

Memorandum 2003-7

Comparison of Evidence Code with Federal Rules: Hearsay Issues

In September 2002, the Commission began its study comparing the Evidence Code with the Federal Rules of Evidence. This memorandum addresses more of the hearsay issues discussed in the background study prepared by Professor Miguel Méndez of Stanford Law School. It supersedes Memorandum 2002-56 and its First Supplement, which were prepared for the Commission's December 2002 meeting but not discussed due to time limitations. The memorandum covers issues relating to:

- (1) The definition of "unavailability."
- (2) Use of a prior consistent statement.
- (3) Use of a prior inconsistent statement.
- (4) Use of a prior statement identifying a person.
- (5) Use of admissions by a party (a party's own statements, adoptive admissions, authorized admissions, and coconspirator's declarations).

Before delving into these issues, we also briefly discuss the Victims' Bill of Rights (Cal. Const. art. I, § 28, approved by the voters as Proposition 8 on June 8, 1982) and its impact on the Evidence Code and on this study.

Our focus is on distinctions between corresponding provisions of the Evidence Code, the Federal Rules of Evidence, and the Uniform Rules of Evidence. We have not reviewed the case law and the literature for other issues relating to these provisions. The Commission is working towards a tentative recommendation covering some or all of the hearsay provisions.

(The hearsay portion of Prof. Méndez's background study — Méndez, *Comparison of Evidence Code with Federal Rules: Part I. Hearsay and Its Exceptions* (May 2002) (hereafter, "Méndez Hearsay Analysis") — was attached to Memorandum 2002-41 and is available on the Commission's website at www.clrc.ca.gov.)

VICTIMS' BILL OF RIGHTS

The Victims' Bill of Rights, a ballot measure approved by the voters in 1982, includes a Truth-in-Evidence provision, which provides:

(d) Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, *relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court.* 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. Nothing in this section shall affect any existing statutory or constitutional right of the press.

Cal. Const. art. I, § 28(d) (emphasis added). This provision “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.” Méndez Hearsay Analysis at 6 (emphasis in original). “Construed literally, this provision would repeal any statute and overturn any case banning or limiting the admission of relevant evidence, unless the prohibition or limitation was expressly exempted from the operation of Proposition 8.” M. Méndez, Evidence: The California Code and the Federal Rules — A Problem Approach § 2.11, at 33 (1999) (footnote omitted) (hereafter, “Méndez Casebook”). Civil cases are not affected by the Truth-in-Evidence provision.

The California Supreme Court has construed the Truth-in-Evidence provision literally in some circumstances, but on other occasions it has upheld limitations on the use of relevant evidence in a criminal case. Méndez Casebook § 2.11, at 33; *see People v. Harris*, 47 Cal. 3d 1047, 1081, 1090 n.22, 767 P.2d 619, 255 Cal. Rptr. 352 (1989) (Truth-in-Evidence provision repealed Evidence Code Sections 786, 787, 788, and 790 in criminal case); *but see, e.g., id.* at 1094-95 (Truth-in-Evidence provision did not repeal California test for admission of scientific evidence).

The chief purpose of the Truth-in-Evidence provision “was to eliminate independent state grounds for exclusion of illegally obtained evidence, leaving the federal Constitution as interpreted by controlling federal decisions as the sole basis for exclusion.” 1 B. Witkin, California Evidence *Introduction* § 8, at 13 (4th ed. 2000); *see In re Lance W.*, 37 Cal. 3d 873, 888, 694 P.2d 744, 210 Cal. Rptr. 631 (1985). “However, the constitutional directive had the effect of nullifying other

statutory and decisional rules restricting the admission of relevant evidence as well.” B. Witkin, *supra*, § 8, at 13-14. There has been a tremendous amount of litigation over the situations in which the Truth-in-Evidence provision does and does not apply. *See id.* § 9, at 14-17 (collecting cases).

Application of the Truth-in-Evidence provision raises a host of issues in the context of this study. For instance, the provision states that “Nothing in this section shall affect any *existing* statutory rule of evidence relating to ... hearsay” (Emphasis added.) On superficial reading, that would seem to make the Truth-in-Evidence provision irrelevant for purposes of the hearsay portion of this study.

Suppose, however, that a provision restricting the admissibility of evidence relates to a hearsay exception, but is not located in the hearsay division of the Code. Does the Truth-in-Evidence provision invalidate that provision when applied to use of hearsay in a criminal case?

Or suppose a statute creating an exception to the hearsay rule is amended to restrict the scope of the exception, thus providing a basis for excluding relevant evidence that was not previously excludable. How does the Truth-in-Evidence provision apply in that situation?

If the amendment is enacted by a two-thirds vote in each house of the Legislature, the answer appears clear: The Truth-in-Evidence provision does not apply, because it expressly states that it can be overridden by “statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature.” “This limits the preemptive effect ordinarily given a rule of constitutional law by subjecting it to the superseding effect of a statutory enactment, suitably passed.” *People v. Scott*, 194 Cal. App. 3d 550, 554, 239 Cal. Rptr. 588 (1987).

But suppose the statute is enacted by a mere majority, not a two-thirds vote, in one or both houses. Is it inapplicable in a criminal case, by virtue of the Truth-in-Evidence provision? Does the answer vary from context to context? Do pre-existing restrictions on the scope of the exception survive the amendment? What happens if an amendment both expands and restricts the scope of an exception to the hearsay rule? Are some aspects of the amendment applicable in a criminal case while others are not?

Clearly, a result of the Truth-in-Evidence provision can be that an evidentiary provision has one meaning in a civil case and another meaning in a criminal case.

That has obvious potential to confuse both courts and practitioners. Should the Commission take any steps to address this problem? Would it make sense to create separate Evidence Codes for civil and criminal cases? Should each provision expressly state how it applies in each type of case? Should there be a mechanism for ensuring that users of the Evidence Code are alerted to the potential effect of the Truth-in-Evidence provision and given ready access to information on whether legislation affecting the Evidence Code (or other evidentiary provisions in the codes) was enacted by a two-thirds vote in each house?

These issues deserve careful consideration and analysis. Unless the Commission otherwise directs, the staff plans to **do further research on the Truth-in-Evidence provision and possible means of addressing it in the context of this study**. It may be worthwhile, however, to brainstorm on the matter to some extent at the upcoming meeting, because Prof. Méndez will be available to participate in the discussion and share his expertise on this matter.

With regard to two of the hearsay exceptions discussed in this memorandum (prior inconsistent statements and prior consistent statements), Prof. Méndez has raised specific concerns regarding the application of the Truth-in-Evidence provision. Méndez Hearsay Analysis at 6-8. We describe those concerns in this memorandum and suggest possible means of addressing them. These are only very tentative suggestions, however, which may need to be rethought once we have more thoroughly explored the implications of the Victims' Bill of Rights.

We have not attempted to identify possible Truth-in-Evidence issues in the other contexts discussed. We plan to defer such analysis until after we have completed further research on the Truth-in-Evidence provision.

DEFINITION OF UNAVAILABILITY

Some types of hearsay evidence are admissible only if the declarant is unavailable to testify. The federal and the California definitions of "unavailability" are similar, but differ in certain respects.

In California, Evidence Code Section 240 defines what it means to be "unavailable as a witness":

240. (a) Except as otherwise provided in subdivision (b), "unavailable as a witness" means that the declarant is any of the following:

(1) Exempted or precluded on the ground of privilege from testifying concerning the matter to which his or her statement is relevant.

(2) Disqualified from testifying to the matter.

(3) Dead or unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity.

(4) Absent from the hearing and the court is unable to compel his or her attendance by its process.

(5) Absent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process.

(b) A declarant is not unavailable as a witness if the exemption, preclusion, disqualification, death, inability, or absence of the declarant was brought about by the procurement or wrongdoing of the proponent of his or her statement for the purpose of preventing the declarant from attending or testifying.

(c) Expert testimony which establishes that physical or mental trauma resulting from an alleged crime has caused harm to a witness of sufficient severity that the witness is physically unable to testify or is unable to testify without suffering substantial trauma may constitute a sufficient showing of unavailability pursuant to paragraph (3) of subdivision (a). As used in this section, the term "expert" means a physician and surgeon, including a psychiatrist, or any person described by subdivision (b), (c), or (e) of Section 1010.

The introduction of evidence to establish the unavailability of a witness under this subdivision shall not be deemed procurement of unavailability, in absence of proof to the contrary.

Federal Rule of Evidence 804(a) sets forth the federal definition:

804. (a) **Definition of unavailability.** "Unavailability as a witness" includes situations in which the declarant —

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the

declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

....

Differences between these provisions are discussed below.

Unavailability of a Witness Who Refuses To Testify

The federal rule provides that a witness is unavailable if the witness refuses to testify despite a court order to do so. Rule 804(a)(2). The California statute does not expressly address this situation, but case law does.

As a practical matter, a witness who refuses to testify after the court takes reasonable steps to require such testimony is as inaccessible as a witness who is unable to attend the hearing. For example, in *People v. Rojas*, 15 Cal. 3d 540, 542 P.2d 229, 125 Cal. Rptr. 357 (1975), a witness refused to testify for fear of his safety and the safety of his family. The witness persisted in this position even after he was held in contempt of court. Based on these facts, the trial court found that the witness was unavailable for purposes of the former testimony exception to the hearsay rule.

The Supreme Court upheld that ruling. 15 Cal. 3d at 547-53. Because Section 240 does not expressly cover a refusal to testify, however, the Court's determination that the witness was unavailable was based on Section 240(a)(3), which applies where a witness is "unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity." Specifically, the Court ruled that a trial court is permitted 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." *Id.* at 551.

It would be more straightforward if the statute expressly recognized that a witness who refuses to testify is unavailable, like the federal provision. Prof. Méndez recommends that Section 240 be amended along those lines. Méndez Hearsay Analysis at 5. **The staff agrees with that recommendation and suggests the following language:**

240. (a) Except as otherwise provided in subdivision (b), "unavailable as a witness" means that the declarant is any of the following:

(1) Exempted or precluded on the ground of privilege from testifying concerning the matter to which his or her statement is relevant.

(2) Disqualified from testifying to the matter.

(3) Dead or unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity.

(4) Absent from the hearing and the court is unable to compel his or her attendance by its process.

(5) Absent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process.

(6) Present at the hearing but persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so.

(b) A declarant is not unavailable as a witness if the ~~exemption, preclusion, disqualification, death, inability, or absence of the declarant~~ circumstance described in subdivision (a) was brought about by the procurement or wrongdoing of the proponent of ~~his or her~~ the declarant's statement for the purpose of preventing the declarant from attending or testifying.

(c) Expert testimony which establishes that physical or mental trauma resulting from an alleged crime has caused harm to a witness of sufficient severity that the witness is physically unable to testify or is unable to testify without suffering substantial trauma may constitute a sufficient showing of unavailability pursuant to paragraph (3) of subdivision (a). As used in this section, the term "expert" means a physician and surgeon, including a psychiatrist, or any person described by subdivision (b), (c), or (e) of Section 1010.

The introduction of evidence to establish the unavailability of a witness under this subdivision shall not be deemed procurement of unavailability, in absence of proof to the contrary.

Comment. Paragraph (6) is added to Section 240(a) to codify case law recognizing that a witness who refuses to testify is unavailable. See *People v. Rojas*, 15 Cal. 3d 540, 547-53, 542 P.2d 229, 125 Cal. Rptr. 357 (1975); *People v. Francis*, 200 Cal. App. 3d 579, 245 Cal. Rptr. 923 (1988); *People v. Walker*, 145 Cal. App. 3d 886, 893-94, 193 Cal. Rptr. 812 (1983); *People v. Sul*, 122 Cal. App. 3d 355, 175 Cal. Rptr. 893 (1981). The language is drawn from Rule 804(a)(2) of the Federal Rules of Evidence. Before making a finding of unavailability, a court must take reasonable steps to induce the witness to testify, unless it is obvious that such steps would be unavailing. *Francis*, 200 Cal. App. 3d at 584, 587; *Walker*, 145 Cal. App. 3d at 894; *Sul*, 122 Cal. App. 3d at 365.

Subdivision (b) is amended to encompass the revision of subdivision (a).

Unavailability of a Witness Who Cannot Testify Due to Memory Loss

Under Rule 804(a)(3), a declarant is unavailable as a witness if the declarant “testifies to a lack of memory of the subject matter of the declarant’s statement.” The Advisory Committee’s note explains:

The position that a claimed lack of memory by the witness of the subject matter of his statement constitutes unavailability ... finds support in the cases, though not without dissent. [Citation omitted.] If the claim is successful, the practical effect is to put the testimony beyond reach, as in the other instances [of unavailability]. In this instance, however, it will be noted that the lack of memory must be established by the testimony of the witness himself, which clearly contemplates his production and subjection to cross-examination.

Unlike the federal provision, Section 240 does not expressly refer to a witness who cannot testify due to a failure of recollection. Again, however, case law addresses the point.

In *People v. Alcala*, 4 Cal. 4th 742, 778, 842 P.2d 1192, 15 Cal. Rptr. 2d 432 (1992), a witness “testified unequivocally that she had lost all memory of relevant events.” The trial court found her credible and believed that she lacked recollection.” *Id.* On that basis, the trial court determined that she was unavailable to testify and admitted testimony that she had given at an earlier trial. *Id.*

The Supreme Court upheld that ruling, even though Section 240 does not refer to unavailability due to memory loss. The Court explained that the witness’ total memory loss constituted a “mental infirmity” within the meaning of the statute. *Id.* at 778. The Court further ruled that expert medical evidence was not necessary to establish the existence of such a mental infirmity. *Id.* at 780.

Again, it would be more straightforward if Section 240 expressly spoke to the situation. Prof. Méndez recommends that the provision be amended to include the witness who suffers substantial memory loss among those who are unavailable to testify. Méndez Hearsay Analysis at 5. **The staff would implement that approach as follows:**

240. (a) Except as otherwise provided in subdivision (b), “unavailable as a witness” means that the declarant is any of the following:

(1) Exempted or precluded on the ground of privilege from testifying concerning the matter to which his or her statement is relevant.

(2) Disqualified from testifying to the matter.

(3) Dead or unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity.

(4) Absent from the hearing and the court is unable to compel his or her attendance by its process.

(5) Absent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process.

(6) Present at the hearing but testifies to a lack of memory of the subject matter of the declarant's statement.

(b) A declarant is not unavailable as a witness if the exemption, preclusion, disqualification, death, inability, or absence of the declarant circumstance described in subdivision (a) was brought about by the procurement or wrongdoing of the proponent of his or her the declarant's statement for the purpose of preventing the declarant from attending or testifying.

(c) Expert testimony which establishes that physical or mental trauma resulting from an alleged crime has caused harm to a witness of sufficient severity that the witness is physically unable to testify or is unable to testify without suffering substantial trauma may constitute a sufficient showing of unavailability pursuant to paragraph (3) of subdivision (a). As used in this section, the term "expert" means a physician and surgeon, including a psychiatrist, or any person described by subdivision (b), (c), or (e) of Section 1010.

The introduction of evidence to establish the unavailability of a witness under this subdivision shall not be deemed procurement of unavailability, in absence of proof to the contrary.

Comment. Paragraph (6) is added to Section 240(a) to codify case law recognizing that a witness who credibly testifies to a total lack of memory concerning the subject matter of an out of court statement is unavailable to testify on that subject. See *People v. Alcala*, 4 Cal. 4th 742, 778, 842 P.2d 1192, 15 Cal. Rptr. 2d 432 (1992). The language is drawn from Rule 804(a)(3) of the Federal Rules of Evidence.

Subdivision (b) is amended to encompass the revision of subdivision (a).

Unavailability of a Witness Who Is Disqualified

Unlike the federal provision, Section 240 states that a witness is unavailable if the witness is disqualified from testifying to the matter. This rule makes sense. It

would apply, for instance, if a witness is disqualified for being incapable of testifying in a manner that can be understood or incapable of understanding the duty to tell the truth. Evid. Code § 701(a). **California should retain this provision.**

Impact of Expert Testimony Regarding Physical or Mental Trauma

Another distinction between Section 240 and the corresponding federal rule is that Section 240 includes language regarding the impact of expert testimony concerning physical or mental trauma resulting from an alleged crime:

(c) Expert testimony which establishes that physical or mental trauma resulting from an alleged crime has caused harm to a witness of sufficient severity that the witness is physically unable to testify or is unable to testify without suffering substantial trauma may constitute a sufficient showing of unavailability pursuant to paragraph (3) of subdivision (a) [inability to attend or testify because of then existing physical or mental illness or infirmity]. As used in this section, the term “expert” means a physician and surgeon, including a psychiatrist, or any person described by subdivision (b), (c), or (e) of Section 1010.

The introduction of evidence to establish the unavailability of a witness under this subdivision shall not be deemed procurement of unavailability, in absence of proof to the contrary.

The first paragraph of subdivision (c) was added to Section 240 in 1984, in response to a case in which the trial court ruled that a minor victim was unavailable based solely on her mother’s testimony that her daughter was suffering from emotional difficulties. *People v. Stritzinger*, 34 Cal. 3d 505, 668 P.2d 738, 194 Cal. Rptr. 431 (1983); see 1 B. Witkin, *California Evidence Hearsay* § 22, at 702-03 (4th ed. 2000); 1 B. Jefferson, *California Evidence Benchbook Hearsay Exceptions: General Principles* § 2.39, at 62 (3d ed. 2002). The Supreme Court disagreed, holding that such testimony was insufficient to establish that the minor was unavailable and admission of the testimony violated the defendant’s right of confrontation. 34 Cal. 3d at 516-17. The Court explained that a “mental infirmity” preventing a witness from testifying must be established either by expert testimony or by the witness’ own refusal to testify. *Id.* The Legislature added the second paragraph of subdivision (c) in 1988, to further clarify the impact of expert testimony concerning physical or mental trauma resulting from an alleged crime.

Because subdivision (c) was added to provide guidance on issues that arose in litigation, the staff **recommends that it be retained**. Deleting subdivision (c) to conform to the federal provision could well generate new confusion regarding issues that have already been settled in California.

Necessity of an Attempt To Depose the Witness

A further difference between the federal and California definitions of unavailability is that in three situations the federal provision requires not only that the proponent of a hearsay statement be unable to procure the declarant's attendance at trial, but also that the proponent attempt to depose the declarant. Fed. R. Evid. 804(a)(5). The contexts in which that extra requirement applies are (1) dying declarations, (2) statements against interest, and (3) statements of personal or family history. *Id.* Rather than discussing the need for the requirement here, we plan to consider it when we discuss each of those topics.

EXCEPTIONS TO THE HEARSAY RULE

Under the hearsay rule, an out-of-court statement (hearsay) is inadmissible to prove the truth of the matter asserted. Evid. Code § 1200; Fed. R. Evid. 801(c), 802. The rule helps to ensure that evidence presented to the factfinder is reliable and is presented in a manner in which it can be effectively evaluated. In particular, hearsay is excluded because the statement is not made under oath, the declarant is not subject to cross-examination, and the factfinder cannot observe the declarant's demeanor in making the statement. As Prof. Méndez explains,

The oath is believed to impress witnesses with the importance of testifying truthfully. Having the witnesses testify before the fact finders enables them to take the witnesses' demeanor into account in assessing their credibility. And subjecting witnesses to a searching cross-examination helps the opposing party expose inadvertent as well as conscious inaccuracies in perception and recollection.

Méndez Casebook § 5.01, at 133-34.

Both the Evidence Code and the Federal Rules of Evidence include numerous exceptions to the hearsay rule. These exceptions are generally justified on one or both of the following grounds:

- (1) There is a strong need for the evidence (e.g., a dying declaration of a homicide victim may be necessary to convict the killer).

- (2) The circumstances under which the statement was made suggest that the statement is reliable to prove the truth of the matter asserted (e.g., a man who believes he is dying may be reluctant to lie due to his religious beliefs, his lack of earthly motives, or the powerful psychological forces affecting him in the face of death) .

Id. § 6.01, at 157. The Commission should bear these policy considerations and the purposes of the hearsay rule in mind as it considers the various exceptions to that rule.

PRIOR INCONSISTENT STATEMENTS

Suppose a witness testifies in court, but the testimony is inconsistent with an earlier statement made by the witness. Is the prior inconsistent statement admissible for the truth of the matter asserted, or is it subject to exclusion under the hearsay rule? The Evidence Code and the Federal Rules of Evidence handle this point differently.

California Approach

Under Evidence Code Section 1235, “[e]vidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770.” Section 770 is intended to ensure that the witness is given an opportunity to explain the inconsistency, either before or after the inconsistent statement is introduced:

770. Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing *shall be excluded* unless:

- (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or
- (b) The witness has not been excused from giving further testimony in the action.

(Emphasis added.)

The Comment to Section 1235 explains that a prior inconsistent statement is admissible as specified “because the dangers against which the hearsay rule is designed to protect are largely nonexistent.” In particular,

[t]he declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter. In many cases, the inconsistent statement is more likely to be true than

the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation. The trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency. Hence, it is in as good a position to determine the truth or falsity of the prior statement as it is to determine the truth or falsity of the inconsistent testimony given in court. Moreover, Section 1235 will provide a party with desirable protection against the “turn-coat” witness who changes his story on the stand and deprive the party calling him of evidence essential to his case.

Id.

Federal Approach

Under Federal Rule of Evidence 801(d)(1)(A), a prior inconsistent statement is admissible for the truth of the matter asserted only if the statement was given under oath subject to the penalty of perjury:

(d) **Statements which are not hearsay.** A statement is not hearsay if —

(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 —

(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*

(Emphasis added.) The federal provision is thus much narrower than its California counterpart, which does not require the inconsistent statement to be made under oath.

In federal court as under California law, extrinsic evidence of a prior inconsistent statement is not admissible unless the witness is given an opportunity to explain the inconsistency:

(b) **Extrinsic evidence of prior inconsistent statement of witness.** Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the

interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

Fed. R. Evid. 613(b).

History of the Federal Approach

As proposed by the United States Supreme Court, the federal provision would have followed California's approach to prior inconsistent statements. In fact, the Advisory Committee's Note on Rule 801(d)(1)(A) quotes at length from the Comment to Section 1235.

The House of Representatives rejected that approach, proposing instead that a prior inconsistent statement be admissible as substantive evidence only if the statement was made while the declarant was subject to cross-examination at a trial, hearing, or deposition. The House Judiciary Committee pointed out that existing federal law was even more restrictive, altogether precluding use of a prior inconsistent statement for substantive purposes, although permitting introduction of the statement for purposes of impeachment. H.R. Rep. 93-650 (1973). The committee justified its approach on grounds that "(1) unlike in most other situations involving unsworn or oral statements, there can be no dispute as to whether the prior statement was made; and (2) the context of a formal proceeding, an oath, and the opportunity for cross-examination provide firm additional assurances of the reliability of the prior statement." *Id.*

The Senate was not persuaded. It urged that the House amendment be rejected and the original proposal reinstated. The Senate Judiciary Committee explained that the requirements imposed by the House appeared unnecessary:

The House severely limited the admissibility of prior inconsistent statements by adding a requirement that the prior statement must have been subject to cross-examination, thus precluding even the use of grand jury statements. The requirement that the prior statement must have been subject to cross-examination appears unnecessary since this rule comes into play only when the witness testifies in the present trial. At that time, he is on the stand and can explain an earlier position and be cross-examined as to both.

The requirement that the statement be under oath also appears unnecessary. Notwithstanding the absence of an oath contemporaneous with the statement, the witness, when on the stand, qualifying or denying the prior statement, is under oath. In any event, of all the many recognized exceptions to the hearsay

rule, only one (former testimony) requires that the out-of-court statement have been made under oath. With respect to the lack of evidence of the demeanor of the witness at the time of the prior statement, it would be difficult to improve upon Judge Learned Hand's observation that when the jury decides that the truth is not what the witness says now but what he said before, they are still deciding from what they see and hear in court. [Citation omitted.]

S. Rep. No. 93-1277 (1974).

The Conference Committee basically stuck to the House approach, but eliminated the requirement that the prior statement have been made while the declarant was subject to cross-examination. Thus, the rule as enacted covers grand jury testimony, as well as other statements "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition."

Prof. Méndez's Analysis

In refusing to permit substantive use of a prior inconsistent statement that was not made under oath, Congress was concerned that such a statement would be too unreliable for a jury to properly evaluate. According to Prof. Méndez, "California appellate opinions do not confirm Congress's concerns." Méndez Hearsay Analysis at 6. Measured by this standard, he sees "no justification" for adopting the federal requirements for use of a prior inconsistent statement in California. *Id.*

Prof. Méndez points out, however, that the impact of the Victims' Bill of Rights should be taken into account. The Truth-in-Evidence provision does not affect "any existing statutory rule of evidence relating to ... hearsay," but the provision governing extrinsic evidence of a prior inconsistent statement (Section 770) is not in the hearsay division of the code. If interpreted literally, the Truth-in-Evidence 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." *Id.* In other words, Section 770 would not apply in a criminal case.

In such cases, then, extrinsic proof of a prior inconsistent statement could be admitted without affording the witness an opportunity to explain the inconsistency, unless the court exercised its discretion to exclude the evidence as unduly prejudicial or misleading under Evidence Code Section 352. A literal interpretation of the Truth-in-Evidence provision "would thus replace the certainty provided by specific rules governing credibility with the discretion

accorded trial judges by Section 352.” Méndez Hearsay Analysis at 7. Whether the provision is to be so construed has not been decided with regard to the restriction on extrinsic proof of a prior inconsistent statement. *Id.*

The uncertainty surrounding application of Section 770 in a criminal case could be eliminated by legislation “enacted by a two-thirds vote of the membership in each house of the Legislature” Cal. Const. art. I, § 28(d). Prof. Méndez explains that “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.” Méndez Hearsay Analysis at 7.

If the Commission is interested in this possibility, it would not be necessary to adopt the federal position allowing substantive use of a prior inconsistent statement only if the statement is obtained under oath. Section 1235 could be left as is.

Instead, Section 770 could be repealed and replaced with a new provision tracking Rule 613(b), which is closely similar in substance to Section 770:

Evid. Code § 770 (repealed). Extrinsic evidence of prior inconsistent statement

SEC. _____. Section 770 of the Evidence Code is repealed:

~~770. Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless:~~

- ~~(a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or~~
- ~~(b) The witness has not been excused from giving further testimony in the action.~~

Comment. To promote uniformity and clarify the impact of the Victims’ Bill of Rights (Cal. Const. art. I, § 28), Section 770 is repealed and replaced with new Section 770, which is drawn from Federal Rule of Evidence 613(b).

Evid. Code § 770 (added). Extrinsic evidence of prior inconsistent statement

SEC. _____. Section 770 is added to the Evidence Code, to read:

770. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the statement and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.

Comment. Section 770 is added to promote uniformity. The provision is drawn from Federal Rule of Evidence 613(b). It is

similar in substance to former Section 770 (1965 Cal. Stat. ch. 299, § 2).

Enactment of Section 770 is also intended to eliminate uncertainty regarding whether the Victims' Bill of Rights (Cal. Const. art. I, § 28) overrides the requirements for introducing extrinsic evidence of a prior inconsistent statement in a criminal case. See Cal. Const. art. I, § 28(d) (exception to Truth-in-Evidence provision may be created by statute enacted by two-thirds vote in each house of Legislature).

The proposed new provision would not include the last sentence of Rule 613(b), which states that "This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2)." The staff is unsure of the basis for this limitation, which is not explained in the Advisory Committee's Note. We invite comment on this point.

We also encourage discussion of whether it makes sense to attempt to clarify the impact of the Victims' Bill of Rights in this manner in this context. The requirement that a witness be given an opportunity to explain a prior inconsistent statement seems reasonable and it would be nice to be able to avoid such litigation in this context if possible. Any effort to limit the effect of the Truth-in-Evidence provision might trigger concerns, however, even in what seems to the staff (perhaps naïvely) to be a benign context.

Is it a good idea to force a determination of how Section 770 intersects with the Victims' Bill of Rights? Suppose, for example, that the proposed amendment is enacted but not by a two-thirds vote in each house. The Commission could revise its proposed Comment to account for this while the bill is pending before the Governor (e.g., by deleting the second paragraph). But would it be advisable to proceed with the reform under such circumstances? The Commission **needs to give careful thought to issues such as this, and to the Truth-in-Evidence provision generally.**

Prof. Friedenthal's Analysis

In his 1976 analysis for the Commission, Professor Jack Friedenthal concluded that the California approach to prior inconsistent statements was preferable to the narrower federal provision. Friedenthal, *Analysis of Differences Between the Federal Rules of Evidence and the California Evidence Code* (Jan. 1976), at 52 (hereafter, "Friedenthal Analysis"). He noted that admission of a prior

inconsistent statement for substantive purposes had a number of important advantages:

First, it is unreasonable to expect a jury to utilize such a statement solely for purposes of impeachment and not to be impressed with its content. Secondly, the presence of the witness helps guarantee accuracy since he can be cross-examined regarding his statement. Third, there is reason to believe that statements made closer in time to the events to which they relate are likely to be more accurate than statements made later including those made under oath at trial. The chief practical effect of permitting such statements to come in for their truth is that they will assist a party in avoiding a directed verdict when his sole or major witness takes the stand and suddenly refutes all that he has said before trial.

Id.

He also acknowledged a weakness in the California approach:

The chief problem with § 1235 occurs in the so-called “sandbagging” case in which one party calls to the stand a witness whom the party knows will testify that he has no information on the issues, only for the purpose of placing before the jury an “inconsistent” statement of the witness regarding the facts. This is particularly disturbing when used by a prosecutor in a criminal case. The matter is not serious if the witness admits making the statement and can be cross-examined thereon; but, if the witness denies both knowing the facts and making the statement, the opposing party is deprived of effective cross-examination.

Id.

In light of this “sandbagging” problem, Prof. Friedenthal suggested a possible amendment of Section 770(b), under which a prior inconsistent statement of a witness is admissible even though the witness is not on the stand, so long as the witness has not yet been excused from the case. “It would seem sound to limit § 770(b) to state that when a witness denies knowledge of events, a prior statement of the witness which is inconsistent with his testimony solely because it discusses these events, cannot be admitted until the witness has had an opportunity to testify as to whether or not he made the statement and, if so, to explain it.” *Id.* at 57. According to Prof. Friedenthal, this “would ensure that the substance of such an inconsistent statement would not be ‘sneaked in’ before the court had an opportunity, based on all the evidence, to decide if its admission would be unduly prejudicial.” *Id.*

In advancing this suggestion, Prof. Friedenthal recognized that the problem he was proposing to address would arise only in a rare case. “In the vast majority of cases cross-examination of the declarant will be available” *Id.* at 52. Even in the rare case when the witness denies both knowledge of the facts and the making of the statement, prejudice generally could be controlled, as by excluding the statement pursuant to Section 352. *Id.*

The staff does not know whether the “sandbagging” problem posited by Prof. Friedenthal has in fact arisen sufficiently frequently to warrant attention. We would appreciate information on this matter. **Absent indications that the problem is significant, we are not inclined to address it.**

PRIOR CONSISTENT STATEMENTS

As with prior inconsistent statements, the California and federal approaches to prior consistent statements differ in significant respects. It is questionable whether the federal provision is an improvement over its California counterparts.

California Approach

Evidence Code Section 1236 provides that “[e]vidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing and is offered in compliance with Section 791.” Section 791, which is not located in the hearsay division of the code, establishes requirements for use of a prior consistent statement:

791. Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after:

(a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or

(b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen.

The Comment to Section 1236 explains that before enactment of the Evidence Code a prior consistent statement was admissible when the credibility of a witness was attacked, but the statement could be used only for purposes of rehabilitating the witness (supporting the witness' credibility), not as evidence of the truth of the matter stated. The Code removed that limitation because there was "no reason to perpetuate the subtle distinction made in the cases." Evid. Code § 1236 Comment. Rather, it is "not realistic to expect a jury to understand that it cannot believe that a witness was telling the truth on a former occasion even though it believes that the same story given at the hearing is true." *Id.*

Federal Approach

There is only one federal provision on use of a prior consistent statement, and it is more terse than its California counterparts:

(d) **Statements which are not hearsay.** A statement is not hearsay if —

(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 —

....

(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

Fed. R. Evid. 801(d)(1)(B). Notably, this provision "do[es] 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." Méndez Hearsay Analysis at 7. The federal provision is also silent about the timing of the prior consistent statement, whereas "the Code requires the rehabilitating party to show that the witness made the consistent statement before [a] motive to fabricate or other improper motive is alleged to have arisen." *Id.* The merits of these distinctions are discussed below, as well as the impact of the Victims' Bill of Rights.

Use of a Prior Consistent Statement After a Witness Has Been Impeached by a Prior Inconsistent Statement

Section 791(a) makes clear that if a witness was impeached by a prior inconsistent statement, the witness can be rehabilitated with a consistent

statement, so long as the consistent statement was made before the inconsistent statement. The Comment to Section 791 explains that this is really just an example of a situation in which the witness is impliedly accused of fabricating testimony:

[R]ecent cases indicate that the offering of a prior inconsistent statement necessarily is an implied charge that the witness has fabricated his testimony since the time the inconsistent statement was made and justifies the admission of a consistent statement made prior to the alleged inconsistent statement. [Citation omitted.] Subdivision (a) makes it clear that evidence of a previous consistent statement is admissible under these circumstances to show that no such fabrication took place. Subdivision (a), thus, is no more than a logical extension of the general rule that evidence of a prior consistent statement is admissible to rehabilitate a witness following an express or implied charge of recent fabrication.

By clarifying that a prior consistent statement is admissible where a witness has been impeached by a prior inconsistent statement, Section 791(a) provides useful guidance with respect to a commonly occurring situation. In contrast, the federal rule does not address this matter, leaving more room for debate over whether a prior consistent statement is admissible where a witness has been impeached by a prior inconsistent statement.

To minimize needless disputes, **Section 791(a) should be retained.** It would be counterproductive to conform to the more vague federal approach.

Timing of the Prior Consistent Statement

Under Section 791(b), a prior consistent statement is admissible to rebut a charge of bias, fabrication, or other improper motive only if “the statement was made *before* the bias, motive for fabrication, or other improper motive is alleged to have arisen.” (Emphasis added.) As the Comment explains, “if the consistent statement was made *after* the time the improper motive is alleged to have arisen, the logical thrust of the evidence is lost and the statement is inadmissible.” (Emphasis in original.)

Unlike Section 791, Rule 801(d)(1)(B) fails to specify whether the prior consistent statement must have been made before bias, motive for fabrication, or other improper motive is alleged to have arisen. This led to considerable confusion and litigation. See E. Imwinkelried & T. Hallahan, *Imwinkelried and Hallahan’s California Evidence Code Annotated* 115 (1995). The matter was

finally clarified in *Tome v. United States*, 513 U.S. 150 (1995), which held that the prior consistent statement must precede the event creating a danger of bias, fabrication, or other improper motive.

By virtue of case law, the federal provision thus produces the same result as the California statute. Because Section 791 is clear on its face, however, it is preferable to the federal provision and **its language regarding the timing of a prior consistent statement should be retained**. Consistent with this analysis, the Uniform Rules of Evidence have been revised to codify the holding of *Tome*. Unif. R. Evid. 801(b)(1)(B) & Comment.

Impact of the Victims' Bill of Rights

In discussing prior consistent statements, Prof. Méndez again voices concern regarding the impact of the Victims' Bill of Rights:

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.

Méndez Hearsay Analysis at 8.

As in the context of prior inconsistent statements, the Commission needs to **carefully weigh the pros and cons of attempting to address the effect of the Victims' Bill of Rights in this context**. If the Commission is inclined to pursue the matter, we hesitate to discard the salutary aspects of Section 791 to conform to the less satisfactory federal provision. Instead, one possibility would be to amend Section 791 to expressly address the effect of the Victims' Bill of Rights:

Evid. Code § 791 (amended). Extrinsic evidence of prior consistent statement

SEC. _____. Section 791 of the Evidence Code is amended to read:

791. Evidence (a) Notwithstanding subdivision (d) of Section 28 of Article I of the California Constitution, evidence of a statement previously made by a witness that is consistent with his the witness' testimony at the hearing is inadmissible to support his the witness' credibility unless it is offered after:

(a) (1) Evidence of a statement made by him the witness that is inconsistent with any part of his the witness' testimony at the

hearing has been admitted for the purpose of attacking his the witness' credibility, and the statement was made before the alleged inconsistent statement; or

(b) (2) An express or implied charge has been made that his the witness' testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen.

(b) Nothing in this section shall be construed to imply whether subdivision (d) of Section 28 of Article I of the California Constitution affects, or does not affect, any other provision of this or any other code.

Comment. Section 770 is amended to eliminate uncertainty regarding whether the Victims' Bill of Rights (Cal. Const. art. I, § 28) overrides the requirements for introducing extrinsic evidence of a prior consistent statement in a criminal case. See Cal. Const. art. I, § 28(d) (exception to Truth-in-Evidence provision may be created by statute enacted by two-thirds vote in each house of Legislature).

An uncodified provision could be included in the bill to ensure that this amendment would become operative only if it were passed by the two-thirds margin in each house that is required under the Victims' Bill of Rights. **We encourage discussion of whether this is a sound approach.**

PRIOR STATEMENT IDENTIFYING A PERSON

Both the Evidence Code and the Federal Rules of Evidence permit an out-of-court statement identifying a person to be used as substantive evidence under certain circumstances.

The federal provision requires only that the declarant made the statement after perceiving the person, and the declarant is subject to cross-examination concerning the statement:

(d) **Statements which are not hearsay.** A statement is not hearsay if —

(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 —

....

(C) one of identification of a person made after perceiving the person

Fed. R. Evid. 801(d)(1)(C). The House Judiciary Committee justified use of the out-of-court identification on the ground that such an identification is likely to be more reliable than one made in court:

Courtroom identification can be very suggestive. The defendant is known to be present and generally sits in a certain location. Out-of-court identifications are generally more reliable. They take place relatively soon after the offense, while the incident is still reasonably fresh in the witness' mind. Out-of-court identifications are particularly important in jurisdictions where there may be a long delay between arrest or indictment and trial. As time goes by, a witness' memory will fade and his identification will become less reliable. An early, out-of-court identification provides fairness to defendants by ensuring accuracy of the identification. At the same time, it aids the government by making sure that delays in the criminal justice system do not lead to cases falling through because the witness can no longer recall the identity of the person he saw commit the crime.

H. R. Rep. 94-355 (1975).

Evidence Code Section 1238 is similar to the federal provision but imposes additional requirements for use of a prior statement of identification:

1238. Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying and:

(a) The statement is an identification of a party or another as a person who participated in a crime or other occurrence;

(b) The statement was made *at a time when the crime or other occurrence was fresh in the witness' memory*; and

(c) The evidence of the statement is offered *after the witness testifies that he made the identification and that it was a true reflection of his opinion at that time*.

(Emphasis added.) These requirements are consistent with the rationale advanced by the House Judiciary Committee in support of the federal provision. An out-of-court identification made while an incident is fresh in a witness' mind is likely to be more reliable than one made later in court, but that is not so clear with regard to an out-of-court identification made long after an event. Similarly, the reliability of an out-of-court identification is questionable if the witness is unwilling to say that it was a true reflection of the witness' opinion when made.

"Conforming the Code to the Federal Rule would result in the loss of [the Code's] additional guarantees of reliability." Méndez Hearsay Analysis at 8.

Identification of a person is often extremely damaging or extremely helpful to a party. It is important to permit introduction of evidence of an identification, but it is critical to ensure that such evidence is reliable if it is to be presented to the factfinder. Section 1238 is carefully crafted to achieve this goal. **It should not be changed.**

ADMISSIONS BY A PARTY

Both the Evidence Code and the Federal Rules of Evidence permit a party to introduce an opponent's out-of-court statements for the truth of the matter asserted. Such statements (party admissions) can be grouped into four main categories:

- (1) A party's own statements.
- (2) Adoptive admissions.
- (3) Authorized admissions.
- (4) Coconspirator's declarations.

The Evidence Code also contains hearsay exceptions for a number of out-of-court statements akin to party 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." Méndez Hearsay Analysis at 9. Prof. Méndez discusses these hearsay exceptions together with authorized admissions, but we will discuss them separately.

A Party's Own Statements

Evidence Code Section 1220 provides: "Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity." The corresponding federal provision is quite similar, except that it classifies a party's admission as nonhearsay, instead of as an exception to the hearsay rule:

(d) **Statements which are not hearsay.** A statement is not hearsay if —

....

(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

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

The Commission has previously decided not to adopt the federal approach of classifying party admissions and certain other types of statements as nonhearsay. Minutes (Sept. 2002) at 7. Section 1220 is also superior to Rule 801(d)(2)(A) because it makes clear that the declarant may be a party in either an individual or a representative capacity for the rule to apply. **Section 1220 should therefore be left as is.**

Adoptive Admissions

The federal provision governing use of an adoptive admission (Fed. R. Evid. 801(d)(2)(B)) is quite similar to the corresponding California provision (Evid. Code § 1221), except that it classifies an adoptive admission as nonhearsay rather than as an exception to the hearsay rule. Because the federal provision offers no apparent advantages and the Commission has previously determined not to use its classification scheme, **we would leave Section 1221 alone.**

Authorized Admissions

There are a number of significant differences between the California and the federal provisions governing use of authorized admissions.

California Approach

Evidence Code Section 1222 governs use of an admission authorized by a party:

1222. Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:

(a) The statement was made by a person authorized by the party to make the statement or statements for him concerning the subject matter of the statement; and

(b) The evidence is offered either after admission of evidence sufficient to sustain a finding of such authority or, in the court’s discretion as to the order of proof, subject to the admission of such evidence.

“Under this exception, if a party authorized an agent to make statements on his behalf, such statements may be introduced against the party under the same

conditions as if they had been made by the party himself.” Evid. Code § 1222 Comment. “The authority of the declarant to make the statement need not be express; it may be implied.” *Id.* Whether the declarant had authority to make the statement is to be determined under the substantive law of agency. *Id.*

Federal Approach

The federal provision on authorized admissions is Federal Rule of Evidence 801(d)(2)(C):

(d) **Statements which are not hearsay.** A statement is not hearsay if —

....

(2) **Admission by party-opponent.** The statement is offered against a party and is —

....

(C) a statement by a person authorized by the party to make a statement concerning the subject

....

The contents of the statement shall be considered but are not alone sufficient to establish the declarant’s authority under subdivision (C)

The Federal Rules of Evidence also contain a provision specifically covering statements made by a party’s agent or servant:

(d) **Statements which are not hearsay.** A statement is not hearsay if —

....

(2) **Admission by party-opponent.** The statement is offered against a party and is —

....

(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

....

The contents of the statement shall be considered but are not alone sufficient to establish ... the agency or employment relationship and scope thereof under subdivision (D)

California does not have a comparable provision.

Proof of Preliminary Facts

Section 1222(b) spells out that a statement allegedly authorized by a party is admissible against the party only if the proponent of the evidence has

introduced, or has promised to introduce, evidence sufficient to sustain a finding that the statement was in fact authorized. Prof. Friedenthal maintains that Section 1222(b) is “unnecessary and redundant in light of Evidence Code §§ 403 and 405 which speak generally of when and before whom preliminary facts are to be proven.” Friedenthal Analysis at 47. He explains that “[t]he particular matter is covered by § 403(1) dealing with situations where relevance depends upon the existence of a preliminary fact; Section 403 has identical requirements as § 1222(b).” *Id.*

Prof. Friedenthal is correct that the requirements of Section 403 are the same as those in Section 1222(b):

403. The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when:

(1) The relevance of the proffered evidence depends on the existence of the preliminary fact

....

(b) Subject to Section 702, the court may admit conditionally the proffered evidence under this section, subject to evidence of the preliminary fact being supplied later in the course of the trial.

But it is not blatantly obvious that Section 403 would be the applicable rule if Section 1222(b) were deleted. The Comment to Evidence Code Section 405 offers guidance on when a preliminary fact determination relating to hearsay is governed by Section 403 as opposed to Section 405. The Comment does not directly state what happens with regard to an authorized admission, however, and some litigants and practitioners may not have ready access to the Comment.

Deleting Section 1222(b) might thus deprive some persons of guidance that they would have found helpful. The staff is therefore **inclined to retain Section 1222(b) despite the argument that it is unnecessary.**

A further issue is whether the approach used in Section 1222(b), requiring introduction of “evidence sufficient to sustain a finding” that the admission was authorized, should be replaced by a stiffer standard such as proof by a preponderance of the evidence. In addition, Section 1222(b) contemplates that admissible evidence will be considered in determining whether a statement can be introduced as an authorized admission. Under the Federal Rules of Evidence,

in contrast, a judge making a preliminary fact determination “is not bound by the rules of evidence except those with respect to privileges.” Fed. R. Evid. 104(a).

The relative merits of these approaches have been extensively debated. We will defer consideration of these issues until Prof. Méndez has completed his analysis of the role of judge and jury, which will be Part 3 of his background study for the Commission.

We will also defer consideration of Rule 801’s requirement that the contents of a statement offered as an authorized admission “shall be considered but are not alone sufficient to establish” that a party authorized the declarant to make the statement. The possible need for such a requirement only arises if inadmissible evidence can be considered in making a preliminary fact determination. Thus, it would be premature to try to address the matter until the Commission has resolved whether to stick with the requirement that only admissible evidence be considered.

Statements Made To a Party

Under Section 1222, an out-of-court statement can be used against a party only if “the statement was made by a person authorized by the party to make the statement or statements *for* him concerning the subject matter of the statement.” (Emphasis added.) In drafting the corresponding federal provision, the Evidence Advisory Committee observed that California’s approach, requiring that the statement be made by a person authorized by the party to make the statement *for* him, “is perhaps an ambiguous limitation to statements to third persons.” Fed. R. Evid. 801 advisory committee’s note.

The Advisory Committee sought to ensure that the federal provision was broadly drafted to apply regardless of whether the statement was made to a third person or to someone else (e.g., a co-worker or the party who authorized the statement). The committee explained:

No authority is required for the general proposition that a statement authorized by a party to be made should have the status of an admission by the party. However, the question arises whether only statements to third persons should be so regarded, to the exclusion of statements by the agent to the principal. The rule is phrased broadly so as to encompass both.... [*C*]ommunication to an outsider has not generally been thought to be an essential characteristic of an admission. Thus a party’s books or records are usable against him, without regard to any intent to disclose to third persons.

Id. (emphasis added).

Prof. Méndez advises the Commission to follow the federal approach on this point. “The limitation in the Code is inadvertent and should [be] eliminated by adopting the federal definition or deleting ‘for him.’” Méndez Hearsay Analysis at 9.

The Commission could implement his advice **by amending Section 1222 as follows:**

Evid. Code § 1222 (amended). Authorized admission

SEC. _____. Section 1222 of the Evidence Code is amended to read:

1222. Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if both of the following conditions are satisfied:

(a) The statement was made by a person authorized by the party to make ~~the statement or statements for him concerning the subject matter of the statement; and~~ a statement concerning the subject.

(b) The evidence is offered either after admission of evidence sufficient to sustain a finding of such authority or, in the court’s discretion as to the order of proof, subject to the admission of such evidence.

Comment. Subdivision (a) of Section 1222 is amended to make clear that the provision applies regardless of whether the statement in question was made to a third person, to the party who authorized the statement, to a co-worker, or to someone else. The language is drawn from Rule 801(d)(2)(C) of the Federal Rules of Evidence. For further discussion, see Fed. R. Evid. 801 advisory committee’s note.

Subdivision (a) is also amended to delete surplusage. See Section 10 (singular includes plural).

Statements by a Party’s Agent or Servant

Under Rule 801(d)(2)(D), an out-of-court statement can be used against a party if it is “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.” The Evidence Advisory Committee explained the basis for this rule:

The tradition has been to test the admissibility of statements by agents, as admissions, by applying the usual test of agency. Was the admission made by the agent acting in the scope of his employment? Since few principals employ agents for the purpose of making damaging statements, the usual result was exclusion of

the statement. Dissatisfaction with this loss of valuable and helpful evidence has been increasing. A substantial trend favors admitting statements related to a matter within the scope of the agency or employment. [Citations omitted.]

Fed. R. Evid. 801 advisory committee's note. Prof. Friedenthal provides further explanation of the policies for admitting such out-of-court statements:

First, the statement is that of a person directly involved and therefore likely to be of importance. Second, the motive of the agent to lie to his employer's detriment is curbed by the fact that a principal or employer has a substantial hold over those who work for him (hence the requirement that the agency must exist at the time the statement is made). Third, if the agent slants his statement in favor of the employer it will not be used, for only an opposing party can introduce an admission.

Friedenthal Analysis at 47.

In drafting the Evidence Code, the Commission proposed to create a similar rule in California. Under the proposed rule, a statement that would be admissible if made by the declarant at the hearing could be used against a party if "[t]he statement is that of an agent, partner or employee of the party and (i) the statement concerned a matter within the scope of the agency, partnership or employment and was made before the termination of such relationship, and (ii) the statement is offered after, or in the judge's discretion subject to, proof by independent evidence of the existence of the relationship between the declarant and the party" Tentative Recommendation on *The Uniform Rules of Evidence* (Aug. 1962), 4 Cal. L. Revision Comm'n Reports 302, 321. In near-final form, the Comment to the proposed rule (then called Section 1225) stated:

Section 1223 makes authorized extrajudicial statements admissible. Section 1225 goes beyond this, making admissible against a party specified extrajudicial statements of an agent, partner or employee, whether or not authorized. A statement is admitted under Section 1225, however, only if it would be admissible if made by the declarant at the hearing whereas no such limitation is applicable to authorized admissions.

The practical scope of Section 1225 is quite limited. The spontaneous statements that it covers are admissible under Section 1240. The self-inculpatory statements which it covers are admissible under Section 1230 as declarations against the declarant's interest. Where the declarant is a witness at the trial, many other statements covered by Section 1225 would be admissible as inconsistent

statements under Section 1235. Thus, Section 1225 has independent significance only as to unauthorized, nonspontaneous, noninculpatory statements of agents, partners and employees who do not testify at the trial concerning the matters within the scope of the agency, partnership or employment. For example, the chauffeur's statement following an accident, "It wasn't my fault; the boss lost his head and grabbed the wheel," would be inadmissible as a declaration against interest under Section 1230, it would be inadmissible as an authorized admission under Section 1223, it would be inadmissible under Section 1235 unless the employee testified inconsistently at the trial, it would be inadmissible under Section 1240 unless made spontaneously, but it would be admissible under Section 1225.

Section 1225 is based on Rule 63(9)(a) of the Uniform Rules of Evidence; and it goes beyond existing California law as found in subdivision 5 of Section 1870 of the Code of Civil Procedure (superseded by Evidence Code Section 1223). Under existing California law only the statements that the principal has authorized the agent to make are admissible. [Citation omitted.]

There are two justifications for the limited extension of the exception for agents' statements provided in Section 1225. First, because of the relationship which existed at the time the statement was made, it is unlikely that the statement would have been made unless it were true. Second, the existence of the relationship makes it highly likely that the party will be able to make an adequate investigation of the statement without having to resort to cross-examination of the declarant in open court.

Memorandum 64-66, p. 1009-10 (Sept. 1964).

The provision was deleted from the proposal due to an objection of a State Bar committee. The committee agreed with portion of the proposed Comment explaining that the practical scope of the proposed provision was limited. Nevertheless, the committee concluded that "the dangers inherent in this section are such as to warrant opposition to it." Memorandum 64-101, Exhibit p. 28. The committee offered this explanation:

The unauthorized statement of an employee or agent with regard to matters involved in a complex business litigation may be and frequently is of a damaging character, yet it may be based upon faulty knowledge, imperfect observation or inaccurate reporting of the acts or statements of another. Once admitted, the party against whom the statements are admitted would not even have the recourse of cross-examination of the declarant. Unauthorized

statements really have no place in litigation unless they fit the tests of trustworthiness inherent in other exceptions to the hearsay rule.

Id. at Exhibit pp. 28-29.

The State Bar committee's concerns seem particularly compelling when one considers the relatively new phenomenon of widespread use of email in the workplace. Employees may be quite careless, indiscreet, impolite, or otherwise rash or inappropriate in their email communications, and an employer may have little control over what they say. It might not be fair to hold an employer accountable for such statements by allowing the statements to be used against the employer simply because they were made while the employee was on the job. Conversely, however, excluding such communications might impede efforts to uncover corporate wrongdoing or learn what actually occurred in a disputed transaction.

Prof. Méndez recommends that California adopt a provision like the federal one; Prof. Friedenthal reached the same conclusion in 1976. Méndez Hearsay Analysis at 9; Friedenthal Analysis at 49. **Whether to follow that approach requires balancing of the competing policy considerations, a matter we leave to the Commission.** If the Commission would find it helpful, however, we could do additional research (focusing on case law and literature regarding the federal provision), in hopes that this would shed further light on the policy issues.

Should the Commission decide to add a provision similar to the federal one, we suggest the following language:

Evid. Code § 1229 (added). Statement by agent or servant

SEC. _____. Section 1229 is added to the Evidence Code, to read:

1229. Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if it is 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.

Comment. Section 1229 is added to promote uniformity. It is drawn from Rule 801(d)(2)(D) of the Federal Rules of Evidence. A statement admitted pursuant to this section is likely to be reliable, because any motive that an agent has to lie to the detriment of the agent's principal is curbed by the fact that the principal has substantial control over the agent. For further discussion of the basis for this exception, see Fed. R. Evid. 801 advisory committee's note.

As with authorized admissions, the Commission should defer consideration of whether to specify, as in Rule 801, that the contents of the statement “shall be considered but are not alone sufficient to establish” the agency or employment relationship and its scope. Again, it would be premature to try to address this matter, because the possible need for such a requirement only arises if inadmissible evidence can be considered in making a preliminary fact determination, and we do not yet have Prof. Méndez’s analysis of the role of judge and jury.

Coconspirator’s Declarations

Both the Evidence Code and the Federal Rules of Evidence permit a damaging statement by a party’s coconspirator to be used as substantive evidence against the party, even if there is no evidence that the party authorized the coconspirator to make the statement.

Evidence Code Section 1223 provides:

1223. Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:

(a) The statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy;

(b) The statement was made prior to or during the time that the party was participating in that conspiracy; and

(c) The evidence is offered either after admission of evidence sufficient to sustain a finding of the facts specified in subdivisions (a) and (b) or, in the court’s discretion as to the order of proof, subject to the admission of such evidence.

The comparable federal provision is Rule 801(d)(2)(E) of the Federal Rules of Evidence, which states:

(d) **Statements which are not hearsay.** A statement is not hearsay if —

....

(2) **Admission by party-opponent.** The statement is offered against a party and is —

....

(E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

The contents of the statement shall be considered but 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 under subdivision (E).

“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.” Méndez Hearsay Analysis at 11. Prof. Méndez has deferred discussion of those points to his analysis on the role of judge and jury. *Id.* at 12. Thus, it is premature to consider them now, just as it is premature to consider similar issues relating to authorized admissions and statements by an agent or servant.

The Commission can, however, resolve one point relating to coconspirator declarations at this time. The California provision clearly specifies that a coconspirator’s statement may be admissible if the statement was “made *prior to* or during the time that the party was participating in that conspiracy.” Evid. Code § 1223(b) (emphasis added). In contrast, the federal provision refers to “a statement by a coconspirator of a party *during the course and in furtherance of the conspiracy.*” Fed. R. 801(d)(2)(E) (emphasis added). It is not clear from the statutory language whether a statement made *prior to* when a person joins a conspiracy is admissible under the rule. Case law, establishes, however, that such a statement is admissible under the federal rule, just as in California. *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948).

Thus, the California provision addresses this point clearly, whereas the federal rule is ambiguous on its face but reaches the same result through case law. **This aspect of the California provision should be retained**, as Prof. Méndez recommends. Méndez Hearsay Analysis at 11, 12.

Respectfully submitted,

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