150, 92 S.Ct. 763, 766, 31 L.Ed.2d 104, 109 [prosecution witness concealed assistant prosecutor's promise that he could avoid prosecution by testifying; whether nondisclosure by different assistant resulted from negligence or design, promise had to be attributed to government and jury was entitled to know of it].) (See generally 77 Harv. L. Rev. 1528 [failure to disclose psychiatric opinion favorable to accused]; 51 Stanf. L. Rev. 567 [discussion of "discovery waivers," in which defendants waive right to additional discovery of potentially favorable evidence as part of plea bargain]; 79 A.L.R.4th 694 [presumption or inference arising from failure to produce or examine spouse]; 80 A.L.R.4th 337 [presumption or inference arising from failure to produce or examine family member other than spouse]; 80 A.L.R.4th 405 [presumption or inference arising from party's failure to produce or examine witness with employment relationship to party]; 80 A.L.R.4th 547 [presumption or inference arising from failure to produce or examine informant]; 81 A.L.R.4th 872 [presumption or inference arising from state's failure to produce or examine law enforcement personnel].)

(2) *Requirement of Materiality.* There is no rule requiring reversal on all occasions when relevant evidence is withheld; the defendant must make a showing of substantial materiality. "The prosecution does not have to risk reversal simply because a complete accounting of all conceivably exculpatory evidence is not made." (*People v. Ruthford* (1975) 14 C.3d 399, 409, 121 C.R. 261, 534 P.2d 1341; 4 Hastings Const. L. Q. 715 [Ruthford]; 6 Golden Gate L. Rev. 851 [Ruthford].) The prosecution's duty of disclosure applies only to evidence that is both *favorable to the defendant* and *material on either guilt or punishment*. (*In re Sassounian* (1995) 9 C.4th 535, 543, 37 C.R.2d 446, 887 P.2d 527, *infra*, §123; and see generally *In re Ferguson* (1971) 5 C.3d 525, 96 C.R. 594, 487 P.2d 1234, *infra*, §134; 7 U.S.F. L. Rev. 348 [development of prosecutorial duty to disclose in California]; 34 A.L.R.3d 16 [suppression of evidence as grounds for vitiating criminal conviction]; 5 Cal. Crim. Law (3d), Criminal Trial, §551.)

(3) *Effect of Nondisclosure.* In *United States v. Agurs* (1976) 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342, defendant was convicted of second degree murder for stabbing her victim to death in a motel room. On a motion for new trial, defendant contended that the prosecutor failed to disclose the victim's prior criminal record, which would have been evidence of his violent character. The prosecution opposed the motion on the primary ground that there was no duty to

tender the record in the absence of an appropriate request. *Held*, the prosecution's conduct did not deprive defendant of a fair trial under the Due Process Clause of the Fifth Amendment.

(a) Cases where material was known to the prosecution but unknown to the defense fall into three general categories. First, where the prosecution's case included perjured testimony and the prosecutor knew or should have known that fact; a strict standard of materiality applies because these cases involve a corruption of the truth-seeking function of the trial process. Second, where defense counsel made a pretrial request for specific evidence, but did not receive it; failure to make a response is seldom, if ever, excusable. Third, where exculpatory information in the prosecutor's possession was unknown to defense counsel, who made no request for material or made only a general request; that category includes the present case. (96 S.Ct. 2397, 49 L.Ed.2d 349.)

(b) In advance of trial and sometimes during trial, the prosecutor must decide what, if anything, to submit voluntarily to defense counsel. After trial, a judge may have to determine whether nondisclosure deprived the defendant of due process. "Logically the same standard must apply at both times. For unless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside; and absent a constitutional violation, there was no breach of the prosecutor's constitutional duty to disclose." (96 S.Ct. 2399, 49 L.Ed.2d 352.) But there is a significant practical difference between the pretrial and post-trial decisions. "If everything that might influence a jury must be disclosed, the only way a prosecutor could discharge his constitutional duty would be to allow complete discovery of his files as a matter of routine practice. ... The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." (96 S.Ct. 2400, 49 L.Ed.2d 353.)

(c) The constitutional obligation is not measured by the prosecutor's moral culpability or wilfulness. "If evidence highly probative of innocence is in his file, he should be presumed to recognize its significance even if he has actually overlooked it. ... Conversely, if evidence actually has no probative significance at all, no purpose would be served by requiring a new trial simply because an inept prosecutor incorrectly believed he was suppressing a fact that would be vital to the defense. If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." (96 S.Ct. 2400, 49 L.Ed.2d 353.)

(d) For evidence that was available to the prosecutor but not submitted to the defense, the defendant should not have to satisfy the severe burden of demonstrating that the newly discovered evidence probably would have resulted in acquittal. If the standard for newly discovered evidence from the prosecutor were the same as from a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice. But not every nondisclosure is error. "[I]f the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." (96 S.Ct. 2401, 49 L.Ed.2d 355.) (See 94 Harv. L. Rev. 887 [prosecutor's duty to disclose promises of favorable treatment made to prosecution witnesses; criticism of *Agurs* standards]; 4 *Pepperdine L. Rev.* 435 [*Agurs* impact on prosecutorial disclosure].)

(4) *Duty To Disclose After Trial*. The prosecutor's duty to disclose material exculpatory evidence extends to evidence that may reflect on the credibility of a material witness, and the duty does not end when the trial is over. (*People v. Garcia* (1993) 17 C.A.4th 1169, 1179, 1183, 22 C.R.2d 545 [at time of negotiating stipulated partial reversal, prosecutor improperly withheld exculpatory evidence as to credibility of prosecution's accident reconstruction expert].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *General Rule*. See 33 *McGeorge L. Rev.* 643 [*Brady v. Maryland*]; 158 A.L.R. Fed 401 [federal prosecutor's duty under *Brady v. Maryland*]; 93 A.L.R.5th 527 [failure to disclose exculpatory photographic evidence]; 94 A.L.R.5th 393 [failure to disclose fingerprint evidence]; 95 A.L.R.5th 611 [failure to disclose exculpatory ballistic evidence]; 101 A.L.R.5th 187 [failure to disclose exculpatory medical reports or tests]; 102 A.L.R.5th 327 [failure to disclose victim's

pretrial statement]; 24 A.L.R.6th 1 [failure to disclose exculpatory tape-recorded evidence].(1a) *(New) Distinction: Rule Inapplicable at Plea Agreement Stage.* The prosecution is not constitutionally required to disclose material impeachment evidence prior to entering into a plea agreement with a criminal defendant. (*United States v. Ruiz* (2002) 536 U.S. 622, 122 S.Ct. 2450, 2457, 153 L.Ed.2d 586, 597.)

(1b) *(New) Distinction: Doubts About Validity of Expert Witness' Testimony.* In *People v. Seaton* (2001) 26 C.4th 598, 110 C.R.2d 441, 28 P.3d 175, a capital murder trial, a pathologist testified for the prosecution during the guilt phase. After the jury returned a guilty verdict, the district attorney's office gave defendant three internal memoranda critical of the witness. One of them was by the prosecutor in this case, and the other two concerned his testimony in other cases. *Held*, the prosecutor did not engage in misconduct in relying on the witness' testimony in his closing argument, and did not have a duty to disclose the information in the memoranda that was critical of the witness. A prosecutor's personal doubts about a theory expounded by an expert witness are not a form of impeaching evidence that must be disclosed to the defendant. If the prosecution becomes aware of information casting doubt on the accuracy of the testimony of one of its expert witnesses, it must disclose that evidence if it is material. In this case, however, there was nothing to suggest that the prosecutor was aware of any such information before trial. His doubts arose after he heard the conflicting testimony of a defense witness. (26 C.4th 649.) As to the memoranda concerning other cases, the criticisms contained in them were not material. They concerned the witness' accuracy as to factual observations, but defendant did not object to the witness' factual testimony in his case, only to the conclusions he drew from those facts. (26 C.4th 648, 649.) (See *People v. Morales* (2003) 112 C.A.4th 1176, 1196, 5 C.R.3d 615 [in murder case in which defendant testified that he was in bedroom selling drugs when murder occurred on front porch, and in which one prosecution witness testified, contrary to all other witnesses, that there was no drug sale, prosecutor did not knowingly use false testimony in violation of defendant's right to due process, where, in closing argument, he stated personal belief that witness was lying, and defendant was unable to demonstrate that witness' testimony was in fact false; relying on *Seaton*].)

(2) *Requirement of Materiality.* See *People v. Ashraf* (2007) 151 C.A.4th 1205, 1212, 60 C.R.3d 624 [trial judge erred in dismissing criminal prosecution on ground that prosecution had failed to disclose certain witness statements that it had never had in its possession; it was not certain that statements even existed, and, if they did, they apparently concerned defendant's ties to foreign terrorist group, and thus there was no basis for conclusion that statements were material and favorable].*West's Key Number Digest*, Criminal Law k.662.4, 700(2) et seq.





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## CHAPTER XI - Presentation At Trial

### V. DETERMINATION OF CREDIBILITY AND WEIGHT

#### E. Evidence Suppressed in Criminal Cases.

##### 1. Suppression by Prosecution.

##### b. Reversible Error.

3 Witkin Cal. Evid. Presentation § 122

[§ 122] Reversible Error.

In *People v. Ruthford* (1975) 14 C.3d 399, 121 C.R. 261, 534 P.2d 1341, the prosecution secretly made arrangements for lenient treatment of a witness' wife in an unrelated case if the witness testified against defendant. Defendant denied participation in the crime and presented an alibi defense, and the case was closely balanced. *Held*, suppression of the evidence that the key prosecution witness had a motive to lie was reversible error under the harmless-beyond-a-reasonable-doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (6 Cal. Crim. Law (3d), *Reversible Error*, §10). (14 C.3d 408.) (But see *In re Sassounian* (1995) 9 C.4th 535, 545, footnote 7, 37 C.R.2d 446, 887 P.2d 527, *infra*, §123 [disapproving use of harmless error analysis in *Ruthford*].)

In *re Brown* (1998) 17 C.4th 873, 72 C.R.2d 698, 952 P.2d 715, was a capital murder case in which defendant did not deny shooting the victim, a police officer, but asserted a defense of diminished capacity, claiming that he was under the influence of methamphetamine at the time of the killing. The prosecution rebutted this claim with blood test results that showed the absence of any drug. A laboratory worksheet, however, never forwarded to the prosecutor, revealed that a preliminary test had shown the presence of phencyclidine. *Held*, reversed; defendant was denied a fair trial.

(a) The crime laboratory's failure to apprise the prosecution of the worksheet did not relieve the prosecutor of his obligation to review the laboratory's files for exculpatory evidence. He was ultimately responsible when the defense did not receive a copy. "Any other rule would leave the defendant's due process rights to the fortuity of a subordinate agency's procedural protocol, which the Supreme Court has squarely rejected." (17 C.4th 880, 881.)

(b) A reviewing court's determination as to whether the undisclosed evidence was material in the constitutional sense rests on principles articulated in *United States v. Bagley* (1985) 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481: (1) Only a "reasonable probability" of a different result is required; (2) the defendant need not demonstrate that, after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict; (3) once constitutional error is found, there is no need for further harmless error review, because one test subsumes the other; (4) although the importance of the undisclosed evidence is evaluated item by item, its cumulative effect must be considered collectively; and (5) the reviewing court may consider any adverse effect that the failure to disclose may have had on the preparation or presentation of the defendant's case, which might have taken a different course if the error had not occurred. (17 C.4th 886, 887.)

(c) Here, although defendant claimed methamphetamine intoxication, defense counsel indicated that the positive phencyclidine results would have refocused their defense on intoxication of that sort, especially because defendant had

an extensive history of drug abuse, including phencyclidine. Any rebuttal evidence presented by the prosecution could have been countered with expert testimony indicating that the differing test outcomes were not necessarily incompatible. Thus the result could have been a battle of experts, with significant points of agreement between the two sides. The prosecution does not dispute the conclusion that defendant could have presented a credible diminished capacity defense along these lines, and it makes no claim that the phencyclidine results would have been inadmissible. "On this record, we conclude the positive ... finding was material. ... As outlined above, this 'favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.' " (17 C.4th 889, 891, quoting *Kyles v. Whitley* (1995) 514 U.S. 419, 115 S.Ct. 1555, 1566, 131 L.Ed.2d 490, 506.)

In *People v. Westmoreland* (1976) 58 C.A.3d 32, 129 C.R. 554, the prosecutor knew that a prosecution witness' negative answer to the question of whether he had been given the chance to plead guilty to a lesser offense was false. But the prosecutor kept silent and foreclosed further defense inquiry into the matter. *Held*, the prosecutor's omission was a failure to disclose material evidence about the credibility of a key prosecution witness and was prejudicial. The witness was an eyewitness whose idea of the truth was the ability to tell the same story more than once. (58 C.A.3d 45.) Even though the prosecutor's failure to clarify the misleading testimony might have been inadvertent, the result was improper. "Where, as here, two or more persons are accused, and then charged, of complicity in the same offense, and where the district attorney plans to call one of them as a prosecution witness, he must disclose to all other defendants any offer he has made to the prospective witness concerning a plea of guilty to a lesser offense, or other lenient treatment, regardless of his reasons for making the offer. The district attorney also must disclose to all defendants any discussions he may have had with the potential witness as to the possibility of leniency in exchange for favorable testimony even though no offer actually was made or accepted. Second, the district attorney must correct any false or misleading testimony that he knows a prosecution witness has created as to discussions or offers of leniency, or other inducements for testifying, regardless as to whether he has any affirmative part in creating the false or misleading impressions." (58 C.A.3d 46.)

In *People v. Filson* (1994) 22 C.A.4th 1841, 28 C.R.2d 335, a prosecution charging three counts of sexual molestation of two minors, defendant contended that he was too intoxicated to form the requisite specific intent. The prosecutor asked for a ruling that defense counsel could not ask witnesses whether defendant had made a statement to them. The trial judge granted this request, and he allowed his ruling to stand, even after defense counsel told him about a tape-recorded statement made by defendant shortly after his arrest, which the prosecution had not previously disclosed. The prosecution presented the testimony of the arresting officer regarding defendant's mental state at the time of arrest, the defense presented no evidence, and defendant was convicted of one count of the charged offense. *Held*, reversed.

(a) Defense counsel clearly demonstrated that the taped statement could have been favorable to the defense by impeaching the arresting officer's testimony regarding the extent of defendant's intoxication. The statement met the test for material evidence, the prosecutor had a duty under the Due Process Clause to disclose it to the defense, even in the absence of a request, and the trial judge erred in failing to order the prosecutor to produce it. (22 C.A.4th 1848, 1849.)

(b) Although the trial judge may exclude probative evidence under *Ev.C. 352* (see 1 *Cal. Evidence* (4th), *Circumstantial Evidence*, §17), neither ground asserted by the prosecutor justified exclusion. The tape could not have been deemed cumulative at the time it was excluded: the arresting officer had not yet testified, so there was no other evidence to which the recording could be cumulative. As to the danger of prejudice, nothing suggested that the tape would arouse the emotions of the jurors or be used in some unwarranted manner, and any collateral misuse could be minimized by editing, a limiting instruction, or argument by the prosecution concerning its evidentiary weight. (22 C.A.4th 1850, 1851.)

(c) The trial judge's erroneous rulings were not harmless. "The jury deliberated long and hard, troubled (as evidenced by its request for additional instructions) by the matter of defendant's intent, the very issue the defense would have developed but for the trial court's rulings. After deliberating longer than the evidentiary phase of the trial, the jury was able to reach a verdict on only one of the three charges against defendant. Clearly, the scope for doubt and

misgivings is substantial." (22 C.A.4th 1852.)

Numerous other cases have resulted in reversal due to prosecutorial suppression of evidence. (See *DeMarco v. United States* (1974) 415 U.S. 449, 94 S.Ct. 1185, 39 L.Ed.2d 501, 503 [if witness had lied about prosecutor's promise before his testimony, defendant's conviction should be reversed, but trial court is appropriate forum to make that determination]; *Kyles v. Whitley* (1995) 514 U.S. 419, 115 S.Ct. 1555, 1569, 131 L.Ed.2d 490, 510 [prosecution's nondisclosure of several items of evidence favorable to defendant necessitated new trial, where net effect of evidence raised reasonable probability that its disclosure would have produced different result at trial]; *People v. Kiihoa* (1960) 53 C.2d 748, 752, 3 C.R. 1, 349 P.2d 673, 2 Cal. Evidence (4th), Witnesses, §329 [delaying prosecution for 5 months until informer had left state and become immune to process was denial of due process]; *People v. Shaparnis* (1983) 147 C.A.3d 190, 196, 195 C.R. 39 [failure to disclose report containing correct name, birthdate, Social Security number and whereabouts of witness who had given police officers reason to believe that he knew who killed victim]; *People v. Kasim* (1997) 56 C.A.4th 1360, 1379, 1384, 66 C.R.2d 494, 5 Cal. Crim. Law (3d), Criminal Trial, §551 [whether intentional or inadvertent, prosecution's failure to disclose that key witnesses received benefits for testifying and had been government informers in past, and that they testified falsely about these matters, necessitated vacation of conviction, because there was reasonable probability jury's judgment was affected; following *Ruthford*, supra]; *In re Pratt* (1999) 69 C.A.4th 1294, 1315, 82 C.R.2d 260 [habeas corpus was properly granted after prosecution failed to disclose that key witness, who testified that defendant had confessed crime to him, had been police informant; evidence was favorable and material because it could have been used to undermine credibility of witness whose testimony was crucial to conviction].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Banks v. Dretke* (2004) 540 U.S. 668, 124 S.Ct. 1256, 1276, 157 L.Ed.2d 1166, 1194, 5 Cal. Crim. Law (3d), Criminal Trial, Supp., §551 [defendant, convicted of capital murder, was entitled to habeas corpus relief where prosecution failed to disclose that prosecution witness was paid police informant]; *People v. Martinez* (2002) 103 C.A.4th 1071, 1080, 1081, 127 C.R.2d 305 [in prosecution for embezzlement, prosecution's failure to disclose that witness had three felony convictions and pending charge of spousal abuse violated defendant's right to due process, where witness represented business that was allegedly embezzled and defendant argued at trial that witness was real culprit]; *Abatti v. Superior Court* (2003) 112 C.A.4th 39, 59, 4 C.R.3d 767 [in assault prosecution, personnel records sought by defendant concerning police officer whom prosecution was planning to call were both favorable and material within meaning of *Brady v. Maryland* (1963) 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215, text, §121, and thus trial judge abused discretion in denying discovery motion; because officer's testimony would be that defendant admitted he was at crime scene, evidence impeaching officer could mean difference between finding of guilt or innocence]; *People v. Johnson* (2006) 142 C.A.4th 776, 782, 786, 48 C.R.3d 439 [on retrial of capital murder case, reversible error resulted from prosecution's failure to disclose police reports that indicated possible involvement of prosecution's sole eyewitness in shooting at convenience store, which occurred before retrial began; withholding of reports denied defendant opportunity to impeach witness with his conduct during shooting and his lies to police afterward, and to cross-examine expert about gang implications of witness' involvement in shooting]; *In re Sodersten* (2007) 146 C.A.4th 1163, 1228, 53 C.R.3d 572 [in murder prosecution, tape-recorded statements that prosecution failed to disclose and that could have been used to impeach two witnesses were material within meaning of *United States v. Bagley* (1985) 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481, text, p. 169; no physical evidence linked defendant to murder, and prosecution's case rested largely on testimony of those two witnesses, who were only persons to directly identify defendant as victim's attacker and killer].



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## CHAPTER XI - Presentation At Trial

### V. DETERMINATION OF CREDIBILITY AND WEIGHT

#### E. Evidence Suppressed in Criminal Cases.

##### 1. Suppression by Prosecution.

##### c. Not Reversible Error.

#### 3 Witkin Cal. Evid. Presentation § 123

[§ 123] Not Reversible Error.

In *People v. Wright* (1985) 39 C.3d 576, 217 C.R. 212, 703 P.2d 1106, a first degree murder case, defendant sought a dismissal and mistrial on the ground that the prosecution suppressed police reports of interviews with the widow of the victim, which could have been used to impeach her testimony at the trial. In upholding the trial judge's denial of the motions, the court explained its reasons for concluding that defendant was not deprived of a fair trial:

(a) The failure to make the police reports available was inadvertent. Local practice called for forwarding all such reports to the district attorney, who would make them available to defense counsel, and the failure was due to an oversight by the officer. (39 C.3d 590.)

(b) In the usual case, suppression is not discovered until the trial is over and a verdict is reached. Here, defendant discovered the missing evidence before jury deliberations had begun, and the trial judge explained the situation to the jury and allowed defense counsel to reopen his case to present the additional evidence. This was an appropriate procedure to remedy the error, and the trial judge properly concluded that the circumstances did not warrant the sanctions of dismissal or mistrial. (39 C.3d 590, 591.)

In *re Sassounian* (1995) 9 C.4th 535, 37 C.R.2d 446, 887 P.2d 527, involved a claim that the prosecution, in a murder case, failed to disclose evidence that could have been used to impeach a prosecution witness. The Supreme Court's decision denying habeas corpus relief clarified California law on this issue in two respects:

(a) The prosecution's duty of disclosure applies only to evidence that is both *favorable to the defendant* and *material on either guilt or punishment*. This is what federal constitutional law requires, and to the extent California cases have construed the Due Process Clause more broadly, they are erroneous. Further, evidence is material only if there is a reasonable probability that, had it been disclosed, the result would have been different. (9 C.4th 543, footnote 5, citing *United States v. Bagley* (1985) 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481, and disapproving *People v. Morris* (1988) 46 C.3d 1, 249 C.R. 119, 756 P.2d 843.)

(b) The harmless error analysis of *Chapman v. California* (1967) 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705, with its harmless-beyond-a-reasonable-doubt standard, is inapplicable. Rather, if defendant demonstrates that the evidence was both favorable to him and material, he has necessarily established prejudice. (9 C.4th 545, footnote 7, disapproving *People v. Ruthford* (1975) 14 C.3d 399, 121 C.R. 261, 534 P.2d 1341, supra, §122, and its progeny to extent they found harmless error analysis to be implicated.)

Here, defendant's claim fails because he cannot establish materiality. At best, the impeachment evidence he claims should have been disclosed would have rendered the prosecution witness' testimony a nullity. But in light of the overwhelming evidence against defendant, it is not reasonably probable a different result would have been obtained even if this witness' testimony had been entirely absent. (9 C.4th 550.)

Other cases in which the prosecutor's failure to disclose evidence was not sufficient to require reversal of the defendant's conviction include the following: *Wood v. Bartholomew* (1995) 516 U.S. 1, 116 S.Ct. 7, 10, 11, 133 L.Ed.2d 1, 7, 8 [reversal of murder conviction was not warranted on basis of prosecution's failure to disclose results of polygraph examination of prosecution witness, where results would not have been admissible at trial, defendant's counsel admitted disclosure would not have changed his cross-examination of witness, and evidence of guilt was overwhelming]; *Strickler v. Greene* (1999) 527 U.S. 263, 119 S.Ct. 1936, 1952, 144 L.Ed.2d 286, 307 [prosecution's failure to disclose materials in police files that cast serious doubt on significant portions of witness' testimony was not prejudicial; other evidence strongly supported conclusion that accused would have been convicted of capital murder and sentenced to death even if witness had been severely impeached or if her testimony had been excluded entirely]; *People v. Padilla* (1995) 11 C.4th 891, 929, 47 C.R.2d 426, 906 P.2d 388 [minor inaccuracies in prosecution witness' testimony relating to his past convictions, which defendant claimed prosecution had duty to correct, were not material; citing *In re Sassounian*]; *In re Malone* (1996) 12 C.4th 935, 976, 977, 50 C.R.2d 281, 911 P.2d 468 [prosecutor's suppression of implied promises of leniency made to witness in exchange for his testimony was not substantially material under *Sassounian*, because it did not bear reasonable probability of affecting result]; *People v. Martin* (1983) 150 C.A.3d 148, 168, 197 C.R. 655 [prosecutor's failure to alert trial court after two prosecution witnesses erroneously testified that they had not been promised lenient treatment in their own criminal cases was suppression of substantial material evidence, but disclosure of promised lenient treatment would not have affected guilty verdict].

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Salazar* (2005) 35 C.4th 1031, 1052, 29 C.R.3d 16, 112 P.3d 14 [even if evidence that could have been used to impeach prosecution witness was favorable to defendant and was improperly suppressed, it was not material and thus no reversible error occurred; equivalent testimony was supplied or could have been supplied by other witnesses]; *People v. Hoyos* (2007) 41 C.4th 872, 897, 63 C.R.3d 1, 162 P.3d 528 [even if prosecution failed to disclose evidence that could have been used to impeach potential prosecution witness, whose testimony would have incriminated codefendant, defendant failed to show that evidence was material; possibility that, because defendant and codefendant had joint defense strategy under which either both would testify or would decline to testify, disclosure of evidence would have led codefendant to testify, and thus defendant to testify as well, was insufficient to establish materiality]; *People v. Zambrano* (2007) 41 C.4th 1082, 1133, 63 C.R.3d 297, 163 P.3d 4 [defendant's disclosure rights were not violated where, after defendant's testimony had commenced, defense counsel announced it had obtained letter, written years earlier by defendant's sister and sent to deputy sheriff, in which she expressed fear of defendant and said he had tried to kill her and other family members; prosecution had not been in possession of letter, sheriff's office was not acting as agent for prosecution, and letter was not remotely favorable to defense]; *People v. Bohannon* (2000) 82 C.A.4th 798, 806, 807, 98 C.R.2d 488 [in prosecution for sexual offenses against multiple victims, failure to disclose to defense counsel addresses of two victims at pretrial hearing did not constitute reversible error, where there was no reasonable probability that outcome of trial would have been different had addresses been disclosed in timely manner].



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## CHAPTER XI - Presentation At Trial

## V. DETERMINATION OF CREDIBILITY AND WEIGHT

## E. Evidence Suppressed in Criminal Cases.

## 2. Destruction of Physical Evidence.

## a. Duty To Preserve Evidence.

## 1. Former California Law.

## 3 Witkin Cal. Evid. Presentation § 124

[§ 124] Former California Law.

(1) *Hitch Created Duty To Preserve.* In *People v. Hitch* (1974) 12 C.3d 641, 117 C.R. 9, 527 P.2d 361, involving the routine destruction of evidence of an intoxication test, the court made the following definitive pronouncement: "[T]he test ampoule, its contents and the reference ampoule customarily used in the test constitute material evidence on the issue of the driver's guilt or innocence of the charge of driving a vehicle under the influence of intoxicating liquor. We conclude that the investigative agency involved in the test has a duty to preserve and disclose such evidence. Accordingly we hold that, where ... such evidence cannot be disclosed because of its intentional but nonmalicious destruction by the investigative officials, sanctions shall in the future be imposed for such nonpreservation and nondisclosure unless the prosecution can show that the governmental agencies involved have established, enforced and attempted in good faith to adhere to rigorous and systematic procedures designed to preserve the test ampoule and its contents and the reference ampoule used in such chemical test. The prosecution shall bear the burden of demonstrating that such duty to preserve the ampoules and their contents has been fulfilled. If the prosecution meets its burden and makes the required showing, then the results of the breathalyzer test shall be admissible in evidence, even though the ampoules and their contents have been lost. If the prosecution fails to meet its burden then the court shall apply sanctions for nondisclosure. Finally we hold that in such latter event due process shall not require a dismissal of the action but shall require merely that the results of the breathalyzer test be excluded from evidence." (12 C.3d 653.) (See 64 Cal. L. Rev. 649 [discussion of *Hitch*]; see also *People v. Swearingen* (1978) 84 C.A.3d 570, 574, 148 C.R. 755 [following *Hitch*]; *Health & Saf.C. 100775* [ampoules and their contents may be destroyed 1 year after date of collection]; 19 A.L.R.4th 509 [destruction of ampoule as warranting suppression of test results].)

(2) *Hitch Extended to Other Physical Evidence.* The *Hitch* rule was applied in many situations with varying results. Cases in which the rule was violated include the following: *People v. Moore* (1983) 34 C.3d 215, 223, 193 C.R. 404, 666 P.2d 419 [probation department's failure to preserve and disclose urine sample that was used as basis for revoking probation; preservation of samples for only 90 days unless request was made for particular sample was inadequate]; *People v. O'Hearn* (1983) 142 C.A.3d 566, 570, 191 C.R. 481 [sheriff's failure to segregate 84 marijuana plants confiscated from defendants; compliance with *Health & Saf.C. 11479* (governing destruction of excess quantities of controlled substances) might have enabled defendants to impeach sheriff's testimony as to quantity and quality of marijuana; no attempt to adhere to "rigorous and systematic procedures" to preserve evidence]; *People v. Jones* (1983) 145 C.A.3d 751, 753, 759, 760, 193 C.R. 663 [failure to preserve police officer's field notes of interview with criminal suspect was proper basis for *Hitch* motion to suppress].

Cases in which *Hitch* did not apply, or in which its application did not require reversal, include the following: *People v. Nation* (1980) 26 C.3d 169, 177, 161 C.R. 299, 604 P.2d 1051 [on charge of sexual offense against woman where police recover semen sample of assailant, authorities must take reasonable measures to preserve it; here, however, sample was delivered to defense in pretrial discovery request, and no showing was made that deterioration was caused by state's inaction]; *People v. Lee* (1974) 38 C.A.3d 749, 757, 113 C.R. 641 [while jurors were sequestered overnight during deliberations, janitor threw out exhibits from jury room; loss of evidence, though "deplorable and alarming," was not prosecutor's responsibility, was not shown to be prejudicial by defendant, and did not deprive defendant of fair trial]; *People v. James* (1976) 56 C.A.3d 876, 890, 128 C.R. 733 [codefendant's wallet was "ordered destroyed" by police before trial; codefendant testified he lost it about 9 days before burglary, but defendant argued that receipts within wallet would have shown later date; while evidence would have damaged codefendant's credibility, missing evidence could not have exculpated defendant, who therefore was not denied fair trial under *Hitch* rule]; *People v. Vera* (1976) 62 C.A.3d 293, 299, 132 C.R. 817 [failure to preserve or photograph defendant's latent fingerprints or object on which they were found; possibility of *Hitch* rule applying discussed, but no showing that defendant was deprived of material evidence]; *People v. Harris* (1976) 62 C.A.3d 859, 863, 133 C.R. 352 [careless or inadvertent destruction of object of little evidentiary importance]; *People v. Garnica* (1981) 121 C.A.3d 727, 732, 175 C.R. 521 [tape recording of key prosecution witness had been lost by police, but 25-page transcript of it, with over 100 blanks for omitted words, was offered in evidence; no error in absence of showing that lost tape had substantial materiality above and beyond that of transcript]; *People v. Perkins* (1981) 126 C.A.3d Supp. 12, 15, 179 C.R. 431 [destruction of printouts from quality control samples of blood test not violation of *Hitch* rule]; *People v. Savage* (1982) 129 C.A.3d 1, 2, 180 C.R. 761 [routine destruction of handwritten notes of police interview, contents of which were later incorporated into formal report; no *Hitch* error]; *People v. Bailes* (1982) 129 C.A.3d 265, 270, 180 C.R. 792 [lost police photograph of bent screen from which burglar's fingerprint had been taken; no *Hitch* error]; *People v. Newsome* (1982) 136 C.A.3d 992, 1006, 186 C.R. 676 [duty to preserve does not embrace correlative duty to test in absence of request by defense]; *People v. Roehler* (1985) 167 C.A.3d 353, 383, 213 C.R. 353 [prosecution did not take steps to preserve bodies of victims after autopsy, but defendant made no showing of potential value of reexamination of corpses]; *People v. Lawrence* (1985) 172 C.A.3d 1069, 1078, 218 C.R. 345 [bullets lost during 11 years defendant was fugitive from justice; "application of sanctions would be inappropriate and a miscarriage of justice"]; *People v. Givens* (1985) 175 C.A.3d 396, 399, 220 C.R. 756 [dismissal of charges as sanction for negligent loss or destruction of tape of witness interview that defense counsel had heard and found not relevant reversed]; see also *People v. Huston* (1989) 210 C.A.3d 192, 225, 258 C.R. 393 [*Hitch* dismissal is not considered a 'final judgment on the merits' having binding collateral estoppel effect].

**SUPPLEMENT:** [This section is current through the latest supplement]  
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### V. DETERMINATION OF CREDIBILITY AND WEIGHT

#### E. Evidence Suppressed in Criminal Cases.

##### 2. Destruction of Physical Evidence.

##### a. Duty To Preserve Evidence.

##### 2. Federal Law.

#### 3 Witkin Cal. Evid. Presentation § 125

[§ 125] Federal Law.

(1) *Trombetta Standard*. In *California v. Trombetta* (1984) 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413, defendants moved to suppress the results of intoxilyzer tests because the arresting officers had failed to preserve the breath samples used in the tests. Their motions were denied, but the Court of Appeal, relying heavily on *People v. Hitch* (1974) 12 C.3d 641, 117 C.R. 9, 527 P.2d 361, supra, §124, ruled that the intoxilyzer results should not be admitted into evidence against defendants. *Held*, reversed. The Due Process Clause of the Fourteenth Amendment does not require that law enforcement agencies preserve breath samples in order to introduce the results of breath-analysis tests at trial.

(a) *Defendant's right of access to exculpatory evidence*. To safeguard a defendant's right to present a complete defense, the Supreme Court has developed "the area of constitutionally guaranteed access to evidence." Thus, the defendant may request and obtain from the prosecution evidence material to guilt or relevant as to punishment (*Brady v. Maryland* (1963) 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215); the prosecution, without request, must turn over exculpatory evidence that would raise a reasonable doubt of guilt (*United States v. Agurs* (1976) 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342, supra, §121); the prosecution must also reveal the contents of plea agreements with key government witnesses (*Giglio v. United States* (1972) 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104); and under some circumstances, may be required to disclose the identity of undercover informants who possess evidence critical to the defense (*Roviaro v. United States* (1956) 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639, 2 Cal. Evidence (4th), Witnesses, §310). (104 S.Ct. 2532, 81 L.Ed.2d 420.)

(b) *Guaranteeing defendants access to evidence not in government's possession*. The government may offend the Due Process Clause if, by deporting potential witnesses, it diminishes a defendant's opportunity to put on an effective defense (*United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 102 S.Ct. 3440, 73 L.Ed.2d 1193, supra, §5). (104 S.Ct. 2533, 81 L.Ed.2d 420.)

(c) *Duty to preserve evidence*.

(1) The Court has never squarely addressed the question of duty to take affirmative steps to preserve evidence for criminal defendants. The difficulties are (a) determining the import of materials whose contents are unknown and very often disputed; and (b) fashioning remedies for illegal destruction. "In nondisclosure cases, a court can grant the defendant a new trial at which the previously suppressed evidence may be introduced. But, when evidence has been destroyed in violation of the Constitution, the court must choose between barring further prosecution or suppressing--as



the California Court of Appeal did in this case--the State's most probative evidence." (104 S.Ct. 2533, 81 L.Ed.2d 421.)

(2) *Killian v. United States* (1961) 368 U.S. 231, 82 S.Ct. 302, 7 L.Ed.2d 256, held that destruction by F.B.I. agents of preliminary notes made while interviewing witnesses did not rise to the level of constitutional violation. Here, the breath samples were taken for the limited purpose of providing raw data to the intoxilyzer; the evidence to be presented at the trial was not the breath but the intoxilyzer results; in *Killian*, the agent's notes were sought in order to impeach their final reports, and here the breath samples are sought to challenge the test results. (104 S.Ct. 2533, 81 L.Ed.2d 421.)

(3) The failure to retain the breath samples was not a violation of the federal Constitution. (a) There was no calculated effort to circumvent the disclosure requirements of *Brady v. Maryland*; the officers acted in good faith and in accord with normal practices. (b) There is little chance that the preserved samples would have been exculpatory. (c) Even if it is assumed that the intoxilyzer results were inaccurate, they could be challenged in other ways, e.g., by inspection of the machine or cross-examination of the officer who administered the test. (104 S.Ct. 2534, 2535, 81 L.Ed.2d 422, 423.)

(2) *Youngblood Standard*. In *Arizona v. Youngblood* (1988) 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281, defendant was convicted of child molestation, sexual assault and kidnaping, based on the 10-year-old victim's identification. On the day of the crime, the examining doctor collected semen samples which, along with the victim's underwear and T-shirt, were turned over to the police. The samples were refrigerated, but the clothing was not. During the trial, the state's criminologist performed an ABO blood grouping test on a semen sample in an attempt to ascertain the blood type of the assailant, but the test failed to detect any blood group substances in the sample. Approximately 15 months after the crime, the criminologist performed an ABO test on semen stains on the victim's clothing, but again failed to obtain blood group substances. The criminologist also performed a P-30 protein molecule test on the stains, but the results were inconclusive as to the assailant's identity. In connection with his defense of wrongful identification by the victim, defendant presented expert testimony concerning what might have been shown by tests performed on the semen samples shortly after they were gathered, or by later tests performed on the clothing stains had the clothing been properly refrigerated. The state Court of Appeals reversed the conviction on the ground that properly conducted tests could have produced results that might have completely exonerated defendant. *Held*, reversed; there was no denial of due process.

(a) The state complied with the requirements of *Brady v. Maryland* (1963) 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215, and *United States v. Agurs* (1976) 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342, *supra*, §121, by informing defendant of the existence of the semen samples and the clothing, and of the victim's hospital examination. It also provided defendant's expert with the reports and notes of the state's criminologist, as well as with access to the samples and the clothing. (109 S.Ct. 336, 102 L.Ed.2d 288.)

(b) The Due Process Clause, as interpreted in *Brady v. Maryland*, *supra*, makes the state's good or bad faith *irrelevant* when it fails to *disclose* to the defendant material exculpatory evidence. However, due process requires a different result where, as here, the state *fails to preserve* evidentiary material whose only value is that it could have been subjected to tests, the results of which might have exonerated the defendant. (109 S.Ct. 337, 102 L.Ed.2d 289.) "We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." (109 S.Ct. 337, 102 L.Ed.2d 289.)

(c) Here, the failure of the police to refrigerate the clothing and to perform tests on the samples can at worst be described as negligent. No information was concealed from defendant, and the evidence was made available to defendant's expert, who declined to perform any tests. Because there was no suggestion of any bad faith on the part of the police, there was no violation of due process. (109 S.Ct. 337, 102 L.Ed.2d 289.)

(d) In reversing the conviction, the state Court of Appeals referred to the state's failure to test certain semen samples with the newer P-30 test. However, due process is not violated by police failure to use a particular investigatory tool. The situation here is analogous to a drunk driving prosecution that rests on police observation alone: The defendant can argue that a breathalyzer test might have been exculpatory, but the police have no constitutional duty to perform any particular test. (109 S.Ct. 338, 102 L.Ed.2d 290.)

Three justices dissented. (See 103 Harv. L. Rev. 157; *People v. Huston* (1989) 210 C.A.3d 192, 213, 258 C.R. 393 [discussing retroactive application of *Youngblood*].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## E. Evidence Suppressed in Criminal Cases.

## 2. Destruction of Physical Evidence.

## a. Duty To Preserve Evidence.

## 3. Current California Law.

## 3 Witkin Cal. Evid. Presentation § 126

[§ 126] Current California Law.

(1) *Differences Between Hitch and Trombetta*. In *People v. Epps* (1986) 182 C.A.3d 1102, 227 C.R. 625, the court pointed out that the formulation of the "duty-to-preserve test" in *California v. Trombetta* (1984) 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413, supra, §125, differs substantially from the standard in *People v. Hitch* (1974) 12 C.3d 641, 117 C.R. 9, 527 P.2d 361, supra, §124. (182 C.A.3d 1112.) While *California v. Trombetta* leaves open the duty to preserve and the analysis of methods employed by the state in so doing, it clearly states a test of materiality more tolerant than *Hitch*: *Hitch* adopts "a relatively neutral attitude toward the *materiality* of the evidence," asking whether it existed and whether it is possible that it could have benefited the defendant; *California v. Trombetta*, on the other hand, requires that the evidence possessed "exculpatory value that was *apparent* before the evidence was destroyed." (182 C.A.3d 1115, 1116.)

(2) *Trombetta/Youngblood Nullify Hitch*. In *People v. Trombetta* (1985) 173 C.A.3d 1093, 219 C.R. 637, decided after the reversal of the previous decision by *California v. Trombetta*, supra, the court declared that the *Hitch* rule rested on the federal Constitution, and that neither federal due process nor equal protection required the preservation of breath samples from an intoxilyzer test. (173 C.A.3d 1100, 1103.) Then, in *People v. Johnson* (1989) 47 C.3d 1194, 1233, 255 C.R. 569, 767 P.2d 1047, the court concluded that, under the analysis in *People v. Trombetta*, supra, and the Truth-in-Evidence provision of Proposition 8 (see 1 Cal. Evidence (4th), Introduction, §8), *Hitch* did not survive *California v. Trombetta*. Moreover, in *People v. Cooper* (1991) 53 C.3d 771, 811, 281 C.R. 90, 809 P.2d 865, the court stated that "the reasons that caused us to adopt *Trombetta* [as a matter of state law] in *Johnson* also apply" to *Arizona v. Youngblood* (1988) 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281, supra, §125. (See *People v. Zapien* (1993) 4 C.4th 929, 964, 17 C.R.2d 122, 846 P.2d 704 ["applicable law no longer found in *Hitch*"]; *People v. Kimble* (1988) 201 C.A.3d 726, 733, 248 C.R. 41 ["The *Hitch* standard is no longer applicable as it has been effectively overruled by the combined effect of *California v. Trombetta* ... and section 28(d)" (Proposition 8)].)

(3) *Current Standard*. The State's duty to preserve evidence is limited to evidence that (a) possesses an exculpatory value that was apparent before the evidence was destroyed, and (b) is of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. Moreover, unless the defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not violate due process. (*People v. Cooper*, supra, 53 C.3d 810, citing *California v. Trombetta* and *Arizona v. Youngblood*; on application of *Hitch* and *California v. Trombetta* to administrative proceedings, see 1 Cal. Evidence (4th), Introduction, §86.)

(4) *Standard of Review as to Bad Faith.* The defendant has the burden of proving that the prosecution acted in bad faith in destroying evidence. Because the trial court's inquiry into this issue is essentially factual, the proper standard of review is substantial evidence. (*People v. Memro* (1995) 11 C.4th 786, 831, 47 C.R.2d 219, 905 P.2d 1305 [trial judge's determination of no bad faith was supported by substantial evidence: police personnel records were destroyed pursuant to statute, and police department would not have realized they might be needed after court in prior trial denied defendant's motion to discover them].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### E. Evidence Suppressed in Criminal Cases.

##### 2. Destruction of Physical Evidence.

##### a. Duty To Preserve Evidence.

##### 4. Illustrations.

#### 3 Witkin Cal. Evid. Presentation § 127

[§ 127] Illustrations.

Since *California v. Trombetta* (1984) 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (supra, §125), and *Arizona v. Youngblood* (1988) 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (supra, §125), many cases have considered the extent of the prosecutor's duty to preserve evidence for use by the defendant.

(1) *Where Evidence Lacked Apparent Exculpatory Value.* Numerous cases have found that the evidence lacked apparent exculpatory value or otherwise failed to meet the standards of materiality required by the federal cases. (See *People v. Beeler* (1995) 9 C.4th 953, 978, 39 C.R.2d 607, 891 P.2d 153 [even if prosecution's test firing of rifle made impossible further testing that could have shown rifle was fired on day of killing, exculpatory value of further testing would not have been reasonably apparent]; *People v. Hines* (1997) 15 C.4th 997, 1042, 64 C.R.2d 594, 938 P.2d 388 [videotape of search of premises where defendant was arrested was properly admitted, even though police had taped over portion showing officers arguing about how search should proceed, because erased portion did not possess exculpatory value that was apparent before it was destroyed]; *People v. Roybal* (1998) 19 C.4th 481, 509, 79 C.R.2d 487, 966 P.2d 521 [defendant was not entitled to instruction regarding police department's loss of doorjamb from victim's residence containing "orangish-red" fingerprint; doorjamb did not have exculpatory value that was apparent before it disappeared; print may or may not have been defendant's and may or may not have been perpetrator's]; *People v. Tierce* (1985) 165 C.A.3d 256, 264, 211 C.R. 325 [officer who followed department procedures and normal practice in destroying preliminary notes acted in good faith; holding in *People v. Jones* (1983) 145 C.A.3d 751, 193 C.R. 663, supra, §124, conflicts with *Trombetta* and is no longer law in California]; *People v. Gonzales* (1986) 179 C.A.3d 566, 572, 224 C.R. 853 [failure to preserve paper on which robbery victim wrote word tattooed on perpetrator's arm; paper did not meet federal subjective materiality test]; *People v. Superior Court (Calamaras)* (1986) 181 C.A.3d 901, 905, 226 C.R. 636 [marijuana seized from three separate plots destroyed except for random samples; no showing that destroyed marijuana met federal standard of materiality]; *People v. Garcia* (1986) 183 C.A.3d 335, 348, 228 C.R. 87 [lost notes of postarrest interview not shown to be material]; *People v. Richbourg* (1986) 185 C.A.3d 1098, 1102, 1103, 230 C.R. 166 [conviction for vehicular manslaughter affirmed; destroyed vehicle had no apparent exculpatory value]; *People v. Lopez* (1988) 198 C.A.3d 135, 143, 243 C.R. 590, infra, §131 [testimony of deported witnesses was not material because they were far from defendant at time of crime]; *People v. Medina* (1990) 51 C.3d 870, 893, 274 C.R. 849, 799 P.2d 1282 [loss of Perrier bottle containing defendant's fingerprint did not require exclusion of evidence, because exculpatory value was not obvious when print was taken]; *People v. Von Villas* (1992) 10 C.A.4th 201, 241, 13 C.R.2d 62 [in robbery prosecution, loss of diamond bindle found in defendant's home was not due process violation, as

bundle did not possess exculpatory value at time it was lost]; *People v. Pastor Cruz* (1993) 16 C.A.4th 322, 325, 20 C.R.2d 13 [no due process violation owing to loss of knife, which had inculpatory rather than exculpatory value]; *People v. Sixto* (1993) 17 C.A.4th 374, 397, 21 C.R.2d 264 [failure to preserve defendant's blood sample for alcohol testing, following defendant's first trial, did not violate due process; "cannot reasonably be said the sample possessed an exculpatory value that was apparent before it was destroyed"].)

(2) *Where Comparable Evidence Available.* In *People v. Sassounian* (1986) 182 C.A.3d 361, 226 C.R. 880, defendant, on trial for first degree murder with special circumstances, charged the prosecution with wilfully destroying a jail record that allegedly indicated that defendant had been kept in a "closed" rather than "open" cell, hence, that he could not have confessed to a jail trustee who later became a key prosecution witness. *Held*, the court properly refused to declare a mistrial or give the jury a directive instruction regarding the contents of the record. Absence of the record did not prejudice the defendant, because all the information it could have provided was supplied by the testimony of a deputy sheriff, who recalled the record and its contents. (182 C.A.3d 394.)

(3) *Where Defendant Fails To Show Bad Faith.* In *People v. Galindo* (1991) 229 C.A.3d 1529, 281 C.R. 155, defendant's motion for sanctions and instruction on failure to preserve evidence was properly denied, where he showed neither materiality under *California v. Trombetta*, nor bad faith by prosecution under *Arizona v. Youngblood*. (229 C.A.3d 1538.) (See *People v. Roybal*, *supra*, 19 C.4th 510 [nothing in defendant's offer of proof disputed conclusion that police department's loss of doorjamb containing possible bloody fingerprint, which was removed during search of victim's residence, was inadvertent].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Where Evidence Lacked Apparent Exculpatory Value.* See *People v. Cook* (2006) 39 C.4th 566, 591, 47 C.R.3d 22, 139 P.3d 492 [in capital murder case, defendant's constitutional rights were not violated by failure to take photographs of footprints leading up to house at location where victim was killed, or by loss of photos taken of 11 persons who were in that house; footprints neither implicated nor exonerated defendant, and although photos of occupants could not be located, defense was supplied with list of names]; *People v. Cook* (2007) 40 C.4th 1334, 1348, 58 C.R.3d 340, 157 P.3d 950 [in murder prosecution, trash bag that had contained bloodstained tennis shoes that were subjected to electrophoretic testing had no apparent exculpatory value, and argument that original version of parolee photo book used to identify defendant was material and favorable evidence was entirely speculative]; *People v. Coles* (2005) 134 C.A.4th 1049, 1055, 36 C.R.3d 484 [no constitutional or statutory rights were violated where, following standard procedure, police officer destroyed interview notes that she used to prepare her report concerning arson; notes were destroyed before any charges were filed against defendant, and no exculpatory value was apparent before their destruction]. (2) *Where Comparable Evidence Available.* See *People v. Cook*, *supra*, 40 C.4th 1349 [preservation of gel plates used in electrophoretic testing of bloodstained tennis shoes would have served no useful purpose because of flaking, fading, or other degradation, and there were sufficient remaining stains that defense could have chosen to test].

(3) *Where Defendant Fails To Show Bad Faith.* See *People v. Carter* (2005) 36 C.4th 1215, 1246, 32 C.R.3d 838, 117 P.3d 544 [in capital murder case in which burglary charge and lying-in-wait special circumstance were premised on theory that defendant unlawfully entered victim's apartment, trial judge did not err in admitting photographs of wood chips lying around entrance to apartment, notwithstanding that prosecution failed to preserve wood chips; defendant made no showing of bad faith in failure to preserve evidence, and nothing in record suggested that chips had exculpatory value that was apparent prior to their disappearance].



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## CHAPTER XI - Presentation At Trial

## V. DETERMINATION OF CREDIBILITY AND WEIGHT

## E. Evidence Suppressed in Criminal Cases.

## 2. Destruction of Physical Evidence.

## b. Authorized Destruction.

3 *Witkin Cal. Evid. Presentation* § 128

[§ 128] Authorized Destruction.

(1) *Release of Victim's Body*. The release of a victim's body to his or her family is not regarded as a suppression of evidence. Thus, in *People v. McNeill* (1980) 112 C.A.3d 330, 169 C.R. 313, defendant, charged with murder, testified that the victim lunged at him and grabbed his wrist, causing his gun to discharge accidentally. He contended that the prosecution failed to preserve crucial evidence by omitting to take fingernail scrapings from the victim. *Held*, the prosecuting authorities acted within the law in releasing the victim's body to his family for cremation immediately after the autopsy. Moreover, the victim's hands and fingernails had been examined by police officers and the autopsy surgeon without discovery of any significant evidence. (112 C.A.3d 337, 338.) (See *People v. Roehler* (1985) 167 C.A.3d 353, 382, 383, 213 C.R. 353, discussing *People v. McNeill*.) (On cremation of homicide victim's body as violation of accused's rights, see 70 A.L.R.4th 1091.)

(2) *Postconviction Destruction of Evidence*. Destruction of evidence after a conviction has become final is likewise a proper procedure. In *People v. Chapman* (1975) 47 C.A.3d 597, 121 C.R. 315, defendant pleaded guilty to felonious assault. Believing the case finished, the district attorney authorized disposal of the physical evidence. The sheriff unsuccessfully tried to contact the owners of the evidence and then threw away the material. Thereafter, on habeas corpus, defendant obtained a new trial on the ground of inadequate representation, and the judge allowed the prosecutor to introduce photographs of the unavailable physical objects. *Held*, no error. (47 C.A.3d 607.)

(3) *Destruction Authorized by Statute*. Recordings of telephone and radio communications may be destroyed by a local governmental entity after 100 days unless they are evidence in "any pending litigation." (Govt.C. 26202.6.) In *Fowler v. Superior Court* (1984) 162 C.A.3d 215, 208 C.R. 408, defendant, charged with possession of a firearm and narcotics, moved to dismiss an information against him because the police had a tape of a phone call reporting a burglary at his residence. His theory was that the pending felony complaint was "pending litigation" that required preservation of the tape. The court pointed to the difficulties involved in monitoring local criminal cases and the relatively slight value of such tapes, and said: "To require police to track litigation would impose an enormous, if not impossible, burden. But it is little to ask of a litigant that he simply advise the department of the pendency of a matter in which the tape will be desired before the time runs. We believe a procedure which permits destruction of the tapes after they have been retained for the 100-day period, in the absence of some action by a party to a lawsuit to notify the department to preserve the tapes, complies with the statute and *Hitch*." (162 C.A.3d 219.) (See *People v. Wilson* (1987) 191 C.A.3d 161, 165, 236 C.R. 280 [substantial compliance with *Health & Saf.C. 11479*, requiring that only representative sample be retained, notwithstanding failure to preserve entire marijuana plant].)

(4) *Destruction Where Evidence Must Be Consumed*. "When a piece of evidence in the possession of the prosecution is destroyed because the prosecution finds it necessary to consume the evidence in order to test it, there is no due process violation. The prosecution must be allowed to investigate and prosecute crime, and due process does not require that it forego investigation in order to avoid destroying potentially exculpatory evidence." (*People v. Griffin* (1988) 46 C.3d 1011, 1021, 251 C.R. 643, 761 P.2d 103; on consumption or destruction of physical evidence in analysis or testing by prosecution's expert, see 40 A.L.R.4th 594.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(3) *Destruction Authorized by Statute*. See *Nelson v. Superior Court* (2001) 89 C.A.4th 565, 574, 107 C.R.2d 469 [government tort claim filed with county in conformance with Govt.C. 911.2 constitutes actual notice that "claim" is pending within meaning of Govt.C. 26202.6, thus triggering duty to preserve recordings until pending litigation is resolved].

(4) *Destruction Where Evidence Must Be Consumed*. See *People v. Houston* (2005) 130 C.A.4th 279, 303, 29 C.R.3d 818 [in murder prosecution, trial judge did not err in denying defendant's pretrial motion to exclude evidence of defendant's DNA found on bullet recovered from crime scene, even though in testing bullet, police biologist found it necessary to put bullet in plastic tube with digestion material that digested all of DNA off bullet; she tested only portion of biological material obtained, remainder was preserved and could still be tested, and there was no assertion of bad faith].





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## CHAPTER XI - Presentation At Trial

### V. DETERMINATION OF CREDIBILITY AND WEIGHT

#### E. Evidence Suppressed in Criminal Cases.

##### 2. Destruction of Physical Evidence.

##### c. Duty To Advise of Destruction.

#### 3 Witkin Cal. Evid. Presentation § 129

[§ 129] Duty To Advise of Destruction.

(1) *No Constitutional Duty To Advise.* *California v. Trombetta* (1984) 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413, supra, §125, did not reach the question whether the police have a duty to advise arrestees choosing a breath test that no sample will be retained for independent testing. In *People v. Mills* (1985) 164 C.A.3d 652, 656, 657, 210 C.R. 669, the court held that no such duty was constitutionally required, and that the statutory duty imposed by *Veh.C. 13353.5*, now *Veh.C. 23614* (see 2 *Cal. Crim. Law* (3d), *Crimes Against Public Peace and Welfare*, §229), was not applicable to tests occurring prior to its effective date (September 15, 1983). (See *People v. Trombetta* (1985) 173 C.A.3d 1093, 1100, 219 C.R. 637, supra, §126 [following *Mills*].)

(2) *Failure To Advise When Required by Statute.* Although some statutes require police or other officials to advise suspects about whether samples taken for testing will be retained for their later use, noncompliance with the statutes is unlikely to lead to suppression of the test results. (See *People v. Lyon* (1985) 171 C.A.3d Supp. 20, 218 C.R. 290 [no suppression for failure to advise]; *In re Garinger* (1987) 188 C.A.3d 1149, 1153, 233 C.R. 853 [under *California v. Trombetta*, failure to advise pursuant to *Veh.C. 23157.5*, now *Veh.C. 23614*, does not violate due process, hence, Proposition 8 (1 *Cal. Evidence* (4th), *Introduction*, §8) precludes exclusion].) (For codification of rule that failure to advise does not affect admissibility, see *Veh.C. 23614(d)*, 2 *Cal. Crim. Law* (3d), *Crimes Against Public Peace and Welfare*, §229.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER XI - Presentation At Trial

### V. DETERMINATION OF CREDIBILITY AND WEIGHT

#### E. Evidence Suppressed in Criminal Cases.

##### 3. Making Witness Unavailable.

##### a. Standards of Materiality.

3 Witkin Cal. Evid. Presentation § 130

[§ 130] Standards of Materiality.

(1) *Former Law: Mejia Standard.* In *People v. Mejia* (1976) 57 C.A.3d 574, 129 C.R. 192, material witnesses arrested with defendant were foreign nationals who were not subpoenaed but were turned over to federal authorities for deportation, without notifying the defendant. Answering the prosecution's argument that the state officers merely complied with federal law, the court declared that "state action initiated and was at least partially responsible" for the unavailability of the witnesses, for the witnesses would not have been deported had they been under subpoena, and failure to notify defendant deprived him of the opportunity to subpoena them. (57 C.A.3d 581, 582.) (See strong dissent, 57 C.A.3d 583, criticizing the "sweepingly broad new declaration of prosecutorial obligation.")

The *Mejia* holding was followed in *Cordova v. Superior Court* (1983) 148 C.A.3d 177, 195 C.R. 758. Defendant and others, including four illegal aliens, were arrested on various drug counts. Twenty-seven days later, without notice to defendant, the charges against the aliens were dismissed and they were turned over to federal immigration authorities, who deported them that day. *Held*, defendant's motion to dismiss should have been granted.

(a) The prosecution contended that the test of materiality of the testimony of the unavailable witness, as enunciated in *Mejia*, had been changed by *United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 102 S.Ct. 3440, 73 L.Ed.2d 1193, *supra*, §5. But the California rule may be based on the independent ground of the California Constitution, and would thus be unaffected by the federal rule. (148 C.A.3d 183.)

(b) The prosecution further contended that *Mejia* was distinguishable because in that case, the witnesses were not available at any time, while here they were in custody for 27 days, and defendant made no effort to contact their counsel or interview them. This contention ignores the practical situation: Counsel for the alien witnesses would not have permitted an interview prior to dismissal of the charges. It would not have been a significant burden on the prosecution to give notice to defense counsel of the impending release from jail of a material alien witness, and "we commend such practice to prosecutors." (148 C.A.3d 186.)

(2) *Federal Standards of Materiality.* Subsequent to *Mejia*, the United States Supreme Court issued two opinions that could be considered to set the standard for measuring the materiality of unavailable witnesses' testimony. *United States v. Valenzuela-Bernal*, *supra*, requires the defendant to make a plausible showing that the testimony of the unavailable witnesses would have been material and favorable to the defense, in ways not merely cumulative to the testimony of available witnesses. (102 S.Ct. 3449, 73 L.Ed.2d 1206.) Meanwhile, *California v. Trombetta* (1984) 467 U.S. 479, 104 S.Ct. 2528, 2530, 81 L.Ed.2d 413, 417 (*supra*, §125), involving the destruction of physical evidence,

requires a defendant to show that the evidence (a) possesses an exculpatory value that was apparent before the evidence was destroyed, and (b) is of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. (104 S.Ct. 2534, 81 L.Ed.2d 422.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
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## CHAPTER XI - Presentation At Trial

### V. DETERMINATION OF CREDIBILITY AND WEIGHT

#### E. Evidence Suppressed in Criminal Cases.

##### 3. Making Witness Unavailable.

##### b. Applicable Standard in California.

#### 3 Witkin Cal. Evid. Presentation § 131

[§ 131] Applicable Standard in California.

The federal standard, rather than the one in *People v. Mejia* (1976) 57 C.A.3d 574, 129 C.R. 192, supra, §130, must be used in California to determine the materiality of an unavailable witness. (*People v. Lopez* (1988) 198 C.A.3d 135, 144, 243 C.R. 590; *People v. Valencia* (1990) 218 C.A.3d 808, 819, 267 C.R. 257.) However, there is disagreement about whether *United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 102 S.Ct. 3440, 73 L.Ed.2d 1193, supra, §5, or *California v. Trombetta* (1984) 467 U.S. 479, 104 S.Ct. 2528, 2530, 81 L.Ed.2d 413, 417, supra, §125, states the correct federal standard:

(1) *Trombetta Applies in Both Physical Evidence and Unavailable Witness Cases.* In *People v. Lopez* (1988) 198 C.A.3d 135, 243 C.R. 590, a robbery case in which five witnesses were deported, the court attempted to reconcile the standards enunciated in *Mejia*, *People v. Hitch* (1974) 12 C.3d 641, 117 C.R. 9, 527 P.2d 361, supra, §124, *Trombetta*, and *Valenzuela-Bernal*, in light of Proposition 8 (see 1 Cal. Evidence (4th), Introduction, §8).

(a) *Mejia* held that an unavailable witness is material if he either participated in the crime, or was an eyewitness in a position to perceive what took place from a sufficiently proximate vantage point. *Hitch* held that unavailable demonstrative evidence is material if there is a reasonable probability that it would constitute favorable evidence on the issue of guilt or innocence. Although the wording is slightly different, these cases establish the same standard of materiality for both testimonial and demonstrative evidence. (198 C.A.3d 143.)

(b) Because of this sameness in the standard of materiality, consistency demands that Proposition 8 be construed as requiring the use of the federal standard in both *Mejia* and *Hitch* situations. (198 C.A.3d 144.)

(c) The federal standard is derived from *Trombetta* and *Valenzuela-Bernal*. Under *Trombetta*, in order for evidence to be material, it must " 'possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.' " (198 C.A.3d 144.) *Valenzuela-Bernal*, which dealt specifically with witness deportation, enunciated a somewhat different standard, i.e., no requirement that the exculpatory nature be apparent prior to the loss of the evidence. (198 C.A.3d 144.) However, "[f]rom the breadth of the discussion in *Trombetta*, which included mention of *Valenzuela-Bernal* ... , we conclude that the United States Supreme Court intended to state in *Trombetta* a more definitive and precise formulation of the constitutional standard of materiality in all loss of evidence cases. We hold that *Trombetta* states the standard of materiality applicable in both *Mejia* and *Hitch* contexts." (198 C.A.3d 145.)

(d) In the present case, the testimony of the deported witnesses was not material under either the *Trombetta* or *Mejia* standard, because they were approximately 50 meters from defendant at the time of the crime and were focusing primarily on a stalled vehicle. (198 C.A.3d 146.) (See *People v. Acuna* (1988) 204 C.A.3d 602, 610, 611, 251 C.R. 387 [prosecution for theft of van; defendant knowingly waived right to detain illegal aliens found in vehicle, and failed to demonstrate, under either *Mejia* or *Trombetta* standard, that they would have offered material, favorable testimony].)

(2) *Valenzuela-Bernal Applies in Unavailable Witness Cases*. The attempted reconciliation put forth by *People v. Lopez*, *supra*, was criticized in *People v. Valencia* (1990) 218 C.A.3d 808, 267 C.R. 257, insofar as it made the *Trombetta* standard applicable in all loss of evidence cases.

In *People v. Valencia*, defendant was charged with one count of possession of cocaine for sale, with an enhancement for being armed with a firearm during commission of the offense. However, in response to defendant's motion under *Mejia*, the trial judge dismissed both the count and enhancement when the prosecution failed to produce witness Alcala, a juvenile who, after being arrested with defendant for possession of narcotics for sale, was deported to Mexico without prior notice to defendant or his counsel. *Held*, under the standard of materiality enunciated in *United States v. Valenzuela-Bernal*, *supra*, the enhancement was properly dismissed, but the count was improperly dismissed.

(a) *Effect of Proposition 8*. In *re Lance W.* (1985) 37 C.3d 873, 210 C.R. 631, 694 P.2d 744, 1 Cal. Evidence (4th), Introduction, §8, *People v. May* (1988) 44 C.3d 309, 243 C.R. 369, 748 P.2d 307, *infra*, §319, and *People v. Johnson* (1989) 47 C.3d 1194, 255 C.R. 569, 767 P.2d 1047, *supra*, §126, illustrate the broad application of Proposition 8 to require federal standards for the *exclusion of evidence* in cases other than those involving search and seizure. And, reasoning that dismissal amounts to exclusion of all of the evidence against the defendant, *People v. Epps* (1986) 182 C.A.3d 1102, 227 C.R. 625, *supra*, §126, and *People v. Lopez*, *supra*, support the application of Proposition 8 to *Mejia* motions, even though the requested remedy is *dismissal* of all charges, rather than exclusion of evidence. Hence, "Proposition 8 abrogated *Mejia* and its state standard of materiality applicable to deported witnesses." (218 C.A.3d 819.)

(b) *Federal standard of materiality*.

(1) *People v. Lopez*, *supra*, held that the standard adopted in *California v. Trombetta*, rather than that stated in *Valenzuela-Bernal*, *supra*, must be applied in determining the materiality of *both* demonstrative evidence and testimony. And the prosecution proposed not only the adoption of *Trombetta* as the appropriate federal standard, but also the inclusion of *Arizona v. Youngblood* (1988) 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281, *supra*, §125, as an additional test of materiality. This proposal must be declined for the following reasons:

First, neither *Trombetta* nor *Youngblood* indicated that it was overruling *Valenzuela-Bernal*. In stating that it was entering an area it had "never squarely addressed," *Trombetta* implied that it was dealing with concerns entirely separate from those involved in *Valenzuela-Bernal*. (218 C.A.3d 822.)

Second, subsequent federal and California decisions (with the exception of *Lopez*) have applied *Trombetta* and *Youngblood* exclusively in the area of demonstrative evidence. (218 C.A.3d 822, citing *People v. Huston* (1989) 210 C.A.3d 192, 258 C.R. 393, and *People v. Martinez* (1989) 207 C.A.3d 1204, 255 C.R. 691.)

Third, the analysis of the materiality of lost evidence differs in each case. *Valenzuela-Bernal*, which analyzed the materiality issue based on the defendant's having been denied the opportunity to interview a deported witness, required that the defendant make a plausible showing that the witness' testimony would have been material and favorable to his defense. *Trombetta*, whose analysis focused on problems presented by the destruction of physical evidence, emphasized the defendant's ability to obtain comparable evidence by other reasonably available means. And *Youngblood*, which focused on the importance of the state's good or bad faith in destroying physical evidence, referred to the fact that it was only dealing with the loss of evidence that might have been subjected to tests, the results of which might have exonerated the defendant. (218 C.A.3d 823.)

(2) "In summary, *Trombetta* and *Valenzuela-Bernal* address two different aspects of the state's duty to preserve

exculpatory evidence. While *Trombetta* certainly presents an in-depth discussion of the constitutional duty to preserve physical evidence, there is nothing in the opinion to indicate that it intended to supersede *Valenzuela-Bernal*'s examination of unavailable deported witnesses. The rationale of each case is supported by the distinctive aspects of physical evidence (*Trombetta*) and unavailable witnesses (*Valenzuela-Bernal*). *Youngblood* presents the most obvious distinction when it refers to evidence which may be subjected to tests." (218 C.A.3d 824.) Hence, the appropriate federal standard of materiality for witness deportation cases is *Valenzuela-Bernal*. (218 C.A.3d 825.)

(c) *Application of standard: possession for sale charge.*

(1) Under *Valenzuela-Bernal*, defendant was required to make a plausible showing that Alcala's testimony would have been material and favorable to defendant in ways not merely cumulative to the testimony of available witnesses. However, the police report, which constituted the only evidence concerning Alcala's testimony as it related to the possession for sale charge, showed that Alcala stated that many people visited defendant in their apartment, but that he (Alcala) neither knew the purpose of the visits nor had knowledge of narcotics being sold there. Because this showing, which is more incriminatory than exculpatory, fell far short of that required by *Valenzuela-Bernal*, the trial judge erred in dismissing the possession for sale charge. (218 C.A.3d 825.)

(2) It should be noted that defendant made no effort to state the nature of any favorable testimony that Alcala might have given, such as who owned either the cocaine or the jacket in which it was found, although under *Valenzuela-Bernal* he was encouraged to do so. (218 C.A.3d 825.)

(d) *Application of standard: firearm enhancement.*

(1) Because Alcala's police report statement that the firearm belonged to a third person constituted an adequate showing that his anticipated testimony on the firearm enhancement would be material and favorable under the *Valenzuela-Bernal* standard, the trial judge was correct in dismissing the enhancement. (218 C.A.3d 826.)

(2) Even though logically the trier of fact could accept as true Alcala's statement about the gun and still find the enhancement to be true (because one may be "armed with a firearm" without owning it), defendant was only required to show that the anticipated testimony would have aided his defense, not that it would have negated the charges against him. Here, although the weight to be accorded Alcala's statement was within the discretion of the trier of fact, it was clearly consistent with defendant's claim that he was not armed or in possession of a weapon. (218 C.A.3d 826.)

(3) It is noteworthy that although the prosecution's good or bad faith in making deportation decisions may have a bearing on the application of the *Valenzuela-Bernal* standard, the prosecution here made no effort to prove absence of bad faith. Instead of providing an explanation for its failure to give defendant or his counsel advance notice of Alcala's deportation, the prosecution merely argued that there was no reasonable possibility that Alcala's testimony could be favorable to defendant. (218 C.A.3d 826.) (See *People v. Jenkins* (1987) 190 C.A.3d 200, 205, 206, 235 C.R. 268 [deportation of men on premises when defendant was arrested for pimping no bar to retrial of defendant; no showing of reasonable possibility that their testimony would have been material to defendant's guilt; on retrial, defendant would have to meet *Valenzuela-Bernal* standard, which is "much stricter" than state standard].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER XI - Presentation At Trial

## V. DETERMINATION OF CREDIBILITY AND WEIGHT

## E. Evidence Suppressed in Criminal Cases.

## 4. Justifiable Failure To Produce.

3 *Witkin Cal. Evid. Presentation* § 132

[§ 132] Justifiable Failure To Produce.

The prosecution need not call all persons appearing to have some knowledge of the crime. Hence, where there is no evidence of intentional concealment, neither the adverse inference nor the due process challenge will be successful. (See *Moore v. Illinois* (1972) 408 U.S. 786, 92 S.Ct. 2562, 2568, 33 L.Ed.2d 706, 713 ["We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case"]; *In re Imbler* (1963) 60 C.2d 554, 569, 35 C.R. 293, 387 P.2d 6 [authorities "are under no duty to report sua sponte to the defendant all that they learn about the case and about their witnesses"]; *In re Lessard* (1965) 62 C.2d 497, 507, 42 C.R. 583, 399 P.2d 39; *People v. Moran* (1970) 1 C.3d 755, 761, 83 C.R. 411, 463 P.2d 763 ["The People are not required to call any particular witness so long as the material evidence relating to the charge against defendant is produced in a manner according him a fair trial"]; *In re Rosoto* (1974) 10 C.3d 939, 949, 112 C.R. 641, 519 P.2d 1065 [where district attorney investigator's answers were misleading, but literally true, he need not have volunteered more explicit information]; *Bellizzi v. Superior Court* (1974) 12 C.3d 33, 35, 115 C.R. 52, 524 P.2d 148 [defense witness not under control of prosecution; left state and could not be located]; *People v. Mason* (1960) 183 C.A.2d 168, 172, 6 C.R. 649 [rejecting defendant's contention that police officer who signed original complaint against him should have been produced]; *In re Jesus B.* (1977) 75 C.A.3d 444, 448, 451, 142 C.R. 197 [following *Bellizzi* analysis; prosecution not required to incarcerate material witness in order to make him available for trial]; 13 So. Cal. L. Rev. 143; 76 A.L.R.4th 812 [adverse inference from failure to produce or examine codefendant or accomplice not on trial].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER XI - Presentation At Trial

### V. DETERMINATION OF CREDIBILITY AND WEIGHT

#### E. Evidence Suppressed in Criminal Cases.

##### 5. Failure To Gather Evidence.

*3 Witkin Cal. Evid. Presentation § 133*

[§ 133] Failure To Gather Evidence.

(1) *No Duty To Gather Evidence Under Hitch*. "To date there is no authority for the proposition that sanctions should be imposed for a failure to gather evidence as opposed to a failure to preserve evidence. ... Thus under present law the failure to record telephone conversations and the failure to record transmissions from a body microphone were not the grounds for sanctions." (*People v. Harris* (1985) 165 C.A.3d 324, 329, 211 C.R. 493; see *People v. Bradley* (1984) 159 C.A.3d 399, 408, 205 C.R. 485 [investigating officer failed to collect and preserve bloodstained articles found at scene of crime]; *People v. Ventura* (1985) 174 C.A.3d 784, 794, 220 C.R. 269 [police, in arresting defendant, noticed that he had alcoholic breath but was not intoxicated; they had no duty to administer intoxication tests and preserve results for trial].)

*In re Michael L.* (1985) 39 C.3d 81, 216 C.R. 140, 702 P.2d 222, reaches the same conclusion. Appellant Michael L., a minor, was adjudicated a ward under Welf.C. 602, on a finding that he robbed a store. The robbery was recorded on an automatic store surveillance camera, and witnesses who viewed the videotape identified the minor as the perpetrator. The police officers asked the store owners to preserve the tape but did not seize it, and later the owners inadvertently erased it. At the trial, appellant's counsel unsuccessfully sought to exclude evidence of the videotape and all identifications derived from it. *Held*, admission of the videotape was proper.

(a) The test for duty to preserve evidence, as set forth in *California v. Trombetta* (1984) 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413, supra, §125, differs substantially from the California test established in *People v. Hitch* (1974) 12 C.3d 641, 117 C.R. 9, 527 P.2d 361, supra, §124. Because the robbery occurred prior to the effective date of Proposition 8 (see 1 *Cal. Evidence* (4th), *Introduction*, §8), the *Hitch* test governs. (39 C.3d 86; on subsequent nullification of *Hitch*, see supra, §126.)

(b) The issue of whether the police have a duty to seize evidence is "complex and provocative," but in this case, the failure of the officers to seize the tape does not warrant the sanction of exclusion of the evidence. (1) Although the officers may have been negligent in failure to obtain the tape, they did not act in bad faith or with any intent to deprive appellant of the evidence; they anticipated that the tape would be preserved. (2) Exclusion of the identification testimony would impose a sanction totally out of proportion to the alleged police failing: Reliability of the witnesses' identification was well established, and appellant made no showing of lack of quality of the tape or accuracy of the identification. (39 C.3d 87.)

A concurring justice, on an examination of California and out-of-state cases, asserted that there is no authority for a duty to seize evidence in the possession of third persons. (39 C.3d 88.) Such a duty would, as a practical matter, be



impossible to perform: "Unless the scene of every crime is to be preserved in a time capsule pending the final resolution of the question of guilt, decisions must be made to exclude certain evidence from collection." (39 C.3d 89.) Also, an exclusionary rule could not be imposed in a case to which Proposition 8 applies. (39 C.3d 89, footnote 3.) However, exceptions to the no-duty rule may arise where investigating officers intentionally or in bad faith decline to seize material, potentially exculpatory evidence, realizing the likelihood that it will be lost or destroyed. (39 C.3d 89.)

An elaborate dissenting opinion argued that a limited duty to seize is a logical extension of the *Hitch* duty to preserve (39 C.3d 90), that the *Hitch* duty rests on independent state grounds (39 C.3d 101), and that to hold an accused to the higher standard of *Trombetta* would undermine the state's interest in an accurate and reliable process (39 C.3d 104).

(2) *No Duty To Gather: Cases After Hitch's Nullification.* Several cases decided after the *Hitch* duty to preserve evidence was discredited have declined to impose a duty to gather evidence. (See *People v. Douglas* (1990) 50 C.3d 468, 513, 268 C.R. 126, 788 P.2d 640 [officer who preserved names and phone numbers of witnesses claiming to have seen murder victims after alleged date of crime and who turned information over to defense investigator on request was not required to conduct further investigation]; *People v. Daniels* (1991) 52 C.3d 815, 855, 277 C.R. 122, 802 P.2d 906 [murder involving use of firearm; police had no duty to test witness for gunshot residue where defendant presented no evidence that witness had fired gun]; *People v. Frye* (1998) 18 C.4th 894, 943, 944, 77 C.R.2d 25, 959 P.2d 183 [even assuming that failure to collect evidence comes within scope of *California v. Trombetta* (1984) 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413, text, §125, officers' failure to gather certain bloodstained items at murder scene did not violate *Trombetta* standards, because exculpatory value of items was matter of speculation and would not have been apparent to officers]; *People v. Von Villas* (1992) 10 C.A.4th 201, 248, 13 C.R.2d 62 [prosecutor's direction to investigator to stop taping interview with witness was not due process violation; police have no duty to generate evidence for impeachment purposes via tape recording]; *People v. Sanchez* (1998) 62 C.A.4th 460, 473, 474, 72 C.R.2d 782 [in prosecution for operation of endless chain scheme, prosecutor had no duty to discover existence of pyramid charts first mentioned and turned over to her by prosecution witnesses during trial].)

(3) *Distinction: Duty To Provide Impeachment Evidence.* The prosecution is constitutionally required to disclose the felony convictions of all material prosecution witnesses, even if it does not have actual knowledge of those convictions, provided the conviction records are "reasonably accessible." (*People v. Little* (1997) 59 C.A.4th 426, 433, 434, 68 C.R.2d 907.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *No Duty To Gather: Cases After Hitch's Nullification.* See *People v. Jordan* (2003) 108 C.A.4th 349, 361, 362, 133 C.R.2d 434 [in prosecution for possession of cocaine base for sale, defendant's constitutional rights were not violated by prosecution's failure to disclose that charges of official misconduct involving fabrication of evidence had been raised against prosecution witness, a police officer, in unrelated criminal cases in same county; "the fact the People may have been a party to every criminal case prosecuted in the county does not give rise to a duty to collect evidence for the defense"].



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#### E. Evidence Suppressed in Criminal Cases.

##### 6. Raising Suppression Issue.

##### a. Defendant's Obligations.

3 Witkin Cal. Evid. Presentation § 134

[§ 134] Defendant's Obligations.

(1) *No Request Necessary*. The prosecution's duty to disclose material evidence favorable to an accused is not dependent on a request by the accused. (*In re Ferguson* (1971) 5 C.3d 525, 532, 96 C.R. 594, 487 P.2d 1234; *People v. Ruthford* (1975) 14 C.3d 399, 406, 121 C.R. 261, 534 P.2d 1341.) In *Ferguson*, the court said: "[T]o condition the duty to disclose upon request would provide a trap for the unwary and place substantial additional burdens on our busy trial courts. The general practice of making the district attorney's file available to defense counsel in Orange County is also followed in many other counties in this state, and this practice can only serve to provide a trap for the unwary if the prosecuting attorney does not know that he is under a duty to disclose evidence favorable to the defense but instead feels that he is free to omit such favorable evidence from his file. On the other hand, if the prosecutor has no such duty, defense counsel in the exercise of due caution to protect his client's interests can be expected to refuse to rely upon the prosecutor's file and to make in every case long and complex motions for discovery to ascertain whether the prosecution is hiding anything. To adopt rules so greatly increasing the burden of our already busy criminal courts would not serve the efficient administration of justice." (5 C.3d 532.) (See *People v. Filson* (1994) 22 C.A.4th 1841, 1848, 28 C.R.2d 335 [child molestation prosecution in which defendant claimed he was too intoxicated to form specific intent; prosecutor was required to disclose defendant's tape-recorded statement made shortly after arrest, even in absence of defense request].)

(2) *Waiver by Failure To Object*. Although no procedural rule sets forth the manner and timing of motions to bar evidence (such as test results) related to improperly suppressed evidence, once the evidence has been received without objection, a belated motion made thereafter is too late. (*People v. Taylor* (1977) 67 C.A.3d 403, 409, 410, 136 C.R. 640; see *People v. Phillips* (1985) 41 C.3d 29, 54, 222 C.R. 127, 711 P.2d 423; *People v. Mayorga* (1985) 171 C.A.3d 929, 941, 218 C.R. 830, *infra*, §135 [untimely to raise issue on motion for new trial].) (On failure to make objection as ineffective representation by counsel, calling for reversal of judgment of conviction, see *People v. Jones* (1983) 145 C.A.3d 751, 760, 193 C.R. 663.)

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## E. Evidence Suppressed in Criminal Cases.

## 6. Raising Suppression Issue.

## b. Procedure for Raising Issue.

## 3 Witkin Cal. Evid. Presentation § 135

[§ 135] Procedure for Raising Issue.

(1) *Preliminary Examination or Trial*. Where the suppression is disclosed in the preliminary examination, a motion to set aside the information may be made; where it is shown at the trial, the conviction will be reversed on appeal. Either procedure gives the reviewing court a record of evidentiary inquiry into the character, materiality and exculpatory potential of the suppressed evidence. (*McCullar v. Superior Court* (1968) 264 C.A.2d 1, 8, 70 C.R. 21 [denying prohibition to prevent trial, where no such record made].) (See *In re Lessard* (1965) 62 C.2d 497, 42 C.R. 583, 399 P.2d 39 [habeas corpus denied on suppression issues]; 20 *Hastings L. J.* 974 [Lessard]; *In re Ferguson* (1971) 5 C.3d 525, 535, 96 C.R. 594, 487 P.2d 1234 [habeas corpus granted after conviction]; 7 U.S.F. L. Rev. 348, 352 [Ferguson]; *People v. Davis* (1971) 20 C.A.3d 890, 896, 98 C.R. 71 [dismissal not warranted where new trial would be appropriate remedy]; *People v. Swearingen* (1978) 84 C.A.3d 570, 574, 148 C.R. 755 [Hitch motion to bar testimony relating to suppressed material evidence]; *People v. Goss* (1980) 109 C.A.3d 443, 167 C.R. 224 [discussion of Hitch motion, sanctions available to trial court where material evidence suppressed, review of ruling on appeal, and harmless error].)

(2) *Motion Before Trial Preferred*. In *People v. Mayorga* (1985) 171 C.A.3d 929, 218 C.R. 830, defendant presented the issue on a motion for new trial. *Held*, the motion was properly denied.

(a) There are three procedural methods for properly raising the issue of prosecutorial suppression of evidence before a trial court, which preserve the issue for appeal. The first and most common method is by motion made before trial. "Certainly, this method is preferred. It allows for a full evidentiary hearing without the time pressures and inefficiencies inherent in interrupting a jury trial; it apprises the court and prosecutor of precisely the evidence which defendant claims has been destroyed; and it affords the prosecutor the opportunity to resist the claim that the evidence is material and to demonstrate that the police had established legally sufficient safeguards. It also provides the court with the best opportunity to fashion the most appropriate sanction." (171 C.A.3d 937, 938; see *infra*, §368 et seq.)

(b) A second, but less preferable, alternative is to object to the admission of evidence at trial. An evidentiary hearing can be held outside the presence of a jury. However, "such a hearing requires the interruption of the trial, with the obvious attendant inefficiencies." (171 C.A.3d 938; see *infra*, §367 et seq.)

(c) The final, and "significantly less favored method" of raising the issue is by motion to strike testimony. This method suffices to preserve the issue on appeal, but it is less desirable, in part because of the interruption in the trial, but also because the evidence has already been placed before the trier of fact. "An instruction that evidence has been stricken and, therefore, to be disregarded can never be more effective than not admitting the evidence in the first place."

(171 C.A.3d 938; see *infra*, §383 et seq.)

(d) The trial judge properly denied defendant's motion under the two-prong test for a nonstatutory new trial motion (see 6 *Cal. Crim. Law* (3d), *Criminal Judgment*, §90 et seq.). Although defendant satisfied the first prong by showing the suppression of material evidence, defendant failed to satisfy the second prong by showing that he could not have raised the issue earlier. To the contrary, defendant failed to avail himself of the opportunity to raise the issue under any of the above methods. (171 C.A.3d 938.)

(3) *Allegation Stricken Under Nonstatutory Motion*. In *Stanton v. Superior Court* (1987) 193 C.A.3d 265, 239 C.R. 328, defendant was charged in an information with a felony violation of P.C. 192(c) (vehicular manslaughter with gross negligence). At the preliminary hearing, three eyewitnesses testified that defendant's automobile ran a red light and struck the decedent's automobile without attempting to stop or avoid the collision. Immediately before the trial, the prosecution provided defendant with an investigative report it had obtained prior to the preliminary hearing from the civil attorney representing the deceased victim's family. The report contained statements the eyewitnesses made to the investigator that directly contradicted their testimony at the preliminary hearing about defendant's failure to attempt to stop. Defendant made a P.C. 995 motion to have the information set aside and a nonstatutory motion to dismiss, both of which the trial judge denied. *Held*, defendant was not entitled to have the information set aside, but was entitled to have the "gross negligence" element stricken and the charge reduced to a misdemeanor.

(a) Defendant sought to have the felony charges reduced to a misdemeanor by persuading the magistrate that she was guilty of ordinary, rather than gross, negligence; and the undisclosed report contained exculpatory evidence on this focal issue. Had the report been available for cross-examination and the prosecution's key witnesses impeached, the magistrate might well have stricken the gross negligence allegation or granted defendant's motion to reduce the charge to a misdemeanor. (193 C.A.3d 272.)

(b) The prosecution's failure to produce this material evidence was not discovered until after the preliminary hearing; hence, the record of the preliminary hearing did not disclose the deprivation, and defendant was not entitled to relief under P.C. 995 (see 4 *Cal. Crim. Law* (3d), *Pretrial Proceedings*, §228 et seq.). (193 C.A.3d 269.) But the nonstatutory motion to dismiss (see 4 *Cal. Crim. Law* (3d), *Pretrial Proceedings*, §§228, 235 et seq.) was a proper device by which to raise the issue, and defendant is entitled to have the gross negligence allegation stricken and the charge reduced to a misdemeanor. (193 C.A.3d 271, 272.)

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#### 7. No Sanction Other Than Suppression of Related Evidence.

#### 3 Witkin Cal. Evid. Presentation § 136

[§ 136] No Sanction Other Than Suppression of Related Evidence.

In *People v. Griffin* (1988) 46 C.3d 1011, 251 C.R. 643, 761 P.2d 103, a rape and murder case, a sample of vaginal fluid on which tests had been performed was destroyed, and the trial judge granted defendant's motion to suppress the test results. Defendant argued that, under *People v. Zamora* (1980) 28 C.3d 88, 167 C.R. 573, 615 P.2d 1361 (5 Cal. Crim. Law (3d), *Criminal Trial*, §62), the trial judge was also required to instruct the jury that they could infer from the destruction that the results were favorable to him. *Held*, *Zamora* is not applicable in this situation. In that case the destroyed evidence had no value to the prosecution, hence, it was not possible to impose the sanction of suppression. Here, however, important prosecution evidence was suppressed, and that sanction was sufficiently harsh to have a curative effect on future police practice concerning how long to preserve samples. (46 C.3d 1023.)

In *People v. Medina* (1990) 51 C.3d 870, 274 C.R. 849, 799 P.2d 1282, a Perrier bottle containing a fingerprint was inadvertently lost or destroyed. At trial, there was conflicting expert testimony on whether the print was defendant's. Defendant argued that the trial judge was required to instruct, sua sponte, that because of the police's negligent failure to preserve the bottle, the jury should (a) draw any conflicting inferences regarding the prints in favor of defendant, and (b) view the print evidence with distrust. *Held*, no such instructions were necessary. They are not required by either *California v. Trombetta* (1984) 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413, supra, §125, or *Arizona v. Youngblood* (1988) 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281, supra, §125, "and we are reluctant to impose such an instructional sanction for mere negligence in failing to preserve evidence whose exculpatory value was unapparent to the officers when their omission occurred." (51 C.3d 894.)

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## E. Evidence Suppressed in Criminal Cases.

## 8. Suppression by Defendant.

3 Witkin Cal. Evid. Presentation § 137

## [§ 137] Suppression by Defendant.

An adverse inference may be drawn from the defendant's suppression of evidence bearing on an issue that the defendant raises and on which he or she has the burden of proof. In *People v. Vaughn* (1968) 262 C.A.2d 42, 54, 68 C.R. 366, defendant sought coram nobis on the ground of insanity at the time of the offense and the trial. At the hearing, he did not introduce the reports of an examination by a clinical psychologist, furnished at his request. *Held*, an inference against him on this issue was proper. (See *People v. Moran* (1970) 1 C.3d 755, 760, 83 C.R. 411, 463 P.2d 763 [defendant's failure to call go-between in LSD sale "supports an inference that his testimony would not be favorable to defendant"]; *People v. Baker* (1974) 39 C.A.3d 550, 556, 113 C.R. 248 [prosecution was properly allowed to prove that incriminating exhibits were destroyed during preliminary hearing, even though only circumstantial evidence was presented to link defendant with destruction; defendant was last person seen with exhibits, he had motive and opportunity to destroy them, and it is rationally inferable that he purloined them and arranged for their destruction]; *People v. Echevarria* (1992) 11 C.A.4th 444, 451, 13 C.R.2d 840 [court properly instructed jury on defendant's attempt to suppress evidence where defendant had shaved off beard and mustache and cut hair after murder]; *People v. Hill* (1995) 34 C.A.4th 727, 737, 41 C.R.2d 39 [evidence of defendant's attempt, while he awaited trial, to have victim killed was properly admitted, even though defendant admitted robbing and shooting victim and identity therefore was not at issue; evidence was relevant to refute claim that shooting was accidental and to show it was motivated by attempt to eliminate witness]; 2 Wigmore (Chadbourn Rev.) §285 et seq.) (On obligation of defense counsel to turn over incriminating physical evidence to prosecution, see *People v. Lee* (1970) 3 C.A.3d 514, 524, 83 C.R. 715, 2 Cal. Evidence (4th), Witnesses, §155; on crime of knowing destruction of exhibit about to be produced in evidence (P.C. 135), see *People v. Fields* (1980) 105 C.A.3d 341, 344, 164 C.R. 336.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
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## CHAPTER XI - Presentation At Trial

## V. DETERMINATION OF CREDIBILITY AND WEIGHT

## F. Sufficiency of Circumstantial Evidence.

## 1. Civil Cases.

## a. Test of Sufficiency.

3 Witkin Cal. Evid. Presentation § 138

[§ 138] Test of Sufficiency.

Evidence of circumstances may be offered if it is relevant, i.e., if it can provide any rational inference in support of the issue. (See 1 Cal. Evidence (4th), *Circumstantial Evidence*, §26.) A stricter standard applies to its sufficiency, and circumstantial evidence that may be admissible will not necessarily be of sufficient strength to sustain a judgment. (See *People v. Graves* (1934) 137 C.A. 1, 10, 29 P.2d 807, 1 Cal. Evidence (4th), *Circumstantial Evidence*, §§26, 28; 1 Wigmore (Tillers Rev.) §12.)

The difference, however, is one of degree only. Thus, it is frequently said that a judgment may be based on inferences drawn from circumstantial evidence, even though there is opposing direct testimony; it is not necessary that the circumstantial evidence in a civil case rise to such a degree of certainty that it excludes every other reasonable conclusion. (See generally *Hasson v. Ford Motor Co.* (1977) 19 C.3d 530, 548, 138 C.R. 705, 564 P.2d 857; *Chalmers v. Hawkins* (1926) 78 C.A. 733, 738, 248 P. 727; *Kerner v. Peacock Dairies* (1933) 129 C.A. 686, 689, 19 P.2d 283 [automobile collision; jury could draw inferences from physical facts, such as tire marks and position and appearance of cars after accident, contrary to direct testimony of eyewitnesses]; *Hilson v. Pacific Gas & Elec. Co.* (1933) 131 C.A. 427, 431, 21 P.2d 662; *Vaccarezza v. Sanguinetti* (1945) 71 C.A.2d 687, 691, 163 P.2d 470, *infra*, §140; *Dougherty v. Lee* (1946) 74 C.A.2d 132, 135, 168 P.2d 54; *Ybarra v. Spangard* (1949) 93 C.A.2d 43, 46, 208 P.2d 445; *Spolter v. Four-Wheel Brake Service Co.* (1950) 99 C.A.2d 690, 694, 222 P.2d 307, *infra*, §139; *Sanders v. MacFarlane's Candies* (1953) 119 C.A.2d 497, 500, 259 P.2d 1010 ["in civil cases the rule of decision is a rule of probability only"]; *Halstead v. Paul* (1954) 129 C.A.2d 339, 341, 277 P.2d 43; *Fibreboard Paper Products Corp. v. East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL-CIO* (1964) 227 C.A.2d 675, 697, 39 C.R. 64; *Dimond v. Caterpillar Tractor Co.* (1976) 65 C.A.3d 173, 184, 134 C.R. 895; 77 A.L.R.2d 580 [sufficiency of evidence, in absence of survivors or eyewitnesses, as to place of impact of colliding vehicles].)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Trial k.209



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## CHAPTER XI - Presentation At Trial

### V. DETERMINATION OF CREDIBILITY AND WEIGHT

#### F. Sufficiency of Circumstantial Evidence.

##### 1. Civil Cases.

##### b. Conflicting Inferences.

3 Witkin Cal. Evid. Presentation § 139

[§ 139] Conflicting Inferences.

(1) *General Rule.* Some confusion appears in cases where the circumstantial evidence gives rise to conflicting inferences of apparently equal weight. It is frequently declared that plaintiffs cannot recover merely on a showing that the circumstances are consistent with their theories; they must show that the inferences favorable to them are more reasonable or probable than those against them. (See generally *Estate of Moore* (1923) 65 C.A. 29, 33, 223 P. 73; *San Joaquin Grocery Co. v. Trewitt* (1926) 80 C.A. 371, 375, 252 P. 332; *Leslie G. v. Perry & Associates* (1996) 43 C.A.4th 472, 483, 50 C.R.2d 785.)

(2) *Qualifications.* This theory is subject to three qualifications:

First, the party's proof need not wholly exclude all unfavorable inferences; i.e., the party is not required to show that, under the circumstances, the inference in his or her favor is the only one that can reasonably be drawn. (*Campbell v. General Motors Corp.* (1982) 32 C.3d 112, 121, 184 C.R. 891, 649 P.2d 224; *West Coast Life Ins. Co. v. Crawford* (1943) 58 C.A.2d 771, 788, 138 P.2d 384; *Estate of Rowley* (1967) 257 C.A.2d 324, 334, 65 C.R. 139; *Short v. Nevada Joint Union High School Dist.* (1985) 163 C.A.3d 1087, 1099, 210 C.R. 297.)

In *Spolter v. Four-Wheel Brake Service Co.* (1950) 99 C.A.2d 690, 222 P.2d 307, plaintiff recovered judgment for wrongful death against defendant, which had replaced a car wheel a few weeks before the accident. *Held*, the jury could conclude that the wheel had not been removed in the interim and that defendant's employees had negligently replaced it with loose lugs. The court pointed out that jurors may call upon their own experience in matters within the realm of common experience, and added: "In this day and place when the ownership and operation of automobiles has become an almost indispensable commonplace of our normal life the jurors from their common experience are in a position to draw the inference that a new tire mounted on a wheel from two to three weeks before the accident would in the meantime with reasonable probability not have to be replaced." (99 C.A.2d 694.)

Second, the theory has practical effect only in the trial court. On appeal, the reviewing court will uphold the judgment if any inferences support it, even though they may not be the more probable ones. (See *McKinney v. Kull* (1981) 118 C.A.3d 951, 955, 173 C.R. 696; *State Farm Fire & Cas. Co. v. Jioras* (1994) 24 C.A.4th 1619, 1626, 29 C.R.2d 840 [all conflicts in inferences to be drawn from evidence are to be resolved in favor of prevailing party]; *Foothill Properties v. Lyon/Copley Corona Associates* (1996) 46 C.A.4th 1542, 1547, footnote 4, 54 C.R.2d 488 [reviewing court generally resolves conflicting evidence in favor of prevailing party]; 9 Cal. Proc. (4th), Appeal, §370.)



Third, the result may be influenced by a policy that makes the action favored or disfavored. In *Umbesen v. Crocker First Nat. Bank of San Francisco* (1949) 33 C.2d 599, 203 P.2d 752, a claimant of presumptively abandoned property (a bank deposit on which a check had been drawn and certified but never cashed, and since lost) had the burden of proving ownership. In view of the total lack of evidence as to what happened to the check, the trial court drew the permissible inference that it had been delivered to the payee, thus effecting an assignment of the funds. On appeal, the judgment against the claimant was reversed, the reviewing court selecting the "more probable" inference, which was "consistent with the purpose" of the statute, that the check had not been delivered. (33 C.2d 602.) (See *Dimond v. Caterpillar Tractor Co.* (1976) 65 C.A.3d 173, 183, 134 C.R. 895, citing the text.)

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## F. Sufficiency of Circumstantial Evidence.

## 1. Civil Cases.

## c. Inference Based on Inference.

## 1. General Rule of Admissibility.

## 3 Witkin Cal. Evid. Presentation § 140

## [§ 140] General Rule of Admissibility.

(1) *Former Law.* A former statute described an inference as a deduction founded "on a fact legally proved," and some courts thought that this language precluded an inference founded on another inference. (See *Hamilton v. Pacific Elec. Ry. Co.* (1939) 12 C.2d 598, 602, 86 P.2d 829; *People v. Smith* (1921) 55 C.A. 324, 333, 203 P. 816; *Walsh v. American Trust Co.* (1935) 7 C.A.2d 654, 659, 47 P.2d 323; *Hubbert v. Aztec Brewing Co.* (1938) 26 C.A.2d 664, 689, 80 P.2d 185, 1016; *Primm v. Joyce* (1948) 87 C.A.2d 288, 292, 196 P.2d 829 ["An inference may not be based on an inference much less a suspicion"].)

This proposition is unsound and has been repudiated by well-considered cases here and elsewhere. "The statement ... does not and cannot mean that an inference cannot be based upon a fact which is itself based upon circumstantial evidence. If that were the rule it would mean that few cases based on circumstantial evidence could ever be tried because it is seldom indeed that but one fact, in such a case, is based on circumstantial evidence. ... The true rule is and should be that an inference cannot be based on an inference that is too remote or conjectural." (*Vaccarezza v. Sanguinetti* (1945) 71 C.A.2d 687, 698, 163 P.2d 470.)

(2) *Present Law.* The better authorities and the later California cases clearly hold that an inference may be based on an inference where the first inference is properly drawn from sufficient evidence, and the second inference is not too remote. (*People v. Graves* (1934) 137 C.A. 1, 14, 29 P.2d 807; *West Coast Life Ins. Co. v. Crawford* (1943) 58 C.A.2d 771, 774, 138 P.2d 384; *Brown-Forman Distillers Corp. v. Walkup Drayage & Warehouse Co.* (1945) 71 C.A.2d 795, 799, 163 P.2d 878 ["when a fact is first proved all reasonable deductions may be drawn from it. Reasoning does not stop when one deduction has been made"]; *Vaccarezza v. Sanguinetti*, *supra*; *Ybarra v. Spangard* (1949) 93 C.A.2d 43, 46, 208 P.2d 445 [criticizing view expressed in *Stewart v. Norsigian* (1944) 64 C.A.2d 540, 545, 149 P.2d 46, as too narrow]; *Savarese v. State Farm Mut. Auto. Ins. Co.* (1957) 150 C.A.2d 518, 520, 310 P.2d 142; *Abrams v. Stone* (1957) 154 C.A.2d 33, 39, 315 P.2d 453; *People v. Vignoli* (1963) 213 C.A.2d 855, 857, 29 C.R. 260, citing the text; *People v. Davis* (1965) 235 C.A.2d 214, 225, 45 C.R. 297, citing the text; *Louis & Diederich v. Cambridge European Imports* (1987) 189 C.A.3d 1574, 1584, 234 C.R. 889, quoting the text; see 1A Wigmore (Tillers Rev.) §41; 5 A.L.R.3d 100 [rule against basing inference on inference].)

*Ev.C. 600(b)* is consistent with this view: The inference may be drawn from "another fact or group of facts found or otherwise established in the action." (See *S. C. Anderson v. Bank of America* (1994) 24 C.A.4th 529, 538, footnote 12, 30 C.R.2d 286, citing *Ev.C. 600(b)* [whether trier of fact may draw inference depends on whether the proposed

conclusion is "reasonable, logical, and nonspeculative deduction from the facts proved"].)

(3) *Illustrations.* In *Vaccarezza v. Sanguinetti*, *supra*, plaintiffs, suing for damages for breach of warranty in a sale of infected pork, offered the following evidence: (a) a doctor's testimony that plaintiffs had unmistakable symptoms of trichinosis, though no actual germs had been found in a test; (b) plaintiffs' testimony that they had purchased their pork products exclusively from defendants. *Held*, the inferences that they had trichinosis, that they contracted it from eating pork, and that the pork from which they contracted it had been obtained from defendants, were properly drawn. (71 C.A.2d 697.)

In *Savarese v. State Farm Mut. Auto. Ins. Co.*, *supra*, defendant insurer denied liability on an automobile policy, asserting cancellation prior to the accident. Defendant proved its copy of the letter to the insured and its established practice of mailing notices, relying on the former presumption that the ordinary course of business was followed and the presumption of *Ev.C. 641* (receipt of letter). *Held*, the lower court's finding of cancellation was proper, despite the fact that the mailing was evidenced by one presumption, and the insured's receipt of the letter by another presumption. (150 C.A.2d 520.)

In *People v. Vignoli*, *supra*, defendant was charged with driving under the influence of narcotic drugs. He had been arrested at 1 p.m. and examined by a medical expert at 5:15 p.m. (a) On the basis of observed facts (fresh needle mark, pupils constricted, drowsiness), the doctor inferred, and gave his opinion, that defendant was under the influence of a narcotic drug at the time of the examination. (b) The doctor also testified that the average span of observable influence of a narcotic injection is 4-6 hours; this supported the further inference that defendant was under the influence 5 hours earlier while driving. (213 C.A.2d 856.)

In *People v. Warner* (1969) 270 C.A.2d 900, 76 C.R. 160, defendant was charged with conspiracy to commit bookmaking. The evidence showed that defendant rented an apartment and arranged for telephone service, and C, his fellow conspirator, attempted to arrange for police protection. Defendant's testimony was that C had tried to interest him in the conspiracy and that he had refused, following which C became cold and indifferent. The prosecution, in rebuttal, introduced evidence that, after defendant's arrest in his apartment, defendant's wife telephoned C twice, advising him of her husband's arrest, and telling him to watch his step and find out who the stool pigeon was. *Held*, this was admissible. From the timing of the calls and the statements made, it could reasonably be inferred that the wife knew defendant was involved in bookmaking with C, and this made more probable the further inference that he was a coconspirator. (270 C.A.2d 908, citing the text.)

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## CHAPTER XI - Presentation At Trial

### V. DETERMINATION OF CREDIBILITY AND WEIGHT

#### F. Sufficiency of Circumstantial Evidence.

##### 1. Civil Cases.

##### c. Inference Based on Inference.

##### 2. Exception: Remote or Conjectural Inference.

#### 3 *Witkin Cal. Evid. Presentation § 141*

[§ 141] Exception: Remote or Conjectural Inference.

In *Savarese v. State Farm Mut. Auto. Ins. Co.* (1957) 150 C.A.2d 518, 310 P.2d 142, the court added a word of caution: "Of course, the building of inference upon inference may often result in a progressive weakening of logical sequence, and lead to an ultimate conclusion which is untenable on the basis of the facts proven. When an ultimate inference is thus remote from the evidence, it should be rejected." (150 C.A.2d 520.)

This qualification of the rule is repeated in cases holding that an inference must ultimately rest on evidence, not on speculative possibility or conjecture. (See *Marshall v. Parkes* (1960) 181 C.A.2d 650, 655, 5 C.R. 657; *Estate of Kuttler* (1960) 185 C.A.2d 189, 204, 8 C.R. 160; *Krause v. Apodaca* (1960) 186 C.A.2d 413, 418, 9 C.R. 10; *Estate of Gutierrez* (1961) 189 C.A.2d 165, 173, 11 C.R. 51; *Cothran v. Town Council* (1962) 209 C.A.2d 647, 664, 26 C.R. 319, citing the text; *Brautigam v. Brooks* (1964) 227 C.A.2d 547, 556, 38 C.R. 784; *Louis & Diederich v. Cambridge European Imports* (1987) 189 C.A.3d 1574, 1584, 1585, 234 C.R. 889; *Kasparian v. Los Angeles* (1995) 38 C.A.4th 242, 269, 45 C.R.2d 90.)

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#### F. Sufficiency of Circumstantial Evidence.

##### 2. Criminal Cases.

##### a. Cautionary Instruction Required.

##### 1. Nature and Purpose.

#### 3 Witkin Cal. Evid. Presentation § 142

[§ 142] Nature and Purpose.

The defendant in a criminal trial is protected by the presumption of innocence (1 Cal. Evidence (4th), *Burden of Proof and Presumptions*, §20), and, therefore, the jury should be informed of the effect of circumstantial evidence offered by the prosecution. (See 36 A.L.R.4th 1046 [modern status of rule].) (On when evidence is circumstantial so as to call for instruction, see 1 Cal. Evidence (4th), *Circumstantial Evidence*, §§1, 2.)

(1) *Where Evidence Wholly or Substantially Circumstantial.* If the prosecution's case rests entirely or substantially on circumstantial evidence, the required instruction is that such evidence must be irreconcilable with the theory of innocence. (See *People v. Wiley* (1976) 18 C.3d 162, 174, 133 C.R. 135, 554 P.2d 881; *People v. Hatchett* (1944) 63 C.A.2d 144, 155, 146 P.2d 469; *People v. Ryan* (1981) 116 C.A.3d 168, 177, 171 C.R. 854; *People v. Fuentes* (1986) 183 C.A.3d 444, 454, 237 C.R. 465, citing the text; CALJIC (6th ed.), No. 2.01 [jury must find that the proved circumstances "are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion"].)

A similar instruction is required where the only element resting substantially or entirely on circumstantial evidence is specific intent or mental state. (CALJIC (6th ed.), No. 2.02 [circumstances must be consistent with theory that defendant had requisite specific intent or mental state and irreconcilable with any other rational conclusion]; see *People v. Gordon* (1982) 136 C.A.3d 519, 531, 186 C.R. 373; *People v. DeLeon* (1982) 138 C.A.3d 602, 607, 188 C.R. 63; *People v. Honig* (1996) 48 C.A.4th 289, 341, 55 C.R.2d 555, 2 Cal. Crim. Law (3d), *Crimes Against Governmental Authority*, §105 [requested instruction based on CALJIC, No. 2.02 was properly refused, as defendant's mental state did not rest substantially on circumstantial evidence: his knowledge of all facts giving rise to offense was overwhelmingly established and for most part was conceded in his testimony].)

The precise form of the traditional instruction is not essential, as long as the doctrine is plainly stated. (See *People v. Bender* (1945) 27 C.2d 164, 177, 163 P.2d 8; *People v. Koenig* (1946) 29 C.2d 87, 92, 173 P.2d 1; *People v. Navarro* (1946) 74 C.A.2d 544, 550, 169 P.2d 265 ["Words of equal import may be substituted if the principle is substantially but clearly and fairly set forth"]; *People v. Mansour* (1951) 103 C.A.2d 592, 597, 230 P.2d 52.)

(2) *Where Two Different Interpretations Are Possible.* A part of CALJIC (6th ed.), No. 2.01, used where two opposing conclusions can be drawn from the evidence, states that the jury should "adopt that interpretation that points to the defendant's innocence, and reject that interpretation that points to his guilt." (See *People v. Merkouris* (1956) 46

*C.2d* 540, 560, 297 *P.2d* 999; *People v. Yokum* (1956) 145 *C.A.2d* 245, 253, 302 *P.2d* 406; see also CALJIC (6th ed.), No. 2.02 [where opposing conclusions can be drawn as to existence of specific intent or mental state, jury must adopt interpretation pointing to absence of such intent or state].)

(3) *Each Essential Fact Proved*. CALJIC (6th ed.), No. 2.01 further provides that "each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt." (See *People v. Watson* (1956) 46 *C.2d* 818, 830, 299 *P.2d* 243; *People v. Yokum*, *supra*, 145 *C.A.2d* 254; *People v. Shea* (1995) 39 *C.A.4th* 1257, 1271, 46 *C.R.2d* 388 [where case is based on direct, not circumstantial, evidence, giving instruction is error, as jury could be led to believe that each of crime's circumstances, e.g., victim's bruises, torn clothes, etc., must be proved beyond reasonable doubt].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Where Evidence Wholly or Substantially Circumstantial*. See *People v. Dunkle* (2005) 36 *C.4th* 861, 928, 32 *C.R.3d* 23, 116 *P.3d* 494 [in penalty phase of capital murder case, trial judge did not err in failing to instruct jury with CALJIC, Nos. 2.01 and 2.02 with regard to evidence of other violent offenses; prosecution relied primarily on direct, rather than circumstantial, evidence, and to extent evidence of defendant's mental state was circumstantial, it was not equally consistent with rational finding of innocence]; *People v. Burch* (2007) 148 *C.A.4th* 862, 872, 55 *C.R.3d* 892, 5 *Cal. Crim. Law* (3d), *Criminal Trial*, Supp., §614 [in prosecution for possession of fictitious bills, trial judge erred in giving CALJIC, No. 2.01 instead of CALJIC, No. 2.02, where prosecution relied substantially on circumstantial evidence to prove specific intent but relied on direct evidence to prove other elements of crime; however, error was harmless, as there was no reasonable probability that jury misapplied more general circumstantial evidence principles of CALJIC, No. 2.01 in determining whether specific intent was proved]; CALCRIM, No. 224 [Circumstantial Evidence: Sufficiency of Evidence]; CALCRIM, No. 225 [Circumstantial Evidence: Intent or Mental State]. *Specific intent or mental state*: See *People v. Cole* (2004) 33 *C.4th* 1158, 1222, 17 *C.R.3d* 532, 95 *P.3d* 811 [in capital murder trial, failure to give instruction on circumstantial evidence as it relates to specific intent or mental state (CALJIC, No. 2.02) was not error, where specific intent or mental state was not only element of case resting substantially or entirely on circumstantial evidence; general instruction on circumstantial evidence (CALJIC, No. 2.01) was appropriate and was given]. *West's Key Number Digest*, Criminal Law k.784 et seq.



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## V. DETERMINATION OF CREDIBILITY AND WEIGHT

## F. Sufficiency of Circumstantial Evidence.

## 2. Criminal Cases.

## a. Cautionary Instruction Required.

## 2. Failure To Instruct.

## 3 Witkin Cal. Evid. Presentation § 143

## [§ 143] Failure To Instruct.

Where the evidence is circumstantial, refusal to instruct is serious error, and failure to instruct is likewise error. In other words, the instruction is a mandatory requirement in a proper case, and the court must give it of its own motion. (*People v. Bender* (1945) 27 C.2d 164, 175, 163 P.2d 8 ["In unequivocal language it should be declared to the jury in every criminal case wherein circumstantial evidence is received"]; *People v. Yrigoyen* (1955) 45 C.2d 46, 49, 286 P.2d 1; *People v. Chenault* (1946) 74 C.A.2d 487, 497, 169 P.2d 29; *People v. Tholke* (1946) 75 C.A.2d 857, 860, 171 P.2d 904; *People v. Goldstein* (1956) 139 C.A.2d 146, 151, 293 P.2d 495; *People v. Yokum* (1956) 145 C.A.2d 245, 249, 302 P.2d 406; *People v. Fuentes* (1986) 183 C.A.3d 444, 454, 237 C.R. 465 [circumstantial evidence relied on to identify defendant, conflicting evidence presented and jury did not find case "easy"; trial judge's refusal to give CALJIC, No. 2.01 instruction held prejudicial error]; cf. *People v. Barkoff* (1958) 163 C.A.2d 639, 644, 329 P.2d 1005 [instruction on former CALJIC, No. 27 (now CALJIC (6th ed.), No. 2.02) should have been given, but no reversible error in view of giving of former CALJIC, No. 26 (now CALJIC (6th ed.), No. 2.01)]; *People v. Rodrigues* (1994) 8 C.4th 1060, 1142, 36 C.R.2d 235, 885 P.2d 1 [because trial court delivered more inclusive instruction under CALJIC, No. 2.01, its refusal to additionally instruct with CALJIC, No. 2.02 clearly was not prejudicial error].)

In *People v. Salas* (1976) 58 C.A.3d 460, 129 C.R. 871, a robbery case, defendant contended that the trial court should have specifically instructed the jury that defendant could not be found guilty of inflicting great bodily harm on the victim, unless the proved circumstances not only were consistent with the hypothesis that defendant had the specific intent, but were irreconcilable with any other rational conclusion. *Held*, the contention was well taken.

(a) Where one element of the crime charged is sought to be proved by direct evidence, while other elements are based on circumstantial evidence, the circumstantial evidence instruction becomes crucial. This is so, however, only when the basic proof of an essential element consists of circumstantial evidence. Then, "it is unequivocally essential that such an instruction be given." (58 C.A.3d 473.)

(b) Here, the trial court gave CALJIC, Nos. 2.01 and 2.02, but the specific intent referred to dealt only with the robbery charge, i.e., with the defendant's specific intent to permanently deprive the owner of his property. The cautionary instruction was not repeated for the issue of specific intent to inflict great bodily injury. This lack was prejudicial error. The trial court's failure to give CALJIC, No. 2.02, as to the bodily injury allegation might well have led the jurors to conclude that they could find defendant possessed the intent by the circumstantial evidence introduced, without considering whether the proved circumstances were irreconcilable with any other rational conclusion.

Pinpointing was necessary in the instructions. (58 C.A.3d 473.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Rogers* (2006) 39 C.4th 826, 885, 48 C.R.3d 1, 141 P.3d 1353 [in capital murder case, trial judge erred in failing to give circumstantial evidence instruction (CALJIC, No. 2.01), where prosecution's case rested principally on two items of circumstantial evidence; however, error was harmless because judge did give CALJIC, No. 2.02 (circumstantial evidence of specific intent or mental state; see text, §142), and thus error could only have affected issue of identity, on which there was strong circumstantial evidence of defendant's guilt].





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## 2. Criminal Cases.

## b. Exceptions and Distinctions.

## 3 Witkin Cal. Evid. Presentation § 144

[§ 144] Exceptions and Distinctions.

(1) *Circumstantial Evidence Incidental*. The earlier statement of the rule called for the instruction where the evidence is "wholly circumstantial." Later, it was said that, where circumstantial evidence is "substantially relied upon for proof of guilt," and particularly "where criminal knowledge is shown only by circumstantial evidence," the instruction must be given. (*People v. Yrigoyen* (1955) 45 C.2d 46, 49, 286 P.2d 1.)

But where there is direct evidence connecting the defendant with the commission of the crime, and the circumstantial evidence is "only incidental or corroborative," the instruction is not required. (See *People v. Jerman* (1946) 29 C.2d 189, 197, 173 P.2d 805; *People v. Malbrough* (1961) 55 C.2d 249, 251, 10 C.R. 632, 359 P.2d 30; *People v. Wiley* (1976) 18 C.3d 162, 175, 133 C.R. 135, 554 P.2d 881; *People v. Harmon* (1948) 89 C.A.2d 55, 60, 200 P.2d 32; *People v. Klinkenberg* (1949) 90 C.A.2d 608, 632, 204 P.2d 47; *People v. Moore* (1961) 196 C.A.2d 91, 98, 16 C.R. 294; *People v. Pruitt* (1969) 269 C.A.2d 501, 504, 75 C.R. 125; *People v. Baldwin* (1979) 97 C.A.3d 396, 402, 159 C.R. 15; *People v. Williams* (1984) 162 C.A.3d 869, 874, 208 C.R. 790; *People v. Thongvilay* (1998) 62 C.A.4th 71, 86, 72 C.R.2d 738; 36 A.L.R.4th 1046.)

(2) *Defendant's Admissions*. Testimony to an extrajudicial admission was described as "indirect evidence" by former C.C.P. 1832. Neither the term "indirect evidence" nor this classification of admissions is used in the Evidence Code; but, even under the old law, the circumstantial evidence instruction was not required in all cases involving reliance on "indirect evidence." The instruction was designed only for the case "in which the defendant's guilt must be inferred from a pattern of incriminating circumstances." (*People v. Gould* (1960) 54 C.2d 621, 629, 630, 7 C.R. 273, 354 P.2d 865 [distinguishing and disapproving of contrary implications in *People v. Koenig* (1946) 29 C.2d 87, 173 P.2d 1, *supra*, §142]; see *People v. Wright* (1990) 52 C.3d 367, 406, 276 C.R. 731, 802 P.2d 221 [circumstantial evidence instruction was not required where prosecution placed primary reliance on defendant's postarrest inculpatory admissions; citing *People v. Wiley*, *supra*].)

Thus, in *Gould*, defendants G and M were convicted of burglary. The case against G consisted mainly of a weak identification by the victim (1 Cal. Evidence (4th), Hearsay, §166), and his own admissions after arrest. He contended that, in view of the equivocal identification, his admissions were necessary to the conviction, and that it was error to deny the circumstantial evidence instruction. The court said: "The requested instructions on circumstantial evidence clearly do not refer to the problem of evaluating hearsay. They are unnecessary, and may be misleading, when the jury is to consider only whether the admission was made, and if made, whether it was true." (54 C.2d 629.)

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#### F. Sufficiency of Circumstantial Evidence.

##### 2. Criminal Cases.

##### c. Review on Appeal.

##### 1. Affirmance on Substantial Evidence.

#### 3 Witkin Cal. Evid. Presentation § 145

[§ 145] Affirmance on Substantial Evidence.

(1) *Conflicting Statements in Early Cases.* In *People v. Staples* (1906) 149 C. 405, 425, 86 P. 886, the court mistakenly applied the trial rule (*supra*, §142) to an appeal, and declared that, to support a criminal judgment, the circumstantial evidence "must be not only consistent with the hypothesis of guilt, but inconsistent with any other rational hypothesis." This mistake was repeated in *People v. Lamson* (1934) 1 C.2d 648, 661, 36 P.2d 361.

The correct rule had been authoritatively stated in *People v. Woo* (1919) 181 C. 315, 326, 184 P. 389: "[I]t is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal ... it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below ... We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict."

(2) *Clarification.* Subsequently, the doctrine of the *Staples* and *Lamson* cases was repudiated in two stages:

The first dealt with the situation in which, unlike *Staples* and *Lamson*, the crime was admitted and the circumstantial evidence related solely to the identity of the defendant. In *People v. Perkins* (1937) 8 C.2d 502, 66 P.2d 631, K, a gambler with whom defendant had been living, was robbed and murdered one morning. Defendant claimed that he also was attacked by assailants who fled. Defendant said that he had not been in a fight the night before, but blood was found on his clothes, and scratches and cuts on his face, neck and body, while skin and blood were found under the fingernails of the deceased. Some time later, paper money resembling that known to have been in the deceased's possession was found concealed in a tree near a house to which defendant had gone for help on the morning. *Held*, the evidence was sufficient to sustain the conviction; even though the appellate court is of the opinion that the circumstances might be reasonably reconciled with the innocence of the defendant, this does not warrant interference with the determination of the jury. (8 C.2d 511.)

In the second stage, where the circumstantial evidence, as in the *Staples* and *Lamson* cases, related to the commission of the crime, the rule of *People v. Woo*, *supra*, was again approved. (See *People v. Green* (1939) 13 C.2d 37, 42, 87 P.2d 821 ["A conviction may not be set aside because the evidence is susceptible of two reasonable inferences, one looking to the guilt of the defendant and the other to his innocence"]; *People v. Newland* (1940) 15 C.2d

678, 681, 104 P.2d 778; *People v. Hills* (1947) 30 C.2d 694, 701, 185 P.2d 11 [circumstantial evidence furnishing inference of premeditation held to support verdict of first degree murder]; *People v. Daugherty* (1953) 40 C.2d 876, 885, 256 P.2d 911; *People v. Redrick* (1961) 55 C.2d 282, 289, 10 C.R. 823, 359 P.2d 255; *People v. Reilly* (1970) 3 C.3d 421, 425, 90 C.R. 417, 475 P.2d 649; *People v. Johnson* (1980) 26 C.3d 557, 575, 162 C.R. 431, 606 P.2d 738; *People v. McNeese* (1940) 40 C.A.2d 97, 101, 104 P.2d 370; *People v. Navarro* (1946) 74 C.A.2d 544, 549, 169 P.2d 265; *People v. Klinkenberg* (1949) 90 C.A.2d 608, 626, 204 P.2d 47; *People v. Camargo* (1955) 130 C.A.2d 543, 549, 279 P.2d 194.)

(3) *California Rule Consistent With Federal Standard.* In *People v. Johnson*, *supra*, the court reviewed the authorities and found the California rule consistent with the standards for review set forth in *Jackson v. Virginia* (1979) 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

(a) "In determining whether a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt, the appellate court 'must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' ... The court does not, however, limit its review to the evidence favorable to the respondent. ... [O]ur task ... is twofold. First, we must resolve the issue in the light of the whole record--i.e., the entire picture of the defendant put before the jury--and may not limit our appraisal to isolated bits of evidence selected by the respondent. Second, we must judge whether the evidence of each of the essential elements ... is substantial; it is not enough for the respondent simply to point to 'some' evidence supporting the finding, for 'Not every surface conflict of evidence remains substantial in the light of other facts.' " (26 C.3d 577, quoting from *People v. Bassett* (1968) 69 C.2d 122, 70 C.R. 193, 443 P.2d 777.)

(b) Some Court of Appeal decisions contain language suggesting that a conviction should be sustained if any evidence taken in isolation might appear substantial. This is not the proper approach: "A formulation of the substantial evidence rule which stresses the importance of isolated evidence supporting the judgment ... risks misleading the court into abdicating its duty to appraise the whole record. As Chief Justice Traynor explained, the 'seemingly sensible' substantial evidence rule may be distorted in this fashion, to take 'some strange twists.' 'Occasionally,' he observes, 'an appellate court affirms the trier of fact on isolated evidence torn from the context of the whole record. Such a court leaps from an acceptable premise, that a trier of fact could reasonably believe the isolated evidence, to the dubious conclusion that the trier of fact reasonably rejected everything that controverted the isolated evidence. Had the appellate court examined the whole record, it might have found that a reasonable trier of fact could not have made the finding in issue. One of the very purposes of review is to uncover just such irrational findings and thus preclude the risk of affirming a finding that should be disaffirmed as a matter of law.' " (26 C.3d 577, quoting Traynor, *The Riddle of Harmless Error*.)

(c) "We do not believe it necessary to disapprove past decisions merely because they contain language which could be misconstrued to permit affirmance based on a standard of review which might contravene *Jackson v. Virginia*. ... We think it sufficient to reaffirm the basic principles which govern judicial review of a criminal conviction challenged as lacking evidentiary support: the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence--that is, evidence which is reasonable, credible, and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (26 C.3d 578.) (See *People v. Oyaas* (1985) 173 C.A.3d 663, 668, 219 C.R. 243 [following *People v. Johnson*]; 26 West L.A. L. Rev. 101 [sufficiency of evidence standard of *Jackson v. Virginia*].)

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##### 2. Criminal Cases.

##### c. Review on Appeal.

#### 2. Reversal Where Evidence Not Substantial.

##### 3 Witkin Cal. Evid. Presentation § 146

[§ 146] Reversal Where Evidence Not Substantial.

(1) *Reversal Not Common.* Under the theory of appellate review declared in the preceding section, insufficiency of evidence is seldom an express ground of reversal; the practice is rather to emphasize the probable prejudice from errors committed in a "close case." (See 6 *Cal. Crim. Law* (3d), *Criminal Appeal*, §§152, 153; 6 *Cal. Crim. Law* (3d), *Reversible Error*, §45.) In rare instances, however, the court, unable to find errors of sufficient substance to justify their characterization as "prejudicial," places its reversal squarely on the ground of insufficiency of evidence. (See 6 *Cal. Crim. Law* (3d), *Criminal Appeal*, §152; *People v. Hall* (1964) 62 C.2d 104, 41 C.R. 284, 396 P.2d 700, *infra*, this section; *People v. Redmond* (1969) 71 C.2d 745, 756, 79 C.R. 529, 457 P.2d 321 [identification of defendant not positive, fingerprint evidence not substantially incriminating]; *People v. Hunt* (1971) 4 C.3d 231, 238, 93 C.R. 197, 481 P.2d 205 [expert opinion as to possession of methedrine for sale not substantial]; *People v. Reyes* (1974) 12 C.3d 486, 497, 500, 116 C.R. 217, 526 P.2d 225; *In re Johnny G.* (1979) 25 C.3d 543, 547, 159 C.R. 180, 601 P.2d 196 [extrajudicial identification of defendant that cannot be confirmed by identification at trial is insufficient to sustain conviction; following *People v. Gould*, 1 *Cal. Evidence* (4th), *Hearsay*, §166]; *People v. Briggs* (1967) 255 C.A.2d 497, 63 C.R. 111, 6 *Cal. Crim. Law* (3d), *Criminal Appeal*, §153; *People v. Blakeslee* (1969) 2 C.A.3d 831, 837, 82 C.R. 839; *People v. Johnson* (1984) 158 C.A.3d 850, 855, 856, 204 C.R. 877 [thumbprint on bottle containing illegal drug insufficient to prove defendant's possession of drug].)

(2) *Illustrations.* In *People v. Hall*, *supra*, decedent, a prostitute, was stabbed to death. In her rooms, police found blood trails, soleprints and heelprints of a man's shoes, a broken window, and a bloody handprint. Witnesses heard talking between decedent and an unidentified man, with the name "Monroe" mentioned (defendant's name was Monroe Hall). There was further evidence that defendant's shoes had been recently scrubbed. Defendant was convicted of second degree murder in a nonjury trial. *Held*, reversed. In holding the evidence insufficient, the court reviewed each supposedly incriminating item:

(a) The mention of "Monroe" was equivocal. Although some witnesses testified he was the only "Monroe" she knew, she undoubtedly knew many persons, and it was unclear whether the name was used at the beginning or end of the statements, i.e., to name the person she was addressing or otherwise. (62 C.2d 110.)

(b) The chemical tests provided no convincing evidence of recent blood on his shoes, and the cleaning of his shoes was not an incriminating fact, because scrubbing would tend to spread any blood and the tests would have discovered it. (62 C.2d 110, 111.)

(c) No expert evidence connected glass in his shoes with the glass found near the broken window, no cuts were found on his arms, and none of the prints was linked to him. (62 C.2d 112.)

The opinion concludes as follows:

"Every attempt to connect defendant with the details of the killing failed. To justify a criminal conviction, the trier of fact must be reasonably persuaded to a near certainty. The trier must therefore have reasonably rejected all that undermines confidence. This case presents a mass of undisputed evidence and unexplained facts that destroys confidence in any inference pointing to guilt. Each item of evidence against defendant is so weak and inconclusive that together they are insufficient to constitute proof beyond a reasonable doubt." (62 C.2d 112.)

In *People v. Blakeslee*, *supra*, the "totality of proof" that defendant killed her mother consisted of the following facts: She was at the crime scene about the time when the crime was committed; she had an opportunity to commit the crime; she and her mother had "friction" in the past (though neither past physical violence nor a present quarrel was shown); on the night of the crime, she gave the police a false account of her movements and denied knowing that her brother owned a .22 rifle. *Held*, conviction of second degree murder reversed.

(a) *Test of sufficiency*. The test is whether proof of guilt is substantial, is of solid value, and reasonably inspires confidence. "We think it follows that the more serious the charge--and murder is considered the most serious charge of all--the more substantial the proof of guilt should be in order to reasonably inspire confidence." (2 C.A.3d 837.)

(b) *Inferences from falsehoods*. Defendant's falsehoods might form the basis for unfavorable inferences against her. "But inferences of what? The refutation of these falsehoods did not directly implicate defendant in the slaying. Rather their refutation merely destroyed defendant's asserted alibi for the time of the crime and rebutted her claimed ignorance of an accessible weapon which could have been used to commit the crime. This negation of a negative (she was not there) does not amount to affirmation of a positive (she did the shooting). Inferences drawn from her tender of a false alibi do not directly support a murder accusation against the defendant. While it is said that a false alibi tends to establish a consciousness of guilt ... , the logical force of this deduction is weakened when there is some plausibility to the defendant's subsequent explanation of the reason for the falsehood. Here, defendant's explanation was that in giving these falsehoods she was trying to protect her brother Michael." (2 C.A.3d 839, citing the text.)

(c) *Lack of ordinarily expected evidence*. In a murder prosecution based on circumstantial evidence, certain evidence is ordinarily expected. It was absent here. "The absence of evidence, like Sherlock Holmes' curious incident of the dog in the nighttime which did not bark, may have as great an impact on the substantiality of a case as any which is produced, for the absence of evidence which would normally be forthcoming can undermine the solidity of the proof relied on to support a finding of guilt." (2 C.A.3d 839.) The "missing evidence" was not peripheral, but was central to the murder charge. "It consists of (1) evidence of a murder weapon, which we do not have; (2) evidence linking the bullets which caused the victim's death to a particular weapon, which we do not have; (3) in the absence of the first two items, evidence of the type or caliber of weapon used for the murder, which we do not have; (4) evidence to establish a connection between a murder weapon and the defendant, either tangible evidence such as fingerprints, palm prints, or powder burns, or testimonial evidence linking the defendant in some manner to a weapon, which evidence we do not have." (2 C.A.3d 840.)

(d) *Evidence susceptible of manipulation*. When evidence is susceptible of such manipulation that it could be used against another person (e.g., the defendant's brother) as plausibly as against defendant, it lacks substantial probative value and does not reasonably inspire confidence in defendant's guilt. The evidence therefore did not constitute proof beyond a reasonable doubt. (2 C.A.3d 840.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER XI - Presentation At Trial

## VI. INTRODUCTION OF DOCUMENTARY AND DEMONSTRATIVE EVIDENCE

- A. Documentary Evidence.
  - 1. Foundation by Authentication.
    - a. In General.

3 Witkin Cal. Evid. Presentation § 147

[§ 147] In General.

Except where authenticity is admitted (2 Cal. Evidence (4th), Documentary Evidence, §21) or presumed (2 Cal. Evidence (4th), Documentary Evidence, §22 et seq.), introduction of a document in evidence requires a foundation by proof of authenticity (2 Cal. Evidence (4th), Documentary Evidence, §3 et seq.). The normal procedure is to call a witness to testify to the preliminary facts showing authenticity. (See Ev.C. 1400 et seq.; 2 Cal. Evidence (4th), Documentary Evidence, §8 et seq.; on the practice, see C.E.B., 2 Civ. Proc. During Trial 3d, §13.65 et seq.; Rutter Group, 2 Civil Trials and Evidence §8:326 et seq.; 35 Proof of Facts 2d 147 [foundation for admission of secondary evidence]; 2 McCormick 5th, §218 et seq.) (On foundation for business records, see 1 Cal. Evidence (4th), Hearsay, §243; on admission of prepared testimony as documentary exhibit in economic litigation case, see C.C.P. 98, 2 Cal. Proc. (4th), Courts, §266.)

The writing must be shown to opposing counsel, who may challenge the sufficiency of the showing of preliminary facts. But the objection to lack of foundation must be specific (infra, §380). Thus, in *Bank of America v. Taliaferro* (1956) 144 C.A.2d 578, 301 P.2d 393, plaintiff bank, to prove a conditional sales contract and assignment to it, merely had an employee testify that the contract was acquired by the bank. Because no showing of due execution and delivery was made, an objection on that ground would have been good. But the only objection was that the contract "purportedly signed" by the conditional buyer was "hearsay, incompetent, irrelevant and immaterial" as to the defendant. *Held*, this did not inform the court and proponent of the defect to be corrected, and it was waived. (144 C.A.2d 582.)

Similarly, in *People v. Alves* (1954) 123 C.A.2d 735, 267 P.2d 858, the action was against a highway carrier for violation of a Public Utilities Commission minimum rate decision. To make the necessary proof of service of the decision on the carrier, the prosecution offered a "Certificate of Service" by C, an employee of the Commission, reciting that "I ... hereby certify that it appears from said records" that service was made by mail. This was plainly insufficient as authentication, being merely the conclusion of the custodian as to what the records showed, instead of a certified copy of the record of service. But defendant's objection was that service could only be proved by a certificate of the person making the service, i.e., that the Commission's records could not be used to prove service. Because such an official record is prima facie evidence of the facts recited therein (2 Cal. Evidence (4th), Documentary Evidence, §44), this objection was untenable; and, having failed to object to the improper manner of proving the official record (a defect easily correctable), he waived the defect. (123 C.A.2d 737.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 2 McCormick 6th, §221 et seq. *West's Key Number Digest*, Criminal Law k.663; Evidence k.369 et seq.; Trial k.39





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### VI. INTRODUCTION OF DOCUMENTARY AND DEMONSTRATIVE EVIDENCE

#### A. Documentary Evidence.

##### 1. Foundation by Authentication.

##### b. Tape Recording.

3 Witkin Cal. Evid. Presentation § 148

[§ 148] Tape Recording.

A tape recording is a writing under *Ev.C. 250*. (See 2 *Cal. Evidence (4th)*, *Documentary Evidence*, §12; 48 Am.Jur. Trials 1 [admission and use of audio recordings as evidence]; 23 Proof of Facts 3d 315 [foundation for audio recordings].)

In *People v. Fonville (1973)* 35 C.A.3d 693, 111 C.R. 53, the prosecution offered a tape recording which was surreptitiously made at the jail where defendant was confined and which supposedly was between defendant and his uncle. The foundation for admission consisted of the following facts: When the uncle arrived at the jail, his name, address and relationship to defendant were taken; defendant and the uncle were assigned to phone No. 30, which was part of the intercom phone set-up in the visiting area and which allowed the two to talk while separated by a glass partition; the jail personnel notified the recording room to record the conversation in accordance with prior instructions from the district attorney; a sheriff's employee recorded the conversation. No one was called to identify the voices or to testify that the tape accurately reproduced the conversation. The tape was admitted. *Held*, a sufficient foundation for admission was established.

(a) The usual way of laying a foundation for the playing of a recording is to call a participant or monitor to testify that the conversation was accurately recorded. But this method is not exclusive. *Ev.C. 1410* et seq. set forth methods to establish a writing's authenticity; *Ev.C. 250* includes a tape recording as a writing; and *Ev.C. 1421* provides that a writing may be authenticated by evidence that the writing refers to matters unlikely to be known by anyone other than the author. Here, the recorded conversation includes statements about what defendant had denied to the police, what he told the police about his state of intoxication, what quantity of intoxicants he took, and when the victim left a cafe. "They are matters that are unlikely to have been known by anyone other than the appellant. In effect, the conversation proves itself." (35 C.A.3d 709.)

(b) As to the identification of defendant's voice, the judge and jury had previously heard another recorded statement made by defendant on the night of his arrest. By comparison, they had a basis for authenticating the fact that defendant's voice was on both tapes. "There are other ways of identifying a voice than by seeing the speaker ... , and we have concluded that comparing the two tapes is one such acceptable method." (35 C.A.3d 709.) (See *People v. Williams (1997)* 16 C.4th 635, 662, 66 C.R.2d 573, 941 P.2d 752 [foundation laid when witness testified that tape was record of his conversation with defendant]; *People v. Estrada (1979)* 93 C.A.3d 76, 100, 155 C.R. 731 [recording of defendant's jailhouse conversation with his brother-in-law was properly authenticated; investigator who monitored conversation identified tape as same one on which he recorded conversation].)

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### VI. INTRODUCTION OF DOCUMENTARY AND DEMONSTRATIVE EVIDENCE

#### A. Documentary Evidence.

#### 2. Offer in Evidence.

*3 Witkin Cal. Evid. Presentation § 149*

[§ 149] Offer in Evidence.

The writing should be offered in evidence and given an identifying exhibit number. (See C.E.B., 2 Civ. Proc. During Trial 3d, §13.45 et seq.; 5 Am.Jur. Trials 553.) But failure to use express words of formal offer in evidence is not necessarily fatal. In *Walsh v. Walsh* (1952) 108 C.A.2d 575, 239 P.2d 472, at a hearing of an order to show cause why respondent husband should not pay costs pending a divorce action, his counsel produced a document described as a property settlement agreement and handed it to the judge. Counsel for both sides asked questions concerning it on direct, cross and redirect examination, but it was not offered in evidence or marked as an exhibit. *Held*, nevertheless, for purposes of the appeal, it was in evidence, because the offering party (respondent), the court, and the appellant treated it as if it were. (108 C.A.2d 578.)

On the other hand, in *Pringle v. Hunsicker* (1957) 154 C.A.2d 789, 316 P.2d 742, a creditor's suit seeking to disregard the entity of a corporation, many important facts were shown by the record of the Corporation Commissioner "brought into court, briefly referred to and received in evidence by reference," after which it was taken away. *Held*, although other proof was sufficient for reversal, appellant's failure to follow the rules could have been disastrous, for the record was not even on file in the lower court and could not be brought up under the augmentation rule. (154 C.A.2d 796.) (The court did not consider the possibility of judicial notice of the administrative officer's records; see 1 Cal. Evidence (4th), Judicial Notice, §19.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Thuss* (2003) 107 C.A.4th 221, 232, 133 C.R.2d 149 [in prosecution for possession of marijuana for sale, trial judge did not err in failing to admit 23 search warrant affidavits, where they were never marked for identification or offered in evidence; counsel's remark, "we have 23 search warrants that essentially say identical things," did not constitute offer in evidence].



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## VI. INTRODUCTION OF DOCUMENTARY AND DEMONSTRATIVE EVIDENCE

## A. Documentary Evidence.

## 3. Production by Witness on Stand.

## 3 Witkin Cal. Evid. Presentation § 150

## [§ 150] Production by Witness on Stand.

(1) *General Rule.* A witness already in court and on the stand may, as part of the examination, be compelled to produce admissible papers or other documents that the witness has available. Production is thus accomplished without a subpoena duces tecum and is simply part of the testimony. As the court said in *Ex parte Clarke* (1899) 126 C. 235, 58 P. 546, "It may be assumed, however, that--although we have no express affirmative statutory provisions on the subject--when a witness is in court, no matter how brought there, and discloses the fact that he has a paper, document, or book which would be evidence in favor of the party desiring it, he may, in a proper case, be rightfully ordered to produce it." (126 C. 239.) (On subpoena duces tecum under C.C.P. 1985 et seq., see 2 Cal. Evidence (4th), Discovery, §218 et seq.; on alternative procedure using notice to produce documents under C.C.P. 1987(c), see 2 Cal. Evidence (4th), Witnesses, §36.)

(2) *Limitation: Requirements of Specificity and Materiality.* However, because this is merely one means of producing evidence from the adverse party or that party's witness, the examining party must make the necessary showing to comply with the tests of specification and materiality. (See 2 Cal. Evidence (4th), Discovery, §224 et seq.) Thus, in *Ex parte Clarke*, supra, petitioner, secretary of a corporation defendant, was directed by the court to produce all of its books, on plaintiff's statement that he intended to prove the "general course of business" of the corporation, and the authority of its president to make a certain contract. *Held*, the order was improper. "It is quite evident that these books were not required to be produced for the direct purpose of introducing them in evidence. Plaintiff would not have offered them or any part of them in evidence unless he found something in the part offered that was relevant and material in support of his side of the case. ... He merely intended to draw his dragnet of inspection through all these books under the ostensible motive of trying to catch something. ... In the meantime, all the private business of the defendant--all its dealings with persons other than plaintiff, its methods of conducting its affairs, perhaps its financial condition and other matters vitally important to its welfare--would have been exposed." (126 C. 241.)

Similarly, in *Kullman, Salz & Co. v. Superior Court* (1911) 15 C.A. 276, 114 P. 589, a wife sued her husband for divorce and alimony, and alleged that petitioner corporation and others had conspired fraudulently to transfer his stock in the corporation. The corporation's answer alleged a valid pledge sale of the stock, and the evidence supported this allegation. At a hearing on an application for temporary alimony, the secretary was asked to produce the records of the corporation showing its profits earned during the past 5 years. *Held*, he was entitled to refuse. Plaintiff might have asked for records that would tend to show that her husband still owned stock in the corporation, notwithstanding the sale, and if such ownership was shown, the further order to produce books showing profits would have been warranted. But in the state of the evidence, there was no showing that the husband owned the stock any longer, and consequently, the books

called for were not material to the issue before the court. (15 C.A. 280.)

(3) *Limitation: Due Process Considerations.* *Oksner v. Superior Court* (1964) 229 C.A.2d 672, 40 C.R. 621, emphasizes another limitation. Plaintiff, a judgment creditor, wanted to reach a promissory note which was an asset of his judgment debtor. The note was about to be sold at a pledge sale by a nonparty. Plaintiff could not raise the bond for an injunction against the sale, and conceived of an inexpensive substitute: He served a subpoena duces tecum on the nonparty's attorney; the latter appeared with the note but objected to jurisdiction; the judge then ordered him to surrender the note to the clerk and held him in contempt for refusal. *Held*, contempt order annulled. The judge could have required production of the note for a proper evidentiary purpose, but to seize and impound it would be a violation of due process. (229 C.A.2d 682.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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### VI. INTRODUCTION OF DOCUMENTARY AND DEMONSTRATIVE EVIDENCE

#### A. Documentary Evidence.

#### 4. Request To Seal Documents.

3 Witkin Cal. Evid. Presentation § 151

[§ 151] Request To Seal Documents.

(1) *In General.* In *Champion v. Superior Court* (1988) 201 C.A.3d 777, 247 C.R. 624, the underlying action was between petitioner, a member of C law firm who resigned and undertook the representation of eight former clients of the firm, and the remaining partners. The issue involved was the manner in which the partnership and a departing partner were to share fees under a provision in the partnership agreement. (See 1 Cal. Proc. (4th), Attorneys, §57.) In this proceeding in mandamus to review the trial court's determination, the parties and amici curiae lodged a great many exhibits with the Court of Appeal which were described in general terms as sensitive and confidential, and requests for sealing the documents were filed. The "quandary" in which the court found itself is thus described:

"At the time of this opinion, our file contains some sealed documents, some public documents, and many documents not yet designated as sealed or public. Most documents blend together discussions of confidential and public materials. Requests to seal all the documents are pending. Nowhere in any of the requests do we find an explanation of why anything provided to us deserves such treatment." (201 C.A.3d 786.)

The court concluded that all the applications to seal should be granted, but outlined procedures to be followed in the future to counteract the "increasing trend by litigants to assume that when the parties stipulate below or convince the trial court of the need for confidentiality, no showing of need must be made in this court." (201 C.A.3d 785.)

(a) The Rules of Court offer no guidance, but *Estate of Hearst* (1977) 67 C.A.3d 777, 136 C.R. 821, is informative: It recognizes the inherent power of the court to restrict the ordinary free access to court records where individual security, personal liberty or the public good may be served by sealing. (201 C.A.3d 786, 787.) However, without such a showing, it is improper, even on stipulation of the parties, to order sealing. (201 C.A.3d 788, citing *Mary R. v. B. & R. Corp.* (1983) 149 C.A.3d 308, 196 C.R. 871.) "[A] party seeking to lodge or file a document under seal bears a heavy burden of showing the appellate court that the interest of the party in confidentiality outweighs the public policy in favor of open court records." (201 C.A.3d 788.)

(b) The appropriate procedures are as follows:

(1) The party must segregate the confidential or arguably confidential documents or portions of documents from the public documents or portions, and in the public documents say nothing that discloses the contents of the confidential ones. (201 C.A.3d 788.)

(2) A request to seal must be filed publicly and separately from the object of the request. (201 C.A.3d 788.)

(3) The request must be supported by a factual declaration or affidavit explaining the particular needs of the case. "Where the contents of the to-be-sealed document become a focus of the argument for sealing, the request must refer the court to the to-be-sealed document, where the court may review its contents and any content-specific declarations and arguments about sealing it." (201 C.A.3d 788.)

(4) "Public documents that argue the merits of the case must refer to sealed or to-be-sealed documents without disclosing their contents, and where possible should, at least when referring to to-be-sealed documents, stand on their own, and not depend upon the contents of the to-be-sealed documents. (This will avoid complications if the court declines to seal the documents and permits the proffering party to withdraw them.)" (201 C.A.3d 788.)

(5) "Arguments on the merits which cannot be made publicly without disclosing confidential information should be made in separate documents accompanied by requests to seal." (201 C.A.3d 789.)

(6) "Parties should be advised, however, that, more often than not, they can argue effectively to an appellate court by disclosing only the general nature of the confidential information. Thus, a request to seal must explain why the confidential information needs to be presented to the appellate court." (201 C.A.3d 789.)

(7) "Parties must also be careful not to enter into stipulations in trial courts or to acquiesce to trial court confidentiality requests expecting that the stipulations or rulings will control the filing or lodging of documents in the appellate courts. A document may be necessary to the appellate court's determination of a petition for extraordinary relief. ... The petitioner, who has the burden of presenting the document, will not be excused from doing so if open filing is prevented by an unjustified stipulation or order entered below and if the appellate court returns the document because petitioner has not shown that it warrants sealing." (201 C.A.3d 789.)

(8) "Where documents have been sealed by order of the lower court, over a petitioner's objection, the petitioner's obligation to present them to the appellate court does not change. When pertinent to the writ petition, they should be presented separately, labeled as confidential, and accompanied by petitioner's objections. Real party in interest must then move for an order sealing the documents in the appellate court and shoulder the burden of proving the need for sealing." (201 C.A.3d 789.) (See *Copley Press v. Superior Court* (1998) 63 C.A.4th 367, 376, 74 C.R.2d 69 [court record of settlement between insurer for school district and student who was sexually assaulted should not have been sealed; damage award, whatever its size, is not private fact deserving protection, and secrecy in public education is not in public interest; applying principles of *Hearst*, *supra*]; on nonparty's request for subsequent unsealing, see *Wilson v. Science Applications Int. Corp.* (1997) 52 C.A.4th 1025, 60 C.R.2d 883, 6 Cal. Proc. (4th), *Proceedings Without Trial*, Supp., §46.)

(2) *Family Law Proceedings*. Generally, court files in family law cases should be treated no differently than the court files in any other cases for purposes of considering the appropriateness of granting a motion to seal any of those files. However, *Family C. 214* (10 Summary (9th), *Parent and Child*, Supp., §2F) provides authority under which a court may order some proceedings before it closed to the public, including the press. An order properly entered under that section would necessarily protect from public scrutiny not only the proceeding itself, but also any transcript of it and documents introduced into the court's files at or in connection with it, including pleadings and exhibits. (*In re Marriage of Lechowick* (1998) 65 C.A.4th 1406, 1414, 1415, 77 C.R.2d 395, 2 Cal. Proc. (4th), *Courts*, Supp., §38.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Family Law Proceedings*.

*Cross-Reference:* 10 Summary (10th), *Parent and Child*, §284.



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## CHAPTER XI - Presentation At Trial

### VI. INTRODUCTION OF DOCUMENTARY AND DEMONSTRATIVE EVIDENCE B. Demonstrative Evidence.

3 Witkin Cal. Evid. Presentation § 152

[§ 152] Demonstrative Evidence.

(1) *General Procedure.* The practice in presenting real or demonstrative evidence, including photographs (see 2 *Cal. Evidence* (4th), *Demonstrative, Experimental, and Scientific Evidence*, §1 et seq.), is similar to that followed in the introduction of writings (supra, §147 et seq.). A foundation must be laid by calling an authenticating witness (see 2 *Cal. Evidence* (4th), *Demonstrative, Experimental, and Scientific Evidence*, §16), and opposing counsel must be allowed to inspect the exhibit. If admitted, it should be given an exhibit number, and if denied admission, it should be marked for identification. (For practice suggestions, see 2 McCormick 5th, §212 et seq.; Rutter Group, 2 Civil Trials and Evidence §8:470 et seq.; C.E.B., 2 Civ. Proc. During Trial 3d, §13.85 et seq.; 5 Am.Jur. Trials 553.) (On foundation for videotape, see *People v. Moran* (1974) 39 C.A.3d 398, 411, 114 C.R. 413, 1 *Cal. Evidence* (4th), *Hearsay*, §268.)

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

(3) *Examination by Jury.* Exhibits introduced in evidence may be taken into the jury room and examined by the jurors in their deliberations. (See 7 *Cal. Proc.* (4th), *Trial*, §334; *People v. Walker* (1957) 150 C.A.2d 594, 599, 310 P.2d 110 [sound tape recording of confession introduced; held no error in jury obtaining recorder to play record again]; 2 McCormick 5th, §217; 10 A.L.R.2d 918 [X-ray picture].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *General Procedure.* See 2 McCormick 6th, §212 et seq.; 78 A.L.R.5th 1 [laying foundation for introduction of nonblood specimen taken from body]; 79 A.L.R.5th 237 [laying foundation for introduction of bullets and other inorganic substances removed from body]. *West's Key Number Digest*, Criminal Law k.663; Trial k.39





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## CHAPTER XI - Presentation At Trial

### VII. INTRODUCTION OF DISCOVERY MATERIAL

#### A. Depositions.

1. How Deposition May Be Used.
  - a. Deposition of Ordinary Witness.

3 Witkin Cal. Evid. Presentation § 153

[§ 153] Deposition of Ordinary Witness.

(1) *Former Law.* The rules for introducing depositions at trial were formerly found in *C.C.P. 2016(e)*. The discovery statutes were repealed and reenacted in 1986, effective July 1, 1987. (See 2 *Cal. Evidence (4th)*, *Discovery*, §5.) Most of the substance of former *C.C.P. 2016(e)* was continued in *C.C.P. 2025(u)*.

(2) *General Rule.* Subject to specified provisions (*infra*, this section and §§155, 156), all or part of a deposition may be used, at trial or at a hearing, *against any party* (a) who was present or represented at the deposition, or (b) who had notice and did not serve a valid objection under *C.C.P. 2025(g)* (2 *Cal. Evidence (4th)*, *Discovery*, §48). (*C.C.P. 2025(u)*; see *C.E.B.*, 2 *Civ. Proc. During Trial* 3d, §12.32 et seq.; *C.J.E.R.*, *Judges Benchbook*, *Civil Proceedings: Trial* §6.2 et seq.; *Hogan*, 1 *Cal. Civil Discovery* §2.37 et seq.; *Rutter Group*, 1 *Civil Trials and Evidence* §1:27 et seq.; 2 *Civil Trials and Evidence* §8:811 et seq.; *Dunne on Depositions in California*, Chap. 13; see also *F.R. Civ. P.*, *Rule 32*; on objections to use of deposition based on lack of notice, see *infra*, §161.)

(3) *Adverse Party.* An adverse party may use the deposition of a party, or someone who was an officer, director, agent, designee, or employee of a party at the time the deposition was taken, *for any purpose*. Use of a party's deposition by an adverse party is not objectionable on the ground that the deponent "is available to testify, has testified, or will testify." (*C.C.P. 2025(u)(2)*; see *C.E.B.*, 2 *Civ. Proc. During Trial* 3d, §12.54 et seq.; *Hogan*, 1 *Cal. Civil Discovery* §2.38; *Rutter Group*, 2 *Civil Trials and Evidence* §8:812; cf. *Ev.C. 776*, *infra*, §202 et seq. [parties subject to examination as adverse witnesses].) Thus, *C.C.P. 2025* "simply applies specifically to the use of depositions the same treatment that the Evidence Code already provides generally for all statements of a party-opponent." (*Hogan*, 1 *Cal. Civil Discovery* §2.38; see *Ev.C. 1236* (prior consistent statements; 1 *Cal. Evidence (4th)*, *Hearsay*, §161) and *Ev.C. 1235* (inconsistent statements; 1 *Cal. Evidence (4th)*, *Hearsay*, §156).)

(4) *Nonparty or Party Other Than Adverse Party.* Because depositions are hearsay evidence, generally a party cannot make unlimited use of the deposition of a nonadverse coparty or a nonparty. (See *Hogan*, 1 *Cal. Civil Discovery* §2.38.) However, any party may use a deposition to contradict or impeach the testimony of the deponent as a witness, "or for any other purpose permitted by the Evidence Code." (*C.C.P. 2025(u)(1)*; see *Hogan*, 1 *Cal. Civil Discovery* §2.39 [second clause means that "whenever a portion of a deposition is received in evidence to impeach the deponent's credibility, the trier of fact may also use that testimony substantively"].) Also, use for any purpose may be permitted under exceptional circumstances or where the deponent is far away or unavailable. (See *infra*, §155.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Former Law. C.C.P. 2025(u)*, on the use of depositions at trial, was repealed and replaced by *C.C.P. 2025.620* in 2004 without substantive change.

(2) *General Rule. C.C.P. 2025(g)*, on objections to a deposition notice, was repealed and replaced by *C.C.P. 2025.410* in 2004 without substantive change.

*C.C.P. 2025(u)*, on the use of depositions at trial, was repealed and replaced by *C.C.P. 2025.620* in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §2.37.

(3) *Adverse Party. C.C.P. 2025(u)(2)*, on the use of depositions by adverse parties, was repealed and replaced by *C.C.P. 2025.620(b)* in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §2.38.(4) *Nonparty or Party Other Than Adverse Party. C.C.P. 2025(u)(1)*, on the use of the depositions of nonparties or nonadverse coparties, was repealed and replaced by *C.C.P. 2025.620(a)* in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §2.38.*West's Key Number Digest*, Criminal Law k.662.30; Pretrial Procedure k.201 et seq.



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## CHAPTER XI - Presentation At Trial

### VII. INTRODUCTION OF DISCOVERY MATERIAL

#### A. Depositions.

1. How Deposition May Be Used.
- b. Deposition of Physician or Expert.

3 *Witkin Cal. Evid. Presentation § 154*

[§ 154] Deposition of Physician or Expert.

A party may introduce into evidence a videotaped deposition of a treating or consulting physician or an expert witness, even though the deponent is available to testify, if the deposition notice reserved the right to use the deposition at trial, and if that party complied with *C.C.P. 2025(l)(2)(I)* (2 *Cal. Evidence (4th), Discovery*, §79). (*C.C.P. 2025(u)(4)*.) This provision reduces both the costs of litigation and the disruption of the practice of doctors and other experts. (See Hogan, 1 Cal. Civil Discovery §2.41.) (On suggestions for using videotaped deposition of expert at trial, see Dunne on Depositions in California §§10:16, 10:17; on protective order to postpone videotaped deposition of expert until moving party has had an opportunity to prepare by ordinary discovery methods, see *C.C.P. 2025(i)*, 2 *Cal. Evidence (4th), Discovery*, §60.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2025(u)(4)*, as amended in 2002, refers to "a video recording of the deposition testimony," rather than "a videotape deposition".

*C.C.P. 2025(u)(4)* was repealed and replaced by *C.C.P. 2025.620(d)* in 2004 without substantive change.

*C.C.P. 2025(l)(2)(I)*, on procedures for offering a video or audio recording of a deposition in evidence, was repealed and replaced by *C.C.P. 2025.340(m)* in 2004 without substantive change.

*C.C.P. 2025(i)*, on protective orders in connection with videotaped depositions, was repealed and replaced by *C.C.P. 2025.420* in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §2.41.



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### VII. INTRODUCTION OF DISCOVERY MATERIAL

#### A. Depositions.

1. How Deposition May Be Used.
  - c. Special Circumstances.

3 Witkin Cal. Evid. Presentation § 155

[§ 155] Special Circumstances.

(1) *Remote Deponent*. A party may use any person's deposition for any purpose if the court finds that the deponent resides more than 150 miles from the place of trial or hearing. (C.C.P. 2025(u)(3)(A).)

(2) *Unavailable Deponent*. Furthermore, use for any purpose is permitted when the court finds that the deponent is one of the following:

(a) Exempted or precluded on the ground of *privilege* from testifying about the matter to which the deponent's testimony is relevant (C.C.P. 2025(u)(3)(B)(i));

(b) *Disqualified* from testifying (C.C.P. 2025(u)(3)(B)(ii));

(c) *Dead or unable to attend* or testify because of existing physical or mental illness or infirmity (C.C.P. 2025(u)(3)(B)(iii));

(d) *Absent* from the trial or other hearing and the court is unable to compel the deponent's attendance by its process (C.C.P. 2025(u)(3)(B)(iv));

(e) *Absent* from the trial or other hearing and the proponent of the deposition, despite exercising reasonable diligence, has been unable to procure the deponent's attendance by the court's process (C.C.P. 2025(u)(3)(B)(v)).

The court must also find that the deponent's unavailability for any of the above reasons is not due to the procurement or wrongdoing of the proponent of the deposition for the purpose of preventing testimony in open court. (C.C.P. 2025(u)(3)(B).) (See Hogan, 1 Cal. Civil Discovery §2.40.)

(3) *Exceptional Circumstances*. A party may use a deposition for any purpose if the court finds that exceptional circumstances "make it desirable to allow" the deposition's use "in the interests of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court." (C.C.P. 2025(u)(3)(C).)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Remote Deponent*. C.C.P. 2025(u)(3)(A), on use of a remote deponent's deposition, was repealed and replaced by C.C.P. 2025.620(c)(1) in 2004 without substantive change. (2) *Unavailable Deponent*. C.C.P. 2025(u)(3)(B), on use of an unavailable deponent's deposition, was repealed and replaced by C.C.P. 2025.620(c)(2) in 2004 without substantive

change. *C.C.P. 2025(u)(3)(B)(i)-(u)(3)(B)(v)* became *C.C.P. 2025.620(c)(2)(A)-(c)(2)(E)*.

See Hogan, 1 Cal. Civil Discovery 2d, §2.40.

(3) *Exceptional Circumstances*. *C.C.P. 2025(u)(3)(C)*, on use of a deposition based on exceptional circumstances, was repealed and replaced by *C.C.P. 2025.620(c)(3)* in 2004 without substantive change.



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## CHAPTER XI - Presentation At Trial

### VII. INTRODUCTION OF DISCOVERY MATERIAL

#### A. Depositions.

#### 1. How Deposition May Be Used.

##### d. Extent of Admissibility.

3 Witkin Cal. Evid. Presentation § 156

[§ 156] Extent of Admissibility.

(1) *General Rule.* The deposition may be used "so far as admissible under the rules of evidence applied as though the deponent were then present and testifying as a witness." (*C.C.P. 2025(u)*.)

(2) *Exclusion of Cumulative Matter.* The general power of the trial judge to limit the introduction of cumulative or repetitive matter (see *supra*, §67) may be exercised to exclude a deposition. Thus, in *Wulferdinger v. Pickwick Stages System* (1930) 105 C.A. 509, 288 P. 93, defendant took plaintiff's deposition and offered it in evidence, but admission was refused. Then defendant called plaintiff personally and examined her as an adverse witness (*infra*, §202). It appeared that the only intended use of the deposition was for the purpose of impeachment, and this purpose was fully realized by the oral examination. The court said: "The permission to read the deposition of a witness ... when he is a party to the action and all the material evidence therein contained has been fully covered by an examination of the witness at the trial is discretionary with the court." (105 C.A. 512.) (See also *California Canning Peach Growers v. Williams* (1938) 11 C.2d 221, 232, 78 P.2d 1154 [trial court excluded depositions of defendants; held not reversible error where both had been examined as adverse witnesses at the trial]; *Estate of Murphy* (1976) 15 C.3d 907, 919, 126 C.R. 820, 544 P.2d 956 [trial court did not err in refusing claimant's deposition, which was in part cumulative to her trial testimony].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *General Rule.* *C.C.P. 2025(u)*, defining the extent of admissibility, was repealed and replaced by *C.C.P. 2025.620* in 2004 without substantive change. *West's Key Number Digest*, Pretrial Procedure k.202



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## CHAPTER XI - Presentation At Trial

### VII. INTRODUCTION OF DISCOVERY MATERIAL

#### A. Depositions.

##### 1. How Deposition May Be Used.

##### e. Substitution and Subsequent Proceedings.

*3 Witkin Cal. Evid. Presentation § 157*

[§ 157] Substitution and Subsequent Proceedings.

(1) *Use of Deposition Against Substituted Parties.* Substitution of parties does not affect the right to use depositions that were previously taken. (*C.C.P. 2025(u)(6)*; see *McKee v. Lynch (1940) 40 C.A.2d 216, 226, 104 P.2d 675* [death of party and substitution of personal representatives].)

(2) *Use of Deposition From Related Action.* When an action has been brought in any federal or state court, and another action involving the same subject matter is subsequently brought between the same parties or their representatives or successors in interest, all depositions "lawfully taken and duly filed" in the initial action may be used in the subsequent action as if they had been originally taken in the subsequent action. A deposition that was previously taken may also be used as permitted by the Evidence Code. (*C.C.P. 2025(u)(7)*; see Hogan, 1 Cal. Civil Discovery §2.42; see also *Ev.C. 1290(c)* [hearsay exception for former testimony] and Comment; 1 *Cal. Evidence (4th), Hearsay*, §262.)

(3) *Deposition Taken in Perpetuation Proceeding.* If a deposition to perpetuate testimony has been taken under *C.C.P. 2035* (2 *Cal. Evidence (4th), Discovery*, §210) or under comparable provisions of the law of another jurisdiction, the deposition may be used in any California action involving the same subject matter, in accordance with *C.C.P. 2025(u)*, against any party, or the successor in interest of any party, named in the petition as an expected adverse party. (*C.C.P. 2035(g)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Use of Deposition Against Substituted Parties.* *C.C.P. 2025(u)(6)*, permitting the use of depositions against substituted parties, was repealed and replaced by *C.C.P. 2025.620(f)* in 2004 without substantive change.

(2) *Use of Deposition From Related Action.* *C.C.P. 2025(u)(7)*, permitting the use of depositions in related actions, was repealed and replaced by *C.C.P. 2025.620(g)* in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §2.42.

(3) *Deposition Taken in Perpetuation Proceeding.* *C.C.P. 2025(u)*, governing the use of depositions at trial, was repealed and replaced by *C.C.P. 2025.620* in 2004 without substantive change.

*C.C.P. 2035*, on discovery for the purpose of perpetuation of testimony or preservation of evidence, was repealed

and replaced by *C.C.P. 2035.010* et seq. in 2004 without substantive change. *C.C.P. 2035(g)*, on the use of a deposition taken in a perpetuation proceeding, became *C.C.P. 2035.060*.





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## CHAPTER XI - Presentation At Trial

### VII. INTRODUCTION OF DISCOVERY MATERIAL

#### A. Depositions.

#### 2. Procedure for Introducing Deposition.

##### a. Reading Questions and Answers.

#### 3 *Witkin Cal. Evid. Presentation § 158*

[§ 158] Reading Questions and Answers.

(1) *Rule Against Introduction Without Reading.* A deposition is not an instrument and, unlike documentary evidence, it cannot be offered in evidence as a whole, without reading it. The reason is that the examination ordinarily takes place before an officer without the qualifications or the authority to hear objections or rule out inadmissible matter. "No one familiar with the practice of law need be informed of the vast amount of irrelevant, immaterial, and incompetent matter which finds its way as evidence into such depositions." (*Estate of Martin* (1915) 170 C. 657, 665, 151 P. 138.) (See *Gammell v. Gammell* (1979) 90 C.A.3d 90, 95, 153 C.R. 169; C.E.B., 2 Civ. Proc. During Trial 3d, §12.48 et seq.; Rutter Group, 1 Civil Trials and Evidence §1:36 et seq.; 2 DeMeo, Cal. Deposition and Discovery Practice §50.31; on reading of prepared testimony into record in economic litigation cases, see C.C.P. 98, 2 Cal. Proc. (4th), Courts, §266.) For the same reason (the inclusion of inadmissible matter), depositions cannot be taken into the jury room. (C.C.P. 612; P.C. 1137; *Higgins v. Los Angeles Gas & Elec. Co.* (1911) 159 C. 651, 656, 115 P. 313; see 7 Cal. Proc. (4th), Trial, §337.)

Whether objections are made at the taking of the deposition or reserved for the trial, the inadmissible questions and answers will be included. Hence, in introducing a deposition, it is necessary that the parties be given an opportunity to object to or move to strike out individual questions or answers, and the court must rule on the objections. This usually necessitates reading of the deposition into the record, and introduction of the entire deposition without reading is improper.

(2) *Illustrations.* Thus, in *Estate of Doyle* (1932) 126 C.A. 446, 14 P.2d 909, counsel said, "I will introduce the depositions and consider them read, your Honor," and the trial judge, over objections of opposing counsel, declared that he would not permit the depositions to be read in open court. *Held*, they should have been read. "Doubtless there are occasions when the heavy demands upon the time of a busy trial court render it inexpedient and impracticable to permit ... the reading *in extenso* of depositions in open forum in all cases where the court is sitting without a jury. Nevertheless, in the absence of express or *implied* agreement thereto by counsel, the reception of depositions by the trial court in the manner above outlined constitutes a departure from the correct procedure and practice." (126 C.A. 452.)

On the other hand, in *Simpson v. Randolph* (1956) 140 C.A.2d 571, 295 P.2d 528, plaintiff's counsel, cross-examining defendant by use of his deposition, wanted to read each question and have defendant state whether or not he made the particular answer even though it did not appear to be impeaching. *Held*, the trial judge properly avoided this useless waste of time by suggesting that counsel offer the entire deposition in evidence. (140 C.A.2d 575.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Trial k.40



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CHAPTER XI - Presentation At Trial

VII. INTRODUCTION OF DISCOVERY MATERIAL

A. Depositions.

2. Procedure for Introducing Deposition.

b. Ruling on Objections.

3 *Witkin Cal. Evid. Presentation* § 159

[§ 159] Ruling on Objections.

It is not enough that the questions and answers be read in full (*supra*, §158); unless the court rules on each objection before the inadmissible matter is permitted to go into the record, the benefits of the procedure are lost.

In *Estate of Martin* (1915) 170 C. 657, 151 P. 138, one counsel read the direct examination, and opposing counsel the cross-examination. The latter urged the judge to examine the depositions as they were being read and to rule on the objections, which the judge refused to do, with the result that much incompetent matter went to the jury. On appeal, this practice was held highly improper. The court said that a witness often gives an improper answer to a proper question, and in oral examination, there is no way to prevent this; but the trial judge, with the deposition before him, has the opportunity to consider and rule on admissibility of matters before they are read, and it is his duty to do so. (170 C. 664.) (See also *Meyer v. Hellman Commercial Trust & Savings Bank* (1927) 83 C.A. 578, 581, 257 P. 103 ["the better course would have been to make any desired objection as a question was read, rather than to wait for the reading of a series of questions and answers and then move to strike out that portion of the deposition upon the ground that the irrelevancy of the answers could not have been anticipated"]; *Estate of Short* (1935) 7 C.A.2d 512, 518, 47 P.2d 555 [approved practice is to present deposition to trial judge and make objections, thus permitting preliminary examination by judge before reading it to jury].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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CHAPTER XI - Presentation At Trial

VII. INTRODUCTION OF DISCOVERY MATERIAL

A. Depositions.

2. Procedure for Introducing Deposition.

c. Introduction of Part of Deposition.

3 *Witkin Cal. Evid. Presentation* § 160

[§ 160] Introduction of Part of Deposition.

(1) *Former Law*. It was formerly improper for a party to introduce selected portions of the deposition of its own witness, omitting the balance. (See *Bank of Orland v. Finnell* (1901) 133 C. 475, 477, 65 P. 976.) This rule was of questionable effect; error could scarcely be prejudicial because the other party could offer the remaining part. (See *Metteer v. Smith* (1909) 156 C. 572, 573, 105 P. 735 [error harmless].)

(2) *Rule Changed*. Subject to the requirements of *C.C.P. 2025*, "a party may offer in evidence all or any part of a deposition, and if the party introduces only part of the deposition, any other party may introduce any other parts that are relevant to the parts introduced." (*C.C.P. 2025(u)(5)*; see *C.E.B.*, 2 Civ. Proc. During Trial 3d, §12.42; Hogan, 1 Cal. Civil Discovery §2.37; Rutter Group, 2 Civil Trials and Evidence §8:813.10.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Rule Changed*. *C.C.P. 2025*, on oral depositions, was repealed and replaced by *C.C.P. 2025.010* et seq. in 2004 without substantive change. *C.C.P. 2025(u)(5)*, permitting the use of only part of a deposition, became *C.C.P. 2025.620(e)*.

See Hogan, 1 Cal. Civil Discovery 2d, §2.37.



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## CHAPTER XI - Presentation At Trial

### VII. INTRODUCTION OF DISCOVERY MATERIAL

#### A. Depositions.

#### 3. Objections and Grounds of Exclusion.

##### a. Advance Objections.

3 Witkin Cal. Evid. Presentation § 161

[§ 161] Advance Objections.

*C.C.P.* 2025 codifies the general principle of the early decisions: If, in spite of improprieties in the procedure, a deposition is actually taken, and the witness or party thereafter seeks to prevent its use, the objection must be raised at the earliest opportunity after taking, or it will be deemed waived. (See *Bollinger v. Bollinger* (1908) 153 C. 190, 196, 94 P. 770; *C.E.B.*, 2 Civ. Proc. During Trial 3d, §12.35; 1 Hogan, Cal. Civil Discovery §§2.7, 2.21, 2.25 et seq., 3.4; 2 DeMeo, Cal. Deposition and Discovery Practice §50:31[a]; 8A Am.Jur. P.P. Forms (1996 ed.), Depositions and Discovery §411 et seq.; see also *F.R. Civ. P.*, Rule 32(d).)

(1) *As to Notice.* A party has 3 calendar days in which to serve written objection to an error or irregularity concerning a deposition notice. (See *C.C.P.* 2025(g), 2 Cal. Evidence (4th), Discovery, §48.) Of course, a total failure to give notice to a party makes the deposition inadmissible against that party. (See *C.C.P.* 2025(u), supra, §153 [deposition admissible against party who had due notice of it]; *Eades v. Los Angeles Ry. Corp.* (1919) 43 C.A. 259, 261, 184 P. 884 [deposition of one defendant taken by stipulation with another defendant; not admissible against plaintiff]; *N.N.V. v. American Assn. of Blood Banks* (1999) 75 C.A.4th 1358, 1394, 89 C.R.2d 885 [deposition of plaintiff's father, who died before trial, was inadmissible against defendant nurse who had not received proper notice of hearing on deposition and had not appeared at deposition; defendant nurse was not employee of institutional defendants who were given notice and who did appear, and institutional defendants had interests adverse to nurse defendant's and would not have had same motives in cross-examining deponent]; cf. *Estate of Short* (1935) 7 C.A.2d 512, 518, 47 P.2d 555 [suggesting that limited admissibility depends on whether action is such as to allow separate verdicts or judgments].)

(2) *As to Disqualification of Officer.* The objection is waived unless made before the deposition begins or as soon thereafter as the ground for the objection becomes known or could be discovered with reasonable diligence. (*C.C.P.* 2025(k), 2 Cal. Evidence (4th), Discovery, §35.)

(3) *As to Taking of Deposition.*

(a) Errors and irregularities that might be cured if promptly presented are waived unless a specific and timely objection is made. Irregularities of this type include, but are not limited to, "those relating to the manner of taking the deposition, to the oath or affirmation administered, to the conduct of a party, attorney, deponent, or deposition officer, or to the form of any question or answer." Unless the objecting party demands that the deposition be suspended to permit a motion for a protective order (see 2 Cal. Evidence (4th), Discovery, §61), the deposition proceeds subject to the objection. (*C.C.P.* 2025(m)(2).) (See *Kyle v. Craig* (1899) 125 C. 107, 114, 57 P. 791 [leading questions]; *Brown v. Ball*

(1932) 123 C.A. 758, 767, 12 P.2d 28 [conclusion of witness called for].)

(b) To avoid waiving an objection to the form of a question in a written deposition, the objecting party must serve a specific objection within 15 days after service of the question. (*C.C.P. 2028(d)*, 2 *Cal. Evidence (4th)*, *Discovery*, §81.)

(c) If counsel was not afforded an adequate opportunity for cross-examination at the taking of the deposition, the trial court has discretion to refuse to admit it in evidence. (*Sprague v. Equifax* (1985) 166 C.A.3d 1012, 1042, 213 C.R. 69 [properly excluded where counsel for person being deposed stated that his client was under stress and that questioning should end; over objection, deposition was terminated and never resumed, and deposed person did not attend trial].)

(4) *As to Signing of Deposition.* Formerly, an unsigned deposition was treated as ineffective and inadmissible in evidence when objection was made at the trial. (See *Bennett v. Superior Court* (1950) 99 C.A.2d 585, 593, 222 P.2d 276; *Voorheis v. Hawthorne-Michaels Co.* (1957) 151 C.A.2d 688, 693, 312 P.2d 51.) However, *C.C.P. 2025(q)* sets forth a procedure whereby an unsigned deposition is treated like a signed one unless the court, on a motion to suppress, determines that the reasons for not signing the deposition require its rejection. (See 2 *Cal. Evidence (4th)*, *Discovery*, §74; see also *Chavez v. Zapata Ocean Resources* (1984) 155 C.A.3d 115, 121, 201 C.R. 887 [unsigned deposition was admissible even though exact statutory procedure (then in *C.C.P. 2019(e)*) was not followed].)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2025*, on oral depositions, was repealed and replaced by *C.C.P. 2025.010* et seq. in 2004 without substantive change.

See Hogan, 1 Cal. Civil Discovery 2d, §§2.21, 2.25 et seq.; 8A Am.Jur. P.P. Forms (2004 ed.), Depositions and Discovery, §274 et seq.

(1) *As to Notice.* *C.C.P. 2025(g)*, on objections to deposition notices, was repealed and replaced by *C.C.P. 2025.410* in 2004 without substantive change.

*C.C.P. 2025(u)*, on the effect of failure to give notice, was repealed and replaced by *C.C.P. 2025.620* in 2004 without substantive change.

(2) *As to Disqualification of Officer.* The portion of *C.C.P. 2025(k)* relating to objections to a deposition officer's qualifications was designated *C.C.P. 2025(k)(5)* in 2000.

*C.C.P. 2025(k)* was repealed and replaced by *C.C.P. 2025.320* in 2004 without substantive change.

(3) *As to Taking of Deposition.*

(a) *Curable errors and irregularities:* *C.C.P. 2025(m)(2)*, on the need to object to curable errors and irregularities, was repealed and replaced by *C.C.P. 2025.460(b)* in 2004 without substantive change. (b) *Objection to form of question:* *C.C.P. 2028(d)*, on the need to object to the form of a question, was repealed and replaced by *C.C.P. 2028.040* in 2004 without substantive change.

(4) *As to Signing of Deposition.* *C.C.P. 2025(q)*, on unsigned depositions, was repealed and replaced by *C.C.P. 2025.520* in 2004 without substantive change.



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#### A. Depositions.

#### 3. Objections and Grounds of Exclusion.

##### b. Objections at Trial.

3 Witkin Cal. Evid. Presentation § 162

[§ 162] Objections at Trial.

(1) *Right To Object at Trial.* In general, defects that are not easily curable are not waived by failure to object at the deposition hearing. "Objections to the competency of the deponent, or to the relevancy, materiality, or admissibility at trial of the testimony or of the materials produced are unnecessary and are not waived by failure to make them before or during the deposition." (C.C.P. 2025(m)(3).) (See 2 DeMeo, 50:31[4]; see also *Estate of Short* (1935) 7 C.A.2d 512, 518, 47 P.2d 555.)

(2) *Form of Objection.* The form and sufficiency of the objection are governed by the rules applicable to testimony at a trial; i.e., the objection must be specific and directed to the particular testimony. (*Lucy v. Davis* (1912) 163 C. 611, 615, 126 P. 490; *Estate of Doyle* (1932) 126 C.A. 446, 453, 14 P.2d 909; *Chavez v. Zapata Ocean Resources* (1984) 155 C.A.3d 115, 121, 201 C.R. 887 [plaintiff's deposition testimony was improperly excluded; objection to it was not sufficiently specific]; see *infra*, §375.) If the question is improper, objection must be made to it; if the question is proper but the answer is improper, a motion to strike is necessary and is sufficient. (*Short v. Frink* (1907) 151 C. 83, 86, 90 P. 200; see *infra*, §383.) In *Gassen v. Hendrick* (1887) 74 C. 444, 16 P. 242, there was an objection accompanied by a motion to strike the *entire* deposition as not complete because the witness had "refused to answer the interrogatories." The witness had answered all fully except one. *Held*, the objection was too general; "it was the right of the judge below to have his attention called to the particular interrogatory which the witness had 'refused to answer,' or her answer to which was evasive or not fully responsive." (74 C. 447.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Right To Object at Trial.* C.C.P. 2025(m)(3), on objections that may be made at trial, was repealed and replaced by C.C.P. 2025.460(c) in 2004 without substantive change.



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## CHAPTER XI - Presentation At Trial

### VII. INTRODUCTION OF DISCOVERY MATERIAL

#### B. Answers to Interrogatories.

*3 Witkin Cal. Evid. Presentation § 163*

[§ 163] Answers to Interrogatories.

Answers to interrogatories may be used "so far as admissible under the rules of evidence" at trial or another hearing in the action. They may not be used *by* the responding party, only *against* that party by another party. It does not matter that the responding party is available to testify, has testified, or will testify. (*C.C.P. 2030(n)*, 2 *Cal. Evidence (4th)*, *Discovery*, §102.) (See *C.E.B.*, 2 Civ. Proc. During Trial 3d, §12.98 et seq.; Rutter Group, 1 Civil Trials and Evidence §1:40 et seq.; 13 A.L.R.3d 1323 [inadmissibility of answers to interrogatories offered on behalf of answering party].)

In *Estate of Horman* (1968) 265 C.A.2d 796, 71 C.R. 780, claimants were foreign citizens absent from a hearing in which the state claimed escheat. They sought to use, in their own favor, their own answers to interrogatories propounded by the state. *Held*, this was improper; the self-serving answers were, in effect, merely affidavits, which are incompetent hearsay (1 *Cal. Evidence (4th)*, *Hearsay*, §297). The court observed that, under discovery statutes of other states and under the federal rules, a party cannot use its own answers. (265 C.A.2d 805.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*C.C.P. 2030(n)*, on the use of answers to interrogatories, was repealed and replaced by *C.C.P. 2030.410* in 2004 without substantive change. *West's Key Number Digest*, Criminal Law k.662.30; Pretrial Procedure k.306 et seq.





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## CHAPTER XI - Presentation At Trial

### VIII. ORAL EXAMINATION A. Specific Answers or Narration.

*3 Witkin Cal. Evid. Presentation § 164*

[§ 164] Specific Answers or Narration.

(1) *Counsel Chooses Method of Questioning.* Subject to the judge's reasonable control over the mode of interrogation (*Ev.C.* 765, *supra*, §77), counsel may use their own methods of questioning witnesses. (See generally *C.J.E.R.*, Judges Benchbook, Civil Proceedings: Trial §8.37 et seq.; *C.E.B.*, Effective Direct and Cross-Examination, Chap. 2; *C.E.B.*, 1 Civ. Proc. During Trial 3d, §11.47 et seq.; Rutter Group, 2 Civil Trials and Evidence §9:33 et seq.; 1 McCormick 5th, §5 et seq.; 81 *Am.Jur.2d* (1992 ed.), *Witnesses* §743 et seq.; Wharton, 2 Criminal Evidence 14th, §379 et seq.; 61 *Am.Jur.* Trials 269 [preparing witnesses]; 47 *Hastings L. J.* 1381, 1423 [advice to prosecutors using informers as witnesses].)

(2) *Form of Direct Examination.* The *direct examination* will usually take either of the following forms:

(a) A series of specific questions calling for specific answers about each particular fact that makes up the total testimony sought. (See 1 McCormick 5th, §5; 3 Wigmore (Chadbourn Rev.) §766.)

(b) Preliminary questions directing the attention of the witness to the time, place and other circumstances, and then a general question seeking the witness' narration of whatever occurred. Specific questions may later call for answers to fill in the gaps. (See 1 McCormick 5th, §5 [with capable witness, this is preferable method]; 3 Wigmore (Chadbourn Rev.) §767.) If incompetent matter comes in as a part of this free narrative, the only remedy of the adverse party is a motion to strike (*infra*, §385).

(3) *Witness Has No Duty To Be More Specific.* When counsel elicits the testimony of a witness by a series of specific questions calling for specific answers about each fact, the witness should respond to the question and should neither evade nor volunteer matters not specifically asked for. If, therefore, a witness' answers are literally true, the witness may not be faulted for failing to volunteer more explicit information. "Although such testimony may cause a misleading impression due to the failure of counsel to ask more specific questions, the witness' failure to volunteer testimony to avoid the misleading impression does not constitute perjury because the crucial element of falsity is not present in his testimony." (*In re Rosoto* (1974) 10 C.3d 939, 949, 112 C.R. 641, 519 P.2d 1065, citing the text.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Counsel Chooses Method of Questioning.* See Simons, *Cal. Evidence Manual*, §3:11 et seq.; 1 McCormick 6th, §5 et seq.; 57 *Stanf. L. Rev.* 291, 317 [witness coaching]; 81 *Am.Jur.2d* (2004 ed.), *Witnesses* §§706, 707.(2) *Form of Direct Examination.*

(a) *Specific questions:* See 1 McCormick 6th, §5.

(b) *Preliminary questions*: See 1 McCormick 6th, §5. *West's Key Number Digest*, Witnesses k.228



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## CHAPTER XI - Presentation At Trial

### VIII. ORAL EXAMINATION

#### B. Form of Questions.

##### 1. Leading Question.

##### a. Nature and Rule of Exclusion.

3 Witkin Cal. Evid. Presentation § 165

[§ 165] Nature and Rule of Exclusion.

(1) *Definition.* A leading question is one that "suggests to the witness the answer that the examining party desires." (Ev.C. 764.) The dangers of improper suggestion are obvious, and such questions are normally excluded on direct examination and redirect examination. (Ev.C. 767(a)(1); see 1 McCormick 5th, §6; 3 Wigmore (Chadbourn Rev.) §769; cf. Model C., Rule 105(g) and Comment.)

The test of a leading question is stated in the statutory definition above, and the rule is clearly violated by a question in such form as "did she" do something (recited in detail) or "did" a specified event take place, i.e., a question that includes an assumption of the truth of a fact in controversy. (See *People v. Williams* (1997) 16 C.4th 635, 672, 66 C.R.2d 573, 941 P.2d 752, citing McCormick and Wigmore; *People v. Whitehead* (1957) 148 C.A.2d 701, 704, 307 P.2d 442; 1 McCormick 5th, §6; 3 Wigmore (Chadbourn Rev.) §771; C.E.B., 1 Civ. Proc. During Trial 3d, §11.54; Rutter Group, 2 Civil Trials and Evidence §9:35 et seq.)

(2) *Illustrations.* *People v. Whitehead*, *supra*, shows how, in a criminal case, a leading question may be seriously prejudicial. Defendant was charged with lewd conduct with a child. The prosecuting witness testified that "He put his hands on me," and was asked to point to the place. When she did, the judge asked, "Are you indicating between the legs?" *Held*, this was misconduct and reversible error: It was a direction to the child giving the jury the clear impression that the judge believed defendant had committed the lewd act. (148 C.A.2d 704.)

But there is one type of partly suggestive question that may be allowed: Where it starts out by asking "What is the fact" or "State whether or not," and then recites alternatives. Thus, in *Estate of Melvin* (1927) 85 C.A. 691, 259 P. 980, a will contest, it was held error to sustain objections to such questions as the following: "How was he as to being able to carry on a connected conversation, whether he would talk about one thing connectedly straight through or whether he would branch off on other subjects?" "What is the fact as to whether she became apparently more devoted to him than she had prior to that time?" "What is the fact as to whether or not that seemed to be the chief topic on his mind when you would visit him?" (85 C.A. 696.) (See 1 McCormick 5th, §6; cf. 3 Wigmore (Chadbourn Rev.) §772.)

(3) *"Yes" or "No" Questions.* It is often loosely said that a question that can be answered by a simple "yes" or "no" is leading, for the content of the answer must be in the question. But this is not invariably true, and there is no rigid rule of exclusion. (See *People v. Williams* (1997) 16 C.4th 635, 672, 66 C.R.2d 573, 941 P.2d 752, quoting Jefferson, Cal. Evidence Benchbook ["question calling for a 'yes' or 'no' answer is a leading question only if, under the circumstances, it is obvious that the examiner is suggesting that the witness answer the question one way only"]; *People v. Tober*

(1966) 241 C.A.2d 66, 69, 50 C.R. 228, *infra*, §167, citing 3 Wigmore, §772 [now 3 Wigmore (Chadbourn Rev.) §772].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Definition*. See 1 McCormick 6th, §6.(2) *Illustrations*. See 1 McCormick 6th, §6. *West's Key Number Digest*, Witnesses k.239 et seq.



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## CHAPTER XI - Presentation At Trial

### VIII. ORAL EXAMINATION

#### B. Form of Questions.

##### 1. Leading Question.

##### b. Exception: Cross-Examination.

3 Witkin Cal. Evid. Presentation § 166

[§ 166] Exception: Cross-Examination.

(1) *General Rule.* Where the witness is presumably hostile, there is little danger of false suggestion. Hence, leading questions are proper in the following kinds of examination:

(a) Cross-examination, or recross-examination of a witness called by the other party. (*Ev.C.* 767(a)(2); see Rutter Group, 2 Civil Trials and Evidence §10:57 et seq.; 1 McCormick 5th, §§6, 20; 3 Wigmore (Chadbourn Rev.) §773, 774.)

(b) Examination of an adverse witness, which is governed by the rules of cross-examination. (See *Koeberle v. Friganza* (1924) 66 C.A. 323, 327, 226 P. 35; infra, §202.)

(2) *Exception Where Witness is Biased in Favor of Cross-Examiner.* However, the judge may forbid the asking of leading questions where it appears that the witness is biased in favor of the cross-examiner and would be unduly influenced by questions that suggest the desired answer. (See 3 Wigmore (Chadbourn Rev.) §773; *Ev.C.* 767, Comment approving Wigmore's observation; *People v. Spain* (1984) 154 C.A.3d 845, 854, 201 C.R. 555.)

In *People v. Spain*, *supra*, defendant was charged with second degree murder. The prosecution called his mother as a witness; she admitted lying to the officers in an effort to protect her son, and the judge ruled that she was a hostile witness and that the prosecutor could use leading questions. On cross-examination, defense counsel also sought to use leading questions and the judge sustained objections. *Held*, the ruling was not an abuse of discretion.

(a) If the prosecution is permitted to ask a hostile witness leading questions on direct examination, does the defendant have the same right on cross-examination? The answer may not be the same in all cases; the witness may be hostile to the prosecution for a reason other than favoritism to the defense. "The problem, of course, is that a limitation on the use of leading questions affects the defendant's ability to confront and cross-examine the witness. The technique of leading is often the defendant's most valuable weapon in his or her effort to discredit the prosecution's case." (154 C.A.3d 853.)

(b) However, a restriction on leading questions is not an impairment of the constitutional right of confrontation; the defendant is still permitted to confront and cross-examine the witness, with a limitation only on the form of the question. (154 C.A.3d 853, 854.) Thus, the matter is within the discretion of the judge, and here, that discretion was properly exercised: Defendant's mother had demonstrated her obvious and natural bias in favor of defendant. (154

*C.A.3d 854.)*

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *General Rule.*

(a) *Cross-examination or recross-examination:* See 1 McCormick 6th, §§6, 20. *West's Key Number Digest*, Witnesses k.282 et seq.



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## CHAPTER XI - Presentation At Trial

### VIII. ORAL EXAMINATION

#### B. Form of Questions.

##### 1. Leading Question.

#### c. Discretionary Exceptions and Nonprejudicial Error.

*3 Witkin Cal. Evid. Presentation § 167*

[§ 167] Discretionary Exceptions and Nonprejudicial Error.

(1) *Discretionary Exceptions.* The rule against leading questions on direct examination is subject to practical exceptions where the danger of improper suggestion is not great, or where this form of questioning is necessary in order to obtain relevant evidence. (See generally 1 McCormick 5th, §6; Rutter Group, 2 Civil Trials and Evidence §9:41 et seq.; 3 Wigmore (Chadbourn Rev.) §773 et seq.) *Ev.C. 767(a)* recognizes this by its proviso, "Except under special circumstances where the interests of justice otherwise require." The principal situations are as follows:

(a) *Preliminary Matters.* Noncontroversial matters such as identification of the witness and his occupation can be presented by leading questions. "It is usually the proper way to conduct the examination until the attention of the witness is brought to the point to which he is expected to testify. It saves time and tends to make the testimony clearer." (*Bruce v. Western Pipe & Steel Co.* (1917) 177 C. 25, 27, 169 P. 660; see also 3 Wigmore (Chadbourn Rev.) §775.)

(b) *Refreshing Recollection.* Where a witness cannot remember a matter without some suggestion, leading questions may be permitted to the extent necessary to stimulate or revive his or her recollection. (See *People v. Williams* (1997) 16 C.4th 635, 672, 673, 66 C.R.2d 573, 941 P.2d 752, citing the text [leading questions were properly used to refresh prosecution witness' memory about statement by one of alleged murderers regarding intention to kill all occupants of house]; 1 McCormick 5th, §6; 3 Wigmore (Chadbourn Rev.) §777; 81 Am.Jur.2d (1992 ed.), *Witnesses* §769.)

(c) *Children or Mentally Disabled Witnesses.* When examining children or persons who are mentally disabled, it is usually permissible to assist them with leading questions. (*Mead v. Mead* (1919) 41 C.A. 280, 284, 182 P. 761 [aged man]; *People v. Hinrich* (1921) 53 C.A. 186, 187, 199 P. 1058 [child]; *People v. Tober* (1966) 241 C.A.2d 66, 69, 50 C.R. 228; see 3 Wigmore (Chadbourn Rev.) §778; cf. *Estate of Cesare* (1955) 130 C.A.2d 557, 569, 279 P.2d 607 [real estate transactions, witness vague, uncertain, confused, and "not very intelligent"].)

In *People v. Tober*, *supra*, a prosecution for lewd acts against a 10-year-old child, defendant contended that the prosecutor should not have asked questions that called for a "yes" or "no" or "I don't remember" answer. In holding that no error was committed, the court first pointed out that such questions are not necessarily leading (*supra*, §165), but then fell back on the discretionary exception for an immature witness in a sex case. (241 C.A.2d 69.)

The judge, in the interests of justice, may permit leading questions to *children under 10* in prosecutions involving the following offenses against children: wilful cruelty (P.C. 273a); wilful infliction of cruel or inhuman corporal

punishment (P.C. 273d); wilful lewd or lascivious act (P.C. 288); continuous sexual abuse (P.C. 288.5). (*Ev.C. 767(b).*)

(d) *Expert Witness*. It is also permissible, ordinarily, to ask leading questions in interrogating an expert. (See *Chula v. Superior Court* (1952) 109 C.A.2d 24, 38, 240 P.2d 398; *Chavez v. Zapata Ocean Resources* (1984) 155 C.A.3d 115, 124, 201 C.R. 887.)

(2) *Nonprejudicial Error*. In a number of cases, the allowance of leading questions has not been ground for reversal; either the court acted within its discretion in permitting the questions or no prejudice appeared. (See *Moran v. Abbey* (1883) 63 C. 56, 58; *California Wine Assn. v. Commercial Union Fire Ins. Co.* (1910) 159 C. 49, 55, 112 P. 858; *Eaton v. Locey* (1913) 22 C.A. 762, 768, 136 P. 534; *Imperial Water Co. No. 1 v. Imperial Irr. Dist.* (1923) 62 C.A. 286, 293, 217 P. 88; *Latky v. Wolfe* (1927) 85 C.A. 332, 346, 259 P. 470; *People v. Mora* (1956) 139 C.A.2d 266, 272, 293 P.2d 522; *People v. Campbell* (1965) 233 C.A.2d 38, 44, 43 C.R. 237; cf. 3 Wigmore (Chadbourn Rev.) §§770, 776, 777.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Discretionary Exceptions*. See *People v. Augustin* (2003) 112 C.A.4th 444, 450, 5 C.R.3d 171 [in prosecution for assault, trial judge did not abuse discretion in allowing prosecutor to use leading questions with victim, who had cerebral palsy, on ground that this was most efficient way to allow her to communicate her testimony]; 1 McCormick 6th, §6.

(b) *Refreshing Recollection*. See 81 *Am.Jur.2d* (2004 ed.), *Witnesses* §742; 1 McCormick 6th, §6.

(c) *Children or Mentally Disabled Witnesses*. *Ev.C. 767(b)* was amended in 2004 to apply to dependent persons with substantial cognitive impairment, as well as to children under the age of 10. The amended subdivision applies in prosecutions under P.C. 273a (wilful harm or injury to a child), P.C. 273d (corporal punishment or injury of a child), P.C. 288.5 (continuous sexual abuse of a child), P.C. 368 (crimes against elder or dependent adults), or for any of the acts described in P.C. 11165.1, 11165.2 (defining "sexual abuse" and "neglect" for purposes of the Child Abuse and Neglect Reporting Act). *West's Key Number Digest*, *Witnesses* k.240(2) et seq.





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## CHAPTER XI - Presentation At Trial

### VIII. ORAL EXAMINATION

#### B. Form of Questions.

#### 2. Argumentative Question.

3 *Witkin Cal. Evid. Presentation* § 168

[§ 168] Argumentative Question.

Argumentative or badgering questions, usually occurring in cross-examination, are improper. Thus, in *Estate of Loucks* (1911) 160 C. 551, 117 P. 673, a witness was confronted with his prior inconsistent statement, and counsel asked: "Well, now, can you reconcile the two statements?" *Held*, an objection was properly sustained; "[t]he two statements were clearly not reconcilable, and the question was doubtless asked for the purpose of involving the witness in an argument." (160 C. 558.) (On permissible question whether prior statement was *true*, see *infra*, §335.)

Similarly, in *Schuh v. Oil Well Supply Co.* (1920) 50 C.A. 588, 195 P. 703, after pointing out to plaintiff the difference between allegations of the first and second complaint, counsel for defendant asked: "Then why did you not allege in your complaint that the belt was defective?" *Held*, this was properly excluded. (50 C.A. 590.) (See also *People v. Harlan* (1901) 133 C. 16, 21, 65 P. 9 ["How is it you can recollect a date as long ago as that, and you cannot remember the day of the week?"]; *People v. Alexander* (1926) 77 C.A. 231, 236, 246 P. 147 ["Q. Then you were mistaken a moment ago? A. I was. Q. When you were so positive?"]; *People v. Hudson* (1981) 126 C.A.3d 733, 735, 179 C.R. 95 [defendant was deprived of right to fair trial by prosecutor's trial tactics, which included vulgar and argumentative questions designed to prejudice jury against defendant].) (See also 3 Wigmore (Chadbourn Rev.) §781; C.E.B., 1 Civ. Proc. During Trial 3d, §11.61; 1 McCormick 5th, §7.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 1 McCormick 6th, §7.



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CHAPTER XI - Presentation At Trial

VIII. ORAL EXAMINATION

B. Form of Questions.

3. Repetitive Questions.

3 *Witkin Cal. Evid. Presentation* § 169

[§ 169] Repetitive Questions.

The court may also refuse to permit questions that have already been asked and answered in substantially the same form. "Where a question is asked and answered in a manner which, as here, indicates that no different answer could probably be given to the same question, the trial court is not bound to have its time consumed by having such question uselessly repeated." (*Doudell v. Shoo* (1912) 20 C.A. 424, 450, 129 P. 478.) (See also *Spitler v. Kaeding* (1901) 133 C. 500, 503, 65 P. 1040; *Estate of Martin* (1915) 170 C. 657, 669, 151 P. 138 [criticizing court below for permitting continuous reiteration, in cross-examination, of matters already covered]; *People v. Lepe* (1997) 57 C.A.4th 977, 985, 67 C.R.2d 525 [magistrate properly sustained objection on basis of repetition]; C.E.B., 1 Civ. Proc. During Trial 3d, §11.59; Rutter Group, 2 Civil Trials and Evidence §9:68; cf. *De Witt v. Floriston Pulp & Paper Co.* (1908) 7 C.A. 774, 783, 96 P. 397 [court's discretion governs]; see 3 Wigmore (Chadbourn Rev.) §782.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Witnesses k.245



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CHAPTER XI - Presentation At Trial

VIII. ORAL EXAMINATION

B. Form of Questions.

4. Uncertain or Unintelligible Question.

3 *Witkin Cal. Evid. Presentation* § 170

[§ 170] Uncertain or Unintelligible Question.

In *Spinks v. Clark* (1905) 147 C. 439, 82 P. 45, an action to rescind an exchange for fraud, defendant was asked whether he had "any arrangement whatever with any of the other stockholders relative to the delivery of shares of stock or the manipulation or management or sale of shares of stock or the fixing of prices of shares of stock in that company, upon the market." *Held*, the question was too general and indefinite, and its object and relevancy were not apparent. "If plaintiff had in mind any particular kind of arrangement or action of Clark in this regard which would have thrown light upon the questions involved he should have asked specifically regarding the same." (147 C. 453.) (See also *Schuur v. Rodenback* (1901) 133 C. 85, 89, 65 P. 298 ["Q. What happened after Mr. Rodenback left on that day?" held too general; court could not say whether an answer would be pertinent]; *Chavez v. Zapata Ocean Resources* (1984) 155 C.A.3d 115, 124, 201 C.R. 887, citing the text.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Witnesses k.236(4)



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## CHAPTER XI - Presentation At Trial

### VIII. ORAL EXAMINATION

#### B. Form of Questions.

#### 5. Omnibus or Compound Question.

*3 Witkin Cal. Evid. Presentation § 171*

[§ 171] Omnibus or Compound Question.

In *Doudell v. Shoo* (1912) 20 C.A. 424, 451, 129 P. 478, defendant, on the stand, said that some matters testified to by plaintiff "occurred and some didn't." He was then asked by his counsel, "What part did, and what part didn't?" *Held*, the trial judge was justified in refusing to permit a large amount of testimony involving various specific topics in response to this omnibus question. (20 C.A. 451.) Counsel "should have questioned him particularly about the several matters" and not have left it entirely to the witness to recall all of them and to separate the correct and the incorrect parts. (20 C.A. 452.)

Similarly, in *Godfrey v. Miller* (1889) 80 C. 420, 22 P. 290, the question was: "Did you know, or did you have any cause to believe, that the transfer of this horse and buggy by Mr. Gilbert to yourself was made with a view to prevent the same from coming to his assignee in insolvency, or to prevent the same from being distributed ratably among his creditors, or to defeat the object of, or in any way to hinder, impede, or delay the operation of, or to evade any of the provisions of the insolvency act?" *Held*, improper, amounting to five questions in one. (80 C. 423.)

In *Wiese v. Rainville* (1959) 173 C.A.2d 496, 343 P.2d 643, plaintiff was an engineer employed by a manufacturer interested in machine wrapping for its products. On invitation, he attended the showing of a machine manufactured by defendant R and demonstrated at the plant of defendant Pearce Plastics. He was injured through alleged negligent operation of the machine by R. In an effort to prove himself an invitee of Pearce Plastics so as to hold it liable as well as R, he asked these questions of R: "(1) Does Pearce Plastics or did Pearce Plastics, at the time of this accident, produce items that your company would be likely to purchase? (2) Is your company in any business, or were they in any business relationship to the Pearce Plastics Company in relation to purchase or vendee or vendor relationship? (3) Did the Pearce Plastic Company, at the time the loss occurred, at the time you went over to the Pearce Plastic Company, produce any item that your company would be interested in purchasing?" *Held*, all three were bad compound questions and objections were properly sustained. They dealt with both past and present times, the present (time of trial) being immaterial; and the third likewise dealt both with relevant time (the accident) and irrelevant times (defendant R had gone to Pearce Plastics on other occasions). (173 C.A.2d 506.) (See also *Chavez v. Zapata Ocean Resources* (1984) 155 C.A.3d 115, 124, 201 C.R. 887, citing the text; C.E.B., 1 Civ. Proc. During Trial 3d, §11.51; Rutter Group, 2 Civil Trials and Evidence §9:65.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER XI - Presentation At Trial

### VIII. ORAL EXAMINATION

#### B. Form of Questions.

#### 6. Question Assuming Fact in Issue.

*3 Witkin Cal. Evid. Presentation § 172*

[§ 172] Question Assuming Fact in Issue.

A question that in its statement assumes the existence of certain facts that are actually in issue and not proved or admitted may be excluded. On direct examination of a friendly witness, it is objectionable as leading (*supra*, §165); on cross-examination or examination of a hostile witness, it is often misleading and unfair in putting unintended words into the witness' mouth, and in bringing before the jury facts that cannot be proved. (See *Hand v. Scodeletti* (1900) 128 C. 674, 676, 61 P. 373; *McDonald v. Price* (1947) 80 C.A.2d 150, 152, 181 P.2d 115; *People v. Heldenburg* (1990) 219 C.A.3d 468, 472, 268 C.R. 255 [prosecutor's question concerning defendant's awareness of Amsterdam gem market assumed fact not in evidence (existence of market), thereby possibly establishing unwarranted, prejudicial nexus between jewelry robbery and defendant's hurried trip to Amsterdam; asking of question raised issue of prosecutorial misconduct, but issue was waived]; 1 McCormick 5th, §7; 3 Wigmore (Chadbourn Rev.) §780; C.E.B., 1 Civ. Proc. During Trial 3d, §11.58.)

The "do you know" type of question on cross-examination is a common example of this error. In *People v. Lillard* (1963) 219 C.A.2d 368, 33 C.R. 189, a freeway condemnation case, plaintiff's witness was being cross-examined on the effect of bypassing the town of Arbuckle. The question, relating to the effect on service stations and restaurants, was, "Did you know their business dropped 50% and some went broke and closed up?" The judge, interrupting, said: "Do you know it? You are assuming something not in evidence. ... You don't know what is happening in Arbuckle." (219 C.A.2d 379.) (See also *People v. Auburn Ski Club* (1966) 241 C.A.2d 781, 788, 50 C.R. 859.)

Such questioning may amount to serious misconduct. In *Love v. Wolf* (1964) 226 C.A.2d 378, 38 C.R. 183, an action for damages for illness (aplastic anemia) following use of defendant pharmaceutical company's antibiotic, plaintiff's counsel cross-examined a company witness by apparently reading from a paper. He asked whether the witness remembered a survey of Dr. W showing many deaths from aplastic anemia. On demand for production of the document, counsel disclaimed any reading of a survey and produced no such report. This, among other errors, led to a reversal of judgment for plaintiff. (226 C.A.2d 390.)

However, the "Isn't it a fact" technique of interrogation is improper only where the question is based on facts not in evidence. There is nothing wrong with the form where it concerns facts in evidence. (*Marcus v. Palm Harbor Hosp.* (1967) 253 C.A.2d 1008, 1015, 61 C.R. 702.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 1 McCormick 6th, §7. *West's Key Number Digest*, Witnesses k.237 et seq.



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## CHAPTER XI - Presentation At Trial

### VIII. ORAL EXAMINATION

#### C. Form of Answers.

1. Opinion or Conclusion of Witness.
  - a. Exclusionary Rule and Exceptions.

3 Witkin Cal. Evid. Presentation § 173

#### [§ 173] Exclusionary Rule and Exceptions.

Under the *opinion rule*, a nonexpert witness must ordinarily testify to facts. Hence, a question that calls for the witness' opinion or conclusion is objectionable, and an answer giving an inadmissible opinion may be stricken. (See 1 Cal. Evidence (4th), Opinion Evidence, §§1, 20 et seq.; 1 McCormick 5th, §11; Rutter Group, 2 Civil Trials and Evidence §§8:643 et seq., 9:63.) But there are some qualifications and exceptions to this rule:

(1) The subject may be one on which the opinion of a lay witness is received. (See 1 Cal. Evidence (4th), Opinion Evidence, §5 et seq.)

(2) Where the question deals with a matter that is *not in issue*, a conclusion may be accepted in order to save the time that might be consumed in covering the background of fact from which it could be deduced. In *Winslow v. Glendale Light & Power Co.* (1913) 164 C. 688, 130 P. 427, 1 Cal. Evidence (4th), Opinion Evidence, §20, the court explained this exception as follows: "[I]n many instances--as where the agency or the ownership of property is not in issue, it is permissible, for the purpose of curtailing the inquiry, to allow questions to be asked and answered, which questions and answers would be to the last degree improper were issue joined upon the question of agency or ownership. Instances come readily to mind, and, indeed, in the courts are of daily or even of hourly occurrence. If the ownership of a piece of land is not in issue, it is not objectionable to ask the witness who owns that land. If the agency or employment is not in question, it is equally permissible to ask the witness whose agent he was, or for whom he was working. It is but a time-saving method of presenting the truth upon a matter not controverted." (164 C. 689.)

(3) A witness who is not positive of the facts may state his or her "best recollection." (See *infra*, §174.)

(4) Although an objection to a question calling for a conclusion should and usually will be sustained, error in allowing the question to be answered is almost never reversible, partly because of the court's discretion in determining the propriety of the question, and partly because cross-examination will nearly always be sufficient to counteract any possible prejudice from the improper answer. (See *Kreuzberger v. Wingfield* (1892) 96 C. 251, 256, 31 P. 109; *Nolan v. Nolan* (1909) 155 C. 476, 480, 101 P. 520; *People v. Mixon* (1982) 129 C.A.3d 118, 127, 180 C.R. 772 [admission of lay opinion testimony is in trial court's discretion and will not be disturbed unless clear abuse of discretion appears].)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 1 McCormick 6th, §11.



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## CHAPTER XI - Presentation At Trial

### VIII. ORAL EXAMINATION

#### C. Form of Answers.

1. Opinion or Conclusion of Witness.
  - b. Best Recollection or Thought.

3 Witkin Cal. Evid. Presentation § 174

[§ 174] Best Recollection or Thought.

The knowledge requirement (2 Cal. Evidence (4th), Witnesses, §46) and the rule against opinions or conclusions (supra, §173) do not set impossible standards either of *certainty* or *factual expression*. So a witness may give the results of his or her observation in less than positive terms, and the answer will be admissible unless it is clear that the witness has no firsthand knowledge of the matter at all, and is merely indulging in speculation or repeating hearsay. (*Weingetz v. Cheverton* (1951) 102 C.A.2d 67, 73, 226 P.2d 742 ["The law does not require that the result of a witness' observation be positive or absolute knowledge"]; *Quiroz v. Stuzane* (1954) 124 C.A.2d 534, 538, 269 P.2d 103; see also 1 McCormick 5th, §10; 2 Wigmore (Chadbourn Rev.) §658; 3 Wigmore (Chadbourn Rev.) §§726 et seq., 728.)

Thus, in *Weingetz v. Cheverton*, supra, the witness testified that an agreement was signed by both parties, in such language as "I do. But will not state too definitely," "I think so, but I am not positive," and "I believe." *Held*, the answers were admissible. (102 C.A.2d 73.)

Similarly, in *Quiroz v. Stuzane*, supra, a witness, describing defendant truck driver's negligent driving, was asked whether he saw what part of the car hit plaintiff. His answer was, "I am not sure, but I think it was the ..." Objection was sustained, the trial judge saying, "You may tell what you saw, not what you think you saw." *Held*, this was error. (124 C.A.2d 538.)

In *Schwenger v. Gaither* (1948) 87 C.A.2d 913, 914, 198 P.2d 108, plaintiff testified that defendant's car, in his opinion, was going 40 miles per hour. On cross-examination, he was asked: "But you don't know as to miles per hour; forty miles an hour is just a guess, is that right?" Answer: "That is right." *Held*, denial of a motion to strike the testimony was proper. "More than one court has recognized that 'in common parlance, 'suppose' and 'guess' are frequently used as expressions of the speaker's enlightened opinion.'" (87 C.A.2d 914.)

In *People v. Otis* (1959) 174 C.A.2d 119, 344 P.2d 342, a police officer testified to overhearing defendant talking with others. In response to the prosecutor's question whether defendant was "discussing his case," the officer replied, "As far as I could gather I would say yes." *Held*, it was within the judge's discretion to admit the answer. (174 C.A.2d 126.) (See also *People v. Soap* (1899) 127 C. 408, 410, 59 P. 771 [witness said "I presume"; asked what he meant, he replied "That was my best information"]; *People v. Schoon* (1918) 177 C. 678, 682, 171 P. 680 ["I thought then I saw somebody lying on the sidewalk"]; *People v. Waller* (1939) 14 C.2d 693, 700, 96 P.2d 344 [identification need not be in positive terms; "looked like him" and "resembled him" are sufficient]; *People v. Harris* (1948) 87 C.A.2d 818, 824, 198 P.2d 60, 1 Cal. Evidence (4th), Opinion Evidence, §5 [same].)

In *People v. Hurlic* (1971) 14 C.A.3d 122, 92 C.R. 55, defendant was convicted of first degree murder, largely on the basis of his statements to a police officer during an interrogation. As a foundation for admitting the incriminating statements, the officer testified that he read the *Miranda* rights to defendant on the morning after the arrest. According to the officer, defendant "indicated" or "acknowledged" that he understood those rights, though the officer could not recall whether defendant made the response verbally or by nodding. Defendant contended that the purported waiver was ineffective because of the officer's lack of specificity. *Held*, judgment affirmed.

(a) "[E]ven if we had a tape recording of the conversation and could hear the defendant say loud and clear that he understood his rights, we could reach a finding that he did so only by inference. All that happened here is that the trial court relied on a different inference: since the 'acknowledgment' to which the officer testified may have been a mere nod of the head it can hardly be interpreted as more than a statement that defendant heard, rather than that he understood the warnings. Thus we conclude that defendant understood because he said he heard, rather than that he understood because he said he understood. The jump may be longer, but the difference is not of constitutional magnitude." (14 C.A.3d 127.)

(b) The objection that the testimony should have been excluded because it was an opinion or conclusion rested on a "misconception" of how the opinion rule (*Ev.C. 800*) affects testimony by nonexperts. "That rule merely requires that witnesses express themselves at the lowest possible level of abstraction. ... Whenever feasible 'concluding' should be left to the jury; however, when the details observed, even though recalled, are 'too complex or too subtle' for concrete description by the witness, he may state his general impression." (14 C.A.3d 127.) That problem was not presented here. Had the officer been able to recall whether defendant spoke or nodded, he could have testified about which it was. "The problem presented is a different one: the extent to which an indistinct recollection of matters personally observed by a witness is an impediment to his testimony." The admissibility of this testimony is well established. (14 C.A.3d 127, citing Wigmore and the text.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 1 McCormick 6th, §10. *West's Key Number Digest*, Witnesses k.251





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## CHAPTER XI - Presentation At Trial

### VIII. ORAL EXAMINATION

#### C. Form of Answers.

#### 2. Nonresponsive Answer.

#### 3 *Witkin Cal. Evid. Presentation* § 175

[§ 175] Nonresponsive Answer.

(1) *Motion by Examiner.* Obviously, a witness should answer the question as put, and not evade or volunteer matters not specifically asked for. If the witness does depart from the question, the nonresponsive answer may be stricken out on motion of the questioner, who is entitled to elicit testimony in his or her own way and to confine the scope of the direct examination as he or she sees fit. (See *In re Rosoto* (1974) 10 C.3d 939, 949, 112 C.R. 641, 519 P.2d 1065, citing the text; 81 Am.Jur.2d (1992 ed.), Witnesses §759 et seq.; cf. *People v. Curtis* (1965) 232 C.A.2d 859, 867, 43 C.R. 286 [defense counsel, cross-examining prosecution witness, received reply "And I also knew of his criminal record"; held error, but not prejudicial, to fail to strike answer].)

(2) *Motion by Opposing Party.* The questioner may want to retain the matter in the nonresponsive answer to save having to ask another question on the point. If he or she does not move to strike, may the opposing party make the motion? On principle, it would seem that the opponent can only object if the answer contains matter inadmissible on other grounds; the nonresponsive answer does no harm. (See *Hirshfeld v. Dana* (1924) 193 C. 142, 147, 223 P. 451; *Holzer v. Read* (1932) 216 C. 119, 122, 13 P.2d 697; *Westman v. Clifton's Brookdale* (1948) 89 C.A.2d 307, 314, 200 P.2d 814 [briefly observing that it was error for trial judge to strike out nonresponsive answer that included relevant matter]; *Van Horn v. Southern Pac. Co.* (1956) 141 C.A.2d 528, 536, 297 P.2d 479 [following *Westman*]; 3 Wigmore (Chadbourn Rev.) §785.)

However, the Legislature has established the opposite rule: The nonresponsive answer "shall be stricken on motion of any party." (Ev.C. 766.) It is difficult to see any purpose in this statute, and its effect is slight: If the motion is granted, the examiner will merely have to reframe the question; but denial of the motion, for the reasons just discussed, cannot constitute prejudicial error.

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Motion by Examiner.* See 81 Am.Jur.2d (2004 ed.), Witnesses §724 et seq. *West's Key Number Digest*, Witnesses k.248 et seq.



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CHAPTER XI - Presentation At Trial

IX. DIRECT EXAMINATION: SPECIAL PROBLEMS

A. Examination of Witness on Writing.

3 *Witkin Cal. Evid. Presentation* § 176

[§ 176] Examination of Witness on Writing.

A witness may be questioned on the content of a writing when the examination does not violate the secondary evidence rule (2 *Cal. Evidence* (4th), *Documentary Evidence*, §31 et seq.) or the parol evidence rule (2 *Cal. Evidence* (4th), *Documentary Evidence*, §59 et seq.). The writing need not be shown, read, or disclosed to the witness. (*Ev.C.* 768(a); for rule on impeachment, see *infra*, §334.) However, if the examining party does show the writing to the witness, "all parties to the action must be given an opportunity to inspect it before any question concerning it may be asked of the witness." (*Ev.C.* 768(b).)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER XI - Presentation At Trial

### IX. DIRECT EXAMINATION: SPECIAL PROBLEMS

#### B. Use of Memorandum by Witness.

#### 1. Refreshing Recollection by Writing.

##### a. Nature of Rule.

3 Witkin Cal. Evid. Presentation § 177

[§ 177] Nature of Rule.

A witness may use a writing to refresh or revive his or her recollection of the facts, subject to the right of the adverse party to inspect and cross-examine on it. (*Ev.C.* 771; see *infra*, §178 et seq.; and see generally *People v. McFarlane* (1903) 138 C. 481, 487, 71 P. 568 [transcript of previous testimony]; *Beecham v. Burns* (1917) 34 C.A. 754, 758, 168 P. 1058 [printed copy of original]; *People v. Mercado* (1922) 59 C.A. 69, 74, 209 P. 1035 [transcript of previous testimony]; *People v. Selby* (1926) 198 C. 426, 431, 245 P. 426 [transcript of grand jury testimony]; *People v. Cornell* (1928) 203 C. 144, 148, 263 P. 216 [transcript of preliminary examination testimony]; *Shaver v. United Parcel Service* (1928) 90 C.A. 764, 771, 266 P. 606 [transcript of coroner's inquest testimony]; *People v. Curtis* (1939) 36 C.A.2d 306, 322, 98 P.2d 228 [transcript of grand jury testimony]; *People v. Allen* (1941) 47 C.A.2d 735, 742, 118 P.2d 927 [transcript of preliminary examination testimony]; *People v. Vera* (1955) 131 C.A.2d 669, 674, 281 P.2d 65 [recorded conversation with police officers]; *Watson v. Los Angeles Transit Lines* (1958) 157 C.A.2d 112, 117, 320 P.2d 890 [previous written statement]; *People v. Wojahn* (1959) 169 C.A.2d 135, 141, 337 P.2d 192 [recording of conversation with police secretary]; *Fernandez v. Di Salvo Appliance Co.* (1960) 179 C.A.2d 240, 245, 3 C.R. 609, citing the text [dictum; vehicle accident report]; *People v. Jenkins* (1965) 231 C.A.2d 928, 932, 42 C.R. 373, citing the text [transcript of preliminary examination testimony]; Rutter Group, 2 Civil Trials and Evidence §§9:174 et seq. [doctrine], 9:201 [procedure]; 1 McCormick 5th, §9; 3 Wigmore (Chadbourn Rev.) §758 et seq.; 81 *Am.Jur.2d* (1992 ed.), *Witnesses* §769; 82 A.L.R.2d 473; 10 Proof of Facts 251; on whether lack of present recollection is condition to use of writing, see 1 McCormick 5th, §9 [should be discretionary]; 3 *U.C.L.A. L. Rev.* 616, 632 [same].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 81 *Am.Jur.2d* (2004 ed.), *Witnesses* §742; 1 McCormick 6th, §9; 88 Proof of Facts 3d 395 [refreshing witness recollection; superseding 10 Proof of Facts 251, text, p. 240]. *West's Key Number Digest*, *Witnesses* k.253 et seq.



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## CHAPTER XI - Presentation At Trial

### IX. DIRECT EXAMINATION: SPECIAL PROBLEMS

#### B. Use of Memorandum by Witness.

1. Refreshing Recollection by Writing.
  - b. Any Writing.

3 Witkin Cal. Evid. Presentation § 178

[§ 178] Any Writing.

(1) *Former Law.* The strict requirements to assure trustworthiness of *past recorded recollection* (infra, §182) were applied in California, under former C.C.P. 2047, to writings used merely for refreshing recollection. Thus, the writing had to be made by the witness or under his or her direction; it had to be made when the fact was fresh in the witness' memory; and he or she had to know that the fact was correctly stated. (See *McGowan v. McDonald* (1896) 111 C. 57, 68, 43 P. 418 [bank passbook to refresh memory of depositor; admissible]; *McEwen v. New York Life Ins. Co.* (1921) 187 C. 144, 148, 201 P. 577 [doctor's report of medical examination made 9 years after event; inadmissible]; *Steinhofer v. Georgeson* (1921) 54 C.A. 550, 558, 202 P. 350 [use of account book improper for lack of personal knowledge of truth]; *People v. McNichol* (1950) 100 C.A.2d 554, 556, 224 P.2d 21 [report of defendant's statements about circumstances of crime, made to his psychologist under "truth serum," rejected].)

(2) *Evidence Code.* *Ev.C. 771(a)* departs from the former rule by allowing present recollection to be revived by "a writing," with no express restrictions on the types of writings or the means used to refresh recollection. (See *Ev.C. 771*, Comment; see also Rutter Group, 2 Civil Trials and Evidence §9:178; 81 *Am.Jur.2d* (1992 ed.), *Witnesses* §789.) *Ev.C. 771* relies on the procedure governing its use to protect against false or manufactured evidence or other abuses. (See infra, §179.)

Thus, in *People v. Hess* (1970) 10 C.A.3d 1071, 90 C.R. 268, a witness was allowed to refresh her memory by use of a written memorandum she had prepared a few days before the trial and over a year after some of the events referred to in the memorandum had taken place. Defendants contended that the use of these notes was error because *Ev.C. 1237* (infra, §181) requires the writing to be made when the recorded fact actually occurred or was fresh in the witness' memory. *Held*, no error. *Ev.C. 771*, not *Ev.C. 1237*, governs the use of a writing to refresh a witness' recollection, whether used by the witness while testifying or prior to trial. (10 C.A.3d 1080, citing the text.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Evidence Code.* See 81 *Am.Jur.2d* (2004 ed.), *Witnesses* §762. *West's Key Number Digest*, *Witnesses* k.255 et seq.



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## CHAPTER XI - Presentation At Trial

### IX. DIRECT EXAMINATION: SPECIAL PROBLEMS

#### B. Use of Memorandum by Witness.

##### 1. Refreshing Recollection by Writing.

##### c. Production, Inspection, and Cross-Examination.

3 Witkin Cal. Evid. Presentation § 179

[§ 179] Production, Inspection, and Cross-Examination.

(1) *Production at the Hearing.* The writing must be produced at the hearing at an adverse party's request, or else the witness' testimony concerning the matter must be stricken. (Ev.C. 771(a).) However, production is excused and no striking will be ordered if, without fault of the witness or party, production is impossible. This exception applies when the writing (a) is not in the possession or control of the witness or the party who produced the witness' testimony concerning the matter; and (b) was not reasonably procurable by that party through the use of the court's process or other available means. (Ev.C. 771(c).)

(2) *Inspection and Cross-Examination by Adverse Party.* If the writing is produced, the adverse party may inspect it and cross-examine the witness concerning it. (Ev.C. 771(b); see generally *People v. Sieber* (1927) 201 C. 341, 350, 257 P. 64; *Souza v. Joseph* (1913) 22 C.A. 179, 189, 133 P. 981; *Inouye v. McCall* (1939) 35 C.A.2d 634, 637, 96 P.2d 386; *Kelliher v. Ray* (1941) 43 C.A.2d 252, 254, 110 P.2d 712 [reversible error to deny right of inspection]; 3 Wigmore (Chadbourn Rev.) §762; 81 Am.Jur.2d (1992 ed.), *Witnesses* §793 et seq.; 82 A.L.R.2d 473, 557; Rutter Group, 2 Civil Trials and Evidence §9:186 et seq.)

(3) *Writing Used Prior to Testifying.* Formerly, production was required only where the memorandum was actually used by the witness to refresh his or her memory while on the stand. (*People v. Gallardo* (1953) 41 C.2d 57, 67, 257 P.2d 29 [prosecution witness used notes before testifying; no error in refusing defendant's request for production]; see 3 Wigmore (Chadbourn Rev.) §762, favoring production.) But the *Gallardo* holding was inconsistent with the right of criminal discovery recognized in *People v. Estrada* (1960) 54 C.2d 713, 7 C.R. 897, 355 P.2d 641, 5 Cal. Crim. Law (3d), *Criminal Trial*, §77. Accordingly, the Commission changed the rule, for both criminal and civil cases, by requiring production of a writing used by the witness "while testifying or prior thereto." (Ev.C. 771(a); Rutter Group, 2 Civil Trials and Evidence §9:187.) As the Comment states, "[T]he adverse party's right to inspect the writing should not be made to depend upon the happenstance of when the writing is used." (See *International Ins. Co. v. Montrose Chemical Corp.* (1991) 231 C.A.3d 1367, 1372, 282 C.R. 783, 2 Cal. Evidence (4th), *Discovery*, §85 [Ev.C. 771 required production of documents used to refresh deponent's memory as to any matter about which he testified; it did not require examining attorney to establish which of several documents actually refreshed deponent's memory on particular point].)

(4) *Writing Within Attorney-Client Privilege.* The word "writing" in Ev.C. 771 was not intended to cover a transcription of a client's original discussion with an attorney; hence, the transcript need not be turned over to opposing counsel. (*Sullivan v. Superior Court* (1972) 29 C.A.3d 64, 105 C.R. 241, 2 Cal. Evidence (4th), *Witnesses*, §77.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Inspection and Cross-Examination by Adverse Party*. See *81 Am.Jur.2d* (2004 ed.), *Witnesses* §765 et seq.

(3) *Writing Used Prior to Testifying*. See *People v. Smith* (2007) 40 C.4th 483, 509, 54 C.R.3d 245, 150 P.3d 1224 [in capital murder trial, it was proper to require disclosure to prosecution of doctor's notes, test data, and test materials, where doctor stated during his testimony that he used those items to refresh his recollection in preparing to testify that defendant's statements to police were involuntary].



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## CHAPTER XI - Presentation At Trial

### IX. DIRECT EXAMINATION: SPECIAL PROBLEMS

#### B. Use of Memorandum by Witness.

#### 1. Refreshing Recollection by Writing.

#### d. Introduction by Adverse Party.

3 Witkin Cal. Evid. Presentation § 180

[§ 180] Introduction by Adverse Party.

(1) *Examining Party Cannot Introduce*. The writing is used by the witness solely to assist him or her in giving oral testimony. It has no independent evidentiary value for the party calling the witness, and is not admissible in evidence at that party's instance. (See *Estate of De Laveaga* (1913) 165 C. 607, 631, 133 P. 307; *Estate of Packer* (1913) 164 C. 525, 530, 129 P. 778 ["To permit this to be done by the party producing the witness would open the door to the admission of hearsay and manufactured evidence without limit"]; *Hawkins v. Sanguinetti* (1950) 98 C.A.2d 278, 284, 220 P.2d 58; *People v. McNichol* (1950) 100 C.A.2d 554, 558, 224 P.2d 21; *People v. Keelin* (1955) 136 C.A.2d 860, 876, 289 P.2d 520; *Vogelsang v. Wolpert* (1964) 227 C.A.2d 102, 126, 38 C.R. 440, quoting the text; *Frio v. Superior Court* (1988) 203 C.A.3d 1480, 1492, 250 C.R. 819; *People v. Lee* (1990) 219 C.A.3d 829, 840, 268 C.R. 595, quoting the text; *Rutter Group*, 2 Civil Trials and Evidence §9:198 et seq.; 3 Wigmore (Chadbourn Rev.) §763; see also 3 U.C.L.A. L. Rev. 616, 617.)

This restriction was circumvented in a questionable manner in *People v. Allen* (1941) 47 C.A.2d 735, 118 P.2d 927. The prosecutor, questioning an aged and confused woman, first allowed her to read portions of her testimony at prior preliminary hearings, next read her former testimony aloud, and then asked if that refreshed her recollection and if the former testimony was true. *Held*, this was proper. (47 C.A.2d 743.)

(2) *Adverse Party Can Introduce Pertinent Parts*. Former C.C.P. 2047 provided that the cross-examiner could read the writing to the jury. There was no authorization for its introduction in evidence, although reading gave it much the same effect as an admitted document.

*Ev.C. 771(b)* changed this rule, by enlargement and restriction: The cross-examiner may "introduce in evidence such portion of it as may be pertinent to the testimony of the witness." Thus, the distinction between reading and offering the writing in evidence is abolished, but there is no right to introduce parts wholly unrelated to the testimony and the purpose of its use. (See *Ev.C. 771*, Comment.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Witnesses k.271 et seq.



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## CHAPTER XI - Presentation At Trial

## IX. DIRECT EXAMINATION: SPECIAL PROBLEMS

## B. Use of Memorandum by Witness.

## 2. Past Recollection Recorded.

## a. Nature of Rule.

3 Witkin Cal. Evid. Presentation § 181

[§ 181] Nature of Rule.

The doctrine of past recollection recorded differs in important respects from that of refreshing recollection. Here, the witness is not, strictly speaking, refreshing his or her recollection; reference to the writing does not recall the facts to the witness' mind. But if the witness does remember that the memorandum was correct when made, he or she will be permitted to give testimony from it. (*Ev.C.* 1237; see generally *Estate of Moore* (1919) 180 C. 570, 583, 182 P. 285; *People v. Dennis* (1998) 17 C.4th 468, 530, 531, 71 C.R.2d 680, 950 P.2d 1035, citing the text; *People v. Deckert* (1926) 77 C.A. 146, 151, 246 P. 157; *Boyajian v. Balian* (1935) 7 C.A.2d 174, 177, 46 P.2d 199; *People v. Davis* (1968) 265 C.A.2d 341, 71 C.R. 242, *infra*, §184; *Sherrell v. Kelso* (1981) 116 C.A.3d Supp. 22, 31, 172 C.R. 667, 2 Cal. Evidence (4th), Witnesses, §274; Rutter Group, 2 Civil Trials and Evidence §§8:1361 et seq., 9:204 et seq.; 2 McCormick 5th, §279 et seq.; 3 Wigmore (Chadbourn Rev.) §734 et seq.; 3 U.C.L.A. L. Rev. 616; cf. Model C., Rule 504 and Comment; 81 Am.Jur.2d (1992 ed.), Witnesses §782 et seq.; 82 A.L.R.2d 473, 520; 10 Proof of Facts 251, 277.)

Thus, in *Estate of Moore*, *supra*, the issue involved the mental capacity of the testator at a certain time. His attorney, called as a witness, identified a bill of exceptions prepared by him containing testimony of the testator during this period, which was lucid and indicative of sound mentality. The attorney testified: "I prepared this document myself while its contents were fresh in my memory, using the court reporter's notes to check it. ... It is a correct statement of what Mr. Moore said on the witness-stand. Looking at the document does not sufficiently refresh my memory to cause me to remember and narrate what Mr. Moore testified to, ... but I know that the document is a correct statement of what occurred." *Held*, the testimony was admissible. (180 C. 584.)

In *Anderson v. Souza* (1952) 38 C.2d 825, 243 P.2d 497, one plaintiff read verbatim into the record a memorandum he had prepared on his observation of low flying planes. He had described the planes and their numbers, etc., on scratch paper or fence posts, then collected them into a permanent memorandum. *Held*, it was proper to allow him to read it even though he retained no recollection. (38 C.2d 832.)

In *People v. Gentry* (1969) 270 C.A.2d 462, 76 C.R. 336, defendant, paramour of Mrs. C., was charged with beating her young child. R, 8, oldest of Mrs. C's children, testified that she had heard noises after she went to bed on the night of the beating. She was unable to relate what followed, either because she could not recollect or was frightened by bullying conduct of defense counsel. But she testified that she had been questioned by officers, and that everything she told them was the truth. Officer T then testified that R had made a statement to him about defendant coming from the victim's room with the victim in his arms, and that he had written it down in a report shortly after it was given. *Held*, T's



testimony was admissible; the statement was recorded by another who was available for cross-examination (*infra*, §184). (270 C.A.2d 468.)

The admonition in former C.C.P. 2047, that "such evidence must be received with caution," was not repeated in *Ev.C. 1237*.

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 81 *Am.Jur.2d* (2004 ed.), *Witnesses* §756 et seq.; 2 McCormick 6th, §279 et seq.



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## CHAPTER XI - Presentation At Trial

### IX. DIRECT EXAMINATION: SPECIAL PROBLEMS

#### B. Use of Memorandum by Witness.

##### 2. Past Recollection Recorded.

##### b. Foundation.

##### 1. In General.

#### 3 *Witkin Cal. Evid. Presentation* § 182

[§ 182] In General.

Several foundation requirements are imposed for the offer of past recollection recorded, designed to preclude the use of self-serving hearsay that has no guarantee of trustworthiness. *Ev.C. 1237*, less strict than former C.C.P. 2047, covers the following: (1) timeliness of recording (see *infra*, §183); (2) recording by witness or another (see *infra*, §184); (3) testimony by witness to truth of facts (see *infra*, §185); and (4) authenticity of recording (see *infra*, §186). (See also Rutter Group, 2 Civil Trials and Evidence §§8:1364 et seq., 9:205 et seq.)

Some courts, viewing the doctrine of past recollection recorded as one of *necessity*, refuse to apply it where the witness has an independent recollection of the facts. (See *People v. Keelin* (1955) 136 C.A.2d 860, 877, 289 P.2d 520; 2 McCormick 5th, §282; see criticism, 3 Wigmore (Chadbourn Rev.) §738; 3 U.C.L.A. L. Rev. 616, 633.) *Ev.C. 1237* does not list this as one of the four foundation requirements, but the section commences by referring to a statement concerning a matter "as to which the witness has insufficient present recollection to enable him to testify fully and accurately." It would seem, therefore, that the witness may be required to show a lack of present recollection. (See C.E.B., 1 Civ. Proc. During Trial 3d, §11.70.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 2 McCormick 6th, §282.



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B. Use of Memorandum by Witness.

2. Past Recollection Recorded.

b. Foundation.

2. Timeliness of Recording.

3 *Witkin Cal. Evid. Presentation* § 183

[§ 183] Timeliness of Recording.

The writing must have been made "at a time when the fact recorded in the writing actually occurred or was fresh in the witness' memory." (*Ev.C. 1237(a)(1)*; see *People v. Miller* (1996) 46 *C.A.4th* 412, 422, 53 *C.R.2d* 773 [detective's testimony was admissible despite lapse of time between witness' overhearing of threats and her report to detective]; 2 *McCormick* 5th, §281; 3 *Wigmore* (Chadbourn Rev.) §745; 82 *A.L.R.2d* 473, 526.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 2 *McCormick* 6th, §281. *West's Key Number Digest*, Witnesses k.255(3), 255(11)



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#### B. Use of Memorandum by Witness.

##### 2. Past Recollection Recorded.

##### b. Foundation.

##### 3. Recording by Witness or Another.

3 Witkin Cal. Evid. Presentation § 184

[§ 184] Recording by Witness or Another.

(1) *By Witness*. It is usually a condition that the writing have been made by the witness, or under his or her direction. (See *People v. Deckert* (1926) 77 C.A. 146, 151, 246 P. 157 [stenographic notes of defendant's statement, taken by stenographer at request of witness]; 3 Wigmore (Chadbourn Rev.) §748; 82 A.L.R.2d 473, 530; cf. 3 U.C.L.A. L. Rev. 616, 623 [criticism of condition]; on requirement of original writing if procurable, see 3 Wigmore (Chadbourn Rev.) §749; 3 U.C.L.A. L. Rev. 616, 625; and see *Anderson v. Souza* (1952) 38 C.2d 825, 832, 243 P.2d 497, supra, §181 [many fragmentary original notes copied by witness in memorandum form; properly used].)

(2) *By Another*. Ev.C. 1237(a)(2) allows, as an alternative, a writing made by another person for the purpose of recording the witness' statement at the time it was made. (See *Stoneking v. Briggs* (1967) 254 C.A.2d 563, 569, 62 C.R. 249, 1 Cal. Evidence (4th), Hearsay, §33 [slander case; newspaper reporters testified that parts of articles purporting to be quotations of defendant's statements were substantially accurate record of what he said].)

In *People v. Davis* (1968) 265 C.A.2d 341, 71 C.R. 242, Mr. W's store was robbed. Mrs. S saw a man running away and got the license number of his car. She then called Mr. W and read him the number, which she had written down, and later gave him the paper. Mr. W testified to the number that he had received over the phone from Mrs. S. But he admitted that the note he had in court was not his original; it was based on telephonic information from his bookkeeper as to his original notation. *Held*:

(a) This was not refreshing recollection, because he had no actual recollection. Hence, the information received from the bookkeeper was not competent evidence of the license number given him by Mrs. S, and this testimony should have been stricken. (265 C.A.2d 348.)

(b) But failure to strike was not prejudicial, for Mr. W was recalled to testify that he had the original paper on which he had written the number that Mrs. S gave him on the phone. This was proper past recollection recorded--the joint product of two persons. (265 C.A.2d 348.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
West's Key Number Digest, Witnesses k.255(4)



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## IX. DIRECT EXAMINATION: SPECIAL PROBLEMS

## B. Use of Memorandum by Witness.

## 2. Past Recollection Recorded.

## b. Foundation.

## 4. Testimony by Witness to Truth of Facts.

## 3 Witkin Cal. Evid. Presentation § 185

## [§ 185] Testimony by Witness to Truth of Facts.

(1) *In General*. Because trustworthiness of the writing depends on the same considerations as oral testimony, the witness must have had knowledge of the facts and must have honestly stated them. Accordingly, the witness must testify that the statement he or she made was a true statement of the facts. (*Ev.C. 1237(a)(3)*.) The witness may do this either by testimony of his or her recollection or of the circumstances, i.e., of his or her habit or practice. (See *Estate of Moore* (1919) 180 C. 570, 583, 182 P. 285, supra, §181 [testimony as to recollection]; *People v. Deckert* (1926) 77 C.A. 146, 151, 246 P. 157 [same]; *Anderson v. Souza* (1952) 38 C.2d 825, 832, 243 P.2d 497 [testimony that he made a copy of original notes held sufficient, although better practice is to ask directly whether copy is correct]; *People v. Parks* (1971) 4 C.3d 955, 95 C.R. 193, 485 P.2d 257; *People v. Cummings* (1993) 4 C.4th 1233, 1294, 18 C.R.2d 796, 850 P.2d 1 [trial judge was within her discretion to determine that witness' testimony that his statement was true was reliable]; 2 McCormick 5th, §283; 3 Wigmore (Chadbourn Rev.) §§746, 747; 3 U.C.L.A. L. Rev. 616, 622; 82 A.L.R.2d 473, 528.)

(2) *Amnesiac Witness*. In *People v. Simmons* (1981) 123 C.A.3d 677, 177 C.R. 17, J made a written, signed statement to the police that defendant had admitted the commission of the crime with which he was later charged. Before the preliminary hearing, J received a head injury causing amnesia, and when called as a witness, could not recall either defendant's admission or his own statement. The statement was held inadmissible as a prior inconsistent statement. (See 1 Cal. Evidence (4th), Hearsay, §159.) The prosecution, however, contended that it could come in as prior recollection recorded, relying on the following as a foundation: (a) He admitted that he would have had no reason to lie to the police; (b) he recognized his signature; and (c) he was asked the question, "To the best of your knowledge and recollection, is that statement true at this time," and he responded, "To the best of my knowledge." Held, the foundation was insufficient.

(a) *Ev.C. 1237* creates a hearsay exception with a foundational requirement to insure trustworthiness: The declarant must appear and swear to the truth of the statement at a time when he is available for cross-examination. Here, the witness was unable to attest to his accuracy, and a basic justification for admissibility was lacking. (123 C.A.3d 682.)

(b) When J said that he had no reason to lie when the statement was prepared, "he could have stated with equal conviction to the best of his (nonexistent) knowledge that he had had ample reason to lie." (123 C.A.3d 682.) And his answer to the question, "[I]s that statement true at this time," was likewise based on no knowledge and was of no evidentiary value. (123 C.A.3d 683.)

Thus, "the indicia of reliability required to satisfy the confrontation clause, oath, cross-examination and an opportunity to examine demeanor, are completely lacking as to admissibility under section 1237 as well as section 1235." (123 C.A.3d 683.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *In General*. See 2 McCormick 6th, §283.



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- B. Use of Memorandum by Witness.
  - 2. Past Recollection Recorded.
    - b. Foundation.
  - 5. Authenticity of Recording.

3 *Witkin Cal. Evid. Presentation* § 186

[§ 186] Authenticity of Recording.

The final requirement is that the writing be "authenticated as an accurate record of the statement." (*Ev.C. 1237(a)(4).*)

Here again, the Evidence Code relaxes a requirement of former California law: Normally, the witness will so testify, and under superseded C.C.P. 2047, he or she was the only person who could. But *Ev.C. 1237* permits the recording to be made by another person (see *supra*, §184), and also allows its authentication by that person. "Sufficient assurance of the trustworthiness of the statement is provided if the declarant is available to testify that he made a true statement and if the person who recorded the statement is available to testify that he accurately recorded the statement." (*Ev.C. 1237*, Comment.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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- B. Use of Memorandum by Witness.
  - 2. Past Recollection Recorded.
- c. Reading by Witness and Introduction by Adverse Party.

#### 3 Witkin Cal. Evid. Presentation § 187

[§ 187] Reading by Witness and Introduction by Adverse Party.

(1) *Reading by Witness*. The writing may be read into evidence (*Ev.C. 1237(b)*), with the usual right of the adverse party to inspect (*Ev.C. 768(b)*), *supra*, §176) and cross-examine. Thus, a court reporter or stenographer may be permitted to use his or her shorthand notes, or transcript of testimony or statements, reading directly from them. (*Burbank v. Dennis* (1894) 101 C. 90, 104, 35 P. 444 [defendant's deposition taken, but he failed to subscribe it, hence, not admissible as a deposition; reporter read his transcribed notes].) (See also *Johnson v. Babcock* (1921) 55 C.A. 84, 85, 202 P. 898 [process server testified from affidavit of service]; *People v. Deckert* (1926) 77 C.A. 146, 149, 246 P. 157 [stenographer's transcribed notes]; *People v. Gardner* (1957) 147 C.A.2d 530, 538, 305 P.2d 614 [same]; 3 Wigmore (Chadbourn Rev.) §753; 82 A.L.R.2d 473, 544.)

(2) *Introduction by Adverse Party*. Many courts admit the writing itself in evidence (see 3 Wigmore (Chadbourn Rev.) §754), and the original Uniform Rules, following the suggestion of some authorities, made it admissible under a new hearsay exception. (See 2 McCormick 5th, §279; 3 U.C.L.A. L. Rev. 616, 620; 82 A.L.R.2d 473, 537.)

The Evidence Code adopted the Uniform Rule theory of a hearsay exception (1 Cal. Evidence (4th), Hearsay, §162), but rejected the unrestricted admissibility view and prescribed a rule similar to that applicable to a memorandum refreshing recollection: Only the adverse party may offer it in evidence. (*Ev.C. 1237(b)*); see *People v. Davis* (1968) 265 C.A.2d 341, 350, 71 C.R. 242 [error to receive it, but not prejudicial in this case].) However, the limitation of *Ev.C. 771(b)* to matters pertinent (see *supra*, §180) is not repeated in *Ev.C. 1237*.

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Introduction by Adverse Party*. See 2 McCormick 6th, §279.





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## IX. DIRECT EXAMINATION: SPECIAL PROBLEMS

- B. Use of Memorandum by Witness.
- 3. Notes Obtained by Illegal Recording.

3 Witkin Cal. Evid. Presentation § 188

[§ 188] Notes Obtained by Illegal Recording.

In *Frio v. Superior Court* (1988) 203 C.A.3d 1480, 250 C.R. 819, F, an independent record producer, entered into a marketing agreement with I, and after a dispute arose I sued F to terminate the relationship. During discovery F produced 671 pages of typed notes of his telephone conversations with parties to the litigation and others. He admitted that he had tape-recorded some and used the recordings to "reinforce" his notes, and that he had reviewed these notes before testifying at his deposition. The trial court granted a motion by I to preclude offering the contents of the notes into evidence, on the ground that the evidence was obtained as a result of eavesdropping in violation of P.C. 632(d) (see 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence*, §342). *Held*, mandamus issued, directing trial court to vacate its order.

(a) *Nature and Scope of Privacy Act (P.C. 630 et seq.)*. The statutory purpose was to prohibit wiretapping or electronic eavesdropping without the consent of all parties to the communication, and there was no such consent here. (203 C.A.3d 1487, 1488.) The statute protects a "confidential communication," and F contended that, because the conversations related to business matters and pending litigation, neither party could have considered them confidential. But many businesses employ extensive security measures to prevent disclosure of business strategy, and each of the tape-recorded parties reasonably expected that the communications would be private. (203 C.A.3d 1489.) "In sum, under section 632 'confidentiality' appears to require nothing more than the existence of a reasonable expectation by one of the parties that no one is 'listening in' or overhearing the conversation. Clearly, the communications in issue meet this threshold standard." (203 C.A.3d 1490.)

(b) *Exclusionary Sanction*. P.C. 632(d) renders inadmissible evidence obtained in violation of the section; but in excluding all use of the recordings the trial court failed to consider the distinction between past recollection recorded and present recollection refreshed (see *supra*, §§177, 181). (1) If the evidence is offered as past recollection recorded, neither the tainted recordings nor the notes derived from them can be read in evidence. (203 C.A.3d 1492.) (2) But use of the materials to refresh recollection would not be a violation of the statute: "The witness's recollection of the communications derives in the first instance not from the illegal tape recordings or the notes prepared from them, but from the 'independent source' of the witness's lawful firsthand participation in the conversations. The testimony thus remains the witness's independent recollection of the event." (203 C.A.3d 1492.) Hence, on remand, the trial court must determine those matters as to which Frio has a present recollection, refreshed or otherwise, and those as to which he does not. (203 C.A.3d 1495.)

(c) *Use of Notes for Impeachment*. If F is allowed to relate his present recollection there is no need to use the tapes to impeach a witness who was recorded; but if F is precluded from giving testimony because of the evidentiary sanction

of P.C. 632, the party asserting the sanction should not be permitted to use it as a shield for perjury. As in the cases on evidence obtained in violation of *Miranda* used to impeach (see *People v. May* (1988) 44 C.3d 309, 243 C.R. 369, 748 P.2d 307, *infra*, §319), the evidentiary sanction of P.C. 632(d) "cannot be construed so as to confer upon a testifying witness the right to commit perjury." (203 C.A.3d 1497.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## IX. DIRECT EXAMINATION: SPECIAL PROBLEMS

## C. Examination of Expert Witness.

## 1. Qualification of Witness.

## a. In General.

## 1. Laying Foundation.

3 Witkin Cal. Evid. Presentation § 189

[§ 189] Laying Foundation.

(1) *Necessity of Foundation.* A person testifying as an expert must be qualified by special knowledge, skill, experience, training, or education. (*Ev.C. 720(a)*, 1 *Cal. Evidence (4th)*, *Opinion Evidence*, §38.) The parties may stipulate to the expert's qualifications and thereby avoid the necessity of showing them. (See *McGuire v. Baird* (1937) 9 *C.2d* 353, 356, 70 *P.2d* 915.) In the absence of a stipulation, the foundation must be laid: "Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert." (*Ev.C. 720(a)*; see *Crooks v. Pirrone* (1964) 228 *C.A.2d* 549, 553, 39 *C.R.* 622; Rutter Group, 2 Civil Trials and Evidence §8:732 et seq.; C.E.B., Expert Witness Guide 2d, §13.2 et seq.; C.E.B., 1 Civ. Proc. During Trial 3d, §11.130 et seq.; 33 Proof of Facts 2d 179.)

(2) *Voir Dire Examination.* The witness' special knowledge or other qualifications may be shown by any otherwise admissible evidence, including the witness' own testimony. (*Ev.C. 720(b)*.) Usually, counsel, in a voir dire or preliminary examination to qualify the witness, will ask questions, the answers to which will disclose the witness' expertise (or lack of it). (See *Crooks v. Pirrone*, *supra*, 228 *C.A.2d* 552; C.E.B., Expert Witness Guide 2d, §14.4 et seq.; 1 McCormick 5th, §13 et seq.; 2 Wigmore (Chadbourn Rev.) §§485, 654, 655.)

Opposing counsel may elect to postpone challenging the witness' qualifications until the general cross-examination after the witness has testified (see *infra*, §250 et seq.), or counsel may immediately cross-examine on qualifications. In the latter event, the judge will rule on the matter before the witness is allowed to give any evidence. (See *Vallejo & Northern R. Co. v. Reed Orchard Co.* (1915) 169 *C.* 545, 575, 147 *P.* 238; *Eble v. Peluso* (1947) 80 *C.A.2d* 154, 157, 181 *P.2d* 680; C.E.B., Expert Witness Guide 2d, §§11.1 et seq. [depositions], 15.6 et seq. [cross-examination at trial]; cf. *People v. Hinkle* (1923) 64 *C.A.* 375, 380, 221 *P.* 693 [although better practice is to allow cross-examination first, trial judge has discretion to postpone it until witness has testified].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Voir Dire Examination.* See 1 McCormick 6th, §13 et seq. *West's Key Number Digest*, Criminal Law k.477 et seq.; Evidence k.535 et seq.



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## C. Examination of Expert Witness.

## 1. Qualification of Witness.

## a. In General.

## 2. Determination and Review.

3 *Witkin Cal. Evid. Presentation* § 190

## [§ 190] Determination and Review.

The qualifications of an expert witness are finally determined by the trial judge, without resubmission of the issue to the jury. (*Ev.C.* 720, Comment; *Ev.C.* 405, Comment.) However, though the judge finds the expert qualified and admits his or her testimony, the jury may consider the expert's qualifications in determining the weight to be given the testimony. (See *Ev.C.* 406, and Comment; *Pfingsten v. Westenhaver* (1952) 39 C.2d 12, 20, 244 P.2d 395; *Gerwin v. Southeastern Calif. Assn. of Seventh Day Adventists* (1971) 14 C.A.3d 209, 218, 92 C.R. 111; see also *Jeffer, Mangels & Butler v. Glickman* (1991) 234 C.A.3d 1432, 1439, 286 C.R. 243, 1 Cal. Evidence (4th), *Opinion Evidence*, §40 [qualifications standard for expert in legal malpractice action is same as that applied in medical malpractice action].)

The judge's discretion in determining qualifications is very broad, and is seldom disturbed on appeal. (See *Vallejo & Northern R. Co. v. Reed Orchard Co.* (1915) 169 C. 545, 575, 147 P. 238; *Huffman v. Lindquist* (1951) 37 C.2d 465, 476, 234 P.2d 34; *People v. Kelly* (1976) 17 C.3d 24, 38, 130 C.R. 144, 549 P.2d 1240, 2 Cal. Evidence (4th), *Demonstrative, Experimental, and Scientific Evidence*, §99, citing the text [general rule restated, but court implied that trial judge erroneously ruled that law enforcement officer technician was qualified as scientist to testify about acceptance of voiceprint technique in scientific community]; *People v. Chavez* (1985) 39 C.3d 823, 828, 829, 218 C.R. 49, 705 P.2d 372 ["Although the matter is not entirely free from doubt," expert held qualified]; *Coast Counties Gas & Elec. Co. v. Miller & Lux* (1931) 118 C.A. 140, 143, 5 P.2d 34; *Bennett v. Los Angeles Tumor Institute* (1951) 102 C.A.2d 293, 296, 227 P.2d 473; *Pfingsten v. Westenhaver*, *supra*; *Crooks v. Pirrone* (1964) 228 C.A.2d 549, 553, 39 C.R. 622; *People v. Murray* (1967) 247 C.A.2d 730, 735, 56 C.R. 21, 1 Cal. Evidence (4th), *Opinion Evidence*, §43, citing the text; *People v. Law* (1974) 40 C.A.3d 69, 74, 114 C.R. 708, citing the text [general rule restated, but with observation that "[t]he actual extent of appellate review of such matters, however, has received minimal analysis in the cases touching on the point"]; *Osborn v. Irwin Memorial Blood Bank* (1992) 5 C.A.4th 234, 274, 7 C.R.2d 101, citing the text.)

There are some reversals, however, principally for error in excluding testimony of a properly qualified expert. (See, e.g., *Seneris v. Haas* (1955) 45 C.2d 811, 832, 291 P.2d 915; *People v. Davis* (1965) 62 C.2d 791, 800, 44 C.R. 454, 402 P.2d 142; *Brown v. Colm* (1974) 11 C.3d 639, 647, 114 C.R. 128, 522 P.2d 688; *Jeffer, Mangels & Butler v. Glickman* (1991) 234 C.A.3d 1432, 1443, 286 C.R. 243.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*West's Key Number Digest*, Criminal Law k.481; Evidence k.546 et seq.



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## IX. DIRECT EXAMINATION: SPECIAL PROBLEMS

## C. Examination of Expert Witness.

## 1. Qualification of Witness.

## b. Doctor in Malpractice Case.

## 1. Familiarity With Local Practice.

## 3 Witkin Cal. Evid. Presentation § 191

## [§ 191] Familiarity With Local Practice.

(1) *Earlier Strict View*. A narrow rule, developed in a number of decisions, made it extremely difficult to obtain medical experts for the plaintiff in a malpractice action: It was held that the doctor must be familiar with medical standards and practice in the *particular locality* at the time of treatment, and the opinion of a practitioner from another locality without such familiarity, even on well-established and generally accepted techniques, was rejected. The theoretical justifications for the rule were that (a) the doctor defendant in a small community without the opportunity to keep abreast of developments should not be held to the same standards of skill and care as doctors in metropolitan areas; and (b) it is improper generally to apply standards of widely separated places with different practices. (See *Soady v. Washburn* (1931) 114 C.A. 82, 84, 299 P. 560 [witness never practiced in California]; *McNamara v. Emmons* (1939) 36 C.A.2d 199, 207, 97 P.2d 503 [San Bernardino doctors could not testify to standards in Ontario, a short distance away]; *Wheeler v. Barker* (1949) 92 C.A.2d 776, 787, 208 P.2d 68 [Los Angeles physician could not testify to standards in Ventura]; 14 Stanf. L. Rev. 884.) (On general problem of obtaining competent medical testimony in malpractice case, see 9 Stanf. L. Rev. 733; 14 Stanf. L. Rev. 884; 1 Cal. Evidence (4th), *Burden of Proof and Presumptions*, §136.)

(2) *Liberal View*. The tendency in later decisions is to apply this rule more reasonably. In *Lewis v. Johnson* (1939) 12 C.2d 558, 86 P.2d 99, the judge excluded testimony of doctors practicing in Los Angeles on the ground that they could not testify to the standard of care in Long Beach, both cities being in the same county, contiguous, and metropolitan in character. *Held*, this was error: "[T]o make the exclusion rest arbitrarily upon a geographical line separating two cities of the same county, with almost identical kinds of medical service, would be a misuse of the rules of evidence and an unjustifiable emphasis on empty technicalities." (12 C.2d 561.) (To the same effect, see *Warnock v. Kraft* (1938) 30 C.A.2d 1, 3, 85 P.2d 505 [Pasadena and Los Angeles]; *Sales v. Bacigalupi* (1941) 47 C.A.2d 82, 86, 117 P.2d 399 [Oakland and San Francisco].)

The liberal view was established for California in the definitive case of *Sinz v. Owens* (1949) 33 C.2d 749, 205 P.2d 3. Defendant, a doctor in Lodi, a small town 12 miles north of Stockton, was sued for malpractice in the treatment of a fractured leg. Plaintiff called Dr. M, who practiced in Oakdale and adjacent small towns, also near Stockton. *Held*, the trial judge did not abuse his discretion in allowing the latter to testify. The earlier emphasis upon medical standards in the "same" or "similar" locality confuses the purpose of the rule. Here, the evidence showed that, as to medical treatment of fractures, the conditions in the two towns and adjoining areas were sufficiently alike to make Dr. M a competent witness. "This conclusion is not based exclusively upon geographical proximity, and necessarily there can be

no hard and fast rule laid down as a test for experience requisite as a basis for testimony as to custom and practice. But where all of the towns in which a physician practices are tributary to a city, such as Stockton, and there is testimony that the degree of care at the place of treatment is equal to that in the city, the evidence is sufficient to support a finding of similar circumstances. The essential factor is knowledge of similarity of conditions; geographical proximity is only one factor to be considered." (33 *C.2d* 756; see also concurring opinion, 33 *C.2d* 766; and see generally 23 *So. Cal. L. Rev.* 138; 5 *Cal. Western L. Rev.* 124; 7 *U.S.F. L. Rev.* 163; 36 *A.L.R.3d* 440 [expert on local hospital standards]; 37 *A.L.R.3d* 420 [competency of doctor from one locality to testify on standard of care in another locality]; 99 *A.L.R.3d* 1133 [modern status of "locality rule"].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## IX. DIRECT EXAMINATION: SPECIAL PROBLEMS

## C. Examination of Expert Witness.

1. Qualification of Witness.
- b. Doctor in Malpractice Case.
2. Experience in Special Field.
- aa. Cases Holding Doctor Qualified.

## 3 Witkin Cal. Evid. Presentation § 192

## [§ 192] Cases Holding Doctor Qualified.

The decisions disclose considerable uncertainty as to the proper qualification of a doctor witness in an action concerned with a special field of medicine. It has been held, however, that different basic training is not necessarily a disqualifying factor; a physician trained in one medical school or branch of medicine may testify in a case involving a physician of another school, where the testifying witness is familiar with the particular treatment involved. (*Hutter v. Hommel* (1931) 213 C. 677, 681, 3 P.2d 554 [homeopathic physician and surgeon testified in action against allopathic surgeon]; *Seneris v. Haas* (1955) 45 C.2d 811, 832, 291 P.2d 915; *Mann v. Cracchiolo* (1985) 38 C.3d 18, 37, 38, 210 C.R. 762, 694 P.2d 1134; *Abos v. Martyn* (1939) 31 C.A.2d 705, 713, 88 P.2d 797 [malpractice of chiropractor, testimony of allopathic physician]; *Agnew v. Los Angeles* (1950) 97 C.A.2d 557, 566, 218 P.2d 66; *Estate of Gore* (1953) 119 C.A.2d 796, 800, 260 P.2d 859, 1 Cal. Evidence (4th), Opinion Evidence, §39; see 2 Wigmore (Chadbourn Rev.) §569; 52 A.L.R.2d 1384 [chiropractor]; 85 A.L.R.2d 1028; 46 A.L.R.3d 275; 99 A.L.R.3d 1133.) Furthermore, where the allegations of negligence concern matters within the knowledge and observation of every physician and surgeon, the testimony of a nonspecialist physician may be admissible. (*Miller v. Silver* (1986) 181 C.A.3d 652, 661, 226 C.R. 479.)

In *Miller*, a malpractice action against a plastic surgeon for failure to administer prophylactic antibiotics to an implant patient, plaintiff's psychiatrist was not competent to give expert testimony concerning the highly specialized surgical technique, but could give an opinion on the necessity of presurgical antibiotics for high-risk surgical patients who have experienced life-threatening complications from recent surgery. (181 C.A.3d 657, 661.)

In *Agnew*, *supra*, the question was whether defendant doctor's failure to take X-rays of plaintiff's hip fracture (hastily diagnosed as a bruise by the receiving hospital) was the proximate cause of later serious crippling effects. Plaintiff called Dr. A, a specialist in pathology and a consultant of other physicians. The trial judge refused to allow his testimony because he was not an orthopedic surgeon. *Held*, reversible error; the issue did not deal with setting of a fracture but with aseptic necrosis, a subject within his professional knowledge. (97 C.A.2d 566.) (See also *Cline v. Lund* (1973) 31 C.A.3d 755, 765, 107 C.R. 629 [following *Seneris* and *Agnew*]; *Chadock v. Cohn* (1979) 96 C.A.3d 205, 208, 157 C.R. 640 [podiatrist qualified as expert on standard of practice of orthopedic surgeon]; *Mann v. Cracchiolo*, *supra*, 38 C.3d 39 ["As a diplomate of surgery and neurosurgery, Dr. Fox is qualified to testify as to the standard of care in reading X-rays, in submitting X-ray reports, and in diagnosing"].)



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1. Qualification of Witness.
  - b. Doctor in Malpractice Case.
  2. Experience in Special Field.
- bb. Cases Holding Doctor Not Qualified.

3 *Witkin Cal. Evid. Presentation* § 193

[§ 193] Cases Holding Doctor Not Qualified.

(1) *Early Decisions*. In actions against specialists involving matters within their special fields, earlier decisions tended to reject plaintiffs' doctors whose experience did not cover the specialty. (See *Moore v. Belt* (1949) 34 C.2d 525, 532, 212 P.2d 509; *Huffman v. Lindquist* (1951) 37 C.2d 465, 476, 234 P.2d 34; *Bennett v. Los Angeles Tumor Institute* (1951) 102 C.A.2d 293, 296, 227 P.2d 473 [chiropracist not qualified to testify that injury to plaintiff's foot was X-ray burn; no experience in X-ray treatments, only X-ray diagnosis]; 25 So. Cal. L. Rev. 218; 85 A.L.R.2d 1022; 46 A.L.R.3d 275.)

In *Huffman v. Lindquist*, *supra*, plaintiffs' son died as a result of a mistaken diagnosis by defendant doctor of the nature of a head injury in an automobile collision. Plaintiffs' expert, Dr. Webb, was in general practice, and had been a railroad doctor treating traumatic injuries, a teacher of anatomy, and an autopsy surgeon for the coroner's office, dealing there with numerous head injuries. But he was not a member of the county medical association, had never been on any hospital staff during his Los Angeles practice, for the past 25 years, had never operated on a living patient, and in the past 10 years, had never actively participated in the treatment of a head injury. *Held*, he was lacking in active practice and "occupational experience" in treatment of living patients suffering comparable brain injuries, and the trial judge did not abuse his discretion in holding him unqualified. (37 C.2d 478.) (See *Pearce v. Linde* (1952) 113 C.A.2d 627, 630, 248 P.2d 506, following *Huffman* [in action involving heel bone injury, expert who was specialist in internal medicine, with no experience in orthopedics or surgery, who referred orthopedic surgery patients to others, and whose knowledge of proper treatment came from what he had read or heard would be no more persuasive than layman who had read and heard what was proper professional practice].)

A vigorous dissent in *Huffman* challenged the opinion by a detailed comparison of the somewhat similar experience of Dr. Webb and the defendant doctor (37 C.2d 480), and expressed grave concern over the practical consequences of this strict test: "It is a matter of common knowledge that members of any county medical society are extremely loath to testify against each other in a malpractice case. It would be very difficult for plaintiff to produce, at a moment's notice, a panel of doctors whose qualifications might satisfy the standards which apparently had to be met in this case. As a result of the disqualification of Dr. Webb, the plaintiff here was effectively precluded from producing any evidence as to the proper and customary practice and procedure in the treatment and care of an injury such as the one received by her son." (37 C.2d 483.) (See *Seneris v. Haas* (1955) 45 C.2d 811, 832, 291 P.2d 915 [trial court abused discretion in excluding

testimony of Dr. Webb (same doctor as in *Huffman*) on matters of anatomy, pathology and causation].)

The court in *Agnew v. Parks* (1959) 172 C.A.2d 756, 343 P.2d 118, commented on the problem raised in the *Huffman* dissent: "[O]ur trial courts have encouraged local medical societies to cooperate in the formation of a panel of impartial qualified medical doctors from which they may with confidence appoint experts to examine claimants involved in negligence actions against doctors and give their unbiased opinion, which endeavor has recently been adopted by our state legislature authorizing the new so-called Impartial Medical Testimony plan. Perhaps the medical profession, having previously tried to cope with the problem of malpractice litigation in a variety of ways with obviously not too much success, will find that its faithful cooperation with the trial courts in this regard will result in the destruction of the ill-reputed 'conspiracy of silence.' " (172 C.A.2d 763.)

(2) *Liberal Trend*. In *Mann v. Cracchiolo* (1985) 38 C.3d 18, 210 C.R. 762, 694 P.2d 1134, the court, reviewing the earlier decisions, quoted from *Brown v. Colm* (1974) 11 C.3d 639, 645, 114 C.R. 128, 522 P.2d 688, 1 Cal. Evidence (4th), *Opinion Evidence*, §34, as follows: "The unmistakable general trend in recent years has been toward liberalizing the rules relating to the testimonial qualifications of medical experts." (38 C.3d 38.)

(3) *Statutory Restrictions*. In *Jutzi v. Los Angeles* (1987) 196 C.A.3d 637, 242 C.R. 74, plaintiff broke her ankle and was taken to a hospital emergency room where her injury was evaluated but not treated. Four hours later, plaintiff was transferred to defendant county hospital and treated by an emergency room physician rather than by an orthopedic specialist. Plaintiff sued defendant for malpractice after she developed gangrene that necessitated amputation of her leg. The trial judge precluded two of plaintiff's experts from testifying under *Health & Saf.C. 1799.110*, which provides that only those physicians having recent and substantial emergency care experience may testify in malpractice actions against emergency care physicians. *Held*, exclusion of this testimony was proper. The medical services rendered by defendant constituted "emergency care" notwithstanding plaintiff's transfer from another hospital. (196 C.A.3d 649.) Plaintiff's decision not to name the allegedly negligent physician as a defendant did not render the statute inapplicable, because its purpose was to encourage emergency care. Failure to apply the statute to protect a physician's employer could inhibit an emergency physician from taking quick, decisive action in the same manner as the threat of personal liability. (196 C.A.3d 651.) (See also *Sigala v. Goldfarb* (1990) 222 C.A.3d 1450, 1455, 266 C.R. 96 [following *Jutzi*]; cf. *Baxter v. Alexian Bros. Hosp.* (1989) 214 C.A.3d 722, 726, 262 C.R. 867 [agreeing with *Jutzi*, but holding *Health & Saf.C. 1799.110* inapplicable to action against hospital based on failure to provide essential services, rather than on negligence of emergency physician].)

In *Zavala v. Board of Trustees* (1993) 16 C.A.4th 1755, 20 C.R.2d 768, plaintiff claimed defendant physician's failure to properly diagnose and treat her in a hospital emergency room led to a delay in necessary brain shunt and abdominal surgery, resulting in permanent injury. The trial judge found one of plaintiff's proposed expert witnesses unqualified to testify under *Health & Saf.C. 1799.110*, and plaintiff made no attempt to show her other expert was qualified. Thus, the trial judge excluded plaintiff's proposed expert testimony and granted defendants' motion for nonsuit. *Held*, affirmed. The court in *Jutzi*, *supra*, was wrong to begin its analysis by asking whether the actual treatment rendered constituted emergency medical care. The real issue was whether defendant physician was acting as an emergency physician in an emergency department when he did the allegedly negligent acts. (16 C.A.4th 1762, 1763.) As the physician was responsible for providing emergency medical services in an emergency department and was acting in that capacity when the alleged negligence occurred, *Health & Saf.C. 1799.110* governed the admissibility of expert testimony. Plaintiff's first expert stated that he was not an emergency room physician, and that he had not acted as an emergency room physician in the last 5 years. (16 C.A.4th 1763.)

In *James v. St. Elizabeth Community Hosp.* (1994) 30 C.A.4th 73, 35 C.R.2d 372, the court followed *Zavala*, *supra*, and, like the *Zavala* court, disagreed with *Jutzi*, *supra*. *Health & Saf.C. 1799.110(c)* makes the statute's requirements applicable in actions against physicians "providing emergency medical coverage for a general acute care hospital emergency department." This means that the statute applies whenever a physician's territory or field of activity includes a general acute care hospital's emergency department. The plaintiff in *James* was treated in a hospital emergency room by an emergency room physician, but she argued that she did not need an expert qualified to testify under *Health &*

*Saf.C. 1799.110* because the care actually rendered was not emergency medical service. *Held*, judgment of nonsuit affirmed. "Under our interpretation, the question is simply whether the defendant physician was acting as an emergency physician in a certain emergency department when the allegedly negligent acts occurred; if the answer is yes, subdivision (c) applies. ... Under the *Jutzi* standard, by contrast, a plaintiff will be forced to speculate whether 'emergency medical services' were actually provided, and if the negligence arose out of those services." (30 C.A.4th 82.)

In *Miranda v. National Emergency Services* (1995) 35 C.A.4th 894, 41 C.R.2d 593, the Court of Appeal agreed with the *Zavala* and *James* courts that, for purposes of determining what treatment calls the statute into play, "emergency medical coverage" means treatment provided in the emergency department of a general acute care hospital by a physician who is "on-duty" in the emergency department at the time. (35 C.A.4th 900.) The court then construed the same phrase for the additional purpose of determining who may qualify as an expert witness. "We give the words 'emergency medical coverage' the same meaning throughout subdivision (c) of section 1799.110. ... Thus, a proposed expert witness satisfies the standard of subdivision (c) of section 1799.110 if he or she is a physician who has had 'substantial professional experience,' within the five years preceding the trial, while employed or otherwise engaged by a general acute care hospital to provide treatment in its emergency room as an 'emergency room physician.' " (35 C.A.4th 905.) As the proposed witness in *Miranda* was an orthopedic specialist who was only "on call" to the emergency room to consult on and treat orthopedic injuries, the trial judge properly found that he was unqualified to give expert medical testimony in the case. (35 C.A.4th 907.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(3) *Statutory Restrictions.* The holdings of *Zavala v. Board of Trustees* (1993) 16 C.A.4th 1755, 20 C.R.2d 768, text, p. 256, and *Miranda v. National Emergency Services* (1995) 35 C.A.4th 894, 41 C.R.2d 593, text, p. 257, were qualified in *Petrou v. South Coast Emergency Group* (2004) 119 C.A.4th 1090, 15 C.R.3d 64, a medical malpractice action in which the 5-year period referred to in *Health & Saf.C. 1799.110* was at issue. Both *Zavala* and *Miranda* spoke of the 5-year period as being the 5 years preceding the trial, but that was not the actual issue in either case, and the court in *Petrou* decided that, although the statutory language could be viewed as referring to either the 5-year period preceding trial or the 5-year period preceding the alleged malpractice, the latter interpretation was what the Legislature intended. (119 C.A.4th 1096.)



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#### C. Examination of Expert Witness.

##### 2. Form of Questioning.

##### a. Hypothetical Question.

##### 1. In General.

3 Witkin Cal. Evid. Presentation § 194

[§ 194] In General.

(1) *Acceptable Method.* The traditional method of taking the opinion evidence of an expert is the hypothetical question. This may be framed on any theory that can be deduced from the evidence, and the questioner may assume any facts within the limits of the evidence and omit any facts not deemed material. (See *Barefoot v. Estelle* (1983) 463 U.S. 880, 103 S.Ct. 3383, 3399, 77 L.Ed.2d 1090, 1106 [asked of psychiatrists, on future dangerousness of defendant, permissible in death penalty case]; *People v. Sims* (1993) 5 C.4th 405, 436, 20 C.R.2d 537, 853 P.2d 992 [citing text; hypothetical question as to whether autopsy evidence was consistent with finding that victim was placed in bathtub while still alive and held under water until dead was proper]; *Waller v. Southern Pac. Co.* (1967) 66 C.2d 201, 207, 57 C.R. 353, 424 P.2d 937 [asked of doctor, concerning foreseeability that person with plaintiff's symptoms would have conditions aggravated by assignment to job involving responsibility and tension; reproduced at length in footnote]; *People v. Obie* (1974) 41 C.A.3d 744, 756, 116 C.R. 283 [because medical witness was testimonially qualified, and because matter about which he testified, i.e., that injuries were caused by repeated blows from short blunt instrument, was proper subject of expert testimony, prosecutor could elicit his special knowledge through use of hypothetical question]; BAJI (8th ed.), No. 2.42; 1 McCormick 5th, §14; 2 Wigmore (Chadbourn Rev.) §672 et seq.; C.E.B., 1 Civ. Proc. During Trial 3d, §11.141 et seq.; C.E.B., Expert Witness Guide 2d, §13.9 et seq.; 31A Am.Jur.2d (1989 ed.), *Expert and Opinion Evidence* §98 et seq.; 56 A.L.R.3d 300; on the form of questions and practice, see 2 Wigmore (Chadbourn Rev.) §681 et seq.; 5 Am.Jur. Trials 675; 6 Proof of Facts 159.)

(2) *Criticism of Method.* The use of hypothetical questions has been denounced by leading authorities. "The hypothetical question, misused by the clumsy and abused by the clever, has in practice led to intolerable obstruction of truth. In the first place, it has artificially clamped the mouth of the expert witness, so that his answer to a complex question may not express his actual opinion on the actual case. This is because the question may be so built up and contrived by counsel as to represent only a partisan conclusion. In the second place, it has tended to mislead the jury as to the purport of actual expert opinion. This is due to the same reason. In the third place, it has tended to confuse the jury, so that its employment becomes a mere waste of time and a futile obstruction." (2 Wigmore, §686, now 2 Wigmore (Chadbourn Rev.) §686; see 1 McCormick 5th, §16; 2 U.C.L.A. L. Rev. 356, 364.)

Equally scorching is the description in a leading California case: "Such questions themselves are always framed with great particularity to meet the views of the side which presents the expert. They always eliminate from consideration the countervailing evidence which may be of a thousand-fold more strength than the evidence upon which

the question is based. They are astutely drawn, and drawn for a purpose, and that purpose never is the presentation of all the evidence. It is never to present the fair and accurate view, but the purpose always is to frame a question such that the answer will announce a predetermined result. ... In the case at bar the hypothetical question presented to these experts eliminated all the facts overwhelmingly proved in favor of Miss Dolbeer's sanity, bore with emphasis upon and threw into prominence trifling circumstances, and contained many statements not justly borne out by the evidence itself. ... All perspective was eliminated, all proportion destroyed, and the picture was as untrue to the original as is a fantastic and distorted shadow cast by a flickering and uncertain light a false portrayal of the reflected object." (*Estate of Dolbeer* (1906) 149 C. 227, 243, 86 P. 695; see also *People v. Bassett* (1968) 69 C.2d 122, 143, footnote 21, 70 C.R. 193, 443 P.2d 777 ["Although the hypothetical question has traditionally been the method used for taking opinion evidence of an expert witness, it has long been damned with faint praise"]; *Estate of Collin* (1957) 150 C.A.2d 702, 713, 310 P.2d 663, *infra*, §196.)

Wigmore's solution to the problem, to allow but not require the hypothetical form except in the trial judge's discretion, was adopted by the Model Code, Model Act, §4, and the original Uniform Rule. But the Commission, disapproving the Uniform Rule (Commission Report, p. 916), made no mention of the practice in the Evidence Code.

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Acceptable Method*. See *People v. Boyette* (2002) 29 C.4th 381, 449, 127 C.R.2d 544, 58 P.3d 391, citing the text; CACI, No. 220 [hypothetical questions]; 1 McCormick 6th, §14.(2) *Criticism of Method*. See 1 McCormick 6th, §16. *West's Key Number Digest*, Criminal Law k.485 et seq.; Evidence k.551 et seq.



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##### 2. Form of Questioning.

##### a. Hypothetical Question.

#### 2. Objecting to Hypothetical Questions.

#### 3 Witkin Cal. Evid. Presentation § 195

[§ 195] Objecting to Hypothetical Questions.

The principal grounds of challenge of a hypothetical question are directed toward its assumptions of fact, e.g., that it improperly assumes facts not in evidence, or assumes inconsistent facts, or does not include all proper matters. (See *Estate of Gould* (1922) 188 C. 353, 356, 205 P. 457 [assumed facts in conflict with undisputed facts and inconsistent with other assumed facts]; *People v. McCaughan* (1957) 49 C.2d 409, 418, 317 P.2d 974; *Citron v. Fields* (1938) 30 C.A.2d 51, 57, 85 P.2d 534 [did not include all proper matters, assumed matters not in evidence]; *Bickford v. Lawson* (1938) 27 C.A.2d 416, 428, 81 P.2d 216 [same]; *Rudat v. Carithers* (1934) 137 C.A. 92, 96, 30 P.2d 435 [similar]; *Hyatt v. Sierra Boat Co.* (1978) 79 C.A.3d 325, 338, 145 C.R. 47; *Coe v. State Farm Mut. Auto. Ins. Co.* (1977) 66 C.A.3d 981, 994, 995, 136 C.R. 331, citing the text; *People v. Hayes* (1985) 172 C.A.3d 517, 522, 218 C.R. 362, citing the text; C.E.B., Expert Witness Guide 2d, §12.8; 2 Wigmore (Chadbourn Rev.) §682.)

In framing the questions, counsel may inadvertently omit or even misstate a significant fact and thus elicit an inappropriate opinion; but unless opposing counsel objects and thereby gives the questioner an opportunity to correct the error, the defect cannot be raised on appeal. (*Waller v. Southern Pac. Co.* (1967) 66 C.2d 201, 210, 57 C.R. 353, 424 P.2d 937.) (See also *Arellano v. Moreno* (1973) 33 C.A.3d 877, 886, 109 C.R. 421 [trial judge improperly excluded question that included fact that was established by impeaching evidence; error was harmless]; *People v. Stamp* (1969) 2 C.A.3d 203, 209, footnote 2, 82 C.R. 598 [hypothetical question need not have stated all evidence as long as it did not omit essential facts and issues].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Boyette* (2002) 29 C.4th 381, 451, 127 C.R.2d 544, 58 P.3d 391 [in penalty phase of capital murder trial, denial of defense objection to prosecutor's hypothetical questioning of psychiatrist was error; prosecutor asked psychiatrist to assume defendant had assaulted Caucasian individual on street for no apparent reason and to opine as to whether that was antisocial behavior, but there was no evidence of such assault, and questions implied existence of additional aggravating evidence as to which defendant had no notice]; *People v. Halvorsen* (2007) 42 C.4th 379, 412, 64 C.R.3d 721, 165 P.3d 512 [in murder prosecution in which defense counsel asked defense toxicologist what blood-alcohol level of male weighing 180 to 190 pounds would be, assuming he had his last drink 11/2 to 2 hours prior to testing, trial judge properly sustained objection on ground that question assumed fact not yet in evidence, i.e., that defendant had not drunk anything after specific time].



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##### a. Hypothetical Question.

##### 3. Question Based on Previous Testimony.

#### 3 Witkin Cal. Evid. Presentation § 196

[§ 196] Question Based on Previous Testimony.

(1) *Goal of Simplifying Questions.* The extreme length and occasional incomprehensibility of the typical hypothetical question (see *supra*, §194) has led to attempts to simplify the procedure. One method is to eliminate the detailed hypothetical recital of all the material facts, and to ask the expert to state his or her opinion on the basis of prior testimony given by other witnesses and heard or read by the expert. (See generally 1 McCormick 5th, §14; 2 Wigmore (Chadbourn Rev.) §§681, 686; 2 U.C.L.A. L. Rev. 356, 365; 6 Proof of Facts 159, 183.)

(2) *Criticism of Method.* In California, a leading case condemned this type of question on the ground that the jury cannot determine what facts formed the basis of the expert's opinion. (*People v. Le Doux* (1909) 155 C. 535, 554, 102 P. 517 ["Now, doctor, assuming each and all of the facts and circumstances testified to by these gentlemen I have named as true, what in your opinion was the cause of the death?"].)

In some jurisdictions, however, the question has been held proper where the prior testimony is not in conflict. *Estate of Collin* (1957) 150 C.A.2d 702, 310 P.2d 663, accepted this view, distinguishing *People v. Le Doux*, *supra*, on the ground that in the *Collin* case, there were no contradictions or conflicts in the prior testimony and exhibits referred to in the question. Dr. L, called by will contestants, read and considered the transcript of testimony of certain witnesses, together with letters written by decedent and introduced in evidence. He was then asked: "Not basing your opinion or founding your opinion upon the opinion of any witness in this case as to the mental capacity of Mr. Verneuil, but solely based upon the testimony which was given by Miss Ryan and Miss Devynck as to the conversations had with Mr. Verneuil and the correspondence that you have examined, I will ask you if you have an opinion as to his mental capacity." An objection was overruled, the doctor testified, and on cross-examination, he related in detail the precise evidence on which his opinion was based. *Held*, the objection was properly overruled. Had the question been put in the usual hypothetical form, nothing of importance would have been included that was not before the doctor in the transcript and the exhibits examined, a great deal more time would have been consumed, and the doctor would not have been in a better position to have given an intelligent opinion. (150 C.A.2d 712.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Goal of Simplifying Questions.* See 1 McCormick 6th, §14.





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##### 2. Form of Questioning.

##### b. Testimony From X-Ray or Photograph.

*3 Witkin Cal. Evid. Presentation § 197*

[§ 197] Testimony From X-Ray or Photograph.

In *Poggetto v. Owen* (1960) 187 C.A.2d 128, 9 C.R. 395, decedent (plaintiff's husband), a motorcycle police officer, was killed in a collision while pursuing a speeder. The crucial issue was whether he came within the "authorized emergency vehicle" exemptions from traffic rules (*Veh.C. 21055, 21056*) by having his red lights on and sounding his siren. Defendants called Dr. M as an expert engineer, and he testified from a photograph of the smashed motorcycle that one of the lights was broken. *Held*, judgment for defendants affirmed. If the witness is qualified and the photograph is descriptive and clear, the situation is not unlike that of a doctor testifying from X-rays. "An expert can express an opinion from a photograph just as he can from a hypothetical question stating the facts which appear in a photograph." (187 C.A.2d 137.) (See *People v. Obie* (1974) 41 C.A.3d 744, 757, 116 C.R. 283 [expert witness was entitled to use photograph of embankment to support opinion that murder victim died from blunt instrument blows rather than by injuries sustained when truck rolled down embankment; citing *Poggetto*].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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### IX. DIRECT EXAMINATION: SPECIAL PROBLEMS

#### C. Examination of Expert Witness.

##### 2. Form of Questioning.

##### c. Direct Question on Facts Observed.

*3 Witkin Cal. Evid. Presentation § 198*

[§ 198] Direct Question on Facts Observed.

If the expert has knowledge of the actual facts of the case derived from his or her own observation, the expert may give an opinion on the facts observed. In this situation, a hypothetical question on assumed facts is permissible, but is not as useful as a direct question and is not required. (*Zelayeta v. Pacific Greyhound Lines* (1951) 104 C.A.2d 716, 721, 724, 232 P.2d 572 [automobile collision case; proper to allow state traffic officer, who arrived on scene, to testify from his observations as to point of impact]; *Wells Truckways v. Cebrian* (1954) 122 C.A.2d 666, 676, 265 P.2d 557 ["either form of such evidence has been held admissible when complying with the tests indicated"]; *Lemley v. Doak Gas Engine Co.* (1919) 40 C.A. 146, 152, 180 P. 671; *Schreidel v. American Honda Motor Co.* (1995) 34 C.A.4th 1242, 1252, 40 C.R.2d 576 [proper testimony of plaintiff's expert concerning cause of defect in plaintiff's car; expert had personally examined plaintiff's car, and examined repair order history, defendant's service manual and independent service manuals]; *Ev.C. 801(b)* [opinion may be based on matter "perceived by or personally known to the witness"]; see 1 McCormick 5th, §14; 2 Wigmore (Chadbourn Rev.) §§675, 678; 6 Proof of Facts 159, 192.)

In *Wells Truckways v. Cebrian*, *supra*, involving a collision of tractors and trailers, the officer examined the scene shortly after the accident. On the basis of gouge marks, location of trucks, tracks of tires, position and damage to tractors and trailers after the collision (the witness drew many diagrams on the board illustrating what he saw), he was allowed to testify to the degree of angulation of the trailer (i.e., that it was on the wrong side of the road). (122 C.A.2d 671.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 1 McCormick 6th, §14. *West's Key Number Digest*, Evidence k.553 et seq.



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## CHAPTER XI - Presentation At Trial

### IX. DIRECT EXAMINATION: SPECIAL PROBLEMS

#### C. Examination of Expert Witness.

#### 3. Answer and Basis for Opinion.

##### a. Right To Give Reasons.

3 Witkin Cal. Evid. Presentation § 199

[§ 199] Right To Give Reasons.

(1) *General Rule.* An expert is always entitled to give the reasons for his or her opinion, and undue restriction of the answer may be serious error. (See *McGuire v. Baird* (1937) 9 C.2d 353, 355, 70 P.2d 915 [long hypothetical question read to doctor, describing certain method of treatment, and doctor forced to answer yes or no, without explanation or qualification, thereby either completely approving or completely condemning method]; *Ev.C. 802*; see 1 *Cal. Evidence* (4th), *Opinion Evidence*, §30; C.E.B., 1 Civ. Proc. During Trial 3d, §11.140; C.E.B., Expert Witness Guide 2d, §13.8; 6 Am.Jur. Trials 109 [basis of medical testimony].)

(2) *Applicable to Direct Testimony.* It is sometimes said that on direct examination, the expert must give his or her opinions alone, and not the reasons for the opinions, the latter being proper only under cross-examination. This view has been justly criticized as greatly weakening the value of the testimony, and there is no certainty that the cross-examination will even call for those reasons. As the court said in *People v. Martin* (1948) 87 C.A.2d 581, 197 P.2d 379, "A medical expert is entitled to express his opinion on a medical question presented in issue and then he may support that opinion by giving the reasons assigned in support of it. ... Expert evidence is really an argument of an expert to the court, and is valuable only in regard to proof of the facts and the validity of the reasons advanced for the conclusions." (87 C.A.2d 584.) (See also *Tierney v. Charles Nelson Co.* (1937) 19 C.A.2d 34, 37, 64 P.2d 1150 [plaintiff's doctor may be allowed to testify to history of accident given him by the patient; although self-serving, the statements are proper for limited purpose of showing basis for doctor's opinion on injuries; see 1 *Cal. Evidence* (4th), *Opinion Evidence*, §§33, 34].)

In 1937, former C.C.P. 1872 was enacted to permit the expert to give reasons on direct examination, and this is now the rule for all witnesses--expert and lay:

"A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter (including, in the case of an expert, his special knowledge, skill, experience, training, and education) upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion." (*Ev.C. 802*.) (See *People v. Aguilar* (1990) 218 C.A.3d 1556, 1567, 267 C.R. 879 [where experts' opinions were based on testing of defendant and statements by his family, rather than on what defendant said, defendant's statements to the experts were not made admissible by *Ev.C. 802*].)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Criminal Law k.486 et seq.; Evidence k.554



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### IX. DIRECT EXAMINATION: SPECIAL PROBLEMS

- C. Examination of Expert Witness.
  - 3. Answer and Basis for Opinion.
    - b. Basis Stated Before Opinion.

3 Witkin Cal. Evid. Presentation § 200

[§ 200] Basis Stated Before Opinion.

(1) *California Rule*. The portion of *Ev.C. 802* quoted, *supra*, §199, establishes the right of the witness to give his or her reasons on direct examination. The remaining questions are whether these reasons *must* be stated (a) on direct examination, and (b) before the opinion is given.

Where a hypothetical question is asked, it is clear that the basis of the opinion--the assumed facts--must be stated before the opinion is given. (See discussion, *Lemley v. Doak Gas Engine Co. (1919) 40 C.A. 146, 152, 180 P. 671; Ev.C. 802*, Comment; *supra*, §§194, 195.)

Where, however, the question is based on facts observed by the witness, there is no requirement that the witness state his or her reasons, i.e., the factual basis for the answer, before the witness gives his or her opinion, nor is there any requirement that the witness state them on direct examination: The opponent may bring them out on cross-examination. (See *Lemley v. Doak Gas Engine Co., supra*, 40 C.A. 151; *Lumbermen's Mut. Cas. Co. v. Industrial Acc. Com. (1946) 29 C.2d 492, 500, 175 P.2d 823; Hart v. Olson (1945) 68 C.A.2d 657, 664, 157 P.2d 385; Ev.C. 802*, Comment.)

Thus, in *Lemley v. Doak Gas Engine Co., supra*, a wrongful death suit, decedent, a machinist's helper, was killed when a flywheel disintegrated. Plaintiff asked his expert, "Will you state to the jury what, in your opinion, caused that flywheel to break?" Over objection, the witness answered, "I think the heat done it." *Held*, the objection of lack of foundation was untenable; the facts were properly brought out on cross-examination. (40 C.A. 151.)

Nevertheless, there are situations in which it would be more helpful to have the facts brought out first; hence, the court in its discretion may require that a witness before testifying in the form of an opinion be first examined concerning the matter upon which his or her opinion is based. (*Ev.C. 802*.)

(2) *Federal Rule*. An expert may testify in the form of opinion or inference, and may give his or her reasons for the opinions or inferences, without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may be required to disclose the underlying facts or data on cross-examination. (*F.R. Evid., Rule 705*; see 3 Mueller & Kirkpatrick, *Federal Evidence* 2d §363.)

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### IX. DIRECT EXAMINATION: SPECIAL PROBLEMS

- C. Examination of Expert Witness.
  - 3. Answer and Basis for Opinion.
    - c. Opinion Based on Improper Matter.

*3 Witkin Cal. Evid. Presentation § 201*

[§ 201] Opinion Based on Improper Matter.

The standards for bases of expert opinions have already been considered. (See *Ev.C. 801, 1 Cal. Evidence (4th), Opinion Evidence, §30* et seq.) The court may, and on objection must, exclude opinion testimony that is based in whole or in significant part on matter that is not a proper basis for the opinion. In that case, the witness may then, if there remains a proper basis for the opinion, state the opinion after excluding the improper matter from consideration. (*Ev.C. 803*; see *Gilroy v. Filice (1963) 221 C.A.2d 259, 271, 34 C.R. 368*; *Elder v. Pacific Tel. & Tel. Co. (1977) 66 C.A.3d 650, 664, 136 C.R. 203* [expert witness may properly testify as to custom and practice in construction safety, but may not state interpretation of law, including safety orders relating to demolition work]; *San Diego v. Sobke (1998) 65 C.A.4th 379, 398, 76 C.R.2d 9* [in eminent domain proceeding, trial judge properly excluded defendant landowners' expert opinion testimony on loss of goodwill, where expert's methodology was inadequate to measure value of any pretaking goodwill or to compare it with value of posttaking goodwill].) This rule is applicable to lay as well as expert witnesses.

Where the opinion is based on both proper and improper matter, the judge has discretion to deny a motion to strike. (*San Bernardino County Flood Control Dist. v. Sweet (1967) 255 C.A.2d 889, 902, 63 C.R. 640.*)

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#### D. Examination as If Under Cross-Examination.

##### 1. Adverse Witness.

##### a. Rule and Theory.

3 Witkin Cal. Evid. Presentation § 202

[§ 202] Rule and Theory.

(1) *Rule*. In a civil action, a party may, at any time during its presentation of evidence, call an adverse party or person identified with the adverse party, and examine him or her "as if under cross-examination." (Ev.C. 776, restating former C.C.P. 2055.) (On former C.C.P. 2055, see *Lawless v. Calaway* (1944) 24 C.2d 81, 99, 147 P.2d 604 [liberal construction to permit fullest inquiry into any relevant issue]; *Estate of Carson* (1920) 184 C. 437, 447, 194 P. 5 [refusal to permit such examination held "a flagrant denial of a common, everyday right of every litigant"]; *Scott v. Del Monte Properties* (1956) 140 C.A.2d 756, 759, 295 P.2d 947 [reversible error to refuse to permit examination in this manner]; *Rowan v. San Francisco* (1966) 244 C.A.2d 308, 314, 53 C.R. 88, infra, §207; and see generally 6 Wigmore (Chadbourn Rev.) §1884; Rutter Group, 2 Civil Trials and Evidence §9.80 et seq. [tactical considerations]; C.E.B., Effective Introduction of Evidence in California 2d, Chap. 6 [Calling Adverse Party or Witness]; 81 Am.Jur.2d (1992 ed.), Witnesses §731 et seq.; 35 A.L.R.2d 756.)

(2) *Significance of Rule*. This provision is still quite useful in situations where the examining party, in presenting his or her case, needs evidence that can only be given by the adverse party or someone connected with that party. But it has lost some of its former importance:

First, under old California law, if the examining party called a witness in the usual manner and the witness gave adverse testimony, the examiner would, in a sense, be "bound" by it, because of the former rule against impeachment of one's own witness (see infra, §355). The adverse witness exception of former C.C.P. 2055 allowed examination "as if under cross-examination," and further declared that the examiner would "not be bound by his testimony," so that the witness could be cross-examined, impeached and contradicted by rebuttal evidence to the fullest extent. (See *Estate of Lances* (1932) 216 C. 397, 404, 14 P.2d 768; *Daggett v. Atchison, Topeka & Santa Fe Ry. Co.* (1957) 48 C.2d 655, 662, 663, 313 P.2d 557; *First Nat. Bank of Petersburg, Illinois v. Shipley* (1930) 109 C.A. 194, 200, 292 P. 996.) Under the Evidence Code, a party may freely impeach its own witness (see infra, §356); hence, this effect of the old statute is obsolete.

Second, under the old law, the testimony of an adverse witness was not considered as having been produced by the party calling the witness so as to dispel a statutory presumption, such as the presumption of due care. (See *Smellie v. Southern Pac. Co.* (1931) 212 C. 540, 561, 299 P. 529; *McKinley v. Southern Pac. Co.* (1947) 80 C.A.2d 301, 310, 181 P.2d 899; *Green v. Uarte* (1948) 87 C.A.2d 75, 78, 196 P.2d 63.) Under the Code, a presumption is not evidence (1 Cal. Evidence (4th), *Burden of Proof and Presumptions*, §52), and the former presumption of due care has been restated as a rule of burden of proof of negligence (1 Cal. Evidence (4th), *Burden of Proof and Presumptions*, §15).

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Rule.* See *81 Am.Jur.2d (2004 ed.)*, *Witnesses §732 et seq.* *West's Key Number Digest*, *Witnesses k.276*



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#### D. Examination as If Under Cross-Examination.

##### 1. Adverse Witness.

##### b. Scope of Statute.

##### 1. Adverse Party.

3 Witkin Cal. Evid. Presentation § 203

[§ 203] Adverse Party.

(1) *Who Is Adverse Party.* In the first class of adverse witnesses is the adverse party ("A party to the record of any civil action"). (*Ev.C. 776(a)*; see *Johnston v. St. Sure* (1920) 50 C.A. 735, 737, 195 P. 947 [joint answer by husband and wife, either may be examined]; *Koeberle v. Friganza* (1924) 66 C.A. 323, 327, 226 P. 35 [one defendant denied liability, alleged that she acted as agent for other defendant]; *Dohrman v. J. B. Roof* (1930) 108 C.A. 456, 466, 291 P. 879 [party named as defendant, who was not served and did not appear in action]; *Simon v. San Francisco* (1947) 79 C.A.2d 590, 593, 180 P.2d 393 [streetcar accident; motorman called without having been substituted in place of Doe; amendment, and then examination under statute, held proper]; *MacGregor v. Kawaoka* (1955) 132 C.A.2d 407, 409, 282 P.2d 130 [plaintiff, suing K, maker, and C, accommodation maker, could call K as adverse witness].)

For the purpose of *Ev.C. 776*, parties represented by the same counsel are deemed to be a single party. (*Ev.C. 776(c)*.)

(2) *Defendant Examined as Expert.* In *Lawless v. Calaway* (1944) 24 C.2d 81, 89, 147 P.2d 604, a malpractice suit requiring expert testimony to establish the standard of care, it was held that plaintiff had a right to examine defendant doctor as an expert on this issue, and that refusal to permit the questioning was reversible error. (See 88 A.L.R.2d 1186.)

(3) *Who Are Not Adverse Parties.* In *Peterson v. Peterson* (1946) 74 C.A.2d 312, 168 P.2d 474, plaintiff sued to quiet title and cancel a deed of trust, and for damages for fraud. Defendant B disclaimed any interest in the property. *Held*, denial of the right to examine B under the statute was not prejudicial error because, at that time, only the equitable issues (quiet title and cancellation) were being tried. Of course, B would be subject to such examination in the trial on the cause of action for damages for fraud. (74 C.A.2d 313.)

In *Pleasant Hill v. First Baptist Church* (1969) 1 C.A.3d 384, 425, 82 C.R. 1, a condemnation action, plaintiff city complained because it was not permitted to call defendant's former appraiser as an adverse witness subject to cross-examination. *Held*, no error. "A literal application of the statute shows that the witness was an employee of the church at the time he obtained knowledge of the matter concerning which he was sought to be examined under this section. Analysis, however, indicates that the prime matter with respect to which he was being examined was the knowledge and opinion which he applied to facts which were open to any member of the public. ... Since the church disclaimed the use of his knowledge and opinion, and no longer employed him for that matter, the mere fact that the



witness instituted some inquiry and compiled data at the request of the church did not perpetuate his status as 'a person identified with' that party. The court properly required the city to make the appraiser its own witness." (1 C.A.3d 426, citing the text.)

The fact that a witness brought a similar but separate action against the same defendant and prevailed therein did not make the witness an adverse party as to the plaintiff. (*Petersen v. Donegani* (1938) 27 C.A.2d 431, 432, 80 P.2d 1001.) And a person who, as equity receiver of a defendant, filed an answer in its behalf, was held not to be an adverse party. (*Howland v. Doyle* (1935) 6 C.A.2d 311, 315, 44 P.2d 453.)

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D. Examination as If Under Cross-Examination.

1. Adverse Witness.
  - b. Scope of Statute.
2. Witness Identified With Adverse Party.
  - aa. Person Benefited.

3 *Witkin Cal. Evid. Presentation* § 204

[§ 204] Person Benefited.

A person "identified with" the party, and therefore an adverse witness, includes a person for whose immediate benefit the action is prosecuted or defended by the party. (*Ev.C. 776(d)(1)*; on elimination of husband-wife privilege, see 2 *Cal. Evidence (4th)*, *Witnesses*, §185.)

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#### D. Examination as If Under Cross-Examination.

1. Adverse Witness.
  - b. Scope of Statute.
2. Witness Identified With Adverse Party.
  - bb. Officer, Agent, or Employee.

#### 3 *Witkin Cal. Evid. Presentation* § 205

[§ 205] Officer, Agent, or Employee.

(1) *Current Officer, Agent, or Employee.* A person is also "identified with" the party if he or she is:

(a) A director, officer, superintendent, member, agent, employee, or managing agent of the party or of a benefited person (see *supra*, §204);

(b) A public employee of a public entity if the public entity is the party. (*Ev.C. 776(d)(2)*; see 56 A.L.R.2d 1108 [who is "employee" for purposes of statute].) (On whether statute should be held inapplicable where employee is in fact friendly witness, see *Parlier Fruit Co. v. Fireman's Fund Ins. Co. (1957) 151 C.A.2d 6, 16, 311 P.2d 62* [question raised but not decided]; 38 A.L.R.2d 952.)

(2) *Former Officer, Agent, or Employee.* In *Wells v. Lloyd (1939) 35 C.A.2d 6, 94 P.2d 373*, the court said of former C.C.P. 2055: "The section was undoubtedly intended to provide for cross-examination of any officer whose official position with the corporation put him in possession of any matters material to the cause on trial. Such a corporate official cannot deprive the adverse party to a lawsuit of the right ... by simply terminating his official connection with the corporation. To hold otherwise would enable a corporation to evade cross-examination under this section by the mere subterfuge of discharging an officer prior to the trial of a cause and then reinstating him at the conclusion of such proceeding." (35 C.A.2d 12.) (See also *Scott v. Del Monte Properties (1956) 140 C.A.2d 756, 760, 295 P.2d 947* [personal injury action, witness an employee of defendant at time of accident].)

The present statute codifies this rule by including a person who was in any of these relationships "at the time of the act or omission giving rise to the cause of action." (*Ev.C. 776(d)(3)*.) It also includes a person who was in any of these relationships "at the time he obtained knowledge of the matter concerning which he is sought to be examined." (*Ev.C. 776(d)(4)*.)

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#### D. Examination as If Under Cross-Examination.

##### 1. Adverse Witness.

##### c. Procedure.

##### 1. Time and Manner of Calling.

3 Witkin Cal. Evid. Presentation § 206

[§ 206] Time and Manner of Calling.

(1) *Any Time During Presentation of Case.* There were conflicting expressions in prior California cases as to whether the trial judge, under the power to control the order of proof (see *supra*, §44), could require a party to call its own witnesses before examining adverse witnesses. (See *Fuchs v. Southern Pac. Co.* (1935) 5 C.A.2d 409, 411, 42 P.2d 704 [describing this as general practice]; *MacGregor v. Kawaoka* (1955) 132 C.A.2d 407, 410, 282 P.2d 130 [opposite view: "Whenever it was material to her case or whenever she desired before the close of the case ... it was her privilege under the statute to do so"]; *Daggett v. Atchison, Topeka & Santa Fe Ry. Co.* (1957) 48 C.2d 655, 663, 313 P.2d 557 [noting, without disapproval, that plaintiffs had called defendant engineer and another employee of defendant railway as their first two witnesses]; cf. *Murry v. Manley* (1959) 170 C.A.2d 364, 366, 338 P.2d 976 [reversible error to refuse to permit such examination before making out prima facie case].)

*Ev.C. 776(a)* makes it clear that there is no such requirement: The adverse witness may be called "at any time during the presentation of evidence by the party calling the witness."

(2) *No Announcement or Offer of Proof Required.* In putting an adverse witness on the stand, it is unnecessary to announce that he or she is called under the statute; the benefits of the section are available regardless. (*Worthington v. Peoples State Bank* (1930) 106 C.A. 238, 241, 288 P. 1086.) If the right is erroneously denied, it is not necessary to make an offer of proof as a basis for urging prejudicial error on appeal. (*Lawless v. Calaway* (1944) 24 C.2d 81, 91, 147 P.2d 604; *MacGregor v. Kawaoka, supra*, 132 C.A.2d 408.)

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#### D. Examination as If Under Cross-Examination.

##### 1. Adverse Witness.

##### c. Procedure.

##### 2. Examination and Cross-Examination.

##### 3 *Witkin Cal. Evid. Presentation* § 207

[§ 207] Examination and Cross-Examination.

(1) *Direct Examination as If Under Cross-Examination.* The party examining an adverse witness may use leading questions, as in a cross-examination. (*Ev.C. 776*; see *Ev.C. 767*, *supra*, §166.) There are no limitations on the scope of the examination: Any relevant matter in issue may be brought out. (See *Lawless v. Calaway* (1944) 24 C.2d 81, 90, 147 P.2d 604; *Daggett v. Atchison, Topeka & Santa Fe Ry. Co.* (1957) 48 C.2d 655, 663, 313 P.2d 557; *Murry v. Manley* (1959) 170 C.A.2d 364, 365, 338 P.2d 976; *Rowan v. San Francisco* (1966) 244 C.A.2d 308, 314, 53 C.R. 88; 35 A.L.R.2d 757.)

In *Rowan v. San Francisco*, *supra*, plaintiff, injured in a fall on a sidewalk, called defendant city's ambulance driver as an adverse witness, and asked questions about the location of the accident and his observation of the conditions. *Held*, the objection that an employee may only be examined as to matters relating to his duties was properly overruled. (244 C.A.2d 314.)

(2) *Cross-Examination by Other Parties.* After the initial examination, the adverse witness may be cross-examined by the other parties to the action in whatever order the court directs. (*Ev.C. 776(b)*.) "For example, a party whose interest in the action is identical with that of the party who called the witness for examination under this section has a right to cross-examine the witness fully because he, too, has the right to call the witness for examination under this section. Similarly, a party whose interest in the action is adverse to the party who calls the witness for examination under this section has the right to cross-examine the witness fully unless he is identified with the witness." (*Ev.C. 776*, Comment.)

(3) *Limited or Full Cross-Examination.* The full right of cross-examination (with leading questions) is denied, and the cross-examination must be conducted as on redirect, in two situations: (a) Where the witness is a *party*, and the cross-examination is by his or her own counsel or counsel for a party not adverse to the witness. (*Ev.C. 776(b)(1)*.) (b) Where the witness is *identified with a party*, and the cross-examination is by counsel for that party or counsel for a party who is not adverse to that party. (*Ev.C. 776(b)(2)*.)

However, the restriction of *Ev.C. 776(b)(2)* was thought to be unfair in situations where the "adverse" witness is not really adverse, e.g., where a plaintiff employee, in an action against his or her employer, calls a coemployee as a witness. The coemployee may actually be in sympathy with the plaintiff's case, and if so, the employer ought to be permitted to use leading questions in cross-examination. Therefore, where the party calling the witness is also "a person

identified with the same party with whom the witness is identified," or is the personal representative, heir, successor, or assignee of such a person, full cross-examination is allowed. (*Ev.C. 776(e).*)

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#### D. Examination as If Under Cross-Examination.

1. Adverse Witness.
- d. Effect of Evidence.

3 Witkin Cal. Evid. Presentation § 208

[§ 208] Effect of Evidence.

(1) *On Motion for Nonsuit or Directed Verdict.* The testimony of the adverse witness cannot ordinarily be considered against the party in determining a motion for nonsuit or directed verdict; only the evidence produced by the party in his or her favor may be considered. (*Dempsey v. Star House Movers* (1934) 2 C.A.2d 720, 722, 38 P.2d 825 [nonsuit]; *Estate of Lances* (1932) 216 C. 397, 400, 14 P.2d 768 [directed verdict]; *Karstensen v. Western Trans. Co.* (1949) 93 C.A.2d 435, 438, 209 P.2d 47 [nonsuit]; *Ashcraft v. King* (1991) 228 C.A.3d 604, 611, 278 C.R. 900 [nonsuit]; cf. *Leonard v. Watsonville Community Hosp.* (1956) 47 C.2d 509, 517, 305 P.2d 36 [testimony of defendant doctors held to overcome presumption of *res ipsa loquitur*, as to one doctor].)

(2) *On Motion for Judgment.* A motion for judgment under C.C.P. 631.8 is analogous to a motion for a nonsuit. Hence, a trial judge improperly considered defense exhibits on a defendant's motion for judgment, where the exhibits had been introduced during defendant's "redirect" examination by his own attorney following his testimony as an adverse witness called by plaintiffs. (*Miller v. Dussault* (1972) 26 C.A.3d 311, 103 C.R. 147, 7 Cal. Proc. (4th), Trial, §442.)

(3) *Evidence in the Case.* The testimony, even if unfavorable, is evidence in the case, which may be considered by the judge or jury in determining the issues, and should receive its proper weight. (*Figari v. Olcese* (1921) 184 C. 775, 782, 195 P. 425; *Daniels v. San Francisco* (1953) 40 C.2d 614, 625, 255 P.2d 785 [proper to instruct to this effect]; *Leonard v. Watsonville Community Hosp.*, *supra*, 47 C.2d 516; *Goehring v. Rogers* (1924) 67 C.A. 260, 262, 227 P. 689; *Green v. Newmark* (1933) 136 C.A. 32, 37, 28 P.2d 395; *Joseph v. Vogt* (1939) 35 C.A.2d 439, 441, 95 P.2d 947; *Frymire v. Brown* (1949) 94 C.A.2d 334, 341, 210 P.2d 707; *Dorn v. Pichinino* (1951) 105 C.A.2d 796, 800, 234 P.2d 307; *Lavine v. Davis* (1959) 175 C.A.2d 647, 648, 346 P.2d 426, citing the text.)

In *Goehring v. Rogers*, *supra*, a suit against two negligent drivers, plaintiff examined both as adverse witnesses, and the trial judge instructed the jury that the testimony of each defendant was binding only on him, and not against the other defendant. *Held*, this was prejudicial error. "[W]here one of two or more joint defendants is called under the section, his testimony, if material to the issues involved, is evidence for all purposes of the case and is binding upon him as well as upon his codefendants." (67 C.A. 262.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER XI - Presentation At Trial

### IX. DIRECT EXAMINATION: SPECIAL PROBLEMS

#### D. Examination as If Under Cross-Examination.

##### 2. Person Relied on by Expert.

##### 3 *Witkin Cal. Evid. Presentation* § 209

[§ 209] Person Relied on by Expert.

(1) *Rule.* An expert may give an opinion based on reliable matter furnished by another person. (*Ev.C. 801(b)*, 1 *Cal. Evidence (4th)*, *Opinion Evidence*, §31.) In this situation, cross-examination of the witness may not be as effective as cross-examination of the person furnishing the basis of the witness' opinion. Accordingly, if a witness testifying as an expert testifies that his or her opinion is based on another person's opinion or statement, the other person may be called and examined by any adverse party as if under cross-examination concerning the opinion or statement. (*Ev.C. 804(a)*.)

(2) *Exceptions.* There are three exceptions to the application of *Ev.C. 804(a)*: Where the person relied on is (a) a party, (b) a person identified with a party, or (c) a witness who has testified in the action concerning the subject matter of the opinion or statement relied on. (*Ev.C. 804(b)*.)

(3) *Effect of Unavailability.* *Ev.C. 804* is merely a *protective* provision, not an exclusionary rule. Hence, the circumstance that the other person is unavailable for cross-examination does not make the expert's opinion inadmissible. (*Ev.C. 804(d)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Exceptions.* See *People v. Ledesma* (2006) 39 *C.4th* 641, 701, 47 *C.R.3d* 326, 140 *P.3d* 657 [circumstance that *Ev.C. 804* is inapplicable if expert is agent of party within meaning of *Ev.C. 804(b)* does not preclude calling expert as witness; it simply signifies that examination is governed by other applicable statutes, e.g., *Ev.C. 776*, text, §203].





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## CHAPTER XI - Presentation At Trial

### IX. DIRECT EXAMINATION: SPECIAL PROBLEMS

#### D. Examination as If Under Cross-Examination.

##### 3. Hearsay Declarant.

*3 Witkin Cal. Evid. Presentation § 210*

[§ 210] Hearsay Declarant.

(1) *Rule.* Hearsay evidence is admitted under exceptions to the hearsay rule, where necessary or desirable, despite the fundamental objection to any statements offered without opportunity to cross-examine. If, however, the hearsay declarant is available and can be found, the opposing party should be entitled to call the declarant and treat him or her as, in effect, an adverse witness. (*Ev.C. 1203*, Comment.) Accordingly, "the declarant of a statement that is admitted as hearsay evidence may be called and examined by any adverse party as if under cross-examination concerning the statement." (*Ev.C. 1203(a)*.)

(2) *Exceptions.* Exceptions are made where the declarant is a party, a person identified with a party, or a witness who testified concerning the subject matter, or where the statement is an admission or a judgment. (*Ev.C. 1203(b)*, (c).) Counsel for a party may not examine his or her own client as if under cross-examination merely because a hearsay statement of the client has been admitted. Moreover, because a party should not have the right to cross-examine its own witness merely because the adverse party has introduced a hearsay statement of the witness, witnesses who have testified in the action concerning the subject matter of the statement are not subject to examination. (*Ev.C. 1203*, Comment.)

*Ev.C. 1203* is inapplicable if the hearsay statement is offered at a preliminary examination, as provided by P.C. 872 (1 *Cal. Evidence* (4th), *Introduction*, §24). (*Ev.C. 1203.1*, added by Proposition 115, 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §30 et seq.) *Ev.C. 1203.1* does not limit the application of P.C. 866 (defendant's right to produce and examine defense witnesses at preliminary hearing; see 4 *Cal. Crim. Law* (3d), *Pretrial Proceedings*, §141 et seq.) to witnesses the defense wishes to call other than the hearsay declarants whose statements were introduced as a part of the prosecution's case. (*People v. Erwin* (1993) 20 *C.A.4th* 1542, 1550, 25 *C.R.2d* 348 [in child molestation case, magistrate erred in refusing to allow defendant to call victim or her mother after the prosecution, under P.C. 872, introduced detective's testimony incorporating interviews with both].)

(3) *Effect of Unavailability.* Unavailability of the declarant for cross-examination does not make the declaration inadmissible. (*Ev.C. 1203(d)*.) (On impeachment of declarant by extrinsic evidence, see *infra*, §357 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER XI - Presentation At Trial

### IX. DIRECT EXAMINATION: SPECIAL PROBLEMS

#### E. Examination of Minor Witness.

##### 1. Criminal Cases.

##### a. Legislative Findings and Intent.

#### *3 Witkin Cal. Evid. Presentation § 211*

#### [§ 211] Legislative Findings and Intent.

"Faced with growing public awareness of the difficulties of prosecuting child sex abuse cases, state legislatures have acted to strengthen the prosecutor's hand while easing the burden that the judicial system places on the child victim." (98 Harv. L. Rev. 806, 808 [legislative innovations involving testimony of child victims in sex abuse prosecutions].) The California Legislature has adopted a number of statutes of this type. (See *infra*, §§212 [protections during trial or hearing]; 213 [support persons]; 217 et seq. [televised testimony].) (On videotaped testimony of child victim at preliminary examination, see 1 Cal. Evidence (4th), *Introduction*, §23; on *Ev.C.* 767(b), authorizing leading questions to children under 10 in prosecutions for specified offenses, see *supra*, §167.)

In the enacting statutes amending P.C. 868.8 (*infra*, §212) (Stats. 1985, Chaps. 1172 and 1174), the following declaration appears:

"The Legislature hereby finds and declares that it is necessary to provide alleged child molestation victims with additional consideration and different treatment from that which is afforded to adults. The Legislature intends, by this act, to provide minors under the age of 11 who are alleged sexual offense victims with certain additional rights and protections during their involvement with criminal proceedings. The Legislature also urges the news media to use restraint in revealing the identity of these alleged victims, especially in particularly sensitive cases."

"The Legislature further finds and declares that some researchers believe that the alleged child molestation victim who is required to testify in court may experience psychological stress in discussing the alleged offense, that traditional court procedures may fail to take into account the potential damage to the child witness, that these procedures might exacerbate any damage already done to the child, and that judges who deal with child molestation cases should receive training in the psychological and social issues of child molestation, the basic principles of child protection and development, and techniques that may make the child more cooperative and thus aid the truth-gathering process."

"The Legislature further finds and declares that innovative approaches in the legal system's handling of alleged child sexual abuse cases should be adopted to prevent additional trauma to the child. The Legislature finds that some researchers believe that traditional courtroom settings intimidate child witnesses and thus may hinder the truth-gathering process; that in order to elicit information most effectively and to maintain the child's cooperation it may be necessary to create new courtroom configurations, designed to respond to the child's size, limited capacity to communicate, and special needs for comfort, support, and reassurance."

**SUPPLEMENT:** [This section is current through the latest supplement]

See 20 J. Juvenile Law 127 [suggesting protections for children who testify as witnesses to gang violence]. *West's Key Number Digest*, Witnesses k.243



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## CHAPTER XI - Presentation At Trial

### IX. DIRECT EXAMINATION: SPECIAL PROBLEMS

#### E. Examination of Minor Witness.

##### 1. Criminal Cases.

##### b. Protections During Trial or Hearing.

*3 Witkin Cal. Evid. Presentation § 212*

[§ 212] Protections During Trial or Hearing.

(1) *Applicable Proceedings.* The trial court must take special precautions to comfort and support the minor and to protect the minor from coercion, intimidation, or undue influence as a witness in specified criminal proceedings: those in which the defendant is charged with a violation of P.C. 243.4, 261, 273a, 273d, 285, 286, 288, 288a, 288.5, 289, 314(1), or 647.6, "committed with or upon a *minor under the age of 11.*" (P.C. 868.8; for specified crimes, see 1 *Cal. Crim. Law (3d)*, *Crimes Against the Person*, §§26, 74 et seq. [P.C. 243.4, sexual battery]; 2 *Cal. Crim. Law (3d)*, *Sex Offenses and Crimes Against Decency*, §§164, 165 [P.C. 273d, corporal punishment of child resulting in traumatic condition]; 2 *Cal. Crim. Law (3d)*, *Sex Offenses and Crimes Against Decency*, §1 et seq. [P.C. 261, rape]; 2 *Cal. Crim. Law (3d)*, *Sex Offenses and Crimes Against Decency*, §138 et seq. [P.C. 285, incest]; 2 *Cal. Crim. Law (3d)*, *Sex Offenses and Crimes Against Decency*, §25 et seq. [P.C. 286, sodomy]; 2 *Cal. Crim. Law (3d)*, *Sex Offenses and Crimes Against Decency*, §31 [P.C. 288a, oral copulation]; 2 *Cal. Crim. Law (3d)*, *Sex Offenses and Crimes Against Decency*, §37 et seq. [P.C. 288, lewd act with child]; 2 *Cal. Crim. Law (3d)*, *Sex Offenses and Crimes Against Decency*, §51 et seq. [P.C. 288.5, continuous sexual abuse of child]; 2 *Cal. Crim. Law (3d)*, *Sex Offenses and Crimes Against Decency*, §47 et seq. [P.C. 289, penetration of anal or genital openings by foreign object]; 2 *Cal. Crim. Law (3d)*, *Sex Offenses and Crimes Against Decency*, §109 [P.C. 314(1), public exposure of private parts]; 2 *Cal. Crim. Law (3d)*, *Sex Offenses and Crimes Against Decency*, §159 et seq. [P.C. 273a, wilfully endangering life or health of child]; 2 *Cal. Crim. Law (3d)*, *Crimes Against Public Peace and Welfare* §§59, 60 [P.C. 647.6, annoying or molesting child].)

(2) *Special Precautions.* The special precautions include, but are not limited to, the following:

(a) *Position of Persons in Courtroom.* In the court's discretion, the judge, parties, witnesses, support persons, and court personnel may be relocated within the courtroom to facilitate a more comfortable and personal environment for the minor witness. (P.C. 868.8(c).) (On support persons, see *infra*, §§213, 214.)

(b) *Judge Presiding Without Robe.* The judge, in his or her discretion, may remove his or her robe if the judge believes that this formal attire intimidates the minor. (P.C. 868.8(b).)

(c) *Periods of Relief.* The court may allow the witness reasonable periods of relief from examination and cross-examination during which the witness may retire from the courtroom. (P.C. 868.8(a).)

(d) *Examination During School Hours.* The court may limit the taking of the child's testimony to the hours during which the child is normally in school, unless there is good cause to take the child's testimony during other hours. (P.C.

868.8(d).)

(e) *Special Courtroom*. In order to provide a nonthreatening environment for minors to better enable them to testify freely and accurately, counties are encouraged to provide a room in or near the courthouse for minors under 16 years of age. In addition, if a county constructs, substantially remodels, or refurbishes a courthouse or facility used as a courthouse on or after January 1, 1988, the facility must contain a room of this type. (P.C. 868.6.)

(f) *Closed Proceedings in Molestation Cases*. On motion by the prosecution in any case involving an offense specified in P.C. 868.8 on a minor under 16, the trial judge must hold a hearing to determine whether the testimony of, and testimony relating to, a minor should be closed to the public in order to protect the minor's reputation. (P.C. 859.1(a).)

In making this determination, the judge must consider (1) the nature and seriousness of the offense; (2) the minor's age; (3) the extent to which the community's size would preclude the victim's anonymity; (4) the likelihood of public opprobrium due to the victim's status; (5) whether the public has an overriding interest in having an open hearing; (6) whether the prosecution has demonstrated a substantial probability that the witness' identity would otherwise be disclosed during the proceeding and would cause serious harm to him or her; (7) whether the witness has provided information concerning the case to the public; and (8) any other factor deemed necessary to protect the interests of justice. (P.C. 859.1(b).)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Applicable Proceedings*. P.C. 868.8 was amended in 2001 to make the statute applicable to disabled persons as well as minors. As amended, the quoted portion reads "committed with or upon a person with a disability or a minor under the age of 11."

P.C. 868.8(e), added in 2001, provides that for purposes of P.C. 868.8, "disability" has the meaning given it in *Govt.C. 12926(i)*. (See 8 *Summary* (10th), *Constitutional Law*, §916.)

(2) *Special Precautions*.

(a) *Positions of Persons in Courtroom*. P.C. 868.8(c) was amended in 2001 to refer to disabled persons as well as child witnesses. (b) *Judge Presiding Without Robe*. P.C. 868.8(b) was amended in 2001 to refer to disabled persons as well as minors.

(d) *Examination During School Hours*. As amended in 2001, P.C. 868.8(d) provides that, in the court's discretion, the taking of the testimony of the minor or disabled person may be limited to "normal school hours" if there is no good cause to take it at another time.

(f) *Closed Proceedings in Molestation Cases*. P.C. 859.1(a) was amended in 2004 to expand the scope of the statute to include dependent persons with a substantial cognitive impairment. In accordance with this change, P.C. 859.1(b) was amended to allow the court to consider the dependent person's level of cognitive development.



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## CHAPTER XI - Presentation At Trial

## IX. DIRECT EXAMINATION: SPECIAL PROBLEMS

## E. Examination of Minor Witness.

## 1. Criminal Cases.

## c. Presence of Support Person or Other Representative.

## 1. Support Persons.

## 3 Witkin Cal. Evid. Presentation § 213

## [§ 213] Support Persons.

(1) *Prosecuting Witness' Option*. In proceedings involving specified serious offenses (including murder, mayhem, rape, robbery, assault, battery, and child abuse), a prosecuting witness is entitled to have up to two *support persons* of his or her own choosing in attendance during his or her testimony. One of the support persons may be a witness (see *infra*, §214). (P.C. 868.5(a); see generally 82 A.L.R.4th 1038 [propriety of third person accompanying or supporting witness during testimony].) The term "prosecuting witness," as used in P.C. 868.5 both as to the witness who is testifying and as to the support person, includes witnesses for the prosecution who are neither victim nor complainant. (*Ortega v. Superior Court* (1982) 135 C.A.3d 244, 252, 185 C.R. 297 [child witness]; *People v. Kabonic* (1986) 177 C.A.3d 487, 492, 223 C.R. 41 [support person].) Although the statute originally allowed support persons only for prosecuting witnesses who were 16 years old or younger, that age limitation has been eliminated.

(2) *Applicable Proceedings*. The support persons may attend preliminary hearings, trials, and juvenile court proceedings. (P.C. 868.5(a).)

(3) *Presence on Stand*. Only one of the support persons may accompany the witness to the witness stand, although the other may remain in the courtroom during the witness' testimony. (P.C. 868.5(a).)

(4) *Newspersons Ineligible*. The chosen support person cannot be a person described in *Ev.C. 1070* (news reporter, publisher, or editor), unless the person is related to the prosecuting witness as a parent, guardian, or sibling and does not make notes during the hearing or proceeding. (P.C. 868.5(a).) (On *Ev.C. 1070*, see 2 *Cal. Evidence* (4th), *Witnesses*, §334.)

(5) *Admonition of Support Person*. The judge in a juvenile court proceeding must inform the support persons that juvenile court proceedings are confidential and may not be discussed with anyone not in attendance at the proceedings. In all cases, the judge must admonish the support persons against prompting, swaying, or influencing the witness in any way. (P.C. 868.5(b).)

(6) *Removal of Support Person*. Nothing in P.C. 868.5 precludes a judge from removing a support person from the courtroom whom the judge believes is prompting, swaying, or influencing the witness. (P.C. 868.5(b).)

(7) *Finding of Need*. Because the statutory procedure affects the constitutional right of confrontation, there must be

a case-specific finding of need before it can be utilized. (*People v. Adams* (1993) 19 C.A.4th 412, 442, 443, 23 C.R.2d 512; see *People v. Lord* (1994) 30 C.A.4th 1718, 1722, 36 C.R.2d 453 [defendant waived any claim of error in court's failure to make finding of need by failing to request hearing or otherwise object to presence of support person]; *People v. Johns* (1997) 56 C.A.4th 550, 554, 65 C.R.2d 434 [disagreeing with *People v. Adams*, *supra*, to the extent it suggests that any impact on any component of confrontation right--face-to-face confrontation, oath, cross-examination, and jury's observation of witness' demeanor--constitutes violation that must be justified by necessity of furthering important public policy].)

**SUPPLEMENT:** [This section is current through the latest supplement]

*West's Key Number Digest*, Witnesses k.228



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### IX. DIRECT EXAMINATION: SPECIAL PROBLEMS

#### E. Examination of Minor Witness.

##### 1. Criminal Cases.

##### c. Presence of Support Person or Other Representative.

##### 2. Support Person Who Is Witness.

#### 3 Witkin Cal. Evid. Presentation § 214

#### [§ 214] Support Person Who Is Witness.

(1) *Required Showing.* If a chosen support person is also a prosecuting witness, the prosecution must present evidence that the person's attendance is both *desired* by the prosecuting witness for support and *will be helpful* to the prosecuting witness. On that showing, the court must grant the request unless the defendant presents information or the court notices that the support person's attendance during the prosecuting witness' testimony "would pose a substantial risk of influencing or affecting the content of that testimony." (P.C. 868.5(b).)

(2) *Exclusion From Courtroom.* The testimony of a chosen support person who is also a prosecuting witness must be presented before the testimony of the prosecuting witness. The prosecuting witness must be excluded from the courtroom during that testimony. Whenever the evidence given by a support person would be subject to exclusion because it was given before the corpus delicti was established, the evidence must be admitted subject to the court's or the defendant's motion to strike it from the record if the corpus delicti is not later established by the prosecuting witness' testimony. (P.C. 868.5(c).)

(3) *Exception to Exclusionary Rule.* The requirement that a support person who is also a prosecution witness must testify before the prosecuting witness testifies, with the prosecuting witness excluded from the courtroom, is subject to an important exception. In *People v. Redondo* (1988) 203 C.A.3d 647, 250 C.R. 46, defendant was charged with lewd conduct with 9-year-old Mariano. Mariano's mother, present as a support person, testified prior to Mariano, but was not asked any questions concerning statements made to her by Mariano shortly after the assault. After Mariano had begun to testify, the prosecutor was informed by the mother that Mariano had told her that defendant had attacked him. The prosecutor attempted to question Mariano concerning the statement, but a hearsay objection was sustained (statement was to mother, not Mariano). After the session, the prosecutor recalled the mother and she testified to the statement. *Held*, admission of the testimony was proper.

(a) The statutory requirement was intended to guard against the possibility that the support person will tailor his or her testimony to match that of the complaining witness. "Nevertheless, we believe a blanket rule which prevents a support person from being recalled in any circumstances after the victim has testified is a far less desirable alternative. Such a rule would keep relevant, admissible, and perhaps important evidence from the jury even where the prosecution in good faith fails to discover the evidence until after the support person and victim have testified. In such circumstances, the marginal benefit gained by preventing a support person from testifying on recall after the victim has testified is vastly outweighed by the cost of keeping admissible evidence from the jury." (203 C.A.3d 654.)



(b) This conclusion finds support in cases dealing with the analogous situation of violation of a witness exclusion order: This does not render the witness incompetent to testify, and does not furnish grounds to refuse permission to testify, "at least where the party who seeks to offer the testimony was not 'at fault.' " (203 C.A.3d 654; see supra, §74.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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CHAPTER XI - Presentation At Trial

IX. DIRECT EXAMINATION: SPECIAL PROBLEMS

E. Examination of Minor Witness.

1. Criminal Cases.

c. Presence of Support Person or Other Representative.

3. Children's Representative in Child Abuse Cases.

3 Witkin Cal. Evid. Presentation § 215

[§ 215] Children's Representative in Child Abuse Cases.

(1) *Applicable Proceedings.* Counties were allowed to establish a 3-year pilot project by July 1, 1987, whereby the court, in prosecutions for child abuse or molestation brought against a member of a child's immediate family, may appoint a *children's representative* to represent the interests of the victim or witness who is under 14 years of age. (P.C. 1348.5(a).)

(2) *Duties.* The representative's duties include accompanying the child through all proceedings, explaining their nature and progress and telling the child what is expected of him or her, and consulting with the court regarding any special needs the child might have. (P.C. 1348.5(k).)

(3) *Limitations.* A representative may not discuss the facts and circumstances of the case with the child witness (P.C. 1348.5(i), (p)), and may not be involved in investigatory interviewing (P.C. 1348.5(s)). Moreover, no privilege is created between the child and the representative. (P.C. 1348.5(q).)

(4) *Eligible Persons.* The statute provides *guidelines* to aid the court in appointing a representative (P.C. 1348.5(c)), and lists *qualifications* (P.C. 1348.5(g)). Attorneys may not be appointed. (P.C. 1348.5(f).)

**SUPPLEMENT:** [This section is current through the latest supplement]  
P.C. 1348.5 was repealed in 2001.



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## CHAPTER XI - Presentation At Trial

## IX. DIRECT EXAMINATION: SPECIAL PROBLEMS

## E. Examination of Minor Witness.

## 1. Criminal Cases.

## d. Televised Testimony.

## 1. Former Law: Unauthorized.

## 3 Witkin Cal. Evid. Presentation § 216

[§ 216] Former Law: Unauthorized.

In *Hochheiser v. Superior Court* (1984) 161 C.A.3d 777, 208 C.R. 273, defendant was charged with lewd conduct with two minors, one 10 years old and one nearly 9 years old. The children testified at the preliminary hearing, but their parents thought they suffered great psychological harm, and at the trial, the prosecutor moved that they be allowed to testify over closed-circuit television from the jury room. The trial judge granted the motion over strong objection, and defendant sought prohibition to prevent enforcement of the order. *Held*, writ granted.

(a) *No inherent power to order the procedure.* *Reynolds v. Superior Court* (1974) 12 C.3d 834, 117 C.R. 437, 528 P.2d 45, and *People v. Collie* (1981) 30 C.3d 43, 177 C.R. 458, 634 P.2d 534, 5 Cal. Crim. Law (3d), Criminal Trial, §28, emphasized the restraint that must be exercised in using inherent power to adopt novel criminal procedures, and these decisions indicate the proper result here.

(1) The order raises federal and state constitutional issues, potentially affecting the defendant's rights to a public trial, confrontation of witnesses against him, and due process. (161 C.A.3d 786.)

(2) There are significant differences between testimony face-to-face and testimony by closed-circuit television, because of distortion by camera lens, angle, and lighting, which may affect the jurors' impressions of the witness' demeanor and credibility. (161 C.A.3d 786.) Also, the credibility of the witness testifying by closed-circuit television "may be enhanced by the phenomenon called status-conferral; it is recognized that the media bestows prestige and enhances the authority of an individual by legitimizing his status." (161 C.A.3d 787.)

(3) The televised presentation may affect the presumption of innocence by creating prejudice against the defendant similar to that created by physical restraints on him. (161 C.A.3d 787.)

(4) The generalized minute order of the court contained no details concerning the actual arrangements. (161 C.A.3d 788.)

(b) *No statutory power under Ev.C. 765.* The trial court's power under *Ev.C. 765* to protect a witness from undue harassment or embarrassment (see *supra*, §77) was intended to govern the type and form of questioning, and must be exercised in the context of questioning of witnesses within the courtroom. (161 C.A.3d 789, 790.)

(c) *No statutory power under P.C. 288(c)*. P.C. 288(c) (now P.C. 288(d)) directs the court to "consider the needs of the child victim" of lewd conduct, and to do "whatever is necessary and constitutionally permissible to prevent psychological harm to the child victim." This language cannot be read as a legislative mandate to introduce a fundamental change that would abrogate the traditional right to the presence of witnesses in the courtroom. "Indeed, were we to read subdivision (c) as literally and broadly as the People urge, it would authorize wholesale revision in the entire procedural format of a criminal trial, especially since every sex crime against a minor under age 14 can be charged as a *Penal Code* section 288 violation." (161 C.A.3d 791.)

(d) *Insufficient showing of necessity*. Even if it were assumed that P.C. 288(c) permits the use of closed-circuit television, this exception to the constitutional right of confrontation can be justified only by a compelling state interest. (161 C.A.3d 792, citing *Ohio v. Roberts* (1980) 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597, supra, §21.) None has been shown: "In our research of the professional literature on the matter, we have not discovered any study, based on empirical data, which deals with the damaging psychological effect of giving testimony in the presence of the jury and the accused, on the sexually abused child." (161 C.A.3d 793.) And before a child victim is excused from testifying in the presence of the jury and the defendant on the premise that he will suffer additional injury, "the basis for such a premise must be established both in fact as well as in logic, and its dimensions must be spelled out in terms of its nature, degree and potential duration." (161 C.A.3d 793.) The parents' testimony on the issue of the children's mental health was insufficient to support a finding of necessity. (161 C.A.3d 794.)

A concurring justice agreed that the parents' testimony was not sufficient to show necessity and that the bare minute order did not protect the defendant's rights, but disagreed with the holding on lack of statutory power under P.C. 288(c). (161 C.A.3d 795.) (On legislative authorization of admission of child's statements under special hearsay exception, and testimony by videotape, see 98 Harv. L. Rev. 806; on legislative authorization of televised testimony, see infra, §217 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Ohio v. Roberts* (1980) 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597, text, p. 280, was overruled in *Crawford v. Washington* (2004) 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177, Supp., supra, §21.



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## IX. DIRECT EXAMINATION: SPECIAL PROBLEMS

## E. Examination of Minor Witness.

## 1. Criminal Cases.

## d. Televised Testimony.

## 2. Statutory Authorization.

## aa. Rule and Legislative Intent.

3 *Witkin Cal. Evid. Presentation* § 217

[§ 217] Rule and Legislative Intent.

(1) *Rule.* The court, in any criminal proceeding, may order that the testimony of a minor 10 years of age or younger at the time of the motion be taken by contemporaneous examination and cross-examination in another place and out of the presence of the judge, jury, defendant, and attorneys, and communicated to the courtroom by means of closed-circuit television. (P.C. 1347(b).) (See 17 *Pacific L. J.* 720; 23 *Cal. Western L. Rev.* 52, 56 [background and legislative intent of P.C. 1347]; 13 *Pepperdine L. Rev.* 157, 180 [constitutional problems under *Hochheiser v. Superior Court* (1984) 161 *C.A.3d* 777, 208 *C.R.* 273, *supra*, §216]; 27 *Santa Clara L. Rev.* 117 [P.C. 1347 as violation of Confrontation Clause]; 18 *Southwestern U. L. Rev.* 53 [same]; 1988 *A.S.* 969 [special treatment of child sexual abuse victims]; 61 *A.L.R.4th* 1156.) Generally, two-way closed circuit television will be used, but in certain cases, the court can further limit the impact on the minor by ordering the use of one-way closed circuit television. (See P.C. 1347(c), *infra*, §219.) (On videotaping of preliminary hearing testimony of minor, see P.C. 1346; 1 *Cal. Evidence* (4th), *Hearsay*, §261; on legislation in other states, see 98 *Harv. L. Rev.* 806, 813, 822; on Iowa statute permitting child to testify behind screen as violation of Confrontation Clause, see *Coy v. Iowa* (1988) 487 *U.S.* 1012, 108 *S.Ct.* 2798, 101 *L.Ed.2d* 857, *supra*, §16; on Maryland statute permitting child to testify by one-way closed circuit television as not violating Confrontation Clause, see *Maryland v. Craig* (1990) 497 *U.S.* 836, 110 *S.Ct.* 3157, 111 *L.Ed.2d* 666, *supra*, §17.)

(2) *Legislative Intent.* P.C. 1347 is meant to allow courts to employ unusual procedures to protect the rights of a child witness, the rights of the defendant, and the integrity of the judicial process. In exercising their discretion, courts necessarily will be required to balance the defendant's rights against the need to protect a child witness and to preserve the integrity of the court's truthfinding function. "This discretion is intended to be used selectively when the facts and circumstances in the individual case present compelling evidence of the need to use these unusual procedures." (P.C. 1347(a).)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Rule.* P.C. 1347(b) was amended in 1998 to raise the maximum age of the minor to 13 years.

See 37 *McGeorge L. Rev.* 294 [constitutional issues raised by P.C. 1347]; 48 *U.C.L.A. L. Rev.* 185 [law and policy issues concerning use of videoconferencing technology in trial proceedings]. (2) *Legislative Intent.* The portion of P.C. 1347(a) quoted in the text was amended in 2005 to change the word "unusual" to "alternative."



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##### bb. Motion, Hearing, and Order.

#### 3 *Witkin Cal. Evid. Presentation* § 218

[§ 218] Motion, Hearing, and Order.

(1) *Noticed Motion or Court's Own Motion.* The order granting televised testimony may be made upon the prosecutor's written notice. The notice must be made at least 3 days prior to the date of the preliminary hearing or trial date on which the testimony of the minor is scheduled. Alternatively, the court may make the order on its own motion during the course of the proceeding. (P.C. 1347(b).)

(2) *Necessary Findings by Court.* The order may be made if the court makes all of the following findings:

(a) The minor's testimony will involve reciting facts (1) of an alleged sexual offense committed on or with the minor, or (2) that show that the minor is a victim of a violent felony, as defined in P.C. 667.5(c). (P.C. 1347(b)(1); on P.C. 667.5(c), see 3 *Cal. Crim. Law* (3d), *Punishment*, §336.) Beginning January 1, 2001, the minor's testimony must involve reciting facts of an alleged sexual offense committed on or with the minor. The second part of P.C. 1347(b)(1) will no longer be operative.

(b) The impact on the minor of one or more of the following factors is shown by clear and convincing evidence to be so substantial that the minor would be "unavailable as a witness" unless closed-circuit television is used:

(1) *Threats* of serious bodily injury to be inflicted on the minor or a family member, of incarceration or deportation of the minor or a family member, or of removal of the minor from the family or dissolution of the family, in order to dissuade the minor from attending or giving testimony, or to prevent the minor from reporting the alleged sexual offense or from assisting in a criminal prosecution. (P.C. 1347(b)(2)(A).)

(2) *Use of a firearm* or another deadly weapon during the commission of the crime. (P.C. 1347(b)(2)(B).)

(3) *Infliction of great bodily injury* on the victim during the commission of the crime. (P.C. 1347(b)(2)(C).)

(4) *Conduct on the part of the defendant or defense counsel* during the hearing or trial that causes the minor to be unable to continue his or her testimony. (P.C. 1347(b)(2)(D).)

(c) The closed-circuit television equipment available would *accurately communicate* the minor's image and demeanor to the judge, jury, defendant, and attorneys. (P.C. 1347(b)(3).)

(3) *Matters To Be Considered by Court.* When determining whether to order televised testimony, the court must consider (a) the age of the minor, (b) the relationship between the minor and the defendant or defendants, (c) any handicap or disability of the minor, and (d) the nature of the acts charged. The minor's refusal to testify will not alone constitute sufficient evidence that televised testimony is necessary. (P.C. 1347(b).)

(4) *Hearing.* The hearing on the motion must be conducted out of the presence of the jury. (P.C. 1347(d)(1).) In determining the merits of the motion, the court may neither compel the minor to testify at the hearing, nor deny the motion on the ground that the minor has not testified. (P.C. 1347(d)(2).)

(5) *Procedure for Determining Impact of Factors.* In determining whether the impact on the minor of one or more of the four factors set forth above (see P.C. 1347(b)(2)(A)-(b)(2)(D), *supra*) is so substantial that the minor is unavailable as a witness unless closed-circuit television is used, the procedure, set forth in P.C. 1347(d)(3), is as follows:

(a) The court may question the minor in chambers, or at some other "comfortable place" other than the courtroom, on the record for a reasonable period of time with the support person, the prosecutor, and defense counsel present.

(b) The defendant must not be present.

(c) The court must conduct the questioning of the minor and must not permit the prosecutor or defense counsel to examine the minor. The prosecutor and defense counsel must be permitted, however, to submit proposed questions to the court before the session in chambers.

(d) Defense counsel must be afforded a reasonable opportunity to consult with the defendant before the session in chambers concludes.

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Necessary Findings by Court.*

(a) *Recitation of facts:* Under P.C. 1347(b)(1), as amended in 2001, 2002, and 2005, the minor's testimony must involve recitation of any of the following: (1) an alleged sexual offense committed on or with the minor; (2) an alleged violent felony, as defined in P.C. 667.5(c), of which the minor is a victim; (3) an alleged felony offense specified in P.C. 273a or P.C. 273d of which the minor is a victim. (b) *Impact on minor:* Under P.C. 1347(b)(2), as amended in 2005, the factors showing impact on the minor are:

(1) Testimony by the minor in the presence of the defendant would result in the minor suffering serious emotional distress so that the minor would be unavailable as a witness. (P.C. 1347(b)(2)(A).)

(2) The defendant used a deadly weapon in the commission of the offense. (P.C. 1347(b)(2)(B).)

(3) The defendant threatened serious bodily injury to the minor or the minor's family, threatened incarceration or deportation of the minor or a family member, threatened removal of the minor from the minor's family, or threatened the dissolution of the minor's family, in order to prevent or dissuade the minor from attending or giving testimony, or to prevent the minor from reporting the alleged sexual offense, or from assisting in criminal prosecution. (P.C. 1347(b)(2)(C).)

(4) The defendant inflicted great bodily injury on the minor in the commission of the offense. (P.C. 1347(b)(2)(D).)

(5) The defendant or his or her counsel behaved during the hearing or trial in a way that caused the minor to be unable to continue his or her testimony. (P.C. 1347(b)(2)(E).)



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##### cc. Taking of Testimony.

#### 3 *Witkin Cal. Evid. Presentation* § 219

#### [§ 219] Taking of Testimony.

P.C. 1347 outlines the procedure to be followed when the motion is granted and the court orders the testimony of the minor to be taken in another place outside of the courtroom.

(1) *Court's Statement of Reasons.* The court must make a brief statement on the record, outside of the presence of the jury, of the reasons supporting its order. Although the statement need not include traditional findings of fact, the reasons must be specified sufficiently to permit meaningful review and to demonstrate that discretion was exercised in a careful, reasonable, and equitable manner. (P.C. 1347(e)(1).)

(2) *Chambers Meeting Before Taking Testimony.* The minor must come to the judge's chambers before the taking of his or her testimony to meet for a reasonable period of time with the judge, the prosecutor, and defense counsel. A support person for the minor (see P.C. 868.5, *supra*, §213) must also be present. The purpose of the meeting is to explain the court process to the minor and to allow the attorneys an opportunity to establish rapport with the minor to facilitate later questioning by closed-circuit television. The participants must not discuss the defendant or any of the facts of the case with the minor during this meeting. (P.C. 1347(g).)

(3) *Minor in Courtroom for Identification.* The court may order the minor to be brought into the courtroom for a limited purpose, including the identification of the defendant, as the court deems necessary. (P.C. 1347(h).)

(4) *One-Way or Two-Way Circuit.* If the court orders the use of closed-circuit television, two-way closed-circuit television will be used. However, if the impact on the minor of one or more of the factors enumerated in P.C. 1347(b)(2)(A)-(b)(2)(D) (see *supra*, §218) is shown by clear and convincing evidence to be so substantial as to make the minor unavailable as a witness even if two-way closed-circuit television is used, then one-way closed-circuit television may be used. The prosecution must give the defendant at least 30 days' written notice of its intent to seek the use of one-way television or show that good cause justifies otherwise. (P.C. 1347(c), applicable only to offenses alleged to have been committed on or after January 1, 1992 (see Stats. 1991, Chap. 948, §2).)

(5) *Examination.* The examination must be under oath, and the defendant must be able to see and hear the minor witness. If two-way closed-circuit television is used, the defendant's image must be transmitted live to the witness. (P.C. 1347(i).)



(6) *Persons Who May Be Present.* Only the minor, a support person, a nonuniformed bailiff, and, after consultation with the prosecution and the defense, a representative appointed by the court, may be physically present for the testimony. One videotape will record the minor's image and testimony, and a separate videotape will record the support person's image. (P.C. 1347(f).)

(7) *Instructions to Jury, Counsel, and Support Person.* The court must instruct the jurors that they are to draw no inferences from the use of the closed-circuit television as a means of facilitating the minor's testimony. (P.C. 1347(e)(2).) The court must instruct respective counsel, outside the jury's presence, that they are not to comment during the trial on the use of closed-circuit television procedures. (P.C. 1347(e)(3).) The court must instruct the support person, outside the jury's presence, that he or she is not to coach, cue, or attempt to influence the minor's testimony. (P.C. 1347(e)(4).)

(8) *Record of Examination.* The court must order that a complete record of the minor's examination, including the images and voices of everyone who participates in the examination, be made and preserved on video tape in addition to being stenographically recorded. The videotape must be transmitted to the clerk of the court, and must be made available for viewing to the prosecutor, the defendant, and the defendant's attorney during ordinary business hours. The videotape must be destroyed 5 years after the date of entry of judgment; but if an appeal is filed, it must not be destroyed until final judgment on appeal. The videotape is subject to a protective order of the court for the purpose of protecting the witness' privacy. (P.C. 1347(e)(5).) P.C. 1347(e)(5) does not affect P.C. 868.7(b), providing for exclusion of the public during testimony of a minor at a preliminary hearing (see 4 Cal. Crim. Law (3d), *Pretrial Proceedings*, §137).

(9) *Disqualification of Witnesses.* Nothing in P.C. 1347 affects the disqualification of witnesses under *Ev.C. 701*. (P.C. 1347(j); on *Ev.C. 701*, see 2 Cal. Evidence (4th), *Witnesses*, §41.)

(10) *Cost of Examination.* The court must bear the cost of examination by contemporaneous closed-circuit television out of its existing budget. (P.C. 1347(k).)

**SUPPLEMENT:** [This section is current through the latest supplement]

(6) *Persons Who May Be Present.* P.C. 1347(f) was amended in 2005 to add "any technicians necessary to operate the closed-circuit equipment" to those who may be present.

(11) *(New) Representation of Defendant During Testimony.* "Nothing in this section shall be construed to prohibit a defendant from being represented by counsel during any closed-circuit testimony." (P.C. 1347(l), added in 2005.)



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#### E. Examination of Minor Witness.

#### 2. Child Custody Termination and Dependency Proceedings.

#### 3 *Witkin Cal. Evid. Presentation* § 220

[§ 220] Child Custody Termination and Dependency Proceedings.

A minor's testimony may be taken in chambers in two kinds of proceedings involving improper parental custody. (See *17 Pacific L. J.* 753.)

(1) *Proceeding To Declare Child Under 18 Free From Parental Custody.* (*Family C. 7892, 10 Summary (9th), Parent and Child, §181 et seq.*) The child's testimony may be taken in chambers and outside the presence of the child's parent or guardian if the child's parent or guardian is represented by counsel, the counsel is present, and any of the following circumstances exist:

(a) The court determines that testimony in chambers is necessary to ensure truthful testimony. (*Family C. 7892(a)(1), (b).*)

(b) The child is likely to be intimidated by a formal courtroom setting. (*Family C. 7892(a)(2), (b).*)

(c) The child is afraid to testify in front of the child's parent or guardian. (*Family C. 7892(a)(3), (b).*)

A finding under *Family C. 7892* must be supported by clear and convincing evidence. (*Family C. 7892(c).*) (See *In re Amber D.* (1991) 235 C.A.3d 718, 722, 286 C.R. 751 [court is not required to hear testimony to make determination regarding necessity of in-chambers testimony; construing language of former C.C. 232(b), predecessor to *Family C. 7892*].)

After testimony in chambers, the parent or parents of the child may elect to have the court reporter read back the testimony or have the testimony summarized by counsel for the parent or parents. (*Family C. 7892(d).*)

(2) *Juvenile Court Dependency Proceeding.* (Welf.C. 350(b), *10 Summary (9th), Parent and Child, §665 et seq.*) Welf.C. 350(b) contains essentially the same provision on testimony in chambers as *Family C. 7892*. (See *In re Mary S.* (1986) 186 C.A.3d 414, 422, 230 C.R. 726.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Proceeding To Declare Child Under 18 Free From Parental Custody.*

*Cross-Reference:* *10 Summary (10th), Parent and Child, §307 et seq.*

(2) *Juvenile Court Dependency Proceeding.*

*Cross-Reference:* 10 *Summary* (10th), *Parent and Child*, §589 et seq. *West's Key Number Digest*, Infants k.207



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## IX. DIRECT EXAMINATION: SPECIAL PROBLEMS

## F. Other Special Circumstances for Examining Witnesses.

## 1. Adult Prosecuting Witness in Case Involving Sex Crime.

*3 Witkin Cal. Evid. Presentation § 221*

[§ 221] Adult Prosecuting Witness in Case Involving Sex Crime.

An adult prosecuting witness in cases involving certain sexual offenses is entitled to have *support persons* in attendance under the same conditions as a child prosecuting witness in those cases (see *supra*, §213). (P.C. 868.5.)

In *People v. Patten* (1992) 9 C.A.4th 1718, 12 C.R.2d 284, defendant was charged with rape and oral copulation. Under P.C. 868.5, Kathy, the adult victim, was allowed to have two support persons with her as she testified, one of whom was her sister Karen, who was also a prosecution witness. Karen testified before Kathy did. Defendant, who was convicted of both charges, contended that P.C. 868.5 is inherently prejudicial. *Held*, judgment affirmed.

(a) *Statute not inherently prejudicial.*

(1) Defendant argued that a case-specific showing that support persons serve an essential state interest is necessary because their presence encroaches upon the fundamental right to a fair trial by clothing the victim in a "mantle of veracity," and by informing the jury that the victim is so emotionally shattered that she cannot testify without assistance. This argument is without merit. (9 C.A.4th 1725.)

(2) In analyzing statutes that provide for the exclusion of the press and public when a minor victim of specified sex crimes testifies or that allow minor victims to testify via closed-circuit television or behind a screen, the United States Supreme Court held that the *mere use* of those procedures violated a constitutional right, hence, required a case-specific finding of necessity based on the victim's need for special protection. (9 C.A.4th 1726, citing *Globe Newspaper Co. v. Superior Court* (1982) 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248, 7 Summary (9th), *Constitutional Law*, §299, *Coy v. Iowa* (1988) 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857, *supra*, §16, and *Maryland v. Craig* (1990) 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666, *supra*, §17.)

(3) However, the fact that P.C. 868.5 does not require a case-specific showing of necessity does not make it unconstitutional per se. "The statute clearly encompasses circumstances when the support persons are present in the audience section of the courtroom and without having any particular attention drawn to them. Such a procedure would result in minimal, if any, influence on a jury and would not rise to a level of possible infringement on the constitutional guarantee of due process." (9 C.A.4th 1727.) Hence, "[t]he utilization of support persons is not by itself a practice that presents an unacceptable risk that impermissible factors will come into play which might erode the presumption of innocence." (9 C.A.4th 1733.)

(b) *Factors influencing right to fair trial.* Where the actual procedures employed in the use of a support person

might unfairly influence the jury's determination of credibility, the trial judge should explore, on the record, both the necessity of the procedure and the viability of alternatives. (9 C.A.4th 1733.) The factors that affect fairness include the following:

(1) The relationship of the support person to the victim. An unrelated person is likely to be viewed by the jury as vouching for the victim's veracity, while a relative is likely to be viewed as merely providing support. Here, the jury was aware from Karen's testimony that she believed her sister's version of the events. Hence, any possible influence on the jury resulting from her presence as a support person was minimal. (9 C.A.4th 1731.)

(2) The location of the support person in relation to the victim. The closer the support person is located to the victim the higher the risk that the jury might be influenced. And the risk is especially high if the person has actual physical contact with the victim. However, the younger that the victim is the more likely that the jury would understand the need for a support person under any circumstances. (9 C.A.4th 1732.)

(3) Whether the support person does anything, such as crying, nodding the head, or hand motions, that might influence the victim or the jury. (9 C.A.4th 1732.)

(4) The nature of the defense. The credibility of the victim is more important, for example, where the defense is consent rather than alibi. And, as a tactical matter, the defendant may want the jury to view the victim as an emotionally unstable individual who needs to rely on a support person. (9 C.A.4th 1732.)

(5) Whether the trial judge has given a warning concerning the presence of a support person. If the presence is clearly known to the jury, the trial judge might admonish the jury to disregard it as a collateral matter unrelated to guilt or innocence. However, admonishment might not be desirable if it would draw undue attention to the presence of an otherwise unobtrusive support person. (9 C.A.4th 1732.)

(c) *No showing of unacceptable risk.* Without a record detailing how the procedure was actually carried out, it is impossible to identify particular factors demonstrating that the jury may have been unfairly influenced by the presence of support persons. Here, the record was devoid of any information regarding the utilization of the support persons, other than that they were identified, their presence was requested by Kathy, and Karen testified before Kathy. Defendant presented no facts that this practice posed an unacceptable risk or that the trial judge should have required a showing of necessity for the procedure. (9 C.A.4th 1733.) Nor did he present any facts supporting a finding that Karen posed a substantial risk of influencing or affecting the content of Kathy's testimony, or in fact did so. (9 C.A.4th 1728.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*Globe Newspaper Co. v. Superior Court:*

*Cross-Reference:* 7 Summary (10th), *Constitutional Law*, §420.



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## CHAPTER XI - Presentation At Trial

### IX. DIRECT EXAMINATION: SPECIAL PROBLEMS F. Other Special Circumstances for Examining Witnesses.

#### 2. Examination of Disabled Person. a. In General.

3 Witkin Cal. Evid. Presentation § 222

[§ 222] In General.

(1) *Rule.* Courts may make reasonable accommodations for disabled persons who have been the victims of sexual or other specified offenses in order to ensure that they are able to participate effectively in criminal proceedings. (P.C. 1347.5(a).) The applicable criminal proceedings are those in which the defendant is charged with violating P.C. 220, 243.4, 261, 261.5, 264.1, 273a, 273d, 285, 286, 288, 288a, 288.5, 289, 314(1), 647.6, or with an attempt to violate one of those statutes, and the alleged victim is a person with a disability. (P.C. 1347.5(b).)

(2) *Disability Defined.* For purposes of P.C. 1347.5, "disability" has the same meaning as in *Govt.C. 11135(c)(1)*, (c)(2), i.e., the person has a physical or mental impairment that substantially limits one or more of the person's major life activities, or has a record of such an impairment. (P.C. 1347.5(a)(1).)

(3) *Accommodations.* The accommodations a court may make include but are not limited to:

(a) Allowing the person reasonable periods of relief from examination and cross-examination, during which the person may retire from the courtroom. (P.C. 1347.5(b)(1).)

(b) Allowing the person to use a support person, a regional center representative providing services to developmentally disabled individuals, or another person necessary to facilitate the communication or physical needs of developmentally disabled individuals. (P.C. 1347.5(b)(2).)

(c) Removal by the judge of his or her robe if the judge believes this formal attire prevents full participation of the person with a disability because it is intimidating to the person. (P.C. 1347.5(b)(3).)

(d) Relocation within the courtroom of the judge, parties, witnesses, support persons, and court personnel to facilitate a more comfortable and personal environment, as well as accommodating any specific requirements for communication by the disabled person. (P.C. 1347.5(b)(4).)

(4) *Videotaping.* The prosecutor may apply for an order that the disabled person's testimony at the preliminary hearing, in addition to being stenographically recorded, be recorded and preserved on videotape. The application must be in writing and made 3 days before the hearing. If the application is timely received, the judge must order the testimony to be videotaped, and the videotape must be transmitted to the court clerk. (P.C. 1347.5(c)(1), (c)(2).)

At the time of trial, the videotape may be admitted as former testimony under *Ev.C. 1291*, if the court finds that

further testimony would cause the disabled person emotional trauma so that he or she is medically unavailable or otherwise unavailable within the meaning of *Ev.C. 240*. (P.C. 1347.5(c)(3).)

The videotape is subject to a protective order for the purpose of protecting the disabled person's privacy. P.C. 1347.5(c) does not affect the provisions of P.C. 868.7(b), requiring the availability to the public of the transcript of a witness' testimony taken in a proceeding in which public access was restricted during the witness' examination. (P.C. 1347.5(c)(4).)

(5) *Contemporaneous Viewing of Testimony*. Examination of the disabled person must be under oath, and the defendant must be able to see and hear the disabled person. If two-way closed-circuit television is used (see *infra*, §223), the defendant's image must be transmitted live to the disabled person. (P.C. 1347.5(h).)

(6) *Traditional Grounds for Disqualifying Witness Retained*. The statute is not intended to affect the disqualification of witnesses for incompetence under *Ev.C. 701*. (P.C. 1347.5(i); on *Ev.C. 701*, see 2 *Cal. Evidence (4th)*, *Witnesses*, §41.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Rule*. P.C. 868.8 (Supp., *supra*, §212) was amended in 2001 to make the protections of that statute applicable to disabled as well as minor witnesses.

P.C. 1347.5(b) was amended in 2004 to add criminal proceedings under P.C. 368 (crimes against elder or dependent adults).

(2) *Disability Defined*. *Govt.C. 11135(c)*, as amended in 2001, no longer directly defines "disability" but adopts the definition contained in *Govt.C. 12926*. (See 8 *Summary* (10th), *Constitutional Law*, §§916, 936.)

(3) *Accommodations*. P.C. 868.8 (Supp., *supra*, §212) was amended to make the protections of that statute applicable to disabled as well as minor witnesses.

(b) *Allowing use of support person*: P.C. 1347.5(b)(2) was amended to substitute "physical needs of the person with a disability" for "physical needs of developmentally disabled individuals."



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#### F. Other Special Circumstances for Examining Witnesses.

##### 2. Examination of Disabled Person.

##### b. Testimony by Closed-Circuit Television.

#### 3 Witkin Cal. Evid. Presentation § 223

[§ 223] Testimony by Closed-Circuit Television.

(1) *In General.* On written notice by the prosecutor at least 3 days before the date of the preliminary hearing or trial date on which the testimony of the disabled person is scheduled, or during the course of the proceeding on the court's own motion, the court may order that the disabled person's testimony be taken by "contemporaneous examination and cross-examination in another place and out of the presence of the judge, jury, and defendant, and communicated to the courtroom by means of two-way closed-circuit television." (P.C. 1347.5(d).)

(2) *Findings.* The court's order must be based on the following findings:

(a) The disabled person will be called on to testify as to facts concerning an alleged sexual offense, or other crime specified in P.C. 1347.5(b) (*supra*, §222), committed on or against the disabled person. (P.C. 1347.5(d)(1).)

(b) The impact on the disabled person of one or more of the factors enumerated, *infra*, this section, is shown by clear and convincing evidence to be so substantial as to make the person unavailable as a witness unless closed-circuit television is used. The disabled person's refusal to testify does not by itself constitute sufficient evidence that the closed-circuit television procedure is necessary, but the court may take into account the relationship between the disabled person and the defendant or defendants. (P.C. 1347.5(d)(2).)

(3) *Basis for Finding of Impact.* Under P.C. 1347.5(d)(2), the following factors may be relied on for a finding that the impact of testifying without the closed-circuit television procedure will render the disabled person unavailable as a witness:

(a) Threats of serious bodily injury to be inflicted on the disabled person or a family member, of incarceration, institutionalization, or deportation of the disabled person or a family member, or of removal of the disabled person from his or her residence by withholding needed services when the threats come from a service provider, in order to prevent or dissuade the disabled person from attending or giving testimony at any trial or court proceeding or to prevent the person from reporting the alleged offense or from assisting in criminal prosecution.

(b) Use of a firearm or any other deadly weapon during commission of the crime.

(c) Infliction of great bodily injury on the disabled person during commission of the crime.

(d) Conduct by the defendant or defense counsel during the hearing or trial that causes the disabled person to be



unable to continue his or her testimony.

(4) *Hearing.* The hearing on the motion must be conducted out of the jury's presence, and the disabled person may not be compelled to testify, nor may his or her refusal to testify be used to justify denial of the motion. In determining the question of impact (see P.C. 1347.5(d)(2), *supra*), the judge may question the disabled person in chambers or some other comfortable place, on the record and for a reasonable period of time, with the prosecutor, defense counsel, and support person (as allowed under P.C. 1347.5(b)(2), *supra*, §222) present. The defendant may not be present, but must be given the opportunity to observe the proceedings by closed-circuit television, and defense counsel must be given an opportunity to consult with the defendant prior to the conclusion of the session in chambers. During the hearing, the judge must explain the process to the disabled person. (P.C. 1347.5(e).)

(5) *Steps Required Where Application Approved.* Where the court approves use of the closed-circuit television procedure, it must do all of the following (P.C. 1347.5(f)):

(a) Make a brief statement, on the record and outside the jury's presence, of the reasons supporting the order. The reasons must be "set forth with sufficient specificity to permit meaningful review and to demonstrate that discretion was exercised in a careful, reasonable, and equitable manner."

(b) Instruct the jurors that "they are to draw no inferences from the use of closed-circuit television as a means of assuring the full participation of the victim who is a person with a disability by accommodating that individual's disability."

(c) Instruct counsel, outside of the jury's presence, that they may make no comment during the trial on the use of closed-circuit television procedures.

(d) Instruct any support person that he or she may not coach, cue, or in any way influence or attempt to influence the testimony of the disabled person.

(e) Order that the examination be videotaped. The videotape must be transmitted to the court clerk and made available for viewing to counsel and the defendant. It must be destroyed after 5 years have elapsed from the date of entry of judgment, but, if an appeal is taken, not until the final judgment on appeal is ordered.

(6) *Disabled Person's Appearance in Court.* Even where the application for closed-circuit television testimony is approved, the judge may order the disabled person to appear in court for limited purposes, including identification of the defendant. (P.C. 1347.5(g).)

(7) *Cost of Examination.* The cost of examination by closed-circuit television is to be borne by the court out of its existing budget. (P.C. 1347.5(j).)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER XI - Presentation At Trial

### X. CROSS-EXAMINATION

#### A. In General.

#### 1. Nature and Purposes.

3 Witkin Cal. Evid. Presentation § 224

[§ 224] Nature and Purposes.

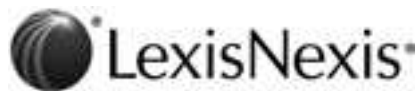
(1) *Nature*. Cross-examination is "the examination of a witness by a party other than the direct examiner upon a matter that is within the scope of the direct examination of the witness." (Ev.C. 761.) And "each other party" may cross-examine "in such order as the court directs." (Ev.C. 773.) (On use of leading questions, see *supra*, §166.)

(2) *Dual Purposes*. The chief purpose of cross-examination is to test the credibility, knowledge and recollection of the witness. (*Sharp v. Hoffman* (1889) 79 C. 404, 408, 21 P. 846; *Razzo v. Varni* (1889) 81 C. 289, 292, 22 P. 848 ["to sift, explain, or modify what has been said on the examination in chief, and to discredit the witness"]; *Neal v. Neal* (1881) 58 C. 287, 288; *People v. Guthreau* (1980) 102 C.A.3d 436, 445, 162 C.R. 376 [testing credibility of witness]; see *infra*, §238 et seq.)

The other purpose is to elicit additional evidence. In *People v. Whitehead* (1952) 113 C.A.2d 43, 48, 247 P.2d 717, the court said, quoting 5 Wigmore, §1368 (now 5 Wigmore (Chadbourn Rev.) §1368): "The remaining and qualifying circumstances of the subject of testimony will probably remain suppressed or undisclosed, not merely because the witness frequently is a partisan, but also and chiefly because his testimony is commonly given only by way of answers to specific interrogatories ... and the counsel producing him will usually ask for nothing but the facts favorable to his party. If nothing more were done to unveil all the facts known to this witness, his testimony (for all that we could surmise) might present half-truths only. Someone must probe for the possible (and usual) remainder. The best person to do this is the one most vitally interested, namely, the opponent. Cross-examination, then, i.e., further examination by the opponent, has for its first utility the extraction of the remaining qualifying circumstances, if any, known to the witness, but hitherto undisclosed by him." (See generally 1 McCormick 5th, §19 et seq.; 5 Wigmore (Chadbourn Rev.) §1367 et seq.; C.E.B., 1 Civ. Proc. During Trial 3d, §11.82 et seq.; C.E.B., Effective Direct and Cross-Examination, Chap. 5; Rutter Group, 2 Civil Trials and Evidence §10:90 et seq.; 25 U.C.L.A. L. Rev. 547; 81 Am.Jur.2d (1992 ed.), Witnesses §800; 6 Am.Jur. Trials 201 [cross-examination of plaintiff and plaintiff's witnesses]; 6 Am.Jur. Trials 297 [cross-examination of defendant]; 6 Am.Jur. Trials 423 [collateral cross-examination of medical witness].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Dual Purposes*. See 81 Am.Jur.2d (2004 ed.), Witnesses §770 et seq.; 1 McCormick 6th, §19 et seq. *West's Key Number Digest*, Witnesses k.266 et seq.



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## CHAPTER XI - Presentation At Trial

### X. CROSS-EXAMINATION

#### A. In General.

#### 2. Effects of Denial or Undue Restriction.

##### a. Denial or Restriction by Court.

##### 1. Civil Cases.

3 Witkin Cal. Evid. Presentation § 225

[§ 225] Civil Cases.

The right of cross-examination is fundamental, and its denial or undue restriction is frequently held to be reversible error. (See *Jackson v. Feather River & Gibsonville Water Co.* (1859) 14 C. 18, 23; *Estate of Kasson* (1900) 127 C. 496, 505, 59 P. 950 [in heirship proceeding, with several parties, each has independent right of cross-examination of any witness]; *Estate of Lagersen* (1959) 169 C.A.2d 359, 364, 337 P.2d 102 [undue restriction held serious error though not reversible under circumstances]; *Graham v. Graham* (1959) 174 C.A.2d 678, 686, 345 P.2d 316 [same; proceeding by husband to modify alimony and child support award, judge made order without allowing wife's attorney to cross-examine husband on needs of himself and his new wife]; *McCarthy v. Mobile Cranes* (1962) 199 C.A.2d 500, 506, 509, 18 C.R. 750 [reversible error per se]; *Mueller v. J. C. Penney Co.* (1985) 173 C.A.3d 713, 722, 219 C.R. 272 [husband was improperly denied right to cross-examination in action for loss of consortium, which had been consolidated with wife's action for assault and battery; however, error was harmless in unique circumstances of case]; 1 McCormick 5th, §19; 5 Wigmore (Chadbourn Rev.) §§1367, 1397; 81 Am.Jur.2d (1992 ed.), Witnesses §802 et seq.; for similar rule in administrative proceedings, see 1 Cal. Evidence (4th), Introduction, §84.)

In *McCarthy v. Mobile Cranes*, *supra*, a trial of three consolidated negligence actions, counsel for plaintiff technically had rested his own case. *Held*, nevertheless, the trial was not concluded until all the evidence was in, and he had a right to cross-examine a witness in one of the other cases. (199 C.A.2d 508.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 81 Am.Jur.2d (2004 ed.), Witnesses §771 et seq.; 1 McCormick 6th, §19.



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## CHAPTER XI - Presentation At Trial

### X. CROSS-EXAMINATION

#### A. In General.

#### 2. Effects of Denial or Undue Restriction.

##### a. Denial or Restriction by Court.

##### 2. Criminal Cases.

##### aa. In General.

#### 3 Witkin Cal. Evid. Presentation § 226

#### [§ 226] In General.

The right of cross-examination is particularly important in criminal cases, for it is considered implicit in the constitutional right of confrontation (*supra*, §14 et seq.). (See *Alford v. United States* (1931) 282 U.S. 687, 51 S.Ct. 218, 219, 75 L.Ed. 624, 627; *Douglas v. Alabama* (1965) 380 U.S. 415, 85 S.Ct. 1074, 1076, 13 L.Ed.2d 934, 957, 5 Cal. Crim. Law (3d), *Criminal Trial*, §532; *Smith v. Illinois* (1968) 390 U.S. 129, 88 S.Ct. 748, 750, 19 L.Ed.2d 956, 960, *infra*, §283 [name and address of witness]; *Chambers v. Mississippi* (1973) 410 U.S. 284, 93 S.Ct. 1038, 1045, 35 L.Ed.2d 297, 308 [trial court improperly restricted defendant's cross-examination of witness who had previously confessed to charged crime but repudiated confession on stand]; *People v. Manchetti* (1946) 29 C.2d 452, 461, 175 P.2d 533, *infra*, §229; *People v. Murphy* (1963) 59 C.2d 818, 831, 31 C.R. 306, 382 P.2d 346 [impeachment of prosecuting witness]; *People v. Sadow* (1933) 133 C.A. 559, 565, 24 P.2d 521; *People v. Flores* (1936) 15 C.A.2d 385, 401, 59 P.2d 517 [not a matter of privilege but of absolute right]; *People v. Hume* (1942) 56 C.A.2d 262, 267, 132 P.2d 52; *People v. Whitehead* (1952) 113 C.A.2d 43, 48, 247 P.2d 717; *People v. Spinosa* (1953) 115 C.A.2d 659, 664, 252 P.2d 409; *People v. Redwine* (1958) 166 C.A.2d 371, 377, 333 P.2d 188; *People v. Scholl* (1964) 225 C.A.2d 558, 564, 37 C.R. 475; *In re Anthony P.* (1985) 167 C.A.3d 502, 507, 213 C.R. 424, *infra*, §278, citing the text; *People v. Ducu* (1991) 226 C.A.3d 1412, 1414, 277 C.R. 464, *infra*, §230; 81 Am.Jur.2d (1992 ed.), *Witnesses* §803.)

In *People v. Redwine*, *supra*, defendant was charged with deadly assault on his stepdaughter J (Count 1) and his wife (Count 2). He waived a jury trial, stipulating that the preliminary examination transcript could be introduced, but reserved the right to further cross-examine J. J, though ordered to attend and once arrested for failure to do so, was absent again at the trial, and defendant sought to be relieved of his waiver. *Held*, denial was reversible error, and his conviction on Count 2 could not stand. The charge grew out of an altercation involving both his wife and J, and J was a prosecution witness at the preliminary; hence, he had an absolute right to cross-examine her further, and the lower court's order striking her testimony and finding defendant not guilty on Count 1 did not cure the fundamental error. (166 C.A.2d 375.)

In *People v. Scholl*, *supra*, defendant, charged with sex offenses (P.C. 288, 288a) against an 8-year-old girl, sought to cross-examine the child's mother by asking if she had complained of advances made to her by various men. *Held*, refusal was reversible error. Other false accusations of the prosecutrix may be shown (*infra*, §242), and the mother of an alleged child victim is "a second prosecutrix." Her concern for the child may take an aggravated form; and, if

abnormally oriented toward sexual conduct, she may implant ideas in the child's mind. Hence:

"For the same reasons that require a broad freedom of exploration of the child's propensities to fabricate or to imagine sexual crimes, we think a defendant should be allowed to explore, within reasonable range, the possibility of similar propensities or motivation on the part of the adult from and through whom the charge to authority emanates in alleged crimes of this nature." (225 C.A.2d 564.)

"Reasonable latitude in cross-examination is likewise indicated in a case, such as here, where four witnesses, none of whom was acquainted with defendant, testified that the reputation of the mother for truthfulness was not good. In such instances, the possibilities of fabrication are enormous and the resulting detriment to the accused is irreparable." (225 C.A.2d 564.)

**SUPPLEMENT:** [This section is current through the latest supplement]

In *People v. Foss* (2007) 155 C.A.4th 113, 65 C.R.3d 790, a child molestation case, the defense moved for permission to cross-examine a witness, the victim's stepmother, on her possible morbid fear of sexual matters, which, the defense asserted, may have caused her to influence the victim to make her claims that defendant molested her. The trial judge denied the motion, and defendant was convicted. *Held*, affirmed; the motion was properly denied. "Just as the testimony of victims of sexual crimes is no longer deemed inherently suspect, we conclude the testimony of a noncomplaining witness in a sex crime case who may have been a victim herself of unwanted sexual attention or advances, likewise should not be inherently distrusted." (155 C.A.4th 128.) *People v. Scholl* (1964) 225 C.A.2d 558, 37 C.R. 475, text, p. 294, which held to the contrary, does not accurately reflect current law and should not be followed. First, the *Scholl* court made no attempt to apply the appropriate standard of review, which was abuse of discretion. Second, the *Scholl* court apparently failed to require an offer of proof from the defense. "And third, the assumptions and reasoning underlying the *Scholl* court's conclusion are no longer valid because they are outdated and have been disproved." (155 C.A.4th 124.)

See 81 Am.Jur.2d (2004 ed.), Witnesses §772.West's Key Number Digest, Criminal Law k.662.7



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## CHAPTER XI - Presentation At Trial

### X. CROSS-EXAMINATION

#### A. In General.

#### 2. Effects of Denial or Undue Restriction.

##### a. Denial or Restriction by Court.

##### 2. Criminal Cases.

##### bb. Where Foreign Language Involved.

#### 3 *Witkin Cal. Evid. Presentation* § 227

[§ 227] Where Foreign Language Involved.

In *People v. Gutierrez* (1982) 137 C.A.3d 542, 187 C.R. 130, defendant was charged with forcible rape. Police officer C, fluent in English and Spanish, had made the arrest, advised defendant of his rights in Spanish, and, after defendant's waiver, taken his oral confession. On the stand, C testified that defendant stated that he took the prosecutrix "forcibly" from her apartment. Counsel for defendant then sought to cross-examine on the Spanish words used by defendant. The trial judge, pointing out that the court reporter would be unable to take down the foreign words, refused to permit any question calling for a response in Spanish. *Held*, conviction reversed; the ruling was reversible error.

(a) The burden on the court reporter did not warrant the blanket ruling. The parties could have stipulated that the bilingual witness or the interpreter write out the answer for insertion in the reporter's transcript at a later time, or the reporter could report the answer phonetically. And if this case were free of the dual language problem, clearly counsel would have been entitled to ask about the inculpatory words actually used by the defendant. (137 C.A.3d 546.)

(b) The limitation on the right of cross-examination was prejudicial: A substantially different connotation could have been drawn by the jury, and defendant said that he was only trying to force his affections on the prosecutrix (instead of *physically* forcing himself on her). (137 C.A.3d 547.)

A concurring justice, citing Wigmore and other authorities, stated the established rule that, where the gist of the case involves uttering of words in a foreign language, it may be necessary to have the actual words repeated in court in the language in which they were spoken. (137 C.A.3d 549.) A dissenting justice contended that no impairment of the right of cross-examination occurred, for defendant made no effort to show by his testimony or that of an interpreter that there was a different meaning for the word: "His own testimony was that he *never* told the officer he used 'force' against [the prosecutrix]. The issue was clearly not one of different interpretations of the word [defendant] used but, rather, whether he said it at all. The argument there are two meanings is clearly a smoke screen." (137 C.A.3d 553.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER XI - Presentation At Trial

### X. CROSS-EXAMINATION

#### A. In General.

#### 2. Effects of Denial or Undue Restriction.

#### b. Refusal or Failure of Witness To Answer.

##### 1. Refusal.

3 Witkin Cal. Evid. Presentation § 228

[§ 228] Refusal.

(1) *Direct Testimony Struck*. In either a civil or criminal case, where a party is deprived of the benefits of cross-examination of a witness by refusal of the witness to answer, the trial court may strike out the direct examination. (*People v. Price* (1991) 1 C.4th 324, 421, 3 C.R.2d 106, 821 P.2d 610 [trial court properly concluded that witness' unwillingness to reveal names of persons whose statements formed basis of opinions witness proposed to give on direct examination would so impair effective cross-examination that testimony should not be admitted]; see *People v. McGowan* (1926) 80 C.A. 293, 297, 251 P. 643 [defendant, on direct examination, testified that on night of crime, he took woman home (alibi), but refused to give her name and address]; 1 McCormick 5th, §19; 5 Wigmore (Chadbourn Rev.) §1391; 35 Cal. L. Rev. 299; 81 Am.Jur.2d (1992 ed.), Witnesses §804; 4 A.L.R.3d 545.)

The rule is also applied where the refusal to answer is based on a valid claim of privilege. (See *People v. King* (1932) 122 C.A. 50, 53, 10 P.2d 89 [dictum; police officer testified to identification of stolen car by secret motor number in hidden place on body, but refused to divulge location, claiming official privilege]; *People v. Barthel* (1965) 231 C.A.2d 827, 834, 42 C.R. 290 [witness claimed privilege against self-incrimination]; but cf. *People v. Parham* (1963) 60 C.2d 378, 381, 33 C.R. 497, 384 P.2d 1001, 5 Cal. Crim. Law (3d), Criminal Trial, §70 [inability of prosecution to produce privileged F.B.I. reports containing statements of witnesses; motion to strike their testimony properly denied].)

Striking the testimony is the appropriate remedy in most cases; a mistrial will not be granted unless incurable prejudice is shown. (See *People v. Woodberry* (1970) 10 C.A.3d 695, 708, 89 C.R. 330; *Gallaher v. Superior Court* (1980) 103 C.A.3d 666, 673, 162 C.R. 389, citing the text.)

(2) *Trial Court's Discretion To Let Direct Testimony Remain*. The refusal to answer some questions may not be as seriously prejudicial as a total refusal to submit to cross-examination, and the judge has discretion to let the direct examination stand where the unanswered question was relatively unimportant. (See *People v. Robinson* (1961) 196 C.A.2d 384, 390, 16 C.R. 484; *People v. Abner* (1962) 209 C.A.2d 484, 490, 25 C.R. 882.)

In *People v. Reynolds* (1984) 152 C.A.3d 42, 199 C.R. 379, defendant, charged with attempted escape from jail, denied intent to escape, and testified that he broke the window glass in his room in order to smuggle drugs into the jail after having been pressured to do so by four other inmates who had threatened physical injury. The prosecutor asked the names of these inmates, and defendant refused to disclose them "for the reason I'm going to prison and I will have a

snitch jacket on me." Defense counsel suggested that a partial striking of that part of defendant's testimony would be appropriate, but the judge, after admonishing defendant, struck all of his testimony. *Held*, the ruling was not an abuse of discretion.

(a) The right of a defendant to testify in his own defense is fundamental (see *supra*, §11); and, in addition, the jurors are entitled to have the benefit of the defense theory before them. Here, defendant's claim of smuggling drugs was not inherently improbable, and his motive in refusing to answer for fear of retaliation was not baseless. (152 C.A.3d 46.)

(b) However, there is no legal exemption from cross-examination by reason of this fear, and defendant's constitutional right to testify must be considered in light of the right of the prosecution to cross-examine and the authority of the court to strike the testimony where such cross-examination is prevented. (152 C.A.3d 46, 47, citing *People v. McGowan, supra.*) Here, in view of the short period of time involved in the events, partial striking that would allow effective cross-examination would be extremely difficult. (152 C.A.3d 47.)

(c) In view of the effect of such a ruling on the fundamental right of the defendant, the following recommendations are offered to the trial judge:

(1) A full record should be made establishing the basis for the ruling. (152 C.A.3d 47.)

(2) The less drastic option of partial striking should be considered, as in *People v. Robinson, supra.* (152 C.A.3d 48.)

(3) Another option is that the defendant's failure to respond to cross-examination may be considered by the jury in evaluating his credibility; e.g., in a federal case where the court held that the prosecutor's continued questioning on matters when he knew that the defendant would refuse to answer was a proper method of impeachment, intended to present to the jury the prosecution's interpretation of his credibility. (152 C.A.3d 48.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Direct Testimony Struck.* See *Fost v. Superior Court* (2000) 80 C.A.4th 724, 735, 95 C.R.2d 620, 2 Cal. Evidence (4th), Witnesses, Supp., §347, quoting the text; 81 Am.Jur.2d (2004 ed.), Witnesses §773; 1 McCormick 6th, §19. West's Key Number Digest, Witnesses k.284





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## CHAPTER XI - Presentation At Trial

### X. CROSS-EXAMINATION

#### A. In General.

2. Effects of Denial or Undue Restriction.
- b. Refusal or Failure of Witness To Answer.
  2. Unavailability of Witness.

#### 3 *Witkin Cal. Evid. Presentation* § 229

[§ 229] Unavailability of Witness.

The same rule (striking the testimony; *supra*, §228) is applied, although perhaps more subject to the judge's discretion, where the party is deprived of the opportunity for cross-examination by *death or illness* of the witness after the direct examination. (See 1 McCormick 5th, §19; 5 Wigmore (Chadbourn Rev.) §1390; 35 *Cal. L. Rev.* 299; see also *Gallaher v. Superior Court* (1980) 103 *C.A.3d* 666, 673, 162 *C.R.* 389 [when defendant is denied right of cross-examination, due to any reason for which defendant is not accountable, direct testimony should be stricken].)

In *People v. Manchetti* (1946) 29 *C.2d* 452, 175 *P.2d* 533, a shell-shocked veteran, a key witness against defendant, was excused with only slight cross-examination by defendant's associate counsel who was relatively unfamiliar with the case. Later, defendant's chief counsel requested permission to recall him for further cross-examination, and, upon refusal of this request, moved that the testimony be stricken. The motion was denied. The Supreme Court criticized this procedure as an abuse of discretion. (29 *C.2d* 461.) (Cf. *Polk v. Polk* (1964) 228 *C.A.2d* 763, 772, 39 *C.R.* 824 [witness voluntarily left before completion of cross-examination, did not reappear; failure to strike was error, though not prejudicial here].)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 1 McCormick 6th, §19.



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## CHAPTER XI - Presentation At Trial

### X. CROSS-EXAMINATION

#### A. In General.

#### 3. Discretion of Judge To Limit.

3 Witkin Cal. Evid. Presentation § 230

[§ 230] Discretion of Judge To Limit.

(1) *General Theory*. To apply the somewhat conflicting notions of the fundamental right to cross-examine (supra, §225 et seq.), the restriction to the scope of the direct (infra, §231 et seq.), and the wide latitude in testing credibility (infra, §238 et seq.) necessarily calls for a large measure of discretion in the trial judge. This is particularly true where incompetent or prejudicial matter is introduced as impeachment under the limited admissibility rule (1 Cal. Evidence (4th), *Circumstantial Evidence*, §30, and infra, §239). (See generally 1 McCormick 5th, §§24, 29; 81 Am.Jur.2d (1992 ed.), *Witnesses* §849.)

The theory was stated in *East Bay Mun. Util. Dist. v. Kieffer* (1929) 99 C.A. 240, 278 P. 476, as follows: "The field of inquiry in cross-examination for the purpose of testing the credibility of a witness and the weight of his testimony is so extensive that the trial court must be given a wide discretion in order to keep such examination within reasonable bounds; otherwise the trial of cases would be overlong. When an appellate court is called upon to decide whether such discretion has been abused, the inquiry is whether a sufficiently wide range has been allowed to test such credibility and weight rather than whether some particular question should have been allowed." (99 C.A. 261.) (See also *Roche v. Baldwin* (1904) 143 C. 186, 190, 76 P. 956; *Tuolumne Water Power Co. v. Frederick* (1910) 13 C.A. 498, 505, 110 P. 134; *People v. Garcia* (1959) 174 C.A.2d 525, 533, 344 P.2d 855, citing the text.)

(2) *Limiting to Matters Raised in Case in Chief*. The trial judge's discretion should not be "given such elasticity as to permit an adversary party to prove his own case under the guise of cross-examination, by thus propounding questions which are neither directly nor collaterally related to the subject matter of the original examination. The truth sought by a cross-examination must, of course, be in respect of and limited to the material matters to which the witness has testified in chief." (*Manuel v. Flynn* (1907) 5 C.A. 319, 325, 90 P. 463; see infra, §231 et seq.)

(3) *Limiting Repetitive or Collateral Matters*. The judge should refuse to permit questioning on time-wasting irrelevant matters, or on matters already fully covered. "[W]hen questions ... are asked of witness after witness, who disclaim any knowledge of the matters, and the questions are continued down to the intimate details of the life of the deceased and his relations with his children and his grandchildren, it becomes manifest that their purpose is not to elicit any facts, but to make weight, to create an atmosphere before the jury." (*Estate of Martin* (1915) 170 C. 657, 670, 151 P. 138.) (See also *Doudell v. Shoo* (1912) 20 C.A. 424, 450, 129 P. 478; *Dollinger v. San Gabriel Lanes* (1962) 205 C.A.2d 705, 710, 23 C.R. 194 [no showing that answers would be material]; *Garcia v. Hoffman* (1963) 212 C.A.2d 530, 536, 28 C.R. 98 [collateral matters that would tend to confuse]; *People v. St. Andrew* (1980) 101 C.A.3d 450, 461, 161 C.R. 634 [no examination on collateral matters for purpose of eliciting something to be thereafter contradicted].)

(4) *Limiting Dual Representation*. In *People v. Clemmons* (1990) 224 C.A.3d 1500, 274 C.R. 623, defendant was charged with felonies in two informations. Private counsel was retained for defense in the first, and court-appointed counsel represented him in the second. The informations were consolidated for trial, and defendant continued to be represented by separate counsel for each information. After cross-examination of several witnesses by the defense attorney representing defendant on the count to which the witness was testifying, the trial judge announced that only one of the defense attorneys would be permitted to cross-examine a particular prosecution witness; and that, if one attorney wanted to cross-examine a witness where the other attorney was attorney of record, he would have to be associated as counsel in that case. Both counsel and defendant expressed understanding and acquiescence. *Held*, the procedure did not deprive defendant of his constitutional right to counsel.

(a) "Although he was not afforded dual cross-examination of witnesses, defendant was otherwise afforded the benefit of two skilled attorneys dedicated solely to his cause throughout his trial, a benefit normally reserved for defendants facing a possible death penalty." (224 C.A.3d 1505.)

(b) Neither defendant nor his attorneys objected, and there was no indication that they disagreed with the procedure. (224 C.A.3d 1505.)

(c) "The defense asserted by each counsel on defendant's behalf was identical. Nothing in the record suggests that either counsel had any conflict of interest in representing defendant in both cases. Each prosecution witness was cross-examined by one of the attorneys." (224 C.A.3d 1506.)

(5) *Limiting Length*. In *People v. Ducu* (1991) 226 C.A.3d 1412, 277 C.R. 464, a prosecution for sex crimes, the court held that it was within the trial judge's discretion to limit defense counsel's cross-examination of a complaining witness based on time constraints imposed by the witness' need to return to Japan. The witness claimed that delay in her departure would arouse the suspicions of her parents, who were unaware that she had been raped or was testifying against defendant. The judge had placed no limitation on the *substance* of the cross-examination, only on the *time* available to defense counsel, who had agreed in advance to the limitation. Hence, any limitation on questioning in particular areas was the result of counsel's choices in conducting the cross-examination. (226 C.A.3d 1415.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *General Theory*. See 81 Am.Jur.2d (2004 ed.), *Witnesses* §816; 1 McCormick 6th, §§24, 29.

(3) *Limiting Repetitive or Collateral Matters*. See *People v. Cornwell* (2005) 37 C.4th 50, 94, 95, 33 C.R.3d 1, 117 P.3d 622 [in capital murder case, trial judge's limitation of cross-examination of prosecution witness as to his knowledge of three strikes law, if erroneous, did not rise to level of constitutional violation of defendant's right of confrontation; although defense counsel's motive was to show that witness feared incarceration and that was why he had contacted authorities with information about defendant, witness' exact understanding about criminal law was of marginal relevance]. *West's Key Number Digest*, *Witnesses* k.267



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## CHAPTER XI - Presentation At Trial

### X. CROSS-EXAMINATION

#### B. To Elicit Facts: Scope of Direct.

##### 1. Restrictive Rule.

##### a. Nature of Rule.

3 Witkin Cal. Evid. Presentation § 231

[§ 231] Nature of Rule.

The common law "wide-open" rule, which survives in England and a few American states, allows cross-examination on any matter relevant to the issues of the case, regardless of whether the matter was raised on the direct examination. This rule has much scholarly support. (See 1 McCormick 5th, §§21, 27; 6 Wigmore (Chadbourn Rev.) §1885 et seq.)

California, however, follows the federal and majority state rule restricting cross-examination to the scope of the direct examination. (*Ev.C.* 761, 773(a), *supra*, §224; see *Overstreet v. Merritt* (1921) 186 C. 494, 508, 200 P. 11; *People v. Price* (1991) 1 C.4th 324, 474, 3 C.R.2d 106, 821 P.2d 610 [cross-examination proper]; *Wechsler v. Capitol Trailer Sales* (1963) 220 C.A.2d 252, 259, 33 C.R. 680, quoting the text; *Marshall v. Marshall* (1965) 232 C.A.2d 232, 255, 42 C.R. 686; *Nienhouse v. Superior Court* (1996) 42 C.A.4th 83, 93, 49 C.R.2d 573 [officer called by prosecution did not testify on direct examination as to any conversations with defendant; thus, defendant's inquiry to officer about defendant's hearsay statements was not proper cross-examination]; 1 McCormick 5th, §21; 6 Wigmore (Chadbourn Rev.) §1885 et seq.; 81 *Am.Jur.2d* (1992 ed.), *Witnesses* §818; *infra*, §232; for application of rule to cross-examination of adverse witness by his or her own counsel, see *supra*, §207.)

The rule is not inflexible; the judge has discretion to allow the cross-examiner to go outside the scope of the direct. In doing so, however, counsel "interrupts" the cross-examination and is subject to the rule governing direct examination, i.e., no leading questions unless the witness is one who can be examined "as if under cross-examination." (*Ev.C.* 772(c) and Comment; *Ev.C.* 760 and Comment; *supra*, §202 et seq.)

But only the party calling the witness may complain that the cross-examination exceeds its proper limitations. Hence, a codefendant cannot object on that ground to questions asked of the plaintiff's witness when the plaintiff does not object. (*Burke v. Dillingham* (1927) 84 C.A. 736, 741, 258 P. 627.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 81 *Am.Jur.2d* (2004 ed.), *Witnesses* §787; 1 McCormick 6th, §§21, 27. *West's Key Number Digest*, *Witnesses* k.269 et seq.



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## CHAPTER XI - Presentation At Trial

### X. CROSS-EXAMINATION

#### B. To Elicit Facts: Scope of Direct.

##### 1. Restrictive Rule.

##### b. Illustrations.

3 Witkin Cal. Evid. Presentation § 232

[§ 232] Illustrations.

In *Haines v. Snedigar* (1895) 110 C. 18, 42 P. 462, a suit on a promissory note, defendant set up the affirmative defense of a new contract made in settlement of the obligation. Plaintiff's witness proved the execution of the note and nonpayment. On cross-examination, he was asked about the *new contract*, and thereupon, its execution was proved and it was admitted in evidence over objection. *Held*, this was error. Though the court might, as a matter of convenience, permit the defendant to prove the agreement by plaintiff's witness on the stand, it was not proper to admit the agreement in evidence at that time. "It was in effect to inject into the case of the plaintiffs a portion of the defense." (110 C. 21.)

Similarly, in *McClung v. Camp* (1933) 132 C.A. 55, 22 P.2d 238, plaintiff payee, on the stand, proved a note and nonpayment. *Held*, defendant was properly prevented from asking whether plaintiff gave *value* for the note. (132 C.A. 56.)

In *Alkus v. Davies* (1927) 86 C.A. 355, 361, 260 P. 894, an automobile accident case, plaintiff testified on direct examination as to where she was sitting and how she was injured. On cross-examination, she was questioned as to the speed of the car, and then was asked whether she remembered seeing a car ahead. *Held*, this was properly excluded; she was called only to prove her injuries. (86 C.A. 361.)

In *Smellie v. Southern Pac. Co.* (1933) 128 C.A. 567, 18 P.2d 97, plaintiffs called a codefendant as an adverse witness. Defendant company cross-examined, asking whether decedent had used intoxicating liquor that day, a matter not touched upon in direct examination. The purpose of the questioning was to establish the affirmative defense of contributory negligence. *Held*, this was not legitimate cross-examination. (128 C.A. 573.)

In *Wechsler v. Capitol Trailer Sales* (1963) 220 C.A.2d 252, 259, 33 C.R. 680, plaintiff agent, alleging wrongful discharge, sued for salary and commissions. On direct examination, he testified to a May 20 meeting and discussion of the discharge with defendant's president. Defendant's counsel then questioned him on various kinds of alleged misconduct during the employment, but prior to the May 20 meeting. *Held*, objection was properly sustained; counsel could have attained his object later by examining plaintiff as an adverse witness.

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER XI - Presentation At Trial

### X. CROSS-EXAMINATION

#### B. To Elicit Facts: Scope of Direct.

#### 2. Where Criminal Defendant Testifies.

##### a. Nature of Rule.

3 *Witkin Cal. Evid. Presentation* § 233

[§ 233] Nature of Rule.

The restriction to the scope of the direct examination (*supra*, §231) is particularly important where the witness is the defendant in a criminal case. The defendant's privilege allows him or her to refrain from testifying at all, and by taking the stand, the defendant waives the privilege only to the extent of the scope of the direct examination. (See 2 *Cal. Evidence* (4th), *Witnesses*, §428.) The rule is therefore stated in positive terms: The judge has no discretion to allow the defendant, over objection, to be cross-examined beyond the scope of the matters to which he or she voluntarily testified on direct examination. (*Ev.C.* 772(d); *Ev.C.* 761, Comment; see *People v. McCarthy* (1948) 88 C.A.2d 883, 886, 200 P.2d 69; *People v. Malicoat* (1949) 89 C.A.2d 742, 744, 201 P.2d 850; *People v. Farnell* (1957) 156 C.A.2d 393, 400, 319 P.2d 749; *People v. Sims* (1958) 165 C.A.2d 108, 113, 331 P.2d 799, *infra*, §351; *People v. Robinson* (1964) 61 C.2d 373, 392, 38 C.R. 890, 392 P.2d 970, *infra*, §234; *People v. Tealer* (1975) 48 C.A.3d 598, 604, 122 C.R. 144 [even when defendant testifies on his own behalf, privilege against self-incrimination prevents prosecution from questioning him on case generally, and in effect, making him prosecution witness]; 1 McCormick 5th, §26; 8 Wigmore (McNaughton Rev.) §2278; 81 *Am.Jur.2d* (1992 ed.), *Witnesses* §818.)

The federal rule is similar: The accused does not, by testifying on a preliminary matter, become subject to cross-examination as to other issues in the case. (*F.R. Evid.*, *Rule 104(d)*; see 1 Mueller & Kirkpatrick, *Federal Evidence* 2d, §§24, 33.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 81 *Am.Jur.2d* (2004 ed.), *Witnesses* §787; 1 McCormick 6th, §26. *West's Key Number Digest*, *Witnesses* k.277 et seq.



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## CHAPTER XI - Presentation At Trial

### X. CROSS-EXAMINATION

#### B. To Elicit Facts: Scope of Direct.

#### 2. Where Criminal Defendant Testifies.

##### b. Illustrations.

#### 3 *Witkin Cal. Evid. Presentation § 234*

[§ 234] Illustrations.

In *People v. Watson* (1956) 46 C.2d 818, 828, 299 P.2d 243, a police officer testified on direct concerning his inspection of an apartment and the deceased's body, and a conversation with defendant. Defendant then sought to cross-examine him on anything he may have heard from third persons while he was in the apartment. *Held*, this was not only outside the scope of the direct examination, but was inadmissible hearsay.

*People v. Robinson* (1964) 61 C.2d 373, 38 C.R. 890, 392 P.2d 970, is an extreme illustration of how technically the restriction can be applied in a criminal case. R, D and H were charged with first degree murder in a killing accompanying a robbery. When the prosecution rested, H was called by his counsel and asked the single question whether his extrajudicial confession was involuntary. He reiterated his voir dire testimony that it was. The prosecutor, on the theory that the jury could infer voluntariness from truth, first recited each part of the confession, asking whether it was true, and received affirmative answers. But then the prosecutor asked leading questions as to the truth of the facts without reference to the confession. *Held*, it was reversible error to permit this latter inquiry, clearly beyond the scope of the direct examination. (61 C.2d 393.)

The dissent persuasively argues that the error, if any, was not a ground for reversal: (a) The switch in the inquiry came about through a nonresponsive answer, volunteered by H, that everything in his confession was true, and H never objected (and did not appeal). (b) The scope was not exceeded because, despite the change in form of the questions, no new fact was developed. It would have been time wasting for the prosecutor to repeat a ritualistic formula, "Is it true that, as you said in your prior statement," etc. (61 C.2d 411.)

In *People v. Bagwell* (1974) 38 C.A.3d 127, 113 C.R. 122, defendant was charged with murder for stabbing her husband in his sleep. Toward the close of the prosecution's case in chief, the prosecutor offered to prove that about a year earlier, defendant had committed a similar assault which resulted in the victim's death, thus indicating an intent to kill in the present case. The trial judge excluded the evidence under Ev.C. 352 (1 Cal. Evidence (4th), *Circumstantial Evidence*, §17), but gave an equivocal response to defense counsel's inquiry on whether defendant would be subjected to cross-examination about the prior incident if she took the stand. On cross-examination, however, the trial judge allowed the prosecutor to ask questions about the prior event. *Held*, this was error. From the trial judge's earlier remarks, "We'll see how the testimony goes on her direct examination," defendant may have been led to believe that if she, on direct examination, made no mention of the earlier affair, no cross-examination on the subject would be allowed. (38 C.A.3d 139.) "And there can be no doubt of the gross prejudice ensuing from the improper questions, defendant's refusal to answer on the grounds of self-incrimination and her unguarded exculpatory answer." (38 C.A.3d

140.)

**SUPPLEMENT:** [This section is current through the latest supplement]





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## CHAPTER XI - Presentation At Trial

### X. CROSS-EXAMINATION

#### B. To Elicit Facts: Scope of Direct.

#### 3. Rule Relaxed Where Subjects Opened Up. a. Civil Cases.

*3 Witkin Cal. Evid. Presentation § 235*

[§ 235] Civil Cases.

The restrictive rule does not prevent the cross-examiner from seeking new facts concerning the matters raised in the direct. Testimony on direct of a very general character may open up a broad field of inquiry, and the same is true of testimony on direct that contains a broad denial of an issue of the case. It is sometimes said that the direct examination, by touching on one phase of a matter, "opens the door" to the fullest inquiry concerning it. (See *McFadden v. Santa Ana, Orange & Tustin Street Ry. Co.* (1891) 87 C. 464, 469, 25 P. 681; *Jackson v. Feather River & Gibsonville Water Co.* (1859) 14 C. 18, 23; *Zane v. De Onativia* (1903) 139 C. 328, 329, 73 P. 856; *Huyck v. Rennie* (1907) 151 C. 411, 415, 90 P. 929; *Meyer v. McNutt Hosp.* (1916) 173 C. 156, 158, 159 P. 436; *Del Monte Ranch Dairy v. Bernardo* (1917) 174 C. 757, 760, 164 P. 628; *Brown v. Chevrolet Motor Co.* (1919) 39 C.A. 738, 739, 179 P. 697; *Broderick v. Broderick* (1919) 40 C.A. 550, 556, 181 P. 402; *Butters v. The Brawley Star* (1920) 48 C.A. 57, 61, 191 P. 987; 6 Wigmore (Chadbourn Rev.) §1885 et seq.; 59 A.L.R.3d 659 [rebuttal of mother's claim of chastity in paternity suit].)

Thus, in *Del Monte Ranch Dairy v. Bernardo*, supra, defendant filed a counterclaim and took the stand to establish it. On cross-examination, plaintiff sought to elicit the fact that defendant had assigned the claim to a third person. *Held*, it was error to exclude the questions. (174 C. 760.)

In *Meyer v. McNutt Hosp.*, supra, the action was for injuries from burns. Defendant's doctor testified that there was no necessity for hot applications, to indicate the probability that none were used. *Held*, it was proper to cross-examine on the custom of the hospital to use hot water bottles to warm beds even though they were not necessary as hot applications. (173 C. 158.)

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## CHAPTER XI - Presentation At Trial

### X. CROSS-EXAMINATION

#### B. To Elicit Facts: Scope of Direct.

#### 3. Rule Relaxed Where Subjects Opened Up.

##### b. Criminal Cases.

##### 1. Nature of Rule.

3 Witkin Cal. Evid. Presentation § 236

[§ 236] Nature of Rule.

In a criminal case, the defendant "cannot, by testifying to a state of things contrary to and inconsistent with the evidence of the prosecution, thus indirectly denying the testimony against him, but without testifying expressly with relation to the same facts, limit the cross-examination to the precise facts concerning which he testifies. He can be cross-examined with respect to facts or denials which are necessarily implied from the testimony in chief, as well as with respect to facts which he expressly states." (*People v. Teshara* (1904) 141 C. 633, 638, 75 P. 338.)

*Ev.C.* 773 (supra, §231) does not mean that cross-examination "must be confined to a mere categorical review of the matters, dates or times mentioned in the direct examination." Moreover, if a defendant takes the stand and makes a general denial of the crime with which he or she is charged, "the permissible scope of cross-examination is very wide." (*People v. Zerillo* (1950) 36 C.2d 222, 228, 223 P.2d 223; see *People v. Atchley* (1959) 53 C.2d 160, 173, 346 P.2d 764, *infra*, §237; *People v. Ing* (1967) 65 C.2d 603, 611, 55 C.R. 902, 422 P.2d 590, 2 Cal. Evidence (4th), Witnesses, §438; *People v. Schader* (1969) 71 C.2d 761, 770, 80 C.R. 1, 457 P.2d 841; *People v. Phillips* (1985) 41 C.3d 29, 55, 222 C.R. 127, 711 P.2d 423; *People v. Ernst* (1953) 121 C.A.2d 287, 293, 263 P.2d 114; *People v. Butterfield* (1960) 177 C.A.2d 553, 559, 2 C.R. 569; *People v. McDowell* (1965) 234 C.A.2d 54, 59, 44 C.R. 79; *People v. Kadison* (1966) 243 C.A.2d 162, 167, 52 C.R. 114, 2 Cal. Evidence (4th), Witnesses, §428; *People v. Eisenberg* (1968) 266 C.A.2d 606, 612, 72 C.R. 390; *People v. Doebke* (1969) 1 C.A.3d 931, 936, 81 C.R. 391.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Witnesses k.277(2) et seq.



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## CHAPTER XI - Presentation At Trial

### X. CROSS-EXAMINATION

#### B. To Elicit Facts: Scope of Direct.

#### 3. Rule Relaxed Where Subjects Opened Up.

##### b. Criminal Cases.

##### 2. Illustrations.

#### 3 Witkin Cal. Evid. Presentation § 237

[§ 237] Illustrations.

(1) *Defendant Opens Subject*. In *People v. Atchley* (1959) 53 C.2d 160, 346 P.2d 764, defendant, charged with murder of his wife, testified that the gun had fired while he and the victim were struggling for it. On cross-examination, he was required to put on the shirt he wore on the night of the killing, to show how he carried the gun, and to demonstrate with an assistant district attorney his and his wife's movements during the alleged struggle. *Held*, this was permissible cross-examination, for he voluntarily raised these matters on direct. (53 C.2d 173.)

In *People v. Wrigley* (1968) 69 C.2d 149, 70 C.R. 116, 443 P.2d 580, the prosecution was for lewd act with a child. The prosecuting witness testified to numerous talks with defendant about sex and sexual activities. Defendant testified that he had never talked about sex with her and had never been alone with her. During direct examination of defendant, his attorney referred to two books in defendant's library seized by the police--*The Psychology of Sex* and *The Encyclopedia of Sexual Behavior*--which defendant said had been used by him as a student. The prosecutor, in the cross-examination of defendant, read passages from the books. *Held*, this was proper. Ownership of the books and familiarity with their contents supported an inference that defendant was conversant with various sexual aberrations which the prosecuting witness said she heard about from him. This tended to overcome his testimony that he had never discussed sex with her, and to corroborate her testimony that she had learned about deviate sex behavior from him. (69 C.2d 162.)

In *People v. Lynn* (1971) 16 C.A.3d 259, 94 C.R. 16, both defendants took the stand to deny that they had planned to escape from custody in a courthouse struggle that resulted in the fatal shooting of a deputy sheriff. On cross-examination, over objection, the prosecutor questioned them about a successful escape nearly 3 weeks before the charged crime, and also about an unsuccessful escape attempt a week earlier. *Held*, no error. Because a general denial of the crime charged gives a very wide scope for cross-examination, it was proper for the prosecutor to refer back to all preceding events that tended to show a preplanned escape scheme. The evidence controverted defendants' denials as to their purpose, motive and general plan on the day of the shooting (see 1 Cal. Evidence (4th), *Circumstantial Evidence*, §92). (16 C.A.3d 272.)

In *People v. James* (1976) 56 C.A.3d 876, 128 C.R. 733, defendant offered an alibi defense to charges of burglary, robbery and rape. On cross-examination, he was questioned about his activities for the nearly 6 months from the date of the crime to the date when he was apprehended out-of-state. *Held*, the interrogation was proper because it tended to negate the alibi testimony and his implied denial of guilt, and also to cast doubt on the supportive testimony of other

defense witnesses.

(a) If, by inference, the facts to which a defendant testifies on direct examination amount to a denial of the charge, he may then be cross-examined on any matter tending to prove his guilt. "An implied denial of guilt is considered as testimony denying the existence of any evidence relevant on the issue of guilt, which makes cross-examination about the subject of any such evidence properly within the scope of the direct examination." (56 C.A.3d 888.)

(b) The prosecution elicited from defendant, his wife and another witness denials of prosecution implications that defendant had discovered the police were looking for him and left the state to avoid them. In view of the defendant's express alibi testimony, which was an implied denial of guilt, the cross-examination was proper. The prosecution was then able to introduce rebuttal testimony tending to establish that defendant was occasionally visited by his wife so he could receive money while avoiding detection. (56 C.A.3d 889.) (See also *People v. Cartwright* (1980) 107 C.A.3d 402, 414, 415, 166 C.R. 37 [defendant, on direct examination, testified to alibi; on cross-examination, he was properly asked whether he had told police about alibi at time of his arrest].)

(2) *Prosecution Witness Opens Subject*. A prosecution witness may also open the door to a broader cross-examination by the defendant. Thus, in *People v. Whitehead* (1952) 113 C.A.2d 43, 247 P.2d 717, witness E testified on direct to the observed circumstances of the shooting of deceased, but was deliberately not asked any question concerning conversations that occurred at the time. On cross-examination, defense counsel sought to elicit the conversations, but was precluded by a ruling that the cross-examination would have to be confined to the scope of the direct--movements and location. The lower court thus supported the prosecution strategy of compelling defendant to call E as his own witness if he wanted to bring in the conversation. *Held*, this was reversible error. "The proper rule would appear to be that physical acts testified to cannot be arbitrarily separated from the verbal acts accompanying them and made at the same time and place. Such 'verbal acts' also must be considered to be admissible in order to prevent the false coloring of the event, to rebut, explain, qualify and possibly to impeach the testimony concerning the physical acts also occurring at that time and place. In other words when testimony has been introduced relative to an occurrence all parts of that occurrence, verbal as well as physical, are properly within the scope of the cross-examiner's probe. ... Therefore since the prosecution examined the witness as to the occurrence during which the deceased was shot, it may not so limit such examination so as to preclude the cross-examiner from eliciting conversation which was a part of the same occurrence. By examining the witness as it did it thereby voluntarily opened a door which it cannot arbitrarily close, and the cross-examiner may bring out all the facts within the knowledge of such witness as had transpired at the occurrence testified to in chief, and which are material to a thorough understanding thereof." (113 C.A.2d 49.)

In *Gallaher v. Superior Court* (1980) 103 C.A.3d 666, 162 C.R. 389, defendant was accused of murder. At the preliminary examination, the prosecution called L, defendant's principal accuser, stating that he would be questioned only as to the facts leading up to the shooting and defendant's statement immediately afterwards, after which L would "take the Fifth." Over defendant's objection, the magistrate acquiesced in the arrangement, and defendant's attorney was not permitted to cross-examine on events following the shooting (defendant and L leaving the scene together, conversations between the two). *Held*, this was error of constitutional dimension, and prohibition issued to compel setting aside of the information. "[W]hen a prosecution witness testifies to facts tending to establish the guilt of one criminally accused, that witness may be cross-examined on *all* relevant and material matters preceding, concurring with, or following the criminal event, within his knowledge and reasonably related to the issue of guilt or innocence." (103 C.A.3d 672.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Defendant Opens Subject*. See *People v. Smith* (2003) 30 C.4th 581, 615, 134 C.R.2d 1, 68 P.3d 302 [where defendant testified that he confessed to murder and rape in order to ease his conscience, but his confession did not admit every element of every charge, prosecutor was properly permitted to explore motivation for confession, including evidence that defendant did not confess until he was arrested for two unrelated assaults and was suspect in present case]; *People v. Coffman & Marlow* (2004) 34 C.4th 1, 72, 17 C.R.3d 710, 96 P.3d 30 [where, on direct examination, defendant denied ever wanting to kill victim "or anyone else," he opened door to cross-examination regarding murder

occurring in neighboring county].



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## CHAPTER XI - Presentation At Trial

### X. CROSS-EXAMINATION C. To Test Credibility: Wide Latitude. 1. In General.

3 Witkin Cal. Evid. Presentation § 238

[§ 238] In General.

The rule restricting cross-examination to the scope of the direct (*supra*, §231) cannot reasonably be applied to cross-examination designed to *impeach* the witness. Hence, it is often declared that a wide latitude should be allowed in cross-examination testing observation, recollection, and credibility. (See *Jackson v. Feather River & Gibsonville Water Co.* (1859) 14 C. 18, 24; *Sharp v. Hoffman* (1889) 79 C. 404, 408, 21 P. 846; *Santa Ana v. Harlin* (1893) 99 C. 538, 549, 34 P. 224; *Estate of Kasson* (1900) 127 C. 496, 500, 59 P. 950 ["a liberal latitude should have been given appellant on cross-examination to test her intelligence, knowledge, accuracy of memory, disposition to tell the truth, bias, relation to the parties, interest, motive, etc."]; *Estate of Strong* (1916) 172 C. 441, 443, 156 P. 1026 [undue restriction held reversible error]; *Estate of Flood* (1933) 217 C. 763, 785, 21 P.2d 579; *Strauss v. Buckley* (1937) 20 C.A.2d 7, 9, 65 P.2d 1352; *In re Anthony P.* (1985) 167 C.A.3d 502, 507, 213 C.R. 424, *infra*, §278, citing the text; 1 McCormick 5th, §22; 6 Wigmore (Chadbourn Rev.) §1891; C.E.B., 1 Civ. Proc. During Trial 3d, §11.83; *infra*, §239 et seq.; for grounds of impeachment, see *infra*, §259; for limiting rule against impeachment on collateral matters, see *infra*, §341 et seq.)

This policy is particularly important where the witness is a *party* to the action. (*Neal v. Neal* (1881) 58 C. 287, 288; *Stromerson v. Averill* (1940) 39 C.A.2d 118, 125, 102 P.2d 571; *Quackenbush v. Los Angeles Ry. Corp.* (1915) 28 C.A. 173, 176, 151 P. 755.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 1 McCormick 6th, §22. *West's Key Number Digest*, Witnesses k.268(5) et seq.



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## CHAPTER XI - Presentation At Trial

### X. CROSS-EXAMINATION

#### C. To Test Credibility: Wide Latitude.

##### 2. Civil Cases.

##### a. Rule Allowing Otherwise Inadmissible Evidence.

#### 3 Witkin Cal. Evid. Presentation § 239

#### [§ 239] Rule Allowing Otherwise Inadmissible Evidence.

Under the rule of limited admissibility (1 *Cal. Evidence* (4th), *Circumstantial Evidence*, §30), cross-examination to test accuracy of observation or other matters affecting credibility may be proper even though it brings in matters otherwise inadmissible. Thus, in *Wagner v. Atchison, Topeka & Santa Fe Ry. Co.* (1930) 210 C. 526, 292 P. 645, an action for damages for personal injuries resulting from a collision of an automobile and a train, defendant called its claims adjuster and fireman to testify to their observations made of conditions at the scene of the accident. On cross-examination, counsel for plaintiff questioned them on surrounding streets, asking in several questions whether they had noticed wigwag signals at the crossings. Defendant objected that this was intended to convey to the jury the inadmissible fact that these other streets had such signals while the street where the accident occurred had none. *Held*, there was no error; the questions were proper on cross-examination to test the accuracy of the observations made by defendant's witnesses. And, because they were admissible for that purpose, they could not be rendered inadmissible by reason of some possible prejudicial effect that the court could correct by a proper instruction. (210 C. 529.)

In *Inyo Chemical Co. v. Los Angeles* (1936) 5 C.2d 525, 55 P.2d 850, an action for damages sustained by the breaking of defendant city's aqueduct, defendant's maintenance engineer testified that he had previously inspected the area, and it was his opinion, at the time, that no overhead or underground drainage was necessary. On cross-examination, he was asked whether he had authorized construction of many spillways after the break. *Held*, though clearly improper on the issue of negligence (subsequent precautions, 1 *Cal. Evidence* (4th), *Circumstantial Evidence*, §163), the questions were properly allowed "for the purpose of weakening the testimony of defendant's expert witness by showing that he had subsequently changed his opinion as to the necessity of drainage." (5 C.2d 543.)

Similarly, in *Daggett v. Atchison, Topeka & Santa Fe Ry. Co.* (1957) 48 C.2d 655, 313 P.2d 557, a suit was brought for wrongful death arising out of a collision at a railway crossing. The train had been going at approximately the railroad speed limit of 90 miles an hour, and the crossing had a single wigwag signal. After the accident, the speed limit was reduced to 50 miles an hour and a flashing light signal was installed at the request of the Public Utilities Commission. These subsequent precautions, inadmissible on the issue of negligence, were brought out in the following manner:

(a) Plaintiff's counsel called defendant motorman as an adverse witness, and the latter testified that 90 miles an hour was the limit. Further questions relating to speed limits in various places in the area were phrased in the *present tense*, and the witness voluntarily stated that the speed limit "is" (at time of trial) 90 miles an hour. (48 C.2d 665; cf. dissent, 48 C.2d 667, contending that witness was confused by the questions.) *Held*, it was proper thereafter to ask him the

impeaching question, whether the speed limit "is" now 50 miles an hour, which he answered affirmatively.

(b) Plaintiff similarly called defendant's signal engineer who qualified as an expert and testified that he was "absolutely sure" that the single wigwag signal in use at the time of the accident was "the safest type of signal" for that crossing. *Held*, it was proper to ask him the impeaching question concerning the newly installed flashing light signals, for this tended to show that he had subsequently changed his opinion as to the safety of the conditions at the time of the accident. (48 C.2d 664.) (See 9 *Hastings L. J.* 316; *Love v. Wolf* (1967) 249 C.A.2d 822, 831, 58 C.R. 42 [following *Daggett*].)

**SUPPLEMENT:** [This section is current through the latest supplement]





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## CHAPTER XI - Presentation At Trial

### X. CROSS-EXAMINATION

#### C. To Test Credibility: Wide Latitude.

##### 2. Civil Cases.

##### b. Rule Held Inapplicable.

#### 3 Witkin Cal. Evid. Presentation § 240

[§ 240] Rule Held Inapplicable.

*Inyo Chemical Co. v. Los Angeles* (1936) 5 C.2d 525, 55 P.2d 850, *Daggett v. Atchison, Topeka & Santa Fe Ry. Co.* (1957) 48 C.2d 655, 313 P.2d 557, and similar cases (supra, §239) have inspired numerous attempts to bring into negligence trials the inadmissible fact of subsequent precautions, in questions directed to a defense witness either on cross-examination or under *Ev.C.* 776 (supra, §202). In *Pierce v. J.C. Penney Co.* (1959) 167 C.A.2d 3, 334 P.2d 117, the court made it clear that this can be done only where the question is clearly impeaching:

First, in the *Inyo* case, the expert witness was in charge of maintenance and was asked whether he had authorized the subsequent precautionary construction. This evidence of his own conduct, inconsistent with the opinion asserted on the stand, was proper impeachment. (167 C.A.2d 8.)

Second, in the *Daggett* case, the defendant's safety engineer had expressed an opinion that a former signal was the safest type, and was impeached by evidence that defendant, after the accident, changed to a different type. A similar situation was presented in *Laird v. Mather* (1958) 51 C.2d 210, 219, 331 P.2d 617, *infra*, §253. (167 C.A.2d 12.)

Third, in the present case, plaintiff slipped and fell on defendant's polished terrazzo steps. After the accident, an abrasive stripping was applied. Plaintiff, cross-examining defendant's witness L, section manager, asked whether he had testified that the steps were not slippery, and, upon receiving the answer "Yes," asked whether the strips had been applied. The witness, over objection, answered "Yes." The legal issue, said the court, is whether such evidence is admissible to impeach a nonexpert witness who testifies concerning his or her observations, but who had nothing to do with the making of the changes. (167 C.A.2d 6.) And the answer, on principle and authority, is that this is not proper impeachment because it does not involve any conduct on the witness' part inconsistent with his or her testimony. (167 C.A.2d 8.)

The court emphasized that this was not a proper case for impeachment by contradictory evidence (see *infra*, §340) because the contradictory evidence--subsequent precautions--was not competent. (167 C.A.2d 9.) And the objections of policy were summed up as follows: "If the present ruling were to be sustained, then the clearest dictates of logic would require a holding in the next case that the same impeaching (contradictory) type of evidence here elicited on cross-examination may properly be elicited from witnesses called in rebuttal. Such a holding would mean that whenever a defendant in this type of case calls any witness to testify to any observation tending to prove the safety of, or the lack of danger or defectiveness, in his premises at the time of an accident, the door is automatically opened to plaintiff to prove (by way of impeachment) every subsequent repair made or precaution taken. Indeed the defendant could not

avoid this result merely by refraining from calling any witness for the purpose of proving the safety of his premises, because plaintiff could call his employees for cross-examination ... and thereafter impeach them in the same manner." (167 C.A.2d 11.) (See also *Sanchez v. Bagues & Sons Mortuaries* (1969) 271 C.A.2d 188, 191, 76 C.R. 372 [following *J.C. Penney Co.*]; 18 *Hastings L. J.* 677.)

In *Westbrooks v. Ball* (1967) 248 C.A.2d 209, 216, 56 C.R. 422, plaintiff invoked the exception where defendant's employee in charge of safety testifies and is then cross-examined on his adoption of new safety measures. *Held*, the exception did not apply here. Z, defendant's general superintendent, did not direct the changes; some undisclosed person, lower in authority, did so.

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## CHAPTER XI - Presentation At Trial

### X. CROSS-EXAMINATION

#### C. To Test Credibility: Wide Latitude.

##### 3. Criminal Cases.

##### a. In General.

3 Witkin Cal. Evid. Presentation § 241

[§ 241] In General.

The necessity of a wide latitude is also stressed in criminal cases. (See *People v. Ormes* (1948) 88 C.A.2d 353, 359, 198 P.2d 690 [prosecution for perjury, limitation of cross-examination held reversible error]; *Chula v. Superior Court* (1952) 109 C.A.2d 24, 36, 240 P.2d 398 [wide latitude permitted defense counsel in cross-examining court-appointed alienist on insanity issue]; *People v. Duran* (1976) 16 C.3d 282, 293, 127 C.R. 618, 545 P.2d 1322 [trial court erred in denying defendant right to cross-examine prisoner witness on possible inducement, i.e., favorable parole consideration, for his testimony]; *People v. Stewart* (1983) 145 C.A.3d 967, 976, 977, 193 C.R. 799 [error in preventing cross-examination of accomplice on her feelings of revenge and bias].)

The trial judge, however, has discretion to limit cross-examination intended only to discredit the prosecution's evidence rather than to develop evidence supporting a defense. (See *People v. Woodberry* (1970) 10 C.A.3d 695, 709, 89 C.R. 330; see also *People v. Alfaro* (1976) 61 C.A.3d 414, 421, 423, 132 C.R. 356 [basis of proposed cross-examination speculative and without evidentiary support].)

**SUPPLEMENT:** [This section is current through the latest supplement]

A defendant's right to cross-examine a witness for the purpose of testing the witness' credibility is not absolute. The defendant should be given wide latitude in this regard, but the trial court may impose reasonable limits on the inquiry based on concerns about harassment, confusion of the issues, or relevance. (*People v. Brown* (2003) 31 C.4th 518, 545, 3 C.R.3d 145, 73 P.3d 1137 [in capital murder trial, trial judge did not deny defendant his constitutional right of cross-examination by prohibiting him from raising pending rape charges as evidence of witness' motive for testifying; any slight impeachment effect of remote possibility that witness was testifying in hopes of leniency was outweighed by undue consumption of time]; see *People v. Sapp* (2003) 31 C.4th 240, 290, 2 C.R.3d 554, 73 P.3d 433 [in penalty phase of capital murder trial, denial of defendant's proposed cross-examination of prosecution witness regarding Medi-Cal fraud charges brought against him several years earlier did not violate defendant's constitutional rights; charges were only nominally relevant to subject matter of witness' testimony regarding defendant's criminal behavior].) *West's Key Number Digest*, Witnesses k.277(3)



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## CHAPTER XI - Presentation At Trial

### X. CROSS-EXAMINATION

#### C. To Test Credibility: Wide Latitude.

##### 3. Criminal Cases.

#### b. Cross-Examination of Prosecutrix in Cases Involving Sex Crimes.

3 Witkin Cal. Evid. Presentation § 242

[§ 242] Cross-Examination of Prosecutrix in Cases Involving Sex Crimes.

(1) *Former Approach.* Traditionally, the courts have emphasized the wide latitude in prosecutions for rape and similar crimes committed against a young girl, where the prosecutrix has the sympathy of the usual jury. The defendant has been allowed, on cross-examination, to go fully into the circumstances, motive and reason for her conduct. (*People v. Vaughn* (1933) 131 C.A. 265, 271, 21 P.2d 438 [failure to complain to close relative shortly after crime had been committed]; *People v. Brown* (1934) 138 C.A. 748, 751, 33 P.2d 460 [request by victim that charges be dismissed]; *People v. Hume* (1942) 56 C.A.2d 262, 267, 132 P.2d 52 [prior inconsistent statement]; *People v. Hurlburt* (1958) 166 C.A.2d 334, 343, 333 P.2d 82 [false accusations against other men]; *People v. Neely* (1964) 228 C.A.2d 16, 18, 39 C.R. 251 [same]; 3A Wigmore (Chadbourn Rev.) §963; 71 A.L.R.4th 469 [impeachment of prosecuting witness by showing that similar charges were made against other persons].)

As the court said in *Hurlburt, supra*: "[W]here the state of mind of the prosecutrix is relevant, showings of possible motives for the charge, instances of extortion by the prosecutrix against the defendant, animosity of the prosecutrix, and the possibility that the witness has been coached, all have been held admissible. None of these is of as great probative value or relevancy as evidence of prior false accusations of the same charge involved in the main case. Such evidence is not offered for the purpose of impeaching or discrediting the general character or reputation of the witness, but is offered to disprove the very charge before the court. It is relevant as to the state of mind of the prosecutrix. Because of its high degree of relevancy and its high probative value, such evidence should be admitted. From the very character of the offense involved the jury has very little to go on in such cases. They have usually nothing more than the testimony of a young child and the denials of the defendant. This fact, which, as already pointed out, has frequently been recognized by the courts and text writers, indicates that a liberal rule should be adopted so that the jury have before it as much relevant information as is legally permissible so that it can reach a just verdict." (166 C.A.2d 342.)

The court added a warning against abuse of the privilege, but concluded that, weighing all the possibilities, "the ends of justice will best be served if the jury is permitted to know that in the past this seemingly young and innocent child has made false charges about such matters." (166 C.A.2d 343.)

(2) *Present Approach.* Ev.C. 782 now imposes strict procedural safeguards on the defendant's introduction of evidence of sexual conduct to impeach the credibility of the prosecutrix. There must be a motion and offer of proof of relevancy, a hearing, and a court order specifying the evidence that may be introduced and the nature of the questions. (See 1 Cal. Evidence (4th), *Circumstantial Evidence*, §62.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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CHAPTER XI - Presentation At Trial

X. CROSS-EXAMINATION

D. Cross-Examination of Defendant's Character Witness.

1. In General.

3 *Witkin Cal. Evid. Presentation* § 243

[§ 243] In General.

When a defendant in a criminal case calls witnesses who testify to his or her good character for the traits involved (e.g., honesty or peace and quiet; see 1 *Cal. Evidence* (4th), *Circumstantial Evidence*, §51), these witnesses may be cross-examined on the *bases of their testimony*. But the scope of such cross-examination to impeach a character witness is restricted, and care must be exercised in the questioning:

(1) The question must deal with the correct character trait, or it is irrelevant. (See *infra*, §244.)

(2) The Evidence Code permits direct testimony in the form of an opinion (see 1 *Cal. Evidence* (4th), *Circumstantial Evidence*, §55); the cross-examination will doubtless follow the form of cross-examination of any lay opinion witness.

(3) The traditional method of proving character is by reputation; and, if the witness testifies to the defendant's reputation, the cross-examination must be limited to matters affecting the witness' knowledge of it. (See *infra*, §245 et seq.) (See 9 *U.C. Davis L. Rev.* 365.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See CALCRIM, No. 351 [Cross-Examination of Character Witness]. *West's Key Number Digest*, Witnesses k.274 et seq.



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## CHAPTER XI - Presentation At Trial

### X. CROSS-EXAMINATION

#### D. Cross-Examination of Defendant's Character Witness.

##### 2. Character Trait Involved.

#### 3 Witkin Cal. Evid. Presentation § 244

#### [§ 244] Character Trait Involved.

If the defendant offers evidence as to his or her good character (see 1 Cal. Evidence (4th), *Circumstantial Evidence*, §51), the cross-examination must relate to the trait of character about which the witness testified. (See *People v. Marsh* (1962) 58 C.2d 732, 745, 26 C.R. 300, 376 P.2d 300; *People v. Clair* (1992) 2 C.4th 629, 684, 7 C.R.2d 564, 828 P.2d 705; *People v. Hernandez* (1941) 47 C.A.2d 132, 134, 117 P.2d 394; *People v. Tucker* (1958) 164 C.A.2d 624, 627, 331 P.2d 160; *People v. Roberson* (1959) 167 C.A.2d 429, 431, 334 P.2d 666; *People v. Pic'l* (1981) 114 C.A.3d 824, 891, 171 C.R. 106; 13 A.L.R.4th 796.)

In *People v. Hernandez*, *supra*, a prosecution for robbery, witnesses testified to defendant's good reputation for honesty. Cross-examination as to their knowledge of his previous arrest for assault with a deadly weapon, and his imprisonment for carrying concealed weapons, was held improper; "the crimes of assault with a deadly weapon and carrying concealed weapons are not acts inconsistent with a good reputation for honesty." (47 C.A.2d 134.) (The questions were also objectionable in inquiring as to *knowledge of acts*, *infra*, §248.)

In *People v. Tucker*, *supra*, a trial for conspiracy to commit arson, defendant took the stand. To impeach him (see *infra*, §280), the prosecution put on rebuttal testimony of his bad reputation for truth. Defendant, in surrebuttal, offered witnesses to bolster his reputation for "truth, honesty and veracity" (his counsel carefully and unnecessarily eliminating "integrity" to avoid any issue of trait other than veracity). The prosecutor, in cross-examination, asked these surrebuttal witnesses if they had heard or knew of specific acts of misconduct, consisting of a wide variety of crimes (violation of vice laws, white slavery, encouragement of prostitution, friendship with gangsters, malicious mischief, arson, juvenile delinquency). *Held*, reversible error; these activities and associations had no direct bearing on the traits involved. (164 C.A.2d 627.) (See also *People v. Marsh*, *supra*, 58 C.2d 745 [witnesses testified to good reputation for truth; cross-examiner asked whether they knew that defendant had been excommunicated from Mormon church for immoral conduct with women; morals charges not necessarily inconsistent with reputation for truth].)

In *People v. Roberson*, *supra*, a trial for sale of narcotics, defendant's character witness, his former employer, testified to his reputation for truth and veracity (the evidence consisting solely of the testimony of defendant and an undercover police agent). On cross-examination, the witness was examined, over objection, about defendant's narcotics and petty theft convictions. *Held*, error; a character witness can be asked only about specific misconduct inconsistent with the trait to which he testified, and these crimes were not. (167 C.A.2d 431.) (See also *People v. Pic'l*, *supra*, 114 C.A.3d 891 [error, although harmless, to permit cross-examination of character witnesses on reports of defendant's financial matters (bankruptcy, nonpayment of rent) that were irrelevant to dispute defendant's character traits (honesty, truthfulness, integrity) in issue].)

**SUPPLEMENT:** [This section is current through the latest supplement]





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## CHAPTER XI - Presentation At Trial

### X. CROSS-EXAMINATION

#### D. Cross-Examination of Defendant's Character Witness.

##### 3. Reputation Witness.

##### a. Limiting Rule.

3 Witkin Cal. Evid. Presentation § 245

#### [§ 245] Limiting Rule.

When a character witness testifies to the defendant's reputation with respect to a relevant character trait (*supra*, §244), the witness may be asked whether he or she has heard rumors or reports of the defendant's wrongful acts inconsistent with the character trait, because the witness' knowledge of reputation is derived from community talk and opinion. The witness cannot be asked whether he or she knows as a fact that the defendant has committed particular wrongful acts or has been guilty of other improper conduct. If the latter sort of question were allowed, the effect would be to bring before the jury irrelevant and highly prejudicial evidence of other crimes, actual or asserted. Nevertheless, it has been pointed out that the distinction is a subtle one, and that the jury is as likely to gain the damaging impression from the correct as from the incorrect question. Hence, the courts tend to impose a requirement of good faith, holding that the prosecutor must possess information that reasonably leads him or her to believe that the acts or conduct by defendant have in fact been committed or the reports of their commission have been generally circulated. (See generally *Michelson v. United States* (1948) 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168; *People v. Payton* (1992) 3 C.4th 1050, 1066, 13 C.R.2d 526, 839 P.2d 1035; *People v. Pic'l* (1981) 114 C.A.3d 824, 891, 171 C.R. 106; 1 McCormick 5th, §191; 3A Wigmore (Chadbourn Rev.) §988; 13 A.L.R.4th 796 [reference to particular acts or crimes--modern state rule]; *infra*, §246 et seq.)

In *Michelson, supra*, the court first reviewed the principles governing good character evidence, pointing out that the witness is only allowed to testify to reputation, i.e., to summarize what he or she has heard in the community ("opinion-based-on-hearsay"), and then said: "Thus the law extends helpful but illogical options to a defendant. Experience taught a necessity that they be counterweighted with equally illogical conditions to keep the advantage from becoming an unfair and unreasonable one. The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him. The prosecution may pursue the inquiry with contradictory witnesses to show that damaging rumors, whether or not well-grounded, were afloat--for it is not the man that he is, but the name that he has which is put in issue. Another hazard is that his own witness is subject to cross-examination as to the contents and extent of the hearsay on which he bases his conclusions, and he may be required to disclose rumors and reports that are current even if they do not affect his own conclusion. It may test the sufficiency of his knowledge by asking what stories were circulating concerning events, such as one's arrest, about which people normally comment and speculate. Thus, while the law gives defendant the option to show as a fact that his reputation reflects a life and habit incompatible with commission of the offense charged, it subjects his proof to tests of credibility designed to prevent him from profiting by a mere parade of partisans." (69 S.Ct. 220, 93 L.Ed. 175.)

The court added: "Wide discretion is accompanied by heavy responsibility on trial courts to protect the practice from any misuse. The trial judge ... took pains to ascertain, out of presence of the jury, that the target of the question was an actual event, which would probably result in some comment among acquaintances if not injury to defendant's reputation. He satisfied himself that counsel was not merely taking a random shot at a reputation imprudently exposed or asking a groundless question to waft an unwarranted innuendo into the jury box." (69 S.Ct. 221, 93 L.Ed. 176.)

The trial judge should inquire into good faith outside the presence of the jury. (See *People v. Eli* (1967) 66 C.2d 63, 77, 56 C.R. 916, 424 P.2d 356; *People v. Gonzales* (1967) 66 C.2d 482, 500, 58 C.R. 361, 426 P.2d 929, citing the text; *People v. Kramer* (1968) 259 C.A.2d 452, 467, 66 C.R. 638; *People v. Hempstead* (1983) 148 C.A.3d 949, 953, 196 C.R. 412; cf. *People v. Wrigley* (1968) 69 C.2d 149, 166, 70 C.R. 116, 443 P.2d 580 [no error where judge gave defendant opportunity to challenge good faith and defendant's counsel didn't]; *People v. Hurd* (1970) 5 C.A.3d 865, 880, footnote 9, 85 C.R. 718 [prosecutor's good faith not in issue because trial judge and counsel had discussed disputed questions out of jury's presence before questions were asked].)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 1 McCormick 6th, §191. *West's Key Number Digest*, Witnesses k.274(2)



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## CHAPTER XI - Presentation At Trial

### X. CROSS-EXAMINATION

#### D. Cross-Examination of Defendant's Character Witness.

##### 3. Reputation Witness.

##### b. Permissible Questions.

##### 1. "Have You Heard."

3 Witkin Cal. Evid. Presentation § 246

[§ 246] "Have You Heard."

(1) *General Rule.* The witnesses may be asked, in good faith on the basis of information in the hands of the prosecution, whether they had heard reports or rumors of wrongful acts or misconduct committed by the defendant and inconsistent with the traits of good character attributed to him or her. (See *People v. Burke* (1912) 18 C.A. 72, 88, 122 P. 435 [explosion with intent to injure; whether they had heard that doctor defendant made a practice of committing abortions and having immoral relations with female patients]; *People v. Stennett* (1921) 51 C.A. 370, 382, 197 P. 372 [whether they had ever heard that he had been previously convicted of petty larceny]; *People v. Stevens* (1935) 5 C.2d 92, 99, 53 P.2d 133 [murder; whether they heard report that he had been discharged from police department for violence, had shot woman, had been intoxicated on duty, had committed assaults and thefts]; *People v. White* (1954) 43 C.2d 740, 744, 278 P.2d 9 [infamous crime against nature; whether they had heard of reports to police of his homosexual activities]; *People v. Thomas* (1962) 58 C.2d 121, 132, 23 C.R. 161, 373 P.2d 97, citing the text; *People v. Wrigley* (1968) 69 C.2d 149, 166, 70 C.R. 116, 443 P.2d 580 ["Have you heard" questions about sexual misbehavior]; *People v. Wagner* (1975) 13 C.3d 612, 617, 119 C.R. 457, 532 P.2d 105 ["Have you heard" form obviously does not apply where witness is defendant]; *People v. Clair* (1992) 2 C.4th 629, 683, 7 C.R.2d 564, 828 P.2d 705 ["Have you heard" of rape charge against defendant in another state]; *People v. Buchanan* (1932) 119 C.A. 523, 526, 6 P.2d 538 [inquiries included arrests and charges while defendant was a minor, and proceedings were in juvenile court]; *People v. Gin Shue* (1943) 58 C.A.2d 625, 633, 137 P.2d 742 [whether they had heard that defendant had been arrested or charged with possession of still, manufacture of whiskey, visiting or conducting gambling place, vagrancy]; *People v. Boone* (1954) 126 C.A.2d 746, 751, 273 P.2d 350 [lewd conduct; whether they had heard that defendant lived with woman not married to him and was ejected from place of residence for pimping]; *People v. Cummings* (1956) 141 C.A.2d 193, 199, 296 P.2d 610 [attempted abortion; whether they had heard he had been performing abortions since 1942 and had done several specified abortions]; *People v. Malloy* (1962) 199 C.A.2d 219, 226, 18 C.R. 545, citing the text; *People v. Ogg* (1968) 258 C.A.2d 841, 845, 66 C.R. 289 ["Have you heard that he killed his wife in Los Angeles by use of his fists?"]; *People v. Hinman* (1967) 253 C.A.2d 896, 905, 61 C.R. 609 ["Have you heard" of various arrests and jail terms]; *People v. Hurd* (1970) 5 C.A.3d 865, 878, 85 C.R. 718 ["Have you heard" of various arrests]; 3A Wigmore (Chadbourn Rev.) §988; 9 U.C. Davis L. Rev. 365; 13 A.L.R.4th 796; 81 Am.Jur.2d (1992 ed.), Witnesses §840.)

(2) *Illustrations.* In *People v. Hurd*, *supra*, a prosecution for incest, oral copulation and sodomy, Father H appeared as a character witness and testified that defendant was of good moral character, honest, upright and fair. On cross-examination, the prosecutor asked whether the witness had heard of defendant's arrests for car thefts, attempted

burglary, armed robbery, use of fraudulent checks, forcible rape and child beating. Defendant contended that this questioning was improper because Father H had given *his opinion* about defendant's *character*, not *reputation*, and because the rumored acts were not inconsistent with the character traits testified to by the witness. *Held*, no error. When a witness states his opinion of a defendant's *character*, there may be "some logic" to excluding "have you heard" questions designed to test his knowledge of defendant's *reputation*. (5 C.A.3d 879.) But the witness' opinion must have had some basis, and the prosecution must be permitted to test that basis and bring the opinion's validity into question. (5 C.A.3d 880.)

"Father [H] testified that in his opinion defendant was of 'good moral character' and that he was 'honest,' 'upright' and 'fair.' Obviously, all of the rumors of the specified acts asked about on cross-examination would be inconsistent with good moral character; most would be inconsistent with honesty and uprightness, and the rumor of child beating would be, at least, inconsistent with fairness." (5 C.A.3d 880.)

In *People v. Qui Mei Lee* (1975) 48 C.A.3d 516, 122 C.R. 43, a defense witness testified, on direct examination, that defendant's reputation for truth and honesty was and is above reproach. On cross-examination, the prosecutor asked the witness whether he had heard that defendant committed acts for which she was then on trial. *Held*, this was proper.

(a) Under *Ev.C. 1102*, the character witness may give an opinion or his or her knowledge of a defendant's reputation either before and at the time of the alleged offense or at the time the witness is testifying. "The time frame used on direct examination determines the extent of the cross-examination." (48 C.A.3d 527.) Hence, if the witness had testified that as of the time of the alleged offenses or even before he was aware of the offenses, defendant was honest or had a good reputation for honesty, any cross-examination about whether he had heard of the charged offense would have exceeded the scope of direct examination and been improper. That questioning could not test the witness' credibility on the subject matter of his direct testimony. Adverse comments involving the charged offense could not cast doubt on the integrity of the past opinion. (48 C.A.3d 527.)

(b) But the result is different when the witness testifies in the present tense. Whatever the defendant's reputation might have been before the charge, after the charge, it is at least dubious. "Thus where the character witness nonetheless states under oath that such defendant's reputation for honesty is presently good, there is a strong suggestion (to say the least) that he is not a credible witness. And on cross-examination, such lack of credibility may be demonstrated by asking him whether he in fact has heard of the commission of the offense for which the defendant is on trial. Such a question is highly relevant, and therefore proper. ... Similarly, if the character witness gives his personal opinion that the defendant is presently honest, the same question on cross-examination is most relevant; for if he has heard of the offense charged, the validity of his opinion may be affected thereby." (48 C.A.3d 527.)

(c) Defense counsel may avoid the problem by limiting the scope of inquiry on direct examination and directing his or her questions to the time of, and reasonably before, the alleged offense. But if the defendant offers character evidence directed to the time of trial, rebuttal evidence on the subject may be similarly directed. (48 C.A.3d 527.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *General Rule*. See 81 *Am.Jur.2d* (2004 ed.), *Witnesses* §807.



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## CHAPTER XI - Presentation At Trial

### X. CROSS-EXAMINATION

#### D. Cross-Examination of Defendant's Character Witness.

##### 3. Reputation Witness.

##### b. Permissible Questions.

##### 2. "Would Your Opinion Have Changed."

3 *Witkin Cal. Evid. Presentation* § 247

[§ 247] "Would Your Opinion Have Changed."

In a number of cases, prosecutors have added a further question: Whether, if the witness had heard a negative report, the witness' opinion as to the defendant's good reputation would have changed. This seems objectionable as calling for an opinion on hypothetical facts instead of testing the witness' knowledge of the defendant's actual reputation. (See *People v. Weber* (1906) 149 C. 325, 343, 86 P. 671; *People v. Neal* (1948) 85 C.A.2d 765, 771, 194 P.2d 57, *infra*, §248; *People v. Beltran* (1949) 94 C.A.2d 197, 210, 210 P.2d 238; *People v. Fowzer* (1954) 127 C.A.2d 742, 750, 274 P.2d 471; 3A Wigmore (Chadbourn Rev.) §988; 12 So. Cal. L. Rev. 93.)

However, in *People v. McKenna* (1938) 11 C.2d 327, 335, 79 P.2d 1065, the question was approved without discussion. And in *People v. Boone* (1954) 126 C.A.2d 746, 751, 273 P.2d 350, the court, noting the conflict in decisions, nevertheless felt bound by the *McKenna* case, and sanctioned the following: "If you had heard such a report would you still think that defendant had a good reputation?" (See also *People v. Malloy* (1962) 199 C.A.2d 219, 229, 18 C.R. 545, noting conflict and holding *McKenna* case controlling; *Smith v. Brown-Forman Distillers Corp.* (1987) 196 C.A.3d 503, 520, 241 C.R. 916 [counsel was allowed to ask witness whether his opinion of defendant corporation's reputation would have been different if he had known of several criminal actions against it in preceding years].)

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## CHAPTER XI - Presentation At Trial

### X. CROSS-EXAMINATION

#### D. Cross-Examination of Defendant's Character Witness.

##### 3. Reputation Witness.

##### c. Improper Questions.

3 Witkin Cal. Evid. Presentation § 248

#### [§ 248] Improper Questions.

(1) *Knowledge of Acts*. The question must be limited to reports (supra, §§246, 247). A deliberate attempt by the prosecutor to introduce evidence of specific wrongful acts by inquiries as to knowledge of such acts is misconduct and is often held reversible error. (See *People v. McDaniel* (1943) 59 C.A.2d 672, 677, 140 P.2d 88 [witness was asked whether he knew defendant gave narcotic injections, performed abortions, etc.; "There is a vast difference between inquiring about reports, rumors and the like ... and questions as to what the witness *knows* of defendant"]; *People v. Neal* (1948) 85 C.A.2d 765, 194 P.2d 57; *People v. Beltran* (1949) 94 C.A.2d 197, 210, 210 P.2d 238; cf. *People v. Boone* (1954) 126 C.A.2d 746, 751, 273 P.2d 350 ["The fact that he and she were living together, if you knew that fact, you would still say he had a good reputation for morality?"; held improper, but not prejudicial, where witness said it wouldn't change his opinion]; *People v. Marsh* (1962) 58 C.2d 732, 745, 26 C.R. 300, 376 P.2d 300 [improper to ask witness, "did you know"]; 13 A.L.R.4th 796.)

In *People v. Caldaralla* (1958) 163 C.A.2d 32, 329 P.2d 137, defendant, charged with assault with a deadly weapon, called character witnesses who testified that he had a good reputation for "peace and quiet." On cross-examination, they were asked if they knew about several arrests for violation of the Alcoholic Beverage Control Act. Defendant, on appeal, contended that this inquiry would only be relevant on whether he was a "law-abiding citizen" and not on his reputation for "peace and quiet." The court said: "[E]ven if the crimes charged had no relevance to the character trait testified to by the witness, his knowledge of the community rumors concerning an arrest would always be relevant to his qualifications to speak on the defendant's reputation. Therefore, the subject of the questions here appears to be proper. But they were not properly put. The witnesses were all asked whether they knew of the arrests, an improper form of the question since the inquiry is general talk about the defendant, not the truth of the rumors." (163 C.A.2d 41.)

(2) *Details of Acts*. It is also improper to pursue the inquiry so as to produce details of specific wrongful acts. Thus, in *People v. Neal*, supra, a trial for violation of P.C. 288, the prosecutor, over objection, repeatedly asked character witnesses whether they knew that defendant had pleaded guilty to rape and to contributing to the delinquency of a minor on prior occasions. The questions went into detail as to plea, change of plea, sentence and probation, and he offered to produce court records of these events. The court said: "The cross-examination should have been restricted to questions which would test the sufficiency of the foundation for the direct testimony, and should not have been extended to include inquiries as to what the witnesses might think defendant's general reputation in the community would be, or what the witnesses individually might think of him, if they had additional information." (85 C.A.2d 771.)

In *People v. Grimes* (1957) 148 C.A.2d 747, 749, 307 P.2d 932, the charge was also sex perversion. Defendant produced witnesses to his good reputation for chastity, virtue and morality. The prosecutor asked each whether he had heard of an alleged arrest with a sailor under sordid circumstances. On receiving negative answers, he continued questioning on what transpired on this hypothetical occasion, bringing the supposed facts to the jury's attention by repetition and emphasis. *Held*, conviction reversed.

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### X. CROSS-EXAMINATION

#### D. Cross-Examination of Defendant's Character Witness.

##### 4. Opinion Witness.

*3 Witkin Cal. Evid. Presentation § 249*

[§ 249] Opinion Witness.

In *People v. Hempstead* (1983) 148 C.A.3d 949, 196 C.R. 412, a prosecution for second degree murder with a firearm and assault with a deadly weapon, the defense was accidental discharge of the gun. Defense counsel intended to call eight witnesses to give opinion testimony on defendant's character based on their contact with him during the previous 5 to 15 years; and he made a motion *in limine* to preclude the prosecutor from cross-examining the witnesses about defendant's prior acts of misconduct (an unprosecuted 1974 battery and an unprosecuted 1973 assault with a deadly weapon and kidnapping). The prosecutor believed in good faith that the acts had occurred, but defense counsel represented, and offered to prove outside the presence of the jury, that none of the character witnesses had heard about either incident. The judge ruled that the cross-examination would be permitted, and counsel then decided not to call the witnesses. *Held*, the ruling was correct.

(a) *People v. Eli* (1967) 66 C.2d 63, 56 C.R. 916, 424 P.2d 356, *People v. Gonzales* (1967) 66 C.2d 482, 58 C.R. 361, 426 P.2d 929, and *People v. Kramer* (1968) 259 C.A.2d 452, 66 C.R. 638, *supra*, §245, involved *reputation* testimony, but the same danger of showing prior misconduct by innuendo rather than by proof is present where, as here, *opinion* testimony is involved. (148 C.A.3d 953.) However, where a witness gives an opinion on good character of the defendant, the prosecution must have the opportunity to let the jury test the validity of the opinion or its weight, even if the witness has no knowledge of events or acts which did occur. If allowing the questions would create a substantial danger of undue prejudice, the judge has discretion to preclude them under *Ev.C. 352*; and where the questions are permitted, the jury should be instructed that the questions and answers are to be considered only for the purposes of determining the weight to be given to the opinion (see CALJIC, No. 2.42 (1979 Revision), now CALJIC (6th ed.), No. 2.42.) (148 C.A.3d 954.)

(b) There was some merit in defendant's contention that the motion should have been granted under *Ev.C. 352* because the prior acts were remote in time; and the record is silent on whether the judge did in fact weigh prejudice against probative value. This procedural omission was error, but in view of the strong case against defendant, was not prejudicial. (148 C.A.3d 955.)

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## CHAPTER XI - Presentation At Trial

### X. CROSS-EXAMINATION

#### E. Cross-Examination of Expert Witness.

##### 1. In General.

3 Witkin Cal. Evid. Presentation § 250

[§ 250] In General.

(1) *Method*. Any permissible method of cross-examination of an ordinary witness may be used in cross-examining an expert witness. It is proper to use a hypothetical question. (See *People v. Tallman* (1945) 27 C.2d 209, 214, 163 P.2d 857; *People v. Busch* (1961) 56 C.2d 868, 874, 16 C.R. 898, 366 P.2d 314; C.E.B., 1 Civ. Proc. During Trial 3d, §11.146 et seq.; C.E.B., Effective Direct and Cross-Examination, §7.9 et seq.; C.E.B., Expert Witness Guide 2d, §15.6; 31A Am.Jur.2d (1989 ed.), *Expert and Opinion Evidence* §91 et seq.; 71 A.L.R.2d 6.)

(2) *Scope*. The scope of cross-examination is also broad: "Once an expert offers his opinion, ... he exposes himself to the kind of inquiry which ordinarily would have no place in the cross-examination of a factual witness." (*Hope v. Arrowhead & Puritas Waters* (1959) 174 C.A.2d 222, 230, 344 P.2d 428, *infra*, §253; see *Dillenbeck v. Los Angeles* (1968) 69 C.2d 472, 482, 72 C.R. 321, 446 P.2d 129, 1 Cal. Evidence (4th), *Hearsay*, §115 [police officer, on department safety rules]; *Grimshaw v. Ford Motor Co.* (1981) 119 C.A.3d 757, 796, 174 C.R. 348.) Thus, a witness testifying as an expert may be cross-examined to the same extent as any other witness. The witness may be fully cross-examined as to (a) his or her qualifications, (b) the subject to which his or her expert testimony relates, and (c) the matter on which his or her opinion is based and the reasons for that opinion. (*Ev.C. 721(a)*; see 11 A.L.R.5th 1 [questioning expert witness about allegations of expert's unprofessional conduct or professional negligence].)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Criminal Law k.489; Evidence k.558 et seq.



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CHAPTER XI - Presentation At Trial

X. CROSS-EXAMINATION

E. Cross-Examination of Expert Witness.

2. Qualifications and Court Appointment.

3 *Witkin Cal. Evid. Presentation* § 251

[§ 251] Qualifications and Court Appointment.

(1) *Qualifications*. The expert may be cross-examined as to his or her qualifications (*Ev.C. 721(a)(1)*), i.e., as to the expert's special knowledge or skill in the particular field. This may take place either on voir dire, after the foundation is laid and before the witness testifies on the issues, or after the witness' direct examination is completed. (See *In re Mullin* (1895) 110 C. 252, 255, 42 P. 645; *San Joaquin Light & Power Co. v. Barlow* (1919) 43 C.A. 241, 243, 184 P. 899; *People v. Stevens* (1959) 175 C.A.2d 123, 127, 345 P.2d 582, citing the text; *supra*, §189; C.E.B., Expert Witness Guide 2d, §15.15.)

(2) *Appointment by Court*. The fact that the court has appointed an expert witness may be revealed to the trier of fact. (*Ev.C. 722*; on court appointment, see 1 *Cal. Evidence (4th)*, *Opinion Evidence*, §79.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Evidence k.558(8)



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## CHAPTER XI - Presentation At Trial

### X. CROSS-EXAMINATION

#### E. Cross-Examination of Expert Witness.

##### 3. Compensation.

3 Witkin Cal. Evid. Presentation § 252

[§ 252] Compensation.

(1) *Inquiry Into Compensation by Party Permissible.* Although recognized by statute in condemnation cases, the right to inquire into compensation of experts generally was uncertain in California until the adoption of the Evidence Code. It is now, however, clear: An adverse party may inquire into the compensation and expenses paid or to be paid to an expert witness by the party calling the expert. The inquiry may be made "as relevant to the credibility of the witness and the weight of" the witness' testimony. (*Ev.C. 722(b)*; see C.E.B., Expert Witness Guide 2d, §15.14.)

The compensation paid an expert witness in a capital case is a proper subject of inquiry under *Ev.C. 722(b)*, even if the expert is being paid under P.C. 987.9, 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §174, which provides that the fact that an application to the court for funds for the payment of investigators, experts, and others has been made must be confidential. (*People v. Berryman* (1993) 6 C.4th 1048, 1071, 25 C.R.2d 867, 864 P.2d 40.)

(2) *Inquiry Into Compensation by Nonparties Restricted.* *Ev.C. 722(b)* authorizes inquiry into the compensation paid to the witness by the party calling the witness. A more controversial issue relates to the court's discretion to permit inquiry into the expert's status as a "professional witness," i.e., into the extent of his or her employment and compensation by parties and insurance companies in other litigation. (See *Allen v. Superior Court* (1984) 151 C.A.3d 447, 198 C.R. 737; 39 A.L.R.4th 742; 21 Proof of Facts 2d 73.)

In *Allen v. Superior Court*, plaintiff sued defendant Allen for injuries sustained in an automobile accident. By stipulation at defendant's request, plaintiff was examined by Dr. S. Plaintiff noticed a deposition of Dr. S, and served him with a subpoena duces tecum calling for records indicating the sources of his income where examinations were made at the request of insurance companies or defense lawyers over the last 5 years, and for records that would reveal what portion of his income was from treatment of patients as opposed to evaluation of persons for the defense during that period. Defendant sought a protective order on the basis of Dr. S's statement that compliance would require examination of all of his patient records, and that rather than comply, he would withdraw as a medical expert. The judge granted a limited protective order that still permitted plaintiff to require the records of reports and evaluations over the 5-year period. Held, mandamus granted to compel vacation of the order insofar as it required disclosure of records concerning other patients and examinees.

(a) Although *Ev.C. 722(b)* expressly refers only to the compensation paid by the party, the general provisions of the Code authorizing evidence relevant to the credibility of a witness permit a more expansive impeachment. The Law Revision Commission observed that *Ev.C. 722* was desirable because of "[t]he tendency of some experts to become advocates for the party employing them." "Just as payment in the instant case is some evidence of advocacy, so too

would be evidence that the particular expert usually or always testifies for one side of a particular class of lawsuit. Nothing in the Evidence Code suggests that such advocacy may be proven only by evidence of payment in the instant case." (151 C.A.3d 451.)

(b) Defendant did not object to questions asked at a deposition or trial; he conceded that Dr. S would be asked about the amount of defense practice performed and the relationship between treating patients and examining persons for insurance companies and the defense. (151 C.A.3d 451, 452, and footnote 2.) But his objection to the burden imposed by the *subpoena duces tecum* called for a weighing by the trial judge of the inconvenience to and right of privacy of the doctor with the right of the plaintiff to show bias. Here, plaintiff made no showing that the information sought could not be obtained through other means, e.g., conducting a deposition without production of the records. Thus, at deposition, the medical expert may be asked questions concerning what percentage of his practice involves examining patients for the defense and how much compensation he derives from defense work. Plaintiff need not learn the details of the expert's billing and accounting or the specifics of his prior testimony and depositions; publications that index the testimony of medical units are available to him. "Exact information as to number of cases and amounts of compensation paid to medical experts is unnecessary for the purpose of showing a bias." (151 C.A.3d 453.) Hence, the judge abused his discretion when he failed to require a less intrusive method of discovery. (151 C.A.3d 453.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Inquiry Into Compensation by Nonparties Restricted.* A plaintiff is entitled to know what percentage of the practice of the defendant's medical expert involves examining patients for the defense and how much compensation derives from defense work. However, this right is not unfettered and unconditional, and a court should not order disclosure of the expert's private affairs without first carefully balancing the expert's privacy interests against the litigant's interest in discovering relevant facts. (*Stony Brook I Homeowners Assn. v. Superior Court* (2000) 84 C.A.4th 691, 698, 699, 101 C.R.2d 67 [defense medical expert could be required to provide description of his practice sufficient to permit inquiry into possible bias, but judge erred in ordering expert to allow temporary personnel access to his files in order to compile precise information about number of cases in which he testified and amount of compensation he received].)



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### X. CROSS-EXAMINATION

#### E. Cross-Examination of Expert Witness.

##### 4. Bases and Reasons for Opinion.

###### a. In General.

3 Witkin Cal. Evid. Presentation § 253

[§ 253] In General.

The most important inquiry of an expert witness concerns the matter on which the witness' opinion is based and the reasons for the opinion. (See *Ev.C. 721(a)(3)*; see also *Laird v. Mather* (1958) 51 C.2d 210, 219, 331 P.2d 617; *People v. Nye* (1969) 71 C.2d 356, 373, 78 C.R. 467, 455 P.2d 395 [prosecution's cross-examination of defendant's psychiatric witness]; *People v. Coleman* (1985) 38 C.3d 69, 88, 211 C.R. 102, 695 P.2d 189, 1 Cal. Evidence (4th), Hearsay, §211; *Hope v. Arrowhead & Puritas Waters* (1959) 174 C.A.2d 222, 230, 344 P.2d 428; *F.R. Evid.*, Rule 705, *supra*, §200.)

Thus, in *Laird v. Mather*, *supra*, on the issue of whether a Pasadena stairway handrail was negligently constructed, defendant's engineer testified that it conformed to "standard engineering practice" in Pasadena. On cross-examination, being asked whether he limited his opinion to that area, he volunteered the answer that this would be true "anywhere in the world." *Held*, it was permissible to impeach him by cross-examination on the contrary provisions of the Los Angeles building code. (51 C.2d 219.)

In *Hope v. Arrowhead & Puritas Waters*, *supra*, a personal injury action, plaintiff's doctor was asked, on cross-examination, whether he had received a report from a neurosurgeon who had examined plaintiff. He replied that he had, and took it into consideration in forming his opinion. *Held*, it was permissible then to quote from the neurosurgeon's report, including the opinion therein that plaintiff was malingering and exaggerating his symptoms. "It is proper to draw from an expert testimony showing whether he has relied on or considered any authority in formulating his opinion and, if he has done so, to confront him with it if it contradicts him." (174 C.A.2d 230.)

If an expert valuation witness has arrived at an opinion by comparing the values of other land, opposing counsel must be allowed to inquire into relevant differences between the condemned land and the property that was the subject of a comparable sale. The factors to be explored include differences in the size or location of the parcels, in project enhancement, and in dates of valuation. (*People v. Reardon* (1971) 4 C.3d 507, 512, 93 C.R. 852, 483 P.2d 20.)

An expert witness may also be impeached by proof that on a former occasion, he or she expressed a different opinion or made statements inconsistent with the opinion expressed. (*People v. Murata* (1958) 161 C.A.2d 369, 379, 326 P.2d 947 [condemnation suit; state sought to show different value testimony of defendant's expert on prior occasion]; see also *Contra Costa v. East Bay Mun. Dist.* (1959) 175 C.A.2d 834, 836, 1 C.R. 60, *infra*, §331.)

In *California v. Stevenson* (1970) 5 C.A.3d 60, 63, 84 C.R. 742, the condemnor's valuation witness appraised defendants' land value at \$ 8 a square foot. Over the condemnor's objection, defendants showed by cross-examination

that the expert had, in an unrelated condemnation case, appraised nearby property at \$ 16 a square foot. The condemnor contended that such testimony was barred by *Ev.C. 822(d)* (now *Ev.C. 822(a)(4)*), providing that an opinion on the value of other property is inadmissible (see 1 *Cal. Evidence (4th)*, *Opinion Evidence*, §116). *Held*, the cross-examination was proper:

"No reported cases have been referred to us construing this section. Plaintiff would have us construe 'inadmissible in evidence' in the first sentence as being all-encompassing. It would preclude the giving of any opinion by any expert bearing any relation to value whether such relation was indirect and only involved one element among many which are combined by the appraiser to arrive at an opinion of market value of the whole; it would also proscribe cross-examination as well as direct examination. We are convinced, however, that the Legislature had no intention of changing existing law. All of the Evidence Code provisions relating to eminent domain were the work of the California Law Revision Commission, and there is not a word in any of that body's reports to indicate either that it was its intent to abolish a rule historically well settled or to emasculate a principle firmly entrenched as a fundamental part of the right of cross-examination. We are convinced that the limit of the intent evinced by section 822, subdivision (d) [now *Ev.C. 822(a)(4)*] was to exclude a party who produces an expert appraiser from using his opinion of the value of property X as a whole as a prop in proving the value of the subject property." (5 *C.A.3d* 64.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Alfaro* (2007) 41 *C.4th* 1277, 1325, 63 *C.R.3d* 433, 163 *P.3d* 118 [in capital murder case, trial judge did not err in allowing prosecutor to cross-examine two defense expert witnesses based on rough notes and data prepared by third expert, and in allowing prosecutor to call third expert to testify in rebuttal; first two experts acknowledged having reviewed notes and data, even though they did not rely on them, and because they questioned their usefulness, rebuttal was appropriate]. *West's Key Number Digest*, Evidence k.558(9)



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### X. CROSS-EXAMINATION

#### E. Cross-Examination of Expert Witness.

##### 4. Bases and Reasons for Opinion.

##### b. Books or Other Publications.

##### 1. Nature of Problem.

*3 Witkin Cal. Evid. Presentation § 254*

[§ 254] Nature of Problem.

The question whether the cross-examiner may impeach an expert's opinion by the use of statements in scientific books or professional publications arises usually, though not invariably, in connection with medical works. It has been pointed out that a medical treatise is ordinarily inadmissible hearsay and cannot be directly offered in evidence. (See *1 Cal. Evidence (4th), Hearsay, §296.*) To allow its use by the cross-examiner does not directly violate the hearsay rule, but it does, to some extent, circumvent the rule by bringing before the jury the incompetent matter in the book. On the other hand, if the expert relies on a particular book, it would unfairly tie the hands of the cross-examiner to prevent him or her from showing that the opinion of the witness lacked support in its stated source. (See *Ev.C. 721, Comment; 60 A.L.R.2d 77; 6 Wigmore (Chadbourn Rev.) §1700; C.E.B., Expert Witness Guide 2d, §15.23 et seq.; 31A Am.Jur.2d (1989 ed.), Expert and Opinion Evidence §125 et seq.; 31 Proof of Facts 2d 443.*)

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### X. CROSS-EXAMINATION

#### E. Cross-Examination of Expert Witness.

##### 4. Bases and Reasons for Opinion.

##### b. Books or Other Publications.

##### 2. Rules Governing Use.

#### 3 Witkin Cal. Evid. Presentation § 255

[§ 255] Rules Governing Use.

(1) *Conditions.* If an expert witness testifies in the form of an opinion, he or she may not be cross-examined in regard to the content or tenor of any scientific, technical, or professional text, treatise, journal, or similar publication unless one of three conditions is met:

(a) The witness *referred to, considered, or relied on* the publication in arriving at or forming his or her opinion. (*Ev.C. 721(b)(1).*) "If an expert witness has relied on a particular publication in forming his opinion, it is necessary to permit cross-examination in regard to that publication in order to show whether the expert correctly read, interpreted, and applied the portions he relied on. Similarly, it is important to permit an expert witness to be cross-examined concerning those publications referred to or considered by him even though not specifically relied on by him in forming his opinion. An expert's reasons for not relying on particular publications that were referred to or considered by him while forming his opinion may reveal important information bearing upon the credibility of his testimony." (*Ev.C. 721, Comment.*)

In *People v. Clark* (1993) 5 C.4th 950, 22 C.R.2d 689, 857 P.2d 1099, a capital murder prosecution, the prosecutor used a scholarly article entitled "With Malice Aforethought" in cross-examining a defense expert, who had testified that defendant had suffered a rage reaction at the time of the charged crimes. *Held*, there was no violation of defendant's federal or state constitutional or statutory rights arising from the use of this article. "In light of (1) [the expert's] testimony that he considered or relied upon all of his training in arriving at his conclusions, (2) the relationship of the abolished defenses of diminished capacity and irresistible impulse to his opinion that defendant lacked the intent to commit his crimes due to a rage reaction, and (3) [the expert's] former association with [the article's author] and his familiarity with [the author's] works, including the article in question, the cross-examination of the witness using the scholarly work was permissible." (5 C.4th 1013.)

(b) The publication has been *admitted in evidence*. In the rare situation in which the book or other publication is already in evidence for some distinct purpose, there is little danger in permitting the cross-examiner to use it, even though the expert has not relied on it or referred to it. Hence, *Ev.C. 721(b)(2)* sanctions its use.

(c) The publication has been *established as a reliable authority* by the testimony or admission of the witness or by other expert testimony or by judicial notice. (*Ev.C. 721(b)(3)*; see *F.R. Evid., Rule 803(18)* [learned treatises exception to hearsay rule], 1 Cal. Evidence (4th), Hearsay, §296.)



(2) *Evidence, Not Exhibit*. If admitted, relevant portions of the publication may be read into evidence but may not be received as exhibits. (*Ev.C. 721(b)*.)

(3) *Publications to Which Rules Apply*. In *McGarity v. Department of Trans.* (1992) 8 C.A.4th 677, 10 C.R.2d 344, plaintiffs sued the State Department of Transportation for personal injury and death resulting from an automobile accident in which a truck hit a fuel tank, and the fuel ignited and engulfed the cab in flames. Defendant's expert gave testimony on the estimated speed of the vehicle, and plaintiffs' counsel, on cross-examination, unsuccessfully attempted to use a crash test report prepared by General Motors, which the witness had not referred to, considered or relied on. Plaintiffs contended that "similar publications" mean only formal publications for mass consumption, such as the "text, treatise, or journal" listed as examples in *Ev.C. 721(b)*. *Held*, the purpose of *Ev.C. 721(b)* supports a broad construction of the term. (8 C.A.4th 683.) Here: "[P]laintiffs' attorney intended to use the report for the very purpose against which section 721(b) guards--to put hearsay opinion before the jury. We conclude section 721(b) applies to the General Motors crash test report." (8 C.A.4th 684.)

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## CHAPTER XI - Presentation At Trial

### X. CROSS-EXAMINATION

#### F. Redirect and Recross-Examination.

##### 1. Redirect Examination.

3 *Witkin Cal. Evid. Presentation* § 256

[§ 256] Redirect Examination.

Once a witness has been examined, he or she cannot be reexamined as to the same matter without leave of the court. The witness may, however, be reexamined as to any new matter on which the witness has been examined by another party to the action. The court may grant or withhold leave in its discretion. (*Ev.C.* 774.)

Redirect examination is "an examination of a witness by the direct examiner subsequent to the cross-examination of the witness." (*Ev.C.* 762.) Its principal purposes are to explain or rebut adverse testimony or inferences developed on cross-examination, and to rehabilitate a witness whose credibility has been impeached. (See *Kimic v. San Jose-Los Gatos Interurban Ry. Co.* (1909) 156 C. 379, 392, 104 P. 986; *Packard v. Moore* (1937) 9 C.2d 571, 577, 71 P.2d 922; *People v. Kynette* (1940) 15 C.2d 731, 751, 104 P.2d 794; *Hale Bros. v. Milliken* (1907) 5 C.A. 344, 363, 90 P. 365; *Myers v. Rose* (1938) 27 C.A.2d 87, 89, 80 P.2d 527; *People v. Adamson* (1953) 118 C.A.2d 714, 719, 258 P.2d 1020; *People v. Penrice* (1961) 195 C.A.2d 360, 364, 15 C.R. 733, citing the text; 1 McCormick 5th, §32; 6 Wigmore (Chadbourn Rev.) §1896; C.E.B., 1 Civ. Proc. During Trial 3d, §11.126; 81 *Am.Jur.2d* (1992 ed.), *Witnesses* §737 et seq.; on practice, see Rutter Group, 2 Civil Trials and Evidence §9:227 et seq.)

Redirect examination is subject to a limiting rule comparable to that governing cross-examination: It must ordinarily be confined to the scope of the cross-examination. (See *Ellsworth v. Palmtag* (1914) 168 C. 360, 363, 143 P. 602; *People v. Barnes* (1947) 30 C.2d 524, 528, 183 P.2d 654; *Moore v. Re* (1933) 131 C.A. 557, 560, 22 P.2d 45.) But the court may in its discretion relax this limitation, and permit questions which are outside the scope of the cross-examination and should have been asked on direct examination. (See *Majors v. Connor* (1912) 162 C. 131, 136, 121 P. 371; 1 McCormick 5th, §32.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 81 *Am.Jur.2d* (2004 ed.), *Witnesses* §738 et seq.; 1 McCormick 6th, §32. *West's Key Number Digest*, *Witnesses* k.285 et seq.



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CHAPTER XI - Presentation At Trial

X. CROSS-EXAMINATION

F. Redirect and Recross-Examination.

2. Recross-Examination.

3 *Witkin Cal. Evid. Presentation* § 257

[§ 257] Recross-Examination.

After a redirect examination has been concluded, the trial judge may allow recross-examination. (*Ev.C.* 763.) Its purpose is to overcome, if possible, the effects of the redirect examination in reestablishing the redirect examiner's case or in rehabilitating the witness. (See *Kimic v. San Jose-Los Gatos Interurban Ry. Co.* (1909) 156 C. 379, 392, 104 P. 986; *People v. Hale* (1927) 81 C.A. 734, 736, 254 P. 639; 1 McCormick 5th, §32; 6 Wigmore (Chadbourn Rev.) §1897; C.E.B., 1 Civ. Proc. During Trial 3d, §11.128; Rutter Group, 2 Civil Trials and Evidence §10:219 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 1 McCormick 6th, §32. *West's Key Number Digest*, Witnesses k.291



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## CHAPTER XI - Presentation At Trial

### XI. IMPEACHMENT

#### A. In General.

#### 1. Methods of Impeachment.

3 Witkin Cal. Evid. Presentation § 258

[§ 258] Methods of Impeachment.

(1) *Impeachment of Witness.* A witness may be impeached, i.e., discredited, by two chief methods: (a) cross-examination of the witness; (b) rebuttal, using other witnesses to impeach the witness, or introducing other impeaching evidence. (See generally *In re Anthony P.* (1985) 167 C.A.3d 502, 511, 213 C.R. 424, *infra*, §278; Rutter Group, 2 Civil Trials and Evidence, §8:2991 et seq.; 1 McCormick 5th, §33 et seq.; 3 Wigmore (Chadbourn Rev.) §868 et seq.; BAJI (8th ed.), No. 2.20 et seq.; 81 Am.Jur.2d (1992 ed.), *Witnesses* §864; Wharton, 2 Criminal Evidence 14th, §420 et seq.)

(2) *Impeachment of Impeaching Witness.* An *impeaching witness* may be impeached in the same manner. Thus, in *People v. Keyes* (1930) 103 C.A. 624, 643, 284 P. 1096, P, a prosecution witness, was impeached by M, a defense witness, who testified to P's declarations of hostility. Then M was impeached by prosecution witnesses who testified to M's statements showing bias toward defendants. (See also *Grover v. Morrison* (1920) 47 C.A. 521, 530, 190 P. 1078, *infra*, §265; 3A Wigmore (Chadbourn Rev.) §894.)

Impeaching the impeaching witness naturally tends to rehabilitate the impeached witness, but there are also other methods of rehabilitation. (See *infra*, §360 et seq.)

(3) *Prior Restrictions Eliminated.* Prior California law restricted the method of impeachment on certain grounds, e.g., on those relating to capacity to observe, recollect and communicate; cross-examination was permitted, but not proof by extrinsic evidence such as other witnesses. The Evidence Code, following the original Uniform Rules, abandoned this limitation. (See *infra*, §261 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Impeachment of Witness.* See CACI, Nos. 107, 5003 [believability of witnesses]; 81 Am.Jur.2d (2004 ed.), *Witnesses* §830; 1 McCormick 6th, §33 et seq. *West's Key Number Digest*, *Witnesses* k.319 et seq.



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## CHAPTER XI - Presentation At Trial

### XI. IMPEACHMENT

#### A. In General.

#### 2. Grounds.

3 Witkin Cal. Evid. Presentation § 259

[§ 259] Grounds.

(1) *Former Law.* The Code of Civil Procedure (former C.C.P. 1847, 2049 et seq.), set forth a number of specific grounds for impeachment, and the opinions often stated that the statutory rules were exclusive. (See *Estate of Gird* (1910) 157 C. 534, 547, 108 P. 499; *People v. Champion* (1924) 193 C. 441, 448, 225 P. 278; *People v. Vanderburg* (1960) 184 C.A.2d 33, 40, 7 C.R. 287.) These sweeping declarations were, however, ignored when such unlisted matters as lack of knowledge, mental incapacity, or bias were shown. (See *infra*, §§261, 267.)

(2) *Uniform Rules.* The original Uniform Rule dispensed with specific recital of grounds and merely provided that, subject to certain limitations, "for the purpose of impairing or supporting the credibility of a witness, any party ... may examine him and introduce extrinsic evidence concerning any conduct by him and any other matter relevant upon the issues of credibility." (See 2 U.C.L.A. L. Rev. 1, 7; 2 U.C.L.A. L. Rev. 32, 38.)

(3) *Evidence Code.* The relevant Evidence Code provision is as broad in scope as the original Uniform Rule, but uses a different approach: It retains the idea of specific listing and restates former California statutory grounds with some expansion, but the listing is only by way of *recital*, and does not operate as a limitation. Unless a statute provides otherwise, the court or jury may consider in determining a witness' credibility "any matter that has any tendency in reason to prove or disprove the truthfulness of the witness' testimony at the hearing." (Ev.C. 780; see BAJI (8th ed.), No. 2.20; 81 Am.Jur.2d (1992 ed.), Witnesses §967 et seq.) These matters include, but are not limited to, the following:

(a) The witness' demeanor while testifying and the manner in which he or she testifies. (Ev.C. 780(a).)

(b) The character of the witness' testimony. (Ev.C. 780(b).)

(c) The extent of the witness' capacity to perceive, to recollect, or to communicate a matter about which he or she testifies. (Ev.C. 780(c).)

(d) The extent of the witness' opportunity to perceive any matter about which he or she testifies. (Ev.C. 780(d).)

(e) The witness' character for honesty or veracity or their opposites. (Ev.C. 780(e).)

(f) The existence or nonexistence of a bias, interest, or other motive. (Ev.C. 780(f).)

(g) A statement previously made by the witness that is consistent with his or her testimony at the hearing. (Ev.C. 780(g).)

(h) A statement made by the witness that is inconsistent with any part of his or her testimony at the hearing. (*Ev.C. 780(h).*)

(i) The existence or nonexistence of any fact testified to by the witness. (*Ev.C. 780(i)*; see *Leader v. California* (1986) 182 C.A.3d 1079, 1089, 226 C.R. 207, *infra*, §340.)

(j) The witness' attitude toward the action in which he or she testifies or toward the giving of testimony. (*Ev.C. 780(j).*)

(k) The witness' admission of untruthfulness. (*Ev.C. 780(k).*)

Because all relevant evidence is admissible unless expressly made inadmissible (*Ev.C. 351, 1 Cal. Evidence (4th), Circumstantial Evidence, §5*), *Ev.C. 780* is in a sense superfluous. But it has a practical purpose: "[T]his section makes it clear that matters that may not be 'evidence' in a technical sense can affect the credibility of a witness, and it provides a convenient list of the most common factors that bear on the question of credibility." (*Ev.C. 780, Comment.*) (For detailed discussion of grounds, see *infra*, §261 *et seq.*; and see *supra*, §90 *et seq.*)

**SUPPLEMENT:** [This section is current through the latest supplement]

(3) *Evidence Code*. See CACI, Nos. 107, 5003 [believability of witnesses]; 81 *Am.Jur.2d* (2004 *ed.*), *Witnesses* §935 *et seq.*



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## CHAPTER XI - Presentation At Trial

### XI. IMPEACHMENT

#### A. In General.

#### 3. Limitations.

3 Witkin Cal. Evid. Presentation § 260

[§ 260] Limitations.

Despite the expanded list of *Ev.C. 780* (supra, §259), there are a few constitutional and statutory limitations on the use of evidence to impeach a witness:

(1) *Religious Belief or Lack of Belief*. The constitutional guarantee of freedom of religion (see 7 *Summary* (9th), *Constitutional Law*, §371) precludes any questioning of the witness' faith. Hence, evidence of a witness' religious belief or lack of belief is inadmissible to attack or support the witness' credibility. (*Ev.C. 789*; see 1 McCormick 5th, §46; 76 A.L.R.3d 539 [propriety and prejudicial effect of impeaching witness by reference to religious belief or lack of it]; *F. R. Evid.*, Rule 610.)

(2) *Nationality, Race, and Alienage*. These are generally considered improper grounds; there is no reasonable basis upon which members of any particular nationality or race can be said to lack credibility. (See 3A *Wigmore* (Chadbourn Rev.) §§936, 937; 2 *Cal. Evidence* (4th), *Witnesses*, §37 [do not affect competency]; infra, §274 [race or other relationship as indication of bias].)

(3) *Character*. Bad character is a proper ground (*Ev.C. 780(e)*), but impeachment is limited to the proper trait (infra, §280) and the permitted methods (infra, §285 et seq.). A nonexpert opinion about the veracity of particular statements is not proper character evidence. (*People v. Melton* (1988) 44 C.3d 713, 744, 244 C.R. 867, 750 P.2d 741, citing *People v. Sergill* (1982) 138 C.A.3d 34, 187 C.R. 497, 1 *Cal. Evidence* (4th), *Opinion Evidence*, §23.)

(4) *Claim of Privilege*. A witness' claim of privilege in a prior proceeding can no longer be shown to impeach the witness. (See 2 *Cal. Evidence* (4th), *Witnesses*, §96.)

(5) *Rape Victim*. *Ev.C. 1103* and *Ev.C. 782* limit impeachment of the complaining witness in a rape case. (See 1 *Cal. Evidence* (4th), *Circumstantial Evidence*, §§62, 63.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Religious Belief or Lack of Belief*. See 1 McCormick 6th, §46.

*Cross-Reference:* 7 *Summary* (10th), *Constitutional Law*, §505.



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## CHAPTER XI - Presentation At Trial

### XI. IMPEACHMENT

#### B. Capacity To Observe, Recollect, and Communicate.

##### 1. Incompetency.

##### a. In General.

3 Witkin Cal. Evid. Presentation § 261

[§ 261] In General.

(1) *Permissible Ground*. Despite lack of statutory authority, California cases recognized insanity or other mental disease as a ground of impeachment. (See *People v. La Rue* (1923) 62 C.A. 276, 284, 216 P. 627.) *Ev.C. 780(c)* broadly covers this and similar grounds: The trier of fact may consider the extent of the witness' capacity to perceive, recollect, or communicate any matter about which he or she testifies. (See generally Rutter Group, 2 Civil Trials and Evidence, §8:2994 et seq.; 1 McCormick 5th, §44; 3A Wigmore (Chadbourn Rev.) §§931, 932; 81 *Am.Jur.2d* (1992 ed.), *Witnesses* §868; 23 *Pepperdine L. Rev.* 387 [ways multiple personality disorder may affect witness' performance]; 44 A.L.R.3d 1203 [cross-examination on mental state or condition]; 2 *Cal. Evidence* (4th), *Witnesses*, §45.) (2) *Proof by Cross-Examination or Extrinsic Evidence*. The former California rule limited such impeachment to cross-examination; other witnesses could not be produced to testify to testimonial incapacity from mental derangement or disease. (See *People v. Dye* (1947) 81 C.A.2d 952, 963, 185 P.2d 624.) The Evidence Code, following the original Uniform Rule, contains no such restriction, and consequently made a significant change in California law. (On cross-examination, see *People v. Newton* (1966) 244 C.A.2d 82, 88, 52 C.R. 727 [rape; cross-examination to show that prosecutrix had been consulting a psychiatrist for 2 years before the trial]; Rutter Group, 2 Civil Trials and Evidence, §10:100 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Permissible Ground*. See 81 *Am.Jur.2d* (2004 ed.), *Witnesses* §834; 1 McCormick 6th, §44.

The effect of *Ev.C. 780(c)* was to change the former inflexible rule of exclusion to a rule of discretion to be exercised by the trial judge. The statute allows the witness' capacity to perceive, recollect, or communicate to be tested, but the trial judge retains the authority to exclude collateral evidence. (*People v. Thornton* (2007) 41 C.4th 391, 428, 61 C.R.3d 461, 161 P.3d 3 [in capital murder case, trial judge did not abuse discretion in refusing to allow defense to explore issue of letter regarding family problems that witness was composing on day she observed defendant and victim struggling in car].)

(3) *(New) No Sua Sponte Duty To Order Psychiatric Evaluation*. A trial judge is not required, on his or her own motion, to order and consider the psychiatric evaluation of a potential witness where that witness' *competence*, an issue for the court, is challenged on grounds of mental or emotional impairment. Further, as far as the jury issue of *credibility* is concerned, the Confrontation Clause confers no right to pretrial discovery of a witness' psychiatric records that would override a statutory or constitutional privilege, and "[n]o case has remotely held that the confrontation clause, or any other constitutional guarantee, could compel a witness to undergo a new court-ordered psychiatric examination, or



impose on the trial court a sua sponte duty to order such an examination." (*People v. Anderson* (2001) 25 C.4th 543, 576, 577, 106 C.R.2d 575, 22 P.3d 347.) *West's Key Number Digest*, Witnesses k.327-



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### XI. IMPEACHMENT

#### B. Capacity To Observe, Recollect, and Communicate.

1. Incompetency.
- b. Expert Opinion.

3 Witkin Cal. Evid. Presentation § 262

[§ 262] Expert Opinion.

Expert testimony concerning a particular witness' testimonial incapacity has been permitted for impeachment in sex cases. Thus, in *People v. Neely* (1964) 228 C.A.2d 16, 39 C.R. 251, D, the prosecutrix, a mental patient at Napa State Hospital, testified to attempted rape by defendant. Defendant called Dr. G, not a psychiatrist but the hospital doctor in charge of D's case, to testify to her tendency to exaggerate and distort. *Held*, it was error to exclude this testimony; defendant "was entitled to have the jury informed of the mental and emotional instability of the prosecuting witness." (228 C.A.2d 20.) (See *People v. Castro* (1994) 30 C.A.4th 390, 396, 35 C.R.2d 839 [rule in sex violation cases allowing admission of psychiatric evidence as to mental and emotional condition of complaining witness for impeachment purposes was inapplicable, where defendant's offer of proof was narrowly directed at truth of victim's molestation allegation]; on use of psychiatric opinions, see 1 McCormick 5th, §44; 3A Wigmore (Chadbourn Rev.) §§935, 990; 48 Cal. L. Rev. 648; 20 A.L.R.3d 684, 701 [testimony as to insanity and mental derangement]; on expert testimony about factors affecting accuracy of eyewitness identification, see *People v. McDonald* (1984) 37 C.3d 351, 208 C.R. 236, 690 P.2d 709, 1 Cal. Evidence (4th), Opinion Evidence, §70.)

**SUPPLEMENT:** [This section is current through the latest supplement]

In *People v. Espinoza* (2002) 95 C.A.4th 1287, 116 C.R.2d 700, a prosecution for lewd conduct with a child, the defense moved to admit testimony by a psychiatrist regarding the victim's credibility. The proposed testimony was based on the psychiatrist's review of the records of the case. The trial judge excluded the evidence under Ev.C. 352 (balancing of probative value against potential for prejudice; see 1 Cal. Evidence (4th), Circumstantial Evidence, §17). *Held*, the ruling was correct. The cases allowing a court to order the complaining witness in a sex offense case to undergo a psychiatric examination were overruled by a 1980 amendment of P.C. 1112 (text, §263). That overruling also extinguished any case authority for the admission of expert psychiatric evidence regarding the credibility of a sex crime victim. There is now no authority for distinguishing between complaining witnesses in sex offense cases and witnesses in other criminal cases. Because the psychiatric expert's testimony was largely inadmissible and, in any case, had little probative value, exclusion of the testimony under Ev.C. 352 was proper. (95 C.A.4th 1312.) (See *People v. Chatman* (2006) 38 C.4th 344, 374, 42 C.R.3d 621, 133 P.3d 534 [where defense subjected prosecution witness to psychological testing without notice to prosecution or awareness on part of court, trial judge properly excluded expert testimony intended to impeach witness on basis of psychological problems; witness was subjected to full cross-examination and impeachment by traditional methods, and exclusion was fully consistent with general policy disfavoring testimony of this nature]; 1 McCormick 6th, §44.)



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## CHAPTER XI - Presentation At Trial

### XI. IMPEACHMENT

#### B. Capacity To Observe, Recollect, and Communicate.

##### 1. Incompetency.

##### c. No Psychiatric Examination in Sexual Assault Case.

3 Witkin Cal. Evid. Presentation § 263

[§ 263] No Psychiatric Examination in Sexual Assault Case.

(1) *Former Law.* In *Ballard v. Superior Court* (1966) 64 C.2d 159, 49 C.R. 302, 410 P.2d 838, the court held that the trial judge, in a rape case, could order a psychiatric examination of the prosecuting witness to aid the jury in its assessment of her credibility. (64 C.2d 173.) *Ballard* was followed in *People v. Russel* (1968) 69 C.2d 187, 70 C.R. 210, 443 P.2d 794. (See 19 Cal. Western L. Rev. 236 [criticism of Wigmore's view that sex victims are unreliable and should be examined]; cf. *People v. Pierce* (1970) 11 C.A.3d 313, 317, 89 C.R. 751 [examination without court order improper, and psychiatrist's testimony excluded]; *People v. Mills* (1978) 87 C.A.3d 302, 308, 151 C.R. 71 [interpreting *Ballard* opinion as allowing comment on refusal of prosecutrix to cooperate, but not use of contempt process to force her to submit to examination].)

(2) *Present Law.* *Ballard* and *Russel* were partially nullified by P.C. 1112: The trial court cannot order a prosecuting witness, complaining witness, or any other witness, or a victim in a sexual assault prosecution to submit to a psychiatric or psychological examination for the purpose of assessing the witness' credibility. (See 12 Pacific L. J. 340; 15 U.C. Davis L. Rev. 973; 45 A.L.R.4th 310 [permissibility of psychiatric examination of complainant in sex case].)

The provision has been applied to dependency hearings. In *re Dolly A.* (1986) 177 C.A.3d 195, 222 C.R. 741, held that P.C. 1112 barred a psychiatric examination of a 7-year-old child who was the subject of a dependency hearing based on allegations that her father had sexually molested her during visits in his home. "[T]he dependency proceeding was, in this instance, more nearly criminal than civil." (177 C.A.3d 203.)

(3) *Statute Held Constitutional.* *People v. Armbruster* (1985) 163 C.A.3d 660, 210 C.R. 11, rejected a constitutional due process attack on P.C. 1112: "*Ballard* prompted increased exercise by trial courts of the authority to order the prosecutrix in a sex case to undergo a mental examination testing her credibility. The Legislature halted that trend by enacting section 1112, the evident purpose of which is to spare victims of sex crimes the inconvenience and embarrassment of a mental examination, a procedure of debatable value to the ascertainment of the truth in such cases ... and a probable disincentive to more widespread reporting of sex offenses. The enactment of section 1112 represents the Legislature's sound assessment of the practice given impetus by *Ballard* and the resulting prohibition bears a reasonable relationship to the evident legislative purpose to counteract that practice." (163 C.A.3d 664.)

(4) *Effect of Proposition 8.* *Armbruster* also rejected the contention that Proposition 8 (Cal. Const., Art. I, §28(d), 1 Cal. Evidence (4th), Introduction, §8) nullified P.C. 1112. The constitutional provision supersedes statutes that exclude relevant evidence; P.C. 1112 does not directly deal with admissibility or inadmissibility of evidence; it merely divests

trial courts of discretion to order mental examinations to test the witness' credibility. (163 C.A.3d 665.) (See also *People v. Hagerman* (1985) 164 C.A.3d 967, 975, 213 C.R. 286 [same holding].)

The 1984 Legislature confirmed the *Armbruster* holding by amending P.C. 1112, to clarify that the statutory prohibition applies "[n]otwithstanding the provisions of subdivision (d) of Section 28 of Article I of the California Constitution." The enacting statute adds: "It is not the intent of the Legislature in enacting this provision to suggest or imply that subdivision (d) of Section 28 of Article I of the California Constitution has limited the application of *Section 1112 of the Penal Code* in any way."

(5) *Examination for Purposes Other Than To Assess Credibility.* In *People v. Taylor* (1986) 180 C.A.3d 622, 225 C.R. 733, defendant, an orderly at a home for developmentally handicapped persons, was convicted of raping one of the residents. His motion for a psychiatric examination of the prosecuting witness to determine whether she suffered from "lunacy or other unsoundness of mind" or whether she was capable of consenting to sexual intercourse was denied. *Held*, the ruling was correct.

(a) Defendant's discovery motion was subject to the standard of *Ballard v. Superior Court*, *supra*, which remains viable except as nullified by P.C. 1112; hence, the determination of whether circumstances indicated the necessity for an examination was a matter for the court's discretion. In view of the extensive psychiatric record of the prosecuting witness, there was no abuse of that discretion in denying defendant's motion for an independent examination. Moreover, consent was not a tendered defense, and defendant's sole claim was that no intercourse occurred. (180 C.A.3d 634, 635.)

(b) Proposition 8 prohibits exclusion of evidence; it does not compel the court to order discovery so that the defendant may obtain such evidence. "To the extent that defendant's motion requested a psychiatric examination for purposes other than prohibited by *Penal Code section 1112*, Proposition 8 has no application." (180 C.A.3d 634, 635.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER XI - Presentation At Trial

### XI. IMPEACHMENT

#### B. Capacity To Observe, Recollect, and Communicate.

##### 2. Poor Memory.

3 Witkin Cal. Evid. Presentation § 264

[§ 264] Poor Memory.

(1) *Permissible Ground*. It is proper to show that the witness has a poor memory, because this tends to cast doubt on the witness' recollection of the particular facts to which he or she has testified. (See *Ev.C. 780(c)*.)

(2) *Cross-Examination*. This defect is usually proved by questioning the witness on his or her recollection of other matters. Thus, in *Davis v. California Powder Works* (1890) 84 C. 617, 24 P. 387, the validity of a Mexican land grant was in question, there being no official record of it. The witness Alvarado testified to signing the same as governor on a particular date some 40 years before. He was cross-examined as to many other events in his life of great importance, but was unable to recollect any dates. *Held*, this was a proper means of cross-examination to test his recollection and to indicate the possibility that he was mistaken as to the date of the grant. The court quoted the following observation: "A shrewd witness, who is swearing falsely to something which cannot be disproved by direct testimony, will confine his recollection wholly to that single fact, professing a want of recollection of all the facts and circumstances attending it. An inexperienced witness, whose willingness to oblige his friend exceeds his judgment, will endeavor to give verisimilitude to his tale by a recital of imaginary circumstances. A stringent cross-examination will generally involve the latter in a web of contradictions, which will be in a measure evaded by the other, with the answer that he 'does not recollect'." (84 C. 625.) (See also *Sharp v. Hoffman* (1889) 79 C. 404, 408, 21 P. 846; 3A Wigmore (Chadbourn Rev.) §§935, 995; 81 *Am.Jur.2d* (1992 ed.), *Witnesses* §871.)

(3) *Proof by Extrinsic Evidence*. Former California cases held, consistently with those on mental derangement (*supra*, §261), that other witnesses could not be called to testify to defective memory. (*Ah Tong v. Earle Fruit Co.* (1896) 112 C. 679, 682, 45 P. 7; *People v. Champion* (1924) 193 C. 441, 448, 225 P. 278.) Here again, the Evidence Code, making no such restriction, changed the California law. (See 20 A.L.R.3d 684, 708 [medical testimony].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Cross-Examination*. See 81 *Am.Jur.2d* (2004 ed.), *Witnesses* §837. *West's Key Number Digest*, *Witnesses* k.328



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## CHAPTER XI - Presentation At Trial

## XI. IMPEACHMENT

## B. Capacity To Observe, Recollect, and Communicate.

## 3. Intoxication.

3 Witkin Cal. Evid. Presentation § 265

[§ 265] Intoxication.

(1) *Intoxication at Time of Events.* It may be shown, in cross-examination or by extrinsic evidence, that the witness was intoxicated at the time of the events about which the witness is testifying, and was therefore unable to observe or comprehend correctly what he or she claims to have seen or heard. (*People v. Salladay* (1913) 22 C.A. 552, 554, 135 P. 508 [reversible error to prevent showing that prosecuting witness was continuously intoxicated for 16 days, including day of crime]; *Grover v. Morrison* (1920) 47 C.A. 521, 530, 190 P. 1078; *Silvey v. Harm* (1932) 120 C.A. 561, 572, 8 P.2d 570 [Q. "Had you had anything to drink?" held proper]; *People v. Singh* (1937) 19 C.A.2d 128, 129, 64 P.2d 1149; *In re D. L.* (1975) 46 C.A.3d 65, 74, 120 C.R. 276 [evidence of intoxication is relevant to witness' capacity to observe, recollect and communicate]; cf. *People v. Acosta* (1937) 21 C.A.2d 57, 63, 68 P.2d 298 [general question as to intoxication on certain day, without reference to time or place of events, is improper]; see 1 McCormick 5th, §44; 3A Wigmore (Chadbourn Rev.) §933; 81 Am.Jur.2d (1992 ed.), Witnesses §872; 8 A.L.R.3d 749.)

In *Grover v. Morrison*, *supra*, an automobile accident case, D, witness for plaintiffs, was asked on cross-examination whether he was drunk at the time, and denied it; W was then called by defendant to testify that D had been drunk, then plaintiffs were denied permission to ask W whether he was drunk himself at the time. *Held*, this was improper. W was subject to impeachment on the same theory that D was; i.e., it could be shown that W's condition rendered him incapable of determining whether D was drunk, or that "experiencing the usual effects of such a condition, his brain was susceptible to the impression that every person he met or saw, and not he, was in a state of alcoholic intoxication." (47 C.A. 530.)

(2) *Prior Acts of Intoxication.* Prior acts of intoxication, or habitual intemperance, are regarded as remote and not proper impeachment. (*People v. Stanley* (1962) 206 C.A.2d 795, 798, 24 C.R. 128; see 1 McCormick 5th, §44; 3A Wigmore (Chadbourn Rev.) §933.)

In *Springer v. Reimers* (1970) 4 C.A.3d 325, 84 C.R. 486, there was no evidence that plaintiff was intoxicated or suffering from delirium tremens when he fell from the top of a moving trailer. Defendants, however, showed that within a year before the accident, he was warned about drinking before coming to work. In argument, defendants claimed that this habitual intemperance affected his credibility. *Held*, chronic alcoholism was an improper basis for impeachment; even if evidence of plaintiff's drinking habits had some relevancy to the issue of damages, defendants could not properly have used it to disparage his credibility and establish indirectly that the accident was his fault. (4 C.A.3d 339.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Intoxication at Time of Events.* See 81 Am.Jur.2d (2004 ed.), Witnesses §838; 1 McCormick 6th, §44.

(2) *Prior Acts of Intoxication*. See 1 McCormick 6th, §44.



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## CHAPTER XI - Presentation At Trial

### XI. IMPEACHMENT

#### B. Capacity To Observe, Recollect, and Communicate.

##### 4. Narcotic Addiction.

3 Witkin Cal. Evid. Presentation § 266

[§ 266] Narcotic Addiction.

(1) *General Rule of Admissibility.* Evidence of habitual use of narcotics is admitted in many jurisdictions, either on cross-examination or by testimony of a medical expert, to show weakened powers of perception, memory and narration. (See 1 McCormick 5th, §44; 3A Wigmore (Chadbourn Rev.) §934; 81 Am.Jur.2d (1992 ed.), Witnesses §§874, 875; 20 A.L.R.3d 684, 709; 65 A.L.R.3d 705.)

California cases are in accord, where the evidence relates to the time of observation of the facts or testimony. (See *People v. Bell* (1955) 138 C.A.2d 7, 11, 291 P.2d 150; *People v. Buono* (1961) 191 C.A.2d 203, 232, 12 C.R. 604 [discussion]; *People v. Perez* (1965) 239 C.A.2d 1, 6, 48 C.R. 596; *People v. Viniegra* (1982) 130 C.A.3d 577, 581, 181 C.R. 848 [prosecution was properly allowed to ask defense witness whether she was under influence of prescription drugs].) (On proof of addiction to impeach veracity, see *infra*, §282.)

(2) *Good Faith in Asking Question.* In *People v. Rocha* (1971) 3 C.3d 893, 92 C.R. 172, 479 P.2d 372, the prosecutor contended that defendant was cross-examined about smoking a marijuana cigarette in order to demonstrate that he was unable to clearly perceive and recall the events on the evening of the knifing. When making an offer of proof, however, the prosecutor failed to produce necessary expert testimony about the effect of marijuana on the cerebral processes, and also failed to show that the substance defendant smoked actually was marijuana or that he was under its influence when the crime was committed. Defendant claimed prejudicial misconduct. *Held*, the prosecutor's failure was not conclusive evidence of bad faith. "His explanation of the reason for the question and his argument that the admissibility of evidence of intoxication caused by smoking marijuana should parallel the introduction of evidence of alcoholic intoxication (which requires no expert testimony) demonstrates a sincere attempt to impeach the witness." (3 C.3d 901.)

(3) *Addiction Related to Significant Period.* Like habitual intemperance (see *supra*, §265), narcotic addiction not related to the significant period cannot be admitted, at least in the absence of expert testimony showing a detrimental effect on testimonial capacity. (See *People v. Pargo* (1966) 241 C.A.2d 594, 600, 50 C.R. 719; *People v. Balderas* (1985) 41 C.3d 144, 191, 222 C.R. 184, 711 P.2d 480.)

In *People v. Bennett* (1969) 276 C.A.2d 172, 80 C.R. 706, defendant was an ex-felon whose sister was dating police officer R. At various times, all three persons used the sister's car, but defendant was alone in the vehicle when it was searched after a routine traffic stop. Hidden under the left front seat was R's fully loaded revolver. At defendant's trial for being an ex-felon in possession of a concealable firearm, he attempted to show that R was a heavy drinker and consumer of narcotics, to suggest that R could have placed the gun there while in a stupor. The proffered evidence,



however, was rejected as irrelevant. *Held*, this was error. The "specified occasion" on which interest centered was the 2-week period during which R failed to report his loss. "It is quite clear from the offers made by defendant that he thought he could prove a habit of drinking and pill taking sufficiently regular so that there should have been several occasions during that period when Officer R.'s condition would cause him not to remember all of his actions." (276 C.A.2d 175.) The evidence was directed to the relevant time period and, "for what it was worth, counsel wanted to lay the foundation for a permissible inference which, if drawn by the jury, would negative the People's theory that his client stole the gun. He should have been permitted to present his proof." (276 C.A.2d 176.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *General Rule of Admissibility*. See 81 Am.Jur.2d (2004 ed.), Witnesses §§840, 841; 1 McCormick 6th, §44.



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### XI. IMPEACHMENT

#### C. Bias or Other Improper Motive.

##### 1. In General.

##### a. Ground of Impeachment.

3 Witkin Cal. Evid. Presentation § 267

[§ 267] Ground of Impeachment.

(1) *Former Law.* Although former California statutes were not explicit, the case law supported impeachment by inquiry into motives. (See *People v. Homan* (1930) 103 C.A. 161, 163, 284 P. 252 [refusal to permit inquiry into motives of prosecution witnesses held reversible error]; *People v. Vanderburg* (1960) 184 C.A.2d 33, 41, 7 C.R. 287, *infra*, §350, quoting the text.)

(2) *Present Law.* The existence of a bias, interest, or other motive is a ground of impeachment. (Ev.C. 780(f); see *People v. Allen* (1978) 77 C.A.3d 924, 931, 144 C.R. 6, citing the text; *People v. Fatone* (1985) 165 C.A.3d 1164, 1173, 211 C.R. 288; *In re Anthony P.* (1985) 167 C.A.3d 502, 507, 213 C.R. 424, *infra*, §278; and see generally Rutter Group, 2 Civil Trials and Evidence, §8:3005 et seq.; 1 McCormick 5th, §39; 3A Wigmore (Chadbourn Rev.) §940 et seq.; 81 *Am.Jur.2d* (1992 ed.), *Witnesses* §876 et seq.; 62 A.L.R.2d 610; on methods of challenging witness for bias on cross-examination, see Rutter Group, 2 Civil Trials and Evidence, §10:106 et seq.) Moreover, the Federal Rules of Evidence clearly contemplate the use of this ground of impeachment. (See *United States v. Abel* (1984) 469 U.S. 45, 105 S.Ct. 465, 468, 83 L.Ed.2d 450, 456, *infra*, §275.)

In *People v. Fatone*, *supra*, defense counsel, cross-examining a deputy sheriff, asked if he had talked to another deputy sheriff who had the same last name as the victim. Counsel was seeking to show bias of the witness, but the judge demanded an offer of proof. When counsel explained that he was unable to see the witness before trial and only wanted to find out whether the event had occurred, the judge declared that the question was asked in bad faith, and admonished counsel before the jury. *Held*, the question was proper and the judge was guilty of prejudicial misconduct. "Defense counsel has an absolute right to explore avenues of potential bias with a prosecution witness, particularly a police officer. And he can hardly be required to know the answer to every question in advance; he cannot compel witnesses to submit to pretrial interviews or to tell the truth if they do." (165 C.A.3d 1173.) The court added the following comment:

"We recognize leading authorities on the subject of cross-examination suggest counsel should never ask a question without knowing the answer in advance ... ; but this is a tactical restriction, not a legal one by any means." (165 C.A.3d 1174.)

(3) *Scope of Inquiry.* For practical reasons, the inquiry for impeachment is usually confined to the *prominent* motives for untruthful testimony: interest in the suit, which necessarily tends to bias, and other circumstances showing bias that are not too remote. (See 3A Wigmore (Chadbourn Rev.) §945.) And a witness who admits prejudice is not allowed to give reasons to justify the prejudice. (*People v. Zemavasky* (1942) 20 C.2d 56, 63, 123 P.2d 478.)

(4) *Constitutional Right to Inquiry*. A trial judge's ruling prohibiting inquiry into bias of a prosecution witness is a violation of the defendant's constitutional right of confrontation; but the error is subject to the *Chapman* harmless error test (whether the error was harmless beyond a reasonable doubt). (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 106 S.Ct. 1431, 1435, 1438, 89 L.Ed.2d 674, 683, 686; see *People v. Dyer* (1988) 45 C.3d 26, 48, 246 C.R. 209, 753 P.2d 1 [distinguishing *Van Arsdall* on its facts, but approving harmless error analysis]; *People v. Adames* (1997) 54 C.A.4th 198, 209, 62 C.R.2d 631 [in prosecution for sexual abuse of minor, trial judge did not violate defendant's confrontation right by excluding evidence of past molestation of victim's mother, which was offered to show bias affecting mother's tendency to believe daughter's accusations; potential for confusion of issues outweighed marginal relevance of collateral inquiry].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Present Law*. See *People v. Zambrano* (2007) 41 C.4th 1082, 1164, 63 C.R.3d 297, 163 P.3d 4 [in capital murder case, trial judge did not err in allowing prosecution to question defense expert regarding his testimony in another case, in attempt to show his propensity to advocate for criminal defendants even in extreme cases]; cf. *People v. Buffington* (2007) 152 C.A.4th 446, 455, 62 C.R.3d 223 [in sexually violent predator recommitment proceeding, evidence of testimony of defense expert in other cases was not relevant, and therefore was not admissible, to show expert's bias in favor of defendants in cases of this type; jury would have had no basis in reason to reject expert's opinion in other cases, and thus evidence did not reflect on reliability of his present testimony]; 81 Am.Jur.2d (2004 ed.), *Witnesses* §842 et seq.; 1 McCormick 6th, §39.(4) *Constitutional Right to Inquiry*. See *People v. Box* (2000) 23 C.4th 1153, 1203, 99 C.R.2d 69, 5 P.3d 130 [even assuming that trial judge erred in precluding defendant from inquiring into nature of charges of unprofessional conduct pending against expert witness who testified for codefendant, error was harmless in light of information jury already had regarding witness]. *West's Key Number Digest*, *Witnesses* k.363 et seq.



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## CHAPTER XI - Presentation At Trial

### XI. IMPEACHMENT

#### C. Bias or Other Improper Motive.

##### 1. In General.

##### b. Abolition of Foundation Requirement.

*3 Witkin Cal. Evid. Presentation § 268*

[§ 268] Abolition of Foundation Requirement.

Under former California law, the fact of hostility or interest could be shown by circumstances without laying any foundation, but, if shown by declarations of the witness, the rule governing prior inconsistent statements applied: A foundation had to be laid by asking the witness if he or she made the statements and giving the witness an opportunity to explain them. (See *Silvey v. Hodgdon* (1874) 48 C. 185, 188; *Fagan v. Lentz* (1909) 156 C. 681, 689, 105 P. 951; *Estate of Bedford* (1910) 158 C. 145, 147, 110 P. 302; *Ash v. Soo Sing Lung* (1918) 177 C. 356, 358, 170 P. 843; *People v. Sweeney* (1960) 55 C.2d 27, 36, 9 C.R. 793, 357 P.2d 1049; on rule in other jurisdictions, see 1 McCormick 5th, §39; 3A Wigmore (Chadbourn Rev.) §§953, 964; 81 Am.Jur.2d (1992 ed.), Witnesses §§881, 882; 87 A.L.R.2d 407.)

The Evidence Code abolished the foundation requirement for inconsistent statements (see *infra*, §333) and thus abrogated this rule.

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 81 Am.Jur.2d (2004 ed.), Witnesses §§847, 848; 1 McCormick 6th, §39.



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C. Bias or Other Improper Motive.

2. Fear or Susceptibility to Pressure.

3 *Witkin Cal. Evid. Presentation* § 269

[§ 269] Fear or Susceptibility to Pressure.

(1) *General Rule of Admissibility.* In *People v. Yeats* (1984) 150 C.A.3d 983, 198 C.R. 268, defendant was charged with hit-and-run driving, based on a collision with a car driven by deputy sheriff P. P was the only identification witness. To impeach his testimony, defendant called H, who testified that he had been at the scene, that the officer was in shock and passing in and out of consciousness, and that the other man at the scene was not defendant. To impeach H, the prosecutor introduced evidence that H had been approached by a stranger who sought by threat to pressure him into testifying falsely that the officer's headlights were off at the time of the accident. The judge instructed the jury that the threat could be considered only on the issue of credibility. *Held*, admission of this evidence was not error. Where the threat comes not from the defendant but from a stranger, the inquiry is into the state of mind of the witness, and the prosecution must first establish that as relevant. Here, H's testimony conflicted with that of P, and raised a question concerning P's mental competence and ability to identify defendant as the driver of the car. Thus, H's credibility was in issue, and the evidence was properly admitted to show that he was fearful, and had a motive not to tell the truth. (150 C.A.3d 986.)

In *Davis v. Alaska* (1974) 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347, the court held that the trial judge improperly restricted cross-examination of a witness on his probationary status as a juvenile delinquent; the defendant was entitled to show susceptibility of the witness to undue pressure. (94 S.Ct. 1110, 39 L.Ed.2d 354.)

Similarly, in *People v. Adams* (1983) 149 C.A.3d 1190, 197 C.R. 623, W, the only witness to give direct testimony against defendant, was on juvenile probation at the time of the alleged crime, and at the time of his first discussion of the case with the police, he was in custody for another matter. *Held*, it was error to prevent questioning on his status as a juvenile probationer. As in *Davis*, *supra*, it was not enough that the witness was questioned about bias; defendant was entitled to go into the facts from which the jurors could draw inferences relating to reliability. W was not simply a past misdemeanor; he was on probation and aware of the consequences of noncooperation. "Thus, his status as a probationer was relevant to impeach his testimony for bias, prejudice, and his possible motive to cooperate with the authorities, regardless of the act that got him on probation in the first place." (149 C.A.3d 1193.) (Cf. *People v. Carpenter* (1999) 21 C.4th 1016, 1050, 90 C.R.2d 607, 988 P.2d 531 [court properly ruled that defense counsel could not ask witness whether she was on probation in juvenile matter or question her about facts underlying her juvenile adjudication, in which she allegedly used gun; defendant was allowed to ask whether witness had juvenile case, whether promises had been made to her regarding her juvenile matter, and whether she was familiar with guns; distinguishing *Davis*].)

(2) *Exception: Speculative Evidence.* If the theory behind the alleged motive is speculative, the evidence may be

excluded. Thus, in *People v. Johnson* (1984) 159 C.A.3d 163, 205 C.R. 427, a probation revocation hearing was held after defendant's arrest for robbery, and T, the key prosecution witness, identified defendant. Defense counsel, in cross-examination, sought to ask T whether he ran a "fencing operation" out of his retail store, whether he "charged working prostitutes money to enter his hotel" and whether he had "contact" with officers in the vice squad. Counsel's theory was that evidence of T's illegal activities showed a motive to fabricate his testimony. *Held*, it was not error to sustain objections to these questions. (a) The theory that T wanted to "please the police" was untenable; there was no indication that he was being investigated, and he had nothing to gain from the police or district attorney by fabricating testimony. (b) The theory that T would testify falsely to protect himself against defendant's disclosure of T's alleged criminal conduct to the police was absurd; such a fear would provide a motive to help, not hurt, defendant. "Indeed, the fact that Mr. Tang became the key prosecution witness suggests that he had nothing to hide from the police and nothing to fear from defendant." (159 C.A.3d 168, 169.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### C. Bias or Other Improper Motive.

##### 3. Financial Interest in Outcome.

3 Witkin Cal. Evid. Presentation § 270

[§ 270] Financial Interest in Outcome.

"It is always proper for a party against whom a witness has given damaging testimony to show out of the mouth of the witness himself, if he can, or by other sources, if necessary, that such witness has an unusual interest in the outcome of the case." (*People v. Sacramento Butchers' Protective Assn. (1910) 12 C.A. 471, 494, 107 P. 712*; see *Ev.C. 780(f)*; 3A Wigmore (Chadbourn Rev.) §§966, 969; 21 Proof of Facts 2d 73 [financial interest of expert witness].)

Thus, it may be shown that the witness is paying some or all of the expenses of the litigation. (*People v. Sacramento Butchers' Protective Assn., supra, 12 C.A. 494.*) In *Gould v. Stafford (1891) 91 C. 146, 27 P. 543*, the witness testified that he was president of a company that paid the expenses. He was asked why the company was doing so, and the court sustained an objection. *Held*, the question should have been allowed. (91 C. 156.)

Any other circumstances tending to show financial interest may also be brought out, or the fact of interest may be ascertained by a direct question. (*Balcom v. Growers Warehouse Co. (1921) 55 C.A. 474, 481, 204 P. 39* [attorney witness had contingent fee contract]; *H. W. Smith v. Swenson (1930) 105 C.A. 60, 65, 286 P. 1050* [witness had assigned notes to plaintiff for collection, recovery to be shared equally].)

In *Calvert v. State Bar (1991) 54 C.3d 765, 1 C.R.2d 684, 819 P.2d 424*, a disciplinary proceeding against an attorney for incompetent representation, the court held that the referee had erroneously refused to allow the attorney to impeach the complaining client regarding the client's financial interest in the outcome of the proceeding. The client had a fee dispute with the attorney, and a pending malpractice action. "Generally, any fact or circumstance tending to show that a witness has a financial interest in the outcome of a legal proceeding is a proper ground for impeachment." (54 C.3d 777, citing the text.)

On the other hand, in *National Oil Refining & Mfg. Co. v. Producers Refining Co. (1915) 169 C. 740, 147 P. 963*, an action for breach of contract, plaintiff's manager was cross-examined on his financial interest as stockholder and otherwise. But the court refused to permit inquiry into alleged trouble he was having with the stockholders which had allegedly influenced him to file this suit to obtain an unjustified recovery and thus quiet their complaints. *Held*, the ruling was proper. (169 C. 742.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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### XI. IMPEACHMENT

#### C. Bias or Other Improper Motive.

#### 4. Benefits Received or Contemplated.

##### a. General Rule of Admissibility.

3 Witkin Cal. Evid. Presentation § 271

[§ 271] General Rule of Admissibility.

(1) *Proper Impeachment.* A witness may be impeached by showing that he or she has received or will receive money or other benefits from the party for whom the witness testifies.

Thus, where two persons are injured in an automobile accident, and in an action brought by one where the other testifies for the defendant, the plaintiff may, on cross-examination, show that the witness has made a settlement with the defendant. (*Bluemel v. Kroizy* (1931) 114 C.A. 205, 207, 299 P. 756; *Luis v. Cavin* (1948) 88 C.A.2d 107, 114, 198 P.2d 563; *Zelayeta v. Pacific Greyhound Lines* (1951) 104 C.A.2d 716, 728, 232 P.2d 572; see 1 McCormick 5th, §§39, 266.)

Similarly, the fact that a witness has been continually employed by the same party, or is receiving more than the statutory witness fees, may be brought out. (See *People v. Tomalty* (1910) 14 C.A. 224, 235, 111 P. 513; *Moniz v. Bettencourt* (1938) 24 C.A.2d 718, 724, 76 P.2d 535 [notwithstanding incidental reference to insurance company employer]; *Causey v. Cornelius* (1958) 164 C.A.2d 269, 280, 330 P.2d 468 [same: employment of insurance company investigator]; 1 McCormick 5th, §39; 3A Wigmore (Chadbourn Rev.) §961; 2 Cal. Evidence (4th), Witnesses, §19; *infra*, §273.)

In a *criminal case*, it is proper for the defense to ask a prosecution witness whether he or she has been promised immunity from punishment for criminal charges brought against him or her; and it is also permissible to inquire into the mere fact that charges are pending against the witness as a circumstance to show that he or she may, by testifying, be seeking favor or leniency. (*People v. Pantages* (1931) 212 C. 237, 258, 297 P. 890 [witness previously arrested on various charges, but released from custody and not yet tried]; *People v. Sweeney* (1960) 55 C.2d 27, 9 C.R. 793, 357 P.2d 1049, *infra*, §344; *People v. Phillips* (1985) 41 C.3d 29, 45, 222 C.R. 127, 711 P.2d 423 [inquiry as to any agreement affecting witness' credibility is proper, even if terms of agreement are not communicated to witness]; *People v. Blackwell* (1927) 81 C.A. 417, 419, 253 P. 964 [charge pending]; *People v. Allen* (1978) 77 C.A.3d 924, 931, 144 C.R. 6, citing the text; see 1 McCormick 5th, §39; 3A Wigmore (Chadbourn Rev.) §§967, 968.)

(2) *Distinction: Exclusion on Relevance Grounds.* The trial judge has wide discretion to limit cross-examination on the grounds of marginal relevance. Although the defense is entitled to elicit evidence that a witness is motivated by an expectation of leniency or immunity, if there is no evidence of an agreement that might furnish a bias or motive to testify against the defendant, limitation for lack of relevance may be proper. (*People v. Bento* (1998) 65 C.A.4th 179, 194, 195, 76 C.R.2d 412 [following *People v. Dyer* (1988) 45 C.3d 26, 246 C.R. 209, 753 P.2d 1; denial of request to



cross-examine prosecution witness concerning four crimes he was involved in was proper, where there was no evidence that witness might receive some benefit for testifying, and there was large amount of other evidence defendant could use to impeach him].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Proper Impeachment*. See 1 McCormick 6th, §39; 2 McCormick 6th, §266.

*Criminal cases:* See *People v. Martinez* (2002) 103 C.A.4th 1071, 1080, 127 C.R.2d 305, quoting the text; 28 *Pepperdine L. Rev.* 1 [proposals for guarding against biased testimony where witness is receiving benefit from government for testifying].



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#### C. Bias or Other Improper Motive.

#### 4. Benefits Received or Contemplated.

#### b. Discretionary Exclusion of Settlement.

3 Witkin Cal. Evid. Presentation § 272

[§ 272] Discretionary Exclusion of Settlement.

The rule of *Zelayeta v. Pacific Greyhound Lines* (1951) 104 C.A.2d 716, 232 P.2d 572 (supra, §271) is subject to the qualification that settlement evidence may be excluded where its probative value is outweighed by its prejudicial effect. (See *Ev.C. 352, 1 Cal. Evidence (4th), Circumstantial Evidence, §132.*) In *Granville v. Parsons* (1968) 259 C.A.2d 298, 66 C.R. 149, defendant P rear-ended B. S, following behind, applied his brakes, lost control, veered into the center of the freeway and collided with plaintiff's car, injuring her and killing decedent. Plaintiff sued B, S and P. B paid \$ 1,000 in settlement, S paid \$ 38,500 in settlement, and both were dismissed. In the trial against P alone, on the sole issue of liability, P conceded negligence, taking the position that S was also negligent and that his negligence was a superseding cause. S, testifying on direct examination for plaintiff, said that his brakes had been in good condition. Defense counsel, on cross-examination, questioned him about the settlement, and made much of it in argument to the jury. Verdict was for defendant P. *Held*, reversed.

(a) The questions were relevant to credibility under the *Zelayeta* rule, but under the Evidence Code, relevancy is not enough, and prior decisions are not always controlling: "Section 352 tells [trial courts] that in the field of relevance *stare decisis* takes a back seat to justice." (259 C.A.2d 305.)

(b) Evidence of money paid to a former plaintiff (*Zelayeta*) or a dismissal given to a former defendant (this case) does not necessarily indicate bias when the ex-litigant becomes a witness. The former plaintiff may have been forced by economic circumstances to take a paltry sum, and the former defendant may have been coerced into an excessive payment by considerations foreign to the litigation. (259 C.A.2d 304.) The trial judge should, outside the presence of the jury, inquire into the circumstances, to make the preliminary ruling on whether the evidence tends to affect credibility. (259 C.A.2d 304; see supra, §50 et seq.)

The court concluded that, assuming the evidence was admissible, defense counsel made an improper use of it in argument. (259 C.A.2d 304.) (See BAJI (8th ed.), No. 2.28 [instruction on limited purpose of evidence of settlement (impeachment only)].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER XI - Presentation At Trial

### XI. IMPEACHMENT

#### C. Bias or Other Improper Motive.

##### 5. Personal or Other Relationship.

###### a. In General.

3 Witkin Cal. Evid. Presentation § 273

[§ 273] In General.

The fact of relationship--family, fraternal, national, etc.--may always be shown as a means of developing an inference of bias. (See *People v. Krug* (1935) 10 C.A.2d 172, 176, 51 P.2d 445 [defendant was Armenian; held proper to cross-examine witnesses as to their nationality on theory that fellow Armenians might be inclined to favor defendant]; *People v. Pierce* (1969) 269 C.A.2d 193, 200, 75 C.R. 257, citing the text [defense witnesses were all close relatives; prosecutor could show that they had changed their stories under pressure of affection, fear or familial relationship]; *People v. Ruiz* (1998) 62 C.A.4th 234, 240, 72 C.R.2d 572, citing the text; 1 McCormick 5th, §39; 3A Wigmore (Chadbourn Rev.) §949; 81 Am.Jur.2d (1992 ed.), Witnesses §886.) (On group relationship, see *infra*, §§274, 275; on meretricious relationship, see *infra*, §276.)

Business relationship may also be shown, e.g., that the witness is employed by a party or representative of a party, and therefore looks to that person for compensation or continued employment. (*People v. Burch* (1920) 46 C.A. 391, 396, 189 P. 716; see 3A Wigmore (Chadbourn Rev.) §949.) This is so despite the fact that in many cases, it may result in the incidental disclosure of insurance, which would ordinarily be improper. Thus, in *Levy v. Berner* (1930) 110 C.A. 65, 293 P. 896, a doctor called by defendant testified to examining plaintiffs after the accident, and said that their injuries were less serious than they claimed. *Held*, it was proper to show that he was employed to make the examination by an insurance company. (110 C.A. 69.) (See *Moniz v. Bettencourt* (1938) 24 C.A.2d 718, 724, 76 P.2d 535; *Causey v. Cornelius* (1958) 164 C.A.2d 269, 280, 330 P.2d 468; cf. *Eldridge v. Clark & Henery Const. Co.* (1925) 75 C.A. 516, 634, 243 P. 43 [approving principle, but referring to older California cases on reference to insurance]; 1 McCormick 5th, §39; 4 A.L.R.2d 761, 779.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 81 Am.Jur.2d (2004 ed.), Witnesses §852; 1 McCormick 6th, §39. *West's Key Number Digest*, Witnesses k.370 et seq.



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### XI. IMPEACHMENT

- C. Bias or Other Improper Motive.
  - 5. Personal or Other Relationship.
- b. Evidence of Group Relationship Improper.

3 Witkin Cal. Evid. Presentation § 274

[§ 274] Evidence of Group Relationship Improper.

In *People v. Perez* (1981) 114 C.A.3d 470, 170 C.R. 619, the court took note of a statement in *People v. Zammora* (1944) 66 C.A.2d 166, 214, 152 P.2d 180, that use of the word "gang" referred only to an ordinary association of young people in a particular neighborhood. But the *Perez* opinion held that admission of evidence of gang membership was prejudicial error: "Thirty-six years have passed since *Zammora*. It is fair to say that when the word "gang" is used in Los Angeles County, one does not have visions of the characters from the 'Our Little Gang' series. The word gang as used in the case at bench connotes opprobrious implications." (114 C.A.3d 479.)

The prejudicial nature of reference to a "gang" was more fully explored by a plurality opinion in *People v. Cardenas* (1982) 31 C.3d 897, 184 C.R. 165, 647 P.2d 569. Defendant was prosecuted for felonies including attempted robbery, and produced a number of alibi witnesses. The prosecutor attacked their credibility by eliciting testimony that they and defendant were members of a youth "gang" or "group" known as El Monte Flores; two of the male witnesses were asked to exhibit to the jury their gang tattoos; and the prosecutor also sought to introduce evidence that members of other "groups" were not welcome to "join" the El Monte Flores gang. *Held*, admission of this evidence, together with another serious error, was prejudicial and called for reversal of the conviction.

(a) The probative value of the gang membership was minimal; the fact that the witnesses lived in the same neighborhood and were friends of defendant had already been established by other testimony. (31 C.3d 904.)

(b) The evidence created a substantial danger of undue prejudice. In Southern California, Chicano youth gangs have received widespread media publicity for purported criminal activities, and the jury might improperly infer defendant's criminal disposition from membership in such a group. (31 C.3d 905.) This danger was increased by questions suggesting that hostilities existed between the two youth gangs, and by questions giving the impression that the attempted robbery was a gang operation. (31 C.3d 905.)

Two justices dissented, asserting that the record did not show any reference to "gangs" or "violent crimes," and that in *re Wing Y.* (1977) 67 C.A.3d 69, 79, 136 C.R. 390, though distinguishable on its facts, affirmed the general rule that a witness may be asked about group association. (31 C.3d 915.) (See *People v. Maestas* (1993) 20 C.A.4th 1482, 1495, 1497, 25 C.R.2d 644, citing the text and following *Cardenas* [trial judge erred in admitting evidence of defendants' common gang membership to show that one of them was biased; evidence was weak and cumulative of other evidence showing close personal relationship between defendants]; *People v. Davis* (1996) 42 C.A.4th 806, 813, 49 C.R.2d 890 [admission of cumulative testimonial evidence as to bias of defendants' fellow gang members constituted abuse of

discretion, but error was harmless in light of "ironclad" nature of prosecution's case; citing *Maestas* and *Cardenas*].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Avitia* (2005) 127 C.A.4th 185, 192, 24 C.R.3d 887 [in prosecution for discharge of firearm in grossly negligent manner and possession of assault weapon, admission of evidence of gang graffiti found in defendant's room was improper, where no gang enhancement was alleged, there was no evidence that charged crimes were related to gang activity, and there was no real dispute that weapons found in defendant's room belonged to him].



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- C. Bias or Other Improper Motive.
  - 5. Personal or Other Relationship.
- c. Evidence of Group Relationship Proper.

3 Witkin Cal. Evid. Presentation § 275

[§ 275] Evidence of Group Relationship Proper.

In *People v. Munoz* (1984) 157 C.A.3d 999, 204 C.R. 271, the trial judge permitted the prosecutor to question defense witnesses on Mexican youth group membership, but directed him to refrain from using the word "gang" in any questions. Defendant contended that this "semantic solution" permitted "equally devastating" terms to be used (association, group, club, and brothers). *Held*, no prejudicial error occurred.

(a) With defense counsel's acquiescence and consistent with *In re Wing Y.* (1977) 67 C.A.3d 69, 136 C.R. 390, the prosecutor limited his inquiry to possible bias or prejudice flowing from a common club or association relationship. The prosecutor did not "add any fillips relating to violence or hostilities between competing groups." (157 C.A.3d 1012, distinguishing *People v. Cardenas* (1982) 31 C.3d 897, 184 C.R. 165, 647 P.2d 569, *supra*, §274.)

(b) After witness R testified to being defendant's friend, any evidence of club affiliation became cumulative, and would be improper if it created a substantial danger of undue prejudice; but here, the questions were limited and the responses were neutral, and it was not reasonably probable that a different verdict would have been rendered if the evidence had been excluded. (157 C.A.3d 1013.)

In *United States v. Abel* (1984) 469 U.S. 45, 105 S.Ct. 465, 83 L.Ed.2d 450, Abel and Ehle were charged with robbery. Ehle pleaded guilty and testified against defendant Abel, identifying him as a participant in the robbery. Defendant then called Mills, who had served time in prison with Ehle, to testify that Ehle told him that he planned to implicate defendant falsely. The prosecutor, on cross-examination of Mills, asked if he and defendant were members of a "secret type of prison organization" which had a creed requiring members to deny its existence and lie or kill for each other. Mills denied knowledge of such an organization, and the prosecutor then recalled Ehle, who testified that Mills and he were indeed members of a secret prison organization with that creed, and that it would have been "suicide" for Ehle to have told Mills what Mills attributed to him. *Held*, the district judge acted within his discretion in admitting Ehle's testimony.

(a) Ehle's testimony about the prison gang made the existence of Mills' bias toward defendant more probable; i.e., the gang membership supported the inference that Mills' testimony was slanted or perhaps fabricated in defendant's favor: "A witness' and a party's common membership in an organization, even without proof that the witness or party has personally adopted its tenets, is certainly probative of bias." (105 S.Ct. 469, 83 L.Ed.2d 457.)

(b) Defendant contended that the judge should not have permitted Ehle's precise description of the gang as a lying

and murderous group; but this argument ignores the fact that the type of organization may be relevant to show bias. "If the organization is a loosely knit group having nothing to do with the subject matter of the litigation, the inference of bias arising from common membership may be small or nonexistent. ... The attributes of the Aryan Brotherhood--a secret prison sect sworn to perjury and self-protection--bore directly not only on the fact of bias but also on the source and strength of Mills' bias. The tenets of this group showed that Mills had a powerful motive to slant his testimony towards respondent, or even commit perjury outright." (105 S.Ct. 470, 83 L.Ed.2d 458.) (See *People v. Harris* (1985) 175 C.A.3d 944, 957, 221 C.R. 321 [evidence of gang membership was admissible as relevant on possible threats to prosecution witnesses that resulted in obvious bias during their testimony]; *People v. Sanchez* (1997) 58 C.A.4th 1435, 1450, 69 C.R.2d 16 [in murder trial, evidence that defendant was gang member was properly admitted because of its relevance to witness credibility, where two witnesses had initially refused to identify defendant out of fear of retaliation by defendant's gang]; *People v. Ruiz* (1998) 62 C.A.4th 234, 242, 72 C.R.2d 572 [evidence that defendant and third party who, in interview with police, confessed to defendant's crime, were both members of same gang was admissible on issue of third party's bias and also to prove direct inconsistency in his interview statements (that he did not even know defendant)].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### 6. Declarations or Acts of Friendship.

3 *Witkin Cal. Evid. Presentation* § 276

[§ 276] Declarations or Acts of Friendship.

Particular acts or declarations showing a friendly disposition toward a party are admissible for impeachment. (See *People v. Lindsey* (1949) 90 C.A.2d 558, 565, 203 P.2d 572 [friendship]; cf. *People v. Vertrees* (1915) 169 C. 404, 411, 146 P. 890 [after ascertainment of fact of friendly interest, improper to inquire into details of transaction prejudicial to defendant]; see also 1 McCormick 5th, §39; 3A Wigmore (Chadbourn Rev.) §§950, 951.)

Thus, a meretricious relationship between the witness and a party may be shown. (*People v. Sweeney* (1960) 55 C.2d 27, 41, 9 C.R. 793, 357 P.2d 1049, *infra*, §344; *People v. Payton* (1939) 36 C.A.2d 41, 54, 96 P.2d 991 [prosecution allowed to ask defendant's witness whether she had lived with him and borne him children]; *People v. Warren* (1959) 175 C.A.2d 233, 241, 346 P.2d 64 [alibi witness for defendant asked whether she had been "sleeping with appellant"]; *People v. Dukes* (1966) 241 C.A.2d 488, 493, 50 C.R. 609 [homosexual relationship]; *People v. Ogg* (1968) 258 C.A.2d 841, 845, 66 C.R. 289 [defendant's character witness, a woman, was asked if she and defendant lived together; following *Sweeney*]; *People v. James* (1976) 56 C.A.3d 876, 886, 128 C.R. 733 [defendant's cross-examination concerning whether prosecution witness lived with and was financially dependent on prosecutrix should have been allowed]; see 25 A.L.R.3d 537 [cross-examining witness about illicit relationship with defendant in criminal case].)

Acts condoning brutal conduct of a defendant may be shown. In *People v. Lint* (1960) 182 C.A.2d 402, 6 C.R. 95, the mother of a murdered child lived with defendant. She was asked whether, in a conversation with a neighbor, she had said that the child got two black eyes falling down the steps, and whether the child had interrupted and said "Daddy hit me." On her denial, the neighbor was called in rebuttal and so testified. *Held*, admissible, to impeach the credibility of the paramour (mother) by indicating her knowledge of defendant's brutal conduct and her condoning of it. (182 C.A.2d 417.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 1 McCormick 6th, §39.





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#### C. Bias or Other Improper Motive.

#### 7. Hostility Toward Adverse Party.

3 Witkin Cal. Evid. Presentation § 277

[§ 277] Hostility Toward Adverse Party.

"The credibility of an adverse witness may be assailed by proof that he cherishes a feeling of hostility towards the party against whom he is called; and it may be established by proof of the acts or declarations of the witness." (*Silvey v. Hodgdon* (1874) 48 C. 185, 188; see *People v. Hannon* (1977) 19 C.3d 588, 601, 138 C.R. 885, 564 P.2d 1203, citing the text; *People v. Keyes* (1930) 103 C.A. 624, 643, 284 P. 1096, supra, §258; *People v. Sandow* (1933) 133 C.A. 559, 563, 24 P.2d 521; *Byrd v. Savage* (1963) 219 C.A.2d 396, 401, 32 C.R. 881; 3A Wigmore (Chadbourn Rev.) §950; 81 Am.Jur.2d (1992 ed.), Witnesses §§883, 884.) Thus, in *Newman v. Los Angeles Transit Lines* (1953) 120 C.A.2d 685, 690, 262 P.2d 95, a personal injury action, defendant, cross-examining plaintiff, properly sought to develop her accusations of spying and frameup, to show her suspicious nature and hatred of defendant.

Such hostility may be inferred from a previous quarrel. In *Anderson v. Southern Pac. Co.* (1933) 129 C.A. 206, 211, 18 P.2d 703, a wrongful death action, plaintiff's expert witness was properly questioned on the possible bias resulting from his discharge from a position as a result of information furnished by defendant. (On right to cross-examine prosecuting witness as to pending or contemplated civil action against accused for damages arising out of same transaction, see 98 A.L.R.3d 1060; 81 Am.Jur.2d (1992 ed.), Witnesses §887.) But the examiner should not go beyond the fact of the quarrel, and the detailed circumstances should be excluded. (See 3A Wigmore (Chadbourn Rev.) §951.)

The impeaching evidence must show hostility toward the party; the rule does not permit a showing of hostility toward another witness. (*People v. Vandenburg* (1960) 184 C.A.2d 33, 41, 7 C.R. 287, infra, §350; see *Webster v. Orr* (1917) 174 C. 426, 428, 163 P. 361 [plaintiff not entitled to show that defendants' witness had been discharged by defendants after accident; evidence could not be used to establish witness' hostility either to plaintiff or to employer]; *Eye v. Kafer* (1962) 202 C.A.2d 449, 456, 457, 20 C.R. 841 [impeaching evidence improper on two grounds: hostility toward nonparty witness, and attempt to show specific acts degrading witness to explain hostility].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Hillhouse* (2002) 27 C.4th 469, 494, 117 C.R.2d 45, 40 P.3d 754, 1 Cal. Crim. Law (3d), Crimes Against the Person, Supp., §265 [in capital murder trial in which witness testified for prosecution and then refused to be cross-examined by defense, trial judge erred in sustaining prosecutor's relevance objection on ground that every witness has right not to talk to prosecution or defense; witness' refusal to talk to party is relevant to witness' credibility because it shows possibility of bias]; 81 Am.Jur.2d (2004 ed.), Witnesses §§849, 850. West's Key Number Digest, Witnesses k.370 et seq.



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#### C. Bias or Other Improper Motive.

##### 8. Bias Against Racial Group.

3 Witkin Cal. Evid. Presentation § 278

[§ 278] Bias Against Racial Group.

*In re Anthony P.* (1985) 167 C.A.3d 502, 213 C.R. 424, decides a question of first impression in California: The propriety and extent of cross-examination to expose a bias against the racial group to which a defendant or other party belongs. Defendant Anthony P., a 17-year-old black high school student, was charged with molesting Deborah M., a 15-year-old white girl student, on the school grounds. He testified that he did not touch or otherwise molest her, and the case hinged entirely on the credibility of Deborah M. On cross-examination, defendant's counsel first asked her whether she had "a prejudice against black people," and she answered in the negative. Counsel then asked, "Would it offend you if a black person asked you for a date?" The prosecution objected and the objection was sustained. *Held*, refusal to allow this question was a violation of defendant's constitutional right of cross-examination and reversible error per se.

(a) Proof of a witness' hostility toward a specific individual who is a party to the litigation is clearly admissible. (167 C.A.3d 508, citing the text.) "But what if the bias or prejudice is against the racial group of which the party happens to be a member rather than the party himself? Is the logical connection between attitude and testimony too attenuated to affect the witness' credibility?" (167 C.A.3d 508.) Several cases from other jurisdictions have answered this question by holding that, in balancing considerations of unfair prejudice with the probative value of the questions, they may be allowed as proper impeachment. (167 C.A.3d 508, 509.) And some courts have extended the rule to permit inquiry into bias against other groups (e.g., mentally retarded persons, police officers). (167 C.A.3d 510.)

(b) The broad language of *Ev.C. 780* supports the position taken by these courts: "The test under this code provision is whether the kind of bias involved has 'any tendency in reason' to affect the issue of credibility. It seems difficult to argue a witness could never be so influenced by racial prejudice that it clouded his perceptions or shaded his testimony or led him to deliberately lie." (167 C.A.3d 510.)

(c) The existence of bias can be established in several ways: "First, under cross-examination, the witness may directly *admit* her bias. 'Yes, I am prejudiced against blacks' is a straightforward example of this form of proof. Secondly, the witness may admit making *past statements* which are circumstantial evidence of the presence of bias. Thus, the witness' admission she has said things like 'I don't think blacks should go to the same schools as whites' would tend to demonstrate the existence of such bias. Thirdly, the witness may have *acted* in ways which are consistent with the presence of bias. For example, an admission the witness had changed seats because a black sat down next to her would be an indication she entertained a bias against blacks. Fourth, a witness may admit that if confronted with a hypothetical situation she *would act or speak* in a certain way which an unbiased person would not be expected to do. 'If a black asked me for a date, I would slap him,' is an example of this form of evidence. Fifth, the witness may have had some personal experience which provides a *motive* to be biased. If a witness admits she has been continually teased by a

group of black students, in her own mind this might give her reason to be biased against all blacks. Sixth, a witness may come from a family or social *environment* which encourages bias against certain groups. A witness who concedes her mother and father had spoken derogatorily about blacks throughout her formative years also has supplied some evidence suggesting she may have been influenced to be biased against blacks." (167 C.A.3d 511.)

(d) It is proper cross-examination to seek to develop any or all of these six kinds of evidence of racial bias, as well as others; and a defendant is not afforded his or her constitutional right if he or she is denied the right to pursue one of these discrete avenues of inquiry: "For instance, merely because a witness denies having had experiences which would give her a motive for bias against a given racial group does not mean further cross-examination won't lead her to admit she has acted or spoken in ways indicating she indeed has such a bias. Or under further cross-examination she may outright admit she is prejudiced against members of this race or that she was brought up to dislike them." (167 C.A.3d 512.) Here, counsel was allowed to ask only one question seeking one form of evidence of bias; at least five other discrete avenues of inquiry were barred. This was a clear abuse of discretion. (167 C.A.3d 512.)

(e) The trial judge has discretion to limit and control the inquiry, but a threshold level of cross-examination is constitutionally required; and cross-examination does not step over this threshold until the witness' various possible biases have been thoroughly explored. Here the cross-examination never came near the threshold. "This is not a situation where, for instance, the cross-examiner already has struck out with three or four of the fundamental lines of inquiry and now seeks to start out on another. Nor had this cross-examiner already asked a large number of questions in pursuit of one of these lines of inquiry without yielding any results and then sought to continue along the same path. It is not even the case where the cross-examiner has been pursuing several lines of inquiry without success for an hour, or a half hour, or even 15 minutes. And it most certainly is not a case where the cross-examiner elicited ample evidence of racial bias and now seeks to draw out cumulative testimony on the same topic." (167 C.A.3d 513.)

(f) The trial judge's ruling denied defendant the constitutional right of effective cross-examination; and, under the rule laid down in *Davis v. Alaska* (1974) 415 U.S. 308, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347, 354, supra, §269, was constitutional error which no showing of lack of prejudice would cure. Hence, it was reversible error per se. (167 C.A.3d 514.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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C. Bias or Other Improper Motive.

9. Corrupt Activities in Case.

3 *Witkin Cal. Evid. Presentation* § 279

[§ 279] Corrupt Activities in Case.

It may be shown that the witness was guilty of corrupt activities in connection with the case, such as an offer to procure or suppress evidence for pay, bribery or attempted bribery of other witnesses, or similar practices. (*Lewis v. Steiger* (1885) 68 C. 200, 201, 8 P. 884 [offer to procure evidence]; *Barkly v. Copeland* (1890) 86 C. 483, 487, 25 P. 1 [offer to suppress evidence]; *People v. Alcalde* (1944) 24 C.2d 177, 184, 148 P.2d 627 [attempt to bribe other witnesses to give false testimony]; see 3A Wigmore (Chadbourn Rev.) §956 et seq.; 4 A.L.R.4th 829 [evidence of attempts to intimidate or influence witness in civil action]; cf. *Luhrs v. Kelly* (1885) 67 C. 289, 291, 7 P. 696 [recognizing rule, but holding it not reversible error to prevent question where particular witness had not testified to any material matters].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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D. Bad Character.

1. Admissibility of Character Traits.
  - a. Honesty or Veracity.

3 *Witkin Cal. Evid. Presentation* § 280

[§ 280] Honesty or Veracity.

A person lacking in veracity is an untrustworthy witness, and may be impeached by proof of this bad character trait. (*Ev.C. 780(e)* [trier of fact may consider witness' "character for honesty or veracity or their opposites"]; see 1 McCormick 5th, §40; 3A Wigmore (Chadbourn Rev.) §977 et seq.; 9 *U.C. Davis L. Rev.* 319 [character evidence to impeach and rehabilitate witness]; 38 *U.C.L.A. L. Rev.* 637 [proposed overhaul of law regarding character impeachment evidence]; 81 *Am.Jur.2d* (1992 ed.), *Witnesses* §895.)

By taking the stand in a criminal case, the defendant puts in issue his or her truth and integrity, and may be impeached by such evidence in the same manner as any other witness. (*People v. Gordon* (1928) 206 C. 29, 34, 273 P. 568; *People v. Taylor* (1986) 180 C.A.3d 622, 631, 225 C.R. 733; see 78 *Harv. L. Rev.* 426, 440.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 81 *Am.Jur.2d* (2004 ed.), *Witnesses* §861; 1 McCormick 6th, §40. *West's Key Number Digest*, *Witnesses* k.333 et seq., 342-



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D. Bad Character.

1. Admissibility of Character Traits.
  - b. Other Traits.

3 Witkin Cal. Evid. Presentation § 281

[§ 281] Other Traits.

(1) *Civil Actions*. Bad general moral character cannot be shown: Evidence of character traits other than honesty or veracity, or their opposites, is inadmissible to attack or support a witness' credibility. (*Ev.C. 786*; see 1 McCormick 5th, §41; 3A Wigmore (Chadbourn Rev.) §922 et seq.)

(2) *Criminal Actions*. The same rule formerly applied in criminal actions. (See *People v. Goodspeed* (1972) 22 C.A.3d 690, 696, 99 C.R. 696; *People v. Peters* (1972) 23 C.A.3d 522, 533, 101 C.R. 403; *People v. Thompson* (1979) 98 C.A.3d 467, 476, 159 C.R. 615, 1 Cal. Evidence (4th), *Circumstantial Evidence*, §85.) However, Proposition 8 nullified the effect of *Ev.C. 786* in criminal cases. (See *People v. Harris* (1989) 47 C.3d 1047, 1082, 255 C.R. 352, 767 P.2d 619; 1 Jefferson, California Evidence Benchbook 3d, §28.28 et seq.; Rutter Group, 2 Civil Trials and Evidence, §8:2940 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Civil Actions*. See 1 McCormick 6th, §41.



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#### D. Bad Character.

1. Admissibility of Character Traits.
  - c. Distinction: Narcotic Addiction.

3 Witkin Cal. Evid. Presentation § 282

[§ 282] Distinction: Narcotic Addiction.

It has been pointed out that drug addiction at the relevant time may be shown to attack the witness' capacity to observe, recollect and communicate. (See *supra*, §266.) A distinct problem is whether it may be shown to impeach the veracity of the witness. (See 16 So. Cal. L. Rev. 333; 48 Cal. L. Rev. 653, 676.)

*People v. Bell* (1955) 138 C.A.2d 7, 291 P.2d 150, upheld the trial judge's exclusion of the evidence on the ground that, like mental incompetency, it could be shown only on cross-examination, and not by the production of other witnesses. (138 C.A.2d 12.) Because the restrictive rule has been eliminated by the Evidence Code (see *supra*, §261), this part of the *Bell* holding is not an obstacle to admission. (See also, for discussions of *Bell* and suggestions that evidence of addiction may be admitted in judge's discretion, *People v. Buono* (1961) 191 C.A.2d 203, 232, 12 C.R. 604, citing the text; *People v. Gonzales* (1963) 217 C.A.2d 41, 48, 31 C.R. 540.)

However, the court in the *Bell* case also observed that there is no substantial medical authority to support the conclusion that addiction causes "a general predilection toward untruthfulness." (138 C.A.2d 12.) And both the weight of authority and the California rule exclude such evidence as collateral matter tending to degrade (see *infra*, §348), unless it is followed by testimony tending to show that the witness was under the influence while testifying or when the events occurred, or that his or her mental faculties were actually impaired by the addiction. (See *People v. Ortega* (1969) 2 C.A.3d 884, 899, 902, 83 C.R. 260; *People v. Smith* (1970) 4 C.A.3d 403, 412, 84 C.R. 412 [following *Ortega*]; *People v. Hernandez* (1976) 63 C.A.3d 393, 405, 133 C.R. 745 [same]; 1 McCormick 5th, §44; 3A Wigmore (Chadbourn Rev.) §934; 81 Am.Jur.2d (1992 ed.), Witnesses §§874, 875.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 81 Am.Jur.2d (2004 ed.), Witnesses §§840, 841; 1 McCormick 6th, §44.



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#### D. Bad Character.

##### 1. Admissibility of Character Traits.

##### d. Distinction: Address and Occupation.

##### 1. Alford Rule of Admissibility.

#### 3 Witkin Cal. Evid. Presentation § 283

[§ 283] Alford Rule of Admissibility.

In *Alford v. United States* (1931) 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624, defendant's counsel questioned a government witness on his address and occupation, seeking to show that he was in the custody of federal authorities. *Held*, such an inquiry is proper for several purposes, e.g., to identify the witness with his community so that reputation evidence may be obtained, to develop facts which might tend to show bias, and to enable the jury to interpret his testimony with knowledge of his environment. (51 S.Ct. 219, 75 L.Ed. 627.)

The *Alford* case was followed in *People v. Lain* (1943) 57 C.A.2d 123, 134 P.2d 284. Defendant was charged with robbery. B, the alleged victim and chief prosecuting witness, testified on direct examination that he was a railroad patrolman. Defendant, on cross-examination, tried to show that his principal occupation was that of a gambler. *Held*, it was error to prevent this inquiry. (57 C.A.2d 135.) (See also, holding that identity or address of witness was essential to fair trial, *People v. Brandow* (1970) 12 C.A.3d 749, 754, 90 C.R. 891 [true identity, home town, name of doctor and address of grandmother]; *People v. Mascarenas* (1971) 21 C.A.3d 660, 666, 98 C.R. 728 [address of 16-year-old volunteer undercover narcotics agent]; and see 1 McCormick 5th, §29, footnote 8; 3A Wigmore (Chadbourn Rev.) §949, p. 791; 81 Am.Jur.2d (1992 ed.), Witnesses §§952, 953; 85 A.L.R.3d 541 [residence].)

In *Smith v. Illinois* (1968) 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956, defendant was charged in an Illinois court with illegal sale of narcotics. The principal witness, who testified that he bought heroin from defendant in a restaurant with marked money furnished by police, was "James Jordan." On cross-examination, Jordan admitted that this was not his real name, but when he was asked for his correct name and address, objections were sustained. *Held*, conviction reversed. When credibility of a witness is in issue, the very starting point of cross-examination is to ask who he is and where he lives; this opens up countless avenues of in-court examination and out-of-court investigation. "To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself." (88 S.Ct. 750, 19 L.Ed.2d 960, citing *Alford v. United States*, *supra*.) A concurring opinion refers to the exception recognized in *Alford* for questions which tend to harass, annoy or humiliate, and would place in the same category questions which tend to endanger the personal safety of the witness; here, however, the State made no showing to come within any such exception. (88 S.Ct. 751, 19 L.Ed.2d 960.)

The dissenting opinion destroys any rational foundation for the majority's holding: Defense counsel knew the witness because he had previously represented him; defendant himself had known the witness for a few years, and knew that he was a narcotic addict; defense counsel never said that he lacked the requested information, and did not pursue



the matter when objections were sustained. "The inference seems to be patent that counsel was asking routine questions, to which he already knew the answers, and that his failure to get answers in court was of no consequence." (88 S.Ct. 752, 19 L.Ed.2d 961.) (See *People v. Ramirez* (1997) 55 C.A.4th 47, 55, 64 C.R.2d 9, 5 Cal. Crim. Law (3d), *Criminal Trial*, §537 [identifying victim only as "Jane Doe" in rape trial, as permitted by P.C. 293.5, did not violate defendant's right to confrontation and cross-examination, because defense was provided with victim's true name; distinguishing *Smith v. Illinois*].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Alvarado v. Superior Court* (2000) 23 C.4th 1121, 1125, 1148, 99 C.R.2d 149, 5 P.3d 203, 5 Cal. Crim. Law (3d), *Criminal Trial*, Supp., §79 [in prosecution of jail inmates for murder of fellow inmate, trial judge erred in ruling that identity of inmate witnesses could be permanently withheld and that witnesses could testify anonymously at trial; without witness names and photographs, defense would be unable to conduct adequate investigation of witnesses and their veracity; relying on *Alford v. United States* (1931) 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624, text, p. 354, and *Smith v. Illinois* (1968) 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956, text, p. 355]; 39 *San Diego L. Rev.* 1165 [defendant's misconduct resulting in waiver of right to know witness' identity; discussing *Alvarado*]; 81 *Am.Jur.2d* (2004 ed.), *Witnesses* §§920, 921; 1 McCormick 6th, §29. *West's Key Number Digest*, *Witnesses* k.344(4)



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## CHAPTER XI - Presentation At Trial

### XI. IMPEACHMENT

#### D. Bad Character.

1. Admissibility of Character Traits.
- d. Distinction: Address and Occupation.
2. Where Disclosure Is Not Required.

#### 3 Witkin Cal. Evid. Presentation § 284

[§ 284] Where Disclosure Is Not Required.

(1) *Not Necessary for Fair Trial*. *Smith v. Illinois* (1968) 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956, supra, §283, was distinguished in *People v. Patejdl* (1973) 35 C.A.3d 936, 940, 111 C.R. 191. The court observed that disclosure of address and identity of an informer has been required where his testimony is the primary evidence of guilt; but, where there is no substantial conflict between the testimony of the defendant and that of the informant on the issues determinative of guilt, impeachment would have no effect and disclosure of the address is not required. (35 C.A.3d 943.) (See also *People v. Mardian* (1975) 47 C.A.3d 16, 40, 121 C.R. 269 [denial of defense inquiry into witness' address is not error where defense counsel has already placed witness in his or her proper setting; distinguishing *Alford*]; *People v. Benjamin* (1975) 52 C.A.3d 63, 73, 75, 124 C.R. 799 [no error in precluding inquiry into home addresses of four prosecution witnesses where addresses were not essential to fair trial of defendant].)

(2) *Peace Officer's Residence*. Where a peace officer's testimony in a criminal action will become a matter of public record, the officer may state his or her business address in lieu of his or her place of residence. (P.C. 1328.5; see *People v. Lewis* (1982) 133 C.A.3d 317, 322, 184 C.R. 31 [applying P.C. 1328.5 to deny defendant's request to discover arresting officers' home addresses for purpose of investigating officers' reputations in their communities].)

(3) *Danger to Law Enforcement Employees and Experts*. Specified witnesses in a criminal proceeding in connection with an event perceived or investigated by the witnesses in the course of their official duties may state their business addresses instead of their places of residence. These witnesses include specialists and experts employed by law enforcement agencies and employees of the county welfare department or the department administering a county's public social services program. However, if the court finds, after an in camera hearing, that the probative value of a witness' residential address outweighs the creation of substantial danger to the witness, the witness must give the residential address. (P.C. 1328.6.) The statute does not abridge a defendant's right to discover the information, and it does not apply to confidential informants.

(4) *Danger to Victim of Sex Crime*. *Ev.C. 352.1* establishes a procedure for exclusion of evidence of the current address and telephone number of the victim of specified sex crimes (rape, sodomy or oral copulation) in which the defendant is alleged to have compelled the participation of the victim by force, violence, duress, menace, or threat of great bodily harm. (a) The district attorney, by noticed motion made within a reasonable time prior to the hearing, seeks exclusion. (b) The court may grant the motion if it finds that the probative value of the evidence is outweighed by substantial danger to the victim. (c) However, nothing in *Ev.C. 352.1* abridges or limits the defendant's right to discover

or investigate that information. (See 9 *Pacific L. J.* 460.)

In order to make it effective after Proposition 8 (see 1 *Cal. Evidence* (4th), *Introduction*, §8), the 1985 Legislature repealed and reenacted *Ev.C.* 352.1 by a two-thirds vote. (Stats. 1985, Chap. 335, §1.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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### XI. IMPEACHMENT

#### D. Bad Character.

#### 2. Methods of Proving Character Traits.

##### a. Specific Acts.

##### 1. General Rule.

##### aa. Civil Action.

3 Witkin Cal. Evid. Presentation § 285

[§ 285] Civil Action.

Except for proof of a felony conviction (*infra*, §292), particular wrongful or criminal acts, or particular instances of untruthfulness, cannot be offered in evidence in a civil action to prove the bad character of the witness for honesty or veracity. (*Ev.C.* 787; see *Estate of James* (1899) 124 C. 653, 657, 662, 57 P. 578 [evidence that one witness had written and another had read an immoral book, and that one woman witness had had illicit relations with a man]; *Steen v. Santa Clara Valley Mill & Lumber Co.* (1901) 134 C. 355, 356, 66 P. 321 [evidence that witness had attempted to defraud his employer]; *Grudt v. Los Angeles* (1970) 2 C.3d 575, 591, 86 C.R. 465, 468 P.2d 825; 1 McCormick 5th, §41; 81 *Am.Jur.2d* (1992 ed.), *Witnesses* §§901, 905; 20 A.L.R.2d 1421.)

In *Grudt v. Los Angeles*, *supra*, plaintiff, suing for wrongful death, contended that municipal police officers had intentionally shotgunning her husband to death. After plaintiff's witnesses gave testimony conflicting with that of officers on the scene, defense counsel, over objection, impeached them with evidence of their own and their families' prior criminal arrests, purportedly to show bias against the officers on trial. *Held*, the impeachment was improper. Under the guise of suggesting bias, the jury was encouraged to disbelieve the witnesses because they were men of "bad character" who had been "in trouble" with the police. (2 C.3d 591.) The court added: "Were we to approve the trial judge's acceptance of this impeachment evidence, we would erect an insurmountable barrier to an aggrieved citizen's ability to gain proper civil redress against errant peace officers. Parties electing to sue any policeman--for damages in tort, for contract reparations, or merely to collect a debt--would be obliged to produce witnesses willing to be subjected to the degradation of a courtroom examination of their prior arrest records and the records of all members of their families to show bias against police generally. And even if such witnesses were found, their credibility in the eyes of the jury would be seriously impaired by evidence of prior criminal arrests, not because of the likelihood of actual bias, but because of the 'bad character' suggested by the mere arrests. Furthermore, the principle advocated by defendants could not be limited to cases in which police officers are parties. Presumably, under defendants' theory, whenever any person testifies contrary to the testimony of a police officer *witness*, the arrest record of that person or of members of his family would be admissible to imply that he so testified because he was biased against policemen generally. To state the proposition is to compel its rejection." (2 C.3d 592.)

The exclusionary rule of *Ev.C.* 787 does not apply where evidence is offered to prove that the witness testified falsely on his or her direct examination. (See *People v. Reyes* (1976) 62 C.A.3d 53, 61, 62, 132 C.R. 848; *Leader v.*

*California* (1986) 182 C.A.3d 1079, 1091, 226 C.R. 207 [plaintiff's misdemeanor convictions were admissible in assault and battery action to prove nonexistence of facts testified to by him; citing *Reyes*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Hernandez v. Paicius* (2003) 109 C.A.4th 452, 460, 134 C.R.2d 756 [in medical malpractice action brought by plaintiff who was in United States illegally, proof of his immigration status was inadmissible under *Ev.C.* 787 to attack his credibility]; 81 *Am.Jur.2d* (2004 ed.), *Witnesses* §§867, 871; 1 McCormick 6th, §41. *West's Key Number Digest*, *Witnesses* k.344-



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## CHAPTER XI - Presentation At Trial

### XI. IMPEACHMENT

#### D. Bad Character.

#### 2. Methods of Proving Character Traits.

##### a. Specific Acts.

##### 1. General Rule.

##### bb. Criminal Action.

#### 3 Witkin Cal. Evid. Presentation § 286

[§ 286] Criminal Action.

*Ev.C. 787* was nullified by Proposition 8 (1 *Cal. Evidence* (4th), *Introduction*, §8) for criminal actions. (*People v. Mickle* (1991) 54 C.3d 140, 168, 284 C.R. 511, 814 P.2d 290 [under Proposition 8, evidence that prosecution witness had threatened witnesses in proceedings against him was admissible; traits of willingness to harm others and to subvert truth-finding process indicated morally lax character and readiness to lie]; *People v. Harris* (1989) 47 C.3d 1047, 1082, 255 C.R. 352, 767 P.2d 619; *People v. Wheeler* (1992) 4 C.4th 284, 295, 14 C.R.2d 418, 841 P.2d 938; *People v. Adams* (1988) 198 C.A.3d 10, 18, 243 C.R. 580, *infra*, §287; *People v. Lankford* (1989) 210 C.A.3d 227, 236, 258 C.R. 322; on impeachment using evidence of past criminal conduct that did not result in conviction, see *infra*, §314.) Nevertheless, evidence of particular acts to show character for honesty or dishonesty is still subject to exclusion under *Ev.C. 352* (1 *Cal. Evidence* (4th), *Circumstantial Evidence*, §17). (See *People v. Von Villas* (1992) 10 C.A.4th 201, 268, 13 C.R.2d 62 [even if trial judge erred in applying *Ev.C. 787* in excluding evidence offered to impeach prosecution witness, error was harmless since evidence was inadmissible under *Ev.C. 352*].)

In *People v. Wheeler*, *supra*, a prosecution for sale of cocaine, the trial judge, over defendant's objection, allowed admission of a defense witness' recent misdemeanor conviction for grand theft to impeach her testimony. The Court of Appeal affirmed, and the Supreme Court affirmed the judgment of the Court of Appeal.

#### (a) Proposition 8.

(1) *Ev.C. 786* prohibits the use of evidence showing traits of a witness' character other than honesty or veracity, and *Ev.C. 787* states the rule that specific instances of conduct relevant only as tending to prove a trait of character are inadmissible for impeachment; but *Ev.C. 788* permits impeachment by evidence of conviction of a felony. (4 C.4th 290.)

(2) Before 1982 it was clear that *Ev.C. 787* precluded the use of misdemeanors for impeachment. But Cal. Const., Art. I, §28(d) supersedes all California restrictions on the admission of relevant evidence except those preserved or permitted by the express words of the section. (4 C.4th 291.) "By its plain terms, section 28(d) requires the admission in criminal cases of all 'relevant' proffered evidence unless exclusion is allowed or required by an 'existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, [s]ections 352, 782 or 1103,' or by new laws passed by two-thirds of each house of the Legislature. ... The limitations on impeachment evidence contained in *Evidence Code*

sections 787 and 788 do not fall within any of section 28(d)'s stated exceptions to its general rule that relevant evidence is admissible. It follows that *Evidence Code* sections 787 and 788 no longer preclude the introduction of relevant misdemeanor misconduct for impeachment in criminal proceedings." (4 C.4th 292.) "We therefore conclude that if past criminal conduct amounting to a misdemeanor has some logical bearing upon the veracity of a witness in a criminal proceeding, that conduct is admissible, subject to trial court discretion, as 'relevant' evidence under section 28(d)." (4 C.4th 295.)

(b) *Standard of admissibility.*

(1) "The voters have expressly removed most statutory restrictions on the admission of relevant credibility evidence in criminal cases, including the rule that felony convictions are the only form of conduct evidence admissible for impeachment. Hence, they have decreed at the least that in proper cases, nonfelony conduct involving moral turpitude should be admissible to impeach a criminal witness." (4 C.4th 295.)

(2) Section 28(d) does preserve the trial court's discretion to exclude evidence where its probative value is substantially outweighed by its potential for prejudice, confusion, or undue consumption of time (*Ev.C.* 352). (4 C.4th 295.) And the admissibility of any past misconduct for impeachment is limited at the outset by the relevance requirement of moral turpitude. (4 C.4th 296; see *infra*, §305 et seq.) "Beyond this, the latitude section 352 allows for exclusion of impeachment evidence in individual cases is broad. That statute empowers courts to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues. By expressly preserving this authority, section 28(d) makes clear the voters' determination to prevent such consequences." (4 C.4th 296.)

(3) In exercising its discretion under *Ev.C.* 352 a court must always take into account the factors traditionally deemed pertinent in this area. "But additional considerations may apply when evidence other than felony convictions is offered for impeachment. In general, a misdemeanor--or any other conduct not amounting to a felony--is a less forceful indicator of immoral character or dishonesty than is a felony. Moreover, impeachment evidence other than felony convictions entails problems of proof, unfair surprise, and moral turpitude evaluation which felony convictions do not present. Hence, courts may and should consider with particular care whether the admission of such evidence might involve undue time, confusion, or prejudice which outweighs its probative value." (4 C.4th 296.)

(4) In this case the trial court consciously exercised its discretion and did so soundly. It concluded that the defense witness' relatively recent conviction for grand theft, an offense necessarily involving both moral turpitude and dishonesty, was highly relevant to the witness' credibility. (4 C.4th 297.)

(c) *Hearsay.*

(1) A misdemeanor conviction itself is inadmissible hearsay when offered as evidence that a witness committed misconduct bearing on credibility. (4 C.4th 297.) As part of the 1965 recodification of evidentiary rules, the Legislature enacted certain exceptions to the hearsay rule for felony convictions. (4 C.4th 298, citing *Ev.C.* 1300, 1 *Cal. Evidence* (4th), *Hearsay*, §271.) At the same time the Legislature retained both the existing prohibition against use of prior conduct for impeachment (*Ev.C.* 787) and the exception for felony convictions (*Ev.C.* 788). Thus, the hearsay objection to the evidence specified in Section 788 is overcome by the declaration in the section that such evidence may be shown for the purpose of attacking a witness' credibility. (4 C.4th 298.)

(2) No similar statutory exception exists for the use of misdemeanor convictions, and nothing in Proposition 8 changes the long-established understanding that a misdemeanor conviction comes within the statutory rule of inadmissible hearsay when offered for the truth of the charge. (4 C.4th 298.) Here the evidence of the witness' misdemeanor conviction was admitted through her personal concession that she had suffered it. But even if her testimony was competent to establish the fact of conviction, the conviction itself was inadmissible hearsay evidence of underlying criminal conduct relevant to impeachment. "We therefore conclude that evidence of a misdemeanor conviction, whether documentary or testimonial, is inadmissible hearsay when offered to impeach a witness'

credibility." (4 C.4th 300.)

(3) "However, defendant waived any hearsay claim by making no trial objection on that specific ground." (4 C.4th 300, citing the text.)

Two justices dissented. (4 C.4th 301, 305.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Ayala* (2000) 23 C.4th 225, 301, 96 C.R.2d 682, 1 P.3d 3 [approving holding of *People v. Von Villas* (1992) 10 C.A.4th 201, 13 C.R.2d 62, text, p. 358, that exclusion of evidence within ambit of Ev.C. 787 is not forbidden if court properly finds evidence should be excluded under Ev.C. 352]; *People v. Stern* (2003) 111 C.A.4th 283, 297, 300, 3 C.R.3d 479 [where defendant was charged with threatening witness, and witness testified to nature of threats, including defendant's mention of prior stabbing he had been involved in, evidence regarding stabbing was properly admitted; Proposition 8 allows admission of character evidence not only to impeach witness but also to bolster witness' credibility]. *West's Key Number Digest*, Witnesses k.337(4)





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#### 2. Methods of Proving Character Traits.

##### a. Specific Acts.

#### 2. Prior Nonsexual Conduct of Rape Prosecutrix.

#### 3 Witkin Cal. Evid. Presentation § 287

[§ 287] Prior Nonsexual Conduct of Rape Prosecutrix.

In *People v. Adams* (1988) 198 C.A.3d 10, 243 C.R. 580, a prosecution for rape and related offenses, the defense was consent. Defendant offered a witness to testify that the prosecutrix had falsely accused others of rape, and the judge excluded the evidence. *Held*, conviction reversed.

(a) *People v. Wall* (1979) 95 C.A.3d 978, 157 C.R. 587, holding such evidence admissible under *Ev.C. 1103(a)(1)*, is in conflict with *People v. Jones* (1984) 155 C.A.3d 153, 202 C.R. 162, holding it inadmissible under *Ev.C. 787*. In *People v. Taylor* (1986) 180 C.A.3d 622, 225 C.R. 733, *supra*, §263, the court held that the Truth-in-Evidence provision of Proposition 8 had repealed *Ev.C. 790* (*infra*, §362), but left open the question whether *Ev.C. 787* remained valid. (198 C.A.3d 17.)

(b) Under the reasoning of *Taylor*, *supra*, and in accord with *Wall*, *supra*, it was error to exclude otherwise admissible evidence that the prosecutrix had on two previous occasions falsely accused others of rape. (198 C.A.3d 18.) (See *People v. Franklin* (1994) 25 C.A.4th 328, 336, 30 C.R.2d 376 [in prosecution for sexual abuse of child, trial judge erred in excluding evidence that victim falsely accused another of sexual misconduct; following *Adams*]; 81 *Am.Jur.2d* (1992 ed.), *Witnesses* §959; 71 A.L.R.4th 469 [showing that witness made similar charges against other persons]; cf. *People v. Alvarez* (1996) 14 C.4th 155, 201, 58 C.R.2d 385, 926 P.2d 365 [rape victim's prior belated rape complaint was properly excluded; if prior complaint was true it was irrelevant for impeachment, and trial judge's determination that falsity of complaint was insufficiently established was reasonable]; on inadmissibility of evidence of witness' prior sexual conduct, see *Ev.C. 782* and *Ev.C. 1103(c)*, 1 *Cal. Evidence* (4th), *Circumstantial Evidence*, §61 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 81 *Am.Jur.2d* (2004 ed.), *Witnesses* §927.



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## CHAPTER XI - Presentation At Trial

### XI. IMPEACHMENT

#### D. Bad Character.

#### 2. Methods of Proving Character Traits.

##### b. Reputation.

##### 1. Reputation in Community.

### 3 Witkin Cal. Evid. Presentation § 288

[§ 288] Reputation in Community.

The traditional method of proving a relevant trait of character is by evidence of reputation. (See *Ev.C. 1100, 1 Cal. Evidence (4th), Circumstantial Evidence, §54.*) And the theory of impeachment by proof of bad reputation necessarily assumes some locality in which the witness circulates and in which his or her reputation is likely to be known. Hence, it has been customary in the past to restrict the showing to evidence of reputation in the community or neighborhood in which the witness lives. "The reason for limiting such proof to the neighborhood of one's residence is that he there usually spends most of his time and most frequently comes into social and business contact with others." (*Khan v. Zemansky (1922) 59 C.A. 324, 329, 210 P. 529, infra, §289.*) And "the witness to such reputation must, at least, be acquainted with the prevailing impression in the community, as disclosed by actions, conduct, or conversations relating to the character in issue, although it is not necessary that the witness testifying should know that the majority of the community have that impression." (*People v. Cord (1910) 157 C. 562, 572, 108 P. 511; see also People v. Markham (1883) 64 C. 157, 163, 30 P. 620* ["he must have reached the bad eminence of notoriety as a liar"; reputation among local police officers is insufficient]; 5 Wigmore (Chadbourn Rev.) §1615; 81 *Am.Jur.2d (1992 ed.)*, Witnesses §897; 49 Proof of Facts 2d 649 [general reputation of person in community]; *Ev.C. 1324, 1 Cal. Evidence (4th), Hearsay, §290* ["in the community in which he then resided"].)

Whether reputation at a place of former residence is too remote is a matter within the court's discretion. (See *People v. Cord*, supra, 157 C. 572; *Broderick v. Broderick (1919) 40 C.A. 550, 560, 181 P. 402.*) The same should be true of reputation in the same place at a former or later time. (See *People v. Hendrix (1923) 192 C. 441, 450, 221 P. 349; 3A Wigmore (Chadbourn Rev.) §927 et seq.; 5 Wigmore (Chadbourn Rev.) §§1617, 1618.*)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 81 *Am.Jur.2d (2004 ed.)*, Witnesses §863. *West's Key Number Digest*, Witnesses k.337(2), 337(3), 338 et seq.



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### XI. IMPEACHMENT

#### D. Bad Character.

#### 2. Methods of Proving Character Traits.

##### b. Reputation.

#### 2. Reputation in Group.

### 3 Witkin Cal. Evid. Presentation § 289

#### [§ 289] Reputation in Group.

(1) *Former Restrictive Rule.* In *Khan v. Zemansky* (1922) 59 C.A. 324, 210 P. 529, defendants, to impeach plaintiff as a witness, called two police officers who testified that his reputation in the community was bad. On cross-examination, each admitted that he did not know where plaintiff lived, but only where he did business. *Held*, the testimony was properly stricken out. (59 C.A. 329.) (See also *Cosler v. Norwood* (1950) 97 C.A.2d 665, 667, 218 P.2d 800 [witness who knew reputation of defendant at cafeteria where she worked, rejected].)

(2) *Modern View: Reputation in Business Circles.* The modern trend is to permit evidence of reputation in business circles in proof of character, on a proper foundation showing that the person had acquired a general reputation in those circles. (See 5 Wigmore (Chadbourn Rev.) §1616; 1 McCormick 5th, §43.)

This rule was established for California in *People v. Workman* (1955) 136 C.A.2d 898, 289 P.2d 514. The impeaching witness, on recross-examination, stated that she had heard the reputation discussed, not in the community at large, but only by fellow workers. It was held error (though not reversible under the circumstances) to strike out her testimony. The court declared that the rule of *People v. Cobb* (1955) 45 C.2d 158, 192, 287 P.2d 752, 1 Cal. Evidence (4th), *Circumstantial Evidence*, §54, on evidence of *good* reputation, should apply also to evidence of *bad* reputation. The opinion quotes Wigmore as follows: "[E]specially in large cities, a man may have one reputation in the suburb of his residence and another in the office or the factory at his place of work; or he may have one reputation in his place of technical domicile in New York and another in the region of the mines of Michigan or the steelmills of Ohio where his investments call him for supervision for portions of time. There may be distinct circles of persons, each circle having no relation to the other, and yet each having a reputation based on constant and intimate personal observation of the man." (136 C.A.2d 901, 902.) (See also *People v. Paisley* (1963) 214 C.A.2d 225, 232, 29 C.R. 307, dictum, quoting the text.)

(3) *Evidence Code: Reputation in Group.* Ev.C. 1324, following the original Uniform Rule, broadens the scope of the rule still further: Reputation in a group with which the witness "then habitually associated" may be shown. The "group" may consist of the witness' business associates or of others. (Cf. 1963 A.S. 302 [Washington case rejecting reputation for truthfulness of witness "in her church," or "among the church people"].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Modern View: Reputation in Business Circles.* See 1 McCormick 6th, §43.



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##### b. Reputation.

#### 3. Foundation and Impeachment.

### 3 Witkin Cal. Evid. Presentation § 290

[§ 290] Foundation and Impeachment.

(1) *Foundation: Qualification of Impeaching Witness.* The first question must lay the foundation, by showing that the impeaching witness is acquainted with the reputation of the person being impeached. The typical method is to ask whether the impeaching witness knows the general reputation of the person being impeached for truth, honesty and integrity in the particular community in which the person being impeached resides, or, under the modern rule, in the business circle or other group with which he or she is habitually associated. (See *Khan v. Zemansky* (1922) 59 C.A. 324, 328, 210 P. 529 [witness was asked whether he knew "his reputation for truth, honesty, and integrity in the city of Sacramento"; held improper, should have asked for his *general* reputation in such community]; *Rios v. Chand* (1955) 130 C.A.2d 833, 838, 280 P.2d 47; *People v. Paisley* (1963) 214 C.A.2d 225, 232, 29 C.R. 307, quoting the text [conversation with one or two persons not enough to qualify witness to reputation in the community]; *People v. Mendoza* (1974) 37 C.A.3d 717, 724, 112 C.R. 565 [police officer who did not profess knowledge of witness' reputation for honesty and veracity in community did not qualify as competent witness on witness' credibility]; cf. *People v. McAlpin* (1991) 53 C.3d 1289, 1311, 283 C.R. 382, 812 P.2d 563 [rule that lay opinion testimony must be based on witness' personal observation does not apply to reputation testimony]; *People v. Woodson* (1964) 231 C.A.2d 10, 15, 41 C.R. 487, citing the text, and commenting on "highly stylized methods," but holding inexact questions not prejudicial; 1 McCormick 5th, §43; 81 Am.Jur.2d (1992 ed.), Witnesses §§896, 898.)

It is not necessary that the impeaching witness reside in the community to qualify as a witness to community reputation. Such residence is, of course, the normal method by which knowledge of reputation is gained, but it is not the only one. "[I]t may, and frequently does, happen that one person who goes into a community for the purpose of ascertaining the general reputation of a person in that community may by diligent inquiry from the representative people gain a fairly accurate estimate of the general reputation of that person in the community." (*Rios v. Chand, supra*, 130 C.A.2d 839 [U.S. immigration inspector in sole charge of witness' case for 4 months, visited area frequently and heard reputation discussed].)

(2) *Impeaching Question and Answer.* The second question calls for the reputation: Q. "What is that reputation?" A. "It is bad." (See *Cameron v. Evans Sec. Corp.* (1931) 119 C.A. 164, 173, 6 P.2d 272; Rutter Group, 2 Civil Trials and Evidence, §8:2948.) A variation, usually allowed, is the additional question: "Knowing that reputation, would you believe him under oath?" Although essentially this calls for an opinion, it has been permitted as an exception to the opinion rule. (See *People v. Tyler* (1868) 35 C. 553, 555 [pointing out that though this question is proper, it is not an

essential question that must be asked]; 1 McCormick 5th, §43; 7 Wigmore (Chadbourn Rev.) §1985; and see *infra*, §291, on admissibility of opinion on character.)

(3) *Cross-Examination of Impeaching Witness*. The impeaching witness, like any other character witness, may be cross-examined as to his or her qualifications, e.g., as to his or her knowledge of where the person lives, or his or her knowledge of the person's general reputation. (See *Khan v. Zemansky*, *supra*; on cross-examination of defendant's character witness, see *supra*, §243 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Foundation: Qualification of Impeaching Witness*. See 81 *Am.Jur.2d* (2004 ed.), *Witnesses* §§862, 864; 1 McCormick 6th, §43.(2) *Impeaching Question and Answer*. See 1 McCormick 6th, §43.*West's Key Number Digest*, *Witnesses* k.351-



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CHAPTER XI - Presentation At Trial

XI. IMPEACHMENT

D. Bad Character.

2. Methods of Proving Character Traits.

c. Opinion.

3 *Witkin Cal. Evid. Presentation § 291*

[§ 291] Opinion.

Opinion evidence on character was formerly held inadmissible except in the form sanctioned by *People v. Tyler* (1868) 35 C. 553, 555, *supra*, §290. *Ev.C. 1100* allows proof of a character trait by opinion evidence of persons intimately familiar with the witness and qualified to give an opinion. (See *1 Cal. Evidence (4th)*, *Circumstantial Evidence*, §43.) There is no limiting provision in the impeachment sections, and, accordingly, such opinions may now be offered. (*Ev.C. 780*, Comment.)

In *People v. Fatone* (1985) 165 C.A.3d 1164, 211 C.R. 288, defendant wife was charged with attempted murder of her husband. The husband testified as a witness for the prosecution, and defense counsel wanted to call a retired court commissioner, who had presided over hearings involving domestic conflicts between defendant wife and her husband, to give his opinion on the husband's character for truth and veracity. The court said: "We know of no established rule of law which could preclude a judge, with sufficient foundation, from testifying to an opinion concerning the character or reputation of a prosecution witness in a criminal trial, based on matters previously disclosed in another proceeding. For example, after hearing repeated admissions of perjury, a judge would obviously have grounds for an adverse opinion of the credibility of a witness. Or, having heard numerous upstanding citizens swear a witness has a poor reputation for truthfulness, a judge would also qualify as one capable of testifying to that fact." (165 C.A.3d 1183.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER XI - Presentation At Trial

### XI. IMPEACHMENT

#### E. Conviction of a Felony.

##### 1. In General.

##### a. Nature of Rule.

3 Witkin Cal. Evid. Presentation § 292

[§ 292] Nature of Rule.

(1) *Civil Actions*. In general, specific wrongful acts of a witness in a civil action cannot be used to impeach. (See *supra*, §285.) The exception is that for the purpose of attacking a witness' credibility, it may be shown that he or she has been convicted of a felony. (*Ev.C.* 788; see 1 McCormick 5th, §42; 3A Wigmore (Chadbourn Rev.) §980; 78 Cal. L. Rev. 1313 [using prior corporate convictions to impeach]; 19 Hastings L. J. 919; 21 Hastings L. J. 968; 1984 A.S. 372; C.E.B., Effective Introduction of Evidence 2d, Chap. 26 [use of felony convictions to impeach in civil trials]; 36 Proof of Facts 2d 747; 81 Am.Jur.2d (1992 ed.), Witnesses §917 et seq.; 9 A.L.R.4th 897 [jury instruction]; 37 A.L.R.5th 319 [prior conviction for drug dealing]; on federal rule, see *Green v. Bock Laundry Machine Co.* (1989) 490 U.S. 504, 109 S.Ct. 1981, 1993, 104 L.Ed.2d 557, 575 [F.R. Evid., Rule 609(a)(1) permits impeachment of civil witness by prior felony conviction, regardless of prejudice to witness or party offering testimony]; 103 Harv. L. Rev. 300.)

If a proper objection to use of the conviction is made, the trial judge must carry out the weighing process required by *Ev.C.* 352 to determine whether the prejudicial effect of admitting the conviction outweighs its probative value. (*Robbins v. Wong* (1994) 27 C.A.4th 261, 274, 32 C.R.2d 337, *infra*, §308; on trial judge's discretion under *Ev.C.* 352 to exclude evidence that is more prejudicial than probative, see 1 Cal. Evidence (4th), Circumstantial Evidence, §17.)

(2) *Criminal Actions*. Any witness in a criminal case, including the defendant if he or she testifies, also may be impeached with a prior felony conviction. However, only felonies involving "moral turpitude" may be used to impeach, and those are subject to discretionary exclusion where their probative value is outweighed by their prejudicial effect. (*People v. Castro* (1985) 38 C.3d 301, 314, 211 C.R. 719, 696 P.2d 111, *infra*, §303; C.E.B., Effective Introduction of Evidence in California 2d, Chap. 27 [use of felony convictions in criminal trials]; but cf. *Robbins v. Wong*, *supra*, 27 C.A.4th 274 [no moral turpitude requirement in civil actions].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Civil Actions*. See 81 Am.Jur.2d (2004 ed.), Witnesses §884 et seq.; 1 McCormick 6th, §42.(2) *Criminal Actions*. See CALCRIM, No. 316 [Additional Instructions on Witness Credibility--Other Conduct]; *People v. Anderson* (2007) 152 C.A.4th 919, 940, 61 C.R.3d 903 [CALCRIM, No. 316 properly guides jury in considering prior crimes evidence]. West's Key Number Digest, Witnesses k.337(5) et seq., 345 et seq.



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## CHAPTER XI - Presentation At Trial

### XI. IMPEACHMENT

#### E. Conviction of a Felony.

##### 1. In General.

##### b. Exceptions: Pardon or Dismissal.

3 Witkin Cal. Evid. Presentation § 293

[§ 293] Exceptions: Pardon or Dismissal.

(1) *Pardon Based on Innocence.* The former rule was that, notwithstanding a pardon, the witness could be impeached, but could offer evidence of the pardon in rehabilitation. (See *People v. Hardwick* (1928) 204 C. 582, 588, 269 P. 427; 16 Cal. L. Rev. 161; 25 So. Cal. L. Rev. 231; 30 A.L.R.2d 893.) Now, impeachment is precluded if the jurisdiction in which the witness was convicted has granted the witness a pardon based on his or her innocence. (*Ev.C. 788(a)*; see 81 Am.Jur.2d (1992 ed.), *Witnesses* §915.)

(2) *Pardon Based on Rehabilitation.* Impeachment is precluded where the witness has received a pardon based on a certificate of rehabilitation granted under P.C. 4852.01 (see 3 Cal. Crim. Law (3d), *Punishment*, §671). (*Ev.C. 788(b)*; see 81 Am.Jur.2d (1992 ed.), *Witnesses* §915.)

(3) *Probation and Dismissal.* It was originally held that, if the witness had been given probation and subsequently obtained a dismissal of the charge under P.C. 1203.4 (see 3 Cal. Crim. Law (3d), *Punishment*, §601), the conviction could not be used to impeach. (See *People v. Mackey* (1922) 58 C.A. 123, 131, 208 P. 135; 81 Am.Jur.2d (1992 ed.), *Witnesses* §915.) P.C. 1203.4 was amended to permit impeachment of a defendant witness in a criminal case. (See *People v. James* (1940) 40 C.A.2d 740, 746, 105 P.2d 947; *People v. O'Brand* (1949) 92 C.A.2d 752, 756, 207 P.2d 1083.) Hence, an ordinary witness in a civil or criminal trial cannot be impeached with such a conviction, but a defendant in a criminal trial who takes the stand can be. (*Ev.C. 788(c)*.)

(4) *Conviction in Another Jurisdiction.* If a witness has been convicted in another jurisdiction and has received a pardon based on rehabilitation or probation and dismissal under procedures "substantially equivalent" to P.C. 4852.01 et seq. or P.C. 1203.4, impeachment is precluded. (*Ev.C. 788(d)*; 81 Am.Jur.2d (1992 ed.), *Witnesses* §914.)

In *People v. Field* (1995) 31 C.A.4th 1778, 37 C.R.2d 803, a murder case, the trial judge prohibited the defense from impeaching a prosecution witness with a conviction he had received in Oklahoma for pointing a firearm at another, because the conviction had been expunged under Oklahoma law. *Held*, this was proper under *Ev.C. 788(c)* and (d).

(a) Under *Ev.C. 788(d)*, a witness convicted under the laws of another jurisdiction may not be impeached if the conviction was expunged pursuant to a procedure that is "substantially equivalent" to that referred to in *Ev.C. 788(c)*, and *Ev.C. 788(c)* refers to P.C. 1203.4, which allows a successful probationer to petition to have his or her record expunged. Although in Oklahoma expungement is automatic upon successful termination of probation, and in



California the probationer must apply, that is not a substantive difference. The expungement statutes "are substantially equivalent in that both were enacted to eradicate the record of conviction for certain purposes when a probationer has successfully completed probation. ... It is unrealistic to expect the legislatures of every state to adopt identical provisions for such procedures as expungement of convictions." (31 C.A.4th 1788, 1789.)

(b) Cal. Const., Art. I, §28(d) and (f) had the effect of superseding all California restrictions on the admission of relevant evidence for impeachment except those preserved or permitted by the express words of the provision itself. However, this did not remove expungement as a viable ground for exclusion: "[T]he very fact of expungement prevents a prior conviction from being *relevant* evidence on the issue of one's credibility." (31 C.A.4th 1790.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Pardon Based on Innocence*. See 81 Am.Jur.2d (2004 ed.), Witnesses §882.

(2) *Pardon Based on Rehabilitation*. See 81 Am.Jur.2d (2004 ed.), Witnesses §882.(3) *Probation and Dismissal*. See 81 Am.Jur.2d (2004 ed.), Witnesses §882.

(4) *Conviction in Another Jurisdiction*. See 81 Am.Jur.2d (2004 ed.), Witnesses §881.West's Key Number Digest, Witnesses k.345(8)



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## CHAPTER XI - Presentation At Trial

XI. IMPEACHMENT  
E. Conviction of a Felony.  
2. Felony.

3 Witkin Cal. Evid. Presentation § 294

[§ 294] Felony.

(1) *Felony Requirement.* The proof must show conviction of a *felony*, not a misdemeanor. (*People v. Lent* (1975) 15 C.3d 481, 484, 124 C.R. 905, 541 P.2d 545; *People v. Griffin* (1962) 209 C.A.2d 125, 128, 25 C.R. 667, citing the text; *People v. Covert* (1967) 249 C.A.2d 81, 90, 57 C.R. 220, citing the text; *Grudt v. Los Angeles* (1970) 2 C.3d 575, 591, 86 C.R. 465, 468 P.2d 825, supra, §285; cf. *People v. Sutton* (1964) 231 C.A.2d 511, 514, 41 C.R. 912 [highly improper to evade rule by indirection, by question "Where are you presently staying?", getting the answer, "at the County Farm" (jail)].) A misdemeanor conviction is inadmissible hearsay when offered to impeach a witness' credibility; however, conduct amounting to a misdemeanor is admissible in a criminal case, subject to the trial court's discretion, if it has a logical bearing on veracity. (*People v. Wheeler* (1992) 4 C.4th 284, 300, 14 C.R.2d 418, 841 P.2d 938, supra, §286; see *People v. Lomeli* (1993) 19 C.A.4th 649, 655, 24 C.R.2d 5 [trial judge, who instructed jury that felony conviction could only be used for credibility, should have given similar instruction regarding misdemeanors; citing *Wheeler*]; *People v. Santos* (1994) 30 C.A.4th 169, 178, 179, 35 C.R.2d 719 [trial judge erred in not allowing defendants to discover prosecution witnesses' misdemeanor convictions, as convictions would have helped defendants obtain direct evidence of misdemeanor conduct to use for impeachment; citing *Wheeler*]; *People v. Cloyd* (1997) 54 C.A.4th 1402, 1407, 1408, 64 C.R.2d 104 [evidence that witness had two misdemeanor cases pending against her for possession of drug paraphernalia was properly excluded as irrelevant to her credibility, and her failure to appear for those two trials was also properly excluded, as there was no evidence this was "conduct amounting to a misdemeanor"].) (For law elsewhere, see 88 A.L.R.3d 74 [use of unrelated traffic offense conviction to impeach general credibility of witness in civil case]; 97 A.L.R.3d 1150 [use of unrelated misdemeanor convictions other than traffic offenses]; on admissibility of prior misconduct that did not result in conviction, see *infra*, §314.)

(2) *California Conviction.* The test laid down in the substantive criminal law--the nature of the punishment--determines whether a conviction is a felony conviction. Hence, where a defendant had been convicted of second degree burglary, but was sentenced to a county jail term, it was error to introduce the record of his conviction. (*People v. Hamilton* (1948) 33 C.2d 45, 49, 198 P.2d 873.) However, where a minor pleaded guilty to burglary, a felony, and was committed to the Preston School of Industry, it was held that this amounted to conviction of a felony and was properly shown for impeachment purposes; the crime was a felony unless the trial court, in its discretion, imposed only a county jail sentence, and the trial court did not so exercise its discretion. (*People v. Williams* (1945) 27 C.2d 220, 228, 163 P.2d 692; see *People v. Ramsey* (1962) 202 C.A.2d 856, 859, 21 C.R. 406 [felony-misdemeanor, probation granted; felony because no sentence to county jail, and impeachment proper]; 1 Cal. Crim. Law (3d), *Introduction to Crimes*, §71.)

(3) *Out-of-State Conviction*. The rule is different where the felony is committed elsewhere: The test depends on the law of the jurisdiction where the conviction took place. Thus, in *People v. Theodore* (1953) 121 C.A.2d 17, 262 P.2d 630, the prosecution proved a conviction of mail fraud in the federal district court of Missouri. Defendant objected that he received only 60 days' imprisonment. *Held*, the evidence was admissible. Under federal law, the length of *possible sentence* is determinative, and the crime was punishable by a maximum of 5 years' imprisonment. (121 C.A.2d 29.)

If the defendant was convicted of a felony but was placed on probation, and under the state law the offense became a misdemeanor, impeachment is improper. (*Truman v. Thomas* (1980) 27 C.3d 285, 296, 165 C.R. 308, 611 P.2d 902.)

(4) *Military Offense*. In *People v. Mathews* (1958) 163 C.A.2d 795, 804, 329 P.2d 983, the court listed the conflicting out-of-state decisions on whether the fact of conviction of a military offense (e.g., desertion) can be used to impeach, but found it unnecessary to decide the point for California. (See 7 A.L.R.4th 468 [conviction by court martial].)

(5) *Timing of Felony*. A prior felony for purposes of Ev.C. 788 means any conviction suffered before trial, regardless of the offense date. Thus, a felony conviction may be admitted for impeachment purposes even though the conduct underlying it occurred after the conduct underlying the charged offense. (*People v. Halsey* (1993) 21 C.A.4th 325, 328, 26 C.R.2d 701.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Felony Requirement*.

*Conduct amounting to misdemeanor*: See *People v. Chavez* (2000) 84 C.A.4th 25, 30, 100 C.R.2d 680 [in robbery prosecution, facts of crime of misdemeanor sexual battery were properly admitted to impeach defendant]; *People v. Rivera* (2003) 107 C.A.4th 1374, 1381, 133 C.R.2d 176 [in prosecution for assault with deadly weapon, conduct underlying defendant's prior juvenile adjudication for misdemeanor possession of deadly weapon with intent to commit assault was properly admitted for impeachment; act of carrying deadly weapon while intending to assault another involves moral turpitude].(5) *Timing of Felony*. See *People v. Hinton* (2006) 37 C.4th 839, 887, 38 C.R.3d 149, 126 P.3d 981 [approving rule of *People v. Halsey* (1993) 21 C.A.4th 325, 26 C.R.2d 701, text, p. 369].*West's Key Number Digest*, Witnesses k.337(9)



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## CHAPTER XI - Presentation At Trial

## XI. IMPEACHMENT

## E. Conviction of a Felony.

## 3. Conviction.

## a. Necessity of Conviction.

3 Witkin Cal. Evid. Presentation § 295

[§ 295] Necessity of Conviction.

(1) *Arrest or Charge Without Conviction.* Cases decided before the passage of Proposition 8 (1 Cal. Evidence (4th), Introduction, §8) held that even though a witness may have committed a felony, this was not enough and could not be shown; the proof had to show a conviction, not merely an arrest or trial. Thus, in *Long v. Barbieri* (1932) 120 C.A. 207, 7 P.2d 1082, the question "In 1918 you were tried in San Francisco for shooting and killing a woman?" was improper, because it related only to trial. (120 C.A. 218.) (See *People v. Duvernay* (1941) 43 C.A.2d 823, 826, 111 P.2d 659 [improper to inquire into previous arrests or "trouble" with police]; *People v. Chandler* (1957) 152 C.A.2d Supp. 916, 920, 313 P.2d 223 [prosecutor's questioning, in obvious bad faith, about prior charge without conviction against defendant for drunkenness and prior petty theft conviction in Texas was reversible error]; 1 McCormick 5th, §42; 3A Wigmore (Chadbourn Rev.) §980a; 81 Am.Jur.2d (1992 ed.), Witnesses §911; 20 A.L.R.2d 1421; 28 A.L.R.4th 505.)

Cases decided after passage of Proposition 8 have deemed past criminal conduct involving moral turpitude, even when it did not result in a felony conviction, to be admissible to impeach criminal witnesses in a proper case. (See *People v. Wheeler* (1992) 4 C.4th 284, 14 C.R.2d 418, 841 P.2d 938, supra, §286; *People v. Lepolo* (1997) 55 C.A.4th 85, 89, 63 C.R.2d 735, infra, §314.) Hence, the holdings in *Long v. Barbieri* and the other early cases may no longer accurately state the law.

(2) *Verdict of Guilty Without Judgment.* The authorities are divided on the propriety of evidence of a verdict of guilty on which no judgment has been entered or sentence passed. (See 28 A.L.R.4th 647.) But an early California case holds that the verdict constitutes a conviction and may be shown. (*People v. Ward* (1901) 134 C. 301, 307, 66 P. 372; see *People v. Williams* (1945) 27 C.2d 220, 228, 163 P.2d 692 [citing *Ward*].)

(3) *Juvenile Court Adjudications.* An adjudication by the juvenile court is not deemed a conviction of a crime and cannot be the basis for impeachment. (Welf.C. 203; *People v. Gomez* (1957) 152 C.A.2d 139, 143, 313 P.2d 58; *People v. Sanchez* (1985) 170 C.A.3d 216, 218, 216 C.R. 21; see 3A Wigmore (Chadbourn Rev.) §980, p. 834; 22 Santa Clara L. Rev. 419; 63 A.L.R.3d 1112.)

However, under *People v. Wheeler*, supra, at least in cases that do not fall under Welf.C. 1772 (honorable discharge by Youthful Offender Parole Board; see 10 Summary (9th), Parent and Child, §822), prior conduct evincing moral turpitude may be introduced even if it was the subject of a juvenile adjudication, "subject, of course, to the restrictions imposed under Evidence Code section 352 and other applicable evidentiary limitations." (*People v. Lee* (1994) 28 C.A.4th 1724, 1740, 34 C.R.2d 723.) (See 1 Jefferson, California Evidence Benchbook 3d, §22.31.)

(4) *Wobbler Offense Where Sentence Not Yet Imposed*. "[T]he term 'convicted' includes otherwise qualifying felony convictions suffered even though sentence has not yet been imposed on the charge. Further, the fact the felony conviction is a wobbler does not change the result since a wobbler is regarded as a felony for every purpose until judgment is entered." (*People v. Martinez* (1998) 62 C.A.4th 1454, 1456, 73 C.R.2d 358.)

(5) *Judgment Not Final*. It is not necessary to show a final and unqualified judgment; the witness may be asked the question even when an appeal from the conviction is pending. (*People v. Braun* (1939) 14 C.2d 1, 6, 92 P.2d 402; see *People v. Scrivens* (1969) 276 C.A.2d 429, 434, 81 C.R. 86, citing the text [impeachment proper even though conviction still subject to motion for new trial or appeal]; 16 A.L.R.3d 726 [appeal or motion for new trial pending]; 81 Am.Jur.2d (1992 ed.), Witnesses §912; on constitutionally defective conviction, see *infra*, §300.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Arrest or Charge Without Conviction*. See 81 Am.Jur.2d (2004 ed.), Witnesses §877; 1 McCormick 6th, §42.(3) *Juvenile Court Adjudications*. Welf.C. 1772 was amended in 2003 to refer to the Youth Authority Board rather than the Youthful Offender Parole Board.

*Cross-Reference:* 10 Summary (10th), *Parent and Child*, §961.(5) *Judgment Not Final*. See 81 Am.Jur.2d (2004 ed.), Witnesses §878. *West's Key Number Digest*, Witnesses k.345(4) et seq.



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## CHAPTER XI - Presentation At Trial

### XI. IMPEACHMENT

#### E. Conviction of a Felony.

##### 3. Conviction.

##### b. Proof by Cross-Examination.

##### 1. In General: Impeaching Question.

3 Witkin Cal. Evid. Presentation § 296

[§ 296] In General: Impeaching Question.

*Ev.C. 788* authorizes only two methods of proof of a prior felony conviction for impeachment purposes. The first is the "examination" of the witness, and the case law has developed limitations on the method of inquiry. (On second method, see *infra*, §299.)

The witness may be asked whether he or she was convicted of a felony. (*People v. David* (1939) 12 C.2d 639, 646, 86 P.2d 811; *People v. Jacobs* (1925) 73 C.A. 334, 347, 238 P. 770, 776 [testimony that he had pleaded guilty is equivalent to proof of conviction]; see *People v. Bauweraerts* (1913) 164 C. 696, 702, 130 P. 717; 36 Proof of Facts 747; 81 Am.Jur.2d (1992 ed.), *Witnesses* §§926, 970.)

It is also permissible to go one step further and ask the nature of the crime, i.e., the particular felony. (*People v. David*, *supra*, 12 C.2d 646; *People v. Smith* (1966) 63 C.2d 779, 790, 48 C.R. 382, 409 P.2d 222; *People v. Jacobs*, *supra*, 73 C.A. 347; cf. *People v. Muchupoff* (1926) 79 C.A. 306, 309, 249 P. 240 [extended questioning held permissible where witness did not understand English and had interpreter]; *People v. Boehm* (1969) 270 C.A.2d 13, 17, 75 C.R. 590 [defendant answered, "injuring a child"; prosecutor then asked, "felony child beating, is that correct?"]; see 67 A.L.R.3d 761, 775 [questions relating to nature and extent of punishment]; but cf. *People v. Terry* (1974) 38 C.A.3d 432, 446, 113 C.R. 233 [defendant charged with armed robbery of finance company; after he admitted prior robbery convictions, prosecutor asked if they involved finance companies; questions about finance companies should have been excluded].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 81 Am.Jur.2d (2004 ed.), *Witnesses* §§894, 938. *West's Key Number Digest*, *Witnesses* k.350 et seq.



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## CHAPTER XI - Presentation At Trial

### XI. IMPEACHMENT

#### E. Conviction of a Felony.

##### 3. Conviction.

##### b. Proof by Cross-Examination.

##### 2. Requirement of Good Faith.

### 3 Witkin Cal. Evid. Presentation § 297

[§ 297] Requirement of Good Faith.

The cross-examination must be conducted in good faith; i.e., the prosecutor must be prepared to show that the witness had suffered a prior conviction. (*People v. Perez* (1962) 58 C.2d 229, 238, 23 C.R. 569, 373 P.2d 617; see *People v. Williams* (1991) 228 C.A.3d 146, 152, 278 C.R. 801 [prosecution's reliance on defendant's rap sheet establishes good faith]; 3 A.L.R.3d 965.)

In *People v. Bryson* (1967) 257 C.A.2d 201, 64 C.R. 706, the prosecutor asked J whether he had been convicted of burglary in Bakersfield. The question was based on a telephone call to the district attorney's office there. J said he had served 10 months in jail on a misdemeanor conviction. The prosecutor thought the service was as a condition of probation, but queried by the judge, he admitted that he had not sought or received the records. *Held*, this was improper; the prosecutor should be prepared to show documentary evidence of felony conviction. (257 C.A.2d 208.)

The requirement of "good faith," i.e., possession of documentary or other competent evidence to prove the prior conviction, is sometimes stated as a basic requirement for even the simple question itself. (See *People v. Conover* (1966) 243 C.A.2d 38, 53, 52 C.R. 172.) This theory was challenged in *People v. Foster* (1969) 271 C.A.2d 763, 766, 76 C.R. 775. Defendant, charged with escapes, called a number of witnesses in his sanity trial. Most of them were county jail inmates whom he had met in jail, and some admitted prior convictions. In two instances, however, the witnesses answered equivocally, claiming that they had served their time in the county jail. The judge then admonished the district attorney that he should not ask the question unless prepared to prove conviction of a felony. *Held*, asking the question was not error; or, if it was error, there was a waiver by failure to object; and also, under the circumstances, no prejudice resulted. (271 C.A.2d 766.) Thus, the holding that the question was proper was only an alternative ground of the decision, but the discussion is illuminating: (a) In some of the cases relied on in *People v. Conover*, *supra*, the question was accusatory in form or suggestive. There is reason for the requirement of good faith in such situations, where the question might plant the seeds of suspicion. (b) Where the question is not accusatory or suggestive, and the witness gives a negative answer, no harm is done. (c) The prosecution cannot always know what witnesses the defendant will call, if any, and has no chance to investigate the backgrounds of all. (271 C.A.2d 768.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Steele* (2000) 83 C.A.4th 212, 223, 99 C.R.2d 458 [where defendant had good faith belief that victim had prior misdemeanor conviction for providing false information to peace officer, trial judge committed error, although

harmless, in preventing defendant from questioning her about prior during cross-examination, even though he may not have had evidence to controvert denial by her].





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## CHAPTER XI - Presentation At Trial

## XI. IMPEACHMENT

## E. Conviction of a Felony.

## 3. Conviction.

## b. Proof by Cross-Examination.

## 3. Inquiry Into Circumstances.

3 Witkin Cal. Evid. Presentation § 298

[§ 298] Inquiry Into Circumstances.

(1) *Improper Inquiry*. In *People v. Wynn* (1941) 44 C.A.2d 723, 112 P.2d 979, defendant, under cross-examination, admitted a conviction of forgery and added that he was later cleared and released. The district attorney then asked whether he had not skipped parole, whether the warden wanted him back, whether he owed 6 months on the term, whether he had pleaded guilty, etc. *Held*, the inquiry went far beyond the permissible limits of the facts of conviction and nature of the crime. (44 C.A.2d 731.) (See *People v. Chenault* (1946) 74 C.A.2d 487, 494, 169 P.2d 29 [criticizing repeated questions, after defendant's denial, as to whether he had been given probation with a short jail sentence, and had escaped]; *People v. Hollander* (1961) 194 C.A.2d 386, 396, 14 C.R. 917.)

In *People v. Gomez* (1957) 152 C.A.2d 139, 313 P.2d 58, the prosecutor, apparently with knowledge that the term served in the state hospital for the insane was by order of the juvenile court, nevertheless seized upon defendant's "No" answer to query him at length on the details and elicit the fact that he was convicted as a psychopathic delinquent. *Held*, the inquiry was not in good faith, and the error was not cured by striking out the testimony. (152 C.A.2d 144.)

In *People v. Malloy* (1974) 41 C.A.3d 944, 116 C.R. 592, defendant denied a prior narcotics conviction by failing to admit it. Over his objection, the prosecution proved the prior by testimony from a narcotics agent who described the earlier purchase, by introduction of the drug which was purchased, and by a chemist's testimony that the drug was LSD. *Held*, this was error (though harmless). "To permit proof of a prior by 'retrying' a defendant for that offense could not only involve undue consumption of judicial time but could result in substantial risk of prejudice to a defendant. In the case at bench the documentary evidence showed that defendant had pleaded guilty to the prior. Knowledge of the contraband character of the items sold could be reasonably inferred from that evidence without retrying the prior. Moreover, defendant never challenged his identity as the one who had suffered the prior conviction. In the foregoing circumstances, the trial judge should have exercised his discretion under *Evidence Code* section 352 and sustained defendant's objection to the introduction of the questioned evidence." (41 C.A.3d 952.)

(2) *Further Inquiry in Good Faith*. The foregoing cases have sometimes been thought to stand for the proposition that, if the defendant does not admit the conviction after the simple questions, cross-examination should stop and proof be made by introduction of the record of conviction (*infra*, §299). (See *People v. Chenault*, *supra*, 74 C.A.2d 494.) But a different view was taken in *People v. Linyard* (1957) 151 C.A.2d 50, 311 P.2d 57. Defendant, having answered "No" to the simple question, was asked whether he had not been convicted of possession of heroin. He answered that "It was a misdemeanor," and was then asked whether he had not been given probation on condition of a county jail term. *Held*,

the prosecution, if in good faith, has this limited right to seek the facts on cross-examination. And good faith was here shown by the fact that defendant had admitted three prior convictions of violations of narcotics laws; the prosecutor was entitled to believe that at least one was a felony conviction because the narcotics law requires a state prison sentence after any prior conviction. (151 C.A.2d 54.) (See also *People v. Smith* (1966) 63 C.2d 779, 790, 48 C.R. 382, 409 P.2d 222 ["Did you serve a term of imprisonment?" held proper].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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3. Conviction.

c. Proof by Record of Judgment.

3 *Witkin Cal. Evid. Presentation* § 299

[§ 299] Proof by Record of Judgment.

Except for the limited right to seek the facts on cross-examination (see *supra*, §296), the prosecution is confined to proof by introduction of a certified copy of the judgment of conviction. (*Ev.C.* 788; see *People v. Craig* (1925) 196 C. 19, 28, 235 P.2d 721; *Pacific Indem. Co. v. Hargreaves* (1939) 36 C.A.2d 338, 345, 98 P.2d 217; *People v. Beal* (1951) 108 C.A.2d 200, 205, 239 P.2d 84; *People v. Conley* (1968) 268 C.A.2d 47, 58, 73 C.R. 673, citing the text; 3A Wigmore (Chadbourn Rev.) §980; 4 Wigmore (Chadbourn Rev.) §1270; 36 Proof of Facts 747.)

However, while it is the usual practice to ask the witness first, and then to introduce documentary evidence if he or she denies the conviction, it is not improper to make the documentary proof without asking the impeaching question. (*People v. Pike* (1962) 58 C.2d 70, 93, 22 C.R. 664, 372 P.2d 656.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Witnesses k.359-



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## CHAPTER XI - Presentation At Trial

## XI. IMPEACHMENT

## E. Conviction of a Felony.

## 3. Conviction.

## d. Constitutionally Defective Conviction.

3 Witkin Cal. Evid. Presentation § 300

[§ 300] Constitutionally Defective Conviction.

(1) *Raising Issue in Trial Court.* A prior conviction obtained in violation of constitutional due process is invalid either for substantive (e.g., habitual criminal adjudication) or procedural purposes, and the constitutional right to counsel applies retrospectively to any past conviction. Thus, if a prior conviction is offered to impeach, the defendant may raise the constitutional defect of lack of counsel and no intelligent waiver of the right in the prior trial. This may be done by collateral attack on the final judgment. (See 6 Cal. Crim. Law (3d), *Criminal Writs*, §40.) But in the interest of efficient judicial administration, the issue should be presented to the trial court for determination there; and a motion to strike that part of the accusatory pleading that charges the prior conviction is an appropriate means. (*People v. Coffey* (1967) 67 C.2d 204, 215, 60 C.R. 457, 430 P.2d 15.)

In the *Coffey* case, the court laid down the rules to govern the hearing and determination of this issue: "*First*, when a defendant, whether by motion to strike the prior conviction or convictions on constitutional grounds, or by denial of such prior conviction or convictions on constitutional grounds at the time of entering his plea to the same, raises the issue for determination, the court shall, prior to trial, hold a hearing outside the presence of the jury in order to determine the constitutional validity of the charged prior or priors in issue. *Second*, in the court of such hearing the prosecutor shall first have the burden of producing evidence of the prior conviction sufficient to justify a finding that defendant 'has suffered such previous conviction.' (*Pen. Code §1025*.) *Third*, when this prima facie showing has been made, the defendant shall thereupon have the burden of producing evidence that his constitutional right to counsel was infringed in the prior proceeding at issue. *Fourth*, if defendant bears this burden, the prosecution shall have the right to produce evidence in rebuttal. *Fifth*, the court shall make a finding on the basis of the evidence thus produced and shall strike from the accusatory pleading any prior conviction found to be constitutionally invalid." (67 C.2d 217.)

Because the trial judge in the *Coffey* case erroneously refused to consider the motion to strike, the Supreme Court had to determine the effect of the error in permitting impeachment: "[W]e are of the view that such error is of federal constitutional dimension. It is clear that a conviction of crime, no matter when sustained, is constitutionally invalid if it was obtained in violation of the Sixth and Fourteenth Amendments. ... We think it equally clear that the utilization of such a conviction, at the trial of a subsequent offense, for any purpose leading to a conviction for such subsequent offense, is violative of the due process clause of the Fourteenth Amendment. Therefore, in assessing the prejudicial effect of such erroneous utilization, we are required to apply the test recently set forth by the United States Supreme Court in *Chapman v. California*." (67 C.2d 218.)

The judgment was accordingly reversed on two counts and affirmed on two counts. (See also *In re Dabney* (1969)

71 C.2d 1, 6, 76 C.R. 636, 452 P.2d 924 [error not reversible per se, but governed by *Chapman* test; following *Coffey*]; *People v. Bowen* (1971) 22 C.A.3d 267, 284, 99 C.R. 498 [once constitutional objections to prior convictions are raised, defendant need not renew objections at time of impeaching cross-examination]; *People v. Reeves* (1981) 123 C.A.3d 65, 69, 176 C.R. 182 [interpreting *Coffey* as permitting challenges only on basis of denial of right to counsel]; 56 Cal. L. Rev. 1732 [*Coffey*]; for federal rule that use of prior void conviction for impeachment deprives criminal defendant of due process when it might have influenced outcome of case, see *Loper v. Beto* (1972) 405 U.S. 473, 92 S.Ct. 1014, 31 L.Ed.2d 374.)

(2) *Burden of Proof.* *People v. Knighton* (1967) 250 C.A.2d 221, 58 C.R. 700, decided before *People v. Coffey*, held that a defendant challenging the use of a prior conviction for impeachment purposes had the burden of proof on the issue of constitutionality. (250 C.A.2d 228.) The *Coffey* case holds otherwise: The burden of proof remains with the prosecution; only the burden of producing evidence shifts. (67 C.2d 217, footnote 15.) (Cf. *People v. Vienne* (1973) 30 C.A.3d 266, 271, 105 C.R. 584 [prosecution's production of certified copies of abstract of judgment makes out prima facie showing of validity; defendant then has burden of producing evidence that his right to counsel was infringed]; *People v. Conley* (1968) 268 C.A.2d 47, 58, 73 C.R. 673 [prosecution produced certified copy of Oregon judgment reciting waiver of counsel; defendant then had burden of going forward with evidence to prove waiver's falsity or inadequacy].)

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## CHAPTER XI - Presentation At Trial

### XI. IMPEACHMENT

#### E. Conviction of a Felony.

#### 4. Discretionary Exclusion.

##### a. Before Proposition 8.

##### 1. People v. Beagle: Discretion Required.

#### 3 Witkin Cal. Evid. Presentation § 301

[§ 301] People v. Beagle: Discretion Required.

In *People v. Beagle* (1972) 6 C.3d 441, 99 C.R. 313, 492 P.2d 1, a prosecution for arson, the court held that *Ev.C. 352* (discretionary exclusion for policy reasons; see 1 Cal. Evidence (4th), *Circumstantial Evidence*, §17) applies to impeachment under *Ev.C. 788*, and that the judge must exercise discretion to prevent impeachment when the probative value of the evidence is substantially outweighed by the risk of undue prejudice.

Defendant, on trial for arson, was impeached by a showing that he suffered a felony conviction some 4 years earlier for issuing a check without sufficient funds. He contended that the conviction bore no necessary relationship either to the charged offenses or to his veracity, and thus improperly restricted his freedom to choose whether to testify. *Held*, the conviction was properly used because the reasonable exercise of discretion by the trial judge could not have justified its exclusion.

(a) *Permissive statutory language.* *Ev.C. 788* is the only exception to the rule that specific instances of conduct are inadmissible to prove a witness' credibility. (See *supra*, §285.) "In providing this exception the Legislature used the permissive word 'may' rather than a mandatory word such as 'shall.' We conclude that the choice of language leaves the trial court with discretion to exclude proof of prior felony convictions offered in impeachment." (6 C.3d 452.) And nothing in *Ev.C. 788* exempts it from the general rule of *Ev.C. 352*. (6 C.3d 452.)

(b) *Factors to be considered.* Rigid standards should not be adopted to govern what "in each instance must depend upon the sound exercise of judicial discretion." (6 C.3d 453.) Among the more important factors to be considered are those recognized as relevant by some federal courts. So, for example, convictions for dishonest conduct relate to credibility while those for violent or assaultive crimes generally do not; yet even a fraud or theft conviction, if it occurred long ago and was followed by a legally blameless life, should generally be excluded for remoteness. Convictions for the same crime should be used sparingly because of the pressure on jurors to believe that "if he did it before he probably did so this time." And even if the prior convictions are relevant to credibility and the risk of prejudice does not warrant their exclusion, the judge may conclude that it is more important for the jury to have the defendant's version of the case than to have him silent for fear of impeachment. (6 C.3d 453.) But this last factor calls for a word of caution: "We do not propose to encourage or countenance a form of blackmail by defendants. No witness including a defendant who elects to testify in his own behalf is entitled to a false aura of veracity. The general rule is that felony convictions bearing on veracity are admissible." (6 C.3d 453.)

The court concluded that the risk of prejudice from such impeachment did not raise an issue of constitutional dimensions, and that, because prosecutors and courts had relied on contrary prior decisions, the new standards would be applied *prospectively* to trials begun after January 5, 1972. (6 *C.3d* 455, footnote 2.) (See 9 *Pacific L. J.* 985 [criticizing decision as contrary to legislative intent]; 61 *Cal. L. Rev.* 515 [suggesting that legislative intent is unclear]; 9 *U.S.F. L. Rev.* 491 [argument for total prohibition of use of prior convictions to impeach]; 5 *Pepperdine L. Rev.* 135 [proposing limitation on application of *Beagle* rule].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER XI - Presentation At Trial

### XI. IMPEACHMENT

#### E. Conviction of a Felony.

#### 4. Discretionary Exclusion.

##### a. Before Proposition 8.

##### 2. Expansion of Beagle.

### 3 Witkin Cal. Evid. Presentation § 302

[§ 302] Expansion of Beagle.

The following cases after *People v. Beagle* (1972) 6 C.3d 441, 99 C.R. 313, 492 P.2d 1, supra, §301, expanded on its holding, emphasizing the trial court's duty to balance prejudice and probative value under Ev.C. 352 and discussing the factors that bear on the balancing test:

*People v. Antick* (1975) 15 C.3d 79, 99, 123 C.R. 475, 539 P.2d 43 [trial for 1973 burglary, circumstantial evidence of guilt not strong; evidence of forgery convictions in 1955 and 1957 should have been excluded].

*People v. Rist* (1976) 16 C.3d 211, 220, 127 C.R. 457, 545 P.2d 833 [trial judge in trial for robbery failed to exercise discriminating judgment when he ruled that defendant's prior robbery conviction (but not convictions for credit card forgery and marijuana possession) would be admissible to impeach; under *Beagle*, prior convictions for same crime should be admitted sparingly].

*People v. Rollo* (1977) 20 C.3d 109, 118, 141 C.R. 177, 569 P.2d 771 [trial judge should have weighed probative value of prior conviction for soliciting another to commit murder against its prejudicial effect, rather than allowing prosecutor to ask whether defendant had been convicted of prior felony without identifying its nature; judge's attempt to strike even balance between competing interests of prosecution and defense directly contravened *Beagle* rule].

*People v. Woodard* (1979) 23 C.3d 329, 338, 152 C.R. 536, 590 P.2d 391 [discretion called for by Ev.C. 352 and by *Beagle* line of decisions must be exercised "whenever a party--plaintiff or defendant, in a civil or criminal case--moves for the exclusion of a witness' prior felony conviction"; weighing process is applicable to all cases].

*People v. Fries* (1979) 24 C.3d 222, 230, 231, 155 C.R. 194, 594 P.2d 19 [risk of prejudice substantial where prior conviction is similar or identical to crime charged; identical prior conviction should have been excluded].

*People v. Spearman* (1979) 25 C.3d 107, 115, 157 C.R. 883, 599 P.2d 74 [admission of prior conviction for possession of heroin for sale was error; "Only a conviction which has as a necessary element an intent to deceive, defraud, lie, steal, etc., impacts on the credibility of a witness"].

*People v. Barrick* (1982) 33 C.3d 115, 125, 127, 187 C.R. 716, 654 P.2d 1243 [in prosecution for theft of vehicle, trial judge improperly used technique of "sanitizing" defendant's prior felony conviction of automobile theft by allowing



prosecutor to ask defendant if he had ever been convicted of "a felony involving theft"; technique tends to focus jury speculation toward conclusion that prior crime was identical].

*People v. Holt* (1984) 37 C.3d 436, 453, 208 C.R. 547, 690 P.2d 1207 [prosecution was not limited to proof of only one of multiple prior convictions; "Whether or not more than one prior felony is to be admitted for the purpose of impeachment is simply one of the factors which must be weighed against the danger of prejudice"].

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER XI - Presentation At Trial

### XI. IMPEACHMENT

#### E. Conviction of a Felony.

#### 4. Discretionary Exclusion.

##### b. After Proposition 8.

#### 1. Establishment of Moral Turpitude Test.

##### aa. *People v. Castro*.

### 3 *Witkin Cal. Evid. Presentation* § 303

[§ 303] *People v. Castro*.

In *People v. Castro* (1985) 38 C.3d 301, 211 C.R. 719, 696 P.2d 111, defendant was charged with receiving stolen property. She moved to bar impeachment on then unspecified prior convictions, and the trial judge denied the motion on the basis of Cal. Const., Art. I, §28(f) (Proposition 8, 1 *Cal. Evidence* (4th), *Introduction*, §8). At the trial, evidence of prior convictions of possession of heroin and possession of heroin for sale was admitted to impeach. Defendant's conviction was affirmed, but the court was divided on the issues of error and prejudice from error.

The lead opinion (three justices) reasons as follows:

(a) *Proposition 8 retained discretion to exclude under Ev.C. 352.*

(1) The history of *Ev.C. 352* shows that it was intended to operate "across the board." *People v. Beagle* (1972) 6 C.3d 441, 99 C.R. 313, 492 P.2d 1, *supra*, §301, confirmed this view, holding that the court had discretion to exclude evidence of prior convictions to impeach, despite *Ev.C. 788*. And subsequent decisions, commencing with *People v. Antick* (1975) 15 C.3d 79, 123 C.R. 475, 539 P.2d 43, *supra*, §302, delineated the boundaries of permissible discretion. (38 C.3d 306, 307, 308.) In each of the cases, a dissenting opinion expressed the view that the guidelines of *Beagle* had become rigid limitations on the trial judge's discretion. (38 C.3d 308.)

(2) The drafters of Cal. Const., Art. I, §28 "wanted a change" and "the voters legislated it." The question remains, "did they intend to throw out the baby with the bath?" "Assuming that the framers and voters were attempting to revitalize section 788 to counter the effect of the *Antick* line of cases, as decried by the dissenters, is there hard evidence that they intended to go further--to abrogate entirely the discretion of the trial court under section 352, a traditional, inherent and, in truth, indispensable tool of the law of evidence?" (38 C.3d 308, 309.)

(3) Subdivision (f) applies to all witnesses in criminal cases. "Did the drafters really intend that *all* persons who choose or are compelled to testify, either for the defense or the prosecution, will inevitably be impeachable by prior convictions? Did they really intend that an elderly victim of a mugging cannot avoid being impeached by a conviction for conspiracy to disturb the peace ... suffered in her youth? Did the framers really intend that a witness to a crime who, as a good citizen, comes forward to aid the police, must anticipate that any felony conviction suffered years before will be used against him if he testifies at a criminal trial? The prosecutor, of course, must disclose the prior criminal record

of prosecution witnesses. ... If the framers intended that the trial court was to have no discretion to prevent impeachment with ancient offenses, have they not--to switch metaphors--cut off their noses to spite their faces? Even convicted felons may make a contribution to the search for truth." (38 C.3d 309.)

(4) Subdivision (f), with its absolute language, must be reconciled with subdivision (d), which states that "Nothing in this section shall affect" *Ev.C.* 352. But the extrinsic evidence (the voter's pamphlet and the legislative committee reports by legislators who were not the drafters) do not indicate that the electorate was informed of the conflict. It should, therefore, be resolved as follows:

"The intention of the drafters of the initiative was to restore trial court discretion as visualized by the Evidence Code and to reject the rigid, black letter rules of exclusion which we had grafted onto the code by the *Antick* line of decisions. ... Nevertheless, the initiative itself expressed continued trust in the discretion of the trial courts; despite the mandatory admonitions, that discretion under section 352 was expressly retained." (38 C.3d 312.)

(b) *Felonies involving moral turpitude may be used to impeach.*

(1) Although subdivision (f) is absolute in terms, the United States Supreme Court has held that, to satisfy due process, inferences (not just presumptions) must be based on a rational connection between the fact proved and the fact to be inferred. The question is: "Can it be said with substantial assurance that the credibility of a witness is adversely affected by his having suffered this conviction?" And, if the answer is "no," impeachment is prohibited: "An important element of a fair trial is that the jury consider only relevant and competent evidence bearing on the issue of guilt or innocence." (38 C.3d 313.)

(2) "[T]he modern justification for the practice must be that prior felony convictions may, somehow, be relevant to the witness' veracity." In Justice Holmes' language, the only ground for disbelieving the witness is "the general readiness to do evil which the conviction may be supposed to show." (38 C.3d 314.) It follows that, if the felony does not show " 'readiness to do evil'--moral turpitude, if you will"--the Due Process Clause prevents its use for impeachment. (38 C.3d 314.) (On what crimes involve moral turpitude, see 38 C.3d 315; *infra*, §306.)

One justice, concurring and dissenting, reasoned as follows: (a) Subdivision (f) is sufficiently clear, and, as a specific provision, should control over the general provision of subdivision (d). (b) *Beagle* relied in part on a federal case, the holding of which was nullified by legislation, and Proposition 8 was intended to have a similar effect. (c) Nevertheless, evidence so potentially prejudicial must meet the constitutional standard of relevance, "and in the absence of legislative guidance I accept the 'moral turpitude' test." (d) However, difficult problems of judicial administration will arise in applying the moral turpitude test and the standards for review of trial court discretion, and "I suggest that the optimum solution may lie in action by the Legislature enumerating or defining the offenses which it believes to have sufficient relevance to veracity to be admissible for purposes of impeachment." (38 C.3d 319, 320, 321, 322.)

A second justice, concurring and dissenting, made two points: (a) He agreed with the first dissenter that subdivision (f) abrogated all judicially created restrictions on admissibility of prior convictions to impeach. (b) He disagreed with the creation of a "moral turpitude" exception, and argued that, rather than burden the trial courts with that uncertain standard, the court should, in the absence of any restrictions imposed by the federal courts, "allow admission of *all* prior felonies on the theory that the commission of a felony offense necessarily bears on one's credibility regardless of the nature of that offense." (38 C.3d 322, 323.)

Two justices joined in a lengthy opinion, concurring and dissenting, as follows: (a) The majority correctly holds that trial courts retain discretion to exclude under *Ev.C.* 352. (b) The *Beagle* factors should continue to guide their exercise of discretion. (c) The moral turpitude standard is neither proper nor workable: The term lacks legal precision, will incorporate into the criminal law vast bodies of noncriminal law, and will give trial courts no clear guidance. (38 C.3d 323, 333, 334.) (See 18 U.C. *Davis L. Rev.* 681 [exhaustive analysis of *Castro* and standards for admissibility of prior felonies]; 15 *Pacific L. J.* 301 [discussion of Proposition 8 prior to *Castro* decision]; 60 *So. Cal. L. Rev.* 539, 554

[analysis of *Castro's* interpretation of Proposition 8]; 24 *Loyola L.A. L. Rev.* 621 [impact of Proposition 8 on prior misconduct impeachment evidence in criminal cases].)

**SUPPLEMENT:** [This section is current through the latest supplement]  
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### XI. IMPEACHMENT

#### E. Conviction of a Felony.

#### 4. Discretionary Exclusion.

##### b. After Proposition 8.

#### 1. Establishment of Moral Turpitude Test.

##### bb. Subsequent Cases.

### 3 Witkin Cal. Evid. Presentation § 304

[§ 304] Subsequent Cases.

Subsequent Court of Appeal cases have attempted to delineate the parameters of *People v. Castro* (1985) 38 C.3d 301, 211 C.R. 719, 696 P.2d 111, and its effect on rules developed before Proposition 8:

*People v. Stewart* (1985) 171 C.A.3d 59, 63, 215 C.R. 716 [from analysis of *Castro*: all prior felonies involving moral turpitude are admissible to impeach, but trial judge retains discretion under *Ev.C.* 352 to exclude].

*People v. Miles* (1985) 172 C.A.3d 474, 480, 218 C.R. 378 [analyzing separate opinions in *Castro*, and concluding that "six justices favored the retention of trial court discretion even with respect to relevant prior convictions pursuant to *Evidence Code* section 352"].

*People v. Foreman* (1985) 174 C.A.3d 175, 180, 181, 219 C.R. 759 [pointing out that *Castro* repudiated former inflexible black letter rules of exclusion in *People v. Antick* (1975) 15 C.3d 79, 123 C.R. 475, 539 P.2d 43 and its progeny (see *supra*, §302), and that rule of sanitization in *People v. Barrick* (1982) 33 C.3d 115, 187 C.R. 716, 654 P.2d 1243, *supra*, §302, did not survive Proposition 8].

*People v. Burns* (1987) 189 C.A.3d 734, 736, 234 C.R. 547 [remoteness of prior conviction remains factor to consider in exercising discretion under *Ev.C.* 352].

*People v. Muldrow* (1988) 202 C.A.3d 636, 647, 248 C.R. 891 [discussion of remoteness and conclusion that systematic occurrence of priors over 20-year period created pattern relevant to defendant's credibility].

*People v. Ballard* (1993) 13 C.A.4th 687, 695, 16 C.R.2d 624, *infra*, §306 [noting many cases have questioned precedential authority of *Castro* lead opinion in excluding impeachment by felonies not involving moral turpitude].

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### 4. Discretionary Exclusion.

##### b. After Proposition 8.

#### 2. Application of Moral Turpitude Test.

##### aa. People v. Castro.

### 3 Witkin Cal. Evid. Presentation § 305

[§ 305] People v. Castro.

In *People v. Castro* (1985) 38 C.3d 301, 211 C.R. 719, 696 P.2d 111, supra, §303, the lead opinion briefly explained the moral turpitude test and applied it to the crimes involved in the case.

(a) The original draft of *Ev.C. 788* proposed by the Law Revision Commission limited felony-impeachment to felonies with respect to which an essential element was dishonesty or false statement. This limitation was rejected by the Legislature. (38 C.3d 315, footnote 10.) And there is some basis for inferring that a person who has committed a crime that involves moral turpitude other than dishonesty is more likely to be dishonest than a witness about whom no such thing is known. (38 C.3d 315.) The practical problem, however, is the necessity of determining whether each felony conviction offered for impeachment involves moral turpitude. "If it does not, that is the end of it. If it does, it is prima facie admissible, subject to the exercise of the court's discretion. Naturally, the more tenuous the court finds the connection between moral defect shown by the conviction and the only defect directly relevant--dishonesty--the more likely it is to disallow impeachment." (38 C.3d 316.)

(b) Does the trial court look only to the elements of the offense or may it go behind the fact of the conviction and receive evidence on the underlying facts? Under the reasoning of *People v. Crowson* (1983) 33 C.3d 623, 633, 190 C.R. 165, 660 P.2d 389, a prior conviction should be admissible for impeachment only "if the least adjudicated elements of the conviction necessarily involve moral turpitude." And "[w]e reemphasize that even such admissibility is subject to trial court discretion under section 352." (38 C.3d 317.)

Simple possession of heroin does not necessarily involve moral turpitude; possession for sale does (the intent is to corrupt others). "Defendant should, therefore, not have been impeached with the conviction for simple possession at all, and the trial court erred in stating it had no discretion with respect to either conviction." (38 C.3d 317.) In the light of the record, however, the errors were not prejudicial. (38 C.3d 319; see *infra*, §313.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### 2. Application of Moral Turpitude Test.

##### bb. Moral Turpitude Found.

### 3 Witkin Cal. Evid. Presentation § 306

[§ 306] Moral Turpitude Found.

In *People v. Fulcher* (1987) 194 C.A.3d 749, 753, 236 C.R. 845, the trial judge denied defendant's motion to bar his 1978 statutory rape conviction for impeachment purposes. *Held*, the crime is necessarily one involving moral turpitude. *People v. Hernandez* (1964) 61 C.2d 529, 39 C.R. 361, 393 P.2d 673, modified the statutory definition of statutory rape--sexual intercourse with a female not the wife of the perpetrator, where the female is under the age of 18 years--by providing for the defense of a good faith, reasonable belief that the female is over 18 years of age. In so doing, the *Hernandez* court categorized the crime as "infamous." (194 C.A.3d 753.) "It may thus be said that at the time of *Fulcher*'s earlier act and conviction (and now) the Penal Code, as interpreted by *People v. Hernandez*, *supra*, proscribed sexual intercourse with a female under the age of 18 years by one without a good faith and reasonable belief that the female was of the age of consent, and that such is an 'infamous' crime. ... [I]t is thus necessarily a crime involving 'moral turpitude.' " (194 C.A.3d 753.) In *People v. Flanagan* (1986) 185 C.A.3d 764, 230 C.R. 64, *infra*, §309, defendant's conviction for statutory rape was prior to *Hernandez*. (194 C.A.3d 754.)

In *People v. Rodriguez* (1992) 5 C.A.4th 1398, 7 C.R.2d 495, the defendant's prior conviction was under P.C. 273.5 (inflicting corporal injury on spouse or cohabitant). The court said:

"We perceive the crux of *Castro*'s definition to be the requisite animus of the felon: Must the crime be attended by knowledge of circumstances and a conscious decision to exploit them sufficient to signify readiness to do evil? To violate section 273.5 the assailant must, at the very least, have set out, successfully, to injure a person of the opposite sex in a special relationship for which society rationally demands, and the victim may reasonably expect, stability and safety, and in which the victim, for these reasons among others, may be especially vulnerable. To have joined in, and thus necessarily to be aware of, that special relationship, and then to violate it wilfully and with intent to injure, necessarily connotes the general readiness to do evil that has been held to define moral turpitude." (5 C.A.4th 1402.)

In *People v. Ballard* (1993) 13 C.A.4th 687, 16 C.R.2d 624, a prosecution for indecent exposure in which the trial judge allowed defendant to be impeached with prior felony convictions for indecent exposure, the court noted that "[a] substantial body of authority has implicitly or explicitly questioned the precedential value of the *Castro* lead opinion in excluding impeachment by felonies not involving moral turpitude, despite the plain language of [Cal. Const., Art. I, §28(f)]." (13 C.A.4th 695.) However, "even under the *Castro* 'moral turpitude' limitation," the court found no abuse of discretion, because indecent exposure is a crime of moral turpitude. (13 C.A.4th 695, 696.)

A number of other Court of Appeal decisions have found moral turpitude in various felonies. (See *People v. Olmedo* (1985) 167 C.A.3d 1085, 213 C.R. 742 [assault with intent to commit murder]; *People v. Bonilla* (1985) 168 C.A.3d 201, 205, 214 C.R. 191 [rape]; *People v. Almarez* (1985) 168 C.A.3d 262, 267, 268, 214 C.R. 105 [forgery and burglary]; *People v. Hunt* (1985) 169 C.A.3d 668, 675, 215 C.R. 429 [burglary]; *People v. Brown* (1985) 169 C.A.3d 800, 806, 215 C.R. 494 [robbery]; *People v. Parrish* (1985) 170 C.A.3d 336, 349, 350, 217 C.R. 700 [forgery and voluntary manslaughter]; *People v. Stewart* (1985) 171 C.A.3d 59, 63, 215 C.R. 716 [robbery]; *People v. Knowlden* (1985) 171 C.A.3d 1052, 1056, 217 C.R. 758 [all burglaries, even if target offense does not involve dishonesty]; *People v. Miles* (1985) 172 C.A.3d 474, 482, 218 C.R. 378 [arson]; *People v. Cavazos* (1985) 172 C.A.3d 589, 593, 594, 218 C.R. 269 [assault with deadly weapon]; *People v. Zataray* (1985) 173 C.A.3d 390, 400, 219 C.R. 33 [simple kidnaping]; *People v. Statler* (1985) 174 C.A.3d 46, 54, 219 C.R. 713 [burglary]; *People v. Jackson* (1985) 174 C.A.3d 260, 266, 220 C.R. 39 [assault with deadly weapon and robbery]; *People v. Armendariz* (1985) 174 C.A.3d 674, 681, 220 C.R. 229 [assault with deadly weapon]; *People v. Mazza* (1985) 175 C.A.3d 836, 843, 221 C.R. 640 [rape]; *People v. Martinez* (1985) 175 C.A.3d 881, 888, 221 C.R. 258 [robbery]; *People v. Coad* (1986) 181 C.A.3d 1094, 1109, 1110, 226 C.R. 386 [voluntary manslaughter]; *People v. Jaimez* (1986) 184 C.A.3d 146, 150, 228 C.R. 852 [pimping and pandering]; *People v. Massey* (1987) 192 C.A.3d 819, 822, 237 C.R. 734 [P.C. 288(a), lewd or lascivious acts with child under age of 14]; *People v. Waldecker* (1987) 195 C.A.3d 1152, 1158, 241 C.R. 650 [escape without violence]; *People v. Muldrow* (1988) 202 C.A.3d 636, 645, 248 C.R. 891 [burglary and attempted burglary]; *People v. Elwell* (1988) 206 C.A.3d 171, 177, 253 C.R. 480 [aggravated assault]; *People v. Thomas* (1988) 206 C.A.3d 689, 695, 700, 254 C.R. 15 [aggravated assault]; *People v. Cornelio* (1989) 207 C.A.3d 1580, 1583, 255 C.R. 775 [felony false imprisonment]; *People v. Lindsay* (1989) 209 C.A.3d 849, 857, 257 C.R. 529 [battery on police officer]; *People v. Bautista* (1990) 217 C.A.3d 1, 7, 265 C.R. 661 [felony hit-and-run]; *People v. Lee* (1991) 229 C.A.3d 1504, 1507, 281 C.R. 9 [escape by failure to return to custody after authorized release]; *People v. Thornton* (1992) 3 C.A.4th 419, 422, 4 C.R.2d 519 [P.C. 422, threat to commit crime resulting in death or great bodily injury]; *People v. Brooks* (1992) 3 C.A.4th 669, 671, 4 C.R.2d 570 [P.C. 273d, corporal punishment of child resulting in traumatic condition]; *People v. White* (1992) 4 C.A.4th 1299, 1301, 1304, 6 C.R.2d 259 [P.C. 246, discharging firearm at inhabited dwelling house]; *People v. Campbell* (1994) 23 C.A.4th 1488, 1492, 1493, 28 C.R.2d 716 [P.C. 594, felony vandalism]; *People v. Forster* (1994) 29 C.A.4th 1746, 1757, 35 C.R.2d 705 [Veh.C. 23175 (now Veh.C. 23550), felony driving under influence with three driving under influence violations within previous 7 years]; *People v. Dewey* (1996) 42 C.A.4th 216, 223, 49 C.R.2d 537 [Veh.C. 2800.2, fleeing peace officer by driving with intent to evade "in a willful or wanton disregard for the safety of persons or property"]; *People v. Vera* (1999) 69 C.A.4th 1100, 1102, 82 C.R.2d 128 [Health & Saf.C. 11366; opening or maintaining place for purpose of unlawfully selling, giving away, or using narcotics]; *People v. Williams* (1999) 72 C.A.4th 1460, 1463, 86 C.R.2d 62 [P.C. 69; resisting executive officer by means of force or violence].)

**SUPPLEMENT:** [This section is current through the latest supplement]

*Other decisions finding moral turpitude:* See *People v. Feaster* (2002) 102 C.A.4th 1084, 1093, 125 C.R.2d 896 [discharge of firearm in grossly negligent manner]; *People v. Maestas* (2005) 132 C.A.4th 1552, 1556, 34 C.R.3d 503 [wilful failure to appear after being charged with or convicted of felony and being released on bail]. *West's Key Number Digest*, Witnesses k.337(11) et seq., 345(2)





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cc. Moral Turpitude Not Found.

3 *Witkin Cal. Evid. Presentation* § 307

[§ 307] Moral Turpitude Not Found.

Among the few cases in which a prior conviction was held not to involve a crime of moral turpitude are the following: *People v. Solis* (1985) 172 C.A.3d 877, 883, 218 C.R. 469 [involuntary manslaughter]; *People v. Flanagan* (1986) 185 C.A.3d 764, 773, 230 C.R. 64 [statutory rape; distinguished in *People v. Fulcher* (1987) 194 C.A.3d 749, 236 C.R. 845, supra, §306]; *People v. Mansfield* (1988) 200 C.A.3d 82, 87, 89, 245 C.R. 800 [felony battery; disagreeing with *People v. Williams* (1985) 169 C.A.3d 951, 215 C.R. 612]; *People v. Sanders* (1992) 10 C.A.4th 1268, 1271, 13 C.R.2d 205 [child endangerment].

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##### dd. Not Applicable in Civil Cases.

### 3 *Witkin Cal. Evid. Presentation* § 308

[§ 308] Not Applicable in Civil Cases.

In *Robbins v. Wong* (1994) 27 C.A.4th 261, 32 C.R.2d 337, a personal injury action, defendants sought to introduce, for impeachment purposes, plaintiff's prior conviction of a drug-related felony. The trial judge allowed the evidence, agreeing with defendants' argument that, because the conviction involved "moral turpitude," it was admissible under Cal. Const., Art. I, §28(f) as interpreted by *People v. Castro* (1985) 38 C.3d 301, 211 C.R. 719, 696 P.2d 111, *supra*, §303. *Held*, affirmed.

(a) The trial judge erred in relying on Cal. Const., Art. I, §28(f). That provision does not apply to civil litigants, nor may the Supreme Court's decisions concerning felony impeachment in criminal decisions be construed as direct holdings on felony impeachment in civil proceedings. However, the trial judge in a civil case may utilize such decisions to formulate guidelines for the judicial weighing of probative value against prejudicial effect under *Ev.C. 352*. (27 C.A.4th 271, 274.)

(b) Earlier civil cases interpreting former C.C.P. 2051 as requiring the mandatory admission of felony impeachment evidence without regard to probative value or prejudice were also inapplicable, as they were superseded by the adoption of *Ev.C. 352*, and *Ev.C. 788* (*supra*, §292). As a result, in a civil case, once a proper objection is made, the trial judge must carry out the weighing process required by *Ev.C. 352*. (27 C.A.4th 274.)

(c) In the present case, the trial judge weighed probative value against prejudice. Because, as a preliminary matter, he also applied the "moral turpitude" test of *People v. Castro*, *supra*, he applied a stricter standard than the civil case law requires. Thus, plaintiff was not disadvantaged, and the felony conviction was properly admitted. (27 C.A.4th 274.)

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##### aa. Showing on Record.

### 3 Witkin Cal. Evid. Presentation § 309

#### [§ 309] Showing on Record.

(1) *Showing Required.* In *People v. Boyd* (1985) 167 C.A.3d 36, 212 C.R. 873, the court, upholding the impeachment, quoted from the record of the proceeding on the motion to exclude (167 C.A.3d 40, footnote 2), observing that an analysis of the colloquy between the court and counsel "discloses that the trial judge engaged in the weighing process that is contemplated by *Evidence Code* section 352." (167 C.A.3d 43.) The court then said:

"The trial court did not here recite the magic words that its decision was based on '352' nor did it intone that the probative value of the evidence, if admitted, was not outweighed by creating substantial danger of undue prejudice, or comments of similar import. The important point is, and we so find, that the court made apparent on the record that prior to exercising its discretion it did, in fact, weigh prejudice against probative value, using a *Beagle* analysis." (167 C.A.3d 45.) (See also *People v. Navarez* (1985) 169 C.A.3d 936, 950, 215 C.R. 519 [record must affirmatively show that trial judge did requisite weighing]; *People v. Flanagan* (1986) 185 C.A.3d 764, 771, 230 C.R. 64; on *People v. Beagle* (1972) 6 C.3d 441, 99 C.R. 313, 492 P.2d 1, see *supra*, §301.)

(2) *Showing Not Required.* In *People v. Johnson* (1987) 193 C.A.3d 1570, 239 C.R. 190, defendant contended that the trial judge failed to demonstrate on-the-record exercise of discretion under *Ev.C.* 352. *Held*, the record was adequate. The entire colloquy before the trial judge on defendant's motion, which his counsel described as "being made under" *Ev.C.* 352, was focused on the exercise of discretion under that section and covered all the factors identified in the *Beagle* case, *supra*. Moreover, the judge decided to permit the use of only two of three priors notwithstanding that all were concededly relevant. (193 C.A.3d 1575.) Hence, although the trial judge did not explicitly state the factors and his assessment of them in making his decision, the content and context of the argument that preceded the judge's ruling, and the nature of the ruling itself, adequately demonstrated a reflection and weighing of *Ev.C.* 352 factors. (193 C.A.3d 1577.)

The issue of a record showing exercise of discretion was reexamined in *People v. Clarida* (1987) 197 C.A.3d 547, 249 C.R. 363.

(a) *People v. Flanagan, supra*, relying on prior Supreme Court and Court of Appeal decisions, held that the trial court commits *Castro* error if the record does not affirmatively show that it engaged in the weighing process. (197 C.A.3d 552.)

(b) *People v. Johnson*, *supra*, relying on *People v. Montiel* (1985) 39 C.3d 910, 924, 218 C.R. 572, 705 P.2d 1248, rejected the *Flanagan* theory. (197 C.A.3d 552.)

(c) "The signals from the high court are somewhat confusing." But *People v. Montiel*, *supra*, states the correct approach: "No doubt it would be better practice for a trial judge to make a clear record of its weighing process; but to establish error on appeal, an appellant should show more than a silent record. He or she should make an affirmative showing of error, something *Clarida* has not done." (197 C.A.3d 553.) (See dissent, arguing that prior Supreme Court decisions support the *Flanagan* theory.)

In *People v. Hoze* (1987) 195 C.A.3d 949, 241 C.R. 14, the court, analyzing *People v. Green* (1980) 27 C.3d 1, 164 C.R. 1, 609 P.2d 468, 1 Cal. Evidence (4th), *Circumstantial Evidence*, §23, and *People v. Frank* (1985) 38 C.3d 711, 214 C.R. 801, 700 P.2d 415, neither of which dealt with prior convictions for impeachment, came to this conclusion: "[W]here the reasonable exercise of discretion by the trial court could not have justified the exclusion of the evidence for impeachment purposes (as held in *Beagle*), it is harmless error for the trial court to fail to state on the record its reasons for denying a motion to exclude impeaching convictions under *Evidence Code* section 352. That is the teaching of *Green* and *Frank*. If there is any contrary implication in *People v. Flanagan*, ... we decline to follow it." (195 C.A.3d 955.) (See also *People v. Gutierrez* (1993) 14 C.A.4th 1425, 1435, 1436, 18 C.R.2d 371 [although trial court should have had record reflect exercise of discretion, "we are satisfied the error was harmless"].)

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## bb. Illustrations of Proper Balancing.

3 *Witkin Cal. Evid. Presentation* § 310

## [§ 310] Illustrations of Proper Balancing.

In *People v. Pitts* (1990) 223 C.A.3d 1547, 273 C.R. 389, defendant argued that the trial judge, rather than exercising discretion under *Ev.C.* 352, improperly applied an inflexible rule that any crime more than 10 years old cannot be used for impeachment. *Held*, there was no error. The judge listened attentively to defendant's arguments, but found no basis for changing his view that when the question is purely a matter of time, 10 years is a reasonable place to draw the line. "In our view establishing 10 years as the presumptive cut off date for prior convictions is an exercise of discretion. It is preferable that the trial court have in mind a presumptive standard of remoteness rather than have no concept of remoteness and issue inconsistent rulings each time the issue comes up." (223 C.A.3d 1554.)

There are numerous illustrations of trial judges properly exercising their discretion in balancing the probative value and prejudicial effect of admitting evidence of prior convictions. (See *People v. Morris* (1991) 53 C.3d 152, 194, 279 C.R. 720, 807 P.2d 949 [7- and 9-year-old convictions for kidnaping, attempted rape, assault and car theft were not too remote; offenses were crimes of moral turpitude and were not identical to charged offenses so as to suggest present guilt]; *People v. DeCosse* (1986) 183 C.A.3d 404, 411, 412, 228 C.R. 114 [trial judge, exercising discretion under *Ev.C.* 352, ruled that prior offense committed 12 years ago was not too remote; held not an abuse of discretion]; *People v. Lewis* (1987) 191 C.A.3d 1288, 1295, 237 C.R. 64 [no abuse of discretion in ruling that rape and robbery priors would be admissible for impeachment in defendant's rape trial]; *People v. Massey* (1987) 192 C.A.3d 819, 825, 237 C.R. 734 [prior conviction not too remote; defendant was incarcerated for most of intervening period]; *People v. Plager* (1987) 196 C.A.3d 1537, 1544, 242 C.R. 624 [record showed trial judge exercised discretion and balanced probative value against prejudice in ruling that prior burglary convictions could be used to impeach]; *People v. Campbell* (1994) 23 C.A.4th 1488, 1496, 1497, 28 C.R.2d 716 [discretion properly exercised in admitting felony vandalism conviction, which tended to shake confidence in defendant's honesty; although conviction was 10 years old, defendant had had others since, and withholding facts underlying the conviction avoided prejudice]; *People v. Green* (1995) 34 C.A.4th 165, 183, 40 C.R.2d 239 [in prosecution for unlawful taking of vehicle, systematic occurrence of defendant's prior auto theft convictions over 20-year period was relevant to credibility and thus they were properly admitted; they were not automatically inadmissible simply because they were same as present offense]; *People v. Kwolek* (1995) 40 C.A.4th 1521, 1533, 48 C.R.2d 325 [defendant charged with attempting to murder wife; admission of prior conviction of possession of marijuana for sale was more probative than prejudicial, allowing jury to infer that defendant lied when he denied demanding that wife obtain marijuana]; cf. *People v. Williams* (1991) 228 C.A.3d 146, 152, 278 C.R. 801 [where

defense counsel conceded that assault conviction was admissible, trial judge had no obligation to weigh its prejudicial effect against its probative value].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Hinton* (2006) 37 C.4th 839, 888, 38 C.R.3d 149, 126 P.3d 981 [inasmuch as defendant had no other prior felony convictions available for impeachment, trial judge did not abuse discretion in admitting defendant's prior convictions for murder, attempted murder, and assault with firearm, even though they were similar to charged offenses]; *People v. Smith* (2007) 40 C.4th 483, 513, 54 C.R.3d 245, 150 P.3d 1224 [in capital murder trial, trial judge did not abuse discretion in permitting defendant to impeach witness against him with only one incident from his juvenile record; defendant did not identify other incidents that so demonstrated moral turpitude that it would be error to exclude them, and further impeachment based on juvenile record would not have produced significantly different impression of witness' testimony]; *Boeken v. Philip Morris* (2005) 127 C.A.4th 1640, 1684, 1685, 26 C.R.3d 638 [in products liability action against cigarette manufacturer, trial judge did not abuse his discretion in refusing to allow defendant to impeach plaintiff with felony wire fraud conviction on ground that allowing it would have caused "the very effects that 352 is designed to prevent occurring in a trial"]; 160 A.L.R. Fed 201 [construction and application of *F.R. Evid.*, Rule 609(b), requiring balancing of probative value against prejudicial effect where conviction is more than 10 years old].



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#### 4. Timing of Decision To Exclude or Admit Conviction.

### 3 Witkin Cal. Evid. Presentation § 311

[§ 311] Timing of Decision To Exclude or Admit Conviction.

In *People v. Washington* (1989) 211 C.A.3d 207, 259 C.R. 307, the issue was whether the trial judge may postpone the ruling on a motion to exclude the use of prior convictions for impeachment until after the defendant testifies. *Held*, although such procedure is neither customary nor recommended, it is not improper.

(a) There are several reasons for requiring the trial judge to make his or her ruling *before* the defendant testifies:

(1) Under *People v. Beagle* (1972) 6 C.3d 441, 99 C.R. 313, 492 P.2d 1, *supra*, §301, and *People v. Castro* (1985) 38 C.3d 301, 211 C.R. 719, 696 P.2d 111, *supra*, §303, the chance that the defendant will not testify is one of the factors that the trial judge should use when weighing the relative prejudice and probative value of a prior conviction. Postponing a ruling on a motion to exclude until after the defendant testifies effectively ignores this factor. (211 C.A.3d 212.)

(2) The defendant cannot knowingly and intelligently assess the risks and benefits of exercising the constitutional right to testify on his or her own behalf without knowing whether the trier of fact will learn of the defendant's past crimes. (211 C.A.3d 213.)

(3) As a practical matter, the probative value of a prior conviction with respect to the defendant's veracity can be determined independently of his or her testimony. The prejudicial effect of a prior conviction can also be evaluated without hearing the defendant's testimony if, as is often the case, it is obvious what that testimony would be. And if prejudicial effect cannot be evaluated without judicial knowledge of the testimony, the defendant can make an offer of proof or testify at an in camera hearing, as described in *People v. Delgado* (1973) 32 C.A.3d 242, 108 C.R. 399. (211 C.A.3d 213.)

(b) Despite these compelling reasons for requiring the trial judge to rule on the admissibility of prior convictions before the defendant testifies, *People v. Collins* (1986) 42 C.3d 378, 228 C.R. 899, 722 P.2d 173, *infra*, §312, adopting language used by *Luce v. United States* (1984) 469 U.S. 38, 105 S.Ct. 460, 83 L.Ed.2d 443, *infra*, §312, declared that in order to balance a prior conviction's probative value against its prejudicial effect, the trial judge " 'must know the precise nature of the defendant's testimony, which is unknowable when ... the defendant does not testify.' " (211 C.A.3d 213.) And the *Collins* court rejected the idea of substituting an offer of proof for the defendant's testimony, pointing out that the testimony can, for numerous reasons, differ from the offer. (211 C.A.3d 213.) Hence, while neither *Collins* nor

*Luce* contains any genuine analysis of the postponement issue, it appears that both cases deliberately permitted postponement. "While this is not the customary practice and in our view should not be encouraged, it would exceed our authority to hold that a California trial judge cannot do that which our own high court and that of the United States have manifestly authorized." (211 C.A.3d 214.) (On whether defendant must testify to preserve alleged error as to admissibility of prior conviction, see *infra*, §312.)

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#### 5. Preserving Right To Review.

### 3 Witkin Cal. Evid. Presentation § 312

[§ 312] Preserving Right To Review.

(1) *Adoption of Luce Rule.* In *People v. Collins* (1986) 42 C.3d 378, 228 C.R. 899, 722 P.2d 173, defendant was charged with burglary and a prior burglary conviction, and he denied the prior. At the start of trial, the prosecution disclosed out of the presence of the jury that defendant had a prior conviction of robbery on which sentence had been stayed. After the prosecution rested, defendant moved to prohibit use of either prior to impeach, but the judge declared that he was bound by Cal. Const., Art. I, §28(f) (Proposition 8) and had to admit both if defendant testified. Defense counsel then advised the court that, although defendant had intended to testify, he would not do so; and defendant rested without calling any witnesses. The jury found him guilty of second degree burglary, and the Court of Appeal affirmed. On review, the Court of Appeal judgment was reversed with directions.

(a) In *Luce v. United States* (1984) 469 U.S. 38, 105 S.Ct. 460, 83 L.Ed.2d 443, the court unanimously held that denial of a motion to exclude a prior conviction offered for impeachment is not reviewable on appeal if the defendant fails to testify, for the reviewing court cannot intelligibly weigh the probative value of the conviction against its prejudicial effect. (42 C.3d 384.)

(b) Although *Luce* is a rule of federal criminal procedure adopted pursuant to the Supreme Court's advisory power, the California Supreme Court also has power to adopt such rules, as it did in *People v. Beagle* (1972) 6 C.3d 441, 99 C.R. 313, 492 P.2d 1, supra, §301. (42 C.3d 385.) The federal rule of evidence implemented in *Luce* is similar in effect to the provision of the California Evidence Code at issue in *Beagle* and *People v. Castro* (1985) 38 C.3d 301, 211 C.R. 719, 696 P.2d 111, supra, §303; the reasoning in *Luce* is sound and equally applicable to California practice; and other states have been virtually unanimous in adopting the *Luce* rule. (42 C.3d 385.) "For all these reasons we likewise adopt the *Luce* rule as a judicially declared rule of criminal procedure in California." (42 C.3d 385.)

(c) Defendant's argument that the *Luce* rule infringes on the privilege against self-incrimination by making its assertion too costly does not withstand analysis. Defendant wants the right to testify without being impeached by prior felony convictions, but no witness has that right: "The procedure of impeaching by proof of prior felony conviction originated at common law, and has long been authorized by our Legislature. ... It is settled that such impeachment does not violate the due process clause of either the federal or the state Constitution ... , or the federal privilege against self-incrimination." (42 C.3d 387.) Thus, the rule is not inconsistent with any constitutional mandate, and should be part of the law of this state. (42 C.3d 388.) (On other states that have adopted *Luce* rule, see 80 A.L.R.4th 1028.)

Three justices dissented from the holding on the *Luce* rule.

(2) *Rule Applies Prospectively Only*. The court in *Collins* went on to consider the applicability of the *Luce* rule to existing cases:

Under prior decisions, a defendant was not required to testify (or even make an offer of proof) in order to preserve a claim of improper impeachment on appeal; and no such sweeping procedural change was stated or implied in Proposition 8 or its ballot materials. "Thus our decision to adopt the *Luce* requirement establishes a new rule of law when there was a previous rule to the contrary; in such circumstances we have the option of giving it prospective effect on policy grounds." (42 C.3d 388.) And considerations of fairness compel exercise of that option: "To deny defendants their right to appeal on this issue because they failed to testify--after we repeatedly told them they need not do so--would be to change the rules after the contest was over." (42 C.3d 388.) Hence, the rule *will apply only prospectively* to trials beginning after this decision is final. (42 C.3d 388.) (See *People v. Mickle* (1991) 54 C.3d 140, 173, 284 C.R. 511, 814 P.2d 290 [requirement that defendant must testify in order to raise *Castro* claim on appeal applies only prospectively]; *People v. Sims* (1993) 5 C.4th 405, 455, 20 C.R.2d 537, 853 P.2d 992 [citing *Luce* and *Collins*].)

Because it is only prospective in effect, *Collins* sets forth a procedure to be followed by appellate courts in applying *Castro* to cases tried before March 11, 1985 (the date of the *Castro* decision) in which the defendant was charged with a crime committed after June 9, 1982 (the date on which Proposition 8 became effective). (See 42 C.3d 489; for subsequent cases on *Collins*-mandated procedure, see *People v. Mickle*, *supra*, 54 C.3d 173; *People v. Littrel* (1986) 185 C.A.3d 699, 703, 230 C.R. 83 [remand to enable trial judge to exercise discretion]; *People v. Flanagan* (1986) 185 C.A.3d 764, 773, 230 C.R. 64 [although case was post-*Castro* and *Collins* did not control, remanded pursuant to "the spirit" of *Collins*]; *People v. Payne* (1988) 202 C.A.3d 933, 939, 249 C.R. 67 [despite some confusion, court both understood and complied with its obligation under *Collins* to exercise discretion].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Adoption of Luce Rule*. See *Ohler v. United States* (2000) 529 U.S. 753, 120 S.Ct. 1851, 1855, 146 L.Ed.2d 826, 832 [where judge rules in limine that defendant's prior conviction is admissible for impeachment and defendant preemptively introduces prior on direct examination, defendant waives claim on appeal that admission of prior was error; relying on *Luce v. United States* (1984) 469 U.S. 38, 105 S.Ct. 460, 83 L.Ed.2d 443, text, p. 391]; *People v. Ledesma* (2006) 39 C.4th 641, 731, 47 C.R.3d 326, 140 P.3d 657 [*Luce* rule applied where defendant sought ruling that if he testified that he was remorseful, prosecutor would not be able to question him about circumstances of crime or use his prior testimony for impeachment, trial judge declined to so rule, and, as a result, defendant declined to testify]; 34 U.C. Davis L. Rev. 615 [*Ohler*].



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## CHAPTER XI - Presentation At Trial

### XI. IMPEACHMENT

#### E. Conviction of a Felony.

#### 4. Discretionary Exclusion.

##### b. After Proposition 8.

##### 6. Effect of Error.

3 Witkin Cal. Evid. Presentation § 313

[§ 313] Effect of Error.

(1) *Watson Test Adopted.* In *People v. Castro* (1985) 38 C.3d 301, 211 C.R. 719, 696 P.2d 111, supra, §303, the court, applying the probability test of *People v. Watson* (1956) 46 C.2d 818, 299 P.2d 243, 6 Cal. Crim. Law (3d), *Reversible Error*, §7, declared that "[a]fter a review of the entire record we are of the opinion that it is not reasonably probable that a result more favorable to defendant would have occurred in the absence of error." (38 C.3d 319.)

Many Court of Appeal decisions on failure to exercise discretion under *Ev.C.* 352 apply the *Watson* probability test and hold the error harmless. (See *People v. Bonilla* (1985) 168 C.A.3d 201, 205, 214 C.R. 191; *People v. Hunt* (1985) 169 C.A.3d 668, 676, 215 C.R. 429; *People v. Dossman* (1985) 171 C.A.3d 843, 850, 217 C.R. 728; *People v. Rogers* (1985) 173 C.A.3d 205, 210, 211, 218 C.R. 494; *People v. Zataray* (1985) 173 C.A.3d 390, 401, 219 C.R. 33; *People v. Statler* (1985) 174 C.A.3d 46, 54, 56, 219 C.R. 713; *People v. Jackson* (1985) 174 C.A.3d 260, 266, 220 C.R. 39; *People v. Armendariz* (1985) 174 C.A.3d 674, 683, 220 C.R. 229; *People v. Mazza* (1985) 175 C.A.3d 836, 844, 221 C.R. 640; *People v. Martinez* (1985) 175 C.A.3d 881, 890, 221 C.R. 258; *People v. Rodriguez* (1986) 177 C.A.3d 174, 179, 222 C.R. 809; *People v. Coad* (1986) 181 C.A.3d 1094, 1113, 226 C.R. 386; *People v. Clarida* (1987) 197 C.A.3d 547, 554, 249 C.R. 363, supra, §309; see also *People v. Lang* (1989) 49 C.3d 991, 1013, 264 C.R. 386, 782 P.2d 627 [trial judge's failure to exercise discretion].)

(2) *Former Distinction Where Defendant Did Not Testify.* In *People v. Almarez* (1985) 168 C.A.3d 262, 214 C.R. 105, the court pointed out that the *Watson* standard has been regularly applied where the defendant testifies (as in *Castro*, supra). But where the defendant does not testify, the court cannot determine the degree of prejudice, and reversal is required under *People v. Rist* (1976) 16 C.3d 211, 127 C.R. 457, 545 P.2d 833 and other Supreme Court decisions. (168 C.A.3d 268, 269.) The *Almarez* opinion treated these decisions as prescribing the standard of reversible error per se. (168 C.A.3d 268.) (See also *People v. Navarez* (1985) 169 C.A.3d 936, 948, 215 C.R. 519 [quoting *People v. Barrick* (1982) 33 C.3d 115, 187 C.R. 716, 654 P.2d 1243, supra, §302, and reversing judgment where trial judge did not engage in weighing process required by *Ev.C.* 352].)

However, in *People v. Forster* (1985) 169 C.A.3d 519, 215 C.R. 218, where defendant did not testify, the court nevertheless applied the *Watson* test and held the error harmless: "Although in such an instance the evaluation of the prejudicial effect of the error is more difficult because in many cases there is no clue as to what the defendant's testimony would have been had he testified ... , nonetheless the harmless error test applies and the judgment must be affirmed if the evidence against the defendant is so airtight and convincing that it is all but obvious that any testimony

by the defendant would not have affected the outcome of his trial." (169 C.A.3d 526.)

In *People v. Brown* (1985) 169 C.A.3d 800, 215 C.R. 494, the court attempted to reconcile conflicting expressions in the cases. The standard set forth in *People v. Fries* (1979) 24 C.3d 222, 230, 231, 155 C.R. 194, 594 P.2d 19, supra, §302, was described as "a reverse *Watson* test," announcing "something akin to a rebuttable presumption of prejudice." (169 C.A.3d 807.) *People v. Spearman* (1979) 25 C.3d 107, 157 C.R. 883, 599 P.2d 74, supra, §302, although citing *Watson*, "states a nearly per se reversal rule." (169 C.A.3d 807.) But *People v. Castro*, supra, "labels *Rist*, *Fries* and *Spearman* as part of the *Antick* line of cases," which were countered by Proposition 8. (169 C.A.3d 807.) The opinion then states:

"This conclusion is supported by the *Castro* court itself which uses a 'pure' *Watson* test in determining the prejudicial effect of the trial court's error. ... Unlike the present case, the defendant in *Castro* did testify; however, the court makes no distinction between testifying and nontestifying defendants. Absent further guidance from the Supreme Court, we conclude that the effect of the error in the present case must be evaluated under the *Watson* standard." (169 C.A.3d 807.) (See also *People v. Parrish* (1985) 170 C.A.3d 336, 353, 217 C.R. 700.)

The effect of error in cases in which the defendant did not testify will rarely be an issue now that a defendant who fails to testify is precluded from obtaining appellate review of the trial court's decision to allow admission of a prior conviction for impeachment. (See *People v. Collins* (1986) 42 C.3d 378, 383, 228 C.R. 899, 722 P.2d 173, supra, §312.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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E. Conviction of a Felony.

5. Extension of Rule to Misconduct Not Resulting in Conviction.

3 *Witkin Cal. Evid. Presentation* § 314

[§ 314] Extension of Rule to Misconduct Not Resulting in Conviction.

Past criminal conduct involving moral turpitude that has some logical bearing on the veracity of a witness in a criminal proceeding is admissible to impeach the witness, subject to the trial court's discretion under *Ev.C.* 352. (*People v. Wheeler* (1992) 4 *C.4th* 284, 288, 295, 14 *C.R.2d* 418, 841 *P.2d* 938, *supra*, §286; *People v. Lepolo* (1997) 55 *C.A.4th* 85, 89, 63 *C.R.2d* 735.) In applying the moral turpitude test to misconduct that did not result in a conviction, the trial judge is not required to give a particular penal label to the offense. Whether the evidence should be admitted turns solely on whether the misconduct in question evinces moral turpitude, not on what it would be called if it were a charged offense. (*People v. Lepolo*, *supra*, 55 *C.A.4th* 89 [evidence of incident in which defendant brandished machete at police officer evinced moral turpitude and was properly admitted in murder prosecution, regardless of whether conduct was characterized as brandishing weapon or making terrorist threat or was given no label at all].)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Witnesses k.337(9)



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## CHAPTER XI - Presentation At Trial

XI. IMPEACHMENT  
F. Inconsistent Statements.  
1. General Rule.

3 Witkin Cal. Evid. Presentation § 315

[§ 315] General Rule.

(1) *Present Law*. A witness may be impeached by evidence of a statement the witness made that is inconsistent with any part of his or her testimony at the hearing. (*Ev.C. 780(h)*.) This familiar rule of impeachment of a witness by self-contradiction casts doubt on the truth of both statements. (See generally *Gackstetter v. Market Street Ry. Co.* (1930) 104 C.A. 89, 94, 285 P. 409 [refusal to permit impeachment held reversible error under the circumstances]; *People v. Murray* (1967) 247 C.A.2d 730, 735, 56 C.R. 21, citing the text; 1 McCormick 5th, §34 et seq.; 3A Wigmore (Chadbourn Rev.) §1017 et seq.; 10 *Pacific L. J.* 1 [use of prior inconsistent statement]; 9 *U.C. Davis L. Rev.* 285 [California theory and practice]; 81 *Am.Jur.2d* (1992 ed.), *Witnesses* §929 et seq.; 49 *Am.Jur.* Trials 501; 21 *Proof of Facts* 2d 101; 152 A.L.R. Fed 375 [use of prior inconsistent statements for impeachment under *F. R. Evid.*, Rule 613].)

(2) *Former Law Compared*. The Evidence Code makes substantial changes in former California law governing this kind of evidence: (a) The foundation requirement is abolished. (See *infra*, §332 et seq.) (b) A party may impeach its own witness in this manner. (See *infra*, §356.) (c) The statement is affirmative evidence under a hearsay exception. (See 1 *Cal. Evidence* (4th), *Hearsay*, §156.)

Special considerations may affect admissibility of inconsistent statements in criminal cases: (a) Involuntary statements are inadmissible. (See 1 *Cal. Evidence* (4th), *Hearsay*, §136.) (b) Statements obtained in violation of the *Miranda* rule are admissible, but a defendant's post-*Miranda* silence cannot be used to impeach. (See *infra*, §321 et seq.) (c) Testimony at a suppression hearing may be used to impeach. (See *infra*, §327.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Present Law*. See *People v. Boyette* (2002) 29 C.4th 381, 414, 127 C.R.2d 544, 58 P.3d 391 [routine practice of permitting adverse party to impeach credibility of witness with prior false- hoods does not violate constitutional requirement of fundamental fairness]; *People v. Panah* (2005) 35 C.4th 395, 493, 25 C.R.3d 672, 107 P.3d 790 [in penalty phase of capital murder trial, after defense witness testified that she believed that defendant was father of her child and that she wanted her child to continue to have relationship with defendant even if he was incarcerated, prior statements she made to two officers to the contrary were properly admitted for impeachment]; *People v. Ledesma* (2006) 39 C.4th 641, 686, 47 C.R.3d 326, 140 P.3d 657 [even if failure of defense witnesses to testify at defendant's first murder trial concerning his drug use resulted from prior counsel's ineffective assistance, use of their prior testimony for impeachment at retrial did not deny defendant fair trial, where defense counsel at retrial had full opportunity to rehabilitate witnesses and permit them to explain discrepancies between prior and subsequent testimony]; 81 *Am.Jur.2d* (2004 ed.), *Witnesses* §897 et seq.; 1 McCormick 6th, §34 et seq. *West's Key Number Digest*, *Witnesses* k.379 et seq.



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## CHAPTER XI - Presentation At Trial

### XI. IMPEACHMENT

#### F. Inconsistent Statements.

##### 2. Nature of Statement.

##### a. Prior Statements.

#### 3 Witkin Cal. Evid. Presentation § 316

[§ 316] Prior Statements.

(1) *Definition.* The broad definition of "statement" in *Ev.C.* 225 covers any "oral or written verbal expression" and even assertive conduct (see 1 *Cal. Evidence* (4th), *Hearsay*, §7). And the cases disclose the use of many kinds of statements, oral or written, formal or informal. (See 3A *Wigmore* (Chadbourn Rev.) §1040; 9 *U.C. Davis L. Rev.* 285, 289.)

(2) *Illustrations.* The following are illustrations:

(a) An *affidavit* or sworn statement not admissible under the limited hearsay exception (1 *Cal. Evidence* (4th), *Hearsay*, §297). (See 3A *Wigmore* (Chadbourn Rev.) §1040; 14 *A.L.R.*4th 828.)

(b) *Former testimony* not admissible under the limited exception of former California law. (See *Loop Bldg. Co. v. Fredenhagen* (1934) 3 *C.A.2d* 151, 152, 39 *P.2d* 222 [testimony on supplemental proceedings before referee]; *Kyne v. Kyne* (1940) 38 *C.A.2d* 122, 130, 100 *P.2d* 806; 11 *A.L.R.2d* 30, 89; see 1 *Cal. Evidence* (4th), *Hearsay*, §256.)

(c) An *unsigned deposition*. (*Bennett v. Superior Court* (1950) 99 *C.A.2d* 585, 593, 222 *P.2d* 276.)

(d) Parts of an *original deposition* before its correction. (See *Gasquet v. Pechin* (1904) 143 *C.* 515, 521, 77 *P.* 481; *Lewis v. Western Truck Line* (1941) 44 *C.A.2d* 455, 561, 112 *P.2d* 747.)

(e) An *abandoned or superseded pleading*, not regarded as a judicial admission. (See *Williams v. Seiglitz* (1921) 186 *C.* 767, 773, 200 *P.* 635; *Meyer v. State Bd. of Equalization* (1954) 42 *C.2d* 376, 385, 267 *P.2d* 257; *Cornwell v. Mulcahy* (1923) 62 *C.A.* 658, 661, 217 *P.* 568; *Gajanich v. Gregory* (1931) 116 *C.A.* 622, 629, 3 *P.2d* 389; 4 *Cal. Proc.* (4th), *Pleading*, §419.) (On statements in superseded pleadings as evidentiary admissions under Evidence Code, see 1 *Cal. Evidence* (4th), *Hearsay*, §97; on right of defendant to introduce contents of sex-offense victim's complaint as prior inconsistent statement, despite limitations imposed on prosecution's use of that evidence, see *People v. Brown* (1994) 8 *C.4th* 746, 762, 35 *C.R.2d* 407, 883 *P.2d* 949, 1 *Cal. Evidence* (4th), *Hearsay*, §168.)

(f) *Statements made in course of plea bargaining negotiations*. (*People v. Crow* (1994) 28 *C.A.4th* 440, 452, 33 *C.R.2d* 624, 1 *Cal. Evidence* (4th), *Hearsay*, §138.)

(g) A *statement by a witness to his or her probation officer*. In *People v. Allen* (1989) 216 *C.A.3d* 208, 264 *C.R.* 621, defendant and DeLaney were originally charged as codefendants in a trial for assault on Williams. Before trial,

DeLaney pleaded guilty to robbery, and at defendant's trial, the prosecution called him as a witness. He described his participation in the robbery and assault, but testified that the man who shot Williams was M, not defendant. The prosecution then introduced DeLaney's prior statement to his probation officer that defendant was the killer. Defense counsel sought to exclude the statement relying on cases holding that statements by a *defendant* to his probation officer are protected by use immunity, pursuant to the policy encouraging a defendant to enter into frank discussion with his probation officer (see *People v. Harrington* (1970) 2 C.3d 991, 88 C.R. 161, 471 P.2d 961). *Held*, the statement was properly admitted.

"The case before us ... presents no conflict between self-incrimination and candor requiring extension of this judicially created use immunity. ... DeLaney's statements to his probation officer were not being used against him in his own criminal trial. He was not a defendant, but merely *a witness in appellant's criminal trial*. The policy of promoting an accused's candor and cooperation with his probation officer was adequately served by DeLaney's protection from use of any such statements against him in his own criminal trial. ... [W]e find no justification for extending the privilege to also protect appellant from incrimination by DeLaney." (216 C.A.3d 212.)

(3) *Distinction: Statement Made at Arbitration Hearing*. C.R.C., Rule 1616(c), providing that evidence adduced at an arbitration hearing may not be used for impeachment at a subsequent trial (see 6 *Cal. Proc.* (4th), *Proceedings Without Trial*, §577), takes precedence over Evidence Code provisions permitting impeachment by use of prior inconsistent statements. (*Jimena v. Alesso* (1995) 36 C.A.4th 1028, 1030, 1031, 43 C.R.2d 18.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(3) *Distinction: Statement Made at Arbitration Hearing*. C.R.C., Rule 1616(c) was renumbered C.R.C., Rule 3.826(c) in 2006. *West's Key Number Digest*, Witnesses k.379(11)





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## CHAPTER XI - Presentation At Trial

### XI. IMPEACHMENT

#### F. Inconsistent Statements.

##### 2. Nature of Statement.

##### b. Subsequent Statements.

*3 Witkin Cal. Evid. Presentation § 317*

[§ 317] Subsequent Statements.

The impeachment rule is generally applied to prior inconsistent statements. But this is not a limitation: Statements made after the testimony may also be shown, even though the witness has left the court and is no longer available to exercise the right to explain. (See *Ev.C. 770*, Comment, on "interests of justice exception," see *infra*, §333.)

Thus, in *People v. Collup* (1946) 27 C.2d 829, 167 P.2d 714, the prosecution was allowed to read the testimony of a witness at the preliminary examination on a showing that she had left the state permanently and was no longer available as a witness. One of the two defendants sought to testify to subsequent statements made by that witness to the effect that the testimony at the preliminary examination had been misleading and untrue. *Held*, the trial judge's order excluding this was reversible error. Because the inconsistent statements were made by the witness subsequent to her testimony, they were not known in time to be used in cross-examination of the witness; and the prosecution should bear the burden of surprise when introducing former testimony of an absent witness. "The defendants are helpless in meeting the testimony by a method which may refute it entirely or cast serious doubts upon its veracity, namely, subsequent contradictory statements or admissions by the witness that the testimony was false. Justice and fairness compel one of two results, that the testimony at the former trial be excluded or that the impeaching evidence be admitted." (27 C.2d 836.) (See also *People v. Redston* (1956) 139 C.A.2d 485, 496, 293 P.2d 880 [following *Collup*].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER XI - Presentation At Trial

## XI. IMPEACHMENT

## F. Inconsistent Statements.

## 2. Nature of Statement.

## c. Statements Obtained in Violation of Miranda Rule.

## 1. Use of Statements.

## aa. General Rule of Admissibility.

## 3 Witkin Cal. Evid. Presentation § 318

## [§ 318] General Rule of Admissibility.

(1) *Admissible Under Federal and California Law.* Statements obtained by police from an accused in violation of the *Miranda* rule (see 5 Cal. Crim. Law (3d), *Criminal Trial*, §89 et seq.) are admissible for the limited purpose of impeachment. (*Harris v. New York* (1971) 401 U.S. 222, 91 S.Ct. 643, 645, 28 L.Ed.2d 1, 4.) The Court said that a defendant who takes the stand has an obligation to speak truthfully and accurately, and that the *Miranda* shield "cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." (91 S.Ct. 646, 28 L.Ed.2d 5.) (See 5 Loyola L.A. L. Rev. 193.)

The same conclusion was reached in *Oregon v. Hass* (1975) 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570, where the *Miranda* warnings were given, but the interrogation continued after defendant said he wanted to telephone an attorney. The Court observed that, though the warnings in the *Harris* case were defective while those here were proper, the effect on admissibility is the same: "inadmissibility would pervert the constitutional right into a right to falsify free from the embarrassment of impeachment evidence from the defendant's own mouth." (95 S.Ct. 1221, 43 L.Ed.2d 578.)

In California, the *Harris* rule was recognized as the governing law in *People v. May* (1988) 44 C.3d 309, 315, 243 C.R. 369, 748 P.2d 307, *infra*, §319. (See also *People v. Baker* (1990) 220 C.A.3d 574, 579, 269 C.R. 475 [*People v. May* followed, even though police admitted violating defendant's *Miranda* rights for express purpose of obtaining evidence to be used against him should he testify]; 19 Southwestern U. L. Rev. 57 [*People v. May*]; *People v. Pacchioli* (1992) 9 C.A.4th 1331, 1340, 12 C.R.2d 156 [statements made to probation officer after guilty plea were not compelled, hence, could be used for impeachment in trial held after withdrawal of guilty plea]; on comparable rule for statements obtained in violation of Public Safety Officers Procedural Bill of Rights Act (Govt.C. 3300 et seq.), see *Los Angeles v. Superior Court (Labio)* (1997) 57 C.A.4th 1506, 67 C.R.2d 775, 8 Summary (9th), *Constitutional Law, Supp.*, §774.)

(2) *Requirement of Limiting Instruction.* In *People v. Duncan* (1988) 204 C.A.3d 613, 620, 251 C.R. 355, the court added that the judge must, on his or her own motion, instruct the jury that the statements may be used only in passing on the defendant's credibility and not as evidence of the defendant's guilt. (204 C.A.3d 621.) However, *People v. Wyatt* (1989) 215 C.A.3d 255, 263 C.R. 556, disagreed with *People v. Duncan*, and followed the holding in *People v. Nudd* (1974) 12 C.3d 204, 115 C.R. 372, 524 P.2d 844, that, in the absence of a request from a party, there is no duty to give the limiting instruction. (215 C.A.3d 258.) (See *People v. Baker*, *supra*, 220 C.A.3d 580; *People v. Torrez* (1995) 31 C.A.4th 1084, 1090, 37 C.R.2d 712 [following *People v. Wyatt*, *supra*].)

(3) *Distinction: Involuntary Statements.* In *People v. Bey* (1993) 21 C.A.4th 1623, 27 C.R.2d 28, under circumstances similar to those in *People v. Baker*, *supra*, the court held that defendant's statements to police should not have been admitted for impeachment. Noting that involuntary statements are inadmissible for *all* purposes, the court found that the continued questioning of defendant after he had indicated an unwillingness to talk without an attorney rendered his subsequent statements involuntary. (21 C.A.4th 1627, 1628.)

(4) *Application of Harris to Other Evidence.* The rule in *Harris* was extended to permit the use of evidence obtained in violation of the Fourth Amendment to impeach. (See *United States v. Havens* (1980) 446 U.S. 620, 100 S.Ct. 1912, 1916, 64 L.Ed.2d 559, 566 [relying on *Harris* and *Hass*]; *People v. Johnson* (1989) 211 C.A.3d 392, 395, 259 C.R. 388 [under *Havens*, illegally seized pipe containing cocaine residue was admissible to impeach witness' testimony that he had never possessed cocaine]; 94 Harv. L. Rev. 77 [*Havens*]; but see *James v. Illinois* (1990) 493 U.S. 307, 110 S.Ct. 648, 652, 107 L.Ed.2d 676, 684 [impeachment exception to exclusionary rule does not permit prosecution to impeach testimony of *all* defense witnesses with illegally obtained evidence].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Admissible Under Federal and California Law.* See *People v. Jablonski* (2006) 37 C.4th 774, 816, 38 C.R.3d 98, 126 P.3d 938 [officers' repeated refusal to honor defendant's invocation of his *Miranda* rights did not render his statement involuntary, and thus statement was admissible for impeachment]; *People v. DePriest* (2007) 42 C.4th 1, 34, 63 C.R.3d 896, 163 P.3d 896 [trial judge did not err in ruling that defendant's statements to California police while jailed in Missouri could be used for impeachment even if he was not read his *Miranda* rights or questioning continued after he asserted those rights; questioning was short and relaxed, and officer's assurance that defendant's statements could not be used in case-in-chief was accurate as far as it went; relying on *Jablonski*]; *People v. Riskin* (2006) 143 C.A.4th 234, 242, 49 C.R.3d 287 [in child molestation prosecution, statements made by defendant to daughter during pretext call were properly admitted for impeachment; as to constitutional right to silence, statements fell within exception of *Harris v. New York* (1971) 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1, text, p. 398, and as to right to counsel, pretext call was made before right attached].

*Cross-Reference:* 8 Summary (10th), *Constitutional Law*, §961.

(2) *Requirement of Limiting Instruction.* See *People v. Coffman & Marlow* (2004) 34 C.4th 1, 63, 17 C.R.3d 710, 96 P.3d 30 [in capital murder trial in which defendants' extrajudicial statements were admitted for impeachment purposes, trial judge did not err in failing to instruct jurors sua sponte that statements obtained in violation of *Miranda* may be used only for impeachment; following *People v. Nudd* (1974) 12 C.3d 204, 115 C.R. 372, 524 P.2d 844, text, p. 399]; CALCRIM, No. 356 [*Miranda*-Defective Statements]; *People v. Pilster* (2006) 138 C.A.4th 1395, 1406, 42 C.R.3d 301 [in assault prosecution in which defendant's prearrest statements to police officer, obtained in violation of *Miranda*, were admitted for impeachment, trial judge's error in denying defendant's request to instruct jurors that they could use statements only on issue of credibility was harmless; verdict demonstrated that jury disbelieved defendant's entire testimony, and his admission to officer that it was possible he had hit victim added little to substantive conclusion of guilt]. (3) *Distinction: Involuntary Statements.* See *People v. Gutierrez* (2002) 28 C.4th 1083, 1132, 124 C.R.2d 373, 52 P.3d 572 [defendant's statement to detective, obtained in violation of *Miranda* rule, was admissible for impeachment under *People v. May* (1988) 44 C.3d 309, 243 C.R. 369, 748 P.2d 307, text, p. 398, even though it was obtained after detective stated it would not be used for any purpose; detective's subjective belief in his representation did not preclude involuntariness finding, but representation was not motivation for defendant's statement, which turned out to be false]; *People v. Neal* (2003) 31 C.4th 63, 1 C.R.3d 650, 72 P.3d 280, Supp., *infra*, §320. *West's Key Number Digest*, Witnesses k.390-



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#### F. Inconsistent Statements.

##### 2. Nature of Statement.

##### c. Statements Obtained in Violation of Miranda Rule.

##### 1. Use of Statements.

##### bb. Former California Law Abrogated.

#### 3 Witkin Cal. Evid. Presentation § 319

[§ 319] Former California Law Abrogated.

(1) *Former Law.* In *People v. Disbrow* (1976) 16 C.3d 101, 127 C.R. 360, 545 P.2d 272, the Supreme Court, overruling its prior decision in *People v. Nudd* (1974) 12 C.3d 204, 115 C.R. 372, 524 P.2d 844, invoked the independent California constitutional grounds doctrine (see 7 *Summary* (9th), *Constitutional Law*, §90), and held evidence obtained in violation of *Miranda* inadmissible for impeachment. (See 65 *Cal. L. Rev.* 393; 9 *Southwestern U. L. Rev.* 771; 12 *Cal. Western L. Rev.* 512.)

The *Disbrow* holding was reaffirmed in *People v. Rucker* (1980) 26 C.3d 368, 389, 162 C.R. 13, 605 P.2d 843, where the court ruled inadmissible lengthy booking interviews obtained from defendant in violation of *Miranda*. (See *People v. Farris* (1981) 120 C.A.3d 51, 58, 174 C.R. 424 [following *Rucker*]; cf. *People v. Robinson* (1997) 53 C.A.4th 270, 279, 61 C.R.2d 587 [even under *Disbrow* rule, applicable because of date of charged crimes, defendant, whose conviction was reversed because of *Miranda* violation, could not state during retrial, without fear of impeachment, that he had never confessed].)

(2) *Disbrow Abrogated by Proposition 8.* Following the passage of Proposition 8 (1 *Cal. Evidence* (4th), *Introduction*, §8), several Court of Appeal decisions took the position that the holdings in *Disbrow* and *Rucker*, although in conflict with the federal rule under *Harris v. New York* (1971) 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1, supra, §318, survived the passage of Proposition 8. (See *People v. Jacobs* (1984) 158 C.A.3d 740, 750, 204 C.R. 849; *People v. Barrios* (1985) 166 C.A.3d 732, 739, 741, 745, 212 C.R. 644; see also 17 *Pacific L. J.* 1337.) This position was rejected in *People v. May* (1988) 44 C.3d 309, 243 C.R. 369, 748 P.2d 307. (See *People v. Kimble* (1988) 201 C.A.3d 726, 731, 248 C.R. 41 [*People v. May* abrogated holding in *Disbrow*]; *People v. Lanfrey* (1988) 204 C.A.3d 491, 509, 251 C.R. 189, 2 *Cal. Evidence* (4th), *Witnesses*, §307 [same]; *People v. Duncan* (1988) 204 C.A.3d 613, 620, 251 C.R. 355 [same]; *People v. O'Sullivan* (1990) 217 C.A.3d 237, 245, 265 C.R. 784 [reasoning of *Jacobs* did not survive *People v. May*].)

In *People v. May*, defendant made a *Disbrow* motion to bar the prosecution from using his extrajudicial statements for impeachment. The trial judge concluded that Proposition 8 and its Truth in Evidence component (Cal. Const., Art. I, §28(d), 1 *Cal. Evidence* (4th), *Introduction*, §8) had abrogated the *Disbrow* rule, and the Court of Appeal reached the same conclusion. On review the Supreme Court first held, in a 5-2 opinion, that *Disbrow* survived the adoption of Proposition 8 and should not be overruled. On rehearing, the court in a 4-3 opinion held that *Disbrow* had been

abrogated by Proposition 8, and therefore did not reach the prosecution's alternative argument that *Disbrow* should be overruled. (44 C.3d 311.) The new Supreme Court opinion adopted in part the opinion of the Court of Appeal.

(a) Crucial to the question of whether the *Disbrow* rule survived is the savings clause in Art I, §28(d), reading in part: "Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay." Defendant contended that *Ev.C. 940*, California's statutory recognition of the constitutional privilege against self-incrimination (see 2 *Cal. Evidence* (4th), *Witnesses*, §357), is an "existing statutory rule relating to privilege." However, the question is not whether a defendant has a constitutional right under *Miranda* to refuse to disclose any information during a police interrogation: "The question is rather, given that defendant's constitutional privileges against self-incrimination and right to counsel were violated by the interrogation, what remedy is available to him?" (44 C.3d 316.)

(b) *In re Lance W.* (1985) 37 C.3d 873, 210 C.R. 631, 694 P.2d 744, 1 *Cal. Evidence* (4th), *Introduction*, §7, involved exclusionary remedies for violation of constitutional rights to counsel and rights against self-incrimination, but its reasoning and result are equally applicable: "Both kinds of exclusionary rules are addressed to evidence obtained by police conduct in violation of constitutional provisions. Both are based on the same rationale of deterring unlawful police conduct." (44 C.3d 316.)

(c) *Disbrow* did not purport to define the scope of the California constitutional privilege against self-incrimination; it created a new remedy for violations of *Miranda*, but did not reinterpret or extend the scope of the substantive rights protected by the Constitution. "Consequently, section 940, which relates only to substantive, not remedial, rights cannot be relied upon to save the exclusionary rule set forth in *Disbrow*." (44 C.3d 317.)

(d) *Ramona R. v. Superior Court* (1985) 37 C.3d 802, 210 C.R. 204, 693 P.2d 789 (2 *Cal. Evidence* (4th), *Witnesses*, §370), does not support defendant's position. That court held that the use-immunity privilege was compelled by the California constitutional privilege against self-incrimination, codified in *Ev.C. 940*. "It consequently was a privilege specifically exempted from the all-relevant-evidence provision of section 28(d)." (44 C.3d 317.)

(e) "Given the probable aim of the voters in adopting section 28(d), namely, to dispense with exclusionary rules derived solely from the state Constitution, it is not reasonably likely that the California voters intended to preserve, in the form of a 'statutory' privilege, a judicially created exclusionary rule *expressly rejected* by the United States Supreme Court under the federal Constitution. ... [I]t seems very likely that Proposition 8 was crafted for the very purpose, among others, of abrogating cases such as *Disbrow*, which had elevated the procedural rights of the criminal defendant above the level required by the federal Constitution, as interpreted by the United States Supreme Court." (44 C.3d 318.)

(f) It is not reasonably likely that the voters deemed the *Disbrow* rule a "statutory rule of evidence relating to ... hearsay" (Cal. Const., Art. I, §28(d)). *Ev.C. 1204* states that an otherwise admissible hearsay statement is inadmissible in a criminal action if it would be inadmissible under the federal or California Constitution (see 1 *Cal. Evidence* (4th), *Hearsay*, §54). "In other words, section 1204 (in much the same manner as section 940) simply acknowledges the existence of judicial decisions under the state or federal Constitutions which bear upon the admissibility issue. As we have previously explained in the context of our analysis of section 940, in adopting section 28(d) and its exception for 'statutory rules of evidence,' the voters probably intended to preserve *legislatively* created evidentiary rules, while abrogating *judicial* decisions which had required the exclusion of evidence solely on state constitutional grounds. We would wholly frustrate this intent were we to hold that the *Disbrow* rule survived merely because the Legislature had acknowledged the existence of judicial rules such as *Disbrow* in statutes such as sections 940 and 1204." (44 C.3d 319.)

One of the four justices concurring in the majority holding on *Disbrow* expressed disagreement with the opinion's discussion of *Ramona R.*, *supra*. (44 C.3d 320.)

The author of the original opinion (superseded by the granting of a rehearing) filed a lengthy dissent, disagreeing with the majority on all major points; and two justices joined in the dissent. (44 C.3d 320.)

(3) *Applicable Date*. In *People v. Aguilar* (1990) 218 C.A.3d 1556, 267 C.R. 879, defendant argued that application of the federal rule to statements made prior to February, 8, 1988, the date of the *May* decision, constituted an ex post facto use of the *May* rule. *Held*, defendant's focus on the date of the *May* decision is misplaced. The *Disbrow* rule was abrogated by the passage of Proposition 8, effective June 9, 1982. Hence, the federal rule applies to all statements made on or after that date. (218 C.A.3d 1568.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Former Law*.

*Cross-Reference:* 7 Summary (10th), *Constitutional Law*, §109.



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##### 1. Use of Statements.

##### cc. Impeachment Use Permissible Even Where Misconduct Deliberate.

#### 3 Witkin Cal. Evid. Presentation § 320

[§ 320] Impeachment Use Permissible Even Where Misconduct Deliberate.

In *People v. Peevy* (1998) 17 C.4th 1184, 73 C.R.2d 865, 953 P.2d 1212, a murder case in which defendant took the stand in his own defense, the trial judge allowed a police officer to testify in rebuttal that statements defendant made during his interrogation contradicted his trial testimony. The officer admitted that he had continued questioning defendant even after defendant requested an attorney, and that he deliberately ignored the request because he believed statements made by defendant during the continued interrogation would be admissible for impeachment. The question presented, therefore, was whether the rule of *Harris v. New York* (1971) 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1, supra, §318, allowing impeachment use of statements obtained in violation of *Miranda*, should apply when the officer deliberately fails to honor a suspect's request for counsel, with the objective of securing evidence for impeachment purposes. *Held*, the rule applies.

(a) Statements taken in violation of *Miranda* are excluded from evidence only to the extent required by the United States Constitution, and thus the issue must be resolved by an examination of United States Supreme Court precedent. (17 C.4th 1188, citing *People v. May* (1988) 44 C.3d 309, 243 C.R. 369, 748 P.2d 307, supra, §319.)

(b) The holdings in *Harris v. New York*, supra, and subsequent United States Supreme Court cases allowing impeachment use of illegally obtained evidence, are premised on the need for a balance between deterring police misconduct and exposing defendants who commit perjury at trial. " 'Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief. ... The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances.' " (17 C.4th 1193, 1194, quoting *Harris v. New York*.)

(c) Other applications of the *Miranda* rule generally do not turn on the officer's subjective state of mind, but instead on the accused's perception of his or her circumstances, and it would be anomalous to hold that the *Harris* rule operates differently. "The question whether the suspect knowingly and intelligently has waived the right to counsel of which he or she has been informed is not answered by examining the silent purposes of the interrogating officer. Rather, evidence of deliberation on the part of the police and--as apparent in this case--of a purpose to violate the suspect's rights in order to secure evidence, implicates the balance struck by the high court in *Harris* and subsequent cases between deterrence of police misconduct and exposure of perjury. Such evidence may call into question the accuracy of the high court's

conclusion in *Harris* that police misconduct will be deterred adequately by excluding improperly obtained evidence from the prosecution's case-in-chief, but such evidence does not render the *Harris* rule inapplicable." (17 C.4th 1200, 1201.)

The court concluded by emphasizing that the misconduct the prophylactic rules of *Miranda* and its progeny were devised to control remains illegal, and that impeachment use is allowed only because any additional deterrence to be gained from disallowing it is not worth the loss that would result if a defendant's perjury could not be exposed. (17 C.4th 1204, 1205.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(New) *Distinction: Involuntary statements:* In *People v. Neal* (2003) 31 C.4th 63, 1 C.R.3d 650, 72 P.3d 280, defendant, then 18 years old, was suspected of murdering a much older man with whom he had been living. While defendant was in custody, a police officer, in order to be able to impeach defendant, deliberately violated *Miranda* by continuing to question him even after he repeatedly invoked his right to remain silent and his right to counsel. During this encounter, the officer threatened to drop defendant off "closer to Timbuktu than to home" if he did not cooperate, and promised to "make it as good for him as he could" if he cooperated. (31 C.4th 85.) Nevertheless, defendant did not admit his guilt. He remained in custody overnight, and the next morning he asked to speak to the officer. Questioning resumed, and ultimately the officer obtained two confessions. At trial, defendant moved to suppress his initial exculpatory statement and the two subsequent confessions. The trial judge ruled that parts of the initial statement were inadmissible because of the *Miranda* violation, but that the confessions were admissible because they were voluntarily made after a break in questioning. The prosecution introduced both confessions at trial but did not use the initial exculpatory statement. Defendant was convicted and the conviction was affirmed by the Court of Appeal. *Held*, reversed. "[I]n light of all the surrounding circumstances--including the officer's deliberate violation of *Miranda*; defendant's youth, inexperience, minimal education, and low intelligence; the deprivation and isolation imposed on defendant during his confinement; and a promise and a threat made by the officer--defendant's initiation of further contact with the officer was involuntary, and his two subsequent confessions were involuntary as well." (31 C.4th 68, distinguishing *People v. Peevy* (1998) 17 C.4th 1184, 73 C.R.2d 865, 953 P.2d 1212, text, p. 402.) The confessions were inadmissible in the prosecution's case-in-chief because they were obtained in violation of *Edwards v. Arizona* (1981) 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378, 1 Cal. Evidence (4th), Hearsay, §78, but they were also inadmissible for any purpose because they were involuntary. (31 C.4th 85.)





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## 2. Use of Defendant's Silence After Miranda Warnings.

## aa. General Rule Against Use of Silence.

## 3 Witkin Cal. Evid. Presentation § 321

[§ 321] General Rule Against Use of Silence.

If the defendant, after the *Miranda* warning that he or she may remain silent, does not speak, his or her silence (after the *Miranda* implied assurance that it will not be used against the defendant) cannot be used to impeach the defendant's testimony at the trial. (*Doyle v. Ohio* (1976) 426 U.S. 610, 96 S.Ct. 2240, 2245, 49 L.Ed.2d 91, 98.) (See also *People v. Schindler* (1980) 114 C.A.3d 178, 186, 170 C.R. 461 [following *Doyle*]; *People v. Givans* (1985) 166 C.A.3d 793, 796, 798, 212 C.R. 762 [following *Doyle*].)

In *People v. Eshelman* (1990) 225 C.A.3d 1513, 275 C.R. 810, a murder trial, the prosecution impeached defendant by eliciting from him that, after he was given his *Miranda* warning, he refused to tell Susan, his lover and the decedent's mother, why he had killed her son, even though she repeatedly asked him why he had done it. Defendant testified that his refusal stemmed from his attorney's order not to talk to Susan before the trial and from his desire to protect her emotionally. *Held*, use of defendant's post-*Miranda* silence violated *Doyle*.

(a) *Doyle* and the majority of cases interpreting it concerned a defendant's post-*Miranda* failure to explain his conduct to the police, rather than to a private person. However, based on its rationale, *Doyle* should also apply whenever the evidence shows that the defendant's silence in front of a private party resulted primarily from the conscious exercise of his constitutional rights. (225 C.A.3d 1520.)

(b) Here, while defendant's second reason for his refusal to explain the killing to Susan, i.e., to protect her emotionally, was insufficient to call *Doyle* into play, his reliance on his attorney's admonition not to talk to Susan clearly exhibited a reliance on his constitutional rights to silence and counsel. Hence, it was error for the prosecutor, through cross-examination and closing argument, to challenge defendant's post-*Miranda* refusal to discuss the crime with Susan. (225 C.A.3d 1521.)

In *People v. Evans* (1994) 25 C.A.4th 358, 31 C.R.2d 20, the prosecutor, during cross-examination, asked defendant why he had not given an exculpatory response during an interrogation by police officers after he was arrested and advised of his constitutional right to remain silent. The trial judge overruled defense counsel's objection. *Held*, this was improper.

(a) Whether error under *Doyle*, *supra*, occurred must be considered in light of *Greer v. Miller* (1988) 483 U.S. 756,

107 S.Ct. 3102, 97 L.Ed.2d 618, *infra*, §322. Under *Greer*, a *Doyle* violation has two components: the prosecution makes use of the defendant's postarrest silence for impeachment purposes, and the trial court permits that use. In *Greer*, the trial judge sustained defense counsel's objection and instructed the jury to ignore the question. In the present case, by contrast, the trial judge, by overruling defense counsel's objection, gave his "approval to the prosecutor's improper inquiry and as much as told the jury that the subject of the prosecutor's question was legitimate." (25 C.A.4th 368, 369.)

(b) Although defendant had mentioned his postarrest silence before the prosecutor's question, this did not function as a waiver of any *Doyle* violation. "The only qualification to *Doyle* is that it will permit a defendant who presents exculpatory testimony at trial to be questioned about a post-*Miranda* statement if that statement is inconsistent with the version unveiled at trial." Because defendant was silent after receiving his *Miranda* warnings, there could be no inconsistency. (25 C.A.4th 369, 370.)

(c) It did not matter that, as a result of defendant's failure to answer the question, no evidence went before the jury. *Doyle* can be violated by a mere reference. (25 C.A.4th 370.)

(d) Although the violation of *Doyle* was clear, it was harmless beyond a reasonable doubt: the record showed an exceptionally persuasive prosecution case confronting an exceptionally feeble showing by defendant. Furthermore, the prosecutor made no reference in her closing argument to defendant's postarrest silence. (25 C.A.4th 370, 372.)

In the view of a concurring justice, a *Doyle* analysis was unnecessary because defendant was the first to introduce evidence concerning his post-*Miranda* silence, and even under a *Doyle* analysis, there was no violation. (25 C.A.4th 372, 373.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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##### bb. Distinction: Limited Inquiry into Silence.

#### 3 *Witkin Cal. Evid. Presentation* § 322

[§ 322] Distinction: Limited Inquiry into Silence.

In *Greer v. Miller* (1988) 483 U.S. 756, 107 S.Ct. 3102, 97 L.Ed.2d 618, defendant testified that he had not participated in the murder committed by his codefendants. On cross-examination the prosecutor asked, "Why didn't you tell this story to anybody when you got arrested?" Defense counsel immediately objected, and the trial judge sustained the objection and instructed the jury to disregard the question. The prosecutor made no further reference to the matter, and defense counsel did not request any additional instruction; the judge, however, further instructed the jury to disregard questions to which objections were sustained. *Held*, there was no *Doyle* violation. In *Doyle* and in each of the cases in which the United States Supreme Court has applied *Doyle*, the trial judge permitted specific inquiry or argument respecting the defendant's post-*Miranda* silence. (107 S.Ct. 3108, 97 L.Ed.2d 629.) In this case, the fact of defendant's "postarrest silence was not submitted to the jury as evidence from which it was allowed to draw any permissible inference, and thus no *Doyle* violation occurred." (107 S.Ct. 3108, 97 L.Ed.2d 630.) Nor, under the facts of this case, did the prosecutor's improper question violate defendant's due process rights. (107 S.Ct. 3109, 97 L.Ed.2d 630.) (See also *Anderson v. Charles* (1980) 447 U.S. 404, 100 S.Ct. 2180, 2182, 65 L.Ed.2d 222, 226 [*Doyle* does not apply to cross-examination that merely inquires into prior inconsistent statements; as to subject matter of his statements, defendant has not remained silent at all].)

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cc. Distinction: Partial Silence.

3 *Witkin Cal. Evid. Presentation* § 323

[§ 323] Distinction: Partial Silence.

"A defendant has no right to remain silent selectively. Once a defendant elects to speak after receiving a *Miranda* warning, his or her refusal to answer questions may be used for impeachment purposes absent any indication that such refusal is an invocation of *Miranda* rights." (*People v. Hurd* (1998) 62 C.A.4th 1084, 1092, 73 C.R.2d 203 [where defendant talked freely and voluntarily about his relationship with his murdered wife and how shooting occurred, including drawing diagram, prosecutor was not precluded from using against him his refusal to demonstrate shooting or take polygraph examination].)

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##### dd. Effect of Error.

### 3 Witkin Cal. Evid. Presentation § 324

[§ 324] Effect of Error.

In *Brecht v. Abrahamson* (1993) 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353, the Court considered the effect of the erroneous use of defendant's post-arrest silence and stated as follows:

"In *Chapman v. California*, ... we held that the standard for determining whether a conviction must be set aside because of federal constitutional error 'was harmless beyond a reasonable doubt.' In this case we must decide whether the *Chapman* harmless-error standard applies in determining whether the prosecution's use for impeachment purposes of petitioner's post-Miranda silence, in violation of due process under *Doyle v. Ohio*, ... entitles petitioner to habeas corpus relief. We hold that it does not. Instead, the standard for determining whether habeas relief must be granted is whether the *Doyle* error 'had substantial and injurious effect or influence in determining the jury's verdict.' ... The *Kotteakos* harmless-error standard is better tailored to the nature and purpose of collateral review than the *Chapman* standard, and application of a less onerous harmless-error standard on habeas promotes the considerations underlying our habeas jurisprudence. Applying this standard, we conclude that petitioner is not entitled to habeas relief." (113 S.Ct. 1713, 123 L.Ed.2d 363, citing *Chapman v. California* (1967) 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705, and *Kotteakos v. United States* (1946) 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557.)

(a) *Doyle* error fits squarely into the category of constitutional violations which this Court has characterized as "trial error." Trial error occurs during the presentation of the case to the jury, and it is amenable to harmless-error analysis because it may be quantitatively assessed in the context of other evidence to determine the effect it had on the trial. At the other end of the spectrum lie structural defects in the constitution of the trial mechanism; such defects, e.g., deprivation of the right to counsel, require automatic reversal of the conviction because they infect the entire trial process. (113 S.Ct. 1717, 123 L.Ed.2d 367.)

(b) *Chapman* reached this Court on direct review; the applicability of the *Chapman* standard on collateral review by habeas has not been squarely addressed. (113 S.Ct. 1718, 123 L.Ed.2d 368.) But "[t]he principle that collateral review is different from direct review resounds throughout our habeas jurisprudence." (113 S.Ct. 1719, 123 L.Ed.2d 370.)

(c) "Overturning final and presumptively correct convictions on collateral review because the State cannot prove that an error is harmless under *Chapman* undermines the States' interest in finality and infringes upon their sovereignty over criminal matters. ... Retrying defendants whose convictions are set aside also imposes significant 'social costs,'

including the expenditure of additional time and resources for all the parties involved, the 'erosion of memory' and 'dispersion of witnesses' which accompany the passage of time and make obtaining convictions on retrial more difficult, and the frustration of 'society's interest in the prompt administration of justice.' " (113 S.Ct. 1721, 123 L.Ed.2d 372, 373.)

(d) For these and other reasons "we hold that the *Kotteakos* harmless-error standard applies in determining whether habeas relief must be granted because of constitutional error of the trial type." (113 S.Ct. 1722, 123 L.Ed.2d 373.) Here defendant admitted shooting the victim, but claimed that it was an accident. The principal question before the jury, therefore, was whether the State met its burden in proving beyond a reasonable doubt that the shooting was intentional. The inquiry here is whether, in the light of the record as a whole, the State's improper use for impeachment purposes of defendant's post-*Miranda* silence "had substantial and injurious effect or influence in determining the jury's verdict." (113 S.Ct. 1722, 123 L.Ed.2d 373.) "We think it clear that it did not." (113 S.Ct. 1722, 123 L.Ed.2d 373.) (See *People v. Earp* (1999) 20 C.4th 826, 857, 85 C.R.2d 857, 978 P.2d 15 [even if prosecutor's comments regarding defendant's failure to mention other man as suspect to friends and relatives constituted *Doyle* error, it was not prejudicial; fact that defendant recounted several versions of cause of victim's injuries to his family and friends impeached his testimony; prosecutor's comments did not].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Hinton* (2006) 37 C.4th 839, 867, 38 C.R.3d 149, 126 P.3d 981 [prosecutor's reference to defendant's invocation of *Miranda* rights on one occasion resulted in harmless error; although jury could in theory have relied on defendant's unwillingness to speak to infer that he was fabricating defense, there was no reasonable possibility it did so, as defendant gave police concededly false versions of circumstances surrounding murders both before and after invocation].



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## CHAPTER XI - Presentation At Trial

### XI. IMPEACHMENT

#### F. Inconsistent Statements.

##### 2. Nature of Statement.

##### c. Statements Obtained in Violation of Miranda Rule.

##### 3. Use of Defendant's Prearrest Silence.

#### 3 Witkin Cal. Evid. Presentation § 325

[§ 325] Use of Defendant's Prearrest Silence.

*Doyle v. Ohio* (1976) 426 U.S. 610, 96 S.Ct. 2240, 2245, 49 L.Ed.2d 91, 98, supra, §321, was distinguished, and the impeachment was held proper, in *Jenkins v. Anderson* (1980) 447 U.S. 231, 100 S.Ct. 2124, 2129, 65 L.Ed.2d 86, 95, 96, where defendant's failure to speak occurred *before* he was taken into custody and given his *Miranda* warning. (See 1981 A.S. 594; 67 Cal. L. Rev. 1205; 35 A.L.R.4th 731.)

The *Jenkins* holding that the defendant's prearrest silence may be used for impeachment was followed in *People v. Burton* (1981) 117 C.A.3d 382, 386, 172 C.R. 632. (See *People v. Earp* (1999) 20 C.4th 826, 856, 85 C.R.2d 857, 978 P.2d 15 [prosecutor's questions and comments regarding defendant's failure to mention other man as suspect to friends and relatives did not implicate *Doyle* at all because they pertained to defendant's silence on that topic before defendant was advised of and asserted right to remain silent]; *People v. Free* (1982) 131 C.A.3d 155, 165, 182 C.R. 259 ["Prearrest silence in circumstances in which there is no inference of a reliance on the right to silence may be used to impeach by way of cross-examination"]; *People v. Callegri* (1984) 154 C.A.3d 856, 863, 202 C.R. 109 [quoting *People v. Free*]; *People v. Delgado* (1992) 10 C.A.4th 1837, 1842, 13 C.R.2d 703 [after Proposition 8, federal rule governs; pre-*Miranda* silence may be used for impeachment].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## XI. IMPEACHMENT

## F. Inconsistent Statements.

## 2. Nature of Statement.

## d. Statements Obtained in Violation of Right to Counsel.

## 3 Witkin Cal. Evid. Presentation § 326

[§ 326] Statements Obtained in Violation of Right to Counsel.

In *People v. Brown* (1996) 42 C.A.4th 461, 49 C.R.2d 652, defendant, wanted on child molestation charges, was apprehended in Utah, waived extradition, and was transported back to California. A detective then conducted a tape-recorded interview with him, during which he admitted certain acts of oral copulation with the victim but denied any acts of intercourse or sodomy. Defendant moved in limine to suppress the interview on the ground that it was obtained in violation of his rights under the Fifth and Sixth Amendments. The trial judge determined that defendant had invoked his right to counsel midway through the interview; that, as to his Fifth Amendment claim, he had impliedly waived his right to remain silent; and that, as to the Sixth Amendment claim, the statements occurring after the right to counsel was invoked were voluntary and could be used for impeachment. Defendant chose not to testify and was convicted. *Held*, affirmed.

(a) The question whether defendant was required to testify in order to preserve his challenge to the trial judge's ruling on the impeachment use of statements obtained in violation of the right to counsel is one of first impression in California. However, a majority of courts in other jurisdictions have allowed the appeal to go forward, and in two California cases, in a slightly different context--statements obtained in violation of the prophylactic *Miranda* rules (1 Cal. Evidence (4th), Hearsay, §76)--the defendant was not required to testify in order to preserve the issue for appeal. "[W]e conclude that when the defendant raises a pure issue of law concerning a fundamental constitutional right, the defendant need not testify to preserve error in the trial court's rulings on impeachable evidence." (42 C.A.4th 471, citing *People v. May* (1988) 44 C.3d 309, 243 C.R. 369, 748 P.2d 307, supra, §319, and *People v. Kimble* (1988) 201 C.A.3d 726, 248 C.R. 41.)

(b) Defendant's position that his statements following invocation of his right to counsel should have been suppressed for all purposes is supported by two published California cases and rulings in a minority of other jurisdictions. (42 C.A.4th 471, 472, citing *People v. Cribas* (1991) 231 C.A.3d 596, 282 C.R. 538, and *People v. Harper* (1991) 228 C.A.3d 843, 279 C.R. 204.) The majority position, allowing impeachment use in this context, is premised on the notion that reliable and probative evidence should not be excluded for *all* purposes unless it is derived from coerced or involuntary statements: The exclusionary rules should not be perverted into a license to commit perjury. "We agree with [this] reasoning. ... Thus, we reject the rule of *Cribas* and *Harper*, and we hold that the exclusion of a defendant's voluntary statements, obtained in violation of the Sixth Amendment right to counsel, from the case-in-chief sufficiently vindicates the defendant's Sixth Amendment rights. However, when the defendant takes the stand and testifies inconsistently with those statements, protection of the truth-finding purpose of a criminal trial requires that such



statements be admissible for impeachment. We find no error in the trial court's ruling." (42 C.A.4th 473, 474.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Guerra* (2006) 37 C.4th 1067, 1094, 40 C.R.3d 118, 129 P.3d 321 [defendant's statements to detective were voluntary and admissible for impeachment, even though they were made after defendant invoked right to counsel, detective threatened to arrest him if he did not speak, and his Guatemalan background may have affected his understanding of interrogation; defendant was cooperative and eager to speak both before and after he invoked right to counsel, and his Guatemalan background was unconnected to police coercion]. *West's Key Number Digest*, Witnesses k.390



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F. Inconsistent Statements.

2. Nature of Statement.

e. Testimony at Suppression Hearing.

3 *Witkin Cal. Evid. Presentation* § 327

[§ 327] Testimony at Suppression Hearing.

In *Simmons v. United States* (1968) 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247, 2 Cal. Evidence (4th), Witnesses, §431, the Court held that the testimony of defendant on a pretrial motion to suppress evidence as illegally obtained was inadmissible at the trial on the issue of guilt, but the opinion did not consider the question whether it might be admissible for the limited purpose of impeachment. In *People v. Douglas* (1977) 66 C.A.3d 998, 136 C.R. 358, the court concluded that such testimony can be used for impeachment where the defendant takes the stand and testifies in a manner inconsistent with his or her pretrial testimony. (66 C.A.3d 1005.) The opinion found persuasive support in the dictum in *People v. Coleman* (1975) 13 C.3d 867, 120 C.R. 384, 533 P.2d 1024, 2 Cal. Evidence (4th), Witnesses, §380, that testimony at a probation revocation hearing is inadmissible in subsequent proceedings on the criminal charge "save for purposes of impeachment." (66 C.A.3d 1003.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## XI. IMPEACHMENT

## F. Inconsistent Statements.

## 3. Inconsistency.

## a. Inconsistency in Effect.

3 Witkin Cal. Evid. Presentation § 328

[§ 328] Inconsistency in Effect.

The statement must be clearly inconsistent. If the supposed contradiction does not really exist, it is not proper impeachment. (See *Froeming v. Stockton Elec. R. Co.* (1915) 171 C. 401, 408, 153 P. 712.) But inconsistency in effect rather than contradiction in express terms is the test. Even though no particular contradiction is found, if the general purport of the testimony is compared with the whole statement, and they appear to be the result of inconsistent beliefs, the prior statement is admissible. (See *Worley v. Spreckels Bros. Commercial Co.* (1912) 163 C. 60, 71, 124 P. 697; *Gregoriev v. Northwestern Pac. R. Co.* (1928) 95 C.A. 428, 438, 273 P. 76; *Fibreboard Paper Products Corp. v. East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL-CIO* (1964) 227 C.A.2d 675, 702, 39 C.R. 64, citing the text; 1 McCormick 5th, §34; 3A Wigmore (Chadbourn Rev.) §1040; 9 U.C. Davis L. Rev. 285, 293; 10 Pacific L. J. 1, 13; 81 Am.Jur.2d (1992 ed.), Witnesses §933 et seq.)

Thus, in *Gregoriev v. Northwestern Pac. R. Co.*, *supra*, an action for personal injuries and wrongful death resulting from a collision with a train at a crossing, a landowner testified for defendant that a particular crossing near his place was clear and unobstructed. On cross-examination, a letter sent by him to the railroad company some years before the accident, requesting a crossing sign for purposes of safety, was properly introduced. The impression created by his testimony was that the place was safe without a crossing sign, and the letter was substantially inconsistent. (95 C.A. 438.)

In *Worley v. Spreckels Bros. Commercial Co.*, *supra*, the question was whether Vargas, a Mexican workman, understood English sufficiently to discharge his duties, and defendant's witness testified that he had never had any difficulty with him. In rebuttal, plaintiff testified that the witness had once said, "I wouldn't hire a man like Vargas unless I had to." *Held*, this was admissible, because the statement implied that Vargas was not a competent workman. It was immaterial that on some conceivable theory, the two statements might be reconciled (e.g., the witness might have disliked the man on account of his nationality, rather than his lack of ability). (163 C. 71.) (See also *In re Deon D.* (1989) 208 C.A.3d 953, 962, 256 C.R. 490 [testimony of witness in rape case who answered some questions, but refused to answer others on ground that he was no "snitch," held inconsistent with prior statement given to police].)

On the other hand, in *People v. Epps* (1981) 122 C.A.3d 691, 176 C.R. 332, a prosecution of a male nursing assistant for annoying or molesting a minor female inmate at a mental health center, defendant testified he had never kissed the inmate. The court admitted the defendant's prior statement that he had kissed *another* minor inmate. *Held*, this was inadmissible, because defendant had not made a "blanket denial" of any prior misconduct of this type. (122 C.A.3d 696.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *81 Am.Jur.2d (2004 ed.)*, *Witnesses* §902 et seq.; 1 McCormick 6th, §34. *West's Key Number Digest*, *Witnesses* k.386



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## CHAPTER XI - Presentation At Trial

### XI. IMPEACHMENT

#### F. Inconsistent Statements.

##### 3. Inconsistency.

##### b. Conduct: Prior Silence on Matter.

##### 1. In General.

3 Witkin Cal. Evid. Presentation § 329

[§ 329] In General.

"A failure to assert a fact, when it would have been natural to assert it, amounts in effect to an assertion of the non-existence of the fact. ... There may be explanations, indicating that the person had in truth no belief of that tenor; but the conduct is 'prima facie' an inconsistency." (*People v. Brophy* (1954) 122 C.A.2d 638, 649, 265 P.2d 593 [quoting Wigmore]; see *People v. Goldberg* (1952) 110 C.A.2d 17, 26, 242 P.2d 116; 3A Wigmore (Chadbourn Rev.) §1042; 9 U.C. Davis L. Rev. 285, 291; 10 Pacific L. J. 1, 14; 20 A.L.R.4th 245; on "statement" as including assertive conduct, see 1 Cal. Evidence (4th), Hearsay, §7.)

However, in *Brooks v. E. J. Willig Truck Trans. Co.* (1953) 40 C.2d 669, 255 P.2d 802, defendant F, a truck driver, hit decedent and drove on without stopping. In this action for wrongful death, defendants unsuccessfully sought to impeach the arresting officer by showing that on a prior naval inquiry and preliminary hearing, he had not mentioned F's statement that he had been drinking. *Held*, the court's refusal to permit this was proper because on the prior occasions, the officer was not specifically questioned on this point. "A witness may not be impeached by showing that he omitted to state a fact or stated it less fully at a prior proceeding unless his attention was called to the matter at that time and he was then asked to testify concerning the very facts embraced in the questions propounded at the trial." (40 C.2d 675.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
*West's Key Number Digest*, Witnesses k.379(12)



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##### 3. Inconsistency.

##### b. Conduct: Prior Silence on Matter.

#### 2. Witness' Failure To Report to Police.

### 3 *Witkin Cal. Evid. Presentation* § 330

[§ 330] Witness' Failure To Report to Police.

In *People v. Ratliff* (1987) 189 C.A.3d 696, 234 C.R. 502, defendant, charged with robbery, offered testimony of Felice, his sister, and Canister, his friend, that defendant was at his sister's home on the night of the robbery and that Canister saw him there. The prosecutor was permitted on cross-examination to ask them why they had not given this exculpatory information to the police prior to trial. *Held*, there was no error.

(a) "There is nothing inherently improper about cross-examining a defense witness as to his failure to come forward at an earlier date. In fact, the information discovered during this type of questioning may well aid the trier of fact in its effort to determine whether the testimony is an accurate reflection of the truth or a recent fabrication." (189 C.A.3d 701, citing *People v. Cartwright* (1980) 107 C.A.3d 402, 166 C.R. 37 [holding question proper in cross-examination of defendant on his alibi testimony].)

(b) "Although a citizen ordinarily has no legal obligation to offer exculpatory information to law enforcement officials, there are many situations where the natural response of a person would be to come forward in order to avoid a mistaken prosecution of a relative or friend. In that situation a witness's silence may be akin to a 'prior inconsistent statement,' and therefore, has probative value." (189 C.A.3d 701.)

(c) There are other situations in which this would not be natural; e.g., where the witness believes that any disclosure would be futile, where the witness has been told by the defendant's attorney not to discuss the case, or where the witness was not aware that he or she possessed exculpatory information; under these circumstances the witness' failure to speak is consistent with his or her trial testimony. Hence, to ensure that the pretrial silence was not a natural consequence of the circumstances, the prosecution must lay a foundation "by first establishing that the witness knew of the pending charges in sufficient detail to realize that he possessed exculpatory information, that the witness had reason to make the information available, that he was familiar with the means of reporting it to the proper authorities, and that the defendant or his lawyer, or both, did not ask the witness to refrain from doing so." (189 C.A.3d 701, quoting from Massachusetts case.)

(d) The prosecutor laid the foundation. (1) In cross-examination of Canister, he established the facts that Canister was a good friend, and knew he possessed the information weeks before the trial. (2) In cross-examination of Felice, he showed that she had discussed the date of the robbery with defendant and knew that she possessed the information over a month before trial. (189 C.A.3d 701.)

(e) Despite the prejudicial effect of the evidence, there was no abuse of discretion in allowing it to reach the jury. The witnesses were able to explain their silence, either to the prosecutor or to defense counsel on redirect examination; and the judge could weigh the information and determine whether the testimony was consistent with the prior behavior and assertions of the witness. (189 C.A.3d 702.)

In *People v. Tauber* (1996) 49 C.A.4th 518, 56 C.R.2d 656, the Court of Appeal agreed with the conclusion in *Ratliff* that "the fact a witness is aware of the potentially exculpatory nature of facts but fails to reveal that evidence to the authorities before trial is relevant to the witness's credibility." (49 C.A.4th 524.) However, in light of the strong constitutional policy favoring the admission of relevant evidence (Cal. Const., Art. I, §28(d); see 1 *Cal. Evidence* (4th), *Introduction*, §8), the court held that the factors stated as foundational requirements in *Ratliff* should instead simply be matters going to the weight of the evidence. If there is substantial evidence that a witness was aware before trial of information that he or she understood tended to exculpate the defendant, "then the failure to report the information before trial is relevant and admissible subject to a prejudice evaluation" under *Ev.C.* 352. (49 C.A.4th 525, 526.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### F. Inconsistent Statements.

##### 3. Inconsistency.

##### c. Inconsistent Opinion.

#### 3 Witkin Cal. Evid. Presentation § 331

#### [§ 331] Inconsistent Opinion.

Since the opinion rule does not apply to admissions (*1 Cal. Evidence (4th)*, *Hearsay*, §95), it should not apply to prior inconsistent statements used to impeach; and this is the modern rule. (See *1 McCormick 5th*, §35; *3A Wigmore (Chadbourn Rev.)* §1041; *9 U.C. Davis L. Rev.* 285, 310; *10 Pacific L. J.* 1, 14; *81 Am.Jur.2d (1992 ed.)*, *Witnesses* §936.)

Thus, in *Hanton v. Pacific Elec. Ry. Co.* (1918) 178 C. 616, 174 P. 61, a personal injury suit, plaintiff's witness testified that she saw plaintiff close to, and walking fast toward, the car, lost sight of him, and about 15 seconds later, the car started. On cross-examination, her prior written statement was produced in which she had said, "The car had started and I am sure it was moving before he could have gotten to it." *Held*, this was admissible. Her testimony was intended to support the inference that plaintiff had time enough to board the train before it started; the prior statement justified the opposite inference. "Certainly, the statement objected to, under the circumstances, was but an expression of opinion, and as a general rule witnesses must testify to facts and not to opinions or inferences. But even opinions expressed by a witness may sometimes be given in evidence if their tendency be to impeach the testimony of the witness given on the stand." (178 C. 619.)

In *Contra Costa v. East Bay Mun. Dist.* (1959) 175 C.A.2d 834, 1 C.R. 60, a condemnation suit, defendant's expert testified to a value of \$ 4,211. On cross-examination, he was asked about his testimony in a prior condemnation suit, 7 months before, involving a comparable piece of property. Over objection, he answered that he had valued the other property at 10 cents per square foot as against 43 cents in the present case, and that he had valued the easement in the other property at \$ 1, while here, he had given it a value equal to the fee. *Held*, this was proper impeachment. An expert who testifies as to the value of land states under oath that his opinion is in fact what he says it is. This can be attacked by showing a different opinion previously expressed about the same land, and the same should be true where the opinion concerns other land, provided it is comparable and the difference in time is not too great. (175 C.A.2d 837.) (See also *People v. Murata* (1958) 161 C.A.2d 369, 379, 326 P.2d 947; *California v. Stevenson* (1970) 5 C.A.3d 60, 65, 84 C.R. 742, *supra*, §253 [appraiser's valuation of condemned land properly impeached by showing he previously valued nearby land at much higher rate].)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See *81 Am.Jur.2d (2004 ed.)*, *Witnesses* §905; *1 McCormick 6th*, §35.





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### XI. IMPEACHMENT

#### F. Inconsistent Statements.

#### 4. Abolition of Foundation Requirements.

##### a. Oral Statements.

##### 1. Former Law.

3 Witkin Cal. Evid. Presentation § 332

[§ 332] Former Law.

An explanation of the former foundation requirement will make clear the significance of the Evidence Code rule:

(1) *No Foundation Required for Simple Cross-Examination.* The belief that a witness could not be asked any question concerning his or her prior statement without a foundation of "time, place and persons present" and an opportunity to explain was widely held, but was erroneous. Such questions are not necessarily intended as a basis for impeachment: "Frequently, they are designed to test the recollection of the witness, and, frequently, as in the instance before us, the question is proper, though ultimately and according to the answer which may be made it will or will not be followed by a strictly impeaching question. Thus, it was proper to ask the witness if he had so testified. His answer might have been that he did not, when an impeaching question would properly follow. His answer might have been that he did so testify with explanation of the variance between his answers, in which case no impeaching question would be necessary." (*People v. Jones* (1911) 160 C. 358, 365, 117 P. 176; see also *People v. Kidd* (1961) 56 C.2d 759, 765, 16 C.R. 793, 366 P.2d 49; *LeCyr v. Dow* (1939) 30 C.A.2d 457, 464, 86 P.2d 900 [no need to lay foundation before party can be asked if he or she had conversation, or what conversation was, or, if he or she made statement, what statement was]; *Shallenberger v. Duncan* (1966) 244 C.A.2d 197, 202, 53 C.R. 77, dictum citing the text.)

(2) *Foundation Required if Extrinsic Evidence To Be Offered.* If the cross-examiner ended his or her inquiry into the prior statement with the cross-examination, no foundation problem would arise. But if the prosecutor intended to prove the inconsistent statement by extrinsic evidence, there was danger of unfairness and undue consumption of time. If the witness were given the opportunity to refresh his or her memory, and admit and explain while on the stand, the calling of other witnesses to impeach the witness might be unnecessary or futile. Hence, former C.C.P. 2052 required that a foundation be laid, while the witness was on the stand, by (a) relating the statements, the times, places and persons present, and (b) asking whether the witness made them and, if so, allowing him or her to explain.

As the court said in *People v. Singh* (1912) 20 C.A. 146, 128 P. 420: "The rule requiring such foundation was designed for the purpose of fully informing the assailed witness of the particulars of the alleged contradictory statement, together with the circumstances of the time and place of its making, and the persons present, in order that the witness, in justice to himself and the party in whose behalf he was called, might fairly and intelligently deny, affirm, or explain the statements attributed to him." (20 C.A. 149.) (See also *People v. Nonella* (1893) 99 C. 333, 335, 33 P. 1097; *Rignell v. Font* (1928) 90 C.A. 730, 735, 266 P. 588; *People v. Greenwell* (1937) 20 C.A.2d 266, 267, 66 P.2d 674; *Lewis v. Western Truck Line* (1941) 44 C.A.2d 455, 465, 112 P.2d 747; *People v. Young* (1945) 70 C.A.2d 28, 34, 160 P.2d 132;

*People v. Holman* (1945) 72 C.A.2d 75, 96, 164 P.2d 297; *Burns v. California Milk Transport* (1948) 89 C.A.2d 70, 74, 200 P.2d 43; *People v. Malicoat* (1949) 89 C.A.2d 742, 745, 201 P.2d 850; 1 McCormick 5th, §37; 3A Wigmore (Chadbourn Rev.) §1025 et seq.)

Considerable latitude was, however, allowed in the framing of the foundation questions. (See *Plass v. Plass* (1898) 122 C. 3, 16, 54 P. 372 [where only witness and person to whom he talked were present, not necessary to state explicitly that no other persons were present]; *People v. Hovermale* (1925) 76 C.A. 91, 94, 243 P. 878 [failure to state place not necessarily prejudicial]; *People v. Singh, supra*, 20 C.A. 149 [sufficient to name person to whom statement was made without naming all others, if conversation was fully identified]; cf. 3A Wigmore (Chadbourn Rev.) §1029 [criticizing inflexible approach of most cases].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Foundation Required if Extrinsic Evidence To Be Offered*. See 1 McCormick 6th, §37.



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### XI. IMPEACHMENT

#### F. Inconsistent Statements.

#### 4. Abolition of Foundation Requirements.

##### a. Oral Statements.

##### 2. Evidence Code.

#### 3 Witkin Cal. Evid. Presentation § 333

[§ 333] Evidence Code.

The foundation requirement was criticized as arbitrary and unrealistic, often working to the disadvantage of the cross-examiner and to the benefit of a dishonest witness. (See 1 McCormick 5th, §§28, 37; 3A Wigmore (Chadbourn Rev.) §1027.) Former Unif. Rule 22(b) made it discretionary with the trial judge to admit or exclude the extrinsic evidence where the witness had not had an opportunity to explain. (See 2 U.C.L.A. L. Rev. 32, 41.) The Evidence Code, adopting some of the language of the Uniform Rule, deals with the problem in similar fashion.

(1) *Restatement of Cross-Examination Rule.* The former rule, that simple cross-examination can proceed without a foundation (supra, §332), is preserved: "In examining a witness concerning a statement or other conduct by him that is inconsistent with any part of his testimony at the hearing, it is not necessary to disclose to him any information concerning the statement or other conduct." (Ev.C. 769.) There may, however, be circumstances under which the information must be given to *opposing counsel*. (See *Kadelbach v. Amaral* (1973) 31 C.A.3d 814, 821, 107 C.R. 720, 2 Cal. Evidence (4th), Witnesses, §149.)

(2) *Abolition of Foundation Requirement for Extrinsic Evidence.* To allow a witness to be impeached by extrinsic evidence of his or her apparently inconsistent statement without giving the witness an opportunity to explain would be most unfair, and the witness' right to do so is protected. But the Code also seeks to strengthen the hand of the cross-examiner by removing the obligation to advise the witness in advance that he or she is going to be so impeached (thereby giving the witness time to contrive a false explanation). "Permitting a witness to explain or deny an alleged inconsistent statement is desirable, but there is no compelling reason to provide the opportunity for explanation before the inconsistent statement is introduced in evidence." (Ev.C. 770, Comment.)

Hence, this rule: Extrinsic evidence of the inconsistent statement is admissible if the witness (a) was given the opportunity to explain or deny while under cross-examination (as the old rule required), or (b) even if not given that opportunity while under cross-examination, if the witness still has the opportunity to take the stand; i.e., he or she "has not been excused from giving further testimony in the action." (Ev.C. 770.) As the Commission observes: "Section 770 will permit more effective cross-examination and impeachment of several collusive witnesses, since there need be no disclosure of prior inconsistency before all such witnesses have been examined." (Ev.C. 770, Comment; see 18 Hastings L. J. 210; 9 U.C. Davis L. Rev. 285, 313; 10 Pacific L. J. 1, 3.)

(3) *Exclusionary Rule and Exception.* The converse of the above stated rule is that if the witness was

unconditionally excused without ever having had an opportunity to explain, the extrinsic impeaching evidence must be excluded. (*Ev.C. 770.*) In *People v. Garcia* (1990) 224 C.A.3d 297, 273 C.R. 666, a prosecution involving the writing of "bad bonds," a prosecution witness answered in the negative when asked whether she had ever told anyone that unless defendant gave her a certain amount of money, she would get him in trouble. The trial judge refused to allow a defense witness to testify that the prosecution witness had made a prior inconsistent statement to her. *Held*, this was correct; the prosecution witness was not given a realistic opportunity to explain or deny the inconsistent statement, as required by *Ev.C. 770*. Such an opportunity requires reference to more than one of the following: (a) the people involved in the conversation, (b) its time and place, or (c) the specific statements that were made during it. Here, the foundational question completely missed the first two categories. (224 C.A.3d 304.)

But the exclusionary rule is subject to a broad discretionary exception: "[u]nless the interests of justice otherwise require." (*Ev.C. 770.*) As the Commission says: "An absolute rule forbidding introduction of such evidence where the specified conditions are not met may cause hardship in some cases. For example, the party seeking to introduce the statement may not have learned of its existence until after the witness has left the court and is no longer available to testify." (*Ev.C. 770*, Comment.) (See *supra*, §317.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 1 McCormick 6th, §§28, 37.

(2) *Abolition of Foundation Requirement for Extrinsic Evidence.* See *Colarossi v. Coty US* (2002) 97 C.A.4th 1142, 1151, 119 C.R.2d 131 [in action alleging that plaintiff was wrongfully fired for cooperating in sexual harassment investigation, trial judge erred in refusing to consider, at summary judgment stage, another employee's declaration that investigation target (employer's marketing director) stated that she wanted to take revenge on investigation participants; statement was inconsistent with her deposition testimony, and, although she had no opportunity in deposition to explain or deny statement, she would have that opportunity at trial].



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#### F. Inconsistent Statements.

#### 4. Abolition of Foundation Requirements. b. Written Statements.

3 Witkin Cal. Evid. Presentation § 334

[§ 334] Written Statements.

(1) *Former Law.* Former C.C.P. 2052 provided that if the inconsistent statement was in writing, it had to be shown to the witness before any question concerning it was put to him or her. This statute codified the holding of *Queens Case* in 1820. In California, it was even applied to oral statements made in the course of an official proceeding, which were later transcribed and the transcription signed by the witness. (See *People v. Orosco* (1925) 73 C.A. 580, 594, 239 P. 82 [coroner's inquest]; *Umemoto v. McDonald* (1936) 6 C.2d 587, 592, 58 P.2d 1274 [same]; cf. *People v. Young* (1945) 70 C.A.2d 28, 35, 160 P.2d 132 [dictum that oral statements made informally did not become writings by later transcription].)

This rule received almost universal condemnation as unsound in principle and undesirable in practice. (See 1 McCormick 5th, §§28, 37; 3A Wigmore (Chadbourn Rev.) §1026; 4 Wigmore (Chadbourn Rev.) §1259 et seq.; 2 U.C.L.A. L. Rev. 32, 41.) As the Comment to *Ev.C.* 769 observes: "The disclosure of inconsistent written statements ... limits the effectiveness of cross-examination by removing the element of surprise. The forewarning gives the dishonest witness the opportunity to reshape his testimony in conformity with the prior statement."

(2) *Evidence Code.* The original Uniform Rule abolished the mandatory foundation requirement, and the Evidence Code does likewise, by making the same rules applicable to oral and written inconsistent statements. Thus, *Ev.C.* 769, eliminating any foundation requirement on cross-examination (supra, §333), applies to "a statement," which, under *Ev.C.* 225, includes both oral and written expressions. And *Ev.C.* 770, calling for an opportunity to explain but not as a foundation requirement (supra, §333), also applies to "a statement." (See *Ev.C.* 769, Comment.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Former Law.* See 1 McCormick 6th, §§28, 37.



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## 5. Proof.

## a. Cross-Examination.

3 Witkin Cal. Evid. Presentation § 335

[§ 335] Cross-Examination.

(1) *Use of Only Part of Statement Prohibited.* The impeaching question should include substantially all of the prior statement, and the use of only a part of it, in a manner calculated to mislead or trick the witness, will not be permitted. Thus, in *Umemoto v. McDonald* (1936) 6 C.2d 587, 58 P.2d 1274, an action for wrongful death, the question was whether the decedent had gone outside the pedestrian crosswalk. The witness said that decedent had not done so. At the coroner's inquest, she had replied to the same question: "I don't know; I couldn't see, but I think she was; *maybe she was trying to get away.*" Counsel for defendant asked if she had previously so testified, but he omitted the italicized portion of her answer, and after objection, still refused to include it on the ground that it was a mere conclusion. *Held*, an objection was properly sustained; the statement in its incomplete form failed to comply with the statutory requirements, and was unfair in omitting the clause that explained the uncertain first part of the sentence. (6 C.2d 591.) (On the practice, see 3A Wigmore (Chadbourn Rev.) §1045; 10 Pacific L. J. 1, 25; 81 Am.Jur.2d (1992 ed.), Witnesses §942.)

(2) *Inquiry About Truth of Prior Statement Proper.* May the cross-examiner ask the witness whether the prior statement was true? The question has been criticized as argumentative, but was held to be proper, in the judge's discretion, in *People v. Southack* (1952) 39 C.2d 578, 248 P.2d 12. The charge was manslaughter. Defendant's daughter, wife of the victim, was questioned on the circumstances, her prior statement to the sheriff was recited to her, she answered that she had been half out of her mind, and the prosecutor then said: "And you are telling us, are you, that when [the sheriff] asked these questions and you gave these answers, you were not telling the truth; is that right?" *Held*, there was no prejudicial error: "Control of cross-examination of a witness as to which of his conflicting statements is true should be in the sound discretion of the trial judge. The purpose of such cross-examination is ascertainment of the truth, and if, as here, that purpose can be furthered by direct questioning as to the truth or falsity of prior statements, such questioning may be permitted; the trial court, however, must be ever alert to protect the witness against being badgered or tricked into statements unintended by the witness." (39 C.2d 590.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Use of Only Part of Statement Prohibited.* See 81 Am.Jur.2d (2004 ed.), Witnesses §911 et seq. West's Key Number Digest, Witnesses k.388(5)



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##### 5. Proof.

##### b. Extrinsic Evidence.

3 Witkin Cal. Evid. Presentation § 336

[§ 336] Extrinsic Evidence.

The same completeness and accuracy in setting forth the statement are required in questioning the impeaching witness as in the cross-examination of the witness who is to be impeached. "The proper method of impeachment is to formulate the question so as to embrace the very statement, at least in substance, which the witness whom it is desired to impeach has denied making, and to ask the impeaching witness for a categorical answer whether the statement was made, giving the circumstances of times, places and persons present." (*McLaughlin v. Los Angeles Ry. Corp.* (1919) 180 C. 527, 539, 182 P. 44; see also *Barsotti v. Imperatrice* (1929) 97 C.A. 569, 574, 275 P. 892 [counsel asked impeaching witness whether she had conversation, then asked her to relate it; held reversible error]; 81 Am.Jur.2d (1992 ed.), *Witnesses* §949.)

Earlier cases furnish many illustrations of the practice, although they stress the now abandoned foundation rule (supra, §333). (See *Western Union Oil Co. v. Newlove* (1905) 145 C. 772, 775, 79 P. 542; *Keyes v. Geary Street, Park & Ocean R. Co.* (1907) 152 C. 437, 441, 93 P. 88; *People v. Raven* (1955) 44 C.2d 523, 282 P.2d 866; *People v. Pollock* (1939) 31 C.A.2d 747, 757, 89 P.2d 128.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 81 Am.Jur.2d (2004 ed.), *Witnesses* §916.



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##### 5. Proof.

##### c. Where Witness Admits Making Statement.

*3 Witkin Cal. Evid. Presentation § 337*

[§ 337] Where Witness Admits Making Statement.

If the witness admits the inconsistent statement, the witness is impeached by his or her own testimony, and this may end the inquiry. But there is some room for discretion of the judge, and some distinctions must be borne in mind:

(1) If the admission is unequivocal, the trial judge may properly restrict further cross-examination or extrinsic evidence. (See *People v. Kennedy* (1937) 21 C.A.2d 185, 200, 69 P.2d 224; *People v. Perez* (1961) 189 C.A.2d 526, 536, 11 C.R. 456; 1 McCormick 5th, §37; but see 3A Wigmore (Chadbourn Rev.) §1037, urging contrary rule.)

(2) The witness may, on redirect examination, explain apparent inconsistencies. (*Hale Bros. v. Milliken* (1907) 5 C.A. 344, 363, 90 P. 365; see supra, §256; cf. *Cornwell v. Mulcahy* (1923) 62 C.A. 658, 661, 217 P. 568 [no error in refusing to permit explanation on cross-examination].)

(3) If the witness, after admitting to making the prior statement, offers an explanation, evidence contradicting the explanation has nothing to do with the issues, and will normally be excluded. And in a criminal case, to allow such evidence against the defendant may be seriously prejudicial. Thus, in *People v. Perez*, supra, a narcotics case, to show knowledge, the prosecution brought L, an 18-year-old boy in custody of the Youth Authority for narcotics possession, to testify to a prior purchase from defendant. But L, on direct examination, said he had never seen defendant. The prosecution, claiming surprise, was allowed, over objection, to impeach L by asking him if he had told officers that he had bought heroin from defendant, and he answered that he had, but did so under the inducement of a promise of release from custody. Then the prosecution called officer P to testify that he never held out any such inducement, and introduced a lengthy tape recording of L's conversation with the officers in which L stated that he had purchased both from defendant and his brother and would so testify. *Held*, reversible error. (189 C.A.2d 536.)

However, *People v. Perez* was distinguished in *People v. Barnett* (1998) 17 C.4th 1044, 74 C.R.2d 121, 954 P.2d 384, a murder case in which defendant's friend acknowledged on cross-examination having told both the prosecutor and his own attorney that he had seen defendant's legs smeared with blood. On redirect, however, defense counsel elicited testimony from him to the effect that he had been pressured by his attorney to make the previous statement. The trial judge then allowed the prosecutor to call the witness' attorney, who testified that the witness had told him on two occasions that he had seen blood on defendant. *Held*, this was proper. *People v. Perez* "preceded the enactment of California's Evidence Code and additionally has been disapproved to the extent it purported to bar the introduction of evidence contradicting a material witness's claim that prior inconsistent statements were made as a result of improper police pressures. ... In any event, its holding does not bar the type of evidence challenged here. Unlike the situation in



*People v. Perez*, the testimony in this case did not pertain to an unrelated offense and was not likely to mislead or otherwise confuse the jury. The prior inconsistent statement at bar--Burgess' statement that he observed what appeared to have been blood on defendant the morning after Eggett's murder--was evidence pointing to defendant's involvement in the charged murder and special circumstance allegations. ... By eliciting testimony from Burgess that his attorney had pressured him to lie, the defense evidently sought to cast doubt on the truthfulness of the prior statement and to neutralize its effect. Under these circumstances, the trial court properly allowed the prosecution to offer Vasquez's testimony to rebut the damaging impression." (17 C.4th 1139, 1140.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Admission is unequivocal:* See 1 McCormick 6th, §37. *West's Key Number Digest*, Witnesses k.389



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#### F. Inconsistent Statements.

##### 5. Proof.

##### d. Where Witness Has No Recollection.

3 Witkin Cal. Evid. Presentation § 338

[§ 338] Where Witness Has No Recollection.

(1) *General Rule of Inadmissibility.* Ordinarily, the testimony of a witness that he or she has forgotten an event is not inconsistent with a prior statement describing that event. In enacting *Ev.C. 1235*, "the Legislature has retained the fundamental requirement that the witness' prior statement in fact be 'inconsistent with his testimony at the hearing' before it can be admitted." (*People v. Sam* (1969) 71 C.2d 194, 210, 77 C.R. 804, 454 P.2d 700 [impeachment improper; "a two-year interval and considerable liquor have intervened between incident and trial"]; see *People v. Johnson* (1992) 3 C.4th 1183, 1219, 14 C.R.2d 702, 842 P.2d 1 [witness' "momentary expression of uncertainty" during cross-examination was not inconsistent with statement during preliminary hearing].)

(2) *Distinction: Evasive or Untruthful Answers.* The general rule applies in "normal circumstances"; a deliberately evasive "I don't remember" answer is an implied denial of the fact and inconsistent in effect with the prior statement. (See *People v. Green* (1971) 3 C.3d 981, 988, 92 C.R. 494, 479 P.2d 998, 1 Cal. Evidence (4th), Hearsay, §159 [impeachment proper; "here the delay was only two months, and even during that brief interval the facts must have been kept uppermost in (the witness') mind by such events as the continuing police investigation, his own arrest and detention, his appearance at defendant's hearing, and the preparation for this trial"]; see also *Clifton v. Ullis* (1976) 17 C.3d 99, 104, 130 C.R. 155, 549 P.2d 1251 ["Fairly stated, *Sam* stands for no more than the proposition that 'prior statements are not admissible to impeach a witness whose answers to questions are *exclusively* of the 'I-don't-remember' variety' "; evidence properly excludable may become admissible when witness no longer says "I don't remember," and expressly denies disputed matters]; *People v. Young* (1945) 70 C.A.2d 28, 34, 160 P.2d 132; *People v. O'Quinn* (1980) 109 C.A.3d 219, 224, 167 C.R. 141; 9 U.C. Davis L. Rev. 285, 295; 10 Pacific L. J. 1, 16.)

In *People v. O'Quinn*, *supra*, a murder trial, S made statements to the police on January 7 and 19 concerning the circumstances of the killing. When called as a prosecution witness at the preliminary examination on January 31, she professed not to remember either the circumstances of the killing or the prior statements she had made to the police. The magistrate ruled that the prior statements were admissible. *Held*, the ruling was correct in the light of the following: (a) The short period between the prior statements and the hearing; (b) the fact that the witness, on two occasions, said "I don't remember" before the prosecutor had completed the question, and in all other cases, the "I don't remember" response was immediate without any attempt to ponder; (c) the fact that the witness was the sister of two defendants and the girlfriend of the third. (109 C.A.3d 224.)

The court also, citing federal cases, rejected the contention that to hold the prior statements admissible where the witness asserts lack of recollection is a denial of the defendant's constitutional right of confrontation. "[A]lthough

Sledge was ostensibly unable to remember the circumstances of the crime or her statements to the police, she was nevertheless on the stand and available for cross-examination. The defense was able to cross-examine her about her use of drugs and their effect on her memory, and could have questioned her about possible bias. ... It is possible that further probing by cross-examination might have jogged the witness' memory." (109 C.A.3d 228.)

In *People v. Plasencia* (1985) 168 C.A.3d 546, 223 C.R. 786, the witnesses M and C had made prior statements linking defendant with gang activities on the night of a criminal assault, but at the trial, gave evasive denials and "I don't remember" answers. In holding the prior statements admissible under the tests laid down in *People v. Green*, *supra*, the court said: "Although the memories of the witnesses faltered when asked if they recalled the details of the attack or the statements given to the investigating officers, both were able to recount in detail the allegedly coercive tactics of the police and that they were nowhere near the scene when the crime occurred." (168 C.A.3d 552.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Distinction: Evasive or Untruthful Answers.* See *People v. Ervin* (2000) 22 C.4th 48, 84, 85, 91 C.R.2d 623, 990 P.2d 506 [in light of witness' apparent evasions and unwillingness to testify against defendant at trial, her earlier testimony was properly admitted as prior inconsistent statement]; *People v. Sapp* (2003) 31 C.4th 240, 296, 297, 2 C.R.3d 554, 73 P.3d 433 [in penalty phase of capital murder trial, witness' prior statements regarding disappearance of defendant's mother several years earlier were properly admitted, where her claim that she did not remember statements amounted to deliberate evasion]; *People v. Perez* (2000) 82 C.A.4th 760, 764, 98 C.R.2d 522 [following *People v. O'Quinn* (1980) 109 C.A.3d 219, 167 C.R. 141, text, p. 422]; *People v. Gunder* (2007) 151 C.A.4th 412, 418, 59 C.R.3d 817 [evidence supported trial judge's implicit conclusion that witness' testimony that he did not remember event "because of medication" was not credible, and thus his prior extrajudicial statement was properly admitted; it was not probable that witness would forget defendant's shooting himself through leg after dropping gun in close proximity to witness but could recall threatening message from one of victims merely because he had written it down].



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F. Inconsistent Statements.

5. Proof.

e. Inapplicability of Corpus Delicti Rule.

3 *Witkin Cal. Evid. Presentation* § 339

[§ 339] Inapplicability of Corpus Delicti Rule.

The rule that the corpus delicti of a crime must be established independently of the accused's extrajudicial admissions (see 1 *Cal. Crim. Law* (3d), *Elements*, §45 et seq.) is inapplicable to a defendant's prior inconsistent statement regarding other crimes. "There is no requirement that the proponent of a prior inconsistent statement prove the truth of the prior statement since it is inconsistency itself which makes the prior statement relevant and admissible evidence." (*People v. Martinez* (1996) 51 *C.A.4th* 537, 543, 546, 59 *C.R.2d* 54 [where murder defendant testified she "wouldn't shoot anybody," her prior statement that she had shot at other people before was properly introduced without proof of any prior shooting].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### G. Contradictory Evidence on Relevant Matter.

##### *3 Witkin Cal. Evid. Presentation § 340*

[§ 340] Contradictory Evidence on Relevant Matter.

(1) *General Rule.* A witness may be impeached by evidence of the "nonexistence of any fact" testified to by the witness. (*Ev.C. 780(i)*.) In other words, if a witness is shown to have testified erroneously as to any particular relevant matter, an inference of untrustworthiness may be drawn as to the rest of his or her testimony. (See *supra*, §110.) Hence, evidence may be introduced to contradict or expose the error or falsity of the particular testimony. (See 3A Wigmore (Chadbourn Rev.) §1008 et seq.; 81 *Am.Jur.2d* (1992 ed.), *Witnesses* §992.)

(2) *Evidence Admissible.* In *Khan v. Zemansky* (1922) 59 C.A. 324, 210 P. 529, the action was for recovery of a ring, and defendant's witness testified that on March 19, he was in defendant's store and saw him deliver it to plaintiff. The witness fixed the date by a sale of stock he made there to M. In rebuttal, plaintiff called M, who testified to only one purchase of stock from the witness on May 10. *Held*, this was admissible as tending to discredit the statement of the witness that he was in the store. (59 C.A. 326.)

In *Moody v. Peirano* (1906) 4 C.A. 411, 88 P. 380, plaintiff sued for breach of warranty of quality in the sale of seed wheat. Defendant testified that he sold seed to Main and Myall on the same conditions, without warranty. In rebuttal, plaintiff called Main, who testified that he had bought seed from the same lot with a warranty. *Held*, this was proper contradiction on a relevant matter, as tending to show defendant's course of business and bearing on the probability of a warranty in the sale to plaintiff. (4 C.A. 416.) (See *Firlotte v. Jessee* (1946) 76 C.A.2d 207, 210, 172 P.2d 710, 1 Cal. Evidence (4th), *Circumstantial Evidence*, §112 [following *Moody v. Peirano* in somewhat similar situation].)

In *Greenleaf v. Pacific Tel. & Tel. Co.* (1919) 43 C.A. 691, 185 P. 872, plaintiff's theory was that defendant's janitor, depositing ashes in a can near plaintiff's building, set it on fire. The janitor testified that he knew he poured water over the ashes because he did so every night. Plaintiff then called another witness, a former employee of defendant, to testify that he had observed, on some occasions during the past month, that the janitor did not wet the ashes. *Held*, this should have been allowed, because it would weaken the janitor's testimony as to his invariable habit. (43 C.A. 694.) (See also *Gadbury v. Ray* (1959) 171 C.A.2d 150, 157, 340 P.2d 66; 1 McCormick 5th, §49; 3A Wigmore (Chadbourn Rev.) §1000 et seq.; *supra*, §239 [evidence of subsequent precautions to contradict opinion as to safety].)

In *Rousseau v. West Coast House Movers* (1967) 256 C.A.2d 878, 64 C.R. 655, a personal injury action, plaintiff claimed that head injuries changed him from a sober, reliable worker into a victim of traumatic epilepsy, and he denied any past or present history of drunkenness. Defendant introduced evidence of plaintiff's arrests for drunkenness before and after the accident, consisting of reports of arresting officers describing the facts of intoxication directly observed by

them. (See 1 *Cal. Evidence* (4th), *Hearsay*, §239.) *Held*, admissible: *First*, to refute plaintiff's claim that his difficulties were recent and caused by the accident. *Second*, to rebut his claim of the cause of epilepsy, by showing that it resulted from excessive drinking. (256 C.A.2d 886.)

In *People v. Ogg* (1968) 258 C.A.2d 841, 66 C.R. 289, a homicide case, defendant, in support of his claim of self-defense, testified to his state of mind: He believed that decedent victim had been drinking, and he feared him when he was drinking. The prosecutor asked him about a conversation with P, 2 weeks after the incident, in which defendant had said, "I'll knock that punk out again." Defendant denied it, and the prosecution called P, who testified to the statement. *Held*, this was admissible, tending to disprove a consequential disputed fact--whether defendant feared the decedent. (258 C.A.2d 847.) (See also *People v. Schumacher* (1967) 256 C.A.2d 858, 864, 64 C.R. 494 [to impeach defendant's denial that he knew what heroin looked like, undercover officer called to prove purchase of heroin from defendant on date after offense charged].)

In *Leader v. California* (1986) 182 C.A.3d 1079, 226 C.R. 207, plaintiff brought an action for assault and battery, alleging that police officers used excessive force to arrest him. In the criminal prosecution, he was convicted of the misdemeanors of resisting arrest and battering an officer. In the civil action, the trial judge refused to allow proof of the misdemeanor convictions, and the jury returned a verdict for plaintiff. *Held*, judgment reversed.

(a) The misdemeanor convictions for a serious offense, after a full and fair hearing, could be used as collateral estoppel on the issue involved in the present civil suit. (182 C.A.3d 1084, 1088, 1089; see 7 *Cal. Proc.* (4th), *Judgment*, §333.)

(b) The convictions were also admissible under *Ev.C.* 780(i) for the limited purpose of proving the nonexistence of facts testified to by him (that he was not belligerent or uncooperative and that he never struck the officer or resisted arrest). (182 C.A.3d 1089, 1090, 1091.)

(3) *Evidence Inadmissible.* In *People v. Rodriguez* (1999) 20 C.4th 1, 82 C.R.2d 413, 971 P.2d 618, a prosecution witness testified that, while walking his dog on the roof of his apartment building, he had seen defendant shoot the victim. Defendant proffered impeachment testimony by the female apartment manager that she had not granted the witness permission to go on the roof. *Held*, the trial judge properly excluded the testimony.

The relevant issue is whether the witness was actually on the roof at the time of the murder. The manager's testimony that she had not granted the witness permission to use the roof "plainly had little, if any, tendency in reason to prove that [the witness] in fact had not gone on the roof and, hence, that he testified untruthfully." (20 C.4th 10.) First, the manager's testimony did not directly meet the witness' testimony, which was, in effect, that a male apartment manager had allowed him to walk his dog on the roof. The proffered testimony did not encompass the question whether the female manager's husband, who was also a manager, had granted permission. Second, the proffer did not demonstrate any personal knowledge by the female manager about whether the witness had gone on the roof. The fact that she allegedly possessed no information that the witness had done so did not impeach his testimony that he had. Finally, counsel's representation that the female manager "might" testify that she had herself gone on the roof and had noticed no trace of dog excrement or urine stains was both uncertain and vague as to the time of the observations. (20 C.4th 10.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *General Rule.* See 81 *Am.Jur.2d* (2004 ed.), *Witnesses* §959.

(2) *Evidence Admissible.* See *In re Marriage of Balcof* (2006) 141 C.A.4th 1509, 1528, 47 C.R.3d 183 [in marital dissolution proceeding in which husband contended that agreement transferring assets from husband to wife was product of undue influence, and wife testified that she never yelled at their children, never used profanities when addressing children, and never interfered with their seeing husband, admission of tape recording of wife doing all of these things did not constitute abuse of discretion]; 1 *McCormick* 6th, §49. *West's Key Number Digest*, *Witnesses* k.398-



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## CHAPTER XI - Presentation At Trial

### XI. IMPEACHMENT

#### H. Impeachment on Collateral Matter.

##### 1. In General.

##### a. Former Exclusionary Rule.

*3 Witkin Cal. Evid. Presentation § 341*

[§ 341] Former Exclusionary Rule.

Proof that a witness was in error in some statement tends to show that the witness is untrustworthy. (See *supra*, §110.) And where the statement concerns a matter that is relevant and therefore could be proved or disproved independently of the impeachment, admissibility of contradictory evidence or of prior inconsistent statements is unquestioned. (See *supra*, §340.) But if it deals with a matter that is not relevant and could not be the subject of proof independently of the impeachment, i.e., "a collateral matter," there are sound policy objections to admitting the impeaching evidence: the possibility of unfair surprise, confusion of issues, and undue consumption of time. (See 1 McCormick 5th, §49; 3A Wigmore (Chadbourn Rev.) §§1001, 1002.)

There are indications in prior California cases that the trial judge had some measure of discretion to allow or prevent cross-examination on collateral matters. (See *People v. Atchley* (1959) 53 C.2d 160, 172, 173, 346 P.2d 764, citing the text.) But extrinsic evidence was held inadmissible, pursuant to an inflexible rule of exclusion. (See *People v. Burness* (1942) 53 C.A.2d 214, 220, 127 P.2d 623; *People v. Vanderburg* (1960) 184 C.A.2d 33, 41, 7 C.R. 287; *People v. Singer* (1963) 217 C.A.2d 743, 760, 32 C.R. 701; 1 McCormick 5th, §§36, 49; 3A Wigmore (Chadbourn Rev.) §1001.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 1 McCormick 6th, §§36, 49. *West's Key Number Digest*, Witnesses k.383



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#### H. Impeachment on Collateral Matter.

##### 1. In General.

##### b. Evidence Code.

3 Witkin Cal. Evid. Presentation § 342

[§ 342] Evidence Code.

(1) *Rule of Discretion.* The Evidence Code, following the approach of the original Uniform Rules, eliminated the inflexible rule, and substituted the broad discretion of the judge. This was accomplished as follows: (a) No mention is made of "collateral" as a ground of exclusion. (b) The general discretion of the judge under *Ev.C.* 352 to exclude any evidence in order to prevent confusion of issues or undue consumption of time (*1 Cal. Evidence (4th), Circumstantial Evidence, §17*) applies; hence, the judge may either allow or refuse to permit impeachment on a collateral matter in any particular situation. (See *Ev.C.* 780, Comment; see *People v. McHenry* (1962) 204 C.A.2d 764, 768, 22 C.R. 621, *infra*, §353, quoting McCormick; *People v. Pierce* (1969) 269 C.A.2d 193, 199, 75 C.R. 257, citing the text; *People v. Fusaro* (1971) 18 C.A.3d 877, 885, 96 C.R. 368, citing the text; *People v. Benjamin* (1974) 40 C.A.3d 1035, 1041, 115 C.R. 668, citing the text [right to cross-examine witness does not mandatorily make admissible every effort to impeach witness on collateral matter]; *People v. Wall* (1979) 95 C.A.3d 978, 986, 157 C.R. 587; *People v. Benson* (1982) 130 C.A.3d 1000, 1006, 180 C.R. 921 [testimony that defendant and P had committed uncharged robbery few days before charged robbery was admissible to impeach defendant's testimony that he had not seen P for few years; impeaching witness could give details of uncharged robbery because it tended to establish her credibility]; 9 *U.C. Davis L. Rev.* 285, 305; 10 *Pacific L. J.* 1, 18.)

In *Smith v. Lewis* (1975) 13 C.3d 349, 118 C.R. 621, 530 P.2d 589, a legal malpractice case, defendant testified that he always attempted to achieve the best possible result for his client, no matter how tenuous he viewed a useful theory, and that if he personally had doubts that an asset belonged to the community in a marriage dissolution action, he would still assert his client's interest to the asset. *Held*: "Such testimony may legitimately be impeached by showing that defendant had made contradictory statements in the past and had conducted himself in an inconsistent manner, though the impeachment may relate to a collateral matter." (13 C.3d 363, citing the text.)

(2) *Effect on Prior Case Law.* The rule affects California case law as follows: (a) The existing test of "collateral matter" remains. (See *infra*, §343.) (b) Decisions upholding or directing exclusion under the inflexible rule may be persuasive but not controlling on the proper exercise of discretion. (See *infra*, §346 et seq.) (c) Cases that found exceptions justifying impeachment even under the inflexible rule should be considered controlling authority for permitting it under the discretionary rule. (See *infra*, §352 et seq.)

(3) *Newly Discovered Evidence on Collateral Matter.* In *Lubeck v. Lopes* (1967) 254 C.A.2d 63, 62 C.R. 36, the court distinguished the problem of discretion to admit (citing the text) from the question whether newly discovered evidence to impeach on a collateral matter is a sufficient basis for granting a new trial. Plaintiff in one automobile was



injured in a collision with defendant L's automobile. L testified to good vision, and mentioned an eye examination by Dr. M. On motion for new trial, plaintiff filed an affidavit showing inability to discover a doctor of that name. Since L's eyesight was never made an issue in the trial, the name was a collateral matter. The new evidence would have been of slight importance, and did not justify a new trial; hence, the order granting the new trial was reversed. (254 C.A.2d 68, 69.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER XI - Presentation At Trial

### XI. IMPEACHMENT

#### H. Impeachment on Collateral Matter.

##### 2. What Are Not Collateral Matters.

##### a. Independently Provable Matters.

#### 3 Witkin Cal. Evid. Presentation § 343

[§ 343] Independently Provable Matters.

(1) *Matters Relevant to an Issue.* Obviously, a matter relevant to an issue cannot be called "collateral," and may always be proved, to establish the issue, or to impeach an opposing witness, or for both purposes. (See *supra*, §340.)

In *People v. Pollock* (1939) 31 C.A.2d 747, 89 P.2d 128, a trial for murder with a claim of self-defense, defendant's wife was asked if defendant had told her that, if he went to prison, he would kill the victim's baby. She denied this. The prosecution then called a witness who testified that defendant's wife had informed him of such a threat by defendant. *Held*, this was admissible. The question was relevant to the issue of malice or ill will toward the deceased and his family, and had a bearing on consciousness of guilt. (31 C.A.2d 757.) (See also *Western Union Oil Co. v. Newlove* (1905) 145 C. 772, 775, 79 P. 542.)

In *Huntingdon v. Crowley* (1966) 64 C.2d 647, 51 C.R. 254, 414 P.2d 382, plaintiff mother, in a paternity suit against defendant, testified that she had no relations with any other men during the conception period. Defendant, on cross-examination and by witness W, developed the fact that plaintiff had spent nights with W during the period. *Held*, the evidence was admissible. Ordinarily, the mother's chastity is not in issue, and degrading questions indicating immorality should not be permitted (*infra*, §349). But here, the evidence was properly received: (a) as impeachment of plaintiff's assertion of devotion to defendant, and (b) as affirmative evidence indicating that W, not defendant, was the father. (64 C.2d 657.)

(2) *Other Matters Independently Provable.* The converse of the above stated proposition is not true; i.e., the early suggestion that matters not relevant to an issue are collateral (see *People v. Devine* (1872) 44 C. 452, 458) has been disapproved. The test is broader: If the matter could have been proved without any statement of the witness to contradict, it can also be proved to contradict his or her statement. (See *People v. Chin Mook Sow* (1877) 51 C. 597, 600; *Moody v. Peirano* (1906) 4 C.A. 411, 416, 88 P. 380 ["If the answer of the witness is a matter which would be allowed on your part to prove in evidence ... , then it is a matter on which you may contradict him"]; *People v. Factor* (1932) 125 C.A. 618, 621, 13 P.2d 984; *Mendez v. Superior Court* (1988) 206 C.A.3d 557, 577, 253 C.R. 731, quoting the text; 1 McCormick 5th, §§36, 49; 3A Wigmore (Chadbourn Rev.) §§1003 et seq., 1020 et seq.; 81 Am.Jur.2d (1992 ed.), Witnesses §994.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(2) *Other Matters Independently Provable.* See 81 Am.Jur.2d (2004 ed.), Witnesses §961; 1 McCormick 6th, §§36, 49.



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## 2. What Are Not Collateral Matters.

## b. Matters Affecting Credibility.

## 1. Bias, Interest, or Other Improper Motive.

## 3 Witkin Cal. Evid. Presentation § 344

[§ 344] Bias, Interest, or Other Improper Motive.

A witness may be asked on cross-examination whether he or she is biased, interested, has a hostile feeling, or had offered to suppress evidence. (See *supra*, §267 et seq.) If the witness' answer is a denial, other witnesses can be called in rebuttal to contradict him or her. These questions relate to the witness' credibility, and the facts of such improper motive or bias can be shown in any event. Hence, they are not collateral matters, and may be proved by extrinsic evidence. (See *Lewis v. Steiger* (1885) 68 C. 200, 201, 8 P. 884 [offer to procure evidence]; *Barkly v. Copeland* (1890) 86 C. 483, 486, 25 P. 1; *People v. Wong Chuey* (1897) 117 C. 624, 627, 49 P. 833; *People v. Sweeney* (1960) 55 C.2d 27, 41, 9 C.R. 793, 357 P.2d 1049; *People v. Keyes* (1930) 103 C.A. 624, 643, 284 P. 1096; *Kelley v. Bailey* (1961) 189 C.A.2d 728, 736, 11 C.R. 448; 1 McCormick 5th, §§36, 49; 3A Wigmore (Chadbourn Rev.) §§1005, 1022; 81 Am.Jur.2d (1992 ed.), Witnesses §999.)

Thus, in *Barkly v. Copeland*, *supra*, a witness for defendant, on cross-examination, was asked whether she had not made an offer to N to suppress her testimony in this case for a certain consideration. Plaintiff's intention was to call N to give the facts if she denied them. Objection was sustained. *Held*, the question should have been allowed. (86 C. 486.)

In *People v. Sweeney*, *supra*, a conviction for giving a narcotic to a hospital patient, W, the patient, testified for defendant that he had never given her any. On cross-examination, she was asked if defendant had ever given her money, if she had lived with him and if she claimed that he was the father of her two children. She answered "No" to all questions. In rebuttal, Mrs. M, a deputy probation officer, testified that W had told her that she lived with defendant as a common-law wife, that the two children were his and that defendant paid her rent and gave her money for food. Birth certificates signed by her and naming defendant as the father were also introduced. *Held*: "The challenged evidence was properly admissible as bearing on the interest and bias of Willi Williams and was not rendered improper because it disclosed defendant's extra-marital relationship. The state of mind of a witness as to bias, prejudice, interest involved, friendship or hostility toward a party are all proper subjects for investigation in the trial of a case." (55 C.2d 41.) (See also *People v. Dukes* (1966) 241 C.A.2d 488, 493, 50 C.R. 609 [homosexual relationship].)

In *Kelley v. Bailey*, *supra*, a personal injury case, defendant, cross-examining plaintiff's doctor, asked him if his testimony had ever been influenced by the person who paid him. The doctor said no. Then defendant, over repeated objection, asked him whether in a certain case he had prepared a report showing serious injury and sent it to the plaintiff, thereafter discovering that he had been hired by the defendant, and changing the report to show no injury. The doctor denied this, and defendant then read from the transcript of that case to show the fact and the doctor's insistence

that he had actually changed his mind about the injuries. *Held*, the evidence was admissible to show bias and prejudice of the witness. (189 C.A.2d 736.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 81 Am.Jur.2d (2004 ed.), *Witnesses* §966; 1 McCormick 6th, §§36, 49. *West's Key Number Digest*, *Witnesses* k.330 et seq.



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##### 2. What Are Not Collateral Matters.

##### b. Matters Affecting Credibility.

##### 2. Other Grounds.

#### 3 *Witkin Cal. Evid. Presentation* § 345

[§ 345] Other Grounds.

"Any fact may be called out in cross-examination which a jury might deem inconsistent with the direct testimony of a witness, and a defendant testifying in his own behalf is in this respect put upon the same plane with other witnesses." (*People v. Linyard* (1957) 151 C.A.2d 50, 56, 311 P.2d 57.)

In *Linyard*, defendant, charged with illegal possession of narcotics, explained his presence in a rooming house as for the purpose of seeing his wife and children who lived there. *Held*, the prosecutor properly asked whether he had been separated from his wife and had been jailed for nonsupport, as discrediting the explanation he gave for his presence there. (151 C.A.2d 56.)

In *People v. Burton* (1961) 55 C.2d 328, 11 C.R. 65, 359 P.2d 433, defendant was convicted of a sex offense with W, a 7-year-old girl. His wife testified that she did not tell Miss B that W had complained of a prior molestation by defendant 2 years ago. Miss B was called in rebuttal to testify that the wife told her that the child said he had put her hand on his body. This did not relate to an issue, but it was admissible to aid in determining the credence to be given to the wife, who contradicted several prosecution witnesses on material matters. (55 C.2d 353.) (See also *Davis v. California Powder Works* (1890) 84 C. 617, 633, 24 P. 387, *supra*, §264 [contradiction of testimony concerning date of another collateral document, to show poor memory or recollection on vital issue of date of document involved in suit].)

The Evidence Code makes admissibility of this kind of evidence abundantly clear by defining "relevant evidence" to include "evidence relevant to the credibility of a witness." (*Ev.C. 210.*)

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#### 3. What Constitutes Collateral Impeachment.

##### a. Cross-Examination.

*3 Witkin Cal. Evid. Presentation § 346*

[§ 346] Cross-Examination.

The cases discussed or cited in this and the following section include many decided before the adoption of the Evidence Code. These are no longer controlling on their basic premise of a positive rule of exclusion, but they illustrate the kind of evidence that the courts regard as collateral, and now subject to discretionary admission or exclusion (see *supra*, §342).

In *People v. Dye* (1888) 75 C. 108, 16 P. 537, defendant, charged with murder, pleaded self-defense. While testifying to his wife's improper relations with the victim, he made the irrelevant observation that his wife went to visit her mother in San Francisco. In cross-examination (as well as in rebuttal), the prosecution was allowed to show that she went to Los Angeles instead; that she saw C, with whom she had had illicit relations, in a saloon; and that her husband sent her there. *Held*, this was reversible error. "A party cannot cross-examine his adversary's witness upon irrelevant matters, for the purpose of eliciting something to be contradicted. And if such matters are drawn out, the court should stop the inquiry there. ... The introduction of irrelevant evidence by one side does not justify the introduction of further irrelevant evidence by the other." (75 C. 112.)

Similarly, in *Khan v. Zemansky* (1922) 59 C.A. 324, 210 P. 529, plaintiff sued for recovery of a ring, and he and his wife testified to their marriage in Montana. Defendant sought to impeach by showing that in another action, they had testified that they were married in California. *Held*, this was improper. (59 C.A. 326.)

In *Crosby v. Martinez* (1958) 159 C.A.2d 534, 324 P.2d 26, a personal injury action, plaintiff woman was cross-examined, over objection, on her lack of a California driver's license, on the fact that she had secured a Michigan license under a fictitious name, and on the fact that she had been convicted of some undefined felony under a fictitious name. *Held*, this was error; all the questions were foreign to the issues (lack of a driver's license is not evidence of negligence). (159 C.A.2d 542.)

In *People v. Golden* (1961) 55 C.2d 358, 11 C.R. 80, 359 P.2d 448, defendant was previously twice tried for statutory rape of P, the first trial ending in a mistrial and the second in a hung jury. In these trials, defendant's stepdaughter W, who was present at the crucial times, was not called as a witness by either side, defendant contending that he wanted to protect her from unpleasantness. In the third trial, the prosecuting attorney delayed calling W until the 4th day, and then, with defendant's wife on the stand as a witness for him, questioned her and elicited her assurance that her daughter would be home for service of a subpoena. The next day, the prosecutor claimed that his server could not locate W, and in argument, stressed the wife's failure to tell the truth about her daughter being available. *Held*, this

questioning of the wife was not proper cross-examination; the issue of W's availability had nothing to do with the events testified to in chief. Obviously, the prosecution delayed calling W to allow defendant to produce her so they could cross-examine; then they undertook a "grand stand play" which the court should have halted. (55 C.2d 368.)

In *People v. Ross* (1969) 276 C.A.2d 729, 81 C.R. 296, at defendant's second trial for robbery, he was identified by a salesman whom he had allegedly forced to lie down at gunpoint. Defense counsel questioned the witness about his recollection of court personnel at the first trial. When the salesman said he was not positive but thought the same clerk was present, counsel made an offer of proof that the first clerk was a white woman and the second a black man. *Held*, the trial judge did not abuse his discretion in rejecting the offer. The "test instance," i.e., the in-court test of a witness' ability to observe and recollect a fact not material to the case but illustrative of his general ability to make observations and then recall and relate them, was improper. It did not fairly measure the salesman's power to observe and remember, because a layman would be less likely to remember a court clerk than a robber committing a crime in the store in his presence. (276 C.A.2d 734.)

In *People v. Laverne* (1971) 4 C.3d 735, 94 C.R. 405, 484 P.2d 77, a robbery prosecution, defense counsel cross-examined O, a confessed accomplice, as to where O had gotten the automobile used in the robbery. Over the prosecution's objection, O testified that he had bought the car, and denied that it was stolen. The defense then sought to impeach O's credibility by showing that the automobile actually had been stolen, but the trial judge sustained an objection under *Ev.C. 352* (1 Cal. Evidence (4th), *Circumstantial Evidence*, §17). *Held*, no error. "The fact that the car was stolen had nothing to do with the facts at issue in the trial. Oliver admitted that he used the car in the robbery. How he came to be possessed of the vehicle had no bearing on Laverne's guilt or innocence and furnished Oliver no motive for falsely implicating Laverne." (4 C.3d 742.) Two additional factors supported the judge's exercise of discretion: (a) "A witness may have a strong reason to lie about the collateral fact which reason would furnish no motive to lie in his other testimony. Where such a situation exists, the possible inference that a witness false in part of his testimony is not to be trusted as to other parts is weakened." (4 C.3d 743.) Here, O apparently had not been charged or convicted of car theft and so had a motive to lie about his ownership, but not about his other testimony. (4 C.3d 743.) (b) Defendant deliberately elicited O's testimony for impeachment purposes. "It seems apparent that the defense knew the origin of the Cadillac in advance. If the witness answered truthfully that he had stolen the vehicle, the defendant would have had the benefit of the admission of an irrelevant fact which would affect the witness' credibility. But the witness denied it was stolen and defendant now wishes to bring otherwise inadmissible testimony in to impeach him. *A party may not cross-examine a witness upon collateral matters for the purpose of eliciting something to be contradicted.* ... This is especially so where the matter the party seeks to elicit would be inadmissible were it not for the fortuitous circumstance that the witness lied in response to the party's questions." (4 C.3d 744.)

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#### 3. What Constitutes Collateral Impeachment. b. Rebuttal Witnesses.

3 Witkin Cal. Evid. Presentation § 347

[§ 347] Rebuttal Witnesses.

The former inflexible exclusionary rule (*supra*, §341) was most positively declared when the cross-examiner sought to bring in rebuttal witnesses to contradict an answer elicited on cross-examination.

Thus, in *Trabing v. California Navigation & Imp. Co.* (1898) 121 C. 137, 53 P. 644, an action for damages for injuries resulting from plaintiff's ejection from a boat, his mother was asked, on cross-examination, whether she had previously told P that plaintiff admitted he had not paid the fare. On her denial, P was called to relate the conversations. *Held*, this evidence was properly excluded. "What she may have said to Mr. Parker was a purely collateral matter, and did not bind or affect the plaintiff; and no rule of evidence is better settled than that collateral matters cannot be elicited for the purposes of impeachment, and that a party putting such collateral question is bound by the answers of the witness." (121 C. 144.)

In *Tellefsen v. Key System Transit Lines* (1958) 158 C.A.2d 243, 322 P.2d 469, a personal injury suit, plaintiff's surgeon testified that he was on the staffs of two hospitals. On cross-examination, he was asked "have you attempted to get on the staff" of another hospital, and answered "No, not recently." Defendants thereafter sought to prove by the business manager of the other hospital that the surgeon had applied and had been refused. *Held*, the offer was properly rejected. (a) If in some way relevant to the doctor's qualifications as an expert, the offered evidence was incompetent hearsay. (b) It did not go to his credibility because he had not claimed such membership on direct. (c) Hence, the cross-examination was merely designed to elicit an answer that could be contradicted on an irrelevant collateral matter. (158 C.A.2d 246.)

In *People v. Smith* (1967) 249 C.A.2d 395, 57 C.R. 508, a homicide case, Mrs. H was a witness to the killing. In her testimony, she referred to a theft by one C from one H, 5 days before the killing. Defendant sought to impeach her by proof that she had observed the theft and shared in the proceeds. *Held*, the offer of proof was properly rejected, for whether C robbed H and whether Mrs. H observed this act were immaterial to the issue of whether defendant shot the victim. (249 C.A.2d 406.)

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#### 4. Collateral Impeachment Degrading Character.

##### a. Theory of Exclusion.

3 Witkin Cal. Evid. Presentation § 348

[§ 348] Theory of Exclusion.

(1) *Former Law.* Former C.C.P. 2065 recited a privilege of a witness not to answer a question that would have a direct tendency to degrade his or her character, unless the question involved a fact in issue. The privilege was designed to protect the witness against disclosure of discreditable facts that were *irrelevant*, and thus would simply injure the witness without accomplishing any legitimate purpose of proof. If, however, the evidence was actually relevant, its degrading effect was not a proper basis of objection. (See *In re Black* (1937) 21 C.A.2d 359, 360, 69 P.2d 200; *San Chez v. Superior Court* (1957) 153 C.A.2d 162, 165, 314 P.2d 135 [separate maintenance; defendant required to answer questions concerning adulterous relations with other women]; 88 A.L.R.3d 304 [privilege of witness to refuse to give answers tending to disgrace or degrade witness or witness' family].)

(2) *Present Law.* This privilege has disappeared in most jurisdictions, its purposes being substantially served by the rule against impeachment on collateral matters. (See 1 McCormick 5th, §40; 3A Wigmore (Chadbourn Rev.) §§984, 986; 8 Wigmore (McNaughton Rev.) §§2215, 2255.)

The Evidence Code omits it as sufficiently covered by other rules: *Ev.C. 350, 1 Cal. Evidence (4th), Circumstantial Evidence*, §6 [exclusion of irrelevant evidence]; *Ev.C. 787, supra*, §285 [specific acts not admissible to prove character]; *Ev.C. 765, supra*, §77 [court must protect witness against "undue harassment or embarrassment"]. (See also A.B.A. Model Rules of Professional Conduct, Rules 3.4 [in trial, lawyer must not allude to any matter that lawyer does not reasonably believe is relevant], 4.4 [in representing client, lawyer must not use means that have no purpose other than to embarrass third person]; 1 *Cal. Proc. (4th), Attorneys*, §§445, 454.)

Decisions relying on both the privilege and the collateral matter rule in cross-examination cases, and on the collateral matter rule in rebuttal witness cases, should be unaffected by the elimination of the so-called privilege. It would appear, also, that in this class of cases, the judge's discretion (*supra*, §342) should almost invariably be exercised to exclude the degrading collateral evidence, for whatever value it might have is substantially outweighed by its prejudicial effect. Putting it another way, the decisions holding that admission of such evidence was a violation of the privilege or of the former collateral matter exclusionary rule may now be cited to the point that its admission constitutes an abuse of discretion.

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(2) *Present Law.* See 1 McCormick 6th, §40. *West's Key Number Digest*, Witnesses k.330(3)



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##### b. Illustrations: Civil Cases.

3 Witkin Cal. Evid. Presentation § 349

[§ 349] Illustrations: Civil Cases.

In *Steen v. Santa Clara Valley Mill & Lumber Co.* (1901) 134 C. 355, 66 P. 321, an action for damages for destruction of cord-wood, plaintiff's foreman testified to the origin of the fire and extent of damages. On cross-examination, he was asked whether he had told D that he wanted to dispose of some of plaintiff's wood under D's name, and whether he had told C that he was disposing of wood and falsifying reports. He denied this, and D and C were called to testify to that effect. *Held*, admission of the statements was improper. (134 C. 356.)

In *Stickel v. San Diego Elec. Ry. Co.* (1948) 32 C.2d 157, 195 P.2d 416, plaintiff was suing for wrongful death of his wife. Defendant sought to question him as to his identity and the date and fact of his marriage, although it was admitted that he was the husband of deceased. *Held*, objections were properly sustained, for it appeared that the purpose was to show that he had used aliases, and had been arrested or convicted of misdemeanors under various names. (32 C.2d 164.)

In *Dastagir v. Dastagir* (1952) 109 C.A.2d 809, 241 P.2d 656, an action by a mother to establish the paternity of her child, it was held error to admit evidence of immorality of the mother at periods prior to the time of probable conception. This evidence was too remote to be relevant on the issue of paternity, and it merely tended to degrade her. (109 C.A.2d 814.)

In *Browning v. King* (1958) 159 C.A.2d 326, 324 P.2d 14, a personal injury action by husband and wife arising out of an automobile collision, both plaintiffs testified. Impeaching testimony was directed at plaintiff husband, who had alleged a fractured right arm. (a) Defendant produced testimony of a deputy sheriff to the husband's assaults shortly before the accident, for the ostensible purpose of showing injury to the right arm. (b) The husband was questioned about a subsequent accident, then about prior accidents and fights, and his denial of an industrial accident was contradicted by introducing an Industrial Accident Commission file. *Held*, admission of this evidence, tending to show the husband as accident-prone and a brawling character, was prejudicial error; the jury "was permitted to listen to a long series of evidential items calculated, intentionally or unintentionally, to provide a somewhat unsavory character picture of the plaintiff." (159 C.A.2d 329.)

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#### 4. Collateral Impeachment Degrading Character.

##### c. Illustrations: Criminal Cases.

##### 1. Ordinary Witness.

3 Witkin Cal. Evid. Presentation § 350

[§ 350] Ordinary Witness.

In *People v. Vanderburg* (1960) 184 C.A.2d 33, 7 C.R. 287, defendant, charged with unlawful furnishing of marijuana, testified, and called friends and associates to testify, in flat contradiction of the state's witnesses. With the issue of credibility of the witnesses thus crucial, the prosecuting attorney deliberately and repeatedly sought, on cross-examination of defendant's witnesses, to show criminal and immoral conduct; and, as to some of the matters denied, produced affirmative evidence. *Held*, this was reversible error. The prosecutor's theory that he was entitled to show the hostility of defendant's witnesses toward the state's principal witness, an undercover agent, was untenable (see *supra*, §277). The court added:

"A party must be allowed to subpoena and to produce on the witness stand any person who has knowledge of facts material to the issues being tried. He certainly cannot be expected to be ready to combat evidence that a witness sometime in his life has been a bad man, nor can a witness be reasonably subjected to such an abrupt and surprising attack. That is why matters affecting his morality and his past life are limited by the statute to evidence 'that his general reputation for truth, honesty, or integrity is bad' and, conversely, 'that evidence may not be given of particular wrongful acts.' " (184 C.A.2d 42.)

In *People v. Thomas* (1962) 204 C.A.2d 292, 22 C.R. 78, defendant, charged with robbery, called Dr. D as his witness to establish an injury to his right hand shortly before the crime, to support the inference that he could not have delivered the blows of which the prosecution witness testified. The prosecutor then drew out from the doctor, by questioning him on his report, that 8 years before, defendant had received a medical discharge from military service for a single instance of asthma. The obvious purpose of the questioning was to elicit the doctor's statement that this was not usual, and that defendant was malingering then, and therefore could be malingering now. *Held*, this evidence was no more admissible than evidence of prior criminal acts merely to show criminal disposition. (204 C.A.2d 299.)

In *People v. Souza* (1970) 11 C.A.3d 873, 90 C.R. 54, the prosecution sought to establish defendant's knowledge of the narcotic nature of marijuana by extensively cross-examining several of his close friends about *their* dealings in narcotics. *Held*, this was improper. The "very vivid" picture which the prosecution painted to show defendant's involvement "far exceeded the quantum of proof required to show knowledge." The evidence "suffered the double vice of establishing (a) guilt by association, and (b) an attempt to prove a disposition on appellant's part to use and traffic in narcotics." (11 C.A.3d 878.) The court said:

"We do not hold that the prosecution is forbidden to examine a defendant or his witnesses for the purpose of establishing defendant's knowledge of the narcotic nature of marijuana. We hold only that such examination must be limited to establishing *that fact* alone, and must not be extended to extraneous matters designed, as here, to improperly and unfairly influence the jury to draw inferences of guilt of the crimes charged from proof of knowledge of the narcotic nature of marijuana." (11 C.A.3d 878.) (See also *People v. Phillips* (1985) 41 C.3d 29, 49, 222 C.R. 127, 711 P.2d 423 [evidence of acts of prostitution by witness, who lived with defendant and who had been charged but not tried as accomplice, properly excluded; questionable relevance outweighed by prejudice (see 1 Cal. Evidence (4th), Circumstantial Evidence, §17 et seq.)]; *People v. Ortiz* (1979) 95 C.A.3d 926, 930, 935, 157 C.R. 448 [homicide trial, victim's wife questioned concerning religious cult to which she and defendant belonged, which practiced animal sacrifices in which defendant participated]; *People v. Hill* (1995) 34 C.A.4th 727, 738, 41 C.R.2d 39 [defendant sought to impeach prosecution witness pursuant to *People v. Wheeler* (1992) 4 C.4th 284, 14 C.R.2d 418, 841 P.2d 938, supra, §286, with evidence of acts of moral turpitude; trial judge properly excluded, as collateral matters, details of sex offenses committed while witness was present but in which she did not participate].)

Before the enactment of statutory restrictions on cross-examination of the prosecutrix in a rape case (see 1 Cal. Evidence (4th), Circumstantial Evidence, §61 et seq.), it was held that she could be questioned as to prior acts of intercourse, but not as to other kinds of misconduct, such as intoxication. (*People v. Mangum* (1939) 31 C.A.2d 374, 379, 382, 88 P.2d 207; *People v. Burnette* (1940) 39 C.A.2d 215, 227, 102 P.2d 799.)

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## CHAPTER XI - Presentation At Trial

### XI. IMPEACHMENT

#### H. Impeachment on Collateral Matter.

#### 4. Collateral Impeachment Degrading Character.

##### c. Illustrations: Criminal Cases.

##### 2. Defendant.

#### 3 Witkin Cal. Evid. Presentation § 351

[§ 351] Defendant.

The protection against collateral impeachment degrading character is especially important where a criminal defendant becomes a witness. Irrelevant inquiries about misconduct, criminal or otherwise, are a highly prejudicial means of injecting the defendant's bad character into the case. The cases on this point are numerous.

In *People v. Smith* (1922) 189 C. 31, 207 P. 518, defendant, charged with inducing a minor to frequent a gambling house, was asked on cross-examination if he had not, some time before, been employed to deal blackjack at a certain club. A police officer was later called to contradict his denial. *Held*, this was error; proof of his occupation was irrelevant, and was an improper method of introducing evidence of a prior wrongful act unconnected with the crime charged. (189 C. 34.)

In *People v. Burness* (1942) 53 C.A.2d 214, 127 P.2d 623, defendant, an automobile wrecker, was charged with receiving stolen property. The prosecutor asked him if he had kept certain wheels at his place of business which he said he was going to hold until the "heat" was over, and whether he went there after release from arrest to get them. On his denial, a witness was called to testify to that effect. *Held*, this was reversible error; there was no proof that the wheels were stolen or that they had any connection with the crime, and the effect of the contradiction was merely to degrade and prejudice the defendant in the eyes of the jury. (53 C.A.2d 220.)

In *People v. McCarthy* (1948) 88 C.A.2d 883, 200 P.2d 69, a prosecution for bookmaking, cross-examination of defendant and testimony by impeaching witnesses dealt with possession of betting materials a year prior to the time of the present arrest. *Held*, this was improper. (88 C.A.2d 888.)

In *People v. Geibel* (1949) 93 C.A.2d 147, 208 P.2d 743, a prosecution of defendant attorney for forgery of a client's will and contract of employment, defendant testified to a period of performance of legal services for the client, with a 1-year interim in which he was "out of the state." On cross-examination, he was asked: "Isn't it a fact that during that period of time you were suspended from practicing law?" *Held*, the question was highly improper, and it was error to overrule defendant's objection. (93 C.A.2d 172.)

In *People v. Watson* (1956) 46 C.2d 818, 299 P.2d 243, defendant, on trial for second degree murder, was cross-examined as to his height. The prosecution offered to prove that he had tried to stretch it to get above Army maximum height, and argued that he was wearing an Army uniform to gain sympathy. *Held*, the casting of aspersions

on his reasons for wearing a uniform that he was entitled to wear had no bearing on his motive or credibility, its only purpose was to degrade, and allowance of the questions was error. (46 C.2d 833.)

In *People v. Giani* (1956) 145 C.A.2d 539, 302 P.2d 813, defendant, charged with violation of P.C. 288a on the person of a boy, took the stand and denied the charge. On cross-examination, the prosecutor was allowed, over objection, to ask, "On May 23d [date of crime charged] were you a homosexual?" *Held*, prejudicial error, and order granting a new trial affirmed. In his direct examination, defendant did not testify as to his sexual makeup, and there was no legal authority or medical data indicating that every homosexual is predisposed to commit the act charged. (145 C.A.2d 541.)

In *People v. Sims* (1958) 165 C.A.2d 108, 331 P.2d 799, a murder trial, defendant took the stand to testify on the issue of self-defense. On cross-examination, the prosecutor asked, over objection, about instances of threatening to kill, carrying knives, cutting people and assaults. On redirect, his counsel tried to have him explain the answers and deny the implications, whereupon the prosecutor asked about other arrests, threats and fights, producing "arrest reports" to "refresh" defendant's memory, all over objection and motion for mistrial. Thereafter, the prosecutor proceeded to impeach defendant's testimony by producing witnesses who had arrested him, and witnesses who heard him threaten, and also a witness to testify to the "authenticity" of the arrest reports. *Held*, reversible error. (165 C.A.2d 114.)

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## CHAPTER XI - Presentation At Trial

## XI. IMPEACHMENT

## H. Impeachment on Collateral Matter.

## 5. Where Witness "Opens The Gates."

## a. General Principles.

3 Witkin Cal. Evid. Presentation § 352

[§ 352] General Principles.

A practical problem on which the authorities are difficult to reconcile arises as follows: A witness, on direct or even cross-examination, makes a statement on an irrelevant matter. The adverse party may have it excluded on objection or motion to strike, but sometimes does not do so. If the evidence were relevant and merely *incompetent* (e.g., hearsay or inadmissible opinion), the failure to object would be a waiver of its inadmissibility (see *infra*, §393). On the other hand, failure to object cannot give irrelevant evidence any probative effect (see *infra*, §396). May the adverse party nevertheless take advantage of the error in the testimony and the party's own failure to object, and impeach the witness, by cross-examination or rebuttal, on the collateral matter?

In support of such a right, it has been said that the offering party on direct examination opened the "door" or the "gates," and that the adverse party is "fighting fire with fire," but the metaphors explain nothing. The real question seems to be whether the matter improperly admitted on any examination was *prejudicial* and not curable by objection or motion to strike. If so, the adverse party should be permitted to contradict it, under the doctrine of "curative admissibility" (*infra*, §§353, 354). If it is not prejudicial, there seems no reason to permit the adverse party to capitalize on the blunder or accident by offering impeaching evidence on a collateral matter. (See generally *People v. McDaniel* (1943) 59 C.A.2d 672, 677, 140 P.2d 88; 1 McCormick 5th, §57; 1 Wigmore (Tillers Rev.) §15, p. 740.)

In the *McDaniel* case, *supra*, the court approved the view that such irrelevant matter should be excluded by the judge on his or her own motion. The opinion states: "Legitimate cross-examination does not extend to matters improperly admitted on direct examination. Failure to object to improper questions on direct examination may not be taken advantage of on cross-examination to elicit immaterial or irrelevant testimony. *The so-called 'open the gates' argument is a popular fallacy.*" (59 C.A.2d 677.)

In *People v. Matlock* (1970) 11 C.A.3d 453, 89 C.R. 862, defendant was asked, on cross-examination, whether he enjoyed beating the victim. He answered, "I don't enjoy beating no one at no time." By a faulty recollection, the trial judge later said defendant had volunteered information that he had never beaten anyone at any time. The prosecutor was thus permitted to cross-examine defendant extensively about his six misdemeanor battery convictions. *Held*, the "flood of inflammatory evidence" was prejudicial. The court said: "It would be a curious rule indeed that would place a person charged with crime in a position where he must admit that he 'enjoys beating' another or suffer the penalty of a parade of his otherwise inadmissible past misdeeds before the jury." (11 C.A.3d 461.)

A number of other cases support this view. (See *Dastagir v. Dastagir* (1952) 109 C.A.2d 809, 815, 241 P.2d 656,

supra, §349; *People v. Heckford* (1957) 149 C.A.2d 250, 255, 308 P.2d 497; *People v. Chandler* (1957) 152 C.A.2d Supp. 916, 919, 313 P.2d 223; *People v. Arends* (1957) 155 C.A.2d 496, 508, 318 P.2d 532, infra, §386; *People v. Parrella* (1958) 158 C.A.2d 140, 147, 322 P.2d 83; *Fortner v. Bruhn* (1963) 217 C.A.2d 184, 189, 31 C.R. 503; *People v. Gambos* (1970) 5 C.A.3d 187, 192, 84 C.R. 908, 1 Cal. Evidence (4th), *Circumstantial Evidence*, §12 ["open the gates" argument is fallacious when objectionable evidence is allowed in so nonobjecting party can bring in its own objectionable evidence].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Steele* (2002) 27 C.4th 1230, 1248, 1249, 120 C.R.2d 432, 47 P.3d 225, quoting the text; 1 McCormick 6th, §57. *West's Key Number Digest*, Witnesses k.383





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## CHAPTER XI - Presentation At Trial

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- b. Curative Admissibility: Criminal Cases.

3 Witkin Cal. Evid. Presentation § 353

[§ 353] Curative Admissibility: Criminal Cases.

Where failure to rebut would be highly damaging to the adverse party's case, the doctrine of curative admissibility is recognized, sometimes by the indirect method of finding that the issue has been raised, and the collateral matter has therefore become relevant.

Thus, in *People v. Westek* (1948) 31 C.2d 469, 190 P.2d 9, defendant, on trial for sodomy and lewd conduct with boys, volunteered the statement that he had never committed a sexual crime with any boy. The prosecution, in rebuttal, was allowed to prove such crimes with boys not named in the charge. "[A]ppellant's voluntary declaration of his good character and unimpeachable moral status in relation to his prior conduct with boys was material to the issue involved." (31 C.2d 479.)

*People v. Clark* (1965) 63 C.2d 503, 47 C.R. 382, 407 P.2d 294, is similar. The 11-year-old prosecutrix in a rape case testified that she had never had any other sexual experience or seen the sex organs of a boy or man. Defendant offered testimony of four boys that they had engaged in intimate sex play with her. *Held*, citing the text, exclusion of this testimony was reversible error; it supported other impeaching testimony by tending to show fabrication or fantasy. (63 C.2d 507.)

In *People v. McHenry* (1962) 204 C.A.2d 764, 22 C.R. 621, an incest case, defendant's counsel asked the victim whether a schoolmate had accused teacher S of the same offense, and whether the victim had conceived the idea from the incident. Defendant himself testified that the victim knew of the incident. On cross-examination, defendant was asked whether a school board meeting to consider the charge involved himself, and in rebuttal, the school superintendent testified that the pupil had made a charge of molesting, but not against S. *Held*, this was proper impeachment. Defendant's counsel brought the incident up in an attempt to prove that the charges against defendant had been inspired by it; it was permissible to contradict the statement concerning S, even though it incidentally implicated defendant in another sex crime. (204 C.A.2d 767.)

In other words: "The accused may not overemphasize his claims of utter innocence by saying that he *never at any time* committed an offense of the kind on trial, or never met his accuser or an adversary witness in his lifetime and claim that he has thereby disproved the accusation and overwhelmed his contradictory witnesses. Having chosen to extend the scope of the inquiry by a resort to superlatives, the accused must expect to be met with contrary proof." (*People v. Lindsey* (1949) 90 C.A.2d 558, 566, 203 P.2d 572; see *People v. Downs* (1952) 114 C.A.2d 758, 762, 251 P.2d 369; *People v. Waggoner* (1961) 195 C.A.2d 385, 387, 15 C.R. 687, citing the text; *People v. Crume* (1976) 61 C.A.3d 803,

812, 132 C.R. 577 [defendant unequivocally denied "at any time" committing sexual crime with complaining witnesses; prosecution, in rebuttal, called the witnesses to testify to many uncharged incidents of sexual misconduct]; *People v. Reyes* (1976) 62 C.A.3d 53, 61, 132 C.R. 848.)

The rebuttal, however, must be responsive to the defendant's claim, and this limitation was strictly applied in *People v. Davis* (1965) 233 C.A.2d 156, 43 C.R. 357. Defendant, a minor, was convicted of first degree robbery on a disputed identification. He and his mother testified that he was at home on the night of the crime, and he further testified that he earned \$ 71 per week. On cross-examination, he was asked whether he had been under the influence of narcotics at the time of his arrest, and on his denial, the arresting officer testified that he was. The prosecution's theory was that his direct testimony on earnings negated a motive for robbery, and that the cross-examination and rebuttal showed abnormal needs and furnished such a motive. The court held, however, that the inference of an expensive narcotic habit (e.g., heroin) rather than an inexpensive one (marijuana) was tenuous, and that it was reversible error to introduce this highly prejudicial evidence on so thin a ground: "The law entitled appellant to stand before the jury presumptively innocent and of good character. In characterizing him as a narcotics user, a charge he was unprepared to meet except by his own denial, the prosecution branded him as a habitual lawbreaker, a loathsome, unworthy person, predisposed to rob or steal to support his habit." (233 C.A.2d 162.)

The court distinguished *People v. Westek*, *supra*, on the ground that defendant "did not raise any issue as to his use or nonuse of narcotics." (233 C.A.2d 161.)

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c. Curative Admissibility: Civil Cases.

3 *Witkin Cal. Evid. Presentation* § 354

[§ 354] Curative Admissibility: Civil Cases.

Although most of the cases involving curative admissibility are criminal (see *supra*, §353), the same principle applies in civil cases. Thus, in *Travis v. Southern Pac. Co.* (1962) 210 C.A.2d 410, 26 C.R. 700, plaintiff, a passenger in an automobile driven by his son, was injured in a collision with defendant's train. On direct examination as to his speed at the time, the son asserted that he was "always conscious of speed laws." On cross-examination, he reiterated this claim of habit. *Held*, the cross-examiner could bring out the facts of repeated arrests for speeding, even though ordinarily, evidence of prior violations of speed laws is not admissible to prove negligence on the particular occasion. (210 C.A.2d 422.)

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## CHAPTER XI - Presentation At Trial

### XI. IMPEACHMENT

#### I. Impeachment of Party's Own Witness.

##### 1. Former Rule Limiting Impeachment.

3 Witkin Cal. Evid. Presentation § 355

[§ 355] Former Rule Limiting Impeachment.

Former California law, based on an application and implementation of former C.C.P. 2049, greatly limited a party's power to impeach its own witness, as follows:

(1) There could be no impeachment for bad character, bias or interest. This limitation was based on two theories: that the party calling the witness "vouches" for the witness' credibility, and that the party would be in a position to coerce the witness by the threat of impeachment. (See generally *People v. Newson* (1951) 37 C.2d 34, 41, 230 P.2d 618; *People v. Zammora* (1944) 66 C.A.2d 166, 215, 152 P.2d 180; 1 McCormick 5th, §38; 3A Wigmore (Chadbourn Rev.) §896 et seq.; 40 Cal. L. Rev. 609; 42 Cal. L. Rev. 178.)

(2) The witness could be impeached by proof of prior inconsistent statements, but only after laying a double foundation, consisting of a showing of surprise and damage. (See *People v. Le Beau* (1952) 39 C.2d 146, 148, 245 P.2d 302; *People v. Kidd* (1961) 56 C.2d 759, 766, 16 C.R. 793, 366 P.2d 49, citing the text; *People v. Flores* (1940) 37 C.A.2d 282, 286, 99 P.2d 326; *Sandoval v. Southern Calif. Enterprises* (1950) 98 C.A.2d 240, 245, 219 P.2d 928; *People v. Spinosa* (1953) 115 C.A.2d 659, 668, 252 P.2d 409; *People v. Wilson* (1958) 156 C.A.2d 728, 742, 320 P.2d 117; *People v. Pickens* (1961) 190 C.A.2d 138, 147, 11 C.R. 795; 40 Cal. L. Rev. 609; 42 Cal. L. Rev. 178; 48 A.L.R.2d 1239.)

The limiting rules did not apply, however, to an adverse witness (see *supra*, §202), or to a required witness, i.e., one who must be called because his or her testimony is essential. (See *People v. McFarlane* (1901) 134 C. 618, 620, 66 P. 865; *Chichester v. Mason* (1941) 43 C.A.2d 577, 583, 111 P.2d 362; 3A Wigmore (Chadbourn Rev.) §917.) And they were of course inapplicable where the object of the question was not to impeach but to refresh the witness' recollection by calling attention to a prior statement and giving the witness an opportunity to correct and explain his or her testimony, instead of allowing it to stand and be attacked on cross-examination. (See *Cummins v. Yellow & Checker Cab Co.* (1932) 127 C.A. 170, 179, 15 P.2d 536; *People v. Curtis* (1939) 36 C.A.2d 306, 322, 98 P.2d 228; *People v. Porterfield* (1960) 186 C.A.2d 149, 158, 8 C.R. 897, quoting the text.)

Another former practice was to ask a prosecution witness whether the defendant had made certain statements and, on the witness' denial, introducing other evidence of the statements. The statements were inadmissible hearsay, which the prosecution tried to get into the record in this devious manner. (See *People v. Flores*, *supra*, 37 C.A.2d 286; *People v. Williams* (1951) 104 C.A.2d 323, 327, 231 P.2d 554; *People v. Wilson*, *supra*, 156 C.A.2d 743.) Because the defendant's prior statements are now admissible as substantive evidence (see 1 Cal. Evidence (4th), Hearsay, §156), the practice would no longer be objectionable.

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *No impeachment for bad character, bias, or interest:* See 1 McCormick 6th, §38. *West's Key Number Digest*, Witnesses k.320 et seq.



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### XI. IMPEACHMENT

#### I. Impeachment of Party's Own Witness.

##### 2. Rule of Unlimited Impeachment.

3 Witkin Cal. Evid. Presentation § 356

[§ 356] Rule of Unlimited Impeachment.

The limiting rule (*supra*, §355) was widely condemned by authoritative writers, who argued that (1) a party does not necessarily have free choice of witnesses but must take those who know the facts, and therefore cannot "vouch" for them; (2) the supposed improper coercive power over the witness is largely illusory, for the common ground of impeachment is prior inconsistent statements, and attacks on character are rare. (See 1 McCormick 5th, §38; 3A Wigmore (Chadbourn Rev.) §§898, 899; *Ev.C.* 785, Comment ["Expanded opportunity for testing credibility is in keeping with the interest of providing a forum for full and free disclosure"]; *People v. Porterfield* (1960) 186 C.A.2d 149, 157, 8 C.R. 897, quoting the text.)

These criticisms proved persuasive; hence, the present rule: The credibility of a witness may be attacked or supported by any party, including the party calling the witness. (*Ev.C.* 785; see *People v. Stanley* (1967) 67 C.2d 812, 816, footnote 1, 63 C.R. 825, 433 P.2d 913 [defense can impeach own witness]; *People v. Chacon* (1968) 69 C.2d 765, 779, 73 C.R. 10, 447 P.2d 106 [prosecution can impeach own witness]; *People v. Gordon* (1973) 10 C.3d 460, 474, footnote 8, 110 C.R. 906, 516 P.2d 298, citing the text [same]; *People v. Stokley* (1968) 266 C.A.2d 930, 936, 72 C.R. 513, citing the text [same]; *People v. Ross* (1979) 92 C.A.3d 391, 400, 154 C.R. 783, citing the text; 56 Cal. L. Rev. 1736 [Stanley]; 9 U.C. Davis L. Rev. 285, 307.)

In *People v. Stokley*, *supra*, defendant was tried for forgery by cashing a forged money order with a stolen I.D. card. On cross-examination, the prosecutor asked him if he had stated to H, a bail bondsman, that he had cashed it but expected to beat the charge because the teller had described someone not resembling him. Defendant denied any such conversation. The prosecutor in rebuttal called H, who confirmed a conversation about the charge; but H denied that defendant had made the above statement and also denied that he, H, had told the prosecutor that defendant had. The prosecutor then took the stand and testified that H had told him this. *Held*, this was proper. (a) The prosecutor was a competent witness. (See 2 Cal. Evidence (4th), Witnesses, §56.) (b) When H testified contrary to expectations, he could be impeached. (266 C.A.2d 936.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 1 McCormick 6th, §38; 3 A.L.R.6th 269 [propriety under Unif. R. Evid., Rule 607 of impeaching party's own witness].



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XI. IMPEACHMENT

J. Impeachment of Hearsay Declarant.

1. Nature of Problem.

3 *Witkin Cal. Evid. Presentation* § 357

[§ 357] Nature of Problem.

A statement admitted under an exception to the hearsay rule is affirmative evidence; and its probative value, like that of testimony on the stand, depends on the credibility of the declarant. Evidence attacking (or supporting) the credibility of the declarant is therefore relevant and admissible. (*Ev.C. 210*; see *Ev.C. 1202*, Comment [pointing out that judge has usual power under *Ev.C. 352* to restrict inquiry that is too remote].)

Problems remain, however, in connection with the most typical form of impeachment--prior inconsistent statements: (1) If, as is often the case, the declarant is unavailable, shall impeachment be permitted despite the declarant's lack of opportunity to deny or explain? (2) Prior inconsistent statements of a witness are now admissible as substantive evidence (see 1 *Cal. Evidence (4th)*, *Hearsay*, §156); should the same be true of prior inconsistent statements of a hearsay declarant?

California case law on this subject was so meager as to offer little guidance, and the Evidence Code bases its broad rule of impeachment on former Unif. Rule 65. (*Ev.C. 1202*; see 22 *U.C.L.A. L. Rev.* 452 [problem of laying proper foundation]; 9 *U.C. Davis L. Rev.* 285, 308; *infra*, §358.)

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#### J. Impeachment of Hearsay Declarant.

#### 2. Impeachment Without Opportunity To Answer.

#### 3 *Witkin Cal. Evid. Presentation § 358*

[§ 358] Impeachment Without Opportunity To Answer.

(1) *Impeachment on Any Ground.* "Evidence of a statement or other conduct by a declarant that is *inconsistent* with a statement by such declarant received in evidence as hearsay evidence" is admissible "for the purpose of attacking the credibility of the declarant." And "[a]ny other evidence offered to attack or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness at the hearing." (*Ev.C. 1202.*) (See *Am-Cal Inv. Co. v. Sharlyn Estates* (1967) 255 C.A.2d 526, 542, 63 C.R. 518 [contradictory evidence]; *People v. Ross* (1979) 92 C.A.3d 391, 406, 154 C.R. 783.)

(2) *Opportunity To Answer Not Required.* The right of impeachment by prior inconsistent statements exists even though the declarant "is not given and has not had an opportunity to explain or to deny such inconsistent statement or other conduct." (*Ev.C. 1202.*) The theory is that, if the hearsay declarant is available, the burden of calling the declarant to explain is not on the impeaching party but on the party who used the hearsay statement. (*Ev.C. 1202, Comment.*)

(3) *Deponent Deemed Hearsay Declarant.* Testimony at a deposition and testimony at a former trial are admitted under the same hearsay exception for the same reasons (see 1 *Cal. Evidence (4th)*, *Hearsay*, §262). Accordingly, the same rule of impeachment is provided by *Ev.C. 1202*: "For the purposes of this section, the deponent of a deposition taken in the action in which it is offered shall be deemed to be a hearsay declarant."

(4) *Impeachment of Hearsay Declarant by Party Calling Declarant.* In *People v. Beyea* (1974) 38 C.A.3d 176, 113 C.R. 254, defendants were Hell's Angels who were charged with beating a victim to death. The case against them depended in large part on the preliminary examination testimony of witnesses unavailable at the time of trial, but the same witnesses had also made statements that helped the defense. The prosecution, therefore, relied on the prior testimony to help convict defendants, while using other inconsistent hearsay statements by the absent witnesses to impeach those parts of their prior testimony that aided defendants. Defendants argued that they were denied their constitutional rights to confrontation. *Held*, the impeaching hearsay was improperly admitted.

(a) Read literally, *Ev.C. 1202* appears to permit the impeachment of a witness, through use of a prior inconsistent statement, by the party who called the witness. But the Law Revision Commission's Comment indicates that if the hearsay declarant is unavailable, it is the party *against whom* the evidence is admitted who has the right to impeach even though the declarant has not had the opportunity to explain or deny the impeaching statement. Here, defendants--and not the prosecution--were the parties against whom the impeaching statements were admitted. (38 C.A.3d 193, discussing the text.)



(b) The proper time for the prosecution to have introduced the impeaching statements was at the preliminary hearing where the witnesses testified. The witnesses would then have had the opportunity to explain any apparent inconsistencies. Here, the prosecution had actual or constructive knowledge of the impeaching statements before the preliminary examination and should not have been permitted to further its own case as it did. But the error was harmless. (38 C.A.3d 194.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Impeachment on Any Ground.* In *People v. Jacobs* (2000) 78 C.A.4th 1444, 93 C.R.2d 783, defendant was convicted of receiving stolen property. At the time of his arrest, he had admitted that he owned the vehicle containing the property but stated that he purchased the property from "Will." At trial a codefendant sought to introduce defendant's admission of vehicle ownership in order to exculpate himself. Defendant argued that if the court permitted introduction of the admission of vehicle ownership, it should admit the entire statement. Ultimately, the trial judge ruled the entire statement admissible and also allowed the prosecution to impeach the statement by means of defendant's prior felony convictions. *Held*, affirmed.

(a) *Impeachment by prior convictions.* *Ev.C. 788* provides for impeachment by means of prior felony convictions, and, under *Ev.C. 1202*, a hearsay declarant's statement may be attacked by a "statement or other conduct" that is inconsistent with the evidence presented by the declarant. *Ev.C. 1202* further provides that "[a]ny other evidence offered to attack or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness at the hearing." Taken together, *Ev.C. 788* and *1202* authorize the admission of prior felony convictions to attack the credibility of a hearsay declarant. Nothing in *Ev.C. 1202* "indicates or even remotely implies that its application is to be limited to hearsay statements which take the form of prior testimony, and we decline to read such a limitation into that section." (78 C.A.4th 1450.)

(b) *Impeachment by party against whom statement is admitted.* *People v. Beyea* (1974) 38 C.A.3d 176, 113 C.R. 254, text, p. 446, held that under *Ev.C. 1202*, it is the party against whom the evidence is admitted who has the right to impeach. But even assuming that this limitation applies where the impeaching evidence is a prior felony conviction, admission of defendant's prior convictions was not error. Although, technically, defendant's story about "Will" came in under *Ev.C. 356* (see 1 *Cal. Evidence* (4th), *Circumstantial Evidence*, §36) to "explain or make clear" the statement about vehicle ownership, it was defendant who argued for its admission. If believed, the story would have exonerated defendant. Thus, it was proper for the prosecution to try to impeach it. (78 C.A.4th 1452.)

See *People v. Corella* (2004) 122 C.A.4th 461, 470, 18 C.R.3d 770 [in prosecution for corporal injury to spouse, trial judge erred in refusing to allow defendant to impeach out-of-court statements by his wife inculcating him with subsequent contradictory statements she made at preliminary hearing; even though she ultimately exercised her privilege against self-incrimination at hearing and her testimony was stricken, statements, once uttered, were available for impeachment].



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CHAPTER XI - Presentation At Trial

XI. IMPEACHMENT

J. Impeachment of Hearsay Declarant.

3. Prior Inconsistent Statement Not Evidence.

*3 Witkin Cal. Evid. Presentation § 359*

[§ 359] Prior Inconsistent Statement Not Evidence.

Under a hearsay exception, the prior inconsistent statement of a witness is affirmative evidence to prove the truth of the matter stated. (*Ev.C. 1235, 1 Cal. Evidence (4th), Hearsay, §156.*) *Ev.C. 1202* makes no such provision for admission of prior inconsistent statements of a hearsay declarant; hence, their only effect is to weaken credibility of the declarant. The Comment to *Ev.C. 1202* says: "If the declarant is not a witness and is not subject to cross-examination upon the subject matter of his statements, there is no sufficient guarantee of the trustworthiness of the statements he has made out of court to warrant their reception as substantive evidence unless they fall within some recognized exception to the hearsay rule." (See *O'Gan v. King City Joint Union High School Dist. (1970) 3 C.A.3d 641, 645, 83 C.R. 795.*)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER XI - Presentation At Trial

### XI. IMPEACHMENT

#### K. Rehabilitation of Impeached Witness.

##### 1. In General.

*3 Witkin Cal. Evid. Presentation § 360*

[§ 360] In General.

(1) *Right To Rehabilitate*. Where the attempt has been made to discredit a witness by any of the foregoing methods of impeachment (see *supra*, §258 et seq.), the party who called the witness is allowed, subject to certain limitations, to "rehabilitate" the witness, i.e., to restore his or her credibility, by rebutting the discrediting evidence, or by introducing evidence favorable to credibility. Except in criminal cases, such evidence is not permitted unless there has been an attempt at impeachment; until the witness' credibility is attacked there is nothing to rehabilitate, and consequently evidence favorable to credibility is excluded. (See generally *Ev.C. 790, 791*; *infra*, §361 et seq.; 1 McCormick 5th, §47; 4 Wigmore (Chadbourn Rev.) §1124; 81 *Am.Jur.2d* (1992 ed.), *Witnesses* §928.)

(2) *Grounds and Limitations*. The grounds of rehabilitation, i.e., the matters that may be shown, are, in theory, the same as those that may be shown to impeach: The court or jury may consider, in determining a witness' credibility, any matter that has any tendency in reason to prove or disprove the truthfulness of the witness' testimony at the hearing. (*Ev.C. 780*, *supra*, §259; see *People v. Di Blasi* (1964) 228 *C.A.2d* 338, 343, 39 *C.R. 416* [showing that witness took stand with knowledge of danger of incriminating himself, i.e., had nothing to gain and something to lose].) And the proviso, "Except as otherwise provided by statute" (*Ev.C. 780*) applies to rehabilitation as well as impeachment. (See *Ev.C. 789*, *supra*, §260 [religious belief cannot be shown]; 27 *A.L.R.4th* 1167 [same]; *Ev.C. 786*, *supra*, §281 [no character trait except honesty or veracity may be shown in civil action]; *Ev.C. 787*, *supra*, §285 [specific acts inadmissible to show good character in civil action].)

In practice, however, rehabilitation usually consists of (a) contradictory evidence (*infra*, §361), (b) good character (*infra*, §362), or (c) prior consistent statements (*infra*, §364 et seq.). (On psychiatric rehabilitation, see *infra*, §363.)

(3) *Affirmative Evidence*. The former rule that prior consistent statements were admissible only to rehabilitate has been abrogated. A new hearsay exception makes them admissible as substantive evidence. (*Ev.C. 1236*, 1 *Cal. Evidence* (4th), *Hearsay*, §161.)

(4) *Distinction: Evidence Relating to Qualifications of Expert*. In *Grimshaw v. Ford Motor Co.* (1981) 119 *C.A.3d* 757, 174 *C.R. 348*, a strict products liability action against an automobile manufacturer, plaintiff called C, a former engineer and executive in charge of defendant's crash testing program, as an expert witness. On direct examination, C testified that he had been forced to take an early retirement because he spoke out on matters of safety. Defendant objected that this testimony was an attempt to support the witness' credibility before any impeachment had been attempted. *Held*, the evidence was properly admitted. Why he left defendant's employ was part of the background information concerning his professional experience, and admissible even though it may also have tended to enhance his

credibility. (119 C.A.3d 786.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Right To Rehabilitate*. See 81 *Am.Jur.2d* (2004 ed.), *Witnesses* §896; 1 McCormick 6th, §47. *West's Key Number Digest*, *Witnesses* k.410 et seq.



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## CHAPTER XI - Presentation At Trial

### XI. IMPEACHMENT

#### K. Rehabilitation of Impeached Witness.

##### 2. Contradiction of Bias or Interest.

3 *Witkin Cal. Evid. Presentation* § 361

[§ 361] Contradiction of Bias or Interest.

If the impeachment is on the ground of bias or hostility, evidence to show absence of such a state of mind is admissible. (See *People v. Nichols* (1970) 3 C.3d 150, 157, 89 C.R. 721, 474 P.2d 673, citing the text [hearsay admissible to rebut claim of bias]; 1 McCormick 5th, §47; 3A Wigmore (Chadbourn Rev.) §952; 4 Wigmore (Chadbourn Rev.) §1119; *Ev.C.* 780(f).)

In *People v. Woodberry* (1970) 10 C.A.3d 695, 89 C.R. 330, T, a prosecution witness in jail on an unrelated charge, was threatened by other prisoners for testifying against defendant. In court, out of the jury's presence, he took the stand to say that, because of the threats, he would not answer further questions on cross-examination by the defense. *Held*, the prosecutor could read this statement to the jury to counteract the possible inference that T's refusal was caused by antagonism toward defendant, by a desire or need to favor the prosecution, or was induced by the prosecution. (10 C.A.3d 710.)

But the rehabilitation must be confined to contradiction; i.e., the only permissible countershowing in rehabilitation is that no such prejudice or hostility exists. If the witness actually admits the prejudice, it is wholly improper to permit him or her to recite instances of purported misconduct of the party by way of justification. (*People v. Zemavasky* (1942) 20 C.2d 56, 63, 123 P.2d 478; *People v. Mullen* (1953) 115 C.A.2d 340, 344, 252 P.2d 19 ["The causes for his bias are not material to the issue at hand, i.e., whether his testimony is colored, for the bias is admitted"]; 3A Wigmore (Chadbourn Rev.) §952.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 1 McCormick 6th, §47.



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## CHAPTER XI - Presentation At Trial

### XI. IMPEACHMENT

#### K. Rehabilitation of Impeached Witness.

##### 3. Good Character.

3 Witkin Cal. Evid. Presentation § 362

[§ 362] Good Character.

(1) *Impeachment Through Attack on Character.* If the impeachment amounts to an attack on the character of the witness, by evidence of bad reputation for veracity or conviction of a felony, evidence of good character may be offered in rebuttal. (*People v. Amanacus* (1875) 50 C. 233, 235; see 1 McCormick 5th, §47; 4 Wigmore (Chadbourn Rev.) §§1105, 1106; 9 U.C. Davis L. Rev. 285, 361.) This theory perhaps extends to allowance of good character evidence to rehabilitate a witness impeached by a showing of corrupt activities in the case (*supra*, §279). (See *People v. Ah Fat* (1874) 48 C. 61, 64 [prosecution witness had offered to testify for defendant if paid]; 4 Wigmore (Chadbourn Rev.) §1107.)

(2) *Impeachment Through Other Methods: Civil Cases.* Where the impeachment is by other methods, such as proof of prior inconsistent statements, contradictory evidence or a showing of bias or interest, character evidence is regarded, in civil cases, as "collateral" and improper. (*Ev.C. 790*; see *Title Ins. & Trust Co. v. Ingersoll* (1908) 153 C. 1, 9, 94 P. 94; *People v. Sellas* (1931) 114 C.A. 367, 372, 300 P. 150; *People v. Mitchell* (1984) 161 C.A.3d 254, 257, 207 C.R. 334 ["If the mere telling of conflicting stories, the essence of litigation, could overcome *Evidence Code* section 790, the rule would rarely prevail over the exception"].)

(3) *Impeachment Through Other Methods: Criminal Cases.* *Ev.C. 790* was nullified as to criminal cases by the "Right to Truth-in-Evidence" provision of Proposition 8 (see 1 *Cal. Evidence* (4th), *Introduction*, §8); hence, a criminal defendant's reputation for honesty is admissible unless subject to exclusion under *Ev.C. 352* (see 1 *Cal. Evidence* (4th), *Circumstantial Evidence*, §17 et seq.). (*People v. Taylor* (1986) 180 C.A.3d 622, 632, 225 C.R. 733; see *People v. Adams* (1988) 198 C.A.3d 10, 18, 243 C.R. 580, *supra*, §287 [following *Taylor* reasoning in case involving P.C. 787, *supra*, 285 et seq., which excludes evidence of specific acts to prove bad character of witness].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Impeachment Through Attack on Character.* See 1 McCormick 6th, §47. *Correction:* Page 449, second to last line of section, "P.C. 787" should be "*Ev.C. 787*".



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K. Rehabilitation of Impeached Witness.

4. Medical or Psychiatric Condition.

3 *Witkin Cal. Evid. Presentation* § 363

[§ 363] Medical or Psychiatric Condition.

In *People v. Blakesley* (1972) 26 C.A.3d 723, 102 C.R. 885, defendant was convicted of contributing to the delinquency of a minor, based on the testimony of a young boy who described several homosexual encounters with him. Through extensive cross-examination, defendant sought to portray the witness as a mentally sick individual. Over objection, the prosecution called as a witness a psychiatrist who had examined the minor pursuant to an earlier court order. The psychiatrist was allowed to testify that the minor was mentally disturbed in the sense that "adolescents are all mentally disturbed people," but that he did not show any serious psychopathology and that homosexuality did not indicate a serious mental disturbance. *Held*, admission of the testimony was proper. The attack on the witness' credibility included depicting him as a mentally sick individual. "The purpose of calling Doctor Wodinsky was merely to put his sickness into proper psychiatric perspective." (26 C.A.3d 728.) (On use, during prosecution's case-in-chief, of expert testimony on rape victim's mental condition in order to support her credibility, see *People v. Herring* (1993) 20 C.A.4th 1066, 1072, 1073, 25 C.R.2d 213.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER XI - Presentation At Trial

### XI. IMPEACHMENT

#### K. Rehabilitation of Impeached Witness.

##### 5. Prior Consistent Statement.

##### a. Where Charge of Improper Motive.

3 Witkin Cal. Evid. Presentation § 364

[§ 364] Where Charge of Improper Motive.

(1) *Admissibility of Prior Consistent Statement.* Where the impeachment has been on the grounds of bias or other improper motive, a consistent statement made prior to the time the bias or motive was alleged to have arisen tends to show that the witness was not influenced by it in testifying on the stand. Accordingly, the prior consistent statement is admissible in rehabilitation. (*Ev.C.* 791(b); see *Barkly v. Copeland* (1887) 74 C. 1, 4, 15 P. 307; *California Elec. Light Co. v. California Safe Deposit & Trust Co.* (1904) 145 C. 124, 128, 78 P. 372; *People v. Kynette* (1940) 15 C.2d 731, 753, 104 P.2d 794; *People v. Cannady* (1972) 8 C.3d 379, 388, 105 C.R. 129, 503 P.2d 585 [failure to object waived error but, in addition, "That there may always have existed another motive for fabricating did not deprive the prosecution of its right to show that a motive shown by the evidence did not affect the witness' testimony"]; *People v. Andrews* (1989) 49 C.3d 200, 210, 260 C.R. 583, 776 P.2d 285; *People v. Doetschman* (1945) 69 C.A.2d 486, 491, 159 P.2d 418; *People v. Duvall* (1968) 262 C.A.2d 417, 420, 68 C.R. 708; *People v. Gentry* (1969) 270 C.A.2d 462, 472, 76 C.R. 336; 58 A.L.R.4th 1014 [criminal cases]; 59 A.L.R.4th 1000 [civil cases]; cf. *People v. Walsh* (1956) 47 C.2d 36, 41, 301 P.2d 247, *infra*, §365; and see 4 Wigmore (Chadbourn Rev.) §1128; 50 So. Cal. L. Rev. 109 [criticism of *Ev.C.* 791, review of case law, and proposed statutory changes].)

Thus, in *Kynette, supra*, a trial for conspiracy to commit murder, prosecution witness S was shown on cross-examination to have been under police protection and to have received \$ 50 weekly from the district attorney for a time. On redirect examination and by rebuttal witnesses, the prosecutor was allowed to prove that S had previously made statements to two persons consistent with his trial testimony. (15 C.2d 753.)

In *People v. Neely* (1958) 163 C.A.2d 289, 329 P.2d 357, an accomplice codefendant testified against defendant, and on cross-examination was asked many questions intimating that he was improperly influenced by hope of leniency. *Held*, it was proper to offer his own prior consistent statements. (163 C.A.2d 311.)

(2) *Exception: Statement Made After Motive Arose.* The prior statement, to be admissible, must have been made before the bias or improper motive is alleged to have arisen. (*Ev.C.* 791(b); see *Tome v. United States* (1995) 513 U.S. 150, 115 S.Ct. 696, 700, 130 L.Ed.2d 574, 581; *People v. Coleman* (1969) 71 C.2d 1159, 1166, 80 C.R. 920, 459 P.2d 248; *People v. Doetschman, supra*, 69 C.A.2d 491; *People v. Hitchings* (1997) 59 C.A.4th 915, 921, 69 C.R.2d 484 [murder defendant's jailhouse conversation with his girlfriend was not admissible as prior consistent statement where it took place after his arrest, which provided motive for bias or fabrication].)

**SUPPLEMENT:** [This section is current through the latest supplement]



(2) *Exception: Statement Made After Motive Arose.*

(New) *Distinction: Multiple motives alleged:* A prior consistent statement may be admitted for rehabilitation purposes if it was made before one of the alleged grounds for bias came into existence, even if at the time it was made, other grounds may have existed. (*People v. Jones* (2003) 30 C.4th 1084, 1106, 135 C.R.2d 370, 70 P.3d 359 [after defense presented evidence of prosecution witness' favorable plea bargain, prosecution was properly allowed to present witness' prior consistent statement, which predated bargain, even though at time of statement, witness may have feared being prosecuted for charged murder and had motive to put blame on defendant].) *West's Key Number Digest*, Witnesses k.414(2)



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## CHAPTER XI - Presentation At Trial

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## K. Rehabilitation of Impeached Witness.

## 5. Prior Consistent Statement.

## b. Where Charge of Recent Fabrication.

3 Witkin Cal. Evid. Presentation § 365

[§ 365] Where Charge of Recent Fabrication.

The charge, express or implied, that the testimony was recently fabricated by the witness, is similar to the charge that it was influenced by improper motives (*supra*, §364). And rehabilitation by proof of prior consistent statements is equally proper, subject to the same limitation, i.e., that the consistent statement was made before the motive for fabrication is alleged to have arisen. (*Ev.C.* 791(b); see *Tome v. United States* (1995) 513 U.S. 150, 115 S.Ct. 696, 700, 130 L.Ed.2d 574, 581; *People v. Welch* (1972) 8 C.3d 106, 116, 104 C.R. 217, 501 P.2d 225 [tape recording of victim's statements on morning she was shot was relevant and material to rebut implied defense charge of recent fabrication about attempted robbery and attempted rape]; *People v. Hayes* (1990) 52 C.3d 577, 609, 276 C.R. 874, 802 P.2d 376 [prior consistent statement is admissible if it was made before existence of any one or more of multiple motives to fabricate]; *People v. Noguera* (1992) 4 C.4th 599, 629, 15 C.R.2d 400, 842 P.2d 1160 [following *People v. Hayes*]; *People v. Bolin* (1998) 18 C.4th 297, 320, 321, 75 C.R.2d 412, 956 P.2d 374 [where defense attempted to undermine prosecution witness' credibility by suggesting that his attorney had encouraged him to fabricate accusations against defendant, testimony of woman to whom witness had made same accusations regarding defendant before he could have had any motive to fabricate was properly admitted]; *Loser v. E. R. Bacon Co.* (1962) 201 C.A.2d 387, 393, 20 C.R. 221; *People v. Utter* (1972) 24 C.A.3d 535, 553, 101 C.R. 214; *Box v. California Date Growers Assn.* (1976) 57 C.A.3d 266, 272, 129 C.R. 146, citing the text [while impeachment may be treated as charge of recent fabrication to come within hearsay exception, cross-examination which attacks credibility does not necessarily give rise to such inference; but error in admitting evidence of prior consistent statement was harmless]; *People v. McCowan* (1978) 85 C.A.3d 675, 681, 149 C.R. 611; *People v. Deletto* (1983) 147 C.A.3d 458, 479, 195 C.R. 233; 1 McCormick 5th, §47; 4 Wigmore (Chadbourn Rev.) §1129; 50 So. Cal. L. Rev. 109, 116; 58 A.L.R.4th 1014 [criminal cases]; 59 A.L.R.4th 1000 [civil cases]; on evidence of prior identification, see 1 Cal. Evidence (4th), Hearsay, §163.)

In *Davis v. Tanner* (1927) 88 C.A. 67, 262 P. 1106, a wrongful death case, plaintiffs' witness H testified to the negligence of defendant's taxi driver. On cross-examination defendants disclosed a conference between H and plaintiffs' attorneys, strongly suggesting that it resulted in fabrication of the trial testimony at the urgent inducement of the attorneys. To impeach H on that basis, defendants offered a former statement by H that was somewhat inconsistent with her trial testimony. *Held*, a statement given by H at the coroner's inquest, which was consistent with her trial testimony and which was made just after the accident and prior to both the inconsistent statement and the conference with plaintiffs' counsel, was properly proved. (88 C.A. 76.)

The *Davis* case makes it clear that impeachment will be treated as a charge of recent fabrication if that is its evident

purpose, even though the impeaching party does not expressly so state. (88 C.A. 78.) Thus, here, the ostensible purpose of the examiner was to test the recollection of the witness, but his innuendoes gave a different impression. (88 C.A. 74.) (To same effect, see *People v. Walsh* (1956) 47 C.2d 36, 43, 301 P.2d 247.)

In *People v. Deletto* (1983) 147 C.A.3d 458, 195 C.R. 233, defendant was charged with unlawful sexual acts committed with his 6-year-old daughter. The child victim's foster mother was permitted to testify that she observed the child engaging in sexual acts with a child and a dog, and asked her what she was doing; and that the child replied that she was doing the same thing that her Dad did to her. *Held*, the testimony was properly admitted. It was, of course, objectionable if offered to prove that the father did those acts; but it was admissible to rebut the inference, created by cross-examination of the minor, that at the trial, she had told a false story fabricated by her foster mother. (147 C.A.3d 479.)

The flexibility of the "recent fabrication" exception, and its tendency to merge with the "statement before alleged motive arose" exception (*supra*, §364), are well illustrated in *People v. Walsh, supra*. Defendants W and S, building inspectors, were charged with bribery--taking money from contractors to fix violations. Cross-examination of the contractor witnesses showed their past and present hostility to defendants and friendliness with the police. The prosecutor was then allowed to introduce the contractors' checks (to defendants) and prior oral statements to the effect that the money was used for bribes. The Court of Appeal held the rehabilitation improper because the witnesses were as much biased against the defendants at the time of the prior consistent statements as at the time of the trial; i.e., the statements were not made before the alleged motive arose. But the Supreme Court, without extended discussion, treated the cross-examination as an implied charge of recent fabrication, observing that "inferences of fabrication since the alleged bribes could be fairly drawn by the jurors." (47 C.2d 43.) (See 45 Cal. L. Rev. 202 [criticism of *Walsh*].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *People v. Crew* (2003) 31 C.4th 822, 843, 3 C.R.3d 733, 74 P.3d 820 [in capital murder trial, prosecution witness' testimony that defendant's friend had told him defendant had admitted killing victim was properly admitted after defendant attacked friend's trial testimony on basis of immunity agreement he had entered into with prosecution; friend's prior statement was made before agreement was reached, and before police investigation of murder, during which friend allegedly lied]; 1 McCormick 6th, §47.



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#### K. Rehabilitation of Impeached Witness.

##### 5. Prior Consistent Statement.

##### c. Where Prior Inconsistent Statement Introduced.

3 Witkin Cal. Evid. Presentation § 366

[§ 366] Where Prior Inconsistent Statement Introduced.

(1) *Former Exclusionary Rule.* The fact that a witness told the same story before does not necessarily add force to his testimony. Hence, prior consistent statements have traditionally been restricted: They have been allowed to rebut a charge of improper motive or recent fabrication (*supra*, §§364, 365), but not to rebut impeachment for bad character or prior inconsistent statements. (See *Bohn v. Gruver* (1931) 111 C.A. 386, 395, 295 P. 891; *Davis v. Tanner* (1927) 88 C.A. 67, 76, 262 P. 1106; cf. *People v. Vera* (1956) 145 C.A.2d 649, 656, 302 P.2d 887 [concurring opinion]; and see also 1 McCormick 5th, §47; 4 Wigmore (Chadbourn Rev.) §1125 et seq.; 45 Cal. L. Rev. 202; 50 So. Cal. L. Rev. 109, 118.)

(2) *Expansion of Recent Fabrication Exception.* The exclusionary rule was undermined by decisions which stretched the flexible recent fabrication theory to cover what ordinarily would be regarded as simple prior inconsistent statements. Thus, in *Bickford v. Mauser* (1942) 53 C.A.2d 680, 128 P.2d 79, a personal injury action, H, defendant's friend and passenger, testified to what happened; on cross-examination he denied having told police officers that he had been resting in the car and did not see the accident; the officers were called and testified to such statements. Defendant was then allowed to introduce a written consistent statement signed by H the day after the accident, and given to the investigator for defendant's counsel. (53 C.A.2d 686.) And in *People v. Bias* (1959) 170 C.A.2d 502, 339 P.2d 204, the court was quite candid in recognizing the change: "The very fact that defendant sought to impeach her on an important circumstance of the crime, proving a statement at the preliminary examination contrary to that made at the trial, is in effect a charge of recent fabrication." (170 C.A.2d 512.) (See also *People v. Basnett* (1960) 186 C.A.2d 108, 121, 8 C.R. 804.)

(3) *Code Rule of Admissibility.* Ev.C. 791(a) gives effect to these decisions by abandoning the limitation, and allowing proof of a prior consistent statement of a witness when "[e]vidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility." But the consistent statement must have been made *before* the inconsistent statement. (Ev.C. 791(a); see *People v. Ainsworth* (1988) 45 C.3d 984, 1015, 248 C.R. 568, 755 P.2d 1017; *Sprague v. Equifax* (1985) 166 C.A.3d 1012, 1036, 213 C.R. 69, citing the text; see also 58 A.L.R.4th 1014 [criminal cases]; 59 A.L.R.4th 1000 [civil cases].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Former Exclusionary Rule.* See 1 McCormick 6th, §47.

(3) *Code Rule of Admissibility.* See *People v. Cook* (2007) 40 C.4th 1334, 1357, 58 C.R.3d 340, 157 P.3d 950 [in

murder trial, prior consistent statement was properly admitted to rehabilitate witness where, as required by *Ev.C.* 791(a), prior inconsistent statement had already been introduced, and consistent statement was earlier of two].



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## CHAPTER XI - Presentation At Trial

## XII. OBJECTIONS TO INADMISSIBLE EVIDENCE

## A. Requirement of Proper Objection.

## 1. Right To Object and Practice.

3 *Witkin Cal. Evid. Presentation* § 367

[§ 367] Right To Object and Practice.

(1) *Right To Object.* Under the adversary system of trial, it is the right and responsibility of counsel to object to inadmissible evidence: "[H]is objection to prohibited evidence (or his failure to waive an objection) cannot in any way be construed to his disadvantage, since by hypothesis the evidence is prohibited, not for his personal sake on grounds independent of the value of his evidence, as privileged evidence is ... but because of the untrustworthiness of the evidence. No doubt a party usually does take advantage of such rules because the forbidden evidence is unfavorable, and no doubt the opponent constantly seeks by innuendo to give an unfavorable meaning to such objections. But the rules of evidence could never be enforced if parties were not guaranteed free scope in calling attention to the impending violation of the rules; and it is universally assumed and understood that no inference can lawfully be urged in consequence of such objections." (*Thompson v. Hickman* (1948) 89 C.A.2d 356, 365, 200 P.2d 893, quoting Wigmore.) (See also 1 McCormick 5th, §52; 1 Wigmore (Tillers Rev.) §18.)

Counsel are also commonly accorded the privilege of arguing the merits of the objection before the court rules on it. (See *Bennett v. Superior Court* (1946) 73 C.A.2d 203, 216, 220, 166 P.2d 318.)

(2) *Practice.* Because failure to make a proper, specific and timely objection is normally a waiver of the right (see *infra*, §371), and incompetent evidence received without objection will sustain a verdict or judgment (see *infra*, §393), counsel should be alert to object to incompetent, harmful evidence. But experienced trial attorneys have warned of the dangers of irritating the jury and trial judge by repeated objections on purely technical or formal grounds, where the defect is readily curable and the only result is to delay the proceedings. (For discussions of advantages and disadvantages of objecting, see 1 McCormick 5th, §52; C.E.B., California Trial Objections 6th, Chap. 4; C.E.B., 2 Civ. Proc. During Trial 3d, §15.32 et seq.; C.E.B., Effective Direct and Cross-Examination, Chap. 11; 6 Am.Jur. Trials 605.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Right To Object.* See 1 McCormick 6th, §52.

(2) *Practice.* See 1 McCormick 6th, §52; 29 *Pepperdine L. Rev.* 243 [handbook on objections in criminal and civil trials]. *West's Key Number Digest*, Criminal Law k.690 et seq.; Trial k.73 et seq.



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## CHAPTER XI - Presentation At Trial

## XII. OBJECTIONS TO INADMISSIBLE EVIDENCE

- A. Requirement of Proper Objection.
- 2. Objection by Motion in Limine.
  - a. Purpose and Scope of Motion.

## 3 Witkin Cal. Evid. Presentation § 368

[§ 368] Purpose and Scope of Motion.

(1) *Purpose of Motion.* A motion in limine is made to exclude evidence before the evidence is offered at trial, on grounds that would be sufficient to object to the evidence. Although not expressly authorized by statute, the motion is recognized as a proper request that the trial court has inherent power to entertain and grant. (See *People v. Morris* (1991) 53 C.3d 152, 188, 279 C.R. 720, 807 P.2d 949, *infra*, §370, citing the text [general discussion of purposes and advantages of motions in limine]; *Sacramento & San Joaquin Drainage Dist. v. Reed* (1963) 215 C.A.2d 60, 66, 67, 68, 29 C.R. 847; *Charbonneau v. Superior Court* (1974) 42 C.A.3d 505, 507, 116 C.R. 153; *Hyatt v. Sierra Boat Co.* (1978) 79 C.A.3d 325, 337, 145 C.R. 47; *Dong v. Board of Trustees of Leland Stanford Junior University* (1987) 191 C.A.3d 1572, 1584, 236 C.R. 912; *Clemens v. American Warranty Corp.* (1987) 193 C.A.3d 444, 451, 238 C.R. 339, quoting the text [dismissal following granting of six motions in limine that were, in net effect, objections to all evidence on grounds of failure to state cause of action (see 6 Cal. Proc. (4th), *Proceedings Without Trial*, §177)]; *Edwards v. Centex Real Estate Corp.* (1997) 53 C.A.4th 15, 26, 61 C.R.2d 518, citing the text [contrasting motion in limine with "objection to all evidence" (see 6 Cal. Proc. (4th), *Proceedings Without Trial*, §176)]; *Mechanical Contractors Assn. v. Greater Bay Area Assn.* (1998) 66 C.A.4th 672, 676, 677, 78 C.R.2d 225 [same; because granting of motion to exclude all evidence was "tantamount to a nonsuit," it was subject to standard of review for nonsuits]; C.E.B., 1 Civ. Proc. During Trial 3d, Chap. 7; C.E.B., California Trial Objections 6th, §2.3 et seq.; C.J.E.R., Judges Benchbook, Civil Proceedings: Trial §3.72 et seq.; Cal. Civil Practice, 3 Procedure, §24:1 et seq.; C.E.B., Expert Witness Guide 2d, §14.2; Rutter Group, 1 Civil Trials and Evidence, §4.217 et seq.; 1 Wigmore (Tillers Rev.) §18, p. 801; 20 Am.Jur. Trials 441; 63 A.L.R.3d 311 [rules for using motion in limine].)

The purpose of the motion is "to avoid the obviously futile attempt to 'unring the bell' in the event a motion to strike is granted in the proceedings before the jury." (*Hyatt v. Sierra Boat Co.*, *supra*, 79 C.A.3d 337.) The motion requests that opposing counsel and witnesses be instructed not to mention before the jury certain objectionable matters that might create an improper inference in the jurors' minds despite a subsequent instruction to disregard those matters. In other words, the motion seeks to avoid the prejudicial effect of questions asked or statements made in connection with the offer of objectionable evidence. (See *Charbonneau v. Superior Court*, *supra*, 42 C.A.3d 507; C.J.E.R., Judges Benchbook, Civil Proceedings: Trial §3.72.)

(2) *Scope of Motion.* The motion may be made to exclude any kind of evidence that could be objected to at the trial, either as irrelevant or subject to discretionary exclusion as unduly prejudicial (*Ev.C. 352, 1 Cal. Evidence (4th), Circumstantial Evidence*, §17 et seq.). (For illustrations of objectionable evidence commonly subject of motion in civil

cases, see C.J.E.R., Judges Benchbook, Civil Proceedings: Trial §9.8; Rutter Group, 1 Civil Trials and Evidence, §§4.240 [plaintiff's examples], 4.258 [defendant's examples]; for motion used in criminal proceedings to prohibit improper impeachment by proof of prior felony conviction (*supra*, §301 et seq.), see *People v. Rist* (1976) 16 C.3d 211, 223, 127 C.R. 457, 545 P.2d 833; *People v. Barrick* (1982) 33 C.3d 115, 123, 124, 187 C.R. 716, 654 P.2d 1243; *People v. Smith* (1984) 151 C.A.3d 89, 93, 198 C.R. 623; *People v. Boyd* (1985) 167 C.A.3d 36, 40, footnote 3, 212 C.R. 873.)

The motion may also be used to obtain a temporary order excluding evidence until the court is in a position to rule on admissibility. (See C.E.B., California Trial Objections 6th, §2.13; C.E.B., 2 Civ. Proc. During Trial 3d, §7.3.)

In *Kelly v. New West Fed. Savings* (1996) 49 C.A.4th 659, 56 C.R.2d 803, plaintiffs, who were injured when they stepped out of an elevator that had "mislevelled," brought a personal injury action against the building owner and manager and the elevator maintenance company. The building had two elevators, and during her deposition, one plaintiff testified that it was the smaller of the elevators that caused her injury. When further discovery revealed that the larger elevator might have been involved, defendants brought a motion in limine to preclude plaintiffs from presenting any evidence relating to the larger elevator, and a second motion to preclude plaintiff's expert, whose deposition testimony had related mostly to the smaller elevator, from testifying regarding the larger elevator. The trial judge granted the first motion, broadened its ruling on the second motion to preclude plaintiff's expert from testifying at all, and then granted defendants' nonsuit motion. *Held*, reversed and remanded.

(a) A party may be precluded from introducing evidence based on a response to a request for admissions, but the other discovery tools, including depositions and interrogatories, have a different function, i.e., assisting counsel to prepare for trial. "It is a misuse of a motion *in limine* to attempt to compel a witness or a party to conform his or her trial testimony to a preconceived factual scenario based on testimony given during pretrial discovery." (49 C.A.4th 672, 673, distinguishing *Campain v. Safeway Stores* (1972) 29 C.A.3d 362, 104 C.R. 752, 1 Cal. Evidence (4th), *Circumstantial Evidence*, §10.) The mere fact that plaintiff initially identified the smaller elevator as the one she thought she was riding on did not render evidence relating to the larger elevator irrelevant. Her deposition testimony indicated that she had witnessed malfunctions in both elevators, and the jury could find that plaintiffs were in fact riding on the larger elevator. The appropriate remedy for any alleged "surprise" to defendants would have been a continuance. (49 C.A.4th 674, 675, citing the text.)

(b) The granting of the second motion in limine was also improper because the trial judge, without notice or adequate warning to plaintiffs' counsel, turned the hearing on that motion into an *Ev.C. 402* hearing on the expert's competence. (See *supra*, §50.) The judge's conclusion that the expert's proposed opinions were not based on competent evidence was beyond the limited scope of the in limine proceeding. (49 C.A.4th 675, 677.) The error as to both motions was reversible per se, as it prevented plaintiffs from offering evidence to establish their case. (49 C.A.4th 677.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Purpose of Motion.* See *Rufo v. Simpson* (2001) 86 C.A.4th 573, 608, 103 C.R.2d 492 [motion in limine is additional protective device for party wishing to exclude evidence, to prevent proponent from even mentioning potentially prejudicial evidence to jury; but making motion in limine is not prerequisite to objecting at trial]; 21 California Lawyer 65 (March 2001) [effective use of motion in limine]. (2) *Scope of Motion.* See *Silva v. Union Pac. R. Co.* (2000) 85 C.A.4th 1024, 1030, 102 C.R.2d 668 [in wrongful death action arising from teenager's being hit by defendant's train, trial judge erred in ruling, in response to competing in limine motions concerning whether defendant could offer evidence on whether it had duty to fence, that defendant had no such duty; ruling of this type can be made on in limine motion but requires clear factual basis, which parties had not provided]; *Ulloa v. McMillin Real Estate & Mortg.* (2007) 149 C.A.4th 333, 338, 57 C.R.3d 1 [in action for specific performance in which defendant sellers cross-complained for fraud, trial judge did not err in granting cross-defendants' motion in limine to exclude evidence that cross-defendant real estate agent had signed counteroffer on client's behalf; even if agent's conduct was improper, it was irrelevant to any damages suffered by defendants, and they did not even learn of it until after pleading was filed]. *West's Key Number Digest*, Pretrial Procedure k.3





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### XII. OBJECTIONS TO INADMISSIBLE EVIDENCE

- A. Requirement of Proper Objection.
  - 2. Objection by Motion in Limine.
    - b. Procedure.

3 Witkin Cal. Evid. Presentation § 369

[§ 369] Procedure.

(1) *Time for Making Motion.* The usual and most desirable time for making the motion is before the jury selection begins or the trial is commenced. If the motion is not made in advance of trial, counsel risks the danger that the opponent will refer to the objectionable matter in the voir dire of the jury or opening statement. (See C.E.B., 1 Civ. Proc. During Trial 3d, §7.13 et seq.; C.J.E.R., Judges Benchbook, Civil Proceedings: Trial, §3.75.)

However, the motion may be made during the trial when counsel has reason to believe that the opponent will attempt to introduce objectionable evidence. (See *Hyatt v. Sierra Boat Co.* (1978) 79 C.A.3d 325, 337, 145 C.R. 47 [after plaintiff rested his case in chief, motion made to exclude testimony of defendant's expert for lack of foundational evidence]; C.J.E.R., Judges Benchbook, Civil Proceedings: Trial, §9.6; C.E.B., 1 Civ. Proc. During Trial 3d, §7.16.)

(2) *Form: Written Motion.* Where the objectionable evidence could have a seriously prejudicial effect, a written motion, supported by points and authorities, is the most desirable method of seeking the court's order. Because the motion is nonstatutory, there is no required format; but it is considered good practice not only to submit points and authorities, but to provide the judge with a proposed written order. (See C.E.B., 1 Civ. Proc. During Trial 3d, §7.23; C.E.B., California Trial Objections 6th, §2.11; C.J.E.R., Judges Benchbook, Civil Proceedings: Trial, §3.74; for forms, see Cal. Civil Practice, 3 Procedure, §24:19; C.E.B., California Trial Objections 6th, §2.19.)

(3) *Oral Motion.* Where the prejudicial matter appears at the trial without advance warning, the motion may be made orally and considered either at a bench conference or at a recess in chambers. (See C.E.B., 1 Civ. Proc. During Trial 3d, §7.18; C.E.B., California Trial Objections 6th, §2.12.)

(4) *Hearing.* The motion may be presented in open court outside the hearing of the jury, or, at the court's invitation, in chambers. (See C.J.E.R., Judges Benchbook, Civil Proceedings: Trial, §9.9.) In a chambers hearing, counsel should request that a reporter be present to ensure a record for appellate review. (See C.E.B., California Trial Objections 6th, §2.12.)

(5) *Ruling and Order.* The order commonly sought is one that prohibits counsel, parties, and witnesses from mentioning or referring to the prejudicial matters. (See C.E.B., 1 Civ. Proc. During Trial 3d, §7.38 et seq.)

If the judge does not dispose of the matter at the hearing but takes it under submission, he or she may make an interim order prohibiting reference to the evidence until the ruling is made. (See C.J.E.R., Judges Benchbook, Civil

Proceedings: Trial, §9.9; C.E.B., California Trial Objections 6th, §§2.13, 2.14.) Counsel and the court should keep track of the pending undecided motions. (See C.J.E.R., Judges Benchbook, Civil Proceedings: Trial, §§3.76, 9.9; Cal. Civil Practice, 3 Procedure, §24:20; on necessity of objection at trial, see *infra*, §370; on effect of trial judge's failure to rule on motion, see *infra*, §391.)

(6) *Sanctions for Violation of Order.* Reference to objectionable matter covered by the judge's order may be sanctioned in several ways: (a) assignment of misconduct and admonition to the jury to disregard the evidence (see *infra*, §386); (b) motion for mistrial; (c) adjudication of contempt. (See C.E.B., California Trial Objections 6th, §2.17.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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### XII. OBJECTIONS TO INADMISSIBLE EVIDENCE

- A. Requirement of Proper Objection.
- 2. Objection by Motion in Limine.
- c. Necessity of Further Objection at Trial.

3 Witkin Cal. Evid. Presentation § 370

[§ 370] Necessity of Further Objection at Trial.

*People v. Jennings* (1988) 46 C.3d 963, 251 C.R. 278, 760 P.2d 475, held that when an in limine ruling that evidence is admissible has been made, the party seeking exclusion must object when the evidence is actually offered to preserve the issue for appeal. "The reason for this rule is that until the evidence is actually offered, and the court is aware of its relevance in context, its probative value, and its potential for prejudice, matters related to the state of the evidence at the time an objection is made, the court cannot intelligently rule on admissibility." (46 C.3d 975, footnote 3.)

The *Jennings* rule was substantially relaxed in *People v. Morris* (1991) 53 C.3d 152, 279 C.R. 720, 807 P.2d 949. The defendant in a capital murder prosecution moved in limine to exclude the testimony of two female accomplices, claiming that their plea agreements were coercive. On appeal, the prosecution argued that defendant had waived any error by failing to object when the witnesses testified. *Held*, the issue was preserved for appeal.

(a) "Under appropriate circumstances, a motion *in limine* can serve the function of a 'motion to exclude' under *Evidence Code section 353* by allowing the trial court to rule on a specific objection to particular evidence." (53 C.3d 188.)

(b) *Sacramento & San Joaquin Drainage Dist. v. Reed* (1963) 215 C.A.2d 60, 67, 29 C.R. 847 held that no objection at trial is necessary to preserve the ruling for appeal. The conflict between the *Jennings* rule and that of *Sacramento & San Joaquin Drainage Dist.* can be reconciled by focusing on the requirements of *Ev.C. 353*: "[A] motion *in limine* to exclude evidence is a sufficient manifestation of objection to protect the record on appeal when it satisfies the basic requirements of *Evidence Code section 353*, i.e.: (1) a specific legal ground for exclusion is advanced and subsequently raised on appeal; (2) the motion is directed to a particular, identifiable body of evidence; and (3) the motion is made at a time before or during trial when the trial judge can determine the evidentiary question in its appropriate context." (53 C.3d 190.)

(c) "Notwithstanding our holding, the better practice in handling motions *in limine* is undoubtedly for the parties to stipulate to the effect of the court's rulings ... or for the trial judge to make it clear to counsel at the end of *in limine* arguments not only what the ruling on the motion is, but whether further objection or argument is desired when the evidence is presented. If this is done, the stipulation or order of the trial court will be respected in the appellate court's determination whether error has been properly preserved." (53 C.3d 190.) (See *People v. Crittenden* (1994) 9 C.4th 83, 127, 36 C.R.2d 474, 885 P.2d 887 [following *People v. Morris*]; C.E.B., 1 Civ. Proc. During Trial 3d, §7.43 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## XII. OBJECTIONS TO INADMISSIBLE EVIDENCE

## A. Requirement of Proper Objection.

## 3. Waiver.

## a. Failure To Object.

3 Witkin Cal. Evid. Presentation § 371

[§ 371] Failure To Object.

(1) *General Rule.* Where inadmissible evidence is offered, the party who desires to raise the point of erroneous admission on appeal must object at the trial, specifically stating the grounds of the objection, and directing the objection to the particular evidence that the party seeks to exclude. Obviously, failure to object at all waives the defect. (*Perry v. McLaughlin* (1931) 212 C. 1, 6, 297 P. 554; *Sublett v. Henry's Turk & Taylor Lunch* (1942) 21 C.2d 273, 275, 131 P.2d 369; *People v. Corrigan* (1957) 48 C.2d 551, 556, 310 P.2d 953 [rule applies also to error or unfairness in question asked by the judge]; *People v. Gates* (1987) 43 C.3d 1168, 1185, 240 C.R. 666, 743 P.2d 301 [purported improper question by prosecutor on cross-examination]; *Standley v. Feather River Pine Mills* (1952) 112 C.A.2d 101, 104, 245 P.2d 657; *People v. Alvidrez* (1958) 158 C.A.2d 299, 300, 322 P.2d 557 [use of unidentified informer-participant; objection waived by failure to demand identification]; *People v. Prado* (1961) 190 C.A.2d 374, 378, 12 C.R. 141, citing the text; *Russell v. Geis* (1967) 251 C.A.2d 560, 570, 59 C.R. 569, quoting the text; *People v. Keel* (1969) 272 C.A.2d 275, 277, 77 C.R. 298, citing the text; *People v. Nugent* (1971) 18 C.A.3d 911, 917, 96 C.R. 209, citing the text; *People v. Harris* (1978) 85 C.A.3d 954, 957, 149 C.R. 860, quoting the text; *Estate of Silverstein* (1984) 159 C.A.3d 221, 225, 205 C.R. 294, quoting the text; 1 McCormick 5th, §52; 1 Wigmore (Tillers Rev.) §18; C.E.B., 2 Civ. Proc. During Trial 3d, §15.24 et seq.; *F.R. Evid.*, Rule 103(a), *infra*, §372; on insufficient or belated objection, see *infra*, §372; for exceptions to waiver rule, see *infra*, §396 et seq.)

(2) *Waiver of Constitutional Claims.* The waiver rule applies to evidence obtained in violation of constitutional guarantees. For example:

(a) Evidence obtained by unlawful search and seizure. (See *Robison v. Superior Court* (1957) 49 C.2d 186, 187, 316 P.2d 1; *People v. Clark* (1990) 50 C.3d 583, 625, 268 C.R. 399, 789 P.2d 127 [in face of express statute on admissibility, party may not excuse failure to object on ground that he did not anticipate later decision holding that statute means just what it says, but limiting its application]; *People v. Flores* (1968) 68 C.2d 563, 567, 68 C.R. 161, 440 P.2d 233; *People v. Gee* (1975) 52 C.A.3d 100, 103, 124 C.R. 735 [P.C. 1538.5(m) makes review of search and seizure on appeal dependent on defendant's moving for return of property or suppression of evidence at some stage of proceedings before conviction]; *People v. Smith* (1986) 180 C.A.3d 72, 79, 225 C.R. 348; 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence*, §381 et seq.)

(b) Evidence obtained in violation of *Miranda* rule. (See *People v. Castro* (1968) 257 C.A.2d 643, 646, 65 C.R. 62; *People v. Meyers* (1968) 262 C.A.2d 307, 310, 68 C.R. 636; 5 Cal. Crim. Law (3d), *Criminal Trial*, §133.)

(3) *Summary Judgment Proceedings*. Although the waiver rule formerly did not apply in summary judgment proceedings (see *Dugar v. Happy Tiger Records* (1974) 41 C.A.3d 811, 817, 116 C.R. 412), the present rule is that evidentiary objections not raised in writing or orally at the hearing on the motion for summary judgment are deemed waived. (C.C.P. 437c(b); see *Haskell v. Carli* (1987) 195 C.A.3d 124, 129, 240 C.R. 439, citing the text; 6 Cal. Proc. (4th), *Proceedings Without Trial*, §§211, 219.) Moreover, objections based on failure to comply with the requirements of C.C.P. 437c(d) (that supporting or opposing affidavits be made on personal knowledge, set forth admissible evidence, and show that the affiant is competent to testify) are waived if they are not made at the hearing. (C.C.P. 437c(d); see 6 Cal. Proc. (4th), *Proceedings Without Trial*, §202 et seq.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *General Rule*. See *People v. Seijas* (2005) 36 C.4th 291, 301, 30 C.R.3d 493, 114 P.3d 742 [in murder prosecution, defendant, by failing to object, forfeited for appeal purposes the issue whether trial judge erred in permitting witness to assert privilege against self-incrimination and thus in admitting witness' preliminary hearing testimony]; *People v. Partida* (2005) 37 C.4th 428, 433, 35 C.R.3d 644, 122 P.3d 765, 6 Cal. Crim. Law (3d), *Reversible Error*, Supp., §36 [where defendant objected at trial to admission of gang evidence on ground that it was more prejudicial than probative (Ev.C. 352), his due process assertions on appeal regarding that ruling were limited to argument that error under Ev.C. 352 was so severe that it violated his due process rights]; *People v. Viray* (2005) 134 C.A.4th 1186, 1208, 36 C.R.3d 693, 5 Cal. Crim. Law (3d), *Criminal Trial*, Supp., §269 [where defendant failed to object to admission of evidentiary fruits of her interrogation, which was obtained in violation of her right to counsel, any objection on this ground was waived for purposes of appeal]; 1 McCormick 6th, §52.(2) *Waiver of Constitutional Claims*.

(c) *(New) Confrontation Clause violations*. A general hearsay objection is insufficient to preserve the claim that admission of a testimonial statement violates *Crawford v. Washington* (2004) 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177, Supp., supra, §21. (*People v. Chaney* (2007) 148 C.A.4th 772, 777, 56 C.R.3d 128.) *West's Key Number Digest*, Criminal Law k.692, 698 et seq.; Trial k.105 et seq.



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### XII. OBJECTIONS TO INADMISSIBLE EVIDENCE

#### A. Requirement of Proper Objection.

##### 3. Waiver.

##### b. Insufficient or Belated Objection.

3 Witkin Cal. Evid. Presentation § 372

[§ 372] Insufficient or Belated Objection.

(1) *California Rule*. A waiver occurs where an objection is made but (a) it is insufficient in form, i.e., it does not clearly state a proper ground (infra, §375 et seq.); or (b) it is not made at the earliest opportunity, i.e., before the improper question is answered, or, if this is not feasible, by motion to strike immediately thereafter (infra, §383 et seq.). (*Ev.C.* 353(a); see *Rupp v. Summerfield* (1958) 161 C.A.2d 657, 662, 326 P.2d 912; *People v. Horn* (1960) 187 C.A.2d 68, 77, 9 C.R. 578, citing the text; *Wagner v. Osborn* (1964) 225 C.A.2d 36, 43, 37 C.R. 27; *People v. Valdez* (1966) 239 C.A.2d 459, 464, 48 C.R. 840; *People v. Ogg* (1968) 258 C.A.2d 841, 846, 66 C.R. 289 [qualifications of opinion witness on character]; *People v. Gutierrez* (1993) 14 C.A.4th 1425, 1434, 18 C.R.2d 371 [objection on ground of vagueness was insufficient to make appealable the issue whether hypothetical questions to gang expert were beyond proper scope of expert testimony]; 1 McCormick 5th, §52; 1 Wigmore (Tillers Rev.) §18; C.E.B., California Trial Objections 6th, §4.17 et seq.) An *objection*, however, is enough; a formal *exception* to the court's ruling is not required. (C.C.P. 647; 9 Cal. Proc. (4th), Appeal, §395.)

An objection at a prior proceeding is not sufficient. In *People v. Clark* (1990) 50 C.3d 583, 268 C.R. 399, 789 P.2d 127, the court rejected the contention that no objection to the introduction of photographs at a second penalty trial was necessary where the judge had overruled an objection to the same photographs at the first penalty trial. "Not only might a party elect different trial tactics at a second trial, but the trial court being more fully informed must be given the opportunity to reconsider the prior ruling. A defendant may not acquiesce in the admission of possibly excludable evidence and then claim on appeal that rulings made in a prior proceeding render objection unnecessary." (50 C.3d 624.)

(2) *Federal Rule*. *F.R. Evid.*, Rule 103 covers both objections to inadmissible evidence and offers of proof after exclusion of admissible evidence (see infra, §401). (On Rule 103 generally, see 1 Mueller & Kirkpatrick, Federal Evidence 2d, §4 et seq.; see also *F.R. Civ. P.*, Rule 46 and *F.R. Crim. P.*, Rule 51 ["exception" not required].)

Error may not be predicated on a ruling to admit or exclude evidence unless a substantial right of the party is affected. Moreover, if the ruling was to admit evidence, a timely objection or motion to strike must appear of record, stating the specific ground of objection, unless that ground was apparent from the context. (*F.R. Evid.*, Rule 103(a)(1).) If the ruling was to exclude evidence, the substance of the evidence must have been made known to the court by offer or must have been apparent from the context within which questions were asked. (*F.R. Evid.*, Rule 103(a)(2).) An exception to this rule occurs in the case of "plain errors affecting substantial rights," which may be noticed even when they were not properly brought to the court's attention. (*F.R. Evid.*, Rule 103(d).)

The court may add to the record a further statement showing the character of the evidence, the form in which it was offered, the objection made, and the ruling. The court may require the offer of proof to be made in question and answer form. (*F.R. Evid.*, *Rule 103(b)*.)

In jury cases, proceedings must be conducted, "to the extent practicable," to prevent inadmissible evidence from being suggested to the jury, avoiding, for example, making statements or offers of proof or asking questions in the jury's hearing. (*F.R. Evid.*, *Rule 103(c)*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *California Rule*. See 1 McCormick 6th, §52.





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### XII. OBJECTIONS TO INADMISSIBLE EVIDENCE

#### A. Requirement of Proper Objection.

##### 3. Waiver.

#### c. Other Acts Constituting Estoppel or Waiver.

*3 Witkin Cal. Evid. Presentation § 373*

[§ 373] Other Acts Constituting Estoppel or Waiver.

(1) *Inadmissible Evidence Offered by Party: Estoppel.* A party who is responsible for the introduction of inadmissible matter is estopped to complain of its admission, for the error was "invited" by the party. This is true, for example, when the party offers the evidence on direct examination (*Gjurich v. Fieg* (1913) 164 C. 429, 433, 129 P. 464; *People v. Moran* (1970) 1 C.3d 755, 762, 83 C.R. 411, 463 P.2d 763, citing the text), or where the party brings it out by questions on cross-examination with knowledge of the likelihood of an objectionable answer (*Zarafonitis v. Yellow Cab Co.* (1932) 127 C.A. 607, 609, 16 P.2d 141). (See C.E.B., California Trial Objections 6th, §4.8.)

(2) *Party's Objection to Striking Inadmissible Evidence: Estoppel.* If a party introduces inadmissible evidence and then seeks to cure the error by having it stricken out, the opposing party should not object. If the opposing party does object, and is successful in preventing the withdrawal, he or she is estopped to raise the error on appeal. (See *Sellers v. Wood Hydraulic Hoist & Body Co.* (1928) 205 C. 519, 523, 271 P. 1055; *Kahn v. Triest-Rosenberg Cap Co.* (1903) 139 C. 340, 346, 73 P. 164.)

(3) *Acquiescence in Theory of Ruling: Waiver.* If a party introduces inadmissible evidence over objection, and later the opposing party offers the same kind of evidence, the opposing party waives the prior objection and loses the right to complain of error. (*Heiman v. Market Street Ry. Co.* (1937) 21 C.A.2d 311, 315, 69 P.2d 178; see 1 Wigmore (Tillers Rev.) §18, p. 837.)

The same is true if the party first objects and then expressly waives the objection. Thus, in *Buchanan v. Nye* (1954) 128 C.A.2d 582, 586, 275 P.2d 767, counsel first objected to a coroner's inquest transcript as hearsay, then stated that he withdrew his objection. On appeal he contended that there was no effective waiver because his purpose was to mitigate the damage to his case by using parts of the transcript favorable to him. The court said: "We cannot be concerned with the mental processes employed by counsel in selecting his trial tactics. In this instance, counsel could have preserved his record by objecting to the entire line of inquiry, but upon reflection chose not to do so. He may not now renege on his decision." (128 C.A.2d 587.) (But see *infra*, §374 [conduct not constituting estoppel].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER XI - Presentation At Trial

### XII. OBJECTIONS TO INADMISSIBLE EVIDENCE

#### A. Requirement of Proper Objection.

##### 3. Waiver.

##### d. Conduct Not Constituting Waiver or Estoppel.

*3 Witkin Cal. Evid. Presentation § 374*

[§ 374] Conduct Not Constituting Waiver or Estoppel.

(1) *Failure To Object to Similar Evidence.* If a party offers some inadmissible evidence of a certain type without objection by the opposing party, this should not make similar evidence admissible for the rest of the trial. In other words, a party may properly elect, for strategic reasons, to allow comparatively harmless, incompetent or irrelevant matter to go in without waiving the right to object to seriously prejudicial matter that may follow it. (See 1 McCormick 5th, §55.)

The same is true where the sequence is reversed; e.g., the overruling of a proper objection to incompetent hearsay may be raised as error on appeal even though the appellant later acquiesced in the admission of other hearsay. (*Buchanan v. Nye* (1954) 128 C.A.2d 582, 587, 275 P.2d 767.)

(2) *Cross-Examination or Rebuttal After Objection Overruled.* Even though a party believes his or her overruled objection is good, it is hardly safe to stake everything on the possibility of reversal on appeal. Usually, the party will meet the challenge of the inadmissible evidence, by cross-examination and, if necessary, by rebuttal evidence on the issue. No waiver results from this necessary defensive action. (See *Jameson v. Tully* (1918) 178 C. 380, 384, 173 P. 577 [cross-examination]; *Warner Const. Corp. v. Los Angeles* (1970) 2 C.3d 285, 299, footnote 17, 85 C.R. 444, 466 P.2d 996, 1 Cal. Evidence (4th), Circumstantial Evidence, §§31, 146; *Fernandez v. Western Fuse & Explosives Co.* (1917) 34 C.A. 420, 423, 167 P. 900 [rebuttal]; *Moore v. Norwood* (1940) 41 C.A.2d 359, 368, 106 P.2d 939 [cross-examination]; *De Roulet v. Mitchel* (1945) 70 C.A.2d 120, 125, 160 P.2d 574 [rebuttal]; 1 Wigmore (Tillers Rev.) §18, p. 838.)

As the court remarked in the *Jameson* case, supra: "[A] party, after rightfully objecting to the admission of evidence, may by his cross-examination lay the foundation for an obviously proper motion to strike it out, or may compel its contradiction or withdrawal, or may utterly destroy its effect, and thus render unnecessary his remedy by appeal from the court's erroneous action." (178 C. 384.)

(3) *Inadvertent Failure To Object: New Trial.* In *Clark v. Bradley* (1951) 106 C.A.2d 537, 235 P.2d 439, a paternity suit, defendant claimed to have worked nights at the time conception allegedly occurred. Plaintiff introduced payroll records of defendant's employer, including a discharge card which *on the back* contained highly prejudicial matter (e.g., "unreliable"). *Held*, a new trial was properly granted. The inadmissible evidence was overlooked by both counsel and the failure to object was excusable. The court emphasized the point that this was not an attempt to raise an objection for the first time on appeal from a judgment, but rather a review of the *trial judge's determination* that a fair trial had not

been had. (106 C.A.2d 544.) (See *Hoel v. Los Angeles* (1955) 136 C.A.2d 295, 307, 288 P.2d 989 ["Even if the moving party was technically estopped to claim error, that fact would not impair the power of the court to do justice by granting the new trial"].)

(4) *Justifiable Reliance on Contemplated Instruction*. An unusual exception was recognized in *Khanoyan v. All Amer. Sports Enterprises* (1964) 229 C.A.2d 785, 793, 40 C.R. 596, a personal injury suit. Defendant's evidence of absence of similar accidents was introduced without objection by plaintiff's counsel because he reasonably expected a *res ipsa loquitur* instruction that would make the evidence admissible. (See 1 Cal. Evidence (4th), *Circumstantial Evidence*, §106.)

(5) *Defensive Acts*. In *People v. Turner* (1990) 50 C.3d 668, 268 C.R. 706, 789 P.2d 887, defense counsel, assuming that Proposition 8 (1 Cal. Evidence (4th), *Introduction*, §8) made defendant's prior felony convictions admissible for impeachment purposes, elicited the existence and nature of the convictions during his direct examination of defendant. On appeal, defendant argued that the trial judge erred in not weighing the prior convictions' probative value against their potential for unfair prejudice, as required by *People v. Castro* (1985) 38 C.3d 301, 211 C.R. 719, 696 P.2d 111 (supra, §303), which was decided after completion of the trial. *Held*, defendant did not waive his right to raise this issue on appeal. "Given the apparent futility of an effort to exclude the prior convictions, ... prudent counsel would be well advised to minimize their 'sting' by eliciting them himself. Such *defensive acts* do not waive an objection on appeal." (50 C.3d 704, footnote 18.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Failure To Object to Similar Evidence*. See 1 McCormick 6th, §55.



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## XII. OBJECTIONS TO INADMISSIBLE EVIDENCE

## A. Requirement of Proper Objection.

## 4. General Objection.

## a. Insufficient.

3 Witkin Cal. Evid. Presentation § 375

[§ 375] Insufficient.

The typical general objection--that the evidence is "incompetent, irrelevant and immaterial"--is ordinarily insufficient and a waiver of the defect. But any other form that does not specify the particular defect may be called a general objection and is equally futile. (See *Ev.C. 353(a)*; *People v. Morris* (1991) 53 C.3d 152, 195, 196, 279 C.R. 720, 807 P.2d 949 [defendant's objection to witness' testimony, on grounds that "jailhouse informants are unreliable witnesses" was not sufficiently specific]; *People v. Jacobs* (1925) 73 C.A. 334, 345, 238 P. 770, 776 ["I object to its being introduced in evidence in respect to this case"]; *Estate of Wahlefeld* (1930) 105 C.A. 770, 772, 288 P. 870 ["I want to call your attention to section 1880 of the Code of Civil Procedure"]; *People v. Boehm* (1969) 270 C.A.2d 13, 18, 75 C.R. 590, citing the text ["I wish to make the strongest objection. I want to make it at the bench"; no showing as to what objection, if any, was made at bench]; *People v. Smith* (1970) 13 C.A.3d 897, 910, 91 C.R. 786, citing the text [defense counsel specified no ground when objecting]; 1 McCormick 5th, §52; 1 Wigmore (Tillers Rev.) §18, p. 818; C.E.B., 2 Civ. Proc. During Trial 3d, §15.39; C.E.B., California Trial Objections 6th, §§4.18, 4.19; on defective specific objections, see *infra*, §378 et seq.)

The reason for the rule is set forth in *Bundy v. Sierra Lumber Co.* (1906) 149 C. 772, 87 P. 622: "Had attention been called directly in the court below to the particular objection ... that court would have had a concrete legal proposition to pass on, and counsel for plaintiff would have been advised directly what the particular complaint against the question was, and, if he deemed it tenable, could have withdrawn the inquiry or reframed his question to obviate the particular objection. Trial judges are not supposed to have the numerous, varied, and complex rules governing the admissibility of evidence so completely in mind and of such ready application that under [a general] objection to a question they can apply with legal accuracy some particular principle of law which the objection does not specifically present." (149 C. 776.) (See also *Crocker v. Carpenter* (1893) 98 C. 418, 421, 33 P. 271; *Eachus v. Los Angeles Consol. Elec. Ry. Co.* (1894) 103 C. 614, 623, 37 P. 750; *Estate of Pusey* (1919) 180 C. 368, 373, 181 P. 648; *King v. Green* (1908) 7 C.A. 473, 479, 94 P. 777 [general objection to depositions]; *Resetar v. Leonardi* (1923) 61 C.A. 765, 767, 216 P. 71; *Donian v. Danielian* (1928) 90 C.A. 675, 681, 266 P. 817; *Estate of Doyle* (1932) 126 C.A. 446, 452, 14 P.2d 909 [general objection to depositions]; cf. *Toomes v. Nunes* (1938) 24 C.A.2d 395, 397, 75 P.2d 94 [same rule governs motion to strike]; *People v. Tolmachoff* (1943) 58 C.A.2d 815, 826, 138 P.2d 61; 1 Wigmore (Tillers Rev.) §18, p. 818.)

Thus, in *Bundy v. Sierra Lumber Co.*, *supra*, the general objection was made to expert testimony. On appeal it was urged that the subject was not appropriate for an expert, and that the witness was not properly qualified. *Held*, the point could not be raised. (149 C. 776.) (See also *Satterlee v. Bliss* (1869) 36 C. 489, 507 [insufficient to raise attorney-client

privilege]; *Crinella v. Northwestern Pac. R. Co.* (1927) 85 C.A. 440, 446, 259 P. 774 [insufficient to raise best evidence rule]; *People v. Sellas* (1931) 114 C.A. 367, 378, 300 P. 150 [insufficient for former defect of no foundation for impeachment by prior inconsistent statement]; *Keim v. D. B. Berelson & Co.* (1951) 105 C.A.2d 154, 162, 233 P.2d 123 [insufficient to raise claim of incompetent hearsay]; *Rupp v. Summerfield* (1958) 161 C.A.2d 657, 662, 326 P.2d 912 [insufficient to raise hearsay objection]; *People v. Horn* (1960) 187 C.A.2d 68, 78, 9 C.R. 578 [did not raise hearsay defect in hospital records offered under business records act]; *People v. Nugent* (1971) 18 C.A.3d 911, 917, 96 C.R. 209, citing the text [objection at trial was that question called for narrative answer from defendant and depended on his ability to remember victims' testimony; failure to contend that question called for conclusion from witness waived issue on appeal].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Boeken v. Philip Morris* (2005) 127 C.A.4th 1640, 1675, 1676, 26 C.R.3d 638 [in products liability action against cigarette manufacturer, defendant's objections to testimony of plaintiff's expert concerning preempted, post-1969 cigarette advertising failed to satisfy specificity requirement of *Ev.C.* 353(a), where they consisted of general in limine objections to any and all evidence that might relate to preempted advertising, and, during trial, vague "running" or "standing" objection that was not directed to particular identifiable body of evidence]; 1 McCormick 6th, §52. *West's Key Number Digest*, Criminal Law k.695(2); Trial k.82-



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### XII. OBJECTIONS TO INADMISSIBLE EVIDENCE

#### A. Requirement of Proper Objection.

##### 4. General Objection.

##### b. Sufficient.

3 Witkin Cal. Evid. Presentation § 376

[§ 376] Sufficient.

There is one important exception to the requirement of a specific objection on the right ground: If the question is objectionable from every standpoint, and the answer could not have been admissible under any theory, a general objection that it is irrelevant, incompetent, and immaterial is sufficient. In such a case, the reason for requiring a particular objection is not present: even if counsel's attention were specifically directed to the defect, he or she could not cure it, hence, is not prejudiced by the form of the objection.

Thus, in *Short v. Frink* (1907) 151 C. 83, 90 P. 200, the court said: "The question upon its face called for matter that was not within the issues made by the pleadings, and that was wholly immaterial and irrelevant. No possible answer favorable to plaintiff has been suggested, and none has occurred to us, that would be proper evidence. ... If a question is objectionable from every standpoint, if on its face there appears no purpose whatever for which the evidence asked could be admissible, a general objection of irrelevancy, incompetency and immateriality is sufficient." (151 C. 86.)

A similar statement was made in *Swan v. Thompson* (1899) 124 C. 193, 56 P. 878: "In certain cases specific objections should be made to questions, in order that the court and opposing counsel may know exactly the particular vice lurking in the question which is relied upon by the party objecting. Especially in fairness to the court should this be the law. This is essentially the rule when the vice in the question is a latent one. But if the question is objectionable from every standpoint, the court is not aided in making an intelligent ruling by a specific objection, and then the specific objection is not demanded. There is no reason for it, and where the reason is not present the rule fails." (124 C. 195.) (See also *Morehouse v. Morehouse* (1903) 140 C. 88, 94, 73 P. 738; 1 Wigmore (Tillers Rev.) §18, p. 824.)

There is danger, however, in overstating this exception: A general objection will not be good merely because the complaint is lacking in some essential allegation and the evidence is therefore technically immaterial, i.e., outside the issues; a specific objection is necessary where the adverse party could have obviated the difficulty by amending the complaint.

Thus, in *Drullinger v. Erskine* (1945) 71 C.A.2d 492, 163 P.2d 48, an action for specific performance, plaintiff failed to allege adequacy of consideration and fairness, and defendants made general objections ("incompetent, irrelevant and immaterial" and "not within the scope of the issues raised by the complaint") to evidence. *Held*, judgment for plaintiff affirmed. Defendants did not demur or object to all evidence on the ground of failure to state a cause of action, and the case was tried on the theory that these issues were raised. Hence, the particular curable defect of pleading was not properly raised in the trial court. (71 C.A.2d 500.) (See 5 Cal. Proc. (4th), Pleading, §§754, 911 et

seq.; *Granberg v. Turnham* (1958) 166 C.A.2d 390, 397, 333 P.2d 423 [contention that special damages not particularly alleged; general objection did not raise defect]; cf. *Morehouse v. Morehouse*, supra [complaint could not have been amended to make evidence admissible].)

There is another danger in the common practice of coupling the general objection with a specific objection; e.g., incompetent, irrelevant and immaterial, "in this," etc., or "for the reason that," etc. If the specific objection is on an untenable ground, the defect is waived even though the evidence might have been excluded under a general objection; i.e., the objection will be treated as specific, and confined to the reasons stated. (See *Fagan v. Lentz* (1909) 156 C. 681, 690, 105 P. 951; *Soares v. Ghisletta* (1934) 1 C.A.2d 402, 404, 36 P.2d 668.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## XII. OBJECTIONS TO INADMISSIBLE EVIDENCE

## A. Requirement of Proper Objection.

## 5. Specific Objection.

## a. Necessity and Form.

3 Witkin Cal. Evid. Presentation § 377

[§ 377] Necessity and Form.

The statement that a general objection is ordinarily insufficient is merely another way of saying that ordinarily the objection must, in fairness to the court and opposing counsel, be specific. (See *supra*, §375.)

What is a good "specific" objection? No set form of words is required (see *People v. Morris* (1991) 53 C.3d 152, 188, 279 C.R. 720, 807 P.2d 949, *supra*, §370), but the following must appear clearly from the objection:

(1) The ground that is being urged; e.g., hearsay, opinion or conclusion of the witness, or privileged communication. Because the rules of evidence are so complex, this often becomes a difficult and burdensome requirement. (See *Ev.C. 353(a)*; *People v. Gibson* (1976) 56 C.A.3d 119, 136, 137, 128 C.R. 302 [reasonable interpretation of counsel's words indicated that he was invoking *Ev.C. 352* (discretionary exclusion) and judge so understood objection]; 1 McCormick 5th, §52; C.E.B., 2 Civ. Proc. During Trial 3d, §15.37 et seq.; C.E.B., California Trial Objections 6th, §4.18; *infra*, §§378, 379.)

(2) The particular item or part of evidence that is objected to on this ground; e.g., where part of a writing or statement is admissible and part is inadmissible. (See *Ballos v. Natural* (1928) 93 C.A. 601, 608, 269 P. 972; *People v. Lang Trans. Corp.* (1941) 43 C.A.2d 134, 141, 110 P.2d 464; *Fibreboard Paper Products Corp. v. East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL-CIO* (1964) 227 C.A.2d 675, 712, 39 C.R. 64; *People v. Harris* (1978) 85 C.A.3d 954, 957, 149 C.R. 860; 1 McCormick 5th, §52; 1 Wigmore (Tillers Rev.) §18, p. 834.)

(3) If, under the doctrine of limited admissibility (1 Cal. Evidence (4th), *Circumstantial Evidence*, §30) the evidence is admissible for some purpose or against some party, the issue or against which party the evidence is inadmissible. (See 1 McCormick 5th, §52; *infra*, §382 [request for limiting instruction].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Ground that is being urged:* See 1 McCormick 6th, §52.

(2) *Particular item objected to:* See *In re Joy M.* (2002) 99 C.A.4th 11, 21, 120 C.R.2d 714 [in dependency proceeding in which reunification services for father were denied, even assuming argument of counsel for father could be construed as evidentiary objection, it failed to satisfy *Ev.C. 353*: it was untimely, and, although it indicated belief that psychologist who had written evaluation report was unqualified, it did not specifically indicate that report should be excluded]; 1 McCormick 6th, §52.



(3) *Limited admissibility*: See 1 McCormick 6th, §52. *West's Key Number Digest*, Criminal Law k.695(2); Trial k.82



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## 5. Specific Objection.

## b. Defective Specific Objections.

## 1. Objection on Wrong Ground.

## aa. Civil Cases.

3 *Witkin Cal. Evid. Presentation* § 378

[§ 378] Civil Cases.

It is often said that an objection that specifies the wrong ground is as bad as an insufficient general objection; i.e., urging of the one ground is a waiver of any others. (See *Estate of Huston* (1912) 163 C. 166, 173, 124 P. 852 [point that testimony privileged; objection was only to form of question, and to knowledge of doctor as to condition of person]; *Griffin v. Jacobsen* (1936) 17 C.A.2d 68, 71, 61 P.2d 350; *Kirkpatrick v. Tapo Oil Co.* (1956) 144 C.A.2d 404, 410, 301 P.2d 274; *Bank of America v. Taliaferro* (1956) 144 C.A.2d 578, 582, 301 P.2d 393, *supra*, §147; *Frampton v. Hartzell* (1960) 179 C.A.2d 771, 776, 4 C.R. 427, quoting the text; *Miller v. Anson-Smith Const. Co.* (1960) 185 C.A.2d 161, 167, 8 C.R. 131, citing the text.)

Thus, in *Kirkpatrick v. Tapo Oil Co.*, *supra*, an ancient document was offered without a proper foundation (showing that it had been generally acted on as genuine, explaining custody; 1 *Cal. Evidence* (4th), *Hearsay*, §293). The objection was: irrelevant, incompetent and immaterial, and hearsay. *Held*, this was insufficient; ancient documents come in under an exception to the hearsay rule, and the curable defect of lack of foundation was waived by failure to raise it. (144 C.A.2d 410.)

Similarly, in *Griffin v. Jacobsen*, *supra*, an admission by defendant J was competent against defendant J but not against defendant H. *Held*, the objection, "hearsay and not the best of evidence," did not properly raise the point of limited admissibility. (17 C.A.2d 71.) (See also *Kinney v. Contra Costa* (1970) 8 C.A.3d 761, 771, 87 C.R. 638, citing the text [false arrest and imprisonment suit; plaintiff's objections to jail supervisor's testimony were improperly based on lack of foundation and inquiry on ultimate fact; objection might have been proper on grounds of immateriality or irrelevancy].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## 5. Specific Objection.

## b. Defective Specific Objections.

## 1. Objection on Wrong Ground.

## bb. Criminal Cases.

3 Witkin Cal. Evid. Presentation § 379

[§ 379] Criminal Cases.

(1) *Waiver*. A defective specific objection is a waiver in criminal as well as civil cases. (See, e.g., *People v. Modell* (1956) 143 C.A.2d 724, 730, 300 P.2d 204, 2 Cal. Evidence (4th), *Demonstrative, Experimental, and Scientific Evidence*, §40; *People v. Wignall* (1932) 125 C.A. 465, 474, 13 P.2d 995; *People v. Wright* (1938) 26 C.A.2d 197, 207, 79 P.2d 102; *People v. Lint* (1960) 182 C.A.2d 402, 414, 6 C.R. 95 [objection to evidence of prior offense on relevancy ground (insufficient), held waiver of hearsay objection]; *People v. Escollias* (1968) 264 C.A.2d 16, 19, 70 C.R. 65, citing the text; *People v. Nugent* (1971) 18 C.A.3d 911, 917, 96 C.R. 209, citing the text; *People v. Lopez* (1978) 81 C.A.3d 103, 108, 146 C.R. 165, citing the text; *People v. Adams* (1988) 198 C.A.3d 10, 17, 243 C.R. 580, citing the text.)

In *People v. Gamble* (1970) 8 C.A.3d 142, 87 C.R. 333, defendants were charged with perjury for providing false testimony at another person's trial on theft charges. Part of the evidence against them consisted of a reading of testimony that had been given by various witnesses at the theft prosecution. Defendants objected to the reading, but only on the grounds of irrelevancy and immateriality. The objections were overruled. *Held*, no error. The testimony was obviously relevant and material, and the only defect was incompetency. "A proper objection on either statutory (hearsay) or constitutional (right to confrontation) grounds would have been sufficient to require the production of the proffered witnesses if their testimony was being offered to prove the truth of the contents thereof." (8 C.A.3d 149.) By failing to raise the constitutional issue through proper trial court objections, defendants waived their rights on appeal. (8 C.A.3d 149.)

In *People v. Stuller* (1970) 10 C.A.3d 582, 89 C.R. 158, a fingerprint expert was asked, "You don't know if anyone put it [a drinking glass] there at some time after you got in the apartment, do you?" He answered, "No, with an explanation. I don't know that they didn't, but I certainly don't believe they did considering the time I was in the kitchen and the living room area." Defense counsel moved to strike the answer on the grounds it was not responsive and was conjectural. *Held*, no error in denial of motion. "As counsel on appeal concedes, the proper objection would have been that the answer was conclusionary. Inasmuch as defense counsel did not make the proper objection, defendant may not raise the objection on appeal." (10 C.A.3d 599.)

In *People v. Castaneda* (1975) 52 C.A.3d 334, 125 C.R. 9, defendant made extrajudicial statements to the police. After he testified, the prosecution offered the statements as rebuttal. On appeal, defendant contended that introduction of

the statements was misconduct. *Held*, no error. Defendant failed to object to the introduction of the statements on the specific ground that they were not proper rebuttal or impeachment evidence. "As the order of proof lies within the sound discretion of the trial court . . . , the absence of a specific objection to the rebuttal testimony constitutes a waiver of the right to claim the trial court abused its discretion." (52 C.A.3d 339.)

In *People v. Reid* (1982) 133 C.A.3d 354, 184 C.R. 186, defendant, charged with robbery, admitted a prior narcotics conviction. At the trial, his counsel, outside the presence of the jury, pointed out that evidence of defendant's prior conviction could not be introduced, and argued that any reference to defendant's being on parole for the narcotics offense should also be excluded as not relevant and "excessively prejudicial." *Held*, this was not a sufficient objection to evidence of the use of narcotics. (a) A relevancy objection to proffered evidence is normally not construed as a request that the judge exercise discretion under Ev.C. 352 to exclude relevant evidence. (133 C.A.3d 360.) (b) Here, the judge reasonably understood the *prejudice* objection as referring only to evidence of parolee status; and, because the other crimes objection referred only to *relevancy*, it was a waiver of the ground that the prejudicial effect of the evidence outweighed its probative value. (133 C.A.3d 361.)

(2) *No Waiver*. Where the error in admission is too serious to be cured or waived, e.g., use of a coerced confession or unduly prejudicial matter, the point may be raised on appeal regardless of the nature of the objection or even total failure to object. (See *infra*, §397.) And in any case involving a serious crime, and particularly a capital case, the requirement of a proper objection may be greatly relaxed.

Thus, in *People v. Bob* (1946) 29 C.2d 321, 175 P.2d 12, two persons had committed a crime. In the trial of one, an accusatory statement of the other, part of which the defendant had denied, was offered in evidence. Defendant's counsel made a wordy objection to the effect that the accuser ought to be produced and brought to testify before the jury, and that the statement was "secondary evidence." *Held*, this was sufficient to raise the objection of the hearsay rule, though the term "hearsay" was not used; and, despite the failure to call the court's attention to the particular part of the statement which was inadmissible, it was the court's duty to exclude that part. The extreme liberality of this holding is made clear by the dissenting opinion: Nearly all of the statement was admissible because the accusations were not denied, and no objection was made on the ground that a particular portion of the generally admissible statement was inadmissible, nor did the defendant move to strike or seek a limiting instruction. (29 C.2d 325.) (See *People v. Frank* (1985) 38 C.3d 711, 736, 737, 214 C.R. 801, 700 P.2d 415 [concurring opinion discussing *People v. Bob* and quoting the text].)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Waiver*. See *People v. Demetrulias* (2006) 39 C.4th 1, 21, 45 C.R.3d 407, 137 P.3d 229 [in capital murder prosecution, defendant waived character evidence objection to admission of evidence of peaceful nature of his two victims by failing to object on that ground; his relevance objection was not sufficient to preserve character evidence claim, and, although his later objection impliedly raised character issue, it was untimely]; *Levin v. Ligon* (2006) 140 C.A.4th 1456, 1464, 45 C.R.3d 560 [in action by husband against former wife for civil partition of financial assets, husband's challenge, on ground of lack of authenticity, to admission of documents from English court proceeding was waived for purposes of appeal; in his opposition to summary judgment motion, he objected only on basis that documents were records of foreign court, inadmissible hearsay, and irrelevant, and at summary judgment hearing he conceded that documents' authenticity was not being challenged].



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#### A. Requirement of Proper Objection.

##### 5. Specific Objection.

##### b. Defective Specific Objections.

#### 2. Objection of No Foundation Laid.

### 3 Witkin Cal. Evid. Presentation § 380

[§ 380] Objection of No Foundation Laid.

A vague challenge such as "hearsay" will not raise the specific objection of lack of proper foundation. (See *supra*, §378.) It does not necessarily follow that the bare statement, "no proper foundation laid," or "the proper foundation has not been laid," is specific and sufficient to raise any failure to establish the conditions for admissibility of evidence conditionally admissible. The various foundation requirements are so dissimilar that such statements are, in some instances, no more informative than the general objection. (See, e.g., *People v. Modell* (1956) 143 C.A.2d 724, 729, 300 P.2d 204, 2 Cal. Evidence (4th), *Demonstrative, Experimental, and Scientific Evidence*, §40.)

But the cases on objections to expert evidence appear to make a distinction between *qualifications* of the expert and the *form of the question*:

In *Lemley v. Doak Gas Engine Co.* (1919) 40 C.A. 146, 151, 180 P. 671, defendant's employee, a machinist, testified to the facts of an accident, and then was asked to state his opinion as to the cause of the breaking of a flywheel. The objection was general, and also "that the proper foundation has not been laid." The Court of Appeal thought that this did not raise the matter of his qualifications as an expert. (40 C.A. 152.) But the Supreme Court, on denial of hearing, disapproved this part of the opinion, and declared that the above objection "fairly presented the question of the sufficiency of the evidence as to the expert qualifications of the witness." (40 C.A. 155.) (See also, following the Supreme Court's view, *Taylor v. Fishbaugh* (1938) 26 C.A.2d 300, 303, 79 P.2d 174.)

In *Parlier Fruit Co. v. Fireman's Fund Ins. Co.* (1957) 151 C.A.2d 6, 311 P.2d 62, defendants objected to a hypothetical question on the ground of no foundation laid. *Held*, this did not raise the point that the question omitted material facts essential to a fair opinion; any such omitted facts should have been pointed out in the objection. (151 C.A.2d 15.)

The Evidence Code introduced new terminology. The foundation is laid by proof of "preliminary facts" to make admissible the "proffered evidence." (Ev.C. 400, 401, *supra*, §49.) Presumably, the objection may now be that the "proffered evidence" is inadmissible because there has been no proof of a necessary "preliminary fact," specifying that fact. On the other hand, there is nothing in the Code to suggest that use of the old "foundation" language will not do just as well, provided that the particular matter lacking (the preliminary fact) is specified. (See C.E.B., California Trial Objections 6th, §21.20.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER XI - Presentation At Trial

### XII. OBJECTIONS TO INADMISSIBLE EVIDENCE

#### A. Requirement of Proper Objection.

##### 6. Objection to Line of Questions.

3 Witkin Cal. Evid. Presentation § 381

[§ 381] Objection to Line of Questions.

Where a good objection is made to a particular question and is overruled by the court, it need not be renewed if the same question is asked again. (*Balcom v. Growers Warehouse Co. (1921) 55 C.A. 474, 482, 204 P. 39; Ev.C. 353*, Comment; cf. *Douglas v. Alabama (1965) 380 U.S. 415, 85 S.Ct. 1074, 1078, 13 L.Ed.2d 934* [repetitious futile objections to confession not required to safeguard review in United States Supreme Court]; C.E.B., 2 Civ. Proc. During Trial 3d, §15.39; C.E.B., California Trial Objections 6th, §4.10.)

The practical problem is more difficult, however, where the objection is applicable to a further line of questions directed to the same or a different witness. It is time-wasting and a source of irritation for counsel to repeat mechanically the stated grounds in detail or even in abbreviated form ("the same objection"). It would seem reasonable to assume that the ruling would be the same and that further objection would therefore be futile. Thus, in *Green v. Southern Pac. Co. (1898) 122 C. 563, 55 P. 577*, objection to the testimony of one witness was overruled, and later another witness testified to substantially the same matter, without objection. The court said: "Where a party has once formally taken exception to a certain line or character of evidence, he is not required to renew the objection at each recurrence thereafter of the objectionable matter arising at each examination of other witnesses; and his silence will not debar him from having the exception reviewed." (122 C. 565.) (See also *People v. Antick (1975) 15 C.3d 79, 95, 123 C.R. 475, 539 P.2d 43*, citing the text [once issue of admissibility of uncharged burglary evidence was resolved against defendant in hearing out of jury's presence, defense counsel was not required to repeat objection when burglary victim actually testified and items of property were admitted in evidence]; *People v. Driggs (1909) 12 C.A. 240, 243, 108 P. 62; 1 McCormick 5th, §52; 1 Wigmore (Tillers Rev.) §18, p. 815; Ev.C. 353, Comment*.)

Similarly, in *Sharon v. Sharon (1889) 79 C. 633, 22 P. 26, 131*, objection was made to an improper question, and the court in response to the objection stated just what might be asked. The improper questioning then continued as authorized by the court. *Held*, it was not necessary for defendant to renew his objections. (79 C. 674.)

But in *W. C. Cook & Co. v. White Truck & Transfer Co. (1932) 124 C.A. 721, 13 P.2d 549*, the original objection, on a single point involving damages, was overruled, and thereafter the witness without direction or authorization by the court testified at length as to various elements of damages, without objection. *Held*, the original objection did not go to the subsequent questions. (124 C.A. 729.)

In order to avoid any possibility of waiver, counsel often seek a stipulation from opposing counsel and a statement of the court to the effect that the same objection and same ruling will be deemed made to the entire line of testimony. (See 1 McCormick 5th, §52; C.E.B., 2 Civ. Proc. During Trial 3d, §15.39; C.E.B., California Trial Objections 6th,

§4.11.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 1 McCormick 6th, §52.





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## CHAPTER XI - Presentation At Trial

### XII. OBJECTIONS TO INADMISSIBLE EVIDENCE

#### B. Other Requirements.

##### 1. Request for Limiting Instruction.

3 Witkin Cal. Evid. Presentation § 382

[§ 382] Request for Limiting Instruction.

(1) *Request by Counsel.* Under the doctrine of "limited admissibility" (1 Cal. Evidence (4th), *Circumstantial Evidence*, §30), certain evidence may be admissible for one purpose or against one party and inadmissible for another purpose or against another party. Because it cannot be excluded, an objection to its admissibility will be futile. Counsel is entitled only to an instruction to the jury, informing them of the limited purpose for which the evidence may be considered, and the fact that it went in without limitation is unappealable unless the instruction was requested. (See *People v. Findley* (1901) 132 C. 301, 306, 64 P. 472; *Liebrandt v. Sorg* (1901) 133 C. 571, 573, 65 P. 1098; *Hatfield v. Levy Bros.* (1941) 18 C.2d 798, 810, 117 P.2d 841; *Daggett v. Atchison, Topeka & Santa Fe Ry. Co.* (1957) 48 C.2d 655, 665, 313 P.2d 557, supra, §239; *People v. White* (1958) 50 C.2d 428, 430, 325 P.2d 985; *People v. Nudd* (1974) 12 C.3d 204, 209, 115 C.R. 372, 524 P.2d 844; *Barsha v. Metro-Goldwyn-Mayer* (1939) 32 C.A.2d 556, 562, 90 P.2d 371 [hearsay offered for impeachment purposes]; *Rupp v. Summerfield* (1958) 161 C.A.2d 657, 662, 326 P.2d 912; *People v. Hawkins* (1960) 177 C.A.2d 714, 718, 2 C.R. 524, citing the text; *Stathos v. Lemich* (1963) 213 C.A.2d 52, 57, 28 C.R. 462; *People v. Wyatt* (1989) 215 C.A.3d 255, 258, 263 C.R. 556; 1 McCormick 5th, §59; 1 Wigmore (Tillers Rev.) §13; C.E.B., 2 Civ. Proc. During Trial 3d, §15.61 et seq.; C.E.B., California Trial Objections 6th, §§2.4, 20.9, 32.8.)

(2) *Instruction Without Request.* Even without a request, the trial court should instruct the jury that evidence of other crimes is admissible only for a limited purpose, should explain that limitation, and should caution against a misuse of that evidence. (See *People v. Williams* (1970) 11 C.A.3d 970, 978, 90 C.R. 292 [failure of trial court to give limiting instruction was harmless]; CALJIC (6th ed.), No. 2.50.)

In *People v. Hughes* (1975) 50 C.A.3d 749, 123 C.R. 767, the court recognized that there is authority requiring a judge to give a limiting instruction even without request to admonish the jury about using evidence of defendant's prior felony convictions only for impeachment purposes. "However, no case holds that such an instruction must be given immediately after a defendant admits prior convictions. In the instant case, at the close of trial, the jury was adequately apprised of the limited purpose for which the evidence of the prior felony convictions could be considered." (50 C.A.3d 754.)

(3) *Protection Beyond Requested Instruction.* In some situations, a limiting instruction may not be a sufficient protection. The party is entitled to the protection that is reasonable under the circumstances, a matter that is largely within the trial court's discretion. In *Adkins v. Brett* (1920) 184 C. 252, 193 P. 251, the court said: "If the point to prove which the evidence is competent can just as well be proven by other evidence, or if the evidence is of but slight weight or importance upon that point, the trial judge might well be justified in excluding it entirely, because of its prejudicial and dangerous character as to other points. ... This would emphatically be true where there is good reason for believing

that the real object for which the evidence is offered is not to prove the point for which it is ostensibly offered and is competent, but is to get before the jury declarations as to other points, to prove which the evidence is incompetent. The same thing would be true as to the introduction of repeated declarations, when once the point for which they are competent has been amply shown. ... The point of the matter is that the opponent of such evidence, so likely to be misused against him, is entitled to such protection against its misuse as can reasonably be given him without impairing the ability of the other party to prove his case, or depriving him of the use of competent evidence reasonably necessary for that purpose." (184 C. 258.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Request by Counsel*. See 1 McCormick 6th, §59.



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### XII. OBJECTIONS TO INADMISSIBLE EVIDENCE

#### B. Other Requirements.

##### 2. Motion To Strike.

##### a. Nature of Requirement and Form of Motion.

*3 Witkin Cal. Evid. Presentation § 383*

[§ 383] Nature of Requirement and Form of Motion.

Sometimes an objection is not practicable or not sufficient, and a motion to strike may be the correct means of raising the point of inadmissibility of the evidence. (See *infra*, §385; for instruction on evidence stricken out, see BAJI (8th ed.), No. 1.02.)

But wherever a motion to strike is required or is proper, it is subject to the same rule of form as an objection, namely, it must point to the specific ground of the objection, and the particular portion of the evidence deemed objectionable. (*Ev.C. 353(a)*; see *Lucy v. Davis* (1912) 163 C. 611, 615, 126 P. 490 ["A motion to be available must be directed with precision to the testimony which the moving party desires the court to eliminate"]; *Rose v. State* (1942) 19 C.2d 713, 742, 123 P.2d 505 [motion to strike all of witness' testimony was properly denied where some was admissible]; *Toomes v. Nunes* (1938) 24 C.A.2d 395, 397, 75 P.2d 94 [motion to strike answer referring to insurance of defendant on ground that it was "improper"; held ineffectual]; *Bates v. Newman* (1953) 121 C.A.2d 800, 804, 264 P.2d 197 [answer in part nonresponsive, motion to strike entire answer was properly denied]; *People v. Loop* (1954) 127 C.A.2d 786, 800, 274 P.2d 885 [motion directed at voluminous testimony of condemnation experts for property owner; held error to grant where reviewing court was unable to determine what part was stricken and what remained]; *People v. Lankford* (1989) 210 C.A.3d 227, 233, 258 C.R. 322, citing the text [defense counsel's request of court ("May that be a yes or no answer?") did not qualify as motion to strike testimony]; C.E.B., 2 Civ. Proc. During Trial 3d, §15.44; C.E.B., California Trial Objections 6th, §§51.8, 51.9.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See CACI, No. 5002 [instruction to disregard testimony that has been stricken]. *West's Key Number Digest*, Criminal Law k.696 et seq.; Trial k.88 et seq.



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### XII. OBJECTIONS TO INADMISSIBLE EVIDENCE

#### B. Other Requirements.

##### 2. Motion To Strike.

##### b. Bad Question: Motion Insufficient and Unnecessary.

#### 3 Witkin Cal. Evid. Presentation § 384

[§ 384] Bad Question: Motion Insufficient and Unnecessary.

A party must ordinarily object to the question. The party cannot wait, speculating on the chance of a favorable answer, and then move to strike after he or she discovers that the answer is unfavorable. Hence, if there is an opportunity to object, i.e., where it is apparent on the face of the question that the answer will necessarily contain inadmissible matter, an objection is necessary and a motion to strike is not sufficient. (*People v. Scalamiero* (1904) 143 C. 343, 345, 76 P. 1098; *Loeb v. Kimmerle* (1932) 215 C. 143, 154, 9 P.2d 199; *People v. Perry* (1972) 7 C.3d 756, 781, 103 C.R. 161, 499 P.2d 129, citing the text; *Hastings v. Serleto* (1943) 61 C.A.2d 672, 692, 143 P.2d 956; 1 McCormick 5th, §52; 1 Wigmore (Tillers Rev.) §18, p. 796; C.E.B., 2 Civ. Proc. During Trial 3d, §15.36; C.E.B., California Trial Objections 6th, §4.16.)

The converse of the above proposition is also true: If a proper objection to the question is made and overruled, it is unnecessary to move to strike the answer. (*Short v. Frink* (1907) 151 C. 83, 87, 90 P. 200; *Balcom v. Growers Warehouse Co.* (1921) 55 C.A. 474, 482, 204 P. 39; *Dolton v. Green* (1945) 72 C.A.2d 427, 440, 164 P.2d 795; *People v. Robinson* (1958) 166 C.A.2d 416, 423, 333 P.2d 120 [counsel, from abundance of caution, advised court that he would not object again and trial judge approved].)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 1 McCormick 6th, §52.



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## XII. OBJECTIONS TO INADMISSIBLE EVIDENCE

## B. Other Requirements.

## 2. Motion To Strike.

## c. Bad Answer: Motion Necessary.

## 3 Witkin Cal. Evid. Presentation § 385

[§ 385] Bad Answer: Motion Necessary.

If the question is not bad on its face, i.e., it is not apparent that it calls for inadmissible evidence, there is ordinarily no reason to object. It is only when the improper answer is given that the adverse party has cause for complaint. In this situation, the motion to strike the answer is sufficient and is necessary, and a prior objection is unnecessary and insufficient. So a party who fails to make the motion cannot raise the point of inadmissibility on appeal. (*People v. Lawrence* (1904) 143 C. 148, 156, 76 P. 893; *Short v. Frink* (1907) 151 C. 83, 88, 90 P. 200; *De Bock v. De Bock* (1919) 43 C.A. 283, 298, 184 P. 890; *Ballos v. Natural* (1928) 93 C.A. 601, 608, 269 P. 972; *People v. Glass* (1954) 127 C.A.2d 751, 753, 274 P.2d 430; *People v. Gilbert* (1992) 5 C.A.4th 1372, 1386, 7 C.R.2d 660, citing the text; 1 McCormick 5th, §52; 1 Wigmore (Tillers Rev.) §18, pp. 800, 817; C.E.B., 2 Civ. Proc. During Trial 3d, §15.44; C.E.B., California Trial Objections 6th, §51.3 et seq.)

Thus, in *De Bock v. De Bock*, *supra*, counsel asked plaintiff, "did you have a conversation with your husband at that time," and "what was it?" During the course of her answer she injected inadmissible matter. Opposing counsel at one point interrupted her answer to object, but did not move to strike. *Held*, the question itself was proper, and an objection to it would have been correctly overruled. Hence, a motion to strike the inadmissible matter was necessary, and the failure to make it was a waiver of the error. (43 C.A. 298.)

In *Johnston v. Beadle* (1907) 6 C.A. 251, 91 P. 1011, a personal injury case, the issue involved loss of time and earnings of plaintiff, a dressmaker. The court refused to permit her to answer the question, "Are you a woman of means?" Her counsel then asked her to "state the means by which you have supported yourself." She answered, "I have no other means or resources." Defendant's motion to strike out this reference to her poverty was denied. *Held*, no prior objection was necessary because it did not appear that counsel was attempting to obtain this improper answer. "It was only when the answer had been given that it could be known that it was immaterial and in violation of the previous ruling of the court." (6 C.A. 254.)

Occasionally, though the question is objectionable on its face, the witness answers before counsel has a chance to object. A prompt motion to strike will then suffice. (See 1 McCormick 5th, §52; C.E.B., 2 Civ. Proc. During Trial 3d, §15.44; C.E.B., California Trial Objections 6th, §51.4; cf. *Wysock v. Borchers Bros.* (1951) 104 C.A.2d 571, 581, 232 P.2d 531 [slight delay; implied finding that delay occurred under circumstances that negated waiver].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 1 McCormick 6th, §52.



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## CHAPTER XI - Presentation At Trial

### XII. OBJECTIONS TO INADMISSIBLE EVIDENCE

#### B. Other Requirements.

#### 3. Assignment of Misconduct.

3 Witkin Cal. Evid. Presentation § 386

[§ 386] Assignment of Misconduct.

(1) *General Practice.* Where the evidence is not merely irrelevant, immaterial or incompetent under some technical exclusionary rule, but is subject to the objection of undue prejudice (1 Cal. Evidence (4th), *Circumstantial Evidence*, §132 et seq.), a special remedy is provided. If counsel in a civil case by a statement or question brings out facts regarding the defendant's insurance or wealth, the defendant's offer to compromise, or the plaintiff's poverty, a bare motion to strike is of little value. The same is true where the prosecutor in a criminal case brings out inadmissible collateral matters affecting character or otherwise prejudicing the defendant before the jury. It is necessary that the jury be promptly and clearly informed of the impropriety of considering these matters. Accordingly, the practice is to "assign" the statement or question as misconduct and ask that the jury be instructed to disregard it. (See C.E.B., California Trial Objections 6th, §29.10 et seq.; 7 Cal. Proc. (4th), *Trial*, §223 et seq.; 6 Cal. Crim. Law (3d), *Reversible Error*, §38 et seq.)

(2) *Civil Cases.* The following rules govern the practice in civil cases:

(a) If the adverse party makes the assignment and the court instructs, the error will normally be "cured" by the instruction, and will not be a ground for reversal on appeal. (See *Baroni v. Rosenberg* (1930) 209 C. 4, 6, 284 P. 1111; *McCullough v. Langer* (1937) 23 C.A.2d 510, 522, 73 P.2d 649; *Ades v. Brush* (1944) 66 C.A.2d 436, 445, 152 P.2d 519; *Jonte v. Key System* (1949) 89 C.A.2d 654, 659, 201 P.2d 562.) But if the improper matter is deemed too seriously prejudicial to be cured by an instruction (particularly where it is intentionally and deliberately introduced), it may be held reversible error on appeal. (*Gee v. Fong Poy* (1928) 88 C.A. 627, 638, 264 P. 564; *Deibler v. Wright* (1931) 119 C.A. 277, 283, 6 P.2d 344; *Stevenson v. Link* (1954) 128 C.A.2d 564, 574, 275 P.2d 782.)

(b) If the adverse party fails to make the assignment, the error will normally be waived and will not be a ground for reversal. (See *Aydrott v. Key System Transit Co.* (1930) 104 C.A. 621, 628, 286 P. 456; *Wills v. J. J. Newberry Co.* (1941) 43 C.A.2d 595, 607, 111 P.2d 346; *Cain v. State Farm Mut. Auto. Ins. Co.* (1975) 47 C.A.3d 783, 800, 121 C.R. 200.) But if the misconduct is deemed too serious to be cured, the failure to seek the cure will not preclude the aggrieved party from obtaining a reversal. (*Dastagir v. Dastagir* (1952) 109 C.A.2d 809, 816, 241 P.2d 656.)

(3) *Criminal Cases.* The requirement also applies in criminal cases; i.e., the normal remedy is to assign the prosecutor's statement or question, or the answer of a witness, as misconduct and ask for an admonition and instruction. But intentional introduction of prejudicial matter is more likely to be deemed "incurable" and reversible error in a criminal than in a civil case. (See *People v. Evans* (1952) 39 C.2d 242, 248, 246 P.2d 636; *People v. Chojnacky* (1973) 8 C.3d 759, 765, 106 C.R. 106, 505 P.2d 530; *People v. Hill* (1998) 17 C.4th 800, 820, 72 C.R.2d 656, 952 P.2d 673)

[reversible error despite lack of request for assignment; additional objections by defense counsel would have been futile and counterproductive to defendant]; *People v. Simon* (1927) 80 C.A. 675, 678, 252 P. 758; *People v. Brophy* (1954) 122 C.A.2d 638, 652, 265 P.2d 593; *People v. Arends* (1957) 155 C.A.2d 496, 506, 318 P.2d 532; *People v. Cabrellis* (1967) 251 C.A.2d 681, 688, 59 C.R. 795, citing the text; 6 Cal. Crim. Law (3d), *Reversible Error*, §40.)

Thus, in *People v. Arends, supra*, a grand theft prosecution, a deputy district attorney was called by the prosecution to testify to defendant's offer to plead guilty (then held admissible). On cross-examination and on redirect, the deputy declared that he had studied the case, was convinced of defendant's guilt, and that his office would dismiss a case unless convinced of guilt. *Held*, the deliberate introduction of this inadmissible personal opinion of guilt was reversible error, despite the fact that (a) it was first brought out by questions asked by defendant's own counsel, and (b) defendant made no objection, motion to strike, or request for instruction. (155 C.A.2d 506.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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### XII. OBJECTIONS TO INADMISSIBLE EVIDENCE

#### C. Effect of Court's Failure To Rule.

##### 1. Objection.

##### a. Ruling Expressly Reserved.

3 Witkin Cal. Evid. Presentation § 387

[§ 387] Ruling Expressly Reserved.

(1) *Procedure Discouraged*. Sometimes the court does not rule on an objection, but admits the evidence provisionally, "reserving" its ruling. This cautious procedure has been frequently criticized as unfair to counsel, and it has the serious disadvantage of permitting the jury to hear the inadmissible matter. In some cases, the practice "may work substantial injustice to a litigant. In any case where it can be shown that such a result follows, the error is of sufficient gravity to call for a reversal." (*Stanwood v. Carson* (1915) 169 C. 640, 644, 147 P. 562; *Piercy v. De Fillipes* (1963) 215 C.A.2d 284, 289, 30 C.R. 62, citing the text; *Estate of Horman* (1968) 265 C.A.2d 796, 806, 71 C.R. 780 [judge did not rule in time to permit appellants to seek continuance to get needed evidence; reversible error]; *People v. Bowen* (1971) 22 C.A.3d 267, 291, 99 C.R. 498; cf. *People v. Vuksanovich* (1982) 136 C.A.3d 65, 74, 185 C.R. 842 [citing *Bowen*; magistrate properly reserved rulings on defendant's objections to admission of approximately 150 exhibits of documents until end of preliminary hearing]; see C.E.B., 2 Civ. Proc. During Trial 3d, §15.66; C.E.B., California Trial Objections 6th, §4.20.)

In *People v. Bowen*, *supra*, the prosecution proposed to introduce bloodstained clothing that the victim allegedly wore when she was stabbed to death. Defendant asked the trial judge to view the exhibits for a ruling on prejudice under Ev.C. 352, but the judge denied a hearing and instructed the prosecutor to proceed. When the defendant objected that the clothing was so bloodstained as to be prejudicial, the judge withheld a ruling until the prosecutor offered the items in evidence and then overruled the objection. The appellate court criticized this improper procedure in the following language:

"The trial judge's observation--'that is the way all evidence comes into Court. It is marked for Identification right before the jury'--displays an inept understanding of exclusionary rules. If a question is raised as to the relevancy, competency or prejudicial effect of an item of evidence which is prejudicial in nature, it is absurd to exhibit it to the jury before the question of its admissibility is resolved. In many instances, where there is merely delay in laying a full foundation, no prejudice can result, but at least the exhibition of the article should be prefaced with an offer of proof of the facts which will authorize its admission." (22 C.A.3d 292.)

This procedure should, therefore, be resorted to only in cases of great necessity, and a ruling should be made before the trial is concluded, so that the party objecting may have the opportunity to present rebutting evidence in the event the objection is overruled. (See *Clopton v. Clopton* (1912) 162 C. 27, 32, 121 P. 720; *DeTray v. Higgins* (1939) 31 C.A.2d 482, 487, 88 P.2d 241; 1 McCormick 5th, §§58, 60; 1 Wigmore (Tillers Rev.) §19.)



(2) *Appeal of Reserved Ruling*. Where the court reserves its ruling, but does not decide the point, the failure to rule formally is an implied ruling against the objection and in favor of admissibility. Hence, the point may be raised on appeal without a motion to strike. (See *Clopton v. Clopton*, *supra*; *Raymond v. Glover* (1898) 122 C. 471, 476, 55 P. 398; *Stanwood v. Carson*, *supra*; *Harris v. Reingold* (1929) 98 C.A. 709, 711, 277 P. 750; cf. *DeTray v. Higgins*, *supra*, 31 C.A.2d 489.)

In *Harris v. Reingold*, *supra*, plaintiff sued on a promissory note. Defendant pleaded lack of consideration and generally denied the indebtedness. At the trial, defendant offered evidence of an accord and satisfaction, to which plaintiff objected as outside the issues. The judge said: "I will hear the testimony and strike it out in the event it is not admissible." No motion to strike was made, and the judge never ruled. In reversing judgment for defendant, the court said: "We must assume that he (plaintiff) came into court prepared to try the case upon the issues which had been framed and unprepared to try any other or different issues." (98 C.A. 713.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Procedure Discouraged*. See 1 McCormick 6th, §§58, 60. *West's Key Number Digest*, Appeal & Error k.1047(2)



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## XII. OBJECTIONS TO INADMISSIBLE EVIDENCE

## C. Effect of Court's Failure To Rule.

## 1. Objection.

## b. Admission Subject to Motion To Strike.

3 Witkin Cal. Evid. Presentation § 388

[§ 388] Admission Subject to Motion To Strike.

A similar problem arises where the court, in doubt as to the propriety of a question, instead of sustaining or overruling the objection, or expressly reserving its ruling, admits the evidence subject to a motion to strike in the event that it later appears that the evidence is inadmissible. This practice may involve the same unfairness as the practice of reserving the ruling (*supra*, §387), but it is within the court's power, and a motion to strike is essential. Failure to make the motion results in a waiver of the right to object on appeal.

In *Tarpey v. Veith* (1913) 22 C.A. 289, 134 P. 367, the court criticized "the lower court's cautious but far from commendable method of repeatedly ruling against the objections of the defendant, with the privilege of moving to strike out later." But the opinion added: "While such method of conducting a trial is ordinarily more conducive to confusion than to a correct conclusion as to the merits of the points presented by an objection, nevertheless it cannot be said that the method pursued in the present case was tantamount to a refusal to rule at all upon the objections as they were made. ... [I]t was the duty of the defendant to avail himself of the privilege of moving to strike out, and failing in this it will be presumed that ultimately he was satisfied with the rulings as originally made." (22 C.A. 294, 295.) (See also *Estate of Wempe* (1921) 185 C. 557, 564, 197 P. 949; *Conte v. Busby* (1931) 115 C.A. 732, 735, 2 P.2d 458; *Schwartz v. Shapiro* (1964) 229 C.A.2d 238, 247, 40 C.R. 189, *infra*, §389, dictum citing the text; 1 McCormick 5th, §58; 1 Wigmore (Tillers Rev.) §§14, 19, p. 847; 6 Wigmore (Chadbourne Rev.) §1871; 88 A.L.R.2d 12 [renewal of objection to, or offer of, evidence admitted or excluded conditionally].)

In *Ault v. International Harvester Co.* (1974) 13 C.3d 113, 117 C.R. 812, 528 P.2d 1148, defendant did not make a motion to strike a hearsay expert opinion but moved instead for a mistrial after plaintiff had rested his case. Defendant asserted that it deliberately failed to make the motion because the evidence was too prejudicial to be corrected and an admonition to the jury would have served only to recall the testimony to the jury's mind. *Held*, the contention lacks merit. (a) The trial judge overlooked plaintiff's earlier promise to lay a foundation for the hearsay opinion; a motion to strike would have reminded plaintiff of his failure to elicit direct testimony about that opinion so that plaintiff would have had the opportunity to supply the necessary foundational testimony. Instead, defendant delayed until plaintiff rested his case and then belatedly moved for a mistrial. (b) The opinion was not so prejudicial that an admonition to the jury would have been without effect. (13 C.3d 123.) (See also *People v. Lang* (1989) 49 C.3d 991, 1020, 264 C.R. 386, 782 P.2d 627, citing *Ault*.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 1 McCormick 6th, §58.



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## CHAPTER XI - Presentation At Trial

## XII. OBJECTIONS TO INADMISSIBLE EVIDENCE

## C. Effect of Court's Failure To Rule.

## 1. Objection.

## c. Ruling Neglected.

3 Witkin Cal. Evid. Presentation § 389

[§ 389] Ruling Neglected.

Another variation of this problem is presented where the court, through inadvertence or neglect, neither rules nor reserves its ruling. In such a case, the party who objected must make some effort to have the court actually rule. If the point is not pressed and is forgotten, the party may be deemed to have waived or abandoned it, just as if he or she had failed to make the objection in the first place. (See *Goodale v. Thorn* (1926) 199 C. 307, 315, 249 P. 11 [after objection and discussion, court said "proceed," and counsel abandoned further examination on point without making certain of meaning of court's ruling, i.e., whether to proceed along that line or some other]; *Campbell v. Genshlea* (1919) 180 C. 213, 220, 180 P. 336; *People v. Staver* (1953) 115 C.A.2d 711, 724, 252 P.2d 700; *Fibreboard Paper Products Corp. v. East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL-CIO* (1964) 227 C.A.2d 675, 698, 39 C.R. 64, citing the text [contract offered, defendants objected that it was not binding on them, judge suggested laying of foundation, offer later renewed without objection]; *Waller v. Waller* (1970) 3 C.A.3d 456, 464, 83 C.R. 533, citing the text; *People v. Obie* (1974) 41 C.A.3d 744, 750, 116 C.R. 283, quoting the text; *Haskell v. Carli* (1987) 195 C.A.3d 124, 129, 240 C.R. 439, citing the text; *People v. Rhodes* (1989) 212 C.A.3d 541, 554, 261 C.R. 1, quoting the text; *People v. Heldenburg* (1990) 219 C.A.3d 468, 475, 268 C.R. 255, quoting the text [trial judge agreed to admonish jury to disregard prosecutor's improper question but forgot to do so, and defense counsel failed to remind him]; C.E.B., 2 Civ. Proc. During Trial 3d, §15.67; C.E.B., California Trial Objections 6th, §4.20.)

On a somewhat related problem, the court, in *People v. Ranney* (1931) 213 C. 70, 1 P.2d 423, disapproved the practice of counsel securing an advance ruling on the propriety of questions by stating the purpose of the question, adding: "The better practice is to ask the direct question and thus secure a direct ruling on it. The rulings of the trial court should not be made in colloquies between itself and counsel as to how it would rule if the specific question were propounded. The trial court should refuse thus to rule in advance as to whether a specific question would be proper, if asked, and counsel should not be satisfied with anything less than a direct ruling on the question." (213 C. 74.)

But the objection may be saved without an actual ruling. In *Schwartz v. Shapiro* (1964) 229 C.A.2d 238, 40 C.R. 189, defendants' counsel, at the conclusion of the trial, stated that they were reserving "all of our rights," and the trial judge responded that "[y]ou have not given up any rights at all." *Held*, there was no waiver. (229 C.A.2d 247.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(New) *Distinction: Objection fruitless:* Where written objections have been filed, the objector has twice orally raised the issue of securing a ruling, and the court nevertheless neglects to rule, the waiver rule does not apply. The issues are

deemed to be preserved for appellate review on the ground that any further objection would be fruitless or an idle act.  
(*Long Beach v. Farmers & Merchants Bank of Long Beach* (2000) 81 C.A.4th 780, 784, 97 C.R.2d 140.)



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## CHAPTER XI - Presentation At Trial

### XII. OBJECTIONS TO INADMISSIBLE EVIDENCE

#### C. Effect of Court's Failure To Rule.

##### 2. Motion To Strike.

*3 Witkin Cal. Evid. Presentation § 390*

[§ 390] Motion To Strike.

If a motion to strike is made, and the court fails to rule on it due to confusion or inadvertence, the error will generally be considered waived.

Thus, in *Bennett v. Hoge* (1930) 108 C.A. 180, 291 P. 444, plaintiff assignee sued for the reasonable value of dental work. The only evidence of satisfactory work came from testimony of the dentist himself in a nonresponsive answer. Defendant's counsel moved to strike out the answer, but after a colloquy said, "I will repeat the question." He never stated the grounds of his motion and never renewed it. *Held*, the evidence was properly in the case, for counsel's actions would lead the trial judge and plaintiff's counsel to believe that the objection was withdrawn. (108 C.A. 183.) (See also *D'Avanzo v. Manno* (1936) 16 C.A.2d 346, 348, 60 P.2d 524; *Dimond v. Caterpillar Tractor Co.* (1976) 65 C.A.3d 173, 180, 134 C.R. 895; C.E.B., California Trial Objections 6th, §52.14.)

In *People v. Curtis* (1965) 232 C.A.2d 859, 867, 43 C.R. 286, the court saw no prejudice in the trial judge's failure to grant a motion to strike a nonresponsive answer, where the judge instructed the jury to disregard the statement; i.e., the instruction was held the equivalent of a ruling.

**SUPPLEMENT:** [This section is current through the latest supplement]



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XII. OBJECTIONS TO INADMISSIBLE EVIDENCE

C. Effect of Court's Failure To Rule.

3. Motion in Limine.

3 *Witkin Cal. Evid. Presentation* § 391

[§ 391] Motion in Limine.

In *People v. Morris* (1991) 53 C.3d 152, 279 C.R. 720, 807 P.2d 949, a murder case, defendant moved in limine to exclude the testimony of a jailhouse informant. The trial judge held a pretrial hearing on the motion, but made no ruling. Defendant did not request a ruling or object when the informant's testimony was offered at trial. *Held*, defendant had waived any claim of error in the introduction of the testimony. He was obligated to press for a ruling on his motion, and to object to the informant's testimony until he obtained one. (53 C.3d 195.) (See C.E.B., California Trial Objections 6th, §§2.13, 2.14, 2.18.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## CHAPTER XI - Presentation At Trial

## XII. OBJECTIONS TO INADMISSIBLE EVIDENCE

## D. Exclusion on Court's Own Motion.

3 *Witkin Cal. Evid. Presentation* § 392

[§ 392] Exclusion on Court's Own Motion.

The trial judge may prevent improper questions or exclude inadmissible matter on the judge's own motion without any objection by counsel, and the same is true where counsel does object but the objection is insufficient. (*Davey v. Southern Pac. Co.* (1897) 116 C. 325, 330, 48 P. 117; *Kimic v. San Jose-Los Gatos Interurban Ry. Co.* (1909) 156 C. 379, 390, 104 P. 986; *People v. White* (1954) 43 C.2d 740, 747, 278 P.2d 9 [argumentative questions]; *People v. Clark* (1992) 3 C.4th 41, 10 C.R.2d 554, 833 P.2d 561, citing *People v. White*; *Laugharn v. Chamberlain* (1934) 139 C.A. 601, 603, 34 P.2d 756; *People v. Williams* (1936) 17 C.A.2d 122, 125, 61 P.2d 813; *People v. Neustice* (1972) 24 C.A.3d 178, 190, 100 C.R. 783.) It has been suggested that this power should be exercised only where the evidence is irrelevant, unreliable, misleading or prejudicial, and that relevant and useful evidence that is merely incompetent under technical exclusionary rules ought to be received in the absence of objection by counsel. (See 1 McCormick 5th, §55.)

The power may sometimes become a duty in a criminal case, i.e., where highly prejudicial matters are offered, the judge probably should act to protect the defendant's right to a fair trial. (See *People v. Arends* (1957) 155 C.A.2d 496, 508, 318 P.2d 532, supra, §386 ["We think the trial judge should have stopped the discourse ... without waiting for an objection or motion to strike"]; 5 *Cal. Crim. Law* (3d), *Criminal Trial*, §547.)

Even though the court acted on an improper ground, the party who offered the evidence has no basis for a claim of error on appeal if the evidence was inadmissible; i.e., the reason for the court's decision is immaterial if the result is correct. (*Careaga v. Moore* (1925) 70 C.A. 614, 623, 234 P. 121; 9 *Cal. Proc.* (4th), *Appeal*, §341.)

**SUPPLEMENT:** [This section is current through the latest supplement]

See 1 McCormick 6th, §55. *West's Key Number Digest*, Criminal Law k.698(2); Trial k.105(6)





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## CHAPTER XI - Presentation At Trial

### XII. OBJECTIONS TO INADMISSIBLE EVIDENCE E. Use of Evidence Admitted Without Proper Objection. 1. Sufficient To Sustain Judgment. a. General Principle.

*3 Witkin Cal. Evid. Presentation § 393*

[§ 393] General Principle.

Material and relevant evidence that is technically incompetent and inadmissible under the exclusionary rules, if offered and received without a proper objection or motion to strike, will be considered in support of the judgment. This principle is recognized in the Evidence Code's definition of "evidence" (see *Ev.C. 140*, Comment), and it has been applied to a wide range of evidentiary topics, including hearsay, secondary evidence violating the former best evidence rule, inadmissible opinions, lack of foundation, incompetent, privileged or unqualified witnesses, illegally obtained evidence and even violation of the parol evidence rule. (See *infra*, §§394, 395; *People v. Alexander* (1963) 212 C.A.2d 84, 98, 27 C.R. 720, citing the text; *People v. Moore* (1970) 13 C.A.3d 424, 435, 91 C.R. 538, citing the text; 1 McCormick 5th, §54; for distinctions and exceptions, see *infra*, §396 et seq.)

The same principle applies to admission of incompetent evidence by express stipulation. (See *Noon v. Noon* (1948) 84 C.A.2d 374, 381, 191 P.2d 35 [court investigator's report]; *Exley v. Exley* (1951) 101 C.A.2d 831, 839, 226 P.2d 662 [same: probation officer investigated home conditions of remarried mother, his two letters treated as evidence in case].)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 1 McCormick 6th, §54. *West's Key Number Digest*, Evidence k.593



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## XII. OBJECTIONS TO INADMISSIBLE EVIDENCE

## E. Use of Evidence Admitted Without Proper Objection.

1. Sufficient To Sustain Judgment.
- b. Hearsay.

3 Witkin Cal. Evid. Presentation § 394

[§ 394] Hearsay.

Incompetent hearsay furnishes most of the illustrations of this principle (*supra*, §393). (See *Powers v. Board of Public Works* (1932) 216 C. 546, 552, 15 P.2d 156; *Estate of Fraysher* (1956) 47 C.2d 131, 135, 301 P.2d 848 [affidavit]; *Soares v. Ghisletta* (1934) 1 C.A.2d 402, 404, 36 P.2d 668 [same]; *People v. Kelly* (1946) 77 C.A.2d 23, 24, 174 P.2d 342 [unverified document, reciting names of husband and wife and date of marriage, signed with rubber stamp of Registrar of Vital Statistics, introduced with consent of appellant]; *In re Plummer* (1947) 79 C.A.2d 651, 655, 180 P.2d 771 [hearsay offered at preliminary examination sufficient to support order holding defendant to answer]; *People v. Stepp* (1947) 82 C.A.2d 49, 51, 185 P.2d 417 [accusatory statement not constituting an admission]; *Murray v. San Leandro Rock Co.* (1952) 111 C.A.2d 641, 647, 245 P.2d 347; *McVey v. McVey* (1955) 132 C.A.2d 120, 123, 281 P.2d 898 [affidavit]; *Crocker-Anglo Nat. Bank v. American Trust Co.* (1959) 170 C.A.2d 289, 338 P.2d 617, citing the text; *Wicktor v. Los Angeles* (1960) 177 C.A.2d 390, 405, 2 C.R. 352 [hearsay admissible for limited purpose of showing intent of declarant; failure to seek limiting instruction leaves it in evidence for truth of statement]; *People v. Bodkin* (1961) 196 C.A.2d 412, 420, 16 C.R. 506, citing the text; *Estate of Ballard* (1962) 210 C.A.2d 799, 802, 26 C.R. 832, citing the text; *In re O'Brien Machinery* (1964) 224 C.A.2d 563, 569, 36 C.R. 782 [corporate dissolution proceedings; affidavits]; *Forslund v. Forslund* (1964) 225 C.A.2d 476, 495, 37 C.R. 489, quoting the text [domestic relations investigator's unverified report]; *Fibreboard Paper Products Corp. v. East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL-CIO* (1964) 227 C.A.2d 675, 700, 39 C.R. 64, citing the text; *Waller v. Waller* (1970) 3 C.A.3d 456, 464, 83 C.R. 533 [declarations under penalty of perjury admitted on hearing for *nunc pro tunc* divorce decree, though containing hearsay and conclusions]; *Flood v. Simpson* (1975) 45 C.A.3d 644, 649, 119 C.R. 675 [hearsay or other incompetent evidence in affidavit, if received without proper objection or motion to strike, is competent evidence to support order or judgment]; *Mosesian v. Pennwalt Corp.* (1987) 191 C.A.3d 851, 865, 236 C.R. 778, 1 Cal. Evidence (4th), *Opinion Evidence*, §35, citing the text; 79 A.L.R.2d 890 [determining facts using inadmissible hearsay evidence introduced without objection].)

**SUPPLEMENT:** [This section is current through the latest supplement]

See *Rupf v. Yan* (2000) 85 C.A.4th 411, 430, 431, 102 C.R.2d 157, 2 Cal. Crim. Law (3d), *Crimes Against Public Peace and Welfare, Supp.*, §183, citing the text [substantial evidence supported trial judge's determination that return of weapon to defendant would likely endanger defendant or others, even if determination was based partly on hearsay contained in sheriff's report, where no hearsay objection was made to report].



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3 Witkin Cal. Evid. Presentation § 395

[§ 395] Other Illustrations.

Other types of inadmissible evidence that may be considered in support of a judgment include the following:

(1) *Secondary evidence violating former best evidence rule, now the secondary evidence rule.* (See *Gille v. Anderson* (1917) 34 C.A. 237, 238, 167 P. 193; *Crinella v. Northwestern Pac. R. Co.* (1927) 85 C.A. 440, 446, 259 P. 774; *Sublett v. Henry's Turk & Taylor Lunch* (1942) 21 C.2d 273, 275, 131 P.2d 369; *Hausen v. Goldman* (1954) 124 C.A.2d 25, 30, 267 P.2d 852; *Martin v. Martin* (1970) 5 C.A.3d 749, 757, 85 C.R. 339, citing the text [financial statement to establish gross taxable income in motion hearing]; on replacement of best evidence rule by secondary evidence rule, see 2 *Cal. Evidence* (4th), *Documentary Evidence*, §31 et seq.)

(2) *Inadmissible opinions.* (See *Pfingst v. Goetting* (1950) 96 C.A.2d 293, 307, 215 P.2d 93 [but "it may be assumed that the court disregarded it"]; *Berry v. Chrome Crankshaft Co.* (1958) 159 C.A.2d 549, 552, 324 P.2d 70.)

(3) *Documentary or other evidence lacking foundation.* (See *Fishel v. F. M. Ball & Co.* (1927) 83 C.A. 128, 133, 256 P. 493 [market price lists, unidentified and unauthenticated]; *People v. Houston* (1948) 88 C.A.2d 11, 17, 198 P.2d 53 [prison record to prove prior felony conviction, not certified in manner required by statute]; *People v. Alves* (1954) 123 C.A.2d 735, 267 P.2d 858, supra, §147 [lack of proper certification]; *Kirkpatrick v. Tapo Oil Co.* (1956) 144 C.A.2d 404, 410, 301 P.2d 274 [ancient document, custody not explained and no showing that it had been acted on as genuine]; *Bank of America v. Taliaferro* (1956) 144 C.A.2d 578, 582, 301 P.2d 393 [contract; no showing of due execution and delivery]; *People v. Modell* (1956) 143 C.A.2d 724, 731, 300 P.2d 204, 2 *Cal. Evidence* (4th), *Demonstrative, Experimental, and Scientific Evidence*, §40 [experiment].)

(4) *Testimony of incompetent, privileged or unqualified witness.* (See *Estate of Huston* (1912) 163 C. 166, 173, 124 P. 852 [privilege of physician]; *McGuire v. Baird* (1937) 9 C.2d 353, 357, 70 P.2d 915 [qualifications of expert]; *Trigueiro v. Skow* (1937) 24 C.A.2d 253, 256, 74 P.2d 836 [child witness not put under oath]; *People v. Jackson* (1960) 177 C.A.2d 181, 183, 1 C.R. 857 [child witness testified without objection at preliminary examination and defendant stipulated to submission of case on transcript].)

(5) *Illegally obtained evidence.* (See *Robison v. Superior Court* (1957) 49 C.2d 186, 316 P.2d 1; *People v. Williams* (1957) 148 C.A.2d 525, 532, 307 P.2d 48; but see infra, §§396, 397.)

(6) *Miscellaneous examples.* (See *Holzer v. Read* (1932) 216 C. 119, 123, 13 P.2d 697 [nonresponsive answer or

volunteered statement]; *Prichard v. Veterans Cab Co.* (1965) 63 C.2d 727, 733, 47 C.R. 904, 408 P.2d 360 [unduly prejudicial evidence of prior accidents to show negligence of automobile driver]; *Matthiesen v. Smith* (1936) 16 C.A.2d 479, 482, 60 P.2d 873 [improper hypothetical question]; *People v. Alvidrez* (1958) 158 C.A.2d 299, 302, 322 P.2d 557 [nondisclosure of identity of informer, waived by failure to demand disclosure]; *Spinelli v. Tallcott* (1969) 272 C.A.2d 589, 592, 77 C.R. 481 [improper method of calculating damages].)

**SUPPLEMENT:** [This section is current through the latest supplement]



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# CHAPTER XI - Presentation At Trial

## XII. OBJECTIONS TO INADMISSIBLE EVIDENCE

### E. Use of Evidence Admitted Without Proper Objection.

#### 2. Insufficient Despite Failure To Object.

##### a. Irrelevant Matter.

3 Witkin Cal. Evid. Presentation § 396

[§ 396] Irrelevant Matter.

The definition of "relevant evidence" to include the concept of materiality (*Ev.C. 210, 1 Cal. Evidence (4th), Circumstantial Evidence, §§3, 4*) can be confusing, and the following distinction should be made:

(1) *Immaterial evidence* may sometimes support a judgment; i.e., relevant evidence may be considered even though it is technically outside the issues made by the pleadings or pretrial order, if the case is tried on the theory that the matter is in issue. (See *Gray v. Janss Inv. Co.* (1921) 186 C. 634, 641, 200 P. 401; *Standley v. Feather River Pine Mills* (1952) 112 C.A.2d 101, 104, 245 P.2d 657; 9 Cal. Proc. (4th), Appeal, §402; 1 McCormick 5th, §54.)

(2) *Irrelevant evidence* will not support a judgment; i.e., if it has no tendency to prove a material issue, it makes no difference whether it is excluded or comes in without objection. (See *Tahoe Nat. Bank v. Phillips* (1971) 4 C.3d 11, 23, 92 C.R. 704, 480 P.2d 320; *Kitchel v. Acree* (1963) 216 C.A.2d 119, 124, 30 C.R. 714, citing the text; *White v. California* (1971) 21 C.A.3d 738, 756, 99 C.R. 58 [irrelevant evidence could not enlarge boundaries of unambiguous patent]; 1 McCormick 5th, §54.)

**SUPPLEMENT:** [This section is current through the latest supplement]

(1) *Immaterial evidence*: See 1 McCormick 6th, §54.

(2) *Irrelevant evidence*: See 1 McCormick 6th, §54.



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2. Insufficient Despite Failure To Object.

b. Fundamental Error.

3 *Witkin Cal. Evid. Presentation* § 397

[§ 397] Fundamental Error.

If the inadmissible matter was so seriously prejudicial that an objection would have been ineffective to remedy the harm, failure to object does not preclude assertion of the error on appeal. (See *supra*, §386 [evidence involving undue prejudice]; 9 *Cal. Proc. (4th), Appeal*, §444; 6 *Cal. Crim. Law (3d), Reversible Error*, §40.)

The same is true where admission of the inadmissible matter in a criminal trial is considered a denial of due process; e.g., involuntary confession, involuntary admission, and evidence obtained by brutality. (See *People v. Underwood* (1964) 61 *C.2d* 113, 120, 126, 37 *C.R.* 313, 389 *P.2d* 937; *People v. Matteson* (1964) 61 *C.2d* 466, 469, 39 *C.R.* 1, 393 *P.2d* 161; 1 *Cal. Evidence (4th), Hearsay*, §§52 et seq., 89, 136; 2 *Cal. Evidence (4th), Witnesses*, 413.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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## XII. OBJECTIONS TO INADMISSIBLE EVIDENCE

## E. Use of Evidence Admitted Without Proper Objection.

## 2. Insufficient Despite Failure To Object.

## c. Supervening Change in Law.

## 3 Witkin Cal. Evid. Presentation § 398

## [§ 398] Supervening Change in Law.

Occasionally, new exclusionary rules, based on constitutional rights, develop in criminal cases. At the time of their announcement by the United States Supreme Court or the California Supreme Court, evidence may have already been admitted in the trial of pending cases which would have been subject to objection if the new and unanticipated rule had been known at the time. In cases in which the judgment of conviction has not become final, the failure to object does not waive the error in admission of the evidence, and the point may be raised on appeal. (See *O'Connor v. Ohio* (1966) 385 U.S. 92, 87 S.Ct. 252, 253, 17 L.Ed.2d 189, 191 [failure to raise rule set forth in *Griffin v. California* (1965) 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106, 2 Cal. Evidence (4th), Witnesses, §433, prior to its pronouncement]; *People v. Kitchens* (1956) 46 C.2d 260, 262, 294 P.2d 17 [evidence illegally obtained, trial before *People v. Cahan* (1955) 44 C.2d 434, 282 P.2d 905, 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence*, §4]; *People v. Hillery* (1965) 62 C.2d 692, 711, 44 C.R. 30, 401 P.2d 382 [incriminating statements violating rule later set forth in *Escobedo v. Illinois* (1964) 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977, 1 Cal. Evidence (4th), Hearsay, §76]; *People v. Nye* (1965) 63 C.2d 166, 175, 45 C.R. 328, 403 P.2d 736 [same]; *People v. De Santiago* (1969) 71 C.2d 18, 22, 76 C.R. 809, 453 P.2d 353 [failure to raise objection to unannounced entry, prior to *People v. Gastelo* (1967) 67 C.2d 586, 63 C.R. 10, 432 P.2d 706]; see *People v. Odom* (1969) 71 C.2d 709, 717, 78 C.R. 873, 456 P.2d 145; *People v. Cooper* (1965) 234 C.A.2d 587, 600, 44 C.R. 483 [evidence illegally obtained, trial before *People v. Burke* (1964) 61 C.2d 575, 39 C.R. 531, 394 P.2d 67, on impounded automobiles, 4 Cal. Crim. Law (3d), *Illegally Obtained Evidence*, §156]; *People v. Natividad* (1966) 240 C.A.2d 244, 246, 49 C.R. 437 [incriminating statements violating rule later set forth in *Escobedo v. Illinois*, *supra*]; *People v. Pierce* (1969) 269 C.A.2d 193, 201, 75 C.R. 257, citing the text [failure to object to introduction of inconsistent statement as substantive evidence, prior to *People v. Johnson* (1968) 68 C.2d 646, 68 C.R. 599, 441 P.2d 111; see 1 Cal. Evidence (4th), Hearsay, §157].)

In *People v. Groves* (1969) 71 C.2d 1196, 80 C.R. 745, 458 P.2d 985, the court emphasized the distinction between a change in the law and the first opportunity for a state court to apply federal constitutional standards. In holding that defendant could not raise a defective warrant point for the first time on appeal, the court said that a significant warrant decision (*People v. Sesslin* (1968) 68 C.2d 418, 67 C.R. 409, 439 P.2d 321) "did not change the law. It was merely the first case in which this court was called upon to apply the foregoing decisions of the United States Supreme Court." (71 C.2d 1198.)

**SUPPLEMENT:** [This section is current through the latest supplement]



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#### E. Use of Evidence Admitted Without Proper Objection.

##### 2. Insufficient Despite Failure To Object.

##### d. Incompetency of Counsel.

#### 3 Witkin Cal. Evid. Presentation § 399

[§ 399] Incompetency of Counsel.

Where the failure to object to significant inadmissible evidence in a criminal trial is due to the inexcusable ignorance or incapacity of the defendant's attorney, the judgment may be reversed for incompetency of counsel. (See *People v. Ibarra* (1963) 60 C.2d 460, 466, 34 C.R. 863, 386 P.2d 487, 5 Cal. Crim. Law (3d), *Criminal Trial*, §201; *People v. Nation* (1980) 26 C.3d 169, 161 C.R. 299, 604 P.2d 1051, 5 Cal. Crim. Law (3d), *Criminal Trial*, §217 [failure to challenge photographic identification that was so suggestive as to taint and invalidate subsequent live lineup identification]; *People v. Williams* (1970) 11 C.A.3d 970, 979, 90 C.R. 292, quoting the text [objection not waived but error harmless]; *People v. Dorsey* (1975) 46 C.A.3d 706, 719, 120 C.R. 508 [failure to assert applicable privilege]; *People v. Sundlee* (1977) 70 C.A.3d 477, 485, 138 C.R. 834 [failure to object to tape recordings and transcripts of conversations as inadmissible hearsay]; *People v. Borba* (1980) 110 C.A.3d 989, 994, 168 C.R. 305 [failure to object to incriminating admissions under *Miranda*]; *People v. Rodriguez* (1981) 115 C.A.3d 1018, 1021, 171 C.R. 798 [withdrawal of objection to prosecutor's calling of associate defense counsel as witness to propriety of pretrial police live lineup].)

In *People v. Coffman* (1969) 2 C.A.3d 681, 82 C.R. 782, defense counsel not only failed to object to the introduction of seized evidence but also advised the judge of a precedent that supposedly justified its admissibility. Although the defense of unlawful search and seizure was thus "lost" because of the failure to object, the attorney's conduct was deemed a misinterpretation of the law rather than a tactical choice. *Held*, conviction reversed because of inadequate representation by counsel. (2 C.A.3d 689.)

**SUPPLEMENT:** [This section is current through the latest supplement]





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CHAPTER XI - Presentation At Trial

XII. OBJECTIONS TO INADMISSIBLE EVIDENCE  
E. Use of Evidence Admitted Without Proper Objection.  
2. Insufficient Despite Failure To Object.  
e. Extrinsic Evidence Violating Parol Evidence Rule.

3 *Witkin Cal. Evid. Presentation* § 400

[§ 400] Extrinsic Evidence Violating Parol Evidence Rule.

Earlier California cases, treating the parol evidence rule as a rule of evidence, held that inadmissible extrinsic evidence admitted without objection could support a judgment. But the modern view that the rule is one of substantive law led to the repudiation of the waived objection rule in *Tahoe Nat. Bank v. Phillips* (1971) 4 C.3d 11, 23, 92 C.R. 704, 480 P.2d 320. (See 2 *Cal. Evidence* (4th), *Documentary Evidence*, §64.)

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## CHAPTER XI - Presentation At Trial

## XIII. EXCLUSION OF ADMISSIBLE EVIDENCE: OFFER OF PROOF

## A. Necessity of Offer.

## 1. Preservation of Issue for Appeal.

3 Witkin Cal. Evid. Presentation § 401

[§ 401] Preservation of Issue for Appeal.

If a question is asked, and it is not clear on its face that it is pertinent (e.g., it is general or preliminary), and the court sustains an objection to it, counsel must either reframe the question, or show the pertinency of the question and the materiality of the answer, so as to give the court an opportunity to correct its ruling. Such a showing is called an "offer of proof": counsel disclosing what he or she intends to prove by the line of questioning. (See *Pacific Gas & Elec. Co. v. Hacienda Mobile Home Park* (1975) 45 C.A.3d 519, 531, 119 C.R. 559, citing the text [inadequate offer of proof justified trial court in ruling proffered evidence inadmissible]; 1 McCormick 5th, §51; 1 Wigmore (Tillers Rev.) §20a; 89 A.L.R.2d 279; *F.R. Evid.*, Rule 103, supra, §372; C.E.B., 2 Civ. Proc. During Trial 3d, §15.50; C.E.B., California Trial Objections 6th, §5.4.)

Failure to make such an offer precludes consideration of the error on appeal. (*Ev.C.* 354(a); see *Marshall v. Hancock* (1889) 80 C. 82, 84, 22 P. 61 [witness was asked "what the conversation was," and objection sustained; no offer to show that conversation related to issues]; *Snowball v. Snowball* (1913) 164 C. 476, 479, 129 P. 784; *MacDonnell v. California Lands* (1940) 15 C.2d 344, 348, 101 P.2d 479; *People v. Danielly* (1949) 33 C.2d 362, 376, 202 P.2d 18; *Helfend v. Southern Calif. Rapid Transit Dist.* (1970) 2 C.3d 1, 17, 84 C.R. 173, 465 P.2d 61, citing the text; *Acosta v. Southern Calif. Rapid Transit Dist.* (1970) 2 C.3d 19, 26, 84 C.R. 184, 465 P.2d 72, citing the text; *People v. Whitt* (1990) 51 C.3d 620, 649, 274 C.R. 252, 798 P.2d 849 [at penalty phase, objections sustained when defendant was asked whether he wanted to live and why he deserved to live; no offer to show relevance]; *People v. Ramos* (1997) 15 C.4th 1133, 1178, 64 C.R.2d 892, 938 P.2d 950 [after trial judge sustained hearsay objections to testimony about codefendant's writings that would have been used to show defendant was acting under codefendant's influence, defendant waived issue by failing to make offer of proof; offer of proof requirement applies to establishing hearsay exceptions]; *Merz v. Poole* (1927) 82 C.A. 12, 15, 254 P. 914 [question whether defendant had "any other transactions" with plaintiff; objection sustained, too broad]; *People v. Asta* (1967) 251 C.A.2d 64, 76, 59 C.R. 206, citing the text; *Pugh v. See's Candies* (1988) 203 C.A.3d 743, 758, 250 C.R. 195, citing the text; *People v. Honig* (1996) 48 C.A.4th 289, 345, 55 C.R.2d 555, 2 Cal. Crim. Law (3d), *Crimes Against Governmental Authority*, §105 [state official, convicted of making official contracts in which he had financial interest, was not entitled to reversal on basis that testimony of private donors to defendant and wife's nonprofit corporation was not allowed, where he did not seek to call those donors or inquire whether their testimony was within court's ruling on admissibility of financial evidence]; *Gutierrez v. Cassiar Mining Corp.* (1998) 64 C.A.4th 148, 161, 75 C.R.2d 132 [in personal injury action against supplier of asbestos fiber, defendant's failure to make offer of proof after trial judge ruled it could not call plaintiff's coworker as witness defeated its claim on appeal that exclusion was error; although judge questioned need for offer, this did not constitute refusal to hear one].)

Similarly, if a party seeks to introduce documentary evidence, and the court temporarily or tentatively excludes it for lack of connection, or pending decision on its admissibility, with the statement that the offer may be made again later, failure to renew the offer or to seek a final ruling may be a waiver of any error. (*Spanfelner v. Meyer* (1942) 51 C.A.2d 390, 391, 124 P.2d 862 [document offered, marked for identification, court stating that "it will probably be admitted but I will defer it" to see whether there was any evidence to tie it in]; *Warren v. Pacific Intermountain Express Co.* (1960) 183 C.A.2d 155, 162, 6 C.R. 824.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 1 McCormick 6th, §51. *West's Key Number Digest*, Trial k.44-



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## XIII. EXCLUSION OF ADMISSIBLE EVIDENCE: OFFER OF PROOF

## A. Necessity of Offer.

## 2. Form of Offer.

## 3 Witkin Cal. Evid. Presentation § 402

## [§ 402] Form of Offer.

Where required, the offer of proof must consist of matter that would be admissible. If a general offer is made to prove a number of things, without segregation, and it includes some inadmissible matter, the entire offer may be rejected. (*Swafford v. Board of Education* (1900) 127 C. 484, 488, 59 P. 900; *Rose v. Doe* (1907) 4 C.A. 680, 686, 89 P. 135; *Lewis v. Western Truck Line* (1941) 44 C.A.2d 455, 465, 112 P.2d 747; *Estate of Stark* (1941) 48 C.A.2d 209, 213, 119 P.2d 961 [counsel "was not entitled to use an offer of proof, as a dragnet, to obviate asking the witness the particular questions to which he desired answers from the witness' own personal knowledge"].)

The offer of proof must be specific in its indication of the purpose of the testimony, the name of the witness, and the content of the answer to be elicited. The judge may properly reject a general or vague offer that does not indicate with precision the evidence to be presented and the witnesses who are to give it. (See *Douillard v. Woodd* (1942) 20 C.2d 665, 670, 128 P.2d 6; *Stickel v. San Diego Elec. Ry. Co.* (1948) 32 C.2d 157, 162, 195 P.2d 416; *Moore v. Rogers* (1958) 157 C.A.2d 192, 197, 320 P.2d 524; *Braly v. Midvalley Chemical Co.* (1961) 192 C.A.2d 369, 380, 13 C.R. 366 [too general]; *Byrd v. Savage* (1963) 219 C.A.2d 396, 401, 32 C.R. 881 ["vague, shotgun" proposal, with no showing of ability to call as witnesses the persons named, and containing much inadmissible matter]; *People v. Hyatt* (1971) 18 C.A.3d 618, 624, 96 C.R. 156; *People v. Sperl* (1976) 54 C.A.3d 640, 657, 126 C.R. 907, citing the text; *Semsch v. Henry Mayo Newhall Memorial Hosp.* (1985) 171 C.A.3d 162, 166, 216 C.R. 913, quoting the text [offer failed to provide specificity as to testimony to be offered, necessary for appropriate evidentiary objections]; *In re Mark C.* (1992) 7 C.A.4th 433, 444, 8 C.R.2d 856 [after objection to results of penile plethysmograph test and numerous sexual inventory and diagnostic tests, general oral statement concerning the standardized tests was insufficient offer of proof]; 1 McCormick 5th, §51; C.E.B., 2 Civ. Proc. During Trial 3d, §15.55 et seq.; C.E.B., California Trial Objections 6th, §5.10 et seq.; 89 A.L.R.2d 279, 288.)

An offer of proof setting forth the substance of facts to be proved does not comply with *Ev.C. 354(a)*: "The substance of evidence to be set forth in a valid offer of proof means the testimony of specific witnesses, writings, material objects, or other things presented to the senses, to be introduced to prove the existence or nonexistence of a fact in issue." (*United Savings & Loan Assn. v. Reeder Dev. Corp.* (1976) 57 C.A.3d 282, 294, 129 C.R. 113; see *McCleery v. Bakersfield* (1985) 170 C.A.3d 1059, 1073, 216 C.R. 852.)

**SUPPLEMENT:** [This section is current through the latest supplement]  
See 1 McCormick 6th, §51. *West's Key Number Digest*, Trial k.45(3)



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## CHAPTER XI - Presentation At Trial

### XIII. EXCLUSION OF ADMISSIBLE EVIDENCE: OFFER OF PROOF

#### B. Where Offer Is Unnecessary.

##### 1. Question Clearly Disclosing Admissibility.

*3 Witkin Cal. Evid. Presentation § 403*

[§ 403] Question Clearly Disclosing Admissibility.

Where the error consists of excluding admissible evidence, sustaining an objection to admissible evidence, or granting a motion to strike, ordinarily no further act at the trial is required of a party as a basis for raising the error on appeal. In this situation, the party asks the question in a form that clearly discloses its purpose, relevancy and materiality, and the trial court sustains the objection or strikes out the answer. The party need not repeat the question to obtain another exclusionary ruling, argue the legal principles governing its admission, or make an offer of proof. (See *Ev.C. 354(a)*; see also *People v. McGee* (1947) 31 C.2d 229, 242, 187 P.2d 706 [questions, together with colloquies with trial judge, clearly disclosed purpose]; *Delta Dynamics v. Arioto* (1968) 69 C.2d 525, 527, footnote 1, 72 C.R. 785, 446 P.2d 785, 2 Cal. Evidence (4th), *Documentary Evidence*, §82 [question, together with pretrial conference order, disclosed purpose]; *People v. Pereles* (1932) 125 C.A. Supp. 787, 792, 12 P.2d 1093; C.E.B., 2 Civ. Proc. During Trial 3d, §15.53; C.E.B., California Trial Objections 6th, §5.7.)

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#### B. Where Offer Is Unnecessary.

#### 2. Judge's Ruling Making Offer Futile.

#### 3 *Witkin Cal. Evid. Presentation § 404*

[§ 404] Judge's Ruling Making Offer Futile.

If the trial judge expressly limits the issues or otherwise indicates a refusal to receive evidence on a certain subject, an offer of proof relating to the excluded issues would be futile and is excused. (See *Ev.C. 354(b)*; see also *Caminetti v. Pacific Mut. Life Ins. Co. (1943) 23 C.2d 94, 100, 142 P.2d 741* [court announced applicable legal measure of damages, thus preventing evidence relating to any other measure]; *Lawless v. Calaway (1944) 24 C.2d 81, 90, 147 P.2d 604* [plaintiff in malpractice suit called defendant doctor as adverse witness, court ruled that he could not be interrogated as expert, thus foreclosing examination on issues that could be proved solely by expert evidence]; *Heimann v. Los Angeles (1947) 30 C.2d 746, 757, 185 P.2d 597*; *Beneficial Fire & Cas. Ins. Co. v. Kurt Hitke & Co. (1956) 46 C.2d 517, 522, 297 P.2d 428* ["Where an entire class of evidence has been declared inadmissible or the trial court has clearly intimated it will receive no evidence of a particular class or upon a particular issue, an offer of proof is not a prerequisite to raising the question on appeal, and an offer, if made, may be broad and general"]; *Ponce v. Marr (1956) 47 C.2d 159, 163, 301 P.2d 837*; *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co. (1968) 69 C.2d 33, 36, footnote 1, 69 C.R. 561, 442 P.2d 641* [judge repeatedly ruled that he would not admit extrinsic evidence to interpret contract]; *Westman v. Clifton's Brookdale (1948) 89 C.A.2d 307, 314, 200 P.2d 814*; *Chambers v. Silver (1951) 103 C.A.2d 633, 642, 230 P.2d 146*; *DiMaria v. Mitchell (1952) 112 C.A.2d 691, 698, 247 P.2d 60*; *Carroll v. Beavers (1954) 126 C.A.2d 828, 838, 273 P.2d 56*; *MacGregor v. Kawaoka (1955) 132 C.A.2d 407, 410, 282 P.2d 130*; *People v. Bennett (1969) 276 C.A.2d 172, 175, 80 C.R. 706* [judge made flat statement that proffered evidence was irrelevant]; *Montez v. Superior Court (1970) 10 C.A.3d 343, 350, 88 C.R. 736* [judge made it clear that he would not receive the proffered evidence]; *In re Eric. H. (1997) 54 C.A.4th 955, 962, 63 C.R.2d 230*, citing the text; C.E.B., 2 Civ. Proc. During Trial 3d, §15.53; C.E.B., California Trial Objections 6th, §5.6.)

The same is true where the judge refuses to allow a witness to testify at all, on an erroneous theory of incompetency, without regard to the admissibility of the testimony the witness might give, and the record indicates that the testimony would be material. (*People v. Duane (1942) 21 C.2d 71, 81, 130 P.2d 123*; cf. *Caldwell v. Caldwell (1962) 204 C.A.2d 819, 821, 22 C.R. 854*, citing the text [judge refused to hear wife on motion to increase child support].)

The theory that a supervening change in the law may permit an objection to inadmissible evidence on appeal that was not made below (see *supra*, §398) may also be applied to the exclusion of admissible evidence where no offer of proof was made below. Thus, in *People v. Nigri (1965) 232 C.A.2d 348, 42 C.R. 679*, the defense in statutory rape cases, of reasonable belief that the female was over the age of consent (see *1 Cal. Crim. Law (3d)*, *Defenses*, §45), was announced by the Supreme Court after the trial judge rejected defendant's evidence to this effect. *Held*, quoting *People*

*v. Kitchens* (1956) 46 C.2d 260, 294 P.2d 17, the judgment of conviction should be reversed to permit defendant to offer this proof. (232 C.A.2d 350.)

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#### B. Where Offer Is Unnecessary.

##### 3. Cross-Examination.

3 Witkin Cal. Evid. Presentation § 405

[§ 405] Cross-Examination.

(1) *Nature and Purpose of Exception.* If counsel in cross-examination were required to disclose the object of a line of questioning, the witness would often be forewarned and the cross-examiner seriously hampered. Therefore, an offer of proof is not necessary where the evidence is sought by questions asked during cross-examination. (*Ev.C.* 354(c).)

In *People v. Jones* (1911) 160 C. 358, 117 P. 176, the trial judge sustained a general objection to a question asked of a prosecution witness, on the ground that it did not appear that the answer would be material. *Held*, the question should have been allowed. An inadmissible answer can be stricken out; "[b]ut to rule out a pertinent question asked on cross-examination because the court and cross-examiner cannot know what the answer will be, is to destroy every purpose of a cross-examination and render it a vain and empty thing." (160 C. 363.) (See also *Lawless v. Calaway* (1944) 24 C.2d 81, 91, 147 P.2d 604 [examination of adverse party "is often exploratory" and offer of proof would be unreasonable requirement]; *Tossmen v. Newman* (1951) 37 C.2d 522, 525, 233 P.2d 1; *MacGregor v. Kawaoka* (1955) 132 C.A.2d 407, 409, 282 P.2d 130; C.E.B., 2 Civ. Proc. During Trial 3d, §15.53; C.E.B., California Trial Objections 6th, §5.5.)

(2) *Unusual Circumstances Making Exception Inapplicable.* In *People v. Coleman* (1970) 8 C.A.3d 722, 729, 87 C.R. 554, a trial for robbery, the prosecuting witness was a 17-year-old Canadian boy who had arrived in the Haight-Ashbury district of San Francisco with \$ 3.50 and, 10 days later, was hitchhiking to Vancouver with \$ 55.00 which defendants allegedly robbed from him. Defense counsel established that the victim had earned money in San Francisco, and then asked, "What did you do for that?" The prosecutor objected that the question was irrelevant and immaterial. Notwithstanding a defense contention that "it's important we establish a basis where this money came from," the objection was sustained. No further argument took place at the trial and no offer of proof was made. On appeal, defendants argued that the victim was unlikely to have possessed the money he claimed was taken, and that the excluded question was the beginning of an attack on his credibility. In support of the ruling, the Attorney General suggested that the trial judge may have relied on either of two principles: That the crime of robbery did not depend on the value of the property taken, or that the inquiry meant to establish that the victim had acquired the money in some illicit or socially undesirable way, and that he was entitled to protection against these efforts. *Held*, there was no abuse of discretion:

"The opposing contentions emphasize the fact that the question which provoked the prosecutor's objection was at least *ambiguous*, if not capable of several meanings; the trial judge was therefore entitled to be apprised of the direction of counsel's inquiry." (8 C.A.3d 729.) "In the face of an objection by the prosecutor and the statement of defense counsel, it should have been clear that the judge was unaware of the materiality of the question if, indeed, it had a



material purpose; the judge did not suggest that counsel refrain from further related inquiry; and defense counsel made no offer of proof or other attempt to explain a relevant purpose of the question, but abandoned the direct line of inquiry and moved on to proper and related questions touching upon the amount and denominations of money on the victim's person on his departure from San Francisco." (8 C.A.3d 730.) (See *Nienhouse v. Superior Court* (1996) 42 C.A.4th 83, 93, 49 C.R.2d 573 [cross-examination exception to offer of proof requirement was inapplicable in preliminary hearing on drug and firearm charges; police officer did not testify on direct examination regarding any statements defendant made, and therefore defendant's inquiry to him about those statements was not cross-examination but attempt to offer affirmative evidence]; C.E.B., 2 Civ. Proc. During Trial 3d, §15.53; C.E.B., California Trial Objections 6th, §5.5.)

**SUPPLEMENT:** [This section is current through the latest supplement]