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Evidence

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Evidence

Evidence; medical and business records

Evidence Code §§ 1158, 1561, 1563, 1564 (amended).
AB 71 (Connelly); 1987 STAT. Ch. 19
(Effective May 12, 1987)

Existing law permits an attorney¹ to inspect and copy all of the patient's medical records² by presenting a written authorization signed by the patient to the record custodian.³ Furthermore, any person or entity having custody of a patient's medical records may charge the authorizing person all reasonable costs⁴ incurred in making the records available.⁵ Existing law, however, limits the fee that may be charged when the records are produced for inspection or copying at the record custodian's place of business to fifteen dollars.⁶ With the enactment of Chapter 19, a person or entity producing records for inspection or copying at the record custodian's place of business may

1. The attorney's agent may also inspect and copy the patient's records by presenting written authorization signed by the patient. CAL. EVID. CODE § 1158.

2. Records which may be inspected are those in the custody or control of a licensed hospital or medical provider including a physician and surgeon, dentist, registered nurse, dispensing optician, registered physical therapist, podiatrist, licensed psychologist, osteopath, chiropractor, clinical laboratory bioanalyst, clinical laboratory technologist, or pharmacist or pharmacy. *Id.*

3. *Id.* (this inspection must take place prior to the filing of an action or the appearance of a defendant in an action). The authorization may be signed by: (1) an adult patient; (2) the guardian or conservator of their estate; (3) the parent or guardian of a minor; or (4) the personal representative or heir of a deceased patient. *Id.* Failure to make the patient's records available during business hours within five days after presentation of the written authorization may subject the record custodian to liability for all reasonable expenses including attorney's fees incurred in any proceeding to enforce this provision. *Id.* See generally *National Football League Management Council v. Superior Court*, 138 Cal. App. 3d 895, 903, 188 Cal. Rptr. 337, 341-42 (1983) (California Evidence Code section 1158 states a clear public policy of permitting a patient to inspect and copy any records concerning the patient prior to filing an action to permit a patient to evaluate the treatment received prior to deciding to bring an action against the medical provider).

4. Reasonable costs include specified costs for reproducing documents, clerical costs, postage charges, and retrieval costs. CAL. EVID. CODE § 1158.

5. *Id.*

6. *Id.*

charge the authorizing person fifteen dollars, plus any actual costs charged to the record custodian by a third person for retrieval and return of records held offsite by a third person.⁷

Existing law provides that business⁸ records requested pursuant to a subpoena duces tecum may be introduced into evidence by following a specific procedure.⁹ As an alternative to this procedure, existing law permits the subpoenaed records to be produced by making the records available to the subpoenaing party's attorney or the attorney's representative for inspection or copying at the witness' place of business.¹⁰ In any civil proceeding, existing law allows a nonparty witness, who produces documents pursuant to a subpoena duces tecum, to charge the subpoenaing party all reasonable costs¹¹ incurred in producing the records.¹² Existing law limits the fee that may be charged to the subpoenaing party to fifteen dollars when the records are produced for inspection or copying at the witness' place of business.¹³ Existing law requires an attorney to provide an affidavit in lieu of the affidavit of the witness when records are produced at the witness' place of business pursuant to a subpoena duces tecum.¹⁴ Chapter 19 allows a witness to charge the subpoenaing party fifteen dollars, plus any actual costs charged to the witness by a third person for retrieval and return of records held offsite when the records are delivered to the attorney or the attorney's representative for inspection or copying at the witness' place of business.¹⁵ Chapter 19 also provides that the attorney's affidavit is required in addition to the witness' affidavit when subpoenaed records are made available for inspection or copying at the witness' place of business pursuant to a subpoena duces tecum.¹⁶

Existing law does not require the production of original documents unless specifically requested in the subpoena duces tecum.¹⁷ Furthermore, prior law provided that when original records were requested, the records could be inspected or copied by the subpoenaing attorney

7. *Id.*

8. *See id.* § 1270 (definition of business records).

9. *Id.* § 1560(b)-(d). The record custodian or other qualified witness of the business must deliver by mail or otherwise a true, legible, and durable copy of all the records requested in the subpoena to the court clerk, judge, or other described person along with an affidavit. *Id.*

10. *Id.* § 1560(e) (the attorney is then responsible for delivering the records).

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

12. *Id.* § 1563(b).

13. *Id.* § 1563(b)(6).

14. *Id.* § 1561(c).

15. *Id.* § 1563(b)(6). If the records are retrieved from microfilm, the witness may charge the subpoenaing party twenty cents per page. *Id.*

16. *Id.* § 1561(c).

17. *Id.* § 1564.

or the attorney's representative at the address of the witness.¹⁸ Chapter 19 provides that original documents requested in a subpoena duces tecum can no longer be inspected or copied by the subpoenaing attorney or the attorney's representative at the witness' address.¹⁹

CDR

18. 1986 Cal. Stat. ch. 603, sec. 9, at ____ (amending CAL. EVID. CODE § 1564).

19. CAL. EVID. CODE § 1564.

Evidence; rape—minors

Evidence Code § 782 (amended).

AB 939 (Monjonner); 1987 STAT. CH. 177

Existing law provides that in a prosecution for certain sex offenses¹ evidence of the victim's² sexual conduct cannot be offered to attack the victim's credibility except in specific circumstances.³ Chapter 177 expands existing law by providing that this prohibition applies in a prosecution for lewd and lascivious acts with a child under the age of fourteen.⁴

MRS

1. See CAL. PENAL CODE §§ 261 (rape), 264.1 (acting in concert to commit rape or penetration of genital or anal openings by a foreign object), 286 (sodomy), 288a (oral copulation), and 289 (penetration of genital or anal opening with a foreign object). See also CAL. EVID. CODE § 782(a) (assault with intent to commit, attempt to commit, or conspiracy to commit any crime defined in California Penal Code sections 261, 264.1, 286, 288a, or 289).

2. See CAL. EVID. CODE § 782(b), (definition of complaining witness).

3. *Id.* § 782. The defendant must file a written motion stating that the defense has an offer of proof of the relevancy of evidence of the complaining victim's sexual conduct, and the relevancy of attacking the credibility of the victim. *Id.* § 782(a)(1). If the court finds that the offer of proof is sufficient the court must order a hearing away from the jury to allow the questioning of the victim regarding the evidence. *Id.* § 782(a)(3). If the court finds that the evidence offered is relevant pursuant to California Evidence Code section 780, and not inadmissible under California Evidence Code section 352, the court may order that the evidence be presented to the jury. *Id.* § 782(a)(4).

4. *Id.* § 782(a).

Evidence; compromise offers

Evidence Code § 1152 (amended)
SB 450 (Kopp); 1987 STAT. Ch. 496

Under existing law, evidence¹ of offers to compromise a claim is not admissible to prove liability.² *White v. Western Title Insurance Co.*³ clarifies existing law by providing that evidence of compromise offers is admissible when that evidence is designed to prove a matter at issue other than liability.⁴ Under Chapter 496, the evidence of any additional offer or counteroffer, if requested, may be admitted in an action for the breach of good faith and fair dealing, or in an action for the violation of laws relating to unfair claims settlement practice,⁵ in the event that evidence of an offer or compromise has previously been admitted in the action.⁶ The evidence admitted must be brought in the following actions: (1) In an action for a new trial; (2) in any proceeding involving additur or remittitur; or (3) on appeal.⁷

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

2. *Id.* § 1152(a).

3. 40 Cal. 3d 870, 710 P.2d 309, 221 Cal. Rptr. 509 (1985). In *White*, evidence of two settlement offers was admitted into evidence. *Id.* at 887, 710 P.2d at 317, 221 Cal. Rptr. at 517. The court in *White*, however, refused to overturn the trial court's exclusion of a third settlement offer which was made after the interlocutory judgment. *Id.* at 889 n.12, P.2d at 320 n.12, 221 Cal. Rptr. at 520 n. 12, 710. The defendant's willingness to make a reasonable settlement offer had little correlation with the ability to prove that the defendant had been acting fairly and in good faith toward the insurer once the trial court had determined liability. *Id.*

4. *Id.* at 887-88, 710 P.2d at 318-19, 221 Cal. Rptr. at 518-19.

5. See CAL. INS. CODE § 790.03(h) (prohibits knowingly committing unfair claims settlement practices).

6. CAL. EVID. CODE § 1152(b). The admission must be at the request of the party against whom the evidence is admitted, or at the request of the party who made the offer to compromise that was admitted. *Id.*

7. *Id.*

Evidence; negligence per se—local government guidelines

Evidence Code § 669.1 (new); Government Code § 811.6 (amended).
SB 1598 (Presley); 1987 STAT. Ch. 1207

Existing law provides that a breach of the standard of due care will be presumed if: (1) A person violates a statute, ordinance, or regulation of a public entity; (2) the violation proximately causes death or injury to person or property; (3) the death or injury is of the type the statute, ordinance, or regulation is designed to prevent; and (4) the person or property harmed is in the class protected by the statute, ordinance, or regulation.¹ This presumption of negligence may be rebutted by proof that the violator acted as an ordinary prudent person might be expected to act under similar circumstances, or the violator was a child exercising the degree of ordinary care someone of similar maturity, intelligence, and capacity would use under similar circumstances.² Under prior law, a local rule, regulation, or guideline that set forth standards of conduct for police officers using deadly force could not be considered a statute, ordinance, or regulation of a public entity³ for the purposes of creating this rebuttable presumption.⁴ With the enactment of Chapter 1207,

1. CAL. EVID. CODE § 669(a)(1)-(4). The determination of whether a violation occurred and whether the violation was the proximate cause of the injury are questions of fact for the jury, while the determinations of whether the injury was of the type the statute was designed to prevent, and if the injured person was in the class to be protected by the statute, are questions of law for the judge. *See, e.g.,* Huang v. Garner, 157 Cal. App. 3d 404, 414-15, 203 Cal. Rptr. 800, 805 (1984) (citing Cade v. Mid-City Hosp. Corp., 45 Cal. App. 3d 589, 598, 119 Cal. Rptr. 571, 576 (1975)). *Accord* Capolungo v. Bondi, 179 Cal. App. 3d 346, 350-52, 224 Cal. Rptr. 326, 330 (1986) (California Vehicle Code sections 21458 and 22507 regulate parking next to yellow curbs but do not indicate a purpose to protect the plaintiff bicyclist from injury suffered as a result of swerving to avoid an illegally parked car).

2. CAL. EVID. CODE § 669(b)(1), (2) (the inference of negligence can not be rebutted by using the standard of care applicable to a child if the violation occurred in the course of an activity normally engaged in only by adults and requiring adult qualifications). *See generally* Holdych, *The Presumption of Negligence Rule in California: The Common Law and Evidence Code Section 669*, 11 PAC. L.J. 907 (1980) (analysis of the common law rule of negligence per se and the incorporation of the common law into the California Evidence Code).

3. Public entity includes a nation, state, county, city and county, city, district, public authority, public agency, or any other political subdivision or public corporation whether foreign or domestic. CAL. EVID. CODE § 200.

4. 1983 Cal. Stat. ch. 168, sec. 1, at 586 (enacting CAL. EVID. CODE § 669.1). Chapter 168 applied only to the application of the presumption in California Evidence Code section 669. *Id.* Chapter 168 was enacted in apparent response to the California Supreme Court decision in Peterson v. Long Beach, 24 Cal. 3d 238, 246-47, 594 P.2d 477, 481, 155 Cal. Rptr. 360, 364 (1979), where a regulation in a police manual regarding the use of firearms was considered a regulation of a public entity and a violation of the regulation created a

any state or local government rule, policy, manual, or guideline that sets public employee guidelines or standards for conduct must not be considered a statute, ordinance, or regulation for the purposes of creating this rebuttable presumption, unless the rule, manual, policy, or guideline has been formally adopted as an ordinance or regulation.⁵ Under existing law, a regulation for the purposes of the California Tort Claims Act⁶ is a rule, regulation, order, or standard having the force of law adopted by an employee or agency of the United States or public entity.⁷ Chapter 1207 requires that the rule, regulation, order, or standard adopted by a United States' employee or agency to have been adopted pursuant to the federal Administrative Procedure Act⁸ and a regulation by a state agency to have been adopted pursuant to the Administrative Procedure Act.⁹

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presumption of negligence. 1983 Cal. Stat. ch. 168, sec. 2, at 586-87 (enacting CAL. EVID. CODE § 669.1). Recent decisions have established a trend to distinguish *Peterson v. City of Oxnard*, 171 Cal. App. 3d 285, 296-97, 217 Cal. Rptr. 450, 456-57 (1985) (internal police department regulations concerning arrest of intoxicated drivers were not regulations within the meaning of California Government Code section 811.6). See also *Hucko v. City of San Diego*, 179 Cal. App. 3d 520, 523, 224 Cal. Rptr. 552, 553 (1986) (lesson plan prepared by an instructor at police academy was not an administrative regulation); *Posey v. State*, 180 Cal. App. 3d 836, 851-52, 225 Cal. Rptr. 830, 839-40 (1986) (highway patrol general order to inspect and remove cars abandoned on the side of highway did not have the force of law because the order was not adopted pursuant to statutory authority). See generally Note, *Police Shootings—Administrative Law as a Method of Control Over Police: Peterson v. City of Long Beach*, 8 PEPPERDINE L. REV. 419 (1981) (analysis and criticism of *Peterson*). The legislature, in enacting Chapter 1207, intends to clarify Instruction No. 3.45 of the Book of Approved California Jury Instructions. 1987 Cal. Stat. ch. 1207, sec. 5, at _____. See BAJI No. 3.45 (7th ed. 1986) (jury instructions on negligence per se).

5. CAL. EVID. CODE § 669.1. California Evidence Code section 669.1 is intended to affect only the presumption in California Evidence Code section 669. *Id.*

6. See CAL. GOV'T CODE §§ 810-996.6 (Claims and Actions Against Public Entities and Public Employees).

7. *Id.* § 811.6. The authority to adopt must be vested in the employee or agency by a constitution, statute, charter, or ordinance. *Id.*

8. See 5 U.S.C. §§ 551-576 (1982 & Supp. 1985) (Federal Administrative Procedure Act).

9. CAL. GOV'T CODE § 811.6. See CAL. GOV'T CODE §§ 11340-11370.5 (California Administrative Procedure Act).

Evidence; eminent domain—inverse condemnation proceedings

Public Utilities Code § 1405.1 (new); Evidence Code § 822 (amended).

AB 616 (Harris); 1987 STAT. Ch. 1278

Under existing law, the price or other terms and circumstances of an acquisition of property not appropriated to a public use or a property interest not so appropriated are inadmissible and cannot be taken into account as the basis of an opinion as to the value of the property¹ in an eminent domain or inverse condemnation proceeding.² With the enactment of Chapter 1278, the price or other terms and circumstances of an acquisition of property or a property interest are inadmissible and cannot be taken into account in forming an opinion as to the value of property if the acquisition was for a public use for which the property could have been taken by eminent domain.³ The price or other terms and circumstances of an acquisition of property appropriated to a public use or a property interest so appropriated are not excluded, however, if the acquisition was for the *same* public use for which the property could have been taken by eminent domain.⁴

Existing law provides that any political subdivision⁵ may file with the Public Utilities Commission (Commission) a petition of the first⁶ or second class⁷ to acquire under eminent domain proceedings the lands, property, and rights⁸ of any public utility.⁹ Upon the filing of the petition, existing law requires the Commission to make an order

1. See CAL. EVID. CODE § 811 (definition of value of property). See also *id.* § 813 (value of property may be shown only by opinion testimony).

2. *Id.* § 822(a)(1). The acquisition must have been for a public use for which the property could have been taken by eminent domain. *Id.* These provisions are intended to provide rules of evidence applicable only to eminent domain and inverse condemnation proceedings. *Id.* § 810.

3. *Id.* § 822(a)(1).

4. *Id.*

5. Political subdivision means a county, city and county, city, municipal water district, county water district, irrigation district, public utility district, or any other public corporation. CAL. PUB. UTIL. CODE § 1402.

6. The petition must set forth the intention of the political subdivision to acquire under eminent domain proceedings the lands, property, and rights of the public utility in question. *Id.* § 1403.

7. The petition must set forth the intention of the political subdivision to initiate proceedings required for the purpose of submitting to the voters of the political subdivision a proposition to acquire under eminent domain proceedings the lands, property, and rights of the public utility in question. *Id.*

8. See *id.* § 1401 (definition of lands, property, and rights).

9. *Id.* § 1403. Each petition must contain the name of the political subdivision, a

directing the owners and claimants named in the petition to show cause why the Commission should not hear the petition and fix the just compensation to be paid for the lands, property, and rights.¹⁰ Chapter 1278 enacts a similar procedure that applies only to intended acquisitions of the lands, property, and rights of water corporations and water companies.¹¹ Under Chapter 1278, the Commission must make an order to show cause upon the filing of the petition.¹² When the petition is of the first class, in response to the order to show cause, the public utility or the owners of more than one-half interest in the public utility may present the Commission with a certified copy of a filed motion to the superior court where the utility property is located in order to take jurisdiction of the matter.¹³ When presented the motion before or at the time of the hearing on the order to show cause, the Commission must dismiss the proceeding and the superior court must grant the motion to take jurisdiction of the matter.¹⁴ The political subdivision may then file, within sixty days of the court's granting the motion, an action in eminent domain.¹⁵ Where the petition is of the second class, in response to the order to show cause, the public utility or the owners of more than one-half interest in the public utility may present the Commission with a copy of the aforementioned motion.¹⁶ Upon presentation of the motion, the Commission must suspend, but must not dismiss, the proceeding.¹⁷ The superior court must grant the motion to take limited jurisdiction of the matter for the sole purpose of determining the just compensation to be paid for the lands, property, and rights.¹⁸

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description of the lands, property, and rights the political subdivision intends to acquire, and the names and addresses of all owners and claimants thereof. *Id.* § 1404.

10. *Id.* § 1405. The order must specify the nature of the proceeding and contain a description of the lands, property, and rights the political subdivision intends to acquire. *Id.*

11. *Id.* § 1405.1.

12. The order must specify the nature of the proceeding, contain a description of the lands, property, and rights the political subdivision intends to acquire, and direct the owners and claimants named in the petition to appear before the Commission to show cause why the Commission should not hear the petition and fix the just compensation to be paid for the lands, property, and rights. *Id.* § 1405.1(a).

13. *Id.* § 1405.1(b).

14. *Id.*

15. *Id.*

16. *Id.* § 1405.1(d).

17. *Id.*

18. *Id.* Upon a determination of just compensation, the superior court must certify the findings of the Commission. *Id.* The finding may not be appealed and is binding on the Commission as if the finding had been made by the Commission. *Id.* The purpose of these provisions is to assure a public utility or the owners of a public utility a court trial in the very limited area of just compensation. 1987 Cal. Stat. ch. 1278, sec. 3, at ____.