

1-1-1985

Evidence

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Recommended Citation

University of the Pacific; McGeorge School of Law, *Evidence*, 17 PAC. L. J. 719 (1986).

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Evidence

Evidence; child witnesses—qualifications

Evidence Code §§700, 701, 765 (amended).

AB 1502 (Molina); 1985 STAT. Ch 884

Support: Attorney General's Commission on the Enforcement of Child Abuse Laws

Existing law provides that every person is qualified to be a witness and may testify to any matter unless provided otherwise by statute.¹ Chapter 884 explicitly provides that all persons are qualified to be witnesses without regard to their age.² In addition, Chapter 884 permits a trial court to reserve challenges to the competency of a witness until conclusion of direct examination of that witness in any proceeding held outside the presence of a jury.³ Finally, Chapter 884 requires that the court take special care to protect a witness under the age of fourteen from undue harassment or embarrassment, or needless repetition of questions.⁴

1. CAL. EVID. CODE §700. For statutory exceptions, see e.g. *id.* §§701 (mental or physical capacity to be a witness), 702 (requirement of personal knowledge), 703 (judge as a witness), 704 (juror as a witness), 900-1070 (privileges).

2. CAL. EVID. CODE §700.

3. *Id.* §701(b).

4. *Id.* §765(b).

Evidence; child witnesses—sex offenses

Penal Code §1347 (new).

SB 46 (Torres); 1985 STAT. Ch 43

(Effective May 20, 1985)

Support: The Children's Civil Rights Fund, Inc.; Los Angeles County Board of Supervisors; Los Angeles County District Attorney; County Welfare Directors Association; Department of Finance; Office of Criminal Justice Planning; Attorney General; California District Attorneys Association; California Medical Association; California Teachers Association; United Way; Adults Molested as Children

Opposition: California Public Defenders Association; California Attorneys for Criminal Justice; Alameda County Public Defenders Association; Los Angeles County Municipal Court Judges Association

Prior law did not authorize a court to order the testimony of a child¹ witness to be given using closed-circuit television.² Chapter 43 allows the court to use two-way closed-circuit television to convey the testimony of a child witness³ in a criminal case involving a sexual offense⁴ committed on or with the child witness.⁵ The court, however, must balance the rights of the defendant⁶ against the need to protect the child witness in deciding whether to use closed-circuit television.⁷

Under Chapter 43, the court may, upon its own motion or the properly noticed motion of the prosecuting attorney, order the use

1. CAL. PENAL CODE §11165 (definition of child).

2. *Hochheiser v. Superior Court*, 161 Cal. App. 3d 777, 791, 208 Cal. Rptr. 273, 282 (1980) (construing CAL. PENAL CODE §288(c) as not mandating the use of closed-circuit television); *id.* at 789, 208 Cal. Rptr. at 280 (construing CAL. EVID. CODE §765 and finding no authorization for the use of closed-circuit television).

3. Chapter 43 only applies to child witnesses ten years of age or younger. CAL. PENAL CODE §1347(b).

4. *See id.* §11105.3(e) (sex crime refers to a conviction for a violation or attempted violation of Penal Code §§220, 261, 261.5, 264.1, 267, 272, 273a, 273d, 285, 286, 288, 288a, 289, 314, 647a, or 647d).

5. *Id.* §1347. In addition, Chapter 43 expresses the legislative intent that the court be provided with discretion to employ unusual court procedures to protect the rights of a child witness. *Id.* §1347(a). Chapter 43 does not, however, affect the disqualification of witnesses pursuant to Evidence Code §701. *Id.* §1347(i).

6. *See generally* *Pointer v. Texas*, 380 U.S. 400, 403 (1964) (Sixth Amendment right of accused to confrontation of witnesses is obligatory on the states); *Mattox v. United States*, 156 U.S. 237, 244 (1895) (substance of right of confrontation is preserved by seeing the witness face to face); *United States v. Benfield*, 593 F.2d 815, 819 (8th Cir. 1979) (physical confrontation is an element of sixth amendment guarantees); *Herbert v. Superior Court*, 177 Cal. App. 3d 661, 671, 172 Cal. Rptr. 850, 855 (1981) (historical concept of the right of confrontation has included the right to see one's accusers face to face); W. LAFAVE, J. ISRAEL, *CRIMINAL PROCEDURE* §23.3(d) (1985) (preference of the framers of the sixth amendment was face to face confrontation). *Contra* *Ohio v. Roberts*, 448 U.S. 56, 63-64 (1980) (competing interests may warrant dispensing with confrontation at trial); *Douglas v. Alabama*, 380 U.S. 415, 418 (1965) (an adequate right to cross-examination may satisfy the Confrontation Clause in absence of physical confrontation) (quoting *Mattox v. United States*, 156 U.S. 237, 243 (1895)); *Mattox v. United States*, 156 U.S. 237, 243 (1895) (right of confrontation must occasionally give way to considerations of public policy and the necessities of the case); *Kansas City v. McCoy*, 525 S.W.2d 336, 339 (1975) (physical presence of witness not required to satisfy the Confrontation Clause). *See also* *Lilly, Notes on the Confrontation Clause and Ohio v. Roberts*, 36 U. FLA. L. REV. 207 (1984) (interpretation of the meaning and implications of *Ohio v. Roberts*).

7. CAL. PENAL CODE §1347(a). *See generally* *State v. Sheppard*, 197 N.J. Super. 411, 484 A.2d 1330, 1333 (N.J. Super. Law Div. 1984) (legal proceedings may put child victim under prolonged mental stress); Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 977, 1015 (1969) (legal proceedings may be traumatic to a victim required to testify).

of closed-circuit television in a criminal proceeding to take the testimony of a child witness.⁸ A hearing on a motion to use closed-circuit television is to be conducted out of the presence of the jury⁹ and the court may not compel the child to testify at the hearing.¹⁰ Prior to allowing the use of closed-circuit television the court must find that the child witness will be unable to testify due to one or more of the following factors: (1) threats of serious bodily injury to be inflicted on the minor or a family member, or deportation or incarceration of the minor or a family member, or removal of the minor from the family or dissolution of the family;¹¹ (2) use of a firearm or any other deadly weapon during the commission of the crime;¹² (3) infliction of great bodily injury upon the victim during the commission of the crime;¹³ or (4) conduct on the part of the defendant or defense counsel during the hearing or trial which causes the minor to be unable to continue testifying.¹⁴ In determining whether one of the four factors is so substantial that the child will be unable to testify unless closed-circuit television is used, the court may question the child, on the record, in chambers, or some comfortable place other than the courtroom.¹⁵

Under Chapter 43, the court may order the use of closed-circuit television if the court specifically finds the following: (1) the testimony of the child witness will involve the recitation of facts of an alleged sex offense committed on or with the child witness;¹⁶ (2) clear and convincing evidence that one of four specific factors will have so substantial an impact that it will render the child witness unable to testify;¹⁷ and (3) the equipment used will accurately communicate the image and demeanor of the child witness.¹⁸ Mere refusal of the child

8. CAL. PENAL CODE §1347(b). The prosecutor must give written notice to the court at least three days prior to the preliminary hearing or trial date on which the testimony of the child witness is to be given. *Id.*

9. *Id.* §1347(c)(1).

10. *Id.* §1347(c)(2). The court may not deny the motion solely on the ground that the child has not testified. *Id.*

11. *Id.* §1347(b)(2)(A).

12. *Id.* §1347(b)(2)(B).

13. *Id.* §1347(b)(2)(C).

14. *Id.* §1347(b)(2)(D).

15. *Id.* §1347(c)(3). Under Chapter 43, only the judge, the support person, the prosecutor and defense counsel are to be present during the questioning of the child witness. The prosecuting attorney and defense counsel may submit proposed questions to the court, but only the court may conduct the questioning. *Id.*

16. *Id.* §1347(b)(1).

17. *Id.* §1347(b)(2). See *supra* notes 11-14 and accompanying text.

18. CAL. PENAL CODE §1347(b)(3). Chapter 43 also allows the courts to consider the age of minor, the relationship of the minor to the defendant, any handicaps or disabilities of the

witness to testify is not sufficient to justify the use of closed-circuit television in obtaining the testimony of the child witness.¹⁹

If the court orders the testimony of the child witness to be taken using closed-circuit television, Chapter 43 requires the court to make a brief statement on the record, but out of the presence of the jury, setting forth the reasons for the order of the court.²⁰ In addition, the court must instruct the members of the jury that they are not to draw any inferences from the use of closed-circuit television,²¹ instruct counsel not to make any comment on the use of closed-circuit television,²² and instruct the support person²³ not to coach or cue the child witness.²⁴ Further, Chapter 43 requires the court to order a video tape and a stenographic recording of the examination.²⁵

Before the child witness testifies, Chapter 43 provides that the child witness must be brought into the judge's chambers for an explanation of the court process and to allow the attorneys to establish rapport with the child witness.²⁶ Only the child witness, a support person, a nonuniformed bailiff and a representative appointed by the court may be present in the room where the testimony of the child witness is taken.²⁷ Finally, Chapter 43 provides that the child witness may be required to enter the courtroom to identify the defendant.²⁸

minor, and the nature of the acts charged. *Id.* §1347(b)(2). Commentators have noted, however, that use of videotape may lessen the completeness of the information conveyed, or result in electronic distortion of the information, perceptual distortions of the information, a loss in the veracity of the information communicated, or innate biasing of the information communicated. See Doret, *Trial By Videotape—Can Justice Be Seen to be Done?*, 47 TEMPLE L.Q. 228, 241 (1974).

19. CAL. PENAL CODE §1347(b)(2).

20. *Id.* §1347(d)(1). In addition, the statement need not include traditional findings of fact. However, the reasons must be set forth with sufficient specificity to allow for a meaningful review and to demonstrate that discretion was exercised by the court. *Id.*

21. *Id.* §1347(d)(2).

22. *Id.* §1347(d)(3).

23. *Id.* §868.5 (definition of support person).

24. *Id.* §1347(d)(4).

25. *Id.* §1347(d)(5). The videotape must be available to the prosecuting attorney, the defendant, and the attorney for the defendant. The videotape is to be destroyed five years after the date of entry of judgement, or a final judgment if an appeal is taken. Additionally, the tape may be subject to a protective order of the court in order to protect the privacy of the witness. *Id.*

26. *Id.* §1347(f). The support person must be allowed to be present in chambers. *Id.*

27. *Id.* §1347(e).

28. *Id.* §1347(g).

Evidence; child abuse

Evidence Code §1228 (amended);

Penal Code §§11165, 11166, 11166.5, 11170, 11172 (amended).
SB 1358 (Carpenter); 1985 STAT. Ch 1572
Support: California Association of Marriage and Family Therapists;
Department of Finance

Existing law provides that a court may admit the hearsay statement of a child under twelve who is the alleged victim of a sexually oriented crime¹ if the statement of the child is used to corroborate the confession of the person accused of the crime.² Existing law further provides that the statement may be admitted only after the court finds that the minor child is unavailable³ and makes other specified findings.⁴ Chapter 1572 expands the definition of unavailable to include disqualification as a witness.⁵

Existing law requires that information concerning a known or suspected child abuse case be supplied to a medical practitioner by a child protective agency⁶ if the medical practitioner is treating a case of known or suspected child abuse.⁷ Chapter 1572 enlarges the class of individuals eligible to receive information concerning cases of known or suspected child abuse by including marriage, family, and child counselor trainees;⁸ unlicensed registered marriage, family, and child counselor interns;⁹ state or county public employees that treat minors for venereal disease or any other condition; coroners; and religious practitioners that diagnose, examine, or treat children.¹⁰

Finally, existing law requires certain classes of persons¹¹ to report suspected instances of child abuse.¹² Chapter 1572 expands the class

1. CAL. EVID. CODE §1228 (specified crimes are Penal Code §§261, 264.1, 285, 286, 288, 288a, 289, 647a).

2. *Id.* §1228. See CAL. EVID. CODE §1200 (hearsay rule).

3. *Id.* §701 (definition of unavailability).

4. *Id.* §1228. The court must make the following findings: the child is under the age of 12 and the statement was included in the written report of a law enforcement official or an employee of a county welfare department; the statement describes the child as a victim of sexual abuse; the statement was made prior to the defendant's confession; no circumstances exist that would render the statement unreliable; and the statement was memorialized in a trustworthy manner. *Id.*

5. *Id.* §1228(e). A witness is disqualified when the witness is incapable of expressing him or herself concerning the matter so as to be understood, either directly or through an interpretation by one who can understand the witness; or the witness is incapable of understanding the duty of a witness to tell the truth. *Id.* §701.

6. *Id.* §11165(j) (definition of child protective agency).

7. CAL. PENAL CODE §11170(b).

8. CAL. BUS. & PROF. CODE §4980.03(c) (definition of marriage, family, and child counselor trainees and interns).

9. See *id.* §4980.44.

10. CAL. PENAL CODE §11170(b). See also *id.* §11165 (definition of health practitioner).

11. CAL. PENAL CODE §11166(a) (persons required to report are child care custodians, health practitioners, or employees of a child protective agency).

12. *Id.*

of persons required to report suspected instances of child abuse to include persons who are administrators or presenters of, or counselors in, child abuse prevention programs in public or private schools.¹³

13. *Id.* See *id.* §11165(h) (definition of child care custodian). Chapter 1572 expands class by including administrators, presenters, or counselors in child abuse programs in public or private schools in the definition of "child care custodian." *Id.*

Evidence; child witnesses—support persons

Penal Code §868.5 (amended).

AB 30 (Filante); 1985 STAT. Ch 467

Support: Task Force on Child Abuse and the Judicial System; Office of Criminal Justice Planning

Existing law provides that a prosecuting witness¹ under the age of seventeen is entitled to have a support person present at the hearing and at trial in specified sex offense cases.² Prior law required that the support person be the parent, guardian, or sibling of the witness.³ Chapter 467 provides that a prosecuting witness under the age of seventeen is entitled during trial, and while testifying to the attendance of up to any two family members.⁴ In addition, prior law provided that if the support person was also a prosecution witness, a noticed motion⁵ showing that the presence of the support person was desired by the witness and would be helpful to the witness was required.⁶ Chapter 467 does not require that a noticed motion be made prior to the presen-

1. See *Ortega v. Superior Court of San Joaquin County*, 135 Cal. App. 3d 244, 185 Cal. Rptr. 676 (1982). The term prosecuting witness is not limited to the victim or person that brings the complaint, but instead refers to witnesses for the prosecution and includes persons that are neither victims nor complainants. *Id.*

2. CAL. PENAL CODE §868.5. Specified offenses are Penal Code §§243.4 (sexual battery), 261 (rape defined), 273a (willful cruelty or unjustifiable punishment of a child endangering the life or health of the child), 273d (corporal punishment or injury inflicted upon a child), 285 (incest), 286 (sodomy), 288 (lewd or lascivious acts with a child under 14), 289 (penetration of genital or anal openings by a foreign object), 647 (disorderly conduct), 314(1) (lewd or obscene conduct: exposure of private parts in public).

3. 1984 Cal. Stat. c. 1423, §4, at ____ (amending CAL. PENAL CODE §868.5).

4. CAL. PENAL CODE §868.5(a). One support person may accompany the witness to the stand. *Id.*

5. See generally CAL. CIV. PROC. CODE §1010 (notice of a motion, other than a motion for a new trial, must be in writing and state when, and upon what grounds the motion will be made).

6. 1984 Cal. Stat. c. 1423, §4, at ____ (amending CAL. PENAL CODE §868.5).

tation of evidence that attendance of a family member who is also a prosecution witness is both helpful to the prosecuting witness, and is desired by that witness.⁷

7. CAL. PENAL CODE §868.5(b). Existing law also provides that the testimony of a support person who is also a prosecuting witness must be given out of the presence of the child witness, and before the child testifies. *Id.* §868.5(c).

Evidence; psychotherapist—patient privilege

Evidence Code §1028 (repealed).

SB 1044 (Torres); 1985 STAT. Ch 1077

Support: California Association of Marriage and Family Therapists;
Governor's Legal Affairs Unit

Existing law provides that a confidential communication between patient and psychotherapist¹ is privileged.² Under prior law, however, the psychotherapist-patient privilege did not apply in a criminal proceeding unless the psychotherapist was authorized to practice medicine and devoted a substantial amount of time to the practice of psychology,³ or was a licensed psychologist.⁴ Chapter 1077 repeals this limitation on the psychotherapist-patient privilege in a criminal proceeding.⁵

1. CAL. EVID. CODE §1012 (definition of confidential communication between patient and psychotherapist). *See id.* §1011 (definition of patient); *id.* §1010 (definition of psychotherapist).

2. *Id.* §1014.

3. CAL. BUS. & PROF. CODE §2903 (requisites for the practice of psychology).

4. 1970 Cal. Stat. c. 1396, §4, at 2625 (enacting CAL. EVID. CODE §1028); 1970 Cal. Stat. c. 1397, §4, at 2627 (enacting CAL. EVID. CODE §1028). *See* CAL. BUS. & PROF. CODE §2902(a) (definition of licensed psychologist).

5. 1985 Cal. Stat. c. 1077, §§1,2, at ____ (repealing CAL. EVID. CODE §1028). *But see* CAL. EVID. CODE §1023 (exception to psychotherapist-patient privilege in a proceeding to determine the sanity of a criminal defendant); *id.* §1024 (exception to the psychotherapist-patient privilege if the patient is dangerous to himself or others).

Evidence; educational psychologist-patient privilege

Evidence Code §1010.5 (new).

AB 1410 (Johnston); 1985 STAT. Ch 545

Support: California Association of School Psychologists; Governor's Legal Affairs Unit

Existing law provides that confidential communications¹ between a patient and psychotherapist are privileged, giving the patient the right to refuse to disclose, or prevent another from disclosing, the contents of any confidential communication.² Existing law additionally provides exceptions to the psychotherapist-patient privilege under specified circumstances.³ Chapter 545 expands existing privileges by providing that communications between a patient and a licensed⁴ educational psychologist are privileged.⁵

1. CAL. EVID. CODE §1012. Confidential communication means information, including information obtained by an examination of the patient, transmitted between a patient and psychologist in the course of that relationship and in confidence. *Id.*

2. *Id.* §§1014 (psychotherapist-patient privilege; application to individuals and entities), 1013 (holder of the privilege).

3. *See id.* §§1016 (patient litigant), 1017 (court appointed psychotherapist), 1018 (crime or tort), 1019 (parties claiming through deceased patient), 1020 (breach of duty arising out of psychotherapist-patient relationship), 1021 (intention of deceased patient concerning a writing affecting a property interest), 1022 (where the validity of a writing executed by a deceased patient affecting a property interest is at issue), 1023 (proceeding to determine the sanity of a criminal defendant), 1024 (patient is dangerous to himself or others), 1025 (proceeding to establish competence), 1026 (required report).

4. CAL. BUS. & PROF. CODE §4986.20 (licensing procedures).

5. CAL. EVID. CODE §1010.5. Ch 545 explicitly provides that the privilege created is exactly the same, and subject to the same limitations, as the privilege that exists between a patient and a psychotherapist as described in Evidence Code §§1010(c), (d), and (e). *Id.*

Evidence; discovery of psychological records and proceedings

Evidence Code §1157 (amended).

SB 328 (Presley); 1985 STAT. Ch 725

Support: California Psychological Association

Under existing law, the records and proceedings of committees responsible for the review of certain health care professionals are

exempt from discovery.¹ Chapter 725 extends the discovery exemption to records and proceedings of state psychological review committees and state or local psychological associations or societies responsible for the evaluation and improvement of the quality of care.² The discovery exemption added by Chapter 725 however, does not prevent the discovery or use of any relevant evidence in a criminal action.³

1. CAL. EVID. CODE §1157(a). The exemption applies to medical, medical-dental, podiatric, registered dietitian, chiropractic, dental hygienist or veterinary hospital staffs and local societies that are responsible for the evaluation and improvement of the quality of care. *Id.*

2. *Id.*

3. *Id.* §1157(e).

Evidence; admissibility of duplicates

Evidence Code §1511 (repealed and new).
SB 641 (Dills); 1985 STAT. Ch 100

Under existing law, the best evidence rule provides that the original¹ of a writing² is the only evidence admissible to prove the content of that writing, unless otherwise provided by statute.³ Prior law allowed an exception to the best evidence rule if the proponent of a duplicate⁴ provided the other parties with written notice and none of the other parties objected to admission.⁵ Chapter 100 expands the admissibility of duplicates by providing that a duplicate is admissible to the same extent as an original, unless the authenticity of the duplicate is in issue or admission of the duplicate in place of the original would be unfair.⁶

1. CAL. EVID. CODE §255 (definition of original).

2. *Id.* §250 (definition of writing).

3. *Id.* §1500; *see id.* §§1501-1510 (statutory exceptions).

4. *Id.* §260 (a duplicate is a counterpart produced by a technique which accurately reproduces the original).

5. 1977 Cal. Stat. c. 708, §4, at 2269 (enacting CAL. EVID. CODE §1511).

6. CAL. EVID. CODE §1511. *Compare id.* with FED. R. EVID. 1003 (the exception provided by Chapter 100 is the same as the existing exception under the Federal Rules).

Evidence; mediation proceedings—admissibility

Evidence Code §1152.5 (new).

AB 1030 (McAlister); 1985 STAT. Ch 731

Support: California Law Revision Commission; State Bar of California

Existing law provides procedures for the mediation or arbitration of disputes in certain civil cases.¹ Chapter 731 provides that anything said or any admission made while participating in a mediation is not admissible evidence in a subsequent civil action if (1) the purpose of the mediation is to compromise, settle, or resolve a dispute;² (2) the persons participating in the mediation execute a written agreement incorporating a portion of Chapter 731 in the text of the agreement;³ and (3) the agreement specifies that the parties to the mediation agree that the provisions of Chapter 731 will apply to the mediation proceedings.⁴

In addition, Chapter 731 provides that documents prepared for the purpose of, in the course of, or pursuant to the mediation are not admissible evidence, unless the persons participating in the mediation otherwise agree.⁵ Chapter 731 provides that the agreement specifying that Chapter 731 applies to the mediation proceedings and any agreement not to take a default in a pending civil action are not made inadmissible by the provisions of Chapter 731.⁶ Specifically excepted from the provisions of Chapter 731 are annulment or separation proceedings,⁷ mediation services and proceedings in which custody or visitation rights with a minor child are at issue,⁸ the investigation and mediation of labor disputes conducted by the Department of Labor,⁹ and all superior court hearings or conferences in conciliation proceedings.¹⁰

1. CAL. CIV. PROC. CODE §§1281 (a written agreement to submit to arbitration an existing controversy is valid, enforceable, and irrevocable), 1281.1 (order to arbitrate controversy), 1282 (exercise of powers and duties of a neutral arbitrator), 1282.2 (hearing; time and place; conduct; evidence; procedure).

2. CAL. EVID. CODE §1152.5(a).

3. *Id.* §1152.5(c). Chapter 731 requires that the agreement set out the text of Evidence Code §1152.5(a) and (b). *Id.*

4. *Id.* §1152.5(c)(2).

5. *Id.* §1152.5(a)(2).

6. *Id.* §1152.5.

7. *Id.* §1152.5(d). SEE CAL. CIV. CODE §431.5 (annulment proceedings).

8. *Id.* §1152.5(d) (CAL. CIV. CODE §4607).

9. CAL. EVID. CODE §1152.5(e). The investigation and mediation of labor disputes is governed by section 65 of the Labor Code. *Id.*

10. *Id.* §1152.5(d). SEE CAL. CIV. PROC. CODE §1747 (court hearings or conferences in conciliation proceedings).

Evidence; unavailable witness declarations—admissibility

Evidence Code §1350 (new); Penal Code §§1335, 1336, 1337, 1341 (amended).

AB 2059 (Condit); 1985 STAT. Ch 783

Support: Los Angeles County District Attorney, California
District Attorneys Association, Attorney General

Opposition: American Civil Liberties Union, California
Newspaper Association

Existing law provides that hearsay¹ is inadmissible unless otherwise provided by law.² Chapter 783 provides that in a criminal proceeding charging a serious felony,³ the statement of a declarant who is unavailable as a witness⁴ is admissible if the following conditions are met: (1) clear and convincing evidence exists to show that the declarant's unavailability was knowingly caused by the defendant for the purpose of preventing the arrest or prosecution of the defendant and is the result of the death by homicide or kidnapping of the declarant;⁵ (2) no evidence exists to show that the declarant's unavailability was caused by the party offering the statement;⁶ (3) the declarant's statement is memorialized in a trustworthy fashion prior to the death or kidnapping of the declarant;⁷ (4) the statement was made under circumstances which indicate that the trustworthiness of the statement was not the result of promise, inducement, threat, or

1. CAL. EVID. CODE §1200(a). Hearsay is evidence of a statement that was made other than by a witness while testifying at the hearing, that is offered to prove the matter asserted. *Id.*

2. *Id.* Statutory exceptions to the hearsay rule include Evidence Code §§1220 (admissions), 1230 (declarations against interest), 1235 (prior statements of witnesses), 1240 (spontaneous, contemporaneous, and dying declarations), 1250 (statements of mental or physical state), 1260 (statements relating to wills and to claims against estates), 1270 (business records), 1280 (official records and other official writings), 1290 (former testimony), 1300 (judgments), 1310 (family history), 1320 (reputation and statements concerning community history, property interests, and character), 1330 (dispositive instruments and ancient writings), 1340 (commercial, scientific and similar publications).

3. *Id.* §1350(d). Serious felony means any of the felonies listed in Penal Code section 1192.7(c) (specified crimes), or Health and Safety Code sections 11351 (possession for sale of controlled substances), 11352 (transportation, sale or giving away of designated controlled substances), 11378 (possession for sale), and 11379 (transportation, sale or manufacture of controlled substances). *Id.*

4. *Id.* §240 (definition of unavailable).

5. *Id.* §1350(a)(1).

6. *Id.* §1350(a)(2).

7. *Id.* §1350(a)(3). The statement must be memorialized in a tape recording made by a law enforcement official or in a written statement prepared by a law enforcement official, signed by the declarant and notarized in the presence of the law enforcement official. *Id.*

coercion;⁸ (5) the statement is relevant to the issues to be tried;⁹ and (6) the statement is corroborated by other evidence connecting the defendant with the commission of the serious crime with which the defendant is charged.¹⁰ If the prosecution intends to offer a statement pursuant to Chapter 783, a written notice must be served upon the defendant ten days prior to the hearing or trial at which the statement will be offered, unless the prosecution shows good cause for failing to provide notice.¹¹ Chapter 783 further provides that when the statement is offered at trial the determination of the court as to the admissibility of the statement must be made out of the presence of the jury.¹² Should the defendant choose to testify at a hearing on a motion brought pursuant to Chapter 783, Chapter 783 specifies the persons who may be present while the defendant is being examined.¹³ Chapter 783 also provides that the testimony of the defendant is not admissible at any other proceeding.¹⁴

Existing law provides that a witness may be examined conditionally under certain circumstances.¹⁵ Chapter 783 allows the conditional examination of a witness when the defendant has been charged with a serious felony¹⁶ and the people have evidence that the life of the witness is in jeopardy.¹⁷

8. *Id.* §1350(a)(4).

9. *Id.* §1350(a)(5).

10. *Id.* §1350(a)(6). The corroboration is insufficient if it merely shows the commission of the offense, or the circumstances thereof. *Id.*

11. *Id.* §1350(b). In the event good cause is shown the defendant is entitled to a reasonable continuance of the hearing or trial. *Id.*

12. *Id.* §1350(c).

13. *Id.* Chapter 783 provides that the clerk, the court reporter, the bailiff, the prosecutor, the investigating officer, the defendant's counsel, an investigator for the defendant, and the officer having custody of the defendant may be present. *Id.*

14. *Id.*

15. CAL. PENAL CODE §1336(a) (witness may be examined conditionally if the witness is about to leave the state, is so sick or infirm as to afford reasonable grounds for apprehension that the witness will not be able to attend).

16. *Id.* 1335(c). Serious means any of the felonies listed in Penal Code section 1192.7, and Health and Safety Code sections 11351, 11352, 11378, and 1379. *Id.*

17. *Id.* §§1335(b), 1336(b).

Evidence; disposition of exhibits

Code of Civil Procedure §1952.3 (amended); Penal Code §1417, 1417.1, 1417.2, 1417.3, 1417.5, 1417.6, 1417.7 (repealed and new); §§1420, 1421 (amended).

AB 556 (Frazee); 1985 STAT. Ch 875

Support: County Clerk's Association; San Diego County Bar Association; Department of Finance

Existing law provides the procedure for the disposition of exhibits or depositions in the custody of the court in civil actions.¹ Under prior law, any party to an action could cause an exhibit or deposition to be preserved three years longer than otherwise required by law by submitting a written request to the court.² Chapter 875 provides that an exhibit or deposition may be preserved for a period of time not exceeding one year upon the submission of a request by a party to the action to preserve an exhibit or deposition by a party.³

Prior law provided procedures for the disposition of evidence introduced in criminal proceedings.⁴ With the enactment of Chapter 875, all exhibits introduced or filed in a criminal action must be retained by the clerk of the court until final determination⁵ of the action.⁶ Chapter 875, however, permits the court to order that the exhibit be delivered up, upon noticed motion of the owner or the party entitled to possession of the exhibit, a finding by the court that no prejudice will be suffered by either party, and the making of a full and complete photographic record of the original exhibit.⁷ In addition, the court may release an exhibit to the state prior to the final determination of the action if the exhibit was offered by the state

1. CAL. CIV. PROC. CODE §§1952.2, 1952.3.

2. 1984 Cal. Stat. c. 25, §3 (amending CAL. CIV. PROC. CODE §1952.3). *See also* CAL. CIV. PROC. CODE §1952.2 (length of time exhibit must remain in the possession of the court).

3. CAL. CIV. PROC. CODE §1952.3(c) (the exhibit or deposition may be destroyed after that time unless another notice is filed).

4. 1959 Cal. Stat. c.1849, §1, at 4397 (amending CAL. CIV. PROC. CODE §1417), 1976 Cal. Stat. c. 369, §2, at 1015 (amending CAL. CIV. PROC. CODE §1418), 1980 Cal. Stat. c. 317, §1, at 767 (amending CAL. CIV. PROC. CODE §1418.5), 1975 Cal. Stat. c. 156, §1, at 287 (amending CAL. PENAL CODE §1418.6), 1953 Cal. Stat. c. 51, §1, at 695 (amending CAL. PENAL CODE §1419).

5. A proceeding becomes final when (1) no notice of appeal is filed, 30 days after the last day for filing that notice; (2) a notice of appeal is filed 30 days after the date the clerk of the court receives the remittitur affirming the judgment; (3) an order for a rehearing, new trial, or other proceeding is granted and the proceedings have not been commenced within one year after the issuance of the order; and (4) cases in which the death penalty has been imposed, 30 days after the date of execution of the sentence. CAL. CIV. PROC. CODE §1417.1.

6. *Id.* §1417.

7. CAL. CIV. PROC. CODE §1417.2.

and poses a security, storage, safety, or health problem.⁸ If an exhibit is by its nature severable, the court may order the retention of a portion of the exhibit.⁹

Chapter 875 provides that sixty days after the final determination of a criminal action the clerk of the court is to dispose of an exhibit.¹⁰ Chapter 875 specifies that on application of the owner or person entitled to possession the court may order the clerk to release the exhibit, if such release will not prejudice the state.¹¹ If the owner fails to apply for the return of an exhibit, Chapter 875 provides that (1) if the exhibit consists of property that was stolen or embezzled, excluding money, the court must return the exhibit to the arresting agency for disposal;¹² (2) if the exhibit is property that was not stolen or embezzled, excluding money,¹³ the exhibit must be transferred to the appropriate county agency for sale to the public.¹⁴ Chapter 875, however, does allow the county to retain any property that is needed for a public use.¹⁵ Specifically excepted from the procedures regarding the disposition of exhibits are any dangerous or deadly weapons, narcotics, poisonous drugs, explosives, or any other property the possession of which is illegal, and which was used by the defendant in the commission of the crime, or was on the defendant's person may at the time of his or her arrest.¹⁶ Chapter 875 provides that the court may order property of a dangerous or illegal character be destroyed or otherwise disposed of sixty days after the final determination of the action.¹⁷

Finally, Chapter 875 requires the court to notify the district attorney, the attorney of record for each party, and any party not represented by counsel, of the proposed disposition of property not less than fifteen days before the action is to take place.¹⁸ Chapter 875 provides that any party may at its own expense make a photographic copy of all or part of an exhibit other than money.¹⁹

8. *Id.* §1417.3.

9. *Id.*

10. *Id.* §1417.5.

11. *Id.* §1417.5(a).

12. *Id.* §1417.5(b)(1) (arresting agency must dispose of the property in accordance with Chapter 12 of the Civil Procedure Code).

13. *Id.* §§1420, 1421 (procedure for the disposition of unclaimed money).

14. *Id.* §1417.5(b)(2). Chapter 875 requires that the public sale be in accordance with procedures set forth in Article 7 of Chapter 5 of Part 2 of Division 2 of Title 3 of the Government Code. *Id.*

15. *Id.*

16. *Id.* §1417.6.

17. *Id.*

18. *Id.* §1417.7.

19. *Id.* The clerk of the court must observe the taking of the photograph and certify that the photograph and accompanying negative represent a true and complete copy of the original, after receipt of a declaration to that effect by the party making the copy. *Id.*