Study K-200 August 29, 2002

Memorandum 2002-41

Comparison of Evidence Code with Federal Rules: Introduction of Study and Definition of Hearsay

At the September meeting, the Commission will commence a study comparing the Evidence Code to the Federal Rules of Evidence (hereafter "the Federal Rules"). The goal of the study is to determine whether the Evidence Code provisions should be conformed to the Federal Rules, either to improve the California rule or for the sake of uniformity. Professor Miguel Mendez of Stanford Law School is preparing a background study for the Commission, which will consist of eight parts:

(1) Hearsay and its exceptions
(2) Expert testimony and the opinion rule
(3) The role of judge and jury
(4) Evidence excluded by extrinsic policies
(5) Presumptions and burdens of proof
(6) Authentication and the best evidence rule
(7) Competency of witnesses and witness credibility
(8) Judicial notice

The first two parts are complete and are being circulated along with this memorandum. Professor Mendez is still preparing the other parts. This memorandum introduces the new study, then presents a few issues regarding the definition of hearsay for the Commission to consider.

HISTORY OF AND PROCEDURE FOR THIS STUDY

As the Commission begins this project, it is appropriate to (1) briefly review the history of the Evidence Code and the Federal Rules, (2) discuss the procedure for this study, (3) describe recent efforts to reform the Federal Rules, and (4) provide background on the Uniform Rules of Evidence.

History of the Evidence Code and the Federal Rules

The Evidence Code was drafted by the Commission and enacted in 1965. It was a major legislative achievement, one of the first codifications of evidence law in the nation. Through its enactment, California replaced an incomplete, inconsistent, and confusing body of statutory and case law with a comprehensive statute.

Since 1965, the Commission has had authority to study whether changes should be made to the Evidence Code. The Commission has undertaken numerous reforms pursuant to this authority, such as measures relating to judicial notice, the psychotherapist-patient privilege, the physician-patient privilege, mediation confidentiality, the best evidence rule, and electronic communications.

The Federal Rules were not codified until 1975. They were drafted by an Evidence Advisory Committee appointed by the Chief Justice of the United States Supreme Court, at the direction of the Judicial Conference of the United States (hereafter "the Advisory Committee"). The Advisory Committee "built on the work of the California Law Revision Commission, which had produced the enacted California Evidence Code; and on the work of the American Law Institute and the National Conference of Commissioners on Uniform State Laws, who had produced the un-enacted but influential Mode Code of Evidence and Uniform Rules of Evidence, respectively." P. Rothstein, Understanding the New Federal Rules of Evidence (1975 Supplement).

The Advisory Committee's work was extensively reviewed, and several drafts were circulated. After rejecting an earlier version, the United States Supreme Court approved a draft in 1973. The draft proved controversial, and Congress substantially revised it before sending the Federal Rules to the president for signature.

Although the Advisory Committee considered the Evidence Code in preparing the Federal Rules, there are many differences between the two sets of evidentiary rules. In 1976, Jack Friedenthal, then a professor at Stanford Law School, prepared a background study for the Commission identifying and discussing these differences. The Commission was inundated with other projects at the time, however, and never followed up on that work.

In late 1999, the Commission decided it was time to undertake this project. Professor Mendez was selected to prepare a new background study. He was a natural choice for the project, because he has authored a book comparing the

Evidence Code and the Federal Rules. M. Mendez, Evidence: The California Code and the Federal Rules — A Problem Approach (2d ed. 1999). Professor Mendez plans to attend the September meeting and describe his work for the Commission.

Study Procedure

The completed parts of Professor Mendez's background study (*Hearsay and Its Exceptions* and *Expert Testimony and the Opinion Rule*) raise numerous issues for consideration. The staff did not circulate these documents for comment before commencing this study, because it seemed unrealistic and unduly burdensome to ask interested persons to comment on them as a whole.

We propose to proceed by starting with the hearsay material, presenting a reasonable of issues for each meeting and continuing through Professor Mendez's analysis until all of the issues have been covered. At that point it might be appropriate to circulate a tentative recommendation on the topic, while commencing consideration of the next topic. Unless the Commission directs otherwise, we would proceed in that fashion until all of the topics are covered, which probably will take several years.

As always, comments from interested persons would be welcome and encouraged at every stage of the study, not just in response to the tentative recommendation. The State Bar is already seeking persons to participate in the study; it might establish an interdisciplinary working group for the project. We hope to generate interest among other influential persons and organizations as well. To that end, we have sent a press release to numerous parties alerting them to the study, including in particular academics, courts, and bar groups. We have also begun to compile a mailing list for the study. We would appreciate suggestions on whom to include, as well as on other means of generating interest in the study.

In working on this study, the Commission will need to refer repeatedly to the current versions of the Evidence Code and the Federal Rules, as well as the corresponding Comments and Advisory Committee Notes. We will either include this information in the meeting materials, or obtain published versions for the Commissioners to use.

Federal Reform

In the Rules Enabling Act, 28 U.S. C. §§ 2071-2077, Congress delegated to the United States Supreme Court authority to maintain the procedural codes, including the Federal Rules of Evidence. The Court assigned this duty to the Judicial Conference of the United States, which in turn assigned it to the Committee on Rules of Practice and Procedure. Within that committee are a number of advisory committees, each of which is responsible for maintaining a particular code.

The Evidence Advisory Committee was disbanded after the Federal Rules of Evidence were enacted, and responsibility for maintaining those rules was assigned to other advisory committees. In those advisory committees, the Federal Rules of Evidence "received little attention." Rice, *Advisory Committee on the Federal Rules of Evidence: Tending to the Past and Pretending for the Future?*, 53 Hastings L.J. 817, 818 (2002).

In response to numerous requests, the Evidence Advisory Committee was reconstituted in 1992. Since then, it has successfully proposed a number of reforms, including new rules relating to expert testimony and evidence of a defendant's past sexual conduct. Each such reform must go through an extensive process. When the Evidence Advisory Committee makes a recommendation,

> it goes first to the Judicial Conference's Standing Committee on Rules of Practice and Procedure. If they approve it for public hearing, then there are public hearings at which the public, anyone really, is invited to comment. Then, if the Standing Committee at a later time approves [the] proposed change, it goes to the Judicial Conference. If they approve it, the proposal goes to the Supreme Court and if the Court approves it then it goes to Congress.

Panel Transcript, *The Politics of [Evidence] Rulemaking*, 53 Hastings L.J. 733, 738 (remarks of United States District Judge Fern Smith, former Chair of the Evidence Advisory Committee).

The new Evidence Advisory Committee has been criticized as too activist and was almost disbanded in 2001. *Id.* at 744 (remarks of Eileen Scallen). But the committee has also been harshly criticized, most notably by Professor Paul Rice of American University Washington College of Law, for adopting an "ain't broke, don't fix it" attitude. *Id.* at 766 (remarks of Paul Rice); *see also* Rice, *supra*, 53 Hastings L.J. 817; Rice & Delker, *A Short History of Too Little Consequence*, 191 F.R.D. 678 (2000). Professor Rice and others prepared a lengthy analysis

proposing numerous revisions of the Federal Rules of Evidence, Rice, *The Evidence Project: Proposed Revisions to the Federal Rules of Evidence with Supporting Commentary*, 171 F.R.D. 330 (1997), which the Evidence Advisory Committee has not pursued, Rice, *supra*, 53 Hastings L.J. at 824 n. 20. At the direction of the Evidence Advisory Committee, however, its Reporter has published a list of instances in which the text of one of the Federal Rules of Evidence deviates from judicial interpretations of the rule. Capra, *Case Law Divergence from the Federal Rules of Evidence*, 197 F.R.D. 531 (2000). Professor Rice believes that such discrepancies warrant further attention:

> Like the engine of an automobile, the rules by which the engine of justice is driven cannot continue to run well with just oil changes and minor adjustments. Preventive maintenance must be practiced. Periodically, every major component must be examined for purposes of overhaul or replacement. Even the design of the machine itself must occasionally be reassessed in light of its overall performance.

Rice, *supra*, 53 Hastings L.J. at 817-18; *see also* Leonard, *Foreword: Twenty Years of the Federal Rules of Evidence*, 28 Loyola L. Rev. 1251, 1258 (1995) (twenty years is "enough time to begin a serious evaluation" of the Federal Rules of Evidence).

At this point, it is unclear whether Professor Rice's pleas for more extensive reform of the Federal Rules of Evidence will ultimately be successful. The staff will track the federal situation as this study progresses, and inform the Commission of relevant developments.

The debate over federal reform raises an important question regarding the scope of this study. Should the Commission consider possible improvements that are not incorporated into the Federal Rules, such as the reforms suggested in the lengthy analysis prepared by Professor Rice and others? Or should the Commission focus only on whether to conform provisions in the Evidence Code to the corresponding Federal Rules?

Adopting the former approach may be intellectually appealing, but it would dramatically expand the scope of this study, requiring research beyond the issues addressed by Professor Mendez in his background study. Given the Commission's limited resources, the staff is inclined to focus primarily on potential reforms that are now incorporated into the Federal Rules. Such reforms are uniquely compelling, because they would promote uniformity between the California and federal evidentiary schemes. If we are aware of other issues, we

would bring these to the Commission's attention, but we would not seek out such issues or research them in depth unless specifically directed by the Commission.

Uniform Rules of Evidence

The Uniform Rules of Evidence (hereafter "Uniform Rules") are promulgated by the National Conference of Commissioners on Uniform State Laws. The 1953 version of the Uniform Rules served as the basis for drafting the Evidence Code. The current version of the Uniform Rules (approved in 1999) is quite similar to the Federal Rules. Unless the Commission directs otherwise, the staff will try to alert the Commission to significant differences between the Federal Rules and the Uniform Rules.

DEFINITION OF HEARSAY

With exceptions, both the Evidence Code and the Federal Rules prohibit the use of hearsay evidence. Evid. Code § 1200(b); Fed. R. Evid. 802. The California and federal definitions of hearsay are similar but not identical. See Evid. Code §§ 125, 135, 145, 225, 1200; Fed. R. Evid. 801. Essentially, both "define hearsay as an out of court statement offered at the hearing to prove as true the propositions asserted by the declarant in the statement." Mendez, *Comparison of Evidence Code with Federal Rules: Part I. Hearsay and Its Exceptions* (May 2002), at 1 (hereafter "Mendez Hearsay Analysis"). Professor Mendez raises two issues relating to these definitions; there has also been debate about whether the federal definition should be revised. We discuss that debate first, because it lays the groundwork for considering one of Professor Mendez's issues. Next, we turn to Professor Mendez's issues, and then to a distinction between the prevailing definitions and the definition in the Uniform Rules.

Implied Assertion Doctrine

Both the Evidence Code and the Federal Rules "recognize that a statement can include nonverbal conduct if the actor *intends* the conduct to substitute for an oral or written expression or assertion." Mendez Hearsay Analysis at 1 (emphasis added). "The classic example is the crime scene witness who points to the accused when asked by a police officer to identify the perpetrator." *Id.* Federal Rule of Evidence 801 states:

> 801. The following definitions apply under this article:
>
> **(a) Statement.** A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, *if it is intended* by the person as an assertion.
>
> **(b) Declarant.** A "declarant" is a person who makes a statement.
>
> **(c) Hearsay.** "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
>
> **(d) Statements which are not hearsay.** …

(Emphasis added.) Similarly, the Evidence Code defines "hearsay evidence" as "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." Evid. Code § 1200(a). A "statement" is "(a) oral or written verbal expression or (b) nonverbal conduct of a person *intended* by him as a substitute for oral or written verbal expression." Evid. Code § 225 (emphasis added).

Conduct that is not intended as an assertion ("nonassertive conduct") is not considered hearsay. The Evidence Code and the Federal Rules thus reject the implied assertion doctrine, the notion that a hearsay assertion may be implied from conduct even though the declarant did not intend to make such an assertion.

The Comment to Evidence Code Section 1200 explains why nonassertive conduct is not regarded as hearsay:

> *First*, one of the principal reasons for the hearsay rule — to exclude declarations where the veracity of the declarant cannot be tested by cross-examination — does not apply because such conduct, being nonassertive, does not involve the veracity of the declarant. *Second*, there is frequently a guarantee of trustworthiness of the inference to be drawn from such nonassertive conduct because the actor has based his actions on the correctness of his belief, *i.e.*, his actions speak louder than words.

Similarly, the drafters of the corresponding federal rule concluded that policy reasons favored admission of nonassertive conduct:

> Admittedly, evidence of this character is untested with respect to the perception, memory, and narration (or their equivalents) of the actor, but the Advisory Committee is of the view that these dangers are minimal in the absence of an intent to assert and do not justify the loss of the evidence on hearsay grounds. No class of evidence is free of the possibility of fabrication, but the likelihood is less with nonverbal than with assertive verbal conduct. The situations giving

> rise to the nonverbal conduct are such as virtually to eliminate questions of sincerity.

Fed. R. Evid. 801 advisory committee's note.

The Advisory Committee also pointed out that "[s]imilar considerations govern nonassertive verbal conduct and verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted." *Id.* According to the Advisory Committee, these situations are also excluded from the definition of hearsay. *Id.*; *see also* Mendez Hearsay Analysis at 1.

The distinction between intended and unintended communications has been criticized:

> The logic of this intentional / unintentional distinction is curious, at best. It was postulated that when a declarant does not intend to assert something by what he says or does, those words and conduct do not carry with them the same dangers of faulty perception, loss of memory, lack of sincerity and ambiguity, as they do when part of an intentional communication. No premise within the Federal Rules of Evidence is more patently and outrageously false. While an unintended communication may certainly be sincere, sincerity provides no assurance of accuracy in perception and memory. The many bets we have made, sincerely, albeit erroneously, believing certain facts to be true, are testaments to the folly of this distinction.

Rice, *supra*, 171 F.R.D. at [page cite unavailable on Westlaw]. Other criticisms and complexities relating to the federal definition of hearsay have also been raised. *See, e.g.*, Capra, *supra*, 197 F.R.D. at [page cite unavailable on Westlaw]; Seidelson, *Implied Assertions and Federal Rule of Evidence 801: A Continuing Quandary for Federal Courts*, 16 Miss. C. L. Rev. 33 (1995); Milich, *Re-Examining Hearsay Under the Federal Rules: Some Method for the Madness*, 39 U. Kan. L. Rev. 893 (1991); Park, *"I Didn't Tell Them Anything About You": Implied Assertions as Hearsay Under the Federal Rules of Evidence*, 74 Minn. L. Rev. 783 (1990). **The staff could provide further information regarding these issues if the Commission is interested.**

Burden of Proof Regarding the Declarant's Intent

A significant distinction between the California and federal definitions of hearsay relates to the burden of proof. The Advisory Committee Note to Federal Rule of Evidence 801 explains that "[w]hen evidence of conduct is offered on the theory that it is not a statement, and hence not hearsay, a preliminary determination will be required to determine whether an assertion is intended."

According to the Advisory Committee, in that situation the federal rule "is so worded as to place the burden upon the party claiming that the intention existed; ambiguous and doubtful cases will be resolved against him and in favor of admissibility." *Id.* As Professor Mendez observes, the wording of the rule "does not support this assertion of the Advisory Committee." Mendez Hearsay Analysis at 2. Nonetheless, courts are unlikely to deviate from the intention expressed in the Advisory Committee Note.

In California, in contrast, "the party claiming that hearsay falls within an exception has the burden of persuading the judge that it falls within the exception." Mendez Hearsay Analysis at 2; see Evid. Code § 405 Comment. Professor Mendez reasonably presumes that "the same party would have the burden of persuading the judge that evidence objected to on hearsay grounds is not hearsay." Mendez Hearsay Analysis at 2. As he explains, "[i]mposing the burden on the proponent would be consistent with the Code's position that hearsay should be withheld from the jury because it is too unreliable to be evaluated properly or because public policy requires its exclusion." *Id*; see Evid. Code § 405 Comment.

If the Evidence Code is interpreted in this manner, however, "different outcomes can be expected in federal and California courts where the hearsay declarant is not readily available to testify about his intentions." Mendez Hearsay Analysis at 2. To illustrate this point, Professor Mendez uses a hypothetical discussed in *United States v. Zenni*, 492 F. Supp. 464, 468 n. 21 (E.D. Ky. 1980), in which an airport security guard runs a metal detector over a passenger and then says "Go on through." The issue is whether the guard's statement can be admitted to prove that the passenger was not armed at the time. As Professor Mendez explains:

> Whether the judge sustains the hearsay objection depends on who has the burden of proving that the guard intended his statement as a substitute for the assertion ["You are not armed."] Under the Code, the proponent appears to have the burden of persuading the judge that the statement is not hearsay because the guard did *not* intend his statement to substitute for the assertion. Because the Rules favor admissibility, the objecting party would have the burden of persuading the judge that the statement is hearsay because the guard *intended* his statement as a substitute for the assertion. Who bears the burden is crucial, since the guard's intentions are not likely to be known by anyone other than the

> guard, and, presumably, the proponent is offering the guard's statement because the guard is unavailable to testify.

Mendez Hearsay Analysis at 2.

Professor Mendez speculates that instances such as this "probably are rare, and conforming the Code to the Rules would require simply a change to the comment to Section 405 clarifying that the opponent has the burden of proving the declarant's intentions." *Id.*

As yet, however, the staff is unsure of the magnitude of the issue. Numerous decisions involve the distinction between intended and unintended assertions. *See, e.g.*, *United States v. Long*, 905 F.2d 1572, 1580 (D.C. Cir. 1990); *United States v. Hensel*, 699 F.2d 18, 31 (1st Cir. 1983); *People v. Clark*, 6 Cal. App. 3d 658, 668, 86 Cal. Rptr. 106 (1970). Assessing how frequently admissibility in these situations turns on allocation of the burden of proof would require careful analysis. We have not yet undertaken such research.

More fundamentally, the Commission needs to consider whether the federal approach favoring admissibility of hearsay in doubtful cases is preferable to the California approach favoring exclusion. This is a critical policy assessment. A key consideration is how much faith to put in the jury and the effectiveness of cross-examination. Is it necessary to exclude such evidence because it is too unreliable for the jury to properly evaluate? Or is the jury more likely to reach a correct result if the evidence is admitted and subjected to cross-examination? **The Commission may want to resolve this point now, or it may prefer to wait until it has considered a few more hearsay issues before deciding the matter.**

If the Commission ultimately decides to adopt the federal approach to the burden of proof, it will not be possible simply to revise the Comment to Evidence Code Section 405. Like all Commission Comments, the Comments to the Evidence Code are legislative history, having been considered by the Legislature in adopting the code. As such, they are highly persuasive in discerning legislative intent. *See, e.g.*, *Arellano v. Moreno*, 33 Cal. App. 3d 877, 885, 109 Cal. Rptr. 421 (1973). Because the Comments are legislative history, however, they cannot be rewritten. Any reform must be accomplished through a statutory revision, which could be accompanied by a new Comment.

Exemption of Prior Statement By Witness or Admission By Party Opponent

A second distinction between the California and federal definitions of hearsay is that Federal Rule 801(d) exempts certain types of statements from the definition of hearsay:

> **(d) Statements which are not hearsay.** A statement is not hearsay if —
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> **(1) Prior statement by witness.** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is —
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> (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or
>
> (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or
>
> (C) one of identification of a person made after perceiving the person; or
>
> **(2) Admission by party-opponent.** The statement is offered against a party and is —
>
> (A) the party's own statement, in either an individual or a representative capacity or
>
> (B) a statement of which the party has manifested an adoption or belief in its truth, or
>
> (C) a statement by a person authorized by the party to make a statement concerning the subject, or
>
> (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or
>
> (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Rather than classifying these types of statements as nonhearsay, the Evidence Code treats them as exceptions to the hearsay rule. Evid. Code §§ 1220, 1221, 1222, 1223, 1235, 1236, 1238.

As Professor Mendez explains, from an outcome perspective "it is immaterial whether prior statements of witnesses are classified as an exception (as under the Code) or as an exemption (as under the Rules) to the hearsay rule." Mendez Hearsay Analysis at 3. "In either case, the net result is that the out of court statement can be received for the truth of the matter stated if certain other conditions are satisfied." *Id.*

Professor Mendez goes on to explain, however, that there are practical consequences to the choice of approach. "Evidence professors spend countless hours explaining to their students how under the Rules these statements, falling squarely within the federal definition of hearsay, nonetheless can be received for the truth of the matters asserted because in the words of Rule 801(d) they are 'not hearsay.'" Mendez Hearsay Analysis at 3. "Adopting the federal approach to prior statements of witnesses would require instructing California judges and lawyers on this elusive distinction." *Id.* Professor Mendez recommends sticking with the California approach, because it is less confusing.

Professor Friedenthal reached the same conclusion in his 1976 background study. "[T]here is no reason whatsoever for California to adopt the federal approach and to consider the listed items as not being hearsay." Friedenthal, *Analysis of Differences Between the Federal Rules of Evidence and the California Evidence Code* (Jan. 1976), at 45.

Likewise, commentators have criticized the federal approach. "The Rules' denomination of certain prior statements and admissions as "non-hearsay" exemptions from (instead of exceptions to) the hearsay rule is unnecessarily confusing." Becker & Orenstein, *The Federal Rules of Evidence After Sixteen Years — The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 Geo. Wash. L. Rev. 857, 907 (1992); *see also* Rice, *supra*, 171 F.R.D. at [page cite unavailable on Westlaw] (exclusions from the hearsay rule should be abolished and reclassified as exceptions).

The staff agrees with these assessments. **Evidence Code Section 1200 should not be revised to incorporate the exclusions listed in Federal Rule 801(d).**

Uniform Rule 801

Federal Rule 801(a) defines "statement" as "(1) an oral or *written assertion* or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." (Emphasis added.) Evidence Code Section 225 defines "statement" as "(a) oral or *written verbal expression* or (b) nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression." (Emphasis added.)

Until recently, the definition in the Uniform Rules was similar, but in 1999 it was changed to refer to "an assertion in the record" instead of a "written assertion." Unif. R. Evid. 801. This was part of a code-wide effort to update the

Uniform Rules to reflect modern technology such as electronic communications. See Unif. R. Evid. 101 Comment.

It does not appear necessary to revise Evidence Code Section 225 to refer to "an assertion in the record" instead of "written verbal expression." Evidence Code Section 250 defines "writing" to include "handwriting, typewriting, printing, photostating, photographing, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof." This definition "is obviously broad enough to include data recorded electronically in a computer; and courts have readily construed the term to include computer-recorded data." Harvey, *Evidence Code Revisions To Accommodate Electronic Communication and Storage* (June 2000), at 3.

Respectfully submitted,

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#K-200

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

BACKGROUND STUDY

Comparison of Evidence Code with Federal Rules: Part I. Hearsay and Its Exceptions

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COMPARISON OF EVIDENCE CODE WITH FEDERAL RULES: PART I. HEARSAY AND ITS EXCEPTIONS

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COMPARISON OF EVIDENCE CODE WITH FEDERAL RULES: PART I. HEARSAY AND ITS EXCEPTIONS

by Professor Miguel A. Méndez*

A. DEFINITION

The California Evidence Code and the Federal Rules of Evidence prohibit the use of hearsay, unless otherwise provided.[1] Although the Code and the Rules do not use identical terms, both define hearsay as an out of court statement offered at the hearing to prove as true the propositions asserted by the declarant in the statement.[2] Both recognize that a statement can include nonverbal conduct if the actor intends the conduct to substitute for an oral or written expression or assertion.[3] The classic example is the crime scene witness who points to the accused when asked by a police officer to identify the perpetrator.

Because only assertive nonverbal conduct is defined as hearsay, the Code and the Rules reject the implied assertion doctrine. Suppose an issue is whether a ship lost at sea was seaworthy. Is evidence that the captain inspected his ship and then placed his family on it hearsay if offered to prove that the ship was seaworthy? Under the Code and the Rules the answer is no, unless the captain intended his acts of inspecting the ship and placing his family on it to substitute for the statement, "The ship is seaworthy."

For the same reason, the Code and the Rules also reject the implied assertion doctrine when a verbal out of court statement is offered, not for the truth of the matter stated, but as circumstantial evidence of the declarant's belief underlying the statement. In *Wright v. Doe D. Tatham*,[4] an heir at law sought to set aside the testator's will on the ground that the testator was mentally incompetent at the time he made the will. At the trial, the beneficiary attempted to prove the testator's competency by offering several letters written to the testator. In one of the letters, the writer described a voyage to Virginia and the conditions he encountered there.[5]

Although the English position in *Wright* is to the contrary, under the Code and the Rules receiving the letters would not violate the hearsay rule. The letters were not offered to prove the truth of the matters stated (for example, the conditions the writer encountered in Virginia), but as circumstantial evidence of the writers' belief in the testator's competency. The writers would not have bothered to communicate with the testator unless they

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1. See Cal. Evid. Code § 1200(b) ("Except as provided by law, hearsay evidence is inadmissible."); Fed. R. Evid. 802 ("Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.").

2. See Cal. Evid. Code §§ 125, 135, 145, 225, 1200; Fed. R. Evid. 801(a)-(c).

3. Cal. Evid. Code § 225; Fed. R. Evid. 801(a).

4. 7 Ad. & El. 313 (Exchequer Chamber 1837).

5. *Id.* at 317-21.

believed that he was sufficiently possessed of his faculties to understand the subject matter of their letters.

Under the Rules, if the opponent objects to the introduction of the letter on hearsay grounds, the opponent has the burden of persuading the judge that the writer intended the letters to substitute for the statement, "The testator is competent." According to the Advisory Committee, Federal Rule 801 is "so worded as to place the burden upon the party claiming that the intention existed" and favors admissibility in ambiguous and doubtful cases.[6] Under the Code, the party claiming that hearsay falls within an exception has the burden of persuading the judge that it falls within the exception.[7] Presumably, the same party would have the burden of persuading the judge that evidence objected to on hearsay grounds is not hearsay. Imposing the burden on the proponent would be consistent with the Code's position that hearsay should be withheld from the jury because it is too unreliable to be evaluated properly or because public policy requires its exclusion.[8]

If this is the correct interpretation of the Code, different outcomes can be expected in federal and California courts where the hearsay declarant is not readily available to testify about his intentions. An example is provided in *United States v. Zenni*.[9] Suppose that a security guard at an airport, after running a metal detector over a passenger, says, "Go on through." Over a hearsay objection, may the declaration be received in a California or federal court to prove that the passenger was not armed at the time? The guard's statement, obviously, is not offered for the truth of the matter stated, as it is bereft of direct assertions. Moreover, his belief that the passenger is not armed cannot be barred under the implied assertion doctrine, since the Code and the Rules reject the doctrine. But a California or federal judge can nonetheless sustain the hearsay objection if the judge concludes that the guard intended his statement as a substitute for the assertion, "You are not armed."

Whether the judge sustains the hearsay objection depends on who has the burden of proving that the guard intended his statement as a substitute for the assertion. Under the Code, the proponent appears to have the burden of persuading the judge that the statement is not hearsay because the guard did *not* intend his statement to substitute for the assertion. Because the Rules favor admissibility, the objecting party would have the burden of persuading the judge that the statement is hearsay because the guard *intended* his statement as a substitute for the assertion. Who bears the burden is crucial, since the guard's intentions are not likely to be known by anyone other than the guard, and, presumably, the proponent is offering the guard's statement because the guard is unavailable to testify.

Cases such as *Zenni* probably are rare, and conforming the Code to the Rules would require simply a change to the comment to Section 405 clarifying that the opponent has the burden of proving the declarant's intentions. A more serious difference stems from the Rules' position that some statements that are clearly hearsay are "not hearsay" under Federal Rule of Evidence 801(d).

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6. Fed. R. Evid. 801 advisory committee's note. The wording of the rule does not support this assertion by the Advisory Committee.

7. Cal. Evid. Code § 405 Comment.

8. *Id.*

9. 492 F. Supp. 464, 468 n.21 (E.D.Ky. 1980).

Subdivision (d) classifies prior statements of witnesses as not constituting hearsay even if these witnesses' out of court statements are offered to prove the truth of the matters asserted. The statements embraced by subdivision (d) include consistent and inconsistent statements, statements of identification, party admissions (including adoptive and authorized admissions), and coconspirator's declarations.[10]

The justification for exempting these statements from the operation of the federal hearsay rule can be traced principally to Professor Edmund Morgan. He advocated a rule, first found in the Model Code of Evidence[11] and later in the 1953 version of the Uniform Rules of Evidence,[12] that would make admissible any hearsay declaration if the judge found that the declarant was present at the hearing and subject to cross-examination.

To a significant degree, Professor Morgan's rule coincides with the ideal conditions for receiving testimony. Witnesses should testify under oath in the fact finder's presence subject to cross-examination.[13] Receiving hearsay violates these conditions whenever the hearsay declarant is not produced for cross-examination. The hearsay rule thus can be seen as designed to give opponents an opportunity to cross-examine percipient witnesses under oath in the presence of the fact finders.

The framers of the California Evidence Code rejected Professor Morgan's position. They feared that such a rule "would permit a party to put in his case through statements carefully prepared in his attorney's office, thus enabling him to present a smoothly coherent story which could often not be duplicated on direct examination of the declarant."[14] The Rules take a contrary position with respect to prior statements of witnesses, presumably since by definition the declarants must appear in court as witnesses where they can be subjected to cross-examination under oath.[15]

From an outcome perspective, it is immaterial whether prior statements of witnesses are classified as an exception (as under the Code) or as an exemption (as under the Rules) to the hearsay rule. In either case, the net result is that the out of court statement can be received for the truth of the matter stated if certain other conditions are satisfied. From a practical perspective, however, consequences do attach to the federal treatment of prior statements. Evidence professors spend countless hours explaining to their students how under the Rules these statements, falling squarely within the federal definition of hearsay, nonetheless can be received for the truth of the matters asserted because in the words of Rule 801(d) they are "not hearsay." Adopting the federal approach to prior statements of witnesses would require instructing California judges and lawyers on this elusive

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10. Fed. R. Evid. 801(d)(1)-(2).

11. Model Code of Evidence Rule 503 (1942).

12. Unif. R. Evid. Evidence 63(1) (1953). The Uniform Rule added a further condition: the prior statement could be admitted only if it would have been admissible if made by the declarant while testifying as a witness. *Id.*

13. Fed. R. Evid. art. VII advisory committee's note.

14. Tentative Recommendation relating to *The Uniform Rules of Evidence*, 4 Cal. L. Revision Comm'n Reports 307, 313 (1964). They were also concerned that such a rule would undermine the rule prohibiting the use of leading questions on direct examination and the requirement that in most instances testimony be given under oath. *Id.*

15. The presumption is unwarranted. A party does not have to testify in order for his or her admissions to admissible. Moreover, the Federal Rule allows declarations by agents and coconspirators to be offered against a party even if the declarants do not testify.

distinction. Moreover, the federal approach invites additional confusion with a related concept. Out of court statements that are not offered for the truth of the matters stated are not hearsay. If prior statements of witnesses are "not hearsay," some might be misled into believing that they cannot be offered for the truth.

California avoids these pitfalls by remaining faithful to the Common Law tradition. If an out of court statement is offered for the truth of the matter stated, then it is hearsay and is not admissible unless it falls within an exception. It is immaterial that the testimonial source for the out of court statement might be the hearsay declarant for purposes of determining whether the statement is hearsay. In this respect, the Code, like the Common Law, is declaration centered.[16] The focus is on whether the out of court declaration is being offered for the truth. The Rules, on the other hand, are declarant centered in the case of prior statements of witnesses. The question is whether the out of court declarant is on the stand subject to cross-examination under oath in the presence of the fact finder. Regardless of the underlying merits of the federal position, it is clear that from a practical perspective the Code's approach is preferable.

B. Unavailability of the Hearsay Declarant

Some exceptions to the hearsay rule require the proponent to demonstrate the unavailability of the hearsay declarant as a witness. These include the exceptions for former testimony and statements against interest. Under the Federal Rules, the proponent of a dying declaration must also show the unavailability of the declarant.[17] The Code, on the other hand, does not impose this condition.[18]

Evidence Code Section 240 sets out the grounds for determining the unavailability of witnesses. It defines as unavailable declarants who are (1) exempted or precluded from testifying on the grounds of privilege, (2) disqualified from testifying, (3) dead or unable to testify on account of mental or physical illness, (4) absent from the hearing and beyond the court's process to compel attendance, or (5) absent from the hearing despite the proponent's reasonable efforts to compel attendance through the court's process.[19] Under the Code, the proponent has the burden of persuading the judge of the declarant's unavailability by a preponderance of the evidence.[20] A declarant, however, is not unavailable if his unavailability was procured by the proponent for the purpose of preventing the declarant from testifying.[21] In this case, however, it is the opponent who has the burden. She must persuade the judge by a preponderance of the evidence that this is the reason for the declarant's unavailability.[22]

16. See Park, *Two Definitions of Hearsay*, *in* J. Kaplan, J. Walz & R. Park, Evidence 90 (7th ed. 1991).
17. Fed. R. Evid. 804(b)(2).
18. Cal. Evid. Code § 1242.
19. Cal. Evid. Code § 240(a).
20. Cal. Evid. Code § 405 Comment.
21. Cal. Evid. Code § 240(b).
22. Cal. Evid. Code § 405 Comment.

The Federal Rules of Evidence differ from the Code in three important respects. Only two are examined here.[23] First, the Rules recognize that a contumacious witness—the witness who refuses to testify despite a court order to do so—is as unavailable as a declarant who does not attend the hearing.[24] Second, the Rules acknowledge that a witness who cannot testify because of a failure of recollection is likewise unavailable.[25]

California cases now recognize as unavailable witnesses who refuse to testify despite court orders to do so. A witness who refuses to testify because of fear for his safety or that of his family is unavailable under Section 240 by reason of "mental illness or infirmity" due to a "defect of personality or will."[26] Mere inconvenience, however, including the anguish and physical discomfort that can be produced by testifying, is insufficient to render the witness unavailable.[27] If, on the other hand, expert testimony establishes that the physical or mental trauma suffered by a crime witness has caused such harm that the witness cannot testify or can do so only by enduring additional substantial trauma, the witness can be declared unavailable.[28]

California cases also recognize that a witness's memory loss can constitute a mental or physical illness that renders the witness unavailable. In *People v. Alcala*[29] the prosecution was allowed to offer a witness's former testimony after eliciting evidence from the witness that she could not recall any matters connected with the case as a result of a stress related disability. In upholding the trial judge's ruling, the California Supreme Court noted that total memory loss can constitute a "mental infirmity" within the meaning of Section 240.[30] Expert testimony is unnecessary to establish that the loss constitutes a mental infirmity. The witness's own testimony, if believed by the trial judge, can support a finding of unavailability on this basis.[31]

The California cases demonstrate the wisdom of the Rules in including the contumacious witness and the witness who suffers substantial memory loss among those who are unavailable to testify. The Code should be amended to include these grounds, and consideration should be given to including some of the language of the cases in a comment to serve as guidance for the application of the new grounds.

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23. The Federal Rules take a more stringent approach to the admissibility of some hearsay statements when the declarant is unavailable to testify. In addition to the usual grounds of unavailability, in some cases the proponent must show that an attempt was made to depose the declarant. See Fed. R. Evid. 804(a)(5).

24. Fed. R. Evid. 804(a)(2).

25. Fed. R. Evid. 804(a)(3).

26. People v. Rojas, 15 Cal. 3d 540, 550-51, 542 P.2d 229, 235-36, 125 Cal. Rptr. 357, 363-64 (1975) (Webster's definition of "infirmity," when considered with the wide discretion given judges to determine necessity in a particular case, "permits the trial court to consider whether a mental state induced by fear of personal or family harm is a 'mental infirmity' that renders the person harboring the fear unavailable as a witness").

27. People v. Williams, 93 Cal. App. 3d 40, 54, 155 Cal. Rptr. 414, 421 (1979).

28. *Id.*

29. 4 Cal. 4th 742, 842 P.2d 1192, 15 Cal. Rptr. 2d 432 (1992).

30. 4 Cal. 4th at 778-79, 842 P.2d at 1212-13, 15 Cal. Rptr. at 452-53.

31. *Id.* at 780, 842 P.2d at 1214, 15 Cal. Rptr. 2d at 454.

C. EXCEPTIONS

The Code contains more exceptions to the hearsay rule than do the Rules. In addition, in some instances, some exceptions that do overlap contain significant differences.

(1) Prior inconsistent statements

Under the Code, statements that are inconsistent with the declarant's testimony may be offered to impeach the declarant as well as for the truth of the matter stated.[32] Extrinsic evidence of the statement, however, may not be received unless the declarant is given an opportunity to explain or deny the statement before the close of the evidence.[33] The Rules take a similar approach, but such statements may be used substantively only if "made under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition."[34] The Federal Rule, as originally prescribed by the United States Supreme Court, was identical to the Code section. Congress, however, placed the limitation on the substantive use of the statements because of concerns about their reliability.[35] California appellate opinions do not confirm Congress's concerns. Measured by this standard, there appears to be no justification for imposing a similar restriction on the hearsay use of prior inconsistent statements in California.

In June 1982, the California electorate approved Proposition 8, an initiative entitled "The Victims Bill of Rights." One of its provisions, "The Right to Truth-in-Evidence," transformed the rules of evidence applicable to criminal proceedings by amending the state constitution to give the parties a right *not* to have relevant evidence excluded.[36] This provision, in pertinent part, reads as follows:

> Except as provided by statute hereafter enacted by a two-thirds vote of the membership of each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding …. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code Sections 352, 782, or 1103.[37]

A literal application of this provision would repeal all the Code sections that ban or limit evidence bearing on the credibility of witnesses, including the restriction on the extrinsic proof of prior inconsistent statements.[38] Since such evidence is relevant, its admissibility would be governed instead by Section 352, a section expressly exempted from the operation of the Right to Truth-in-Evidence provision. Under Section 352, a judge can exclude relevant evidence if its probative value is substantially outweighed by enumerated trial concerns.[39] These include the risk that the evidence may consume too much time, unfairly prejudice the opposing party, confuse the issues, or mislead the

32. Cal. Evid. Code §§ 1235, 770.

33. *Id*.

34. Fed. R. Evid. 801(d)(1)(A).

35. Conference Committee Report, Fed. R. Evid. 801(d)(A)(1).

36. Cal. Const. art. I, § 28(d).

37. *Id*.

38. Section 782, however, would not be affected because it is expressly exempted from the operation of Proposition 8. Section 782 governs the use of a complaining witness's sexual conduct to attack her credibility in sex offense prosecutions. Cal. Evid. Code § 782.

39. Cal. Evid. Code § 352.

jury.[40] A literal interpretation of the proposition would thus replace the certainty provided by specific rules governing credibility with the discretion accorded trial judges by Section 352. Whether or not the initiative has repealed the restrictions on the use of extrinsic evidence of prior inconsistent statements has not been decided.[41] But conforming the Code to the Rule's provision on prior inconsistent statements by the super majority contemplated by the initiative would repeal the effect of the initiative on the use of such statements.

(2) Prior consistent statements

Both the Code and the Rules authorize the use of statements that are consistent with a witness's testimony to be offered for the truth of the matter stated as well as to support the witness's credibility.[42] The principal difference is not the hearsay aspects of such statements, but the circumstances which authorize their use. The Code allows a party to support the credibility of a witness with statements that are consistent with the witness's testimony if one of two conditions is satisfied.[43] First, if the witness was impeached with a prior inconsistent statement, the witness can be rehabilitated with a consistent statement, if the statement was made before the alleged inconsistent statement.[44] Second, where the witness has been expressly or impliedly charged with fabricating his testimony or allowing bias or other improper motive to shape his testimony, the witness can be rehabilitated with a prior consistent statement if the statement was made before the motive to fabricate or other improper motive is alleged to have arisen.[45]

The Rules take a more restrictive approach. A prior consistent statement may be received only to rebut an express or implied charge of recent fabrication or improper influence.[46] The Rules do not contain a provision equivalent to Section 791(a) which permits the use of a prior consistent statement to rehabilitate a witness if the witness has been impeached by a prior inconsistent statement and the consistent statement was made before the inconsistent one.[47] Conforming the Code to the Rules would require repealing this section.

Where the witness has been expressly or impliedly charged with fabricating his testimony or allowing bias or other improper motive to shape his testimony, the Code requires the rehabilitating party to show that the witness made the consistent statement before the motive to fabricate or other improper motive is alleged to have arisen.[48] The Rules omit

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40. *Id*.

41. A post-Proposition 8 decision discussing the need to give the witness an opportunity to explain or deny the statement fails to mention the impact of Proposition 8 on this requirement. See People v. Garcia, 224 Cal. App. 3d 297, 303-06, 273 Cal. Rptr. 666, 669-70 (1990).

42. Cal. Evid. Code §§ 791, 1236; Fed. R. Evid. 801(d)(1)(B).

43. Cal. Evid. Code § 791.

44. Cal. Evid. Code § 791(a).

45. Cal. Evid. Code § 791(b).

46. Fed. R. Evid. 801(d)(1)(B). An argument, however, can be made that the Rules should permit such rehabilitation: offering a prior inconsistent statement necessarily implies that the witness has fabricated his testimony since the time he made the inconsistent statement. See Cal. Evid. Code § 791 Comment.

47. Cal. Evid. Code § 791 Comment.

48. Cal. Evid. Code § 791(b).

this requirement, but the United States Supreme Court has read it into the Federal Rule as a matter of statutory interpretation.[49] The Code's requirement should be retained in the event the Code provision is conformed to the Federal Rule.

In California criminal cases, a literal application of Proposition 8 would repeal the restrictions on the use of consistent statements to rehabilitate witnesses and, instead, would commit their admissibility to the judge's discretion under Section 352. Consistent statements are probative of a witness's credibility even if the witness's credibility has not first been attacked. Conforming the Code provision to the Federal Rule would eliminate the effect of Proposition 8 if the re-enactment satisfies the initiative's super majority requirements.

(3) Statements of identification

Both the Code and the Rules allow the hearsay use of a statement previously made by a witness identifying another as a person who participated in a crime or other occurrence.[50] The Federal Rule imposes no limitations on the use of the statement provided the declarant made the statement after perceiving the person and is subject to cross-examination concerning the statement.[51] The Code, on the other hand, imposes a number of limitations. To be admissible under this hearsay exception, the proponent must show that the statement was made at a time when the crime or other occurrence was fresh in the declarant's memory. In addition, the proponent may not offer the statement unless the declarant first testifies that the statement of identification was a true reflection of his or her recollection.[52] Under the Code, subjecting the declarant to cross-examination is not a sufficient guarantee of trustworthiness. In addition, the declarant must vouch for the accuracy of the statement. Conforming the Code to the Federal Rule would result in the loss of these additional guarantees of reliability.

(4) Admissions by a party

The Code and the Rules allow a party to offer the opposing party's out of court statements for the truth of the matter asserted.[53] These statements fall into four principal categories: (a) a party's own statements, (b) statements made by others but adopted by a party, (c) statements a party has authorized others to make on his or her behalf, and (d) statements made by a party's coconspirator.

(a) A party's own statements. The definition of a party's own statements is virtually the same under the Code and the Rules.[54]

(b) Adoptive admissions. The definition of adoptive admissions is virtually the same under the Code and the Rules.[55]

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49. Tome v. United States, 513 U.S. 150, 159-60 (1995).
50. Cal. Evid. Code § 1238; Fed. R. Evid. 801(d)(1)(C).
51. Fed. R. Evid. 801(d)(1)(C).
52. Cal. Evid. Code § 1238.
53. Cal. Evid. Code § 1220; Fed. R. Evid. 801(d)(2).
54. *Compare* Cal. Evid. Code § 1220 *with* Fed. R. Evid. 801(d)(2)(A).
55. *Compare* Cal. Evid. Code § 1221 *with* Fed. R. Evid. 801(d)(2)(B).

(c) Authorized admissions. Although the definition of authorized admissions is similar under the Code and the Rules, the Code defines these statements as those made by a person authorized by the party to make the statement "for him" concerning the subject matter of the statement.[56] The Federal Rule also embraces statements made *to* the party.[57] Under the Code, statements an agent makes to the party are beyond the definition even if the agent is authorized to make the statement. The limitation in the Code is inadvertent and should eliminated by adopting the federal definition or deleting "for him."

Whether or not a party has authorized someone to make a statement on the party's behalf presents a preliminary issue that should be resolved, not by the law of evidence, but by the law of agency. California cases, however, have drained the exception of much of its utility by insisting on proof that the party expressly authorized the declarant to make the statement.[58] Concerned that federal courts might impose such a narrow construction on authorized admissions, the framers of the Federal Rules added a new hearsay exception for statements made "by a party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship."[59] The California Law Revision Commission included a similar provision when it recommended the adoption of the Evidence Code.[60] The Legislature, however, deleted the provision. In light of the judicial limitations placed on the use of authorized admissions, the Legislature should enact the provision originally recommended by the Commission.

Unlike the Rules, the Code contains a hearsay exception for a number of out of court statements akin to admissions. These statements do not qualify as admissions because the declarant is not a party to the action in which the declarations are offered and the statements do not qualify as statements adopted or authorized by the party against whom offered. But the statements would qualify as party admissions had the declarant had been a party.

Section 1224 provides as follows:

> When the liability, obligation, or duty of a party to a civil action is based in whole or in part upon the liability, obligation, or duty of the declarant, or when the claim or right asserted by a party to a civil action is barred or diminished by a breach of the duty by the declarant, evidence of a statement made by the declarant is as admissible against the party as it would be if offered against the declarant in an action involving that liability, obligation, duty, or breach of duty.[61]

Labis v. Stopper[62] illustrates how Section 1224 can be used. Labis sued a painting contractor for injuries she received when one of the contractor's painters moved a drop cloth

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56. Cal. Evid. Code § 1222.

57. Fed. R. Evid. 801(d)(2)(C).

58. See cases collected in M. Méndez, Evidence: The California Code and the Federal Rules — A Problem Approach § 703 (2d ed. 1999).

59. Fed. R. Evid. 801(d)(2)(D).

60. Chadbourn, *A Study Relating to the Hearsay Evidence Article of the Uniform Rules of Evidence,* 4 Cal. L. Revision Comm'n Reports 401, 485-89 (1964).

61. Cal. Evid. Code § 1224.

62. 11 Cal. App. 3d 1003, 89 Cal. Rptr. 926 (1970). Although Section 1224 would appear to apply to any case involving the liability of an employer under the doctrine of respondeat superior, Chadbourn, *A Study Relating to the Hearsay Evidence Article of the Uniform Rules of Evidence*, 4 Cal. L. Revision

while the plaintiff was walking on it. To prove that the painter moved the drop cloth without first looking, she offered a statement in which the painter told an investigating police officer that he was not aware that anyone was on the drop cloth when he moved it.[63] The contractor's liability depended in part on the painter's breach of the duty of care he owed the plaintiff; consequently, since the painter's statement would have been admissible against him as an admission, it was admissible against the contractor under Section 1224 for the truth of the matter stated.[64]

In some instances, Section 1224 can confer a benefit on the plaintiff without according the defendant a similar advantage. Suppose that in *Labis* the plaintiff had died and the action had been brought by her survivor as a wrongful death action. Suppose also that prior to her death the plaintiff had said that she had walked around a sawhorse designed to keep pedestrians off the drop cloth. The statement would not be admissible against the survivor as an admission by the party opponent, since the decedent is not a party in the wrongful death action. Nor would the statement be admissible under Section 1224, since the section contemplates the use of the statement against defendants, not plaintiffs. To help rectify this imbalance, the Code includes a hearsay exception for some statements made by the deceased in wrongful death actions. Under Section 1227, statements made by the deceased are as admissible against the survivor as they would have been against the deceased in an action brought by the deceased.[65] Similarly, in actions brought by parents to recover for injuries to their children, the children's statements are as admissible against the parents as they would have been against the children in an action brought by the children.[66] Again, in actions involving property disputes, declarations by a predecessor in interest are as admissible against successors as they would have been in action against the predecessor.[67]

These sections permit the use of the statements even though the parties against whom they are offered in no way authorized the declarants to make the statements. The Federal Rule exempting from the hearsay rule statements by a party's agent or servant at most might embrace the painter's statement if under the law agency he qualifies as an agent or servant.[68] The Code provisions provide useful exceptions and should be retained if the Code is conformed to the Federal Rules.[69]

Comm'n Reports 401, 495 (1964), the California Supreme Court, citing lack of precedent, refused to give that construction to Section 1224, Markley v. Beagle, 66 Cal. 2d 951, 429 P.2d 129, 59 Cal. Rptr. 809 (1967). The *Labis* court in turn declined to follow *Markley,* holding that "it would be an unfair extension of the true rule of *Markley* to broaden its language beyond its holding …." Labis v. Stopper, 11 Cal. App. at 1005, 89 Cal. Rptr. at 927.

63. 11 Cal. App. 3d at 1004-05, 89 Cal. Rptr. at 926, 927.

64. *Id*.

65. Cal. Evid. Code § 1227.

66. Cal. Evid. Code § 1226.

67. Cal. Evid. Code § 1225.

68. Fed. R. Evid. 801(d)(2)(D).

69. In some instances, hearsay statements by children who have been abused sexually may be offered for the truth of the matter stated in order to comply with the foundational requirements for the introduction of the confessions of the persons accused of abusing the children. See Cal. Evid. Code § 1228 for a list of the conditions that must be satisfied for the children's hearsay statements to be received.

(d) Coconspirator's declarations. Both the Code and the Rules allow damaging statements made by a party's coconspirators to be offered against the party for the truth of the matter asserted even in the absence of evidence that the party authorized the coconspirator to make the statement on his or her behalf.[70] Conspirators are presumed to authorize each other to speak for each other if certain conditions are met. These relate principally to the circumstances attending the making of the statements.

In California, the proponent must show that the coconspirator made the declaration while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the conspiracy.[71] The proponent must also show that the coconspirator made the declaration prior to or during the time that the opponent was participating in the conspiracy.[72] Similarly, the Federal Rules require the proponent to show that the declaration was made by the coconspirator during the course and in furtherance of the conspiracy.[73] And though the Rules seemingly require the proponent to show that the declaration was made while the declarant was a coconspirator of the party opponent, case law holds that, as in California, declarations made prior to the time the party joined the conspiracy are admissible against the party.

The major differences between the California and federal approaches to coconspirators' declarations concern the standard that must be met in proving the preliminary or foundational facts and the kind of evidence that can be offered to satisfy the standard. In California, a sufficiency standard applies.[74] Viewing the evidence in the light most favorable to the proponent, the judge must be convinced that a reasonable fact finder could find the foundational facts.[75] In making this showing, however, the proponent is limited to offering admissible evidence.[76] This limitation precludes bootstrapping. Over a hearsay

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70. Cal. Evid. Code § 1223; Fed. R. Evid. 801(d)(2)(E).

71. Cal. Evid. Code § 1223. Statements not in furtherance of the conspiracy are outside the exception because they are not the acts "of the conspiracy for which the party, as a coconspirator, is legally responsible." Cal. Evid. Code § 1223 Comment. Underlying this concept is the notion that conspirators act as agents for each other only with respect to acts and statements that promote the agreed upon criminal enterprise. See Fed. R. Evid. 801(d)(2)(E) advisory committee's note.

72. Cal. Evid. Code § 1223.

73. Fed. R. Evid. 801(d)(2)(D).

74. Cal. Evid. Code § 1223(c).

75. See Cal. Evid. Code § 403 Comment. Some reviewing courts do not understand the role of trial judges in determining the existence of preliminary facts under a prima facie standard. Confusing the sufficiency standard with proof by a preponderance of the evidence, some hold that for a co-conspirator's declaration to be admissible the proponent has to "proffer sufficient evidence to allow the trier of fact to determine that the conspiracy exists by a preponderance of the evidence." See People v. Herrera, 83 Cal. App. 4th 46, 63, 98 Cal. Rptr. 2d 911, 922 (2000), and cases cited therein. For purposes of admissibility, the question for the trial judge is merely where a reasonable juror could find that a conspiracy existed if the proponent's evidence is believed. Whether jurors should be instructed to disregard the evidence *after* it has been admitted unless they find the conspiracy by some higher standard is a separate question. In California, for example, jurors are routinely told to disregard evidence of uncharged misdeeds unless they first find by a preponderance of the evidence that the misdeed was committed. See Méndez, *supra* note 58, § 3.17. The 2001 revision to CALJIC 6.24 warns jurors not to consider a coconspirator's declaration unless they first find the foundational facts, including the conspiracy, by a preponderance of the evidence.

76. The Law Revision Commission recommended a rule on preliminary fact determinations that would have permitted the judge to consider inadmissible evidence in some instances. 6 Cal. L. Revision Comm'n Reports 19-21 (1964). The proposed rule, however, was rejected by the Legislature which instead retained the practice of requiring the use of admissible evidence. See Cal. Evid. Code §§ 400-406.

objection, the proponent may not offer the coconspirator's hearsay declaration as evidence of the foundational requirements.[77]

The Federal Rules are seemingly more protective of the accused than is the Code. The United States Supreme Court has construed the Rules to require the proponent to prove the foundational facts by a preponderance of the evidence.[78] This added protection, however, is undercut by the Rules' position permitting the proponent to offer the coconspirator's hearsay declaration as evidence of the existence of the conspiracy and of the accused's participation.[79] In enacting the rule governing the proof of preliminary facts (Federal Rule of Evidence 104), Congress adopted the approach recommended by the California Law Revision Commission but rejected by the Legislature: the judge, in making preliminary fact determinations, is not bound by the rules of evidence except those regarding privileges.[80] Consequently, a federal judge can consider the coconspirator's declaration in determining whether the prosecution has proved the conspiracy and the accused's participation by a preponderance of the evidence, even though the use of the declaration for these purposes violates the hearsay rule.[81]

A federal judge, however, may not rely on the coconspirator's statement alone to find the preliminary facts. A 1997 amendment to Federal Rule 801 provides that the "contents of the statement are not alone sufficient to establish … the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered …."[82] The judge, in addition, must consider "the circumstances surrounding the statement, such as the identity of the speaker, the context in which the statement was made, or evidence corroborating the contents of the statement in making its determination as to each preliminary question."[83]

If the Code is conformed to the Federal Rule, California should retain the provision making a coconspirator's declaration admissible even if it was made prior to the time the party against whom offered joined the conspiracy. Whether the Code should be amended to allow judges to consider inadmissible evidence (other than privileged information) in making foundational determinations presents difficult questions regarding the proper allocation of power between judge and jury, and are left for later consideration. So is the related question of whether the foundational facts should be proved only by a sufficiency standard or by a preponderance of the evidence.

(5) Contemporaneous statements

Section 1241 creates a hearsay exception for statements which are "offered to explain, qualify, or make understandable conduct of the declarant" and which were "made while the declarant was engaged in such conduct."[84] Trustworthiness is derived from the

77. See People v. Longines, 34 Cal. App. 4th 621, 626, 40 Cal. Rptr. 2d 356, 359 (1995).

78. Bourjaily v. United States, 483 U.S. 171, 175 (1987).

79. See Fed. R. Evid. 104(a); see also Fed. R. Evid. 1101(d)(1).

80. *Id*.

81. See Fed. R. Evid. 801(d)(2) (as amended in 1997) & advisory committee's note.

82. Fed. R. Evid. 801(d)(2).

83. Fed. R. Evid. 801(d)(2) advisory committee's note.

84. Cal. Evid. Code § 1241.

requirement that the declaration be contemporaneous with the conduct that is being explained, qualified, or made understandable.

The Assembly Committee questioned the need for this exception, noting that some commentators do not regard the kinds of the statements contemplated by Section 1241 to be hearsay.[85] For example, under the laws relating to personal property, merely lending a pen to someone does not strip the lender of ownership of the pen; it creates only a bailment. But giving the pen to another can transfer ownership by creating an inter vivos gift. Whether a bailment or inter vivos gift was created depends on the intention of the owner. Thus, if in the act of handing the pen the owner says, "Use my pen," only a bailment is created. But if the owner says, "I want you to have this pen," then an inter vivos transfer is effected.

Section 1241 is designed to remove any hearsay barriers to these kinds of statements. Depending on which statement the owner made, the declarations will clarify whether a bailment or inter vivos gift was intended. But closer analysis discloses that no hearsay is involved. These statements are verbal acts. When the substantive law governing the action invests certain utterances with legal significance, then proof of those utterances does not violate the hearsay rule.

The Federal Rules do not contain a hearsay exception for contemporaneous statements, most likely because there is no need for an exception for these kinds of statements. Instead, Federal Rule of Evidence 803(1) creates an exception for present sense impressions, statements "describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter."[86] The Law Revision Commission recommended an exception for present sense impressions,[87] but the Legislature rejected the recommendation and adopted only the exception for contemporaneous statements.

The Code looks inwardly, creating an exception for statements reflecting the declarant's state of mind regarding his own conduct.[88] The Rules focus outwardly, providing an exception for statements by the declarant describing external phenomena. The present sense impressions contemplated by Rule 802(1) are much closer to excited utterances.

Present sense impressions differ from excited utterances under the Federal Rules in two significant respects. First, while excited utterances can be made at any time during the excited state, present sense impressions must be made while the declarant is perceiving the event or shortly thereafter.[89] Moreover, excited utterances under the Rules need only relate to the startling event giving rise to the declaration; present sense impressions are limited to statements describing or explaining the event or condition.[90] "[In] the absence of a startling event, [they] may extend no farther."[91]

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85. Cal. Evid. Code § 1241 Comment.

86. Fed. R. Evid. 803(1).

87. See Chadbourn, *A Study Relating to the Hearsay Evidence Article of the Uniform Rules of Evidence*, 4 Cal. L. Revision Comm'n Reports 401, 471 (1964).

88. See Cal. Evid. Code § 1241.

89. Fed. R. Evid. 803(1) advisory committee's note.

90. *Id.*

91. *Id.*

Although a hearsay exception is not necessary for the kind of statements contemplated by Section 1241, it should be retained to the extent that confusion may still abound about the hearsay status of such statements. On the other hand, an exception is needed for present sense impressions. As in the case of contemporaneous statements, the requirement of substantial contemporaneity of the event and the statement diminish the likelihood of deliberate and conscious misrepresentation.[92] The Code should be conformed to the Rules by providing an exception for present sense impressions.

(6) Excited utterances

Both the Code and the Rules create a hearsay exception for spontaneous utterances made while the declarant was under the stress of an exciting or startling event.[93] The scope of the exceptions is not identical, however. Under the Code, the exception is limited to those statements that purport "to narrate, describe, or explain an act, condition, or event perceived by the declarant"[94] while under the Rules, the statement only needs to relate to the startling event or condition.[95]

California cases have not applied the limitation in Section 1240 strictly. Statements admitted under the California exception include a declaration in which the declarant identified his assailant as an acquaintance and drug customer of his roommate[96] and a statement by a rape victim in which the victim reported that the accused had confessed to a murder in the course of raping her.[97] In light of the liberal interpretation given the to Code, Section 1240 should be amended to include statements relating to the startling event.

(7) State of mind declarations

(a) Declarations regarding a then existing mental state. The Code and the Rules provide a hearsay exception for declarations in which the declarant describes a then existing state of mind.[98] The insistence on contemporaneity furnishes the exception with trustworthiness. Expressions of existing feelings and discomforts — as opposed to narratives of past feelings and miseries — are likely to be sincere and spontaneous.[99] The need for this kind of evidence also justifies the exception, since it is difficult to divine what people think unless they tell us. Nonetheless, reservations about the reliability of these expressions caused the Code framers to include a provision empowering trial judges to exclude them if they find that the declarations "were made under circumstances such as to

92. *Id*.

93. Cal. Evid. Code § 1240; Fed. R. Evid. 803(2).

94. Cal. Evid. Code § 1240(a).

95. Fed. R. Evid. 803(2).

96. See, e.g., People v. Farmer, 47 Cal. 3d 888, 904-05, 765 P.2d 940, 950, 254 Cal. Rptr. 508, 517-18, *cert. denied*, 490 U.S. 1107 (1989).

97. People v. Arias, 13 Cal. 4th 92, 150, 913 P.2d 980, 1017, 51 Cal. Rptr. 2d 770, 808 (1996), *cert. denied*, 520 U.S. 1251 (1997).

98. Cal. Evid. Code § 1250; Fed. R. Evid. 803(3).

99. Chadbourn, *A Study Relating to the Hearsay Evidence Article of the Uniform Rules of Evidence*, 4 Cal. L. Revision Comm'n Reports 401, 505 (1964).

indicate [their] lack of trustworthiness."[100] The Federal Rule does not contain this limitation.

The Code makes clear that declarations of a then existing state of mind can be offered to prove the declarant's state of mind at that time or at any other time when the mental state itself is an issue in the action.[101] Accordingly, the declaration can be offered as circumstantial evidence that the declarant had a similar state of mind prior to or subsequent to the time period embraced in the declaration. The Federal Rule does not contain a similar provision, but the Rules' relevance provisions should permit a similar use of the declarations in federal court.

The Code also contains a provision expressly allowing a declaration of a then existing mental state to be used to prove or explain acts or conduct of the declarant.[102] An example would be the use of a declaration regarding future plans to prove that the declarant implemented those plans. Again, the Federal Rule does not contain an analogous provision, but such use is allowed by the Rules' relevance provisions.

Declarations concerning future plans are controversial because often they include the future plans of individuals other than the hearsay declarant. In People v. Alcalde[103] the accused was tried for murdering a woman he had been seeing socially. At issue was the admissibility of a declaration made by the victim on the day of the killing in which she stated that she was "going out with Frank" that evening.[104] "Frank" was the accused's first name. The accused objected that the victim's declaration was inadmissible to prove *his* future plans to see the victim. The California Supreme Court upheld the use of the declaration, noting that in overruling the objection the trial judge had taken "the precaution to state in the presence of the jury that the evidence was admitted for the limited purpose of showing the decedent's intention."[105] The Code, which was enacted after *Alcalde*, underscores the point by limiting these declarations to proving or explaining the acts or conduct of the *declarant*.[106]

The California courts, however, have not abided by this limitation. Although the California Supreme Court has declined to rule on whether the Evidence Code limits *Alcalde* to proving only the declarant's future plans,[107] some lower courts have mistakenly construed another Supreme Court case, People v. Morales,[108] as allowing the use of a declaration regarding future plans to prove the plans of others in addition to those of the declarant.[109]

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100. Cal. Evid. Code § 1252.

101. Cal. Evid. Code § 1250(a)(1).

102. Cal. Evid. Code § 1250(a)(2).

103. 24 Cal. 2d 177, 148 P.2d 627 (1944).

104. *Id*. at 185, 148 P.2d at 630.

105. *Id*.

106. Cal. Evid. Code § 1250(a)(2).

107. People v. Melton, 44 Cal. 3d 713, 739, 750 P.2d 741, 755, 244 Cal. Rptr. 867, 881 (1988), *cert. denied*, 488 U.S. 934 (1988).

108. 48 Cal. 3d 527, 770 P.2d 244, 257 Cal. Rptr. 64 (1989).

109. See, e.g., People v. Han, 78 Cal. App. 4th 797, 808, 93 Cal. Rptr. 2d 139, 147 (2000) (declarant's statement that she wanted to arrange her sister's murder was admissible to prove that the declarant and the accused conspired to murder the sister).

The Federal Rule does not contain the limitation found in the Code. However, in approving the Federal Rule, the House Committee on the Judiciary expressed agreement with such a limitation. In its report the committee states that its intent is that Federal Rule of Evidence 803(3) "be construed to limit the doctrine of *Mutual Life Insurance Co. v. Hillmon* … so as to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person."[110] *Hillmon* is the classic case exploring the use of declarations regarding future plans. Despite the House's unambiguous position, some appellate federal courts, including the Ninth Circuit, have approved the use of the declarations to prove the future conduct of others.[111] The Code should retain the limitation.

(b) Declarations regarding a past state of mind. As a general rule, the Code and the Rules prohibit the use of a statement of memory or belief to prove the fact remembered or believed.[112] Otherwise, the hearsay rule might be inadvertently repealed since any statement of a past event is a statement of the declarant's then existing state of mind regarding the past event.

The Code, however, creates a hearsay exception for declarations of past state of mind in three circumstances. First, where the previous mental state is itself an issue in the case and the declaration is not offered to prove any fact other than that mental state, and the declarant is unavailable to testify.[113] The Rules do not contain an equivalent provision.

Second, where the statement was made for purposes of medical diagnosis or treatment and describes medical history, including past as well as present symptoms, insofar as reasonably pertinent to diagnosis or treatment.[114] The exception, however, applies only to a statement made by a victim when the victim is a minor at the time of proceedings, "provided the statement was made when the victim was under the age of 12 describing any act, or attempted act, of child abuse or neglect."[115] This exception is merely a truncated version of Federal Rule of Evidence 803(4).

In *Morales* the accused was prosecuted for murder. The prosecution's theory was that the accused had killed the victim as part of a conspiracy. Over a defense hearsay objection, a witness was allowed to testify to overhearing the declarant, Ortega, state that he intended to kill the victim and would enlist the accused's aid. The California Supreme Court approved the use of the declaration. Ortega's declaration concerning his plan to kill the victim with the accused's aid fell within the exception for state of mind declarations regarding future plans. The declaration was probative of his soliciting the accused to help him kill the victim, and in the court's view, such a solicitation in turn was probative of a conspiracy between the accused and Ortega to kill the victim. People v. Morales, *supra* at 552, 770 P.2d at 257, 257 Cal. Rptr. at 77. While this relevance analysis is correct, it still raises disturbing questions. If Ortega had said that he intended to conspire with the accused to kill the victim, then under *Alcalde* and the plain language of the Code, the statement would have been admissible only to prove Ortega's participation in such a conspiracy but not the accused's. *Morales* makes no mention of *Melton*.

110. House Judiciary Committee Report, Fed. R. Evid. 803(3).

111. See, e.g., United States v. Stanchich, 550 F.2d 1294 (2d Cir. 1977); United States v. Pheaster, 544 F.2d 353 (9th Cir. 1976), *cert. denied*, 429 U.S. 1099 (1977).

112. Cal. Evid. Code § 1250(b); Fed. R. Evid. 803(3).

113. Cal. Evid. Code § 1251.

114. Cal. Evid. Code § 1253.

115. *Id.*

Third, where the statement consists of a declaration in which the declarants state that they have or have not made a will, or have or have not revoked a will.[116] The Rules contain a similar provision.[117] Under the Code, however, the declaration is not admissible if the declarant is available to testify.[118] The Rules do not impose this limitation.

Unlike the Code, the Rules contain a broad hearsay exception for statements made for purposes of medical diagnosis or treatment. Rule 803(4) provides an exception for statements made "for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."[119] Unlike the California exception, the Federal Rule is not limited to statements made by minors describing acts or attempted acts of child abuse and neglect.

Rule 803(4) is a marked and generous departure from the Common Law. It includes present as well as past symptoms, and it is immaterial whether the physician was consulted for treatment or for the purpose of enabling the doctor to testify. The declarant's motive goes to weight, not admissibility.[120] Moreover, it is not indispensable for the statement to be made to a doctor. "Statements to hospital attendants, ambulance drivers, or even members of the family" can be included if reasonably pertinent to diagnosis or treatment.[121]

Under Rule 803(4), statements of causation are also admissible if reasonably pertinent to diagnosis or treatment.[122] Knowing what caused an injury can assist a doctor in making the proper diagnosis or formulating the appropriate treatment. Thus, even a child's statement to a doctor about the identity of the person who molested her is admissible if made for purposes of medical diagnosis or treatment.[123] The fact that the statement may embrace the identity of the perpetrator does not detract from its reliability: a "patient can be expected to tell the truth about her injury because she will want to be diagnosed correctly and treated appropriately."[124] But even under the Federal Rule, statements relating to fault do not generally qualify. "Thus a patient's statement that he was struck by an automobile would qualify but not his statement that the car was driven through a red light."[125]

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116. Cal. Evid. Code § 1260.

117. Fed. R. Evid. 803(3).

118. Cal. Evid. Code § 1260.

119. Fed. R. Evid. 803(4).

120. Fed. R. Evid. 803(4) advisory committee's note.

121. *Id*.

122. *Id*.

123. People of the Territory of Guam v. Ignacio, 10 F.3d 608 (9th Cir. 1993).

124. *Id*. at 612. If the statement, however, was not made for the purposes of diagnosis or treatment, then it is not admissible under the Federal Rule. In *Ignacio*, for example, the victim's statement to the doctor was admissible because made for these purposes but not her statement to a social worker who was simply trying to ensure the victim's safety. *Id*. The record was devoid of any evidence indicating that the child made the statements to the social worker for medical purposes. *Id*.

125. Fed. R. Evid. 803(4) advisory committee's note.

The Legislature has taken one step toward the federal approach in enacting Section 1253. The Legislature should take the additional step of replacing Section 1253 with the federal rule.

(8) Past recollection recorded

Although using different language, the Code and the Rules provide a hearsay exception for recorded recollection if the witness has insufficient recollection to testify fully and accurately.[126] The Code, however, includes an additional limitation. Only those recorded statements that would have been admissible if made by the witness while testifying are admissible.[127] Presumably, the same outcome would obtain in federal court since the Federal Rule does not preclude the opponent from using other grounds to object to the admissibility of the recorded statement. The California limitation prevents confusion on this point and should be retained.

(9) Business records

Evidence in the form of testimony that otherwise might be barred by the hearsay rule may be admissible under the exception for business records. The justification is rooted in the legal acceptance of businesses practices as well as necessity. If businesses rely on business records "in the most important undertakings of mercantile and industrial life," then such records should be sufficiently trustworthy for use in court.[128]

There is substantial overlap between the California and federal exceptions for business records. Both define a business broadly[129] and require the business entry to be made in the regular course of business at or near the time the event recorded took place.[130] In addition, both dispense with the need to call a witness to identify the record and testify about its mode of preparation under specified circumstances.[131] There are some differences between the California and federal approaches, however.

First, the Federal Rule requires the proponent to show that it was the regular practice of the business to create the record, not just that it was created in the course of regularly conducted business activity.[132]

Second, the Code and the Rules give the judge the power to exclude a record otherwise satisfying the foundational requirements if the judge determines that the sources of information used to create the record or the method and circumstances of preparation indicate lack of trustworthiness. In California, however, over objection the proponent must show that the record is trustworthy.[133] In federal court, it is the opponent who must persuade the judge of the record's untrustworthiness.[134] Admissibility is assumed in the first instance under the Rules.

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126. Cal. Evid. Code § 1237; Fed. R. Evid. 803(5).
127. Cal. Evid. Code § 1237.
128. Fed. R. Evid. 803(6) advisory committee's note.
129. Cal. Evid. Code § 1270; Fed. R. Evid. 803(6).
130. Cal. Evid. Code § 1271; Fed. R. Evid. 803(6).
131. Cal. Evid. Code §§ 712, 1560-66, 1567; Fed. R. Evid. 803(6).
132. Fed. R. Evid. 803(6).
133. Cal. Evid. Code § 1271(d); see also Cal. Evid. Code § 405 Comment.
134. Fed. R. Evid. 803(6) & advisory committee's note

Third, the Federal Rule explicitly states that an opinion or diagnosis can qualify as an admissible entry. The Code omits these terms, but the opponent can always object to an entry on the ground that it constitutes an inadmissible opinion.

Whether opinions in business records can be received as part of the record depends on the application of the opinion rule. In California and federal courts, a lay witness may not testify in the form of an opinion unless the opinion is rationally based on the witness's perception and is helpful to a clear understanding of the witness's testimony.[135] An officer's statement in a police report that "it was raining" would qualify. His conclusion would be based on his own perception and would surely help the fact finder understand the officer's perception of the weather conditions.

An expert, on the other hand, may not testify in the form of an opinion unless (1) the expert is qualified to give the opinion and (2) the fact finder needs the opinion in resolving important factual issues.[136] In a personal injury case, for example, an important question may be whether the injuries suffered by the plaintiff are permanent. It is unlikely that a jury listening to the plaintiff's complaints can resolve this issue. An opinion by a qualified physician would help. Accordingly, such an opinion in a medical report otherwise admissible under the exception would be admissible.

The point is that nothing in the exception for business records favors or disfavors opinions.[137] Whether a particular opinion is admissible depends in the first instance on whether it would be admissible through the hearsay declarant if the declarant testified at the hearing.

The California courts, however, have taken a more restrictive approach. Opinions in business records should be limited to readily observable acts, events or conditions.[138] Thus, an opinion that the plaintiff suffered a broken leg should be admitted but not an opinion that he suffers from a psychiatric condition.[139] The greater the thought process required to reach an opinion, the greater the need for cross examining the hearsay declarant.[140]

The Federal Rules take a more expansive approach. "Opinions" and "diagnoses" may be admitted as part of business records if such opinions would be admissible through the hearsay declarant as a witness.[141]

The Code and the Federal Rule retain the business duty rule. The rule requires the proponent to show that observations reflected in a record emanate from percipient witnesses

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135. Cal. Evid. Code § 800; Fed. R. Evid. 701. Section 800 also permits lay witnesses to testify in the form of an opinion to the extent "permitted by law." *Id*.

136. Cal. Evid. Code § 801; Fed. R. Evid. 702. Other limitations also apply. Federal judges, for example, may exclude opinions that are not scientifically valid. California judges may exclude opinions based on novel scientific principles or techniques that have not been generally accepted by the pertinent scientific community. See generally, M. Méndez, *supra* note 58, §1604.

137. People v. Reyes, 12 Cal. 3d 486, 502-04, 526 P.2d 225, 235-36, 116 Cal. Rptr. 217, 227-28 (1974). See also People v. Campos, 32 Cal. App. 4th 304, 307-08, 38 Cal. Rptr. 2d 113, 114-15 (1995) (Records containing opinions concerning the accused's mental state were not admissible as business or official records of acts, conditions, or events.).

138. People v. Reyes, *supra* note 137.

139. *Id*.

140. *Id*.

141. Fed. R. Evid. 803(6).

who had a duty to observe and report their observations. Neither rule incorporates the business duty rule explicitly. But the commentary to both makes clear that application of the business duty rule required.[142]

(10) Absence of entry in business records

Just as entries in business records may be used to prove the occurrence of an act or event, or the existence of a condition, the absence of such entries may be offered to prove their nonoccurrence or nonexistence. A creditor, for example, may prove nonpayment by evidence that his records do not reflect that payment was received. The use of records for this purpose may not violate the hearsay rule. The creditor, for example, probably does not intend his failure to make a payment entry to substitute for the statement that the debtor has failed to make the payment. Most likely, the creditor did not make the entry because no payment was received. But because the question has not been free of controversy, the Law Revision Commission and the framers of the Federal Rules opted for creating a hearsay exception for the absence of entries.[143] As in the case of business records, the Federal Rule assumes admissibility if the foundational requirements are satisfied, unless the opponent convinces the judge of the record's lack of trustworthiness.[144] Under the Code, it is the proponent who, over objection, must establish the record's trustworthiness.[145]

(11) Official records

Although the Code and the Rules create a hearsay exception for official records, each takes a radically different approach to their admissibility. Under the Code, a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if the writing was made by and within the scope of duty of a public employee, the writing was made at or near the time of the act, condition, or event recorded, and the sources of information and method and time of preparation were such as to indicate trustworthiness.[146] Because the same showing of trustworthiness is required of California official records as for California business records, the limitations imposed on business records apply to official ones as well. Official records are equally subject to the opinion rule and the rule requiring those who impart information to the preparer to be under a duty to provide such information. In *People v. Baeske*,[147] for example, a police report offered to prove a license number was excluded because the individual who provided the number was "not a public employee with any duty either to observe facts correctly or to report her observations accurately to the police department."[148] But as in the case of business records, other hearsay exceptions

142. Cal. Evid. Code § 1271 Comment; Fed. R. Evid. 803(6) advisory committee's note.

143. Cal. Evid. Code § 1272 Comment; Fed. R. Evid. 803(7) advisory committee's note.

144. Fed. R. Evid. 803(7).

145. Cal. Evid. Code § 1272(b).

146. Cal. Evid. Code § 1280.

147. 58 Cal. App. 3d 775, 130 Cal. Rptr. 384 (1976).

148. *Id.* at 780, 130 Cal. Rptr. at 35. See also People v. Hernandez, 55 Cal. App. 4th 225, 240-41, 63 Cal. Rptr. 2d 769, 779 (1997) (A computer printout which was prepared by a crime analyst from police reports and which identified the accused as the probable perpetrator of the rapes being tried was inadmissible as an

may supply the required reliability. In *Jackson v. Department of Motor Vehicles*[149] the issue was the admissibility of a statement in a police report in which the plaintiff admitted driving a car. Although the officer who took the statement did not see who drove the car, the statement was nonetheless admitted for the truth of the matter stated. The plaintiff's statement fell within the admissions exception to the hearsay rule, and the officer had first hand knowledge of what the plaintiff said as well as a duty to record the information.[150] As in the case of business records, the entrant does not have to have first hand knowledge of the information contained in the official record. If the exception's other requirements are satisfied, the trustworthiness requirement can be established by showing that the official record is based upon the observations of public employees who have a duty to observe the facts recorded and to report their observations correctly to those making the entries.[151]

The federal exception for public records and reports has three distinct parts. Part (A) creates a hearsay exception for the records of public offices and agencies setting forth the activities of the office or agency; part (B) creates a hearsay exception for records of public offices and agencies setting forth matters observed pursuant to duty imposed by law as to which matters there was a duty to report, but excluding in criminal cases matters observed by police officers and other law enforcement personnel; part (C) creates a hearsay exception for records of public offices and agencies setting forth in civil actions and proceedings, and against the government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law.[152] As in the case of business records, the Federal Rule assumes admissibility if all of the foundational requirements are met, unless the opponent persuades the judge that the sources of information or other circumstances indicate lack of trustworthiness.[153]

The federal approach to official records departs from that of the Code in two significant respects. First, the Rules limit the admissibility of such records when offered against the accused in criminal cases, and, second, the Rules expand the admissibility of reports containing opinions in civil cases and in criminal cases when offered against the government.

Criminal cases. Federal Rule of Evidence 803(8) creates a hearsay exception for reports "in any form, of public offices or agencies, setting forth … (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law

official or business record, as the persons who furnished the information contained in the reports were under no duty to do so.); Behr v. County of Santa Cruz, 172 Cal. App. 2d 697, 704, 342 P.2d 987, 992 (1959).

149. 22 Cal. App. 4th 730, 27 Cal. Rptr. 2d 712 (1994).

150. *Id.* at 739, 27 Cal. Rptr. 2d at 718. See also Ruff v. Yan, 85 Cal. App. 4th 411, 432, 102 Cal. Rptr. 2d 157, 172 (2000) (party's admissions to a police officer incorporated by the officer into his report are admissible if the report meets the requirements of the official record's exception to the hearsay rule).

151. People v. Baeske, 58 Cal. App. 3d 775, 780, 130 Cal. Rptr. 35, 38 (1976).

152. Fed. R. Evid. 803(8)(A)-(C).

153. Fed. R. Evid. 803(C).

enforcement personnel ...."[154] In *United States v. Oates*,[155] the Second Circuit held that this provision required excluding a government chemist's report offered against the accused. Reasoning that the chemist was a member of the law enforcement team, the court concluded that the report fell within the prohibition of the rule.[156]

The government contended that the use of the report was proper because the report also satisfied the federal exception for business records.[157] While not denying that the report qualified as a business record,[158] the Second Circuit rejected the government's argument.[159] In the court's view, extensive amendments by Congress to the exception for official records evidenced Congress' concern with trying criminal defendants by police report. Though not holding that the use of the chemist's report would violate the accused's right of confrontation,[160] the court refused to permit the government to circumvent the balance struck by Congress in Rule 803(8) by allowing the government to resort to other hearsay exceptions.[161] Other circuits, though not all, have embraced *Oates*.[162]

The California exception for official records is devoid of any language limiting the use of the records when offered against the accused. In California, the accused would have to object on Sixth Amendment grounds.

Some circuits have drawn a distinction between reports prepared by law enforcement personnel who were in an adversarial position to the accused and those prepared by personnel who were indifferent to the accused. In United States v. Orozco,[163] for example, the Ninth Circuit upheld the use of border crossing cards by immigration officials to prove that a car registered to the accused had crossed from Mexico into the United States shortly before narcotics were found in the car. While conceding that the immigration officials could be deemed law enforcement personnel, the court nonetheless upheld the use of the cards on the ground that they were trustworthy.[164] The cards had been prepared

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154. Fed. R. Evid. 803(8)(B).

155. 560 F.2d 45 (2d Cir. 1977), *on remand*, 445 F. Supp. 351 (E.D.N.Y. 1978), *aff'd*, 591 F.2d 1332 (2d Cir. 1978).

156. *Id*. at 67-68.

157. *Id*. at 74.

158. *Id*. at 75.

159. *Id*. at 78.

160. *Id*. at 80.

161. *Id*. at 84. The Second Circuit, however, has retreated somewhat from this position. In *United States v. Yakobov*, 712 F.2d 20 (2d Cir. 1983), it held that *Oates* did not preclude the government from offering a record to prove the absence of an entry under Fed. R. Evid. 803(10), even though the record would be inadmissible as an official record. *Id*. at 25-27.

162. United States v. Cain, 615 F.2d 380 (5th Cir. 1980). The Seventh Circuit agrees but would allow the use of another hearsay exception if the preparer of the record takes the stand. United States v. King, 613 F.2d 670 (7th Cir. 1980). The Eighth Circuit allows the use of other hearsay exceptions. United States v. Baker, 855 F.2d 1353 (8th Cir. 1988), *cert. denied*, 490 U.S. 1069 (1989).

163. 590 F.2d 789 (9th Cir. 1979), *cert. denied*, 439 U.S. 1049 (1978).

164. *Id*. at 793-94. This provision allows defendants in criminal cases to offer factual findings in investigative reports against the government. But it does not authorize the government to offer such findings against defendants in criminal cases. Accordingly, this provision was unavailable to the government in *Oates* to justify the admission of the chemist's report.

as part of a routine practice and at a time when the government and its agents were not in an adversarial position vis-à-vis the accused.[165]

Civil cases. Federal Rule of Evidence 803(8) creates a hearsay exception for records "in any form, of public offices or agencies, setting forth … (c) in civil actions and proceedings … factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or circumstances indicate lack of trustworthiness …."[166] The broad scope of this exception was examined by the United States Supreme Court in Beech Aircraft Corp. v. Rainey,[167] a wrongful death action brought by the spouses of two pilots killed in an aircraft accident against the manufacturer of the plane. The plaintiffs' theory was that the accident had been caused by engine failure. The manufacturer countered that the accident had been caused by pilot error. The question before the Court was the admissibility of a Judge Advocate General's report in which the investigator concluded, among other matters, that the "most probable cause of the accident was the pilots [sic] failure to maintain proper interval."[168]

In upholding the admissibility of the report, the Court rejected the argument that the "factual findings" contemplated by the rule excluded factually based conclusions or opinions:[169] "portions of investigatory reports otherwise admissible under Rule (8)(C) are not inadmissible merely because they state a conclusion or opinion. As long as the conclusion is based on a factual investigation and satisfies the Rule's trustworthiness requirement, it should be admissible along with other portions of the report."[170]

The Advisory Committee lists four factors federal judges should consider in determining the reliability of investigative reports: (1) the timeliness of the investigation, (2) the investigator's skill or experience, (3) whether a hearing was held and the level at which conducted, and (4) possible bias when reports are prepared with a view to possible litigation.[171]

In reaching its decision, the Court was influenced by the Rules' approach to admissibility. Under the exceptions for business and official records, admissibility is assumed in the first instance unless the opponent raises serious questions of reliability.[172] Under the Code, it is the proponent who must satisfy the judge that the business or official record is trustworthy.[173]

Would such a report be admissible in California? In Elsworth v. Beech Aircraft Corp.[174] the judge admitted a report of a Congressional committee which in turn referred

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165. *Id*.

166. Fed. R. Evid. 803(8)(C).

167. 488 U.S. 153 (1988), *on remand*, 868 F.2d 1531 (11th Cir. 1989).

168. *Id*. at 157.

169. *Id*. at 164.

170. *Id*. at 170. The Court declined to rule on the admissibility of conclusions of law under the Rules. *Id*. at n.13.

171. Fed. R. Evid. 803(8) advisory committee's note; see also Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 168, n.11 (1988), *on remand*, 868 F.2d 1531 (11th Cir. 1989).

172. Fed. R. Evid. 803(8) advisory committee's note.

173. See Cal. Evid. Code §§ 405, 1271(d), 1280(c).

174. 37 Cal. 3d 540, 208 Cal. Rptr. 874, 691 P.2d 630 (1984), *cert. denied*, 471 U.S. 1110 (1985).

to a study prepared by an employee of the General Accounting Office. The study stated that the FAA had considered withdrawing Beech's authorization to participate in an airworthiness certification process because Beech had failed to comply with enumerated obligations imposed by the FAA. The California Supreme Court held that the study was inadmissible.[175] The holding, however, is not dispositive of the question. Because the court found, among other matters, that the proponent had failed to produce evidence of the author's identity,[176] it held that the judge lacked a basis for finding that the study was prepared from sources of information indicating trustworthiness.[177]

A better guide to the admissibility of "factual findings" in California can be found in the court's approach to the admissibility of opinions in business or official records. As has been discussed, the court has taken a cautious approach. The court has not taken the unequivocal position that opinions in records should be admissible if the opinions satisfy the conditions of admissibility imposed by the opinion rule.[178] Rather, the court seems to favor a rule limiting opinions in records to readily observable acts, events, or conditions.[179] In People v. Reyes[180] the court suggested that an opinion that an individual suffered a broken leg should be admitted but not an opinion that he suffers from a psychiatric condition.[181] In the court's view, the greater the thought process required to reach an opinion or conclusion, the greater the need for cross examining the hearsay declarant.[182] Applying this test, a California judge might well conclude that findings or opinions based on extensive investigations should not be received through an official or business record. Perhaps, this is why early cases expressed the view that "'records of investigations and inquiries conducted either voluntarily or pursuant to requirement of law by public officers concerning causes and effects, and involving the exercise of judgment and discretion, expression of opinion, and the making of conclusions, are not admissible in evidence as public records.'"[183]

(12) Judgments of conviction

In California a final judgment adjudging a person guilty of a crime punishable as a felony is not made inadmissible by the hearsay rule when offered in a civil action to prove any fact essential to the judgment.[184] It is immaterial whether the judgment is based on a guilty verdict, a finding of guilt, a plea of guilty, or a plea of nolo contendere.[185]

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175. *Id*. at 553, 691 P.2d at 638, 208 Cal. Rptr. at 882.

176. *Id*.

177. *Id*.

178. *Id*.

179. *Id*.

180. 12 Cal. 3d 486, 526 P.2d 225, 116 Cal. Rptr. 217 (1974).

181. *Id*. at 502-04, 526 P.2d at 235-36, 116 Cal. Rptr. at 227-28.

182. *Id*.

183. See, e.g., Pruett v. Burr, 118 Cal. App. 2d 188, 200, 257 P.2d 690, 698 (1953), *quoting* 20 Am. Jur. § 1027, at 866.

184. Cal. Evid. Code § 1300.

185. *Id*.

A hearsay exception is required because the judgment is a proxy for the evidence which the prosecution offered or would have offered in its case-in-chief to make out a prima facie case. The purpose of the exception is not to prove the fact of conviction — the business or official records exceptions can be used for that purpose — but to prove the misconduct underlying the conviction.

The Federal Rule differs from the Code in several respects. First, the Federal Rule retains the traditional approach of excluding from the exception felony grade convictions based on a plea of nolo contendere.[186] The purpose of such a plea is to encourage criminal defendants to forego the right of trial without fear that the plea might be offered against them as a party admission in a subsequent civil action for damages. The California Legislature amended the Code in 1982 to remove this exclusion in order to facilitate suits by crime victims.

Second, the Federal Rule allows the use of judgments of convictions in criminal and civil trials.[187] But to avoid constitutional concerns, the Federal Rule does not allow the use of a judgment of conviction of a third person when offered by the prosecution against the accused.[188] For example, under the Federal Rule the prosecution may not use a thief's conviction to prove that the accused possessed stolen postage stamps.[189] California avoids the problem by limiting the use of judgments of convictions to civil cases.

(13) Judgments against persons entitled to indemnity

The Code creates a hearsay exception for final judgments offered by a judgment debtor to prove any fact which was essential to the judgment in an action seeking to recover partial or total indemnity or exoneration for money paid or liability incurred on account of the judgment, to enforce a warranty to protect the judgment debtor against liability determined by the judgment, or to recover damages for breach of a warranty substantially the same as the warranty determined by the judgment to have been breached.[190] The Federal Rules do not contain an equivalent exception.

(14) Judgments determining the liability of a third person

When the liability, obligation, or duty of a third person is an issue in a civil action, the Code creates a hearsay exception for a final judgment against that person when offered to prove such liability, obligation, or duty.[191] The Rules do not contain an equivalent exception.

(15) Former testimony

Under the Code and the Rules, former testimony may be admissible if the proponent first establishes the unavailability of the witness at the hearing in which the testimony is offered.[192] The Code and the Rules provide a hearsay exception for testimony given by a

186. Fed. R. Evid. 803(22).

187. *Id*.

188. *Id*.

189. Fed. R. Evid. 803(22) advisory committee's note.

190. Cal. Evid. Code § 1301.

191. Cal. Evid. Code § 1302.

192. Cal. Evid. Code § 1291; Fed. R. Evid. 804(b)(1).

witness at another hearing of the same or different proceeding, or in a deposition taken in another action if the party against whom the testimony is offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.[193] In addition, the Code allows the use of former testimony against a party in a civil action who was not a party to the original action if the party to the original action had the right and opportunity to cross-examine the witness with an interest and motive similar to those which the opponent has at the current hearing.[194] The Federal Rule allows the use of the testimony in these circumstances only if the opponent's "predecessor in interest" had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.[195]

The meaning of the term "predecessor in interest" is uncertain.[196] The Code avoids the term and, instead, describes with particularity the circumstances when the former testimony may be offered against a party who was not a party to the original action.[197] The Code's approach should be retained.

As a general rule, the Code and the Rules allow the party opposing the former testimony to object to a question or answer on the same grounds as if the declarant were on the stand testifying.[198] But where the former testimony is offered against a party to the former proceeding, the Code precludes the opponent from objecting to the form of the question unless the opponent objected on that ground at the former hearing.[199] The justification is that the proponent should not lose the answer on account of the defect in the question, since the opponent had an opportunity to object on that ground at the former hearing.[200] The Federal Rule is silent on this point. Presumably, under the Rules, there is no need for the opponent to preserve any objection by objecting at the former hearing.

Under the Code, depositions offered in the action in which they are taken do not qualify as former testimony.[201] Only depositions taken in another action qualify.[202] Accordingly, the admissibility of depositions offered in the action in which taken depends not on the former testimony exception to the hearsay rule but on the provisions of the California Code of Civil Procedure governing the use of depositions at trial. If the deposition qualifies as former testimony, then its admissibility depends on the Evidence Code, not the Code of Civil Procedure. The distinction is important because the waiver provisions of the Code of Civil Procedure are broader than those found in the Evidence Code. In the absence of stipulations, the Code of Civil Procedure requires parties opposing the deposi-

193. *Id*.

194. Cal. Evid. Code § 1292.

195. Fed. R. Evid. 804(b)(1).

196. See C. Mueller & L. Kirkpatrick, Evidence § 8.99 (2d ed. 1999).

197. See Cal. Evid. Code § 1292.

198. See Cal. Evid. Code §§ 1291(b), 1292(b); Fed. R. Evid. 804(b)(1).

199. Cal. Evid. Code § 1291(b)(1).

200. Cal. Evid. Code § 1291 Comment. Moreover, had the opponent objected at the former hearing, the proponent might have easily cured the defect by rephrasing the question.

201. Cal. Evid. Code § 1290(c).

202. *Id*.

tion at trial to show that they objected to the question or answer on the same grounds whenever the defect might have been cured if promptly presented at the deposition.[203]

As prescribed by the Supreme Court, the Federal Rule of Evidence, like the California rule, exempted from the definition of former testimony depositions offered in the case taken.[204] Under the court's rule, the admissibility of those depositions would depend initially on the Federal Rules of Civil Procedure, not the Federal Rules of Evidence. Congress, however, amended the rule to include as former testimony depositions offered in the action in which they are taken. Two complications resulting from this change merit discussion.

First, the unavailability grounds prescribed by the Federal Rule of Evidence are not identical to the grounds enumerated under the Federal Rules of Civil Procedure.[205] Satisfaction of a ground listed only in the Federal Rules of Civil Procedure raises questions whether such a ground satisfies the unavailability requirements of the Federal Rule of Evidence.[206] Second, the Federal Rule of Evidence is silent about whether parties opposing the former testimony must show that at the former hearing they objected on the same grounds to a question or answer the proponent seeks to prove at the current hearing. In the absence of stipulations, the Federal Rules of Civil Procedure impose this requirement to the extent that the defect in the question or answer could have been cured if promptly presented at the deposition.[207]

The requirement imposes no additional burden on the proponent when the deposition was taken in the action offered. Even under the rule approved by the Supreme Court, the proponent would have been subject to the limitations imposed by the Federal Rules of Civil Procedure. Those rules, not the exception for former testimony, would have governed the use of the deposition at trial. That, however, would not have been true in the case of depositions not taken in the action offered. Such a deposition would been governed exclusively by the federal rule on former testimony, not the Federal Rules of Civil Procedure. As noted, the federal exception for former testimony contains no waiver provisions. A question, then, is whether by subjecting both types of depositions to the exception for former testimony and subjecting one kind — those taken in the action offered — to the limitations of the procedural rules, Congress inadvertently opened the door to imposing the same limitations on the other kind as well. The Federal Rules of Civil Procedure are not dispositive of the matter. The waiver provisions of Rule 32 apply to depositions offered "[a]t the trial."[208] Whether "trial" refers only to the trial of the action in which the deposition was taken is not entirely clear.[209]

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203. Cal. Code Civ. Proc. § 2025(m)(2).

204. Note by Federal Judicial Center, Fed. R. Evid. 804.

205. *Compare* Fed. R. Evid. 804(a) *with* Fed. R. Civ. Proc. 32(a)(3)(B).

206. The questions arise because by including depositions offered in the action taken in the definition of former testimony, Congress made those depositions subject to the unavailability provisions of the former testimony exception to the hearsay rule when the deponent is unavailable to testify at the hearing. The enumeration of unavailability grounds under Fed. R. Evid. 804(a) is not inclusive.

207. Fed. R. Civ. Proc. 32(d)(3)(B).

208. Fed. R. Civ. Proc. 32(a).

209. Some commentators believe that a deposition not taken in the action offered is admissible under Rule 32 if the testimony given was such "that the party-opponent in [the other action] had the same interest and motive in his cross-examination that the present opponent now has." C. Wright, A. Miller & R. Marcus,

The Code avoids these uncertainties by exempting from the definition of former testimony those depositions offered in the action in which they are taken. The Code approach is sound and should be retained.

(16) Former testimony by minor at preliminary hearing

The Code, but not the Rules, creates a hearsay exception for testimony given by a complaining witness at a preliminary hearing if the witness was a minor, the former testimony is offered at a hearing to declare the minor a dependent child under the Welfare and Institutions Code, and the issues are such that the defendant at the preliminary hearing had the right and opportunity to cross-examine the minor with a motive and interest similar to those which the parent or guardian against whom the testimony is offered has at the dependency hearing.[210]

At the dependency hearing, the parent or guardian may object to any question or answer as though the child were testifying at the hearing.[211] In addition, the parent or guardian may challenge the admissibility of the former testimony on the ground that issues are substantially new and different from those raised at the preliminary hearing.[212]

The purpose of the exception is to spare the minor the necessity to testify twice to substantially similar matters, once at the preliminary hearing and a second time at the dependency hearing. California should retain the exception.

(17) Former testimony and prior inconsistent statements

Sometimes, a witness who has given helpful information to the police recants when called to testify at the preliminary hearing. A witness, for example, who tells the police that the accused was the assailant, may claim at the preliminary hearing that she did not see the assailant. Under those circumstances, the prosecution may call to the stand the officer who took the statement to repeat the witness's statement. In California, the statement can be received to impeach the witness and, more importantly, to prove that the accused was the assailant.[213]

If the witness then fails to appear at the trial, may the prosecution offer the witness's and the officer's preliminary hearing testimony as former testimony? If at the preliminary hearing the witness had identified the defendant as her assailant, then that portion of her testimony would have been admissible against the accused at the trial if the witness were shown to be unavailable to testify. But where, as in the example, the witness recants her out of court identification at the preliminary hearing, then at the trial her out of court statement to the officer will not be admissible for the truth in the absence of a hearsay exception for that statement.[214] Since the witness does not appear at the trial, the use of

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Federal Practice and Procedure § 2150, at 191 (West 1994). The question, however, is not whether such a deposition should be admissible under Rule 32 but whether its use should be governed exclusively by the federal former testimony exception to the hearsay rule.

210. Cal. Evid. Code § 1293.

211. *Id*.

212. *Id*.

213. Cal. Evid. Code § 1235.

214. A hearsay declarant may be impeached with a statement made by the declarant that is inconsistent with the hearsay declaration received in evidence. Cal. Evid. Code § 1202. However, unless the declaration falls within an exception, it may not be received for the truth of the matter stated.

the hearsay exception for prior inconsistent statements is problematical. Under Sections 770 and 1235, a prior inconsistent statement may be offered for the truth only if the witness is afforded an opportunity to explain or deny the statement before the close of the evidence.[215] A hearsay declarant who does not appear at the trial is not afforded such an opportunity.[216] To solve this problem, Section 1294 of the Evidence Code allows the prosecution at the trial to offer the witness's statement to the officer for the truth of the matter asserted after offering the witness's recantation at the preliminary hearing.[217]

At the trial, the prosecution is limited to proving the witness's former testimony by videotape or a transcript. If at the preliminary hearing the inconsistent statement was offered through a videotape taken by the police, then the prosecution may offer the videotape at the trial. If the statement was offered through the testimony of the officer who took the statement, then the prosecution may offer that portion of the transcript of the preliminary hearing containing the statement.[218]

The accused may object to the introduction of the inconsistent statement on the grounds that the statement to the officer was not properly received at the preliminary hearing as a prior inconsistent statement, or that the videotape or transcript does not qualify as former testimony.[219] If the statement is received at the trial, the accused retains the right to call and cross-examine the witnesses who appeared at the preliminary hearing to testify about the prior inconsistent statement.[220]

The Federal Rules of Evidence do not appear to contain a solution to this problem.[221] The California provision should be retained.

(18) Declarant's unavailability caused by the accused

Both the Code and the Rules recognize the need for a hearsay exception for damaging statements made by declarants who are prevented by a party from testifying. The Federal Rules provide an exception for a statement offered against a party who "has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."[222] Under the Federal Rules, the statement may be offered against

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215. Cal. Evid. Code §§ 770, 1235. Multiple hearsay is admissible if each hearsay statement meets the requirements of an exception to the hearsay rule. Cal. Evid. Code § 1201. This rule is unavailable because the inconsistent statement does not meet the requirements of the exception for inconsistent statements.

216. To satisfy the inconsistency requirement of the exception, the prosecution first would have to offer that portion of the witness's preliminary hearing testimony at which the witness denied having seen the assailant.

217. Cal. Evid. Code § 1294. The exception also applies to inconsistent statements received at an previous trial of the same criminal matter. *Id*.

218. *Id*.

219. *Id*.

220. *Id*.

221. Indeed, under the Rules a prior inconsistent statement needs to be made under oath in some kind of proceeding in order to be received for the truth. See Fed. R. Evid. 801(d)(1)(C). The exception for statements of identification presuppose the presence of the hearsay declarant for cross-examination. Fed. R. Evid. 801(d)(1)(C).

222. Fed. R. Evid. 804(b)(6).

any party in a criminal or civil proceeding, so long as the proponent proves the foundational facts by a preponderance of the evidence.[223]

The Code places more restrictions on the use of these declarations. They are admissible only in prosecutions charging a serious felony if, among other matters, the proponent proves by clear and convincing evidence that the declarant's unavailability was "knowingly caused by, aided by, or solicited by the party against whom the statement is offered for the purpose of preventing the arrest or prosecution" of that party.[224] In addition, the proponent must prove by clear and convincing evidence that the declarant's unavailability is the result of death by homicide or of kidnapping.[225]

Other limitations include proof by a preponderance of the evidence that the statement was made under circumstances which indicate it is trustworthy and not the result of promise, inducement, threat, or coercion.[226] Corroboration is also required. The proponent must corroborate the statement by evidence tending to connect the party against whom the statement is offered with the commission of the serious felony with which the party is charged.[227] Proof that merely shows the commission of the offense or its circumstances is insufficient.[228] The proponent must also show that the statement was memorialized in a tape recording made by a law enforcement official or in a statement prepared by a law enforcement official and signed and notarized by the declarant in the presence of the law enforcement official.[229]

Procedural safeguards include a requirement that the prosecution serve a written notice upon the accused of its intent to use the statement at least 10 days prior to the hearing or trial at which the statement is to be offered, unless the prosecution shows good cause for the failure to provide the notice.[230] If good cause is shown, the accused is entitled to a reasonable continuance of the hearing or trial.[231]

If the statement is offered during the trial, the judge must determine its admissibility at a hearing out of the presence of the jury. If the accused testifies at the hearing, the judge must exclude all persons, except for the clerk, the court reporter, the bailiff, the prosecutor, the investigating officer, the accused, and defense counsel.[232] The accused's testimony is not admissible in any other proceeding, and if a transcript is made, it must be sealed and transmitted to the clerk of the court in which the action is pending.[233]

A final limitation is that hearsay declarations by others included in the statement admitted are inadmissible unless they fall within an exception to the hearsay rule.[234]

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223. Fed. R. Evid. 804(b)(6) advisory committee's note.

224. Cal. Evid. Code § 1350.

225. *Id*.

226. *Id*.

227. *Id*.

228. *Id*.

229. *Id*.

230. *Id*.

231. *Id*.

232. *Id*.

233. *Id*.

234. *Id*.

The numerous California limitations evince an abundance of caution when abolishing the right of criminal defendants to object to hearsay even when they have been charged with bringing about the hearsay declarant's unavailability as a witness. In contrast, the federal exception can be applied against any party, including the prosecution, in both civil and criminal cases. Moreover, under the Rules the wrongdoing behind the declarant's unavailability does not have to amount to a criminal act.[235]

(19) Statements by dead declarants regarding gang activities

California has a limited hearsay exception for sworn statements by dead declarants regarding gang-related crimes.[236] The purpose of the exception is to discourage gang members from eliminating potential witnesses in prosecutions for gang crimes. California makes it a separate offense for a gang member to promote or assist any felonious criminal activity by members of gangs.[237]

The statements may be used only in anti-gang prosecutions and are subject to numerous restrictions. Chief among these are that the declarant die from other than natural causes, that the statement relate to acts or events within the personal knowledge of the declarant, that the statement be made under oath or affirmation in an affidavit or at a deposition, preliminary hearing, grand jury hearing, or other hearing under penalty of perjury, and that a verbatim transcript or copy, or record of the statement exists.[238]

In addition, the exception requires the proponent to notify the opponent of the intent to use the statement in advance of the hearing in which the statement will be offered.[239] The proponent must also persuade the judge that the statement was made under circumstances that indicate its trustworthiness and render the declarant's statement particularly worthy of belief.[240] Among the circumstances the judge can take into account are whether the statement was made in contemplation of a pending or anticipated criminal or civil matter in which the declarant had an interest other than as a witness, whether the declarant had a bias or motive to fabricate the statement, whether the statement is corroborated by evidence other than the statements that are admissible under the exception, and whether the statement was a declaration against the declarant's interest.[241]

The Federal Rules do not contain an equivalent exception. The California exception is designed to meet a special need in gang prosecutions and should be retained.

(20) Dying declarations

The Code and the Rules provide a hearsay exception for deathbed declarations regarding the cause and circumstances of death if the declarant made the statement while under

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235. Fed. R. Evid. 805(6) & advisory committee's note.

236. Cal. Evid. Code § 1231.

237. Cal. Penal Code § 186.22.

238. Cal. Evid. Code § 1231.

239. Cal. Evid. Code § 1231.1.

240. Cal. Evid. Code § 1231. The U.S. Supreme Court requires hearsay admitted against the accused under a novel hearsay exception to be "particularly worthy of belief." Idaho v. Wright, 497 U.S. 805, 817 (1990).

241. Cal. Evid. Code § 1231. For additional limitations on the use of the statements offered under Section 1231, see Sections 1231.2-1231.4.

a sense of impending death.[242] Under the Code, the declarations can be offered in a civil or criminal proceeding.[243] Under the Rules, they can also be offered in a civil proceeding, but Congress amended the rule prescribed by the U.S. Supreme Court to limit their admissibility in criminal cases to homicide prosecutions.[244] According to the House Judiciary Committee, dying declarations are not "among the most reliable forms of hearsay."[245] But if that is the case, one would expect the declarations to be excluded precisely in those cases — homicides — where the stakes are highest and call for using only the most reliable evidence against the accused.

Under the Code, the proponent does not have to establish the declarant's unavailability as a condition of admissibility. Accordingly, dying declarations should be admissible in attempted murder prosecutions and personal injury actions even if the declarant unexpectedly survives and is available to testify. The Rules do require the proponent to establish the declarant's unavailability,[246] but since the grounds of unavailability are not limited to death,[247] the declarations should be admissible in a civil case even if the declarant survives.

California should retain its rule.

(21) Declarations against interest

The Code and the Rules provide a hearsay exception for declarations against interest if the declarant is unavailable to testify.[248] One difference is that only the Code creates an exception for declarations against social interest.[249] Congress deleted this category from the rule proposed by the U.S. Supreme Court.[250] Another difference is that under the Federal Rule a "statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."[251] No such limitation is imposed by the Code.

The Federal Rules also take a different, more stringent, approach to unavailability. In addition to such usual grounds of unavailability as death or illness, in the case of declarations against interest the proponent must also show that he has been unable to procure the declarant's testimony by process or other reasonable means.[252] According to the House, which added this requirement, the "amendment is designed primarily to require that an attempt be made to depose a witness (as well as to seek his attendance) as a precondition

242. Cal. Evid. Code § 1242; Fed. R. Evid. 804(b)(2).

243. Cal. Evid. Code § 1242.

244. House Judiciary Committee Report, Fed. R. Evid. 804(b)(2).

245. *Id*.

246. Fed. R. Evid. 804(b)(2).

247. Fed. R. Evid. 804(a).

248. Cal. Evid. Code § 1230; Fed. R. Evid. 804(b)(3).

249. Cal. Evid. Code § 1230.

250. Conference Committee Report, Fed. R. Evid. 804(b)(3).

251. Fed. R. Evid. 804(b)(3).

252. Fed. R. Evid. 804(a)(5).

to the witness being deemed unavailable."[253] No such requirement is imposed by the Code.

One aspect of declarations against interest has been especially troubling to judges and scholars. If a declaration is disserving of the declarant's interests and also of the interests of a party mentioned in the declaration, may the declaration be received against that party? The California Supreme Court resolved this question in *People v. Leach*.[254] It held that as a matter of statutory construction the California provision is limited to those statements disserving only of the declarant's interest.[255]

The U.S. Supreme Court has likewise limited the Federal Rule only to those statements that are disserving of the declarant's interests.[256] Thus, the statement, "I am taking the cocaine to Atlanta for Williamson," though against the declarant's penal interests, may not be offered against Williamson in a drug prosecution. Limiting the exception to those statements disserving of the declarant's interests minimizes the risk of offending the accused's confrontation rights.

Any change to the California Code should make this limitation explicit in the rule itself or in the accompanying comment.

(22) Statements by minors describing acts or attempted acts of child abuse or neglect

The Code, but not the Rules, provide a hearsay exception for a statement made by minor victim under age 12 describing any act or attempted act of child abuse or neglect upon the child.[257] The statement is admissible only at a criminal prosecution if at the time of the criminal proceeding the victim is still a minor, the statement is not otherwise admissible by statute or court rule, the judge finds at a hearing outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient indicia of reliability, and the proponent informs the adverse party of its intention to offer the statement.[258]

To be admissible, the minor must testify at the hearing, unless the minor is shown to be unavailable as witness.[259] If the minor is unavailable, the statement may not be received unless the judge finds that the statement is corroborated by evidence of child abuse or neglect.[260]

The California provision was enacted in response to increased prosecutions for child abuse and neglect. It should be retained.

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253. House Judiciary Committee Report, Fed. R. Evid. 804(a)(5).

254. 15 Cal. 3d 419, 541 P.2d 296, 124 Cal. Rptr. 752 (1975), *cert. denied*, 424 U.S. 926 (1976).

255. *Id.* at 441, 541 P.2d at 310, 124 Cal. Rptr. at 766. *Leach*'s holding was reaffirmed by the California Supreme Court in *People v. Duarte*, 24 Cal. 4th 603, 612, 12 P.2d 1110, 1116, 101 Cal. Rptr. 2d 701, 707 (2000).

256. Williamson v. United States, 512 U.S. 594, 599 (1994).

257. Cal. Evid. Code § 1360.

258. *Id.*

259. *Id.*

260. *Id.*

(23) Statements by crime victims relating threats

Declarations describing the infliction of physical injury do not fall within the California exception for state of mind statements if offered to prove the injuries remembered.[261] Neither do declarations relating threats by others to injure the declarant if offered to prove the threat remembered.[262] Following the acquittal of O. J. Simpson of murder, the Legislature enacted a new hearsay exception for these kinds of declarations if the declarant is unavailable to testify.[263]

To be admissible, the declaration must be made at or near the time of the infliction or threat of physical injury.[264] In addition, the declaration must made in writing, be electronically recorded, or made to a physician, nurse, paramedic, or to a law enforcement official, and under circumstances indicating trustworthiness.[265]

In assessing its trustworthiness, the judge may consider, among other matters, whether the declaration was made in contemplation of pending or anticipated litigation in which the declarant had an interest, whether the declarant had a bias or motive for fabricating the declaration, and whether the declaration is corroborated by evidence other than by the kind of declarations admissible under the exception.[266]

The declaration may not be received unless the proponent informed the adverse party of its intention to offer the declaration sufficiently in advance of the hearing in which it is to be offered, so as to provide the adverse party with a fair opportunity to prepare to oppose the declaration.[267]

The Rules do not contain an equivalent provision.

(24) Declarations by elders and dependent adults

California law punishes certain crimes committed against elders and dependent adults.[268] Elders are persons who are 65 or older.[269] Dependent adults are persons between the ages of 18 and 64 who have physical or mental limitations that restrict their ability to carry out normal activities and includes persons with physical or developmental disabilities or whose physical or mental abilities have declined with age.[270]

The Evidence Code facilitates the prosecution of these crimes by providing a hearsay exception for declarations made by elders and dependent adults who are unavailable to testify.[271] In addition to meeting the unavailability requirements of the Code, the proponent must show that at the time of the criminal proceeding the declarant, if not dead, suffers from the infirmities of aging as manifested by advanced age or organic brain damage

261. See Cal. Evid. Code § 1250.

262. *Id*.

263. Cal. Evid. Code § 1370.

264. *Id*.

265. *Id*.

266. *Id*.

267. *Id*.

268. Cal. Penal Code § 368.

269. *Id*.

270. *Id*.

271. Cal. Evid. Code § 1380.

or other physical, mental, or emotional dysfunctions that impair the declarant's ability to provide adequately for his or her care and protection.[272]

A number of other limitations apply. Pretrial notice by the proponent of the intent to use the declaration is required.[273] The question of the declarant's unavailability must be determined out of the presence of the jury.[274] If the accused elects to testify at the hearing on the admissibility of the declaration, the hearing must be closed to the public,[275] and the defendant's testimony may not used in any other proceeding.[276]

Only statements made by elder/dependent adult victim are admissible, and then only if the entire statement has been memorialized in a videotape made by a law enforcement official prior to the death or disabling of the victim.[277] The statement must be supported by corroborative evidence.[278] In addition, the proponent must persuade the judge that the circumstances attending the making of the statement render it particularly worthy of belief and that the statement was not the result of promise, inducement, threat, or coercion.[279] Finally, there must be no evidence that the unavailability of the declarant was caused, aided, or solicited by or procured on behalf of the proponent.[280]

The Rules do not contain an equivalent provision. The need to facilitate prosecutions against victims who suffer from serious age or developmental disabilities justifies the exception. The numerous limitations are designed to ensure reliability. The California rule should be retained.

(25) Dead Man's Statute

California at one time recognized the Dead Man's Statute, which prohibited a party who sued on a claim against a decedent's estate from testifying about any matter occurring before the decedent's death. Dissatisfaction with the statute led the Law Revision Commission to recommend repealing the statute. The Code now allows a party to testify to these matters but balances the advantage by creating a hearsay exception for those statements of decedents embracing matter made upon personal knowledge at a time when the matter had been recently perceived and while the decedent's recollection was clear.[281] The judge may still exclude the statement if it was made under circumstances indicating lack of trustworthiness.[282]

The Rules do not contain an equivalent provision. Repeal of the Dead Man's Statute was good policy. The Code provision should be retained.

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272. *Id*.
273. *Id*.
274. *Id*.
275. *Id*.
276. *Id*.
277. *Id*.
278. *Id*.
279. *Id*.
280. *Id*.
281. Cal. Evid. Code § 1261 & Comment.
282. Cal. Evid. Code § 1261.

(26) Proof of business records by affidavit

Ordinarily, the proponent must call a qualified witness to establish the foundation for the introduction of business records. The witness will identify the record as the record of a particular entity and will then describe the mode of preparation of those kinds of records, including the time frame for their preparation and the sources of information customarily used in their preparation. The Code contains a number of provisions allowing a party to bypass the necessity of calling the witness by offering instead an affidavit containing the foundational information. The most notable provision allows the use of affidavits in the case of business records which have been subpoenaed.[283] In addition, the Code allows a party to use an affidavit by a qualified technician to prove the technique used in taking a blood sample.[284] It also allows a party to use an employer's income and benefit form in a proceeding to modify or terminate an order for child, family, or spousal support if certain conditions are met.[285]

The Rules do not contain equivalent hearsay exceptions for these kinds of documents. In the case of the broadest category — business records — production of the custodian can still be compelled in California if the party requesting the records demands the custodian's appearance in the subpoena duces tecum. The California exceptions should be retained.

(27) Records of conviction

The Code provides a hearsay exception for felony convictions used to impeach a witness.[286] The Code also creates a hearsay exception for felony convictions offered in a civil action to prove the conduct underlying the conviction.[287] When a party must prove the fact of a conviction, the party may rely on the exceptions for official or business records.[288]

Sometimes, however, a party (usually the prosecution) must prove as true other matters recited in a conviction record. The Code provides a hearsay exception for recitals in copies of conviction records offered to prove the commission, attempted commission, or solicitation of an offense, service of a prison term, "or other act, condition, or event recorded by the record" if the original meets the foundational requirements of the hearsay exception for official records and the copy meets the certification requirements for writings in the custody of public entities.[289]

The proliferation of recidivist statutes in California often requires prosecutors to prove facts other than just the fact of conviction.[290] The Code provision attempts to ease the proof of such facts. The Rules have no equivalent provision. The Code provision should be retained.

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283. See Cal. Evid. Code §§ 1560-1562.
284. Cal. Evid. Code § 712.
285. Cal. Evid. Code § 1567.
286. Cal. Evid. Code § 788.
287. Cal. Evid. Code § 1300.
288. Cal. Evid. Code § 1271, 1280.
289. Cal. Evid. Code § 452(b).
290. See, e.g., Cal. Penal Code §§ 667(d)-(e), 1197.7.

(28) Findings of death by federal employees

The Code provides a hearsay exception for a written finding of death by a federal employee authorized to make such a finding under the Federal Missing Persons Act.[291] The finding may include also the date, circumstances, and place of the decedent's disappearance.[292]

The Federal Rules do not contain an equivalent provision. The Code provision should be retained.

(29) Federal missing person records

The Code creates a hearsay exception for official reports or records prepared by an employee of the United States who is authorized to make such a report or record to prove that a person is missing, missing in action, interned in a foreign country, captured by a hostile force, beleaguered by a hostile force, besieged by a hostile force, or detained in a foreign country against his or her will, or is dead or alive.[293]

The Federal Rules do not contain an equivalent provision. The Code provision should be retained.

(30) Records of vital statistics

Both the Code and the Rules create a hearsay exception for records of birth, fetal death, death, or marriage.[294] The Rules require only that the record be made to a public office pursuant to the requirements of law.[295] Under the Code, the maker must be required by law to file the record in a designated public office, and the record must be made and filed as required by law.[296] The difference is probably immaterial.

(31) Statement of absence of public record

The Code creates a hearsay exception for a written statement by a public employee who is the official custodian of the records in a public office, reciting diligent search and failure to find a record when offered to prove the absence of a record in that office.[297] The Rules contain a similar exception but require the written statement to be in the form of a certificate.[298] The Rules allow the proponent to offer testimony in lieu of the certificate.[299] The Code does not expressly authorize the use of testimony, but neither does it prohibit its use.

The Rules allow the use of the certificate or testimony to prove the absence of an entry in a public record to prove the nonoccurrence or nonexistence of a matter if such entries

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291. Cal. Evid. Code § 1282.
292. *Id*.
293. Cal. Evid. Code § 1283.
294. Cal. Evid. Code § 1281; Fed. R. Evid. 803(9).
295. Fed. R. Evid. 803(9).
296. Cal. Evid. Code § 1281.
297. Cal. Evid. Code § 1284.
298. Fed. R. Evid. 803(10).
299. *Id*.

were regularly made and preserved by the public office or agency.[300] Both the Rules and the Code provide a similar exception for the absence of entries in business records.[301] The Code should be amended to allow for the proof of the nonoccurrence of an event by the absence of an entry in a public record if such entries were regularly made and preserved by the public office.

(32) Church records concerning family history

Doubts about whether the hearsay exception for business records would cover all the of the information customarily included in church records relating family history prompted the Law Revision Commission to recommend a hearsay exception for church records.[302] Under the Code, a church record meeting the requirements of the business records exception can be offered to prove a person's birth, marriage, divorce, death, parent and child relationship, race, ancestry, relationship by blood or marriage, and other similar facts of family history.[303] The Rules contain a similar exception.[304]

(33) Marriage, baptismal, and similar certificates

The Code and the Rules permit the use of marriage, baptismal, and similar certificates to prove the same kinds of kinds of facts that can be proved by church records.[305] The exception is not limited to certificates issued by religious organizations and includes those issued by public officials who are authorized to issue them.[306]

(34) Entries in family records

The Code and the Rules allow the use of entries in family Bibles and charts, as well as engravings on rings, family portraits, urns, crypts, tombstones, and the like to prove the same kinds of facts that can be proved by church records.[307] The Code differs from the Federal Rule in that it includes a nonexclusive list of the kinds of family facts that can be proved under the exception.[308] The Advisory Committee views the Federal Rule as substantially identical to the Code provision.[309]

(35) Recitals in writings affecting property

The Code and Rules create a hearsay exception for recitals in dispositive instruments, such as wills and conveyances.[310] To be admissible under the exception, the statements in

300. *Id*.

301. Fed. R. Evid. 803(7); Cal. Evid. Code § 1272.

302. Cal. Evid. Code § 1315 Comment.

303. Cal. Evid. Code § 1315.

304. Fed. R. Evid. 803(11).

305. Cal. Evid. Code § 1316; Fed. R. Evid. 803(12).

306. Cal. Evid. Code § 1316; Fed. R. Evid. 803(12).

307. Cal. Evid. Code § 1312.; Fed. R. Evid. 803(13).

308. Cal. Evid. Code § 1312.

309. Fed. R. Evid. 803(13) advisory committee's note.

310. Cal. Evid. Code § 1330; Fed. R. Evid. 803(15).

the recitals must be germane to the purpose of the instrument and the dealings with the property must have been consistent with the instrument.[311]

(36) Records of documents affecting an interest in property

The Rules create an exception for the record of a document purporting to establish or affect an interest in property when offered as proof of the content of the original document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.[312] The Advisory Committee explains that the exception is needed to overcome the lack of firsthand knowledge by the recorder when the record is offered as proof of execution and delivery.[313]

The Code does not contain a similar exception. Its need in California is undetermined.

(37) Recitals in ancient writings

The Code and the Rules provide a hearsay exception for statements in recitals in ancient writings.[314] The California exception is more stringent. The writing must be more than 30 years old, as opposed to no less than 20 years under the Rules, and the proponent must show that the statement has been generally acted upon as true by persons having an interest in the matter.[315]

In California the age of the document alone is an insufficient guarantee of trustworthiness to justify the exception. The California provision should be retained.

(38) Commercial publications

The Federal Rules create a hearsay exception for market quotations, tabulations, lists, directories, and other published compilations used and relied upon by the public or by persons in particular occupations.[316] California provides a more limited exception. It excludes opinions and does not expressly include market quotations.[317] The federal requirement of reliance by persons in particular occupations is probably the equivalent of the California requirement of reliance by a business as defined by in the hearsay exception for business records.[318] Reliance by a "business," however, has been construed to include reliance by the public.[319]

Reliance by the public or segments of it and the motivation of the compiler to foster reliance by being accurate justify the exception.[320] The California provision should be replaced by the Federal Rule.

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311. *Id.*
312. Fed. R. Evid. 803(14).
313. Fed. R. Evid. 803(14) advisory committee's note.
314. Cal. Evid. Code § 1331; Fed. R. Evid. 803(16).
315. Cal. Evid. Code § 1331.
316. Fed. R. Evid. 803(16).
317. Cal. Evid. Code § 1340.
318. *Id.*
319. In re Michael G., 19 Cal. App. 4th 1674, 1678, 24 Cal. Rptr. 2d 260, 262 (1993).
320. Fed. R. Evid. 803(17) advisory committee's note.

(39) Statements in learned treatises

Statements in books of science, art, and history often coincide with the kinds of statements that should be offered by experts who are subject to cross-examination. Receiving these statements under a hearsay exception can deprive the opponent of the opportunity to test their validity through cross-examination. Accordingly, the Code exception for statements in learned treatises is limited to those statements made by persons who are indifferent between the parties when offered to prove facts of general notoriety and interest.[321]

The general notoriety requirement has been narrowly construed to include only facts that are not subject to dispute.[322] Such facts include the definition of words found in dictionaries, life expectancies found in actuarial tables, and the information found in tables of weights and measures, and currency, annuity, and interest tables.[323] Facts of general notoriety do not include statements in medical treatises, as "medicine is not considered one of the exact sciences."[324] It is, instead, the kind of field in which knowledge changes; consequently, "if [medical] treatises were to be held admissible, the question at issue might be tried, not by testimony, but upon excerpts from works presenting partial views of variant and perhaps contradictory theories."[325]

The fact that experts can be cross examined about the content of learned treatises does not affect the limitations on the admissibility of statements in such works. Under the Code, expert witnesses, including medical experts, may be cross examined about the content or tenor of any scientific journal or treatise if one of three conditions is satisfied: (1) the expert referred to, considered, or relied upon the publication in arriving at or in forming the expert opinion; (2) the publication has been admitted in evidence; or (3) the publication has been established as a reliable authority by the testimony or admission of the expert or another expert, or by judicial notice.[326] But the right to conduct such a cross-examination does not mean that the portion of the publication used is in evidence for the truth of the matter stated.[327] The pertinent statements may not be read to the jury for the truth of the matter stated unless the publication has been admitted or qualifies for admission under a hearsay exception such as the one for learned treatises.[328]

The Federal Rules take a more generous approach to the admissibility of information contained in learned treatises. Under the Federal Rule, statements contained in such treatises (including medical ones) may be admitted for the truth of the matter asserted if (1) such statements are established as reliable authority by expert testimony or judicial notice and (2) the treatise was relied upon by an expert witness on direct examination or was called to the expert's attention on cross-examination.[329] Thus, when a treatise has been

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321. Cal. Evid. Code § 1341.

322. See Gallagher v. Market St. R. Co., 67 Cal. 13, 6 P. 869 (1885). Although *Gallagher* was decided 80 years before the adoption of the Code, it construed a provision virtually identical with Section 1341.

323. *Id*. at 16, 6 P. at 871.

324. *Id*.

325. *Id*. at 16, 6 P. at 872.

326. Cal. Evid. Code § 721(b).

327. Cal. Evid. Code § 721(b) Comment.

328. Cal. Evid. Code § 721(b).

329. Fed. R. Evid. 803(18).

established as authoritative, appropriate passages may be offered in evidence, so long as an expert is on the stand and available to explain and assist in applying the treatise.[330] If admitted, the passages may be read into evidence but may not be received as exhibits.[331] This limitation is designed "to prevent jurors from overvaluing the written word and from roaming at large through the treatise thereby forming conclusions not subjected to expert explanation and assistance."[332]

In federal court, the cross examiner does not have to show that the expert relied on the treatise. The Rules thus avoid the possibility that at the outset the expert might block cross-examination by refusing to concede reliance on the treatise.[333]

The concerns giving rise to the California limitations on the use of statements in learned treatises appear to be taken into account fully by the more generous and practical treatment accorded such statements by the Federal Rule. Consideration should be given to replacing the California provision with the Federal Rule.

(40) Reputation concerning character

A reputation witness does not necessarily offer an out of court statement for the truth of the matter stated. Instead, the reputation witness offers a conclusion about whether an individual enjoys a particular reputation based on what the witness has heard others say or not say about the conduct at issue. The classic example is the testimony of a qualified witness who states that another witness's reputation for truth and veracity is good or poor. Although the purpose of the offer is to prove that the other witness has the kind of character the witness is reputed to have, the reputation witness is not asked on direct examination to repeat what he or she overheard others say about the other witness. But because the reputation witness's conclusion is based on what the witness has heard others say, the Code and the Rules resolve doubts about the hearsay status of reputation evidence by creating an exception.[334] Both permit the conclusion to be based on what associates or community members say or do not say about the pertinent character trait.[335]

The differences between the California and federal provisions are not material. California, however, emphasizes that reputation among associates should be limited to those with whom a person habitually associates.[336]

(41) Reputation concerning family history

The Rules have one provision creating a hearsay exception for reputation concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.[337] The

330. Fed. R. Evid. 803(18) advisory committee's note.

331. Fed. R. Evid. 803(18).

332. M. Graham, Handbook of Federal Evidence § 803.18 (3d ed. 1991).

333. Fed. R. Evid. 803(18) advisory committee's note.

334. Cal. Evid. Code § 1324; Fed. R. Evid. 803(21).

335. *Id*.

336. Cal. Evid. Code § 1324.

337. Fed. R. Evid. 803(3).

reputation can be based on what family members, associates, or community members say about the pertinent personal or family fact.[338]

The Code, on the other hand, has two separate provisions: one relates to reputation among family members[339] and the other to reputation among community residents.[340] Reputation among community residents is limited to the date of birth or fact of birth, marriage, divorce or death of a person.[341] Reputation among associates is not expressly included under either provision.

(42) Reputation concerning boundaries

The Code and the Rules create a hearsay exception for reputation in a community concerning boundaries of or customs affecting land in the community provided the reputation arose before the controversy.[342] The provisions are substantially identical.

(43) Reputation concerning community history

The Code and the Rules create a hearsay exception for reputation concerning an event of general history important to the community or state or nation in which the event took place.[343] The provisions are substantially identical.

(44) Reputation concerning public interest in property

The Code, but not the Rules, creates a hearsay exception for reputation in a community concerning the interest of the public in property in the community if the reputation arose before the controversy.[344] The California provision was designed to codify existing law.[345]

(45) Statements concerning boundaries

The Code, but not the Rules, creates a hearsay exception for statements concerning the boundary of land if the declarant is unavailable to testify and had sufficient knowledge of the subject.[346] The judge is expressly empowered to exclude the statement if it was made under circumstances indicating lack of trustworthiness.[347] The California provision was designed to codify existing law.[348]

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338. *Id*.
339. Cal. Evid. Code § 1313.
340. Cal. Evid. Code § 1314.
341. *Id*.
342. Cal. Evid. Code § 1322; Fed. R. Evid. 803(20).
343. Cal. Evid. Code § 1320; Fed. R. Evid. 802(20).
344. Cal. Evid. Code § 1321.
345. Cal. Evid. Code § 1321 Comment.
346. Cal. Evid. Code § 1323.
347. *Id*.
348. Cal. Evid. Code § 1323 Comment.

(46) Judgments concerning personal, family, or general history, or boundaries.

The Rules create a hearsay exception for judgments when offered as proof of matters of personal history, family or general history, or boundaries, essential to the judgment, if those matters would be provable by evidence of reputation.[349] The federal provision is justified by the belief that judgments offered for these purposes are as reliable as reputation evidence offered for the same purposes. The Rules create a hearsay exception for reputation evidence offered to prove the matters listed.[350]

California does not have an equivalent provision.

(47) Statements concerning a declarant's own family history

The Code and the Rules create an exception for statements concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, race, or other similar fact of family history, even though the declarant had no means of acquiring personal knowledge of the matter stated, if the declarant is unavailable to testify.[351] The California provision expressly authorizes the judge to exclude the declaration if made under circumstances indicating lack of trustworthiness.[352] Accordingly, the declarant's motive to tell the truth or lie goes to admissibility, not just weight.

The California provision should be retained.

(48) Statements concerning the family history of another

The Code and the Rules create a hearsay exception for statements concerning the birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, race, death or other similar fact of family history of another person, if the declarant is unavailable to testify and the declarant was related by blood or marriage or was so intimately associated with the other person's family as to be likely to have accurate information about the matter declared.[353] In California the proponent must also show that the declarant made the statement upon information received from the other person or from a person related by blood or marriage to the other person, or upon repute in the other person's family.[354]

A California judge can exclude the statement if made under circumstances indicating lack of trustworthiness.[355] The California provision should be retained.

(49) Hearsay offered at preliminary hearings

As a result of Proposition 115, hearsay may now be received for the truth of the matter stated at California preliminary hearings if offered under Penal Code Section 872.[356] This

349. Fed. R. Evid. 803(23).

350. Fed. R. Evid. 803(19)-(20).

351. Cal. Evid. Code § 1310; Fed. R. Evid. 804(4)(A).

352. Cal. Evid. Code § 1310.

353. Cal. Evid. Code § 1311; Fed. R. Evid. 803(4)(B).

354. Cal. Evid. Code § 1311.

355. *Id*.

356. Cal. Evid. Code § 1203.1.

provision allows a magistrate to base a probable cause finding in whole or in part upon the sworn testimony of a law enforcement officer relating out of court statements.[357] Prior to the initiative, the use of hearsay at preliminary hearings was subject to the Evidence Code.

The Federal Rules of Evidence do not apply to federal preliminary examinations.[358] The California provision should be retained.

(50) Residual exception

The Rules empower the trial judge to fashion new hearsay exceptions for statements not covered by the Rules "but having equivalent circumstantial guarantees of trustworthiness" if the proponent meets certain conditions.[359] These include the requirements that the statement be probative of a material fact, be more probative of the point for which it is offered than any other available evidence which the proponent can obtain through reasonable efforts, and best serve the interests of justice.[360] This innovative approach to the hearsay exceptions was prompted by an unwillingness "to assume that all possible desirable exceptions to the hearsay rule have been catalogued and to pass the hearsay rule to oncoming generations as a closed system."[361]

The Code does not create a closed system either. Under the Code, exceptions to the hearsay rule may be found either in statutes or in decisional law.[362] But, unlike the Federal Rules, the Code does not empower trial judges to craft an exception for evidence offered in the case being tried. The Code, however, does not strip judges of their Common Law power to create new exceptions for classes of evidence for which there is a substantial need and which possess such intrinsic reliability as to enable the exceptions to surmount constitutional and other objections that generally apply to hearsay.[363]

(51) Hearsay and confrontation

The right of the accused to confront their accusers places some limits on the use of hearsay against criminal defendants. The Code recognizes that hearsay that satisfies the requirements of an exception may nonetheless be excluded if receiving it would violate a defendant's federal and state constitutional rights.[364] The Federal Rules do not contain an equivalent provision, as none is necessary to exclude evidence that is inadmissible on constitutional grounds.

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357. Cal. Penal Code § 872.

358. Fed. R. Evid. 1101(d)(3).

359. Fed. R. Evid. 807.

360. *Id*.

361. Fed. R. Evid. 803(24) advisory committee's note.

362. Cal. Evid. Code § 1200 Comment. Adoption of the Code did not repeal by implication any other statute relating to hearsay evidence. Cal. Evid. Code § 1205.

363. In re Cindy L., 17 Cal. 4th 15, 28, 947 P.2d 1340, 1348, 69 Cal. Rptr. 2d 803, 811 (1997).

364. Cal. Evid. Code § 1204.

(52) Multiple hearsay

The Code and the Rules provide that hearsay within hearsay is admissible if each hearsay declaration meets the requirements of an exception.[365]

D. CROSS-EXAMINATION OF THE HEARSAY DECLARANT

When a hearsay declaration is received under an exception, the hearsay declarant in effect has testified even though the declarant may not have appeared as a witness. The jurors, after all, are entitled to consider the hearsay declaration for the truth of the matter asserted. As a rule, then, both the Code and the Federal Rules permit the party opposing the hearsay declaration to impeach the hearsay declarant in the same manner as if the declarant had appeared and testified.[366]

In the case of declarants who do testify, any statements they have made that are inconsistent with their testimony can be offered to impeach them. Moreover, in California their statements can be offered to prove the truth of the matters stated so long as the declarants are given an opportunity to explain or deny their statements under oath and in the presence of the fact finder before the close of the evidence.[367] But when the "witness" to be impeached is a hearsay declarant who does not appear as a witness, two problems arise when the impeaching party seeks to discredit the declarant with statements by the declarant that are inconsistent with the hearsay declaration that has been received in evidence.

One is that the inconsistent statement may not be a *prior* inconsistent statement but a *subsequent* one: the declarant may have made the inconsistent statement after making the hearsay declaration that was received in evidence. Both the Code and the Rules nonetheless allow the impeaching party to use the statement.[368] Since the declarant did not appear as a witness, the impeaching party did not have an opportunity to examine the declarant about the nature or the circumstances surrounding the making of the excited utterance. Therefore, the Code and the Rules recognize that fairness requires allowing the impeaching party to use the inconsistent statement even if the declarant made the statement after making the hearsay declaration that has been received in evidence.

The other problem concerns the interests of the party who offered the hearsay declaration in the first place. When, as in the example, the hearsay declarant does not appear as a witness, the proponent of the hearsay declaration is deprived of an opportunity to have the declarant explain or deny the inconsistent statement attributed by the opponent's witnesses to the declarant. Under the rules governing the use of conventional inconsistent statements, the absence of such an opportunity would be fatal to the introduction of the

365. Cal. Evid. Code § 1201; Fed. R. Evid. 805.

366. Cal. Evid. Code § 1202; Fed. R. Evid. 806.

367. The Federal Rules impose additional limits on inconsistent statements offered for the truth of the matter asserted. The statement must be made under oath in some kind of proceeding. Fed. R. Evid. 801(d)(1)(A).

368. Cal. Evid. Code § 1202; Fed. R. Evid. 806. The impeaching party, however, must be the party against whom the hearsay declaration was offered, People v. Beyea, 38 Cal. App. 3d 176, 193, 113 Cal. Rptr. 254, 264 (1974), even though Section 1202 does not contain such a limitation and Section 785 allows the calling party to impeach his own witnesses.

inconsistent statement.[369] But that is not the case when the inconsistent statement is offered to impeach a hearsay declarant. Since the proponent has benefited from the introduction of the absent declarant's hearsay declaration, the opponent will be permitted to use the inconsistent statement even though the proponent may be deprived of the opportunity to have the declarant explain or deny the inconsistent statement.[370] Under the Code, however, the proponent is entitled to some consolation: unless the impeaching statement falls within a recognized exception to the hearsay rule, the inconsistent statement may be received only for impeachment and not for the truth of the matter stated.[371] The Federal Rules are silent on this point. But one can expect the same outcome. Unless the inconsistent statement falls within a recognized exception or exemption to the federal hearsay rule, the statement may be received only to impeach the hearsay declarant.

Although the Code and the Rules focus on the use of inconsistent statements to impeach the hearsay declarant, both permit the use of any impeaching evidence that would have been admissible if the declarant had appeared and testified.[372] Both also allow the credibility of the hearsay declarant to be supported by any evidence that would have been admissible for that purpose if the declarant had testified as a witness.[373] Both also permit the party opposing the hearsay declaration to call and examine the declarant as if under cross-examination.[374] The Code, however, does not permit the use of leading questions if the hearsay declarant is a party, a person identified with a party, or a witness who has testified in the action concerning the subject matter.[375]

The California provision is more comprehensive than the Federal Rule and should be retained.

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369. See Cal. Evid. Code § 770; Fed. R. Evid. 613(b).

370. Cal. Evid. Code § 1202; Fed. R. Evid. 806.

371. Cal. Evid. Code § 1202 & Comment.

372. Cal. Evid. Code § 1202; Fed. R. Evid. 806. See, e.g., People v. Stevenson, 79 Cal. App. 3d 976, 989, 145 Cal. Rptr. 301, 309 (1978) (party opposing hearsay statement may impeach hearsay declarant with felony conviction involving dishonesty). *Accord* People v. Jacobs, 78 Cal. App. 4th 1444, 1452, 93 Cal. Rptr. 2d 783, 789 (2000).

373. Cal. Evid. Code § 1202.

374. Cal. Evid. Code § 1203; Fed. R. Evid. 806.

375. Cal. Evid. Code § 1203.

#K-200

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

BACKGROUND STUDY

Comparison of Evidence Code with Federal Rules: Part II. Expert Testimony and the Opinion Rule

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COMPARISON OF EVIDENCE CODE WITH FEDERAL RULES: PART II. EXPERT TESTIMONY AND THE OPINION RULE

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CONTENTS

COMPARISON OF EVIDENCE CODE WITH FEDERAL RULES: PART II. EXPERT TESTIMONY AND THE OPINION RULE

by Professor Miguel A. Méndez*

A. INTRODUCTION

The rules of evidence recognize that occasionally jurors need expert help in resolving important factual issues. The California Evidence Code and the Federal Rules of Evidence have responded by replacing restrictive Common Law rules with a generous approach that generally allows experts to present to jurors the same kind of information experts use and rely upon in their respective fields. But opening the door to expert testimony has raised a number of concerns. Chief among these is the fear that testimony by experts with impressive credentials will overwhelm the jurors. Rather than resolve factual controversies by a dispassionate consideration of the evidence, the rules betray a concern that jurors might overestimate the value of expert testimony and give undue weight to evidence of dubious worth.

The framers of modern evidence codes have sought to diminish the risk of juror attributional error by requiring trial judges, upon objection, to withhold unreliable expert testimony from the jurors. Entrusting judges with this gatekeeping task raises two questions. One is whether the judge should play a limited or expansive role in screening the evidence. The other concerns the grounds for excluding unreliable expert testimony.

Whether a judge should play a limited or expansive role in screening the evidence depends on one's view of the competency of jurors to assess expert testimony. Those with confidence in the ability of jurors to assess the testimony would favor the use of a sufficiency standard. If the question, for example, is whether the expert used inappropriate matter in reaching an opinion, the judge would overrule the objection and allow the jurors to hear the opinion if the proponent's evidence that the expert used appropriate data is believed. The opponent would still be entitled to adduce contrary evidence through its own experts in its case-in-chief or rebuttal. But that evidence would not result in the reconsideration of the admissibility decision. Instead, the jurors would be allowed to consider the conflicting evidence presented by the parties in assessing the weight they should give to the expert's opinion. In the end the jurors would be the final arbiters of the value and validity of the expert testimony.

Those who distrust the ability of jurors to assess expert testimony would favor giving judges a greater role in screening the evidence. The judge should be empowered to withhold expert opinion from the jurors unless the judge is convinced that the opinion is valid. In fact, both the Code and the Rules adopt this model. But neither the language of their respective rules nor the opinions construing those rules specifies adequately the grounds for objecting to expert testimony or the burden the proponent must discharge, although

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recent amendments to the Federal Rules have remedied some of these defects in federal trials.

The law's discomfort with expert testimony can be measured by comparing the law's response to hearsay. Hearsay is frequently cited as the classic example of unreliable evidence. Unless hearsay falls into an exception, it is excluded because the opposing party is deprived of the opportunity to test its trustworthiness whenever the testimonial source is not produced for examination under oath in front of the fact finder.[1] Where the opponent does have that opportunity, concern about the use of hearsay diminishes and in some cases disappears altogether.[2] In contrast, the opportunity to cross examine experts on their credentials as well as on the data, principles, and methods they use in arriving at their opinions does not automatically result in the admission of their testimony. Unless the judge is convinced by all the evidence, including the opposing party's, that the expert opinion is reliable, the judge must (or should) withhold the evidence from the jurors.

The grounds for excluding expert testimony can best be determined by focusing on the opposing party's objections. Opponents should be able to choose from an array of objections. These include objecting to the need for the expert testimony as well as challenging the qualifications of the witness to provide the evidence. In addition, the opponents should be able to object to a particular opinion on the ground that it is based on inappropriate matter as determined by experts in the field. They should also have an opportunity to contest the validity of the principles and the propriety of the methods employed by the witness in reaching the expert opinion. The Code and the Rules are not in agreement on the availability of these grounds.

This paper compares the California and federal approaches to the admissibility of expert testimony. Part B discusses the opinion rule, a fundamental limitation that discourages the use of opinions by witnesses. Part C introduces an exception for some lay opinions. Part D traces the evolution of the exception for expert opinions and shows how the Code and the Rules use similar approaches to withhold unreliable evidence from the jurors. Part E explores some important differences in the role California and federal judges play in screening some types of expert testimony. Part F suggests changes to the Code that would specify more fully the grounds for objecting to expert testimony and clarify the burden the proponent should discharge. Parts G and H round out the paper by comparing the California and federal rules governing the cross-examination of experts and the appointment of experts by judges.

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1. In California, a judge is empowered to withhold hearsay from the jurors unless the proponent convinces the judge by a preponderance of the evidence of the existence of the circumstances justifying the exception. Once that showing has been made, the judge may allow the jurors to hear the hearsay declaration. See Cal. Evid. Code § 405.

2. Indeed, under the Federal Rules of Evidence, the opportunity to cross-examine witnesses about their prior statements has resulted in exempting their out of court statements from the definition of hearsay. See Fed. R. Evid. 801(d). Subject to certain limitations, their out of court statements can be offered for the truth even if the opponent declines the opportunity to cross examine them. *Id*. The Code achieves the same outcome by creating hearsay exceptions for these statements. See Cal. Evid. Code §§ 1235, 1236, 1238.

B. THE OPINION RULE

The American system of proof discourages the giving of opinions.[3] It proceeds on the assumption that the fact finder can resolve factual disputes on the basis of the information presented by the parties. If the issue is whether the defendant was negligent, then the jurors can decide that question on the basis of the evidence that was received. The jurors do not need a witness to tell them whether in the witness's opinion the defendant was negligent.[4]

Observations, however, are often expressed in the form of opinions or conclusions. When we say that it is raining or it is cold, these observations are really deductions or conclusions based on our experience with weather conditions. Though the law of evidence disfavors opinions, it recognizes that forcing witnesses to describe their observations without using conclusions would make for awkward, time-consuming testimony. Both the Code and the Federal Rules allow lay witnesses to testify in the form of an opinion if the opinion is rationally based on the perception of the witness and is helpful to a clear understanding of the witness's testimony.[5]

At times, however, the fact finder, whether judge or juror, is incapable of resolving a factual issue because the knowledge needed is beyond the fact finder's competence. An issue in a personal injury case, for example, may be whether the plaintiff's back injury is permanent. Jurors hearing the plaintiff's description of her injuries and even her doctor's diagnosis of the injuries will probably be unable to decide this issue without expert help. Accordingly, the law of evidence will permit an expert to tell the jurors whether in the expert's opinion the plaintiff's injuries are permanent.[6] Of course, the expert will not be allowed to provide the jurors with the opinion or prognosis, unless he or she is qualified to do so.[7] The jurors, however, do not need to be "wholly ignorant" of the subject to which the expert opinion is directed. Expert opinion should be excluded only when it would add nothing to the jurors' common fund of knowledge.[8]

To ensure the reliability of the expert opinion, in California the proponent also must satisfy the judge that, in reaching the opinion, the expert relied on matters of a type reasonably relied upon by experts in the field.[9] Sometimes, the proponent must clear an additional hurdle. If the expert's testimony is based on a novel scientific principle, the proponent may also have to demonstrate that the principle has been generally accepted as valid by the relevant scientific community.[10]

The Federal Rules of Evidence governing expert opinion are remarkably similar to the California Evidence Code provisions. But, as will be shown, as a result principally of

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3. Holland v. Zollner, 102 Cal. 633, 635, 36 P. 930, 931, *aff'd*, 102 Cal. 633, 37 P. 231 (1894).

4. See Westbrooks v. State, 173 Cal. App. 3d 1203, 1209-10, 219 Cal. Rptr. 674, 678 (1985) (Expert opinion could not be received on whether safety measures eliminated dangerous conditions at a collapsed bridge as the jurors could determine that issue from the evidence without expert help.).

5. Cal. Evid. Code § 800; Fed. R. Evid. 701.

6. Cal. Evid. Code § 801; Fed. R. Evid. 702.

7. Cal. Evid. Code § 801; Fed. R. Evid. 702.

8. People v. McDonald, 37 Cal. 3d 351, 367, 690 P.2d 709, 719, 208 Cal. Rptr. 236, 246 (1984).

9. Cal. Evid. Code § 801.

10. People v. Kelly, 17 Cal. 3d 24, 30, 549 P.2d 1240, 1244, 130 Cal. Rptr. 144, 148 (1976).

judicial interpretation, the role of the federal trial judge today differs markedly from that of the California trial judge in determining the admissibility of some kinds of expert testimony.

C. LAY OPINION

Despite the general proscription against opinions, lay witnesses are allowed to give a variety of opinions. For over a century, California lay witnesses have been permitted to estimate quantity, value, weight, measure, time, distance, and velocity; to describe such emotions as anger, fear, excitement, love, hatred, sorrow, and joy; to describe character traits, such as truthfulness and mendacity; to describe aspects of appearance, such as age, manner of walking, and type of hair; to relate whether others appeared to be sick, well, intoxicated, or even irrational.[11]

Some of these deductions resemble observations that for convenience's sake are expressed in the form of a shorthand opinion or conclusion, for example, describing others as angry, happy, or sad. Others imply greater deliberation in reaching the characterization, for example, describing someone as irrational. The witness who provides this opinion can probably describe a number of specific acts which prompted the witness to characterize the conduct as irrational.[12] Yet, both characterizations — angry and irrational — are offered by the California Law Revision Commission as examples of permissible lay opinions.[13] The examples underscore the modern approach to lay opinions. The question is not whether the witness can describe the observations underlying an opinion but whether the opinion is helpful to a clear understanding of the witness's testimony.[14] If in the exercise of discretion a California or federal judge finds that the opinion is helpful, the judge will permit the jurors to hear the opinion if it is rationally based on the witness's perception.[15]

The Federal Rule was amended in 2000 to exclude lay opinions which are based on scientific, technical, or other specialized knowledge and which would otherwise be governed by the limitations imposed on expert testimony by Rule 702.[16] The amendment is designed "to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing. Under the amendment, a witness' testimony must be scrutinized under the rules regulating expert opinion to the extent that the witness is providing testimony based on scientific, technical, or other specialized knowledge within the scope of Rule 702."[17]

The Code does not contain this limitation. Though the risk that prompted the amendment to the Federal Rule exists in California, the risk apparently is small. Appellate opinions do not disclose an abuse of the California provision.

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11. Holland v. Zollner, 102 Cal. 633, 635-36, 36 P. 930, 931, *aff'd*, 102 Cal. 633, 37 P. 231 (1894).
12. See, e.g., *id*.
13. 6 Cal. L. Revision Comm'n Reports 931-35 (1964).
14. *Id*. at 933.
15. Cal. Evid. Code § 800; Fed. R. Evid. 701.
16. Fed. R. Evid. 701.
17. Fed. R. Evid. 701 advisory committee's note.

D. EXPERT OPINION: CONVERGENCE

When first adopted in 1975, the federal approach to the admissibility of expert opinion was remarkably similar to that of the Evidence Code. To appreciate the changes introduced by the Code and the Rules, it is important to focus first on why the Common Law allowed expert testimony in the first place.

The Common Law recognized that the triers of fact, whether judges or jurors, were sometimes incapable of drawing a necessary inference from the evidence. If the issue, for example, was whether the plaintiff's injury was permanent, the fact finder might not have the training or experience needed to determine that issue from the testimony of percipient witnesses, such as the plaintiff's account of the effects of the injury.

One way to remedy this deficiency was to have a qualified medical expert present in the court room during the examination of the plaintiff and other witnesses called to describe the plaintiff's injuries. The expert would then be called to draw the needed inference from the evidence in the form of an opinion. Convenience gave way to the use of the hypothetical question. No longer was it necessary to have the expert sit in court. Instead, the calling party could supply the critical parts of the percipient witnesses' testimony to the expert in a question in which the calling party asked the expert to assume the existence of the facts supplied by the percipient witnesses.

First the Code and then the Rules introduced a radical change to the use of expert opinion by allowing an expert to offer an opinion that was not necessarily based on the evidence introduced at the trial.[18] Moreover, both permitted the use of the expert's opinion even if it was based on matter that was inadmissible.[19] What matters under the Code and the Rules is that the data used by the expert be of the type reasonably relied upon by experts in the field.[20] Permitting experts to base opinions on matter reasonably relied upon by experts in the field conformed evidentiary practice with the customs and practices of experts themselves. Thus, if sound medical practices allow doctors to reach important health decisions on information provided by patients and specialists, then those decisions should be sufficiently reliable for use in court even if the information provided by the patients and specialists is not admissible.

The use of inadmissible information to support an expert opinion introduced a new danger: the risk that fact finders might use the inadmissible matter for an improper purpose. It might be sound medical practice for a doctor to use a radiologist's report in determining whether the plaintiff's injury is permanent. But over a hearsay objection, it would be improper for the jurors to consider the radiologist's report for the truth of the matter asserted unless the report has been received in evidence. It is one matter for the doctor on direct examination to tell the jurors that she took the radiologist's report into account in reaching her prognosis. It is quite another for the doctor to disclose the radiologist's finding to the jurors.

In California the opposing party may object on hearsay (and other) grounds to the doctor's disclosure of the radiologist's finding. If the judge sustains the hearsay objection but concludes that the probative value of disclosing the finding is not substantially out-

18. Cal. Evid. Code § 801(b); Fed. R. Evid. 703.

19. Cal. Evid. Code § 801(b); Fed. R. Evid. 703.

20. Cal. Evid. Code § 801(b); Fed. R. Evid. 702.

weighed by its prejudicial effects, the judge may allow the jury to hear the evidence subject to a limiting instruction charging them not to consider the finding for the truth of the matter stated. Because of doubts about whether jurors can abide by this instruction, a 2000 amendment to the Federal Rule prohibits the disclosure of inadmissible facts or data to the jurors unless the judge determines that their probative value in assisting the jurors evaluate the expert's opinion substantially outweighs their prejudicial effects.[21]

The Federal Rule offers the opposing party greater protection than does the Code. Under the Rules' special balancing provision, the judge may not allow the proponent to disclose the inadmissible matter unless the judge finds that the evaluative value of the evidence substantially outweighs its prejudicial effects. Under the California approach, the traditional balancing rule requires the judge to allow disclosure of the inadmissible matter unless its evaluative value is substantially outweighed by its prejudicial effects.[22] Because of the significant risk that jurors might not abide by the limiting instruction, California should consider adopting the Rules' special balancing test.

Other federal provisions governing the use of expert opinion virtually mirror the provisions found in the Code. Both recognize that for expert opinion to be received the fact finders do not have to be wholly ignorant of the subject to which the expert testimony is directed. Under the Code and the Rules, it is enough if the expert opinion assists the fact finders understand evidence or determine an issue that is beyond their common experience.[23] Both provide that an expert may be qualified on the basis of knowledge, skill, experience, training, or education,[24] including the expert's own testimony.[25] Both allow the use of opinions that are otherwise admissible even if they embrace ultimate issues.[26] And both permit experts to give their opinions without first disclosing the basis of their opinions, unless the judge requires otherwise.[27]

California has some special provisions. One addresses the admissibility of expert opinions based on other opinions. The provision makes clear that an expert opinion can be based in whole or in part on opinions by others,[28] even if the other persons are unavailable for examination.[29] But if those persons are available, the adverse party may call and examine them as if under cross-examination concerning their opinions.[30] Nothing in the Rules prohibits the adverse party from calling and examining these witnesses or prohibits the use of opinions based on opinions by individuals who are unavailable for examination. Under the Code and probably under the Rules, the admissibility of expert

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21. Fed. R. Evid. 703. Even where the federal judge makes this finding, the opposing party is still entitled to the limiting instruction.

22. Cal. Evid. Code § 352.

23. Cal. Evid. Code § 801(b); Fed. R. Evid. 702.

24. Cal. Evid. Code § 720(a); Fed. R. Evid. 702.

25. Cal. Evid. Code § 720(a)-(b). An expert's testimony would likewise be admissible in federal court under the Rules' relevance provisions. See Federal Rules of Evidence 401, 402.

26. Cal. Evid. Code § 805; Fed. R. Evid. 704(a).

27. Cal. Evid. Code § 802; Fed. R. Evid. 705. As a matter of effective advocacy, however, lawyers will ask experts to disclose the basis of their opinions on direct examination.

28. Cal. Evid. Code § 804(c).

29. Cal. Evid. Code § 804(d).

30. Cal. Evid. Code § 804(a). See subdivision (b) for exceptions to the cross-examination right.

testimony based on opinions by others depends initially on whether those opinions are of the type reasonably relied upon by experts in the field in reaching their conclusions.[31]

California has a number of provisions governing opinion evidence regarding the value, damages, and benefits in eminent domain and inverse condemnation cases.[32] These provisions should be retained. California also has special provisions on the use of lay and expert opinion on the question of sanity.[33] They too should be retained.

Of particular importance in criminal cases, California has a provision authorizing the use of expert testimony to prove battered women's syndrome, including to explain why a woman suffering from the syndrome perceived a need to kill in self-defense.[34] The provision is designed to end controversy regarding the use of battered women's syndrome evidence and should be retained.

The Rules prohibit an expert from giving an opinion on whether the accused did or did not have a mental state constituting an element of the offense charged or a defense thereto.[35] This provision was added by Congress in 1984. Earlier that year, the California Legislature added a similar provision to the Penal Code prohibiting an expert from testifying about whether an accused's mental illness, disorder, or defect precluded the accused from forming the mental state of the offense charged.[36] Although the California provision is narrower, in both jurisdictions, only the trier of fact is allowed to deduce whether the accused entertained the requisite mental state.[37]

E. EXPERT OPINION: DIVERGENCE

The Code and the Rules, as interpreted, differ on the role the judge should play in excluding some forms of unreliable expert testimony. Although the Code and the Rules began with similar provisions, judicial construction of the California and federal provisions has led to a divergence in the judge's role.

(1) California: The General Rule

Expert opinion will not help fact finders understand evidence or resolve issues beyond their competence unless the expert is qualified to provide them with the help they need. Whether an expert is qualified to provide the needed help is determined under California Evidence Code Section 405.[38] This provision is designed to withhold evidence from the jurors that is unreliable.[39] Combined with other provisions, it requires the party calling

31. See Cal. Evid. Code § 801(b); Fed. R. Evid. 703.
32. Cal. Evid. Code §§ 810-824.
33. Cal. Evid. Code § 870.
34. Cal. Evid. Code § 1107.
35. Fed. R. Evid. 704(b).
36. Cal. Penal Code § 29.
37. Cal. Penal Code § 29; Fed. R. Evid. 704(b).
38. Cal. Evid. Code § 405 Comment.
39. *Id*.

the expert to persuade the judge by a preponderance of the evidence that the expert is qualified to render the needed assistance.[40]

An opinion even by a qualified expert will not help the fact finders unless it is validly drawn from appropriate data. The Code attempts to exclude unreliable opinions by limiting experts to those opinions based on matter "that is of the type that reasonably may be relied upon" by experts in the field.[41] As the California Law Revision Commission explains, "In large measure, this [provision] assures the reliability and trustworthiness of the information used by experts in forming their opinions."[42] Over objection, the calling party must persuade the judge by a preponderance of the evidence that the expert's opinion is predicated on such matter.[43] In *Board of Trustees v. Porini*,[44] for example, expert testimony that a teacher was mentally ill was excluded because the expert improperly relied on opinions by lay persons contained in a dossier on the teacher.[45]

Moreover, the question whether required protocols or methodologies have been followed also should be governed by Section 405. The failure to follow correct procedures can result in invalid conclusions even if the expert is qualified to draw the conclusion and used appropriate data.[46] Accordingly, over objection the calling party should persuade the judge by a preponderance of the evidence that the expert followed the required protocols and methodologies in reaching the opinion.[47] Smith v. ACandS, Inc.[48] is an example. Expert testimony regarding the quantity of asbestos at a job site was held inadmissible because the calling party failed to convince the judge that the expert employed the correct method for measuring asbestos levels.[49]

The inadmissibility of expert opinions based on improper matter is reinforced in California by another rule. On its own motion or upon objection, a court is required to "exclude testimony in the form of an opinion that is based in whole or in significant part on matter that is not a proper basis for such an opinion."[50]

(2) California: A Special Rule

When the expert opinion is based on novel scientific principles or techniques, the California courts use the *Kelly* test to determine the admissibility of the opinion. Adopting the

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40. See Méndez, Evidence: The Code and the Federal Rules — A Problem Approach § 17.04 (2d ed. 1999).

41. Cal. Evid. Code § 801.

42. Cal. Evid. Code § 801 Comment.

43. See Méndez, *supra* note 40, §§ 17.03-17.04. See also Cal. Evid. Code § 405 Comment ("Section 405 deals with evidentiary rules designed to withhold evidence from the jury because it is too unreliable ….").

44. 263 Cal. App. 2d 784, 70 Cal. Rptr. 73 (1968).

45. *Id*. at 793-94, 70 Cal. Rptr. at 79-80.

46. People v. Axell, 235 Cal. App. 3d 836, 862, 1 Cal. Rptr. 2d 411, 427 (1991).

47. People v. Venegas, 18 Cal. 4th 47, 78, 954 P.2d 525, 545, 74 Cal. Rptr. 2d 262, 282 (1998).

48. 31 Cal. App. 4th 77, 37 Cal. Rptr. 2d 457 (1994).

49. *Id*. at 92, 37 Cal. Rptr. 2d at 465 (The expert used photographs instead of filtering the air through a membrane and then using an electron microscope to magnify the membrane to count the retained asbestos fibers.).

50. Cal. Evid. Code § 803.

approach taken in *Frye v. United States*,[51] the California Supreme Court held in *People v. Kelly*[52] that the proponent must persuade the judge that the novel scientific principle or technique "'has been sufficiently established to have gained general acceptance in the particular field in which it belongs.'"[53] General acceptance, not just reasonable reliance as defined in the Code,[54] is the test.

Critics of the *Kelly* approach emphasize the difficulties of distinguishing expert testimony based on novel scientific principles from other expert testimony, of deciding in which particular field the principle belongs, and of determining whether it has been generally accepted by the appropriate members of that field.[55] The California Supreme Court has nonetheless defended the use of the general acceptance test. In the court's view, the test promotes a degree of uniformity with respect to the admissibility of evidence based on scientific principles: "Individual judges whose particular conclusions may differ regarding the reliability of particular scientific evidence, may discover substantial agreement and consensus in the scientific community."[56] Of greater importance, the test is designed "to interpose a substantial obstacle to the unrestrained admission of evidence based upon new scientific principles."[57] In the court's view, caution is called for because of the risk that jurors might give unwarranted weight to "'scientific' evidence when presented by "experts" with impressive credentials."[58] Finally, the court favors applying stringent standards to the use of scientific evidence based upon a new scientific technique because "once a trial court has admitted evidence based upon a new scientific technique, and that decision is affirmed on appeal by a published appellate decision, the precedent so established may control subsequent trials, at least until new evidence is presented reflecting a change in the attitude of the scientific community."[59]

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51. 293 Fed. 1013 (D.C. Cir. 1923).

52. 17 Cal. 3d 24, 549 P.2d 1240, 130 Cal. Rptr. 144 (1976).

53. *Id*. at 30, 549 P.2d at 1244, 130 Cal. Rptr. at 148, *quoting* Frye v. United States, 293 Fed. 1013, 1014 (D.C. Cir. 1923).

54. See Cal. Evid. Code § 801.

55. See, e.g., C. McCormick, Handbook of the Law of Evidence § 203 (E. Cleary 2d ed. 1972). An additional criticism of the *Kelly-Frye* test is that in some fields, especially the forensic sciences, the experts in the field all depend for their living on the viability of their expertise. According to Jennifer Mnookin:

> We would hardly expect polygraph examiners to be the most objective or critical observers of the polygraph, or those who practice hair identification to argue that the science was insufficiently reliable. When there is challenge to the fundamental reliability of a technique through which the practitioners make their living, there is good reason to be especially dubious about "general acceptance" as a proxy for reliability ….

J. Mnookin, *Fingerprint Evidence in an Age of DNA Profiling*, 67 Brooklyn L. Rev. 13, 62-63 (2001).

56. People v. Kelly, 17 Cal. 3d 24, 31, 549 P.2d 1240, 1245, 130 Cal. Rptr. 144, 149 (1976).

57. *Id*.

58. *Id*.

59. *Id*. at 32, 549 P.2d at 1245, 130 Cal. Rptr. at 149. It is not altogether clear why an appellate opinion upholding the use of a particular scientific principle or technique should be given an estoppel effect. Traditional principles of res judicata and collateral estoppel simply do not apply because the parties to the appellate case approving the use of the evidence at the trial level are not the parties in the subsequent suit in which the admissibility of the evidence is contested. The doctrine of stare decisis may likewise be unavailable. It provides that a point of law determined by an appellate court should be followed by the lower courts within the jurisdiction. Auto Equity Sales, Inc. v. Superior Court, 57 Cal. 2d 450, 455, 369 P.2d 937, 939,

The court's defense notwithstanding, the use of the *Kelly* test does pose some problems. As the critics maintain, at times it calls for the difficult task of distinguishing novel scientific evidence from other expert testimony. In *People v. Stoll*,[60] for example, the California Supreme Court was called upon to determine whether the Code's reasonable reliance test or *Kelly* applied to a clinical psychologist's opinion that a defendant charged with committing lewd and lascivious acts upon children displayed no signs of deviance or abnormality. In holding that *Kelly* did not apply, the court discerned two "themes" that should guide judges and lawyers in determining which of the two tests applies.[61]

First, the court emphasized that *Kelly* is limited "to that class of expert testimony which is based, in whole or in part, on a technique, process, or theory which is *new* to science and, even more so, the law."[62] Until the courts are reasonably certain that the pertinent scientific community no longer views such techniques as "experimental or of dubious validity," the courts should forego the use of the evidence.[63] Upon objection, then, the proponent must persuade the judge that the principle or technique either is not new to science or law or, if it is, that it satisfies the *Kelly* test.

Second, the court underscored that *Kelly* should be applied to expert evidence that carries a "misleading aura of scientific infallibility."[64] According to the court, the concern is with "the unproven technique or procedure" which threatens to mislead jurors because they appear "both in name and description to provide some definitive truth which the expert need only accurately recognize and relay to the jury. The most obvious examples are machines or procedures which analyze physical data."[65] Other examples cited by the

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20 Cal. Rptr. 321, 323 (1962). Thus, the California Supreme Court's determination in *Kelly* that evidence based on novel scientific principles or techniques must pass the general acceptance test is binding on the lower courts. But an appellate determination that a particular principle or technique passes the test may be no more than an appellate assessment that the trial judge's ruling admitting the evidence over objection was not incorrect. In essence, the appellate court is merely rejecting the appealing party's claim that the trial judge's assessment of the evidence presented by the opposing parties, including the credibility of the witnesses, was in error.

Irrespective of whether conventional doctrine supports the court's assertion in *Kelly*, lower courts must now resolve which aspects of a favorable *Kelly* appellate determination are entitled to an estoppel effect. The consensus appears to be that only the first determination — that a particular principle or technique has been generally accepted by the pertinent scientific community — is entitled to this effect. See People v. Morganti, 43 Cal. App. 4th 643, 658, 50 Cal. Rptr. 2d 837, 846 (1996), and cases cited therein. Whether correct procedures were used in the case at hand and whether the expert called to relate the findings is qualified to give them are not entitled to an estoppel effect. *Id.* at 660-63, 50 Cal. Rptr. 2d at 848-49, and cases cited therein. *Morganti* has been cited with approval by the California Supreme Court. See People v. Venegas, 18 Cal. 4th 47, 78, 954 P.2d 525, 545, 74 Cal. Rptr. 2d 262, 282 (1998).

60. 49 Cal. 3d 1136, 783 P.2d 698, 265 Cal. Rptr. 111 (1989).

61. *Id.* at 1156, 783 P.2d at 710, 265 Cal. Rptr. at 123.

62. *Id.* (emphasis in the original). "In determining whether a scientific technique is 'new' for *Kelly* purposes, long-standing use by police officers seems less significant a factor than repeated use, study, testing, and confirmation by scientists or trained technicians. … To hold that a scientific technique could become immune from *Kelly* scrutiny merely by reason of long-standing and persistent use by law enforcement *outside* the laboratory or the courtroom, seems unjustified." People v. Leahy, 8 Cal. 4th 587, 606, 882 P.2d 321, 332, 34 Cal. Rptr. 2d 663, 674 (1994) (emphasis in the original).

63. People v. Stoll, 49 Cal. 3d 1136, 783 P.2d 698, 265 Cal. Rptr. 111 (1989).

64. *Id.* at 1157, 783 P.2d at 711, 265 Cal. Rptr. at 124.

65. *Id.*

court include expert opinions based on polygraphs, truth serum, Nalline tests, human bite marks, microscopic identification of gunshot residue particles, electrophoretic testing of body fluid and blood stains, the hemostick method of presumptive testing for the presence of blood,[66] and penile plethysmographs.[67]

Despite the court's guidelines, it is still difficult at times to determine whether *Kelly* should apply to some expert opinions. Before *Stoll*, for example, reasonable people could disagree on whether *Kelly* applied to an opinion that a person charged with committing lewd and lascivious acts did not exhibit signs of abnormality or deviance. Without question, the uncertainty surrounding *Kelly*'s application is a drawback, as lawyers and judges will not always find guidance in the cases distinguishing circumstances in which *Kelly* applies from those in which only the Code's reasonable reliance test suffices.[68]

Other aspects of *Kelly* have also proved troublesome. One relates to the burden the calling party must discharge when the opponent successfully interposes a *Kelly* objection. Though the application of the Code's provisions seems straightforward, the California courts have struggled to define the burden.

As has been noted, in all cases in which the admissibility of expert opinion is contested, the proponent must convince the judge that the expert testimony would be helpful to the jury and that the expert is qualified to give them that help. If *Kelly* applies, the proponent must also persuade the judge that the scientific principles or techniques underlying the expert testimony meet the general acceptance test.[69] Moreover, if the expert testimony is predicated on the application of specific protocols or methodologies, the proponent must satisfy the judge that the correct procedures were followed.[70]

Since *Kelly* is designed to withhold expert testimony that is too unreliable to be evaluated properly, the question whether the underlying scientific principle or technique has been generally accepted by the relevant scientific community should be governed by California Evidence Code Section 405.[71] Under Section 405, the judge should exclude the expert testimony unless the proponent convinces the judge by a preponderance of the evidence that the principle or technique in question meets the *Kelly* standards of acceptance.[72] If after the hearing it is unclear to the judge whether the required scientific consensus has developed, the judge should exclude the expert evidence.[73]

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66. *Id*.

67. *Id*. at 1160 n.21, 783 P.2d at 713, n.21, 265 Cal. Rptr. at 126, n.21.

68. For a collection and discussion of these cases, see Méndez, *supra* note 40, § 16.04.

69. People v. Kelly, 17 Cal. 3d 24, 30, 549 P.2d 1240, 1244, 130 Cal. Rptr. 144, 148 (1976).

70. *Id*. The California Supreme Court has characterized the *Kelly* test as consisting of three prongs. The first is whether the principle or technique underlying the expert opinion has been generally accepted by the relevant scientific community; the second is whether the expert is qualified to testify about the principle's or technique's general acceptance by the pertinent scientific community; the third is whether the expert opinion offered was the result of following correct scientific procedures. People v. Venegas, 18 Cal. 4th 47, 78, 954 P.2d 525, 545, 74 Cal. Rptr. 2d 262, 282 (1998).

71. Cal. Evid. Code § 405 & Comment; see also People v. Ashmus, 54 Cal. 3d 932, 971, 820 P.2d 214, 235, 2 Cal. Rptr. 2d 112, 132 (1991), *cert. denied*, 506 U.S. 841 (1992).

72. Cal. Evid. Code §§ 115, 405. See also People v. Brown, 40 Cal. 3d 512, 533, 726 P.2d 516, 525, 230 Cal. Rptr. 834, 843 (1985).

73. *Brown*, 40 Cal. 3d at 535 n.5, 726 P.2d at 527 n.5, 230 Cal. Rptr. at 845 n.5.

Moreover, the question whether specific protocols or methodologies have been followed also should be governed by Section 405. The failure to follow correct procedures in applying the novel principle or technique involved could give rise to opinions that are as unreliable as opinions based on principles and techniques rejected by the relevant scientific community.[74] Accordingly, the failure to follow the appropriate procedures should result in the exclusion of the expert opinion even if the proponent has demonstrated general acceptance by the pertinent scientific community of the scientific principles or techniques underlying the opinion.[75]

Confusion surrounding this prong of the *Kelly* test stems from the California courts' failure to distinguish between evidence attacking the expert opinion once it has been admitted and evidence offered to prevent the admission of the expert opinion. Sometimes, the evidence attacking the methods of gathering, preserving, or testing the data used to formulate the expert opinion is offered, not at the hearing to determine compliance with *Kelly*, but after the court has held that the *Kelly* standards have been satisfied.[76] Obviously, in such a situation whether or not the appropriate protocols or methodologies have been followed goes to weight and should be considered by the trier of fact.[77] But where the attacking evidence has been offered at the hearing to determine whether the *Kelly* standards have been met, then the court cannot escape its duty to take the evidence into account in making its *Kelly* ruling.[78] Such a duty is consistent with California Evidence Code Section 801(b). This provision requires judges to exclude expert opinion unless based on matter "that is of the type that reasonably may be relied upon" by experts in the field.[79] Whether or not a *Kelly* issue is involved, this command calls for the exclusion of expert opinion whenever based on matter that is inappropriate because of the failure to abide by the protocols or methodologies experts in the field would observe.

In light of a radically different interpretation given to admissibility of expert opinion under the Federal Rules, it is important to note that *Kelly* does not require the judge to determine whether the novel scientific principles underlying the expert testimony are "reliable as a matter of scientific fact."[80] Rather, *Kelly* merely requires the judge to determine "from the professional literature and expert testimony whether … the new scientific technique is accepted as reliable in the relevant scientific community [or] whether '"scientists significant either in number or expertise publicly oppose [a technique] as unreliable."'"[81] *Kelly*, moreover, "does not demand the impossible — proof of an abso-

74. People v. Axell, 235 Cal. App. 3d 836, 862, 1 Cal. Rptr. 2d 411, 427 (1991).

75. People v. Venegas, 18 Cal. 4th 47, 78, 954 P.2d 525, 545, 74 Cal. Rptr. 2d 262, 282 (1998). An exception should be made in the rare case where the credible evidence shows that the failure to follow correct procedures is trivial and does not materially affect the opinion.

76. See, e.g., People v. Wright, 62 Cal. App. 4th 31, 41, 72 Cal. Rptr. 2d 246, 252 (1998).

77. Presumably, this is what the California Supreme Court had in mind when it declared, "Careless testing affects the weight of the evidence and not its admissibility, and must be attacked on cross-examination or by other expert testimony." People v. Farmer, 47 Cal. 3d 888, 913, 765 P.2d 940, 956, 254 Cal. Rptr. 508, 524 (1989), *cert. denied*, 490 U.S. 1107 (1989).

78. People v. Venegas, 18 Cal. 4th 47, 78-79, 954 P.2d 525, 545, 74 Cal. Rptr. 2d 262, 282 (1998).

79. Cal. Evid. Code § 801(b).

80. People v. Axell, 235 Cal. App. 3d 836, 854, 1 Cal. Rptr. 2d 411, 421 (1991). In federal courts, however, *Daubert* imposes this role on the judge. See text accompanying note 96 *infra*.

81. *Id.*, *quoting* People v. Brown, 40 Cal. 3d 512, 726 P.2d 516, 230 Cal. Rptr. 834 (1985).

lute unanimity of views in the scientific community before a new technique will be deemed reliable; any such unanimity would be highly unusual …. Rather, the test is met if use of the technique is supported by a clear majority of the members of that community."[82] "'General acceptance' under *Kelly* means a consensus drawn from a typical cross-section of the relevant, qualified scientific community."[83]

Although the California appellate courts have treated *Kelly* as independent of the Evidence Code, such a view is not necessary. Admittedly, *Kelly* is based on *Frye v. United States*,[84] a case that preceded the adoption of the Code by over sixty years. And, indeed, until the United States Supreme Court's *Daubert*[85] opinion superseded *Frye*, it was customary for the California courts to refer to the general acceptance test as the *Kelly-Frye* rule. Nonetheless, the Code's provisions governing expert testimony support the use of *Kelly*. Over objection, expert opinion is inadmissible in California unless it is based on matter that is of a type reasonably relied upon by experts in the field.[86] Clearly, expert opinion based on novel scientific or techniques rejected by the pertinent scientific community fails that test. *Kelly* thus can be viewed as a specialized application of the reasonable reliance test prescribed by the Code.

Neither *Kelly* nor the Code's reasonable reliance test is limited "to techniques analyzing 'physical evidence.'"[87] Both also embrace expert opinion based on social science research. Given *Kelly*'s aim of barring the use of evidence based on techniques "which carry an undeserved aura of certainty,"[88] the test applies as well to "less tangible new procedures,"[89] such as "'a new scientific process operating on purely psychological evidence.'"[90] An example is hypnotically refreshed testimony. In California hypnotically refreshed testimony is excluded because its use fails to satisfy the *Kelly* test.[91]

(3) The Federal Approach

As originally enacted, Federal Rule of Evidence 703 provided that facts or data used by an expert in reaching an opinion did not have to be admissible if "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences."[92] Although the rule focused on dispensing with the admissibility of the underlying data, the Advisory Committee's note suggests that the quoted language might have had another purpose as well — to assure the reliability of the opinion. In its note, the Advisory Committee cites the California Law Revision Commission's comment to Evidence Code Sec-

82. People v. Guerra, 37 Cal. 3d 385, 418, 690 P.2d 635, 656, 208 Cal. Rptr. 162, 183 (1984).
83. People v. Leahy, 8 Cal. 4th 587, 612, 882 P.2d 321, 337, 34 Cal. Rptr. 2d 663, 679 (1994).
84. 293 Fed. 1013 (D.C. Cir. 1923).
85. 509 U.S. 579 (1993).
86. Cal. Evid. Code § 801.
87. People v. Stoll, 49 Cal. 3d 1136, 1156, 783 P.2d 698, 710, 265 Cal. Rptr. 111, 123 (1989).
88. *Id.*
89. *Id.*
90. *Id.*, *quoting* People v. Shirley, 31 Cal. 3d 18, 723 P.2d 1354, 181 Cal. Rptr. 243 (1982).
91. People v. Shirley, 31 Cal. 3d 18, 723 P.2d 1354, 181 Cal. Rptr. 243 (1982).
92. Fed. R. Evid. 703 (West 1975).

tion 801.[93] Section 801 limits expert opinions to those based on matter "that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates …."[94] In its comment, the Law Revision Commission stresses that "[i]n large measure, this [limitation] assures the reliability and trustworthiness of the information used by experts in forming their opinions."[95] If this was the construction the Advisory Committee intended to give to Rule 703, then the rule provided federal judges with a basis for excluding unreliable expert testimony, including opinions based on novel scientific principles or techniques not generally accepted by the pertinent scientific community.

Whatever the intention of the Advisory Committee, in its 1993 *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[96] decision, the United States Supreme Court defined the role of federal judges in screening expert testimony. The issue in *Daubert* was whether the trial judge had properly excluded an expert opinion that failed to meet *Frye*'s general acceptance test.[97] The proponents claimed that the adoption of the Federal Rules of Evidence had displaced *Frye*. The Court agreed. Noting sharp divisions among the circuits on the proper standards for admitting expert testimony, the Court held that under the Federal Rules of Evidence federal trial judges must ensure "that any and all scientific testimony or evidence is not only relevant, but reliable."[98]

The Court laid down four guidelines to help federal judges assess the evidence's scientific validity. One is whether the evidence is based on theories or techniques that can be or have been tested.[99] In the Court's view, the testing of hypotheses is what distinguishes science from other fields.[100] Another guideline is whether the theory or technique has been subjected to peer review and publication.[101] Though publication is not a sine qua non of admissibility (some propositions may be too new or of limited interest to be published), publication "in a peer-reviewed journal" is a relevant consideration "in assessing the scientific validity of a particular technique or methodology on which an opinion is premised."[102] A judge should also consider the known or potential rate of error as well as

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93. Fed. R. Evid. 801 advisory committee's note.

94. Cal. Evid. Code § 801.

95. Cal. Evid. Code § 801 Comment.

96. 509 U.S. 579 (1993).

97. *Id*. at 585.

98. *Id*. at 589. At the time, Rule 702 provided that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Fed. R. Evid. 702 (West 1975).

In discharging their gatekeeping function to ensure the relevance and reliability of expert testimony, federal trial judges are accorded some protection. In reviewing the propriety of a trial judge's ruling admitting or excluding scientific evidence, federal appellate courts must apply the abuse of discretion standard. General Electric Co. v. Joiner, 522 U.S. 136, 145 (1997).

99. *Daubert*, 509 U.S. at 593.

100. *Id*.

101. *Id*. at 593-94.

102. *Id*.

the existence and maintenance of standards controlling a technique's operation.[103] Finally, a judge should consider whether the techniques or theories employed have been generally accepted or rejected by the pertinent scientific community.[104] Though a finding that the proffered evidence is scientifically valid does not require that the techniques or theories supporting it be generally accepted, widespread acceptance or rejection "can be an important factor" in ruling the evidence admissible.[105]

The Court did not intend the *Daubert* guidelines to be exclusive. Lower federal courts are free to consider other factors in determining the reliability of expert testimony. Examples include whether the expert is proposing to testify on the basis of research conducted independently of the litigation, whether the expert has adequately accounted for obvious alternative explanations, whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion, and whether the field of expertise claimed by the expert is known to reach reliable results.[106] The latter factor is important because it is designed to foreclose testimony by "experts" who uncritically find that a principle or technique is generally accepted because the experts in the field depend for their living on the viability of the contested principle or technique.

Of significance to the federal bench and bar, *Daubert* is not limited to scientific evidence despite its emphasis on "scientific testimony." In Kumho Tire Co. Ltd. v. Carmichael[107] the United States Supreme Court held that the federal judiciary's obligation to ensure that all scientific testimony is not only relevant but reliable extends to all "expert" testimony. Emphasizing the inclusion in Rule 702 of such categories as "technical" and "other specialized knowledge" in addition to "scientific knowledge," the Court held that *Daubert* applied to the testimony of a tire failure expert called by the plaintiffs to establish that their injuries were caused by a defective tire manufactured by the defendant.[108]

In response to *Daubert* and *Kumho* Federal Rule of Evidence 702 was amended in 2000. It now calls for the exclusion of expert opinion based on scientific, technical or other specialized knowledge unless the judge finds that "(1) the testimony is sufficiently based upon reliable facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."[109] In the Advisory Committee's opinion, the "standards set forth in the amendment are broad enough to require consideration of any or all of the specific *Daubert* factors where appropriate."[110] In its note, the Advisory Committee makes clear

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103. *Id*.

104. *Id*.

105. *Id*. The Court underscored that in assessing the reliability of scientific evidence the judge should also apply other rules, such as Rule 703. *Id*. This rule provides that facts or data used by an expert need not be admissible in order for the expert's opinion to be admitted, if the underlying matter is of a type reasonably relied upon by experts in the field.

106. See generally Fed. R. Evid. 702 advisory committee's note.

107. 526 U.S. 137 (1999).

108. *Id*. at 152.

109. Fed. R. Evid. 702.

110. Fed. R. Evid. 702 advisory committee's note.

that under the amended rule the proponent must establish the admissibility requirements of expert testimony and other scientific evidence by a preponderance of the evidence.[111]

Has *Daubert* promoted or discouraged the use of expert testimony in federal trials? Thus far, *Daubert* appears to have restrained the use of expert testimony in federal civil cases. According to Professor George Fisher:

> A Rand Institute report released early in 2002 concludes that for several years after *Daubert*, challenges to expert evidence in federal civil actions prevailed more often than before. Focusing on cases from the Third Circuit, the authors found that among those cases in which expert evidence was challenged, "the exclusion rate … for evidence based on physical science in a product liability case jumped from 53 percent during the two years before *Daubert* to 70 percent between mid-1995 and mid-1996" — though the rate subsided after that. LLOYD DIXON & BRIAN GILL, CHANGES IN THE STANDARDS FOR ADMITTING EXPERT EVIDENCE IN FEDERAL CIVIL CASES SINCE THE *DAUBERT* DECISION xvi (2001).
>
> A tangible result of this increasing scrutiny of expert evidence appears to have been an increase in both summary judgment motions and their success rate. "[S]ummary judgments were granted in 21 percent of challenges during the four years preceding Daubert, compared to 48 percent between July 1995 and June 1997." Id. at xvi, 56. Noting that the success rate of Daubert challenges declined after 1997, the authors speculate that litigants "either did not propose … [expert] evidence not meeting the new standards, or better tailored the evidence they did propose to fit the new standards." *Id*. at xvii.
>
> The Rand study's most surprising discovery is how little *Daubert* seems to have changed the significance of *Frye*'s old "general acceptance" test. Before *Daubert* a judge's finding that an expert's methods were generally accepted always or almost always assured a judgment that the evidence was reliable. After *Daubert* a favorable finding on general acceptance secured such a judgment ninety percent of the time. Conversely, an *unfavorable* finding on general acceptance resulted in a finding of unreliability in an overwhelming majority of cases before *Daubert* — and if anything made exclusion of the evidence even more certain afterward. *See id*. at 44.[112]

(4) *Daubert* and California

In *People v. Leahy*[113] the California Supreme Court declined to adopt *Daubert* as the standard to be used to determine the admissibility of expert testimony in California. Instead, the court chose to adhere to the *Kelly* test.[114] Although the court conceded that the Evidence Code sections governing expert testimony do not expressly sanction the use of the general acceptance test, the court found the test compatible with those provisions.[115] More importantly, the court concluded that, despite its weaknesses, *Kelly* was effective in excluding expert opinion based on novel scientific principles or techniques not generally accepted by the pertinent scientific community.[116]

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111. *Id*.

112. G. Fisher, Evidence (2002 ed.), at 638 (emphasis in the original). *Cf*. Fed. R. Evid. 702 advisory committee's note ("A review of the caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule.").

113. 8 Cal. 4th 587, 882 P.2d 321, 34 Cal. Rptr. 2d 663 (1994).

114. *Id*. at 599-04, 882 P.2d at 328-31, 34 Cal. Rptr. 2d at 670-73.

115. *Id*.

116. *Id*. The court was also impressed by the Legislature's failure to abrogate the general acceptance test despite ample opportunity to so. *Id*.

California's rejection of *Daubert* should not be overstated, however. *Kelly* is of limited application. California judges are required to apply *Kelly* only when the admissibility of an expert's opinion is challenged on the ground that it is based on novel scientific principles or techniques that lack the required acceptance by experts in the field. Still, a California judge's screening role can differ sharply from a federal judge's when *Kelly* does apply. While *Daubert* forces federal judges to determine the scientific validity of all expert testimony grounded in science, *Kelly* merely requires California judges to determine whether the contested principle or technique has been accepted as reliable by the relevant scientific community. The role of the California judge is not to determine reliability as a scientific matter but only whether the relevant scientific community has reached the prescribed consensus. The head counting burden *Kelly* places on California judges is obviously much less onerous than the burden *Daubert* imposes on federal judges.

On the other hand, California judges do play a role similar to that of federal judges when expert opinion is challenged on non-*Kelly* grounds. Over objection the proponent must still persuade the judge by preponderance of the evidence that (1) the expert's opinion is based on the type of matter relied upon by experts in the field and (2) the expert followed accepted protocols or methodologies in reaching his or her opinion.[117] Opinions based on matter experts would ignore or on incorrect procedures are unlikely to produce valid conclusions. Accordingly, ruling on these objections requires California judges to assess the scientific validity of the proffered opinion.

Does *Kelly* really matter? It is impossible to determine whether California trial judges are called upon to decide *Kelly* challenges more often than other challenges to the introduction of expert testimony. Trial courts are not required to keep these data. Moreover, appellate opinions disposing of expert testimony claims may not be representative. Still, appellate decisions do shed some light on the kinds of challenges California trial judges have to resolve. In the last 20 or so years, of about 30 cases presenting expert questions on appeal, 15 raised *Kelly* issues.[118] The figure suggests that in a substantial number of cases California judges are relieved from determining the scientific validity of the principle or technique underlying expert opinion.

F. SUGGESTED CHANGES

Daubert's re-examination of the role of judges in screening expert evidence offers an opportunity to reconsider the role judges should play. Should judges be empowered to withhold the opinion from the jury unless they are satisfied by a preponderance of the evidence that the opinion satisfies the reasonable reliance, general acceptance or other tests? Or should judges let the jury evaluate the worth of the opinion once they find that the proponent's evidence satisfies the applicable test by a sufficiency standard? Under the latter standard, judges would let the jury hear the expert testimony if judges conclude that a reasonable jury could find that the opinion satisfies the pertinent test if the proponent's evidence is believed. Although a reconsideration of the judge's screening role raises important fundamental questions about the proper allocation of power between judge and

117. See text accompanying note 39 *supra*.

118. See Méndez, *supra* note 40, § 16.04.

jury, the history of the rules of evidence as enacted and interpreted suggests a continuing commitment to retaining the present balance. As some judges have stressed, jurors are not to be trusted to evaluate the validity of expert evidence, especially when the evidence appears to judges to carry "an undeserved aura of scientific infallibility".[119]

Nonetheless, something can be learned from *Daubert*. Precisely because *Kelly* is limited to assessing the admissibility of evidence based on novel scientific principles or techniques, California trial judges, like their federal counterparts, must determine the validity of other expert testimony. In discharging this function, it would be more useful to provide California judges and practitioners with the kind of checklist provided by amended Federal Rule 702 than the simple and somewhat incomplete principle of Section 801(b). Limiting expert opinions to those based on matter "that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates" does not embrace the universe of objections that could be raised. It would be much more useful if Section 801(b) were rewritten to include also challenges to the validity of the principles as well as the propriety of the methods experts use in reaching their opinions.

The 1999 version of Uniform Rule of Evidence 702 includes these grounds as well as challenges to the need for the expert testimony, the qualifications of the witness to provide the evidence, and the propriety of the data used by the expert in his or her testimony.[120] Grouping the most common objections in one section would help judges and lawyers grasp quickly the standards for admitting expert testimony in California.

The amended section or its comment should make clear that the grounds listed are not exclusive.[121] Scientific and technical knowledge is dynamic, and it would be unwise to attempt to include all possible substantive objections to expert evidence in a single rule.[122] Moreover, to dispel confusion about the burden the proponent must discharge, the comment should be rewritten to clarify that objections based on the use of inappropriate matter, invalid principles, or incorrect methods should be determined under Section 405.[123]

The limited applicability of *Kelly* also needs to be reconsidered. Despite its flaws, its saving virtue is that it precludes saddling judges — many of whom have no scientific training — with the difficult burden of determining the scientific validity of opinions in those instances where the opponent merely claims rejection by the pertinent scientific community of the principle or technique underlying the opinion. Head counting might be a better way of excluding unreliable expert evidence contested on this ground than an

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119. People v. Stoll, 49 Cal. 3d 1136, 1157, 783 P.2d 698, 711, 265 Cal. Rptr. 111, 124 (1989).

120. Uniform Rule of Evidence 702, Federal Rules of Evidence (2001-2002 ed.).

121. For an example of how this can be accomplished, see Uniform Rule of Evidence 702(e): "In determining the reliability of a principle or method, the court shall consider all relevant additional factors …."

122. As the California Law Revision Commission observed:

> It is not practical to formulate a detailed statutory rule that lists all of the matters upon which an expert may properly base his opinion, for it would be necessary to prescribe specific rules applicable to each field of expertise. This is clearly impossible; the subjects upon which expert opinion may be received are too numerous to make statutory prescriptions of applicable rules a feasible venture.

Cal. Evid. Code § 801 Comment.

123. The comment to Section 405 already provides that this section governs whether an expert is qualified to testify.

individual judge's determination of the scientific validity of the principle or technique involved. But there appears to be no convincing reason for limiting *Kelly* to those cases in which the principle or technique is "novel." While *Kelly* might be especially useful in those cases, any expert opinion predicated on principles or techniques rejected by experts in the field should likewise be excluded. The Federal Rules, as amended, and the Uniform Rules of Evidence do not limit the general acceptance test to novel scientific principles or techniques.[124] The comment to an amended Section 801(b) should make this clear.

G. CROSS-EXAMINING EXPERTS

The Code has a number of provisions regulating the cross-examination of expert witnesses. A general provision allows the adverse party to cross examine an expert to the same extent as any other witness, including the expert's qualifications, the subject to which the expert's testimony relates, the matter upon which the expert's opinion is based, and the reasons for the expert's opinion.[125] Another allows the adverse party to question an expert about the compensation and expenses the calling party paid or will pay to the expert.[126] The Rules do not have specific provisions on these matters, but all are within the federal definition of relevant matter, since evidence relating to the credibility of witnesses is of consequence to the determination of the action.[127]

The Code, but not the Rules, prohibits cross examining an expert "in regard to the content or tenor of any scientific, technical, or professional text, treatise, journal, or similar publication unless … (1) the witness referred to, considered, or relied upon such publication in arriving at or forming his or her opinion, (2) the publication has been admitted in evidence, or (3) the publication has been established as reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice."[128] The Law Revision Commission justifies limitation (1) on the following grounds:

> If an expert witness has relied on a particular publication in forming his opinion, it is necessary to permit cross-examination in regard to that publication in order to show whether the expert correctly read, interpreted, and applied the portions he relied on. Similarly, it is important to permit an expert witness to be cross-examined concerning those publications referred to or considered by him in forming his opinion. An expert's reasons for not relying on particular publications that were referred to or considered by him while forming his opinion may reveal important information bearing upon the credibility of his testimony. However, a rule permitting cross-examination on technical treatises not considered by the expert witness would permit the cross-examiner to utilize this opportunity not for its ostensible purpose — to test the expert's opinion — but to bring before the trier of fact the opinion of absentee authors without the safeguard of cross-examination. … [T]he statements in the text might be based on inadequate background research, might be subject to unexpressed qualifications that would be applicable to the case before the

124. Fed. R. Evid. 702; Uniform Rule of Evidence 702, Federal Rules of Evidence (2001-2002 ed.).

125. Cal. Evid. Code § 721(a).

126. Cal. Evid. Code § 722(b).

127. See Fed. R. Evid. 401, 402.

128. Cal. Evid. Code § 721(b).

> court, or might be unreliable for some other reason that could be revealed if the author were subject to cross-examination.[129]

Despite these admonitions, the California Supreme Court has ignored the Code's prohibition on crossing experts on treatises they did not consider. According to the court, "[A] party seeking to attack the credibility of [an] expert may bring to the attention of the jury material relevant to the issue on which the expert has offered an opinion [and] of which the expert was *unaware* or which he did *not* consider."[130]

Though the material may be called to the expert's attention on cross-examination, upon request the jury must be told not to consider the material for the truth of the matter asserted unless it has been received in evidence or qualifies under a hearsay exception such as the one for learned treatises.[131] Thus, while a mental health expert may be asked whether he is aware that a particular researcher has found that "psychiatrists are unable to accurately diagnose schizophrenia and paranoia,"[132] the jurors should be warned not to consider the researcher's finding for the truth of the matter asserted.[133]

The limits on the cross examiner are inapplicable if the publication has been received in evidence.[134] No risk then exists that inadmissible evidence will be brought before the jury.[135] The problem is getting such publications into evidence. Judicial notice is unlikely to help since statements in technical treatises are hardly the kind of "universally known" facts and propositions within the grasp of persons of average intelligence.[136] The California hearsay exception for learned treatises is likewise unavailing; it provides an excep-

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129. Cal. Evid. Code § 721 Comment.

130. People v. Bell, 49 Cal. 3d 502, 532, 778 P.2d 129, 145, 262 Cal. Rptr. 1, 17 (1989) (emphasis added), *cert. denied*, 495 U.S. 963 (1990).

In criminal cases, the Right to Truth-in-Evidence provision of Proposition 8, if literally construed, would repeal the Code limitation on crossing experts. Evidence that an expert is unaware of important works in his field of expertise is relevant to the expert's lack of credibility. But *Bell* did not rely on Proposition 8 to defend the departure from the Code. For an extended discussion of the effects of Proposition 8 on evidence attacking or supporting the credibility of witnesses, see Méndez, *supra* note 40, § 15.03.

Perhaps what the *Bell* court had in mind is the distinction between identity and substance. It is one matter to ask an expert on cross to identify those publications the expert did not consider or rely on; it is quite another to use the expert to get the substance of those publications before the fact finder.

131. As a practical matter, such cross-examination is not fruitful unless the expert concedes that the author of the material is an expert in the area in which the testifying expert offered an opinion. If the testifying expert refuses to concede the author's expertise, the cross-examiner will have to establish it through some other source.

The hearsay problem will disappear if the testifying expert adopts the assertions in the material as his or her own. This can be done by asking the testifying expert if he or she agrees with the assertions in the material. If the expert declines to adopt the assertions, then the cross examiner will have to rely on a hearsay exception. For a discussion of the learned treatise exception to the hearsay rule, see Méndez, *supra* note 40, § 12.01.

132. People v. Visciotti, 2 Cal. 4th 1, 80-81, 825 P.2d 388, 434, 5 Cal. Rptr. 2d 495, 541-42 (1992), *cert. denied*, 506 U.S. 893 (1992), *reh'g denied*, 506 U.S. 1016 (1992).

133. *Id.*

134. Cal. Evid. Code § 721(b) & Comment.

135. Cal. Evid. Code § 721 Comment.

136. Cal. Evid. Code § 451(f) & Comment.

tion only for "facts of general notoriety and interest,"[137] that is, facts and propositions that are not subject to dispute.[138]

The Federal Rules are more generous than the Code with respect to the cross-examination of experts. First, they permit the cross examiner to inquire about statements in treatises, irrespective of whether the expert relied on them or considers them authoritative.[139] The Rules are designed to avoid "the possibility that the expert may at the outset block cross-examination by refusing to concede reliance or authoritativeness."[140] Second, the Rules provide that the statements may be admitted for the truth of the matter asserted if (1) the statements are established as reliable authority by expert testimony or judicial notice and (2) the treatise was relied upon by an expert witness on direct examination or was called to the expert's attention on cross-examination.[141] Thus, when a treatise has been established as authoritative, appropriate passages may be read in evidence, so long as an expert is on the stand and available to explain and assist in applying the treatise.[142]

Consideration should be given to adopting the federal approach to the cross-examination of expert witnesses and the federal definition of the hearsay exception for statements in learned treatises and similar publications.

H. COURT APPOINTED EXPERTS

Both the Code and the Rules allow judges to appoint experts on their own or a party's motion if in the judge's discretion expert assistance is necessary.[143] The Code authorizes judges to appoint experts to investigate and report as well as to testify.[144] The Rules are not as specific; they simply require the judge to inform the experts of their duties.[145] Experts appointed by federal judges, however, are required to inform the parties of their findings, if any.[146] The Code is silent on this point, but nothing in the Code precludes a California judge from ordering court appointed experts to disclose their findings to the parties.

The Rules expressly allow the parties to depose a court appointed expert.[147] The Code does not contain an equivalent provision.[148]

The Code and the Rules empower the judge to fix the compensation to be paid to court appointed experts and, in civil actions, to apportion the compensation among the par-

137. Cal. Evid. Code § 1341.

138. See Méndez, *supra* note 40, § 12.01.

139. Fed. R. Evid. 803(18) advisory committee's note.

140. *Id*.

141. Fed. R. Evid. 803(18).

142. Fed. R. Evid. 803(18) advisory committee's note.

143. Cal. Evid. Code § 730; Fed. R. Evid. 706.

144. Cal. Evid. Code § 730.

145. Fed. R. Evid. 706.

146. *Id*.

147. *Id*.

148. Deposing experts is governed generally by California Code of Civil Procedure Section 2034.

ties.[149] In California criminal and juvenile cases and in federal criminal and unjust compensation cases special provisions are made for compensating experts.[150]

In federal court, each party may cross-examine a court appointed expert, including the party calling the expert.[151] In California, each party may cross-examine the expert if the court calls and examines the expert.[152] But if a party calls the court appointed expert, the calling party may not examine the expert as if on cross-examination.[153]

Both the Code and the Rules allow the judge to inform the jurors of the fact that an expert witness was appointed by the court.[154] In both jurisdictions, the calling of court appointed experts does not preclude the parties from calling their own experts to testify on the same matters.[155]

149. Cal. Evid. Code § 731(c); Fed. R. Evid. 706(b).

150. Cal. Evid. Code § 731 (a); Fed. R. Evid. 706(b). The Code also has special provisions for compensating medical experts appointed by the court. See Cal. Evid. Code § 731(b).

151. Fed. R. Evid. 706(a).

152. Cal. Evid. Code § 732.

153. *Id*.

154. Cal. Evid. Code § 722; Fed. R. Evid. 706(c).

155. Cal. Evid. Code § 733; Fed. R. Evid. 706(d).