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Evidence

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Evidence

Evidence; character evidence of crime victim

Evidence Code § 1103 (amended).

AB 2615 (Quackenbush); 1990 STAT. Ch. 268

Source: California District Attorney's Association; Attorney General

Support: California Correctional Peace Officers' Association

Opposition: California Attorneys for Criminal Justice; American Civil Liberties Union; California Public Defenders' Association

Existing law provides that evidence¹ of the character or a character trait of the victim² of a crime³ is admissible in the form of opinion or reputation testimony, in order to prove the conduct⁴ of the victim.⁵ Under prior law, evidence of specific instances of conduct was also admissible under these circumstances.⁶ Chapter 268 provides that evidence of specific instances of conduct is inadmissible if offered to prove that conduct on a specific occasion was in conformity with the character or character trait of the victim.⁷

1. See CAL. EVID. CODE § 140 (West 1966) (definition of evidence).

2. See CAL. PENAL CODE § 1102.6(e) (West Supp. 1990) (definition of victim).

3. See *id.* § 15 (West 1988) (definition of a crime).

4. See CAL. EVID. CODE § 125 (West 1966) (definition of conduct).

5. *Id.* § 1103(a)(1) (amended by Chapter 268). The prosecution may also offer such evidence to rebut character evidence offered by the defendant. *Id.* § 1103(a)(2) (amended by Chapter 268). See FED. R. EVID. 405 advisory committee's note (1988) (although evidence of specific instances is the most convincing, such evidence has the greatest possibility of arousing prejudice).

6. 1989 Cal. Stat. ch. 726, sec. 2, at 2876-77 (amending Cal. Evid. Code § 1103) (amended by Chapter 268).

7. CAL. EVID. CODE § 1103(a) (amended by Chapter 268). See generally *Id.* § 1102 Law Revision Commission comment (West 1966). The defendant may introduce evidence to prove his or her own character, but only in the form of an opinion or reputation. *Id.* The need to amend California Evidence Code section 1103 in the manner provided by Chapter 268 arises primarily in drug-related murder cases and cases involving gang-related activity. Telephone interview with Michael Itkoff, Legislative Analyst to the Executive Director, California District Attorney's Association (July 27, 1990) (notes on file at the *Pacific Law Journal*). The apparent legislative intent is to place the prosecution and defense on equal grounds during a criminal trial. *Id.* Because under prior law the specific conduct of the victim was admissible, defense attorneys were able to discredit the victim's character, while the defendant's character could not be affected by past instances of specific conduct. *Id.* Chapter 268 also prevents the character of victims who have died from being discredited by their prior specific conduct. *Id.*

With the enactment of Chapter 268, the law with respect to the use of specific instances of conduct to prove character is consistent with the Federal Rules of Evidence.⁸ Chapter 268 is also consistent with California's "Rape Shield Law"⁹ with respect to the admissibility of evidence to show the character of a rape victim.¹⁰

8. Compare CAL. EVID. CODE § 1103(a)(2) (amended by Chapter 268) (evidence of the opinion or reputation of the victim is admissible if offered by the prosecution to rebut evidence brought by the defendant to prove conduct of the victim in conformity with the character or trait of character adduced by the defendant) with FED. R. EVID. 405(b) (1988) (inquiry into relevant specific instances of conduct is allowed on cross examination only in cases where evidence of character or a trait of character is an essential element of a charge, claim or defense). See *Bright v. Shimoda*, 819 F.2d 227, 228 (9th Cir. 1987) (foreclosing cross-examination regarding specific instances of conduct was proper since the victim's character was not an issue brought up on direct examination).

9. See CAL. EVID. CODE §§ 782(a)(4), 1103(b)(1) (West Supp. 1990).

10. Compare *id.* § 1103(a) (amended by Chapter 268) with §§ 782(a)(4), 1103(b)(1) (West Supp. 1990). In a rape prosecution, evidence in the form of specific instances of the victim's sexual conduct is inadmissible to prove the consent of the victim. *Id.* See *id.* § 1103(b)(2) (amended by Chapter 268) (evidence of the victim's prior sexual conduct with the defendant is admissible to show consent); *People v. Perez*, 194 Cal. App. 3d 525, 528-29, 239 Cal. Rptr. 569, 572 (1987) (the evidence of prior consensual intercourse between the victim and the defendant may be considered in evaluating whether the defendant had a reasonable, good faith belief that the victim consented). Prior to the enactment of California's Rape Shield Law, a thorough cross examination of the victim's sexual conduct was permissible, including examination concerning the victim's prior specific instances of conduct. Note, *California Rape Evidence Reform: An Analysis of Senate Bill 1678*, 26 HASTINGS L.J. 1551, 1552 (1975). See also *People v. Walker*, 150 Cal. App. 2d 594, 600-01, 310 P.2d 110, 114 (1957) (defendant was entitled to introduce evidence of the victim's prior specific sexual relations and prior unchastity). Some rape shield laws which restrict the admissibility of a victim's sexual conduct have been successfully challenged as violative of a defendant's right to a fair trial. Tanford & Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544, 545 (1980). But see *People v. Blackburn*, 56 Cal. App. 3d 685, 691, 128 Cal. Rptr. 864, 866-67 (1976) (upholding California Evidence Code sections 1103 and 782 as not violative of a defendant's right to a fair trial, or the right to confront witnesses). By making specific instances of the victim's conduct inadmissible to prove character, it is unclear under Chapter 268 whether a defendant in a rape prosecution may introduce evidence of the victim's prior specific instances of sexual conduct with the defendant. See CAL. EVID. CODE 1103(b)(2)-(3) (amended by Chapter 268). See generally *Review of Selected 1981 California Legislation*, 13 PAC. L.J. 513, 658 (1982) (discussing the exclusion of evidence of a victim's sexual conduct).

Moreover, the evidence provisions of the "Victim's Bill of Rights"¹¹ do not appear to affect the provisions of Chapter 268.¹²

LSP & UOR

Evidence; holographic wills

Probate Code § 6111 (new); § 6111.5 (repealed).
SB 1984 (Robbins); 1990 STAT. Ch. 263

Existing law provides that a holographic will¹ is valid if the signature and material provisions² are in the testator's handwriting.³ Chapter 263 liberalizes the requirements for a valid holographic will by permitting statements of testamentary intent to be set forth in the printed portion of a commercial form will.⁴ Chapter 263 also provides that extrinsic evidence may be

11. See CAL. CONST. art. I, § 28(d) (enacted by Proposition 8 of 1982).

12. See *id.* The "Right to Truth-in-Evidence" clause provides that in any criminal proceeding, relevant evidence must not be excluded, except as provided by California Evidence Code sections 352, 783 and 1103. *Id.* See also Mendez, *California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 UCLA L. REV. 1003 (1981) (proposing that the effect of Proposition 8 is the almost total abolition of the common law rules of character evidence and the replacement of those rules with a grant of broad judicial discretion to admit or exclude character evidence pursuant to Evidence Code section 352); CAL. EVID. CODE § 352 (West 1966) (at its discretion, the court may exclude evidence if the probability that it will create a danger of prejudice or mislead the jury outweighs its probative value).

1. A holographic will is a will that is written entirely in the handwriting of the testator. BLACK'S LAW DICTIONARY 1433 (5th ed. 1979).

2. Testamentary intent is a material provision. *Estate of Baker*, 59 Cal. 2d 680, 685, 31 Cal. Rptr. 33, 36, 381 P.2d 913, 916 (1963).

3. CAL. PROB. CODE § 6111(a) (amended by Chapter 263). Wills other than holographic wills must be in the testator's handwriting, signed by the testator, and witnessed by at least two people. *Id.* § 6110 (West Supp. 1990). For a review of cases discussing the validity of holographic wills containing writing not in the hand of the testator, see Annotation, *Requirement that Holographic Will, or its Material Provisions, Be Entirely in Testator's Handwriting as Affected by Appearance of Some Printed or Written Matter Not in Testator's Handwriting*, 37 A.L.R. 4th 528 (1985).

4. CAL. PROB. CODE § 6111(c) (amended by Chapter 263).

introduced to prove the existence of a will, or to determine the meaning of all or part of the will if the meaning is ambiguous.⁵

DAG

Evidence; interpreters and translators

Evidence Code § 754.5 (new); §§ 751, 754 (amended).

SB 2046 (Lockyer); 1990 STAT. Ch. 1450

Support: Southern California Association for the Deaf-Blind;
California Center for Law and the Deaf; Life Signs; Caption
Center

Existing law permits the assistance of translators and interpreters in proceedings where a witness is unable to understand the proceedings or clearly express himself or herself to counsel.¹ Prior law required interpreters for the deaf or hard of hearing to be certified by the National Registry of Interpreters for the Deaf and included on a list of recommended interpreters established by the court in order to assist in proceedings.² Chapter 1450 increases the number of interpreters available in judicial proceedings by defining qualified interpreters as those who have been certified to interpret

5. *Id.* § 6111.5 (enacted by Chapter 263).

1. CAL. EVID. CODE § 752(a) (West Supp. 1990). An interpreter or translator may be provided if the witness is unable to communicate in English. *Id.* Judicial proceedings are required to be conducted and recorded in English. CAL. CIV. PROC. CODE § 185 (West 1982). *See* CAL. EVID. CODE § 754(b) (amended by Chapter 1450) (in any action involving a witness or party who is deaf or hard of hearing, the proceedings shall be interpreted in a language that the person understands).

2. 1984 Cal. Stat. ch. 768, sec. 2, at 2761 (amending CAL. EVID. CODE § 754(c)) (amended by Chapter 1450) (qualified interpreters also included those who met the standards of a state affiliate of the National Registry of Interpreters, or an organization which had similar competency requirements).

proceedings by any organization approved by the Judicial Council.³

Existing law provides that communications that occur in the course of specified relationships are privileged.⁴ Chapter 1450 states that any privilege that exists between a deaf or hard of hearing person and another is not waived because an interpreter was used to facilitate the communication.⁵

Interpreters and translators are required to take an oath promising to make true interpretations to the best of their ability.⁶ Chapter 1450 requires a translator or interpreter for a hearing impaired person who is participating in a judicial proceeding to inform the court if he or she is unable to comply with the oath.⁷

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3. CAL. EVID. CODE § 754(f) (amended by Chapter 1450). The Judicial Council must conduct research to set guidelines for determining those organizations whose certification will enable a person to act as an interpreter. *Id.* § 754(h) (amended by Chapter 1450).

4. A person does not have a privilege against testifying as a witness unless otherwise provided by statute. *Id.* § 911(a) (West 1966). *See id.* §§ 954 (West Supp. 1990) (attorney-client privilege); 970 (West 1966) (spousal privilege); 994 (West Supp. 1990) (doctor-patient privilege).

5. *Id.* § 754.5 (enacted by Chapter 1450). *Cf.* ARIZ. REV. STAT. ANN. § 12-242 E (Supp. 1989) (privilege extended to an interpreter if the communication facilitated by the interpreter is privileged); MASS. GEN. LAWS. ANN. ch. 221, § 92A(3) (West Supp. 1990) (client has a privilege to prevent an interpreter from disclosing a confidential communication facilitated by the interpreter).

6. CAL. EVID. CODE § 751(a) (amended by Chapter 1450).

7. *Id.* § 751(b) (amended by Chapter 1450).

Evidence; paternity

Civil Code § 7004.5 (new); Evidence Code § 621 (amended).

SB 2015 (Kopp); 1990 STAT. Ch. 543

Sponsor: The Joint Custody Association

Support: Family Law Section, State Bar; California Judges Association; Equality Nationwide for Unwed Fathers

Opposition: Family Law Section, Los Angeles County Bar; American Association of Matrimonial Lawyers, Southern California Chapter

Under existing law, there is a presumption that the issue¹ of a wife cohabiting with her husband is a child of the marriage.² The presumption is conclusive, except that the mother or her husband may file a motion for a blood test in order to rebut the presumption.³ Chapter 543 extends the right to file a motion for blood tests to a presumed father⁴ and to the child's guardian ad

1. See CAL. PROB. CODE § 50 (West Supp. 1990) (definition of issue).

2. CAL. EVID. CODE § 621(a) (amended by Chapter 543). The presumption does not apply if the husband is sterile or impotent. *Id.*

3. *Id.* § 621(b)-(d) (amended by Chapter 543). This provision does not apply in cases of conception by artificial insemination or other surgical procedure. *Id.* § 621(e) (amended by Chapter 543). The mother may file the motion for a blood test only if the biological father has filed an affidavit acknowledging paternity. *Id.* § 621(d) (amended by Chapter 543). *Cf.* Vincent B. v. Joan R., 126 Cal. App. 3d 619, 624, 179 Cal. Rptr. 9, 11 (1981); Keaton v. Keaton, 7 Cal. App. 3d 214, 217-18, 86 Cal. Rptr. 562, 564 (1970) (holding blood test results inadmissible to rebut the presumption of legitimacy of the child if the wife and husband were cohabiting at the time of conception). See generally Hoffman, *California's Tangled Web: Blood Tests and the Conclusive Presumption of Legitimacy*, 20 STAN. L. REV. 754 (1968); Comment, *California's Conclusive Presumption of Legitimacy: Jackson v. Jackson and Evidence Code Section 621*, 19 HASTINGS L.J. 963 (1968) (discussing blood tests and the presumption of legitimacy); Sterlek and Jacobson, *Paternity Testing with the Human Leukocyte Antigen System: A Medicolegal Breakthrough*, 20 SANTA CLARA L. REV. 511 (1980) (reviewing paternity tests in general).

4. See CAL. CIV. CODE § 7004 (West Supp. 1990) (definition of presumed father). See also Michael U. v. Jamie B., 39 Cal. 3d 787, 218 Cal. Rptr. 39 (1985); Adoption of Baby Boy D, 159 Cal. App. 3d 8, 205 Cal. Rptr. 361 (1984) (reviewing the rights of unwed natural fathers). See generally Michael H. and Victoria D. v. Gerald D., 109 S. Ct. 2333, 2340-46 (1989) (holding that California Evidence Code section 621 does not infringe upon the rights of putative fathers). See also Uniform Putative and Unknown Fathers Act § 1, 9B U. L. A. 24 (1990) (definition of putative father); Koeppe, *The Rights of Unwed Fathers are Being Violated Under California's Statutory Scheme in Light of the United States Supreme Court Decision in Caban v. Mohammed*, 23 SANTA CLARA L. REV. 899 (1983) (analyzing the effect of California Evidence Code section 621 on unwed fathers).

litem.⁵ If the court determines that a parent-child relationship exists based on blood test results, and that it is in the best interests of the child, Chapter 543 allows the court to grant the natural father temporary custody or reasonable visitation rights.⁶

SAJ

Evidence; privileged communications

Evidence Code § 1014 (amended).
SB 2245 (Davis); 1990 STAT. Ch. 605

Existing law states that confidential communications¹ between a patient and psychotherapist² are privileged.³ This privilege extends to communications made pursuant to the relationship between psychological corporations⁴ and patients.⁵ Chapter 605 extends this privilege to marriage, family, and child counseling corporations.⁶

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5. CAL. EVID. CODE § 621(c) (amended by Chapter 543). *Cf.* Uniform Putative and Unknown Fathers Act § 2, 9B U. L. A. 26 (1990) (discussing putative father's right to bring an action to determine paternity).

6. CAL. CIV. CODE § 7004.5 (enacted by Chapter 543). *Cf.* Uniform Putative and Unknown Fathers Act §§ 4, 9B U. L. A. 30 (1990) (requiring all putative fathers receive notice of judicial proceedings regarding custody or visitation); 5, 9B U. L. A. 31 (1990) (factors in determining parental rights of putative father).

1. *See* CAL. EVID. CODE § 1012 (West Supp. 1990) (definition of a confidential patient-psychotherapist communication).

2. *See id.* § 1010(e) (psychotherapists include licensed marriage, family, and child counselors).

3. *Id.* § 1014 (amended by Chapter 605).

4. *See* CAL. BUS. & PROF. CODE § 2995 (West 1990) (definition of a psychological corporation).

5. CAL. EVID. CODE § 1014(c) (amended by Chapter 605).

6. *Id.* *See* CAL. BUS. & PROF. CODE § 4987.5 (West 1990) (definition of marriage, family, and child counseling corporation). *See generally* Louisell & Sinclair, *Foreword: Reflections on the Law of Privileged Communications - The Psychotherapist-Patient Privilege in Perspective*, 59 CALIF. L. REV. 30 (1971) (discussion of the psychotherapist-patient privilege).

Evidence; trade secrets--protective orders

Evidence Code §§ 1061, 1062 (new).

AB 2986 (Quackenbush); 1990 STAT. Ch. 149

Existing law specifies that the owner of a trade secret¹ may claim a privilege to prevent disclosure of that secret if the exercise of the privilege will not conceal fraud or effect some other injustice.² Chapter 149 establishes a procedure by which the owner of a trade secret may secure a protective order to shield those secrets during a criminal proceeding.³ Although criminal defendants have a constitutional right to a public trial,⁴ the court must review and rule on the motion at an *in camera* hearing.⁵ If the court determines that the trade secret should not be publicized, the court may close the proceedings only to the extent necessary to protect the trade secret.⁶ In addition, Chapter 149 provides that the

1. See CAL. PENAL CODE § 499c(a)(9) (West Supp. 1990) (definition of trade secret). Cf. CAL. CIV. CODE § 3426.1(d) (West 1990) (similar definition).

2. CAL. CIV. CODE § 3426.5 (West Supp. 1990); CAL. EVID. CODE § 1060 (West 1987). Unprivileged disclosure of trade secrets is a criminal offense. CAL. PENAL CODE § 499c(b) (West Supp. 1990).

3. CAL. EVID. CODE §§ 1061, 1062 (enacted by Chapter 149). The owner of a trade secret may apply for and receive a protective order to protect a trade secret if the court deems, by a preponderance of the evidence, that a release of the secret would be substantially likely to cause serious harm to the owner, and there is no higher public interest. *Id.* § 1062(a) (enacted by Chapter 149). The motion must include affidavits stating the affiant's qualifications for giving an opinion regarding the trade secret based on personal knowledge. *Id.* § 1061(a)(1) (enacted by Chapter 149). The court may hold an evidentiary hearing on the propriety of the protective order, or rule on the motion without a hearing. *Id.* § 1061(a)(3) (enacted by Chapter 149). The protective order may include the following limitations: (1) trade secrets may be distributed only to the parties' counsel; (2) defendants may view the secret only in the presence of counsel; (3) parties attempting to show the secret must obtain court approval; and (4) physical articles disclosing the trade secret may be admitted as evidence under seal. *Id.* § 1061(a)(4)(A)-(E) (enacted by Chapter 149). See *Rosato v. Superior Court*, 51 Cal. App. 3d 190, 206, 124 Cal. Rptr. 427, 438 (1975) (courts have an implied power to issue protective orders to further the orderly administration of justice).

4. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564 (1980) (criminal cases must be open to the public unless the state establishes an overriding countervailing interest recognized by the court). See also *Press Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984) (to establish an overriding interest, the court must determine that closing the trial to the public is essential to preserve higher values and that such closure can be narrowly tailored).

5. CAL. EVID. CODE § 1062(b) (enacted by Chapter X). The court must seal the transcript and any physical evidence presented at the hearings. *Id.*

6. *Id.* § 1062(c) (enacted by Chapter 149).

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court must make public, as soon as practicable, the transcript of the closed portion of the proceeding, editing it so as to protect the sensitive information.⁷ The protective order is subject to appellate review upon petition for extraordinary relief.⁸

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7. *Id.* § 1062(e) (enacted by Chapter 149).

8. *Id.* § 1062(d) (enacted by Chapter 149).