

# CALIFORNIA LAW REVISION COMMISSION

## TENTATIVE RECOMMENDATION

### Miscellaneous Hearsay Exceptions: Forfeiture By Wrongdoing

October 2007

The purpose of this tentative recommendation is to solicit public comment on the Commission's tentative conclusions. A comment submitted to the Commission will be part of the public record. The Commission will consider the comment at a public meeting when the Commission determines what, if any, recommendation it will make to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made to it.

TO BE MOST HELPFUL, COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY **December 3, 2007**. The Commission will still accept comments after that date and consider them to the extent possible. The Commission expects to approve a final recommendation on February 14, 2008. Comments must be received by then to have any impact on the Commission's recommendation.

The Commission will often substantially revise a proposal in response to comment it receives. Thus, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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## SUMMARY OF TENTATIVE RECOMMENDATION

Fundamental to our justice system is the principle that each side in a civil or criminal case is given the opportunity to question adverse witnesses under oath in the presence of the trier of fact. The federal and state constitutions guarantee this right of confrontation to a defendant in a criminal case; the federal and state prohibitions against use of hearsay evidence serve a similar function but apply to all parties in either a civil or a criminal case. The process of questioning witnesses in this manner promotes determination of the truth, so that justice can be served.

Sometimes, however, a person attempts to thwart justice by killing a witness, threatening a witness so that the witness refuses to testify, or engaging in other conduct that prevents a witness from testifying. If such conduct is sufficiently egregious and appropriately proved, it may result in forfeiture of the constitutional right of confrontation, such that there is no constitutional barrier to admission of an out-of-court statement by the unavailable witness.

Similarly, federal law contains an exception to the hearsay rule, which applies when a party has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of a witness. If an out-of-court statement satisfies both the requirements of that exception and the constitutional requirements for forfeiture, the statement may be admitted in evidence. California has a similar hearsay rule exception, but it is narrower and more detailed than the federal one.

The Law Revision Commission is studying whether to revise California's approach to this matter. Its report is due by March 1, 2008. Possible steps include:

- Repeal California's existing provision on forfeiture by wrongdoing and replace it with a provision that tracks the constitutional minimum.
- Replace the existing provision with one similar to the federal rule.
- Broaden the existing provision to a limited extent, with the possibility of further revisions later.
- Leave the law alone until there is further judicial guidance.

The first approach is inadvisable because the United States Supreme Court has not yet given guidance on key aspects of the constitutional minimum. The Commission has tentatively concluded that the other options are reasonable possibilities. It solicits comment on which of these approaches is preferable.

A related issue is defining when a witness is "unavailable" for purposes of the hearsay rule. The Commission tentatively recommends that California's provision on unavailability be amended to expressly recognize that a witness who refuses to testify or has a total lack of memory on a subject is unavailable. The Commission also solicits comment on this reform.

This recommendation was prepared pursuant to Resolution Chapter 100 of the Statutes of 2007.

MISCELLANEOUS HEARSAY EXCEPTIONS:  
FORFEITURE BY WRONGDOING

1 The Law Revision Commission has been directed to study forfeiture by  
2 wrongdoing as an exception to the hearsay rule.<sup>1</sup> On some occasions, misconduct  
3 by a defendant causes a declarant (a person who made a statement) to be  
4 unavailable to testify at trial. For example, a criminal defendant charged with a  
5 third strike might arrange for a key witness to be murdered. The goal of this study  
6 is to determine under which circumstances such misconduct should constitute an  
7 exception to the hearsay rule, such that an out-of-court statement by the  
8 unavailable witness can be introduced against the defendant. Any statute on this  
9 point will have to comply with the Confrontation Clause of the federal<sup>2</sup> and state<sup>3</sup>  
10 constitutions.

11 A related issue is whether the statutory definition of an “unavailable” witness for  
12 purposes of the hearsay rule should expressly include a witness who refuses to  
13 testify. The Commission has also been asked to study this issue.<sup>4</sup> The  
14 Commission’s report on these matters is due by March 1, 2008.<sup>5</sup>

15 To provide context for consideration of these issues, it is necessary to present  
16 some background information on the hearsay rule and the Confrontation Clause.

17 Next, the Commission examines what constitutes unavailability for purposes of  
18 the hearsay rule. The Commission tentatively recommends that California’s  
19 provision on unavailability be amended to codify case law recognizing that a  
20 witness who refuses to testify is unavailable. The Commission also recommends  
21 codifying case law holding that a witness who credibly testifies to a total lack of  
22 memory concerning the subject matter of an out-of-court statement is unavailable  
23 to testify on that subject.

24 Finally, the Commission discusses forfeiture by wrongdoing as an exception to  
25 the hearsay rule. The Commission has tentatively concluded that three approaches  
26 deserve serious consideration at this time:

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1. See Letter from Ellen Corbett, Chair of Senate Committee on Judiciary, to Brian Hebert, Executive Secretary of California Law Revision Commission (Aug. 20, 2007) (Commission Staff Memorandum 2007-28 (Aug. 21, 2007), Exhibit p. 1).

Any California Law Revision Commission document referred to in this recommendation can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website ([www.clrc.ca.gov](http://www.clrc.ca.gov)). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

2. U.S. Const. amend. VI.

3. Cal. Const. art. I, § 15; see also Penal Code § 686.

4. See Letter from Ellen Corbett, *supra* note 1.

5. *Id.*

- 1 • Repeal California’s existing provision on forfeiture by wrongdoing and  
2 replace it with a provision similar to the corresponding federal rule.
- 3 • Broaden the existing provision to a limited extent, with the possibility of  
4 further revisions later.
- 5 • Leave the law alone until there is further judicial guidance.

6 The Commission solicits comment on which of these approaches is preferable.  
7 The Commission also solicits comment on the proposed reforms relating to  
8 unavailability, and on any other aspect of this tentative recommendation.

9 THE HEARSAY RULE AND ITS PURPOSE

10 The Evidence Code defines “hearsay evidence” as “evidence of a statement that  
11 was made other than by a witness while testifying at the hearing and that is offered  
12 to prove the truth of the matter stated.”<sup>6</sup> Under this definition, evidence of a  
13 statement is not hearsay if it is offered for a purpose other than proving the truth of  
14 the statement.<sup>7</sup>

15 For example, suppose a hospital patient says that an object is blue and evidence  
16 of the statement is later offered in court. If the statement is offered to prove that  
17 the object in question was blue, then the statement is hearsay. If instead the  
18 statement is offered to prove that the patient was capable of speech, then the  
19 statement is not hearsay.

20 Except as otherwise provided by law, hearsay evidence is inadmissible.<sup>8</sup> This is  
21 known as the hearsay rule.<sup>9</sup>

22 A principal reason for the hearsay rule is to exclude a statement when the  
23 truthfulness of the declarant cannot be tested through cross-examination.<sup>10</sup> The  
24 process of cross-examination allows an opposing party to expose both inadvertent  
25 and conscious inaccuracies in perception and recollection.<sup>11</sup> Cross-examination  
26 has been described as “the ‘greatest legal engine ever invented for the discovery of  
27 truth.’”<sup>12</sup>

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6. Evid. Code § 1200(a).

7. Evid. Code § 1200 Comment.

8. Evid. Code § 1200(b).

9. Evid. Code § 1200(c).

10. Evid. Code § 1200 Comment.

11. M. Méndez, *Evidence: The California Code and the Federal Rules* 166 (3d ed. 2004) (hereafter, “Méndez Treatise”).

12. *California v. Green*, 399 U.S. 149, 158 (1970) (quoting 5 Wigmore on Evidence § 1367). As the California Supreme Court has explained:

Through cross-examination, [a party] can raise doubts as to the general truthfulness of the witness and question the credibility of [the witness’] version of the facts. Also, the [witness’] memory and capacity for observation can be challenged. Prior inconsistent statements may be used to impeach credibility.

*People v. Fries*, 24 Cal. 3d 222, 231, 594 P.2d 19, 155 Cal. Rptr. 194 (1979).

1 A second reason for the hearsay rule is that court testimony is given under oath,  
2 while an out-of-court statement typically is not. As a ceremonial and religious  
3 symbol, an oath may cause a witness to feel a special obligation to speak the  
4 truth.<sup>13</sup> It may also help make the witness aware of the possibility of criminal  
5 punishment for perjury.<sup>14</sup>

6 A third reason for the hearsay rule is that if a witness testifies before the trier of  
7 fact, that enables the trier of fact to take the demeanor of the witness into account  
8 in assessing credibility.”<sup>15</sup> A person who sees, hears, and observes a witness may  
9 be convinced of, or unpersuaded of, the witness’ honesty, integrity, and reliability.  
10 Evaluating the credibility of a witness depends largely on intuition, “that  
11 intangible, inarticulable capacity of one human being to evaluate the sincerity,  
12 honesty and integrity of another human being with whom he comes in contact.”<sup>16</sup>

13 In summary, the main reasons for excluding hearsay evidence are: (1) the  
14 opposing party has no opportunity to examine the declarant, (2) the declarant’s  
15 statement is not made under oath, and (3) the factfinder cannot observe the  
16 declarant’s demeanor. All three of these rationales reflect an overriding concern  
17 with enhancing the truth-finding function of the judicial system.

## 18 THE CONFRONTATION CLAUSE AND ITS PURPOSE

19 Another important limitation on the admissibility of evidence is the  
20 Confrontation Clause of the United States Constitution,<sup>17</sup> which is binding on the  
21 states.<sup>18</sup> In addition, the California Constitution contains its own Confrontation  
22 Clause.<sup>19</sup>

23 The state constitutional right of confrontation is not coextensive with the  
24 corresponding federal right.<sup>20</sup> California is not bound to adopt the same

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In contrast, when a witness simply repeats someone else’s out-of-court statement, the witness is unable to explain any particulars, answer any questions, solve any difficulties, reconcile any contradictions, explain any obscurities, or clarify any ambiguities. C. McCormick, Handbook of the Law of Evidence 458-59 (1954).

13. McCormick, *supra* note 12, at 457.

14. *Id.*

15. Méndez Treatise, *supra* note 11, at 165-66. “A witness’s demeanor is ‘part of the evidence’ and is ‘of considerable legal consequence.’” *Elkins v. Superior Court*, 41 Cal. 4th 1337, 1358, 163 P.3d 160, 63 Cal. Rptr. 3d 483 (2007) (quoting *People v. Adams*, 19 Cal. App. 4th 412, 438, 23 Cal. Rptr. 2d 512 (1993)).

16. *Meiner v. Ford Motor Co.*, 17 Cal. App. 3d 127, 140-41, 94 Cal. Rptr. 702 (1971).

17. U.S. Const. amend. VI.

18. *Pointer v. Texas*, 380 U.S. 400, 406 (1965).

19. Cal. Const. art. I, § 15.

20. *People v. Chavez*, 26 Cal. 3d 334, 351-52, 605 P.2d 401, 161 Cal. Rptr. 762 (1980); see also *In re Johnny G.*, 25 Cal. 3d 543, 556-59, 601 P.2d 196, 159 Cal. Rptr. 180 (1979) (Mosk, J., concurring).

1 interpretation of its Confrontation Clause that the federal courts adopt with regard  
2 to the federal Confrontation Clause.<sup>21</sup>

3 The federal Confrontation Clause gives the defendant in a criminal case the right  
4 “to be confronted with the witnesses against him.”<sup>22</sup> Similarly, the state’s  
5 Confrontation Clause gives the defendant in a criminal case the right “to be  
6 confronted with the witnesses against the defendant.”<sup>23</sup> Under either provision, the  
7 Confrontation Clause can be invoked only by a defendant in a criminal case.

8 The essential purpose of the federal Confrontation Clause is to give the  
9 defendant the opportunity to cross-examine adverse witnesses, which is essential  
10 to ensuring a fair trial.<sup>24</sup> The Clause calls for

11 a personal examination and cross-examination of the witness in which the accused  
12 has an opportunity, not only of testing the recollection and sifting the conscience  
13 of the witness, but of compelling him to stand face to face with the jury in order  
14 that they may look at him, and judge by his demeanor upon the stand and the  
15 manner in which he gives his testimony whether he is worthy of belief.<sup>25</sup>

16 Thus, the hearsay rule and the Confrontation Clause protect similar values. They  
17 both ensure that prosecution witnesses testify under oath, subject to cross-  
18 examination, and in the presence of the trier of fact.<sup>26</sup> The United States Supreme  
19 Court has made clear, however, that the Confrontation Clause is not a mere  
20 codification of the hearsay rule.<sup>27</sup> Admission of evidence in violation of the  
21 hearsay rule is not necessarily a violation of the right of confrontation.<sup>28</sup> Similarly,  
22 the Court has more than once found a Confrontation Clause violation even though  
23 the statement in question was admitted under a hearsay exception.<sup>29</sup>

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21. “Nothing in the draftmen’s comments ... suggests that they contemplated that state courts, in interpreting the state confrontation clause, would be invariably bound to adopt the same interpretation which federal courts may afford the federal confrontation guarantee.” *Chavez*, 26 Cal. 3d at 351.

This does not mean that federal precedents are irrelevant in interpreting the corresponding state provision. The California Supreme Court has noted that “while not controlling, the United States Supreme Court’s interpretation of similar provisions of the federal Constitution, like our sister state courts’ interpretations of similar state constitutional provisions, will provide valuable guidance in the interpretation of our state constitutional guarantees.” *Id.* at 352.

22. U.S. Const. amend. VI.

23. Cal. Const. art. I, § 15.

24. *Alvarado v. Superior Court*, 23 Cal. 4th 1121, 1137, 5 P.3d 203, 99 Cal. Rptr. 2d 149 (2000).

25. *Mattox v. United States*, 156 U.S. 237, 242-43 (1895); see also *Ohio v. Roberts*, 448 U.S. 56, 63-64 (1980).

26. *Méndez, Crawford v. Washington: A Critique*, 57 Stan. L. Rev. 569, 574 (2004); see also *California v. Green*, 399 U.S. 149, 157 (1970).

27. The Court’s decisions “have never established such a congruence ....” *Green*, 399 U.S. at 155.

28. *Id.* at 156.

29. *Id.* at 155-56.

1 Under the Supremacy Clause of the United States Constitution,<sup>30</sup> if evidence is  
2 inadmissible under the federal Confrontation Clause, that result prevails and  
3 cannot be overridden by state law.<sup>31</sup> The Evidence Code specifically  
4 acknowledges as much.<sup>32</sup>

5 The federal Confrontation Clause thus establishes the minimum criteria for  
6 admissibility of an out-of-court statement. The Evidence Code and the California  
7 Constitution can impose additional requirements, but they cannot deny the  
8 fundamental protections afforded by the federal Confrontation Clause.

9 THE *CRAWFORD* AND *DAVIS* DECISIONS

10 The United States Supreme Court has recently issued two major decisions  
11 interpreting the federal Confrontation Clause: *Crawford v. Washington*,<sup>33</sup> and  
12 *Davis v. Washington*.<sup>34</sup> For many years before *Crawford*, the Court used the two-  
13 part test of *Ohio v. Roberts*<sup>35</sup> to determine whether a hearsay statement had  
14 “adequate indicia of reliability” and thus could be admitted at trial in the  
15 declarant’s absence without violating the Confrontation Clause. To meet this test,  
16 the hearsay statement had to either (1) fall within a “firmly rooted hearsay  
17 exception,” or (2) have “particularized guarantees of trustworthiness.”<sup>36</sup>

18 In *Crawford*, the Court harshly criticized the *Roberts* test. It pointed out that the  
19 “principal evil at which the Confrontation Clause was directed was the civil-law  
20 mode of criminal procedure, and particularly its use of *ex parte* examinations as  
21 evidence against the accused.”<sup>37</sup> The Court explained that in light of this purpose,  
22 the *Roberts* test is both overbroad and overly narrow,<sup>38</sup> and so unpredictable that it  
23 does not provide meaningful protection even with respect to core confrontation  
24 violations.<sup>39</sup> According to the Court, the most serious vice of the *Roberts* test is not

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30. U.S. Const. art. VI, § 2.

31. See, e.g., *Kater v. Maloney*, 459 F.3d 56, 62 (1st Cir. 2006) (“[U]nder the Constitution ... the states are free to adopt any number of different rules for criminal proceedings so long as the application of those rules does not violate federal constitutional requirements.”).

32. “A statement that is otherwise admissible as hearsay evidence is inadmissible against the defendant in a criminal action if the statement was made, either by the defendant or by another, under such circumstances that it is inadmissible against the defendant under the Constitution of the United States or the State of California.” Evid. Code § 1204 (emphasis added).

33. 541 U.S. 36 (2004).

34. \_\_\_ U.S. \_\_\_, 126 S.Ct. 2266 (2006).

35. 448 U.S. 56 (1980).

36. *Id.* at 66.

37. 541 U.S. at 50.

38. *Id.* at 60.

39. *Id.* at 62-63.

1 its unpredictability but rather “its demonstrated capacity to admit core testimonial  
2 statements that the Confrontation Clause plainly meant to exclude.”<sup>40</sup>

3 The Court thus drew a distinction between a “testimonial statement” and other  
4 types of hearsay offered against an accused in a criminal case. The Court made  
5 clear that the *Roberts* test no longer applies to a testimonial statement. Under the  
6 Court’s new approach, it does not matter whether the statement falls within a  
7 firmly rooted exception to the hearsay rule, nor does it matter whether the  
8 statement falls under a new hearsay exception that bears particularized guarantees  
9 of trustworthiness. Rather, if the prosecution offers a testimonial statement as  
10 substantive evidence in a criminal case and the declarant does not testify at trial,  
11 the statement is admissible only if the declarant is unavailable to testify and the  
12 defendant had a prior opportunity to cross-examine the declarant.<sup>41</sup> If those  
13 conditions are not met, admission of the statement would violate the Confrontation  
14 Clause.

15 The Court did not define the term “testimonial statement.”<sup>42</sup> It just said that at a  
16 minimum, the term encompasses a statement taken by a police officer in the  
17 course of an interrogation, and prior testimony at a preliminary hearing, grand jury  
18 proceeding, or former trial.<sup>43</sup>

19 In *Davis*, the Court provided guidance on when statements taken by police  
20 officers and related officials, such as 911 operators, constitute a testimonial  
21 statement. The Court held:

22 Statements are nontestimonial when made in the course of police interrogation  
23 under circumstances objectively indicating that the primary purpose of the  
24 interrogation is to enable police assistance to meet an ongoing emergency. They  
25 are testimonial when the circumstances objectively indicate that there is no such  
26 ongoing emergency, and that the primary purpose of the interrogation is to  
27 establish or prove past events potentially relevant to later criminal prosecution.<sup>44</sup>

28 The Court also made clear that a nontestimonial statement is subject to traditional  
29 limitations upon hearsay evidence, but it is not subject to the federal Confrontation  
30 Clause.<sup>45</sup>

### 31 THE DEFINITION OF UNAVAILABILITY

32 The hearsay rule has many exceptions.<sup>46</sup> In general, two justifications for these  
33 exceptions have been advanced.<sup>47</sup> First, there is the necessity rationale: An

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40. *Id.* at 63.

41. *Id.* at 53-54.

42. *Id.* at 51-52, 68.

43. *Id.* at 68.

44. 126 S.Ct. at 2273-74.

45. *Id.* at 2273.



1 exception may be justified by identifying a special need for the evidence.<sup>48</sup>  
2 Second, there is the reliability rationale: An exception may be based on a belief  
3 that the circumstances under which a statement was made suggest that the  
4 statement is reliable to prove the truth of the matter stated.<sup>49</sup> These circumstances  
5 are considered an adequate substitute for the benefits of cross-examining the  
6 declarant under oath in the presence of the trier of fact.<sup>50</sup>

7 Consistent with the necessity rationale, some exceptions to California’s hearsay  
8 rule apply only if the declarant is unavailable.<sup>51</sup> Similarly, some exceptions to the  
9 federal rule that prohibits hearsay evidence<sup>52</sup> apply only if the declarant is  
10 unavailable.<sup>53</sup>

11 To facilitate application of these exceptions, both the Evidence Code<sup>54</sup> and the  
12 Federal Rules of Evidence<sup>55</sup> define what it means for a declarant to be

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46. See Evid. Code §§ 1220-1380.

47. Méndez Treatise, *supra* note 11, at 191.

48. *Id.*

49. *Id.*

50. *Id.*

51. See, e.g., Evid. Code §§ 1230 (declaration against interest), 1290-1292 (former testimony).

52. Fed. R. Evid. 802.

53. See Fed. R. Evid. 804(b).

54. Evidence Code Section 240 provides:

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

(1) Exempted or precluded on the ground of privilege from testifying concerning the matter to which his or her statement is relevant.

(2) Disqualified from testifying to the matter.

(3) Dead or unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity.

(4) Absent from the hearing and the court is unable to compel his or her attendance by its process.

(5) Absent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court’s process.

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

(c) Expert testimony which establishes that physical or mental trauma resulting from an alleged crime has caused harm to a witness of sufficient severity that the witness is physically unable to testify or is unable to testify without suffering substantial trauma may constitute a sufficient showing of unavailability pursuant to paragraph (3) of subdivision (a). As used in this section, the term “expert” means a physician and surgeon, including a psychiatrist, or any person described by subdivision (b), (c), or (e) of Section 1010.

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

55. Federal Rule of Evidence 804(a) provides:

804. (a) Definition of unavailability. “Unavailability as a witness” includes situations in which the declarant —

1 “unavailable.” The federal and the California definitions of “unavailability” are  
2 similar, but differ in certain respects. In particular, they differ in their approach to  
3 (1) a witness who refuses to testify and (2) a person who cannot testify due to  
4 memory loss.<sup>56</sup>

5 **Unavailability of a Person Who Refuses to Testify**

6 The federal rule provides that a witness is unavailable if the witness refuses to  
7 testify despite a court order to do so.<sup>57</sup> The California statute does not expressly  
8 address this situation,<sup>58</sup> but case law does.

9 As a practical matter, a witness who refuses to testify after the court takes  
10 reasonable steps to require such testimony is as inaccessible as a witness who is  
11 unable to attend the hearing. For example, in a leading California case, a witness  
12 refused to testify for fear of his safety and the safety of his family.<sup>59</sup> The witness  
13 persisted in this position even after he was held in contempt of court. Based on  
14 these facts, the trial court found that the witness was unavailable for purposes of  
15 the former testimony exception to the hearsay rule.

16 The California Supreme Court upheld that ruling.<sup>60</sup> Because the California  
17 statute on unavailability does not expressly cover a refusal to testify, however, the  
18 Court’s determination that the witness was unavailable was based on the provision  
19 that applies when a witness is “unable to attend or to testify at the hearing because  
20 of then existing physical or mental illness or infirmity.”<sup>61</sup> Specifically, the Court  
21 ruled that a trial court is permitted to “consider whether a mental state induced by

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(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant’s statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant’s statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant’s attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant’s attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

56. There are also several other distinctions between the California statute and the corresponding federal rule on unavailability of a declarant. For information on these points, see Commission Staff Memorandum 2005-6, (Jan. 6, 2005), p. 11; Commission Staff Memorandum 2004-45 (Aug. 31, 2004), pp. 43-44; Commission Staff Memorandum 2003-7 (Feb. 25, 2003), pp. 9-11.

57. Fed. R. Evid. 804(a)(2).

58. See Evid. Code § 240.

59. *People v. Rojas*, 15 Cal. 3d 540, 542 P.2d 229, 125 Cal. Rptr. 357 (1975).

60. *Id.* at 547-52.

61. Evid. Code § 240(a)(3).

1 fear of personal or family harm is a ‘mental infirmity’ that renders the person  
2 harboring the fear unavailable as a witness.”<sup>62</sup>

3 It would be more straightforward if the statute expressly recognized that a  
4 witness who refuses to testify is unavailable, like the federal provision.<sup>63</sup> The Law  
5 Revision Commission recommends that California’s provision on unavailability be  
6 amended in that manner.<sup>64</sup>

#### 7 **Unavailability of a Person Who Cannot Testify Due to Memory Loss**

8 Just as it expressly addresses a refusal to testify, the federal rule also makes  
9 clear that a declarant is unavailable as a witness if the declarant “testifies to a lack  
10 of memory of the subject matter of the declarant’s statement.”<sup>65</sup> Unlike the federal  
11 provision, the corresponding California provision does not expressly refer to a  
12 witness who cannot testify due to a failure of recollection.<sup>66</sup> Again, however, case  
13 law addresses this point.

14 In *People v. Alcala*,<sup>67</sup> a witness “testified unequivocally that she had lost all  
15 memory of relevant events.” The trial court found her credible and believed that  
16 she lacked recollection.<sup>68</sup> On that basis, the trial court determined that she was  
17 unavailable to testify and admitted testimony that she had given at an earlier trial.<sup>69</sup>

18 The Supreme Court upheld that ruling, even though California’s statute on  
19 unavailability does not refer to unavailability due to memory loss. The Court  
20 explained that the witness’ total memory loss constituted a “mental infirmity”

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62. *Rojas*, 15 Cal. 3d at 551.

63. Méndez, *California Evidence Code — Federal Rules of Evidence, Part I. Hearsay and Its Exceptions: Conforming the Evidence Code to the Federal Rules*, 37 U.S.F. L. Rev. 351, 357 (2003) (hereafter, “Méndez Hearsay Analysis”).

64. See proposed amendment to Evid. Code § 240 *infra*. The language used in the proposed new paragraph on refusal to testify (proposed paragraph (a)(6)) tracks the language used in Federal Rule of Evidence 804(a)(2). The proposed amendment would thus offer the benefits of uniformity.

The proposed Comment refers to cases discussing whether a witness was unavailable due to a refusal to testify. If the proposed amendment is enacted, these references in the Comment will enable judges and other persons to readily access the pertinent case law. The Comment will be entitled to great weight in construing the statute. See *2006-2007 Annual Report*, 36 Cal. L. Revision Comm’n Reports 1, 18-24 (2006) & sources cited therein.

65. Fed. R. Evid. 804(a)(3). The advisory committee’s note explains:

The position that a claimed lack of memory by the witness of the subject matter of his statement constitutes unavailability ... finds support in the cases, though not without dissent. [Citation omitted.] If the claim is successful, the practical effect is to put the testimony beyond reach, as in the other instances [of unavailability]. In this instance, however, it will be noted that the lack of memory must be established by the testimony of the witness himself, which clearly contemplates his production and subjection to cross-examination.

66. See Evid. Code § 240.

67. 4 Cal. 4th 742, 778, 842 P.2d 1192, 15 Cal. Rptr. 2d 432 (1992).

68. *Id.*

69. *Id.* at 778.

1 within the meaning of the statute.<sup>70</sup> The Court further ruled that expert medical  
2 evidence was not necessary to establish the existence of such a mental infirmity.<sup>71</sup>

3 Again, it would be more straightforward if California’s statute on unavailability  
4 expressly covered this situation.<sup>72</sup> The Law Revision Commission recommends  
5 that the statute be amended to expressly state that a witness who suffers substantial  
6 memory loss is unavailable to testify.<sup>73</sup>

### 7 **Need for the Reforms**

8 These reforms relating to unavailability appeared advisable before *Crawford*  
9 was decided.<sup>74</sup> *Crawford* has reinforced the need for the reforms.

10 The new approach to the Confrontation Clause enunciated in *Crawford* made  
11 some prosecutions more difficult than they would have been in the past. Key  
12 evidence in a case may be characterized as a testimonial. If so, the evidence is  
13 inadmissible under *Crawford* unless the declarant testifies at trial, or the declarant  
14 is unavailable to testify at trial and the defendant had a prior opportunity to cross-  
15 examine the declarant.

16 For example, a prosecution for domestic violence, child abuse, or criminal  
17 conspiracy frequently relies on a hearsay statement of an unavailable witness.<sup>75</sup>  
18 These cases are particularly affected by *Crawford* because the victim is often  
19 reluctant to testify, prone to recant a prior statement, or considered too young to  
20 testify.<sup>76</sup>

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70. *Id.* at 778.

71. *Id.* at 780.

72. Méndez Hearsay Analysis, *supra* note 63, at 357.

73. See proposed amendment to Evid. Code § 240 *infra*. The language used in the proposed new paragraph on lack of memory (proposed paragraph (a)(7)) tracks the language used in Federal Rule of Evidence 804(a)(3). The proposed amendment would thus offer the benefits of uniformity.

The proposed Comment refers to case law discussing whether a witness was unavailable due to a lack of memory. If the proposed amendment is enacted, the references in the Comment will enable judges and other persons to readily access the pertinent case law. The Comment will be entitled to great weight in construing the statute. See *2006-2007 Annual Report*, 36 Cal. L. Revision Comm’n Reports 1, 18-24 (2006) & sources cited therein.

74. See Minutes of March 7, 2003, Commission Meeting, pp. 10-11.

75. Flanagan, *Confrontation, Equity, and the Misnamed Exception for “Forfeiture” by Wrongdoing*, 14 Wm. & Mary Bill Rts. J. 1193, 1194 (2006).

76. *Id.*; see also McKinstry, “An Exercise in Fiction”: *The Sixth Amendment Confrontation Clause, Forfeiture by Wrongdoing, and Domestic Violence in Davis v. Washington*, 30 Harv. J. L. & Gender 531, 531-32 (2007); Percival, *The Price of Silence: The Prosecution of Domestic Violence Cases in Light of Crawford v. Washington*, 79 S. Cal. L. Rev. 213, 215-16, 235-37 (2005).

It has been estimated, for instance, that about “80% of domestic violence victims refuse to testify or recant their earlier statements to the police about the violent incident for which the defendant is charged.” King-Ries, 39 Creighton L. Rev. 441, 458 (2006); see also Percival, *supra*, at 235 (“Most jurisdictions report that in the overwhelming majority of domestic violence cases, victims recant the testimony that was given to law enforcement immediately following the violent event, and many victims refuse to continue cooperating with the prosecution.”).

1 To a certain extent, concern about the impact of *Crawford* on these types of  
2 cases was alleviated by *Davis*, which clarified that a statement is not testimonial if  
3 it is made during a police interrogation under circumstances objectively indicating  
4 that the primary purpose of the interrogation is to enable the police to meet an  
5 ongoing emergency.<sup>77</sup> For example, if a person makes a 911 call for help against a  
6 bona fide, ongoing physical threat, and the 911 operator elicits statements that are  
7 given under unsafe conditions and are necessary to resolve the present emergency,  
8 the statements are nontestimonial and thus can be admitted without satisfying the  
9 *Crawford* requirements.<sup>78</sup>

10 Concerns about the impact of *Crawford* could be further alleviated by amending  
11 California's statute on unavailability to expressly state that a witness who refuses  
12 to testify despite a court order, or who lacks memory of a subject, is unavailable  
13 for purposes of the hearsay rule. That would not represent a substantive change in  
14 existing law, but it would facilitate reference to the applicable rules. Courts,  
15 attorneys, litigants, and others could simply refer to the text of the statute, without  
16 having to search and explain case law on these matters. Amending the statute in  
17 that manner would thus help courts and other persons determine whether the  
18 requirement of unavailability for certain hearsay exceptions is met.

#### 19 FORFEITURE BY WRONGDOING

20 Sometimes, a defendant facing serious charges will arrange for a key adverse  
21 witness to be murdered. In other cases, a defendant may threaten such a witness or  
22 the witness' family, so that the witness refuses to testify or flees the jurisdiction  
23 and cannot be brought to court. A defendant may also engage in other types of  
24 wrongdoing with the objective of rendering a witness unavailable at trial.

25 Both the Evidence Code and the Federal Rules of Evidence include a hearsay  
26 rule exception based on a defendant's misconduct that causes a witness to be  
27 unavailable. The scope of those exceptions is quite different.

28 The California provision, Evidence Code Section 1350, is detailed and  
29 incorporates many safeguards to ensure that it is only invoked where there is  
30 strong evidence that a criminal defendant engaged in egregious conduct to prevent  
31 a witness from testifying.<sup>79</sup> The provision was enacted in 1985 to address what is

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It has also been noted, however, that many techniques are available to address the reasons for a domestic violence victim's refusal to testify. Some data suggests that by using a combination of these techniques, between 65% and 95% of domestic violence victims will fully cooperate with the prosecution. Corsilles, Note, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution*, 63 Fordham L. Rev. 853, 873 (1994).

77. 126 S.Ct. at 2273.

78. *Id.* at 2276-77.

79. Evidence Code Section 1350 provides:

1350. (a) In a criminal proceeding charging a serious felony, evidence of a statement made by a declarant is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness, and all of the following are true:

1 known as the “murdered witness problem” — the unfortunate reality that “serious  
2 charges are dismissed, lost or reduced every year because of the unavailability of  
3 prosecution witnesses who have been murdered or kidnapped by the persons  
4 against whom they would testify.”<sup>80</sup>

5 The corresponding federal provision, Federal Rule of Evidence 804(b)(6), was  
6 enacted only ten years ago. It is broader in scope than the California provision, but  
7 it is far less detailed. It creates a hearsay rule exception for a statement that is  
8 “offered against a party that has engaged or acquiesced in wrongdoing that was

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(1) There is clear and convincing evidence that the declarant’s unavailability was knowingly caused by, aided by, or solicited by the party against whom the statement is offered for the purpose of preventing the arrest or prosecution of the party and is the result of the death by homicide or the kidnapping of the declarant.

(2) There is no evidence that the unavailability of the declarant was caused by, aided by, solicited by, or procured on behalf of, the party who is offering the statement.

(3) The statement has been memorialized in a tape recording made by a law enforcement official, or in a written statement prepared by a law enforcement official and signed by the declarant and notarized in the presence of the law enforcement official, prior to the death or kidnapping of the declarant.

(4) The statement was made under circumstances which indicate its trustworthiness and was not the result of promise, inducement, threat, or coercion.

(5) The statement is relevant to the issues to be tried.

(6) The statement is corroborated by other evidence which tends to connect the party against whom the statement is offered with the commission of the serious felony with which the party is charged.

The corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

(b) If the prosecution intends to offer a statement pursuant to this section, the prosecution shall serve a written notice upon the defendant at least 10 days prior to the hearing or trial at which the prosecution intends to offer the statement, unless the prosecution shows good cause for the failure to provide that notice. In the event that good cause is shown, the defendant shall be entitled to a reasonable continuance of the hearing or trial.

(c) If the statement is offered during trial, the court’s determination shall be made out of the presence of the jury. If the defendant elects to testify at the hearing on a motion brought pursuant to this section, the court shall exclude from the examination every person except the clerk, the court reporter, the bailiff, the prosecutor, the investigating officer, the defendant and his or her counsel, an investigator for the defendant, and the officer having custody of the defendant. Notwithstanding any other provision of law, the defendant’s testimony at the hearing shall not be admissible in any other proceeding except the hearing brought on the motion pursuant to this section. If a transcript is made of the defendant’s testimony, it shall be sealed and transmitted to the clerk of the court in which the action is pending.

(d) As used in this section, “serious felony” means any of the felonies listed in subdivision (c) of Section 1192.7 of the Penal Code or any violation of Section 11351, 11352, 11378, or 11379 of the Health and Safety Code.

(e) If a statement to be admitted pursuant to this section includes hearsay statements made by anyone other than the declarant who is unavailable pursuant to subdivision (a), those hearsay statements are inadmissible unless they meet the requirements of an exception to the hearsay rule.

80. *Dalton v. Superior Court*, 19 Cal. App. 4th 1506, 1511, 24 Cal. Rptr. 2d 248 (1993) (quoting Assembly Floor Analysis of AB 2059 (1985-86)). The Law Revision Commission was not involved in drafting Evidence Code Section 1350.

1 intended to, and did, procure the unavailability of the declarant as a witness.”<sup>81</sup>  
2 The provision is intended as a “prophylactic rule” to deal with abhorrent behavior  
3 that strikes at the heart of the justice system.<sup>82</sup>

#### 4 **Differences Between the California Approach and the Federal Approach**

5 There are numerous distinctions between the California provision and the  
6 federal rule on forfeiture by wrongdoing:

- 7 • **Type of Case in Which the Exception Applies.** The California provision  
8 applies only in “a criminal proceeding charging a serious felony.”<sup>83</sup> The  
9 federal rule applies in any type of case, civil or criminal.<sup>84</sup>
- 10 • **Party Against Whom the Exception May Be Invoked.** The California  
11 provision can be invoked against a party who wrongfully sought to prevent  
12 the arrest or prosecution of the party.<sup>85</sup> There does not seem to be any basis  
13 for invoking the California provision against the government. In contrast,  
14 the federal rule “applies to all parties, including the government.”<sup>86</sup>
- 15 • **Reason for the Declarant’s Unavailability.** The California provision  
16 applies only when the declarant’s unavailability “is the result of the death by  
17 homicide or the kidnapping of the declarant.”<sup>87</sup> Under the federal rule, “[t]he  
18 wrongdoing need not consist of a criminal act.”<sup>88</sup>
- 19 • **Acquiescence in Wrongdoing that Results in the Declarant’s**  
20 **Unavailability.** The California provision applies only when “the declarant’s  
21 unavailability was *knowingly caused by, aided by, or solicited by* the party  
22 against whom the statement is offered ....”<sup>89</sup> In contrast, under the federal  
23 rule it is sufficient if a party “has engaged *or acquiesced* in wrongdoing that  
24 was intended to, and did, procure the unavailability of the declarant as a  
25 witness.”<sup>90</sup>
- 26 • **Standard of Proof.** The California provision requires “*clear and convincing*  
27 *evidence* that the declarant’s unavailability was knowingly caused by, aided

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81. According to the advisory committee’s note, the provision was added “to provide that a party forfeits the right to object on hearsay grounds to the admission of a declarant’s prior statement when the party’s deliberate wrongdoing or acquiescence therein procured the unavailability of the declarant as a witness.”

The Uniform Rules of Evidence contain a provision that is almost identical to the federal rule. See Unif. R. Evid. 804(b)(5).

82. Fed. R. Evid. 804(b)(6) advisory committee’s note (quoting *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982)).

83. Evid. Code § 1350(a).

84. See Fed. R. Evid. 804(b)(6).

85. Evid. Code § 1350(a)(1).

86. Fed. R. Evid. 804(b)(6) advisory committee’s note.

87. Evid. Code § 1350(a)(1).

88. Fed. R. Evid. 804(b)(6) advisory committee’s note.

89. Evid. Code § 1350(a)(1) (emphasis added).

90. Fed. R. Evid. 804(b)(6) (emphasis added).

1 by, or solicited by the party against whom the statement is offered for the  
2 purpose of preventing the arrest or prosecution of the party and is the result  
3 of the death by homicide or the kidnapping of the declarant.”<sup>91</sup> The federal  
4 rule does not expressly state the applicable standard of proof, but the  
5 advisory committee’s note explains that the “usual Rule 104(a)  
6 *preponderance of the evidence standard* has been adopted in light of the  
7 behavior the new Rule 804(b)(6) seeks to discourage.”<sup>92</sup>

- 8 • **Evidence that the Proponent of the Hearsay Statement Is Responsible**  
9 **for the Declarant’s Unavailability.** The California provision cannot be  
10 invoked if there is “evidence that the unavailability of the declarant was  
11 caused by, aided by, solicited by, or procured on behalf of, the party who is  
12 offering the statement.”<sup>93</sup> The federal rule does not include such a  
13 limitation.<sup>94</sup>
- 14 • **Form of the Hearsay Statement.** The California provision applies only if  
15 the hearsay statement “has been memorialized in a tape recording made by a  
16 law enforcement official, or in a written statement prepared by a law  
17 enforcement official and signed by the declarant and notarized in the  
18 presence of the law enforcement official, prior to the death or kidnapping of  
19 the declarant.”<sup>95</sup> The federal rule does not impose any limitations on the  
20 form of the hearsay statement.<sup>96</sup>
- 21 • **Circumstances Under Which the Hearsay Statement Was Made.** The  
22 California provision can be invoked only if the hearsay statement “was  
23 made under circumstances which indicate its trustworthiness and was not  
24 the result of promise, inducement, threat, or coercion.”<sup>97</sup> The federal rule  
25 does not include such a limitation.<sup>98</sup>
- 26 • **Relevance of the Hearsay Statement.** The California provision expressly  
27 states that the hearsay statement must be “relevant to the issues to be  
28 tried.”<sup>99</sup> The federal rule includes no such language.<sup>100</sup> In both contexts,  
29 such language is unnecessary due to the general prohibition on introducing  
30 irrelevant evidence.<sup>101</sup>
- 31 • **Evidence Connecting the Defendant to Commission of the Serious**  
32 **Felony Charged.** Under the California provision, the hearsay statement

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91. Evid. Code § 1350(a)(1) (emphasis added).

92. Fed. R. Evid. 804(b)(6) advisory committee’s note (emphasis added).

93. Evid. Code § 1350(a)(2).

94. See Fed. R. Evid. 804(b)(6).

95. Evid. Code § 1350(a)(3).

96. See Fed. R. Evid. 804(b)(6).

97. Evid. Code § 1350(a)(4).

98. See Fed. R. Evid. 804(b)(6).

99. Evid. Code § 1350(a)(5).

100. See Fed. R. Evid. 804(b)(6).

101. See Evid. Code § 350 (“No evidence is admissible except relevant evidence.”); Fed. R. Evid. 402 (“Evidence which is not relevant is not admissible.”).



1 cannot be the sole evidence that connects the defendant to the serious felony  
2 charged against the defendant. Rather, the statement is admissible only if it  
3 “is corroborated by other evidence which tends to connect the party against  
4 whom the statement is offered with the commission of the serious felony  
5 with which the party is charged.”<sup>102</sup> “The corroboration is not sufficient if it  
6 merely shows the commission of the offense or the circumstances  
7 thereof.”<sup>103</sup> The federal rule includes no such requirement.<sup>104</sup>

- 8 • **Notice of Intent to Invoke the Forfeiture by Wrongdoing Exception.** The  
9 California provision requires the prosecution to notify the defendant ten  
10 days before the prosecution offers a hearsay statement under the  
11 provision.<sup>105</sup> The federal rule does not require a party to give advance notice  
12 of intent to invoke the rule.<sup>106</sup>
- 13 • **Procedure for Determining Whether the Exception Applies.** The  
14 California provision expressly states that if a hearsay statement is offered  
15 under it during trial, “the court’s determination shall be made out of the  
16 presence of the jury.”<sup>107</sup> The provision also gives guidance on what  
17 procedure to use if the defendant elects to testify in connection with that  
18 determination.<sup>108</sup> The federal rule does not provide guidance on these  
19 points.<sup>109</sup>
- 20 • **Multiple Hearsay.** The California provision expressly states that if the  
21 proffered statement “includes hearsay statements made by anyone other than  
22 the declarant who is unavailable ..., those hearsay statements are  
23 inadmissible unless they meet the requirements of an exception to the  
24 hearsay rule.”<sup>110</sup> The federal rule includes no such language.<sup>111</sup> In both  
25 contexts, such language is unnecessary due to the general provision  
26 governing multiple hearsay.<sup>112</sup>
- 27 • **Use of Proffered Statement in Determining Whether Exception Applies.**  
28 The California provision and the federal rule also differ in the extent to  
29 which they permit the court to consider the proffered statement in  
30 determining whether the exception applies.<sup>113</sup>

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102. Evid. Code § 1350(a)(6).

103. *Id.*

104. See Fed. R. Evid. 804(b)(6).

105. Evid. Code § 1350(b). There is a good cause exception to the notice requirement, but if good cause is shown “the defendant shall be entitled to a reasonable continuance of the hearing or trial.” *Id.*

106. See Fed. R. Evid. 804(b)(6).

107. Evid. Code § 1350(c).

108. *Id.*

109. See Fed. R. Evid. 804(b)(6).

110. Evid. Code § 1350(e).

111. See Fed. R. Evid. 804(b)(6).

112. See Evid. Code § 1201; Fed. R. Evid. 805.

113. See discussion of “Use of the Hearsay Statement in Determining Whether There Was Wrongdoing Warranting Forfeiture” *infra*.

1 In summary, California’s hearsay exception for forfeiture by wrongdoing is  
2 narrower and incorporates more restrictions than the corresponding federal rule.  
3 The many restrictions in the California provision “evince an abundance of caution  
4 when abolishing the right of criminal defendants to object to hearsay even when  
5 they have been charged with bringing about the hearsay declarant’s unavailability  
6 as a witness.”<sup>114</sup>

7 **Forfeiture by Wrongdoing Exception to the Confrontation Clause**

8 In determining whether to revise California law on forfeiture by wrongdoing as  
9 an exception to the hearsay rule, it is necessary to consider the constitutional  
10 constraints imposed by the Confrontation Clause.

11 If hearsay evidence is admitted against a criminal defendant pursuant to  
12 Evidence Code Section 1350 or Federal Rule of Evidence 804(b)(6), the defendant  
13 has no opportunity to cross-examine the declarant. If the hearsay evidence is  
14 testimonial, does this deprive the defendant of the constitutional right of  
15 confrontation?

16 Key case law on this point is discussed below.

17 ***Early Decisions by the United States Supreme Court***

18 Although the Confrontation Clause generally gives a defendant the right to  
19 confront an adverse witness, the United States Supreme Court has long recognized  
20 an exception when the defendant has taken steps to prevent a witness from  
21 testifying. As the Court explained in *Reynolds v. United States*,<sup>115</sup>

22 The Constitution gives the accused the right to a trial at which he should be  
23 confronted with the witnesses against him; but if a witness is absent by his own  
24 wrongful procurement, he cannot complain if competent evidence is admitted to  
25 supply the place of that which he has kept away. The Constitution does not  
26 guarantee an accused person against the legitimate consequences of his own  
27 wrongful acts. It grants him the privilege of being confronted with the witnesses  
28 against him; but if he voluntarily keeps the witnesses away, he cannot insist on his  
29 privilege. If, therefore, when absent by his procurement, their evidence is supplied  
30 in some lawful way, he is in no condition to assert that his constitutional rights  
31 have been violated.

32 The Court further explained that the forfeiture exception “has its foundation in the  
33 maxim that no one shall be permitted to take advantage of his own wrong; and,  
34 consequently, if there has not been, in legal contemplation, a wrong committed,  
35 the way has not been opened for the introduction of the testimony.”<sup>116</sup> In several

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114. Méndez Hearsay Analysis, *supra* note 63, at 390.

115. 98 U.S. 145, 158 (1878).

116. *Id.* at 159.

1 later cases, the Court mentioned the forfeiture exception, but did not provide much  
2 more guidance on its contours.<sup>117</sup>

3 ***Recent Decisions by the United States Supreme Court***

4 When it decided *Crawford* in 2004, the Court made clear that the new approach  
5 it took in that case did not negate the forfeiture exception to the Confrontation  
6 Clause. After carefully distinguishing between hearsay exceptions that do and do  
7 not “claim to be a surrogate means of assessing reliability,” the Court explained  
8 that “the rule of forfeiture by wrongdoing (*which we accept*) extinguishes  
9 confrontation claims on essentially equitable grounds; it does not purport to be an  
10 alternate means of determining reliability.”<sup>118</sup>

11 In *Davis*, the hearsay proponents and several amici contended that a testimonial  
12 statement should be more readily admissible in a domestic violence case than in  
13 other cases because that “particular type of crime is notoriously susceptible to  
14 intimidation or coercion of the victim to ensure that she does not testify at trial.”<sup>119</sup>  
15 In responding to that contention, the Court did not establish a special rule  
16 applicable to a testimonial statement in a domestic violence case. It did, however,  
17 discuss the forfeiture exception to the Confrontation Clause in some detail:

18 “[W]hen defendants seek to undermine the judicial process by procuring or  
19 coercing silence from witnesses and victims, the Sixth Amendment does not  
20 require courts to acquiesce. While defendants have no duty to assist the State in  
21 proving their guilt, they *do* have the duty to refrain from acting in ways that  
22 destroy the integrity of the criminal-trial system. We reiterate what we said in  
23 *Crawford*: that “the rule of forfeiture by wrongdoing ... extinguishes confrontation  
24 claims on essentially equitable grounds.” That is, one who obtains the absence of  
25 a witness by wrongdoing forfeits the constitutional right to confrontation.

26 We take no position on the standards necessary to demonstrate such forfeiture,  
27 but federal courts using Federal Rule of Evidence 804(b)(6), which codifies the  
28 forfeiture doctrine, have generally held the Government to the preponderance-of-  
29 the-evidence standard. State courts tend to follow the same practice. Moreover, if  
30 a hearing on forfeiture is required, [a Massachusetts case] observed that “hearsay  
31 evidence, including the unavailable witness’s out-of-court statements, may be  
32 considered.” The *Roberts* approach to the Confrontation Clause undoubtedly  
33 made recourse to this doctrine less necessary, because prosecutors could show the  
34 “reliability” of *ex parte* statements more easily than they could show the  
35 defendant’s procurement of the witness’s absence. *Crawford*, in overruling  
36 *Roberts*, did not destroy the ability of courts to protect the integrity of their  
37 proceedings.

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117. See *Diaz v. United States*, 223 U.S. 442, 449-53 (1912), *West v. Louisiana*, 194 U.S. 258, 265-67 (1904); *Motes v. United States*, 178 U.S. 458, 471-74 (1900); *Mattox v. United States*, 156 U.S. 237, 242 (1895); *Eureka Lake & Yuba Canal Co. v. Superior Court*, 116 U.S. 410, 418 (1886).

118. *Crawford v. Washington*, 541 U.S. 36, 62 (2004) (emphasis added).

119. *Davis v. Washington*, \_\_\_ U.S. \_\_\_, 126 S.Ct. 2266, 2279-80 (2006).

1 We have determined that, absent a finding of forfeiture by wrongdoing, the  
2 Sixth Amendment operates to exclude Amy Hammon’s affidavit. The Indiana  
3 courts may (if they are asked) determine on remand whether such a claim of  
4 forfeiture is properly raised and, if so, whether it is meritorious.<sup>120</sup>

5 ***Recent Decision by the California Supreme Court***

6 A recent decision by the California Supreme Court provides further guidance on  
7 the scope of the forfeiture by wrongdoing exception to the federal Confrontation  
8 Clause. In *People v. Giles*,<sup>121</sup> the defendant admitted killing his ex-girlfriend, but  
9 he claimed to have acted in self-defense.<sup>122</sup> Over his objection, “the trial court  
10 admitted the victim’s prior statements to a police officer who had been  
11 investigating a report of domestic violence involving defendant and the victim.”<sup>123</sup>  
12 In those statements, the victim described an incident that allegedly occurred a few  
13 weeks before the killing. She said that the defendant “had held a knife to her and  
14 threatened to kill her.”<sup>124</sup>

15 The Court concluded that the defendant “forfeited his confrontation clause  
16 challenge to the victim’s prior out-of-court statements to the police.”<sup>125</sup> In reaching  
17 that conclusion, the Court addressed a number of important issues.

18 First, the defendant argued that the forfeiture by wrongdoing exception to the  
19 Confrontation Clause was inapplicable because there was no showing that the  
20 defendant killed the victim “*with the intent of preventing her testimony* at a  
21 pending or potential trial.”<sup>126</sup> The Court discussed this point at length and  
22 ultimately concluded that it is not necessary to show an intent to prevent testimony  
23 to invoke the forfeiture exception to the Confrontation Clause:

24 Although courts have traditionally applied the forfeiture rule to witness tampering  
25 cases, forfeiture principles can and should logically and equitably be extended to  
26 other types of cases in which an intent-to-silence element is missing. As the Court  
27 of Appeal here stated, “Forfeiture is a logical extension of the equitable principle  
28 that no person should benefit from his own wrongful acts. A defendant whose  
29 intentional criminal act renders a witness unavailable for trial benefits from his  
30 crime if he can use the witness’s unavailability to exclude damaging hearsay  
31 statements by the witness that would otherwise be admissible. *This is so whether*  
32 *or not the defendant specifically intended to prevent the witness from testifying at*  
33 *the time he committed the act that rendered the witness unavailable.*<sup>127</sup>

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120. *Id.* at 2280 (citations omitted, emphasis in original).

121. 40 Cal. 4th 833, 152 P.3d 433, 55 Cal. Rptr. 3d 133 (2007), *petition for cert. filed*, \_\_\_ U.S.L.W. \_\_\_ (U.S. Aug. 20, 2007) (No. 07-6053).

122. *Id.* at 837.

123. *Id.*

124. *Id.*

125. *Id.* at 855.

126. *Id.* at 841 (emphasis added).

127. *Id.* at 849 (emphasis added).

1 Thus, the Court concluded it is enough to show that the witness is genuinely  
2 unavailable to testify and the defendant’s intentional criminal act caused that  
3 unavailability.<sup>128</sup>

4 Second, the Court considered “whether the doctrine of forfeiture by wrongdoing  
5 applies where the alleged wrongdoing *is the same as the offense for which*  
6 *defendant was on trial.*”<sup>129</sup> In a classic witness tampering case, “the defendant is  
7 *not* on trial for the same wrongdoing that caused the forfeiture of his confrontation  
8 right, but rather for a prior underlying crime about which the victim was about to  
9 testify.”<sup>130</sup> In *Giles*, however, the defendant was on trial for murder, the same  
10 wrongdoing that the prosecution pointed to in contending that the defendant had  
11 forfeited his right of confrontation. The argument against extending the forfeiture  
12 exception to such a situation is that “in ruling on the evidentiary matter, a trial  
13 court is required, in essence, to make *the same determination of guilt of the*  
14 *charged crime as the jury.*”<sup>131</sup>

15 The Court rejected that argument, explaining that the presumption of innocence  
16 and right to jury trial will not be violated because the jury will not know of the  
17 judge’s preliminary finding and will use different information and a different  
18 standard of proof in deciding the defendant’s guilt.<sup>132</sup> Consistent with that  
19 conclusion, the Court made clear that the jury should not be informed of the  
20 judge’s preliminary finding that the defendant committed an intentional criminal  
21 act.<sup>133</sup>

22 Third, the Court considered what standard applies in proving the facts necessary  
23 to invoke the forfeiture exception under the federal Confrontation Clause. The  
24 defendant argued that those facts must be proved by *clear and convincing*  
25 *evidence*. The Court disagreed. It noted that the “majority of the lower federal  
26 courts have held that the applicable standard necessary for the prosecutor to  
27 demonstrate forfeiture by wrongdoing is *by a preponderance of the evidence.*”<sup>134</sup>  
28 The Court endorsed that standard, explaining that the Constitution only requires  
29 proof that it is more probable than not that the defendant procured the declarant’s  
30 unavailability.<sup>135</sup>

31 Fourth, the Court discussed whether the proffered hearsay statement can be  
32 considered in determining whether the forfeiture exception applies. The Court  
33 concluded that the statement can be considered, subject to a limitation.

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128. *Id.* at 854.

129. *Id.* at 851 (emphasis added).

130. *Id.* (emphasis added).

131. *Id.* (emphasis added).

132. *Id.* (quoting *United States v. Mayhew*, 380 F. Supp. 2d 961, 968 (S.D. Ohio 2005)).

133. *Id.* at 854.

134. *Id.* at 852 (emphasis added).

135. *Id.* at 853.

1 Specifically, the Court cautioned that “a trial court cannot make a forfeiture  
2 finding based solely on the unavailable witness’s unopposed testimony; there  
3 must be independent corroborative evidence that supports the forfeiture  
4 finding.”<sup>136</sup>

5 Finally, the Court made clear that its decision simply outlines the requirements  
6 of the Confrontation Clause; it does not foreclose the possibility that the Evidence  
7 Code imposes additional restrictions on the admissibility of a hearsay statement:

8       The forfeiture by wrongdoing doctrine, as adopted by us, only bars a  
9 defendant’s objections under the confrontation clause of the federal Constitution  
10 and does not bar statutory objections under the Evidence Code. Thus, even if it is  
11 established that a defendant has forfeited his or her right of confrontation, the  
12 contested evidence is still governed by the rules of evidence; a trial court should  
13 still determine whether an unavailable witness’s prior hearsay statement falls  
14 within a recognized hearsay exception and whether the probative value of the  
15 proffered evidence outweighs its prejudicial effect. (Evid. Code, § 352.)<sup>137</sup>

16 After losing the case, the defendant in *Giles* petitioned the United States  
17 Supreme Court, urging it to review the California Supreme Court’s decision. The  
18 United States Supreme Court has not yet ruled on whether to grant certiorari and  
19 consider the case on its merits.

#### 20 *Justice Werdegar’s Concurrence*

21 Justice Werdegar, joined by Justice Moreno, concurred in the California  
22 Supreme Court’s decision in *Giles*. She agreed with the majority that “the doctrine  
23 of forfeiture by wrongdoing is not confined exclusively to witness-tampering  
24 cases, in which a defendant commits malfeasance in order to procure the  
25 unavailability of a witness,” but can also be applied “where defendant’s actions in  
26 procuring a witness’s unavailability were the same actions for which he stood  
27 trial.”<sup>138</sup> She criticized the Court, however, for addressing and resolving two  
28 subsidiary questions that were unnecessary to disposition of the case before it.<sup>139</sup>

29 In particular, Justice Werdegar noted:

- 30       • The Court “decides whether the prosecution, in order to use the victim’s  
31 hearsay statements, must demonstrate the defendant’s wrongdoing by clear  
32 and convincing evidence or only a preponderance of the evidence, despite  
33 its implicit acknowledgment the issue is not implicated here because either  
34 standard was satisfied.”<sup>140</sup>

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136. *Id.* at 854.

137. *Id.*

138. *Id.* at 855 (Werdegar, J., concurring).

139. *Id.*

140. *Id.*

- 1       • The Court “decides whether and to what extent the victim’s challenged  
2 statements may be used in making this threshold showing of wrongdoing,  
3 despite the fact, again, the evidence independent of [the victim’s] statements  
4 makes it unnecessary to speak to this point.”<sup>141</sup>

5 She explained that it was “unnecessary and unwise” to decide these issues because  
6 they were not addressed by either of the lower courts, they were not included in  
7 the grant of review and thus not fully briefed, and they required constitutional  
8 analysis, which “should not be embarked on lightly and never when a case’s  
9 resolution does not demand it.”<sup>142</sup>

#### 10 **Possible Statutory Approaches**

11 Due to *Crawford* and the restrictions it has placed on introduction of a  
12 testimonial statement, there has been debate over whether to change California’s  
13 approach to forfeiture by wrongdoing.<sup>143</sup> Because California’s hearsay rule  
14 exception for forfeiture by wrongdoing appears to be narrower than the  
15 constitutional exception for forfeiture by wrongdoing, a testimonial statement that  
16 would be admissible under the constitutional exception might still be excluded  
17 under the hearsay rule in California.

18 In response to that debate, the Legislature could take a number of different  
19 approaches to forfeiture by wrongdoing as an exception to the hearsay rule:

- 20       (1) Replace Evidence Code Section 1350 with a provision that tracks the  
21 constitutional minimum as enumerated by the California Supreme Court.  
22       (2) Replace Section 1350 with a provision similar to Federal Rule of Evidence  
23 804(b)(6).  
24       (3) Broaden Section 1350 to a limited extent, with the possibility of further  
25 revisions later.  
26       (4) Leave Section 1350 alone, at least until there is further judicial guidance.

27 The next section discusses some key points to consider in evaluating these  
28 approaches. Each approach is then analyzed separately.

#### 29 **Key Points to Consider**

30 In evaluating the possible statutory approaches, the Legislature should bear in  
31 mind two overriding and competing policy interests. On the one hand, if a person  
32 commits a wrongful act that causes a witness to be unavailable to testify, such  
33 behavior interferes with the operation of the justice system and may enable the  
34 person to evade justice. Under such circumstances, it may be appropriate to  
35 deprive the person of the opportunity to object to an out-of-court statement by the

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141. *Id.*

142. *Id.* at 856, 857.

143. See, e.g., AB 268 (Calderon) (2007-2008).

1 unavailable witness, so as to level the playing field that was distorted by the  
2 person's misconduct.

3 On the other hand, an innocent person should not be punished for a criminal act  
4 committed by another, nor should a person guilty of one crime (e.g.,  
5 manslaughter) be found guilty of a more egregious crime (e.g., premeditated  
6 murder). Likewise, it is important to achieve a just result in a civil case, not only  
7 for the sake of the parties but also because an unfair outcome may undermine  
8 public confidence in the justice system.

9 An out-of-court statement by a witness who is wrongfully prevented from  
10 testifying does not necessarily have any special assurance of reliability. Admission  
11 of such a statement, without an opportunity to cross-examine the declarant, may  
12 mislead the factfinder and lead to an incorrect decision. While it might be  
13 appropriate to admit such a statement under some circumstances, the  
14 circumstances should be crafted to minimize the likelihood of an incorrect result,  
15 as well as ensure that wrongful conduct actually occurred and was sufficiently  
16 serious to justify forfeiture of the constitutional right of confrontation.

17 Above all, any legislation on forfeiture by wrongdoing must comply with  
18 constitutional constraints. The Constitution of the United States is "the supreme  
19 law of the land, and the judges in every state shall be bound thereby, any thing in  
20 the ... laws of any state to the contrary notwithstanding."<sup>144</sup>

21 **Option #1. Replace Evidence Code Section 1350 With a Provision That Tracks the**  
22 **Constitutional Minimum As Enumerated By the California Supreme Court**

23 The hearsay rule exception provided by Evidence Code Section 1350 is much  
24 narrower than the forfeiture exception to the federal Confrontation Clause as  
25 described by the California Supreme Court in *Giles*. Thus, admission of a hearsay  
26 statement might be constitutionally acceptable, yet the statement might still be  
27 subject to exclusion under the hearsay rule because it fails to satisfy the more  
28 stringent admissibility requirements of Section 1350.

29 To prevent a person from benefiting from wrongfully causing a witness'  
30 unavailability, the Legislature could repeal Section 1350 and replace it with a  
31 provision that tracks the constitutional minimum as enumerated by the California  
32 Supreme Court in *Giles*. Specifically, a new provision could create an exception to  
33 the hearsay rule that applies in the following circumstances:

- 34 • A party offers evidence of a statement made by a declarant who is  
35 unavailable to testify.
- 36 • The evidence is offered against a party whose intentional criminal act  
37 caused the declarant to be unavailable to testify. It is not necessary that the  
38 party intended to prevent the declarant from testifying.
- 39 • Such misconduct is proved to the court by a preponderance of the evidence.

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144. U.S. Const. art. VI, § 2.



- 1 • The court may consider the declarant’s statement in determining whether the  
2 party against whom it is offered engaged in an intentional criminal act that  
3 caused the declarant to be unavailable to testify.
- 4 • The declarant’s statement is not the sole basis for finding that the party  
5 against whom it is offered engaged in an intentional criminal act that caused  
6 the declarant to be unavailable to testify. There must be some independent  
7 corroborating evidence.
- 8 • The intentional criminal act that caused the declarant’s unavailability may  
9 be the same act charged in the underlying case or it may be a different act.
- 10 • In a jury trial, the admissibility of the evidence is determined outside the  
11 presence of the jury. The jury is not informed of the court’s finding.<sup>145</sup>

12 As explained below, the Law Revision Commission does not consider such an  
13 approach advisable at this time.

14 ***Lack of Guidance From the United States Supreme Court***

15 A problem with attempting to codify *Giles* is that the California Supreme Court  
16 is not the final authority on the meaning of the federal Confrontation Clause. In  
17 fact, its decision in *Giles* is now pending before the United States Supreme Court.  
18 In addition, another case raising similar issues, *State v. Romero*,<sup>146</sup> is also pending  
19 before that court. It is difficult to predict when the Court will rule on the petitions  
20 for certiorari and whether it will decide to review either case on its merits.

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145. A provision attempting to codify *Giles* could perhaps be drafted along the following lines:

Evid. Code § 1350 (added). Forfeiture by wrongdoing

1350. (a) Evidence of a statement made by a declarant is not made inadmissible by the hearsay rule if both of the following are true:

(1) The declarant is unavailable as a witness.

(2) The evidence is offered against a party whose intentional criminal act caused the declarant to be unavailable to testify.

(b) The requirements of subdivision (a) shall be proved to the court by a preponderance of the evidence.

(c) The court may consider the evidence of the declarant’s statement in determining whether the party against whom it is offered engaged in an intentional criminal act that caused the declarant to be unavailable as a witness. That evidence shall not be the sole basis for a finding that the party against whom it is offered engaged in an intentional criminal act that caused the declarant to be unavailable as a witness. There shall also be some independent corroborating evidence.

(d) The intentional criminal act that caused the declarant’s unavailability may be the same as an act charged against the opponent of the evidence, or it may be a different act.

(e) If evidence is offered under this section in a jury trial, the court shall determine the admissibility of the evidence outside the presence of the jury. The jury shall not be informed of the court’s finding.

Comment. Section 1350 supersedes former Section 1350 (1985 Cal. Stat. ch. 783, § 1). The new provision tracks the requirements of the forfeiture by wrongdoing exception to the federal Confrontation Clause (U.S. Const. amend. VI), as described by the California Supreme Court in *People v. Giles*, 40 Cal. 4th 833, 837, 152 P.3d 433, 55 Cal. Rptr. 3d 133 (2007), *petition for cert. filed*, \_\_\_ U.S.L.W. \_\_\_ (U.S. Aug. 20, 2007) (No. 07-6053).

See Section 240 (“unavailable as a witness”).

146. 141 N.M. 403, 156 P.3d 694, *petition for cert. filed*, \_\_\_ U.S.L.W. \_\_\_ (U.S. July 6, 2007) (No. 07-37).

1 If the United States Supreme Court grants certiorari in *Giles* or *Romero*, or in a  
2 later case on forfeiture by wrongdoing, it might reach the same decisions about the  
3 constraints of the federal Confrontation Clause that the California Supreme Court  
4 reached in *Giles*. But that is not a foregone conclusion, as explained below.

5 ***Uncertainty Regarding Intent to Prevent Testimony***

6 Although the California Supreme Court concluded that in establishing forfeiture  
7 it is not necessary to prove the defendant intended to prevent the declarant from  
8 testifying, some courts and commentators have reached the opposite conclusion.  
9 As the Court acknowledged in *Giles*, “courts have disagreed over this  
10 requirement.”<sup>147</sup> In *Romero*, for instance, the New Mexico Supreme Court held  
11 that “the prosecution is required to prove intent to procure the witness’s  
12 unavailability in order to bar a defendant’s right to confront that witness.”<sup>148</sup>  
13 According to the New Mexico Supreme Court, that is the majority rule.<sup>149</sup>

14 Similarly, a commentator has reported that the “history and precedents of the  
15 ‘forfeiture’ rule from seventeenth-century England to the date that *Crawford* was  
16 decided, all focused on witness tampering and all included an intent  
17 requirement.”<sup>150</sup> He reports that after *Crawford*, however, “a broader version of  
18 the rule is gaining currency” in the lower courts, under which a defendant “loses  
19 any confrontation rights if he is responsible in any way for the absence of the  
20 witness at trial, regardless of his intent.”<sup>151</sup>

21 Some commentators believe the original approach, requiring proof of intent to  
22 prevent testimony, is better policy than the alternative approach.<sup>152</sup> Still other  
23 commentators disagree.<sup>153</sup>

24 Until the United States Supreme Court rules on the issue, it is impossible to be  
25 certain whether the constitutional forfeiture doctrine requires proof that the  
26 defendant intended to prevent the declarant from testifying. Regardless of how the

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147. 40 Cal. 4th at 846.

148. 156 P.3d at 703.

149. *Id.* at 702.

150. Flanagan, *supra* note 75, at 1214.

151. *Id.* at 1196.

152. See *id.* at 1248-49; see also Comparet-Cassani, *Crawford and the Forfeiture by Wrongdoing Exception*, 42 San Diego L. Rev. 1185, 1209 (2005) (“To extend the doctrine to cases where there is no evidence that the accused intended to prevent the witness from testifying at trial is to apply the doctrine where there is no equitable basis for its invocation.”).

153. See, e.g., Raeder, *Confrontation Clause Analysis After Davis*, 22 Crim. Just. 10, 19 (Spring 2007) (forfeiture rationale is appropriate “despite the lack of any intentional witness tampering”); Friedman, *Adjusting to Crawford: High Court Decision Restores Confrontation Clause Protection*, 19 Crim. Just. 4, 12 (Summer 2004) (dismissing concerns about eliminating requirement of intent to prevent testimony); *Percival*, *supra* note 76, at 253 (“The standard of forfeiture by wrongdoing should not require a showing of the defendant’s intent to prevent a witness from testifying.”).

1 Court rules, a further question is whether it would be good policy to statutorily  
2 require such proof.

3 ***Uncertainty Regarding Other Issues***

4 The petitions for certiorari in *Giles* and *Romero* focus on the issue of intent to  
5 prevent testimony. But uncertainty exists regarding other issues as well.

6 An “important ambiguity regarding the forfeiture by wrongdoing doctrine after  
7 *Crawford* is whether courts can make a finding of forfeiture based on the same  
8 criminal acts for which the defendant is currently on trial.”<sup>154</sup> This issue is to some  
9 extent linked to the intent issue. If a finding of forfeiture requires proof that the  
10 defendant committed a wrongful act with intent to prevent a witness from  
11 testifying about a crime, it is arguably implicit in this rule that the underlying  
12 crime predates and is distinct from the wrongful act that is committed with intent  
13 to cover up evidence of the crime.

14 Another issue is the standard of proof. A majority of federal courts have used  
15 the preponderance of the evidence standard in determining whether the  
16 constitutional right of confrontation has been forfeited.<sup>155</sup> As Justice Werdegar  
17 pointed out in her *Giles* concurrence, however, that majority federal view “might  
18 well be right, but it might also be wrong,” especially because the federal cases  
19 cited in *Giles* “uniformly antedate the United States Supreme Court’s recent  
20 reassertion of the breadth and importance of the confrontation clause in ensuring  
21 defendants their fair trials.”<sup>156</sup>

22 There is also “disagreement in the courts as to the issue of ‘bootstrapping,’ or  
23 whether the statement itself can establish the wrongdoing.”<sup>157</sup> As Justice Werdegar  
24 stated, it is unclear “whether and to what extent the victim’s challenged statements  
25 may be used” in making the threshold showing of wrongdoing that results in  
26 forfeiture.<sup>158</sup>

27 ***Analysis***

28 It may not be realistic to expect the United States Supreme Court to provide  
29 guidance on all of the unresolved constitutional issues in the near future. Given the  
30 importance of the issues, however, and the degree of disagreement that exists  
31 regarding the intent requirement in particular, it would be premature to replace  
32 Evidence Code Section 1350 with a provision tracking the constitutional minimum  
33 at this time.

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154. Percival, *supra* note 76, at 231.

155. *Davis*, 126 S. Ct. at 2280; *Giles*, 40 Cal. 4th at 852.

156. *Giles*, 40 Cal. 4th at 856 (Werdegar, J., concurring).

157. King-Ries, *supra* note 76, at 456 (footnote omitted).

158. *Giles*, 40 Cal. 4th at 855 (Werdegar, J., concurring).

1 Certainly, the Legislature should not act before the United States Supreme Court  
2 rules on the petitions for certiorari in *Giles* and *Romero*. If the Court grants  
3 certiorari in one of those cases, then it would be unwise to act until the Court  
4 decides that case on its merits. If the Court denies certiorari in both cases, the  
5 Court may nonetheless address the intent issue and perhaps some of the other  
6 unsettled issues within the next few years, because they are significant issues that  
7 are likely to arise frequently in criminal cases across the country. It would be  
8 unfortunate to have enacted legislation based on *Giles* only to find that some  
9 aspect of it is unconstitutional, causing reversals in numerous California cases.

10 The better course would be to wait for further guidance from the United States  
11 Supreme Court, at least on the divisive issue of intent. Ideally, there would also be  
12 guidance from the California Supreme Court on the requirements of California's  
13 Confrontation Clause.<sup>159</sup> Then California could examine the constitutional  
14 minimum and determine whether it wants to codify that minimum or deviate from  
15 it by providing additional statutory protection in one or more respects.

16 **Option #2. Replace Evidence Code Section 1350 With a Provision Similar to Federal Rule of**  
17 **Evidence 804(b)(6)**

18 A second possibility would be to repeal Evidence Code Section 1350 and  
19 replace it with a provision similar to Federal Rule of Evidence 804(b)(6).<sup>160</sup>  
20 Because the federal rule provides a much broader forfeiture exception to the  
21 hearsay rule than the California provision, this approach would allow introduction  
22 of hearsay evidence that might otherwise be excluded. It would therefore help to  
23 address concerns that prosecution of some criminal cases has been impeded by  
24 *Crawford's* limitations on admissibility of testimonial statements.

25 Because the federal rule applies to all parties, this approach would also be more  
26 even-handed than the California provision, under which the forfeiture doctrine can  
27 only be invoked against the defendant. Further, the federal rule applies to both  
28 civil and criminal cases, so enacting a provision like it would discourage witness  
29 tampering in all types of cases, not just in serious felonies as provided by the  
30 California provision.

31 It is important to consider, however, whether a provision modeled on the federal  
32 rule would comply with the constraints of the Confrontation Clause. That point is  
33 discussed below.

34 ***Intent to Prevent Testimony***

35 The federal rule applies only if a party “engaged or acquiesced in wrongdoing  
36 that *was intended to*, and did, *procure the unavailability of the declarant as a*  
37 *witness.*”<sup>161</sup> Because the federal rule requires proof of intent to prevent testimony,

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159. Cal. Const. art. I, § 15.

160. See proposed Evid. Code § 1350 (Option #2) *infra*.

161. Fed. R. Evid. 804(b)(6) (emphasis added).

1 neither it nor a provision modeled on it could be held unconstitutional for failure  
2 to incorporate such a requirement. Guidance from the United States Supreme  
3 Court on the issue of intent is not needed to provide assurance that a provision  
4 modeled on the federal rule is constitutionally viable in this respect.

5 ***Standard of Proof***

6 With regard to the standard of proof, the matter is not quite so clear-cut. The  
7 federal rule does not specify the standard of proof.<sup>162</sup> The advisory committee's  
8 note states, however, that the preponderance of the evidence standard was adopted  
9 in light of the behavior the forfeiture rule tries to discourage.<sup>163</sup> It is thus probable  
10 that any provision modeled on the federal rule would be interpreted to incorporate  
11 a preponderance of the evidence standard, unless the provision expressly provides  
12 otherwise.

13 To help ensure that a provision modeled on the federal rule is constitutional, it  
14 could be modified to expressly incorporate the clear and convincing evidence  
15 standard. That language could perhaps be changed later if the United States  
16 Supreme Court adopts a preponderance of the evidence standard.

17 Alternatively, the provision could be proposed without such language, on the  
18 assumption that the Court will find it constitutional to use a preponderance of the  
19 evidence standard. That assumption might be well-founded, as there is only sparse  
20 authority to the contrary and the Court has permitted use of the preponderance of  
21 the evidence standard in contexts that could be considered comparable to a  
22 determination of forfeiture by wrongdoing.<sup>164</sup> But it is impossible to predict with  
23 certainty what standard of proof the Court will require.

24 ***Use of the Hearsay Statement in Determining Whether There Was Wrongdoing Warranting***  
25 ***Forfeiture***

26 A further constitutional issue is whether a court may rely on the proffered  
27 hearsay statement in determining the existence of wrongdoing warranting  
28 forfeiture and, if so, whether that statement can constitute the sole basis for a  
29 finding of such wrongdoing. The federal rule on forfeiture by wrongdoing does  
30 not address either point,<sup>165</sup> but another federal rule states that in determining a  
31 preliminary question of admissibility, the court "is not bound by the rules of  
32 evidence except those with respect to privileges."<sup>166</sup> That approach received  
33 approval in *Bourjaily v. United States*,<sup>167</sup> which held that a court may consider

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162. See Fed. R. Evid. 804(b)(6).

163. Fed. R. Evid. 804(b)(6) advisory committee's note.

164. See, e.g., *Lego v. Twomey*, 404 U.S. 477, 489 (1972) (court may use preponderance of evidence standard in determining voluntariness of confession).

165. See Fed. R. Evid. 804(b)(6).

166. Federal Rule of Evidence 104(a).

167. 483 U.S. 171 (1987).

1 evidence of a co-conspirator's statement in determining the admissibility of the  
2 statement pursuant to the co-conspirator exception to the hearsay rule.<sup>168</sup> It is  
3 likely, but by no means sure, that the United States Supreme Court would reach a  
4 similar result in the context of forfeiture by wrongdoing.

5 There is, however, the additional issue of whether the hearsay statement could  
6 constitute the sole basis for a finding of wrongdoing warranting forfeiture. The  
7 United States Supreme Court did not resolve that issue with respect to a co-  
8 conspirator's statement in *Bourjaily*. In *Giles*, the California Supreme Court  
9 concluded that under the federal Confrontation Clause, a court cannot base a  
10 forfeiture finding solely on the proffered hearsay statement.<sup>169</sup>

11 In contrast to the Federal Rules of Evidence, the Evidence Code does not permit  
12 a court to consider inadmissible evidence in determining a preliminary question of  
13 admissibility.<sup>170</sup> Thus, if the new provision modeled on Rule 804(b)(6) is silent on  
14 use of the proffered statement to determine the existence of wrongdoing  
15 warranting forfeiture, the general rule precluding reliance on inadmissible  
16 evidence would seem to apply and the provision's constitutionality in this regard  
17 would not be in doubt.

18 If, however, the new provision expressly authorized consideration of the  
19 proffered statement, then *Giles* mandates that any finding of forfeiture be  
20 supported by corroborating evidence, not the proffered statement alone. To  
21 comply with *Giles*, language to that effect would have to be included in the new  
22 provision, in addition to the language authorizing consideration of the proffered  
23 statement. While that approach might ultimately receive approval from the United  
24 States Supreme Court, the Court has not yet spoken on use of a proffered  
25 statement to establish forfeiture by wrongdoing. It would therefore be safer to stay  
26 silent on the issue than to address it in any manner in the new provision.

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168. Fed. R. Evid. 801(d)(2)(E).

169. 40 Cal. 4th at 854.

170. Fed. R. Evid. 104(a) advisory committee's note (California does not allow judge to consider inadmissible evidence in determining admissibility); Méndez Treatise, *supra* note 11, at 598-99 (same); J. Friedenthal, Analysis of Differences Between the Federal Rules of Evidence and the California Evidence Code 6-7 (1976) (on file with the Commission) (same). Compare Tentative Recommendation and a Study relating to *The Uniform Rules of Evidence: Article 1. General Provisions*, 6 Cal. L. Revision Comm'n Reports 1, 19-21 (1964) (proposing provision that would generally permit judge to consider inadmissible evidence in determining preliminary fact that affects admissibility) and Revised Preprint Senate Bill No. 1 (1965), p. 20 (attached to Commission Staff Memorandum 64-101 (Nov. 13, 1964)) (same — see proposed Evid. Code § 402(d)) with Evidence Code Section 402 (mirroring proposed provision in some respects, but omitting language that would generally permit judge to consider inadmissible evidence in determining preliminary fact that affects admissibility).

1 *Analysis*

2 If California's statute on forfeiture by wrongdoing was modeled on the federal  
3 rule, there would be consistency at the federal and state level. Cases interpreting  
4 the federal rule could be used in interpreting the California provision.

5 Following the federal approach would, however, be a significant relaxation of  
6 the protections now found in Evidence Code Section 1350. Hearsay evidence that  
7 could not be admitted in the past might become admissible, yet the evidence might  
8 be unreliable and might distort the truth-finding process. Whether the federal  
9 approach represents good policy has not been fully tested, because the federal rule  
10 was only adopted in 1997 and it was less important before *Crawford* than it is  
11 now. If California adopts a provision modeled on the federal rule, and the test of  
12 time later shows it would be better policy to narrow the rule in some respect, such  
13 a reform would be difficult to achieve in California due to the Truth-in-Evidence  
14 provision of the Victims' Bill of Rights.<sup>171</sup>

15 Nonetheless, replacing Evidence Code Section 1350 with a provision similar to  
16 Federal Rule of Evidence 804(b)(6) appears to be a reasonable option. The Law  
17 Revision Commission solicits comment on whether it is the best option.

18 **Option #3. Broaden Evidence Code Section 1350 to a Limited Extent, with the Possibility of**  
19 **Further Revisions Later**

20 A third possibility would be to broaden Evidence Code Section 1350 to a limited  
21 extent, with the possibility of further revisions after there is more judicial guidance  
22 on the constitutional requirements for forfeiture. This could be done in a variety of  
23 different ways, because the statute includes many features.

24 In particular, the features to consider and some possible revisions are:

- 25 • **Type of Case in Which the Exception Applies.** Section 1350 applies only  
26 in a criminal case charging a serious felony.<sup>172</sup> To discourage witness  
27 tampering in all types of cases, the provision could be modified to apply in  
28 any case, civil or criminal.
- 29 • **Party Against Whom the Exception May Be Invoked.** Section 1350 can  
30 only be invoked against a criminal defendant.<sup>173</sup> The provision would be  
31 more even-handed if it was modified to apply to any party.
- 32 • **Reason for the Declarant's Unavailability.** Section 1350 applies only  
33 when the declarant's unavailability "is the result of the death by homicide or  
34 the kidnapping of the declarant."<sup>174</sup> It might be appropriate to remove that  
35 limitation.

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171. Cal. Const. art. I, § 28(d) (statute restricting admissibility of relevant evidence in criminal case must be enacted "by a two-thirds vote of the membership in each house of the Legislature").

172. Evid. Code § 1350(a).

173. Evid. Code § 1350(a)(1).

174. *Id.*

- 1 • **Acquiescence in Wrongdoing that Results in the Declarant’s**  
2 **Unavailability.** Section 1350 applies only when “the declarant’s  
3 unavailability was knowingly caused by, aided by, or solicited by the party  
4 against whom the statement is offered ....”<sup>175</sup> In contrast, under the federal  
5 rule it is sufficient if a party has “acquiesced” in wrongdoing that was  
6 intended to, and did, procure the unavailability of the declarant as a  
7 witness.<sup>176</sup> It would be possible to extend Section 1350 to acquiescence in  
8 wrongdoing, like the federal rule. Given the limited experience under the  
9 federal rule, however, it might be preferable to stick with the current  
10 California approach on this point, at least for the time being.
- 11 • **Standard of Proof.** Section 1350 requires proof by clear and convincing  
12 evidence.<sup>177</sup> Until the United States Supreme Court provides guidance on  
13 the proper standard of proof, it would be safest to leave this requirement in  
14 place.
- 15 • **Evidence that the Proponent of the Hearsay Statement Is Responsible**  
16 **for the Declarant’s Unavailability.** Section 1350 cannot be invoked if  
17 there is “evidence that the unavailability of the declarant was caused by,  
18 aided by, solicited by, or procured on behalf of, the party who is offering the  
19 statement.”<sup>178</sup> This safeguard against unreliable evidence might be worth  
20 retaining.
- 21 • **Form of the Hearsay Statement.** Section 1350 applies only if the hearsay  
22 statement “has been memorialized in a tape recording made by a law  
23 enforcement official, or in a written statement prepared by a law  
24 enforcement official and signed by the declarant and notarized in the  
25 presence of the law enforcement official, prior to the death or kidnapping of  
26 the declarant.”<sup>179</sup> This is a strong safeguard against fabricated evidence. It so  
27 severely limits application of the statute, however, that the provision may be  
28 of little use. It might be appropriate to remove the requirement altogether. A  
29 middle ground would be to revise the statute to require that the hearsay  
30 statement be memorialized in a recording or in a writing made at or near the  
31 time of the statement.
- 32 • **Circumstances Under Which the Hearsay Statement Was Made.** Section  
33 1350 can be invoked only if the hearsay statement “was made under  
34 circumstances which indicate its trustworthiness and was not the result of  
35 promise, inducement, threat, or coercion.”<sup>180</sup> These safeguards against  
36 unreliable evidence may be worth retaining.
- 37 • **Relevance of the Hearsay Statement.** Section 1350 expressly requires that  
38 the hearsay statement be relevant to the issues being tried.<sup>181</sup> That language

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175. *Id.*

176. See Fed. R. Evid. 804(b)(6).

177. Evid. Code § 1350(a)(1).

178. Evid. Code § 1350(a)(2).

179. Evid. Code § 1350(a)(3).

180. Evid. Code § 1350(a)(4).

181. Evid. Code § 1350(a)(5).



1 is unnecessary due to the general prohibition on introducing irrelevant  
2 evidence.<sup>182</sup> The language should be deleted.<sup>183</sup>

- 3 • **Evidence Connecting the Defendant to Commission of the Serious**  
4 **Felony Charged.** Under Section 1350, the proffered statement cannot be the  
5 sole evidence that connects the defendant to the serious felony charged  
6 against the defendant. Rather, the statement is admissible only if it “is  
7 corroborated by other evidence which tends to connect the party against  
8 whom the statement is offered with the commission of the serious felony  
9 with which the party is charged.”<sup>184</sup> Evidence that merely shows the  
10 commission or circumstances of the offense is not sufficient  
11 corroboration.<sup>185</sup>

12 This corroboration requirement focuses on connecting the defendant to the  
13 crime charged. It is different from requiring corroboration of the  
14 wrongdoing that results in forfeiture of a defendant’s right of confrontation.  
15 It appears to be intended to promote reliability in determinations of whether  
16 the defendant, as opposed to someone else, committed the crime charged.  
17 To continue such protection, the requirement might be worth retaining and  
18 extending to any criminal case, not just a case charging a serious felony.

- 19 • **Notice of Intent to Invoke the Forfeiture by Wrongdoing Exception.**  
20 Section 1350 requires the prosecution to notify the defendant ten days  
21 before the prosecution offers a hearsay statement under the provision.<sup>186</sup>  
22 There is a good cause exception, but if good cause is shown the defendant is  
23 entitled to a reasonable continuance.<sup>187</sup> This procedural requirement makes  
24 sense and should be retained, but the language will require modification if  
25 the statute is extended to all parties in all types of cases.

- 26 • **Procedure for Determining Whether the Exception Applies.** Section  
27 1350 expressly states that if a hearsay statement is offered under it during  
28 trial, “the court’s determination shall be made out of the presence of the  
29 jury.”<sup>188</sup> The provision also gives guidance on what procedure to use if a  
30 defendant elects to testify in connection with that determination.<sup>189</sup> This  
31 guidance is useful and should be retained.

- 32 • **Multiple Hearsay.** Section 1350 expressly states that if the proffered  
33 statement “includes hearsay statements made by anyone other than the  
34 declarant who is unavailable ..., those hearsay statements are inadmissible  
35 unless they meet the requirements of an exception to the hearsay rule.”<sup>190</sup>

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182. See Evid. Code § 350.

183. See discussion of “Differences Between the California Approach and the Federal Approach” *supra*.

184. Evid. Code § 1350(a)(6).

185. *Id.*

186. Evid. Code § 1350(b).

187. *Id.*

188. Evid. Code § 1350(c).

189. *Id.*

190. Evid. Code § 1350(e).

1           That language is unnecessary due to the general provision governing  
2           multiple hearsay.<sup>191</sup> The language should be deleted.<sup>192</sup>

3           The various revisions discussed above could be combined in a single  
4           amendment.<sup>193</sup>

5           ***Constitutionality***

6           Such an amendment should withstand constitutional scrutiny. As under existing  
7           law, the declarant’s unavailability would have to be “*knowingly* caused by, aided  
8           by, or solicited by the party against whom the statement is offered *for the purpose*  
9           *of preventing testimony against the party.*”<sup>194</sup> Because the provision would require  
10          proof of intent to prevent testimony, it could not be held unconstitutional for  
11          failure to incorporate such a requirement.

12          The statute would also continue to require proof of the requisite misconduct by  
13          clear and convincing evidence.<sup>195</sup> Because it would use that standard rather than  
14          the lower preponderance of the evidence standard, the provision would not be  
15          unconstitutional even if the United States Supreme Court ultimately rejects the  
16          preponderance of the evidence standard.<sup>196</sup>

17          Finally, the statute would continue to be silent on whether a court may consider  
18          a proffered statement in determining whether a party engaged in misconduct  
19          forfeiting the right of cross-examination. Because the provision would be silent on  
20          this matter, the matter would seem to be governed by the general rule under the  
21          Evidence Code precluding consideration of inadmissible evidence in determining  
22          admissibility.<sup>197</sup> Consequently, there does not seem to be any danger that the  
23          provision would be invalidated even if the United States Supreme Court concludes  
24          it is unconstitutional to consider the proffered statement in determining forfeiture,  
25          or to use the proffered statement as the sole basis for a forfeiture determination.

26          ***Analysis***

27          A reform broadening Evidence Code Section 1350 as discussed above might not  
28          go as far as some people and organizations consider necessary to discourage  
29          subversion of the justice system and enable prosecution of those who attempt to  
30          subvert justice. But it would be a significant broadening of the statute. As such, it  
31          is also likely to draw criticism from others for allowing introduction of unreliable

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191. Evid. Code § 1201.

192. See discussion of “Differences Between the California Approach and the Federal Approach” *supra*.

193. See proposed amendment to Evid. Code § 1350 (Option #3) *infra*.

194. *Id.* (emphasis added).

195. *Id.*

196. If the United States Supreme Court ultimately approves the preponderance of the evidence standard, California could consider the possibility of switching to that standard.

197. See *supra* note 170 & accompanying text.

1 evidence that cannot be tested through cross-examination, possibly leading to  
2 incorrect judicial decisions. For instance, some commentators have praised  
3 Section 1350 as “far more sensible than the vague and wide-ranging federal  
4 provision.”<sup>198</sup>

5 The Law Revision Commission does not yet have sufficient information to  
6 assess whether amending Section 1350 along the lines discussed would represent  
7 an acceptable compromise between the competing views. More importantly, the  
8 Commission lacks sufficient information to determine whether such an  
9 amendment would represent an appropriate balance of the competing policy  
10 interests, which would serve California well in the long-term.

11 Based on the information currently on hand, however, amending Section 1350 to  
12 broaden its application appears to be another reasonable option. The Commission  
13 solicits comment on the pros and cons of this option as compared to the other  
14 options.

15 **Option #4. Leave Evidence Code Section 1350 Alone Until There Is Further Judicial**  
16 **Guidance**

17 A fourth option would be to leave Evidence Code Section 1350 alone and take  
18 no action on forfeiture by wrongdoing as an exception to the hearsay rule until  
19 there is further judicial guidance. California could simply wait to see what the  
20 United States Supreme Court says, particularly on the issue of intent to prevent  
21 testimony. Such guidance may be forthcoming within the next few years, because  
22 it is much needed, not only here but throughout the nation.

23 Once the United States Supreme Court speaks (and perhaps the California  
24 Supreme Court also speaks on the requirements of the California Constitution),  
25 California would have the benefit of definitive guidance on the Confrontation  
26 Clause in determining what statutory approach to follow. There might also be  
27 dissenting or concurring opinions, briefs, additional lower court case law, and new  
28 law review articles or other commentary that shed light on both the constitutional  
29 requirements and the best means of accommodating the competing policies, which  
30 might not be the same as the constitutional minimum.

31 Awaiting further judicial guidance would require patience on the part of those  
32 who are dissatisfied with the status quo in California on forfeiture by wrongdoing  
33 as an exception to the hearsay rule. The approach might, however, be preferable to  
34 the other options. It would not pose the specter of possible constitutional infirmity  
35 and reversals of criminal convictions, like Option #1. A lesser but still significant  
36 consideration is that the approach would not entail repeated statutory reforms and  
37 resultant transitional difficulties, as might occur if the Legislature pursues Option  
38 #2 or Option #3 and then later decides to modify the statutory scheme again in  
39 light of new judicial guidance.

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198. E. Scallen & G. Weissenberger, *California Evidence: Courtroom Manual* 1209 (Anderson Publishing Co. 1st ed. 2000).

1 For these reasons, the possibility of taking no action on forfeiture by  
2 wrongdoing and awaiting further judicial guidance appears to be a reasonable  
3 option, warranting further exploration. The Commission solicits comment on  
4 whether to follow this approach.

5 **Selection of the Best Option**

6 Input from experts, stakeholders, and other interested persons is critical to the  
7 Law Revision Commission's study process. That may be especially true in this  
8 study, which the Commission is conducting under a tight time constraint. The  
9 Commission encourages individuals and organizations to share and explain their  
10 views on forfeiture by wrongdoing as an exception to the hearsay rule. That will  
11 be of invaluable assistance to the Commission in evaluating the options and  
12 developing a sound proposal.

13 In the end, it will be up to the Legislature to weigh the competing policies and  
14 strike an appropriate balance. Any statute it enacts must, however, comply with  
15 constitutional constraints. Failure to do so would create a risk of overturned  
16 convictions and concomitant problems.

17 Until the United States Supreme Court provides guidance on key issues relating  
18 to forfeiture by wrongdoing, any statute enacted should stay well within  
19 constitutional bounds, avoiding the controversial issues. The Legislature could  
20 always revise the statute later if it turns out that the Constitution is more  
21 permissive and it would be good policy to revise the statute to conform to the  
22 constitutional minimum.

PROPOSED LEGISLATION

1 **Evid. Code § 240 (amended). Unavailable witness**

2 SEC. \_\_\_\_\_. Section 240 of the Evidence Code is amended to read:

3 240. (a) Except as otherwise provided in subdivision (b), “unavailable as a  
4 witness” means that the declarant is any of the following:

5 (1) Exempted or precluded on the ground of privilege from testifying concerning  
6 the matter to which his or her statement is relevant.

7 (2) Disqualified from testifying to the matter.

8 (3) Dead or unable to attend or to testify at the hearing because of then existing  
9 physical or mental illness or infirmity.

10 (4) Absent from the hearing and the court is unable to compel his or her  
11 attendance by its process.

12 (5) Absent from the hearing and the proponent of his or her statement has  
13 exercised reasonable diligence but has been unable to procure his or her  
14 attendance by the court’s process.

15 (6) Present at the hearing but persists in refusing to testify concerning the  
16 subject matter of the declarant’s statement despite an order of the court to do so.

17 (7) Present at the hearing but lacks memory of the subject matter of the  
18 declarant’s statement.

19 (b) A declarant is not unavailable as a witness if the ~~exemption, preclusion,~~  
20 ~~disqualification, death, inability, or absence of the declarant~~ circumstance  
21 described in subdivision (a) was brought about by the procurement or wrongdoing  
22 of the proponent of ~~his or her~~ the declarant’s statement for the purpose of  
23 preventing the declarant from attending or testifying.

24 (c) Expert testimony which establishes that physical or mental trauma resulting  
25 from an alleged crime has caused harm to a witness of sufficient severity that the  
26 witness is physically unable to testify or is unable to testify without suffering  
27 substantial trauma may constitute a sufficient showing of unavailability ~~pursuant~~  
28 ~~to paragraph (3) of subdivision (a).~~ As used in this section, the term “expert”  
29 means a physician and surgeon, including a psychiatrist, or any person described  
30 by subdivision (b), (c), or (e) of Section 1010.

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

34 **Comment.** Paragraph (6) is added to Section 240(a) to codify case law recognizing that a  
35 witness who refuses to testify is unavailable. See *People v. Rojas*, 15 Cal. 3d 540, 547-52, 542  
36 P.2d 229, 125 Cal. Rptr. 357 (1975); *People v. Francis*, 200 Cal. App. 3d 579, 245 Cal. Rptr. 923  
37 (1988); *People v. Walker*, 145 Cal. App. 3d 886, 893-94, 193 Cal. Rptr. 812 (1983); *People v.*  
38 *Sul*, 122 Cal. App. 3d 355, 175 Cal. Rptr. 893 (1981). The language is drawn from Rule 804(a)(2)  
39 of the Federal Rules of Evidence. Before making a finding of unavailability, a court must take  
40 reasonable steps to induce the witness to testify, unless it is obvious that such steps would be

1 unavailing. *Francis*, 200 Cal. App. 3d at 584, 587; *Walker*, 145 Cal. App. 3d at 894; *Sul*, 122 Cal.  
2 App. 3d at 365.

3 Paragraph (7) is added to Section 240(a) to codify case law recognizing that a witness who  
4 credibly testifies to a total lack of memory concerning the subject matter of an out-of-court  
5 statement is unavailable to testify on that subject. See *People v. Alcala*, 4 Cal. 4th 742, 778, 842  
6 P.2d 1192, 15 Cal. Rptr. 2d 432 (1992). The language is drawn from Rule 804(a)(3) of the  
7 Federal Rules of Evidence.

8 The addition of paragraph (7) has no impact on the twin doctrines of *People v. Green*, 3 Cal. 3d  
9 981, 479 P.2d 998, 92 Cal. Rptr. 494 (1971). In *Green*, the Court held that the hearsay exception  
10 for a prior inconsistent statement (Section 1235) can be invoked when a witness claims at trial not  
11 to remember an event but that claim is inherently incredible, amounting to an implied denial of  
12 the prior statement. *Id.* at 985-89. The Court further concluded that a witness' inherently  
13 incredible lapse of memory at trial is not equivalent to depriving the defendant of the right of  
14 cross-examination guaranteed by the Confrontation Clause (U.S. Const. amend. VI). *Id.* at 989-  
15 91. These doctrines are not inconsistent with the concept that for purposes of other hearsay  
16 exceptions, a witness is unavailable if the witness testifies to a lack of memory on a subject. See  
17 *United States v. Owens*, 484 U.S. 554, 563-64 (1988); *People v. Gunder*, 151 Cal. App. 4th 412,  
18 419 n.8, 59 Cal. Rptr. 3d 817 (2007); *People v. Perez*, 82 Cal. App. 4th 760, 767 n.2, 98 Cal.  
19 Rptr. 2d 522 (2000).

20 Subdivision (b) is amended to encompass the revisions of subdivision (a).

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21 **Note.** Possible approaches to forfeiture by wrongdoing include:

22 **Option #1.** Repeal California's existing provision on forfeiture by wrongdoing  
23 and replace it with a provision that tracks the constitutional minimum. For  
24 example, see the draft provision in footnote 145 *supra* (and the accompanying  
25 text), which would attempt to codify *People v. Giles*, 40 Cal. 4th 833, 152 P.3d  
26 433, 55 Cal. Rptr. 3d 133 (2007), *petition for cert. filed*, \_\_ U.S.L.W. \_\_ (U.S.  
27 Aug. 20, 2007) (No. 07-6053).

28 **Option #2.** Replace the existing provision with one similar to the federal rule.

29 **Option #3.** Broaden the existing provision to a limited extent, with the possibility  
30 of further revisions later.

31 **Option #4.** Leave the law alone until there is further judicial guidance.

32 The first approach is inadvisable because the United States Supreme Court has not yet given  
33 guidance on key aspects of the constitutional minimum. The Law Revision Commission has  
34 tentatively concluded that the other options are reasonable possibilities. It solicits comment on  
35 which of these approaches is preferable.

36 Options #2 and #3 are shown below; no legislation on forfeiture by wrongdoing would be  
37 necessary under Option #4. The Commission solicits comment on each of these alternatives. The  
38 Commission also welcomes any other suggestions or comments relating to forfeiture by  
39 wrongdoing.

#### 40 OPTION #2.

#### 41 Repeal Evidence Code Section 1350 and Replace It with a Provision 42 Similar to Federal Rule of Evidence 804(b)(6)

#### 43 **Evid. Code § 1350 (repealed). Forfeiture by wrongdoing**

44 SEC. \_\_\_\_\_. Section 1350 of the Evidence Code is repealed.

1 ~~1350. (a) In a criminal proceeding charging a serious felony, evidence of a~~  
2 ~~statement made by a declarant is not made inadmissible by the hearsay rule if the~~  
3 ~~declarant is unavailable as a witness, and all of the following are true:~~

4 ~~(1) There is clear and convincing evidence that the declarant's unavailability~~  
5 ~~was knowingly caused by, aided by, or solicited by the party against whom the~~  
6 ~~statement is offered for the purpose of preventing the arrest or prosecution of the~~  
7 ~~party and is the result of the death by homicide or the kidnapping of the declarant.~~

8 ~~(2) There is no evidence that the unavailability of the declarant was caused by,~~  
9 ~~aided by, solicited by, or procured on behalf of, the party who is offering the~~  
10 ~~statement.~~

11 ~~(3) The statement has been memorialized in a tape recording made by a law~~  
12 ~~enforcement official, or in a written statement prepared by a law enforcement~~  
13 ~~official and signed by the declarant and notarized in the presence of the law~~  
14 ~~enforcement official, prior to the death or kidnapping of the declarant.~~

15 ~~(4) The statement was made under circumstances which indicate its~~  
16 ~~trustworthiness and was not the result of promise, inducement, threat, or coercion.~~

17 ~~(5) The statement is relevant to the issues to be tried.~~

18 ~~(6) The statement is corroborated by other evidence which tends to connect the~~  
19 ~~party against whom the statement is offered with the commission of the serious~~  
20 ~~felony with which the party is charged.~~

21 ~~The corroboration is not sufficient if it merely shows the commission of the~~  
22 ~~offense or the circumstances thereof.~~

23 ~~(b) If the prosecution intends to offer a statement pursuant to this section, the~~  
24 ~~prosecution shall serve a written notice upon the defendant at least 10 days prior to~~  
25 ~~the hearing or trial at which the prosecution intends to offer the statement, unless~~  
26 ~~the prosecution shows good cause for the failure to provide that notice. In the~~  
27 ~~event that good cause is shown, the defendant shall be entitled to a reasonable~~  
28 ~~continuance of the hearing or trial.~~

29 ~~(c) If the statement is offered during trial, the court's determination shall be~~  
30 ~~made out of the presence of the jury. If the defendant elects to testify at the~~  
31 ~~hearing on a motion brought pursuant to this section, the court shall exclude from~~  
32 ~~the examination every person except the clerk, the court reporter, the bailiff, the~~  
33 ~~prosecutor, the investigating officer, the defendant and his or her counsel, an~~  
34 ~~investigator for the defendant, and the officer having custody of the defendant.~~  
35 ~~Notwithstanding any other provision of law, the defendant's testimony at the~~  
36 ~~hearing shall not be admissible in any other proceeding except the hearing brought~~  
37 ~~on the motion pursuant to this section. If a transcript is made of the defendant's~~  
38 ~~testimony, it shall be sealed and transmitted to the clerk of the court in which the~~  
39 ~~action is pending.~~

40 ~~(d) As used in this section, "serious felony" means any of the felonies listed in~~  
41 ~~subdivision (c) of Section 1192.7 of the Penal Code or any violation of Section~~  
42 ~~11351, 11352, 11378, or 11379 of the Health and Safety Code.~~

1 ~~(e) If a statement to be admitted pursuant to this section includes hearsay~~  
2 ~~statements made by anyone other than the declarant who is unavailable pursuant to~~  
3 ~~subdivision (a), those hearsay statements are inadmissible unless they meet the~~  
4 ~~requirements of an exception to the hearsay rule.~~

5 **Comment.** This section is superseded by new Section 1350, which is drawn from Federal Rule  
6 of Evidence 804(b)(6) and Uniform Rule of Evidence 804(b)(5).

7 **Evid. Code § 1350 (added). Forfeiture by wrongdoing**

8 SEC. \_\_\_\_\_. Section 1350 is added to the Evidence Code, to read:

9 1350. Evidence of a statement made by a declarant is not made inadmissible by  
10 the hearsay rule if both of the following are true:

11 (a) The declarant is unavailable as a witness.

12 (b) The evidence is offered against a party who has engaged or acquiesced in  
13 wrongdoing that was intended to, and did, procure the unavailability of the  
14 declarant as a witness.

15 **Comment.** Section 1350 supersedes former Section 1350 (1985 Cal. Stat. ch. 783, § 1). The  
16 new provision is drawn from Federal Rule of Evidence 804(b)(6) and Uniform Rule of Evidence  
17 804(b)(5).

18 See Section 240 (“unavailable as a witness”).

19 **OPTION #3.**

20 **Broaden Evidence Code Section 1350 to a Limited Extent,**  
21 **with the Possibility of Further Revisions Later**

22 **Evid. Code § 1350 (amended). Forfeiture by wrongdoing**

23 SEC. \_\_\_\_\_. Section 1350 of the Evidence Code is amended to read:

24 1350. (a) ~~In a criminal proceeding charging a serious felony, evidence~~ Evidence  
25 of a statement made by a declarant is not made inadmissible by the hearsay rule if  
26 the declarant is unavailable as a witness, and all of the following are true:

27 (1) There is clear and convincing evidence that the declarant’s unavailability  
28 was knowingly caused by, aided by, or solicited by the party against whom the  
29 statement is offered for the purpose of preventing ~~the arrest or prosecution of~~  
30 testimony against the party ~~and is the result of the death by homicide or the~~  
31 kidnapping of the declarant.

32 (2) There is no evidence that the unavailability of the declarant was caused by,  
33 aided by, solicited by, or procured on behalf of, the party who is offering the  
34 statement.

35 (3) The statement has been memorialized in a ~~tape recording made by a law~~  
36 ~~enforcement official, or in a written statement prepared by a law enforcement~~  
37 ~~official and signed by the declarant and notarized in the presence of the law~~  
38 ~~enforcement official, prior to the death or kidnapping of the declarant~~ or a writing,  
39 which was made at or near the time of the statement.



1 (4) The statement was made under circumstances ~~which~~ that indicate its  
2 trustworthiness and was not the result of promise, inducement, threat, or coercion.

3 ~~(5) The statement is relevant to the issues to be tried.~~

4 ~~(6) The statement~~ (5) If the statement is offered against the defendant in a  
5 criminal case, it is corroborated by other evidence which that tends to connect the  
6 party against whom the statement is offered with the commission of the serious  
7 felony offense with which the party is charged. The

8 ~~The~~ corroboratorion is not sufficient if it merely shows the commission of the  
9 offense or the circumstances thereof.

10 (b) ~~If the prosecution~~ a party intends to offer a statement pursuant to this section,  
11 ~~the prosecution~~ that party shall serve a written notice upon the ~~defendant~~ adverse  
12 party at least 10 days prior to the hearing or trial at which the ~~prosecution party~~  
13 intends to offer the statement, unless the prosecution party shows good cause for  
14 the failure to provide that notice. In the event that good cause is shown, the  
15 ~~defendant~~ adverse party shall be entitled to a reasonable continuance of the  
16 hearing or trial.

17 (c) If the statement is offered during a jury trial, the court's determination shall  
18 be made out of the presence of the jury. ~~If the~~ a criminal defendant elects to testify  
19 at the hearing on a motion brought pursuant to this section, the court shall exclude  
20 from the examination every person except the clerk, the court reporter, the bailiff,  
21 the prosecutor, the investigating officer, the defendant and his or her counsel, an  
22 investigator for the defendant, and the officer having custody of the defendant.  
23 Notwithstanding any other provision of law, the defendant's testimony at the  
24 hearing shall not be admissible in any other proceeding except the hearing brought  
25 on the motion pursuant to this section. If a transcript is made of the defendant's  
26 testimony, it shall be sealed and transmitted to the clerk of the court in which the  
27 action is pending.

28 ~~(d) As used in this section, "serious felony" means any of the felonies listed in~~  
29 ~~subdivision (c) of Section 1192.7 of the Penal Code or any violation of Section~~  
30 ~~11351, 11352, 11378, or 11379 of the Health and Safety Code.~~

31 ~~(e) If a statement to be admitted pursuant to this section includes hearsay~~  
32 ~~statements made by anyone other than the declarant who is unavailable pursuant to~~  
33 ~~subdivision (a), those hearsay statements are inadmissible unless they meet the~~  
34 ~~requirements of an exception to the hearsay rule.~~

35 **Comment.** Section 1350 is amended to broaden its application.

36 The introductory paragraph of subdivision (a) is amended to make the section applicable in any  
37 civil or criminal case, not just in a case charging a serious felony. The federal hearsay exception  
38 for forfeiture by wrongdoing is similar in this regard. See Fed. R. Evid. 804(b)(6).

39 Consistent with the extension of this section to civil cases, subdivision (a)(1) is amended to  
40 refer to prevention of testimony, as opposed to prevention of arrest or prosecution. Subdivision  
41 (a)(1) is also amended to remove the limitation that the declarant's unavailability be the result of  
42 death by homicide or kidnapping of the declarant. The federal hearsay exception for forfeiture by  
43 wrongdoing is similar in this respect; it includes no such limitation. See Fed. R. Evid. 804(b)(6).

1 Subdivision (a)(3) is amended to expand the types of statements that are admissible under this  
2 section. Timely memorialization is still required, but it is no longer necessary that the statement  
3 be given to a law enforcement official and taped or notarized. See Section 250 (“writing”).

4 Subdivision (a)(4) is amended to make a stylistic revision.

5 Subdivision (a)(5) is deleted as surplusage. See Section 350 (“No evidence is admissible except  
6 relevant evidence.”).

7 Subdivision (a)(6) (new subdivision (a)(5)) is amended to reflect that this section is no longer  
8 limited to a case charging a serious felony. The corroboration requirement of this subdivision,  
9 which focuses on connecting the defendant to the crime charged, now applies in any criminal  
10 case, but only if the evidence is proffered by the prosecution.

11 Subdivision (b) is amended to reflect that this section may now be invoked by any party, not  
12 just by the prosecution in a criminal case.

13 Subdivision (c) is amended to reflect that a case does not necessarily involve a jury. The  
14 subdivision is also amended to reflect that this section now applies to any civil or criminal case.  
15 The restrictions pertaining to testimony by a defendant were originally drafted for the criminal  
16 context; they are still limited to that context.

17 Subdivision (d), defining “serious felony,” is deleted to reflect that this section now applies in  
18 any civil or criminal case, not just a case charging a serious felony.

19 Subdivision (e) is deleted as surplusage. See Evid. Code § 1201 (if evidence involves more  
20 than one hearsay statement, each hearsay statement must satisfy exception to hearsay rule).

21 See Section 240 (“unavailable as a witness”).

22 **OPTION #4.**

23 **Leave Evidence Code Section 1350 Alone**  
24 **Until There Is Further Judicial Guidance**

25 **Note.** No legislation on forfeiture by wrongdoing would be necessary under this alternative.

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26 **Uncodified (added). Operative date**

27 SEC. \_\_\_\_\_. (a) This act shall become operative on January 1, 2009.

28 (b) This act applies in an action or proceeding commenced before, on, or after  
29 January 1, 2009.

30 (c) Nothing in this act invalidates an evidentiary determination made before  
31 January 1, 2009, that evidence is inadmissible pursuant to Section 1200 of the  
32 Evidence Code. However, if an action or proceeding is pending on January 1,  
33 2009, the proponent of evidence excluded pursuant to Section 1200 of the  
34 Evidence Code may, on or after January 1, 2009, and before entry of judgment in  
35 the action or proceeding, make a new request for admission of the evidence on the  
36 basis of this act.

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