

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

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December 2007

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
www.clrc.ca.gov

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NOTE

The Commission's reports, recommendations, and studies are published in separate pamphlets that are later bound in hardcover form. The page numbers in each pamphlet are the same as in the volume in which the pamphlet is bound, which permits citation to Commission publications before they are bound.

This publication (#229) will appear in Volume 37 of the Commission's *Reports, Recommendations, and Studies*.

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STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Deposition in Out-of-State Litigation

December 2007

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
www.clrc.ca.gov

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative. The Comments are legislative history and are entitled to substantial weight in construing the statutory provisions. For a discussion of cases addressing the use of Law Revision Commission materials in ascertaining legislative intent, see the Commission's most recent *Annual Report*.

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STATE OF CALIFORNIA

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December 14, 2007

To: The Honorable Arnold Schwarzenegger
Governor of California, and
The Legislature of California

The Law Revision Commission proposes to clarify and refine the procedure for obtaining discovery from a witness in this state for purposes of a proceeding pending in another jurisdiction. The recommended legislation is based in part on the Uniform Interstate Depositions and Discovery Act (2007) (“UIDDA”), which was recently approved by the National Conference of Commissioners on Uniform State Laws. The recommended legislation also addresses procedural details not addressed in UIDDA.

Among other things, the recommended legislation would:

- Make clear that discovery for an out-of-state proceeding can be taken from an entity located in California, not just from a natural person.
- Eliminate any doubt that such discovery can include a deposition solely for the production of tangible items.
- Expressly allow an inspection of land or other property for purposes of an out-of-state proceeding.
- Simplify procedure by permitting issuance of a California subpoena to be based on any document

from an out-of-state court that commands a person in California to testify or provide other discovery.

- Specify the fee and other procedural requirements for obtaining a subpoena from a California court for discovery in an out-of-state proceeding.
- Direct the Judicial Council to prepare a subpoena form and a subpoena application form for use in obtaining discovery for an out-of-state proceeding (or modify an existing form to expressly address that situation).
- Make clear that under specified circumstances local counsel can issue a subpoena for discovery in an out-of-state proceeding.

The recommended legislation would also clarify the procedure for resolving a dispute relating to discovery for an out-of-state proceeding. To resolve such a dispute in a California court, a litigant, deponent, or other affected person would need to file a petition in the superior court for the county in which the discovery is being conducted. The recommended legislation would specify the proper fee, briefing schedule, hearing date, and other procedural details.

By providing guidance on these points and related matters, the recommended legislation would help to prevent confusion, disputes, unnecessary expenditure of resources, and inconsistent treatment of litigants. The recommended reforms would not only benefit litigants in out-of-state proceedings, but would also assist California court personnel, process servers, witnesses, and others affected by discovery conducted for out-of-state litigation.

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

Respectfully submitted,

Sidney Greathouse
Chairperson

DEPOSITION IN OUT-OF-STATE LITIGATION

The Law Revision Commission is engaged in a study of civil discovery and has issued several recommendations on that topic, all of which have been enacted.¹ In this tentative recommendation, the Commission proposes to revise the law to provide clear guidance on the procedure that litigants, courts, and witnesses are to follow when discovery is taken in California for purposes of an out-of-state proceeding.

The recommended reforms are based in part on the Uniform Interstate Depositions and Discovery Act (2007) (“UIDDA”), which was recently approved by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”).² The recommended legislation also addresses procedural details that are not addressed in UIDDA.

1. *Time Limits for Discovery in an Unlawful Detainer Case*, 36 Cal. L. Revision Comm’n Reports 271 (2006), implemented by 2007 Cal. Stat. ch. 113; *Civil Discovery: Correction of Obsolete Cross-References*, 34 Cal. L. Revision Comm’n Reports 161 (2004), implemented by 2005 Cal. Stat. ch. 294; *Civil Discovery: Statutory Clarification and Minor Substantive Improvements*, 34 Cal. L. Revision Comm’n Reports 137 (2004), implemented by 2005 Cal. Stat. ch. 294; *Civil Discovery: Nonsubstantive Reform*, 33 Cal. L. Revision Comm’n Reports 789 (2003), implemented by 2004 Cal. Stat. ch. 182.

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). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

2. In response to concerns about how the California courts were handling discovery for out-of-state litigation, the Commission began studying this topic in July 2005. NCCUSL began drafting a uniform act on the topic soon afterwards. The Commission decided to await the completion of NCCUSL’s study before finalizing its own recommendation.

Existing Law

Code of Civil Procedure Section 2029.010³ governs the procedure for deposing⁴ a witness in California for purposes of a proceeding pending in another jurisdiction. The provision applies when an out-of-state court issues a mandate,⁵ writ,⁶ letters rogatory,⁷ letter of request,⁸ or commission⁹ requesting that a person in California testify or produce materials for use in an out-of-state case. It states:

3. 2004 Cal. Stat. ch. 182, § 23. Section 2029.010 continues former Code of Civil Procedure Section 2029 without change. See Code Civ. Proc. § 2029.010 Comment.

4. In California, a “deposition” is defined as “a written declaration, under oath, made upon notice to the adverse party, for the purpose of enabling him to attend and cross-examine.” Code Civ. Proc. § 2004. The term “deposition” is used to refer to: (1) a pretrial proceeding in which a witness orally testifies and the answers are transcribed (Code Civ. Proc. §§ 2020.310, 2025.010-2025.620), (2) a pretrial proceeding in which a witness answers written questions under oath (Code Civ. Proc. §§ 2028.010-2028.080), (3) a pretrial proceeding in which a witness testifies and produces documents or other tangible things (Code Civ. Proc. §§ 2020.510, 2025.010-2025.620), and (4) a pretrial proceeding in which a witness is only required to produce business records for copying (Code Civ. Proc. §§ 2020.410-2020.440; Evid. Code §§ 1560-1567).

5. A “mandate” is a “judicial command.” Cochran’s Law Lexicon (5th ed. 1973).

6. A “writ” is a “court’s written order, in the name of a state or other competent legal authority, commanding the addressee to do or refrain from doing some specified act.” Black’s Law Dictionary (8th ed. 2004).

7. The term “letters rogatory” is synonymous with “letter of request.” It refers to a “document issued by one court to a foreign court, requesting that the foreign court (1) take evidence from a specific person within the foreign jurisdiction or serve process on an individual or corporation within the foreign jurisdiction and (2) return the testimony or proof of service for use in a pending case.” Black’s Law Dictionary 916 (8th ed. 2004).

8. For what constitutes a “letter of request,” see *supra* note 7.

9. A “commission” is a “warrant or authority, from the government or a court, that empowers the person named to execute official acts.” Black’s Law Dictionary (8th ed. 2004).

2029.010. Whenever any mandate, writ, letters rogatory, letter of request, or commission is issued out of any court of record in any other state, territory, or district of the United States, or in a foreign nation, or whenever, on notice or agreement, it is required to take the oral or written deposition of a natural person in California, the deponent may be compelled to appear and testify, and to produce documents and things, in the same manner, and by the same process as may be employed for the purpose of taking testimony in actions pending in California.

Under this provision, a California court can use its subpoena power to compel a witness in the state to submit to a deposition for purposes of a proceeding pending elsewhere.¹⁰ Because an out-of-state tribunal may be unable to compel discovery from a non-party witness located in California, the provision can be critical in ascertaining the truth and achieving justice in an out-of-state proceeding.¹¹ The assistance that the provision extends to other jurisdictions may in turn prompt such jurisdictions to reciprocate with respect to cases pending in California.¹²

10. State Bar-Judicial Council Joint Commission on Discovery, Proposed California Civil Discovery Act of 1986, *Reporter's Note to Section 2029*, at 59 (Jan. 1986) (hereafter, "State Bar-Judicial Council Report").

11. Mullin, Jr., *Interstate Deposition Statutes: Survey and Analysis*, 11 U. Balt. L. Rev. 1, 2 (1981).

12. State Bar-Judicial Council Report, *supra* note 10, at 59. Section 2029.010 is similar to the Uniform Foreign Depositions Act ("UFDA"), which was approved in 1920 by NCCUSL and the American Bar Association. Quite a number of states have adopted UFDA or a variant of it. See, e.g., Fla. Stat. Ann. § 92.251; Ga. Code Ann. § 24-10-110 to 24-10-112; Md. Code Ann., Cts. & Jud. Proc. §§ 9-401 to 9-403; Nev. Rev. Stat. §§ 53.050-53.070; N.Y. C.P.L.R. 3102(e); Ohio Rev. Code Ann. § 2319.09; Or. R. Civ. Proc. 38(C); S.D. Codified Laws § 19-5-4; Tenn. Code Ann. § 24-9-103; Va. Code Ann. § 8.01-411 to 8.01-412.1; Wyo. Stat. Ann. § 1-12-115; see also La. Rev. Stat. Ann. § 13:3821-13:3822, 13:3824; Mo. Stat. Ann. § 492.270; Mo. R. Civ. Proc. 57.08; Neb. R. Civ. Disc. 28(e); N.D. R. Civ. Proc. 45(a)(3); N.H. Rev. Stat.

Inadequacies of Existing Law

Section 2029.010 does not specify the details of the procedure for issuing a subpoena to take a deposition in California for purposes of an out-of-state proceeding. It is not clear from the statutory text what type of paper the deposing party must submit to the court, whether that party must pay a fee and, if so, what fee applies, whether an attorney (rather than the court) may issue a subpoena, what format to use for the subpoena, and whether it is necessary to retain local counsel.¹³ Because the provision applies to a “natural person,” it is also questionable whether an organization located in California can be deposed for an out-of-state proceeding. The statute covers a deposition in which the witness is required to produce documents as well as testify, but is ambiguous as to whether it covers a deposition solely for the production of documents. Its applicability to an inspection of land or other premises is also debatable.¹⁴

Ann. §§ 517:18, 517-A:1; S.C. R. Civ. Proc. 28(d); Tex. Civ. Prac. & Rem. Code Ann. § 20.002; Utah R. Civ. Proc. 26(h).

Other states have not adopted UFDA but also extend comity with regard to an in-state deposition for purposes of an out-of-state proceeding. See *infra* note 14.

13. Code of Civil Procedure Section 1986 provides some additional guidance but does not fully address the issues raised. It states:

1986. A subpoena is obtainable as follows:

(a) To require attendance before a court, or at the trial of an issue therein, or upon the taking of a deposition in an action or proceeding pending therein, it is obtainable from the clerk of the court in which the action or proceeding is pending.

(b) *To require attendance before a commissioner appointed to take testimony by a court of a foreign country, or of the United States, or of any other state in the United States, or before any officer or officers empowered by the laws of the United States to take testimony, it may be obtained from the clerk of the superior court of the county in which the witness is to be examined.*

(c) To require attendance out of court, in cases not provided for in subdivision (a), before a judge, justice, or other officer authorized to administer oaths or take testimony in any matter under the laws of this

Further, the statute does not make clear how to seek relief when a dispute arises in a deposition taken in California for purposes of an out-of-state proceeding. The proper enforcement procedure is particularly uncertain when a deposition is taken on notice or agreement without issuance of a California subpoena.

Because the statute fails to provide guidance on these points, California courts vary widely in how they handle such

state, it is obtainable from the judge, justice, or other officer before whom the attendance is required.

If the subpoena is to require attendance before a court, or at the trial of an issue therein, it is obtainable from the clerk, as of course, upon the application of the party desiring it. *If it is obtained to require attendance before a commissioner or other officer upon the taking of a deposition, it must be obtained, as of course, from the clerk of the superior court of the county wherein the attendance is required upon the application of the party requiring it.*

(Emphasis added.) Assuming that the last sentence of Section 1986 is meant to apply not only to a deposition subpoena for a California case but also to a deposition subpoena for an out-of-state proceeding, it is consistent with but less detailed than the procedure proposed by the Commission specifically for the latter situation.

14. Like Section 2029.010, UFDA does not specify the details of the procedure for issuing a subpoena to take a deposition in a state for purposes of a proceeding pending in another state. In contrast, Section 3.02 of the Uniform Interstate and International Procedure Act (“UIIPA”) is more specific in some respects.

UIIPA was approved by NCCUSL in 1962 and was intended to supersede UFDA. It has only been adopted or essentially adopted in a few jurisdictions. See Ind. R. Trial Proc. 28(E); Mass. Gen. Laws ch. 223A, § 11; Mich. Comp. Laws § 600.1852; 42 Pa. Cons. Stat. § 5326; see also La. Rev. Stat. Ann. §§ 13:3821-13:3822, 13:3824 (adopting UIIPA Section 3.02, but also retaining version of UFDA). NCCUSL withdrew UIIPA in 1977. See NCCUSL, Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Annual Conference Meeting in its 105th Year, Table IV, at 578 (1996). For this reason, and because it was not widely adopted, Section 3.02 of UIIPA is of limited value as a model for nationwide uniformity.

matters.¹⁵ This inconsistent and unpredictable treatment is unfair.

To ensure even-handedness and prevent confusion, the Law Revision Commission proposes to repeal the provision and replace it with a new set of provisions, based in part on

Many states have provisions that do not track either UFDA or UIIPA Section 3.02. There is great variety among these. See Ala. R. Civ. Proc. 28(c); Alaska R. Civ. Proc. 27(c); Ariz. R. Civ. Proc. 30(h); Ark. R. Civ. Proc. 28(c); Conn. Gen. Stat. § 52-155; Conn. R. Superior Ct. Civ. Proc. § 13-28; Del. Code Ann. tit. 10, § 4311; Haw. Rev. Stat. § 624-27; Idaho R. Civ. Proc. 28(e); Ill. Supreme Ct. R. 204(b); Iowa Code § 622.84; Kan. Stat. Ann. § 60-228(d); Ky. R. Civ. Proc. 28.03; Me. R. Civ. Proc. 30(h); Minn. R. Civ. Proc. 45.01(d); Miss. R. Civ. Proc. 45(a)(2); Mont. R. Civ. Proc. 28(d); N.J. R. Civ. Prac. 4:11-4; N.M. Stat. Ann. § 38-8-1; N.C. R. Civ. Proc. 28(d); Okla. Stat. Ann. tit. 12, § 2004.1(A)(2); R.I. Gen. Laws § 9-18-11; Vt. Stat. Ann. tit. 12, § 1248; Wash. Superior Ct. Civ. R. 45(e)(4); W. Va. R. Civ. Proc. 28(d); Wisc. Stat. § 887.24; see also Bushnell, *How To Take an Out-of-State Deposition*, 14 Utah Bar J. 28, 28 (2001) (explaining that “each state has its own peculiar requirements”); Mullin, Jr., *supra* note 11, at 52 (noting “the numerous varieties of interstate deposition statutes, their inconsistencies, and their ambiguities”). There does not seem to be any uniformity in how other states handle the points that require clarification here in California.

15. A recent Texas case in which discovery was taken in several California counties provides a good illustration of the disparity in treatment. In that case, a clerk in San Mateo County Superior Court issued a subpoena simply upon presentation of documentation from the Texas court. No fee was required. The same thing happened in San Diego County Superior Court.

In San Francisco County Superior Court, however, the request for a subpoena was repeatedly rejected. The clerk did not issue the subpoena until after the applicant presented certified documentation from the Texas court, hired a California attorney to sign a civil case cover sheet and prepare a petition and declaration, paid the full fee for filing a new case, and complied with other requirements orally conveyed by the clerk. See Email from Tony Klein to Barbara Gaal (Aug. 2, 2007) (Commission Staff Memorandum 2007-35, Exhibit pp. 1-17).

For further examples, see Email from Tony Klein to Barbara Gaal (April 24, 2006) (Second Supplement to Commission Staff Memorandum 2006-7, Exhibit p. 3); Email from Kristen Tsangaris to Barbara Gaal (Dec. 28, 2005) (Commission Staff Memorandum 2006-7, Exhibit p. 9); Email from Tony Klein to Barbara Gaal (Sept. 8, 2004) (Commission Staff Memorandum 2005-26, Exhibit pp. 1-3); R. Best, C.C.P. Revisions: California Subpoena for Foreign State Action (2004) (Commission Staff Memorandum 2005-26, Exhibit pp. 4-6).

UIDDA. The new provisions would give guidance as detailed below. The recommended reforms to clarify and improve the process will not only benefit litigants in out-of-state proceedings, but will also assist California court personnel, process servers, witnesses, and others affected by discovery for an out-of-state case.

Recommended Reforms

The Commission proposes clarifications and improvements relating to: (1) the types of deponent permitted, (2) the types of discovery permitted, (3) which out-of-state documents are acceptable, (4) other aspects of the procedure for issuing a subpoena that compels discovery for an out-of-state proceeding, (5) the use of local counsel in conducting such discovery, and (6) the procedure for resolving a dispute arising in connection with discovery.

Type of Deponent

By its terms, Section 2029.010 is limited to “the oral or written deposition of a natural person in California” This limitation was deliberately imposed in the Civil Discovery Act of 1986.¹⁶ The drafters’ apparent concern was that some jurisdictions might not permit a deposition of an organization (as opposed to a natural person) and litigants might try to subvert such a restriction by seeking to depose an organization in California instead of the forum state.¹⁷

California appears to be unusual and perhaps unique in its approach to this point. The Commission is not aware of any statute comparable to Section 2029.010 that expressly applies only to a deposition of a natural person.

16. State Bar-Judicial Council Report, *supra* note 10, at 59.

17. See *id.*

As a matter of policy, deposing an organization located in California may be just as important to the pursuit of truth as deposing an individual who resides in California. UIDDA recognizes as much, by permitting discovery from “a person,”¹⁸ and defining “person” to mean “an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency or instrumentality, or any other legal or commercial entity.”¹⁹ The Commission recommends that California follow UIDDA’s approach on this point.²⁰

Type of Discovery Sought

From the statutory language, it is clear that Section 2029.010 encompasses not only a deposition requiring testimony alone, but also one requiring both testimony and the production of tangible evidence. It is ambiguous, however, whether the language encompasses a deposition in which no testimony is required, only the production of documents or other tangible evidence.²¹ It is also ambiguous whether the language encompasses a request to inspect land or other premises.

In contrast, UIDDA clearly encompasses a deposition that is solely for the production of tangible items.²² UIDDA also expressly encompasses a request to inspect land or other

18. UIDDA § 5.

19. UIDDA § 2(3).

20. See proposed Code Civ. Proc. § 2029.200(c) *infra*.

21. For key provisions governing such a deposition, see Code Civ. Proc. §§ 2020.010(a)(3), 2020.410-2020.440.

22. UIDDA § 2(5).

premises.²³ The Commission recommends that California follow UIDDA's approach on these points.²⁴

Acceptable Out-of-State Documents

By its terms, Section 2029.010 does not apply unless (1) a court of another jurisdiction has issued a mandate, writ, letters rogatory, letter of request, or commission, or (2) the deposition of a natural person in California is required by notice or agreement. If neither of these requirements is satisfied, a California court lacks authority to issue a subpoena under the statute.

It may be costly and time-consuming, however, to obtain a letter of request or other document enumerated in the statute. To eliminate unnecessary expense and delay, UIDDA simply requires submission of a "subpoena" from a court of record²⁵ of another jurisdiction.²⁶ "Subpoena" is broadly defined as:

... a document, *however denominated*, issued under authority of a court of record requiring a person to:

(A) attend and give testimony at a deposition;

(B) produce and permit inspection and copying of designated books, documents, records, electronically stored information, or tangible things in the possession, custody, or control of the person; or

(C) permit inspection of premises under the control of the person.²⁷

23. *Id.*

24. See proposed Code Civ. Proc. § 2029.200(e) *infra*.

25. UIDDA only applies to a discovery request in a proceeding conducted in a court of record, not to other proceedings such as an arbitration. See UIDDA § 3 comment. The recommended legislation takes the same approach. See proposed Code Civ. Proc. § 2029.200 *infra*.

26. UIDDA § 3; see also UIDDA § 2(2) (defining "foreign subpoena").

27. UIDDA § 2(5) (emphasis added).

The Commission agrees that the focus should be on the function served by a document, not its name or format. Any document from an out-of-state court that commands a person in California to testify or provide another form of discovery should be sufficient for purposes of obtaining a California subpoena compelling such discovery. It should just be necessary to provide assurance that the document is what it purports to be. That could be achieved by submitting either the original or a true and correct copy.

The Commission therefore recommends that California adopt UIDDA's definition of "subpoena" in this context²⁸ and UIDDA's requirement that an out-of-state "subpoena" be submitted to the California court from which a subpoena is requested.²⁹ Either the original or a true and correct copy would suffice.³⁰

Other Aspects of the Procedure for Issuance of a Subpoena By a California Court

Aside from having to present one of the enumerated documents, it is not altogether clear what a litigant must do to obtain a subpoena from a California court under Section 2029.010. The requirements reportedly differ from court to court and sometimes even from clerk to clerk.³¹ In some instances, a clerk will issue a subpoena on mere presentation of the original or a copy of one of the documents listed in the statute. Other times, a court may require greater formality,

28. See proposed Code Civ. Proc. § 2029.200(e) *infra*.

29. See proposed Code Civ. Proc. §§ 2029.200(b), 2029.300(a) *infra*.

30. *Id.* A true and correct copy of the required document should be sufficient. It would not be appropriate to insist on the original or a certified copy, because the original might not be accessible to the litigant requesting the subpoena nor in the custody of a court or other entity that could provide a certified copy.

31. See sources cited in note 15 *supra*.

such as the filing of a formal petition or civil case cover sheet, or attendance at a hearing.³²

There is also great disparity in the fees California courts charge for issuance of a subpoena to take a deposition in the state for purposes of an out-of-state proceeding. Some courts charge a first appearance fee and at least one court charges multiple first appearance fees if a litigant seeks more than one subpoena. Other courts require more modest fees.³³

The Commission recommends that the procedure for obtaining a California subpoena for purposes of an out-of-state proceeding be clear, simple, and uniform from county to county. Under UIDDA, submission of a subpoena from another jurisdiction³⁴ would be sufficient to compel the clerk

32. Like Section 2029.010, many of the comparable statutes of other states are silent regarding the proper procedural approach. The statutes that do address such details vary in the degree of formality they require. In some states, a judge must issue the subpoena, not the court clerk. See, e.g., Mich. R. Civ. Proc. 2.305(E); Ala. R. Civ. Proc. 28(c); Ky. R. Civ. Proc. 28.03; N.C. R. Civ. Proc. 28(d); Wash. Superior Ct. Civ. R. 45(e)(4). Other states use a less complicated approach. See, e.g., Ariz. R. Civ. Proc. 30(h); Mont. R. Civ. Proc. 28(d); Miss. R. Civ. Proc. 45(a)(2); N.D. R. Civ. Proc. 45(a)(3); Utah R. Civ. Proc. 26(h).

33. Email from Tony Klein to Barbara Gaal (Aug. 2, 2007) (Commission Staff Memorandum 2007-35, Exhibit pp. 1-17); Email from Tony Klein to Barbara Gaal (Sept. 8, 2004) (Commission Staff Memorandum 2005-26, Exhibit pp. 1-3); see also Email from Tony Klein to Barbara Gaal (April 24, 2006) (Second Supplement to Commission Staff Memorandum 2006-7, Exhibit p. 3); Email from Kristen Tsangaris to Barbara Gaal (Dec. 28, 2005) (Commission Staff Memorandum 2006-7, Exhibit p. 9).

The Uniform Civil Fees and Standard Fee Schedule Act of 2005 does not expressly address what fee to charge in this situation. See 2005 Cal. Stat. ch. 75.

34. UIDDA only applies with respect to litigation pending in another “State,” which is defined as “a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, [a federally recognized Indian tribe], or any territory or insular possession subject to the jurisdiction of the United States.” UIDDA § 2(4) (brackets in original.) In contrast, the recommended legislation would also apply to litigation pending in a foreign nation. See proposed Code Civ. Proc. § 2029.200 & Comment *infra*.

In this respect, the recommended legislation is similar to existing Section 2029.010, which expressly applies to a “mandate, writ, letters rogatory, letter of

of a court to issue a subpoena with the same terms under the authority of that court.³⁵ UIDDA does not specify a fee for the service, but contemplates that there will be one.³⁶ UIDDA also recognizes that it might be helpful to provide a short transmittal letter along with the out-of-state subpoena, which would advise the clerk that a local subpoena is being sought and cite the state statute authorizing issuance of such a subpoena.³⁷

The Commission recommends a similar but not identical approach. To obtain a subpoena from a California court compelling discovery for an out-of-state case, a party would have to: (1) submit the original or a true and correct copy of a subpoena from the jurisdiction where the case is pending,³⁸ (2) pay a fee of \$20 per subpoena, which is comparable to the fee for issuing a commission to take an out-of-state deposition,³⁹ and (3) submit an application on a form prescribed by the Judicial Council.⁴⁰ The proper court for submitting the application would be the superior court of the county in which the discovery is to be taken.⁴¹

request, or commission ... issued out of any court of record ... in a foreign nation ...” The predecessors of Section 2029.010 also applied to discovery for an action in a foreign nation, as did UFDA, upon which many state statutes are modeled. See former Code Civ. Proc. §§ 2023 (1959 Cal. Stat. ch. 1590, § 5), 2029 (1986 Cal. Stat. ch. 1334, § 2); *supra* note 12. If the recommended legislation did not address litigation pending in a foreign nation, California courts would have no guidance on how to handle a discovery request relating to such litigation.

35. UIDDA § 3.

36. UIDDA § 3 comment.

37. *Id.*

38. See proposed Code Civ. Proc. § 2029.300 *infra*.

39. See proposed amendment to Gov’t Code § 70626 *infra*.

40. See proposed Code Civ. Proc. §§ 2029.300, 2029.390 *infra*.

41. See proposed Code Civ. Proc. §§ 2029.300 *infra*. See also Code Civ. Proc. § 1986.

The content of the application form would be left to the Judicial Council to develop, perhaps drawing on requirements stated in some of the more detailed statutes from other states.⁴² The intent is to prevent confusion, ensure that court clerks receive all necessary information, and draw attention to applicable requirements for taking the requested discovery in California.⁴³ This would streamline the process for litigants, court clerks, process servers, attorneys, and other affected parties.

To further streamline the process, the proposed law would also direct the Judicial Council to prepare one or more subpoena forms that include clear instructions for use in issuance of a subpoena for discovery in an out-of-state proceeding.⁴⁴ The Judicial Council would have the option of either creating new forms or modifying existing forms to

42. See, e.g., Ariz. R. Civ. Proc. 30(h); Me. R. Civ. Proc. 30(h).

43. These objectives might be achieved by a simple form that would:

- Include a space at the top for indicating the caption and case number of the out-of-state case.
- Include another space for indicating the name of the court in which the application is filed.
- State that the applicant is requesting issuance of a subpoena pursuant to Code of Civil Procedure Sections 2029.100-2029.900.
- Require the applicant to attach a copy of the document from the out-of-state court requesting discovery.
- Require a declaration under penalty of perjury that the attached document is a true and correct copy of what it purports to be.
- Make clear that any document from an out-of-state court requiring discovery is sufficient, even if the document is not labeled as a subpoena.
- Require the applicant to attach a California subpoena that is ready for the court to issue with identical terms as the out-of-state document.
- Perhaps also alert the applicant to requirements such as the necessary fee, California rules governing service of process, and applicable witness fees.

44. See proposed Code Civ. Proc. § 2029.390 *infra*.

meet this requirement.⁴⁵ To ensure that the deponent has key information to seek protection if needed, the subpoena would have to bear the caption and case number of the out-of-state case to which it relates, as well as the name of the superior court that authorized the discovery and has jurisdiction in the event of a problem.

Retention of Local Counsel

Section 2029.010 does not say whether it is necessary for a party to retain local counsel to be able to depose a witness in California for a proceeding pending in another jurisdiction. But there is other guidance on that point.

By statute, a person may not practice law in California unless the person is an active member of the State Bar.⁴⁶ A recently adopted rule of court makes clear, however, that

45. In many respects, the existing subpoena forms are already suitable for use when a person seeks to depose a California witness for purposes of an out-of-state proceeding. But portions of those forms are not. For instance, it is unclear what caption and case number to include, and some of the statutory references in some of the forms are plainly inapplicable to a deposition for purposes of an out-of-state proceeding (e.g., the form Deposition Subpoena for Personal Appearance includes a box for indicating that “This videotape deposition is intended for possible use at trial under Code of Civil Procedure section 2025.620(d).”) Although the necessary adjustments may be minor, it would be beneficial to have the Judicial Council review the subpoena forms with out-of-state litigation in mind.

In particular, it may be useful to include a reference to the statute governing discovery for an out-of-state case. The Council should also strive to ensure that a subpoena recipient is not required to incur substantial expense obtaining information that could be cheaply and readily provided as a routine matter. For example, a subpoena recipient is likely to wonder why the subpoena has been issued. The answer to that question might be clear if a copy of the subpoena application or other documentation (e.g., the foreign subpoena, any document that accompanied the subpoena application, or any document that was filed in the foreign jurisdiction to justify issuance of the foreign subpoena) was attached to the subpoena. Absent such documentation, the recipient might pay an attorney to figure out why the subpoena was issued.

46. Bus. & Prof. Code § 6125.

under specified conditions it is permissible for an attorney duly licensed to practice in another state to perform litigation tasks in California on a temporary basis for a proceeding pending in another jurisdiction.⁴⁷

The drafters of this rule specifically considered the situation in which an out-of-state attorney deposes a witness in California for purposes of an out-of-state proceeding.⁴⁸ Thus, if a party is represented by an out-of-state attorney in an out-of-state proceeding under the conditions specified in the rule, the party does not have to retain local counsel to be able to depose a witness in California. Further, if a party is self-represented in an out-of-state proceeding, the party does not have to retain local counsel to be able to depose a witness in California.⁴⁹ Local counsel may be needed, however, if a discovery dispute arises in a deposition for an out-of-state proceeding and it is necessary to appear in a California court to resolve the dispute.

Because these matters are already governed by other California law, it might not be necessary to address them in

47. Cal. R. Ct. 9.47. An attorney who temporarily practices law in California pursuant to this rule thereby submits to the jurisdiction of the State Bar and the state courts to the same extent as a member of the State Bar. The attorney is also subject to the laws of the State of California relating to the practice of law, the State Bar Rules of Professional Conduct, the rules and regulations of the State Bar, and the California Rules of Court. *Id.*

For a case holding that Business and Professions Code Section 6125 did not apply to legal services provided in California by out-of-state counsel to a non-California resident, see *Estate of Condon*, 65 Cal. App. 4th 1138, 76 Cal. Rptr. 2d 922 (1998).

48. California Supreme Court Advisory Task Force on Multijurisdictional Practice, Final Report and Recommendations, at 24 (Jan. 7, 2002).

49. See *Birbrower v. Superior Court*, 17 Cal. 4th 119, 127, 949 P.2d 1, 70 Cal. Rptr. 2d 304 (1998) (“[A]lthough persons may represent themselves and their own interests regardless of State Bar membership, no one but an active member of the State Bar may practice law for another person in California.”).

this proposal.⁵⁰ But UIDDA includes a sentence stating that a “request for the issuance of a subpoena under this act does not constitute an appearance in the courts of this state.”⁵¹ This sentence was included at the request of NCCUSL delegates from other states, in which there might not be as much guidance on authorized practice of law as there is in California. The sentence is included in the recommended legislation,⁵² because omitting it might trigger concerns that the rule is different in California.

Issuance of a Subpoena By Counsel

For an action pending in California, an attorney of record may issue a subpoena instead of having to obtain a subpoena from the court.⁵³ Section 2029.010 does not specify, however, whether an attorney may issue a subpoena to depose a witness in California for a proceeding pending in another jurisdiction.

The Commission proposes to add a new provision that would make clear that an active member of the California Bar retained to represent a party in an out-of-state proceeding may issue a deposition subpoena pursuant to the statute for purposes of that proceeding.⁵⁴ The proposed law would not extend that privilege to an out-of-state attorney. It seems reasonable to require the involvement of either a California court or a California attorney to issue process under the authority of the State of California.⁵⁵

50. To assist persons involved in discovery for an out-of-state case, the relevant authorities would be referenced in the Comments to proposed Code of Civil Procedure Sections 2029.300 and 2029.350 *infra*.

51. UIDDA § 3.

52. See proposed Code Civ. Proc. § 2029.300 *infra*.

53. Code Civ. Proc. § 1985(c).

54. See proposed Code Civ. Proc. § 2029.350 *infra*.

55. Contrary to the proposed approach, Iowa seems to permit an out-of-state attorney to issue a subpoena under Iowa authority that is directed to a witness

Discovery Dispute

If a dispute arises regarding discovery conducted in California for a proceeding pending elsewhere, it may be necessary for the deponent, a party, or other interested person to seek relief in court. Section 2029.010 does not provide guidance on the proper procedure to follow in that situation.

The proposed law would eliminate this ambiguity. If a dispute arises, the proposed law would permit filing of a request for relief in the superior court of the county in which discovery is to be conducted.⁵⁶ Such a request would have to comply with California law. That requirement, coupled with the constraints of personal jurisdiction,⁵⁷ would further the state's interest in protecting its residents from unreasonable or unduly burdensome discovery requests.⁵⁸

within the state. See Iowa Code Ann. § 622.84(1). That appears to be an unusual position.

56. See proposed Code Civ. Proc. § 2029.600(a) *infra*. A request for relief pursuant to this section would be denominated a “petition,” not a “motion,” because there would not be a pending California case in which to file a “motion.”

For example, suppose a party to an out-of-state proceeding subpoenas personal records of a nonparty consumer under Code of Civil Procedure Section 1985.3 and the nonparty consumer serves a written objection to production as authorized by the statute. To obtain production, the subpoenaing party would have to file a “petition” to enforce the subpoena, not a “motion” as Section 1985.3(g) prescribes for a case pending in California. See proposed Code Civ. Proc. § 2029.600(b) *infra*.

57. The out-of-state court might be unable to effectively resolve a dispute because it lacks personal jurisdiction over the deponent, a consumer whose records are requested, or other person involved in the dispute. See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

58. UIDDA appears to take essentially the same approach. The pertinent text seems to mandate that any request for relief be filed in California. See UIDDA § 6. But the corresponding Comment makes clear that in some circumstances relief may be sought in the out-of-state forum. See *id*.

Upon seeking relief in a California court, the petitioner would have to pay a first appearance fee,⁵⁹ as would each person who responds to the petition.⁶⁰ The amount of these first appearance fees would be \$320, the same as the corresponding first appearance fees for an unlimited civil case pending in a California court.⁶¹ This fee amount is appropriate because resolving the dispute might involve difficult choice-of-law issues or other complications arising because the discovery in question is being conducted for an out-of-state case, not a California case. Additionally, although the matter consists of a discovery dispute rather than an entire case, it may require at least as much effort for the court to resolve as many cases that are filed in California.⁶²

A special rule would apply to a person who is not a party to the out-of-state case. If such a person were the petitioner, the fee for filing the petition would be \$40, the same as for a discovery motion in a California case.⁶³ If such a person were

59. See proposed Code Civ. Proc. § 2029.610(a) *infra*.

60. See proposed Code Civ. Proc. § 2029.610(c) *infra*.

61. See proposed Code Civ. Proc. § 2029.610(a), (c) *infra*; Gov't Code §§ 70611, 70612.

The Commission considered the possibility of varying the amount charged depending on the nature of the out-of-state case. For example, if the out-of-state case were comparable to a limited civil case, the fee would be the same as the first appearance fee for a limited civil case; if the out-of-state case were comparable to an unlimited civil case, the fee would be the same as the first appearance fee for an unlimited civil case. The Commission rejected this approach because there might be disputes over whether an out-of-state case is comparable to a particular type of California proceeding and because it would be difficult for a court clerk to make such determinations.

62. Frequently, the only action in a California case will be the filing of pleadings and perhaps taking of some discovery, followed by settlement. Nonetheless, each party must pay a first appearance fee, even though the case consumes few judicial resources. Resolving a dispute regarding discovery for an out-of-state case may actually be more burdensome on a California court than a typical California case.

63. See proposed Code Civ. Proc. § 2029.610(a) *infra*.

responding to a petition, there would be no fee for filing the response.⁶⁴ This would parallel the treatment of a nonparty in a California case.⁶⁵

To ensure that all documents relating to the same out-of-state case are filed together (including the subpoena application, subpoena, and documents relating to any subsequent discovery dispute), the petition and any response to it would have to bear the caption and case number of the out-of-state case.⁶⁶ To ensure that all persons involved in a dispute know which California court is handling the dispute, the first page of the petition or any response would also have to include the name of the court in which the document is filed.⁶⁷ In addition, the proposed law would require the superior court to assign a California case number.⁶⁸

Further, the proposed law would clarify the briefing schedule and notice requirements that apply to a petition for relief pertaining to discovery in an out-of-state case. Those matters would be governed by Code of Civil Procedure Section 1005, the same as for a discovery motion in a case pending within the state.⁶⁹

Subsequent Discovery Dispute in Same Case and County

On occasion, more than one discovery dispute relating to a particular out-of-state case might arise in the same county. In some instances, both disputes might involve the same disputants in the same roles (petitioner or respondent). Other

64. See proposed Code Civ. Proc. § 2029.610(c) *infra*.

65. Only a party or an intervenor must pay a first appearance fee in a California case. See, e.g., Gov't Code §§ 70611, 70612.

66. See proposed Code Civ. Proc. § 2029.610(d) *infra*.

67. *Id.*

68. See proposed Code Civ. Proc. § 2029.610(b) *infra*.

69. See proposed Code Civ. Proc. § 2029.630 *infra*.

times, there might be little or no overlap between the first dispute and a subsequent dispute: the disputants might be different⁷⁰ or their roles might be reversed.⁷¹

Regardless of which situation occurs, the superior court should be aware of all previous actions it has taken with regard to the out-of-state case. This is necessary to promote efficiency and fairness and to minimize inconsistent results.

By requiring use of the out-of-state caption and case number on all documents relating to an out-of-state case, the recommended legislation would facilitate that objective.⁷² To further ensure that all documents relating to the same out-of-state case are filed together, the first page of any subsequent petition would have to include the same California case number that the court assigned to the first petition filed in connection with the out-of-state case.⁷³

The proposed legislation would also make clear what fee applies when multiple discovery disputes relating to the same out-of-state case arise in the same county. If a disputant is a party to the out-of-state case and has not previously paid a first appearance fee, the disputant would have to pay such a

70. For example, the first dispute might be between the plaintiff in an out-of-state case and a California deponent who refuses to produce a particular document; the second dispute might be between a defendant in the out-of-state case and a different deponent.

71. For example, a deponent might seek a protective order with regard to a particular document requested by the plaintiff in the out-of-state case; later, the plaintiff might move to compel the same deponent to answer a particular question at the deposition.

72. See proposed Code Civ. Proc. §§ 2029.300(d)(3), 2029.350(b)(3), 2029.610(d)(1), 2029.620(e)(1) *infra*. If the caption on a petition were based on the names and roles of the disputants instead, documents relating to the same out-of-state case might be placed in different files, causing confusion or other adverse consequences.

73. See proposed Code Civ. Proc. § 2029.620(e)(3) *infra*.

fee.⁷⁴ If a disputant is not a party to the out-of-state case, or has previously paid a first appearance fee, the disputant would only have to pay \$40 for filing a petition and would not have to pay anything for filing a response.⁷⁵ To assist in determination of the appropriate fees, the first page of a subsequent petition would have to clearly indicate that it is not the first petition filed in the county pertaining to the out-of-state case.⁷⁶

Subsequent Discovery Dispute in Another County

At times, two or more discovery disputes relating to the same out-of-state case might arise in different counties. In that situation, the recommended legislation would require that each petition for relief be filed in the superior court of the county in which the discovery in question is being conducted.⁷⁷ This approach is necessary to avoid forcing a California witness to appear in a court far away from where the witness resides.

In appropriate circumstances, a petition could be transferred and consolidated with a petition pending in another county.⁷⁸ In determining whether to order a transfer, a court should consider factors such as convenience of the deponent and similarity of issues.

Deposition on Notice or Agreement

Section 2029.010 expressly applies “whenever, on notice or agreement, it is required to take the oral or written deposition

74. See proposed Code Civ. Proc. § 2029.620(c), (d) *infra*.

75. *Id.*

76. See proposed Code Civ. Proc. § 2029.620(b) & Comment *infra*. See also Code Civ. Proc. § 1991.

77. See proposed Code Civ. Proc. § 2029.600(a) *infra*.

78. See Code Civ. Proc. §§ 403 (transfer), 1048(a) (consolidation); see also Gov’t Code § 70618 (transfer fees).

of a natural person in California....”⁷⁹ If a deposition is required on notice or agreement, the deposing party may see no need to subpoena the witness under the statute because the witness is already obligated to attend the deposition.⁸⁰ The statute does not make clear, however, whether issuance of a California subpoena is a prerequisite to invoking the enforcement power of a California court in the event of a discovery dispute.

It should be possible for the deponent or party to resort to the California court regardless of whether the deposition is being taken pursuant to a California subpoena. The opposite approach — requiring a California subpoena to enforce discovery rights and obligations relating to a deposition on notice or agreement taken in California for an out-of-state case — would entail needless paperwork, expense, and expenditure of judicial and litigant resources in the many instances in which no discovery dispute occurs. The recommended legislation would thus make clear that if a party to an out-of-state case deposes a witness in this state by properly issued notice or by agreement, the deponent or any party may seek relief in a California court regardless of whether the deposing party obtained a subpoena from a California court.⁸¹

Review of Superior Court Decision in Discovery Dispute

A further issue is how to obtain appellate review of a superior court decision resolving a dispute relating to discovery for an out-of-state case. The recommended legislation would permit a party or deponent aggrieved by a

79. UFDA and many statutes modeled on UFDA also encompass a deposition on notice or agreement. See sources cited in note 12 *supra*.

80. A witness who can be deposed on notice generally will be a party deponent and thus will be subject to the jurisdiction of the out-of-state tribunal.

81. See proposed Code Civ. Proc. § 2029.640 *infra*.

decision to seek an extraordinary writ in the appropriate court of appeal.⁸² Review by way of writ is proper because the decision would be equivalent to a pretrial ruling on a discovery issue, not a final judgment. The court of appeal is the appropriate tribunal because the superior court proceeding would be treated like an unlimited civil case, due to the potential complexity of the issues.⁸³

Effect of the Proposed Reforms

The procedure for obtaining discovery from a California resident for use in out-of-state litigation should be clear and simple, while still protecting the interests of the public generally and the deponent in particular. The reforms recommended by the Commission would help to achieve justice, prevent confusion, and make such discovery more workable for all concerned. If UIDDA is adopted in other jurisdictions as well as in California, the state will also reap the benefits of uniformity.

82. See proposed Code Civ. Proc. § 2029.650 *infra*.

Under existing law, a California court may review a decision regarding discovery for an out-of-state case by an interlocutory appeal or by an extraordinary writ. See *H.B. Fuller Co. v. Doe*, 151 Cal. App. 4th 879, 885-86, 60 Cal. Rptr. 3d 501 (2007); *Warford v. Medeiros*, 160 Cal. App. 3d 1035, 1040, 207 Cal. Rptr. 94 (1984). The Commission considers the appeal process inappropriate in this context due to the delay inherent in that process.

83. See discussion of “Discovery Dispute” *supra*.

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PROPOSED LEGISLATION

Heading of Chapter 12 (commencing with Section 2029.010) (amended)

SECTION 1. The heading of Chapter 12 (commencing with Section 2029.010) of Title 4 of Part 4 of the Code of Civil Procedure is amended to read:

CHAPTER 12. ~~DEPOSITION~~ *DISCOVERY* IN ACTION PENDING OUTSIDE CALIFORNIA

Comment. To improve clarity, the heading of Chapter 12 is amended to replace the reference to “Deposition” with a reference to “Discovery.” This change helps to emphasize that the chapter applies not only to an oral deposition, but also to other forms of discovery. For example, the chapter applies to a deposition solely for the production of business records (see Sections 2020.010(a)(3), 2020.410-2020.440), yet in some jurisdictions such a procedure might not be referred to as a “deposition.”

Code Civ. Proc. § 2029.010 (repealed). Deposition in action pending outside California

SEC. 2. Section 2029.010 of the Code of Civil Procedure is repealed.

~~2029.010. Whenever any mandate, writ, letters rogatory, letter of request, or commission is issued out of any court of record in any other state, territory, or district of the United States, or in a foreign nation, or whenever, on notice or agreement, it is required to take the oral or written deposition of a natural person in California, the deponent may be compelled to appear and testify, and to produce documents and things, in the same manner, and by the same process as may be employed for the purpose of taking testimony in actions pending in California.~~

Comment. Former Section 2029.010 is superseded by enactment of the Interstate and International Depositions and Discovery Act (Sections 2029.100-2029.900).

Code Civ. Proc. §§ 2029.100-2029.900 (added). Interstate and International Depositions and Discovery Act

SEC. 3. Article 1 (commencing with Section 2029.100) is added to Chapter 12 of Title 4 of Part 4 of the Code of Civil Procedure, to read:

**Article 1. Interstate and International
Depositions and Discovery Act**

§ 2029.100. Short title [UIDDA § 1]

2029.100. This article may be cited as the Interstate and International Depositions and Discovery Act.

Comment. Section 2029.100 is similar to Section 1 of the Uniform Interstate Depositions and Discovery Act (2007) (“UIDDA”). This article differs in two significant respects from UIDDA: (1) it addresses procedural details not addressed in UIDDA (see Sections 2029.300, 2029.350, 2029.390, 2029.600, 2029.610, 2029.620, 2029.630, 2029.640, 2029.650), and (2) it governs discovery for purposes of an action pending in a foreign nation, not just discovery for purposes of an action pending in another jurisdiction of the United States (see Section 2029.200(a)(2) & Comment).

The entire article may be referred to as the “Interstate and International Depositions and Discovery Act.” The portions of the article that are drawn from the Uniform Interstate Depositions and Discovery Act may collectively be referred to as the “California version of the Uniform Interstate Depositions and Discovery Act.” See Section 2029.700 (uniformity of application and construction).

§ 2029.200. Definitions [UIDDA § 2]

2029.200. In this article:

(a) “Foreign jurisdiction” means either of the following:

- (1) A state other than this state.
- (2) A foreign nation.

(b) “Foreign subpoena” means a subpoena issued under authority of a court of record of a foreign jurisdiction.

(c) “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company,

association, joint venture, public corporation, government, or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(d) “State” means a state of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States.

(e) “Subpoena” means a document, however denominated, issued under authority of a court of record requiring a person to do any of the following:

(1) Attend and give testimony at a deposition.

(2) Produce and permit inspection and copying of designated books, documents, records, electronically stored information, or tangible things in the possession, custody, or control of the person.

(3) Permit inspection of premises under the control of the person.

Comment. Section 2029.200 is the same as Section 2 of the Uniform Interstate Depositions and Discovery Act (2007), except that (1) the definition of “foreign jurisdiction” in subdivision (a) includes a foreign nation, not just a state other than California, and (2) the term “Virgin Islands” is substituted for “United States Virgin Islands” in subdivision (d), because “Virgin Islands” is the official name for the entity in question.

Subdivision (c) defines “person” broadly. This is consistent with the general code-wide definition in Section 17 (“the word ‘person’ includes a corporation as well as a natural person”). For guidance on interpreting other provisions of this code referring to a “person,” see *Hassan v. Mercy American River Hospital*, 31 Cal. 4th 709, 715-18, 74 P.3d 726, 3 Cal. Rptr. 3d 623 (2003) (whether “person” as used in particular section of Code of Civil Procedure includes corporation or non-corporate entity “is ultimately a question of legislative intent”); *Diamond View Limited v. Herz*, 180 Cal. App. 3d 612, 616-19, 225 Cal. Rptr. 651 (1986) (“[T]he preliminary definition contained in section 17 is superseded when it obviously conflicts with the Legislature’s subsequent use of the term in a different statute.”); *Oil Workers Int’l Union v. Superior Court*, 103 Cal. App. 2d 512, 570-71, 230 P.2d 71 (1951) (unincorporated association is “person” for purpose of statutes in Code of Civil Procedure governing

contempt).

To facilitate discovery under this article, subdivision (e) defines “subpoena” broadly. The term includes not only a document denominated a “subpoena,” but also a mandate, writ, letters rogatory, letter of request, commission, or other court document that requires a person to testify at a deposition, produce documents or other items, or permit inspection of property.

Background from Uniform Act

The term “Subpoena” includes a subpoena duces tecum. The description of a subpoena in the Act is based on the language of Rule 45 of the Federal Rules of Civil Procedure.

The term “Subpoena” does not include a subpoena for the inspection of a person (subdivision (e)(3) is limited to inspection of premises). Medical examinations in a personal injury case, for example, are separately controlled by state discovery rules (the corresponding federal rule is Rule 35 of the Federal Rules of Civil Procedure). Since the plaintiff is already subject to the jurisdiction of the trial state, a subpoena is never necessary.

The term “Court of Record” was chosen to exclude non-court of record proceedings from the ambit of the Act. Extending the Act to such proceedings as arbitrations would be a significant expansion that might generate resistance to the Act. A “Court of Record” includes anyone who is authorized to issue a subpoena under the laws of that state, which usually includes an attorney of record for a party in the proceeding.

[Adapted from UIDDA § 2 comment & § 3 comment.]

§ 2029.300. Issuance of subpoena by clerk of court [UIDDA § 3]

2029.300. (a) To request issuance of a subpoena under this section, a party shall submit the original or a true and correct copy of a foreign subpoena to the clerk of the superior court in the county in which discovery is sought to be conducted in this state. A request for the issuance of a subpoena under this section does not constitute making an appearance in the courts of this state.

(b) In addition to submitting a foreign subpoena under subdivision (a), a party seeking discovery shall do both of the following:

(1) Submit an application requesting that the superior court issue a subpoena with the same terms as the foreign

subpoena. The application shall be on a form prescribed by the Judicial Council pursuant to Section 2029.390. No civil case cover sheet is required.

(2) Pay the fee specified in Section 70626 of the Government Code.

(c) When a party submits a foreign subpoena to the clerk of the superior court in accordance with subdivision (a), and satisfies the requirements of subdivision (b), the clerk shall promptly issue a subpoena for service upon the person to which the foreign subpoena is directed.

(d) A subpoena issued under this section shall satisfy all of the following conditions:

(1) It shall incorporate the terms used in the foreign subpoena.

(2) It shall contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

(3) It shall bear the caption and case number of the out-of-state case to which it relates.

(4) It shall state the name of the court that issues it.

(5) It shall be on a form prescribed by the Judicial Council pursuant to Section 2029.390.

Comment. Section 2029.300 is added to clarify the procedure for obtaining a California subpoena to obtain discovery from a witness in this state for use in a proceeding pending in another jurisdiction. For the benefit of the party seeking the subpoena and the court issuing it, the procedure is designed to be simple and expeditious.

Subdivisions (a), (c), and (d)(1)-(2) are similar to Section 3 of the Uniform Interstate Depositions and Discovery Act (2007). Subdivisions (b) and (d)(3)-(5) address additional procedural details.

To obtain a subpoena under this section, a party must submit the original or a true and correct copy of a “foreign subpoena.” For definitions of “foreign subpoena” and “subpoena,” see Section 2029.200 (definitions). The definition of “subpoena” is broad, encompassing not only a document denominated a “subpoena,” but also a mandate, writ, letters rogatory, letter of request, commission, or other court document

that requires a person to testify at a deposition, produce documents or other items, or permit inspection of property.

Subdivision (a) makes clear that requesting and obtaining a subpoena under this section does not constitute making an appearance in the California courts. For further guidance on avoiding unauthorized practice of law, see Bus. & Prof. Code § 6125; Cal. R. Ct. 9.40, 9.47; Report of the California Supreme Court Multijurisdictional Practice Implementation Committee: Final Report and Proposed Rules (March 10, 2004); California Supreme Court Advisory Task Force on Multijurisdictional Practice, Final Report and Recommendations (Jan. 7, 2002). In general, a party to out-of-state litigation may take a deposition in California without retaining local counsel if the party is self-represented or represented by an attorney duly admitted to practice in another jurisdiction of the United States. *Birbrower v. Superior Court*, 17 Cal. 4th 119, 127, 949 P.2d 1, 70 Cal. Rptr. 2d 304 (1998) (“[P]ersons may represent themselves and their own interests regardless of State Bar membership...”); Cal. R. Ct. 9.47; Final Report and Recommendations, *supra*, at 24. Different considerations may apply, however, if a discovery dispute arises in connection with such a deposition and a party to out-of-state litigation wants to appear in a California court with respect to the dispute.

See also Sections 2029.350 (issuance of subpoena by local counsel), 2029.640 (discovery on notice or agreement).

Background from Uniform Act

The term “Submitted” to a clerk of court includes delivering to or filing. Presenting a subpoena to the clerk of court in the discovery state, so that a subpoena is then issued in the name of the discovery state, is the necessary act that invokes the jurisdiction of the discovery state, which in turn makes the newly issued subpoena both enforceable and challengeable in the discovery state.

The committee envisions the standard procedure under this section will become as follows, using as an example a case filed in Kansas (the trial state) where the witness to be deposed lives in California (the discovery state): A lawyer of record for a party in the action pending in Kansas will issue a subpoena in Kansas (the same way lawyers in Kansas routinely issue subpoenas in pending actions). That lawyer will then check with the clerk’s office, in the California county in which the witness to be deposed lives, to obtain a copy of its subpoena form (the clerk’s office will usually have a Web page explaining its forms and procedures). The lawyer will then prepare a California subpoena so that it has the same terms as the Kansas subpoena. The lawyer will then hire a process server (or local counsel) in California, who will take the completed and executed Kansas subpoena and the completed but not yet

executed California subpoena to the clerk's office in California. The clerk of court, upon being given the Kansas subpoena, will then issue the identical California subpoena. The process server (or other agent of the party) will pay any necessary filing fees, and then serve the California subpoena on the deponent in accordance with California law (which includes any applicable local rules).

The advantages of this process are readily apparent. The act of the clerk of court is ministerial, yet is sufficient to invoke the jurisdiction of the discovery state over the deponent. The only documents that need to be presented to the clerk of court in the discovery state are the subpoena issued in the trial state and the draft subpoena of the discovery state. [Note: In California, an application form would also be required.] There is no need to hire local counsel to have the subpoena issued in the discovery state, and there is no need to present the matter to a judge in the discovery state before the subpoena can be issued. In effect, the clerk of court in the discovery state simply reissues the subpoena of the trial state, and the new subpoena is then served on the deponent in accordance with the laws of the discovery state. The process is simple and efficient, costs are kept to a minimum, and local counsel and judicial participation are unnecessary to have the subpoena issued and served in the discovery state.

The Act will not change or repeal the law in those states that still require a commission or letters rogatory to take a deposition in a foreign jurisdiction. The Act does, however, repeal the law in those discovery states that still require a commission or letter rogatory from a trial state before a deposition can be taken in those states. It is the hope of the Conference that this Act will encourage states that still require the use of commissions or letters rogatory to repeal those laws.

The Act requires that, when the subpoena is served, it contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record and of any party not represented by counsel. The committee believes that this requirement imposes no significant burden on the lawyer issuing the subpoena, given that the lawyer already has the obligation to send a notice of deposition to every counsel of record and any unrepresented parties. The benefits in the discovery state, by contrast, are significant. This requirement makes it easy for the deponent (or, as will frequently be the case, the deponent's lawyer) to learn the names of and contact the other lawyers in the case. This requirement can easily be met, since the subpoena will contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record and of

any party not represented by counsel (which is the same information that will ordinarily be contained on a notice of deposition and proof of service).

[Adapted from UIDDA § 3 comment.]

§ 2029.350. Issuance of subpoena by local counsel

2029.350. (a) Notwithstanding Sections 1986 and 2029.300, if a party to a proceeding pending in a foreign jurisdiction retains an attorney licensed to practice in this state, who is an active member of the State Bar, and that attorney receives the original or a true and correct copy of a foreign subpoena, the attorney may issue a subpoena under this article.

(b) A subpoena issued under this section shall satisfy all of the following conditions:

(1) It shall incorporate the terms used in the foreign subpoena.

(2) It shall contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

(3) It shall bear the caption and case number of the out-of-state case to which it relates.

(4) It shall state the name of the superior court of the county in which the discovery is to be conducted.

(5) It shall be on a form prescribed by the Judicial Council pursuant to Section 2029.390.

Comment. Section 2029.350 is added to make clear that if certain conditions are satisfied, local counsel may issue process compelling a California witness to appear at a deposition for an action pending in another jurisdiction.

To issue a subpoena under this section, a California attorney acting as local counsel must receive the original or a true and correct copy of a “foreign subpoena.” For definitions of “foreign subpoena” and “subpoena,” see Section 2029.200 (definitions). The definition of “subpoena” is broad, encompassing not only a document denominated a “subpoena,” but also a mandate, writ, letters rogatory, letter of request,

commission, or other court document that requires a person to testify at a deposition, produce documents or other items, or permit inspection of property.

This section does not make retention of local counsel mandatory. For guidance on that point, see Section 2029.300(a); Bus. & Prof. Code § 6125; Cal. R. Ct. 9.40, 9.47; Report of the California Supreme Court Multijurisdictional Practice Implementation Committee: Final Report and Proposed Rules (March 10, 2004); California Supreme Court Advisory Task Force on Multijurisdictional Practice, Final Report and Recommendations (Jan. 7, 2002). In general, a party to out-of-state litigation may take a deposition in California without retaining local counsel if the party is self-represented or represented by an attorney duly admitted to practice in another jurisdiction of the United States. *Birbrower v. Superior Court*, 17 Cal. 4th 119, 127, 949 P.2d 1, 70 Cal. Rptr. 2d 304 (1998) (“[P]ersons may represent themselves and their own interests regardless of State Bar membership...”); Cal. R. Ct. 9.47; Final Report and Recommendations, *supra*, at 24. Different considerations may apply, however, if a discovery dispute arises in connection with such a deposition and a party to out-of-state litigation wants to appear in a California court with respect to the dispute.

See also Sections 2029.300 (issuance of subpoena by clerk of court), 2029.640 (discovery on notice or agreement).

§ 2029.390. Judicial Council forms

2029.390. On or before January 1, 2010, the Judicial Council shall do all of the following:

(a) Prepare an application form to be used for purposes of Section 2029.300.

(b) Prepare one or more new subpoena forms that include clear instructions for use in issuance of a subpoena under Section 2029.300 or 2029.350. Alternatively, the Judicial Council may modify one or more existing subpoena forms to include clear instructions for use in issuance of a subpoena under Section 2029.300 or 2029.350.

Comment. Section 2029.390 is new. The Judicial Council is to prepare forms to facilitate compliance with this article.

§ 2029.400. Service of subpoena [UIDDA § 4]

2029.400. A subpoena issued under this article shall be

personally served in compliance with the law of this state, including, without limitation, Section 1985.

Comment. Section 2029.400 is similar to Section 4 of the Uniform Interstate Depositions and Discovery Act (2007). Section 2029.400 applies not only to a subpoena issued by a clerk of court under Section 2029.300, but also to a subpoena issued by local counsel under Section 2029.350.

§ 2029.500. Deposition, production, and inspection [UIDDA § 5]

2029.500. Titles 3 (commencing with Section 1985) and 4 (commencing with Section 2016.010) of Part 4, and any other law or court rule of this state governing the time, place, or manner of a deposition, a production of documents or other tangible items, or an inspection of premises, apply to discovery under this article.

Comment. Section 2029.500 is similar to Section 5 of the Uniform Interstate Depositions and Discovery Act (2007). Section 2029.500 applies not only to a subpoena issued by a clerk of court under Section 2029.300, but also to a subpoena issued by local counsel under Section 2029.350 and to discovery taken in this state pursuant to properly issued notice or by agreement.

Background from Uniform Act

The Act requires that the discovery permitted by this section must comply with the laws of the discovery state. The discovery state has a significant interest in these cases in protecting its residents who become non-party witnesses in an action pending in a foreign jurisdiction from any unreasonable or unduly burdensome discovery request. Therefore, the committee believes that the discovery procedure must be the same as it would be if the case had originally been filed in the discovery state.

[Adapted from UIDDA § 5 comment.]

§ 2029.600. Discovery dispute [UIDDA § 6]

2029.600. (a) If a dispute arises relating to discovery under this article, any request for a protective order or to enforce, quash, or modify a subpoena, or for other relief may be filed in the superior court in the county in which discovery is to be conducted and, if so filed, shall comply with the applicable rules or statutes of this state.

(b) A request for relief pursuant to this section shall be referred to as a petition notwithstanding any statute under which a request for the same relief would be referred to as a motion or by another term if it was brought in a proceeding pending in this state.

(c) A petition for relief pursuant to this section shall be accompanied by a civil case cover sheet.

Comment. Section 2029.600 is similar to Section 6 of the Uniform Interstate Depositions and Discovery Act (2007). It serves to clarify the procedure for using a California court to resolve a dispute relating to discovery conducted in this state for purposes of a proceeding pending in another jurisdiction.

The objective of subdivision (a) is to ensure that if a dispute arises relating to discovery under this article, California is able to protect its policy interests and the interests of persons located in the state. In particular, the state must be able to protect its residents from unreasonable or unduly burdensome discovery requests. A court should interpret the provision with this objective in mind.

Subdivision (b) makes clear that a request for relief pursuant to this section is properly denominated a “petition,” not a “motion.” For example, suppose a party to an out-of-state proceeding subpoenas personal records of a nonparty consumer under Section 1985.3 and the nonparty consumer serves a written objection to production as authorized by the statute. To obtain production, the subpoenaing party would have to file a “petition” to enforce the subpoena, not a “motion” as Section 1985.3(g) prescribes for a case pending in California.

See also Sections 2029.610 (fees and format of papers relating to discovery dispute), 2029.620 (subsequent discovery dispute in same case and county), 2029.630 (hearing date and briefing schedule), 2029.640 (discovery on notice or agreement), 2029.650 (writ petition).

§ 2029.610. Fees and format of papers relating to discovery dispute

2029.610. (a) On filing a petition under Section 2029.600, a petitioner who is a party to the out-of-state proceeding shall pay a first appearance fee as specified in Section 70611 of the Government Code. A petitioner who is not a party to the out-of-state proceeding shall pay a motion fee as specified in subdivision (a) of Section 70617 of the Government Code.

(b) The court in which the petition is filed shall assign it a

case number.

(c) On responding to a petition under Section 2029.600, a party to the out-of-state proceeding shall pay a first appearance fee as specified in Section 70612 of the Government Code. A person who is not a party to the out-of-state proceeding may file a response without paying a fee.

(d) Any petition, response, or other document filed under this section shall satisfy all of the following conditions:

(1) It shall bear the caption and case number of the out-of-state case to which it relates.

(2) The first page shall state the name of the court in which the document is filed.

(3) The first page shall state the case number assigned by the court under subdivision (b).

Comment. Section 2029.610 is added to clarify procedural details for resolution of a dispute relating to discovery under this article.

See also Sections 2029.600 (discovery dispute), 2029.620 (subsequent discovery dispute in same case and county), 2029.630 (hearing date and briefing schedule), 2029.640 (discovery on notice or agreement), 2029.650 (writ petition).

§ 2029.620. Subsequent discovery dispute in same case and county

2029.620. (a) If a petition has been filed under Section 2029.600 and another dispute later arises relating to discovery being conducted in the same county for purposes of the same out-of-state proceeding, the deponent or other disputant may file a petition for appropriate relief in the same superior court as the previous petition.

(b) The first page of the petition shall clearly indicate that it is not the first petition filed in that court that relates to the out-of-state case.

(c) If the petitioner in the new dispute is not a party to the out-of-state case, or is a party who previously paid a first appearance fee under this article, the petitioner shall pay a motion fee as specified in subdivision (a) of Section 70617 of

the Government Code. If the petitioner in the new dispute is a party to the out-of-state case but has not previously paid a first appearance fee under this article, the petitioner shall pay a first appearance fee as specified in Section 70611 of the Government Code.

(d) If a person responding to the new petition is not a party to the out-of-state case, or is a party who previously paid a first appearance fee under this article, that person does not have to pay a fee for responding. If a person responding to the new petition is a party to the out-of-state case but has not previously paid a first appearance fee under this article, that person shall pay a first appearance fee as specified in Section 70612 of the Government Code.

(e) Any petition, response, or other document filed under this section shall satisfy all of the following conditions:

(1) It shall bear the caption and case number of the out-of-state case to which it relates.

(2) The first page shall state the name of the court in which the document is filed.

(3) The first page shall state the same case number that the court assigned to the first petition relating to the out-of-state case.

(f) A petition for relief pursuant to this section shall be accompanied by a civil case cover sheet.

Comment. Section 2029.620 is added to clarify the procedure that applies when two or more discovery disputes relating to the same out-of-state proceeding arise in the same county. To promote efficiency and fairness and minimize inconsistent results, all documents relating to the same out-of-state case are to be filed together, bearing the same California case number.

In addition, subdivision (b) requires the first page of a subsequent petition to clearly indicate that it is not the first petition filed in the court relating to the out-of-state case. If the petitioner does not know the history of the case, the petitioner has a duty to determine whether a previous petition has been filed. That duty should not be difficult to satisfy, because the petitioner has an obligation to meet and confer with the other disputant before seeking relief in court.

Section 2029.620 does not apply when discovery disputes relate to the same out-of-state case but arise in different counties. In that situation, each petition for relief must be filed in the superior court of the county in which the deposition is being taken. See Section 2029.600. In appropriate circumstances, a petition may be transferred and consolidated with a petition pending in another county. See Sections 403 (transfer), 1048(a) (consolidation); see also Gov't Code § 70618 (transfer fees). In determining whether to order a transfer, a court should consider factors such as convenience of the deponent and similarity of issues.

See also Sections 2029.600 (discovery dispute), 2029.610 (fees and format of papers relating to discovery dispute), 2029.630 (hearing date and briefing schedule), 2029.640 (discovery on notice or agreement), 2029.650 (writ petition).

§ 2029.630. Hearing date and briefing schedule

2029.630. A petition under Section 2029.600 or Section 2029.620 is subject to the requirements of Section 1005 relating to notice and to filing and service of papers.

Comment. Section 2029.630 is added to clarify the proper hearing date and briefing schedule for a petition under Section 2029.600 or 2029.620. The petition is to be treated in the same manner as a discovery motion in a case pending within the state.

§ 2029.640. Discovery on notice or agreement

2029.640. If a party to a proceeding pending in a foreign jurisdiction seeks discovery from a witness in this state by properly issued notice or by agreement, it is not necessary for that party to obtain a subpoena under this article to be able to seek relief under Section 2029.600 or 2029.620. The deponent or any other party may also seek relief under Section 2029.600 or 2029.620 in those circumstances, regardless of whether the deponent was subpoenaed under this article.

Comment. Section 2029.640 is added to clarify how this article applies when a party to a proceeding pending in another jurisdiction seeks discovery from a witness in this state by properly issued notice or by agreement. See also Section 2029.500 (deposition, production, and inspection).

§ 2029.650. Writ petition

2029.650. (a) If a superior court issues an order granting, denying, or otherwise resolving a petition under Section 2029.600 or 2029.620, a person aggrieved by the order may petition the appropriate court of appeal for an extraordinary writ. No order or other action of a court under this article is appealable in this state.

(b) Pending its decision on the writ petition, the court of appeal may stay the order of the superior court, the discovery that is the subject of that order, or both.

Comment. Section 2029.650 is added to clarify the procedure for reviewing a decision of a superior court on a dispute arising in connection with discovery under this article. For further guidance on that procedure, see in particular Cal. R. Ct. 8.264(a)(1) (when relevant, clerk of court of appeal shall promptly send court of appeal's opinion or order to lower court), 8.272(b) (transmittal of remittitur and opinion or order to lower court), 8.490(k) (notice to trial court with regard to writ), 8.490(f)(1) (writ petition shall be served on respondent superior court).

§ 2029.700. Uniformity of application and construction [UIDDA § 7]

2029.700. (a) Sections 2029.100, 2029.200, 2029.300, 2029.400, 2029.500, 2029.600, 2029.800, 2029.900, and this section, collectively, constitute and may be referred to as the "California version of the Uniform Interstate Depositions and Discovery Act."

(b) In applying and construing this uniform act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact it.

Comment. Subdivision (a) of Section 2029.700 provides a convenient means of referring to the sections within this article that are drawn from the Uniform Interstate Depositions and Discovery Act (2007). The entire article may be referred to as the "Interstate and International Depositions and Discovery Act." See Section 2029.100 & Comment.

Subdivision (b) is similar to Section 7 of the Uniform Interstate Depositions and Discovery Act.

§ 2029.800. Application to pending action [UIDDA § 8]

2029.800. This article applies to requests for discovery in cases pending on or after the operative date of this section.

Comment. Section 2029.800 is the same as Section 8 of the Uniform Interstate Depositions and Discovery Act (2007), except “or after” is inserted to improve clarity and “operative date” is substituted for “effective date.”

In California, “effective date” refers to the date on which a statute is recognized as constituting California law. In contrast, “operative date” refers to the date on which the statute actually becomes operative. See, e.g., *People v. Palomar*, 171 Cal. App. 3d 131, 134 (1985) (“The ‘enactment is a law on its effective date only in the sense that it cannot be changed except by legislative process; the rights of individuals under its provisions are not substantially affected until the provision operates as law.’”).

The effective date of this article is January 1 of the year following its enactment. See Cal. Const. art. IV, § 8(c)(1); Gov’t Code § 9600(a). Usually, the operative date of a statute is the same as the effective date. *People v. Henderson*, 107 Cal. App. 3d 475, 488 (1980). In some instances, a statute may specify a different operative date. *Cline v. Lewis*, 175 Cal. 315, 318; *Johnston v. Alexis*, 153 Cal. App. 3d 33, 40 (1984). Here, the operative date for this article (except for Section 2029.390) is delayed to allow time for the Judicial Council to prepare forms pursuant to Section 2029.390. See Section 2029.900.

§ 2029.900. Operative date [UIDDA § 9]

2029.900. Section 2029.390 is operative on January 1, 2009. The remainder of this article is operative on January 1, 2010.

Comment. Section 2029.900 is similar to Section 9 of the Uniform Interstate Depositions and Discovery Act (2007), except that “operative date” is substituted for “effective date” and the operative date for the article (except for Section 2029.390) is delayed to allow time for the Judicial Council to prepare forms pursuant to Section 2029.390. For an explanation of the distinction between “effective date” and “operative date” in California, see Section 2029.800 Comment.

Gov't Code § 70626 (amended). Miscellaneous filing fees

SEC. 4. Section 70626 of the Government Code is amended to read:

70626. (a) The fee for each of the following services is fifteen dollars (\$15). Amounts collected shall be distributed to the Trial Court Trust Fund under Section 68085.1.

(1) Issuing a writ of attachment, a writ of mandate, a writ of execution, a writ of sale, a writ of possession, a writ of prohibition, or any other writ for the enforcement of any order or judgment.

(2) Issuing an abstract of judgment.

(3) Issuing a certificate of satisfaction of judgment under Section 724.100 of the Code of Civil Procedure.

(4) Certifying a copy of any paper, record, or proceeding on file in the office of the clerk of any court.

(5) Taking an affidavit, except in criminal cases or adoption proceedings.

(6) Acknowledgment of any deed or other instrument, including the certificate.

(7) Recording or registering any license or certificate, or issuing any certificate in connection with a license, required by law, for which a charge is not otherwise prescribed.

(8) Issuing any certificate for which the fee is not otherwise fixed.

(b) The fee for each of the following services is twenty dollars (\$20). Amounts collected shall be distributed to the Trial Court Trust Fund under Section 68085.1.

(1) Issuing an order of sale.

(2) Receiving and filing an abstract of judgment rendered by a judge of another court and subsequent services based on it, unless the abstract of judgment is filed under Section 704.750 or 708.160 of the Code of Civil Procedure.

(3) Filing a confession of judgment under Section 1134 of the Code of Civil Procedure.

(4) Filing an application for renewal of judgment under Section 683.150 of the Code of Civil Procedure.

(5) Issuing a commission to take a deposition in another state or place under Section 2026.010 of the Code of Civil Procedure, *or issuing a subpoena under Section 2029.300 to take a deposition in this state for purposes of a proceeding pending in another jurisdiction.*

(6) Filing and entering an award under the Workers' Compensation Law (Division 4 (commencing with Section 3200) of the Labor Code).

(7) Filing an affidavit of publication of notice of dissolution of partnership.

(8) Filing an appeal of a determination whether a dog is potentially dangerous or vicious under Section 31622 of the Food and Agricultural Code.

(9) Filing an affidavit under Section 13200 of the Probate Code, together with the issuance of one certified copy of the affidavit under Section 13202 of the Probate Code.

(10) Filing and indexing all papers for which a charge is not elsewhere provided, other than papers filed in actions or special proceedings, official bonds, or certificates of appointment.

Comment. Subdivision (b) of Section 70626 is amended to specify the fee for obtaining a subpoena from a California court to take a deposition in this state for purposes of a proceeding pending in another jurisdiction. If a person seeks multiple subpoenas, a separate fee is payable under this subdivision for each subpoena sought.

Background from Uniform Act

The committee believes that the fee, if any, for issuing a subpoena should be sufficient to cover only the actual transaction costs, or should be the same as the fee for local deposition subpoenas.

[Adapted from UIDDA § 5 comment.]

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Trial Court Restructuring: Appellate Jurisdiction of Bail Forfeiture

December 2007

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
www.clrc.ca.gov

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative. The Comments are legislative history and are entitled to substantial weight in construing the statutory provisions. For a discussion of cases addressing the use of Law Revision Commission materials in ascertaining legislative intent, see the Commission's most recent *Annual Report*.

Cite this report as *Trial Court Restructuring: Appellate Jurisdiction of Bail Forfeiture*, 37 Cal. L. Revision Comm'n Reports 149 (2007). This is part of publication #229.

STATE OF CALIFORNIA

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December 14, 2007

To: The Honorable Arnold Schwarzenegger
Governor of California, and
The Legislature of California

In the past decade, the trial court system has been dramatically restructured, necessitating revision of hundreds of code provisions. As a result of trial court restructuring and related amendments to provisions on civil procedure, jurisdiction of a bail forfeiture appeal became unclear.

In this recommendation, the Commission proposes legislation that would clarify jurisdiction of a bail forfeiture appeal. The proposed legislation would require such an appeal to be handled as it was before unification of the municipal and superior courts. The proposal to preserve pre-unification procedures is consistent with previous work by the Commission and previous legislation on trial court restructuring.

The Commission is continuing its work on trial court restructuring and plans to address other subjects in future recommendations.

This recommendation was prepared pursuant to Government Code Section 71674.

Respectfully submitted,

Sidney Greathouse
Chairperson

TRIAL COURT
RESTRUCTURING: APPELLATE
JURISDICTION OF BAIL
FORFEITURE

When a criminal defendant has been released on bail¹ and then fails to appear in court when required, the bail may subsequently be forfeited according to a statutory procedure.² An order relating to bail forfeiture may be appealed.³ Due to

1. Bail may be posted by a surety, contracting with the government to either secure the defendant's presence when lawfully required or forfeit bail. Penal Code §§ 1268-1269, 1276, 1276.5, 1287, 1458-1459; *People v. Am. Contractors Indem. Co.*, 33 Cal. 4th 653, 657, 93 P.3d 1020, 16 Cal. Rptr. 3d 76 (2004) (citing *People v. Ranger Ins. Co.*, 31 Cal. App. 4th 13, 22, 36 Cal. Rptr. 2d 807 (1994)).

2. See Penal Code §§ 1305-1306. If the defendant fails to appear when lawfully required (for example, for arraignment, trial, judgment, etc.), "without sufficient excuse," a court must declare the bail forfeited (hereafter, a "bail forfeiture declaration order"). Penal Code § 1305(a). The bail forfeiture declaration order is not an actual forfeiture, but an initial step in forfeiture proceedings. *People v. Sur. Ins. Co.*, 82 Cal. App. 3d 229, 236-237, 147 Cal. Rptr. 65 (1978). Following the bail forfeiture declaration order, the surety is given notice of the defendant's absence. Penal Code § 1305(b) (notice required for deposits over \$400). If the surety secures the defendant's presence within a 180-day period, the court must vacate the bail forfeiture declaration order. Penal Code § 1305(c). However, if the defendant fails to appear without sufficient excuse, the court must enter summary judgment against the surety (hereafter, "bail forfeiture summary judgment"). Penal Code §§ 1305.1 (court with belief of sufficient excuse for absence may extend time period), 1306(a) (court shall enter summary judgment against bondsman). For further detail on bail forfeiture procedures, see *People v. Int'l Fid. Ins. Co.*, 151 Cal. App. 4th 1056, 60 Cal. Rptr. 3d 355 (2007).

3. A bail forfeiture declaration order may be challenged by a motion to vacate. See Penal Code § 1305; *People v. Hodges*, 205 Cal. 476, 478, 271 P. 897 (1928); 6 B. Witkin, *California Criminal Law Criminal Appeal* § 74, at 319 (3d ed. 2000). The order granting or denying the motion to vacate the bail forfeiture declaration order may be appealed. *People v. Wilcox*, 53 Cal. 2d 651, 654-655,

recent restructuring of the trial court system, some confusion exists regarding when such an appeal is to be filed in the court of appeal and when such an appeal is to be filed in the appellate division of the superior court.⁴

The Law Revision Commission is responsible for recommending revisions to the codes to implement trial court restructuring.⁵ The Commission recommends that legislation

349 P.2d 522, 2 Cal. Rptr. 754 (1960) (citing Code Civ. Proc. § 963 and *Howe v. Key Sys. Transit Co.*, 198 Cal. 525, 531, 246 P. 39 (1926)).

A bail forfeiture summary judgment against the surety is a consent judgment. See *Am. Contractors*, 33 Cal. 4th at 663-64. When the judgment is voidable because it was improperly entered, the judgment may be challenged by an appeal or a motion to set aside the order. *Id.* at 663-65; see also *People v. Allegheny Cas. Co.*, 41 Cal. 4th 704, 716 n.7, 161 P.3d 198, 61 Cal. Rptr. 3d 689 (2007).

An order relating to bail forfeiture may also be challenged by an extraordinary writ. See, e.g., *Newman v. Superior Court*, 67 Cal. 2d 620, 621, 432 P.2d 972, 63 Cal. Rptr. 284 (1967) (issuing writ of mandate). Because the jurisdiction of an extraordinary writ tracks appellate jurisdiction, there is no need for a special provision regarding a challenge in the form of an extraordinary writ. See Cal. Const. art. VI, § 10 (“The appellate division of the superior court has original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition directed to the superior court in causes subject to its appellate jurisdiction.”); Code Civ. Proc. §§ 85, 904.1, 904.2, 1068(b), 1085(b), 1103(b).

4. See *People v. Ranger Ins. Co.*, No. H030919, 2007 WL 2175059, at *2 n.5 (Cal. Ct. App. July 30, 2007) (unpublished decision) (“After unification... the proper appellate path of bail bond forfeiture proceedings ... seems unclear and is in need of legislative clarification.”); Letter from Alex Cerul, Santa Clara County Superior Court Staff Attorney, to California Law Revision Commission (Oct. 5, 2006) (Commission Staff Memorandum 2007-14 (April 18, 2007), Exhibit pp. 1-4 (available from the Commission, www.clrc.ca.gov)).

5. Gov’t Code § 71674. The Commission has recommended revisions to hundreds of code provisions in response to this directive. Almost all of the recommended reforms have been enacted. See *Trial Court Unification: Revision of Codes*, 28 Cal. L. Revision Comm’n Reports 51 (1998) (hereafter, *Revision of Codes*), implemented by 1998 Cal. Stat. ch. 931; 1999 Cal. Stat. ch. 344; *Report of the California Law Revision Commission on Chapter 344 of the Statutes of 1999 (Senate Bill 210)*, 29 Cal. L. Revision Comm’n Reports 657 (1999) (hereafter, *Report on Chapter 344*); *Statutes Made Obsolete by Trial Court*

be enacted to clarify the appellate jurisdiction of bail forfeiture cases.

Throughout the process of implementing trial court restructuring, the Commission has been careful not to make any substantive change, other than adjusting a provision to account for unification.⁶ This recommendation continues that practice by recommending legislation that would preserve the pre-unification path of bail forfeiture appeals.

Trial Court Unification

One of the trial court restructuring reforms was unification of the trial courts. The process of trial court unification began in 1998 after California voters approved a measure permitting the municipal and superior courts in each county to unify.⁷

Restructuring: Part 1, 32 Cal. L. Revision Comm'n Reports 1 (2002) (hereafter, *Trial Court Restructuring: Part 1*), implemented by 2002 Cal. Stat. ch. 784 & ACA 15, approved by the voters Nov. 5, 2002 (Proposition 48); *Statutes Made Obsolete by Trial Court Restructuring: Part 2*, 33 Cal. L. Revision Comm'n Reports 169 (2003) (hereafter, *Trial Court Restructuring: Part 2*), implemented by 2003 Cal. Stat. ch. 149; *Statutes Made Obsolete by Trial Court Restructuring: Part 3*, 36 Cal. L. Revision Comm'n Reports 305 (2006), implemented by 2007 Cal. Stat. ch. 43.

This directive to revise the codes follows an earlier legislative assignment in which the Commission made recommendations on the constitutional revisions necessary to implement trial court unification. See *Trial Court Unification: Constitutional Revision (SCA 3)*, 24 Cal. L. Revision Comm'n Reports 1 (1994) (hereafter, *Constitutional Revision*); *Trial Court Unification: Transitional Provisions for SCA 3*, 24 Cal. L. Revision Comm'n Reports 627 (1994).

6. See *Revision of Codes*, *supra* note 5, at 60; *Constitutional Revision*, *supra* note 5, at 18-19, 28.

7. The measure permitted the municipal and superior courts in each county to unify on a majority vote by the municipal court judges and a majority vote by the superior court judges in the county. Former Cal. Const. art. VI, § 5(e); 1996 Cal. Stat. res. ch. 36 (SCA 4), approved by the voters June 2, 1998 (Proposition 220).

Other major trial court restructuring reforms were:

The same year, the codes were revised on Commission recommendation to accommodate unification, i.e., to make the statutes workable in a county in which the municipal and superior courts decided to unify.⁸

Three guiding principles were used in revising the codes and the Constitution to accommodate unification. First, care was taken “to preserve existing rights and procedures despite unification, with no disparity of treatment between a party appearing in municipal court and a similarly situated party appearing in superior court as a result of unification of the municipal and superior courts in the county.”⁹ Second, steps were taken to ensure that the court of appeal would continue to have jurisdiction over cases historically within its appellate jurisdiction.¹⁰ Third, efforts were made to ensure that unification did not increase the workload of the courts of appeal, but generally left intact the respective workloads of the courts of appeal and appellate departments¹¹ of the superior courts.¹²

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- State, instead of local, funding of trial court operations. See 1997 Cal. Stat. ch. 850; Gov’t Code §§ 77000-77655.
 - Enactment of the Trial Court Protection and Governance Act, which established a new personnel system for trial court employees. See 2000 Cal. Stat. ch. 1010; Gov’t Code §§ 71600-71675.

8. *Revision of Codes*, *supra* note 5; see also 1999 Cal. Stat. ch. 344; *Report on Chapter 344*, *supra* note 5.

9. *Revision of Codes*, *supra* note 5, at 60; see also *Lempert v. Superior Court*, 112 Cal. App. 4th 1161, 1169, 5 Cal. Rptr. 3d 700 (2003); *Gen. Elec. Capital Auto Fin. Serv., Inc. v. Appellate Division of the Superior Court*, 88 Cal. App. 4th 136, 141, 105 Cal. Rptr. 2d 552 (2001).

10. See Cal. Const. art. VI, § 11(a); see also *People v. Nickerson*, 128 Cal. App. 4th 33, 38, 26 Cal. Rptr. 3d. 563 (2005) (“[T]rial court unification ... did not change the court to which cases were to be appealed.”).

11. The appellate department of the superior court was an entity created by statute. See former Code Civ. Proc. § 77 (1984 Cal. Stat. ch. 704). When unification on a county-by-county basis was approved by the voters in 1998, the appellate department was replaced by the appellate division of the superior court, an entity of constitutional dimension. See Cal. Const. art. VI, § 4; Code

By 2001, the trial courts in each county had unified, and the municipal courts were subsumed into a unified superior court.¹³ Further revisions of the codes were made on Commission recommendation in 2002, 2003, and 2007 to reflect that municipal courts no longer existed.¹⁴

This recommendation addresses a matter, jurisdiction of bail forfeiture appeals, which was recently identified as needing attention.¹⁵ As before, the Commission has tried to maintain the pre-unification procedural status quo, while making the law workable in a unified court system.

Appellate Jurisdiction of Bail Forfeiture

Jurisdiction of a bail forfeiture appeal became unclear after provisions on civil procedure were amended to implement trial court unification. Even though a bail forfeiture arises in a criminal case, it is a civil matter.¹⁶ The provisions governing

Civ. Proc. § 77; 1998 Cal. Stat. ch. 931, § 21; 2 B. Witkin, *California Procedure Courts* § 346, at 141 (4th ed. 2006 Supp.); *Constitutional Revision*, *supra* note 5, at 30-33. The Constitution requires the Chief Justice to “assign judges to the appellate division for specified terms pursuant to rules, not inconsistent with statute, adopted by the Judicial Council to promote the independence of the appellate division.” Cal. Const. art. VI, § 4.

12. *Constitutional Revision*, *supra* note 5, at 32; see also *Nickerson*, 128 Cal. App. 4th at 38.

13. The courts in Kings County were the last to unify, on February 8, 2001.

14. See *Trial Court Restructuring: Part 1*, *supra* note 5; *Trial Court Restructuring: Part 2*, *supra* note 5; *Trial Court Restructuring: Part 3*, *supra* note 5.

15. See *People v. Ranger Ins.*, No. H030919, 2007 WL 2175059, at *2 n.5 (Cal. Ct. App. July 30, 2007) (unpublished decision); Letter from Alex Cerul, *supra* note 4.

16. See *People v. Am. Contractors Indem. Co.*, 33 Cal. 4th 653, 657, 93 P.3d 1020, 16 Cal. Rptr. 3d 76 (2004) (citing *People v. Wilcox*, 53 Cal. 2d 651, 654, 349 P.2d 522, 2 Cal. Rptr. 754 (1960)). Consequently, certain rules governing civil actions, such as the time to file a notice of appeal, apply to a bail forfeiture appeal. *People v. United Bonding Ins. Co.*, 272 Cal. App. 2d 441, 442, 77 Cal.

jurisdiction of a civil appeal involving a monetary sum base jurisdiction on the amount in controversy.¹⁷ Before unification, however, jurisdiction of a bail forfeiture appeal was not based on the amount in controversy, i.e., the amount of bail.¹⁸ Instead, it was determined by which court ordered the forfeiture.¹⁹ Forfeiture ordered by the municipal court was appealed to the appellate department of the superior court.²⁰

Rptr. 310 (1969) (civil rules for time to file notice of appeal apply to bail forfeiture case).

17. Code Civ. Proc. §§ 85 (limited civil case is generally one in which amount in controversy is not more than \$25,000), 904.1 (appeal of case other than limited civil case is to court of appeal), 904.2 (appeal of limited civil case is to appellate division of superior court).

18. *Newman v. Superior Court*, 67 Cal. 2d 620, 621-23, 432 P.2d 972, 63 Cal. Rptr. 284 (1967); see, e.g., *County of Los Angeles v. Am. Bankers Ins. Co.*, 202 Cal. App. 3d 1291, 1293, 1297, 249 Cal. Rptr. 540 (1988) (court of appeal heard bail forfeiture appeal involving failure to appear before superior court, even though bail amount was less than court of appeal's jurisdictional limit at that time).

19. *Newman*, 67 Cal. 2d at 621-23. In an unpublished opinion lacking precedential value, the Sixth District Court of Appeal recently provided a nice summary of pre-unification appellate jurisdiction of bail forfeiture. See *People v. Ranger Ins. Co.*, No. H030919, 2007 WL 2175059, at *2 n.5 (Cal. Ct. App. July 30, 2007) (unpublished decision). The court stated:

Before unification, bond forfeiture ordered by the municipal court was appealed to the appellate department of the superior court and forfeiture ordered by the superior court was appealed to the court of appeal, regardless of the amount of the bond. This was true despite the civil nature of bail bond proceedings.

20. Former Cal. Const. art. VI § 11 (added Nov. 8, 1966) (appellate jurisdiction of superior court in causes statutorily prescribed as arising in municipal court); former Code Civ. Proc. §§ 77(e) (1984 Cal. Stat. ch. 704, § 1), 904.2 (1990 Cal. Stat. ch. 1305, § 5) (appealable orders from municipal court); see, e.g., *Newman*, 67 Cal. 2d at 621, 623-25 (determining that bail forfeiture order by magistrate in municipal court at preliminary examination is an order of that court, and ordering appellate department of superior court to accept appeal from such an order).

Forfeiture ordered by the superior court was appealed to the court of appeal.²¹

Since unification, a review of bail forfeiture appeals illustrates that courts are confused over which rules apply.²² Courts do not uniformly apply the provisions governing the jurisdiction of civil appeals,²³ nor do they uniformly direct bail forfeiture appeals along the pre-unification path.²⁴ And in

21. Former Cal. Const. art. VI § 11 (added Nov. 8, 1966) (appellate jurisdiction of court of appeal when superior court has original jurisdiction); former Code Civ. Proc. § 904.1 (1993 Cal. Stat. ch. 456, § 12) (appealable orders from superior court); see, e.g., *Am. Bankers*, 202 Cal. App. 3d at 1297.

22. Noting the confusion, the Sixth District Court of Appeal expressed a need for clarifying legislation. See *Ranger*, 2007 WL 2175059, at *2 n.5. Additionally, the confusion is apparent from the Santa Clara County Superior Court's request for clarifying legislation. See Letter from Alex Cerul, *supra* note 4.

23. Under those provisions, an appeal involving an amount in controversy of \$25,000 or less is taken to the appellate division of the superior court. Code Civ. Proc. §§ 85, 904.2. If the appeal involves an amount in controversy exceeding \$25,000, the appeal is taken to the court of appeal. Code Civ. Proc. §§ 85, 904.1.

Some courts do not apply those provisions. See, e.g., *People v. Lincoln Gen'l Ins. Co.*, 2007 WL 2258284 (5th Dist.) (unpublished decision) (appeal from forfeiture of bail less than \$25,000 taken to court of appeal instead of appellate division of superior court); *People v. Granite State Ins. Co.*, 2003 WL 21227856 (2d Dist.) (unpublished decision) (same); *People v. Accredited Sur. & Cas. Co.*, 2003 WL 1542116 (6th Dist.) (unpublished decision) (same). Other courts apply such provisions, even when that causes an appeal to depart from the pre-unification path. See, e.g., *People v. Safety Nat'l Cas. Corp.*, 150 Cal. App. 4th 11, 57 Cal. Rptr. 3d 659 (5th Dist. 2007) (appeal from forfeiture of bail exceeding \$25,000 in misdemeanor case taken to court of appeal); *People v. Alistar Ins. Co.*, 115 Cal. App. 4th 122, 9 Cal. Rptr. 3d 497 (4th Dist. 2003) (same); see also discussion of "Appellate Jurisdiction Based on Pre-Unification Appeal Path" *infra*.

24. See, e.g., *County of Orange v. Ranger Ins. Co.*, 135 Cal. App. 4th 820, 37 Cal. Rptr. 3d 575 (4th Dist. 2005) (appeal from forfeiture of bail by magistrate at preliminary proceeding taken to court of appeal, instead of appellate division of superior court); see *Safety Nat'l*, 150 Cal. App. 4th 11 (appeal from forfeiture of bail in misdemeanor case taken to court of appeal); *Alistar*, 115 Cal. App. 4th 122 (same); see also discussion of "Appellate Jurisdiction Based on Pre-Unification Appeal Path" *infra*.

some cases, the appeal has followed neither the pre-unification path nor the provisions on civil procedure.²⁵ Legislation is needed to resolve the confusion.²⁶

Possible Approaches

One way to resolve the confusion would be to make clear that jurisdiction of a bail forfeiture appeal is based on the amount in controversy, like other civil appeals. Another possibility would be to treat bail forfeiture appeals the same way as before unification, when jurisdiction was not dependent on the amount in controversy.

Appellate Jurisdiction Based on Amount in Controversy

If jurisdiction of a bail forfeiture appeal were based on the amount in controversy, like other civil cases, then an appeal

25. See, e.g., *People v. Ranger Ins. Co.*, 2007 WL 2164928 (4th Dist.) (unpublished decision); *People v. Ranger Ins. Co.*, 145 Cal. App. 4th 23, 51 Cal. Rptr. 3d 326 (2d Dist. 2006).

The appeal in the *Ranger* case decided by the Fourth District Court of Appeal involved bail forfeiture of \$25,000 by a magistrate at the preliminary examination on a felony charge. 2007 WL 2164928 at *1. If the provisions governing the appeal of a civil matter had been applied, the appeal would have been taken to the appellate division of the superior court, *not* the court of appeal. See Code Civ. Proc. §§ 85, 904.2. It is also apparent that the pre-unification path was not followed: Before unification, the appeal from a forfeiture by a magistrate at a preliminary examination on a felony charge went to the appellate department (now, the appellate division) of the superior court, *not* the court of appeal. See *supra* note 20.

Similarly, the appeal in the *Ranger* case decided by the Second District Court of Appeal involved forfeiture of bail less than \$25,000 by a magistrate at a preliminary proceeding on a felony charge. 145 Cal. App. 4th at 25-26. If the provisions governing civil appeals had been applied, the appeal would have been taken to the appellate division of the superior court, *not* the court of appeal. See Code Civ. Proc. §§ 85, 904.2. Nor was the pre-unification path followed, as the appeal would have been taken to the appellate division of the superior court, *not* the court of appeal. See *supra* note 20.

26. See *People v. Ranger Ins. Co.*, No. H030919, 2007 WL 2175059, at *2 n.5 (Cal. Ct. App. July 30, 2007) (unpublished decision).

involving bail of \$25,000 or less would be heard by the appellate division of the superior court²⁷ and an appeal involving bail of more than \$25,000 would be heard by the court of appeal.²⁸ That approach has the appeal of simplicity. However, the Commission does not recommend this approach.

The approach would cause some appeals to depart from the pre-unification path. Such a departure would clash with guiding principles of unification: to avoid disruption of pre-existing rights and procedures, leave the historical jurisdiction of the courts of appeal intact, and preserve the workload balance between the courts of appeal and the appellate divisions of the superior court.

Moreover, basing jurisdiction on the amount of bail in certain appeals — those arising in a post-preliminary examination felony case in which bail of \$25,000 or less was forfeited — would unconstitutionally diminish the appellate jurisdiction of the courts of appeal from what it was as of June 30, 1995.²⁹

Appellate Jurisdiction Based on Pre-Unification Appeal Path

A second possibility would be to direct bail forfeiture appeals in the same manner as before unification. This approach would be consistent with the overall policy of preserving existing rights and procedures despite

27. See Code Civ. Proc. §§ 85, 904.2.

28. See Code Civ. Proc. §§ 85, 904.1.

29. See Cal. Const. art. VI § 11(a) (“courts of appeal have appellate jurisdiction when superior courts have original jurisdiction in causes of a type within the appellate jurisdiction of the courts of appeal on June 30, 1995”). Because an appeal from a bail forfeiture that occurred in a felony prosecution in superior court involving bail of \$25,000 or less was in the appellate jurisdiction of the courts of appeal as of June 30, 1995, the Legislature cannot constitutionally remove such appeals from the courts of appeal. See *id.*

unification.³⁰ It would also comply with the constitutional provision preserving the jurisdiction of the courts of appeal as of June 30, 1995.³¹ For these reasons, the Commission recommends this approach.

The recommended legislation is thus based on the pre-unification path of bail forfeiture appeals. Before unification, jurisdiction of a bail forfeiture appeal depended on which trial court, municipal or superior, ordered the forfeiture.³² Specifically, an appeal from bail forfeiture ordered in municipal court went to the appellate department of the superior court,³³ and an appeal from bail forfeiture ordered in superior court went to the court of appeal.³⁴

To carry forward pre-unification procedures in a system without municipal courts, the recommended legislation uses a proxy for which trial court would have ordered a bail forfeiture before unification: the underlying criminal charge.³⁵ For a felony, the court ordering forfeiture also depended on the stage of the case. The proposal therefore bases jurisdiction of a bail forfeiture appeal on the underlying criminal charge and the stage of the proceeding at which bail was forfeited.³⁶

The recommended legislation would direct an appeal from a bail forfeiture in a misdemeanor case³⁷ to the appellate

30. See discussion of “Trial Court Unification” *supra*.

31. See *supra* note 29.

32. See *supra* note 19.

33. See *supra* note 20.

34. See *supra* note 21.

35. The underlying criminal charge determined which court, municipal or superior, had jurisdiction over the criminal case. See *infra* notes 39, 48.

36. See proposed Penal Code § 1305.5 *infra*.

37. A “misdemeanor case” only includes misdemeanor charges; it does not include a felony charge. Penal Code § 691(g); *cf. infra* note 41.

division of the superior court.³⁸ Before unification, a misdemeanor case was tried in the municipal court.³⁹ A bail forfeiture in a misdemeanor case was an order by the municipal court, and was appealed to the appellate department of the superior court.⁴⁰

The recommended legislation would base appellate jurisdiction of a bail forfeiture in a felony case⁴¹ according to when the forfeiture occurs. If the forfeiture occurs at a preliminary proceeding before a magistrate,⁴² the appeal would be to the appellate division of the superior court.⁴³ This reflects the pre-unification practice that such preliminary proceedings were conducted by a magistrate in municipal

38. See proposed Penal Code § 1305.5(c) *infra*.

39. The municipal court had jurisdiction over a misdemeanor charge. Former Penal Code § 1462(a) (1991 Cal. Stat. ch. 613, § 8); *In re Joiner*, 180 Cal. App. 2d 250, 254-255, 4 Cal. Rptr. 667 (1960). The municipal court did not have jurisdiction over a felony. *Cf.* 11 B. Witkin, *California Criminal Law Jurisdiction & Venue* § 14, at 102-103 (3d. ed. 2000) (stating that municipal and superior courts did not have concurrent criminal jurisdiction of any particular case, that superior court had jurisdiction over felony, and that superior court had jurisdiction over misdemeanor joined with felony). This was true even though a magistrate sitting in municipal court could, and did, conduct preliminary proceedings related to a felony charge. See *infra* note 44; former Penal Code § 808 (1925 Cal. Stat. ch. 445, § 1) (adding municipal court judges to list of judges who are magistrates); see, e.g., *Newman v. Superior Court*, 67 Cal. 2d. 620, 432 P.2d 972, 63 Cal. Rptr. 284 (1967) (considering appeal relating to bail forfeiture ordered by magistrate in municipal court at preliminary examination).

40. See *supra* note 20.

41. A felony case may include a misdemeanor charged with a felony. See Penal Code § 691(f); see also *infra* note 48; *cf. supra* note 37.

42. Prosecution of a felony by information, rather than indictment, in superior court was (and still is) preceded by a preliminary hearing before a magistrate. See Cal. Const. art. I, § 14; Penal Code §§ 738-739, 806, 872; see also *infra* note 46.

43. See proposed Penal Code § 1305.5(b) *infra*.

court,⁴⁴ and that an appeal from that court went to the appellate department of the superior court.⁴⁵

If the forfeiture occurs after an indictment or a legal commitment by a magistrate,⁴⁶ the appeal would be to the court of appeal.⁴⁷ This would also mirror the pre-unification situation: After an indictment or a legal commitment, a felony case was prosecuted in superior court⁴⁸ not municipal court, and an appeal of a bail forfeiture from that court went to the court of appeal.⁴⁹

44. See Cal. Const. art. I, § 14; Penal Code §§ 738-739, 806, 859, 872, 976; *People v. Thompson*, 50 Cal. 3d 134, 155, 785 P.2d 857, 266 Cal. Rptr. 309 (1990); *Lempert v. Superior Court*, 112 Cal. App. 4th 1161, 1168, 5 Cal Rptr. 3d 700 (2003); *People v. Valdez*, 33 Cal. App. 4th 1633, 1637, 39 Cal. Rptr. 818 (1995); see also Uelmen, *California Criminal Procedure and Trial Court Unification* (March 2002), at 2; *California Criminal Law Practice and Procedure Arraignment* § 6.10, at 144-45, *Preliminary Hearings* § 8.1, at 188-89; *California Judges Benchbook: Criminal Pretrial Proceedings, Commencing the Action* § 1.1, at 3.

45. See *supra* note 20.

46. A felony is prosecuted either upon an indictment or upon an information, which occurs after a legal commitment by a magistrate. See Cal. Const. art I, § 14; Penal Code §§ 739, 872.

47. See proposed Penal Code § 1305.5(a) *infra*.

48. The superior court had jurisdiction over a felony case, which included a misdemeanor committed in connection with a felony. See Penal Code § 954; *People v. Leney*, 213 Cal. App. 3d 265, 268, 261 Cal. Rptr. 541 (1989) (superior court jurisdiction over properly joined misdemeanor); 11 B. Witkin, *California Criminal Law Jurisdiction & Venue* § 14, at 102 (3d. ed. 2000) (citing Cal. Const. art. VI, § 10 and Penal Code § 1462(a)). The superior court retained jurisdiction over connected misdemeanor charges even if the felony charges were eliminated before trial. *People v. Clark*, 17 Cal. App. 3d 890, 897-898, 95 Cal. Rptr. 411 (1971).

49. See *supra* note 21.

Effect of the Recommended Legislation

Pursuant to constitutional and unification principles, the Commission proposes legislation that would direct bail forfeiture appeals as they were before unification.

The recommended legislation would help to prevent disputes and confusion over the proper jurisdiction for a bail forfeiture appeal. That would benefit the public by (1) reducing litigation expenses of the People and of other parties to bail forfeiture proceedings, and (2) conserving judicial resources. The recommended legislation should be promptly enacted to achieve these results.

PROPOSED LEGISLATION

Penal Code § 1305.5 (added). Appeal from order denying motion to vacate bail forfeiture declaration

SEC. _____. Section 1305.5 is added to the Penal Code, to read:

1305.5. Notwithstanding Sections 85, 580, 904.1, and 904.2 of the Code of Civil Procedure, if the people, a surety, or other person appeals from an order of the superior court on a motion to vacate a bail forfeiture declared under Section 1305, the following rules apply:

(a) If the bail forfeiture was in a felony case, or in a case in which both a felony and a misdemeanor were charged, and the forfeiture occurred at or after the sentencing hearing or after the indictment or the legal commitment by a magistrate, the appeal is to the court of appeal and it shall be treated as an unlimited civil case, regardless of the amount of bail.

(b) If the bail forfeiture was in a felony case, or in a case in which both a felony and a misdemeanor were charged, and the forfeiture occurred at the preliminary hearing or at another proceeding before the legal commitment by a magistrate, the appeal is to the appellate division of the superior court and it shall be treated as a limited civil case, regardless of the amount of bail.

(c) If the bail forfeiture was in a misdemeanor case, the appeal is to the appellate division of the superior court and it shall be treated as a limited civil case, regardless of the amount of bail.

Comment. Section 1305.5 is added to clarify the appellate jurisdiction of bail forfeiture matters after trial court unification. The provision preserves the procedural pre-unification status quo. See, e.g., *Newman v. Superior Court*, 67 Cal. 2d 620, 623, 432 P.2d 972, 63 Cal. Rptr. 284 (1967) (amount of bail does not determine jurisdiction of appeal relating to bail forfeiture order); *People v. Topa Ins. Co.*, 32 Cal. App. 4th 296, 38 Cal. Rptr. 2d 167 (1995) (court of appeal heard bail forfeiture appeal involving failure to appear before superior court in felony case, even

though bail was less than jurisdictional limit of municipal court); *County of Los Angeles v. Am. Bankers Ins. Co.*, 202 Cal. App. 3d 1291, 249 Cal. Rptr. 540 (1988) (same); see also *People v. Leney*, 213 Cal. App. 3d 265, 268, 261 Cal. Rptr. 541 (1989) (superior court has jurisdiction to try remaining misdemeanor even if felony charge eliminated before trial); *People v. Clark*, 17 Cal. App. 3d 890, 897-898, 95 Cal. Rptr. 411 (1971) (same).

See also Section 691 (“felony case” and “misdemeanor or infraction case” defined).

Penal Code § 1306 (amended). Procedures after court declares bail forfeiture

SEC. _____. Section 1306 of the Penal Code is amended to read:

1306. (a) When any bond is forfeited and the period of time specified in Section 1305 has elapsed without the forfeiture having been set aside, the court which has declared the forfeiture, ~~regardless of the amount of the bail~~, shall enter a summary judgment against each bondsman named in the bond in the amount for which the bondsman is bound. The judgment shall be the amount of the bond plus costs, and notwithstanding any other law, no penalty assessments shall be levied or added to the judgment.

(b) If a court grants relief from bail forfeiture, it shall impose a monetary payment as a condition of relief to compensate the people for the costs of returning a defendant to custody pursuant to Section 1305, except for cases where the court determines that in the best interest of justice no costs should be imposed. The amount imposed shall reflect the actual costs of returning the defendant to custody. Failure to act within the required time to make the payment imposed pursuant to this subdivision shall not be the basis for a summary judgment against any or all of the underlying amount of the bail. A summary judgment entered for failure to make the payment imposed under this subdivision is subject to the provisions of Section 1308, and shall apply only

to the amount of the costs owing at the time the summary judgment is entered, plus administrative costs and ~~interests~~ interest.

(c) If, because of the failure of any court to promptly perform the duties enjoined upon it pursuant to this section, summary judgment is not entered within 90 days after the date upon which it may first be entered, the right to do so expires and the bail is exonerated.

(d) A dismissal of the complaint, indictment, or information after the default of the defendant shall not release or affect the obligation of the bail bond or undertaking.

(e) The district attorney or county counsel shall:

(1) Demand immediate payment of the judgment within 30 days after the summary judgment becomes final.

(2) If the judgment remains unpaid for a period of 20 days after demand has been made, shall forthwith enforce the judgment in the manner provided for enforcement of money judgments generally. If the judgment is appealed by the surety or bondsman, the undertaking required to be given in these cases shall be provided by a surety other than the one filing the appeal. The undertaking shall comply with the enforcement requirements of Section 917.1 of the Code of Civil Procedure. *Notwithstanding Sections 85, 580, 904.1, and 904.2 of the Code of Civil Procedure, jurisdiction of the appeal, and treatment of the appeal as a limited civil case or an unlimited civil case, is governed by Section 1305.5.*

(f) The right to enforce a summary judgment entered against a bondsman pursuant to this section shall expire two years after the entry of the judgment.

Comment. Subdivision (a) of Section 1306 is amended to delete language that is obsolete due to trial court unification. Before unification, it was necessary to make clear that a municipal court was authorized to enter summary judgment based on a bail forfeiture even though the amount of bail exceeded the jurisdictional limit of the municipal court. See 1977 Cal. Stat. ch. 889, § 3.5; *Newman v. Superior Court*, 67 Cal. 2d

620, 622, 432 P.2d 972, 63 Cal. Rptr. 284 (1967); see also Department of Consumer Affairs, Analyst's Report SB 1107 (Song), p. 2. Because municipal courts no longer exist and the superior court has no jurisdictional limit, that language is no longer needed.

Subdivision (b) is amended to correct an apparent typographical error.

Subdivision (e)(2) is amended to clarify the jurisdiction and treatment of an appeal from a summary judgment based on a bail bond. The amendment preserves the procedural pre-unification status quo. See Section 1305.5 Comment.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Statutes Made Obsolete by
Trial Court Restructuring: Part 4

December 2007

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
www.clrc.ca.gov

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative. The Comments are legislative history and are entitled to substantial weight in construing the statutory provisions. For a discussion of cases addressing the use of Law Revision Commission materials in ascertaining legislative intent, see the Commission's most recent *Annual Report*.

Cite this report as *Statutes Made Obsolete by Trial Court Restructuring: Part 4*, 37 Cal. L. Revision Comm'n Reports 171 (2007). This is part of publication #229.

STATE OF CALIFORNIA

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December 14, 2007

To: The Honorable Arnold Schwarzenegger
Governor of California, and
The Legislature of California

In the past decade, the trial court system has been dramatically restructured, necessitating revision of hundreds of code provisions.

By statute, the Law Revision Commission is responsible for revising the codes to reflect trial court restructuring. The Commission has done extensive work in response to this directive, and several major reforms have been enacted.

Of the work that remains, this recommendation addresses the following:

- Municipal court action specifying the number, qualifications, or compensation of municipal court officers or employees.
- Statutes made obsolete by implementation of the fiscal provisions of the Trial Court Funding Act of 1985.
- Jurisdiction over a minor charged with certain motor vehicle offenses.

The Commission is continuing its work on trial court restructuring and plans to address other subjects in future recommendations.

This recommendation was prepared pursuant to Government Code Section 71674 and Resolution Chapter 100 of the Statutes of 2007.

Respectfully submitted,

Sidney Greathouse
Chairperson

STATUTES MADE OBSOLETE BY
TRIAL COURT
RESTRUCTURING: PART 4

Over the past decade, California's trial court system has been dramatically restructured. Major reforms include:

- State, as opposed to local, funding of trial court operations.¹
- Trial court unification on a county-by-county basis, eventually occurring in all counties. Trial court operations have been consolidated in the superior court of each county and municipal courts no longer exist.²
- Enactment of the Trial Court Employment Protection and Governance Act, which established a new personnel system for trial court employees.³

As a result of these reforms, hundreds of sections of the California codes became obsolete, in whole or in part. The Legislature directed the Law Revision Commission to revise the codes to eliminate material that became obsolete as a result of trial court restructuring.⁴

1. The Lockyer-Isenberg Trial Court Funding Act, enacted in 1997, made the state responsible for funding trial court operations. See 1997 Cal. Stat. ch. 850; see generally Gov't Code §§ 77000-77655.

2. In 1998, California voters approved a measure that amended the California Constitution to permit the municipal and superior courts in each county to unify on a vote of a majority of the municipal court judges and a majority of the superior court judges in the county. Former Cal. Const. art. VI, § 5(e), approved by the voters June 2, 1998 (Proposition 220). Upon unification of the courts in Kings County, on February 8, 2001, the courts in all 58 counties had unified.

3. 2000 Cal. Stat. ch. 1010; see Gov't Code §§ 71600-71675.

4. Gov't Code § 71674. The Commission is also authorized to make recommendations "pertaining to statutory changes that may be necessitated by court unification." 2007 Cal. Stat. ch. 100.

The Commission has completed a vast amount of work on trial court restructuring, and the Legislature has enacted several measures to implement the Commission's recommendations.⁵ In this work, the approach has been to avoid making any substantive change, other than that necessary to implement the restructuring reform.⁶

Of the topics that still require attention, this recommendation addresses the following:

- Municipal court action specifying the number, qualifications, or compensation of municipal court officers or employees.
- Statutes made obsolete by implementation of the fiscal provisions of the Trial Court Funding Act of 1985.⁷

5. See *Trial Court Unification: Revision of Codes*, 28 Cal. L. Revision Comm'n Reports 51, 60 (1998), implemented by 1998 Cal. Stat. ch. 931 (revising the codes to accommodate trial court unification) (hereafter, *Revision of Codes*); 1999 Cal. Stat. ch. 344; *Report of the California Law Revision Commission on Chapter 344 of the Statutes of 1999 (Senate Bill 210)*, 29 Cal. L. Revision Comm'n Reports 657 (1999); *Statutes Made Obsolete by Trial Court Restructuring: Part 1*, 32 Cal. L. Revision Comm'n Reports 1 (2002), implemented by 2002 Cal. Stat. ch. 784 & ACA 15, approved by the voters Nov. 5, 2002 (Proposition 48); *Statutes Made Obsolete by Trial Court Restructuring: Part 2*, 33 Cal. L. Revision Comm'n Reports 169 (2003), implemented by 2003 Cal. Stat. ch. 149; *Statutes Made Obsolete by Trial Court Restructuring: Part 3*, 36 Cal. L. Revision Comm'n Reports 305 (2006), implemented by 2007 Cal. Stat. ch. 43.

6. See, e.g., *Revision of Codes*, *supra* note 5; *Trial Court Unification: Constitutional Revision (SCA 3)*, 24 Cal. L. Revision Comm'n Reports 1, 18-19, 28 (1994).

7. Government Code Section 71674 directs the Commission to determine statutory obsolescence as a result of the Lockyer-Isenberg Trial Court Funding Act of 1997, not earlier measures. However, the issue of statutory obsolescence resulting from the Trial Court Funding Act of 1985 is reasonably related to the Commission's work on trial court restructuring and is within its authority to correct technical and minor substantive statutory defects. See Gov't Code § 8298.

- Jurisdiction over a minor charged with certain motor vehicle offenses.

The Commission has studied each of these topics and reached conclusions on how to revise the pertinent statutes to reflect trial court restructuring.

MUNICIPAL COURT ACTION SPECIFYING NUMBER,
QUALIFICATIONS, OR COMPENSATION OF
MUNICIPAL COURT OFFICERS OR EMPLOYEES

Government Code Section 71617 provides that “any action by the municipal court specifying the number, qualification, or compensation of [its] officers or employees ... which differs from that prescribed by the Legislature” shall remain in effect for no more than two years, unless extended by the Legislature.

By February 2001, the trial courts in each county had unified, and the municipal courts were subsumed into a unified superior court.⁸ Because no municipal court has existed since February 2001, no municipal court action pursuant to Government Code Section 71617 could be in effect after February 2003. Therefore, Government Code Section 71617 is obsolete, and the Commission recommends that the provision be repealed.

STATUTES MADE OBSOLETE BY IMPLEMENTATION
OF THE FISCAL PROVISIONS OF THE
TRIAL COURT FUNDING ACT OF 1985

The Bergeson-Costa-Nielsen County Revenue Stabilization Act (hereafter, “the Act” or “the County Revenue Stabilization Act”) comprises a short chapter in the

8. See *supra* note 2.

Government Code.⁹ The Act enables counties to receive state funding for certain services, including “justice programs.”¹⁰ Funding of justice programs under the Act is to cease upon full implementation of the fiscal provisions of the Trial Court Funding Act of 1985.¹¹

The Trial Court Funding Act of 1985 has been repealed.¹² Significantly, however, the substance of its fiscal provisions has been fully implemented by later-enacted provisions providing for full trial court funding by the state.¹³

Because the substance of the fiscal provisions of the Trial Court Funding Act of 1985 has been fully implemented, justice programs are no longer to be funded under the County Revenue Stabilization Act.¹⁴ As a result, provisions in that Act relating to justice programs are no longer necessary.

While the Commission was studying those provisions, other obsolete material became apparent. To remove the obsolete material from the County Revenue Stabilization Act, the Commission recommends the following reforms:

- Revise the provisions relating to justice programs to reflect that they are no longer funded under the Act.¹⁵

9. See Gov’t Code §§ 16265-16265.7.

10. “Justice programs” include trial courts, district attorney and public defender services, probation, and correctional facilities. See Gov’t Code § 16265.2(c).

11. See Gov’t Code § 16562.6.

12. 1988 Cal. Stat. ch. 945, § 9.

13. 1998 Cal. Stat. ch. 146, § 6 (amending Government Code Sections 77200 *et seq.*, giving state ongoing responsibility for trial court funding); 1997 Cal. Stat. ch. 850, § 46 (enacting Government Code Sections 77200 *et seq.*, providing for full funding by state for one year); see also Gov’t Code § 77201.1(a) (amounts counties pay to state).

14. See *supra* note 11.

15. See proposed amendments to Gov’t Code §§ 16265.1 (deleting references to justice programs), 16265.4 (deleting provisions for funding justice programs), 16265.5 (deleting reference to justice programs) & Comments *infra*.

- Delete the provision specifying when funding of justice programs under the Act is to cease.¹⁶
- Delete a reference to Revenue and Taxation Code Section 11003.3, which has been repealed.¹⁷
- Delete obsolete dates.¹⁸
- Repeal a provision that only operated in a past year.¹⁹
- Make various adjustments to the remaining provisions to fully implement the removal of obsolete material.²⁰

The Commission also recommends the repeal of a provision that is not part of the County Revenue Stabilization Act, but refers to the Trial Court Funding Act of 1985. By its own terms, this provision ceased to operate in 1992.²¹

JURISDICTION OVER MINOR CHARGED WITH CERTAIN MOTOR VEHICLE OFFENSES

Welfare and Institutions Code Section 603.5 provides a mechanism for a county to give jurisdiction over a minor charged with certain motor vehicle offenses to the “municipal court or the superior court in a county in which there is no municipal court,” instead of to the juvenile court.²²

16. See proposed repeal of Gov’t Code § 16265.6 & Comment *infra*.

17. See proposed amendment to Gov’t Code § 16265.2 & Comment *infra*.

18. See proposed amendment to Gov’t Code § 16265.4 & Comment *infra*.

19. See proposed repeal of Gov’t Code § 16265.3 (prescribing calculation of funding in 1988 only) & Comment *infra*.

20. For example, because Government Code Section 16265.4 refers to a calculation scheme in Section 16265.3, which is recommended for repeal, Section 16265.4 would be amended to include the calculation scheme. See proposed amendment to Gov’t Code § 16265.4 & Comment *infra*.

21. See proposed repeal of Gov’t Code § 68618 *infra*.

22. The superior court is referred to as the juvenile court when the superior court applies “juvenile court law.” Welf. & Inst. Code § 245; see also Welf. & Inst. Code § 200 (“juvenile court law” is Welf. & Inst. Code §§ 200-987).

Because the municipal court no longer exists, the references to the municipal court are obsolete.²³ Accordingly, the Commission recommends deleting those references from Section 603.5.²⁴

FURTHER WORK

This recommendation does not deal with all remaining statutes that need revision due to trial court restructuring.²⁵ The Commission will continue to make recommendations addressing obsolete statutes as issues are resolved and time warrants. Failure to address a particular statute in this recommendation should not be construed to mean that the Commission has decided the statute should be preserved. The statute may be the subject of a future recommendation by the Commission.

23. See *supra* note 2.

24. See proposed amendment to Welf. & Inst. Code § 603.5 *infra*.

The Commission explored the possibility of also revising Section 603.5 to reflect enactment of Vehicle Code Sections 40200-40230, which establish civil administrative enforcement procedures and civil penalties for any non-misdemeanor parking or standing violation. The matter is complicated and is unrelated to trial court restructuring, so the Commission decided not to propose any revisions along these lines. See Tentative Recommendation on *Statutes Made Obsolete by Trial Court Restructuring: Part 4* at 8-9, 20-22 (Aug. 2007); Commission Staff Memorandum 2007-50 (available from the Commission, www.clrc.ca.gov).

25. For a detailed summary of the work that remained to be done as of February 2006, see Commission Staff Memorandum 2006-9 (available from the Commission, www.clrc.ca.gov).

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PROPOSED LEGISLATION

Gov't Code § 16265.1 (amended). Legislative intent

SEC. _____. Section 16265.1 of the Government Code is amended to read:

16265.1. The Legislature finds and declares all of the following:

(a) The provision of basic social welfare, *and* public health, ~~and justice~~ programs by counties is a matter of statewide interest.

(b) In some cases, the costs of these programs have grown more quickly than the counties' own general purpose revenues.

(c) A county should not be required to drastically divert its own general purpose revenues from other public programs in order to pay for basic social welfare, *and* public health, ~~and justice~~ programs.

(d) California residents should not be denied the benefits of these programs because counties are hampered by a severe lack of funds for these purposes.

(e) Accordingly, it is the intent of the Legislature in enacting this chapter to protect the public peace, health, and safety by stabilizing counties' revenues.

Comment. Section 16265.1 is amended to delete obsolete references to justice programs. The funding under this chapter relating to justice programs was to discontinue upon full implementation of the fiscal provisions of the Trial Court Funding Act of 1985. See former Section 16265.6. That has been achieved; the trial courts are now fully funded by the state. See Sections 77200-77213.

Gov't Code § 16265.2 (amended). Definitions

SEC. _____. Section 16265.2 of the Government Code is amended to read:

16265.2. As used in this chapter:

(a) "County" means a county and a city and county.

(b) “County costs of eligible programs” means the amount of money other than federal and state funds, as reported by the State Department of Social Services to the Department of Finance or as derived from the Controller’s “Annual Report of Financial Transactions Concerning Counties of California,” that each county spends for each of the following:

(1) The Aid to Families with Dependent Children for Family Group and Unemployed Parents programs plus county administrative costs for each program minus the county’s share of child support collections for each program, as described in Sections 10100, 10101, and 11250 of, and subdivisions (a) and (b) of Section 15200 of, the Welfare and Institutions Code.

(2) The county share of the cost of service provided for the In-Home Supportive Services Program, as described in Sections 10100, 10101, and 12306 of the Welfare and Institutions Code.

(3) The community mental health program, as described in Section 5705 of the Welfare and Institutions Code.

(4) The county share of the Food Stamp Program, as described in Section 18906.5 of the Welfare and Institutions Code.

~~(c) “County costs of justice programs” means the amount of money other than federal and state funds, as reported in the Controller’s “Annual Report of Financial Transactions Concerning Counties of California,” that each county spends for each of the following:~~

- ~~(1) Superior courts.~~
- ~~(2) District attorney.~~
- ~~(3) Public defender.~~
- ~~(4) Probation.~~
- ~~(5) Correctional facilities.~~

~~“County costs of justice programs” does not include any costs eligible for reimbursement to the county pursuant to Chapter 3 (commencing with Section 15200) of Part 6 of Division 3.~~

(d) “General purpose revenues” means revenues received by a county whose purpose is not restricted by state law to a particular purpose or program, as reported in the Controller’s “Annual Report of Financial Transactions Concerning Counties of California.” “General purpose revenues” are limited to all of the following:

(1) Property tax revenues, exclusive of those revenues dedicated to repay voter approved indebtedness, received pursuant to Part 0.5 (commencing with Section 50) of Division 1 of the Revenue and Taxation Code, or received pursuant to Section 33401 of the Health and Safety Code.

(2) Sales tax revenues received pursuant to Part 1 (commencing ~~the~~ with Section 6001) of Division 2 of the Revenue and Taxation Code.

(3) Any other taxes levied by a county.

(4) Fines and forfeitures.

(5) Licenses, permits, and franchises.

(6) Revenue derived from the use of money and property.

(7) Vehicle license fees received pursuant to Section 11005 of the Revenue and Taxation Code.

~~(8) Trailer coach fees received pursuant to Section 11003.3 of the Revenue and Taxation Code.~~

~~(9) Revenues from cigarette taxes received pursuant to Part 13 (commencing with Section 30001) of Division 2 of the Revenue and Taxation Code.~~

~~(10)~~ (9) Revenue received as open-space subventions pursuant to Chapter 3 (commencing with Section 16140) of Part 1.

~~(11)~~ (10) Revenue received as homeowners' property tax exemption subventions pursuant to Chapter 2 (commencing with Section 16120) of Part 1.

~~(12)~~ (11) General revenue sharing funds received from the federal government.

"General purpose revenues" does not include revenues received by a county pursuant to Chapter 3 (commencing with Section 15200) of Part 6 of Division 3.

Comment. Subdivision (c) of Section 16265.2, which defined "county costs of justice programs," is deleted as obsolete. This definition was relevant only to a funding scheme that is no longer in effect. See Section 16265.4 & Comment; former Section 16265.6 (1987 Cal. Stat. ch. 1286, § 3) & Comment.

Paragraph (2) of subdivision (d) (reabeled as subdivision (c)) is amended to correct a grammatical mistake.

Paragraph (8) of the same subdivision is deleted as obsolete. Former Revenue and Taxation Code Section 11003.3 was repealed in 1992. 1992 Cal. Stat. ch. 699, §§ 17-19 (effective Sept. 15, 1992).

Gov't Code § 16265.3 (repealed). 1988 funding

SEC. _____. Section 16265.3 of the Government Code is repealed.

~~16265.3. (a) On or before October 31, 1988, the Director of Finance shall:~~

~~(1) Determine for each county the county costs of eligible programs and each county's general purpose revenues for the 1981-82 fiscal year.~~

~~(2) Determine a percentage for each county by dividing the county costs of eligible programs by the general purposes revenues for the 1981-82 fiscal year.~~

~~(3) Make the determination as prescribed in paragraphs (1) and (2) for each county for the 1986-87 fiscal year.~~

~~(4) Compare the percentage determined pursuant to paragraph (3) with the percentage determined pursuant to paragraph (2).~~

~~(5) If the percentage determined pursuant to paragraph (3) is greater than the percentage determined pursuant to paragraph (2), determine an amount necessary to offset the difference.~~

~~(6) Determine an amount which is the sum of the amounts for all counties determined pursuant to paragraph (5).~~

~~(b) On or before October 31, 1988, the Director of Finance shall:~~

~~(1) Determine for each county the county costs of justice programs and each county's general purpose revenues for the 1981-82 fiscal year.~~

~~(2) Determine a percentage for each county by dividing the county costs of justice programs by the general purpose revenues for the 1981-82 fiscal year.~~

~~(3) Make the determination as prescribed in paragraphs (1) and (2) for each county for the 1986-87 fiscal year.~~

~~(4) Compare the percentage determined pursuant to paragraph (3) with the percentage determined pursuant to paragraph (2).~~

~~(5) If the percentage determined pursuant to paragraph (3) is greater than the percentage determined pursuant to paragraph (2), determine an amount necessary to offset the difference, provided that the amount shall not be greater than one million dollars (\$1,000,000).~~

~~(6) Determine an amount which is the sum of the amounts for all counties determined pursuant to paragraph (5).~~

~~(7) Determine a percentage for each county by dividing the amount determined for that county pursuant to paragraph (5) by the amount for all counties determined pursuant to paragraph (6).~~

~~(8) Determine an amount which is the sum of the amounts for all counties determined pursuant to paragraph (5) of subdivision (a).~~

~~(9) Determine an amount by subtracting the amount determined pursuant to paragraph (8) from fifteen million dollars (\$15,000,000).~~

~~(10) Determine an amount for each county by multiplying the amount determined pursuant to paragraph (9) by the percentage determined pursuant to paragraph (7).~~

~~(c) On or before October 31, 1988, the Director of Finance shall certify the amounts determined for each county pursuant to paragraph (5) of subdivision (a) and paragraph (10) of subdivision (b).~~

~~(d) On or before November 30, 1988, the Controller shall issue a warrant to each county, as applicable, in the amount certified by the Director of Finance under subdivision (c).~~

Comment. Section 16265.3 is repealed as obsolete because it prescribes funding for a past fiscal year.

Gov't Code § 16265.4 (amended). State funding of county programs

SEC. _____. Section 16265.4 of the Government Code is amended to read:

16265.4. (a) On or before October 31, ~~1989~~, and of each year thereafter, the Director of Finance shall:

~~(1) Determine the percentage for each county which was determined for the 1981-82 fiscal year pursuant to paragraph (2) of subdivision (a) of Section 16265.3 the county costs of eligible programs and each county's general purpose revenues for the 1981-82 fiscal year.~~

~~(2) Determine a percentage for each county by dividing the county costs of eligible programs by the general purpose revenues for the 1981-82 fiscal year.~~

~~(2) (3) Make the determination as prescribed by paragraphs (1) and (2) of subdivision (a) of Section 16265.3 for each county for the 1987-88 fiscal year, and for each fiscal year thereafter.~~

~~(3)~~ (4) Compare the percentage determined pursuant to paragraph ~~(2)~~ (3) with the percentage determined pursuant to paragraph ~~(1)~~ (2).

~~(4)~~ (5) For any fiscal year in which the percentage determined pursuant to paragraph ~~(2)~~ (3) is greater than the percentage determined pursuant to paragraph ~~(1)~~ (2), ~~make the determinations prescribed by paragraphs (5) and (6) of subdivision (a) of Section 16265.3~~ determine an amount necessary to offset the difference.

(6) Determine an amount which is the sum of the amounts for all counties determined pursuant to paragraph (5).

~~(b) On or before October 31, 1989, and on or before October 31 of each year thereafter, the Director of Finance shall:~~

~~(1) Determine the percentage for each county which was determined for the 1981-82 fiscal year pursuant to paragraph (2) of subdivision (b) of Section 16265.3.~~

~~(2) Make the determination prescribed by paragraphs (1) and (2) of subdivision (b) of Section 16265.3 for each county for the 1987-88 fiscal year, and for each fiscal year thereafter.~~

~~(3) Compare the percentage determined pursuant to paragraph (2) with the percentage determined pursuant to paragraph (1).~~

~~(4) For any fiscal year in which the percentage determined pursuant to paragraph (2) is greater than the percentage determined pursuant to paragraph (1), make the determinations prescribed by paragraphs (5) to (10), inclusive, of subdivision (b) of Section 16265.3.~~

~~(e) On or before October 31, 1989, and on or before October 31 of each year thereafter, the Director of Finance shall determine an amount for each county as prescribed by paragraph (5) of subdivision (a) of Section 16265.3 for the applicable fiscal year and paragraph (4) of subdivision (b).~~

~~(d)~~ (c) On or before October 31, 1989, and on or before October 31 of each year thereafter, the Director of Finance shall certify the amount determined for each county pursuant to subdivision ~~(e)~~ (b) to the Controller.

~~(e)~~ (d) On or before November 30, 1989, and on or before November 30 of each year thereafter, the Controller shall issue a warrant to each county, as applicable, in the amount certified by the Director of Finance under subdivision ~~(d)~~ (c).

Comment. Subdivision (a) of Section 16265.4 is amended to reflect the repeal of former Section 16265.3 (1987 Cal. Stat. ch. 1286, § 3). Formerly, subdivision (a) incorporated the calculation scheme of Section 16265.3 by reference. Due to the repeal of Section 16265.3, the calculation scheme is now stated in subdivision (a) itself.

Subdivision (a) is also amended to delete an obsolete reference to October 31, 1989.

Subdivision (b) is deleted as obsolete. The Director of Finance was to use the funding scheme prescribed in it only until the fiscal provisions of the Trial Court Funding Act of 1985 were fully implemented. See former Section 16265.6 (1987 Cal. Stat. ch. 1286, § 3). That has been achieved; the trial courts are now fully funded by the State. See Sections 77200-77213.

Former subdivisions (c)-(e) are relabeled as subdivisions (b)-(d). Those provisions are also amended to correct cross-references and delete obsolete references to dates in 1989.

Gov't Code § 16265.5 (amended). Allocations over \$15,000,000

SEC. _____. Section 16265.5 of the Government Code is amended to read:

16265.5. If a statute appropriates more than fifteen million dollars (\$15,000,000) for the purposes of this chapter in a fiscal year, then ~~Sections 16265.3 and~~ Section 16265.4 shall not apply to the allocation of that amount of money which is greater than fifteen million dollars (\$15,000,000). It is the intent of the Legislature to allocate any amount of money greater than fifteen million dollars (\$15,000,000) based on criteria which shall consider the costs to counties of welfare, justice programs, and indigent health care.

Comment. Section 16265.5 is amended to reflect the repeal of former Section 16265.3 (1987 Cal. Stat. ch. 1286, § 3).

Section 16265.5 is also amended to delete an obsolete reference to justice programs. The funding under this chapter relating to justice programs was to discontinue upon full implementation of the fiscal provisions of the Trial Court Funding Act of 1985. See former Section 16265.6 (1987 Cal. Stat. ch. 1286, § 3). That has been achieved; the trial courts are now fully funded by the state. See Sections 77200-77213.

Gov't Code § 16265.6 (repealed). Implementation of Trial Court Funding Act of 1985

SEC. _____. Section 16265.6 of the Government Code is repealed.

~~16265.6. Notwithstanding any other provision of this chapter, once the Legislature has fully implemented the fiscal provisions of the Trial Court Funding Act of 1985, as contained in Chapter 13 (commencing with Section 77000) of Title 8, the Director of Finance shall not make the determinations pursuant to subdivision (b) of Section 16265.3 and subdivisions (b) of Section 16265.4.~~

Comment. Section 16265.6 is repealed. It is no longer necessary due to the full implementation of the fiscal provisions of the Trial Court Funding Act of 1985, which provided a scheme of state funding for trial courts of participating counties. See 1985 Cal. Stat. ch. 1607, § 21. Although that Act was repealed in 1988, the trial courts have been fully funded by the state since the enactment of the Lockyer-Isenberg Trial Court Funding Act of 1997. See 1998 Cal. Stat. ch. 146, § 6; Sections 77200-77213; 1997 Cal. Stat. ch. 850, § 46 (enacting Lockyer-Isenberg Trial Court Funding Act); 1988 Cal. Stat. ch. 945, § 9 (repealing Trial Court Funding Act of 1985).

Gov't Code § 68618 (repealed). Delay reduction program

SEC. _____. Section 68618 of the Government Code is repealed.

~~68618. In each county which has opted under the Trial Court Funding Act of 1985 (Chapter 13 (commencing with Section 77000)), the superior court, at the option of the~~

~~presiding judge, may elect to establish an exemplary delay reduction program pursuant to this article.~~

~~The presiding judge of a superior court electing to establish an exemplary delay reduction program shall notify the Judicial Council of that election, along with the identity of the judges who will participate in the program, and the date the program is scheduled to begin.~~

~~This section shall cease to be operative on July 1, 1992.~~

Comment. Section 68618 is repealed as obsolete. By its own terms, the provision ceased to operate on July 1, 1992.

Gov't Code § 71617 (repealed). Municipal court employees

SEC. _____. Section 71617 of the Government Code is repealed.

~~71617. To the extent this chapter applies to a municipal court, any action by the municipal court specifying the number, qualification, or compensation of officers or employees of the municipal court which differs from that prescribed by the Legislature pursuant to Section 5 of Article VI of the California Constitution shall remain in effect for a period of no more than two years unless prescribed by the Legislature within that period.~~

Comment. Section 71617 is repealed to reflect unification of the municipal and superior courts pursuant to former Section 5(e) of Article VI of the California Constitution.

Welf. & Inst. Code § 603.5 (amended). Jurisdiction over minor charged with certain motor vehicle offenses

SEC. _____. Section 603.5 of the Welfare and Institutions Code is amended to read:

603.5. (a) Notwithstanding any other provision of law, in ~~counties which adopt~~ *a county that adopts* the provisions of this section, jurisdiction over the case of a minor alleged to have committed only a violation of the Vehicle Code classified as an infraction or a violation of a local ordinance

involving the driving, parking, or operation of a motor vehicle, is with ~~the municipal court or the superior court in a county in which there is no municipal court~~, except that the court may refer to the juvenile court for adjudication, cases involving a minor who has been adjudicated a ward of the juvenile court, or who has other matters pending in the juvenile court.

(b) The cases specified in subdivision (a) shall not be governed by the procedures set forth in the juvenile court law.

(c) Any provisions of juvenile court law requiring that confidentiality be observed as to cases and proceedings, prohibiting or restricting the disclosure of juvenile court records, or restricting attendance by the public at juvenile court proceedings shall not apply. The procedures for bail specified in Chapter 1 (commencing with Section 1268) of Title 10 of Part 2 of the Penal Code shall apply.

(d) The provisions of this section shall apply in a county in which the trial courts make the section applicable as to any matters to be heard and the court has determined that there is available funding for any increased costs.

Comment. Subdivision (a) of Section 603.5 is amended to reflect unification of the municipal and superior courts pursuant to former Section 5(e) of Article VI of the California Constitution.

Subdivision (a) is further amended to make stylistic revisions.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Trial Court Restructuring: Transfer of Case Based on Lack of Jurisdiction

December 2007

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
www.clrc.ca.gov

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative. The Comments are legislative history and are entitled to substantial weight in construing the statutory provisions. For a discussion of cases addressing the use of Law Revision Commission materials in ascertaining legislative intent, see the Commission's most recent *Annual Report*.

Cite this report as *Trial Court Restructuring: Transfer of Case Based on Lack of Jurisdiction*, 37 Cal. L. Revision Comm'n Reports 195 (2007). This is part of publication #229.

STATE OF CALIFORNIA

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December 14, 2007

To: The Honorable Arnold Schwarzenegger
Governor of California, and
The Legislature of California

In the past decade, the trial court system has been dramatically restructured, necessitating revision of hundreds of code provisions. One major restructuring reform was the unification of the trial courts. As a result of trial court unification, the ongoing relevance of Code of Civil Procedure Section 396 became unclear.

Section 396 mandates transfer of a case based on a lack of subject matter jurisdiction from one state court to another state court that would have jurisdiction. After trial court unification, Section 396 is no longer relevant to a transfer between trial courts. Due to disagreement in the courts, it is unclear whether the section is obsolete, or whether it is relevant to a transfer by a trial court to an appellate court.

To resolve the ambiguity, the Commission recommends legislation that would repeal Section 396, and enact a new provision in its place that would clearly require a trial court to transfer a matter over which it lacks jurisdiction to an appellate court that would have jurisdiction.

This recommendation was prepared pursuant to Government Code Section 71674 and Resolution Chapter 100 of the Statutes of 2007.

Respectfully submitted,

Sidney Greathouse
Chairperson

TRIAL COURT RESTRUCTURING: TRANSFER OF CASE BASED ON LACK OF JURISDICTION

Over the past decade, California's trial court system has been dramatically restructured. A major trial court restructuring reform was the unification of the trial courts on a county-by-county basis.¹ Trial court operations have been consolidated in the superior court of each county and municipal courts no longer exist.²

As a result of trial court restructuring, hundreds of sections of the California codes became obsolete, in whole or in part. The Legislature authorized the Law Revision Commission to recommend changes to the statutes "that may be necessitated by court unification"³ and directed the Commission to revise the statutes to eliminate material that became obsolete as a result of trial court restructuring.⁴

The Commission has completed a vast amount of work on trial court restructuring, and the Legislature has enacted several measures to implement the Commission's

1. In 1998, California voters approved a measure that amended the California Constitution to permit the municipal and superior courts in each county to unify on a vote of a majority of the municipal court judges and a majority of the superior court judges in the county. Former Cal. Const. art. VI, § 5(e), approved by the voters June 2, 1998 (Proposition 220).

Other major trial court restructuring reforms include:

- State, as opposed to local, funding of trial court operations. See 1997 Cal. Stat. ch. 850; see generally Gov't Code §§ 77000-77655.
- Enactment of the Trial Court Employment Protection and Governance Act, which established a new personnel system for trial court employees. 2000 Cal. Stat. ch. 1010; see Gov't Code §§ 71600-71675.

2. Upon unification of the courts in Kings County, on February 8, 2001, the courts in all 58 counties had unified.

3. 2007 Cal. Stat. res. ch. 100.

4. Gov't Code § 71674.

recommendations.⁵ In this work, the Commission has sought to avoid making any substantive change, other than that necessary to implement the restructuring reform.⁶

Code of Civil Procedure Section 396

Code of Civil Procedure Section 396 mandates that a trial court transfer a case, and prohibits dismissal of the case, when the trial court lacks subject matter jurisdiction and another state court would have such jurisdiction.

Before the municipal courts unified with the superior courts, the subject matter jurisdiction of the municipal court differed from the subject matter jurisdiction of the superior court.⁷ When a municipal court lacked subject matter jurisdiction over a case, but the case was within the jurisdiction of the superior court, the municipal court

5. See *Trial Court Unification: Revision of Codes*, 28 Cal. L. Revision Comm'n Reports 51, 60 (1998), implemented by 1998 Cal. Stat. ch. 931 (revising the codes to accommodate trial court unification) (hereafter, *Revision of Codes*); 1999 Cal. Stat. ch. 344; *Report of the California Law Revision Commission on Chapter 344 of the Statutes of 1999 (Senate Bill 210)*, 29 Cal. L. Revision Comm'n Reports 657 (1999); *Statutes Made Obsolete by Trial Court Restructuring: Part 1*, 32 Cal. L. Revision Comm'n Reports 1 (2002), implemented by 2002 Cal. Stat. ch. 784 & ACA 15, approved by the voters Nov. 5, 2002 (Proposition 48); *Statutes Made Obsolete by Trial Court Restructuring: Part 2*, 33 Cal. L. Revision Comm'n Reports 169 (2003), implemented by 2003 Cal. Stat. ch. 149; *Statutes Made Obsolete by Trial Court Restructuring: Part 3*, 36 Cal. L. Revision Comm'n Reports 305 (2006), implemented by 2007 Cal. Stat. ch. 43.

6. See, e.g., *Revision of Codes*, *supra* note 5; *Trial Court Unification: Constitutional Revision (SCA 3)*, 24 Cal. L. Revision Comm'n Reports 1, 18-19, 28 (1994).

7. See former Cal. Const. art VI, § 10 (adopted Nov. 8, 1966) (“Superior courts have original jurisdiction in all causes except those given by statute to other trial courts.”); Former Code Civ. Proc. § 86 (1997 Cal. Stat. ch. 527, § 2) (municipal court jurisdiction in specified civil proceedings); former Penal Code § 1462 (1972 Cal. Stat. ch. 809, § 1) (municipal court jurisdiction in specified criminal proceedings).

transferred the case pursuant to Section 396 to the superior court, and vice versa.⁸

Now that the trial courts in each county have unified into a single court with broad subject matter jurisdiction, Section 396 is no longer relevant to a transfer between trial courts.⁹ If a case is filed in the wrong division, department, or location of the superior court, other authority exists for a superior court to transfer the case to the proper division, department, or location.¹⁰ Section 396 does not authorize such a transfer

8. See e.g., *Walker v. Superior Court*, 53 Cal. 3d 257, 266-70, 807 P.2d 418, 279 Cal. Rptr. 576 (1991) (superior court to transfer to municipal court if verdict necessarily will be less than jurisdictional requirement that claim exceed \$25,000); *Cal. Employment Stabilization Comm'n v. Municipal Court*, 62 Cal. App. 2d 781, 787, 145 P.2d 361 (1944) (municipal court to transfer to superior court when superior court, not municipal court, has jurisdiction).

9. See Cal. Const. art. VI, §§ 1, 4, 10; Code Civ. Proc. § 116.210 (“small claims” court is division of superior court); *Snukal v. Flightways Mfg., Inc.*, 23 Cal. 4th 754, 763 n.2, 3 P.3d 286, 98 Cal. Rptr. 2d 1 (2000) (“On unification of the trial courts in a county, all causes will be within the original jurisdiction of the superior court.”) (quoting *Revision of Codes*, *supra* note 5, at 64-65); *Glade v. Glade*, 38 Cal. App. 4th 1441, 1449, 45 Cal. Rptr. 2d 695 (1995) (“Even though a superior court is divided into branches or departments, pursuant to California Constitution, article VI, section 4, there is only one superior court in a county and jurisdiction is therefore vested in that court, not in any particular judge or department. Whether sitting separately or together, the judges hold but one and the same court.”); 2 B. Witkin, *California Procedure Courts* § 225, at 293 (4th ed. 1996) (case in wrong department, often discussed as “wrong court,” is distinct from lack of subject matter jurisdiction); 2 B. Witkin, *California Procedure Jurisdiction* § 289, at 860 (4th ed. 1997) (“[I]f the action or proceeding is in the right superior court but the wrong department, jurisdiction of the subject matter exists.”); see also *Eldridge v. Richfield Oil Corp.*, 247 F. Supp. 407, 411 n.8 (1965) (Section 396 does not apply to require transfer by federal trial court to state trial court).

10. For example, Code of Civil Procedure section 402 authorizes the superior court to transfer a case to another location of the same court. See also, e.g., Code Civ. Proc. §§ 397(a) (court may, on motion, change place of trial when complaint designates wrong court), 403 (court may, on motion, transfer for coordination purposes), 403.040 (procedure to reclassify civil case as limited or unlimited), 404 (transfer for coordination purposes); *People v. Superior Court*, 104 Cal. App. 276, 281, 285 P. 871 (1930) (“The Juvenile Court is itself a

because the provision only applies, by its terms, when a court lacks subject matter jurisdiction.¹¹

Although Section 396 is no longer relevant to a transfer between trial courts, it might serve another purpose. In a case decided before trial court unification, the Fifth District Court of Appeal held that if a superior court lacks jurisdiction of a case and a court of appeal or the Supreme Court (hereafter, “an appellate court”) would have jurisdiction, Section 396 requires the superior court to transfer the case to the appropriate appellate court.¹² After unification, however, the Second District Court of Appeal disagreed with the Fifth District’s opinion, and stated that Section 396 does not authorize a transfer by a superior court to an appellate court.¹³

The disagreement in the courts of appeal, and the ambiguity of the text of Section 396 as to its scope, make it unclear whether the provision requires a transfer by a superior court lacking subject matter jurisdiction to an appellate court that

Superior Court, although acting in a particular class of cases, and has an inherent power to transfer a case to another department of the same court.”); Cal. R. Ct. 10.603(b)(1)(B) (superior court presiding judge may assign and reassign cases to departments in apportioning court business), 10.603(c)(1)(D) (superior court presiding judge to reassign cases between departments as convenience or necessity requires).

11. See *Rosenberg v. Superior Court*, 67 Cal. App. 4th 860, 867, 79 Cal. Rptr. 2d 365 (1988) (“The plain language of Code Civ. Proc., § 396, permits transfer only when the transferring court lacks jurisdiction of the subject matter.”); see also *supra* note 9.

12. *Padilla v. Dep’t of Alcoholic Beverage Control*, 43 Cal. App. 4th 1151, 1154, 51 Cal. Rptr. 2d 133 (1996) (Section 396 applies to “proceedings filed in the superior court which, by statute, may only be filed in the Supreme Court or the Court of Appeal.”).

13. *TrafficSchoolOnline, Inc. v. Superior Court*, 89 Cal. App. 4th 222, 225, 234-35, 107 Cal. Rptr. 2d 412 (2001) (stating disagreement with *Padilla* court and concluding that “the superior court is not vested with the authority by Code of Civil Procedure section 396 to transfer a case to the Court of Appeal or the Supreme Court”).

would have jurisdiction.¹⁴ Because the meaning of the provision is unclear, in determining how to revise it, the Commission cannot simply follow the normal approach of avoiding any substantive change other than that necessary to account for trial court restructuring. Various options for how Section 396 could be handled, and the corresponding implications, are discussed below.

Leave Section 396 Alone

One approach would be to leave Section 396 as it is. This approach would continue the present ambiguity in the scope of the provision. By implication, however, it would endorse the position of the Fifth District and would imply that Section 396 requires a superior court without subject matter jurisdiction to transfer a case to an appellate court that would have jurisdiction.¹⁵ If the provision was not construed to authorize such a transfer, there would be no justification for leaving it in place.

Revise Section 396

Another approach would be to revise Section 396 to delete the language that is only applicable to a transfer between trial courts. This approach would also endorse the Fifth District's opinion.¹⁶ It would imply, more strongly than leaving Section 396 alone, that the provision requires a superior court to

14. See *Pajaro Valley Mgmt. Agency v. McGrath*, 128 Cal. App. 4th 1093, 1104 n.4, 27 Cal. Rptr. 3d 741 (2005) (commenting on split in courts of appeal and speculating that Section 396 might retain vitality as empowering superior court to transfer cases within exclusive jurisdiction of court of appeal or Supreme Court); 3 B. Witkin, *California Procedure Jurisdiction* § 393A, at 321-22 (4th ed. Supp. 2007) (stating Section 396 "is not inapplicable" to transfer from superior court to court of appeal or Supreme Court and discussing cases comprising split).

15. See *supra* note 12.

16. *Id.*

transfer a case over which it lacks subject matter jurisdiction to an appellate court that would have jurisdiction.

Repeal Section 396

Conversely, a repeal of Section 396 would reject the Fifth District's view.¹⁷ Repealing Section 396 would reflect a determination that the provision is no longer useful. Taking that step would thus endorse the Second District's view that the provision does not apply to a transfer by a superior court to an appellate court.¹⁸

Repeal Section 396 and Enact a New Section 396

Another approach would be to repeal Section 396 and enact a new provision in its place, which would clearly require a superior court to transfer a matter over which it lacks jurisdiction to an appellate court that would have jurisdiction. This approach would eliminate the uncertainty regarding the scope of Section 396.

The Commission recommends this approach. It would carry forward a widespread, long-standing policy behind Section 396 that allows a matter to be considered on its merits in the proper tribunal, despite a previous misfiling in the wrong court.¹⁹

17. *Id.*

18. See *supra* note 13.

19. See *Friends of Mammoth v. Bd. of Supervisors*, 8 Cal. 3d 247, 268-69, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972) (naming Section 396 and applying its policy to petition for writ of mandamus that was promptly re-filed in superior court after dismissal from court of appeal); *Nichols v. Canoga Indus.*, 83 Cal. App. 3d 956, 959, 962, 148 Cal. Rptr. 459 (1978) (identifying established policy of relieving litigant that timely filed in wrong forum from statute of limitations, and concluding that federal court filing tolled state statute of limitations to allow re-filing in state court); *Morgan v. Somervell*, 40 Cal. App. 2d 398, 400, 104 P.2d 866 (1940) (Section 396 furthers "policy frequently exemplified in legislative acts" to consider timely filed matter on merits "notwithstanding

Absent authority to transfer, a court must dismiss a matter over which it lacks jurisdiction.²⁰ If a superior court dismisses a petition or appeal because it is within the exclusive jurisdiction of the courts of appeal or the Supreme Court, the time to re-file in the proper court might have expired.²¹ That would bar consideration of the petition or appeal on the merits and would undermine the long-standing policy underlying Section 396. That undesirable result could be avoided, however, by repealing Section 396 and enacting proposed Section 396, which would clearly direct a superior

defects in the form ... or *mistake in the tribunal invoked*.” (emphasis in original)).

Furthermore, a transfer of a matter to another court is broadly authorized in several other situations. See, e.g., Cal. Const. art. VI, § 12(a) (authorizing Supreme Court to transfer cases between itself and court of appeal); Code Civ. Proc. § 911 (granting court of appeal discretion to order transfer from superior court to promote uniformity or settle important legal question); Gov’t Code § 68915 (prohibiting dismissal and requiring transfer by Supreme Court and courts of appeal when appeal taken to wrong court); Penal Code § 1471 (granting court of appeal discretion to order transfer from superior court to promote uniformity or settle important legal question); *People v. Nickerson*, 128 Cal. App. 4th 33, 39-40, 26 Cal. Rptr. 3d 563 (2005) (court of appeal empowered by inherent authority and Government Code Section 68915 to transfer appeal, misdirected by court clerk, to appellate division of superior court); Cal. R. Ct. 10.1000(a) (Supreme Court may transfer case between courts and divisions of courts of appeal).

20. See *Goodwine v. Superior Court*, 63 Cal. 2d 481, 484, 407 P.2d 1, 47 Cal. Rptr. 201 (1965) (court lacking subject matter jurisdiction must dismiss on own motion).

21. See, e.g., Bus. & Prof. Code § 23090 (authorizing review of final order by Alcoholic Beverage Control Board in court of appeal or Supreme Court within 30 days); Code Civ. Proc. § 170.3(d) (review of judge disqualification order only by writ of mandate in court of appeal within 10 days); Welf. & Inst. Code § 366.26(l) (order to hold hearing pursuant to Section 366.26 — regarding placement of juvenile court dependents and parental rights termination — only appealable if extraordinary writ petition is timely filed); Cal. R. Ct. 8.452 (10 days to file writ to challenge order for Section 366.26 hearing); see also Cal. R. Ct. 8.751(a) (time to appeal).

court to transfer a case over which it lacks jurisdiction to an appellate court that would have jurisdiction.²²

FURTHER WORK

This recommendation does not deal with all remaining statutes that need revision due to trial court restructuring.²³ The Commission will continue to make recommendations addressing obsolete statutes as issues are resolved and time warrants. Failure to address a particular statute in this recommendation should not be construed to mean that the Commission has decided the statute should be preserved. The statute may be the subject of a future recommendation by the Commission.

22. The proposed new provision is modeled on Government Code Section 68915, which requires the courts of appeal and the Supreme Court to transfer, not dismiss, an appeal that is filed in the wrong court.

Like Government Code Section 68915, the new provision would apply to an appeal. Determining whether jurisdiction over a particular appeal is in the appellate division of the superior court or in the court of appeal can be difficult. The filing of an appeal in the wrong court could occur by no fault of the appellant. See *Nickerson*, 128 Cal. App. 4th at 35-36 (discussing difficulty in determining appellate jurisdiction of felony now that all notices of appeal are filed in unified superior court, and transferring appeal, misdirected by court clerk, to appellate division of superior court).

In contrast to Government Code Section 68915, the proposed new provision would expressly apply to a petition for a writ, for two reasons. First, it was in the context of a writ petition that the Fifth District held that Section 396 mandates a transfer from a superior court lacking jurisdiction to an appellate court that would have jurisdiction. See *Padilla v. Dep't of Alcoholic Beverage Control*, 43 Cal. App. 4th 1151, 1155, 51 Cal. Rptr. 2d 133 (1996). Second, the California Supreme Court has expressly applied the policy behind Section 396 to a writ. See *Friends of Mammoth*, 8 Cal. 3d at 268-69 (writ petition filed after deadline should be considered on merits, where petition had been dismissed but promptly re-filed in proper court).

23. For a detailed summary of the work that remained to be done as of February 2006, see Commission Staff Memorandum 2006-9 (available from the Commission, www.clrc.ca.gov).

PROPOSED LEGISLATION

Code Civ. Proc. § 396 (repealed). Court without jurisdiction

SEC. _____. Section 396 of the Code of Civil Procedure is repealed.

~~396. (a) If an action or proceeding is commenced in a court that lacks jurisdiction of the subject matter thereof, as determined by the complaint or petition, if there is a court of this state that has subject matter jurisdiction, the action or proceeding shall not be dismissed (except as provided in Section 399, and paragraph (1) of subdivision (b) of Section 581) but shall, on the application of either party, or on the court's own motion, be transferred to a court having jurisdiction of the subject matter that may be agreed upon by the parties, or, if they do not agree, to a court having subject matter jurisdiction that is designated by law as a proper court for the trial or determination thereof, and it shall thereupon be entered and prosecuted in the court to which it is transferred as if it had been commenced therein, all prior proceedings being saved. In that case, if summons is served prior to the filing of the action or proceeding in the court to which it is transferred, as to any defendant, so served, who has not appeared in the action or proceeding, the time to answer or otherwise plead shall date from service upon that defendant of written notice of filing of the action or proceeding in the court to which it is transferred.~~

~~(b) If an action or proceeding is commenced in or transferred to a court that has jurisdiction of the subject matter thereof as determined by the complaint or petition, and it thereafter appears from the verified pleadings, or at the trial, or hearing, that the determination of the action or proceeding, or of a cross complaint, will necessarily involve the determination of questions not within the jurisdiction of the court, in which the action or proceeding is pending, the~~

~~court, whenever that lack of jurisdiction appears, must suspend all further proceedings therein and transfer the action or proceeding and certify the pleadings (or if the pleadings be oral, a transcript of the same), and all papers and proceedings therein to a court having jurisdiction thereof that may be agreed upon by the parties, or, if they do not agree, to a court having subject matter jurisdiction that is designated by law as a proper court for the trial or determination thereof.~~

~~(c) An action or proceeding that is transferred under the provisions of this section shall be deemed to have been commenced at the time the complaint or petition was filed in the court from which it was originally transferred.~~

~~(d) This section may not be construed to preclude or affect the right to amend the pleadings as provided in this code.~~

~~(e) Upon the making of an order for transfer, proceedings shall be had as provided in Section 399, the costs and fees thereof, and of filing the case in the court to which transferred, to be paid by the party filing the pleading in which the question outside the jurisdiction of the court appears unless the court ordering the transfer shall otherwise direct.~~

Comment. Section 396 is repealed due to trial court unification. The provision directed a court not to dismiss but to transfer a case if the court lacked subject matter jurisdiction and another state court would have such jurisdiction. The provision was often invoked when a municipal court transferred a case outside its jurisdiction to the superior court, or vice versa. See, e.g., *Walker v. Superior Court*, 53 Cal. 3d 257, 807 P.2d 418, 279 Cal. Rptr. 576 (1991); *Cal. Employment Stabilization Comm'n v. Municipal Court*, 62 Cal. App. 2d 781, 145 P.2d 361 (1944). After unification of the municipal and superior courts, it no longer served that purpose.

There was a split of authority regarding whether the provision authorized a superior court lacking jurisdiction to transfer a case to a court of appeal or the state Supreme Court. Compare *TrafficSchoolOnline, Inc. v. Superior Court*, 89 Cal. App. 4th 222, 225, 107 Cal. Rptr. 2d 412 (2001) (“[T]he superior court is not vested with the authority by Code of Civil Procedure Section 396 to transfer a case to the

Court of Appeal or the Supreme Court.”), with *Padilla v. Dep’t of Alcoholic Beverage Control*, 43 Cal. App. 4th 1151, 1154, 51 Cal. Rptr. 2d 133 (1996) (Transfer requirement of Section 396 applies “in the case of proceedings filed in the superior court which, by statute, may be filed only in the Supreme Court or the Court of Appeal.”); see also *Pajaro Valley Water Mgmt. Agency v. McGrath*, 128 Cal. App. 4th 1093, 1104 n.4, 27 Cal. Rptr. 3d 741 (2005) (“It is possible, though a point of disagreement, that [Section 396] retains vitality as empowering the *superior* court to transfer cases within the exclusive original jurisdiction of the *appellate* courts.” (emphasis in original)).

Consistent with the key policy of deciding a case on its merits even if it is filed in the wrong tribunal, new Section 396 makes clear that if a superior court lacks jurisdiction of a matter and a state appellate court would have jurisdiction, the superior court must transfer the matter instead of dismissing it.

Code Civ. Proc. § 396 (added). Court without jurisdiction

SEC. _____. Section 396 is added to the Code of Civil Procedure, to read:

396. No appeal or petition filed in the superior court shall be dismissed solely because the appeal or petition was not filed in the proper state court. If the superior court lacks jurisdiction of an appeal or petition, and a court of appeal or the Supreme Court would have jurisdiction, the appeal or petition shall be transferred to the court having jurisdiction upon terms as to costs or otherwise as may be just, and proceeded with as if regularly filed therein.

Comment. Section 396 requires a superior court to transfer an appeal or petition over which the superior court lacks jurisdiction to an appellate court that has jurisdiction. The provision continues a policy that requires transfer and prohibits dismissal of a cause simply because it was filed in the wrong court. See, e.g., former Section 396 (2002 Cal. Stat. ch. 806, § 9); Gov’t Code § 68915; see *Friends of Mammoth v. Bd. of Supervisors*, 8 Cal. 3d 247, 268-69, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972); *Morgan v. Somervell*, 40 Cal. App. 2d 398, 400, 104 P.2d 866 (1940).

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Technical and Minor Substantive Statutory Corrections: References to Recording Technology

December 2007

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
www.clrc.ca.gov

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative. The Comments are legislative history and are entitled to substantial weight in construing the statutory provisions. For a discussion of cases addressing the use of Law Revision Commission materials in ascertaining legislative intent, see the Commission's most recent *Annual Report*.

Cite this report as *Technical and Minor Substantive Statutory Corrections: References to Recording Technology*, 37 Cal. L. Revision Comm'n Reports 211 (2007). This is part of publication #229.

STATE OF CALIFORNIA

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December 14, 2007

To: The Honorable Arnold Schwarzenegger
Governor of California, and
The Legislature of California

The Commission recommends technical and minor substantive revisions to generalize and modernize existing statutory references to audio or video recording.

Specifically, references to the use of a “tape,” “cassette,” “audiotape,” or “videotape” would be revised to instead refer in a generic manner to any recording technology. The revisions would thereby allow for use of existing digital recording technology that does not make use of a tape, as well as other recording technologies that may be developed in the future.

This recommendation was prepared pursuant to Government Code Section 8298.

Respectfully submitted,

Sidney Greathouse
Chairperson

TECHNICAL AND MINOR
SUBSTANTIVE STATUTORY
CORRECTIONS: REFERENCES TO
RECORDING TECHNOLOGY

The Law Revision Commission is authorized by Government Code Section 8298 to study and recommend revisions correcting technical and minor substantive defects in California statutes.

This recommendation proposes technical and minor substantive revisions to generalize and modernize existing statutory references to audio or video recording.¹ Specifically, references to the use of a “tape,” “cassette,” “audiotape,” or “videotape” would be revised to instead refer in a generic manner to any recording technology. The revisions would thereby allow for use of existing digital recording technology that does not make use of a tape, as well as other recording technologies that may be developed in the future.

The revisions are consistent with two prior reforms: (1) a bill enacted in 2002, revising numerous references to “audiotape and “videotape” in the Civil Discovery Act,² and (2) similar revisions to a limited number of sections in the Civil Discovery Act recommended by the Commission in 2004, and subsequently enacted into law.³

The recommended revisions generally involve replacing a reference to “audio tape” or “videotape” with references to

1. The recommendation would revise statutory text that will be in effect on January 1, 2008, including all legislative action through the conclusion of the 2007 legislative calendar. See 2007 Cal. Stat. ch. 176 (amending Bus. & Prof. Code §§ 19861, 19870), 2007 Cal. Stat. ch. 56 (amending Educ. Code § 56341.1), 2007 Cal. Stat. ch. 130 (amending Penal Code § 298.1).

2. 2002 Cal. Stat. ch. 1068.

3. See 2005 Cal. Stat. ch. 294; *Civil Discovery: Statutory Clarification and Minor Substantive Improvements*, 34 Cal. L. Revision Comm’n Reports 146 (2004).

“audio recording” or “video recording,” or involve similar substitutions of terms. An example would be the proposed revision to Business and Professions Code Section 19870:

19870.

(d) All proceedings at a meeting of the commission relating to a license application shall be recorded stenographically or ~~on audiotape or videotape~~ *by audio or video recording.*

....

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PROPOSED LEGISLATION

BUSINESS AND PROFESSIONS CODE

Bus. & Prof. Code § 2293 (amended). Professional competency examination

SECTION 1. Section 2293 of the Business and Professions Code is amended to read:

2293. (a) The professional competency examination shall be in the form of an oral clinical examination to be administered by three physician examiners selected by the division or its designee, who shall test for medical knowledge specific to the physician's specialty or specific suspected deficiency. The examination shall be ~~tape~~ *audio* recorded.

(b) A failing grade from two of the examiners shall constitute a failure of an examination. In the event of a failure, the board shall supply a true and correct copy of a ~~tape~~ *the audio recording* of the examination to the unsuccessful examinee.

(c) Within 45 days following receipt of the ~~tape~~ *audio recording* of the examination, a physician who fails the examination may request a hearing before the administrative law judge as designated in Section 11371 of the Government Code to determine whether he or she is entitled to take a second examination.

(d) If the physician timely requests a hearing concerning the right to reexamination under subdivision (c), the hearing shall be held in accordance with the Administrative Procedure Act. Upon a finding that the examination or procedure is unfair or that one or more of the examiners manifest bias towards the examinee, a reexamination shall be ordered.

(e) If the examinee fails the examination and is not afforded the right to reexamination, the division may take action

pursuant to Section 2230 by directing that an accusation be filed charging the examinee with incompetency under subdivision (d) of Section 2234. The modes of discipline are set forth in Sections 2227 and 2228.

(f) Findings and conclusions reported by the examiners may be received in the administrative hearing on the accusation. The passing of the examination shall constitute prima facie evidence of present competence in the area of coverage of the examination.

(g) Competency examinations shall be conducted under a uniform examination system, and for that purpose the division may make arrangements with organizations furnishing examination material as deemed desirable.

Comment. Section 2293 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

Bus. & Prof. Code § 3635 (amended). Continuing education

SEC. _____. Section 3635 of the Business and Professions Code is amended to read:

3635. (a) In addition to any other qualifications and requirements for licensure renewal, the bureau shall require the satisfactory completion of 60 hours of approved continuing education biennially. This requirement is waived for the initial license renewal. The continuing education shall meet the following requirements:

- (1) At least 20 hours shall be in pharmacotherapeutics.
- (2) No more than 15 hours may be in naturopathic medical journals or osteopathic or allopathic medical journals, or audio or ~~videotaped~~ *video recorded* presentations, slides, programmed instruction, or computer-assisted instruction or preceptorships.
- (3) No more than 20 hours may be in any single topic.

(4) No more than 15 hours of the continuing education requirements for the specialty certificate in naturopathic childbirth attendance shall apply to the 60 hours of continuing education requirement.

(b) The continuing education requirements of this section may be met through continuing education courses approved by the California Naturopathic Doctors Association, the American Association of Naturopathic Physicians, the Medical Board of California, the California State Board of Pharmacy, the State Board of Chiropractic Examiners, or other courses approved by the bureau.

Comment. Subdivision (a)(2) of Section 3635 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

Bus. & Prof. Code § 4846.5 (amended). Continuing education

SEC. _____. Section 4846.5 of the Business and Professions Code is amended to read:

4846.5. (a) On or after January 1, 2002, except as provided in this section, the board shall issue renewal licenses only to those applicants that have completed a minimum of 36 hours of continuing education in the preceding two years.

(b)(1) Notwithstanding any other provision of law, continuing education hours shall be earned by attending courses relevant to veterinary medicine and sponsored or cosponsored by any of the following:

(A) American Veterinary Medical Association (AVMA) accredited veterinary medical colleges.

(B) Accredited colleges or universities offering programs relevant to veterinary medicine.

(C) The American Veterinary Medical Association.

(D) American Veterinary Medical Association recognized specialty or affiliated allied groups.

(E) American Veterinary Medical Association's affiliated state veterinary medical associations.

(F) Nonprofit annual conferences established in conjunction with state veterinary medical associations.

(G) Educational organizations affiliated with the American Veterinary Medical Association or its state affiliated veterinary medical associations.

(H) Local veterinary medical associations affiliated with the California Veterinary Medical Association.

(I) Federal, state, or local government agencies.

(J) Providers accredited by the Accreditation Council for Continuing Medical Education (ACCME) or approved by the American Medical Association (AMA), providers recognized by the American Dental Association Continuing Education Recognition Program (ADA CERP), and AMA or ADA affiliated state, local, and specialty organizations.

(2) Continuing education credits shall be granted to those veterinarians taking self-study courses, which may include, but are not limited to, reading journals, viewing of ~~videotapes~~ *video recordings*, or listening to ~~audiotapes~~ *audio recordings*. The taking of these courses shall be limited to no more than six hours biennially.

(3) The board may approve other continuing veterinary medical education providers not specified in paragraph (1).

(A) The board has the authority to recognize national continuing education approval bodies for the purpose of approving continuing education providers not specified in paragraph (1).

(B) Applicants seeking continuing education provider approval shall have the option of applying to the board or to a board-recognized national approval body.

(4) For good cause, the board may adopt an order specifying, on a prospective basis, that a provider of continuing veterinary medical education authorized pursuant

to ~~paragraphs (1) or (2)~~ *paragraph (1) or (3)* is no longer an acceptable provider.

(5) Continuing education hours earned by attending courses sponsored or cosponsored by those entities listed in paragraph (1) between January 1, 2000, and the effective date of this act shall be credited toward a veterinarian's continuing education requirement under this section.

(c) Every person renewing his or her license issued pursuant to Section 4846.4 or any person applying for relicensure or for reinstatement of his or her license to active status, shall submit proof of compliance with this section to the board certifying that he or she is in compliance with this section. Any false statement submitted pursuant to this section shall be a violation subject to Section 4831.

(d) This section shall not apply to a veterinarian's first license renewal. This section shall apply only to second and subsequent license renewals granted on or after January 1, 2002.

(e) The board shall have the right to audit the records of all applicants to verify the completion of the continuing education requirement. Applicants shall maintain records of completion of required continuing education coursework for a period of four years and shall make these records available to the board for auditing purposes upon request. If the board, during this audit, questions whether any course reported by the veterinarian satisfies the continuing education requirement, the veterinarian shall provide information to the board concerning the content of the course; the name of its sponsor and cosponsor, if any; and specify the specific curricula that was of benefit to the veterinarian.

(f) A veterinarian desiring an inactive license or to restore an inactive license under Section 701, shall submit an application on a form provided by the board. In order to restore an inactive license to active status, the veterinarian

shall have completed a minimum of 36 hours of continuing education within the last two years preceding application. The inactive license status of a veterinarian shall not deprive the board of its authority to institute or continue a disciplinary action against a licensee.

(g) Knowing misrepresentation of compliance with the requirements of this article by a veterinarian constitutes unprofessional conduct and grounds for disciplinary action or for the issuance of a citation and the imposition of a civil penalty pursuant to Section 4883.

(h) The board, in its discretion, may exempt from the continuing education requirement, any veterinarian who for reasons of health, military service, or undue hardship, cannot meet those requirements. Applications for waivers shall be submitted on a form provided by the board.

(i) The administration of this section may be funded through professional license and continuing education provider fees. The fees related to the administration of this section shall not exceed the costs of administering the corresponding provisions of this section.

(j) For those continuing education providers not listed in paragraph (1) of subdivision (b), the board or its recognized national approval agent shall establish criteria by which a provider of continuing education shall be approved. The board shall initially review and approve these criteria and may review the criteria as needed. The board or its recognized agent shall monitor, maintain, and manage related records and data. The board shall have the authority to impose an application fee, not to exceed two hundred dollars (\$200) biennially, for continuing education providers not listed in paragraph (1) of subdivision (b).

Comment. Subdivision (b)(2) of Section 4846.5 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous

references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

Subdivision (b)(4) is amended to correct an erroneous cross-reference.

Bus. & Prof. Code § 8027 (amended). Court reporting school requirements

SEC. _____. Section 8027 of the Business and Professions Code is amended to read:

8027. (a) As used in this section, “school” means a court reporter training program or an institution that provides a course of instruction approved by the board and the Bureau for Private Postsecondary and Vocational Education, is a public school in this state, or is accredited by the Western Association of Schools and Colleges.

(b) A court reporting school shall be primarily organized to train students for the practice of shorthand reporting, as defined in Sections 8016 and 8017. Its educational program shall be on the postsecondary or collegiate level. It shall be legally organized and authorized to conduct its program under all applicable laws of the state, and shall conform to and offer all components of the minimum prescribed course of study established by the board. Its records shall be kept and shall be maintained in a manner to render them safe from theft, fire, or other loss. The records shall indicate positive daily and clock-hour attendance of each student for all classes, apprenticeship and graduation reports, high school transcripts or the equivalent or self-certification of high school graduation or the equivalent, transcripts of other education, and student progress to date, including all progress and counseling reports.

(c) Any school intending to offer a program in court reporting shall notify the board within 30 days of the date on which it provides notice to, or seeks approval from, the California Department of Education, the Bureau for Private Postsecondary and Vocational Education, the Chancellor’s

Office of the California Community Colleges, or the Western Association of Schools and Colleges, whichever is applicable. The board shall review the proposed curriculum and provide the school tentative approval, or notice of denial, within 60 days of receipt of the notice. The school shall apply for provisional recognition pursuant to subdivision (d) within no more than one year from the date it begins offering court reporting classes.

(d) The board may grant provisional recognition to a new court reporting school upon satisfactory evidence that it has met all of the provisions of subdivision (b) and this subdivision. Recognition may be granted by the board to a provisionally recognized school after it has been in continuous operation for a period of no less than three consecutive years from the date provisional recognition was granted, during which period the school shall provide satisfactory evidence that at least one person has successfully completed the entire course of study established by the board and complied with the provisions of Section 8020, and has been issued a certificate to practice shorthand reporting as defined in Sections 8016 and 8017. The board may, for good cause shown, extend the three-year provisional recognition period for not more than one year. Failure to meet the provisions and terms of this section shall require the board to deny recognition. Once granted, recognition may be withdrawn by the board for failure to comply with all applicable laws and regulations.

(e) Application for recognition of a court reporting school shall be made upon a form prescribed by the board and shall be accompanied by all evidence, statements, or documents requested. Each branch, extension center, or off-campus facility requires separate application.

(f) All recognized and provisionally recognized court reporting schools shall notify the board of any change in

school name, address, telephone number, responsible court reporting program manager, owner of private schools, and the effective date thereof, within 30 days of the change. All of these notifications shall be made in writing.

(g) A school shall notify the board in writing immediately of the discontinuance or pending discontinuance of its court reporting program or any of the program's components. Within two years of the date this notice is sent to the board, the school shall discontinue its court reporting program in its entirety. The board may, for good cause shown, grant not more than two one-year extensions of this period to a school. If a student is to be enrolled after this notice is sent to the board, a school shall disclose to the student the fact of the discontinuance or pending discontinuance of its court reporting program or any of its program components.

(h) The board shall maintain a roster of currently recognized and provisionally recognized court reporting schools, including, but not limited to, the name, address, telephone number, and the name of the responsible court reporting program manager of each school.

(i) The board shall maintain statistics that display the number and passing percentage of all first-time examinees, including, but not limited to, those qualified by each recognized or provisionally recognized school and those first-time examinees qualified by other methods as defined in Section 8020.

(j) Inspections and investigations shall be conducted by the board as necessary to carry out this section, including, but not limited to, unannounced site visits.

(k) All recognized and provisionally recognized schools shall print in their school or course catalog the name, address, and telephone number of the board. At a minimum, the information shall be in 8-point bold type and include the following statement:

“IN ORDER FOR A PERSON TO QUALIFY FROM A SCHOOL TO TAKE THE STATE LICENSING EXAMINATION, THE PERSON SHALL COMPLETE A PROGRAM AT A RECOGNIZED SCHOOL. FOR INFORMATION CONCERNING THE MINIMUM REQUIREMENTS THAT A COURT REPORTING PROGRAM MUST MEET IN ORDER TO BE RECOGNIZED, CONTACT: THE COURT REPORTERS BOARD OF CALIFORNIA; (ADDRESS); (TELEPHONE NUMBER).”

(l) Each court reporting school shall file with the board, not later than June 30 of each year, a current school catalog that shows all course offerings and staff, and for private schools, the owner, except that where there have been no changes to the catalog within the previous year, no catalog need be sent. In addition, each school shall also file with the board a statement certifying whether the school is in compliance with all statutes and the rules and regulations of the board, signed by the responsible court reporting program manager.

(m) A school offering court reporting may not make any written or verbal claims of employment opportunities or potential earnings unless those claims are based on verified data and reflect current employment conditions.

(n) If a school offers a course of instruction that exceeds the board’s minimum requirements, the school shall disclose orally and in writing the board’s minimum requirements and how the course of instruction differs from those criteria. The school shall make this disclosure before a prospective student executes an agreement obligating that person to pay any money to the school for the course of instruction. The school shall also make this disclosure to all students enrolled on January 1, 2002.

(o) Private and public schools shall provide each prospective student with all of the following and have the

prospective student sign a document that shall become part of that individual's permanent record, acknowledging receipt of each item:

(1) A student consumer information brochure published by the board.

(2) A list of the school's graduation requirements, including the number of tests, the pass point of each test, the speed of each test, and the type of test, such as jury charge or literary.

(3) A list of requirements to qualify for the state certified shorthand reporter licensing examination, including the number of tests, the pass point of each test, the speed of each test, and the type of test, such as jury charge or literary, if different than those requirements listed in paragraph (2).

(4) A copy of the school's board-approved benchmarks for satisfactory progress as identified in subdivision (u).

(5) A report showing the number of students from the school who qualified for each of the certified shorthand reporter licensing examinations within the preceding two years, the number of those students that passed each examination, the time, as of the date of qualification, that each student was enrolled in court reporting school, and the placement rate for all students that passed each examination.

(6) On and after January 1, 2005, the school shall also provide to prospective students the number of hours each currently enrolled student who has qualified to take the next licensing test, exclusive of transfer students, has attended court reporting classes.

(p) All enrolled students shall have the information in subdivisions (n) and (o) on file no later than June 30, 2005.

(q) Public schools shall provide the information in subdivisions (n) and (o) to each new student the first day he or she attends theory or machine speed class, if it was not provided previously.

(r) Each enrolled student shall be provided written notification of any change in qualification or graduation requirements that is being implemented due to the requirements of any one of the school's oversight agencies. This notice shall be provided to each affected student at least 30 days before the effective date of the change and shall state the new requirement and the name, address, and telephone number of the agency that is requiring it of the school. Each student shall initial and date a document acknowledging receipt of that information and that document, or a copy thereof, shall be made part of the student's permanent file.

(s) Schools shall make available a comprehensive final examination in each academic subject to any student desiring to challenge an academic class in order to obtain credit towards certification for the state licensing examination. The points required to pass a challenge examination shall not be higher than the minimum points required of other students completing the academic class.

(t) An individual serving as a teacher, instructor, or reader shall meet the qualifications specified by regulation for his or her position.

(u) Each school shall provide a substitute teacher or instructor for any class for which the teacher or instructor is absent for two consecutive days or more.

(v) The board has the authority to approve or disapprove benchmarks for satisfactory progress which each school shall develop for its court reporting program. Schools shall use only board-approved benchmarks to comply with the provisions of paragraph (4) of subdivision (o) and subdivision (u).

(w) Each school shall counsel each student a minimum of one time within each 12-month period to identify the level of attendance and progress, and the prognosis for completing the requirements to become eligible to sit for the state licensing

examination. If the student has not progressed in accordance with the board-approved benchmarks for that school, the student shall be counseled a minimum of one additional time within that same 12-month period.

(x) The school shall provide to the board, for each student qualifying through the school as eligible to sit for the state licensing examination, the number of hours the student attended court reporting classes, both academic and machine speed classes, including theory.

(y) The pass rate of first-time exam takers for each school offering court reporting shall meet or exceed the average pass rate of all first-time test takers for a majority of examinations given for the preceding three years. Failure to do so shall require the board to conduct a review of the program. In addition, the board may place the school on probation and may withdraw recognition if the school continues to place below the above described standard on the two exams that follow the three-year period.

(z) A school shall not require more than one 10-minute qualifying examination, as defined in the regulations of the board, for a student to be eligible to sit for the state certification examination.

(aa) A school shall provide the board the actual number of hours of attendance for each applicant the school qualifies for the state licensing examination.

(bb) The board shall, by December 1, 2001, do the following by regulation as necessary:

(1) Establish the format that shall be used by schools to report tracking of all attendance hours and actual timeframes for completed coursework.

(2) Require schools to provide a minimum of 10 hours of live dictation class each school week for every full-time student.

(3) Require schools to provide students with the opportunity to read back from their stenographic notes a minimum of one time each day to his or her instructor.

(4) Require schools to provide students with the opportunity to practice with a school-approved speed-building ~~tape~~ *audio recording*, or other assigned material, a minimum of one hour per day after school hours as a homework assignment and provide the notes from this ~~tape~~ *audio recording* to their instructor the following day for review.

(5) Develop standardization of policies on the use and administration of qualifier examinations by schools.

(6) Define qualifier exam as follows: the qualifier exam shall consist of 4-voice testimony of 10-minute duration at 200 wpm, graded at 97.5 percent accuracy, and in accordance with the guidelines followed by the board. Schools shall be required to date and number each qualifier and announce the date and number to the students at the time of administering the qualifier. All qualifiers shall indicate the actual dictation time of the test and the school shall catalog and maintain the qualifier for a period of not less than three years for the purpose of inspection by the board.

(7) Require schools to develop a program to provide students with the opportunity to interact with professional court reporters to provide skill support, mentoring, or counseling which they can document at least quarterly.

(8) Define qualifications and educational requirements required of instructors and readers that read test material and qualifiers.

(cc) The board shall adopt regulations to implement the requirements of this section not later than September 1, 2002.

(dd) The board may recover costs for any additional expenses incurred under the enactment amending this section

in the 2001-02 Regular Session of the Legislature pursuant to its fee authority in Section 8031.

Comment. Subdivision (bb)(4) of Section 8027 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

Bus. & Prof. Code § 17539.55 (amended). Sweepstakes using 900 numbers

SEC. _____. Section 17539.55 of the Business and Professions Code is amended to read:

17539.55. (a) It shall be unlawful to operate a sweepstakes in this state through the use of a 900 number, unless the information provider registers with the Department of Justice as provided in this section within 10 days after causing any advertisement for the sweepstakes to be directed to any person in this state.

(b) The registration shall include the following information:

(1) Each 900 number to be used in the sweepstakes.

(2) The name and address of the information provider including corporate identity, if any, and the name and address for the information provider’s agent for service of process within the state.

(3) A copy of the information provider’s audio text, prerecorded, or live operator scripts.

(4) A copy of the official rules for the sweepstakes.

(5) For television, video, or any on-screen advertisements, a copy of the storyboard and ~~videotape~~ *video recording*.

(6) For radio advertisements, a copy of the script and audio ~~cassette~~ *recording*.

(7) For print or electronic form transmitted over the Internet, a copy of all advertisements.

(8) For direct mail solicitations, a copy of all principal solicitations.

(9) For telephone solicitations, a copy of the script.

(10) The names of the carriers which the information provider plans to utilize to carry the 900 number calls.

(c) The information provider shall pay an annual registration fee of fifty dollars (\$50) for each 900 number used for sweepstakes purposes.

(d) It shall be unlawful for any information provider that operates a sweepstakes to make reference, in any contact with the public, to the fact that the information provider is registered with the Department of Justice, as required by this section, or in any other manner imply that such registration represents approval of the sweepstakes by the Department of Justice.

Comment. Section 17539.55 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

Bus. & Prof. Code § 19513 (amended). Examinations

SEC. _____. Section 19513 of the Business and Professions Code is amended to read:

19513. (a) The board shall prepare both written and oral examinations. All examinations shall be standardized and, in the case of oral examinations, ~~tape~~ *audio* recorded. Written examinations may be administered by members of the board staff. Oral examinations shall be conducted by a panel of not less than three board members.

(b) The board shall provide a detailed outline of the subjects to be covered by the oral and written examinations for a license to every person who requests the outline.

(c) The results of the oral and written examinations for stewards licenses shall be a public record.

Comment. Section 19513 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see

2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

Bus. & Prof. Code § 19576 (amended). Recording of race for commercial purpose

SEC. _____. Section 19576 of the Business and Professions Code is amended to read:

19576. (a) No person may furnish a ~~tape~~ *an audio or video recording* of any quarter horse race occurring in this state to any other person either within or outside of the state for any commercial purpose, including the use of the ~~tape recording~~ in any type of video game, without first securing the consent of the racing association conducting the meeting, the organization representing horsemen participating in the meeting, and the board.

(b) No person may use any ~~tape~~ *audio or video recording* of any quarter horse race occurring in this state for any commercial purpose without first securing the consent of the racing association holding the meeting, the organization representing horsemen participating in the meeting, and the board.

(c) Any person whose consent is required under this section may file and maintain an action in superior court to obtain an injunction against the furnishing or commercial use of a *recording of a quarter horse race* ~~tape~~ in violation of this section.

Comment. Section 19576 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

Bus. & Prof. Code § 19861 (amended). Licensing of gambling establishment

SEC. _____. Section 19861 of the Business and Professions Code is amended to read:

19861. Notwithstanding subdivision (i) of Section 19801, the commission shall not deny a license to a gambling establishment solely because it is not open to the public, provided that all of the following are true: (a) the gambling establishment is situated in a local jurisdiction that has an ordinance allowing only private clubs, and the gambling establishment was in operation as a private club under that ordinance on December 31, 1997, and met all applicable state and local gaming registration requirements; (b) the gambling establishment consists of no more than five gaming tables; (c) ~~videotaped~~ *video* recordings of the entrance to the gambling room or rooms and all tables situated therein are made during all hours of operation by means of closed circuit television cameras, and these ~~tapes~~ *recordings* are retained for a period of 30 days and are made available for review by the department or commission upon request; and (d) the gambling establishment is open to members of the private club and their spouses in accordance with membership criteria in effect as of December 31, 1997.

A gambling establishment meeting these criteria, in addition to the other requirements of this chapter, may be licensed to operate as a private club gambling establishment until November 30, 2003, or until the ownership or operation of the gambling establishment changes from the ownership or operation as of January 1, 1998, whichever occurs first. Operation of the gambling establishments after this date shall only be permitted if the local jurisdiction approves an ordinance, pursuant to Sections 19961 and 19962, authorizing the operation of gambling establishments that are open to the public. The commission shall adopt regulations implementing

this section. Prior to the commission's issuance of a license to a private club, the department shall ensure that the ownership of the gambling establishment has remained constant since January 1, 1998, and the operation of the gambling establishment has not been leased to any third party.

Comment. Section 19861 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to "audiotape" in Civil Discovery Act with either "audio technology," "audio recording," or "audio record," as context required).

Bus. & Prof. Code § 19870 (amended). Grant or denial of license

SEC. _____. Section 19870 of the Business and Professions Code is amended to read:

19870. (a) The commission, after considering the recommendation of the chief and any other testimony and written comments as may be presented at the meeting, or as may have been submitted in writing to the commission prior to the meeting, may either deny the application or grant a license to an applicant who it determines to be qualified to hold the license.

(b) When the commission grants an application for a license or approval, the commission may limit or place restrictions thereon as it may deem necessary in the public interest, consistent with the policies described in this chapter.

(c) When an application is denied, the commission shall prepare and file a detailed statement of its reasons for the denial.

(d) All proceedings at a meeting of the commission relating to a license application shall be recorded stenographically or ~~on audiotape or videotape~~ by *audio or video recording*.

(e) A decision of the commission denying a license or approval, or imposing any condition or restriction on the grant of a license or approval may be reviewed by petition pursuant to Section 1085 of the Code of Civil Procedure.

Section 1094.5 of the Code of Civil Procedure shall not apply to any judicial proceeding described in the foregoing sentence, and the court may grant the petition only if the court finds that the action of the commission was arbitrary and capricious, or that the action exceeded the commission's jurisdiction.

Comment. Section 19870 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to "audiotape" in Civil Discovery Act with either "audio technology," "audio recording," or "audio record," as context required).

Bus. & Prof. Code § 21701.1 (amended). Transport of storage containers

SEC. _____. Section 21701.1 of the Business and Professions Code is amended to read:

21701.1. (a) The owner or operator of a self-service storage facility or a household goods carrier, may, for a fee, transport individual storage containers to and from a self-service storage facility that he or she owns or operates. This transportation activity, whether performed by an owner, operator, or carrier, shall not be deemed transportation for compensation or hire as a business of used household goods and is not subject to regulation under Chapter 7 (commencing with Section 5101) of Division 2 of the Public Utilities Code, provided that all of the following requirements are met:

(1) The fee charged (A) to deliver an empty individual storage container to a customer and to transport the loaded container to a self-service storage facility or (B) to return a loaded individual storage container from a self-service storage facility to the customer does not exceed one hundred dollars (\$100).

(2) The owner, operator, or carrier, or any affiliate of the owner, operator, or carrier, does not load, pack, or otherwise handle the contents of the container.

(3) The owner, operator, or carrier is registered under Chapter 2 (commencing with Section 34620) of Division 14.85 of the Vehicle Code or holds a permit under Chapter 7 (commencing with Section 5101) of Division 2 of the Public Utilities Code.

(4) The owner, operator, or carrier has procured and maintained cargo insurance in the amount of at least twenty thousand dollars (\$20,000) per shipment. Proof of cargo insurance coverage shall be maintained on file and presented to the Department of Motor Vehicles or Public Utilities Commission upon written request.

(5) The owner, operator, or carrier shall disclose to the customer in advance the following information regarding the container transfer service offered, in a written document separate from others furnished at the time of disclosure:

(A) A detailed description of the transfer service, including a commitment to use its best efforts to place the container in an appropriate location designated by the customer.

(B) The dimensions and construction of the individual storage containers used.

(C) The unit charge, if any, for the container transfer service that is in addition to the storage charge or any other fees under the rental agreement.

(D) The availability of delivery or pickup by the customer of his or her goods at the self-service storage facility.

(E) The maximum allowable distance, measured from the self-service storage facility, for the initial pickup and final delivery of the loaded container.

(F) The precise terms of the company's right to move a container from the initial storage location at its own discretion and a statement that the customer will not be required to pay additional charges with respect to that transfer.

(G) Conspicuous disclosure in bold text of the allocation of responsibility for the risk of loss or damage to the customer's

goods, including any disclaimer of the company's liability, and the procedure for presenting any claim regarding loss or damage to the company.

The disclosure of terms and conditions required by this subdivision, and the rental agreement, shall be received by the customer a minimum of 72 hours prior to delivery of the empty individual storage container; however, the customer may, in writing, knowingly and voluntarily waive that receipt. The company shall record in writing, and retain for a period of at least six months after the end of the rental, the time and method of delivery of the information, any waiver made by the customer, and the times and dates of initial pickup and redelivery of the containerized goods.

(6) No later than the time the empty individual storage container is delivered to the customer, the company shall provide the customer with an informational brochure containing the following information about loading the container:

(A) Packing and loading tips to minimize damage in transit.

(B) A suggestion that the customer make an inventory of the items as they are loaded and keep any other record (for example, photographs or ~~videotape~~ *video recording*) that may assist in any subsequent claims processing.

(C) A list of items that are impermissible to pack in the container (for example, flammable items).

(D) A list of items that are not recommended to be packed in light of foreseeable hazards inherent in the company's handling of the containers and in light of any limitation of liability contained in the rental agreement.

(b) Pickup and delivery of the individual storage containers shall be on a date agreed upon between the customer and the company. If the company requires the customer to be physically present at the time of pickup, the company shall in fact be at the customer's premises prepared to perform the

service not more than four hours later than the scheduled time agreed to by the customer and company, and in the event of a preventable breach of that obligation by the company, the customer shall be entitled to receive a penalty of fifty dollars (\$50) from the company and to elect rescission of the rental agreement without liability.

(c) No charge shall be assessed with respect to any movement of the container between self-service storage facilities by the company at its own discretion, nor for the delivery of a container to a customer's premises if the customer advises the company, at least 24 hours before the agreed time of container dropoff, orally or in writing, that he or she is rescinding the request for service.

(d) For purposes of this chapter, "individual storage container" means a container that meets all of the following requirements:

- (1) It shall be fully enclosed and locked.
- (2) It contains not less than 100 and not more than 1,100 cubic feet.
- (3) It is constructed out of a durable material appropriate for repeated use. A box constructed out of cardboard or a similar material shall not constitute an individual storage container for purposes of this section.

(e) Nothing in this section shall be construed to limit the authority of the Public Utilities Commission to investigate and commence an appropriate enforcement action pursuant to Chapter 7 (commencing with Section 5101) of Division 2 of the Public Utilities Code against any person transporting household goods in individual storage containers in a manner other than that described in this section.

Comment. Subdivision (a)(6)(B) of Section 21701.1 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to "audiotape" in Civil Discovery Act with either

“audio technology,” “audio recording,” or “audio record,” as context required).

Bus. & Prof. Code § 25658.4 (amended). Professional competency examination

SEC. _____. Section 25658.4 of the Business and Professions Code is amended to read:

25658.4. (a) On and after January 1, 1992, no clerk shall make an off sale of alcoholic beverages unless the clerk executes under penalty of perjury on the first day he or she makes that sale an application and acknowledgment. The application and acknowledgment shall be in a form understandable to the clerk.

(1) The department shall specify the form of the application and acknowledgment which shall include at a minimum a summary of this division pertaining to the following:

(A) The prohibitions contained in Sections 25658 and 25658.5 pertaining to the sale to, and purchase of, alcoholic beverages by persons under 21 years of age.

(B) Bona fide evidence of majority as provided in Section 25660.

(C) Hours of operation as provided in Article 2 (commencing with Section ~~25630~~ 25631) of Chapter 16.

(D) The prohibitions contained in subdivision (a) of Section 25602 and Section 25602.1 pertaining to sales to an intoxicated person.

(E) Sections 23393 and 23394 as they pertain to on-premises consumption of alcoholic beverages in an off-sale premises.

(F) The requirements and prohibitions contained in Section 25659.5 pertaining to sales of keg beer for consumption off licensed premises.

(2) The application and acknowledgment shall also include a statement that the clerk has read and understands the summary, a statement that the clerk has never been convicted

of violating this division or, if convicted, an explanation of the circumstances of each conviction, and a statement that the application and acknowledgment is executed under penalty of perjury.

(3) The licensee shall keep the executed application and acknowledgment on the premises at all times and available for inspection by the department. A licensee with more than one licensed off-sale premises in the state may comply with this subdivision by maintaining an executed application and acknowledgment at a designated licensed premises, regional office, or headquarters office in the state. An executed application and acknowledgment maintained at the designated locations shall be valid for all licensed off-sale premises owned by the licensee. Any licensee maintaining an application and acknowledgment at a designated site other than the individual licensed off-sale premises shall notify the department in advance and in writing of the site where the application and acknowledgment shall be maintained and available for inspection. A licensee electing to maintain application and acknowledgments at a designated site other than the licensed premises shall maintain at each licensed premises a notice of where the executed application and acknowledgments are located. Any licensee with more than one licensed off-sale premises who elects to maintain the application and acknowledgments at a designated site other than each licensed premises shall provide the department, upon written demand, a copy of any employee's executed application and acknowledgment within 10 business days. A violation of this subdivision by a licensee constitutes grounds for discipline by the department.

(b) On and after January 1, 1992, the licensee shall post a notice that contains and describes, in concise terms, prohibited sales of alcoholic beverages, a statement that the off-sale seller will refuse to make a sale if the seller

reasonably suspects that the Alcoholic Beverage Control Act may be violated, and a statement that a minor who purchases or attempts to purchase alcoholic beverages is subject to suspension or delay in the issuance of his or her driver's license pursuant to Section 13202.5 of the Vehicle Code. The notice shall be posted at an entrance or at a point of sale in the licensed premises or in any other location that is visible to purchasers of alcoholic beverages and to the off-sale seller.

(c) On and after January 1, 1998, a retail licensee shall post a notice that contains and describes, in concise terms, the fines and penalties for any violation of Section 25658, relating to the sale of alcoholic beverages to, or the purchase of alcoholic beverages by, any person under the age of 21 years.

(d) Nonprofit organizations or licensees may obtain ~~videotapes~~ *video recordings* and other training materials from the department on the Licensee Education on Alcohol and Drugs (LEAD) program. The ~~videotapes~~ *video recordings* and training materials may be updated periodically and may be provided in English and other languages, and when made available by the department, shall be provided at cost.

(e) As used in this section:

(1) "Off-sale seller" means any person holding a retail off-sale license issued by the department and any person employed by that licensee who in the course of that employment sells alcoholic beverages.

(2) "Clerk" means an off-sale seller who is not a licensee.

(f) The department may adopt rules and appropriate fees for licensees that it determines necessary for the administration of this section.

Comment. Subdivision (a)(1)(C) of Section 25658.4 is amended to correct a cross-reference. Former Section 25630, the first section of Article 2 of Chapter 16, was repealed by 1969 Cal. Stat. ch. 614, § 1.

Subdivision (d) is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see

2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

CIVIL CODE

Civ. Code § 916 (amended). Inspection and testing

SEC. _____. Section 916 of the Civil Code is amended to read:

916. (a) If a builder elects to inspect the claimed unmet standards, the builder shall complete the initial inspection and testing within 14 days after acknowledgment of receipt of the notice of the claim, at a mutually convenient date and time. If the homeowner has retained legal representation, the inspection shall be scheduled with the legal representative’s office at a mutually convenient date and time, unless the legal representative is unavailable during the relevant time periods. All costs of builder inspection and testing, including any damage caused by the builder inspection, shall be borne by the builder. The builder shall also provide written proof that the builder has liability insurance to cover any damages or injuries occurring during inspection and testing. The builder shall restore the property to its pretesting condition within 48 hours of the testing. The builder shall, upon request, allow the inspections to be observed and electronically recorded, ~~videotaped~~ *video recorded*, or photographed by the claimant or his or her legal representative.

(b) Nothing that occurs during a builder’s or claimant’s inspection or testing may be used or introduced as evidence to support a spoliation defense by any potential party in any subsequent litigation.

(c) If a builder deems a second inspection or testing reasonably necessary, and specifies the reasons therefor in writing within three days following the initial inspection, the

builder may conduct a second inspection or testing. A second inspection or testing shall be completed within 40 days of the initial inspection or testing. All requirements concerning the initial inspection or testing shall also apply to the second inspection or testing.

(d) If the builder fails to inspect or test the property within the time specified, the claimant is released from the requirements of this section and may proceed with the filing of an action. However, the standards set forth in the other chapters of this title shall continue to apply to the action.

(e) If a builder intends to hold a subcontractor, design professional, individual product manufacturer, or material supplier, including an insurance carrier, warranty company, or service company, responsible for its contribution to the unmet standard, the builder shall provide notice to that person or entity sufficiently in advance to allow them to attend the initial, or if requested, second inspection of any alleged unmet standard and to participate in the repair process. The claimant and his or her legal representative, if any, shall be advised in a reasonable time prior to the inspection as to the identity of all persons or entities invited to attend. This subdivision does not apply to the builder's insurance company. Except with respect to any claims involving a repair actually conducted under this chapter, nothing in this subdivision shall be construed to relieve a subcontractor, design professional, individual product manufacturer, or material supplier of any liability under an action brought by a claimant.

Comment. Subdivision (a) of Section 916 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to "audiotape" in Civil Discovery Act with either "audio technology," "audio recording," or "audio record," as context required).

Civ. Code § 922 (amended). Recording of repair

SEC. _____. Section 922 of the Civil Code is amended to read:

922. The builder shall, upon request, allow the repair to be observed and electronically recorded, ~~videotaped~~, *video recorded*, or photographed by the claimant or his or her legal representative. Nothing that occurs during the repair process may be used or introduced as evidence to support a spoliation defense by any potential party in any subsequent litigation.

Comment. Section 922 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

Civ. Code § 1799.3 (amended). Disclosure of personal information

SEC. _____. Section 1799.3 of the Civil Code is amended to read:

1799.3. (a) No person providing video ~~cassette recording~~ sales or rental services shall disclose any personal information or the contents of any record, including sales or rental information, which is prepared or maintained by that person, to any person, other than the individual who is the subject of the record, without the written consent of that individual.

(b) This section does not apply to any of the following:

(1) To a disclosure to any person pursuant to a subpoena or court order.

(2) To a disclosure which is in response to the proper use of discovery in a pending civil action.

(3) To a disclosure to any person acting pursuant to a lawful search warrant.

(4) To a disclosure to a law enforcement agency when required for investigations of criminal activity, unless that disclosure is prohibited by law.

(5) To a disclosure to a taxing agency for purposes of tax administration.

(6) To a disclosure of names and addresses only for commercial purposes.

(c) Any willful violation of this section shall be subject to a civil penalty not to exceed five hundred dollars (\$500) for each violation, which may be recovered in a civil action brought by the person who is the subject of the records.

(d)(1) Any person who willfully violates this section on three or more occasions in any six-month period shall, in addition, be subject to a civil penalty not to exceed five hundred dollars (\$500) for each violation, which may be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General, by any district attorney or city attorney, or by a city prosecutor in any city or city and county having a full-time city prosecutor, in any court of competent jurisdiction.

(2) If the action is brought by the Attorney General, one-half of the penalty collected shall be paid to the treasurer of the county in which the judgment was entered, and one-half to the General Fund. If the action is brought by a district attorney, the penalty collected shall be paid to the treasurer of the county in which the judgment was entered. If the action is brought by a city attorney or city prosecutor, one-half of the penalty shall be paid to the treasurer of the city in which the judgment was entered, and one-half to the treasurer of the county in which the judgment was entered.

(e) The penalty provided by this section is not an exclusive remedy, and does not affect any other relief or remedy provided by law.

Comment. Subdivision (a) of Section 1799.3 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

Civ. Code § 3344.1 (amended). Use of deceased personality's likeness

SEC. _____. Section 3344.1 of the Civil Code is amended to read:

3344.1. (a)(1) Any person who uses a deceased personality's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services, without prior consent from the person or persons specified in subdivision (c), shall be liable for any damages sustained by the person or persons injured as a result thereof. In addition, in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount equal to the greater of seven hundred fifty dollars (\$750) or the actual damages suffered by the injured party or parties, as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages. In establishing these profits, the injured party or parties shall be required to present proof only of the gross revenue attributable to the use and the person who violated the section is required to prove his or her deductible expenses. Punitive damages may also be awarded to the injured party or parties. The prevailing party or parties in any action under this section shall also be entitled to attorneys' fees and costs.

(2) For purposes of this subdivision, a play, book, magazine, newspaper, musical composition, audiovisual work, radio or television program, single and original work of art, work of political or newsworthy value, or an advertisement or commercial announcement for any of these works, shall not be considered a product, article of merchandise, good, or service if it is fictional or nonfictional entertainment, or a dramatic, literary, or musical work.

(3) If a work that is protected under paragraph (2) includes within it a use in connection with a product, article of merchandise, good, or service, this use shall not be exempt under this subdivision, notwithstanding the unprotected use's inclusion in a work otherwise exempt under this subdivision, if the claimant proves that this use is so directly connected with a product, article of merchandise, good, or service as to constitute an act of advertising, selling, or soliciting purchases of that product, article of merchandise, good, or service by the deceased personality without prior consent from the person or persons specified in subdivision (c).

(b) The rights recognized under this section are property rights, freely transferable or descendible, in whole or in part, by contract or by means of any trust or any other testamentary instrument, executed before or after January 1, 1985. The rights recognized under this section shall be deemed to have existed at the time of death of any deceased personality who died prior to January 1, 1985, and, except as provided in subdivision (o), shall vest in the persons entitled to these property rights under the testamentary instrument of the deceased personality effective as of the date of his or her death. In the absence of an express transfer in a testamentary instrument of the deceased personality's rights in his or her name, voice, signature, photograph, or likeness, a provision in the testamentary instrument that provides for the disposition of the residue of the deceased personality's assets shall be effective to transfer the rights recognized under this section in accordance with the terms of that provision. The rights established by this section shall also be freely transferable or descendible by contract, trust, or any other testamentary instrument by any subsequent owner of the deceased personality's rights as recognized by this section. Nothing in this section shall be construed to render invalid or unenforceable any contract entered into by a deceased

personality during his or her lifetime by which the deceased personality assigned the rights, in whole or in part, to use his or her name, voice, signature, photograph or likeness, regardless of whether the contract was entered into before or after January 1, 1985.

(c) The consent required by this section shall be exercisable by the person or persons to whom the right of consent, or portion thereof, has been transferred in accordance with subdivision (b), or if no transfer has occurred, then by the person or persons to whom the right of consent, or portion thereof, has passed in accordance with subdivision (d).

(d) Subject to subdivisions (b) and (c), after the death of any person, the rights under this section shall belong to the following person or persons and may be exercised, on behalf of and for the benefit of all of those persons, by those persons who, in the aggregate, are entitled to more than a one-half interest in the rights:

(1) The entire interest in those rights belong to the surviving spouse of the deceased personality unless there are any surviving children or grandchildren of the deceased personality, in which case one-half of the entire interest in those rights belong to the surviving spouse.

(2) The entire interest in those rights belong to the surviving children of the deceased personality and to the surviving children of any dead child of the deceased personality unless the deceased personality has a surviving spouse, in which case the ownership of a one-half interest in rights is divided among the surviving children and grandchildren.

(3) If there is no surviving spouse, and no surviving children or grandchildren, then the entire interest in those rights belong to the surviving parent or parents of the deceased personality.

(4) The rights of the deceased personality's children and grandchildren are in all cases divided among them and exercisable in the manner provided in Section 240 of the Probate Code according to the number of the deceased personality's children represented. The share of the children of a dead child of a deceased personality can be exercised only by the action of a majority of them.

(e) If any deceased personality does not transfer his or her rights under this section by contract, or by means of a trust or testamentary instrument, and there are no surviving persons as described in subdivision (d), then the rights set forth in subdivision (a) shall terminate.

(f)(1) A successor in interest to the rights of a deceased personality under this section or a licensee thereof may not recover damages for a use prohibited by this section that occurs before the successor in interest or licensee registers a claim of the rights under paragraph (2).

(2) Any person claiming to be a successor in interest to the rights of a deceased personality under this section or a licensee thereof may register that claim with the Secretary of State on a form prescribed by the Secretary of State and upon payment of a fee as set forth in subdivision (d) of Section 12195 of the Government Code. The form shall be verified and shall include the name and date of death of the deceased personality, the name and address of the claimant, the basis of the claim, and the rights claimed.

(3) Upon receipt and after filing of any document under this section, the Secretary of State shall post the document along with the entire registry of persons claiming to be a successor in interest to the rights of a deceased personality or a registered licensee under this section upon the World Wide Web, also known as the Internet. The Secretary of State may microfilm or reproduce by other techniques any of the filings or documents and destroy the original filing or document. The

microfilm or other reproduction of any document under the provisions of this section shall be admissible in any court of law. The microfilm or other reproduction of any document may be destroyed by the Secretary of State 70 years after the death of the personality named therein.

(4) Claims registered under this subdivision shall be public records.

(g) No action shall be brought under this section by reason of any use of a deceased personality's name, voice, signature, photograph, or likeness occurring after the expiration of 70 years after the death of the deceased personality.

(h) As used in this section, "deceased personality" means any natural person whose name, voice, signature, photograph, or likeness has commercial value at the time of his or her death, whether or not during the lifetime of that natural person the person used his or her name, voice, signature, photograph, or likeness on or in products, merchandise or goods, or for purposes of advertising or selling, or solicitation of purchase of, products, merchandise, goods, or services. A "deceased personality" shall include, without limitation, any such natural person who has died within 70 years prior to January 1, 1985.

(i) As used in this section, "photograph" means any photograph or photographic reproduction, still or moving, or any video ~~tape~~ recording or live television transmission, of any person, such that the deceased personality is readily identifiable. A deceased personality shall be deemed to be readily identifiable from a photograph when one who views the photograph with the naked eye can reasonably determine who the person depicted in the photograph is.

(j) For purposes of this section, a use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any

political campaign, shall not constitute a use for which consent is required under subdivision (a).

(k) The use of a name, voice, signature, photograph, or likeness in a commercial medium shall not constitute a use for which consent is required under subdivision (a) solely because the material containing the use is commercially sponsored or contains paid advertising. Rather, it shall be a question of fact whether or not the use of the deceased personality's name, voice, signature, photograph, or likeness was so directly connected with the commercial sponsorship or with the paid advertising as to constitute a use for which consent is required under subdivision (a).

(l) Nothing in this section shall apply to the owners or employees of any medium used for advertising, including, but not limited to, newspapers, magazines, radio and television networks and stations, cable television systems, billboards, and transit ads, by whom any advertisement or solicitation in violation of this section is published or disseminated, unless it is established that the owners or employees had knowledge of the unauthorized use of the deceased personality's name, voice, signature, photograph, or likeness as prohibited by this section.

(m) The remedies provided for in this section are cumulative and shall be in addition to any others provided for by law.

(n) This section shall apply to the adjudication of liability and the imposition of any damages or other remedies in cases in which the liability, damages, and other remedies arise from acts occurring directly in this state. For purposes of this section, acts giving rise to liability shall be limited to the use, on or in products, merchandise, goods, or services, or the advertising or selling, or soliciting purchases of, products, merchandise, goods, or services prohibited by this section.

(o) Notwithstanding any provision of this section to the contrary, if an action was taken prior to May 1, 2007, to exercise rights recognized under this section relating to a deceased personality who died prior to January 1, 1985, by a person described in subdivision (d), other than a person who was disinherited by the deceased personality in a testamentary instrument, and the exercise of those rights was not challenged successfully in a court action by a person described in subdivision (b), that exercise shall not be affected by subdivision (b). In such a case, the rights that would otherwise vest in one or more persons described in subdivision (b) shall vest solely in the person or persons described in subdivision (d), other than a person disinherited by the deceased personality in a testamentary instrument, for all future purposes.

(p) The rights recognized by this section are expressly made retroactive, including to those deceased personalities who died before January 1, 1985.

Comment. Subdivision (i) of Section 3344.1 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

CODE OF CIVIL PROCEDURE

Code Civ. Proc. § 129 (amended). Reproduction of image of deceased person

SEC. _____. Section 129 of the Code of the Civil Procedure is amended to read:

129. Notwithstanding any other provision of law, no copy, reproduction, or facsimile of any kind shall be made of any photograph, negative, or print, including instant photographs and video ~~tapes~~ recordings, of the body, or any portion of the body, of a deceased person, taken by or for the coroner at the

scene of death or in the course of a post mortem examination or autopsy made by or caused to be made by the coroner, except for use in a criminal action or proceeding in this state which relates to the death of that person, or except as a court of this state permits, by order after good cause has been shown and after written notification of the request for the court order has been served, at least five days before the order is made, upon the district attorney of the county in which the post mortem examination or autopsy has been made or caused to be made.

This section shall not apply to the making of such a copy, reproduction, or facsimile for use in the field of forensic pathology, for use in medical, or scientific education or research, or for use by any law enforcement agency in this or any other state or the United States.

This section shall apply to any such copy, reproduction, or facsimile, and to any such photograph, negative, or print, heretofore or hereafter made.

Comment. Section 129 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

Code Civ. Proc. § 1033.5 (amended). Allowable costs

SEC. _____. Section 1033.5 of the Code of Civil Procedure is amended to read:

1033.5. (a) The following items are allowable as costs under Section 1032:

- (1) Filing, motion, and jury fees.
- (2) Juror food and lodging while they are kept together during trial and after the jury retires for deliberation.
- (3) Taking, ~~videotaping~~ *video recording*, and transcribing necessary depositions including an original and one copy of those taken by the claimant and one copy of depositions taken

by the party against whom costs are allowed, and travel expenses to attend depositions.

(4) Service of process by a public officer, registered process server, or other means, as follows:

(A) When service is by a public officer, the recoverable cost is the fee authorized by law at the time of service.

(B) If service is by a process server registered pursuant to Chapter 16 (commencing with Section 22350) of Division 8 of the Business and Professions Code, the recoverable cost is the amount actually incurred in effecting service, including, but not limited to, a stakeout or other means employed in locating the person to be served, unless such charges are successfully challenged by a party to the action.

(C) When service is by publication, the recoverable cost is the sum actually incurred in effecting service.

(D) When service is by a means other than that set forth in subparagraph (A), (B) or (C), the recoverable cost is the lesser of the sum actually incurred, or the amount allowed to a public officer in this state for such service, except that the court may allow the sum actually incurred in effecting service upon application pursuant to paragraph (4) of subdivision (c).

(5) Expenses of attachment including keeper's fees.

(6) Premiums on necessary surety bonds.

(7) Ordinary witness fees pursuant to Section 68093 of the Government Code.

(8) Fees of expert witnesses ordered by the court.

(9) Transcripts of court proceedings ordered by the court.

(10) Attorney fees, when authorized by any of the following:

(A) Contract.

(B) Statute.

(C) Law.

(11) Court reporters fees as established by statute.

(12) Models and blowups of exhibits and photocopies of exhibits may be allowed if they were reasonably helpful to aid the trier of fact.

(13) Any other item that is required to be awarded to the prevailing party pursuant to statute as an incident to prevailing in the action at trial or on appeal.

(b) The following items are not allowable as costs, except when expressly authorized by law:

- (1) Fees of experts not ordered by the court.
- (2) Investigation expenses in preparing the case for trial.
- (3) Postage, telephone, and photocopying charges, except for exhibits.
- (4) Costs in investigation of jurors or in preparation for voir dire.

(5) Transcripts of court proceedings not ordered by the court.

(c) Any award of costs shall be subject to the following:

- (1) Costs are allowable if incurred, whether or not paid.
- (2) Allowable costs shall be reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation.
- (3) Allowable costs shall be reasonable in amount.
- (4) Items not mentioned in this section and items assessed upon application may be allowed or denied in the court's discretion.

(5) When any statute of this state refers to the award of "costs and attorney's fees," attorney's fees are an item and component of the costs to be awarded and are allowable as costs pursuant to subparagraph (B) of paragraph (10) of subdivision (a). Any claim not based upon the court's established schedule of attorney's fees for actions on a contract shall bear the burden of proof. Attorney's fees allowable as costs pursuant to subparagraph (B) of paragraph (10) of subdivision (a) may be fixed as follows: (A) upon a

noticed motion, (B) at the time a statement of decision is rendered, (C) upon application supported by affidavit made concurrently with a claim for other costs, or (D) upon entry of default judgment. Attorney's fees allowable as costs pursuant to subparagraph (A) or (C) of paragraph (10) of subdivision (a) shall be fixed either upon a noticed motion or upon entry of a default judgment, unless otherwise provided by stipulation of the parties.

Attorney's fees awarded pursuant to Section 1717 of the Civil Code are allowable costs under Section 1032 as authorized by subparagraph (A) of paragraph (10) of subdivision (a).

Comment. Subdivision (a)(3) of Section 1033.5 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to "audiotape" in Civil Discovery Act with either "audio technology," "audio recording," or "audio record," as context required).

Code Civ. Proc. § 2025.560 (amended). Recording of deposition testimony

SEC. _____. Section 2025.560 of the Code of Civil Procedure is amended to read:

2025.560. (a) An audio or video ~~record~~ *recording* of deposition testimony made by, or at the direction of, any party, including a certified ~~tape~~ *recording* made by an operator qualified under subdivisions (b) to (f), inclusive, of Section 2025.340, shall not be filed with the court. Instead, the operator shall retain custody of that ~~record~~ *recording* and shall store it under conditions that will protect it against loss, destruction, or tampering, and preserve as far as practicable the quality of the recording and the integrity of the testimony and images it contains.

(b) At the request of any party to the action, including a party who did not attend the taking of the deposition

testimony, or at the request of the deponent, that operator shall promptly do both of the following:

(1) Permit the one making the request to hear or to view the recording on receipt of payment of a reasonable charge for providing the facilities for hearing or viewing the recording.

(2) Furnish a copy of the audio or video recording to the one making the request on receipt of payment of the reasonable cost of making that copy of the recording.

(c) The attorney or operator who has custody of an audio or video ~~record~~ *recording* of deposition testimony made by, or at the direction of, any party, shall retain custody of it until six months after final disposition of the action. At that time, the audio or video recording may be destroyed or erased, unless the court, on motion of any party and for good cause shown, orders that the recording be preserved for a longer period.

Comment. Section 2025.560 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

EDUCATION CODE

Educ. Code § 8971 (amended). Definitions

SEC. _____. Section 8971 of the Education Code is amended to read:

8971. As used in this chapter, the following terms shall have the following meanings:

(a) “Child development program” means a full-day or part-day comprehensive developmental program for children ages 0 to 14 years that is administered by the State Department of Education.

(b) “Early primary program,” means an integrated, experiential, and developmentally appropriate educational

program for children in preschool, kindergarten, and grades 1 to 3, inclusive, that incorporates various instructional strategies and authentic assessment practices, including educationally appropriate curricula, heterogeneous groupings, active learning activities, oral language development, small-group instruction, peer interaction, use of concrete manipulative materials in the classroom, planned articulation among preschool, kindergarten and primary grades, and parent involvement and education.

(c) “Integrated, experiential, and developmentally appropriate educational program” means a program that is designed around the abilities and interests of the children in the program and one in which children learn about the various subjects simultaneously, as opposed to segmented courses, and through “hands-on” or “active learning” teaching methods that are more appropriate for young children than the academic “textbook” approach.

(d) “Preschool program” means a comprehensive developmental program for children who are too young to enroll in kindergarten.

(e) “Portfolio material” means a selection of representative samples of the child’s performance within the program setting that may include, but not be limited to, teacher observations, work samples, developmental profiles, photographs, and audio or video ~~tapes~~ *recordings* that present a picture of the child’s progress over time.

(f) “School district” includes county offices of education.

(g) “State preschool program,” means a part-day comprehensive developmental program for children three to five years of age from low-income families, administered by the State Department of Education.

Comment. Subdivision (e) of Section 8971 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous

references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

Educ. Code § 17002 (amended). Definitions

SEC. _____. Section 17002 of the Education Code is amended to read:

17002. The following terms wherever used or referred to in this chapter, shall have the following meanings, respectively, unless a different meaning appears from the context:

(a) “Apportionment” means a reservation of funds necessary to finance the cost of any project approved by the board for lease to an applicant school district.

(b) “Board” means the State Allocation Board.

(c) “Cost of project” includes, but is not limited to, the cost of all real estate property rights, and easements acquired, and the cost of developing the site and streets and utilities immediately adjacent thereto, the cost of construction, reconstruction, or modernization of buildings and the furnishing and equipping, including the purchase of educational technology hardware, of those buildings, the supporting wiring and cabling, and the technological modernization of existing buildings to support that hardware, the cost of plans, specifications, surveys, and estimates of costs, and other expenses that are necessary or incidental to the financing of the project. For purposes of this section, “educational technology hardware” includes, but is not limited to, computers, telephones, televisions, and video ~~cassette recorders~~ *recording equipment*.

(d)(1) “Good repair” means the facility is maintained in a manner that assures that it is clean, safe, and functional as determined pursuant to a school facility inspection and evaluation instrument developed by the Office of Public School Construction and approved by the board or a local evaluation instrument that meets the same criteria. Until the school facility inspection and evaluation instrument is

approved by the board, “good repair” means the facility is maintained in a manner that assures that it is clean, safe, and functional as determined by the interim evaluation instrument developed by the Office of Public School Construction or a local evaluation instrument that meets the same criteria as the interim evaluation instrument. The school facility inspection and evaluation instrument and local evaluation instruments that meet the minimum criteria of this subdivision shall not require capital enhancements beyond the standards to which the facility was designed and constructed. In order to provide that school facilities are reviewed to be clean, safe, and functional, the school facility inspection and evaluation instrument and local evaluation instruments shall include at least the following criteria:

(A) Gas systems and pipes appear and smell safe, functional, and free of leaks.

(B)(i) Mechanical systems, including heating, ventilation, and air-conditioning systems, are functional and unobstructed.

(ii) Appear to supply adequate amount of air to all classrooms, work spaces, and facilities.

(iii) Maintain interior temperatures within normally acceptable ranges.

(C) Doors and windows are intact, functional and open, close, and lock as designed, unless there is a valid reason they should not function as designed.

(D) Fences and gates are intact, functional, and free of holes and other conditions that could present a safety hazard to pupils, staff, or others. Locks and other security hardware function as designed.

(E) Interior surfaces, including walls, floors, and ceilings, are free of safety hazards from tears, holes, missing floor and ceiling tiles, torn carpet, water damage, or other cause.

Ceiling tiles are intact. Surfaces display no evidence of mold or mildew.

(F) Hazardous and flammable materials are stored properly. No evidence of peeling, chipping, or cracking paint is apparent. No indicators of mold, mildew, or asbestos exposure are evident. There is no apparent evidence of hazardous materials that may pose a threat to the health and safety of pupils or staff.

(G) Structures, including posts, beams, supports for portable classrooms and ramps, and other structural building members appear intact, secure, and functional as designed. Ceilings and floors are not sloping or sagging beyond their intended design. There is no visible evidence of severe cracks, dry rot, mold, or damage that undermines structural components.

(H) Fire sprinklers, fire extinguishers, emergency alarm systems, and all emergency equipment and systems appear to be functioning properly. Fire alarm pull stations are clearly visible. Fire extinguishers are current and placed in all required areas, including every classroom and assembly area. Emergency exits are clearly marked and unobstructed.

(I) Electrical systems, components, and equipment, including switches, junction boxes, panels, wiring, outlets, and light fixtures, are securely enclosed, properly covered and guarded from pupil access, and appear to be working properly.

(J) Lighting appears to be adequate and working properly. Lights do not flicker, dim, or malfunction, and there is no unusual hum or noise from light fixtures. Exterior lights onsite appear to be working properly.

(K) No visible or odorous indicators of pest or vermin infestation are evident.

(L) Interior and exterior drinking fountains are functional, accessible, and free of leaks. Drinking fountain water

pressure is adequate. Fountain water is clear and without unusual taste or odor, and moss, mold, or excessive staining is not evident.

(M)(i) Restrooms and restroom fixtures are functional.

(ii) Appear to be maintained and stocked with supplies regularly.

(iii) Appear to be accessible to pupils during the schoolday.

(iv) Appear to be in compliance with Section 35292.5.

(N) The sanitary sewer system controls odor as designed, displays no signs of stoppage, backup, or flooding, in the facilities or on school grounds, and appears to be functioning properly.

(O) Roofs, gutters, roof drains, and downspouts appear to be functioning properly and are free of visible damage and evidence of disrepair when observed from the ground inside and outside of the building.

(P) The school grounds do not exhibit signs of drainage problems, such as visible evidence of flooded areas, eroded soil, water damage to asphalt playgrounds or parking areas, or clogged storm drain inlets.

(Q) Playground equipment and exterior fixtures, seating, tables, and equipment are functional and free of significant cracks, trip hazards, holes, deterioration that affects functionality or safety, and other health and safety hazards.

(R) School grounds, fields, walkways, and parking lot surfaces are free of significant cracks, trip hazards, holes, deterioration that affects functionality or safety, and other health and safety hazards.

(S) Overall cleanliness of the school grounds, buildings, common areas, and individual rooms demonstrates that all areas appear to have been cleaned regularly, and are free of accumulated refuse and unabated graffiti. Restrooms, drinking fountains, and food preparation or serving areas

appear to have been cleaned each day that the school is in session.

(2)(A) On or before January 1, 2007, the Office of Public School Construction shall develop the school facility inspection and evaluation instrument and instructions for users. The school facility inspection and evaluation instrument and local evaluation instruments that meet the minimum criteria of this subdivision shall include a system that will evaluate each facility, based on the criteria listed in paragraph (1), on a scale of “good,” “fair,” or “poor,” as developed by the Office of Public School Construction, and provide an overall summary of the conditions at each school on a scale of “exemplary,” “good,” “fair,” or “poor.”

(B) On or before July 1, 2007, the Office of Public School Construction, in consultation with county offices of education, shall define objective criteria for determining the overall summary of the conditions of schools.

(C) For purposes of this paragraph, “users” means local educational agencies that participate in either of the programs established pursuant to this chapter, Chapter 12.5 (commencing with Section 17070.10), or Section 17582.

(e) “Lease” includes a lease with an option to purchase.

(f) “Project” means the facility being constructed or acquired by the state for rental to the applicant school district and may include the reconstruction or modernization of existing buildings, construction of new buildings, the grading and development of sites, acquisition of sites therefor and any easements or rights-of-way pertinent thereto or necessary for its full use including the development of streets and utilities.

(g) “Property” includes all property, real, personal or mixed, tangible or intangible, or any interest therein necessary or desirable for carrying out the purposes of this chapter.

Comment. Subdivision (c) of Section 17002 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

Educ. Code § 18032 (amended). Library policy regarding video recordings

SEC. _____. Section 18032 of the Education Code is amended to read:

18032. (a) Every public library that receives state funds pursuant to this chapter and that provides public access to ~~motion picture videotapes~~ *video recordings* shall, by a majority vote of the governing board, adopt a policy regarding access by minors to ~~motion picture videotapes~~ *video recordings* by January 1, 2000.

(b) Every public library that is required to adopt a policy pursuant to subdivision (a) shall make that policy available to members of the public at every library branch.

Comment. Section 18032 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

Educ. Code § 19323 (amended). Loan of audio recordings

SEC. _____. Section 19323 of the Education Code is amended to read:

19323. The State Librarian shall make available *in the state* on a loan basis to legally blind persons, or to persons with a disability that prevents them from reading conventional printed materials, ~~in the state tape~~ *audio* recordings of books and other related materials. The ~~tape~~ *audio* recordings shall be selected by the State Library on the same basis as the State Library’s general program for providing library materials to legally blind readers.

Comment. Section 19323 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

The section is also amended to make a stylistic revision.

Educ. Code § 32255 (amended). Definitions

SEC. _____. Section 32255 of the Education Code is amended to read:

32255. As used in this chapter:

(a) “Animal” means any living organism of the kingdom animalia, beings that typically differ from plants in capacity for spontaneous movement and rapid motor response to stimulation by a usually greater mobility with some degree of voluntary locomotor ability and by greater irritability commonly mediated through a more or less centralized nervous system, beings that are characterized by a requirement for complex organic nutrients including proteins or their constituents that are usually digested in an internal cavity before assimilation into the body proper, and beings that are distinguished from typical plants by lack of chlorophyll, by an inability to perform photosynthesis, by cells that lack cellulose walls, and by the frequent presence of discrete complex sense organs.

(b) “Alternative education project” includes, but is not limited to, the use of video ~~tapes~~ *recordings*, models, films, books, and computers, which would provide an alternate avenue for obtaining the knowledge, information, or experience required by the course of study in question. “Alternative education project” also includes “alternative test.”

(c) “Pupil” means a person under 18 years of age who is matriculated in a course of instruction in an educational institution within the scope of Section 32255.5. For the

purpose of asserting the pupil's rights and receiving any notice or response pursuant to this chapter, "pupil" also includes the parents of the matriculated minor.

Comment. Section 32255 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to "audiotape" in Civil Discovery Act with either "audio technology," "audio recording," or "audio record," as context required).

Educ. Code § 49091.10 (amended). Parental right of inspection

SEC. _____. Section 49091.10 of the Education Code is amended to read:

49091.10. (a) All primary supplemental instructional materials and assessments, including textbooks, teacher's manuals, films, ~~tapes~~ *audio and video recordings*, and software shall be compiled and stored by the classroom instructor and made available promptly for inspection by a parent or guardian in a reasonable timeframe or in accordance with procedures determined by the governing board of the school district.

(b) A parent or guardian has the right to observe instruction and other school activities that involve his or her child in accordance with procedures determined by the governing board of the school district to ensure the safety of pupils and school personnel and to prevent undue interference with instruction or harassment of school personnel. Reasonable accommodation of parents and guardians shall be considered by the governing board of the school district. Upon written request by the parent or guardian, school officials shall arrange for the parental observation of the requested class or classes or activities by that parent or guardian in a reasonable timeframe and in accordance with procedures determined by the governing board of the school district.

Comment. Section 49091.10 is amended to reflect advances in recording technology and for consistency of terminology. For a similar

reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

Educ. Code § 52740 (amended). Instructional material relating to certain important historical events

SEC. _____. Section 52740 of the Education Code is amended to read:

52740. (a) It is the intent of the Legislature to provide accurate instructional materials to schools on all of the following topics:

(1) The internment in the United States of persons of Japanese origin and its impact on Japanese-American citizens.

(2) The Armenian genocide.

(3) The World War II internment, relocation, and restriction in the United States of persons of Italian origin and its impact on the Italian-American community.

(b) The Legislature finds and declares that there are few films or ~~videotapes~~ *video recordings* available on the subjects of the internment of persons of Japanese origin, the Armenian genocide, and the World War II internment, relocation, and restriction of persons of Italian origin, for teachers to use when teaching pupils about these three devastating events. The shortage of available films or ~~videotapes~~ *video recordings* on these subjects is especially true for the Armenian genocide.

(c) The Legislature hereby finds and declares that films and ~~videotapes~~ *video recordings* giving a historically accurate depiction of the internment in the United States of persons of Japanese origin during World War II, the Armenian genocide, and the World War II internment, relocation, and restriction of persons of Italian origin, should be made in order that pupils will recognize these events for the horror they represented. The Legislature hereby encourages teachers to

use these films and ~~videotapes~~ *video recordings* as a resource in teaching pupils about these three important historical events that are commonly overlooked in today's school curriculum.

Comment. Section 52740 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to "audiotape" in Civil Discovery Act with either "audio technology," "audio recording," or "audio record," as context required).

Educ. Code § 52742 (amended). Review of films and video recordings

SEC. _____. Section 52742 of the Education Code is amended to read:

52742. The films or video ~~tapes~~ *recordings* produced pursuant to this article shall be submitted to the Curriculum Development and Supplemental Materials Commission for its review, and may be made available to schools, as provided by this article, only upon adoption by the Curriculum Development and Supplemental Materials Commission.

Comment. Section 52742 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to "audiotape" in Civil Discovery Act with either "audio technology," "audio recording," or "audio record," as context required).

Educ. Code § 52743 (amended). Availability of films and video recordings

SEC. _____. Section 52743 of the Education Code is amended to read:

52743. The State Department of Education shall make available the films or video ~~tapes~~ *recordings* produced pursuant to this article to schools.

Comment. Section 52743 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to "audiotape"

in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

Educ. Code § 56341.1 (amended). Individualized education programs

SEC. _____. Section 56341.1 of the Education Code is amended to read:

56341.1. (a) When developing each pupil’s individualized education program, the individualized education program team shall consider the following:

- (1) The strengths of the pupil.
- (2) The concerns of the parents or guardians for enhancing the education of the pupil.
- (3) The results of the initial assessment or most recent assessment of the pupil.
- (4) The academic, developmental, and functional needs of the child.

(b) The individualized education program team shall do the following:

(1) In the case of a pupil whose behavior impedes his or her learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.

(2) In the case of a pupil with limited-English proficiency, consider the language needs of the pupil as those needs relate to the pupil’s individualized education program.

(3) In the case of a pupil who is blind or visually impaired, provide for instruction in braille, and the use of braille, unless the individualized education program team determines, after an assessment of the pupil’s reading and writing skills, needs, and appropriate reading and writing media, including an assessment of the pupil’s future needs for instruction in braille or the use of braille, that instruction in braille or the use of braille is not appropriate for the pupil.

(4) Consider the communication needs of the pupil, and in the case of a pupil who is deaf or hard of hearing, consider the pupil's language and communication needs, opportunities for direct communications with peers and professional personnel in the pupil's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the pupil's language and communication mode.

(5) Consider whether the pupil requires assistive technology devices and services as defined in Section 1401(1) and (2) of Title 20 of the United States Code.

(c) If, in considering the special factors described in subdivisions (a) and (b), the individualized education program team determines that a pupil needs a particular device or service, including an intervention, accommodation, or other program modification, in order for the pupil to receive a free appropriate public education, the individualized education program team shall include a statement to that effect in the pupil's individualized education program.

(d) The individualized education program team shall review the pupil's individualized education program periodically, but not less frequently than annually, to determine whether the annual goals for the pupil are being achieved, and revise the individualized education program, as appropriate, to address among other matters the following:

(1) Any lack of expected progress toward the annual goals and in the general education curriculum, where appropriate.

(2) The results of any reassessment conducted pursuant to Section 56381.

(3) Information about the pupil provided to, or by, the parents or guardians, as described in subdivision (b) of Section 56381.

(4) The pupil's anticipated needs.

(5) Any other relevant matter.

(e) A regular education teacher of the pupil, who is a member of the individualized education program team, shall participate in the review and revision of the individualized education program of the pupil consistent with Section 1414(d)(1)(C) of Title 20 of the United States Code.

(f) The parent or guardian shall have the right to present information to the individualized education program team in person or through a representative and the right to participate in meetings, relating to eligibility for special education and related services, recommendations, and program planning.

(g)(1) Notwithstanding Section 632 of the Penal Code, the parent or guardian, or local educational agency shall have the right to *audio* record ~~electronically~~ the proceedings of individualized education program team meetings ~~on an audiotape recorder~~. The parent or guardian, or local educational agency shall notify the members of the individualized education program team of their intent to record a meeting at least 24 hours prior to the meeting. If the local educational agency initiates the notice of intent to ~~audiotape~~ *audio* record a meeting and the parent or guardian objects or refuses to attend the meeting because it will be ~~tape~~ *audio* recorded, the meeting shall not be *audio* recorded ~~on an audiotape recorder~~.

(2) The Legislature hereby finds as follows:

(A) Under federal law, ~~audiotape~~ *audio* recordings made by a local educational agency are subject to the federal Family Educational Rights and Privacy Act (20 U.S.C. Sec. 1232g), and are subject to the confidentiality requirements of the regulations under Sections 300.610 to 300.626, inclusive, of ~~Part~~ Title 34 of the Code of Federal Regulations.

(B) Parents or guardians have the right, pursuant to Sections 99.10 to 99.22, inclusive, of Title 34 of the Code of Federal Regulations, to do all of the following:

(i) Inspect and review the ~~tape~~ *audio* recordings.

(ii) Request that the ~~tape~~ *audio* recordings be amended if the parent or guardian believes that they contain information that is inaccurate, misleading, or in violation of the rights of privacy or other rights of the individual with exceptional needs.

(iii) Challenge, in a hearing, information that the parent or guardian believes is inaccurate, misleading, or in violation of the individual's rights of privacy or other rights.

(h) It is the intent of the Legislature that the individualized education program team meetings be nonadversarial and convened solely for the purpose of making educational decisions for the good of the individual with exceptional needs.

Comment. Subdivision (g) of Section 56341.1 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to "audiotape" in Civil Discovery Act with either "audio technology," "audio recording," or "audio record," as context required).

Subdivision (g) is also amended to correct an erroneous cross reference.

Educ. Code § 60204 (amended). Duties of commission

SEC. _____. Section 60204 of the Education Code is amended to read:

60204. The commission shall:

(a) Recommend curriculum frameworks to the state board.

(b) Develop criteria for evaluating instructional materials submitted for adoption so that the materials adopted shall adequately cover the subjects in the indicated grade or grades and which comply with the provisions of Article 3 (commencing with Section 60040) of Chapter 1. The criteria developed by the commission shall be consistent with the duties of the state board pursuant to Section 60200. The criteria shall be public information and shall be provided in

written or printed form to any person requesting such information.

(c) Study and evaluate instructional materials submitted for adoption.

(d) Recommend to the state board instructional materials which it approves for adoption.

(e) Review and have the authority to adopt the educational films or ~~videotapes~~ *video recordings* produced in accordance with Article 3 (commencing with Section 52740) of Chapter 11 of Part 28.

(f) Recommend to the state board policies and activities to assist the department and school districts in the use of the curriculum framework and other available model curriculum materials for the purpose of guiding and strengthening the quality of instruction in the public schools.

Comment. Section 60204 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

ELECTION CODE

Elec. Code § 2052 (amended). Visually impaired individuals

SEC. _____. Section 2052 of the Election Code is amended to read:

2052. It is the intent of the Legislature to promote the fundamental right to vote of visually impaired individuals, and to make efforts to improve public awareness of the availability of ballot pamphlet ~~cassette tapes~~ *audio recordings* and improve their delivery to these voters.

Comment. Section 2052 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape”

in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

Elec. Code § 2053 (amended). Visually Impaired Voter Assistance Advisory Board

SEC. _____. Section 2053 of the Election Code is amended to read:

2053. (a) The Secretary of State shall establish a Visually Impaired Voter Assistance Advisory Board. This board shall consist of the Secretary of State or his or her designee and the following membership, appointed by the Secretary of State:

(1) A representative from the State Advisory Council on Libraries.

(2) One member from each of three private organizations. Two of the organizations shall be representative of organizations for blind persons in the state.

(b) The board shall do all of the following:

(1) Establish guidelines for reaching as many visually impaired persons as practical.

(2) Make recommendations to the Secretary of State for improving the availability and accessibility of ballot pamphlet ~~cassette tapes~~ *audio recordings* and their delivery to visually impaired voters. The Secretary of State may implement the recommendations made by the board.

(3) Increase the distribution of public service announcements identifying the availability of ballot pamphlet ~~cassette tapes~~ *audio recordings* at least 45 days before any federal, state, and local election.

(4) Promote the Secretary of State’s toll-free voter registration telephone line for citizens needing voter registration information, including information for those who are visually handicapped, and the toll-free telephone service regarding the California State Library and regional library service for the visually impaired.

(c) No member shall receive compensation, but each member shall be reimbursed for his or her reasonable and necessary expenses in connection with service on the board.

Comment. Section 2053 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

Elec. Code § 9082.5 (amended). Audio recording of state ballot pamphlet

SEC. _____. Section 9082.5 of the Election Code is amended to read:

9082.5. The Secretary of State shall cause to be produced an ~~audiocassette~~ *audio* recorded version of the state ballot pamphlet. This *audio* recorded ~~cassette~~ version shall be made available in quantities to be determined by the Secretary of State and shall contain an impartial summary, arguments for and against, rebuttal arguments, and other information concerning each measure that the Secretary of State determines will make the ~~cassette~~ *audio* recorded version of the state ballot pamphlet easier to understand or more useful to the average voter.

Comment. Section 9082.5 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

Elec. Code § 18541 (amended). Dissuading voters

SEC. _____. Section 18541 of the Election Code is amended to read:

18541. (a) No person shall, with the intent of dissuading another person from voting, within 100 feet of a polling place, do any of the following:

(1) Solicit a vote or speak to a voter on the subject of marking his or her ballot.

(2) Place a sign relating to voters' qualifications or speak to a voter on the subject of his or her qualifications except as provided in Section 14240.

(3) Photograph, ~~videotape~~ *video record*, or otherwise record a voter entering or exiting a polling place.

(b) Any violation of this section is punishable by imprisonment in a county jail for not more than 12 months, or in the state prison. Any person who conspires to violate this section is guilty of a felony.

(c) For purposes of this section, 100 feet means a distance of 100 feet from the room or rooms in which voters are signing the roster and casting ballots.

Comment. Section 18541 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to "audiotape" in Civil Discovery Act with either "audio technology," "audio recording," or "audio record," as context required).

EVIDENCE CODE

Evid. Code § 795 (amended). Professional competency examination

SEC. _____. Section 795 of the Evidence Code is amended to read:

795. (a) The testimony of a witness is not inadmissible in a criminal proceeding by reason of the fact that the witness has previously undergone hypnosis for the purpose of recalling events which are the subject of the witness' testimony, if all of the following conditions are met:

(1) The testimony is limited to those matters which the witness recalled and related prior to the hypnosis.

(2) The substance of the prehypnotic memory was preserved in ~~written, audiotape, or videotape form~~ *a writing, audio recording, or video recording* prior to the hypnosis.

(3) The hypnosis was conducted in accordance with all of the following procedures:

(A) A written record was made prior to hypnosis documenting the subject's description of the event, and information which was provided to the hypnotist concerning the subject matter of the hypnosis.

(B) The subject gave informed consent to the hypnosis.

(C) The hypnosis session, including the pre- and post-hypnosis interviews, was ~~videotape~~ *video* recorded for subsequent review.

(D) The hypnosis was performed by a licensed medical doctor, psychologist, licensed clinical social worker, or a licensed marriage and family therapist experienced in the use of hypnosis and independent of and not in the presence of law enforcement, the prosecution, or the defense.

(4) Prior to admission of the testimony, the court holds a hearing pursuant to Section 402 of the Evidence Code at which the proponent of the evidence proves by clear and convincing evidence that the hypnosis did not so affect the witness as to render the witness' prehypnosis recollection unreliable or to substantially impair the ability to cross-examine the witness concerning the witness' prehypnosis recollection. At the hearing, each side shall have the right to present expert testimony and to cross-examine witnesses.

(b) Nothing in this section shall be construed to limit the ability of a party to attack the credibility of a witness who has undergone hypnosis, or to limit other legal grounds to admit or exclude the testimony of that witness.

Comment. Section 795 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to "audiotape"

in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

Evid. Code § 1118 (amended). Oral agreement

SEC. _____. Section 1118 of the Evidence Code is amended to read:

1118. An oral agreement “in accordance with Section 1118” means an oral agreement that satisfies all of the following conditions:

(a) The oral agreement is recorded by a court reporter, ~~tape recorder, or other~~ reliable means of ~~sound~~ audio recording.

(b) The terms of the oral agreement are recited on the record in the presence of the parties and the mediator, and the parties express on the record that they agree to the terms recited.

(c) The parties to the oral agreement expressly state on the record that the agreement is enforceable or binding or words to that effect.

(d) The recording is reduced to writing and the writing is signed by the parties within 72 hours after it is recorded.

Comment. Section 1118 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

Evid. Code § 1294 (amended). Prior inconsistent statement

SEC. _____. Section 1294 of the Evidence Code is amended to read:

1294. (a) The following evidence of prior inconsistent statements of a witness properly admitted in a preliminary hearing or trial of the same criminal matter pursuant to Section 1235 is not made inadmissible by the hearsay rule if the witness is unavailable and former testimony of the witness is admitted pursuant to Section 1291:

(1) A ~~videotaped~~ *video recorded* statement introduced at a preliminary hearing or prior proceeding concerning the same criminal matter.

(2) A transcript, containing the statements, of the preliminary hearing or prior proceeding concerning the same criminal matter.

(b) The party against whom the prior inconsistent statements are offered, at his or her option, may examine or cross-examine any person who testified at the preliminary hearing or prior proceeding as to the prior inconsistent statements of the witness.

Comment. Section 1294 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

FAMILY CODE

Fam. Code § 3170 (amended). Custody or visitation issues

SEC. _____. Section 3170 of the Family Code is amended to read:

3170. (a) If it appears on the face of a petition, application, or other pleading to obtain or modify a temporary or permanent custody or visitation order that custody, visitation, or both are contested, the court shall set the contested issues for mediation.

(b) Domestic violence cases shall be handled by Family Court Services in accordance with a separate written protocol approved by the Judicial Council. The Judicial Council shall adopt guidelines for services, other than services provided under this chapter, that counties may offer to parents who have been unable to resolve their disputes. These services may include, but are not limited to, parent education

programs, booklets, ~~videotapes~~ *video recordings*, or referrals to additional community resources.

Comment. Section 3170 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

Fam. Code § 7572 (amended). Written informational material

SEC. _____. Section 7572 of the Family Code is amended to read:

7572. (a) The Department of Child Support Services, in consultation with the State Department of Health Services, the California Association of Hospitals and Health Systems, and other affected health provider organizations, shall work cooperatively to develop written materials to assist providers and parents in complying with this chapter. This written material shall be updated periodically by the Department of Child Support Services to reflect changes in law, procedures, or public need.

(b) The written materials for parents which shall be attached to the form specified in Section 7574 and provided to unmarried parents shall contain the following information:

(1) A signed voluntary declaration of paternity that is filed with the Department of Child Support Services legally establishes paternity.

(2) The legal rights and obligations of both parents and the child that result from the establishment of paternity.

(3) An alleged father’s constitutional rights to have the issue of paternity decided by a court; to notice of any hearing on the issue of paternity; to have an opportunity to present his case to the court, including his right to present and cross-examine witnesses; to have an attorney represent him; and to have an attorney appointed to represent him if he cannot

afford one in a paternity action filed by a local child support agency.

(4) That by signing the voluntary declaration of paternity, the father is voluntarily waiving his constitutional rights.

(c) Parents shall also be given oral notice of the rights and responsibilities specified in subdivision (b). Oral notice may be accomplished through the use of audio or ~~videotape~~ *video recorded* programs developed by the Department of Child Support Services to the extent permitted by federal law.

(d) The Department of Child Support Services shall, free of charge, make available to hospitals, clinics, and other places of birth any and all informational and training materials for the program under this chapter, as well as the paternity declaration form. The Department of Child Support Services shall make training available to every participating hospital, clinic, local registrar of births and deaths, and other place of birth no later than June 30, 1999.

(e) The Department of Child Support Services may adopt regulations, including emergency regulations, necessary to implement this chapter.

Comment. Subdivision (c) of Section 7572 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

Fam. Code § 10005 (amended). Additional duties of family law facilitator

SEC. _____. Section 10005 of the Family Code is amended to read:

10005. (a) By local rule, the superior court may designate additional duties of the family law facilitator, which may include, but are not limited to, the following:

(1) Meeting with litigants to mediate issues of child support, spousal support, and maintenance of health

insurance, subject to Section 10012. Actions in which one or both of the parties are unrepresented by counsel shall have priority.

(2) Drafting stipulations to include all issues agreed to by the parties, which may include issues other than those specified in Section 10003.

(3) If the parties are unable to resolve issues with the assistance of the family law facilitator, prior to or at the hearing, and at the request of the court, the family law facilitator shall review the paperwork, examine documents, prepare support schedules, and advise the judge whether or not the matter is ready to proceed.

(4) Assisting the clerk in maintaining records.

(5) Preparing formal orders consistent with the court's announced order in cases where both parties are unrepresented.

(6) Serving as a special master in proceedings and making findings to the court unless he or she has served as a mediator in that case.

~~(7) Providing the services specified in Division 15 (commencing with Section 10100). Except for the funding specifically designated for visitation programs pursuant to Section 669B of Title 42 of the United States Code, Title IV-D child support funds shall not be used to fund the services specified in Division 15 (commencing with Section 10100).~~

~~(8) Providing the services specified in Section 10004 concerning the issues of child custody and visitation as they relate to calculating child support, if funding is provided for that purpose.~~

(b) If staff and other resources are available and the duties listed in subdivision (a) have been accomplished, the duties of the family law facilitator may also include the following:

(1) Assisting the court with research and any other responsibilities which will enable the court to be responsive to the litigants' needs.

(2) Developing programs for bar and community outreach through day and evening programs, ~~videotapes~~ *video recordings*, and other innovative means that will assist unrepresented and financially disadvantaged litigants in gaining meaningful access to family court. These programs shall specifically include information concerning underutilized legislation, such as expedited child support orders (Chapter 5 (commencing with Section 3620) of Part 1 of Division 9), and preexisting, court-sponsored programs, such as supervised visitation and appointment of attorneys for children.

Comment. Subdivision (a)(7) of Section 10005 is deleted as obsolete. Former Division 15 was repealed by 1999 Cal. Stat. 1004, § 6.

Subdivision (b)(2) is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to "audiotape" in Civil Discovery Act with either "audio technology," "audio recording," or "audio record," as context required).

Fam. Code § 20034 (amended). Duties of Attorney-Mediator

SEC. _____. Section 20034 of the Family Code is amended to read:

20034. (a) An attorney, known as an Attorney-Mediator, shall be hired to assist the court in resolving child and spousal support disputes, to develop community outreach programs, and to undertake other duties as assigned by the court.

(b) The Attorney-Mediator shall be an attorney, licensed to practice in this state, with mediation or litigation experience, or both, in the field of family law.

(c) By local rule, the superior court may designate the duties of the Attorney-Mediator, which may include, but are not limited to, the following:

(1) Meeting with litigants to mediate issues of child support, spousal support, and maintenance of health insurance. Actions in which one or both of the parties are unrepresented by counsel shall have priority.

(2) Preparing support schedules based on statutory guidelines accessed through existing up-to-date computer technology.

(3) Drafting stipulations to include all issues agreed to by the parties, which may include issues other than those specified in Section 20031.

(4) If the parties are unable to resolve issues with the assistance of the Attorney-Mediator, prior to or at the hearing, and at the request of the court, the Attorney-Mediator shall review the paperwork, examine documents, prepare support schedules, and advise the judge whether or not the matter is ready to proceed.

(5) Assisting the clerk in maintaining records.

(6) Preparing formal orders consistent with the court's announced order in cases where both parties are unrepresented.

(7) Serving as a special master to hearing proceedings and making findings to the court unless he or she has served as a mediator in that case.

(8) Assisting the court with research and any other responsibilities which will enable the court to be responsive to the litigants' needs.

(9) Developing programs for bar and community outreach through day and evening programs, ~~videotapes~~ *video recordings*, and other innovative means that will assist unrepresented and financially disadvantaged litigants in gaining meaningful access to Family Court. These programs shall specifically include information concerning underutilized legislation, such as expedited temporary support orders (Chapter 5 (commencing with Section 3620) of Part 1

of Division 9), modification of support orders (Article 3 (commencing with Section 3680) of Chapter 6 of Part 1 of Division 9) and preexisting, court-sponsored programs, such as supervised visitation and appointment of attorneys for children.

(d) The court shall develop a protocol wherein all litigants, both unrepresented by counsel and represented by counsel, have ultimate access to a hearing before the court.

Comment. Subdivision (c)(9) of Section 20034 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

GOVERNMENT CODE

Gov’t Code § 8880.30 (amended). Regulations for determining lottery winners

SEC. _____. Section 8888.30 of the Government Code is amended to read:

8880.30. The Commission shall promulgate regulations that specify the method for determining winners in each lottery game, provided:

(a) A lottery game may be based on the results of a horse race with the consent of the association conducting the race and the California Horse Racing Board. Any compensation received by an association for the use of its races to determine the winners of a lottery game shall be divided equally between commissions and purses.

(b) If a lottery game utilizes a drawing of winning numbers, a drawing among entries, or a drawing among finalists, the drawings shall always be open to the public. No manual or physical selection in the drawings shall be conducted by any employee of the Lottery. Except for computer automated drawings, drawings shall be witnessed by an independent

lottery contractor having qualifications established by the Commission. Any equipment used in the drawings shall be inspected by the independent lottery contractor and an employee of the Lottery both before and after the drawings. The drawings and the inspections shall be *both audio and video* recorded ~~on both videotape and audiotape~~.

(c) It is the intent of this chapter that the Commission may use any of a variety of existing or future methods or technologies in determining winners.

Comment. Section 8880.30 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

Gov’t Code § 11124.1 (amended). Recording of public meeting

SEC. _____. Section 11124.1 of the Government Code is amended to read:

11124.1. (a) Any person attending an open and public meeting of the state body shall have the right to record the proceedings with an audio or video ~~tape~~ recorder or a still or motion picture camera in the absence of a reasonable finding by the state body that the recording cannot continue without noise, illumination, or obstruction of view that constitutes, or would constitute, a persistent disruption of the proceedings.

(b) Any ~~tape or film record~~ *audio or video recording* of an open and public meeting made for whatever purpose by or at the direction of the state body shall be subject to inspection pursuant to the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1), but may be erased or destroyed 30 days after the ~~taping or~~ recording. Any inspection of an ~~audio or video tape~~ *audio or video* recording shall be provided without charge on ~~an audio or video tape player~~ *equipment* made available by the state body.

(c) No state body shall prohibit or otherwise restrict the broadcast of its open and public meetings in the absence of a reasonable finding that the broadcast cannot be accomplished without noise, illumination, or obstruction of view that would constitute a persistent disruption of the proceedings.

Comment. Section 11124.1 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

Gov’t Code § 11130 (amended). Action to stop or prevent violation of meeting provision

SEC. _____. Section 11130 of the Government Code is amended to read:

11130. (a) The Attorney General, the district attorney, or any interested person may commence an action by mandamus, injunction, or declaratory relief for the purpose of stopping or preventing violations or threatened violations of this article or to determine the applicability of this article to past actions or threatened future action by members of the state body or to determine whether any rule or action by the state body to penalize or otherwise discourage the expression of one or more of its members is valid or invalid under the laws of this state or of the United States, or to compel the state body to ~~tape~~ *audio* record its closed sessions as hereinafter provided.

(b) The court in its discretion may, upon a judgment of a violation of Section 11126, order the state body to ~~tape~~ *audio* record its closed sessions and preserve the ~~tape~~ *audio* recordings for the period and under the terms of security and confidentiality the court deems appropriate.

(c)(1) Each recording so kept shall be immediately labeled with the date of the closed session recorded and the title of

the clerk or other officer who shall be custodian of the recording.

(2) The ~~tapes~~ *audio recordings* shall be subject to the following discovery procedures:

(A) In any case in which discovery or disclosure of the ~~tape~~ *audio recording* is sought by the Attorney General, the district attorney, or the plaintiff in a civil action pursuant to this section or Section 11130.3 alleging that a violation of this article has occurred in a closed session that has been recorded pursuant to this section, the party seeking discovery or disclosure shall file a written notice of motion with the appropriate court with notice to the governmental agency that has custody and control of the ~~tape~~ *audio* recording. The notice shall be given pursuant to subdivision (b) of Section 1005 of the Code of Civil Procedure.

(B) The notice shall include, in addition to the items required by Section 1010 of the Code of Civil Procedure, all of the following:

(i) Identification of the proceeding in which discovery or disclosure is sought, the party seeking discovery or disclosure, the date and time of the meeting recorded, and the governmental agency that has custody and control of the recording.

(ii) An affidavit that contains specific facts indicating that a violation of the act occurred in the closed session.

(3) If the court, following a review of the motion, finds that there is good cause to believe that a violation has occurred, the court may review, in camera, the recording of that portion of the closed session alleged to have violated the act.

(4) If, following the in-camera review, the court concludes that disclosure of a portion of the recording would be likely to materially assist in the resolution of the litigation alleging violation of this article, the court shall, in its discretion, make

a certified transcript of the portion of the recording a public exhibit in the proceeding.

(5) Nothing in this section shall permit discovery of communications that are protected by the attorney-client privilege.

Comment. Section 11130 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

Gov’t Code § 12811.3 (amended). Employee transfer

SEC. _____. Section 12811.3 of the Government Code is amended to read:

12811.3. (a) Notwithstanding any other provision of law and subject to the provisions of subdivision (i), any employee of a department, board, or commission under the jurisdiction of the Youth and Adult Correctional Agency, who is designated as a peace officer described in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code, may transfer from his or her current position to another department, board, or commission under the jurisdiction of the Youth and Adult Correctional Agency.

(b) Any peace officer who desires to transfer to another department, board, or commission pursuant to subdivision (a), and who is prohibited from carrying a firearm pursuant to paragraph (8) of subdivision (g) of Section 922 of Title 18 of the United States Code or Section 12021 of the Penal Code may not transfer to a department, board, or commission that requires the use of a firearm.

(c) Any peace officer who desires to transfer to another department, board, or commission pursuant to subdivision (a) to a position requiring the ability to carry a firearm, as determined by the department, board, or commission, and who has not completed the required training pursuant to

Section 832 of the Penal Code, shall successfully complete the required training before appointment to his or her new peace officer position.

(d)(1) Any peace officer who desires to transfer shall not be required to undergo a psychological screening pursuant to subdivision (f) of Section 1031 or subdivision (a) of Section 13601 of the Penal Code, unless the Secretary of the Youth and Adult Correctional Agency, or his or her designee, makes a determination that a peace officer is required to undergo all or a portion of a psychological screening as described in subdivision (f) of Section 1031 of this code or subdivision (a) of Section 13601 of the Penal Code.

(2) The Secretary of the Youth and Adult Correctional Agency shall promulgate emergency regulations in order to implement paragraph (1). Notwithstanding subdivision (b) of Section 11346.1, no showing of an emergency shall be necessary in order to adopt, amend, or repeal the emergency regulations required by this paragraph.

(e) Any peace officer who has successfully completed a course of training pursuant to Section 13602 of the Penal Code and who transfers to another department, board, or commission pursuant to subdivision (a) shall not be required to complete a new course of training pursuant to Section 13602 of the Penal Code. However, each department, board, or commission may prescribe additional training to be provided to an employee who transfers pursuant to subdivision (a) and shall provide that training within the first six months of appointment to his or her new peace officer position.

(f) Any peace officer who desires to transfer to another department, board, or commission pursuant to subdivision (a) shall not be required to undergo a new background investigation pursuant to Section 1029.1.

(g) Nothing in this section shall affect an employee's seniority calculation as provided for under current law or any memorandum of understanding between the state and any applicable bargaining unit agreement in effect upon the effective date of this section.

(h) The provisions of the Unit 6 Memorandum of Understanding, which expires July 2, 2006, as modified by the ratified addendum dated June 30, 2004, relating to the release of copies of ~~videotaped~~ *video recorded* incidents, shall be subject to the California Public Records Act.

(i) This section shall become operative only when the Secretary of the Youth and Adult Correctional Agency certifies in writing that it is necessary to prevent or minimize employment actions, including, but not limited to, layoffs, demotions, reductions in time base, or involuntary transfers of employees. In addition, the Secretary of the Youth and Adult Correctional Agency shall have the sole authority to designate any or all departments, boards, or commissions eligible to have its peace officer employees transfer pursuant to subdivision (a) and any or all departments, boards, or commissions that shall accept peace officer employees under this section.

Comment. Section 12811.3 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to "audiotape" in Civil Discovery Act with either "audio technology," "audio recording," or "audio record," as context required).

Gov't Code § 14999.31 (amended). Permit to engage in film production

SEC. _____. Section 14999.31 of the Government Code is amended to read:

14999.31. The Film Office and its director shall encourage the use of the uniform application form described in Section 14999.32 for obtaining a local permit to engage in film

production within the jurisdiction of a county, city, or city and county. As used in this chapter “film” includes, but is not limited to, feature motion pictures, ~~videotapes~~ *video recordings*, television motion pictures, commercials, and stills. “Production” means the activity of making a film for commercial or noncommercial purposes on property owned by a county, city, or city and county or on private property within the jurisdiction of a county, city, or city and county.

Comment. Section 14999.31 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

Gov’t Code § 26202.6 (amended). Recordings of video monitoring and telephone and radio communications

SEC. _____. Section 26202.6 of the Government Code is amended to read:

26202.6. (a) Notwithstanding the provisions of Sections 26202, 26205, and 26205.1, the head of a department of a county, after one year, may destroy recordings of routine video monitoring, and after 100 days may destroy recordings of telephone and radio communications maintained by the department. This destruction shall be approved by the legislative body and the written consent of the agency attorney shall be obtained. In the event that the recordings are evidence in any claim filed or any pending litigation, they shall be preserved until pending litigation is resolved.

(b) For purposes of this section, “recordings of telephone and radio communications” means the routine daily ~~taping~~ ~~and~~ recording of telephone communications to and from a county and all radio communications relating to the operations of the departments.

(c) For purposes of this section, “routine video monitoring” means ~~videotaping~~ *video recording* by a video or electronic

imaging system designed to record the regular and ongoing operations of the departments described in subdivision (a), including mobile in-car video systems, jail observation and monitoring systems, and building security ~~taping~~ recording systems.

(d) For purposes of this section, “department” includes a public safety communications center operated by the county and the governing board of any special district whose membership is the same as the membership of the board of supervisors.

Comment. Section 26202.6 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

Gov’t Code § 26206.7 (amended). Destruction of duplicates of county records

SEC. _____. Section 26206.7 of the Government Code is amended to read:

26206.7. Notwithstanding the provisions of Section 26202, the legislative body of a county may prescribe a procedure whereby duplicates of county records less than two years old may be destroyed if they are no longer required.

For purposes of this section, video recording media, ~~such as videotapes and films, and~~ including recordings of “routine video monitoring” pursuant to Section 26202.6, shall be considered duplicate records if the county keeps another record, such as written minutes or an ~~audiotape~~ audio recording, of the event that is recorded in the video medium. However, a video recording medium shall not be destroyed or erased pursuant to this section for a period of at least 90 days after occurrence of the event recorded thereon.

Comment. Section 26206.7 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to

“audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

Gov’t Code § 26206.8 (amended). Transit agency security systems

SEC. _____. Section 26206.8 of the Government Code is amended to read:

26206.8. (a) When installing new security systems, a transit agency operated by a county shall only purchase and install equipment capable of storing recorded images for at least one year, unless all of the following conditions apply:

(1) The transit agency has made a diligent effort to identify a security system that is capable of storing recorded data for one year.

(2) The transit agency determines that the technology to store recorded data in an economically and technologically feasible manner for one year is not available.

(3) The transit agency purchases and installs the best available technology with respect to storage capacity that is both economically and technologically feasible at that time.

(b) Notwithstanding any other provision of law, ~~videotapes~~ *or video recordings or other* recordings made by security systems operated as part of a public transit system shall be retained for one year, unless one of the following conditions applies:

(1) The ~~videotapes~~ *or video recordings or other* recordings are evidence in any claim filed or any pending litigation, in which case the ~~videotapes~~ *or video recordings or other* recordings shall be preserved until the claim or the pending litigation is resolved.

(2) The ~~videotapes~~ *or video recordings or other* recordings recorded an event that was or is the subject of an incident report, in which case the ~~videotapes~~ *or video recordings or other* recordings shall be preserved until the incident is resolved.

(3) The transit agency utilizes a security system that was purchased or installed prior to January 1, 2004, or that meets the requirements of subdivision (a), in which case the ~~videotapes or~~ *video recordings or other* recordings shall be preserved for as long as the installed technology allows.

Comment. Section 26206.8 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

Gov’t Code § 27491.47 (amended). Removal of corneal eye tissue

SEC. _____. Section 27491.47 of the Government Code is amended to read:

27491.47. (a) Notwithstanding any other provision of law, the coroner may, in the course of an autopsy, remove and release or authorize the removal and release of corneal eye tissue from a body within the coroner’s custody, if all of the following conditions are met:

(1) The autopsy has otherwise been authorized.

(2) The coroner has no knowledge of objection to the removal and release of corneal tissue having been made by the decedent or any other person specified in Section 7151 of the Health and Safety Code and has obtained any one of the following:

(A) A dated and signed written consent by the donor or any other person specified in Section 7151 of the Health and Safety Code on a form that clearly indicates the general intended use of the tissue and contains the signature of at least one witness.

(B) Proof of the existence of a recorded telephonic consent by the donor or any other person specified in Section 7151 of the Health and Safety Code in the form of an audio ~~tape~~ recording of the conversation or a transcript of the recorded

conversation, which indicates the general intended use of the tissue.

(C) A document recording a verbal telephonic consent by the donor or any other person specified in Section 7151 of the Health and Safety Code, witnessed and signed by no less than two members of the requesting entity, hospital, eye bank, or procurement organization, memorializing the consenting person's knowledge of and consent to the general intended use of the gift.

The form of consent obtained under subparagraph (A), (B), or (C) shall be kept on file by the requesting entity and the official agency for a minimum of three years.

(3) The removal of the tissue will not unnecessarily mutilate the body, be accomplished by enucleation, nor interfere with the autopsy.

(4) The tissue will be removed by a coroner, licensed physician and surgeon, or a trained transplant technician.

(5) The tissue will be released to a public or nonprofit facility for transplant, therapeutic, or scientific purposes.

(b) Neither the coroner nor medical examiner authorizing the removal of the corneal tissue, nor any hospital, medical center, tissue bank, storage facility, or person acting upon the request, order, or direction of the coroner or medical examiner in the removal of corneal tissue pursuant to this section, shall incur civil liability for the removal in an action brought by any person who did not object prior to the removal of the corneal tissue, nor be subject to criminal prosecution for the removal of the corneal tissue pursuant to the provisions of this section.

(c) This section may not be construed to interfere with the ability of a person to make an anatomical gift pursuant to the Uniform Anatomical Gift Act (Chapter 3.5 (commencing with Section 7150) of Part 1 of Division 7 of the Health and Safety Code).

Comment. Section 27491.7 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

Gov’t Code § 34090.6 (amended). Destruction by department of recordings of routine video monitoring and telephone and radio communications

SEC. _____. Section 34090.6 of the Government Code is amended to read:

34090.6. (a) Notwithstanding the provisions of Section 34090, the head of a department of a city or city and county, after one year, may destroy recordings of routine video monitoring, and after 100 days may destroy recordings of telephone and radio communications maintained by the department. This destruction shall be approved by the legislative body and the written consent of the agency attorney shall be obtained. In the event that the recordings are evidence in any claim filed or any pending litigation, they shall be preserved until pending litigation is resolved.

(b) For purposes of this section, “recordings of telephone and radio communications” means the routine daily ~~taping~~ ~~and~~ recording of telephone communications to and from a city, city and county, or department, and all radio communications relating to the operations of the departments.

(c) For purposes of this section, “routine video monitoring” means ~~videotaping~~ *video recording* by a video or electronic imaging system designed to record the regular and ongoing operations of the departments described in subdivision (a), including mobile in-car video systems, jail observation and monitoring systems, and building security ~~taping~~ *recording* systems.

(d) For purposes of this section, “department” includes a public safety communications center operated by the city or city and county.

Comment. Section 34090.6 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

Gov’t Code § 34090.7 (amended). Destruction by legislative body of recordings of routine video monitoring and telephone and radio communications

SEC. _____. Section 34090.7 of the Family Code is amended to read:

34090.7. Notwithstanding the provisions of Section 34090, the legislative body of a city may prescribe a procedure whereby duplicates of city records less than two years old may be destroyed if they are no longer required.

For purposes of this section, video recording media, ~~such as videotapes and films, and~~ including recordings of “routine video monitoring” pursuant to Section 34090.6, shall be considered duplicate records if the city keeps another record, such as written minutes or an ~~audiotape~~ audio recording, of the event that is recorded in the video medium. However, a video recording medium shall not be destroyed or erased pursuant to this section for a period of at least 90 days after occurrence of the event recorded thereon.

Comment. Section 34090.7 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

Gov’t Code § 34090.8 (amended). Transit agency security systems

SEC. _____. Section 34090.8 of the Government Code is amended to read:

34090.8. (a) When installing new security systems, a transit agency operated by a city or city and county shall only purchase and install equipment capable of storing recorded

images for at least one year, unless all of the following conditions apply:

(1) The transit agency has made a diligent effort to identify a security system that is capable of storing recorded data for one year.

(2) The transit agency determines that the technology to store recorded data in an economically and technologically feasible manner for one year is not available.

(3) The transit agency purchases and installs the best available technology with respect to storage capacity that is both economically and technologically feasible at that time.

(b) Notwithstanding any other provision of law, ~~videotapes~~ *or video recordings or other recordings* made by security systems operated as part of a public transit system shall be retained for one year, unless one of the following conditions applies:

(1) The ~~videotapes~~ *or video recordings or other recordings* are evidence in any claim filed or any pending litigation, in which case the ~~videotapes~~ *or video recordings or other recordings* shall be preserved until the claim or the pending litigation is resolved.

(2) The ~~videotapes~~ *or video recordings or other recordings* recorded an event that was or is the subject of an incident report, in which case the ~~videotapes~~ *or video recordings or other recordings* shall be preserved until the incident is resolved.

(3) The transit agency utilizes a security system that was purchased or installed prior to January 1, 2004, or that meets the requirements of subdivision (a), in which case the ~~videotapes~~ *or video recordings or other recordings* shall be preserved for as long as the installed technology allows.

Comment. Section 34090.8 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to

“audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

Gov’t Code § 50028 (amended). Coin-operated viewing machines

SEC. _____. Section 50028 of the Government Code is amended to read:

50028. (a) The legislative body of any county, city, or city and county, whether general law or chartered, may adopt, by ordinance, such rules and regulations as it deems necessary, which require any coin-operated viewing machine to have permanently attached thereto a tally counter which will count each coin, and accumulate such count or the accumulated amount of money, deposited in such coin-operated viewing machine. Such tally counter shall be resistant to tampering, and shall not be capable of being reset to a lower number, and shall display the count in such a manner that the accumulated total is readily visible near the coin insertion slot or opening. For the purposes of this section, “coin-operated viewing machine” means any projector, machine, television, or other device which displays for viewing motion pictures, projection slides, filmstrips, photographic pictures, video ~~tapes~~ *recordings*, or drawings, and which is operated by the viewer, or for the viewer, by means of inserting a coin into the device, an attachment thereto, an enclosure surrounding such device, or any other device electrically or mechanically connected thereto. For the purposes of this section, “coin” means any physical object, including, but not limited to, a piece of metal issued by the federal government as money. “Coin-operated viewing machine” does not include an electronic video game of skill wherein the image is created, generated, or synthesized electronically, or coin-operated television receivers which display commercial or public service broadcasts.

(b) Notwithstanding any other provision of law, any county ordinance adopted pursuant to this section shall be

enforceable within the incorporated, as well as the unincorporated, area of the county, whether general law or chartered, unless a city ordinance in direct conflict with such county ordinance has been adopted, in which case such county ordinance shall be enforceable in the area of the county outside of such city.

(c)(1) Any person who violates the provisions of the ordinance adopted pursuant to this section shall be subject to a civil penalty not to exceed ten thousand dollars (\$10,000) for each such machine and each day in which such violation occurs.

(2) In determining the amount of such penalty, the court shall take into consideration all relevant circumstances, including but not limited to, the frequency of inspection, the cash flow through such machine, the amount of revenue derived by other such machines in the vicinity, prior revenues generated, the nature and persistence of the violation, and prior violations by the same person or establishment.

(d) No peace officer, as defined in Section 830 of the Penal Code, shall check such tally counters, provided, however, that an ordinance adopted pursuant to this section may provide for checking of such tally counters by a person or persons employed by the adopting county, city, or city and county, other than a peace officer, on a predetermined schedule.

(e) The provisions of this section shall not be construed to limit, or otherwise affect, any other power of a county, city, or city and county to license, tax, or regulate business or commercial enterprises or property within their jurisdiction, but shall be in addition to such powers.

Comment. Section 50028 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

Gov't Code § 53160 (amended). Destruction of recordings of routine video monitoring and telephone and radio communications

SEC. _____. Section 53160 of the Government Code is amended to read:

53160. (a) The head of a special district, after one year, may destroy recordings of routine video monitoring, and after 100 days may destroy recordings of telephone and radio communications maintained by the special district. This destruction shall be approved by the legislative body and the written consent of the agency attorney shall be obtained. In the event that the recordings are evidence in any claim filed or any pending litigation, they shall be preserved until pending litigation is resolved.

(b) For purposes of this article, “recordings of telephone and radio communications” means the routine daily ~~taping~~ ~~and~~ recording of telephone communications to and from a special district, and all radio communications relating to the operations of the special district.

(c) For purposes of this article, “routine video monitoring” means ~~videotaping~~ *video recording* by a video or electronic imaging system designed to record the regular and ongoing operations of the special district, including mobile in-car video systems, jail observation and monitoring systems, and building security ~~taping~~ *recording* systems.

(d) For purposes of this article, “special district” shall have the same meaning as “public agency,” as that term is defined in Section 53050.

Comment. Section 53160 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

Gov't Code § 53161 (amended). Destruction by legislative body of recordings of routine video monitoring and telephone and radio communications

SEC. _____. Section 53161 of the Government Code is amended to read:

53161. Notwithstanding Section 53160, the legislative body of a special district may prescribe a procedure whereby duplicates of special district records less than two years old may be destroyed if they are no longer required.

For purposes of this section, video recording media, ~~such as videotapes and films,~~ and including recordings of “routine video monitoring” pursuant to Section 53160, shall be considered duplicate records if the special district keeps another record, such as written minutes or an ~~audiotape~~ *audio* recording, of the event that is recorded in the video medium. However, a video recording medium shall not be destroyed or erased pursuant to this section for at least 90 days after occurrence of the event recorded thereon.

Comment. Section 53161 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

Gov't Code § 53162 (amended). Transit agency security systems

SEC. _____. Section 53162 of the Government Code is amended to read:

53162. (a) When installing new security systems, a transit agency operated by a special district shall only purchase and install equipment capable of storing recorded images for at least one year, unless all of the following conditions apply:

(1) The transit agency has made a diligent effort to identify a security system that is capable of storing recorded data for one year.

(2) The transit agency determines that the technology to store recorded data in an economically and technologically feasible manner for one year is not available.

(3) The transit agency purchases and installs the best available technology with respect to storage capacity that is both economically and technologically feasible at that time.

(b) Notwithstanding any other provision of law, ~~videotapes or video recordings or other~~ recordings made by security systems operated as part of a public transit system shall be retained for one year, unless one of the following conditions applies:

(1) The ~~videotapes or video recordings or other~~ recordings are evidence in any claim filed or any pending litigation, in which case the ~~videotapes or video recordings or other~~ recordings shall be preserved until the claim or the pending litigation is resolved.

(2) The ~~videotapes or video recordings or other~~ recordings recorded an event that was or is the subject of an incident report, in which case the ~~videotapes or video recordings or other~~ recordings shall be preserved until the incident is resolved.

(3) The transit agency utilizes a security system that was purchased or installed prior to January 1, 2004, or that meets the requirements of subdivision (a), in which case the ~~videotapes or video recordings or other~~ recordings shall be preserved for as long as the installed technology allows.

Comment. Section 53162 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

Gov’t Code § 54953.5 (amended). Recording of public meeting

SEC. _____. Section 54953.5 of the Government Code is amended to read:

54953.5. (a) Any person attending an open and public meeting of a legislative body of a local agency shall have the right to record the proceedings with an audio or video ~~tape~~ recorder or a still or motion picture camera in the absence of a reasonable finding by the legislative body of the local agency that the recording cannot continue without noise, illumination, or obstruction of view that constitutes, or would constitute, a persistent disruption of the proceedings.

(b) Any ~~tape or film record~~ *audio or video recording* of an open and public meeting made for whatever purpose by or at the direction of the local agency shall be subject to inspection pursuant to the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1), but, notwithstanding Section 34090, may be erased or destroyed 30 days after the ~~taping or~~ recording. Any inspection of ~~a video or tape~~ *an audio or video* recording shall be provided without charge on ~~a video or tape player~~ *equipment* made available by the local agency.

Comment. Section 54953.5 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

Gov’t Code § 54960 (amended). Action to stop or prevent violation of meeting provision

SEC. _____. Section 54960 of the Government Code is amended to read:

54960. (a) The district attorney or any interested person may commence an action by mandamus, injunction or declaratory relief for the purpose of stopping or preventing violations or threatened violations of this chapter by members of the legislative body of a local agency or to determine the applicability of this chapter to actions or threatened future action of the legislative body, or to determine whether any

rule or action by the legislative body to penalize or otherwise discourage the expression of one or more of its members is valid or invalid under the laws of this state or of the United States, or to compel the legislative body to ~~tape~~ *audio* record its closed sessions as hereinafter provided.

(b) The court in its discretion may, upon a judgment of a violation of Section 54956.7, 54956.8, 54956.9, 54956.95, 54957, or 54957.6, order the legislative body to ~~tape~~ *audio* record its closed sessions and preserve the ~~tape~~ *audio* recordings for the period and under the terms of security and confidentiality the court deems appropriate.

(c)(1) Each recording so kept shall be immediately labeled with the date of the closed session recorded and the title of the clerk or other officer who shall be custodian of the recording.

(2) The ~~tapes~~ *audio recordings* shall be subject to the following discovery procedures:

(A) In any case in which discovery or disclosure of the ~~tape~~ *audio recording* is sought by either the district attorney or the plaintiff in a civil action pursuant to Section 54959, 54960, or 54960.1 alleging that a violation of this chapter has occurred in a closed session which has been recorded pursuant to this section, the party seeking discovery or disclosure shall file a written notice of motion with the appropriate court with notice to the governmental agency which has custody and control of the ~~tape~~ *audio* recording. The notice shall be given pursuant to subdivision (b) of Section 1005 of the Code of Civil Procedure.

(B) The notice shall include, in addition to the items required by Section 1010 of the Code of Civil Procedure, all of the following:

(i) Identification of the proceeding in which discovery or disclosure is sought, the party seeking discovery or disclosure, the date and time of the meeting recorded, and the

governmental agency which has custody and control of the recording.

(ii) An affidavit which contains specific facts indicating that a violation of the act occurred in the closed session.

(3) If the court, following a review of the motion, finds that there is good cause to believe that a violation has occurred, the court may review, *in camera*, the recording of that portion of the closed session alleged to have violated the act.

(4) If, following the *in camera* review, the court concludes that disclosure of a portion of the recording would be likely to materially assist in the resolution of the litigation alleging violation of this chapter, the court shall, in its discretion, make a certified transcript of the portion of the recording a public exhibit in the proceeding.

(5) Nothing in this section shall permit discovery of communications which are protected by the attorney-client privilege.

Comment. Section 54960 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

Gov’t Code § 68151 (amended). Definitions

SEC. _____. Section 68151 of the Government Code is amended to read:

68151. The following definitions apply to this chapter:

(a) “Court record” shall consist of the following:

(1) All filed papers and documents in the case folder; but if no case folder is created by the court, all filed papers and documents that would have been in the case folder if one had been created.

(2) Administrative records filed in an action or proceeding, depositions, paper exhibits, transcripts, including preliminary hearing transcripts, and ~~tapes~~ *recordings* of electronically

recorded proceedings filed, lodged, or maintained in connection with the case, unless disposed of earlier in the case pursuant to law.

(3) Other records listed under subdivision (j) of Section 68152.

(b) “Notice of destruction and no transfer” means that the clerk has given notice of destruction of the superior court records open to public inspection, and that there is no request and order for transfer of the records as provided in the California Rules of Court.

(c) “Final disposition of the case” means that an acquittal, dismissal, or order of judgment has been entered in the case or proceeding, the judgment has become final, and no postjudgment motions or appeals are pending in the case or for the reviewing court upon the mailing of notice of the issuance of the remittitur.

In a criminal prosecution, the order of judgment shall mean imposition of sentence, entry of an appealable order (including, but not limited to, an order granting probation, commitment of a defendant for insanity, or commitment of a defendant as a narcotics addict appealable under Section 1237 of the Penal Code), or forfeiture of bail without issuance of a bench warrant or calendaring of other proceedings.

(d) “Retain permanently” means that the original court records shall never be transferred or destroyed.

Comment. Section 68151 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

HEALTH AND SAFETY CODE

Health & Safety Code § 1569.69 (amended). Training of employees

SEC. _____. Section 1569.69 of the Health and Safety Code is amended to read:

1569.69. (a) Each residential care facility for the elderly licensed under this chapter shall ensure that each employee of the facility who assists residents with the self-administration of medications meets the following training requirements:

(1) In facilities licensed to provide care for 16 or more persons, the employee shall complete 16 hours of initial training. This training shall consist of eight hours of hands-on shadowing training, which shall be completed prior to assisting with the self-administration of medications, and eight hours of other training or instruction, as described in subdivision (f), which shall be completed within the first two weeks of employment.

(2) In facilities licensed to provide care for 15 or fewer persons, the employee shall complete six hours of initial training. This training shall consist of two hours of hands-on shadowing training, which shall be completed prior to assisting with the self-administration of medications, and four hours of other training or instruction, as described in subdivision (f), which shall be completed within the first two weeks of employment.

(3) An employee shall be required to complete the training requirements for hands-on shadowing training described in this subdivision prior to assisting any resident in the self-administration of medications. The training and instruction described in this subdivision shall be completed, in their entirety, within the first two weeks of employment.

(4) The training shall cover all of the following areas:

(A) The role, responsibilities, and limitations of staff who assist residents with the self-administration of medication, including tasks limited to licensed medical professionals.

(B) An explanation of the terminology specific to medication assistance.

(C) An explanation of the different types of medication orders: prescription, over-the-counter, controlled, and other medications.

(D) An explanation of the basic rules and precautions of medication assistance.

(E) Information on medication forms and routes for medication taken by residents.

(F) A description of procedures for providing assistance with the self-administration of medications in and out of the facility, and information on the medication documentation system used in the facility.

(G) An explanation of guidelines for the proper storage, security, and documentation of centrally stored medications.

(H) A description of the processes used for medication ordering, refills and the receipt of medications from the pharmacy.

(I) An explanation of medication side effects, adverse reactions, and errors.

(5) To complete the training requirements set forth in this subdivision, each employee shall pass an examination that tests the employee's comprehension of, and competency in, the subjects listed in paragraph (3).

(6) Residential care facilities for the elderly shall encourage pharmacists and licensed medical professionals to use plain English when preparing labels on medications supplied to residents. As used in this section, "plain English" means that no abbreviations, symbols, or Latin medical terms shall be used in the instructions for the self-administration of medication.

(7) The training requirements of this section are not intended to replace or supplant those required of all staff members who assist residents with personal activities of daily living as set forth in Section 1569.625.

(8) The training requirements of this section shall be repeated if either of the following occur:

(A) An employee returns to work for the same licensee after a break of service of more than 180 consecutive calendar days.

(B) An employee goes to work for another licensee in a facility in which he or she assists residents with the self-administration of medication.

(b) Each employee who received training and passed the exam required in paragraph (5) of subdivision (a), and who continues to assist with the self-administration of medicines, shall also complete four hours of in-service training on medication-related issues in each succeeding 12-month period.

(c) The requirements set forth in subdivisions (a) and (b) do not apply to persons who are licensed medical professionals.

(d) Each residential care facility for the elderly that provides employee training under this section shall use the training material and the accompanying examination that are developed by, or in consultation with, a licensed nurse, pharmacist, or physician. The licensed residential care facility for the elderly shall maintain the following documentation for each medical consultant used to develop the training:

(1) The name, address, and telephone number of the consultant.

(2) The date when consultation was provided.

(3) The consultant's organization affiliation, if any, and any educational and professional qualifications specific to medication management.

(4) The training topics for which consultation was provided.

(e) Each person who provides employee training under this section shall meet the following education and experience requirements:

(1) A minimum of five hours of initial, or certified continuing, education or three semester units, or the equivalent, from an accredited educational institution, on topics relevant to medication management.

(2) The person shall meet any of the following practical experience or licensure requirements:

(A) Two years full-time experience, within the last four years, as a consultant with expertise in medication management in areas covered by the training described *is in* subdivision (a).

(B) Two years full-time experience, or the equivalent, within the last four years, as an administrator for a residential care facility for the elderly, during which time the individual has acted in substantial compliance with applicable regulations.

(C) Two years full-time experience, or the equivalent, within the last four years, as a direct care provider assisting with the self-administration of medications for a residential care facility for the elderly, during which time the individual has acted in substantial compliance with applicable regulations.

(D) Possession of a license as a medical professional.

(3) The licensed residential care facility for the elderly shall maintain the following documentation on each person who provides employee training under this section:

(A) The person's name, address, and telephone number.

(B) Information on the topics or subject matter covered in the training.

(C) The time, dates, and hours of training provided.

(f) Other training or instruction, as required in paragraphs (1) and (2) of subdivision (a), may be provided off site, and

may use various methods of instruction, including, but not limited to, all of the following:

(1) Lectures by presenters who are knowledgeable about medication management.

(2) Video ~~instruction tapes~~ *recorded instruction*, interactive material, online training, and books.

(3) Other written or visual materials approved by organizations or individuals with expertise in medication management.

(g) Residential care facilities for the elderly licensed to provide care for 16 or more persons shall maintain documentation that demonstrates that a consultant pharmacist or nurse has reviewed the facility's medication management program and procedures at least twice a year.

(h) Nothing in this section authorizes unlicensed personnel to directly administer medications.

(i) This section shall become operative on January 1, 2008.

Comment. Subdivision (e)(2) of Section 1569.69 is amended to correct a typographical error.

Subdivision (f)(2) is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to "audiotape" in Civil Discovery Act with either "audio technology," "audio recording," or "audio record," as context required).

Health & Safety Code § 1736.5 (amended). Grounds for denial of application or certificate

SEC. _____. Section 1736.5 of the Health and Safety Code is amended to read:

1736.5. (a) The state department shall deny a training application and deny, suspend, or revoke a certificate issued under this article if the applicant or certificate holder has been convicted of a violation or attempted violation of any of the following Penal Code provisions: Section 187, subdivision (a) of Section 192, Section 203, 205, 206, 207, 209, 210, 210.5, 211, 220, 222, 243.4, 245, 261, 262, or 264.1, Sections 265 to

267, inclusive, Section 273a, 273d, 273.5, or 285, subdivisions (c), (d), (f), and (g) of Section 286, Section 288, subdivisions (c), (d), (f), and (g) of Section 288a, Section 288.5, 289, 289.5, 368, 451, 459, 470, 475, 484, or 484b, Sections 484d to 484j, inclusive, Section 487, 488, 496, 503, 518, or 666, unless any of the following apply:

(1) The person was convicted of a felony and has obtained a certificate of rehabilitation under Chapter 3.5 (commencing with Section 4852.01) of Title 6 of the Penal Code and the information or accusation against him or her has been dismissed pursuant to Section 1203.4 of the Penal Code.

(2) The person was convicted of a misdemeanor and the information or accusation against him or her has been dismissed pursuant to Section 1203.4 or 1203.4a of the Penal Code.

(3) The certificate holder was convicted of a felony or a misdemeanor, but has previously disclosed the fact of each conviction to the department, and the department has made a determination in accordance with law that the conviction does not disqualify the applicant from certification.

(b) An application or certificate shall be denied, suspended, or revoked upon conviction in another state of an offense that, if committed or attempted in this state, would have been punishable as one or more of the offenses set forth in subdivision (a), unless evidence of rehabilitation comparable to the certificate of rehabilitation or dismissal of a misdemeanor set forth in paragraph (1) or (2) of subdivision (a) is provided.

(c)(1) The state department may deny an application or deny, suspend, or revoke a certificate issued under this article for any of the following:

(A) Unprofessional conduct, including, but not limited to, incompetence, gross negligence, physical, mental, or verbal

abuse of patients, or misappropriation of property of patients or others.

(B) Conviction of a crime substantially related to the qualifications, functions, and duties of a home health aide, irrespective of a subsequent order under Section 1203.4, 1203.4a, or 4852.13 of the Penal Code, where the state department determines that the applicant or certificate holder has not adequately demonstrated that he or she has been rehabilitated and will present a threat to the health, safety, or welfare of patients.

(C) Conviction for, or use of, any controlled substance as defined in Division 10 (commencing with Section 11000), or any dangerous drug, as defined in Section 4022 of the Business and Professions Code, or alcoholic beverages, to an extent or in a manner dangerous or injurious to the home health aide, any other person, or the public, to the extent that this use would impair the ability to conduct, with safety to the public, the practice authorized by a certificate.

(D) Procuring a home health aide certificate by fraud, misrepresentation, or mistake.

(E) Making or giving any false statement or information in conjunction with the application for issuance of a home health aide certificate or training and examination application.

(F) Impersonating any applicant, or acting as proxy for an applicant, in any examination required under this article for the issuance of a certificate.

(G) Impersonating another home health aide, a licensed vocational nurse, or a registered nurse, or permitting or allowing another person to use a certificate for the purpose of providing nursing services.

(H) Violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate any provision or term of, this article.

(2) In determining whether or not to deny an application or deny, suspend, or revoke a certificate issued under this article pursuant to this subdivision, the department shall take into consideration the following factors as evidence of good character and rehabilitation:

(A) The nature and seriousness of the offense under consideration and its relationship to their employment duties and responsibilities.

(B) Activities since conviction, including employment or participation in therapy or education, that would indicate changed behavior.

(C) The time that has elapsed since the commission of the conduct or offense referred to in subparagraph (A) or (B) and the number of offenses.

(D) The extent to which the person has complied with any terms of parole, probation, restitution, or any other sanction lawfully imposed against the person.

(E) Any rehabilitation evidence, including character references, submitted by the person.

(F) Employment history and current employer recommendations.

(G) Circumstances surrounding the commission of the offense that would demonstrate the unlikelihood of repetition.

(H) Granting by the Governor of a full and unconditional pardon.

(I) A certificate of rehabilitation from a superior court.

(d) When the state department determines that a certificate shall be suspended, the state department shall specify the period of actual suspension. The state department may determine that the suspension shall be stayed, placing the certificate holder on probation with specified conditions for a period not to exceed two years. When the state department determines that probation is the appropriate action, the certificate holder shall be notified that in lieu of the state

department proceeding with a formal action to suspend the certification and in lieu of an appeal pursuant to subdivision (g), the certificate holder may request to enter into a diversion program agreement. A diversion program agreement shall specify terms and conditions related to matters, including, but not limited to, work performance, rehabilitation, training, counseling, progress reports, and treatment programs. If a certificate holder successfully completes a diversion program, no action shall be taken upon the allegations that were the basis for the diversion agreement. Upon failure of the certificate holder to comply with the terms and conditions of an agreement, the state department may proceed with a formal action to suspend or revoke the certification.

(e) A plea or verdict of guilty, or a conviction following a plea of nolo contendere, shall be deemed a conviction within the meaning of this article. The state department may deny an application or deny, suspend, or revoke a certification based on a conviction as provided in this article when the judgment of conviction is entered or when an order granting probation is made suspending the imposition of sentence.

(f) Upon determination to deny an application or deny, revoke, or suspend a certificate, the state department shall notify the applicant or certificate holder in writing by certified mail of all of the following:

- (1) The reasons for the determination.
- (2) The applicant's or certificate holder's right to appeal the determination if the determination was made under subdivision (c).

(g)(1) Upon written notification that the state department has determined that an application shall be denied or a certificate shall be denied, suspended, or revoked under subdivision (c), the applicant or certificate holder may request an administrative hearing by submitting a written request to the state department within 20 business days of receipt of the

written notification. Upon receipt of a written request, the state department shall hold an administrative hearing pursuant to the procedures specified in Section 100171, except where those procedures are inconsistent with this section.

(2) A hearing under this section shall be conducted by a hearing officer or administrative law judge designated by the director at a location other than the work facility convenient to the applicant or certificate holder. The hearing shall be ~~tape~~ *audio or video* recorded and a written decision shall be sent by certified mail to the applicant or certificate holder within 30 calendar days of the hearing. Except as specified in subdivision (h), the effective date of an action to revoke or suspend a certificate shall be specified in the written decision, or if no administrative hearing is timely requested, the effective date shall be 21 business days from written notification of the department's determination to revoke or suspend.

(h) The state department may revoke or suspend a certificate prior to any hearing when immediate action is necessary in the judgment of the director to protect the public welfare. Notice of this action, including a statement of the necessity of immediate action to protect the public welfare, shall be sent in accordance with subdivision (f). If the certificate holder requests an administrative hearing pursuant to subdivision (g), the state department shall hold the administrative hearing as soon as possible but not later than 30 calendar days from receipt of the request for a hearing. A written hearing decision upholding or setting aside the action shall be sent by certified mail to the certificate holder within 30 calendar days of the hearing.

(i) Upon the expiration of the term of suspension, he or she shall be reinstated by the state department and shall be entitled to resume practice unless it is established to the satisfaction of the state department that the person has

practiced as a home health aide in California during the term of suspension. In this event, the state department shall revoke the person's certificate.

(j) Upon a determination to deny an application or deny, revoke, or suspend a certificate, the department shall notify the employer of the applicant or certificate holder in writing of that determination, and whether the determination is final, or whether a hearing is pending relating to this determination. If a licensee or facility is required to deny employment or terminate employment of the employee based upon notice from the state that the employee is determined to be unsuitable for employment under this section, the licensee or facility shall not incur criminal, civil, unemployment insurance, workers' compensation, or administrative liability as a result of that denial or termination.

Comment. Subdivision (g)(2) of Section 1736.5 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to "audiotape" in Civil Discovery Act with either "audio technology," "audio recording," or "audio record," as context required).

Health & Safety Code § 7158.3 (amended). Duties of donee of anatomical gift

SEC. _____. Section 7158.3 of the Health and Safety Code is amended to read:

7158.3. (a) The following definitions shall apply for purposes of this section:

(1) "Cosmetic surgery" means surgery that is performed to alter or reshape normal structures of the body in order to improve appearance.

(2) "Donee" means a hospital, as defined in subdivision (f) of Section 7150.1, or an organ procurement organization, as defined in subdivision (j) of Section 7150.1, or a tissue bank licensed pursuant to Chapter 4.1 (commencing with Section 1635) of Division 2.

(3) “Reconstructive surgery” means surgery performed to correct or repair abnormal structures of the body caused by congenital defects, developmental abnormalities, trauma, infection, tumors, or disease to do either of the following:

(A) To improve function.

(B) To create a normal appearance, to the extent possible.

(b) For purposes of accepting anatomical gifts, as defined in subdivision (a) of Section 7150.1, a donee shall do all of the following:

(1) Revise existing informed consent forms and procedures to advise a donor or, if the donor is deceased, the donor’s representative, that tissue banks work with both nonprofit and for-profit tissue processors and distributors, that it is possible that donated skin may be used for cosmetic or reconstructive surgery purposes, and that donated tissue may be used for transplants outside of the United States.

(2) The revised consent form or procedure shall separately allow the donor or donor’s representative to withhold consent for any of the following:

(A) Donated skin to be used for cosmetic surgery purposes.

(B) Donated tissue to be used for applications outside of the United States.

(C) Donated tissue to be used by for-profit tissue processors and distributors.

(3) A donee shall be deemed to have complied with paragraph (2) by designating tissue that has been donated with specific restrictions on its use. Once the donee transfers the tissue to a separate entity, the donee’s responsibility for compliance with any restrictions on the tissue ceases.

(4) The donor may recover, in a civil action against any individual or entity that fails to comply with this subdivision, civil penalties to be assessed in an amount not less than one thousand dollars (\$1,000) and not more than five thousand dollars (\$5,000), plus court costs, as determined by the court.

A separate penalty shall be assessed for each individual or entity that fails to comply with this subdivision. Any civil penalty provided under this paragraph shall be in addition to any license revocation or suspension, if appropriate, authorized under subdivision (c).

(5) If the consent of the donor or donor's representative is obtained in writing, the donee shall offer to provide the donor or donor's representative with a copy of the completed consent form. If consent is obtained by telephone, the donee shall advise the donor or donor's representative that the conversation will be ~~tape~~ *audio* recorded for verification and enforcement purposes, and shall offer to provide the donor or donor's representative with a written copy of the recorded telephonic consent form.

(c) Violation of this section by a licensed health care provider constitutes unprofessional conduct.

(d) This section shall not apply to the removal of sperm or ova pursuant to Section 2260 of the Business and Professions Code.

Comment. Subdivision (b)(5) of Section 7158.3 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to "audiotape" in Civil Discovery Act with either "audio technology," "audio recording," or "audio record," as context required).

Health & Safety Code § 13220 (amended). Furnishing emergency procedures to persons entering buildings

SEC. _____. Section 13220 of the Health and Safety Code is amended to read:

13220. The owner or operator of any of the following buildings shall provide to persons entering those buildings specific emergency procedures to be followed in the event of fire, including procedures for handicapped and nonambulatory persons:

(a) In the case of privately owned highrise structures, as defined in Section 13210, and office buildings two stories or more in height, the emergency procedure information shall be made available in a conspicuous area of the structure that is easily accessible to all persons entering the structure, designated pursuant to regulations of the State Fire Marshal.

(b) In the case of hotels and motels, as defined in subdivision (b) of Section 25503.16 of the Business and Professions Code, the emergency procedure information shall be posted in a conspicuous place in every room available for rental in the hotel or motel, or, at the option of the hotel or motel operator, it shall be provided through the use of brochures, pamphlets, ~~videotapes~~ *video recordings*, or other means, pursuant to regulations adopted by the State Fire Marshal.

(c) In the case of apartment houses two stories or more in height that contain three or more dwelling units, and where the front door opens into an interior hallway or an interior lobby area, the emergency information shall be provided as follows:

(1) Information for exiting the structure shall be posted on signs using international symbols at every stairway landing, at every elevator landing, at an intermediate point of any hallway exceeding 100 feet in length, at all hallway intersections, and immediately inside all public entrances to the building.

(2) Information shall be provided to all tenants of record, through the use of brochures, pamphlets, or ~~videotapes~~ *video recordings*, if any of these items is available, or this requirement may be satisfied pursuant to regulations adopted by the State Fire Marshal.

(3) If the owner or operator, or any individual acting on behalf of the owner or operator, of an apartment house, as defined in this subdivision, negotiates a lease, sublease, rental

contract, or other term of tenancy contract or agreement in any language other than English, the information required to be provided pursuant to paragraph (2) of this subdivision shall be provided in English, in international symbols, and in the four most common non-English languages spoken in California, as determined by the State Fire Marshal.

(4) This subdivision shall become operative on July 1, 1996.

(d) On or before July 1, 1996, the State Fire Marshal shall adopt, for use in apartment houses described in subdivision (c), a consumer-oriented model brochure or pamphlet that includes general emergency procedure information in English, in international symbols, and in the four most common non-English languages spoken in California, as determined by the State Fire Marshal.

(e) An owner, agent, operator, translator, or transcriber who provides emergency procedure information pursuant to this section in good faith and without gross negligence shall be held harmless for any errors in the translation or transcription of that emergency information. This limited immunity shall apply only to errors in the translation or transcription and not to the providing of the information required to be provided pursuant to this section.

(f) Unless expressly stated, nothing in this section shall be deemed to require an owner or operator of any of the buildings listed in this section to provide emergency procedure information in any language other than English, or through the use of international symbols.

Comment. Section 13220 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

Health & Safety Code § 13221 (amended). Regulations for furnishing emergency procedures

SEC. _____. Section 13221 of the Health and Safety Code is amended to read:

13221. The State Fire Marshal shall adopt regulations for the furnishing of emergency procedure information according to this chapter. Those regulations may include the general contents of brochures, pamphlets, signs, or ~~videotapes~~ *video recordings* used in furnishing emergency procedure information, but shall provide for at least the following:

- (a) A reference to the posting of exit plans for the structure.
- (b) A general explanation of operation of the fire alarm system of the structure.
- (c) Other fire emergency procedures.

Comment. Section 13221 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

Health & Safety Code § 25201.11 (amended). Departmental copyright protection and other rights

SEC. _____. Section 25201.11 of the Health and Safety Code is amended to read:

25201.11. (a) Copyright protection and all other rights and privileges provided pursuant to Title 17 of the United States Code are available to the department to the fullest extent authorized by law, and the department may sell, lease, or license for commercial or noncommercial use any work, including, but not limited to, ~~videotapes~~ *video recordings*, ~~audiotapes~~ *audio recordings*, books, pamphlets, and computer software as that term is defined in Section 6254.9 of the Government Code, that the department produces whether the department is entitled to that copyright protection or not.

(b) Any royalties, fees, or compensation of any type that is paid to the department to make use of a work entitled to copyright protection shall be deposited in the Hazardous Waste Control Account.

(c) Nothing in this section is intended to limit any powers granted to the department pursuant to Section 6254.9 of the Government Code or any other provision of law.

Comment. Section 25201.11 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

Health & Safety Code § 40828 (amended). Testimony by members of public

SEC. _____. Section 40828 of the Health and Safety Code is amended to read:

40828. (a) A hearing board shall allow interested members of the public a reasonable opportunity to testify with regards to the matter under consideration, and shall consider such testimony in making its decision.

(b) The hearing board shall prepare a record of the witnesses and the testimony of each witness at the hearing. Such a record may be a ~~tape~~ *an audio* recording. The record shall be retained by the hearing board while the variance is in effect, or for the period of one year, whichever is longer.

Comment. Section 40828 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

Health & Safety Code § 100171 (amended). Adjudicative hearing

SEC. _____. Section 100171 of the Health and Safety Code is amended to read:

100171. Notwithstanding any other provision of law, whenever the department is authorized or required by statute, regulation, due process (14th amendment, United States Constitution; subdivision (a) of Section 7 of Article I, California Constitution), or a contract, to conduct an adjudicative hearing leading to a final decision of the director or the department, the following shall apply:

(a) The proceeding shall be conducted pursuant to the administrative adjudication provisions of Chapter 4.5 (commencing with Section 11400) and Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, except as specified in this section.

(b) Notwithstanding Section 11502 of the Government Code, whenever the department conducts a hearing under Chapter 4.5 (commencing with Section 11400) or Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, the hearing shall be conducted before an administrative law judge selected by the department and assigned to a hearing office that complies with the procedural requirements of Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 of the Government Code.

(c)(1) Notwithstanding Section 11508 of the Government Code, whenever the department conducts a hearing under Chapter 4.5 (commencing with Section 11400) or Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, the time and place of the hearing shall be determined by the staff assigned to the hearing office of the department, except as provided in paragraph (2) or unless the department by regulation specifies otherwise.

(2) Formal hearings requested by institutional Medi-Cal providers and health facilities shall be held in Sacramento.

(d)(1) Unless otherwise specified in this section, the following sections of the Government Code shall apply to any adjudicative hearing conducted by the department only if the department has not, by regulation, specified an alternative procedure for the particular type of hearing at issue: Section 11503 (relating to accusations), Section 11504 (relating to statements of issues), Section 11505 (relating to the contents of the statement to respondent), Section 11506 (relating to the notice of defense), Section 11507.6 (relating to discovery rights and procedures), Section 11508 (relating to the time and place of hearings), and Section 11516 (relating to amendment of accusations).

(2) Any alternative procedure specified by the department in accordance with this subdivision shall conform to the purpose of the Government Code provision it replaces insofar as it is possible to do so consistent with the specific procedural requirements applicable to the type of hearing at issue.

(3) Any alternative procedures adopted by the department under this subdivision shall not diminish the amount of notice given of the issues to be heard by the department or deprive appellants of the right to discovery suitable to the particular proceedings. Except as specified in paragraph (2) of subdivision (c), modifications of timeframes or of the place of hearing made by regulation may not lengthen timeframes within which the department is required to act nor require hearings to be held at a greater distance from the appellant's place of residence or business than is the case under the otherwise applicable Government Code provision.

(e) The specific timelines specified in Section 11517 of the Government Code shall not apply to any adjudicative hearing conducted by the department to the extent that the department has, by regulation, specified different timelines for the particular type of hearing at issue.

(f) In the case of any adjudicative hearing conducted by the department, “transcript,” as used in subdivision (c) of Section 11517 of the Government Code, shall be deemed to include any alternative form of recordation of the oral proceedings, including, but not limited to, an ~~audiotape~~ *audio recording*.

(g) Pursuant to Section 11415.50 of the Government Code, the department may, by regulation, provide for any appropriate informal procedure to be used for an informal level of review that does not itself lead to a final decision of the department or the director. The procedures specified in Article 10 (commencing with Section 11445.10) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code shall not apply to any such an informal level of review. Informal conferences concerning appeals by institutional Medi-Cal providers and health facilities may be held in Sacramento or Los Angeles.

(h) Notwithstanding any other provision of law, any adjudicative hearing conducted by the department that is conducted pursuant to a federal statutory or regulatory requirement that contains specific procedures may be conducted pursuant to those procedures to the extent they are inconsistent with the procedures specified in this section.

(i) Nothing in this section shall apply to a fair hearing involving a Medi-Cal beneficiary insofar as the hearing is, by agreement or otherwise, heard before an administrative law judge employed by the State Department of Social Services, or insofar as the hearing is being held pursuant to Division 4.5 (commencing with Section 4500) of the Welfare and Institutions Code in connection with services provided by the State Department of Developmental Services under applicable federal medicaid waivers. Nothing in this subdivision shall be interpreted as abrogating the authority of the State Department of Health Services as the single state agency under the state medicaid plan.

(j) Nothing in this provision shall supersede express provisions of law that apply to any hearing that is not adjudicative in nature or that does not involve due process rights specific to an individual or specific individuals, as opposed to the general public or a segment of the general public.

Comment. Subdivision (f) of Section 100171 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

Health & Safety Code § 127240 (amended). Informal public hearing

SEC. _____. Section 127240 of the Health and Safety Code is amended to read:

127240. (a) Notwithstanding subdivision (b), (c), (d), (e), or (f) of Section 127235, if the office orders a hearing on an application, the applicant may request an informal hearing of the matter, described in this section, in lieu of, and in the alternative to, the formal procedures described in subdivisions (b), (c), (d), (e), and (f) of Section 127235.

(b) If an applicant requests an informal hearing and the office concurs with the request, the office shall proceed as follows:

(1) Within five calendar days after receipt of the request for an informal public hearing, the office shall order the informal public hearing by the service of a copy of the order on the applicant. The order shall include the staff report and recommendations prepared by staff of the office. Except as otherwise agreed by the applicant and the office, the informal public hearing shall commence within 20 days of the date of the order. Upon the scheduling of the hearing, the office shall promptly serve notice of the date, location, and time of the informal public hearing upon the applicant. The office shall also publish a notice of the date, location, and time of the

informal public hearing in at least one newspaper of general circulation in the health service area served by the applicant. The notice shall also include the name and address of the applicant, the nature of the proposed project, and other information, deemed relevant by the office.

(2) The informal public hearing shall not be conducted in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code. The informal public hearing shall be conducted by an employee of the office designated by the office director. The person conducting the informal public hearing may exercise all powers relating to the conduct of the hearing, including the power to reasonably limit the length of oral presentations by any person who has been allowed to make a statement.

The informal public hearing shall be conducted as follows:

(A) The applicant shall be given an opportunity to present the merits of the project and to address the issues raised by the staff report and recommendations.

(B) The office staff shall be given an opportunity to present their analysis of the project.

(C) Other interested persons shall be given an opportunity to present written or oral statements.

(D) The person conducting the informal public hearing may question any person making a written or oral statement and may give the applicant and office staff an opportunity to question any person who has made a written or oral statement.

(E) The applicant and staff shall be given an opportunity to make closing statements.

(F) The office shall make ~~a tape~~ *an audio or video* recording of the hearing, and copies of the ~~tape~~ *recording* shall be made available at cost upon reasonable notice. However, the applicant shall have a right to bring a certified shorthand reporter to be used in place of the ~~tape~~ *audio or*

video recording, provided that he or she provides the office with a copy of the transcript.

(c) The informal public hearing shall conclude within 10 calendar days after commencement of the hearing unless one of the following occurs:

(1) The applicant agrees to extend the time for conclusion of the hearing.

(2) The hearing is ongoing and continuing during consecutive business days, in which case it shall be concluded as soon as reasonably practicable thereafter.

(d) Within 10 days after the conclusion of the informal public hearing, the person conducting the hearing shall render a proposed decision supported by findings of fact, based solely upon the record of the hearing. The proposed decision shall be served upon the applicant and the office staff.

(e) The director shall make a final decision on an application within 10 calendar days after issuance of the proposed decision. The decisions shall either approve the application, approve it with modifications, reject it, or approve it with conditions mutually agreed upon by the applicant and the office. The failure of any applicant to fulfill the conditions under which the certificate of need was granted shall constitute grounds for revocation of the certificate of need.

(f) Notice of the substance of the office's decisions shall be published in a newspaper of general circulation within the health service area served by the applicant, within 10 calendar days following the decision.

(g) Whether or not an informal hearing is granted shall be at the discretion of the office.

Comment. Section 127240 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to "audiotape" in Civil Discovery Act with either "audio technology," "audio recording," or "audio record," as context required).

INSURANCE CODE

Ins. Code § 1758.97 (amended). Prerequisites to sale or offer to sell insurance

SEC. _____. Section 1758.97 of the Insurance Code is amended to read:

1758.97. A credit insurance agent shall not sell or offer to sell insurance pursuant to this article unless all of the following conditions are satisfied:

(a) The credit insurance agent provides brochures or other written materials to the prospective purchaser that do all of the following:

(1) Summarize the material terms and conditions of coverage offered, including the identity of the insurer.

(2) Describe the process for filing a claim, including a toll-free telephone number to report a claim.

(3) Disclose any additional information on the price, benefits, exclusions, conditions, or other limitations of those policies that the commissioner may by rule prescribe.

(b) The credit insurance agent makes all of the following disclosures, either with or as part of each individual policy or group certificate, or with a notice of proposed insurance, or, if the insurance is sold at the same time and place as the related credit transaction, in a statement acknowledged by the purchaser in writing on a separate form, electronically, digitally, or by ~~tape~~ audio recording:

(1) That the purchase of the kinds of insurance prescribed in this article is not required in order to secure the loan or an extension of credit.

(2) That the insurance coverage offered by the credit insurance agent may provide a duplication of coverage already provided by a purchaser's other personal insurance policies or by another source of coverage.

(3) That the endorsee is not qualified or authorized to evaluate the adequacy of the purchaser's existing coverages, unless the individual is licensed pursuant to Article 3 (commencing with Section 1631).

(4) That the customer may cancel the insurance at any time. If the customer cancels within 30 days from the delivery of the insurance policy, certificate, or notice of proposed insurance, the premium will be refunded in full. If the customer cancels at any time thereafter, any unearned premium will be refunded in accordance with applicable law.

(c) Evidence of coverage is provided to every person who elects to purchase that coverage.

(d) Costs for the insurance are separately itemized in any loan, credit, or retail agreement.

(e) The insurance is provided under an individual policy issued to the purchaser or under a group or master policy issued to the organization licensed as a credit insurance agent by an insurer authorized to transact the applicable kinds or types of insurance in this state. Any of the conditions and disclosures specified in this section shall be deemed satisfied if the consumer is otherwise provided with the information required in this section by any other disclosures required by existing federal or state law or regulations.

No statement, disclosure, or notice made for the purpose of compliance with this section shall be construed to cause the policy form, certificate of insurance, or notice of proposed insurance, by themselves, to be considered nonstandard forms, as described in Article 6.9 (commencing with Section 2249) of Subchapter 2 of Chapter 5 of Title 10 of the California Code of Regulations.

Comment. Subdivision (b) of Section 1758.97 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to "audiotape" in Civil Discovery Act with either "audio technology," "audio recording," or "audio record," as context required).

Ins. Code § 2071.1 (amended). Examination of insured

SEC. _____. Section 2071.1 of the Insurance Code is amended to read:

2071.1. (a) This section applies to an examination of an insured under oath pursuant to Section 2071 labeled “Requirements in case loss occurs” and other relevant provisions of that section, and to any policy that insures property and contains a provision for examining an insured under oath, when the policy is originated or renewed on and after January 1, 2002.

The following are among the rights of each insured who is requested to submit to an examination under oath:

(1) An insurer that determines that it will conduct an examination under oath of an insured shall notify the insured of that determination and shall include a copy of this section in the notification.

(2) An insurer may conduct an examination under oath only to obtain information that is relevant and reasonably necessary to process or investigate the claim.

(3) An examination under oath may only be conducted upon reasonable notice, at a reasonably convenient place and for a reasonable length of time.

(4) The insured may be represented by counsel and may record the examination proceedings in their entirety.

(5) The insurer shall notify the insured that, upon request and free of charge, it will provide the insured with a copy of the transcript of the proceedings and ~~a tape~~ *an audio or video recording* of the proceedings, if one exists. Where an insured requests a copy of the transcript, the ~~tape recording~~, or both, of their examination under oath, the insurer shall provide it within 10 business days of receipt by the insurer or its counsel of the transcript, the ~~tape recording~~, or both. An insured may make sworn corrections to the transcript so it accurately reflects the testimony under oath.

(6) In an examination under oath, an insured may assert any objection that can be made in a deposition under state or federal law. However, if as a result of asserting an objection an insured fails to provide an answer to a material question, and that failure prevents the insurer from being able to determine the extent of loss and validity of the claim, the rights of the insured under the contract may be affected.

(7) An insured who submits a fraudulent claim may be subject to all criminal and civil penalties applicable under law.

(b) The department shall conduct a study quantifying the number of examinations under oath performed by carriers regulated by the department and the number of contacts made by consumers regarding alleged concerns with the utilization of the examination under oath process for the resolution of pending claims. The department shall report both the number of examinations under oath performed by each carrier and the number of justified and unjustified claims alleged by insureds as defined in the Insurance Code. To the best extent practicable, the department shall also determine if any of these complaints also resulted in suspected fraudulent claims with the department's fraud division.

(c) The department shall also survey licensed carriers as to the number of suspected fraudulent claims under residential property insurance policies that are submitted to the department's fraud division as required by law, and that resulted, or eventually resulted, in the utilization of the examination under oath process. Policies of residential property insurance shall be as defined in Section 10087.

(d) The department shall submit the findings of this report to the Chairs of the Assembly and Senate Committees on Insurance no later than March 1, 2003.

Comment. Subdivision (a)(5) of Section 2071.1 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous

references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

PENAL CODE

Penal Code § 298.1 (amended). Refusal to give specimen, sample or impression

SEC. _____. Section 298.1 of the Penal Code is amended to read:

298.1. (a) As of the effective date of this chapter, any person who refuses to give any or all of the following, blood specimens, saliva samples, or thumb or palm print impressions as required by this chapter, once he or she has received written notice from the Department of Justice, the Department of Corrections and Rehabilitation, any law enforcement personnel, or officer of the court that he or she is required to provide specimens, samples, and print impressions pursuant to this chapter is guilty of a misdemeanor. The refusal or failure to give any or all of the following, a blood specimen, saliva sample, or thumb or palm print impression is punishable as a separate offense by both a fine of five hundred dollars (\$500) and imprisonment of up to one year in a county jail, or if the person is already imprisoned in the state prison, by sanctions for misdemeanors according to a schedule determined by the Department of Corrections and Rehabilitation.

(b)(1) Notwithstanding subdivision (a), authorized law enforcement, custodial, or corrections personnel, including peace officers as defined in Sections 830, 830.1, subdivision (d) of Section 830.2, Sections ~~830.5~~, 830.38, ~~830.5~~, or 830.55, may employ reasonable force to collect blood specimens, saliva samples, or thumb or palm print impressions pursuant to this chapter from individuals who,

after written or oral request, refuse to provide those specimens, samples, or thumb or palm print impressions.

(2) The withdrawal of blood shall be performed in a medically approved manner in accordance with the requirements of paragraph (2) of subdivision (b) of Section 298.

(3) The use of reasonable force as provided in this subdivision shall be carried out in a manner consistent with regulations and guidelines adopted pursuant to subdivision (c).

(c)(1) The Department of Corrections and Rehabilitation and the Division of Juvenile Justice shall adopt regulations governing the use of reasonable force as provided in subdivision (b), which shall include the following:

(A) "Use of reasonable force" shall be defined as the force that an objective, trained, and competent correctional employee, faced with similar facts and circumstances, would consider necessary and reasonable to gain compliance with this chapter.

(B) The use of reasonable force shall not be authorized without the prior written authorization of the supervising officer on duty. The authorization shall include information that reflects the fact that the offender was asked to provide the requisite specimen, sample, or impression and refused.

(C) The use of reasonable force shall be preceded by efforts to secure voluntary compliance with this section.

(D) If the use of reasonable force includes a cell extraction, the regulations shall provide that the extraction be ~~videotaped~~ *video recorded*.

(2) The Corrections Standards Authority shall adopt guidelines governing the use of reasonable force as provided in subdivision (b) for local detention facilities, which shall include the following:

(A) “Use of reasonable force” shall be defined as the force that an objective, trained and competent correctional employee, faced with similar facts and circumstances, would consider necessary and reasonable to gain compliance with this chapter.

(B) The use of reasonable force shall not be authorized without the prior written authorization of the supervising officer on duty. The authorization shall include information that reflects the fact that the offender was asked to provide the requisite specimen, sample, or impression and refused.

(C) The use of reasonable force shall be preceded by efforts to secure voluntary compliance with this section.

(D) If the use of reasonable force includes a cell extraction, the extraction shall be ~~videotaped~~ *video recorded*.

(3) The Department of Corrections and Rehabilitation, the Division of Juvenile Justice, and the Corrections Standards Authority shall report to the Legislature not later than January 1, 2005, on the use of reasonable force pursuant to this section. The report shall include, but is not limited to, the number of refusals, the number of incidents of the use of reasonable force under this section, the type of force used, the efforts undertaken to obtain voluntary compliance, if any, and whether any medical attention was needed by the prisoner or personnel as a result of force being used.

Comment. Section 298.1 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

Subdivision (b)(1) is amended to make a stylistic revision.

Penal Code § 599aa (amended). Seizure of birds, animals and related items

SEC. _____. Section 599aa of the Penal Code is amended to read:

599aa. (a) Any authorized officer making an arrest under Section 597.5 shall, and any authorized officer making an arrest under Section 597b, 597c, 597j, or 599a may, lawfully take possession of all birds or animals and all paraphernalia, implements or other property or things used or employed, or about to be employed, in the violation of any of the provisions of this code relating to the fighting of birds or animals that can be used in animal or bird fighting, in training animals or birds to fight, or to inflict pain or cruelty upon animals or birds in respect to animal or bird fighting.

(b) Upon taking possession, the officer shall inventory the items seized and question the persons present as to the identity of the owner or owners of the items. The inventory list shall identify the location where the items were seized, the names of the persons from whom the property was seized, and the names of any known owners of the property.

Any person claiming ownership or possession of any item shall be provided with a signed copy of the inventory list which shall identify the seizing officer and his or her employing agency. If no person claims ownership or possession of the items, a copy of the inventory list shall be left at the location from which the items were seized.

(c) The officer shall file with the magistrate before whom the complaint against the arrested person is made, a copy of the inventory list and an affidavit stating the affiant's basis for his or her belief that the property and items taken were in violation of this code. On receipt of the affidavit, the magistrate shall order the items seized to be held until the final disposition of any charges filed in the case subject to subdivision (e).

(d) All animals and birds seized shall, at the discretion of the seizing officer, be taken promptly to an appropriate animal storage facility. For purposes of this subdivision, an appropriate animal storage facility is one in which the animals

or birds may be stored humanely. However, if an appropriate animal storage facility is not available, the officer may cause the animals or birds used in committing or possessed for the purpose of the alleged offenses to remain at the location at which they were found. In determining whether it is more humane to leave the animals or birds at the location at which they were found than to take the animals or birds to an animal storage facility, the officer shall, at a minimum, consider the difficulty of transporting the animals or birds and the adequacy of the available animal storage facility. When the officer does not seize and transport all animals or birds to a storage facility, he or she shall do both of the following:

(1) Seize a representative sample of animals or birds for evidentiary purposes from the animals or birds found at the site of the alleged offenses. The animals or birds seized as a representative sample shall be transported to an appropriate animal storage facility.

(2) Cause all animals or birds used in committing or possessed for the purpose of the alleged offenses to be banded, tagged, or marked by microchip, and photographed or ~~videotaped~~ *video recorded* for evidentiary purposes.

(e)(1) If ownership of the seized animals or birds cannot be determined after reasonable efforts, the officer or other person named and designated in the order as custodian of the animals or birds may, after holding the animals and birds for a period of not less than 10 days, petition the magistrate for permission to humanely destroy or otherwise dispose of the animals or birds. The petition shall be published for three successive days in a newspaper of general circulation. The magistrate shall hold a hearing on the petition not less than 10 days after seizure of the animals or birds, after which he or she may order the animals or birds to be humanely destroyed or otherwise disposed of, or to be retained by the officer or person with custody until the conviction or final discharge of

the arrested person. No animal or bird may be destroyed or otherwise disposed of until 4 days after the order.

(2) Paragraph (1) shall apply only to those animals and birds seized under any of the following circumstances:

(A) After having been used in violation of any of the provisions of this code relating to the fighting of birds or animals.

(B) At the scene or site of a violation of any of the provisions of this code relating to the fighting of birds or animals.

(f) Upon the conviction of the arrested person, all property seized shall be adjudged by the court to be forfeited and shall then be destroyed or otherwise disposed of as the court may order. Upon the conviction of the arrested person, the court may order the person to make payment to the appropriate public entity for the costs incurred in the housing, care, feeding, and treatment of the animals or birds. Each person convicted in connection with a particular animal or bird, excluding any person convicted as a spectator pursuant to Section 597b or 597c, or subdivision (b) of Section 597.5, may be held jointly and severally liable for restitution pursuant to this subdivision. This payment shall be in addition to any other fine or other sentence ordered by the court. The court shall specify in the order that the public entity shall not enforce the order until the defendant satisfies all other outstanding fines, penalties, assessments, restitution fines, and restitution orders. The court may relieve any convicted person of the obligation to make payment pursuant to this subdivision for good cause but shall state the reasons for that decision in the record. In the event of the acquittal or final discharge without conviction of the arrested person, the court shall, on demand, direct the delivery of the property held in custody to the owner. If the owner is unknown, the court shall

order the animals or birds to be humanely destroyed or otherwise disposed of.

Comment. Subdivision (d)(2) of Section 599aa is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

Penal Code § 868.7 (amended). Closure of examination

SEC. _____. Section 868.7 of the Penal Code is amended to read:

868.7. (a) Notwithstanding any other provision of law, the magistrate may, upon motion of the prosecutor, close the examination in the manner described in Section 868 during the testimony of a witness:

(1) Who is a minor or a dependent person with a substantial cognitive impairment, as defined in paragraph (3) of subdivision (f) of Section 288, and is the complaining victim of a sex offense, where testimony before the general public would be likely to cause serious psychological harm to the witness and where no alternative procedures, including, but not limited to, ~~videotaped~~ *video recorded* deposition or contemporaneous examination in another place communicated to the courtroom by means of closed-circuit television, are available to avoid the perceived harm.

(2) Whose life would be subject to a substantial risk in appearing before the general public, and where no alternative security measures, including, but not limited to, efforts to conceal his or her features or physical description, searches of members of the public attending the examination, or the temporary exclusion of other actual or potential witnesses, would be adequate to minimize the perceived threat.

(b) In any case where public access to the courtroom is restricted during the examination of a witness pursuant to this

section, a transcript of the testimony of the witness shall be made available to the public as soon as is practicable.

~~This section shall become operative on January 1, 1987.~~

Comment. Subdivision (a)(1) of Section 868.7 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

The second paragraph of subdivision (b) is deleted as obsolete.

Penal Code § 1191.15 (amended). Victim statement

SEC. _____. Section 1191.15 of the Penal Code is amended to read:

1191.15. (a) The court may permit the victim of any crime, or his or her parent or guardian if the victim is a minor, or the next of kin of the victim if the victim has died, to file with the court a written, ~~audiotaped~~ *audio recorded*, or ~~videotaped~~ *video recorded* statement, or statement stored on a ~~CD Rom, DVD,~~ or any other recording medium acceptable to the court, expressing his or her views concerning the crime, the person responsible, and the need for restitution, in lieu of or in addition to the person personally appearing at the time of judgment and sentence. The court shall consider the statement filed with the court prior to imposing judgment and sentence.

Whenever an *audio recorded* or *video recorded* statement or statement stored on a ~~CD Rom, DVD,~~ or other *any* medium is filed with the court, a written transcript of the statement shall also be provided by the person filing the statement, and shall be made available as a public record of the court after the judgment and sentence have been imposed.

(b) Whenever a written, *audio recorded*, or *video recorded* statement or statement stored on a ~~CD Rom, DVD,~~ or other *any* medium is filed with the court, it shall remain sealed until the time set for imposition of judgment and sentence except that the court, the probation officer, and counsel for the

parties may view and listen to the statement not more than two court days prior to the date set for imposition of judgment and sentence.

(c) No person may, and no court shall, permit any person to duplicate, copy, or reproduce by any audio or visual means any statement submitted to the court under the provisions of this section.

(d) Nothing in this section shall be construed to prohibit the prosecutor from representing to the court the views of the victim or his or her parent or guardian or the next of kin.

(e) In the event the court permits an audio *recorded* or video *recorded* statement or statement stored on ~~a CD Rom, DVD, or other~~ any medium to be filed, the court shall not be responsible for providing any equipment or resources needed to assist the victim in preparing the statement.

Comment. Section 1191.15 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

Penal Code § 1203.098. (amended). Batterers’ intervention program facilitators

SEC. _____. Section 1203.098 of the Penal Code is amended to read:

1203.098. (a) Unless otherwise provided, a person who works as a facilitator in a batterers’ intervention program that provides programs for batterers pursuant to subdivision (c) of Section 1203.097 shall complete the following requirements before being eligible to work as a facilitator in a batterers’ intervention program:

(1) Forty hours of core-basic training. A minimum of eight hours of this instruction shall be provided by a shelter-based or shelter-approved trainer. The core curriculum shall include the following components:

(A) A minimum of eight hours in basic domestic violence knowledge focusing on victim safety and the role of domestic violence shelters in a community-coordinated response.

(B) A minimum of eight hours in multicultural, cross cultural, and multiethnic diversity and domestic violence.

(C) A minimum of four hours in substance abuse and domestic violence.

(D) A minimum of four hours in intake and assessment, including the history of violence and the nature of threats and substance abuse.

(E) A minimum of eight hours in group content areas focusing on gender roles and socialization, the nature of violence, the dynamics of power and control, and the affects of abuse on children and others as required by Section 1203.097.

(F) A minimum of four hours in group facilitation.

(G) A minimum of four hours in domestic violence and the law, ethics, all requirements specified by the probation department pursuant to Section 1203.097, and the role of batterers' intervention programs in a coordinated-community response.

(H) Any person that provides documentation of coursework, or equivalent training, that he or she has satisfactorily completed, shall be exempt from that part of the training that was covered by the satisfactorily completed coursework.

(I) The coursework that this person performs shall count towards the continuing education requirement.

(2) Fifty-two weeks or no less than 104 hours in six months, as a trainee in an approved batterers' intervention program with a minimum of a two-hour group each week. A training program shall include at least one of the following:

(A) Cofacilitation internship in which an experienced facilitator is present in the room during the group session.

(B) Observation by a trainer of the trainee conducting a group session via a one-way mirror.

(C) Observation by a trainer of the trainee conducting a group session via a video or audio ~~tape~~ *recording*.

(D) Consultation and or supervision twice a week in a six-month program or once a week in a 52-week program.

(3) An experienced facilitator is one who has the following qualifications:

(A) Documentation on file, approved by the agency, evidencing that the experienced facilitator has the skills needed to provide quality supervision and training.

(B) Documented experience working with batterers for three years, and a minimum of two years working with batterer's groups.

(C) Documentation by January 1, 2003, of coursework or equivalent training that demonstrates satisfactory completion of the 40-hour basic-core training.

(b) A facilitator of a batterers' intervention program shall complete, as a minimum continuing education requirement, 16 hours annually of continuing education in either domestic violence or a related field with a minimum of 8 hours in domestic violence.

(c) A person or agency with a specific hardship may request the probation department, in writing, for an extension of time to complete the training or to complete alternative training options.

(d)(1) An experienced facilitator, as defined in paragraph (3) of subdivision (a), is not subject to the supervision requirements of this section, if they meet the requirements of subparagraph (C) of paragraph (3) of subdivision (a).

(2) This section does not apply to a person who provides batterers' treatment through a jail education program if the person in charge of that program determines that such person

has adequate education or training in domestic violence or a related field.

(e) A person who satisfactorily completes the training requirements of a county probation department whose training program is equivalent to or exceeds the training requirements of this act shall be exempt from the training requirements of this act.

Comment. Subdivision (a)(2)(C) of Section 1203.098 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

Penal Code § 3043 (amended). Hearing relating to parole suitability or setting of parole date

SEC. _____. Section 3043 of the Penal Code is amended to read:

3043. (a) Upon request, notice of any hearing to review or consider the parole suitability or the setting of a parole date for any prisoner in a state prison shall be sent by the Board of Prison Terms at least 30 days before the hearing to any victim of a crime committed by the prisoner, or to the next of kin of the victim if the victim has died. The requesting party shall keep the board apprised of his or her current mailing address.

(b) The victim, next of kin, two members of the victim’s immediate family, or two representatives designated for a particular hearing by the victim or, in the event the victim is deceased or incapacitated, by the next of kin in writing prior to the hearing have the right to appear, personally or by counsel, at the hearing and to adequately and reasonably express his, her, or their views concerning the crime and the person responsible, except that any statement provided by a representative designated by the victim or next of kin shall be

limited to comments concerning the effect of the crime on the victim.

(c) A representative designated by the victim or the victim's next of kin for purposes of this section must be either a family or household member of the victim. The board may not permit a representative designated by the victim or the victim's next of kin to provide testimony at a hearing, or to submit a statement to be included in the hearing as provided in Section 3043.2, if the victim, next of kin, or a member of the victim's immediate family is present at the hearing, or if the victim, next of kin, or a member of the victim's immediate family has submitted a statement as described in Section 3043.2.

(d) Nothing in this section is intended to allow the board to permit a victim's representative to attend a particular hearing if the victim, next of kin, or a member of the victim's immediate family is present at any hearing covered in this section, or if the victim, next of kin, or member of the victim's immediate family has submitted a written, ~~audiotaped~~ *audio recorded*, or ~~videotaped~~ *video recorded* statement.

(e) The board, in deciding whether to release the person on parole, shall consider the statements of the victim or victims, next of kin, immediate family members of the victim, and the designated representatives of the victim or next of kin, if applicable, made pursuant to this section and shall include in its report a statement of whether the person would pose a threat to public safety if released on parole.

In those cases where there are more than two immediate family members of the victim who wish to attend any hearing covered in this section, the board may, in its discretion, allow attendance of additional immediate family members or limit attendance to the following order of preference: spouse, children, parents, siblings, grandchildren, and grandparents.

The provisions of this section shall not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors.

Comment. Subdivision (d) of Section 3043 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

PUBLIC RESOURCES CODE

Pub. Res. Code § 4423.1 (amended). Suspension, restriction, or prohibition of permit burning

SEC. _____. Section 4423.1 of the Public Resources Code is amended to read:

4423.1. Burning under permit by any person on public or private lands, except within incorporated cities, may be suspended, restricted, or otherwise prohibited by proclamation. Any of the following public officers may issue a proclamation, which shall be applicable within their respective jurisdictions:

- (a) The director or his or her designee.
- (b) Any county fire warden with the approval of the director.
- (c) The federal officers directing activities within California of the United States Bureau of Land Management, the National Park Service, and the United States Forest Service.

The proclamation may be issued when, in the judgment of the issuing public official, the menace of destruction by fire to life, improved property, or natural resources is, or is forecast to become, extreme due to critical fire weather, fire suppression forces being heavily committed to control fires already burning, acute dryness of the vegetation, or other

factors that may cause the rapid spread of fire. A proclamation is effective on issuance or at a time specified therein and shall remain in effect until a proclamation removing the suspension, restriction, or prohibition is issued. The proclamation may be effective for a single day or longer. The proclamation shall declare the conditions that necessitate its issuance, designate the geographic area to which it applies, require that all or specified burning under permit be suspended, restricted, or prohibited until the conditions necessitating the proclamation abate, and identify the public official issuing the proclamation. The proclamation may be in the form of a verbal or ~~tape-recorded~~ *audio recorded* telephone message, a press release, or a posted order.

The proclamation may be issued without complying with Chapter 3.5 (commencing with Section 11340) and Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

Comment. Subdivision (c) of Section 4423.1 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

REVENUE AND TAXATION CODE

Rev. & Tax Code § 1611 (amended). Record of hearing

SEC. _____. Section 1611 of the Revenue and Taxation Code is amended to read:

1611. The county board shall make a record of the hearing and, upon request, shall furnish the party with ~~a tape~~ *an audio* recording or a transcript thereof at his expense. Request for a ~~tape~~ *an audio* recording or a transcript may be made at any time, but not later than 60 days following the final determination by the county board.

Comment. Section 1611 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

WELFARE AND INSTITUTIONS CODE

Welf. & Inst. Code § 19639 (amended). Rules and regulations

SEC. _____. Section 19639 of the Welfare and Institutions Code is amended to read:

19639. (a) The director shall adopt and promulgate necessary rules and regulations, in compliance with Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, and do all things necessary and proper to carry out this article. The director shall review these regulations for possible revision at least every three years.

(b) These regulations shall include, but not be limited to:

(1) Uniform procedures for vendor application and termination.

(2) Criteria and standards for selecting vendors and matching vendors to facilities which shall ensure that the most qualified person is selected for a facility.

(3) Equipment life standards and service standards for the inventory, repair, and purchase of equipment, as required under subdivision (a) of Section 19626.5.

(4) The minimum requirements for installation of a facility.

(5) A fair minimum of return to vendors.

(6) Standards for training, in-service retraining, and upward mobility.

(7) The policies and procedures used by the department for collection and deposit or disbursement of all vending facility income, including, but not limited to, the frequency, rules

regarding, and method of collection of funds from facilities operated by licensed blind vendors and facilities operated by other individuals or entities.

(c) The director shall provide a written copy of all rules and regulations adopted pursuant to this section to all vendors. Upon request by a vendor, the rules and regulations shall be supplied to the vendor ~~on cassette tapes~~ *in an audio recording* in lieu of the written copy. In addition, the director shall notify all vendors of any proposed changes to the rules and regulations.

Comment. Section 19639 is amended to reflect advances in recording technology and for consistency of terminology. For a similar reform, see 2002 Cal. Stat. ch. 1068 (replacing numerous references to “audiotape” in Civil Discovery Act with either “audio technology,” “audio recording,” or “audio record,” as context required).

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Revision of No Contest Clause Statute

January 2008

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
www.clrc.ca.gov

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative. The Comments are legislative history and are entitled to substantial weight in construing the statutory provisions. For a discussion of cases addressing the use of Law Revision Commission materials in ascertaining legislative intent, see the Commission's most recent *Annual Report*.

Cite this report as *Revision of No Contest Clause Statute*, 37 Cal. L. Revision Comm'n Reports 359 (2007). This is part of publication #229.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

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January 17, 2008

To: The Honorable Arnold Schwarzenegger
Governor of California, and
The Legislature of California

A no contest clause is a provision in a will, trust, or other estate planning instrument to the effect that a beneficiary who contests the instrument forfeits any gift made by the instrument. Such a clause is intended to reduce litigation by disappointed beneficiaries.

This recommendation would address two problems with existing law on the enforcement of no contest clauses.

(1) Enforcement of a no contest clause is subject to a complex set of statutory and common law exceptions. The complexity of existing law can create uncertainty as to the scope of application of a no contest clause. That uncertainty leads to widespread use of declaratory relief to construe the application of no contest clauses, adding an additional layer of litigation that does nothing to resolve the substance of any underlying issues.

The Law Revision Commission recommends that the existing statute be substantially simplified, so as to eliminate most sources of uncertainty as to the application of a no contest clause. The proposed simplification would result in

minor substantive changes to the law governing the application of a no contest clause. Those changes would be consistent with and strengthen the general policies underlying the existing statute.

(2) A no contest clause can be used to shield fraud or undue influence from judicial review. A person who procures a testamentary gift through fraud or undue influence can use a no contest clause to deter other beneficiaries from challenging the gift to that person.

The Law Revision Commission recommends the creation of a probable cause exception for a contest that challenges a gift on the grounds of menace, duress, fraud, or undue influence. A beneficiary who brings such a contest with probable cause would not be subject to forfeiture under a no contest clause. This would allow a beneficiary who has good cause to believe that a gift was procured improperly to contest the gift without fear of disinheritance.

Existing law already provides a probable cause exception for many types of direct contests, including a contest grounded on a statutory presumption of fraud or undue influence. The proposed law would generalize the probable exception so that it applies to all direct contests.

This recommendation was prepared pursuant to Resolution Chapter 122 of the Statutes of 2005.

Respectfully submitted,

Sidney Greathouse
Chairperson

REVISION OF NO CONTEST CLAUSE STATUTE

BACKGROUND

A no contest clause (also called an *in terrorem* clause) is a provision inserted in a will, trust, or other instrument to the effect that a person who contests or attacks the instrument or any of its provisions takes nothing under the instrument or takes a reduced share. Such a clause is intended to reduce litigation by beneficiaries whose expectations are frustrated by the donative scheme of the instrument.¹

The Legislature has directed the Law Revision Commission to prepare a report weighing the advantages and disadvantages of enforcing a no contest clause in a will, trust, or other estate planning instrument.² In preparing the report, the Commission is to do the following:

Review the various approaches in this area of the law taken by other states and proposed in the Uniform Probate Code, and present to the Legislature an evaluation of the broad range of options, including possible modification or repeal of existing statutes, attorney fee shifting, and other reform proposals, as well as the potential benefits of maintaining current law.³

1. The statutory law that governs enforcement of a no contest clause was enacted in 1990, on the recommendation of the Law Revision Commission. See *No Contest Clauses*, 20 Cal. L. Revision Comm'n Reports 7 (1990). It has been amended several times since enactment, adding a number of specific exceptions to the enforcement of a no contest clause. See 1994 Cal. Stat. ch. 40; 1995 Cal. Stat. ch. 730; 2000 Cal. Stat. ch. 17; 2002 Cal. Stat. ch. 150; 2004 Cal. Stat. ch. 183.

2. See SCR 42 (Campbell), enacted as 2005 Cal. Stat. res. ch. 122.

3. *Id.*

This report discusses the arguments for and against the enforcement of a no contest clause, the approach to enforcement taken in California and in other states, and problems that have arisen under the California statute. It concludes with a recommendation for changes to the existing statute.

POLICIES FAVORING ENFORCEMENT

The longstanding general rule in California is that a no contest clause will be enforced: “No contest clauses are valid in California and are favored by the public policies of discouraging litigation and giving effect to the purposes expressed by the testator.”⁴ Policies supporting that general rule are discussed below.

Effectuating Transferor’s Intent

The law should respect a person’s ability to control the use and disposition of the person’s own property. That includes the ability to make a gift, either during life or on death. An owner may place a condition on a gift, so long as the condition imposed is not illegal or otherwise against public policy:

[The] testatrix was at full liberty to dispose of her property as she saw fit and upon whatever condition she desired to impose, so long as the condition was not prohibited by some law or opposed to public policy. The testatrix could give or refrain from giving; and could attach to her gift any lawful condition which her reason or caprice might dictate. She was but dealing with her own property

4. *Burch v. George*, 7 Cal. 4th 246, 254, 866 P.2d 92, 27 Cal. Rptr. 2d 165 (1994).

and the beneficiary claiming thereunder must take the gift, if at all, upon the terms offered.⁵

As noted, there will be situations in which a no contest clause is unenforceable as a matter of public policy, notwithstanding the intentions of the transferor.⁶

Avoiding Litigation

There are a number of good reasons why a transferor would want to avoid litigation contesting the transferor's estate plan:

Cost and Delay. The cost of litigation depletes assets that were intended to go to the transferor's beneficiaries. That is generally undesirable, but it can also have unexpected effects on the relative value of the gifts given to different beneficiaries. For example, where one beneficiary is given a specifically identified asset and the other beneficiary takes the residue of the estate, litigation costs will disproportionately affect the second beneficiary.⁷

By deterring contest litigation, a no contest clause preserves the corpus of the estate and the transferor's dispositional plan.

Discord Between Beneficiaries. A dispute over the proper disposition of a transferor's estate can pit family members and friends against one another. The dispute may be protracted, emotional, and destructive of important personal relationships.

A transferor may execute a no contest clause in order to avoid just that sort of discord. For example, in *Estate of Ferber*,⁸ the transferor had served as the personal representative of his father's estate, which was open for 17

5. Estate of Kitchen, 192 Cal. 384, 388-89, 220 P. 301 (1923).

6. See discussion of "Public Policy Exceptions" *infra*.

7. See Prob. Code § 21402 (order of abatement).

8. 66 Cal. App. 4th 244, 77 Cal. Rptr. 2d 774 (1998).

years. He did not want his own representative to go through the same difficulties: “Due to his angst over this state of affairs and its negative impact on his health and quality of life, ... he directed his attorneys to prepare the strongest possible no contest clause.”⁹

Privacy. A contest proceeding may bring to light “matters of private life that ought not to be made public, and in respect to which the voice of the testator cannot be heard, either in explanation or denial...”¹⁰ Unless a no contest clause is given effect, the resulting squabbles between disappointed beneficiaries could lead to “disgraceful family exposures,” as a result of which “the family skeleton will have been made to dance.”¹¹

An effective no contest clause can prevent that sort of public airing of private matters.

Avoiding Settlement Pressure

A disappointed beneficiary may attempt to extract a larger gift from the estate by threatening to file a contest. So long as the amount demanded is less than the cost to defend against the contest, there will be pressure to accede to the demand, regardless of its merits.

A no contest clause can be used to avoid that result. The potential contestant’s bargaining position is much reduced if filing a nuisance suit would forfeit the gift made to that person under the estate plan.

9. *Id.* at 247.

10. Estate of Hite, 155 Cal. 436, 441, 101 P. 443 (1909) (quoting *Smithsonian Inst. v. Meech*, 169 U.S. 398, 415 (1898)).

11. Leavitt, *Scope and Effectiveness of No-Contest Clauses in Last Wills and Testaments*, 15 Hastings L.J. 45, 61 (1963) (citations omitted).

Use of Forced Election to Avoid Ownership Disputes

In some cases, the proper disposition of a transferor's property may be complicated by difficult property characterization issues.

For example:

A decedent is survived by his wife of many years. It was a second marriage for both spouses, each of whom had significant separate property assets of their own. Over the years of their marriage it became increasingly difficult to characterize ownership of their assets as separate or community property: gifts were made (or implied), accounts were mingled, community property contributions were made to separate property business interests, etc. Rather than put his beneficiaries to the expense and delay that would be required for a thorough property characterization, the transferor uses a no contest clause to avoid the issue.

The transferor claims that all of the disputed assets are his separate property, gives a gift to his surviving wife that is clearly greater than the amount she would recover if she were to contest the property characterization, and includes a no contest clause. This forces the surviving spouse to make a choice between acquiescing in the decedent's estate plan and taking the amount offered under that plan, or forfeiting that amount in order to pursue her independent rights under community property law.

If the offer made in the estate plan is fair to the surviving spouse, she can save the estate money and time by accepting the gift offered (thereby effectively waiving any community property claim to purported estate assets).

Similar facts were at issue in a recent case involving a forced election:

[Estate] planning for many married couples now entails allocating a lifetime of community and separate assets between the current spouse and children from a previous marriage. The difficulties inherent in ascertaining community interests in otherwise separate property pose a

significant challenge to the testator or testatrix. If the testator or testatrix errs in identifying or calculating the community interests in his or her property, costly and divisive litigation may ensue and testamentary distributions in favor of one or more beneficiaries might unexpectedly be extinguished. As both the Legislature and courts have long recognized, no contest clauses serve an important public policy in these situations by reducing the threat of litigation and uncertainty.¹²

There are other situations, besides the disposition of marital property, that may give rise to a forced election of the type described above. For example, business partners may have mingled assets in a way that would make proper division difficult, or there may be a disputed debt owed by the decedent to a beneficiary. In such cases, a no contest clause and a sufficiently generous gift can resolve the matter without litigation.

Continuity of Law

Many existing estate plans have been drafted in reliance on existing law. Any significant substantive change in the law governing the enforcement of a no contest clause could result in transitional costs, as transferors would be required to review their estate plans and make whatever changes make sense under the new law. If a transferor were to die before adjustments could be made, the estate plan could operate in an unintended way. Those concerns weigh in favor of continuing the substance of existing law.

12. *Burch v. George*, 7 Cal. 4th 246, 265-66, 866 P.2d 92, 27 Cal. Rptr. 2d 165 (1994).

POLICIES FAVORING NON-ENFORCEMENT

It is true that a transferor generally has the right to dispose of property on death as the transferor sees fit. The law does not require that an estate plan be wise or fair.

However, it has long been held that public policy concerns can trump a transferor's intention to create a no contest clause.¹³ Specific policy concerns are discussed below.

Access to Justice

As a general matter, a person should have access to the courts to remedy a wrong or protect important rights. A no contest clause works against that policy, by threatening a significant loss to a beneficiary who files an action in court. In one of the earliest decisions holding that a no contest clause is unenforceable, the court based its holding on the importance of access to justice:

[It] is against the fundamental principles of justice and policy to inhibit a party from ascertaining his rights by appeal to the tribunals established by the State to settle and determine conflicting claims. If there be any such thing as public policy, it must embrace the right of a citizen to have his claims determined by law.¹⁴

Forfeiture Disfavored

Because forfeiture is such a harsh penalty, it is disfavored as a matter of policy. Accordingly, a no contest clause should be applied conservatively, so as not to extend the scope of

13. Estate of Kitchen, 192 Cal. 384, 388, 220 P. 301 (1923) (no contest clause enforceable "so long as the condition was not prohibited by some law or opposed to public policy.").

14. Mallet v. Smith, 6 Rich. Eq. 12 (S.C. App. Eq. Dec. 1853). Notwithstanding that decision, South Carolina now follows the Uniform Probate Code approach; a no contest clause will be enforced in the absence of probable cause to bring a contest. S.C. Code Ann. § 62-3-905.

application beyond what was intended: “Because a no contest clause results in a forfeiture ... a court is required to strictly construe it and may not extend it beyond what was plainly the testator’s intent.”¹⁵

Judicial Action Required to Determine or Implement Transferor’s Intentions

In order to effectuate a transferor’s intentions, it is necessary to ascertain those intentions. In some situations, a judicial proceeding may be required to do so. In those cases, a no contest clause could work against the effectuation of the transferor’s intentions, by deterring action that is necessary to determine or preserve those intentions. Areas of specific concern are discussed below.

Capacity and Freedom of Choice. An instrument should only be enforced if it expresses the free choice of a transferor who has the legally required mental capacity to understand the choice being made. An instrument that is the product of menace, duress, fraud, or undue influence is not an expression of the transferor’s free will and should not be enforced.¹⁶ An instrument executed by a transferor who lacks the requisite mental capacity is also not a reliable expression of the transferor’s wishes and is invalid.¹⁷ For obvious reasons, a forgery is not given effect.

If a no contest clause deters a beneficiary from challenging an instrument on any of those grounds, it may work against

15. Burch v. George, 7 Cal. 4th at 254. See also Prob. Code § 21304 (no contest clause to be strictly construed).

16. See Prob. Code § 6104 (will procured by duress, menace, fraud, or undue influence is ineffective); Civ. Code §§ 1565-1575 (contract procured by duress, menace, fraud, or undue influence is voidable).

17. See Prob. Code §§ 811-812 (capacity to convey property and contract), 6100.5(a) (capacity to make will).

the transferor's actual intentions, by protecting an instrument that should not be given effect.

Ambiguity. If a provision of a donative instrument is ambiguous, it may be difficult to determine the transferor's intentions. Different beneficiaries may argue for different meanings. Judicial construction of the instrument may be necessary to resolve the matter.¹⁸

To the extent that a no contest clause would deter the beneficiaries from seeking judicial construction of an ambiguous provision, it works against the policy of effectuating the transferor's intentions.

Reformation or Modification of Instrument. There may be instances where the meaning of a donative instrument is clear, but there is an unanticipated change in circumstances that would make the instrument ineffective to implement the transferor's purpose. In such a case, it may be appropriate to seek judicial modification of the instrument.

For example, a court may modify or terminate a trust, on the petition of a trustee or a beneficiary, "if, owing to circumstances not known to the settlor and not anticipated by the settlor, the continuation of the trust under its terms would defeat or substantially impair the accomplishment of the purposes of the trust."¹⁹

In such a case, a no contest clause could deter beneficiaries from seeking a judicial modification of an instrument that is

18. See 64 Cal. Jur. 3d *Wills* § 355 (2006) (construction of will); Prob. Code § 17200(b)(1) (construction of trust). Note that California exempts an action to construe an instrument from enforcement of a no contest clause. Prob. Code § 21305(b)(9).

19. Prob. Code § 15409. Note that California exempts an action to modify or reform an instrument from enforcement of a no contest clause. Prob. Code § 21305(b)(1), (11).

necessary in order to effectuate the transferor's actual intentions.

Judicial Supervision of Fiduciary

Important public policies are served by judicial supervision of an executor, trustee, or other fiduciary, and such supervision should not be impeded by the operation of a no contest clause: "No contest clauses that purport to insulate executors completely from vigilant beneficiaries violate the public policy behind court supervision."²⁰

Misuse of Forced Election

As discussed above,²¹ a no contest clause may be used to force a beneficiary to either take whatever is offered under the transferor's estate plan or forfeit that gift in order to assert an independent interest in the estate assets (e.g., by filing a creditor's claim or disputing ownership or dispositive control of marital property).

Such a forced election may be entirely fair, where the amount offered to the beneficiary is sufficiently large to justify acquiescence in the estate plan. Costly litigation will be avoided and the details of the transferor's estate plan can be implemented as intended.

However, there are reasons for concern about the use of a no contest clause to force an election:

- (1) *The beneficiary may settle for less than what is due.* Suppose that a surviving spouse has good reason to believe that the transferor's estate plan would transfer \$100,000 of property that is actually owned by the

20. Estate of Ferber, 66 Cal. App. 4th 244, 253, 77 Cal. Rptr. 2d 774 (1998). Note that California exempts actions relating to the supervision of a fiduciary from enforcement of a no contest clause. Prob. Code § 21305(b)(6)-(8), (12).

21. See discussion of "Use of Forced Election to Avoid Ownership Disputes" *supra*.

surviving spouse. If it would cost \$30,000 to adjudicate the matter, the surviving spouse might rationally accept a gift of \$80,000 rather than forfeit that amount in order to recover a net amount of \$70,000. If the inconvenience, risk, and delay of litigation are significant detriments, the surviving spouse might accept even less.

- (2) *The estate plan may be inconsistent with the beneficiary's own dispositional preferences.* For example, a surviving spouse would have liked her share of a family business to pass to her children from a former marriage. Under community property law, she should be free to make that disposition of her own interest in the property. Instead, the transferor's estate plan transfers the entire business to his children from a former marriage. A no contest clause may coerce the surviving spouse into accepting that result, even though it is contrary to her own preferences as to the disposition of property that is by law under her control.
- (3) *Unilateral disposition of community property violates public policy.* California law provides that one spouse may not make a gift of community property without the written consent of the other spouse,²² but a forced election may, as a practical matter, have that effect. The surviving spouse has not given advance written consent. Any acquiescence in the result may well be the result of coercion. That may be especially true for an elderly surviving spouse.

These problems result from the “take it or leave it” nature of a forced election. The transferor is given unilateral control to frame the choice, without an opportunity for negotiation. The choice may be framed benevolently, so as to benefit everyone concerned, or it may be framed cynically or

22. Fam. Code §§ 1100-1102.

carelessly, offering a choice between two undesirable results.²³

The benefits of a forced election could often be achieved through advance consultation and joint estate planning. If spouses cannot agree during life on the characterization or disposition of estate property, allowing one spouse to make unilateral decisions on death might be especially problematic.

TREATMENT OF NO CONTEST CLAUSES IN OTHER JURISDICTIONS

In all but two states, a no contest clause is generally enforceable. However, enforcement may be subject to a number of restrictions:

- In most states, a no contest clause will not be enforced if there is probable cause to bring the contest.
- In a few states, a probable cause exception applies to some, but not all, types of contests.
- In general, a no contest clause will not be enforced if enforcement would conflict with an important public policy. This has led to a number of specific public policy exceptions to enforcement. Some derive from court holdings, while others have been enacted by statute. California law includes several express public policy exceptions.
- Many states provide special rules of construction that limit or clarify the application of a no contest clause.

The differing approaches to the enforcement of a no contest clause are discussed more fully below.

23. See also *Burch v. George*, 7 Cal. 4th 246, 283-87, 866 P.2d 92, 27 Cal. Rptr. 2d 165 (1994) (Kennard, J., dissenting) (arguing against use of no contest clause to create marital forced election).

No Contest Clause Unenforceable

In Florida and Indiana the enforcement of a no contest clause is prohibited by statute.²⁴

Florida's prohibition was added in 1974 as part of a general adoption of the Uniform Probate Code.²⁵ It is not clear why Florida chose to diverge from the Uniform Probate Code approach of enforcing a no contest clause in the absence of probable cause to bring a contest.²⁶ Prior to enactment of the 1974 statute, the Florida courts would enforce a no contest clause unless the contest was brought in good faith and with probable cause, or was brought to "settle doubtful rights" and not for the purpose of destroying the will.²⁷

Indiana's statutory prohibition on the enforcement of a no contest clause dates back to at least 1917.²⁸

General Probable Cause Exception

The majority approach in the United States is to provide a probable cause exception to the enforcement of a no contest clause. A no contest clause will only be enforced if the contestant lacks probable cause to bring the contest. That is the approach taken in the Uniform Probate Code,²⁹ which has

24. See Fla. Stat. Ann. §§ 732.517 (wills), 737.207 (trusts); Ind. Code Ann. § 29-1-6-2.

25. Fenn & Koren, *The 1974 Florida Probate Code — A Marriage of Convenience*, 27 U. Fla. L. Rev. 1 (1974). Note that the parallel provision governing trusts was added in 1993. See 1993 Fla. Laws ch. 257, § 12. The trust provision was recodified in 2006. See 2006 Fla. Laws ch. 217, § 11.

26. "While this provision eliminates litigation about what constitutes 'probable cause,' it may have the effect of encouraging a disappointed beneficiary to use a will contest (or the threat thereof) to establish a bargaining position." Fenn & Koren, *supra* note 25, at 43.

27. See *Wells v. Menn*, 28 So. 2d 881, 885 (Fla. 1946).

28. See *Doyle v. Paul*, 86 N.E.2d 98, 101 (Ind. App. 1949) (quoting Acts of 1917, ch. 46, § 1, Burns' 1933, § 7-501).

29. See Unif. Prob. Code §§ 2-517, 3-905 (1990).

been adopted in 17 states.³⁰ Another 11 states have adopted a probable cause exception that is not derived from the Uniform Probate Code. In some of those states, good faith is also expressly required.³¹

No state has expressly defined the meaning of “probable cause” to bring a contest. However, the Restatement (Third) of Property states that probable cause exists if, at the time of instituting a proceeding, there is evidence that “would lead a reasonable person, properly informed and advised, to conclude that there was a substantial likelihood that the challenge would be successful.”³²

30. See Alaska Stat. §§ 13.12.517, 13.16.555 (Alaska), Ariz. Rev. Stat. § 14-2517 (Arizona), Colo. Rev. Stat. § 15-12-905 (Colorado), Haw. Rev. Stat. § 560:3-905 (Hawaii), Idaho Code Ann. § 15-3-905 (Idaho), Me. Rev. Stat. Ann. tit. 18-A, § 3-905 (Maine), Mich. Comp. Laws Ann. § 700.2518 (Michigan), Minn. Stat. Ann. § 524.2-517 (Minnesota), Mont. Code Ann. § 72-2-537 (Montana), Neb. Rev. Stat. § 30-24.103 (Nebraska), N.J. Stat. Ann. § 3B:3-47 (New Jersey), N.M. Stat. Ann. § 45-2-517 (New Mexico), N.D. Cent. Code § 30.1-20-05 (North Dakota), 20 Pa. Cons. Stat. Ann. § 2521 (Pennsylvania), S.C. Code Ann. § 62-3-905 (South Carolina), S.D. Codified Laws § 29A-3-905 (South Dakota), Utah Code Ann. § 75-3-905 (Utah).

31. See *South Norwalk Trust Co. v. St. John*, 101 A. 961, 963 (Conn. 1917) (good faith also required) (Connecticut); *In re Cocklin's Estate*, 17 N.W.2d 129, 136 (Iowa 1945) (good faith also required) (Iowa); *In re Foster's Estate*, 376 P.2d 784, 786 (1963) (good faith also required) (Kansas); Md. Code Ann., Est. & Trusts § 4-413 (Maryland); *Hannam v. Brown*, 114 Nev. 350, 357 (1998) (Nevada); *Ryan v. Wachovia Bank & Trust Co.*, 70 S.E.2d 853, 856 (N.C. 1952) (North Carolina); *Tate v. Camp*, 245 S.W. 839, 844 (Tenn. 1922) (Tennessee); *Hodge v. Ellis*, 268 S.W.2d 275 (Tex. Ct. App. 1954) (Texas); *In re Estate of Chappell*, 127 Wash. 638, 646 (1923) (Washington); *Dutterer v. Logan*, 103 W. Va. 216, 221 (1927) (West Virginia); *In re Keenan's Will*, 188 Wis. 163, 179 (1925) (Wisconsin).

32. Restatement (Third) of Property: Wills & Other Donative Transfers § 8.5 cmt. (2003).

Selective Probable Cause Exception

In New York and Oregon, there is a probable cause exception to enforcement of a no contest clause, but only if the contest is based on a claim of forgery or revocation.³³

Public Policy Exceptions

In states that enforce a no contest clause, there are a number of specific exceptions that are based on public policy:³⁴

Construction and Reformation of Instrument. To effectuate the transferor's true intentions, it may be necessary to seek judicial construction of an ambiguous provision or the modification, reformation, or termination of an instrument that has become incompatible with the transferor's intentions. The need to determine the transferor's actual intentions may trump the transferor's desire to avoid litigation.

[It] is the privilege and right of a party beneficiary to an estate at all times to seek a construction of the provisions of the will. An action brought to construe a will is not a contest within the meaning of the usual forfeiture clause, because it is obvious that the moving party does not by such means seek to set aside or annul the will, but rather to ascertain the true meaning of the testatrix and to enforce what she desired.³⁵

New York has a statutory exception for an action to construe an instrument.³⁶

33. New York Est. Powers & Trusts § 3-3.5(b)(1) (McKinney 2006); Or. Rev. Stat. § 112.272(2) (1997). California has a similar rule. See Prob. Code § 21306.

34. California has the most extensive list of public policy exceptions. See Prob. Code § 21305(b).

35. Estate of Miller, 230 Cal. App. 2d 888, 903, 41 Cal. Rptr. 410 (1964).

36. New York Est. Powers & Trusts § 3-3.5(b)(3)(E) (McKinney 2006).

Action on Behalf of Minor or Incompetent. In New York and Oregon, an action on behalf of a minor or incompetent to oppose the probate of a will is exempt from the application of a no contest clause.³⁷ Presumably, the concern is that a minor or incompetent should not suffer a forfeiture as a result of a decision that is made by another. The guardian may exercise poor judgment, resulting in a significant loss that cannot be recovered.

Forfeiture for Action of Another. In Louisiana, one court held that a no contest clause was unenforceable because it would cause all beneficiaries to forfeit if any heir were to contest the will.³⁸

However, other jurisdictions, including California,³⁹ allow a no contest clause to condition a forfeiture of a beneficiary's interest on the actions of another person.⁴⁰

Failure to Provide Alternative Disposition. In Georgia, a no contest clause in a will is not enforceable if the will fails to provide an alternative disposition of the assets that would be forfeited under the clause.⁴¹

Procedural Exceptions. New York provides a number of exceptions for specified actions relating to estate administration. A no contest clause does not apply to an objection to the jurisdiction of the court in which a will is

37. New York Est. Powers & Trusts § 3-3.5(b)(2) (McKinney 2006); Or. Rev. Stat. § 112.272(3) (1997).

38. Succession of Kern, 252 So. 2d 507, 510 (La. App., 1971).

39. Tunstall v. Wells, 144 Cal. App. 4th 554, 50 Cal. Rptr. 3d 468 (2006).

40. “[A] transferor may provide for the rescission of a gift to a grandchild in the event that the disinherited parent of the grandchild institutes proceedings either to contest the donative document or to challenge any of its provisions.” Restatement (Third) of Property: Wills & Other Donative Transfers § 8.5, cmt. (2003).

41. Ga. Code Ann. § 53-4-68(b) (1996).

offered for probate,⁴² the preliminary examination of witnesses,⁴³ a beneficiary's disclosure, to a court or otherwise, of information that is relevant to a probate proceeding,⁴⁴ or a failure to join in, consent to, or waive notice of a probate proceeding.⁴⁵

Strict Construction

In addition to substantive limitations on the enforcement of a no contest clause, many states, including California, provide that a no contest clause must be strictly construed.⁴⁶ "Strict construction is consistent with the public policy to avoid a forfeiture."⁴⁷

SUMMARY OF CALIFORNIA LAW

California law on the enforcement of a no contest clause combines a number of different rules, as summarized below:

- A no contest clause is generally enforceable, subject to the exceptions described below.⁴⁸
- Some types of "direct contests"⁴⁹ are subject to a probable cause (or "reasonable cause") exception.⁵⁰

42. New York Est. Powers & Trusts § 3-3.5(b)(3)(A) (McKinney 2006).

43. *Id.* § 3-3.5(b)(3)(D) (McKinney 2006).

44. *Id.* § 3-3.5(b)(3)(B) (McKinney 2006).

45. *Id.* § 3-3.5(b)(3)(C) (McKinney 2006).

46. See Prob. Code § 21304. See also *Kershaw v. Kershaw*, 848 So. 2d 942, 954-55 (Ala. 2002) (Alabama); *Estate of Pepller*, 971 P.2d 694, 696 (Colo. Ct. App. 1998) (Colorado); *Estate of Wojtalewicz*, 418 N.E.2d 418, 420 (Ill. App. Ct. 1981) (Illinois); *Saier v. Saier*, 115 N.W.2d 279, 281 (1962) (Michigan); *Estate of Alexander*, 395 N.Y.S.2d 598, 601 (Sur. Ct. 1977) (New York); *Estate of Westfahl*, 674 P.2d 21, 24 (Okla. 1983) (Oklahoma); *Estate of Hodges*, 725 S.W.2d 265, 268 (Tex. App. 1986) (Texas).

47. Prob. Code § 21304 Comment.

48. Prob. Code § 21303.

- An extensive list of “indirect contests”⁵¹ are exempt from the enforcement of a no contest clause on public policy grounds.
- An indirect contest based on a creditor claim or property ownership claim is subject to a no contest clause, but only if the no contest clause specifically provides for that application.⁵² Application of a no contest clause to such claims creates a “forced election.”
- A no contest clause may apply to an instrument other than the instrument that contains the no contest clause, but only if the no contest clause specifically provides for that application.⁵³

49. A “direct contest” is a contest that attempts to invalidate an instrument or one or more of the terms of an instrument on the grounds of incapacity, failure of execution formalities, forgery, mistake, misrepresentation, menace, duress, fraud, or undue influence. See Prob. Code § 21300(b). A direct contest is the “traditional” form of contest. See former Probate Code Section 371, which described a will contest as follows:

Any issue of fact involving the competency of the decedent to make a last will and testament, the freedom of the decedent at the time of the execution of the will from duress, menace, fraud, or undue influence, the due execution and attestation of the will, or any other question substantially affecting the validity of the will....

1931 Cal. Stat. ch 281.

50. Prob. Code §§ 21306-21307. Sections 21306 and 21307 overlap in application, but state nominally different standards for the exception. Section 21306 provides an exception for “reasonable cause,” as defined. Section 21307 provides an exception for “probable cause.” A court construing Section 21306 stated, in *dicta*, that the terms were synonymous. See *In re Estate of Gonzalez*, 102 Cal. App. 4th 1296, 1305, 126 Cal. Rptr. 2d 332 (2002).

51. An indirect contest is an action other than a direct contest that attempts to “indirectly invalidate” an instrument or one or more of its terms. Prob. Code § 21300(c).

52. Prob. Code § 21305(a)(1)-(2).

53. Prob. Code § 21305(a)(3).

- A declaratory relief procedure is available to determine whether a pleading would violate a no contest clause.⁵⁴ The court may not provide declaratory relief if doing so would require determination of the merits of the contemplated action.
- A no contest clause is to be strictly construed.⁵⁵

PROBLEMS UNDER EXISTING LAW

The Trusts and Estates Section of the State Bar has identified a number of problems with existing California law.⁵⁶ Existing law is perceived to be too complex and uncertain in its operation. That uncertainty leads to over-reliance on the declaratory relief procedure, to protect beneficiaries from any chance of unexpected forfeiture. The Trusts and Estates Section is also concerned that no contest clauses are being used to shield fraud and undue influence from judicial scrutiny. Finally, both the Trusts and Estates Section and the California Judges Association have expressed concern that forced elections may be used unfairly, to deprive an elderly surviving spouse of community property.⁵⁷

In February 2006, the Commission conducted a survey of the members of the Trusts and Estate Section of the State Bar of California and the members of the California chapters of

54. Prob. Code § 21320.

55. Prob. Code § 21304.

56. See Hartog et al., *Why Repealing the No Contest Clause is a Good Idea*, Cal. Tr. & Est. Q., Fall 2004; Baer, *A Practitioner's View*, Cal. Tr. & Est. Q., Fall 2004; Horton, *A Legislative Proposal to Abolish Enforcing No Contest Clauses in California*, Cal. Tr. & Est. Q., Fall 2004. But see MacDonald & Godshall, *California's No Contest Statute Should be Reformed Rather Than Repealed*, Cal. Tr. & Est. Q., Fall 2004.

57. See Second Supplement to Commission Staff Memorandum 2006-42 (Oct. 25, 2006), Exhibit p. 4 (available from the Commission, www.clrc.ca.gov).

the National Academy of Elder Law Attorneys.⁵⁸ The survey was designed to answer two questions: (1) Do practitioners believe that there are problems with existing law that are serious enough to justify a significant change in the law? (2) Which of the problems identified in the survey is most problematic?

Most survey respondents agreed that problems with existing law are serious enough to justify a significant change in the law.⁵⁹

The problems identified by practitioners are discussed more fully below.

Uncertain Application

The most common and serious problem reported by practitioners is uncertainty as to whether a particular no contest clause would apply to an intended action.⁶⁰

That uncertainty has three main sources: (1) the open-ended definition of “contest,” (2) the complexity of existing law, and (3) the perceived failure of courts to construe no contest clauses strictly.

Definition of “Contest.” Under existing law, the concept of what constitutes a “contest” is open-ended. It can include any pleading in any proceeding in any court that “challenges the

58. For full survey results, see Commission Staff Memorandum 2007-7 (Feb. 21, 2007) (available from the Commission, www.clrc.ca.gov). The Commission received 351 responses to the survey. *Id.* at 4-5.

59. Of those who expressed an opinion, 63% agreed or strongly agreed that there is a need for reform. Support for reform was strongest among those who self-identified as elder law practitioners. Eighty percent of elder law practitioners who expressed an opinion see a need for reform. *Id.* at 5.

60. Of those who expressed an opinion, 63% believe that this problem is common or very common and 65% found the problem to be of moderate or serious severity. *Id.* at 6.

validity of an instrument or one or more of its terms.”⁶¹ This means that any court pleading that affects estate assets or the operation of an instrument could potentially be governed by a no contest clause.⁶²

The main limiting factor is the no contest clause itself. It defines what pleadings will trigger forfeiture under the clause.⁶³ If a clause is stated broadly or imprecisely, its scope of application may be uncertain. Each case will require the interpretation of unique language as applied to unique facts.

The Legislature has narrowed the scope of that problem by exempting many types of indirect contests from the operation of a no contest clause.⁶⁴ However, any attempt to list all pleadings that should be exempt as a matter of policy will inevitably be incomplete. Over time, new circumstances will arise that had not previously been considered.⁶⁵

61. Prob. Code § 21300(a)-(c).

62. See, e.g., *In re Estate of Goulet*, 10 Cal. 4th 1074, 898 P.2d 425, 43 Cal. Rptr. 2d 111 (1995) (action to enforce premarital agreement); *Burch v. George*, 7 Cal. 4th 246, 866 P.2d 92, 27 Cal. Rptr. 2d 165 (1994) (action to determine whether purported estate asset is community property); *Hermanson v. Hermanson*, 108 Cal. App. 4th 441, 133 Cal. Rptr. 2d 486 (2003) (petition to remove trustee).

63. Prob. Code § 21300(a) (“‘Contest’ means any action identified in a ‘no contest clause’ as a violation of the clause.”).

64. Prob. Code § 21305(b).

65. For example, under existing law a petition to modify a trust to reflect changed circumstances is not subject to a no contest clause as a matter of public policy. See Prob. Code §§ 15409, 21305(b)(1). Such a modification serves to preserve the transferor’s intentions rather than thwart them. It should not cause a forfeiture.

However, existing law does not provide a public policy exception for a petition under the Uniform Principal and Income Act (UPIA) (Prob. Code § 16320 *et seq.*). It arguably should. The UPIA allows a trustee to impartially adjust between a trust’s principal and income, to reflect changes in the trust’s investment portfolio. If that power did not exist, necessary investment decisions might alter the balance of beneficial enjoyment between different groups of beneficiaries, contrary to what the transferor intended. As with modification of a

Existing law also provides that a no contest clause will not be enforced against a creditor claim or property ownership claim, or applied to an instrument other than the instrument that contains the no contest clause, unless the no contest clause specifically provides for such application.⁶⁶ The question of whether a no contest clause is sufficiently specific in providing for such application may itself be a source of interpretive uncertainty.

Complexity of Existing Law. The existing statute is overly complex. This complexity has two sources:

(1) There are two separate sections that provide for a probable (or reasonable) cause exception for certain types of direct contests.⁶⁷ The sections overlap in their application; both apply to an attempt to invalidate a gift to a person who drafts or transcribes the instrument making the gift.⁶⁸ The overlap is problematic because each of the sections uses different language in defining the exception that it provides. Section 21306 provides an exception for a contest brought with “reasonable cause,” which is expressly defined. Section 21307 provides an exception for a contest brought with “probable cause,” which is left undefined. One court case has held, in dicta, that the terms were synonymous, but the question has not been decisively settled.⁶⁹

trust under Section 15409, action under UPIA serves to preserve a transferor’s intentions despite an unanticipated change in circumstances. Nonetheless, a recent case held that a petition under UPIA would violate a no contest clause. *McKenzie v. Vanderpoel*, 151 Cal. App. 4th 1442, 60 Cal. Rptr. 3d 719 (2007).

66. Prob. Code § 21305(a).

67. See Prob. Code §§ 21306-21307.

68. *Cf.* Prob. Code §§ 21306(a)(3), 21307(a), (b).

69. *In re Estate of Gonzalez*, 102 Cal. App. 4th 1296, 126 Cal. Rptr. 2d 332 (2002) (interpreting “reasonable cause” as used in Probate Code Section 21306).

(2) The limitations and exceptions that apply to indirect contests are governed by a complex set of application provisions. The limitation on forced elections only applies to instruments executed on or after January 1, 2001.⁷⁰ A codicil or amendment is governed by a different rule, which is drafted in very confusing language.⁷¹ Certain public policy exceptions only apply if the transferor dies or the instrument becomes irrevocable after January 1, 2001.⁷² The remainder apply if the transferor dies or the instrument becomes irrevocable after January 1, 2003.⁷³

In addition, certain specified exceptions do not apply if the contest is actually a “direct contest.”⁷⁴ There is no explanation of how the actions described in the specified exceptions might actually be direct contests. Nor is there any clear reason why certain exceptions have been singled out as posing that risk, while the remainder have not.

The complexity of these rules invites error. It contributes to uncertainty as to whether a particular action would be exempt from a no contest clause as a matter of law.

Strict Construction. Probate Code Section 21304 requires that a no contest clause be strictly construed. The Law Revision Commission recommended that rule in order to provide greater certainty as to the application of a no contest clause:

A major concern with the application of existing California law is that a beneficiary cannot predict with any consistency when an activity will be held to fall within the proscription of a particular no contest clause. To increase

70. Prob. Code § 21305(a).

71. Prob. Code § 21305(c).

72. Prob. Code § 21305(d).

73. *Id.*

74. Prob. Code § 21305(e).

predictability, the proposed law recognizes that a no contest clause is to be strictly construed in determining the donor's intent. This is consistent with the public policy to avoid a forfeiture absent the donor's clear intent.⁷⁵

Some practitioners believe that the courts have strayed from the rule of strict construction, by considering extrinsic evidence in construing the application of a no contest clause.⁷⁶ If extrinsic evidence is considered in construing a no contest clause, then a beneficiary cannot simply read the instrument to determine the meaning of the no contest clause. That creates a risk of unanticipated application and forfeiture.

Over-Reliance on Declaratory Relief

The uncertainty that exists under current law can sometimes be resolved by declaratory relief pursuant to Probate Code Section 21320. That provision authorizes a beneficiary to seek judicial interpretation of a no contest clause to determine whether it would apply to a particular pleading. If the court finds that it does not apply, the beneficiary may proceed with the pleading without risk of forfeiture. The declaratory relief provides a safe harbor.

That protection against forfeiture (and attorney malpractice) has led to widespread use of the declaratory relief procedure:

Prudent practitioners now routinely file petitions for declaratory relief under Probate Code § 21320. Californians now expect to have two levels of litigation when instruments contain a no contest clause: file a Probate Code § 21320 petition and litigate the declaratory relief, and then litigate the substantive issues in another, separate proceeding.⁷⁷

75. *No Contest Clauses*, 20 Cal. L. Revision Comm'n Reports 7, 12 (1990).

76. Hartog et al., *Why Repealing the No Contest Clause is a Good Idea*, Cal. Tr. & Est. Q., Fall 2004, at 10.

77. *Id.*

In fact, there may be a need for more than one declaratory relief proceeding in connection with a contest. If, in the course of litigation a contestant discovers new facts that could affect the nature of the contest, a “prudent practitioner will advise her client to file a new petition for declaratory relief. ... Indeed, in any complex proceeding with discovery producing evidence of new potential claims, a second or third filing pursuant to Probate Code § 21320 is likely.”⁷⁸

That additional source of litigation adds costs to estates, beneficiaries, and the courts.⁷⁹

Respondents to the Commission’s survey ranked the cost and delay associated with declaratory relief proceedings as

78. *Id.*

79. The Executive Committee of the Trusts and Estates Section has estimated the typical cost to a petitioner to obtain declaratory relief as follows:

- In 20% of cases, \$1,500-5,000.
- In 40% of cases, \$5,000-20,000.
- In 30% of cases, \$20,000 to 50,000.
- In 10% of cases, \$50,000 to 100,000.

The Executive Committee also surveyed several Superior Courts as to the average number of declaratory relief petitions filed in a year:

Alameda County Superior Court:	50 per year
Los Angeles County Superior Court:	212 per year
Orange County Superior Court:	100-150 per year
San Diego County Superior Court:	12-19 per year
San Francisco County Superior Court:	25 per year

If the average cost to a petitioner for declaratory relief is \$10,000, the figures above would suggest that declaratory relief procedure in the listed counties is costing petitioners over four million dollars in legal costs and fees annually. There would also be costs to those opposing the petitions and to the courts.

See Commission Staff Memorandum 2006-42 (Oct. 10, 2007), Exhibit pp. 7, 9-10, (available from the Commission, www.clrc.ca.gov).

the second most common and serious of the problems identified in the survey.⁸⁰

Fraud and Undue Influence Shielded From Review

An unscrupulous person may use a no contest clause to deter inquiry into whether a gift in an estate planning instrument was procured through duress, menace, fraud, or undue influence. “Experienced practitioners are well aware that the no contest clause is a favorite device of undue influencers and those who use duress to become the (unnatural) object of a decedent’s bounty.”⁸¹

In general, the only way to contest a suspect instrument without forfeiture is to successfully invalidate the instrument. Even in a case where there is strong reason to suspect foul play, a beneficiary may still fall short of certainty that a contest would be successful. In such a case, the abuse may stand unchallenged.

Most Commission survey respondents indicate that the use of a no contest clause to shield elder financial abuse is a serious problem, but not a common one.⁸²

80. Of those who expressed an opinion (excluding survey participants who had no opinion on this point), 61% believe that this problem is common or very common; 63% found the problem to be of moderate or serious severity. See Commission Staff Memorandum 2007-7 (Feb. 21, 2007), at Exhibit pp. 1-3.

81. See Hartog et al., *Why Repealing the No Contest Clause is a Good Idea*, Cal. Tr. & Est. Q., Fall 2004, at 11.

82. Of those who expressed an opinion, 55% believe that this problem is of moderate or serious severity, but only 42% found the problem to be common or very common. Concern is greater among self-identified elder law practitioners: 67% of those who expressed an opinion found the problem to be of moderate or serious severity; 62% found it to be common or very common. That probably reflects the nature of the cases handled by these specialists. Commission Staff Memorandum 2007-7 (Feb. 21, 2007), pp. 7-8 (available from the Commission, www.clrc.ca.gov).

Problematic Forced Election

As discussed, a no contest clause can be used to create a forced election; the beneficiary is then forced to choose between taking the gift offered under the estate plan or forfeiting that gift in order to assert an independent legal right (such as a creditor claim or a claim of a community property interest in purported estate assets). A forced election can be used in a way that benefits all parties by making a generous gift to the beneficiary and thereby avoiding costly litigation.⁸³ A forced election can also be used in an unfair way, with the transferor claiming property that belongs to the beneficiary and offering a choice between the lesser of two evils: acquiesce in my disposition of your property or face forfeiture and the cost, delay, and uncertainty of litigation to secure your rights.⁸⁴

The Commission asked survey participants to rank the frequency and severity of the following problem that could result from the use of a no contest clause: “Deterrence of a reasonable claim of ownership of estate assets.” The purpose of the question was to gauge the extent to which forced elections are seen by practitioners as problematic.

Respondents rated the deterrence of reasonable property ownership claims to be the least common and serious of the problems described in the survey; most respondents found the problem to be rare or uncommon.⁸⁵

The survey results are consistent with the Commission’s general impression of opinion within the estate planning

83. See discussion of “Use of Forced Election to Avoid Ownership Disputes” *supra*.

84. See discussion of “Misuse of Forced Election” *supra*.

85. Of those who responded, 55% felt that the problem was uncommon or rare, and 44% described the severity of the problem as minor or insignificant. Commission Staff Memorandum 2007-7 (Feb. 21, 2007), p. 8 (available from the Commission, www.clrc.ca.gov).

community. Opinion appears to be significantly divided on whether forced elections should be preserved as a useful planning tool, or prohibited as potentially unfair. There is no consensus that significant reform of the forced election is needed.

FEE SHIFTING ALTERNATIVE

The Trusts and Estates Section of the State Bar has proposed that all no contest clauses be made unenforceable. The deterrence of contest litigation would instead be achieved through an award of costs and fees against a person who brings an unsuccessful direct contest without reasonable cause.⁸⁶

The Commission does not recommend that approach, for two reasons:

Transferor Intention Disregarded

The rationale for enforcement of a no contest clause is based primarily on deference to a transferor's intentions and the transferor's fundamental right to place a lawful condition on a gift of the transferor's property.

A statutory rule providing for an award of costs and fees against any unsuccessful contestant who lacks reasonable cause to bring a contest cannot be justified by reference to a transferor's intentions. Absent that intention, it is not clear that a beneficiary should be sanctioned for bringing an unsuccessful contest. The law already sanctions frivolous actions.⁸⁷

86. See Horton, *A Legislative Proposal to Abolish Enforcing No Contest Clauses in California*, 10 Cal. Tr. & Est. Q., Fall 2004, at 7-8.

87. See Code Civ. Proc. §§ 128.5-128.7.

Deterrence Undermined

The purpose of a no contest clause is to deter contest litigation. Many of the harms that can result from litigation occur early in a contest (e.g., reputational harm to the transferor or beneficiaries, acrimony between beneficiaries, and pressure to settle with a dissatisfied beneficiary).

To deter those harms, forfeiture of a gift under a no contest clause is triggered by the mere filing of a pleading.⁸⁸ This creates a clear choice for a contestant. The only way to avoid forfeiture is to take no court action at all.

The proposed fee shifting alternative would not present that sort of bright line choice. Because the penalty for bringing an unreasonable contest would be the payment of defense costs and fees, the magnitude of the penalty would be proportional to the duration of the litigation. A contestant who simply files a pleading would bear little cost for doing so. A contestant who is willing to bear larger costs could go on to conduct discovery, in the hopes of finding evidentiary support for the contest. That sort of incremental exploratory litigation could cause many of the harms that a no contest clause seeks to avoid. It would also strengthen the bargaining position of a disappointed beneficiary who wants to negotiate a settlement that makes a larger gift to the beneficiary.

RECOMMENDATIONS

The Law Revision Commission recommends against making any fundamental substantive change to the existing no contest clause statute. As under existing law, a no contest clause should be enforceable unless it conflicts with public policy. A transferor should have the right to place lawful conditions on an at-death gift of the transferor's property.

88. See Prob. Code §§ 21300, 21303.

Although the general policy of existing law would remain unchanged, the Commission recommends the following improvements to the existing statute:

- The statute should be simplified and clarified.
- The probable cause exception that applies to many direct contests should be extended to all direct contests.
- The scope of declaratory relief should be narrowed.

Those recommendations are discussed below.

Statutory Simplification and Clarification

The uncertainty that arises under existing law is largely a result of the open-ended definition of “contest,” combined with a complex and lengthy set of exceptions. Because any pleading relating to an estate could be governed by a no contest clause, every such pleading must be examined to determine whether it would, in fact, trigger a no contest clause. That analysis requires interpretation of the language used in the no contest clause and the interpretation and application of the statutory exemption scheme.

A simpler approach would be to limit the enforcement of a no contest clause to a list of specified contest types. Under that approach, any pleading that is not one of the expressly covered types would not be governed by a no contest clause. No further analysis would be required. That would eliminate both the open-ended definition of “contest” as well as the lengthy (and inevitably incomplete) list of statutory exceptions.

That is the approach taken in the proposed law.⁸⁹ A no contest clause could only be enforced in response to three

89. See proposed Prob. Code § 21311 *infra*.

types of contests: (1) a direct contest, (2) a creditor claim, or (3) a property ownership dispute.

Direct Contest. A direct contest is an attempt to invalidate an instrument on one or more of the following grounds: forgery; lack of due execution; lack of capacity; menace, duress, fraud, or undue influence; revocation of the instrument; or disqualification of a beneficiary under Section 6112 or 21350.⁹⁰ No other pleadings would constitute a direct contest. There should be no ambiguity about whether a contest is a direct contest. The grounds for a direct contest would be limited and clear.

Creditor Claim. A creditor claim would be defined using language from existing law.⁹¹ The Commission investigated whether the existing language could be refined so as to preclude unintended application of a no contest clause to a creditor claim. The principal concern is that a no contest clause will be applied to a debt that the transferor did not have in mind at the time of executing the no contest clause and never intended to be governed by the no contest clause.

That risk could be eliminated by requiring that a no contest clause specifically identify the debts that it is intended to govern, or by providing that a no contest clause only applies to debts that pre-date the execution of a no contest clause.

However, such restrictions would also narrow the utility of a no contest clause. A transferor may intend that a no contest clause apply to all creditor claims, whether identifiable at the time of execution of the clause or not, in order to deter beneficiaries from bringing fabricated claims after the transferor's death. The restrictions described above would prevent such use of a no contest clause.

90. See proposed Prob. Code § 21310(b) *infra*.

91. See Prob. Code § 21305(a)(1).

The Commission did not find sufficient support within the legal community for a substantive narrowing of the creditor claim provision.

Property Ownership Dispute. Existing law provides for the application of a no contest clause to an “action or proceeding to determine the character, title, or ownership of property.”⁹²

That language allows a transferor to create a forced election, providing that a beneficiary who contests the transferor’s ownership of purported estate assets forfeits any gift to that beneficiary made by the estate plan.

The existing statutory language appears to be overbroad for that purpose. Any action that would determine a beneficiary’s right to a gift under an estate plan could be characterized as an action to determine the “ownership of property.”⁹³ Under that reading, a no contest clause could be enforced against any pleading that would determine the distribution of property under the transferor’s estate.

The proposed law would restate the existing provision, so as to continue its substance while preventing overbroad interpretation. Under the proposed law, a no contest clause could be enforced against: “A pleading to challenge a transfer of property on the grounds that it was not the transferor’s property at the time of the transfer....”⁹⁴

The proposed law would continue the ability of a transferor to use a no contest clause to create a forced election with respect to such disputes.

92. Prob. Code § 21305(a)(2).

93. For example, if a beneficiary petitions for judicial construction of an ambiguous provision in a trust, the result might be to determine who receives a gift under that provision. That could be described as an action to determine the ownership of the gifted property. Under existing law, an action to construe an instrument is exempt from enforcement of a no contest clause as a matter of public policy. Prob. Code § 21305(b)(9).

94. See proposed Prob. Code § 21311(a)(2) *infra*.

Other Indirect Contests. One of the main benefits of limiting the enforcement of a no contest clause to an express and exclusive list of contest types is that the existing attempt to describe public policy exceptions can be abandoned. That would eliminate a significant source of complexity and confusion in existing law.

The substantive effect of that change would be relatively modest. Existing law already exempts nearly all types of indirect contests from the operation of a no contest clause (other than forced elections).⁹⁵ The policy implication of that trend is clear. A beneficiary should not be punished for bringing an action to ensure the proper interpretation, reformation, or administration of an estate plan. Such actions serve the public policy of facilitating the fair and efficient administration of estates and help to effectuate the transferor's intentions, which might otherwise be undone by mistake, ambiguity, or changed circumstances.

The proposed law would merely extend that principle to its logical end, the exemption of all indirect contests other than forced elections.

Terminology. The proposed law would also define and use the term "protected instrument" to provide a clear rule as to which instruments are governed by a no contest clause.⁹⁶ Other minor terminological clarifications would also be made.⁹⁷

95. Where the existing list of public policy extensions does not apply to an indirect contest, the gap in coverage is probably inadvertent. See *supra* note 66 and accompanying text.

96. See proposed Prob. Code § 21310(e) *infra*.

97. See proposed Prob. Code § 21310(a) ("contest"), (c) ("no contest clause"), (d) ("pleading") *infra*.

Declaratory Relief Narrowed

By limiting the application of a no contest clause to an exclusive list of defined contest types, the proposed law would eliminate much of the uncertainty that arises under existing law.

There should be little or no uncertainty as to whether a no contest clause would apply to a direct contest. The proposed law would eliminate declaratory relief as to that issue.

However, there could still be some uncertainty as to whether a no contest clause would apply to a creditor claim or property ownership dispute. The existing declaratory relief procedure would be retained for those issues only.⁹⁸

The narrowed scope of the declaratory relief remedy should result in a significant reduction in pre-contest proceedings, with a savings in procedural costs for estates, beneficiaries, and the courts.

Expansion of Probable Cause Exception

Existing law already provides a probable cause exception for a contest based on the following grounds:⁹⁹

- Forgery.
- Revocation.
- The beneficiary is disqualified under Probate Code Section 21350.
- The beneficiary drafted or transcribed the instrument.
- The beneficiary directed the drafter of the instrument (unless the transferor affirmatively instructed the drafter regarding the same provision).
- The beneficiary is a witness to the instrument.

98. See proposed amendment to Prob. Code § 21320 *infra*.

99. Prob. Code §§ 21306-21307.

There is considerable overlap between the last four grounds, but they are all aimed at the same concern, a provision that is likely to have been the product of fraud or undue influence.

The existing probable cause exception does not apply to a direct contest brought on the following grounds: incapacity, menace, duress, or lack of due execution. The Commission sees no policy justification for that distinction. The proposed law would extend the existing probable cause exception to all types of direct contests.¹⁰⁰

That extension of the existing exception would provide greater latitude to contest an instrument that is believed to have been the product of fraud, undue influence, or other misconduct.

The proposed law would define “probable cause” as follows:

[Probable] cause exists if, at the time of filing a contest, the facts known to the contestant would cause a reasonable person to believe that there is a reasonable likelihood that the requested relief will be granted after an opportunity for further investigation or discovery.¹⁰¹

That standard is drawn from existing Probate Code Section 21306, with two substantive changes:

(1) Existing law focuses only on the likelihood that the contestant’s “factual contentions” will be proven. The proposed law would require a likelihood that the requested relief will be granted.¹⁰² That question depends not only on the proof of facts, but on the proof of facts that are sufficient to establish a legally sufficient ground for the requested relief.

100. See proposed Prob. Code § 21311(a) *infra*.

101. See proposed Prob. Code § 21311(b) *infra*.

102. *Id.*

That is a more complete expression of the concept of probable cause.

(2) Existing law requires only that it be “likely” that the contestant will prevail. That degree of probability has been equated with the standard that governs malicious prosecution cases, requiring only that the contest be “legally tenable.”¹⁰³ The Commission believes that such a standard is too forgiving. A no contest clause should deter more than just a frivolous contest. General law already provides sanctions for frivolous actions.¹⁰⁴

Instead, the proposed law would require a “reasonable likelihood” of being granted relief.¹⁰⁵ That standard has been interpreted as requiring more than a mere possibility, but less than a likelihood that is “more probable than not.”¹⁰⁶

Grace Period

The proposed law would have a one-year deferred operation date.¹⁰⁷ That would provide a grace period for those who wish to revise their estate plans before the new law takes effect.

Once the proposed law becomes operative, it would apply to any instrument, whenever executed, with one exception. It would not apply to an instrument that became irrevocable

103. See *In re Estate of Gonzalez*, 102 Cal. App. 4th 1296, 126 Cal. Rptr. 2d 332 (2002) (interpreting “reasonable cause” as used in Probate Code Section 21306). See also *Sheldon Appel Co. v. Albert & Olier*, 47 Cal. 3d 863, 254 Cal. Rptr. 336 (1989) (discussing malicious prosecution and frivolous appeal standards).

104. See Code Civ. Proc. §§ 128.5-128.7.

105. See proposed Prob. Code § 21311(b) *infra*.

106. See *People v. Proctor*, 4 Cal. 4th 499, 523, 15 Cal. Rptr. 2d 340 (1992) (construing Penal Code § 1033); *Alvarez v. Superior Ct.*, 154 Cal. App. 4th 642, 653 n.4, 64 Cal. Rptr. 3d 854 (2007) (construing Penal Code § 938.1).

107. See Section 4 (uncodified) of the proposed law *infra*.

before January 1, 2001.¹⁰⁸ That would preserve existing law as to instruments that became irrevocable before the enactment of the existing scheme of statutory exceptions to the enforcement of a no contest clause.

The proposed law would apply to an instrument that became irrevocable on or after January 1, 2001. For the most part, that would be consistent with the application of existing Probate Code Section 21305. Where there are differences in the effect of the proposed law and existing Section 21305, the retroactive application of the proposed law to January 1, 2001, would be limited by the exceptions provided in Probate Code Section 3. That section provides a default rule of retroactive application for changes in the Probate Code, with specific exceptions to preserve the effect of certain completed acts and orders.¹⁰⁹ Section 3 also provides a general exception that allows a court to apply prior law if it determines that retroactive application of the new law would substantially interfere with the rights of interested persons.¹¹⁰

108. See proposed Prob. Code § 21315 *infra*.

109. Prob. Code § 3(c)-(f).

110. Prob. Code § 3(h).

PROPOSED LEGISLATION

Prob. Code §§ 21300-21308 (repealed). No contest clauses

SECTION 1. Chapter 1 (commencing with Section 21300) of Part 3 of Division 11 of the Probate Code is repealed.

Prob. Code §§ 21310-21315 (added). No contest clauses

SEC. 2. Chapter 1 (commencing with Section 21310) is added to Part 3 of Division 11 of the Probate Code, to read:

CHAPTER 1. GENERAL PROVISIONS

§ 21310. Definitions

21310. As used in this part:

(a) “Contest” means a pleading filed with the court by a beneficiary that would result in a penalty under a no contest clause, if the no contest clause is enforced.

(b) “Direct contest” means a contest that alleges the invalidity of a protected instrument or one or more of its terms, based on one or more of the following grounds:

- (1) Forgery.
- (2) Lack of due execution.
- (3) Lack of capacity.
- (4) Menace, duress, fraud, or undue influence.
- (5) Revocation of a will pursuant to Section 6120, revocation of a trust pursuant to Section 15401, or revocation of an instrument other than a will or trust pursuant to the procedure for revocation that is provided by statute or by the instrument.
- (6) Disqualification of a beneficiary under Section 6112 or 21350.

(c) “No contest clause” means a provision in an otherwise valid instrument that, if enforced, would penalize a beneficiary for filing a pleading in any court.

(d) “Pleading” means a petition, complaint, cross-complaint, objection, answer, response, or claim.

(e) “Protected instrument” means all of the following instruments:

(1) The instrument that contains the no contest clause.

(2) An instrument that is in existence on the date that the instrument containing the no contest clause is executed and is expressly identified in the no contest clause, either individually or as part of an identifiable class of instruments, as being governed by the no contest clause.

Comment. Section 21310 is new. Subdivision (a) continues part of the substance of former Section 21300(b).

Subdivision (b)(1)-(5) continues the substance of former Section 21300(b), except that mistake and misrepresentation are no longer included as separate grounds for a direct contest.

Subdivision (b)(6) is consistent with former Sections 21306(a)(3) and 21307(c).

Subdivision (c) continues the substance of former Section 21300(c).

Subdivision (d) restates the substance of former Section 21305(f).

Subdivision (e) is new. Subdivision (e)(1) provides that a protected instrument includes an instrument that contains a no contest clause. That may include an instrument that expressly incorporates or republishes a no contest clause in another instrument. Subdivision (e)(2) is similar to former Section 21305(a)(3).

§ 21311. Enforcement of no contest clause

21311. (a) A no contest clause shall only be enforced against the following types of contests:

(1) A direct contest that is brought without probable cause.

(2) A pleading to challenge a transfer of property on the grounds that it was not the transferor’s property at the time of the transfer. A no contest clause shall be enforced under this paragraph only if the no contest clause expressly provides for that application.

(3) The filing of a creditor’s claim or prosecution of an action based on it. A no contest clause shall be enforced

under this paragraph only if the no contest clause expressly provides for that application.

(b) For the purposes of this section, probable cause exists if, at the time of filing a contest, the facts known to the contestant would cause a reasonable person to believe that there is a reasonable likelihood that the requested relief will be granted after an opportunity for further investigation or discovery.

Comment. Section 21311 is new.

Subdivision (a)(1) generalizes the probable cause exception provided in former Sections 21306 and 21307, so that it applies to all direct contests.

For a direct contest based on Section 6112 or 21350, the probable cause exception requires only that the contestant show probable cause that a beneficiary is a witness described in Section 6112(c) or a “disqualified person” under Section 21350.5.

Subdivision (a)(2) restates the substance of former Section 21305(a)(2). It provides for enforcement of a no contest clause in response to a pleading that contests a transfer of property on the ground that the property was not subject to the transferor’s dispositional control at the time of the transfer. Probable cause is not a defense to the enforcement of a no contest clause under this provision.

Subdivision (a)(3) continues former Section 21305(a)(1) without substantive change. Probable cause is not a defense to the enforcement of a no contest clause under this provision.

Subdivision (b) restates the reasonable cause exception provided in former Sections 21306, with two exceptions:

(1) The former standard referred only to the contestant’s factual contentions. By contrast, subdivision (a) refers to the granting of relief, which requires not only the proof of factual contentions but also a legally sufficient ground for the requested relief.

(2) The former standard required only that success be “likely.” One court interpreted that standard as requiring only that a contest be “legally tenable.” In re Estate of Gonzalez, 102 Cal. App. 4th 1296, 1304, 126 Cal. Rptr. 2d 332 (2002). Subdivision (a) imposes a higher standard. There must be a “reasonable likelihood” that the requested relief will be granted. The term “reasonable likelihood” has been interpreted to mean more than merely possible, but less than “more probable than not.” See Alvarez v. Superior Ct., 154 Cal. App. 4th 642, 653 n.4, 64 Cal. Rptr. 3d 854 (2007) (construing Penal Code § 938.1); People v. Proctor, 4 Cal.

4th 499, 523, 15 Cal. Rptr. 2d 340 (1992) (construing Penal Code § 1033). See Section 21310(b) (“direct contest” defined).

§ 21312. Construction of no contest clause

21312. In determining the intent of the transferor, a no contest clause shall be strictly construed.

Comment. Section 21312 continues former Section 21304 without change.

§ 21313. Application of common law.

21313. This part is not intended as a complete codification of the law governing enforcement of a no contest clause. The common law governs enforcement of a no contest clause to the extent this part does not apply.

Comment. Section 21313 continues former Section 21301 without change.

§ 21314. Effect of contrary instrument

21314. This part applies notwithstanding a contrary provision in the instrument.

Comment. Section 21314 continues former Section 21302 without change.

§ 21315. Transitional provision

21315. (a) Except as provided in Section 3, this chapter applies to any instrument, whenever executed, that became irrevocable on or after January 1, 2001.

(b) This chapter does not apply to an instrument that became irrevocable before January 1, 2001.

Comment. Section 21315 is new. It is similar in effect to the application date provisions of former Section 21305. Section 3 may further limit the application of this chapter to an instrument that became irrevocable prior to the operative date of the chapter. See Section 3(d)-(f), (h). An instrument that is not governed by this chapter would be governed by the law that applied to the instrument prior to the operative date of this chapter. See Section 3(g).

Prob. Code § 21320 (amended). No contest clause

SEC. 3. Section 21320 of the Probate Code is amended to read:

21320. (a) If an instrument containing a no contest clause is or has become irrevocable, a beneficiary may apply to the court for a determination of whether ~~a particular motion, petition, or other act by the beneficiary, including, but not limited to, creditor claims under Part 4 (commencing with Section 9000) of Division 7, Part 8 (commencing with Section 19000) of Division 9, an action pursuant to Section 21305, and an action under Part 7 (commencing with Section 21700) of Division 11, would be a contest within the terms of the no contest clause~~ *the no contest clause could be enforced against a particular pleading by the beneficiary, under paragraph (2) or (3) of subdivision (a) of Section 21311. The court shall not make a determination under this section if the determination would depend on the merits of the proposed pleading.*

(b) A no contest clause is not enforceable against a beneficiary to the extent an application under subdivision (a) is limited to the procedure and purpose described in subdivision (a).

~~(c) A determination under this section of whether a proposed motion, petition, or other act by the beneficiary violates a no contest clause may not be made if a determination of the merits of the motion, petition, or other act by the beneficiary is required.~~

~~(d) A determination of whether Section 21306 or 21307 would apply in a particular case may not be made under this section.~~

Comment. Section 21320 is amended to limit its scope of application. The procedure provided in the section may only be used to determine whether a no contest clause could be enforced under Section 21333(a)(2) or (3).

Operative Date (uncodified)

SEC. 4. This act becomes operative on January 1, 2010.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Miscellaneous Hearsay Exceptions: Present Sense Impression

February 2008

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
www.clrc.ca.gov

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative. The Comments are legislative history and are entitled to substantial weight in construing the statutory provisions. For a discussion of cases addressing the use of Law Revision Commission materials in ascertaining legislative intent, see the Commission's most recent *Annual Report*.

Cite this report as *Miscellaneous Hearsay Exceptions: Present Sense Impression*, 37 Cal. L. Revision Comm'n Reports 407 (2007). This is part of publication #229.

STATE OF CALIFORNIA

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February 14, 2008

To: The Honorable Arnold Schwarzenegger
Governor of California, and
The Legislature of California

A present sense impression is a statement that describes an event or condition that the speaker is perceiving, or has just perceived. For example, a bystander might say, “Look, there’s a masked man running out of the bank carrying a black briefcase!”

If evidence of that statement were later offered in court to prove that a masked man ran out of the bank carrying a black briefcase, the evidence would be hearsay — an out-of-court statement offered to prove the truth of the matter asserted.

Under the hearsay rule, hearsay evidence is generally inadmissible. However, the Federal Rules of Evidence and a vast majority of states recognize an exception to the hearsay rule for a present sense impression. The Evidence Code does not include such an exception.

The Law Revision Commission proposes that California adopt an exception to the hearsay rule for a present sense impression.

There are sound justifications for such an exception and proffered criticisms are unpersuasive. Adopting an exception

for a present sense impression would further the pursuit of truth in court proceedings. It would also bring California into conformity with federal law and the law of many other states. That would promote consistent results and help to prevent confusion when an attorney practices in multiple jurisdictions.

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

Respectfully submitted,

Sidney Greathouse
Chairperson

MISCELLANEOUS HEARSAY
EXCEPTIONS: PRESENT SENSE
IMPRESSION

The hearsay rule precludes admission of an out-of-court statement into evidence to prove the truth of the matter stated.¹ Hearsay is generally excluded because (1) the opposing party has no opportunity to question the person who made the out-of-court statement (“the declarant”),² (2) the declarant typically did not make the statement under oath,³ and (3) the factfinder cannot observe the declarant’s demeanor.⁴ Such safeguards permit evaluation of a person’s memory, veracity, and ability to perceive and clearly describe an event. These are the chief concerns of the hearsay rule.⁵

Both in California and under federal law, there are many exceptions to the hearsay rule.⁶ Federal law recognizes an exception for a present sense impression, which is a statement that describes or explains an event or condition that the speaker is perceiving, or has just perceived.⁷ The Law

1. See Evid. Code § 1200; Fed. R. Evid. 802. For example, suppose a witness to a car accident says, “The driver of the blue car ran the red light.” If evidence of that statement is later offered in court to prove that the driver of the blue car ran the red light, the evidence is hearsay, which is subject to the hearsay rule.

2. See Evid. Code § 1200 Comment; *People v. Fries*, 24 Cal. 3d. 222, 231, 594 P.2d 19, 155 Cal. Rptr. 194 (1979).

3. See C. McCormick, *Handbook of the Law of Evidence* § 224, at 457 (1954).

4. M. Méndez, *Evidence: The California Code and the Federal Rules* 165-66 (3d ed. 2004) (hereafter, “Méndez Treatise”).

5. 2 K. Broun, *McCormick on Evidence* § 245, at 125 (6th ed. 2006).

6. See, e.g., Evid. Code §§ 1220-1380; Fed. R. Evid. 803-807.

7. The federal present sense impression exception is:

Revision Commission recommends that California adopt a similar exception.

Present Sense Impression

A good example of a present sense impression is a radio announcer's play-by-play description of a baseball game.⁸ The announcer describes the events as they transpire, without time for reflection or deliberation.

Under federal law, a present sense impression is admissible as an exception to the hearsay rule.⁹ Thirty-nine states have a statute or a court rule on a present sense impression that is identical to the federal exception,¹⁰ or very similar.¹¹ Five

803. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

....

Uniform Rule of Evidence 803(1) is almost identical to the federal rule.

8. Passannante, Note, *Res Gestae, The Present Sense Impression Exception and Extrinsic Corroboration Under Federal Rule of Evidence 803(1) and Its State Counterparts*, 17 *Fordham Urb. L.J.* 89, 99 (1989).

9. Fed. R. Evid. 803(1).

10. The following states have a statute or court rule identical to Federal Rule of Evidence 803(1): Alabama (Ala. R. Evid. 803(1)), Alaska (Alaska R. Evid. 803(1)), Arizona (Ariz. R. Evid. 803(1)), Arkansas (Ark. R. Evid. 803(1)), Delaware (Del. Unif. R. Evid. 803(1)), Hawaii (Haw. R. Evid. 803(b)(1)), Idaho (Idaho R. Evid. 803(1)), Indiana (Ind. R. Evid. 803(1)), Iowa (Iowa R. Evid. 5.803), Kentucky (Ky. R. Evid. 803), Louisiana (La. Code Evid. Ann. art. 803), Maine (Me. R. Evid. 803(1)), Maryland (Md. R. 5-803(b)(1)), Michigan (Mich. R. Evid. 803(1)), Mississippi (Miss. R. Evid. 803(1)), Montana (Mont. R. Evid. 803(1)), Nevada (Nev. Rev. Stat. § 51.085), New Hampshire (N.H. R. Evid. 803(1)), New Mexico (N.M. R. Evid. 11-803(A)), North Carolina (N.C. R. Evid. 803(1)), North Dakota (N.D. R. Evid. 803(1)), Oklahoma (12 Okl. St. Ann. § 2803(1)), Pennsylvania (Pa. R. Evid. 803(1)), Rhode Island (R.I. R. Evid. 803(1)), South Carolina (S.C. R. Evid. 803(1)), South Dakota (S.D. Codified Laws § 19-16-5), Texas (Tex. R. Evid. 803(1)), Utah (Utah R. Evid. 803(1)), Vermont (Vt. R. Evid. 803(1)), Washington (Wash. R. Evid. 803(1)), West

states have a hearsay rule exception for a present sense impression as a matter of common law.¹² Six states do not

Virginia (W. Va. R. Evid. 803(1)), Wisconsin (Wis. Stat. Ann. § 908.03(1)), Wyoming (Wyo. R. Evid. 803(1)).

11. The following states have a statute or court rule similar but not identical to Federal Rule of Evidence 803(1): Colorado (Colo. R. Evid. 803(1)) (differing from federal rule by not including phrase “or immediately thereafter”), Florida (Fla. Stat. § 90.803(1)) (expressly barring admission of a statement if circumstances indicate that statement lacks trustworthiness), Georgia (Ga. Code Ann. § 24-3-3 (creating *res gestae* exception, which has been construed to include present sense impression); Kansas (Kan. Stat. Ann. § 60-460(d)(1)) (differing from federal rule by not including phrase “or immediately thereafter”), New Jersey (N.J. R. Evid. 803(c)(1)) (precluding admission of statement made after time to “deliberate or fabricate”), Ohio (Ohio R. Evid. 803(1)) (expressly barring admission of statement if circumstances indicate that statement lacks trustworthiness).

12. The following states recognize a hearsay rule exception for a present sense impression as a matter of common law:

- Illinois. See *People v. Alsup*, 869 N.E. 2d 157, 168 (Ill. App. Ct. 2007) (stating that Illinois recognizes present sense impression exception, citing *People v. Stack*, 311 Ill. App. 3d 162, 175-76, 243 Ill. Dec. 770, 724 N.E.2d 79, 89-90 (Ill. App. Ct. 1999), and repeating text of Fed. R. Evid. 803(1)).
- Massachusetts. See *Commonwealth v. Capone*, 39 Mass. App. Ct. 606, 610 n.2, 659 N.E.2d 1196 (Mass. App. Ct. 1996) (stating that “judge properly admitted the statement relying on what he termed a ‘present sense impression’ exception to the hearsay rule”).
- Missouri. See *Lindsay v. Mazzio’s Corp.*, 136 S.W.3d 915, 923 (Mo. Ct. App. 2004) (stating that present sense impression exception applies to “a declaration uttered simultaneously, or almost simultaneously, with the occurrence of the act”).
- New York. See *People v. Herrera*, 11 Misc. 3d 1070(A), No. 05-208, 2006 WL 758544, at *14 (N.Y. Sup. Ct. Rockland County Mar. 22, 2006) (stating that court of appeals of New York adopted present sense impression in *People v. Brown*, 80 N.Y.2d 729, 735, 594 N.Y.S.2d 696, 700 (1993), and that exception requires corroboration).
- Virginia. See *Clark v. Commonwealth*, 14 Va. App. 1068, 1070, 421 S.E.2d 28, 30 (Va. Ct. App. 1992) (stating that Virginia’s present sense impression exception extends to statement describing any act of any person when act is relevant).

have a hearsay rule exception for a present sense impression.¹³

An exception similar to the present sense impression exception was proposed when the Evidence Code was first drafted in 1965.¹⁴ That proposed exception was narrowed and became Evidence Code Section 1241, which permits admission of hearsay known as a “contemporaneous statement.”¹⁵

Contemporaneous Statement

The contemporaneous statement exception covers a statement by a declarant that (1) explains, qualifies, or makes understandable the declarant’s conduct, and (2) was made while the declarant was engaged in such conduct.¹⁶ For example, this provision would apply where one person gives another a pen, and simultaneously makes a statement about the transfer (e.g., “You can borrow my pen” or “I want you to

13. The following states do not have a hearsay rule exception for a present sense impression: California, Connecticut, Minnesota, Nebraska, Oregon, Tennessee. Although Minnesota does not have a hearsay rule exception, it does allow admission of a present sense impression as *non-hearsay*, so long as the declarant is a witness subject to cross-examination on the statement. See Minn. R. Evid. 801(d)(1)(D).

14. *Recommendation Proposing an Evidence Code*, 7 Cal. L. Revision Comm’n Reports 1, 237-38 (1965). Unlike the federal rule, however, the draft exception required that the declarant be unavailable to testify at trial.

15. Since then, two Commission consultants have recommended adoption of a hearsay exception for a present sense impression: Prof. Friedenthal (then of Stanford Law School) in 1976 and Prof. Méndez (Stanford Law School) in 2003. See Friedenthal, *Analysis of Differences Between the Federal Rules of Evidence and the California Evidence Code* (Jan. 1976), at 55 (on file with the Commission); Méndez, *California Evidence Code – Federal Rules of Evidence, I. Hearsay and Its Exceptions: Conforming the Evidence Code to the Federal Rules*, 37 U.S.F. L. Rev. 351, 368 (2003) (hereafter, “Méndez Hearsay Analysis”).

16. Evid. Code § 1241.

have this pen”).¹⁷ The statement determines the legal impact of the event — whether the speaker made a gift as opposed to a loan.¹⁸

Technically, however, the statement is not hearsay but rather a verbal act, a statement that has legal significance and is offered for that purpose.¹⁹ The Comment to Section 1241 acknowledges that some writers “do not regard evidence of this sort as hearsay evidence.” The Legislature nonetheless included the exception to eliminate “any doubt that might otherwise exist concerning the admissibility of such evidence under the hearsay rule.”²⁰

The Federal Rules of Evidence do not have a contemporaneous statement exception.²¹ The exception is not needed under the federal rules because the hearsay definition under those rules does not include statements that fall under the contemporaneous statement exception (i.e., verbal acts).²²

17. See Méndez Hearsay Analysis, *supra* note 15, at 367.

18. *Id.*

19. *Id.*

20. Evid. Code § 1241 Comment.

21. See Méndez Hearsay Analysis, *supra* note 15, at 367.

22. The advisory committee’s note to Federal Rule of Evidence 801(c) explains:

The definition [of hearsay] ... includ[es] only statements offered to prove the truth of the matter asserted. If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay. *The effect is to exclude from hearsay the entire category of “verbal acts” and “verbal parts of an act,” in which the statement itself affects the legal rights of the parties or is a circumstance bearing on conduct affecting their rights.*

(Emphasis added, citations omitted). See also Méndez Hearsay Analysis, *supra* note 15, at 367.

Differences Between a Present Sense Impression and a Contemporaneous Statement

California's exception for a contemporaneous statement, Evidence Code Section 1241, focuses on verbal acts. The federal exception for a present sense impression, Federal Rule of Evidence 803(1), does not address verbal acts; the federal rules do not even treat such acts as hearsay.²³

Three other major differences between the California exception for a contemporaneous statement and the federal exception for a present sense impression are:

- (1) Under the federal exception, the declarant's statement can describe the conduct of another person, while under the California exception, the declarant's statement must explain the declarant's own conduct.
- (2) Under the California exception, the conduct the declarant explains must be equivocal in nature and need explanation, but, under the federal exception, the declarant's statement may describe an event or condition that is unequivocal and unambiguous in nature.
- (3) Under the federal exception, the declarant's statement may be made immediately after the event or condition has been completed, while, under the California exception, a declarant's explanation of conduct must be simultaneous with the conduct, not made afterwards.²⁴

23. See *id.*

24. 1 B. Jefferson, *Jefferson's California Evidence Benchbook Spontaneous and Contemporaneous Statements* § 13.14, at 213 (3d ed. & March 2007 update).

Justifications for a Present Sense Impression Exception to the Hearsay Rule

A number of justifications have been advanced for making evidence of a present sense impression admissible despite the hearsay rule.

The Likelihood of Memory Loss Is Diminished

A person's comment about what the person perceives through sight or other senses *at the time* of receiving the impression is safe from the problem of memory loss.²⁵ Because little or no time elapses between the statement and the event, there is no opportunity to forget the event and thus no need for concern that the person's memory is faulty.²⁶

As a result, evidence admitted under a hearsay rule exception for a present sense impression may actually be more reliable than in-court testimony. As one commentator put it, "a statement made at the time of an event is preferable to a reconstruction of the occurrence at trial, when the witness' memory has almost certainly altered"²⁷

The Likelihood of Insincerity Is Diminished

A second justification for admitting evidence of a present sense impression is that there is little or no time for a deliberate deception.²⁸ The exception applies only to a statement describing an event that the declarant is in the midst

25. See McCormick, *supra* note 3, § 273, at 584 (emphasis in original).

26. Gardner v. United States, 898 A.2d 367, 374 (D.C. 2006).

27. Beck, Note, *The Present Sense Impression*, 56 Tex. L. Rev. 1053, 1075 (1978); see also Waltz, *The Present Sense Impression Exception to the Rule Against Hearsay: Origins and Attributes*, 66 Iowa L. Rev. 869, 880-81 (1981) (statement of present sense impression is different in kind and character than in-court testimony based on distant memory) (hereafter, "Waltz Iowa L. Rev. article").

28. McCormick, *supra* note 3, § 273, at 584.

of perceiving, so there is no opportunity to reflect and distort the facts.²⁹

The federal exception for a present sense impression is based upon this rationale. The advisory committee's note explains that the "substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation."³⁰ The requirement of contemporaneity preserves "the benefit of spontaneity in the narrow span of time before a declarant has an opportunity to reflect and fabricate."³¹

Accordingly, the present sense impression satisfies the hearsay concerns relating to memory and sincerity, leaving only the risks of ambiguity and misperception. For these reasons, it is considered sufficiently reliable to warrant an exception to the hearsay rule.³²

Corroboration as an Additional Safeguard of Trustworthiness in Some Cases

In many but not all cases, there is an additional justification for admitting evidence of a present sense impression. Such a statement usually will be made to another person who has equal opportunities to observe the event and thus to check a misstatement.³³ Testimony by such a witness helps the fact-finder gauge the trustworthiness of the out-of-court statement.

29. See *Gardner*, 898 A.2d at 374.

30. Fed. R. Evid. 803(1) advisory committee's note.

31. *Booth v. State*, 306 Md. 313, 320, 324, 508 A.2d 976, 981 (Md. 1986).

32. McFarland, *Present Sense Impressions Cannot Live in the Past*, 28 Fla. St. U. L. Rev. 907, 913-14 (2001); see also 4 C. Mueller & L. Kirkpatrick, *Federal Evidence* § 8:67, at 559-60 (3d ed. 2007).

33. McCormick, *supra* note 3, § 273, at 584; see also Passannante, *supra* note 8, at 98 n.58.

The witness' own account of the event can be used to shed light on the out-of-court description of the event.³⁴

Further, if the witness testifying to the out-of-court statement is the declarant, the factfinder may evaluate the demeanor of the declarant-witness. In addition, cross-examination on the statement can probe into its credibility.³⁵

Such corroboration thus reduces the risks of ambiguity and misperception, which are the two key hearsay concerns not addressed by contemporaneity.³⁶ When such corroboration is coupled with contemporaneity, all of the key concerns underlying the hearsay rule are addressed, at least to some extent.

Utility

By allowing admission of trustworthy statements, a present sense impression exception would further the pursuit of truth in court proceedings. When evidence is both relevant and trustworthy, it should be admissible, so that the factfinder is fully informed and able to correctly assess the situation at issue.

The exception's main utility would be to allow admission of an immediate impression of an event that was not startling.³⁷ A different hearsay exception, known in California as the spontaneous statement exception and in the federal

34. See Fed. R. Evid. 803(1) advisory committee's note; Wohlsen, Comment, *The Present Sense Impression to the Hearsay Rule: Federal Rule of Evidence 803(1)*, 81 Dick. L. Rev. 347, 355 (1977).

35. See Fed. R. Evid. 803(1) advisory committee's note; Kraus, Comment, *The Recent Perception Exception to the Hearsay Rule: A Justifiable Track Record*, 1985 Wis. L. Rev. 1525, 1532.

36. Mueller & Kirkpatrick, *supra* note 32, § 8:67 at 560.

37. See, e.g., *Booth v. State*, 306 Md. 313, 324, 331, 508 A.2d 976 (1986); Mueller & Kirkpatrick, *supra* note 32, § 8:67 at 567; *cf.* Evid. Code § 1240 (admitting hearsay statement spontaneously made about event or condition while under stress of excitement caused by the event or condition).

system as the excited utterance exception, already allows admission of a statement that was made under the stress of excitement, whether at the time of an exciting event or afterwards.³⁸ A statement made about an event that was not startling is not admissible under the spontaneous statement exception.³⁹ However, the statement would be admissible under the present sense impression exception.⁴⁰ Such an exception would be especially useful when the declarant makes an observation just before an exciting event.⁴¹

The drafters of the federal rules concluded that including both an exception for a present sense impression and an exception for an excited utterance was needed to avoid “needless niggling.”⁴² Presumably, the drafters did not think it profitable for courts to spend significant effort differentiating between an excited utterance and a present sense impression. For that reason, and because of the distinctions in coverage, the federal courts and 44 states have a present sense impression exception to the hearsay rule, *in addition to an*

38. Fed. R. Evid. 803(2) (excited utterance); Evid. Code § 1240 (spontaneous statement).

39. See, e.g., *People v. Hines*, 15 Cal. 4th 997, 1032, 1034 n.4, 1035-36, 938 P.2d 388, 64 Cal. Rptr. 2d 594 (1997) (determining that statement was not admissible as spontaneous statement under Section 1240 or contemporaneous statement under Section 1241 but that it would have been admissible as present sense impression under Fed. R. Evid. 803(1)).

40. See *id.*

41. Mueller & Kirkpatrick, *supra* note 32, § 8:67 at 567-68; see, e.g., *Houston Oxygen Co. v. Davis*, 139 Tex. 1, 5-6, 161 S.W.2d 474, 476-77 (Tex. Comm’n App. 1942) (admitting spontaneous statement about passing car minutes before accident).

42. Fed. R. Evid. 803(1) advisory committee’s note.

excited utterance exception, that is codified in court rule or statute,⁴³ or recognized as a matter of common law.⁴⁴

43. For a list of the states with a hearsay exception for a present sense impression, see *supra* notes 10-12. Each of those states also has a hearsay exception for an excited utterance. See Ala. R. Evid. 803(2) (Alabama); Alaska R. Evid. 803(2) (Alaska); Ariz. R. Evid. 803(2) (Arizona); Ark. R. Evid. 803(2) (Arkansas); Colo. R. Evid. 803(2) (Colorado); Del. Unif. R. Evid. 803(2) (Delaware); Fla. Stat. § 90.803(2) (Florida); Haw. R. Evid. 803(b)(2) (Hawaii); Idaho R. Evid. 803(2) (Idaho); Ind. R. Evid. 803(2) (Indiana); Iowa R. Evid. 5.803(2) (Iowa); Kan. Stat. Ann. § 60-460(d)(2) (Kansas); Ky. R. Evid. 803(2) (Kentucky); La. Code Evid. Ann. art. 803(2) (Louisiana); Me. R. Evid. 803(2) (Maine); Md. R. Evid. 5-803(b)(2) (Maryland); Mich. R. Evid. 803(2) (Michigan); Miss. R. Evid. 803(2) (Mississippi); Mont. R. Evid. 803(2) (Montana); Nev. Rev. Stat. § 51.095 (Nevada); N.H. R. Evid. 803(2) (New Hampshire); N.J. R. Evid. 803(c)(2) (New Jersey); N.M. R. Evid. 11-803(B) (New Mexico); N.C. R. Evid. 803(2) (North Carolina); N.D. R. Evid. 803(2) (North Dakota); Ohio R. Evid. 803(2) (Ohio); 12 Okla. St. Ann. § 2803(2) (Oklahoma); Pa. R. Evid. 803(2) (Pennsylvania); R.I. R. Evid. 803(2) (Rhode Island); S.C. R. Evid. 803(2) (South Carolina); S.D. Codified Laws § 19-16-6 (South Dakota); Tex. R. Evid. 803(2) (Texas); Utah R. Evid. 803(2) (Utah); Vt. R. Evid. 803(2) (Vermont); Wash. R. Evid. 803(2) (Washington); W. Va. R. Evid. 803(2) (West Virginia); Wis. Stat. Ann. § 908.03(2) (Wisconsin); Wyo. R. Evid. 803(2) (Wyoming).

44. States that recognize the excited utterance exception in common law are:

- Georgia. See *Walthour v. State*, 269 Ga. 396, 397, 497 S.E.2d 799 (1998) (“Included in our Code’s *res gestae* exception to the rule against hearsay is an exception for excited utterances.”); see also Ga. Code § 24-3-3 (*res gestae* exception).
- Illinois. See *Kellman v. Twin Orchard Country Club*, 202 Ill. App. 3d 968, 972 560 N.E.2d 888 (1990) (“The contemporary hearsay rule recognizes ‘spontaneous declarations’ or ‘excited utterances’ as properly admissible exceptions to the rule.”).
- Massachusetts. See *Com. v. Sellon*, 380 Mass. 220, 229 & n.14, 402 N.E.2d 1329 (1980) (stating that judge correctly admitted statements because they were spontaneous exclamations); see also 20 W. Young et. al., *Massachusetts Practice Evidence* § 803.2 (2d ed. 2007).
- Missouri. See 22A W. Schroeder, *Missouri Practice Missouri Evidence* § 803(2).1 & nn.1-4 (2d ed. 2007) (stating that Missouri has long recognized the exception as part of *res gestae*, and now exception is referred to as “excited utterance” exception and has been brought into line with the federal exception).

Adoption of a present sense impression exception would bring California into conformity with federal law and the law of the many states that recognize such an exception. That would help prevent confusion over applicable evidentiary rules when an attorney practices in multiple jurisdictions. Such conformity would also promote consistent results when a dispute involves litigation in multiple jurisdictions.

Criticism of the Present Sense Impression Exception to the Hearsay Rule

A few courts and commentators have criticized the hearsay rule exception for a present sense impression on a number of different grounds. Their criticisms largely focus on specific aspects of the exception. They do not question the basic premise of the exception (the idea that a description given while perceiving or just after the event described is sufficiently reliable to be introduced into evidence without an opportunity for cross-examination).⁴⁵

By contrast, the California Public Defender's Association and the Los Angeles Public Defender's office (hereafter, the "public defenders") sent the Commission a comment

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- New York. See *People v. Caviness*, 38 N.Y.2d 227, 342 N.E.2d 496 (1975) ("Spontaneous declarations, frequently referred to with some inexactitude as *Res gestae* declarations ... form an exception to the hearsay rule.").
 - Virginia. See *Chappell v. White*, 182 Va. 625, 633, 29 S.E.2d 858 (1944); Virginia Practice Trial Handbook *Hearsay Evidence* § 28:10, ch. 28 (2007 ed.).

45. Although the United States Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36, 61-62 (2004), called into question *all* hearsay rule exceptions based on notions of reliability (at least as applied to a defendant in a criminal case), the decision did not single out the present sense impression exception. *Crawford* has limited application in the context of a present sense impression. See discussion of "Testimonial Statement" *infra*.

opposing the concept of a present sense impression exception.⁴⁶

The criticisms are unpersuasive, as explained below.

Necessity

The public defenders do not believe that an exception for a present sense impression is necessary.⁴⁷ They say that nearly every statement that would be admissible as a present sense impression is already admissible as a spontaneous statement.⁴⁸

Although there is some overlap between the spontaneous statement exception and the present sense impression exception,⁴⁹ the overlap is incomplete, as discussed above.⁵⁰ Because of the potential utility of the exception,⁵¹ the Commission believes the exception would be a valuable addition to California evidence law.

Cumulative Evidence

A related criticism by courts and commentators is that present sense impression statements are often “merely

46. See Commission Staff Memorandum 2007-53 (Dec. 10, 2007), Exhibit p. 1.

47. See Commission Staff Memorandum 2007-53 (Dec. 10, 2007), Exhibit p. 4.

48. See Commission Staff Memorandum 2007-53 (Dec. 10, 2007), Exhibit p. 1.

49. The Commission’s former consultant, Prof. James Chadbourn (then of UCLA Law School), acknowledged this overlap long ago. See *A Study Relating to the Hearsay Evidence Article of the Uniform Rules of Evidence*, 6 Cal. L. Revision Comm’n Reports app. 401, app. 468 (1962). He nonetheless recommended that California adopt a present sense impression exception to the hearsay rule. See *id.* at app. 471.

50. See discussion of “Utility” *supra*.

51. *Id.*

cumulative.”⁵² This claim seems to assume that an out-of-court statement and in-court testimony about the same event are repetitive.

However, the two types of evidence are different. As discussed above, an out-of-court statement about a present sense impression may be more reliable than an in-court statement about a past event, because the former statement is not based on the witness’ distant memory.⁵³

Moreover, any problem of cumulative evidence can be addressed through Evidence Code Section 352. That provision permits a court in its discretion to “exclude evidence if its probative value is substantially outweighed by the probability that its admission will ... necessitate undue consumption of time ...”

For these reasons, the criticism concerning cumulative evidence is not persuasive.

Eyewitness Identification

Another scholarly criticism is that the hearsay rule exception for a present sense impression is not clear on whether it would admit a pretrial identification (e.g., at a lineup, a declarant’s statement “that’s the one who robbed me”).⁵⁴ It has been argued that the exception should not operate to admit such a statement.⁵⁵

52. See Beck, *supra* note 27, at 1075; U.S. v. Parker, 491 F.2d 517, 523 (8th Cir. 1973).

53. See Beck, *supra* note 27, at 1075; Waltz *Iowa L. Rev.* article, *supra* note 27, at 880-81 (rejecting argument that present sense impression statements are cumulative because they are different in kind and character than in-court testimony based on distant memory).

54. Waltz, *Present Sense Impressions and the Residual Exceptions: A New Day for “Great” Hearsay?*, 2 Litig. 22, 24 (1976) (hereafter, “Waltz Litigation article”).

55. *Id.*

It appears, however, that a pretrial identification would not be admitted as a present sense impression because the statement actually relates to a past event, i.e., a pre-lineup identification of the person who is identified at the lineup.⁵⁶ In fact, a different federal rule specifically addresses the admissibility of a pretrial identification.⁵⁷

Likewise, California has a provision specifically addressing the admissibility of a pretrial identification.⁵⁸ The Commission's Comment to the proposed new exception for a present sense impression would refer to that provision.⁵⁹ That would help prevent confusion over the proper treatment of a pretrial identification.

Statement in the Form of an Opinion

Another issue discussed by courts and commentators is whether the exception for a present sense impression should allow admission of a statement in the form of an opinion.⁶⁰ This issue arises often, as present sense impression statements

56. As one court explained:

The essence of an identification such as at a photo array or a lineup ... is a comparison between what the witness is contemporaneously viewing and the witness' recollection of a prior event, in this case the bank robbery. As the district court aptly noted: "The heart of a photographic identification [is that] you are asking someone about their perception of a past event.... [Y]ou are asking them to recall[,] by definition[,] what happened in the past." Brewer's characterization of observations made during the viewing of a photo array as "highly trustworthy because they were made simultaneously with the event being perceived, namely, the photo array", ignores the vital element of memory.

United States v. Brewer, 36 F.3d 266, 272 (2d Cir. 1994).

57. See Fed. R. Evid. 801(d)(1)(C) (pretrial identification is not hearsay).

58. See Evid. Code § 1238 (if pretrial identification satisfies certain conditions, it is not inadmissible under hearsay rule).

59. See proposed Evid. Code § 1243 Comment *infra*.

60. See McFarland, *supra* note 32, at 929 n.132.

tend to characterize what is observed in language that is, or appears to be, an opinion.⁶¹

Professor Morgan, who was instrumental in the adoption of the federal provision on present sense impressions, argues that it is

absurd to insist that the statement must not be phrased in terms of inference or opinion. People speaking without reflection usually talk in terms of inference in describing what they have seen or heard. So long as the language does not indicate a conscious deduction, rather than a shorthand method of statement, the opinion rule should have no application.⁶²

However, it appears that the courts are divided on the admissibility of a present sense impression in the form of an opinion.⁶³ The majority view rejects an opinion if it allocates blame.⁶⁴ If it does not, the courts are split more evenly.⁶⁵

The Commission believes that the admissibility of a present sense impression that is in the form of an opinion would be best determined by the courts as the issue arises in the context of actual cases.⁶⁶

Testimonial Statement

The public defenders maintain that in many factual contexts a present sense impression will be a testimonial statement⁶⁷

61. See *Booth v. State*, 306 Md. 313, 325, 508 A.2d 976, 982 (Md. 1986).

62. E. Morgan, *Basic Problems of State and Federal Evidence* 343 (1963); see also *Waltz Iowa L. Rev.* article, *supra* note 27, at 881 n.74.

63. See *Booth*, 306 Md. at 325.

64. *Id.* at 326.

65. *Id.*

66. *Cf. People v. Miron*, 210 Cal. App. 3d 580, 584, 258 Cal. Rptr. 494 (1989) (holding that opinion rule applied to spontaneous exclamation that appeared to allocate blame); see also Evid. Code § 800 (opinion rule).

67. Commission Staff Memorandum 2007-53 (Dec. 10, 2007), Exhibit p. 3.

and thus constitutionally inadmissible under the doctrine of *Crawford v. Washington*.⁶⁸ They say that since *Crawford* will preclude admissibility, it would be pointless for California to adopt a hearsay exception for a present sense impression.⁶⁹

That conclusion is misguided for a number of reasons. First, *Crawford* involved the Confrontation Clause of the federal Constitution,⁷⁰ which only applies to a criminal defendant.⁷¹ The limitations of *Crawford* do not apply to a civil case, nor do they apply to evidence that is offered against the prosecution in a criminal case.

Second, *Crawford* only restricts the admissibility of a testimonial statement.⁷² Courts have usually found present sense impressions to be non-testimonial.⁷³ The criteria for a testimonial statement are not fully defined, but focus on factors such as whether the statement was made for the purpose of providing evidence for use in prosecution,⁷⁴ whether the statement was given under a degree of formality or solemnity similar to testifying under oath,⁷⁵ and whether the statement was made in a non-emergency setting.⁷⁶ A

68. 541 U.S. 36 (2004).

69. Commission Staff Memorandum 2007-53 (Dec. 10, 2007), Exhibit p. 3.

70. U.S. Const. amend. VI.

71. See *id.* (“In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him”).

72. See *Crawford*, 541 U.S. at 53-54.

73. See, e.g., *U.S. v. Thomas*, 453 F.3d 838, 841, 844 (7th Cir. 2006); *U.S. v. Danford*, 435 F.3d 682, 687 (7th Cir. 2005); *State v. Price*, 952 So.2d 112, 121 (La. App. 2006); *People v. Coleman*, 16 A.D.3d 254, 254-55, 791 N.Y.S.2d 112 (N.Y. App. Div. 2005); *Salt Lake City v. Williams*, 128 P.3d 47, 49-50, 53-54, 54 n.6 (Utah Ct. App. 2005); *but see People v. Dobbin*, 6 Misc. 3d 892, 898, 791 N.Y.S.2d 897 (N.Y. Sup. Ct. 2004).

74. *Davis v. Washington*, 547 U.S. 813 (2006).

75. *Id.*

76. *Id.*

present sense impression is not likely to have been given for the purpose of providing evidence for prosecution. There is no time to formulate such a purpose when a statement is made spontaneously. Nor is there time to impart a degree of formality or solemnity similar to testifying under oath. Although some present sense impressions are made in a non-emergency setting, others are made during an ongoing emergency.

Third, even if a court considers a particular present sense impression testimonial and the evidence is offered against a criminal defendant, *Crawford* might not compel exclusion of the evidence. The doctrine of *Crawford* would not preclude the admission of a present sense impression if the declarant testifies at trial, or if the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant.⁷⁷

Finally, if California adopts a hearsay exception for a present sense impression, it would not be necessary to codify *Crawford's* constitutional requirements in that exception. If a particular present sense impression was considered testimonial and the other requirements of *Crawford* were met, the federal Constitution would automatically override any state statute.⁷⁸ In addition, the Evidence Code already includes a mechanism for ensuring that courts construe hearsay rule exceptions in accordance with the federal Confrontation Clause.⁷⁹

77. 541 U.S. at 53-54.

78. See U.S. Const. art. VI, cl. 2 (Supremacy Clause).

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

Time Lapse Between Statement and Event

Another issue raised in cases and commentary on present sense impressions relates to the amount of time that elapses between an event and a statement describing the event. Federal Rule of Evidence 803(1) encompasses a statement made about an event while the declarant was perceiving the event, “or immediately thereafter.” The advisory committee’s note states that with respect to the time element, the rule “recognizes that in many, if not most, instances precise contemporaneity is not possible, and hence a slight lapse is allowable.” This slight lapse is described as “substantial contemporaneity” between the event and statement, which “negate[s] the likelihood of deliberate or conscious misrepresentation.”⁸⁰

Applying these guidelines, one widely-cited case states:

[B]ecause the presumed reliability of a statement of present sense impression flows from the fact of spontaneity, the time interval between observation and utterance must be very short. The appropriate inquiry is whether, considering the surrounding circumstances, sufficient time elapsed to have permitted reflective thought.⁸¹

Some commentators criticize courts for admitting statements made after there was ample time for fabrication, memory loss, and confabulation.⁸² Several commentators

80. Fed. R. Evid. 803(1) advisory committee’s note.

81. *Booth*, 306 Md. at 324; see also Waltz *Iowa L. Rev.* article, *supra* note 27, at 880. For a compilation of federal cases discussing the permissible time lapse, see 4 M. Graham, *Handbook of Federal Evidence* § 803:1, at n.5 (6th ed. 2006).

82. See, e.g., McFarland, *supra* note 32, at 908, 915, 919-20, 931 (disapproving of several cases admitting statements despite time lapse between statement and event ranging from a “few seconds, one minute, three to five minutes . . . , at least eighteen minutes,” to “twenty-three minutes”); Note, *The Present Sense Impression Hearsay Exception: An Analysis of the Contemporaneity and Corroboration Requirements*, 71 *Nw. U. L. Rev.* 666, 670

maintain that the exception should require strict contemporaneity (i.e., only enough “time to get the words out of the mouth”), not “substantial” contemporaneity, between the event and statement, because mere seconds are enough time for fabrication.⁸³

Prof. Douglas McFarland supports the concept of a present sense impression exception to the hearsay rule.⁸⁴ To achieve strict contemporaneity, he suggests that the exception should not include the phrase “or immediately thereafter.”⁸⁵ Provisions in two states, Colorado and Kansas, are drafted that way.⁸⁶ Neither state, however, appears to require strict contemporaneity.⁸⁷

(1976) (stating that courts have allowed statements after unacceptable delays and arguing exception should only allow “the natural and inevitable time lag between any perception and its verbal description”) (hereafter, “Note on Contemporaneity and Corroboration”).

Confabulation is the filling in of gaps in memory with fabrications that one believes are facts. The American Heritage Dictionary of the English Language 385 (4th ed. 2000).

83. See, e.g., McFarland, *supra* note 32, at 916, 931; Beck, *supra* note 27, at 1060-61; Note on Contemporaneity and Corroboration, *supra* note 81, at 669. Prof. McFarland cites a study finding that some “spontaneous, manipulative liars” are quicker than “nonmanipulative truth-tellers,” and another study showing it takes only .8029 seconds to tell a prepared lie, 1.6556 seconds to tell a truthful statement, and 2.967 seconds to tell a spontaneous lie. McFarland, *supra* note 32, at 916-17.

84. First Supplement to Commission Staff Memorandum 2008-6 (Feb. 11, 2008), Exhibit p. 1.

85. *Id.* at Exhibit pp. 1-2; see also McFarland, *supra* note 32, at 931.

86. See Colo. R. Evid. 803(1); Kan. Stat. Ann. § 60-460(d)(1).

87. See, e.g., Colo. R. Evid. 803(1) Comment (focusing on *spontaneity* as guarantee of trustworthiness); *State v. Blake*, 209 Kan. 196, 197, 201-02, 495 P.2d 905, 909-10 (Kan. 1972) (applying Kansas exception to require only *substantial* contemporaneousness); see also Slough, *Some Evidentiary Aspects of the Kansas Code of Civil Procedure*, 13 U. Kan. L. Rev. 197, 223 (1964) (interpreting then newly enacted Kansas provision as only requiring “*substantial* contemporaneousness” between statement and event); Gard, *Evidence*, 12 U. Kan. L. Rev. 239, 250 (1964) (same).

Prof. McFarland alternatively suggests that if the phrase “or immediately thereafter” is included in the exception, an accompanying comment should include strong language explaining that the phrase is to be read narrowly.⁸⁸ The public defenders maintain that any attempt to ensure a narrow reading of the phrase is likely to fail.⁸⁹

Another commentator supports requiring strict contemporaneity, but would allow a longer time lapse if other evidence indicates that the statement is trustworthy.⁹⁰ Other approaches have also been taken:

- The New Jersey exception permits a statement made “immediately after” the declarant perceived the event, so long as the declarant had no “opportunity to deliberate or fabricate.”⁹¹ The note to this provision explains that “statements made immediately after the event must be so close to the event as to exclude the likelihood of fabrication or deliberation.”
- Florida follows the federal approach on what is a permissible time lapse. However, Florida’s exception only applies to “[a] spontaneous statement,” and it bars admission when the statement “is made under circumstances that indicate its lack of trustworthiness.”⁹²
- Ohio also follows the federal approach on what is a permissible time lapse. Like Florida, however, Ohio adds a clause aimed at ensuring trustworthiness of the statement.⁹³

88. See First Supplement to Commission Staff Memorandum 2008-6 (Feb. 11, 2008), Exhibit p. 2.

89. See Commission Staff Memorandum 2007-53 (Dec. 10, 2007), Exhibit pp. 1-2.

90. See Waltz *Iowa L. Rev.* article, *supra* note 27, at 880.

91. See N.J. R. Evid. 803(c)(1).

92. See Fla. Stat. § 90.803(1).

93. See Ohio R. Evid. 803(1).

It appears that the federal rule and these other formulations are essentially trying to address the same considerations: (1) It might take a moment to utter a statement about an event perceived, but (2) there should not be enough time to concoct a lie.

Even commentators who argue for strict contemporaneity acknowledge that there must be some “passage of time to get the words out of the mouth,” a “split-second to form words.”⁹⁴ It is unrealistic to insist that a statement be made at exactly the same time that an event occurs. The Commission therefore advises that the phrase “or immediately thereafter” be included.⁹⁵

Inclusion of the phrase “or immediately thereafter” would provide uniformity with federal law and the law of many other states. To illustrate the proper application of the new exception, the Commission’s Comment would stress that the permissible time lapse is strictly limited to the moment required to verbalize what has just been perceived.⁹⁶ The Comment would also give examples of acceptable and unacceptable time lapses.⁹⁷

Corroboration

A final area of criticism relates to corroboration of a present sense impression. The issue is whether corroboration (i.e., evidence other than the present sense impression itself) is necessary to obtain admission of a present sense impression.

Corroborative evidence may provide support that (1) the event or condition about which a statement was made actually occurred, (2) the declarant actually perceived the event or

94. See, e.g., McFarland, *supra* note 32, at 931.

95. See proposed Evid. Code § 1243 & Comment *infra*.

96. See proposed Evid. Code § 1243 Comment *infra*.

97. *Id.*

condition described, or (3) the statement's description of the event or condition is accurate.

The text of the federal rule is silent on the need for corroboration. The accompanying advisory committee's note mentions the subject, but is largely inconclusive. There is extensive disagreement over whether the federal rule requires, and whether it should require, corroboration.⁹⁸

If California adopted an exception based on the federal provision, however, it would be clear that corroborative evidence would be required to show that (1) the event or condition actually occurred and (2) the declarant actually perceived the event or condition described. Unlike a federal court, a California court may *not* consider inadmissible evidence in determining admissibility.⁹⁹ Thus, a California court could not consider a proffered present sense impression in determining whether that statement should be admitted. To establish that the provision applied, the proponent of a present sense impression in California necessarily would have to present other evidence showing that (1) the event or condition

98. *Booth v. State*, 306 Md. 313, 327, 508 A.2d 976, 983 (Md. 1986); *Graham*, *supra* note 81, § 803:1; *Passannante*, *supra* note 8, at 105 (observing that the courts "apply dissimilar tests," and cannot even agree "as to what has to be corroborated").

99. 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 4, 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) 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).

actually occurred, and (2) the declarant actually perceived the event or condition.

The public defenders argue that these corroborative requirements should be included in the text of the exception itself.¹⁰⁰ The Commission does not recommend that approach. First, it is unnecessary because these requirements would apply automatically, as a consequence of the general rule that a judge may not consider inadmissible evidence in determining admissibility. Second, if the need for corroboration was expressly stated in only one exception (the present sense impression exception), it would misleadingly create a negative inference that such a requirement no longer applies to other hearsay exceptions. It would thus create confusion and lead to an erosion of the general rule that a judge may not consider inadmissible evidence in determining admissibility.

Although it would be necessary to corroborate that the event or condition occurred and that the declarant perceived the event, corroboration of the *accuracy* of the declarant's description of the event or condition would not necessarily be required if California adopted a provision like the federal exception for a present sense impression. A statement could meet the criteria for admissibility as a present sense impression even if the description given is not completely accurate.

It is generally agreed that the federal provision for a present sense impression does not require corroboration of the accuracy of the declarant's description.¹⁰¹ Commentators,

100. Commission Staff Memorandum 2007-53 (Dec. 10, 2007), Exhibit p. 3.

101. See, e.g., Graham, *supra* note 81, § 803:1, at 68-69; Passannante, *supra* note 8, at 100 n.67; Beck, *supra* note 27, at 1069; Waltz *Litigation* article, *supra* note 54, at 24.

however, are divided as to whether such corroboration should be required.¹⁰²

Because a present sense impression has indicia of reliability besides corroboration, the Commission believes that corroboration of the description's accuracy should not be required. As previously explained, the likelihood of memory loss is diminished,¹⁰³ as is the likelihood of insincerity.¹⁰⁴ The probability that a present sense impression will be corroborated merely reinforces these other justifications for creating an exception to the hearsay rule. For that reason, and because conformity with the federal rule would be desirable, corroboration of a description's accuracy should not be a prerequisite to admissibility as a present sense impression.

The proposed legislation would take that approach. To provide clarity, however, the Comment to the proposed new exception would address the matter of corroboration. It would

102. Some commentators argue that corroboration of a description's accuracy should not be required. See, e.g., Broun, *supra* note 5, § 271, at 254 (Although corroboration adds further assurance of accuracy, a "general justification for admission is not the same as a requirement."); Passannante, *supra* note 8, at 106 (corroboration goes to weight, not admissibility, of statement).

Other commentators argue that the exception should require corroboration of a description's accuracy, at least to some extent. See, e.g., Waltz *Iowa L. Rev.* article, *supra* note 27, at 889, 892, 896, 898 (corroboration of description's accuracy should be required); Foster, *Present Sense Impressions: An Analysis and a Proposal*, 10 *Loy. U. Chi. L.J.* 299, 333-34 (1979) (exception should require declarant or equally percipient witness to be subject to cross-examination on statement); Beck, *supra* note 27, at 1071 (declarant should be required to testify regarding present sense impression if declarant is available).

Similarly, the public defenders express concern that an inaccurate statement could be admitted under a present sense impression exception. See Commission Staff Memorandum 2007-53 (Dec. 10, 2007), Exhibit pp. 2-3. They illustrate this point with a hypothetical. See *id.* For discussion of why this hypothetical is unpersuasive, see Commission Staff Memorandum 2007-53 (Dec. 10, 2007), pp. 5-6.

103. See discussion of "The Likelihood of Memory Loss is Diminished" *supra*.

104. See discussion of "The Likelihood of Insincerity is Diminished" *supra*.

explain that corroboration of the accuracy of the statement is not required, but corroboration of the event or condition and of the declarant's perception must necessarily be provided under the normal procedure for determining admissibility in California.¹⁰⁵

Weighing the Justifications and the Criticisms

There are persuasive justifications for creating a hearsay rule exception for a present sense impression. Because a present sense impression is expressed at or immediately after an event or condition occurs, the likelihood of memory loss is diminished,¹⁰⁶ as is the likelihood of insincerity.¹⁰⁷ In some cases, corroboration of the present sense impression is possible, providing additional assurance of reliability.¹⁰⁸ An exception for a present sense impression would be a useful supplement to the existing provisions in the Evidence Code. It would further the pursuit of truth by enabling a factfinder to consider trustworthy evidence that might otherwise be excluded.¹⁰⁹

Although there have been criticisms of such an exception, most are directed at specific aspects of the exception, and do not challenge its underlying merits. The criticism that the exception is unnecessary is not persuasive.¹¹⁰ Neither is the criticism regarding cumulative evidence,¹¹¹ nor the concern

105. See proposed Evid. Code § 1243 Comment *infra*.

106. See discussion of "The Likelihood of Memory Loss is Diminished" *supra*.

107. See discussion of "The Likelihood of Insincerity is Diminished" *supra*.

108. See discussion of "Corroboration as an Additional Safeguard of Trustworthiness in Some Cases" *supra*.

109. See discussion of "Utility" *supra*.

110. See discussions of "Necessity" *supra* and "Utility" *supra*.

111. See discussion of "Cumulative Evidence" *supra*.

relating to *Crawford*.¹¹² The proper treatment of a pretrial identification is evident from the existing provision on that subject, which would be referenced in the Comment to the proposed new exception.¹¹³ The proper treatment of a present sense impression in the form of an opinion would properly be left to the courts.¹¹⁴ The concerns relating to the proper time lapse would be addressed by providing guidance and examples in the Comment,¹¹⁵ as would the concerns relating to corroboration.¹¹⁶

Based on the sound justifications for the exception, the Commission recommends that California adopt a hearsay rule exception for a present sense impression. To promote uniformity, the Commission further recommends that the new exception be modeled on the federal rule.¹¹⁷

Retention of the Hearsay Rule Exception for a Contemporaneous Statement

A final issue is whether the hearsay rule exception for a contemporaneous statement should be retained if a new exception for a present sense impression is enacted. The Law Revision Commission recommends that the contemporaneous statement exception be left intact.

It is true that the federal exception for a present sense impression applies not only when a declarant describes the conduct of another person, but also when a declarant

112. See discussion of “Testimonial Statement” *supra*.

113. See discussion of “Eyewitness Identification” *supra*; see also proposed Evid. Code § 1243 Comment *infra*.

114. See discussion of “Statement in the Form of an Opinion” *supra*.

115. See discussion of “Time Lapse Between Statement and Event” *supra*; see also proposed Evid. Code § 1243 Comment *infra*.

116. See discussion of “Corroboration” *supra*; see also proposed Evid. Code § 1243 Comment *infra*.

117. See proposed Evid. Code § 1243 & Comment *infra*.

describes the declarant's own conduct.¹¹⁸ On initial consideration, that might make the exception for a contemporaneous statement seem superfluous.

However, the federal exception for a present sense impression is not meant to apply to a verbal act. Under the Federal Rules of Evidence, a verbal act is not regarded as hearsay.¹¹⁹

Consequently, a California provision modeled on the federal exception for a present sense impression probably would not be construed to apply to a verbal act. To ensure that a verbal act remains admissible, California should retain its hearsay rule exception for a contemporaneous statement.¹²⁰

118. See, e.g., *Jonas v. Isuzu Motors, Ltd.*, 210 F. Supp. 2d 1373, 1378-79 (M.D. Ga. 2002) (declarant's statement that he had fallen asleep at wheel, killed his father, and wanted to die was admissible as present sense impression); *United States v. Campbell*, 782 F. Supp. 1258, 1262 (N.D. Ill. 1991) (police officer's 911 call, recounting officer's ongoing chase of suspect, was admissible as present sense impression).

119. Fed. R. Evid. 801(c) advisory committee's note.

120. The Truth-in-Evidence provision of the Victims' Bill of Rights (Cal. Const. art. I, § 28(d)) provides a further reason for retaining the exception for a contemporaneous statement. Unless it can be said with certainty that the exception is 100% superfluous, repealing the exception would restrict the admissibility of relevant evidence in a criminal case. Under the Truth-in-Evidence provision of the Victims' Bill of Rights, that cannot be done except by statute "enacted by a two-thirds vote of the membership in each house of the Legislature"

PROPOSED LEGISLATION

Heading of Article 4 (commencing with Section 1240) (amended)

SECTION 1. The heading of Article 4 (commencing with Section 1240) of Chapter 2 of Division 10 of the Evidence Code is amended to read:

Article. 4. Spontaneous, Contemporaneous, ~~and~~ Dying, *and Present Sense* Declarations

Comment. The heading “Article 4. Spontaneous, Contemporaneous, and Dying Declarations” is amended to reflect the addition of Section 1243 (present sense impression).

Evid. Code § 1243 (added). Present sense impression

SEC. 2. Section 1243 is added to the Evidence Code, to read:

1243. Evidence of a statement is not made inadmissible by the hearsay rule if both of the following conditions are satisfied:

(a) The statement is offered to describe or explain an event or condition.

(b) The statement was made while the declarant was perceiving the event or condition, or immediately thereafter.

Comment. Section 1243 is drawn from Rule 803(1) of the Federal Rules of Evidence. A present sense impression is sufficiently trustworthy to be considered by the trier of fact for two reasons. First, there is no problem concerning the declarant’s memory because the statement is simultaneous with or immediately after the event. Second, there is little or no time for calculated misstatement. Additionally, in some cases, the statement is made to one whose proximity provides an immediate opportunity to check the accuracy of the statement in light of the physical facts. Chadbourn, *A Study Relating to the Hearsay Evidence Article of the Uniform Rules of Evidence*, 4 Cal. L. Revision Comm’n Reports 401, 467 (1963); see also Fed. R. Evid. 803(1) advisory committee’s note.

Section 1243 applies to a statement “made while the declarant was perceiving the event or condition, or immediately thereafter.” The phrase

“or immediately thereafter” is included in recognition that it requires a few seconds to convert an observation into words. See McFarland, *Present Sense Impressions Cannot Live in the Past*, 28 Fla. St. U. L. Rev. 907, 918 (2001). The permissible time lapse between the event and the statement is strictly limited to the moment required to verbalize what has just been perceived. After that moment, there is time for deliberation and fabrication, undermining the justification for allowing admission of the hearsay statement. See *id.* at 914-17.

Under Rule 803(1), some courts have admitted a statement made after the time necessary to convert an observation into words. See, e.g., *United States v. Montero-Camargo*, 177 F.3d 1113, 1124 (9th Cir. 1999) (upholding admission of motorist’s statement to agents made “about a minute” after motorist observed event), *amended by*, 183 F.3d 1172 (1999), *withdrawn and reh’g en banc granted*, 192 F.3d 946 (1999), *reh’g en banc*, 208 F.3d 1122 (2000); *United States v. Parker*, 936 F.2d 950, 954 (7th Cir. 1991) (upholding admission of railroad worker’s statement made after walking about 100 feet from event); *United States v. Obayagbona*, 627 F. Supp. 329, 339-40 (E.D.N.Y. 1985) (admitting statement made over two minutes after event, and stating that “[a] few minutes’ pause after the moment at which the statement could have been made is within the period contemplated in Rule 803(1)”; see also McFarland, *supra*, at 919-20 (criticizing several cases for admitting statement despite time lapse in which there was time to deliberate or fabricate). Section 1243 does not allow admission of such a statement.

A radio announcer’s play-by-play description of a baseball game is a classic example of a present sense impression. See D. Binder, *Hearsay Handbook* 89 (2d ed. 1983 & 1985 Supp.). For an example of a statement made after the event described but still soon enough to be admissible under this section, see *Houston Oxygen Co. v. Davis*, 139 Tex. 1, 5-6 (1942). For an example of a statement made simultaneously with the event described, see *Booth v. Maryland*, 306 Md. 313, 316, 331 (1986).

To establish that a statement is admissible as a present sense impression, the proponent of the evidence must present other evidence that (1) the event or condition described in the statement actually occurred, and (2) the declarant perceived the event or condition and made the statement while doing so or immediately thereafter. The proponent cannot rely on the proffered statement itself. See generally Fed. R. Evid. 104(a) advisory committee’s note (California does not allow judge to consider inadmissible evidence in determining admissibility); M. Méndez, *Evidence: The California Code and the Federal Rules* 598-99 (3d ed. 2004) (same).

The proponent need not, however, present evidence corroborating the accuracy of the declarant’s description of the event or condition. It is up

to the trier of fact to assess the accuracy of the description. The existence of evidence corroborating the description's accuracy goes to its weight, not its admissibility. See, e.g., 2 K. Broun, *McCormick on Evidence* § 271, at 254 (6th ed. 2006); Passannante, Note, *Res Gestae, the Present Sense Impression Exception and Extrinsic Corroboration Under Federal Rule of Evidence 803(1) and Its State Counterparts*, 17 *Fordham Urb. L.J.* 89, 106 (1989).

This section does not apply to a pretrial identification. See generally *United States v. Brewer*, 36 F.3d 266 (2d Cir. 1994). For the admissibility of a pretrial identification, see Section 1238.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Miscellaneous Hearsay Exceptions: Forfeiture by Wrongdoing

February 2008

California Law Revision Commission
4000 Middlefield Road, Room D-1
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NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative. The Comments are legislative history and are entitled to substantial weight in construing the statutory provisions. For a discussion of cases addressing the use of Law Revision Commission materials in ascertaining legislative intent, see the Commission's most recent *Annual Report*.

Cite this report as *Miscellaneous Hearsay Exceptions: Forfeiture by Wrongdoing*, 37 Cal. L. Revision Comm'n Reports 443 (2007). This is part of publication #229.

STATE OF CALIFORNIA

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February 14, 2008

To: The Honorable Arnold Schwarzenegger
Governor of California, and
The Legislature of California

At the request of the Senate Committee on Judiciary, the Law Revision Commission has been studying forfeiture by wrongdoing as an exception to the hearsay rule. The Commission submits this report in compliance with the March 1, 2008, deadline for this study.

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.

In 2007, the California Supreme Court gave guidance on the federal constitutional requirements for forfeiture. According to that court, those constitutional requirements are less stringent than the statutory requirements for admission of hearsay under the federal exception for forfeiture by wrongdoing, and far less stringent than the requirements for admission of hearsay under the California exception for forfeiture by wrongdoing. The Law Revision Commission was asked to consider whether California law should be revised to conform to the constitutional minimum as articulated by the California Supreme Court.

The ultimate authority on the federal constitutional requirements is not the California Supreme Court but the United States Supreme Court. The United States Supreme Court has not yet given guidance on key issues relating to forfeiture of the constitutional right of confrontation. Early this year, however, it agreed to review the California Supreme Court's decision on that topic. The United States Supreme Court is expected to issue its decision in the case by the end of June.

The Law Revision Commission recommends that the Legislature take no action on forfeiture by wrongdoing until after the United States Supreme Court issues the forthcoming decision. At that time, the Legislature will be in a better position than at present to assess the merits of the possible approaches.

In its study, the Commission considered the following possibilities:

- Repeal California’s existing provision on forfeiture by wrongdoing and replace it with a provision that tracks the constitutional minimum as articulated by the California Supreme Court.
- Replace the existing provision with one similar to the federal rule.
- Broaden the existing provision to some extent.
- Leave the law alone.

To assist the Legislature when it assesses how to proceed, this report describes each of these approaches and relevant points to consider. After the United States Supreme Court acts, the Commission could provide further analysis if needed.

Whatever the Legislature decides on forfeiture by wrongdoing as an exception to the hearsay rule, its decision will have major implications for the criminal justice system and the public. It should make that decision carefully, with thorough deliberations and ample opportunity for persons to share their views.

In addition to studying forfeiture by wrongdoing, the Commission was asked to study whether a witness who refuses to testify should be considered “unavailable” for purposes of the hearsay rule. The Commission recommends that California’s provision on unavailability be amended to expressly recognize that a witness is unavailable if the witness refuses to testify on a subject, despite a court order to

do so. This reform is in order regardless of how the United States Supreme Court rules on forfeiture of the federal constitutional right of confrontation.

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

Respectfully submitted,

Sidney Greathouse
Chairperson

ACKNOWLEDGMENTS

Comments from knowledgeable persons are invaluable in the Commission's study process. In this study, the Commission is especially grateful for the assistance of Prof. Miguel Méndez (Stanford Law School), who has served as the Commission's consultant for its general review of the Evidence Code. The Commission would also like to express its appreciation to the other individuals and organizations who have taken the time to share their thoughts with the Commission.

Inclusion of the name of an individual or organization should not be taken as an indication of the individual's opinion or the organization's position on any aspect of this recommendation. The Commission regrets any errors or omissions that may have been made in compiling these acknowledgments.

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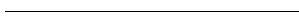
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MISCELLANEOUS HEARSAY EXCEPTIONS: FORFEITURE BY WRONGDOING

The Law Revision Commission was directed to study forfeiture by wrongdoing as an exception to the hearsay rule.¹ The Commission submits this report in compliance with the March 1, 2008, deadline for its report.²

On some occasions, misconduct by a defendant causes a declarant (a person who made a statement) to be unavailable to testify at trial. For example, a criminal defendant charged with a third strike might arrange for a key witness to be murdered. The goal of this study was to determine under which circumstances such misconduct should constitute an exception to the hearsay rule, such that an out-of-court statement by the unavailable witness can be introduced against the defendant. Any statute on this point will have to comply with the Confrontation Clause of the federal³ and state⁴ constitutions.

A related issue is whether the statutory definition of an “unavailable” witness for purposes of the hearsay rule should

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). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

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

3. U.S. Const. amend. VI.

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

expressly include a witness who refuses to testify. The Commission was also asked to study this issue.⁵

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

Next, the Commission examines what constitutes unavailability for purposes of the hearsay rule. The Commission recommends that California's provision on unavailability be amended to codify case law recognizing that a witness who refuses to testify is unavailable.

Finally, the Commission discusses forfeiture by wrongdoing as an exception to the hearsay rule. Due to a pending decision by the United States Supreme Court, the Commission has concluded that it would be premature to recommend any legislation on this topic at this time. After the Court issues its decision, the constitutional constraints will be more clear than at present, and there will be new analyses of the relevant policy considerations for the Legislature to consider. The Legislature should take no action until after it has the benefit of this guidance, which is expected by the end of June 2008.

To assist the Legislature when it determines how to proceed, this report describes and provides information on the possible approaches that the Commission investigated:

- Repeal California's existing provision on forfeiture by wrongdoing and replace it with a provision that tracks the constitutional minimum as articulated by the California Supreme Court.
- Replace the existing provision with one similar to the corresponding federal rule.
- Broaden the existing provision to some extent.
- Leave the law alone.

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

If needed, the Commission could provide further analysis after the United States Supreme Court acts.

THE HEARSAY RULE AND ITS PURPOSE

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

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

Except as otherwise provided by law, hearsay evidence is inadmissible.⁸ This is known as the hearsay rule.⁹

A principal reason for the hearsay rule is to exclude a statement when the truthfulness of the declarant cannot be tested through cross-examination.¹⁰ The process of cross-examination allows an opposing party to expose both inadvertent and conscious inaccuracies in perception and recollection.¹¹ Cross-examination has been described as “the

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”).

‘greatest legal engine ever invented for the discovery of truth.’”¹²

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

A third reason for the hearsay rule is that if a witness testifies before the trier of fact, that enables the trier of fact to take the demeanor of the witness into account in assessing credibility.”¹⁵ A person who sees, hears, and observes a witness may be convinced of, or unpersuaded of, the witness’ honesty, integrity, and reliability. Evaluating the credibility of a witness depends largely on intuition, “that intangible, inarticulable capacity of one human being to evaluate the

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).

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)).

sincerity, honesty and integrity of another human being with whom he comes in contact.”¹⁶

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

THE CONFRONTATION CLAUSE AND ITS PURPOSE

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

The California Supreme Court has held that the state constitutional right of confrontation is not coextensive with the corresponding federal right.²⁰ In other words, the Court has held that California is not bound to adopt the same

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). The California Supreme Court apparently has not revisited the *Chavez* ruling since the Truth-in-Evidence provision (Cal. Const. art. I, § 28(d)) was added to the California Constitution in 1982. For a case discussing the impact of the Truth-in-Evidence provision in another context, see *People v. May*, 44 Cal. 3d 309, 314, 748 P.2d 307, 243 Cal. Rptr. 369 (1988).

interpretation of its Confrontation Clause that the federal courts adopt with regard to the federal Confrontation Clause.²¹

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

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

a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which

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).

he gives his testimony whether he is worthy of belief.²⁵

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

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

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.

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

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

THE *CRAWFORD* AND *DAVIS* DECISIONS

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

In *Crawford*, the Court harshly criticized the *Roberts* test. It pointed out that the “principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.”³⁷ The Court explained that in light of this purpose, the *Roberts* test is both overbroad and

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. 547 U.S. 813, 126 S.Ct. 2266 (2006).

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

36. *Id.* at 66.

37. 541 U.S. at 50.

overly narrow,³⁸ and so unpredictable that it does not provide meaningful protection even with respect to core confrontation violations.³⁹ According to the Court, the most serious vice of the *Roberts* test is not its unpredictability but rather “its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude.”⁴⁰

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

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

38. *Id.* at 60.

39. *Id.* at 62-63.

40. *Id.* at 63.

41. *Id.* at 53-54.

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

43. *Id.* at 68.

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

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

The Court also made clear that a nontestimonial statement is subject to traditional limitations upon hearsay evidence, but it is not subject to the federal Confrontation Clause.⁴⁵

THE DEFINITION OF UNAVAILABILITY

The hearsay rule has many exceptions.⁴⁶ In general, two justifications for these exceptions have been advanced.⁴⁷ First, there is the necessity rationale: An exception may be justified by identifying a special need for the evidence.⁴⁸ Second, there is the reliability rationale: An exception may be based on a belief that the circumstances under which a statement was made suggest that the statement is reliable to prove the truth of the matter stated.⁴⁹ These circumstances are considered an

44. 547 U.S. at ___, 126 S.Ct. at 2273-74.

45. *Id.* at 2273.

46. See Evid. Code §§ 1220-1380.

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

48. *Id.*

49. *Id.*

adequate substitute for the benefits of cross-examining the declarant under oath in the presence of the trier of fact.⁵⁰

Consistent with the necessity rationale, some exceptions to California's hearsay rule apply only if the declarant is unavailable.⁵¹ Similarly, some exceptions to the federal rule that prohibits hearsay evidence⁵² apply only if the declarant is unavailable.⁵³

To facilitate application of these exceptions, both the Evidence Code⁵⁴ and the Federal Rules of Evidence⁵⁵ define

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.

what it means for a declarant to be “unavailable.” The federal and the California definitions of “unavailability” are similar, but differ in certain respects. In particular, they differ in their approach to a witness who refuses to testify.⁵⁶

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) 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.

One of the distinctions is that the federal rule, unlike the California statute, says that a declarant is unavailable if the declarant “testifies to a lack of memory of the subject matter of the declarant’s statement.” See Fed. R. Evid. 804(a)(3). In this study, the Commission tentatively recommended that California adopt the federal approach on this point. Tentative Recommendation on *Miscellaneous Hearsay Exceptions: Forfeiture by Wrongdoing* (Oct. 2007), pp. 9-10, 35-36. Due to concerns raised in a comment, the Commission has withdrawn that proposal for further study. See Commission Staff Memorandum 2008-2, p. 7 & Exhibit pp. 5-6; Minutes of Jan. 17, 2008, Commission Meeting, p. 3.

Unavailability of a Person Who Refuses to Testify

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

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

The California Supreme Court upheld that ruling.⁶⁰ Because the California statute on unavailability does not expressly cover a refusal to testify, however, the Court's determination that the witness was unavailable was based on the provision that applies when a witness is "unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity."⁶¹ Specifically, the Court ruled that a trial court is permitted to "consider whether a mental state induced by fear of personal or family harm is a 'mental infirmity' that

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

58. See Evid. Code § 240. Although the statute does not expressly address a refusal to testify, it does expressly address a failure to appear. See subdivision (a)(4) (declarant is unavailable if absent from hearing and court cannot compel declarant's attendance by its process) and subdivision (a)(5) (declarant is unavailable if absent from hearing and proponent of statement has exercised reasonable diligence but has been unable to compel declarant's attendance by court's process).

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).

renders the person harboring the fear unavailable as a witness.”⁶²

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

Need for the Reform

This reform relating to a refusal to testify was advisable before *Crawford* was decided.⁶⁵ To some extent, *Crawford* has reinforced the need for the reform.

The new approach to the Confrontation Clause enunciated in *Crawford* made some prosecutions more difficult than they would have been in the past.⁶⁶ Key evidence in a case may be characterized as testimonial. If so, the evidence is inadmissible under *Crawford* unless the declarant testifies at

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

66. Tuerkheimer, *Forfeiture in the Domestic Violence Realm* (2007), <http://www.texasrev.com/seealso/pdfs/85TexasLRevSeeAlso49.pdf>.

Prof. Tuerkheimer’s online article is reproduced in Commission Staff Memorandum 2008-7 (Feb. 11, 2008), Exhibit pp. 2-7.

trial, or the declarant is unavailable to testify at trial and the defendant had a prior opportunity to cross-examine the declarant.⁶⁷

For example, a prosecution for domestic violence, child abuse, or criminal conspiracy may rely on a hearsay statement of an unavailable witness.⁶⁸ These cases are particularly affected by *Crawford* because the victim is often reluctant to testify, prone to recant a prior statement, or considered too young to testify.⁶⁹

67. As Prof. Tuerkheimer explains:

Before the Supreme Court's reinterpretation of the Confrontation Clause, prosecuting domestic violence without the testimony of a victim (known as "victimless" prosecution) by using various hearsay exceptions to admit her out-of-court statements had become commonplace. The Court's decisions in *Crawford v. Washington* and *Davis v. Washington* have transformed this landscape. Because the designation of a statement as "testimonial" now subjects it to exclusion, the viability of a significant number of formerly prosecutable domestic violence cases has been undermined.

Id. at 49-50.

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

69. *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.").

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*:

Concern about the impact of *Crawford* on these types of cases was considerably alleviated by *Davis*, which clarified that a statement is not testimonial if it is made during a police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable the police to meet an ongoing emergency.⁷⁰ For example, if a person makes a 911 call for help against a bona fide, ongoing physical threat, and the 911 operator elicits statements that are given under unsafe conditions and are necessary to resolve the present emergency, the statements are nontestimonial and thus can be admitted without satisfying the *Crawford* requirements.⁷¹

Concern about the impact of *Crawford* could be further alleviated by amending California's statute on unavailability to expressly state that a witness who refuses to testify despite a court order is unavailable for purposes of the hearsay rule. That would not represent a substantive change in existing law,⁷² but it would facilitate reference to the applicable rules. Courts, attorneys, litigants, and others could simply refer to the text of the statute, without having to search and explain case law on these matters. Amending the statute in that manner would thus help courts and other persons determine whether the requirement of unavailability for certain hearsay exceptions is met.

Guarantee to Action or Dangerous Solution, 63 Fordham L. Rev. 853, 873 (1994).

70. 126 S.Ct. at 2273.

71. *Id.* at 2276-77.

72. See, e.g., *People v. Rojas*, 15 Cal. 3d 540, 542 P.2d 229, 125 Cal. Rptr. 357 (1975) (witness who appeared in court but refused to testify was unavailable); *People v. Francis*, 200 Cal. App. 3d 579, 245 Cal. Rptr. 923 (1988) (same); *People v. Walker*, 145 Cal. App. 3d 886, 893-94, 193 Cal. Rptr. 812 (1983) (same); *People v. Sul*, 122 Cal. App. 3d 355, 175 Cal. Rptr. 893 (1981) (same).

FORFEITURE BY WRONGDOING

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

To address such misconduct, California and some other jurisdictions have adopted a forfeiture by wrongdoing exception to the hearsay rule. In specified circumstances, such an exception allows an out-of-court statement by an unavailable declarant to be admitted at trial over a hearsay objection. A closely related doctrine is the forfeiture by wrongdoing exception to the constitutional right of confrontation.

The discussion below (1) describes existing law on the forfeiture by wrongdoing exception to the hearsay rule, (2) discusses the forfeiture by wrongdoing exception to the Confrontation Clause, (3) recounts recent interest in revising California's forfeiture by wrongdoing exception to the hearsay rule and explains why such action would be premature at this time, (4) provides information about some possible approaches for the Legislature to consider in the future, and (5) offers a few general suggestions regarding how the Legislature should proceed.

Existing Law on Forfeiture by Wrongdoing as an Exception to the Hearsay Rule

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

California Approach

The California provision, Evidence Code Section 1350, is detailed and incorporates many safeguards to ensure that it is only invoked where there is strong evidence that a criminal defendant engaged in egregious conduct to prevent a witness from testifying.⁷³ The provision was enacted in 1985 to

73. 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) 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

address what is known as the “murdered witness problem” — the unfortunate reality that “serious charges are dismissed, lost or reduced every year because of the unavailability of prosecution witnesses who have been murdered or kidnapped by the persons against whom they would testify.”⁷⁴

Federal Approach

The corresponding federal provision, Federal Rule of Evidence 804(b)(6), was enacted only ten years ago. It is broader in scope than the California provision, but it is far less detailed. It creates a hearsay rule exception for a statement that is “offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.”⁷⁵ The

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.

74. *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.

75. 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

provision is intended as a “prophylactic rule” to deal with abhorrent behavior that strikes at the heart of the justice system.⁷⁶

Differences Between the California Approach and the Federal Approach

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

- **Type of Case in Which the Exception Applies.** The California provision applies only in “a criminal proceeding charging a serious felony.”⁷⁷ The federal rule applies in any type of case, civil or criminal.⁷⁸
- **Party Against Whom the Exception May Be Invoked.** The California provision can be invoked against a party who wrongfully sought to prevent the arrest or prosecution of the party.⁷⁹ There does not seem to be any basis for invoking the California provision against the government. In contrast, the federal rule “applies to all parties, including the government.”⁸⁰
- **Reason for the Declarant’s Unavailability.** The California provision applies only when the declarant’s unavailability “is the result of the death by homicide or the kidnapping of the declarant.”⁸¹ Under 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).

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

77. Evid. Code § 1350(a).

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

79. Evid. Code § 1350(a)(1).

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

81. Evid. Code § 1350(a)(1).

federal rule, “[t]he wrongdoing need not consist of a criminal act.”⁸²

- **Acquiescence in Wrongdoing that Results in the Declarant’s Unavailability.** The California provision applies only when “the declarant’s unavailability was *knowingly caused by, aided by, or solicited by* the party against whom the statement is offered....”⁸³ In contrast, under the federal rule it is sufficient if a party “has engaged *or acquiesced* in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.”⁸⁴
- **Standard of Proof.** The California provision requires “*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.”⁸⁵ The federal rule does not expressly state the applicable standard of proof, but the advisory committee’s note explains that the “usual Rule 104(a) *preponderance of the evidence standard* has been adopted in light of the behavior the new Rule 804(b)(6) seeks to discourage.”⁸⁶
- **Evidence that the Proponent of the Hearsay Statement Is Responsible for the Declarant’s Unavailability.** The California provision cannot be invoked if there is “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

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

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

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

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

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

statement.”⁸⁷ The federal rule does not include such a limitation.⁸⁸

- **Form of the Hearsay Statement.** The California provision applies only if the hearsay 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.”⁸⁹ The federal rule does not impose any limitations on the form of the hearsay statement.⁹⁰
- **Circumstances Under Which the Hearsay Statement Was Made.** The California provision can be invoked only if the hearsay statement “was made under circumstances which indicate its trustworthiness and was not the result of promise, inducement, threat, or coercion.”⁹¹ The federal rule does not include such a limitation.⁹²
- **Relevance of the Hearsay Statement.** The California provision expressly states that the hearsay statement must be “relevant to the issues to be tried.”⁹³ The federal rule includes no such language.⁹⁴ In both contexts, such language is unnecessary due to the general prohibition on introducing irrelevant evidence.⁹⁵

87. Evid. Code § 1350(a)(2).

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

89. Evid. Code § 1350(a)(3).

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

91. Evid. Code § 1350(a)(4).

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

93. Evid. Code § 1350(a)(5).

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

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

- **Evidence Connecting the Defendant to Commission of the Serious Felony Charged.** Under the California provision, the hearsay statement cannot be the sole evidence that connects the defendant to the serious felony charged against the defendant. Rather, the statement is admissible only if it “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.”⁹⁶ “The corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.”⁹⁷ The federal rule includes no such requirement.⁹⁸
- **Notice of Intent to Invoke the Forfeiture by Wrongdoing Exception.** The California provision requires the prosecution to notify the defendant ten days before the prosecution offers a hearsay statement under the provision.⁹⁹ The federal rule does not require a party to give advance notice of intent to invoke the rule.¹⁰⁰
- **Procedure for Determining Whether the Exception Applies.** The California provision expressly states that if a hearsay statement is offered under it during trial, “the court’s determination shall be made out of the presence of the jury.”¹⁰¹ The provision also gives guidance on what procedure to use if the defendant elects to testify in connection with that

96. Evid. Code § 1350(a)(6).

97. *Id.*

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

99. 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.*

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

101. Evid. Code § 1350(c).

determination.¹⁰² The federal rule does not provide guidance on these points.¹⁰³

- **Multiple Hearsay.** The California provision expressly states that if the proffered statement “includes hearsay statements made by anyone other than the declarant who is unavailable ..., those hearsay statements are inadmissible unless they meet the requirements of an exception to the hearsay rule.”¹⁰⁴ The federal rule includes no such language,¹⁰⁵ but the general rule governing multiple hearsay would seem to apply.¹⁰⁶
- **Use of Proffered Statement in Determining Whether Exception Applies.** The California provision and the federal rule also differ in the extent to which they permit the court to consider the proffered statement in determining whether the exception applies.¹⁰⁷

In summary, California’s hearsay exception for forfeiture by wrongdoing is narrower and incorporates more restrictions than the corresponding federal rule. The many restrictions in the California provision “evince an abundance of caution when abolishing the right of criminal defendants to object to hearsay even when they have been charged with bringing about the hearsay declarant’s unavailability as a witness.”¹⁰⁸

102. *Id.*

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

104. Evid. Code § 1350(e).

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

106. See Fed. R. Evid. 805. California has a similar provision. See Evid. Code § 1201.

107. See *infra* note 195 & accompanying text.

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

Other Jurisdictions

Six states have adopted laws or court rules identical to the federal exception for forfeiture by wrongdoing.¹⁰⁹ In addition to mirroring the language used in the federal provision, several of these state provisions have comments that explicitly say the state and federal provisions are identical.¹¹⁰

Four other states have adopted provisions similar but not identical to the federal exception: Connecticut,¹¹¹ Michigan,¹¹² Ohio,¹¹³ and Tennessee.¹¹⁴ Each of these states omits the

109. Del. R. Evid. 804(b)(6); Ky. R. Evid. 804(b)(5); N.M. R. Evid. 11-804(B)(5); N.D. R. Evid. 804(b)(6); Pa. R. Evid. 804(b)(6); Vt. R. Evid. 804(b)(6).

110. Comment to Del. R. Evid. 804(b)(6) (“D.R.E. 804(b)(6) tracks F.R.E. 804(b)(6).”); Comment to N.M. R. Evid. 11-804(B)(5) (“The new exception added to Subparagraph (5) of Paragraph B is taken verbatim from federal rule 804(b)(6)...”); Comment to Pa. R. Evid. 804(b)(6) (“Pa.R.E. 804(b)(6) is identical to F.R.E. 804(b)(6).”); Comment to Vt. R. Evid. 804(b)(6) (“The rule is identical to the 1997 amendment to the Federal Rules of Evidence which added F.R.E. 804(b)(6)”).

111. The Connecticut provision states:

Conn. Evid. Code § 8-6. Hearsay Exceptions: Declarant Must Be Unavailable

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

....

(8) Forfeiture by wrongdoing. A statement offered against a party that has engaged in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

112. The Michigan provision states:

Mich. R. Evid. 804(b). Hearsay exceptions

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

....

(6) Statement by declarant made unavailable by opponent. A statement offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

113. The Ohio provision states:

Ohio R. Evid. 804(B). Hearsay exceptions

reference to having “acquiesced in” wrongdoing;¹¹⁵ Michigan substitutes a reference to having “encouraged” wrongdoing.¹¹⁶ Ohio requires the proponent of the hearsay statement to give the adverse party advance notice of intent to use the statement at trial.¹¹⁷

Three other states have provisions quite different from the federal exception. In Hawaii, it is sufficient that a party “procured the unavailability of the declarant as a witness.”¹¹⁸ Apparently, it is not necessary to show that the party intended to procure the unavailability of the declarant.

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

....

(6) Forfeiture by wrongdoing. A statement offered against a party if the unavailability of the witness is due to the wrongdoing of the party for the purpose of preventing the witness from attending or testifying. However, a statement is not admissible under this rule unless the proponent has given to each adverse party advance written notice of an intention to introduce the statement sufficient to provide the adverse party a fair opportunity to contest the admissibility of the statement.

114. The Tennessee provision states:

Tenn. R. Evid. 804(b). Hearsay Exceptions

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

....

(6) Forfeiture by Wrongdoing. A statement offered against a party that has engaged in wrongdoing that was intended to and did procure the unavailability of the declarant as a witness.

115. See *supra* notes 111-14.

116. See *supra* note 112.

117. See *supra* note 113.

118. The Hawaii provision states:

Haw. R. Evid. 804(b). Hearsay exceptions

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

....

(7) Forfeiture by wrongdoing. A statement offered against a party that has procured the unavailability of the declarant as a witness.

Oregon draws a distinction between when a party intentionally or knowingly engages in criminal conduct that causes death, incapacity, or incompetence of the declarant, and when a party engages in, directs, or otherwise participates in wrongful conduct that causes the declarant to be unavailable.¹¹⁹ In the latter situation, the proponent of the hearsay statement must show that the declarant intended to cause the declarant to be unavailable as a witness.¹²⁰ Such proof is not required in the former situation.¹²¹

Finally, Maryland has two different hearsay exceptions for forfeiture by wrongdoing, one for a civil case¹²² and the other

119. The Oregon provision states:

Or. Rev. Stat. § 40.465(3)

The following are not excluded by ORS 40.455 if the declarant is unavailable as a witness:

....

(f) A statement offered against a party who intentionally or knowingly engaged in criminal conduct that directly caused the death of the declarant, or directly caused the declarant to become unavailable as a witness because of incapacity or incompetence.

(g) A statement offered against a party who engaged in, directed or otherwise participated in wrongful conduct that was intended to cause the declarant to be unavailable as a witness, and did cause the declarant to be unavailable.

120. See *supra* note 119.

121. *Id.*

122. Maryland Rule 5-804(5), which pertains to forfeiture by wrongdoing in civil actions, provides:

Witness Unavailable Because of Party's Wrongdoing

(A) Civil Actions. In civil actions in which a witness is unavailable because of a party's wrongdoing, a statement that (i) was (a) given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition; (b) reduced to writing and was signed by the declarant; or (c) recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement, and (ii) is offered against a party who has engaged in, directed, or conspired to commit wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness, provided however the statement may not be admitted unless, as soon as practicable after the proponent of the statement learns that the declarant will be

for a criminal case.¹²³ Both of these exceptions are detailed and, like California's forfeiture by wrongdoing exception,

unavailable, the proponent makes known to the adverse party the intention to offer the statement and the particulars of it.

(B) Criminal Causes. In criminal causes in which a witness is unavailable because of a party's wrongdoing, admission of the witness's statement under this exception is governed by Code, Courts Article, § 10-901.

123. Maryland Courts and Judicial Procedure Code § 10-901, which pertains to criminal actions, provides:

Hearsay evidence; witnesses unavailable due to wrongdoing

(a) During the trial of a criminal case in which the defendant is charged with a felonious violation of Title 5 of the Criminal Law Article or with the commission of a crime of violence as defined in § 14-101 of the Criminal Law Article, a statement as defined in Maryland Rule 5-801(a) is not excluded by the hearsay rule if the statement is offered against a party that has engaged in, directed, or conspired to commit wrongdoing that was intended to and did procure the unavailability of the declarant of the statement, as defined in Maryland Rule 5-804.

(b) Subject to subsection (c) of this section, before admitting a statement under this section, the court shall hold a hearing outside the presence of the jury at which:

(1) The Maryland Rules of Evidence are strictly applied; and

(2) The court finds by clear and convincing evidence that the party against whom the statement is offered engaged in, directed, or conspired to commit the wrongdoing that procured the unavailability of the declarant.

(c) A statement may not be admitted under this section unless:

(1) The statement was:

(i) Given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(ii) Reduced to writing and signed by the declarant; or

(iii) Recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement; and

(2) As soon as is practicable after the proponent of the statement learns that the declarant will be unavailable, the proponent notifies the adverse party of:

(i) The intention to offer the statement;

(ii) The particulars of the statement; and

(iii) The identity of the witness through whom the statement will be offered.

provide safeguards that are not present in the federal exception.¹²⁴

The remaining thirty-six states do not have a statute or court rule on forfeiture by wrongdoing as an exception to the hearsay rule.¹²⁵ A few of these states have recently investigated the possibility of adopting such a provision, but do not yet appear to have done so.¹²⁶

124. See *supra* notes 122-23.

125. These states are Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oklahoma, Rhode Island, South Carolina, South Dakota, Texas, Utah, Washington, Virginia, West Virginia, Wisconsin, Wyoming.

126. In Washington, a bill (HB 1508) to enact a provision like the federal exception for forfeiture by wrongdoing was introduced in 2005. It was not enacted.

Similarly, the Montana Supreme Court has been investigating the possibility of adopting a rule like the federal exception. See *Supreme Court Amends the Rules of Evidence*, 32 Mont. Law. 26, 26-27 (Aug. 2007).

The Evidence Rules Advisory Committee in Idaho has extensively studied this matter. After considering several different approaches, it recommended the following provision:

(5) Forfeiture by wrongdoing

(a) A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, prevent the testimony of the declarant as a witness, provided that the party offering the statement shall file and serve notice reasonably in advance of trial or during the trial if the court excuses pretrial notice on good cause shown, of the party's intent to rely upon this exception and the evidence it intends to present to establish the evidence's admissibility under this exception.

(b) The determination of the admissibility of the evidence shall be held outside the presence of the jury. The proponent of the evidence has the burden of proving the applicability of this exception by a preponderance of the evidence when the statement is offered in a civil matter or by a defendant in a criminal case. Clear and convincing evidence is required if the statement is offered against a defendant in a criminal case.

See Evidence Rules Advisory Committee, Minutes of Meeting on Nov. 9, 2007 (available at www.isc.idaho.gov/rules/IRE-CommMin-1107.html).

Forfeiture by Wrongdoing Exception to the Confrontation Clause

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

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

Key case law on this point is discussed below.

Early Decisions by the United States Supreme Court

Although the Confrontation Clause generally gives a defendant the right to confront an adverse witness, the United States Supreme Court has long recognized an exception when the defendant has taken steps to prevent a witness from testifying. As the Court explained in *Reynolds v. United States*,¹²⁷

The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some

127. 98 U.S. 145, 158 (1878).

lawful way, he is in no condition to assert that his constitutional rights have been violated.

The Court further explained that the forfeiture exception “has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong; and, consequently, if there has not been, in legal contemplation, a wrong committed, the way has not been opened for the introduction of the testimony.”¹²⁸ In several later cases, the Court mentioned the forfeiture exception, but did not provide much more guidance on its contours.¹²⁹

Recent Decisions by the United States Supreme Court

When it decided *Crawford* in 2004, the Court made clear that the new approach it took in that case did not negate the forfeiture exception to the Confrontation Clause. After carefully distinguishing between hearsay exceptions that do and do not “claim to be a surrogate means of assessing reliability,” the Court explained that “the rule of forfeiture by wrongdoing (*which we accept*) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternate means of determining reliability.”¹³⁰

In *Davis*, the hearsay proponents and several amici contended that a testimonial statement should be more readily admissible in a domestic violence case than in other cases because that “particular type of crime is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial.”¹³¹ In responding to that

128. *Id.* at 159.

129. 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).

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

131. *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 2279-80 (2006).

contention, the Court did not establish a special rule applicable to a testimonial statement in a domestic violence case. It did, however, discuss the forfeiture exception to the Confrontation Clause in some detail:

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

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

We have determined that, absent a finding of forfeiture by wrongdoing, the Sixth Amendment operates to exclude Amy Hammon’s affidavit. The

Indiana courts may (if they are asked) determine on remand whether such a claim of forfeiture is properly raised and, if so, whether it is meritorious.¹³²

Recent Decision by the California Supreme Court

A recent decision by the California Supreme Court provides further guidance on the scope of the forfeiture by wrongdoing exception to the federal Confrontation Clause. In *People v. Giles*,¹³³ the defendant admitted killing his ex-girlfriend, but he claimed to have acted in self-defense.¹³⁴ Over his objection, “the trial court admitted the victim’s prior statements to a police officer who had been investigating a report of domestic violence involving defendant and the victim.”¹³⁵ In those statements, the victim described an incident that allegedly occurred a few weeks before the killing. She said that the defendant “had held a knife to her and threatened to kill her.”¹³⁶

The Court concluded that the defendant “forfeited his confrontation clause challenge to the victim’s prior out-of-court statements to the police.”¹³⁷ In reaching that conclusion, the Court addressed a number of important issues.

First, the defendant argued that the forfeiture by wrongdoing exception to the Confrontation Clause was inapplicable because there was no showing that the defendant killed the victim “*with the intent of preventing her testimony*

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

133. 40 Cal. 4th 833, 152 P.3d 433, 55 Cal. Rptr. 3d 133 (2007), *cert. granted*, 76 U.S.L.W. 3364, 3371 (U.S. Jan. 11, 2008) (No. 07-6053).

134. *Id.* at 837.

135. *Id.*

136. *Id.*

137. *Id.* at 855.

at a pending or potential trial.”¹³⁸ The Court discussed this point at length and ultimately concluded that it is not necessary to show an intent to prevent testimony to invoke the forfeiture exception to the Confrontation Clause:

Although courts have traditionally applied the forfeiture rule to witness tampering cases, forfeiture principles can and should logically and equitably be extended to other types of cases in which an intent-to-silence element is missing. As the Court of Appeal here stated, “Forfeiture is a logical extension of the equitable principle that no person should benefit from his own wrongful acts. A defendant whose intentional criminal act renders a witness unavailable for trial benefits from his crime if he can use the witness’s unavailability to exclude damaging hearsay statements by the witness that would otherwise be admissible. *This is so whether or not the defendant specifically intended to prevent the witness from testifying at the time he committed the act that rendered the witness unavailable.*”¹³⁹

Thus, the Court concluded it is enough to show that the witness is genuinely unavailable to testify and the defendant’s intentional criminal act caused that unavailability.¹⁴⁰

Second, the Court considered “whether the doctrine of forfeiture by wrongdoing applies where the alleged wrongdoing *is the same as the offense for which defendant was on trial.*”¹⁴¹ In a classic witness tampering case, “the defendant is *not* on trial for the same wrongdoing that caused the forfeiture of his confrontation right, but rather for a prior underlying crime about which the victim was about to

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

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

140. *Id.* at 854.

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

testify.”¹⁴² In *Giles*, however, the defendant was on trial for murder, the same wrongdoing that the prosecution pointed to in contending that the defendant had forfeited his right of confrontation. The argument against extending the forfeiture exception to such a situation is that “in ruling on the evidentiary matter, a trial court is required, in essence, to make *the same determination of guilt of the charged crime as the jury.*”¹⁴³

The Court rejected that argument, explaining that the presumption of innocence and right to jury trial will not be violated because the jury will not know of the judge’s preliminary finding and will use different information and a different standard of proof in deciding the defendant’s guilt.¹⁴⁴ Consistent with that conclusion, the Court made clear that the jury should not be informed of the judge’s preliminary finding that the defendant committed an intentional criminal act.¹⁴⁵

Third, the Court considered what standard applies in proving the facts necessary to invoke the forfeiture exception under the federal Confrontation Clause. The defendant argued that those facts must be proved by *clear and convincing evidence*. The Court disagreed. It noted that the “majority of the lower federal courts have held that the applicable standard necessary for the prosecutor to demonstrate forfeiture by wrongdoing is *by a preponderance of the evidence.*”¹⁴⁶ The Court endorsed that standard, explaining that the Constitution

142. *Id.* (emphasis added).

143. *Id.* (emphasis added).

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

145. *Id.* at 854.

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

only requires proof that it is more probable than not that the defendant procured the declarant's unavailability.¹⁴⁷

Fourth, the Court discussed whether the proffered hearsay statement can be considered in determining whether the forfeiture exception applies. The Court concluded that the statement can be considered, subject to a limitation. Specifically, the Court cautioned that "a trial court cannot make a forfeiture finding based solely on the unavailable witness's unfronted testimony; there must be independent corroborative evidence that supports the forfeiture finding."¹⁴⁸

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

The forfeiture by wrongdoing doctrine, as adopted by us, only bars a defendant's objections under the confrontation clause of the federal Constitution and does not bar statutory objections under the Evidence Code. Thus, even if it is established that a defendant has forfeited his or her right of confrontation, the contested evidence is still governed by the rules of evidence; a trial court should still determine whether an unavailable witness's prior hearsay statement falls within a recognized hearsay exception and whether the probative value of the proffered evidence outweighs its prejudicial effect. (Evid. Code, § 352.)¹⁴⁹

147. *Id.* at 853.

148. *Id.* at 854.

149. *Id.*

Justice Werdegar's Concurrence

Justice Werdegar, joined by Justice Moreno, concurred in the California Supreme Court's decision in *Giles*. She agreed with the majority that "the doctrine of forfeiture by wrongdoing is not confined exclusively to witness-tampering cases, in which a defendant commits malfeasance in order to procure the unavailability of a witness," but can also be applied "where defendant's actions in procuring a witness's unavailability were the same actions for which he stood trial."¹⁵⁰ She criticized the Court, however, for addressing and resolving two subsidiary questions that were unnecessary to disposition of the case before it.¹⁵¹

In particular, Justice Werdegar noted:

- The Court "decides whether the prosecution, in order to use the victim's hearsay statements, must demonstrate the defendant's wrongdoing by clear and convincing evidence or only a preponderance of the evidence, despite its implicit acknowledgment the issue is not implicated here because either standard was satisfied."¹⁵²
- The Court "decides whether and to what extent the victim's challenged statements may be used in making this threshold showing of wrongdoing, despite the fact, again, the evidence independent of [the victim's] statements makes it unnecessary to speak to this point."¹⁵³

She explained that it was "unnecessary and unwise" to decide these issues because they were not addressed by either of the lower courts, they were not included in the grant of review

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

151. *Id.*

152. *Id.*

153. *Id.*

and thus not fully briefed, and they required constitutional analysis, which “should not be embarked on lightly and never when a case’s resolution does not demand it.”¹⁵⁴

Review by the United States Supreme Court

After losing the case, the defendant in *Giles* petitioned the United States Supreme Court, urging it to review the California Supreme Court’s decision. Specifically, the defendant asked the Court to consider the following issue:

Does a criminal defendant “forfeit” his or her Sixth Amendment Confrontation Clause claims upon a mere showing that the defendant has caused the unavailability of a witness, as some courts have held, or must there also be an additional showing that the defendant’s actions were undertaken for the purpose of preventing the witness from testifying, as other courts have held?

In petitioning the Court to take the case, the defendant pointed out that lower courts are sharply divided on this issue.¹⁵⁵ The petition also emphasized the magnitude of the issue:

154. *Id.* at 856, 857.

155. See Petition for *Certiorari* in *Giles*, p. 10; see also *United States v. Garcia-Meza*, 403 F.3d 364, 370 (6th Cir. 2005) (“There is no requirement that a defendant who prevents a witness from testifying against him through his own wrongdoing only forfeits the right to confront the witness where, in procuring the witness’s unavailability, he intended to prevent the witness from testifying.”); *Giles*, 40 Cal. 4th at 849 (“Although courts have traditionally applied the forfeiture rule to witness tampering cases, forfeiture principles can and should logically and equitably be extended to other types of cases in which an intent-to-silence element is missing.”); *People v. Moreno*, 160 P.3d 242, 247 (Colo. 2007) (“Because the People failed to prove that the defendant had any intent to prevent or dissuade the child from witnessing against him, the record fails to demonstrate that he forfeited his constitutional right to confront her.”); *People v. Stechly*, 225 Ill. 2d 246, 277, 870 N.E.2d 333, 312 Ill. Dec. 268 (Ill. 2007) (plurality) (“[W]e hold that the State must prove that the defendant

A forfeiture rule that is triggered by mere causality emasculates the right to confrontation guaranteed in *Crawford*, because this exception will swallow the rule and it creates a perverse incentive for prosecutors to introduce hearsay rather than provide an opportunity for cross-examination.

The expanded forfeiture rule has wide application because it makes forfeiture of confrontation rights

intended by his actions to procure the witness' absence to invoke the doctrine of forfeiture by wrongdoing."); *State v. Meeks*, 277 Kan. 609, 614-16, 88 P.3d 789 (Kan. 2004) (without discussing whether defendant intended to prevent testimony, court finds defendant forfeited his right of confrontation by murdering victim), *overruled on other grounds*, *State v. Davis*, 283 Kan. 569, 158 P.3d 317 (Kan. 2006); *Commonwealth v. Edwards*, 444 Mass. 526, 540, 830 N.E.2d 158 (Mass. 2005) ("We hold that a defendant forfeits, by virtue of wrongdoing, the right to object to the admission of an unavailable witness's out-of-court statements on both confrontation and hearsay grounds on findings that (1) the witness is unavailable; (2) the defendant was involved in, or responsible for, procuring the unavailability of the witness; and (3) the defendant acted with the intent to procure the witness's unavailability."); *State v. Fields*, 679 N.W.2d 341, 347 (Minn. 2004) (upholding district court's forfeiture ruling because "the district court's findings that Fields engaged in wrongful conduct, that he intended to procure the unavailability of Johnson and that the intentional wrongful conduct actually did procure the unavailability of Johnson, were not clearly erroneous."); *State v. Romero*, 141 N.M. 403, 156 P.3d 694, 703, *cert. dismissed*, __ S.Ct. __, 2008 WL 114456 (Jan. 11, 2008) (No. 07-37) ("[W]e reaffirm our holding in *Alvarez-Lopez* that the prosecution is required to prove intent to procure the witness's unavailability in order to bar a defendant's right to confront that witness."); *State v. Mason*, 160 Wash. 2d 910, 926, 162 P.2d 396 (2007) ("Specific intent to prevent testimony is unnecessary. Knowledge that the foreseeable consequences of one's actions include a witness' unavailability at trial is adequate to conclude a forfeiture of confrontation rights."); *State v. Mechling*, 219 W.Va. 366, 326, 633 S.E.2d 311 (W.Va. 2006) ("In order for forfeiture to be proven in domestic violence actions, prosecutors, law enforcement officers and courts must secure evidence — possibly from third parties — prior to trial, indicating that these victims are too frightened to testify about the intimidating and coercive character of the accused's actions."); *State v. Jensen*, 299 Wis. 2d 267, 272, 727 N.W.2d 518, 2007 WI 26 (Wisc. 2007) ("Today, we explicitly adopt this doctrine whereby a defendant is deemed to have lost the right to object on confrontation grounds to the admissibility of out-of-court statements of a declarant whose unavailability the defendant has caused.").

virtually automatic in every homicide case. For the first time, an entire class of defendants has been stripped of the right to confrontation.

The expanded forfeiture rule also applies to cases where the witness could testify but does not. Prosecutors have argued that the defendant forfeits the right to confrontation whenever the witness's absence is due to the trauma of the criminal act. Domestic violence and sexual abuse cases can present the situation. Thus, once there is plausible evidence that the defendant is responsible for the traumatizing crime, the victim's testimonial hearsay would be admitted. This is so even though a witness may have independent, personal, and sometimes self-serving reasons for not appearing, such as concerns about privacy, possible self-incrimination, prior inconsistent statements, or the desirability of preserving pre-existing relationships.¹⁵⁶

Another petition simultaneously raised the same issue, but from the perspective of the prosecution, which had lost on the issue in the New Mexico Supreme Court.¹⁵⁷ That petition also emphasized the magnitude of the issue, but described the situation quite differently from the *Giles* petition:

In 1943, Justice Jackson expressed a ... fundamental public policy that ... counsels in favor of adopting a constitutional forfeiture rule without regard to the defendant's subjective intent or motive:

The influence of lawless force directed toward parties or witnesses to proceedings during their pendency is so sinister and undermining of the process of adjudication itself that no court should regard it with

156. Petition for *Certiorari* in *Giles*, pp. 15-16 (citations omitted).

157. The New Mexico case was *State v. Romero*, 141 N.M. 403, 156 P.3d 694, *cert. dismissed*, ___ S.Ct. ___, 2008 WL 114456 (Jan. 11, 2008) (No. 07-37).

indifference or shelter it from exposure and inquiry. The remedies of the law are substitutes for violence, not supplements to violence[.]

The New Mexico Supreme Court's opinion in this case holds that in some circumstances the federal Constitution requires our judicial system not only to tolerate but to reward its own undermining.

[B]y rewarding the intimidation and even murder of witnesses, the New Mexico Supreme Court's decision can only have the unintended effect of encouraging those practices. It is difficult to conceive of any result more sadly perverse than that.¹⁵⁸

In January 2008, the Court granted the petition in *Giles* and set a briefing schedule.¹⁵⁹ Oral argument will be heard in April and the Court is expected to issue its decision by the end of June.

Modification of Existing Law on Forfeiture by Wrongdoing as an Exception to the Hearsay Rule

Due to *Crawford* and the restrictions it has placed on introduction of a testimonial statement, there has been debate over whether to change California's approach to forfeiture by wrongdoing.¹⁶⁰ The concern is that California's hearsay rule exception for forfeiture by wrongdoing appears to be narrower than the constitutional exception for forfeiture by

158. Petition for *Certiorari* in *Romero*, p. 14 (citation omitted).

159. The Petition for *Certiorari* in *Romero* was dismissed on motion of the petitioner. See *supra* note 157.

160. See, e.g., AB 268 (Calderon) (2007-2008); SB 657 (Runner & Harman) (2007-2008); Revised Safe Neighborhood Act (No. 07-0094) (submitted 12/5/07 & amended 12/17/07); Crime Victims Protection Act: Stop Gang and Street Crime (No. 07-0089) (submitted 11/29/07 & withdrawn 12/21/07); Safe Neighborhood Act (No. 07-0076) (submitted 10/22/07 & amended 11/6/07).

wrongdoing, and thus a testimonial statement that would be admissible under the constitutional exception might still be excluded under the hearsay rule in California.

In August 2007, the Senate Committee on Judiciary asked the Law Revision Commission to study forfeiture by wrongdoing, particularly whether California should adopt a hearsay rule exception that tracks the constitutional minimum as articulated by the California Supreme Court in *Giles*.¹⁶¹ The Commission has since followed its usual procedure in conducting the requested study: holding a series of public meetings, preparing a tentative recommendation, posting the tentative recommendation to the Commission's website and broadly circulating it for comment, considering the comments on the tentative recommendation, and then drafting a final recommendation for printing and submission to the Legislature. Due to the deadline of March 1, 2008, the Commission had to accelerate this process, completing each step more quickly than usual.

From the outset, the Commission was concerned about the lack of guidance from the United States Supreme Court on key issues relating to forfeiture of the constitutional right of confrontation, particularly on the divisive issue of whether it is necessary to prove that the defendant intended to prevent testimony.¹⁶² The Commission's study thus explored four different possibilities:

- (1) Repeal California's existing provision on forfeiture by wrongdoing and replace it with a provision that tracks the constitutional minimum as articulated by the California Supreme Court.

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

162. See Minutes of Oct. 26, 2008, Commission Meeting, p. 5; Second Supplement to Commission Staff Memorandum 2007-41 (Oct. 23, 2007), Attachment pp. 23-26, 36.

- (2) Replace the existing provision with one similar to the federal rule.
- (3) Broaden the existing provision to some extent.
- (4) Leave the law alone.

While the Commission was exploring these possibilities, the United States Supreme Court agreed to consider the issue raised in *Giles*. In light of that development, the Commission recommends that the Legislature take no action on forfeiture by wrongdoing until after the Court issues its decision. It would be unwise to proceed without the Court's soon-to-be-provided guidance on the constitutional constraints.

After the Court decides *Giles*, much more information will be available than at present, both on the permissible constitutional parameters and on the relevant policy considerations. The Legislature will have the benefit not only of the Court's opinion, but also any concurring or dissenting opinions, the briefs filed by the parties and any amici, and the wealth of scholarly writings that are likely to be generated as the case is pending and upon issuance of the Court's decision. The Legislature should wait for that information before assessing how to proceed.¹⁶³ This is not only the Commission's recommendation, but also the advice of many of the participants in the Commission's study.¹⁶⁴

163. Ideally, the Legislature would also have guidance from the California Supreme Court on the requirements of California's Confrontation Clause (Cal. Const. art. I, § 15). Cases interpreting that provision are rare, however, so it would be unrealistic to wait for such guidance.

164. See Commission Staff Memorandum 2007-54, Exhibit p. 1 (comments of California Public Defenders Ass'n & Los Angeles Public Defender's Office); Commission Staff Memorandum 2007-41 (Oct. 23, 2007), Exhibit p. 1 (comments of Prof. Capra); Second Supplement to Commission Staff Memorandum 2007-41 (Oct. 23, 2007), Exhibit p. 4 (comments of Prof. Friedman); Third Supplement to Commission Staff Memorandum 2007-41 (Oct. 23, 2007), Exhibit p. 1 (comments of Prof. Flanagan). At the Commission meeting on January 17, 2008, the California District Attorneys Association and

Once the Court decides *Giles*, the Legislature should fully consider the merits of the various approaches to forfeiture by wrongdoing as an exception to the hearsay rule, and then determine which approach would best serve the citizens of California. To assist the Legislature in this endeavor, the remainder of this report provides information about the approaches considered by the Commission, and gives some general suggestions regarding how the Legislature should proceed.

Approaches Considered by the Commission

Each approach considered by the Commission is described and discussed below. At this time, the Commission makes no recommendation on which approach would be the best long-term solution. The approaches are discussed in the order in which they were initially presented for Commission consideration.¹⁶⁵ The Commission has not ranked them in any manner.

Option #1. Replace Evidence Code Section 1350 with a Provision that Tracks the Constitutional Minimum as Articulated by the California Supreme Court.

The hearsay rule exception provided by Evidence Code Section 1350 is much narrower than the forfeiture exception to the federal Confrontation Clause as described by the

the Los Angeles City Attorney's Office also took the position that the Legislature should wait until *Giles* is decided before enacting any legislation on forfeiture by wrongdoing.

For contrary views, see Commission Staff Memorandum 2008-2 (Jan. 15, 2008), Exhibit p. 3 (comments of Paul Vinegrad) (urging immediate enactment of legislation tracking constitutional minimum as articulated by the California Supreme Court in *Giles*); Commission Staff Memorandum 2007-54 (Dec. 11, 2007), Exhibit p. 12 (comments of Prof. Uelmen) (urging enactment of legislation similar to the federal exception for forfeiture by wrongdoing, without waiting until constitutional litigation is resolved).

165. See Commission Staff Memorandum 2007-41 (Oct. 10, 2007), pp. 29-45.

California Supreme Court in *Giles*. If the California Supreme Court's constitutional analysis is correct, admission of a hearsay statement might be constitutionally acceptable, yet the statement might still be subject to exclusion under the hearsay rule because it fails to satisfy the more stringent admissibility requirements of Section 1350.

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

- The exception would apply when a party offers evidence of a statement made by a declarant who is unavailable to testify.
- The evidence must be offered against a party whose intentional criminal act caused the declarant to be unavailable to testify. It would not be necessary to show that the party intended to prevent the declarant from testifying.
- Such misconduct must be proved to the court by a preponderance of the evidence.
- The court would be permitted to consider 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 to testify.
- The declarant's statement could not be the sole basis for finding that the party against whom it is offered engaged in an intentional criminal act that caused the declarant to be unavailable to testify. There must be some independent corroborating evidence.
- The intentional criminal act that caused the declarant's unavailability could be the same act

charged in the underlying case or it could be a different act.

- In a jury trial, the admissibility of the evidence must be determined outside the presence of the jury. The jury shall not be informed of the court's finding.¹⁶⁶

Many comments indicated that such an approach would be premature absent guidance from the United States Supreme Court on the constitutional minimum, especially on whether

166. The tentative recommendation indicated that 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").

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such an exception could constitutionally be invoked against a criminal defendant without proof that the defendant intended to prevent the declarant from testifying.¹⁶⁷ Comments on the merits of this approach were mixed.

Prosecutors who commented strongly favor the approach.¹⁶⁸ They pointed out that witnesses are often eliminated, intimidated, or otherwise deterred or prevented from testifying, particularly in gang cases, homicides, and domestic violence cases.¹⁶⁹ This impedes prosecutions.¹⁷⁰ If a defendant engages in an intentional criminal act that causes a witness to be unavailable, the defendant may benefit from that conduct by escaping conviction.¹⁷¹ The prosecutors maintained that such misconduct can and should be deterred by allowing out-of-court statements by the unavailable witness to be introduced against the defendant.¹⁷² They believe that proving the defendant's misconduct caused the witness' unavailability should be a sufficient basis for admissibility, without the additional burden of having to prove the defendant intended to silence the witness, which they consider overly difficult to

167. See *supra* note 163.

168. See Commission Staff Memorandum 2008-2 (Jan. 15, 2008), Exhibit p. 3 (comments of prosecutor Paul Vinegrad); Commission Staff Memorandum 2007-54 (Dec. 11, 2007), Exhibit pp. 6-11 (comments of California District Attorneys Ass'n & Los Angeles City Attorney's Office).

169. See Commission Staff Memorandum 2007-54 (Dec. 11, 2007), Exhibit pp. 7-8 (comments of California District Attorneys Ass'n & Los Angeles City Attorney's Office).

170. *Id.*

171. See Commission Staff Memorandum 2008-2 (Jan. 15, 2008), Exhibit p. 3 (comments of prosecutor Paul Vinegrad).

172. Commission Staff Memorandum 2008-2 (Jan. 15, 2008), Exhibit p. 3 (comments of prosecutor Paul Vinegrad); Commission Staff Memorandum 2007-54 (Dec. 11, 2007), Exhibit p. 7 (comments of California District Attorneys Ass'n & Los Angeles City Attorney's Office).

meet.¹⁷³ In their view, adopting this approach will help to save witness' lives and ensure that criminals are brought to justice.¹⁷⁴

In law reviews and other legal commentary, a number of scholars have taken a similar position.¹⁷⁵ Two of these scholars, Prof. Richard Friedman and Prof. Deborah Tuerkheimer, submitted comments to that effect.¹⁷⁶

Public defenders strongly oppose the concept of enacting a hearsay exception that tracks the constitutional minimum as articulated by the California Supreme Court in *Giles*.¹⁷⁷ They point out that people do not always tell the truth and hearsay evidence, as compared to live testimony, is intrinsically

173. Commission Staff Memorandum 2007-54 (Dec. 11, 2007), Exhibit pp. 8-9.

174. *Id.* at Exhibit p.8.

175. 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”); Tuerkheimer, *supra* note 67, at 49 (favorably discussing Prof. Lininger’s analysis); Lininger, *Reconceptualizing Confrontation After Davis*, 85 Tex. L. Rev. 271, 303 (2006) (“The best legislative strategy would be to devise a hearsay exception that covers both intentional procurement of unavailability and other wrongful conduct that incidentally, but foreseeably, results in the unavailability of the declarant.”); 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 69, at 253 (“The standard of forfeiture by wrongdoing should not require a showing of the defendant’s intent to prevent a witness from testifying.”).

176. Commission Staff Memorandum 2008-7 (Feb. 11, 2008), Exhibit pp. 1-8 (comments of Prof. Tuerkheimer) (favorably discussing Prof. Lininger’s proposed hearsay exception covering both intentional procurement of unavailability and other wrongful conduct that incidentally, but foreseeably, results in declarant’s unavailability); Second Supplement to Commission Staff Memorandum 2007-41 (Oct. 23, 2007), Exhibit p. 4 (comments of Prof. Friedman) (California Supreme Court “got it right” in *Giles*).

177. Commission Staff Memorandum 2007-54 (Dec. 11, 2007), Exhibit pp. 1-2.

inferior proof.¹⁷⁸ They say that adopting the *Giles* approach would thus lead to the introduction of unreliable evidence, which defendants would be unable to effectively challenge through cross-examination.¹⁷⁹ They warn that this will impede the truth-finding process and cause innocent people to be wrongfully convicted and punished.¹⁸⁰ In their view, the admissibility of hearsay evidence should not be liberalized without demonstrating an unequivocal need for reform, supported by empirical evidence, which has not been provided in this context.¹⁸¹

Some scholars have likewise criticized the notion of a broad hearsay exception for forfeiture by wrongdoing, which does not require proof that the defendant intended to prevent the declarant from testifying.¹⁸² In the Commission's study, Prof. Miguel Méndez favorably discussed the intent-to-silence limitation and suggested that even if the United States Supreme Court does not impose such a limitation as a matter of constitutional law, the California Legislature should consider doing so.¹⁸³ Prof. Gerald Uelmen warned that if California adopts a hearsay exception based on the California

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. See, e.g., Flanagan, *supra* note 68, at 1248-49 (“[I]ntent, or implied intent, provides the essential connection between the defendant’s act and the loss of the confrontation rights that supports and justifies the loss of confrontation. Intent satisfies our view of constitutional rights as personal rights, and how they may be relinquished by personal decision”); 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.”).

183. First Supplement to Commission Staff Memorandum 2007-41 (Oct. 23, 2007), Exhibit pp. 15-16.

Supreme Court's approach in *Giles*, that would undermine the presumption of innocence in a murder case.¹⁸⁴ He explained that under the *Giles* approach, virtually every statement by a homicide victim would be admissible, because the defendant is accused of unlawfully rendering the victim unavailable, and *Giles* would only require the prosecution to support that accusation by a preponderance of the evidence at a foundational hearing.¹⁸⁵ Similarly, Prof. Daniel Capra reported that a group of federal judges expressed concern that the practical effect of eliminating the intent requirement would be to convict the defendant by a preponderance of the evidence.¹⁸⁶

In the same vein, Prof. Jeffrey Fisher cautioned that eliminating the intent-to-silence requirement might essentially mean that there is no right to cross-examine the victim in a domestic violence or child abuse case.¹⁸⁷ His concern is that courts will conclude the very nature of domestic violence or child abuse makes the victim afraid to testify and thereby triggers forfeiture.¹⁸⁸ Prof. James Flanagan shares this concern about exemption of categories of cases from the right of cross-examination.¹⁸⁹

Prosecutor organizations commented that this concern is misplaced.¹⁹⁰ Among other things, they pointed out that a

184. Commission Staff Memorandum 2007-54 (Dec. 11, 2007), Exhibit p. 13.

185. *Id.*

186. First Supplement to Commission Staff Memorandum 2007-41 (Oct. 23, 2007), Exhibit p. 3.

187. *Id.*

188. Third Supplement to Commission Staff Memorandum 2007-41, Exhibit p. 2.

189. *Id.*

190. Commission Staff Memorandum 2008-2 (Jan. 15, 2008), Exhibit pp. 1-2 (comments of California District Attorneys Ass'n & Los Angeles City Attorney's Office). For additional analysis of the hypotheticals discussed in this

judge may exclude a victim's statement on grounds other than the hearsay rule, such as by exercising discretion to exclude evidence that is more prejudicial than probative.¹⁹¹ They also noted that this discretionary power can serve as a safeguard against introduction of unreliable evidence.¹⁹²

Because there is strong disagreement about codifying the California Supreme Court's approach in *Giles*, the Legislature will need to carefully weigh the relevant considerations if the United States Supreme Court decides that approach is constitutional. If the Legislature decides to go forward with the approach, it should consider a number of additional issues, including:

- Whether the hearsay exception for forfeiture by wrongdoing should include a requirement that the proffered statement was made under circumstances that indicate its trustworthiness.¹⁹³

comment, see Commission Staff Memorandum 2008-2 (Jan. 15, 2008), pp. 4-6; First Supplement to Commission Staff Memorandum 2008-2 (Feb. 1, 2008), Exhibit pp. 5-6 (comments of Prof. Méndez).

191. Commission Staff Memorandum 2008-2 (Jan. 15, 2008), Exhibit p. 2 (comments of California District Attorneys Ass'n & Los Angeles City Attorney's Office).

192. *Id.* at Exhibit p. 2; see Evid. Code § 352.

193. Prof. Méndez raised this issue. See Third Supplement to Commission Staff Memorandum 2007-41 (Oct. 26, 2007), Exhibit p. 5; First Supplement to Commission Staff Memorandum 2007-41 (Oct. 16, 2007), Exhibit p. 14. He noted that the admissibility requirements of *Giles* would not screen out evidence that lacks circumstantial guarantees of trustworthiness. Third Supplement to Commission Staff Memorandum 2007-41 (Oct. 26, 2007), Exhibit p. 5. He suggested that if California adopts a hearsay exception based on *Giles*, the exception should include a requirement that the proffered statement was made under circumstances that indicate its trustworthiness. *Id.* For an example of such a requirement, see Evid. Code § 1350(a)(4).

Prof. Capra criticized this idea. See Second Supplement to Memorandum 2007-41 (Oct. 23, 2007), Exhibit p. 3. The California District Attorneys Association and Los Angeles City Attorney's Office also opposed the idea at a Commission meeting.

- Whether it would be good policy to differentiate between a dead declarant and a live one, requiring proof of intent-to-silence if the declarant is alive but not if the declarant is dead.¹⁹⁴
- Whether to permit a judge to consider the proffered statement in determining whether the exception applies, which would be a deviation from California's longstanding rule that a judge can only consider admissible evidence in resolving a foundational fact dispute.¹⁹⁵

194. Prof. Fisher first brought this point to the Commission's attention. See First Supplement to Commission Staff Memorandum 2007-41 (Oct. 16, 2007), Exhibit p. 22. Some courts have mentioned the possibility of drawing such a distinction, without endorsing or rejecting that approach. See, e.g., *People v. Moreno*, 160 P.3d 242, 245-46 (Colo. 2007); *People v. Stechly*, 225 Ill. 2d 246, 870 N.E.2d 333, 352-53, 312 Ill. Dec. 268 (Ill. 2007) (plurality). The rationale for such a distinction would be that a dead declarant is certain to be unavailable to testify, while such certainty does not exist with respect to a live declarant.

If the Legislature decides to draw a distinction like this, it should do so in the hearsay exception for forfeiture by wrongdoing, not in the provision on unavailability (Evid. Code § 240). Unavailability, even unavailability due to a refusal to testify, can occur in a case that has nothing to do with forfeiture by wrongdoing (e.g., a brother refusing to testify against his sister out of feelings of loyalty). The proposed provision on unavailability due to a refusal to testify needs to function properly in this context, not just in the forfeiture context. Including an intent-to-silence requirement in it, rather than in the forfeiture provision, would be problematic.

195. Prof. Méndez raised this issue. See First Supplement to Commission Staff Memorandum 2007-41 (Oct. 16, 2007), Exhibit pp. 16-18.

In the federal courts, a judge is not bound by the rules of evidence in determining a preliminary question of admissibility. See Fed. R. Evid. 104(a); see also *Bourjaily v. United States*, 483 U.S. 171 (1987).

In contrast to the Federal Rules of Evidence, the Evidence Code does not permit a court to consider inadmissible evidence in determining a preliminary question of admissibility. See 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

- Whether to draw any distinction between a civil case and a criminal case in drafting the exception.¹⁹⁶
- Whether to clarify the concept of causation, such as by specifying that the declarant's unavailability must be a foreseeable result of the wrongful act, that the wrongful act need not be the sole cause of the declarant's unavailability, or that the wrongful act must be a "but for" cause of the declarant's unavailability.¹⁹⁷
- Whether the exception should apply when a party acquiesces in an intentional criminal act that causes a declarant's unavailability, or only when a party engages in an intentional criminal act that causes a declarant's unavailability.¹⁹⁸
- Whether to impose a duty to mitigate, such that an out-of-court statement is inadmissible if the party

1, 19-21 (1964) (proposing provision that would generally permit judge to consider inadmissible evidence in determining preliminary fact that affects admissibility) 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).

If the Legislature decides to deviate from this longstanding, code-wide approach and allow a judge to consider a declarant's statement in determining whether the statement is admissible due to forfeiture, a further issue is whether to allow a judge to base a forfeiture finding solely on the proffered statement. The United States Supreme Court's decision in *Giles* might address the constitutionality of such an action.

196. Maryland has two separate forfeiture exceptions: one for a civil case and the other for a criminal case. See *supra* notes 122-24.

197. Prof. Fisher alerted the Commission to the causation issue. See First Supplement to Commission Staff Memorandum 2007-41 (Oct. 23, 2007), Exhibit p. 23. For an interesting discussion of causation in the context of forfeiture, see Tuerkheimer, *supra* note 66, at 53-54 (arguing that dynamics of battering warrant expanded conception of causation of witness' unavailability).

198. This issue has been raised primarily in the context of whether to adopt the federal approach to forfeiture by wrongdoing. See *infra* note 216. However, it also arises in the context of whether to codify the California Supreme Court's approach in *Giles*.

proffering the statement failed to take reasonable steps to afford the adverse party an opportunity for cross-examination.¹⁹⁹

- Whether the exception should expressly say whether a pretrial showing of abuse, by itself, is sufficient to trigger forfeiture.²⁰⁰
- Whether particular language needs to be included in the exception to ensure that other objections to a statement, such as the declarant's lack of personal knowledge or inclusion of multiple hearsay, are permitted.²⁰¹

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

A second possibility would be to repeal Evidence Code Section 1350 and replace it with a provision similar to

199. Prof. Friedman proposed the duty to mitigate in his Confrontation Blog. See <http://confrontationright.blogspot.com/2007/12/duty-to-mitigate-with-respect-to.html>. He says that *People v. Quitiquit*, 155 Cal. App. 4th 1, 65 Cal. Rptr. 3d 674 (2007), is an example of a case in which there was a failure to mitigate.

In that case, the victim made accusations against the defendant long before she died, and the state charged the defendant with assault before her death, yet the state did not give the defendant an opportunity to cross-examine the victim on her accusations. See *id.*

The trial court admitted the accusations under Evidence Code Section 1370, which creates a hearsay exception for a statement describing infliction or threat of physical injury. The court of appeal reversed, because the accusations were not made "at or near" the time of injury and were not made under circumstances indicating their trustworthiness. *Id.* at 9-12. Under a hearsay exception codifying the California Supreme Court's approach in *Giles*, the accusations probably would have been admissible (absent a duty to mitigate). See Commission Staff Memorandum 2008-2 (Jan. 15, 2008), Exhibit p. 3 (comments of Paul Vinegrad).

200. Prof. Fisher raised this issue. See First Supplement to Commission Staff Memorandum 2007-41 (Oct. 23, 2007), Exhibit p. 23.

201. Prof. Méndez raised this drafting issue. See First Supplement to Commission Staff Memorandum 2008-2 (Feb. 1, 2008), Exhibit pp. 5-6.

Federal Rule of Evidence 804(b)(6).²⁰² That could be done as follows:

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

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

(a) The declarant is unavailable as a witness.

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

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

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

Because the federal rule provides a much broader forfeiture exception to the hearsay rule than the existing California provision, this approach would allow introduction of hearsay evidence that might otherwise be excluded. It would therefore help to address concerns that prosecution of some criminal cases has been impeded by *Crawford's* limitations on admissibility of testimonial statements.

Like the comments on the preceding approach, the comments on this approach were sharply divided.

Several scholars expressed support for the approach. Prof. Capra said California should adopt the federal approach to forfeiture by wrongdoing because consistency at the federal and state levels would be desirable.²⁰³ Prof. Méndez also made favorable comments about the federal approach,

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

203. See Commission Staff Memorandum 2007-41 (Oct. 10, 2007), p. 37.

particularly its intent-to-silence limitation, although he did not directly endorse that approach.²⁰⁴

Prof. Uelmen commented that California should adopt the federal approach for two reasons.²⁰⁵ First, he said the federal approach would be preferable to the *Giles* approach because it would better serve the values underlying the hearsay rule: the preference for testimony given under oath, subject to cross-examination, and in a setting that permits the factfinder to observe the witness' demeanor.²⁰⁶ Second, he mentioned the importance of consistency and warned that forum shopping may occur if California's forfeiture by wrongdoing exception is broader than the federal one.²⁰⁷

Both prosecutor and public defender groups criticized the federal approach. The prosecutors said the approach is inadequate to address the problem of witness intimidation, because it requires proof of intent-to-silence and such proof is almost impossible to provide.²⁰⁸ Their understanding is that the federal exception is used infrequently for exactly that reason.²⁰⁹

For example, they noted that in a battering situation, it may be difficult to differentiate between a beating that is motivated by intent to intimidate the victim from testifying, and a beating that is motivated by other factors.²¹⁰ They said

204. First Supplement to Commission Staff Memorandum 2007-41 (Oct. 16, 2007), Exhibit pp. 14-16.

205. Commission Staff Memorandum 2007-54 (Dec. 11, 2007), Exhibit pp. 14-15.

206. *Id.*

207. *Id.* at Exhibit p. 15.

208. Commission Staff Memorandum 2007-54 (Dec. 11, 2007), Exhibit p. 8 (comments of California District Attorneys Ass'n & Los Angeles City Attorney's Office).

209. *Id.*

210. *Id.* at Exhibit p. 9; see also Tuerkheimer, *supra* note 66, at 53-54.

that in either situation, the likely result is that the victim is afraid to testify, fails to appear at trial, and the batterer profits from wrongful conduct. They therefore believe the forfeiture exception should apply regardless of the motivation for the wrongful conduct.²¹¹

Public defender groups gave different reasons for opposing the federal approach. Writing before the United States Supreme Court agreed to hear *Giles*, they stressed that there is much uncertainty regarding various forfeiture issues, so adoption of the federal approach may not actually result in consistency between the state and federal systems.²¹² They also warned that adopting the federal approach would result in admission of unreliable evidence that would be excluded under the current provision.²¹³ They further maintained that the approach exclusively benefits the prosecutor and thus unconstitutionally fails to provide procedural reciprocity to a criminal defendant.²¹⁴

If the Legislature weighs the competing considerations and decides to pursue the federal approach to forfeiture by wrongdoing, it would then be appropriate to consider many of the same points mentioned above with respect to codifying the California Supreme Court's approach in *Giles*.²¹⁵ In

211. Commission Staff Memorandum 2007-54 (Dec. 11, 2007), Exhibit p. 9 (comments of California District Attorneys Ass'n & Los Angeles City Attorney's Office).

212. *Id.* at Exhibit p. 2 (comments of California Public Defenders Ass'n & Los Angeles Public Defenders Office).

213. *Id.* at Exhibit pp. 1-2.

214. *Id.* at Exhibit p. 3. Their point is that if a police officer engaged in wrongdoing that caused the unavailability of a declarant, the federal forfeiture exception would not apply because a police officer is not considered a party to a prosecution. In raising this issue, they cite *Wardius v. Oregon*, 412 U.S. 470 (1973), which involved the right to reciprocal discovery, not a forfeiture situation.

215. See *supra* notes 193-201 & accompanying text.

particular, concerns have been raised regarding application of the federal exception to a party who acquiesces, rather than engages, in wrongdoing that was intended to and did cause a declarant to be unavailable.²¹⁶ In considering this and other points, the Legislature should bear in mind that deviating from the text of the federal rule will reduce the benefits of consistency.

Option #3. Broaden Evidence Code Section 1350 to Some Extent

A third possibility would be to broaden Evidence Code Section 1350 to some extent. This could be done in a variety of different ways, because the statute includes many features.

In particular, if the Legislature is interested in exploring this approach, the features to consider and some possible revisions are:

- **Type of Case in Which the Exception Applies.** Section 1350 applies only in a criminal case charging a serious felony.²¹⁷ To discourage witness tampering in all types of cases, the provision could be modified to apply in any case, civil or criminal.

216. Prof. Flanagan did not take a position on the general concept of adopting the federal approach. But he pointed out that the term “acquiesce” is problematic because it includes not only a person who agrees to and encourages wrongdoing, but also a person who merely accepts the wrongdoing without agreeing to it. Third Supplement to Commission Staff Memorandum 1007-41 (Oct. 10, 2007), Exhibit p. 1; see also Flanagan, *Forfeiture by Wrongdoing and Those Who Acquiesce in Witness Intimidation: A Reach Exceeding Its Grasp and Other Problems With Federal Rule of Evidence 804(b)(6)*, 51 Drake L. Rev. 459, 498-526 (2003). Prof. Méndez also voiced concern about the term “acquiesce,” but he has not elaborated. See Commission Staff Memorandum 2007-54 (Dec. 11, 2007), p. 15. Several states have not included the term “acquiesce” in their forfeiture exceptions. See *supra* notes 111-16, 118, 119, 122-23 & accompanying text. However, the California District Attorneys Association and Los Angeles City Attorney’s Office see no problem with use of the term “acquiesce” and consider its inclusion necessary to successfully address the problem of witness intimidation. See *id.* at Exhibit p. 11.

217. Evid. Code § 1350(a).

- **Party Against Whom the Exception May Be Invoked.** Section 1350 can only be invoked against a criminal defendant.²¹⁸ The provision would be more even-handed if it was modified to apply to any party.
- **Reason for the Declarant's Unavailability.** Section 1350 applies only when the declarant's unavailability "is the result of the death by homicide or the kidnapping of the declarant."²¹⁹ The Legislature could perhaps remove that limitation.
- **Acquiescence in Wrongdoing that Results in the Declarant's Unavailability.** Section 1350 applies only when "the declarant's unavailability was knowingly caused by, aided by, or solicited by the party against whom the statement is offered"²²⁰ In contrast, under the federal rule it is sufficient if a party has "acquiesced" in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.²²¹ It would be possible to extend Section 1350 to acquiescence in wrongdoing, like the federal rule.²²²
- **Standard of Proof.** Section 1350 requires proof by clear and convincing evidence.²²³ If the United States Supreme Court says a lower standard of proof would be constitutionally acceptable (such as preponderance of the evidence), the Legislature could consider whether it would be good policy to incorporate that standard in the statute.
- **Evidence that the Proponent of the Hearsay Statement Is Responsible for the Declarant's Unavailability.** Section 1350 cannot be invoked if

218. Evid. Code § 1350(a)(1).

219. *Id.*

220. *Id.*

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

222. But see *supra* note 216 & accompanying text.

223. Evid. Code § 1350(a)(1).

there is “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.”²²⁴ This safeguard against unreliable evidence might be worth retaining.

- **Form of the Hearsay Statement.** Section 1350 applies only if the hearsay 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.”²²⁵ This is a strong safeguard against fabricated evidence. It so severely limits application of the statute, however, that the provision may be of little use. The Legislature could consider removing the requirement altogether, or revising the statute to require that the hearsay statement be memorialized in a recording or in a writing made at or near the time of the statement.
- **Circumstances Under Which the Hearsay Statement Was Made.** Section 1350 can be invoked only if the hearsay statement “was made under circumstances which indicate its trustworthiness and was not the result of promise, inducement, threat, or coercion.”²²⁶ The Legislature could examine the effect of these requirements and determine whether they are worth retaining.
- **Relevance of the Hearsay Statement.** Section 1350 expressly requires that the hearsay statement be relevant to the issues being tried.²²⁷ That language is unnecessary due to the general prohibition on

224. Evid. Code § 1350(a)(2).

225. Evid. Code § 1350(a)(3).

226. Evid. Code § 1350(a)(4).

227. Evid. Code § 1350(a)(5).

introducing irrelevant evidence.²²⁸ The language should be deleted.²²⁹

- **Evidence Connecting the Defendant to Commission of the Serious Felony Charged.** Under Section 1350, the proffered statement cannot be the sole evidence that connects the defendant to the serious felony charged against the defendant. Rather, the statement is admissible only if it “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.”²³⁰ Evidence that merely shows the commission or circumstances of the offense is not sufficient corroboration.²³¹

This corroboration requirement focuses on connecting the defendant to the crime charged. It is different from requiring corroboration of the wrongdoing that results in forfeiture of a defendant’s right of confrontation. It appears to be intended to promote reliability in determinations of whether the defendant, as opposed to someone else, committed the crime charged. The Legislature could consider whether to continue such protection, and, if so, whether to extend it to any criminal case, not just a case charging a serious felony.

- **Notice of Intent to Invoke the Forfeiture by Wrongdoing Exception.** Section 1350 requires the prosecution to notify the defendant ten days before the prosecution offers a hearsay statement under the provision.²³² There is a good cause exception, but if good cause is shown the defendant is entitled to a

228. See Evid. Code § 350.

229. See *supra* notes 93-95 & accompanying text.

230. Evid. Code § 1350(a)(6).

231. *Id.*

232. Evid. Code § 1350(b).

reasonable continuance.²³³ This procedural requirement makes sense and probably should be retained, but the language would require modification if the statute were extended to all parties in all types of cases.

- **Procedure for Determining Whether the Exception Applies.** Section 1350 expressly states that if a hearsay statement is offered under it during trial, “the court’s determination shall be made out of the presence of the jury.”²³⁴ The provision also gives guidance on what procedure to use if a defendant elects to testify in connection with that determination.²³⁵ This guidance is useful and probably should be retained.
- **Multiple Hearsay.** Section 1350 expressly states that if the proffered statement “includes hearsay statements made by anyone other than the declarant who is unavailable ..., those hearsay statements are inadmissible unless they meet the requirements of an exception to the hearsay rule.”²³⁶ That language might be unnecessary due to the general provision governing multiple hearsay.²³⁷

Revisions such as those discussed above could be combined in a single amendment.²³⁸

The concept of retaining Section 1350 but broadening it in some respects drew no clear support. In part, this might have been because the Commission’s tentative recommendation

233. *Id.*

234. Evid. Code § 1350(c).

235. *Id.*

236. Evid. Code § 1350(e).

237. Evid. Code § 1201. But see First Supplement to Commission Staff Memorandum 2008-2 (Feb. 1, 2008), Exhibit pp. 5-6 (comments of Prof. Méndez).

238. See Appendix *infra*.

indicated that the reform could perhaps be a temporary measure, pending further guidance from the United States Supreme Court on the constitutional requirements.

Prof. Uelmen opposed the approach on the ground that it could lead to extended statutory tinkering.²³⁹ He considers forfeiture an area of the law where trial courts need certainty and clear guidance.²⁴⁰

Public defender groups opposed the approach on the ground that it would invite admission of unreliable evidence and thus lead to conviction of innocent people.²⁴¹ In contrast, prosecutor groups opposed the approach on the ground that it would not effectively address the problem of witness intimidation.²⁴²

Prof. Flanagan did not take a position on whether Section 1350 should be revised. He commented, however, that Section 1350 is a carefully drafted and limited forfeiture exception.²⁴³ He urged the Legislature to be cautious about making any revisions, so as to avoid creating a situation in which hearsay evidence is used in lieu of live testimony that could have been obtained.²⁴⁴ He also said that if the Legislature revises the statute, it should seriously consider leaving certain of its requirements intact, to safeguard against introduction of unreliable evidence.²⁴⁵

239. Commission Staff Memorandum 2007-54 (Dec. 11, 2007), Exhibit p. 16.

240. *Id.*

241. *Id.* at Exhibit pp. 1, 3 (comments of California Public Defenders Ass'n & Los Angeles Public Defender's Office).

242. *Id.* at Exhibit p. 8 (comments of California District Attorneys Ass'n & Los Angeles Public Defender's Office).

243. Third Supplement to Commission Staff Memorandum 2007-41 (Oct. 26, 2007), Exhibit p. 2.

244. *Id.*

245. See *id.* (Legislature should give serious consideration to retaining subdivisions (a)(2)-(4) if Section 1350 is revised).

Although the concept of revising, rather than replacing or retaining, Section 1350 did not receive any support during the Commission's study, that could change depending on what the United States Supreme Court decides in *Giles*. The Legislature should evaluate the merits of the approach after the Court issues its decision.

Option #4. Leave Evidence Code Section 1350 Alone

A fourth option would be to leave Evidence Code Section 1350 alone and take no action on forfeiture by wrongdoing as an exception to the hearsay rule. This approach would leave intact a narrow, infrequently used hearsay exception designed to screen out unreliable evidence.

Public defender groups commented that this would be the best option for California.²⁴⁶ They believe it would best protect a defendant's constitutional right to a fair trial and the truth-seeking process of the criminal justice system.²⁴⁷ Although they submitted these comments before the United States Supreme Court agreed to hear *Giles*, and they stressed the uncertainty regarding the constitutional constraints for forfeiture,²⁴⁸ it seems probable that they will take the same position after the Court decides *Giles*.

Prof. Flanagan praised Section 1350 as carefully drafted,²⁴⁹ and other scholars have expressed similar views in legal

246. Commission Staff Memorandum 2007-54 (Dec. 11, 2007), Exhibit p. 3 (comments of California Public Defenders Ass'n & Los Angeles Public Defender's Office).

247. *Id.*

248. *Id.* at Exhibit pp. 2-3.

249. Third Supplement to Commission Staff Memorandum 2007-41 (Oct. 26, 2007), Exhibit p. 2.

commentary.²⁵⁰ However, neither Prof. Flanagan nor any other scholar who commented in the Commission's study expressed a clear preference for leaving Section 1350 alone.

Prosecutor groups opposed the idea for the same reason that they opposed the concept of amending Section 1350. They view the statute as completely ineffective in deterring witness intimidation.²⁵¹

Prof. Uelmen also opposed the idea of leaving Section 1350 alone, but for a different reason. He considers the intent-to-silence requirement important and believes it is most likely to be preserved in the long-term if California adopts the federal approach to forfeiture by wrongdoing.²⁵²

Again, comments on the approach under consideration were strongly divided. In determining how to address forfeiture by wrongdoing as an exception to the hearsay rule, the Legislature is not likely to be able to achieve consensus. It should focus on making its own assessment of the best policy for the state.

Selection of the Best Approach

After the United States Supreme Court decides *Giles*, the Legislature will need to examine the constitutional minimum and determine whether to codify that minimum or deviate from it by providing additional statutory protection in one or more respects. Its decision on this matter will have major implications for the criminal justice system in California, and will also affect the civil justice system. The Legislature

250. E. Scallen & G. Weissenberger, *California Evidence: Courtroom Manual* 1209 (Anderson Publishing Co. 1st ed. 2000) (Section 1350 is "far more sensible than the vague and wide-ranging federal provision.").

251. Commission Staff Memorandum 2007-54 (Dec. 11, 2007), Exhibit p. 8 (comments of California District Attorneys Ass'n & Los Angeles City Attorney's Office).

252. *Id.* at Exhibit pp. 13-16.

should therefore proceed with care, engaging in thorough deliberations and providing ample opportunity for input.²⁵³ If additional analysis from the Commission would be useful in this process, the Legislature could refer the matter (or aspects of it) back to the Commission for further study after the United States Supreme Court decides *Giles*. If the Legislature ultimately decides to enact new legislation on forfeiture by wrongdoing, that legislation should include a transitional provision, so as to prevent unnecessary litigation over retroactivity of the reform.²⁵⁴

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

253. Due to the Truth-in-Evidence provision of the Victims' Bill of Rights (Cal. Const. art. I, § 28(d)), caution is especially warranted with respect to a reform that would increase the admissibility of relevant evidence in a criminal case. If such a reform is enacted and later proves unwise, it could only be undone by a vote of the people or a statute "enacted by a two-thirds vote of the membership in each house of the Legislature." *Id.*

254. For example, a transitional provision could be drafted as follows:

(a) This act shall become operative on January 1, 2010.

(b) This act applies in an action or proceeding commenced before, on, or after January 1, 2010.

(c) Nothing in this act invalidates an evidentiary determination made before January 1, 2010, that evidence is inadmissible pursuant to Section 1200 of the Evidence Code. However, if an action or proceeding is pending on January 1, 2010, the proponent of evidence excluded pursuant to Section 1200 of the Evidence Code may, on or after January 1, 2010, and before entry of judgment in the action or proceeding, make a new request for admission of the evidence on the basis of this act.

to level the playing field that was distorted by the person's misconduct.

On the other hand, an innocent person should not be punished for a criminal act committed by another, nor should a person guilty of one crime (e.g., manslaughter) be found guilty of a more egregious crime (e.g., premeditated murder). Likewise, it is important to achieve a just result in a civil case, not only for the sake of the parties but also because an unfair outcome may undermine public confidence in the justice system.²⁵⁵

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

Above all, any legislation on forfeiture by wrongdoing must comply with constitutional constraints. Failure to do so would create a risk of overturned convictions and concomitant problems. The Constitution of the United States is "the supreme law of the land, and the judges in every state shall be bound thereby, any thing in the ... laws of any state to the contrary notwithstanding."²⁵⁶

255. "Confidence in the reliability of verdicts is necessarily undermined when a party is stripped of the right to cross examine material adverse witnesses." First Supplement to Commission Staff Memorandum 2007-41 (Oct. 16, 2007), Exhibit p. 16 (comments of Prof. Méndez).

256. U.S. Const. art. VI, § 2.

PROPOSED LEGISLATION

Evid. Code § 240 (amended). Unavailable witness

SEC. _____. Section 240 of the Evidence Code is amended to read:

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.

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

(b) A declarant is not unavailable as a witness if the ~~exemption, preclusion, disqualification, death, inability, or absence of the declarant~~ *circumstance described in subdivision (a)* 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. ~~The 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.

(d) 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.

Comment. Paragraph (6) is added to Section 240(a) to codify case law recognizing that a witness who refuses to testify is unavailable. See *People v. Rojas*, 15 Cal. 3d 540, 547-52, 542 P.2d 229, 125 Cal. Rptr. 357 (1975); *People v. Francis*, 200 Cal. App. 3d 579, 245 Cal. Rptr. 923 (1988); *People v. Walker*, 145 Cal. App. 3d 886, 893-94, 193 Cal. Rptr. 812 (1983); *People v. Sul*, 122 Cal. App. 3d 355, 175 Cal. Rptr. 893 (1981). The language is drawn from Rule 804(a)(2) of the Federal Rules of Evidence. Before making a finding of unavailability, a court must take reasonable steps to induce the witness to testify, unless it is obvious that such steps would be unavailing. *Francis*, 200 Cal. App. 3d at 584, 587; *Walker*, 145 Cal. App. 3d at 894; *Sul*, 122 Cal. App. 3d at 365.

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

Subdivision (c) is amended to reflect the revisions of subdivision (a) and delete the second sentence, which is continued without substantive change in new subdivision (d).

APPENDIX

The Commission's tentative recommendation on *Miscellaneous Hearsay Exceptions: Forfeiture by Wrongdoing* (Oct. 2007) solicited comment on several possible reforms. Among those reforms was an amendment of Evidence Code Section 1350, which is shown below for background purposes only. The Commission is not recommending any change to Section 1350 at this time.

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

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

(1) There is clear and convincing evidence that the declarant's unavailability was knowingly caused by, aided by, or solicited by the party against whom the statement is offered for the purpose of preventing ~~the arrest or prosecution of testimony against 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~~ *or a writing, which was made at or near the time of the statement.*

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

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

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

~~(c) If the statement is offered during a jury trial, the court's determination shall be made out of the presence of the jury. If the a criminal 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.~~

Comment. Section 1350 is amended to broaden its application.

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

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

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

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

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

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

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

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

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

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

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