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# Evidence

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# Evidence

## Evidence; Best Evidence Rule—preliminary examinations

Penal Code § 872.5 (new); § 1328d (amended).  
SB 1661 (Presley); 1986 STAT. Ch. 992

Under existing law, the Best Evidence Rule generally provides that no evidence other than the original of a writing<sup>1</sup> may be admitted to prove the content of a writing.<sup>2</sup> Chapter 992 specifies that the Best Evidence Rule does not apply to preliminary hearings.<sup>3</sup>

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1. CAL. EVID. CODE § 250 (a writing is any handwriting, typewriting, printing, photostating, photographing, and any other means of recording, communicating, or representing a tangible thing).

2. *Id.* § 1500 (the Best Evidence Rule applies unless a statute provides otherwise). See *id.* §§ 1500.5-1562 (exceptions to the Best Evidence Rule).

3. *Id.* § 872.5. Cf. *People v. Shuber*, 71 Cal. App. 2d 773, 775, 163 P.2d 498, 499 (1945) (the same rules of evidence apply to trials and preliminary hearings).

## Evidence; child witnesses

Evidence Code § 765 (amended); Penal Code § 1127f (new); § 868.8 (amended).

AB 3849 (Margolin); 1986 STAT. Ch. 1051

Sponsor: Children's Legislative Organizations United by Trauma  
Opposition: Judicial Council; State Bar Committee on Juvenile Justice

Under existing law, a court is required to exercise reasonable control over the mode of interrogation of a witness in order to make the interrogation effective in ascertaining the truth, and to protect

the witness from undue harassment or embarrassment.<sup>1</sup> In addition, existing law specifies that the court must take special care to protect witnesses under the age of fourteen from undue harassment or embarrassment, and from unnecessary repetition of questions.<sup>2</sup> Chapter 1051 requires the court, when a witness is under the age of fourteen, to take special care to ensure all questions are stated in a form appropriate to the age of the witness.<sup>3</sup> In addition, Chapter 1051 authorizes the court, after objection by a party, to prohibit questions in a form the witness is not reasonably likely to understand.<sup>4</sup>

Under existing law, in criminal proceedings for certain sex-related crimes<sup>5</sup> committed with or against any minor under the age of eleven, the court must take special precautions<sup>6</sup> to provide the testifying minor with comfort and support.<sup>7</sup> Chapter 1051 expands existing law by giving the court discretion to limit the testimony of a child under the age of eleven to the hours when the child is normally in school, provided no good reason exists for taking the testimony during other hours.<sup>8</sup> Furthermore, Chapter 1051 permits a party to request special

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1. CAL. EVID. CODE § 765(a).

2. *Id.* § 765(b).

3. *Id.* Existing law permits a court to allow leading questions, during the examination of a child witness under ten years of age, in any prosecution involving physical or sexual abuse of the child. *Id.* § 767(b).

4. *Id.* § 765(b) (not likely to understand due to the age of the witness).

5. Crimes include any violation of Penal Code §§ 243.4 (sexual battery), 261 (rape), 273a (cruelty to child), 273d (corporal punishment or injury inflicted upon child), 285 (incest), 286 (sodomy), 288 (lewd or lascivious acts involving children), 288a (oral copulation), 289 (penetration of genital or anal openings with foreign objects), 314(1) (indecent exposure), and 647a (vagrancy). CAL. PENAL CODE § 868.8(a)-(c).

6. Special precautions include, but are not limited to, the following: (1) relocating the judge, parties, witnesses, and other persons within the courtroom, if the court thinks relocation would facilitate a better environment for the child witness; (2) removing the judge's robe, if the minor is intimidated by the judge's formal attire; and (3) allowing the witness reasonable periods of relief from examinations and cross-examinations, during which they may leave the courtroom. *Id.* § 868.8.

7. *Id.* The court must also protect the minor from coercion, undue influence, and intimidation. *Id.*

8. *Id.* § 868.8(d).

jury instructions in any criminal trial or hearing in which a child under the age of eleven is to testify.<sup>9</sup>

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9. *Id.* § 1127f. Either party may request the following special jury instruction: In evaluating the testimony of a child you should consider all of the factors surrounding the child's testimony, including the age of the child and any evidence regarding the child's level of cognitive development. Although, because of age and level of cognitive development, a child may perform differently as a witness from an adult, that does not mean that a child is any more or less credible a witness than an adult. You should not discount or distrust the testimony of a child solely because he or she is a child.

*Id.* See generally Myers, *The Legal Response to Child Abuse: In the Best Interest of Children?*, 24 J. FAM. L. 149 (1985) (discussion of abused children and the problems encountered with child witnesses); Comment, *Child Witness in Sexual Abuse Criminal Proceedings: Their Capabilities, Special Problems, and Proposals for Reform*, 13 PEPPERDINE L. REV. 157 (1985) (discussion of the abilities of a child witness in sexual abuse proceedings).

## Evidence; eminent domain

Business and Professions Code § 6103.5 (new); Evidence Code § 822 (amended).

SB 906 (Lockyer); 1986 STAT. Ch. 1238

Sponsor: Association for California Tort Reform

Under existing law, the price<sup>1</sup> of comparable property<sup>2</sup> acquired for a public use which could have been taken by eminent domain<sup>3</sup> is inadmissible as evidence and may not be taken into account as a basis for an opinion as to the value of property in an eminent domain or inverse condemnation proceeding.<sup>4</sup> Chapter 1238 allows the price of comparable property which was appropriated for a public use and already is in public use to be admissible as evidence or as a basis for an opinion regarding the value of property in the eminent domain or inverse condemnation proceeding, if the use for which the com-

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1. CAL. EVID. CODE § 822(a)(1) (price includes other terms or circumstances of an acquisition of the property).

2. *Id.* (property includes property interest).

3. *Id.* (includes inverse condemnation actions).

4. *Id.*

parable property was appropriated was a use for which the comparable property could have been taken by eminent domain.<sup>5</sup>

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5. *Id.*

### Evidence; newspapers and periodicals—presumptions

Evidence Code § 645.1 (new).

AB 2632 (O'Connell); 1986 STAT. Ch. 330

Sponsor: Editor of Santa Barbara Newspaper

Support: California Newspaper Publishers Association

Existing law requires writings<sup>1</sup> to be authenticated<sup>2</sup> before they are received as evidence.<sup>3</sup> A writing may be authenticated by introducing evidence sufficient to sustain a finding that the writing is what the proponent claims, or by establishing that fact through any other means provided by law.<sup>4</sup> Chapter 330 creates an exception to existing law by providing that printed materials purporting to be a particular newspaper or periodical, that are regularly published at average intervals not exceeding three months, are presumed<sup>5</sup> to be that periodical.<sup>6</sup>

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1. CAL. EVID. CODE § 250 (definition of writing).

2. *Id.* § 1400 (definition of authentication). *See id.* §§ 1410-1421 (means of authenticating and proving writings).

3. *Id.* § 1401(a). *Id.* § 140 (definition of evidence).

4. *Id.* § 1400.

5. *Id.* § 600(a) (definition of presumption).

6. *Id.* § 645.1.

**Evidence; photocopying records for subpoena duces tecum**

Business and Professions Code § 22462 (amended); Civil Procedure Code §§ 409.4, 1985, 1986.5 (amended); Evidence Code §§ 1158, 1560, 1561, 1563, 1564 (amended).

AB 3540 (McAlister); 1986 STAT. Ch. 603

Sponsor: California Association of Photocopiers and Process Servers

Existing law provides for the inspection of all medical records by a patient or the patient's attorney.<sup>1</sup> Furthermore, existing law requires that a specified procedure<sup>2</sup> be followed to admit into evidence documents secured pursuant to a subpoena duces tecum.<sup>3</sup> Existing law also provides that a subpoenaed witness must be paid reasonable fees.<sup>4</sup>

Chapter 603 requires that, when an attorney uses a representative for the purpose of inspecting or copying documents at the record custodian's place of business, the representative present authorization from the attorney before photocopying the records.<sup>5</sup> In addition, Chapter 603 specifically restricts medical providers<sup>6</sup> from copying any material when a professional photocopier has been hired by the requesting attorney.<sup>7</sup>

Chapter 603 creates an alternative to the specified procedure for admitting into evidence documents secured pursuant to a subpoena duces tecum.<sup>8</sup> The alternative provision allows the requesting attorney or the attorney's representative to copy the requested documents at the record custodian's place of business during normal business

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1. CAL. EVID. CODE § 1158 (inspection of documents must occur prior to the filing of an action or the appearance of the defendant in an action).

2. *Id.* § 1560(b)-(d). All documents requested in the subpoena duces tecum must be mailed to the court or place of deposition in legible copy, and accompanied by an affidavit enclosed in an inner envelope or wrapper, unless both parties agree otherwise. *Id.*

3. *Id.*

4. CAL. CIV. PROC. CODE § 1986.5.

5. CAL. EVID. CODE § 1158.

6. *Id.* (medical provider includes a physician and surgeon, dentist, registered nurse, dispensing optician, registered physical therapist, podiatrist, licensed psychologist, osteopath, chiropractor, clinical laboratory bioanalyst, clinical laboratory technologist, pharmacist, pharmacy, or licensed hospital).

7. *Id.* (includes attorney's agent). Presentation of the attorney's authorization by the agent is sufficient proof of the representative relationship. *Id.*

8. *See id.* § 1560(e). *See also supra* note 2 and accompanying text (specified procedure for admitting documents secured pursuant to a subpoena duces tecum).

hours.<sup>9</sup> As part of the alternative, Chapter 603 requires that the records delivered be accompanied by an affidavit from the custodian stating that the records were delivered to the attorney.<sup>10</sup> Due to an oversight in the drafting,<sup>11</sup> Chapter 603 requires a second affidavit from the attorney<sup>12</sup> *in lieu of*<sup>13</sup> the first affidavit required from the custodian.<sup>14</sup>

In addition, Chapter 603 provides for reasonable costs<sup>15</sup> for the copying of documents pursuant to a subpoena duces tecum,<sup>16</sup> but does not limit such costs to those specified in the chapter.<sup>17</sup> Chapter 603 also clarifies existing law as to the fees recoverable by a witness who supplies documents but does not appear in the action.<sup>18</sup> Finally, prior law stated that a judge could deliver a subpoena duces tecum only when no clerks were present.<sup>19</sup> Chapter 603 clarifies prior law by specifically allowing a judge, as well as a clerk, to deliver a subpoena duces tecum whenever one is requested.<sup>20</sup>

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9. CAL. EVID. CODE § 1560(e) (the attorney's representative is then responsible for proper delivery).

10. *Id.* § 1561(a)(4) (affidavit must state delivery to either attorney or attorney's representative).

11. Phone Conversation with Assemblyman Alister McAlister (September 15, 1986) (notes on file at *Pacific Law Journal*). The phrase "in lieu of" was incorrectly inserted and the error was not realized soon enough to substitute the correct phrase "in addition to." A trailer bill is under preparation as an urgency measure for introduction in December of 1986, in an attempt to effect the correction by March 1, 1987. Until this correction is accomplished, the section should be used and interpreted as if the phrase "in addition to" were in place of "in lieu of," in order to provide logical application of the section. *Id.*

12. CAL. EVID. CODE § 1561(c) (includes attorney's representative).

13. See *supra* note 11 and accompanying text.

14. CAL. EVID. CODE § 1561(c).

15. *Id.* § 1563(b)(1) (definition of reasonable costs).

16. *Id.* § 1563 (raises fees from the previous level).

17. *Id. Contra In re Marriage of Stephens*, 156 Cal. App. 3d 909, 917, 203 Cal. Rptr. 331, 336 (1984) (reasonable fees were specifically limited to the fees specified in the statute).

18. CAL. CIV. PROC. CODE § 1986.5 (reasonable fees for a witness who is only required to copy documents are prescribed in § 1563 of the Evidence Code).

19. 1982 Cal. Stat. ch. 452, sec. 1, at 1823 (amending CAL. CIV. PROC. CODE § 1985).

20. CAL. CIV. PROC. CODE § 1985.

**Evidence; prior similar acts**

Evidence Code § 1101 (amended).

AB 3597 (Calderon); 1986 STAT. Ch. 1432

Sponsor: Attorney General

Support: Attorney General; Los Angeles Commission on Assaulters Against Women; National Action Against Rape; Highland Sexual Assault Center; Center for Women's Studies and Services; Human Response Network

Opposition: Criminal Law Section of the California State Bar; American Civil Liberties Union; California Attorneys for Criminal Justice; California Public Defenders Association

Under existing law, prior acts<sup>1</sup> by a defendant are admissible into evidence when relevant to prove a fact<sup>2</sup> other than the disposition of the defendant to commit such acts.<sup>3</sup> Existing law provides that prior acts by a defendant may only be used to prove some ultimate fact such as the identity, intent, or larger scheme of the defendant, but not to show the defendant's disposition to commit the charged crime.<sup>4</sup>

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1. Prior acts include crimes, civil wrongs, or any other relevant acts. CAL. EVID. CODE § 1101(b).

2. *Id.* (includes motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident).

3. *Id.*

4. *Id.* § 1101. *People v. Tassell*, 36 Cal. 3d 77, 679 P.2d 1, 201 Cal. Rptr. 567 (1984) (evidence of two prior similar sex offenses were inadmissible in a rape and oral copulation case to show common design or plan, when circumstances showed these rationales for admission were merely euphemisms for the defendant's disposition). Prior to *Tassell*, decisions in this area were not entirely consistent. *Compare* *People v. Thompson*, 27 Cal. 3d 303, 611 P.2d 883, 165 Cal. Rptr. 289 (1980) (evidence of prior similar acts in a murder and robbery case was inadmissible because not sufficiently similar) *and* *People v. Sam*, 71 Cal. 2d 194, 454 P.2d 700, 77 Cal. Rptr. 804 (1969) (since there was no issue of identity in voluntary manslaughter case, prior similar acts by the defendant were not admissible to show *modus operandi*) *and* *People v. Stanley*, 67 Cal. 2d 812, 433 P.2d 913, 63 Cal. Rptr. 825 (1967) (evidence of similar act on a young boy, other than the complaining witness, in an oral copulation case, was more prejudicial than probative, and therefore inadmissible) *with* *People v. Covert*, 249 Cal. App. 2d 81, 57 Cal. Rptr. 220 (1967) (evidence in an incest case, of a similar act against defendant's daughter (the prosecutrix' sister), was admissible to show common plan) *and* *People v. Ing*, 65 Cal. 2d 603, 442 P.2d 590, 55 Cal. Rptr. 902 (1967) (evidence of prior similar acts by the defendant, involving three other women in a rape case, was admissible to show a common plan because of the striking similarity of the acts to the case at hand) *and* *People v. Cramer*, 67 Cal. 2d 126, 429 P.2d 582, 60 Cal. Rptr. 230 (1967) (evidence of prior similar acts on a young boy, other than the complaining witness, was admissible in an oral copulation case to show existence of common plan, when prior acts were sufficiently similar). *See generally* Comment, *Evidence of Other Sex Offenses Offered as Part of the Prosecution's Case-in-Chief*, 25 UCLA L. REV. 261 (1972) (history of admissibility in California of prior similar acts in prosecutions for unlawful sex acts).



Chapter 1432 permits evidence of prior similar acts to be admitted in prosecutions for unlawful sex acts to show the defendant did not have a reasonable and good faith belief that the act was consensual.<sup>5</sup> With Chapter 1432, the legislature intends to clarify any inference from the holding of *People v. Tassell*,<sup>6</sup> indicating that evidence of a similar act is ipso facto inadmissible or irrelevant to the issue of a defendant's reasonable and good faith belief that the victim consented.<sup>7</sup> Chapter 1432 rejects this inference by providing that such evidence may be relevant to the issue of the defendant's reasonable belief in a particular case, depending upon the circumstances.<sup>8</sup>

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5. CAL. EVID. CODE § 1101(b).

6. 36 Cal. 3d 77, 679 P.2d 1, 201 Cal. Rptr. 567 (1984).

7. 1986 Cal. Stat. ch. 1432, sec. 2, at \_\_\_\_\_(stating legislative intent).

8. *Id.*