Evidence Code Section 771: Conflict with Privileged Communications

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Evidence Code Section 771: Conflict With Privileged Communications

Section 771 of the California Evidence Code embodies the common law rule of production under the doctrine of present recollection revived which grants an adverse party the right to compel the production of a writing used by a witness to refresh his memory for the purpose of testifying. The statute allows the witness to secure his best possible memory by imposing no restrictions on the type of writing which may be used to refresh recollection, and guards against false or manufactured testimony by granting an adverse party the right to inspect the refreshing writing and to cross-examine the witness concerning it. Despite the salutary purpose of this rule, recent cases suggest that, as codified in section 771, it is susceptible to abuse as a general discovery device which may be employed to reach even privileged communications to which a witness referred before testifying at trial or deposition.

The purpose of this comment is to develop a critical analysis of section 771 with particular emphasis on that statute's apparent overexpansion of the scope of production to include privileged communications. First, the historical development of the expanded scope of production under section 771 will be explored, with emphasis on the factors giving rise to a conflict with those sections of the Evidence Code which protect privileged communications from compelled disclosure. This discussion will be followed by an examination of the nature of the conflict and the judicial response to date. Finally various approaches for resolving the conflict will be considered including a suggested amendment to section 771 and the privilege statutes.


2. McCormick, supra note 1, §9, at 17; 3 Wigmore, supra note 1, §758.

3. See text accompanying notes 48-71 infra.
PRESENT RECOLLECTION REVIVED IN CALIFORNIA

A. Two Theories Confused

Prior to 1967, the rule granting an adverse party the right to inspect a writing used by a witness to refresh his memory was codified in former section 2047 of the Code of Civil Procedure. This statute failed to distinguish the common law doctrine of present recollection revived from the superficially similar but theoretically distinct doctrine of past recollection recorded. The ramifications of this doctrinal interfusion are illustrated by a brief discussion of the major differences between the two theories. Past recollection recorded is generally regarded as an exception to the hearsay rule whereby evidence of a witness' former observations which are contained in a writing is admissible after a proper foundation has been laid to establish the writing's trustworthiness. In order to lay a proper foundation under former section 2047 the proponent had to establish the following facts: (1) that the writing was made by the witness or under his direction; (2) that the writing was made at the time when the event occurred or when it was still fresh in the witness' mind; and (3) that the witness knew that the facts as stated in the writing were true. Once these facts were established, the authenticated writing simply became a record of the past recollection of the witness, and the witness was permitted to read the contents of the writing into evidence even though he retained no present recollection of the facts. In contrast, under the doctrine of present recollection revived, the witness testifies from an independent memory which has been refreshed by an examination of the writing. Unlike past

4. CAL. CODES, Civil Procedure §2047, at 531 (1872), repealed, CAL. STATS. 1965, c. 299, §126, at 1366, effective Jan. 1, 1967:
A witness is allowed to refresh his memory respecting a fact, by anything written by himself, or under his direction, at the time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing. But in such case the writing must be produced, and may be seen by the adverse party, who may, if he chooses, cross-examine the witness upon it, and may read it to the jury. So, also, a witness may testify from such a writing, though he retain no recollection of the particular facts, but such evidence must be received with caution.


6. For a discussion of the development of the doctrine of past recollection recorded see MCCORMICK, supra note 1, §§276-280; 3 WIGMORE, supra note 1, §§734-755. For a treatment of the law in California see McBaine, supra note 1, §295; WITKIN, supra note 1, §§1171-1173.

7. MCCORMICK, supra note 1, §276; 3 WIGMORE, supra note 1, §734.

8. See note 4 supra.


10. MCCORMICK, supra note 1, §9; 3 WIGMORE, supra note 1, §758.
recollection recorded, the trustworthiness of the refreshing memorandum is not a necessary precondition to the admission of the witness' testimony. The writing itself is merely an aid to stimulate the mind of the witness, and testimonial trustworthiness is adequately assured by granting the adverse party the right to inspect the writing and cross-examine the witness concerning it.

As a result of the amalgamation of the doctrines of past recollection recorded and present recollection revived under former section 2047, the strict foundation requirements imposed under the former doctrine were unnecessarily applied in the latter.

Furthermore, in People v. Gallardo the California Supreme Court imposed an additional limitation by holding that former section 2047 permitted production of writings for inspection only when the witness used them to refresh his memory while on the stand. Because of these restrictions upon the scope of writings subject to production, the only writings available to an adverse party under former section 2047 were those which the witness had caused to be made when he had firsthand knowledge of the facts therein, and which had been used by the witness to refresh his memory while on the stand. This situation was radically changed with the enactment of section 771 of the Evidence Code.

B. Expanded Scope of Production

Former section 2047 of the Code of Civil Procedure was repealed in 1967 simultaneously with the effective date of the new Evidence Code. With the enactment of the new law, the legislature clearly distinguished the doctrines of past recollection recorded and present recollection revived by affording each a separate section in the Code. Past recollection recorded is codified in section 1237 of the Evidence Code and substantially embodies the common law foundation requirements set forth under former section 2047 of the Code of Civil Procedure. The rule of

11. See McCormick, supra note 1, §9; 3 Wigmore, supra note 1, §758; Underhill, supra note 1, §1170.
12. McCormick, supra note 1, §9, at 17.
13. See Comment, The Forgetful Witness: Refreshing Memory and Past Recollection Recorded, 3 U.C.L.A. L. Rev. 616, 633-34 (1956). But see McCormick, supra note 1, §9, at 16, referring to the improper use of foundation requirements to establish the trustworthiness of a writing used to refresh memory: "Even if the latter requirement is a historical or analytical blunder, it will be none the worse if it is a safeguard needed in the search for truth." 14. 41 Cal. 2d 57, 257 P.2d 29 (1953).
15. Id. at 66-67, 257 P.2d at 35-36. Although it represents the majority view, the "at trial" limitation which was adopted by the court in Gallardo has not gone without criticism. E.g. McCormick, supra note 1, §9, at 17; 3 Wigmore, supra note 1, §758.
17. CAL. EVID. CODE §1237. Under the new law, foundation requirements have been liberalized to the extent that the writing may be made not only by the witness himself but also by some other person for the purpose of recording the witness' statement.
production under the doctrine of present recollection revived is embodied in section 771 of the Evidence Code which provides in part:

(a) [I]f a witness, either while testifying or prior thereto, uses a writing to refresh his memory with respect to any matter about which he testifies, such writing must be produced at the hearing at the request of an adverse party and, unless the writing is so produced, the testimony of the witness concerning such matter shall be stricken.

(b) If the writing is produced at the hearing, the adverse party may, if he chooses, inspect the writing, cross-examine the witness concerning it, and introduce in evidence such portion of it as may be pertinent to the testimony of the witness.¹⁸

Unlike its predecessor, section 771 imposes no restrictions in the form of foundation requirements upon an adverse party's right to demand production other than the requirement that a witness must have used the writing "to refresh his memory with respect to any matter about which he testifies."¹⁹ In addition, the new law repudiated the Gallardo limitation by including within the scope of writings subject to production a writing used by a witness to refresh his memory before taking the stand.²⁰ As a result, under section 771 an adverse party may theoretically compel the production of any writing used by a witness to refresh his memory, without regard to its origin, authenticity, the time of its making, or the time it was used by the witness to refresh. The only express statutory exception to this absolute rule of production is found in subsection (c) of the statute which provides that production is excused if the writing is not in the possession or control of the witness or proponent or if the writing is not reasonably procurable by such party through use of the court's process or other available means.²¹

C. Overexpansion

Former section 2047 of the Code of Civil Procedure did not require the imposition of sanctions in the event of noncompliance with a request at the time it was made. Comment—Assembly Committee on Judiciary, Cal. Evid. Code §1237. Under section 1237 it appears that the witness may be required to show a lack of present recollection. Witkin, supra note 1, §1173.

19. Id. It is the responsibility of the trial judge to make a finding as to whether the writing did in fact refresh the witness' memory, and if he does not so find, an order compelling production will be denied. Morgan v. Stubblefield, 6 Cal. 3d 606, 493 P.2d 465, 100 Cal. Rptr. 1 (1972). Upon a finding that the writing did refresh, the trial judge is apparently without discretion as to the application of the rule. See B. Jeffer-son, California Evidence Benchbook §27.16, at 390 (1972). See text accompanying notes 22-31 infra.
20. Comment—Assembly Committee on Judiciary, Cal. Evid. Code §771: "If a witness' testimony depends upon the use of a writing to refresh his recollection, the adverse party's right to inspect the writing should not be made to depend upon the happenstance of when the writing is used."
for production by an adverse party. The statute simply provided that if a witness refreshed his memory from a writing that satisfied that section's foundation requirements, then "in such case the writing must be produced, and may be seen by the adverse party . . . ." 22 In light of the absence of sanctions for noncompliance with the rule of production, the language of former section 2047 can be regarded as essentially directory in nature. 23 As a predictable consequence of this discretionary language and the extremely limited scope of production under former section 2047, conflicts between that statute and those protecting privileged communications from compelled disclosure were apparently not very common. 24 Probably the most logical explanation for this is that counsel could avoid production of any writing under former section 2047, whether or not privileged, by simply allowing the witness to refresh his memory before taking the stand. 25 In any event, former section 2047 posed no appreciable threat as a potential discovery device for privileged communications.

This is not the case, however, under section 771 of the Evidence Code. Although abolition of the unnecessary foundation requirements and the "at trial" limitation imposed under prior law is in accordance with the views of leading commentators, 26 the expanded scope of production occasioned by these changes potentially encompasses any writing, including privileged communications. 27 Furthermore, section 771 has ostensibly eliminated any element of judicial discretion in its application by mandating that a writing used to refresh a witness' memory "must be produced" at the request of the adverse party or "the testimony of the witness concerning such matter shall be stricken." 28 As a general

22. See note 4 supra (emphasis added).
23. "The requirements of a statute are directory, not mandatory, unless means be provided for its enforcement." Gowanlock v. Turner, 42 Cal. 2d 296, 301, 267 P.2d 310, 312 (1954); see McCrea v. Haraszthy, 51 Cal. 146, 150 (1875). See also People v. Sigal, 235 Cal. App. 2d 449, 455, 45 Cal. Rptr. 481, 485 (1965); C. SANDS, STATUTES AND STATUTORY CONSTRUCTION §§57.02-57.08, 58.01-58.06 (1973).
24. Two cases, Dwelly v. McReynolds, 6 Cal. 2d 128, 56 P.2d 1232 (1936) and Inoye v. McCall, 35 Cal. App. 2d 634, 96 P.2d 386 (1939), dealt with demands for production under former Code of Civil Procedure Section 2047 of police accident reports claimed to be protected from such production under former Vehicle Code Section 488, CAL. STATS. 1935, c. 27, at 173. Because the latter statute protected only the accident report itself, but not its contents when embodied in another writing, production was permitted pursuant to former section 2047. However, as noted by one commentator, a reasonable implication might be drawn from those decisions that, had a privilege been found, production would have been denied. Title, Police Accident Reports, 43 Cal. S.B.J. 711, 717 (1968).
26. E.g., McCormick, supra note 1, §9, at 17; 3 Wigmore, supra note 1, §§758, 762.
27. See text accompanying notes 17-21 supra.
28. CAL. EVID. CODE §771(a) (emphasis added).
rule of construction, where a statutory provision contains language of command accompanied by mandatory sanctions for noncompliance, there is a presumption that the legislature intended to remove any element of judicial discretion in the application of the statute.²⁹ This interpretation of the legislative intent is strengthened by another rule of construction which provides that a change from discretionary language, as used in former section 2047, to mandatory language, as used in section 771, is presumed to be intentional.³⁰ The overexpansion of the scope of production under section 771 was thus primarily caused by its mandatory language which eliminated any element of judicial discretion in honoring a demand for production and which admits of no exception for privileged communications.³¹ In light of this overexpansion, conflict between section 771 and those statutes protecting privileged communications was inevitable.

CONFLICT WITH PRIVILEGED COMMUNICATIONS

A. Nature of Conflict

The purpose of the rule of production codified in section 771 of the Evidence Code is to help insure the reliability of a witness’ testimony. Contrasted with the purpose of section 771 and most other rules of evidence is the purpose underlying privilege statutes which is the protection of certain communications from disclosure for reasons of policy unrelated to the reliability of the information involved.³² The more familiar statutory privileges protecting confidential communications are found in the Evidence Code.³³ These include the attorney-client privilege,³⁴ doctor-patient privilege,³⁵ psychotherapist-patient privilege,³⁶ clergyman-penitent privilege,³⁷ and the marital privilege.³⁸ Before a commu-

³¹. Another factor in the overexpansion of the scope of production under section 771 which indirectly promotes the conflict with privileged communications is the language of the statute that ostensibly permits production of the entire writing although only a portion of the writing may have actually refreshed the witness’ memory. See text accompanying notes 86-88 infra.
³². Comment—Assembly Committee on Judiciary, CAL. EVID. CODE §910; MCCORMICK, supra note 1, §72.
³³. Other privilege statutes which might conflict with section 771 of the Evidence Code are: CAL. CODE CIV. PROC. §2016(b) (attorney’s work product privilege); CAL. REV. & TAX. CODE §19282 (income tax returns); CAL. UNEMP. INS. CODE §§1094, 2111 (employment information).
³⁴. CAL. EVID. CODE §§950-962.
³⁵. CAL. EVID. CODE §§990-1007.
³⁶. CAL. EVID. CODE §§1010-1026.
³⁷. CAL. EVID. CODE §§1030-1034.
³⁸. CAL. EVID. CODE §§980-987.
unication will be protected from compelled disclosure, the code requires that the appropriate relationship exist between the parties and that the communication be of a confidential nature, but protection will be denied a communication meeting these requirements when it falls within a statutory exception to the privilege, or when the privilege has been waived.\(^3\)

Because the special protection extended to privileged communications tends to suppress relevant evidence and thus impede the search for truth, communications are not protected from disclosure in California unless they enjoy a privilege specifically recognized by statute,\(^4\) and the statutes which grant privileges are strictly construed.\(^4\) However, once it is found that a communication meets the requirements for a statutory privilege then disclosure generally\(^4\) cannot be compelled—the legislature has made a determination that it is more important to keep certain information confidential than it is to require disclosure of all information relevant to the issues in a pending proceeding.\(^4\) Furthermore, there are many other provisions embodied in the California codes which are designed to insure the confidentiality of privileged communications. Thus, communications made in the course of the attorney-client, physician-patient, psychotherapist-patient, clergyman-penitent, or marital relationship are presumed to be confidential;\(^4\) the privilege protecting such communications extends to all "proceedings"\(^4\) and pretrial discovery;\(^4\) and the trial judge or presiding officer is expressly charged with the responsibility of excluding privileged information when there is no person present at the proceeding to claim the privilege.\(^4\) As a result of the absolute nature of the privilege statutes, the California courts have been faced with what appears to be an irreconcilable conflict between the language of those statutes and section 771 of the Evidence Code, which makes mandatory the production of *any* writing used to refresh a witness' memory. The courts have responded

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42. Not all privileges in the Evidence Code are absolute. For example, the privileges embodied in Evidence Code sections 1040 and 1041 (official information and identity of informer) are expressly conditioned upon a finding that the necessity for preserving the confidentiality of the information outweighs the necessity for disclosure in the interest of justice. The privilege embodied in Evidence Code Section 1060 (trade secret) is conditioned on a finding that the allowance thereof will not conceal fraud or work an injustice.
with decisions that reflect both their impatience with the conflict and their ingenuity in evading it.

B. Judicial Response

Thus far no appellate court has required the production of a privileged writing under section 771, and all of the decisions have indicated that the judiciary is unwilling to allow the statute to be used as a device for compelling disclosure of privileged communications. On the other hand, the appellate courts have consistently avoided directly resolving the issue of whether privilege statutes should control over an adverse party's right to compel production. The courts have evaded the crux of the problem by finding, often on questionable grounds, either that there was a waiver of any privilege that might have existed, or that section 771 was somehow inapplicable.

Kerns Construction Co. v. Superior Court was the first appellate decision to address the problem. Kerns, as cross-defendant, took the deposition of a Mr. Reynolds who was an employee of the cross-plaintiff, Southern Counties Gas Company. Reynolds was questioned with regard to certain facts about which he had no independent recollection but which were contained in reports prepared by him. It was necessary for Reynolds to "refresh his memory," by reading from the reports.

While two other California decisions have sub silentio permitted the use of section 771 as a pretrial discovery device, the propriety of this practice has yet to be directly challenged. See Morgan v. Stubblefield, 6 Cal. 3d 606, 493 P.2d 465, 100 Cal. Rptr. 1 (1972); Sullivan v. Superior Court, 29 Cal. App. 3d 64, 105 Cal. Rptr. 241 (1972). One possible objection to employing section 771 in this manner may be found in the language of the statute itself which expressly restricts the time of production to the "hearing." Section 145 of the Evidence Code makes it clear that the hearing referred to is that "at which a question under the Code arises, and not some earlier or later hearing," and California decisions have construed "hearing" to mean either a judicial or administrative proceeding where evidence is presented or questions of law or fact are determined. E.g., People v. Ivenditti, 276 Cal. App. 2d 178, 80 Cal. Rptr. 761 (1969). A deposition is not a hearing but a proceeding used to discover facts for trial preparation, and the officer taking the deposition is not competent to rule on the questions of refreshment, privilege, or waiver. CAL. CODE CIV. PROC. §2019c. Thus it is arguable that the legislature never intended section 771 to be available to a deposing party as a pretrial discovery device.

Another possible ground for objection to the use of section 771 as a pretrial discovery device may be found in Greyhound v. Superior Court, 56 Cal. 2d 355, 364 P.2d 266, 15 Cal. Rptr. 90 (1961). In Greyhound, the California Supreme Court held that the Discovery Act provided adequate protection against unreasonable searches and seizures because of the statutory requirement for "good cause," taken together with the wide discretion afforded the trial judge under the Act to limit discovery. Id. at 393-95, 364 P.2d at 386-87, 15 Cal. Rptr. at 110-11. These safeguards are not available under section 771, and thus, as applied to pretrial discovery, it is arguable that the statute may be subject to attack on constitutional grounds.

The fact that Reynolds had no independent recollection of the facts and was unable to testify without reading from the report would indicate that his memory was incapable of being refreshed. Thus, section 771 was not properly applicable. People v. Parks, 4 Cal. 3d 955, 960-61, 485 P.2d 257, 260, 95 Cal. Rptr. 193, 196 (1971). See text accompanying notes 10-12 supra.
in order to give testimony, and this was inexplicably permitted by Southern's attorney. Yet when deposing counsel requested that the identified reports be appended to the deposition, the attorney for Southern objected on the ground that the reports were protected under the attorney-client privilege.

The trial judge agreed that the reports were privileged, but disposed of any conflict with the statutory command to order production under section 771 by finding that production was excused within the meaning of subsection (c) of that statute. Apparently, the trial judge construed the statutory language so that, by virtue of being privileged, the report was not "in the possession or control" of either Reynolds or Southern, nor "reasonably procurable by [Southern] through the use of the court's process or other available means." Such a construction cannot be squared with the fact that the report actually belonged to Southern. However, in light of the appellate court's resolution of the case, there was no further discussion of this issue. The appellate court reversed, noting that although a privileged communication is protected from compelled disclosure, section 912 of the Evidence Code provides that the privilege is waived if the holder of the privilege discloses a significant part of the communication or consents to such a disclosure by another. Southern's failure to assert the attorney-client privilege before Reynolds had disclosed a substantial portion of the report operated as a waiver of the privilege, and production of the report was ordered pursuant to section 771.

Although a waiver was correctly found in Kerns, the mere fact that a witness testifies from a memory refreshed by a privileged writing does not automatically cause a waiver by disclosure. This is because the witness may not disclose a significant part of the communication. A basis for this argument may be found in People v. Aikin wherein the court apparently found that the testimony of a defense witness who had refreshed his memory from a report protected by the attorney-client privilege was insufficient to cause a waiver of that privilege. The Aikin court, however, avoided a direct confrontation between the attorney-client privilege and section 771 by finding a previously unrecognized

51. 266 Cal. App. 2d at 409, 72 Cal. Rptr. at 76.
52. CAL. EVID. CODE §§771(c)(1).
53. CAL. EVID. CODE §§771(c)(2).
54. 266 Cal. App. 2d at 412-14, 72 Cal. Rptr. at 78-79.
55. Id.

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exception to the privilege. In *Aikin* the defendant was examined by a court appointed psychiatrist in order to provide the defendant’s attorney with information concerning the defendant’s mental status. The psychiatrist’s confidential report, which was delivered directly to the attorney, was acknowledged as being initially protected by both the psychotherapist-patient privilege and the attorney-client privilege.\(^5\) However, because the defendant tendered the issue of his mental condition by asserting the defense of insanity, he brought the psychiatrist’s report within the express statutory exception to the psychotherapist-patient privilege found in section 1016 of the Evidence Code.\(^6\) Although there is no analogous express statutory exception to the attorney-client privilege the appellate court interpreted those code sections which delineate the attorney-client privilege as permitting such an exception and affirmed the trial court’s ruling which granted production of the report to the prosecution under section 771.\(^6\) The rationale underlying the *Aikin* court’s ruling was discredited by the California Supreme Court in *People v. Lines*.\(^6\) In *Lines* the court expressly overruled *Aikin* insofar as that decision approved a client-litigant exception to the attorney-client privilege.\(^5\) However, because a demand for production under section 771 was not made in *Lines*, the dilemma presented by the conflict between that statute and privileged communications was not addressed by the high court.

In two other recent cases, privileged writings were examined by a witness before testifying, but the adverse party’s request for production under Evidence Code Section 771 was denied. In one case the court found

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\(^5\) *Id.*

\(^6\) *Id.* at 694, 97 Cal. Rptr. at 257.

\(^6\) *Id.* at 697, 97 Cal. Rptr. at 259. Apparently the defendant did not raise the issue of a possible violation of the privilege against self-incrimination resulting from the prosecution’s use of section 771 to compel the defendant to produce information which might have helped to establish his own guilt. In *People v. Chavez*, 33 Cal. App. 3d 454, 109 Cal. Rptr. 157 (1973), the court noted that the right of the prosecution in a criminal case to inspect documents under section 771 should be limited by the rule laid down in *Prudhomme v. Superior Court*, 2 Cal. 3d 320, 327, 466 P.2d 673, 677-78, 85 Cal. Rptr. 129, 133-34 (1970), where it was held that the privilege against self-incrimination prohibits the state from compelling the defendant to disclose information during pretrial discovery which might serve as a “link in the chain” of evidence tending to establish guilt. This rule was expanded to discovery at trial in *People v. Bais*, 31 Cal. App. 3d 663, 107 Cal. Rptr. 519 (1973). As stated in *Chavez*:

“For in view of the *Prudhomme* rule, . . . such inspection should be limited to an inspection of the matters to which [the witness] testified and not to an inspection of the entire statement without a prior examination [by the trial judge] to determine whether the statement contains matters which would aid the prosecution’s case other than matters in the statement testified to by the witness.”

33 Cal. App. 3d at 462, 109 Cal. Rptr. at 163. For a discussion of other factors which should be considered with regard to an *in camera* examination by the court of writings subject to production under section 771, see text accompanying notes 75-87 infra.

\(^6\) 13 Cal. 3d 500, — P.2d —, 119 Cal. Rptr. 225 (1972).

\(^6\) *Id.* at 513-14, — P.2d —, 119 Cal. Rptr. at 234-35.
that the memorandum did not in fact refresh the witness' memory and therefore refused to strike his testimony. The second decision, Sullivan v. Superior Court, illustrates a more provocative solution to the problem. In Sullivan, plaintiff's attorney conducted an interview with his client concerning the events surrounding an automobile accident. This interview was tape recorded, and the recording was later transcribed by the attorney's secretary. The client used the transcription to refresh her memory before deposition. Upon the defendant's demand for production of the writing pursuant to section 771, the petitioner refused on the ground that it was protected by the attorney-client privilege. The court agreed that the interview as transcribed was a privileged communication and further found that there had been no waiver. After pointing out the conflict between the language of section 2016(b) of the Code of Civil Procedure on the one hand (exempting privileged communications from discovery) and section 771 of the Evidence Code on the other (compelling production of any writing), the court stated:

The various statutes may be harmonized by holding that the word "writing" in section 771 was never intended to mean a transcription of a client's original discussion with her attorney concerning an accident as to which she is employing his legal services.

In support of its decision the court noted that a transcription of an electronic recording was "far removed" from the type of writing generally associated with refreshing a witness' memory.

There appear to be two weaknesses in the Sullivan court's reasoning. First, the court made no reference to section 250 of the Evidence Code which defines "writing" to include all forms of tangible expression, including sound recordings. Thus, within the literal meaning of that statute, not only the transcription, but the recording itself would be a "writing" subject to production if used by the witness to refresh his memory. Second, the theoretical considerations which prompted the abolition of the strict foundation requirements imposed under former section 2047 of the Code of Civil Procedure are not consistent with the court's interpretation of section 771 of the Evidence Code; that is, under the doctrine of present recollection revived in California there is no limitation

64. Morgan v. Stubblefield, 6 Cal. 3d 606, 623 n.11, 493 P.2d 465, 477 n.11, 100 Cal. Rptr. 1, 13 n.11 (1972); B. Jefferson, California Evidence Benchbook §27.16, at 388 (1972).
66. See note 49 supra.
67. 29 Cal. App. 3d at 73, 105 Cal. Rptr. at 246.
68. Id.
69. Id. at 74, 105 Cal. Rptr. at 247.
upon the type of writing that may be used by a witness to refresh his memory,\textsuperscript{71} and any such writing is potentially subject to a demand for production by an adverse party. Denial of a request for production should be based upon a finding that the writing is privileged, not upon what is effectively a judicially imposed "foundation" requirement bearing no relationship to the purposes of the privilege statutes or section 771.

It is apparent from the preceding cases that courts have yet to squarely face the direct conflict between section 771 and the Evidence Code provisions protecting privileged communications. The harmony between the competing statutes sought in the Sullivan decision cannot be attained so long as the mandatory provisions of section 771 admit of no exception for privileged writings. However, once it is acknowledged that the language of the conflicting statutes is irreconcilable, it will be the task of the courts, through judicial construction, or the legislature, by statutory amendment, to determine which of these provisions should control.

**RESOLVING THE CONFLICT**

**A. Judicial Construction**

Under accepted principles of statutory construction,\textsuperscript{72} a judicial interpretation of the California Evidence Code is possible which would completely exempt privileged communications from production under section 771. This result would follow from the application of either one of two rules of construction. The first rule provides that when two provisions of a statute are inconsistent, then a specific provision will control over a general one.\textsuperscript{73} It may be argued that the specific provisions of the Evidence Code, which protect privileges by detailing the relationships and circumstances which must exist before a communication will be protected from compelled disclosure, should control over the more general language of section 771, which permits the production of any writing used by a witness to refresh his memory. The second rule of construction provides that when an irreconcilable conflict exists between two sections of a statute, the later provision in point of position controls over the earlier provision, though both were enacted at the same time.\textsuperscript{74} The

\textsuperscript{71} Comment—Assembly Committee on Judiciary, CAL. EVID. CODE §771. See text accompanying notes 17-21 supra.

\textsuperscript{72} For a survey of statutory rules of construction pertinent to this comment see F. McCaffrey, STATUTORY CONSTRUCTION §§8-9, at 43-49 (1953); C. Sands, STATUTES AND STATUTORY CONSTRUCTION §§50.01-51.08, 57.01-58.06 (1973).


\textsuperscript{74} Hartford Acc. & Indem. Co. v. Tulare, 30 Cal. 2d 832, 186 P.2d 121 (1947).
Evidence Code was enacted as a single statute in 1965, and the provisions that protect privileged communications are found between sections 950 and 1034 of the Code. Thus arguably they should prevail over section 771—the presumption being that the latter part of the statute was last considered. Such an interpretation would permit the specific language of the privilege statutes to control over the more mechanical features of section 771, and a judicial finding that a writing is privileged would constitute an absolute bar to production under the latter section.

B. Statutory Amendment

Whether by judicial construction or through statutory amendment, a resolution of the conflict which totally exempts privileged communications from production under section 771 does not necessarily represent the best possible balance between the purposes served by the competing statutes. This is because a finding that a writing is privileged would necessarily preclude its examination by the trial judge for the purpose of determining whether the writing has in fact refreshed the witness' memory, and if so, whether there has been a significant disclosure of the writing sufficient to constitute a waiver of the privilege. These questions are of course crucial in determining whether an adverse party's demand for production under section 771 should be honored, yet it could be argued that unless the court is granted access to the privileged writings, it will be without adequate information to rule intelligently on either question. In some cases the judge might be able to make such a ruling based on his voir dire of the witness without examining the allegedly privileged information in the writing. However, if the witness is evasive, or if the necessary facts are otherwise unavailable to the court, it will be difficult for the judge to make an objective determination as to whether there has been a significant disclosure sufficient for a waiver. As a result, it may be possible for a witness or party

77. See People v. Dobbins, 73 Cal. 257, 14 P. 860 (1887); Estate of Beech, 63 Cal. 458 (1883); Odd Fellows Sav. Bank v. Banton, 46 Cal. 603 (1879); see also 45 Cal. Jur. 2d, Statutes §80, at 599.
78. See note 19 supra.
79. See text accompanying notes 54-55 supra.
80. See B. Jefferson, California Evidence Benchbook §27.16, at 388 (1972). Another approach was apparently taken in Mize v. Atcheson, Topeka & Santa Fe Ry., 46 Cal. App. 3d 436, 446 — Cal. Rptr. — (1975), wherein the trial judge permitted the witness himself to decide which portions of a writing refreshed his memory. Although a witness' opinion in this regard may be a most important factor in the court's finding, an admission or denial of refreshment by the witness clearly should not in itself be conclusive. See text accompanying notes 92-93 infra.
81. Professor Wigmore implicitly recognized this difficulty when he stated: There is always the objective consideration that when his [holder of the privilege] conduct touches a certain point of disclosure, fairness requires that
to tender the contents of a writing into evidence, through the witness' testimony, while successfully relying on a mere claim of privilege to deny an adverse party his right to compel the production of information necessary to test the witness' credibility on cross-examination.

The legislature has attached a great deal of significance to the protection of the right to production by an adverse party, as evidenced by the mandatory language of section 771 which is not found in other statutory schemes for compelling the production of writings. It is suggested that it would be inconsistent with this legislative intent to permit a refreshing writing which has lost its privileged status to escape inspection by an adverse party merely because the trial judge is denied the information necessary to rule on the questions of refreshment and waiver. Therefore, it is submitted that a more favorable accommodation between the goals of the conflicting statutes may be found in a legislative amendment to section 711 that would require, at the request of the adverse party, an in camera examination by the trial judge of a privileged writing reviewed by a witness before testifying if the judge would otherwise be without adequate information to rule on the questions of refreshment or waiver. If no waiver could be found, production for the benefit of the adverse party would be denied. Such an amendment would also require a corresponding revision of the Evidence Code sections protecting privileged communications to allow this procedure. These provisions would serve to harmonize the irreconcilable language of the competing statutes while extending the maximum degree of protection to an adverse party's right of production, that is consistent with the essential confidentiality necessary to maintain the effectiveness of the privilege statutes. Of course compelled disclosure of potentially privileged information to the trial judge would operate to slightly lessen the degree of protection afforded most privileged com-

8 Wigmore on Evidence §2327 (McNaughton rev. 1961) (emphasis added).
82. See text accompanying notes 22-31 supra.
83. Nonprivileged writings may be subject to discovery pursuant to Code of Civil Procedure Sections 2031 (production of writings for inspection) or 1985 (subpoena duces tecum). Discovery of writings under the Discovery Act is subject to the discretion of the trial court. Cal. Code Civ. Proc. §2019(b)(1); Greyhound v. Superior Court, 56 Cal. 2d 355, 380-83, 364 P.2d 266, 283-84, 15 Cal. Rptr. 90, 106-08 (1961); see also Witkin, supra note 1, §946.
84. Since Evidence Code Sections 954 (attorney-client), 980 (marital), 994 (physician-patient), 1014 (psychotherapist-patient), and 1033 and 1034 (clergyman-penitent) absolutely preclude the trial judge from compelling disclosure of the privileged communication, these sections would require amendment to allow the in camera inspection suggested in this comment. There are several privileges in the Evidence Code which do not absolutely preclude disclosure; thus no amendment to these sections would be required. See note 42 supra.
munications. However, provision could be made to insure that the trial judge would maintain the confidentiality of the writings involved, and the concomitant advantage to the cause of testimonial reliability would seem to justify such a limited disclosure.

C. Other Factors in a Complete Statutory Amendment

For reasons not directly related to the conflict with privileged communications, but nonetheless important to a complete amendment, the provision for an in camera examination by the trial judge should also extend to all nonprivileged refreshing writings. Under the proposed amendment, after a writing has been found subject to production (i.e. the writing refreshed the witness’ memory and, if privileged, the privilege was waived) the trial judge would then examine the writing for the purpose of excising any material not related to the witness’ testimony. Although section 771 now expressly provides that only those portions of the writing pertinent to the witness’ testimony may be introduced into evidence, there is no such restriction upon the adverse party's right to inspect. Consequently, even though only a single sentence contained in a report may truly refresh a witness' memory, section 771 would ostensibly permit production of the entire “writing.”

85. Such a procedure is not without precedent. Section 915(b) of the Evidence Code makes express provision for an in camera disclosure of information for the purpose of ruling on a claim of privilege under Evidence Code Sections 1040 (official information), 1041 (identity of informer), or 1060 (trade secret). Section 915(b) specifically charges the trial judge with the responsibility of maintaining the confidentiality of the privileged information. The special nature of these privileges is indicated in note 42 supra.

86. CAL. EVID. CODE § 771(b).

87. Thus, in Kems Construction Co. v. Superior Court, 266 Cal. App. 2d 405, 72 Cal. Rptr. 74 (1968), the adverse party apparently obtained the production of an entire accident report, and in People v. Aiken, 19 Cal. App. 3d 683, 97 Cal. Rptr. 225 (1971), overruled, People v. Lines, 13 Cal. 3d 500 — P.2d —, 119 Cal. Rptr. 225 (1975), the prosecution successfully compelled the production of what was apparently a complete psychiatrist's report. A recent decision, Mize v. Atcheson, Topeka & Santa Fe Ry., 46 Cal. App. 3d 436, — Cal. Rptr. — (1975), departed from this approach by expressly limiting the adverse party's right to production to only those portions of a file which actually refreshed the witness' memory. The decision is noteworthy because it is the first case which recognizes that under section 771 not all material in a refreshing writing should be subject to production. However, the court in Mize did not restrict production to those portions of the file which, although used to refresh the witness' memory, were related to the subject matter of the testimony given. Thus, Mize arguably compelled disclosure of more than section 771 requires. See text accompanying notes 48-61 supra.

88. Support for such an in camera examination by the trial judge may be found in the Federal Rules of Evidence, rule 612 (effective July 1, 1975):

If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portion not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal.

Further, dicta in a recent California appellate decision indicates that under certain circumstances such a procedure may even be constitutionally mandated. People v. Chavez, 33 Cal. App. 3d 454, 462, 109 Cal. Rptr. 157, 163 (1973). See note 61 supra.
ble despite the fact that most of the information in the writing might not be relevant either to the witness' testimony or to the subject matter of the action. Therefore the advantage of interposing the trial judge for the purpose of excising unrelated material is that it would effectively limit an adverse party's right to production to only that information necessary to accomplish the purpose of the rule—securing the best memory of the witness—while guarding against imposition by false or manufactured testimony. The proponent's files would thus be protected against unwarranted intrusion while the adverse party's right to adequate information with which to effectively cross-examine the witness would be preserved.88

D. Discretionary Application of the Rule of Production: An Alternative?

As previously discussed, it is the mandatory provisions of section 771 that are primarily responsible for the conflict with privileged communications.89 This fact suggests that one way of harmonizing the competing statutes would be an amendment that would simply make the application of section 771 discretionary with the trial judge. The problem with such an approach is that it necessarily results in a lesser degree of protection for an adverse party's rights under section 771 by interposing an additional condition (the trial court's approval) before he is entitled to inspect pertinent portions of the refreshing writing. Thus, even if the court found that the refreshing writing was not privileged, it could deny the adverse party access to information related to the witness' testimony that might be necessary for a thorough cross-examination of the witness. However, because judicial discretion in the application of the rule of production under the doctrine of present recollection revived is permitted in many jurisdictions90 and enjoys the support of leading commentators,91 this approach may appear to be an attractive alternative to the more complicated amendment proposed in the preceding section. Therefore it is important to examine briefly the arguments propounded in support of a discretionary rule of production in order to determine

88. See text accompanying notes 22-31 supra.
89. E.g., Fed. R. Evid. 612, effective July 1, 1975. Rule 612 apparently allows the court no discretion with regard to the production of a writing used by a witness while testifying. However, if a witness uses a writing to refresh his memory before taking the stand, protection is discretionary with the court, as was the case under prior federal law. See Goldman v. United States, 316 U.S. 129 (1942). For specific state citations referring to discretionary application of the rule, see Annot., 82 A.L.R.2d 473, 489-91, 557-66 (1962); Annot., 125 A.L.R. 19, 24-34, 64-69, 207-08 (1940).
90. E.g., McCormick, supra note 1, §755, 765; see Maquire & Quick, Testimony: Memory and Memoranda, 3 How. L.J., 1, 12-14, 20-21 (1957).
whether they are sufficient to justify this approach to the California law.

The two arguments most often set forth in support of conditioning the rule of production upon the discretion of the court are quite unrelated to the conflict with privileged communications. The first argument urges that, consistent with his power to control the manner of examination, the trial judge must have total discretion so that he may deny the use of a writing as an aid to memory when he regards the danger of undue suggestion as outweighing its value to genuinely stimulate memory. That is, testimonial reliability may be insured by keeping from the witness a writing that might lead him into imaginative fiction. This view may be appropriate in jurisdictions which permit a witness to refresh his memory from a writing only while in the presence of the court, but it is inapposite under section 771. This is because the California law imposes no limitations upon the type of writing that a witness may use to refresh his recollection or upon the time when the witness may refer to such a writing. Thus, as a practical matter, it is naive to think that the trial judge can successfully insulate the witness from all improper stimulants to his memory. Section 771 already provides an essential safeguard by charging the court with the responsibility of determining whether the writing did in fact refresh the witness' memory (as distinguished from his imagination), but after the court rules on this question of fact, the best guarantee of trustworthy testimony is not to be found in allowing the trial judge discretion to deny production of the writing to the adverse party. Clearly, the purpose behind the rule of production is better served by a statutory amendment that grants an adverse party the absolute right to inspect all nonprivileged information contained in the refreshing writing that is pertinent to the subject matter of the witness' testimony. In this way the adverse party will have the greatest amount of relevant information with which to test the credibility of the witness' testimony on cross-examination.

The second argument in support of a discretionary application of the rule of production maintains that such an approach is necessary as a safeguard against use of the rule as a pretext for wholesale exploration of an opposing party's files. This is a legitimate concern that is not new to

92. 3 Wigmore, supra note 1, §§755, 765.
93. McCormick, supra note 1, §9, at 17; 3 Wigmore, supra note 1, §§758; Maguire & Quick, Testimony: Memory and Memoranda, 3 How. L.J. 1, 2 (1957).
94. This is the position adopted by the House Judiciary Committee which prompted its amendment to rule 612 of the Federal Rules of Evidence providing for discretionary application of the rule of production with respect to writings used by a witness to refresh his memory before testifying. H.R. Rep. No. 650, 93d Cong., 2d Sess. 7086 (1974).
the California courts in the context of civil discovery, and it could be a point of attack against section 771 as it is now written. However, the proposed amendment to section 771 developed in this comment would provide adequate safeguards to prevent such an abuse of the rule. Under the suggested amendment, not only would privileged writings be exempt from production, but the trial judge would be empowered to interpose an in camera examination of the refreshing writing for the purpose of excising material unrelated to the witness' testimony. Given that production of material in a refreshing writing that is related to the witness' testimony will be strictly controlled by the court, and that such information is essential to the purpose of testimonial reliability, it can hardly be said to be the impermissible product of a "fishing expedition."

CONCLUSION

Expansion of the scope of production under section 771 of the Evidence Code was a necessary and desirable consequence of the abolition of the unnecessary foundation requirements imposed under prior law and of the limitation restricting production to those writings used to refresh a witness' memory while on the stand. Unfortunately, the strict language of the statute leaves the trial judge without discretion and appears to permit an overexpansion of the scope of production by making available entire writings which may not be wholly pertinent to the subject matter of the witness' testimony. The immediate effect of this overexpansion is a conflict between privileged communications and the rule of production under section 771. This difficulty may be cured by an amendment that provides a mechanism whereby the trial judge may intelligently rule on a claim of privilege while clearly exempting privileged documents from the writings subject to production under section 771. Such an amendment to the statutory language would not only be consistent with the purpose of the common law rule, but would also serve to harmonize section 771 with those statutes protecting privileged communications. Although an amendment that would condition application of the rule of production upon the discretion of the court might also serve to alleviate the conflict with privileged communications, the price paid for harmonizing the conflicting statutes would be the derogation of safeguards intended to insure testimonial reliability. Under the California

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96. This is because section 771 presently does not expressly provide a means for limiting the information available to an adverse party which is contained in a refreshing writing to only that which is related to the witness' testimony. It should be noted, however, that the present language of the statute does not preclude such a construction. See note 87, and text accompanying notes 86-88 supra.
rule which permits a witness to refresh his memory from any source and at any time, the most effective safeguard against false or manufactured testimony is vigorous cross-examination, and for this purpose the adverse party must have access to the refreshing writing.

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