Study K-600 October 10, 2007

Memorandum 2007-41

Miscellaneous Hearsay Exceptions: Forfeiture by Wrongdoing

At the request of the Senate Committee on Judiciary, the Law Revision Commission is conducting a study of forfeiture by wrongdoing as an exception to the hearsay rule. See CLRC Memorandum 2007-28. On some occasions, misconduct by a defendant causes a declarant (a person who made a statement) to be unavailable to testify at trial. For example, a criminal defendant charged with a third strike might arrange for a key witness to be murdered. The goal of this study is to determine under which circumstances such misconduct should constitute an exception to the hearsay rule, such that an out-of-court statement by the unavailable witness can be introduced against the defendant. Any statute on this point will have to comply with the Confrontation Clause of the federal and state constitutions (U.S. Const. amend. VI; Cal. Const. art. I, § 15; see also Penal Code § 686).

A related issue is whether the statutory definition of an "unavailable" witness for purposes of the hearsay rule should expressly include a witness who refuses to testify. The Commission has also been asked to study this issue. See CLRC Memorandum 2007-28.

The Commission's report on these matters is due by March 1, 2008. **To meet that deadline, the Commission should approve a tentative recommendation at the October meeting if possible.** The tentative recommendation could then be circulated for comment during November and comments could be considered at the December meeting and, if necessary, in January. The Commission would have to finalize its report at the February meeting. To facilitate this schedule, the staff plans to prepare a draft of a tentative recommendation along the lines discussed in this memorandum, and include it in a supplement for the Commission to consider in October.

The memorandum begins by providing background information on the hearsay rule and the Confrontation Clause. Next, the memorandum discusses refusal to testify as a basis for unavailability for purposes of the hearsay rule. Of

Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

the two topics discussed in this memorandum, that one appears to be more straightforward and probably less controversial. The more difficult topic, forfeiture by wrongdoing as an exception to the hearsay rule, is discussed last. The bulk of the memorandum is devoted to that topic.

In preparing this memorandum, the staff had the benefit of research and analysis by Elizabeth Lyon, a third year student at Hastings School of Law. The staff is grateful for her able assistance.

In detail, the contents of the memorandum are as follows:

THE HEARSAY RULE AND ITS PURPOSE

Evidence Code Section 1200(a) defines "hearsay evidence" as evidence of "a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." The corresponding Law Revision Commission Comment explains that under this definition, "a statement that is offered for some purpose other than to prove the fact stated therein is not hearsay." For example, suppose a hospital patient says that an object is blue and evidence of the statement is later offered in court. If the statement is offered to prove that the object in question was blue, then the statement is hearsay. If instead the statement is offered to prove that the patient was capable of speech, then the statement is not hearsay.

Evidence Code Section 1200(b) says that "[e]xcept as provided by law, hearsay evidence is inadmissible." This is known as the hearsay rule. See Evid. Code § 1200(c).

"[O]ne of the principal reasons for the hearsay rule [is] to exclude declarations where the veracity of the declarant cannot be tested by cross-examination ...." Evid. Code § 1200 Comment. "[S]ubjecting witnesses to a searching cross-examination helps the opposing party expose inadvertent as well as conscious inaccuracies in perception and recollection." M. Méndez, Evidence: The California Code and the Federal Rules 166 (3d ed. 2004) (hereafter, "Méndez Treatise"). Cross-examination has been described as the greatest legal engine

ever invented for the discovery of truth. *California v. Green*, 399 U.S. 149, 158, *quoting* 5 Wigmore on Evidence § 1367. As the California Supreme Court has explained,

> Through cross-examination, [a party] can raise doubts as to the general truthfulness of the witness and question the credibility of [the witness'] version of the facts. Also, the [witness'] memory and capacity for observation can be challenged. Prior inconsistent statements may be used to impeach credibility.

People v. Fries, 24 Cal. 3d 222, 231, 594 P.2d 19, 155 Cal. Rptr. 194 (1979). In contrast, when a witness simply repeats someone else's out-of-court statement, the witness is unable to explain any particulars, answer any questions, solve any difficulties, reconcile any contradictions, explain any obscurities, or clarify any ambiguities. C. McCormick, Handbook of the Law of Evidence 458-59 (1954).

A second reason for the hearsay rule is that court testimony is given under oath, while an out-of-court statement typically is not. As a ceremonial and religious symbol, an oath "may induce in the witness a feeling of special obligation to speak the truth ...." *Id.* at 457. It may also "impress upon the witness the danger of criminal punishment for perjury ...." *Id.*

A third reason for the hearsay rule is that "[h]aving witnesses testify before the fact finders enables them to take the witnesses' demeanor into account in assessing their credibility." Méndez Treatise, *supra*, at 165-66. "A witness's demeanor is 'part of the evidence' and is 'of considerable legal consequence.'" *Elkins v. Superior Court*, 41 Cal. 4th 1337, 1358, 163 P.3d 160, 63 Cal. Rptr. 3d 483 (2007). A person who sees, hears, and observes a witness may be convinced of, or unpersuaded of, the witness' honesty, integrity, and reliability. A "great deal of that highly delicate process we call evaluating the credibility of a witness is based on ... 'intuition' — that intangible, inarticulable capacity of one human being to evaluate the sincerity, honesty and integrity of another human being with whom he comes in contact." *Meiner v. Ford Motor Co.*, 17 Cal. App. 3d 127, 140-41, 94 Cal. Rptr. 702 (1971).

In summary, the main reasons for excluding hearsay evidence are: (1) the opposing party has no opportunity to examine the declarant, (2) the declarant's statement is not made under oath, and (3) the factfinder cannot observe the declarant's demeanor. All three of these rationales reflect an overriding concern with enhancing the truth-finding function of the judicial system.

THE CONFRONTATION CLAUSE AND ITS PURPOSE

Another important limitation on the admissibility of evidence is the Confrontation Clause of the United States Constitution (U.S. Const. amend. VI), which is binding on the states. *Pointer v. Texas*, 380 U.S. 400 (1965). In addition, the California Constitution contains its own Confrontation Clause (Cal. Const. art. I, § 15).

The state constitutional right of confrontation is not coextensive with the corresponding federal right. *People v. Chavez*, 26 Cal. 3d 334, 351-52, 605 P.2d 401, 161 Cal. Rptr. 762 (1980); *see also In re Johnny G.*, 25 Cal. 3d 543, 556-59, 601 P.2d 196, 159 Cal. Rptr. 180 (1979) (Mosk, J., concurring). "Nothing in the draftmen's comments ... suggests that they contemplated that state courts, in interpreting the state confrontation clause, would be invariably bound to adopt the same interpretation which federal courts may afford the federal confrontation guarantee." *Chavez*, 26 Cal. 3d at 351. This does not mean that federal precedents are irrelevant in interpreting the corresponding state provision. The California Supreme Court has noted that "while not controlling, the United States Supreme Court's interpretation of similar provisions of the federal Constitution, like our sister state courts' interpretations of similar state constitutional provisions, will provide valuable guidance in the interpretation of our state constitutional guarantees." *Id.* at 352.

The federal Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. Similarly, the state's Confrontation Clause provides that "[t]he defendant in a criminal cause has the right ... to be confronted with the witnesses against the defendant." Cal. Const. art. I, 15. Under either provision, the Confrontation Clause can only be invoked by a defendant in a criminal case.

The federal Confrontation Clause

> means more than being allowed to confront the witness physically. Indeed, the main and essential purpose of confrontation *is to secure for the opponent the opportunity of cross-examination*. The right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, to deprive the accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law.

Alvarado v. Superior Court, 23 Cal. 4th 1121, 1137, 5 P.3d 203, 99 Cal. Rptr. 2d 149 (2000) (citations, quotation marks, brackets, and ellipses omitted) (emphasis in original). The Clause calls for

> a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Mattox v. United States, 156 U.S. 237, 242-43 (1895); *see also Ohio v. Roberts*, 448 U.S. 56, 63-64 (1980).

Thus, "the hearsay rule and the Confrontation Clause protect similar values by ensuring that witnesses adverse to the accused testify under oath, subject to cross-examination, and in the presence of the fact finder." Méndez, Crawford v. Washington*: A Critique*, 57 Stan. L. Rev. 569, 574; *see also California v. Green*, 399 U.S. 149, 157 (1970). The United States Supreme Court has made clear, however, that the Confrontation Clause is not a mere codification of the hearsay rule. The Court's decisions "have never established such a congruence ...." *Green*, 399 U.S. at 155. "[M]erely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied." *Id*. at 156. Similarly, the Court has "more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception." *Id*. at 155-56.

Under the Supremacy Clause of the United States Constitution (U.S. Const. art. VI, § 2), if evidence is inadmissible under the federal Confrontation Clause, that result prevails and cannot be overridden by state law. The Evidence Code specifically acknowledges as much. *"A statement that is otherwise admissible as hearsay evidence is inadmissible* against the defendant in a criminal action *if the statement was made,* either by the defendant or by another, *under such circumstances that it is inadmissible against the defendant under the Constitution of the United States* or the State of California." Evid. Code § 1204 (emphasis added).

The federal Confrontation Clause thus establishes the minimum criteria for admissibility of an out-of-court statement. The Evidence Code and the California Constitution can impose additional requirements, but they cannot deny the fundamental protections afforded by the federal Confrontation Clause.

The hearsay rule has many exceptions. See Cal. Evid. Code §§ 1220-1380. "An examination of the hearsay exceptions discloses that two grounds generally have been advanced for their creation." Méndez Treatise, *supra*, at 191. First, there is the necessity rationale: An exception may be justified by identifying a special need for the evidence. *Id*. Second, there is the reliability rationale: An exception may be based on a "belief that the circumstances under which the declaration was made suggest that the declaration is reliable for proving the truth of the matter stated." *Id*. "These circumstances are believed to furnish an adequate substitute for the benefits that would accrue if the declarant were cross examined under oath in the presence of the fact finder." *Id*.

Consistent with the necessity rationale, some exceptions to California's hearsay rule apply only if the declarant is unavailable. See, e.g., Evid. Code §§ 1230 (declaration against interest), 1290-1292 (former testimony). Similarly, some exceptions to the federal rule that prohibits hearsay evidence (Fed. R. Evid. 802) apply only if the declarant is unavailable. See Fed. R. Evid. 804(b).

To facilitate application of these exceptions, both the Evidence Code and the Federal Rules of Evidence define what it means for a declarant to be "unavailable."

California Approach

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

> 240. (a) Except as otherwise provided in subdivision (b), "unavailable as a witness" means that the declarant is any of the following:
>
> (1) Exempted or precluded on the ground of privilege from testifying concerning the matter to which his or her statement is relevant.
>
> (2) Disqualified from testifying to the matter.
>
> (3) Dead or unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity.
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> (4) Absent from the hearing and the court is unable to compel his or her attendance by its process.
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> (5) Absent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process.
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> (b) A declarant is not unavailable as a witness if the exemption, preclusion, disqualification, death, inability, or absence of the declarant was brought about by the procurement or wrongdoing of

the proponent of his or her statement for the purpose of preventing the declarant from attending or testifying.

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

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

Federal Approach

Federal Rule of Evidence 804(a) is the corresponding federal provision. It establishes the following rules for determining when a declarant is unavailable:

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

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

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

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

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

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

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

….

Differences Between the California Approach and the Federal Approach

The federal and the California definitions of "unavailability" are similar, but differ in certain respects.

Unavailability of a Person Who Refuses to Testify

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

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

The Supreme Court upheld that ruling. *Id*. at 547-53. Because Section 240 does not expressly cover a refusal to testify, however, the Court's determination that the witness was unavailable was based on Section 240(a)(3), which applies when a witness is "unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity." Specifically, the Court ruled that a trial court is permitted to "consider whether a mental state induced by fear of personal or family harm is a 'mental infirmity' that renders the person harboring the fear unavailable as a witness." *Rojas*, 15 Cal. 3d at 551.

It would be more straightforward if the statute expressly recognized that a witness who refuses to testify is unavailable, like the federal provision. In a background study for the Law Revision Commission comparing the federal and California hearsay rules, Prof. Miguel Méndez of Stanford Law School recommended that Section 240 be amended in that manner. Méndez, *California Evidence Code — Federal Rules of Evidence, Part I. Hearsay and Its Exceptions*, 37 U.S.F. L. Rev. 351, 357 (2003) (hereafter, "Méndez Hearsay Analysis").

Unavailability of a Person Who Cannot Testify Due to Memory Loss

Just as it expressly addresses a refusal to testify, the federal rule also makes clear that a declarant is unavailable as a witness if the declarant "testifies to a lack of memory of the subject matter of the declarant's statement." Fed. R. Evid. 804(a)(3). The advisory committee's note explains:

> The position that a claimed lack of memory by the witness of the subject matter of his statement constitutes unavailability … finds support in the cases, though not without dissent. [Citation omitted.] If the claim is successful, the practical effect is to put the

> testimony beyond reach, as in the other instances [of unavailability]. In this instance, however, it will be noted that the lack of memory must be established by the testimony of the witness himself, which clearly contemplates his production and subjection to cross-examination.

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

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

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

Again, it would be more straightforward if Section 240 expressly covered the situation. In his background study, Prof. Méndez recommended that the provision be amended to include the witness who suffers substantial memory loss among those who are unavailable to testify. Méndez Hearsay Analysis at 355.

Other Distinctions Between the California Approach and the Federal Approach

In addition to the points discussed above, there are several other distinctions between the California statute and the corresponding federal rule on unavailability of a declarant. It is not necessary to discuss those distinctions here. For information on them, see CLRC Memorandum 2005-6, p. 11; CLRC Memorandum 2004-45, pp. 43-44; CLRC Memorandum 2003-7, pp. 9-11.

Prior Decisions of the Commission

In late 2002, the Commission began a study comparing the Evidence Code to the Federal Rules of Evidence. Between then and early 2005, the Commission did considerable work on hearsay issues, using Prof. Méndez's background study and materials prepared by the staff. Before the Commission issued a tentative

recommendation, however, the study was put on hold. See CLRC Memorandum 2006-36, pp. 9-10.

One topic the Commission considered in its study was the definition of unavailability. For purposes of a tentative recommendation, the Commission decided that "Evidence Code Section 240 should be amended to expressly recognize that a witness who refuses to testify is unavailable." CLRC Minutes (March 2003), p. 10. The Commission also decided that the same provision should "be amended to expressly refer to a witness who cannot testify due to a failure of recollection." *Id*.

A representative of the California District Attorneys Association voiced concern about whether such an amendment would affect the doctrine of *People v. Green*, 3 Cal. 3d 981, 479 P.2d 998, 92 Cal. Rptr. 494 (1971). In *Green*, the California Supreme Court concluded that the hearsay exception for a prior inconsistent statement (Evid. Code § 1235) can be invoked when a witness claims at trial not to remember an event but that claim is inherently incredible, amounting to an implied denial of the prior statement. *Id*. at 985-89. The Court further determined that a witness' inherently incredible lapse of memory at trial is not equivalent to depriving the defendant of the right of cross-examination; the Confrontation Clause is satisfied so long as the defendant "has an adequate *opportunity*" to examine the witness. *Id*. at 989-91 (emphasis in original). These rules are not inconsistent with the idea that for purposes of other hearsay exceptions, a witness is unavailable if the witness testifies to a lack of memory on a subject. *See United States v. Owens*, 484 U.S. 554, (1988); 563-64; *People v. Gunder*, 151 Cal. App. 4th 412, 419 n.8, 59 Cal. Rptr. 3d 817 (2007); *People v. Perez*, 82 Cal. App. 4th 760, 767 n.2, 98 Cal. Rptr. 2d 522 (2000).

The Commission decided that its Comment should make clear that the proposed amendment of Section 240 "is not intended to have any impact" on the doctrine of *Green*. CLRC Minutes (March 2003), p. 10.

The Commission approved specific language for the proposed amendment of Section 240 and most of the corresponding proposed Comment. *Id*. at 10-11. Specific language for the portion of the Comment discussing *Green* was not drafted. *Id*. at 11.

The *Crawford* and *Davis* Decisions

Since the Commission last considered the definition of unavailability, the United States Supreme Court has issued two major decisions interpreting the

federal Confrontation Clause: *Crawford v. Washington*, 541 U.S. 36 (2004), and *Davis v. Washington*, __ U.S. __, 126 S.Ct. 2266 (2006).

For many years before *Crawford*, the United States Supreme Court used a two-part test to determine whether a hearsay statement had "adequate indicia of reliability" and thus could be admitted at trial in the declarant's absence without violating the Confrontation Clause. To meet this test, the hearsay statement had to either (1) fall within a "firmly rooted hearsay exception," or (2) have "particularized guarantees of trustworthiness." *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

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." 541 U.S. at 50. The Court explained that in light of this purpose, the *Roberts* test is both overbroad and overly narrow, *id.* at 59, and "is so unpredictable that it fails to provide meaningful protection from even core confrontation violations," *id*. at 63. 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 53-54. 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 51-52, 68. 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.* at 68.

In *Davis*, the Court provided guidance on when statements taken by police officers and related officials, such as 911 operators, constitute a testimonial statement. The Court held:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

126 S.Ct. at 2273-74. The Court also made clear that a nontestimonial statement is "subject to traditional limitations upon hearsay evidence, [but] is not subject to the Confrontation Clause." *Id*. at 2273.

Analysis

The new approach to the Confrontation Clause enunciated in *Crawford* made some prosecutions more difficult than they would have been in the past. Key evidence in such cases included one or more statements that might be characterized as testimonial and thus inadmissible under *Crawford* unless (1) the declarant testified at trial, or (2) the declarant was unavailable to testify at trial and the defendant had a prior opportunity to cross-examine the declarant.

For example, "[p]rosecutions for domestic violence, child abuse, and criminal conspiracies often rely on the hearsay statements of absent and unavailable witnesses." Flanagan, *Confrontation, Equity, and the Misnamed Exception for "Forfeiture" by Wrongdoing*, 14 Wm. & Mary Bill Rts. J. 1193, 1194 (2006). "These cases are particularly affected by *Crawford* because the victims often are unavailable, reluctant to testify, prone to recant prior statements, or, by reason of tender age, may be unlikely to testify." *Id*.; *see also* McKinstry, *"An Exercise in Fiction": The Sixth Amendment Confrontation Clause, Forfeiture by Wrongdoing, and Domestic Violence in* Davis v. Washington, 30 Harv. J. L. & Gender 531, 531-32 (2007); Percival, *The Price of Silence: The Prosecution of Domestic Violence Cases in Light of* Crawford v. Washington, 79 So. Cal. L. Rev. 213, 215-16, 235-37 (2005). It has been estimated, for instance, that about "80% of domestic violence victims refuse to testify or recant their earlier statements to the police about the violent incident for which the defendant is charged." King-Ries, 39 Creighton L. Rev. 441, 458 (2006); *see also* Percival, *supra*, at 235 ("Most jurisdictions report that in

the overwhelming majority of domestic violence cases, victims recant the testimony that was given to law enforcement immediately following the violent event, and many victims refuse to continue cooperating with the prosecution.").

To a certain extent, concern about the impact of *Crawford* on these types of cases was alleviated by *Davis*, which clarified that a statement is not testimonial if it is "made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." 126 S.Ct. at 2273. For example, if a person makes a 911 call for help against a bona fide, ongoing physical threat, and the 911 operator elicits statements that are given under unsafe conditions and are necessary to resolve the present emergency, the statements are nontestimonial and thus can be admitted without satisfying the *Crawford* requirements. *Id*. at 2276-77.

Concerns about the impact of *Crawford* could be further alleviated by amending Evidence Code Section 240 along the lines previously approved by the Commission — i.e., to expressly provide that a witness who refuses to testify despite a court order, or who lacks memory of a subject, is unavailable for purposes of the hearsay rule. That would not represent a substantive change in existing law, but it would facilitate reference to the applicable rules: Courts, attorneys, litigants, and others could simply refer to the text of Section 240, without having to search and explain case law on these matters. Amending the definition of unavailability would thus help courts and other persons determine whether the requirement of unavailability for certain hearsay exceptions is met.

For purposes of a tentative recommendation, the staff therefore recommends that the Commission **proceed with the amendment of Section 240 previously approved.** With revisions of the Comment to address *Green*, **that amendment would read as follows:**

> **Evid. Code § 240 (amended). Unavailable witness**
>
> 240. (a) Except as otherwise provided in subdivision (b), "unavailable as a witness" means that the declarant is any of the following:
>
> (1) Exempted or precluded on the ground of privilege from testifying concerning the matter to which his or her statement is relevant.
>
> (2) Disqualified from testifying to the matter.
>
> (3) Dead or unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity.

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

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

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

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

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

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

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

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

Paragraph (7) is added to Section 240(a) to codify case law recognizing that a witness who credibly testifies to a total lack of memory concerning the subject matter of an out-of-court statement is unavailable to testify on that subject. See People v. Alcala, 4 Cal. 4th 742, 778, 842 P.2d 1192, 15 Cal. Rptr. 2d 432 (1992). The language is drawn from Rule 804(a)(3) of the Federal Rules of Evidence.

> The addition of paragraph (7) has no impact on the twin doctrines of *People v. Green*, 3 Cal. 3d 981, 479 P.2d 998, 92 Cal. Rptr. 494 (1971). In *Green*, the Court held that the hearsay exception for a prior inconsistent statement (Section 1235) can be invoked when a witness claims at trial not to remember an event but that claim is inherently incredible, amounting to an implied denial of the prior statement. *Id.* at 985-89. The Court further concluded that a witness' inherently incredible lapse of memory at trial is not equivalent to depriving the defendant of the right of cross-examination guaranteed by the Confrontation Clause (U.S. Const. amend. VI). *Id.* at 989-91. These doctrines are not inconsistent with the concept that for purposes of other hearsay exceptions, a witness is unavailable if the witness testifies to a lack of memory on a subject. See United States v. Owens, 484 U.S. 554, (1988); 563-64; People v. Gunder, 151 Cal. App. 4th 412, 419 n.8, 59 Cal. Rptr. 3d 817 (2007); People v. Perez, 82 Cal. App. 4th 760, 767 n.2, 98 Cal. Rptr. 2d 522 (2000).
>
> Subdivision (b) is amended to encompass the revisions of subdivision (a).

The language used in the new paragraph on refusal to testify (paragraph (a)(6)) tracks the language used in Federal Rule of Evidence 804(a)(2). Similarly, the language used in the new paragraph on lack of memory (paragraph (a)(7)) tracks the language used in Federal Rule of Evidence 804(a)(3). The proposed amendment would thus offer the benefits of uniformity.

The proposed Comment refers to cases discussing whether a witness was unavailable due to a refusal to testify or a lack of memory. If the proposed amendment is enacted, these references in the Comment will enable judges and other persons to readily access the pertinent case law. The Comment will be entitled to great weight in construing the statute. See *2006-2007 Annual Report*, 36 Cal. L. Revision Comm'n Reports 1, 18-24 (2006) & sources cited therein.

FORFEITURE BY WRONGDOING

Sometimes, a defendant facing serious charges will arrange for a key adverse witness to be murdered. In other cases, a defendant may threaten such a witness or the witness' family, so that the witness refuses to testify or flees the jurisdiction and cannot be brought to court. A defendant may also engage in other types of wrongdoing with the objective of rendering a witness unavailable at trial.

Both the Evidence Code and the Federal Rules of Evidence include a hearsay rule exception based on a defendant's misconduct that causes a witness to be unavailable. The scope of those exceptions is quite different.

California Approach

Evidence Code Section 1350 is a detailed provision incorporating many safeguards, which was enacted in 1985. The Law Revision Commission was not involved in drafting the legislation, which was enacted to deal with the "murdered witness problem" — i.e., "serious charges are dismissed, lost or reduced every year because of the unavailability of prosecution witnesses who have been murdered or kidnapped by the persons against whom they would testify." *Dalton v. Superior Court*, 19 Cal. App. 4th 1506, 1511, 24 Cal. Rptr. 2d 248 (1993), *quoting* Assembly Floor Analysis of AB 2059 (1985-86).

Section 1350 provides:

> 1350. (a) In a criminal proceeding charging a serious felony, evidence of a statement made by a declarant is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness, and all of the following are true:
>
> (1) There is clear and convincing evidence that the declarant's unavailability was knowingly caused by, aided by, or solicited by the party against whom the statement is offered for the purpose of preventing the arrest or prosecution of the party and is the result of the death by homicide or the kidnapping of the declarant.
>
> (2) There is no evidence that the unavailability of the declarant was caused by, aided by, solicited by, or procured on behalf of, the party who is offering the statement.
>
> (3) The statement has been memorialized in a tape recording made by a law enforcement official, or in a written statement prepared by a law enforcement official and signed by the declarant and notarized in the presence of the law enforcement official, prior to the death or kidnapping of the declarant.
>
> (4) The statement was made under circumstances which indicate its trustworthiness and was not the result of promise, inducement, threat, or coercion.
>
> (5) The statement is relevant to the issues to be tried.
>
> (6) The statement is corroborated by other evidence which tends to connect the party against whom the statement is offered with the commission of the serious felony with which the party is charged.
>
> The corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.
>
> (b) If the prosecution intends to offer a statement pursuant to this section, the prosecution shall serve a written notice upon the defendant at least 10 days prior to the hearing or trial at which the

> prosecution intends to offer the statement, unless the prosecution shows good cause for the failure to provide that notice. In the event that good cause is shown, the defendant shall be entitled to a reasonable continuance of the hearing or trial.
>
> (c) If the statement is offered during trial, the court's determination shall be made out of the presence of the jury. If the defendant elects to testify at the hearing on a motion brought pursuant to this section, the court shall exclude from the examination every person except the clerk, the court reporter, the bailiff, the prosecutor, the investigating officer, the defendant and his or her counsel, an investigator for the defendant, and the officer having custody of the defendant. Notwithstanding any other provision of law, the defendant's testimony at the hearing shall not be admissible in any other proceeding except the hearing brought on the motion pursuant to this section. If a transcript is made of the defendant's testimony, it shall be sealed and transmitted to the clerk of the court in which the action is pending.
>
> (d) As used in this section, "serious felony" means any of the felonies listed in subdivision (c) of Section 1192.7 of the Penal Code or any violation of Section 11351, 11352, 11378, or 11379 of the Health and Safety Code.
>
> (e) If a statement to be admitted pursuant to this section includes hearsay statements made by anyone other than the declarant who is unavailable pursuant to subdivision (a), those hearsay statements are inadmissible unless they meet the requirements of an exception to the hearsay rule.

Federal Approach

The corresponding federal provision, enacted only ten years ago, is broader in scope but far less detailed. Federal Rule of Evidence 804(b)(6) provides:

> 804. ... (b) **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> ....
>
> (6) **Forfeiture by wrongdoing.** A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

The Uniform Rules of Evidence contain a provision that is almost identical to the federal rule. See Unif. R. Evid. 804(b)(5).

The advisory committee's note to Rule 804(b)(6) explains that the provision was added "to provide that a party forfeits the right to object on hearsay grounds to the admission of a declarant's prior statement when the party's deliberate wrongdoing or acquiescence therein procured the unavailability of the declarant as a witness." The provision thus "recognizes the need for a prophylactic rule to

deal with abhorrent behavior 'which strikes at the heart of the system of justice itself.'" Fed. R. Evid. 804(b)(6) advisory committee's note, *quoting United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982).

Differences Between the California Approach and the Federal Approach

There are numerous distinctions between the California provision and the federal provision on forfeiture by wrongdoing:

- **Type of Case in Which the Exception Applies.** Evidence Code Section 1350 applies only in "a criminal proceeding charging a serious felony." Federal Rule of Evidence 804(b)(6) applies in any type of case, civil or criminal.
- **Party Against Whom the Exception May Be Invoked.** The California provision can be invoked against a party who wrongfully sought to "preven[t] the arrest or prosecution of the party ...." Evid. Code § 1350(a)(1). There does not seem to be any basis for invoking the California provision against the government. In contrast, the federal rule "applies to all parties, including the government." Fed. R. Evid. 804(b)(6) advisory committee's note.
- **Reason for the Declarant's Unavailability.** The California provision applies only when the declarant's unavailability "is the result of the death by homicide or the kidnapping of the declarant." Evid. Code § 1350(a)(1). Under the federal rule, "[t]he wrongdoing need not consist of a criminal act." Fed. R. Evid. 804(b)(6) advisory committee's note.
- **Acquiescence in Wrongdoing that Results in the Declarant's Unavailability.** The California provision applies only when "the declarant's unavailability was *knowingly caused by, aided by, or solicited by* the party against whom the statement is offered ...." Evid. Code § 1350(a)(1) (emphasis added). In contrast, under the federal rule it is sufficient if a party "has engaged *or acquiesced* in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." Fed. R. Evid. 804(b)(6) (emphasis added).
- **Standard of Proof.** The California provision requires "*clear and convincing evidence* that the declarant's unavailability was knowingly cause by, aided by, or solicited by the party against whom the statement is offered for the purpose of preventing the arrest or prosecution of the party and is the result of the death by homicide or the kidnapping of the declarant." Evid. Code § 1350(a)(1) (emphasis added). The federal rule does not expressly state the applicable standard of proof, but the advisory committee's note explains that the "usual Rule 104(a) *preponderance of the evidence standard* has been adopted in light of the behavior the new Rule 804(b)(6) seeks to discourage." (Emphasis added.)

- **Evidence that the Proponent of the Hearsay Statement Is Responsible for the Declarant's Unavailability.** The California provision cannot be invoked if there is "evidence that the unavailability of the declarant was caused by, aided by, solicited by, or procured on behalf of, the party who is offering the statement." Evid. Code § 1350(a)(2). The corresponding federal rule does not include such a limitation.
- **Form of the Hearsay Statement.** The California provision applies only if the hearsay statement "has been memorialized in a tape recording made by a law enforcement official, or in a written statement prepared by a law enforcement official and signed by the declarant and notarized in the presence of the law enforcement official, prior to the death or kidnapping of the declarant." Evid. Code § 1350(a)(3). The corresponding federal rule does not impose any limitations on the form of the hearsay statement.
- **Circumstances Under Which the Hearsay Statement Was Made.** The California provision can be invoked only if the hearsay statement "was made under circumstances which indicate its trustworthiness and was not the result of promise, inducement, threat, or coercion." Evid. Code § 1350(a)(4). The corresponding federal rule does not include such a limitation.
- **Relevance of the Hearsay Statement.** The California provision expressly states that the hearsay statement must be "relevant to the issues to be tried." Evid. Code § 1350(a)(5). The corresponding federal rule includes no such language. In both contexts, such language is unnecessary due to the general prohibition on introducing irrelevant evidence. See Evid. Code § 350 ("No evidence is admissible except relevant evidence."); Fed. R. Evid. 402 ("Evidence which is not relevant is not admissible.").
- **Evidence Connecting the Defendant to Commission of the Serious Felony Charged.** Under the California provision, the hearsay statement cannot be the sole evidence that connects the defendant to the serious felony charged against the defendant. Rather, the statement is admissible only if it "is corroborated by other evidence which tends to connect the party against whom the statement is offered with the commission of the serious felony with which the party is charged." Evid. Code § 1350(a)(6). "The corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." *Id.* The corresponding federal rule includes no such requirement.
- **Notice of Intent to Invoke the Forfeiture by Wrongdoing Exception.** The California provision requires the prosecution to notify the defendant ten days before the prosecution offers a hearsay statement under the provision. Evid. Code § 1350(b). There is a good cause exception, but if good cause is shown "the defendant shall be entitled to a reasonable continuance of the

hearing or trial." *Id*. The corresponding federal rule does not require a party to give advance notice of intent to invoke the rule.

- **Procedure for Determining Whether the Exception Applies.** The California provision expressly states that if a hearsay statement is offered under it during trial, "the court's determination shall be made out of the presence of the jury." Evid. Code § 1350(c). The provision also gives guidance on what procedure to use if the defendant elects to testify in connection with that determination. *Id*. The corresponding federal rule does not provide guidance on these points.
- **Multiple Hearsay.** The California provision expressly states that if the proffered statement "includes hearsay statements made by anyone other than the declarant who is unavailable ..., those hearsay statements are inadmissible unless they meet the requirements of an exception to the hearsay rule." Evid. Code § 1350(e). The corresponding federal rule includes no such language. In both contexts, such language is unnecessary due to the general provision governing multiple hearsay. See Evid. Code § 1201; Fed. R. Evid. 805.
- The California provision and the corresponding federal rule differ in the extent to which they permit the court to consider the proffered statement in determining whether the exception applies. This point will be explained in greater detail later in this memorandum.

In summary, California's hearsay exception for forfeiture by wrongdoing (Evid. Code § 1350) is more narrow and incorporates more restrictions than the corresponding federal rule (Fed. R. Evid. 804(b)(6)). As Prof. Méndez said in his background study for the Commission, "[t]he numerous California limitations evince an abundance of caution when abolishing the right of criminal defendants to object to hearsay even when they have been charged with bringing about the hearsay declarant's unavailability as a witness." Méndez Hearsay Analysis, *supra*, at 390. Prof. Méndez did not make a recommendation on whether the federal approach is preferable to the California approach. *See id.* at 388-90.

Prior Decisions of the Commission

In 2004, the staff prepared a memorandum that discussed the California and federal provisions on forfeiture by wrongdoing, as well as other hearsay exceptions. CLRC Memorandum 2004-45. The staff pointed out that Profs. Eileen Scallen and Glen Weissenberger "regard the California provision as 'far more sensible than the vague and wide-ranging federal provision.'" *Id*. at 30, *quoting* E. Scallen & G. Weissenberger, California Evidence: Courtroom Manual 1209 (1st

ed. 2000). The staff agreed with that perspective, advising the Commission not to "relax the careful safeguards incorporated into Section 1350, which obviously were designed to restrict the provision to a situation in which there is solid evidence of the accused's misconduct." CLRC Memorandum 2004-45, p. 30. That advice was consistent with the Commission's general practice not to interfere with a recent enactment that balances competing policies.

The staff urged the Commission to consider supplementing Section 1350 "with a provision similar to Rule 804(b)(6) that could be invoked in a civil case." *Id*. at 30-31." Cautioning that it could be controversial, the staff also raised the possibility of adding "a similar provision applicable to the prosecution in a criminal case." *Id*. at 31.

After discussing the memorandum at a public meeting, the Commission decided that "Evidence Code Section 1350 should be left as is." CLRC Minutes (March 17-18, 2005), p. 10. The Commission further decided to propose a new provision that could be invoked in a civil case, along the following lines:

> 1351. Evidence of a statement is not made inadmissible by the hearsay rule if both of the following conditions are satisfied:
> (a) The declarant is unavailable as a witness.
> (b) The statement is offered against a party in a civil action when that party has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.
>
> **Comment.** Section 1351 is added to the Evidence Code to help ensure that a party does not benefit from wrongfully causing the unavailability of an adverse witness. It is drawn from Federal Rule of Evidence 804(b)(6) and Uniform Rule of Evidence 804(b)(5). For a provision governing unavailability of a declarant due to wrongdoing by the defendant in a criminal proceeding charging a serious felony, see Section 1350.
> See also Section 120 ("civil action" defined).

Id. The Commission decided not to draft a provision similar to Section 1350 that would apply to the prosecution in a criminal case. *Id*.

Forfeiture by Wrongdoing Exception to the Confrontation Clause

Before revisiting the Commission's earlier decisions, it is necessary to discuss the interplay between the Confrontation Clause and the doctrine of forfeiture by wrongdoing.

If hearsay evidence is admitted against a criminal defendant pursuant to Evidence Code Section 1350 or Federal Rule of Evidence 804(b)(6), the defendant

has no opportunity to cross-examine the declarant. If the hearsay evidence is testimonial, does this deprive the defendant of the constitutional right of confrontation?

Key case law on this point is discussed below.

Early Decisions by the United States Supreme Court

Although the Confrontation Clause generally gives a defendant the right to confront an adverse witness, the United States Supreme Court has long recognized an exception when the defendant has taken steps to prevent a witness from testifying. As the Court explained in *Reynolds v. United States*, 98 U.S. 145, 158 (1878):

> The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he as kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.

The Court further explained that the forfeiture exception "has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong; and, consequently, if there has not been, in legal contemplation, a wrong committed, the way has not been opened for the introduction of the testimony." *Id*. at 159. In several later cases, the Court mentioned the forfeiture exception, but did not provide much more guidance on its contours. *See Diaz v. United States*, 223 U.S. 442, 449-53 (1912), *West v. Louisiana*, 194 U.S. 258, 265 (1904); *Motes v. United States*, 178 U.S. 458, 471-74 (1900); *Mattox v. United States*, 156 U.S. 237, 242 (1895); *Eureka Lake & Yuba Canal Co. v. Superior Court*, 116 U.S. 410, 418 (1886).

Recent Decisions by the United States Supreme Court

When it decided *Crawford* in 2004, the Court made clear that the new approach it took in that case did not negate the forfeiture exception to the Confrontation Clause. After carefully distinguishing between hearsay exceptions that do and do not "claim to be a surrogate means of assessing reliability," the Court explained that "the rule of forfeiture by wrongdoing *(which we accept)*

extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternate means of determining reliability." 541 U.S. at 62 (emphasis added).

In *Davis*, the hearsay proponents and several amici contended that a testimonial statement should be more readily admissible in a domestic violence case than in other cases because that "particular type of crime is notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial." 126 S.Ct. at 2279-80. In responding to that contention, the Court did not establish a special rule applicable to a testimonial statement in a domestic violence case. It did, however, discuss the forfeiture exception to the Confrontation Clause in some detail:

> "[W]hen defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they *do* have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system. We reiterate what we said in *Crawford*: that "the rule of forfeiture by wrongdoing ... extinguishes confrontation claims on essentially equitable grounds." [Citation omitted.] That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.
>
> We take no position on the standards necessary to demonstrate such forfeiture, but federal courts using Federal Rule of Evidence 804(b)(6), which codifies the forfeiture doctrine, have generally held the Government to the preponderance-of-the-evidence standard, [citations omitted.] State courts tend to follow the same practice, [citations omitted]. Moreover, if a hearing on forfeiture is required, [a Massachusetts case], for instance, observed that "hearsay evidence, including the unavailable witness's out-of-court statements, may be considered." [Citation omitted.] The *Roberts* approach to the Confrontation Clause undoubtedly made recourse to this doctrine less necessary, because prosecutors could show the "reliability" of *ex parte* statements more easily than they could show the defendant's procurement of the witness's absence. *Crawford*, in overruling *Roberts*, did not destroy the ability of courts to protect the integrity of their proceedings.
>
> We have determined that, absent a finding of forfeiture by wrongdoing, the Sixth Amendment operates to exclude Amy Hammon's affidavit. The Indiana courts may (if they are asked) determine on remand whether such a claim of forfeiture is properly raised and, if so, whether it is meritorious.

Id. at 2280 (emphasis in original).

Recent Decision by the California Supreme Court

A recent decision by the California Supreme Court provides further guidance on the scope of the forfeiture by wrongdoing exception to the federal Confrontation Clause. In *People v. Giles*, 40 Cal. 4th 833, 837, 152 P.3d 433, 55 Cal. Rptr. 3d 133 (2007), *petition for cert. filed*, __ U.S.L.W. __ (U.S. Aug. 20, 2007) (No. 07-6053), the defendant "admitted that he killed his ex-girlfriend, but claimed that the killing was committed in self-defense." Over his objection, "the trial court admitted the victim's prior statements to a police officer who had been investigating a report of domestic violence involving defendant and the victim." *Id*. In those statements, the victim described an incident that occurred a few weeks before the killing. *Id*. She said that the defendant "had held a knife to her and threatened to kill her." *Id*.

The Court concluded that the defendant "forfeited his confrontation clause challenge to the victim's prior out-of-court statements to the police." *Id*. at 855. In reaching that conclusion, the Court addressed a number of important issues.

First, the defendant argued that the forfeiture by wrongdoing exception to the Confrontation Clause was inapplicable because there was no showing that the defendant killed the victim "*with the intent of preventing her testimony* at a pending or potential trial." *Id*. at 841 (emphasis added). The Court discussed this point at length and ultimately concluded that it is not necessary to show an intent to prevent testimony to invoke the forfeiture exception to the Confrontation Clause:

> Although courts have traditionally applied the forfeiture rule to witness tampering cases, *forfeiture principles can and should logically and equitably be extended to other types of cases in which an intent-to-silence element is missing*. As the Court of Appeal here stated, "Forfeiture is a logical extension of the equitable principle that no person should benefit from his own wrongful acts. A defendant whose intentional criminal act renders a witness unavailable for trial benefits from his crime if he can use the witness's unavailability to exclude damaging hearsay statements by the witness that would otherwise be admissible. *This is so whether or not the defendant specifically intended to prevent the witness from testifying at the time he committed the act that rendered the witness unavailable*.

Id. at 849 (footnote omitted, emphasis added). Thus, the Court concluded it is enough to show that the witness is "genuinely unavailable to testify" and "the unavailability for cross-examination [was] caused by the defendant's intentional criminal act." *Id*. at 854.

Second, the Court considered "whether the doctrine of forfeiture by wrongdoing applies where the alleged wrongdoing *is the same as* the offense for which defendant was on trial." *Id*. at 851 (emphasis added). In a classic witness tampering case, "the defendant is *not* on trial for the same wrongdoing that caused the forfeiture of his confrontation right, but rather for a prior underlying crime about which the victim was about to testify." *Id*. at 851 (emphasis added). In *Giles*, however, the defendant was on trial for murder, the same wrongdoing that the prosecution pointed to in contending that the defendant had forfeited his right of confrontation. The argument against extending the forfeiture exception to such a situation is that "in ruling on the evidentiary matter, a trial court is required, in essence, to make *the same determination of guilt of the charged crime as the jury*." *Id*. (emphasis added).

The Court rejected that argument, explaining that the "presumption of innocence and right to jury trial will not be infringed because the jury 'will never learn of the judge's preliminary finding' and 'will use different information and a different standard of proof to decide the defendant's guilt.'" *Id*. at 851, *quoting United States v. Mayhew*, 380 F. Supp. 2d 961, 968 (S.D. Ohio 2005). Consistent with that conclusion, the Court made clear that "the jury should not be advised of the trial court's underlying finding that the defendant committed an intentional criminal act ...." *Id*. at 854.

Third, the Court considered what standard applies in proving the facts necessary to invoke the forfeiture exception under the federal Confrontation Clause. The defendant argued that those facts must be proved by *clear and convincing evidence*. The Court disagreed. It noted that the "majority of the lower federal courts have held that the applicable standard necessary for the prosecutor to demonstrate forfeiture by wrongdoing is *by a preponderance of the evidence*." *Giles*, 40 Cal. 4th at 852 (emphasis added). The Court endorsed that standard, explaining that the Constitution only requires proof that it is more probable than not that the defendant procured the declarant's unavailability. *Id*. at 853.

Fourth, the Court discussed whether the proffered hearsay statement can be considered in determining whether the forfeiture exception applies. The Court concluded that the statement can be considered, subject to a limitation. Specifically, the Court cautioned that "a trial court cannot make a forfeiture finding based solely on the unavailable witness's unconfronted testimony; there must be independent corroborative evidence that supports the forfeiture finding." *Id*. at 854.

Finally, the Court made clear that its decision simply outlines the requirements of the Confrontation Clause; it does not foreclose the possibility that the Evidence Code imposes additional restrictions on the admissibility of a hearsay statement:

> The forfeiture by wrongdoing doctrine, as adopted by us, only bars a defendant's objections under the confrontation clause of the federal Constitution and does not bar statutory objections under the Evidence Code. Thus, even if it is established that a defendant has forfeited his or her right of confrontation, the contested evidence is still governed by the rules of evidence; a trial court should still determine whether an unavailable witness's prior hearsay statement falls within a recognized hearsay exception and whether the probative value of the proffered evidence outweighs its prejudicial effect. (Evid. Code, § 352.)

Id.

After losing the case, the defendant in *Giles* petitioned the United States Supreme Court, urging it to review the California Supreme Court's decision. The United States Supreme Court has not yet ruled on whether to grant certiorari and consider the case on its merits.

Justice Werdegar's Concurrence

Justice Werdegar, joined by Justice Moreno, concurred in the California Supreme Court's decision in *Giles*. She agreed with the majority that "the doctrine of forfeiture by wrongdoing is not confined exclusively to witness-tampering cases, in which a defendant commits malfeasance in order to procure the unavailability of a witness, but can [also] be applied ... where the defendant's actions in procuring a witness's unavailability were the same actions for which he stood trial." *Id*. at 855 (Werdegar, J., concurring). She criticized the Court, however, for "address[ing] and resolv[ing] two subsidiary questions" that were unnecessary to disposition of the case before it. *Id*.

In particular, Justice Werdegar noted:

- The Court "decides whether the prosecution, in order to use the victim's hearsay statements, must demonstrate the defendant's wrongdoing by clear and convincing evidence or only a preponderance of the evidence, despite its implicit acknowledgment the issue is not implicated here because either standard was satisfied." *Id*.
- The Court "decides whether and to what extent the victim's challenged statements may be used in making this threshold

> showing of wrongdoing, despite the fact, again, the evidence independent of [the victim's] statements makes it unnecessary to speak to this point." *Id*.

She explained that it was "unnecessary and unwise" to decide these issues because they were not addressed by either of the lower courts, they were not included in the grant of review and thus not fully briefed, and they required constitutional analysis, which "should not be embarked on lightly and never when a case's resolution does not demand it." *Id*. at 856, 857.

Possible Statutory Approaches

Much has happened since the Commission previously considered Evidence Code Section 1350 and the doctrine of forfeiture by wrongdoing. The full implications of *Crawford* are unfolding and the United States Supreme Court has provided significant new guidance in *Davis*. In *Giles*, the California Supreme Court described in detail what is required to satisfy the forfeiture by wrongdoing exception to the federal Confrontation Clause. Through its letter asking the Commission to prepare a report by March 1, 2008, the Senate Committee on Judiciary made clear that it wants the Commission to review and make a recommendation relating to the doctrine of forfeiture by wrongdoing. That entails reexamining the policy decisions underlying Evidence Code Section 1350, not merely accepting them as a recent enactment.

Based on the research we have done so far, the staff sees several possible approaches that the Legislature could take: (1) replace Section 1350 with a provision that tracks the constitutional minimum as enumerated by the California Supreme Court, (2) replace Section 1350 with a provision similar to Federal Rule of Evidence 804(b)(6), (3) broaden Section 1350 to a limited extent, with the possibility of further revisions later, and (4) leave Section 1350 alone, at least until there is further judicial guidance. The next section discusses some key points to consider in evaluating these approaches. Each approach is then analyzed separately.

Key Points to Consider

In evaluating the possible statutory approaches, the Commission should bear in mind two overriding and competing policy interests. On the one hand, if a person commits a wrongful act that causes a witness to be unavailable to testify, such behavior interferes with the operation of the justice system and may enable the person to evade justice. Under such circumstances, it may be appropriate to

deprive the person of the opportunity to object to an out-of-court statement by the unavailable witness, to in effect level the playing field that was distorted by the person's misconduct.

On the other hand, an innocent person should not be punished for a criminal act committed by another, nor should a person guilty of one crime (e.g., manslaughter) be found guilty of a more egregious crime (e.g., premeditated murder). Likewise, it is important to achieve a just result in a civil case, not only for the sake of the parties but also because an unfair outcome may undermine public confidence in the justice system.

An out-of-court statement by a witness who is wrongfully prevented from testifying does not necessarily have any special assurance of reliability. Admission of such a statement, without an opportunity to cross-examine the declarant, may mislead the factfinder and lead to an incorrect decision. While it might be appropriate to admit such a statement under some circumstances, the circumstances should be crafted to minimize the likelihood of an incorrect result, as well as ensure that wrongful conduct actually occurred and was sufficiently serious to justify forfeiture of the constitutional right of confrontation.

Above all, any legislation on forfeiture by wrongdoing must comply with constitutional constraints. The Constitution of the United States is "the supreme law of the land, and the judges in every state shall be bound thereby, any thing in the ... laws of any state to the contrary notwithstanding." U.S. Const. art. VI, § 2.

Option #1. Replace Section 1350 With a Provision That Tracks the Constitutional Minimum As Enumerated By the California Supreme Court

The hearsay rule exception provided by Evidence Code Section 1350 is much narrower than the forfeiture exception to the federal Confrontation Clause as described by the California Supreme Court in *Giles*. Thus, admission of a hearsay statement might be constitutionally acceptable, yet the statement might still be subject to exclusion under the hearsay rule because it fails to satisfy the more stringent admissibility requirements of Section 1350.

To prevent a person from benefiting from wrongfully causing a witness' unavailability, the Legislature could repeal Section 1350 and replace it with a provision that tracks the constitutional minimum as enumerated by the California Supreme Court in *Giles*. Specifically, a new provision could create an exception to the hearsay rule that applies in the following circumstances:

- A party offers evidence of a statement made by a declarant who is unavailable to testify.
- The evidence is offered against a party whose intentional criminal act caused the declarant to be unavailable to testify. It is not necessary that the party intended to prevent the declarant from testifying.
- Such misconduct is proved to the court by a preponderance of the evidence.
- The court may consider the declarant's statement in determining whether the party against whom it is offered engaged in an intentional criminal act that caused the declarant to be unavailable to testify.
- The declarant's statement is not the sole basis for finding that the party against whom it is offered engaged in an intentional criminal act that caused the declarant to be unavailable to testify. There must be some independent corroborating evidence.
- The intentional criminal act that caused the declarant's unavailability may be the same act charged in the underlying case or it may be a different act.
- In a jury trial, the admissibility of the evidence is determined outside the presence of the jury. The jury is not informed of the court's finding.

The new provision codifying *Giles* could perhaps be drafted along the following lines:

> **Evid. Code § 1350 (added). Forfeiture by wrongdoing**
>
> 1350. (a) Evidence of a statement made by a declarant is not made inadmissible by the hearsay rule if both of the following are true:
>
> (1) The declarant is unavailable as a witness.
>
> (2) The evidence is offered against a party whose intentional criminal act caused the declarant to be unavailable to testify.
>
> (b) The requirements of subdivision (a) shall be proved to the court by a preponderance of the evidence.
>
> (c) The court may consider the evidence of the declarant's statement in determining whether the party against whom it is offered engaged in an intentional criminal act that caused the declarant to be unavailable as a witness. That evidence shall not be the sole basis for a finding that the party against whom it is offered engaged in an intentional criminal act that caused the declarant to be unavailable as a witness. There shall also be some independent corroborating evidence.
>
> (d) The intentional criminal act that caused the declarant's unavailability may be the same as an act charged against the opponent of the evidence, or it may be a different act.

(e) If evidence is offered under this section in a jury trial, the court shall determine the admissibility of the evidence outside the presence of the jury. The jury shall not be informed of the court's finding.

Comment. Section 1350 supersedes former Section 1350 (1985 Cal. Stat. ch. 783, § 1). The new provision tracks the requirements of the forfeiture by wrongdoing exception to the federal Confrontation Clause (U.S. Const. amend. VI), as described by the California Supreme Court in *People v. Giles*, 40 Cal. 4th 833, 837, 152 P.3d 433, 55 Cal. Rptr. 3d 133 (2007), *petition for cert. filed*, __ U.S.L.W. __ (U.S. Aug. 20, 2007) (No. 07-6053).

See Section 240 ("unavailable as a witness").

Lack of Guidance From the United States Supreme Court

A problem with attempting to codify *Giles* is that the California Supreme Court is not the final authority on the meaning of the federal Confrontation Clause. In fact, its decision in *Giles* is now pending before the United States Supreme Court. In addition, another case raising similar issues is also pending before that court. *State v. Romero*, 141 N.M. 403, 156 P.3d 694, *petition for cert. filed*, __ U.S.L.W. __ (U.S. July 6, 2007) (No. 07-37). It is difficult to predict when the Court will rule on the petitions for certiorari and whether it will decide to review either case on its merits.

If the United States Supreme Court grants certiorari in *Giles* or *Romero*, or in a later case on forfeiture by wrongdoing, it might reach the same decisions about the constraints of the federal Confrontation Clause that the California Supreme Court reached in *Giles*. But that is not a foregone conclusion, as explained below.

Uncertainty Regarding Intent to Prevent Testimony

Although the California Supreme Court concluded that in establishing forfeiture it is not necessary to prove the defendant intended to prevent the declarant from testifying, some courts and commentators have reached the opposite conclusion. As the Court acknowledged in *Giles*, "courts have disagreed over this requirement." 40 Cal. 4th at 846. In *Romero*, for instance, the New Mexico Supreme Court held that "the prosecution is required to prove intent to procure the witness's unavailability in order to bar a defendant's right to confront that witness." 156 P.3d at 703. According to the New Mexico Supreme Court, that is the majority rule. *Id*. at 702.

Similarly, Prof. James Flanagan (University of South Carolina) says that the "history and precedents of the 'forfeiture' rule from seventeenth-century

England to the date that *Crawford* was decided, all focused on witness tampering and all included an intent requirement." Flanagan, *supra*, at 1214. He reports that after *Crawford*, however, "a broader version of the rule is gaining currency" in the lower courts, under which a defendant "loses any confrontation rights if he is responsible in any way for the absence of the witness at trial, regardless of his intent." *Id*. at 1196.

Prof. Flanagan believes the original approach, requiring proof of intent to prevent testimony, is better policy than the alternative approach. *See id.* at 1248-49. Some other commentators have expressed similar views. *See, e.g.*, Comparet-Cassani, Crawford *and the Forfeiture by Wrongdoing Exception*, 42 San Diego L. Rev. 1185, 1209 (2005) ("To extend the doctrine to cases where there is no evidence that the accused intended to prevent the witness from testifying at trial is to apply the doctrine where there is no equitable basis for its invocation."). Still other commentators disagree. *See, e.g.*, Raeder, *Confrontation Clause Analysis After Davis*, 22 Crim. Just. 10, 19 (Spring 2007) (forfeiture rationale is appropriate "despite the lack of any intentional witness tampering"); Friedman, *Adjusting to* Crawford*: High Court Decision Restores Confrontation Clause Protection*, 19 Crim. Just. 4, 12 (Summer 2004) (dismissing concerns about eliminating requirement of intent to prevent testimony); *Percival*, *supra*, at 253 ("The standard of forfeiture by wrongdoing should not require a showing of the defendant's intent to prevent a witness from testifying.").

When the staff learned about the ongoing dispute over whether it is necessary and whether it should be necessary to prove that the defendant intended to impede testimony, we contacted Prof. Daniel Capra (Fordham University School of Law) to find out whether there had been any recent efforts to remove the intent requirement from Federal Rule of Evidence 804(b)(6). Prof. Capra serves as the reporter for the advisory committee on the Federal Rules of Evidence. He was not aware of any such efforts. Email from D. Capra to B. Gaal (9/17/07). He cautioned against taking out the intent requirement in California, because that would "raise constitutional questions you may not wish to encounter." Email from D. Capra to B. Gaal (9/19/07). In particular, although some people contend that intent to prevent testimony is not constitutionally required for forfeiture, Prof. Capra "do[es]n't think anyone can say with confidence that this is actually so." *Id*.

Uncertainty Regarding Other Issues

The petition for certiorari in *Giles* focuses on the issue of intent to prevent testimony; we understand that the same is true of the petition for certiorari in *Romero*, which we have not yet seen. But uncertainty exists regarding other issues as well.

An "important ambiguity regarding the forfeiture by wrongdoing doctrine after *Crawford* is whether courts can make a finding of forfeiture based on the same criminal acts for which the defendant is currently on trial." Percival, *supra*, at 231. This issue is to some extent linked to the intent issue. If a finding of forfeiture requires proof that the defendant committed a wrongful act with intent to prevent a witness from testifying about a crime, it is arguably implicit in this rule that the underlying crime predates and is distinct from the wrongful act that is committed with intent to cover up evidence of the crime.

Another issue is the standard of proof. A majority of federal courts have used the preponderance of the evidence standard in determining whether the constitutional right of confrontation has been forfeited. *Davis,* 126 S. Ct. at 2280; *Giles*, 40 Cal. 4th at 852. As Justice Werdegar pointed out in her *Giles* concurrence, however, "[t]hat majority federal view might well be right, but it might also be wrong, especially given that the federal cases [cited in *Giles*] uniformly antedate the United States Supreme Court's recent reassertion of the breadth and importance of the confrontation clause in ensuring defendants their fair trials." *Giles*, 40 Cal. 4th at 856 (Werdegar, J., concurring).

There is also "disagreement in the courts as to the issue of 'bootstrapping,' or whether the statement itself can establish the wrongdoing." King-Ries, *supra,* at 2. As Justice Werdegar stated, it is unclear "whether and to what extent the victim's challenged statements may be used in making th[e] threshold showing of wrongdoing" that results in forfeiture. *Giles*, 40 Cal. 4th at 855 (Werdegar, J., concurring).

Analysis

It may not be realistic to expect the United States Supreme Court to provide guidance on all of the unresolved constitutional issues in the near future. Given the importance of the issues, however, and the degree of disagreement that exists regarding the intent requirement in particular, **it would be premature to replace Section 1350 with a provision tracking the constitutional minimum at this time.** Certainly, the Legislature should not act before the United States Supreme

Court rules on the petitions for certiorari in *Giles* and *Romero*. If the Court grants certiorari in one of those cases, then it would be unwise to act until the Court decides that case on its merits. If the Court denies certiorari in both cases, the Court may nonetheless address the intent issue and perhaps some of the other unsettled issues within the next few years, because they are significant issues that are likely to arise frequently in criminal cases across the country. It would be unfortunate to have enacted legislation based on *Giles* only to find that some aspect of it is unconstitutional, causing reversals in numerous California cases. The better course would be to wait for further guidance from the United States Supreme Court, at least on the divisive issue of intent. Ideally, there would also be guidance from the California Supreme Court on the requirements of California's Confrontation Clause (Cal. Const. art. art. I, § 15). Then California could examine the constitutional minimum and determine whether it wants to codify that minimum or deviate from it by providing additional statutory protection in one or more respects.

Option #2. Replace Section 1350 With a Provision Similar to Federal Rule of Evidence 804(b)(6)

A second possibility would be to repeal Section 1350 and replace it with a provision similar to Federal Rule of Evidence 804(b)(6). Because Rule 804(b)(6) provides a much broader forfeiture exception to the hearsay rule than Section 1350, this approach would allow introduction of hearsay evidence that might otherwise be excluded. It would therefore help to address concerns that prosecution of some criminal cases has been impeded by *Crawford's* limitations on admissibility of testimonial statements. Because Rule 804(b)(6) applies to all parties, this approach would also be more even-handed than Section 1350, under which the forfeiture doctrine can only be invoked against the defendant. Further, the federal rule applies to both civil and criminal cases, so enacting a provision like it would discourage witness tampering in all types of cases, not just in serious felonies as provided by Section 1350.

A provision based on Rule 804(b)(6) could be drafted along the following lines:

> **Evid. Code § 1350 (added). Forfeiture by wrongdoing**
>
> 1350. Evidence of a statement made by a declarant is not made inadmissible by the hearsay rule if both of the following are true:
>
> (a) The declarant is unavailable as a witness.

(b) The evidence is offered against a party who has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

Comment. Section 1350 supersedes former Section 1350 (1985 Cal. Stat. ch. 783, § 1). The new provision is drawn from Federal Rule of Evidence 804(b)(6) and Uniform Rule of Evidence 804(b)(5).

See Section 240 ("unavailable as a witness").

It is important to consider whether such a provision would comply with the constraints of the Confrontation Clause. That point is discussed below.

Intent to Prevent Testimony

The provision shown above, like Rule 804(b)(6), would expressly require that the party against whom the hearsay statement is offered "engaged or acquiesced in wrongdoing that *was intended to,* and did, *procure the unavailability of the declarant as a witness*." (Emphasis added.) Because it requires proof of intent to prevent testimony, the provision could not be held unconstitutional for failure to incorporate such a requirement. Guidance from the United States Supreme Court on the issue of intent is not needed to ensure that the provision is constitutionally viable in this respect.

Standard of Proof

With regard to the standard of proof, the matter is not quite so clear-cut. Like Rule 804(b)(6), the provision shown above would not specify the standard of proof. But the advisory committee's note to Rule 804(b)(6) states that the "usual Rule 104(a) preponderance of the evidence standard has been adopted in light of the behavior the new Rule 804(b)(6) seeks to discourage." It is thus probable that any provision modeled on Rule 804(b)(6) would be interpreted to incorporate a preponderance of the evidence standard, unless the provision expressly provides otherwise.

To help ensure that the above provision modeled on Rule 804(b)(6) is constitutional, it could be modified to expressly incorporate the clear and convincing evidence standard:

Evid. Code § 1350 (added). Forfeiture by wrongdoing

1350. (a) Evidence of a statement made by a declarant is not made inadmissible by the hearsay rule if both of the following are true:

~~(a)~~ (1) The declarant is unavailable as a witness.

~~(b)~~ (2) The evidence is offered against a party who has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

(b) The requirements of subdivision (a) shall be proved to the court by clear and convincing evidence.

Comment. Section 1350 supersedes former Section 1350 (1985 Cal. Stat. ch. 783, § 1). The new provision is drawn from Federal Rule of Evidence 804(b)(6) and Uniform Rule of Evidence 804(b)(5).

Subdivision (b) makes clear that evidence cannot be admitted pursuant to this section unless the requirements of subdivision (a) are proved by clear and convincing evidence, not just by a preponderance of the evidence. In this respect, the provision differs from Federal Rule of Evidence 804(b)(6). See Fed. R. Evid. 804(b)(6) advisory committee's note ("The usual Rule 104(a) preponderance of the evidence standard has been adopted in light of the behavior the new Rule 804(b)(6) seeks to discourage.").

See Section 240 ("unavailable as a witness").

That language could perhaps be changed later if the United States Supreme Court adopts a preponderance of the evidence standard.

Alternatively, the provision could be proposed without such language, on the assumption that the United States Supreme Court will find it constitutional to use a preponderance of the evidence standard. That assumption might be well-founded, as there is only sparse authority to the contrary and the United States Supreme Court has permitted use of the preponderance of the evidence standard in contexts that could be considered comparable to a determination of forfeiture by wrongdoing. *See, e.g., Lego v. Twomey*, 404 U.S. 477, 489 (1972) (court may use preponderance of evidence standard in determining voluntariness of confession). But it is impossible to predict with certainty what standard of proof the Court will require.

Use of the Hearsay Statement in Determining Whether There Was Wrongdoing Warranting Forfeiture

A further constitutional issue is whether a court may rely on the proffered hearsay statement in determining the existence of wrongdoing warranting forfeiture and, if so, whether that statement can constitute the sole basis for a finding of such wrongdoing. Rule 804(b)(6) does not address either point, but Federal Rule of Evidence 104(a) states that in determining a preliminary question of admissibility, the court "is not bound by the rules of evidence except those with respect to privileges." That approach received approval in *Bourjaily v. United States*, 483 U.S. 171 (1987), which held that a court may consider evidence

of a co-conspirator's statement in determining the admissibility of the statement pursuant to the co-conspirator exception to the hearsay rule (Fed. R. Evid. 801(d)(2)(E)). It is likely, but by no means sure, that the United States Supreme Court would reach a similar result in the context of forfeiture by wrongdoing.

There is, however, the additional issue of whether the hearsay statement could constitute the sole basis for a finding of wrongdoing warranting forfeiture. The United States Supreme Court did not resolve that issue with respect to a co-conspirator's statement in *Bourjaily*. In *Giles*, the California Supreme Court concluded that under the federal Confrontation Clause, a court cannot base a forfeiture finding solely on the proffered hearsay statement. 40 Cal. 4th at 854.

In contrast to the Federal Rules of Evidence, the Evidence Code does not permit a court to consider inadmissible evidence in determining a preliminary question of admissibility. Méndez Treatise at 598-99; see also J. Friedenthal, Analysis of Differences Between the Federal Rules of Evidence and the California Evidence Code 6-7 (1976) (on file with the Commission). Thus, if the new provision modeled on Rule 804(b)(6) is silent on use of the proffered statement to determine the existence of wrongdoing warranting forfeiture, the general rule precluding reliance on inadmissible evidence would seem to apply and the provision's constitutionality in this regard would not be in doubt.

If, however, the possible new provision was revised to expressly authorize consideration of the proffered statement, then *Giles* mandates that any finding of forfeiture be supported by corroborating evidence, not the proffered statement alone. To comply with *Giles*, language to that effect would have to be included in the new provision, in addition to the language authorizing consideration of the proffered statement. While that approach might ultimately receive approval from the United States Supreme Court, the Court has not yet spoken on use of a proffered statement to establish forfeiture by wrongdoing. It would therefore be safer to stay silent on the issue than to address it in any manner in the new provision.

Analysis

Prof. Capra "can to some extent see the necessity of broadening California's current rule in light of *Crawford*." Email from D. Capra to B. Gaal (9/19/07). If that is to be done, he suggests broadening it "by replicating Rule 804b6," because there "is virtue in having consistency at the federal and state level." *Id.* For example, if the California provision was modeled on Rule 804(b)(6), cases

interpreting the federal rule could be used in interpreting the California provision. Prof. Capra also considers it "pretty clear from *Crawford* and *Davis* that 804b6 passes constitutional muster." *Id*.

Following the federal approach would, however, be a significant relaxation of the protections now found in Evidence Code Section 1350. Hearsay evidence that could not be admitted in the past might become admissible, yet the evidence might be unreliable and might distort the truth-finding process. Whether the federal approach represents good policy has not been fully tested, because Rule 804(b)(6) was only adopted in 1997 and it was less important before *Crawford* than it is now. If California adopts a provision modeled on the federal rule, and the test of time later shows it would be better policy to narrow the rule in some respect, such a reform would be difficult to achieve in California due to the Truth-in-Evidence provision of the Victims' Bill of Rights (Cal. Const. art. I, § 28(d) (statute restricting admissibility of relevant evidence in criminal case must be enacted "by a two-thirds vote of the membership in each house of the Legislature")).

Nonetheless, **based on the information the staff has obtained so far, replacing Section 1350 with a provision similar to Federal Rule of Evidence 804(b)(6) appears to be a reasonable option.** Whether it is the best option is not clear to us at this time.

Option #3. Broaden Section 1350 to a Limited Extent, with the Possibility of Further Revisions Later

A third possibility would be to broaden Section 1350 to a limited extent, with the possibility of further revisions after there is more judicial guidance on the constitutional requirements for forfeiture. This could be done in a variety of different ways, because Section 1350 includes many features.

In particular, the features to consider and some possible revisions are:

- **Type of Case in Which the Exception Applies.** Section 1350 applies only in a criminal case charging a serious felony. To discourage witness tampering in all types of cases, the provision could be modified to apply in any case, civil or criminal.
- **Party Against Whom the Exception May Be Invoked.** Section 1350 can only be invoked against a criminal defendant. The provision would be more even-handed if it was modified to apply to any party.
- **Reason for the Declarant's Unavailability.** Section 1350 applies only when the declarant's unavailability "is the result of the death

by homicide or the kidnapping of the declarant." It might be appropriate to remove that limitation.

- **Acquiescence in Wrongdoing that Results in the Declarant's Unavailability.** Section 1350 applies only when "the declarant's unavailability was knowingly caused by, aided by, or solicited by the party against whom the statement is offered ...." In contrast, under the federal rule it is sufficient if a party has "acquiesced" in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness. It would be possible to extend Section 1350 to acquiescence in wrongdoing, like the federal rule. Given the limited experience under the federal rule, however, it might be preferable to stick with the current California approach on this point, at least for the time being.
- **Standard of Proof.** Section 1350 requires proof by clear and convincing evidence. Until the United States Supreme Court provides guidance on the proper standard of proof, it would be safest to leave this requirement in place.
- **Evidence that the Proponent of the Hearsay Statement Is Responsible for the Declarant's Unavailability.** Section 1350 cannot be invoked if there is "evidence that the unavailability of the declarant was caused by, aided by, solicited by, or procured on behalf of, the party who is offering the statement." This safeguard against unreliable evidence might be worth retaining.
- **Form of the Hearsay Statement.** Section 1350 applies only if the hearsay statement "has been memorialized in a tape recording made by a law enforcement official, or in a written statement prepared by a law enforcement official and signed by the declarant and notarized in the presence of the law enforcement official, prior to the death or kidnapping of the declarant." This is a strong safeguard against fabricated evidence. It so severely limits application of Section 1350, however, that the provision may be of little use. It might be appropriate to remove the requirement altogether. A middle ground would be to revise Section 1350 to require that the hearsay statement be memorialized in a recording or in a writing made at or near the time of the statement.
- **Circumstances Under Which the Hearsay Statement Was Made.** Section 1350 can be invoked only if the hearsay statement "was made under circumstances which indicate its trustworthiness and was not the result of promise, inducement, threat, or coercion." These safeguards against unreliable evidence may be worth retaining.
- **Relevance of the Hearsay Statement.** Section 1350 expressly requires that the hearsay statement be relevant to the issues being tried. As previously explained, that language is unnecessary due to the general prohibition on introducing irrelevant evidence. The language should be deleted.

- **Evidence Connecting the Defendant to Commission of the Serious Felony Charged.** Under Section 1350(a)(6), the proffered statement cannot be the sole evidence that connects the defendant to the serious felony charged against the defendant. Rather, the statement is admissible only if it "is corroborated by other evidence which tends to connect the party against whom the statement is offered with the commission of the serious felony with which the party is charged." Evidence that merely shows the commission or circumstances of the offense is not sufficient corroboration.

  This corroboration requirement focuses on connecting the defendant to the crime charged. It is different from requiring corroboration of the wrongdoing that results in forfeiture of a defendant's right of confrontation. It appears to be intended to promote reliability in determinations of whether the defendant, as opposed to someone else, committed the crime charged. To continue such protection, the requirement might be worth retaining and extending to any criminal case, not just a case charging a serious felony.
- **Notice of Intent to Invoke the Forfeiture by Wrongdoing Exception.** Section 1350 requires the prosecution to notify the defendant ten days before the prosecution offers a hearsay statement under the provision. There is a good cause exception, but if good cause is shown the defendant is entitled to a reasonable continuance. This procedural requirement makes sense and should be retained, but the language will require modification if Section 1350 is extended to all parties in all types of cases.
- **Procedure for Determining Whether the Exception Applies.** Section 1350 expressly states that if a hearsay statement is offered under it during trial, "the court's determination shall be made out of the presence of the jury." The provision also gives guidance on what procedure to use if a defendant elects to testify in connection with that determination. This guidance is useful and should be retained.
- **Multiple Hearsay.** Section 1350 expressly states that if the proffered statement "includes hearsay statements made by anyone other than the declarant who is unavailable ..., those hearsay statements are inadmissible unless they meet the requirements of an exception to the hearsay rule." As previously explained, that language is unnecessary due to the general provision governing multiple hearsay. The language should be deleted.

An amendment of Section 1350 reflecting the points discussed above might look something like this:

Evid. Code § 1350 (amended). Forfeiture by wrongdoing

1350. (a) ~~In a criminal proceeding charging a serious felony, evidence~~ Evidence of a statement made by a declarant is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness, and all of the following are true:

(1) There is clear and convincing evidence that the declarant's unavailability was knowingly caused by, aided by, or solicited by the party against whom the statement is offered for the purpose of preventing ~~the arrest or prosecution of~~ testimony against the party ~~and is the result of the death by homicide or the kidnapping of the declarant~~.

(2) There is no evidence that the unavailability of the declarant was caused by, aided by, solicited by, or procured on behalf of, the party who is offering the statement.

(3) The statement has been memorialized in a ~~tape~~ recording ~~made by a law enforcement official, or in a written statement prepared by a law enforcement official and signed by the declarant and notarized in the presence of the law enforcement official, prior to the death or kidnapping of the declarant~~ or a writing, which was made at or near the time of the statement.

(4) The statement was made under circumstances ~~which~~ that indicate its trustworthiness and was not the result of promise, inducement, threat, or coercion.

~~(5) The statement is relevant to the issues to be tried~~.

~~(6) The statement~~ (5) If the statement is offered in a criminal case, it is corroborated by other evidence ~~which~~ that tends to connect the party against whom the statement is offered with the commission of the ~~serious felony~~ offense with which the party is charged. The

~~The~~ corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

(b) If ~~the prosecution~~ a party intends to offer a statement pursuant to this section, ~~the prosecution~~ that party shall serve a written notice upon the ~~defendant~~ adverse party at least 10 days prior to the hearing or trial at which the ~~prosecution~~ party intends to offer the statement, unless the ~~prosecution~~ party shows good cause for the failure to provide that notice. In the event that good cause is shown, the ~~defendant~~ adverse party shall be entitled to a reasonable continuance of the hearing or trial.

(c) If the statement is offered during a jury trial, the court's determination shall be made out of the presence of the jury. If ~~the~~ a criminal defendant elects to testify at the hearing on a motion brought pursuant to this section, the court shall exclude from the examination every person except the clerk, the court reporter, the bailiff, the prosecutor, the investigating officer, the defendant and his or her counsel, an investigator for the defendant, and the officer having custody of the defendant. Notwithstanding any other provision of law, the defendant's testimony at the hearing shall not

be admissible in any other proceeding except the hearing brought on the motion pursuant to this section. If a transcript is made of the defendant's testimony, it shall be sealed and transmitted to the clerk of the court in which the action is pending.

~~(d) As used in this section, "serious felony" means any of the felonies listed in subdivision (c) of Section 1192.7 of the Penal Code or any violation of Section 11351, 11352, 11378, or 11379 of the Health and Safety Code.~~

~~(e) If a statement to be admitted pursuant to this section includes hearsay statements made by anyone other than the declarant who is unavailable pursuant to subdivision (a), those hearsay statements are inadmissible unless they meet the requirements of an exception to the hearsay rule.~~

Comment. Section 1350 is amended to broaden its application.

The introductory paragraph of subdivision (a) is amended to make the section applicable in any civil or criminal case, not just in a case charging a serious felony. The federal hearsay exception for forfeiture by wrongdoing is similar in this regard. See Fed. R. Evid. 804(b)(6).

Consistent with the extension of this section to civil cases, subdivision (a)(1) is amended to refer to prevention of testimony, as opposed to prevention of arrest or prosecution. Subdivision (a)(1) is also amended to remove the limitation that the declarant's unavailability be the result of death by homicide or kidnapping of the declarant. The federal hearsay exception for forfeiture by wrongdoing is similar in this respect; it includes no such limitation. See Fed. R. Evid. 804(b)(6).

Subdivision (a)(3) is amended to expand the types of statements that are admissible under this section. Timely memorialization is still required, but it is no longer necessary that the statement be given to a law enforcement official and taped or notorized. See Section 250 ("writing").

Subdivision (a)(4) is amended to make a stylistic revision.

Subdivision (a)(5) is deleted as surplusage. See Section 350 ("No evidence is admissible except relevant evidence.").

Subdivision (a)(6) (new subdivision (a)(5)) is amended to reflect that this section is no longer limited to a case charging a serious felony. The corroboration requirement of this subdivision, which focuses on connecting the defendant to the crime charged, now applies in any criminal case.

Subdivision (b) is amended to reflect that this section may now be invoked by any party, not just by the prosecution in a criminal case.

Subdivision (c) is amended to reflect that a case does not necessarily involve a jury. The subdivision is also amended to reflect that this section now applies to any civil or criminal case. The restrictions pertaining to testimony by a defendant were

originally drafted for the criminal context; they are still limited to that context.

Subdivision (d), defining "serious felony," is deleted to reflect that this section now applies in any civil or criminal case, not just a case charging a serious felony.

Subdivision (e) is deleted as surplusage. See Evid. Code § 1201 (if evidence involves more than one hearsay statement, each hearsay statement must satisfy exception to hearsay rule).

See Section 240 ("unavailable as a witness").

Constitutionality

The provision shown above should withstand constitutional scrutiny. Under subdivision (a)(1), the declarant's unavailability would have to be "*knowingly* caused by, aided by, or solicited by the party against whom the statement is offered *for the purpose of preventing testimony against the party*." (Emphasis added.) Because the provision would require proof of intent to prevent testimony, it could not be held unconstitutional for failure to incorporate such a requirement.

Subdivision (a)(1) would also require proof of the requisite misconduct by clear and convincing evidence. Because it uses that standard rather than the lower preponderance of the evidence standard, the provision shown above would not be unconstitutional even if the United States Supreme Court ultimately rejects the preponderance of the evidence standard. (If the United States Supreme Court ultimately approves the preponderance of the evidence standard, California could consider the possibility of switching to that standard.)

Finally, the provision shown above would be silent on whether a court may consider a proffered statement in determining whether a party engaged in misconduct forfeiting the right of cross-examination. Because the provision is silent on this matter, the matter would seem to be governed by the general rule under the Evidence Code precluding consideration of inadmissible evidence in determining admissibility. Consequently, there is no danger that the provision would be invalidated even if the United States Supreme Court concludes it is unconstitutional to consider the proffered statement in determining forfeiture, or to use the proffered statement as the sole basis for a forfeiture determination.

Analysis

A reform broadening Section 1350 as shown above might not go as far as some people and organizations consider necessary to discourage subversion of the justice system and enable prosecution of those who attempt to subvert justice. But it would be a significant broadening of the statute. As such, it is also likely to

draw criticism from others for allowing introduction of unreliable evidence that cannot be tested through cross-examination, possibly leading to incorrect judicial decisions.

Would the above amendment of Section 1350 represent an acceptable compromise between the competing views? More importantly, would it represent an appropriate balance of the competing policy interests, which would serve California well in the long-term?

Based on the information the staff has obtained so far, amending Section 1350 to broaden its application appears to be another reasonable option. It would be helpful to have more information, more opportunity to conduct research and hear from interested persons, and more time for reflection before having to decide whether it is the best option.

Option #4. Leave Section 1350 Alone Until There Is Further Judicial Guidance

A fourth option would be to leave Section 1350 alone and take no action on forfeiture by wrongdoing as an exception to the hearsay rule until there is further judicial guidance. California could simply wait to see what the United States Supreme Court says, particularly on the issue of intent to prevent testimony. Such guidance may be forthcoming within the next few years, because it is much needed, not only here but throughout the nation.

Once the United States Supreme Court speaks (and perhaps the California Supreme Court also speaks on the requirements of the California Constitution), California would have the benefit of definitive guidance on the Confrontation Clause in determining what statutory approach to follow. There might also be dissenting or concurring opinions, briefs, additional lower court case law, and new law review articles or other commentary that shed light on both the constitutional requirements and the best means of accommodating the competing policies, which might not be the same as the constitutional minimum.

Awaiting further judicial guidance would require patience on the part of those who are dissatisfied with the status quo in California on forfeiture by wrongdoing as an exception to the hearsay rule. The approach might, however, be preferable to the other options. It would not pose the specter of possible constitutional infirmity and reversals of criminal convictions, like Option #1. A lesser but still significant consideration is that the approach would not entail repeated statutory reforms and resultant transitional difficulties, as might occur

if the Legislature pursues Option #2 or Option #3 and then later decides to modify the statutory scheme again in light of new judicial guidance.

The staff would like more time to assess whether this is the best approach among the available options. Based on current information, however, we believe that **the possibility of taking no action on forfeiture by wrongdoing and awaiting further judicial guidance is a reasonable option, warranting further exploration.**

Recommendation

The Commission is under an unusual time constraint in conducting this study. Because its report is due by March 1, 2008, it needs to approve a tentative recommendation at the October meeting if at all possible, so as to allow time for submission and consideration of comments before it finalizes its report. The Commission typically has more time than this to consider and explore a topic before it issues a tentative recommendation.

Due to the time constraint, it might not be advisable to follow the Commission's usual practice of proposing one particular approach in a tentative recommendation. Instead, **it may be better to issue a tentative recommendation that solicits comment on all three of the reasonable alternatives discussed above (Options #2, #3, and #4).** That approach is likely to generate input, which would help in evaluating the options and developing a sound proposal.

In the end, it will be up to the Legislature to weigh the competing policies and strike an appropriate balance. Any statute it enacts must, however, comply with constitutional constraints. Failure to do so would create a risk of overturned convictions and concomitant problems.

Because the United States Supreme Court has not yet provided guidance on key issues relating to forfeiture by wrongdoing, **any statute enacted now should stay well within constitutional bounds, avoiding the controversial issues.** The Legislature could always revise the statute later if it turns out that the Constitution is more permissive and revising the statute to conform to the constitutional minimum would be good policy.

Respectfully submitted,

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