Study K-200 August 4, 2003

Memorandum 2003-26

Comparison of Evidence Code with Federal Rules: Hearsay Issues

In its study comparing the Evidence Code to the Federal Rules of Evidence, the Commission is working towards the preparation of a tentative recommendation covering some or all of the hearsay provisions. We have been proceeding through the analysis prepared by the Commission's consultant, Professor Miguel Méndez of Stanford Law School. Continuing in that manner, this memorandum discusses the following hearsay exceptions:

(1) Contemporaneous statement and present sense impression.
(2) Spontaneous statement and excited utterance.
(3) Statement regarding declarant's then existing mental or physical state.
(4) Statement regarding declarant's previously existing mental or physical state.
(5) Past recollection recorded.

The memorandum concludes with an analysis of how the Truth-in-Evidence provision of the Victims' Bill of Rights might affect the reforms recommended by the staff relating to these exceptions.

As before, the focus is on differences between the California and the federal provisions, as well as on unique aspects of the Uniform Rules of Evidence. We have not researched other issues relating to the pertinent provisions.

(The hearsay analysis prepared by Prof. Méndez — 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. The analysis has also been published. See Méndez, *California Evidence Code — Federal Rules of Evidence, I. Hearsay and Its Exceptions: Conforming the Evidence Code to the Federal Rules*, 37 U.S.F. L. Rev. 351 (2003).)

California recognizes a hearsay exception for what is commonly referred to as a contemporaneous statement, while the Federal Rules of Evidence include an exception for a present sense impression. These exceptions differ in significant respects.

California Approach: Hearsay Exception for a Contemporaneous Statement

Evidence Code Section 1241 is the provision creating a hearsay exception for a contemporaneous statement:

> 1241. Evidence of a statement is not made inadmissible by the hearsay rule if the statement:
> (a) Is offered to explain, qualify, or make understandable conduct of the declarant; and
> (b) Was made while the declarant was engaged in such conduct.

Prof. Méndez points out that this provision would apply where one person gives another a pen, and simultaneously makes a statement about the transfer (e.g., "You can borrow my pen" or "I want you to have this pen"). The statement determines the legal impact of the event — whether the speaker made a gift as opposed to a loan. Méndez Hearsay Analysis at 13.

Technically, however, the statement is not hearsay but rather a verbal act, a statement that has legal significance and is offered for that purpose. *Id*. The Comment to Section 1241 acknowledges that "[s]ome writers do not regard evidence of this sort as hearsay evidence." The Legislature nonetheless included the exception in the Evidence Code, to "remov[e] any doubt that might otherwise exist concerning the admissibility of such evidence under the hearsay rule." Evid. Code § 1241 Comment.

Federal Approach: Hearsay Exception for a Present Sense Impression

"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." Méndez Hearsay Analysis at 13. But Federal Rule of Evidence 803(1) creates a hearsay exception for a present sense impression, which is a statement that describes or explains an event or condition that the speaker is perceiving or recently perceived:

> 803. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

> (1) **Present sense impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

Uniform Rule of Evidence 803(1) is almost identical to the corresponding federal rule.

Comparison of the California and the Federal Approaches

As Justice Bernard Jefferson explains in his well-known treatise, the California exception for a contemporaneous statement differs from the federal exception for a present sense impression in three major respects:

- Under Rule 803(1), the declarant's statement can be that of describing the conduct of another person, while under Evid C § 1241, the declarant's statement must be that of explaining *the declarant's own conduct*;
- Under the contemporaneous-statement exception of Evid C § 1241, the declarant's conduct that is explained must be equivocal in nature and need explanation, but, under the present-sense-impression exception of Rule 803(1), a declarant's statement may be one describing an event or condition that is unequivocal and unambiguous in nature;
- Under Rule 803(1), the declarant's statement may be made immediately after the event or condition has been completed, while, under Evid C § 1241, a declarant's statement made after his or her conduct has been completed is inadmissible.

1 B. Jefferson, Jefferson's California Evidence Benchbook *Spontaneous and Contemporaneous Statements* § 13.14, at 207 (3d ed. 1997 & 2003 update) (emphasis in original).

History of the California Provision

As originally proposed by the Law Revision Commission in 1965, Evidence Code Section 1241 would have been similar to the later-enacted federal provision regarding present sense impressions, but would only have applied if the declarant was unavailable as a witness. *Recommendation proposing an Evidence Code*, 7 Cal. L. Revision Comm'n Reports 1, 237-38 (1965). It appeared that this might be an extension of the law as it existed at that time, both in California and elsewhere. *See id.*; *see also* McFarland, *Present Sense Impressions Cannot Live in the Past*, 28 Fla. St. U. L. Rev. 907, 907 (2001).

While the legislation was pending, a joint committee of the Judicial Council and the Conference of California Judges strongly urged the Commission to "confine the exception to the one recognized in existing law for statements accompanying acts that are offered to explain such acts." Memorandum 65-4, pp. 16-17. Previously, a State Bar committee (the Special Committee of the State Bar to Consider the Uniform Rules of Evidence) had suggested that the provision be deleted altogether, because no compelling necessity for it had been shown and it would apply to many statements "the accuracy of which may be subject to substantial doubt." Memorandum 64-101, Exhibit I at 30 (item 55). In light of these objections, the provision was narrowed to its present scope. See First Supplement to Memorandum 65-4, p. 31.

Analysis and Recommendation

Prof. Méndez recommends keeping California's exception for a contemporaneous statement. "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." Méndez Hearsay Analysis at 14. The staff is inclined to agree that **Section 1241 is useful and should be left as is.**

Prof. Méndez further recommends adding an exception for a present sense impression to the Evidence Code, similar to the federal provision. *Id.* Professor Jack Friedenthal made the same recommendation in his 1976 analysis for the Commission comparing the Evidence Code with the Federal Rules of Evidence. Friedenthal, *Analysis of Differences Between the Federal Rules of Evidence and the California Evidence Code* (Jan. 1976), at 55 (hereafter, "Friedenthal Analysis").

There is a strong policy basis for recognizing a hearsay exception for a present sense impression. As explained in the proposed Comment to the version of Section 1241 originally proposed by the Commission,

> The statements are sufficiently trustworthy to be considered by the trier of fact for three reasons. *First*, there is no problem concerning the declarant's memory because the statement is simultaneous with the event. *Second*, there is little or no time for calculated misstatement. *Third*, the statement is usually made to one whose proximity provides an immediate opportunity to check the accuracy of the statement in light of the physical facts.

Recommendation proposing an Evidence Code, *supra*, at 238; *see also* Fed. R. Evid. 803 advisory committee's note; Chadbourn, *A Study Relating to the Hearsay Evidence*

Article of the Uniform Rules of Evidence, 4 Cal. L. Revision Comm'n Reports 401, 466-68 (1963).

As best we can tell from limited research, the fears that the State Bar and the judiciary expressed about the exception when the Evidence Code was drafted in the early 1960's have not materialized to any substantial degree in the federal courts, which have now recognized the exception for more than a quarter century. The present sense impression has not proved to be "the bold new exception many anticipated." McFarland, *supra*, at 913. A few commentators have suggested some tinkering with the exception. *See id*. at 929-32 (Rule 803(3) should only apply to a statement made while perceiving an event, not a statement made immediately after an event); Passaannante, *Res Gestae, the Present Sense Impression Exception and Extrinsic Corroboration Under Federal Rule of Evidence 803(1) and Its State Counterparts*, 17 Fordham Urb. L.J. 89, 113-14 (1989) ("present sense impression exception should be applied as codified in the Federal Rules of Evidence," not burdened with additional requirements for admissibility imposed in some states). But we are not aware of any serious proposal to repeal the federal exception, and the federal approach has been adopted in a clear majority of states. McFarland, *supra*, at 907, 932; Passaannante, *supra*, at 98-99 & n.61. It seems reasonable for California to do the same.

If the Commission agrees that it is good policy, **an exception for a present sense impression could be created by adding a provision like the following:**

> **Evid. Code § 1240. 5 (added). Present sense impression**
>
> SEC. ____. Section 1240.5 is added to the Evidence Code, to read:
>
> 1240.5. Evidence of a statement is not made inadmissible by the hearsay rule if both of the following conditions are satisfied:
>
> (a) The statement is offered to describe or explain an event or condition.
>
> (b) The statement was made while the declarant was perceiving the event or condition, or immediately thereafter.
>
> **Comment.** Section 1241 is drawn from Rule 803(1) of the Federal Rules of Evidence. A present sense impression is sufficiently trustworthy to be considered by the trier of fact for three reasons. First, there is no problem concerning the declarant's memory because the statement is simultaneous with the event. Second, there is little or no time for calculated misstatement. Third, the statement is usually made to one whose proximity provides an immediate opportunity to check the accuracy of the statement in light of the physical facts. Chadbourn, *A Study Relating to the Hearsay Evidence*

Article of the Uniform Rules of Evidence, 4 Cal. L. Revision Comm'n Reports 401, 467 (1963); see also Fed. R. Evid. 803 advisory committee's note.

SPONTANEOUS STATEMENT AND EXCITED UTTERANCE

Both the Evidence Code and the Federal Rules of Evidence include a hearsay exception for a statement made while the speaker is under the stress of an exciting event. The California provision refers to this type of statement as a "spontaneous statement;" the federal rule uses the term "excited utterance."

There is some overlap between these exceptions and the federal exception for a present sense impression. But not every present sense impression is a spontaneous statement or excited utterance, or vice versa. A spontaneous statement or excited utterance must be made under the stress of excitement caused by an event or condition; a present sense impression need not stem from an event that causes stress. Further, while a spontaneous statement or an excited utterance can be made at any time during the excited state caused by an event, a present sense impression must be made while the declarant is perceiving an event or shortly thereafter. Méndez Hearsay Analysis at 13.

The exceptions for a spontaneous statement and an excited utterance are discussed in greater detail below.

California Approach: Spontaneous Statement Narrating, Describing, or Explaining an Act, Condition, or Event Perceived By the Declarant

Evidence Code Section 1240 provides:

> 1240. Evidence of a statement is not made inadmissible by the hearsay rule if the statement:
>
> (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and
>
> (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception.

"The rationale of this exception is that the spontaneity of such statements and the consequent lack of opportunity for reflection and deliberate fabrication provide an adequate guarantee of their trustworthiness." Evid. Code § 1240 Comment. "[I]n the stress of nervous excitement, the reflective faculties may be stilled and the utterance may become the instinctive and uninhibited expression of the speaker's actual impressions and belief." *People v. Farmer*, 47 Cal. 3d 888, 903, 765 P.2d 940, 254 Cal. Rptr. 508 (1989). The crucial element in determining whether

the exception applies is "not the nature of the statement but the mental state of the speaker." *Id*.

Federal Approach: Excited Utterance Relating to a Startling Event

Federal Rule of Evidence 803(2) sets forth a similar but not identical exception:

> 803. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (2) **Excited utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

This rule is broader than the corresponding California provision, because it covers any statement that "relates" to a startling event, while the California provision only admits a statement that "[p]urports to narrate, describe, or explain an act, condition, or event perceived by the declarant."

Recommendations of Profs. Friedenthal and Méndez

Prof. Friedenthal noted the broader scope of the federal provision in his 1976 analysis. Friedenthal Analysis at 55. He explained that "if a person is injured in a certain manner, the spontaneous excited statement of a witness that 'She's the third person hurt that way this month,' arguably, might not fall under the California provision although it would come under the federal rule." *Id*. Prof. Friedenthal did not consider it necessary to revise the California provision. He seemed to accept the policy of the federal rule, but argued that inclusion of the word "explain" in Section 1240 was "adequate to give sufficient flexibility to the courts to admit spontaneous statements when otherwise appropriate." *Id*.

As predicted by Prof. Friedenthal, the courts "have not applied the limitation in Section 1240 strictly." Méndez Hearsay Analysis at 14. For example, *Farmer* upheld the admission of a statement in which the declarant identified his assailant as an acquaintance and drug customer of his roommate. 47 Cal. 3d at 903-05. Another California Supreme Court decision upheld the admission of a statement in which a rape victim reported that the accused had confessed to a murder in the course of raping her. The defense argued that the statement should be excluded because the declarant was not a witness to the murder, and "therefore was not spontaneously recounting an incident she had observed in person." *People v. Arias*, 13 Cal. 4th 770, 807-08, 913 P.2d 980, 51 Cal. Rptr. 2d 770

(1996). But the Court disagreed, pointing out that the declarant was describing the rape to which she had been subjected. *Id.* at 808. In light of the liberal interpretation given to the California provision, Prof. Méndez recommends that it "be amended to include statements *relating* to the startling event," as under the corresponding federal rule. Méndez Hearsay Analysis at 14 (emphasis added).

Staff Recommendation

The staff agrees with Prof. Méndez that the California provision should be amended to conform to the federal approach. The policy underlying the exception (the idea that the stress of excitement results in instinctive expression of a speaker's actual views) applies to any "statement relating to a startling event," not just to a statement that "[p]urports to narrate, describe, or explain an act, condition, or event perceived by the declarant." Although California courts have interpreted Section 1240 liberally, it would be better to remove ambiguity about its proper scope and eliminate disputes over whether a statement made under the stress of excitement "narrates, describes, or explains an act, condition, or event perceived by the declarant." That could be accomplished by **amending Section 1240 along the following lines:**

> **Evid. Code § 1240 (amended). Spontaneous statement**
>
> SEC. ____. Section 1240 of the Evidence Code is amended to read:
>
> 1240. Evidence of a statement is not made inadmissible by the hearsay rule if the statement:
>
> (a) ~~Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant~~ Relates to a startling event or condition; and
>
> (b) Was made spontaneously while the declarant was under the stress of excitement caused by ~~such perception~~ the event or condition.
>
> **Comment.** Section 1240 is amended to apply to any statement made under stress of excitement that *relates* to a startling event, not just a statement that "[p]urports to narrate, describe, or explain an act, condition, or event perceived by the declarant." This conforms to the federal approach. See Fed. R. Evid. 803(2). It is also consistent with judicial interpretations of the previous language. See, e.g., People v. Arias, 13 Cal. 4th 770, 807-08, 913 P.2d 980, 51 Cal. Rptr. 2d 770 (1996) (trial court properly admitted statement in which rape victim reported defendant's confession to murder made during rape); People v. Farmer, 47 Cal. 3d 888, 903-05, 765 P.2d 940, 254 Cal. Rptr. 508 (1989) (trial court properly admitted statement in

which declarant identified assailant as acquaintance and drug customer of roommate).

STATEMENT REGARDING DECLARANT'S THEN EXISTING MENTAL OR PHYSICAL STATE

Evidence Code Section 1250 creates a hearsay exception for a statement regarding the declarant's then existing mental or physical state:

> 1250. (a) Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when:
>
> (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or
>
> (2) The evidence is offered to prove or explain acts or conduct of the declarant.
>
> (b) This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed.

Federal Rule of Evidence 803(3) is the corresponding federal provision:

> 803. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (3) **Then existing mental, emotional, or physical condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

These exceptions are based on the notion that "[e]xpressions of existing feelings and discomforts — as opposed to narratives of past feelings and miseries — are likely to be sincere and spontaneous." Méndez Hearsay Analysis at 14. "The need for this type of evidence also justifies the exception, since it is difficult to divine what people think unless they tell us." *Id*.

From a practical point of view, the California and federal exceptions are quite similar in substance. See Friedenthal Analysis at 57. Nonetheless, some distinctions warrant discussion.

Statement Made Under Circumstances Indicating a Lack of Trustworthiness

Under the California provision, a statement of a declarant's then existing mental or physical state is admissible "[s]ubject to Section 1252," which requires the court to exclude the statement if it was "made under circumstances such as to indicate its lack of trustworthiness." This restriction stems from some California cases predating the Evidence Code. See Evid. Code § 1252 Comment. It reflects "reservations about the reliability" of the statements in question. Méndez Hearsay Analysis at 14. Federal Rule of Evidence 803(3) does not include a comparable limitation.

According to Prof. Friedenthal, however, Section 1252 "is superfluous in light of general provisions for exclusion of evidence . . . ." Friedenthal Analysis at 59. Presumably, his point is that a court could exclude a seemingly untrustworthy statement pursuant to Evidence Code Section 352, which permits a court to exclude evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

Federal Rule of Evidence 403 is a similar provision, under which a federal court may exclude relevant evidence if its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." If a federal court invoked Rule 403 to exclude a seemingly untrustworthy statement of a declarant's then existing mental or physical state, the result would be the same as under Section 1252 in California — the trier of fact could not consider the evidence.

Thus it might be of little importance that Section 1252 expressly requires exclusion of a statement "made under circumstances such as to indicate its lack of trustworthiness," whereas Rule 803(3) does not. Perhaps there would be little impact if Section 1252 were repealed to conform to the federal approach.

But Section 1252 provides specific guidance on exclusion of a seemingly untrustworthy statement regarding the declarant's then existing mental or physical state. It *requires* the court to consider such evidence inadmissible, whereas Section 352 simply *gives the court discretion* to exclude evidence. Repealing Section 1252 might generate confusion and lead to an unintended inference that a court is powerless to exclude such a statement.

Moreover, Prof. Méndez cautions that Section 352 and Rule 403 may not apply "where the judge's distrust of the hearsay declaration stems from the judge's belief that the hearsay declarant is simply not credible." Email from M. Méndez to B. Gaal (July 25, 2003). He explains:

> Because credibility is generally a jury issue, a judge's discretionary power to exclude relevant evidence on the grounds specified under § 352 and Rule 403 does not include lack of credibility. Consequently, where the proponent makes out the foundation for a hearsay exception, the judge may exclude the hearsay declaration on lack of credibility grounds only if authorized to do so by provisions such as § 1252.

Id. He provides specific examples to support those points. *Id*.

Prof. Méndez would therefore retain Section 1252. *Id*. Despite contending that the provision is superfluous, Prof. Friedenthal would also keep it, because "it emphasizes the need for caution on the part of courts regarding the evidence in question . . . ." Friedenthal Analysis at 59. **It thus seems advisable to leave Section 1252 as is.**

Use of Statement as Circumstantial Evidence of Declarant's Mental or Physical State At Another Time

Section 1250 makes clear that a statement regarding the declarant's then existing mental or physical state may be used to prove the declarant's mental or physical state either (1) at the time the statement was made or (2) "at any other time" when the declarant's mental or physical state is an issue in the action. Thus, a 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." Méndez Hearsay Analysis at 15 (emphasis added).

The corresponding federal provision does not say that a statement within its scope may be used to show the declarant's mental or physical state at a time other than when the statement was made. Prof. Méndez points out, however, that the relevance provisions of the Federal Rules of Evidence should permit such use. Méndez Hearsay Analysis at 15.

The clarity of Section 1250 on this point is desirable. **The statute should not be revised in this regard to conform to the less explicit federal provision.**

Statement Regarding Future Plans of Declarant

Under Evidence Code Section 1250(a)(2), a statement regarding the declarant's then existing mental or physical state is admissible "to prove or explain acts or conduct of the declarant." For example, a statement of the declarant's intent to do a certain act is admissible to prove that the declarant actually did that act. Evid. Code § 1250 Comment. Such statements are admissible "under the theory that they make it somewhat probable that the conduct that was intended was carried out." Kiesel, *One Person's Thoughts, Another Person's Acts: How the Federal Circuit Courts Interpret the Hillmon Doctrine*, 33 Cath. U. L. Rev. 699, 738 (1984). "From the declared intent to do a particular thing an inference that the thing was done may fairly be drawn." *People v. Alcalde*, 24 Cal. 2d 177, 185, 148 P.2d 627 (1944).

Rule 803(3) does not contain comparable language. Again, however, use of such evidence for this purpose would be permissible under the relevance provisions of the Federal Rules of Evidence. Méndez Hearsay Analysis at 15; *see generally Mutual Life Ins. Co. of New York v. Hillmon*, 145 U.S. 285 (1892).

Although the result would be the same under both the Evidence Code and the Federal Rules of Evidence, **the express language of Section 1250(a)(2) is helpful. It should not be deleted.**

Statement Regarding Future Plans of Person Other Than Declarant

A statement of intent to do a certain act may pertain not only to the declarant, but also to another person. For instance, suppose Mary says that she plans to go hiking with Bill. Mary's statement is clearly admissible to prove that Mary went hiking. But it is quite another matter to use Mary's statement to prove that Bill went hiking. The statement is not an expression of Bill's intent, so there is no reason to believe that it reliably reflects what he did. Once the statement "venture[s] into the realm of another person's intended conduct, the first-hand knowledge is gone." Kiesel, *supra*, at 738-39. The policy basis for the hearsay exception does not apply.

While this analysis seems straightforward, there has been extensive discussion of the subject, both in cases and in legal commentary. *See, e.g.*, Weissenberger, *Judge Wirk Confronts Mr. Hillmon: A Narrative Having Something To Do With the Law of Evidence*, 81 B.U. L. Rev. 707 (2001); McFarland, *Dead Men Tell Tales: Thirty Times Three Years of the Judicial Process After Hillmon*, 30 Vill. L. Rev. 1 (1985); Kiesel, *supra*. There appears to be considerable confusion regarding the

proper interpretation of both the federal and the California state of mind provisions in this context.

Federal Law

The leading federal case is the Supreme Court's decision in *Hillmon*, which has been described as "the most often and intensely examined case in all of American evidence jurisprudence." *People v. James*, 93 N.Y.2d 620, 628 n.2, 695 N.Y.S.2d 715, 717 N.E.2d 1052 (1999). In *Hillmon*, a widow sought to recover as the beneficiary of her husband's life insurance policies. The insurance companies refused to pay, contending that the dead man in question was not her husband, Mr. Hillmon, but rather an acquaintance named Mr. Walters. To support that position, the insurers offered two letters in which Mr. Walters stated that he planned to travel across Kansas with Mr. Hillmon. The insurers contended that these letters would help to show that the dead body found at a Kansas campsite was that of Mr. Walters, not Mr. Hillmon. But the trial court excluded the letters.

On appeal, the Supreme Court ruled that "the two letters were competent evidence of the intention of Walters at the time of writing them, which was a material fact bearing upon the question in controversy; and that for the exclusion of these letters, . . . the verdicts must be set aside, and a new trial had." 145 U.S. at 299-300. The Court appears to have concluded that the letters could be used not only to show what Walters did, but also to show what Hillmon did:

> The letters in question were competent not as narratives of facts communicated to the writer by others, nor yet as proof that he actually went away from Wichita, but as evidence that, shortly before the time when other evidence tended to show that he went away, he had the intention of going, *and of going with Hillmon*, which made it more probably both that he did go *and that he went with Hillmon* than if there had been no proof of such intention.

Id. at 295-96 (emphasis added).

Not long after *Hillmon,* scholars sharply criticized the idea that a person's statement of intent could be used to show what another person did. *See, e.g.*, Maguire, *The Hillmon Case — Thirty-three Years After*, 38 Harv. L. Rev. 709 (1925); Seligman, *An Exception to the Hearsay Rule*, 26 Harv. L. Rev. 146 (1912). The Supreme Court also cast doubt on the practice, in dictum in a case in which the state of mind hearsay exception was raised on appeal but not at trial. *Shepard v. United States*, 290 U.S. 96 (1933); *see* Kiesel, *supra*, at 702 n.21.

As initially proposed and as enacted, the text of Rule 803(3) does not address the issue. The Advisory Committee's Note states simply that "[t]he rule of [*Hillmon*], allowing evidence of intention as tending to prove the doing of the act intended, is, of course, left undisturbed." The Note does not say whether a person's statement of intent may be used as evidence of another person's actions.

When the bill to enact the Federal Rules of Evidence was pending in Congress, however, the House Judiciary Committee made its view on the matter clear:

> Rule 803(3) was approved in the form submitted by the Court to Congress. However, the Committee intends that the Rule be construed to limit the doctrine of [*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*.

H.R. Rep. No. 93-650 (1973) (emphasis added). The House Judiciary Committee report was the last word on the subject, and the only legislative history directly addressing the point, so one would think that it would be controlling. Prof. Méndez takes this view in his analysis for the Commission. Méndez Hearsay Analysis at 16.

Nonetheless, the federal courts are divided regarding the proper interpretation of Rule 803(3). Some courts, including the Ninth Circuit, have allowed a declarant's statement of intent to be used to show conduct of another person. *See, e.g., Terrovona v. Kincheloe*, 852 F. 2d 424, 427 (9th Cir. 1988); *United States v. Pheaster*, 544 F.2d 353, 374-80 (9th Cir. 1976); *United States v. Houlihan*, 871 F. Supp. 1495, 1500-02 (1994). Other courts have also allowed such evidence to be used for that purpose, but only if there is independent evidence connecting the statement with the other person's conduct. *See United States v. Nersesian*, 824 F.2d 1294, 1325 (2d Cir. 1987); *see also United States v. Jenkins*, 579 F.2d 840, 842-43 (4th Cir. 1978) (declarant's statement of intent cannot be used to show conduct of nondeclarant, but is admissible to prove why nondeclarant acted as he did, so long as independent evidence shows that declarant did in fact engage in alleged conduct). There is also authority that a declarant's statement of intent is "only reliable as to the declarant's own intention," not the conduct of anyone else. *Clark v. United States*, 412 A.2d 21, 29-30 (D.C. 1980); *see also Gual Morales v. Hernandez Vega*, 579 F.2d 677, 680 n.2 (1st Cir. 1978). The inconsistent application of Rule 803(3) "is impeding the goal of a uniform standard for evidentiary procedure,"

which underlay the adoption of the Federal Rules of Evidence. Kiesel, *supra*, at 699-700.

California Law

A similar state of uncertainty exists in California. The leading decision is *Alcalde*, a murder case concerning the admissibility of the decedent's statement that she was going out with "Frank" that evening. 24 Cal. 2d at 185. In admitting this evidence, the trial court "took 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." *Id*. (emphasis added).

The California Supreme Court ruled that "the trial court did not err in admitting the declaration." *Id*. at 188. It explained:

> No attempt need be made here to define or summarize all the limitations or restrictions upon the admissibility of declarations of intent to do an act in the future or to indicate what degree of unavailability or corroboration should exist in every case. Elements essential to admissibility are that the declaration must tend to prove the declarant's intention at the time it was made; it must have been made under circumstances which naturally give verity to the utterance; it must be relevant to an issue in the case. Those qualifications are here present. The declaration of the decedent made on November 22d that she was going out with Frank that evening stated a present intention to do an act in the future. Certainly it was a natural utterance made under circumstances which could create no suspicion of untruth in the statement of here intent. It did not necessarily refer to the defendant as the person named. But the defendant was called "Frank" as a nickname and he registered as Frank at the hotel where he lived. The defendant admittedly had been entertaining the decedent. Manifestly that fact, together with other corroborating circumstances, bore directly on the question of the relevancy of the declaration. Unquestionably the deceased's statement of her intent and the logical inference to be drawn therefrom, namely, that she was with the defendant that night, were relevant to the issue of the guilt of the defendant. *But the declaration was not the only fact from which an inference could be drawn that the deceased was with the defendant that night.* Other facts were in evidence from which the inference could reasonably be drawn. *The cumulation of facts corroborative of the guilt of the defendant was sufficient to indicate that the trial court did not err in admitting the declaration.*

Id. at 187-88 (emphasis added). Notably, the court's *holding* was that the trial court did not err in admitting the decedent's declaration for the limited purpose of showing *the decedent's* intention. The opinion is dictum to the extent, if any, that it can be interpreted as indicating that the declaration could be used to show the *defendant's* conduct.

Justice Traynor (joined by Justice Edmonds) dissented, maintaining that a declaration as to what one person intended to do "cannot safely be accepted as evidence of what another probably did." 24 Cal. 2d at 189. Justice Traynor explained:

> The declaration of the deceased in this case that she was going out with Frank is also a declaration that he was going out with her, and *it could not be admitted for the limited purpose of showing that she went out with him at the time in question without necessarily showing that he went with her.* In the words of Mr. Justice Cardozo, "Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds. It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed." [*Shepard*, 290 U.S. at 104.] Such a declaration *could not be admitted without the risk that the jury would conclude that it tended to prove the acts of the defendant as well as of the declarant, and it is clear that the prosecution used the declaration to that end.* There is no dispute as to the identity of the deceased or as to where she was at the time of her death. Since the evidence is overwhelming as to who the deceased was and where she was when she met her death, no legitimate purpose could be served by admitting here declarations of what she intended to do on the evening of November 22d. The only purpose that could be served by admitting such declarations would be to induce the belief that the defendant went out with the deceased, took her to the scene of the crime and there murdered her. Her declarations cannot be admitted for that purpose without setting aside the rule against hearsay.
>
> The evidence in question was so damaging to the defendant that it cannot reasonably be said that it probably had not effect on the jury's verdict. [Citation omitted.]

24 Cal. 2d at 189-90 (Traynor, J., dissenting) (emphasis added). Justice Traynor thus believed that the evidence should have excluded altogether, rather than admitted for the ostensibly limited purpose of showing *the decedent's* intention.

Alcalde was decided long before the Evidence Code was adopted on Commission recommendation in 1965. The Comment to Section 1250 cites the case for the simple proposition that "a statement of the declarant's intent to do

certain acts is admissible to prove that he did those acts." The Comment does not discuss whether a statement of intent may be used to show the future conduct of a person other than the declarant. Nor is the issue mentioned in Commission staff memoranda on drafting the Hearsay Division of the Evidence Code, or in the Comment to Uniform Rule of Evidence 63(12) (as approved in 1953), from which Section 1250 was drawn.

But the statute appears to resolve that matter on its face, specifying that a statement of a declarant's then existing mental or physical state (including a statement of intent) "is not made inadmissible by the hearsay rule when [it] is offered to prove or explain acts or conduct *of the declarant*." Evid. Code § 1250(a)(2) (emphasis added). The phrase "of the declarant" would be unnecessary if the hearsay exception was meant to extend to conduct of a person other than the declarant. According to Prof. Méndez, the exception is limited to "proving or explaining the acts or conduct of the *declarant*." Méndez Hearsay Analysis at 15 (emphasis in original).

We are inclined to agree with that assessment. The plain meaning of the provision is that a statement of intent may only be used to establish the declarant's future conduct, not the future conduct of another person.

But there is no California Supreme Court decision to that effect. If anything, the Court's decisions suggest a contrary interpretation.

In particular, *People v. Majors*, 18 Cal. 4th 385, 956 P.2d 1137, 75 Cal. Rptr. 2d 684 (1998), was a murder case involving evidence that on the night he was killed, the decedent stated that he was going to conduct a drug deal with people from Arizona. The evidence was admitted at trial without objection. On appeal, however, the defendant argued that the failure to object amounted to ineffective assistance of counsel.

The Supreme Court rejected that claim, relying on *Alcalde* and Section 1250. 18 Cal. 4th at 404-05. That was appropriate, inasmuch as *Alcalde* and Section 1250 clearly establish that the evidence was admissible for the purpose of showing *the declarant's* intent. Further, defense counsel could not be faulted for failing to request a limiting instruction, because the decedent's statement did not specifically refer to the defendant, and because there were ample corroborating circumstances linking the defendant to the drug deal. 18 Cal. 4th at 405. The Court referred to those circumstances, *id.*, but did not mention the possibility of a limiting instruction, perhaps because the defendant did not argue on appeal that

such an instruction should have been given (the opinion does not disclose whether the defendant made that argument).

The Court also seemed to broadly reject the notion that a statement of intent is admissible only to show the intent of the declarant:

> Throughout his briefing, defendant disparages our decision in *Alcalde*, pointing to both the dissent in *Alcalde* itself as well as subsequent criticism of the decision by legal scholars. In his reply brief, defendant urges that *Alcalde* "is technically wrong" insofar as "it allowed the declarant's statements to be used by the prosecutor to indirectly prove the actions of a person other than the declarant." *This argument is misplaced. Alcalde* has been codified in Evidence Code section 1250 (see *ante*, fn. 12), and hence, we lack the authority to reconsider it. (See *People v. Jones*, *supra*, 13 Cal. 4th at p. 548, 54 Cal. Rptr. 2d 42, 917 P.2d 1165.)

Id. at 404 (emphasis added). It is debatable whether these comments were essential to the Court's decision, and whether the Court ruled that a statement of intent is admissible to show the intent of a *nondeclarant*, or only concluded that the defendant's argument was beside the point because the evidence in question was admissible to show the *declarant's* intent.

The sources cited in the quote do not shed light on these matters. Footnote 12 of *People v. Majors* only recites the text of Evidence Code Sections 1250 and 1252. The case of *People v. Jones*, 13 Cal. 4th 535, 917 P.2d 1165, 54 Cal. Rptr. 2d 42 (1996), was a murder trial involving the admissibility of the decedent's statement that she was going to Oakland with the defendant. The defendant contended on appeal that this statement should have been excluded as inadmissible hearsay. The Supreme Court disagreed: "[B]ecause the Legislature has determined that a statement of a declarant's state of mind, such as that here at issue, is not inadmissible under the hearsay rule when offered to prove conduct *of the declarant* in conformity with that state of mind, we have no occasion or authority to reconsider the *Alcalde* decision. *Id*. at 548 (emphasis added). The Court did not say whether the declarant's statement was admissible to prove conduct *of the defendant*, and the Court's comments were dictum in any event because the Court vacated the defendant's conviction due to ineffective assistance of counsel. *See id*. at 547.

In an earlier decision, the Court expressly declined to decide whether a statement of intent is admissible to show conduct of a nondeclarant:

> Defendant urges that *Alcalde* has been superseded by statute to the extent it allows use of a decedent's statements to prove the conduct of another. Even if not, defendant contends, the substantial scholarly criticism of *Alcalde* in that regard warrants overruling that decision.
>
> *We need not confront the issue*.

People v. Melton, 44 Cal. 3d 713, 740, 750 P.2d 741, 244 Cal. Rptr. 867 (1988) (emphasis added).

Similarly, in *People v. Chambers*, 136 Cal. App. 3d 444, 186 Cal. Rptr. 306 (1982), the court of appeal refrained from deciding whether Section 1250 codifies Justice Traynor's *Alcalde* dissent, as the defendant contended. *Id*. at 453. The court did, however, point out that *Alcalde* had been criticized. *Id*. at 451-52. The court further explained that

> Such criticism, however meritorious, does not relieve us of the responsibility for following Supreme Court precedent, and appellant's proposition that *Alcalde* has been superseded by the Evidence Code is subject to considerable question. The Evidence Code was the product of a study and report by the California Law Revision Commission, and the commission, in recommending the adoption of what is now Evidence Code section 1250, commented: "Section 1250 also makes a statement of then existing state of mind admissible to 'prove or explain acts or conduct of the declarant.' Thus a statement of the declarant's intent to do certain acts is admissible to prove that he did those acts. *People v. Alcalde* 24 Cal. 2d 177, 148 P.2d 627 (1944)." (7 Cal. Law Revision Com. Rep. (1965) p. 1235.) The commission's comments were ultimately approved by the Assembly Committee on Judiciary and adopted as the comment to Evidence Code section 1250. If the Legislature intended to disapprove *Alcalde*, and to adopt Justice Traynor's dissent as appellant suggests, this seems an odd way of doing it.

Id. at 452-53.

The recent case of *People v. Han*, 78 Cal. App. 4th 797, 93 Cal. Rptr. 2d 139 (2000), also discusses the admissibility of a statement of intent. In *Han*, the defendants contended that the trial court should have excluded evidence that one of the defendants expressed a desire to arrange her sister's murder. The court of appeal disagreed, stating that the evidence was admissible under Section 1250 because the "Supreme Court has consistently allowed such evidence to prove the state of mind of the declarant, *as well as the declarant's confederates*." *Id*. at 806 (emphasis in original).

Instead of relying on *Majors* or *Jones*, the court referred to three other Supreme Court decisions: (1) *People v. Sanders*, 11 Cal. 4th 475, 498, 905 P.2d 420, 46 Cal. Rptr. 2d 751 (1995); (2) *People v. Morales*, 48 Cal. 3d 527, 770 P.2d 244, 257 Cal. Rptr. 64 (1989); and (3) *People v. Howard*, 44 Cal. 3d 375, 749 P.2d 279, 243 Cal. Rptr. 842 (1988). As best we can tell, however, these decisions do not establish that a statement of intent is admissible to prove conduct of a nondeclarant. The portion of *Sanders* relied on in *Han* involves admission of evidence for a *nonhearsay* purpose. *See Han*, 78 Cal. App. 4th at 806. *Morales* likewise fails to address the issue, as Prof. Méndez explains in detail. Méndez Hearsay Analysis at 15-16 n. 109. And the declarant's statements in *Howard* were admitted only for the limited purpose of showing *the declarant's* later actions. 44 Cal. 3d at 403.

The underpinnings of *Han* are thus questionable. It is also unclear whether the issue was squarely presented in *Han*, because the defense did not request a limiting instruction, *id*. at 807, and because the jury was told that the statement could not be used against the nondeclarants if it was made before the formation of a conspiracy, *id*. at 805.

In sum, California law on this point remains debatable. While the case law seems to suggest that a statement of intent may be used to show future conduct of a nondeclarant, the case law is not definitive and that view is difficult to reconcile with the language of Section 1250.

Consultants' Recommendations

Prof. Méndez believes that both Section 1250 and Rule 803(3) should be interpreted to permit a statement of intent to be used only to show the declarant's intent, not the conduct of another person. Méndez Hearsay Analysis at 15-16. He recommends retaining the language in Section 1250 specifying that a statement of intent may be used "to prove or explain acts or conduct *of the declarant*." (Emphasis added.) See Méndez Hearsay Analysis at 16.

Prof. Friedenthal took a similar position in his 1976 analysis for the Commission:

> The limitations in California § 1250 simply refer to the relevancy of such statements and reflect a fear that the law adopted in the famous case of *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285, 295-300 (1892), might be applied too broadly. The question raised by *Hillmon* is whether a statement by one person, X, "I am going to Cripple Creek with Y," can be utilized to show not only that X went to Cripple Creek, but that Y did so as well. Obviously, the

> declarant's stated interest is relevant as to his own actions in regard thereto; but *such a statement cannot logically be used to prove the acts of another.* That Rule 803(3) was not intended to interfere with the normal rules of relevancy of such statements is clear. In approving Rule 803(3) the House Committee on the Judiciary specifically cited *Hillmon* and noted that the rule should not permit statements of intent to prove conduct of someone other than the declarant.

Friedenthal Analysis at 57 (emphasis added).

Analysis and Staff Recommendation

Going back to our original example, there are at least four possible ways of handling Mary's statement that she plans to go hiking with Bill:

(1) Admit the statement for purposes of proving Mary's conduct *and* Bill's conduct.

(2) Admit the statement for purposes of proving Mary's conduct. Also admit the statement for purposes of proving Bill's conduct, but only if there is independent evidence connecting the statement with Bill's conduct.

(3) Admit the statement for purposes of proving Mary's conduct. Instruct the jury not to consider the statement for purposes of proving Bill's conduct. If the statement would be more prejudicial than probative even with a limiting instruction, the court may exclude it under Evidence Code Section 352.

(4) Exclude the statement, as urged by Justice Traynor in his *Alcalde* dissent.

From a drafting standpoint, it would be a relatively simple matter to revise Section 1250 to make more clear which of these approaches is correct. For example, a sentence could be added permitting use of a statement of intent to prove conduct of a person other than the declarant:

> 1250. (a) Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when:
>
> . . . .
>
> (2) The evidence is offered to prove or explain acts or conduct of the declarant. A declaration of intent to engage in conduct with another person may be used to prove or explain acts or conduct of the declarant or the other person.

The New York Law Revision Commission has proposed a provision along these lines. See *James*, 93 N.Y.2d at 634 n.5 (referring to Proposed NY Code of Evidence § 804(b)(5) (1991)).

Alternatively, the provision could be revised to expressly state that a declaration of intent may not be used to prove conduct of a nondeclarant:

> 1250. (a) Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when:
>
> . . . .
>
> (2) The evidence is offered to prove or explain acts or conduct of the declarant. A declaration of intent to engage in conduct with another person may not be used to prove or explain acts or conduct of the other person.

This approach seems most consistent with the existing statutory language and with the commonsense notion that a speaker has knowledge of the speaker's own state of mind and can conform the speaker's actions accordingly, but lacks such insight into the thoughts of another person and is less able to control that person's future conduct. The approach would also be consistent with the views of both Prof. Méndez and Prof. Friedenthal.

Because this is a serious question of interpretation relating to a provision drafted by the Commission, the staff is tempted to engage in such a cleanup effort. We are concerned, however, that it might prove controversial, consume an inordinate amount of Commission resources, and derail or sidetrack efforts to make other improvements in the hearsay provisions.

The topic involves complexities, and scholars have debated it for decades. Attempting to explain and justify whatever position the Commission advances is sure to demand much time and effort.

In addition, most of the published decisions addressing the issue are criminal cases, in which the prosecution argued for admission of the statement of intent and the defense sought its exclusion. While the issue could easily arise with respect to exculpatory evidence instead of inculpatory evidence (e.g., a statement supporting a defendant's alibi), that does not seem to be the typical pattern. Consequently, it may be difficult to achieve a consensus on the point among criminal law practitioners.

It is possible, however, that the situation is not as lopsided as it appears from the published decisions, because the prosecution's right to seek appellate review is more limited than that of a criminal defendant. It is also possible that a clarification of this matter might be instrumental in achieving a reform package that fairly balances prosecution and defense interests.

The Commission needs to assess these considerations and determine whether to attempt clarification of Section 1250 in the context of this study. If the Commission decides to address the issue, further research would be useful. If the Commission decides not to pursue the issue in this study, it should consider whether to take up the matter as a separate project when time and resources permit.

Statement Regarding Declarant's Will

Section 1250(b) makes clear that the hearsay exception for a declarant's then existing mental or physical state "does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed." This restriction is necessary to preserve the hearsay rule. As the Comment to Section 1250 explains:

> Any statement of a past event is, of course, a statement of the declarant's then existing state of mind — his memory or belief — concerning the past event. If the evidence of that state of mind — the statement of memory — were admissible to show that the fact remembered or believed actually occurred, any statement narrating a past event would be, by a process of circuitous reasoning, admissible to prove that the event occurred.

Rule 803(3) is subject to a similar restriction, but the restriction does not apply to a statement of memory or belief relating to "the execution, revocation, identification, or terms of declarant's will." The Advisory Committee's Note explains that the "carving out . . . of declarations relating to the execution, revocation, identification, or terms of declarant's will represents an ad hoc judgment which finds ample reinforcement in the decisions, resting on practical grounds of necessity and expediency rather than logic." The Advisory Committee also points out that a "similar recognition of the need for and practical value of this kind of evidence is found in California Evidence Code § 1260."

Section 1260 provides:

> 1260. (a) Evidence of a statement made by a declarant who is unavailable as a witness that he has or has not made a will, or has or has not revoked his will, or that identifies his will, is not made inadmissible by the hearsay rule.
>
> (b) Evidence of a statement is inadmissible under this section if the statement was made under circumstances such as to indicate its lack of trustworthiness.

This provision differs in several respects from the corresponding language in Rule 803(3).

First, Section 1260 requires that the declarant be unavailable as a witness regarding the will, whereas Rule 803(3) does not. This distinction appears to have little practical effect, because "it is difficult to imagine how statements pertaining to a declarant's will could be relevant if the declarant were not unavailable through death." E. Scallen & G. Weissenberger, California Evidence: Courtroom Manual 1109 (1st ed. 2000). "Where wills are concerned, the declarant is undoubtedly unavailable by death, since a will only becomes legally significant upon the testator/declarant's death." *Id*. The language in Section 1260 requiring unavailability might thus be unnecessary. **The express requirement of unavailability does not seem to do any harm, however, so we are inclined to leave it as is.**

Second, Section 1260(b) requires exclusion of a statement relating to a will if it "was made under circumstances such as to indicate its lack of trustworthiness." Rule 803(3) does not contain comparable language. As with the similar requirement in Section 1250, we are inclined to **retain the restriction of Section 1260(b).** See "Statement Made Under Circumstances Indicating a Lack of Trustworthiness" *supra*.

Third, Section 1260 applies to a statement relating to the execution, revocation, or identification of a will. Rule 803(3) mentions all of these types of statements, but also refers to a statement relating to the *terms* of a will. We are not sure why Section 1260 does not include a statement relating to the terms of a will. Probably the provision only refers to execution, revocation, and identification of a will because those acts had been addressed in published California cases at the time when the Evidence Code was being drafted. See Chadbourn, *supra*, at 512; Evid. Code § 1260 Comment.

For purposes of uniformity, it might be appropriate to **amend Section 1260 to cover a statement relating to the terms of a declarant's will, thus conforming the provision to Rule 803(3) in this regard:**

Evid. Code § 1260 (amended). Statement regarding declarant's will

SEC. ____. Section 1260 of the Evidence Code is amended to read:

1260. (a) Evidence of a statement made by a declarant who is unavailable as a witness that ~~he~~ the declarant has or has not made a will, or has or has not revoked ~~his~~ a will, or that identifies ~~his~~ the declarant's will or relates to the terms of the declarant's will, is not made inadmissible by the hearsay rule.

(b) Evidence of a statement is inadmissible under this section if the statement was made under circumstances such as to indicate its lack of trustworthiness.

Comment. Section 1260 is amended to apply to a statement relating to the terms of the declarant's will, as well as a statement relating to execution, revocation, or identification of the declarant's will. This conforms to the federal approach. See Fed. R. Evid. 803(3).

Section 1260 is also amended to use gender-neutral language.

We would appreciate input on whether this would be good policy. We have not fully researched that point, but are encouraged by Prof. Friedenthal's observations that the hearsay exception "assists in carrying out testators' intentions," and "[n]ormally, there is little danger that a person will deliberately make a false or misleading statement concerning his own will." Friedenthal Analysis at 60.

STATEMENT REGARDING DECLARANT'S PREVIOUSLY EXISTING MENTAL OR PHYSICAL STATE

As explained below, California's approach to a statement regarding the declarant's previously existing mental or physical state is quite different from the federal approach.

California Approach: Two Narrow Hearsay Exceptions

California recognizes a narrow hearsay exception for evidence of the declarant's previously existing mental or physical state:

> 1251. Subject to Section 1252, evidence of a statement of the declarant's state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) at a time prior to the statement is not made inadmissible by the hearsay rule if:
>
> (a) The declarant is unavailable as a witness; and

> (b) The evidence is offered to prove such prior state of mind, emotion, or physical sensation when it is itself an issue in the action and the evidence is not offered to prove any fact other than such state of mind, emotion, or physical sensation.

Such evidence is admissible only if the declarant is unavailable to testify, the declarant's past mental or physical condition is in issue in the action, the evidence is offered to prove that condition, the evidence is not offered for any other purpose, and the evidence is sufficiently trustworthy as specified in Section 1252.

These restrictions are warranted because the statement is a narration of a past condition. "There is, therefore, a greater opportunity for the declarant to remember inaccurately or even to fabricate." Evid. Code § 1251 Comment. As Prof. Friedenthal explains, "[t]he hearsay dangers are substantially enhanced when a declarant describes past as opposed to present symptoms, for declarant's memory of previous sufferings may be faulty and those to whom the statement is made cannot observe declarant's actions to see if they are consistent with the stated symptoms." Friedenthal Analysis at 57.

California also recognizes a narrow hearsay exception for a statement made under specified circumstances by a child abuse victim for purposes of medical diagnosis or treatment:

> 1253. Subject to Section 1252, evidence of a statement is not made inadmissible by the hearsay rule if the statement was made for purposes of medical diagnosis or treatment and describes medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment. This section applies only to a statement made by a victim who is a minor at the time of the 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. "Child abuse" and "child neglect," for purposes of this section, have the meanings provided in subdivision (c) of Section 1360. In addition, "child abuse" means any act proscribed by Chapter 5 (commencing with Section 281) of Title 9 of Part 1 of the Penal Code committed against a minor.

This exception was added in 1995 in a bill sponsored by the California Attorney General. 1995 Cal. Stat. ch. 87, § 2 (AB 355 (Rogan)).

Federal Approach: Broad Hearsay Exception for a Statement Made for Purposes of Medical Diagnosis or Treatment

The Federal Rules of Evidence do not contain a provision comparable to California's narrow hearsay exception for evidence of the declarant's previously existing mental or physical state (Section 1251). But the Federal Rules do include a broad hearsay exception for a statement that is made for purposes of medical diagnosis or treatment:

> 803. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (4) **Statements for purposes of medical diagnosis or treatment.** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

This exception to the hearsay rule "is founded on a theory of reliability that emanates from the patient's own selfish motive — her understanding 'that the effectiveness of the treatment received will depend upon the accuracy of the information provided to the physician.'" *United States v. Joe*, 8 F.3d 1488, 1493-94 (10th Cir. 1993), *quoting* 2 McCormick on Evidence 277, at 246-47 (4th ed. 1992). In fact, a statement made in the course of procuring medical services, where the declarant knows that a false statement may cause misdiagnosis or mistreatment, carries special guarantees of credibility that a trier of fact may not think replicated by courtroom testimony." *White v. Illinois*, 502 U.S. 346, 356 (1992).

Whether to Expand Section 1253 to Track the Federal Approach

Prof. Méndez notes that the Legislature "has taken one step toward the federal approach in enacting Section 1253, relating to child abuse. Méndez Hearsay Analysis at 18. He recommends that the Legislature "take the additional step of replacing Section 1253 with the federal rule." *Id*.

Similarly, Prof. Friedenthal points out that Rule 803(4) applies in some situations that are not covered by California's exception for evidence of the declarant's previously existing mental or physical state (Section 1251). Friedenthal Analysis at 57. He explains that

> a statement of an absent eyewitness made to a doctor for diagnostic purposes could have relevance to a case despite the fact that the

> declarant's own physical condition was not in issue. For example, in a case by X against his employer, E, for negligently controlling radioactive materials, statements of X's fellow employee, Y, who died of radiation poisoning, to Y's doctor could be of great significance.

Id. at 57-58. He suggests revising California law to permit introduction of a statement of "a person's past mental or physical symptoms or sensations made to a doctor for purposes of diagnosis or treatment, even though such physical or mental condition is not in issue." *Id*. at 58.

The staff tentatively agrees with Prof. Méndez and Prof. Friedenthal. We have some reservations about this, however, because the 1995 bill that added Section 1253 to the Evidence Code originally proposed a broader exception that was essentially identical to Rule 803(4). AB 355 (Rogan), as introduced Feb. 10, 1995. The bill was amended in the Assembly Public Safety Committee to narrow the exception to the child abuse context. The bill analysis prepared in that committee does not shed light on the reasons for narrowing the exception.

From reviewing other materials relating to the bill, however, it appears that the California Attorneys for Criminal Justice and the American Civil Liberties Union opposed even the narrow version of proposed Section 1253 on the ground that it would violate a defendant's constitutional right to confront those accusing the defendant of wrongdoing (U.S. Const. amend. VI; Cal. Const. art. 1, § 15). That argument is not persuasive, because in 1992 (three years before Section 1253 was enacted) the United States Supreme Court held that Rule 803(4) does not violate the Confrontation Clause, *White v. Illinois*, 502 U.S. at 355-57, and earlier this year a California court of appeal held that Section 1253 does not violate the Confrontation Clause, *In re Daniel W.*, 106 Cal. App. 4th 159, 168, 130 Cal. Rptr. 2d 412 (2003).

The issue thus boils down to whether, as a matter of policy, it makes sense to recognize a hearsay exception for a statement made for purposes of medical diagnosis or treatment, as is done in Rule 803(3) and in many states. Such an out-of-court statement entails strong indicia of reliability, but admitting the statement would deprive the opposing party of the opportunity to confront and cross-examine the declarant regarding the matter asserted. **The Commission needs to determine how to balance these competing interests,** keeping in mind the potential benefit of uniformity that could be achieved by adopting the federal

approach. If the Commission decides to expand Section 1253 beyond the child abuse context, **that policy decision could be implemented as follows:**

> **Evid. Code § 1253 (amended). Statement for purposes of medical diagnosis or treatment**
>
> SEC. ____. Section 1253 of the Evidence Code is amended to read:
>
> 1253. (a) Subject to Section 1252, evidence of a statement is not made inadmissible by the hearsay rule if the statement was made for purposes of medical diagnosis or treatment and describes medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.
>
> (b) This section ~~applies only to a statement made by a victim who is a minor at the time of the proceedings, provided the statement was made when the victim was under the age of 12~~ includes, but is not limited to, a statement describing any act, or attempted act, of child abuse or neglect. "Child abuse" and "child neglect," for purposes of this section, have the meanings provided in subdivision (c) of Section 1360. In addition, "child abuse" means any act proscribed by Chapter 5 (commencing with Section 281) of Title 9 of Part 1 of the Penal Code committed against a minor.
>
> **Comment.** Section 1253 is amended to apply in general to a statement that is made for purposes of medical diagnosis or treatment, not just to a statement that is made and offered under certain conditions for purposes of diagnosing and treating child abuse or neglect. This conforms to the federal approach. See Fed. R. Evid. 803(4). For the constitutionality of this approach, see White v. Illinois, 502 U.S. 346, 356 (1992); see also In re Daniel W., 106 Cal. App. 4th 159, 168, 130 Cal. Rptr. 2d 412 (2003).

Whether to Eliminate Section 1251

A secondary issue is whether to retain Section 1251, California's narrow exception for evidence of the declarant's previously existing mental or physical state. In his 1976 analysis, Prof. Friedenthal commented that the provisions of this section "are quite modest; they require the declarant to be unavailable, and, under § 1252, such declarations are inadmissible if circumstances indicate the declarations are not trustworthy." Friedenthal Analysis at 58. He therefore concluded that "[o]n the surface, at least, current § 1251 appears reasonable." *Id*. He explained that when "a person's physical or mental condition is in issue and that person is unavailable, the need for the evidence, if otherwise trustworthy, outweighs the hearsay dangers." *Id*.

Prof. Friedenthal cautioned, however, that "in issue" is not a precise term and might lead to disputes over interpretation. *Id*. at 58-59. He elaborated on that point and stated that the problem "raise[d] a serious question as to whether § 1251 should be scrapped entirely in favor of Federal Rule 803(4)." *Id*. He stopped short of recommending that step, however, primarily because the Federal Rules of Evidence include two catchall provisions that can be invoked to admit evidence of a declarant's previously existing mental or physical state in appropriate cases, whereas the Evidence Code does not include a catchall exception to the hearsay rule. *Id*.

As best we can tell from the little case law interpreting Section 1251, the problem that Prof. Friedenthal was concerned about has not proved substantial. For the moment, **it seems advisable to leave the provision alone.** It might be appropriate to revisit that decision, however, if the Commission proposes to add a catchall hearsay exception to the Evidence Code.

PAST RECOLLECTION RECORDED

Both the Evidence Code and the Federal Rules of Evidence include a hearsay exception for a recorded recollection of an event, which applies only if a witness testifies that the recollection was true when made and the witness lacks sufficient memory to testify fully and accurately regarding the event. The California provision is Evidence Code Section 1237:

> 1237. (a) 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, the statement concerns a matter as to which the witness has insufficient present recollection to enable him to testify fully and accurately, and the statement is contained in a writing which:
>
> (1) Was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness' memory;
>
> (2) Was made (i) by the witness himself or under his direction or (ii) by some other person for the purpose of recording the witness' statement at the time it was made;
>
> (3) Is offered after the witness testifies that the statement he made was a true statement of such fact; and
>
> (4) Is offered after the writing is authenticated as an accurate record of the statement.
>
> (b) The writing may be read into evidence, but the writing itself may not be received in evidence unless offered by an adverse party.

Federal Rule of Evidence 803(5) is quite similar:

> 803. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
> ….
> (5) **Recorded recollection.** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

The guarantee of trustworthiness justifying these provisions "is found in the reliability inherent in a record made while events were still fresh in mind and accurately reflecting them." Fed. R. Evid. 803 advisory committee's note.

Requirement that the Statement Would Have Been Admissible If Made While Testifying

Under the California provision, a recorded statement is admissible only if the statement would have been admissible if it had been made by the witness while testifying. Evid. Code § 1237(a). The federal provision does not expressly address this point. Presumably, however, "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." Méndez Hearsay Analysis at 18. Prof. Méndez recommends retaining the express language of the California provision on this point, because it helps to prevent confusion. *Id*. The staff agrees that **Section 1237 should be left as is in this regard.**

Recorded Statement of Another Person That Is Adopted By the Witness

In his 1976 analysis for the Commission, Prof. Friedenthal pointed out another distinction between the California and the federal exceptions for a past recollection recorded:

> § 1237(a)(2) requires that the record must be "made (i) by the witness himself or under his direction or (ii) by some other person for the purpose of recording the witness' statement at the time it was made," whereas Rule 803(5) requires only that the statement must be "shown to have been made or adopted by the witness." Thus, under the federal rule if X makes a recorded statement, to

> which Y later assents, the exception could apply if all other conditions were met regarding either X or Y, whereas in California, the statement is admissible only if the requirements are met with regard to X. Thus if X is dead, the statement would not be admissible despite the fact that Y was actually present when X made the statement, assented to it immediately thereafter, and is quite clear and willing to testify that it accurately reflected the facts as Y saw them shortly before X's statement was recorded.

Friedenthal Analysis at 53-54. Prof. Friedenthal recommended that Section 1237(a) be amended "to include recorded statements of others adopted by a witness, provided all other requirements of § 1237 are met." *Id.*

If the staff understands his point correctly, the issue is *not* whether the hearsay exception extends to a statement *memorialized* by someone other than the speaker. Both the California provision and the federal rule apply regardless of who *memorializes* the statement — the speaker or another person (or persons) — so long as the accuracy of the original statement and the process of memorialization is established. See Fed. R. Evid. 803 advisory committee's note; Evid. Code § 1237 Comment; *United States v. Hernandez*, 333 F.3d 1168, 1179 (10th Cir. 2003); *United States v. Green*, 258 F. 3d 683 (7th Cir. 2001); *United States v. Schoenborn*, 4 F.3d 1424, 1427-29 (7th Cir. 1993); *United States v. Lewis*, 954 F.2d 1386, 1392-95 (7th Cir. 1992); *United States v. Williams*, 571 F.2d 344, 348-50 (6th Cir. 1978); *People v. Miller*, 46 Cal. App. 4th 412, 53 Cal. Rptr. 773 (1996); *People v. Davis*, 265 Cal. App. 2d 341, 347-50, 71 Cal. Rptr. 242 (1968).

Rather, Prof. Friedenthal's point seems to be that the language of the California provision is limited to a statement *made* by the witness who testifies to a lack of recollection, whereas the federal rule is broad enough to also cover a statement that was *made by someone else,* provided that the testifying witness "adopted" the statement shortly after it was made and the other requirements of the rule are satisfied. In other words, suppose two people have personal knowledge of an event. One of them describes the event soon afterwards, the description is memorialized, and the memorialization is promptly "adopted" by the other person — i.e., that person in some manner affirms that the description properly recounts what occurred. Later, the person who "adopted" the description testifies at trial and claims to lack any recollection of the event. According to Prof. Friedenthal, Rule 803(5) would apply in that situation, while Evidence Code Section 1237 would not. He would revise Section 1237 to conform to his reading of Rule 803(5).

As a matter of policy, it might be appropriate to extend the California exception to that circumstance. Reliability would be sufficiently assured by the memorialization and adoption of the statement at or near the time of the event, when the witness' memory was fresh.

But we have not been able to find any federal cases applying Rule 803(5) in circumstances such as those postulated by Prof. Friedenthal. The situation appears to be uncommon if it arises at all. Unless there is case law confirming Prof. Friedenthal's interpretation of Rule 803(5), **we would not attempt to revise Section 1237 to address his point.**

Uniform Rule of Evidence 803(5)

Uniform Rule of Evidence 803(5) is very similar to the corresponding federal rule, but it refers to a "record" concerning a matter about which a witness once had knowledge, not a "memorandum or record" as in the federal rule. The Uniform Law Commission adopted this approach in 1999, as part of an effort to update the rules to reflect modern recordkeeping practices, such as the use of email. See Unif. Rule Evid. 101 Comment. The Uniform Law Commission broadly defined a "record" as "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form." Unif. Rule Evid. 101(3). Under this broad definition of "record," the reference to "memorandum" in Uniform Rule of Evidence 803(5) became surplusage and thus was deleted.

In contrast to the Uniform Rule, Evidence Code Section 1237 refers to a "statement" that is "contained in a writing." 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." Evid. Code § 225. A "writing" is broadly defined to include

> handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, 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, and any record thereby created, regardless of the manner in which the record has been stored.

Evid. Code § 250. Given this broad definition of "writing," **it does not appear necessary to revise Section 1237 to refer to a "record" as in the Uniform Rule.**

IMPACT OF THE TRUTH-IN-EVIDENCE PROVISION

In considering the proposed reforms discussed in this memorandum, the Commission should bear in mind the potential impact of the Truth-in-Evidence provision of the Victims' Bill of Rights, 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). The Commission already discussed this provision to some extent at the March meeting. Minutes (March 2003), pp. 9-10; see also Memorandum 2003-7, pp. 2-4. But that discussion only scratched the surface with regard to the issues that the Truth-in-Evidence provision poses in the context of this study. The Commission decided that in reviewing the Evidence Code, it would consider issues relating to the Truth-in-Evidence provision as they arise in specific contexts and perhaps also take a more comprehensive look at the Truth-in-Evidence issues after completing its review of the whole code or of a particular area. Minutes (March 2003), p. 10.

The reforms suggested in this memorandum include:

(1) Addition of a hearsay exception for a present sense impression.
(2) Expansion of the hearsay exception for a spontaneous statement (Evid. Code § 1240) to apply to any statement relating to a startling event, not just a statement that "[p]urports to narrate, describe, or explain an act, condition, or event perceived by the declarant."
(3) Expansion of the hearsay exception for a statement regarding the declarant's will (Evid. Code § 1260) to cover a statement relating to the terms of the declarant's will.
(4) Expansion of the hearsay exception for a statement by a child abuse victim for purposes of obtaining medical treatment (Evid. Code § 1253) to cover a statement by anyone for purposes obtaining medical treatment.
(5) Possible clarification of the admissibility of a statement of intent to engage in conduct with another person (Evid. Code § 1250).

The first four of these reforms would expand the admissibility of relevant evidence. Depending on how the Commission decides to handle a statement of intent to engage in conduct with another person, the last reform could be viewed as expanding the admissibility of relevant evidence, reducing the admissibility of relevant evidence, or simply clarifying the status quo.

By its terms, the Truth-in-Evidence provision applies only to admission of evidence in a criminal case. Consequently, the provision would have no impact on any of these reforms in the civil context.

Further, the Truth-in-Evidence provision states that it does not "affect any existing statutory rule of evidence relating to . . . hearsay." Cal. Const. art. I, § 28(d). If the intent of this clause was to prevent the Truth-in-Evidence provision from repealing the ban on hearsay, then the Truth-in-Evidence provision would have no impact on any reform relating to hearsay, regardless of whether the reform expands or reduces the admissibility of hearsay. As Prof. Méndez explains,

> Under this construction, it would be immaterial if an amendment limiting an existing hearsay exception restricts the admission of previously admissible, relevant hearsay. The definition of hearsay as it existed at the time the initiative was adopted would remain unchanged, and so would the purpose of the hearsay rule, which is to prevent the use of relevant hearsay for a hearsay purpose unless it falls within an exception.

Email from M. Méndez to B. Gaal (July 29, 2003, at 14:00).

Perhaps significantly, however, the Truth-in-Evidence provision says that it does not affect "any *existing* statutory rule of evidence relating to . . . hearsay." Cal. Const. art. I, § 28(d) (emphasis added). "If the intention of the framers of Proposition 8 was to freeze the status quo by exempting only *existing* rules of evidence relating to hearsay, then an amendment to an exception that excludes hearsay admissible at the time the initiative was adopted would be subject to the super majority requirement" of the Truth-in-Evidence provision. Email from M. Méndez to B. Gaal (July 29, 2003, at 14:33). Prof. Méndez questions whether this is the correct interpretation of the provision:

> Although this construction is appealing, it carries a self-contradiction. Freezing the status quo also has the effect of subjecting to the super majority requirement amendments that would *increase* the use of relevant hearsay, even though such

> amendments would be consistent with the goal of increasing the use of relevant evidence.

Id. (emphasis added).

Prof. Méndez is not aware of any case law discussing which construction of the hearsay exemption in the Truth-in-Evidence provision is correct. *Id*. **Unless the Commission otherwise directs, we will continue to look into this issue as the Commission works on the hearsay material.**

Respectfully submitted,

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