

1-1-1985

Evidence

University of the Pacific; McGeorge School of Law

Follow this and additional works at: <https://scholarlycommons.pacific.edu/mlr>

Part of the [Legislation Commons](#)

Recommended Citation

University of the Pacific; McGeorge School of Law, *Evidence*, 16 PAC. L. J. 681 (1985).

Available at: <https://scholarlycommons.pacific.edu/mlr/vol16/iss2/21>

This Greensheet is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in McGeorge Law Review by an authorized editor of Scholarly Commons. For more information, please contact mgibney@pacific.edu.

Evidence

Evidence; unavailability of witnesses

Evidence Code §240 (amended).
AB 3840 (Mojonnier); 1984 STAT. Ch 401

Under existing law a witness is unavailable if that witness is unable to testify due to an existing physical or mental illness or infirmity.¹ With the enactment of Chapter 401, expert² testimony may establish that physical or mental trauma resulting from an alleged crime has caused sufficient harm to a witness to physically prevent that witness from testifying without suffering substantial trauma.³ The court then may view this testimony as a sufficient showing of unavailability.⁴

-
1. CAL. EVID. CODE §240(a)(3).
 2. A physician, surgeon, psychiatrist, or a psychoanalyst who meets the description of section 1010(b),(c) or (e). *Id.* §240(c).
 3. *Id.* §240(c).
 4. *Id.* §240(a)(3).

Evidence; hypnosis of witnesses

Evidence Code §795 (new).
AB 2669 (Sher); 1984 STAT. Ch 479

The testimony of a witness who has been hypnotized to facilitate the recall of events, which are the subject of the testimony, is inadmissible under current case law.¹ The Victim's Bill of Rights² of 1982, however, includes the Truth in Evidence clause³ which provides

-
1. *People v. Shirley*, 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243 (1982). This decision was based on the "Frye Test," which stated that admissibility of evidence obtained through new scientific techniques is contingent upon acceptance in the scientific community of the technique in question. *Id.* See also *Frye v. U.S.*, 293 F. 1013-14 (D.C. Cir. 1923).
 2. CAL. CONST. art. I, §28.
 3. *Id.* §28(d).

that no relevant evidence⁴ shall be excluded.⁵ Chapter 479 authorizes the admission of testimony by a witness hypnotized to recall events, which are the subject of the testimony, under certain conditions.⁶

Chapter 479 limits the admissibility of the testimony of a previously hypnotized witness to matters recalled and related prior to hypnosis.⁷ Chapter 479 also requires the prior recollections to have been preserved⁸ before the hypnosis.⁹ Moreover, before the evidence can be admitted, the hypnosis must have been conducted in accordance with specified procedures.¹⁰ Specifically, a written record must be made of the information given to the hypnotist concerning the event.¹¹ The hypnotist must obtain the informed consent¹² of the witness.¹³ Furthermore, Chapter 479 requires the hypnotic session¹⁴ to be (1) videotaped,¹⁵ (2) performed by a licensed medical doctor or psychologist experienced with hypnosis, and (3) performed out of the presence of law enforcement officers, counsel for the prosecution, or counsel for the defense.¹⁶

Chapter 479 provides that prior to admission, the party offering the testimony must prove by clear and convincing evidence¹⁷ that the hypnosis did not render the prehypnotic recollection unreliable.¹⁸ In addition, the party must prove that the hypnosis did not substantially impair the ability to cross-examine the witness regarding the prehypnotic recollection.¹⁹

Finally, Chapter 479 provides that a party retains the right to attack the credibility of a witness who has been hypnotized²⁰ and the right to present other grounds to admit or exclude the testimony of a witness.²¹

4. CAL. EVID. CODE §210 (definition of relevant evidence).

5. CAL. CONST. art. I, §28(d).

6. CAL. EVID. CODE §795(a).

7. *Id.* §795(a)(1).

8. The form must be written, audiotaped, or videotaped. *Id.* §795(a)(2).

9. *Id.*

10. *Id.* §795(a)(3).

11. *Id.*

12. *Lebeuf v. Atkins*, 621 P.2d 787, 790 (Wash. Ct. App. 1980) (definition of informed consent).

13. CAL. EVID. CODE §795(a)(3)(B).

14. Session include pre- and post-hypnotic interviews. *Id.* §795(a)(3)(C).

15. *Id.*

16. *Id.* §795(a)(3)(D).

17. B. WITKIN, CALIFORNIA EVIDENCE, §209 (1966) (definition of clear and convincing).

18. CAL. EVID. CODE §795(a)(4).

19. *Id.*

20. *Id.* §§780-791 (credibility of witnesses); *Id.* §795(b).

21. *Id.* §795(b). *See id.* §§350-406 (admission and exclusion of evidence).