

## Memorandum 2004-28

**Conforming the Evidence Code to the Federal Rules of Evidence:  
Hearsay Issues**

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The United States Supreme Court recently issued *Crawford v. Washington*, \_\_\_ U.S. \_\_\_, 124 S.Ct. 1354 (2004), a major new decision interpreting the Confrontation Clause of the United States Constitution (U.S. Const. amend. VI). This memorandum briefly discusses the impact of that decision on the Commission's study comparing California's codification of the hearsay rule and its exceptions with the corresponding federal provisions. We plan to address *Crawford* in further detail as issues relating to the decision arise in specific contexts in the course of the Commission's study.

CONFRONTATION CLAUSE DOCTRINE BEFORE *CRAWFORD*

The Confrontation Clause guarantees a defendant in a criminal case the right to confront the witnesses for the prosecution. This right applies in a state prosecution, as well as in a federal prosecution. *Pointer v. Texas*, 380 U.S. 400 (1965).

The California Constitution includes a similar provision. Cal. Const. art. I, § 15. The scope of the California provision has been construed to be identical to the Confrontation Clause. *People v. Contreras*, 57 Cal. App. 3d 816, 820, 129 Cal. Rptr. 397 (1976).

In *California v. Green*, 399 U.S. 149, 157 (1970), the United States Supreme Court recognized that "hearsay rules and the Confrontation Clause are generally designed to protect similar values" by ensuring that prosecution witnesses testify under oath, subject to cross-examination, and in the factfinder's presence. But the Court rejected the view that "the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law." *Id.*

Nonetheless, subsequent decisions established considerable overlap between the two provisions. The Court ruled that admitting hearsay evidence against a criminal defendant without giving the defendant an opportunity to cross-examine the declarant does not violate the Confrontation Clause if the evidence

(1) falls within a “firmly rooted hearsay exception” or (2) is supported by “a showing of particularized guarantees of trustworthiness.” *Ohio v. Roberts*, 448 U.S. 56, 66 (1980); *see also White v. Illinois*, 502 U.S. 346, 356 (1992); *Idaho v. Wright*, 497 U.S. 805, 816-17 (1990). This two-part *Roberts* test was widely used until *Crawford* was decided.

#### CRAWFORD

In *Crawford*, the Court harshly criticized the *Roberts* test. It pointed out that the “principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused.” 124 S.Ct. at 1363. The Court then explained that the *Roberts* test is both overbroad and overly narrow:

First, it is too broad: It applies the same mode of analysis whether or not the hearsay consists of ex parte testimony. This often results in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause. At the same time, however, the test is too narrow: It admits statements that do consist of ex parte testimony upon a mere finding of reliability. This malleable standard often fails to protect against paradigmatic confrontation violations.

*Id.* at 1369. The Court went on to say that the *Roberts* test “is so unpredictable that it fails to provide meaningful protection from even core confrontation violations.” 124 S.Ct. at 1371. According to the Court, “[t]he unpardonable vice of the *Roberts* test ... is not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude.” *Id.*

The Court thus drew a distinction between a “testimonial statement” and other types of hearsay offered against an accused in a criminal case. The Court made clear that the *Roberts* test no longer applies to a testimonial statement. Under the Court’s new approach, it does not matter whether the statement falls within a firmly rooted exception to the hearsay rule, nor does it matter whether the statement falls under a new hearsay exception that bears particularized guarantees of trustworthiness. Rather, if the prosecution offers a testimonial statement as substantive evidence in a criminal case and the declarant does not testify at trial, the statement is admissible only if the declarant was “unavailable to testify, and the defendant had ... a prior opportunity for cross-examination.” *Id.* at 1365. If those conditions are not met, admission of the statement would violate the Confrontation Clause.

Significantly, the Court did not define the term “testimonial statement.” *Id.* at 1364, 1374. It just said that at a minimum, the term encompasses a statement taken by a police officer in the course of an interrogation, and prior testimony at a preliminary hearing, grand jury proceeding, or former trial. *Id.* Courts, litigants, and commentators are just beginning to grapple with the problem of identifying what else, if anything, constitutes a “testimonial statement.” The Commission’s consultant, Prof. Miguel Méndez of Stanford Law School, is participating in that effort. He has already written an article on *Crawford* that will be published in the *Stanford Law Review*, probably in the fall.

Another major uncertainty is whether the *Roberts* test continues to apply to hearsay that does not qualify as a testimonial statement. The Court left that question open in *Crawford*. See 124 S.Ct. at 1370, 1374. It is possible that the Court will decide to “apply the Confrontation Clause only to testimonial statements, leaving the remainder to regulation by hearsay law ....” *Id.* at 1370.

#### IMPACT OF *CRAWFORD* ON THE COMMISSION’S STUDY

*Crawford* represents a major departure from previous Confrontation Clause jurisprudence. It will affect the admissibility of hearsay evidence in many cases across the country.

Its effect on the Commission’s study of the federal and California hearsay rules is likely to be less dramatic, because of the way those rules are structured. The exceptions to those rules do not state that certain evidence is admissible. Rather, they simply provide that certain evidence is not made inadmissible by the hearsay rule. They do not preclude an objection to and exclusion of the evidence on other grounds, such as the Confrontation Clause.

Of course, it would be pointless to have a hearsay exception if all of the evidence falling within that exception necessarily is inadmissible under the Confrontation Clause. With this in mind, the staff reviewed the hearsay exceptions that the Commission has considered thus far. We did not find any that seem to fall into this category. Most of the exceptions apply both in a civil case and in a criminal case, and apply to evidence offered by a criminal defendant as well as evidence offered by the prosecution. We will continue to check for pointless exceptions as the Commission studies the remainder of the hearsay exceptions.

In reviewing the work the Commission has done thus far, however, we did come across one proposed reform that requires rethinking in light of *Crawford*.

Specifically, Evidence Code Sections 1560-1566 set forth a procedure for subpoenaing and using a business record without requiring the custodian of the record to testify in person. Evidence Code Section 1562 provides for admissibility of business records produced in accordance with this procedure. The Commission has tentatively decided to amend this provision to make clear that an affidavit complying with Evidence Code Section 1561 may be used to prove the absence of a business record or absence of an entry in such a record, not just the existence or content of a business record. Minutes (Nov. 2003), pp. 9-10. The proposed Comment refers to the Confrontation Clause:

**Evid. Code § 1562 (amended). Admissibility of affidavit of custodian or other qualified witness**

SEC. \_\_\_\_\_. Section 1562 of the Evidence Code is amended to read:

1562. If (a) If (i) a copy of a business record is produced under Section 1560 together with an affidavit complying with Section 1561, (ii) the requirements of Section 1271 have been met, and (iii) the original records would be admissible in evidence if the custodian or other qualified witness had been present and testified to the matters stated in the affidavit, and if the requirements of Section 1271 have been met, the copy of the records is admissible in evidence. The affidavit is admissible as evidence of the matters stated therein pursuant to Section 1561 and the matters so stated are presumed true.

(b) If (i) an affidavit under Section 1561 states that the business has none of the records described, or only part thereof, and (ii) the requirements of Section 1272 have been met, the affidavit is admissible as evidence of the absence of the records sought and the matters stated in it are presumed true.

(c) When more than one person has knowledge of the facts, more than one affidavit under Section 1561 may be made. The

(d) Each presumption established by this section is a presumption affecting the burden of producing evidence.

**Comment.** Section 1562 is amended to make clear that an affidavit of a custodian or other qualified witness under Section 1561 may be used to prove the absence of a business record or entry therein, not just the existence or content of a business record. For a similar rule, see Unif. R. Evid. 803(7) & Comment.

Importantly, however, such an affidavit is not admissible if its use would violate a criminal defendant's state or federal constitutional right to cross-examine the prosecution witnesses. See U.S. Const. amend. VI; Cal. Const. art. I, § 15; *People v. Dickinson*, 59 Cal. App. 3d 314, 318-20, 130 Cal. Rptr. 561 (1976) ("in criminal proceedings such evidence would violate the defendant's right to

confront witnesses against him guaranteed by the Sixth Amendment of the federal Constitution and by article I, section 15, of the California Constitution”); but see *Ohio v. Roberts*, 448 U.S. 56, 65-66 & n.7 (1980) (hearsay evidence against criminal defendant does not violate constitutional right of confrontation if declarant is unavailable to testify and hearsay statement has sufficient “indicia of reliability” or declarant is available but calling and cross-examining declarant is unlikely to further search for truth); see also *People v. Aguilar*, 16 Cal. App. 3d 1001, 94 Cal. Rptr. 492 (1971) (admission of business records did not violate defendant’s constitutional right of confrontation); *People v. Gambos*, 5 Cal. App. 3d 187, 194, 84 Cal. Rptr. 908 (1970) (Sections 1270-1272 “when properly applied are without constitutional fault”) (emphasis in original).

This Comment needs to be revised in light of *Crawford*. The staff proposes to **delete the entire second paragraph of the Comment**. It is not necessary to refer to the limitations of the Confrontation Clause in the Comment. By virtue of the Supremacy Clause of the United States Constitution (U.S. Const. art. VI, § 2), all state statutes are subject to the Confrontation Clause, as well as the other rights guaranteed by the federal Constitution. We initially proposed to refer to the Confrontation Clause in this Comment primarily because of overbroad language in *People v. Dickinson*, 59 Cal. App. 3d 314, 318-20, 130 Cal. Rptr. 561 (1976), which could be interpreted to preclude use of the affidavit procedure in any criminal case, regardless of the circumstances (e.g., regardless of whether the accused or the prosecution is offering the evidence). By citing some other Confrontation Clause decisions, we hoped to alert practitioners that the situation might not be that straightforward. The new decision in *Crawford*, undoing established Confrontation Clause jurisprudence, convinces us that such an effort might generate more confusion and problems than it would help to prevent. It seems best to avoid getting into the matter.

Prof. Méndez will be available at the Commission meeting to provide further insight regarding *Crawford* and its impact on the Commission’s study.

Respectfully submitted,

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