

## First Supplement to Memorandum 2003-7

### Comparison of Evidence Code with Federal Rules: Hearsay Issues

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The Evidence Code includes four hearsay exceptions (Evid. Code §§ 1224-1227) for statements that are similar to party admissions but are not made, authorized, or adopted by a party. The Federal Rules of Evidence do not contain such provisions. This supplement describes the four exceptions and analyzes whether they should be retained.

#### STATEMENT OF DECLARANT WHOSE LIABILITY OR BREACH OF DUTY IS IN ISSUE

Evidence Code Section 1224 provides:

1224. 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 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.

Under Section 1224, “if a party’s liability is vicarious, *i.e.*, based on the liability of another, then statements of the person who is primarily liable can come in against the party, even though no agency relationship exists.” Friedenthal Analysis at 47. For instance, if A borrows a car from B and crashes the car into C, then B might be liable to C as the owner of the car. Under Section 1224, statements of A could be used against B in an action against B, even though A is not an agent of B. *Id.*

Case law is murky on whether Section 1224 applies where an agency relationship exists. In an early case, the California Supreme Court indicated that Section 1224 did not apply to an employment relationship. *Markley v. Beagle*, 66 Cal. 2d 951, 958-60, 429 P.2d 129, 59 Cal. Rptr. 809 (1967). Later, however, a court of appeal declined to follow *Markley*, maintaining that *Markley* should be limited to its facts. *Labis v. Stopper*, 11 Cal. App. 3d 1003, 1005, 89 Cal. Rptr. 926 (1970).

Section 1224 derives from former Code of Civil Procedure Section 1851, which was applied in many cases. *See, e.g., Butte County v. Morgan*, 76 Cal. 1, 5, 18 P. 115 (1888); *Ingram v. Bob Jaffe Co.*, 139 Cal. App. 2d 193, 198, 293 P.2d 132 (1956); *see also Chadbourn, A Study Relating to the Hearsay Evidence Article of the Uniform Rules of Evidence*, 4 Cal. L. Revision Comm'n Reports 401, 491-96 (1962). As yet, however, the staff has not been able to find a clear explanation of the policy basis for this hearsay exception — i.e., an explanation of why the evidence in question is sufficiently reliable or necessary (or both) to recognize an exception to the hearsay rule.

In two respects, Section 1224 is broader than Evidence Code Section 1230, which permits a declaration against interest to be used as substantive evidence:

(1) A statement can be introduced under Section 1230 only if the declarant is unavailable. Section 1224 does not require that the declarant be unavailable.

(2) A statement can be introduced under Section 1230 only if it was against the declarant's interest when made. Section 1224 contains no such limitation.

#### STATEMENTS OF SPECIFIED PREDECESSORS IN INTEREST

Evidence Code Sections 1225, 1226, and 1227 make a statement by a party's predecessor in interest admissible under specified circumstances:

1225. When a right, title, or interest in any property or claim asserted by a party to a civil action requires a determination that a right, title, or interest exists or existed in the declarant, evidence of a statement made by the declarant during the time the party now claims the declarant was the holder of the right, title, or interest is as admissible against the party as it would be if offered against the declarant in an action involving that right, title, or interest.

1226. Evidence of a statement by a minor child is not made inadmissible by the hearsay rule if offered against the plaintiff in an action brought under Section 376 of the Code of Civil Procedure for injury to such minor child.

1227. Evidence of a statement by the deceased is not made inadmissible by the hearsay rule if offered against the plaintiff in an action for wrongful death brought under Section 377 of the Code of Civil Procedure.

These exceptions sometimes provide a useful counterbalance to Section 1224, which "can confer a benefit on the plaintiff without according the defendant a

similar advantage.” Méndez Hearsay Analysis at 10. The Comment to Section 1225 explains:

Under Section 1224, for example, a party suing an executor on an obligation incurred by the decedent prior to his death may introduce admissions of the decedent. Similarly, under Section 1225, a party sued by an executor on an obligation claimed to have been owed to the decedent may introduce admissions of the decedent.

It would be “grossly unfair to permit only the plaintiff executor to introduce statements of the defendant’s decedent and not to afford the defendant the same rights with regard to plaintiff’s decedent.” Friedenthal Analysis at 49.

#### ANALYSIS

Prof. Méndez states that Sections 1224-1227 “provide useful exceptions and should be retained if the Code is conformed to the Federal Rules.” Méndez Hearsay Analysis at 10. Prof. Friedenthal expresses quite a different view. In his opinion, the propriety of Sections 1224-1227 is

questionable, for without even the safeguard brought about by the agency relationship, there seems little justification for a special exception for these types of hearsay. First, a special California exception is unnecessary if the statements were against declarant’s interest when made. Such statements would come in under the broad exception for declarations against interest, § 1230, which is justified by the fact that people do not usually make untrue statements which they perceive to be personally detrimental. Second, in the absence of normal safeguards, the most dangerous types of hearsay are admissible under the California code. For example, a disgruntled employee, fired because of his accident record, has nothing to lose by blaming any specific accident on his former employer, both to obtain revenge against the employer and to help vindicate himself. Such a statement will be admissible against the employer under § 1224 if the accident occurred prior to the time the employee was discharged. A similar situation would occur if the borrower of a car, to exonerate himself, tells the police that an accident was due not to his poor driving but to improper maintenance by the owner.

Friedenthal Analysis at 48.

Prof. Friedenthal also notes that “unlike a direct admission of a party, which is admissible because the party (or his legal representative) will be present at trial

and can and will take steps directly to correct or explain the admission, a statement by a non-agent witness cannot be refuted in the same way.” *Id.* The declarant may be unavailable to explain the statement, and the party generally will be unable to explain the statement because the party was not present when the critical events occurred. *Id.* “Furthermore, the declarant may not have the same motive as does a party to protect the party’s interests.” *Id.*

Prof. Friedenthal acknowledges that a primary reason for including Sections 1225-1227 in the Evidence Code “was to equalize the situation caused by § 1224.” *Id.* at 49. He points out, however, that if Section 1224 were repealed, “the justification for §§ 1225-1227 would be greatly diminished.” *Id.*

He recommends that all four of these sections “be repealed in favor of a provision akin to Federal Rule 801(d)(2)(D),” which creates a hearsay rule exemption for a statement of an agent or servant acting within the scope of the agency or employment. Friedenthal Analysis at 49. He explains that “[g]iven the broad range of hearsay exceptions for declarations against interest, and for excited and contemporaneous utterances that exist in California, neither the exception in § 1224 nor those in §§ 1225-1227 can be justified either on grounds that they involve statements likely to be accurate or that there is great necessity for such statements despite the hearsay hazards.” *Id.*

The federal provision governing statements by an agent or servant is discussed at pages 30-34 of Memorandum 2003-7. Whatever position the Commission takes regarding that provision should be taken into account in determining whether to retain Sections 1224-1227. The staff recommends caution in deciding whether to repeal these long-standing exceptions to the hearsay rule in California. We encourage participants in this study to share any thoughts or experiences they have regarding these provisions. **It might be appropriate to conduct further research and analysis before the Commission takes a position,** although we are not confident we will find anything useful. An alternate approach would be to reproduce the provisions in the tentative recommendation and solicit comment on whether they should be repealed, without taking a tentative position on the matter.

Respectfully submitted,

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